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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF TYRONE D. ,

Appellant ,

-against-

STATE OF NEW YORK ,

No. 13
(papers sealed)

Respondent .

20 Eagle Street
Albany, New York 12207
January 13, 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: We're going to start
2 with number 13.

3 Counselor, you're on. Would you like any
4 rebuttal time?

5 MR. CIRANDO: One minute, Your Honor, if
6 necessary.

7 CHIEF JUDGE LIPPMAN: One minute, you have
8 it. Go ahead.

9 MR. CIRANDO: Thank you. John Cirando of
10 Syracuse, New York, attorney for appellant Tyrone D.

11 This is an appeal from an Article 10 annual
12 review proceeding. The first issue we'd like to
13 discuss, in the order, I think, of which things
14 happened, there was a motion for a change of venue,
15 and we submit that the court incorrectly denied the
16 motion for the change of venue in this case.

17 The way the statute reads, it says any
18 hearing or trial pursuant to this Article - - - at
19 any hearing or trial, the court may change the venue
20 of the trial to any county for good cause - - -

21 CHIEF JUDGE LIPPMAN: Counsel, let me - - -
22 let me stop you just a second.

23 MR. CIRANDO: Yeah.

24 CHIEF JUDGE LIPPMAN: What - - - what is
25 the logic of - - - of moving the annual hearing,

1 where it would appear that much of the testimony
2 that's going to go on would be from where the - - -
3 the individual is being treated? Does it make sense
4 to change - - - in that context, does it make sense
5 to move it, let's say, to a - - - a venue that's more
6 convenient for family or whatever?

7 MR. CIRANDO: Yes, Your Honor, it does,
8 because - - -

9 CHIEF JUDGE LIPPMAN: Why?

10 MR. CIRANDO: Because the statute provides,
11 number one, that the treating doctor or the examining
12 doctor or the reporting doctor can testify by video
13 conference. So they don't have to be, in - - - in
14 this case, in Oneida County. Number two, one of the
15 aspects to determine in the hearing is, should the
16 individual remain in the CNY Psychiatric Center, or
17 should the individual be placed in SIST which in this
18 case, would have been back where he lived - - -

19 JUDGE RIVERA: But - - - but counsel,
20 doesn't that turn on medical evaluations and clinical
21 assessments, not on whether or not he's got a family
22 support system?

23 MR. CIRANDO: But we don't know that - - -
24 we don't know that until we get into a hearing.

25 JUDGE ABDUS-SALAAM: Well, counsel, usually

1 the hearing - - - the original hearing is a
2 bifurcated - - -

3 MR. CIRANDO: Right.

4 JUDGE ABDUS-SALAAM: - - - proceeding,
5 isn't it? It - - - first the jury has to determine -
6 - - if there's a jury trial - - - whether the - - -
7 the individual is a dangerous sex offender, and then
8 after that determination is made, then there is a - -
9 - a hearing on disposition. Why would - - - why
10 wouldn't it be the same for a continuation?

11 MR. CIRANDO: I - - - I don't think the
12 statute provides for the bifurcation of the - - - of
13 the - - -

14 JUDGE ABDUS-SALAAM: But wouldn't you - - -
15 wouldn't the - - - wouldn't the court still need to
16 determine first whether the person is a dangerous sex
17 offender before deciding whether SIST or something
18 else would be necessary?

19 MR. CIRANDO: That is true, Your Honor. I
20 - - - I guess, in that regard though, I think, for
21 that type of analysis, I think you probably would
22 have to amend the statute. But at this - - - at this
23 juncture on this record, there was a - - - we submit
24 - - - a proper application to change the venue. And
25 one of the things that can be shown on behalf of the

1 individual is does he need - - - does he need to stay
2 in confinement. And in - - - in this case - - -

3 JUDGE ABDUS-SALAAM: Wouldn't that be
4 determined by whether he is still a dangerous sex
5 offender? So even though it's not a formal
6 bifurcation, it's still a bifurcation of some sort,
7 isn't it? Once you have to - - - you have to first
8 determine whether the person is still a dangerous sex
9 offender, and then what to do about the person if
10 that position changes, if there's something different
11 about his status?

12 MR. CIRANDO: To get the - - - the two area
13 - - - the two definitional parts of the - - - of the
14 statute, yes, Your Honor. But you would need - - -
15 in this case, we submit that the mental abnormality
16 in the sex offense history, while the crime was
17 horrific, you don't have the - - - you don't have
18 really a - - - a - - - I'm looking for the right word
19 - - - a mental - - - evidence of the mental - - - the
20 abnormality, because it - - - it seems that - - -
21 that he's - - - they're stuck on the fact of his
22 antisocial behavior and - - - and a provisional
23 sexual diagnosis.

24 So I think, if we had gotten that far, I
25 think we should have been in the Bronx or in New York

1 City - - - New York County.

2 CHIEF JUDGE LIPPMAN: Counsel, e - - - even
3 if we accept your statutory interpretation, he can
4 get a change of venue for the annual hearing, what
5 was submitted in support of this particular request,
6 and was it enough to really, you know - - - were
7 there affidavits from witnesses? It was just the
8 attorney's - - -

9 MR. CIRANDO: It was the attorney's
10 statement that the family members - - - it would cost
11 - - -

12 CHIEF JUDGE LIPPMAN: Is that enough, I
13 guess, is my question?

14 JUDGE READ: He didn't identify any family
15 members, right?

16 MR. CIRANDO: He didn't identify any family
17 members, no.

18 JUDGE READ: Or any other individual
19 potential witness?

20 MR. CIRANDO: But they - - - they indicated
21 that it was an 8-hour re - - - roundtrip, 480-mile
22 roundtrip. It'd cost them at least 220 dollars, but
23 I - - - I think the overriding concern was to show
24 that there was some support or some area where it
25 could be in his best interest to be considered for

1 that - - - that other area. So I - - - I, you know -
2 - - the record is what it is, but I think in this
3 regard - - - I think in this record, it - - - it was
4 sufficient.

5 JUDGE READ: If we conclude - - -

6 JUDGE PIGOTT: Was that a typo?

7 JUDGE READ: If we conclude it wasn't, then
8 do we even have to decide the venue issue?

9 MR. CIRANDO: I think the venue issue
10 should be decided so that in the future - - -

11 JUDGE READ: People will know what it is -
12 - -

13 MR. CIRANDO: - - - counsel will know what
14 to do in these situations.

15 JUDGE READ: I have a mundane que - - - a
16 very mundane question related to that. There's a
17 citation in your brief to this memorandum of the - -
18 - of the New York State Assembly Codes Committee on -
19 - - on - - - on the bill. It's on page 4 of your
20 brief, and it cites to a - - - it cites to a
21 nongovernment website and I - - - I haven't been able
22 to find that document in the bill jacket. I mean, is
23 that some kind of official document or was that a
24 draft, or - - - because it certainly supports your
25 statutory interpretation.

1 MR. CIRANDO: We found it - - - I'll have
2 to go back and check the files to where we exactly
3 found it and I'll - - - I can send it to the clerk's
4 office.

5 JUDGE READ: I - - - I wish you would,
6 because I can't - - - I can't find it in any - - -
7 any bill jacket or any oth - - - any kind of
8 government document, and I wondered if it was some
9 kind of a draft, or if it has any kind of
10 officialness about it at all.

11 MR. CIRANDO: Okay.

12 JUDGE READ: Thank you.

13 MR. CIRANDO: We - - - we'll get - - -
14 we'll get that to the court. I'm just looking for
15 the beginning - - -

16 CHIEF JUDGE LIPPMAN: Judge Pigott?

17 JUDGE PIGOTT: Do you - - - so do you think
18 that's a typo in the statute that says "trial"
19 instead "hearing" - - -

20 MR. CIRANDO: Yeah. It doesn't make sens -
21 - - it - - - the Appellate Division read the word - -
22 - took the word "hearing" out of the - - - out of the
23 statute, and - - - and - - - and it - - - hearing or
24 trial should be in there.

25 JUDGE PIGOTT: Can we make that leap? I -

1 - -

2 MR. CIRANDO: I think you can.

3 JUDGE PIGOTT: I understand your argument.

4 You're saying you can leave that phrase out and - - -

5 MR. CIRANDO: I think you can, because you
6 - - - when you look at - - - I think it's 10.07 which
7 talks about the trial initially - - - that talk - - -
8 that's self-contained - - - it's got a self-contained
9 change of venue provision.

10 JUDGE PIGOTT: The initial - - -

11 MR. CIRANDO: Yeah, yeah.

12 JUDGE PIGOTT: Right.

13 MR. CIRANDO: So it seems to me when we
14 talk about the compromise that - - - that - - - that
15 they came to that they were concerned about the
16 hearing as well. And the - - - the hearing - - - you
17 know, not to belabor it, but - - - but it's - - - if
18 you're going to let somebody - - - if the person has
19 a chance to get out, that part - - - that hearing,
20 you know, should be where they're going to go to.

21 JUDGE PIGOTT: So your - - - your
22 recommendation would be that we read it your way, and
23 if the legislature thinks we read it wrong, they can
24 correct it - - -

25 MR. CIRANDO: Yeah.

1 JUDGE PIGOTT: - - - if we read it right,
2 then we've solved their problem.

3 MR. CIRANDO: Yes.

4 THE COURT: And you get over the hurdle
5 about the - - - the medical testimony that you could
6 do that by video?

7 MR. CIRANDO: Yes. Yes, you can do that -
8 - - that's already in the law. That's already in
9 there, Your Honor. The other issue, unless the court
10 has questions about the venue, is the - - - I call it
11 presence or waiver, and - - -

12 CHIEF JUDGE LIPPMAN: Right.

13 MR. CIRANDO: - - - when you look at page
14 67, I don't think there's a proper waiver of the
15 hearing. It's a - - -

16 JUDGE PIGOTT: So when you say that - - -
17 he's not coming. Not - - - that - - - that became
18 quite obvious. Now, let's assume for a minute that
19 he's not coming. All right. Is it your position
20 that the court still have had - - - should have had a
21 hearing in absentia - - -

22 MR. CIRANDO: Yes, Your Honor.

23 JUDGE PIGOTT: - - - for them to establish
24 their prima facie? Is the burden on them initially?
25 Because I know that the respondent is the - - - the

1 petitioner - - - I mean, when they bring these, the
2 statute says that the inmate, for lack of a better
3 word, is the petitioner. So he's petitioning to get
4 out. And is - - - so if he doesn't appear, what then
5 happens? I mean, is it a default?

6 MR. CIRANDO: I - - - I think - - -

7 JUDGE PIGOTT: Or do you think they still
8 have a prima facie obligation?

9 MR. CIRANDO: The - - - doesn't the statute
10 say that the burden is on the Attorney General to
11 show by clear - - -

12 JUDGE PIGOTT: Clear and convincing.

13 MR. CIRANDO: - - - clear and convincing
14 evidence, and the court did find this by clear and
15 convincing evidence. So I think the court should
16 have had - - - was still required to make the det - -
17 - the - - - a correct determination based on - - - on
18 a - - - based on a hearing.

19 JUDGE PIGOTT: If Dr. Peterson's (ph.) - -
20 - I - - - I think I got the name right - - -

21 MR. CIRANDO: Yes.

22 JUDGE PIGOTT: If - - - if her - - - if her
23 report was appropriately certified, wouldn't - - -
24 wouldn't that be enough, in your view?

25 MR. CIRANDO: No, because then to excuse

1 her - - - isn't the phrase a good cause shown to - -
2 - to excuse her - - -

3 JUDGE PIGOTT: From - - - from testifying
4 first.

5 MR. CIRANDO: - - - from testifying, yes.
6 And I think they'd have to show good cause to excuse
7 her. And - - -

8 JUDGE PIGOTT: Your point being that then
9 the - - - the mental hygiene lawyer should have at
10 least had an opportunity to cross-examine her with
11 respect to the report she filed.

12 MR. CIRANDO: Yes.

13 JUDGE ABDUS-SALAAM: Counsel, what is - - -

14 JUDGE RIVERA: Counsel, can I just clarify
15 what you're arguing with respect to the waiver? Is
16 your point that a counsel can never communicate their
17 client's waiver? That the court must have either in
18 writing or an actual oral statement from - - -

19 MR. CIRANDO: The client can communicate -
20 - - obviously, can communicate waiver. But here - -
21 -

22 JUDGE RIVERA: No, no, the - - - the
23 lawyer, I think, is that what you meant?

24 MR. CIRANDO: The - - - the lawyer, I'm
25 sorry.

1 JUDGE RIVERA: He could, okay.

2 MR. CIRANDO: But here, it's the court - -
3 - "He doesn't want his review. That's his choice.
4 So I'll deem his nonappearance a waiver." Well, on
5 this record, the non - - - we submit that the
6 nonappearance is not a waiver on page 67.

7 JUDGE RIVERA: But I thought he did ask - -
8 - didn't he ask the lawyer? So he doesn't want to be
9 here - - -

10 MR. CIRANDO: He doesn't want - - -

11 JUDGE RIVERA: - - - and he doesn't want a
12 hearing?

13 MR. CIRANDO: "Doesn't want a hearing?
14 Right. Did he sign anything? Sent signing" - - - "I
15 sent him a letter confirming that". The letter was
16 never produced for the court - - - for Judge Walsh -
17 - -

18 JUDGE RIVERA: But why isn't that enough?
19 "So he didn't want to come and he doesn't want his
20 hearing" and the lawyer says "Right".

21 MR. CIRANDO: They - - -

22 JUDGE RIVERA: I mean I - - - I understand
23 you might have an argument about ineffective
24 assistance of counsel - - -

25 MR. CIRANDO: Right.

1 JUDGE RIVERA: - - - but how is this not
2 sufficient?

3 MR. CIRANDO: Because the way - - - what
4 the judge - - - the way the judge phrased it - - -
5 the judge improperly phrased it as a nonappearance is
6 equivalent of a waiver, and you can't - - - that's -
7 - - that's not the right analysis, and I see the red
8 light.

9 JUDGE RIVERA: But shouldn't counsel then
10 say, he - - - he does not want to be here, but we do
11 want to proceed with the hearing? Why - - - why is
12 counsel - - -

13 MR. CIRANDO: Well, that's - - -

14 JUDGE RIVERA: - - - unable to say that if
15 that is indeed what his client has communicated to
16 the counsel?

17 MR. CIRANDO: She could have done that, but
18 she didn't.

19 JUDGE RIVERA: She didn't.

20 CHIEF JUDGE LIPPMAN: Okay. Judge Abdus-
21 Salaam, did you have a - - -

22 JUDGE ABDUS-SALAAM: I - - - that was the
23 question I - - -

24 CHIEF JUDGE LIPPMAN: Okay.

25 Thank you, counsel.

1 MR. CIRANDO: Thank you.

2 CHIEF JUDGE LIPPMAN: You'll have your
3 rebuttal. Let's go to your adversary.

4 MS. ETLINGER: May it please the court,
5 Laura Etlinger for respondents.

6 CHIEF JUDGE LIPPMAN: Counsel, do we - - -
7 do we have to - - - or should we decide the statutory
8 issue as to whether or not you're entitled to change
9 venue?

10 MS. ETLINGER: No, the court does not need
11 to reach that issue. The simpler and the - - - the
12 simpler way of deciding the venue issue in this case
13 is that petitioner did not establish good cause for a
14 venue change.

15 CHIEF JUDGE LIPPMAN: Well, we'll - - -
16 we'll talk about that in a second. But counsel's
17 argument is that it would be helpful to the bar to
18 understand - - -

19 MS. ETLINGER: Well, first of all - - -

20 CHIEF JUDGE LIPPMAN: - - - whether you
21 could do that.

22 MS. ETLINGER: - - - we would submit that
23 the issue is not properly before the court, because
24 it was not properly before the Appellate Division.

25 JUDGE READ: That's the whole Aho argument?

1 MS. ETLINGER: Yes. The only - - - this
2 was a nonfinal order. And nonfinal orders come up
3 for review on appeal from a final order only if they
4 necessarily affect the final order. And in this
5 case, the question of whether the hearing should have
6 been held in Oneida County or should have been held
7 in Bronx County could not have affected the final
8 determination - - -

9 CHIEF JUDGE LIPPMAN: Yeah, but it's so
10 vital. Isn't it central to what happened here?

11 MS. ETLINGER: Not in this case.

12 CHIEF JUDGE LIPPMAN: That it was - - - it
13 was not granted, so the guy doesn't appear. Isn't
14 that - - - doesn't that, in effect, affect the whole
15 thing?

16 MS. ETLINGER: Well, there's an interesting
17 question, I think, in what Your Honor is saying. If
18 he had made the argument that the reason he waived
19 the hearing was because the venue was not changed,
20 but he never made that argument.

21 JUDGE PIGOTT: Yeah, but that piles on to
22 the - - - Mr. Cirando's third argument, I guess,
23 about ineffective assistance of counsel.

24 But let me ask you this. Let's assume what
25 you say is true. Then why was the hearing held in

1 Onondaga County?

2 MS. ETLINGER: The hearing was held in - -
3 - in, I believe, it was Oneida County.

4 JUDGE PIGOTT: No, it's Onondaga.

5 MS. ETLINGER: Oh, it's Onondaga.

6 JUDGE PIGOTT: Yup. Judge - - - Judge Wal
7 - - - Walsh was sitting in Onondaga County when all
8 of this conversation went on.

9 MS. ETLINGER: Well, it would have been in
10 the county where the petitioner was residing.

11 JUDGE PIGOTT: No, it was - - - it - - -
12 Judge - - -

13 MS. ETLINGER: I - - - it should have been
14 properly - - -

15 JUDGE PIGOTT: - - - Judge Walsh was
16 sitting in Onondaga County when all of these
17 conversations happened. Where is your client? He's
18 not coming? So he's waiving, right? All of that was
19 in Onondaga County. Now, the order he signed, he put
20 an Oneida County order on it, but had the hearing
21 gone on on the 26th of July, it would have been in
22 Onondaga County, and if - - - and that's absolutely
23 the wrong venue, right?

24 MS. ETLINGER: Yeah, I don't think the
25 record reflects why he was sitting at that - - - the

1 record - - -

2 JUDGE PIGOTT: That's - - - that's where he
3 is. He's - - - he's the county court judge - - -

4 MS. ETLINGER: Right.

5 JUDGE PIGOTT: - - - in Onondaga County - -
6 -

7 MS. ETLINGER: Right, but the - - -

8 JUDGE PIGOTT: - - - serving as a Supreme
9 Court Judge where he has general jurisdiction - - -

10 MS. ETLINGER: Yes.

11 JUDGE PIGOTT: - - - and could have sat in
12 Oneida. It may have been, you know, the consent of
13 the parties.

14 But the fact of the matter is, we're having
15 this huge argument or discussion about venue, and
16 here without anybody flickering an eyelash, he's
17 sitting in Onondaga County, an hour away from - - -
18 from Utica, with a lawyer from Utica representing the
19 - - - the - - - the inmate, a lawyer from Utica
20 representing the People. With the only two doctors
21 who were going to testify, your Dr. Peterson, who's
22 from, I think, New York, and the - - - and the - - -
23 and Aranda who is the doctor for the respondent here,
24 or the petitioner as it turns out, from New York. It
25 seemed to - - - and he wants to go and have it in the

1 Bronx, where, in the original proceeding, he got
2 venue in the Bronx.

3 So the whole trial as to whether or not he
4 was a dangerous person in need of - - - of
5 confinement was litigated with whoever the witnesses
6 were in the Bronx. So he's litigated in the Bronx,
7 found to be asum -- a candidate in - - - in need of
8 confinement. He - - - a year later, he's coming up
9 for review, and wouldn't logic dictate not Onondaga
10 County certainly, maybe Utica, but maybe the Bronx.

11 MS. ETLINGER: Well, the record doesn't
12 reflect why the proceedings happened in On - - -
13 Onondaga County. That's correct. There's no - - - I
14 - - - I can't answer that on this record. I don't
15 know if there were any discussions before the actual
16 date - - -

17 JUDGE PIGOTT: I just - - - I just think
18 that, you know, the State argues so vigorously that -
19 - -

20 MS. ETLINGER: No - - -

21 JUDGE PIGOTT: - - - it's got to be here,
22 because that's where all the witnesses are, and there
23 wasn't a single witness in this pla - - - in this
24 proceeding that I saw that was going to be testifying
25 from Central New York Psychiatric Center, and all the

1 witnesses were from New York. And I thought, why are
2 we fighting so hard to keep it in Oneida County when
3 in fact, we're going to have it in Onondaga?

4 MS. ETLINGER: Well, I - - - I can't answer
5 why it was in Onon - - - Onondaga.

6 JUDGE READ: Let me ask you something else
7 about the - - - about the section of the statute
8 10.08. Isn't that just a classic scrivener's error?

9 MS. ETLINGER: Well, I would like to say
10 that upon further reflection, we have - - - we
11 believe the better reading of the statute is that it
12 does not categorically exclude all venue changes for
13 hearings. And we think this upon further reflection,
14 because there could be reasons, for example, in a
15 SIST revocation hearing, why you would want to change
16 - - -

17 CHIEF JUDGE LIPPMAN: So we don't have to -
18 - - so you concede that that's - - - that's the case
19 that we don't have to deal with?

20 MS. ETLINGER: Yes, there could - - - the
21 court could find that there's not a - - - a
22 categorical exclusion, and that would actually be - -
23 -

24 CHIEF JUDGE LIPPMAN: So you would do it as
25 you - - - you suggest in your papers - - - you would

1 do it based on the fact that the - - - it was not
2 supported by sufficient - - -

3 MS. ETLINGER: There was no good - - -

4 CHIEF JUDGE LIPPMAN: - - - affidavits or
5 whatever.

6 MS. ETLINGER: Yes, there was no good cause
7 shown here. There was no showing that the - - - that
8 the unidentified witnesses, whom we don't know if
9 they were willing and available to testify, had any
10 relevant testimony to the question whether the
11 petitioner's conduct and treatment in the prior year
12 had improved to the point where he was no longer a
13 dangerous sex offender.

14 CHIEF JUDGE LIPPMAN: How about your - - -
15 your adversary's comment that, well, doing it by
16 video is authorized, so what's the problem?

17 MS. ETLINGER: Well, he has to show good
18 cause if - - - if he's going under 10.08(e), he has
19 to show good cause.

20 CHIEF JUDGE LIPPMAN: What if his cause is
21 just as simple as, well, you know, I - - - I want the
22 support of my family. The medical testimony could be
23 by video, and that's important - - -

24 MS. ETLINGER: Well - - -

25 CHIEF JUDGE LIPPMAN: - - - to me to have

1 the support system, which I gather is a good part of
2 what's - - - what's being advocated.

3 MS. ETLINGER: Well, it's not really. The
4 - - - the issue before court at an annual review
5 hearing is the condition - - - is the petitioner's
6 mental condition.

7 CHIEF JUDGE LIPPMAN: So your point is,
8 regardless of whether he needs that support, it's not
9 relevant to the purpose of this hearing.

10 MS. ETLINGER: Yes. And - - -

11 JUDGE PIGOTT: Let me offer you a
12 suggestion, though. Let's assume, as - - - as I
13 point out, both of the shrinks in this case - - -
14 pardon me - - - the psychologists are from New York
15 City. So it makes sense that maybe they - - - they
16 could testify that way. He then - - - or the next
17 person to argue this says, I have my - - - my pastor,
18 I have someone who's going to offer me a job. I want
19 to - - - I - - - I have people that are going - - -
20 that are - - - that are going to take care of me.
21 I'm - - - where I'm going to live. And I want all of
22 those people to come in and testify.

23 And as - - - as Mr. Cirando points out,
24 it's expensive to drive all the way to Oneida County.
25 It's about a hundred bucks to fly on JetBlue for an

1 hour to get down to New York from Oneida County.

2 MS. ETLINGER: The - - - the - - - the
3 witness - - - the proposed witnesses here might have
4 some relevant information to provide about why
5 certain - - - whether certain conditions of SIST were
6 appropriate. But they really don't have relevant
7 testimony to the question of his mental condition.
8 And - - -

9 JUDGE PIGOTT: No, but you're saying that.
10 And but I'm - - - what I'm saying is, you're going to
11 have your - - - you witness, Dr. Peterson, say he's
12 nuts. He's going to have his guy - - - I know it's
13 not true in this case, because he didn't talk to him
14 - - - but that - - - let's assume for a minute they
15 have their guy who's going to say he is as sane as
16 you or I.

17 Now the judge is sitting there saying, oh,
18 what am I supposed to do, and to add spice to the
19 sauce, he has all of these other witnesses from the
20 area who want to say, all right, gi - - - give him
21 SIST; we'll take care of him, and if - - -

22 MS. ETLINGER: But the - - -

23 JUDGE PIGOTT: - - - maybe that would tip
24 the balance.

25 MS. ETLINGER: But the primary witnesses,

1 we don't - - - we don't know who the State's
2 witnesses were going to be in this case, because no
3 hearing was held. The primary other witnesses would
4 be people who had treated petitioner during the past
5 year, who had observed his conduct in the secure
6 setting, and perhaps the petitioner himself, and
7 those are the primary witnesses along with the
8 experts at an annual review hearing. And all of
9 those witnesses who have relevant testimony to his
10 condition are located in the county where the
11 petitioner is confined.

12 And I just wanted to answer your question
13 from before, why it was held in Bronx County. That's
14 because there's a separate statutory provision in Men
15 - - - in the Mental Hygiene Law 10.06, which gives
16 the petitioner the right to transfer the venue - - -
17 the venue of the original hearing is where the
18 petitioner was incarcerated. He has the right to
19 transfer it, just to one place - - -

20 JUDGE PIGOTT: But isn't that interesting?

21 MS. ETLINGER: - - - where the crimes
22 occurred.

23 JUDGE PIGOTT: Right. Isn't that
24 interesting, though, that the only two places you can
25 be held in this state to my knowledge - - -

1 MS. ETLINGER: Yes.

2 JUDGE PIGOTT: - - - are both upstate.

3 MS. ETLINGER: Yes, that's correct.

4 JUDGE PIGOTT: One of them is in Utica, New
5 York, and u - - - and Oneida County, great place to
6 live. I think they've got two county court judges.
7 St. Lawrence County, I assume has got two. And
8 they're even farther away. There are a number of
9 people within the - - - within this system who, the
10 only time they've seen Oneida County, is from the - -
11 - from the four walls of - - - of the Central New
12 York Psychiatric Center or upstate at Saint Lawrence.

13 And does it trouble the - - - the State at
14 all that the only judges who are going to judge all
15 of these people are judges from Oneida County and St.
16 Lawrence County, or in the case of a supreme, you
17 know, somebody from that area?

18 MS. ETLINGER: No, it - - - it doesn't, and
19 that's where the legislature decided that they should
20 be.

21 JUDGE PIGOTT: I know that. But doesn't
22 that bother you that - - - that - - - that all of
23 these people - - - you know, our great friends in New
24 York City are taken out of the city and - - - and are
25 - - - and are put upstate and don't have the opp - -

1 - at least the opportunity to say, I want to be home.
2 I want to be close to where, you know, I committed
3 the crime, and I think, I - - - I deserve that.

4 MS. ETLINGER: Well, they can if they can
5 show good cause for the venue change. And that's the
6 standard that the legislature set in 10.08.

7 CHIEF JUDGE LIPPMAN: Okay.

8 MS. ETLINGER: Thank you.

9 CHIEF JUDGE LIPPMAN: Thanks, counsel.

10 Counselor, rebuttal?

11 MR. CIRANDO: I think St. Lawrence only has
12 one county court judge, Judge.

13 CHIEF JUDGE LIPPMAN: He stands corrected.

14 JUDGE PIGOTT: You - - - you'd know better
15 than I.

16 MR. CIRANDO: But, you know - - -

17 CHIEF JUDGE LIPPMAN: But what about that
18 policy argument that Judge Pigott is making? Is that
19 the thrust of - - - of really what you're advocating
20 here?

21 MR. CIRANDO: He sounded pretty good, yeah.

22 JUDGE PIGOTT: Well, I looked at it. I
23 mean, this one is Chemung. And I - - - you know,
24 great people in Elmira. Attica County - - - Attica
25 is in Wyoming County, and I - - - and it's always - -

1 - where they're coming out of. And most of our
2 prisons are upstate as well, I think. I - - -

3 MR. CIRANDO: It's - - - it's - - - it's
4 very difficult for a person, I think, to come so far
5 away from where they live and have no opportunity to
6 try to get back there on this type of record. And -
7 - -

8 CHIEF JUDGE LIPPMAN: But you - - - but
9 you'd agree, counsel, that as - - - as attractive as
10 that argument is, your - - - your - - - a motion has
11 to have more than that, right? You have to have some
12 basis other than I want to go home. Good cause being
13 - - -

14 MR. CIRANDO: Good cause.

15 CHIEF JUDGE LIPPMAN: - - - it has to have
16 a little more specificity, wouldn't you say?

17 MR. CIRANDO: But, when - - - when you look
18 at this - - - this individual, I mean, he committed a
19 violent crime back when he was, what, seventeen,
20 eighteen years old? He's been in jail now twenty-
21 one, twenty years, and they're saying, gees, he's got
22 el - - - antisocial behavior. You know, part - - -
23 part of that could be from the fact that maybe he's
24 been in jail for such a long period of time, and - -
25 - and - - -

1 JUDGE PIGOTT: Well, he's a pretty busy boy
2 when he was in jail, too.

3 MR. CIRANDO: Well - - -

4 JUDGE RIVERA: But counsel, that goes - - -
5 that goes to the merits of whether or not he's a - -
6 - he fits within the definition that he should
7 continue to be - - -

8 MR. CIRANDO: And I think that - - -

9 JUDGE RIVERA: - - - co - - - confined, and
10 that - - - again, I ask you, isn't that based on the
11 medical and clinical evaluations and evidence, not on
12 whether or not his family and he would like him to be
13 - - -

14 MR. CIRANDO: Well, I think - - -

15 JUDGE RIVERA: - - - closer to home?

16 MR. CIRANDO: I - - - I think when you look
17 at this record and this report, and when the judge
18 says it's clear and convincing evidence, and you've
19 got, you know, a provisional sexual diagnosis
20 together with antisocial behavior, I don't think
21 that's enough to get - - -

22 JUDGE RIVERA: Well, your only remedy here
23 a the - - -

24 MR. CIRANDO: - - - to get the over the
25 hurdle.

1 JUDGE RIVERA: - - - is a hearing, yeah?
2 What's your remedy? If we agree with you, what's the
3 remedy?

4 MR. CIRANDO: It'd be a hearing in the
5 Bronx.

6 JUDGE RIVERA: A hearing in the Bronx. And
7 if we decide the - - - the venue issue either
8 statutorily doesn't work in your favor or, as your
9 opponent says, on - - - on the actual merits of the
10 papers presented you didn't satisfy the standard, if
11 we agreed with that - - -

12 MR. CIRANDO: Then I think that - - -

13 JUDGE RIVERA: - - - are you only left with
14 a hearing?

15 MR. CIRANDO: I think if you - - -

16 JUDGE RIVERA: I mean, maybe you have
17 another shot at making out the good cause at the - -
18 - at the next hearing.

19 MR. CIRANDO: Well, I - - - you have - - -
20 but - - - but also I think - - - I think you'd have -
21 - - we would ask that you answer the - - - the issue
22 concerning is - - - is - - - is there clear and
23 convincing evidence just based on that report. And
24 the - - - the final thing, unfortunately, would be,
25 is - - - is counsel - - - was counsel ineffective in

1 regard to the waiver, the venue, and failing to - - -
2 to hold - - - have the State hold - - - hold the
3 State's feet to the fire in - - - in the hearing
4 itself.

5 CHIEF JUDGE LIPPMAN: Okay, counsel, thank
6 you.

7 MR. CIRANDO: Thank you.

8 CHIEF JUDGE LIPPMAN: Thank you both.
9 Appreciate it.

10 MR. CIRANDO: And I'll get that - - -

11 JUDGE READ: Citation?

12 MR. CIRANDO: I'll find that.

13 CHIEF JUDGE LIPPMAN: Yes, oh, thank you,
14 counsel, we appreciate it.

15 MR. CIRANDO: I better find it.

16 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Tyrone D. v. State of New York, No. 13 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: January 20, 2015