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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF JORGE LINARES,

Appellant,

-against-

No. 124

ANDREA W. EVANS,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
September 08, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

ALFRED O'CONNOR, ESQ.  
NEW YORK STATE DEFENDERS ASSOCIATION  
Attorneys for Appellant  
194 Washington Avenue  
Suite 500  
Albany, NY 12210

KATE H. NEPVEU, ASG  
ATTORNEY GENERAL OF THE STATE OF NEW YORK  
Attorneys for Respondent  
The Capitol  
Albany, NY 12224

Penina Wolicki  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 124, Matter of  
2 Linares.

3 Counselor, do you want any rebuttal time?

4 MR. O'CONNOR: Two minutes, please.

5 CHIEF JUDGE LIPPMAN: Yeah.

6 MR. O'CONNOR: Alfred O'Connor for Mr.  
7 Linares.

8 The Board of Parole authorizes its members  
9 to use the COMPAS risk and needs assessment  
10 instrument indiscriminately, in any manner they wish.  
11 Board members may give COMPAS no weight for - - -

12 CHIEF JUDGE LIPPMAN: Counsel, what do you  
13 want to do within this proceeding? You - - - you  
14 want to challenge the - - - the validity of the - - -  
15 what was passed, in contretemps to what the  
16 legislature directed? Is that the real purpose of  
17 pursuing the proceeding?

18 MR. O'CONNOR: What - - - what we'd - - -  
19 what we'd like the court to do is to recognize that  
20 the Board has not yet complied with the language - -  
21 -

22 CHIEF JUDGE LIPPMAN: Right. So you - - -

23 MR. O'CONNOR: - - - of the - - -

24 CHIEF JUDGE LIPPMAN: - - - want to  
25 basically challenge what they've done as inadequate.

1 MR. O'CONNOR: That's right. That's right.

2 JUDGE PIGOTT: How do we know that? I  
3 mean, wouldn't it have been better if you'd gone and  
4 gotten a - - - had his parole hearing and maybe it  
5 would have been granted and he wouldn't be here?

6 MR. O'CONNOR: Well - - -

7 JUDGE PIGOTT: Or maybe it would have been  
8 denied - - -

9 MR. O'CONNOR: - - - that's always going to  
10 be the circumstance that somebody - - -

11 JUDGE PIGOTT: - - - maybe it would have  
12 been denied and he could say see, here - - - here are  
13 the COMPAS rules, and they ignored them. They went  
14 on the evidence memo, and that's wrong. Or they did  
15 the COMPAS and it was - - - it was incomplete or it  
16 was inadequate. But how do we now decide that the  
17 way they're going to apply it is - - - is wrong?

18 MR. O'CONNOR: Well, because we know what  
19 the rule now - - - the - - - the - - - what the rule  
20 is. So there's no disagreement - - -

21 JUDGE FAHEY: No, no, no. How does it fit  
22 within this case. I can understand the issue is an  
23 important issue.

24 MR. O'CONNOR: Right.

25 JUDGE FAHEY: How does it fit with this

1 case and these facts when the - - - when - - - when  
2 the COMPAS rules weren't applied in this  
3 circumstance?

4 MR. O'CONNOR: Well, he challenged this in  
5 2011, at a time when the - - - the statute was - - -

6 JUDGE FAHEY: I know. I understand it was  
7 a convoluted history. Yeah.

8 MR. O'CONNOR: - - - in effect. And so the  
9 Board's position hasn't changed. And what they have  
10 said is from day one - - - or four days after this  
11 law went into effect, we've had rules in effect. And  
12 those rules require the Board to use the instrument.

13 JUDGE PIGOTT: Right.

14 MR. O'CONNOR: Whatever that may mean. And  
15 so here's what - - - and there's no disagreement - -  
16 - here's what that means. They may - - -

17 JUDGE ABDUS-SALAAM: I understood, counsel  
18 - - -

19 MR. O'CONNOR: - - - use it any way they  
20 wish.

21 JUDGE ABDUS-SALAAM: - - - I - - - excuse  
22 me, counsel. I understood that after the Third  
23 Department's decision in Garfield, the Board said it  
24 would - - - it would comply with Garfield?

25 MR. O'CONNOR: Well, what does - - - what

1 does that mean? The - - - the Third - - - the Third  
2 Department said in Garfield, to - - - you must  
3 consider the - - - the risk assessment instrument.  
4 The question is, there were supposed to be rules in  
5 place as to how they would consider it. And what  
6 they have done - - - the rules that have been in  
7 effect from - - -

8 JUDGE ABDUS-SALAAM: What - - - what are  
9 those rules that you - - - as you see it? What - - -  
10 what does the statute require those rules to be?

11 MR. O'CONNOR: The statute requires that  
12 the Board establish written procedures that  
13 incorporate COMPAS into the decision-making process.  
14 What - - - what that means is it's not discretionary  
15 - - -

16 CHIEF JUDGE LIPPMAN: Your view is it's - -  
17 - it's more than an additional factor.

18 MR. O'CONNOR: That's right. It's not - -  
19 -

20 JUDGE PIGOTT: Have they done it?

21 MR. O'CONNOR: - - - a discretionary  
22 process.

23 JUDGE PIGOTT: Have they done it?

24 MR. O'CONNOR: They have not.

25 JUDGE PIGOTT: Not on any single prisoner

1 that's come before the Board since 2011?

2 MR. O'CONNOR: What they say - - -

3 JUDGE PIGOTT: No, is - - - is that a yes  
4 or a no?

5 MR. O'CONNOR: They have - - - they do not  
6 give reasons when they override COMPAS - - -

7 JUDGE PIGOTT: Have they used COMPAS?

8 MR. O'CONNOR: Not in the way that the  
9 statute requires.

10 JUDGE PIGOTT: Yes, but?

11 MR. O'CONNOR: Well, if - - - if what - - -  
12 Judge Pigott, if - - - if using it means I've read it  
13 and I give it no - - - I dismiss it out of hand - - -

14 JUDGE PIGOTT: We don't know.

15 MR. O'CONNOR: - - - then yes, they have.

16 JUDGE PIGOTT: The - - - we don't know. In  
17 other words, you know, maybe they use it correctly.  
18 We don't know. I mean, the - - -

19 MR. O'CONNOR: Well, that's what the  
20 procedures are supposed to provide for.

21 JUDGE PIGOTT: Why don't you - - - why  
22 doesn't he - - - why don't you go, say by the way - -  
23 - because you've got a very articulate client here  
24 saying COMPAS means that you've got to do X, Y, and  
25 Z.

1 MR. O'CONNOR: He said that already.

2 JUDGE PIGOTT: If they do - - - well, no.  
3 Because he hasn't gone back. He sits in his cell and  
4 says I want the Court of Appeals to tell them they  
5 got to do something for me before I go.

6 MR. O'CONNOR: Here's the problem, Judge.  
7 There - - - the rules that they have enacted, either  
8 - - - whether the evidence memo or this regulation -  
9 - - doesn't require them to state any reasons. And  
10 that is their position. They're not required to  
11 state reasons if they override - - -

12 JUDGE RIVERA: I thought the rule is that  
13 they have to give reasons and detail why they're not  
14 granting parole?

15 MR. O'CONNOR: Yes.

16 JUDGE RIVERA: Do I misunderstand the  
17 rules?

18 MR. O'CONNOR: But that's a separate  
19 question, all right?

20 JUDGE RIVERA: How is it a separate  
21 question?

22 MR. O'CONNOR: Well, if you say that the  
23 reason we're denying parole is you - - - we - - - we  
24 have deci - - - we have concluded that you will not  
25 live and remain at liberty without violating the law,

1           that doesn't tell anyone as to why the co - - - the  
2           Board has rejected a COMPAS result that reflects a  
3           low risk to reoffend.

4                    JUDGE RIVERA: Does - - - is your position  
5           that the Board has to adopt COMPAS, and if it  
6           doesn't, it has to explain why? That the default is  
7           always COMPAS?

8                    MR. O'CONNOR: No, we're not - - - the  
9           Board has enormous discretion. The legislature gave  
10          the Board discretion to figure out how they were  
11          going to do that. And there are lots of different  
12          ways that you can meaningfully incorporate these two  
13          methodologies for determining risk.

14                   JUDGE RIVERA: And they say they make it a  
15          factor. Why is that not - - -

16                    MR. O'CONNOR: Be - - -

17                    JUDGE RIVERA: - - - in compliance with the  
18          statutory - - -

19                    MR. O'CONNOR: - - - well, by - - -

20                    JUDGE RIVERA: - - - mandate?

21                    MR. O'CONNOR: - - - by making it a mere  
22          factor, under 259-i, it authorizes Board members to  
23          dismiss those results out of hand for no reason.

24                    JUDGE RIVERA: It says that if each  
25          individual Board member - - -

1 MR. O'CONNOR: Yes.

2 JUDGE RIVERA: - - - determines for  
3 themselves - - -

4 MR. O'CONNOR: That's their position.

5 JUDGE RIVERA: - - - the value and weight  
6 of COMPAS - - -

7 MR. O'CONNOR: Right.

8 JUDGE RIVERA: - - - as opposed to a - - -  
9 a guideline that says this is how all of you must  
10 treat - - -

11 MR. O'CONNOR: And all - - -

12 JUDGE RIVERA: - - - this number, this  
13 recommendation of the - - -

14 MR. O'CONNOR: That the purpose of this  
15 legislation was to make sure that - - - there are  
16 fourteen Board members - - - that they're all using  
17 the same playbook. They're not making up their own  
18 minds - - -

19 CHIEF JUDGE LIPPMAN: Counsel, how - - -  
20 assume you're right. Assume that - - - that this  
21 doesn't comply with the legislative mandate. How do  
22 you - - - is this an exception to the mootness  
23 doctrine?

24 MR. O'CONNOR: Well - - -

25 CHIEF JUDGE LIPPMAN: How do - - - how do

1           you get there - - - how do you get that we should  
2           consider, in the context of this particular  
3           proceeding, that issue? Basically you want to  
4           challenge these guidelines that they've issued as  
5           being not compliant with the statute.

6                     MR. O'CONNOR: Right.

7                     CHIEF JUDGE LIPPMAN: How do you get there?

8                     MR. O'CONNOR: Well, first off, as far as  
9           mootness, that assumes the answer to this. If  
10          they're in compliance with the 2011 statute - - -

11                    CHIEF JUDGE LIPPMAN: Assuming they're not  
12          - - -

13                    MR. O'CONNOR: - - - we're just wrong.  
14          That's all.

15                    CHIEF JUDGE LIPPMAN: - - - assume they're  
16          not in compliance.

17                    MR. O'CONNOR: All right.

18                    CHIEF JUDGE LIPPMAN: Why is this something  
19          that we can consider?

20                    MR. O'CONNOR: Because - - -

21                    CHIEF JUDGE LIPPMAN: Jurisdictionally, how  
22          do we consider it?

23                    MR. O'CONNOR: - - - because he's before  
24          the court with, and he's aggrieved because the  
25          Appellate Division said consider COMPAS, but there's

1 a rule that says - - -

2 CHIEF JUDGE LIPPMAN: Is it a waste - - -

3 MR. O'CONNOR: - - - you really don't have  
4 to consider - - -

5 CHIEF JUDGE LIPPMAN: I - - - I guess what  
6 I'm leading you towards is, is - - - is it a waste of  
7 time to make him go through the hearing and then come  
8 back?

9 MR. O'CONNOR: Yes, it is. Yes. Well,  
10 especially when we're not going to get any answers  
11 from them as to why - - - if they - - - if they do  
12 deny it, why they're - - -

13 CHIEF JUDGE LIPPMAN: They're not going to  
14 do it the way you - - - you think they should - - -

15 MR. O'CONNOR: Right.

16 CHIEF JUDGE LIPPMAN: - - - or let's assume  
17 they should.

18 JUDGE FAHEY: Could - - - could I ask what  
19 your - - -

20 MR. O'CONNOR: Yes.

21 JUDGE FAHEY: - - - in the litigation  
22 overall, as I understand it, you want to get to the  
23 merits of 8002, the July 2014 rule, right?

24 MR. O'CONNOR: That's right.

25 JUDGE FAHEY: That's what you want to do

1 here?

2 MR. O'CONNOR: Yes.

3 JUDGE FAHEY: That's your goal. Sure.

4 MR. O'CONNOR: That's the latest iteration  
5 of the rule.

6 JUDGE FAHEY: Right.

7 MR. O'CONNOR: Yes.

8 JUDGE FAHEY: And you want to - - - and so  
9 our question, I guess, is how can we address that  
10 unless we have a case that's been decided that based  
11 - - - or not decided based upon that regulation?

12 MR. O'CONNOR: Well, because the question  
13 is, he is going to a hearing, and the question is  
14 what are the rules that apply to the consideration of  
15 COMPAS at this hearing. And - - -

16 JUDGE FAHEY: Um-hum.

17 MR. O'CONNOR: - - - and the parties agree  
18 on what those rules are. We say those rules are  
19 insufficient. He's entitled to a hearing - - - the  
20 one that is - - - the de novo or the - - - or the  
21 ordinary ones that he's due, at this point, that  
22 complies with - - -

23 JUDGE RIVERA: So - - - so you're - - -

24 MR. O'CONNOR: - - - the 2011 legislation.

25 JUDGE RIVERA: - - - you're - - - am I

1 understanding then that your argument is because  
2 yours is a facial challenge - - -

3 MR. O'CONNOR: Yes.

4 JUDGE RIVERA: - - - not an as-applied  
5 challenge - - -

6 MR. O'CONNOR: That's right.

7 JUDGE RIVERA: - - - it's not as - - - if  
8 the rule on its face looked fine but as it's applied  
9 to him it is inappropriate or violates the  
10 Constitution or his rights otherwise?

11 MR. O'CONNOR: That's right. What they  
12 have done does not comply with the words - - -

13 JUDGE RIVERA: It could very well be that  
14 if he went back to the hearing, that they applied it  
15 as you argue they should apply it, even if the rule  
16 would not lend itself to that reading, because they  
17 have great discretion.

18 MR. O'CONNOR: Well, if they follow - - -

19 JUDGE RIVERA: The likelihood, you may  
20 think, is zero - - -

21 MR. O'CONNOR: I don't - - -

22 JUDGE RIVERA: - - - but - - -

23 MR. O'CONNOR: - - - I don't think that's  
24 likely.

25 JUDGE RIVERA: - - - but you got my point.

1                   MR. O'CONNOR: But - - - but if they follow  
2 the rule, they would not provide any reasons, because  
3 they're not required to - - -

4                   CHIEF JUDGE LIPPMAN: Okay, counselor.

5                   MR. O'CONNOR: - - - and we'd be right back  
6 where we started.

7                   JUDGE PIGOTT: Just one more - - -

8                   CHIEF JUDGE LIPPMAN: Go ahead, Judge  
9 Pigott.

10                  MR. O'CONNOR: Yeah.

11                  JUDGE PIGOTT: So what - - - what - - -  
12 what does our order look like? What do we say?

13                  MR. O'CONNOR: What you say is that - - -  
14 that the regulation does not comply with the 2011  
15 legislation.

16                  JUDGE PIGOTT: We're going to say the legi  
17 - - - the legislature was wrong.

18                  MR. O'CONNOR: No. No, no, no. No. No,  
19 the board has not complied with the literal language  
20 of the 2011 legislation.

21                  JUDGE PIGOTT: You're saying the regulation  
22 is wrong.

23                  MR. O'CONNOR: Try - - - try again. Yes,  
24 try again, because you're not in facial compliance -  
25 - -

1 JUDGE PIGOTT: What are we going to tell  
2 them when we say to try again?

3 MR. O'CONNOR: Minimally, requirement - - -  
4 a minimum requirement. Now you have discretion as to  
5 how you would actually enact - - - comply with the  
6 statute.

7 JUDGE PIGOTT: With COMPAS.

8 MR. O'CONNOR: A minimum requirement would  
9 be that you give reasons when you override it.  
10 That's something - - -

11 JUDGE PIGOTT: Okay, so why wouldn't we, in  
12 this ca - - - why wouldn't your client, in this case,  
13 go back - - - I mean, he - - - he argued before that  
14 259-c hadn't been complied with and - - - and he won.  
15 The Third Department's saying - - -

16 MR. O'CONNOR: I - - -

17 JUDGE PIGOTT: - - - you win. So why  
18 wouldn't he go back and say listen, you've got to  
19 give reasons for this or I'm going to be back in - -  
20 - and by now, I mean, he's been sitting around for a  
21 couple - - - three years now - - -

22 MR. O'CONNOR: Four, now.

23 JUDGE PIGOTT: Four.

24 MR. O'CONNOR: Four.

25 JUDGE PIGOTT: I mean, by now, he would

1 have had his hearing, won or lost, and - - - and  
2 everything would have been ducky or not.

3 MR. O'CONNOR: No, it wouldn't be. Because  
4 if he had gone to a hearing, there would have been -  
5 - - they would have moved to dismiss on the ground of  
6 mootness, because the way the mootness rule is  
7 applied in parole cases, is it doesn't matter. If  
8 you're released it's moot, and we would agree with  
9 that - - - and if you're denied, it's moot. That's  
10 the way the rule is applied.

11 It's unfair in - - -

12 JUDGE PIGOTT: No, he was denied in the - -  
13 - the reason he's here is he was denied, and he went  
14 to the Third Department and he won. And now you  
15 wound up here.

16 MR. O'CONNOR: Well, you know, we can  
17 quibble on this. We don't think he won anything. We  
18 - - - he got the right to - - -

19 JUDGE PIGOTT: I mean, he got an appeal.  
20 He got an appeal. You want to say there's no more  
21 appeals. I mean, if he goes back now, there's no  
22 more appeals. And I think you're wrong. I think he  
23 goes back and they either do what you think has to be  
24 done - - -

25 MR. O'CONNOR: Well, they're not - - -

1                   JUDGE PIGOTT: - - - and you can - - - and  
2 he's gone. Or they're not going to comply. I don't  
3 know how we, as a court, are going to say rewrite  
4 your reg to say A, B, C, and D.

5                   MR. O'CONNOR: We're not asking the court  
6 to do that.

7                   JUDGE PIGOTT: Okay.

8                   MR. O'CONNOR: What we're asking the court  
9 to do is to say that any application of this 2011  
10 legislation requires, as a matter of preserving the  
11 judic - - - judicial review, that there be a  
12 statement of reasons if you override. That is  
13 something that is basic to this process

14                   CHIEF JUDGE LIPPMAN: Okay, counselor.  
15 Thanks, counselor.

16                   Let - - - you'll have your rebuttal. Let's  
17 hear from your adversary.

18                   MS. NEPVEU: Good afternoon, Your Honors.  
19 Kate Nepveu for respondents.

20                   CHIEF JUDGE LIPPMAN: Counsel, why don't we  
21 just get this over with. Why - - - why don't we deal  
22 with this, as your adversary recommends, instead of  
23 saying go back - - - it's clear what they're saying,  
24 and their ad - - - their position is it doesn't  
25 comply with the statute. What prevents us from



1 MS. NEPVEU: Yes.

2 CHIEF JUDGE LIPPMAN: - - - but aren't  
3 there exceptions that this case could fit into?

4 MS. NEPVEU: Potentially, Your Honor. In  
5 addition, what the - - - what the court has already  
6 suggested that this is very premature.

7 There is no decision that's weighed a  
8 COMPAS. There is no way to assess how the Board will  
9 weigh a COMPAS with regard to petitioner or what its  
10 decision would look like if it denies parole.

11 The Board is already required by statute,  
12 and has been since 1977 - - -

13 CHIEF JUDGE LIPPMAN: Yeah, but they're  
14 saying that - - - that what you've done in these most  
15 recent revisions - - -

16 MS. NEPVEU: Um-hum.

17 CHIEF JUDGE LIPPMAN: - - - don't really  
18 comply with the language of the legislation, which  
19 without drawing any finer conclusions, do seem to say  
20 that - - - that this compass and this whole idea is  
21 not just an additional factor, it's what you have to  
22 do, what you have to consider.

23 Assume we thought, for the sake of  
24 argument, that what you've done is not consistent  
25 with the statute and that you really do have to give

1 the reasons if you overrule COMPAS. What I'm saying  
2 to you is, why isn't this an exception to the  
3 mootness doctrine? Just deal with it.

4 MS. NEPVEU: Because it wasn't - - - the  
5 question of the weight of COMPAS or the regulations  
6 wasn't raised. If it's not preserved, because the  
7 regulations didn't exist - - -

8 CHIEF JUDGE LIPPMAN: He's saying it's the  
9 same thing. If it's - - - if it's defective to send  
10 them back is useless.

11 MS. NEPVEU: Your Honor, you asked me why  
12 the court couldn't act - - -

13 CHIEF JUDGE LIPPMAN: Yes.

14 MS. NEPVEU: - - - and the court couldn't  
15 act because it's not preserved. If the court  
16 disagrees with that, the reason it shouldn't act is  
17 because it's incorrect. It's not a correct reading  
18 of the statute.

19 CHIEF JUDGE LIPPMAN: Ah, okay.

20 MS. NEPVEU: So then - - -

21 CHIEF JUDGE LIPPMAN: But assume - - -

22 MS. NEPVEU: Yes.

23 CHIEF JUDGE LIPPMAN: - - - assume he's  
24 right on the reading of the statute.

25 MS. NEPVEU: Again, Your Honor, because

1           it's not preserved. Again, if the court disagrees  
2           with that, the substantive reasons - - -

3                    JUDGE RIVERA: You think he didn't make a -  
4           - - a facial challenge?

5                    MS. NEPVEU: No, Your Honor. What he said  
6           in his petition was I didn't get a COMPAS. The  
7           reason they're not complying - - - they didn't comply  
8           with the statute is I didn't have a COMPAS at my  
9           interview. That's what the petition said.

10                   JUDGE PIGOTT: You said in your - - -

11                   MS. NEPVEU: For more than two years now  
12           the - - -

13                   JUDGE RIVERA: Okay, so let's - - - let's  
14           assume - - - he's nodding no, but we'll hear what he  
15           says on rebuttal.

16                   But let's assume you're correct about that.  
17           Why - - - why doesn't that mean I - - - I am seeking  
18           an assessment under COMPAS that is accurate and in  
19           compliance with the law? And he's saying what - - -  
20           what - - - the regs as you've now passed them, is not  
21           in compliance with the statutory mandate.

22                   MS. NEPVEU: Yes.

23                   JUDGE RIVERA: How is that not preserving  
24           this question.

25                   MS. NEPVEU: Because that is something that

1 can't be assessed without an actual inter - - - de  
2 novo interview.

3 JUDGE RIVERA: Well, no, he says it's a  
4 facial cha - - - he says it's not about the  
5 application, it's about the - - - I mean, eventually  
6 it's about the application to him. But it's a facial  
7 - - - if you just look at the regs and you just look  
8 at the statute, it's obvious on - - - on that plain  
9 reading, is his argument.

10 MS. NEPVEU: Yes, and that's not correct,  
11 Your Honor. And here's why. The regul - - - the  
12 statute says the Board was required to create written  
13 procedures that incorporated risk and needs  
14 guidelines. It didn't say you must use this  
15 particular risk and needs assessment - - -

16 JUDGE RIVERA: No, no, no.

17 MS. NEPVEU: Excuse me.

18 JUDGE RIVERA: I believe it says risks and  
19 needs - - -

20 MS. NEPVEU: Principles.

21 JUDGE RIVERA: - - - principles.

22 MS. NEPVEU: Excuse me.

23 JUDGE RIVERA: Not guidelines.

24 MS. NEPVEU: You're quite right. I  
25 apologize for misspeaking. Yes.

1 Risk - - - use risk and needs principles to  
2 assist in making release decisions. It didn't say  
3 you must use a particular instrument in a particular  
4 way. It left - - -

5 JUDGE RIVERA: That's true. But the Board  
6 chose COMPAS, did it not?

7 MS. NEPVEU: Yes.

8 JUDGE RIVERA: Okay.

9 MS. NEPVEU: But it - - -

10 JUDGE RIVERA: So that's the instrument  
11 you're stuck with.

12 MS. NEPVEU: No - - - I'm not - - - I'm not  
13 disputing that - - -

14 JUDGE RIVERA: But you changed your mind.

15 MS. NEPVEU: - - - Your Honor. What I'm  
16 saying is that the legislature didn't direct the  
17 Board to use COMPAS or any other instrument - - - its  
18 chosen instrument in a particular way. It said  
19 "assist in making a decision" - - - "release  
20 decisions".

21 JUDGE ABDUS-SALAAM: In other words,  
22 counsel, what your adversary is saying is, the Board  
23 should use some kind of checklist; that the written  
24 procedures should be some sort of checklist that the  
25 Board has to use. And if the Board is going to

1 deviate from that checklist, it has to give reasons  
2 for that.

3 Is that your understanding of - - - of what  
4 he's - - - your adversary is asking?

5 MS. NEPVEU: I - - - Your Honor, to my  
6 understanding, that - - - they're arguing that COMPAS  
7 should be given more weight, because it's - - - but  
8 that's not what the statute says.

9 JUDGE PIGOTT: See, that's the problem.  
10 And - - - and in your letter to the Appellate  
11 Division you said, "In the court below and in its  
12 brief to this court, the petitioner argued that the  
13 Parole Board's determination was unlawful, because  
14 the Board did not utilize the COMPAS risk and needs  
15 assessment in making its determination. In light of  
16 the court's decision in Garfield, the Board will not  
17 defend this appeal."

18 Now you're saying, well maybe we'll use  
19 COMPAS, maybe we won't - - -

20 MS. NEPVEU: No, Your Honor.

21 JUDGE PIGOTT: - - - you're - - - wait a  
22 minute. And - - - and they're saying, that's the  
23 problem. We don't trust these people, because the  
24 last time was the Evans memorandum, which was really  
25 a back - - - backhand reply to the court saying

1           you've got to spend some time on these things, and  
2           not just rubber-stamp everybody back to jail.

3                   MS. NEPVEU:   Your Honor, we're not saying  
4           that we will - - - that we might not - - - that the  
5           Board might not consider COMPAS.  The regulations - -  
6           -

7                   JUDGE PIGOTT:  I'm not saying "might not  
8           consider", I'm saying "will use".  And you're saying  
9           we're not going to say that.  We are not going to say  
10          we're going to use COMPAS, and - - - and you can't  
11          tell us we are - - - we - - - we must.

12                   MS. NEPVEU:  Your Honor, I'm - - - I'm  
13          sorry.  The regulations say the Board must consider  
14          COMPAS.  I'm not entirely sure how I've given the  
15          court that impre - - - impression that that Board  
16          won't or might not.  That is not the case.

17                   The Board is required by its own  
18          regulations to consider COMPAS.  And by statute - - -

19                   CHIEF JUDGE LIPPMAN:  As an additional  
20          factor?  As an additional factor, or along the lines  
21          that Judge Abdus-Salaam indicated; you have a  
22          checklist and if you don't follow it?

23                   MS. NEPVEU:  You have a legis - - - you  
24          have a list of factors that the legislature has  
25          required the Board to consider.  Yes.

1 CHIEF JUDGE LIPPMAN: But isn't that the  
2 point that they're saying you must consider this,  
3 that, and the other thing. And they're saying,  
4 that's not what you did.

5 MS. NEPVEU: Well, first - - -

6 CHIEF JUDGE LIPPMAN: That you're doing it  
7 as kind of an additional factor, but it's not - - -  
8 it doesn't comply with the clear import of the  
9 statute, is what they're saying.

10 MS. NEPVEU: Right. And why that's not  
11 correct is the legislature said you use risk and  
12 needs principles to assist in decision making. But  
13 it didn't change the substantive standards that had  
14 to be met before parole was granted.

15 JUDGE RIVERA: Actually, that's not what it  
16 says. The statute says: "Establish written  
17 procedure for its use in making parole decisions as  
18 required by law. Such written procedures shall  
19 incorporate risk and needs principles to measure the  
20 rehabilitation of persons appearing before the Board,  
21 the likelihood of success of such persons upon  
22 release, and assist members of the State Board of  
23 Parole in determining which inmates may be released  
24 to parole supervision."

25 If it meant added as a laundry list of all

1 the other factors, like we have in the other statute,  
2 it would have used that word. But it didn't. It  
3 used "principles". It's connecting it directly to  
4 measuring rehabilitation and the likelihood of  
5 success upon release.

6 MS. NEPVEU: We don't dispute that COMPAS  
7 is relevant to those. But those aren't the only  
8 questions the Board has to consider when it considers  
9 whether to grant parole.

10 JUDGE RIVERA: Correct.

11 MS. NEPVEU: It has to consider whether  
12 release would deprecate the seriousness of the crime  
13 - - - and I admit, I'm using these - - - these in a  
14 short form of the statutory language - - -

15 JUDGE RIVERA: Right, right.

16 MS. NEPVEU: - - - for my time here - - -  
17 and whether it's compatible with the welfare of  
18 society.

19 JUDGE PIGOTT: I think - - - I - - - what -  
20 - - you're making me nervous here. Because - - -

21 MS. NEPVEU: I certainly don't want to do  
22 that, Your Honor. What's your concern?

23 JUDGE PIGOTT: You read - - - you read  
24 enough of those parole denials, and it's almost like,  
25 you know, they're rubber stamped. And I understand

1           there's a lot of people that at the first time up,  
2           you know, it almost could be, I mean, due to the  
3           heinousness of the crime, or you know, any number of  
4           factors.

5                         But what the - - - what the legislature's  
6           concerned about and what the courts seem to be saying  
7           is, stop that. I mean, if you're going to do  
8           something, if you're going to tell somebody they've  
9           got to be in jail for an awful lot longer, spend some  
10          time. And - - - and it doesn't look like time is  
11          being spent. And - - - and even if it's a little bit  
12          of time, explain what's going - - - what - - - what  
13          worries me is that you're going to go back and say  
14          Court of Appeals says we don't have to do this  
15          anymore, we can just say - - - and we considered  
16          COMPAS and we're denying your - - - your application.

17                        MS. NEPVEU: Your Honor, the statute, since  
18           its inception, has required that reasons for denial  
19           be given in detail and not in conclusory - - -

20                        JUDGE PIGOTT: I'm sorry, I didn't hear  
21           you.

22                        MS. NEPVEU: I'm sorry. The statute, since  
23           1977, has required that reasons for denial be given  
24           in detail and not - - -

25                        JUDGE PIGOTT: Yeah, and how have you been

1           doing?

2                       MR. O'CONNOR: - - - in conclusory terms.  
3           And the courts routinely roo - - - review decisions  
4           for whether they're too conclusory, and some of them  
5           are denied.

6                       This is an ordinary part of review of  
7           parole decisions.

8                       JUDGE PIGOTT: You see - - - you see how  
9           causal you're treating this. That's - - -

10                      MS. NEPVEU: I did - - -

11                      JUDGE PIGOTT: - - - that's what's - - -

12                      MS. NEPVEU: - - - not mean to give that  
13           impression.

14                      JUDGE PIGOTT: - - - that's what's  
15           concerning. I mean, I get that ninety-eight out of a  
16           hundred, you know, particularly the first time up, or  
17           maybe seventy-five out of a hundred, you know, it's  
18           routine. I get that.

19                      But the worry is the ones that are not.  
20           And - - - and it sounds like you're saying all right,  
21           we'll throw in COMPAS. And - - - you know - - - and  
22           we'll say we considered COMPAS, and you're denied.

23                      MS. NEPVEU: No, Your Honor. What I'm  
24           saying is that because the legislature maintained the  
25           same substantive standards, and because the rule has

1 always been that reasons must be given in detail,  
2 there's no need for additional relief at this time,  
3 before any decision is made in this case.

4 CHIEF JUDGE LIPPMAN: Are you - - - are you  
5 saying that - - - that in this - - - this scheme as  
6 the way it's drawn up now, that COMPAS is more than  
7 just an additional factor?

8 MS. NEPVEU: No, Your Honor. The COMPAS is  
9 one of the considerations - - -

10 CHIEF JUDGE LIPPMAN: COMPAS is essentially  
11 an additional factor.

12 MS. NEPVEU: It is something the Board  
13 considers when it evaluates rehabilitation, Your  
14 Honor.

15 CHIEF JUDGE LIPPMAN: Right, but - - - but  
16 again, a very clear - - - your adversary's arguing a  
17 very clear import of the statute is that it's more  
18 than that.

19 MS. NEPVEU: If the legislature wanted to  
20 make COMPAS or a general risk and needs assessment  
21 instrument a - - - a - - - something that was a  
22 presumptive guideline or a - - - a governing  
23 framework, it could have said that. It said - - -

24 JUDGE RIVERA: Then why refer to risk and  
25 needs assessments as - - - as principles, separate

1 and apart from what is otherwise set forth in Section  
2 259-i - - - whatever it is - - - c - - - i - - -

3 MS. NEPVEU: Yes, Your Honor.

4 JUDGE RIVERA: - - - 2 - - - you know which  
5 one - - -

6 MS. NEPVEU: Yes, Your Honor.

7 JUDGE RIVERA: - - - C(A)(d) (sic), that  
8 lists - - - it doesn't use the word "factors",  
9 granted, but says - - -

10 MS. NEPVEU: Um-hum. Yes.

11 JUDGE RIVERA: - - - "This article shall  
12 require that the following be considered" - - -

13 MS. NEPVEU: Yes, Your Honor. The reason -  
14 - - there - - - there's no legislative history.  
15 Here's one reason based on the overall structure. In  
16 the same legislation that changed 259-c(4), the Board  
17 and the Commissioner of Corrections were directed to  
18 develop an - - - an assessment instrument, a risk and  
19 needs assessment instrument. So the legislature  
20 didn't know what that instrument was going to look  
21 like. They didn't direct - - - they didn't know if  
22 it would be able to contain all of the statutory  
23 factors in 259 or not?

24 CHIEF JUDGE LIPPMAN: Counsel, Judge  
25 Pigott, last question.

1                   JUDGE PIGOTT: On - - - in October of '11,  
2                   the Chairman of the Board, when she issued her  
3                   memorandum, said, "It's also noted that in September  
4                   2011, Board members have been trained in the use of  
5                   Correctional Offender Management Profiling and  
6                   Alternative Sanctions," the COMPAS system. But it  
7                   also noted that, "The statement for assessing the  
8                   appropriateness had not changed, nor had the  
9                   statutory criteria." And that's what she said, you  
10                  know, in her - - - in her memo then.

11                  I think that's what the concern is. It  
12                  seems like, you know, everybody's trying to tell you  
13                  to do something, and you're saying, yeah, but  
14                  nothing's changed.

15                  MS. NEPVEU: Your Honor, we don't say that  
16                  nothing's changed. We say that the Board is required  
17                  to consider COMPAS, and that when it denies parole,  
18                  as it always has, it's required to give reasons for  
19                  that denial in detail. And if there is a denial,  
20                  when petitioner has his new hear - - - new interview  
21                  with COMPAS, then he can challenge it under well-  
22                  established precedent.

23                  There's no basis for this court to make an  
24                  order now.

25                  CHIEF JUDGE LIPPMAN: Okay, counsel.

1 Thanks, counsel.

2 MS. NEPVEU: Thank you, Your Honors.

3 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

4 MR. O'CONNOR: Yes, just briefly.

5 This is the Board's position on this, and  
6 this is what they state repeatedly - - -

7 CHIEF JUDGE LIPPMAN: Is what Judge Pigott  
8 just read the Board's position?

9 MR. O'CONNOR: The Board is entitled to  
10 give whatever weight, if any, it deems appropriate to  
11 the COMPAS report. So they reserve the right to give  
12 no weight to it, and they do not require that there  
13 even be a rational reason articulated, if they decide  
14 to give it no weight.

15 So Board members could decide irrationally,  
16 I'm only going to follow COMPAS when it recommends a  
17 high risk to reoffend; I'm not going to follow it  
18 otherwise. And that's - - -

19 JUDGE PIGOTT: But what - - -

20 MR. O'CONNOR: - - - and that is okay,  
21 under this scheme.

22 JUDGE PIGOTT: - - - what do you picture,  
23 you know, someone who murders his entire family in  
24 the most heinous way and gets twenty-five to life,  
25 and now he's up for the first time, and there's no

1 way in God's green earth that anybody's going to let  
2 him out. Can - - - do they have to go through, you  
3 know, COMPAS and say - - - you know, or can they  
4 simply say, you ain't getting out because - - -

5 MR. O'CONNOR: Well, I think in that  
6 circumstance, there are - - - there're three major  
7 criteria for parole, and COMPAS is relevant to the  
8 first two: whether you're likely to reoffend, and  
9 whether your release is incompatible with the welfare  
10 of society. So that has a public safety component to  
11 it.

12 The third, nobody contends that this is - -  
13 - COMPAS addresses the third factor, whether it would  
14 so deprecate - - - release would so deprecate the  
15 seriousness of the crime, as to undermine respect for  
16 the law.

17 JUDGE PIGOTT: But if three - - - if three  
18 is the reason, do they have go through one and two?

19 MR. O'CONNOR: Well, I think that - - -  
20 yes. They're required to make an assessment as to  
21 whether you're likely to reoffend. That's just part  
22 of the process.

23 Ultimately, they may decide - - -

24 JUDGE ABDUS-SALAAM: Counsel, what's - - -

25 MR. O'CONNOR: - - - well, we agree, you're

1 not likely to reoffend, but we're not going to let  
2 you out anyway. And that's not an issue here.

3 JUDGE ABDUS-SALAAM: Excuse me, counsel.  
4 Was I correct when I described what you're asking for  
5 is some sort of checklist of procedures?

6 MR. O'CONNOR: Well - - -

7 JUDGE ABDUS-SALAAM: Am I wrong about that?

8 MR. O'CONNOR: - - - all we're asking for  
9 is what the COMPAS manual provides for, is that if  
10 you override it, if you disagree with it, state why  
11 so that any - - - so that we can review - - -

12 JUDGE FAHEY: So you're - - -

13 MR. O'CONNOR: - - - it. That's it.

14 JUDGE FAHEY: - - - aiming for a system  
15 similar to the SORA system, the RAI system. Is that  
16 where you're - - - that's what you're aiming for  
17 here, right?

18 MR. O'CONNOR: Well - - -

19 JUDGE FAHEY: Policy-wise?

20 MR. O'CONNOR: - - - yes. This involves a  
21 validated risk assessment - - -

22 JUDGE FAHEY: I understand that. But - - -

23 MR. O'CONNOR: It's - - -

24 CHIEF JUDGE LIPPMAN: But you're - - -

25 JUDGE FAHEY: Am I correct in saying that's

1 your goal?

2 MR. O'CONNOR: Yes.

3 JUDGE FAHEY: Okay.

4 MR. O'CONNOR: It's what probation - - -  
5 probation does 40,000 of these assessments a year.

6 CHIEF JUDGE LIPPMAN: Yeah, but - - -

7 MR. O'CONNOR: And that's their rule.

8 State a reason if you disagree.

9 CHIEF JUDGE LIPPMAN: - - - but consistent  
10 - - - consistent with the question you were just  
11 asked, but they could say, on number 3, this is  
12 dispositive in our minds?

13 MR. O'CONNOR: They could, and - - -

14 CHIEF JUDGE LIPPMAN: They do the others,  
15 and then they say, but 3, you're not getting out?

16 MR. O'CONNOR: Sure. And so you may not  
17 prevail in the end, on that. And - - -

18 JUDGE RIVERA: Then I've - - - I've  
19 misunderstood your argument. Because I thought that  
20 the Board had correctly represented your argument  
21 when they said what you want is that COMPAS has  
22 greater weight - - -

23 MR. O'CONNOR: No.

24 JUDGE RIVERA: - - - than some of these  
25 other factors?

1 MR. O'CONNOR: No.

2 JUDGE RIVERA: Because you take it as a  
3 default. If I'm not the - - - if I'm the Board - - -  
4 I'm the Board member and I'm not following the COMPAS  
5 recommendation, I must explain why. Whereas on the  
6 factors that are listed, I think you both agree, you  
7 don't have to explain every individual factor and why  
8 you may reject it. Is that correct?

9 MR. O'CONNOR: Right. Two different method  
10 - - -

11 JUDGE RIVERA: Why do I have to explain  
12 COMPAS?

13 MR. O'CONNOR: There are two different  
14 methodologies. The list in 259-i, those - - - those  
15 factors - - -

16 JUDGE RIVERA: Yes.

17 MR. O'CONNOR: - - - of information that's  
18 reviewed - - -

19 JUDGE RIVERA: Right.

20 MR. O'CONNOR: - - - is in support of the  
21 Board's longstanding subjective assessment of whether  
22 you're likely to reoffend, whether you're appropriate  
23 for release. This is a completely new methodology  
24 that was introduced in 2011. Right?

25 It has - - - it speaks directly to that

1 issue. All right? It's not in - - - in support of  
2 your subjective assessment of whether someone's  
3 likely to reoffend.

4 JUDGE ABDUS-SALAAM: Counsel - - -

5 MR. O'CONNOR: It's a different way of  
6 determining it.

7 JUDGE RIVERA: So what - - - what - - - I'm  
8 sorry. What are the factors - - - or let me ask it a  
9 different way. You're saying that COMPAS - - - what  
10 COMPAS takes into consideration does not completely  
11 overlap with these factors. Whether they're the ones  
12 in the statute or in the rules promulgated by the  
13 Board.

14 MR. O'CONNOR: There - - -

15 JUDGE RIVERA: Is that true?

16 MR. O'CONNOR: - - - there could be a  
17 little overlap. But COMPAS is evidence-based and - -  
18 - it has - - - it looks at really many, many indices  
19 as to whether you're likely to reoffend, static and  
20 dynamic factors. There might be a little overlap,  
21 but it's a completely different process. One is  
22 evidence-based, and one is in support of a subjective  
23 assessment.

24 CHIEF JUDGE LIPPMAN: Judge Abdus-Salaam.

25 MR. O'CONNOR: And the point of this

1           legislation was merging those two methodologies into  
2           your decision-making process.

3                   CHIEF JUDGE LIPPMAN:   Okay, Judge Abdus-  
4           Salaam.

5                   JUDGE ABDUS-SALAAM:   Counsel, I go back to,  
6           then, Judge Pigott's question.  How do we know  
7           they're not going to do that - - -

8                   MR. O'CONNOR:   Well - - -

9                   JUDGE ABDUS-SALAAM:   - - - if your - - - if  
10          your client goes back for a hearing?

11                   MR. O'CONNOR:   Okay.  He - - - fortune may  
12          smile upon him and they may release him.  That's not  
13          something that, you know, we can count on, at this  
14          point.  All we're here for is to ask that he be given  
15          a fair hearing under the 2011 require - - -  
16          legislation that requires meaningful use of the  
17          COMPAS instrument and not irrational dismissal of it.

18                   CHIEF JUDGE LIPPMAN:   Thank you - - -

19                   JUDGE RIVERA:   I - - -

20                   CHIEF JUDGE LIPPMAN:   Judge Rivera?

21                   JUDGE RIVERA:   - - - I have to just follow  
22          up on what you said about subjective.  But I'm  
23          looking at the factors.  These look like objective  
24          factors.  Do you mean the weight - - - what - - -  
25          what you consider - - - because that then strikes me

1 the same as the weight of COMPAS's - - -

2 MR. O'CONNOR: Well, which factors, now are  
3 - - - are you talking about? The ones in - - - in  
4 259-i?

5 JUDGE RIVERA: The length of the  
6 determinant sentence looks to me like it's just a  
7 number?

8 MR. O'CONNOR: Right. Some of those other  
9 ones are the pre-sentence report, the recommendations  
10 of the District Attorney, the sentencing judge, the -  
11 - - the defense lawyer. Those are subjective  
12 assessments.

13 And certainly I can tell you, they don't  
14 have to give any weight to the recommendations of the  
15 defense lawyer. That's in support of their  
16 subjective analysis of the way they've been doing it  
17 forever.

18 This is the new methodology - - -

19 JUDGE RIVERA: The underlying factor itself  
20 has subjectivity inherently built into it, apart from  
21 the Board's on assessment of what weight it will give  
22 that recommendation or that statement?

23 MR. O'CONNOR: That's right.

24 JUDGE RIVERA: Okay.

25 MR. O'CONNOR: That's right. And - - - and

1 the law has always been very clear on that, is that  
2 they do not have to provide reasons if they disregard  
3 - - - completely disregard, give no weight to any of  
4 those - - -

5 CHIEF JUDGE LIPPMAN: Thank you, counsel.

6 MR. O'CONNOR: - - - they don't have to  
7 give reasons.

8 CHIEF JUDGE LIPPMAN: Thank you. Thank you  
9 both.

10 MR. O'CONNOR: Thank you.

11 CHIEF JUDGE LIPPMAN: Appreciate it.

12 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Jorge Linares v. Andrea W. Evans, No. 124 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

Date: September 12, 2015