

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : UNION COUNTY
SUMMONS NO. X-042792
App. Div. Dkt. No. A-6384-04T1

STATE OF NEW JERSEY, :
 :
 v. : Transcript of
 : Hearing
 THOMAS R. MAC DERMANT, :
 :
 Defendant. :

PLACE: Union County Courthouse
2 Broad Street
Elizabeth, New Jersey

DATE: Thursday, June 23, 2005

BEFORE: HONORABLE WALTER R. BARISONEK, A.J.S.C.

TRANSCRIPT ORDERED BY:

ALEXANDER W. BOOTH, ESQ. (Brownstein Booth &
Associates)

APPEARANCES:

STEVEN KAFLOWITZ, ESQ.
Assistant Union County Prosecutor

ANTHONY N. PALUMBO, ESQ. (Palumbo & Renaud)
Attorneys for Defendant

APD- **ED** **DIVISION**
WILLIAM DONEGAN, ESQ.
Assistant Union County Counsel

SEP 16 2005

ANTHONY MACK, ESQ.
Borough of Roselle Municipal Prosecutor

J. Jeffrey P. Thomas
ACTING CLERK

FREDERICK D. WOLFF, III, C.S.R.
Official Court Reporter
Union County Courthouse
2 Broad Street
Elizabeth, New Jersey

1 Thursday, June 23, 2005

2 This is State of New Jersey v. Thomas

3 MacDermant, Summons X-042792. This is a matter that
4 originates out of the Roselle Municipal Court for a
5 D.W.I. conviction under 39:4-50. Notice of appeal has
6 been filed by the County of Union pursuant to Rule
7 3:23-2 as an aggrieved party.

8 Basically as I understand the issue, Mr.
9 MacDermant was sentenced to 180 days in the Union
10 County Jail by Judge Jones out of the Roselle Municipal
11 Court. He was brought to the county jail, from the
12 county jail was transported to Delaney Hall, was
13 subsequently released from Delaney Hall on the wristlet
14 program and there was an anonymous letter sent to the
15 Municipal Court in Roselle as well as to the municipal
16 P.J. who is Judge Gross, for Union County -- P.J.
17 meaning presiding judge -- who then in turn referred
18 the matter to me alleging that there was an improper
19 transfer to Delaney Hall and then an improper release
20 to the wristlet program, monitoring program is what
21 Delaney Hall calls the program, and that Judge Jones
22 then directed that the defendant be apprehended,
23 brought back to the Union County Jail and be
24 incarcerated at the Union County Jail; not be permitted
25 at Delaney Hall, not be permitted to be on a wristlet

1 program.

2 I was contacted by Mr. Kologgi. Mr. Kologgi
3 asked me to intervene. I said I had no authority to
4 intervene because there was nothing pending before the
5 Superior Court in Union County. It was purely an issue
6 between Delaney Hall and -- I forget the gentleman's
7 name who is in charge of it, the warden at the Union
8 County Jail, Judge Jones and Mr. MacDermant.

9 And I never heard again until I received a
10 telephone call I think from you yesterday Mr. Palumbo,
11 if I remember, yesterday.

12 MR. PALUMBO: Yes, Judge.

13 THE COURT: Advising me that the matter was
14 back before Judge Jones in Municipal Court. She denied
15 a request either to release Mr. MacDermant, to allow
16 for his transfer back to Delaney Hall and her position
17 was he must remain in custody for 180 days in the Union
18 County Jail because it's a mandatory sentence because
19 he's a third offender.

20 Now, there's more information, but the reason
21 I'm doing this is I have Mr. Mack who is representing
22 the municipality calling in so I can get him on the
23 phone. He was not able to appear because he had
24 another court appearance. I told him I'm directing him
25 to at least call here. We'll move into chambers and

1 take his telephone call so he can answer the following.

2 I know Mr. MacDermant. He works for the
3 county. Mr. MacDermant physically has done work in my
4 chambers in his capacity working for the county. I
5 don't have a personal relationship. I've never been
6 with him socially; purely in terms of a relationship
7 with his working within the county itself.

8 I have contacted another court, Morris County
9 in the event that anybody feels it's inappropriate for
10 a judge in Union County, including me, to hear this
11 matter on the basis of the appeal that has been filed
12 by the county. And Mr. Palumbo in behalf of the
13 defendant joins in that appeal as a defendant. The
14 State is an aggrieved party because of the order
15 directing how the warden is to act with respect to
16 Judge Jones' order.

17 So I asked for notice to go to the county
18 prosecutor so I had, so to speak, all the parties in
19 interest here, including Mr. Mack. I don't need to
20 speak to Mr. Mack if somebody else voices any kind of
21 objection, either to a conflict of interest or an
22 appearance of impropriety. I spoke to Judge Bozonellis
23 because I want to get this heard as quickly as possible
24 in the event anybody does object to the matter being
25 heard in Union County. Quite candidly, every other

1 judge is going to be in the same situation as I am in
2 in Union County because of Mr. MacDermant's, the nature
3 of his employment. He doesn't work for the judiciary,
4 works for the County of Union.

5 Mr. MacDermant what's your official capacity?

6 THE DEFENDANT: Bureau chief in charge of the
7 building trades.

8 THE COURT: Bureau Chief in Charge of
9 Building Trades, to obviously get involved with any
10 alterations or improvements including judges' chambers
11 in the courthouse. I have disclosed for the record my
12 involvement with Mr. MacDermant. I do know him from
13 that capacity. He was involved with respect to
14 renovations in my chambers in the past, and I'll ask
15 everybody, first of all does Mr. MacDermant have any
16 problem in terms of what I have disclosed in terms of
17 me dealing with the case?

18 THE DEFENDANT: No, sir.

19 MR. PALUMBO: No, Judge.

20 THE COURT: Mr. MacDermant you understand
21 everything I have said?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Mr. Palumbo, any objection from
24 you?

25 MR. PALUMBO: No, Judge.

1 THE COURT: Mr. Donegan?

2 MR. DONEGAN: No, your Honor.

3 THE COURT: Mr. Kaflowitz?

4 MR. KAFLOWITZ: No, your Honor.

5 THE COURT: All right. We need to hear from
6 Mr. Mack now, is our next step. I told him to call in.
7 It's now 20 of. For once everything worked out. As
8 soon as we get the call.

9 MR. PALUMBO: If we -- may I supplement a few
10 things? I think, I'm not sure if advertently or
11 inadvertently left out. First one being Mr. MacDermant
12 was not sentenced immediately to the county jail. He
13 was --

14 THE COURT: I left that out. I left that all
15 out. I'll supplement once I hear there is no issue
16 concerning me hearing --

17 MR. PALUMBO: Last thing that was not
18 mentioned was the fact that the order wherein Judge
19 Jones changed her decision to no parole, no satellite
20 monitoring and no Delaney Hall and she had never
21 addressed any of these issues before. That order was
22 done without Mr. MacDermant being present and without
23 his attorney being present. Apparently it was done
24 from the bench, sui sponte.

25 THE COURT: You mean the last appearance?

1 MR. PALUMBO: Yes.

2 THE COURT: I thought you were in court.

3 MR. PALUMBO: No, no. I'm talking about when
4 she sentenced, when she took him out of the Delaney
5 Hall program.

6 THE COURT: You know what, we'll get into all
7 that. I didn't put every fact on because I want to
8 make sure I can hear it first of all. Okay?

9 MR. PALUMBO: Lastly Judge, one of the things
10 I asked for was that he be released on bail pending an
11 appeal and I went there on a reconsideration of
12 sentence Tuesday along with a representative of the
13 County Counsel's office requesting that and we went
14 there again today renewing our argument before Judge
15 Jones. She said if we can come up with some other
16 arguments she might consider them. Went there 12:30,
17 she again denied our application.

18 THE COURT: The appeal I assume I have is
19 from her order on Tuesday of this week which denied
20 bail pending appeal. The appeal has since been filed.
21 The appeal deals with her directing that Mr. MacDermant
22 be maintained in the county jail physically as opposed
23 to Delaney Hall. Are you appealing the issue
24 concerning the monitoring program?

25 MR. DONEGAN: Your Honor, I'm appealing

1 anything that would tie the hands of the warden of the
2 Union County Jail, and if he determined that he was
3 eligible for the satellite monitoring program. I'm
4 told by the county jail that that's a form of
5 in-custody status, although he's out, it's a form of
6 in-custody status.

7 THE COURT: That's a whole separate issue.
8 We'll address it later on.

9 MR. DONEGAN: A little housekeeping issue.
10 In order to perfect this appeal, I noticed there is a
11 mistake on the moving papers, it's 39:4-50 I'm moving
12 under, not 4-10. Ask the court's permission to amend.

13 THE COURT: It will be amended. I picked
14 that up.

15 MR. DONEGAN: Thanks, Judge.

16 THE COURT: D.W.I. convictions.

17 All right so just need Mr. Mack to call in.
18 Basically, I'll say the same thing I said out here, see
19 what his position is. If he says he does not want a
20 judge in Union County to hear it, I am prepared to send
21 it up to Morris County. I spoke to Judge Bozonellis,
22 he's agreed to assign it. The only reason I did it
23 before is because we're dealing with a liberty issue.
24 I want to get it heard as quickly as possibly and have
25 all my ducks so to speak lined up.

1 MR. PALUMBO: Might also mention concerning
2 Mr. Mack, I spoke to him this morning and he had
3 requested that he be allowed to waive his appearance
4 and that he --

5 THE COURT: I said no.

6 MR. PALUMBO: That he consented to whatever
7 decision the court decided to impose.

8 THE COURT: I said I want him. I don't care
9 about his appearing, dealing with the decision as a
10 matter of law, I care about what he has to say in terms
11 of the alleged appearance of impropriety or conflict
12 because that can't just be waived.

13 All right that has to be specifically
14 addressed. That's why I had Mr. MacDermant over here
15 because case law says he has to specifically be
16 addressed not just through counsel.

17 (The following takes place in chambers.)

18 THE COURT: Mr. Mack, I have you on speaker
19 phone. I have the court reporter in here so we're on
20 the record. I have Mr. MacDermant in here, the
21 defendant. I have Mr. Donegan from the Union County
22 Counsel's Office. I have Mr. Palumbo,

23 MR. DONEGAN: Mr. Kaflowitz from the
24 Prosecutor's office will be here in a moment.

25 THE COURT: Mr. Kaflowitz will be here in a

1 moment.

2 A VOICE: He's coming in now.

3 THE COURT: Here is the issue. Mr. Palumbo
4 represented to me on the record that you were willing
5 to be bound as the representative of the municipal
6 court, as prosecutor, since this case originated out of
7 Roselle, in terms of any legal argument and agreed to
8 waive your appearance since we have both the County
9 Prosecutor here and a representative from the County
10 Counsel.

11 The issue that I needed to address with you
12 on the record has to do rather with one of an
13 appearance of impropriety which doesn't necessarily
14 remove a judge from hearing a case, and/or an
15 allegation by anybody that there is a direct conflict
16 with a judge, meaning me in Union County hearing this
17 matter now on a quick notice without record or
18 transcript.

19 Basically what that is, so you understand is
20 Mr. MacDermant is a county employee, and his
21 responsibility is to supervise all the trades within
22 buildings and grounds. That in fact involves
23 renovations and repairs to judges' chambers. I do not
24 know Mr. MacDermant personally except through that
25 relationship in the county where he comes in and does

1 work within the building. I have never been out with
2 him socially, don't know his family. And it's purely
3 that type of relationship, if you call it a
4 relationship. But I know him in that capacity I guess
5 I should say.

6 The County Counsel's Office, Mr. Kafowitz
7 from the Prosecutor's Office, Mr. Palumbo, his attorney
8 for Mr. MacDermant, Mr. MacDermant himself have waived
9 any problem with me hearing the case. I advised them
10 in case anybody had a problem I have already made a
11 call to Morris County. If there is an issue
12 concerning -- it's going to be the same issue with any
13 judge in Union County hearing this case, so I said if
14 anybody had an issue, doesn't want a judge in Union
15 County, specifically me or any other judge to handle
16 the case, I would refer the matter for immediate
17 hearing to Morris County.

18 What's your position on this issue?

19 MR. MACK: Well, I don't have any direct
20 knowledge that there would be any conflict and I don't
21 think that it necessarily is a direct appearance of
22 impropriety.

23 THE COURT: Okay.

24 MR. MACK: I have no objection to it.

25 THE COURT: The other issue is do you want to

1 say anything on the record with respect to the pendency
2 of the matter from a legal standpoint? The issue is
3 does the jail have authority to send Mr. MacDermant to
4 Delaney Hall, number one, and number two, do they have
5 a right to put him on a wristlet program and should he
6 be permitted bail pending any appeal and actually I
7 have agreed to do the hearing today on the appeal that
8 has been filed on this case, even though I don't have a
9 transcript because I'm familiar with the record and
10 familiar with Judge Jones' ruling.

11 Do you want to be heard on any of those
12 issues?

13 MR. MACK: Let me just ask a question. So
14 then actually the way that the matter is before you
15 right now is basically -- well, is on an expedited
16 appeal basis?

17 THE COURT: Yes, it is.

18 MR. MACK: I just wanted it clear exactly how
19 it was before you. Then I have submitted a brief in
20 opposition or response to the County Counsel's brief in
21 which Mr. Palumbo joined and that was my position.

22 At this point, at the time of the hearing in
23 Municipal Court I stated what my position was on the
24 brief, but essentially submitted to Judge Jones'
25 position. At this point I'm willing to submit to the

1 court on any decision.

2 THE COURT: That's -- my recollection of that
3 position was the judge had authority, because of the
4 D.W.I. statute, to incarcerate for 180 days and it
5 should be in the county jail, correct?

6 MR. MACK: Well, that was my understanding of
7 the statute pursuant to 4:50 and 4:51, but you know
8 ultimately my, that was my understanding of the
9 statute, but my ultimate decision on the matter or
10 opinion on the matter lie with the discretion of the
11 court.

12 THE COURT: Okay.

13 MR. MACK: That's what I'm willing -- my
14 appearance can be waived today because I'm unavailable,
15 part-time prosecutor in Paterson Municipal Court as
16 well and I'm here right now. Without me the court
17 would essentially not be able to function this
18 afternoon and I would further submit to the court on
19 your decision.

20 THE COURT: All right. As I indicate, that's
21 why I wanted to do it, have you on speaker phone so I
22 could listen to any argument you wanted to make; also
23 have your wisdom as to whether or not there's any
24 conflict. So, I think we have taken care of everything
25 and obviously based on what you said on the record

1 you're waving your physical appearance and any further
2 argument.

3 All right thanks for your information, and
4 for setting up the call.

5 MR. MACK: Surely. Thank you.

6 THE COURT: Take care.

7 MR. MACK: Bye.

8 THE COURT: Okay we'll go back out:

9 (The following takes place in the courtroom.)

10 THE COURT: As I indicated in chambers, I'll
11 say again out here, there is no transcript because of
12 the nature of the application. Everybody agrees I can
13 hear this because it was really a legal determination.
14 There was no factual dispute as to what occurred. The
15 issue is under the 39:4-50 if Mr. Mack said, whether or
16 not it's a mandatory sentence, whether or not it's the
17 judge who can order where someone is housed, once
18 they're sentenced, and is the wristlet program a viable
19 alternative. So you have really three separate issues.
20 What's the sentence under 39:4-51; number two, once the
21 defendant is sentenced can a judge indicate where the
22 sentence is to be served, and number three, if the
23 judge does not have that right, is the defendant
24 eligible for a wristlet program.

25 Okay, we'll start with you Mr. Donegan since

1 you filed the notice of appeal.

2 MR. DONEGAN: Your Honor, the County's
3 position is pretty simple. We believe that the
4 municipal court judge confused the issue of sentence as
5 opposed to custody. Judge Jones in her capacity as
6 municipal court judge did sentence Mr. MacDermant. The
7 sentence that she imposed initially was legitimate,
8 legal, proper in all respects, your Honor. Mr.
9 MacDermant was sent to the Union County Jail. After a
10 time in the commitment, he was classified, using
11 objective standards promulgated by the New Jersey
12 Administrative Code, and from his classification he was
13 determined to be eligible for another form of
14 in-custody status which was Delaney Hall.

15 THE COURT: Just so the record's clear,
16 because people may not know what Delaney Hall is,
17 Delaney Hall is an alcohol and drug treatment program
18 allegedly part of the Union County Jail, and the
19 State's position is, it's a form of incarceration at a
20 different location from the jail. That's what it
21 means.

22 MR. DONEGAN: Exactly right, your Honor.

23 As your Honor already fleshed out, Mr.
24 MacDermant was further classified to be eligible for a
25 wristlet program technically known as a satellite

1 monitoring program. That program enables county jail
2 officials and I want to stress this, it is county jail
3 officials that monitor the program, run the program and
4 anyone who's on it, in that status is subject to
5 urinalysis, Breathalyzer, whole array of safety
6 features that are included in that custody status.

7 THE COURT: Would you agree with me when the
8 person has a wristlet on, actually satellite monitoring
9 program, is a little different than what we
10 conveniently call the wristlet program tied into a
11 phone system? These actually, the satellite system can
12 show the defendant's location no matter where he be?

13 MR. DONEGAN: Exactly right, your Honor.
14 It's a global position satellite system. Any deviation
15 from the parameters that are set for each unique
16 particular prisoner sets off the alarm or monitor
17 and --

18 THE COURT: But he's physically on the
19 street?

20 MR. DONEGAN: Yes, he is physically. Well,
21 on the street is one way of putting it. If he's
22 subject to being at home that might be his parameter.
23 If he's allowed to go within a certain distance from
24 the device, that's within his parameter. Whatever the
25 jail official decided.

1 THE COURT: I don't think there is any
2 dispute Mr. MacDermant was given a little more freedom
3 than that.

4 MR. DONEGAN: I think that's correct, your
5 Honor.

6 THE COURT: I saw him around. So I know in
7 that sense, it wasn't a home confinement total
8 situation. He was going, I believe, for outpatient
9 treatment. If I remember, he was doing some community
10 service work based on his skills as a contractor and
11 was not physically in the Delaney Hall environment.

12 MR. DONEGAN: Correct, Judge.

13 THE COURT: Is that a frustration of 39:4-50
14 which calls for a mandatory 90 and 90 at a minimum and
15 that's what Mr. Palumbo's talking about initially. The
16 original sentence called for 90 day inpatient -- used
17 to be community service. No longer 90 day community
18 service, now a 90 day residential inpatient program
19 that's approved by the I.D.R.C. And you can do 90 days
20 then in the county jail.

21 Mr. MacDermant was put in a 90 day inpatient
22 program. Again these facts are not in dispute. I
23 think after 22 days, if I remember correctly, he left
24 or was terminated from that program. Judge Jones
25 issued a warrant, brought him back and resentenced to

1 180 days in county, less the 22 days he was in the
2 inpatient program, less the days that he had spent in
3 the county and in Delaney Hall, whatever the total
4 was. So that's the rest of the facts that I have to
5 put on the record.

6 MR. DONEGAN: You know, I believe, Judge,
7 that would be more Mr. Palumbo's argument in terms of
8 this defendant. My position, though, is if --

9 THE COURT: Your argument to me is about the
10 monitoring program. If somebody's out on street in a
11 monitoring program, and the original order provided 90
12 day inpatient, you can't be on the street, you let
13 somebody on a wristlet program say they can go
14 out-patient doesn't that frustrate the intent of the
15 statute?

16 MR. DONEGAN: Again, Judge, I don't think
17 that's my argument. My argument is if the jail
18 classifies you as eligible for this type of housing or
19 that type of housing or this monitoring program, it's
20 considered by jail officials to be in-custody status.

21 THE COURT: What makes it in-custody?

22 MR. DONEGAN: Even though he's on the street?

23 THE COURT: How about my case that went to
24 the Appellate Division, State v. Masterpeter. How do
25 you distinguish that case?

1 MR. DONEGAN: Not familiar with it, Judge.

2 THE COURT: Well I will make you familiar
3 with it. State v. Mastapeter was a murder case, and
4 the second case was -- actually your office was very
5 involved in the case, the guard case as I
6 affectionately call it out of Union County.

7 The particular defendant involved in that was
8 State v. Werthmann, William Werthmann. Masterpeter was
9 a murder case where Mr. Masterpeter had been sentenced
10 by me, he was found, pled guilty, I believe, and pled
11 guilty to manslaughter, if I remember correctly. This
12 is before the 85 percent act; pled guilt to a
13 manslaughter; called for I believe a three year, four
14 year period of imprisonment, State Prison. He asked to
15 remain on the wristlet program pending appeal, as
16 opposed to being in the county jail. I agreed to allow
17 him on the wristlet program. When he was, when his
18 appeal was denied he then sought jail credits for the
19 wristlet program. The Appellate Division said no,
20 wristlet is not incarceration. Same thing on State v.
21 Werthmann. He was convicted of official misconduct,
22 second degree offense, gave him three or four year
23 State Prison sentence, treated as a third degree
24 offender, out on bail pending appeal, wristlet program
25 subject to the exact things you're talking about.

1 Appeal was denied. He turned himself in, sought
2 credits. I denied the credits. The Appellate Division
3 affirmed and said it's not the equivalent of
4 incarceration.

5 MR. DONEGAN: Okay. Judge, again I'm not
6 familiar with those cases. The wristlet program that
7 you are describing in those cases is it a satellite
8 monitoring program also or just --

9 THE COURT: Actually, no, it's the old
10 wristlet; phone calls and you can't leave your house
11 without permission. You needed permission to work,
12 needed permission to go anywhere. Here they give the
13 permission, set up parameters up front. That's why the
14 monitoring, satellite monitoring can show the jail
15 authorities, those who do the monitoring as to the
16 exact location. As an example you can go home, can go
17 to work, they know where work is, know where home is.
18 You violate in terms of your journey from one location
19 to the next, they can see it immediately where you are
20 on the computer based on the satellite program and know
21 there's an instantaneous violation and they can in the
22 vernacular pull your ticket and bring you back in.
23 It's similar but yet a little different.

24 MR. DONEGAN: Okay. Without answering your
25 question, Judge, well, I'll answer your question this

1 way, in terms of frustration of the statute, I didn't
2 see anything in terms of, that there's no eligibility
3 for parole.

4 THE COURT: It says the court shall impose
5 180 days, not up to 180.

6 MR. DONEGAN: True, Judge, but parole isn't
7 dependent, parole is dependent on the number of days
8 you're sentenced, you know, and the number of days you
9 served, you know. And that parole decision is made
10 based on the original sentence times served and
11 whatever other parameters.

12 THE COURT: You don't think it's a mandatory
13 sentence, 180?

14 MR. DONEGAN: I don't think, Judge, I don't
15 think counsel has answered that question.

16 THE COURT: I'm sure Mr. Palumbo will.

17 MR. DONEGAN: I believe I'm here, Judge, to
18 just argue for the fact that the warden's hands can't
19 be tied in terms of the housing or programs that an
20 inmate is eligible for, whether they be Delaney Hall --

21 THE COURT: We all agree that the judge
22 sentenced him to a mandatory 180. I think everybody
23 agrees to that.

24 MR. DONEGAN: On the second sentencing, on
25 the second sentencing, yes.

1 THE COURT: When she resentenced him.

2 MR. DONEGAN: Yes.

3 THE COURT: First one was 90/90, second one
4 mandatory 180 county jail sentence.

5 MR. DONEGAN: I also understand, Judge, just
6 to fill this in, I also understand Mr. MacDermant had a
7 parole date of May 31st that he was eligible for
8 parole, was looked at by parole as I understand. I
9 don't know what happened in terms of he got paroled
10 before Judge Jones pulled the ticket, as you might say.

11 THE COURT: A lot depends on how the judge
12 words the commitment sheet. If you say 180 days
13 county, it could be subjectively read to include he's
14 not eligible for parole. If you use mandatory minimum
15 of 180, not much question what the judge is ordering.

16 MR. DONEGAN: Little different, Judge.
17 You're right.

18 THE COURT: My understanding is she, at least
19 the second time ordered a mandatory 180.

20 MR. DONEGAN: That's my understanding of it.
21 But in any event, that's why I'm here, Judge, that's
22 why we took the appeal. That would be a precedent
23 that's untenable for this county to be able to handle.
24 If Judge Jones can do that, any other Municipal Court
25 or for that matter Superior Court Judge could determine

1 the type of in custody housing that an inmate would
2 have and I think that's the prerogative of the
3 Executive Branch. I think that's the prerogative of
4 the warden.

5 THE COURT: Okay. Again, just so the
6 record's clear, I don't think there is a dispute. The
7 Sheriff does not run the jail in Union County. The
8 Freeholders -- in fact, it's done through the
9 Freeholders by statute. They have elected to in fact
10 not have the Sheriff run the jail. There is a warden
11 who's hired by the freeholders, the freeholders or
12 powers that be. That's why I said I wanted you to
13 notice County Counsel with the application because the
14 warden works for the county.

15 MR. DONEGAN: Yes.

16 THE COURT: As opposed to the sheriff. All
17 right. Mr. Palumbo?

18 MR. PALUMBO: Judge we had the hearings
19 Tuesday, the notice of appeal was filed by the County
20 Counsel yesterday. In fact I didn't get a chance to
21 see it until this morning when I got to the office. I
22 quickly joined in the appeal. I also asked to be heard
23 on the possibility of bail pending appeal.

24 The reason I'll tell you that, Judge, I have
25 not had an opportunity to research the issue as to

1 whether the sentence of 180 days means that you must
2 serve that and you're not eligible for parole. I'm not
3 willing to concede that. And part of the reason I
4 guess, Judge, I'm thinking to the many Fridays that I
5 have heard your Honor when you were sitting as a
6 criminal court judge state: I sentence you to the
7 Department of Corrections for a period of ten years,
8 and that's the last thing you said. Then right after
9 that, the defendant goes down to the classification
10 center and they decide what happens to him. And in
11 fact they have to decide whether he's going to go to
12 the Youth Correctional Facility or they decide whether
13 he's going to go to a low, medium or high security
14 prison. They decide what credits to give for the time
15 served. That happens in cases of people charged with
16 things like murder, rape, robbery, heinous crimes.

17 I find it hard to believe that a person
18 charged with an offense where nobody was injured, other
19 than himself, should be entitled to the same type of
20 credits. Maybe I'm wrong, maybe there's something that
21 makes it mandatory but I don't see why it should be and
22 I don't understand whether it is or isn't. But I would
23 make that analogy and that determination concerning the
24 issue as to whether parole is something that he might
25 be eligible for or not. The argument that the court

1 made concerning the issue of Mastapeter and Werthmann
2 stating that the time you spend on a wristlet doesn't
3 count toward jail sentence, was it the Appellate
4 Division or Supreme Court?

5 THE COURT: Appellate.

6 MR. PALUMBO: Assume that the Appellate
7 Division was correct, and even if they are, that
8 doesn't address the question as to number one --

9 THE COURT: Mr. Kologi just called in and
10 said assume there is not ineffective assistance of
11 counsel by Mr. Palumbo, of course.

12 Okay, go ahead.

13 MR. PALUMBO: Assuming that that is correct,
14 still doesn't address the issue of whether he would get
15 credit for time spent in Delaney Hall.

16 THE COURT: I think definitely if Delaney
17 Hall, if the warden has authority to do so, I'll save
18 you the time, if the warden has the authority that Mr.
19 Donegan says he has, and if it's a part of the jail,
20 it's a part of the incarceration and he's entitled to
21 jail credits. I mean if anybody else want's to argue
22 that, I will listen to you, but to me that's very
23 clear. You get credits when you do an inpatient
24 residential program. That is the equivalent to
25 incarceration, depending on the restriction, so I don't

1 think -- Mr. Kaflowitz do you have any issue about this
2 at all?

3 MR. KAFLOWITZ: I have none.

4 THE COURT: Everybody agrees,

5 MR. PALUMBO: I won't address it.

6 Judge that leads me to the second part of the
7 argument that was addressed by Judge Jones the other
8 day, made reference to in her decision to 4-50 and she
9 said that she had the authority that she had to
10 sentence the way she did because 4-51. Now that was
11 said at the end of the opinion. I didn't get a chance
12 look at 4-51 until the next day. When you look at
13 4-51, it's as clear as clear could be, that 4-51 does
14 not involve a third offender. It only is a sentence
15 for first and second offender. So whatever
16 restrictions or authority she has under 4-51 she
17 doesn't have for Mr. MacDermant because he's a third
18 offender.

19 When I pointed that out to her this morning,
20 and I pointed out the fact that you construe statutes,
21 she said that, well, since they intend it for first and
22 second they must have intended it for thirds. I don't
23 buy that Judge. I don't know what the reason is why
24 they said it the way they said it, but clearly he's not
25 covered by 4-51, which means the only thing that we

1 have to help guide us is the language of 4-50.

2 I think in passing that he should be eligible
3 for parole. I think that, I should point out to the
4 court he's already spent 100 days in confinement,
5 Judge; spent five days in Delaney Hall; 22 days in
6 rehabilitation, 32 days in jail, and 42 days on the
7 monitoring program. He served somewhere between 100
8 and 101 days in confinement.

9 I guess the last issue that I want to
10 address, Judge, is the issue as to whether in fact he
11 should be allowed out on bail pending this appeal.

12 Judge, I think the court would consider that
13 in fact there are some issues that might very well go
14 his way, at least I would hope that you might consider
15 that, and if you think that might happen and if you
16 think that you might possibly be persuaded to reverse
17 the decision of Judge Jones, if that's the case, then I
18 think that you should release him on bail and I ask
19 that bail be his own recognizance pending this appeal.
20 I don't know if the court is going to finish its
21 decision today or if it's going to ask for briefs.

22 THE COURT: No, I intend on ruling today.

23 MR. PALUMBO: Pardon?

24 THE COURT: I intend on ruling today.

25 MR. PALUMBO: Sorry.

1 THE COURT: I intend on ruling today.

2 MR. PALUMBO: I would ask you to consider, if
3 you're going to rule today, Judge, I guess there is no
4 point for me asking for bail pending appeal.

5 THE COURT: I think you're right.

6 MR. PALUMBO: Unless you rule against me in
7 which case I'll ask for bail pending appeal.

8 THE COURT: You have a right to do that at
9 the end.

10 MR. PALUMBO: Yes, at the end.

11 THE COURT: I'm doing this expedited because
12 there is a liberty interest at stake and it's an
13 important issue, not just this case, but affects many,
14 many cases; can affect potentially many cases in terms
15 of the discretion that the warden has in a given
16 situation as to a location of incarceration. So that's
17 why I agreed to do this on an expedited basis, since
18 all the attorneys agreed to it. On this basis, I had
19 no problem, not having a transcript.

20 All right Mr. Kaflowitz, anything you want to
21 say, sir?

22 MR. KAFLOWITZ: No, Judge, unless you want me
23 to comment.

24 THE COURT: No. It's up to you. I said you
25 had an interest here because this may affect the county

1 as a whole. I always like to give notice to the county
2 prosecutor, particularly when it deals with these kinds
3 of appeal issues. The prosecutor generally handles
4 municipal appeals for municipalities. This is a little
5 bit of a unique situation because we're not appealing,
6 I believe it was a plea, right?

7 MR. PALUMBO: Plea.

8 THE COURT: It was a plea. There was no big
9 issue concerning sentence. The sentence is not an
10 issue in terms of what's imposed. What's opposed, what
11 is the issue is whether it's mandatory, number one,
12 number two, whether it can be at Delaney Hall or on a
13 monitoring program.

14 MR. KAFLOWITZ: I will submit your Honor.

15 THE COURT: Okay.

16 Let's deal with the first issue that I think
17 is somewhat cut and dried. That deals with whether or
18 not Mr. MacDermant can go to Delaney Hall or is it
19 mandated that he has to be incarcerated in the Union
20 County Jail and/or is Delaney Hall considered part of
21 the Union County Jail. That's really what it comes
22 down to.

23 39:4-51 says, "A person who has been
24 convicted of violating section 39:4-50 and in pursuance
25 thereof has been imprisoned in a county jail or

1 workhouse in the county in which the offense was
2 committed shall, not after commitment, be released
3 therefrom until the term of imprisonment imposed has
4 been served." I think that means you do the term, the
5 whole time.

6 "A person imprisoned in the county jail or
7 workhouse may in the discretion of the court be
8 released on a work release program." That's different.
9 That means they leave the workhouse, leave the county
10 jail, go to work and go back to the county jail.

11 "No warden or other officer having custody of
12 the county jail or workhouse shall release therefrom a
13 person so committed unless the person has been released
14 by the court on a work release program." In other
15 words, the warden does not have authority to release to
16 any other form of program. "A person sentenced to an
17 inpatient rehabilitation program may upon petition by
18 the treating agency be released by the court to an
19 outpatient rehabilitation program for the duration of
20 the original sentence." The warden doesn't have the
21 authority, the application has to be made to the court
22 for the release to the outpatient program.

23 "Nothing in this section shall be construed
24 to interfere in any way with the operation of a writ of
25 habeas corpus, a proceeding in lieu of the prerogative

1 writs, or an appeal."

2 "The director shall adopt such rules and
3 regulations to effectuate the provisions of this
4 section as he shall deem necessary."

5 Okay.

6 So the warden has authority to release for
7 work release if a judge says it's okay. That judge is
8 me, the Assignment Judge, under another part of our
9 law, has authority to decide whether or not a person
10 should be released, should be subject to work release.
11 That is a discretionary call. The way that works is
12 the jail has a social service worker who interviews the
13 defendant, verifies employment, sets the parameters of
14 work in terms of when they can leave and come back,
15 sets the standards under which the person must act, in
16 other words no alcohol, no drugs, can go to work, come
17 back all things of that fashion. All that is
18 communicated to the Assignment Judge. The Assignment
19 Judge generally -- I can tell you what I do. I don't
20 know what every other one does. I call the sentencing
21 judge to see what, how they feel about it and I make my
22 decision based on the recommendation from the social
23 worker at the jail.

24 The warden is really not involved in the
25 procedure. The nature of the sentence, listen to what

1 the sentencing judge has to say, and I make my call
2 whether the person is released.

3 This application does not deal with work
4 release. This application I find has to deal with
5 whether or not the warden has authority first to put
6 him in Delaney Hall. I find the warden has that
7 authority. I refer to N.J.S.A. 30:8-16.2, facilities
8 for treatment of alcoholics during confinement;
9 appropriations and expenditures.

10 I will note there are multiple statutes that
11 deal with these issues that are similar in nature.

12 There's another statute that deals with the
13 circumstances of release when the individual has a drug
14 problem. There's another statute that deals with
15 alcoholism and clearly everybody has found that Mr.
16 MacDermant has an alcohol problem. This was his third
17 and I understand there was a fourth conviction that --
18 wasn't there?

19 Okay, Mr. MacDermant's telling me no. I
20 don't know. It's not before me. Bottom line, he's
21 sentenced on the third. It says, "It shall be lawful
22 for any board of chosen freeholders in this state to
23 erect and maintain" -- here's the key -- "as part of
24 its jail, workhouse or penitentiary, a suitable
25 building, buildings or additions for treatment while

1 confined in such jail, workhouse or penitentiary, of
2 inmates having a history of alcoholism; such board
3 shall have the power to appropriate and expend monies
4 necessary in its judgment for such purpose."

5 This is exactly what was done by the
6 Freeholders in establishing Delaney Hall. The
7 Freeholders are the ones who run a jail. The warden
8 operates it and in the sense of administering it in
9 behalf of the Freeholders. So Delaney Hall is an
10 adoption of another building for treatment while an
11 inmate is confined in the county jail. The statute is
12 very clear that it's considered part of the jail.
13 There is confinement. There is not release. This is
14 not a work release. They can't do it based on the
15 statute that I just read, 39:4-51 provision. But they
16 do have the right to set up a separate program and/or
17 building for confinement of alcoholics and/or drug
18 abusers, addicts for treatment of addiction because
19 both are addictions. So that the warden and the
20 Freeholders pursuant to statute have this authority.

21 It is not a judge's function to determine. A
22 judge can recommend one way or another. We do this all
23 the time.

24 Mr. Palumbo was not being facetious before.
25 I did this for almost 14 years in terms of sentencing.

1 They ask you all the time will your Honor consider
2 Delaney Hall and make a recommendation? And it goes a
3 long way if the judge says I recommend that the person
4 go in, that I find he's an appropriate candidate or she
5 finds he's or she's an appropriate candidate for
6 treatment.

7 At the same time, the judge can say I'm
8 opposed to it. But the judge doesn't control. I
9 think, therefore, the municipal court judge was not
10 proper in designating that the time must be spent
11 within the confines of the county jail building itself,
12 but rather since Delaney Hall is a building of
13 confinement, separate and apart from the county jail
14 but administered and part of the county jail, it fits
15 within this category. While he's confined to the 180
16 days he has a right to receive treatment and if you
17 think about it, that's what's needed. I mean, it'
18 sreally not an issue in my mind at all about it.
19 That's where he should be. Gets nothing in the county
20 jail by way of treatment.

21 Mr. Palumbo was right. Nobody was hurt in
22 this thing, thank God, but at the same time, you don't
23 want anybody hurt because his condition continues,
24 either himself or another party and God forbid today
25 you cause injury to somebody when you're drinking,

1 you're in jail for 85 percent. You can be in jail for
2 a minimum of eight and a half years, minimum today.

3 So when you look at the statute, D.W.I.
4 statute, look at this statute, it is the warden's
5 decision where someone gets housed.

6 Now I recognize the analogy Mr. Palumbo was
7 talking about in terms of the Department of
8 Corrections, but they are separate statutes that don't
9 apply in this case. Although they're analogous, it's a
10 separate statute. This statute is very specific in
11 terms of the operation of county jails or county
12 workhouses.

13 The next question becomes whether or not, do
14 they have the authority to release him to a wristlet
15 monitoring program. They don't. The reason I say they
16 don't is as I read verbatim 39:4-51, that says it has
17 to be served in the institution. Delaney Hall is part
18 of the institution. They can't even allow a work
19 release where you're still considered confined unless
20 it's approved by the court. They can't even allow for
21 a change under 39:4-51. You can't even provide for a
22 change in an outpatient, inpatient program unless the
23 agency makes application to the court. All you have to
24 do is read the language. Even if you didn't have
25 39:4-51, just read the language of the 39:4-50. It

1 says "up to." Every other sentence talks about "up
2 to."

3 Mr. Palumbo you looked confused.

4 MR. PALUMBO: Judge, the reason why I'm
5 confused is because I looked this morning at the
6 statute. I checked Westlaw and the section of 4-51
7 that I read reads in the first full sentence, "A person
8 who has been convicted of a first or second violation
9 of section 39:4-50." That's the only person who's
10 subject to the provisions of that statute, not Mr.
11 MacDermant who has been sentenced to a third offense.

12 THE COURT: Can I see that? Wait, wait,
13 wait. Okay I see what your talking about in the pocket
14 part. So you think they mean if it's a third or
15 higher, therefore they should be able to go into a
16 program?

17 MR. PALUMBO: Judge.

18 THE COURT: Makes no sense.

19 MR. PALUMBO: This section was revised a year
20 ago. I'm sure they took a look at it. They apparently
21 changed the language a year ago. I don't know what it
22 said before.

23 THE COURT: I read it verbatim before. All
24 right, let's read it verbatim: "A person who has been
25 convicted of" and cross out the word violating, it says

1 "a first or second degree violation of" and that's
2 underlined "first or second violation of Section
3 39:4-50 and pursuant thereof has been imprisoned in a
4 county jail or workhouse in the county in which the
5 offense was committed shall not, after commitment, be
6 released therefrom until the term of imprisonment
7 imposed has been served.

8 "A person imprisoned in the county jail or
9 workhouse may in the discretion of the court be
10 released to a work release program. No warden or other
11 officer" -- basically I get everything else all the way
12 down in terms of original matter, original statute,
13 then it's says, for the record says "chief
14 administrator shall adopt such rules and regulations to
15 effectuate the provisions as shall be deemed
16 necessary."

17 So you're saying because it says first or
18 second by way of an amendment therefore doesn't apply
19 on a third or fourth offense, can be released?

20 MR. PALUMBO: That's what I'm saying.

21 THE COURT: Okay. I disagree with you
22 strenuously. I understand your interpretation because
23 of what it says, but it makes absolutely zero sense
24 because when you're involved in a circumstance, okay
25 when you're involved in a circumstance where you have a

1 third offender, you have a mandatory period of
2 incarceration of 180 days, okay, with a provision for a
3 90 and 90. Read 39:4-50. Let's look at that statute.

4 MR. PALUMBO: I can think of a reason why
5 they wouldn't include third.

6 THE COURT: Go ahead.

7 MR. PALUMBO: How about penalty. The jail
8 penalties for a first and second are nowhere near as
9 significant or stringent as they are for a third. For
10 some reason they wanted to give the judge these
11 additional powers for first and second, but not for a
12 third because it was stringent enough without that.

13 THE COURT: I would find that truly amazing
14 because somebody at three or four, you are more of a
15 risk to the public in terms of somebody getting hurt.
16 You know what, you can argue that in the Appellate
17 Division. I can't conceive of -- conceivably that
18 that's what it intends. Why would you have a more
19 severe penalty than if you could provide for release.
20 Makes no sense in terms of a reasonable interpretation
21 of the statute.

22 Let's look at the D.W.I. statute 39:4-50.
23 Mr. MacDermant was sentenced. Did they have the two
24 provisions, .08 and .10. Anybody know?

25 MR. PALUMBO: I did not represent him, Judge,

1 I don't know.

2 THE COURT: I obviously wasn't there. No one
3 here was. I don't know. The penalties were a little
4 different, for second and third degree offenders. The
5 section remains, forgetting for the time being, you
6 know .08 as opposed to a 0.10. But it says in terms of
7 fines and penalties and goes through the 48 hours, what
8 the fines are, and shall be subject to a term of
9 imprisonment of not more than 30 days. Okay.

10 MR. PALUMBO: Are you reading?

11 THE COURT: I'm reading 39:4-50. Not more
12 than 30 days under subsection (f) and shall forfeit the
13 right to operate a motor vehicle for three months.
14 Under (a) (ii), okay, you got (a)(1) now double (ii),
15 if it's 0.10 or higher they go into all the information
16 again about the fines, I.D.R.C., then they talk about a
17 term of imprisonment of not more than 30 days, okay,
18 forfeit license. Then under subsection two, now we're
19 up to 39:4-50(a)(2), second violation, repeats the
20 fines, community service 30 days, I.D.R.C. 48 days, and
21 shall be sentenced to not more than 90 days in the
22 county jail. Now you have a third, under subsection
23 three. These were language changes. Shall be
24 sentenced to imprisonment for a term of not less than,
25 not up to, or not more than, not less than 180 days in

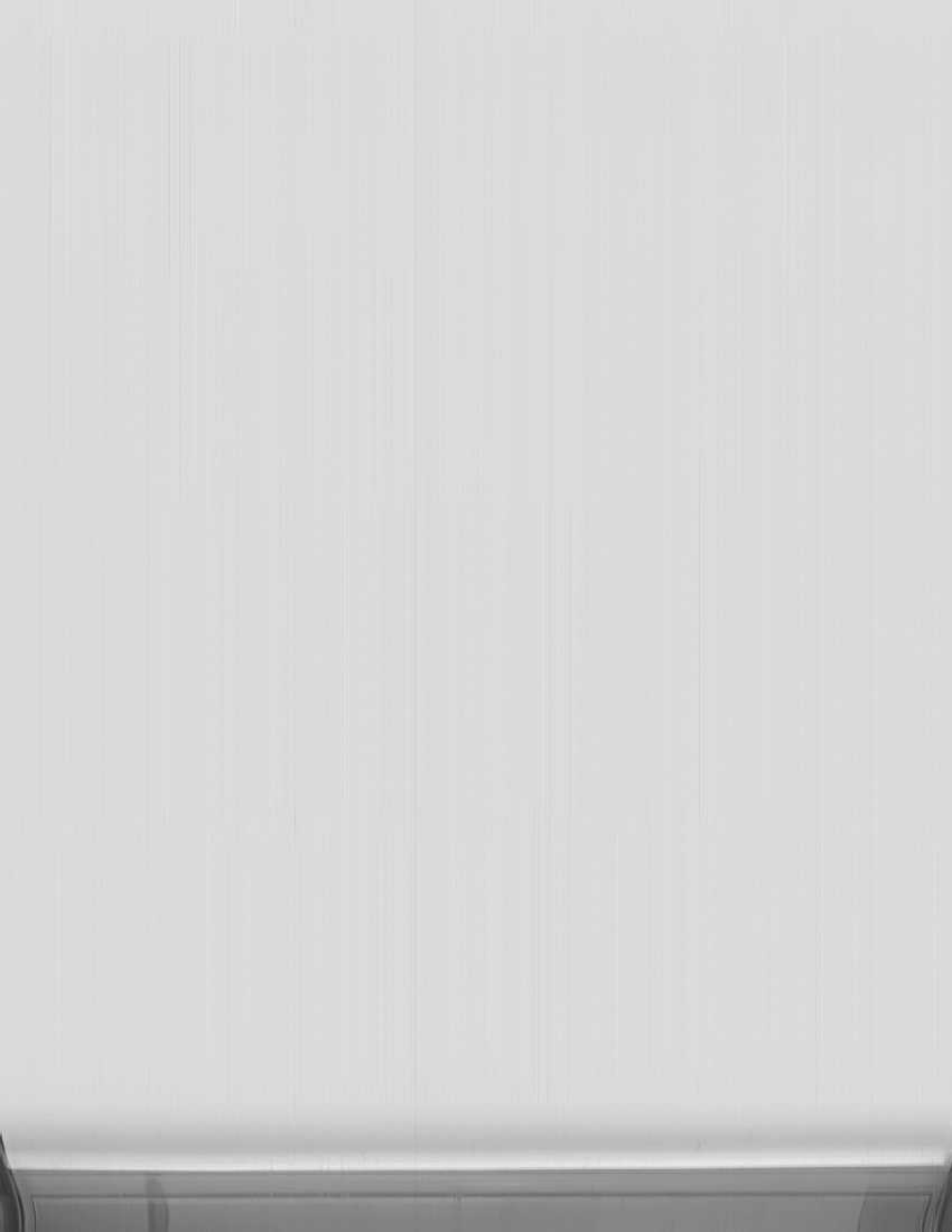
1 the county jail.

2 Obviously they have used different language
3 here, and indicating that it's mandatory. You have to
4 be in for not less than 180 days. I think it's clear,
5 in a county jail or workhouse, except that the court
6 can lower the term by not -- for each day not exceeding
7 90 days in a drug or alcohol inpatient program.

8 This is what the judge did initially, 90 and
9 90. So you have up to 90 days in an inpatient. The
10 statute was changed. Used to be 90 days of community
11 service. So you could see the reasoning of the
12 legislature in terms of having inpatient rehabilitation
13 program approved by the I.D.R.C. center and then a
14 license is revoked for ten years. Then you have the
15 ignition interlock device. Then they get into a big
16 discussion of all other sentences.

17 So really, you see, the change in the
18 language as it relates to the mandatory nature of the
19 penalty, and that's why I believe it's mandatory,
20 number one. This is not subject to parole, because it
21 cannot, it is not less than 90 days. It's a mandatory
22 minimum, same as I would say five years with a three
23 year parole disqualifier.

24 MR. PALUMBO: Judge 39:3-4 provides that for
25 a third offense of driving on the revoked list you



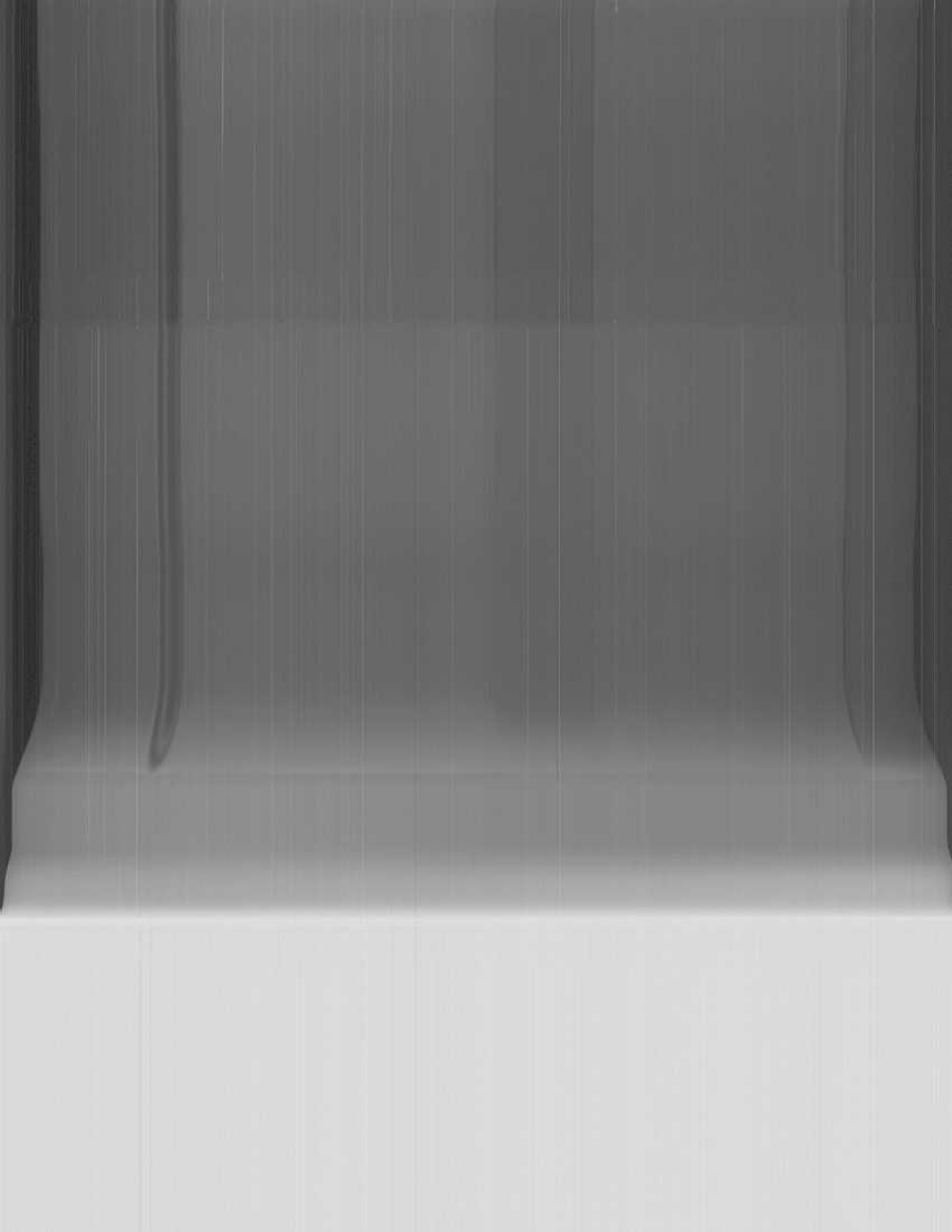
Decision

1 shall serve ten days in jail. Nobody serves ten days
2 in jail for that. Everybody gives out --

3 THE COURT: Maybe the State would appeal the
4 issue and they would start to serve it. I don't know.

5 MR. PALUMBO: All wind up serving some kind
6 of time sitting in the courtroom until the end of the
7 COURT SESSION, doing things of that sort. Every





1 shall serve ten days in jail. Nobody serves ten days
2 in jail for that. Everybody gives out --

3 THE COURT: Maybe the State would appeal the
4 issue and they would start to serve it. I don't know.

5 MR. PALUMBO: All wind up serving some kind
6 of time sitting in the courtroom until the end of the
7 court session, doing things of that sort. Every
8 municipality in the state, and it says "shall."

9 THE COURT: Let me tell how bad this is, Mr.
10 Palumbo. I'll share it on the record. I have had,
11 just had one, two weeks ago, an attorney come down here
12 to me with a court order from a municipal judge with no
13 appeal pending saying they wanted me to pre-approve
14 that the person could serve SLAP the 180 days.

15 First of all, no jurisdiction. Second of
16 all, if the judge thinks that's an appropriate
17 sentence, then enter the sentence and let the State
18 appeal it. I haven't seen Mr. Kaflowitz jumping up
19 here and saying he thinks that somebody has a right to
20 get paroled on 180 days, or before 180 days. Not less
21 than is a mandatory minimum. The language is very
22 clear to me. I don't care what 4-51 says. I think the
23 concern with 4-51 has to do with the issue of not more
24 than, and deals with first or second degree.

25 If the warden does not have the authority to

1 release somebody even on work release without a
2 judicial order, what gives him the authority to let
3 someone into a monitoring program? And just follow the
4 reasoning of it. If you're in a mandatory inpatient
5 program and getting credit for the 90 days, day for day
6 credit, you leave that program, you get sentenced to
7 the county jail and the county jail says we're going to
8 let you go to an outpatient program when you couldn't
9 get that to begin with, it's just totally inconsistent
10 and not within the authority of the institution because
11 it's violating the mandatory nature of either an
12 inpatient program or county jail. They don't have the
13 authority. Or everybody will say I'll take the Delaney
14 Hall, put me in a monitoring program so I can be out on
15 the street and not even have to do inpatient. I mean
16 it's common sense. I would do it if it was me. You
17 tell every client you represent in the circumstances do
18 it and clearly that's not what the legislature
19 intended.

20 My finding today is he has a right to go to
21 Delaney Hall. That's the warden's decision. I agree
22 with Mr. Donegan's analysis of the statute I quoted.
23 The warden does not have the authority nor anybody in
24 Delaney Hall, they don't have the authority to release
25 him to an outpatient program or any program without

1 judicial approval.

2 This is not a situation prior to a conviction
3 where somebody is incarcerated on bail and it's akin to
4 a wristlet program where you can be monitored. These
5 are post-sentencing with specific mandatory minimums
6 under the statute and when you look at the statute, it
7 specifically addresses the circumstances under which
8 the defendant is to be treated, county jail or
9 inpatient. Take your pick, or both. If you violate
10 one, the only alternative is 180 and it's mandatory.
11 Cannot be less than 180. That's my ruling

12 / As far as jail credits are concerned, I agree
13 with Mr. Palumbo's argument. Number one, since it is
14 incarceration in a jail setting, he is entitled for day
15 to day credit. If you didn't get credits, makes no
16 sense why you would be at Delaney Hall incarcerated,
17 under lock and key and that's what Delaney Hall is.
18 You'd get no one wanting to go to the jail because they
19 would never finish serving the sentence if they're not
20 getting credit. So clearly Delaney Hall is a day for
21 day credit.

22 The next issue we have is Mr. MacDermant
23 getting the time that he was on the wristlet program
24 and State v. Anthony Masterpeter is the case. I don't
25 have the specific cite. I can tell you it was decided

1 by the Appellate Division, May 2, 1996. It was
2 approved for publication, was an Appellate Division
3 decision by Judge Stern. He goes through the entire
4 program of talking about credits allowed pursuant to
5 3:21-8 which is the criminal jail credits statute that
6 deals with it, and basically what it comes down to,
7 since you're at liberty, you're out on the street, even
8 though you're being monitored, it is not the same as an
9 incarceration in an in-house situation. And therefore
10 you are not entitled for day for day jail credit
11 because you're out on a monitoring program.

12 This is very much akin to the circumstances I
13 talked about with somebody out on bail. If you're out
14 on bail and you're on a monitoring program or wristlet
15 program, you can serve the whole term before your
16 appeal is heard. You enjoy freedoms that a person
17 who's incarcerated does not enjoy when you're on a
18 monitoring program. I think Masterpeter is very clear
19 about that. He was obligated to participate in an
20 electronic monitoring wristlet program as a condition
21 of pretrial release. It's the same kind of situation,
22 these post sentencing releases, where you're out in the
23 program, since the warden doesn't have the authority to
24 do it, first of all, and second of all, since it is not
25 a form of incarceration because he's out in the street,

1 he does not get the credits for the time he was on work
2 monitoring program. He does get day to day credits for
3 the time he was incarcerated in the Delaney Hall.

4 I will enter an order today. If Mr.
5 MacDermant wants to go back to Delaney Hall,
6 authorizing his transfer to Delaney Hall. Actually
7 it's up to the warden. The warden has the authority to
8 do that if he feels he qualifies. Can't be on my
9 order, because it's an institution decision.

10 MR. PALUMBO: Judge can I make two points for
11 the record?

12 THE COURT: Sure.

13 MR. PALUMBO: The first point is concerning
14 electronic monitoring, at the time he was allowed by
15 the warden to go into the electronic monitoring program
16 he was under the belief based upon the color of
17 authority of the warden to make that decision by doing
18 that he was going to be getting day to day credit for
19 that, while he was on that electronic monitoring
20 program.

21 THE COURT: How long was he on it?

22 MR. PALUMBO: For how long a time, Judge? 42
23 days. His liberty to some extent was curtailed because
24 of the fact that he was on electronic monitoring.
25 Among other things, during that time he went four times

1 a week to A.A. meetings. When you take the
2 combination, the fact that his liberty was curtailed
3 and he was doing this under the color of the authority
4 as told him by the warden.

5 THE COURT: You make a different argument to
6 me now. First we talked about law and interpretation
7 of the statute. Now you're talking about, I think the
8 word they use, simple case would be unjust enrichment,
9 fundamental fairness. Now you're talking about a
10 fundamental fairness argument.

11 MR. PALUMBO: I think I am.

12 THE COURT: That's different. That's what I
13 thought you were talking about, fundamental fairness.
14 I'm talking about law and statute, persons have
15 authority or not. Little license in terms of
16 fundamental fairness.

17 MR. PALUMBO: Judge, I briefly stated it.
18 Out of time when he was within the control of the
19 warden of the Union County Jail, he was told by that
20 warden that in addition to going to Delaney Hall we
21 find you to be a suitable candidate for going to the
22 electronic monitoring program and they told him what
23 his restrictions were. You have to have curfew at a
24 certain time; can't leave the area outside; can't go
25 past your home; can't leave your home at night. There

1 were many times I'm sure he would like to have gone out
2 at eleven o'clock at night to do something he couldn't
3 do and he did that because he was led to believe by the
4 warden of the Union County Jail he had to do that in
5 order to satisfy the 180 day sentence.

6 THE COURT: Only thing, only flaw in your
7 argument, I don't know if you're aware of this, it
8 needs to be addressed because it's part of the record.
9 Whoever made that decision -- it is not the warden.
10 It's made at the Delaney Hall. I have the name, if you
11 want me to get the name because I made a call over
12 there. I happened to be in the Criminal Division,
13 might have been Presiding Judge when Delaney Hall was
14 first being discussed. I thought it was a good idea.
15 Makes a difference. Thought it was a good idea to have
16 treatment. When I called over there to speak to the
17 gentleman who was in charge of the monitoring program,
18 he never returned my call. I eventually called the
19 Director of Delaney Hall, finally got a response from
20 the director. Mr. Lawson I think is the person in
21 charge of the monitoring program. I could be wrong,
22 Italian name is the director.

23 Finally got a call back. I questioned this
24 issue because all this was brought to my attention.
25 You're not even supposed to be released into a

1 monitoring program until you're in Delaney Hall for 30
2 days. Did you know that?

3 MR. PALUMBO: I don't think it matters,
4 Judge.

5 THE COURT: Well, it does matter because
6 we're talking about fundamental fairness and we're
7 talking about in terms of your client shouldn't even
8 have been released to begin with. You're saying would
9 at least receive credit if he remained inside Delaney
10 Hall.

11 MR. PALUMBO: Exactly.

12 THE COURT: My point is, how he gets released
13 and under the circumstance he's on the street so
14 quickly in terms of when you look at the law again, the
15 statute. I don't know why the person who made the
16 decision made this decision. Certainly nobody called
17 me as the assignment judge and asked my opinion and
18 certainly I think this is why Judge Jones was so upset
19 that nobody contacted her or asked what her opinion was
20 on the issue. It was just done by the jail authority
21 and clearly they don't have the authority to do it.

22 MR. PALUMBO: If we're looking, if we're
23 really examining the issue of fundamental fairness,
24 when you take a layman who's being told by someone
25 who's in a position of authority over him, whether it

1 be the warden or people at Delaney Hall, yes you can go
2 into this electronic monitoring program and the only
3 bad thing about it, Mr. MacDermant, you can't do this,
4 that, can't go here, can't go there, based upon that he
5 said okay. And now he spent 42 days with his liberty
6 confined and restricted and the court has just said to
7 him --

8 THE COURT: Now, the saddest part about the
9 whole case is his program was wasted. Never stayed in
10 Delaney Hall. He gets released, he's then picked up
11 put back in the jail and sitting in medical in the
12 county jail this whole time without any treatment.
13 That's the saddest part about this.

14 MR. PALUMBO: And, Judge, in the jail he has
15 been held on the medical floor the entire time, not
16 even released to the population. Can't even walk
17 around.

18 THE COURT: I don't know if he wants to walk
19 around. That's between him and the jail. I didn't
20 order it. That's before me for the first time. I was
21 not involved in any order.

22 All right, so your argument from the
23 fundamental standpoint is because of the wristlet
24 monitoring program he's entitled to 42 days?

25 Mr. Kaflowitz.

1 MR. KAFLOWITZ: Judge, I agree with Mr.
2 Palumbo's arguments and I just want to put on the
3 record, although I doubt many people will get ahold of
4 the records, I agree with him because it's a drunk
5 driving case, a motor vehicle violation, it's not a
6 defendant convicted of an indictable offense. If he
7 was, had been a defendant convicted of an indictable
8 offense, let out of jail improperly by jail
9 authorities, as your Honor just ruled, and then asks
10 for the same relief on the same basis, my expectation
11 is I would object to that. But under these
12 circumstances, for a defendant who has been convicted
13 of a motor vehicle violation, albeit drunk driving,
14 certainly a serious violation, albeit it's a third
15 time, very serious motor vehicle violation, these
16 circumstances nonetheless, given he had done apparently
17 42 days on a wristlet program, with that expectation, I
18 don't have an objection if your Honor agrees with Mr.
19 Palumbo.

20 THE COURT: This is a little different
21 situation than somebody being released by mistake.
22 Okay. When you take Mr. Molinari's example out of New
23 York, incarcerated, released from the institution, not
24 subject to any restriction. Here Mr. MacDermant was
25 subject to restrictions in terms of the monitoring

1 system; liberty was restricted albeit not to the extent
2 where he gets day-to-day credit pursuant to State v.
3 Masterpeter. In terms of the fundamental fairness
4 argument, I can tell you where this come into play as
5 another example. I have had this case, one of my own
6 cases that went to the Appellate Division, was remanded
7 for me to consider a fundamental fairness issue.

8 A defendant had been in a long-term inpatient
9 program for a protracted period of time prior to the
10 time he had been sentenced, actually sentenced, had
11 been released, finished serving that sentence got
12 re-arrested, went back into the program. Technically
13 he was not entitled to full credits and because it
14 overlapped the violation of probation and a new
15 commission of the crime, I would not give the
16 appropriate credits on the V.O.P., said look at it from
17 a fundamental fairness issue not because you're
18 entitled legally to credit pursuant to 3:21.

19 You know, Mr. Palumbo's correct. This is not
20 Mr. MacDermant's fault that this happened. Other
21 people would look at it as to why he ended up getting
22 released as he did in violation of the guidelines of
23 the program. It's not for me to decide. Bottom line
24 is, I think from the fundamental fairness issue, he is
25 entitled to appropriate credit for 42 days because his

1 liberty to a large extent, although not the equivalent
2 of incarceration on a day to day basis was not his
3 doing. He did go for treatment. Does it frustrate to
4 some extent the D.W.I. statute? Of course it does.
5 But that's not occasioned. He created the problem by
6 leaving the residential inpatient program to begin
7 with, but he certainly didn't occasion what ended up
8 happening with his release from the Delaney Hall.

9 You're representing to me he was involved in
10 an outpatient program after receiving treatment, Mr.
11 Palumbo?

12 MR. PALUMBO: He advised me he was attending
13 A.A.

14 THE DEFENDANT: Four A.A. meetings a week as
15 prescribed by the director of the program.

16 THE COURT: Which is interesting because he
17 doesn't have authority to do that, in terms of
18 outpatient program without the court approval. So this
19 is the message, Mr. Donegan, that I expect you will go
20 back to your client with. You're representing the
21 warden. They do not have the authority on a mandatory
22 sentence to release someone to an outpatient program,
23 particularly when the statute as in the D.W.I. says
24 inpatient, without court approval. And somebody else
25 gets hurt because they're not doing what they're

1 issue as far as I'm concerned. You made a motion for a
2 stay in front of me. I'm going to deny your
3 application for a stay pending appeal. You want to go
4 to Appellate Division, you can see if the Appellate
5 Division will give you a further stay at this point.
6 But I don't think I'm wrong.

7 MR. PALUMBO: You're anticipating my
8 thoughts, Judge.

9 THE COURT: I don't think I'm wrong. I'll
10 include in a form of order, if you want an order I'll
11 give you an order today denying the stay. You can go
12 to the Appellate Division.

13 MR. PALUMBO: I don't think we're going to do
14 that, Judge.

15 THE COURT: Okay. Thank you, gentlemen.

16 MR. PALUMBO: I also, Judge, want to thank
17 you on behalf of Mr. MacDermant for taking us on short
18 notice. Appreciate it.

19 MR. DONEGAN: Thank you, your Honor.

20 MR. PALUMBO: A thought occurred to me. Mr.
21 Donegan mentioned it because you mentioned it before,
22 and that is you have the authority to order work
23 release. Could I ask the court?

24 THE COURT: No. Make a formal application,
25 get me all his records and I'll look at it.

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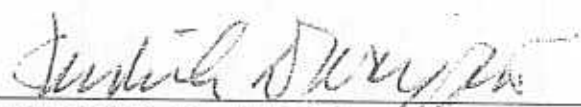
MR. PALUMBO: Thank you.

THE COURT: I'm not going to do it on the basis of oral argument. I want the prosecutor here from the municipality because it's a new application.

MR. DONEGAN: Thank you, Judge.

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

I, Frederick D. Wolff, III, C.S.R., License No. XI00369, an Official Court Reporter in and for the State of New Jersey, do hereby certify the foregoing to be prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript, to the best of my ability.



FREDERICK D. WOLFF, III, C.S.R.
Official Court Reporter
Union County Courthouse
Elizabeth, New Jersey

August 30, 2005
Date