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COURT OF APPEALS

STATE OF NEW YORK

STATE OF NEW YORK EX REL. LOUIS M.

Appellant,

-against-

NO. 55

POPIEL,

Respondents.

20 Eagle Street
Albany, New York
May 20, 2026

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: Next case on the calendar is
2 State of New York ex rel. Louis M. v. Popiel.

3 MS. JACOBSEN NOVOTNAK: Good afternoon, and may
4 it please the court, Marina Novotnak of Mental Hygiene
5 Legal Service for the appellant, Louis M.

6 May I reserve three minutes of my time for
7 rebuttal?

8 CHIEF JUDGE WILSON: Yes.

9 MS. JACOBSEN NOVOTNAK: Louis M. correctly used a
10 writ of habeas corpus to seek relief from the NYPD's
11 illegal physical restraints consistent with common law,
12 precedent, and the plain language of the CPLR. The trial
13 court and the Appellate Division erred when holding
14 otherwise, and this court should reverse.

15 JUDGE HALLIGAN: Counsel, can I ask you - - -
16 over here. Is your position that habeas is not - - - that
17 habeas can extend to conditions of confinement, or that
18 this is not a conditions of confinement case?

19 MS. JACOBSEN NOVOTNAK: The latter. I think the
20 problem is a lack of - - -

21 JUDGE HALLIGAN: Why not?

22 MS. JACOBSEN NOVOTNAK: So I think the problem is
23 a lack of definition of what conditions of confinement
24 means.

25 JUDGE HALLIGAN: Okay. So how would you define

1 it to encompass what could be understood to be conditions?
2 How is it different, for example, from being placed in a
3 segregated housing unit?

4 MS. JACOBSEN NOVOTNAK: Well, I would say that
5 segregated housing unit is within the sort of thing that
6 can be addressed by habeas. I think that what Dawson holds
7 is not that solitary confinement is - - -

8 JUDGE HALLIGAN: Your view is that a segregated
9 housing unit is not conditions?

10 MS. JACOBSEN NOVOTNAK: That's correct. Anything
11 that's a physical restraint upon the person, which includes
12 the location that the person is being held. Dawson did not
13 hold, I would posit, that solitary confinement is
14 categorically unreachable, it's that if you have a
15 superintendent's proceeding. If you have this
16 administrative process by which superintendent - - - excuse
17 me - - - by which solitary confinement is the end result.
18 And solitary confinement is of the kind of condition that
19 can be authorized.

20 JUDGE HALLIGAN: So you view the line not as
21 conditions versus other circumstances? I think there might
22 be some case law, particularly from the U.S. Supreme Court,
23 suggesting that conditions is not available. But instead
24 you would say it's because what exactly? Because there is
25 an administrative procedure? Because Article 78 is

1 available? What precisely is the line you would draw?

2 MS. JACOBSEN NOVOTNAK: In Dawson? Why Dawson
3 came out with an Article 78 versus a - - -

4 JUDGE HALLIGAN: Well, what you think the line is
5 based on Dawson?

6 MS. JACOBSEN NOVOTNAK: Absolutely. So I think
7 that what the United States Supreme Court said in Preiser
8 about the core claim of habeas, that in each case, a person
9 is being unlawfully subject to physical restraint, and in
10 each case, habeas has been accepted as a specific
11 instrument. So habeas - - -

12 JUDGE HALLIGAN: So why wouldn't that be true - -
13 - you know, so for example, in the context of DOCCS, right?
14 Let's assume someone is put in keep lock, for example,
15 because of a violation. The question of whether or not
16 they're lawfully held seems to me to be something that in
17 that keep lock is often adjudicated in the course of the
18 internal grievance procedure, and then, if the incarcerated
19 person chooses, by an Article 78. And I don't think we
20 would expect that a habeas would lie there.

21 So how come that line you're proposing would hold
22 up?

23 MS. JACOBSEN NOVOTNAK: Because an Article 78, in
24 his appellate - - - is an appellate process for an
25 administrative proceeding. And what prior case law has

1 held on habeas is that it's not there to skip the line for
2 an appeal.

3 JUDGE HALLIGAN: So in your view, the dispositive
4 question is, is there an administrative procedure available
5 to test whatever the circumstance is; is that correct?

6 MS. JACOBSEN NOVOTNAK: That would make Article
7 78 available. Yes.

8 JUDGE HALLIGAN: And - - - and - - -

9 MS. JACOBSEN NOVOTNAK: And that would - - -

10 JUDGE HALLIGAN: - - - habeas not?

11 MS. JACOBSEN NOVOTNAK: Exactly.

12 JUDGE CANNATARO: Can I just push back on that
13 appellate process theory? I - - - there are a number of
14 writs subsumed within Article 78, including, for example,
15 the writ of mandamus, which is not an appellate process.
16 It's just compelling someone to do something that the law
17 requires them to do. Would that not have been available to
18 you?

19 MS. JACOBSEN NOVOTNAK: If the NYPD is now
20 conceding that their patrol guide is facially illegal and
21 they had a nondiscretionary duty, as soon as he was
22 inpatient as a - - - in a psychiatric unit to release him
23 from shackles, then that nondiscretionary duty would
24 attach. But they're also saying they had discretion - - -

25 JUDGE CANNATARO: Well, I thought the source of

1 your authority was the MHL, not the patrol guide?

2 MS. JACOBSEN NOVOTNAK: Well, yes. I mean, we'll
3 take it and run with it if you're saying that they're - - -
4 you know, if they're saying that. Because I think that's
5 the same end result, which is that the patrol guide is
6 facially illegal.

7 JUDGE HALLIGAN: It seems to me that the city - -
8 - and I'm sure they'll address this - - - but I read their
9 briefs as acknowledging that an Article 78 is available
10 here. So if that's correct, then why would habeas lie?

11 MS. JACOBSEN NOVOTNAK: Well, the problem is that
12 an Article 78 was not available here. So in order to - - -

13 JUDGE HALLIGAN: Because if the city says it is
14 available, your view is that had your client brought an
15 Article 78 - - - and I think you also suggested that
16 conversion might have been appropriate if habeas was not.
17 But why would a 78 not lie here?

18 MS. JACOBSEN NOVOTNAK: Because as you described,
19 the - - - an Article 78 is a codification of common law
20 writs. And each of these common law writs has elements
21 that need to be met.

22 And if - - - again, if it's a - - - if it's
23 mandamus to compel, if there is a nondiscretionary duty if
24 it is facially illegal, then we reach the same result here
25 that we had in the beginning, but - - -

1 JUDGE CANNATARO: Okay. So if - - - the - - - if
2 the appellant asked to be released from these constraints
3 and then medical staff at the facility said release him
4 from the constraints and the police said no, why wouldn't
5 the - - - why wouldn't an Article 78 lie right there?

6 MS. JACOBSEN NOVOTNAK: You mean in terms of
7 whether there was - - - whether that is finality?

8 JUDGE HALLIGAN: Yeah.

9 JUDGE CANNATARO: Yeah.

10 MS. JACOBSEN NOVOTNAK: No agency decision was
11 ever made here. I mean, no one from - - -

12 JUDGE CANNATARO: That is a decision. The
13 request is made to release him, and they categorically
14 refused to do it. I've consulted with my superiors, and
15 we've decided that he needs to stay in the restraints.

16 MS. JACOBSEN NOVOTNAK: There is no evidence that
17 decision was ever communicated to Louis M. himself. We
18 have that - - -

19 JUDGE HALLIGAN: Okay. But that strikes me as
20 perhaps a different point. Is it your view that if your
21 client had requested to be taken out of restraints, which I
22 thought the record indicated he did, and the officer said
23 no directly to him, that then a 78 would lie in habeas,
24 would not?

25 MS. JACOBSEN NOVOTNAK: No. I don't believe that

1 that's true either.

2 JUDGE HALLIGAN: Okay. So what - - - why - - -
3 along the lines of Judge Cannataro's question, I'm trying
4 to understand why there's no finality here that would give
5 rise to a 78 in a typical circumstance.

6 MS. JACOBSEN NOVOTNAK: Sure. So a final agency
7 decision is reached when it can't be ameliorated by any
8 further steps from the party here. And what we have here
9 is different shifts of officers rotating in and out - - -

10 JUDGE CANNATARO: Well, surely there's no agency
11 review of a police officer's decision not to let someone
12 out of restraints. It's not like you can take it to the
13 board of restraint review or something like that.

14 MS. JACOBSEN NOVOTNAK: Well, and until the next
15 shift of officers comes in. I mean, that is the problem
16 here, is that there's - - - there's no evidence that this
17 decision was ever communicated - - -

18 JUDGE RIVERA: Well, there's a supervisor.

19 MS. JACOBSEN NOVOTNAK: Well, there's no evidence
20 that this was even communicated to a supervisor. There's
21 no evidence that this was communicated from one officer to
22 another officer, let alone from the officers to Louis M.
23 herself.

24 JUDGE CANNATARO: Wouldn't that be an argument
25 then that it's even more final in that instance? The

1 officer there is the, basically, the final authority on
2 whether or not this person's coming out of restraints.

3 MS. JACOBSEN NOVOTNAK: Again, until the next
4 shift of officers comes in.

5 JUDGE GARCIA: Why can't you - - - why couldn't
6 some of this be converted to a declaratory judgment action?
7 I mean, you're asking that 3303 apply in these situations.
8 Why isn't that a declaratory judgment?

9 MS. JACOBSEN NOVOTNAK: It doesn't have the same
10 force and effect as habeas.

11 JUDGE GARCIA: But I mean, if you convert it, you
12 get the relief, right? You get a declaration.

13 MS. JACOBSEN NOVOTNAK: No. But declaratory
14 judgment wouldn't have the same effect as releasing him
15 from the restraints. Declaratory judgment would clarify
16 the rights and obligations of the parties.

17 JUDGE HALLIGAN: Well, he's already released from
18 the restraints anyway. I mean, to the extent the concern
19 is with the NYPD's policy across individuals, why isn't
20 Judge Garcia's proposed procedural vehicle, you know,
21 available and maybe in some ways preferable?

22 MS. JACOBSEN NOVOTNAK: I'm sorry. You mean
23 conversion here, now, to a declaratory judgment or
24 conversion at - - -

25 JUDGE GARCIA: Conversion then - - -

1 MS. JACOBSEN NOVOTNAK: No.

2 JUDGE GARCIA: - - - or conversion in the
3 Appellate Division.

4 MS. JACOBSEN NOVOTNAK: He was continuously
5 restrained still when it was at the trial level.
6 Conversion would be appropriate to declaratory judgment - -
7 - obviously, he's not in shackles. So in lieu of shackles.

8 JUDGE GARCIA: So when the Appellate Division
9 declines to convert, why is that wrong?

10 MS. JACOBSEN NOVOTNAK: Declined to convert to a
11 declaratory judgment?

12 JUDGE GARCIA: They declined to convert the
13 action, right? At the Appellate Division. Why is that
14 error?

15 MS. JACOBSEN NOVOTNAK: For several reasons. One
16 is that it leaves vulnerable not just all persons in
17 psychiatric units who have been physically confined in this
18 way without habeas as a remedy to quickly seek release - -
19 -

20 JUDGE GARCIA: But why couldn't you have a
21 declaratory judgment at that point?

22 MS. JACOBSEN NOVOTNAK: That habeas was an
23 appropriate vehicle and that - - -

24 JUDGE GARCIA: That you could convert. You could
25 ask - - - even appropriate or not, you can convert it to a

1 declaratory judgment at that point, right?

2 JUDGE CANNATARO: That the policy violates his
3 rights.

4 MS. JACOBSEN NOVOTNAK: Sure.

5 JUDGE GARCIA: Or that 3303 applies. And then
6 petitioner's - - - potential petitioners in this position
7 in the future would be able to say this is a declaratory
8 judgment action that 3303 applies.

9 MS. JACOBSEN NOVOTNAK: I mean, I think that that
10 would be a good result for - - -

11 JUDGE GARCIA: They didn't do that here.

12 MS. JACOBSEN NOVOTNAK: They didn't do that. I -
13 - - I would - - - I don't think - - -

14 JUDGE GARCIA: Aren't we just reviewing a
15 declination to convert?

16 MS. JACOBSEN NOVOTNAK: No. Because I think
17 again, we have - - - saying that this procedural tool of
18 habeas is categorically unavailable. And I think that that
19 decision is inconsistent with this court's prior decisions.
20 We have Brown and Saia where it wasn't complete and total
21 release from custody. You had transfer from one facility
22 to another.

23 JUDGE GARCIA: And Brown is the 1961 case?

24 MS. JACOBSEN NOVOTNAK: I believe that that's
25 correct.

1 JUDGE GARCIA: That's before the CPLR, as I
2 understand it, 103. So I think the court was facing a yes-
3 or-no choice in that case because I think the old
4 procedural code didn't have a method for converting. So
5 the court's looking at habeas or nothing.

6 But now the court is not faced with that choice
7 anymore.

8 MS. JACOBSEN NOVOTNAK: I think that it's not - -
9 - again, it's not just this case, but it's the downstream
10 effects of saying that habeas is not available when a
11 person is shackled to their bed for weeks at a time. I
12 think that is the danger and that is the problem. The
13 problem, again - - -

14 JUDGE RIVERA: And so if I - - - I just want to
15 clarify because you're asked about these different writs,
16 and I think you're trying to explain why each one doesn't
17 fit. So maybe we can just get your answer on that and then
18 dig through that.

19 So on the Article 78, you say it's because
20 there's not a final administrative determination because
21 the shifts constantly change.

22 MS. JACOBSEN NOVOTNAK: And because there's no
23 determination ever communicated to Louis M. at all - - -

24 JUDGE RIVERA: Okay.

25 MS. JACOBSEN NOVOTNAK: - - - and there's no

1 procedure.

2 JUDGE RIVERA: Okay.

3 MS. JACOBSEN NOVOTNAK: I'm sorry. For which - -

4 -

5 JUDGE RIVERA: Well, let's say you did. What
6 about the timing of the remedy?

7 MS. JACOBSEN NOVOTNAK: The - - -

8 JUDGE RIVERA: How quickly can you get the remedy
9 if you proceed on an Article 78, if it's based on a final
10 administrative determination that you want to challenge?

11 MS. JACOBSEN NOVOTNAK: So typically Article 78s
12 have to be noticed. I believe it's twenty days. I - - -
13 but - - - twenty days.

14 JUDGE RIVERA: Can't it be expedited?

15 MS. JACOBSEN NOVOTNAK: If you have some sort of
16 - - - you can seek a injunctive relief and attach to it,
17 but it's a much, much more - - -

18 JUDGE CANNATARO: You can bring an order to show
19 cause, can't you?

20 MS. JACOBSEN NOVOTNAK: Yes. But it's a much
21 more onerous procedural mechanism than habeas, which is
22 designed to seek release from literal physical restraint.

23 If I can turn briefly to - - -

24 JUDGE HALLIGAN: Well, from - - -

25 JUDGE CANNATARO: Confinement.

1 JUDGE HALLIGAN: That's the question in part,
2 right? Is it designed - - -

3 JUDGE RIVERA: Okay. But can you go to the - - -
4 I'm sorry. I just want to clarify because you said it
5 before and I'm just not clear and your light - - - white
6 light is already on.

7 Why are the other risks - - - because this was
8 asked by several members of the court. Why aren't the
9 other writs that would pursue through an Article 78 process
10 sufficient to address your concern, which I hear, I got to
11 get the quick turnaround because he's shackled, we can't be
12 waiting days and weeks - - -

13 MS. JACOBSEN NOVOTNAK: Right.

14 JUDGE RIVERA: - - - to get before this judge on
15 this issue.

16 MS. JACOBSEN NOVOTNAK: So there's no mandamus to
17 compel, unless indeed there was a nondiscretionary duty to
18 remove the shackles, in which case - - -

19 JUDGE RIVERA: Okay.

20 MS. JACOBSEN NOVOTNAK: - - - again, take that.
21 But it's not a mandamus to review because there is no
22 finality here. Again, there's no agency decision
23 communicated at all.

24 If I can turn briefly to why he was entitled to
25 relief in this case. Mental - - - Mental Hygiene Law 33.04



1 was written in contemplating that there would be different
2 custodians over a person. It was over a consent decree
3 relating to a prison hospital.

4 So the persons who were administering the
5 restraints in Matteawan were not just clinicians, they were
6 also Department of Corrections officers. And so it's
7 absolutely true that - - - that the legislature knew that a
8 person could be in dual custody and that that is why it's
9 written reflexively. It's not about who's administering
10 the restraints, it's about who the restraints are
11 administered to. The patient.

12 And I see that my light is on.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. SCHOEPP-WONG: May it please the court, Jon
15 Schoepp-Wong on behalf of the respondents.

16 Petitioner's expansive view of habeas here has no
17 basis in history. The common law - - -

18 JUDGE RIVERA: So if habeas is not available, how
19 does this individual or someone in this situation get
20 immediately before a judge to decide whether or not they
21 can be restrained to their bed in this way?

22 MR. SCHOEPP-WONG: Sure. So I think there are a
23 plethora of remedies that the - - -

24 JUDGE RIVERA: Okay.

25 MR. SCHOEPP-WONG: - - - the petitioner here did



1 not take advantage of. I think that, number one, it seems
2 to be the - - - the primary concern here seems to be the
3 length of alleged time that the restraints were being
4 applied. And there is a well-recognized habeas remedy for
5 that sort of incident here. And that is under this court's
6 precedent in Maxian targeting the delay in arraignment.

7 But this - - - the petitioner didn't bring that
8 claim. They could have sought that claim, which would have
9 resulted in release from custody, would have resulted in
10 release from the restraints as well. But they let that one
11 pass them by.

12 I think that to the extent that the court is
13 going to look to Article 78, I submit that it is mandamus
14 to compel in this case. We agree on that. Because that's
15 the way that the petitioner - - -

16 JUDGE TROUTMAN: But being arraigned - - -
17 bringing a proceeding to challenge a delay in your
18 arraignment versus the conditions under which you're being
19 held at a facility, those are different.

20 MR. SCHOEPP-WONG: That's right, Your Honor. And
21 the point I was making about the habeas targeting the delay
22 in arraignment is that there was a remedy in this instance.

23 JUDGE RIVERA: But all that means that I think
24 Judge Troutman is trying to point out is that you might
25 move the arraignment along. You might shorten the amount

1 of time that the person is waiting for the delay. But this
2 - - - they're, nevertheless, still restrained, shackled to
3 their bed - - -

4 MR. SCHOEPP-WONG: I think that - - -

5 JUDGE RIVERA: - - - as they wait for that
6 arraignment.

7 MR. SCHOEPP-WONG: - - - I think that once the
8 arraignment occurs, then they are no longer in NYPD
9 custody. I don't think that there's any - - -

10 JUDGE RIVERA: Yeah. But again, there might be a
11 delay. It may not be as long as if they had not brought
12 that action. Or are you saying that the mechanism you're
13 referring to will ensure that the arraignment happens
14 within a few hours?

15 MR. SCHOEPP-WONG: Well, I think that there are
16 options that a court would have in terms of how they
17 structure the - - - a writ being granted in that case. I
18 don't know whether it would be an immediate arraignment or
19 not, but I think that's - - -

20 JUDGE RIVERA: Could a judge under this vehicle
21 you're talking about say, well, I want you to remove them
22 from restraints. I'm persuaded that's unnecessary while we
23 wait for this arraignment.

24 MR. SCHOEPP-WONG: No, Your Honor.

25 JUDGE RIVERA: Could they have done that?

1 MR. SCHOEPP-WONG: I don't think so, Your Honor,
2 because I think that's - - - that would run into the fact
3 that habeas has never been held to reach the sorts of
4 conditions of confinement - - -

5 JUDGE RIVERA: So what if that's the remedy
6 they're seeking?

7 MR. SCHOEPP-WONG: Which remedy?

8 JUDGE RIVERA: That - - - what if that's the
9 remedy they're seeking? That's sort of not - - - not so
10 much worried about the delay in the arraignment. They're
11 really just worried about this limitation on their body
12 movement.

13 MR. SCHOEPP-WONG: Well, to the - - - I think
14 that there are two problems with that sort of - - -

15 JUDGE RIVERA: Yes.

16 MR. SCHOEPP-WONG: - - - petition. I think that
17 the first one is that habeas doesn't reach, as this court
18 recognized in Dawson, the type of confinement - - - changes
19 to the type of confinement as opposed to petitions that are
20 attacking custody or imprisonment. I think that Dawson
21 recognized that, and I think that Dawson - - -

22 JUDGE RIVERA: But are any of those even close to
23 what we're talking about here? I mean, this is the
24 ultimate in restraint. They're strapped to their bed.

25 MR. SCHOEPP-WONG: Well, I think that's - - -

1 JUDGE RIVERA: They're only allowed to get up
2 once or twice. I can't even believe that that would be
3 enough time for someone to use a bathroom.

4 MR. SCHOEPP-WONG: I think that we - - - a couple
5 of issues. I think that we can't overlook that this would
6 be a sea change in how habeas has been interpreted, both in
7 this court as well as throughout the country. I think that
8 our brief has - - - demonstrates that, you know, these
9 sorts of conditions of confinement, courts have also found
10 that restraints - - - restraints of this nature do not fall
11 within the - - -

12 JUDGE HALLIGAN: You think - - - you think you
13 think that we would have to say all conditions of
14 confinement are subject to habeas, and not something that
15 would be specifically focused on the types of restraints at
16 issue here? Do you think it's all or nothing?

17 MR. SCHOEPP-WONG: Well, I think that's - - -
18 there are, you know - - - I think that the scope of habeas
19 is based on the common law. I think that the court can
20 think about whether it's an arbitrary - - -

21 JUDGE HALLIGAN: I'm just asking you do you think
22 that's the - - - the only option we have? We could only
23 say habeas is available for all conditions. Or could we
24 say habeas is available specifically to challenge these
25 types of bodily restraints, but not broadly other

1 conditions of confinement?

2 MR. SCHOEPP-WONG: Well, I think that what we
3 would have to think about in that circumstance, if the
4 court were inclined to go that way, is where's the line? I
5 think that there is - - - you know, I think the petitioner
6 has put forward what I submit is - - -

7 JUDGE RIVERA: Well, I thought the lower courts
8 have already entertained the use of habeas in this way?

9 MR. SCHOEPP-WONG: I'm sorry?

10 JUDGE RIVERA: I thought lower - - - some lower
11 courts had already entertained the use of habeas in this
12 way.

13 MR. SCHOEPP-WONG: Very recently, I think that
14 MHLS has been successful in some supreme court trial level
15 courts in obtaining this writ, but none of those decisions
16 have - - -

17 CHIEF JUDGE WILSON: So if Louis M. is strapped
18 to a plywood board instead of a hospital bed, still no
19 habeas?

20 MR. SCHOEPP-WONG: I'm sorry? If - - -

21 CHIEF JUDGE WILSON: If he's strapped to a
22 plywood board instead of a hospital bed, habeas is still
23 not available?

24 MR. SCHOEPP-WONG: I think that that would still
25 fall within the sorts of physical constraints within lawful

1 custody. If they're not challenging the lawfulness of the
2 custody - - -

3 CHIEF JUDGE WILSON: Strapped to a bale of neds -
4 - -

5 MR. SCHOEPP-WONG: - - - writ of habeas wouldn't
6 lie.

7 CHIEF JUDGE WILSON: - - - bed of nails?

8 MR. SCHOEPP-WONG: But I think that - - - in
9 those circumstances there would be other remedies. I think
10 that - - - I think that just because these - - - the
11 petitioners have chosen to proceed - - -

12 JUDGE RIVERA: What's the remedy other than the
13 one you've already articulated? What's the alternative
14 remedy?

15 MR. SCHOEPP-WONG: I think that in - - - well, in
16 the circumstance of this case - - -

17 JUDGE RIVERA: Um-hum.

18 MR. SCHOEPP-WONG: - - - I think that the
19 petitioners have put forward a theory where law enforcement
20 has zero discretion. Zero under either the substantive due
21 process - - -

22 JUDGE RIVERA: Okay. But what - - - what's the
23 path?

24 MR. SCHOEPP-WONG: But I think that that path - -
25 -



1 JUDGE RIVERA: Send this for judicial review?

2 MR. SCHOEPP-WONG: That path would be an Article
3 78 - - -

4 CHIEF JUDGE WILSON: Do you agree that they have
5 no - - -

6 MR. SCHOEPP-WONG: - - - in the nature of
7 mandamus to compel.

8 CHIEF JUDGE WILSON: Do you agree they have no
9 discretion?

10 MR. SCHOEPP-WONG: I'm sorry?

11 CHIEF JUDGE WILSON: Do you agree that law
12 enforcement has no discretion in - - -

13 MR. SCHOEPP-WONG: We do not. I think that the -
14 - - that the argument - - -

15 CHIEF JUDGE WILSON: Well, but then you're saying
16 that that writ's not available, mandamus to compel, right?

17 MR. SCHOEPP-WONG: Well, I think that the - - -
18 that would be the path to bring this argument. I think
19 that - - -

20 JUDGE HALLIGAN: Well, wait. Just to clarify.
21 Are you saying it's mandamus to review or mandamus to
22 compel that would enable a 78?

23 MR. SCHOEPP-WONG: I think that primarily - - - I
24 think that the court could look at it either way. I think
25 that the way that the petitioners have framed this argument



1 - - -

2 JUDGE HALLIGAN: Well, just to take them one by
3 one. If it's mandamus to review, where is the finality?

4 MR. SCHOEPP-WONG: I think that mandamus to
5 review lies both in the fact that the restraints remain
6 applied, and in the fact that in the petitioner's own
7 petition, they state that the request was made by a
8 professional to remove the restraints - - -

9 JUDGE HALLIGAN: But certainly - - -

10 MR. SCHOEPP-WONG: - - - and it was declined.

11 JUDGE HALLIGAN: Well, I think that the - - -
12 that that's because they were deferring to the PD. And I
13 think that what you would need is to have some capacity to
14 bring mandamus to review against the PD's decision.

15 But let me ask you this. It certainly strikes me
16 that this is very different in kind from a typical Article
17 78 where there is, for example, again, take DOCCS as an
18 analogy, there is an internal procedure through which an
19 administrative agency determination is made, there is
20 finality, and then that can be tested in an Article 78.

21 Here, you don't have a procedure, I don't think.
22 I don't see one in the record. And you do have, as your
23 adversary pointed out, different shifts of officers that
24 come in one - - - you know, one after the other. So how do
25 you see this as - - - you know, both yielding finality and

1 also as being appropriate for a traditional mandamus to
2 review?

3 MR. SCHOEPP-WONG: Sure. That's if we're looking
4 at this as mandamus to review. I would emphasize that if
5 it is mandamus to compel, as they have argued - - -

6 JUDGE HALLIGAN: I'm asking you to state first -
7 - -

8 MR. SCHOEPP-WONG: - - - there would not be
9 finality required.

10 JUDGE HALLIGAN: I want to explore first whether
11 mandamus to review is available.

12 MR. SCHOEPP-WONG: Absolutely. So it's also - -
13 - I think this court could also consider this available
14 under mandamus review. Finality exists because the
15 restraints have been continued to be applied after the
16 request has been made.

17 JUDGE HALLIGAN: And where's the procedure that
18 the agency - - - that yields the agency determination?

19 MR. SCHOEPP-WONG: The procedure is exactly
20 what's laid out in the NYPD policy. The - - - there's a
21 consultation with the doctor - - -

22 JUDGE HALLIGAN: So there's no individualized
23 determination? It's just what goes into the manual? Into
24 the determination, in the paragraph, in the manual that the
25 restraints shall be applied.



1 MR. SCHOEPP-WONG: The procedure that is followed
2 after - - - as it's laid out in the manual, that's the
3 administrative process. That is documented according to
4 the policy - - -

5 JUDGE HALLIGAN: Well, that's very different than
6 - - - I mean, a typical administrative process is an
7 individualized determination that applies an agency policy
8 to the circumstances of a particular case, right?

9 MR. SCHOEPP-WONG: Sure. And I think that there
10 is an agency policy being applied here. I think that it's
11 being applied in an individualized circumstance based on
12 what the information is that's confronting the officer.

13 JUDGE HALLIGAN: And if you think mandamus to
14 compel is perhaps more readily available. Where is the
15 nondiscretionary duty that lies here?

16 MR. SCHOEPP-WONG: Well, the argument that they
17 are making is that this is a nondiscretionary duty.

18 CHIEF JUDGE WILSON: Yeah. But you disagree with
19 that, right?

20 MR. SCHOEPP-WONG: We did - - - we do disagree
21 with that.

22 CHIEF JUDGE WILSON: But those - - -

23 JUDGE HALLIGAN: So how could mandamus to compel
24 lie? Sorry, Chief, I didn't mean to - - -

25 CHIEF JUDGE WILSON: No. That's what I was

1 obviously going to ask.

2 MR. SCHOEPP-WONG: Just based on the manner in
3 which they have framed their contentions in this case.

4 JUDGE CANNATARO: So you're saying if they're
5 right, that they have an absolute statutory duty to
6 release, then they could have mandamus to compel?

7 MR. SCHOEPP-WONG: That's right, Your Honor.

8 CHIEF JUDGE WILSON: But you're saying they're -
9 - -

10 JUDGE CANNATARO: A proposition with which you
11 disagree, right?

12 CHIEF JUDGE WILSON: Right. And you would oppose
13 that?

14 MR. SCHOEPP-WONG: But that doesn't mean that
15 this remedy doesn't - - - you know, they can't target this
16 remedy. I think that's the determining question.

17 CHIEF JUDGE WILSON: Well, you mean they can
18 bring it and lose, is what you're saying?

19 MR. SCHOEPP-WONG: I think that - - -

20 CHIEF JUDGE WILSON: That's not much of a remedy.

21 MR. SCHOEPP-WONG: I think that they would lose
22 under - - - understand this because - - -

23 JUDGE RIVERA: They can bring it, lose, appeal,
24 and a higher court might disagree with one side or the
25 other, correct?

1 MR. SCHOEPP-WONG: I'm sorry?

2 JUDGE RIVERA: They could bring it; lose, and
3 then appeal as this is kind of - - - I'm just trying to
4 figure out your process - - - and then a higher court will
5 decide either way?

6 MR. SCHOEPP-WONG: I think that's right. I think
7 that - - - you know, if they want to present this argument
8 that the - - - you know, substantive due process or the - -
9 -

10 JUDGE RIVERA: And how long will that take and
11 how long will this individual be strapped again to this bed
12 in restraints?

13 MR. SCHOEPP-WONG: Well, I think that's - - - I
14 think that the individual could be removed from this - - -
15 these restraints immediately, Your Honor, to the point of
16 there being the ability to - - -

17 JUDGE RIVERA: Based on what? Wait. Based on
18 what? Based on what?

19 MR. SCHOEPP-WONG: Being the ability to have
20 commenced an Article 78 by order to show cause as well - -
21 -

22 JUDGE RIVERA: Okay.

23 MR. SCHOEPP-WONG: - - - as to seek preliminary
24 relief, a preliminary injunction, a TRO that could even be
25 ex parte under appropriate circumstances. So there's no

1 reason to believe that under appropriate circumstances, if
2 there is a legal claim here, that the restraints couldn't
3 be removed immediately.

4 And the difference between habeas and an Article
5 78 - - - and again, I would just emphasize that it is
6 petitioners who have decided to frame this as a habeas
7 petition instead of the available Article 78 remedy that
8 all the courts thus far have said has been available to
9 them. The difference there is that it balances the ability
10 for this quick relief with the ability to review the city's
11 citywide policy in terms of restraints and how these
12 individuals are processed in hospitals to arraignment.

13 So I think that that balance is critical here
14 because - - - and that's what's missing in this case - - -

15 JUDGE RIVERA: Well, maybe they're preparing that
16 case. But in the interim, they've got a - - - they have
17 someone who's strapped to this bed in these restraints, and
18 they want immediate judicial review of that so they can
19 make their argument that that is contrary to law.

20 MR. SCHOEPP-WONG: And the - - - and there's no
21 reason - - -

22 JUDGE RIVERA: With respect to just this
23 individual. Maybe they're working on that other case
24 you're talking about.

25 MR. SCHOEPP-WONG: Sure.

1 JUDGE RIVERA: Who knows.

2 MR. SCHOEPP-WONG: And there's no reason that
3 that relief wouldn't be available immediately at the - - -
4 if supreme court were so inclined to grant an order to show
5 cause and a temporary restraining order to remove
6 restraints, if they believe that this was - - -

7 JUDGE RIVERA: Through a mandamus proceeding?

8 MR. SCHOEPP-WONG: In the midst of a mandamus
9 proceeding, absolutely.

10 JUDGE CANNATARO: You mean as temporary
11 injunctive relief pending the Article 78 procedure?

12 MR. SCHOEPP-WONG: That's right, Your Honor. So
13 I think that this strikes the appropriate balance between,
14 you know, hearing this claim quickly as well as allowing
15 the developments - - -

16 JUDGE RIVERA: Let's say the judge denies that.
17 How much longer are they going to wait?

18 MR. SCHOEPP-WONG: There's no reason that they
19 couldn't seek an appeal immediately. That they couldn't
20 seek preliminary injunctive relief before an appeal.

21 JUDGE RIVERA: Now, are we at day twenty now?

22 MR. SCHOEPP-WONG: Just because they are - - -
23 these claims require some time to be reviewed, doesn't mean
24 that they've - - - the remedy is not available to them.

25 JUDGE RIVERA: No. But that's the point of

1 habeas. That there are particular types of confinement and
2 restraint that must be dealt with urgently, immediately.
3 That society says we will not allow this. You must present
4 the body to the judicial officer. That's the point.

5 MR. SCHOEPP-WONG: Well, I think that's the - - -
6 a habeas petition could be denied in the circumstance too,
7 and then that would have to require an appellate process
8 for these restraints to be removed. So I don't see - - -

9 JUDGE RIVERA: But we're only dealing with
10 whether or not they can bring - - - not the merits of
11 habeas. You're correct. They might not have succeeded on
12 the merits of the habeas. I'm not talking about that.

13 I'm just talking about the pathway to move this
14 expeditiously along. This is not like any other type of
15 confinement.

16 MR. SCHOEPP-WONG: Well, I think - - - I think
17 that there's no reason that an Article 78 and the
18 preliminary determination being made couldn't be made just
19 as quickly as the - - - a habeas determination could be
20 made. I think that that provides the balance between
21 addressing the immediate issues that Your Honor has - - -
22 has, you know, noted. And also balances the ability of the
23 city to put together an actual record, to put together an
24 actual answer, to explain the basis for this policy, what
25 the circumstances were that the police officers were facing

1 in this instance. What the security - - -

2 JUDGE SINGAS: Practically, is there any
3 difference for you if it's an Article 78 or if it's a
4 habeas proceeding?

5 MR. SCHOEPP-WONG: Well, I think that's - - - you
6 know, I think that we are following what the law requires
7 for habeas. And that, under this court's precedent, as
8 well as settled precedent around the country, states that -
9 - -

10 CHIEF JUDGE WILSON: That doesn't really answer
11 Judge Singas' question, which was about a practical
12 difference to you.

13 MR. SCHOEPP-WONG: The practical difference is
14 that it - - - it balances the ability to seek immediate
15 relief that petitioner desires and provides respondents the
16 opportunity to present a record to present an - - -

17 CHIEF JUDGE WILSON: Which habeas - - - which
18 habeas doesn't?

19 MR. SCHOEPP-WONG: Which habeas doesn't in the
20 same way - - -

21 CHIEF JUDGE WILSON: Because - - -

22 MR. SCHOEPP-WONG: - - - that Article 78 - - -

23 CHIEF JUDGE WILSON: - - - because - - -

24 MR. SCHOEPP-WONG: - - - allows.

25 CHIEF JUDGE WILSON: Because?

1 MR. SCHOEPP-WONG: Because of the - - - the speed
2 with which habeas proceedings are litigated to conclusion.
3 I think that the - - - I think that the fact that Article
4 78 - - -

5 CHIEF JUDGE WILSON: Well, earlier you said it
6 would - - - earlier you said the Article 78 could proceed
7 just as fast as the habeas - - -

8 MR. SCHOEPP-WONG: Could remove - - -

9 CHIEF JUDGE WILSON: - - - and now you're saying
10 it can't.

11 MR. SCHOEPP-WONG: I'm sorry. It could remove
12 the restraints just as fast. I think that - - - that that
13 strikes the appropriate balance. It can remove the
14 restraints through - - - via preliminary injunctive relief
15 if necessary.

16 JUDGE RIVERA: But wouldn't you argue you need
17 time to develop the record as to why the restraints are
18 appropriate, if not absolutely necessary under the
19 circumstances?

20 MR. SCHOEPP-WONG: I think that's - - - that's -
21 - -

22 JUDGE RIVERA: And/or to argue that there are
23 legal basis under the Mental Health Hygiene Law - - -
24 excuse me - - - does not bind the police department?

25 MR. SCHOEPP-WONG: Does not bind the police

1 department?

2 JUDGE RIVERA: Right. As I understood your
3 argument it's that the law doesn't even apply to you.

4 MR. SCHOEPP-WONG: Oh, the substantive process -
5 - -

6 JUDGE RIVERA: Because he's a pre-arraignment - -
7 - he's in pre-arraignment confinement so that law doesn't
8 even apply to you was my understanding of your argument.
9 But I may be wrong.

10 MR. SCHOEPP-WONG: Yes. Well, I mean, that's our
11 - - - that's the argument that we made on the substantive
12 claims.

13 JUDGE RIVERA: It's a different standard, as I
14 recall.

15 MR. SCHOEPP-WONG: Yes. I think that - - - you
16 know, objective reasonableness - - - reasonableness under
17 the Fourth Amendment as well as reasonableness test under
18 the CPL are the standard that we would be seeking. But I
19 think that those questions could be addressed in an Article
20 78 or any of the other actions that were available,
21 including a preliminary one, Your Honors.

22 CHIEF JUDGE WILSON: Thank you.

23 MR. SCHOEPP-WONG: Thank you.

24 JUDGE HALLIGAN: Can I ask you, Counsel, is - - -
25 do you see the nub of your claim as being about the delay

1 or more broadly about the policy directive that restraints
2 automatically be applied?

3 MS. JACOBSEN NOVOTNAK: I think that with any
4 habeas there's two points: whether habeas is the
5 appropriate remedy, and then if you win on the merits. And
6 I think we make both here.

7 The first - - -

8 JUDGE HALLIGAN: No, no. I'm - - - but maybe my
9 question might not be clear. Had you not - - - had your
10 client not been subject to the restraints for a protracted
11 period of time because, as I think the record indicates,
12 the arraignment was delayed - - - do you - - - is your
13 primary complaint the delay and therefore the duration for
14 which he was confined? Or are you really looking to argue
15 that in no case should someone be subject to automatic
16 constraints per the PD manual?

17 MS. JACOBSEN NOVOTNAK: The latter. That it is
18 never legal to hold a person for - - -

19 JUDGE HALLIGAN: So if that's the crux of your
20 complaint, then why isn't this better brought in an Article
21 78 or a declaratory judgment where a more thorough record
22 can be mustered?

23 MS. JACOBSEN NOVOTNAK: Because in the interim,
24 Louis M. is chained to a bed. I mean, that is the - - -
25 that is the - - -

1 JUDGE HALLIGAN: That's why I'm - - -

2 JUDGE GARCIA: What if he was chained for twelve
3 hours and you go in - - - twenty-four hours, and by the
4 time you get in, he's not chained anymore?

5 MS. JACOBSEN NOVOTNAK: Well, then we'd no longer
6 have a writ and we'd withdraw.

7 JUDGE GARCIA: Would you ask for declaratory
8 judgment then?

9 MS. JACOBSEN NOVOTNAK: I believe if we're
10 bringing on a writ, we would withdraw the claim.

11 JUDGE CANNATARO: Yeah. But it's a - - - that
12 question is illustrative - - -

13 JUDGE GARCIA: You would just withdraw it? You
14 wouldn't ask for it to be converted to - - -

15 MS. JACOBSEN NOVOTNAK: To a declaratory - - -

16 JUDGE GARCIA: - - - deal with this question - -
17 -

18 MS. JACOBSEN NOVOTNAK: - - - judgment?

19 JUDGE GARCIA: - - - that Judge Halligan just
20 asked you?

21 MS. JACOBSEN NOVOTNAK: I think it's important to
22 recognize that relief could have been granted to Louis M.
23 in this case without holding or invalidating completely the
24 NYPD manual. But I would - - -

25 JUDGE HALLIGAN: But that's what gives rise, I

1 think, to my question, right. If your primary goal is to
2 challenge the policy, then why not do that with a
3 procedural vehicle that enables that to be fully litigated
4 with a record that is developed, as opposed to seeking to
5 do that in the context of habeas? Which, whether it is,
6 you know, available or not available, may not be the best
7 suited vehicle for that sort of question.

8 JUDGE CANNATARO: And I will add to that
9 question. Those proceedings do have the availability of
10 preliminary injunctive relief as well. So you could do
11 both things.

12 MS. JACOBSEN NOVOTNAK: For entitlement to relief
13 under habeas, the confinement must be illegal. So
14 therefore we must assert the illegality of his confinement,
15 which is what we were doing. We were saying it is
16 unconstitutional. It is not permitted by the statute.
17 That is required for habeas proceedings.

18 JUDGE RIVERA: Only in his case - - -

19 MS. JACOBSEN NOVOTNAK: For any habeas. Any - -
20 -

21 JUDGE RIVERA: - - - or in any one who is a pre-
22 arraignment detainee held in the psychiatric units, who is
23 in these restraints?

24 MS. JACOBSEN NOVOTNAK: For any habeas
25 proceeding, the confinement must be unlawful. And so you



1 have to prove the illegality of the confinement.

2 JUDGE CANNATARO: But in this case - - - I
3 thought your answer to Judge Halligan's question was what
4 you - - - the source of that is the NYPD policy?

5 MS. JACOBSEN NOVOTNAK: Well, that's the problem,
6 is that the policy is directing them to violate the law.

7 If I can just briefly add one - - -

8 JUDGE HALLIGAN: So why not - - - I'm sorry. I'm
9 just not sure, and I know your light's on. I'll be very
10 brief.

11 Why not bring that claim via a declaratory
12 judgment action?

13 MS. JACOBSEN NOVOTNAK: That certainly may be
14 forthcoming. But again, it doesn't necessarily get Louis
15 M. out of the shackles.

16 JUDGE HALLIGAN: But he's out now.

17 MR. SCHOEPP-WONG: Right. But other patients are
18 not. Other patients - - - this keeps happening.

19 JUDGE HALLIGAN: And so I take it your view would
20 be that, even for a patient who's in for four hours, eight
21 hours, that that's sufficient to allow you to bring a
22 habeas action?

23 MS. JACOBSEN NOVOTNAK: Correct. Whether the
24 person is released from restraints before the habeas action
25 is heard, like any habeas action.

1 JUDGE RIVERA: Well, if their doctor says that
2 they should be released, otherwise, no, right?

3 MS. JACOBSEN NOVOTNAK: Exactly. That's part of
4 the problem is that there's no way that - - -

5 JUDGE GARCIA: I think the question was that four
6 hours, could you go in and ask for habeas?

7 MS. JACOBSEN NOVOTNAK: Again, it would - - - it
8 requires to be aware that they've been constrained for four
9 hours and at that point - - -

10 JUDGE GARCIA: But if you are?

11 MS. JACOBSEN NOVOTNAK: Potentially. It would be
12 heard then the next day. But yes, four hours would be
13 sufficient.

14 If I can just briefly address - - -

15 JUDGE RIVERA: Four hours, if they're going to
16 continue the restraint and the doctor says don't continue
17 the restraint?

18 MS. JACOBSEN NOVOTNAK: Yeah. Or if they ignore
19 the doctor, or if it's never written in the record, or if
20 no one ever tells Louis M. or a hundred different reasons.

21 JUDGE GARCIA: Right.

22 MS. JACOBSEN NOVOTNAK: But if I could just
23 briefly - - - because we're talking about this as though
24 it's a sea change and it just isn't. If we go back to
25 Blackstone's Commentaries, where Blackstone talks about the

1 stocks, he talks about confinement of the person in any
2 way. So putting him in the stocks is addressable through a
3 writ of habeas corpus. That, just because the stocks have
4 been illegal for 700 years and we don't see stocks
5 confinement anymore, doesn't mean that habeas has not been
6 the appropriate remedy.

7 JUDGE GARCIA: Procedures have been somewhat
8 modified since that.

9 MS. JACOBSEN NOVOTNAK: They've been a little
10 updated from then. But I would argue that this is a
11 particularly barbaric thing to do to a patient as well.

12 JUDGE GARCIA: Not those procedures. But the
13 procedures for getting redress, right? I mean - - -

14 MS. JACOBSEN NOVOTNAK: But I think that - - -

15 JUDGE GARCIA: - - - it's not a reliance on
16 habeas solely anymore, because now judges have flexibility
17 to convert those proceedings without dismissing them.

18 MS. JACOBSEN NOVOTNAK: Except that there hasn't
19 really been any identified avenue. My adversary wants to
20 say, well, it could be a motion to compel, but they'd lose.
21 It could be - - - or excuse me. Yeah. A writ of mandamus
22 to compel or they lose, or a writ of mandamus to review but
23 - - - you know, finality despite we don't know who made the
24 decision, when it was made. That this is somehow final
25 agency action and then is any time that any person is

1 handcuffed, that's a final agency action.

2 JUDGE RIVERA: What about his point about how you
3 could truncate the period of delay, right? In terms of
4 pursuing one of these other avenues that he described, you
5 could shorten the time frame that that might usually take.

6 MS. JACOBSEN NOVOTNAK: If the - - - but again,
7 you have to meet the elements - - -

8 JUDGE RIVERA: Do you think that that's not
9 practical? That you could not have sought that?

10 MS. JACOBSEN NOVOTNAK: No. I don't think it's
11 practical because I don't think he can mete out any of the
12 elements of any of the writs under Article 78. And so if
13 you say that's the remedy, except they haven't challenged
14 the finality yet and then they do on appeal, and then that
15 remedy doesn't assist anymore.

16 JUDGE RIVERA: That's about the merits. Let me
17 just get to the - - - when he says, well, they could have
18 asked for TRO.

19 MS. JACOBSEN NOVOTNAK: Right.

20 JUDGE RIVERA: Get him out of the restraints
21 while the mandamus is pending.

22 MS. JACOBSEN NOVOTNAK: Except that I think that
23 you would have to have show some entitlement to relief,
24 right? And if you can't make out the elements of a claim
25 under Article 78, then I don't see why a judge would grant

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a TRO.

CHIEF JUDGE WILSON: Thank you.

MS. JACOBSEN NOVOTNAK: Thank you so much.

(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 State of New York ex rel. Louis M. v. Popiel, No. 55 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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