

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

PEOPLE EX REL. DELIA O/B/O STEPHEN S.,

Appellant,

-against-

MUNSEY,

No. 136
(Papers Sealed)

Respondent.

20 Eagle Street
Albany, New York 12207
September 11, 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:

LISA VOLPE, ESQ.
MENTAL HYGIENE LEGAL SERVICE
Attorneys for Appellant
170 Old Country Road
Suite 500
Mineola, NY 11501

ERIC BROUTMAN, ESQ.
ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, FORMATO, FERRARA &
WOLF, LLP
Attorneys for Respondent
111 Marcus Avenue
Suite 107
Lake Success, NY 11042

Sara Winkeljohn
Official Court Transcriber

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CHIEF JUDGE LIPPMAN: Let's go to 136,
People v. Munsey.

Go ahead, counsel. You want any rebuttal
time?

MS. VOLPE: One minute, Your Honor, please.

CHIEF JUDGE LIPPMAN: One minute. Go
ahead.

MS. VOLPE: Good afternoon, Your Honors.
May it please the court - - - excuse me - - - my name
is Lisa Volpe of the Mental Hygiene Legal Service,
and I'm appearing today on behalf of the appellant
Mr. S.

Your Honors, the right of access to the
great writ is guaranteed to every citizen by the U.S.
Constitution and by New York Constitution.

CHIEF JUDGE LIPPMAN: Does 33.15 limit that
right?

MS. VOLPE: No. It absolutely cannot, and
I don't believe that's what the legislature intended
when it brought the - - -

CHIEF JUDGE LIPPMAN: Can you read it
together making any sense?

MS. VOLPE: Yes, you can. Because the
common law writ and the 33.15 writ do two different

1 things. The common law writ is really quite limited
2 in that it allows an individual to challenge an
3 unlawful detention. In this case, it was the
4 detention of the individual after - - -

5 CHIEF JUDGE LIPPMAN: Right.

6 MS. VOLPE: - - - the court order had
7 expired. So there's no - - -

8 CHIEF JUDGE LIPPMAN: For how long was that
9 again?

10 MS. VOLPE: That was for six weeks.

11 CHIEF JUDGE LIPPMAN: Right.

12 MS. VOLPE: So there was no basis, no legal
13 basis, for the hospital to have retained him at that
14 point.

15 The 33.15 writ does something entirely
16 different, and this court has recognized that in more
17 than one case over the period of many, many years.
18 And that is, as the court has said, that it allows
19 the individual to challenge a lawful detention,
20 meaning within a court ordered period of time - - -

21 CHIEF JUDGE LIPPMAN: Right.

22 MS. VOLPE: - - - because the mental
23 condition has changed. And it puts the bear - - -
24 burden on the patient. Now, that makes sense, and it
25 fits within the - - - the scheme of Article 9 for a

1 number of reasons. In the first place, the purpose
2 of involuntary confinement is to give somebody
3 treatment.

4 JUDGE STEIN: Can I just stop you here? I
5 mean, I think part of - - - of the argument here on
6 the other side is is that - - - that the 33.15 is
7 also challenging an unlawful detention. Because - -
8 - because the - - - the patient - - - if - - - if the
9 patient is no - - - no longer medically needs - - -
10 if his condition - - - his or her condition has
11 changed, then the retention is no longer lawful, so
12 they're - - - they're - - - they're saying that
13 they're both the same thing and that the more
14 specific should control over the more general. So
15 how - - - how do you respond to that?

16 MS. VOLPE: But there are two bases for it
17 being unlawful. There's a difference between having
18 a lawful mandate to keep the person involuntary
19 confined and then allowing the patient - - - which
20 Article 9, by the way, does not provide that
21 mechanism, so the legislature put it into 33.15 - - -
22 allowing the patient to challenge, because there's
23 been a change in the - - - the medical condition
24 which then allows them to come into court and say, I
25 bear the burden here of showing you, but I want to

1 show you that my condition has improved and I no
2 longer meet the legal standard for involuntary
3 retention. Now, that's very - - -

4 JUDGE RIVERA: So because of this shifting
5 of burden, is the concern that the facilities - - -
6 maybe this is rare, maybe this is not - - -
7 facilities will not act in a timely manner, and then
8 the burden has automatically shifted to the patient?

9 MS. VOLPE: Yes. And I think that's a very
10 great concern that - - - and - - - and I think it's
11 one of the reasons that Article 9 was - - - was
12 enacted in the first place is to - - - to deter
13 hospitals from holding onto individuals without any
14 lawful mandate - - -

15 JUDGE ABDUS-SALAAM: So on that note - - -

16 MS. VOLPE: - - - and for extended periods.

17 JUDGE ABDUS-SALAAM: - - - I - - - I'd just
18 like to ask what happens if the hospital exceeds the
19 involuntary commitment period and the patient gets
20 out on habeas, perhaps? Is there - - - and - - - and
21 the patient shouldn't have gotten out because maybe
22 he needed - - - the patient needed to be committed
23 further. That - - - in other words, unlike what
24 you're arguing, the patient hasn't recovered or
25 hasn't regained sanity and should still be

1 hospitalized because the patient is a - - - is a
2 danger to him or herself or the public, but the
3 patient gets out on habeas. What is the procedure or
4 is there a procedure for having that person
5 recommitted? What happens?

6 MS. VOLPE: Well, just to take it back one
7 step before I answer that question directly, Article
8 9 provides for, upon admission, the beginning of
9 discharge planning. So we have a process that goes
10 along with treatment which provides for the ultimate
11 release into the community with an appropriate
12 discharge plan. And if somebody is released under
13 whatever conditions, even if it's under the condition
14 of a writ where there's been no lawful mandate and
15 somebody's released, they have to be released with
16 appropriate discharge, and then if something changes
17 in their condition in the community, then they can be
18 brought back. But the Third Department has said in
19 the Matter of Leonard HH, there has to be some kind
20 of change in the circumstance. But - - - but again -
21 - -

22 JUDGE ABDUS-SALAAM: I'm sorry. I may have
23 missed - - - are you saying that if they - - - if,
24 for example, when your client gets out - - - I think
25 your client's already out, right?

1 MS. VOLPE: Yes.

2 JUDGE ABDUS-SALAAM: Yes. But let's assume
3 the habeas had taken place earlier, he got out, but
4 he wasn't really ready to be out. Are you saying
5 that he would be released with a discharge plan even
6 on a habeas writ?

7 MS. VOLPE: The - - - the hospital would
8 have an obligation to ensure that he was being
9 released appropriate - - - with appropriate plans in
10 place. Yes. I think that that - - - that's rather
11 crucial because it's part of the statutory scheme.

12 CHIEF JUDGE LIPPMAN: So what happens next?
13 I think what the judge is asking you is let's say he
14 gets out and it comes time to issue this and for
15 whatever reason, there's a terrible threat to the
16 public safety by he - - - his being out. What - - -
17 what happens? What - - - what does the State do?

18 MS. VOLPE: They - - - he can - - -

19 CHIEF JUDGE LIPPMAN: They bring another
20 Article 9?

21 MS. VOLPE: He can be recommitted.
22 Absolutely. There are - - -

23 CHIEF JUDGE LIPPMAN: So what - - - so
24 Article 9 is the - - -

25 MS. VOLPE: - - - admission processes.

1 CHIEF JUDGE LIPPMAN: Article 9 is the
2 vehicle if that were the case?

3 MS. VOLPE: If he had been released. Yes.

4 CHIEF JUDGE LIPPMAN: Yes. That's it.

5 MS. VOLPE: Absolutely.

6 CHIEF JUDGE LIPPMAN: So I - - - I think
7 that was the import of the question that the public
8 safety can be addressed if there's a need to.

9 MS. VOLPE: Yes. And - - - and the
10 legislative scheme is - - - is specific and detailed
11 enough that it - - -

12 JUDGE STEIN: How quickly can that happen?

13 MS. VOLPE: - - - has accounted for that.

14 JUDGE STEIN: How quickly can that happen,
15 the - - - the Article 9 process? So - - - so let's
16 say - - - let's say, for the sake of argument, here's
17 somebody who is - - - is really almost unquestionably
18 or unquestionably a danger to himself or to others
19 and - - - but somebody doesn't file the necessary
20 retention proceedings and he files a habeas and he
21 gets out, how quickly could an Article 9 proceeding
22 be filed - - - a new one be filed and he be brought
23 before - - - you know, brought either to be
24 readmitted or before a court?

25 MS. VOLPE: Well, the Third Department has

1 spoken to that and said that there has to be some
2 change in circumstance, so I - - - I would suggest
3 that it might be within a matter of days if there is
4 a showing that this person is acting in a way that
5 shows a change in the circumstances. But I - - -

6 JUDGE STEIN: Well, but - - - but is that
7 under these circumstances, or is that under the
8 circumstances where - - - where someone is discharged
9 and then it's sought to have them readmitted? In
10 other words, discharged, you know, with - - - with
11 the consent of the facility or whatever or - - - or
12 by - - -

13 MS. VOLPE: Well, again, the Third
14 Department has spoken to that in Matter of Dix v.
15 Maul in which the court said it doesn't matter
16 whether it's under discharge or release, the fact is
17 that there has to be responsible discharge planning,
18 and then speaking to Leonard HH - - -

19 CHIEF JUDGE LIPPMAN: So what if there's -
20 - - what if there's planning and you - - - and you -
21 - - you - - - you get to habeas and there's planning
22 and they're giving him whatever his discharge papers
23 are, and they say geez, this guy is getting out on a
24 habeas, he's going to kill somebody? Can they just
25 bring an Article 9, or according to what you're

1 saying based on the Third Department's ruling, they
2 couldn't unless he walked out the door or while he
3 was getting the - - - the - - - the discharge papers,
4 he flipped out or whatever it was? I mean the - - -
5 the issue that we're trying to grapple with is if
6 there was a habeas and he had the right to be out but
7 at the same time, there's a public safety component
8 to that that jumps out at people, is there a vehicle
9 or is the - - - is he basically on the street and he
10 has to do something, say something that - - - that
11 jumps out as some kind of change in circumstance?

12 MS. VOLPE: I would say, Your Honor, that
13 the vehicle is through Article 9, and - - - and the
14 reality of this - - -

15 CHIEF JUDGE LIPPMAN: But - - - but there
16 has to be - - - it can't be that they realize that
17 they made a mistake, they kept him when they had no
18 right to keep him, he's entitled to habeas, but he
19 shouldn't be out on the street; that's not enough?
20 He - - -

21 MS. VOLPE: No. That - - - that's not
22 enough, Your Honor.

23 CHIEF JUDGE LIPPMAN: That's what I'm
24 saying. He's got to - - -

25 MS. VOLPE: Because - - - because they've

1 already violated his due process - - -

2 CHIEF JUDGE LIPPMAN: Yes.

3 MS. VOLPE: - - - rights.

4 CHIEF JUDGE LIPPMAN: So they've got to - -
5 - he's got to go out and there's got to be reason to
6 bring an Article 9 to bring him back in?

7 MS. VOLPE: And - - - and - - - and the
8 reality is if there is such reason that they've been
9 dealing with him - - - in this case, this gentleman
10 has been confined for well over three months within
11 the - - - the proper court order and then beyond that
12 time - - - if they have been seeing this kind of
13 behavior that they think is so dangerous - - -

14 CHIEF JUDGE LIPPMAN: They should have been
15 doing something already.

16 MS. VOLPE: - - - they should have been
17 aware and - - -

18 JUDGE FAHEY: Clearly - - - clearly here -
19 - -

20 MS. VOLPE: - - - preparing appropriately.

21 JUDGE FAHEY: Clearly here there's no basis
22 to hold him after 9/13. What I'm wondering about,
23 though, is - - - is - - - is the failure to - - - to
24 hold any - - - any hearing at all. Article 70 seems
25 to apply in it, but it has that language in there

1 that says "except as otherwise prescribed by
2 statute." And then that language seems to take it to
3 the MHL which, under this circumstance, you may
4 release him per habeas corpus but you've got to hold
5 a hearing and make a determination first.

6 MS. VOLPE: Well, the Article - - -

7 JUDGE FAHEY: And that - - - that seems to
8 limit the relief that you're seeking.

9 MS. VOLPE: I - - - I would suggest
10 otherwise, Your Honor, because Article 70 says - - -
11 and I see that my time is - - -

12 CHIEF JUDGE LIPPMAN: No. No. Answer - -
13 - answer the question. Sure.

14 MS. VOLPE: Article 70 says that the
15 procedures, and it speaks only to procedures, apply
16 to both common law writs and to statutory writs.
17 33.15 in subsection D says, the procedures of Article
18 70 apply here. And what - - - what it then - - -

19 JUDGE FAHEY: So you wouldn't say that - -
20 -

21 MS. VOLPE: - - - does it enhance - - -

22 JUDGE FAHEY: So you wouldn't say that the
23 - - - the - - - the prescribed procedure in 33.15
24 isn't prescribing Article 70?

25 MS. VOLPE: No. I would not say that it's

1 limiting. I think that - - - and as this court has
2 said - - - because you cannot abrogate or limit the
3 Constitutional common law writ, the best that you can
4 say for Article 33 - - - and I think the
5 legislature's intent was to enhance the rights of the
6 patient in a circumstance where Article 9 does not
7 give them a vehicle for challenging a lawful
8 detention when their - - - their condition has
9 improved as compared with the unlawful detention when
10 there is no legal basis anymore.

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 You'll have your rebuttal.

13 MS. VOLPE: Thank you, Your Honors.

14 MR. BROUTMAN: Good afternoon, Your Honors.

15 My name's Eric Broutman. I'm counsel for the
16 respondent Douglas Munsey in this appeal. At - - -
17 at the outset I'd like to address the fact that the
18 appellant lacks a jurisdictional predicate to raise
19 this appeal before this court. The appellant argues
20 that it maintains jurisdiction based upon a
21 Constitutional argument. However, the court below
22 rendered its decision based purely upon statutory
23 interpretation.

24 CHIEF JUDGE LIPPMAN: Yeah. Yeah. But
25 that statute may not be applicable to this situation.

1 Her whole argument is that it's not a 33.15
2 situation, right?

3 MR. BROUTMAN: I would say it's her - - -

4 CHIEF JUDGE LIPPMAN: The A - - - the
5 Appellate Division was wrong?

6 MR. BROUTMAN: I - - - I would disagree
7 with that.

8 CHIEF JUDGE LIPPMAN: I understand. But -
9 - - but - - - but if there is a violation, and it
10 seems kind of open and shut, that he was held without
11 any basis whatsoever, why shouldn't we uphold his
12 right to - - - to habeas and to go out? It is the
13 great writ for a reason, and how could the statute
14 possibly restrict the ability to - - - to get out on
15 a - - - on a habeas?

16 MR. BROUTMAN: Your Honor, I don't - - - it
17 doesn't restrict the ability for a psychiatric
18 patient to institute a writ of habeas corpus at all.

19 CHIEF JUDGE LIPPMAN: No?

20 MR. BROUTMAN: The question when one brings
21 a writ of habeas corpus is to question the legality
22 of the individual's detention. In this case, an
23 individual's - - - that - - - that legality is
24 questioned by conducting the very hearing that the
25 court below called for.

1 CHIEF JUDGE LIPPMAN: The 33.15?

2 MR. BROUTMAN: That 30 - - - yes, that
3 33.15 calls for.

4 CHIEF JUDGE LIPPMAN: What does that have
5 to do with this?

6 MR. BROUTMAN: Because 33.15 - - -

7 CHIEF JUDGE LIPPMAN: 33.15 can't change
8 the right to bring this writ, right?

9 MR. BROUTMAN: Not at all, Your Honor, and
10 it doesn't change it at all. It merely codifies the
11 requirement - - -

12 CHIEF JUDGE LIPPMAN: So then how could you
13 - - - how could you keep him in based on
14 considerations that are related to 33.15 rather than
15 the considerations that are relevant to this just
16 fundamental writ that he has a right to bring?

17 MR. BROUTMAN: Well, I think that the
18 question at the heart of this case is whether or not
19 the continued retention of a patient beyond the time
20 limitations of Article 9 is per se illegal.

21 JUDGE PIGOTT: Well, why do you - - - why
22 do you have to do anything after that? I mean, if we
23 - - - if we agree with you, I don't think you have to
24 recertify anybody; just keep them.

25 MR. BROUTMAN: That's not true, Your Honor,

1 because the Mental Hygiene Law - - -

2 JUDGE PIGOTT: No. No. Because - - -

3 because what happens then is they - - - they - - -

4 they bring the 33.15 writ, you say we're entitled to

5 hearing; he's still nuts; we're keeping him. And you

6 say oh, you're right, even though you've kept him for

7 a year-and-a-half without bothering to follow the

8 Mental Hygiene Law, we - - - we've now held a

9 hearing, and we realize that he's still nuts, and so

10 you - - - so we're going to keep - - - you can keep

11 him.

12 MR. BROUTMAN: Well, hospitals are required

13 to conduct these hearings, and if they do not, then -

14 - -

15 JUDGE PIGOTT: Then what?

16 MR. BROUTMAN: - - - can be sanctioned by

17 the Office of Mental Health.

18 JUDGE PIGOTT: Well, that's nice. But why

19 don't - - - why don't we say if you don't do it and

20 you let somebody out and there - - - and there's no

21 reason to keep them, he's out, and if you want to

22 bring a two - - - two - - - two-physician petition

23 you can bring it and probably get it - - - even

24 within that, the 9.33, if I understand it right, you

25 can do it immediately; you can call the cops; you can

1 - - - you can get a two-physician petition and have
2 the police pick the person up. So there's all the -
3 - - lot of safeguards there and - - - and the one
4 that troubles me is - - - and I'm not picking on
5 Holliswood or anybody else - - - but there can be a
6 tendency within governments to not follow the law
7 exactly and then say well, of course we messed up,
8 but, you know, let us do it this way.

9 MR. BROUTMAN: Well, first I'd like to say
10 this is an exceedingly rare circumstance. In the
11 thousands of - - -

12 CHIEF JUDGE LIPPMAN: Yeah. But you can
13 have more of these circumstances if you're allowed to
14 do what - - - what you did.

15 MR. BROUTMAN: Well - - -

16 CHIEF JUDGE LIPPMAN: It promotes the kind
17 of laxity in terms of people's basic fundamental
18 rights.

19 MR. BROUTMAN: At - - - at the current
20 time, the - - - the state of law through three
21 Appellate Division courts, the First, Second, and
22 Third Department have all concluded that the
23 appropriate remedy is a hearing on the merits. And
24 yet - - -

25 CHIEF JUDGE LIPPMAN: But that - - -

1 MR. BROUTMAN: - - - this has not continued
2 and is not - - -

3 CHIEF JUDGE LIPPMAN: - - - that's - - -
4 that's why we're here to decide that issue, right?

5 MR. BROUTMAN: Yes, Your Honor. You are.
6 And the reason - - -

7 JUDGE RIVERA: So - - - so, counsel, let's
8 say we hold against you on this, we hold - - - we
9 hold for your adversary on this - - - I just want to
10 understand - - - other than, of course, trying to
11 comply with the original deadline - - - let's put
12 that aside - - - things happen, a mistake is made,
13 person's going to be released, perhaps I'm asking you
14 to retread ground that's already been covered by the
15 ad - - - your adversary, but I want to hear your
16 position, what would the facility then do?

17 MR. BROUTMAN: If the individual is
18 required to be released?

19 JUDGE RIVERA: If - - - if - - -

20 MR. BROUTMAN: There's not much they could
21 do, Your Honor. They would release them and then it
22 would be up to the Office of Mental Health or a local
23 community mental health department to involuntarily
24 commit that person. Otherwise, we're - - - we're
25 dealing with a potentially farcical situation where

1 we're releasing a patient out the back door just to
2 bring them to the front door to readmit them, and
3 that certainly makes no sense.

4 CHIEF JUDGE LIPPMAN: But - - - but your
5 adversary indicates, and I assume you agree, there's
6 got to be a change in some kind of circumstance that
7 would let him be recommitted or a new Article 9 to be
8 brought?

9 MR. BROUTMAN: There would need to be some
10 sort of - - - especially if we're talking about
11 someone being readmitted so quickly, which,
12 especially when we look at the facts of this case,
13 would be difficult because this patient is an
14 exceedingly dangerous individual who committed no
15 less than ten acts of violence during the short five-
16 month period - - -

17 JUDGE RIVERA: He's out now?

18 MR. BROUTMAN: He is. He was released in
19 April of 2013. Yes. But during - - -

20 JUDGE RIVERA: And he's been out for over
21 two years?

22 MR. BROUTMAN: For - - - yes. Nearly - - -
23 over two years now. But - - -

24 CHIEF JUDGE LIPPMAN: What's been the
25 history of that afterwards?

1 MR. BROUTMAN: That I'm not sure, Your
2 Honor. He's been released and - - - and Holliswood
3 Hospital actually no longer exists, either. They
4 went out of business in 2014.

5 JUDGE FAHEY: Well, in - - - in this
6 situation the - - - the release - - - the - - - the
7 detention was - - - you - - - he file - - - they
8 filed a petition for - - - he had a writ of habeas
9 corpus, and you filed it within a day or two days, a
10 new petition. Is that the sequence that happened
11 here?

12 MR. BROUTMAN: Correct, Your Honor. As - -
13 - as soon as the hospital recognized it had failed to
14 timely apply - - -

15 JUDGE FAHEY: And in your petition, who
16 bore the burden of - - - of establishing his
17 incapacity?

18 MR. BROUTMAN: The hospital would maintain
19 the burden to show that the patient continues to be
20 mentally ill and dangerous whether or not it was
21 through a writ of habeas corpus or an untimely
22 petition that was filed.

23 JUDGE FAHEY: So - - - so in essence - - -

24 MR. BROUTMAN: The hospital would always
25 maintain that burden.

1 say that even in the instance where there are some
2 procedural errors, the patient is still properly
3 detained.

4 CHIEF JUDGE LIPPMAN: You're holding him
5 with no bas - - - what's the basis to hold him?

6 MR. BROUTMAN: The basis to hold him is
7 that the patient is mentally ill and dangerous and
8 the State is exercising its - - -

9 CHIEF JUDGE LIPPMAN: Yeah. But you're
10 saying that after the fact you want to come in and
11 say that oh, well, he's still - - - he still has a
12 problem, we're keeping him? It's what Judge Pigott
13 asked you before. So let's just do - - - whoever we
14 want to - - - who's - - - who's there, we'll keep
15 them under no real rules, and if anyone raises an
16 issue, let's just keep him because he's still sick.
17 That's not the way, you know, individual liberties
18 and rights are treated in this country.

19 MR. BROUTMAN: And - - - and I - - - I - -
20 - I agree with you, Your Honor. And - - - and again,
21 this is the rare circumstance in which there was an
22 error, and there are countless areas in which
23 hospitals can unfortunately make errors.

24 CHIEF JUDGE LIPPMAN: In that - - - in that
25 rare circumstance, he's out, unless there's a reason

1 that you have that comports with the law to put him
2 back in.

3 MR. BROUTMAN: And that reason, Your Honor,
4 would be a hearing on the merits to determine if the
5 patient is mentally ill and dangerous.

6 CHIEF JUDGE LIPPMAN: You would - - - you
7 would virtually do away with the great writ, it
8 doesn't exist?

9 MR. BROUTMAN: I - - - I would respectfully
10 disagree with you, Your Honor. And - - -

11 CHIEF JUDGE LIPPMAN: Yeah. If you
12 exercise it and you say huh-uh, let's go back to
13 33.15 or whatever it is and that's the basis we're
14 going to look at it, you're doing away with it. It's
15 of no val - - - what - - - of what value was him
16 bringing the writ if you could just go in and say oh,
17 you brought the writ, great, 33.15, keep him, he's -
18 - - he's - - - he's not - - -

19 MR. BROUTMAN: Well - - - well, Your Honor,
20 that doesn't guaran - - -

21 CHIEF JUDGE LIPPMAN: He's not well.

22 MR. BROUTMAN: That doesn't guarantee that
23 the individual would be retained. It requires a
24 hearing before a judge and, as many judges do, they
25 might determine that the patient does not meet the

1 criteria for - - -

2 JUDGE PIGOTT: Is - - - is - - -

3 MR. BROUTMAN: - - - involuntarily
4 retention and release that patient.

5 JUDGE PIGOTT: Is the difference that we're
6 fencing over und - - - under a common law writ,
7 they're saying there's no order holding me so I
8 should be out, and you would have to come in and say
9 yes, there is an order holding you, here it is. But
10 you can't do that. You don't have an order holding
11 him, so he gets to leave. In the meantime, if you
12 brought a two - - - you know, two-physician petition,
13 that's a whole different situation and conceivably
14 you could have him arrested as he's walking out of
15 the courtroom and - - - and ask for a hearing under -
16 - - under 9.33, right?

17 MR. BROUTMAN: Well, what - - - what - - -
18 what would happen - - - I - - - I suppose what Your
19 Honor is asking is - - - is whether or not the
20 hospital could then apprehend the individual once
21 they leave the courtroom, then bring them back to the
22 hospital. And at that point, no - - - no hearing,
23 though, would be required.

24 JUDGE PIGOTT: Why? Isn't there a hearing
25 under 9.33?

1 MR. BROUTMAN: There is, but that's only
2 once the patient has already been in the hospital and
3 for sixty days and then the hospital wants to
4 continue their retention. There is no - - -

5 JUDGE PIGOTT: Okay.

6 MR. BROUTMAN: - - - initial hearing at the
7 time that a hospital involuntarily retains a
8 psychiatric patient.

9 JUDGE STEIN: Would you agree that you
10 would have to show a change in circumstances if - - -
11 if a patient was let out on a common law writ, an
12 Article 70 writ, and - - - and you were to file a new
13 Article 9, do you agree that you have to show that -
14 - - that the condition of that patient has changed
15 since he or she was - - - was - - - was in the
16 hospital?

17 MR. BROUTMAN: Yes, Your Honor. That - - -
18 that's the current state of the law that there would
19 need to be some change in circumstance because this
20 patient was just ordered to be released from the
21 hospital. And I think we must also consider not only
22 the interests of - - - we must consider the interest
23 of patients who are properly committed who are there
24 and require treatment and need treatment. For them
25 to be released just because the hospital made an

1 error does no favor to that patient whatsoever. That
2 patient is released to the community, may potentially
3 be a danger to others, may potentially be unable to
4 care for themselves.

5 CHIEF JUDGE LIPPMAN: Yes. But we - - -
6 but we are - - - we are governed by the rule of law.

7 MR. BROUTMAN: We are.

8 CHIEF JUDGE LIPPMAN: It can't just be that
9 you make up this as you go along.

10 MR. BROUTMAN: I agree with that, Your
11 Honor. And again, like I said, this is the
12 exceedingly rare circumstance and the question is
13 what - - -

14 CHIEF JUDGE LIPPMAN: So the exceedingly
15 rare circumstance, he's out, and then if you have
16 something that you can do consistent with the law as
17 it exists today, then you - - - you - - - you're free
18 to do it.

19 MR. BROUTMAN: I see my time is - - -

20 JUDGE ABDUS-SALAAM: Before you sit down,
21 counsel, I just - - -

22 MR. BROUTMAN: Yes, Your Honor?

23 JUDGE ABDUS-SALAAM: Chief, may I ask this
24 one question?

25 CHIEF JUDGE LIPPMAN: Yeah. Sure, Judge

1 Abdus-Salaam.

2 JUDGE ABDUS-SALAAM: You're - - -
3 essentially, you're saying that the hearing has to
4 take place regardless, and I'm - - - I'm wondering
5 what - - - why isn't Mental Hygiene Legal Services'
6 interpretation of 33.15 correct that this is just for
7 someone who is trying to get out of a hospital who
8 says I'm no longer insane, I've recovered, and I'd
9 like to get out earlier than my normal commitment
10 time? Why isn't that interpretation correct?

11 MR. BROUTMAN: Well - - -

12 JUDGE ABDUS-SALAAM: Or what's wrong with
13 it?

14 MR. BROUTMAN: Well, I - - - I would give
15 two answers to that, Your Honor. To one extent,
16 which writ is used, the CPLR writ or the Mental
17 Hygiene Writ, makes no difference because it - - - it
18 calls for that very same remedy, which is the hearing
19 on the merits. But Mental Hygiene Law 33.15
20 specifically states that it can be used for the
21 purpose that my - - - that my adversary indicated or
22 it can just be used for the purpose to question the
23 legality of one's detention, so in other words, just
24 to have a hearing before the court to determine if
25 the patient meets the criteria for involuntarily

1 confinement which is dangerousness and mental
2 illness.

3 JUDGE STEIN: Well, then why do you need
4 33.15? If they - - - if they're coextensive, what's
5 the purpose of the leg - - - the legislation?

6 MR. BROUTMAN: The - - - the purpose is - -
7 - is to codify the requirement that already exists.

8 JUDGE STEIN: Why does it need to be
9 codified?

10 MR. BROUTMAN: I - - - I would agree with
11 you, Your Honor, that it doesn't need to, but the - -
12 - the legislature has - - - and again, it's also to
13 not only meet the instance in which we deal with
14 here, but also instances where there's - - - there's
15 no question that the patient is properly
16 involuntarily committed but the patient contends that
17 I have now reconstituted my sanity, I'm no longer a
18 danger, and therefore, even though there's a valid
19 order in place, I want to challenge before the time
20 period of that order - - -

21 CHIEF JUDGE LIPPMAN: Okay, counsel.

22 MR. BROUTMAN: - - - has expired.

23 CHIEF JUDGE LIPPMAN: Thanks, counsel.

24 MR. BROUTMAN: Thank you, Your Honor.

25 CHIEF JUDGE LIPPMAN: Let's get rebuttal.

1 MS. VOLPE: Thank you, Your Honors. In the
2 first place, Your Honors, it is not such an
3 exceedingly rare circumstance that individuals'
4 court-ordered time expires and that they're left in
5 this predicament. And then to say that all the
6 courts are in agreement that the appropriate remedy
7 is a hearing on the merits is also in part a
8 misinterpretation.

9 Those cases that to which my - - - my
10 adversary is re - - - referring are cases in which
11 33.15 was the remedy that was requested, and so it's
12 not a question of whether Article - - - the - - - the
13 common law writ or the 33.15 writ were - - - was the
14 right remedy. Now, as to the idea that - - -

15 JUDGE RIVERA: He's - - - I - - - I just
16 want you to address this. I - - - I thought I
17 understood your adversary to basically say that it's
18 the same burden on his side either way, and you have
19 already made clear that that's not your position.
20 Could you respond to that - - -

21 MS. VOLPE: It - - - it absolutely is not
22 correct.

23 JUDGE READ: - - - in greater detail why
24 it's not?

25 MS. VOLPE: The 33.15 - - - I would suggest

1 that when the language of 33.15 says that it's both
2 questioning the legality and the - - - the mental
3 condition, we're talking about a change in mental
4 condition in which, if it's proven - - - and again,
5 the burden is on the - - - on the patient - - - that
6 he no longer meets the legal standard, then the
7 legality of holding him under those circumstances is
8 called into question. And so under those
9 circumstances, it is a very different thing than
10 simply questioning the - - - the Constitutionality of
11 keeping somebody with an illegal mandate.

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 Thanks.

14 MS. VOLPE: Thank you very much.

15 CHIEF JUDGE LIPPMAN: Thank you both.

16 Appreciate it.

17 (Court is adjourned)

18

19

20

21

22

23

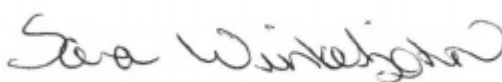
24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People ex rel. DeLia o/b/o Stephen S. v. Munsey, No. 136 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

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

Date: September 16, 2015