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COURT OF APPEALS  
STATE OF NEW YORK

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MATTER OF STATE OF NEW YORK,

Respondent,

-against-

NO. 102

FLOYD Y.,

Appellant.

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20 Eagle Street  
Albany, New York  
September 13, 2017

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Number 102, the Matter of  
2 the State of New York v. Floyd Y.

3 Counsel?

4 MS. KEELING: Good afternoon, Your Honor. I'd  
5 like to request two minutes of rebuttal.

6 CHIEF JUDGE DIFIORE: You may.

7 MS. KEELING: Thank you.

8 Alexandra Keeling, Mental Hygiene Legal Service,  
9 for Floyd Y. May it please the court.

10 The psychological portrait presented here by the  
11 expert, the state expert, mirrored that in Kenneth T., with  
12 the same state expert using the same analytical reasoning  
13 and the same language to describe Floyd Y.

14 And the First Department went out of its way,  
15 beyond the record, to quote the DSM, but - - - to conflate  
16 prongs one and two of the mental abnormality standard with  
17 their statement that pedophilia, by definition, involves an  
18 element of difficulty of control. But that is not what the  
19 DSM says.

20 The - - - the First Department engaged in an  
21 armchair psychology to cure what was the - - -

22 JUDGE RIVERA: Well, the - - - the - - - the  
23 decision's not based solely on the diagnosis of pedophilia,  
24 correct?

25 MS. KEELING: The - - - he - - - correct, Your



1 Honor, in the sense that Floyd Y. was diagnosed also with  
2 ASPD as well as substance use disorder. And that is  
3 exactly what Justice Conviser gets right here, where he, at  
4 A-69 of the appendix in his decision notes that Dr.  
5 Kirshner's testimony what - - - all - - - about on that  
6 second prong; about a serious difficulty of control of  
7 sexual behavior was rooted solely in the non-paraphilic  
8 diagnoses ASPD, and was not linked back to any paraphilic  
9 behavior, and that's what this court warns against in - - -

10 JUDGE FEINMAN: But doesn't the - - -

11 MS. KEELING: -- in Kenneth T.

12 JUDGE GARCIA: Well - - - but doesn't the  
13 Appellate Division in its last paragraph or second to last,  
14 say, "We do not hold that all offenders who suffer from  
15 pedophilia automatically by virtue of the diagnosis alone  
16 are subject to mandatory management". And they go on to  
17 say, we look at everything; the diagnoses, the history of  
18 sexual misconduct, admitted inability to control his  
19 pedophilic urges, lack of satisfactory progress in sex  
20 offender treatment, so I don't see how you can read that  
21 decision to say they relied only on the diagnosis.

22 MS. KEELING: Well, the - - - the language that  
23 pedophilia, by definition, involves a - - - an element of  
24 difficulty of control is just wrong; that's not what the  
25 DSM says, but however the other evidence that the First



1 Department, to your question, Your Honor, is not what the  
2 record is here. Dr. Kirshner - - -

3 JUDGE GARCIA: So then you're asking us to  
4 substitute our view of what the record says for the  
5 Appellate Division.

6 MS. KEELING: The - - - the question for this  
7 court is whether or not the evidence was legally sufficient  
8 and - - -

9 JUDGE GARCIA: But assuming it's what they say,  
10 you would agree they are right? You're just saying, what  
11 they say is wrong?

12 MS. KEELING: Correct, Your Honor, and here's why  
13 it is wrong. Precisely what Justice Conviser notes in his  
14 decision is that the State expert relied precisely on the -  
15 - - what this court has said, a general tendency towards  
16 criminality. Those types of behaviors, it's rooted solely  
17 in the ASPD. He uses identical language; the internal  
18 breaking mechanism, a lack of conscience - - -

19 JUDGE GARCIA: But he didn't have a lack of  
20 satisfactory progress in his sex offender treatment  
21 program; that's not an accurate statement or - - -

22 MS. KEELING: That's not an accurate statement,  
23 Your Honor, to the extent that number one, he did complete,  
24 successfully graduates from a sex offender treatment  
25 program while he was in prison, and then his subsequent



1 treatment, he - - - it's not that he is not completed it.  
2 He is still in it. And he - - - and Dr. Kirshner's  
3 testimony is that there have been gains and setbacks, and  
4 so to say that he has failed completely - - - by that alone  
5 does not make this case sufficient.

6 JUDGE WILSON: What are the underlying sorts of  
7 facts on which an expert could rely to find prong two  
8 satisfied?

9 MS. KEELING: Your Honor, and that is something  
10 that this court has spoken to both in Kenneth T. and as  
11 well as in Dennis K., which reaffirms the holding it in  
12 Kenneth T. and Donald D.D. - - -

13 JUDGE FAHEY: Well, it - - - it really - - -

14 MS. KEELING: - - - that it's the detailed  
15 psychological - - -

16 JUDGE FAHEY: - - - slow down.

17 MS. KEELING: - - - portrait - - -

18 JUDGE FAHEY: Slow - - - excuse me. Slow down.  
19 It doesn't really; does it? Because I thought Dennis K.  
20 said ASPD plus borderline personality disorder was legally  
21 sufficient. And it really distinguished Kenneth T.; don't  
22 you - - - don't you think?

23 MS. KEELING: Dennis K., some of the fact  
24 patterns distinguish - - - or distinguish, factually  
25 distinguishable. In terms of - - - one of the things that



1 this court says in Kenneth T. are the - - - the types of  
2 evidence that's equivocal, that could be - - - on the one  
3 hand go one way, and on the other hand go another way, and  
4 one of the things that this court points out is crimes that  
5 are situational and opportunistic are not to the converse  
6 of the question about mental abnormality what types of  
7 facts. It - - -

8 JUDGE WILSON: Well, you're answering the obverse  
9 of my question.

10 MS. KEELING: And to get to that as well, Your  
11 Honor, the types of facts - - - it is linked back to the -  
12 - - to the predicate diagnosis. Crane says that the  
13 serious difficulty of control to the Supreme Court  
14 jurisprudence of the serious difficulty of control must be  
15 viewed in the light of such features as a psychiatric  
16 diagnosis as well as the severity of the mental  
17 abnormality, and everything from the crimes themselves, the  
18 circumstances surrounding the crimes themselves, yes, the  
19 diagnosis itself, and the ones - - -

20 JUDGE GARCIA: Can - - -

21 MS. KEELING: - - - progress and treatment - - -

22 JUDGE STEIN: Isn't that exactly what happened  
23 here?

24 MS. KEELING: No, Your Honor, when you - - -

25 JUDGE STEIN: What - - - what's missing here?



1 MS. KEELING: Is the linkage back to the  
2 paraphilic behavior, to the pedophilia. It's - - -

3 JUDGE FAHEY: All right. Can I - - -

4 MS. KEELING: - - - Dr. Kirshner - - -

5 JUDGE FAHEY: Can I - - - excuse me. Can I stop  
6 you there? Kenneth T. is about paraphilia. This case is  
7 pedophilia. They aren't the same thing. And your argument  
8 presumes that they're the same thing. Isn't there a  
9 disconnect there for you?

10 MS. KEELING: Your Honor, that - - - it's - - -  
11 it's Dr. Kirshner's testimony, Dr. Kirshner - - -

12 JUDGE FAHEY: Well, no, let's just stay on my  
13 question. My - - - my question, respectfully, was  
14 paraphilia is not equivalent to pedophilia; do you agree  
15 with that statement?

16 MS. KEELING: I agree, Your Honor, of course.

17 JUDGE FAHEY: Okay. And Kenneth T. or Kenneth -  
18 - - whatever his initial was - - - was about paraphilia,  
19 correct?

20 MS. KEELING: Correct.

21 JUDGE FAHEY: All right.

22 MS. KEELING: Paraphilia NOS.

23 JUDGE FAHEY: Now we're talking about pedophilia,  
24 which is a - - - certainly, a - - - a defined  
25 manifestations of abhorrent behavior in the DSM. There's



1 no question about it. This court has not said that  
2 paraphilia - - - excuse me, that pedophilia is not one of  
3 the things that could be considered for legal sufficiency,  
4 and isn't that a distinction that we should be looking at,  
5 because I understand your paraphilia argument, but I don't  
6 think it applies to pedophilia.

7 MS. KEELING: I think that gets into the two  
8 prongs of mental abnormality, Your Honor.

9 JUDGE FAHEY: Okay.

10 MS. KEELING: Where the paraphilia, pedophilia -  
11 - - pedophilia meets that first prong, which is the  
12 predicate diagnosis that predisposes one to engage in  
13 behavior that would constitute a sex offense.

14 JUDGE FAHEY: Oh, we - - -

15 MS. KEELING: But we're - - -

16 JUDGE FAHEY: We've got a - - - we've got a man  
17 who says - - - who says - - - who - - - who's - - - there's  
18 more than one prong here. There's three prongs that  
19 Kirshner was relying on; the ASPD, the pedophilia, and of  
20 course, his substance abuse behavior. But also, we've got  
21 a man who - - - who clearly says, I think the quote from  
22 Dr. Kirshner's testimony was when describing why he acted  
23 the way he did impulsively, he said, "I want what I want  
24 when I want it." That's, I believe, a direct quote from  
25 the doctor's testimony. Isn't that something we can rely





1 on?

2 MS. KEELING: Certainly, one of the - - - the  
3 most quality types of evidence is a - - - is an offender's  
4 own statements, but that was contextualized as to the  
5 behavior in question at that time. And moreover, Dr.  
6 Kirshner is rooting this serious difficulty of control, and  
7 he isolates it as to the ASPD only and does not connect it  
8 back to the pedophilia, the predicate diagnosis.

9 JUDGE STEIN: Well, I thought there was testimony  
10 from him also; that -- that Floyd said that he had been  
11 fighting his urges towards his step-daughter for a long  
12 time and finally gave in to them. Isn't that some  
13 indication of a tie in between the pedophilia and an  
14 inability to control his urges?

15 MS. KEELING: Well, one - - - two things, Your  
16 Honor. I mean, one, in Kenneth T., the respondent, Kenneth  
17 T., himself, made a statement, a one-time statement here.  
18 It's also a one-time statement, but that was as to that  
19 time period in question. It is - - - there's a difference  
20 between the fighting the urge in those moments versus an  
21 ongoing - - - and there's nothing to suggest that the - - -  
22 that his inability to control is ongoing. And I would just  
23 end with it's the difference between the sick and wicked as  
24 the Seventh Circuit characterized it. And here, questions  
25 of serious difficulty of control are difficult logically,



1 but it's Dr. Kirshner's testimony that mirrors Kenneth T.,  
2 which this court held was insufficient. Thank you.

3 CHIEF JUDGE DIFIORE: Thank you, counselor.

4 Counsel, what was the detailed psychological  
5 portrait that was relied on just before the - - -

6 MR. GRIECO: So the detailed psychological  
7 portrait, as this court explained in Dennis K., consists of  
8 several components. Here, the detailed psychological  
9 portrait was made up of the specific and detailed testimony  
10 similar to that this court found sufficient in Dennis K.  
11 comprising the following pieces. Direct testimony about  
12 Floyd Y.'s thinking and direct evidence about how that  
13 thinking leads to a specific offense pattern. There was no  
14 testimony relied upon by the expert witness in Kenneth T.  
15 of that nature.

16 The logical starting point to assess serious  
17 difficulty of control, as Dennis K. made clear, is the  
18 individualized characteristics of Floyd Y.'s diagnoses.  
19 Floyd Y. suffers from the rare and powerful combination of  
20 pedophilia and ASPD. In the authoritative manual in this  
21 field, the DSM, recognizes that this specific combination  
22 causes a heightened volitional impairment, as both experts  
23 testified. And that is a - - - that is strong evidence of  
24 a mental abnormality.

25 JUDGE FAHEY: No, we - - - you know, we're



1 familiar with that. They referred to it as a toxic mix.

2 MR. GRIECO: Right.

3 JUDGE FAHEY: But there was another element that  
4 was added, which was his - - - his participation in  
5 programs, his substance abuse problems.

6 MR. GRIECO: That's right.

7 JUDGE FAHEY: One of the things that strikes me  
8 is it seems that there's a catch-22 problem, where these -  
9 - - the people that are involved in these programs are sent  
10 into the programs, and they're - - - they have to either  
11 admit their past behavior, which can then be used as  
12 evidence against them, or they don't admit, and then  
13 they're cited for failure to cooperate with the program.

14 And in this catch-22, that's how we're producing  
15 evidence, and it seems like we're producing evidence,  
16 programmatic evidence, that doesn't comport with basic due  
17 process principles.

18 MR. GRIECO: The way forward out of that is the  
19 road map that this court set in the Michael M. case. The  
20 respondent in that case explained that he was able to  
21 develop practical tools for avoiding reoffending, and that  
22 would be - - - that would be the first and - - - and most  
23 important step. And secondly, I would say, it's simply not  
24 true that people are trapped. There - - - there have been  
25 twenty-one instances in which people who were diagnosed

1 with pedophilia, have been release - - - people who were  
 2 diagnosed with pedophilia, and have been released - - -  
 3 were on SIST, and have now been fully discharged to  
 4 discharge from all civil management. And - - - and in  
 5 nineteen of those twenty-one cases of people who fully - -  
 6 - been fully discharged from SIST to no civil management -  
 7 - -

8 JUDGE FAHEY: And you understand what I'm saying,  
 9 though. It's usually the other forms of evidence that  
 10 we're talking about. This particular form of evidence, the  
 11 evidence that comes out of the programs, it still doesn't  
 12 alleviate that problem.

13 MR. GRIECO: The way forward out of the problem  
 14 is to at least - - - to at least expect the respondent to  
 15 have a plan for - - - to avoid reoffending when we're  
 16 talking about proven offenses.

17 And here, as - as his own expert described, he  
 18 has acknowledged being sexually aroused by a - - - by his  
 19 step-daughter and giving into those urges on, at least,  
 20 three occasions over the two - - - over a two-year period  
 21 which - - - when she was eight and ten years old. And  
 22 furthermore, as - as Dr. Kirshner explained to the jury, he  
 23 told his expert that he was thinking to himself as he was  
 24 doing it, you know, "what the hell am I doing", were his  
 25 words to his expert, and he was still unable to restrain



1 himself from offending. That's at page 453.

2 JUDGE STEIN: One of the things that - - - that  
3 struck me in this case was that the testimony about his  
4 lacking of cognitive skills to be able to manage his  
5 pedophilia and also his - - -his lack of a prevention, you  
6 know, relapse prevention program, which I think go  
7 together.

8 MR. GRIECO: Right.

9 JUDGE STEIN: So is that - - -

10 MR. GRIECO: Yeah, it's - - - it's - - - it's the  
11 absence of a relapse prevention program is the single most  
12 important fact that comes out of - - - comes out of the  
13 treatment process.

14 JUDGE RIVERA: Is that - - - does that say that  
15 anywhere in Article 10 you need that?

16 MR. GRIECO: The - - - well, that - - - that's  
17 what Dr. Kirshner - - -

18 JUDGE RIVERA: Is that required on - - -

19 MR. GRIECO: - - - testified - - -

20 JUDGE RIVERA: I was asking you, is it required  
21 under Article 10 to have what you call a relapse program?

22 MR. GRIECO: Well, what the statute - - - what  
23 the statute requires is serious difficulty controlling  
24 one's conduct. And Dr. Kirshner - - -

25 JUDGE RIVERA: Okay. So let's get back to that.



1 Let's get back to what you said before. If - - - if - - -  
2 if he didn't have ASPD and it was just the pedophilia,  
3 would that have met the standard under Article 10?

4 MR. GRIECO: What - - -

5 JUDGE RIVERA: Could you have shown the second  
6 prong of the test?

7 MR. GRIECO: Could - - - could - - - could it be  
8 shown, yes.

9 JUDGE RIVERA: Inability to control their - - -  
10 how so?

11 MR. GRIECO: Could - - - you would - - - you  
12 would show it by putting together the full detailed  
13 psychological portrait including the diagnoses, the extent  
14 of his success in treatment, and the - - - how that - - -  
15 how that leads to a specific pattern of offending. Now,  
16 whatever the case would be in a case where it was just  
17 pedophilia - - -

18 JUDGE RIVERA: But I'm talking - - - does that  
19 boil down to his statements? Pedophilia in his statements  
20 that I can't control my urges?

21 MR. GRIECO: It - - - it - - - it's pedophilia.  
22 It's whether he is - - - he is meaningfully engaging in  
23 treatment and I would - - - I would point out that Floyd Y.  
24 made gains in treatment early on and then backslid from  
25 that. And it is the backsliding that is cause for concern.



1 He - - - as recently as 2014, which was his most recent  
2 interview with his expert, he was continuing to invent  
3 implausible explanations for - - -

4 JUDGE RIVERA: Okay. So again - - -

5 MR. GRIECO: - - - for his proven conduct.

6 JUDGE RIVERA: - - - it's his - - - it - - - what  
7 you're saying is that it's the pedophilia. We've gone with  
8 the hypothetical, as we're assuming someone doesn't have  
9 the ASPD. The pedophilia and the individual's statements.

10 MR. GRIECO: Pedophilia and - - - and the overall  
11 assessment of his engagement and conduct and whether the -  
12 - - and the expert's explanation to the jury of how this  
13 manifests in a particular pattern of behavior. Let me  
14 explain what I mean by - - -

15 JUDGE RIVERA: But the pattern of behavior,  
16 doesn't that rely on the crimes that he has committed,  
17 which we've already said in Article 10 makes clear you  
18 cannot rely on for this diagnosis?

19 MR. GRIECO: That's not what Kenneth T. said,  
20 Your Honor. Kenneth T. said that the - - - the facts of  
21 someone's sex offenses standing alone will rarely suffice  
22 to show serious difficulty. Nothing in Kenneth T.  
23 suggested that the facts of one's offenses are  
24 categorically irrelevant to showing serious difficulty, nor  
25 could - - - nor could that be the case. That was the



1 fundamental error that Judge Conviser made.

2 As the Supreme Court has recognized in the Kansas  
3 case v. - - -

4 JUDGE RIVERA: Well, isn't that what - - - unless  
5 you have the profile, all right, unless you have the  
6 profile that the court has referred to in the past, if  
7 you're looking at crimes that have been committed in that  
8 pattern, aren't you just hypothesizing that he will commit  
9 the crime again, as opposed to what Article 10 requires?

10 It's you've esta - - - because it's your burden.  
11 You've established, you've persuaded the jury that indeed,  
12 he cannot control these urges. So I'm just trying to  
13 figure out how - - - how you - - - perhaps, it's more of  
14 what Judge Wilson was asking before, how - - - how you're  
15 going to be able to establish - - -

16 MR. GRIECO: The - - -

17 JUDGE RIVERA: - - - other than the pedophilia,  
18 the inability to control urges.

19 MR. GRIECO: It is a - - -

20 JUDGE RIVERA: If ASPD alone would not give you  
21 that?

22 MR. GRIECO: ASPD alone, this court said in  
23 Donald D.D., would not give you that. However, whatever  
24 the case may be with someone with ASPD alone, someone who  
25 has ASPD and pedophilia, it is the single psycholo - - -





1 psychiatric risk factor recognized by the DSM. And here,  
2 Dr. Kirshner - - -

3 JUDGE RIVERA: So then it boils down to what  
4 Judge Fahey was asking about that - - - that pedophilia is  
5 not paraphilia NOS; there's something different about  
6 pedophilia that the combination allows you to get to this  
7 conclusion and determination under Article 10?

8 MR. GRIECO: On the facts of this case, and with  
9 respect to the specific combination of pedophilia and ASPD,  
10 yes, it is special, because the - - - the psychiatric - - -

11 JUDGE RIVERA: And is that because pedophilia is  
12 specifically about sexual urges?

13 MR. GRIECO: It is because pedophilia - - -

14 JUDGE RIVERA: Whereas paraphilia NOS is not  
15 necessarily about sexual urges?

16 MR. GRIECO: Well, all paraphilia is in some way  
17 involve sexual urges.

18 JUDGE RIVERA: Um-hum.

19 MR. GRIECO: What it's about is the fact that  
20 pedophilia, the profession has recognized that that  
21 specific kind of paraphilia has a specific interaction with  
22 ASPD. And the - - -

23 JUDGE RIVERA: Because it's the interest in the  
24 prepubescent children?

25 MR. GRIECO: I - - - well, the interest in



1           prepubescent children and acting on that over a period of  
2           more than six months, or in Floyd Y.'s case, over a period  
3           of two years, that is the definition of pedophilia.

4                        It is - - - it is - - - it is just in the text of  
5           the DSM in - - - it lists the risk factors for pedophilia,  
6           and there's only one psychiatric comorbidity that it lists  
7           as a risk factor for pedophilia, and that is ASPD.

8                        And getting to your question, Judge Rivera, about  
9           - - -

10                       JUDGE RIVERA: Does it mean if you establish  
11           that, does a jury have to determine that you've met your  
12           burden of proof?

13                       MR. GRIECO: No, there's no presumption.  
14           Pedophilia is strong evidence of a mental abnormality, and  
15           that - - - and the evidence is particularly strong when  
16           pedophilia is mixed with ASPD. You - - - that's when you  
17           go - - - you go then to the other factors of the detailed  
18           psychological portrait. These are the same factors that  
19           the court relied upon in Dennis K. He point - - -

20                       JUDGE STEIN: Is it possible to enunciate a - - -  
21           a specific rule, or is this - - - I mean, the more I get  
22           into this, the more it feels like you know it when you see  
23           it. You know, how much is enough. Is that what we're  
24           talking about here, or is - - - or can you articulate what  
25           it is that has to be shown and how you show it?



1 MR. GRIECO: What has to be sh - - -

2 JUDGE STEIN: And you know what has to be shown,  
3 but - - -

4 MR. GRIECO: Right.

5 JUDGE STEIN: -- how do you show it?

6 MR. GRIECO: What - - - what has to be shown is,  
7 of course, serious difficulty, and in this case, it means  
8 serious difficulty sufficient to justify supervision in the  
9 community as opposed to total release from all civil  
10 management.

11 And the way that you show it is through - - - you  
12 - - - you begin - - - as I said at the beginning of the  
13 argument - - - you begin, and this is where the court began  
14 in Dennis K., you begin with the individualized  
15 characteristics of the respondent's diagnoses, and you  
16 then, from there, it is the responsibility of the expert to  
17 provide a detailed psychological portrait, which will draw  
18 upon multiple factors; it will draw upon his success in  
19 treatment, not just his statements, but also his degree of  
20 engagement and whether he's developing a relapse prevention  
21 plan, and also the particular pattern of offending.

22 And here, the particular pattern of offending,  
23 which is comparable to the patterns of offending described  
24 in Dennis K., particularly the Richard T. T. respondent in  
25 Dennis K. He targets people who are vulnerable because



1 they occupy particular positions of trust in his life, and  
2 over the time - - - and over time, he has shifted towards  
3 increasingly younger victims, culminating in his multi-year  
4 abuse of his prepubescent step-children. He could develop  
5 a plan to avoid reoffending, but he hasn't done so. That's  
6 the testimony that was provided here that wasn't provided  
7 in Dennis K., and that's why this court should - - - wasn't  
8 provided in Kenneth T., and that's why this court should  
9 affirm.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 Ms. Keeling, how significant is the absence of a  
12 relapse prevention program?

13 MS. KEELING: According to this court's  
14 jurisprudence, it's not significant enough to make this  
15 case sufficient. And in ter - - - it's a protective  
16 factor. Treatment is a protective factor that does speak  
17 to someone's ability to control, but the absence of it does  
18 not mean that does not exist the concept of someone who's  
19 wicked, who chooses to engage in their behavior.

20 And I take issue with the idea that the DSM says  
21 that pedophilia combined with ASPD, the comorbidity speaks  
22 to volitional control. It speaks to recidivism. And the  
23 difference between a risk of reoffending and the ability to  
24 control is also a fine, subtle distinction, but it's what  
25 Justice Conviser warns against, again, at A-71 in his



1 decision about these in - - - these inferential shortcuts.  
2 That because someone repeats their crimes it feels like  
3 they can't control themselves, but there is a difference  
4 between an offender who repeats their crimes by choice - -  
5 - and here, Dr. Kirshner's testimony it - - - he isolates  
6 it as to the ASPD only regarding the serious difficulty of  
7 control and when these crimes, the pattern of offending,  
8 shows that these crimes are situational and opportunistic  
9 at which this court in Kenneth T. notes crimes of  
10 opportunities do not have that sufficient quality. It's  
11 not that quantum - - -

12 JUDGE STEIN: But does the substance abuse  
13 diagnosis add anything to this mix?

14 MS. KEELING: The - - - certainly, Your Honor,  
15 the substance abuse diagnosis, A, speaks to the first  
16 prong, and as well as to serious difficulty of control, but  
17 it's not linked back to the paraphilic behavior and  
18 pedophilia here - - -

19 JUDGE STEIN: What do you mean by - - -

20 MS. KEELING: -- by Dr. - - -

21 JUDGE STEIN: What do you mean by link, because  
22 that seems to be the nub of your argument, you know, when  
23 you've been presented with various questions from this  
24 bench on what's missing, you know what you need, you keep  
25 talking about a link. Give me a specific example of what



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that link would look like.

MS. KEELING: Well, I - - - the - - - I think, to conversely - - - to my adversary, Richard T.T. shows the - - the linkage between his predicate diagnosis and his serious difficulty of control where he admits that his frequent sexual thoughts are driving him nuts. He has - - he's possessing pornography while combined in sex offender treatment. He is writing obsessively regarding his obsession with underage girls, and everything in a consistent pattern, he's exhibiting this inability to control through these different factors that links back to his - - - his disorder that predisposes him his psychological condition. It's for these reasons we ask that the First Department's decision be reversed. Thank you, Your Honors.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)



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

I, Gina Gattone, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of State of New York v. Floyd V., No. 102 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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