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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF STATE OF NEW YORK,

Respondent,

-against-

No. 172

SHANNON S.,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
September 11, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: State of New York v.  
2 Shannon S.

3 Counselor, do you want any rebuttal time?

4 MR. DAVISON: Yes. If I could have three  
5 minutes, Your Honor.

6 CHIEF JUDGE LIPPMAN: Three minutes. Go  
7 ahead.

8 MR. DAVISON: May it please the court.  
9 We're here today because we have a statute that  
10 authorizes people to be locked up because of the  
11 possibility that they may - - -

12 CHIEF JUDGE LIPPMAN: Why is isn't this  
13 diagnosis - - -

14 MR. DAVISON: - - - commit future crimes.

15 CHIEF JUDGE LIPPMAN: - - - within the  
16 statute, the paraphinia (sic) NOS?

17 MR. DAVISON: Pardon?

18 CHIEF JUDGE LIPPMAN: What is paraphilia  
19 NOS - - - why is that not within the statute, in your  
20 mind?

21 MR. DAVISON: Paraphilia is a whole group  
22 of mental disorders.

23 CHIEF JUDGE LIPPMAN: Is it one of the  
24 things listed in the statute?

25 MR. DAVISON: Paraphilia nonconsenting - -

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CHIEF JUDGE LIPPMAN: Yes.

MR. DAVISON: - - - is not listed.

Hebephilia is not listed. The State's doctors said that those are - - -

CHIEF JUDGE LIPPMAN: If they're not listed, then that's the end of the story, in your mind?

MR. DAVISON: They're not listed because they were specifically kept out. And - - -

JUDGE GRAFFEO: By kept out, you mean they're not on the DSM-IV list?

MR. DAVISON: Yes. The hebephilia, there's a doubt whether that even exists. And certainly the question - - -

JUDGE GRAFFEO: I thought the paraphilia was on the DSM list. It's not?

MR. DAVISON: Paraphilia, yes.

CHIEF JUDGE LIPPMAN: Isn't there many different types of paraphilia?

MR. DAVISON: Some of the better-known ones that are listed are exhibitionism, necrophilia, fetishism.

JUDGE READ: Are you saying something has to be listed in the DSM before it falls under the

1 statute?

2 MR. DAVISON: No. What I'm saying - - -  
3 well, yes I am saying that. But I'm also saying that  
4 if it's specifically kept out of the DSM, you can't  
5 get around that by labeling it paraphilia NOS.

6 JUDGE SMITH: Isn't this the sort of thing  
7 that should have been dealt with at a Frye hearing?  
8 Aren't you really arguing about whether this is  
9 generally accepted in the relevant scientific  
10 community?

11 MR. DAVISON: The - - - that would be one  
12 way of dealing with it. This - - - if this was dealt  
13 - - -

14 JUDGE SMITH: Are you saying that as a  
15 matter of law, if the DSM doesn't say it, it can't be  
16 generally accepted in the relevant scientific  
17 community?

18 MR. DAVISON: I'm saying that if it is  
19 specifically kept out of the DSM, then it is wrong  
20 for psychiatrists to call it NOS and get around that.

21 JUDGE SMITH: Let me ask this - - -

22 JUDGE GRAFFEO: Could I just ask, how does  
23 the court know that it's intentionally kept off the  
24 DSM-IV list?

25 MR. DAVISON: There was testimony to that

1 effect at the trial in this case.

2 JUDGE GRAFFEO: Did the State experts agree  
3 with that, or did they disagree with that?

4 MR. DAVISON: They - - - the State's  
5 experts - - -

6 JUDGE GRAFFEO: Because I thought they  
7 claimed it was included. But maybe I'm - - -

8 MR. DAVISON: They agreed - - -

9 JUDGE GRAFFEO: - - - misinterpreting their  
10 testimony.

11 MR. DAVISON: - - - that - - - they agreed  
12 that paraphilia NOS was included. But they agreed -  
13 - - I think at - - -

14 JUDGE GRAFFEO: I thought that's what we're  
15 talking about.

16 MR. DAVISON: Well, it's this paraphilia  
17 NOS nonconsenting that's the problem.

18 CHIEF JUDGE LIPPMAN: Translate this into  
19 understandable layman's terms. What does it mean?  
20 What is it that they're saying is the condition, and  
21 why is it that that is not - - - does not come within  
22 the terms and that it shouldn't be a recognized  
23 condition?

24 MR. DAVISON: The - - -

25 CHIEF JUDGE LIPPMAN: In simple terms, what

1 is it? What's the condition?

2 MR. DAVISON: In simple terms, the  
3 testimony was that Mr. S. is attracted to teenage  
4 girls.

5 CHIEF JUDGE LIPPMAN: Okay.

6 MR. DAVISON: And the question is whether  
7 that is a mental disorder or not.

8 JUDGE SMITH: And your - - - your point is  
9 that surely no one's saying that just the urge itself  
10 to look at a pretty teenager can't be a mental  
11 abnormality.

12 MR. DAVISON: And there was testimony to  
13 that effect that - - -

14 JUDGE JONES: You're also drawing a  
15 distinction between consensual sex and forcible sex?

16 MR. DAVISON: Yes, yes. The - - -

17 JUDGE JONES: Lack of consent simply by age  
18 as opposed to force.

19 MR. DAVISON: - - - that's the problem in  
20 this case - - -

21 JUDGE JONES: Yes.

22 MR. DAVISON: - - - that there was one  
23 instance of forcible rape in the criminal history of  
24 Mr. S. He did his time for that. That's - - - you  
25 know, that's inexcusable. But the basis for the

1 diagnosis of mental abnormality is his relationships  
2 with sixteen-year-olds.

3 JUDGE PIGOTT: Isn't one of the problems,  
4 Mr. Davison, that if you put them all into DSM,  
5 you've got a defense to every criminal rape charge  
6 that can come down the road?

7 MR. DAVISON: That is - - - that's a  
8 problem with it. And that is - - - there was  
9 testimony that that is one of the reasons that  
10 paraphilia nonconsent isn't in the DSM, because they  
11 don't want that.

12 JUDGE SMITH: What does paraphilia mean?  
13 Does it just mean - - - is it just Greek for sexual  
14 abnormality?

15 MR. DAVISON: Paraphilia is intense  
16 recurring sexual urges that occur over a period of  
17 six months or more.

18 JUDGE SMITH: Well, everybody has - - - not  
19 everybody maybe. Most people have intense recurring  
20 sexual urges.

21 MR. DAVISON: Well, deviant - - - I didn't  
22 - - - deviant sexual urges.

23 JUDGE SMITH: All right.

24 MR. DAVISON: And the question is - - -

25 JUDGE SMITH: But - - - okay. But your

1 point here is that the urge - - - it's not the urge  
2 that's deviant, it's the behavior, right?

3 MR. DAVISON: The - - - my - - - yes. My  
4 point is that the urge is not deviant. There was  
5 testimony that it's quite common among adult males to  
6 be attracted to teenagers.

7 JUDGE SMITH: And perhaps we didn't even  
8 need that testimony.

9 MR. DAVISON: Yes. And the - - - but the  
10 question - - - and because it's not deviant - - -

11 JUDGE SMITH: I guess what I'm getting at  
12 is this.

13 MR. DAVISON: Yes.

14 JUDGE SMITH: When you say that somebody  
15 has paraphilia nonconsent, doesn't that essentially  
16 mean an urge to commit rape?

17 MR. DAVISON: That - - - in all of the  
18 cases where that has been held to be a valid  
19 diagnosis, it has been forcible rape.

20 JUDGE SMITH: Okay. But even - - - but  
21 suppose it's forcible. I mean, isn't that a problem,  
22 whether it's forcible or nonforcible? I mean, if the  
23 disease consists only of a tendency to commit the  
24 crime, aren't we blurring the distinction that the  
25 Supreme Court has said is important?



1 MR. DAVISON: Yes. I agree that they've  
2 basically - - - what they've done is the  
3 psychiatrists have turned it on its head. They have  
4 said that if the law says that girls sixteen or  
5 younger cannot consent, then our concept of  
6 nonconsent must be in agreement with what the law  
7 says.

8 JUDGE SMITH: So that if the age of consent  
9 were changed - - - were lowered, then your client  
10 would be instantly cured of his disease or his mental  
11 abnormality?

12 MR. DAVISON: Yes. The testimony - - - all  
13 of the experts said he's not a pedophile. He has no  
14 interest in pre-pubescent girls. If you - - - if you  
15 lower the threshold to the age of puberty he's - - -

16 CHIEF JUDGE LIPPMAN: Why is this - - - and  
17 I gather it is in your - - - from your perspective -  
18 - - not the kind of person who is meant to be covered  
19 by Article 10. What's different about it?

20 MR. DAVISON: Aside - - -

21 CHIEF JUDGE LIPPMAN: Why isn't this the  
22 kind of person that you want to confine?

23 MR. DAVISON: The problem - - -

24 CHIEF JUDGE LIPPMAN: From a policy  
25 perspective.

1                   MR. DAVISON: From a policy perspective,  
2                   you're letting - - - you're taking - - - the civil  
3                   confinement statutes have always been based on two  
4                   premises: mental illness and dangerousness. And  
5                   what you're - - - you cannot be confined unless you  
6                   have both. And if you - - - if you are - - -

7                   JUDGE SMITH: You can't be confined  
8                   civilly?

9                   MR. DAVISON: Civilly, yes. And if you are  
10                  confined and you get better, they have to let you  
11                  out, even though you're dangerous. The Supreme Court  
12                  - - -

13                  JUDGE SMITH: So you're really saying,  
14                  maybe he is the sort of guy that we want to confine,  
15                  but you can't do it with the civil law?

16                  MR. DAVISON: Yes. That there were - - -

17                  JUDGE GRAFFEO: Are you saying he can't go  
18                  on SIST?

19                  MR. DAVISON: That - - - well, that's  
20                  another component of my argument. If he doesn't have  
21                  a mental abnormality, he can't go on SIST. I - - -

22                  CHIEF JUDGE LIPPMAN: So what do we do with  
23                  him? What's - - -

24                  JUDGE GRAFFEO: Even though he's violated  
25                  his community supervision several times in the past

1 and he didn't complete sex offender treatment, if I  
2 understand the record correctly - - -

3 MR. DAVISON: Yes, there - - -

4 JUDGE GRAFFEO: - - - he's still - - - so  
5 there's nothing?

6 MR. DAVISON: The - - -

7 JUDGE GRAFFEO: No supervision?

8 MR. DAVISON: - - - the remedy for that is  
9 when the legislature enacted Article 10, they also  
10 enacted Penal Law Section 70.80, which enhanced the  
11 sentencing provisions for felony sex offenders. If  
12 you've got somebody who is a repeat offender, they  
13 could be looking at sentences that include up to  
14 twenty years of post-release supervision. That's  
15 four times - - -

16 JUDGE SMITH: And there's also SORA, isn't  
17 there?

18 MR. DAVISON: There's also SORA. There - -  
19 - Mr. S. is a level 3 sex offender. You can see his  
20 picture on the web site.

21 JUDGE SMITH: But you are - - - I mean, I  
22 think - - - if I understand what you're saying, for  
23 all this, you admit that there's, hypothetically  
24 anyway, there's a risk to the community in leaving  
25 this guy out.

1 MR. DAVISON: Yes, but - - -

2 JUDGE SMITH: And you're saying - - -  
3 you're basically saying that we've got to run that  
4 risk because you're stretching the civil commitment  
5 system too far?

6 MR. DAVISON: Exactly. That you have a  
7 statute - - - the whole Constitution in this country  
8 is premised on the idea that people are punished for  
9 crimes that they have committed. This is a whole new  
10 area; locking people up so they can't commit crimes  
11 in the future. Are you going to do that on the basis  
12 of a diagnosis that doesn't exist in the medical  
13 profession? Are you going to do that if you don't  
14 have proof beyond a reasonable doubt? Is the - - -  
15 we have to - - -

16 JUDGE GRAFFEO: But that point wasn't  
17 preserved at the trial, was it?

18 MR. DAVISON: Not at the trial. And I  
19 would argue that if you view it in the context of a  
20 civil analysis, it doesn't have to be preserved  
21 because - - - at trial, because there is no factual  
22 showing that could be made - - -

23 JUDGE SMITH: But isn't it a simpler point?  
24 I mean, the presumption of the reasonable doubt  
25 argument is it has to be treated as though it were

1 criminal.

2 MR. DAVISON: That's the flip side.

3 JUDGE SMITH: And in People v. Patterson we  
4 say you don't have to preserve reasonable doubt  
5 arguments.

6 MR. DAVISON: Exactly. The burden of proof  
7 is a mode of proceedings error.

8 The - - - and to - - - you wouldn't have to  
9 bring in a factual showing. All you have to do is  
10 look at the difference between Article 9 and Article  
11 10. It's like the difference between civil contempt  
12 and criminal contempt. Article 9 can be prosecuted  
13 by any family member. All you have to do is prove  
14 that the person is mentally ill. If they get better,  
15 they get out.

16 Article 10 can only be prosecuted by the  
17 attorney general. Mental illness - - - if you don't  
18 have a DSM diagnosis, mental illness isn't a factor  
19 anymore. You've got this concept of mental  
20 abnormality, and you've got exactly the problem that  
21 Justice Kennedy warned about in the Hendricks case.  
22 You're turning the whole system into an instrument of  
23 the criminal process. It's not a civil commitment  
24 anymore. So if you - - - you don't - - -

25 JUDGE SMITH: I'm not quite sure whether

1           you're saying that's a problem and, therefore, don't  
2           do it, or are you saying you have done that, and  
3           therefore you have to use a reasonable doubt  
4           standard.

5                       MR. DAVISON: I'm saying in order to do  
6           that, you have to use the reasonable doubt standard.  
7           That although the Supreme Court said in Addington  
8           that it isn't required in traditional civil  
9           commitments, this isn't a traditional civil  
10          commitment anymore.

11                      JUDGE CIPARICK: So do you want a new trial  
12          applying a higher standard, or you just want us to  
13          dismiss the petition?

14                      MR. DAVISON: I would argue that the court  
15          should hold that the higher standard should be  
16          applied and the case should be sent back for a trial  
17          on that standard.

18                      CHIEF JUDGE LIPPMAN: Okay, counselor.  
19          You'll have some rebuttal.

20                      MS. TREASURE: Good afternoon. May it  
21          please the court. I'd like - - -

22                      CHIEF JUDGE LIPPMAN: Counsel, what's his -  
23          - - what's his abnormality?

24                      MS. TREASURE: His mental abnormality  
25          consists of paraphilia NOS, which is in the DSM - - -

1 CHIEF JUDGE LIPPMAN: In layman's terms,  
2 what does it mean? What's his abnormality?

3 MS. TREASURE: Intense - - - intense sexual  
4 and recurring sexual urges towards nonconsenting  
5 persons. That's in the definition.

6 JUDGE SMITH: Aren't those urges - - -  
7 aren't such urges, apart from the acts, rather  
8 common?

9 MS. TREASURE: Not - - - well, the urges -  
10 - - that's what Dr. Ewing said is that the urges were  
11 - - -

12 JUDGE SMITH: Is he wrong? He says most  
13 straight men are attracted to pretty teenage girls.  
14 Is that - - - did we really need him to tell us that?

15 MS. TREASURE: Well, the problem is, is the  
16 respondent continues to act on it despite - - -

17 JUDGE SMITH: Yes.

18 MS. TREASURE: - - - criminal sanctions.

19 JUDGE SMITH: Yes. That was my question.  
20 Apart from the acts, there's nothing abnormal about  
21 the urge, right?

22 MS. TREASURE: Well, I think that's a  
23 matter - - - probably - - - that's a matter of the  
24 psychiatric community. Probably - - -

25 JUDGE PIGOTT: Well, if you put it the

1 other way, if you look at it in terms of alcoholism,  
2 all right? And if we all of a sudden decided that we  
3 were sick and tired of all of the DWIs and the  
4 problems that happen here, and we apply an Article 11  
5 which says that if you're diagnosed as an alcoholic,  
6 you can be civilly confined so that we can cure you  
7 of your alcoholism, so you won't drink and drive, we  
8 would think that - - - either that's good or bad, but  
9 that's what we'd be talking about, right?

10 MS. TREASURE: Right.

11 JUDGE PIGOTT: That type of thing. And  
12 this person, what you're saying is, he may, as Mr.  
13 Davison said, he may commit another crime, so we're  
14 going to stop him by keeping him in?

15 MS. TREASURE: What we're saying is that  
16 he's got a mental abnormality under the statute. And  
17 that is predisposing him to commit acts.

18 JUDGE PIGOTT: And the abnormality is - - -  
19 you said nonconsent?

20 MS. TREASURE: No, no, no. Paraphilia not  
21 otherwise specified.

22 JUDGE PIGOTT: Right. But you said that  
23 that - - - what that equaled was an attraction to  
24 young teenage girls, which everyone says is not  
25 unusual. But you said and - - - I thought you said



1 and taking advantage of them by nonconsent, or  
2 something like that.

3 MS. TREASURE: Well, there's the aspect  
4 that there - - - there were three things that our  
5 experts relied upon here. There was the aspect that  
6 he was attracted to adolescent girls. There was the  
7 aspect, too, that he was using force, not only  
8 against the thirteen-year-old, but he had another  
9 arrest for a sexual charge against an adult where he  
10 also had used force. There was a component of force  
11 in one of his relationships - - - so-called  
12 relationships.

13 JUDGE SMITH: You know, it seems to me like  
14 you're saying that every rapist has a mental  
15 abnormality, which in a way, of course it's true.  
16 But - - - so why bother with the criminal rape laws?  
17 Why don't we - - - couldn't you save a lot of trouble  
18 by just locking up all the rapists on civil  
19 commitment?

20 MS. TREASURE: Well, no, because I don't  
21 think you can say that every rapist has a mental  
22 abnormality.

23 JUDGE SMITH: Tell me about one who  
24 doesn't.

25 MS. TREASURE: Well, there could be

1 somebody who has one isolated rape where - - - it  
2 depends on what the psychiatrist - - -

3 JUDGE SMITH: One isolated rape sounds  
4 pretty abnormal to me.

5 MS. TREASURE: It sounds horrendous, but it  
6 doesn't necessarily mean that they have the mental  
7 abnormality, which they have to meet the definitional  
8 component of the statute.

9 JUDGE SMITH: Why not? But as you define  
10 it, the definitional component is a tendency to act  
11 on these otherwise normal urges. Are you saying  
12 you've got to do it more than once?

13 MS. TREASURE: No. Well, I'm saying - - -

14 JUDGE SMITH: Every serial rapist has a  
15 mental abnormality?

16 MS. TREASURE: It's possible they do and  
17 they don't. It's what does the psychiatric diagnosis  
18 lead them to conclude? Do they have a predisposition  
19 to commit the - - -

20 JUDGE SMITH: Well, I mean, the trouble is,  
21 I'm cynical enough to think that in almost any  
22 litigation, you can get an expert to say almost  
23 anything. So are you saying that if you can get a  
24 psychiatrist to say this guy is sick, you can lock  
25 him up civilly, and that's all there is to it?

1 MS. TREASURE: No. I mean, that's why the  
2 court is there to weigh the testimony, which is what  
3 the court did here.

4 JUDGE SMITH: Okay. But how do you weigh  
5 it? I mean, you're not giving me any analysis.  
6 You're not telling me how I tell the difference  
7 between somebody who's a serial rapist and somebody  
8 who's got a mental abnormality.

9 MS. TREASURE: Well, I think I'm not giving  
10 - - - I'm sorry, Your Honor, if I'm not giving you  
11 the appropriate answer, because it just turns so much  
12 on a case-by-case basis.

13 JUDGE PIGOTT: Well, Mr. Davison points out  
14 that there's been amendments to the criminal law that  
15 make these sentences very long. We do have predicate  
16 felony and persistent felony and PRS, et cetera. And  
17 not to put words in his mouth, but the conclusion of  
18 that seems to be, if they commit one, you can put him  
19 away for twenty years. Presumably there's some type  
20 of sex offense education or whatever is needed there.  
21 And you control it that way, because now you know  
22 this was committed and this is the penalty.

23 His argument is you're saying this was  
24 committed, that was a penalty, and now we're going to  
25 put him in a civil ins - - - confine him civilly,

1 because we think he might do it again.

2 MS. TREASURE: That's - - - well, that's  
3 the purpose of the Article 10, is when we find that  
4 somebody has a mental abnormality that predisposes  
5 them to this type of conduct, and they're recidivists  
6 - - - they may be a recidivist sex offender; most of  
7 the time they are - - - that they can be treated in  
8 an inpatient facility and civilly committed so as to  
9 protect society from their recidivism.

10 JUDGE SMITH: Is there any recidivist sex  
11 offender who cannot be confined under Article 10?

12 MS. TREASURE: Who cannot?

13 JUDGE SMITH: Assume - - - that is, assume  
14 you can find a psychiatrist who can say I think this  
15 recidivist sex offense is abnormal; which doesn't  
16 sound like such a stretch.

17 MS. TREASURE: Well, I mean, again, if you  
18 have an expert - - - and these sex offenders do go  
19 through a screening process from the time when they -  
20 - -

21 JUDGE SMITH: I understand - - -

22 MS. TREASURE: So it's not that everybody  
23 who's - - -

24 JUDGE SMITH: - - - I don't think I  
25 appreciate it.

1 MS. TREASURE: - - - coming through - - -

2 JUDGE SMITH: Your office has been very,  
3 very restrained in using this statute. But we can't  
4 rely entirely on the restraint of the prosecutors. I  
5 mean, is there a principle that would prevent the  
6 State from locking up every rapist or every serial  
7 rapist?

8 MS. TREASURE: The principle is, is that  
9 the State has to prove by clear and convincing  
10 evidence to a court's satisfaction, that the  
11 individual suffers from mental abnormality under the  
12 statute. And that is a disease disorder that  
13 predisposes that individual to committing sex  
14 offenses, and that results in their having serious  
15 difficulty controlling behavior.

16 JUDGE JONES: What do you think of his  
17 position that the statute is not aimed at statutory  
18 rape - - - what we commonly refer to as statutory  
19 rape?

20 MS. TREASURE: I think the statute is aimed  
21 at the sex offenses that are enumerated, and that  
22 includes rape in the third degree, which is the rape  
23 of a person who is not of the age of consent.

24 JUDGE JONES: But he's saying in principle,  
25 what that means is forcible rape.

1 MS. TREASURE: No. There's nothing in the  
2 statute to indicate that it is limited to rapists who  
3 - - - individuals who commit forcible rape. Although  
4 again, we have an individual here with a mental  
5 abnormality of paraphilia NOS, which the experts say  
6 predisposes him towards sex offenses against  
7 adolescent girls, and also includes the forcible  
8 component to it, in that he has used force in a 1992  
9 charge. He also used force in the rape of the  
10 thirteen-year-old.

11 JUDGE SMITH: Does this - - -

12 JUDGE JONES: So if all of this - - - if  
13 all of this person's offenses involve statutory rape,  
14 and none of them had any component of force, your  
15 position would be the same?

16 MS. TREASURE: No, Your Honor. I mean,  
17 yes, it would be the same, actually. I mean, he does  
18 have - - - there's no doubt that the experts here  
19 were especially concerned with the fact that he  
20 continues to seek out underage girls and engage in  
21 rape in the third degree.

22 JUDGE SMITH: But if you're continuing to  
23 commit forcible rape, so your average expert would be  
24 pretty concerned with that, too?

25 MS. TREASURE: Absolutely, they would.

1 Rightfully so.

2 JUDGE SMITH: And your average non-expert  
3 would be concerned. There's a very strong case for  
4 locking these people up. But where is the limit to  
5 the point at which you do it civilly? I mean, is  
6 there any way we can be assured that an aggressive  
7 state will not simply substitute the civil law for  
8 the criminal law.

9 MS. TREASURE: Again, I can only say is  
10 that I think that the statute itself and its standard  
11 for mental abnormality and for confinement are the  
12 limits on the State's ability to confine these people  
13 civilly.

14 JUDGE GRAFFEO: Well, why is the clear and  
15 convincing standard better than the reasonable doubt  
16 standard that your adversary's suggesting - - -

17 MS. TREASURE: Again - - -

18 JUDGE GRAFFEO: - - - toward that aim?

19 MS. TREASURE: - - - the clear and  
20 convincing evidence standard, it was articulated by  
21 the Supreme Court in Addington v. Texas. It is  
22 particularly appropriate to civil commitment  
23 proceedings, not just traditional ones, but ones  
24 where the psych - - - there is a component that rests  
25 upon the expert opinion of a psychiatrist.

1                   JUDGE SMITH: But would you agree that the  
2 closer the civil proceeding comes to be criminal - -  
3 - comes to being criminal, the stronger the case is  
4 for a reasonable doubt standard?

5                   MS. TREASURE: It may well be. But I think  
6 that these cases here, we not only have that the  
7 Supreme Court has said that this is appropriate in  
8 these types of cases, but there are other due process  
9 protections that have been built into the statute  
10 here to assure against an erroneous determination.

11                   And then again, to get back to why it  
12 should be a clear-and-convincing-evidence standard,  
13 again, the Supreme Court in Addington said it's a  
14 matter of allocating the risk of an erroneous  
15 determination, and that society should not have to  
16 bear almost the entire risk of an erroneous  
17 determination where the risk may well be that a  
18 dangerous individual is released into the community.

19                   JUDGE SMITH: Well, that can't be the  
20 general rule, because then you've just abolished  
21 reasonable doubt in criminal cases.

22                   MS. TREASURE: No, I'm talking about in  
23 civil commitment proceedings - - -

24                   JUDGE SMITH: Okay, but - - -

25                   MS. TREASURE: - - - where there's a



1 balance between - - -

2 JUDGE SMITH: - - - okay, but yes.

3 MS. TREASURE: - - - society's interest and  
4 the great public interest.

5 JUDGE SMITH: But if the rule is different  
6 in civil and criminal cases, then there has to be  
7 some reliable way of distinguishing the two, doesn't  
8 there?

9 MS. TREASURE: To distinguish between?

10 JUDGE SMITH: Civil and criminal.

11 MS. TREASURE: Well, in criminal you have  
12 the punitive effect of criminal. You have the stigma  
13 of being labeled a criminal. You have all the other  
14 due process protections, apart from the fact that  
15 it's traditionally been viewed under the beyond-a-  
16 reasonable-doubt standard. And under civil  
17 commitment proceedings such as this, you have the  
18 issue of the fact that this society, again, should  
19 not be forced to bear the risk that an error - - -  
20 entirely, of an erroneous determination.

21 JUDGE SMITH: But in an ordinary  
22 prosecution for rape, even if it's his tenth rape,  
23 society does bear that risk?

24 MS. TREASURE: Society bears the risk  
25 because the understanding and the policy there is

1 better that a guilty man go free than an innocent man  
2 be put in prison.

3 JUDGE SMITH: Okay. And if you - - - I  
4 guess what I'm saying is, that is the policy. And  
5 it's a policy that a lot of law enf -- a lot of  
6 people don't like, especially in particular cases.  
7 And if a state or a state's law enforcement decides  
8 I'm sick of this, all these guilty people going free,  
9 tell you what I'm going to do; I'm going to label  
10 them all as nut cases and lock them up. Can the  
11 state do that?

12 MS. TREASURE: Well, you're talking about  
13 if a district attorney decides that he's not going to  
14 pursue a criminal?

15 JUDGE SMITH: I'm talking about the State  
16 of New York, as a matter of policy, decides that it  
17 is sick of having guilty people go free on the  
18 reasonable doubt standard, and therefore, it is going  
19 to classify every serious criminal as mentally  
20 abnormal, which almost every serious criminal in some  
21 sense is, and is going to lock them up civilly and  
22 save a lot of time and trouble. Is that okay?

23 MS. TREASURE: Well, I mean, I would think  
24 probably there is some Constitutional limitation on  
25 that. The fact of the matter - - -

1 JUDGE SMITH: Okay. And you want to  
2 suggest - - -

3 MS. TREASURE: - - - is it's - - -

4 JUDGE SMITH: - - - where it is?

5 MS. TREASURE: Your Honor, it's difficult,  
6 because I don't think that that's the case that we  
7 have. Here we have a scheme that comports with the  
8 Constitutional outlines of Kansas v. Hendricks and  
9 Kansas v. Crane, and that these types of cases have -  
10 - -

11 JUDGE SMITH: Well, but in both those cases  
12 there's some rather strong language, in Justice  
13 Kennedy's concurrence in Hendricks and in the  
14 majority in Crane, saying you've got to distinguish  
15 the ordinary dangerous recidivist from the really  
16 mentally ill person. How does the law, as you  
17 interpret it, do that?

18 MS. TREASURE: The law does that by  
19 requiring the State to prove that the individual has  
20 a disease, disorder, or condition - - -

21 JUDGE SMITH: And is that proved by having  
22 a psychiatrist say it?

23 MS. TREASURE: That's evidence of it.

24 JUDGE SMITH: If you can get a psychiatrist  
25 to state that conclusion, is that the end of the ball

1 game?

2 MS. TREASURE: No, not at all. I mean,  
3 it's that the psychiatrist has to have a basis for  
4 their opinion.

5 JUDGE PIGOTT: Well, you have an addition.  
6 I mean, this is care and treatment, and I think it's  
7 reviewable annually, is it not?

8 MS. TREASURE: It is.

9 JUDGE PIGOTT: I mean, this isn't like you  
10 get seven years for being whatever.

11 MS. TREASURE: That is absolutely true,  
12 Your Honor. They get annual review every year. They  
13 can petition for release from confinement at any  
14 time.

15 JUDGE JONES: But as a practical matter, we  
16 know that that's statistically difficult to do?

17 MS. TREASURE: I believe I - - - I hope the  
18 court received my letter correcting my statement.

19 JUDGE PIGOTT: We did.

20 JUDGE JONES: We did.

21 MS. TREASURE: It was - - - it is 38 out of  
22 about 200 people who've been confined who've been  
23 released. But it also - - - again, it goes along  
24 with the type of treatment they have to undergo. It  
25 has to do with the fact that - - -

1 JUDGE SMITH: It's a tough condition to  
2 treat, isn't it?

3 MS. TREASURE: Excuse me?

4 JUDGE SMITH: This is a - - - I don't know  
5 anything about it, but I think being - - - I would  
6 think that your average serial rapist has a condition  
7 that's hard to treat.

8 MS. TREASURE: It can be very difficult to  
9 treat.

10 JUDGE SMITH: If it's very difficult to  
11 treat, that means he stays locked up.

12 MS. TREASURE: If it's very difficult to  
13 treat and he has no progress, and the State can  
14 continue to prove by clear and convincing evidence  
15 that he is dangerous, then he stays in the facility  
16 to receive treatment. That is - - -

17 JUDGE SMITH: What about the preservation  
18 of the reasonable doubt point? Why doesn't People v.  
19 Patterson dispose of that?

20 MS. TREASURE: I think because People v.  
21 Patterson, it is a criminal proceeding. I think the  
22 mode of proceedings here are - - -

23 JUDGE SMITH: But I guess, doesn't that - -  
24 - aren't you starting with a conclusion? Sure, if  
25 this isn't a criminal proceeding, maybe it's not

1 preserved, but if it's not a criminal proceeding,  
2 they're going to lose on the merits. Don't we have  
3 to assume that he has a good argument to decide  
4 whether it's preserved?

5 MS. TREASURE: Well, I think - - -

6 JUDGE SMITH: Or the preservation is  
7 necessary?

8 MS. TREASURE: - - - I think preservation  
9 was necessary in this case. And the thing is, is  
10 this is not the type of case for the court to make an  
11 exception to preservation rules. The court would  
12 benefit from a thorough - - -

13 JUDGE SMITH: We made it in Patterson.

14 MS. TREASURE: In Patterson, it was indeed  
15 made. But here we don't - - - we have not had - - -  
16 in Patterson, there was the issue of the fact that  
17 the Supreme Court, in the interim, while the  
18 individual appeal was pending, handed down a case  
19 that had effectively changed the laws that existed.

20 JUDGE SMITH: But didn't we say in  
21 Patterson that it was a mode of proceedings error  
22 that didn't depend on the intervening Supreme Court  
23 case.

24 MS. TREASURE: That's true. You said there  
25 was a mode of proceedings error. But I do think the

1 fact that the Supreme Court case was handed down in  
2 the interim did have some weigh-in on that as well.

3 Here we have the case law has basically  
4 been settled in federal courts and in some of the  
5 state courts that this is a confinement - - - that  
6 the standard for civil confinement is clear and  
7 convincing evidence. So we don't have any of the  
8 confusion that was evident in Patterson. We also  
9 have the benefit - - - or the policy of this court is  
10 to encourage individuals to bring their  
11 Constitutional claims in the trial court in order so  
12 that the lower courts can have the benefit of  
13 thorough briefing on them and this court can have the  
14 benefit of those decisions. And - - -

15 CHIEF JUDGE LIPPMAN: Okay, counsel.

16 MS. TREASURE: - - - I would urge them to -  
17 - -

18 CHIEF JUDGE LIPPMAN: Thank you.

19 MS. TREASURE: - - - weight those here.  
20 Thank you.

21 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

22 MR. DAVISON: Yes, Your Honor. I'd like to  
23 specifically address Judge Pigott's point about the  
24 annual review process. Annual review does only apply  
25 to someone who's confined. If they're released on

1           SIST conditions, it's every two years.

2                       But - - - and I'm not familiar with the  
3 information that was provided to the court in the  
4 Daniel F. case. But the attorney general's own 2012  
5 annual report says that in the first five years of  
6 Article 10, there were 211 people confined. Only 96  
7 were released on SIST conditions. And that - - -

8                       JUDGE SMITH: And that's 211 plus 96. Not  
9 96 out of the 211, but 96 in addition to the 211?

10                      MR. DAVISON: Yes, 96 in addition, which  
11 goes to this issue of procedural safeguards. If  
12 Article 10 specifically says that the legislature  
13 intended only to confine in the most extreme cases,  
14 the most dangerous people, it's not even a majority.  
15 It's over two to one are being locked up.

16                      JUDGE SMITH: Well, Ms. Treasure says they  
17 did some screening before they picked out those 300.

18                      MR. DAVISON: True. True. But the - - -  
19 what the statute says is if - - - once you're  
20 determined to have the mental abnormality, that's  
21 when you decide whether SIST conditions apply or  
22 whether you're confined.

23                      JUDGE PIGOTT: Do you know what's happened  
24 here? I mean, this - - - I forget when the decision  
25 was made. But I mean, obviously, he should have been



1 up for a couple reviews by now, should he not?

2 MR. DAVISON: I don't know. He's been  
3 contacting another attorney as far as the annual  
4 review process goes. And I don't know what advice  
5 that attorney's given him.

6 JUDGE PIGOTT: Are you entitled to assigned  
7 counsel at that time? I mean, these are civil, so I  
8 just don't know.

9 MR. DAVISON: I believe yes. I believe the  
10 annual review, you are entitled to an attorney. But  
11 what I was going to point out was that in the annual  
12 report it talks about that there have been 293 annual  
13 reviews for confined people, and of those, it says 25  
14 of them were stepped down to release on SIST  
15 conditions. But in all 25 of those cases, the men  
16 were still determined to have a mental abnormality.

17 So it's not like they're getting better.  
18 It's not like there's treatment. It's just that the  
19 State has finally decided, well, you know, maybe  
20 these guys can go out in the community.

21 JUDGE SMITH: You're saying this is a  
22 condition that, as far as you know, has never been  
23 cured?

24 MR. DAVISON: The - - - at least if you  
25 look at the annual report, there's no evidence that

1 it's been cured.

2 JUDGE PIGOTT: I can't remember if - - - I  
3 don't remember anything in the testimony talking  
4 about what the treatment consists of. Is that part  
5 of this whole hearing?

6 MR. DAVISON: I don't believe it was in  
7 this case. My recollection is that Dr. Ewing talked  
8 about how release on SIST conditions could work for  
9 him. And one component of that release on SIST  
10 conditions is sex offender treatment. So if he  
11 violates, he goes into confinement. But if he's  
12 released on SIST conditions, at least as in the  
13 Daniel F. case, you can see that the State is on him  
14 pretty closely to make sure that he does get help.

15 CHIEF JUDGE LIPPMAN: Okay, counsel.

16 MR. DAVISON: Thank you.

17 CHIEF JUDGE LIPPMAN: Thanks, counsel.

18 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of State of New York v. Shannon S., No. 172 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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