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COURT OF APPEALS  
STATE OF NEW YORK

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MATTER OF LOPEZ,

Respondent,

-against-

EVANS,

No. 51  
(some papers sealed)

Appellant.  
-----

20 Eagle Street  
Albany, New York 12207  
February 12, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's start with  
2 number 51, Matter of Lopez v. Evans.

3 Counselor, do you want any rebuttal time?

4 MR. WU: Two minutes, please.

5 CHIEF JUDGE LIPPMAN: Two minutes, go  
6 ahead. You're - - - you're on.

7 MR. WU: May it please the court, Steven Wu  
8 for Parole. Due process does not require that  
9 mentally incompetent parolees be immune - - -

10 CHIEF JUDGE LIPPMAN: Counselor, what - - -  
11 what about - - - let's talk about fairness. How does  
12 it - - - does it - - - what - - - what - - - what  
13 should happen when you have an incompetent person in  
14 a - - - in a parole hearing? What - - - what  
15 variables are kind of at stake? How do we look at  
16 this proceeding and how does it differ from a typical  
17 criminal proceeding?

18 MR. WU: Well, it differs from a criminal  
19 proceeding in that it's a civil proceeding with a  
20 perspective and a remedial focus. And so it's  
21 similar to other civil proceedings when an  
22 incompetent individual's liberty might be at stake.

23 And the answer to what to do with  
24 incompetence is two-fold. The first is that the  
25 individual is entitled to procedural protections that

1 will enable them to present a defense.

2 CHIEF JUDGE LIPPMAN: Yeah, yeah, but - - -  
3 but - - - but can the normal procedural protections  
4 apply if the person involved, for instance, can't  
5 consult with his attorney?

6 MR. WU: They can. There are obstacles  
7 when somebody is incompetent.

8 CHIEF JUDGE LIPPMAN: So how do you get  
9 around the obstacles?

10 MR. WU: And the obstacles are avoided  
11 basically by having counsel that can effectively  
12 represent them. What can they do even with - - -

13 JUDGE RIVERA: Well, how - - - how can  
14 counsel effectively represent if they can't really  
15 have any kind of conversation with the client? The  
16 client's not able to make choices if they're  
17 incompetent. How can you have effective  
18 representation?

19 MR. WU: They - - -

20 JUDGE RIVERA: Who are you representing?

21 MR. WU: They can still evaluate the  
22 evidence, cross-examine witnesses at the hearing.  
23 They can present new evidence - - -

24 JUDGE RIVERA: But the client can't help  
25 them.

1 MR. WU: And they can investigate the  
2 facts. It is true the client can't help them, but I  
3 will just emphasize that as a factor - - -

4 JUDGE RIVERA: But isn't it possible the  
5 client might have relevant and, in fact, critical  
6 information?

7 MR. WU: That is also possible. But that  
8 is a defect that occurred in a number of civil  
9 proceedings where somebody's liberty is at stake.  
10 And in the Article 9 process and Article 10, in  
11 federal removal - - -

12 CHIEF JUDGE LIPPMAN: How does this - - -  
13 how does this - - -

14 MR. WU: - - - even in CPL 730.

15 CHIEF JUDGE LIPPMAN: How does this comport  
16 to the Morrissey case?

17 MR. WU: It comports because it provides  
18 adequate procedural protections for somebody to be  
19 able to present a defense at the revocation hearing.  
20 It - - - it - - -

21 CHIEF JUDGE LIPPMAN: But what's the  
22 ultimate goal of the parole hearing versus a criminal  
23 hearing or - - - or a trial? What - - - what's the  
24 different - - - why - - - why is it different?

25 MR. WU: It's dramatically different

1 because - - -

2 CHIEF JUDGE LIPPMAN: Why? Why?

3 MR. WU: - - - the parole revocation  
4 process is not a punitive process. It does not  
5 express a social judgment - - -

6 CHIEF JUDGE LIPPMAN: Yeah, yeah, but your  
7 - - - but - - -

8 MR. WU: - - - or stigma about the  
9 violation.

10 CHIEF JUDGE LIPPMAN: Let me just stop you  
11 for one sec. But we're talking about someone's  
12 liberty.

13 MR. WU: Yeah - - -

14 CHIEF JUDGE LIPPMAN: Isn't it the same in  
15 that sense that criminal procedure - - - proceeding  
16 can take away your liberty and a parole hearing can  
17 take away your liberty. Isn't that the - - - that's  
18 the big picture issue that we're dealing here.

19 MR. WU: That's correct, but - - -

20 CHIEF JUDGE LIPPMAN: And - - - and what  
21 you have to - - - the barrier you have to get over,  
22 because from a visceral perspective, one would think  
23 - - - and again, not a judgment legally as to how  
24 we're going to decide, but from a visceral  
25 perspective, your liberty's at stake. You can't - -

1           - you don't really know what's happening. You can't  
2           consult with your attorney. It - - - doesn't it  
3           seem, again, not right, not fair, that - - - that  
4           gee, why are you making them go through this  
5           procedure? There must be some other way to do this  
6           when you have someone who's incompetent.

7                       MR. WU: Liberty's at stake in a wide  
8           variety of proceedings, Chief Judge Lippman.

9                       CHIEF JUDGE LIPPMAN: Yes, agreed.

10                      MR. WU: Criminal trials are really the  
11           only ones where there has a flat incompetence bar.  
12           In other proceedings where liberty's at stake, courts  
13           have repeatedly recognized that due process allows  
14           the proceeding to go forward with the protections,  
15           such as the right to counsel, that apply, and with  
16           special consideration given to somebody's mental  
17           state.

18                      JUDGE ABDUS-SALAAM: But counsel, what  
19           we're getting at is, perhaps the right to counsel may  
20           exist, but it - - - it can't be effectively used  
21           because the person is incompetent. The person may  
22           not even know counsel versus - - - if you brought  
23           them in the courtroom, they may not know whether the  
24           person sitting next to them is their counsel or that  
25           the judge on the bench is the judge or what this is

1 ab - - - especially in this case, where  
2 unfortunately, Mr. Lopez lost - - - you know, he's  
3 lost his memory; he doesn't know anything. So how -  
4 - - how should he be treated, along with all of these  
5 other folks that you're talking about?

6 MR. WU: Well, we fundamentally disagree  
7 with the argument that says the right to counsel is  
8 ineffective. If you look at what happened in the  
9 hearings in this case, it is clear that Mr. Lopez's  
10 counsel from Legal Aid was able to present a defense.  
11 They aggressively cross-examined the witness. They  
12 were able to exclude evidence that they thought  
13 should not have been in. And they were able to  
14 investigate the cri - - - the incident here that  
15 underlied the parole violation.

16 JUDGE RIVERA: But aren't you describing  
17 that they just basically did the best with what they  
18 could?

19 MR. WU: And that's all that due process  
20 requires. And it is the same - - -

21 JUDGE RIVERA: No, doesn't it require an  
22 effective representation?

23 MR. WU: It is the same process that is  
24 available in proceedings, such as Article 9 and  
25 Article 10, where the end result is somebody's loss

1 of liberty, sometimes for periods far greater than a  
2 return to prison after a parole violation.

3 CHIEF JUDGE LIPPMAN: Yeah, but - - - but 9  
4 and 10 are dealing with so - - - with treatment, with  
5 psychiatric treatment. This is dealing with a  
6 different issue, isn't it?

7 MR. WU: It's the same issue. The basic  
8 inquiry - - -

9 CHIEF JUDGE LIPPMAN: Okay, why is it the  
10 same issue?

11 MR. WU: The basic inquiry in a revocation  
12 proceeding is to assess the risks of somebody who is  
13 out in the community and who has shown incapable in  
14 complying with their condition.

15 CHIEF JUDGE LIPPMAN: Yeah, yeah, but - - -  
16 but that's not really what's at issue in 9 and 10.

17 MR. WU: It is the same issue.

18 CHIEF JUDGE LIPPMAN: The issue is the  
19 nature of the treatment, the psychiatric treatment  
20 that you get.

21 MR. WU: There is always a predicate in  
22 Article 9 and 10 proceedings about the underlying  
23 facts, and about whether it is safe for somebody who  
24 has shown signs of dangerousness, which differ among  
25 these populations, whether they should remain on the



1 streets, or whether they should be committed, whether  
2 their liberty should be deprived.

3 JUDGE STEIN: And - - - and those  
4 proceedings are subject to continual review. Would -  
5 - - would the same be true if - - - if parole was  
6 revoked and someone was reincarcerated? Would they  
7 get that same opportunity to have their mental status  
8 reviewed and - - - and to be released?

9 MR. WU: Well, they don't have the exact  
10 same review. The time assessments that can be  
11 imposed have a maximum of two years. And they have  
12 to be released at the end of the time, unless they  
13 commit a serious disciplinary infraction. So it is  
14 not - - -

15 JUDGE STEIN: They have to be released  
16 unless they commit a - - -

17 MR. WU: That is correct. That's what  
18 happens with the amendment to the executive law most  
19 recently. But I will just emphasize, part of the  
20 reason there is not continuing evaluation of  
21 somebody's mental health while in prison, if they are  
22 in prison, is because mental incompetence is not a  
23 grounds for vacating someone's criminal sentence, if  
24 they're still subject to it.

25 And that's the same basic argument parole

1 is making here. Somebody subject to parole  
2 supervision should remain subject to supervision,  
3 notwithstanding their late developing incompetence,  
4 and part of the supervision process is the ability to  
5 subject them to revocation.

6 JUDGE RIVERA: But - - - but - - -

7 MR. WU: I'll just add - - -

8 JUDGE RIVERA: but where - - -

9 JUDGE FAHEY: But let me just ask here - -

10 JUDGE RIVERA: - - - where does that do any  
11 good with respect to what is obviously the necessary  
12 treatment for someone who has a mental health  
13 problem?

14 MR. WU: Well, there's a couple of - - -

15 JUDGE RIVERA: Where's the benefit to  
16 society in that?

17 MR. WU: There's a couple of answers to  
18 that. One is that mental health treatment is  
19 available in prisons, often administered by OMH, the  
20 same - - -

21 JUDGE RIVERA: But certainly not if someone  
22 really needs the kind of services you get when you're  
23 institutionalized.

24 MR. WU: Well, and the Correction Law 402  
25 permits a DOC's inmate to be transferred to an OMH

1 civil facility to be treated in the unusual cases  
2 that you identified, Judge Rivera, where they can't  
3 get the treatment that they need in prison. I mean,  
4 at the end of the day - - -

5 CHIEF JUDGE LIPPMAN: Why not just send  
6 them directly to OMH? Why do you want to incarcerate  
7 them for?

8 MR. WU: That might be one of the options  
9 here. But I want to emphasize, this is not a case  
10 about the appropriate disposition for Mr. Lopez.  
11 That's the question resolved at the revocation  
12 hearing. What the First Department's rule does here  
13 is to prevent even an inquiry into whether a  
14 violation has occurred, and what the appropriate  
15 disposition should be.

16 CHIEF JUDGE LIPPMAN: Okay, counsel. Judge  
17 Fahey had a question.

18 JUDGE FAHEY: I think you answered it  
19 there. I was wondering what the practical effects of  
20 this would be. And it seems to me that - - - that  
21 the Parole Board would not have the authority to do  
22 the practical thing, which would be to send the  
23 person on to some sort of OMH custody, and that the  
24 real solution to this problem - - - and it does  
25 appear to be a problem - - - is through legislative

1 action. And - - - and it's - - - it's a difficult  
2 issue for the court to get at with any kind of  
3 workable solution.

4 MR. WU: Well, it is true, the Parole Board  
5 does not have direct authority to simply send someone  
6 to an OMH facility.

7 JUDGE FAHEY: Well, with the statute, I  
8 looked - - - I could be wrong - - - I don't think  
9 they have statutory authority to do this, so.

10 The other point is, and you addressed this  
11 briefly, is I think the distinction between civil  
12 confinement issues that result from mental health and  
13 criminal confinement issues that - - - after an  
14 adjudication has been made concerning criminality, I  
15 think that that burden is different. And - - - but I  
16 do think this is a very serious issue, but I - - -  
17 those distinctions have to be drawn and while civil  
18 confinement can take place, you know, both - - - both  
19 the Article 10 proceedings and the Article 9  
20 proceedings provide for them in different  
21 circumstances.

22 Here, I think that if we can implicate the  
23 liberty interest in that circumstance, I - - - after  
24 a criminal trial has taken place, and we've already  
25 made - - - they've already had all the processes due,

1 and they're still under that criminal penalty, I  
2 would think that that's your point, that since  
3 they're still under that penalty, they're no  
4 different than a prisoner who's incarcerated who has  
5 mental health problems, as to being one who isn't in  
6 jail. They're still living out that time period  
7 where incarceration is a possibility.

8 MR. WU: That - - - that's correct. I  
9 mean, and that is the critical difference. That is  
10 what the parole revocation process recognizes, is  
11 they are still subject to supervision. Article 9 and  
12 Article 10 and others, although they permit  
13 commitment under defined circumstances - - -

14 JUDGE FAHEY: Taking it one step further.

15 MR. WU: - - - do not take that into  
16 account.

17 JUDGE FAHEY: One step - - -

18 JUDGE RIVERA: Yeah, but they - - - they -  
19 - -

20 JUDGE FAHEY: Judge - - - Judge Lippman's  
21 point is really - - - and - - - and it's hard to  
22 disagree with it doesn't seem fair that, you know - -  
23 - that's all. Due - - - due process sometimes seems  
24 like a - - - a gut response, and - - - and I can  
25 sympathize with that, and understand the basis for

1           that analysis.

2                   MR. WU: I mean, I'll respond to that very  
3 briefly, and I know my - - -

4                   JUDGE RIVERA: Yeah, but counselor, you're  
5 not - - - are you equating the status of someone who  
6 is - - - has no liberty, because they are  
7 incarcerated, with someone who is actually out and  
8 has liberty and that liberty is jeopardized?

9                   MR. WU: No, we - - -

10                   JUDGE RIVERA: You're equate - - - they're  
11 not equal.

12                   MR. WU: No, as this court has recognized,  
13 they are entitled to due process protections for the  
14 revocation process. And fundamentally that is fair,  
15 because one, there are procedural protections that  
16 account for their incompetence, and two, because at  
17 the end of the day, the revocation process is the  
18 critical procedure by which the Parole Board could  
19 exercise supervision.

20                   CHIEF JUDGE LIPPMAN: Don't you really need  
21 here - - - and following up on Judge Fahey said  
22 before - - - don't you really need the legislature to  
23 create a - - - an analog to 730 or parole-type  
24 proceedings?

25                   MR. WU: No, we don't. The parole - - -

1 CHIEF JUDGE LIPPMAN: You don't think so.

2 MR. WU: The parole revocation process is  
3 available. It's actually tailored to assess the  
4 risks of those individuals who have failed to comply  
5 with their conditions and the par, parole revocation  
6 process can account for mental incompetence, and can  
7 provide the necessary mental health treatment.

8 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's  
9 hear from your adversary and then you'll have your  
10 rebuttal.

11 MR. HARPAZ: Good afternoon, I'm Elon  
12 Harpaz of the Legal Aid Society and I represent  
13 respondent, Edwin Lopez. Your Honors - - -

14 CHIEF JUDGE LIPPMAN: Counsel, Judge Fahey  
15 and I talked about fairness. Sometimes, you know,  
16 our - - - our protocols that are in place do work an  
17 unfairness or it's certainly viscerally unfair. Why  
18 isn't what your adversary is saying consistent with  
19 existing law? What - - - where does it say that they  
20 can't - - - they can't do a parole hearing? That due  
21 process is violated or - - - where is it? Where is  
22 it? What do - - -

23 MR. HARPAZ: It's - - - it - - - it- - -

24 CHIEF JUDGE LIPPMAN: - - - what do you - -  
25 - what are you hanging your hat on? And I understand

1 it, and Judge Fahey said before, we understand the  
2 fairness side.

3 MR. HARPAZ: Right.

4 CHIEF JUDGE LIPPMAN: Where - - - where  
5 legally do we go to - - -

6 MR. HARPAZ: This is - - -

7 CHIEF JUDGE LIPPMAN: - - - to reinforce  
8 that fairness argument?

9 MR. HARPAZ: This all starts with Morrissey  
10 v. Brewer.

11 CHIEF JUDGE LIPPMAN: Yeah.

12 MR. HARPAZ: That case - - -

13 CHIEF JUDGE LIPPMAN: And you think that's  
14 dispositive - - -

15 MR. HARPAZ: - - - wrote the bible on  
16 parole revocation proceedings. It - - - it  
17 established certain basic due process protections,  
18 including the right to be present at your hearing,  
19 the right to testify on your own behalf, the right to  
20 look your accusers in the eye and confront them - - -

21 CHIEF JUDGE LIPPMAN: You can't do all - -  
22 - all of that, in your view?

23 MR. HARPAZ: You can't - - - I - - - I  
24 don't think that's just my view. I think that is in  
25 fact - - -



1 CHIEF JUDGE LIPPMAN: And what about - - -

2 MR. HARPAZ: - - - the very definition of a  
3 person who is mentally incapacitated - - -

4 CHIEF JUDGE LIPPMAN: What about Menechino,  
5 which predated Morrissey?

6 MR. HARPAZ: Right. And in Menechino, this  
7 court recognized that fundamentally, a parole  
8 revocation proceeding was a proceeding to determine  
9 whether someone was going to be stripped of their  
10 liberty - - - liberty and sent to prison. And  
11 because of that, this court said that it is  
12 essential, to ensure the fairness of the proceeding,  
13 that the parolee have the assistance of counsel, so  
14 that we have a reliable determination made in the  
15 proceeding.

16 JUDGE PIGOTT: The argument is made that -  
17 - - that - - - that you're arguing that mentally  
18 incompetent people are immune from parole revocation?

19 MR. HARPAZ: Certainly not. What I'm  
20 arguing is that what we need is exactly what Judge  
21 Lippman said, which is for the legislature to  
22 establish - - -

23 JUDGE PIGOTT: But they didn't. They - - -

24 MR. HARPAZ: - - - a - - - an analog - - -

25 JUDGE PIGOTT: But they didn't, so - - -

1 MR. HARPAZ: They haven't yet, but - - -

2 JUDGE PIGOTT: All right. So what you're  
3 saying is that mentally incompetent people are immune  
4 from - - - from parole revocation until the  
5 legislature fixes it.

6 MR. HARPAZ: No, I don't think that's  
7 correct, either. I think that this court would have  
8 the authority, should it - - - should it determine -  
9 - - as I'm asking it to do - - - that there is a  
10 fundamental due process right to competency, would  
11 have the authority to put in place temporarily, until  
12 the legislature were to determine otherwise,  
13 procedures which - - -

14 CHIEF JUDGE LIPPMAN: What - - - what  
15 procedure would you suggest we put in place?

16 MR. HARPAZ: I think there are two  
17 possibilities, Your Honor.

18 CHIEF JUDGE LIPPMAN: Go ahead.

19 MR. HARPAZ: One was what the First  
20 Department said. You know, they went - - - the four  
21 justice - - - the majority went through it  
22 extensively and said that the - - - the Parole Board  
23 could make a competency determination.

24 JUDGE READ: They have the authority to do  
25 that?

1 MR. HARPAZ: Well, under - - - according to  
2 the First Department, yes.

3 CHIEF JUDGE LIPPMAN: Well, there was a  
4 strong - - - there was a - - -

5 MR. HARPAZ: Because - - - because - - -  
6 because they have the authority - - -

7 CHIEF JUDGE LIPPMAN: There was a strong  
8 writing that said that they don't, correct?

9 MR. HARPAZ: Correct. Because they have  
10 the authority to make a determination as to the  
11 revocation proceeding, everything subsumed within  
12 that, including the determination of competency,  
13 falls in there.

14 CHIEF JUDGE LIPPMAN: But assume they - - -  
15 assume they don't. Then what do you do?

16 MR. HARPAZ: Assume they don't, then I  
17 think the - - - the solution would be wha - - -  
18 exactly what the Supreme Court of Wisconsin did in  
19 State ex rel. Vanderbeke, which was to say, okay,  
20 when a question of competency arises, the presiding  
21 officer in the revocation proceeding should refer the  
22 matter to a State Supreme Court justice, who will  
23 utilize the available procedures that are in place  
24 under the criminal procedural law analog, and make a  
25 competency determination, and then follow the

1 procedures that exist if the individual's determined  
2 not to be competent and - - - and otherwise - - -

3 CHIEF JUDGE LIPPMAN: So what in your - - -

4 MR. HARPAZ: - - - send it back.

5 CHIEF JUDGE LIPPMAN: - - - what in your  
6 situation would happen?

7 MR. HARPAZ: So in Mr. Lopez's case, he  
8 would have - - -

9 CHIEF JUDGE LIPPMAN: Assume he's  
10 incompetent, what happens next?

11 MR. HARPAZ: Right, he would have been  
12 remand - - -

13 CHIEF JUDGE LIPPMAN: He's found to be  
14 incompetent under - - -

15 MR. HARPAZ: Right, he would have been  
16 remanded to the custody of OMH, which is all we were  
17 asking for all along in this proceeding, for a  
18 determination as to whether he posed a danger to  
19 himself and others - - -

20 CHIEF JUDGE LIPPMAN: So you're really - -  
21 - you're really just don't want him to go to the  
22 parole hearing? In this kind of situation, you want  
23 him to go directly to - - - to OMH, and let them - -  
24 - let them determine what they ordinarily determine.

25 MR. HARPAZ: Mr. Lopez was in OMH custody

1 for four years before this began.

2 JUDGE PIGOTT: Who - - - who should  
3 initiate that proceeding that would be under Article  
4 9?

5 MR. HARPAZ: If - - - if OMH determined  
6 that the individual posed a danger?

7 JUDGE PIGOTT: No, you got - - - you're  
8 going to a parole hearing - - -

9 MR. HARPAZ: Right.

10 JUDGE PIGOTT: - - - right? Now you - - -  
11 you want to - - - you don't want to go because you're  
12 incompetent. You got a lawyer. Does the lawyer file  
13 - - - you know, begin an Article 9 - - -

14 MR. HARPAZ: No, the lawyer - - -

15 JUDGE PIGOTT: - - - before the parole  
16 hearing?

17 MR. HARPAZ: The lawyer makes the case to  
18 the presiding officer, saying my client - - - I  
19 cannot - - -

20 JUDGE PIGOTT: No, no, but they're  
21 incompetent to make that determination. They're - -  
22 - that's not they're - - -

23 MR. HARPAZ: The lawyer's not incompetent  
24 to make that determination.

25 JUDGE PIGOTT: The Parole Board. It - - -

1 they're going to decide whether he violated parole or  
2 not.

3 MR. HARPAZ: Right.

4 JUDGE PIGOTT: If you want to assert an  
5 affirmative defense that he's incompetent, wouldn't  
6 it behoove you to file that case, stay the parole - -  
7 -

8 MR. HARPAZ: Right.

9 JUDGE PIGOTT: - - - and then come back and  
10 say, I've got an adjudication and - - -

11 MR. HARPAZ: We - - - we have filed writs  
12 of habeas corpus precisely to do that, and we've  
13 gotten mixed results with that. It's not an  
14 affirmative defense, because we don't know that the  
15 person is actually guilty of the charges, and that's  
16 fundamentally why we have a - - -

17 JUDGE PIGOTT: No, no, I'm - - - I'm  
18 understanding that. What I'm trying to do is get  
19 over the - - - you know, you - - - it sounds like you  
20 want to say is my guy committed an assault, he's  
21 incompetent, so put him back on the street. Don't -  
22 - - you know, you can't violate him for - - - for  
23 violating his parole, because he's incompetent. So  
24 let him go assault somebody else, and we'll bring him  
25 back, and maybe - - -

1 MR. HARPAZ: He wasn't on the street,  
2 Judge. He was in a secure psychiatric setting. And  
3 that's where he needed to be returned to. And if he  
4 needed additional restraints in that secure  
5 psychiatric setting - - -

6 JUDGE PIGOTT: I understand that.

7 MR. HARPAZ: - - - that's available.

8 JUDGE PIGOTT: But - - -

9 MR. HARPAZ: And so he wasn't even - - -  
10 Mr. Lopez wasn't - - -

11 JUDGE PIGOTT: - - - your next one.

12 MR. HARPAZ: - - - effectively on parole  
13 anyway - - -

14 JUDGE PIGOTT: Your next one.

15 MR. HARPAZ: - - - in this case.

16 JUDGE PIGOTT: You know, I mean, you want  
17 to say if you're mentally incompetent, you can't  
18 violate parole, right?

19 MR. HARPAZ: What I want to say is that if  
20 you're not mentally competent, they cannot proceed  
21 against you until a determination of your competency  
22 is, in fact, made by a - - - either a court or by the  
23 Parole Board. And in the event you are declared not  
24 competent to face the charges, then we follow the  
25 analog in the criminal law, which does not always

1 result in the case being dismissed - - -

2 JUDGE PIGOTT: I know. I don't necessarily  
3 disagree with that - - -

4 MR. HARPAZ: - - - it can result in a - - -  
5 in - - - in - - -

6 JUDGE PIGOTT: - - - I - - - I guess what  
7 I'm asking you is, why - - - why do you want the  
8 Parole Board to do your work? And I don't mean you  
9 personally and I don't mean this - - - this  
10 particular person. But I would think if I was a  
11 lawyer for someone in this - - - in a situation like  
12 this, I would be going over and trying to get a  
13 petition filed to have him declared incompetent that  
14 I could use at the parole hearing.

15 MR. HARPAZ: As I said, we have attempted  
16 to do that - - -

17 JUDGE PIGOTT: So you - - -

18 MR. HARPAZ: - - - in cases where there's  
19 no related criminal proceeding.

20 JUDGE PIGOTT: So there's a good - - -

21 MR. HARPAZ: We've gotten some mixed  
22 results; we've prevailed, we haven't prevailed, but -  
23 - - but - - -

24 JUDGE PIGOTT: So you have - - -

25 MR. HARPAZ: - - - the same questions have



1           been asked about - - -

2                   JUDGE PIGOTT:   So you have an avenue.

3                   MR. HARPAZ:   - - - what's the authority?

4                   JUDGE PIGOTT:   You have an avenue.

5                   MR. HARPAZ:   Um?

6                   JUDGE PIGOTT:   So you have an avenue.

7                   MR. HARPAZ:   I - - - I wouldn't say that  
8 all, because until - - -

9                   JUDGE PIGOTT:   You were successful in some  
10 of them.

11                   MR. HARPAZ:   Well, because the First  
12 Department has established the right.  This court has  
13 to - - - has to take the bull by the horns and either  
14 say yes or no.  Either there is a fundamental right  
15 to competency in parole revocation hearings, or  
16 there's not.  It - - -

17                   JUDGE PIGOTT:   I don't think anybody's  
18 going to disagree with that concept, but what I - - -  
19 what - - - what I'm having trouble with - - - I'll  
20 tell you what I would do.  I - - - I - - - if I went  
21 to a Parole Board, I'd tell every single one of my  
22 clients - - - tell them you're nuts.

23                   MR. HARPAZ:   Judge, it's not that - - - no,  
24 I don't think so.

25                   JUDGE RIVERA:   Well, the - - -

1                   MR. HARPAZ: I - - - I don't think that's  
2 how it would work. I don't think that's how lawyers  
3 operate.

4                   JUDGE RIVERA: But counsel, under your - -  
5 -

6                   JUDGE PIGOTT: I would think the Parole  
7 Board would - - - I'm sorry, Judge.

8                   JUDGE RIVERA: No, no.

9                   JUDGE PIGOTT: I would think the parole  
10 board would then say, prove to me you're nuts. And -  
11 - - and - - - and that's why I'm saying it just seems  
12 to me that we - - - we shouldn't be putting this on  
13 the Parole Board.

14                   MR. HARPAZ: A couple of things. In - - -  
15 in the two years since Lopez was decided, my office,  
16 which handles 5,000 cases more - - - a little bit  
17 more than that per year in New York City; almost all  
18 the revocation proceedings that go on there and  
19 virtually half the cases statewide. We have raised  
20 this issue approximately forty times over two years.  
21 So we're talking maybe twenty cases a year, half  
22 split between rel - - - people who have related  
23 criminal proceedings and those who do not. We are  
24 not talking about something that is going to bring  
25 the system of parole to its knees and prevent them -

1 - -

2 JUDGE PIGOTT: No, I was - - - no, no - - -  
3 you misunder - - -

4 MR. HARPAZ: - - - from enforcing the law.

5 JUDGE PIGOTT: You're misunderstanding me.  
6 I'm saying we've got parole people. They sit there  
7 and they do parole stuff. We don't have shrinks and  
8 we don't have people who do mental illness stuff. If  
9 I was a lawyer for one of these, it would just seem  
10 to me logical that you say before I give it to these  
11 people who don't know anything about mental hygiene,  
12 I'll - - - I'll go get a ruling, and if I win, I can  
13 go back up and say I win.

14 MR. HARPAZ: You see - - -

15 JUDGE RIVERA: But to clarify your - - -  
16 your position - - - I just want to clarify, so  
17 perhaps we can understand why you're not being  
18 responsive, I think, to what Judge Pigott is  
19 suggesting.

20 Your position is not that the Parole Board  
21 makes this determination, your position is that the  
22 Parole Board recognizes that - - - you're arguing  
23 that the client is incompetent to stand for this  
24 revocation hearing, and so now you want to have them  
25 go before a Supreme Court Justice to then proceed

1 under the appropriate statute when it comes to  
2 determining whether or not someone is mentally  
3 competent.

4 And if they are - - - as you say, if  
5 they're found incompetent, then they would be  
6 institutionalized, potentially, right, or - - - I  
7 just want to - - - because you're - - -

8 MR. HARPAZ: That's one - - -

9 JUDGE RIVERA: I think Judge Pigott is  
10 right. You're not quite responsive to his question,  
11 so - - -

12 MR. HARPAZ: Right.

13 JUDGE RIVERA: - - - I just want to clarify  
14 what you're suggesting.

15 MR. HARPAZ: It's hard to clarify to the  
16 extent that the legislature hasn't written the law on  
17 this. And so they could write exactly what you - - -  
18 what you just said.

19 JUDGE RIVERA: Yeah, but you're - - -

20 MR. HARPAZ: And - - -

21 JUDGE RIVERA: - - - but what - - - when we  
22 asked, your proposal was either follow the First  
23 Department or then you can have this kind of scenario  
24 - - -

25 MR. HARPAZ: Well, I would prefer sending

1           it - - -

2                   JUDGE RIVERA: - - - which means that the  
3 Board is never deciding - - -

4                   MR. HARPAZ: Right.

5                   JUDGE RIVERA: - - - the competency  
6 question - - -

7                   MR. HARPAZ: Right.

8                   JUDGE RIVERA: - - - under the second  
9 approach.

10                  MR. HARPAZ: I would prefer the second  
11 approach, but - - - but I can see it either way.

12                  If I could just - - -

13                  JUDGE FAHEY: I guess, just - - - just - -  
14 -

15                  MR. HARPAZ: Yeah.

16                  JUDGE FAHEY: - - - I know this is a rabbit  
17 hole, you feel as if - - - you figured I'm not in the  
18 legislature; I don't want to write this; I just want  
19 to address this case, but let me just follow through  
20 on it one more - - - one more time.

21                  This is not an issue - - - the way I  
22 understood it was it was not an issue before the  
23 Parole Board, but actually a parole revocation  
24 hearing before a trial justice or some - - - somebody  
25 in, you know, whatever court they're in, in county

1 court or State Supreme Court. Isn't that what you're  
2 talking about? You're talking about the revocation  
3 apropos, so for a violation at some point. Isn't  
4 that the situation?

5 MR. HARPAZ: No, the violation - - -

6 JUDGE FAHEY: No?

7 MR. HARPAZ: - - - is handled

8 administratively by the Parole Board - - -

9 JUDGE FAHEY: I see. All right.

10 MR. HARPAZ: Okay? Every vio - - - that is  
11 - - -

12 JUDGE FAHEY: So this is a pure violation  
13 of parole and - - - all right, all right. I get it.

14 MR. HARPAZ: It is an administration  
15 proceeding. What we're suggesting is that it be - -  
16 -

17 JUDGE FAHEY: You know, I got that. I got  
18 that, all right.

19 MR. HARPAZ: Yeah. If - - -

20 CHIEF JUDGE LIPPMAN: Okay, counsel.

21 MR. HARPAZ: Could I correct one factual  
22 error?

23 CHIEF JUDGE LIPPMAN: You could correct one  
24 factual - - - by all means, go ahead.

25 MR. HARPAZ: Okay. It is absolutely

1 incorrect to say that parole violators are subject to  
2 a maximum period of reincarceration of up to two  
3 years. In Mr. Lopez's case, he faced potential  
4 reincarceration for life. And just as the petitioner  
5 did in Menechino, he was actually imprisoned for four  
6 years on this case, and some of our clients - - -

7 CHIEF JUDGE LIPPMAN: Okay, counselor.

8 MR. HARPAZ: - - - get sent back for long  
9 periods.

10 CHIEF JUDGE LIPPMAN: Thanks, appreciate  
11 it.

12 MR. WU: I want to emphasize one point at  
13 the outset.

14 CHIEF JUDGE LIPPMAN: Why don't you address  
15 the last point that your adversary just raised?

16 MR. WU: That's correct. I mean, there's a  
17 two-year time assessment and then it's evaluated  
18 again for initial parole release. But - - - but I  
19 think the fact that Mr. Lopez - - -

20 CHIEF JUDGE LIPPMAN: But they wind up - -  
21 - they could be there for life, right?

22 MR. WU: They - - - they could be there for  
23 life. He was only there for four years.

24 CHIEF JUDGE LIPPMAN: Okay, go ahead.

25 MR. WU: The critical point I want to

1 emphasize is that Article 9 commitment and other  
2 civil commitments are not a perfect substitute for  
3 parole revocation. In this case, Mr. Lopez was in an  
4 OMH facility. But in many cases, the types of things  
5 that would lead to parole revocation would not be  
6 adequate to support Article 9 commitment.

7 JUDGE PIGOTT: But what's your solu - - -  
8 you see the problem, right? I was fencing with your  
9 opponent about, you know, who goes first? I mean,  
10 the Parole Board have to conduct a competency  
11 hearing, or should the lawyer go - - - begin an  
12 Article 9 or - - - and then come back to the Parole  
13 Board?

14 MR. WU: Well, the Article 9 process is  
15 just separate from this.

16 JUDGE PIGOTT: No - - -

17 MR. WU: I'll answer your question directly  
18 which is, the way competence should be raised is in  
19 the parole revocation proceeding itself. They're  
20 entitled to bring forth evidence of incompetence, and  
21 to argue for it as a basis for finding no violation,  
22 or most importantly, for recommending a disposition  
23 that is not reincarceration. That's the longstanding  
24 rule from the Third and Fourth Departments, and that  
25 is also the - - - the rule that the Federal Parole



1 Board follows and the State of Washington follows.

2 And the reason that - - -

3 CHIEF JUDGE LIPPMAN: Yeah, but that - - -  
4 that doesn't necessarily follow from the U.S. Supreme  
5 Court's, you know, opining on this issue. Why - - -  
6 why shouldn't we fashion relief that takes into  
7 account the basic problem that I think you see, your  
8 adversary sees? There's an issue here that needs to  
9 be addressed, and we understand that obviously in the  
10 first instance, we'd much rather the legislature  
11 dealt with it.

12 But if we're running into a - - - a - - - a  
13 legal barrier to treating these incompetent people in  
14 the parole hearings, why wouldn't the court fashion  
15 relief as the First Department has tried to do?

16 MR. WU: There isn't a problem here, Chief  
17 Judge Lippman.

18 CHIEF JUDGE LIPPMAN: No problem?

19 MR. WU: There's not a problem here,  
20 because the predicate of the argument - - -

21 CHIEF JUDGE LIPPMAN: Incompetents should  
22 be perfectly comfortable if they knew what was  
23 happening with the process and the parole hearing?

24 MR. WU: The predicate of the argument on  
25 the other side is that you cannot hold a civil

1 proceeding against an incompetent individual. And  
2 the court - - - this court and others have repeatedly  
3 recognized otherwise. Article 9 - - -

4 CHIEF JUDGE LIPPMAN: So, yeah, and - - -  
5 and what about the consequence that your adversary  
6 raises with, this guy is going to be put away for  
7 life, and he has no idea what's happening at this  
8 proceeding. Does that sound like there's no problem  
9 to you?

10 MR. WU: Well, he is reincarcerated under  
11 his original criminal sentence, which is what  
12 authorizes the life term - - -

13 CHIEF JUDGE LIPPMAN: But he hasn't been in  
14 jail. He's been in - - - he's been in the OMH.

15 MR. WU: That's an argument about the  
16 disposition, Chief Judge Lippman. And the problem  
17 with this case is that that argument was not  
18 ventilated in the procedure that the legislature  
19 created - - -

20 JUDGE PIGOTT: Can we talk about that a  
21 little bit?

22 MR. WU: - - - to talk about that.

23 JUDGE PIGOTT: Doesn't this - - - so this  
24 ends up with him going back to - - - I'll say Attica,  
25 because - - - you know, right? So he loses whatever

1 benefit he was getting in - - - in the halfway house  
2 or - - - and the only review is substantial evidence,  
3 right? I mean, it's not - - - you know, it's not a  
4 plenary review of what the Parole Board did.

5 MR. WU: I'll say two things in response to  
6 that. The immediate response to this ruling is not  
7 that he goes to prison. It is that a revocation  
8 hearing is held for incompetent parolees, where one  
9 of the options is reincarceration. But the second  
10 and this is an important point to emphasize as well -  
11 - -

12 JUDGE PIGOTT: Well, can I just - - - just

13 MR. WU: Pris

14 JUDGE PIGOTT: before you get there, the -  
15 - - the finding was he's "not currently amenable to  
16 parole supervision. Alternatives to incarceration  
17 were considered but are not appropriate".

18 MR. WU: That's - - - that's correct. So  
19 those - - -

20 JUDGE PIGOTT: So he's going to jail.

21 MR. WU: Those factors are ventilated  
22 during the process. The difficulty with the position  
23 from the First Department - - -

24 JUDGE PIGOTT: No, so does that mean he's  
25 going to jail?

1 MR. WU: That's - - - in this case, he did  
2 mean he's going to jail.

3 JUDGE PIGOTT: And the only review of that  
4 is - - - is - - -

5 MR. WU: That's cor - - -

6 JUDGE PIGOTT: - - - substantial evidence.

7 MR. WU: That's correct, but even in  
8 prison, Mr. Lopez can receive the mental health  
9 treatment that he needs. And he did receive that  
10 treatment here. And - - - and I should just add - -  
11 -

12 JUDGE RIVERA: I don't know. The various  
13 lawsuits seemed to suggest otherwise, but go ahead.

14 MR. WU: But the treat - - - the response  
15 to those is to improve mental health treatment in  
16 prison, not to prevent revocation in the first place.

17 I'll - - - I'll just say one more thing - -  
18 -

19 CHIEF JUDGE LIPPMAN: Go - - -

20 JUDGE RIVERA: Can I just ask you? So if  
21 in the parole revocation hearing, every single member  
22 of the Board decides that he's incompetent, do they  
23 send him to jail? Is that the only option they have?

24 MR. WU: It is not the only option they  
25 have. One appropriate - - -

1 JUDGE RIVERA: What else can they do?

2 MR. WU: One appropriate disposition is to  
3 release on parole with the understanding that he's in  
4 an OMH facility.

5 JUDGE RIVERA: The likelihood of that is  
6 what?

7 MR. WU: I mean, it - - - there is a  
8 release as opposed to reincarceration. It's  
9 something like a third of cases that go in front of  
10 the Parole Board, so reincarceration is not  
11 guaranteed.

12 JUDGE RIVERA: But release to get mental  
13 ser - - - health services?

14 MR. WU: Well, they do release - - -

15 JUDGE RIVERA: Where the Board can ensure  
16 that?

17 MR. WU: They can. I mean, they can add it  
18 to the parole conditions, for instance. Or they can  
19 rely upon an existing detention in an Article 9  
20 facility, and so understand that the practical  
21 consequence of parole release is a return to that  
22 facility. But I - - - I do want to say one more  
23 point.

24 CHIEF JUDGE LIPPMAN: Just a point,  
25 counselor. Go ahead; finish off.

1                   MR. WU: I do want to say one more point,  
2                   which is there are times when it is more appropriate  
3                   for someone to be treated for mental health in a  
4                   prison rather than in a correction - - - rather than  
5                   in a civilian facility. I want to just emphasize.  
6                   Mr. Lopez was in an Article 9 facility when he  
7                   assaulted a fellow patient. That is the impetus for  
8                   the parole officer saying - - -

9                   CHIEF JUDGE LIPPMAN: So therefore we put -  
10                  - -

11                  MR. WU: - - - this man should be treated  
12                  in prison.

13                  CHIEF JUDGE LIPPMAN: Therefore we put him  
14                  in prison, when he has no idea what the proceeding is  
15                  that makes him wind up there? That's - - - that's -  
16                  - - that makes sense to you?

17                  MR. WU: It is an option that somebody may  
18                  be more appropriately treated in a controlled  
19                  correctional environment - - -

20                  CHIEF JUDGE LIPPMAN: Okay.

21                  MR. WU: - - - especially when as here,  
22                  they've shown the inability to be supervised.

23                  CHIEF JUDGE LIPPMAN: Okay, counsel.

24                  Thanks. Thank you both, appreciate it.

25                  (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Lopez v Evans, No. 51, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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