A DIAGNOSIS OF PARAPHILIA NOS (NONCONSENT) IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT).

The Second Department determined that Supreme Court properly found, after a Frye hearing ordered by the Second Department and held after the trial, the diagnosis of paraphilia NOS (nonconsent) is not generally accepted in the psychiatric and psychological communities. The evidence should not have been admitted at the sex offender's civil commitment trial:

> The evidence at the Frye hearing showed that there was no clear definition or criteria for the diagnosis, the diagnosis could not be reliably distinguished from other motivations for rape, the articles offered in support of the diagnosis did not reflect a wide, significant, or well-rounded body of research supporting the validity of the diagnosis, and the diagnosis was repeatedly rejected for inclusion in the Diagnostic and Statistical Manual of Mental Disorders (hereinafter DSM) or in the DSM appendix ... . Thus, evidence of the paraphilia NOS (nonconsent) diagnosis should not have been admitted at trial. Since the error was not harmless, the matter must be remitted to the Supreme Court, Queens County, for a new trial on the issue of mental abnormality, excluding evidence of the paraphilia NOS (nonconsent) diagnosis, and, if necessary, a new dispositional hearing. Matter of State of New York v Richard S., 2018 NY Slip Op 01072, Second Dept 2-14-18

MENTAL HYGIENE LAW (SEX OFFENDER, CIVIL COMMITMENT, A DIAGNOSIS OF PARAPHIILIA NOS (NONCONSENT) S NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT))/SEX OFFENDERS (CIVIL COMMITMENT, A DIAGNOSIS OF PARAPHILIA NOS (NONCONSENT) IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT))/CIVIL COMMITMENT (SEX OFFENDERS, MENTAL HYGIENE LAW, A DIAGNOSIS OF PARAPHILIA NOS (NONCONSENT) IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT))UNSPECIFIED PARAPHILIC DISORDER (MENTAL HYGIENE LAW, SEX OFFENDERS, CIVIL COMMITMENT, A DIAGNOSIS OF PARAPHILIA NOS (NONCONSENT) IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT))

A DIAGNOSIS OF UNSPECIFIED PARAPHILIC DISORDER IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the Frye hearing did not demonstrate that diagnosis of unspecified paraphilic disorder has achieved general acceptance in the psychiatric and psychological communities. Therefore the expert evidence on the disorder should not have been admitted at the trial to determine whether appellant sex offender should be subject to civil commitment:

> At the Frye hearing, Dr. David Thornton and Dr. Kostas Katsavdakis, who testified for the State, and Dr. Joe Scroppo, who testified on behalf of the appellant, agreed that the forensic use of the diagnosis of unspecified paraphilic disorder, which was added to the latest edition of the Diagnostic and Statistical Manual of Mental Disorders (hereinafter DSM-5) in 2013, was problematic and controversial, since there was no clear definition or criteria for the proposed disorder. Moreover, all of the experts testified that there was no research demonstrating the reliability of the unspecified paraphilic disorder diagnosis after its introduction in the DSM-5 in 2013. Notably, the experts were not aware of any published research, clinical trials, or field studies regarding unspecified paraphilic disorder.
>
> Accordingly, we conclude that the State failed to establish that the diagnosis of unspecified paraphilic disorder has achieved general acceptance in the psychiatric and psychological communities so as to make expert testimony on that diagnosis admissible, and as such, that diagnosis should not have been admitted at the appellant's trial. Since the admission of this testimony was not harmless, we remit the matter to the Supreme Court, Nassau County, for a new trial on the issue of mental abnormality, excluding evidence of the unspecified paraphilic disorder diagnosis, and, if necessary, a new dispositional hearing. Matter of State of New York v Hilton C., 2018 NY Slip Op 01071, Second Dept 2-14-18

MENTAL HYGIENE LAW (SEX OFFENDER, CIVIL COMMITMENT, A DIAGNOSIS OF UNSPECIFIED PARAPHILIC DISORDER IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT))/SEX OFFENDERS (CIVIL COMMITMENT, A DIAGNOSIS OF UNSPECIFIED PARAPHILIC DISORDER IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX

OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT))/CIVIL COMMITMENT (SEX OFFENDERS, MENTAL HYGIENE LAW, A DIAGNOSIS OF UNSPECIFIED PARAPHILIC DISORDER IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT))UNSPECIFIED PARAPHILIC DISORDER (MENTAL HYGIENE LAW, SEX OFFENDERS, CIVIL COMMITMENT, A DIAGNOSIS OF UNSPECIFIED PARAPHILIC DISORDER IS NOT ACCEPTED IN THE PSYCHIATRIC OR PSYCHOLOGICAL COMMUNITIES, EXPERT EVIDENCE ABOUT THE DISORDER SHOULD NOT HAVE BEEN ADMITTED IN THIS SEX OFFENDER CIVIL COMMITMENT TRIAL (SECOND DEPT))

INSUFFICIENT SHOWING THAT SEX OFFENDER'S VIOLATION OF NON-SEXUAL TERMS OF HIS STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST) JUSTIFIED A FINDING HE IS UNABLE TO CONTROL SEXUAL MISCONDUCT, COMMITMENT TO LOCKED FACILITY REVERSED (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice DeMoyer, reversing County Court, determined that there was an insufficient showing that respondent sex offender's non-sexual violations of the terms of his strict and intensive supervision and treatment (SIST) (alcohol abuse) justified a finding he has an inability to control sexual misconduct:

> ... [A] Mental Hygiene Law § 10.03 (e) finding of "inability" based on nonsexual SIST violations will satisfy the Michael M. [24 NY3d 649] standard only when such violations bear a close causative relationship to sex offending. Such a relationship is missing here. It is simply not true — as the State claims — that "there is a significant link between respondent's alcohol use disorder and his sex offenses" or that his sex offending is "fueled by his drug and alcohol use." A review of the record citations upon which the State relies for those propositions reveals only that respondent was intoxicated during his sex offending decades ago, and that alcohol use "increases his impulsivity and makes [him] more likely to act out." ... [N]o expert has testified that respondent's substance abuse is "strongly fused" or otherwise inextricably intertwined with his sex offending ... . At most, the expert testimony in this case shows that respondent's alcohol use is colocated with his sex offending (and, for that matter, with every other facet of his life), and that alcohol disinhibits him from resisting the urge to offend sexually. But this testimony is virtually identical to the expert testimony ... is inadequate to meet the State's burden under Michael M. Matter of State of New York v George N., 2018 NY Slip Op 00942, Fourth Dept 2-8-16

MENTAL HYGIENE LAW (INSUFFICIENT SHOWING THAT SEX OFFENDER'S VIOLATION OF NON-SEXUAL TERMS OF HIS STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST) JUSTIFIED A FINDING HE IS UNABLE TO CONTROL SEXUAL MISCONDUCT, COMMITMENT TO LOCKED FACILITY REVERSED (FOURTH DEPT))/STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST) (MENTAL HYGIENE LAW, INSUFFICIENT SHOWING THAT SEX OFFENDER'S VIOLATION OF NON-SEXUAL TERMS OF HIS STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST) JUSTIFIED A FINDING HE IS UNABLE TO CONTROL SEXUAL MISCONDUCT, COMMITMENT TO LOCKED FACILITY REVERSED (FOURTH DEPT))/SEX OFFENDERS (MENTAL HYGIENE LAW, NSUFFICIENT SHOWING THAT SEX OFFENDER'S VIOLATION OF NON-SEXUAL TERMS OF HIS STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST) JUSTIFIED A FINDING HE IS UNABLE TO CONTROL SEXUAL MISCONDUCT, COMMITMENT TO LOCKED FACILITY REVERSED (FOURTH DEPT))/CIVIL COMMITMENT (SEX OFFENDERS, MENTAL HYGIENE LAW, INSUFFICIENT SHOWING THAT SEX OFFENDER'S VIOLATION OF NON-SEXUAL TERMS OF HIS STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST) JUSTIFIED A FINDING HE IS UNABLE TO CONTROL SEXUAL MISCONDUCT, COMMITMENT TO LOCKED FACILITY REVERSED (FOURTH DEPT))

SEALED LOCAL GOVERNMENT RECORDS PROPERLY UNSEALED FOR CONSIDERATION IN THIS SEX OFFENDER CIVIL COMMITMENT PROCEEDING (SECOND DEPT).

The Second Department determined sealed records were properly unsealed in this sex offender civil commitment hearing:

> The Supreme Court properly granted the State's motion to unseal the records kept by the Office of the Suffolk County District Attorney and the Suffolk County Police Department regarding the defendant's 2001 arrest for rape in the first degree. Mental Hygiene Law § 10.08(c) provides, "Notwithstanding any other provision of law, the commissioner, the case review panel and the attorney general shall be entitled to request from any agency, office, department or other entity of the state, and such entity shall be authorized to provide upon request, any and all records and reports relating to the respondent's commission or alleged commission of a sex offense, the

institutional adjustment and any treatment received by such respondent, and any medical, clinical or other information relevant to a determination of whether the respondent is a sex offender requiring civil management." "The primary goal of the court in interpreting a statute is to determine and implement the Legislature's intent"… . Given the legislative purpose underlying Mental Hygiene Law § 10.08(c), we have construed this statute to permit authorized parties to obtain records from local government entities in addition to State entities … . Matter of State of New York v David B., 2017 NY Slip Op 08831, Second Dept 12-20-17

MENTAL HYGIENE LAW (SEX OFFENDERS, CIVIL COMMITMENT, SEALED LOCAL GOVERNMENT RECORDS PROPERLY UNSEALED FOR CONSIDERATION IN THIS SEX OFFENDER CIVIL COMMITMENT PROCEEDING (SECOND DEPT))/EVIDENCE (MENTAL HYGIENE LAW, SEX OFFENDERS, SEALED LOCAL GOVERNMENT RECORDS PROPERLY UNSEALED FOR CONSIDERATION IN THIS SEX OFFENDER CIVIL COMMITMENT PROCEEDING (SECOND DEPT))/MUNICIPAL LAW (SEALED RECORDS, MENTAL HYGIENE LAW, SEX OFFENDERS, SEALED LOCAL GOVERNMENT RECORDS PROPERLY UNSEALED FOR CONSIDERATION IN THIS SEX OFFENDER CIVIL COMMITMENT PROCEEDING (SECOND DEPT))/SEALED RECORDS SEX OFFENDERS, CIVIL COMMITMENT, SEALED LOCAL GOVERNMENT RECORDS PROPERLY UNSEALED FOR CONSIDERATION IN THIS SEX OFFENDER CIVIL COMMITMENT PROCEEDING (SECOND DEPT))

STATE'S EXPERTS SHOULD NOT HAVE RELIED ON HEARSAY EVIDENCE OF CONVICTIONS WHICH WERE VACATED BASED UPON DNA EVIDENCE, NEW MENTAL ABNORMALITY TRIAL ORDERED, SEALED CRIMINAL RECORDS PROPERLY CONSIDERED, FAILURE HOLD PROBABLE CAUSE HEARING AND TRIAL WITHIN STATUTORY TIME FRAMES DID NOT VIOLATE DUE PROCESS (SECOND DEPT).

The Second Department, in a comprehensive opinion by Justice Sgroi, determined that a detained sex offender, Kerry K, was entitled to a new civil commitment trial on the issue of mental abnormality and, if necessary, a new dispositional hearing. The finding that Kerry K suffered from a mental abnormality was based in part on hearsay about a conviction which had been vacated based upon DNA evidence (after defendant served 11 years in prison). The Second Department further held that the fact that the probable cause hearing and trial did not occur within the statutory time-frames was not a jurisdictional defect or a violation of due process. And the fact that sealed criminal records were relied upon by the state's experts was deemed proper:

… [T]he failure to conduct the probable cause hearing and trial within the statutory time frames did not deprive the court of jurisdiction or, under the circumstances, violate Kerry K.'s due process rights. … Mental Hygiene Law § 10.08(c) permits the State to obtain, from local government entities, sealed records relating to an offender's commission or alleged commission of a sex offense. … [W]e conclude that the court erred in admitting the hearsay basis testimony regarding convictions of which Kerry K. was exonerated … . * * *

The experts' testimony about the vacated 1982 convictions … did not satisfy the reliability and relevance requirements for admission of hearsay basis evidence. As the Court of Appeals has observed, "unlike adjudications and admissions of guilt, an acquittal cannot provide the basis for reliability" … . Further, "[c]harges that resulted in acquittal are surely more prejudicial than probative on the question of the respondent's mental abnormality" … . Thus, "acquittal of criminal charges bars admission of those accusations, absent some other basis to substantiate them" … .

In the present case, the information regarding the 1982 convictions was even less reliable and relevant than information concerning charges of which a respondent has merely been acquitted. An acquittal on a particular charge indicates that the People were unable to prove the defendant's guilt of that charge beyond a reasonable doubt. Here, in contrast, the 1982 convictions were vacated, on consent of the Suffolk County District Attorney's Office, based on the results of DNA testing conducted by Kerry K.'s and the State's experts, and Kerry K. later affirmatively proved his innocence by clear and convincing evidence … . Thus, it was error to permit the State's experts to testify about the 1982 convictions, and this error deprived Kerry K. of due process … . Matter of State of New York v Kerry K., 2017 NY Slip Op 08671, Second Dept 12-13-17

MENTAL HYGIENE LAW (SEX OFFENDERS, CIVIL COMMITMENT, STATE'S EXPERTS SHOULD NOT HAVE RELIED ON HEARSAY EVIDENCE OF CONVICTIONS WHICH WERE VACATED BASED UPON DNA EVIDENCE, NEW MENTAL ABNORMALITY TRIAL ORDERED, SEALED CRIMINAL RECORDS PROPERLY CONSIDERED, FAILURE HOLD PROBABLE CAUSE HEARING AND TRIAL WITH STATUTORY TIME FRAMES DID NOT VIOLATE DUE PROCESS (SECOND DEPT))/EVIDENCE (MENTAL HYGIENE LAW, SEX OFFENDERS, CIVIL COMMITMENT, STATE'S EXPERTS SHOULD NOT HAVE RELIED ON HEARSAY EVIDENCE OF CONVICTIONS WHICH WERE VACATED BASED UPON DNA EVIDENCE, NEW MENTAL ABNORMALITY TRIAL ORDERED, SEALED CRIMINAL RECORDS PROPERLY

CONSIDERED, FAILURE HOLD PROBABLE CAUSE HEARING AND TRIAL WITH STATUTORY TIME FRAMES DID NOT VIOLATE DUE PROCESS (SECOND DEPT))/SEX OFFENDERS (CIVIL COMMITMENT, STATE'S EXPERTS SHOULD NOT HAVE RELIED ON HEARSAY EVIDENCE OF CONVICTIONS WHICH WERE VACATED BASED UPON DNA EVIDENCE, NEW MENTAL ABNORMALITY TRIAL ORDERED, SEALED CRIMINAL RECORDS PROPERLY CONSIDERED, FAILURE HOLD PROBABLE CAUSE HEARING AND TRIAL WITH STATUTORY TIME FRAMES DID NOT VIOLATE DUE PROCESS (SECOND DEPT))/CIVIL COMMITMENT (SEX OFFENDERS STATE'S EXPERTS SHOULD NOT HAVE RELIED ON HEARSAY EVIDENCE OF CONVICTIONS WHICH WERE VACATED BASED UPON DNA EVIDENCE, NEW MENTAL ABNORMALITY TRIAL ORDERED, SEALED CRIMINAL RECORDS PROPERLY CONSIDERED, FAILURE HOLD PROBABLE CAUSE HEARING AND TRIAL WITH STATUTORY TIME FRAMES DID NOT VIOLATE DUE PROCESS (SECOND DEPT))

SERVICE AND VENUE PROVISIONS IN CONTRACT WITH A LIMITED LIABILITY COMPANY DID NOT APPLY TO DEFENDANT INDIVIDUALLY, DEFECTS IN SERVICE PROPERLY OVERLOOKED PURSUANT TO CPLR 2001 (THIRD DEPT).

The Third Department determined plaintiffs' service of process on defendant was flawed but Supreme Court properly overlooked the defects under CPLR 2001. The Third Department further held that the defendant's motion to change venue should have been granted. Both the method of service (mail) and venue were based on provisions in a purchase and sale contract. However, the purchase and sale agreement was with a limited liability company, but the confessions of judgment upon which the suit were based were signed by defendant in her personal capacity, not as the sole member of the LLC. Therefore the service and venue contract provisions did not apply:

> Defendant and the limited liability companies of which she is a member "are distinct entities," however, and the former is not individually bound by the contractual commitments of the latter… . Nothing in the purchase and sale agreement binds defendant to its terms, instead making clear that no "shareholder, director, officer of or principal or agent of" [the LLC] will "have any personal liability, directly or indirectly, under or in connection with" either the agreement or any amendments to it. …
>
> Due to the inapplicability of those contractual provisions, plaintiffs' effort to serve defendant by mail was deficient in that service "under CPLR 3213 is subject to the rules governing service of the summons generally" … . The mailing nevertheless placed defendant on notice of the pending motion for summary judgment in lieu of complaint, and she responded with a cross motion that opposed the motion on various grounds. Plaintiffs then arranged for proper, albeit untimely, service of defendant pursuant to CPLR 308 (2), and advised that they were amenable to any further adjournment of the return date "as defendant and [Supreme] Court may find proper."… Accordingly, while a wholesale failure to timely serve defendant with the initiatory papers constitutes "a fatal jurisdictional defect"… , defendant was placed on notice, then submitted a cross motion that raised various objections and included substantive opposition before being properly served. In light of these peculiar circumstances, as well as the absence of any prejudice flowing from plaintiffs' missteps, we are persuaded that the untimeliness of the proper service could be and rightly was overlooked (seeCPLR 2001, 2004 …). Capolino v Goren, 2017 NY Slip Op 08246, Third Dept 11-22-17

CIVIL PROCEDURE (SERVICE AND VENUE PROVISIONS IN CONTRACT WITH A LIMITED LIABILITY COMPANY DID NOT APPLY TO DEFENDANT INDIVIDUALLY, DEFECTS IN SERVICE PROPERLY OVERLOOKED PURSUANT TO CPLR 2001 (THIRD DEPT))/LIMITED LIABILITY COMPANY (SERVICE AND VENUE PROVISIONS IN CONTRACT WITH A LIMITED LIABILITY COMPANY DID NOT APPLY TO DEFENDANT INDIVIDUALLY, DEFECTS IN SERVICE PROPERLY OVERLOOKED PURSUANT TO CPLR 2001 (THIRD DEPT))/CONTRACT LAW (SERVICE AND VENUE PROVISIONS IN CONTRACT WITH A LIMITED LIABILITY COMPANY DID NOT APPLY TO DEFENDANT INDIVIDUALLY, DEFECTS IN SERVICE PROPERLY OVERLOOKED PURSUANT TO CPLR 2001 (THIRD DEPT))/CPLR 2001 (SERVICE AND VENUE PROVISIONS IN CONTRACT WITH A LIMITED LIABILITY COMPANY DID NOT APPLY TO DEFENDANT INDIVIDUALLY, DEFECTS IN SERVICE PROPERLY OVERLOOKED PURSUANT TO CPLR 2001 (THIRD DEPT))

RECORD OF A RETENTION HEARING FOR AN INSANITY ACQUITTEE NEED NOT BE SEALED (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Clark, over a two-justice dissent, determined that the record of a retention hearing for an insanity acquittee need not be sealed:

> Mental Hygiene Law § 33.13 does not, as respondent contends, require that the record of his retention proceeding be sealed. …
>
> Respondent accepted a plea of not responsible by reason of mental disease or defect and, therefore, "avoid[ed] criminal penalties and . . . [became] subject to the CPL 330.20 scheme" … . As the Court of Appeals has consistently recognized, "[t]his places insanity acquittees in a significantly different posture than involuntarily committed civil patients" and, thus, justifies "rational differences

between procedures for commitment and release applicable to defendants found not responsible and persons involuntarily committed under the Mental Hygiene Law" … . The distinction between an insanity acquittee, as we have here, and an involuntarily committed civil patient is apparent by the Legislature's enactment of a separate statutory scheme — CPL 330.20 — to address the commitment and retention procedures for persons found not responsible for their crimes by reason of mental disease or defect. The detailed statutory framework of CPL 330.20 does not include a provision that requires, or even contemplates, the sealing of these commitment and retention proceedings. Nor does the relevant legislative history indicate that the Legislature intended for these proceedings — which arise only after a criminal defendant affirmatively places his or her mental competency in issue — to be sealed from the public … . Matter of James Q., 2017 NY Slip Op 06222, 3rd Dept 8-17-17

MENTAL HYGIENE LAW (CRIMINAL LAW, RECORD OF A RETENTION HEARING FOR AN INSANITY ACQUITTEE NEED NOT BE SEALED (THIRD DEPT))/CRIMINAL LAW (INSANITY ACQUITTEE, RECORD OF A RETENTION HEARING FOR AN INSANITY ACQUITTEE NEED NOT BE SEALED (THIRD DEPT)/INSANITY ACQUITTEE (CRIMINAL LAW, RECORD OF A RETENTION HEARING FOR AN INSANITY ACQUITTEE NEED NOT BE SEALED (THIRD DEPT))/RETENTION HEARING (INSANITY ACQUITTEE, (CRIMINAL LAW, RECORD OF A RETENTION HEARING FOR AN INSANITY ACQUITTEE NEED NOT BE SEALED (THIRD DEPT))/

INSUFFICIENT PROOF DEFENDANT SUFFERED FROM A DANGEROUS MENTAL DISORDER WITHIN THE MEANING OF THE CRIMINAL PROCEDURE LAW 2ND DEPT.

The Second Department, reversing County Court, determined the evidence at this civil commitment hearing supported a finding defendant was not suffering from a "dangerous mental disorder," but rather was "mentally ill," within the meaning of the Criminal Procedure Law (CPL) 330.20:

… County Court accepted the appellant's plea of not responsible by reason of mental disease or defect to the charge of strangulation in the second degree. After the court issued an examination order pursuant to CPL 330.20(3), the appellant was remanded to Mid-Hudson Forensic Psychiatric … , where he was evaluated by three psychiatric examiners. Two of the examiners found him to be suffering from a dangerous mental disorder, while the third determined that he was mentally ill. * * *

The opinions expressed by the People's experts were based, in large part, upon speculation and an overly narrow focus on the appellant's conduct during the relatively brief period of time between the instant offense and the time when the appellant began taking medication. As evidenced by the unrebutted testimony of the appellant's experts, the appellant has had no history of relapses into violent behavior. Moreover, he had no notable history of substance or alcohol abuse, had always been compliant with treatment, both during the 18-month period he was released on bail and during his subsequent time at Mid-Hudson, and had a positive support system. Therefore, the preponderance of the record evidence did not support the conclusion of the People's experts that the appellant suffered from a dangerous mental disorder… Contrary to the County Court's determination, the preponderance of the evidence adduced at the hearing demonstrated only that the appellant was mentally ill … .

Accordingly, the County Court's findings of fact must be vacated and the matter remitted to the County Court, Orange County, for the entry of a finding that the appellant is mentally ill pursuant to CPL 330.20(1)(d), and the issuance of such further orders as may be appropriate under the Mental Hygiene Law and CPL 330.20(7). Matter of Eric F., 2017 NY Slip Op 05594, 2nd Dept 7-12-17

CRIMINAL LAW (CIVIL COMMITMENT, INSUFFICIENT PROOF DEFENDANT SUFFERED FROM A DANGEROUS MENTAL DISORDER WITHIN THE MEANING OF THE CRIMINAL PROCEDURE LAW 2ND DEPT)/MENTAL HYGIENE LAW (CRIMINAL LAW, CIVIL COMMITMENT, INSUFFICIENT PROOF DEFENDANT SUFFERED FROM A DANGEROUS MENTAL DISORDER WITHIN THE MEANING OF THE CRIMINAL PROCEDURE LAW 2ND DEPT)/MENTAL ILLNESS (CRIMINAL LAW, INSUFFICIENT PROOF DEFENDANT SUFFERED FROM A DANGEROUS MENTAL DISORDER WITHIN THE MEANING OF THE CRIMINAL PROCEDURE LAW 2ND DEPT)

FOR CAUSE CHALLENGE TO A JUROR IN THIS SEX-OFFENDER CIVIL COMMITMENT ACTION SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED 2ND DEPT.

The Second Department, reversing Supreme Court, determined defendant sex offender's "for cause" challenge to a juror should have been granted in this civil commitment proceeding:

The record of the voir dire reveals that after the appellant's counsel disclosed that the appellant previously had committed rapes and robberies against 11 different victims and had been dubbed "the Flatbush rapist" in 1991, a prospective juror repeatedly turned away from counsel, said "Wow" on numerous occasions, and acknowledged that she remembered the Flatbush rapist. She further expressed the concern that "I got too many granddaughters," and when asked at various points if the appellant's prior offenses might influence her ability to be fair, she remarked "I just went blank," "I don't know, I—it&mdash," and "You know I'm looking at the man and I'm—I know his face, but that's when he was young and I'm like, wow." Significantly, the prospective juror never unequivocally asserted that she could be fair and impartial following these remarks. The appellant's subsequent challenge to the prospective juror for cause was denied, and the appellant utilized a peremptory challenge to remove her from the panel.

The appellant contends that the denial of his for-cause challenge constituted error. We agree. Contrary to the State's contention, this issue is preserved for appellate review, since the appellant exhausted his peremptory challenges before jury selection was completed (… Mental Hygiene Law § 10.07[b]; CPL 270.20[2]). Turning to the merits, CPL 270.20(1)(b) provides that a challenge for cause is authorized when a prospective juror "has a state of mind that is likely to preclude him [or her] from rendering an impartial verdict based upon the evidence adduced at the trial." Where a prospective juror's responses raise serious doubt with regard to his ability to be impartial, that prospective juror must be excused absent an unequivocal statement on the record assuring that he or she can be fair and impartial… . Here, the equivocal responses of the prospective juror, along with her other remarks and expressions of concern, raised substantial doubt as to whether she could be fair and impartial in her evaluation of the case, triggering an obligation on the part of the Supreme Court to inquire further … . Matter of State of New York v Keith G., 2017 NY Slip Op 05444, 2nd Dept 7-5-17

MENTAL HYGIENE LAW (SEX OFFENDERS, CIVIL COMMITMENT, FOR CAUSE CHALLENGE TO A JUROR IN THIS SEX-OFFENDER CIVIL COMMITMENT ACTION SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED 2ND DEPT)/CRIMINAL LAW (MENTAL HYGIENE LAW, SEX OFFENDERS, CIVIL COMMITMENT, FOR CAUSE CHALLENGE TO A JUROR IN THIS SEX-OFFENDER CIVIL COMMITMENT ACTION SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED 2ND DEPT)/SEX OFFENDERS (MENTAL HYGIENE LAW, CIVIL COMMITMENT, FOR CAUSE CHALLENGE TO A JUROR IN THIS SEX-OFFENDER CIVIL COMMITMENT ACTION SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED 2ND DEPT)/CIVIL COMMITMENT (SEX OFFENDERS, MENTAL HYGIENE LAW, FOR CAUSE CHALLENGE TO A JUROR IN THIS SEX-OFFENDER CIVIL COMMITMENT ACTION SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED 2ND DEPT)/JURORS (MENTAL HYGIENE LAW, SEX OFFENDERS, CIVIL COMMITMENT, FOR CAUSE CHALLENGE TO A JUROR IN THIS SEX-OFFENDER CIVIL COMMITMENT ACTION SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED 2ND DEPT)/FOR CAUSE CHALLENGE (JURORS, MENTAL HYGIENE LAW, CIVIL COMMITMENT, SEX OFFENDERS, FOR CAUSE CHALLENGE TO A JUROR IN THIS SEX-OFFENDER CIVIL COMMITMENT ACTION SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED 2ND DEPT)

CHANGE OF VENUE TO ALLOW PETITIONER'S MOTHER TO TESTIFY SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined petitioner sex offender's motion for a change of venue for the annual review of his civil commitment under Article 10 should have been granted. The change was sought to allow petitioner's mother to testify:

In this annual review proceeding pursuant to Mental Hygiene Law § 10.09, petitioner appeals from an order that, inter alia, denied that part of his motion seeking a change of venue to New York County for the convenience of witnesses … . Petitioner was previously determined to be a dangerous sex offender requiring civil confinement and confined to a secure treatment facility … . He is currently confined at the Central New York Psychiatric Center in Oneida County. We now grant that part of the motion seeking a change of venue.

The court may change the venue of an annual review proceeding" to any county for good cause, which may include considerations relating to the convenience of the parties or witnesses or the condition of the [confined sex offender]' " … . We agree with petitioner that Supreme Court improvidently exercised its discretion in denying his motion inasmuch as the proposed testimony of his mother, who lives in New York County, is "relevant to the issue of whether petitioner remained a dangerous sex offender in need of confinement" … . Although respondent correctly notes that the subjects of the mother's proposed testimony also may be the subjects of expert testimony, "[t]he pertinent question is whether a witness—expert or lay—has material and relevant evidence to offer on the issues to be resolved" … . We agree with petitioner that his mother's proposed testimony concerning his stated goals and priorities, likely living arrangements, and the availability and extent of a familial support system in the event of release, is material and relevant to the issue whether he "is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" … . Matter of Charada T. v State of New York, 2017 NY Slip Op 03379, 4th Dept 4-28-17

MENTAL HYGIENE LAW (SEX OFFENDERS, CIVIL COMMITMENT, CHANGE OF VENUE TO ALLOW PETITIONER'S MOTHER TO TESTIFY SHOULD HAVE BEEN GRANTED)/SEX

OFFENDERS (MENTAL HYGIENE LAW, CHANGE OF VENUE TO ALLOW PETITIONER'S MOTHER TO TESTIFY SHOULD HAVE BEEN GRANTED)/CIVIL COMMITMENT (MENTAL HYGIENE LAW, CHANGE OF VENUE TO ALLOW PETITIONER'S MOTHER TO TESTIFY SHOULD HAVE BEEN GRANTED)/VENUE (MENTAL HYGIENE LAW, CHANGE OF VENUE TO ALLOW PETITIONER'S MOTHER TO TESTIFY SHOULD HAVE BEEN GRANTED)