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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF STATE OF NEW YORK,
Respondent,

-against-

No. 173

KENNETH T.,
Appellant.

MATTER OF STATE OF NEW YORK,
Respondent,

-against-

No. 172

DONALD DD,
Appellant.

20 Eagle Street
Albany, New York 12207
September 18, 2014

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

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Appearances:

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1 CHIEF JUDGE LIPPMAN: 173 and 172.

2 Counsel, do you want any rebuttal time?

3 MS. VUK-PAVLOVIC: Two minutes, please,
4 Your Honor.

5 CHIEF JUDGE LIPPMAN: Okay. You're doing
6 Kenneth T. Go ahead.

7 MS. VUK-PAVLOVIC: May it please the court,
8 Ana Vuk-Pavlovic for the Kenneth T.

9 Indefinite civil confinement under Article
10 of the Mental Hygiene Law, has to be based on more
11 than just evidence of past crimes, but that's all the
12 State had in this case. Neither - - -

13 CHIEF JUDGE LIPPMAN: What's the diagnosis
14 of Kenneth T.?

15 MS. VUK-PAVLOVIC: There were two
16 diagnoses. And - - -

17 CHIEF JUDGE LIPPMAN: Go ahead - - -

18 MS. VUK-PAVLOVIC: - - - the State's expert
19 relied on both - - - the interplay of both of them in
20 finding a mental abnormality - - -

21 CHIEF JUDGE LIPPMAN: What are they? Go
22 ahead.

23 MS. VUK-PAVLOVIC: One was paraphilia, not
24 otherwise specified, nonconsent, which is - - - Dr.
25 Kirschner explained, involved intense sexual urges or

1 fantasies directed specifically at the nonconsent of
2 the victim.

3 CHIEF JUDGE LIPPMAN: Is that what's shown
4 here?

5 MS. VUK-PAVLOVIC: No.

6 CHIEF JUDGE LIPPMAN: Why not?

7 MS. VUK-PAVLOVIC: Not at all. If - - -

8 CHIEF JUDGE LIPPMAN: What not? What is
9 shown here? What - - - what's the evidence here?

10 MS. VUK-PAVLOVIC: The evidence is just the
11 past crimes themselves. Dr. Kirschner - - -

12 CHIEF JUDGE LIPPMAN: Doesn't Dr. Kirschner
13 say you can infer from the - - - from the past crime
14 - - - from those crimes that he - - - that he has
15 this urge? Or did he say it doesn't matter?

16 MS. VUK-PAVLOVIC: He says both. He says
17 that you can infer from the past crimes, but that's
18 an impermissible inference, because you have - - -

19 CHIEF JUDGE LIPPMAN: But you're saying in
20 fact, he's inferring from the crimes? What - - -
21 what's - - -

22 MS. VUK-PAVLOVIC: Well, that's what he
23 testified, yeah, over and over. I mean, he - - - he
24 said that he inferred the existence of these deviant
25 sexual urges to coercion itself just from the - - -

1 the fact that Kenneth T. - - -

2 JUDGE SMITH: I mean, you can - - - you can
3 presumably infer, if a rape has been committed, you
4 can infer that the rapist had some sexual urges, I
5 guess. That seems like that would be true in most
6 cases.

7 MS. VUK-PAVLOVIC: Yes. But this - - -

8 JUDGE SMITH: Did he say any more than
9 that?

10 MS. VUK-PAVLOVIC: He didn't say any - - -
11 anything more than that. In his diagnosis - - -

12 CHIEF JUDGE LIPPMAN: Can you infer the
13 nonconsent - - - this - - - this urge as it relates
14 to - - - to people who are not consenting?

15 MS. VUK-PAVLOVIC: No, because there was no
16 - - - you can't infer that just from the fact of a
17 nonconsensual encounter. I mean, that's - - -

18 JUDGE PIGOTT: If you - - - if you did do
19 that, it would seem to me - - - and I'm probably
20 wrong about this - - - but it almost would - - -
21 would acquit him of the rape. If - - - if the
22 disease is that he can't - - - that he can't make the
23 decision - - - you know, it's a - - - it's a disease
24 that makes him rape, well, then where does - - -
25 where does the rape that he got convicted of go,

1 because Dr. Kirschner seemed to be saying I know he's
2 a sick person and I know he suffers from this - - -
3 this mental disease, because he raped somebody. And
4 that's - - - and that shows that he has this
5 proclivity. And it almost seemed to me that by doing
6 that, you're saying that rape is a disease.

7 MS. VUK-PAVLOVIC: Yes. I mean, this is -
8 - - this is, you know, often called rapism. It - - -
9 I mean, it's basically the - - - the expert here is
10 pathologizing the facts of the crimes themselves.
11 And that's - - -

12 JUDGE READ: So you're saying it's legally
13 insufficient? That's your basic argument: there's
14 legally insufficient evidence to show the mental
15 abnormality?

16 MS. VUK-PAVLOVIC: Yes. Because there was
17 no evidence of a - - - of a valid paraphilia
18 diagnosis here.

19 JUDGE SMITH: Why - - - why is the case
20 different from Shannon S.?

21 MS. VUK-PAVLOVIC: Well, that case involved
22 a completely different diagnosis, which is
23 hebephilia. It had specified parameters. It
24 involved - - -

25 JUDGE SMITH: And it also had some of the

1 same kind of stuff we have here, the paraphilia NOS,
2 nonconsenting partners. But you're saying - - -
3 you're saying that it would have come out the other
4 way if the hebephilia hadn't been there?

5 MS. VUK-PAVLOVIC: Well, I - - - this
6 court, in its decision in Shannon S., upheld the
7 commitment based on the hebephilia diagnosis. And -
8 - - and that is very different from - - - from the
9 diagnosis here, because it involved specified
10 parameters. The - - - the urges there - - -

11 CHIEF JUDGE LIPPMAN: This doesn't have
12 specified parameters?

13 MS. VUK-PAVLOVIC: No, not beyond the facts
14 of the, you know, nonconsensual - - -

15 JUDGE GRAFFEO: Is your posture that - - -

16 MS. VUK-PAVLOVIC: - - - acts.

17 JUDGE GRAFFEO: - - - that no one with this
18 diagnosis or carrying this label could ever be
19 subject to Article 10 commitment? Separate from the
20 proof in this case, from this expert.

21 MS. VUK-PAVLOVIC: The history - - -

22 JUDGE GRAFFEO: I'm trying to determine the
23 contours of your argument.

24 MS. VUK-PAVLOVIC: Well, def - - -
25 definitely, no one can suffer from paraphilia NOS

1 nonconsent without evidence that they're specifically
2 aroused by - - -

3 CHIEF JUDGE LIPPMAN: No, no, but is the
4 diagnosis itself something that's recognized that can
5 be - - - you know?

6 MS. VUK-PAVLOVIC: Not - - -

7 JUDGE GRAFFEO: In another case, could
8 there be different expert testimony that would
9 justify Article 10 treatment?

10 MS. VUK-PAVLOVIC: Well, there could be.
11 If this - - - if this court accepts that this is - -
12 - you know, the diagnosis itself satisfies
13 substantive due process for - - - you know, and is a
14 valid basis for - - -

15 CHIEF JUDGE LIPPMAN: But isn't - - -

16 MS. VUK-PAVLOVIC: - - - a commitment - - -

17 CHIEF JUDGE LIPPMAN: - - - there some
18 debate about whether this kind of diagnosis - - -

19 MS. VUK-PAVLOVIC: There's a very, very - -
20 -

21 CHIEF JUDGE LIPPMAN: - - - what it means
22 and - - -

23 MS. VUK-PAVLOVIC: - - - there's a serious
24 debate. And the history shows us that this is a
25 diagnosis that's been rejected in the - - - in - - -

1 from the DSM over the past thirty years - - -

2 JUDGE SMITH: Shouldn't - - - should you -

3 - -

4 MS. VUK-PAVLOVIC: - - - it was created - -

5 -

6 JUDGE SMITH: - - - I mean, I understand
7 that point. But shouldn't you have told that to the
8 court at a Frye hearing rather than telling us on
9 appeal?

10 MS. VUK-PAVLOVIC: Well, that would have
11 been one way to deal with it. And - - - and this - -

12 -

13 JUDGE GRAFFEO: I mean, there's literature
14 on both sides of the issue.

15 MS. VUK-PAVLOVIC: There is. But this case
16 doesn't present, you know, the - - - a question about
17 the admissibility of the evidence at trial - - -

18 CHIEF JUDGE LIPPMAN: You don't have to - -
19 - you don't have to, in this case, make that
20 determination whether it's recognized or shouldn't be
21 recognized? You're saying in your - - - in this
22 case, even if you accept this as a recognized
23 diagnosis, it's no good, there was nothing to support
24 it?

25 MS. VUK-PAVLOVIC: Exactly.

1 JUDGE SMITH: Even - - - I guess - - - if I
2 understand what you're saying, you're saying if
3 you've got a diagnosis of - - - or have diagnosis of
4 anything, measles or mumps, whatever it is, if the
5 only basis for the diagnosis is that the man
6 committed two rapes, that's not enough.

7 MS. VUK-PAVLOVIC: Right. And Article 10
8 expressly prohibits a finding of mental abnormality
9 based just on the crimes alone. Section 10.07(d)
10 says the fact - - - fact-finder can't find mental
11 abnormality based just on - - -

12 JUDGE GRAFFEO: And how our decision in
13 John S. relate to this case?

14 MS. VUK-PAVLOVIC: I don't think this court
15 reached this issue in John S., because there the
16 respondent didn't challenge the ASPD diagnosis as
17 being insufficient as a matter of substantive due
18 process to - - - to uphold his commitment. He just
19 challenged the - - - he just questioned whether the
20 diagnosis in his case caused in him to be predisposed
21 to committing sexual offenses, and to - - -

22 CHIEF JUDGE LIPPMAN: So this is left - - -

23 MS. VUK-PAVLOVIC: - - - not - - -

24 CHIEF JUDGE LIPPMAN: - - - open in your
25 mind?

1 MS. VUK-PAVLOVIC: Yes. The - - - the
2 question of whether the ASPD diagnosis can - - - can
3 ever support civil commitment is left open, because -
4 - -

5 JUDGE SMITH: But that's - - - that's more
6 - - - that's presented in its purer form in the other
7 case, isn't it? Because you've got two diagnoses in
8 your case?

9 MS. VUK-PAVLOVIC: Yes. But even - - -
10 even if it had been - - -

11 JUDGE SMITH: Well, why is John S.
12 irrelevant to that?

13 MS. VUK-PAVLOVIC: I'm sorry?

14 JUDGE SMITH: Why - - - I mean, why - - - I
15 mean, so I realize that John S. didn't reach the
16 question of will ASPD do it, but what - - - what
17 about your other issue? Why is John S. irrelevant to
18 that?

19 MS. VUK-PAVLOVIC: Because in this case,
20 Dr. Kirschner based his diagnosis on the interplay of
21 paraphilia NOS nonconsent and ASPD. He - - - he
22 didn't say ASPD alone would be a sufficient basis for
23 commitment. He said that ASPD caused him to act out
24 on his paraphilic urges, which, you know, the
25 paraphilic urges, there's no evidence of that.

1 JUDGE SMITH: I mean, I guess my - - - my
2 reading of John S. is it's basically an evidence
3 case. There's a question of whether the evidence was
4 sufficient under Floyd Y. It doesn't go to what's -
5 - - what substantively - - - whether the evidence is
6 sufficient to support a finding or not. Do you agree
7 with that?

8 MS. VUK-PAVLOVIC: I - - - I believe that
9 in - - - it did. Yes. It was a sufficiency of the
10 evidence case, and it didn't - - - it didn't address
11 the sufficiency of the ASPD diagnosis in itself as a
12 basis for civil commitment.

13 CHIEF JUDGE LIPPMAN: Okay, thanks,
14 counsel.

15 Let's hear from the other side.

16 MS. DAVIS NOLL: Bethany Davis Noll for the
17 State.

18 There was ample evidence to support the
19 affirmed findings of fact here in this case.

20 CHIEF JUDGE LIPPMAN: What do you have
21 other than the two - - - the two crimes?

22 MS. DAVIS NOLL: Well, in the record
23 there's evidence that Kenneth T. told Dr. Etu (ph.)
24 and Dr. Etu testified to this at probable - - - in
25 the probable cause hearing - - - that he doesn't have

1 - - - that he lacks control over his sexual behavior.
2 Dr. Kirschner - - -

3 JUDGE SMITH: Are there a lot of rapists
4 who have control over their sexual behavior?

5 MS. DAVIS NOLL: That's a question for the
6 experts. I think there might be. They - - - they
7 rape for - - - for reasons of control or they rape in
8 a way where they can't be caught. But that's another
9 thing that Dr. - - -

10 CHIEF JUDGE LIPPMAN: And it - - - and it's
11 in relation to nonconsenting partners?

12 MS. DAVIS NOLL: In here, Dr. - - -

13 CHIEF JUDGE LIPPMAN: The evidence shows a
14 - - - a lack of control in relation to particular
15 heightened - - - this impulse is in relation to
16 nonconsenting partners?

17 MS. DAVIS NOLL: That's right. The
18 evidence also shows that Kenneth T. - - -

19 CHIEF JUDGE LIPPMAN: It does show that?
20 Where does it show that?

21 MS. DAVIS NOLL: It shows that Kenneth T.
22 had urges that caused him to ignore all the sanctions
23 that he recently received for rape - - -

24 JUDGE PIGOTT: Well, when was asked - - -
25 when Dr. Kirschner was asked on cross-examination

1 about that, he says that, "The conclusion that the
2 respondent was aroused by the - - - by the notion of
3 nonconsensual sex was simply an inference from his
4 criminal behavior from 'the way he conducted himself
5 during the two offenses'."

6 And then the court asked whether the
7 respondent in Dr. Kirschner's view was getting
8 aroused from having - - - having sex in a
9 nonconsensual situation, and he said, "I'm not sure."

10 MS. DAVIS NOLL: Well, the court did - - -
11 did - - - he did - - - Dr. Kirschner was subject to
12 vigorous cross-examination on his paraphilia NOS
13 diagnosis. And the court even engaged him and asked
14 him if he'd improperly labeled Kenneth T. And Dr.
15 Kirschner steadfastly testified that he had not, and
16 that he had used the behaviors - - -

17 CHIEF JUDGE LIPPMAN: But what's the theory
18 that comes out of his testimony - - -

19 MS. DAVIS NOLL: So the - - -

20 CHIEF JUDGE LIPPMAN: - - - as to what he's
21 going on? How does he get to the endgame based on -
22 - - on the evidence that he has?

23 MS. DAVIS NOLL: Well, the - - - the
24 question here is whether the two diagnoses, both ASPD
25 and paraphilia NOS, which is what Dr. Kirschner

1 relied on, how they manifest themselves in Kenneth T.
2 to predispose him to commit future sex offenses. And
3 he has his prior - - -

4 JUDGE ABDUS-SALAAM: Is it sufficient - - -
5 counselor, is it sufficient for the expert to just
6 testify that those two have an interplay, without
7 presenting any evidence showing how they do interplay
8 with each other?

9 MS. DAVIS NOLL: Well, he - - - they're - -
10 - he does - - - his evidence does need to be
11 supported by the record. But here, both the trial
12 court that was the fact-finder here, and the
13 Appellate Division, both found that the evidence does
14 support the determination - - -

15 JUDGE SMITH: Can you - - - can you give us
16 a hypothetical case in which a - - - an expert says I
17 think this guy has ASPD and paraphilia and NOS and it
18 would not be supported by the record? Assume - - -
19 assume we have a rapist.

20 MS. DAVIS NOLL: If there's no evidence
21 that he can - - - that he doesn't - - - can't control
22 his urges, for example - - -

23 JUDGE SMITH: Yeah, well, are - - - is it
24 okay for the expert to infer that he can't control
25 his urges from the fact that he committed these

1 crimes, I mean, and got himself locked up?

2 MS. DAVIS NOLL: That - - - it's okay for
3 that to be part of the analysis. These - - - the - -
4 -

5 JUDGE SMITH: But it can't be the whole
6 analysis?

7 MS. DAVIS NOLL: Dr. Kirschner - - -

8 JUDGE SMITH: Can it - - - can it be the
9 whole analysis?

10 MS. DAVIS NOLL: It very well could be if -
11 - - if that is how he analyzes - - -

12 JUDGE SMITH: So if you - - -

13 MS. DAVIS NOLL: - - - the individual.

14 JUDGE SMITH: - - - if you have an expert,
15 it's enough, in your view, for an expert to say, I've
16 seen the guy, he committed rape twice. From these
17 rapes, I infer that he cannot control his urges;
18 Article 10 is satisfied. That's it?

19 MS. DAVIS NOLL: Well, in this case - - -
20 in this case we have much more than just the rapes.
21 We have - - -

22 JUDGE SMITH: Okay. I'm talking about - -
23 -

24 MS. DAVIS NOLL: - - - Kenneth T.'s - - -

25 JUDGE SMITH: - - - a hypothetical case

1 where that's all.

2 MS. DAVIS NOLL: If that's the it - - - if
3 that's it, if that's the testimony?

4 JUDGE SMITH: That's it.

5 MS. DAVIS NOLL: That's probably - - - that
6 would be a harder case. I don't think that would be
7 enough.

8 JUDGE SMITH: Okay. And what - - - and now
9 tell us, what in this case - - - what makes this case
10 different from the hypothetical?

11 MS. DAVIS NOLL: In this case, there's at
12 least five - - - five factors. I've already
13 mentioned his testi - - - his admission to Dr. Etu
14 about his inability to control his sexual behavior.
15 He al - - - I've also already mentioned that he - - -
16 he committed his second attempted rape while he - - -
17 after he just spent seventeen years in prison. And
18 in - - - with someone who knew him, so he could be
19 easily caught, even though he was on parole at the
20 time.

21 He's also never acknowledged his crimes.
22 He's still denying them. And - - -

23 JUDGE PIGOTT: So we're still talking about
24 two crimes, that's it?

25 MS. DAVIS NOLL: Two crimes. And then the

1 fourth factor which I was just going to mention was
2 his long prison disciplinary record which Dr.
3 Krischner said was the worst one he'd ever seen.

4 JUDGE PIGOTT: Right, but that - - - that -
5 - - that does a lot for the ASPD. I mean - - -

6 MS. DAVIS NOLL: Right, well the mental
7 abnormality determination was based both on ASPD - -
8 -

9 JUDGE PIGOTT: The what determination?

10 MS. DAVIS NOLL: The mental abnormality
11 determination was based - - - based both on ASPD and
12 paraphilia NOS - - -

13 JUDGE PIGOTT: I know. But I mean, we've
14 gone through this ASPD thing about - - - you know, I
15 mean, you could have ASPD and not be a sex offender.

16 MS. DAVIS NOLL: That's right. You could
17 have para - - -

18 JUDGE PIGOTT: Half the prison population,
19 I think, someone said in a dissent recently, have
20 ASPD. So we know that's there. So you - - - so you
21 got eighty percent of them over there. What makes a
22 person ASP - - - who has ASPD a sex offender?

23 MS. DAVIS NOLL: The question is how they
24 manifest - - - how, in this case, the two diagnoses
25 manifested themselves - - -

1 JUDGE PIGOTT: That's right. And what - -
2 - what I think we're trying to get at is if - - - if
3 Dr. Kirschner is saying it's because he committed two
4 rapes, is that it, and is that enough?

5 MS. DAVIS NOLL: That's not all he said.
6 And that it might - - -

7 CHIEF JUDGE LIPPMAN: You don't think - - -

8 MS. DAVIS NOLL: - - - be enough.

9 CHIEF JUDGE LIPPMAN: - - - you could read
10 his testimony as saying it's based on the two crimes
11 and it doesn't really matter anything else?

12 MS. DAVIS NOLL: No, I mean, you could
13 maybe say that - - -

14 CHIEF JUDGE LIPPMAN: You can't read it
15 that way?

16 MS. DAVIS NOLL: No, because he explained
17 at length all the factors he deter - - - he used to
18 determine both Kenneth T.'s ASPD - - -

19 CHIEF JUDGE LIPPMAN: Yeah, but did his
20 testimony come down to, after all that explaining at
21 length?

22 MS. DAVIS NOLL: He also men - - - he also
23 - - -

24 CHIEF JUDGE LIPPMAN: No, what's the answer
25 to my question?

1 MS. DAVIS NOLL: It was a - - -

2 CHIEF JUDGE LIPPMAN: If you had to des - -
3 - describe what he said in a - - - in a global way,
4 you don't think he said he's just basing it on the
5 two crimes?

6 MS. DAVIS NOLL: No, he le - - - the
7 described at length, Kenneth T.'s refusal to admit to
8 his crimes and his longstanding tendency to lie, his
9 longstanding tendency to refuse to comply with both
10 societal and prison norms.

11 JUDGE PIGOTT: Let's assume all of that.
12 Let's assume he has antisocial personality disorder
13 and it's - - - and it's demonstrated in sixty-three
14 Tier II and three Tier III violations in prison and
15 all the other stuff that goes with that. He's got
16 ASPD. No question about it. But he gambles a lot.
17 So does - - - is he - - - does he have a gambling
18 affliction because he has ASPD and he gambles a lot?

19 MS. DAVIS NOLL: That's a different person.
20 I suppose - - -

21 JUDGE PIGOTT: Right.

22 MS. DAVIS NOLL: - - - that person might.

23 JUDGE PIGOTT: That's right. So because he
24 had two rapes, is that it, Q.E.D., as he's now been
25 shown to be a sex offender, and he - - -

1 MS. DAVIS NOLL: No, it's - - - it's how
2 these factors all combine themselves in him to make
3 him predisposed to commit sex offenses.

4 JUDGE PIGOTT: Are you missing my point or
5 am I just not being clear?

6 MS. DAVIS NOLL: Well, I'm - - -

7 JUDGE PIGOTT: We want to make him an ASPD.
8 We've got that. He's one of them. He's - - - he's
9 one of the worst prisoners they've ever had and it's
10 - - - and it's unbelievable, and he goes around, and
11 he keeps picking on people, and he's stealing stuff
12 and everything else. Done.

13 Does he have a sexual disorder?

14 MS. DAVIS NOLL: Yes, because he - - -

15 JUDGE PIGOTT: Yes, he has it because he
16 raped two people?

17 MS. DAVIS NOLL: That's - - - that's part
18 of the evidence. The other - - - the sexual disorder
19 is also supported by his - - - he harassed female
20 staff in the prison. But he also refuses to
21 acknowledge those crimes now, and refuses to engage
22 in sex offender treatment - - -

23 CHIEF JUDGE LIPPMAN: That gives him a
24 sexual disorder that he refuses to acknowledge the
25 crime?

1 MS. DAVIS NOLL: Well, it shows that he's
2 not grappling with his disorder and that he's - - -

3 JUDGE SMITH: And but if he - - - if he
4 says I can't help myself, that also gives him a
5 sexual disorder?

6 MS. DAVIS NOLL: He also refuses to engage
7 in sex offender treatment, and was kicked out of sex
8 offender treatment for disciplinary violations.

9 JUDGE SMITH: And if he - - - and if - - -
10 but if he agrees - - - but if he says I'm happy - - -
11 I'm happy to engage in sex offender treatment, you'd
12 say aha, that's an acknowledgement that he's sick.

13 MS. DAVIS NOLL: That's not - - - that's -
14 - - I don't think the record supports that. The
15 record supports that individuals do make progress.

16 CHIEF JUDGE LIPPMAN: Yeah, but if said - -
17 - if he said that?

18 MS. DAVIS NOLL: I don't - - - I don't
19 think so. I mean - - -

20 CHIEF JUDGE LIPPMAN: Wouldn't that be the
21 conclusion?

22 MS. DAVIS NOLL: Well, the record - - -

23 CHIEF JUDGE LIPPMAN: I acknowledge I have
24 a problem.

25 MS. DAVIS NOLL: Yeah, and - - - and

1 actually, if you look at the latest annual report, it
2 - - - from the Sex Offender Management Bureau, you'll
3 see that offenders do make progress.

4 JUDGE PIGOTT: I was going to ask you about
5 that, but I didn't think you'd know. Has anybody
6 ever gotten out?

7 MS. DAVIS NOLL: Yes, there's - - - there's
8 definitely people who - - -

9 JUDGE PIGOTT: I kept - - -

10 MS. DAVIS NOLL: - - - have been both - - -

11 JUDGE SMITH: What's the number?

12 MS. DAVIS NOLL: Well, I think it's at
13 least ten percent of people who've been released on
14 to SIST, who were found to have - - -

15 JUDGE PIGOTT: Are they - - -

16 MS. DAVIS NOLL: - - - a mental abnormality
17 and originally - - -

18 JUDGE SMITH: Oh, there are a lot - - -
19 there are a lot of - - -

20 MS. DAVIS NOLL: - - - put under civil
21 management - - -

22 JUDGE SMITH: - - - there are a lot of
23 people who do not - - - who don't get committed to a
24 secure facility.

25 MS. DAVIS NOLL: In the first place.

1 JUDGE SMITH: Once you're committed to a
2 secure facility, how many have got out?

3 MS. DAVIS NOLL: Then, I think it's at
4 least - - - then I think it's ten percent who have
5 been got - - - who have been released on SIST - - -

6 CHIEF JUDGE LIPPMAN: Ten percent out of
7 how many?

8 MS. DAVIS NOLL: Out of the number that
9 were being civilly managed. And then out of that - -
10 -

11 JUDGE PIGOTT: How many is that? How many
12 you got?

13 MS. DAVIS NOLL: Okay, I'll pull it up.
14 And then out of that, there's also a number - - -

15 JUDGE PIGOTT: It didn't say in the report
16 that they released anyone. I mean - - - and somebody
17 had to get out. But if you look at - - -

18 JUDGE SMITH: I thought - - - I thought I
19 found one in the report.

20 JUDGE PIGOTT: - - - if you look at page 8,
21 I mean, it's gone from about 100 in 2007 to about 350
22 in 2013, and I don't see any dips in the line.

23 MS. DAVIS NOLL: Well, I know - - - I mean,
24 I think this is in the report. I know there have
25 been - - - there's ten percent that have been

1 released to SIST, and then from that, fifty percent
2 that have been released from SIST. So that shows
3 that there is progress being made.

4 JUDGE RIVERA: But I think the question was
5 about confinement, not - - - not SIST, which is
6 management outside of confinement.

7 MS. DAVIS NOLL: How many don't get
8 confined?

9 JUDGE RIVERA: How many - - -

10 JUDGE SMITH: How many - - - how many
11 released from - - -

12 JUDGE RIVERA: - - - after confinement are
13 - - -

14 JUDGE SMITH: - - - confinement?

15 JUDGE RIVERA: - - - yes, are released
16 after confinement.

17 MS. DAVIS NOLL: Released, in other words
18 without SIST, or I mean - - -

19 JUDGE SMITH: Released to SIST from - - -
20 released to anything from confinement?

21 JUDGE RIVERA: Just released.

22 JUDGE SMITH: If you - - - once - - - once
23 they've found that you're a dangerous sex offender in
24 need of confinement, what are your odds of ever
25 getting out? That's the question.

1 MS. DAVIS NOLL: Well, what I have now - -
2 - what the statistics - - -

3 JUDGE GRAFFEO: Has - - - has anybody ever
4 gotten out who's been - - -

5 MS. DAVIS NOLL: That's the ten percent.
6 So far - - -

7 JUDGE PIGOTT: Ten percent SIST, five
8 percent totally out?

9 JUDGE GRAFFEO: No, no. Let me finish the
10 question. Has any - - - has any confined dangerous
11 sex offender been released from whatever facility
12 they were sent to?

13 MS. DAVIS NOLL: I - - -

14 JUDGE GRAFFEO: Take SIST out of the
15 picture.

16 MS. DAVIS NOLL: Right.

17 JUDGE GRAFFEO: Maybe they've been - - -
18 maybe they've gone from the facility to SIST. That
19 would be included. Has anybody gotten out of - - -

20 MS. DAVIS NOLL: Yes.

21 JUDGE GRAFFEO: - - - confinement?

22 MS. DAVIS NOLL: Yes. So at least - - -

23 JUDGE GRAFFEO: So we've asked this
24 question before in other cases that you folks have
25 had in front of us, and we never get an answer to

1 that question.

2 MS. DAVIS NOLL: Okay. So the answer is
3 yes.

4 JUDGE RIVERA: And what's the number?

5 JUDGE GRAFFEO: How many?

6 JUDGE SMITH: What - - -

7 JUDGE GRAFFEO: We're trying to ask for
8 actual statistics.

9 MS. DAVIS NOLL: Well, I mean, I don't know
10 - - - I mean these statistics are from this year.
11 But fifty-one - - - fifty-one have been released to
12 SIST, and then twenty-four released from SIST. So
13 that's getting out. That's - - - after you've been
14 found to have a mental abnormality.

15 JUDGE SMITH: That's after - - - that's
16 after commitment?

17 MS. DAVIS NOLL: Right. That's after
18 you've been found to have a mental abnormality and
19 have been confined.

20 JUDGE SMITH: No, no, no. After you've
21 been found to require confinement.

22 MS. DAVIS NOLL: Right; right.

23 JUDGE READ: You're saying, what, they go
24 if you - - - if you require confinement, you go first
25 to SIST and then you get released? Is that what

1 you're saying?

2 MS. DAVIS NOLL: I mean, I don't know if
3 that's exactly what happens in every one of these
4 cases, but - - -

5 CHIEF JUDGE LIPPMAN: Counsel, but - - -

6 MS. DAVIS NOLL: - - - if you want - - -

7 CHIEF JUDGE LIPPMAN: - - - but someone
8 should know.

9 MS. DAVIS NOLL: If the court would like
10 specific information - - -

11 CHIEF JUDGE LIPPMAN: Counsel, is it a
12 miniscule - - - is the answer to these questions that
13 a miniscule, at best, number of people get out?

14 MS. DAVIS NOLL: Is - - - I don't think ten
15 percent is miniscule. After you've been found - - -

16 JUDGE PIGOTT: They say - - -

17 MS. DAVIS NOLL: - - - to be committed - -
18 -

19 JUDGE PIGOTT: - - - you say ten percent to
20 SIST, and then you said and half of them get out of
21 SIST.

22 MS. DAVIS NOLL: Right. That's what's
23 happened so far.

24 JUDGE PIGOTT: Well, that would be five
25 percent of those who are originally incarcerated for

1 this are - - -

2 MS. DAVIS NOLL: It's mandatory
3 confinement.

4 JUDGE PIGOTT: - - - now - - - well, all
5 right - - - are now on the street?

6 JUDGE READ: Do you know - - -

7 JUDGE PIGOTT: Ninety-five percent are not.

8 MS. DAVIS NOLL: I mean, if the court would
9 like detailed information on this - - -

10 CHIEF JUDGE LIPPMAN: The court would like
11 - - - the court would like, and I think - - -

12 MS. DAVIS NOLL: I could submit a letter.

13 CHIEF JUDGE LIPPMAN: - - - I - - -

14 JUDGE GRAFFEO: And how many years has this
15 been going - - - and for how many years - - -

16 MS. DAVIS NOLL: Since 2007. That's when
17 this - - -

18 JUDGE GRAFFEO: I'm sorry?

19 MS. DAVIS NOLL: I think the statute was
20 enacted in 2007. So it hasn't been that long. But -
21 - -

22 CHIEF JUDGE LIPPMAN: Okay coun - - -

23 MS. DAVIS NOLL: - - - but the bottom line
24 here is this isn't a categorical determination that
25 can be undertaken about any one diagnosis. It's how

1 the diagnosis manifests itself - - -

2 CHIEF JUDGE LIPPMAN: We've - - -

3 MS. DAVIS NOLL: - - - in Kenneth T.

4 CHIEF JUDGE LIPPMAN: - - - we've heard

5 your view.

6 MS. DAVIS NOLL: Okay.

7 CHIEF JUDGE LIPPMAN: Now, let's have

8 rebuttal. Thanks, counsel.

9 MS. DAVIS NOLL: Thank you.

10 CHIEF JUDGE LIPPMAN: Counsel, do you know
11 how many of these people get out?

12 MS. VUK-PAVLOVIC: I remember reading that
13 I think only one person has actually completed
14 treatment and been released that way.

15 CHIEF JUDGE LIPPMAN: Thank you. Go ahead.

16 MS. VUK-PAVLOVIC: So even - - - you know,
17 none of - - - none of the circumstances of these
18 crimes indicate at all that Kenneth T. has deviant
19 sexual urges. This is just completely an attempt to
20 medicalize his two past crimes. You know, and I
21 think given the history of the paraphilia NOS
22 diagnosis and the fact that it was created by a sex
23 offender evaluator who, you know, works for the
24 government, for the purpose of facilitating people's
25 civil commitment, I think it's - - - you know, we're

1 in very dangerous territory, and I think the State
2 is, you know, confining people based just on past
3 crimes and based on, you know, an ASPD diagnosis that
4 covers eighty percent of the prison population.

5 JUDGE PIGOTT: Well, we're dealing with
6 sufficiency here - - - pardon me, Judge Read.

7 JUDGE READ: That's what I was getting to.

8 JUDGE PIGOTT: But part of the factor, I
9 guess, is Dr. Kirschner works for Mental Hygiene
10 Legal - - - or he works for the State, right?

11 MS. VUK-PAVLOVIC: He's an expert that's
12 retained by the State, yes.

13 JUDGE PIGOTT: Okay. He is - - - he's
14 independent of the State, though?

15 MS. VUK-PAVLOVIC: Yes, although, he's - -
16 - he's found mental abnormality in every single case.

17 JUDGE ABDUS-SALAAM: Well, even if there
18 were no ASPD diagnosis here, your - - - your position
19 would still be that there are only two crimes - - -
20 two sex crimes upon which this person has been
21 confined, correct, and that that would be legally
22 insufficient?

23 MS. VUK-PAVLOVIC: Without a qualifying
24 psychiatric disorder, yeah. Because that is - - -
25 that is what is missing here is a disorder that

1 distinguishes him from the typical recidivist. And -
2 - - and the disorders here are just based on his
3 crimes alone without any - - -

4 JUDGE PIGOTT: Are you saying paraphilia
5 NOS should never be used, or are you just saying it
6 doesn't apply in this case?

7 MS. VUK-PAVLOVIC: I think the history
8 suggests that it shouldn't be used, because of the
9 diagnostic difficulties in it, because it's so hard
10 to distinguish someone who chooses to commit sex
11 crimes from someone who has a paraphilic interest in
12 coercion itself. And I think that's why it's been,
13 you know, rejected time and time again from the DSM.

14 So I think - - - I think there would
15 definitely be grounds to find that it's - - - it's
16 insufficient.

17 JUDGE GRAFFEO: There are some - - - there
18 are some other states that have - - - courts in other
19 states that have accepted it?

20 MS. VUK-PAVLOVIC: There are - - -
21 commitments have been upheld based on this disorder.

22 JUDGE SMITH: Has anyone anywhere ever
23 asked for a Frye hearing on this subject?

24 MS. VUK-PAVLOVIC: Yes. And I - - - and I
25 know it's been denied, citing this court's decision

1 in Shannon S. that it's a matter for the fact finder
2 to determine reliability.

3 CHIEF JUDGE LIPPMAN: Okay, thanks,
4 counselor.

5 MS. VUK-PAVLOVIC: Thank you.

6 CHIEF JUDGE LIPPMAN: Thank you both.
7 Let's go on to Donald DD.

8 MR. HOFFMAN: Good afternoon, Your Honors.

9 CHIEF JUDGE LIPPMAN: Good afternoon,
10 counselor.

11 MR. HOFFMAN: May it please the court,
12 George Hoffman representing Donald DD. If I could
13 reserve two minutes for rebuttal, please?

14 CHIEF JUDGE LIPPMAN: Sure, go ahead.

15 MR. HOFFMAN: This matter provides the
16 textbook example of the dire consequences that result
17 when the State uses a civil commitment statute to
18 indefinitely confine your typical criminal
19 recidivist.

20 Here, unlike Kenneth T. - - -

21 CHIEF JUDGE LIPPMAN: Is that what - - -
22 what Donald DD is, a typical recidivist?

23 MR. HOFFMAN: It is, Your Honor. He - - -

24 CHIEF JUDGE LIPPMAN: And you're saying
25 he's a - - - he may be a criminal, but he's not a sex

1 criminal, necessarily?

2 MR. HOFFMAN: That's - - - that's precisely
3 it, Your Honor. If this was a conclave determining
4 sainthood, I don't know that he'd make it through,
5 but - - -

6 JUDGE SMITH: If it were a conclave
7 determining dangerousness, he wouldn't do too well,
8 either.

9 MR. HOFFMAN: I understand, Your Honor, but
10 not sexually - - -

11 JUDGE SMITH: How - - - how - - - nervous
12 should we be - - -

13 MR. HOFFMAN: - - - dangerous.

14 JUDGE SMITH: - - - if we go your way, what
15 we're loosing on the community?

16 MR. HOFFMAN: I'm sorry, Your Honor?

17 JUDGE SMITH: How nervous should we be
18 about what we're turning loose on the community if we
19 go your way?

20 MR. HOFFMAN: Well, I think it's been
21 indicated in case law that there's always a risk of
22 recidivism whenever anyone's released from prison - -
23 -

24 JUDGE SMITH: Your real answer is, be - - -

25 MR. HOFFMAN: - - - but here's no

1 indication - - -

2 JUDGE SMITH: - - - be as nervous as want,
3 but you have no choice?

4 MR. HOFFMAN: Exactly. But here there's no
5 indication - - -

6 JUDGE GRAFFEO: But was - - - his first
7 evaluation he wasn't found to need Article 10
8 commitment?

9 MR. HOFFMAN: Not at all, Your Honor.

10 JUDGE GRAFFEO: So I mean, it - - - it
11 appears that he was somewhat fairly evaluated in that
12 instance?

13 MR. HOFFMAN: And the ironic part - - -

14 JUDGE GRAFFEO: And he obviously
15 recommitted. Doesn't that show - - -

16 MR. HOFFMAN: Well, he didn't - - -

17 JUDGE GRAFFEO: - - - show that he's got a
18 different kind of a problem?

19 MR. HOFFMAN: He - - - he didn't recommit,
20 Your Honor. And actually, if you look at the 2008
21 scenario, when Dr. Cederbaum looked at him - - -

22 JUDGE GRAFFEO: Is that because you're
23 eliminating the two children?

24 MR. HOFFMAN: Well, I think you have to.
25 They're - - - they're uncharged accusations. I think

1 in Floyd Y., you talked about the inherent - - -

2 JUDGE SMITH: Yeah, but this - - -

3 MR. HOFFMAN: - - - unreliability - - -

4 JUDGE SMITH: - - - but they got in without
5 objection into this record.

6 MR. HOFFMAN: They did get in without
7 objection, Your Honor. But for this court to say - -

8 -

9 JUDGE GRAFFEO: And the - - - and the - - -

10 MR. HOFFMAN: - - - they're inherently - -

11 -

12 JUDGE GRAFFEO: - - - and the wife also,
13 was she objected to?

14 MR. HOFFMAN: I'm sorry, Your Honor?

15 JUDGE GRAFFEO: The - - - the claim about -
16 - - that - - - involving his wife, was that - - - was
17 that objected to or not objected to?

18 MR. HOFFMAN: No, Your Honor, that - - -
19 that wasn't objected to. And again, no charges were
20 brought as a result of that. The DA's office and the
21 state police, specifically looked into them.
22 There're notes in the parole records specifically
23 indicating that the DA says they don't have enough
24 evidence to bring charges on those.

25 JUDGE ABDUS-SALAAM: Counsel, didn't Dr.

1 Cederbaum also say that while he couldn't diagnose
2 your client as having a mental abnormality, he also
3 couldn't stick with his prior diagnosis from the
4 previous hearing? He was the one who evaluated your
5 client previously and said he didn't have a mental
6 abnor - - - abnormality. And then on this one, he
7 hadn't reevaluated him, but he found out more
8 information like the 1993 problems that your client
9 didn't tell him about or he didn't know about before
10 - - -

11 MR. HOFFMAN: Well, he - - -

12 JUDGE ABDUS-SALAAM: - - - and he said he
13 wouldn't stick to the - - - the determination that he
14 made previously.

15 MR. HOFFMAN: He - - - he did know about
16 the 1993 problems. And in his initial report, he
17 specifically discounted them saying there was no way
18 to determine the reliability of those allegations and
19 - - -

20 JUDGE ABDUS-SALAAM: What he didn't know
21 was - - -

22 MR. HOFFMAN: - - - then - - -

23 JUDGE ABDUS-SALAAM: - - - that your client
24 had confessed to them or admitted to them in family
25 court?

1 MR. HOFFMAN: I - - - I think he - - - he
2 was a nine-year-old boy that admitted to them in a
3 family court proceeding. I don't know that that
4 establishes the clear reliability - - -

5 JUDGE SMITH: Well, but - - - but assume -
6 - - assume that there are real differences between
7 the two evaluations, and that - - - and that Dr.
8 Cederbaum did have more - - - more criminal conduct,
9 more bad conduct to go on the second time than the
10 first time. Does that change - - - does that mean
11 that the evidence is sufficient here?

12 MR. HOFFMAN: I don't believe it does, Your
13 Honor. I don't think - - -

14 JUDGE SMITH: Why not?

15 MR. HOFFMAN: - - - an ASPD diagnosis by
16 itself is sufficient.

17 JUDGE SMITH: Okay, now he was - - -

18 MR. HOFFMAN: I think you give it some - -
19 -

20 JUDGE SMITH: - - - he was ASPD - - - he
21 was ASPD - - - as I understand it, he was ASPD both
22 times.

23 MR. HOFFMAN: Correct.

24 JUDGE SMITH: And the second time,
25 Cederbaum said, I always knew he was ASPD, but now

1 I'm convinced that his ASPD predisposes him to commit
2 sex crimes.

3 MR. HOFFMAN: No, Cederbaum didn't say
4 that. Cederbaum simply said I can't stand by my
5 initial - - -

6 JUDGE SMITH: Oh, I retract my - - -

7 MR. HOFFMAN: - - - opinion.

8 JUDGE SMITH: - - - previous statement that
9 it didn't predispose him; is that what he said?

10 MR. HOFFMAN: He didn't make an opinion at
11 that point in time.

12 JUDGE SMITH: I see.

13 MR. HOFFMAN: Simply that he couldn't stand
14 by his opinion.

15 JUDGE SMITH: So he just - - - he was
16 called just to disown his previous opinion - - -

17 MR. HOFFMAN: Correct.

18 JUDGE SMITH: - - - not to offer - - -

19 MR. HOFFMAN: And the only differentiating
20 factor are these uncharged criminal allegations. So
21 essentially - - -

22 JUDGE SMITH: Okay, but I guess - - - I
23 guess what I'm really saying is, let's assume that
24 the State was entirely fair with your guy in the
25 sense that it - - - it originally didn't think he was

1 quite bad enough for this program, and then it gets -
2 - - then it gets word of these two horrible things -
3 - - the horrible thing with the two kids, and they
4 say that's it, that's over the line, which looks - -
5 - sort of looks like that's what happened, doesn't
6 it?

7 MR. HOFFMAN: What looks like happened,
8 Your Honor, is that they realized they couldn't
9 prosecute him civilly, because they didn't have
10 enough - - - or criminally - - -

11 JUDGE SMITH: You mean criminally?

12 MR. HOFFMAN: - - - because - - -

13 JUDGE SMITH: Yeah - - -

14 MR. HOFFMAN: - - - they didn't have enough
15 evidence - - -

16 JUDGE SMITH: - - - it does - - - it does
17 look like - - - you're saying that they're using - -
18 - here, they're using Article 10 as a substitute for
19 an original criminal prosecution.

20 MR. HOFFMAN: That's - - - that's precisely
21 what they're doing, and that's precisely what - - -

22 JUDGE SMITH: Which basically would mean -
23 - -

24 MR. HOFFMAN: - - - Justice Kennedy warned
25 about.

1 JUDGE SMITH: - - - in that - - - if you -
2 - - it looks - - - in the other cases that I've seen,
3 it looks like they're doing - - - they have a guy
4 who's already been locked up and they're using
5 Article 10 to extend his term.

6 MR. HOFFMAN: Well, I - - - locked up is -
7 - -

8 JUDGE SMITH: I mean, who's already served
9 something like ten years, and they say ten isn't
10 enough.

11 MR. HOFFMAN: Well, that's not the case
12 here, Your Honor. Here - - -

13 JUDGE SMITH: Yeah, this is - - -

14 MR. HOFFMAN: - - - of course - - -

15 JUDGE SMITH: - - - this is - - - that's
16 what I'm suggesting. This is a different - - - the
17 fact pattern here is different.

18 MR. HOFFMAN: You have to - - - and the
19 fact pattern here is extremely important. I mean,
20 for his sexual criminal convictions, which occurred
21 when he was a teenager, he got split sentences: six
22 months in jail, and ten years probation. For his
23 second sexual misconduct, he got six months and
24 continued probation.

25 Those were the extent of his criminal

1 punishment. If they should have punished him
2 further, well, that was a problem then. They can't
3 go back now and do it through the civil process.

4 JUDGE SMITH: Well, I guess - - - I guess
5 what I'm suggesting is that they - - - in this case,
6 which is, in this way, atypical of Article 10 cases,
7 they're - - - it sort of looks like they have a case
8 they can't prove in criminal court, and they made it
9 the occasion for an Article 10 proceeding. Is that
10 what you're saying?

11 MR. HOFFMAN: Precisely. And that's what
12 makes this the most dangerous Article 10 case, that
13 they're relying solely upon a diagnosis which has no
14 sexual criterion, no connection to sex whatsoever - -
15 -

16 CHIEF JUDGE LIPPMAN: So what's the purpose
17 of all of this, preventive detention? Is that - - -

18 MR. HOFFMAN: That's - - - that's exactly
19 what it looks like, Your Honor. That they're
20 preventively - - -

21 CHIEF JUDGE LIPPMAN: And - - - and your -
22 - - your argument is you can't keep someone in
23 indefinitely for dangerousness?

24 MR. HOFFMAN: Certainly. That's - - -
25 that's Foucha.

1 JUDGE SMITH: If you were going to - - - if
2 you were going to pick somebody, this might be a good
3 guy?

4 MR. HOFFMAN: This is - - - well, again, if
5 this were determining sainthood, I don't know that
6 we'd necessarily come out with a favorable - - -

7 JUDGE RIVERA: But - - - but the point - -
8 -

9 MR. HOFFMAN: - - - result, Your Honor.

10 JUDGE RIVERA: - - - of Article 10 and why
11 it survives all the precedent on this is because it's
12 remedial, not - - - not punitive. Is that not
13 correct?

14 MR. HOFFMAN: I'm sorry, Your Honor?

15 JUDGE RIVERA: The - - - the point of
16 Article 10 is remedial, not punitive?

17 MR. HOFFMAN: Well, that's the stated
18 purpose. I think in looking at this case, the - - -
19 the only conclusion you can come to is that they're
20 attempting to use this punitively.

21 JUDGE READ: Really? I mean - - -

22 MR. HOFFMAN: He - - - he received - - -

23 JUDGE READ: - - - couldn't - - -

24 MR. HOFFMAN: - - - local - - -

25 JUDGE READ: - - - couldn't you also look

1 at this and come to the conclusion that they said
2 boy, we really blew it. We let this guy out,
3 immediately he goes out and look what happens?

4 MR. HOFFMAN: Immediately he goes out and
5 he and his wife get in an argument, and in the
6 context of a custody dispute, she says, oh, by the
7 way, he raped me and he abused our children, and she
8 doesn't mention the rape until the police just happen
9 to show up at - - -

10 JUDGE SMITH: Well, but wouldn't - - -

11 MR. HOFFMAN: - - - her door.

12 JUDGE SMITH: - - - wouldn't - - - but
13 putting aside - - -

14 JUDGE READ: What about the other - - -
15 what about the - - -

16 JUDGE SMITH: - - - the precise facts,
17 wouldn't it be fair to infer from this record,
18 whether punitive - - - yeah, I don't think anyone's
19 suggesting that the State is bringing this proceeding
20 for Donald's benefit. They did not do this to do him
21 a favor. They did - - - they're doing it to - - -
22 whether you call it punitive or not, they're doing it
23 to protect the community, correct?

24 MR. HOFFMAN: They may very well be doing
25 it to protect the community, but from these facts,

1 Your Honor, it's to protect the community from a
2 criminal recidivist, and we have criminal laws for
3 that.

4 CHIEF JUDGE LIPPMAN: And not a sexual
5 deviant - - -

6 MR. HOFFMAN: And not a sexual recidivist.

7 CHIEF JUDGE LIPPMAN: - - - okay. Thanks,
8 counsel.

9 MR. HOFFMAN: Thank you.

10 CHIEF JUDGE LIPPMAN: Let's hear from your
11 adversary and then you'll have rebuttal.

12 MS. TREASURE: Good afternoon, Your Honors,
13 may it please the court.

14 CHIEF JUDGE LIPPMAN: Counsel, are we
15 punishing this - - - this defendant because he's a -
16 - - he's a sexual recidivist?

17 MS. TREASURE: Absolutely not. We are
18 trying - - -

19 CHIEF JUDGE LIPPMAN: Why - - - why are - -
20 - why is this proceeding being brought?

21 MS. TREASURE: This proceeding's being
22 brought because two of our experts examined Donald DD
23 and found that he had a mental abnormality consisting
24 of antisocial personality disorder and pathological
25 traits.

1 What happened here with Dr. Cederbaum's
2 earlier evaluation - - -

3 CHIEF JUDGE LIPPMAN: And anti - - - ASPD
4 can be - - - is enough?

5 MS. TREASURE: Absolute - - - well, at - -
6 - at - - - the diagnosis alone - - -

7 CHIEF JUDGE LIPPMAN: If you show that - -
8 -

9 MS. TREASURE: - - - is not enough. What
10 we have to show is the linkage between the diagnosis
11 and the individual's predisposition to commit sex
12 offenses - - -

13 JUDGE SMITH: But if you have somebody - -
14 -

15 MS. TREASURE: - - - an inability - - -

16 JUDGE SMITH: - - - who has ASPD, and who
17 has committed several sex crimes, it's a pretty
18 reasonable inference that those two are not - - -
19 that that's not a coincidence, that those two are
20 related, correct?

21 MS. TREASURE: It's - - - it can be a
22 reasonable inference. It's always going to turn on
23 particular facts of the case involving the
24 individual.

25 JUDGE SMITH: Well, is there - - - can you

1 imagine a case in which the two facts I've stated
2 exist: one, you have a prisoner with AS - - - a
3 defendant with A - - - or whatever he is - - - a
4 respondent with ASPD, and a record of a few or more
5 than a few sex crimes. On that - - - on that, could
6 the evidence ever be insufficient - - - and you have
7 a doctor who's willing to say I - - - I find a mental
8 abnormality. On those facts, could the evidence ever
9 be insufficient to support a verdict of mental
10 abnormality?

11 MS. TREASURE: When you have a doctor to
12 willing to say - - - I mean, there can be
13 circumstances when the person - - - yes, has ASPD and
14 multiple sex crimes, and what happens is, the ASPD
15 doesn't predispose him in that way, and it doesn't -
16 - -

17 JUDGE SMITH: Well, but it - - - well, it's
18 - - - I mean, maybe I'm being cynical with everybody
19 today. It's very hard for me to imagine that you
20 have a guy with ASPD, a record of sex crimes, and
21 that you can't find somewhere a psychiatrist who'll
22 say in my opinion, there's a connection between the
23 two.

24 MS. TREASURE: Well, I mean, there's - - -
25 there's likely you're going to be able to find

1 somebody, but it doesn't mean that the evidence is
2 going to support that.

3 We're - - - we have the burden - - -

4 JUDGE SMITH: Explain - - -

5 MS. TREASURE: - - - of showing it.

6 JUDGE SMITH: - - - give me a hypothetical
7 case where the evidence would fail, as a matter of
8 law, to support a finding of mental abnormality on
9 those facts?

10 MS. TREASURE: He's got three traits of
11 antisocial personality disorder. One of them is lack
12 of social norms, the other one is irritability, the
13 other one is irresponsibility.

14 JUDGE SMITH: And he's committed four sex
15 crimes, and an expert says one is connected with the
16 other. You say that's insufficient evidence?

17 MS. TREASURE: Well, that would be
18 sufficient evidence, because we have the expert who's
19 using his judgment to make the link. But the other
20 part of this, though, is that, you know, there are
21 going to be different scenarios where we're not
22 always going to find somebody who's committed
23 multiple sex crimes who has ASPD is going to have a
24 mental abnormality. We're going to be looking at - -
25 -

1 JUDGE PIGOTT: In the - - - in their
2 opinion, the Appellate Division says, "Respondent
3 initially contends that the jury's verdict was
4 against the weight of the evidence, specifically
5 asserting that the jury could not determine that he
6 suffered from a mental abnormality, because he
7 suffers from a mental condition without any sexual
8 component, namely antisocial personality disorder
9 with psychopathic traits. We disagree." Are they
10 wrong?

11 MS. TREASURE: No, they're not wrong. We
12 don't - - -

13 JUDGE PIGOTT: ASPD alone can - - - can get
14 you a SOMTA sentence?

15 MS. TREASURE: No, ASPD alone, the
16 diagnosis alone, cannot get you - - - cannot get you
17 to civil management. What the State has to show is
18 how the diagnosis, whether it's ASPD or another
19 diagnosis, is linked - - - how it affects the
20 person's volitional, emotional, or cognitive control
21 to the point that it - - -

22 JUDGE SMITH: You say the State has to - -
23 -

24 MS. TREASURE: - - - predisposes them.

25 JUDGE SMITH: - - - show how, but in fact,

1 they - - - what the - - - what the doctors tend to
2 say, very candidly, is it looks to me like there's a
3 - - - you know, he committed the crimes, he has ASPD,
4 looks to me like his ASPD is predisposing him to sex
5 crimes.

6 MS. TREASURE: No. Usually what - - -

7 JUDGE SMITH: What did he - - - what did he
8 say more than that?

9 MS. TREASURE: What we're looking at is the
10 behavioral pattern of this individual throughout his
11 lifetime. And in this case, we have an individual
12 who, as a nine-year-old child, was engaging in
13 pathological - - - I'm sorry - - - psychopathic
14 behavior setting fires - - -

15 JUDGE SMITH: All - - - all people with
16 ASPD had conduct disorder in childhood?

17 MS. TREASURE: Yes, that's correct. But
18 some people's conduct disorder is going to be more
19 severe than other people's conduct disorder. What
20 I'm saying is - - -

21 CHIEF JUDGE LIPPMAN: So the conduct that
22 you just mentioned is enough to - - - to give you the
23 diagnosis?

24 MS. TREASURE: No, Your Honor. What our -
25 - -

1 CHIEF JUDGE LIPPMAN: To make it a mental
2 abnormality?

3 MS. TREASURE: What our expert - - -

4 CHIEF JUDGE LIPPMAN: What other examples -
5 - - what - - -

6 MS. TREASURE: What - - -

7 CHIEF JUDGE LIPPMAN: - - - is in this case
8 that links it and makes him an appropriate candidate
9 for mental abnormality.

10 MS. TREASURE: What the experts testified
11 to was that his disregard for the safety and
12 wellbeing of others, his lack - - - his failure to
13 follow social norms, his extreme impulsivity - - -

14 JUDGE PIGOTT: If - - - if you had a
15 defendant who was charged with rape, and - - - and
16 his previous history was a history of DWI, public
17 drunkenness, gambling, and any other antisocial thing
18 you could think of, is he a SOMTA candidate?

19 MS. TREASURE: Probably not. I mean - - -

20 JUDGE PIGOTT: Why not?

21 MS. TREASURE: - - - if he has one sex
22 offense among all the other sex offenses, what we're
23 looking for is somebody who - - -

24 JUDGE SMITH: Well, you're probably right
25 in that I think your office would probably do the

1 responsible thing and not bring a proceeding. But
2 suppose some less - - - less responsible law
3 enforcement authority thinks I want to get his guy,
4 and I got a psychiatrist who'll testify that his sex
5 offense is linked to his ASPD, again, I'm having
6 trouble seeing how on your theory, the evidence would
7 ever be insufficient to support a finding.

8 MS. TREASURE: Well, I - - - I just want to
9 say one thing, too, Your Honor. It's not just our
10 office here who are making the decisions. We have
11 10,000 people, overall, who have been evaluated by
12 the system here. More than 8,000 of those
13 individuals were determined not to require civil
14 management.

15 JUDGE SMITH: I under - - - I understand
16 that.

17 MS. TREASURE: I mean - - -

18 JUDGE SMITH: And I think that's a great
19 credit to - - - I didn't mean to give all the credit
20 to your office.

21 MS. TREASURE: No, no, no. But - - -

22 JUDGE SMITH: It's a great credit to the
23 State. But should - - - but isn't it a bad idea to
24 depend solely on law enforcement authorities to sort
25 this out? Shouldn't we have rules that - - - that

1 prevent the conviction of any - - - any dangerous
2 recidivist? Don't we have to have such rules?

3 MS. TREASURE: Well, we have such rules.
4 We have the fact that the legislature had put forth
5 what the definition of mental abnormality is, and
6 it's placed the burden upon the State to prove by
7 clear and convincing evidence that the diagnosis
8 attributed to the individual that they are trying to
9 civilly commit has - - - predisposes that individual
10 to commit sex offenses and causes them serious
11 difficulty controlling their conduct.

12 That's just for the purpose of showing
13 mental abnormality. We have another standard that we
14 have to meet if we want to try and civilly - - - if
15 we want to civilly confine them as opposed to letting
16 them go out on SIST.

17 JUDGE SMITH: Let me ask you, suppose the
18 legislature gets - - - gets upset about something
19 other than sex crimes. Suppose they decide they - -
20 - that there's too much murder, there's too much
21 robbery, there's too much drug dealing. Can they
22 enact a drug - - - a drug offenders' management and
23 treatment act, a homicide offenders' management and
24 treatment act, and so on?

25 MS. TREASURE: I think it depends, Your

1 Honor. I mean, the Kansas v. Crane court basically
2 said is that what the State has to show if it's going
3 to civilly confine somebody under a mental health
4 statute is they have to show a link between the
5 person's danger - - -

6 JUDGE SMITH: Okay, but that - - -

7 MS. TREASURE: - - - and the future - - -

8 JUDGE SMITH: - - - that sounds - - - that
9 sounds like a yes. I mean, if you can show - - - so
10 if you're got - - - and as we say, half the people in
11 jail have ASPD, and they're not in jail because they
12 didn't commit a crime. Why in a - - - isn't it very
13 easy to imagine a situation where a - - - a nominally
14 civil commitment becomes a substitute for the
15 criminal law?

16 MS. TREASURE: No, Your Honor. I mean, not
17 in this case. It just doesn't - - -

18 JUDGE PIGOTT: Well, if we look at this
19 case - - - you know, he - - - he was - - - in 2008 he
20 was released on parole, and that's when Cederbaum
21 first said that he - - - he did not qualify, right?
22 Then in December he's returned to custody because he
23 failed to register under SORA. He was late by a day;
24 and he served five days. And then in December he was
25 at a Burger King post curfew, and then all of a

1 sudden there's these - - - as your opponent says - -
2 - these unsubstantiated charges of molesting kids
3 that was never proceed - - - pursued.

4 And that's it, isn't it, from 2008, he
5 failed - - -

6 MS. TREASURE: What Ceder - - - no, Your
7 Honor. Cederbaum, when he testified, said he was
8 unaware of more information than just the allegations
9 - - -

10 JUDGE PIGOTT: But aren't we true that - -
11 -

12 MS. TREASURE: - - - regarding the case.

13 JUDGE PIGOTT: - - - from '08 until the
14 time of this, that the only violations that occurred
15 was the SORA - - - you know failure to file and a
16 curfew violation? In other words, there was nothing
17 that said, jeez, we really should have canned this
18 guy because look at all the sex crimes he's committed
19 since 2008 when we let him out?

20 MS. TREASURE: Well, there were the
21 allegations with the children, as well, but - - -

22 JUDGE SMITH: I mean, isn't - - - doesn't
23 common sense tell you that the molestation of the
24 children here was the - - - was the event that
25 triggered this proceeding?

1 MS. TREASURE: I don't know - - - Your
2 Honor, I don't think it was the event, necessarily.
3 Again, we had Dr. Cederbaum testify. He was unaware
4 that the PINS adjudi - - - PINS petition - - -

5 JUDGE SMITH: You - - -

6 MS. TREASURE: - - - resulted - - -

7 JUDGE SMITH: - - - oh, you mean someone
8 told Dr. Cederbaum, oh, he did admit to that stuff
9 when he was nine years old. And he said, oh, in that
10 case, let's bring a proceeding? Give me a break.

11 MS. TREASURE: No, he had more - - - again,
12 he had the petition - - - that he was told that he
13 did admit to the allegations of molesting young
14 children, setting fires. He also had not had before
15 him before the victim statements from the 2002 rapes
16 in which the victim said he was aware of their ages -
17 - -

18 JUDGE SMITH: Both - - - both experts - - -

19 MS. TREASURE: - - - and he proceeded
20 against them.

21 JUDGE SMITH: - - - testified - - - both
22 experts testified that the allegations of molestation
23 were significant to them, right?

24 MS. TREASURE: Well, Dr. Hamil (ph.) said
25 that even without the allegations, he would have

1 formed an opinion of mental abnormality. Dr. Krunkle
2 (ph.) did say that he relied upon him.

3 But I'd like to - - -

4 JUDGE SMITH: Would you - - - would you
5 agree with me that if an objection had been raised
6 under Floyd Y. or someone with the foresight to
7 foresee Floyd Y., that - - - the - - - the fact-
8 finder here would never have heard of the molestation
9 allegation?

10 MS. TREASURE: I can't agree to that, Your
11 Honor, because I don't know what opportunity the
12 State would have taken at that time to try and - - -

13 JUDGE SMITH: Well, I understand. Could -
14 - - they would have - - - they would have had to get
15 - - - this evidence wouldn't have got in. You agree
16 with that?

17 MS. TREASURE: I - - - again, I don't know
18 what the State - - -

19 JUDGE SMITH: They could - - - they could
20 call - - -

21 MS. TREASURE: - - - would have done - - -

22 JUDGE SMITH: - - - they could call the
23 kids if they wanted to. I agree with you.

24 MS. TREASURE: Exactly. I mean, we could
25 have tried to call the kids. We could have seen if

1 we could have cured the hearsay nature of this.

2 JUDGE SMITH: Okay.

3 MS. TREASURE: But we didn't have that
4 opportunity. And - - -

5 CHIEF JUDGE LIPPMAN: Okay, counsel,
6 thanks.

7 Counselor, rebuttal?

8 MR. HOFFMAN: I think Judge Pigott made the
9 key point. There's nothing different about this case
10 from 2008 on, other than those uncharged accusations.
11 And if that's what we're going to allow a potential
12 lifetime incarceration on - - -

13 CHIEF JUDGE LIPPMAN: You think that's what
14 triggered this?

15 MR. HOFFMAN: I do. And perhaps that I'm -
16 - - Judge Smith's cynicism is rubbing off on me,
17 but I do believe that's what triggered this.

18 CHIEF JUDGE LIPPMAN: It rubs off on all of
19 us.

20 Keep going, yeah.

21 MR. HOFFMAN: So I think if you - - -

22 JUDGE SMITH: You're going to miss me.

23 MR. HOFFMAN: - - - if you look at the
24 behavioral pattern, what you don't see is a sexual
25 behavioral pattern. You see the poster child for

1 criminal recidivism: petty larceny, falsely
2 reporting, criminal mischief, stalking, criminal
3 contempt, menacing, assault, reckless endangerment,
4 endangering the welfare of a child, and harassment.

5 Dr. Cederbaum even said when he let him
6 out, I think he could get out and commit more crimes.
7 But they won't be sexual in nature. There's not an
8 indication that he's predisposed - - -

9 JUDGE ABDUS-SALAAM: Aren't we missing one
10 other crime? Wasn't there a rape of his wife's best
11 friend or some acquaintance of the wife?

12 MR. HOFFMAN: That - - - that is part of
13 his sexual criminal history. And it was reduced to a
14 sexual misconduct. That - - - as soon as he got out
15 - - -

16 JUDGE SMITH: But the - - - the rape of - -
17 - the rape of the friend was - - - must have been
18 known at the time of the two thou - - - Dr.
19 Cederbaum's initial - - -

20 JUDGE READ: 2004.

21 MR. HOFFMAN: Absolutely. It was a 2004
22 conviction.

23 JUDGE SMITH: But what about the rapes of
24 his wife?

25 MR. HOFFMAN: That - - - the allegations of

1 raping his wife?

2 JUDGE SMITH: Yeah.

3 MR. HOFFMAN: Were not known at the time.

4 JUDGE SMITH: So that - - - that - - -

5 MR. HOFFMAN: Those were - - -

6 JUDGE SMITH: - - - they actually came out

7 at the same time as the child abuse, and - - -

8 MR. HOFFMAN: As part of a - - -

9 JUDGE SMITH: - - - it's really part of the
10 same package.

11 MR. HOFFMAN: - - - scenario.

12 JUDGE SMITH: When we talk about the

13 molestation of the children, he's - - - he's

14 versatile, he's got rape of the wife, too?

15 MR. HOFFMAN: Exactly, but interestingly,
16 those weren't even a basis for his parole violation.
17 As Judge Pigott pointed out, his parole violation was
18 a curfew violation and a failure to report.

19 And if Your Honors have no further
20 questions - - -

21 CHIEF JUDGE LIPPMAN: Okay.

22 JUDGE PIGOTT: How long has he been - - -

23 CHIEF JUDGE LIPPMAN: Sorry, Judge Pigott?

24 JUDGE PIGOTT: Pardon me. When was this
25 adjudication? 2010?

1 MR. HOFFMAN: 2010. And I'd like to point
2 out, as part of Dr. Cederbaum, when he released him,
3 he commended to the fact that he'd gone twenty-three
4 months without the commission of a sex offense.
5 Those twenty-three months have now extended to ten
6 years without the commission of a further sex
7 offense. Thank you.

8 JUDGE SMITH: Well, is he - - - wait, was
9 he in or out?

10 MR. HOFFMAN: Both.

11 JUDGE SMITH: I mean, right now?

12 MR. HOFFMAN: Right now he's in.

13 JUDGE SMITH: Yeah, so it's - - - it's less
14 - - - the time increasing is somewhat less of an
15 achievement than it would be in the outside world.

16 MR. HOFFMAN: But still, there are no
17 reports of violations and internal violations.

18 CHIEF JUDGE LIPPMAN: Okay, counsel,
19 thanks. Thank you all. Appreciate it.

20 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of State of New York v. Kenneth T., No. 173 and Matter of State of New York v. Donald DD, No. 172, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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