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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 14

MICHAEL PALMER,

Appellant.

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PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 15

CORNELL LONG,

Appellant.

20 Eagle Street  
Albany, New York 12207  
January 07, 2013

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.

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1 CHIEF JUDGE LIPPMAN: 14 and 15, People v.  
2 Palmer and People v. Long.

3 CHIEF JUDGE LIPPMAN: Counselor, would you like  
4 any rebuttal time?

5 MS. PERVUKHIN: Yes, I'd like to reserve one  
6 minute, please.

7 CHIEF JUDGE LIPPMAN: One minute, sure. Go  
8 ahead.

9 MS. PERVUKHIN: Good afternoon. May it please  
10 the Court. My name is Anna Pervukhin. I represent Mr.  
11 Palmer.

12 The issue in this case is whether a single  
13 instance of social drinking constitutes clear and  
14 convincing evidence - - -

15 CHIEF JUDGE LIPPMAN: Is it clear that Palmer  
16 was a social drinker?

17 MS. PERVUKHIN: Well, yes, the People rely  
18 entirely on his bare statement that he had been drinking  
19 at an afterwork party on the date he committed the first  
20 sexual offense.

21 CHIEF JUDGE LIPPMAN: That's the only evidence  
22 that he was drinking?

23 MS. PERVUKHIN: It's the only evidence.

24 JUDGE SMITH: Is it fair to infer that the  
25 drinking had something to do with the offense?

1 MS. PERVUKHIN: Well, that's speculation, and  
2 it's not proof.

3 JUDGE SMITH: You wouldn't even - - - assume - -  
4 - okay, you say no, but assume - - - assume we disagree.  
5 If it did have something to do with the offense, does that  
6 make the finding appropriate?

7 MS. PERVUKHIN: Even if it had something to do  
8 with the offense, that's not proof, by clear and  
9 convincing evidence, that Mr. Palmer had a history of  
10 abusing drugs and alcohol. It's just not sufficient.

11 JUDGE GRAFFEO: Well, the guidelines aren't  
12 limited to a history of drug or alcohol, correct? Risk  
13 factor 11 is a history of drug or alcohol abuse or was  
14 abusing drugs and/or alcohol at the time of the offense.  
15 It's two separate categories.

16 MS. PERVUKHIN: Well, that's correct, but either  
17 way - - -

18 JUDGE SMITH: That's what the commentary says.

19 MS. PERVUKHIN: Correct, but either way, social  
20 drinking is specifically exempted. And it's hard to  
21 imagine a more quintessential example of social drinking  
22 than having a drink at an afterwork party.

23 JUDGE PIGOTT: Well, it sounds like he was - - -  
24 at the time that he said it - - - it was in his PSI - - -  
25 it was in mitigation of his crime. He was - - - I mean,

1 it didn't sound like he was under any analysis. He was  
2 saying, you know, I was drunk; that's why this happened.

3 MS. PERVUKHIN: Well, but that's not what he  
4 said. That's a speculative inference. The People have to  
5 prove the facts supporting a determination by clear and  
6 convincing evidence. And - - -

7 JUDGE GRAFFEO: So what's clear and convincing  
8 evidence?

9 MS. PERVUKHIN: Well, you have to - - -

10 JUDGE GRAFFEO: What's abuse - - - what's abuse  
11 of alcohol and what's social drinking?

12 MS. PERVUKHIN: Well - - -

13 JUDGE GRAFFEO: How do you want us to define the  
14 difference?

15 MS. PERVUKHIN: Well, if you look at the source  
16 statute in the guidelines, they do that work for you.  
17 They tell you; they use the word "abuse" six times in a  
18 row in the guidelines, and the guidelines are implementing  
19 the statute, which says that they're concerned about  
20 offenders whose conduct is, quote, unquote, "characterized  
21 by repetitive and compulsive behavior". And then if you  
22 look at the DSM IV definition of abuse, which is a  
23 universally recognized manual, it says that it's a  
24 nonadaptive pattern that's manifested by recurrent use and  
25 recurrent alcohol-related problems.

1 CHIEF JUDGE LIPPMAN: But if there's no - - -

2 MS. PERVUKHIN: Abuse requires repetition.

3 CHIEF JUDGE LIPPMAN: If there's no pattern and  
4 - - - but the drink does fuel the offense, that would be  
5 enough?

6 MS. PERVUKHIN: Well - - -

7 CHIEF JUDGE LIPPMAN: Even if there's no pattern  
8 because it's - - -

9 MS. PERVUKHIN: Well, if there was proof - - -

10 CHIEF JUDGE LIPPMAN: - - - immediate and - - -

11 MS. PERVUKHIN: If there was proof that the  
12 drink fueled the offense, if there was that connection, if  
13 the - - -

14 CHIEF JUDGE LIPPMAN: That's what I'm saying - -  
15 -

16 MS. PERVUKHIN: - - - victim said - - - Your  
17 Honor, if the victim said every time this happened this  
18 was something that the person habitually used. Here we  
19 just have - - -

20 JUDGE SMITH: Well, maybe - - -

21 MS. PERVUKHIN: - - - this bare statement - - -

22 JUDGE SMITH: You do say it has to be habitual.  
23 Let's suppose that this was - - - which maybe he was  
24 saying it was - - - it was a once in a lifetime thing, he  
25 got drunk and did something he would never do otherwise,

1 does he get assessed - - - and the drinking caused him to  
2 do it, does he get assessed the points or not?

3 MS. PERVUKHIN: Well, the thing is, if he said  
4 that, he did - - -

5 JUDGE SMITH: Well, put aside what he said.  
6 Let's suppose the court finds -- let's suppose the court  
7 finds that the guy - - - a hypothetical case, the man  
8 never had a drink in his life, very unwisely did a little  
9 drinking one afternoon, and as a result, went wild and  
10 committed a sex crime. On those facts, does he get  
11 assessed the points for drug and alcohol abuse?

12 MS. PERVUKHIN: Well, as a result - - - I mean,  
13 the other thing that I wanted to - - -

14 JUDGE SMITH: Can you try yes or no to that one?  
15 Does he get the points for drug and alcohol abuse in my  
16 hypothetical case?

17 MS. PERVUKHIN: Well, how would People prove  
18 that the abuse resulted - - -

19 JUDGE SMITH: So you're not going to say yes or  
20 no to that?

21 MS. PERVUKHIN: Well, Your Honor, I mean, even  
22 if it were true - - - and let's concede, for the sake of  
23 argument, that you could have a case where somebody - - -

24 JUDGE SMITH: No, that's what - - - I'm assuming  
25 - - - it's a hypothetical.

1 MS. PERVUKHIN: Okay.

2 JUDGE SMITH: I'm assuming it for the sake of  
3 argument.

4 MS. PERVUKHIN: Yes.

5 JUDGE SMITH: How does the case come out?

6 MS. PERVUKHIN: Well, it would depend, also, on  
7 whether or not the crime was a continuing offense. If you  
8 had someone who said, well, I got drunk and this caused me  
9 to do something I would never do - - -

10 JUDGE SMITH: I'm assuming it's not a con - - -  
11 I understand this one was; I'm assuming it's not a - - - I  
12 don't understand why you're resisting addressing it. A  
13 sex crime preceded by drinking, no prior history of  
14 drinking, the drinking caused the sex crime; is that  
15 enough for assessing the points?

16 MS. PERVUKHIN: Well, if the People could prove  
17 that it caused the sex crime. My personal feeling is that  
18 no, I think that the SORA - - - the people who wrote the  
19 statute and the guidelines made that decision already.  
20 They said that even though that may be a sensible policy  
21 position that Your Honor is suggesting, that may be  
22 sensible, but the people who wrote the statute and the  
23 people who drafted the guidelines, that implemented the  
24 statute, thought this through, and that what they - - -  
25 what they concluded was that they were concerned about



1 people who abused alcohol.

2 JUDGE GRAFFEO: So in a case like this where  
3 there's sexual activity with a child, you're saying the  
4 child has to somehow indicate that every time - - -

5 MS. PERVUKHIN: Well, Your Honor, if Mr. Palmer  
6 - - -

7 JUDGE GRAFFEO: - - - they were subjected to - -  
8 -

9 MS. PERVUKHIN: If Mr. - - -

10 JUDGE GRAFFEO: - - - sexual activity that - - -

11 MS. PERVUKHIN: Not at all. Not at all.

12 JUDGE GRAFFEO: - - - their father, uncle,  
13 mother's boyfriend, whoever - - -

14 MS. PERVUKHIN: Although, certainly if the - - -

15 JUDGE GRAFFEO: - - - was intoxicated?

16 MS. PERVUKHIN: - - - child mentioned that, that  
17 would be helpful. But if Mr. Palmer had come - - -

18 JUDGE GRAFFEO: Would all - - -

19 MS. PERVUKHIN: - - - and said - - -

20 JUDGE GRAFFEO: Would all children know whether  
21 or not the person is - - -

22 MS. PERVUKHIN: But - - -

23 JUDGE GRAFFEO: - - - intoxicated?

24 MS. PERVUKHIN: No. If Mr. Palmer had said, you  
25 know what, I have a drinking problem. But here, if you

1 look at the probation report, Mr. Palmer indicated that he  
2 was a teetotaler who did not normally drink. The people  
3 who evaluated him, before he was incarcerated, did not  
4 recommend him for any kind of treatment. They found that  
5 he didn't have a drug or alcohol problem. There was no  
6 evidence whatsoever, not even speculative, hand weigh the  
7 evidence that he had any - - - that he drank anything  
8 prior to any of the other incidents. We don't know what  
9 he was drinking. We don't know how much he drank and how  
10 much time elapsed between the party and the first of a  
11 series of encounters. It's just this purely - - - it's a  
12 speculative whiff - - -

13 CHIEF JUDGE LIPPMAN: Okay, counselor, you'll  
14 have your rebuttal. Thanks.

15 Let's - - - okay, go ahead. Do you want to do  
16 this - - - yeah, go ahead.

17 MR. KOELSCH: May it please the Court, Adam  
18 Koelsch on behalf of the respondent in the Palmer case,  
19 Your Honor.

20 I think I can go to Judge Smith's hypothetical  
21 right off the bat, because that's this case, and that's  
22 what the distinction drawn - - -

23 CHIEF JUDGE LIPPMAN: How do we know that it  
24 fueled the - - - the attack?

25 MR. KOELSCH: Well, here the defendant has said

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CHIEF JUDGE LIPPMAN: Where's the proof that that - - - assume that - - - which she doesn't, but assume she acknowledged that just the drinking, if it fueled the attack, that's enough; where is it in this case that shows that that's what happened?

MR. KOELSCH: We actually have quite a bit of evidence here.

CHIEF JUDGE LIPPMAN: What is it?

MR. KOELSCH: First of all, the defendant's attorney said that he had drinks; that's plural.

JUDGE PIGOTT: Where are you now? You're at the plea?

MR. KOELSCH: That's - - - if you look on page A20 of the - - -

JUDGE PIGOTT: Are you at the plea?

MR. KOELSCH: This is during the SORA hearing.

JUDGE PIGOTT: During the SORA hearing.

MR. KOELSCH: During the SORA hearing. It says "drinks", plural.

JUDGE PIGOTT: But at the PSI, though, it said: "Present offense, defendant not influenced by substance at the time of offense. Defendant's statement that he had been drinking alcohol at an afterwork party on the date he committed the above" - - - the first occasion, and I guess

1           there were many, but only - - -

2                   MR. KOELSCH: That's correct.

3                   JUDGE PIGOTT: - - - only - - -

4                   MR. KOELSCH: This was a course of conduct over  
5 a couple of years.

6                   JUDGE PIGOTT: This was only with respect to the  
7 first one. It says he denies use of a controlled  
8 substance and/or alcohol, and sex offender counseling was  
9 recommended. And in the guidelines it says: "The  
10 category will focus on the offender's history of abuse and  
11 the circumstances at the time of the event; it is not  
12 meant to include occasional social drinking."

13                   MR. KOELSCH: Correct.

14                   JUDGE PIGOTT: So - - -

15                   MR. KOELSCH: Correct.

16                   JUDGE PIGOTT: - - - this guy says at one time -  
17 - - the first time he did this, he was drinking socially.  
18 And there's no other evidence of alcohol abuse related to  
19 this particular - - -

20                   MR. KOELSCH: Well, again, if we're assuming the  
21 truth of Judge Smith's hypothetical, which we are - - -

22                   JUDGE PIGOTT: No, I ignored it.

23                   JUDGE SMITH: Well, I'm ready to assume it - - -

24                   MR. KOELSCH: Right.

25                   JUDGE SMITH: - - - but the Chief Judge wants

1           you to demonstrate it.

2                   MR. KOELSCH: Right. If you're talking about  
3 what does occasional social drinking mean and what does  
4 that prohibition mean, well, use of alcohol at the time of  
5 the offense doesn't fall under that prohibition.

6                   JUDGE READ: Well, you - - -

7                   MR. KOELSCH: That was meant to prohibit the  
8 assessment of points for somebody who drinks occasionally  
9 and has - - -

10                  CHIEF JUDGE LIPPMAN: But did he - - -

11                  MR. KOELSCH: - - - drank occasionally in the  
12 past.

13                  CHIEF JUDGE LIPPMAN: But go back to the point  
14 of did he prove - - - did they prove it?

15                  MR. KOELSCH: Yes, I think they did here,  
16 because again - - -

17                  CHIEF JUDGE LIPPMAN: What - - -

18                  MR. KOELSCH: - - - there's proof that he - - -  
19 his defense attorney said he had "drinks", plural, at the  
20 time - - - I'm sorry, on the night that he committed the  
21 offense. So at nighttime - - - so we have - - - we have  
22 some proof about quantity; it's more than one. And it  
23 didn't happen earlier in the day; it happened on the night  
24 that he committed his offense. And significantly, he  
25 tries to use his drinking as an excuse to mitigate his

1 responsibility for the crime.

2 JUDGE SMITH: Isn't the sequence of events  
3 something, and it's so - - - that is, someone has several  
4 drinks, and immediate - - - which we know is a  
5 disinhibitor - - - and immediately after does one of the  
6 most ghastly, uninhibited things you can think of; it  
7 doesn't sound like it's a coincidence.

8 MR. KOELSCH: Correct, and even - - -

9 JUDGE SMITH: Okay. But why - - - but I'm  
10 really more interested in the - - - the point, why is that  
11 abuse of alcohol? It's abuse of the child, but that's - -  
12 -

13 MR. KOELSCH: Well, it - - -

14 JUDGE SMITH: The guidelines don't say "use";  
15 they say "abuse".

16 MR. KOELSCH: Right, and we're not contending  
17 that mere use is enough. Any use isn't going to be - - -

18 JUDGE SMITH: But you say - - -

19 MR. KOELSCH: Correct.

20 JUDGE SMITH: - - - you say any use that has a  
21 causative role in the crime is enough?

22 MR. KOELSCH: Correct, so it's some kind of  
23 disinhibiting - - -

24 JUDGE SMITH: Then why does the commentary not  
25 say that? The commentary says if he was abusing alcohol

1 at the time of the crime.

2 MR. KOELSCH: Right. Well, that - - -

3 JUDGE SMITH: Why doesn't it just say if he was  
4 using alcohol at the time of the crime?

5 MR. KOELSCH: Well, again, because "use" would  
6 be overinclusive. If somebody has one beer and there's  
7 absolutely no other evidence of disinhibition - - -

8 JUDGE PIGOTT: Well, they don't say - - -

9 MR. KOELSCH: - - - then that likely wouldn't be  
10 enough.

11 JUDGE PIGOTT: Well, they don't say that. They  
12 don't say - - - I mean, they say it's occasional social  
13 drinking. And my experience is that very few people have  
14 one. So if you're at a party or something - - - you're  
15 drawing a distinction that if you have one and then go do  
16 this, then you've saved yourself fifteen points; if you  
17 have two, then you're into the fifteen-point range.

18 MR. KOELSCH: Well, that's not necessarily true.  
19 Again, it depends on the disinhibiting effect.

20 JUDGE PIGOTT: Well - - -

21 JUDGE READ: Well, aren't you - - -

22 JUDGE PIGOTT: And that's your opponent's  
23 argument that you didn't prove that.

24 MR. KOELSCH: Well, again, I would say that we  
25 did, not only because we do have some evidence about the

1 amount of alcohol and how close to the time of the events  
2 - - -

3 CHIEF JUDGE LIPPMAN: Counselor, why do the  
4 guidelines say over and over again about abuse - - - that  
5 it's abuse?

6 MR. KOELSCH: Well, again - - -

7 CHIEF JUDGE LIPPMAN: They seem to be making a  
8 very strong point as to a dividing line here.

9 MR. KOELSCH: Well, again, because it's not  
10 talking in terms just of mere use. Mere use isn't going  
11 to necessarily be enough. There has to be evidence of the  
12 disinhibiting effect. There has to be a correlation.

13 JUDGE READ: Well, what's the evidence of the  
14 disinhibiting effect, other than the fact the crime was  
15 committed?

16 MR. KOELSCH: Well, again, here the defendant  
17 also blamed - - - he used his drinking as an excuse to  
18 mitigate his responsibility for the crime.

19 JUDGE PIGOTT: First one.

20 MR. KOELSCH: Correct, but that's even greater  
21 evidence, because here the time when your inhibitions  
22 against committing a course of deviant sexual conduct are  
23 going to be strongest, when this isn't an ordinary thing  
24 for you, during your first offense. That's going to be  
25 the time when alcohol is most necessary - - -



1 JUDGE PIGOTT: You're making a good argument on  
2 that, but I mean, there were no - - - as you point out,  
3 multiple times this happened. Alcohol, as near as we can  
4 tell on this record, was not a factor in any of the  
5 others.

6 MR. KOELSCH: Oh, it doesn't have to be.

7 JUDGE PIGOTT: Well, that's - - - I understand  
8 that's the argument - - -

9 MR. KOELSCH: Right.

10 JUDGE PIGOTT: - - - you're making, but at what  
11 point - - - well, never mind, I guess I've made my point.

12 MR. KOELSCH: Well, if it's - - -

13 JUDGE SMITH: Why does the statute say  
14 "compulsive and repetitive behavior"?

15 MR. KOELSCH: Well, clearly, that's one of the  
16 types of behavior that it wanted to take into account but  
17 it's not always - - -

18 JUDGE SMITH: I mean, let me suggest to you,  
19 suppose this is what he says it is, although usually  
20 they're not telling the truth when they say it, but we  
21 don't have any other evidence. This is a guy who led a  
22 blameless life, never had a drink, foolishly took a few  
23 drinks and did something horrible. Let's - - - for  
24 hypothetical purposes, let's forget about all the other  
25 horrible things he did, but on those facts, why isn't that

1           guy a lesser danger to reoffend than most others, because  
2           now he knows he'll be sober again?

3                   MR. KOELSCH: Well, it's not only - - - there  
4           are actually two intents behind the guidelines, according  
5           to the SORA statute. There's the risk of reoffense, and  
6           there's the threat posed to public safety. Now, alcohol  
7           use is common and socially sanctioned, so the risk of  
8           reoffense is highly probable. He might go out there and  
9           take a drink again.

10                   JUDGE SMITH: Well, almost - - -

11                   MR. KOELSCH: But there's - - -

12                   JUDGE SMITH: - - - almost any sex offender you  
13           would worry about, but the fact - - - but if you could  
14           attribute his offense to a once-in-a-lifetime event, you  
15           might worry a little less; wouldn't you?

16                   MR. KOELSCH: That's -- but it's assessing a  
17           risk. It's assessing a risk.

18                   JUDGE READ: Would this be a different case if  
19           he hadn't made, let's say, the confession of attributing  
20           the offense - - - the first offense to his inebriation?  
21           Let's say that were out of the case, would that make it  
22           different? Would there still be clear and convincing  
23           evidence?

24                   MR. KOELSCH: Well, it depends on - - - which  
25           evidence are you particularly trying - - -

1 JUDGE READ: I'm excluding the fact, because  
2 you've said a couple of times that he attributed his  
3 behavior to the alcohol - - -

4 MR. KOELSCH: Correct.

5 JUDGE READ: - - - which I gather you're saying  
6 is in the way of an admission on his part, that his  
7 disinhibition, and this was caused by the al - - - what if  
8 that were out of the case - - - would there still be clear  
9 and convincing evidence?

10 MR. KOELSCH: Well, it's certainly a more  
11 difficult case, but again, there is other - - -

12 JUDGE READ: Well, would it be - - -

13 MR. KOELSCH: - - - evidence.

14 JUDGE READ: Well, there still would be enough,  
15 in your view?

16 MR. KOELSCH: I think there still would be  
17 enough.

18 JUDGE READ: And that would be because of the  
19 attorney's representation as to quantity and because of  
20 the proximity in time?

21 MR. KOELSCH: Well, the attorney's  
22 representation, but that's also consistent with the fact  
23 that he stated to probation that he was drinking at an  
24 afterwork party. I think the fair inference is that he  
25 didn't just have a sip of alcohol; he likely had more than

1           one drink. But it's also that this particular offense was  
2           that he was drinking before he committed his first  
3           offense, in particular. And it should be noted that  
4           nothing that he said at the SORA hearing was actually  
5           inconsistent with the idea that he was disinhibited at the  
6           time that he committed his offense. All he said was that  
7           he wasn't intoxicated. And you don't need to be  
8           intoxicated in order to be disinhibited.

9                        CHIEF JUDGE LIPPMAN: Okay, couns - - -

10                       JUDGE GRAFFEO: I have just one - - -

11                       CHIEF JUDGE LIPPMAN: Oh, I'm sorry, Judge  
12           Graffeo.

13                       JUDGE GRAFFEO: - - - procedural question for  
14           you.

15                       MR. KOELSCH: Sure.

16                       JUDGE GRAFFEO: If we disagree with you and find  
17           that this defendant doesn't get these fifteen points - - -

18                       MR. KOELSCH: Yes.

19                       JUDGE GRAFFEO: - - - I take it this then  
20           becomes a level one?

21                       MR. KOELSCH: Yes, he will be - - -

22                       JUDGE GRAFFEO: Because you didn't appeal from the  
23           lack of an upward deviation by the judge.

24                       MR. KOELSCH: Correct, this would be - - - he  
25           would be assessed sixty-five points.

1 JUDGE SMITH: Don't you have - - - I mean, you  
2 didn't need an upward deviation because you've got a two.  
3 Don't you have the right to go back and ask him to depart  
4 upward?

5 MR. KOELSCH: To ask the - - -

6 JUDGE SMITH: If the judge gave him - - - the  
7 judge gave him two, right?

8 MR. KOELSCH: Correct.

9 JUDGE SMITH: And the Appellate Division said  
10 it's a one. Shouldn't you be entitled to go back and say,  
11 okay, he's a one but depart upward - - - he's a one on the  
12 points but depart upward?

13 MR. KOELSCH: I - - -

14 JUDGE GRAFFEO: Did you appeal that way?

15 MR. KOELSCH: Well, no, I don't think that on  
16 the basis of these facts, that because of this, I don't  
17 think based on his alcohol - - - based on his use of  
18 alcohol we could ask for an upward departure because - - -

19 JUDGE SMITH: You're not - - - whether you're  
20 entitled to it or not, you're not asking for it?

21 MR. KOELSCH: Well, we wouldn't be asking for it  
22 because it's taken into account by the guidelines. So - -  
23 -

24 CHIEF JUDGE LIPPMAN: Okay, counselor. Thanks,  
25 counselor.

1 MR. KOELSCH: Thank you.

2 CHIEF JUDGE LIPPMAN: Counselor, your rebuttal?  
3 One minute.

4 MS. PERVUKHIN: Yes, just briefly. I think that  
5 when my adversary stated that even without this inference  
6 that this was somehow mitigating, just the fact that Mr.  
7 Palmer was drinking at an afterwork party, in and of  
8 itself, is supposedly sufficient to establish this  
9 guideline. I think it really lays bare the People's  
10 position that they're trying to read the clear and  
11 convincing evidentiary standard out of the statute; that's  
12 Section 168-n(3). The legislature determined that these  
13 facts should be proven by clear and convincing evidence.  
14 It should be highly probable that this person was either  
15 abusing drugs or alcohol at the time of the offense, or it  
16 should be highly probable that he drank such a vast amount  
17 of alcohol that it caused this - - -

18 JUDGE SMITH: If you - - -

19 MS. PERVUKHIN: - - - this thing to happen.

20 JUDGE SMITH: I mean, if you knew that someone  
21 had had a - - - not a vast but a significant amount of  
22 alcohol, and that that same evening he had raped his  
23 daughter, you wouldn't think it was pretty clear and  
24 convincing that the two were connected?

25 MS. PERVUKHIN: If it was a vast amount of

1 alcohol - - -

2 JUDGE SMITH: No, not vast, but some amount, had  
3 indulged at a cocktail party and that evening raped his  
4 daughter. It just seems so unlikely to be a coincidence.

5 MS. PERVUKHIN: Your Honor, the real point here  
6 is advancing the goal of the legislature which has come up  
7 with an accurate determination of the risk that a sex  
8 offender poses to the public. The real question here is  
9 does the fact that Mr. Palmer had a couple of drinks at an  
10 afterwork event on the same date really raise his risk of  
11 reoffense to the point where instead of being the low-risk  
12 offender that we feel he really is, he should be on the  
13 Internet for life because he had that beer at an afterwork  
14 event and he - - -

15 JUDGE PIGOTT: Well, five out of the six - - -

16 MS. PERVUKHIN: - - - happened to mention it at  
17 probation?

18 JUDGE PIGOTT: - - - times he did it, he did it  
19 he was stone sober, apparently. I mean, it seems to me  
20 there's more danger the other way than this way.

21 MS. PERVUKHIN: And that's an argument that I  
22 made in my papers, which is that you would think that if  
23 the court adopts this rule then someone - - - if you had a  
24 teenager having a consensual relationship that qualified  
25 as statutory rape and they had a couple of beers before

1 having consensual sex, they would supposedly be a higher  
2 risk level for reoffense than - - -

3 CHIEF JUDGE LIPPMAN: Okay, counselor.

4 MS. PERVUKHIN: - - - a stone sober - - -

5 CHIEF JUDGE LIPPMAN: Okay, counselor. Thanks,  
6 counselor.

7 MS. PERVUKHIN: Okay.

8 CHIEF JUDGE LIPPMAN: Okay.

9 MS. PERVUKHIN: Thank you.

10 CHIEF JUDGE LIPPMAN: Counselor? Long?

11 MR. GUGINO: Vincent Gugino for Cornell Long.

12 CHIEF JUDGE LIPPMAN: Do you want any rebuttal?

13 MR. GUGINO: I'd like one - - -

14 CHIEF JUDGE LIPPMAN: What do you want?

15 MR. GUGINO: One minute.

16 CHIEF JUDGE LIPPMAN: One minute, sure. Go  
17 ahead.

18 MR. GUGINO: Thank you. I think the - - -

19 CHIEF JUDGE LIPPMAN: How does your case square  
20 with the first case; is it different?

21 MR. GUGINO: It's not a social drinking  
22 situation; it's a domestic conflict situation. The  
23 defendant had lived with the complainant for five years.  
24 He started living with her when he was sixteen years old  
25 and she was twenty-one. It's even conceivable that she



1 was the initial sexual offender here, if he was - - -

2 CHIEF JUDGE LIPPMAN: But he was clearly  
3 drinking that night, right, your - - -

4 MR. GUGINO: He had some - - -

5 JUDGE GRAFFEO: Your record reflects a longer  
6 period of imbibing in alcohol.

7 MR. GUGINO: I would say this, Your Honor, we  
8 know when he started; we don't know when he stopped. What  
9 it does say is - - - and I'm reading from the pre-sentence  
10 report: "Mr. Long said he started drinking beer at 11  
11 p.m. and was getting depressed while thinking about his  
12 brother who had died a couple of years ago." He describes  
13 on the record, in pages 39 to 40, a fairly lengthy period  
14 of time in which they are arguing, in which there is some  
15 consensual sex, and there is - - - and then there is  
16 nonconsensual sex. We don't know how - - - we don't know  
17 the amount he was drinking of beer. We don't know what  
18 the effect was, and to us the rest is speculation and  
19 conjecture. They're - - - this is a - - - this is a  
20 situation where we would hope the court would resist the  
21 District Attorney's attempt to say alcohol consumption is  
22 equal to alcohol abuse. I mean, that - - - that also  
23 touches on the case we just heard. I think one of the - -  
24 -

25 JUDGE GRAFFEO: So there's no such thing as

1 abusing alcohol for one instance?

2 MR. GUGINO: If it - - - if the amount - - -

3 JUDGE GRAFFEO: Extreme - - -

4 MR. GUGINO: If the amount - - -

5 JUDGE GRAFFEO: Extreme intoxication, then - - -

6 MR. GUGINO: I would say it - - -

7 JUDGE GRAFFEO: - - - doesn't qualify under the  
8 guidelines?

9 MR. GUGINO: I think it is possible. If the  
10 amounts - - -

11 JUDGE SMITH: If he had twenty beers, say?

12 MR. GUGINO: - - - if the amounts are  
13 significant and it is connected to the crime.

14 JUDGE SMITH: Well, suppose he said he had three  
15 beer, and he admitted that it had some connection with the  
16 crime; does he get the points?

17 MR. GUGINO: He might be able to then, yes. I  
18 think that - - - I think - - -

19 JUDGE SMITH: Well, why - - -

20 MR. GUGINO: Because the question - - -

21 JUDGE SMITH: Why is three beer - - -

22 MR. GUGINO: - - - here is - - -

23 JUDGE SMITH: Why is three beers an abuse of  
24 alcohol?

25 MR. GUGINO: Well - - -

1 JUDGE SMITH: I mean, I - - -

2 MR. GUGINO: Okay. Let me back up and say over  
3 a two-hour period it might not be. He's five foot-eleven  
4 and 189 pounds.

5 JUDGE SMITH: Yeah, but if he had thirty, you  
6 would admit it was abuse?

7 MR. GUGINO: Well, yeah, that's an extreme  
8 example. I would say, boy, if he had thirty, he would  
9 have probably have passed out, so he couldn't have been  
10 capable of committing the offense.

11 The problem here is we have no - - - the time  
12 frame is open, there's a difference between the case  
13 summary and the pre-sentence report in terms of their  
14 description of the offense. The case summary is  
15 symptomatic. It says they're assessing the points - - -  
16 and this is toward the bottom of the case summary; it's on  
17 page 8 of the record - - - it says they're assessing for  
18 alcohol abuse, for drinking prior to the offense. So for  
19 this analyst, the fact that he was drinking at all is not  
20 - - - is equal to alcohol abuse. And our position is  
21 there's not enough on the record for us to know what the  
22 effect of this, especially since - - -

23 JUDGE GRAFFEO: And I guess my question is,  
24 because we have to deal with more than the two cases - - -

25 MR. GUGINO: Sure.

1 JUDGE GRAFFEO: - - - that are being argued  
2 here. How do we describe for the trial courts when to  
3 assess the fifteen points in an instance where we don't  
4 have a course - - - you know, a history of alcohol  
5 treatment, that type of thing - - -

6 MR. GUGINO: You - - - when - - -

7 JUDGE GRAFFEO: - - - that obviously shows that  
8 there's an alcohol problem over a period of time where we  
9 just have - - -

10 MR. GUGINO: A one-off - - -

11 JUDGE GRAFFEO: - - - a consumption of alcohol  
12 and an offense.

13 MR. GUGINO: Where you have a one-off, I think  
14 it's - - - I think the problem - - - I think it's harder  
15 for the People to show clear and convincing evidence or  
16 the high probability standard. Then they're going to - -  
17 - maybe the people should have put on the complainant and  
18 she should have described what the effect of alcohol or  
19 what the amount of drinking was. I don't think there's  
20 enough proof based on these mere assertions here,  
21 especially since we don't know the amount or the effect  
22 over the period of time at all. I don't think there's  
23 clear and convincing evidence in the least here. The rest  
24 is speculation, really. If they want to put on more  
25 proof, they could have asked for an adjournment.

1 JUDGE SMITH: Is it really speculation to infer  
2 that alcohol and sex - - - that alcohol and sex on the  
3 same evening have some connection? Isn't that sort of  
4 common human experience?

5 MR. GUGINO: Depending on the amounts, depending  
6 on whether it was alcohol abuse. I don't think - - -  
7 again, I think the record is too impressionistic of - - -  
8 for this young man to have to register for the rest of his  
9 life as a sex - - - as a - - -

10 JUDGE SMITH: I was going to say, you're also  
11 arguing that even if there's a causal connection, if it's  
12 not abuse he shouldn't - - - he shouldn't have the points?

13 MR. GUGINO: Well, yes, that also. But I don't  
14 think there is a - - - I don't think there is a causal  
15 connection here because he says some al - - - some beer,  
16 and the prob - - - he's also asked during the probation -  
17 - -

18 JUDGE SMITH: He said he was drinking beer and  
19 getting depressed. When somebody says that you sort of  
20 think there's a connection, at least between the beer and  
21 the depression, right?

22 MR. GUGINO: Well, no, what - - - if you look at  
23 the case summary that's - - - those are the words used.  
24 The case summary is not that reliable on this question, is  
25 our position, Your Honor. He says in the pre-sentence

1 report he was drinking beer at 11 p.m. - - - "he started  
2 drinking beer at 11 p.m. and was getting depressed while  
3 thinking about his brother who had died a couple years  
4 ago". The case summary has - - -

5 JUDGE GRAFFEO: It als - - -

6 MR. GUGINO: - - - no other basis for - - -

7 JUDGE GRAFFEO: Well, it also says that he  
8 claimed that the victim put him down, so he hit her in the  
9 head and slapped her. That kind of sounds like that would  
10 be connected to the alcohol.

11 MR. GUGINO: It could have been - - -

12 JUDGE GRAFFEO: I mean, what precipitated that?

13 MR. GUGINO: It could have been connected to the  
14 fact that they had been arguing for a period of time.

15 JUDGE SMITH: And don't - - - I mean, don't - -  
16 - I mean, isn't it just common sense that people are more  
17 likely to slap around their girlfriends when they're drunk  
18 than when they're sober?

19 MR. GUGINO: I have no experience with that - -  
20 -

21 JUDGE READ: One way or the other?

22 MR. GUGINO: - - - so I don't know what common  
23 sense would be. Suffice it to say that we don't have a  
24 significant sense of what the alcohol did to him here,  
25 because we don't know whether he had two beers in a half

1 an hour, whether he had one be - - - two beers in an hour  
2 or an hour and a half. So therefore, the idea that there  
3 is a, you know, a nexus here is, I think, speculative  
4 still, based on this - - - if we look - - - if we stay  
5 close to this record.

6 CHIEF JUDGE LIPPMAN: Okay, counselor. Thanks,  
7 counselor.

8 MR. HERATY: Good afternoon, Your Honors. David  
9 Heraty - - -

10 CHIEF JUDGE LIPPMAN: Counsel, where is the  
11 connection?

12 MR. HERATY: The connection is that the  
13 defendant was drinking alcohol within ninety minutes of  
14 the offense, and during that period his behavior toward  
15 the victim escalated from private depression, to a verbal  
16 altercation, to a physical attack, to a sexual assault.  
17 The defendant lost control of his behavior, and the only  
18 explanation on this record is that he was consuming  
19 alcohol.

20 CHIEF JUDGE LIPPMAN: Was this abuse of alcohol?

21 MR. HERATY: It is. I think it's - - -

22 CHIEF JUDGE LIPPMAN: So it's abuse and there's  
23 a causal connection.

24 MR. HERATY: Absolutely. The abuse of alcohol -  
25 - - abuse of alcohol is a determinative - - -

1 JUDGE SMITH: Is there a distinction between  
2 abuse of alcohol and use of alcohol?

3 MR. HERATY: Absolutely, Judge Smith, use of  
4 alcohol obviously includes any - - -

5 JUDGE PIGOTT: When did he cross the line here?

6 MR. HERATY: I'm sorry, Judge Pigott?

7 JUDGE PIGOTT: When did he cross the line from  
8 use to abuse here?

9 MR. HERATY: I can't answer that question.

10 JUDGE PIGOTT: Shouldn't the judge have to?

11 MR. HERATY: I think that in a case - - - this  
12 risk factor, as it relates to abuse of alcohol at the time  
13 of the offense, inherently lends itself to discretion.  
14 It's not going to be established by - - -

15 JUDGE PIGOTT: Well, it's clear and convincing;  
16 it's not really - - - one of my concerns here is kind of a  
17 left-handed one. We're going to - - - you make this list  
18 of people who are on the sex offender registration so big  
19 that nobody can control it. It just seems to me that a  
20 little more attention to some of these would be in order.  
21 And in this case you had a judge that didn't do it right  
22 the first time. When he got it sent back he just did it  
23 the same way, only he put it in - - - it looked like he  
24 put it in a list order as opposed to the other. And you  
25 wonder if maybe there shouldn't be some type of a hearing



1 or a mini-hearing or some type of, as the statute  
2 requires, findings of fact.

3 MR. HERATY: You're absolutely right, Judge  
4 Pigott, that this was not done the right way, and I'm not  
5 here to defend the procedure. The hearing court didn't  
6 make findings of fact either time, so the next question is  
7 well, what's the remedy for that? And I think that  
8 there's a litany of cases from the Second and Fourth  
9 Department. And the rule that this court has made for  
10 suppression hearings in criminal cases is that where there  
11 is a sufficient hearing record - - - in other words, a  
12 hearing - - - a record that's sufficient for a meaningful  
13 appellate review, the Appellate Division may make findings  
14 of fact where the hearing court fails to do so. I agree  
15 it's absolutely not the ideal way to do it; the hearing  
16 court should have done it. But in the interest of  
17 judicial economy, there was a sufficient hearing record  
18 here and the Appellate Division was within its authority  
19 and hopefully it'll - - - obviously, the process will get  
20 better in the future.

21 But I would - - - I would just reiterate that  
22 this risk factor is discretionary, but the only - - - the  
23 most logical inference in this case is that the  
24 defendant's use of alcohol became abuse when it caused him  
25 to lose control of his behavior. And we can see that in

1 the proximity, the fact that - - -

2 JUDGE SMITH: I mean, is there a distinction  
3 between - - - I mean, an abu - - - he obviously abused the  
4 victim, but isn't abusing alcohol something else? And  
5 isn't it possible for mere use, which is not abusive, to  
6 cause a crime?

7 MR. HERATY: Not under the definition that the  
8 commentary has - - -

9 JUDGE SMITH: Which words in the commentary do  
10 you rely on?

11 MR. HERATY: That the abuse of alcohol occurs -  
12 - - and I'm not going to - - - I'm not bringing it  
13 verbatim, but that it's - - -

14 JUDGE SMITH: That he was abusing alcohol at the  
15 time of the crime.

16 MR. HERATY: That he was - - - that it serves as  
17 a disinhibitor that - - -

18 JUDGE SMITH: But I mean, I guess what I'm  
19 saying is couldn't they have said if he was using alcohol  
20 at the time of the crime, if that's what they meant?

21 MR. HERATY: Absolutely not, because you can be  
22 using alcohol and it may not affect your behavior at all.  
23 It depends. That's - - -

24 CHIEF JUDGE LIPPMAN: How do we know here? How  
25 do we know that it's an abuse and it affected his

1 behavior?

2 MR. HERATY: I would point to a few things,  
3 Chief Judge Lippman. One is the proximity, that it began  
4 ninety minutes before the offense. Two is the fact that  
5 there was some continuity. He said that he began  
6 drinking, which implies that he continued drinking  
7 throughout that - - - throughout this period. Three, as  
8 Judge Pigott made reference to earlier, that he used this  
9 as an excuse to mitigate his conduct in the pre-sentence  
10 report, so he's essentially admitting that this has some  
11 effect on his behavior. And finally, the escalation of  
12 his behavior from private depression, to a verbal  
13 altercation, to the physical attack, to the sexual  
14 assault, the loss of control of his emotions, the loss of  
15 his control to the behavior, with no other explanation. I  
16 can't say what degree it had on his behavior, exactly what  
17 - - - I mean, this is obviously something that there's  
18 multiple causes, but I think absolutely that the most  
19 logical inference on this record is that his consumption  
20 of alcohol reduced his inhibitions and caused him to do  
21 this unthinkable act, which he wouldn't have done under  
22 normal circumstances.

23 JUDGE SMITH: Assuming that's the case, why does  
24 that make him more likely to lead - - - to reoffend?

25 MR. HERATY: Judge Smith, the commission that

1 drafted the guidelines in the commentary has determined  
2 that use of alcohol and abuse - - -

3 JUDGE SMITH: Well, let's assume - - - let's  
4 assume that we find the guidelines and the commentary  
5 ambiguous and we want to know how best to interpret it.  
6 Would you say it's - - - we should inter - - - if we  
7 interpret it your way, you're saying a guy who would not  
8 otherwise have committed a crime and who has no history of  
9 alcoholism but who was disinhibited by alcohol on one  
10 occasion and then committed the crime, you're saying he  
11 gets more points than someone who does it cold sober?  
12 That's not intuitively right.

13 MR. HERATY: I believe it is, because where he  
14 is - - - where an offender is - - - if alcohol has this  
15 effect on an offender then he's more likely to reoffend.  
16 Drinking is a fact of life for most people - - -

17 JUDGE SMITH: Well, if he's an alcoholic I agree  
18 with you - - -

19 MR. HERATY: Not - - -

20 JUDGE SMITH: - - - but if he is someone who can  
21 normally control his drinking and who can behave himself  
22 when he's sober, I guess I would say he's less likely to  
23 reoffend, wouldn't you?

24 MR. HERATY: Absolutely - - - absolutely not,  
25 Judge Smith, because he is - - - he's proven that, at

1           least in this one instance, that where he consumes  
2           whatever degree of alcohol it was he's unable to control  
3           his behavior and that he's a risk - - -

4                    JUDGE SMITH: Well, then compare him to the guy  
5           who doesn't - - - who is unable to control it when cold  
6           sober. Why is that guy less dangerous than he?

7                    MR. HERATY: There are other considerations for  
8           that under the risk - - - under the risk assessment, but  
9           this is narrowly focused on - - - maybe that's why there's  
10          fewer points allotted for this than for certain other risk  
11          factors. But the bottom line is the commentary - - - the  
12          text of the commentary is clear that they made this  
13          provision for abuse of alcohol at the time of the offense,  
14          as opposed to a history. They recognize that if some  
15          people - - - if a person cannot control his behavior when  
16          he is using alcohol then he is a greater risk to reoffend,  
17          and that's the rationale.

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

20                   MR. HERATY: Thank you very much.

21                   CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

22                   MR. GUGINO: Very briefly, Your Honor.

23                    Certainly there's an indication that he was  
24          using alcohol. I don't think there was proof that he was  
25          abusing alcohol, because we don't know really much about

1           what he was - - - how much he was having and what was  
2           happening.

3                        If you look at page 42 of the record, where the  
4           probation officer asks him about his substance or alcohol  
5           usage, he describes himself as someone who had only  
6           started having some beers when he was twenty years old;  
7           this offense happened when he was twenty-one. He  
8           described himself as using alcohol - - - he would have two  
9           or three beers a month. So there's -- and there's no  
10          other indication of alcohol abuse on the record at all.

11                      CHIEF JUDGE LIPPMAN: Okay. Thanks, counselor.

12                      MR. GUGINO: Thank you, Your Honors.

13                      CHIEF JUDGE LIPPMAN: Thank you all.

14                      (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 PEOPLE v. MICHAEL PALMER, No. 14 and PEOPLE v. CORNELL LONG, No. 15, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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