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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK
EX REL. SARA MOLINARO ON BEHALF OF
WEI LI,

Respondent,

NO. 94

-against-

WARDEN, RIKERS ISLAND, EMTC, 10-10
HAZEN STREET, EAST ELMHURST, NY
11370, OR ANY OTHER PERSON HAVING
CUSTODY OF THE DEFENDANT,

Appellant.

20 Eagle Street
Albany, New York
November 15, 2022

Before:

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

Appearances:

JULIAN N. JOIRIS, ADA
KINGS COUNTY DISTRICT ATTORNEY
Attorney for Appellant
350 Jay Street
Brooklyn, NY 11201

ALEXANDRA R. FERLISE, ESQ.
BROOKLYN DEFENDER SERVICES
Attorney for Respondent
177 Livingston Street
Brooklyn, NY 11201

Aubrey A. Haslow
Official Court Transcriber

1 ACTING CHIEF JUDGE CANNATARO: Good afternoon.
2 Our first appeal on today's calendar is number 94, Molinaro
3 v. Warden.

4 Counsel?

5 MR. JOIRIS: Good afternoon. Julian Joiris for
6 the People, appellant. I'd like to reserve two minutes'
7 rebuttal, please.

8 ACTING CHIEF JUDGE CANNATARO: You have two
9 minutes.

10 MR. JOIRIS: The Appellate Division's decision in
11 this case leaves trial courts effectively powerless to
12 enforce orders for competency hearings. Now, in any case
13 where the defendant is charged only with nonqualifying
14 offenses - - -

15 JUDGE TROUTMAN: But aren't there provisions in
16 the mental hygiene law that if someone needs an
17 examination, they could be invoked for that purpose?

18 MR. JOIRIS: So the provisions of the mental
19 hygiene law - - - I believe Your Honor is referring to
20 9.43, in - - - in that area. That is really a specific,
21 really public safety-oriented provision - - - or collection
22 of provisions that have to do with defendants who may be a
23 danger to themselves or others.

24 JUDGE TROUTMAN: Uh-huh.

25 MR. JOIRIS: It is - - - 9.43 is essentially a

1 court-ordered ride to an emergency room to determine - - -

2 JUDGE TROUTMAN: So why should someone be held
3 for bail in a nonbailable offense simply for the purpose of
4 an exam? And where in the CPL does it provide that you can
5 do that?

6 MR. JOIRIS: So first, the purpose of holding
7 someone under Article 730 is simply if the court believes
8 that is necessary in order to ensure that the defendant
9 will actually show up for the 730 exam.

10 JUDGE TROUTMAN: Actually, it's usually to see if
11 they're competent to participate in the proceedings.

12 MR. JOIRIS: Right. That's the purpose of the
13 exam, and the purpose of holding the defendant for the exam
14 is to make sure the defendant will actually show up. You
15 can't - - -

16 JUDGE TROUTMAN: Where's the authority to hold
17 them without bail so that they can be - - - simply be
18 examined?

19 MR. JOIRIS: That stems from Article 730,
20 specifically 730.20(2). That is dealing with defendants
21 who are not otherwise in custody. And it's clear there,
22 although the - - - I'll say it's unambiguous there. The
23 statute could be phrased more clearly, but it's
24 unambiguous. The phrasing is the court - - - if the
25 defendant is at liberty, the court may order an outpatient

1 examination. The necessary implication there is, or the
2 court may not.

3 ACTING CHIEF JUDGE CANNATARO: That's the
4 clarity? The clarity comes through the necessary
5 implication?

6 MR. JOIRIS: That's correct, Your Honor. We're -
7 - -

8 ACTING CHIEF JUDGE CANNATARO: I mean, there are
9 no words in that section that say the court may order
10 outpatient or secure to a facility. Correct?

11 MR. JOIRIS: That's correct. We are arguing, and
12 we have argued all along, this is simply what is
13 necessarily implied from the text of the statute.

14 ACTING CHIEF JUDGE CANNATARO: So - - -

15 JUDGE TROUTMAN: So you're adding - - - I'm
16 sorry.

17 ACTING CHIEF JUDGE CANNATARO: I was just going
18 to say, just continuing on with the text of the statute, it
19 does provide an explicit alternative in the statute, which
20 is that the director of a facility can request placement
21 into a facility. It seems as if the "may" might relate to
22 either of those two options and not some necessary
23 implication whose words are nowhere to be found in the
24 statute itself.

25 MR. JOIRIS: So I think if we were to look at

1 Subdivision 2 in a vacuum, I think that argument might have
2 some traction, but then you see immediately below at
3 Subdivision 3 we have a parallel construction, the court
4 must order the examination to take place where the
5 defendant is being held in custody. And then, even though
6 that is a mandatory "must", immediately following in
7 ubdivision 3 we have this exception, this carveout, if the
8 director feels it's necessary, then instead of being, you
9 know, where the defendant is held in custody in jail, then
10 it's conducted in a hospital.

11 So the "may" in Subdivision 2 isn't just to allow
12 for the possibility of hospital confine - - - if that were
13 the case, it would have been written with a "must" the same
14 way as it is in Subdivision 3.

15 ACTING CHIEF JUDGE CANNATARO: So the "may"
16 provision takes you to - - - for - - - for the not-in-
17 custody subject, somehow takes you down to the next section
18 for the in-custody subject?

19 MR. JOIRIS: No, Your Honor. What I'm saying is
20 that we can tell that the "may", the - - - where it says,
21 may order it on an outpatient basis, that isn't just to
22 allow for an exception for hospital confinement because
23 when we contrast that with Subdivision 3, there it says,
24 must occur where the defendant's being held in custody, and
25 yet despite that mandatory language, has a carveout - - -

1 JUDGE TROUTMAN: However, there is a distinct
2 difference. Subdivision 2, it - - - 730(2) simply
3 describes, arguably, what the court's options are if the
4 defendant is not in custody, not that you can hold them.

5 MR. JOIRIS: So it provides - - - one, it says
6 you can have - - - again, this is permissive, not mandatory
7 language. You can have an outpatient examination when the
8 defendant otherwise would be at liberty.

9 JUDGE TROUTMAN: And that makes sense because
10 they're not in custody. However, if they are in custody,
11 it would make sense that different language is used because
12 they are in custody so that you have to do the exam in a
13 certain prescribed manner because they are held in a
14 facility.

15 MR. JOIRIS: Are you referring to Subdivision - -
16 -

17 JUDGE TROUTMAN: 3.

18 MR. JOIRIS: - - - 3?

19 JUDGE TROUTMAN: Yes.

20 MR. JOIRIS: And so what we see - - -

21 JUDGE TROUTMAN: So there's a reason for the
22 difference.

23 MR. JOIRIS: There is a reason for the
24 difference. The reason for the difference is under
25 Subdivision 3, the defendant is being held in custody. The

1 only question is where, right? Under - - -

2 JUDGE TROUTMAN: Correct.

3 MR. JOIRIS: - - - Subdivision 3, it's jail or
4 hospital. And under Subdivision 2 - - - and this is really
5 the - - - one of the main differences from the predecessor
6 statute, the Code of Criminal Procedure. Subdivision 2
7 adds another possibility, says, or the defendant can stay
8 at liberty. You could have an outpatient examination.

9 JUDGE RIVERA: Well, it would have made sense,
10 then, to - - - to have 3 come before 2, but I want to ask
11 you a different question.

12 So 2 says, when the defendant is not in custody
13 at the time, a court issues an order of examination because
14 he was theretofore released on bail on his own
15 recognizance. Now, I didn't understand that to be the case
16 here. So number 2 only applies once you've already been
17 released. Here, there was a presumption of release, but
18 that order had not been signed. So I don't understand how
19 number 2 applies at all. That's what - - - that's my
20 challenge. I'm having difficulty seeing how 2 applies at
21 all.

22 MR. JOIRIS: Well, so Your Honor, if we're under
23 3, then the defendant has to remain in custody. Then we're
24 under 3 - - -

25 JUDGE RIVERA: No, no. I - - - that's my point.

1 MR. JOIRIS: Yeah.

2 JUDGE RIVERA: I'm - - - I understand because you
3 - - - I thought you were saying the authority stems from 2.
4 If I've misunderstood you, that's a different situation.
5 But I thought you were saying the authority for the judge
6 to do what the judge did here flows from number 2. But I'm
7 not sure 2 applies, is my point.

8 MR. JOIRIS: So I think if - - - if we're under
9 Sub 3 - - -

10 JUDGE RIVERA: Yes.

11 MR. JOIRIS: - - - then I think there's, I don't
12 believe, any dispute that the defendant remained in custody
13 unless the director says a hospital confinement is
14 necessary.

15 JUDGE RIVERA: Well, yeah, that's my point,
16 because - - -

17 MR. JOIRIS: Right.

18 JUDGE RIVERA: - - - 2 is qualifying the nature
19 of the custody. 3 is not; it just says custody, right? So
20 I guess - - - and then going further on this issue about
21 number 2, can indeed the court order an examination before
22 making a determination on bail? That then I think is the
23 next question to try and answer my question about number 2.

24 MR. JOIRIS: Right. I mean, that has - - - II
25 would say really, that's - - - it's just a matter of really

1 the timing. I don't know that - - -

2 JUDGE RIVERA: Well, yeah.

3 MR. JOIRIS: - - - the order - - -

4 JUDGE RIVERA: Is there any prohibition on
5 issuing the order before you've made a determination about
6 bail? I guess that's the way to put that.

7 MR. JOIRIS: I don't see any prohibition in the
8 text of the statute.

9 JUDGE RIVERA: Okay.

10 MR. JOIRIS: That, of course, you know, depends
11 on - - - and there was some argument about this in the
12 Appellate Division, what the definition is of "after
13 arraignment". Does it mean - - -

14 JUDGE RIVERA: Uh-huh.

15 MR. JOIRIS: - - - after the entire arraignment
16 proceeding, or does it mean after the defendant has been
17 brought up to the arraignment court?

18 JUDGE RIVERA: Uh-huh.

19 MR. JOIRIS: You know, I - - -

20 JUDGE RIVERA: The entire process of arraignment
21 as opposed to the end of arraignment.

22 MR. JOIRIS: Correct, Your Honor. Now - - -

23 JUDGE WILSON: Can I ask you a question - - -

24 MR. JOIRIS: Yes.

25 JUDGE WILSON: - - - a practical question about a

1 part of sub 2? How hard is it for you to get a director of
2 a hospital to say, we need to do this, we need to confine
3 the person in the hospital?

4 MR. JOIRIS: To be perfectly frank, I have never
5 heard of it happening, certainly in Kings County, I believe
6 in New York City. I - - -

7 JUDGE WILSON: Is that for want of trying, or
8 why?

9 MR. JOIRIS: Or - - -

10 JUDGE WILSON: Or it's because it's tried and
11 it's rejected?

12 MR. JOIRIS: I quite frankly - - - my
13 understanding is we have been attempting for a year to
14 figure out who the director is for this statutory purpose.
15 This is not, like, a person who's in charge of a hospital
16 that can take patients. There's a 730 clinic, I believe.
17 I forget what city agency exactly it's run out of.

18 But you know, more broadly speaking, certainly,
19 right, the - - - the mechanism of asking the director to
20 opine on this I think is just, even under the best of
21 circumstances, impracticable. Certainly, the director
22 can't be there in every court part, or even if we're just
23 talking arraignments, you know, dayshifts, nightshifts,
24 seven days a week.

25 JUDGE WILSON: Well, presumably, that could be

1 delegated to somebody or some group of people by the
2 director, no? But your point is you don't even know who
3 the director of one of these hospitals is.

4 MR. JOIRIS: Yeah, I have never - - - I have
5 never heard of the director provisions being used, ever,
6 again, I think in New York City in general, and certainly
7 not in Kings County. I - - -

8 JUDGE GARCIA: Counsel - - -

9 JUDGE RIVERA: But if the director - - - whoever
10 - - - or whoever they might designate is not available, is
11 it your position that the court can merely hold a person
12 until that person's available to come and make this
13 determination under paragraph 2?

14 MR. JOIRIS: I think that's an open question
15 under the Appellate Division's decision. I would argue
16 there would be at least some - - - you know, if we're
17 relying on the director's availability or some designee's
18 ability to opine on this, I would say, well, the court
19 should be able to hold someone at least until the director
20 can - - - can make that decision.

21 That being said, I - - - the Appellate Division
22 didn't have occasion to address that, obviously, and so far
23 as I know, it has not practically speaking come up. I'm
24 sure eventually - - -

25 JUDGE GARCIA: Counsel - - -

1 MR. JOIRIS: - - - it may.

2 JUDGE GARCIA: - - - can I ask you something
3 before -- your time is up, but - - -

4 MR. JOIRIS: Of course.

5 JUDGE GARCIA: Your - - - the harm you're seeking
6 to avoid is the person doesn't show up for the exam, right?
7 They're going to be out on bail. It - - - or not bail.
8 They're going to be released. They're going to have to
9 show up for court. So let's say they don't show up for the
10 exam. You have no recourse as the prosecutor.

11 MR. JOIRIS: So effectively, no. I mean, they -
12 - - if we're speaking especially with some who has a
13 nonqualifying offense, bail can't be set, let alone remand.
14 If this person is showing up for court - - - and again, the
15 mental hygiene law provisions, 9.43 and so on, don't apply
16 - - - you - - - you know, there are provisions in the bail
17 laws for someone who willfully and persistently fails to
18 appear for court. That's - - -

19 JUDGE GARCIA: Uh-huh.

20 MR. JOIRIS: That's a separate issue. These may
21 overlap, these may not. But for the purpose specifically
22 of ensuring someone shows up, ensuring the examination can
23 happen so that we can tell, is this someone who is
24 incapacitated or is there going to be a trial, no, the - -
25 - there's no - - - there's no feasible alternative here.

1 JUDGE RIVERA: Would they be in contempt for
2 obstructing the proceedings?

3 MR. JOIRIS: Right. I don't know that that's
4 ever been tried, Your Honor, but - - -

5 JUDGE RIVERA: Okay.

6 ACTING CHIEF JUDGE CANNATARO: Thank you,
7 Counsel.

8 MR. JOIRIS: Thank you.

9 MS. FERLISE: Good afternoon. Alexandra Ferlise
10 for Sara Molinaro and Petitioner Wei Li.

11 JUDGE GARCIA: Do you agree with that, there's no
12 recourse for the prosecutor if the person doesn't show up,
13 defendant doesn't show up for the exam?

14 MS. FERLISE: No, absolutely not. There are - -
15 - there is recourse within the bail statutes.

16 So generally, in a practical matter, when
17 competency exams are issued in Brooklyn, they're set the
18 same day as the court appearance. So missing one pretty
19 much necessitates missing the other. In those situations,
20 the court can and ideally would use the bail statutes,
21 specifically 530.60, to revisit bail as it is set,
22 recognizance as it is set, to see what the person needs to
23 - - - in order to come back to court.

24 Of course, recognizance alone is not the only
25 thing available to the court when it's a nonqualifying

1 offense. Nonmonetary securing orders, including supervised
2 release, are normally and - - - used in force to get people
3 to return to court and get them resources they need within
4 their community.

5 JUDGE SINGAS: Do you have any sense practically
6 if defendants are undergoing these exams on an outpatient
7 basis?

8 MS. FERLISE: My understanding is that they are
9 very common in outpatient proceedings and that the hospital
10 director's input to confine them is just not typically
11 necessary. I haven't had personal experience where there
12 is a problem where the director would need to get involved
13 in that respect. So my understanding is, yes, they are
14 commonly going forward in the outpatient settings.

15 JUDGE RIVERA: Could you tell me why paragraph 2
16 applies?

17 MS. FERLISE: Paragraph 2 applies because the
18 courts must arraign the defendant before a 730 exam could
19 be ordered. So any time a person comes before the court, a
20 secure - - -

21 JUDGE RIVERA: And the source of that is where?

22 MS. FERLISE: In the bail laws. Articles 510,
23 530, all say that a - - - a securing order must be issued
24 at arraignment within that title, Title P of the Criminal
25 Procedure Law.

1 JUDGE RIVERA: Why can't it be done
2 simultaneously?

3 MS. FERLISE: Simply because - - - first of all,
4 the bail laws say that, first of all, the person must be
5 arraigned. Second of all, in 730, the articles and the
6 text of the statute presupposes, as the Appellate Division
7 had said, that a securing order had been issued, primarily
8 based on the theretofore language in 730.20 and 730.20(2)
9 and (3), where the court - - - the Appellate Division found
10 that that language itself, again, presupposes that the bail
11 laws had been followed, which I - - -

12 JUDGE RIVERA: Well, I don't really understand
13 why - - - I'm having difficulty understanding why that
14 language is there. Because your point is true without that
15 language. They're not in custody. They're just not in
16 custody.

17 MS. FERLISE: Of course.

18 JUDGE RIVERA: Period.

19 MS. FERLISE: They're - - - they're technically
20 in custody in terms of, you know, being in the courthouse,
21 in the back, being held for arraignment. So in that
22 respect, they are technically in custody until the
23 arraignment, in which case a securing order must be set.
24 And our position is - - -

25 JUDGE RIVERA: Well, during the arraignment,

1 they're in custody. You agree to that, right?

2 MS. FERLISE: Agreed until the securing order is
3 set, yes. And that securing order must be done - - -

4 JUDGE RIVERA: Either the custody is continued -
5 - -

6 MS. FERLISE: Custody could be continued - - -

7 JUDGE RIVERA: - - - or they're released, right?

8 MS. FERLISE: Exactly. And you know, when
9 release is required, then this says Subsection 2 kicks in,
10 in force.

11 JUDGE RIVERA: Yeah, but the - - - again, I
12 understand that, but that would be true without this
13 section, and it does say, because he was theretofore
14 released, not because he's entitled to be released.

15 MS. FERLISE: Well, yes, of course. This was
16 written before the bail amendment's required release - - -

17 JUDGE RIVERA: Yeah. Right.

18 MS. FERLISE: - - - under these circumstances,
19 particularly - - -

20 JUDGE RIVERA: Uh-huh.

21 MS. FERLISE: - - - for Mr. Li.

22 JUDGE RIVERA: Uh-huh.

23 MS. FERLISE: But this was a real move by
24 legislature to get it out of this mandatory sixty-day
25 hospital stay. So these outpatient procedures for people

1 who are either on bail or out on bail or required, mandated
2 to be released, has to be directed somehow. The courts
3 have to be empowered to do this outpatient, which they
4 weren't before 1970. Of course, the legislature and the
5 courts do need to be empowered to direct hospital
6 confinement, which is, again, why that "may" is in that
7 first subsection there.

8 So yes. While - - -

9 JUDGE RIVERA: So why doesn't it say "must"?

10 MS. FERLISE: It doesn't say "must" because there
11 are two options in this subsection whereas there's one
12 option in the Subsection 3. It doesn't need to say "must"
13 here. It is - - - it can be very easily construed as a
14 mandatory provision, which may, has been, on multiple
15 occasions - - -

16 JUDGE RIVERA: Well, you'd say must be done in
17 outpatient provision unless - - -

18 MS. FERLISE: Of course, that - - -

19 JUDGE RIVERA: Right?

20 MS. FERLISE: - - - would be - - -

21 JUDGE RIVERA: And then they may or must,
22 whatever the legislature decides.

23 MS. FERLISE: It - - - I think that would be
24 better, and there are - - - you know, if this was a case of
25 better - - -

1 JUDGE RIVERA: But if 3 has "must", why does 2
2 have "may", and why does it have this language which is
3 superfluous about theretofore released?

4 MS. FERLISE: I don't believe it's - - -

5 JUDGE RIVERA: You might not have written it this
6 way. I understand that.

7 MS. FERLISE: Yeah.

8 JUDGE RIVERA: This is what we have. And of
9 course, in LaBelle, we've already recognized that there's
10 some ambiguity in the statute and there's a problem.

11 MS. FERLISE: Well, I believe in LaBelle, that
12 was more of an issue of the court saying that it was simple
13 legal error whereas not - - - not necessarily judicial
14 misconduct.

15 JUDGE RIVERA: Right.

16 MS. FERLISE: But this section, if this was an
17 issue - - -

18 JUDGE RIVERA: But that went to whether or not
19 the judge could be viewed as having acted in violation of
20 rules of proper judicial conduct because it was not so
21 obvious that what he was charged - - - or some of the
22 things he was charged with doing he couldn't do. That - -
23 - that's the point of that ambiguity language, no?

24 MS. FERLISE: I think the - - - well - - -

25 JUDGE RIVERA: In LaBelle. That - - - and that -

1 - - that's their reference, I think.

2 MS. FERLISE: I think it's just that it's so
3 specific to judicial misconduct and not - - - you know, the
4 court even in LaBelle did not look upon this favorably. It
5 was more of a legal error issue, and I believe the court
6 even said something to the effect of, you know, we believe
7 our interpretation that the judge was wrong is the correct
8 interpretation. But this is - - - it was just not the
9 level of judicial misconduct.

10 JUDGE RIVERA: Uh-huh.

11 ACTING CHIEF JUDGE CANNATARO: But to get back to
12 - - -

13 MS. FERLISE: Yes.

14 ACTING CHIEF JUDGE CANNATARO: But to get back to
15 Judge Rivera's original question, there's a - - - there's a
16 way to construct this statute - - - and I don't know.
17 Maybe it's just a drafting disagreement you have with the
18 legislature. But you could have drafted Section 2 with a
19 "must" - - - I think she suggested "must unless"
20 construction, which would have been much more clear.

21 But is that the explanation for why "may" is
22 here, that it's just bad drafting, or is it possible that
23 it actually means something slightly different than what
24 you're arguing right now?

25 MS. FERLISE: No, I wouldn't even say it's bad

1 drafting. I think this is, you know, less than perfect
2 drafting. I think that it could have been a "must" - - -

3 ACTING CHIEF JUDGE CANNATARO: I stand corrected.

4 MS. FERLISE: - - - and that would have been - -
5 - yeah. I just think that there's - - - the level of
6 inference necessary to make this "may" mean that remand can
7 be instituted without express authority is an extreme step
8 where "may" is very easily interpreted as a mandatory
9 provision, which, again, it has been multiple times in the
10 CPL.

11 JUDGE SINGAS: But lower courts have said that
12 trial courts do have the power to remand for these exams.
13 And the legislature, we presume, is aware of that
14 interpretation and yet has continued with this same
15 language.

16 MS. FERLISE: Two lower courts - - -

17 JUDGE SINGAS: How - - - how can you explain
18 that?

19 MS. FERLISE: Two lower courts prior to the bail
20 laws being changed did say that. Those issues were not
21 addressed by a higher court, and as soon as a higher court,
22 the Appellate Division, Second Department, was able to
23 address these issues, it came out in the negative, they
24 cannot be doing that. Knight-Ridder and all of those other
25 cases that, you know, would say that the legislature is

1 imputed to know this I don't think apply here because of
2 the lower nature of the decisions and the fact that, you
3 know, even if we're going to say that the legislature was
4 aware of this, they did make a provision within the bail
5 laws to eliminate the prior decision's application.

6 In the bail laws, it says that, you know, the
7 court must set a securing order in accordance with this
8 title, meaning Title P of the Criminal Procedure Law. 730
9 is not in Title P; it's in Title U. So that one phrase
10 essentially abrogated any holding that this could go
11 forward.

12 Now, the two cases that were decided after the
13 change in the bail laws are simply incorrect. And again,
14 as soon as the Appellate Division could review those
15 issues, they have found in the defendant's favor.

16 JUDGE SINGAS: But the legislature could have
17 reviewed that when they were redrafting, and they didn't.
18 Should we ascribe any meaning to that?

19 MS. FERLISE: Well, for - - -

20 JUDGE RIVERA: What about the treatises and - - -
21 isn't there a judges' handbook? I mean, it's not just a -
22 - - a couple or - - -

23 MS. FERLISE: Yes.

24 JUDGE RIVERA: - - - a handful of lower court
25 decisions, right?

1 MS. FERLISE: There's a couple of - - - I believe
2 that most of those other secondary treatises do rely on
3 those cases.

4 JUDGE RIVERA: Uh-huh.

5 MS. FERLISE: So those cases did infect a lot of
6 that jurisprudence. So I think we really have to look at
7 the legislative intent here, and that has been clear and
8 consistent the entire time. The legislative intent is very
9 simple. The status of an accused who has been at large on
10 bail should not be changed because of a pre-trial
11 examination. The Code of Criminal Procedure was much more
12 restrictive, and they went to a more permissive outpatient
13 setting.

14 JUDGE RIVERA: I guess the question is, if that
15 status hasn't yet been determined and an order issued, can
16 you do this? That - - - again, that's my problem with
17 paragraph 2.

18 MS. FERLISE: I - - - again, I think this is - -
19 -

20 JUDGE RIVERA: I mean, I think there's ambiguity.
21 I think there's a gap. I'm not sure it gets filled the way
22 you argue it gets filled. That's my problem.

23 MS. FERLISE: I believe it gets filled by the
24 plain, easy way of actually doing the bail securing order
25 correctly. And I think that has to happen first, and I

1 think there - - - again, then a 730 exam can be issued.
2 That just wasn't followed here, and there are practical - -
3 -

4 JUDGE RIVERA: Let me ask you a different
5 question. Is there anything in the record, given the
6 colloquy, where the judge makes some statement or some
7 finding that the judge is concerned that the individual
8 would not return or would otherwise not be cooperative with
9 the exam? Which strikes me as that's why you're holding
10 them. I mean, because if they're going to come back, why
11 are you holding them?

12 MS. FERLISE: My memory of this case is that the
13 court just saw some erratic behavior - - -

14 JUDGE RIVERA: Uh-huh.

15 MS. FERLISE: - - - and summarily remanded for
16 the 730 as was common practice in some - - - in some - - -
17 in many cases, really. And you know, arraignment must go
18 forward under 7 - - -

19 JUDGE RIVERA: Well, if it's common practice,
20 then you'd really think the legislature would act.

21 MS. FERLISE: I'm sorry?

22 JUDGE RIVERA: If it's common practice, you'd
23 really think the legislature would act.

24 MS. FERLISE: Well - - -

25 JUDGE RIVERA: Not wait for all these people to

1 be held while the - - - a case finally makes it to us.

2 MS. FERLISE: Again, I think the legislature did
3 act. But really, this legal error cannot be grandfathered
4 in, particularly when we have these - - - these, you know,
5 four lower case decisions that the People are, you know,
6 clinging to in this aspect, again, which went unreviewed by
7 a higher court until this case.

8 ACTING CHIEF JUDGE CANNATARO: Thank you,
9 Counsel.

10 MS. FERLISE: Thank you.

11 MR. JOIRIS: So I'd like to briefly note I think
12 two things my opponent said which actually, if I'm
13 interpreting correctly, I agree with. The first is that
14 this is all about the legislative intent. We agree there.
15 And the second, I believe there was an acknowledgement that
16 you could change the first "may" under Sub 2 to a "must"
17 and that would yield the interpretation that the defendant
18 is arguing for.

19 And where I think we part ways is I think here,
20 especially when you have two subdivisions one after the
21 other, one uses the permissive "may", one uses the
22 mandatory "must", we can't just assume, well, because
23 sometimes they use the "may" in a mandatory sense - - -
24 here, though they're using different words, they must have
25 meant the same thing.

1 ACTING CHIEF JUDGE CANNATARO: Does the "may"
2 open up any other possibilities other than the one that the
3 judge here chose, which was to remand this person to jail?
4 Could they, I don't know, direct them to be locked in a
5 closet somewhere until the exam could be held or shipped
6 off to a - - - a large waiting room? I mean, what's the
7 limitation? If the word's "may" and that gives the judge
8 this sort of unfettered discretion, what's off limits in
9 your version of this?

10 MR. JOIRIS: So I wouldn't qualify it as
11 unfettered discretion. I will say as a practical matter,
12 what courts have done when the defendant is not otherwise,
13 you know, being held on bail or remand is either order an
14 in 730 or keep the defendant at liberty. So those are the
15 two options that I think we've really seen at play.

16 But I think really, that's not necessarily the
17 only option, and I think, though it is, you know, the only
18 one that's at issue here because that's what the judge did
19 - - - I mean, I think this is really something where that's
20 what habeas review is for in an individual case if there -
21 - - a judge says, well, I'm doing, I don't know, a
22 supervised release to make sure you show up for the 730,
23 even though I wouldn't order it under the bail statute,
24 something like that. In an individual case, the particular
25 terms could be reviewed on habeas review.

1 So I don't know that I have an answer for, you
2 know, what's the hard-and-fast rule. I don't know that
3 there is a hard-and-fast rule. But I do believe the
4 statute very clearly allows for what the judge did in this
5 case, which - - -

6 JUDGE WILSON: So on the legislative intent, if -
7 - - I understand the defendant's position about what the
8 legislative intent shows is that the Bartlett Commission
9 recommended and the legislature acted to ensure that if
10 somebody was entitled to release on bail, that person
11 wouldn't be held simply because of a need for a 730 unless
12 the director of the hospital said so. Do you have a
13 different understanding of legislative history?

14 MR. JOIRIS: I have a I think subtly different
15 understanding. The way I read the legislative history,
16 especially in the context of, again, the Code of Criminal
17 Procedure, which just assumed someone would be in custody,
18 is the defendant wouldn't be held solely because a 730 exam
19 was ordered, right?

20 And we're not saying solely because. We're not
21 saying, well, you ordered a 730 therefore, the defendant
22 has to be in custody. We're saying it should be an option.
23 If the court is sufficiently convinced that the defendant
24 would not show up for the exam, it should be a possible
25 option that the judge can order the defendant held in jail

1 to show up. So I think that's - - -

2 JUDGE WILSON: But then that goes to the question
3 that you were asked earlier about what in the record, if
4 anything, says that the judge here made that determination.

5 MR. JOIRIS: Yeah. I do agree it's not the most
6 robust record in terms of the arraignment court. But that
7 is - - - and this is, again, what has been in the - - - the
8 really uniform interpretation in the trial courts until the
9 Appellate Division's decision. It's this understanding
10 that the ability to order an in 730 - - - and she says, I
11 believe, I'm ordering him held for the 730. I - - - words
12 along those lines. So making it clear it's for the purpose
13 of - - -

14 JUDGE RIVERA: Well, of course. I mean, the
15 purpose - - - that's the whole point of 730, purpose of the
16 exam. The question is whether or not you can just hold
17 someone because you want them to have the exam or whether
18 or not you need a finding - - - that something in the
19 record supports the finding that the judge thinks that you
20 might not show up, and so that's why they're holding you.

21 MR. JOIRIS: And I - - -

22 JUDGE RIVERA: Or that - - - or that you might be
23 a danger. I mean, I get there are other articles that
24 might address some of that.

25 MR. JOIRIS: And I - - - I believe it is - - -

1 JUDGE RIVERA: Otherwise, aren't we back to what
2 she was describing before as the bad old days? Everybody
3 goes in, everybody stays in until the exam is done?

4 MR. JOIRIS: So I believe it is clear enough from
5 the record here that, again, the judge says, I'm - - -
6 something to the effect of, I'm holding him in for the 730,
7 that this is - - - right? It's after seeing the
8 defendant's erratic behavior, I would say, is an
9 understatement - - -

10 JUDGE RIVERA: Well, that's suggesting the
11 competency, right? That's not necessarily a basis to say
12 that they're not - - - they're not going to be cooperative
13 with the exam.

14 MR. JOIRIS: Well, it can be - - - it can be
15 both, right? The same sort of behavior can give you
16 concerns for both. And here, where the defendant didn't
17 believe the judge was a judge, didn't believe his attorney
18 was an attorney, didn't want the interpreter to speak, that
19 kind of behavior would not only give you concerns about
20 competency - - -

21 JUDGE RIVERA: Okay, your red light is on.

22 MR. JOIRIS: Yes.

23 JUDGE RIVERA: Let me just ask you, can you just
24 quickly address your adversary's point about the securing -
25 - - securing order issuing on the Title P?

1 MR. JOIRIS: Oh, yes. This I believe is the
2 defendant's argument that the 2019 amendments to the CPL
3 effectively abrogated this interpretation of 730.

4 JUDGE RIVERA: Uh-huh.

5 MR. JOIRIS: No, absolutely not. You see - - -
6 and this is addressed in our brief.

7 JUDGE RIVERA: Uh-huh.

8 MR. JOIRIS: You see when the amendments to the
9 CPL wanted to change other provisions that were affected by
10 these changes in the bail statutes, they changed those
11 other provisions. They didn't just obliquely say, oh, you
12 know, leave some language in the bail provisions that you
13 could maybe interpret as affecting other statutes. When
14 they wanted to change the other provisions, they did, and
15 in fact, they inserted the words "in this title" or
16 "pursuant to this title" in several places where there was
17 no dispute that we were - - - you know, it was talking
18 about bail.

19 So - - - and if it's - - - again, I see my red
20 light is on. That's I believe fully addressed in my brief.

21 ACTING CHIEF JUDGE CANNATARO: Thank you,
22 Counsel.

23 MR. JOIRIS: Thank you.

24 (Court is adjourned)

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

I, Aubrey A. Haslow, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York Ex Rel. Sara Molinaro on Behalf of Wei Li v. Warden, Rikers Island, EMTC, 10-10 Hazen Street, East Elmhurst, NY 11370, or Any Other Person Having Custody of the Defendant, No. 94 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Aubrey A Haslow

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

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