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COURT OF APPEALS

STATE OF NEW YORK

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STATE OF NEW YORK,

Respondent,

-against-

No. 151

DANIEL F.,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
September 4, 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:

LISA L. PAINE, ESQ.  
MENTAL HYGIENE LEGAL SERVICE  
Attorneys for Appellant  
50 East Avenue  
Suite 402  
Rochester, NY 14604

KATHLEEN M. TREASURE, ESQ.  
OFFICE OF THE ATTORNEY GENERAL  
Attorneys for Respondent  
The Capitol  
Albany, NY 12230

Penina Wolicki  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: And we'll start with the  
2 first case, which is 151, counsel, Matter of State of New  
3 York v. Daniel F.

4 Counsel, would you like any rebuttal time?

5 MS. PAINE: Yes, Your Honor. Please, two  
6 minutes.

7 CHIEF JUDGE LIPPMAN: Two minutes. Okay, sure.

8 MS. PAINE: Good afternoon. May it please the  
9 Court, I'm Lisa Paine on behalf of appellant, Daniel F.

10 With the court's permission I would like to lead  
11 with point 1. The lower court found insufficient evidence  
12 to prove a clear and convincing nexus between appellant's  
13 inability to control his behavior and the likelihood to  
14 commit sex offenses.

15 JUDGE READ: In your view, are we looking  
16 at something where the two courts differed on a  
17 question of law or a question of facts?

18 MS. PAINE: Your Honor, in this case, the  
19 Appellate Division reversed on a question of law.

20 JUDGE READ: I know that's what they said.

21 MS. PAINE: Yes.

22 JUDGE READ: Do you agree with that? You  
23 don't think it was on the facts?

24 MS. PAINE: Well, I - - - it is my opinion, Your  
25 Honor, that the Appellate Division substituted its own

1 finding of facts without the benefit of the lower court's  
2 decision until having received the decision based on  
3 granting the motion to amend the record.

4 JUDGE PIGOTT: Do you know why that  
5 happened? It seems odd that there's an order, what,  
6 in April, and I think the decision came down in  
7 October or something. I mean, the writing was  
8 substantially behind the actual order from which  
9 someone could appeal. Was there any explanation for  
10 that? Because you're right. I mean, the Appellate  
11 Division makes a decision without the written  
12 decision being there. I just have never encountered  
13 that. Is that one of your arguments that they should  
14 have at least waited for the decision? I don't know.

15 MS. PAINE: Yes, Your Honor. Certainly  
16 that would be - - - that was one of my arguments. It  
17 is certainly upon the Appellate Division to give due  
18 deference to the trial court. The trial court is in  
19 the best position to give credibility - - - weigh the  
20 credibility of the evidence.

21 JUDGE SMITH: But the Appellate Division is  
22 entitled to make its own judgment, isn't it?

23 MS. PAINE: Certainly, Your Honor.

24 JUDGE SMITH: And we're - - - and in this  
25 posture, assuming that we do have a difference of

1 fact, then we're - - - we can choose between them; we  
2 can decide which one we think is right?

3 MS. PAINE: Well, Your Honor, if there was  
4 a difference - - - if there was a substantial  
5 insufficiency of verdict or findings or if the record  
6 was confusing or incomplete, the Tri-state SolAire  
7 Appellate Division Second Department case says if the  
8 parties' contentions different sharply, if the  
9 testimony abounded with discrepancies, then certainly  
10 there would be reason to perhaps remand for a new  
11 trial - - -

12 JUDGE CIPARICK: Do we have - - -

13 JUDGE GRAFFEO: I'm confused. What are you  
14 saying our standard of review is in this case?

15 MS. PAINE: Well, Your Honor, in this case  
16 we are asking to have the lower court decision  
17 reinstated, because in this case - - -

18 JUDGE GRAFFEO: No, I'm asking you what our  
19 standard of review is. Because I thought, where  
20 there's a discrepancy in the facts, that our standard  
21 of review was to review the evidence and to - - -

22 MS. PAINE: Absolutely.

23 JUDGE GRAFFEO: - - - review the two  
24 different lower court decisions and determine which  
25 one comports with the evidence most closely.

1 MS. PAINE: Absolutely. Absolutely, Your  
2 Honor.

3 CHIEF JUDGE LIPPMAN: Counselor, don't you  
4 think that this is really just a disagreement as to  
5 the credibility to be given to Dr. Calistra (ph.)? I  
6 mean, that the trial judge obviously had a lot of  
7 doubt about the evidence and that focused on that and  
8 really didn't give it too much weight, while the  
9 Appellate Division apparently did.

10 MS. PAINE: Your Honor, I think the trial  
11 judge certainly had a great deal of doubt regarding  
12 Dr. Calistra. But she also had a great deal of doubt  
13 regarding all the petitioner's experts. She had a  
14 great deal of doubt regarding Dr. Lord as well. She  
15 detailed it - - -

16 JUDGE SMITH: But putting aside - - -

17 MS. PAINE: - - - in her decision.

18 JUDGE SMITH: - - - the experts, what  
19 bothers me is this guy has terrible - - - obviously  
20 has a terrible problem doing what he's supposed to  
21 do. We have somebody with a bad record, and he keeps  
22 doing these stupid petty things; admittedly, not  
23 major. How can we feel comfortable - - - how can any  
24 fact finder feel comfortable that he's not going to  
25 do something horrible some day; that the same

1           inability to control himself which makes him drive  
2           without a driver's license, with only a learner's  
3           permit, really a trivial offense, but that same  
4           tendency to take stupid risks and make bad judgments  
5           isn't going to make him rape somebody?

6                    MS. PAINE:  Certainly, Your Honor, that is  
7           - - - that is the question before this honorable  
8           court.

9                    JUDGE CIPARICK:  Don't we have to find a  
10          nexus - - -

11                   JUDGE SMITH:  Yeah, make us feel more  
12          comfortable?

13                   MS. PAINE:  It is - - -

14                   JUDGE CIPARICK:  Don't we have to find a  
15          nexus between his inability to control his behavior,  
16          his alcoholism, pornography, et cetera, and the  
17          possibility that he would - - - or the likelihood  
18          that he would commit another sex offense?

19                   MS. PAINE:  Yes.

20                   JUDGE CIPARICK:  Isn't that the test here?

21                   MS. PAINE:  Yes.  And - - -

22                   JUDGE CIPARICK:  So what is that nexus?  
23          What is that required nexus?

24                   MS. PAINE:  It's Kansas v. Hendricks.  It's  
25          - - - the U.S. Supreme Court had said where there is

1 a fundamental liberty interest at stake here, where  
2 his - - - that it must be that - - -

3 JUDGE GRAFFEO: He has - - - he has - - -

4 MS. PAINE: - - - he has a substantially  
5 pro - - -

6 JUDGE GRAFFEO: He has violated the terms  
7 of his outpatient treatment, right? I mean, there  
8 were two - - - there were two programs that he was  
9 terminated in, and there was also pornography found  
10 on the computer and software to erase the  
11 pornography. Are those three things together enough  
12 of a nexus to what he's claimed helps to fuel his  
13 inappropriate behaviors in the past?

14 MS. PAINE: The lower court did not find  
15 that that was enough. The lower court found that - -  
16 -

17 CHIEF JUDGE LIPPMAN: But why is it - - -

18 MS. PAINE: - - - it was primary - - -

19 CHIEF JUDGE LIPPMAN: - - - but why is it  
20 not reasonable what the Appellate Division did, which  
21 was basically to take those violations in the context  
22 of what happened before and his reliance on things  
23 that obviously made him difficult to control his  
24 behavior? Why does that not make sense to put it in  
25 the context of this particular person and what his

1 problems are? Why does that not make sense?

2 MS. PAINE: Because, Your Honor, the lower  
3 court found that the determination of risk that the  
4 petitioner's experts determined - - - they relied on  
5 actuarial instruments that could not measure an  
6 individual's risk of reoffending.

7 JUDGE PIGOTT: You know, but you - - - the  
8 respondent here - - - I mean, it was the court that  
9 did it. It was kind of remarkable to me that when  
10 you had the hearing in Supreme Court it was the court  
11 that went after the petitioner here. I don't know  
12 how much the respondent did at all. And it seemed to  
13 me what the Appellate Division was signaling at least  
14 is while demeanor evidence is important, et cetera,  
15 they were a little tired - - - as Judge Smith, I  
16 think, is implying - - - you know, five violations,  
17 albeit all of them not necessarily all trivial, but  
18 not amounting to a whole lot. But at some point  
19 someone's got to - - - someone's got to realize I'm a  
20 dangerous sex offender; I've got to start toeing the  
21 mark.

22 And I think that's what People - - - what  
23 the Appellate Division seemed to be concerned about,  
24 that because he refused to go to the treatment, he  
25 refused to appear in front of Dr. Calistra, she tried

1 to extrapolate stuff. And the Supreme Court seemed  
2 to say, well, because that evidence isn't there, he  
3 gets the benefit of the doubt.

4 MS. PAINE: But the record reflects that he  
5 did show up for the substance abuse evaluation. He  
6 could not pay for it because of the Medicaid  
7 approval. The record does reflect that he did  
8 comply; he did attend all of the outpatient  
9 appointments; that he did have a good rapport with  
10 his outpatient provider. The record does reflect  
11 that he did go to substance abuse counseling.

12 CHIEF JUDGE LIPPMAN: Yes, but this is all  
13 in the context of a finding of a mental abnormality,  
14 right?

15 MS. PAINE: Well, it isn't just enough to  
16 have mental abnormality, though. There must also be  
17 the inability to - - -

18 CHIEF JUDGE LIPPMAN: I understand. But  
19 that's the context in which these other things kick  
20 in, these violations that, again, in a vacuum might  
21 just be violations, but the Appellate Division  
22 obviously put all of that together.

23 JUDGE PIGOTT: Could you have appealed that  
24 - - -

25 JUDGE CIPARICK: And found that there's a

1 high risk of recidivism here. That's what their  
2 finding was.

3 MS. PAINE: Well, the finding was also  
4 based on reversing based on Matter of Donald N.,  
5 which is clearly distinguishable in this case.  
6 Donald N. was an individual who reoffended, having  
7 sex with at least twenty underage individuals after  
8 he had undergone sex offender treatment, which was  
9 not the case in this - - -

10 CHIEF JUDGE LIPPMAN: But the bottom line,  
11 getting back to - - - I don't remember whether if it  
12 was Judge Graffeo or Judge Smith said, basically we  
13 can choose which better comports with the weight of  
14 the evidence between the AD and the trial court?

15 MS. PAINE: Yes, Your Honor.

16 CHIEF JUDGE LIPPMAN: Okay.

17 MS. PAINE: Okay. Thank you.

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

20 JUDGE CIPARICK: So we're basically being  
21 asked here to do a weight of the evidence review?

22 MS. TREASURE: Yes, Your Honor. The court  
23 is being asked - - - because the Appellate Division  
24 did make factual findings that differ from that of  
25 the trial court, this court is supposed to review the

1 record to see which decision the record comports with  
2 better.

3 CHIEF JUDGE LIPPMAN: Is this really a per  
4 se rule that when you violate, that's enough,  
5 regardless of what it is? That's what this case - -  
6 -

7 MS. TREASURE: No.

8 CHIEF JUDGE LIPPMAN: - - - is all about?

9 MS. TREASURE: Not at all, Your Honor.

10 CHIEF JUDGE LIPPMAN: Why not?

11 MS. TREASURE: It's not automatic. What it  
12 is, is that - - -

13 CHIEF JUDGE LIPPMAN: What happened here?  
14 Yeah.

15 MS. TREASURE: Well, what happened here was  
16 we had a parole officer who determined that he had  
17 violated his SIST conditions and had exercised his  
18 discretion to bring him in. And the State presented  
19 evidence, when it brought the petition for  
20 confinement, that there was a nexus, there was a  
21 connection between his SIST violations and his risk  
22 of reoffending.

23 JUDGE PIGOTT: Where does that line get  
24 drawn? Let's assume he's driving without a learner's  
25 permit, he gets violated for that, and the judge

1 says, yep, you violated your SIST requirements; I'm  
2 therefore going to confine you. Is that reviewable  
3 as a matter of law? I mean, do we say wait a minute,  
4 you can't just violate him for - - -

5 MS. TREASURE: There has to be the psychi -  
6 - - there has to be some expert testimony  
7 establishing that either the violation - - - or if  
8 more information comes about because the person has  
9 been examined by a psychiatric expert - - -

10 JUDGE SMITH: So you would say that without  
11 the psychiatric testimony here, you would not say  
12 that you had a case to confine him?

13 MS. TREASURE: It would be much more  
14 difficult because we have to show - - -

15 JUDGE SMITH: But didn't - - - I mean, I  
16 thought Justice Karalunas', it's probably fair to  
17 say, cross-examination of the expert was pretty  
18 effective. The expert testimony it seemed, did a lot  
19 of double counting and strange counting.

20 MS. TREASURE: I disagree, Your Honor. I  
21 think the trial court's determination that Dr.  
22 Calistra was not credible itself is flawed in four  
23 major respects. First of all, she's saying that Dr.  
24 Calistra improperly considered the fact that he has  
25 viewed pornography, and there was no evidence of

1 pornography, when in fact we have him discussing his  
2 - - -

3 JUDGE SMITH: I grant you the pornography.  
4 But what about his scoring him for his social  
5 isolation, when he doesn't seem to have been  
6 particularly isolated?

7 MS. TREASURE: Well, perhaps that might be  
8 in error. But that's rather trivial, because Dr.  
9 Calistra was really relying on the fact that he is  
10 engaging in these high-risk behaviors.

11 CHIEF JUDGE LIPPMAN: Counsel, talk a  
12 little bit about the policy. Is this the kind of  
13 person who we want to be confined? Is this what the  
14 legislature had in mind? Step back from this a  
15 little bit.

16 MS. TREASURE: Um-hum.

17 CHIEF JUDGE LIPPMAN: Is this the kind of  
18 person - - -

19 MS. TREASURE: Yes.

20 CHIEF JUDGE LIPPMAN: - - - who is going to  
21 be locked up and locked away? And is this what the  
22 legislature had in mind?

23 MS. TREASURE: The legislature intended for  
24 this person to receive inpatient treatment, because  
25 he cannot be safely managed in the community.

1 CHIEF JUDGE LIPPMAN: Well, but it's not as  
2 simple - - - I mean, you're taking away his liberty?

3 MS. TREASURE: That's exactly right. Which  
4 is why we have - - -

5 CHIEF JUDGE LIPPMAN: That's a pretty  
6 powerful thing to do, no?

7 MS. TREASURE: That is a very powerful  
8 thing to do. But what would be the - - -

9 JUDGE CIPARICK: And you have a very high  
10 burden here. There's a clear and convincing evidence  
11 burden that he's a dangerous sex offender requiring  
12 confinement.

13 MS. TREASURE: The clear and convincing  
14 evidence - - -

15 JUDGE CIPARICK: And these violations, the  
16 alcohol, pornography, et cetera, this establishes  
17 that?

18 MS. TREASURE: They're all tied to his  
19 sexual offending behavior, Your Honor.

20 JUDGE SMITH: Is there any evidence of what  
21 you would call antisocial conduct? I realize he  
22 violated every rule in the book. But is it the sort  
23 of conduct that a civilized person wouldn't do,  
24 really antisocial conduct, during the time he was  
25 under supervision?

1 MS. TREASURE: Well, as the expert  
2 testified, the antisocial conduct is the lawbreaking  
3 behavior. It's this deception. It is - - -

4 JUDGE SMITH: Well, what's the worst thing  
5 he did - - - not in his life, those are horrible - -  
6 - but during the time he was under supervision?

7 MS. TREASURE: I would say - - - it's hard  
8 to - - - it's hard to kind of put them in a  
9 hierarchy, Your Honor. I would say, you know,  
10 probably the most horrible things he did was he's  
11 consuming substances and alcohol and viewing  
12 pornography when he's not supposed to.

13 CHIEF JUDGE LIPPMAN: But you agree that in  
14 and of them - - - itself, I think what the judge is  
15 driving at is each one of those things is not  
16 necessarily something that we're going to say lock  
17 him up and throw away the key. What's your argument?  
18 That put together in the context of - - -

19 MS. TREASURE: Exactly.

20 CHIEF JUDGE LIPPMAN: - - - the prior  
21 crimes? Because you would agree that in and of  
22 themselves, they're not necessarily so - - -

23 MS. TREASURE: I - - -

24 CHIEF JUDGE LIPPMAN: - - - not that  
25 they're good. Don't get me wrong - - -

1 MS. TREASURE: No, no.

2 CHIEF JUDGE LIPPMAN: - - - but not enough  
3 to say gee, we're putting this guy away?

4 MS. TREASURE: It's a context - - - it's  
5 exactly right. You have to look at the violations in  
6 the context of the person. You have to look at it in  
7 the context of all the information we have about this  
8 - - -

9 JUDGE JONES: Is there any violation, in  
10 your mind, that would not result in confinement?

11 MS. TREASURE: If he had been brought in  
12 for the permit violation alone, that wouldn't justify  
13 confinement. But I think - - -

14 JUDGE SMITH: But even the substance - - -  
15 I mean, he was using substances he wasn't supposed to  
16 use, but there's no evidence of intoxication, is  
17 there?

18 MS. TREASURE: There doesn't need to be,  
19 Your Honor.

20 JUDGE SMITH: But there isn't.

21 MS. TREASURE: Again, we have the sex  
22 offender treatment providers on top of the expert  
23 saying that sex offenders cannot be consuming these  
24 substances, and for him it is particularly dangerous  
25 because it has triggered his sexual behavior - - -

1 JUDGE PIGOTT: Let's move ahead a year.  
2 Let's assume he's confined. Now, he's entitled to a  
3 review after a year - - -

4 MS. TREASURE: Yes.

5 JUDGE PIGOTT: - - - of confinement, right?  
6 What would that hearing consist of then? Assuming  
7 for the purposes of this case, that his three main  
8 violations are that he was drinking, that he was  
9 watching pornography, and that he refuses to go to  
10 his treatment. If a year from now he says, obviously  
11 I had nothing to drink because I'm in your holding  
12 center; I haven't watched any pornography, because  
13 you won't let me on the Internet; and obviously I've  
14 attended all the meetings, because all I have to do  
15 is walk down the hall. Under those circumstances, is  
16 he then released - - -

17 MS. TREASURE: No, not - - -

18 JUDGE PIGOTT: - - - to the SIST?

19 MS. TREASURE: - - - not necessarily, Your  
20 Honor. Again, it has to do with what the psychiatric  
21 examiners determined. Has he progressed?

22 JUDGE SMITH: Do these people ever get  
23 released?

24 MS. TREASURE: Yes, Your Honor. They do.  
25 We've had - - -

1 JUDGE SMITH: How many have been released?

2 MS. TREASURE: Let's see. We've had 220 -

3 - -

4 JUDGE CIPARICK: This is a relatively new -

5 - -

6 MS. TREASURE: Excuse me?

7 JUDGE CIPARICK: I'm sorry, it's a

8 relatively new statute.

9 MS. TREASURE: It's a relatively new  
10 statute. We have had, let's see, over 200 cases of  
11 confined, and we have had, I think, of those - - -  
12 I'm sorry, my notes are very poor here - - - I think  
13 it's been 6 or so have been released to SIST.

14 CHIEF JUDGE LIPPMAN: 6 out of 200?

15 MS. TREASURE: I believe that's so, to  
16 SIST.

17 CHIEF JUDGE LIPPMAN: So that's not a lot  
18 of people.

19 MS. TREASURE: That's not a lot. But it's  
20 a relatively - - -

21 JUDGE PIGOTT: Let's go back again.

22 MS. TREASURE: - - - new statute.

23 JUDGE PIGOTT: I just want to reask this,  
24 because I'm not sure where - - - that your answer was  
25 what I was thinking or hoping for. If the reason

1           you're going in is reasons 1, 2, and 3 -- drinking,  
2           pornography, not attending your sessions -- and a  
3           year from now you come back and say I did them all,  
4           he doesn't get out. He can - - - you can keep him in  
5           for what? Because now that he's attended the  
6           sessions, the psychiatrist or psychologist is not  
7           satisfied that releasing him would be in the best  
8           interests of the community?

9                       MS. TREASURE: It can be that way, Your  
10           Honor, based upon the fact - -- again, you're  
11           looking at what is his mental abnormality, as well.  
12           That also plays a part.

13                      JUDGE PIGOTT: But do you - - - in other  
14           words, is there a de novo review of what Supreme  
15           Court Judge Karalunas found after the - - - because  
16           there was a hung jury originally on even the  
17           dangerousness here or the mental abnormality. But  
18           after that, she then has this long hearing on this  
19           and found that SIST would apply. Appellate Division  
20           made a different finding.

21                      When it goes back a year from now, assuming  
22           that you win this case and he goes in, the review at  
23           the year-end stage, is that a de novo review as if  
24           there was - - -

25                      MS. TREASURE: No, no.

1                   JUDGE PIGOTT: - - - just a brand new  
2 finding of abnormality?

3                   MS. TREASURE: Absolutely not. It is a  
4 review of all the evidence, everything they will have  
5 from the - - - they will have everything from, like,  
6 the trial evidence; they'll have everything from the  
7 - - -

8                   JUDGE PIGOTT: Well, then it is a de novo  
9 review?

10                  MS. TREASURE: Well, they look at - - - I  
11 guess maybe I'm misunderstanding what you're saying  
12 "de novo". It's not anything cut off from a certain  
13 period of time.

14                  JUDGE PIGOTT: What I'm saying is, if  
15 you're going in for one - - - let's assume that he's  
16 going in because he won't stay off the Internet and  
17 pornography and the psychologist says that's what  
18 triggers him to do bad things. So he goes in, and  
19 he's obviously not watching pornography. And the  
20 psychologist says he's not watching it, and he tells  
21 us he won't and we're satisfied that he won't. Does  
22 he come out?

23                  MS. TREASURE: Not necessarily. And again,  
24 it has to turn on what the psychologists are saying.  
25 Can - - -

1 JUDGE GRAFFEO: So what does he have to do  
2 to achieve release? I guess that's what we're trying  
3 to ask.

4 MS. TREASURE: They have to meaningfully  
5 engage in the sex offender treatment that's being  
6 provided to him. He's not doing that at this point  
7 but - - -

8 JUDGE PIGOTT: No, I'm saying the - - -

9 MS. TREASURE: - - - he needs to do that.

10 JUDGE PIGOTT: - - - the psychiatrist says  
11 that. Now - - -

12 MS. TREASURE: Oh.

13 JUDGE PIGOTT: - - - that we've had him for  
14 a year, I mean, he can't go anywhere, so we've given  
15 him all this stuff, so let's let him go.

16 MS. TREASURE: Well, the psychologist says  
17 that, says let him go?

18 JUDGE PIGOTT: Yes. Yes.

19 MS. TREASURE: Oh, at that point in time,  
20 OMH having - - - I assume that that would be OMH's  
21 determination after the annual review - - -

22 CHIEF JUDGE LIPPMAN: Yes, but - - -

23 MS. TREASURE: - - - that he no longer  
24 requires confinement.

25 CHIEF JUDGE LIPPMAN: - - - but I think,

1           counsel, I think what's being said - - - what if he  
2           does everything that he's supposed to do in that  
3           year, and he takes the counseling, he doesn't drink,  
4           he doesn't do pornography, the doctor could still  
5           come in and say well, that's fine, but he's got a  
6           predisposition to sex offenses and if you let him  
7           out, you know, I feel he may violate again, and  
8           therefore we're going to keep him in. That's  
9           perfectly possible. So once you put him in, it's  
10          hard to get him out, as witnessed by your own  
11          numbers, right?

12                   MS. TREASURE: They - - - yes. And they  
13          have to go through - - - well, they have to go  
14          through the four phases of treatment. And they have  
15          to satisfy the psychologist that they are no longer a  
16          danger, and that they can be - - -

17                   JUDGE CIPARICK: But where is he now?

18                   MS. TREASURE: - - - safely released.

19                   JUDGE CIPARICK: Where is he now?

20                   MS. TREASURE: In Central New York  
21          Psychiatric Center.

22                   JUDGE PIGOTT: I got a - - -

23                   CHIEF JUDGE LIPPMAN: Judge Pigott?

24                   JUDGE PIGOTT: What I was going to say is,  
25          we've been pretty strong in telling judges, for

1 example, that parole doesn't decide - - - in other  
2 words, it's the court that makes these decisions.  
3 And just because a parole officer says, you know, you  
4 got to go back in because he made me mad or I - - -  
5 there's a hearing. And the judge says, I can  
6 understand why you're upset, but I think that he  
7 doesn't go in.

8 The same thing, I would think, would apply  
9 here, where if the Supreme Court judge did what she  
10 did at the initial one, and says I'm not at all  
11 satisfied with what the psychologist is telling me  
12 about what's been going on for the next year, and I  
13 do think he ought to be out, he or she could do that.  
14 It's not just - - -

15 MS. TREASURE: Yes.

16 JUDGE PIGOTT: - - - the psychologist who  
17 says well - - -

18 MS. TREASURE: Yes.

19 JUDGE PIGOTT: - - - we did the four phases  
20 and we don't think he passed the last two, and so we  
21 want to keep him for another year.

22 MS. TREASURE: That's correct. After the  
23 annual review, if the OMH makes the determination  
24 he's still dangerous, he can petition the court to be  
25 released nonetheless, and the court then reviews the

1 determination.

2 JUDGE JONES: Well, statistically, that has  
3 not been very successful, has it?

4 MS. TREASURE: Statistically, no, I don't  
5 think so, but I think it's because - - -

6 JUDGE JONES: 6 out of 200?

7 MS. TREASURE: - - - because the trial  
8 courts are looking at weighing the evidence before  
9 them.

10 CHIEF JUDGE LIPPMAN: But I think the point  
11 that's being made is we have to be really awful  
12 certain that this is someone that should be locked  
13 up, because once they're locked up, they're not so  
14 easily getting out.

15 MS. TREASURE: I think that's right, Your  
16 Honor. And I think that's what the - - -

17 CHIEF JUDGE LIPPMAN: And that's why I  
18 asked - - -

19 MS. TREASURE: - - - Appellate Division - -  
20 -

21 CHIEF JUDGE LIPPMAN: - - - you about  
22 policy. Is this the kind of person - - -

23 MS. TREASURE: Yes.

24 CHIEF JUDGE LIPPMAN: - - - that we're  
25 talking about?

1 MS. TREASURE: Yes, Your Honor.

2 CHIEF JUDGE LIPPMAN: Okay.

3 MS. TREASURE: And I think the Appellate -

4 - -

5 JUDGE PIGOTT: Can I get in one more?

6 CHIEF JUDGE LIPPMAN: Sure, Judge Pigott.

7 JUDGE PIGOTT: One of the things that it  
8 seemed to me the Supreme Court did was took issue  
9 with the way the psychologist had what seemed to be a  
10 check-the-box kind of approach to this. As Judge  
11 Smith was pointing out, she went after the  
12 psychologist on each one of the things that - - - she  
13 would say, well, this is a seven out of sixteen, and  
14 that's nine. It was all numbers. Is that, in your  
15 view, the way these things should be conducted?

16 MS. TREASURE: It would be better if the  
17 psychologist had an interview with the respondent.  
18 But the respondent refused to engage in one. He  
19 declined the psychologist. So she was forced to  
20 conduct a record review. And yes, it is perfectly  
21 acceptable in the profession for the psychologists to  
22 be rendering their opinions based upon the record  
23 review, and based upon the actual areas.

24 JUDGE SMITH: Her knowledge of his  
25 situation, maybe it's difficult, but her knowledge

1 was rather less than exhaustive. I mean, she seemed  
2 to know about three facts, and was plugging them in  
3 at every point in the grid.

4 MS. TREASURE: I think the facts - - - I  
5 think the record shows that the psychologist went  
6 through the entire record.

7 JUDGE SMITH: She said she relied on his  
8 infidelities to his girlfriend, but she didn't really  
9 have the slightest idea whether he was unfaithful to  
10 his girlfriend or not.

11 MS. TREASURE: She had spoken with his sex  
12 offender treatment provider who had relayed that  
13 information to her as one of the bases for having  
14 discharged him from sex offender treatment. And she  
15 got that information as well from PO Walters, who had  
16 also told her about another woman who had come in to  
17 pick up his stuff.

18 CHIEF JUDGE LIPPMAN: Okay, Judge Jones?

19 JUDGE JONES: So we're talking about  
20 indefinite incarceration, because someone has shown  
21 infidelity?

22 MS. TREASURE: Again, Your Honor, that's  
23 really - - - it's taking that entirely out of  
24 context. This was a whole host of information had  
25 been given to the psychologist. What she was saying

1 was that the potential infidelity showed, perhaps,  
2 that he was oversexualized, but she was also talking  
3 about, and talked about at length, the fact that he  
4 is not supposed to be engaging in alcohol use or  
5 substance use - - -

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

8 MS. TREASURE: Thank you.

9 CHIEF JUDGE LIPPMAN: Appreciate it.

10 Counsel, just address the policy issue  
11 first. Why isn't this one of the guys that should be  
12 locked up according to what the intent of this is all  
13 about?

14 MS. PAINE: Your Honor, as - - - I had  
15 cited the State v. Michael D. case in my brief, and  
16 which certainly cited the legislative purpose and  
17 intent of Article 10; only the most extreme cases  
18 require confinement, and that is what the legislature  
19 had cited when it established Article 10.

20 JUDGE PIGOTT: I have a procedural  
21 question. When he's brought back in for the hearings  
22 on the SIST violations, as Ms. Treasure points out,  
23 one of his problems is he can't seem to show up for  
24 appointments. Is it possible, procedurally, for him  
25 to be held - - - I know there's bail in these things

1           - - - but held for the purpose of having the  
2           examinations that, as your opponent points out, he  
3           wouldn't show up for, and as we note, that leaves a  
4           psychologist with a speculation on previously  
5           determined things.

6                       MS. PAINE: Certainly, some of the  
7           arrangements that were made were that the  
8           appointments would be at the parole officer's office.

9                       JUDGE PIGOTT: No, I'm figuring this out.  
10          Let's assume he comes in, he's arraigned on the  
11          violations, right, and she seemed to - - - I think he  
12          got out on bail almost every time. When he's not out  
13          on ba - - - if the judge said, I'm not releasing you  
14          on bail, and in fact, while you're in, I'm going to  
15          order the doctor here to have an examination for you,  
16          and if I'm not satisfied that you're cooperating in  
17          the examination, I'm not releasing you, can that be  
18          done, procedurally?

19                      MS. PAINE: Certainly, Your Honor, in  
20          theory, yes. That's certainly a possibility.

21                      JUDGE GRAFFEO: What are you - - - what's  
22          the disposition that you're recommending we consider?

23                      MS. PAINE: The disposition I'm requesting,  
24          Your Honor, is reinstating the lower court's  
25          conditional order of release.

1 JUDGE GRAFFEO: Does that mean he still has  
2 to register as a sex offender?

3 MS. PAINE: Yes, Your Honor. He's already  
4 registered as a sex offender.

5 JUDGE SMITH: He would still be under  
6 strict and intensive supervision and treatment?

7 MS. PAINE: Absolutely, Your Honor. Yes.

8 CHIEF JUDGE LIPPMAN: Okay, counselor.

9 MS. PAINE: Thank you very much.

10 CHIEF JUDGE LIPPMAN: Anything else?

11 No? Thank you.

12 MS. PAINE: Thank you.

13 (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 State of New York v. Daniel F., No. 151 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

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