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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF STATE OF NEW YORK,

Respondent,

-against-

NELSON D.,

No. 194  
(Papers sealed)

Appellant.

-----

20 Eagle Street  
Albany, New York 12207  
October 15, 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.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 194, the State  
2 v. Nelson D.

3 Counsel, would you like any rebuttal time?

4 MS. TEMKIN: Two minutes, please?

5 CHIEF JUDGE LIPPMAN: Two minutes, sure, go  
6 ahead.

7 MS. TEMKIN: May it please the court, my  
8 name is Diane Temkin for appellant Nelson D.

9 There's only one way for a sex offender  
10 who's been found to require civil management to get  
11 confined under Article 10, and that's for a court to  
12 find that the person is a dangerous sex offender  
13 requiring - - -

14 CHIEF JUDGE LIPPMAN: Counsel, what about -  
15 - -

16 MS. TEMKIN: - - - confinement.

17 CHIEF JUDGE LIPPMAN: - - - the requirement  
18 of - - - in 10 of listing the - - - the residence or  
19 the place that he's going to go to? Is that a  
20 sufficient basis under 10 to - - - to - - - to put  
21 him in Valley Ridge?

22 MS. TEMKIN: No, it is not.

23 CHIEF JUDGE LIPPMAN: Why not? Go ahead.

24 MS. TEMKIN: Because there are other  
25 facilities that have their own set of commitment

1 procedures.

2 CHIEF JUDGE LIPPMAN: What if - - - what  
3 does that provision in 10 mean, where it says you  
4 have to - - - you have to state the - - - the place  
5 of residence?

6 MS. TEMKIN: Well, it's - - - it's at - - -  
7 first of all, you don't have - - - the court doesn't  
8 have to, it - - - they may. There's a set of  
9 conditions and they may require residence or type of  
10 residence as - - - as one of the conditions, and - -  
11 - but the legislature intended for a SIST to be  
12 outpatient treatment, and expressly says outpatient  
13 in the community, and that's the legislative intent.

14 And a residence can't just mean - - - for  
15 instance, I mean, it can't - - - they - - - they  
16 can't just mean, like, prison or jail. Those are  
17 residences, but they have their own set of rules.

18 JUDGE GRAFFEO: So - - - so tell me, both  
19 doctors here seem to agree that your client has some  
20 difficulty maintaining his medication regimen, and  
21 needs fairly constant supervision. I - - - I think  
22 both physicians - - - do you disagree - - - they - -  
23 -

24 MS. TEMKIN: No, I don't disagree that - -  
25 - that - - -

1                   JUDGE GRAFFEO:   - - - they more or less - -  
2                   - they more or less agreed on that point.  So how is  
3                   that to be provided for him?  What - - - what are - -  
4                   - what are you asking for?  What were options of the  
5                   court here?

6                   MS. TEMKIN:  Well, the options were to put  
7                   him in a community residence - - - an individualized  
8                   residential alternative, which is called an IRA,  
9                   which is highly structured, with one-on-one  
10                  supervision - - -

11                  JUDGE ABDUS-SALAAM:  Were there any  
12                  available for him?

13                  MS. TEMKIN:  And - - - well, we were - - -  
14                  well, it was up to - - - the statutory duty is for  
15                  docs and - - - to provide a lawful - - -

16                  JUDGE SMITH:  Suppose - - -

17                  MS. TEMKIN:  - - - conditions for him, but  
18                  - - - I'm sorry.

19                  CHIEF JUDGE LIPPMAN:  Go ahead, go ahead.

20                  MS. TEMKIN:  Yeah, but - - -

21                  JUDGE GRAFFEO:  And was that - - - was that  
22                  appropriate for his - - -

23                  MS. TEMKIN:  But, yeah, they never tried to  
24                  find a IRA, and we - - - so we - - - we were trying  
25                  to find an IRA, and - - - and - - -

1 JUDGE GRAFFEO: An OMR - - -

2 MS. TEMKIN: - - - the AG wouldn't let us.

3 JUDGE GRAFFEO: An OMRDD, or whatever we  
4 call the new agency now - - -

5 MS. TEMKIN: OPWDD.

6 JUDGE GRAFFEO: - - - that operated these  
7 particular types of facilities?

8 MS. TEMKIN: Yes, they did, and the - - -  
9 and the AG precluded us from talking to OPWDD.

10 CHIEF JUDGE LIPPMAN: Do you agree - - -

11 MS. TEMKIN: They wouldn't let us.

12 CHIEF JUDGE LIPPMAN: Do you agree under  
13 Article 15 that they could - - - that they could do  
14 this?

15 MS. TEMKIN: Yes, in fact, they - - -

16 CHIEF JUDGE LIPPMAN: Was this - - - was an  
17 Article 15 application?

18 MS. TEMKIN: Well, the application didn't  
19 even need to be before the court. Under - - - under  
20 15.27, admission to Valley Ridge or other Article 15  
21 facilities is on medical certification, and - - -  
22 that you need two physicians, and an applicant, which  
23 could be the director of a facility. And Nelson D.  
24 was in a facility. He was at Manhattan Psychiatric  
25 Center - - -

1 CHIEF JUDGE LIPPMAN: Yeah, but your  
2 argument is that's - - - that's not here in this case  
3 to qualify him for 15? Is that true?

4 MS. TEMKIN: Well, the State could have  
5 done it, and - - -

6 CHIEF JUDGE LIPPMAN: Right, but - - -

7 MS. TEMKIN: - - - and they didn't.

8 CHIEF JUDGE LIPPMAN: - - - but they  
9 didn't. That is your argument, right?

10 MS. TEMKIN: They didn't. And this was an  
11 Article 10 proceeding.

12 JUDGE SMITH: Suppose - - - suppose you've  
13 got an Article 10 offender, and I just assume - - - I  
14 mean, I - - - putting aside whether this is your guy  
15 or not. You got somebody who can - - - who is  
16 dangerous - - - very dangerous - - - who's going to  
17 commit rapes and all kinds of ghastly assaults,  
18 unless he is in something of the order of - - - of a  
19 - - - what's it called - - - Valley Ridge. What  
20 happens to that guy?

21 MS. TEMKIN: Well, if the court thinks that  
22 a person is likely to commit sex offenses if not  
23 confined, then the court should find that he's a  
24 dangerous sex offender requiring confinement.

25 JUDGE SMITH: Your - - - your answer is he

1 can't go to Valley Ridge; he has to go to a secure  
2 facility?

3 MS. TEMKIN: He has to go to a secure - - -

4 JUDGE SMITH: Does that make any sense?

5 MS. TEMKIN: I - - - yes, it does under the  
6 law, because under Article 10, OPWDD is - - - can  
7 designate a secure treatment facility, but they  
8 haven't. There are only two - - -

9 JUDGE SMITH: Okay, but - - - but I guess  
10 I'm - - - what I'm saying is, is it - - - assuming we  
11 were to find any ambiguity in this statute, wouldn't  
12 it be very - - - wouldn't it be strange to attribute  
13 to the legislature this intention to either have to  
14 let him go or put him a secure facility? You can't  
15 put him in a less secure facility?

16 MS. TEMKIN: And - - - you can - - - under  
17 Article 10, you can only put him in an Article 10  
18 facility. It's - - -

19 JUDGE SMITH: My question - - - I  
20 understand what you say the law says. I'm saying,  
21 wouldn't that be a rather strange intention to  
22 attribute to the legislature, to rule out this  
23 intermediate possibility of a less secure facility?

24 MS. TEMKIN: I don't think it would be a  
25 strange intent of the legislature, because there are

1 other commitment procedures in order to put dangerous  
2 people in confinement.

3 JUDGE SMITH: But you're saying for the  
4 hypothetical person that I've named, you're saying  
5 that Article 10 should just not be used at all? You  
6 should resort to Article 15?

7 MS. TEMKIN: Yes. Because it's an Article  
8 15 facility, and under Article 15, unless otherwise  
9 specifically provided for - - - for by statute, you  
10 have to use the procedures of Article 15, and - - -

11 JUDGE ABDUS-SALAAM: The State points out  
12 that there was an Article 10 individual at Valley  
13 Ridge. Is he there - - - or she - - - I guess it's a  
14 he - - - is he there improperly, as well?

15 MS. TEMKIN: No, he isn't, because that was  
16 - - - that was a special settlement agree - - -  
17 reached in that case. That person was paroled at - -  
18 - was a voluntary. He has a legal status under  
19 Article 15 as a voluntary, as a condition of parole,  
20 and when his parole was up, he - - - and - - - and  
21 the State brought an Article 10 petition against him,  
22 he requested that he stay at Valley Ridge.

23 He - - - he was the - - - the type of  
24 defendant that - - - that - - - like Hendricks in - -  
25 - in Kansas v. Hendricks, where he said, please, keep



1 me locked up, because - - - or else I will do this  
2 again. He was a - - -

3 JUDGE SMITH: Could the - - - could the  
4 State - - -

5 MS. TEMKIN: - - - a child molester.

6 JUDGE SMITH: Could the State in this - - -  
7 in this proceeding insist as a condition of strict  
8 and intensive supervision that your guy make a  
9 similar request?

10 MS. TEMKIN: I don't think so, because then  
11 it wouldn't be voluntary. I mean, it's up to the  
12 State to evaluate him under Article 15. He - - - he  
13 wouldn't be voluntary in that case. There - - -

14 JUDGE SMITH: But of course, you said  
15 yourself a minute ago that if someone really is  
16 dangerous and - - - and can't - - - you can't send  
17 him to Valley Ridge, you have to put him in a secure  
18 facility. Doesn't that - - - yeah - - - doesn't that  
19 suggest that maybe it might be in his interest to  
20 say, you know, I - - - I'm just like that other guy;  
21 I want to be at Valley Ridge; I love the place.

22 MS. TEMKIN: Well, it hasn't been our  
23 experience that the State is - - - is willing to  
24 negotiate settlements for SIST that often. They  
25 would have - - -

1 JUDGE PIGOTT: This seems difficult.  
2 You're really saying they ought to punish your client  
3 more. Right? In other words, you don't like this  
4 intermediate facility. You want him back in - - -  
5 back in jail? Back at Western - - -

6 MS. TEMKIN: No, no. We're just saying  
7 that if he's going to be confined, he has to be  
8 confined under a substantive legal standard.

9 JUDGE PIGOTT: So you want him - - - you  
10 want - - - can he go to Central New York Psychiatric  
11 Center, and we're done?

12 MS. TEMKIN: No, he can't, because that's  
13 an Article 10 facility, and he was found not to  
14 require Article 10 confinement.

15 CHIEF JUDGE LIPPMAN: Counsel, does it - -  
16 - does it mater that - - - that here the intent of  
17 the State, I think, is humane is nature? Does that  
18 matter or basically you can't confiscate his liter -  
19 - - liberty unless he's found dangerous? I mean, do  
20 you follow what I'm saying? They're - - - assume  
21 that they're doing it to be humane. Does that  
22 matter?

23 MS. TEMKIN: We're - - - we're not saying  
24 if he's dangerous, he shouldn't be confined.

25 CHIEF JUDGE LIPPMAN: I understand that.

1 MS. TEMKIN: We're say - - - we're saying  
2 if he's dangerous, he needs to be confined under a  
3 substantive standard with procedures.

4 CHIEF JUDGE LIPPMAN: I understand, but  
5 what I'm asking you, assuming that - - - that he  
6 can't - - - he is not dangerous. He doesn't have a  
7 mental abnormality and dangerous, at least the  
8 finding of that. But the State in this case is try -  
9 - - let's assume - - - is trying to - - - to be  
10 humane. The bottom line is they still have to go to  
11 Article 15, otherwise you're confiscating his liberty  
12 when there's no finding of being dangerous.

13 MS. TEMKIN: Yes, but it would have been  
14 easy for the State. They - - - he was in a hospital.  
15 All you had to do was find two doctors - - -

16 CHIEF JUDGE LIPPMAN: I'm not arguing with  
17 counsel. I'm asking you that question.

18 MS. TEMKIN: Yes.

19 JUDGE GRAFFEO: I - - - I think what - - -

20 CHIEF JUDGE LIPPMAN: Yes, is the answer.  
21 Good.

22 JUDGE GRAFFEO: - - - you're being asked  
23 is, the State had one of three options. They could  
24 have tried to prove he was dangerous and had a mental  
25 abnormality and commit him under Article 10. And

1 that didn't work. He wasn't found to have a mental  
2 abnormality.

3 MS. TEMKIN: No, he was found to have a em  
4 - - - a mental abnormality.

5 CHIEF JUDGE LIPPMAN: He was found - - -

6 JUDGE GRAFFEO: Or he was - - - he was  
7 found not to be dangerous, I'm sorry. Or they could  
8 have brought an Article 15 proceeding. Or they could  
9 put him on SIST. And since they are recommending  
10 SIST, you're saying he has to go to a community  
11 residence. He can't go to an Article 15 facility.

12 MS. TEMKIN: Okay. This - - - this court  
13 has found in Myron - - -

14 JUDGE GRAFFEO: Are those the three options  
15 that - - -

16 MS. TEMKIN: No, there are two options.  
17 This court's found in Myron P., that there are two  
18 dispositions: either SIST or confinement.

19 JUDGE SMITH: Well, wait - - -

20 MS. TEMKIN: There are only two.

21 JUDGE SMITH: Well, I think Judge Graffeo  
22 is suggesting maybe Article 15 - - -

23 MS. TEMKIN: It's what is SIST - - -

24 JUDGE SMITH: Is Article 15 a possible  
25 third, not under Article 10, but under Article 15?

1 MS. TEMKIN: The State could have done that  
2 at any time; they don't need the court.

3 JUDGE PIGOTT: So the answer's yes?

4 JUDGE READ: Yes.

5 MS. TEMKIN: Yes.

6 JUDGE PIGOTT: Okay.

7 MS. TEMKIN: The State could have done  
8 that.

9 JUDGE RIVERA: But you're saying under - -  
10 - what they chose was Article 10?

11 MS. TEMKIN: Yes.

12 JUDGE RIVERA: And Article 10 gives two  
13 options. And they can't seek to do confinement when  
14 the court has decided the disposition is SIST?

15 MS. TEMKIN: Well, even under SIST, you - -  
16 - if someone is, like, on parole - - - okay, can I  
17 finish the answer?

18 CHIEF JUDGE LIPPMAN: Yes.

19 MS. TEMKIN: Yeah.

20 CHIEF JUDGE LIPPMAN: Please do.

21 MS. TEMKIN: If someone's on parole, for  
22 instance, they could be rearrested. They could be  
23 committed if they're mentally ill. They could be  
24 committed if they're mentally retarded and dangerous.

25 JUDGE PIGOTT: Well, let me ask you - - -

1 MS. TEMKIN: It - - - you could be on SIST  
2 and also on Article 15.

3 JUDGE PIGOTT: Let me - - - let me ask you  
4 - - -

5 JUDGE RIVERA: But - - - but just in the  
6 posture of the case - - - I understand what you're  
7 saying - - - but in the posture of this case, when  
8 the court was rendering its decision, once it had  
9 decided that - - - that the People did - - - that the  
10 State did not meet its burden to show that he's  
11 dangerous, the court is left with one option, which  
12 is SIST. And if I'm - - - if I'm not  
13 misunderstanding your argument, unless they then are  
14 going to make some other argument under a different  
15 legal statute, they're stuck with Article 10, and  
16 Article 10's choice for the court is something that's  
17 not confinement.

18 MS. TEMKIN: Yes.

19 CHIEF JUDGE LIPPMAN: Okay, thanks,  
20 counsel.

21 Counsel?

22 MS. DUBECK: May it please the court,  
23 Leslie Dubeck for the State of New York.

24 CHIEF JUDGE LIPPMAN: Counsel, how can you  
25 confiscate his liberty if he's not find - - - found

1 to be dangerous under Article 10?

2 MS. DUBECK: Article 10 includes two  
3 dispositions.

4 CHIEF JUDGE LIPPMAN: You can't be released  
5 and confined at the same time, can you?

6 MS. DUBECK: Every disposition under  
7 Article 10 involves a curtailment of liberty. SIST  
8 involves a curtailment of liberty.

9 CHIEF JUDGE LIPPMAN: You can confine him  
10 under 10, if you're not found to be dangerous?

11 MS. DUBECK: No, and he hasn't been  
12 confined. Confinement as - - -

13 CHIEF JUDGE LIPPMAN: What - - - what do  
14 you call this? It's involuntary.

15 MS. DUBECK: He - - - he was placed in a  
16 transitional placement in an OPWDD facility.

17 CHIEF JUDGE LIPPMAN: Wait, wait, wait.  
18 That's - - - are you - - - is this voluntary?

19 MS. DUBECK: It's not voluntary, but SIST  
20 isn't vol - - -

21 CHIEF JUDGE LIPPMAN: So you're confining  
22 him?

23 MS. DUBECK: No, there is something short  
24 of confinement that is also involuntary. All of SIST  
25 - - -

1 CHIEF JUDGE LIPPMAN: If he agrees to it.  
2 But he didn't agree to this. It's either SIST or  
3 confinement, isn't it?

4 MS. DUBECK: Correct.

5 CHIEF JUDGE LIPPMAN: If you're found  
6 dangerous, it's confinement. If not, it's SIST.

7 MS. DUBECK: Right, and this is SIST.

8 CHIEF JUDGE LIPPMAN: And you have the  
9 right under SIST to do the same thing that you would  
10 do under Article 10, if he was found to be dangerous?

11 MS. DUBECK: This isn't the same thing as  
12 confinement.

13 JUDGE SMITH: You're - - - you're - - - are  
14 you saying that confinement in Article 10 is a term -  
15 - - is really just shorthand for confinement in a  
16 secure facility?

17 MS. DUBECK: That's exactly - - - that is  
18 the dispositional choice: confinement in a secure  
19 treatment facility or SIST.

20 JUDGE SMITH: So - - - so - - - so but - -  
21 - so if - - - so if a guy is at Valley Ridge, in what  
22 a layman might think is - - - think he's confined,  
23 you're saying, well, he may be confined in reality,  
24 but in fact, he's in the community within the meaning  
25 of the statute?



1 MS. DUBECK: And it - - - yes, but also,  
2 it's not even the equivalent of confinement to a  
3 secure treatment facility. He was placed at Valley  
4 Ridge as a transitional - - -

5 JUDGE ABDUS-SALAAM: He can leave?

6 MS. DUBECK: - - - placement.

7 JUDGE ABDUS-SALAAM: Can he leave?

8 MS. DUBECK: He could not leave Valley  
9 Ridge, but the - - - the order placing him there gave  
10 OPWDD the discretion to move him, and he was moved.

11 JUDGE ABDUS-SALAAM: Well, if he were in  
12 SIST, could he move around? Could he leave?

13 MS. DUBECK: It - - - it depends what the  
14 conditions of SIST are. SIST can include lots of  
15 conditions. They can include curfews that - - - if  
16 Nelson D. agrees that SIST can obviously include  
17 curfews - - -

18 JUDGE ABDUS-SALAAM: Well, if it were GPS  
19 monitoring - - -

20 JUDGE RIVERA: When is it no longer SIST,  
21 and when is it confinement?

22 MS. DUBECK: When it's confinement to a  
23 secure treatment facility. Here, a key difference is  
24 that OPWDD could move his facility without a  
25 discharge order.

1 CHIEF JUDGE LIPPMAN: Counsel, what are the  
2 standards in which you keep him there now? Is there  
3 anything under Article 10 that gives you the right to  
4 continue reviewing when he's not found to be  
5 dangerous and it doesn't come under 10? Why wouldn't  
6 you use 15, where, if this was necessary, there are  
7 standards to review his continued situation?

8 MS. DUBECK: There are standards.

9 CHIEF JUDGE LIPPMAN: What are the  
10 standards?

11 MS. DUBECK: The standard is that he has a  
12 mental abnormality. A jury found that, and that  
13 finding is not contested - - -

14 CHIEF JUDGE LIPPMAN: So when he has a  
15 mental abnormality without being found dangerous, you  
16 can confine him? And look, I'm not questioning your  
17 motives. I'm asking you what is the legal basis upon  
18 which you doing that?

19 MS. DUBECK: Any sex - - - a sex offender  
20 that is found to have a mental abnormality is  
21 dangerous within the definition set up by the Supreme  
22 Court in Kansas v. Hendricks, and Kansas v. Crane.

23 CHIEF JUDGE LIPPMAN: So you can - - - you  
24 can take away his liberty when he's not found to be  
25 dangerous, because you're saying, hey, he's dangerous

1           anyway, so we'll take away his liberty.  Isn't the  
2           whole purpose of Article 10 to see whether he should  
3           be confined - - -

4                       MS. DUBECK:  All - - -

5                       CHIEF JUDGE LIPPMAN:  - - - as opposed to  
6           SIST?

7                       MS. DUBECK:  All of SIST is a curtailment  
8           of liberty.  Confinement is - - -

9                       JUDGE PIGOTT:  Are we talking about Section  
10          10.11?

11                      MS. DUBECK:  10.11 is what lays out what  
12          SIST is as an alternative.

13                      JUDGE PIGOTT:  It says that the  
14          "supervision requirements, in consultation with the  
15          commissioner, includes electronic monitoring, global  
16          positioning, satellite tracking, polygraph  
17          monitoring, specification of a residence or type of a  
18          residence, prohibition of contact with identified  
19          past potential victims, strict and intensive  
20          supervision by a parole officer, and any other lawful  
21          and necessary conditions that may be imposed by the  
22          court."  Is that the - - - is that the area we're  
23          discussing?

24                      MS. DUBECK:  That - - - that is the area of  
25          SIST.

1                   JUDGE PIGOTT: So when you talk about  
2 specifications of residence or type of residence, why  
3 wouldn't this fall within that?

4                   MS. DUBECK: This falls exactly within  
5 that, and this is exactly what the legislature meant  
6 SIST to do. It provides an alternative to  
7 confinement for a person who is dangerous enough that  
8 a jury verdict has found they could be indefinitely  
9 civilly contained under - - -

10                  JUDGE SMITH: Did - - - did anyone ever ask  
11 the question specific - - - was any - - - was your  
12 expert ever asked, doctor, what, in your opinion, is  
13 likely to happen if he is not sent to - - - if he  
14 sent neither to a secure facility nor to Valley  
15 Ridge?

16                  MS. DUBECK: The question that was asked  
17 is, whether he could live safely outside of Valley  
18 Ridge and our expert said no.

19                  JUDGE SMITH: Well, well, there's - - -  
20 let's - - - yeah, I asked your adversary about a  
21 hypothetical guy who's going to commit rape. Suppose  
22 this guy is not going to commit rape. Maybe - - -  
23 maybe that's what the record shows; maybe it doesn't.  
24 He - - - the - - - maybe the - - - suppose the doctor  
25 says I cannot predict that he's going to commit rape

1 or any other Article 10-type sex crime. He is going  
2 to continue committing the kind of gross public  
3 lewdness that he commits all the time, but that's - -  
4 - yeah - - - but that's not - - - but Article 10  
5 isn't concerned with that.

6 If that's the fact, don't they - - - don't  
7 they have to put him in the community and deal with -  
8 - - deal with the public lewdness in whatever other  
9 way they want?

10 MS. DUBECK: That expert testimony would  
11 directly con - - - contradict the jury's finding. A  
12 jury finding of mental abnormality - - -

13 JUDGE SMITH: The jury's - - - the jury's  
14 find - - - that includes a propensity to commit sex  
15 crimes.

16 MS. DUBECK: And an inability to control  
17 oneself.

18 JUDGE SMITH: Yeah, okay. But - - - but  
19 suppose - - - but the - - - to get somebody in a  
20 secure facility, you need a stronger finding. You  
21 need a finding that there's a likelihood that he will  
22 commit sex crimes.

23 MS. DUBECK: You - - - you need a finding  
24 that - - - that confinement is necessary; that SIST  
25 is not an alternative.

1                   JUDGE SMITH: Did - - - isn't part of the  
2 definition of a dangerous sex offender likely to  
3 commit sex crimes unless confined in a secure  
4 facility?

5                   MS. DUBECK: I think that is right.

6                   JUDGE SMITH: Yeah.

7                   MS. DUBECK: But - - -

8                   JUDGE SMITH: So - - - so if - - - suppose  
9 your doctor says, I can't say he's likely to commit  
10 sex crimes. I can say he's likely to commit indecent  
11 exposure. But I can't say he's likely to commit sex  
12 crimes. If that - - - I understand that you would  
13 dispute that that's what the record is, but if that's  
14 the record, you have to - - - you - - - you can't  
15 confine him, can you?

16                   MS. DUBECK: If that's the record, he  
17 couldn't have been found to have a mental  
18 abnormality. If he's not like - - -

19                   JUDGE SMITH: Well, wait a minute. What's  
20 - - - wait a minute.

21                   MS. DUBECK: If he - - -

22                   JUDGE SMITH: Why is the definition of  
23 dangerous sex offender requiring confinement  
24 different - - - I mean - - - you're saying that  
25 everyone who has a mental abnormality is dangerous

1 enough to be confined?

2 MS. DUBECK: Under - - - under - - -

3 JUDGE SMITH: What's the point of having  
4 another trial?

5 MS. DUBECK: Under substantive due process,  
6 it's true. They want - - -

7 JUDGE SMITH: I'm not having due process.  
8 What about the statute?

9 MS. DUBECK: Under the statute, the - - -  
10 every - - - you must have a propensity and an  
11 inability to control that propensity. That is what  
12 dangerous is - - -

13 JUDGE SMITH: Okay, okay, they - - - well,  
14 wait a minute. They found - - - they - - - the jury  
15 found that he had - - - that he had a propensity and  
16 difficulty in controlling it. Your expert would not  
17 testify that there was a likelihood that he would  
18 commit sex crimes unless confined. Isn't that  
19 finding also necessary?

20 MS. DUBECK: That would - - - his testimony  
21 was that that wasn't true, if he was on a program of  
22 SIST that involved placement evaluation.

23 JUDGE SMITH: Okay, so what you're - - -  
24 what you're really saying, is you read his testimony  
25 to say, yeah, there is a likelihood unless he's at

1 Valley Ridge.

2 MS. DUBECK: Yes, and that is what SIST  
3 would - - -

4 JUDGE SMITH: If he didn't say that, you  
5 don't win, do you?

6 MS. DUBECK: We already didn't win the  
7 question of whether he gets confined to the secure  
8 treatment facility.

9 JUDGE SMITH: I understand. If - - - if he  
10 didn't say that, then you don't really have a basis  
11 for saying he has - - - of - - - for saying he needs  
12 - - - he needs any kind of confinement, whether  
13 colloquial confinement or technical confinement.

14 MS. DUBECK: The expert testimony from both  
15 sides was that he needed strict supervision, often  
16 one-on-one supervision - - -

17 JUDGE SMITH: Okay, but - - - but isn't - -  
18 -

19 MS. DUBECK: - - - and that wasn't  
20 available.

21 JUDGE SMITH: But isn't there ambiguity  
22 about needs it for what? Needs it to prevent him  
23 from masturbating in public or needs it to prevent  
24 him from raping people? There's a difference.

25 MS. DUBECK: Article 10 is meant to protect



1 the public, to reduce recidivism, and to provide  
2 treatment. And you can't provide treatment to  
3 somebody in a circumstance where they are threatening  
4 other people that are in a treatment center. There  
5 was no testimony that a group home - - -

6 JUDGE SMITH: Okay, wait - - - wait a  
7 minute. You can't lock the guy up just because he  
8 needs treatment. He also has to - - - there has to  
9 be a likelihood he will commit sex crimes. Do you  
10 agree with me on that?

11 MS. DUBECK: To put him in a confined - - -  
12 to call him a dangerous sex offender requiring  
13 confinement in a secure treatment facility, yes. But  
14 this is not that. He was placed in a transitional  
15 placement that specifically contemplated he would be  
16 moved to lesser secure treatment facilities, and he  
17 was. If he had been placed in the secure treatment  
18 facility, OPWDD could not have moved him.

19 JUDGE SMITH: Let me ask you a more basic  
20 question. Suppose for some - - - it's a ridiculous  
21 supposition - - - suppose everybody admits, okay,  
22 this guy's cured of raping people. He - - - he raped  
23 someone once a long time ago; he's never going to do  
24 it again. On that - - - at that point, you can - - -  
25 you cannot subject him to either SIST or confinement,

1 right?

2 MS. DUBECK: I think that's right. And he  
3 has the ability to move - - - to be removed from  
4 SIST. He has that ability now and he has never used  
5 the ability. He has never challenged - - -

6 JUDGE SMITH: What about the - - - speaking  
7 about being removed from SIST, what about that two-  
8 year restriction? That's a problem, isn't it?

9 MS. DUBECK: No - - -

10 JUDGE SMITH: Suppose - - - suppose a guy  
11 gets well in six months. He's got to - - - he's got  
12 to stay locked up for a year and a half because the  
13 statute says so?

14 MS. DUBECK: No, there are quarterly review  
15 provisions that OPWDD reviews him and makes  
16 appropriate placements as necessary. They could move  
17 him into a group home.

18 JUDGE SMITH: Okay, does he - - - does he  
19 have a way - - - does he have a way to challenge  
20 that, if he disagrees with them?

21 MS. DUBECK: His - - - his way of  
22 challenging it is limited to two years, but his two-  
23 year limit has come and gone and he hasn't - - -

24 JUDGE SMITH: Really - - - is that - - -  
25 can you really - - - can you really do that? Can you

1 say I'm locking you up and I'm going to review every  
2 few months, and if you disagree with me, two years  
3 from today you can bring a lawsuit?

4 MS. DUBECK: It - - - well, it's not the  
5 Attorney General. It's the expert agencies that are  
6 charged with caring for - - -

7 JUDGE SMITH: Yeah - - - okay, yeah - - -  
8 okay. The expert - - - I - - - an expert agency can  
9 put me in a cell, and leave me there for as long as  
10 it thinks it's necessary for me to stay, and if I - -  
11 - if I want to challenge that in court, I wait two  
12 years? Is that constitutional?

13 MS. DUBECK: It might be. In this case,  
14 he's not in a cell; he's in a nonsecure - - -

15 JUDGE SMITH: Is your answer really we do -  
16 - - yeah, why don't you bring that case, when you've  
17 - - - when you've got it?

18 MS. DUBECK: That - - - that, too. Here's  
19 it's not - - -

20 CHIEF JUDGE LIPPMAN: Counsel, is there any  
21 doubt he's being confined?

22 MS. DUBECK: Yes, he's not - - -

23 CHIEF JUDGE LIPPMAN: You're - - - I  
24 understand that you're - - - you're trying to confine  
25 him for his own good. I get that. I don't get how

1           you're able to do it and say, well, we couldn't get  
2           dangerous, but we're going to confine you anyway. So  
3           if you win, you confine him, and if you lose, you  
4           confine him, and when there are other provisions that  
5           would allow you to involuntarily deal with him, not  
6           Article 10.

7                       MS. DUBECK: Because this court in Myron P.  
8           already recognized that the determination of whether  
9           someone needs confinement is inextricably tied to  
10          what SIST would look like. It depends what's  
11          available, what structure, what treatment is  
12          available on the SIST.

13                      JUDGE PIGOTT: You - - -

14                      CHIEF JUDGE LIPPMAN: But you can't make  
15          this up as you go along. There's got to be  
16          standards.

17                      MS. DUBECK: And - - -

18                      CHIEF JUDGE LIPPMAN: There's got to be a  
19          legal basis to do it, other than - - - and I  
20          understand it, that you're trying to do what you  
21          think is good for him.

22                      MS. DUBECK: But the evidence presented  
23          here was that the only way he could avoid confinement  
24          was if this SIST option was on the table. If this  
25          court takes this SIST option off the table, the case

1 has to be remanded for a redetermination of whether  
2 SIST remains a viable option.

3 JUDGE PIGOTT: You said - - - you said - -  
4 - you were asked if Valley Ridge is a secure  
5 facility, and you said no. Or maybe your answer was  
6 an insecure facility - - - a nonsecure facility, and  
7 you said yes. What's Valley Ridge? I don't have a  
8 clue.

9 MS. DUBECK: Valley Ridge is a - - - a more  
10 secure facility for mentally ill people. It is not a  
11 segregated facility like Article - - - Article 10  
12 requires of a secure treatment facility. He is not  
13 even in Valley Ridge anymore. He spent less than  
14 five months there before he was transitioned to the  
15 Broome Developmental Facility, which is not a secure  
16 facility. Patients can come and go from Broome - - -

17 JUDGE PIGOTT: But if - - - if we were  
18 talking about Valley Ridge, he's - - - he's in there  
19 with other residents who are not sexual predators?  
20 Who are not SIST?

21 MS. DUBECK: Correct, who are not  
22 necessarily SIST people, because - - - and that's  
23 another way you know that he hasn't been confined to  
24 a secure treatment facility, because 10.10 says that  
25 a secure treatment facility must segregate sex

1 offenders from all other patients.

2 JUDGE RIVERA: But, counsel, what - - -  
3 unless I'm misunderstanding your adversary, her  
4 argument is that this is not SIST. The placement is  
5 not SIST, and that you're basically trying to do an  
6 Article 15 placement through Article 10 and that's  
7 not what the law provides for. Why can't you just do  
8 the Article 15? If you will - - - you did not carry  
9 your burden in the dispositional hearing to convince  
10 the court to do the confinement.

11 MS. DUBECK: But - - - but we did carry our  
12 burden to - - - to convince the court that he had a  
13 mental abnormality and required - - - the jury  
14 already said SIST.

15 JUDGE RIVERA: No, the jury already found  
16 the mental abnormality. That wasn't the burden at  
17 the - - - at the dispositional hearing.

18 MS. DUBECK: But that is all of what is up  
19 on appeal - - - that is the order. It is - - -  
20 Article 10 is the order - - - the mental abnormality  
21 order followed by a dispositional order. We didn't  
22 convince the court that he was dangerous and needing  
23 confinement to a secure treatment facility, but we  
24 did convince the court that what he needed was this  
25 version of SIST.

1 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank  
2 you, counsel. Appreciate it.

3 Counsel, rebuttal?

4 MS. TEMKIN: In - - - to answer your  
5 question about what kind of facility Valley Ridge is,  
6 on page 304 of the record, the AG is - - - is saying  
7 "It's considered a secure facility. I have the  
8 pamphlet there. It does state it's secure. It's a  
9 secure treatment center. It's a secure Article 15" -  
10 - - it's doesn't say that it's a secure Article 15 -  
11 - -

12 JUDGE PIGOTT: Yeah, but if - - -

13 MS. TEMKIN: - - - it's not a secure  
14 Article 10.

15 JUDGE GRAFFEO: If he's not there anymore,  
16 what are - - - what are you asking us to do?

17 MS. TEMKIN: Well, he's - - - he's in  
18 Broome Developmental Center, which is also an  
19 inpatient facility. In the briefs I cite Daniel OO  
20 and Sidney JJ. It's the same Article 15 standard for  
21 confinement. He's still involuntary confined and - -  
22 -

23 JUDGE ABDUS-SALAAM: Counsel, your position  
24 is - - -

25 MS. TEMKIN: - - - and - - -

1 JUDGE ABDUS-SALAAM: - - - this has - - -  
2 SIST has to be outpatient treatment. Is that right?

3 MS. TEMKIN: Yes.

4 JUDGE ABDUS-SALAAM: So anything short of  
5 something outpatient is not SIST.

6 MS. TEMKIN: It's not SIST. It could be  
7 confinement under Article 9 or under Article 15 or it  
8 could be - - -

9 JUDGE PIGOTT: What - - - what does - - -  
10 what does 10.11 mean, when - - - when it says  
11 "specification of residence or type of residence"?

12 MS. TEMKIN: It means any place where - - -  
13 that is lawful, because it also requires - - -

14 JUDGE PIGOTT: Of course, it means lawful.

15 MS. TEMKIN: Well, no, it says it in the  
16 statute, lawful.

17 JUDGE PIGOTT: Most statutes require lawful  
18 conduct.

19 MS. TEMKIN: Right. That's true.

20 JUDGE PIGOTT: I'm just - - - I'm just  
21 asking you what did - - - what in your opinion does  
22 it mean when it says that the court "in consultation  
23 with the commissioner, shall, among other things,  
24 specify a residence or type of residence"?

25 MS. TEMKIN: It - - - it could mean an IRA



1           which was what was before the court here, because  
2           he's mentally retarded and he needs a high level of  
3           structure. That's what the evidence was here.

4                    JUDGE PIGOTT: And IRA being?

5                    MS. TEMKIN: An individualized residential  
6           alternative, which - - -

7                    JUDGE PIGOTT: So they - - - they could put  
8           him in a residence?

9                    MS. TEMKIN: It's - - - it's in OPWDD - - -  
10          it's in the community, but it's OPWDD-managed.

11                   JUDGE PIGOTT: But they can put him in it?  
12          The court can?

13                   MS. TEMKIN: They can - - - they can  
14          require him to live there.

15                   JUDGE SMITH: And but he - - -

16                   JUDGE PIGOTT: All right. So what's your  
17          argument?

18                   MS. TEMKIN: That's in the community, but  
19          that's not involuntary commitment.

20                   JUDGE SMITH: But how do you know it's in  
21          the community, because - - - I mean, is - - - they  
22          can require him to go there, but the doors aren't  
23          locked, is that it?

24                   MS. TEMKIN: I don't know if the doors are  
25          locked, but they have alarms, so - - -

1                   JUDGE SMITH: Well, what's - - - well, why  
2                   - - - in what sense is he not confined in the IRA  
3                   that he is confined in - - -

4                   MS. TEMKIN: Well, no, he doesn't have to  
5                   stay there. He's allowed out. He would abide by the  
6                   rules of that residence. The same way there are  
7                   people - - - on one - - -

8                   JUDGE SMITH: But what if you're concerned  
9                   that if you allow him out, he's not going to come  
10                  back?

11                  MS. TEMKIN: Well, that's up to the  
12                  residence. And maybe if he's in that residence and  
13                  they're concerned that he's not going to come back,  
14                  they would ask for Article 15 confinement.

15                  JUDGE SMITH: Well, what - - - I don't - -  
16                  - the Chief keep talking about policy reason. What's  
17                  the policy that says if you don't - - - if you don't  
18                  trust the guy to come back, why can't the court  
19                  exercise its judgment to say Valley Ridge is a better  
20                  place for him than the IRA?

21                  MS. TEMKIN: Because there has to be a  
22                  substantive standard to commit somebody to Valley  
23                  Ridge.

24                  JUDGE PIGOTT: What's the difference  
25                  between this and so many times when - - - when there

1 are - - - there are criminals who are sentenced, and  
2 they say, well, please send me to boot camp, or, you  
3 know, one of these other facilities. And the judge  
4 says no; I think you're going where I think you ought  
5 to go.

6 MS. TEMKIN: Well, that would - - -

7 JUDGE PIGOTT: As opposed to this, where  
8 you want to say he is Article 15 sick; he's not  
9 Article 10 sick. And therefore you got - - - you  
10 don't the option of using Article 10. You've got to  
11 go use Article 15.

12 MS. TEMKIN: Well, they used Article 10.  
13 There's only one option for confinement under Article  
14 10 and he was find (sic) not to need it. You need a  
15 substantive standard - - -

16 JUDGE PIGOTT: That's your argument, I mean  
17 - - -

18 MS. TEMKIN: Right.

19 JUDGE PIGOTT: - - - what I'm getting at is  
20 you want to say, well, there's Article 9; there's  
21 Article 15. There's a lot of stuff under the Mental  
22 Hygiene Law. All true. But we put, unfortunately,  
23 people in need of a lot of treatment in jail. And  
24 you could come in here and make the argument, well,  
25 they just sentenced him twenty-five years to life for

1           that murder, and the man is crazy, and they shouldn't  
2           be putting him in jail. They ought to be putting him  
3           in an Article 15 facility.

4                       Well, that's not the proceeding we're in.  
5           And in the proceeding we're in, it says that they can  
6           designate a facility, and you want to say, well, you  
7           can't pick any facility; you got to pick a facility  
8           that fits under Article 15.

9                       MS. TEMKIN: Well, it doesn't say  
10          designated facility. A facility would be an  
11          institution. It says a residence.

12                      JUDGE PIGOTT: What am I reading?  
13          Specification of residence or type of residence.

14                      MS. TEMKIN: Right. And that can't be some  
15          - - - and that can't be a residence or an institution  
16          that has a substantive standard of commitment.

17                      CHIEF JUDGE LIPPMAN: Counsel, one - - -  
18          one final question, as far as I'm concerned. Is this  
19          - - - your adversary keeps saying this is a form of  
20          SIST. Do you believe this is a form of SIST?

21                      MS. TEMKIN: No, because it's not lawful,  
22          because it bypasses any kind of commitment statute.  
23          And the facility that he's in has a commitment  
24          standard with procedures. He has - - - he's not  
25          committed under Article 15 or Article 10. He's not

1 committed under any statute.

2 CHIEF JUDGE LIPPMAN: Thanks, counsel.

3 Thank you both. Appreciate it.

4 (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 State of New York v. Nelson D., No. 194 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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