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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF STATE OF NEW YORK,

Respondent,

-against-

No. 182

FLOYD Y.,

Appellant.

20 Eagle Street
Albany, New York 12207
September 12, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Okay, number 182.

2 Counselor, you're on. Go ahead. You want any
3 rebuttal time, Counselor?

4 MS. MANTELL: Four minutes for rebuttal.

5 CHIEF JUDGE LIPPMAN: Four minutes. Sure. Go
6 ahead.

7 MS. MANTELL: Okay. May it please the court, my
8 name is Deborah Mantell, and I represent the appellant
9 Floyd Y. Floyd Y. was civilly committed after a trial
10 where the State's case relied on unproven accusations that
11 he had molested seven minors rather than two, and that
12 evidence was introduced through the testimony of the
13 State's expert witnesses who relied on hearsay statements
14 that were not - - -

15 JUDGE PIGOTT: Did she - - - did she rely on
16 those as part of the treatment, too?

17 MS. MANTELL: Her testimony was that she relied
18 on them for the purpose of providing treatment to Floyd Y.

19 JUDGE PIGOTT: So they were - - - they were a
20 part of the body of - - - I don't want to say evidence,
21 but part of what - - - of what she based her prognosis and
22 diagnosis on before this was ever a trial.

23 MS. MANTELL: In fact, she - - - well, she
24 actually treated Floyd Y. before there was a - - - at a
25 point in time before the statute had been passed and

1 before there was a petition, and she did have some
2 information about these accusations be - - - before.

3 JUDGE PIGOTT: Does that make a difference? In
4 other words, let's assume they had an expert that - - - a
5 forensic expert just for the purpose of the trial and they
6 used this evidence, that would be one argument that you
7 can't because he was acquitted on at least one, correct?

8 MS. MANTELL: Right, he was acquitted on one;
9 others have been dismissed.

10 JUDGE PIGOTT: But does he have a treating, you
11 know, who says, I reviewed these records and these records
12 were important to me in treating him. Wouldn't that be a
13 different issue, evidentiary-wise?

14 MS. MANTELL: Well, there's - - - I mean, the
15 treatment provider was testifying as an expert witness in
16 the evidentiary issues. I mean, in a sense, they're the
17 same because it's inadmissible hearsay.

18 JUDGE SMITH: Does it still - - - I mean, I
19 guess the question is if - - - we're not talking about
20 whether there's a medical records exception. If there's
21 medical records that the - - - that the treating physician
22 relied on and there's hearsay in those records, does that
23 hearsay get in?

24 MS. MANTELL: No, it wouldn't because the - - -
25 it wouldn't be part of the business record exception that

1 would have allowed in the medical record.

2 JUDGE SMITH: Well, I mean, maybe - - - because
3 it's one thing if it came from the patient, as I
4 understand it, at least as - - - there's some
5 interpretations, you figure the patient's going to tell
6 his doctor the truth. So even in a case where the patient
7 is not a party, you can - - - you can use - - - that's an
8 exception to the hearsay rule. But here - - -

9 MS. MANTELL: Well, yes, in that case - - -

10 JUDGE SMITH: But here, the hearsay - - -

11 MS. MANTELL: - - - they would be admissions.

12 JUDGE SMITH: But here, the hearsay came from
13 people the doctor never talked to and wasn't treating.

14 MS. MANTELL: That's correct. It came from
15 people that - - - that the witness had never spoken with.
16 There was no information about the context under which the
17 statements were even made. I don't know if the witness
18 was even aware.

19 JUDGE SMITH: In other words, if one of the
20 victims had gone to her doctor and the doctor had recorded
21 her account, would that be within an exception to the
22 hearsay rule?

23 MS. MANTELL: If - - - if that account had been
24 made to the doctor for the purpose of the doctors who
25 provide treatment to that patient, and I believe that

1 there's precedent from this court on that, and it would -
2 - - it has to go to getting proper treatment for whatever
3 the patient was going for. Here, these weren't statements
4 made to the medical provider. I mean, they might have
5 been. All that's known is that they were affidavits.

6 JUDGE ABDUS-SALAAM: But are these the type of
7 statements, counsel, that an expert in this field of
8 psychiatry/psychology would ordinarily rely on in making a
9 diagnosis of the type that would be the subject of this
10 type - - - this hearing?

11 MS. MANTELL: No, it's not because to make a
12 judgment for this type of proceeding, there needs to be
13 some consideration of what is going to be supportable as
14 evidence of the - - - the rights of the subject, whereas a
15 diagnosis - - -

16 JUDGE GRAFFEO: Well, if you took all - - - if
17 you took all these documents out, what's the doctor get
18 left to look at - - -

19 MS. MANTELL: Well, there - - - there was - - -

20 JUDGE GRAFFEO: - - - other than statements of
21 the - - - of the person subject to the Article 10
22 proceeding?

23 MS. MANTELL: Well, there were - - - there were
24 his convictions, and he did make admissions in treatment,
25 not to any of the statements that are at issue here.

1 JUDGE SMITH: Well, is it - - -

2 JUDGE GRAFFEO: So all you have is solely what
3 the subject is saying? They can't look at any of the
4 relevant, fairly common documents that are accumulated
5 during - - - during the course of the criminal
6 proceedings?

7 MS. MANTELL: Oh, the - - - a doctor must
8 certainly - - - certainly can, but here, these weren't the
9 types of documents that - - -

10 JUDGE SMITH: Well, you're not saying that she
11 can't look at them; you're saying she can't essentially -
12 - - she can't disclose their contents to the jury.

13 MS. MANTELL: Well, I mean, that's correct. As
14 a treatment provider, she could look at them. It's not
15 necessarily the case that a testifying expert's opinion
16 can be based on information like that. But here we have
17 either - - - the information apparently came from a pre-
18 sentence report that had mentioned a case that had been
19 pending. There was information that I - - - I'm not quite
20 sure how Dr. Mortiere obtained the information.

21 JUDGE SMITH: Suppose the - - - suppose the
22 State had called some or all of these victims as witnesses
23 at the trial, could the expert have relied - - - relied on
24 their statement - - - on a summary of their testimony or
25 on statements that corresponded to their testimony?

1 MS. MANTELL: Yes, yes, because then there would
2 have been an opportunity for cross-examination. It would
3 have been - - - it would have complied with this court's
4 decision in People v. Sugden, and it would have been more
5 reliable, particularly because there would have been an
6 opportunity for - - - for Floyd Y. to cross-examine those
7 people.

8 JUDGE READ: Are you arguing that Crawford
9 applies to these proceedings?

10 MS. MANTELL: Not necessarily because Crawford -
11 - - I mean, Crawford would preclude otherwise admissible
12 hearsay that's testimonial. Here, the hearsay didn't even
13 meet any exception to the hearsay rule.

14 JUDGE READ: So what - - - what cases do we look
15 to do decide what the boundary is between permissible and
16 impermissible?

17 MS. MANTELL: Specht v. Patterson and People v.
18 Goldstein. In Specht - - -

19 CHIEF JUDGE LIPPMAN: Did the AD understand
20 Goldstein, Appellate Division? Did they get it right on
21 what Goldstein means in relation to this case?

22 MS. MANTELL: No, because the Appellate Division
23 said that there is some sort of distinction between
24 testimony - - - or used to explain the basis of an
25 expert's opinion that would somehow distinguish it from

1 being offered for the truth of the matter asserted and
2 also credit a limiting instruction to that effect, and
3 that is contrary to Goldstein where - - -

4 CHIEF JUDGE LIPPMAN: Yeah, so they
5 misunderstand Goldstein in that regard?

6 MS. MANTELL: I'm not sure what the basis was
7 for how that decision came out but - - -

8 JUDGE ABDUS-SALAAM: Why is that contrary to
9 Goldstein?

10 MS. MANTELL: It seems to conflict with
11 Goldstein where - - -

12 JUDGE ABDUS-SALAAM: But why? Why is it
13 contrary to Goldstein?

14 MS. MANTELL: Because Goldstein acknowledged
15 that there is little, if any, distinction between offering
16 information as the basis for an expert's opinion versus
17 offering it for the truth of a matter asserted. And
18 Goldstein has since been adopted by a majority of the
19 Supreme Court in the sense of not finding a distinction
20 between introducing the information for its truth versus
21 as the basis for an expert's opinion. And that was in the
22 case of Williams v. Illinois.

23 JUDGE SMITH: I can concede a minor point. You
24 mentioned two cases, and one of them was Goldstein. What
25 was the other?

1 MS. MANTELL: Specht v. Patterson where the
2 Supreme Court found that in a proceeding that sort of
3 emanates after following a criminal proceeding finding
4 someone guilty of a sex offense, there's a separate
5 proceeding to determine whether the person's mental
6 condition could require treatment and render them a
7 potential danger to the community, and it was a case
8 concerning the procedural due process rights of the
9 defendant in that proceeding, and the Supreme Court found
10 that the defendant should have the same due process rights
11 that would be afforded a criminal defendant in the
12 proceeding that decides guilt or innocence, and that that
13 includes the right to cross-examination. Specht v.
14 Patterson is good law.

15 JUDGE SMITH: Suppose - - - I mean, suppose the
16 Appellate Division and the Supreme Court were right that
17 this hearsay was reliable, does that get it in?

18 MS. MANTELL: No, because the - - - there needs
19 to be a lot - - - an opportunity for the respondent to
20 test the reliability of that information to agree that - -
21 -

22 JUDGE ABDUS-SALAAM: Why can't that be done
23 through cross-examination of the expert?

24 MS. MANTELL: Because the expert - - -

25 JUDGE ABDUS-SALAAM: That's what Goldstein says.

1 MS. MANTELL: - - - isn't going to have the
2 information sufficient for the respondent to challenge
3 her, and there's the risk that the respondent is simply
4 drawing more and more attention to the unproven
5 accusations by - - -

6 CHIEF JUDGE LIPPMAN: Is this like a - - -

7 MS. MANTELL: - - - focusing - - -

8 CHIEF JUDGE LIPPMAN: - - - criminal trial
9 almost? This - - - the rights that you have?

10 MS. MANTELL: Under Specht, the rights should be
11 at least to the same extent that they - - -

12 CHIEF JUDGE LIPPMAN: Because someone - - -

13 MS. MANTELL: - - - the criminal defense at that
14 time.

15 CHIEF JUDGE LIPPMAN: - - - someone's liberty is
16 at stake? I mean, is that basically - - -

17 MS. MANTELL: Liberty is - - - liberty interests
18 are arguably even greater than - - - than those of a
19 criminal defendant. And here, it was just - - - I mean,
20 the State was allowed to simply use an expert witness.
21 And to - - - to go to the prior point, there's - - - there
22 is to be a concern that the jurors probably assume that
23 there was some reason why the court would allow
24 information like this.

25 CHIEF JUDGE LIPPMAN: What about - - - quickly,

1 your light's on. What about the patient - - - the
2 psychiatrist-patient privilege?

3 MS. MANTELL: That is another problem that - - -
4 another error in this case that's ground for reversal in
5 itself. The Article 10 abrogated the privilege only to
6 the extent that records could be disclosed, not to the
7 extent that would allow the therapist to become an agent
8 of the State in an adversarial proceeding against her
9 patient to confine him.

10 JUDGE PIGOTT: Well, the point is made to go
11 back - - - the Appellate Division had seemed to, almost by
12 the way - - - it said the two allegations from the younger
13 declarants were insufficiently reliable to support an
14 expert conclusion because the respondent had been found
15 not guilty. Now, this is civil. And not guilty, of
16 course, doesn't mean innocent. And if a DA chooses not to
17 prosecute, that doesn't mean you're innocent either. So
18 why couldn't they be used?

19 MS. MANTELL: I think what the Appellate
20 Division was doing was recognizing that there should be -
21 - - there was a presumption that that information wasn't
22 reliable, and without there having been anything more,
23 their - - - it was - - - it was error for the trial court
24 to admit it. If there had been an acquittal or a
25 dismissal, and the State brought - - - presented the

1 witness in some respect, either pre-trial or at trial,
2 then then it's possible that that information would still
3 be reliable and could be used.

4 JUDGE SMITH: Your - - - but your position is
5 that even if it's the most reliable thing in the world and
6 they got convictions in both cases, they still - - - it's
7 still hearsay.

8 MS. MANTELL: No, no. If there was something
9 that fit within a well-recognized exception to the hearsay
10 rule, it would still be admissible. Even still - - - even
11 if there was a lower standard and there was some
12 individual finding or scrutiny about the reliability of
13 the information, that would still call for a reversal in
14 this case because there wasn't anything like that done
15 here.

16 CHIEF JUDGE LIPPMAN: Okay, counselor. You'll
17 have your rebuttal.

18 Counsel.

19 MR. GRIECO: May it please the court, Matthew
20 Grieco for the attorney general.

21 The purpose of Article 10 is to accurately
22 determine whether the respondent has a mental abnormality.
23 And the State's experts in this case testified without
24 contradiction that certain materials including victim
25 statements and police reports are regularly relied upon in

1 the profession - - -

2 JUDGE SMITH: Does that mean - - - once an
3 expert says that, does that mean the expert can read it
4 aloud to the jury?

5 MR. GRIECO: There - - - this court explained in
6 Goldstein that the same expert who relies on the method
7 can explain that the methodology is reliable. The
8 legislature has determined, in the context of Article 10,
9 that certain materials, the materials described in Section
10 - - -

11 JUDGE SMITH: I'm not sure you're addressing my
12 question. If - - - I mean, are you saying that you have
13 an expert who testifies that certain materials are
14 reliable, it's the kind she relies on, she's allowed - - -
15 she's allowed to rely on them. My question is, is she
16 allowed to read them aloud to the jury. Are you saying in
17 Article 10 cases, yes, or in all cases?

18 MR. GRIECO: The Article 10 cases, it should
19 usually be the rule that an expert can testify to the
20 basis of her opinion unless in a particular - - -

21 JUDGE SMITH: You say the basis of her - - -
22 including disclosing the underlying facts?

23 MR. GRIECO: That's right.

24 JUDGE SMITH: Even if they're hearsay?

25 MR. GRIECO: If they meet with the - - - if they

1 meet the professional reliability exception, and in - - -

2 JUDGE SMITH: And you say - - - is that a
3 different rule from what you have in a criminal case?

4 MR. GRIECO: It could be. I mean, this court
5 doesn't need to address the issue that's left open in
6 Goldstein in this particular case because - - - because
7 New York adopts its hearsay rules through the decisions of
8 this court rather than through a written hearsay code,
9 it's enough in this case to say that the legislature has
10 made a determination that the materials described in M.H.
11 - - - Mental Hygiene Law, Section 1008(c), are usually
12 going to be relied upon by experts in forming their
13 opinions. And so as a general rule, those materials are
14 going to be - - - are going to be reliable. Now, even if
15 this court wants to additional apply - - -

16 JUDGE SMITH: Well, but - - - I mean, isn't it
17 true in general reliability - - - there's no pre-standing
18 reliability exception to the hearsay rule. I mean, where
19 - - - where in Article 10 does it suspend the operation of
20 the hearsay rule?

21 MR. GRIECO: It doesn't suspend the operation of
22 the hearsay rule, but the professional reliability rule
23 applies and allows a - - - allows an expert to summarize
24 materials notwithstanding that they are hearsay. I mean,
25 we already know - - -

1 JUDGE PIGOTT: I don't - - - you're going too
2 fast. I understand the "even though the hearsay part",
3 but as it gets down to when they were looking at the
4 allegations that did not result in convictions, there's a
5 '96, a '97, two '98s, can the expert testify as to the
6 underlying facts of those or simply say, you know, I was
7 told these things happened and if they did happen, this
8 demonstrates that this person is a dangerous sex offender.

9 MR. GRIECO: The latter, Judge Pigott, is closer
10 to what actually happened because she presented them as
11 allegations. She said, for example, on direct, that there
12 was an acquittal in the Nicole incident and that there had
13 been a decision not to prosecute.

14 JUDGE SMITH: But her opinion is obviously
15 useless to the extent it's based on those facts if the
16 facts aren't true.

17 MR. GRIECO: But we already know from the Sugden
18 and Goldstein decisions that juries can accept expert
19 opinions that incorporate some truth of a hearsay
20 statement. The question is whether the jury is
21 additionally going to hear a brief summary of those facts.
22 And as the editors of - - -

23 JUDGE GRAFFEO: There's no limit what she can
24 recite to the jury?

25 MR. GRIECO: The rule that we would advocate in

1 the Article 10 context is that in Article 10 the - - - the
2 basis of an expert's opinion should usually be admissible
3 unless in a particular case there was a showing that it is
4 significantly more prejudicial than probative.

5 JUDGE READ: So you want the federal rule 703
6 basically?

7 MR. GRIECO: Somewhat different because if you
8 read Sections 3.7 through 3.9 of the New Wigmore, which is
9 the same treatise this court relied upon in Goldstein, it
10 advocates that the default rule should be towards
11 disclosure. Yes, there will be cases where disclosure
12 should be prohibited, but the most important thing is that
13 the court adopt a rule that is flexible for the benefit of
14 trial judges. Much more important than the outcome of any
15 particular case is that there be a balancing test applied
16 by - - - in the first instance by trial judges with
17 deferential review, and we would advocate the one that is
18 urged by the New Wigmore in Section 3.9 of that treatise,
19 advocating a rule that defaults towards disclosure-basis
20 testimony. And the reason you want to do that is
21 prohibiting basis testimony doesn't keep a jury from
22 hearing opinions based on hearsay in incorporating the
23 truth.

24 JUDGE PIGOTT: Yeah, but the problem I'm
25 perceiving with respect to that is this is an adversarial

1 process.

2 MR. GRIECO: That's correct.

3 JUDGE PIGOTT: This isn't - - - this isn't
4 people sitting around saying should we keep this guy in or
5 not, this panel's going to decide that. It's you've got
6 an expert that's going to testify, this guy's going to
7 stay in jail for a very long - - - or stay in the
8 treatment center for a very long time, and they got an
9 expert that says the opposite, and the question then
10 becomes, we're hoping they're both going to be objective,
11 but how they objectively reach totally different
12 conclusions is an issue. And if he's acquitted of
13 something but your expert says, yeah, acquittal is beyond
14 a reasonable doubt, I'm a doctor, I can tell you right now
15 that he did it, it's just a question of they didn't get
16 enough proof in for the jury, I think a jury's going to -
17 - - the civil jury's going to believe your expert - - -

18 MR. GRIECO: Right, but she didn't say that.
19 She disclosed the fact that it was merely an allegation
20 and said that - - -

21 JUDGE PIGOTT: Well, hold on. But my point is
22 this, can she even go that far? I mean, can't she simply
23 say, there are a number of allegations, I looked at them,
24 they involve children, they involve the - - - and based
25 upon that, I think he has a problem, rather than getting

1 into the nitty-gritty where - - - that a jury can be
2 pretty offended by pretty quickly.

3 MR. GRIECO: The jury should hear about it, and
4 the reason is that if you prohibit the expert from talking
5 about it, the jury - - - once there's been a threshold
6 determination by the trial court that the materials are
7 sufficiently reliable to serve as the basis of an opinion,
8 the opinion is - - -

9 JUDGE PIGOTT: Well, that's kind of the point.
10 That's what - - - I'm not there yet. I'm saying how do we
11 say it's sufficiently reliable when there's an acquittal
12 if she wants to say that's reasonable doubt and we're
13 talking about preponderance here, I want to be able to say
14 that this actually happened even if you get acquitted.

15 MR. GRIECO: The trial court in this case
16 actually went above and beyond what Hambsch - - - which is
17 the test that would apply at the first stage of the
18 analysis.

19 JUDGE PIGOTT: Let's - - - I mean, with respect
20 to my particular example, would you say - - - how would
21 you, if you were the court, decide that?

22 MR. GRIECO: If the court - - - if the expert
23 wanted to actually testify I'm sure that this really
24 happened?

25 JUDGE PIGOTT: Yeah - - - no. Well, if he says

1 I want to - - - I am convinced that what - - - he told me
2 that this was what happened would be one thing. He told
3 me it didn't happened is another. But I don't believe
4 him, and I think it did happen, and therefore I think he's
5 dangerous. You can see where the problems can arise here,
6 right?

7 MR. GRIECO: But in this particular case, the -
8 - - we know that he engages in consistent denials and
9 shifting explanations for his conduct even with respect to
10 the conduct for which he was convicted just with respect
11 to the instant offense where he was proven guilty beyond a
12 reasonable. In the process of talking to Dr. Kunz, he
13 offered six different explanations over the course - - -

14 JUDGE SMITH: He may be a perfectly horrible,
15 dangerous human being, but he's still entitled to a fair
16 trial before they lock him up.

17 MR. GRIECO: But the fairest way to have a trial
18 in the Article 10 context - - -

19 JUDGE RIVERA: But, yeah, could you explain why
20 your rule is the default towards disclosure? Why is that
21 better than the default to nondisclosure?

22 MR. GRIECO: The reason it's better to default
23 to disclosure is that the best way to test these
24 statements is through the adversarial process. And that's
25 exactly what the editors of the New Wigmore argue and what

1 is argued in several of the articles that they cite.

2 JUDGE SMITH: But isn't cross-examination a
3 fairly traditional part of the adversarial process?

4 MR. GRIECO: And in this case, cross-examination
5 of the witness - - - it's a civil case - - - cross-
6 examination of the witness is sufficient, and - - -

7 JUDGE SMITH: Well, the usual - - - the point of
8 the hearsay rule is you're - - - when you have a statement
9 of fact put before a jury, you're supposed to be able to
10 cross-examine the person who said it.

11 MR. GRIECO: Right. But consider, Judge Smith,
12 that if this court prohibits basis testimony, the jury is
13 still going to, in many cases, hear the opinions that
14 incorporated it. I would submit to the court that it's
15 not possible that the legislature intended to the
16 materials in M.H.L. Section 1008(c) always come in but
17 never be used. So assuming that they are sometimes - - -

18 JUDGE ABDUS-SALAAM: I'd like to stop you there
19 about when they always come in under 1008(c). Those are -
20 - - - those materials are things that the legislature has
21 said that doctors should have access to, but your position
22 is that they should automatically come in, is that right,
23 under the professional reliabilities standard?

24 MR. GRIECO: Our position is that the
25 legislature declared them to be available because the

1 legislature understood that those are usually the kind of
2 materials that experts actually rely on in forming their
3 opinions. And Article 10 is meant to be, for the most
4 part - - - not exclusively but for the most part, a battle
5 of the experts.

6 JUDGE READ: And they come in.

7 MR. GRIECO: What's that?

8 JUDGE READ: And they come in automatically.

9 MR. GRIECO: In the majority of cases, they
10 should come in. And even if - - -

11 JUDGE READ: What about - - -

12 JUDGE ABDUS-SALAAM: Well - - -

13 JUDGE READ: Go ahead, Sheila.

14 JUDGE ABDUS-SALAAM: So in a majority of cases,
15 which means that it wouldn't be automatic for every case,
16 so why should we consider that they should come in in the
17 majority of cases?

18 MR. GRIECO: Because in the majority of cases,
19 there is going to be a way to demonstrate, as there was in
20 this case, that the materials are individually reliable
21 and relied upon in the profession. If the court applies
22 the Hamsch test additionally to the test that I'm
23 proposing, it was easily satisfied here by the pre-trial
24 conference in which the court looked individually at every
25 affidavit - - - and I do want to stress, by the way, that

1 there was an affidavit from every declarant whose
2 allegation did not result in a conviction, and that
3 includes CARA who they say in their reply brief there
4 wasn't one from.

5 JUDGE READ: Could you talk about the privilege
6 a little bit? I mean, it strikes me that you want the
7 therapist and the patient to be a free flow of
8 information, but how can that happen if the - - - if the
9 treating physician then testifies?

10 MR. GRIECO: Two points in response to that,
11 Judge Read. The first is that the statute is clear on its
12 face. It says notwithstanding any other provision of law,
13 the material will be disclosed. Once it's disclosed - - -

14 JUDGE READ: That's not the - - - okay, once
15 it's disclosed, then?

16 MR. GRIECO: Then the privilege has been - - -
17 has been abrogated for Article 10 purposes. So - - -

18 JUDGE READ: So there's - - - so once it's been
19 disclosed, then that means the treating physician
20 testifies, even if the - - - even if the - - - even if the
21 individual objects.

22 MR. GRIECO: That's right. If you - - - if you
23 look at the text of 1008(c), it specifically makes
24 treatment one of the considerations relevant to whether
25 the - - - whether the respondent has a mental abnormality,

1 and there's a reason for that. And this actually relates
2 to another issue in the case. They often suggest that
3 there is this bright line distinction between the moment
4 of evaluation and the process of treatment, but it's a
5 continuum. And what matters is that when - - - that when
6 the expert testifies on the stand she can testify - - -

7 JUDGE SMITH: But in this case, it looks
8 prettily clear. The one doctor treated him, and the other
9 one was the evaluator.

10 MR. GRIECO: But both of them offered their
11 present opinion to the jury about whether the respondent
12 had - - -

13 JUDGE SMITH: Yeah, that's the problem.

14 MR. GRIECO: It's not a problem, Your Honor,
15 because the jury is supposed to hear from the expert the
16 reasons why the expert believes that there is - - -

17 JUDGE SMITH: Isn't - - - isn't there something
18 wrong when - - - I mean, if you go to a doctor for
19 treatment and then you find out a few years later that the
20 doctor was testifying against you to incarcerate you for
21 years?

22 MR. GRIECO: Well, although it's true that the
23 respondent in this case was originally put into civil
24 commitment as a heart (sic) patient before Article 10 was
25 - - - Article 10 was enacted, he was well aware that he

1 was put in for treatment of - - - treatment of his
2 condition and that the method by which he would complete
3 his treatment was to progress in his treatment. But he
4 has instead continued to make evasive and - - -

5 CHIEF JUDGE LIPPMAN: Shouldn't you really
6 provide meaningful treatment when that's - - - that's
7 what's going to happen when you come in and testify about
8 what went on? Doesn't that seem just inconsistent with
9 the whole purpose of the statute and what the doctor is
10 supposed to be doing?

11 MR. GRIECO: I don't think so, Your Honor, first
12 of all, because the legislature declared that it comes in.

13 JUDGE PIGOTT: Well, that's true, but in fact,
14 this has been debated. Defense lawyers say, the way this
15 thing is going, you should be advising your clients do not
16 seek treatment once you're sentenced to state time because
17 whoever you talk to is going to come in and testify at the
18 end of your sentence and double it for you.

19 MR. GRIECO: But the respondent in this case, he
20 denies his conduct even with respect to - - -

21 JUDGE PIGOTT: What do you think of that?

22 MR. GRIECO: What's that?

23 JUDGE SMITH: I mean, what do you think of that?
24 I mean, isn't that an issue?

25 MR. GRIECO: I think that the legislature

1 intended a system in which respondents are aware of why
2 they're being put into commitment.

3 JUDGE READ: So you're saying the legislature
4 considered that but said it was okay anyway?

5 MR. GRIECO: I think that - - - I think that has
6 to be the conclusion - - -

7 JUDGE SMITH: What are the words in which they
8 said it was okay?

9 MR. GRIECO: It's - - - it's the context of
10 1008(c) in which the legislature directed that these
11 materials would be available to the State.

12 CHIEF JUDGE LIPPMAN: These materials?

13 MR. GRIECO: Including descriptions of the
14 treatment. I mean, the word "treatment" - - -

15 JUDGE SMITH: Isn't a step from there to say the
16 treating physician can testify against her patient?

17 MR. GRIECO: But it's not because the privilege
18 is waived at the moment that the - - -

19 JUDGE SMITH: Waived?

20 MR. GRIECO: The privilege is abrogated the
21 moment that the materials are disclosed.

22 JUDGE READ: By the way, is it common in these
23 Article 10 proceedings for the treating - - - for a
24 treating physician to testify?

25 MR. GRIECO: I'm not aware of the percentage of

1 proceedings in which it happens. I know that I've seen
2 other cases in which it has.

3 CHIEF JUDGE LIPPMAN: But, I mean, the fact that
4 it's discoverable, that's enough?

5 MR. GRIECO: It's certainly enough to abrogate -
6 - -

7 CHIEF JUDGE LIPPMAN: Then he can testify?

8 MR. GRIECO: It's certainly - - -

9 CHIEF JUDGE LIPPMAN: Aren't they two different
10 things?

11 MR. GRIECO: It's certainly enough to abrogate
12 the privilege, and once the privilege applies, then
13 there's no basis for - - - once the privilege doesn't
14 apply, there's no basis for precluding the testimony.

15 Before my time expires - - -

16 JUDGE SMITH: Before you're out of time, does -
17 - - what kind of constitutional rights does a respondent
18 in a proceeding like this have? Does he have a right of
19 confrontation?

20 MR. GRIECO: He does not have a right of
21 confrontation. He has the rights associated with due
22 process, which to return to my - - -

23 JUDGE SMITH: This is like any other civil
24 proceeding?

25 MR. GRIECO: It - - - he needs rights

1 commensurate to ensure that there was not an erroneous
2 deprivation of liberty. Confrontation - - -

3 CHIEF JUDGE LIPPMAN: Doesn't he need rights
4 that guarantee - - - when you've got liberty at stake,
5 doesn't he have a right to cross and to confront? How
6 could you not?

7 MR. GRIECO: He doesn't have that particular
8 right.

9 CHIEF JUDGE LIPPMAN: Given what's at stake, why
10 wouldn't you?

11 MR. GRIECO: No court has ever - - - no court
12 has ever held that there is a right to actual in-court
13 confrontation in a civil - - -

14 JUDGE SMITH: Is there - - - is there a
15 privilege against self-incrimination?

16 MR. GRIECO: There is not.

17 JUDGE SMITH: So you could have called Floyd Y.
18 as your first witness?

19 MR. GRIECO: I don't know that we're allowed to
20 call the respondent himself. I actually don't know the
21 answer to that. I do want to quickly address - - -

22 CHIEF JUDGE LIPPMAN: Isn't that fairly
23 cavalier, counsel?

24 MR. GRIECO: What's that?

25 CHIEF JUDGE LIPPMAN: Isn't it cavalier on your

1 part to say that it just doesn't matter, his liberty is at
2 stake, but he really has no rights - - -

3 MR. GRIECO: Oh, of course, it matters. He - -
4 -

5 CHIEF JUDGE LIPPMAN: - - - that are - - - that
6 are consistent with what's at stake?

7 MR. GRIECO: He receives due - - - the due
8 process procedures that are - - - that are consistent with
9 the need to - - - Mathews v. Eldridge explains that a
10 respondent in a civil proceeding - - - and this is true,
11 and the Supreme Court of the United States made this very
12 clear in Kansas v. Hendricks that when a state has made a
13 determination to declare civil management a truly civil
14 proceeding, and it has, the state - - - the statute here
15 is on par - - -

16 CHIEF JUDGE LIPPMAN: How would you describe an
17 Article 10 proceeding as to what it's all about?

18 MR. GRIECO: You apply the Mathews v. Eldridge
19 test and decide which proceedings are actually necessary
20 to avoid an erroneous deprivation of liberty. I do,
21 before my - - - before I sit down, if I may - - -

22 CHIEF JUDGE LIPPMAN: Last thought, counsel. Do
23 it.

24 MR. GRIECO: Yes. Thank you.

25 I do want to respond in particular to Ms.

1 Mantell's reliance on the Specht case. That case actually
2 doesn't apply here for two reasons. The first is that
3 that court - - - that statute, despite having some sex
4 offender element to it, was, by the State's own
5 declaration, a criminal statute. And second of all, to
6 the extent that it ever would have applied, it's abrogated
7 by the Supreme Court's decision in Kansas v. Hendricks - -
8 -

9 CHIEF JUDGE LIPPMAN: Okay, counsel.

10 MR. GRIECO: - - - which says that we applied -
11 - -

12 CHIEF JUDGE LIPPMAN: Thank you, counsel.
13 Counselor, rebuttal.

14 MS. MANTELL: There are several things about the
15 State's argument that, to begin with, are contrary to the
16 statute, and I'll start with privilege. The statute
17 actually allows that there be two experts who are
18 nontreatment providers that could end up being witnesses -
19 - - witnesses for the State in these proceedings, and it
20 is anomalous for the treatment provider to be one of the
21 expert witnesses. That's not what the statute provides.
22 For the legislature, I think, took pains to make it so
23 that the State could make its case if it had one.

24 JUDGE READ: When you say "anomalous", you mean
25 it's - - - this case is somewhat unusual in that respect?

1 MS. MANTELL: Absolutely.

2 JUDGE READ: Okay.

3 MS. MANTELL: Absolutely.

4 JUDGE RIVERA: Unless we - - - unless we decide
5 otherwise.

6 MS. MANTELL: Well, it's - - -

7 JUDGE RIVERA: If we agree with him, it might
8 very well be that you would have more of the - - -

9 MS. MANTELL: I - - - I - - -

10 JUDGE RIVERA: Is that not correct?

11 MS. MANTELL: I mean, I find it unlikely that
12 most treatment providers would do this.

13 JUDGE PIGOTT: All right. But now when you said
14 - - -

15 MS. MANTELL: There's ethical issues involved.

16 JUDGE RIVERA: Because of their ethical issues?

17 MS. MANTELL: Yes.

18 JUDGE PIGOTT: Did you say it's statutory that
19 they can use two experts?

20 MS. MANTELL: Yes, it is. There's an expert who
21 - - -

22 JUDGE PIGOTT: Where is it?

23 MS. MANTELL: He's part of a case review team
24 that - - -

25 MS. MANTELL: Where is it? I'll find it.

1 MS. MANTELL: 1005(e) and 1006(d).

2 And there is nothing to support the State's
3 position that the legislature had intended that - - - that
4 charges that ended in dismissals or acquittals or - - - or
5 offenses reported but not charged due to insufficient
6 evidence could be - - - could be brought in as evidence
7 against the respondents. For one thing - - -

8 JUDGE SMITH: But they could still call the
9 victims, couldn't they?

10 MS. MANTELL: Yes, they could. But in terms of
11 documents being disclosed that could automatically come
12 into - - - to evidence, I mean, for one thing, the State
13 is conflating discovery with admissibility. Number 2,
14 it's a questionable presumption to say that the statute
15 allows for the disclosure of these types of records, but
16 in any event, somehow Dr. Mortiere got a hold of them
17 before there was even a proceeding.

18 Furthermore, the court did not make any
19 individual reliability determinations regarding these
20 accusations. The court decided before a trial, before any
21 witness was presented that if an affidavit reflected the -
22 - - if there was an affidavit about the accusations, they
23 were admissible. And the example of the accusations
24 involving the acquittal are a great example of this
25 because the court initially held that they weren't

1 reliable enough to be admitted but then said that, well,
2 because there's an affidavit they could come in, and it
3 reflects that there wasn't an individual reliability
4 determination. And for that, the pages of the record that
5 this is on are 525, 534, and 597 to 600.

6 Specht v. Patterson is applicable because even
7 though that was a proceeding that was labeled criminal,
8 the court was cognizant of the fact that it wasn't about
9 guilt or innocence. Kansas v. Hendricks did not overrule
10 Specht. Kansas v. Hendricks had to do with sub - - - had
11 to do with substantive due process. Specht is about
12 procedural due process. And Kansas v. Hendricks, Kansas
13 v. Crane weren't about the procedural rights that a
14 respondent would be entitled to. It just - - - it had a
15 definition for what it recognized distinguishing a
16 definition between a criminal proceeding and a civil
17 proceeding. If Specht v. Paterson had occurred post
18 Kansas v. Hendricks, it would have been labeled a civil
19 proceeding. It doesn't make any difference to the court's
20 reasoning in that case.

21 CHIEF JUDGE LIPPMAN: Okay, counselor. Thank
22 you.

23 Thank you both. Appreciate it.

24 (Court is adjourned)

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

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of the State of New York v. Floyd Y., No. 182 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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