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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE EX REL. NEVILLE,

Appellant,

-against-

TOULON,

Respondent.

NO. 79

20 Eagle Street
Albany, New York
September 11, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: Good afternoon. First case
2 on today's calendar is People ex rel. Neville v. Toulon.

3 MR. RISELVATO: Good afternoon. May it please
4 the court. Timothy Riselvato of the Mental Hygiene Legal
5 Service, for the appellant, Ralph S. I'd like to reserve
6 two minutes for rebuttal time.

7 CHIEF JUDGE WILSON: Yes, sir.

8 MR. RISELVATO: Thank you. Your Honors, this
9 appeal challenges the provision of the Mental Hygiene Law
10 10.11(d)(4), as unconstitutional on its face and as applied
11 to appellant. The provision concerns revocation of strict
12 and intensive supervision and treatment, SIST. It allows
13 for a finding of probable cause and pre-hearing confinement
14 on an entirely ex parte process based only on the state's
15 petition and papers where the result is that an individual
16 is removed from the community and detained in jail
17 indefinitely pending a hearing without - - -

18 JUDGE SINGAS: Why isn't the liberty interest
19 diminished because of the prior SIST finding of mental
20 abnormality by a jury?

21 MR. RISELVATO: Well, that's a good question,
22 Your Honor. That's essentially what the Appellate Division
23 below held, was that because there was this finding of
24 mental abnormality, that someone who's on SIST isn't
25 entitled to the full due process protections. But that's

1 not the case. An individual on SIST has been found
2 appropriate to be on SIST by a judicial finding, and that
3 means that the state has failed to prove that they have a -
4 - - that they required confinement. So what the state - -
5 -

6 JUDGE SINGAS: Well, that's not necessarily true.
7 It's a discretionary finding that they could be placed on
8 SIST, but initially, the finding is that they have a mental
9 abnormality which indicates dangerousness.

10 MR. RISELVATO: Respectfully, Your Honor, it's -
11 - - it's not discretionary. The state could agree to SIST.
12 But otherwise, if the state doesn't agree to SIST, the only
13 way someone would get on SIST is if they were found not to
14 be so dangerous as to require confinement.

15 JUDGE CANNATARO: So is your argument that having
16 been placed on SIST, as a matter of law, they were deemed
17 at that point to no longer have a dangerous mental
18 abnormality?

19 MR. RISELVATO: Dangerous is the word there. In
20 fact, when someone is found appropriate for SIST, the
21 question is whether the person is, in the statute, a
22 dangerous sex offender who requires confinement of a sex
23 offender.

24 JUDGE CANNATARO: But my question is a little
25 different because there has been a prior adjudication, and

1 I'm asking you whether the effect of the SIST order somehow
2 vacates that prior adjudication with respect to the finding
3 that was made at the initial commitment.

4 MR. RISELVATO: Not at all. Every person who's
5 on SIST has been found to have a mental abnormality, but
6 they've also been given a state-created liberty interest in
7 remaining on SIST. And they have a legitimate expectation
8 that they will not be removed from SIST and put in jail
9 without reasonable due process accommodations.

10 JUDGE HALLIGAN: Can I ask you, are you making -
11 - - right here. Are you making only a procedural due
12 process argument or also a substantive due process
13 argument?

14 MR. RISELVATO: This is a procedural due process
15 argument.

16 JUDGE HALLIGAN: Okay.

17 MR. RISELVATO: What happens is it's - - - it's -
18 - - the situation is most similar to parole. Parolees have
19 a liberty interest in remaining on parole just like
20 individuals on SIST have a liberty interest in remaining on
21 SIST. Parolees, though, have both a right to a preliminary
22 parole revocation hearing on the need for pre-hearing
23 detention, which was required by the U.S. Supreme Court in
24 *Morrissey v. Brewer*, and they have a enforceable limit of
25 thirty days of pre-hearing detention. Now, both of those

1 procedural protections are expressly denied to individuals
2 pursuant to 10.11(d)(4).

3 JUDGE HALLIGAN: And - - -

4 JUDGE TROUTMAN: Does it matter that the parole
5 you're talking about a criminal process and going into a
6 prison versus a civil confinement?

7 MR. RISELVATO: That's - - - it does matter
8 because here, this is purely civil. So even if it's - - -
9 if someone's on parole, they still owe a criminal sentence.
10 This is a purely civil matter where someone is being put
11 into jail.

12 JUDGE TROUTMAN: So your argument is he should be
13 entitled to greater protections?

14 MR. RISELVATO: Absolutely. Because this is a
15 purely civil process.

16 JUDGE HALLIGAN: And it's your argument that
17 there's no confinement at all allowed on an ex parte
18 finding of probable cause or only if it runs more than
19 thirty days?

20 MR. RISELVATO: I would say, there should be no
21 confinement on an ex parte finding. You have to give the
22 person due process opportunity to be - - -

23 JUDGE HALLIGAN: So zero days. You can't confine
24 at all. Your view is before that?

25 MR. RISELVATO: Well, initially there's - - - the

1 individuals are taken into confinement for five days, and
2 that's before the state has to bring their petition and the
3 ex parte finding is found.

4 JUDGE HALLIGAN: So the first five days are
5 permissible, in your view, under due process, but then
6 there has to be an opportunity to be heard. And the - - -
7 and if that's done in the thirty days, that's still not
8 sufficient?

9 MR. RISELVATO: No, it's - - - it's not because
10 there needs to be the - - - the preliminary opportunity to
11 be heard before the time begins to run. Now, the Appellate
12 Division largely found that this was permissible because of
13 other procedural safeguards, but those safeguards are
14 largely illusory. For example, the fact that Mental
15 Hygiene Legal Service is alerted when they are taken into
16 custody for the initial five days doesn't really help us
17 prevent any unjust deprivation because we're not allowed to
18 argue on his behalf on the probable cause finding. So it
19 doesn't really help anything. Another supposed protection
20 is the thirty days that was mentioned, but - - -

21 JUDGE TROUTMAN: Could you move to set aside the
22 ex parte order?

23 MR. RISELVATO: No. In fact, there is no way to
24 challenge it. And the statute even says, if it goes beyond
25 thirty days, it specifically says any failure to commence

1 the hearing within the time period specified shall not
2 result in dismissal of the petition.

3 JUDGE TROUTMAN: So the court can't - - - with
4 respect to - - - when you say ex parte order, are you
5 referring to an order of the court?

6 MR. RISELVATO: Yes. The initial probable cause
7 finding.

8 JUDGE TROUTMAN: Can a court, upon an
9 application, withdraw its own order?

10 MR. RISELVATO: It's not permitted by the statute
11 as it's written, which is why it's unconstitutional on its
12 face.

13 JUDGE RIVERA: Well, I don't know how it's not
14 permitted. It might be difficult to make the application
15 if you don't have access to the paperwork, but I don't
16 think it's not permitted.

17 MR. RISELVATO: Well, specifically, if it goes
18 beyond thirty days and we were to argue that the duration
19 has become excessive, it specifically says that it shall
20 not be dismissed and there shall - - -

21 JUDGE RIVERA: Yes. But that doesn't foreclose
22 an application for an immediate hearing.

23 MR. RISELVATO: Well, the hearing - - -

24 JUDGE RIVERA: Would that not help to protect the
25 individual's rights?

1 MR. RISELVATO: Well, at that juncture, the
2 damage has already been done if it's gone over the thirty
3 days. The individual has been confined at that point
4 without due process on a purely ex parte situation. And in
5 fact - - -

6 JUDGE CANNATARO: Can you cite an example of an
7 adversarial probable cause finding process that is
8 analogous to what it is you're proposing be done here?
9 Because I think, in general, most people think that these
10 probable cause determinations are not made with an
11 adversarial process attached to them.

12 MR. RISELVATO: Well, the best example, as I
13 mentioned, is parole. Someone who's on parole and they are
14 alleged to have violated parole, they get a preliminary
15 hearing on the need for pre-hearing detention until such
16 time as they can have their final parole revocation
17 hearing. At that hearing, they get to present evidence.
18 They get to confront witnesses. That's exactly the
19 situation that we would ask for here.

20 JUDGE CANNATARO: And is the fact that those
21 hearings are essentially criminal in nature, you know, the
22 person is facing additional incarceration and criminal not
23 an important distinction?

24 MR. RISELVATO: It is an important distinction
25 because - - - because this is purely civil, individuals on

1 SIST have more rights. They should not be put in jail for
2 longer periods of time just - - - especially because this
3 is a civil proceeding.

4 JUDGE HALLIGAN: If you know, do you have a sense
5 of how often the hearing is held more than thirty days
6 after the probable cause determination?

7 MR. RISELVATO: Yes. In practice, it is
8 virtually never held within the thirty days. It is almost
9 always much longer as it was in this case. This case, it
10 was five months.

11 CHIEF JUDGE WILSON: So I just want to be clear
12 that I understand the procedural setup of this. You're
13 asking for a probable cause hearing early on - - -

14 MR. RISELVATO: Yes.

15 CHIEF JUDGE WILSON: - - - at which the issue
16 would be whether there was probable cause to believe that
17 the person had violated the terms of SIST?

18 MR. RISELVATO: No.

19 CHIEF JUDGE WILSON: Is that - - - no?

20 MR. RISELVATO: Because this - - - unlike parole
21 where the issue at a parole revocation hearing is whether
22 someone has violated the parole conditions, on SIST the
23 only issue is the same as at the initial disposition. It's
24 whether the person has become unable to govern their sex
25 offenses. So you could have a situation - - -

1 CHIEF JUDGE WILSON: So it's the same thing that
2 you would be asking for in the thirty-day hearing, same
3 standard?

4 MR. RISELVATO: Yes.

5 CHIEF JUDGE WILSON: Okay.

6 MR. RISELVATO: You - - - you could have a
7 situation where someone has actually violated a SIST
8 condition but because there are hundreds of SIST
9 conditions, at least sometimes over a hundred, many courts
10 have held that violation of certain SIST conditions is not,
11 as a matter of law, sufficient to justify confining someone
12 because there's a lot of technical violation.

13 JUDGE HALLIGAN: On your as-applied challenge,
14 which I take to be to the nature of the SIST violation
15 here, are you arguing that it violates due process to rely
16 on that condition or it violates the statute?

17 MR. RISELVATO: Both because - - -

18 JUDGE HALLIGAN: And why does it violate due
19 process?

20 MR. RISELVATO: Well, because we didn't get an
21 opportunity to raise the argument.

22 JUDGE HALLIGAN: Right. But if you - - - if you
23 had been given an opportunity to raise the issue, so the
24 procedural aspect with regard to the timing is taken out of
25 the picture, are you arguing that, as a matter of

1 procedural due process, that you can't rely on the
2 condition here?

3 MR. RISELVATO: That would be just as a matter of
4 what would constitute the sufficient evidence to - - -

5 JUDGE HALLIGAN: So the - - -

6 MR. RISELVATO: - - - justify confinement.

7 JUDGE HALLIGAN: Okay. And do you - - - is your
8 view that, as a matter of what the statute allows, that the
9 alcohol use is permissible if there's a proof - - - if
10 there's proof provided that it's causally related to the
11 inability to control impulses?

12 MR. RISELVATO: There was a Fourth Department
13 case that gave guidance on this, and it was State v. George
14 N. And that case held that, quote, "The statutes and case
15 law do not permit the state to confine any sex offender who
16 drinks a beer while on SIST."

17 JUDGE HALLIGAN: Right. I'm asking, is that your
18 view that the statute does not permit confinement for
19 alcohol use even if there is proof that alcohol use makes
20 it not possible for the individual to control their sexual
21 impulses?

22 MR. RISELVATO: No. There may be an argument,
23 but in most cases, that's not going to be the case.

24 JUDGE HALLIGAN: So it's a matter of proof?

25 MR. RISELVATO: Right. And we would need an

1 opportunity to challenge. And in fact, in this case, when
2 he eventually did get his final SIST hearing, he was
3 released and returned to SIST because the judge properly
4 found that the alleged violation didn't show that he had
5 become unable to govern his sex offender contact - - -
6 conduct - - - because he wasn't related to sex offending
7 behavior. So you can't say that we would have definitely
8 failed on that argument. And perhaps he could have avoided
9 five months in jail if we could have at least - - -

10 JUDGE RIVERA: Can I just clarify on that
11 original ex parte application? Is the court simply
12 deciding whether or not there's a basis for the allegation
13 that there is a violation of SIST as opposed to whether or
14 not that shows that indeed - - -

15 MR. RISELVATO: No.

16 JUDGE RIVERA: - - - he can't control his
17 impulses and he needs to be confined?

18 MR. RISELVATO: They're - - - at the initial
19 probable cause determination, they're determining whether
20 there's probable cause that the individual has become
21 unable to govern their sex offending and requires
22 confinement. I see my time is up. Thank you.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. AKOSAH: Good afternoon, Your Honors. May it
25 please the court. Kwame Akosah, for the Office of Mental

1 Health. This court should affirm the Appellate Division
2 because an ex parte probable cause determination in SIST
3 revocation proceedings does not violate due process on its
4 face or is applied to the appellant.

5 JUDGE HALLIGAN: Can I ask you if you agree with
6 the characterization that the hearings are virtually always
7 held after thirty days, to the extent you know?

8 MR. AKOSAH: Your Honor, it's - - - it is our
9 understanding the vast majority of cases, the court will
10 put on the hearing in less than thirty days as required by
11 the statute.

12 JUDGE HALLIGAN: So you have the exact opposite
13 view of your adversary?

14 MR. AKOSAH: I don't have the exact - - - what
15 I'm - - - what I'm saying is the court will schedule the
16 hearing, but then the parties will take an action - - -

17 JUDGE HALLIGAN: I see. Okay.

18 MR. AKOSAH: - - - subsequent to delay the
19 hearing. And so in the vast majority of cases, based on my
20 conversation with trial counsel, what occurs is that
21 there's a request for an adjournment, which happened in
22 this case.

23 JUDGE GARCIA: That happened here, didn't it?

24 MR. AKOSAH: Sorry?

25 JUDGE GARCIA: Didn't that happen here?



1 MR. AKOSAH: That's what happened here, Your
2 Honor. There was a request for an adjournment for - - -
3 the hearing was scheduled twenty-two days after the state
4 filed its petition for confinement. There was a finding of
5 probable cause, and then there was adjournment and the - -
6 - to obtain an expert evaluation, and that expert
7 evaluation was not brought until the middle of March. And
8 then a few days later, the Covid 19 pandemic comes.

9 JUDGE HALLIGAN: And so I take it's your view,
10 but tell me if I'm wrong, is that the thirty days in the
11 statute is totally hortatory. Basically, it has no - - -
12 it can't be enforced?

13 MR. AKOSAH: No. No. We would seriously dispute
14 that. The statute - - -

15 JUDGE HALLIGAN: So what are the consequences for
16 going beyond thirty days?

17 MR. AKOSAH: Well, the consequences for going - -
18 - Your Honor, we would dispute the idea that there needs to
19 be a consequence in order that - - - in order for there to
20 be a right to adjourn - - -

21 JUDGE HALLIGAN: Okay.

22 MR. AKOSAH: - - - within thirty days, yeah.

23 JUDGE HALLIGAN: But if it's not adhered to - - -

24 MR. AKOSAH: Right.

25 JUDGE HALLIGAN: - - - what, if any, consequences

1 are there permitted under your reading of the statute?

2 MR. AKOSAH: My understanding of the statute is
3 that remedy is available in a circumstance where a hearing
4 is not provided in thirty days. At a minimum, the
5 appellant - - - or the respondent - - - needs to make an
6 application to have their hearing within thirty days or a
7 motion. And if the court denies that, they can seek
8 mandamus relief, or in this case, habeas relief. But at a
9 minimum, there needs to be some process - - - some attempt
10 to have the hearing within thirty days.

11 JUDGE HALLIGAN: And so if they do that and they
12 try to get relief via mandamus or habeas, set to decide
13 whether, you know, that's a reasonable burden, what in the
14 statute authorizes the court to provide the relief? It
15 seems to me that probably either the thirty days is a
16 requirement that has to be complied with or it's
17 essentially a suggestion. So I'm trying to understand
18 which of the two you think it is.

19 MR. AKOSAH: I think it's a requirement that must
20 be complied with. It is a right conferred to every
21 respondent in SIST revocation proceedings. The statute is
22 very clear that the hearing has to be held within thirty
23 days. That means it can be held any time before the
24 thirty-day mark. And - - -

25 JUDGE HALLIGAN: And if it's not?

1 MR. AKOSAH: And if it's not the proper recourse
2 - - - just to clarify, the statute does not say that the -
3 - - the provision is toothless. What it says is that there
4 are certain remedies that are not available - - -

5 JUDGE HALLIGAN: Right.

6 MR. AKOSAH: - - - in circumstances where the
7 thirty days - - -

8 JUDGE HALLIGAN: So what remedy is available?

9 MR. AKOSAH: The remedy is to hold the hearing.
10 In a situation where the hearing - - -

11 JUDGE HALLIGAN: Okay.

12 MR. AKOSAH: - - - is not held, the remedy is to
13 hold the hearing, and if that fails the mandamus relief or
14 other sorts of - - - forms of relief.

15 JUDGE SINGAS: On average, how long does it take
16 to get a competing psychiatrist's evaluation report?

17 MR. AKOSAH: Your Honor, as I stand here today, I
18 don't have information about the sort of MHLS's time to get
19 a competing psychiatric evaluation, but the statute is
20 built under the assumption that the psychiatric evaluation
21 would be obtained in the short period - - - the short
22 period of time between the state's petition for confinement
23 and the final revocation hearing. And so - - - and that's
24 a - - - this legislature designed it this way for very
25 practical reason, is because the probable cause



1 determination, as my colleague just mentioned, has to be
2 made with expert evaluators. It's a question that goes to
3 their psychiatric state of mind, whether or not they have
4 an inability to control their sex offense conduct. And so
5 that requires expert testimony. And the state's petition
6 contains an evaluation that was conducted in a short five-
7 day period. And in that period, the stakes are quite high
8 for the state. What happens is that the individual is
9 taken into custody, and the state has to conduct a mental
10 health evaluation in that short period, file the petition
11 for confinement, and then the court has to look at those
12 papers to make a determination. And that's a reasonable
13 system that the legislature put together because - - -

14 CHIEF JUDGE WILSON: Well, so the hardest thing -
15 - - over here, the hardest thing, I think, for you is
16 Morrissey. So maybe you can address that.

17 MR. AKOSAH: Well, Your Honor, I think there are
18 important distinctions here between parole. I think, at
19 the outset, the SIST procedures are imposed by a court with
20 - - - with opportunity - - - you know, this opportunity to
21 be heard with the right of counsel, and they're signed
22 before the court. And the court also plays a role in
23 overseeing - - -

24 CHIEF JUDGE WILSON: So is the sentence of
25 conviction in a criminal case.

1 MR. AKOSAH: Yes, Your Honor. But the - - - but
2 the SIST conditions, like the special conditions of parole,
3 are posed by a court rather than by a parole board or a
4 parole officer. So that's an important distinction on the
5 front end in terms of due process. And then on the - - -
6 and then going forward, the - - - if they're going - - -
7 needs to be a modification in the SIST conditions, those
8 also have to be done by a court. And the court plays an
9 important role in monitoring the SIST performance. They
10 get quarterly reports as - - - from the Office of Mental
11 Health. And all parties get this information about how the
12 progress is going. And then in that first five-day period,
13 as I was just outlining, the court plays an important role
14 in making a probable cause determination.

15 CHIEF JUDGE WILSON: What is the burden of
16 allowing MHLS to appear?

17 MR. AKOSAH: Well, Your Honor, I think at the
18 outset, the probable cause determination is not a
19 particularly high bar. So the - - - so the question under
20 Matthews, right, is whether or not the additional procedure
21 would be useful in correcting erroneous deprivations of
22 liberty. And it's just not clear that the adversarial
23 process here would do that because it is not a particularly
24 high bar to establish probable cause. The court - - -
25 judges are well equipped to make these determinations on

1 their own without a battle of the experts or the weighing
2 of witness credibility. These things are not essential to
3 probable cause determinations. And so what would happen is
4 that if there needs to be a hearing, it would ultimately
5 delay that pre-determination period of detention.

6 JUDGE CANNATARO: Counsel, your adversary argues
7 that the due process protections that are currently in
8 place in the regime are illusory, I think is the word that
9 he used, a proposition I'm sure you disagree with. But why
10 is it that - - - you know, why is it that you feel that
11 these provisions are sufficient for minimum due process
12 concerns, especially where there's no opportunity for input
13 from the person who's looking at a deprivation of liberty?

14 MR. AKOSAH: Well, at the outset, it's - - - as
15 panel has already identified, is that an individual on SIST
16 has already been subject to a mental abnormality finding by
17 a - - - by a trial, and that goes to their dangerousness.
18 And so this - - - we're talking about individuals here who
19 are not just your typical recidivist. We're talking about
20 people here who have a serious difficulty controlling their
21 sex offense conduct. So there's an important need for the
22 state to be able to act quickly and detain the individual
23 and obtain a probable cause determination. And so that - -
24 -

25 JUDGE CANNATARO: So you're saying the state's

1 interest is enhanced by the fact that this person has
2 already been adjudicated a dangerous sex offender?

3 MR. AKOSAH: That's correct, Your Honor. I think
4 the state has an important - - - in the balancing test, the
5 state's interest here is quite important because of the
6 nature of the mental abnormality. And then as I laid out,
7 there are these other procedural safeguards. They are not
8 illusory. At the outset, the court has to impose the SIST
9 conditions. And then if there's a SIST violation and
10 there's someone who's taken to custody, MHLS is immediately
11 notified. That gives them time to get their expert in
12 order. And then there's a mental health evaluation. And
13 in this case, MHLS counsel was present to observe the
14 mental health evaluation. And then in that five-day
15 period, the state has to file a petition for confinement.
16 And if it fails to do so, if it fails to get everything
17 together in that first five days, the individual is
18 returned to SIST automatically. And that is an important
19 procedural safeguard right there. So if the state is able
20 to get an expert to agree with the parole officer's
21 allegations - - -

22 JUDGE CANNATARO: Does that happen very often in
23 real life? Does the person get brought in and then the
24 attorney general or whoever is required to finish the
25 paperwork decides not to submit it?

1 MR. AKOSAH: Well, Your Honor, in this case, in
2 fact, there were some violations of SIST that did not - - -
3 did not result in a petition for confinement. I believe
4 there was an incident report for testing of cannabis in
5 February of 2019 that didn't result in a petition for
6 confinement. So it's not just that the expert rubber
7 stamps whatever alleged - - - is alleged. The expert has
8 to conduct a thorough evaluation and make a determination
9 about whether or not this particular violation is reason to
10 believe that this person is a dangerous sex offender
11 requiring confinement.

12 JUDGE HALLIGAN: Will you come back to your
13 question - - - your answer to the Chief Judge's question
14 about Morrissey? I'm not sure I fully understand your
15 argument that it's distinguishable.

16 MR. AKOSAH: Well, the distinction here is the
17 safety issue first. There are a few issues, but first is
18 the safety one, is that individuals who are on SIST have
19 already been adjudicated at trial to have a dangerous - - -
20 sorry, to have a serious difficulty controlling their sex
21 offense conduct. So - - -

22 CHIEF JUDGE WILSON: Well, there are plenty of
23 people in prison who are recidivists, who have a difficult
24 - - - great difficulty - - - maybe inability to control
25 their robberies or their murders or, you know, other

1 things. These people are different in that respect in that
2 they're sex offenders, but there are plenty of people who
3 are in the regular parole system who can't control their
4 offending behavior.

5 MR. AKOSAH: Right. Certainly, Your Honor. But
6 there has not been a process to adjudicate whether or not
7 they have that condition.

8 JUDGE HALLIGAN: But what if we were to say folks
9 who have been found guilty of a violent crime, you know,
10 perhaps are more akin to the individuals here? Is it
11 because the determination here is targeted only at
12 dangerousness and not simply whether you committed an act
13 that might evince dangerousness?

14 MR. AKOSAH: It is about dangerous and in one
15 particular aspect it's volitional impairment, the inability
16 or - - -

17 JUDGE HALLIGAN: Okay.

18 MR. AKOSAH: - - - or the - - - the lack of
19 ability to control one's behavior. That's the key
20 distinction here. And so that finding exists for
21 individuals who are on SIST - - -

22 CHIEF JUDGE WILSON: And you might say it exists
23 for persistent felony offenders too. And there's a
24 designation for that and rules around that, and those
25 people released on parole.



1 MR. AKOSAH: Correct, Your Honor. But I - - -
2 what I would just say is that the primary purpose behind
3 SIST and the mental abnormality trial is to treat
4 individuals who have this particular type of mental
5 abnormality that goes to volitional impairment, and it's
6 demonstrated through expert testimony. And there's plenty
7 of procedural safeguards to - - - in these proceedings
8 about the various conditions that may qualify for mental
9 abnormality.

10 CHIEF JUDGE WILSON: Let me ask you a practical
11 question. When there's a SIST violation, do you pick the
12 person up and then start the paperwork or do you start the
13 paperwork first and then pick the person up?

14 MR. AKOSAH: Your Honor, I think the paperwork
15 will probably start after the individual is picked up, but
16 I - - - there's been ongoing monitoring of the individual.
17 So when the psychiatric evaluator, in this case, in fact,
18 completed an annual evaluation in November of 2019, just a
19 month before the person was picked up, so there was some
20 work that was done beforehand. So I guess it's not
21 accurate to say that there's nothing done beforehand, but
22 the point is, is that there's been evaluations and
23 monitoring throughout the SIST process and all that
24 information is taken into account by the mental health
25 evaluator.

1 CHIEF JUDGE WILSON: And it's up to you when to
2 pick the person up. You don't have to pick the person up
3 as soon as there's a violation?

4 MR. AKOSAH: No. No, Your Honor. There has to
5 be the - - - what happened here was the parole officer
6 concluded that there was - - - this was a very serious
7 violation.

8 CHIEF JUDGE WILSON: Well, I'm just sort of going
9 back to your idea that you have only five days in which to
10 do all the things you need to do to meet this very low bar,
11 that you actually could do those things in advance of
12 picking the person up. And if the bar is that low, it may
13 not be that much that you have to do to demonstrate
14 probable cause.

15 MR. AKOSAH: Well, certainly the - - - if the
16 state needs to act quickly, if there's been a SIST
17 violation. In this case, the SIST violations occurred days
18 before the person was taken into custody. So it wouldn't
19 be possible for the state to anticipate the SIST violation
20 and then prepare the petition. So in most cases, these are
21 serious safety concerns which - - -

22 JUDGE HALLIGAN: So in explaining why, in your
23 view, the opportunity to appear is not something that adds
24 a lot under the Matthews calculus, I think you said that
25 it's a low bar, you know, the probable cause determination.



1 Setting that to the side, is there some practical reason
2 why allowing an appearance if the determination is still
3 one of probable cause, not the finding itself would be
4 difficult?

5 MR. AKOSAH: Yes, Your Honor. I think it goes to
6 the potential for delay here. And so the important thing
7 is that there'll be a final revocation hearing within
8 thirty days. And so the legislature set up a system where
9 there could be an expedited process so that we can ensure
10 to have that thirty-day hearing. And so if we add more
11 process, it introduces more practical limitations for - - -

12 JUDGE HALLIGAN: But specifically, I take it,
13 what would be involved is notifying MHLS, which I think is
14 already done, right, of the time and place of the probable
15 cause determination and actually letting them stand up and
16 presumably consult with their client in advance of doing
17 so. Why would that step specifically introduce a lot of,
18 you know, logistical challenges?

19 MR. AKOSAH: Because under the current framework,
20 it's done on the paper so there is no proceeding or
21 hearing. And so what happens is that the state provides
22 the expert evaluation, and the court will - - - has to
23 properly make a determination. In this case, the
24 determination was made the day was filed. If there had to
25 be a proceeding, there would - - - that would - - - the

1 parties will have to get their experts together and appear
2 before the judge and - - -

3 JUDGE HALLIGAN: So there's not an in-person - -
4 -

5 MR. AKOSAH: No.

6 JUDGE HALLIGAN: - - - hearing prior to the
7 probable cause determination. It's just done on the - - -

8 MR. AKOSAH: It's on the papers, Your Honor.

9 JUDGE HALLIGAN: - - - on the ex parte papers?

10 MR. AKOSAH: That's right.

11 JUDGE HALLIGAN: And could you allow the MHLS
12 attorney, if they chose to do so to submit papers in
13 response?

14 MR. AKOSAH: Well, Your Honor, what would that
15 would entail was, is that they would need to have
16 additional time after the state's five days in order to get
17 their expert evaluation and produce their papers to come to
18 rebut the allegations and the petition for confinement. So
19 that would ultimately just delay the - - -

20 CHIEF JUDGE WILSON: But it sounds like you're
21 not concerned when in - - - as it regards the thirty-day
22 hearing, they ask for an extension of time and that kicks
23 it way beyond the thirty days. You're perfectly willing to
24 tolerate that delay. And I don't think you disputed what
25 counsel said that, in fact, these hearings usually occur



1 after the thirty days. So I'm wondering why you don't seem
2 to care very much if they ask for an extension to get their
3 expert in line for the thirty-day hearing, but you have a
4 problem if they want, say, five days to put in some papers
5 on probable cause because it might cause a little bit more
6 delay.

7 MR. AKOSAH: Well, Your Honor, the standard with
8 Matthews here is - - - is the question of whether or not
9 this procedure is going to be useful in limiting - - - in
10 limiting erroneous deprivations of liberty. So it's not
11 enough just to say what if - - - what about this liberty
12 protecting procedure? What about this procedure? The
13 question is, is whether or not the procedures on the whole
14 provide enough due process protections. And that - - - and
15 the procedures do provide due process protections because
16 the hearing has to be held in less than thirty days. And
17 so if the parties are ready to proceed to a preliminary
18 hearing - - - I see my time is up.

19 CHIEF JUDGE WILSON: Go ahead.

20 MR. AKOSAH: If the parties are ready for proceed
21 to a preliminary hearing and they have their experts, they
22 have experts, they have their witnesses, then it would be -
23 - - due process would be better served for the parties just
24 to proceed to the final hearing. There's no limit - - -
25 there's no provision in the statute that would prohibit the

1 court from having a preliminary - - - or rather, a final
2 revocation hearing in far less than thirty days. In fact,
3 in this case, the final hearing was scheduled for twenty-
4 two days. If the parties are truly ready to proceed to
5 have experts and in-person argument and adversarial
6 process, they might as well proceed to the main thing
7 rather than have a dress rehearsal where the same question
8 presented exists in - - - but for the probable cause
9 standard.

10 JUDGE HALLIGAN: Chief - - -

11 CHIEF JUDGE WILSON: Thank you.

12 JUDGE HALLIGAN: - - - can I ask one additional -
13 - -

14 CHIEF JUDGE WILSON: Of course.

15 JUDGE HALLIGAN: - - - question? On the facial
16 challenge with respect to duration, do you agree that if we
17 were to conclude that the regime, as it's set up in the
18 statute, which allows for the People to present their
19 papers and get a probable cause determination without any
20 opportunity to file something else within those five days
21 doesn't provide sufficient procedural safeguards. Would
22 the facial challenge then succeed or would there need to be
23 some - - - is there some other circumstance in which an as-
24 applied challenge would fail and therefore the facial
25 challenge would still fail if you follow me? In other

1 words, would you agree that in that circumstance, it would
2 be unconstitutional in all its applications?

3 MR. AKOSAH: No, Your Honor. We wouldn't think -
4 - - we wouldn't agree that, in that context, if this court
5 were to think that the five-day period doesn't provide
6 enough procedural safeguards, that it's unconstitutional in
7 all circumstances because the statute permits for the
8 hearings to be held expeditiously if the parties are ready
9 to proceed and have the hearing.

10 JUDGE HALLIGAN: So the potential that you could
11 have a hearing - - - I'm not sure if one's ever been done
12 and maybe you know, but you could have a full hearing
13 within five days would, in your view, obviate the facial
14 challenge. Is that your view?

15 MR. AKOSAH: With respect to the issue of
16 duration and - - -

17 JUDGE HALLIGAN: Yes.

18 MR. AKOSAH: - - - necessary - - -

19 JUDGE HALLIGAN: Yes.

20 MR. AKOSAH: - - - procedural safeguards for the
21 thirty days or the five or whatever period we're talking
22 about here, the possibility that this hearing can be held
23 in a reasonable amount of time under the current statutory
24 provisions and that individuals, if they have - - - they
25 have a right to the hearing in less than thirty days. And

1 if they want that hearing earlier, they can move the court
2 and request it. And it's their right under the statute.
3 And if they're ready to proceed in that and have that
4 revocation hearing, they may do so. So I would say the
5 statute provides the necessary safeguards in some respects.
6 And if there are situations - - - there may be situations
7 where someone is detained for long periods of time and
8 there's - - - the reasons are chargeable to the state or
9 there's some other reason like that, that would be a basis
10 on - - - as an - - - on as - - - as-applied challenge
11 perhaps to say that these reasons may suggest the statute
12 is unconstitutional as applied here.

13 JUDGE RIVERA: What might be the outer limit in
14 when the hearing could be held beyond the thirty days?

15 MR. AKOSAH: Well, Your Honor, when - - - courts
16 have generally not drawn bright lines when it comes to this
17 sort of thing, but really, generally, it's a - - - to tally
18 the circumstance test, we take into account the length or
19 the duration, whether there has been prejudice, and in
20 particular, the reasons for the delay. And I just want to
21 stress, Your Honors, that when there was an opportunity in
22 Supreme Court for MHLS to put in reasons for why there was
23 delay in these proceedings, why they were having difficulty
24 having a mental - - - getting an expert, they implored that
25 the court not explore the reasons for the delay, and that

1 means that the durational as-applied challenge has not been
2 preserved for review in this court. And I would just
3 encourage this court - - - and I would just argue that this
4 court should - - - cannot address it. But in terms of the
5 reasons for the delay, MHLS sought an adjournment from
6 January 2020 - - - January 15 to February, and then the
7 expert evaluation was not brought until March. None of the
8 delays here were chargeable to the state. So under the
9 circumstances here, the state did not violate due process.

10 JUDGE RIVERA: So I was more interested in what
11 might be the outer limit, not when they're seeking an
12 adjournment. I understand your position fully when they're
13 seeking the adjournment, the delay is falling on their
14 shoulders. When some of the delay may be caused by - - -
15 by your office.

16 MR. AKOSAH: Well, Your Honor, again, I would say
17 that it is a totality, the circumstances test. Every
18 situation is different. So the question is, is how much is
19 it chargeable to our office, the delays, how much are
20 chargeable to the - - - to MHLS. And so the outer limit
21 here, we would say, at the outset, is thirty days. And
22 then everything else has to be thought through with the - -
23 - with the - - - whether or not - - - who was responsible
24 for the subsequent delay, who bears more of a
25 responsibility under the circumstances.

1 CHIEF JUDGE WILSON: Thank you.

2 MR. AKOSAH: If there are no further questions,
3 we ask that you affirm.

4 MR. RISELVATO: Your Honors, I'd just like to say
5 with respect to the Matthews factors, yes, the state does
6 have an interest in supervising individuals who are on
7 SIST, but individuals on SIST also have a greater state-
8 created liberty interest and a legitimate expectation that
9 they won't be removed from staying on SIST without at least
10 having due process of law. And we don't - - - we have no
11 burden at the initial probable cause hearing. The burden
12 is entirely on the state. So we don't have to produce an
13 expert. We can challenge their evidence and see if they've
14 made sufficient arguments, and if they - - -

15 CHIEF JUDGE WILSON: So as a practical matter,
16 how quickly could you do that if you were asked - - - if
17 you had the opportunity?

18 MR. RISELVATO: We could do it immediately. I
19 would say - - - I would think a fair compromise would be if
20 you have the probable cause hearing within three days of
21 the petition. That would - - - that's - - - if you look at
22 other provisions of the article 10 statute like 10.06(h),
23 that's the time limit for when someone is released and
24 prior to an initial MA determination. So I think that that
25 would be enough time to have a hearing. And then if you

1 enforce the thirty-day time limit after that, I think it
2 would bring this statute into constitutionality. But as it
3 stands now, you have 10.11(d)(4) combining a lack of notice
4 and any opportunity to be heard with essentially what is an
5 unlimited amount of time that they can put you in - - -

6 JUDGE RIVERA: I'm a little confused. Is - - -
7 isn't the burden higher, not the five-day hearing, the
8 hearing that's otherwise provided for the statute within
9 thirty days? And if you all are asking for adjournment,
10 some more time, how could you possibly be successful within
11 a much shorter window of opportunity based on a much lower
12 standard?

13 MR. RISELVATO: We don't have any burden to
14 prove. The burden is on the state.

15 JUDGE RIVERA: No. No. I understand that.

16 MR. RISELVATO: So what - - - for - - - so for
17 example, if they bring a petition, they could bring a
18 petition. We've had circumstances where they get the wrong
19 name or they - - - there's a factual - - - something is
20 incorrect, or that there's a misapplication of the law, or
21 maybe the SIST violation never even actually happened, or
22 maybe what the violation is isn't, as a matter of law,
23 legally sufficient to warrant civil confinement. We could
24 make these arguments right away and maybe spare someone
25 months of time in jail until they eventually get to make

1 them whenever the state gets around and - - -

2 JUDGE RIVERA: If the state took five days,
3 wouldn't you be able to do that rather quickly? If you're
4 saying you could do that very quickly within the five days,
5 you can't do it very quickly after the five days?

6 MR. RISELVATO: I'm sorry. The - - - we can have
7 the hearing right away. When they bring the petition after
8 that initial five-day detention period - - -

9 JUDGE RIVERA: Yes.

10 MR. RISELVATO: - - - we can go ahead and have a
11 hearing. Give us the opportunity - - -

12 JUDGE SINGAS: With the psychiatric evaluation
13 report, you think you could do that right away or you would
14 - - -

15 MR. RISELVATO: We don't have to get one.

16 JUDGE SINGAS: - - - you would forego that?

17 JUDGE CANNATARO: But you - - - in this case, you
18 did ask for an adjournment to get a psychiatric report,
19 right?

20 MR. RISELVATO: Before the ultimate determination
21 which - - - not - - - we're talking about the probable
22 cause determination here, which is at issue. The probable
23 cause finding results in a person being put into jail for
24 pre-hearing confinement before we even get served with the
25 petition. So the person is already in jail by the time we



1 even really know what's going on. So after we get that
2 petition, give us a very short turnaround time. We can go
3 with that and make the argument.

4 JUDGE RIVERA: But the examples you were giving
5 before, some of the fact - - - it's the wrong name, it's
6 this and that, those are things that you would quickly know
7 right after the probable cause hearing that the judge
8 missed or it was just an error on the papers, and you could
9 quickly - - - you don't have to seek the adjournment.
10 You're then going to proceed, you know, very quickly - - -

11 MR. RISELVATO: We're not asking for
12 adjournments.

13 JUDGE RIVERA: But - - -

14 MR. RISELVATO: This is a fabrication that he's
15 put forth.

16 JUDGE RIVERA: I know. Let me just finish,
17 please. But the question I think some members of the bench
18 are asking, including Judge Singas, is if indeed what
19 you're going to do is try to show that the violation does
20 not show that this is an individual who cannot control
21 their impulses, that is to say they need to be removed from
22 SIST and now confined. That is not about some factual
23 error. That's a legal conclusion after the judge looks at
24 the submissions. You do need more time.

25 MR. RISELVATO: Well, for the ultimate

1 determination we, when we're looking at whether someone is
2 going to be removed fully from SIST - - -

3 JUDGE RIVERA: Yes.

4 MR. RISELVATO: - - - at the thirty days, that's
5 why we asked for an adjournment. And in this case, they
6 brought the petition on Christmas Eve. We had very
7 difficult time finding the - - - an expert and our
8 attorneys. There was a lot of resources that were
9 difficult at that time. We asked for one adjournment.

10 JUDGE RIVERA: Yes.

11 MR. RISELVATO: And he was detained for four
12 months, and additional after that, and none of that was
13 because of anything that he asked for. So the fact that we
14 asked for one adjournment - - -

15 JUDGE RIVERA: Are you saying you're unable to
16 apply to the court, given those particular circumstances,
17 for release?

18 MR. RISELVATO: I'm sorry?

19 JUDGE RIVERA: You're unable - - - I just want to
20 be clear. Your understanding of the statute is, under
21 those particular circumstances, you couldn't apply to the
22 court for release because you could see that, in your
23 opinion, moving forward this will - - - there will be no
24 hearing within thirty days?

25 MR. RISELVATO: Well, basically, what the initial

1 probable cause determination would allow us to do is, if
2 they offer a very faulty petition, we could brush away
3 right away - - -

4 JUDGE RIVERA: Yes.

5 MR. RISELVATO: - - - without having to go to the
6 extra burdens of getting an expert and defending our
7 position fully. It's a really - - - it's a protection
8 that's necessary to avoid, basically, just putting someone
9 in jail on insufficient evidence that's - - - that's
10 plainly insufficient. And we can check those errors right
11 away. That's why it's so important. So when he says
12 there's no purpose of it because the burden is low, it's
13 very important because here, he made the argument that the
14 alleged violation wasn't sufficient, and ultimately, he
15 won. But if he could have made that argument initially,
16 maybe he could have stayed out of jail for five additional
17 months, but he didn't get the opportunity to do that.

18 JUDGE SINGAS: I have one more question, Chief.

19 CHIEF JUDGE WILSON: Of course.

20 JUDGE SINGAS: So if we agree with your adversary
21 that the as-applied challenge regarding the duration is
22 unpreserved, is the rest of your argument, basically, that
23 there's no evidentiary support for the probable cause
24 hearing - - -

25 MR. RISELVATO: Yes. We - - - we did - - -

1 JUDGE SINGAS: - - - finding?

2 MR. RISELVATO: We made an argument beyond just
3 the duration that otherwise he would - - - we could still
4 have prevailed at a probable cause determination if one was
5 afforded to him, but he was denied it. And - - -

6 JUDGE SINGAS: And the thirty-day - - - the
7 failure to act within the thirty days, do you think that
8 goes to the - - - on the face challenge or is that an as-
9 applied challenge?

10 MR. RISELVATO: It's both because - - -

11 JUDGE SINGAS: Got it.

12 MR. RISELVATO: - - - the fact is the statute
13 just suggests thirty days, but then immediately after
14 abrogates any duration of challenge.

15 JUDGE SINGAS: But if some respondents have their
16 hearing within thirty days, doesn't that defeat your
17 argument as - - -

18 MR. RISELVATO: No. Because - - -

19 JUDGE SINGAS: - - - on its face?

20 MR. RISELVATO: - - - because you still couldn't
21 bring a durational challenge. Maybe you think twenty-six
22 days in confinement is too long on an ex parte basis. You
23 just can't bring that challenge. So the fact that you get
24 no opportunity to be heard at all before being put into
25 jail for significant time where you're going to lose any of

1 your reintegration progress, probably going to lose your
2 job, maybe your residence, your treatment is going to get
3 interrupted, this is a significant deprivation to be done
4 completely ex parte. So we need - - - absolutely need an
5 opportunity to be heard. And the protections, they are
6 illusory. The thirty days, it's not enforceable. When you
7 ask how - - - what's the outer limit? The outer limit, as
8 written, is eternity. They could keep you in forever. And
9 that, on its face, is too long. And here, five months,
10 four months beyond our adjournment, that's too long, too,
11 as-applied.

12 CHIEF JUDGE WILSON: Thank you, Counsel.

13 (Court is adjourned)

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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of People ex rel. Neville v. Toulon, No. 79 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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