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COURT OF APPEALS
STATE OF NEW YORK

JAMES Q.,

Appellant,

-against-

NO. 3

SUFFOLK COUNTY DISTRICT ATTORNEY,

Respondent.

20 Eagle Street
Albany, New York
January 8, 2019

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:

BRENT R. STACK, ESQ.
MENTAL HYGIENE LEGAL SERVICE
THIRD JUDICIAL DEPARTMENT
Attorney for Appellant
286 Washington Avenue Extension
Suite 205
Albany, NY 12203

GUY ARCIDIACONO, ADA
DISTRICT ATTORNEY OF SUFFOLK COUNTY
Attorney for Respondent
Criminal Courts Building
200 Center Drive
Riverhead, NY 11901

Penina Wolicki



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Official Court Transcriber



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CHIEF JUDGE DIFIORE: The next appeal is appeal



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number 3, the Matter of James Q. v. Commissioner of the



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Office for People with Developmental Disabilities.



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Counsel?



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MR. STACK: May it please the court, I'm Brent



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Stack, Mental Hygiene Legal Service, on behalf of appellant



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James Q.



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James Q. is asking - - -



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CHIEF JUDGE DIFIORE: Counsel, would you like to



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reserve - - -



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MR. STACK: Oh - - -



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CHIEF JUDGE DIFIORE: - - - any rebuttal time,



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MR. STACK: I would thank you, Your Honor. Two



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minutes, please.



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James Q. is asking this court to reverse the



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opinion and order of the Third Department and direct that



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the record of his CPL 330.20 proceeding be sealed in its



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JUDGE RIVERA: Counsel, just to clarify, under



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the Third Department's ruling, since it provides for



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redaction, what's the information that you say would not be



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redacted that would have been covered by the sealing - - -



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MR. STACK: Um - - -



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JUDGE RIVERA: - - - since everything's going to



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be sealed. I want to know what is it that's left that - -



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MR. STACK: Well - - -



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JUDGE RIVERA: - - - you're particularly troubled



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by?



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MR. STACK: I think that - - - I think that



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raises one of the primary issues with the Third



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Department's decision. What would be redacted would be



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determined on a case-by-case basis by a Supreme Court



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judge. There would be essentially redaction litigation.



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MHLS would argue that the patient should have the full



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force and effect of Mental Hygiene Law Section 33.13(c),



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which makes confidential any information that identifies -



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JUDGE FAHEY: No, I didn't see - - -



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JUDGE STEIN: Are you looking for an all-or-



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nothing result here, sort of? Are you gambling on an all-



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or-nothing - - - not - - - I shouldn't say gambling but - -



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- are you advocating that - - - that it should be all



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sealed, but if it's not going to be all sealed then - - -



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then there shouldn't be any redaction, it should just be as



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MR. STACK: I mean, sealing - - - confidentiality



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should be the rule. There are certain exceptions to the



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rule, provided both in MHL - - - or Mental Hygiene Law



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Section 33.13 as well as CPL 30- - - -



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JUDGE STEIN: Well, let's talk about



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confidentiality. In these cases, we have public hearings,



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don't we? And at those public hearings, the defendant is



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obligated - - - has a burden of proof. It's either a plea



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or it's a trial - - - has a - - - has a burden of proving



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the defense, right, with particularity and medical



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testimony and all sorts of - - - and other evidence.



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That's all public.



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So what is - - - I - - - I don't understand why,



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then, when that is the case and - - - and this defendant



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has put his or her mental condition into - - - into



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dispute, why is it, then, that the court is required to



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seal its records?



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MR. STACK: James Q. is not ask - - -



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JUDGE STEIN: And where does the statute say that



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it does?



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MR. STACK: James Q. is not asking for the



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initial criminal proceeding to be sealed. He's only - - -



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JUDGE STEIN: But what - - - a retention hearing



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is also - - -



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MR. STACK: A retention - - -



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JUDGE STEIN: - - - it's a civil proceeding.



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MR. STACK: A retention hearing is a civil



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proceeding that's post-verdict or post-plea. Post-plea,



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CPL 330.20 provides - - -



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JUDGE FAHEY: Yeah, but just - - - just - - -



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just to follow up, though, on what Judge Stein is saying is



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- - - her point, the way I understand it - - - is at trial



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you go forward, you - - - you have to - - - you have to



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prove your defense. And in the context of then proving



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you're not - - - you're not guilty by reason of mental



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disease or defect, you put all of this medical proof in the



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record to establish that. That is the way it's done.



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And so a retention hearing simply does a similar



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thing. It reviews the current state of that person - - -



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the current mental state of that person, and then it makes



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a determination on whether or not they can be released,



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whether or not their proof is sufficient to show that they



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can be released. What's the difference?



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MR. STACK: Well, the difference is that CPL



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330.20 proceedings at - - - at that point, the individual



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becomes a patient. And a patient - - -



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JUDGE FAHEY: Well, so - - - so the difference,



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then, is between the civil and the criminal nature of the



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proceeding, right? That's the first thing.



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MR. STACK: Correct.



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JUDGE FAHEY: And the second, which once there's



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a determination that a person is not guilty by reason of



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mental disease or defect, then we're saying - - - the State



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is saying that this person has a disease and that therefore



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their disease gives them certain rights. Do you under - -



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- do we agree on that?



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MR. STACK: Um - - -



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JUDGE FAHEY: Certain rights - - -



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MR. STACK: If they're a patient - - -



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JUDGE FAHEY: - - - protection, confidentiality,



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and certain records.



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MR. STACK: Treatment.



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JUDGE FAHEY: Sure, of course.



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So that being the case, then, this is why the



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Appellate Division, I kind of understood what they were



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doing, because they seem to be drawing a distinction



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between, at that point in the proceeding, between the court



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records and the clinical records; the clinical records not



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being accessible, court records being accessible. And that



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seems to be a rational distinction to draw in a civil



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proceeding that you perhaps wouldn't draw in the initial



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determination in the criminal proceeding.



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MR. STACK: I think that's an impractical



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distinction, because - - -



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JUDGE FAHEY: Okay, tell me why?



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MR. STACK: - - - because the court records



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contain information that is made confidential by statute,



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and that statute is Mental Hygiene Law Section 33.13(c).



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JUDGE FAHEY: Um-hum.



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MR. STACK: And that statute covers any



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information that would tend to identify the patient as a



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patient, identify any diagnosis, and identify any care and



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treatment.



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So the - - - the petition itself would identify



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the patient as someone who is mentally ill or alleged to be



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mentally ill. It would contain information specific to



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that mental illness. It would identify - - -



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JUDGE STEIN: Is there any reference - along



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those lines - - - in 33.13(c) permitting disclosure to the



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courts for information required for the retention hearing?



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MR. STACK: 33.13 (c) ?



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JUDGE STEIN: Yeah.



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MR. STACK: Information to the courts?



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JUDGE STEIN: Well, that's where they set forth



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the exceptions to - - - permits disclosure of certain



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things.



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MR. STACK: The - - - the court - - -



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JUDGE STEIN: They don't refer to the courts - -



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- it doesn't refer to the courts at all, does it?



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MR. STACK: At a - - - at a retention proceeding,



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the court would have access to all of the information.



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JUDGE STEIN: Well, but it doesn't say that in



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33.13, right?



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MR. STACK: 33.13 is a confidentiality provision



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regarding the - - - a patient's right to confidentiality.



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A court - - -



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JUDGE STEIN: So I guess that's my point. My



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point is, is that is meant for the facility that it is not



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meant for the - - - an independent body, the court, that is



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adjudicating these - - - these situations.



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MR. STACK: Well, the - - - the regulation,



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specifically 22 NYCRR 38.1(4) requires the courts to adopt



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the rules, providing for the retention and disposition of



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court records, sub (4), including provisions to ensure the



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confidentiality of court records sealed or otherwise made



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confidential by law.



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So the courts do have a duty to protect the



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confidentiality of not only records that are sealed by



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court order, but those records that are made confidential



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by law.



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JUDGE RIVERA: Counsel, let me ask you about a



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provision in 330.20, because I - - - I thought it supported



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your argument, but I'm - - - I'm just not sure.



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So 330.20.7 says, "The latter order" - - - and



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it's referring there to the order where the court



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determines that the individual should be committed to the



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custody of the Commissioner. So this is after the



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conviction, the plea, this is after the examination, this



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is after the hearing - - - the initial hearing, and this is



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the decision of - - - of committing someone.



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It says that "order shall be deemed an order made



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pursuant to the mental hygiene law and not pursuant to this



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section," which is referring to CPL 330.20, "and further



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retention, conditional release, or discharge of such



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defendant shall be in accordance with the provisions of the



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mental hygiene law."



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Was your argument that then, as a result, the



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individuals who fit under 330.20, once there's an order of



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- - - of them being committed, now are essentially



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individuals who fit under Article 9, and so the sealing



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provisions also apply in that sense?



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MR. STACK: In that - - - in that sense, yes,



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Your Honor. That - - - that section is specific to track-



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two and track-three CPL 330.20 patients. And it



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specifically states that further proceedings shall be



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governed by Article 9 or Article 15. And that would



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certainly include those sealing provisions.



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JUDGE STEIN: What about track 1?



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MR. STACK: Track one is governed by the balance



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of CPL 33.20, and - - -



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CHIEF JUDGE DIFIORE: So counsel, the retention



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hearing is conducted under CPL 330.20. What's the impact



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and interplay of CPL 160.50, the sealing provision, which



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lays out the occasions on which records and proceedings are



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sealed?



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MR. STACK: I'm not certain of the interplay



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between those two provisions. I believe that the balance



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of CPL 330.20 does talk about notice to certain



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individuals, including the District Attorney and any other



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individual that the court may deem necessary to receive



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information and an opportunity to be heard.



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And that's where the public protection comes in.



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And specifically, for track-one defendants, they cannot be



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moved to any lesser restrictive form of hospitalization or



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care and treatment unless the - - - the People are given



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notice to be heard. And that's through the District



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Attorney's Office, including any other person, which may



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include the victim or any one - - - any other person deemed



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to be notified as a necessity by the court.



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So that's where CPL 330.20 does pull back some of



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the confidentiality protections provided by the Mental



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Hygiene Law. And they're - - - they're specific to 330.20,



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and that's in line with our argument in which 330.20.7 - -



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- or 17 states that the Mental Hygiene Law shall apply to



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these individuals unless specifically limited or otherwise



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excluded specifically by this section, by no other



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operation of law, but just by 330.20



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JUDGE FEINMAN: If - - - if I may? I know this



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is - - - but let's say we don't agree with you about the



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wholesale sealing. What should we do with the redaction



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language in the Appellate Division decision, particularly



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to the extent that they seem to indicate that it's as a



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matter of law? Should this be a discretionary thing, on a



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case-by-case, or always redacted or - - -



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MR. STACK: I think - - -



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JUDGE FEINMAN: - - - what should we do with that



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part of it?



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MR. STACK: - - - I think that highlights the



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problematic nature of the - - - the decision rendered by



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the Third Department, because it's going to lead to



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different results in different courts and for different



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patients.



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Some patients are going to be entitled to more



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confidentiality, and some are going to be entitled to less.



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And you're going to have an entire class of persons



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statewide who are treated differently by the law. And



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aside from that, you're going to have a logistical problem



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in the clerk's offices, because there are still people that



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are entitled to access to these records under different



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provisions of the Mental Hygiene Law, and if you've gone



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and now redacted all of the records, those - - - those



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people who seek access are going to get access to records



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that don't provide - - - in many cases, don't provide any



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useful information at all.



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CHIEF JUDGE DIFIORE: Can we reach the redaction



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MR. STACK: Um - - -



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CHIEF JUDGE DIFIORE: The People didn't appeal



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that, right? That's not a ruling adverse to you?



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MR. STACK: I suppose it's not adverse - - -



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well, it is adverse to us - - -



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CHIEF JUDGE DIFIORE: How so?



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MR. STACK: - - - to - - - to our clients. In



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this case, James Q.'s record has been sealed - - - sealed



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in its entirety awaiting this court's determination.



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JUDGE STEIN: Well, the - - - just to follow up.



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The provision that - - - of the Appellate Division saying



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that it's not sealed entirely is adverse to you, but the



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provision that says but we're redacting this information,



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how is that adverse to you?



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MR. STACK: Well, we've already seen this become



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an issue at the Supreme Court level, because courts do not



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know how to apply the Third Department's determination,



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because it's still - - - like I said, it leads to further



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litigation - - -



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JUDGE STEIN: Well, then the adverse decision



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would be the refusal to redact something, not the



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redaction?



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MR. STACK: It could lead to, on a case-by-case



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basis, redaction litigation, which is then appealed.



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JUDGE RIVERA: I - - - I thought it was adverse



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because part of what you say needs to not be public is the



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identity of the individual - - -



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MR. STACK: Correct, Your Honor.



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JUDGE RIVERA: - - - and that will stay, because



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you've got the order and you've got the petition, correct?



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MR. STACK: Unless those documents are so



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redacted that you can't tell - - -



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JUDGE RIVERA: But the majority didn't order that



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redacted?



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MR. STACK: No, they did not.



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CHIEF JUDGE DIFIORE: Thank you, counsel.



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MR. STACK: So you still have information - - -



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thank you.



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CHIEF JUDGE DIFIORE: Thank you.



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Counsel?



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MR. ARCIDIACONO: May it please the court, my



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name is Guy Arcidiacono. I'm an Assistant District in



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Suffolk County.



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Defendant pled not responsible by reason of



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mental disease or defect to a number of charges, and by



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raising and accepting that affirmative defense, he placed



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his mental condition in issue. That is a fundamental



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difference from strictly civil cases, and it is a



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fundamental difference here - - -



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JUDGE RIVERA: Well, sure, at that hearing. But



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then once - - - once you have the determination, the



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statute seems to say that these individuals are then



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protected by the provisions of the Mental Hygiene Law, and



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that's what your adversary is arguing about - - - not the



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initial proceeding, and that - - - so that's really not the



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focus of the statutory construction argument here.



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MR. ARCIDIACONO: The inquiry doesn't end there,



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Judge, because subsequent proceedings, at least in most



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courts throughout the State, are still public.



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JUDGE RIVERA: Well, but that's the question



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that's driven in - - - in this appeal, right, whether or



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not there are provisions of the Mental Hygiene Law that



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require the sealing here. That - - - that's the merits



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argument. So why don't you get to the merits about whether



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or not the law doesn't require that?



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MR. ARCIDIACONO: Okay. Well, first of all,



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330.13 is obviously part of the Mental Hygiene Law, but it



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is subject to the limitation specifically stated in



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330.20.17, which - - -



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JUDGE RIVERA: And does 330.20 anywhere say that



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you cannot seal?



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MR. ARCIDIACONO: No, and neither does it say



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that anything should be sealed.



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JUDGE RIVERA: But - - -



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MR. ARCIDIACONO: And as the - - -



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JUDGE RIVERA: - - - provisions of the Mental



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Hygiene Law do - - - wouldn't that be - - -



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MR. ARCIDIACONO: Well - - -



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JUDGE RIVERA: - - - a way to harmonize it?



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MR. ARCIDIACONO: 33.13 is a confidentiality



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provision as the Third Department pointed out, and they



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also - - -



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JUDGE RIVERA: But it also - - - it does say



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they're - - - they're not public records, right? So it



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then goes on to explain - - -



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MR. ARCIDIACONO: As far as it goes.



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JUDGE RIVERA: - - - to the facility what to do



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with the fact that it is the repository of records that are



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not public?



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MR. ARCIDIACONO: Well, if - - - if you look at



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what the Third Department said, they noted that 9.31 and



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15.31 specifically are sealing provisions and that



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therefore those provision would really be meaningless if,



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in fact, 33.13 required sealing.



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And - - - and so - - -



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JUDGE RIVERA: So what's the point of adding in



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that they're not public doc - - - why would the legislature



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include that? What's the purpose?



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MR. ARCIDIACONO: In 33.13?



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JUDGE RIVERA: Correct.



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MR. ARCIDIACONO: Well, because clearly that



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relates to civil proceedings. These cases - - -



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JUDGE RIVERA: But these are civil - - -



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MR. ARCIDIACONO: - - - the 330.20 - - -



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JUDGE RIVERA: - - - proceedings?



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MR. ARCIDIACONO: Well, they're - - - they



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actually have been called quasi-civil, because the



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defendant is still subject to a criminal statute, 330.20.



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Even in track-two and track-three cases that was



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mentioned a moment ago - - -



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JUDGE RIVERA : Um-hum.



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MR. ARCIDIACONO: - - - I believe as you pointed



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out, under 330.20.7 - - -



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JUDGE RIVERA: 7.



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MR. ARCIDIACONO: - - - that if the defendants



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are found track two or three, they're governed by the



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Mental Hygiene Law. However, they are still governed by



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330.20. They do come up for review.



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JUDGE RIVERA: Does that mean they - - - they - -



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- somehow their rights are diminished, given that 330.20.17



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says they have the protections of the Mental Hygiene Law?



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MR. ARCIDIACONO: They're diminished to the



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extent - - -



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JUDGE RIVERA: Let's assume it's a quasi - - -



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MR. ARCIDIACONO: Yeah.



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JUDGE RIVERA: - - - as you say, quasi proceeding



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MR. ARCIDIACONO: Yeah, I think - - -



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JUDGE RIVERA: - - - quasi-civil proceeding.



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MR. ARCIDIACONO: - - - I think they are limited,



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at least, to the extent that any other criminal defendant



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has their rights somewhat abridged because of the fact that



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they took a not-responsible plea.



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Under - - - under track two and - - -



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JUDGE RIVERA: But then - - - but then the court



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decides that they really do have - - - let's stay with a



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track-two, track-three - - -



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MR. ARCIDIACONO: Um-hum.



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JUDGE RIVERA: - - - for one moment. They really



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do have the mental defect, mental disease, mental illness,



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whatever the specific language is.



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It seems in the Mental Hygiene Law, that the



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legislature's policy decision is to protect that very type



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of personal information about one's medical status and how



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in - - - in these cases it might be relevant to their legal



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status.



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MR. ARCIDIACONO: Except that as Judge Fahey



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pointed out - - -



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JUDGE RIVERA : Um-hum.



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MR. ARCIDIACONO: - - - early on - - -



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JUDGE RIVERA: Yeah.



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MR. ARCIDIACONO: - - - these cases are somewhat



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different in that they begin with a criminal prosecution,



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which is public; there are usually hearings, which are



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public. There - - -



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JUDGE RIVERA: They're talking about hearings



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post-that, once - - - once they're now in the mental



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hygiene - - - under the Mental Hygiene Law rubric.



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MR. ARCIDIACONO: Yes. And - - -



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JUDGE RIVERA: They're patients now.



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MR. ARCIDIACONO: - - - and for - - - certainly



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for a track-three, such as this defendant, in most courts,



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those subsequent proceedings are public. Orange County's



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Supreme Court meets every Wednesday. Those proceedings are



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by and large public proceedings, where a defendant, if he



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is put up for retention, for example, is subject to a



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hearing that's done in open court. Doctors come in from



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the hospital - - - possibly their own doctor - - - and they



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testify publicly about what the defendant's current



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condition is.



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JUDGE RIVERA: But - - - but - - - but it's



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sealed, yeah, the - - - the documents?



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MR. ARCIDIACONO: No, it's not.



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JUDGE RIVERA: The records are not sealed?



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MR. ARCIDIACONO: To my knowledge, they are not



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sealed, Judge. And - - - and as we're pointing out, there



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really is nothing in 330.20 that requires sealing. And I



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don't think you would expect to find that, because the



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whole point of 330.20 was to enhance public safety.



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And if you look at what was going on around the



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time of the Insanity Defense Reform Act of 1980, you had



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the Adam Berwid case; you had the Albert Fentress case.



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These were - - -



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JUDGE FAHEY: Well, it really was about President



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Reagan, eventually, wasn't it?



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MR. ARCIDIACONO: Well - - -



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JUDGE FAHEY: Changes to that - - -



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MR. ARCIDIACONO: Hinckley as well - - - the



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Hinckley shooting. But the point was, for the enhancement



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of public safety.



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And so there really is no sealing provision in



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330.20. Now, what is troubling is that under MHL's



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argument, if an SHTA, or a staff member, or a nurse, or a



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doctor puts a note in the clinical record, that it would -



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- - would refer to say what the defendant was charged with



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or what the - - - the court's original conclusion about his



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- - - his current condition was, that suddenly that



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requires sealing of court records. And that clearly can't



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be, because it's the court that's responsible for thier own



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records. It's the court that should do the sealing, if - -



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- if there is to be any sealing. And under 330.20 what is



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JUDGE RIVERA: What - - - what court record would



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not reveal the patient's identity or something about their



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medical condition?



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MR. ARCIDIACONO: Well, that's - - - really,



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that's part of the problem. Because these defendants are



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here from a criminal case, very often acts of violence,



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very often crimes that were notorious, that were publicly



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reported, and - - - and to think now that simply because -



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JUDGE RIVERA: And then they were found to have a



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mental defect or disease - - -



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MR. ARCIDIACONO: Correct.



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JUDGE RIVERA: - - - so now they're patients. So



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the question is what, then, does the law provide for them?



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And you may be correct - - -



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MR. ARCIDIACONO: This court - - -



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JUDGE RIVERA: - - - the court may decide you



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don't get to seal - - -



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MR. ARCIDIACONO: Well, this court has - - -



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JUDGE RIVERA: - - - it.



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MR. ARCIDIACONO: - - - decided - - - this court



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has decided that a 330.20 insanity acquittee has not the



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same rights as a civil defendant. The United States



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Supreme Court has decided the - - -



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JUDGE RIVERA: Well, with respect to the - - -



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MR. ARCIDIACONO: - - - the same thing.



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JUDGE RIVERA: - - - procedure. I understand



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that. But here we're talking about the - - - the privacy



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interest. And it - - - it's clear the legislature thinks



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that they should be treated pursuant to the Mental Hygiene



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Law, that those - - -



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MR. ARCIDIACONO: Well - - -



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JUDGE RIVERA: - - - guarantees apply.



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MR. ARCIDIACONO: - - - with limitation - - - I



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think the - - - the wording out of 330.20.17 is "subject to



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the" - - -



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JUDGE RIVERA: Right. All I'm saying is - - -



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MR. ARCIDIACONO: - - - "limitations and



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provisions."



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JUDGE RIVERA: - - - there's nothing express in



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330.20 that says they don't get sealed.



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MR. ARCIDIACONO: No, but there's nothing - - -



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JUDGE RIVERA: So there's no way to harmonize.



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MR. ARCIDIACONO: - - - express - - - there's



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nothing - - -



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JUDGE RIVERA: But there is the cross-reference



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and - - - and the specific language that refers back to the



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Mental Hygiene Law. And the Mental Hygiene Law, in that



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way is very - - -



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MR. ARCIDIACONO: Sure.



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JUDGE RIVERA: - - - clear.



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MR. ARCIDIACONO: But I think you also have to



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look at the distinction between a civil and a criminal



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patient. A civil patient typically hasn't committed a



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crime, typically they don't place their own mental



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condition in issue. Very often, it's the police, it's - -



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- it's family member, someone who's - - - who's called the



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authorities and said this person needs help in a



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psychiatric facility.



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JUDGE RIVERA: I understand your - - -



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MR. ARCIDIACONO: So - - -



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JUDGE RIVERA: - - - argument. But the - - - the



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- - - yes, of course. This is an individual who was found



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guilty of a crime. But then there is a court and - - - and



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the legislature has recognized that if that person is not



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culpable in the same way as someone else, given the nature



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of their mental disability, then we give them a different



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treatment. At that point, they are now a patient.



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MR. ARCIDIACONO: Well, and I think - - -



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JUDGE RIVERA: That's all I'm pointing out to



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you. I'm not disagreeing with you about the first part.



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JUDGE GARCIA: Counsel, could we get on to a



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different issue now?



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MR. ARCIDIACONO: Sure.



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JUDGE GARCIA: Going back to something the Chief



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Judge said, if we were to disagree with the sealing - - -



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the additional sealing done by the Appellate Division, is



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there a way for us to reach that on this appeal? If we



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think that wasn't necessary, for example?



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MR. ARCIDIACONO: If you think that - - -



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JUDGE GARCIA: The redaction - - - the



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redactions, I'm sorry.



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MR. ARCIDIACONO: - - - the redactions were not



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necessary?



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JUDGE GARCIA: Yeah.



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MR. ARCIDIACONO: In other words, do we have



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standing? Our position would be yes, because really you



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have to decide what the limits of confidentiality are. And



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one way or another, it's going to affect whether that's



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through redaction or no redactions are needed. So I think



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in effect - - -



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JUDGE STEIN: Well, but that - - -



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MR. ARCIDIACONO: - - - you're going to reach



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that anyway.



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JUDGE STEIN: - - - but it's either reviewable or



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it isn't, in this particular case. I mean, ultimately - -



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MR. ARCIDIACONO: Well, it was certainly - - -



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JUDGE STEIN: - - - you may be right, but that



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doesn't answer the question of whether we can reach it



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here.



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MR. ARCIDIACONO: I think, first of all, it was



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adverse to the - - - to the defendant, because they wanted



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full redaction, and the court only gave partial redaction.



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So certainly I think you can reach it under those terms.



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If - - - if I could just switch gears again?



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There is another issue here, and that is the presumption of



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openness in all court proceedings. And the fact that it's



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not just the defendant who has the right to that open



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proceeding, but the public has that right to the open



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proceeding as well. And I won't go through it here, but if



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- - - in our brief we lay out some of what Dr. Fraser said



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in her application about defendant, having to do with his -



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- - I'm sorry, I see my time is up.



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CHIEF JUDGE DIFIORE: You may continue.



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MR. ARCIDIACONO: - - - having to do with how he



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relates to women. That goes to safety. It goes to public



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safety. And certainly if we're reviewing his case, it



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should be in a public proceeding, the way it is through



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most of the state now. And it - - - and the public should



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be able to - - - to gauge whether a defendant is being



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treated properly under 330.20, whether they're being



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released precipitously.



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JUDGE GARCIA: If there is a - - - let's say, a



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case where there is a victim of a violent crime, and the



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records are sealed - - - according to what your - - - your



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opponent is asking, is there a separate provision of law



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that provides for notification to the victim of the



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proceedings that take place after the initial criminal



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action?



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MR. ARCIDIACONO: I - - - my understanding, I - -



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- I think we would be limited, probably under 330.20,



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subdivision, I think it's 22, that would provide for a



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special order of conditions which would actually serve very



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much like an - - - an order of protection.



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So I - - - I suppose you could do that, but that



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would really kind of be - - -



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JUDGE GARCIA: But there's not a standard - - -



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MR. ARCIDIACONO: - - - after the fact.



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JUDGE GARCIA: - - - there's not a standard



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provision in the law that provides for notification to



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victims in this circumstance?



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MR. ARCIDIACONO: In this circumstance, I don't



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think so.



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CHIEF JUDGE DIFIORE: Thank you, counsel.



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MR. ARCIDIACONO: Thank you very much.



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CHIEF JUDGE DIFIORE: Counsel?



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MR. STACK: Thank you. Judge, if I could begin



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by answering your question. There - - - there is a



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specific provision. CPL 330.20.18 provides - - - this is



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with respect to track-one patients - - - it provides that



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notwithstanding any other provision of law, no person



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confined by reason of a commitment order, shall be either



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discharged or released unless the Commis - - - Commissioner



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shall deliver written notice to the following people.



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One is the District Attorney, (b) is the police



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department having jurisdiction in the area to which the



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defendant is discharged or released; and (c) is any other



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person the court may designate. And certainly that would



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include or could include a victim or the victim's family.



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There's a separate provis - - - provision - - -



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JUDGE GARCIA: That's a notice of a result?



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MR. STACK: That's - - - that's - - -



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JUDGE GARCIA: That's a notice of a result?



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MR. STACK: - - - no, it's - - - it's a notice of



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an application to either discharge or release. And these



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people are given an opportunity to be heard, not just



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notice of a result.



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JUDGE GARCIA: And if they come in and they're



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heard, is that sealed, under your rule?



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MR. STACK: It - - - it would be - - - it would



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be sealed to the public.



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JUDGE GARCIA: Right.



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MR. STACK: But their access to the records



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wouldn't be - - -



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JUDGE GARCIA: So they could have access to the



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entire court record, the victims?



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MR. STACK: I would say that their notice



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wouldn't be sufficient unless they had access to - - - and



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they - - - and they can get access - - -



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JUDGE STEIN: Why - - - why wouldn't it just be



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limited to notice that there was an application without any



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of the records?



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MR. STACK: Well, that would hinder their



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opportunity to be heard, if they wanted to object to the



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application.



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JUDGE STEIN: Where does it say that that's an



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exception?



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MR. STACK: 33.13(c) would provide them access to



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perhaps the entire clinical file, if - - - if that were



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relevant. So they could make a separate application to the



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same court for full access to the clinical record. And



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then they could sufficiently be heard in any application



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for discharge or release.



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Also, there's the - - - this section below that.



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Sub (19) provides that any victim or other - - - other



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appropriate people be entitled to notice of any escape.



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JUDGE GARCIA: But doesn't that sort - - - in



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some way reinforce - - - which has been a back-and-forth



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for a while in this argument - - - that this still retains



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the elements - - - some elements of a criminal prosecution?



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There is still some interest here in terms of a victim, a



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crime, a disposition in a criminal case, that now is



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continuing, especially in the sense that you're requiring



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notice and an opportunity for a victim of a crime to come



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into this type of hearing.



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Doesn't that somewhat emphasize the fact that



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this is very different from your ordinary civil commitment



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proceeding?



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MR. STACK: I would agree with that, Your Honor,



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for certain individuals. For those individuals, not for



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the public at large. The public at large does not have an



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opportunity to be heard in the context of a release or



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discharge application. The public at large, to the extent



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that they're not represented by the People or the - - - the



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local municipal law enforcement, they don't have a separate



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right to be heard or a separate right.



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To be clear, what the People are arguing for here



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JUDGE STEIN: Well, you - - -



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MR. STACK: - - - open records that - - -



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JUDGE STEIN: - - - we're not talking about the



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right to be heard. We're talking about the right - - -



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MR. STACK: To protection.



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JUDGE STEIN: - - - to the records.



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MR. STACK: And I - - -



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JUDGE STEIN: To the records.



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MR. STACK: To the clin - - -



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JUDGE STEIN: And I think - - - if I - - - if I



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understand Judge Garcia's question, is it's a more general



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question. We're really looking at not a purely civil



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proceeding here. We're looking at, at least, a quasi-



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criminal proceeding, because these things suggest that it's



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more than just a civil proceeding.



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MR. STACK: Well, I think with - - - with respect



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to track-three - - - two and track-three patients, which I



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- - - I also wanted to clarify, James Q. is a track-one



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patient. He's not a track-three.



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And also to the extent that there are proceedings



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involving track-two and track-three patients that are open



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to the public, that's a misapplication of law. Those



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proceedings should be sealed pursuant to CPL 330.20.7,



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which states that those proceedings are specifically



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governed by Articles 9 and Articles 15 of the Mental



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Hygiene Law. And there's no limitation in that section or



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anywhere else in the criminal procedures law that limits



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Section 9.31 and 15.31, as far as their seal provis - - -



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sealing provisions go.



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CHIEF JUDGE DIFIORE: Thank you, counsel.



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MR. STACK: Thank you.



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(Court is adjourned)



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I, Penina Wolicki, certify that the foregoing



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Q. v. Suffolk County District Attorney, No. 3 was prepared



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Penina Wilch



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Agency Name: eScribers



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Address of Agency: 352 Seventh Avenue



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New York, NY 10001



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Date: January 14, 2019

