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Maria Benvenuto

Boston College Law School, maria.benvenuto@bc.edu

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CLEANING UP THE STANDARDS OF THE MENTAL HYGIENE LAW: *STATE v. DENNIS K.* AND CIVIL COMMITMENT

MARIA BENVENUTO*

Abstract: On July 5, 2016, in *State v. Dennis K.*, the Court of Appeals of New York upheld the civil commitment of two individuals in accordance with article 10 of the Mental Hygiene Law. The majority relied on the testimony of expert witnesses and the individuals' past criminal records to classify them as possessing a "mental abnormality" that predisposes them to commit sexual offenses, a necessary element of a civil commitment finding. The court ultimately found the evidence presented sufficient to make this classification and indefinitely restrict the freedom of such individuals. In contrast, the dissent emphasized the lack of certainty in such classifications, specifically in the link between the mental diagnoses of the individuals and their predisposition to commit sexual offenses. In civilly committing individuals who may not be predisposed to commit sex offenses, the dissent accurately argues that the state statute is not serving a legitimate purpose, and is therefore unjustly infringing on the substantive due process rights of those who commit sexual offenses, an already politically unpopular group.

INTRODUCTION

Petitioners Anthony N. and Richard TT. were each convicted of numerous sex offenses at various points throughout their lives.¹ In accordance with arti-

* Staff Writer, BOSTON COLLEGE JOURNAL OF LAW & SOCIAL JUSTICE, 2016–2017.

¹ See N.Y. MENTAL HYG. LAW art. 10 (McKinney 2017); *State v. Dennis K.*, 59 N.E.3d 500, 512–13, 518 (N.Y. 2016). A "sex offense" is an act or acts constituting:

(1) [A]ny felony defined in article one hundred thirty of the penal law, including a sexually motivated felony; (2) patronizing a person for prostitution in the first degree as defined in section 230.06 of the penal law, aggravated patronizing a minor for prostitution in the first degree as defined in section 230.13 of the penal law, aggravated patronizing a minor for prostitution in the second degree as defined in section 230.12 of the penal law, aggravated patronizing a minor for prostitution in the third degree as defined in section 230.11 of the penal law, incest in the second degree as defined in section 255.26 of the penal law, or incest in the first degree as defined in section 255.27 of the penal law; (3) a felony attempt or conspiracy to commit any of the foregoing offenses set forth in this subdivision; or (4) a designated felony, as defined in subdivision (f) of this section, if sexually motivated and committed prior to the effective date of this article.

MENTAL HYG. § 10.03(p). Civil commitment is a court-ordered institutionalization of a person who suffers from mental illness and poses a danger to himself or to others. *Civil Commitment*, MERRIAM-WEBSTER: LAW DICTIONARY, <https://www.merriam-webster.com/legal/civil%20commitment> [<https://perma.cc/Y2BP-C3CS>].

cle 10 of the Mental Hygiene Law, the State of New York commenced separate civil commitment hearings for the petitioners, arguing that each was a “detained sexual offender” suffering from a mental abnormality and consequently should be civilly committed.² The State of New York argued that Petitioner Anthony N. suffered from Antisocial Personality Disorder (ASPD) and Borderline Personality Disorder (BPD).³ The State similarly argued that Petitioner Richard TT. suffered from ASPD, BPD, and psychopathy.⁴

² MENTAL HYG. art. 10; *Dennis K.*, 59 N.E.3d at 513–14, 518. Under the Mental Hygiene Law, a “detained sex offender” is defined as:

- [A] person who is in the care, custody, control, or supervision of an agency with jurisdiction, with respect to a sex offense or designated felony, in that the person is either:
- (1) A person who stands convicted of a sex offense as defined in subdivision (p) of this section, and is currently serving a sentence for, or subject to supervision by the division of parole, whether on parole or on post-release supervision, for such offense or for a related offense;
 - (2) A person charged with a sex offense who has been determined to be an incapacitated person with respect to that offense and has been committed pursuant to article seven hundred thirty of the criminal procedure law, but did engage in the conduct constituting such offense;
 - (3) A person charged with a sex offense who has been found not responsible by reason of mental disease or defect for the commission of that offense;
 - (4) A person who stands convicted of a designated felony that was sexually motivated and committed prior to the effective date of this article;
 - (5) A person convicted of a sex offense who is, or was at any time after September first, two thousand five, a patient in a hospital operated by the office of mental health, and who was admitted directly to such facility pursuant to article nine of this title or section four hundred two of the correction law upon release or conditional release from a correctional facility, provided that the provisions of this article shall not be deemed to shorten or lengthen the time for which such person may be held pursuant to such article or section respectively; or
 - (6) A person who has been determined to be a sex offender requiring civil management pursuant to this article.

MENTAL HYG. § 10.03(g). “Mental abnormality” is defined as “a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct.” *Id.* § 10.03(i). If an individual is found to be a dangerous sex offender requiring confinement and is committed to a secure treatment facility, that facility shall provide care, treatment and control of the afflicted until such time that the court discharges the individual from civil confinement. *Id.* § 10.10(a).

³ *Dennis K.*, 59 N.E.3d at 513–14. ASPD consists of “a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood.” AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 659 (5th ed. 2013) [hereinafter DSM-V]. Four criteria to support an ASPD diagnosis include: (1) the person is over the age of 18; (2) there is evidence that the person had an onset of conduct disorder before the age of 15; (3) the occurrence of antisocial behavior did not “exclusively occur” during the course of bipolar disorder or schizophrenia; and (4) the person has displayed “[a] pervasive pattern of disregard for and violation of the rights of others, occurring since the age of 15” *Id.* This last criterion can consist of failure to conform to social norms, deceitfulness, impulsivity, irritability and aggressiveness, reckless disregard for one’s safety or that of others, consistent irresponsibility, and lack of remorse. *See id.* Borderline Personality Disorder (BPD) consists of “[a] pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity,

Article 10 of the Mental Hygiene Law serves to reduce the risks posed to society by sexual offenders suffering from mental abnormalities that make them more likely to commit sexual offenses, and to provide the appropriate treatment to limit such sexual misconduct.⁵ Therefore, for an offender to be civilly committed in an article 10 hearing, a jury must find that the offender has a “condition, disease or disorder” that relates to the offender’s predisposition to commit sexual offenses, and the offender must have “serious difficulty controlling” such conduct.⁶

beginning by early adulthood and present in a variety of contexts” as indicated by five or more of the following:

1. Frantic efforts to avoid real or imagined abandonment. . . .
2. A pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation.
3. Identity disturbance: markedly and persistently unstable self-image or sense of self.
4. Impulsivity in at least two areas that are potentially self-damaging (e.g., spending, sex, substance abuse, reckless driving, binge eating). . . .
5. Recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior.
6. Affective instability due to a marked reactivity of mood
7. Chronic feelings of emptiness.
8. Inappropriate, intense anger or difficulty controlling anger
9. Transient, stress-related paranoid ideation or severe dissociative symptoms.

DSM-V, *supra*, at 663.

⁴ *Dennis K.*, 59 N.E.3d at 519. Psychopathy is a mental disorder or a psychopathic personality, which involves “behavior toward other individuals or toward society in which reality is usu. clearly perceived except for an individual’s social responsibilities or moral obligations.” *Psychopathic Personality*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (copy. 1984). Psychopathy has been recognized as a synonym of antisocial personality disorder in the DSM. DSM-V, *supra* note 3, at 659.

⁵ MENTAL HYG. § 10.01(d); *Dennis K.*, 59 N.E.3d at 505. The goals of civil commitment include protection of society, supervision of offenders, and management of their behavior. MENTAL HYG. § 10.01(d).

⁶ *Dennis K.*, 59 N.E.3d at 505 (quoting MENTAL HYG. § 10.03(i)). The State of New York civilly manages individuals who suffer from mental abnormalities that predispose them to commit sex offenses by either placing them in “strict and intensive supervision and treatment,” (SIST) in which they can live in their communities but are closely supervised by the Division of Parole, or—for more dangerous sex offenders—civilly confine or commit the individual to a psychiatric facility run by the Office of Mental Health. *Frequently Asked Questions Regarding New York’s Civil Management Law*, N.Y. STATE DIVISION OF CRIM. JUST. SERVS., http://www.criminaljustice.ny.gov/nsor/som_faqs.htm [<https://perma.cc/KM8Y-ZMTP>]. The formal process for an article 10 civil commitment hearing begins when the commissioner of mental health, after consultation with other mental health professionals, coordinates a case review panel that serves the purpose of reviewing cases of detained sex offenders who are approaching release from confinement. MENTAL HYG. § 10.05(a). The case review panel reviews relevant medical, clinical, criminal, and institutional records, actuarial risk assessment instruments, and other records and reports to determine if the individual convicted of a designated felony was sexually motivated. *Id.* § 10.05(b). If the case review team finds that the individual is a sex offender requiring civil management, the attorney general will file a sex offender civil management petition. *Id.* § 10.06(a). The individual will submit to an evaluation by a psychiatric examiner. *Id.* § 10.06(c). Within thirty days of the petitioner filing the sex offender civil management petition, the supreme court or county court before which the petition is pending shall conduct a hearing without a jury to determine whether there is probable cause to prove the individual is a sex offender requiring civil management. *Id.* § 10.06(g). At the conclusion of the hearing, if the court concludes that there is

In each of the Petitioners' civil commitment hearings, the Supreme Court of the State of New York found the Petitioners had mental abnormalities, in accordance with section 10.03 of the Mental Hygiene Law, and were thus in need of civil commitment.⁷ The supreme court stated that the Petitioners' predisposition to commit sexual offenses and their difficulty controlling their urges to commit offenses, which qualified them as a "dangerous sex offender requiring civil confinement, justified such a classification."⁸ Both Petitioners appealed the supreme court's orders to the Appellate Division of the Supreme Court, which affirmed in both cases, holding that Petitioners did suffer from a "mental abnormality," as defined by the Mental Hygiene Law, that allows for their classification as a dangerous sex offender requiring civil commitment.⁹

Following another appeal by Petitioners, the Court of Appeals of New York ultimately affirmed Petitioners' civil commitment in *State v. Dennis K.*¹⁰ In applying several precedent-setting cases, the Court of Appeals of New York held that in each of the Petitioners' cases the State presented a "detailed psychological portrait" that satisfied both the "predisposition" and "serious difficulty in controlling" sexual misconduct requirements necessary for an article 10 civil commitment.¹¹ The court of appeals in *Dennis K.* thus held that the

not probable cause to designate the individual a sex offender, the individual will be released. *Id.* § 10.06(k). If the court concludes that probable cause has been established, the court shall: (1) order the individual to be released to a secure treatment facility designated by the commissioner for care, treatment and control, and (2) set a date for trial in accordance with section 10.07 of the Mental Hygiene Law. *Id.* Within sixty days that the court determines that the individual is a sex offender requiring civil management, the court will conduct a jury trial to determine whether, by clear and convincing evidence, the individual is a sexual offender who suffers from a mental abnormality. *Id.* § 10.07(a). The burden of proof to prove the individual is a sex offender in need of civil commitment is on the attorney general. *Id.* § 10.07(d). If the jury finds that the individual is a detained sex offender who suffers from a mental abnormality, it shall consider whether the individual requires confinement or strict and intensive supervision. *Id.* § 10.07(f). Confinement entails the individual being committed to a secure treatment facility for care, treatment, and control until such time as he or she no longer requires confinement. *Id.* The conditions of strict and intensive supervision are articulated in section 10.11 of the Mental Hygiene Law. *Id.* § 10.11.

⁷ See MENTAL HYG. § 10.03; *Dennis K.*, 59 N.E.3d at 515, 520. Note that the citations to trial courts are absent in this Comment because parties to article 10 proceedings may seal the record. See MENTAL HYG. § 10.08(g). In New York State, the supreme courts are one type of court of first impression. *The Courts—General Information*, NYCOURTS.GOV (Feb. 15, 2013), <http://www.courts.state.ny.us/courts/structure.shtml> [<https://perma.cc/3T6N-39QA>]. Appeals from the supreme courts are made to the Appellate Division of the Supreme Court, and, finally, to the New York Court of Appeals. *Id.*

⁸ See *Dennis K.*, 59 N.E.3d at 515, 520.

⁹ MENTAL HYG. art. 10; *State v. Richard TT.*, 14 N.Y.S.3d 824, 829 (App. Div. 2015), *aff'd sub nom. Dennis K.*, 59 N.E.3d 500; *State v. Nervina*, 991 N.Y.S.2d 208, 211 (App. Div. 2014), *aff'd sub nom. Dennis K.*, 59 N.E.3d 500.

¹⁰ See *Dennis K.*, 59 N.E.3d at 523.

¹¹ See *id.* at 505, 510–11, 522 (quoting MENTAL HYG. § 10.03(i); then quoting *State v. Donald DD.*, 21 N.E.3d 239, 248 (2014)).

evidence that the State presented was legally sufficient to support the Supreme Court of New York's decision to civilly commit.¹²

Part I of this Comment outlines the factual and procedural history of *Dennis K.*, including both *State v. Anthony N.* and *State v. Richard TT.* Part II discusses the majority's decision in *Dennis K.* to categorize the Petitioners as possessing "mental abnormalities" that require their civil commitment, as well as the dissent's opposition to such classification. Finally, Part III disagrees with the court of appeal's classification of the Petitioners and their requisite civil commitment, and emphasizes how the evidence relied upon in the civil commitment proceedings was insufficient to civilly commit and deprive the Petitioners of their substantive due process rights.

I. THE SUPPORT BEHIND EACH CIVIL COMMITMENT

Petitioners Anthony N. and Richard TT. exhibited parallel mental diagnoses, and made similar challenges to their mental abnormality classifications and civil commitments.¹³ Following decisions of the Appellate Division of the Supreme Court of the State of New York in 2014 and 2015, which supported their civil commitment, both Petitioners argued that the lower courts lacked clear and convincing evidence to prove that their diagnoses predisposed them to commit sexual offenses.¹⁴ As such, they argued that they could not be properly distinguished from typical general recidivist offenders, and were thus unfit for civil commitment.¹⁵ The Court of Appeals of New York ultimately rejected this argument in *State v. Dennis K.*, decided on July 5, 2016, and affirmed each of their civil commitments.¹⁶

A. Petitioner Anthony N.

Anthony N. was convicted of numerous assaults throughout his life.¹⁷ On June 9, 2010, the State commenced an article 10 civil commitment proceeding,

¹² See *id.* at 517, 523.

¹³ See *State v. Dennis K.*, 59 N.E.3d 500, 513, 516, 521–22 (N.Y. 2016).

¹⁴ See *id.* at 515–17.

¹⁵ See *id.* at 524.

¹⁶ See *id.* at 523.

¹⁷ See *id.* at 512–13. Convictions included assault in the third degree in 1983, burglary in the third degree in 1984, sexual abuse in the first degree in 1993, and attempted burglary in the second degree in 2003, the latter of which is considered a "sexually motivated" offense under sections 10.03(f), (p) and (s) of the Mental Hygiene Law. N.Y. MENTAL HYG. LAW § 10.03(f), (p), (s) (McKinney 2017); *Dennis K.*, 59 N.E.3d at 512–13. Sexually motivated offenses include "acts constituting a designated felony [that] were committed in whole or in substantial part for the purpose of direct sexual gratification of the actor." MENTAL HYG. § 10.03(s). Additionally, Petitioner was also arrested for rape in the first degree and burglary in the second degree in 1988. *Dennis K.*, 59 N.E.3d at 512. Throughout the trial and appeals process, Petitioner repeatedly disputed the fact that the attempted burglary was sex-

claiming that Petitioner, Anthony N., suffered from mental abnormalities under section 10.03(i) that consisted of Antisocial Personality Disorder (ASPD) and Borderline Personality Disorder (BPD).¹⁸ Petitioner moved to dismiss, arguing that the State failed to prove that he had a mental abnormality falling under section 10.03(i).¹⁹ The Supreme Court of the State of New York denied the motion.²⁰ The jury then determined that Petitioner was a detained sex offender who suffered from a mental abnormality within the meaning of section 10.03(i).²¹ Following the jury's verdict, the court released Petitioner into Strict and Intensive Supervision and Treatment (SIST).²²

In October 2012, after Petitioner allegedly violated the SIST conditions, the supreme court held a revocation hearing and concluded that Petitioner was a dangerous sex offender necessitating civil commitment.²³ Petitioner appealed the orders classifying him as a dangerous sex offender, requiring civil commitment, and the order revoking his SIST.²⁴ The Appellate Division of the Supreme Court of the State of New York affirmed the lower court's decision on August 8, 2014, and Petitioner then appealed to the Court of Appeals of New York.²⁵ On July 5, 2016, the Court of Appeals affirmed the lower court's clas-

ually motivated. *Id.* at 515–16. If not, the state could not use it to prove that Petitioner was a sex offender in need of civil commitment. *Id.*

¹⁸ MENTAL HYG. § 10.03(i); *Dennis K.*, 59 N.E.3d at 513–14.

¹⁹ MENTAL HYG. § 10.03(i); *Dennis K.*, 59 N.E.3d at 514.

²⁰ See *Dennis K.*, 59 N.E.3d at 514. Petitioner also argued that his 2003 burglary conviction was not sexually motivated. See *id.* The State's two psychologists testified at trial that Petitioner felt "entitled" to sex, and due to his BPD, possessed a "desperate need" to have contact with the women he had relationships with, or wished to have relationships with, in such a manner that resulted in forcible sexual conduct with them. See *id.* at 525–26. Dr. Thomassen testified that Anthony's BPD predisposed him to commit sex offenses based on uncontrollable urges. *Id.* at 740.

²¹ See MENTAL HYG. § 10.03(i); *Dennis K.*, 59 N.E.3d at 515. The jury held that Petitioner's 2003 burglary conviction was sexually motivated. See *Dennis K.*, 59 N.E.3d at 515.

²² *Dennis K.*, 59 N.E.3d at 515. SIST may include, but is not limited to:

electronic monitoring or global positioning satellite tracking for an appropriate period of time, polygraph monitoring, specification of residence or type or [sic] residence, prohibition of contact with identified past or potential victims, strict and intensive supervision by a parole officer, and any other lawful and necessary conditions that may be imposed by a court.

MENTAL HYG. § 10.11(a)(1). The commissioner of mental health, after consultation with psychiatrists, will recommend a specific course of treatment. *Id.*

²³ See *Dennis K.*, 59 N.E.3d at 515. The Division of Parole enforces SIST conditions, which can include GPS monitoring, no contact with victims, or polygraph monitoring. *Frequently Asked Questions Regarding New York's Civil Management Law*, *supra* note 6. Although the court did not specify which of the conditions Petitioner violated, the court can choose to revoke SIST if one of the conditions is violated or if the treating professional thinks that the individual is a dangerous sex offender in need of confinement. *Dennis K.*, 59 N.E.3d at 515. The court, finding that Petitioner violated at least one of the conditions, revoked Petitioner's SIST. *Id.*

²⁴ See *Dennis K.*, 59 N.E.3d at 515.

²⁵ See *id.*; *State v. Nervina*, 991 N.Y.S.2d 208, 211 (App. Div. 2014), *aff'd sub nom. Dennis K.*, 59 N.E.3d 500. The appellate division held that the State presented clear and convincing evidence that

sifications and decision to civilly commit, finding that the State presented clear and convincing evidence proving that Petitioner was a sexual offender requiring civil commitment.²⁶

B. Petitioner Richard TT.

Petitioner Richard TT., like Anthony N., was also convicted of numerous sex offenses throughout his life.²⁷ In May 2010, the State of New York commenced an article 10 civil management proceeding against Petitioner, claiming that he suffered from mental abnormalities consisting of ASPD, BPD, and psychopathy.²⁸ The State's psychologist testified in the proceeding that the combination of these disorders established a mental abnormality that predisposed Petitioner to commit sex offenses because they caused him to lack impulse control and display aggression.²⁹ The Supreme Court of the State of New York found that Richard TT. did suffer from such mental abnormalities and, as such, the court classified him as a dangerous sex offender that required civil commitment.³⁰ Richard TT. appealed to the Appellate Division of the Supreme Court of the State of New York.³¹

During the pendency of Richard TT.'s appeal, the court of appeals issued its opinion in *State v. Donald DD.*, redefining the legal sufficiency of certain diagnoses, specifically focusing on ASPD, to qualify an offender as suffering from a mental abnormality.³² Richard TT. then filed a motion to vacate and dismiss the supreme court's order's finding that he suffered from a mental abnormality within the meaning of section 10.03(i).³³ The supreme court granted the motion on October 22, 2015 in compliance with *Donald DD.*³⁴ The State then appealed that order to the appellate division, arguing that Petitioner was diagnosed with multiple mental disorders that caused impulsive sexual behav-

Petitioner was a sexual offender in need of confinement. *Nervina*, 991 N.Y.S.2d at 211. The appellate division relied on the testimony of expert witnesses who presented evidence that Anthony N. suffered from numerous mental disorders, including BPD, which caused him to lack control over his sexual urges. *Dennis K.*, 59 N.E.3d at 514. The Court of Appeals of New York granted Petitioner's leave for appeal, where Petitioner again argued that the State failed to meet its burden in proving that his 2003 conviction was sexually motivated and that a diagnosis of BPD cannot alone qualify him as possessing a mental abnormality. *Id.* at 515, 516–17.

²⁶ *Dennis K.*, 59 N.E.3d at 517–18, 523. Again, the Court of Appeals of New York relied on the evidence and testimony presented at the trial court level, demonstrating that Anthony N. was predisposed to sexual urges and lack control of such urges due to his mental disorders. *Id.* at 514–15.

²⁷ *See id.* at 518. Anthony N.'s sex offenses included sexual abuse in the first degree and endangering the welfare of a child in 1999, and rape in the third degree and sexual misconduct in 2007. *Id.*

²⁸ N.Y. MENTAL HYG. LAW art. 10 (McKinney 2017); *Dennis K.*, 59 N.E.3d at 518–19.

²⁹ *Dennis K.*, 59 N.E.3d at 519–20.

³⁰ *Id.* at 520.

³¹ *See id.*

³² *Id.* at 506.

³³ MENTAL HYG. § 10.03(i); *Dennis K.*, 59 N.E.3d at 520.

³⁴ *Dennis K.*, 59 N.E.3d at 520.

ior.³⁵ On August 13, 2015, the appellate division held that the confinement conviction should not have been vacated and that the evidence produced by the State supported civil commitment.³⁶ After granting leave for appeal, the Court of Appeals of New York affirmed July 5, 2016, finding that the Petition did suffer from a mental abnormality within the meaning of section 10.03(i) that classified him as a dangerous sex offender in need of civil commitment.³⁷

II. MAJORITY SUPPORT OF NEW YORK CIVIL COMMITMENT PROCEDURES

In *State v. Dennis K.*, a consolidated opinion, the Court of Appeals of New York affirmed the decisions of the Appellate Division of the Supreme Court of the State of New York, finding, by clear and convincing evidence, that both of the petitioners, Anthony N. and Richard TT., suffered from a mental abnormality under section 10.03 of the Mental Hygiene Law, and thus required civil commitment.³⁸ The opinion, written by Justice Eugene F. Pigott, supported the classifications and methods employed by the state of New York as fair procedures.³⁹ Justice Jenny Rivera filed a dissenting opinion in the matter of Anthony N. and Richard TT., challenging the degree of certitude in mental diagnosis and related impulse predispositions that the majority found to be sufficient before civilly committing the petitioners.⁴⁰

³⁵ *Id.* at 520–21. The state further argued that the supreme court abused its discretion in vacating its order of civil commitment because it misinterpreted *Donald DD.* *Id.* The appellate division held that the orders finding Richard TT. suffered from a mental abnormality and that he was a dangerous sex offender requiring civil commitment were supported by the evidence. *Id.* The court noted that Richard TT. was diagnosed with multiple disorders that caused him to engage in impulsive and inappropriate sexual behavior. *Id.* Therefore, despite the ruling in *Donald DD.*, which questioned the legal sufficiency of ASPD to constitute a mental abnormality under the Mental Hygiene Law, the court found that all other evidence supported the finding that Richard TT. was a dangerous sex offender requiring civil commitment. *Id.* Two dissenting appellate division judges stated that they were constrained by the ruling in *Donald DD.* and that, therefore, Richard TT.'s civil commitment was not justified. *Id.* at 524, 526 (Rivera, J., dissenting).

³⁶ *State v. Richard TT.*, 14 N.Y.S.3d 824, 829 (App. Div. 2015), *aff'd sub nom. Dennis K.*, 59 N.E.3d 500 (majority opinion).

³⁷ MENTAL HYG. § 10.03(i); *Dennis K.*, 59 N.E.3d at 523.

³⁸ See N.Y. MENTAL HYG. LAW § 10.03(i) (McKinney 2017); *State v. Dennis K.*, 59 N.E.3d 500, 523 (N.Y. 2016); Alexander Tsesis, *Due Process in Civil Commitments*, 68 WASH. & LEE L. REV. 253, 270 (2011). The right to be free from physical restraint is a fundamental liberty, as determined by the Supreme Court in *Foucha v. Louisiana.* *Id.* (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). Nonetheless, as held in *Addington v. Texas* and *United States v. Comstock*, the courts use intermediate scrutiny in assessing civil commitment cases, not strict scrutiny. *Id.* at 267 (citing *Addington v. Texas*, 441 U.S. 418, 429 (1979); and then citing *United States v. Comstock*, 560 U.S. 126, 131 (2010)). Strict scrutiny is usually afforded to cases involving fundamental rights. *Id.* at 264. Intermediate scrutiny requires that the standard of proof only be clear and convincing evidence. *Id.* at 301. Clear and convincing evidence amounts to a high degree of probability, not near certainty, which is required under strict scrutiny. *Id.* at 302.

³⁹ See *Dennis K.*, 59 N.E.3d at 500–26.

⁴⁰ See *id.* at 523–26 (Rivera, J., dissenting).

A. The Majority's Commitment to Current Civil Commitment Procedures

The procedure to civilly commit an individual, as outlined in the Mental Hygiene Law and interpreted through court decisions, requires the State to establish by clear and convincing evidence that an individual has a “condition, disease, or disorder” that affects his “emotional, cognitive, or volitional capacity . . . in a manner that predisposes him . . . to the commission of conduct constituting a sex offense.”⁴¹ New York courts have determined that the Mental Hygiene Law and its civil commitment procedures amount to a two-prong test.⁴² The first prong requires that the individual possess a mental abnormality as defined by the Mental Hygiene Law.⁴³ The second prong requires both that the mental abnormality predispose the individual to commit sexual offenses, and that the individual has “serious difficulty controlling” sexual conduct.⁴⁴

Petitioner Anthony N. challenged the legal sufficiency of his mental abnormality diagnosis.⁴⁵ Petitioner referenced *State v. Donald DD.*, a court of appeals opinion that stated that a diagnosis of ASPD alone was not sufficient to constitute a mental abnormality under the Mental Hygiene Law because such a diagnosis did not predispose the individual to commit sexual offenses.⁴⁶ Anthony N. argued that, like ASPD, BPD was insufficient to qualify as a mental abnormality.⁴⁷ The court of appeals rejected Petitioner's reliance on *Donald DD.*, and held that BPD sufficiently serves as a predisposition to specifically commit sexual offenses.⁴⁸ They found that while one of the traits of BPD is a fear of abandonment and a need to restore threatened relationships, Anthony N. satisfied these fears and needs by forcing women to have sexual relations with him against their will, creating a strong sexual component to his BPD diagnosis.⁴⁹ The court of appeals found this to be sufficient for the State to establish a

⁴¹ *Id.* at 505 (majority opinion).

⁴² See MENTAL HYG. § 10.03(i); *Dennis K.*, 59 N.E.3d at 502, 506–07.

⁴³ See MENTAL HYG. § 10.03(i); *Dennis K.*, 59 N.E.3d at 505.

⁴⁴ See *Dennis K.*, 59 N.E.3d at 505.

⁴⁵ *Id.* at 515–17. Petitioner again challenged the fact that his felony conviction was sexually motivated. See *id.* at 515. In regards to this argument, the court of appeals held that the State presented sufficient evidence to conclude that the 2003 attempted burglary was sexually motivated. *Id.* at 516. As evidence of his sexual intentions, the court of appeals relied on the fact that Petitioner arrived at the victim's residence in 2003 with a sex toy and lubricant, and told the victim that he was going to rape her. See *id.*

⁴⁶ *Id.* at 516–17 (citing *State v. Donald DD.*, 21 N.E.3d 239, 240 (N.Y. 2014)). The majority in *Donald DD.* reasoned that ASPD alone only amounts to a tendency to commit general offenses, not sexual offenses specifically. 21 N.E.3d at 240. Therefore, individuals afflicted solely by ASPD would not satisfy the two-prong test to civilly commit. *Id.*

⁴⁷ *Dennis K.*, 59 N.E.3d at 516–17.

⁴⁸ *Id.* at 517. The court tried to make a distinction between ASPD and BPD, asserting that BPD leads to fear of abandonment by the afflicted, which after considering testimony of expert witnesses and Petitioner's past crimes, was manifested through the need to have women against their will. See *id.*

⁴⁹ *Id.*

link between Anthony N.'s BPD and a predisposition to commit sex offenses.⁵⁰ The court thus asserted that the two-prong test was met and that Petitioner should be civilly committed.⁵¹

Petitioner Richard TT., diagnosed with ASPD, BPD, and psychopathy, also challenged the legal sufficiency of his mental abnormality classification.⁵² The court of appeals noted that the combination of ASPD, BPD, and psychopathy were sufficient to qualify Petitioner as suffering from a mental abnormality that led to sexual preoccupation and impulsivity.⁵³ Relying on the holding in *Donald DD.* that an ASPD diagnosis could not qualify as a mental abnormality unless accompanied by another disorder, the court focused on the fact that Richard TT. suffered from multiple disorders.⁵⁴ The court stated that the combination of ASPD, BPD, and psychopathy creates a personality structure that results in a disregard for the needs and wants of other individuals and a lack of impulse control, which, based on Petitioner's past crimes, was manifested through sexual offenses.⁵⁵ The court of appeals held that the supreme court misinterpreted the holding in *Donald DD.* and thus Richard TT. should be civilly committed.⁵⁶

B. Dissenting to the Classification

In a dissenting opinion, Judge Jenny Rivera contested the majority's classification of Anthony N. and Richard TT. as having mental abnormalities requiring civil commitment.⁵⁷ Judge Rivera argued that the majority relied on insufficient evidence to hold that the diagnoses of Anthony N. and Richard TT. were sufficiently linked to a predisposition to commit sexual offenses, thus rendering them no different from general recidivist offenders.⁵⁸ If so, their civil commitment cannot be justified and would be a violation of their substantive due process rights under the Fourteenth Amendment to the United States Con-

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 519, 521.

⁵³ *See id.* at 519–20, 522–23.

⁵⁴ *See id.* at 523.

⁵⁵ *Id.* at 522.

⁵⁶ *Id.* at 523. The Mental Hygiene Law and the precedent-setting cases have thus molded a relatively clear two-prong test for determining whether to civilly commit sexual offenders. *See id.* at 517, 523 (citing N.Y. MENTAL HYG. LAW § 10.03(i) (McKinney 2017)). *Donald DD.* held that an ASPD diagnosis cannot support a finding of a mental abnormality if not accompanied by another diagnosis. *Id.* at 524 (citing *State v. Donald DD.*, 21 N.E.3d 239, 240 (N.Y. 2014)). The court of appeals found that the supreme court misinterpreted the holding in *Donald DD.* when it vacated the orders civilly committing Richard TT. *Id.* at 523. The court of appeals focused on the fact that Richard TT. also suffered from BPD and psychopathy, which they thought created a personality structure that required civil commitment. *Id.* at 521.

⁵⁷ *Id.* at 524–25 (Rivera, J., dissenting).

⁵⁸ *Id.* at 524.

stitution.⁵⁹ The state is only justified in infringing on an individual's liberty if they have a legitimate state interest.⁶⁰ The legitimate state interest behind article 10, Judge Rivera highlighted, is to protect the public from a particular class of dangerous sex offenders and to provide that group necessary treatment.⁶¹ Judge Rivera accordingly contended that the only way for the Mental Hygiene Law to constitutionally civilly commit individuals is to ensure that there is a clear distinction between sex offenders with a mental abnormality that result in lack of sexual impulse control and general criminal recidivists.⁶² She did not believe the evidence was able to sufficiently make that distinction.⁶³

Judge Rivera founded her reasoning and uncertainty in the majority's conclusions on the court of appeals decision in *Donald DD*.⁶⁴ Judge Rivera argued that Borderline Personality Disorder (BPD) is just as common as Anti-social Personality Disorder (ASPD), which the court held in *Donald DD*. was not alone sufficient to qualify as a mental abnormality.⁶⁵ She therefore argued that BPD similarly does not predispose offenders to commit sexual offenses and should not serve as a predicate for civil commitment on its own.⁶⁶

Specifically focusing on the characteristics of the mental diagnoses, Judge Rivera highlighted the ways in which ASPD and BPD are similar and thus the reasons why the court should be bound by *Donald DD*. in finding ASPD and BPD insufficient to civilly commit the petitioners.⁶⁷ She reasoned that, like ASPD, BPD is prevalent among the prison population, sexual impulsivity is not a general characteristic of BPD, and there is no evidence to support that sexual impulsivity, even if present, will manifest itself through sexual offenses.⁶⁸ Judge Rivera criticized the majority for essentially employing a "combination diagnosis" theory in which the court purported that while none of the petitioners' diagnoses were sufficient to establish a predisposition to commit sex offenses, together and based on past criminal records, the court could infer such a link.⁶⁹

⁵⁹ U.S. CONST. amend. XIV, § 1; *Dennis K.*, 59 N.E.3d at 523 (Rivera, J., dissenting). The Fourteenth Amendment prohibits states from depriving individuals of "life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

⁶⁰ Tesis, *supra* note 38, at 262–63.

⁶¹ See MENTAL HYG. LAW art. 10; *Dennis K.*, 59 N.E.3d at 523 (Rivera, J., dissenting).

⁶² *Dennis K.*, 59 N.E.3d at 524 (Rivera, J., dissenting).

⁶³ *Id.*

⁶⁴ See *id.* at 525.

⁶⁵ See *id.* Judge Rivera argued that the court of appeals should be bound by the reasoning of *Donald DD*. and, accordingly, just as ASPD accompanied by sexual crimes could not constitute a mental abnormality in *Donald DD*., neither could BPD accompanied by sexual crimes constitute a mental abnormality in the case of Anthony N. and Richard TT. *Id.* at 524–25.

⁶⁶ See *id.* at 524–25.

⁶⁷ *Id.* at 525.

⁶⁸ *Id.*

⁶⁹ *Id.* at 525–26

Judge Rivera found fault in the manner in which the majority fabricated such a relationship to support its conclusions.⁷⁰ Judge Rivera contended that in order for the experts at trial to connect BPD to uncontrollable sexual conduct, they must have relied on past crimes.⁷¹ Judge Rivera argued that such a backward-looking diagnosis and justification leads to misdiagnosis, especially considering the weight juries give to expert witnesses, as compared to convicted offenders.⁷² Without sufficient evidence to justify potentially permanent civil commitment, Judge Rivera dissented from the majority's conclusion in *Dennis K.* that petitioners Anthony N. and Richard TT. possess mental abnormalities that qualify them for civil commitment.⁷³

III. REQUIRING CERTAINTY IN CIVIL COMMITMENT

The majority's opinion in *State v. Dennis K.* presents significant concerns regarding the degree of certainty the New York criminal justice system has come to accept before depriving citizens of their fundamental liberties.⁷⁴ Involuntary civil commitment, like criminal imprisonment, naturally infringes on an individual's liberty to be free from bodily restraint, thus raising significant Constitutional substantive due process concerns.⁷⁵ To justify such an infringement on liberty, the government must have a legitimate purpose behind the infringement.⁷⁶ The state interest behind civil commitment is to protect the public from dangerous sex offenders and provide those sex offenders with therapeutic treatment.⁷⁷ As the dissent correctly noted, it is therefore crucial for the court to accurately determine by clear and convincing evidence that the individuals who are being civilly committed not only have a mental abnormality, but that their mental abnormality predisposes them to commit sex offenses, such that they pose a threat to society and would benefit from the treatment civil commitment offers.⁷⁸ If the individuals are not dangerous sex offenders predisposed to commit sex offenses, the state would not have a legitimate interest behind depriving such individuals of their liberty, and their commitment would be unconstitutional.⁷⁹ As the Supreme Court correctly stated in *O'Connor v. Donaldson*, "a finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in

⁷⁰ *Id.* at 526.

⁷¹ *Id.* According to article 10, a finding of mental abnormality cannot be based solely on past sexual offenses. *Id.* (citing N.Y. MENTAL HYG. LAW § 10.07[d] (McKinney 2017)).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See *State v. Dennis K.*, 59 N.E.3d 500, 523–24 (N.Y. 2016) (Rivera, J., dissenting).

⁷⁵ U.S. CONST. art. XIV, § 1; Tsesis, *supra* note 38, at 260.

⁷⁶ See Tsesis, *supra* note 38, at 260.

⁷⁷ See *Dennis K.*, 59 N.E.3d at 523.

⁷⁸ See *id.*

⁷⁹ See *id.*

simple custodial confinement . . . [T]here is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.”⁸⁰

Civil commitment under the Mental Hygiene Law is exclusively designed and constitutionally justified for dangerous sex offenders with a predisposition to commit sexual offenses.⁸¹ The focus, as the dissent accurately noted, must then be on ensuring that there is a distinction between dangerous sex offenders, justly in need of civil commitment, and general recidivist offenders, who may suffer from mental disorders but are not predisposed to commit sexual offenses.⁸² Although civil commitment is unquestionably necessary in certain situations, the majority inappropriately advocated for its expansion in the cases of Anthony N. and Richard TT., where it is unclear whether petitioners’ diagnoses, such as BPD, will result in sexual misconduct at all.⁸³ In failing to make this distinction, and therefore potentially civilly committing general recidivist offenders, the majority’s decision threatens substantive due process.⁸⁴

The majority in *Dennis K.* inaccurately focused on the number of mental diagnoses, as opposed to the characteristics of the diagnoses.⁸⁵ However, as the dissent properly highlighted, BPD, even in conjunction with ASPD, should not be sufficient to civilly commit individuals because the link between BPD and a predisposition to commit sexual offenses is unclear.⁸⁶ Judge Rivera correctly noted that BPD, like ASPD, is widespread among the prison population, evidence that BPD is not exclusive to or notable among sex offenders.⁸⁷ Additionally, BPD does not require sexual impulsivity as a symptom, nor does the Di-

⁸⁰ O’Connor v. Donaldson, 422 U.S. 563, 575 (1975).

⁸¹ See N.Y. MENTAL HYG. LAW art. 10 (McKinney 2017); *Dennis K.*, 59 N.E.3d at 523 (Rivera, J., dissenting).

⁸² See *Dennis K.*, 59 N.E.3d at 524 (Rivera, J., dissenting).

⁸³ See *id.* at 517, 523 (majority opinion); *id.* at 526 (Rivera, J., dissenting).

⁸⁴ See *id.* at 526 (Rivera, J., dissenting).

⁸⁵ *Id.* at 512–13, 519 (majority opinion). The majority erred in inappropriately relying upon *Donald DD.* and determining that so long as ASPD was accompanied by another disorder, the individual could be labeled as a dangerous sex offender in need of civil commitment. See *id.* at 517, 521–22. *Donald DD.* held that individuals who suffer from ASPD, alone, could not be civilly committed, as this disorder does not sufficiently predispose sexual misconduct. See *State v. Donald DD.*, 21 N.E.3d 239, 251 (N.Y. 2014). ASPD only establishes a general tendency towards criminality and has no requisite relationship to difficulty controlling one’s behavior. See *id.* However, the court in *Donald DD.* held that ASPD in conjunction with other mental diagnoses could justify civil commitment. See *id.* Nonetheless, the decision in *Donald DD.* failed to adequately acknowledge that, even if ASPD is accompanied by another mental diagnosis, if there is no necessary relationship between the additional diagnosis and a predisposition to commit sex offenses, then the additional diagnosis would also be insufficient to classify individuals as possessing a mental abnormality. *Id.*

⁸⁶ *Dennis K.*, 59 N.E.3d at 526 (Rivera, J., dissenting).

⁸⁷ *Id.* at 525. Twenty-five to fifty percent of prisoners suffer from BPD. *Id.* Statistics show that as many as eighty percent of inmates in prison, currently or in the past, could be diagnosed with ASPD, making it incredibly common. Petition for Writ of Certiorari at 20, Anthony N. v. New York, 137 S. Ct. 574 (2016) (No. 16-6237).

agnostic and Statistical Manual of Mental Disorders associate BPD with sexual offenses.⁸⁸ On cross-examination, the State's expert even admitted that "borderline personality disorder is not a traditional diagnosis that's been linked to future sexual offenses"⁸⁹ Thus, even if Anthony N. and Richard T.T. suffer from both ASPD and BPD, such diagnoses, either alone or combined, should not be sufficient to justify civil commitment.⁹⁰ Had the court considered more than just the number of mental diagnoses and petitioners' past crimes, it would have realized that the decision is not in compliance with the reasoning of *Donald D.D.*, but in fact violates the petitioners' substantive due process rights.⁹¹

The lack of certainty and fallibility of predictions about future behaviors, even as noted by the State's witnesses, is of most concern.⁹² When fundamental liberties of United States citizens are at stake, the justice system has a duty to ensure that the reasons behind such deprivations of freedom are justified by clear and convincing evidence.⁹³ Nothing about the majority's decision is sufficiently clear or convincing.⁹⁴ Additionally, the methods used by the majority in making inferences about the petitioners are imprecise and therefore alarming.⁹⁵ Reliance on past crimes coupled with traditionally non-sexual disorders to infer a causal link between the two, which involves a hindsight analysis by experts who work backwards from a sexual offense to diagnose a mental abnormality, is inaccurate.⁹⁶ The courts should analyze the evidence first, and work towards a conclusion, not vice versa.⁹⁷ It is in making this link between a mental abnormality and a predisposition to commit sexual offenses, without proper evidence, that undeniably creates opportunities for misdiagnoses, and violates the substantive due process of civilly committed individuals.⁹⁸

As the dissent in *Dennis K.* appropriately acknowledges, the petitioners have committed heinous and unacceptable acts.⁹⁹ However, individuals suffering from ASPD and BPD are not automatically predisposed to commit sexual

⁸⁸ *Dennis K.*, 59 N.E.3d at 525 (Rivera, J., dissenting).

⁸⁹ Petition for Writ of Certiorari, *supra* note 87, at 9.

⁹⁰ See *Dennis K.*, 59 N.E.3d at 524–26 (Rivera, J., dissenting).

⁹¹ See *id.* at 526.

⁹² Tesis, *supra* note 38, at 284 n.206. In *Barefoot v. Estelle*, the Supreme Court, as supported by the American Psychiatric Association, presented research to prove that psychiatrists' predictions of patients' future dangerousness were usually wrong. *Id.* (citing *Barefoot v. Estelle*, 463 U.S. 880, 900–01 (1983), *superseded on other grounds*, 28 U.S.C. § 2253(c)(2) (2006)). Clinical studies have repeatedly shown inaccuracies in psychiatrists' abilities to predict future behavior, and dangers associated with judicial and legislative acceptance of such predictions. *Id.* at 286.

⁹³ See *Dennis K.*, 59 N.E.3d at 526 (Rivera, J., dissenting).

⁹⁴ See *id.*

⁹⁵ See *id.* at 517–18, 523 (majority opinion).

⁹⁶ *Id.* at 526 (Rivera, J., dissenting).

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ *Id.*

offenses simply due to these conditions.¹⁰⁰ It is evident that such mentally impaired individuals, already politically unpopular, are predisposed to being taken advantage of in our justice system, as they are often stigmatized and cannot properly advocate for themselves due to their mental disorders.¹⁰¹ Further, these individuals are predisposed to being prejudged by members of the jury, who subconsciously prefer the testimony of expert witness, experts whose opinions are based on hindsight reasoning.¹⁰² Before the justice system moves forwards in depriving such individuals of fundamental liberties, the process and evidence supporting their classification under the Mental Hygiene Law must be undeniable and sound.¹⁰³ The majority's opinion failed to demonstrate how such hindsight analysis and reliance on non-sexual disorders appropriately safeguards individuals from erroneous deprivation.¹⁰⁴ Accordingly, it is a severe violation of substantive due process to civilly commit Anthony N. and Richard TT.¹⁰⁵

CONCLUSION

Fundamental liberty and freedom are central to our justice system, and the justifications behind depriving individuals of such freedoms should be clear and certain. The Court of Appeals of New York deprived petitioners Anthony N. and Richard TT. of their freedom when it held that Antisocial Personality Disorder (ASPD) and Bipolar Personality Disorder (BPD) were sufficient mental diagnoses to classify petitioners as possessing mental abnormalities, thereby civilly committing them under section 10.03 of the New York Mental Hygiene Law.

By relying on the petitioners' past crimes, the majority in *State v. Dennis K.* argued that, although neither diagnosis is commonly associated specifically with sexual impulses, the evidence was sufficient to civilly commit them. However, such hindsight analysis and decisions made on the *possibility* of sexual misconduct should not justify the civil commitment of individuals afflicted by these diagnoses. Neither BPD nor ASPD can be said to certainly be associated with a predisposition to commit sexual offenses, a requisite prong for civil commitment. As such, the evidence presented by the State cannot be sufficiently clear or convincing to justify the civil commitment of the petitioners or those similarly situated. The justice system must seek to protect those unable to properly advocate for themselves by requiring certainty that their mental

¹⁰⁰ *See id.*

¹⁰¹ *See id.* (discussing the disproportionate weight juries afford expert witnesses in comparison to the doubts juries have towards accused sex offenders).

¹⁰² *See id.*

¹⁰³ N.Y. MENTAL HYG. LAW art. 10 (McKinney 2017); *see Dennis K.*, 59 N.E.3d at 526.

¹⁰⁴ *See id.* at 524–26.

¹⁰⁵ *Id.* at 526.

diagnoses are associated with a predisposition to commit sexual offenses before depriving them of their liberties through civil commitment.