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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF STATE OF NEW YORK,

Respondent,

-against-

No. 206

MYRON P.,

Appellant.

20 Eagle Street
Albany, New York 12207
October 18, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Counselor, you're
2 on. Do you want any rebuttal time, counselor?

3 MR. MCPHERSON: Yes, please, Your Honor.
4 If I could have two minutes?

5 THE COURT: Two minutes. Sure, go ahead.

6 MR. MCPHERSON: May it please the court,
7 Mark David McPherson for the appellant in this case,
8 Myron P.

9 Your Honors, for the last six years, Myron
10 P. has been confined in a secure treatment facility,
11 yet no jury ever authorized his confinement.

12 CHIEF JUDGE LIPPMAN: Counselor, don't 9
13 and 10 have different purposes?

14 MS. MCPHERSON: I agree with that, Your
15 Honor.

16 CHIEF JUDGE LIPPMAN: Yes? And so why
17 can't he have certain rights under 9 and certain
18 rights under 10?

19 MS. MCPHERSON: For two reasons. First of
20 all, both deal with the confinement of a mentally ill
21 population. Now, Your Honor is correct that there
22 are - - -

23 CHIEF JUDGE LIPPMAN: But they're designed
24 to achieve different things.

25 MR. MCPHERSON: That's true. But with

1 respect to the confinement issue, there are two
2 fundamental points. One is that the great tradition
3 of this state is that well before 1894, a confinement
4 decision had to be made by a jury. And because the
5 1894 constitution enshrined the right to a jury trial
6 - - -

7 JUDGE SMITH: But there wasn't - - - but
8 there wasn't a separate confinement decision back
9 then, was there?

10 MR. MCPHERSON: That's right, Your Honor.
11 But the point is that before 1894, in order to
12 confine an individual because of mental illness, a
13 jury had to authorize that confinement in some way.

14 JUDGE SMITH: Well, it was automatic. If
15 someone was found to be a lunatic - - -

16 MR. MCPHERSON: That's right.

17 JUDGE SMITH: - - - before 1894, he was
18 automatically confined. Suppose you have a criminal
19 statute that calls for automatic imprisonment, and
20 the legislature amends it to say he can be given
21 probation instead of imprisonment at the judge's
22 discretion, does that violate the jury trial right?

23 MR. MCPHERSON: If the jury authorizes the
24 confinement by a finding of guilt, yes. But the
25 difference is that in this case, the jury was

1 explicitly told, based on the clear text of article
2 10, not to consider the issue of confinement. The
3 jury - - -

4 JUDGE PIGOTT: Would it have been - - -

5 JUDGE SMITH: Well, in any criminal case,
6 the jury is told - - - I realize this is civil, but
7 I'm making an analogy - - - in any criminal case, the
8 jury is told not to concern itself with - - -

9 JUDGE CIPARICK: Right.

10 JUDGE SMITH: - - - punishment.

11 JUDGE CIPARICK: Exactly.

12 MR. MCPHERSON: Not to concern itself with
13 the term of punishment or whether it will be
14 imprisonment or probation. But the jury certainly
15 knows that a consequence of a finding of guilt beyond
16 a reasonable doubt is the very possibility of
17 confinement.

18 JUDGE GRAFFEO: Can you clarify what it is
19 you're asking us to do? Because at the end of your
20 brief, I thought you were suggesting that you still
21 want the judge to be involved in determining
22 retention or other supervision. I'm not quite sure
23 exactly what you're proposing as the procedure.

24 MR. MCPHERSON: Sure. We understand that
25 there are differences in the statutory schemes set up

1 by article 9 and article 10. The difference, though,
2 is that a judge determines the type of treatment - -
3 -

4 JUDGE GRAFFEO: What do you want to happen
5 - - -

6 MR. MCPHERSON: We want - - -

7 JUDGE GRAFFEO: - - - in article 10
8 proceedings?

9 MR. MCPHERSON: - - - to happen - - - we
10 want to have a jury to determine confinement. That
11 can happen in one of two ways.

12 CHIEF JUDGE LIPPMAN: You want it to be
13 treated like an article 9?

14 MR. MCPHERSON: Well, it could happen in
15 one of two ways, Your Honor. First of all, the court
16 could read C.P.L.R.'s right to a jury provision in
17 4101(3) into article 10.07(f). That's the
18 dispositional hearing at which - - -

19 JUDGE CIPARICK: But we went through this
20 in Harkavy - - -

21 JUDGE GRAFFEO: You want - - -

22 JUDGE CIPARICK: - - - I'm sorry. We went
23 through this in Harkavy I and II where proceedings
24 had been instituted under article 9. We said that
25 that was not the proper proceeding, that they had to

1 be instituted through the Correction Law. Then the
2 legislature amended the statute to add article 10 to
3 address some of the concerns that we voiced in
4 Harkavy I and II. And now, it seems as if you're
5 challenging what the legislature has done and you
6 feel that it's not constitutional, that it's
7 depriving someone similarly situated to your client
8 from a jury trial on the issue of confinement.

9 MR. MCPHERSON: Yes, Your Honor. Because
10 it - - - we don't take issue with what the
11 legislature - - -

12 JUDGE GRAFFEO: You want only one
13 proceeding, or you still want two proceedings?

14 MR. MCPHERSON: Well, Your Honor, as I was
15 saying, it could be done in a couple of ways. One
16 way - - - the simplest way, in my view, is for
17 10.07(f) to be read in such a way that instead of
18 saying "the court shall determine confinement or
19 strict and intensive supervised treatment", it should
20 say the jury or a court, if a jury trial is waived,
21 should make that confinement determination.

22 JUDGE SMITH: Do we - - - do we have
23 authority to rewrite the statute to that extent?

24 MR. MCPHERSON: You do, Your Honor. First
25 of all, because it's not rewriting the statute, it's

1 simply applying C.P.L.R. 4101; and second, because
2 that's exactly what the Court of Appeals did in the
3 Lally case, when the issue was whether the similar
4 procedure for insanity acquittees violated the equal
5 protection right based exactly on the argument that
6 we're making here, that because article 9 provides
7 for a jury right, there had to be a jury right for
8 insanity acquittees. And this court in that case
9 said - - -

10 JUDGE PIGOTT: Assuming for a minute - - -
11 assuming for a minute that you're right, are you sure
12 you want this? You want a jury to sit there and
13 listen to, let's say, you know, a rapist, you know,
14 several times over, and have them decide whether or
15 not they're going to be - - - this person's going to
16 be confined or be subject to strict and intense
17 supervision and treatment?

18 MR. MCPHERSON: Well, with all due respect,
19 Your Honor, that's not a decision that this court
20 should made.

21 JUDGE PIGOTT: I understand that.

22 MR. MCPHERSON: That's a decision that each
23 respondent - - -

24 JUDGE PIGOTT: I - - - believe me, I read
25 your brief - - -

1 MR. MCPHERSON: - - - should be able to
2 make.

3 JUDGE PIGOTT: I understand your point.

4 MR. MCPHERSON: Right.

5 JUDGE PIGOTT: I'm just saying, what you
6 want to say is, we don't trust a judge to take - - -
7 to look at these two alternatives; we would rather
8 have six citizens sit there and do it. And what you
9 want us to do is do this for everybody; not just for
10 your client, but for every single sex offender who
11 comes under the Sex Offender Management and Treatment
12 Act, to say no longer will judges have discretion to
13 determine whether or not this person's going to be
14 confined or subject to strict and intensive
15 supervision and treatment, which is a very
16 sophisticated thing that the judges are looking at.
17 You want to say a jury in the community is going to
18 decide that.

19 MR. MCPHERSON: But no, Your Honor.
20 Actually that's not what we're saying. We're not
21 saying that the judge should no longer have any
22 discretion. We're saying that before the judge
23 exercises that discretion, a jury must authorize
24 confinement. So a person can't be detained, can't be
25 confined, unless a jury authorizes it.

1 JUDGE CIPARICK: So going back to Judge
2 Graffeo's question, does that mean two proceedings:
3 one to determine the mental illness and a second one
4 to determine whether there should be confinement or
5 not, and then - - -

6 MR. MCPHERSON: Well, that is - - - that's
7 how the statute - - -

8 JUDGE CIPARICK: - - - it goes to the
9 judge?

10 MR. MCPHERSON: - - - operates now.

11 JUDGE PIGOTT: No, it doesn't.

12 JUDGE CIPARICK: No.

13 MR. MCPHERSON: Under article - - - under
14 article 10 - - -

15 JUDGE CIPARICK: Well, but the judge - - -

16 MR. MCPHERSON: - - - there's a - - -

17 JUDGE CIPARICK: - - - but you want a jury
18 to make that determination.

19 MR. MCPHERSON: Right. Under 10.07(d),
20 there's a trial on the issue of mental abnormality -
21 - -

22 JUDGE CIPARICK: Right, right.

23 MR. MCPHERSON: - - - and then it proceeds
24 to a dispositional phase under 10.07(f) to determine
25 whether confinement is - - -

1 JUDGE GRAFFEO: If the jury determines they
2 want confinement, then how does the judge - - -

3 JUDGE CIPARICK: Right.

4 JUDGE GRAFFEO: - - - decide to do
5 intensive supervision?

6 MR. MCPHERSON: If the jury determines that
7 there should be confinement, then the individual
8 would be confined under - - -

9 JUDGE READ: So the judge has no dis - - -

10 MR. MCPHERSON: - - - under 10.10.

11 JUDGE READ: So the judge has no discretion
12 there?

13 JUDGE GRAFFEO: So you're taking the judge
14 out of the equation.

15 MR. MCPHERSON: But if the jury says that -
16 - -

17 JUDGE GRAFFEO: Do you think the pool of
18 sex offenders under article 10, that most of them
19 would prefer that, to have a jury determination?

20 MR. MCPHERSON: Well, and, Your Honor,
21 again, a respondent can make a determination for him
22 or herself whether to waive - - -

23 JUDGE SMITH: You're saying - - -

24 MR. MCPHERSON: - - - the provision.

25 JUDGE SMITH: - - - if they don't want it,

1 they can waive it?

2 MR. MCPHERSON: Exactly. They can make the
3 decision to waive it. But if the jury determines
4 that the person - - - all we're asking for is that a
5 jury has to determine whether a respondent satisfies
6 the definition of 10.03(e), whether the individual is
7 a dangerous sex offender requiring confinement.

8 If the jury says no, then the judge could
9 proceed under 10.11 to determine what the particular
10 treatment that's appropriate for that respondent
11 might be.

12 JUDGE PIGOTT: Can the judge also say
13 they've said no, and therefore I'm releasing him?

14 MR. MCPHERSON: Well, that's - - - that
15 could be the case, even if the - - -

16 JUDGE PIGOTT: I don't read that.

17 MR. MCPHERSON: - - - even under the
18 current statute.

19 JUDGE PIGOTT: You're saying it.

20 MR. MCPHERSON: Yes.

21 JUDGE PIGOTT: You're saying that the jury
22 comes back and says he's not dangerous, and the judge
23 says, happy days.

24 MR. MCPHERSON: And that could happen under
25 the current treat - - -

1 JUDGE SMITH: But if the jury - - -

2 MR. MCPHERSON: - - - statute.

3 JUDGE SMITH: - - - if the jury says - - -
4 if the jury does determine the question of
5 confinement and it's in favor of confinement, then
6 the ball game's over?

7 MR. MCPHERSON: Well, then the judge, I
8 think, still has to determine what kind of treatment
9 is necessary while the individual is confined.

10 CHIEF JUDGE LIPPMAN: Okay, counselor.

11 MR. MCPHERSON: Thank you, Your Honors.

12 CHIEF JUDGE LIPPMAN: You'll have some
13 rebuttal. Thank you.

14 Counselor?

15 MR. BRADY: Good afternoon, Your Honors.
16 May it please the court.

17 The first point I'd like to make is that we
18 don't believe that these claims are reviewable,
19 because they weren't - - - neither the argument that
20 he has a state constitutional right to a jury trial
21 in the dispositional phase of article 10 or the idea
22 that the different dispositional confinement
23 determinations between article 9 and article 10,
24 violates equal protection.

25 CHIEF JUDGE LIPPMAN: Counselor, do you

1 think once they consented to 10 that they're out of
2 luck, basically, in terms of wanting to be treated
3 like 9 - - - like it's an article 9 proceeding?

4 MR. BRADY: Well, as the point was made by
5 Judge Ciparick, is that once the article 10 petition
6 is filed, the article 9 rights become academic, as
7 this - - -

8 CHIEF JUDGE LIPPMAN: Lose, finished?

9 MR. BRADY: - - - court has already held.
10 Right. So - - -

11 CHIEF JUDGE LIPPMAN: So what should they
12 have done? Should they not have consented to 10?

13 MR. BRADY: Well, I don't think they so
14 much consented to 10. I mean, they were - - - he - -
15 - Myron P. was the subject of an article 10 petition
16 on the basis - - - he was a detained sex offender,
17 because he is one of those people who had been
18 transferred from the Department of Correctional
19 Services - - -

20 JUDGE SMITH: And he said you can't do that
21 to me, because I have a right to a jury trial.

22 MR. BRADY: Yes, he tried to - - - what he
23 tried to - - -

24 CHIEF JUDGE LIPPMAN: Under 9?

25 MR. BRADY: - - - he tried - - -

1 CHIEF JUDGE LIPPMAN: Is that what he said;
2 under 9?

3 MR. BRADY: He tried to defeat the article
4 10 by saying that the basis for my - - - for the
5 article 10 jurisdiction is the fact that I was in
6 pursuant to article 9.

7 JUDGE PIGOTT: What was the basis - - -

8 MR. BRADY: So Myron P. - - -

9 JUDGE PIGOTT: - - - what was - - -

10 MR. BRADY: - - - decided - - -

11 JUDGE PIGOTT: - - - the basis for the
12 article 9?

13 JUDGE CIPARICK: Was it - - -

14 MR. BRADY: The basis for the article 9? I
15 don't know. It's not in my - - -

16 JUDGE CIPARICK: It was before the article
17 10 had even been passed.

18 MR. BRADY: It was before the article 10
19 happened.

20 JUDGE CIPARICK: Right.

21 JUDGE PIGOTT: I understand it. But my
22 point is that at least impliedly, there's something
23 here where because you haven't moved on the article
24 10, you use article 9 as kind of a holding pattern,
25 so then you can later file an article 10.

1 MR. BRADY: He was a - - - he was among
2 those class of individuals who the Department of
3 Correctional Services had initially proceeded under
4 article 9, under - - - and this court found that that
5 was improper; that they should have proceeded under
6 Correction Law - - -

7 JUDGE PIGOTT: I see. So then - - -

8 MR. BRADY: - - - 404.

9 JUDGE PIGOTT: - - - so then - - -

10 MR. BRADY: He was one of those people.

11 And when they enacted article 10, they - - -
12 10.03(g)(5) specifically refers to that class of
13 people and says that those people who were
14 transferred from DOCS, pursuant to article 9 - - - to
15 MH pursuant to article 9, were subject - - - could be
16 subject to article 10 petition.

17 JUDGE SMITH: But to get - - -

18 MR. BRADY: He was one of those
19 individuals. And he - - - what he did is he moved
20 for a stay of the article 10 proceeding. He didn't
21 want to be subject to article 10.

22 JUDGE SMITH: Okay. If I could just get
23 you back to preservation for a moment.

24 MR. BRADY: Yes.

25 JUDGE SMITH: He did say the article 10

1 proceeding violates my constitutional rights,
2 including my right to a jury trial?

3 MR. BRADY: No, never did. No, never did.

4 JUDGE SMITH: He said - - -

5 MR. BRADY: What he did is he - - - this is
6 important - - - he made a stay motion. He wanted to
7 stay the article 10 proceeding.

8 JUDGE SMITH: He wanted - - -

9 MR. BRADY: He said - - - and he said - - -

10 JUDGE SMITH: - - - he wanted to have an
11 article 9 proceeding first, because he says, because
12 - - -

13 MR. BRADY: Because he says - - -

14 JUDGE SMITH: - - - article 10 would not
15 give him a jury?

16 MR. BRADY: No.

17 JUDGE SMITH: No?

18 MR. BRADY: No. No. What he says is - - -

19 JUDGE SMITH: What did he say about his - -
20 -

21 MR. BRADY: I'll tell you exactly what he
22 says, because it's in the motion papers. "If the
23 article 9 admission is held to be invalid, or that
24 Myron P. does not meet the criteria for involuntary
25 admission to a psychiatric hospital, that is under

1 article 9, then there is no jurisdiction to commence
2 the article 10 proceeding."

3 JUDGE SMITH: You're saying he did not
4 raise any constitutional issue?

5 MR. BRADY: No.

6 JUDGE SMITH: Justice O'Connor thought he
7 did.

8 MR. BRADY: He made the very argument that
9 this court rejected in the second Harkavy case.

10 JUDGE SMITH: Are you really saying he
11 raised no constitutional issue? Because I thought -
12 - - I really thought I saw it.

13 MR. BRADY: I - - -

14 JUDGE SMITH: And Justice O'Connor thought
15 she saw it.

16 MR. BRADY: What he did, in the context of
17 this - - - of this stay motion, Your Honor, in an
18 attempt to persuade the court that the should have
19 his article 9 rights adjudicated first, he cited the
20 equal protection clause and he cited the state
21 constitutional right to a jury trial.

22 JUDGE SMITH: Okay, that's really - - -

23 MR. BRADY: But that's only in the - - -

24 JUDGE SMITH: - - - that's really what I've
25 been asking you for a few minutes. He did cite the

1 constitutional right to a trial by jury?

2 MR. BRADY: He cited it, but he never - - -

3 JUDGE SMITH: Okay. Are you - - - I mean,
4 it think it would help if you'd told me that first.
5 The - - -

6 MR. BRADY: I wanted to - - -

7 JUDGE SMITH: He cited it. Your argument
8 is that he did not - - - that his way of citing it
9 was insufficient to preserve the point because of the
10 context in which he cited it?

11 MR. BRADY: Yes. It was merely part of his
12 argument to persuade the court that - - -

13 JUDGE SMITH: Okay, but - - -

14 MR. BRADY: - - - the court should stay the
15 - - -

16 JUDGE SMITH: - - - but the - - -

17 MR. BRADY: - - - article 10 proceeding.

18 THE COURT: - - - but once - - -

19 MR. BRADY: He never once asked for - - -
20 if I could answer the question?

21 JUDGE SMITH: If I could follow up, please?
22 If I could - - - having - - - once Justice O'Connor
23 had ruled that his constitutional right was without
24 merit, and when Justice - - - who was the second
25 justice - - -

1 JUDGE CIPARICK: McNamara.

2 JUDGE SMITH: - - - McNamara said, in
3 effect, I'm not revisiting what she has done,
4 wouldn't it have been clearly futile for him to say,
5 wait a minute, I have a trial - - - a jury trial
6 right?

7 MR. BRADY: If he had asked for a - - - if
8 he asked for the right to a jury trial in the
9 dispositional phase of article 10 - - -

10 JUDGE SMITH: Um-hum.

11 MR. BRADY: - - - in the first instance,
12 you would be right, Your Honor. But he never asked
13 for a jury trial.

14 JUDGE SMITH: Okay. I guess what I'm
15 saying is would - - - I mean, I do under - - -
16 despite the fact that I yell at you, I do understand
17 your point.

18 MR. BRADY: Well, I don't mean to interrupt
19 you either, Judge.

20 JUDGE SMITH: But it's - - - wouldn't it
21 have been an exercise in futility for him to ask
22 Justice McNamara to decide what Justice O'Connor had
23 already decided and what Justice McNamara had
24 indicated he wouldn't revisit?

25 MR. BRADY: Well, the - - - what the first

1 judge decided, was that he couldn't - - - he denied
2 his stay motion. That's all the decision was.

3 JUDGE SMITH: Well, it says - - - it did
4 mention that he had constitutional arguments and it
5 found them without merit.

6 MR. BRADY: In his motion papers - - - no,
7 it did not. It did not - - - it did not reject an
8 argument that he had a right to a jury trial in the
9 dispositional phase of - - -

10 JUDGE SMITH: It didn't - - -

11 MR. BRADY: - - - article 10.

12 JUDGE SMITH: - - - it didn't discuss jury
13 trial, but it did mention that he - - - it recited
14 the constitutional ground for his motion, and then it
15 said his other arguments are without merit, correct?

16 MR. BRADY: Well, I can tell you what - - -
17 he did cite the constitutional provisions we're
18 talking about, there's no question. But he did that
19 only to try to persuade the court not to - - - not to
20 subject him to article 9, to stay the article - - -
21 I'm sorry, to stay - - - that I shouldn't be subject
22 to article 10, because I have these state
23 constitutional rights to a jury trial. And under
24 equal - - - and he cites the equal protection clause.
25 It doesn't really say the context. But he says that

1 stay the article 10 - - - he's raising the same issue
2 that was rejected in Harkavy - - - stay the article
3 10; I want to - - - I want my - - - I want to
4 challenge - - -

5 JUDGE CIPARICK: Article 9 rights.

6 MR. BRADY: - - - the basis of my article 9
7 confinement. And if I can defeat that, well then
8 you'll have no basis to go after me under article 10.

9 JUDGE PIGOTT: What happened - - -

10 MR. BRADY: We know that's wrong.

11 JUDGE PIGOTT: What happened to the article
12 9?

13 MR. BRADY: It was - - - you know, whether
14 it was dismissed - - - I guess it was dismissed. I
15 don't - - -

16 JUDGE PIGOTT: I didn't find that either.
17 In the ruling in July of '08, the court just said,
18 "The issues pertaining to his article 9 must be
19 resolved in an appropriate commitment hearing held in
20 accordance with 10." So what - - - did they merge
21 them?

22 MR. BRADY: I think - - - as this court
23 said in Harkavy, it just becomes - - - the article 10
24 petition just becomes academic.

25 JUDGE PIGOTT: Well, except that there's -

1 - -

2 MR. BRADY: Because - - -

3 JUDGE PIGOTT: - - - there's a - - -

4 MR. BRADY: - - - because what happens is
5 the - - -

6 JUDGE PIGOTT: - - - there's that - - -

7 MR. BRADY: - - - subject of his
8 confinement is now article 10.

9 JUDGE PIGOTT: - - - there's that equal
10 protection argument that they make as well, which
11 says that under 9 I get a jury; under 10 I don't, and
12 you're denying me equal protection by not giving me
13 my 9 that you started, and instead going with 10.
14 Does he have a point?

15 MR. BRADY: I - - - no. If the article 9
16 proceeding is academic, he doesn't have a point. The
17 article 9 proceeding doesn't exist anymore.

18 JUDGE READ: And that's academic because of
19 what we decided, you're saying?

20 MR. BRADY: Right, because of what you
21 decided in Harkavy, the article 9 proceeding falls by
22 the wayside. Because now, he's being confined under
23 article 10. And that's where his rights have to be
24 adjudicated.

25 JUDGE SMITH: Did Justice O'Connor, in the

1 course of that motion, have to determine his - - -
2 whether he was - - - whether article 10 did or did
3 not violate his right to trial by jury?

4 MR. BRADY: No. No. No, it wasn't
5 implicit in the court's finding at all.

6 JUDGE SMITH: I mean, suppose - - - suppose
7 she - - - if she had thought that he was right on the
8 merits, that he's entitled to a jury trial right,
9 shouldn't she have done something other than say go
10 to an article 10 proceeding?

11 MR. BRADY: Well, she could have
12 entertained any motion that he made for this relief.
13 He could have - - - he could have asked for a jury
14 instruction, frankly, on what he's asking this court
15 - - - you know, whether it should be an up or down -
16 - -

17 JUDGE SMITH: I mean, I do - - - I do think
18 you have a point that it was easy for him to say,
19 Your Honor, I'm demanding a trial by jury, and he
20 didn't say it. I guess I'm just saying, would it
21 have made any difference, or would it have been a
22 ritual?

23 MR. BRADY: I - - - well, if he'd actually
24 raised this issue, Your Honor, it's important from
25 the State's point of view, because then the State

1 would have been in a position to put forth - - - make
2 an evidentiary finding - - - make an evidentiary
3 showing why article 9 respondents are treated so
4 differently from article 10.

5 JUDGE SMITH: We've used up too much of
6 your time. Spend the remaining time on the merits.
7 I'm sorry.

8 MR. BRADY: Well, that is - - - that is
9 part of my merits, is that the court shouldn't reach
10 this important - - -

11 JUDGE SMITH: Okay, but just in case we do,
12 you might want to say something about it.

13 MR. BRADY: Well - - -

14 CHIEF JUDGE LIPPMAN: You've got about
15 thirty seconds, so say it, if you're going to say it.

16 MR. BRADY: Well, it's been mentioned
17 already. The - - - we don't believe that the article
18 10 procedures violate the state constitutional right
19 to a jury trial and civil commitment proceedings. We
20 believe that article 10, the determination in article
21 10 mirrors what the 1894 jury, with respect to
22 finding mental illness and dangerousness. With res -
23 - - I see my time is out.

24 CHIEF JUDGE LIPPMAN: Finish your sentence.
25 Go ahead.

1 MR. BRADY: I was just going to say that
2 with respect to the equal protection, you know, as
3 it's been pointed out, the legislature, in enacting
4 article 10, found that these were very different
5 populations. And because they are very different
6 populations, there's a rational basis to have this
7 different procedure, this different dispositional
8 question at the end of the - - - in the article 10
9 proceeding.

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

12 Counselor, rebuttal.

13 MR. MCPHERSON: Thank you, Your Honor.
14 Just to address the preservation issue briefly. I
15 think the basic purpose of the preservation
16 requirement is simply to put the court and the
17 opposing party on notice so that they can cure any
18 defect. And that's clearly what Myron P. did here.
19 He made the argument that - - -

20 JUDGE SMITH: I mean, your adversary has a
21 point. It would have been pretty simple to stand up
22 and say, Your Honor, for the record, I'm demanding a
23 trial by jury.

24 MR. MCPHERSON: You're right. But it's
25 also clear from the record that Your Honor was

1 correct that it would have been a futile exercise
2 because every time he stood up to challenge the
3 previous ruling, the judge said we hear you; your
4 objections are preserved; now please sit down.

5 That happened on the first day of the
6 trial. Myron P.'s counsel stated, we preserve all
7 rights that we have relating to the underlying
8 rulings. And the court said, yes, I hear you.

9 On the second day, again, the issue came up
10 and again counsel said we want to preserve our
11 rights, and the judge said okay, let's move on. And
12 it happened on the third day as well.

13 At each stage, counsel preserved the
14 argument. Now, you're right, he could have done it
15 more artfully. He could have done it more
16 eloquently, perhaps, but it was clear that he was
17 making the constitutional argument.

18 CHIEF JUDGE LIPPMAN: Okay. Thanks,
19 counsel.

20 MR. MCPHERSON: Thank you very much, Your
21 Honors.

22 (Court is adjourned)
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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of State of New York v. Myron P., No. 206 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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