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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF STATE OF NEW YORK,

Respondent, Papers Sealed

-against-

No. 106

DENNIS K.,

Appellant.

MATTER OF STATE OF NEW YORK,

Respondent, Papers Sealed

-against-

No. 107

ANTHONY N.,

Appellant.

MATTER OF STATE OF NEW YORK,

Respondent, Papers Sealed

-against-

No. 108

RICHARD TT,

Appellant.

20 Eagle Street
Albany, New York 12207
May 31, 2016

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Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA

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1 CHIEF JUDGE DIFIORE: Next on the calendar
2 is number 106, Matter of the State of New York v.
3 Dennis K.

4 MR. RISELVATO: May it please the court,
5 Timothy Riselvato for Appellant Dennis K. I request
6 two minutes for rebuttal.

7 CHIEF JUDGE DIFIORE: You may have two
8 minutes, sir.

9 MR. RISELVATO: Your Honors, this appeal
10 was taken for several reasons, but first, I'd like to
11 discuss the fact that the disorders that the State's
12 expert actually testified to are insufficient
13 predicates for a finding of mental abnormality. You
14 have paraphilia NOS rape or non-consent, AKA rapism.
15 It's not a sufficient diagnosis because - - - not
16 just because it has no empirical support or
17 reliability, but more importantly, it could be used
18 against virtually every single rapist, and it cannot
19 legally distinguish between a typical recidivist and
20 someone who would be properly subject to Article 10,
21 as required by the U.S. Supreme Court. The State's
22 expert, Dr. Kirschner was very clear in his opinion
23 that if you commit a rape, you're mentally
24 disordered, and if you rape more than once, you have
25 that disorder. He said it was a problem that the DSM

1 doesn't include a diagnosis of rapist, and what he's
2 doing is essentially unconstitutionally conflating
3 the crime itself with a mental disorder which even
4 the statute says you can't do for a finding of mental
5 abnormality. He's taking mere - - -

6 JUDGE RIVERA: But is - - - is it possible
7 for a doctor to determine that someone has a mental
8 disorder that makes it impossible for them to control
9 their sexual urge to rape?

10 MR. RISELVATO: I - - - I would say no, not
11 in this case.

12 JUDGE RIVERA: Ever?

13 MR. RISELVATO: Well, perhaps
14 theoretically, but what we had in this case was
15 testimony that he committed the crimes and therefore,
16 he has this disorder. Now that's not a sufficient
17 basis, even if we were to accept that it could be
18 theoretically possible that this rapism existed, to
19 say it's essentially just based on the crime's
20 typical motivation, such as power and control,
21 pathologizing them and making them a mental disorder
22 to facilitate the civil detention of this individual.

23 JUDGE STEIN: Well, didn't - - - didn't the
24 expert in this case ref - - - also refer to the
25 respondent's fantasies, to his feelings, to his self-

1 description? I mean wasn't it more than just what he
2 did? It was - - - it - - - I mean, as I see it,
3 there's - - - there's three elements of what a mental
4 abnormality is. There's the - - - there's the
5 condition, there's the predisposition to commit acts
6 that - - - that are of a sexual nature, and then
7 there's the - - - the lack of control or - - - or,
8 right?

9 MR. RISELVATO: But - - - well, Your Honor,
10 the - - - the condition would have to be the
11 predisposing factor.

12 JUDGE STEIN: That's right, but that
13 doesn't mean it has to be a sexual abnormality, does
14 it? Couldn't - - - couldn't it be a - - - a
15 condition that, as to this defendant, predisposes him
16 to commit acts of a sexual nature that - - - and
17 because of who he is, he has - - - he lacks the
18 ability to sufficiently control his behavior?

19 MR. RISELVATO: I would disagree,
20 especially with regard to this person. What we have
21 in terms of his statements regarding his fantasies,
22 they're all in relation to the crime in the past
23 tense at that time, and he was discussing things such
24 as his desire for power and control. Now
25 historically, this is viewed as the typical

1 motivation to - - - for anyone to commit a rape. So
2 when we say, ah, well, this person had - - - had that
3 kind of desire to make it a disorder, it doesn't rise
4 to that level.

5 Now the State also failed to meet the - - -
6 the second prong of mental abnormality, which is a
7 serious difficulty controlling sex offending
8 behavior. Now it's no dispute that here we have
9 twenty years without a single incident of sexual
10 misconduct. He completed a State-provided sex
11 offender treatment program to the satisfaction of his
12 providers and two aggression replacement therapy
13 programs. He's abided by an agreement not to view
14 pornography, which he did before, and there's really
15 simply not much more he could have possibly done to
16 show that he is in control of himself.

17 JUDGE GARCIA: But what would our standard
18 for reviewing that be?

19 MR. RISELVATO: That - - - that standard of
20 review was outlaid in - - - by this court in State v.
21 Kenneth T., where it rejected all the bases such as
22 offending shortly after being released and it - - -
23 it explicitly laid it out what's not sufficient. And
24 what we have here, if we compare it to Kenneth T., is
25 someone who is like Kenneth T., but in every respect

1 more cooperative and more well behaved. So on that
2 Kenneth T. baseline, he's clearly insufficient
3 evidence.

4 JUDGE GARCIA: But it has to be as a matter
5 of law this was insufficient - - -

6 MR. RISELVATO: Correct.

7 JUDGE GARCIA: - - - right?

8 MR. RISELVATO: Yes. As a matter of law,
9 and here it is.

10 JUDGE GARCIA: And is your argument - - -
11 and I guess going back to a little bit to what Judge
12 Stein was asking about that this diagnosis itself,
13 stick with the diagnosis, would in all cases preclude
14 a finding of, you know, that he was subject to this
15 type of commitment.

16 MR. RISELVATO: I'd say the diagnosis
17 itself is insufficient as a violation of due process
18 because it is so wide. It's - - - it could take any
19 sex offender who committed a - - - any recidivist
20 offender and say you have this disorder and then
21 justify their continued detention.

22 JUDGE GARCIA: Right, but that's not what
23 they were doing here, right? They were saying you
24 have this disorder, and then this proof that we're
25 discussing now was the points two and three that

1 Judge Stein was discussing. So if, I think everyone
2 would agree, if you said somebody has a disorder, you
3 know, that disorder makes it, you know, as a matter
4 of, you know, science you have a difficulty in
5 controlling or whatever the standard is, that would
6 be bad, right. But here they're not saying that. I
7 mean you're kind of saying that. You're saying this
8 would never allow you to find this. But it seems to
9 me the statute's written to say okay, you find this,
10 and then you need to find steps two and three with
11 respect to this particular person that you have in
12 front of you. So then we're arguing over what was
13 the proof of steps two and three.

14 MR. RISELVATO: Well, first, you'd have to
15 get a sufficient and valid disorder that comports
16 with due process, and I would submit that this one
17 does not because of its wide breadth.

18 JUDGE ABDUS-SALAAM: Well, and isn't this
19 very close to what we said in Shannon S.?

20 MR. RISELVATO: Well, if you look - - -

21 JUDGE ABDUS-SALAAM: And we said that was -
22 - - that qualified as a disorder.

23 MR. RISELVATO: In Shannon S. this court
24 had a specific diagnosis which was hebephilia. It's
25 essentially pedophilia and it screws a - - - skews a

1 bit older. What we have here is this rapism where it
2 can be applied literally to every rapist. It's not a
3 specific diagnos - - - disorder, and it doesn't have
4 that kind of criteria that could uniquely identify
5 someone such as an - - -

6 JUDGE RIVERA: So then - - - so then the
7 condition itself has to have a sexual component to
8 it; is that what you're saying?

9 MR. RISELVATO: Absolutely, and it has to
10 be a sufficient diagnosis.

11 JUDGE RIVERA: Is that what you're saying
12 is the difference between Shannon and the majority
13 and the dissent in Donald DD?

14 MR. RISELVATO: In Shannon - - -

15 JUDGE RIVERA: To me, this other argument
16 sounded like the dissent in Donald DD.

17 MR. RISELVATO: Yeah, essentially, in
18 Shannon S. it was hebephilia.

19 JUDGE RIVERA: Yeah.

20 MR. RISELVATO: It's a different diagnosis,
21 so that diagnosis predisposed that individual to
22 committing crimes against teenagers. Here, we're
23 saying he's predisposed to committing acts of rape,
24 in general. It's - - - it's not as specific. It
25 doesn't have that kind of limitations, as this court

1 in Shannon S. found.

2 But even if we were to assume that that was
3 a valid diagnosis, there was another serious error
4 that would require reversal in this case. When the
5 assistant attorney general, in summation, told the
6 jurors, with respect to the paraphilia NOS non-
7 consent diagnosis reasonable minds can differ, and if
8 you don't want to credit that, what you can do is
9 simply ignore all the expert testimony that was
10 advanced altogether and make up your own diagnosis,
11 and they said call it the Dennis K. disorder. Now
12 civilly confining Dennis K. based on a spontaneously
13 made up disorder, that obviously doesn't comport with
14 due process and because all the evidence offered by
15 the experts was hearsay basis evidence to support the
16 - - - the basis of their opinion, if they ignored all
17 - - -

18 JUDGE ABDUS-SALAAM: Well, are you - - -
19 are you saying that the disorder has to be in the DSM
20 or some other, you know, manual or guideline in order
21 to qualify as a - - - a disorder that would require
22 commitment?

23 MR. RISELVATO: It doesn't have to
24 specifically be in the DSM, but it does have to
25 exist. It has to exist somehow and an expert has to

1 testify to it. What they were encouraging the jurors
2 to do was ignore all the expert testimony and make
3 something up themselves, and they - - -

4 JUDGE STEIN: Yeah, but here wasn't there
5 overwhelming evidence that - - - that there was a
6 proper diagnosis? Whether or not you - - - you think
7 that it's adequate to - - - to result in a finding of
8 mental disability is another thing. But there - - -
9 there's no doubt that - - - that he was diagnosed
10 with paraphilia NOS, right?

11 MR. RISELVATO: Well, there's no doubt that
12 an expert said he had it whether it was a legitimate
13 diagnosis or not. But what happened here was that
14 the attorney general urged the jurors to find it on
15 an alternative basis, and we can't now know what
16 basis they found it on, whether they found it on the
17 basis of the evidence deduced by the experts or
18 whether they ignored it and - - - and made their own
19 determination by connecting the dots as they were
20 told to do.

21 JUDGE GARCIA: But didn't the judge give a
22 proper charge on that?

23 MR. RISELVATO: No. Well, what happened
24 was the judge gave the standard jury charge. Now - -
25 -

1 JUDGE GARCIA: Which would require them to
2 do - - - to follow the statute and make the
3 appropriate findings, right?

4 MR. RISELVATO: Right. But what was not
5 adequately conveyed to the jurors, and what the
6 curative instruction appellant's attorney requested,
7 was that they - - - to tell the jurors they can't
8 reject the State's expert and still find in the
9 State's favor. Because the State has the burden of
10 proof and without that expert opinion, they have
11 simply no evidence. So that was never adequately
12 conveyed to the jurors because they were just told in
13 disparate sections you have to rely on the evidence,
14 you can ignore the experts if you want, and the - - -
15 the definition of hearsay basis. So that's very
16 difficult - - -

17 JUDGE GARCIA: Were they told that these
18 are the instructions you have to follow, just kind of
19 a standard instruction a judge would give when
20 charging the jury?

21 MR. RISELVATO: They got the standard
22 instructions, yes.

23 JUDGE GARCIA: Doesn't that include these
24 are the instructions you have to follow?

25 MR. RISELVATO: Um-hum.

1 JUDGE GARCIA: I mean what the People are
2 saying is - - - what the attorney - - - their - - -
3 it's argument, right?

4 MR. RISELVATO: It's - - - it's really not
5 because it essentially took away the State's burden.
6 It said we don't have to prove a valid scientifically
7 based disorder; you can make one up based on the
8 crimes themselves.

9 JUDGE STEIN: But what Judge Garcia's
10 getting to is the court instructed them otherwise.
11 You - - - you don't follow what the - - - what the
12 prosecutor tells you you do, you follow what I tell
13 you you do, right?

14 MR. RISELVATO: Right, but I - - - I would
15 say the judge, by not giving the curative instruction
16 that was needed specifically saying you can't ignore
17 the evidence and find for the State, that never got
18 conveyed to the jury, and that didn't cure the error
19 of what the attorney general said.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.
21 Counsel.

22 MS. LIN: May it please the court, Karen
23 Lin for the State of New York. The jury here heard
24 overwhelming evidence that Dennis K. is not merely an
25 ordinary criminal recidivist or even an ordinary

1 rapist but instead is driven by a specific and
2 deviant urge to overpower nonconsenting women and
3 rape them. The expert here - - - the State's expert
4 here - - -

5 JUDGE RIVERA: Does Article 10 require that
6 the condition be one that inherently has a sexual
7 component to it?

8 MS. LIN: No, Your - - -

9 JUDGE RIVERA: When you decide whether or
10 not it affects his - - - his - - - it affects the
11 defendant's urges?

12 MS. LIN: No, Your Honor, Article 10 does -
13 - - does not require a disorder that - - -

14 JUDGE RIVERA: Isn't that what the dissent
15 argued in Donald DD and the majority rejected it?

16 MS. LIN: No, Your Honor. I - - - the - -
17 - the dissent in Donald DD was talk - - - Don - - -
18 Donald DD was about ASPD which was about general
19 criminality, and so the issue there was whether just
20 from general criminality and the fact of committing
21 sex offenses together you could - - - you could
22 arrive at a mental abnormality conclusion. But here
23 we actually do have a disorder that has an inherently
24 sexual component. We have paraphilia NOS which is a
25 sexual disorder, and the State's expert clearly

1 testified that Don - - - Dennis - - -

2 JUDGE RIVERA: Is that specifically
3 rejected by the DSM?

4 MS. LIN: No, Your Honor.

5 JUDGE RIVERA: As opposed to not included,
6 just specifically rejected?

7 MS. LIN: No, Your Honor. What - - -
8 there's a debate. There is a psych - - - a debate in
9 the psychological community as to the use of
10 paraphilia NOS, but that's something that was aired
11 in front of the jury and the jury reasonably and
12 rationally credited the State's expert.

13 JUDGE PIGOTT: Well, when you say a debate,
14 who's the debate between?

15 MS. LIN: The debate is between different -
16 - - different psychologists. And I would point out
17 that - - -

18 JUDGE PIGOTT: Should we leave that to a
19 jury?

20 MS. LIN: Yes, Your Honor, as this - - - as
21 this court said in Shannon S., that's something that
22 should be fully aired in the adversarial process and
23 left to the fact finder. And I would point out that
24 here we actually have on the record - - -

25 JUDGE RIVERA: Does that mean that one

1 Article 10 jury could decide on one side of that
2 debate and another Article 10 jury can decide on the
3 other side of the debate?

4 MS. LIN: It might depend on the record
5 that's in front of the jury in each - - -

6 JUDGE RIVERA: Exact same experts, exact
7 same debate.

8 MS. LIN: In the exact same debate, it - -
9 - again, it would probably depend on what is said at
10 the - - - at that trial, but here we have a consensus
11 between the experts. Dennis K.'s - - -

12 JUDGE PIGOTT: Why - - - why did - - -

13 MS. LIN: - - - own expert said - - -

14 JUDGE PIGOTT: What's your opin - - -
15 what's your opinion of that summation? That seemed
16 very troubling to me.

17 MS. LIN: The - - - Dennis K.
18 mischaracterizes what the assistant attorney general
19 said in summation. All that the assistant attorney
20 general said was that the jury should perform its
21 normal jury role, which is to use its own informed
22 judgment to come to it - - - an informed conclusion.
23 And any challenge to those statements - - -

24 JUDGE PIGOTT: But your - - - your - - -

25 MS. LIN: - - - is undeserved.

1 JUDGE PIGOTT: Your opinion is that that
2 was a perfectly finw summation?

3 MS. LIN: It may not have been the clearest
4 in - - -

5 JUDGE PIGOTT: No, no, no. I'm asking you
6 your opinion of it. In other words, you think it's -
7 - - it's fine, that you can say reject the evidence,
8 you make up your own mind, this guy is a bad guy?

9 MS. LIN: That's not the - - - that's not
10 what was conveyed by the assistant attorney general
11 in her summation. She didn't say you can reject all
12 the evidence.

13 JUDGE PIGOTT: So - - - so your opinion is
14 that that's a good - - - that's a - - - that's a
15 perfectly fine summation?

16 MS. LIN: Not - - - it's not the way that
17 Dennis K. mischaracterizes summation. We did not
18 argue that the - - -

19 JUDGE RIVERA: Well, didn't the AAG say you
20 could reject the experts?

21 MS. LIN: The - - - what the AAG said was
22 you don't need to a pysch - - - a psychologist. You
23 should use your own - - -

24 JUDGE PIGOTT: What is - - - what is Dennis
25 K. disease? I had never heard that before.

1 MS. LIN: Well, what she was saying in that
2 - - - that statement was that you don't need a DSM
3 diagnosis. This court said in Kenneth T. that - - -

4 JUDGE PIGOTT: What - - - what is Dennis K.
5 disease? That - - -

6 MS. LIN: Dennis K. disorder is the
7 detailed psychological portrait that this court
8 refers to in Kenneth T. where you have to - - -

9 JUDGE PIGOTT: I'm not sure - - -

10 MS. LIN: - - - look at at a - - -

11 JUDGE PIGOTT: I'm not sure I was around
12 for those. I'm not sure we ever came up with a
13 Dennis K. disease. I - - - you got - - - it was my
14 impression you said there's your - - - there's your
15 sex offender. There's the person that this - - -
16 that this Article 10 is designed for. Put him away.
17 You don't need anything else. Look at him, you know
18 what he did, he goes away. I - - - that's the
19 impression I got in saying that there's - - - there's
20 Dennis K. disorder.

21 MS. LIN: Your Honor - - -

22 JUDGE PIGOTT: And you have to admit she's
23 talking about the respondent, right?

24 MS. LIN: She's talking about the
25 respondent. That's not what she intended to convey.

1 And that's not what the jury came away with because
2 the court gave clear and proper instructions
3 afterwards.

4 JUDGE PIGOTT: I - - - I don't mean to
5 fence with you. I - - - I tend, you know, we - - -
6 we can talk about what the - - - what the judge did.
7 I'm just surprised that you're willing to support
8 that summation because it does seem to me that it's
9 beyond the pale. I - - -

10 MS. LIN: Well, if that's - - - if the
11 reading of that summation is that you can make up
12 whatever you want based on his conduct, that's not
13 something that's - - - that we support. That's not
14 our position. Our position is that that's not what
15 she was conveying, and that was made clear by the
16 judge afterwards in his instructions. And at the end
17 of his instructions, he specifically asked Dennis
18 K.'s counsel do you have any objections to the
19 instructions? Do you have any additions to the
20 instructions? And in both instances, Dennis K.'s
21 counsel responded no, and that's - - - so - - -

22 JUDGE RIVERA: Did he preserve the
23 exception, though?

24 MS. LIN: No. He - - - he did not. First
25 of all, during the summation, almost all of the

1 challenged statements were not objected to, and the -
2 - - the objection at the end of summation, first of
3 all, was cured the only way it could have been, which
4 is through the court's instructions and, again, was
5 only in response to the connect-the-dots statement
6 which is just an accurate statement of what the
7 jury's supposed to do in - - - in fulfilling its
8 role. And here, the thrust of the summation - - -

9 JUDGE RIVERA: It - - - given the
10 statements by the AAG, should the instructions have
11 been more pointed to why the AAG's statements were
12 not a correct articulation of the standard of the
13 law?

14 MS. LIN: No, Your Honor, two - - - for two
15 reasons. First, the court gave the inst - - - the -
16 - - the thrust of the court's instructions was
17 exactly what Dennis K.'s counsel requested. The
18 court said you need to rely on - - - you need to base
19 your - - - your verdict on the evidence, which in
20 this case is testimony, and they did it.

21 JUDGE PIGOTT: So that the - - - so you're
22 saying that the request that the defense made with
23 respect to what they thought was a corrective
24 instruction was, in fact, given?

25 MS. LIN: Yes, Your Honor. And - - - and -

1 - -

2 JUDGE PIGOTT: So they're clearly wrong. I
3 mean they're making an argument here that's clearly
4 wrong.

5 MS. LIN: Yes, Your Honor. That's - - -
6 that's our position. And if you look at the thrust
7 of atto - - - assistant attorney's summation, what
8 she is saying is you should credit Dr. Kirschner, who
9 diagnosed Dennis K. with paraphilia NOS. That was
10 the thrust of her summation, and she went through the
11 reasons why the paraphilia NOS diagnosis was clearly
12 valid here - - - valid and credible here. And those
13 - - - Dr. Kirschner relied on the three factors that
14 are commonly relied on in the psychological community
15 in arriving at his diagnosis. And that - - -

16 JUDGE ABDUS-SALAAM: Counsel, are the
17 instructions on expert testimony in SOMTA case any
18 different than any other case about expert testimony?

19 MS. LIN: I don't believe they are, Your
20 Honor. But again, they're very clear instructions,
21 and they - - - the facts of the matter is that they
22 were clear enough that Dennis K.'s counsel didn't
23 believe that there needed to be any addition or
24 change at the end of the instructions. And again,
25 here the evidence show - - - the evidence

1 overwhelmingly supported the verdict because the jury
2 heard that the - - - Dr. Kirschner diagnosed Dennis
3 K. with paraphilia NOS based on three factors that
4 are commonly relied on in the psychological community
5 which are Dennis K.'s own admissions and - - - and
6 statements about his thinking when he raped; second,
7 his - - - his striking history of committing rapes
8 over the decades; and third, circum - - - his
9 persistence in committing those rapes in
10 circumstances that would otherwise deter an ordinary
11 recidivist.

12 JUDGE RIVERA: How are the last two
13 different from Donald DD?

14 MS. LIN: The - - - the last two are
15 different because, number one, it's not that they're
16 totally irrelevant to the inquiry. We're not just
17 relying on the fact that he committed sex offenses.
18 But here what we have is much more striking than what
19 was in Kenneth T. because we have a much more
20 persistent history of sex offenses. We don't just
21 have two isolated sex offenses. We have five
22 separate rapes over many decades starting when he was
23 very young, and - - - and in addition - - -

24 JUDGE RIVERA: What does Article 10 mean
25 when it says you can't rely on crimes?

1 MS. LIN: It means that you can't rely on
2 crimes just in a - - - in and of themselves. And
3 here what - - -

4 JUDGE RIVERA: What else other than the
5 crime?

6 MS. LIN: We have his admissions that he
7 raped because that - - - because he wanted to
8 overpower and control the nonconsenting women. We
9 have the fact that he - - -

10 JUDGE RIVERA: And how does that - - - how
11 does that establish an - - - a sexual urge you are
12 not able to control as opposed to I desire power over
13 this victim?

14 MS. LIN: So the issue of predisposing you
15 to commit the rapes is it goes to the predis - - -
16 disposition and then the inability to control his
17 urges is manifested in the fact that he was - - - he
18 wasn't able to con - - - control his urges, and
19 regardless of the fact that he had access to non - -
20 - to consenting - - -

21 JUDGE RIVERA: Or he's a criminal who
22 repeats the crimes.

23 MS. LIN: Well, but he did it - - -

24 JUDGE RIVERA: Isn't - - - isn't that the
25 problem?

1 MS. LIN: We had additional details about
2 his psychological thinking here where he committed
3 the crimes even though he had access to numerous
4 consensual relationships. He was on probation at - -
5 - or parole on - - - on each of these rapes. He
6 committed them within the community that he
7 frequented. He had been incarcerated multiple times,
8 one time for twelve years.

9 JUDGE RIVERA: Again, aren't those issues
10 that were raised in prior cases and this court has
11 found that that's not enough?

12 MS. LIN: In addition to those, we - - -
13 again, we have the admissions. We also have the fact
14 that he specifically sought out his victims. This is
15 not the case of Kenneth T. where you had two isolated
16 incidents where it could have been an opportunistic
17 rape, which Dr. Singer (ph.) himself said describes
18 most rapists. Here we know that Dennis K. didn't
19 just wait around for an opportunity to present itself
20 where he could gratify general sex - - - sexual
21 urges. He felt such strong urges to go and find - -
22 - to go rape nonconsenting women that he created
23 these urges. He recruited gang members to help him
24 abduct women off the street and bring them to
25 isolated places where he could hold them and rape

1 them. He created these opportunities and that's - -
2 - that distinguishes him from an ordinary rapist and
3 from the rapist in Kenneth T. We also have the fact
4 that he continu - - - we have evidence that his
5 recent statements show that he still does not
6 understand what he did was wrong. He refused to - -
7 -

8 JUDGE RIVERA: Does - - - does the gang
9 affiliation make any difference with respect to the -
10 - - the purpose, the motivation?

11 MS. LIN: No, Your Honor. Because Kenneth
12 T. (sic) himself told the experts that the rapes
13 weren't something that were required by the gang.
14 What, in fact, was the case was he used the gang to
15 satisfy his own urges. We see that he was leader of
16 these rapes. He was the one that was driving these
17 rapes. So he was using the gang to help fulfill his
18 urge to rape nonconsenting women, to abduct these
19 women off the street and hold them so that they can -
20 - - so that he could rape them. And we see this
21 that, again, it was his urge that was driving these
22 rapes. Because in the incident offense, he com - - -
23 he acted alone. So even once he was no longer part
24 of a gang, he continued to rape. So his paraphilia
25 was persistent through life events starting with

1 adolescence through middle age. This is something
2 that's chronic, and he's not been able to learn how
3 to identify the urges, his progression of urges
4 through sex offenses, as demonstrated by the fact
5 that he continues to deny certain of his offenses.

6 JUDGE RIVERA: Are all serial rapists going
7 to be subject to Article 10 commitment?

8 MS. LIN: No, Your Honor. First - - -

9 JUDGE RIVERA: Well, what - - - what - - -
10 where is the difference?

11 MS. LIN: The diff - - - there are a couple
12 differences. So first, the issue is whether we know
13 that they're being driven to rape because of a
14 specific deviant urge. We don't - - - we - - -
15 that's not always the case. We know that it is here.
16 Second, many rapists will be able to go through sex
17 offender treatment and retain the benefits of
18 treatment and learn how to recognize their urges and
19 stop those urges. Dennis K. has not done that here.
20 We know this because he hasn't even fulfilled the
21 first step of sex offender treatment which is to
22 recognize what you did wrong so that you can identify
23 the progression of your urges to offenses and stop
24 those urges becom - - - before they become offenses.
25 Here, we see that he's denied his urges, and he

1 minimizes his offense. He denies and minimizes the
2 offenses, and therefore, has not made the necessary
3 steps in order to be released safely into community.
4 Unless this court has any other questions, I'll stand
5 on my briefs.

6 CHIEF JUDGE DIFIORE: Thank you.

7 Counsel, the - - - your expert testified
8 below that paraphilia NOS is a valid - - - exists in
9 the DSM. It's a valid diagnosis, I believe he said,
10 for clinical day-to-day practice but not to be used
11 in a forensic setting.

12 MR. RISELVATO: Right.

13 CHIEF JUDGE DIFIORE: So what's the basis
14 of that in - - - in limiting that to one setting or
15 another?

16 MR. RISELVATO: It's a residual category.
17 So it's for - - -

18 CHIEF JUDGE DIFIORE: What does that mean,
19 a residual category?

20 MR. RISELVATO: It's - - - there's eight
21 diag - - - paraphilia diagnoses in the book and then
22 there's a residual category, not otherwise specified,
23 where you can add in other things. Now there are
24 diagnoses like necrophilia, for example, that would
25 be sufficient and form that category. But you can't

1 use anything because the only limits would be the
2 imagination of the diagnostician. So to say that
3 just rapism could be included is incorrect. And to
4 answer your question before, the DSM-5 did
5 specifically reject for inclusion a non-consent
6 diagnosis, and the DSM has rejected it for forty
7 years.

8 JUDGE STEIN: Did anybody request a Frye
9 hearing here?

10 MR. RISELVATO: This - - - unfortunately,
11 no, no Frye hearing was requested here. This was
12 before this court in Kenneth T. recommended Frye
13 hearings. And - - -

14 JUDGE STEIN: And didn't - - - didn't
15 Donald DD say - - - distinguish Shannon S. and say
16 that - - - that paraphilia NOS is, at the very least,
17 potentially relevant to a finding of a
18 predisposition?

19 MR. RISELVATO: Potentially. It didn't
20 explore that, though, because it - - - like here,
21 there was no sign of - - -

22 JUDGE STEIN: Well, that's my point. To -
23 - - to explore it, don't you need a Frye hearing?

24 MR. RISELVATO: There was none here. It
25 has failed two Frye hearings since this brief was

1 written. Also, I'd just like to clear up that the
2 psychologist (sic) did specifically say and quote
3 "You don't need Dr. Kirschner or Dr. Singer", that's
4 on page 1047 of the appendix. It's not true that
5 they were just trying to say you don't need a DSM
6 diagnosis. She repeatedly told them that you don't
7 need any psych - - - psychological expert testimony.

8 JUDGE ABDUS-SALAAM: I - - - I don't know
9 that that's true, counsel, but I'll ask you the same
10 question I asked your adversary. What is the
11 difference in the instruction about expert testimony
12 in this case or in SOMTA cases versus other - - -
13 other cases?

14 MR. RISELVATO: Here the State had a
15 burden, and what it really was, as we requested
16 properly before the jury was charged that preserved
17 it here, that you can't reject the State's expert and
18 still find in the State's favor, and that is the
19 specific - - -

20 JUDGE ABDUS-SALAAM: Well, a plaintiff has
21 a burden in a - - - a regular negligence case, and in
22 medical malpractice cases a big burden because you
23 have to have medical expert testimony, generally.

24 MR. RISELVATO: Right. And I suggest if
25 they had come in and said in a plaintiff's testimony

1 just make something up to find out why he is injured,
2 that would not be sufficient. But perhaps the
3 instructions wouldn't - - - the general instructions
4 wouldn't clarify that in a way that a typical jury
5 could understand.

6 JUDGE RIVERA: Are you saying that absent -
7 - - that the State cannot proceed in these Article 10
8 hearings without an expert?

9 MR. RISELVATO: Absolutely.

10 JUDGE RIVERA: There is no - - - no way to
11 persuade the jury of the mental abnormality within
12 the meaning of the statute without expert testimony?

13 MR. RISELVATO: That's come up in case.
14 You could look at State v. Davis from Queens County.
15 They dismissed the petition when the State didn't
16 present an expert. Look at the Supreme Court in
17 Addington v. Texas where they said issues of mental
18 illness and confinement require an expert.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.
20 Thank you.

21 Number 107, Matter of the State of New York
22 v. Anthony N.

23 MR. DAVISON: Good afternoon, Your Honors.

24 CHIEF JUDGE DIFIORE: Good afternoon.

25 MR. DAVISON: Mark Davison for Anthony N.

1 I'd like to reserve two minutes for rebuttal, please.

2 CHIEF JUDGE DIFIORE: Of course.

3 MR. DAVISON: Picking up on the discussion
4 in the last case, the difference here is that with
5 Anthony N. we don't have a Kenneth TT case - - - or a
6 Kenneth T. case, we have a Donald DD case because the
7 only diagnosis for Anthony N. was borderline
8 personality disorder. And now it's - - - it's not
9 exactly the same as antisocial personality disorder
10 from the Donald DD case, but the difference here is
11 that there was no sexual diagnosis. There's no
12 paraphilia.

13 JUDGE RIVERA: But doesn't BPD work on
14 impulse and thus sexual urges?

15 MR. DAVISON: It - - -

16 JUDGE RIVERA: Which is different from sort
17 of the general category of ASPD and general
18 criminality?

19 MR. DAVISON: It - - - it - - - there is an
20 element of - - - of impulsiveness and mood swings in
21 - - - in borderline personality disorder. But the -
22 - - the main component is this overwhelming fear of
23 abandonment that - - - that the result is that the
24 person - - - it doesn't drive the person to commit
25 sexual offenses; it drives the person to either

1 restore the relationship or, in this case, possibly
2 end the relationship.

3 JUDGE STEIN: Well, it doesn't necessarily
4 drive a person, but the expert testimony here said it
5 drove this person to - - -

6 MR. DAVISON: Um-hum.

7 JUDGE STEIN: - - - to commit sexual
8 offenses.

9 MR. DAVISON: The - - - the difference is
10 that the - - - you had the test - - - all of the
11 experts in this case said that a diagnosis of
12 borderline personality disorder is not, by itself, a
13 mental abnormality. Dr. Lord (ph.) for the State
14 said that specifically at page 580 of the record.
15 Dr. Thomassen for the State testified that he had
16 trouble finding a mental abnormality because
17 borderline personality disorder is not a - - - is not
18 typically found. It's - - - it - - -

19 JUDGE GARCIA: But didn't Dr. Lord also
20 find he had other things, other issues, ASPD also?

21 MR. DAVISON: He found ASPD and he found
22 alcohol abuse. But the ASPD is not sufficient
23 because of - - -

24 JUDGE STEIN: Not alone.

25 JUDGE GARCIA: That alone.

1 JUDGE STEIN: There could be a combination.

2 MR. DAVISON: And - - - correct. And the
3 alcohol abuse, I submit, is - - - is also not a
4 sexual disorder. The - - - it's not - - -

5 JUDGE STEIN: Well, where - - - where in
6 the statute does it say that it has to be a sexual
7 disorder? It says disorder and then it says that
8 disorder has to predispo - - - predispose someone to
9 commit sexual crimes. So if this disorder, BPD in
10 this case, predisposes this defendant to commit
11 sexual offenses and this defendant is unable to
12 adequately control those urges - - -

13 MR. DAVISON: Um-hum.

14 JUDGE STEIN: - - - why isn't it a mental
15 abnormality?

16 MR. DAVISON: For the same reasons that it
17 wasn't for Donald DD. The - - - the experts in
18 Donald DD tried to do the same thing. They tried to
19 apply that to Donald DD specifically and said not
20 only did it establish predisposition for him, but it
21 also established inability to control and - - -

22 JUDGE STEIN: That's what they argued. But
23 my reading of Donald DD is that the court said they
24 didn't successfully establish those two elements of
25 the - - -

1 MR. DAVISON: They - - -

2 JUDGE STEIN: - - - of the definition in
3 Donald DD and that's why it was no good.

4 MR. DAVISON: I think - - - I think the - -
5 - my reading was that - - - and I stand corrected, I
6 may stand corrected, that with Kenneth TT, the - - -
7 or Kenneth T., the court got to the second element of
8 - - - of serious difficulty in controlling, and
9 concluded, with respect to him, that the diagnosis of
10 paraphilia NOS, it did not establish that element.

11 Then the court went to Donald DD's case, in
12 particular, and said we don't get to the second
13 element because ASPD, by definition, does not
14 establish the first element, the predisposition. And
15 - - - and what I think this record says is that
16 borderline personality disorder does not establish
17 that disposition either, that predisposition either.

18 JUDGE GARCIA: But wouldn't - - - if we
19 were going by this rule that you're saying Donald DD
20 says, wouldn't it be that any time you diagnosis this
21 person with X, then you're already finding they have
22 this predisposition and it would be exactly the
23 opposite kind of individualized determination that
24 the Supreme Court in Article 10 is trying to get at.
25 Whereas, I think as Judge Stein is saying, if you

1 have a diagnosis of a mental abnormality, then the
2 individualized determination is does that or does it
3 not lead you to this predisposition. So it - - - it
4 seems like we're always arguing is there too much of
5 a sexual component in the diagnosis, is there not
6 enough of a sexual - - - why isn't it you get the
7 mental abnormality and then you make an indiv - - -
8 individualized determination as the Supreme Court has
9 told us you have to do?

10 MR. DAVISON: The - - - I think the - - -
11 you had that problem in Donald DD. I think there was
12 testimony that something like seven percent of people
13 in prison diagnosed with ASPD were sex offenders. So
14 - - - so clearly, it was possible to draw that link.
15 But - - - but what the court did was say that because
16 ASPD is so common in the - - - in the prison system,
17 we're going to require more. We're going to require
18 a specific sexual diagnosis, not - - - not this - - -

19 JUDGE GARCIA: But isn't that then most
20 rapists suffer from ASPD so it's not any good, and
21 you're saying now borderline personality disorder
22 isn't something that rapists generally suffer from so
23 it's not any good either?

24 MR. DAVISON: That's correct. And - - -
25 and something like twenty-five to fifty percent of -

1 - - of people in prison, under this federal study
2 that I cited, suffer from borderline personality
3 disorder. So what - - - so what I'm saying is that
4 you have to have something more than that if you're
5 going to - - - to civilly commit them for the rest of
6 their life.

7 JUDGE GARCIA: You have to show that that
8 creates a predisposition to commit sexual offenses -
9 - -

10 MR. DAVISON: The - - -

11 JUDGE GARCIA: - - - that they have
12 difficulty controlling?

13 MR. DAVISON: I - - - I think in this case,
14 as in Donald DD, this particular offense, you - - -
15 you don't get past the predisposition case or issue
16 because the - - - the diagnosis by definition does
17 not establish the predisposition.

18 JUDGE RIVERA: Is - - - isn't the problem
19 with - - - with this discussion and this back and
20 forth is - - - well, there's two problems. One is
21 that the dissent chided the majority in Donald DD for
22 not doing the type of individualized assessment, so
23 sort of you've got to look at Donald DD within that
24 context. But the other issue is how would you make
25 this determination if there's not something sexual in

1 the condition other than the prior crimes and there's
2 the problem. Article 10 says you cannot rely on the
3 prior crimes. Now, of course, if the individual has
4 made statements or done something else or said
5 something else that maybe there's something that a
6 doctor could rely on and the jury could draw on. But
7 I'm - - - and I'll ask this to - - - to your
8 adversary, what - - - what is it that in Article 10
9 that would allow someone to be an expert who's not
10 looking at prior crimes and make this determination
11 based on a condition that doesn't have a sexual
12 component to it?

13 MR. DAVISON: That's exactly my point.
14 That - - - that - - -

15 JUDGE GARCIA: Well, you can't ever look at
16 the facts and circumstances of the prior crimes.

17 MR. DAVISON: The - - - you can't - - - I
18 think you have to look at that in - - - in developing
19 the diagnosis, but the question is when you - - -
20 when you then come up with a diagnosis, does it have
21 to have the sexual component. And - - - and I think
22 that's what differentiates this case from Kenneth T.
23 and makes it a Donald DD case. You had the doctors
24 looking at all the crimes, which they - - - they
25 properly did, but they didn't conclude that he had a

1 paraphilia. They didn't conclude - - - they didn't
2 conclude that he had a sexual disorder. They said he
3 was borderline.

4 JUDGE GARCIA: Again, we're restricting the
5 abnormalities - - - we're going through each
6 abnormality and this court will then decide does that
7 have a sexual component of it rather than a jury
8 deciding does that predispose you to commit these
9 acts and whatever the standard is.

10 MR. DAVISON: I - - -

11 JUDGE GARCIA: So the court will then parse
12 the DSM?

13 MR. DAVISON: I - - - I don't think the
14 court has to do that. I think the court can look at
15 the record. The - - - I think if you look at Dr.
16 Schlosser's testimony, in - - - in particular at page
17 685, he says in his practice, the diagnosis of BPD
18 has never been a basis for predisposition to sexually
19 offend.

20 JUDGE GARCIA: The jury heard that.

21 MR. DAVISON: That's - - - pardon?

22 JUDGE GARCIA: They - - - they heard that.

23 MR. DAVISON: They - - -

24 JUDGE GARCIA: That was aired out in court.

25 JUDGE STEIN: And there - - - and there was

1 expert testimony that BPD can be associated with
2 strong sexual urges, that this respondent can't let
3 go of a relationship and will be desperate to restore
4 it, and that that along with his emotional
5 instability and anger leads him to assault and rom -
6 - - and rape romantic partners and so on and so
7 forth. Why doesn't that meet the - - - the Donald DD
8 requirement that the diagnosis be at least
9 potentially relevant to a finding of predisposition
10 to conduct - - - to conduct constituting a sex
11 offense?

12 MR. DAVISON: Because the - - - the
13 diagnosis that the court was talking about in - - -
14 in Donald DD, to my understanding, was the paraphilia
15 NOS diagnosis, not the ASPD. They were - - - what
16 the court was saying, I - - - I thought - - -

17 JUDGE STEIN: But it - - - it didn't
18 overrule Shannon.

19 MR. DAVISON: And I was the attorney on
20 Shannon S., and - - - and my - - - that's my
21 understanding. That's the reason that I understand
22 that the court distinguished the two was because in -
23 - - the court found in Shannon S. that there was this
24 diagnosis of paraphilia NOS and hebephilia and that
25 that diagnosis, the court said in Donald DD, was

1 potentially relevant in Kenneth T.'s case to - - - to
2 a diagnosis of - - - to a mental abnormality
3 determination on the issue of inability to control.
4 But I don't think that the court did - - - said the
5 same thing in Donald DD with respect to Donald DD
6 himself. I don't think they got to that issue.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 MR. HITSOUS: Good afternoon, Your Honors;
9 Jonathan Hitsous for the State.

10 CHIEF JUDGE DIFIORE: Mr. Hitsous, I have a
11 question for you. What was - - - let's look at the
12 upfront portion of these proceedings. What was the
13 non-hearsay evidence that demonstrated that this
14 burglary that Anthony N. was convicted of was a
15 sexually motivated crime?

16 MR. HITSOUS: Well, this evidence is all
17 hear - - - it's opinion basis testimony, Your Honor,
18 and it's permissible opinion basis testimony. This
19 balance is the concern about re-litigating - - - re-
20 litigating the facts of the crime. Here, the expert
21 is testifying about what happened over a crime of
22 conviction, and this is something that Article 10
23 actually requires for the sexual motivation analysis.
24 So the testimony is not only reliable but it's also
25 more probative than prejudicial because it

1 necessarily has to come in.

2 CHIEF JUDGE DIFIORE: So you believe that
3 the - - - you're arguing to us that the non - - -
4 that the hearsay testimony was sufficient to
5 establish the sexual motivation; is that what you're
6 suggesting?

7 MR. HITSOUS: I'm suggesting, Your Honor,
8 that the opinion of the experts that this crime was
9 sexually motivated was sufficient and that it was
10 permissible for the jury to hear it because that's
11 necessarily, aside from calling the victims
12 themselves, which is frowned up, that's the only way
13 for the jury to understand whether or not the - - -
14 the offense was sexually motivated. Also - - -

15 CHIEF JUDGE DIFIORE: Was the grand jury
16 testimony of this victim available to you?

17 MR. HITSOUS: No, Your Honor.

18 CHIEF JUDGE DIFIORE: No?

19 MR. HITSOUS: But the experts testified
20 about the grand jury testimony. And I will also note
21 that there was no discussion of grand jury testimony
22 here as it related to the 2003 burglary that formed
23 the basis of the predicate offense. The experts
24 testified about what they knew as far as the offense
25 occurred and its consistency with Anthony N.'s prior

1 behavior.

2 JUDGE PIGOTT: Could they have made the
3 opinion that he was - - - his intent was to murder?

4 MR. HITSOUS: That was a possibility, Your
5 Honor. Anthony N. testified - - - or - - - or spoke
6 to Dr. Schlosser and said that his intent was - - -
7 was to kill, but the facts of the offense show
8 otherwise. He explicitly says to the victim at the
9 time that he breaks into the house that he's going to
10 have sex with her, and then he takes steps in
11 furtherance of that. He drags her up the steps, put
12 her on a bed - - -

13 JUDGE PIGOTT: So you - - - so your expert
14 can make the determination it was not to murder? I
15 have - - - my expert opinion is that this was not an
16 attempted murder, it - - - rather, it was a sexual
17 assault?

18 MR. HITSOUS: That's correct, Your Honor.
19 These entire proceedings are all about establishing
20 what this court refers to as a detailed psychological
21 portrait. So both for abnormality and for sexual
22 motivation, we're looking at what is motivating and
23 what is driving this particular respondent. So
24 having an expert testify that the circumstances of a
25 particular offense are consistent with a disorder

1 that he suffers - - -

2 JUDGE PIGOTT: So when he broke into the
3 house, hit her with a hammer, threatened to kill her,
4 and then said I'm going to kill myself, all of that
5 was sexually - - - was, what, a sexual motivation?

6 MR. HITSOUS: That's correct, Your Honor.

7 JUDGE PIGOTT: Oh.

8 MR. HITSOUS: The standard for such a
9 motivation is that sexual gratification plays a
10 substantial part in this.

11 JUDGE PIGOTT: Well, why is he going to
12 kill himself? Who is going to have the sex? I don't
13 mean to be crude about this but, I mean, I'm
14 wondering how you get to - - - you know.

15 MR. HITSOUS: I understand, Your Honor.
16 And what we have here is that, well, he didn't kill
17 himself. The actions that he took were actions that
18 seemed to be in furtherance of rape. He's making the
19 victim undress. What I think is also important to
20 realize here is that the experts are testifying that
21 he has borderline personality disorder. And the
22 experts have given the opinion that in Anthony N.'s
23 case, restoring a relationship or reestablishing a
24 relationship is sexual as he experiences it. So if
25 he's going over there to try and rekindle a

1 relationship, to Anthony N. that means having sex.

2 He - - -

3 JUDGE RIVERA: Okay, but - - - but is that
4 based solely on the past crimes?

5 MR. HITSOUS: No, Your Honor. That - - -

6 JUDGE RIVERA: That conclusion that that's
7 driven by a sexual urge as opposed to I want to be
8 with this person, putting aside the sexual nature of
9 it?

10 MR. HITSOUS: Not on this record, Your
11 Honor, because Anthony N. is only diffused after the
12 victim tells him that - - - that she's going to get
13 back together with him and that when they get back
14 together, they're going to have sex all night long.
15 Now his history is also relevant to the question of
16 sexual motivation, and the experts testified to this
17 as well. They opined that this is consistent with
18 his behavior in past relationships whereby the
19 relationships are filled with tumult and he will
20 vanish for a time.

21 JUDGE RIVERA: That's what I'm saying. How
22 - - - how is it - - - considering Article 10's
23 prohibition on basing this - - - this - - -
24 determination of mental abnormality on - - - on the
25 prior crimes, how - - - and as a genuine question,

1 how is an expert able to - - - to go through this
2 exercise and give this testimony without looking
3 back? How are they not saying this is my conclusion
4 based on looking back? If Article 10 is telling you
5 not to do that or - - - or maybe there's a way you
6 want to recommend how we can harmonize or explain
7 that language in Article 10.

8 MR. HITSOUS: Your Honor, 10.07[d], which
9 is the - - - the prohibition on that, is best
10 understood as a prohibition on - - - of the jury
11 relying on the fact that the crimes occurred. But
12 certainly, the facts underscoring the crimes
13 themselves would certainly be relevant. So the - - -
14 the mere fact that Anthony N. might be sexually
15 assaulting a spouse wouldn't be relevant in a vacuum,
16 but the fact that he's saying during the offense I
17 have to have you would be relevant to a diagnosis of
18 borderline personality disorder or it could be
19 relevant to sexual motivation. The fact that he
20 vanishes for a time and comes back and demands sex
21 and that sometimes - - -

22 JUDGE RIVERA: Well, then how is he
23 distinguished from other batterers because that
24 sounds like the cycle of a batterer?

25 MR. HITSOUS: That - - -

1 JUDGE RIVERA: Is every batterer then
2 subject to Article 10 confinement?

3 MR. HITSOUS: Absolutely not, Your Honor.
4 Not every batterer is committing a battery in a
5 frantic effort to avoid perceived rejection. Not
6 every batterer has borderline personality disorder,
7 and not every batterer could have their actions
8 explained through that lens. Here what we have is
9 expert testimony establishing exactly how it is that
10 borderline personality disorder manifests in the form
11 of sexual misbehavior, and they're doing it relying
12 on more than the mere fact that sex crimes have
13 occurred. They're tying it to the established traits
14 of borderline personality disorder.

15 For instance, it's common that sufferers of
16 borderline personality disorder tend to idealize and
17 devalue objects of their affection. They also tend
18 to have profound fears of being rejected by these
19 objects of affection and try to - - - to minimize
20 these fears by establishing connections. In the case
21 of Anthony N. - - -

22 JUDGE RIVERA: Does the law require a
23 sexual connection?

24 MR. HITSOUS: In the case of Anthony N., he
25 connects with people by engaging in sexual activity.

1 JUDGE RIVERA: And how is that analysis or
2 conclusion by the expert different from what the
3 dissent posited in Donald DD - - -

4 MR. HITSOUS: Be - - -

5 JUDGE RIVERA: - - - which was rejected by
6 the majority?

7 MR. HITSOUS: Because in Donald DD, this
8 court notes when they're discussing the testimony,
9 that the expert there couldn't explain the - - - the
10 commission of sex offenses other than the fact that
11 the crimes occurred. This appears, I believe, on
12 page 193 of the record. They quote the testimony and
13 they're asked how does this predispose him, and the
14 expert says because he commits sex offenses.

15 Here, on the other hand, the experts are
16 fitting his behavior through the lens of the - - - of
17 the traits of borderline personality disorder. And
18 his - - - it's important to note, also, that
19 borderline personality disorder is not just a
20 manifestation of his sex offenses, it's a
21 manifestation of all of his sexual conduct. Due to
22 his need - - - his desperate need, as the experts
23 testified, to establish a sexual connection, in the
24 best of times, he is constantly seeking sex from his
25 partners to validate that connection. In the worst

1 of times, that's when he sexually reoffends. In the
2 worst of times, he fears that he's losing this
3 connection and he then demands sex, and whether or
4 not the partner wants sex, he's going to give it to
5 them.

6 That is what distinguishes Anthony N. from
7 the typical recidivist. The typical recidivist
8 doesn't look at having sex with a person as a way to
9 have them on a deeper level. He doesn't have a
10 compelling need to satisfy this need time and again,
11 and he doesn't consider having sex with a victim to
12 be calming to him and make him feel complete, which
13 is what Dr. Thomassen testified to, even when a
14 victim is protesting or physically fighting him off,
15 which has happened in this case. Dr. Thomassen notes
16 that the exp - - - that Anthony N.'s victims had
17 fought him off but that sex to Anthony N. gives him a
18 sense of - - - of calmness alleviating his fear of
19 abandonment. And in so doing - - -

20 JUDGE RIVERA: Let's say - - - let's say
21 you have someone who has a - - - the expert says has
22 a disease that doesn't have a sexual component to it
23 but, as you say, manifests itself in a particular
24 way, right. That drives the compulsion and they
25 cannot control their sexual urges. Given the goal of

1 Article 10, that is the only constitutional goal of
2 Article 10, is to get that person into treatment
3 whether it's confinement or assist, let's talk about
4 confinement. What would be the nature of the
5 treatment given that the condition itself has no
6 sexual component to it? How are you going to address
7 that as - - - as someone who is a sexual offender and
8 needs treatment based on these sexual urges?

9 MR. HITSOUS: Well, they would - - -

10 JUDGE RIVERA: The underlying condition has
11 no sexual component to it.

12 MR. HITSOUS: Even though an underlying
13 condition might not have a sexual component, Your
14 Honor, it could be still - - - it could still be
15 treatable as a mental health condition, and the
16 mental health community would treat a condition like
17 borderline personality disorder as borderline
18 personality disorder while keeping in mind that in
19 this case it manifests in the form of sexual
20 misconduct. And it could conceivably manifest among
21 other things, but they would be looking at it from
22 the perspective of sexual misconduct.

23 If - - - if I could briefly note, one of
24 the vehicles which this court identified in Donald DD
25 to distinguish a - - - an Article 10 respondent from

1 the typical rapist was to create this detailed
2 psychological portrait. And the detailed
3 psychological portrait asks courts and fact finders
4 to look at why it is that a respondent is committing
5 sex offenses. Under the theory that Anthony N.
6 articulates, which would require only a sexual
7 disorder, that would reduce the detailed
8 psychological portrait to instead of looking at why,
9 to simply be looking at whether a respondent could
10 have a formulaic category of disorder by - - - by
11 diagnostic criteria. And that under - - - that's not
12 something that either Article 10 or the Constitution
13 requires. That's not something that Donald DD
14 requires. Whereas here, the experts can explain how
15 it is that a disorder manifests in sexual
16 misbehavior. The next question is whether they did
17 under the standard of clear and convincing evidence.
18 And if the case rises and falls on its record, that's
19 one thing. But it wouldn't exclude the disorder
20 categorically as ASPD was in Donald DD.

21 CHIEF JUDGE DIFIORE: Thank you.

22 MR. HITSOUS: Thank you.

23 CHIEF JUDGE DIFIORE: Counsel.

24 MR. DAVISON: With respect to the - - - the
25 issue of a sexually motivated felony, which I - - - I

1 didn't get to in my argument, I think that that
2 particularly highlights what happened here with - - -
3 with Anthony N. His - - - his motivation was to
4 restore the relationship. He goes over to - - -

5 JUDGE ABDUS-SALAAM: That was one of his
6 motivations, according to even his own expert. It
7 wasn't his only motivation in the - - - and I - - - I
8 believe his expert didn't rule out that there would
9 have been or could have been a sexual component to
10 it.

11 MR. DAVISON: It - - - but the - - - but
12 look at what happened in - - - in this particular
13 instance. He goes over and he waves a hammer around
14 at her, they go upstairs, they - - - they end up
15 naked in bed together and they spend two hours
16 talking to each other during which time she - - - she
17 says that she told him, you know, we'll have sex all
18 night long, but he didn't touch her during that
19 entire time. He - - - it's not - - - it wasn't a
20 situation where he was going over to - - - to make
21 himself feel better the only way he could by having
22 sex with her because he didn't. He - - - he's trying
23 to restore the relationship, and - - - and that's - -
24 - it's - - -

25 JUDGE RIVERA: Didn't he react just because

1 the son - - - the child came home?

2 MR. DAVISON: The - - - that's what they
3 say is that - - - that the - - - it was two hours
4 later when the son came home that - - - that they,
5 you know - - - that the episode ended and then she
6 leaves and calls the police. But the - - - the point
7 I'm trying to make is that there - - - there wasn't
8 this - - - it wasn't a case of a sexual urge. It
9 wasn't - - - it was - - - Dr. Lord's conclusion was
10 based on the ex-wife's statement that it must have
11 been an attempted rape because he didn't take
12 anything. It couldn't have been a burglary. Well,
13 you don't have to have a taking to be a burglary - -
14 - for a burglary. You have to have - - - you have to
15 enter with or remain with the purpose of committing a
16 crime. And - - -

17 JUDGE ABDUS-SALAAM: Sorry, counsel. So he
18 needed to drag her upstairs to the bedroom and throw
19 her on the bed and threaten sex to restore the
20 relationship? I don't get that. I get the coming
21 with the hammer and waving it around, but he could
22 have tried to restore the relationship on the couch
23 in the living room. Why did it have to be in the bed
24 upstairs?

25 MR. DAVISON: The - - - he disputes in the

1 record the account of - - - of dragging her upstairs.
2 But the - - - it seems clear that they did end
3 upstairs in - - - in bed together. And - - - and
4 what happened was they - - - they talked about their
5 relationship, and she - - - she placated him by
6 saying they would have sex all night long. But that
7 - - - that's the point, I think, of the - - - of the
8 borderline aspect of it is that he's trying to
9 restore the relationship. It may be a strange way of
10 doing so.

11 JUDGE RIVERA: But the People argue he's
12 not like other batterers. He's in a category on his
13 own or perhaps with another group of batterers, but
14 he's not sort of - - -

15 MR. DAVISON: That - - -

16 JUDGE RIVERA: - - - batterers overall.

17 MR. DAVISON: It - - - one of the - - - one
18 of the nine factors that is - - - is used to
19 diagnosis borderline is - - - is suicidal tendencies,
20 and that fits in perfectly with - - - with when he
21 said, you know, kill me. He - - - he realized, you
22 know, where he was and - - - and he couldn't live
23 with himself. It's - - - you know, that's - - - the
24 statistics on - - - on suicides with borderlines are
25 - - - are outrageous. It's - - - it's a terrible

1 risk and - - - and I submit that the - - - the
2 disorder itself, by definition, is much more likely
3 to result in a suicide than it is in a - - - in a
4 sexual offense.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 Number 108, Matter of the State of New York
7 v. Richard TT.

8 Counsel.

9 MR. STOCKWELL: May it please the court, I
10 am Shannon Stockwell on behalf of Richard TT. I'd
11 like to reserve two minutes rebuttal time, please.

12 CHIEF JUDGE DIFIORE: Yes, sir.

13 MR. STOCKWELL: I'd like to - - - at the
14 outset, I'd like to remind the court that this - - -
15 the procedural stance of this case is somewhat
16 different from the others in that it's a appeal from
17 a post-judgment 5015 motion. That being the case,
18 the issue before the court is whether there's an
19 abuse of discretion by the nisi prius court
20 warranting reversal by the Appellate Division. Under
21 the circumstances of this case and this record, I
22 would submit that, clearly, there was - - - there was
23 no abuse of discretion. This court should reverse
24 the Appellate Division and restore Richard TT to his
25 liberty.

1 JUDGE ABDUS-SALAAM: Is that the - - - is
2 the abuse of discretion, is that the only issue that
3 we're to review here, nothing else? Is that what
4 your argument is that we only need to decide whether
5 there should be a vacatur or not?

6 MR. STOCKWELL: Yes, Your Honor. The case
7 is Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62.
8 This court specifically held that the abuse of
9 discretion standard applies in an appeal following a
10 post-judgment motion to vacate under CPLR 5015. So
11 under the circumstance of Mr. Richard TT's case,
12 there's no - - - no sexual disorder. The State's
13 proof of mental abnormality is legally insufficient,
14 in any event, setting aside the issue of whether it
15 needs to be a categorically sexual disorder.

16 Neither of the experts in this case
17 described - - - their description of borderline
18 personality dis - - - disorder didn't include an
19 association with a predisposition to commit sexual
20 offenses or serious difficulty in controlling sex-
21 offending conduct. Both experts testified that ASPD
22 and borderline personality disorder are similar
23 disorders, and the Supreme Court found considerable
24 overlap in symptoms between ASPD and borderline
25 personality disorder. Dr. Schlosser specifically

1 testified that, "There is no research in the field at
2 this time that links borderline personality disorder
3 in any way, shape, or form with sexually offending
4 behaviors."

5 So I would submit that the State's proof
6 that Richard TT has a predisposition to commit sex
7 offenses and also has serious difficulty controlling
8 such conduct would be legally sufficient, set - - -
9 setting aside the issue of whether there needs to be
10 a sexual disorder which in - - - in this case there
11 clearly was not. The disorder is ASPD, borderline
12 personality disorder, and Judge Krogmann also found
13 that Richard TT suffers from - - - or exhibits traits
14 of psychopathy. There's a split amongst the two
15 doctors as to whether psychopathy even exists in this
16 case.

17 JUDGE STEIN: Did - - - did Judge Krogmann
18 actually exercise his discretion, or did he just
19 assume that he was bound by Donald DD - - -

20 MR. STOCKWELL: Well - - -

21 JUDGE STEIN: - - - and that it applied
22 here?

23 MR. STOCKWELL: Well, he was bound by
24 Donald DD.

25 JUDGE STEIN: As a legal - - - as a legal

1 matter.

2 MR. STOCKWELL: He - - - Judge - - - Judge
3 Krogmann, his - - - his decision, I believe, it
4 reflects that it was - - - he was exercising his in -
5 - - inherent discretion to vacate his own order in a
6 5015 motion. And he was bound by Donald DD. This -
7 - - this case - - - and this court held that in
8 Donald DD that ASPD is - - - is not enough. You take
9 out - - - ASPD out of the picture, look at what
10 remains, borderline personality disorder. In this
11 case, this record, no connection between borderline
12 personality disorder and a predisposition to commit
13 sex offenses. And - - -

14 JUDGE GARCIA: But why do you have to take
15 it out of the record? Why can't you use it in
16 combination?

17 MR. STOCKWELL: Well, the reason why you
18 don't want to do that, Your Honor, is because if you
19 look at the whole, as - - - as Judge Devine did in
20 the majority of the Appellate Division, there's
21 enormous opportunity for false positives where ASPD
22 or an underlying criminal disposition is causing the
23 sex offending behavior. You - - - you have to take
24 out ASPD or else it's an end run around on Donald - -
25 - Donald DD.

1 In addition to that, due process requires
2 it. If you look at the Judge - - - Justice Kennedy's
3 concurring opinion in Kansas v. Hendricks, he - - -
4 he warned about this particular sort of thing,
5 substituting civil process for criminal in - - - as a
6 means of locking up dangerously dangerous criminals.

7 JUDGE GARCIA: But the process itself,
8 which is modeled on those decisions from the Supreme
9 Court, is constitutional. I mean you're not arguing
10 Article 10 is unconstitutional, right?

11 MR. STOCKWELL: Not today.

12 JUDGE GARCIA: So if we have a
13 constitutional apparatus which is adopted right from
14 the Supreme Court, despite Justice Kennedy's, I'm
15 sure, insightful concurrence, what is the due process
16 violation?

17 MR. STOCKWELL: Well, the - - - this court
18 decided Donald DD on substantive due process grounds.

19 JUDGE GARCIA: But Donald DD, which we hear
20 a lot about today, is on one diagnosis and that that
21 standing alone cannot support this finding. But you
22 don't have that here. So I guess going back to Judge
23 Stein's question, it clearly seems that trial judge
24 here reversed his ruling based on Donald DD as a
25 matter of law saying I thought this was this way

1 before, now they've decided Don - - - Donald DD, as
2 you say, I'm bound by that. But isn't that a
3 question of law for us whether or not Donald DD is
4 controlling?

5 MR. STOCKWELL: Back to my - - - my first
6 thing I said before this court today was that the - -
7 - the abuse of discretion standard applies here
8 today. This court could disagree - - -

9 JUDGE GARCIA: But if the judge had said,
10 as a matter of discretion, I've seen Donald DD, I
11 think that's a great argument, you know, great line
12 of reasoning, I'm going to apply it here in my
13 discretion, and then you'd have an abuse of
14 discretion standard. But he's saying I'm bound by
15 that.

16 MR. STOCKWELL: I - - - I fail to see the -
17 - - the distinction. Judge Krogmann was bound by
18 Donald DD. This court held that ASPD is not enough.
19 You have to look at - - -

20 JUDGE GARCIA: But what if we found - - -

21 JUDGE RIVERA: No, no. But isn't - - -
22 isn't the point whether or not the judge is correct
23 in his interpretation of Donald DD and that's the
24 question for the court?

25 MR. STOCKWELL: Well, abuse of discretion -

1 - -

2 JUDGE RIVERA: I'm bound by Donald DD
3 because I interpret it this way and this is the
4 consequences - - -

5 MR. STOCKWELL: Okay.

6 JUDGE RIVERA: - - - of my understanding of
7 Donald DD. And if the judge is wrong, isn't that
8 we're here to address?

9 MR. STOCKWELL: Judge Krogmann's
10 interpretation of Donald DD was entirely reasonable.
11 He - - - he saw a language in there saying that there
12 had to be a necessary relationship between the
13 disorder and sex-offending conduct. He - - - he
14 apparently concluded that he - - - he could take ASPD
15 out of the picture, look at what remains, and this -
16 - - on this record, there's - - - there's nothing
17 there. There's no connection between - - -

18 JUDGE RIVERA: I understand. But I don't
19 think the standard is whether or not his
20 interpretation is reasonable, right. It's not the
21 federal courts; it's not the antiterrorism statute.
22 It's - - - it's whether or not he's correct about
23 Donald DD.

24 MR. STOCKWELL: I think - - - what happened
25 at the Appellate Division, three-two decision. Five

1 judges disagreed. If you count Judge Krogmann in
2 there, we have a three-three split on the Supreme
3 Court justices that have heard - - - heard this case.
4 Reasonable judicial minds can differ as to whether
5 Donald DD required vacatur in this case. The
6 question of whether Judge Krogmann got it right or
7 wrong, irrelevant to the - - - to the issue before
8 the court here today.

9 JUDGE STEIN: Or is the - - - or is the
10 question whether the Appellate Division abused its
11 discretion in - - -

12 MR. STOCKWELL: The - - - the Appellate
13 Division did not - - - it was - - - that's not the
14 question before the court. In Woodson v. Mendon
15 Leasing Corp, there was a review of a trial judge's
16 vacatur of a default judgment. Appellate Division, I
17 can't remember off the top of my head if they - - -

18 JUDGE STEIN: This wasn't a vacatur of a
19 default judgment.

20 MR. STOCKWELL: It's - - - it's the grounds
21 within 15 - - - 5015. It's just an example of a
22 post-judgment 5015 motion that went through the
23 Appellate Division and went to the Court of Appeals
24 and the Court of Appeals applied the abuse of
25 discretion standard.

1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 MR. STOCKWELL: Thank you.

3 MS. LEVINE: Good afternoon, Your Honors;
4 may it please the court, Allyson Levine for the State
5 of New York. This is a pure question of law before
6 the court. The standard here is whether or not there
7 was legally sufficient evidence. And the abuse of
8 discretion at the Third Department was the Third
9 Department holding that the Supreme Court abused its
10 discretion by concluding that Donald DD required it
11 to find the evidence legally insufficient.

12 So this court is - - - is looking at a pure
13 issue of law here, and the standard is whether or not
14 the State showed that Donald DD - - - I'm sorry, that
15 Richard is different from a typical criminal
16 recidivist, and it did that here. First, it showed,
17 based on his diagnoses, that he's different from a
18 typical recidivist. He has far more than ASPD. He
19 also has borderline personality disorder, he does
20 have ASPD, he also psychopathy, and from those - - -

21 JUDGE RIVERA: But doesn't this go back to
22 how one interprets Donald DD? Aren't we left with
23 that question?

24 MS. LEVINE: Yes. Yes. But if the issue
25 is - - -

1 JUDGE RIVERA: Right, so that's the quest -
2 - - that - - - don't we have to start with that
3 question?

4 MS. LEVINE: Whether or not Donald DD
5 governs here?

6 JUDGE RIVERA: Correct.

7 MS. LEVINE: Yes.

8 JUDGE RIVERA: And if so, what does it
9 mean.

10 MS. LEVINE: Right. So Donald DD doesn't
11 govern here because, as Judge Garcia has already
12 articulated, it's - - - there the court was focused
13 on one very prudential concern, and that was that
14 ASPD is little more than a deep-seated tendency to
15 commit crimes. And there the court is - - - is
16 citing the Supreme Court's language. But here we
17 have so much more than just a portrait of - - - of
18 someone who has a deep-seated tendency to commit
19 crimes. Our expert looked back. She started at four
20 and she moved up to present day and showed that he
21 was a deeply sexually preoccupied individual. And -
22 - - and what she was doing here is showing that each
23 of his disorders manifest as sexual offenses.

24 But to your concern, Judge Rivera, she's
25 not just using the sexual offenses as evidence of his

1 disorder, she's going far beyond that. She's looking
2 at the - - - at the underlying circumstances of - - -
3 of those disorders. So it's not just the fact that
4 he anally rapes a five and eight-year-old. It's that
5 years later, when talking about it, he accuses the
6 five and eight-year-old of inviting their own abuse.
7 It's not just the fact that he raped the girl behind
8 the YMCA. It's the fact that his borderline creates
9 overwhelming sexual impulsivity and that he knows
10 that her mother's on the way to come get her but he's
11 still doing it. You know, it's - - - it's not just
12 his psychopathy. It's the - - -

13 JUDGE RIVERA: Yeah, but - - - but
14 criminals take risks all the time. What makes him
15 different?

16 MS. LEVINE: It's true.

17 JUDGE RIVERA: Right, criminals do things
18 that are risky and perhaps not so smart all the time.
19 Fortunately, that's why they get caught.

20 MS. LEVINE: Right.

21 JUDGE RIVERA: So what makes him so
22 different?

23 MS. LEVINE: What makes Richard so diff - -
24 - different is this deeply seated tendency since - -
25 - since childhood. Again, it's - - - it's not just

1 the criminal offenses here. It - - - it's all the
2 circumstances. But again, she's also looking at his
3 - - - his conduct in a juvenile facility where he's
4 masturbating in front of female workers there, where
5 he's telling workers that he can touch them sexually
6 any time he wants. You know, he has this deeply
7 seated sexual entitlement.

8 JUDGE ABDUS-SALAAM: Counsel, did - - - did
9 Dr. Peterson ever actually link Mr. Richard TT's
10 predisposition to commit sexual offenses to his ASPD
11 or his BPD or any of the other conditions that she
12 diagnosed him with?

13 MS. LEVINE: Yes.

14 JUDGE ABDUS-SALAAM: Where in the record
15 did she do that?

16 MS. LEVINE: Okay, two places. First, in
17 her testimony at page 400 - - - she starts at page
18 400 - - - she's sort of given a little bit of carte
19 blanche here to - - - to talk. So she starts at page
20 457 and it goes to 465. And then, really, her report
21 I - - - I think is very helpful, from pages 800 to
22 802 in the record. And I think what's important here
23 is that she's not connecting his borderline alone or
24 his ASPD alone or his psychopathy alone or his sexual
25 preoccupation alone. She's looking at the entire

1 picture, and what she says in her testimony is that
2 these disorders and these conditions predispose him.
3 And she's talking about how his borderline and his
4 ASPD and his psychopathy from those conditions
5 emerged these traits of sexual preoccupation, sexual
6 entitlement, and cognitive distortions. And then
7 she's further linking those to - - - to
8 predisposition.

9 JUDGE RIVERA: So if they - - - if each of
10 those cond - - - go with me for one moment on this.

11 MS. LEVINE: Sure.

12 JUDGE RIVERA: You may disagree. But let's
13 assume for one moment each of those conditions has no
14 sexual component inherent to it, what gets you to the
15 lack of impulse control for the sexual offense? What
16 - - - what connects those dots?

17 MS. LEVINE: Here what connects those dots,
18 I think, is sexual preoccupation for him, is - - - is
19 this deep-seated sexual preoccupation.

20 JUDGE RIVERA: I'm saying is that sourced
21 in one of those conditions or something else?

22 MS. LEVINE: She's - - - she's saying here
23 that his sexual preoccupation is really emerging from
24 his - - - from his conditions. But - - -

25 JUDGE RIVERA: Even though none of those

1 conditions, in and of themselves independently, have
2 a sexual - - - inherent sexual component to them?

3 MS. LEVINE: Well, I want to - - - I want
4 to push back on that, Your Honor.

5 JUDGE RIVERA: Well, this is what I said.

6 MS. LEVINE: Right.

7 JUDGE RIVERA: I - - - I thought you were
8 going to go and disagree on that.

9 MS. LEVINE: Right, because a component of
10 borderline is - - -

11 JUDGE RIVERA: Okay.

12 MS. LEVINE: - - - is impulsivity, is self-
13 damaging impulsivity. So again - - -

14 JUDGE RIVERA: So but that doesn't
15 necessarily have a sexual component to it.

16 MS. LEVINE: It doesn't necessarily but - -
17 -

18 JUDGE RIVERA: Correct? One can have BPD
19 without this sexual urge.

20 MS. LEVINE: Right, it's the - - - the
21 diagnostic criteria is sexual - - - is self-damaging
22 impulsivity in at least two or more areas, and one -
23 - - two of them are listed. And for Richard, it's
24 sex and substance abuse. And for psychopathy, there
25 is - - - there actually is a sexual component there

1 as well, Your Honor. It's he's - - - one of the
2 twenty factors that Dr. Peterson looks at as part of
3 the psychopathy assessment tool is sexual
4 promiscuity. Richard received a - - - a two in that
5 which is - - - indicates that it's - - - it's,
6 indeed, present. So - - - so I would say that those
7 two do have a sexual component, but even if this
8 court said that it didn't, what's relevant here is
9 that for Richard they - - - they do manifest
10 sexually.

11 He - - - he has a number of borderline
12 urges, and as a result of his formative experiences
13 and childhood and personality structure, he's
14 channeling these urges. He channels them in
15 different ways. He - - - he's a cutter; he cuts.
16 But he also channels them into sex offenses, and - -
17 - and he's admitted in treatment that sex is one way
18 that he - - - he copes with - - - with his borderline
19 and his problems, in general.

20 So she's - - - again, she's not just
21 looking at his sex offenses, she's looking at the
22 circumstances surrounding his sex offenses. And what
23 she's doing is creating what this court required in
24 Kenneth T., which is a detailed psychological
25 portrait. She's showing that a typical recidivist

1 does not suffer from this plethora, this toxic mix,
2 of conditions. But she's also showing that not all
3 recidivists have an early onset of sex offenses. Not
4 all recidivists have ten victims before their
5 twentieth birthday. Not all recidivists are blaming
6 their victims for their abuse. Not all recidivists
7 have been institutionalized as both a child and an
8 adult for sex offenses and have mastur - - -
9 masturbated in front of staff in that - - - in that
10 setting. But Richard is. Richard's doing all these
11 things.

12 JUDGE RIVERA: Is - - - is there a
13 difference between someone who manifests various
14 conditions through anger and one who manifests that
15 anger, right, the outlet becomes I have an ability to
16 control through sex? It's not an urge, it's just
17 they see the opportunism of sex to deal with their
18 desire to - - - to have control or to be angry and
19 express that anger?

20 MS. LEVINE: I - - - I think I lack the
21 expertise to answer that question. But I - - - I
22 think whether someone's raping out of anger or
23 whether they're raping out of sex, I mean most - - -
24 most rapes are out of anger or control. So I guess -
25 - - I guess I would say it - - - it doesn't really

1 matter, you know, exactly what's - - - what's driving
2 that. We know from - - - from Richard - - -

3 JUDGE RIVERA: Well, doesn't it for Article
4 10? Because the point is the sexual urge that you
5 can't control as opposed to I do it out of anger,
6 yeah, I could choose to do my anger another way but I
7 want to express it this way?

8 MS. LEVINE: Right. It's - - - it's the
9 manifestation. It's - - - it's - - -

10 JUDGE RIVERA: Which I can't control the
11 urge - - -

12 MS. LEVINE: Right.

13 JUDGE RIVERA: - - - as opposed to I've
14 made a choice.

15 MS. LEVINE: Right, exactly. It's the
16 manifestation of - - - of - - -

17 JUDGE RIVERA: The compulsive behavior that
18 you cannot stop. That's the point of being, right,
19 put in treatment.

20 MS. LEVINE: Exactly. Exactly.

21 JUDGE GARCIA: But isn't the point of
22 Article 10 also protect society? I mean it's not
23 only treatment statute, is it?

24 MS. LEVINE: No, it's - - - it's both, Your
25 Honor. It's definitely both.

1 JUDGE RIVERA: But constitutionally you
2 can't lock up people because you think they're going
3 to rape.

4 MS. LEVINE: Of course not.

5 JUDGE RIVERA: All right. Okay.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.
7 Mr. Stockwell.

8 MR. STOCKWELL: Just responding to one of
9 the judge's questions about whether Dr. Peterson
10 linked Richard TT's offending behavior to borderline
11 personal - - - personality disorder. If you look at
12 Dr. Peterson's report, the - - - the first one, May
13 2010, that's at A-765, she specifically found that
14 Richard TT's antisocial personality disorder was what
15 - - - what predisposes him to commit sexual offenses,
16 and she indicated that there are several traits of
17 Richard TT's antisocial personality disorder,
18 including sexual preoccupation, attitude supporting
19 offending behavior, inability to control - - - I'm
20 sorry, emotionally to relate to victims, impulsivity,
21 and aggressiveness. And - - - and Dr. Peterson, in
22 her initial report, had a provisional paraphilia NOS
23 diagnosis that she later rejected, and she indicated
24 that the reason why she reject - - - rejected the
25 paraphilia NOS diagnosi - - - provisional diagnosis

1 was because, based on everything she saw since the
2 first report, Richard TT's behaviors that made her
3 consider paraphilia NOS were more consistent with
4 ASPD.

5 JUDGE STEIN: Is - - - is the crux of your
6 argument - - - well, let me ask you. Do you - - - do
7 you concede that there was proof that - - - that the
8 respondent here had difficulty controlling his
9 behavior?

10 MR. STOCKWELL: There - - - I - - - I will
11 concede that there's proof that he had difficulty
12 controlling behavior but not that it's related to AS
13 - - - borderline personality disorder.

14 JUDGE STEIN: Okay. But that's not my
15 question. My question is is that isn't the crux of
16 your argument that because it - - - as you see it,
17 none of these conditions are - - - are in and of
18 themselves sexually related that they can't be the
19 basis of a - - -

20 MR. STOCKWELL: That is - - -

21 JUDGE STEIN: - - - of a determination?

22 MR. STOCKWELL: That is the argument. But
23 also, in addition to that, Judge, I would indicate
24 that based on this record, there's no proof that the
25 - - - that his diagnoses did predispose him or result

1 in him having serious difficulty controlling sex-
2 offending conduct. And - - -

3 JUDGE RIVERA: But the People just went
4 through a rather compelling description - - -

5 MR. STOCKWELL: All as - - -

6 JUDGE RIVERA: - - - that that is not true.

7 MR. STOCKWELL: All as a result of an
8 underlying criminal disposition, Your Honor.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MR. STOCKWELL: Thank you.

11 (Court is adjourned)

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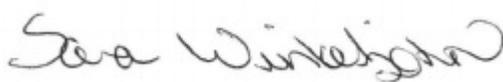
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of State of New York v. Dennis K., No. 106 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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