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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF THE STATE OF NEW YORK,

Respondent,

-against-

JOHN S.,

No. 75
(Papers sealed)

Appellant.

MATTER OF THE STATE OF NEW YORK,

Respondent,

-against-

CHARADA T.

No. 76
(Papers sealed)

Appellant.

20 Eagle Street
Albany, New York 12207
March 27, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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Appearances:

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1 CHIEF JUDGE LIPPMAN: Matter of State of
2 New York v. John S. and Charada T.

3 Counselor, you want any rebuttal time?

4 MS. MANTELL: Yes, three minutes, please.

5 CHIEF JUDGE LIPPMAN: Three minutes, sure.
6 Go ahead.

7 MS. MANTELL: May it please the court. My
8 name is Deborah Mantell, and I'm counsel for John S.

9 In this case, the State was allowed to
10 civilly commit my client, relying heavily on forty-
11 and thirty-year-old dismissed and sealed criminal
12 accusations, and despite the fact that John S. had
13 not shown aggressive or sexual misconduct in the
14 fourteen years prior to the civil commitment trial.

15 CHIEF JUDGE LIPPMAN: Well, they did that
16 based on the broad language of Article 10?

17 MS. MANTELL: Well, the - - - in terms of
18 the unsealing of the records?

19 CHIEF JUDGE LIPPMAN: Yes.

20 MS. MANTELL: The - - - the unsealing
21 court, Justice Cataldo, relied on the State's motion
22 that - - - that MHL 1008(c) allowed for - - - for
23 unsealing.

24 JUDGE GRAFFEO: Is his past criminal
25 activities completely irrelevant to this

1 determination?

2 MS. MANTELL: Well, under CPL 160.60, the
3 criminal charges were deemed a nullity when they were
4 dismissed, because they were terminated in his favor.

5 JUDGE GRAFFEO: I didn't say convictions; I
6 said his criminal activities. You don't - - - you
7 don't want them to consider these at all?

8 MS. MANTELL: Well, we don't know - - -

9 JUDGE GRAFFEO: What if they had been - - -

10 MS. MANTELL: We don't - - -

11 JUDGE GRAFFEO: - - - five years ago
12 instead of fourteen years ago?

13 MS. MANTELL: Well, there were - - - I'm -
14 - - I'm sorry; what was the question?

15 JUDGE GRAFFEO: I'm trying to understand.
16 You don't want these taken into consideration because
17 the convictions were reversed, correct?

18 MS. MANTELL: Correct, the ones from 1968.

19 JUDGE GRAFFEO: The underlying criminal
20 activities, I take it you don't want those considered
21 either?

22 MS. MANTELL: Well, I mean, the - - - the
23 problem is that we don't know for a fact what the
24 criminal activities were.

25 JUDGE SMITH: So you're saying they had to

1 be proved by - - - at least by reliable hearsay?

2 MS. MANTELL: At a minimum, there had to be
3 some corroborating evidence. All of the accusations
4 were, in fact, hearsay, and they weren't shown to be
5 reliable. There was no accompanying conviction for
6 any of them.

7 CHIEF JUDGE LIPPMAN: Well, we treat it
8 like an acquittal, right?

9 MS. MANTELL: Well, in this - - - in this
10 situation, it should be treated like an acquittal and
11 with the level of admissibility that an acquittal
12 would have.

13 JUDGE SMITH: But you're not saying that if
14 he was - - - let's say - - - let's say he pleads - -
15 - I think what happens is in - - - one of the '68
16 rapes he pleads to one and the other two get
17 dismissed. If his other two victims come in and say
18 he raped me, that's obviously appropriate for the
19 jury to consider, isn't it?

20 MS. MANTELL: Well, yes, and then there
21 would be actual evidence and testimony and an
22 opportunity for my client to have questioned this.

23 JUDGE SMITH: And under - - - and under
24 Floyd Y., as I understand it, if you have hearsay
25 evidence but the hearsay is corroborated by his

1 admission or by some other reli - - - some other
2 index of reliability, that would also be - - - be
3 okay, right?

4 MS. MANTELL: Under Floyd Y., since they
5 were ultimately a dismissed case, that would be okay.
6 There would have to be some - - - something
7 satisfying evidence.

8 JUDGE SMITH: So your - - - your basic
9 point is that they don't have - - - the State here
10 did not present the kind of evidence of these rapes
11 that - - - that Floyd Y. requires.

12 MS. MANTELL: No, they didn't, and they
13 weren't required to. The - - - the trial court found
14 that the - - - the information was reliable just
15 based on the fact that John S. had been indicted.
16 And if an indictment were sufficient for - - - for
17 reliability, then the Floyd Y. decision would have
18 had to have been a lot different.

19 Also I mean, while it's inadmissible under
20 Floyd Y., it's also contrary to People v. Geraci; an
21 indictment is not considered reliable. But yet,
22 that's what the trial court - - -

23 JUDGE GRAFFEO: If there - - -

24 MS. MANTELL: - - - held.

25 JUDGE GRAFFEO: Hypothetically, if there

1 were confessions and then the criminal proceeding is
2 reversed on - - - for some other technical reasons,
3 would those confessions be admissible as
4 corroborating evidence?

5 MS. MANTELL: The - - - it would depend on
6 the details of the confession and the circumstances.
7 I mean, here - - -

8 JUDGE SMITH: Well, wait a minute.

9 MS. MANTELL: - - - there was a competency
10 problem.

11 JUDGE SMITH: There's no hearsay problem
12 there. I mean, his confession is his confession.

13 JUDGE PIGOTT: It's an admission.

14 MS. MANTELL: If it's - - - if it's
15 recorded in a manner that it wouldn't be hearsay,
16 then yes, there wouldn't be an evidence problem. If
17 the confession had been recorded by somebody who had
18 heard it and then it was presented as admissible
19 evidence, then yes.

20 JUDGE GRAFFEO: Or signed; he wrote out a
21 confession and signed it.

22 MS. MANTELL: If there had - - - if there
23 had been that, yes, it probably would have been - - -
24 there could have been an issue with - - - in this
25 case, at least, with the competence, and whether

1 something was knowing and voluntary. But there was
2 no written admission here.

3 JUDGE PIGOTT: But doesn't this come down
4 to, if you look at the testimony, and particularly of
5 the experts, they're saying - - - and you're right,
6 all of this comes in, but they're - - - they're
7 essentially saying if all of this is true, then he is
8 this. And don't - - - doesn't the - - - doesn't he
9 then have the opportunity to cross-examine that
10 expert and say if I didn't commit those, would your -
11 - - would your opinion change? And then the jury
12 would be able to weigh that evidence, it having been
13 cross-examined by the - - - by John S. in this case?

14 MS. MANTELL: That would have been one way
15 of establishing insufficiency of the State's case.
16 You know, in this case when - - - the ability to
17 cross-examine the experts about the offenses
18 themselves was completely constrained by the trial
19 court's ruling, saying that we were going to, sort
20 of, mislead the jury about what happened with the
21 1968 cases and not tell them it was dismissed, just
22 say he wasn't convicted, because it is clearly
23 prejudicial to use the - - - the details and the
24 vacated conviction against him but yet - - -

25 JUDGE PIGOTT: I missed that. I - - -

1 MS. MANTELL: - - - John S. couldn't - - -
2 couldn't cross-examine the experts about their
3 reliance on that information.

4 JUDGE SMITH: Well, it would have been - -
5 - I mean, I assume the State would have been
6 perfectly happy to - - - to have the jury know that
7 he was in fact convicted of these things and they got
8 tossed.

9 MS. MANTELL: Well, that was what the State
10 was seeking to use. But in - - - I mean, in just - -
11 - in still allowing the State to introduce that he
12 had been accused - - - and not only that, they were
13 able to introduce that he did it. That was their
14 expert's testimony, was that he did the offenses, but
15 just that he wasn't convicted. And also that - - -

16 JUDGE SMITH: He was - - -

17 MS. MANTELL: - - - that a grand jury found
18 - - -

19 JUDGE SMITH: The reason he was not
20 convicted was that the federal court found that he
21 was not competent to plead guilty.

22 MS. MANTELL: That's correct. And after
23 that, the cases were, in fact, dismissed.

24 JUDGE SMITH: But you can - - - but if the
25 jury had known that, they might have thought he

1 actually did it, right?

2 MS. MANTELL: You know, it's - - - who
3 knows? Who knows which way it would have been worse.
4 But I mean, it's - - - it was replacing one form of
5 prejudice with another, and - - - and by the way, not
6 doing anything to limit the hearsay accusations. It
7 should have gone without saying that the State
8 couldn't introduce that he was convicted. The
9 conviction was nullified as a matter of law.

10 And - - - but even if that information had
11 been admissible, properly accessed and properly
12 admitted, there still wasn't sufficient evidence that
13 John S. currently had a mental abnormality.

14 JUDGE SMITH: I mean, I guess your light's
15 on, but are you - - - can you speak for one minute
16 about whether ASPD can support this commitment of - -
17 -

18 MS. MANTELL: Antisocial personality cannot
19 support this commitment of this respondent because
20 the evidence in this case didn't show a link between
21 how that disorder predisposed John S. to commit sex
22 crimes and caused him - - -

23 JUDGE SMITH: Are you - - -

24 MS. MANTELL: - - - difficulty in control.

25 JUDGE SMITH: Are you acknowledging that

1 ASPD can, in some cases, be a proper basis for
2 commitment?

3 MS. MANTELL: It may very - - - very well
4 be a proper basis for commitment in some cases. And
5 in the cases the State cites where it - - - where it
6 was a proper basis for a commitment, those decisions
7 discuss expressly that the - - - the respondent had
8 acted out recently in prison, for example, engaging
9 in sexual misconduct or aggressive behavior.

10 JUDGE SMITH: So you're not making the
11 argument that antisocial personality disorder is just
12 such a general - - - it sweeps so broadly that it
13 shouldn't be used at all in these cases?

14 MS. MANTELL: No, that's not the argument.
15 But because it sweeps so broadly, there needs to be a
16 close examination of whether or not it's currently
17 affecting somebody, especially somebody of John S.'s
18 age, in a manner that currently causes them difficult
19 controlling.

20 CHIEF JUDGE LIPPMAN: Okay. Thanks,
21 counsel.

22 MR. AMEND: May it please the court.
23 Andrew Amend for the State of New York.

24 CHIEF JUDGE LIPPMAN: Counselor, how do you
25 get in the - - - the - - - the information relating

1 to these charges that he's found incompetent to plead
2 guilty to?

3 MR. AMEND: There were - - -

4 CHIEF JUDGE LIPPMAN: Is it appropriate
5 that that comes in?

6 MR. AMEND: As the trial court found, there
7 were, quote, "very significant indicia of
8 reliability", unquote, to support those - - -

9 CHIEF JUDGE LIPPMAN: But you agree that -
10 - -

11 MR. AMEND: - - - the - - - the testimony
12 about this.

13 CHIEF JUDGE LIPPMAN: - - - that for our
14 purposes they're treated as an acquittal, right?

15 MR. AMEND: No, I - - - we do not agree.
16 An acquittal - - -

17 CHIEF JUDGE LIPPMAN: You don't agree?

18 MR. AMEND: No. An acquittal involves - -
19 -

20 CHIEF JUDGE LIPPMAN: How could it not be
21 treated as an acquittal?

22 MR. AMEND: An acquittal involves a finding
23 by a fact finder, on the State's best evidence, that
24 there wasn't sufficient proof to establish guilt
25 beyond a reasonable doubt. Here we have - - -

1 CHIEF JUDGE LIPPMAN: Yeah, but here he
2 can't plead guilty.

3 MR. AMEND: Sorry?

4 CHIEF JUDGE LIPPMAN: He's not capable of
5 pleading guilty, though, right?

6 MR. AMEND: We're not saying that it should
7 be treated as a conviction either. We're - - - what
8 we're saying is that each case needs to be assessed
9 on its facts. This is one thing that distinguishes
10 our position from John S.'s here. We're not asking
11 for a bright line rule that just because there was no
12 conviction - - -

13 JUDGE SMITH: What are your indicia of
14 reliability?

15 MR. AMEND: Yes, thank you, Judge Smith.
16 There was, in fact, an admission that he made to a
17 witness who testified at his Article 10 trial. So
18 there's no question - - -

19 JUDGE SMITH: What he admitted to - - - are
20 you talking about the 1968 rapes?

21 MR. AMEND: He admitted to the 1968 rape
22 which he was then serving a sentence for.

23 JUDGE SMITH: The - - - to one of them.

24 MR. AMEND: To one rape, but that rape also
25 was part of a remarkable pattern - - -

1 JUDGE SMITH: Yeah.

2 MR. AMEND: - - - of five rapes.

3 JUDGE SMITH: Yeah, but I'm - - - as I
4 remember, it was pretty clear that you had evidence
5 of one rape, but there's a difference between one and
6 three, if you're talking about how - - - how mentally
7 abnormal someone is.

8 MR. AMEND: Right, but what we're - - -
9 what we're talking about, in addition to that - - -
10 the fact that there was the one rape that he admitted
11 to, you've got to - - - this is a remarkable pattern
12 of conduct with five incidents in thirty-two days
13 against - - -

14 JUDGE SMITH: Well, wait a minute. How did
15 you prove the other four incidents even happened?

16 MR. AMEND: We proved that there were
17 sufficient indicia of reliability - - -

18 JUDGE SMITH: That was my original
19 question.

20 MR. AMEND: - - - for the expert to be able
21 to - - -

22 JUDGE SMITH: I mean, yeah - - - yeah,
23 sure, once you - - - once you prove 'em, you can say
24 it's quite a pattern. But you can't say it's - - -
25 yeah, you can't say here's a rape he admitted to and

1 here's four I have no proof of that are just the
2 same. That's not an indicia of reliability.

3 MR. AMEND: Well, there weren't - - - it's
4 not that there was no proof of the other rapes.

5 JUDGE SMITH: That you've got.

6 MR. AMEND: There were contemporaneous - -
7 sorry, the pre-sentence report - - -

8 CHIEF JUDGE LIPPMAN: Is that reliable?

9 MR. AMEND: Yes. That issue is presented
10 more squarely in the Charada T. case that my - - -

11 JUDGE SMITH: What was - - - did he admit
12 to those rapes in the pre-sentence report?

13 MR. AMEND: There's nothing in the pre-
14 sentence report on that one way or the other. But -
15 - -

16 JUDGE SMITH: What - - - what do they have?

17 MR. AMEND: What - - - well, what you have
18 is, you know, a document that has been prepared for
19 use by a court in sentencing that was in fact
20 considered by the court in sentencing John S. for the
21 1968 case.

22 JUDGE SMITH: That says he did all three.

23 MR. AMEND: It's saying - - - yes - - -
24 yes, that's what it says.

25 JUDGE SMITH: But of course that's based -

1 - - I mean, how does it - - - that's based on the
2 same hearsay your - - - your expert used on the - - -
3 on the hearsay word of the victim, which may be - - -
4 which may, in fact, be very reliable, but isn't it
5 clear from Floyd Y. that - - - that out-of-court
6 statements by the victims aren't, in themselves,
7 enough?

8 MR. AMEND: What Floyd Y. said is that
9 there's no inflexible standard for establishing
10 reliability of expert basis testimony so we - - -

11 JUDGE SMITH: Yeah, but we wouldn't - - -
12 we could not - - - we would not have reversed in
13 Floyd Y. if we had said every time you got a hearsay
14 statement by a victim that she was raped that's
15 enough.

16 MR. AMEND: What I'm - - - what we are
17 proposing, and what Justice Konviser reasonably did
18 in this case, was look at the - - - all the
19 contemporaneous documents that were available in this
20 case, including the pre-sentence report, the fact
21 that a jury found reasonable cause to indict, the
22 fact that there were arrests, the fact that while
23 there was eventually a vacatur of the 1968 conviction
24 that was a plea to all of those offenses, or all of
25 those indicted offenses, that was on grounds that

1 didn't necessarily affect the probative value of the
2 underlying - - -

3 JUDGE SMITH: So you're saying the vacated
4 plea is, in itself, an index of reliability?

5 MR. AMEND: What we're saying is that the
6 reasons that the plea was vacated are relevant. This
7 is not - - - this is a - - -

8 JUDGE SMITH: Well, we don't get to the
9 reasons it's vacated, unless the plea itself means
10 something.

11 MR. AMEND: I'm not sure that that's
12 necessarily true. What - - - I guess this is another
13 way of saying what I said earlier. The fact that
14 there was ultimately not a conviction, it depends on
15 what the reason is that there wasn't a conviction.
16 If there were an acquittal, that would be - - -

17 JUDGE SMITH: Well, wait a minute - - -

18 MR. AMEND: - - - something that might - -
19 -

20 JUDGE SMITH: - - - I've never been
21 convicted of rape either. You don't start by saying
22 well, you have to know the reasons you were not
23 convicted. You have to prove something about me.

24 MR. AMEND: What we - - - what the State's
25 burden is under Floyd Y. is to establish that it was

1 reasonable enough for an expert who - - - experts - -
2 - and all of the experts testified in this case, by
3 the way, that it is routine practice for clinical
4 practitioners to rely on the types of official
5 records. There are reasons this court wasn't - - -

6 JUDGE SMITH: Well, wasn't this also true
7 in Floyd Y.?

8 MR. AMEND: My understanding - - - I don't
9 know - - - I don't read from the Floyd Y. opinion a
10 close analysis of these particular documents. There
11 were witness statements - - -

12 JUDGE RIVERA: No, no, no, no. An expert
13 may choose to use hearsay, right?

14 MR. AMEND: Correct.

15 JUDGE RIVERA: The question is whether or
16 not you can then get in any of that hearsay, and
17 that's what Floyd Y. was dealing with. And then you
18 have to look at - - - you have to scrutinize each of
19 these documents or statements that you're trying to
20 get in, which I think is what Judge Smith is trying
21 to ask you about. What - - - what have you got for
22 each of those documents, each of those statements
23 that satisfies the Floyd Y. standard? It's a due
24 process standard.

25 MR. AMEND: We were not presented with any

1 kind of a challenge to each of these specific
2 documents. What we have are the question - - - or
3 what we have are uniform practice by experts that, in
4 the absence of some reason to doubt the veracity of
5 these types of official records, it's something that
6 I can consider. And this is only for the purpose of
7 saying can the expert consider it, and should the
8 fact finder know that the expert considered it. And
9 the fact finder doesn't have to agree with the
10 expert, that this information was as reliable as the
11 expert thinks, to analyze the expert's opinion.

12 JUDGE PIGOTT: Well, in - - -

13 MR. AMEND: The fact finder - - -

14 JUDGE PIGOTT: With '68 you had that - - -
15 was it Elwyn (ph.)?

16 MR. AMEND: Yes.

17 JUDGE PIGOTT: You know, who said he told
18 me he did this, right?

19 MR. AMEND: Yes.

20 JUDGE PIGOTT: And then you had the - - -
21 you're talking about the PSI, which apparently - - -
22 I mean, either it was challenged or unchallenged at
23 the time of the sentencing. I understand later on it
24 gets overturned, but the defendant, at that point,
25 had an - - - had an opportunity to challenge anything

1 in the PSI, to say, well, before you sentence me,
2 Judge, understand that these things you've got in
3 here are right or wrong, and - - - and a decision was
4 made by that court on that issue before the - - - the
5 reversal. And I assume it's your argument, then,
6 that that having been done, that there is some
7 indicia of reliability here that - - - that a trier
8 of fact may choose to believe or not believe.

9 MR. AMEND: Exactly. Thank you.

10 It's, you know, also the case that - - -
11 with - - - if I can move on to the - - - the 1978
12 rape, because there was also - - -

13 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

14 MR. AMEND: - - - a - - - a dispute there.
15 Similarly, again, you've got a - - - a pre-sentence
16 investigation, a remarkable pattern of conduct, and
17 this is one reason that this is also important to put
18 before the fact finder - - -

19 CHIEF JUDGE LIPPMAN: Where does all of
20 this information come from - - -

21 MR. AMEND: I - - -

22 CHIEF JUDGE LIPPMAN: - - - about the '60 -
23 - - about the '78?

24 MR. AMEND: In the '78 case there was the
25 pre-sentence report - - -

1 CHIEF JUDGE LIPPMAN: - - - It's the pre-
2 sentence report?

3 MR. AMEND: - - - underlying police reports
4 - - -

5 CHIEF JUDGE LIPPMAN: A lot of it is from
6 that, again?

7 MR. AMEND: A lot of it; not all of it.

8 JUDGE SMITH: Did the pre-sentence report
9 itself have any source, other than the victim's
10 version of the rape?

11 MR. AMEND: Statements from the arresting
12 officer, statements from the - - - the prosecuting
13 attorney involved in the case. There were underlying
14 police reports. And again, this is - - - from a
15 common sense point of view, you know, what are the
16 odds that someone would be falsely accused - - -

17 JUDGE SMITH: From a commonsense point of
18 view, of course he did all of these rapes and of
19 course Floyd Y. did them all too. But we put some -
20 - - yeah, but Floyd Y. put some limits on how - - -
21 on whether you can prove them. I mean, I don't think
22 anybody had any doubt that Floyd Y. had raped a lot
23 of people, but we said that it can't come in by
24 hearsay unless it's reliable hearsay.

25 CHIEF JUDGE LIPPMAN: The PSR isn't

1 inherently reliable, is it?

2 MR. AMEND: The PSR, we would posit, is,
3 for reasons that this court described, chiefly in its
4 Mingo opinion, and which my colleague also has
5 addressed in his brief, presumptively reliable.
6 There are due process protections that go into what's
7 into a PSR. And those - - - PSRs are also used to
8 make very consequential decisions about people's
9 liberty. And they're relied on in that case for
10 their truth. Here we're not talking about admitting
11 them for their truth; we're talking about simply, you
12 know, providing - - - asking is there a reasonable
13 basis for the expert to have relied on them and for
14 the fact finder to consider that the expert relied on
15 them in assessing the expert's opinion.

16 CHIEF JUDGE LIPPMAN: Okay, counselor,
17 thanks.

18 JUDGE SMITH: I'm sorry, can I ask - - -

19 CHIEF JUDGE LIPPMAN: I'm sorry. Judge
20 Smith.

21 JUDGE SMITH: - - - can I ask you the ASPD
22 question too? But I mean, suppose - - - let me put
23 it this way. Suppose the legislature thinks this sex
24 offender program is working so well that it's going
25 to drop the word "sex" out of it and apply it to all

1 offenders, and anybody who has antisocial personality
2 disorder can be held, after the end of his term, upon
3 - - - upon proof that he's got - - - that he does
4 have this disease, antisocial personality disorder,
5 that predisposes him to commit crimes. Is that - - -
6 is that okay?

7 MR. AMEND: There would have to be a reason
8 - - - we would have to understand that there was a -
9 - - you know, particular, recognized, psychological,
10 psychiatric condition that was driving - - -

11 JUDGE SMITH: Well - - -

12 MR. AMEND: - - - that individual - - -

13 JUDGE SMITH: - - - there is one - - -

14 MR. AMEND: - - - that would meaningfully
15 distinguish - - -

16 JUDGE SMITH: - - - antisocial personality
17 disorder; it's right there in the DSM.

18 MR. AMEND: Well, and that - - - if there
19 were sufficient indications that, in that case, the
20 pool of potential recidivists was being meaningfully
21 limited, and we were identifying individuals who are
22 not simply engaging opportunistically in isolated
23 series of conduct - - -

24 JUDGE SMITH: But my problem is everyone
25 seems to admit that ASPD is a condition that fifty to

1 eighty percent of the prison population has. I mean,
2 can you really - - - could the State, if it wanted
3 to, say all these guys are - - - are sick, and
4 therefore, we're going to keep them overtime?

5 MR. AMEND: The legislature would have to
6 make - - - it would be a question, first of all, of
7 whether the legislature made findings that there were
8 a particular danger to society posed by people who
9 have anti-personality (sic) disorder going out - - -

10 JUDGE SMITH: But it doesn't sound like a
11 hard finding to make to me. I mean, they - - - they
12 - - - you think - - - what do you think? Do people
13 that have antisocial personality disorder present a
14 danger to society?

15 MR. AMEND: They could potentially do so,
16 and it would have to be decided upon the facts of
17 each case.

18 CHIEF JUDGE LIPPMAN: Okay, thanks,
19 counselor.

20 Counselor, rebuttal?

21 MS. MANTELL: Yes, I'd like to clarify a
22 few things that - - - that counsel had said during
23 his argument that I'm not quite sure were accurate.

24 First, with respect to the 1968 cases,
25 there was - - - there were not admissions or pleas

1 that related to all of the charges. There were - - -
2 the pleas that were vacated and - - - and nullified,
3 only involved one count of rape and one count of
4 robbery.

5 JUDGE SMITH: What about the pre-sentence
6 reports? What were they based on?

7 MS. MANTELL: The pre-sentence report was
8 based on the indictment. And I'm not sure, in 1968,
9 that a criminal defendant would have any right or
10 opportunity to - - - to see a pre-sentence report and
11 challenge it. Those are the newer statutes that have
12 - - - would have allowed some sort of challenge.

13 JUDGE PIGOTT: I think they used to come
14 out, and then you'd get 'em before your - - - your
15 client gets sentenced, and they ask you do you have
16 any problems with the PSI, and you say no, and - - -
17 or if you say yes, it doesn't make a difference; they
18 sentence him anyway.

19 MS. MANTELL: In any event, it was just - - -
20 - it was just a recitation of the indictment. The -
21 - - when probation spoke with my client, at that
22 time, and he was hospitalized at Bellevue Hospital,
23 he didn't admit anything. In fact he said that - - -

24 CHIEF JUDGE LIPPMAN: He was not spec - - -

25 MS. MANTELL: - - - he said - - -

1 CHIEF JUDGE LIPPMAN: He was not specific
2 as to what crime he admitted, is that what you're
3 saying?

4 MS. MANTELL: No, he said that he had never
5 even been charged. He didn't even know about them at
6 that time. He was very ill. And there was not
7 testimony from all of the experts saying that this is
8 the type of information relied upon. Dr. Plodd (ph.)
9 was the expert who testified on behalf of John S.,
10 and his testimony actually was that when there's been
11 a criminal charge, but that hasn't been proven, and
12 it's not corroborated by some valid admission, he's
13 not, as a psychiatric examiner, in a position to
14 determine the - - - the truth or falsity of the
15 accusation.

16 JUDGE PIGOTT: That's a good point, but
17 didn't - - - didn't Kirshner (ph.) say the opposite?
18 Didn't he say these are reliable?

19 MS. MANTELL: Dr. Kirshner said that he can
20 rely on it because he is not bound by proof beyond a
21 reasonable doubt. But Dr. Kirshner also didn't know
22 what the evidence might have been against my client
23 in 1968. Dr. Kirshner also didn't even know that
24 John S. had been found incompetent when he pled. He
25 - - - and it was also presented by State's counsel as

1 a - - - as a legal technicality. And Dr. Kirshner
2 agreed with State's counsel that this was a legal
3 technicality, the reason for the reversal.

4 With respect to the 1978 information, I'd
5 like the chance to address that, because counsel has
6 raised issues during argument that were not raised in
7 his brief. The - - - the only information from 1978
8 that was presented - - - actually - - - actually,
9 nothing was really presented into the record. There
10 was, attached to the civil commitment petition, an
11 evaluation report by the - - - the case review team
12 evaluator, Dr. Peterson (ph.), that included - - -
13 that quoted a pre-sentence report. And it became
14 apparent, during pre-trial hearings, that the source
15 of the information for the pre-sentence report was a
16 police report that had been written at the time of
17 the arrest. So there's nothing from a pre-sentence
18 investigation to establish what actually happened - -
19 -

20 CHIEF JUDGE LIPPMAN: Do you agree - - -

21 MS. MANTELL: - - - in 1978.

22 CHIEF JUDGE LIPPMAN: - - - that the pre-
23 sentence report is presumptively reliable?

24 MS. MANTELL: No, it's not reliable. A
25 pre-sentence report has all different sources of

1 information in it.

2 JUDGE READ: Didn't he say something like
3 that in Mingo, though?

4 MS. MANTELL: Well, in Mingo, the
5 information was being presented, first of all, before
6 a - - - a hearing court and a trial judge that was
7 familiar with pre-sentence reports, and could
8 determine whether or not certain information in a
9 pre-sentence report would be reliable.

10 JUDGE SMITH: Is the - - - would you agree
11 that the threshold for reliability should be higher
12 in an Article 10 case than in a Registration Act
13 case?

14 MS. MANTELL: It absolutely must be. The -
15 - - the liberty interests at stake in Article 10
16 cases are much greater, and also, the information is
17 going before a jury. If - - - presuming there's a
18 jury trial, like there was here, in an Article 10
19 case, where a jury might not understand what it means
20 for information to have been in a pre-sentence
21 report, whereas a criminal court judge will and will
22 be able to evaluate that information properly.

23 CHIEF JUDGE LIPPMAN: Okay, counsel,
24 thanks.

25 Okay, counsel?

1 MS. MANTELL: May it please the court.

2 Deborah Mantell. And - - -

3 CHIEF JUDGE LIPPMAN: You look familiar.

4 Go ahead.

5 MS. MANTELL: - - - could I please have
6 three minutes for - - - for rebuttal?

7 CHIEF JUDGE LIPPMAN: You've got it. Go
8 ahead.

9 MS. MANTELL: Now on behalf of Charada T.
10 In this case, Charada T.'s Article 10 trial was a
11 battle of the experts, where each side had one expert
12 witness. The State, however, was unfairly allowed to
13 use inadmissible basis hearsay to discredit Charada
14 T.'s expert.

15 JUDGE SMITH: Isn't the case a lot like
16 John S., except that in Charada T. you might have a
17 harmless error problem?

18 MS. MANTELL: Well, it is - - - it is very
19 similar. The - - - the difference here would be that
20 the Appellate Division in Charada T. actually held
21 that the evidence or information about an uncharged
22 crime was inadmissible, but the Appellate Division
23 erred by finding that the error was harmless.

24 JUDGE SMITH: Why wasn't it?

25 JUDGE RIVERA: Yeah, why?

1 MS. MANTELL: Well, because it went to one
2 of the central issues in Charada T.'s case, which was
3 whether or not Charada T. took res - - - took
4 responsibility for the 1996 and 1997 sex crimes,
5 which was a central issue and part of the basis of
6 Charada T.'s expert witness' opinion that - - - that
7 Charada T. - - -

8 CHIEF JUDGE LIPPMAN: Did the expert rely
9 on that?

10 MS. MANTELL: No, I mean, the expert's
11 position - - - well, Charada T.'s expert? Charada
12 T.'s expert didn't credit that as prior conduct of
13 Charada T., whereas the State's expert thought it - -
14 -

15 CHIEF JUDGE LIPPMAN: The State's expert,
16 yes.

17 MS. MANTELL: Dr. Harris (ph.) - - - Dr.
18 Harris relied on it. Well, Dr. Harris initially had
19 believed that there had been a charge and that there
20 had been a conviction relating to - - - to that
21 incident, which was incorrect, and Dr. Harris had
22 believed that - - - that, in addition to the two
23 other offenses of that time period, demonstrated that
24 Charada T. had a difficulty controlling.

25 So what's - - - what's significant here is

1 that not only was that information, which was
2 completely unreliable, used to - - - to bolster the
3 State's case, it was also used to undermine Dr.
4 Grave's opinion.

5 CHIEF JUDGE LIPPMAN: But the State expert
6 really didn't rely on it heavily, or did he?

7 MS. MANTELL: The State's expert might not
8 have relied on it as heavily as the other offenses,
9 but that actually goes to show that under a Floyd Y.
10 analysis the information had very little probative
11 value. And the State actually used that information
12 to emphasize, during its summation, that Charada T.
13 had not, in fact, taken responsibility for all of his
14 crimes. So - - -

15 JUDGE ABDUS-SALAAM: Are you talking about
16 the alleged fourth rape? Is that during the 1978
17 period?

18 MS. MANTELL: It was 1997, and that was the
19 - - -

20 JUDGE ABDUS-SALAAM: 1997.

21 MS. MANTELL: - - - uncharged accusation,
22 and yes, and it would have been the fourth sexual
23 assault. But there was just - - - there's no
24 information that Charada T. had committed that crime.
25 I mean, even - - - even presuming that the crime had

1 objection about it, right?

2 MS. MANTELL: There's a general objection
3 and a request to - - - to approach that the judge
4 denied. But the - - - the reason why it shouldn't be
5 found to have been unpreserved is that there's no
6 prejudice to the State. The only thing that the
7 State would have been able to show in - - - as a
8 foundation would have been the names and credentials
9 or the titles of the staff that did the evaluations.

10 JUDGE SMITH: Well, couldn't they - - - I
11 don't quite understand why these things were here?
12 Why wasn't the record of his treatment a business
13 record or an official record?

14 MS. MANTELL: Well, this information, in
15 particular, was, first of all, from after Charada T.
16 had been discharged from the program, so it wasn't
17 information that was entered as direct observations
18 or routinely entered. And there - - - that is - - -

19 JUDGE SMITH: I'm sorry. What was it? Who
20 - - - who said what to who?

21 MS. MANTELL: These were, quote, unquote,
22 "evaluations" by staff saying that Charada T. had
23 minimized his offenses and had not progressed in
24 treatment.

25 JUDGE SMITH: Why - - - but were they - - -

1 were they done in the ordinary course of - - - of the
2 - - - of the staff member's activity?

3 MS. MANTELL: No. Or if there were, there
4 was - - - there was no foundation to say it, but it
5 doesn't - - - it doesn't seem that there were.

6 JUDGE SMITH: No, but I mean, I - - - yeah,
7 I'm just wondering; you say there's no prejudice to
8 the State. I'm wondering if they couldn't have just
9 raid (sic) - - - laid a - - - laid a foundation for
10 the records if you - - - if you make - - - as far as
11 I know, you - - - you never even said the word
12 "hearsay" in objecting to this stuff.

13 MS. MANTELL: Well, even - - - even still,
14 the information wouldn't have been admissible, even
15 if there had been a foundation, because there would
16 have to be an opportunity to cross-examine a witness
17 about that for - - -

18 JUDGE SMITH: Not on a business record.

19 MS. MANTELL: Well, as evaluations and not,
20 sort of, contemporaneous notes - - -

21 JUDGE SMITH: Maybe you're right.

22 MS. MANTELL: - - - of what's happ - - - of
23 what's occurring, it would not have - - - still would
24 not have met the business record exception. And it
25 also seems that the information was given to - - -

1 JUDGE SMITH: But of course if you'd rai -
2 - - but maybe if you'd raised the hearsay objection
3 they could have brought in the witness.

4 MS. MANTELL: Well, that wouldn't have been
5 possible either, because under CPLR 3101(d)(1), they
6 wouldn't be able to bring in an opinion witness if
7 they hadn't disclosed in advance. So there was no -
8 - -

9 JUDGE PIGOTT: Well, 3101(d), you're
10 talking about an expert, right?

11 MS. MANTELL: Yes. Yes - - -

12 JUDGE PIGOTT: Yeah.

13 MS. MANTELL: - - - because this would have
14 been an expert opinion witness. So - - -

15 JUDGE PIGOTT: It would have been a fact
16 witness saying I talked to him and this is what he
17 said.

18 MS. MANTELL: Well, the information that
19 was used was opinion information. It wasn't
20 conveying statements of somebody. It was - - -

21 JUDGE RIVERA: It was an assessment.

22 MS. MANTELL: - - - an opinion.

23 JUDGE RIVERA: It was an assessment.

24 MS. MANTELL: It was an assessment, and it
25 wasn't even information that - - - Dr. Harris, by his

1 own testimony, hadn't even relied on it. It was used
2 purely to bolster Dr. Harris' opinion and undermine
3 Dr. Grave's.

4 JUDGE SMITH: But you didn't - - - well, if
5 he was talking about - - - you wouldn't - - - not a
6 lot of prejudice to you, though, from the absence of
7 the 3101(d) notice. I mean, you knew - - - you knew
8 they were going to use this stuff, didn't you, or did
9 you?

10 MS. MANTELL: It wasn't apparent that it
11 was going to be used because it wasn't information
12 that Dr. Harris had based his opinion on.

13 CHIEF JUDGE LIPPMAN: Okay. Anything else,
14 counselor? That's it? Thank you. You'll have
15 rebuttal.

16 Counsel?

17 MR. PLATTON: May it please the court.
18 Claude Platton on behalf of the State.

19 The State's expert properly provided the
20 basis testimony at issue here. Pre-sentence reports
21 are routinely consulted and recognized as reliable by
22 courts making critical criminal justice decisions and
23 treatment records prepared in the course of sex
24 offender treatment and relied on for use in
25 treatment. And given that the records are deemed

1 reliable for use for their truth in those contexts -
2 - -

3 JUDGE SMITH: You're talking about the
4 treatment program records?

5 MR. PLATTON: And also pre-sentence
6 reports, Your Honor, which are used in - - - which
7 this court has described as the most important
8 document for sentencing in - - -

9 JUDGE SMITH: And you think it's consistent
10 with Floyd Y. to say anything that's in a pre-
11 sentence report can be relied on by the expert?

12 MR. PLATTON: It's consistent with Floyd Y.
13 to say that anything that's in a pre-sentence report,
14 absent a colorable reliability challenge, has
15 sufficient reliability to be presented to the jury on
16 the basis of his testimony.

17 JUDGE SMITH: So in Floyd Y., the - - - the
18 expert was relying on the witnesses' statements, I've
19 been raped, in effect, or I was abused, or whatever
20 it was. The author of the pre-sentence report would
21 - - - I would think normally would rely on the same
22 thing, or would rely on the indictment, which relied
23 on the grand jury, which relied on the same thing.
24 Why does - - - why does putting it through more
25 chains of hearsay make it more reliable?

1 MR. PLATTON: Well, the courts rely on the
2 contents of pre-sentence reports for sentencing for
3 their truth at sentencing corrections for parole both
4 because the probation officer - - -

5 JUDGE SMITH: Well, courts - - - courts
6 rely on a lot of hearsay for sentencing.

7 MR. PLATTON: That's true, but - - -

8 JUDGE SMITH: That doesn't mean it gets in
9 under Floyd Y.

10 MR. PLATTON: Right, but it - - - they - -
11 - it's reliable both because the probation officer
12 has a statutory duty to evaluate and collect the - -
13 -

14 CHIEF JUDGE LIPPMAN: Counsel, but it's not
15 inherently reliable, which is what you're saying.

16 MR. PLATTON: Well, in addition to the
17 collecting of the information, there's also strong
18 due process protections around the accuracy of the
19 information in the pre-sentence report.

20 JUDGE PIGOTT: The PSI, really?

21 MR. PLATTON: Yeah, well, the - - - at
22 sentencing or prior to sentencing, the defendant
23 who's represented by counsel, can challenge the
24 inclusion of information in the pre-sentence report
25 and the material can be either struck or not - - -

1 JUDGE PIGOTT: Right, but if the - - -

2 MR. PLATTON: - - - received for

3 sentencing.

4 JUDGE PIGOTT: - - - if the probation
5 officer, you know, in the course of preparing the
6 PSI, talks to the victim, or the victim's mother, and
7 said, you know, stole our - - - stole my - - - stole
8 my - - - stole my - - - my innocence, you know,
9 destroyed my life going forward. And that all ends
10 up in the PSI, you know, and the - - - and the judge
11 gets outraged, you know, you've stolen this - - -
12 this person's life, you've stolen their future,
13 they've stolen - - - you know, and therefore I'm
14 giving you twenty years. All of that's reliable now?

15 MR. PLATTON: Not necessarily. Well,
16 first, there's - - - there's a basis for a - - - for
17 the court to not consider prejudicial material in the
18 pre-sentence report. There's no evidence here that
19 the - - - the accusation about this fourth assault
20 was - - - was challenged during the sentencing or
21 prior to sentencing. That would - - - certainly, if
22 that had been the case, if it had been either not
23 considered since - - -

24 JUDGE PIGOTT: I'm just suggesting that we
25 can't make a broad statement that PSI is a written

1 in.

2 MR. PLATTON: No, but there doesn't need to
3 be a broad rule here, Your Honor. The question - - -
4 the point is that, absent some colorable question
5 about the reliability and the - - -

6 CHIEF JUDGE LIPPMAN: But you are doing a
7 broad rule. You're saying, basically, that generally
8 we accept it, period.

9 MR. PLATTON: Generally, pre-sentence
10 reports are recognized as reliable.

11 CHIEF JUDGE LIPPMAN: That's the rule, that
12 it's - - -

13 MR. PLATTON: It's - - -

14 CHIEF JUDGE LIPPMAN: - - - that it is - -
15 - it is, again, inherently reliable, in and of itself
16 - - -

17 MR. PLATTON: Well, no - - -

18 CHIEF JUDGE LIPPMAN: - - - when we know
19 the conditions in which it's made?

20 MR. PLATTON: That lends a degree of
21 reliability that - - - and it isn't the end of the
22 question. If - - - if there is a challenge about the
23 reliability of information, the court must - - - must
24 assess that prior to the - - -

25 JUDGE RIVERA: It sounded like you were

1 saying that he had his opportunity, when the PSI was
2 developed, and having failed to challenge, that's the
3 equivalent of - - - of an admission. That sounded to
4 me like what you were saying. Did I misunderstand
5 you?

6 MR. PLATTON: Abs - - - absolutely, that's
7 not our position - - -

8 JUDGE RIVERA: Okay.

9 MR. PLATTON: - - - Judge Rivera.

10 JUDGE RIVERA: What's your position?

11 MR. PLATTON: Our position is that
12 information contained in a pre-sentence report, if
13 there's no evidence that the respondent challenged it
14 prior to the sentencing, has - - - those are indicia
15 of reliability, and that certainly if - - -

16 JUDGE RIVERA: Because if it wasn't true,
17 he would have said something or his counsel would
18 have said something?

19 MR. PLATTON: There is - - - that suggests
20 that he - - - that he might have done that. If he
21 says - - - for example, if he comes to - - - before
22 the Article 10 court prior to trial and says I didn't
23 know I could challenge it; this is untrue; I was told
24 it was - - - it was - - - couldn't have been - - -

25 JUDGE SMITH: Isn't it true of all hearsay

1 that the - - - that the person - - - the person
2 accused can always say it's untrue?

3 MR. PLATTON: Well, yes.

4 JUDGE SMITH: So it all gets in?

5 MR. PLATTON: No, well - - - the - - - the
6 court - - - well, should hear any reliability
7 challenges put before it prior to the - - - to the
8 admission of the basis testimony and consider whether
9 there's sufficient indicia or reliability. That's
10 what the court did here. The challenge was raised
11 that - - - that this was an accusation that shouldn't
12 be considered. The court heard from our counsel that
13 this was included in the pre-sentence report, not
14 removed from the pre-sentence report prior to
15 sentencing, that there were additional indicia of
16 reliability suggesting that this - - - linking
17 Charada T. to this crime, and on the basis - - -

18 JUDGE RIVERA: What were those additional
19 indicia?

20 MR. PLATTON: Well, there were striking
21 similarities between this crime and the three others
22 that he undisputedly committed. There's the timing,
23 the location, the characteristics of the victims, the
24 choking, which was a common feature of all four of
25 the sexual assaults - - -

1 JUDGE SMITH: Well, but that - - -

2 JUDGE RIVERA: If it seems like he did it,
3 he must have done it?

4 MR. PLATTON: No, those are indicia of
5 reliability. They don't have to - - -

6 JUDGE SMITH: But the - - - you're assuming
7 that all the - - - that all these crimes happened. I
8 mean, I think they did too, but it's still hearsay.
9 It's based - - - it's based entirely on hearsay.

10 MR. PLATTON: Three of the crimes
11 undisputedly did occur. He was - - - he had pleaded
12 guilty to two, he admitted to the third.

13 JUDGE SMITH: Okay. Was it - - -

14 MR. PLATTON: Yeah, and - - -

15 JUDGE SMITH: But so there's a fourth one.
16 But you have a hearsay statement and you're saying
17 it's reliable because it's a lot like the other
18 three?

19 MR. PLATTON: It's reliable. It isn't the
20 court's burden - - - job before the - - - before
21 admitting this ma - - - permitting the expert to
22 provide the basis testimony, to determine if it's
23 true. The point is does it bear sufficient indicia
24 of reliability that the jury can hear that this was
25 part of the basis of the expert's testimony. And

1 here, Dr. Harris explained that this was one of the -
2 - - the bases of his opinion. He said, in addition,
3 this is a disputed fact; this is not something that's
4 been - - - been determined, and gave this much less
5 weight than the others.

6 JUDGE RIVERA: Okay. How about the second
7 prong of Floyd Y.'s analysis?

8 MR. PLATTON: Right.

9 JUDGE RIVERA: "The court" - - - the second
10 - - - "The court must determine that the probative
11 value in helping the jury evaluate the expert's
12 opinion substantially outweighs its prejudicial
13 effect."

14 MR. PLATTON: Yes, Dr. Harris believe - - -
15 testified that the commission of three rapes within a
16 twenty-four hour period was very probative of
17 paraphilia and an inability to control this offending
18 - - - Charada T.'s offending conduct, that that's - -
19 - that's one of the - - - a basis of his opinion that
20 the jury should be able to understand in
21 understanding how he arrived at this decision.

22 On the other end of the scale, Dr. Harris
23 carefully cabined that testimony, explaining that it
24 - - - unlike the other three, this one was disputed,
25 explained that - - - gave it much less time in his

1 testimony, admitted inflammatory details that - - -
2 that might have prejudiced Charada T. and - - -

3 JUDGE RIVERA: Well, it sounds like you're
4 saying it's probative but it's really not meaningful.

5 MR. PLATTON: No, absolutely not. I'm
6 saying that it's - - - it's probative of his test - -
7 - of the basis of his opinion, and he carefully
8 limited his testimony to ensure that it wouldn't
9 cause undue prejudice, particularly by giving the
10 jury the tools it needed to understand that this,
11 unlike the other three, was something that - - - that
12 Dr. Harris gave less weight, that the jury could
13 decide it didn't believe occurred, and that the jury
14 could credit - - - could evaluate Dr. Harris'
15 opinion, in light of the fact that Dr. Harris had
16 relied on an accusation and not on a conviction in
17 this instance.

18 JUDGE RIVERA: What - - -

19 JUDGE READ: You make a harmless error here
20 - - -

21 JUDGE RIVERA: Yeah, what's the harm - - -

22 JUDGE READ: - - - in this case too, is
23 that correct?

24 MR. PLATTON: That's correct, Your Honor.

25 JUDGE READ: And why is it harmless?

1 MR. PLATTON: It's harmless primarily
2 because the - - - this was one - - - first this - - -
3 in terms of the criminal history Dr. Harris
4 considered, this was just one of four rapes, three of
5 which are - - - indisputably occurred, that Dr.
6 Harris described in detail to the jury as evidence -
7 - - as explaining the basis of the opinion.

8 In addition, we have many other sources Dr.
9 Harris considered in arriving at his - - - his
10 conclusion, including the - - - the egregious
11 disciplinary record of Charada T. while he was in
12 prison, which featured very serious conduct involv -
13 - - sexually related conduct involving a correctional
14 officer where he was masturbating in front - - -
15 grabbing the correctional officer. His - - - Charada
16 T.'s writings, while he was in prison, were a strong
17 source of Dr. Harris' opinion, and in addition, the
18 treatment evaluations from the providers all - - -
19 all of that together overwhelmingly provided evidence
20 to - - - for the jury to credit Dr. Harris's opinion
21 over Dr. Grave's, which is based - - -

22 JUDGE SMITH: Were the treatment
23 evaluations hearsay?

24 MR. PLATTON: They - - - they - - - the
25 information was hearsay. It was certainly reliable.

1 We know the source of the information. And it was
2 probative of Dr. Harris' opinion.

3 JUDGE SMITH: What's the - - - I'm having
4 trouble getting my mind around that. What's the
5 index of reliability that - - - that - - - I mean, I
6 - - - you're saying it's reliable because these are
7 people - - - these are professional people who did
8 it, but I'm not - - - I'm not sure that's what Floyd
9 Y. means by reliability.

10 MR. PLATTON: Well, the reliability in this
11 instance - - - and reliability can come from many
12 different sources - - - here, it's the fact that
13 these are treatment records prepared in the course of
14 treatment for use in treatment. And that - - - those
15 are the - - - the touchstones of the business records
16 exceptions that - - - those are the features that - -
17 -

18 JUDGE SMITH: Do you say they're within an
19 exception to the old-fashioned hearsay rule? Or
20 you're saying they're reliable under Floyd Y.?

21 MR. PLATTON: I'm saying they're reliable
22 under Floyd Y. for the - - - the reliability comes
23 from the same source that the business records
24 exception permits these kinds of documents to come in
25 for their truth. And I think we could have - - -

1 JUDGE SMITH: Because if they're within the
2 business records exception then - - - then we don't
3 care whether Floyd Y. applies - - - we don't have to
4 reach the Floyd Y. question.

5 MR. PLATTON: Right, and we probably could
6 have admitted them as business records. This issue
7 wasn't vetted at trial; it wasn't raised at trial.
8 And - - - but again, I think this court, on the
9 review of the record, can determine that this
10 information was reliable, it was contemporaneous
11 information about Charada T.'s progress in treatment
12 that was highly probative.

13 JUDGE SMITH: I guess to back up, you say
14 this whole point wasn't preserved to begin with as to
15 - - -

16 MR. PLATTON: That's correct, Your Honor.
17 And it's particularly important because this could
18 have been cured, and all of these ambiguities that
19 are being raised on appeal for the first time could
20 have been resolved at trial.

21 CHIEF JUDGE LIPPMAN: Okay, counsel.
22 Thanks.

23 MR. PLATTON: Thank you.

24 CHIEF JUDGE LIPPMAN: Rebuttal, counsel?

25 MS. MANTELL: There's a huge gaping hole in

1 the State's argument about the pre-sentence
2 investigation report. There - - - the State is
3 completely trying to shift the burden here by saying
4 that there was no evidence that Charada T. had
5 challenged the pre-sentence report at sentencing.
6 There was no information about what happened at
7 sentencing. There was no - - - there were no
8 sentencing minutes and - - - and in fact that was - -
9 - State's counsel had conceded that.

10 JUDGE SMITH: So for all we know he was
11 screaming it's all lies, and we wouldn't know.

12 MS. MANTELL: And that's correct. And
13 also, under the Criminal Procedure Laws that State's
14 counsel insists provide adequate due process, those
15 laws don't - - - don't require a sentencing court to
16 make a record of a defendant's objection to
17 information in a pre-sentence report.

18 Furthermore, in the 2007, New York State
19 Sentencing Commission specifically noted that there
20 should be concerns about information in pre-sentence
21 reports being erroneous because there wasn't enough
22 of a meaningful opportunity for a defendant to
23 challenge that sort of information.

24 So there - - - there can't be indicia of
25 reliability without any evidence. And furthermore,

1 we don't even know what was actually presented in the
2 pre-sentence report because it was ne - - - that
3 information was never given to the trial court. The
4 - - - the pre-trial hearing is actually quite brief.
5 It's on pages 66 to 70 of the appendix. And it's
6 clear there that the State did not present any
7 indicia of reliability to get that information into -
8 - - into evidence.

9 And furthermore, it's - - - yes, Dr. Harris
10 had testified that Charada T. did not admit to this
11 crime or that he wasn't convicted of it, but that - -
12 - Dr. Harris still testified that Charada T.
13 committed it. So it - - - it's not very - - - it's
14 not dispelling any prejudice to say that he didn't
15 admit to it or wasn't convicted of it and to still
16 say that he did it.

17 JUDGE ABDUS-SALAAM: Counsel, could we back
18 up just a second to the - - -

19 MS. MANTELL: Um-hum.

20 JUDGE ABDUS-SALAAM: - - - the sentencing
21 and whether there's a record made? Are you saying
22 that if the judge - - - well, the pre-sentence report
23 is given to the defendant - - -

24 MS. MANTELL: Um-hum.

25 JUDGE ABDUS-SALAAM: - - - before

1 sentencing, usually. And if - - - if there was some
2 objection to it, you're seeing it doesn't have to be
3 on the record?

4 MS. MANTELL: According to the Criminal
5 Procedure Rules that - - - 390 and 410, there doesn't
6 necessarily have to be any record of a defendant's
7 objection to a part of the pre-sentence report.

8 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
9 you.

10 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of Matter of The State of New York v. John S., No. 75, and Matter of The State of New York v. Charada T. No. 76 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

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