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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF VERONICA P.,

Respondent,

-against-

RADCLIFF A.,

Appellant.

No. 12  
(Papers sealed)

-----

20 Eagle Street  
Albany, New York 12207  
January 08, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 12, People v.  
2 Radcliff.

3 Hi, counsel. You want any rebuttal time,  
4 counsel?

5 MR. REED: Yes, Your Honor. Appellant  
6 requires one minute rebuttal.

7 CHIEF JUDGE LIPPMAN: One minute. You have  
8 it.

9 MR. REED: Thank you.

10 CHIEF JUDGE LIPPMAN: Go ahead. Proceed.

11 MR. REED: May it please the court, my name  
12 is George Reed, and I represent the appellant,  
13 Radcliff A., in this matter. The system for family  
14 court adjudication and Appellate Division review is  
15 very simple and well established. There's a fact-  
16 finding hearing, there's a disposition, you wait  
17 until the end, and as long as you fought the fact-  
18 finding, which happened in this case, the defendant  
19 didn't default, there is an absolute appeal as a  
20 right at the end from the order of disposition which  
21 brings up the order of fact finding for review.

22 And this is in - - - this is statutory.  
23 This is what almost all the cases that are family  
24 court appeals turn out to be. And in fact, most of  
25 those are cases - - -

1 CHIEF JUDGE LIPPMAN: Could you argue that  
2 this - - - could someone argue that this is moot?

3 MR. REED: Well, this is moot only if the  
4 only thing that somebody has the right to relief from  
5 is the order of protection. But the fact finding - -  
6 -

7 JUDGE ABDUS-SALAAM: Didn't you - - -  
8 counsel, didn't you only appeal the order of  
9 protection in the Appellate Division?

10 MR. REED: Well, the - - - I - - - the - -  
11 - that's all there was.

12 JUDGE ABDUS-SALAAM: You didn't appeal the  
13 oral - - - you didn't appeal the - - - the family  
14 court's oral finding of family offense. You just  
15 appealed the order of protection, didn't you?

16 MR. REED: The order of protection was the  
17 only piece of paper there was. And this - - - this  
18 is something - - -

19 JUDGE ABDUS-SALAAM: Didn't you just say  
20 you could have - - -

21 MR. REED: - - - that goes on in family - -  
22 - I'm sorry.

23 JUDGE ABDUS-SALAAM: - - - you could have  
24 directly appealed the family court's family offense?

25 MR. REED: Well, I can't appeal orally. I

1 have to have something in writing. And this comes up  
2 all the time in family offenses and it comes up in -  
3 - - in child support cases where the - - - the only  
4 paper is the order of commitment. And this court  
5 doesn't tend to get these cases, but the Appellate  
6 Divisions routinely just say, in effect, it's an  
7 appeal from the determination, because they know that  
8 the family court isn't doing this.

9 CHIEF JUDGE LIPPMAN: What's the harm to  
10 you if you can't contest this?

11 MR. REED: My client has a stigma. What -  
12 - - it's like a social stigma. He's a bad person.  
13 He's been declared, he's been found to be a bad  
14 person because he assaulted or - - - or harassed - -  
15 - nobody knows what it is. It happens to be  
16 harassment but people don't look at that. All they  
17 know is there's a ninety-two-year-old lady - - - she  
18 now is; she was eighty-seven then so she was younger,  
19 and she - - - and a - - - a court found that he did  
20 something that resulted in an order or protection.  
21 And that is enough to label him one of the worst  
22 people around, which is a domestic violence offender.  
23 And did a - - -

24 CHIEF JUDGE LIPPMAN: Is there case law to  
25 support your position?

1                   MR. REED: The - - - the - - - just the  
2                   very fact that the - - - that the cases are routinely  
3                   - - - are - - - are routinely addressing fact-finding  
4                   determinations in family court without requiring that  
5                   somebody first go back and get a fact-finding order  
6                   setting forth what was in that. I mean I think it's  
7                   - - - it's partly economic, because a lot of these  
8                   appeals are being taken by 18B.

9                   CHIEF JUDGE LIPPMAN: Yeah, but your main  
10                  argument is that this has an enduring consequence for  
11                  you if you're not allowed to, right?

12                  MR. REED: The enduring consequence, yes.  
13                  In addition to the fact that it is - - - it is a  
14                  disgrace to be found to have - - - to commit a family  
15                  offense against a - - - an elderly lady - - -

16                  CHIEF JUDGE LIPPMAN: What's the - - - what  
17                  is the enduring consequences?

18                  MR. REED: The enduring consequence is that  
19                  - - -

20                  CHIEF JUDGE LIPPMAN: And we understand the  
21                  argument stigmatizing.

22                  MR. REED: Right. No, the - - - the - - -  
23                  the - - - that if - - - if the case - - - if the  
24                  person ever is brought back to court for any reason,  
25                  the court, unlike the First Department, the family

1 court will not say oh, well, I see that - - - that -  
2 - - that this happened more than two years ago. The  
3 order of protections - - -

4 JUDGE LIPPMAN: Right.

5 MR. REED: So we won't - - - we won't  
6 consider that. You get a fresh start. No, you don't  
7 get a fresh start. There's no ACD. There's no fresh  
8 start. He is forever a domestic violence offender,  
9 and he always has to worry. And matter of fact,  
10 right now - - -

11 JUDGE ABDUS-SALAAM: Well, what does he  
12 have to worry about?

13 MR. REED: Well - - -

14 JUDGE ABDUS-SALAAM: That's what we're  
15 asking. What does he have to worry about?

16 MR. REED: He could - - - he could go.  
17 Let's say he - - - he wanted to go back into that  
18 apartment. I mean, because he has this finding that  
19 has never been reviewed under his belt the - - - the  
20 - - - any judge who heard of an application based on  
21 that would say you've already been, you know, found  
22 to have done this. Don't come here and say - - -

23 JUDGE PIGOTT: When - - - when - - - when  
24 you - - -

25 MR. REED: - - - you can do it again.

1 JUDGE PIGOTT: When you mentioned that, you  
2 know, when it comes up to the Appellate Division,  
3 quite often it's on an - - - it's on an oral order or  
4 finding. Is that - - - is that what you're saying?

5 MR. REED: And that was - - -

6 JUDGE PIGOTT: That's right?

7 MR. REED: Right, just the decision on the  
8 record.

9 JUDGE PIGOTT: All right.

10 MR. REED: Yeah.

11 JUDGE PIGOTT: So if we - - - if we agreed  
12 with you, the remedy would be what, to send it back  
13 to the Appellate Division? Because they - - - they -  
14 - - they didn't listen to you because they said the -  
15 - - the - - - the appeal - - -

16 MR. REED: Right.

17 JUDGE PIGOTT: - - - was moot, right?

18 MR. REED: I couldn't ask for this court to  
19 review the facts. I mean, it would have to be the  
20 Appellate.

21 JUDGE PIGOTT: Do you want - - - you would  
22 want to go back if - - - if we agreed with you?

23 MR. REED: Yes, Your Honor. And I  
24 theoretically could go back. I wasn't the attorney  
25 in the court below, but I theoretically could go back

1 now and submit an order and start over again. But I  
2 think that that would be a - - - a tremendous waste  
3 of jud - - - of judicial resources or whatever you  
4 call the payment of the 18B lawyers and so on. But  
5 there isn't any time that's expired for that. But I  
6 think that's why the Appellate Divisions, and all of  
7 them including the First Department, will - - - will  
8 - - - will disregard the fact that there's only an  
9 order of disposition and order - - - and not an order  
10 of fact-finding.

11 JUDGE READ: So you've - - - you've  
12 identified potential consequences in future court or  
13 administrative proceedings. Is there any other  
14 potential future consequence or practical consequence  
15 if you don't get a chance to - - - to challenge,  
16 appeal?

17 MR. REED: Well, I - - - I think that's a  
18 lot. I don't think the - - - I don't think that the  
19 - - - I mean - - -

20 JUDGE READ: Well, I'm - - - I'm not saying  
21 it's not. I'm saying is there any - - - is that it?  
22 It's the stigma and these potential effects in future  
23 court proceedings or administrative proceedings?

24 MR. REED: Well, I mean, any - - - anybody  
25 who's entitled - - -



1 JUDGE READ: Does it have an effect on - -  
2 -

3 MR. REED: What?

4 JUDGE READ: Does it have an effect - - -

5 MR. REED: I'm sorry.

6 JUDGE READ: Does something like this have  
7 any effect on employment prospects or - - -

8 MR. REED: I would - - - I would imagine  
9 that anybody that has the power to search the record  
10 of orders of protection is going to find a - - - a  
11 affirmed, or in this case appeal dismissed, order of  
12 protection saying that he committed an - - - an act.  
13 It doesn't say what it is but it's - - - but that's  
14 permanent - - -

15 JUDGE RIVERA: Well, I guess if there's a -  
16 - - if there's an employment application that asks  
17 has a - - - has an order ever been entered against  
18 you, what's going to be your client's answer?

19 MR. REED: Well, that - - - he would have  
20 to disclose that. That's correct.

21 JUDGE RIVERA: Disclose it.

22 MR. REED: But I - - - I think that - - -  
23 that because there's this structure of fact finding,  
24 disposition, and one appeal to the Appellate Division  
25 as of right that's - - - that's established across

1 the board, I think that it - - - that it - - - it  
2 would be a - - - a mistake to change it to a case-by-  
3 case analysis. That what - - - that Radcliff has to  
4 come in and say why he anticipates this is going to  
5 cause trouble in the future. And - - - and - - - and  
6 as I said in my brief, I mean in the extreme - - -

7 JUDGE ABDUS-SALAAM: Because if it doesn't,  
8 counsel - - -

9 MR. REED: What?

10 JUDGE ABDUS-SALAAM: - - - why would we  
11 bother? If it's - - - if it - - - it's - - - if the  
12 order of protection expires and it's moot, why would  
13 the court want to look behind it if there's no  
14 consequence to the person that the order has been  
15 issued against?

16 MR. REED: Well, I - - - I don't think it's  
17 behind anything, because I think the word order of  
18 protection, permanent order of protection, means that  
19 - - - you know, the family offense caption permanent  
20 order of protection means that that person committed  
21 a family offense. It's not a question of trying to  
22 find out - - -

23 JUDGE ABDUS-SALAAM: You said it's  
24 permanent.

25 MR. REED: - - - which it was.

1 JUDGE ABDUS-SALAAM: But the order here has  
2 expired, hasn't it?

3 MR. REED: It has, but it's not treated as  
4 expired. It continues to be referred to by - - - by  
5 anybody who has access to it. And he can't use that  
6 as a defense. He can't say well, it - - - I - - -  
7 this has already expired. So - - -

8 JUDGE ABDUS-SALAAM: And how broad is this  
9 universe of people who have - - - or institutions  
10 that have access to the order of protection? You  
11 said future employers, but do they really have access  
12 to this kind of information in the family court?

13 MR. REED: I - - - I don't - - - I - - - I  
14 think that - - - I don't know exactly the extent of  
15 that, although I think that people that - - - that  
16 have any employers where there's anything like  
17 driving a school bus or something like that where  
18 there's - - - where there's relevance probably can do  
19 that.

20 CHIEF JUDGE LIPPMAN: There is - - - there  
21 is a database or something on orders of protection,  
22 isn't there, that in the last years it's become  
23 commonplace to have?

24 MR. REED: Right, and it's not wiped out.  
25 It - - - it doesn't - - - it's - - - it's not

1 expunged.

2 CHIEF JUDGE LIPPMAN: Does it - - - does it  
3 leave that database when it becomes not active  
4 anymore or it stays on? Do you know?

5 MR. REED: As far as I can tell, it - - -  
6 it's still accessible. And of course data - - -

7 JUDGE READ: To the public?

8 MR. REED: What?

9 JUDGE READ: To the public? Accessible to  
10 the public?

11 CHIEF JUDGE LIPPMAN: To law enforcement or  
12 the public, in general?

13 MR. REED: I - - - I - - - I'm not aware  
14 the public can do it. However, the public seems to  
15 be able to access a lot through the Internet with - -  
16 - by paying twelve dollars or something like that for  
17 a search. I mean, a lot of things are coming up.

18 JUDGE PIGOTT: And you - - - you - - - you,  
19 I think, in your brief said that - - - that the rem -  
20 - - under the executive law they have that what is  
21 removed from, quote, "active files", unquote. Which  
22 I - - - you can read either way.

23 MR. REED: Right, exactly. I couldn't say.

24 JUDGE PIGOTT: It's now in an inactive file  
25 and if they went and looked at your client's name

1 under the inactive files that at one point there was  
2 an OP.

3 MR. REED: But the - - - the problem I have  
4 with the - - - the - - - the idea of a case-by-case  
5 analysis is that that basically says to my client  
6 that if he wants to win this appeal, he should come  
7 in and say I intend as soon as - - - as soon as I  
8 find out that I'm safe to do it, I'm going to go back  
9 and commit another family offense against somebody.  
10 And - - - and then the court would have to say well,  
11 then you're going to be prejudiced by this file.

12 JUDGE PIGOTT: Well, no, you - - - there -  
13 - - there are some stipulated ones. I'm not sure  
14 that if you - - - if you agreed to an OP and then - -  
15 - and then I said want to appeal it that, had it  
16 expired, that you could do that.

17 MR. REED: Oh, right. That's - - - that's  
18 why I said at the very beginning that it would have  
19 to be defended.

20 JUDGE PIGOTT: Right.

21 MR. REED: And he did not - - - he did  
22 defend this fact-finding. There's no default.  
23 There's no consent.

24 JUDGE PIGOTT: I thought you were arguing  
25 that we shouldn't take them on a case-by-case basis,

1 and I was making that distinction. But I see your  
2 point.

3 MR. REED: No, I meant this court - - - any  
4 - - - neither Appellate Court should engage in  
5 analysis as to how serious this is or how bad it is,  
6 because the family court judges don't do that.

7 JUDGE READ: That's what - - - that's what  
8 - - -

9 MR. REED: They don't say to somebody - - -  
10 huh?

11 JUDGE READ: That's what we shouldn't do on  
12 a case-by-case basis is what you're saying? The  
13 Appellate Court shouldn't evaluate the severity of it  
14 or what they think the severity of it is on a case-  
15 by-case basis before deciding to hear it?

16 MR. REED: Before deciding to hear it,  
17 right.

18 CHIEF JUDGE LIPPMAN: That's your - - -

19 JUDGE READ: That's your position, right?

20 CHIEF JUDGE LIPPMAN: That's your argument.

21 Yeah.

22 MR. REED: Right. Yeah.

23 CHIEF JUDGE LIPPMAN: Okay, counsel.

24 MR. REED: Thank you, Your Honor.

25 CHIEF JUDGE LIPPMAN: You'll have your

1 rebuttal. Let's - - - let's hear from your  
2 adversary.

3 MR. NELSON: May it please the court - - -

4 CHIEF JUDGE LIPPMAN: Counsel - - -

5 MR. NELSON: Your Honor, I would like to  
6 reserve one minute of rebuttal.

7 CHIEF JUDGE LIPPMAN: No, no, you - - - you  
8 can't.

9 MR. NELSON: Oh, I cannot? I'm sorry.

10 CHIEF JUDGE LIPPMAN: Nope. But you'll  
11 have your full ten minutes of argument.

12 MR. NELSON: Thank you.

13 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

14 MR. NELSON: May it please the court my  
15 name's Eric Nelson. I represent Veronica P.  
16 Veronica P. was the petitioner in the original family  
17 court.

18 CHIEF JUDGE LIPPMAN: Counsel, you know,  
19 Judge Abdus-Salaam was talking before about the  
20 consequence and this issue of whether you can appeal  
21 or not appeal. Is there a - - - a - - - focusing on  
22 that issue of consequence, is this something that - -  
23 - that does stigmatize someone and that they should  
24 have the right to challenge? Because in one form or  
25 another, and Judge Pigott was talking about active,

1 inactive, whatever, in form or another it's there and  
2 it says, you know, it - - - it does make a statement  
3 that there was a two-year order for protection. Is  
4 that - - - is that a reason why, really, your - - -  
5 your adversary should be able to contest this  
6 finding, the factual finding that resulted in the  
7 order of protection?

8 MR. NELSON: Your Honor, if I could address  
9 it in three separate parts, I'm prepared to respond  
10 to it.

11 CHIEF JUDGE LIPPMAN: Go ahead, three  
12 separate parts. Go to it.

13 MR. REED: Three separate parts, and I'm  
14 prepared to respond to some of the questions that the  
15 - - - the - - -

16 CHIEF JUDGE LIPPMAN: Okay.

17 MR. REED: - - - rest of the panel has.

18 CHIEF JUDGE LIPPMAN: But first - - - first  
19 do this. Go ahead.

20 MR. REED: Judge, first the Executive Law  
21 Section 221, subdivision 8, paragraph 6 provides that  
22 upon the expiration of an order of protection, the  
23 superintendent of the record shall remove from the  
24 family court registry all evidence, all records,  
25 including any counterclaims, of any order of



1 protection that took - - - that was imposed against  
2 Mr. Radcliff in this case or against any individual.

3 CHIEF JUDGE LIPPMAN: So in answer to Judge  
4 Read's question if someone asks him have you ever had  
5 an order of protection against you, you can say no?

6 MR. NELSON: I think you could say no. And  
7 I think you could say no in terms of the - - - the  
8 facts of the case. And for example, if you were  
9 before any proceeding, whether it be a criminal or a  
10 civil proceeding, and you were cross-examined about  
11 it - - -

12 CHIEF JUDGE LIPPMAN: And you have - - -  
13 you have a divorce proceeding, all kinds of things.  
14 You - - - you just say, eh, nothing to do with me?

15 MR. NELSON: You could say that - - - that  
16 the matter has been expunged and I don't think that's  
17 a proper form of cross-examination.

18 JUDGE RIVERA: But - - - but - - - but you  
19 must - - - I - - - I just want to clarify. You're  
20 saying that you could - - - that his client could  
21 actually say I've never had an order of protection  
22 issued against me?

23 MR. NELSON: I'm not saying that. I'm not  
24 saying, Your Honor, that he could not say he never  
25 had an order of protection. I think that the

1 question would be improper, and I think it would be  
2 sustainable.

3 JUDGE RIVERA: But if it's on an employment  
4 application?

5 MR. NELSON: Your Honor, I - - - if - - -  
6 getting to that issue, and I think it was raised by  
7 the panel, this is a family court registry which is  
8 not accessible to the public.

9 JUDGE RIVERA: I understand, but if he's  
10 asked the question?

11 MR. NELSON: If he's asked a question then,  
12 obviously, he has to tell the truth.

13 JUDGE RIVERA: For purposes of securing  
14 employment or for purposes of answering some other  
15 question in some judicial proceeding, doesn't he have  
16 to say yes? There's no way to escape saying yes.  
17 Maybe there's an explanation, but he's got to say  
18 yes.

19 MR. NELSON: I think he has to say yes and  
20 then he has to offer an explanation as - - - as to  
21 what - - -

22 CHIEF JUDGE LIPPMAN: Okay. What's your  
23 second and third argument that's - - -

24 MR. NELSON: The - - - the sec - - - the  
25 second and third arguments is - - - is - - - and - -

1 - and I want to go into the rationale of the - - -  
2 the First, the Third, and the Fourth Departments that  
3 dealt with this issue, which is - - -

4 CHIEF JUDGE LIPPMAN: Go ahead.

5 MR. NELSON: - - - they've all held that it  
6 was moot. And I believe Your Honor and I believe  
7 Your Honor Judge Abdus-Salaam decided recent cases.  
8 I think you were involved with the Diallo case, which  
9 is cited by the Appellate Division in denial of the  
10 right to appeal on this matter. And - - -

11 CHIEF JUDGE LIPPMAN: There's - - - there's  
12 conflicting case law on this, isn't there, though?

13 MR. NELSON: There - - - there's  
14 conflicting case law but - - - but, Your Honor, the -  
15 - - the Second Department is the only department  
16 which has held - - - and again, the brief - - - the  
17 cases are very cursory, they're not very fact-  
18 specific, which state in the Second Department - - -

19 CHIEF JUDGE LIPPMAN: Well, isn't that the  
20 point that there's no real rationale for whatever?  
21 The cases that we have thus far don't really go very  
22 deeply into what the rationale is, right?

23 MR. NELSON: Except, Mr. Chief Judge, in -  
24 - - in the cases where they held that there was a  
25 right to appeal, there was usually a finding of

1 contempt, there was usually a finding of - - - of  
2 family court contempt, civil contempt. I - - - I  
3 look at the Court of - - -

4 JUDGE PIGOTT: Well, I think you cited  
5 Kali-Anne, which was the - - - the woman in Florida,  
6 and - - - and that was justiciable, even - - - even  
7 though I forget exactly the facts. But they said,  
8 you know, it's a stain. She'd been charged with, I  
9 think, an offense against her children, which was  
10 taken away. And then she wanted the OP taken out,  
11 you know. There - - - there are reasons - - - when  
12 the - - - when Mr. Reed - - - I didn't think of this  
13 until he was arguing it, he didn't get an appeal on  
14 the - - - on the underlying charge.

15 MR. NELSON: He - - - no, I - - - I believe  
16 that may not necessarily be correct, Your Honor,  
17 because looking at Mr. Reed's brief and - - - and  
18 looking at the briefs that were submitted before the  
19 First Department, one of the issues that he raised  
20 was whether or not a finding of harassment in the  
21 second degree was contrary to the weight of the  
22 evidence. So it was before the Appellate Court, and  
23 he did - - -

24 JUDGE PIGOTT: But they didn't hear it.  
25 They - - - they said, well, the OP's expired. It's -

1           - - the - - - the appeal is now moot. And - - - and  
2           so he did not get to - - - if I'm - - - correct me if  
3           I'm wrong. He did not get to argue the validity of  
4           the - - - of - - - of the - - - of the harassment  
5           charge and the OP because they - - - they took the  
6           position, because it had expired, the - - - the - - -  
7           the appeal was dismissed.

8                       MR. NELSON: That's correct.

9                       JUDGE PIGOTT: Does that sound fair?

10                      MR. NELSON: I - - - I - - - I - - - I  
11           can't answer whether or not it's fair, but I think  
12           under the - - - the - - - the circumstances of this  
13           particular case, and I think under the circumstances  
14           under which the courts have held with the concept of  
15           mootness - - -

16                      JUDGE PIGOTT: But suppose he's innocent.  
17           Suppose he didn't harass.

18                      MR. NELSON: Well - - - well - - - in - - -  
19           in - - - in that case, then, of course, he would have  
20           - - - I understand that the - - - the - - - the point  
21           in which he should have a right to appeal the  
22           underlying facts of this case. But I think the  
23           courts have set clear guidelines regarding when you  
24           could appeal and when the appeal is moot.

25                      JUDGE PIGOTT: But - - - but you can

1 understand that this - - - the - - - the Appellate  
2 Division wasn't sitting there saying, you know, we  
3 really think this guy's innocent of harassment but  
4 because the order - - - the order of protection's  
5 expired, we can't hear it.

6 MR. NELSON: Then I think in that case,  
7 rather than the court sending - - - setting a broad  
8 rule, maybe it should be remitted to the Appellate  
9 Division to determine the issue of whether or not it  
10 sustained the charges of harassment in the second  
11 degree. But I don't think that this court - - - and  
12 - - - and I believe that the rationale of the - - -

13 CHIEF JUDGE LIPPMAN: But you agree he  
14 should have a way to contest the factual finding?

15 MR. NELSON: I - - - I believe he has. I  
16 believe courts have set down, and at least three of  
17 the departments have set down, that there are no  
18 enduring consequences. And I think that ties into  
19 the issue of mootness that there - - - there has not  
20 been any enduring consequences that were shown.

21 CHIEF JUDGE LIPPMAN: If there are enduring  
22 consequences, you agree we should - - -

23 MR. NELSON: I agree, because this court in  
24 - - - in the Matter of Bickwid - - - and - - - and in  
25 fact, in your recent opinion, Judge Rivera, in the

1 Matter of Rubenstein, held that in certain  
2 circumstances there is no issue of mootness when  
3 there are enduring consequences.

4 CHIEF JUDGE LIPPMAN: Or an enduring  
5 stigmatization, is that an enduring consequence?

6 MR. NELSON: I - - - I don't think it's - -  
7 - it - - - it would take place, Your Honor, because  
8 of the fact that the executive law provides some  
9 removal of the fact that there has been a - - - a - -  
10 - there - - - there has been an order of protection  
11 issued.

12 CHIEF JUDGE LIPPMAN: But it doesn't - - -  
13 but I - - - I guess - - - and - - - and a lot of the  
14 questions have centered around this, it doesn't cease  
15 to exist for all purposes, does it? I mean you're  
16 saying that - - - that it's finished, it's gone, it's  
17 like it never happened. That's not really the case  
18 in a - - - you know, just from a practical, pragmatic  
19 view. Could it be the case that it's just gone into  
20 the wind and it never existed?

21 MR. NELSON: I - - - I also - - - I - - - I  
22 agree with your analysis, and I think Your Honor  
23 Judge Pigott was also getting to that issue in terms  
24 of the fairness. But you - - - you have to establish  
25 - - -

1 CHIEF JUDGE LIPPMAN: This is important,  
2 counsel. This is what we do, you know.

3 MR. NELSON: Of - - - of course it's - - -  
4 it's all about fairness. But of course you have to  
5 establish something substantive, some enduring  
6 consequences that may result - - -

7 JUDGE RIVERA: It sounds like you're  
8 arguing, really, that - - - that - - - that what he  
9 has suggested is - - - are the consequences of this  
10 particular stigma and the enduring aspects of this  
11 are too speculative. That he really can't point to  
12 anything now.

13 MR. NELSON: No. And the question is do  
14 you point to something ten years in the future to - -  
15 -

16 JUDGE RIVERA: But doesn't he - - - that's  
17 my question. Let me assume I even accepted the - - -  
18 the way you position this particular argument.  
19 Doesn't he always have - - - doesn't his client  
20 always have to answer yes when he's ever asked  
21 whether there's been an order issued against him by a  
22 court?

23 MR. NELSON: I - - -

24 JUDGE RIVERA: That's not speculative.

25 MR. NELSON: No, it's not. And the answer



1 is yes, you have to answer yes to that question. But  
2 the question is, is again, what is - - - and - - -  
3 and how - - - what is the - - -

4 JUDGE READ: That's not a positive thing,  
5 is it?

6 MR. NELSON: It's - - - it's not a  
7 positive, but it's also not as if you're answering if  
8 you've been commit - - - have convicted of a crime.

9 CHIEF JUDGE LIPPMAN: I think it's a pretty  
10 serious thing in the - - - in the world of today with  
11 domestic violence issues be so at the forefront of  
12 our minds. I think it's a pretty big deal, you know,  
13 to me, anyway.

14 JUDGE ABDUS-SALAAM: If we allowed - - -

15 MR. NELSON: It - - - it - - - it - - -

16 JUDGE ABDUS-SALAAM: If we allowed every  
17 case where there was an order of protection to  
18 appeal, we would - - - that would mean that every  
19 time an order of protection is entered, whether the -  
20 - - it has consequences or not, would be appealable.  
21 Is that - - - is that right?

22 MR. NELSON: I - - - I think you would be  
23 opening a tremendous amount of floodgates in terms of  
24 everybody because the - - -

25 CHIEF JUDGE LIPPMAN: That's your argument.

1 MR. NELSON: Well, that's one of my  
2 arguments.

3 CHIEF JUDGE LIPPMAN: But the - - - but  
4 then - - - but the question comes back then to is  
5 there an enduring consequence?

6 MR. NELSON: In this particular matter, I  
7 submit that no enduring consequences has been shown.  
8 In all the other cases for - - -

9 JUDGE ABDUS-SALAAM: In other words, every  
10 time an order of protection is entered that would  
11 equal an enduring consequence whether or not the - -  
12 - the order's expunged, expired, or whether it was  
13 based on something or nothing.

14 MR. NELSON: That's correct.

15 JUDGE ABDUS-SALAAM: Just - - - just the  
16 fact of existence, at some point, of an order of  
17 protection would be an enduring consequence.

18 MR. NELSON: That's correct as to be  
19 compared to - - -

20 JUDGE RIVERA: Well, other than a - - -

21 MR. NELSON: I'm sorry.

22 JUDGE RIVERA: - - - if he's successful  
23 challenging on the merits, and that's his point.

24 MR. NELSON: That's correct.

25 JUDGE PIGOTT: In Diallo, which I think you

1           cited to, the - - - the First Department said that it  
2           was moot but if - - - if we were to review the facts  
3           we would have found that the facts were not - - -  
4           were not against the weight of the evidence. Would  
5           that have been a better approach here? In other  
6           words, if they had looked at this case and said it's  
7           moot but were we to look at the underlying facts, the  
8           harassment charge, and find that the weight of the  
9           evidence claim was not valid, you might not be here.

10                   MR. NELSON: I - - - I - - - I think so,  
11           because in Diallo, as they determined, both that - -  
12           - that that issue is moot because the appellant in  
13           Diallo had not shown any stigma or any enduring  
14           consequences presently, but they also decided in that  
15           case that assuming that - - - that was not - - - that  
16           was the case, we still find that it still merited the  
17           charges, which was the second point of my brief in  
18           this matter.

19                   CHIEF JUDGE LIPPMAN: Okay, counsel. Let's  
20           let your adversary address that - - - that point or  
21           whatever else in his minute.

22                   MR. NELSON: Thank you very much.

23                   CHIEF JUDGE LIPPMAN: Thank you, appreciate  
24           it.

25                   Counsel?

1                   MR. REED: Thank you, Your Honor. I just  
2 want to state in - - - in regards to a recent point  
3 that was - - -

4                   CHIEF JUDGE LIPPMAN: Answer Judge Abdus-  
5 Salaam's point, though, that - - - that are we really  
6 - - - would we really be saying that in every - - -  
7 in every order for protection, there's an enduring  
8 consequence? And, you know, rather than saying gee,  
9 there are these thousands and thousands and  
10 thousands, how do you - - - how do you answer that  
11 question?

12                   MR. REED: Well, most of those thousands  
13 and thousands are temporary orders of protection,  
14 which aren't involved here. Somebody can say - - -

15                   CHIEF JUDGE LIPPMAN: There are lots of  
16 permanent orders, too, right?

17                   MR. REED: Right. Right, there were. But  
18 - - - but there's probably - - - you know, the - - -  
19 the ratio is different. And to the consent, no  
20 question, can't appeal that. But - - -

21                   CHIEF JUDGE LIPPMAN: So what's the - - -  
22 what's your answer?

23                   MR. REED: It's the - - - it's the - - -  
24 each person is entitled to review. It's not his  
25 fault if there are 20,000 others.

1 CHIEF JUDGE LIPPMAN: No. No, I think we  
2 understand your argument. Permanent order of  
3 protection, you have a right to review. That's your  
4 position?

5 MR. REED: Yes, to bring up the - - - the  
6 family offense that we were concerned about.

7 CHIEF JUDGE LIPPMAN: You have - - - you  
8 have a factual basis for the finding.

9 MR. REED: Yeah. And in terms of the  
10 floodgates, it's - - - it's important to note that  
11 the - - - the - - - if there is a - - - a - - - there  
12 isn't going to be quite a flood, because it - - - it  
13 has to - - - it takes two years now for an order of  
14 protection, usually, to expire, though sometimes they  
15 start retroactively, so basically it's less than two  
16 years. And it was really the fault of the assigned  
17 counsel system here, which as I understand, is the  
18 court's responsibility to - - - to make sure the  
19 assigned counsel system worked. In this case it  
20 didn't work, and the only reason this ran to two  
21 years was because another attorney had to be  
22 assigned.

23 CHIEF JUDGE LIPPMAN: Okay, counsel.

24 MR. REED: Thank you.

25 CHIEF JUDGE LIPPMAN: We get your argument.

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We appreciate both of your - - -

MR. NELSON: Thank you.

CHIEF JUDGE LIPPMAN: - - - presentations.

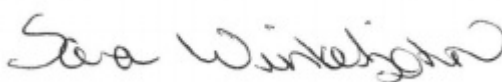
Thank you so much.

(Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Veronica P. v. Radcliff A., No. 12 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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