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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 24

DONNA MIDDLETON,

Appellant.

-----

20 Eagle Street  
Albany, New York  
March 17, 2020

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this  
2 afternoon's calendar is appeal number 24, The People of the  
3 State of New York v. Donna Middleton.

4 Counsel, please remain at your stations. Yes,  
5 you may stand, sir. Argue from your point.

6 MR. BAKER: May it please the court. I'm Mark  
7 Baker on behalf of Ms. Middleton, and I would respectfully  
8 reserve two minutes for rebuttal.

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. BAKER: I think I can simplify this case  
11 beyond all the complex arguments in the brief. Here the  
12 one act in the complaint that involved a single inmate in  
13 order to meet the prosecutor's obligations of setting forth  
14 nonhearsay allegations, establishing every element of the  
15 defense and the defendant's commission, the People relied  
16 on Ms. Middleton's rather rambling statement where she  
17 discussed six different inmates.

18 But the only unnamed inmate in the complaint that  
19 even comes close to matching what she was referencing in  
20 her statement was Inmate Chandler. Now, the only reference  
21 to Inmate Chandler in her statement regarding the  
22 accusation on a complaint of disclosing, that she disclosed  
23 information of an unusual incident on March 9th, 2015.

24 But if you go to her statement on A-7 of the  
25 appendix, which says: "In March 2015 Inmate Chandler was



1 transferred to another facility for ordering a hit on  
2 another inmate. I printed up the separation paperwork in  
3 the facility computer. Inmate Bell observed the paperwork  
4 and took it off of my desk. Inmate Bell took the paperwork  
5 to his cell."

6 She never did, according to her own statement,  
7 what the complaint said she did. The complaint said she  
8 gave it over regarding - - -

9 JUDGE RIVERA: Why can't there be an inference  
10 drawn, given the entire statement - - -

11 MR. BAKER: I think - - -

12 JUDGE RIVERA: - - - about - - - excuse me - - -  
13 about her interactions with these several inmates - - -

14 MR. BAKER: Because they - - -

15 JUDGE RIVERA: - - - about her desire to get into  
16 a good relationship with these inmates even if it's not,  
17 sort of, intimate? Why - - - why isn't it a reasonable  
18 inference that, by leaving it on the table or her desk, and  
19 him taking it, because she didn't stop him, she didn't  
20 report it, she doesn't say any of that in - - - in her  
21 statement, and knowing he took it to the cell that - - -  
22 that - - - his cell, that there could be an inference one  
23 would draw from that?

24 MR. BAKER: Because it doesn't establish it,  
25 Judge - - -



1 JUDGE RIVERA: Well, does it have to?

2 MR. BAKER: It does; it has to establish her  
3 commission and the crime by nonhearsay evidence. The  
4 complaint - - -

5 JUDGE FAHEY: No - - -

6 MR. BAKER: - - - was very circumscribed.

7 JUDGE FAHEY: We're talking here about intent to  
8 benefit, right?

9 MR. BAKER: Judge Fahey - - -

10 JUDGE FAHEY: Mr. Baker - - -

11 MR. BAKER: - - - yes.

12 JUDGE FAHEY: - - - yeah, we're talking directly  
13 about an intent to benefit.

14 MR. BAKER: That's correct.

15 JUDGE FAHEY: That it boil - - - this case, we  
16 all agree, it boils down to that, right?

17 MR. BAKER: That's correct.

18 JUDGE FAHEY: And the way I understand the case  
19 law is is that the act itself can - - - can show the  
20 intent.

21 MR. BAKER: Right.

22 JUDGE FAHEY: And there doesn't need to be a  
23 statement - - - the People never have to show that she said  
24 that she intended to benefit someone; what they have to  
25 show is that by her actions it's a - - - you can infer that



1           there was an intent to benefit herself or a third party.  
2           And a third party, the intent would be friend - - - the  
3           benefit would be friendship, the relationship with the  
4           people that she was involved with, and the intent was clear  
5           by the act that she took. That's the way I understand  
6           their argument.

7                       MR. BAKER: Well, first of all, there's no intent  
8           demonstrated by another inmate seeing something on her desk  
9           and taking it. That's an inference Judge - - - that Judge  
10          Rivera was suggesting which I don't think fits the facts of  
11          this case.

12                      JUDGE WILSON: But why isn't there an inference  
13          from that? That is, she printed it out, the inmate's in  
14          her office, she sees the inmate take it, she doesn't report  
15          him. This is what Judge - - - Judge Rivera's asking. Why  
16          can't we infer from that an intent to benefit that inmate  
17          or some other inmate?

18                      MR. BAKER: Well, if we want to get to intent to  
19          benefit, let's discuss that for a second, because Judge  
20          Fahey's saying that that should be implicit based on the  
21          facts.

22                      Twenty years ago I lost the Feerick case in this  
23          court. I hope I learned from it a little bit. And the  
24          fact of the matter is, in this case there is an ambiguity,  
25          because there's two benefits that, according to the People,



1 in their response to the motion to dismiss, fit the facts  
2 in this case. Number one - - -

3 JUDGE STEIN: But are those two benefits - - - I  
4 know you're talking about whether it was for her own  
5 companionship or friendship or relationship versus whether  
6 it was to assist the - - -

7 MR. BAKER: Yes.

8 JUDGE STEIN: - - - one or more inmates. But  
9 aren't those two coextensive? Why - - - why would that be  
10 - - -

11 MR. BAKER: Because - - -

12 JUDGE STEIN: Why would they be inconsistent with  
13 each other?

14 MR. BAKER: - - - we're talking about notice of  
15 what you're charged with in order, A, to defend against it,  
16 and B, to be able to determine - - -

17 JUDGE WILSON: But - - -

18 MR. BAKER: - - - if you've done - - -

19 JUDGE WILSON: But if they're not mutually  
20 exclusive, she's charged with both. And why isn't that  
21 sufficient notice to defend against both?

22 MR. BAKER: She's not charged with both. What  
23 the District Attorney did, in response to a motion to  
24 dismiss, where they alleged that there was not a specific  
25 or comprehensible benefit - - - under Feerick, which is the



1 case that was discussed - - - your Flanagan case, Madame  
2 Chief Judge, dealt with more of the authorization issue.  
3 Feerick dealt with the intent.

4 Now, in Feerick, it was clear what the intent was  
5 because the court determined that the police officers acted  
6 contrary to what they were directed to do, and they wanted  
7 to get this radio back, which was clearly something that  
8 they would have benefitted from. So the intentional  
9 benefit is here.

10 JUDGE FAHEY: Well - - -

11 JUDGE STEIN: I may have misunderstood; when you  
12 first started arguing, you were talking about, I thought,  
13 some ambiguity about what the paper was that was provided  
14 to the other inmate.

15 MR. BAKER: That's correct.

16 JUDGE STEIN: Is that - - - is that the same as -  
17 - -

18 MR. BAKER: That's my - - -

19 JUDGE STEIN: - - - intent to benefit?

20 MR. BAKER: No, no, it's a separate - - -

21 JUDGE STEIN: That's what I thought, okay.

22 MR. BAKER: It's a separate argument. I thought  
23 - - -

24 JUDGE STEIN: Okay.

25 MR. BAKER: I thought I was - - -



1 JUDGE STEIN: So you're talking about notice of -  
2 - - of what it was - - - of the actual act.

3 MR. BAKER: Well, with my first argument, I'm  
4 suggesting that the corroborating statement which rambles  
5 on - - -

6 JUDGE STEIN: Right.

7 MR. BAKER: - - - about all of these different  
8 inmates, many of which she's saying I didn't do that  
9 because I knew that would be inappropriate, in - - -  
10 doesn't support, and I don't think it allows for the  
11 inference that she purposely disclosed something. It said  
12 the inmate saw it on her desk and took it. That's just  
13 different from that - - -

14 JUDGE FAHEY: Well, isn't that a violation of the  
15 employee manual?

16 MR. BAKER: Well, then we get into the Rossi  
17 issue, which - - -

18 JUDGE FAHEY: Well, let's just stay with this for  
19 a second, all right?

20 MR. BAKER: Sure.

21 JUDGE FAHEY: Letting an inmate - - - taking  
22 something off your desk for their - - - for his own  
23 purpose, which is an official prison document, is a  
24 violation of the employee manual. I thought that was  
25 straightforward.





1 MR. BAKER: Well - - -

2 JUDGE FAHEY: You wouldn't disagree with that?

3 MR. BAKER: It didn't say she let him. And it  
4 doesn't say where she was when he did it.

5 JUDGE FAHEY: Well, she didn't report it, right?

6 MR. BAKER: The statement is very quick and - - -  
7 and succinct. And they - - -

8 JUDGE FAHEY: See, well, the whole light of the  
9 thing is - - -

10 MR. BAKER: I'm sorry.

11 JUDGE RIVERA: Well, it's - - -

12 JUDGE FAHEY: Mr. Baker, the whole light of the  
13 thing is back - - - we're back to that intent argument  
14 again, and that's why I think our - - - I think it's  
15 happened, Dumay, those cases make very, very clear that an  
16 intent may be inferred from the act itself, and the act of  
17 not reporting it, the act of not complying with the  
18 employee manual that she signed and verified, and it's in -  
19 - - it's in the information. It - - - it makes it a more  
20 difficult case, I think.

21 I thought you were arguing, to be honest, that -  
22 - - that there wasn't notice as to what the benefit was,  
23 and that two different people, that one county court  
24 clarified it as one thing - - -

25 MR. BAKER: That's exactly it.



1 JUDGE FAHEY: That's the argument I thought you  
2 were making.

3 MR. BAKER: Yes, on the question of benefit,  
4 that's where I was going.

5 JUDGE FAHEY: Okay. Well, get there then. Go  
6 ahead.

7 MR. BAKER: Okay.

8 JUDGE FAHEY: Yeah.

9 MR. BAKER: The benefit that the People said were  
10 arising out of these facts were a personal benefit, that  
11 she had new relationships and fostered relationships with  
12 these inmates and also benefit to the inmates themselves.  
13 And as you said, the - - -

14 JUDGE FAHEY: I'm not sure I agree with that; I'm  
15 just giving you your argument.

16 MR. BAKER: Well, I'm just taking what the facts  
17 were as - - -

18 JUDGE FAHEY: All right.

19 MR. BAKER: - - - litigated by the People and  
20 then found by one judge - - - the town court judge said  
21 it's for her, and the county court judge said - - -

22 JUDGE FAHEY: Here's the problem with the  
23 argument. One - - - one - - - the town judge said one  
24 thing was a benefit and the county judge said another thing  
25 was a benefit. They're two sides of the same coin. But



1 the question is it kind of doesn't matter if there was a  
2 benefit, does it?

3 MR. BAKER: It does, because she has a right to  
4 know specifically what she's charged with.

5 JUDGE STEIN: Well, if this case went to trial -  
6 - -

7 MR. BAKER: Yes.

8 JUDGE STEIN: - - - wouldn't we allow the jury to  
9 decide what, if any, benefit she intended?

10 MR. BAKER: Well, I don't believe it should have  
11 gone to trial because I think there wasn't a sufficient - -  
12 -

13 JUDGE STEIN: Well, I guess what I'm saying is -  
14 - -

15 MR. BAKER: - - - instrument on its face.

16 JUDGE STEIN: - - - that it seems to me that  
17 you're asking for a specificity in the accusatory  
18 instrument that I'm not sure that we've ever required  
19 before with regard to intent.

20 MR. BAKER: Which is precisely where I was going  
21 because what you have here is admit - - - admittedly so by  
22 the defendant, bad judgment. And Feerick said that is  
23 specifically what is precluded from the official misconduct  
24 statute. No matter how heinous - - - no matter how - - -  
25 Judge Fahey, if she violated directives in the manual,



1 that's administratively remedial, but it doesn't amount to  
2 obstruction of justice and a crime.

3 JUDGE GARCIA: But isn't that - - - I think what  
4 Judge Fahey's getting at with the manual isn't that would  
5 be a misdemeanor, it's that's evidence that we can use to  
6 infer something from these - - - this document. So the  
7 fact that she didn't report it goes to what can we infer  
8 from the fact that she left it on her desk and somebody  
9 else - - - another inmate took it, right?

10 MR. BAKER: It's sloppiness, but it's not - - -  
11 we're talking about - - - what - - - what did Feerick say?  
12 "The statute erects high barriers to prevent a criminal  
13 court from viewing mere errors of judgment on the part of  
14 the public officials."

15 JUDGE GARCIA: Right, and I think if she had been  
16 charged with a mere error of judgment, that would be a  
17 relevant case - - -

18 MR. BAKER: But she's not - - -

19 JUDGE GARCIA: - - - but she's not.

20 MR. BAKER: Her responsibility as an ASAT  
21 counselor, was to, as she said in her statement, she's got  
22 two groups of eighteen inmates a day, where she's  
23 counseling them on alcohol and drug abuse. That's her  
24 responsibility. And to do that - - -

25 JUDGE GARCIA: And then why would she print this



1 document off and leave it on her desk? I mean, that all  
2 goes to what you can infer from the facts in the complaint.

3 But getting back to intent to benefit, so if  
4 there is an act alleged and it's, you know, something was  
5 given to an inmate, which clearly is a benefit to the  
6 inmate, and it says, you know, I do this because I want  
7 friendship, et cetera, do the People at some point have to  
8 choose in that document and say she did this solely for the  
9 purpose of benefiting herself, or she did this solely for  
10 the purpose of benefiting the inmate because otherwise  
11 we're going to have this problem.

12 MR. BAKER: I think it has to be in the  
13 instrument, and it's not here. My adversary, if she's true  
14 to her brief, is going to tell you, well, we fixed it in a  
15 bill of particulars or in the discovery of the thumb  
16 transcript. But this court has said in Alejandro, a bill  
17 of particulars does not salvage an otherwise deficient  
18 accusatory instrument. And it's not there. It's simply  
19 not there. What you have is bad judgment. That's what - -  
20 -

21 JUDGE GARCIA: But my question is if you - - -

22 JUDGE RIVERA: But in Feerick, the court said  
23 that it was enough. You're right about the statement of  
24 the law; I'm not disagreeing with you about that, about - -  
25 -you know, bad judgment is not going to - - - is not going



1 to satisfy the - - - the legal threshold. But in Feerick,  
2 of course, it's not about the charging instrument, it's  
3 about the evidence, and the court does say that it's  
4 enough.

5 MR. BAKER: No, what we argued in Feerick was  
6 that there had to be a corrupt motive coupled with the  
7 intent, and the court held that that's not true. It's a  
8 benefit, and here it was quite pointed, they wanted to get  
9 the radio back, and the court explained how they could  
10 benefit. But there's no explanation here.

11 JUDGE RIVERA: Yeah, but in her statement it's  
12 very - - -

13 MR. BAKER: It's totally ambiguous.

14 JUDGE RIVERA: One can infer from her statement  
15 that she is indeed, and she says she's trying to - - -

16 MR. BAKER: Her state - - -

17 JUDGE RIVERA: - - - have this good rapport with  
18 - - -

19 MR. BAKER: What she needed to do - - -

20 JUDGE RIVERA: - - - various inmates.

21 MR. BAKER: - - - in order to be an ASAT  
22 counselor.

23 JUDGE RIVERA: Sure, that could be her defense at  
24 a trial.

25 MR. BAKER: Yes, but - - - but she didn't - - -



1 JUDGE WILSON: Well, the police needed the radio  
2 back to be effective. I mean - - -

3 MR. BAKER: It comes down to where - - - I hope -  
4 - - hopefully we're not having disagreement beyond our  
5 argument today. If it comes down to what she said in her  
6 statement, which you said, Judge Rivera, you started off by  
7 suggesting it's inferable that she meant to do it  
8 purposely. I think that that's a quantum leap - - -

9 JUDGE RIVERA: Yes, but if the statement - - -

10 MR. BAKER: - - - when we're talking about - - -

11 JUDGE RIVERA: If the statement was only I  
12 printed up this document, I put it on my desk, the inmate  
13 took it and took it to his cell, there I think you have a  
14 stronger case. But in the context of everything else she  
15 says, and she doesn't then say, and I reported him when he  
16 did it, when at other times in the statement she's saying I  
17 told him I couldn't do that, I knew I couldn't do that.

18 MR. BAKER: That's after the fact. What we need  
19 to focus on, I respectfully submit, is what happened at  
20 that moment, and at that moment she doesn't support,  
21 corroborate the complaint. There was no nonhearsay  
22 allegation establishing that element. I think inferring  
23 from that is a quantum leap.

24 And I ask the court - - - I see my time is up,  
25 just there is a statement in People v. Jackson where the



1 lower court, 35 Misc. 3d 179, said: "Contrary to the  
2 defendant's argument, the court is not aware of case law  
3 requiring the accusatory instrument to specifically spell  
4 out which factual allegation constitutes the benefit."

5 That is the current state of the law, but I  
6 submit that, aside from a Feerick case and other cases that  
7 I cited, where it's clearly understandable what your  
8 alleged benefit is, it's not here. By her saying Inmate  
9 Bell took it, how does that benefit her, and how does it  
10 benefit Chandler? I - - -

11 CHIEF JUDGE DIFIORE: Thank you, Mr. Baker.

12 MR. BAKER: I submit it doesn't. Thank you.

13 CHIEF JUDGE DIFIORE: Counsel?

14 MS. KONSUL: May it please the court, Lauren  
15 Konsul, New York Prosecutors Training Institute, of counsel  
16 to respondent in this matter, District Attorney Anthony  
17 Jordan of Washington County.

18 Your Honors, this is not a case about poor  
19 judgment.

20 JUDGE FEINMAN: So looking at the four corners of  
21 the complaint and the attached statement, and limiting it  
22 to that, what are the factual allegations that you're  
23 relying on to say that she had an intent to benefit  
24 herself?

25 MS. KONSUL: Your Honor, those allegations would





1 be that this defendant had a position as a program aide.  
2 She used that position to disclose information that she  
3 knew was to be safeguarded. And to be clear, she didn't  
4 just know that Inmate Bell took the paperwork off her desk;  
5 she knew he had it in his cell. So that is another factual  
6 piece of information that we can infer her knowledge and  
7 disclosure from.

8 JUDGE FEINMAN: But how does that benefit  
9 herself?

10 MS. KONSUL: How does that benefit her? It  
11 garners her favor with the inmates. And you will see, in  
12 the four corners of the information, she does discuss  
13 various inmates, and as to one, I believe it is Jones, she  
14 does say that he told her he loved her; she said right back  
15 at you.

16 JUDGE FAHEY: Well, see, those remarks - - - I'm  
17 not sure I agree with the judge, but I think that the judge  
18 is right that those remarks can't really come in from the  
19 telephone conversation that was recorded. That's what  
20 you're talking about, right? Because - - -

21 MS. KONSUL: No, Your Honor, I'm talking about  
22 that particular remark is in the accusatory instrument.

23 JUDGE FAHEY: Oh, all right.

24 MS. KONSUL: I understand, and I agree with you.

25 JUDGE FAHEY: Well, then you're all right with



1 that.

2 MS. KONSUL: Yes.

3 JUDGE FAHEY: But I think really, ultimately,  
4 here it's what do we mean by a benefit, I guess, is what  
5 we're talking about, right?

6 MS. KONSUL: That is correct, and we have - - -

7 JUDGE FAHEY: All right. So what do you mean?  
8 What do you mean by a benefit?

9 MS. KONSUL: Well, I think it's very clear from  
10 the accusatory portion combined with the factual - - -  
11 excuse me, with the deposition and the factual report.

12 JUDGE FAHEY: No, this is really straightforward.  
13 Can friendship - - -

14 MS. KONSUL: The benefit - - -

15 JUDGE FAHEY: Let me finish. Can friendship be a  
16 benefit?

17 MS. KONSUL: Absolutely.

18 JUDGE FAHEY: Um-hum.

19 MS. KONSUL: And I believe there are cases that  
20 are cited in our brief where a romantic relationship can be  
21 - - -

22 JUDGE FAHEY: But that's not really - - - that's  
23 certainly not in the accusatory instrument, and it's - - -  
24 it's not - - - can we imply the benefit of friendship, in  
25 and of itself, is that sufficient, I think. That's the



1 question for - - - for the facial sufficiency of this  
2 instrument.

3 MS. KONSUL: Yes, I believe we can because there  
4 is additional information there in this instrument that  
5 demonstrates she is doing various favors for inmates and  
6 was only charged with this particular disclosure of an  
7 unusual incident which, by the way, was a slashing, and you  
8 know, is a serious offense. She talks about the fact that  
9 several of these inmates are gang members. I mean, this  
10 was very dangerous information that she was potentially  
11 passing on, and she knew that. She - - -

12 JUDGE WILSON: So Mr. Baker says that her doing  
13 this is part of her job. Does that change whether this is  
14 really a benefit to her?

15 MS. KONSUL: Absolutely not, because she is not  
16 authorized by her job to print out these documents and  
17 distribute them to inmates, period. I don't think, in any  
18 way, shape, or form, that that can be couched as her job.  
19 Certainly would she need to form - - -

20 JUDGE FAHEY: As I understood, the form was taken  
21 by Bell, and it involved Chandler; is that correct?

22 MS. KONSUL: Yes, that is correct.

23 JUDGE FAHEY: All right. And what did the form  
24 say?

25 MS. KONSUL: The form was regarding an unusual



1 incident on a particular date which we see was regarding a  
2 slashing or some type of stabbing incident at the prison.

3 JUDGE FAHEY: I see.

4 JUDGE STEIN: So what confuses me about that is  
5 that the complaint says that it has to do with an unusual  
6 incident, and her statement says that it had to do with  
7 separation papers.

8 MS. KONSUL: The inference there - - -

9 JUDGE STEIN: Is that - - -

10 MS. KONSUL: - - - is - - -

11 JUDGE STEIN: Yeah, go ahead.

12 MS. KONSUL: - - - would be that the - - - that  
13 would be the incident that caused the separate - - - so it  
14 would be part of the separation papers because it indicated  
15 that Chandler was transferred to another prison because he  
16 ordered a hit on another inmate. So presumably, this  
17 incident was involved.

18 JUDGE STEIN: And that would give her sufficient  
19 notice of what you were talk - - - I found that confusing,  
20 so - - - so I guess my question is is did that give her  
21 specific notice of exactly what act she was accused of  
22 committing?

23 MS. KONSUL: Well, Your Honor, because it is  
24 spelled out in the complaint that they're talking  
25 specifically about an unusual incident report at a specific



1 date, I believe that that is what - - - you know, it's  
2 certainly sufficient to charge her with that. If they  
3 wanted to, you know, later amend or supersede and include  
4 all of the separation paperwork, certainly they could have  
5 done that, but as to this, you know, my assumption is  
6 that's probably the most critical part of that paperwork,  
7 which is why - - -

8 JUDGE STEIN: Let me ask you this because it  
9 seems that, if I'm understanding counsel's argument  
10 correctly, the issue really is how much - - - how specific  
11 do the allegations of intent have to be?

12 MS. KONSUL: Your Honor, that's exactly what I  
13 was going to start with is that this is a defendant who  
14 received an extremely advantageous plea bargain and now  
15 wants a new rule of particularity, that has never before  
16 been enforced by New York law, in order to vacate her  
17 conviction. And the standard that we have is that you need  
18 to establish reasonable cause that the person committed the  
19 offense, presuming that what is in the complaint is taken  
20 at face value - - -

21 JUDGE FAHEY: Well, this is the prima facie  
22 requirement, though, isn't it, that we're talking about?

23 MS. KONSUL: And then also you do need to  
24 establish a prima facie case.

25 JUDGE FAHEY: Yeah.



1 MS. KONSUL: And we - - - we have that here in  
2 that we have - - -

3 JUDGE STEIN: Well, can you give me an example of  
4 an official misconduct complaint from which intent could  
5 not be inferred?

6 MS. KONSUL: I suppose - - - suppose if you had a  
7 distinct act, and you had no background for why that act  
8 took place, or where it took place, or that there was no  
9 employee manual, if you were absent a lot of the  
10 explanatory and surrounding facts that we have here,  
11 certainly it may not be obvious and it may need to be  
12 spelled out.

13 JUDGE STEIN: So it's sort of like what happened  
14 in Jones.

15 MS. KONSUL: Yes, Jones, I believe - - -

16 JUDGE STEIN: That was a disorderly conduct.

17 MS. KONSUL: That was the one, yes, where they  
18 did not make out what exactly the action was that the  
19 person was doing that constituted - - - I forget the exact  
20 language, but a disruption to the public, essentially.  
21 They just said - - - is that - - - I believe that's the one  
22 where he was just standing and, yeah - - -

23 JUDGE STEIN: On the sidewalk.

24 MS. KONSUL: - - - blocking the sidewalk. And  
25 they never said that he was causing a disturbance by



1 blocking the sidewalk or that he was somehow otherwise  
2 fitting in a statute. They just simply said he was  
3 blocking the sidewalk. So therefore we wouldn't be able to  
4 infer, just from him standing there, that he was causing  
5 whatever the specific language is - - - I forget, off the  
6 top of my head, but intent to recklessly create a risk of  
7 public inconvenience, annoyance, or alarm. You can't  
8 really infer that just from someone's standing. So that  
9 was why it was deficient in Jones, very different from  
10 here.

11 JUDGE STEIN: So it has to do with context - - -

12 MS. KONSUL: Absolutely.

13 JUDGE STEIN: - - - in a general sense. And here  
14 you say that her statement provided that context.

15 MS. KONSUL: Absolutely. And what defendant is  
16 asking for is essentially for there to be either an arrow  
17 drawn between the accusatory and factual and attachment  
18 portions of the information or for there to be an  
19 additional sentence that says the benefit is X.

20 That is not something that is required at the  
21 pleading stage ever in - - - in the case law that we have  
22 here from this court and other courts. And in many  
23 instances, for practical purposes, at the pleading stage,  
24 we're still investigating, we're still gathering  
25 information. We may not, you know, and again, there could



1 be - - - there could be mutual benefits, as we have here.  
2 You know, these benefits go hand in hand. They are not  
3 mutually exclusive. They're not in conflict, and in fact -  
4 - -

5 JUDGE RIVERA: Counsel, just so I can be clear,  
6 so we're going to come back a little full circle here.

7 MS. KONSUL: Sure.

8 JUDGE RIVERA: Just reading the - - - the  
9 information and the attached statement, the People's  
10 position is that the benefit was what?

11 MS. KONSUL: That the benefit was to help the  
12 inmates and garner some type of favor or relationship with  
13 them.

14 JUDGE RIVERA: So both.

15 MS. KONSUL: Absolutely.

16 JUDGE RIVERA: A benefit to herself and a benefit  
17 to a third party.

18 MS. KONSUL: Correct, and either one of those  
19 would have been sufficient to meet - - - and it only  
20 actually has to be an intent to benefit.

21 JUDGE RIVERA: To the third party; who's the  
22 third party?

23 MS. KONSUL: The inmates.

24 JUDGE RIVERA: All of them?

25 MS. KONSUL: Well, it's - - -





1 JUDGE RIVERA: So releasing this one document  
2 benefited all of the inmates named in the statement?

3 MS. KONSUL: No, in this particular incident it  
4 would be the inmates involved with the unusual incident  
5 report.

6 JUDGE RIVERA: And how would she know that?  
7 You're saying she would infer that from the fact that it's  
8 the unusual incident document?

9 MS. KONSUL: Because the factual - - - yeah, the  
10 factual portion of the allegation does spell out that they  
11 are - - - the charge is for disclosing to an inmate  
12 regarding the unusual incident report on a specific date.

13 JUDGE RIVERA: So how is Bell benefited?

14 MS. KONSUL: Well, Your Honor, we don't know that  
15 - - -

16 JUDGE RIVERA: From the four corners of this, how  
17 is Bell benefited?

18 MS. KONSUL: He has information he's not supposed  
19 to have as an inmate.

20 JUDGE RIVERA: Okay.

21 MS. KONSUL: Very simply, I mean - - -

22 JUDGE RIVERA: So it doesn't really matter that  
23 this particular document is the one that he picked. Any  
24 document that included information that inmate didn't have  
25 access to would have been enough?



1 MS. KONSUL: Coming from the computer system at  
2 the prison, absolutely.

3 JUDGE RIVERA: Yes, because he wouldn't have had  
4 access to it; that's what I'm saying.

5 MS. KONSUL: Absolutely, yes, Your Honor. And in  
6 fact, it's not a benefit that even has to be tangible or  
7 executed; it's an intent to benefit. So clearly from this  
8 statement we have an intent to benefit

9 And I see my time is up, if Your Honors have no  
10 further questions.

11 CHIEF JUDGE DIFIORE: Thank you, Ms. Konsul.

12 MS. KONSUL: Thank you.

13 CHIEF JUDGE DIFIORE: Mr. Baker?

14 MR. BAKER: My adversary is creating benefits for  
15 inmates that are not the subject of this prosecution. For  
16 instance, in support of their position in response to the  
17 motion to dismiss, on page A-32: "It can be implied from  
18 the defendant's statement she received an inferred benefit  
19 of companionship, friendship, potential" - - - "I love you;  
20 I told him right back I love you."

21 But that has nothing to do with Chandler. If you  
22 go back to defendant's statement, that was dealing with  
23 Inmate Jones. You've got to remember something, Your  
24 Honors. This is a woman who lived - - - who worked in a  
25 very dangerous environment. In the beginning of her



1 statement, she talks about how she was scared by one of the  
2 inmates who was performing a sexual act in her presence,  
3 and she got quite intimidated. It's very important for her  
4 to function as an ASAT counselor, to have a good  
5 relationship with these people.

6 So by her saying to an inmate "I love you" back,  
7 that's only protecting herself, and it's not the benefit  
8 that's alleged by the Chandler complaint, but it's what the  
9 DA relied upon in order to justify the legal sufficiency of  
10 this instrument. I submit to you that, under these facts,  
11 if this is upheld, with such an amorphous benefit that only  
12 comes in later, it's, in effect, taking a strict liability  
13 offense out of - - - making it into a strict liability  
14 offense out of this crime which requires very specific  
15 intent, dual.

16 She has to know what she's doing is unauthorized,  
17 and I submit she didn't admit to doing anything  
18 unauthorized. Inmate Bell took it. And B, she's got an  
19 intent of benefit. The intended benefit that the district  
20 attorney suggests, and one of the judges embraced, has  
21 nothing to do with the subject inmate in the complaint.

22 Thank you very much for your attention.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of The People of the State of New York v. Donna Middleton, No. 24, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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