



SEX OFFENDERS HAVE A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN MENTAL HYGIENE LAW ARTICLE 10 PROCEEDINGS.

The Second Department determined a respondent in a Mental Hygiene Law article 10 proceeding (re: civil commitment of sex offenders) has a right to effective assistance of counsel (not usually the case in a civil proceeding). Respondent's writ of error coram nobis, alleging ineffective assistance, however, was denied on the merits:

Generally, in the context of civil litigation, an attorney's errors or omissions are binding on the client and a claim of ineffective assistance of counsel will not be entertained in the absence of extraordinary circumstances However, a respondent in a Mental Hygiene Law article 10 proceeding has a statutory right to counsel ... and, as in proceedings pursuant to the Sex Offender Registration Act (Correction Law art 6-C) and certain Family Court proceedings, the consequences of an unfavorable determination in these particular civil proceedings are uniquely severe Indeed, a respondent in a Mental Hygiene Law article 10 proceeding "arguably faces an even more severe threat to his or her liberty than that faced by a criminal defendant. When successfully litigated by the State, such a proceeding can result in civil confinement, after a respondent is released from prison, which is involuntary and indefinite, and can last the remainder of a respondent's life" Further, a respondent's statutory right to counsel in a Mental Hygiene Law article 10 proceeding would be eviscerated if counsel were ineffective... . Thus, a claim of ineffective assistance of counsel may be raised in a Mental Hygiene Law article 10 proceeding [Matter of State of New York v Wayne J., 2017 NY Slip Op 02798, 2nd Dept 4-12-17](#)

MENTAL HYGIENE LAW (SEX OFFENDERS HAVE A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN MENTAL HYGIENE LAW ARTICLE 10 PROCEEDINGS)/ATTORNEYS (MENTAL HYGIENE LAW, SEX OFFENDERS HAVE A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN MENTAL HYGIENE LAW ARTICLE 10 PROCEEDINGS)/SEX OFFENDERS (MENTAL HYGIENE LAW, SEX OFFENDERS HAVE A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN MENTAL HYGIENE LAW ARTICLE 10 PROCEEDINGS)

FATHER PAID CHILD SUPPORT PRIOR TO SENTENCING FOR WILLFUL FAILURE TO PAY, FAMILY COURT SHOULD NOT HAVE ISSUED THE ORDER OF COMMITMENT.

The Third Department determined a sentence of incarceration for father's willful failure to pay child support was proper. However, because the support was paid by father prior to sentencing, Family Court abused its discretion by issuing the order of commitment:

Upon a willful violation, Family Court is authorized to impose a sentence of incarceration of up to six months Such a sentence is in the nature of a civil contempt, which "may only continue until such time as the offender, if it is within his or her power, complies with the support order" Since respondent cured the default prior to sentencing, we conclude that Family Court abused its discretion by issuing the order of commitment. [Matter of Provost v Provost, 2017 NY Slip Op 01422, 3rd Dept 2-23-17](#)

FAMILY LAW (FATHER PAID CHILD SUPPORT PRIOR TO SENTENCING FOR WILLFUL FAILURE TO PAY, FAMILY COURT SHOULD NOT HAVE ISSUED THE ORDER OF COMMITMENT)/CHILD SUPPORT (FATHER PAID CHILD SUPPORT PRIOR TO SENTENCING FOR WILLFUL FAILURE TO PAY, FAMILY COURT SHOULD NOT HAVE ISSUED THE ORDER OF COMMITMENT)

SUPREME COURT SHOULD NOT HAVE DISMISSED PETITION FOR CIVIL MANAGEMENT OF A SEX OFFENDER FOR FAILURE TO STATE A CAUSE OF ACTION.

The Second Department determined Supreme Court should not have dismissed a petition for civil management of a sex offender (Ezekiel R) for failure to state a cause of action:

The Supreme Court, relying on *Matter of State of New York v Donald DD.* (24 NY3d 174), dismissed the State of New York's petition for the civil management of Ezekiel R. on the ground that it failed to state a cause of action. This was error. It is true that a diagnosis of antisocial personality disorder does not, by itself, "distinguish the sex offender whose mental abnormality subjects him to civil commitment from the typical recidivist convicted in an ordinary criminal case" Here, however, the petition alleges a mental abnormality based on a composite diagnosis of antisocial personality disorder and psychopathy, and is supported by expert evidence containing an additional diagnosis of conduct disorder, a provisional diagnosis of sexual sadism disorder, and a determination that Ezekiel R.'s actions were suggestive of his potential for deviant sexual behavior and/or sexual preoccupation. Under these circumstances, the petition was facially valid and not subject to dismissal prior to a probable cause hearing Although the court at a probable cause hearing or the factfinder at trial may or may not be convinced by the expert evidence, the evidence was not so deficient as to warrant dismissal of the petition at this early juncture [Matter of State of New York v Ezekiel R., 2017 NY Slip Op 01213, 2nd](#)



[Dept 2-15-17](#)

MENTAL HYGIENE LAW (SUPREME COURT SHOULD NOT HAVE DISMISSED PETITION FOR CIVIL MANAGEMENT OF A SEX OFFENDER FOR FAILURE TO STATE A CAUSE OF ACTION)/SEX OFFENDERS (MENTAL HYGIENE LAW, SUPREME COURT SHOULD NOT HAVE DISMISSED PETITION FOR CIVIL MANAGEMENT OF A SEX OFFENDER FOR FAILURE TO STATE A CAUSE OF ACTION)

PROOF OF MENTAL ABNORMALITIES SUFFICIENT TO JUSTIFY CIVIL COMMITMENT OF SEX OFFENDERS CLARIFIED.

The Court of Appeals, in an extensive opinion by Judge Pigott, over a dissent in two of the three cases, determined the evidence presented in Mental Hygiene Law Article 10 proceedings supported civil commitment of the three respondents as sex offenders with mental abnormalities resulting in “serious difficulty in controlling [sexual] conduct.” The facts of each case were discussed in detail, and the determination in each case must be considered “fact specific.” However, in one case the diagnosis of anti-social personality disorder (ASPD) coupled with paraphilia NOS was deemed sufficient. In the other two cases, the diagnosis of borderline personality disorder coupled with ASPD and evidence of sexual crimes was deemed sufficient. The dissent would have found the proof of borderline personality disorder insufficient. The number of distinct issues discussed, and the depth of those discussions, cannot fairly be summarized here. [Matter of State of New York v Dennis K., 2016 NY Slip Op 05330, CtApp 7-5-16](#)

MENTAL HYGIENE LAW (PROOF OF MENTAL ABNORMALITIES SUFFICIENT TO JUSTIFY CIVIL COMMITMENT OF SEX OFFENDERS CLARIFIED)/EVIDENCE (MENTAL HYGIENE LAW, PROOF OF MENTAL ABNORMALITIES SUFFICIENT TO JUSTIFY CIVIL COMMITMENT OF SEX OFFENDERS CLARIFIED)/SEX OFFENDERS (MENTAL HYGIENE LAW, PROOF OF MENTAL ABNORMALITIES SUFFICIENT TO JUSTIFY CIVIL COMMITMENT OF SEX OFFENDERS CLARIFIED)/CRIMINAL LAW (MENTAL HYGIENE LAW, PROOF OF MENTAL ABNORMALITIES SUFFICIENT TO JUSTIFY CIVIL COMMITMENT OF SEX OFFENDERS CLARIFIED)/ANTISOCIAL PERSONALITY DISORDER (ASPD) (MENTAL HYGIENE LAW, PROOF OF MENTAL ABNORMALITIES SUFFICIENT TO JUSTIFY CIVIL COMMITMENT OF SEX OFFENDERS CLARIFIED)/PARAPHILIA NOS (MENTAL HYGIENE LAW, PROOF OF MENTAL ABNORMALITIES SUFFICIENT TO JUSTIFY CIVIL COMMITMENT OF SEX OFFENDERS CLARIFIED)/BORDERLINE PERSONALITY DISORDER (MENTAL HYGIENE LAW, PROOF OF MENTAL ABNORMALITIES SUFFICIENT TO JUSTIFY CIVIL COMMITMENT OF SEX OFFENDERS CLARIFIED)

ANTISOCIAL PERSONALITY DISORDER WITH PSYCHOPATHY SUFFICIENT TO DEMONSTRATE PROBABLE CAUSE, SEX OFFENDER CIVIL MANAGEMENT PETITION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined the state's petition for sex offender civil management should not have been dismissed after the article 10 probable cause hearing. Expert evidence was presented which alleged respondent suffered from antisocial personality disorder (ASPD) with psychopathy. That was sufficient to demonstrate probable cause:

“[I]n article 10 proceedings, issues concerning the viability and reliability of the respondent's diagnosis are properly reserved for resolution by the jury” ... Here, the State expert opined that respondent suffers from a mental abnormality within the meaning of the MHL based on a diagnosis of antisocial personality disorder (ASPD) with psychopathy. Although the factfinder at trial may or may not accept the expert's opinion, the expert's testimony at the hearing was not so deficient as to warrant dismissal of the petition at this early juncture, especially since the expert offered extensive testimony regarding the distinctions between ASPD and psychopathy, and since the Court of Appeals in Donald DD. did not state that a diagnosis of ASPD with psychopathy is insufficient to support a finding of mental abnormality ... [Matter of State of New York v Jerome A., 2016 NY Slip Op 01788, 1st Dept 3-15-16](#)

MENTAL HYGIENE LAW (ANTISOCIAL PERSONALITY DISORDER WITH PSYCHOPATHY SUFFICIENT TO DEMONSTRATE PROBABLE CAUSE FOR SEX OFFENDER CIVIL COMMITMENT)/SEX OFFENDERS (ANTISOCIAL PERSONALITY DISORDER WITH PSYCHOPATHY SUFFICIENT TO DEMONSTRATE PROBABLE CAUSE FOR SEX OFFENDER CIVIL COMMITMENT)

A DIAGNOSIS OF ANTISOCIAL PERSONALITY DISORDER WITH NARCISSISTIC AND PARANOID FEATURES IS SUFFICIENT TO SUPPORT CIVIL COMMITMENT IN A SECURE FACILITY PURSUANT TO CPL 330.20.

In finding that respondent suffers from a dangerous mental disorder requiring civil commitment in a secure facility, the Third Department first determined a diagnosis of antisocial personality disorder (ASPD) with narcissistic and paranoid features was sufficient to justify civil



commitment pursuant to Criminal Procedure Law 330.20:

... [R]espondent contends, among other things, that the fact that ASPD, alone, is a legally insufficient diagnosis for the purposes of civil confinement pursuant to Mental Hygiene Law article 10 (see *Matter of State of New York v Donald DD.*, 24 NY3d 174, 191 [2014]) merits the conclusion that a diagnosis of ASPD with narcissistic and paranoid features is a legally insufficient diagnosis for the purposes CPL 330.20. The Supreme Court of the United States has established that “[s]tates retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for [civil] commitment” The constitutional guarantee of due process limits that discretion, however, by ensuring that civil commitment is not used as a mechanism to identify and confine the dangerous but “typical [criminal] recidivist[s]” With this in mind, proof sufficient to satisfy due process requires proof of a mental condition that causes a person to have serious difficulty in controlling his or her dangerous behavior

* * * CPL 330.20 (1) (c) ... does not limit the relevant form of dangerousness in the same manner; it only requires a relationship between respondent’s current mental condition and “a physical danger to himself [or herself] or others.”

Further, the diagnosis of ASPD with narcissistic and paranoid features is more specific than a generic ASPD diagnosis. Accordingly, this case does not force us to confront a generic ASPD diagnosis that, as elucidated by expert evidence, “means little more than a deep-seated tendency to commit crimes” Therefore, we turn to the expert evidence further clarifying respondent’s ASPD diagnosis and its attendant narcissistic and paranoid features.

Expert testimony established that ASPD causes individuals to have “distortions related to their thoughts [and] behaviors, and . . . a reckless disregard for societal norms.” Individuals are diagnosed with narcissistic features when they engage in “grandiose” thinking, have a “sense of self-importance” and feel “entitled” and possibly omnipotent. Finally, individuals with paranoid features often have feelings that “people are out to get them.” Considering this evidence, we conclude that a mental condition marked by a disregard for societal norms and specifically amplified by an unreasonably inflated sense of self worth and an irrational attribution of hostile intentions to other people sufficiently distinguishes a respondent from the typical recidivist and has a relationship to the requisite dangerousness pursuant to CPL 330.20. Accordingly, we conclude that the diagnosis of ASPD with narcissistic and paranoid features is not legally insufficient to support civil confinement pursuant to CPL 330.20. [Matter of John Z. \(Commissioner of Mental Health\), 2016 NY Slip Op 01234, 3rd Dept 2-18-16](#)

CRIMINAL LAW (CIVIL COMMITMENT JUSTIFIED BY DIAGNOSIS OF ANTISOCIAL PERSONALITY DISORDER WITH NARCISSISTIC AND PARANOID FEATURES)/CIVIL COMMITMENT (JUSTIFIED BY DIAGNOSIS OF ANTISOCIAL PERSONALITY DISORDER WITH NARCISSISTIC AND PARANOID FEATURES)/DANGEROUS MENTAL DISORDER (CIVIL COMMITMENT JUSTIFIED BY DIAGNOSIS OF ANTISOCIAL PERSONALITY DISORDER WITH NARCISSISTIC AND PARANOID FEATURES)

HEARSAY EVIDENCE OF CHARGES OF WHICH SEX OFFENDER WAS ACQUITTED AND CHARGES WHICH WERE DISMISSED SHOULD NOT HAVE BEEN CONSIDERED, NEW TRIAL ORDERED.

The First Department determined respondent sex-offender was entitled to a new civil-commitment trial because the state’s expert relied on sex-offense charges of which respondent was acquitted and other sex-offense charges which were dismissed. The acquittal was completely off-limits. And no evidence to demonstrate respondent had committed the dismissed offenses was presented. The court noted that, in order to preserve a challenge to the sufficiency of the evidence in these Mental Hygiene Law proceedings, a motion for a directed verdict must be made at the close of the state’s proof:

Respondent failed to preserve his remaining claims that the trial evidence was legally insufficient to support the jury’s verdict. In order to challenge the sufficiency of the evidence on appeal, a party must first have moved for a directed verdict under CPLR 4401 Here, respondent never moved before the trial court for a directed verdict or otherwise challenged the legal sufficiency of the evidence. Thus, his claims are unpreserved for appellate review, and we decline to reach them.

... [T]he court erred in allowing the State’s experts, in explaining the basis for their opinions, to testify regarding two sets of sex offense charges against respondent that did not result in convictions (see *Matter of State of New York v Floyd Y.*, 22 NY3d 95 [2013]). In *Floyd Y.*, the Court held that hearsay basis evidence satisfies due process only if it is demonstrated to be reliable and its probative value outweighs its prejudicial effect (*id.* at 109). Here, one set of charges resulted in an acquittal, and so was categorically precluded from providing the basis for reliability (*id.* at 110). The second group of charges, which resulted in dismissal, also failed to meet the reliability threshold, because they were unaccompanied by indicia that respondent committed the charged acts notwithstanding the lack of a conviction (see *id.*). Accordingly, a new trial is required. [Matter of State of New York v David S., 2016 NY Slip Op 00777, 1st Dept 2-4-16](#)



MENTAL HYGIENE LAW (EVIDENCE OF CHARGES OF WHICH SEX OFFENDER WAS ACQUITTED AND CHARGES WHICH WERE DISMISSED SHOULD NOT HAVE BEEN CONSIDERED IN ARTICLE 10 TRIAL)/EVIDENCE (HEARSY EVIDENCE OF CHARGES OF WHICH SEX OFFENDER WAS ACQUITTED AND CHARGES WHICH WERE DISMISSED SHOULD NOT HAVE BEEN CONSIDERED IN ARTICLE 10 TRIAL)/APPEALS (TO PRESERVE CHALLENGE TO LEGAL SUFFICIENCY OF EVIDENCE IN A MENTAL HYGIENE LAW ARTICLE 10 SEX-OFFENDER CIVIL-COMMITMENT PROCEEDING, SEX OFFENDER MUST MOVE FOR A DIRECTED VERDICT)

PETITIONER’S MOTION FOR A DIRECTED VERDICT IN AN ARTICLE 10 TRIAL SHOULD NOT HAVE BEEN GRANTED; A TRIABLE ISSUE HAD BEEN RAISED CONCERNING PETITIONER’S ABILITY TO CONTROL HIS SEXUAL CONDUCT.

The Fourth Department, over a two-justice dissent, reversing Supreme Court, determined that petitioner-sex-offender’s motion for a directed verdict in an Article 10 trial should not have been granted. Petitioner had been deemed a dangerous sex offender and was committed to a secure facility. In the instant proceeding, petitioner sought release under a regimen of strict and intensive supervision and treatment. The state presented evidence petitioner had been diagnosed with antisocial personality disorder, paraphilia otherwise specified, and cannabis dependence. The majority concluded that the state’s expert, Dr. Prince, had presented sufficient additional evidence, including a history of defendant’s sexual behavior, his response to treatment, and the results of psychological tests, to raise a triable issue of fact whether defendant had serious difficulty in controlling difficulty controlling his sexual conduct:

When coupled with the evidence of petitioner’s clear, well-defined cycle of offending that begins with becoming frustrated, the deficits in his recent treatment plan on that specific area, and his stagnating course of treatment, we conclude that Dr. Prince’s opinion and the supporting evidence, “ when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, [establish that petitioner is a] . . . dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment[, rather than a] dangerous but typical recidivist convicted in an ordinary criminal case’ ” . . . Thus, respondents submitted sufficient evidence that, if it is credited by the factfinder, would establish that petitioner has a condition, disease or disorder “that predisposes him . . . to the commission of conduct constituting a sex offense and that results in [petitioner] having serious difficulty in controlling such conduct” (§ 10.03 [i] ...). Consequently, we conclude that, if the factfinder accepts that evidence, there is a “rational process by which the [factfinder] could find for [respondents] as against” petitioner . . . [Matter of Wright v State of New York, 2015 NY Slip Op 09711, 4th Dept 12-31-15](#)

MENTAL HYGIENE LAW (TRIALE QUESTION OF FACT WHETHER PETITIONER HAD SERIOUS DIFFICULTY CONTROLLING SEXUAL CONDUCT)/SEX OFFENDERS (MENTAL HYGIENE LAW, TRIABLE QUESTION OF FACT WHETHER PETITIONER HAD SERIOUS DIFFICULTY CONTROLLING SEXUAL CONDUCT)

Frye Hearing to Determine Acceptance of Paraphilia NOS Diagnosis Required

The Second Department determined defendant sex offender’s request for a Frye hearing in Mental Hygiene Law proceedings for civil commitment should have been granted. Defendant questioned the general acceptance in the psychiatric community of a “paraphilia NOS” diagnosis:

“[E]xpert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has gained general acceptance in its specified field” Recently, in *Matter of State of New York v Donald DD*, (24 NY3d 174), the Court of Appeals noted that paraphilia NOS “is a controversial diagnosis,” and that it had not yet decided “the question that would be decided at a Frye hearing: whether the diagnosis of paraphilia NOS . . . has gained general acceptance in the psychiatric community” (id. at 186-187). However, the Court of Appeals declined to reach this issue in *Matter of Donald DD*, because no Frye hearing had been requested or held (id. at 187). Here, however, a Frye hearing was requested and the appellant supported his request with scientific literature. Under these circumstances, a Frye hearing should be conducted to resolve the question of whether the diagnosis of paraphilia NOS has achieved general acceptance in the psychiatric and psychological communities. [Matter of State of New York v Richard S., 2015 NY Slip Op 08179, 2nd Dept 11-12-15](#)



Pedophilia Diagnosis, in Combination with Anti-Social Personality Disorder (ASPD), Substance Abuse Disorders, Failed Treatment and History of Sexual Misconduct, Constituted Sufficient Proof Respondent Had Serious Difficulty Controlling His Behavior Warranting Civil Commitment

The First Department, in a full-fledged opinion by Justice Richter, reversed Supreme Court (which had set aside the jury verdict) and determined civil commitment of respondent sex offender was supported by the evidence. The case is another attempt to interpret and implement the criteria for civil commitment laid out by the Court of Appeals in *Matter of State of New York v Donald DD. (Kenneth T.)*, 24 NY 3d 174 (2014). The respondent here was diagnosed with pedophilia, which, combined with anti-social personality disorder (ASPD), substance abuse disorders, respondent's history of sexual misconduct, and his failure to benefit from treatment programs, was deemed sufficient proof respondent had difficulty controlling his behavior:

In *Kenneth T.*, the State's expert testified that *Kenneth T.* suffered from paraphilia not otherwise specified (paraphilia NOS) and ASPD, and that, together, these disorders predisposed him to committing sexual misconduct and resulted in his having serious difficulty controlling that conduct. In concluding that *Kenneth T.* had the requisite serious difficulty, the expert identified two factors: the fact that *Kenneth T.* had carried out two rapes under circumstances allowing for identification by his victims, and the fact that he committed the second rape despite having spent significant time in prison for the earlier rape. In finding this evidence legally insufficient, the Court stated that the serious difficulty prong could rarely, if ever, be satisfied from the facts of a sex offense alone

Here, in contrast, [the State's expert] did not solely rely on the facts of respondent's sex offenses in concluding that he had serious difficulty controlling his urges. Instead, Dr. [the expert] based his opinion on respondent's triple diagnosis (pedophilia, ASPD and substance abuse disorders), his pattern of sexual misconduct, and his abject failure to satisfactorily progress in treatment. Notably, the underlying sexual disorder in *Kenneth T.* was paraphilia NOS, not pedophilia. The distinction is critical because, unlike paraphilia, pedophilia can only be diagnosed where the individual has actually acted upon sexual urges towards prepubescent children (or has experienced significant distress at those urges) for more than six months. Thus, pedophilia, by definition, involves an element of difficulty in control. Further, the DSM-5 explicitly recognizes that the dangerous combination of respondent's ASPD and pedophilia increases the likelihood that he will act out sexually with children (see DSM-5 at 699). In addition, the diagnosis of respondent's substance abuse disorders, not present in *Kenneth T.*, provides a further basis for the jury's finding of serious difficulty. * * *

By this decision, we do not hold that all offenders who suffer from pedophilia are automatically, by virtue of that diagnosis alone, subject to mandatory civil management. We simply hold that the State's evidence in this case — including respondent's multiple diagnoses, his history of sexual misconduct, his admitted inability to control his pedophilic urges, his lack of satisfactory progress in sex offender treatment and his failure to have a viable relapse prevention plan — was legally sufficient to uphold the jury's conclusion that respondent has difficulty controlling his sexually offending behavior. [Matter of State of New York v Floyd Y., 2015 NY Slip Op 08102, 1st Dept 11-10-15](#)