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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE EX REL. BOURLAYE T.,

Appellant, (Papers sealed)

-against-

No. 82

CONNOLLY,

Respondent.

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Judicial Institute  
84 North Broadway  
White Plains, New York 10603  
April 29, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
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:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Connolly,  
2 number 82.

3 Counsel, would you like any rebuttal time?

4 MS. VUK-PAVLOVIC: Two minutes, please,  
5 Your Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes. You're  
7 on. Go ahead.

8 MS. VUK-PAVLOVIC: May it please the court  
9 my name is Ana Vuk-Pavlovic, and I represent Bourlaye  
10 T. In the middle of the night without any cause to  
11 believe that Bourlaye T. violated the conditions of  
12 his parole supervision, state officers appeared at  
13 his bedside and, with their guns drawn, handcuffed  
14 him and dragged him off to prison. The state  
15 conducted this unconstitutional arrest for the  
16 purpose of making Bourlaye T., a detained sex  
17 offender Art - - - under Article 10 - - -

18 CHIEF JUDGE LIPPMAN: What was it - - - is  
19 it your argument that the Article 10 proceeding was  
20 pretextual and it was made - - - it was sort of  
21 trumped up to - - - to do what they wanted to  
22 accomplish? Is that what you're saying?

23 MS. VUK-PAVLOVIC: Well, the - - - the  
24 State in this - - - the argument is that the State  
25 intentionally conducted an unconstitutional arrest so

1 that it could bring an Article 10 proceeding because  
2 one of - - - the basic jurisdictional requirement for  
3 an Article 10 petition is that the person has to be a  
4 detained sex offender. And there's - - - there's - -  
5 -

6 JUDGE PIGOTT: But aren't you a detained  
7 sex offender if you're on parole?

8 MS. VUK-PAVLOVIC: Well, there's two - - -  
9 the legislature clearly sets out the - - - the times  
10 in which a per - - - a detained sex offender can be  
11 subjected to civil management. And that's either at  
12 the time that he is incarcerated and nearing a - - -  
13 an anticipated release for incarceration or if he's  
14 on parole supervision when he's nearing the end of  
15 that term of supervision. So he - - - he wasn't  
16 subject to Article 10 jurisdiction based on his  
17 status as a parolee, because he still had ten years  
18 to serve in - - - on parole.

19 CHIEF JUDGE LIPPMAN: How does this compare  
20 to Joseph II - - -

21 MS. VUK-PAVLOVIC: Joseph II - - -

22 CHIEF JUDGE LIPPMAN: - - - that kind of  
23 situation?

24 MS. VUK-PAVLOVIC: - - - was a completely -  
25 - -

1 CHIEF JUDGE LIPPMAN: Is that dispositive  
2 of this case?

3 MS. VUK-PAVLOVIC: Not at all. That was a  
4 - - -

5 CHIEF JUDGE LIPPMAN: Why not?

6 MS. VUK-PAVLOVIC: That was a completely  
7 different set of circumstances.

8 CHIEF JUDGE LIPPMAN: Why? What's  
9 different?

10 MS. VUK-PAVLOVIC: In this - - - in this -  
11 - - in that case this court held that persons who  
12 were already in custody based on violations of terms  
13 of post-release supervision - - -

14 CHIEF JUDGE LIPPMAN: Right.

15 MS. VUK-PAVLOVIC: - - - could be  
16 petitioned for Article 10, even though their - - -  
17 their PRS terms were unlawful where - - -

18 CHIEF JUDGE LIPPMAN: So can that be  
19 analogized to this kind of situation?

20 MS. VUK-PAVLOVIC: Not at all, because that  
21 was - - - those PRS sentences were actually provided  
22 for by the legislature in the penal law. The  
23 illegality there was merely a procedural one where  
24 the Department of Corrections was improperly imposing  
25 - - -

1 JUDGE STEIN: Well, isn't - - -

2 MS. VUK-PAVLOVIC: - - - those sentences  
3 rather - - -

4 JUDGE STEIN: - - - isn't this sort of  
5 procedural also because couldn't they have gotten a  
6 securing order to confine him under Article 10?

7 MS. VUK-PAVLOVIC: No, they couldn't have.  
8 They - - - they - - - they could have if they had  
9 timely conducted the Article 10 review before he was  
10 conditionally released.

11 JUDGE STEIN: Well, those - - - those time  
12 frames, do - - - do they say that you can't bring an  
13 Article 10 if you don't comply with those time frames  
14 or - - - or - - - or are they designed to - - - to  
15 give everybody an opportunity to act before someone  
16 either gets out of - - - out of prison or off parole?  
17 Are they - - - are they jurisdictional?

18 MS. VUK-PAVLOVIC: They are. They're - - -  
19 they're jurisdictional.

20 JUDGE STEIN: How - - - where - - - how - -  
21 - what's your authority for that?

22 MS. VUK-PAVLOVIC: It's Section 10.05(b).  
23 And that says that an agency with jurisdiction can -  
24 - - can give notice that a person who may be a  
25 detained sex offender is nearing an anticipated

1 release from - - - from confinement. So - - -

2 JUDGE STEIN: So if they don't do it during  
3 the time frame that says that they can never - - -  
4 they can't do it?

5 MS. VUK-PAVLOVIC: It does, because that  
6 notice is the first step in the entire Article 10  
7 process. So the fact that there - - - there's a time  
8 frame given for when that notice can be done, either  
9 when the person's nearing release from incarceration  
10 or when he's nearing release from the end of his  
11 parole supervision, that is a basic jurisdiction  
12 rule. So to tell otherwise - - -

13 JUDGE PIGOTT: Suppose you have a - - -

14 CHIEF JUDGE LIPPMAN: Judge Piggott - - -

15 JUDGE PIGOTT: Suppose you have a situation  
16 where as - - - as it seems to have appeared here,  
17 where the - - - the prisoner is released by mistake.  
18 In other words, they - - - they - - - they gave him  
19 to ICE and ICE, for some reason, decided they're not  
20 going to deport to the - - - to the Ivory Coast.  
21 They say we should have done something back when - -  
22 - when we were releasing him to ICE, and we didn't.  
23 Is it your argument that because he's got ten years  
24 of PRS they have to - - - they have to wait, you  
25 know, like nine years until he gets close to the end

1 of his PRS before he can go after him, even though  
2 they know that he's a pretty serious sexual predator?

3 MS. VUK-PAVLOVIC: Yes. First of all, the  
4 - - - the State didn't make a mistake. The - - - the  
5 State - - - I mean the State intentionally did not  
6 review Bourlaye T. for a civil management - - -

7 JUDGE READ: Well, they thought he was  
8 going to get deported.

9 MS. VUK-PAVLOVIC: - - - prior to his  
10 release, because they thought he was going to be  
11 deported. He was - - - he wasn't released early from  
12 prison. He had reached his conditional release date  
13 and was ent - - - entitled to release by law - - -

14 JUDGE PIGOTT: But I'm surprised that - - -

15 MS. VUK-PAVLOVIC: - - - after serving  
16 twenty-five years.

17 JUDGE PIGOTT: - - - you say that - - -  
18 that as he approached twenty-five years you can do it  
19 but as he begins the PRS he - - - he - - - he's not  
20 subject to SOMTA for, like, nine years. I mean no  
21 matter what.

22 MS. VUK-PAVLOVIC: That's correct. Until  
23 he - - - until he's nearing the end of his parole  
24 supervision. And - - -

25 JUDGE PIGOTT: Does that make any sense to

1           you? I mean why - - - why would that be?

2                   MS. VUK-PAVLOVIC: Absolutely. Because I  
3           think the - - - the legislature didn't want to  
4           subject people to an even greater deprivation of  
5           liberty if they were living lawfully in the community  
6           and - - - and complying with the terms of their  
7           parole supervision.

8                   JUDGE RIVERA: That's - - - that's, like,  
9           the whole point of SOMTA, right, is to ensure that if  
10          someone is a sex offender with this mental  
11          abnormality, they can't control their urges and that  
12          they're a danger to the community, that the State has  
13          an opportunity to present that evidence and have them  
14          either confined or put on SIST, if that's the  
15          appropriate outcome.

16                   So let me ask you this. What should have  
17          happ - - - what, if any, recourse did the State have  
18          - - - have here? Because I think that's what Judge  
19          Pigott is asking. It sounds like you're saying  
20          nothing. They've got to wait nine years, or maybe  
21          he'll commit some crime in the interim, who knows?

22                   MS. VUK-PAVLOVIC: Well, the State was  
23          required under the Mental Hygiene under Article 10 to  
24          initiate the Article 10 review process prior to his  
25          conditional release. Since they didn't, they can't

1 now go back and unconstitutionally arrest him, seize  
2 him from the community - - -

3 JUDGE READ: So they can do nothing.

4 MS. VUK-PAVLOVIC: - - - when he's done  
5 nothing wrong.

6 JUDGE RIVERA: So that - - - so that - - -

7 JUDGE READ: They can do nothing.

8 MS. VUK-PAVLOVIC: So they can closely  
9 supervise him under parole supervision, and if he  
10 takes any - - - if he makes any missteps they can  
11 lodge a parole violation warrant and have him  
12 arrested. At - - - if he - - - that - - - and that's  
13 even for a minor infraction, a - - - a rule  
14 violation, a missed curfew.

15 JUDGE PIGOTT: Could they then begin a  
16 SOMTA?

17 MS. VUK-PAVLOVIC: If he - - - then if he's  
18 reincarcerated on the parole violation and as he's  
19 nearing release then that's - - - that's one of the  
20 times in which the State does have jurisdiction to  
21 review him again.

22 JUDGE RIVERA: But if Joseph II recognizes  
23 even unlawful custody, why - - - why can't they just  
24 pick him up? Let's circle back to the beginning of  
25 this argument.

1 MS. VUK-PAVLOVIC: Because Article - - -

2 JUDGE RIVERA: They pick him up. He's in  
3 unlawful custody. I thought that was the heart of  
4 Joseph II.

5 MS. VUK-PAVLOVIC: Well, Article 10 can't  
6 be interpreted in a way that authorizes  
7 unconstitutional arrests. And here there was no  
8 legal authority for his arrest. So has - - - it has  
9 to be interpreted in compliance with the  
10 Constitution. Otherwise - - -

11 JUDGE FAHEY: Well, would it be different  
12 if the type of incarceration - - - he - - - he's  
13 still in jail, right?

14 MS. VUK-PAVLOVIC: He is.

15 JUDGE FAHEY: Still incarcerated.

16 MS. VUK-PAVLOVIC: He's still incarcerated.

17 JUDGE FAHEY: Okay. Would it be different  
18 if the type of incarceration was different or if  
19 deprivation of liberty was different? In other  
20 words, if he was - - - you're bringing a writ, so if  
21 he was in civil confinement, the writ wouldn't apply.  
22 Would you - - - would you say that he could be put in  
23 civil confinement under Joseph II but he could not be  
24 put in incarceration? He couldn't - - - he couldn't  
25 be in a - - - a jail? Does that make a difference?

1 MS. VUK-PAVLOVIC: If he were - - - I'm  
2 sorry?

3 JUDGE FAHEY: All right. He's in jail  
4 right now. You bring a writ of habeas corpus. You  
5 want to have him let out of jail. If he had been,  
6 after the Article 10 - - - they - - - what did they  
7 hold him for probable cause? Is that what happened,  
8 and then they made the determination? Is that the  
9 right sequence?

10 MS. VUK-PAVLOVIC: They - - - they filed  
11 the Article 10 petition on the same day that he filed  
12 his habeas corpus petition. And subsequently,  
13 probable cause was - - - was found on - - -

14 JUDGE FAHEY: Okay. So he's - - -

15 MS. VUK-PAVLOVIC: - - - the Article 10  
16 petition.

17 JUDGE FAHEY: - - - he's still  
18 incarcerated. But if he had been in civil  
19 confinement, Gowanda Psychiatric Center, would it be  
20 a different situation?

21 MS. VUK-PAVLOVIC: If he had been  
22 unlawfully arrested and put in civil confinement?

23 JUDGE FAHEY: Right.

24 MS. VUK-PAVLOVIC: Yes. I believe he could  
25 file a habeas petition because he - - - he's still

1 unlawfully restrained and his liberty - - -

2 JUDGE FAHEY: So it doesn't - - - the type  
3 of incarceration doesn't matter - - -

4 MS. VUK-PAVLOVIC: No.

5 JUDGE FAHEY: - - - in terms of his liberty  
6 - - -

7 MS. VUK-PAVLOVIC: Well, as long as he's  
8 unlawfully detained in his - - - in his liberty, he  
9 has the right to bring a writ of habeas corpus for a  
10 court to review the - - -

11 JUDGE READ: And - - - and - - -

12 MS. VUK-PAVLOVIC: - - - the legality of  
13 the detention.

14 JUDGE READ: And the probable cause finding  
15 makes no difference?

16 MS. VUK-PAVLOVIC: It doesn't, because it's  
17 jurisdictionally void.

18 JUDGE READ: Because you're saying the  
19 initial - - - the initial picking him up and  
20 incarcerating was improper?

21 MS. VUK-PAVLOVIC: Right. Because it - - -

22 JUDGE READ: So - - -

23 MS. VUK-PAVLOVIC: - - - it was - - - it  
24 was unconstitutionally - - - I'm sorry, Your Honor.

25 JUDGE READ: No. That's what - - - that's

1 - - - that's you're - - -

2 MS. VUK-PAVLOVIC: Yes.

3 JUDGE READ: - - - that's what you're - - -

4 MS. VUK-PAVLOVIC: Yes, because it was  
5 based on this intentional unconstitutional arrest.  
6 It didn't - - -

7 JUDGE PIGOTT: But then we have the sit - -  
8 - I'm sorry.

9 MS. VUK-PAVLOVIC: I'm sorry.

10 JUDGE PIGOTT: I was going to - - - we then  
11 have a situation where there has been a finding that  
12 this person is a sex offender in need of treatment  
13 and, in fact, the need of - - - of confinement, and  
14 we're saying, well, because you arrested him  
15 improperly we're going to let this sex offender out.

16 JUDGE FAHEY: You see the problem. It - -  
17 - it - - - it circles around to that.

18 MS. VUK-PAVLOVIC: Well - - - well, the  
19 issue is - - -

20 JUDGE FAHEY: Assuming an unlawful custody,  
21 once a lawful determination is made that SORA's been  
22 viol - - - or that - - - that he's subject to the  
23 restrictions set out in SORA, then he - - - I don't  
24 know if the writ can apply at that point.

25 MS. VUK-PAVLOVIC: Well, it's not lawful

1 here because they didn't have jurisdiction. I mean  
2 this would basically entitle the State - - -

3 JUDGE FAHEY: You're saying under the  
4 initial arrest they didn't have jurisdiction. That  
5 was clearly unlawful. Let's assume that.

6 MS. VUK-PAVLOVIC: Correct.

7 JUDGE FAHEY: So now we have the SORA  
8 hearing and find out, okay, he's going to - - - he's  
9 going to go to - - - to - - - he's - - - he's - - -  
10 he - - - we can civilly confine him even though he  
11 can't be criminally confined.

12 MS. VUK-PAVLOVIC: Well, he can't be  
13 subject to Article 10 because the basic requirement  
14 of detained sex offender wasn't met because of that  
15 unlawful, unconstitutional - - -

16 JUDGE FAHEY: You're saying the unlawful -  
17 - -

18 MS. VUK-PAVLOVIC: - - - arrest.

19 JUDGE FAHEY: So that would be - - - is  
20 that opposite from what Joseph II says, the principle  
21 of Joseph II? I know the facts are different.

22 MS. VUK-PAVLOVIC: It's - - - it's  
23 different because in - - - in - - - in that case,  
24 this court said that where - - - where the unlawful  
25 custody was a result of a - - - a procedural error,

1 an administrative mistake, that's okay. But it  
2 didn't authorize the State to intentionally  
3 manufacture a person's arrest to bring that - - -

4 CHIEF JUDGE LIPPMAN: Okay. We - - - we  
5 understand.

6 JUDGE RIVERA: Can I - - - can I - - - I  
7 just - - -

8 CHIEF JUDGE LIPPMAN: Judge Rivera.

9 JUDGE RIVERA: - - - on Joseph II the  
10 majority mentions that perhaps the legislature  
11 thought Article 9 procedures might be adequate where  
12 you've got the gap we're talking about because we've  
13 been asking you, or some of us have, what - - - what  
14 recourse does the State have. Do you disagree with  
15 the majority's suggestion there that perhaps Article  
16 9 - - -

17 MS. VUK-PAVLOVIC: No.

18 JUDGE RIVERA: - - - might - - - might  
19 address the situation where someone is out and  
20 otherwise, under your argument, is not subject to the  
21 Article 10 procedures?

22 MS. VUK-PAVLOVIC: Absolutely. Here he's  
23 subject to parole supervision and if he, at any  
24 point, is - - -

25 JUDGE READ: So that's exclusive?

1 MS. VUK-PAVLOVIC: - - - the State believes  
2 he's - - -

3 JUDGE READ: That's exclusive? Article 9  
4 can't possibly - - -

5 MS. VUK-PAVLOVIC: No. It - - - it can.  
6 In addition to that, if he's - - - if he's determined  
7 to be mentally ill and pose a dang - - - danger to  
8 himself or others he could also be civilly committed  
9 under Article 9.

10 CHIEF JUDGE LIPPMAN: Okay, counsel.  
11 Thanks, counsel.

12 MS. VUK-PAVLOVIC: Thank you.

13 CHIEF JUDGE LIPPMAN: Counsel?

14 MR. HARROW: May it please the court, Jason  
15 Harrow for the superintendent.

16 CHIEF JUDGE LIPPMAN: Counsel, you agree  
17 that - - - that the Article 10 was - - - was  
18 jurisdict - - - dictionally defective?

19 MR. HARROW: Not at all, Your Honor. In  
20 fact, the - - -

21 CHIEF JUDGE LIPPMAN: Why? Why? What - -  
22 - what basis did you - - - found - - - foundation did  
23 you lay under Article 10 to be able to have this  
24 proceeding?

25 MR. HARROW: Well, I - - - I think as the

1 discussion that the court had earlier with my friend  
2 on the other side, the - - - the definition of  
3 detained sex offender plainly encompasses Bourlaye  
4 T., whether or not he was at Fishkill or on parole.

5 JUDGE PIGOTT: Does this mean - - - if you  
6 look at your annual report I - - - I think there's,  
7 trying to think, 1,600 or so sex offenders referred  
8 to the AG or to the SOMTA board for review, and they  
9 do 160 of them. I'm just using - - - does that meant  
10 that the other roughly 1,000 people who, in the view  
11 of someone des - - - deserved to be referred to the  
12 SOMTA board and nothing was done on it, for the  
13 entire time that they were on probation or post-  
14 release supervision, are subject to being arrested on  
15 the street and put in jail and then a SOMTA  
16 proceeding begun like what happened here?

17 MR. HARROW: There - - - there would be no  
18 jurisdictional problem, Your Honor, with that in - -  
19 - in that they are in the class of persons of sex  
20 offenders.

21 CHIEF JUDGE LIPPMAN: When are you supposed  
22 to bring this proceeding?

23 MR. HARROW: This - - - this proceeding was  
24 supposed to be brought - - - well, he was - - -

25 CHIEF JUDGE LIPPMAN: Bef - - - before,

1 right?

2 MR. HARROW: Corr - - - correct. He was  
3 supposed to have that initial review - - -

4 CHIEF JUDGE LIPPMAN: But you didn't do it.

5 MR. HARROW: - - - in March of 2012. The  
6 Department didn't do it because everyone thought that  
7 he was going to be deported to the Ivory Coast.

8 CHIEF JUDGE LIPPMAN: Yes. But then when  
9 he wasn't, where do you have the authority to go and  
10 do it even though he's - - - he's out now?

11 MR. HARROW: Well, Your Honor, with - - -  
12 with respect, I don't think that's dispositive to the  
13 habeas petition here, and the reason is that that  
14 January 29th, 2013 - - -

15 CHIEF JUDGE LIPPMAN: If what you did is  
16 unconstitutional it's dispositive, right?

17 MR. HARROW: Well, for - - - for several  
18 reasons it's - - - it's not, Your Honor. The first  
19 is - - -

20 CHIEF JUDGE LIPPMAN: Okay. But if it is  
21 it's disp - - - dispositive, right?

22 MR. HARROW: No, I don't think so because -  
23 - -

24 CHIEF JUDGE LIPPMAN: Even if it's  
25 unconstitutional it's not dispositive?

1 MR. HARROW: Correct, Your - - - Your  
2 Honor. And - - -

3 CHIEF JUDGE LIPPMAN: Okay. Why isn't it  
4 dispositive if it's unconstitutional?

5 MR. HARROW: It's not dispositive because  
6 for the same reason that violation, perhaps, of  
7 speedy trial rights or of the ninety-day bar - - -  
8 the - - - the ninety-day window to have a parole  
9 hearing. All these pre-trial proceedings don't  
10 always affect the actual jurisdiction of a criminal  
11 court or - - - or here the - - - a civil commitment  
12 proceeding. So - - -

13 JUDGE ABDUS-SALAAM: That may be true but  
14 if the man is on the street and he just gets snatched  
15 up, and he hasn't done anything, he was properly  
16 released because there was no hold on him. There was  
17 no confinement hold. So he's out on the street, and  
18 you're saying he can just be scooped up off the  
19 street and then a proceeding can be started because  
20 he's on parole supervision but hasn't done anything  
21 to violate that parole?

22 MR. HARROW: I'm not saying that, Judge  
23 Abdus-Salaam, but - - - but - - - and I - - - I just  
24 want to explain that for two straightforward reasons.  
25 The - - - the first is that whether or not the

1 Department here was authorized to pick Bourlaye T. up  
2 on parole, and, again, he was not at liberty as - - -  
3 as the court recognizes. He was subject for - - -  
4 until 2023 to an ongoing sentence for his - - - his  
5 rape spree, what really can only described that way.  
6 And - - - and so what happened was he was still on  
7 parole, and he was then able to be - - - have Article  
8 10 proceedings proceed against him because he meets  
9 the definition of detained sex offender.

10 JUDGE PIGOTT: I think what we're - - -  
11 what we're focu - - -

12 MR. HARROW: And so - - -

13 JUDGE PIGOTT: I'm sorry. What we're  
14 focusing on is can - - - can somebody sitting in a  
15 police station somewhere say, you know, I think I'm  
16 going to go arrest this guy, and he arrests him. No  
17 - - - no grounds. No reason. He just arrests him.  
18 And then - - - and then you go to - - - to the AG and  
19 you say, you know, you should have filed a SOMTA on  
20 this guy and you blew it. So get going, because I  
21 got him in jail illegally. But if you get the SOMTA  
22 going fast - - - fast enough and we get a PH done,  
23 then we could keep him and we could do this over and  
24 over and over again as a service to the community by  
25 just scarfing people up and then hoping that a SOMTA

1 applies. You see the flaw in that?

2 MR. HARROW: I see the problem, but that's  
3 not what happened here, Judge Pigott. The - - - the  
4 - - - the record - - -

5 CHIEF JUDGE LIPPMAN: In what way is that  
6 not what happened here?

7 MR. HARROW: Well, page 98 of the record,  
8 Your Honor, is a letter from the Department of Parole  
9 counsel, lead counsel, explaining in response to  
10 Bourlaye T.'s request exactly what happened. And  
11 what he explained was what I - - - what I think the  
12 court understands, which is there was a - - - there  
13 was a mistake. Everybody thought he was going to be  
14 deported. He was not. And - - - and all of a sudden  
15 they realized that there was someone at liberty who  
16 had committed, within three months of unlawfully  
17 entering the country - - -

18 CHIEF JUDGE LIPPMAN: What - - - what was  
19 the mistake? What was the mistake?

20 MR. HARROW: The mistake was not undergoing  
21 the Article 10 process.

22 CHIEF JUDGE LIPPMAN: Yeah. But - - - but  
23 - - - yes, that's a mistake. That's true. But you  
24 can't always just correct your mistake by arresting  
25 somebody on no grounds.

1                   JUDGE READ: Well, when you were surprised  
2 by the fact that he wasn't going to be deported, did  
3 you have - - - did you have any other alternative  
4 that you could have taken?

5                   MR. HARROW: Well, Judge Read, there may  
6 have been some alternatives, including, as - - - as  
7 the court acknowledged earlier, some alternatives in  
8 Article 10 itself including a securing petition which  
9 would give - - - which would create an automatic  
10 return to custody and then a right to a probable  
11 cause hearing within seventy-two hours.

12                   There's also another option, which I  
13 understand the Department has now instituted. Which  
14 is to basically make it a condition of parole or have  
15 an outstanding warrant so that in this very rare,  
16 unexpected case where it turns out, because there's  
17 turmoil in Ivory Coast and he's unable to be deported  
18 or any - - - any other country going forward, that  
19 the Department can more easily know the whereabouts,  
20 obt - - - place the respondent back into custody, do  
21 the evaluations that are necessary, and contemplate -  
22 - -

23                   CHIEF JUDGE LIPPMAN: Yeah. But we  
24 understood - - - we understand, we get it, that you  
25 were trying to do the public good. Oh, this guy is

1 in the street. But as Judge Read was just  
2 suggesting, if there were other ways that did not  
3 require an unconstitutional act, weren't you mandated  
4 to try those things to - - - to get him if there was  
5 a public threat of some kind rather than just - - -  
6 we're all using different variations of this to - - -  
7 to describe this scooping him up and saying we'll  
8 figure out later how we're going to take care of him?  
9 I mean - - - don't - - - didn't you have to do  
10 something else?

11 MR. HARROW: Your Honor, there - - - there  
12 are best practices and better practices that I can  
13 assure the court are being followed.

14 CHIEF JUDGE LIPPMAN: Right. But there are  
15 worse and worse - - -

16 MR. HARROW: But that doesn't entitle - - -

17 CHIEF JUDGE LIPPMAN: - - - and worse  
18 practices which went on here.

19 JUDGE PIGOTT: Let me - - - let me - - -  
20 let me add - - - let me pile on. You - - - you  
21 release this guy and - - - and he's going to the  
22 Ivory Coast. You didn't tell the Ivory Coast: and  
23 by the way he's a one-man terror in - - - in our  
24 country who's been raping women in - - - in a  
25 consecutive order. You were happy to ship him off to

1 the Ivory Coast. And then all of a sudden he's not  
2 going and he becomes a SOMTA? I - - - there - - -  
3 there's an inconsistency there, too. And - - - and  
4 so I - - - I - - - it just looked like such a panic  
5 because that - - - that whole SOMTA program came  
6 together faster than, you know, most summary judgment  
7 motions. And - - - and all of a sudden he's  
8 incarcerated.

9 JUDGE READ: Well, ICE probably said  
10 something to Ivory Coast, didn't they?

11 MR. HARROW: Yeah. I - - - I - - - Judge  
12 Pigott, I - - - I think that the view of the State  
13 was that the federal government was going to  
14 successfully dep - - - deport him, obviously. And -  
15 - - and so - - - and in response, Judge Read, to your  
16 question, you know, we don't know exactly the  
17 communication that has been going on between the  
18 federal government here. In fact, at best we can  
19 tell, there's none.

20 JUDGE ABDUS-SALAAM: So what will happen -  
21 - -

22 JUDGE READ: Maybe the reason - - - I was -  
23 - - I guess what I was suggesting is maybe the reason  
24 Ivory Coast didn't want him was because he was a one-  
25 man crime spree.

1 MR. HARROW: And that's possible and so for  
2 reasons of public safety, as the court recognizes - -  
3 -

4 JUDGE ABDUS-SALAAM: What - - - what will  
5 happen - - -

6 JUDGE STEIN: What was your - - -

7 JUDGE ABDUS-SALAAM: - - - if - - - what  
8 will happen if he is now released because that's - -  
9 - what if we disagree with your position and we  
10 believe that this was an unconstitutional confinement  
11 and that everything that followed it is void. What  
12 will happen with his deportation? Is ICE prepared  
13 now to - - - to send him to the Ivory Coast or what?

14 MR. HARROW: Not that we know of, Your  
15 Honor. The - - - the - - - there have been no  
16 discussions, no assurances from the federal  
17 government that the situation in Ivory Coast has  
18 improved at all. But - - -

19 JUDGE STEIN: Could - - - could you just go  
20 ahead and get a securing order if - - - if that were  
21 to happen? If - - - if we were to reverse could you  
22 then go seek a securing order and start all over  
23 again the right way or the better way or the best  
24 way?

25 MR. HARROW: I - - - I think so, Your

1 Honor. I - - - I don't - - -

2 JUDGE STEIN: What do you have to show to  
3 get a securing order?

4 MR. HARROW: There - - - there would be  
5 probable - - - the same thing that's already been  
6 shown.

7 JUDGE STEIN: Probable cause.

8 MR. HARROW: Exactly. The - - - and - - -  
9 and - - -

10 JUDGE RIVERA: And how long will he be out  
11 while you're doing that?

12 MR. HARROW: Well, he - - - he may not be  
13 out at all.

14 JUDGE RIVERA: Or not.

15 MR. HARROW: Yeah. Be - - - because a - - -  
16 -

17 JUDGE RIVERA: Yeah. That's what I - - -

18 MR. HARROW: - - - a securing petition  
19 entitles the - - - the State to in - - - hold  
20 Bourlaye T. at a facility of his choice. And  
21 actually, Judge Fahey, you asked earlier regarding  
22 the availability of the writ. It - - - it - - - it's  
23 actually his choice that he's now at Fishkill,  
24 because he's being held pursuant to Article 10, which  
25 I think is an important point. He's no longer being

1 held pursuant to that brief period of detention that  
2 he stresses so much. He's now fully in the Article  
3 10 process.

4 CHIEF JUDGE LIPPMAN: Yeah. But he  
5 shouldn't be in the Article 10. He shouldn't be  
6 there.

7 JUDGE STEIN: Does the - - -

8 CHIEF JUDGE LIPPMAN: Isn't that the point  
9 that - - - we get it. Now you have him under an  
10 Article 10 order.

11 MR. HARROW: Corr - - - correct. And  
12 that's - - - that's - - -

13 CHIEF JUDGE LIPPMAN: But you didn't - - -  
14 you didn't go about that in accordance with the - - -  
15 the law, and there are lots of threats to public  
16 safety walking around the streets. We don't - - -  
17 other than in a totalitarian government, we don't go  
18 and scoop them all up off the street without any kind  
19 of basis and say you're a threat to public safety.  
20 We're putting you in and then later figure out how to  
21 keep you there. Isn't that what - - - this is all  
22 we're saying to you. And - - - and - - - and, you  
23 know, you're trying to, after the fact, make this  
24 good. And it's - - - it's not good. It's not - - -  
25 may not be Constitutionally good.

1 MR. HARROW: I - - - I - - - I absolutely  
2 agree with - - - with the premise of the question,  
3 Your Honor. But I don't - - -

4 CHIEF JUDGE LIPPMAN: But you want us to  
5 just - - -

6 MR. HARROW: - - - agree with the  
7 conclusion because - - -

8 CHIEF JUDGE LIPPMAN: Even if - - - if you  
9 agree with us you're saying, yeah, but - - - but now  
10 he's okay. Keep him there.

11 JUDGE READ: But if you're - - - I guess if  
12 you're saying - - - if you're saying you can get a  
13 securing order because you have to make the same  
14 showing you've already shown, and you've fixed your  
15 procedures going forward, then there's no real  
16 practical effect to our decision one way or another,  
17 is there?

18 MR. HARROW: Correct. And I think this  
19 decision - - - that - - - and even a grant of habeas  
20 would be ineffective for several other reasons.  
21 First, it wouldn't actually dismiss the Article 10  
22 petition anyway here, Your Honors. It - - - there's  
23 still an ongoing Article 10 petition. He hasn't even  
24 had a trial. He have - - - they haven't made pre-  
25 trial motions regarding mental abnormality, if that's

1 to come, and so that process needs to play out. He's  
2 no longer held pursuant to that initial seizure which  
3 may have been entitled to immediate relief which this  
4 court has noted is really the touchstone of habeas  
5 availability. So that's another procedural wrinkle.

6 In addition to even if somehow this habeas  
7 posit - - - petition, which is in the very unusual  
8 circumstance of being collateral to an ongoing  
9 proceeding, even if that - - - that he were entitled  
10 to habeas somehow, as I think the court recognizes,  
11 he - - - he may not be released and there would just  
12 be a kind of déjà vu because there would be a 10.07 -  
13 - -

14 CHIEF JUDGE LIPPMAN: Yeah. But isn't it  
15 important - - - isn't it important for the court to  
16 say that this - - - this is not tolerable?  
17 Especially if you're saying in - - - in reality there  
18 will be no practical effect. Isn't it - - - isn't it  
19 important that we say you can't do it this way?

20 MR. HARROW: Well, like I said, I think we  
21 - - - we recognize and have tried to - - - to do it  
22 in a more orderly fashion. But in - - - in any  
23 event, there are other venues, you know, for - - -  
24 for challenging unlawful custody. But the important  
25 point is that this is someone that nobody doubts

1           should have been subject to Article 10, was  
2           dangerous.

3                         JUDGE PIGOTT:  Yeah.  It - - - it - - - it  
4           seemed like you - - - somebody panicked.  I mean I -  
5           - - I just don't understand this.  Your opponent  
6           argues that you - - - you can't bring these until  
7           you're nearing the end of your - - - of your custody.  
8           And if - - - and if that's true he wasn't anywhere  
9           near the end of his - - - of his PRS, right?

10                        MR. HARROW:  That - - - that's a hundred  
11           percent right, Judge Pigott.  And - - - and - - - and  
12           nobody wanted to wait for that kind of - - - you  
13           know, my - - - my friend on the other side says  
14           there's this gap, this nine-year gap, that they would  
15           have to wait.  I don't think that's in the statute.  
16           As - - - as the court recognized, detained sex  
17           offender means anyone on parole, not someone near,  
18           about to be released.  That has to do with notice.  
19           But that's exactly the problem that was try - - -  
20           that the - - - the Department was trying to solve,  
21           including public safety in his arrest.

22                        JUDGE ABDUS-SALAAM:  Did you - - - did you  
23           argue the - - - the supervision, the parole  
24           supervision below?  You didn't argue that below, did  
25           you?  Didn't you argue he was confined?

1                   MR. HARROW: We - - - we didn't address it.  
2                   The - - - the Appellate Division did - - - did bring  
3                   it up in its opinion. We didn't address it because  
4                   eith - - - either way, you know, he is subject to  
5                   Article 10, as a detained sex offender.

6                   JUDGE PIGOTT: Well, we can go into that.  
7                   Because there was a - - - at least an allegation from  
8                   your - - - your opponent, I think, that - - - that  
9                   they had un - - - lied. They said he had absconded,  
10                  which wasn't true. And then they brought up a  
11                  disciplinary action against him at Fishkill. It - -  
12                  - it just looks like such a - - - a misuse of - - -  
13                  of - - - of proper procedures in this whole thing.  
14                  You disagree? Am I reading it wrong?

15                  MR. HARROW: Well, I - - - I disagree in  
16                  the sense that the posture of this case is simply on  
17                  a motion to dismiss. You know, it - - - there - - -  
18                  there's not really a fully developed record. But I  
19                  think that record, in any event, would be irrelevant  
20                  to the jurisdiction of the Article 10 court and the  
21                  need to - - - undergo the orderly Article 10  
22                  proceedings - - -

23                  CHIEF JUDGE LIPPMAN: Okay, counsel.

24                  MR. HARROW: - - - that is what the  
25                  legislature contemplated.

1 CHIEF JUDGE LIPPMAN: Thanks, counsel.

2 MR. HARROW: Thank you.

3 CHIEF JUDGE LIPPMAN: Appreciate it.

4 Rebuttal, counsel.

5 MS. VUK-PAVLOVIC: Your Honor, I'd just  
6 like to clarify that there was no proper way to bring  
7 an Article 10 proceeding at this time. There was no  
8 securing petition that could have been obtained.

9 JUDGE READ: What about in the future?

10 MS. VUK-PAVLOVIC: In the future, once  
11 there is Article 10 jurisdiction, which means that  
12 when he's a detained sex offender nearing release,  
13 then - - -

14 JUDGE READ: So that's after nine years,  
15 you're saying, or roughly.

16 MS. VUK-PAVLOVIC: Unle - - - unless - - -  
17 unless he's reincarcerated on a parole violation.

18 JUDGE READ: Okay.

19 MS. VUK-PAVLOVIC: Then the parole - - - we  
20 have to defer to the parole process to supervise him.  
21 And - - - and as long he's successful and - - - and  
22 can live safely in the community under parole  
23 supervision, the - - - the Article 10 proceeding  
24 can't be commenced. There's just - - - there isn't  
25 jurisdiction.

1                   JUDGE STEIN: So - - - so - - - so if he's  
2 really - - - he - - - he committed terrible,  
3 horrible, heinous sex crimes, which is why he was  
4 incarcerated, and - - - and he - - - he didn't go  
5 through sex offender training and, you know, he had a  
6 terrible disciplinary history and all of these  
7 things, and this - - - this exact situation happened,  
8 you say that - - - that the State would have to wait  
9 until he did something bad again? It could be a  
10 minor infraction, or it could be anoth - - - it could  
11 be a rape and murder. We don't know which. But  
12 there's nothing that the State could do under Article  
13 10?

14                   MS. VUK-PAVLOVIC: No. The Arti - - - the  
15 Article 10 statute doesn't provide for civil  
16 management outside of those two time periods. And it  
17 can't be the - - - it has to be strictly complied  
18 with because - - -

19                   JUDGE RIVERA: Clari - - - clarify again  
20 why it's at - - - right before the end of the  
21 supervision period?

22                   MS. VUK-PAVLOVIC: Section 10.05(b) sets  
23 that out, and that's when the initial notice which  
24 initiates the entire Article 10 process is - - - is  
25 given. It says that it can only - - - that it can be

1 given when the person is incarcerated and nearing  
2 release from incarceration. Or - - -

3 CHIEF JUDGE LIPPMAN: But you agree there  
4 were other avenues that might have been pursued?

5 MS. VUK-PAVLOVIC: For the Article 10?

6 CHIEF JUDGE LIPPMAN: No, in general.

7 MS. VUK-PAVLOVIC: In general, he's - - -  
8 he's subject to parole supervision. He's subject to  
9 release conditions by immigration, because they are -  
10 - - he is still subject to a final order of removal.

11 CHIEF JUDGE LIPPMAN: What could the State  
12 have done in this circumstance rather than do what  
13 they did?

14 MS. VUK-PAVLOVIC: The State could have  
15 complied with the Mental Hygiene Law by initiating  
16 the Article 10 review process prior to his  
17 conditional release.

18 CHIEF JUDGE LIPPMAN: No, no. But when it  
19 was too late and he's on the street, what could they  
20 do?

21 JUDGE READ: When it - - - when it's - - -  
22 when they're surprised. When they find out all of a  
23 sudden that he's not going to be deported as  
24 everybody expected, what can they do?

25 MS. VUK-PAVLOVIC: Supervise him closely

1 under parole. Make sure he's at his - - - his - - -  
2 at his approved residence. Make sure he's reporting  
3 to his programs every day.

4 CHIEF JUDGE LIPPMAN: Article 9? Article  
5 9?

6 JUDGE RIVERA: It sounds like this is a  
7 full control, almost SIST - - -

8 MS. VUK-PAVLOVIC: Initiating Article 9.

9 JUDGE RIVERA: - - - but not quite without  
10 the hearing.

11 JUDGE READ: Yeah.

12 MS. VUK-PAVLOVIC: Many, many of the - - -  
13 there's many of the same - - -

14 JUDGE RIVERA: You're missing a step there,  
15 aren't you, with that one? I mean you're missing the  
16 - - - the determination that - - - that SIST is  
17 appropriate or something similar. It's the  
18 functional equivalent to SIST in all - - - in many  
19 ways. SIST would be better for him. He might get  
20 some services.

21 MS. VUK-PAVLOVIC: Under parole he can get  
22 - - - he can get the same services. He can get  
23 treatment. Most parolees are - - - are mandated to -  
24 - - to treatment.

25 JUDGE RIVERA: But he was not, right?

1 MS. VUK-PAVLOVIC: Sometimes residential.

2 JUDGE RIVERA: But he is not?

3 MS. VUK-PAVLOVIC: Well, he - - - he had -  
4 - - at that - - - this time only made his initial arr  
5 - - - arrival report and that's when he was snatched  
6 out from - - - from his bed and incarcerated. So he  
7 was complying with all - - -

8 JUDGE RIVERA: You think that would satisf  
9 - - - you think that comports with the legislative  
10 intent behind SOMTA, what you've just described?

11 MS. VUK-PAVLOVIC: I think - - -

12 JUDGE RIVERA: You got to do it at this  
13 moment or you never get a chance again unless he  
14 violates parole or - - -

15 MS. VUK-PAVLOVIC: I think it - - -

16 JUDGE RIVERA: - - - or ten years down the  
17 road.

18 MS. VUK-PAVLOVIC: I think it does. I  
19 don't - - - the - - - the legislature didn't intend  
20 for people who are lawfully living on parole to be  
21 subjected to a further deprivation of their liberty  
22 and to have - - -

23 CHIEF JUDGE LIPPMAN: But you could have  
24 had an Article 9 proceeding, right?

25 MS. VUK-PAVLOVIC: If - - - if he were to

1           commit some sort of overt act and determined - - -  
2           and if he were determined to be mentally ill and  
3           dangerous he could be committed, civilly committed,  
4           under Article 9. But that's - - - that - - - that -  
5           - - he was - - - he was complying with the terms of  
6           his parole supervision. He was doing everything he  
7           had to.

8                         And I'd just like to note that since his  
9           release from immigration custody, the necessary  
10          travel permit was issued. The Ivory Coast is taking  
11          him back, is - - - is cooperating.

12                        CHIEF JUDGE LIPPMAN: When is that supposed  
13          to happen?

14                        MS. VUK-PAVLOVIC: I'm sorry?

15                        CHIEF JUDGE LIPPMAN: When is that supposed  
16          to happen?

17                        MS. VUK-PAVLOVIC: Currently, ICE is  
18          actually in the process of obtaining the - - -  
19          another travel permit, because that one expired. It  
20          was a three-month permit. So they're in the process  
21          of obtaining another one. So should the - - - should  
22          the court rule to - - - to order habeas relief, the  
23          immigration process will be ready.

24                        CHIEF JUDGE LIPPMAN: Okay. Thank you  
25          both.

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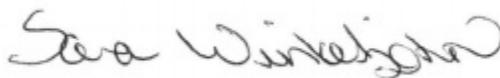
MS. VUK-PAVLOVIC: Thank you.

CHIEF JUDGE LIPPMAN: Appreciate it.

(Court is adjourned)

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

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2  
3 I, Sara Winkeljohn, certify that the  
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