

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

NATHANIEL BOONE,
Appellant.

NO. 8

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

ALBERT COTTO,
Appellant.

NO. 9

20 Eagle Street
Albany, New York
January 10, 2024

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 JUSTICE JOHN M. CURRAN

Appearances:

NICOLE P. GEOGLIS
CENTER FOR APPELLATE LITIGATION
Attorney for Appellant Boone
120 Wall Street, 28th Floor
New York, NY 10005

NATALIE REA
THE LEGAL AID SOCIETY



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Attorney for Appellant Cotto
199 Water Street
New York, NY 10038

SHANE A. MAGNETTI
BRONX DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
198 E 161 Street
Bronx, NY 10451

Christy Wright
Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 number 8, People v. Boone.

3 MS. GEOGLIS: Good afternoon. May it please the
4 court, Nicole Geoglis on behalf of Nathaniel Boone. If I
5 may, I would like to reserve three minutes for rebuttal,
6 please?

7 CHIEF JUDGE WILSON: Yes. And I just wanted to
8 say that we are delighted to have our colleague from the
9 Fourth Department, Justice Curran, here with us.

10 MS. GEOGLIS: Thank you. Because Mr. Boone was
11 facing Article 10 proceedings and no longer eligible for
12 discharge or release, his SORA risk level hearing was
13 premature. Where a registrant such as Mr. Boone informs
14 the SORA Court that he's received notice of Article 10
15 proceedings, the Correction Law and due process require
16 that any pending risk level hearing be adjourned until such
17 time as the registrants discharge - - -

18 JUDGE TROUTMAN: Does it matter how long he may
19 have been incarcerated prior to and had been afforded the
20 opportunity to participate in services while incarcerated?

21 MS. GEOGLIS: No, Your Honor, he's not - - -
22 whether or not he participates in services is - - -

23 JUDGE TROUTMAN: So what's the difference between
24 having the hearing when he's released from a penal
25 institution versus release after the other facility?

1 What's the difference?

2 MS. GEOGLIS: The difference is the currentness
3 of the information that the court is using to make a risk
4 level determination when the individual is actually going
5 to be in the community, and the legislature when it amended
6 - - -

7 JUDGE TROUTMAN: So is the operative, like,
8 release to the community? So as long as they are
9 incarcerated, they're in the one facility, and if they keep
10 moving to some other different type of confinement that
11 does not release them to the community, then you don't do
12 the designation; is that your argument?

13 MS. GEOGLIS: Correct. If you are in continuous
14 New York State custody on the underlying criminal action
15 that subjects you to registration, which is the way that
16 the law exists as it does now - - -

17 JUDGE TROUTMAN: Which includes the civil
18 confinement? Is that what you're - - - you're including
19 that likewise?

20 MS. GEOGLIS: Article 10 civil management. Yes.
21 Which is premised on the individual being what Article 10
22 defines as a detained sex offender. So a person who is in
23 the custody of - - - of a New York State institution
24 because of a underlying criminal action involving sexual
25 misconduct.

1 JUDGE CANNATARO: And are they automatically in
2 the custody of those institutions with safeguards because
3 of their status as criminal sex offender? Because there
4 was a question in the last appeal concerning the hospital
5 community itself, the patients, the people who work there,
6 maybe the people who are visiting there, that's an
7 extension of the community at large as well. So I'm
8 wondering whether there are safeguards in place for that
9 segment of the community in the hospital setting.

10 MS. GEOGLIS: There are. So Article 10, when it
11 was enacted, Mental Hygiene Law Article 10, includes a
12 provision that creates secure psychiatric forensic
13 facilities that specifically are limited in terms of who
14 can be maintained and committed in those facilities. So
15 they are only in a facility with other individuals who are
16 detained under Article 10 or are perhaps receiving
17 treatment while they're serving a correctional sentence for
18 a sex offense. So the - - -

19 JUDGE TROUTMAN: What about the staff? Are they
20 part of that community?

21 MS. GEOGLIS: Yes, they are. And they are
22 working at a Article 10 facility created for detained
23 dangerous sex offenders.

24 JUDGE TROUTMAN: So their safety issues or notice
25 as to the level, that's not an issue; is that what you're

1 saying, because of the nature of the facility?

2 MS. GEOGLIS: Given the nature of the facility
3 and the fact that they are working in - - - they are
4 working in an institution specifically designed for what
5 the legislature has denoted as the highest risk individuals
6 who have committed sex offenses. Yes, they are aware of -
7 - -

8 CHIEF JUDGE WILSON: These people are - - - are
9 sex offenders who are unable to control their sexual
10 offending. That's how they get determined to be in one of
11 these facilities, right, under Article 10?

12 MS. GEOGLIS: They are either - - - they've
13 either been determined that way or the state is alleging
14 that they are.

15 CHIEF JUDGE WILSON: Yeah. So the people who
16 work there know that they're dealing with people who are
17 really even above level 3 in a sense?

18 MS. GEOGLIS: Yes. Yes. That the state believes
19 are above level 3. Yes, that that would be correct.

20 JUDGE GARCIA: Counsel, you said you had a
21 statutory argument, which I understand, and a due process
22 argument. What's the due process argument?

23 MS. GEOGLIS: The due process argument stems from
24 the fact that a registrant has a right to a accurate risk
25 level that's determined at a meaningful time. And the

1 meaningful time is the time at which the public
2 notification is actually going to be impactful and is going
3 to be informative. And so having a hearing when an
4 individual may be detained in custody for years on end and
5 it's based on backward looking information, stale
6 information, they have a right to have that hearing close
7 in time to their rejoining the community.

8 JUDGE CANNATARO: Is that concern ameliorated at
9 all by the right to have a risk level reassessment on an
10 annual basis?

11 MS. GEOGLIS: No, because a 168-o modification
12 petition, which I believe is what Your Honor is
13 referencing, in that instance, the burden is completely
14 flipped. Not only is the burden now solely on the
15 registrant to establish that their circumstances have
16 changed, but the burden is the highest, heaviest burden in
17 civil cases, which is clear and convincing. Moreover, in
18 such cases they cannot dispute any of the factors that may
19 have been determined at the original hearing. The Board
20 has been very clear, and courts have been very clear that
21 it's not an opportunity to relitigate your original
22 hearing.

23 JUDGE SINGAS: So your argument is that - - -
24 that in the interim, maybe they'll rehabilitate. But as -
25 - - as the Chief Judge said, these are the above 3s. So I

1 would think that you're getting to a level 3 pretty easily
2 on static factors based especially like if you look at the
3 nature of this crime or on overrides. So I - - - I'm
4 having trouble understanding what could happen in the
5 interim that won't be cured by a yearly reassessment that
6 you think would bring that above 3 to another level.

7 MS. GEOGLIS: For starters, I think the whole
8 spirit of Article 10 and civil management is the prospect
9 that we would - - - that the purpose of this is to
10 rehabilitate individuals that we think pose a risk. And if
11 we're saying that you can't be rehabilitated, then that
12 calls into question how - - - are we just detaining people
13 for the sake of we don't want them in the community? And
14 that sounds quite punitive and not civil. I'd also note
15 that there are other things that can develop beyond
16 rehabilitation.

17 JUDGE TROUTMAN: So are you saying rehabilitation
18 and the sex offender designation, those are intertwined?

19 MS. GEOGLIS: Absolutely, because as you are
20 rehabilitated, you presumably pose a lesser risk. And the
21 designation and the risk level is what is your likelihood
22 of sexually reoffending. As you rehabilitate, your
23 likelihood of sexually re-offending decreases.

24 CHIEF JUDGE WILSON: So some people who are
25 confined are not immediately eligible for SIST, but some

1 are then released on SIST, right?

2 MS. GEOGLIS: The vast majority of individuals
3 who are subject to civil commitment are released on SIST.
4 They are not just released.

5 CHIEF JUDGE WILSON: Right. And they're - - -
6 and presumably that means their situation is somewhat
7 different when they're released on SIST than when they
8 first are confined.

9 MS. GEOGLIS: Correct. They are - - -

10 CHIEF JUDGE WILSON: Here's your argument, I
11 guess, is you would like to have that determination made at
12 the later point rather than the former point?

13 MS. GEOGLIS: Yes. And the fact that they are
14 released on SIST is also informative because as, for
15 example, Factor 14 on the risk assessment instrument takes
16 into account, and the Board recognizes, increased
17 supervision may be something that impacts the appropriate
18 risk level. In addition, if someone is being subject to
19 civil management for years, they're aging during that time,
20 and we know from social science research that an
21 individual's age is the most salient factor when we're
22 considering their future risk. They may also develop
23 medical conditions that may affect their mobility, which
24 may impact their future risk. So it's not just
25 rehabilitation that will be the new information that can be

1 available if a SORA hearing is held at a meaningful time.

2 I see my red light is on. I'm prepared to answer
3 more questions, but I don't want to abuse my privilege.

4 JUSTICE CURRAN: Mr. Chief Judge, may I?

5 CHIEF JUDGE WILSON: Of course.

6 JUSTICE CURRAN: Thank you, Judge. I'm going to
7 take you back to the statutory construction issue. And I'm
8 sorry to bring it back to the twigs, but under your theory
9 that is, under the Mental Hygiene Law, as I see it, there's
10 an anticipated release date that's described in MHL 10.
11 And that's set by DOCCS, as I understand it. And as I
12 understand it, there was a conditional release date for
13 your client. And that was the operative date that the
14 Board and the court went by, correct?

15 MS. GEOGLIS: So the conditional release date and
16 the reference to an anticipated release is language that is
17 more apparent in the SORA statute, the Correction Law
18 rather than Mental Hygiene Law.

19 JUSTICE CURRAN: I understand. I'm just using by
20 analogy. I know what the language in the SORA statute
21 says. And I realize that the Board under the SORA statute
22 sets the release date, whatever it's going to be, discharge
23 date by virtue of what it's told by its own agency, DOCCS.
24 That's what happens, as I understand it. My question to
25 you is, under your argument about prematurity and

1 construing the statute is when did the prematurity vis-a-
2 vis your client occur? My understanding is the prematurity
3 occurred upon the moment that he was transferred to the
4 secure treatment facility. Do I have your argument
5 correct?

6 MS. GEOGLIS: The moment that the prematurity
7 occurred was when Mr. Boone, or a registrant, receives
8 notice that they are subject to Article 10 civil
9 management, so they are no longer eligible for their
10 release on their conditional release date. So that may
11 predate their transfer to a secure facility because they
12 may elect to stay in DOCCS custody or they may transfer.

13 JUSTICE CURRAN: Just by virtue of the notice?

14 MS. GEOGLIS: Yes, that is - - -

15 JUSTICE CURRAN: The AG doesn't have to apply for
16 a securing order under SORA or in the mental hygiene - - -
17 forget Mental Hygiene Law?

18 MS. GEOGLIS: In Mr. Boone's case, there was a
19 petition filed by the time of the SORA hearing.

20 JUSTICE CURRAN: How do we know that? That's not
21 in the record.

22 MS. GEOGLIS: That is in the record in - - -

23 JUSTICE CURRAN: The petition?

24 MS. GEOGLIS: Excuse - - - no, the petition is
25 not in the record. But in the SORA court's decision, the -

1 - - the September decision, he notes that there is a
2 pending - - -

3 JUSTICE CURRAN: It's an accompanying thing. But
4 in terms of - - - so is your argument that the moment that
5 there's a care review by the team, that that's the
6 operative time that generates prematurity as far as your
7 argument is concerned?

8 MS. GEOGLIS: Yes. That is the first time that
9 an individual becomes a respondent in the Mental Hygiene
10 Law. Thank you.

11 CHIEF JUDGE WILSON: Thank you.

12 MS. REA: Good afternoon, Your Honors. Natalie
13 Rea of the Legal Aid Society for Mr. Cotto. I will simply
14 - - - of course, we completely agree with the reading of my
15 colleague as to the statute, but I would like to address
16 some of the concerns that the People raised and that the
17 court has raised as to the - - - the staff in these mental
18 institutions. I think we all care about the staff of the
19 mental institutions. The legislature certainly did, I'm
20 sure, also. But I think that we also care about the staff
21 in the correctional facility. I don't think that one wins
22 over the other. And we don't have a SORA hearing at the
23 time of sentencing to say that this sex offender, the sex
24 offender who is sentenced at that moment, may be the same
25 person who goes into Article 10. So I think that the - - -

1 the - - - the purpose of SORA is the public. It is not - -
2 - we - - - again, we care. And I'm not saying we don't
3 care about - - -

4 JUDGE TROUTMAN: So like, that's an interesting
5 dynamic because if - - - if incarceration isn't a part of
6 the sentence and the person is released under probation
7 supervision, the designation occurs right away, correct?

8 MS. REA: Correct.

9 JUDGE TROUTMAN: But you're saying if they stay
10 in, they're somehow being treated differently, even though
11 they're both - - - they have convictions at the time, they
12 are required to be determined at - - - at a point.

13 MS. REA: Correct.

14 JUDGE TROUTMAN: So there's a difference in the
15 law in the first instance. If you walk out the door from
16 the courthouse immediately, you have a designation. If you
17 go to incarceration, you actually, in addition to serving
18 time because there's a determination that a penal sentence
19 is appropriate, but you're getting benefit of that
20 impacting your designation, correct?

21 MS. REA: You're getting a benefit from because
22 you don't have a level, but you're not in the community
23 when you're incarcerated.

24 JUDGE TROUTMAN: You're - - - you're not in - - -
25 so that's what I'm trying to say. I'm asking, is it the

1 benefit that your client's going to get by waiting until
2 they're released, and you say it's more current, but the
3 one person, they're released right away. So they're just
4 decided based on the fact that they're walking out the
5 door. So is it the walking out of the door or you're
6 wanting more accurate information once they've been
7 afforded to have the passage of time?

8 MS. REA: It's actually the statute what I want,
9 but it's actually the statute. And SORA, I think we can
10 all agree that SORA's not a model of clarity. But
11 actually, as to the timing of the SORA hearing, it is
12 clear. It starts to - - - the statute starts, and it is at
13 the time, within thirty days of release into the community
14 from the continuous detention, the custody of New York. It
15 says so. It's either the correctional facility - - - it's
16 continuous if the person is going to get out after
17 incarceration, as the DA's want us to have the SORA here,
18 they will have a SORA here. They will be in the community,
19 and the community will be notified. They are of no risk in
20 an Article 10. So as long as they're in this continuous
21 New York State custody, that's OMH or DOCCS, then they are
22 - - - it's at the end of that when they go into - - -

23 JUDGE TROUTMAN: So the balance is on the
24 probation, they're walking out into the community - - -

25 MS. REA: Immediately.

1 JUDGE TROUTMAN: They're being held. They're
2 not, whether it's the original penal sentence or the
3 Article 10?

4 MS. REA: Correct. They are clearly not a risk
5 to the community. And the statute just, you know, it says
6 so when it decides when the institution is supposed to
7 notify DCJS under 168-c. It does so under - - -

8 JUDGE TROUTMAN: Is there an impact in order to
9 be able to make the designation? Is there a difference
10 between the ability of the designation to be made by the
11 Board if they're in the penal institution versus the
12 Article 10?

13 MS. REA: No, Your Honor. The statute on that -
14 - - on that topic is clear. Once SOMTA came that was
15 enacted and the SORA amended its definition of hospital to
16 include - - - to include Article 10 hospitals, at that
17 moment, the obligation the statute had put on - - - on
18 DOCCS became the obligations they put on OMH. Now, the
19 People seem to think that this is going to be a logistical
20 nightmare. Now, one, if it is the statute, we disagree.
21 If DOCCS with its forty-four prisons, its thirty some
22 thousand persons incarcerated does not have - - - cause a
23 logistical nightmare in conducting SORA hearings at a
24 timely fashion, according to the statute for people that
25 are released from DOCCS, certainly OMH with its two

1 facilities, its 400 maximum only sex offenders in their
2 facility with - - - in the - - - the whole history of the
3 length of the statute, I think the OMH says that only
4 fifty-nine people have been released from Article 10 into
5 the community.

6 I think there is no logistical nightmare. And so
7 as to that, I think it's just not happening. The People
8 are also very concerned about these roaming unassessed sex
9 offenders everywhere. Well, first of all, just like they
10 do with DOCCS, the timing is the same. If somebody is
11 released from Article 10, then the court - - - there's a
12 plan. And if by any chance it has to be that the person is
13 released without a hearing - - -

14 JUDGE TROUTMAN: So is your main concern though,
15 if the assessment is done when they're not actually
16 released to the community, that they're not getting benefit
17 of - - - of - - - I'll say information that becomes stale
18 when they're actually released?

19 MS. REA: Yes. And not only that, they are not -
20 - - Mr. Cotto has not been released. Mr. Cotto has been on
21 the sex offender registry, you know, outed as a mental
22 patient for the past, since 2015. In other words, the idea
23 that all - - - for a sentence, unless you have a life,
24 you're going to get out. If you're an Article 10, again,
25 only fifty-nine people have been released. So the first

1 thing - - -

2 JUSTICE CURRAN: One second.

3 MS. REA: Yes.

4 JUSTICE CURRAN: But ultimately, you agree that
5 there's nothing in the Mental Hygiene Law that specifies
6 the procedure you're suggesting to this court, right?

7 MS. REA: Oh, I - - -

8 JUSTICE CURRAN: It would have to be sort of
9 contrived by both OMH and - - - and DOCCS to make it work,
10 because as the other side points out, there is no notice to
11 what the sentencing court, to the DA's office. It's only
12 to the AG's office. So you're looking to have a procedure
13 devised by the court outside the legislation?

14 MS. REA: Absolutely not. Your Honor, I must
15 disagree. Once something was enacted and the - - - and the
16 definition of hospital, which was not before, including an
17 Article 10, then every - - - the release from a
18 correctional facility or an Article 10, the same
19 requirements come in.

20 JUSTICE CURRAN: When you say the same
21 requirements, forgive me for interrupting you again, but
22 that's where I want to drill down a little bit. That's for
23 registration purposes. That is the hospitals. I
24 understand it now has an obligation to notify the person
25 that you have to register. But in terms of the procedure

1 that's specified in SORA for involving the DA's office, the
2 sentencing court and the like, that's not specified in MHL
3 statute.

4 MS. REA: It's not - - - you don't need a
5 separate notice under MHL because it all is under SORA. So
6 the - - - the notice that the People mentioned often - - -
7 often. First, I'm going to go to the registration. Yes, C
8 and E referred to registration and DCJS, etcetera. But
9 they would never be registration ten days from release to a
10 hospital under the People's reading because they would have
11 been - - - they would have had a SORA hearing at the end of
12 their incarceration.

13 JUSTICE CURRAN: Under your theory, as I'll call
14 it - - -

15 MS. REA: The statute, I believe, Your Honor.

16 JUSTICE CURRAN: The statute, forgive me,
17 counselor. But under your statutory view - - -

18 MS. REA: Yes, Your Honor.

19 JUSTICE CURRAN: There's something in Article 10
20 that provides that somehow the person be released from an
21 Article 10 facility that's going to be then the - - - the
22 District Attorney's office is going to be notified and the
23 sentencing court is brought involved. Forgive me, I did
24 not see that in Article 10 or in SORA. If you can point
25 that to me - - -

1 MS. REA: Absolutely.

2 JUSTICE CURRAN: - - - I'd be grateful.

3 MS. REA: Let me walk you through it. Under 168
4 - - - okay. The notice registration under C and E is
5 clear, ten days from release from a correctional facility.
6 No hospital, no problem. Once you get to 1 - - - 168-m,
7 there it says there's no express - - - let me go back one
8 second. There is only one express stated notice in SORA to
9 the DA, and that is by the sentencing court after it has
10 received the recommendation of the Board. Whether that
11 recommendation - - - and the Board has done its
12 recommendation 120 days from release into the community.
13 So we're back - - - whether you're released from DOCCS or
14 from OMH, you don't need separate things. The same, the
15 statute says so, M says so that by 120 days, the
16 correctional facility - - - the Board will have received
17 from the correctional fac - - -

18 JUDGE TROUTMAN: So your argument is the
19 infrastructure is put in place, whether it's the penal
20 institution or the secured facility?

21 MS. REA: And speci - - - yes, Your Honor. It's
22 specifically after the enactment of SOMTA by changing the
23 definition. Thank you.

24 JUDGE CANNATARO: Can I just ask one quick
25 question?

1 MS. REA: And can I have some reply? I forgot to
2 ask for my reply.

3 CHIEF JUDGE WILSON: Yes, we'll save a couple
4 minutes for your reply.

5 MS. REA: Thank you, Your Honor.

6 JUDGE CANNATARO: Quick question. Those fifty-
7 nine people who were released from Article 10 management,
8 did they get their initial SORA risk assessment when they
9 were leaving incarceration or when they left facilities?
10 Do you know?

11 MS. REA: No, because it's under - - - this is
12 under the OMH, the report from the - - - from the
13 commissioner of OMH puts these numbers out and no, you
14 don't have that. But it could be that some of these people
15 were out, you know, let's say they were out in the
16 community on post-release supervision, whatever. So they
17 did have a level. What's important in adding - - - we're
18 adding in the hospital, it has to be the continuous - - -
19 the - - - the end of the continuous custody, because if not
20 all the rest, you would have to take out the word hospital
21 from 168-c from 168-e, etcetera, etcetera. Thank you.

22 CHIEF JUDGE WILSON: Thank you.

23 MR. MAGNETTI: Good afternoon, Your Honors, and
24 may it please the court. My name is Shane Magnetti and I
25 represent the Office of Darcel Clark. SORA plain - - -



1 JUDGE TROUTMAN: Is there a state infrastructure
2 already in place to do the assessment upon release from the
3 secured facility as opposed to from a penal institution?

4 MR. MAGNETTI: No, Your Honor. And I think one
5 fact that has gone overlooked in our discussion of that is
6 the fact that the date of an offender's release from civil
7 confinement is inherently an uncertain date that the
8 parties cannot know of 120 days in advance. An offender
9 could be released from civil confinement at a number of
10 different points throughout the proceeding. It could be if
11 the CRT decides not to go forward. It could be if the
12 offender prevails at a probable cause hearing. It could be
13 if he prevails at trial.

14 But none of those are scheduled 120 days in
15 advance, like release from prison is. So using that as a
16 benchmark, the way that works out practically is that when
17 the offender does become slated for release from
18 confinement, there is a much shorter window of time for the
19 Board to gather materials that are relevant to the
20 assessment. There's a much shorter window of time for the
21 offender to gather their own rebuttal evidence and
22 formulate counterarguments. And there's a shorter window
23 of time for the People to gather evidence that they might
24 need to meet their burden.

25 JUDGE RIVERA: And can I ask, in some of those

1 examples, would they be released before the hearing? For
2 example, an adjournment?

3 MR. MAGNETTI: Released from the Article 10
4 facility? Yes, Judge.

5 JUDGE RIVERA: Yes.

6 MR. MAGNETTI: It could happen that if - - - if
7 the parties don't have notice of the release and that the
8 division only finds out like ten days before release is
9 imminent.

10 JUDGE RIVERA: But in response to Judge Troutman,
11 you're saying that there is no governmental mechanism now
12 in place to address that particular period of time?

13 MR. MAGNETTI: That's correct. Unlike in Article
14 10, where the attorney general could file a securing
15 petition or where the SOMTA court could delay the
16 offender's release, there's no equivalent mechanism where a
17 SORA court could stay an offender's release from the
18 Article 10 facility pending the SORA determination.

19 JUSTICE CURRAN: It'd probably be in two separate
20 counties in any event, more than likely since most of these
21 facilities are up in our neck of the woods and the Third
22 Department.

23 MR. MAGNETTI: That's absolutely correct, Your
24 Honor.

25 JUSTICE CURRAN: What happens, for example, you

1 mentioned just a second ago there was a case, I think, that
 2 came to this court a few years ago called Donald G. And
 3 the basic fact pattern was it went to trial in Auburn, New
 4 York. And the individual on Article 10 was found to be not
 5 to - - - not so dangerous as he had to be confined. So the
 6 state had to apply for a stay to hold him in there on the
 7 Article 10 for the appeal. But theoretically, that
 8 individual could have walked out of a courtroom, as I
 9 understand it, without any SORA adjudication whatsoever; am
 10 I correct?

11 MR. MAGNETTI: You're correct, Your Honor. The
 12 individual could have walked out without one. At that
 13 point, I will say it's not that these sex offenders are
 14 just escaping into the ether altogether without a hearing.
 15 It's that when they leave these facilities and the parties
 16 to the SORA hearing have such short notice of it, the
 17 mandate is to conduct the hearing under section 1(8) of the
 18 Correction Law of 168 of the Correction Law, which requires
 19 the court to proceed expeditiously. And the term
 20 expeditiously does not contemplate that same 100 day - - -
 21 120-day window that you would find in 168-m.

22 JUDGE SINGAS: So how would an offender account
 23 for rehabilitation in those circumstances?

24 MR. MAGNETTI: By a modification petition, Your
 25 Honor. Rehabilitation and much of the factors that the



1 defendants have identified here are all speculative factors
2 that might not ever happen.

3 CHIEF JUDGE WILSON: Are there no circumstances
4 where an inmate is released from DOCCS custody without 120
5 days' notice?

6 MR. MAGNETTI: Are there no circum - - - I'm
7 sorry, could you repeat the question?

8 CHIEF JUDGE WILSON: Sure. Are there inmates who
9 are sometimes released from DOCCS custody without that
10 having been determined more than 120 days in advance?

11 MR. MAGNETTI: I'm not sure if there are inmates
12 who are released.

13 CHIEF JUDGE WILSON: How about clemency? Do you
14 get 120 days' notice?

15 MR. MAGNETTI: I'm not sure - - -

16 CHIEF JUDGE WILSON: Pardons?

17 MR. MAGNETTI: - - - how that works in the event
18 of clemency - - -

19 CHIEF JUDGE WILSON: Do you know if more than
20 fifty-nine people have been granted clemency or pardoned?

21 MR. MAGNETTI: I'm sorry?

22 CHIEF JUDGE WILSON: Do you know if - - - how
23 does that number compare to fifty-nine? We're talking
24 about a very small population here, I understand. Would
25 you agree with that?

1 MR. MAGNETTI: It is a small population, Your
2 Honor. I would say that - - -

3 CHIEF JUDGE WILSON: So what I'm trying to find
4 out is, is there a comparably small population, or maybe
5 even a somewhat larger population, where you don't have 120
6 days' notice and you may also have an issue in trying to
7 get the - - - the wheels of SORA moving?

8 MR. MAGNETTI: Well, that may well be, Judge, but
9 I think the difference is that when an offender is released
10 from DOCCS custody, they still have jurisdiction over that
11 defendant. Whereas when these offenders are being released
12 from OMH, there's simply no mechanism that would allow the
13 court too, as the visiting Justice - - -

14 JUDGE CANNATARO: Well, what about you mentioned
15 that section of 168, the expeditiously as possible section.
16 I think this might be the same question that the Chief
17 Judge just asked you, but this is a small population that
18 sort of evades the normal course of processing, of
19 adjudication of a risk level. But there's a provision in
20 there, a sort of catch-all, to account for these strang - -
21 - I don't want to use improper adjectives, but for these
22 situations where the normal way of doing things for
23 whatever reason doesn't work out. That seems to be exactly
24 what that section is addressing.

25 MR. MAGNETTI: The - - - well, yes, it is sort of

1 a catch-all to encompass the offenders who are not within
2 that 120-day window. But the concern that I have with that
3 section is that those offenders are at more risk of being
4 inaccurately classified than they are, as if they were
5 afforded the 120-day window that they would - - -

6 JUDGE CANNATARO: Why is that? Because all the
7 materials have to be gathered up quickly?

8 MR. MAGNETTI: Because of the condensed time
9 frame.

10 JUSTICE CURRAN: And under that section, this is
11 where I'm confused, maybe - - - maybe I'm not getting it.
12 Thank you. As expeditiously as possible. I've got that
13 statute in front of me. But there again, there's no
14 provision for the Board to have done its work because it's
15 only after the Board does its work does the court then have
16 a compulsory, you know, a requirement to act? So the Board
17 hasn't been involved. I suppose the DA could be notified
18 by the sentencing court. But let's assume the person has
19 never gone through the Board. That expeditiously as
20 possible doesn't involve the Board. The Board is supposed
21 to go before the court, right? I mean, so how is the Board
22 involved under that subsection 8, or whatever it is, that
23 you pointed us to?

24 MR. MAGNETTI: Well, the way ultimately that I
25 think the Board and the parties to the SORA hearing get



1 notified when the hearing proceeds expeditiously is that
2 the offender has to send an updated registration form to
3 the division. The division then circulates that form to
4 the law enforcement agencies having jurisdiction. So
5 that's the way that they find out about it. But the issue
6 is by that time, that offender might already be out in the
7 community and expeditiously is meant to minimize the amount
8 of time that these offenders are out in the public,
9 interacting with people without any registration or
10 obligation requirements in place.

11 CHIEF JUDGE WILSON: Or as possible is meant to
12 qualify the expeditiously.

13 MR. MAGNETTI: Yes, to minimize the amount of
14 time they're in the community, Judge.

15 JUSTICE CURRAN: Counsel, let me take you to the
16 twigs, as I called them a minute ago. The appellant here
17 argues that even though - - - as I read the brief, the
18 brief seems to say it's because Mr. Boone had been
19 transferred to the custody of a secured treatment facility,
20 that that was the activating point. Today, I heard an oral
21 argument from Boone's counsel that, no, it's when the CRT,
22 the Care Review Team, sends a letter saying, we're looking
23 at your thing, your situation here, sir. What do you think
24 of that being the date as opposed to the transfer to a
25 different type of confinement? That's where I thought the

1 Boone appeal was going was because he was confined to
2 another facility, he was still confined. But now if it's
3 the moment that person gets a letter, somehow stays the
4 SORA review, does that stay the Board's review? So I'm not
5 sure how that would work.

6 MR. MAGNETTI: Well, Your Honor, the - - - I
7 think the statute lists a few different points at which it
8 is appropriate for the court to conduct the SORA hearing.
9 The plain - - - the plain language of the statute
10 authorizes the court to proceed thirty days prior to an
11 offender's discharge, parole, or release.

12 JUSTICE CURRAN: And that's all set forth on the
13 DOCCS website, correct?

14 MR. MAGNETTI: That is all in 168-n(2) and n(1).

15 JUSTICE CURRAN: In terms of what those dates
16 are, I mean.

17 MR. MAGNETTI: Oh, well, that's correct.

18 JUSTICE CURRAN: Every time we do an appeal at
19 the Appellate Division, we list what the person's ID number
20 is, what their expected release date is. There might be a
21 conditional release date, as there was for Mr. Boone.
22 There might be a maximum expiration date as there was for
23 Mr. Cotto. So that is sort of the date that seems to be
24 set by DOCCS. And it's a DOCCS statute that we're
25 interpreting under SORA, correct? DOCCS related statute, I

1 should say.

2 MR. MAGNETTI: That's absolutely right, Judge.
3 And the language discharge, paroled, or released would
4 suggest that any of those instances are an appropriate time
5 for the court to proceed. And in these cases, both of
6 these - - -

7 JUSTICE CURRAN: Both terms of art that tie into
8 other portions of the Correction Law, if you look at
9 section 72, it defines confinement. If you look at section
10 201, it talks about release, 203, I think it is, that
11 actually talks about release for sex offenders. So when
12 DOCCS talks about conditional release and they put it on
13 their website, it's a very specific sort of meaning,
14 correct?

15 MR. MAGNETTI: Yes, it is, at least as the way
16 DOCCS understands it. It's released from DOCCS custody.
17 And in these cases, defendants Boone and Cotto were both
18 discharged from prison. Both of them were placed on
19 parole, and both of them were ultimately released from
20 DOCCS custody altogether.

21 JUSTICE CURRAN: And under the due process
22 argument, would it be possible for the defendants here - -
23 - the appellants here, forgive me, to be able to argue that
24 the most meaningful time would be at the end of, for
25 example, Mr. Boone, his twenty-year PRS? Shouldn't it - -

1 - if it's going to be meaningful, let's wait until the end
2 of PRS.

3 MR. MAGNETTI: Well, Judge, I think that argument
4 misunderstands exactly what the meaningful timing
5 requirement is. The meaningful timing requirement simply
6 requires that the offender has an opportunity to be heard
7 prior to the deprivation of the liberty interest. It does
8 not guarantee an offender the right to delay his or her
9 hearing indefinitely in hopes that more favorable evidence
10 might materialize at some point in the future. And if it
11 does, then the answer is a modification petition. Both of
12 these offenders, if those circumstances ever do come to
13 pass - - -

14 JUDGE TROUTMAN: But what about the concern
15 raised about the burden at that point of modification
16 versus the original designation?

17 MR. MAGNETTI: The burden does not matter in this
18 instance, because here these defendants already received an
19 initial classification hearing at which they afforded the -
20 - - all of the due process rights they were entitled to, at
21 which they were able to contest the accuracy of the Board's
22 recommendation and while the state still bore the burden of
23 proof. The difference in burdens of proof becomes relevant
24 if, such as in David W. or Doe v. Pataki, the offender is
25 only afforded an opportunity to be heard at a time when the

1 burden of proof now rests with him or her for - - - for
2 example, that's why the modification petition was not
3 sufficient to remedy the due process harm in those cases
4 because they never had notice or an opportunity to be heard
5 in the first instance.

6 JUDGE CANNATARO: And the fact that the burden of
7 proof is a different one in modification, that shouldn't
8 factor in at all?

9 MR. MAGNETTI: Well, it is relevant, Your Honor.
10 But I do think it's worth pointing out that in terms of
11 arguing for a downward departure and in terms of seeking
12 reclassification, the burden is still on the defendant in
13 both of those instances. And I would also just like to
14 point out that I don't think it would be right to say that
15 these - - - these courts abused their discretion in
16 declining to grant an indefinite adjournment here. In this
17 instance, both of these defendants were presumptive level 3
18 sexually violent - - -

19 JUSTICE CURRAN: We - - - I mean, I'm sitting on
20 the Court of Appeals, my - - - probably my one and only
21 time, but the - - - but in terms of abuse of discretion,
22 that would only be for this court if we found a legal error
23 as a matter of law. That's the only way we could reach
24 that.

25 MR. MAGNETTI: That that's correct, Judge. And

1 in this instance, these defendants were both presumptive
2 level 3 sexually violent and predicate sex offenders.
3 There was no guarantee that either of them would be
4 confined. And there's also no way to be sure that the SORA
5 courts could ultimately secure their appearances at a SORA
6 hearing if they were confined and then released from OMH
7 custody. And unless Your Honors have any - - - any further
8 questions, I will rest on my brief and ask that you affirm.

9 CHIEF JUDGE WILSON: Thank you.

10 MR. MAGNETTI: Thank you.

11 MS. GEOGLIS: Thank you. I'd like to just bring
12 it all the way back to Your Honor's initial question to our
13 adversary regarding the infrastructure that is in place or
14 not in place. I think it's important to understand that
15 the Correction Law 168 as written, once SOMTA amended the
16 definition of hospital, it put DOCCS and OMH on exactly
17 equal footing. There is no provision in the Correction Law
18 that mandates that DOCCS notify the Board in any special
19 way that doesn't equally apply to OMH and a release from a
20 secure psychiatric facility.

21 JUDGE CANNATARO: Is it your position that when
22 that change was made, that some accounting was made for the
23 timelines? Because the argument we heard is that release
24 from DOCCS fits very nicely within the timelines because
25 you know when the release date is, for the most part, and

1 other factors that just make it a sort of more seamless
2 process, that arguably don't exist when you're talking
3 about one of these facilities.

4 MS. GEOGLIS: When the - - - one thing that I
5 think is meaningful is if you look at the timelines in
6 SOMTA, they are staggered in such a way so that ideally if
7 they're followed, those decisions about whether or not to
8 seek civil management are made before the deadlines that
9 are triggered under the Correction Law. Moreover, the idea
10 that - - - that you are unable to determine when an
11 individual is going to be released in advance when you're
12 talking about Article 10 is a red herring. Every provision
13 that enables an individual that is subject to civil
14 management to be released indicates that any release has to
15 be in accordance with the provisions of any other law, such
16 as the Correction Law. It's also the case - - -

17 JUDGE GARCIA: So is it your point in one of his
18 scenarios where the person could be released and they don't
19 have 120 days, that they could hold the person 120 days
20 while you do this proceeding?

21 MS. GEOGLIS: No, the same way that if an
22 individual is subject to release from DOCCS and they
23 haven't followed the 120 days. Chief Judge Wilson, you
24 asked about are there instances where DOCCS doesn't have
25 120 days' notice, and there certainly are. Where, for

1 example, an individual is granted parole release, where an
2 individual may have lost their good time and then been
3 given it back. And you regularly see that the Board is
4 able to pull the information together and ideally the
5 hearing will be held - - -

6 JUDGE GARCIA: We're talking about an extra risk
7 here, right? I think somebody described it earlier as
8 level 3 plus. So anyone who's going into this process,
9 there have already been indications that they are so much
10 of a risk that they are not able to be released into the
11 public, right? And now all of a sudden for that small
12 class, so I think it's a very different class than those
13 that are getting pardoned or getting clemency. These are
14 people that DOCCS considers so dangerous they can't be
15 released when their sentence is up. They're being released
16 without 120 days, not another person who's in DOCCS, but
17 this subgroup of offenders. Does that make a difference?

18 MS. GEOGLIS: The only way that they would be
19 released without any sort of advance notice is if - - -

20 JUDGE GARCIA: Enough advance notice.

21 MS. GEOGLIS: Without enough advance notice is if
22 an independent court has found based on evidence that the
23 individual actually isn't as dangerous as perhaps the state
24 suggested by filing a petition.

25 JUDGE GARCIA: All right. Let's say they are

1 still a presumptive level 3 sexually violent offender. Do
2 you know how many of those are released without sufficient
3 time to go through this process?

4 MS. GEOGLIS: I don't know how many. I do know
5 that in the entirety of the enactment of SOMTA, in terms
6 of, for example, where there wasn't enough for probable
7 cause following a petition, that happened in five cases.
8 It's also the case that if an individual has any sort of
9 parole or post-release supervision as part of their penal
10 sentence, then DOCCS does and can impose as a condition
11 that they can only be in the community if they have a risk
12 level, in which case they could, for example, be taken back
13 into DOCCS custody and put into a residential treatment
14 facility pending the SORA hearing.

15 So there are plenty of mechanisms in place. And
16 the legislature could have included in the statute in SORA,
17 no one without a risk level can be in the community. They
18 could have done that. They did not. Instead, in multiple
19 instances throughout the statute, they created
20 circumstances and instances where individuals who do not
21 have a risk level are still required to register, they're
22 still subject to law enforcement oversight, and they're in
23 the community for potentially brief periods of time without
24 a risk level.

25 CHIEF JUDGE WILSON: Thank you.

1 MS. GEOGLIS: We ask that you reverse. Thank
2 you.

3 MS. REA: So I'll add just a few points. The - -
4 - Your Honor, welcome to the Court of Appeals. The - - -
5 the - - - whether it's the DOCCS notifies the Board. OMH
6 notifies the Board under SORA. It says so, and under the
7 SOMTA timing, as we say, they look in tandem. You should
8 know all this. At the time of the SORA hearing. We should
9 know this and the court shouldn't interpret and - - - and
10 misread the clear part of the - - - of SORA because somehow
11 the OMH is not getting its act together under SOMTA. And
12 the numbers in the most recent report from the Attorney
13 General shows that at the beginning of SOMTA they didn't
14 decide - - - they would decide whether petition was going
15 to be filed maybe eight days before the person was released
16 from DOCCS.

17 Now it's thirty days. The system, it's working.
18 The same, as my colleague said, the same obligations apply
19 for DOCCS and for OMH, and they have - - - OMH has a very
20 small population. As far as the - - - the timeline on
21 when, is the - - - the reason that the - - - your - - - the
22 timeline the court should adjourn when it goes from the
23 CRT, from the - - - the multiple disciplinary group to the
24 CRT review, is that is when SOMTA decides that our client
25 is a respondent. He is then an Article 10 proceedings.

1 Now, in the case of Mr. Cotto, it's important
2 that that be the time, because if not, the court can, just
3 as it did with Mr. Cotto, deny an adjournment, right? Mr.
4 - - - the court knew. The SORA court knew. He was
5 referred to the CRT. The CRT had asked for a psych
6 evaluation. That was key to whether or not there was going
7 to be a petition. And the court said, no. That kind, it
8 can't happen. It shouldn't happen, because when he became
9 an Article 10, and an Article 10 respondent, that was the
10 time the court had - - -

11 JUDGE GARCIA: Counsel, does - - - does the court
12 have any authority - - - I don't know the answer to this,
13 but does the court of any authority to assign a conditional
14 risk level?

15 MS. REA: I think that that's some - - - my own
16 experience is that some courts do and some courts don't. I
17 don't know which - - -

18 JUDGE GARCIA: Yeah, sometimes when there's an
19 adjournment and they haven't decided something, they'll
20 agree, right? That will give this - - - I think I've seen
21 this again. But why wouldn't that be the answer, if that's
22 possible here? You give a conditional risk level. If the
23 - - - this protects the public, if the person gets out
24 without notice, they have this conditional risk level. If
25 they don't, you come back in, you have a de novo hearing

1 and you get a different risk level.

2 MS. REA: I mean, I think that, you know, if the
3 court wants to find a way here that maybe that's a
4 possibility. That's just simply the - - - the statute
5 doesn't say that. And what SORA doesn't do is provide a
6 mechanism to vacate a prior - - -

7 JUDGE GARCIA: No, but this one's conditional.
8 So you don't have to be - - -

9 MS. REA: As long as it's not on the internet,
10 Your Honor, that is because once that bell is rung, you
11 can't unring it. And again, I will just say in my time
12 that let's face it, SORA is not a lenient statute in New
13 York. The - - - you know, you register for life. You can
14 never get off. The legislature was not being lenient. It
15 was being very severe. Nevertheless, it contemplated times
16 where it doesn't all work according to the - - - to the
17 thirty days, etcetera, by enacting 1(8), by allowing sex
18 offenders from - - - from - - - with a federal conviction
19 to come in. Therefore, it - - - it is a severe statute.
20 It has contemplated that. And we would ask that the court
21 - - -

22 JUDGE RIVERA: So can - - - before you sit down,
23 since you said what is extremely problematic is if they're
24 on the website. So is it your position, I would ask this
25 in the prior case, that a court could not order this



1 condition prior to while this period is pending?

2 MS. REA: I think the court one, could ask that
3 it be, and I have just to suspend public notification. I
4 don't think it's clear whether that exists in the statute.
5 But if that's a concern - - -

6 JUDGE RIVERA: But I'm saying is your position
7 that the court could not order that they be placed on the
8 website with the possibility of later on their removal from
9 the website?

10 MS. REA: I think that that - - -

11 JUDGE RIVERA: Is that irreparable injury? Is
12 that what your point was before?

13 MS. REA: I think that's the greatest injury.
14 It's the greatest injury once it's on the website and - - -
15 and - - -

16 JUDGE GARCIA: But what's on the website? The
17 fact that your - - -

18 MS. REA: The name - - -

19 JUDGE GARCIA: No, no, no.

20 MS. REA: Oh, excuse me.

21 JUDGE GARCIA: The fact that they're a sex
22 offender or the fact that they're confined in a facility?

23 MS. REA: They're both - - - it's both on the
24 website when they are of no risk to the public. We have to
25 read this, you know, read the statute to further the

1 purpose of the statute. The purpose of the statute now is
 2 not to have a grade for everybody who's a sex offender.
 3 It's to protect the public. SORA's put it in place. SOMTA
 4 is the one that delays on purpose. It has the same
 5 purpose. It's to protect the public and therefore finds
 6 that sometimes a sex offender at the end of his sentence
 7 may need to delay release for further treatment. And I
 8 think that the - - - it is our position that the statute is
 9 clear on that, and that the SORA hearing should be at the
 10 end of the continuous custody into the - - - into the
 11 community. Thank you, Your Honor.

12 CHIEF JUDGE WILSON: Thank you.

13 (Court is adjourned)

14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Nathaniel Boone, Albert Cotto v. People, Nos. 8, 9 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Christy Wright

Agency Name: eScribers
Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020
Date: January 16, 2024