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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE ex rel KON,

Appellant,

-against-

NO. 76

MAGINLEY-LIDDIE,

Respondent.

20 Eagle Street
Albany, New York
September 10, 2025

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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Official Court Transcriber



1 CHIEF JUDGE WILSON: The next case on the
2 calendar is People ex rel Kon v. McGinley-Liddie.

3 MS. WEISMAN KON: Good afternoon. May it please
4 the court. Hannah Kon, on behalf of Diego Guerra. May I
5 reserve three minutes for rebuttal?

6 CHIEF JUDGE WILSON: Of course.

7 MS. WEISMAN KON: In a single sentence the lower
8 court remanded Mr. Guerra after his conviction was
9 reversed. And even as we speak now, he is unlawfully
10 detained in Rikers Island. The court gave a very
11 boilerplate, generic statement that failed to explain the
12 basis of its determination and choice of securing order on
13 the record - - -

14 JUDGE SINGAS: Well, hold on a second. Remand
15 was permissible under this - - - under the bail laws,
16 correct?

17 MS. WEISMAN KON: Well, remand is permissible for
18 a qualified offense, but I don't think it was permissible
19 here, because I don't think there was a determination that
20 remand is what was necessary to assure Mr. Guerra's return
21 to court. And that's what's required for a lawful
22 detention. There's nothing on the record to suggest that.
23 And importantly, the court's securing order doesn't explain
24 the basis. And so there is no lawful basis for which to
25 detain Mr. - - -

1 JUDGE GARCIA: So if we agree with you, what
2 would happen? What do we do?

3 MS. WEISMAN KON: Well, I think that habeas
4 allows only one option and that is release. When someone
5 is illegally detained, the only remedy under habeas is his
6 immediate discharge.

7 JUDGE HALLIGAN: To the extent we have concerns -
8 - - you identify concerns about the failure to provide an
9 explanation. Why would this be resolved under 710(a)
10 instead of 710(b)? Why is - - - why would that not then be
11 an abuse of discretion under (b) as opposed to something
12 that is illegal under (a)?

13 MS. WEISMAN KON: Well, I think it's because - -
14 - so the discretion comes in paragraph 4 of 510.10. You
15 know, it gives the court discretion in applying this and
16 deciding a securing order. But before we get to that
17 discretion, we have paragraph 1 of the law. And that gives
18 a requirement to the court of these three things - - - you
19 know: individualized determination, choosing the correct
20 securing order, and then explaining that on the record.

21 And so I think that before we get to discretion,
22 we have to ensure that the correct analysis was conducted
23 to begin with.

24 JUDGE HALLIGAN: So is your view that the only
25 way in which a court could examine the sufficiency of an

1 explanation would be under (a), not (b)? So could - - -
2 could if there's an explanation that is not sufficient, is
3 that something that can never be an abuse of discretion?

4 MS. WEISMAN KON: No, I don't think so. I think
5 that if you had - - - you know, some explanation that just
6 didn't fully justify, that could be an abuse of discretion.
7 Here we have - - - we have no explanation. And even if
8 this was analyzed under the abuse of discretion, we still
9 have an illegal detention here because this was an abuse of
10 discretion.

11 CHIEF JUDGE WILSON: So if we were to grant the
12 habeas petition and agree with you he's got to be released,
13 can the People then go and attempt to get a new bail
14 determination?

15 MS. WEISMAN KON: Absolutely. Under 510.10.6,
16 they absolutely can apply for a new securing order. And
17 hopefully then that securing order would be
18 constitutionally and statutorily valid. You know,
19 hopefully that - - - then, if it went back to Justice
20 Aloise, he would then comply with the statute, put his
21 reasoning on the record. And I think also, I would hope -
22 - -

23 JUDGE SINGAS: Can it go back to Justice Aloise,
24 or does it have to be done at the Appellate Division?

25 MS. WEISMAN KON: Well, I think that the new

1 securing order would be before Justice Aloise, because if
2 this court were to - - - you know, grant the writ, and
3 release him, then there would be no valid securing order in
4 place. And I think the People would then start over.

5 JUDGE HALLIGAN: But under (b), I think it would
6 be back before the Appellate Division. Do you agree with
7 that?

8 MS. WEISMAN KON: Yes. I think under (b) it
9 would be back before the - - - the Appellate Division to
10 develop the appropriate securing order.

11 JUDGE HALLIGAN: And why can we not or should we
12 not take into account whatever else had transpired and
13 conclude that implicit in the statement from the judge is
14 an understanding of not the fact of the vacated conviction,
15 but all of the evidence that had come in at trial and so
16 forth?

17 MS. WEISMAN KON: For two reasons, Your Honor.
18 The first reason is that the statute doesn't allow for an
19 implicit determination. It's - - - it uses a lot of words.
20 It says, explain the basis of the determination and the
21 choice. It says it over and over again throughout the
22 statute. That does not allow for us to assume that the
23 judge considered the right factors.

24 And the fact that he presided over the - - - over
25 the trial doesn't mean that Justice Aloise is exempt.

1 JUDGE HALLIGAN: But we do have the prosecution's
2 - - - the People's argument, which was before the judge.
3 How come that isn't something we can account for at all?

4 MS. WEISMAN KON: Well, again, it - - - the
5 statute doesn't say the record should reflect. It says the
6 court must give an explanation.

7 And secondly because there is nothing that
8 happened at this trial that would justify this. I mean,
9 the People - - - the People concede that all of the
10 evidence is going to be the same. This is a computer based
11 case - - -

12 JUDGE TROUTMAN: However, there is something
13 that's different. The defendant was convicted at the
14 earlier trial. It was reversed, but there was evidence
15 presented. He knows now of a likelihood of being
16 reconvicted. Would that not impact one's flight risk?

17 MS. WEISMAN KON: No. So I respectfully
18 disagree. I think Mr. Guerra was well aware of all the
19 evidence before the first trial. All of this evidence was
20 known from the beginning.

21 JUDGE TROUTMAN: No. He wasn't aware of what a
22 jury would determine after that evidence was presented.

23 MS. WEISMAN KON: Well, he's not aware of that
24 now because he never had a trial where that evidence was
25 put through the adversarial testing that the Constitution

1 requires. So the fact that he was convicted once after a -
2 - - a trial where he was failed by his counsel, by the
3 court, by the prosecution who told the jury that they
4 should wonder what Mr. Guerrea hadn't told them, the fact
5 that he got a conviction - - -

6 JUDGE TROUTMAN: So you're saying because the
7 first trial was flawed, one cannot consider that the
8 defendant might take into account the chances of being
9 convicted again when assessing flight risk?

10 MS. WEISMAN KON: Right. I think because we're
11 looking at this from Mr. Guerrea's perspective. From Mr.
12 Guerrea's perspective - - -

13 JUDGE TROUTMAN: No, that's what I'm asking you.

14 MS. WEISMAN KON: Right.

15 JUDGE TROUTMAN: You're saying the fact that he
16 was convicted before, that is not to be considered from his
17 perspective?

18 MS. WEISMAN KON: From his perspective? No.
19 Because he has just won his appeal. There is no reason for
20 him to think that now that he's finally going to get the
21 trial that he deserves, that he - - - that he would fail.

22 JUDGE RIVERA: Is that a per se rule? Over here.
23 Sorry. Is that a per se rule?

24 MS. WEISMAN KON: No, I don't think so. I think
25 that that's particularly - - -

1 JUDGE RIVERA: Turns on the grounds for a
2 reversal?

3 MS. WEISMAN KON: I don't think it turns on the
4 grounds for the reversal. I think it - - - I think it
5 turns on what the evidence is in the case. This is a
6 purely computer based case so it's not as if there's going
7 to be a really compelling complainant that's now going to
8 testify at the next trial.

9 CHIEF JUDGE WILSON: And you're not if I
10 understand you correctly - - - sorry. Over here. You're
11 not - - - you're not saying that had Justice Aloise made a
12 determination on the record and said one of the factors is
13 that there was evidence at trial that I considered and that
14 makes me think that there's a greater risk of flight here,
15 that that might not be sufficient.

16 I thought your problem is that he didn't say
17 anything and so we don't know whether any of this affected
18 him at all or even thought about it.

19 MS. WEISMAN KON: That's exactly right. I think
20 if Justice Aloise had said what Your Honor just said, this
21 would be a really different case. I still might take
22 issue. I still might think it's abuse of discretion in
23 terms of how he weighed it, but I don't think we would have
24 an illegal securing order.

25 CHIEF JUDGE WILSON: You wouldn't be under (a) in

1 any case.

2 MS. WEISMAN KON: Exactly. That's exactly - - -

3 JUDGE HALLIGAN: And so - - - so you're not - - -
4 sorry. I didn't mean to interrupt you. Go ahead.

5 MS. WEISMAN KON: I lost my train of thought, so.

6 JUDGE HALLIGAN: Okay. Well, my apologies then.
7 So you're not arguing that where you have a conviction that
8 is vacated, that anything that transpired in the first
9 trial is beyond the court's consideration as a matter of
10 law? You're not suggesting that?

11 MS. WEISMAN KON: No, not at all. What I'm
12 saying is that - - - those facts, those things that have
13 transpired, have to relate to risk of flight. But what the
14 People are - - - have said here, and I think we should take
15 them at their word from the bail hearing, they say he - - -
16 you should remand him because of the disturbing charges he
17 has been convicted of. So it's the fact of his conviction
18 alone as a standalone basis for remand, that - - - that I
19 think is the constitutional problem. And it, in fact,
20 taken to its logical conclusion, I think - - -

21 JUDGE HALLIGAN: Well, when you say a
22 constitutional problem, I thought you were making an
23 argument from the statute.

24 MS. WEISMAN KON: I'm making both. I think that
25 the statute here has been violated, unquestionably. I

1 think it is also a constitutional violation to incarcerate
2 someone simply because he has a conviction that has been
3 now reversed.

4 JUDGE HALLIGAN: And why is that, exactly? Is it
5 because it burdens the right to appeal, in your view, or
6 some other reason?

7 MS. WEISMAN KON: No. Because a reverse
8 conviction is is a nullity.

9 JUDGE HALLIGAN: There's no basis?

10 MS. WEISMAN KON: Yes.

11 JUDGE SINGAS: But what if it was - - -

12 JUDGE HALLIGAN: And the - - - the evaluation
13 that the jury has made - - - let's take a different case.
14 Let's take a case where there's not the sort of problem
15 that we have here, but there is some other basis on which a
16 conviction is vacated, which doesn't really go to the way
17 in which the jury perceived the evidence.

18 In your view, could the fact of the conviction -
19 - - I - - - by which I mean the defendant's understanding
20 of the way the jury processed the evidence. Could that be
21 something that the - - - that the judge could take into
22 account, because the judge would conclude the defendant
23 thinks that the same result is likely the next time around?

24 MS. WEISMAN KON: I think possibly. Yeah. I
25 mean, I think if this was something like, you know, he - -

1 - the right to a public trial was violated. Something that
2 was - - -

3 JUDGE HALLIGAN: Yeah.

4 MS. WEISMAN KON: - - - really - - - and so
5 nothing was going to change. Then I think possibly in that
6 situation, the court could take that into account with
7 respect to flight risk. And then I think the court would
8 really need to put that on the record. And that's what we
9 don't have here.

10 He's imposing the harshest possible security
11 order. He's rejected all of the alternatives under the new
12 bail law, you know, all the nonmonetary conditions, and we
13 have no idea why. And I think had Justice Aloise given
14 that - - - even that explanation - - - you know, it would
15 have gone a long way to ameliorate - - -

16 CHIEF JUDGE WILSON: I'm not sure in this - - -
17 sorry. Over here. I'm not sure that it - - - that he
18 actually rejected all the considerations under the new bail
19 law. Because it appears that he cited the old bail law,
20 and not - - - he may not have recognized that there was a
21 new bail law in place at all. He cited the old one that -
22 - - that was no longer on the books at the time he made
23 this determination.

24 MS. WEISMAN KON: I agree, and in fact, he says
25 the factors in 510.30 and actually the factors used to be

1 in 510.30 before the bail law reform. So I think what
2 little we can glean from this record is that he was
3 applying a pre-2019 framework.

4 CHIEF JUDGE WILSON: He was applying what the
5 legislature wiped out?

6 MS. WEISMAN KON: Exactly. Which again just
7 supports that this is an illegal securing order.

8 JUDGE HALLIGAN: But those considerations as
9 opposed to perhaps the failure to give an explanation, they
10 might go to an abuse of discretion. No?

11 MS. WEISMAN KON: I think when you have an
12 absolute failure to establish any lawful basis to detain,
13 that is actually - - - we're in Section (a). That's - - -
14 that's an illegal detention.

15 I think that's particularly true when it - - -
16 we're talking about remand, and we're talking about a
17 change from the monetary bill that was set before the first
18 trial. The equivalent to the monetary bail in the first
19 trial, now under the new bail law, would likely be - - -
20 you know, released with some nonmonetary conditions or
21 released like the CJA recommended before the first trial.

22 Because when we look at this record, Mr. Guerrea
23 isn't any kind of flight risk.

24 JUDGE GARCIA: Counsel, I'm sorry. Your light's
25 on. Just quickly. I do see a few Appellate Division

1 cases, habeas, where that court remitted where there was an
2 insufficient record made by the trial court in similar
3 circumstances. Would you say those cases were wrongly
4 decided or wrongly disposed of or distinguishable?

5 MS. WEISMAN KON: I would say that those cases
6 without knowing - - - without remembering the facts of
7 them, it's hard to distinguish. But I would say that I
8 think that that is the wrong result, because I don't think
9 the habeas statute provides for that remedy.

10 I mean, look, habeas is a very blunt instrument.
11 Illegal detention or no illegal detention. And if it's
12 illegal detention, release has to happen. There isn't
13 really any provision within this statute that allows for
14 remand. I see my time - - -

15 JUDGE RIVERA: But - - -

16 JUDGE GARCIA: Can I - - - I'm sorry.

17 JUDGE RIVERA: No. Go ahead.

18 JUDGE GARCIA: The Appellate Division couldn't
19 say it's unclear whether there's illegal detention? What
20 if it's unclear if there is? What do you do then? Then
21 you just detain? It has to be clear?

22 MS. WEISMAN KON: Well, I think if you have a
23 situation where it's unclear, I think you're probably in
24 abuse of discretion land, in which case the Appellate
25 Division fashions the appropriate securing order.

1 JUDGE RIVERA: If I could just - - - I just want
2 to be clear on your argument. Perhaps I'm misunderstanding
3 you. Is your argument that the judge fails to explain what
4 he means by assuring the return to court? Defendant's
5 return to court?

6 MS. WEISMAN KON: Yes.

7 JUDGE RIVERA: Or are you saying that even that
8 is not enough?

9 MS. WEISMAN KON: Oh, I think that even that is
10 not - - -

11 JUDGE RIVERA: So it's - - - well, I'm sorry.
12 Not enough to make clear that what the court was focused on
13 was whether or not the individual was a flight risk?

14 MS. WEISMAN KON: Yes. I - - - I think it - - -
15 I think it's the latter in the sense that the court didn't
16 explain the basis of its determination that he's a flight
17 risk. He didn't apply the flight risk factors to - - -

18 JUDGE RIVERA: Do you agree there's a
19 determination that he's a flight risk?

20 MS. WEISMAN KON: I'm - - - I'm not sure - - -

21 JUDGE RIVERA: You're not challenging that?
22 Perhaps I'm being - - - not being clear.

23 MS. WEISMAN KON: No, I think I am challenging
24 that. I don't think there's an indication that the court
25 even made that first step.

1 JUDGE RIVERA: Well, what could it possibly be
2 referring to?

3 MS. WEISMAN KON: I - - - I - - -

4 JUDGE RIVERA: That the least restrictive - - -
5 the court finds that the least restrictive means of
6 assuring his - - - or it doesn't find - - - assuring his
7 return to court is, in fact, continued remand.

8 MS. WEISMAN KON: Well, I don't think the court
9 really gave the analysis the right - - - the full - - -

10 JUDGE RIVERA: No, no. I understand the rest of
11 that. But - - -

12 MS. WEISMAN KON: No. Right.

13 JUDGE RIVERA: - - - isn't - - - isn't the whole
14 point of saying that the court finds that the least
15 restrictive means of assuring his return to court is, in
16 fact, continued remand, meaning that the court has
17 concluded he's a flight risk? Might not have explained
18 why. I get that part of your argument. But I'm not sure I
19 fully appreciate if this is the argument you're making,
20 that even the little that the judge says is not enough to
21 conclude that the judge had decided Mr. Guerrea was a
22 flight risk.

23 MS. WEISMAN KON: I will explain very quickly. I
24 think it is because there is no individualized
25 determination here on the record that he's a flight risk at

1 all. It's almost as if the court just assumed it without
2 undergoing that statutory requirement to determine whether
3 that's true. And then just jumped right to this
4 boilerplate, generic explanation that could have applied to
5 any defendant that walked in the room that day.

6 JUDGE CANNATARO: What is it about the statement
7 that leads you to that conclusion that it - - - what is it
8 about that that doesn't show that there wasn't some
9 evaluative process that took place in the judge's mind at
10 the time he said that?

11 MS. WEISMAN KON: Well, for starters, he's citing
12 the wrong statute, he's citing the wrong standard. He's
13 not applying any factors to Mr. Guerrea specifically.

14 JUDGE CANNATARO: No, he's not showing his work.
15 But you said that that somehow betrays that he didn't apply
16 the statute at all with respect to - - - to the limited
17 question that you were just asked. Not that he failed to
18 explain it. That's a given. But why does that indicate
19 that there was a lack of process in the judge's own mind
20 about that?

21 MS. WEISMAN KON: Well, I think that that goes to
22 the very purpose of this requirement. We don't know what's
23 going on in the judge's mind. That's the problem. And so
24 - - -

25 JUDGE HALLIGAN: So you're saying that the judge

1 has to show her work?

2 MS. WEISMAN KON: Yes. I think that the
3 legislature is very clear about that, repeats it over and
4 over again. I'll reserve my - - - the rest of my argument
5 for rebuttal.

6 CHIEF JUDGE WILSON: Thank you.

7 MS. FITZPATRICK TALCOTT: Good afternoon, Nancy
8 Fitzpatrick Talcott from the office of Melinda Katz, the
9 District Attorney of Queens County.

10 The Appellate Division properly dismissed the
11 writ because the defendant was not illegally detained, and
12 the lower court did not abuse its discretion in remanding
13 the defendant.

14 The court expressly stated it had considered all
15 the factors in the statute - - -

16 CHIEF JUDGE WILSON: In the wrong statute?

17 MS. FITZPATRICK TALCOTT: Right. Although 510.30
18 incorporates 510.10 by reference. So if the court
19 misspoke, it was clear it did consider the factors in the
20 statute, and that's likely why defense counsel did not
21 object or ask for clarification.

22 JUDGE HALLIGAN: But how is it explaining the
23 basis?

24 MS. FITZPATRICK TALCOTT: Well - - -

25 JUDGE HALLIGAN: That seems to me to require

1 something more than asserting the conclusion, which I think
2 is all we have here.

3 MS. FITZPATRICK TALCOTT: Well, so - - - yeah.
4 Just to conclude with the first point. He found the least
5 restrictive means of assuring defendant's return was
6 remand.

7 JUDGE HALLIGAN: And that's the conclusion?

8 MS. FITZPATRICK TALCOTT: That indicates the
9 basis for the decision was defendant's risk of flight.

10 JUDGE HALLIGAN: Well, okay. First of all, why
11 is that? Is that - - - why is that evident from that
12 statement?

13 MS. FITZPATRICK TALCOTT: Because assuring
14 defendant's return indicates there's some indication that
15 he might not return. That's a risk of flight.

16 JUDGE HALLIGAN: And then how does that - - - how
17 does that sentence explain the basis for that conclusion?

18 MS. FITZPATRICK TALCOTT: Well, I think, where
19 the court's reasoning was evident given the arguments that
20 were before it.

21 JUDGE HALLIGAN: So you're saying that it's
22 implicit given what the judge has heard, and the judge
23 doesn't have to make explicit the actual basis? Is that
24 right?

25 MS. FITZPATRICK TALCOTT: Well, I think the court

1 should be able to rely on arguments in front of it.

2 JUDGE CANNATARO: So - - -

3 JUDGE RIVERA: But then why doesn't the court say
4 that? Based on the People's argument, I am persuaded, et
5 cetera, et cetera, et cetera.

6 MS. FITZPATRICK TALCOTT: It certainly would have
7 been better. But it can observe the statute based on the
8 arguments before it. And the argument - - -

9 JUDGE TROUTMAN: Does the statute say that?

10 JUDGE RIVERA: Well, it could have, but we don't
11 know. Could have, but we don't know. Right?

12 MS. FITZPATRICK TALCOTT: No.

13 JUDGE TROUTMAN: And does the statute say that?

14 MS. FITZPATRICK TALCOTT: Well, the statute
15 doesn't require a catechistic - - -

16 JUDGE HALLIGAN: No. But it says explain the
17 basis. It - - - it - - -

18 MS. FITZPATRICK TALCOTT: No. Right. But the -
19 - - where the record makes obvious the reason. Whereas
20 here it does based on the People's argument.

21 JUDGE HALLIGAN: But it doesn't say the record
22 shall reflect, or it doesn't say the judge shall determine
23 which might be a better case for the sort of - - - you
24 know, reliance on the record point that you're making. I'm
25 just trying to understand how we give meaning to the words,

1 "explain the basis", if we conclude that looking to the
2 arguments made to the judge. And there may be countering
3 arguments, and I would think in most cases there will be.
4 I'm just not sure how we get there.

5 MS. FITZPATRICK TALCOTT: Well, the two lower
6 court decisions cited in our brief, they say where the
7 record makes it obvious the reasons for the decision - - -

8 JUDGE HALLIGAN: Yes.

9 MS. FITZPATRICK TALCOTT: - - - a short, concise
10 - - -

11 JUDGE HALLIGAN: But why does that comport - - -

12 MS. FITZPATRICK TALCOTT: - - - explanation
13 should be sufficient.

14 JUDGE HALLIGAN: Right. But where is there any
15 explanation here? I'm not suggesting catechistic or long
16 or whatever, but where is there any content? I take it
17 you're saying that there doesn't need to be. It can simply
18 be that there have been arguments made to the judge, and
19 the flat determination is sufficient to essentially
20 bootstrap those into the judge's conclusion.

21 MS. FITZPATRICK TALCOTT: Well, he did reference
22 the factors. The factors were the subject of the arguments
23 that the people's - - -

24 JUDGE HALLIGAN: He said he had considered the
25 factors.

1 MS. FITZPATRICK TALCOTT: Right. And the
2 People's fact - - - the factors the People set forth
3 unquestionably were factors that were relevant to a risk of
4 flight, which the court made clear was the basis for its
5 decision.

6 JUDGE HALLIGAN: Can I ask you a different
7 question if I can? I didn't see a lot in your brief on
8 this, and I would welcome your thoughts. The distinction
9 between 710(a) and 710(b). I understand your view is that
10 the explanation was sufficient. But what about the
11 difference if you would?

12 MS. FITZPATRICK TALCOTT: Well, I think a flaw in
13 the process, which is arguably what we have here, doesn't
14 mean the detention is illegal. So - - -

15 JUDGE HALLIGAN: Well, your adversary says, I
16 think, where there is no explanation given, the predicate
17 has not been met. So why is that not right, as opposed to
18 it being an abuse of discretion?

19 MS. FITZPATRICK TALCOTT: Well, there's a
20 difference between the procedure being flawed and the
21 result being illegal. For example, if this was a - - - if
22 he was charged with a crime that was not - - -

23 JUDGE HALLIGAN: Not qualifying?

24 MS. FITZPATRICK TALCOTT: - - - not qualifying,
25 that would be illegal. What we have here is a flaw in the

1 process. So again, to touch upon what the judges brought
2 up with my opponent, the remedy would be you can send it
3 back for clarification.

4 And the Appellate Division recognized - - -
5 because we're reviewing that decision here. A more
6 complete record would have made its decision less
7 difficult. But in the end, it obviously concluded that the
8 record, albeit not perfect, not as comprehensive, or
9 exhaustive as anyone would like, it was sufficient to
10 conclude that the lower court's determination did not
11 violate constitutional or statutory standards. Because the
12 bail court's - - -

13 JUDGE RIVERA: If we agree with you, doesn't that
14 incentivize judges to do exactly this, even though you
15 yourself are saying, will it be better if they actually
16 explained their analysis? Maybe the judges would cite the
17 right provision, but that's another story. And is that the
18 way we anticipate the legislature intended for these
19 decisions to be made available for appellate review?

20 MS. FITZPATRICK TALCOTT: Well, the courts could
21 certainly give guidance in this case.

22 JUDGE CANNATARO: In what context?

23 MS. FITZPATRICK TALCOTT: Or - - -

24 JUDGE CANNATARO: I mean, I think part of the
25 problem here is I feel like habeas is the only vehicle for

1 us to give that guidance. Right? This could not be the
2 subject of an appeal, could it?

3 MS. FITZPATRICK TALCOTT: No. Habeas - - - you
4 know, we never argued that habeas wasn't the right vehicle.
5 But again, you can - - -

6 JUDGE CANNATARO: No. But if we want to enforce
7 the notion that you really do need to follow the
8 requirements of the statute, what you call a process error,
9 the - - - our - - - we have to do it within the confines of
10 the relief that's afforded by habeas, which potentially
11 could be simply release. Although I heard you argue that
12 maybe there are some instances where it could be some sort
13 of remittal, but this is really the only place where we can
14 do that, right?

15 MS. FITZPATRICK TALCOTT: Right. Or you can send
16 it back with a directive to the Appellate Division, perhaps
17 hold the writ in abeyance, or conditionally grant the writ
18 until the court explains it. Then we get guidance. You
19 know what? This isn't enough. You have to say more.

20 JUDGE HALLIGAN: You know what I'm struggling
21 with here, to Judge Cannataro's question is there is no
22 explanation on the record. There is a statement that the
23 judge considered the factors and reached the conclusion.
24 Right? So if - - - this is not a case where the judge
25 gives a conclusory explanation and we're being asked to

1 say, well, is - - - are those two sentences good enough?
2 Right? So if not in this case, where would we conclude
3 that "explain the basis" was not met?

4 MS. FITZPATRICK TALCOTT: I think, for example,
5 if the court had just said remand. Even worse, I think if
6 you had no - - -

7 JUDGE HALLIGAN: Well, how is that meaningfully
8 different in terms of explaining the basis? I mean,
9 "explain the basis," I guess, under that reading would
10 simply mean I considered the factors, remand.

11 MS. FITZPATRICK TALCOTT: But in my example to
12 you, which - - - perhaps an example where it would be
13 warranted is if you just said remand and he didn't mention
14 the factors.

15 JUDGE HALLIGAN: Okay. But - - - so the - - -
16 then we'd have to decide that it's, I considered the
17 factors, remand is acceptable. But remand alone is not.
18 I'm just not sure that that does a lot of work in terms of
19 explaining the basis.

20 MS. FITZPATRICK TALCOTT: No. But you have
21 remand plus the factors affecting - - - the factors
22 affecting flight that were put forth before the court. For
23 example, so an even worse case scenario - - -

24 JUDGE RIVERA: But the problem is we have no idea
25 because the judge chose not to explain the reasoning. If

1 the judge agreed with everything the prosecutor said or
2 took a different view of some of it.

3 MS. FITZPATRICK TALCOTT: Well - - -

4 JUDGE RIVERA: That's the problem, isn't it?
5 Even - - - even if I could see my way to this argument
6 that, oh, you just look at the arguments and that will
7 somehow give you some insight into the judge's analysis.
8 But here, there's no way you can do that.

9 MS. FITZPATRICK TALCOTT: Well, you can infer
10 that he adopted or agreed with the People's arguments,
11 which, again, were unquestionably factors that related to
12 flight. And it would be an even worse case scenario had
13 there been - - -

14 JUDGE RIVERA: What were the arguments? Just
15 quickly, I don't want you to waste too much time on it.
16 What are the - - - what were the arguments as you viewed
17 them that the judge - - -

18 MS. FITZPATRICK TALCOTT: The seriousness - - -

19 JUDGE RIVERA: - - - relied on that were made?

20 MS. FITZPATRICK TALCOTT: The seriousness - - -

21 JUDGE RIVERA: Go ahead.

22 MS. FITZPATRICK TALCOTT: - - - of the charges.

23 JUDGE RIVERA: Right.

24 MS. FITZPATRICK TALCOTT: The strength of the
25 People's appeal, the strong evidence in the event of a

1 retrial, and the severity of the sentence defendant
2 continued to face. Those all - - -

3 JUDGE RIVERA: What if he rejected three of the
4 four, and the one he relied on, this court might say you
5 can't rely on?

6 MS. FITZPATRICK TALCOTT: Well, then I - - - I -
7 - -

8 JUDGE RIVERA: We don't - - - we don't know.

9 MS. FITZPATRICK TALCOTT: Right. So then the
10 remedy would be back - - - to send it and get it clarified.
11 Because again, perhaps the worst case scenario than him
12 just saying remand is no arguments and he just says remand.
13 That's far more of a - - -

14 JUDGE TROUTMAN: But - - - but still - - -

15 JUDGE RIVERA: If there were no arguments?
16 Sorry.

17 JUDGE TROUTMAN: But still there's a
18 responsibility of the court to explain on the record or in
19 writing, its reasoning?

20 MS. FITZPATRICK TALCOTT: Right.

21 JUDGE TROUTMAN: And you're asking us to infer
22 what that reasoning is?

23 MS. FITZPATRICK TALCOTT: Well, the court, again,
24 should be able to rely on the arguments before it.

25 JUDGE TROUTMAN: And we're not saying that it's



1 not. But did the court say that or put that in writing?
2 That I'm relying on - - - and as Judge Rivera just said,
3 prosecutors can make a lot of arguments, but the court need
4 not adopt all. But is it not important to know what it did
5 adopt and what it did reject in order to determine if it
6 was an appropriate decision?

7 MS. FITZPATRICK TALCOTT: Well, if that's the
8 flaw here, then it should be - - - it - - - that doesn't
9 result in that the detention is illegal.

10 JUDGE TROUTMAN: Okay.

11 MS. FITZPATRICK TALCOTT: That means it should be
12 sent back for clarification. And this court doing so would
13 give guidance in that respect.

14 CHIEF JUDGE WILSON: I mean, if you went to DA
15 Katz and she said, explain your reasoning for how you're
16 coming out to this result and you said, I complied with the
17 law and left her office, do you think she'd be satisfied?

18 MS. FITZPATRICK TALCOTT: Well, I would like to
19 think I would give her more.

20 CHIEF JUDGE WILSON: Exactly the point.

21 JUDGE RIVERA: That's the point.

22 MS. FITZPATRICK TALCOTT: But again, I would
23 repeat the arguments put forth before the court and just
24 hopefully explain it better.

25 But again, the Appellate Division recognized

1 wasn't the greatest record, but it still found, at the end
2 of the day, it was sufficient to find that the lower court
3 didn't abuse its discretion. And because the bail court's
4 decision was supported by the factors viewed together, the
5 decision to remand rested on a rational basis. That's
6 beyond correction in a habeas.

7 So the Appellate Division's decision was proper.
8 Defendant wasn't being illegally detained and the correct -
9 - -

10 JUDGE RIVERA: Let's just say we disagree in
11 terms of your argument of why we should uphold the
12 Appellate Division. But then the remedy, in your view, is
13 to do what? A - - - a - - - hold the habeas in abeyance?
14 What's the remedy, in your view?

15 MS. FITZPATRICK TALCOTT: Well, I - - - I think
16 this court could have several options. Perhaps send it
17 back to the Appellate Division directing it to hold it in
18 abeyance.

19 JUDGE HALLIGAN: That's what (b) instructs if
20 that's the provision, you would suggest we would proceed
21 under.

22 MS. FITZPATRICK TALCOTT: Right. Or
23 conditionally grant the writ until the court sets forth its
24 reasoning. You could direct the Appellate Division to do
25 that as well.

1 JUDGE HALLIGAN: Thank you.

2 MS. FITZPATRICK TALCOTT: But - - - and just
3 briefly. In any event, the factors the court considered,
4 it is proper to consider the first trial. The defendant
5 was not in the same position as someone awaiting a first
6 trial. The court and the defendant were fully aware of the
7 strength of the evidence against the defendant and the
8 potential sentence he faced. Proof of guilt was fully
9 elicited. The witnesses were cross-examined. It's largely
10 digital. It's not going to be a case where a witness - - -
11 you know, has some discrepancy or - - - you know, second
12 guesses their identification or anything. With this - - -

13 JUDGE SINGAS: Is there a preservation issue
14 here?

15 MS. FITZPATRICK TALCOTT: With regard to?

16 JUDGE SINGAS: Was there an objection made as to
17 the sufficiency of the reasons that the judge set out?

18 MS. FITZPATRICK TALCOTT: I mean, they - - - they
19 objected to the remand. Is that what you're say - - -
20 asking?

21 JUDGE SINGAS: Yeah. Specifically as to the fact
22 that there were no reasons set out?

23 MS. FITZPATRICK TALCOTT: Oh, no. And that was
24 my point with - - - that the court presumably misspoke when
25 it cited the wrong statute, that he never said, well,

1 judge, there's no factors listed in 510.30. You're not
2 setting forth what you're relying on. No. There was - - -
3 there was no objection in that regard.

4 So he's not in the same position as the first
5 trial. So the court properly considered part of the
6 history was this conviction. Not the fact that he was
7 convicted, but what that meant.

8 We had a first trial. The defendant was fully
9 aware of the magnitude and strength of the People's case.
10 Not so when you're awaiting a first trial. The court could
11 consider the charges, including the nature, the
12 seriousness, and the sentence. That doesn't impact the
13 presumption of innocence. The court can consider the
14 strength of the People's case before the first trial. The
15 fact that the criminal conviction is properly before the
16 court for consideration the - - - that's not to say it
17 should ignore that the case was reversed. It was fully
18 aware of that.

19 But keep in mind, it was also fully aware that
20 the Appellate Division, the majority, and the dissent, five
21 judges found that the evidence was legally sufficient and
22 that the weight supported a verdict of guilty. The court
23 was well aware of that.

24 The Court could also consider the charges alleged
25 to have caused harm. While the defendant's crimes are



1 deemed nonviolent felonies, they stem from heinous crimes.
 2 And defendant's crimes result in the market for that - - -
 3 for those underlying crimes to continue, and that harms
 4 untold numbers of babies, toddlers, and children who are
 5 the subject of these videos and images. And the court
 6 could properly consider that.

7 And in the case of an application for a securing
 8 order, the pending appeal is not limited to a defendant's
 9 appeal. Nothing in the statute restricts the court from
 10 considering the People's appeal, and that was put before
 11 the court. And the strength of People's appeal. There was
 12 a strong dissent. It was three to two. The court was
 13 familiar with the issues upon which the case was reversed
 14 and the other findings in the decision, and it could
 15 properly consider that.

16 In the end, the Appellate Division properly
 17 dismissed the writ. The defendant was not being illegally
 18 detained. And the lower court did not abuse its discretion
 19 in remanding the defendant.

20 If the court finds the records insufficient, the
 21 remedy is not release, it should go back to the Appellate
 22 Division to direct the trial court to make a more
 23 sufficient record.

24 CHIEF JUDGE WILSON: Thank you.

25 MS. WEISMAN KON: The charges and the strength of

1 the case, those are all the same in 2017. And yet, the
2 People offered a one-and-a-third to three-year plea deal to
3 Mr. Guerra for these deemed nonviolent felonies. A plea
4 deal that he rejected because he's so adamant about
5 clearing his name.

6 This is someone who surrendered voluntarily for
7 questioning. This is someone who has never absconded, who
8 has no criminal record. This is someone who has just won
9 an appeal and will finally get the trial that he is
10 entitled to. He has - - -

11 JUDGE TROUTMAN: But there is also the fact just
12 because you win an appeal, unless the conviction is - - -
13 unless it's said that there can be no retrial, retrial
14 presents a possibility of another conviction; does it not?

15 MS. WEISMAN KON: Right. Well, any time that the
16 court - - -

17 JUDGE TROUTMAN: And are you suggesting that a
18 court cannot consider what the defendant's viewing. He's
19 had a full - - - not just an anticipation of what the
20 evidence may be. He or she will have actually seen it
21 after that first trial, correct?

22 MS. WEISMAN KON: Correct. The problem is that
23 anytime the Appellate Division finds the evidence is
24 legally insufficient or against the weight, they dismiss
25 the case. So the only time you have a retrial is when you

1 have had a reversed conviction.

2 JUDGE TROUTMAN: And there is a likelihood that
3 one can be convicted?

4 MS. WEISMAN KON: Sure. And I think - - - but I
5 think that there is a big difference between saying, okay,
6 the facts of this trial, what came out here, this is
7 different now there's a testifying codefendant, you've seen
8 that or whatever. Even if it's something like, you know,
9 the - - -

10 JUDGE TROUTMAN: But the prior conviction is
11 something that is different from the first time that bail
12 was considered. Would you not agree with that?

13 MS. WEISMAN KON: I don't agree with that and
14 here's why - - -

15 JUDGE TROUTMAN: And you don't agree that there
16 was - - - that that information, that conviction wasn't
17 before the trial court before trial?

18 MS. WEISMAN KON: I think that the evidence in
19 the trial might not have been. But the conviction itself
20 doesn't exist anymore. It's - - - it's a legal nullity.
21 So the fact - - -

22 JUDGE SINGAS: So can I ask you this? What if it
23 was another way? What if the conviction was overturned
24 because a statement was let in that shouldn't have been let
25 in, and that's the major evidence of the case. So now this

1 statement is no longer going to be in front of the new
2 jury, which was the most damning piece of evidence. You're
3 saying that you couldn't go in front of a judge on a new
4 bail application and say, judge, their case has now just
5 been significantly weakened, and I think my client should
6 be out.

7 MS. WEISMAN KON: Sure. I think you could, and I
8 think the reverse is true. If there was something that
9 came out at trial that significantly strengthened the
10 prosecution's case, I absolutely think the court could
11 consider that.

12 JUDGE SINGAS: But you don't think a conviction
13 by a jury and a reversal on a stipulation is something that
14 the People can rely on to say the - - - our case is
15 basically the same, but stronger, because we know that a
16 jury has looked at this evidence, weighed it, and convicted
17 him?

18 MS. WEISMAN KON: No, I don't think a conviction
19 that is based on a trial where there was ineffective
20 assistance of counsel, where that evidence was not
21 subjected to adversarial testing, I don't think that that
22 conviction should hold any weight in a flight risk
23 analysis.

24 JUDGE GARCIA: That conviction's on appeal,
25 right? Leave was granted. And putting aside the merits of

1 that. But if this went back, could the trial judge
2 consider that fact? That that ten-to-twenty year sentence
3 is now on appeal to this court in determining what
4 conditions were appropriate?

5 MS. WEISMAN KON: Yeah. Well, he's already
6 served almost ten of that ten to twenty. So if he goes
7 back, he's imminently eligible for - - -

8 JUDGE GARCIA: So could they consider that or
9 not?

10 MS. WEISMAN KON: Yeah. What I'm saying is I
11 think that you could consider that, and I think it weighs
12 in favor of - - - of release because he - - - he is very
13 disincentivized to hurt his chances at parole if he
14 absconds. So actually a defendant who has their whole
15 sentence ahead of them is probably more incentivized to
16 flee than Mr. Guerrea, who has served almost the entire
17 thing.

18 I think also in terms of the strength of the
19 People's case - - - you know, I don't think it's as strong
20 as people think it is. The jury is deliberating. They're
21 asking, are they bound by this stipulation? If they were
22 accepting all the evidence wholesale, they wouldn't be
23 worried about being bound by the stipulation if they had
24 rejected the defense.

25 And I don't think - - - and I'm wrapping up. I

1 don't think that when there has been a statutory violation
2 here, which there has been, that the Appellate Division is
3 free to just dismiss the writ. The writ has to be granted.
4 Mr. Guerrea has to be released for all of the reasons I've
5 said, whether or not it's because we're in Section (a) and
6 there's a per se or we're in Section (b), and the Court
7 abused its discretion. Either way, I would urge this court
8 to order Mr. Guerrea's immediate release. Thank you.

9 CHIEF JUDGE WILSON: Thank you.

10 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People ex rel Kon v. Maginley-Liddie No. 76 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: September 17, 2025

