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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF STATE OF NEW YORK,

Respondent,

(Papers sealed)

-against-

No. 224

MICHAEL M.,

Appellant.

20 Eagle Street
Albany, New York 12207
November 18, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 224, State of New
2 York v. Michael M.

3 You want any rebuttal time, counsel?

4 MS. BENNETT: One minute, please, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: One minute.

7 MS. BENNETT: Thank you.

8 CHIEF JUDGE LIPPMAN: Go ahead.

9 MS. BENNETT: May it please the court, my
10 name is Margot Bennett. I work for Mental Hygiene
11 Legal Service, and today I'm here on behalf of
12 appellant Michael M. Animus - - -

13 CHIEF JUDGE LIPPMAN: So what happened to
14 your client? He - - - he gets into SIST on certain
15 conditions. There are some violations, which don't
16 have to do with compulsive sexual behavior. And
17 everything falls apart and then he's committed this -
18 - - what - - - what exactly - - -

19 MS. BENNETT: It's a little bit of a
20 perfect - - -

21 CHIEF JUDGE LIPPMAN: SIST is supposed to
22 restore people to a community, right?

23 MS. BENNETT: Yes, Your Honor. It was a
24 little bit of a perfect storm for this particular
25 man.

1 CHIEF JUDGE LIPPMAN: So SIST - - - did
2 SIST feel - - - failed? Was there just some
3 unimportant violations or - - - or is there some - -
4 - is there any - - - any basis for what - - - in your
5 mind, you're arguing that - - - that your client
6 just, out of the blue, winds up being committed for -
7 - - for this? What the - - - what's this all about
8 it? How did this happen? It seems - - - seems like
9 a very bizarre set of circumstances as opposed to the
10 typical cases that we get in this area.

11 MS. BENNETT: That's because it is - - -

12 CHIEF JUDGE LIPPMAN: Tell us why.

13 MS. BENNETT: - - - a bizarre set of
14 circumstances.

15 CHIEF JUDGE LIPPMAN: Why is it unusual,
16 and why does your client - - - why should your client
17 prevail?

18 MS. BENNETT: Well, before I go too far,
19 it's both unusual and not unusual.

20 CHIEF JUDGE LIPPMAN: Okay, go ahead.

21 MS. BENNETT: What's - - - what's most
22 unusual about this particular appellant is he had a
23 prolonged period of time in the community.

24 CHIEF JUDGE LIPPMAN: Right.

25 MS. BENNETT: And so that when Judge Kloch

1 held the bench trial, to - - - we did a combination
2 to determine mental abnormality and disposition - - -
3 he had that wealth of information in evidence before
4 him that - - -

5 CHIEF JUDGE LIPPMAN: He was functioning in
6 the community and apparently, fairly well.

7 MS. BENNETT: That's correct.

8 CHIEF JUDGE LIPPMAN: Okay.

9 MS. BENNETT: He was staying - - - maintain
10 - - - he was staying offense free.

11 CHIEF JUDGE LIPPMAN: Okay.

12 MS. BENNETT: Within a month, a petition is
13 brought. He no longer has the job he did, and he has
14 lost his apartment. So now he's, at this point, by
15 the time he gets back in front of Judge Kloch - - -

16 CHIEF JUDGE LIPPMAN: Whose fault is that?
17 The world comes apart for him. Whose fault was that?

18 MS. BENNETT: Well, Judge Kloch attributes
19 it to the system of reg - - - of SIST, the regimen
20 that is SIST. My - - -

21 JUDGE SMITH: But - - - but Judge Kloch
22 also did find that, at that point, he was dangerous
23 and required confinement.

24 MS. BENNETT: I think his fact-findings
25 were thoughtful and candid, but his legal conclusion

1 was dead wrong. I think he felt frustrated, and his
2 decision doesn't uphold SIST.

3 JUDGE SMITH: Well, it's - - - whether he's
4 - - - yes, whether he's - - - the facts, I suppose,
5 whether your guy is so dangerous that he requires
6 confinement?

7 MS. BENNETT: I would argue it's a legal
8 conclusion, and that's why judges decide disposition
9 and not juries.

10 JUDGE SMITH: Well, okay, but - - - but he
11 - - -

12 MS. BENNETT: Juries decide - - -

13 JUDGE SMITH: He did - - - he did - - - why
14 - - - I mean Judge Kloch obviously wasn't either
15 overawed or intimidated by the parole board or - - -
16 or with the parole officers or the - - - or the
17 social service ag - - - ag - - - agency. Why did he
18 think that conf - - - that - - - that confinement
19 was, nevertheless, required?

20 MS. BENNETT: I do think he took to heart
21 that the SIST team that is supposed to be
22 coordinating the social service and the safety net
23 that you have to employ to do two purposes that are
24 required under the statute: both maintain, as much
25 as you can, safety in the community, but also treat

1 this person to reduce their deviant urges, to reduce
2 the risk of recidivism. That he thought these people
3 aren't going to work with him. They're not going to
4 cooperate.

5 CHIEF JUDGE LIPPMAN: So therefore, he
6 found - - - he found that he should be committed?

7 MS. BENNETT: But that's what he said, and
8 don't we have to take - - -

9 CHIEF JUDGE LIPPMAN: So you're saying - -
10 -

11 MS. BENNETT: - - - him at his word?

12 CHIEF JUDGE LIPPMAN: I see. So you're
13 saying his - - - his legal conclusion is wrong even
14 though the - - - tonally he got what wasto happening
15 here; is that what you're saying?

16 MS. BENNETT: Yes, I think he did not reali
17 - - - well, couple of things. I think, one, he
18 forget that he's not some passive umpire, that as a
19 trial court he has some supervisory responsibility to
20 protect citizens.

21 CHIEF JUDGE LIPPMAN: Who - - -

22 JUDGE RIVERA: But - - - but counsel, does
23 - - - isn't there more going on here? But in - - -
24 in his decision he says, "I must accordingly find in
25 the absence of the positive improvements in Mr. M.'s

1 life" - - - is - - - isn't he reacting to the fact
2 that the fiancée's gone, that he's homeless, that he
3 doesn't have employment, that the - - - that that
4 means the - - - the things that are external to what
5 he might have been able to design under SIST, or
6 anyone would design under SIST, that had put this
7 particular individual on the track that he could
8 actually function outside in the community was no
9 longer there for him.

10 MS. BENNETT: Well a coup - - -

11 JUDGE RIVERA: Isn't that what really turns
12 this case?

13 MS. BENNETT: A couple of things - - -

14 JUDGE RIVERA: Yeah.

15 MS. BENNETT: A couple of things are
16 happening when you do that, though.

17 JUDGE RIVERA: Yeah.

18 MS. BENNETT: First, you're - - - you're
19 not upholding the whole statute. Our state chose two
20 tracks. You can - - -

21 JUDGE RIVERA: Yeah, but no - - - no, but -
22 - - but isn't the judge just taking - - - taking your
23 client where he was at that time, and saying now I've
24 got to decide. Can this person function out in
25 society when he no longer has the things that I find

1 helped him stay stable - - -

2 MS. BENNETT: Yes, and who - - -

3 JUDGE RIVERA: - - - and control his urges.

4 MS. BENNETT: - - - and who's supposed to
5 help him?

6 JUDGE PIGOTT: You're - - - you're saying -
7 - -

8 JUDGE RIVERA: Well - - - well, no, they're
9 not going to find him a fiancée.

10 JUDGE PIGOTT: Well, wait - - - wait.

11 MS. BENNETT: Well, no, but the job and the
12 homelessness, that's going to apply to everyone
13 coming out of prison; isn't it?

14 JUDGE SMITH: But - - - but - - - is it - -
15 - is it really the law? I mean - - - I mean supp - -
16 - the facts as you - - - you seem to be suggesting
17 are that if the guy's - - - if this guy is, indeed,
18 dangerous and someone who can't live in the community
19 without committing offenses or without an accept - -
20 - an unacceptably high risk of committing offenses,
21 that that's the fault of the people who were supposed
22 to be giving him a - - - a - - - a useful SIST
23 regimen and completely failed. Assume you're right,
24 does that mean that he - - - we let him stay in the
25 community and commit sex offenses?

1 MS. BENNETT: Respectfully, I don't think
2 that's what I'm arguing. I'm arguing that the facts
3 - - - assuming all of the facts Judge Kloch found are
4 true, they don't show that this person, because now
5 he's living in the mission and he's without a job.
6 Gee, a level 3 sex offender without a job. That is
7 not - - -

8 CHIEF JUDGE LIPPMAN: You're saying
9 regardless of whose fault it is - - -

10 MS. BENNETT: Exactly.

11 CHIEF JUDGE LIPPMAN: - - - that - - - that
12 there's not sufficient evidence to support the
13 judge's finding?

14 MS. BENNETT: Exactly.

15 CHIEF JUDGE LIPPMAN: And - - - but at the
16 same time, the judge is saying, or appears to be
17 putting great fault on the system.

18 MS. BENNETT: He is.

19 CHIEF JUDGE LIPPMAN: So - - - so he got it
20 - - - it - - - from your perspective, he got it right
21 putting great fault on the system, but he got it
22 wrong in that even with that fault, whatever caused
23 it, and saying there's sufficient evidence to say
24 that he's - - - can't survive out in the real world
25 because of this compulsion or - - - or abnormality.

1 MS. BENNETT: Correct, there's no
2 connection between his violation and this particular
3 offender's MO, for lack of a better phrase. What is
4 the clinical condition - - -

5 CHIEF JUDGE LIPPMAN: So what should the
6 judge have done, send him back to SIST after all
7 this?

8 MS. BENNETT: Yes, put him back on SIST.
9 He could have modified SIST. He could have said to
10 the SIST team okay - - -

11 JUDGE ABDUS-SALAAM: Was there any request
12 for a modification of SIST?

13 MS. BENNETT: No, I asked him - - - for him
14 to dismiss or modify in a motion, which was denied
15 off the record, and then with the decision was
16 essentially denied. So yes, I think he knew he - - -
17 on some level knew he had that option but somehow - -
18 - somewhere - - -

19 JUDGE PIGOTT: What - - - what should have
20 he have done, in your view?

21 MS. BENNETT: Told the parties to try
22 harder.

23 JUDGE PIGOTT: That - - - that - - - you
24 can't put that in an order.

25 MS. BENNETT: Sure, you can. The - - - the

1 statute - - -

2 JUDGE PIGOTT: Well, I don't - - - I don't
3 know if you want us to say - - -

4 MS. BENNETT: Oh.

5 JUDGE PIGOTT: - - - from now on we want -
6 - - we want an order that says, from now on try
7 harder.

8 MS. BENNETT: All right, then you make in
9 the fact-finding there are eighty-two conditions that
10 this person must abide, and it does look like there
11 may or may not be a technical violation of residency,
12 because now you're homeless.

13 JUDGE PIGOTT: Well, I - - - well, I guess
14 my point - - - my - - - my question is much more
15 basic. I don't even know - - - you know, I - - - I
16 get the eighty-two and the - - - you know, and - - -

17 CHIEF JUDGE LIPPMAN: Excuse me.

18 JUDGE PIGOTT: - - - all of that. But then
19 where it goes from there is kind of a mystery. Now,
20 I - - - what I - - - what I compared this to, let's
21 assume somebody's on probation, and they have to - -
22 - they have to report to their probation officer on a
23 monthly basis, and every time they go, the probation
24 officer's not there. Either he's - - - just make
25 anything up on why he's not doing his job. So they

1 bring him in and - - - and - - - and they say well,
2 obviously, probation's not working for you. I'm
3 putting you in jail. And I don't think that would be
4 good for the defendant, since it's not his fault that
5 he didn't make probation. And it seems to me maybe
6 something should be done at the probation department
7 to find out why this person wasn't there. Are we in
8 that kind of a mode here?

9 MS. BENNETT: Yes and no. My nervousness
10 is that I feel like a parole or probation model was
11 employed here when it shouldn't have been. He's not
12 an inmate anymore. He's supposed to be a patient,
13 albeit a sex offender patient with some different
14 rules. But why couldn't the judge deny the petition
15 for confinement, direct some modification if he
16 thought appropriate, order the parties back in like
17 you do when you have probationers coming and saying
18 you know what, please don't do that again. The two
19 of you need to communicate about it.

20 JUDGE ABDUS-SALAAM: Is that the rule you
21 would like us to adopt here?

22 MS. BENNETT: I'm sorry?

23 JUDGE ABDUS-SALAAM: Is that the rule you
24 would like us to adopt here?

25 MS. BENNETT: I think the easiest way is -

1 - - is - - - if - - - or the cleanest rule would be
2 least restrictive alternative does matter here. It's
3 built into the statute, actually, throughout 10.01,
4 at 10.07, at 10.11.

5 JUDGE SMITH: But isn't - - - isn't - - -
6 isn't there an implicit finding in the - - - in the
7 cour - - - by the courts below that any less
8 restrictive alternative would - - - would create an
9 unacceptable danger to the community?

10 MS. BENNETT: I don't think that the record
11 supports that, and I think that if you have that in
12 place, it will put pressure on the parties
13 appropriately.

14 CHIEF JUDGE LIPPMAN: So your bottom line
15 is, your argument is, there's not enough evidence to
16 show inability to control behavior, period.

17 MS. BENNETT: Behavior that would be sex
18 offending, yes.

19 CHIEF JUDGE LIPPMAN: Yes, obviously.

20 MS. BENNETT: Yes, Your Honor.

21 CHIEF JUDGE LIPPMAN: Okay, let's hear from
22 your adversary.

23 MR. BRADY: Good afternoon, Your Honors.

24 CHIEF JUDGE LIPPMAN: Counsel, what's the -
25 - - what's the evidence to show that he can't control

1 his behavior?

2 MR. BRADY: Well, the evide - - -

3 CHIEF JUDGE LIPPMAN: He is out in the
4 community. There's a couple of what appear to be
5 relatively minor infractions in terms of the SIST
6 protocols. What is it that - - - in this record that
7 shows that he - - - he's unable to control his
8 behavior in - - - in a clear and convincing way to
9 meet the statutory standard? What is it? What's
10 there in the record?

11 MR. BRADY: It's the expert testimony. The
12 expert testified that he's a pedophile who continues
13 to struggle with his strong urges to sexually - - -

14 CHIEF JUDGE LIPPMAN: I thought the expert
15 testified that he does seem to have the ability to
16 control his behavior?

17 MR. BRADY: No, they - - - they - - -

18 CHIEF JUDGE LIPPMAN: No, he didn't have
19 any testimony about him recognizing his problem and
20 being able to cope with it in various ways?

21 MR. BRADY: Well, there - - - excuse me,
22 Your Honor. There - - - there's testimony that he
23 recognizes the - - - his issues and that there's
24 testimony he told the expert that he is working to
25 control his issues.

1 JUDGE SMITH: Well, and - - - and - - - in
2 fact - - -

3 MR. BRADY: But he - - - he - - -

4 JUDGE SMITH: - - - he - - - he lived a
5 blameless life, essentially, for a year or so.

6 MR. BRADY: We know that he had no contacts
7 with the criminal justice system for - - -

8 JUDGE SMITH: And as far - - - as far as -
9 - - as far as you know, he lived a - - - he - - - he
10 - - - he was - - -

11 MR. BRADY: As far as - - - as far as we
12 know, he had no contacts with the criminal justice
13 system for - - -

14 JUDGE PIGOTT: One of things that - - -

15 MR. BRADY: - - - for a year - - -

16 JUDGE PIGOTT: One of the things that comes
17 up here - - -

18 MR. BRADY: - - - for a year and a half.

19 JUDGE PIGOTT: - - - it seems to me, is you
20 had right to appeal as SIST, and you didn't. And - -
21 - and - - - but within thirty days of the time he's
22 on SIST you guys are putting him back in jail. I
23 didn't even know you could do that, but - - - but if
24 you disagreed with the SIST decision that Judge Kloch
25 made just a month before, shouldn't you have appealed

1 that?

2 MR. BRADY: Your Honor, we did not bring
3 the SIST violation because we disagreed with Judge
4 Kloch's decision. Judge Kloch made his decision in
5 September. He signed the order on November 15th.
6 And as you know, in the quick month, the respondent's
7 life disintegrated in a way that was not - - -

8 JUDGE PIGOTT: I disagree. I - - - I - - -
9 I mean I'm - - - I'm not going to fence with you over
10 whether it disintegrated or not. That's a - - - you
11 know, a - - - a conclusion.

12 MR. BRADY: Well, there were - - - there
13 were - - - stability - - -

14 JUDGE PIGOTT: But - - -

15 MR. BRADY: He lost stability.

16 JUDGE PIGOTT: But the reasons seem to be,
17 as I think was put in one of the briefs, it was like
18 a domino effect, and - - - and - - - and it didn't
19 seem like there was anybody there on the - - -
20 whatever that group, the SIST group was, to catch him
21 and say - - -

22 MR. BRADY: Well, what the - - - what - - -

23 JUDGE PIGOTT: - - - you know, let's see if
24 we can find you a job. Let's see if we can find - -
25 - I guess somebody did try to find him a house. But

1 gee, you're half an hour late and we're going to viol
2 - - - we're going to - - - you're under arrest.

3 MR. BRADY: Well, you - - - the - - -
4 obviously the judge is frustrated, and you can read
5 that in his decision, that the treatment team and
6 parole, you know, didn't provide him with housing or,
7 you know, didn't - - - didn't do more for him. But
8 it's important to remember that the reason that - - -
9 that he was found to be a dangerous sex offender by -
10 - - by the court - - - and - - - and the - - - which
11 the Appellate Division also found, is because he re -
12 - - he - - - he is a pedophile who continues to
13 struggle with his - - - with his urges to sexually
14 reoffend against prepubescent females - - -

15 JUDGE PIGOTT: He was candid - - - he was
16 candid - - -

17 MR. BRADY: And - - - and - - - and if I
18 could just get this out - - -

19 JUDGE PIGOTT: He was - - - okay.

20 MR. BRADY: If I could just get this out.
21 And what happened was he refused to accept treatment.
22 He refused to abide by the conditions of SIST. There
23 was a - - -

24 JUDGE PIGOTT: That wasn't in the record.

25 MR. BRADY: Excuse me?

1 JUDGE PIGOTT: That wasn't in the record
2 that I saw. When Dr. Etu was testifying, you know,
3 he said what - - - what we've repeated now a couple
4 times, that he struggles with it, that - - - but he's
5 - - - he's talking to him. He's - - - he - - - you
6 know - - -

7 MR. BRADY: Your Honor, then I'd ask the
8 court - - - there's a - - - this record clearly shows
9 there's a meeting on December 13th, a - - - a week
10 after he was late or had missed an appointment, his
11 first appointment with sexual orientation treat - - -
12 for treatment. They were going to set him up. They
13 scheduled an - - - an appointment the following week,
14 December 13th, and that appoint - - - that meeting is
15 very important to what happened.

16 JUDGE ABDUS-SALAAM: Where is that in the
17 record, counsel?

18 MR. BRADY: This is in the record. This is
19 - - -

20 JUDGE PIGOTT: 12/13 - - - December 13th?

21 MR. BRADY: December 13th, this is very
22 important.

23 JUDGE ABDUS-SALAAM: Where?

24 JUDGE SMITH: And he had a - - -

25 MR. BRADY: And - - -

1 JUDGE SMITH: - - - he had a - - - he had a
2 bad attitude at that meeting?

3 MR. BRADY: No, what he - - - well - - -
4 well, he - - - he may have, but what - - - what he -
5 - - that's the way the court characterized it. The
6 court said that we brought this petition because he
7 had a bad attitude and because he was late for a
8 meeting, but that's not true. What happened at that
9 meeting is - - - was the treatment team sat down with
10 him - - - and this is in the record. They sat down
11 with him and they - - - and they wanted to address
12 with him the problems that he was having in his life.
13 They could see the problems that he was having in his
14 life. And they also thought that he was being
15 resistant in the way he had gotten kicked out of the
16 house.

17 JUDGE SMITH: Be - - - be - - - be - - -

18 MR. BRADY: He had gotten kicked out of the
19 - - -

20 JUDGE SMITH: - - - being resistant and a
21 bad attitude are sort of similar, different ways of
22 describing the same thing.

23 MR. BRADY: Nevertheless, they saw that he
24 had been kicked out of his housing because he wasn't
25 complying with the jobs program, and they saw that he

1 was late for an - - - an appointment and never
2 called. So they - - - they wanted to have a meeting
3 with him, because they felt that he wasn't rec - - -
4 they felt he wasn't receptive. He was having
5 problems. They wanted to address them.

6 CHIEF JUDGE LIPPMAN: Yeah, but again where
7 is it?

8 MR. BRADY: The problem was with - - -

9 CHIEF JUDGE LIPPMAN: Where in the record
10 does it show his inability to control his sexual
11 behavior?

12 MR. BRADY: It's - - - Dr. Etu's testimony
13 is what supports the finding.

14 CHIEF JUDGE LIPPMAN: The doctor - - - but
15 again, the doctor seems to recognize that - - - that
16 he's able to deal with this or trying to and without
17 having a problem, he's doing it.

18 MR. BRADY: Doctor - - -

19 CHIEF JUDGE LIPPMAN: Because he has
20 certain mechanisms.

21 MR. BRADY: Dr. Etu testified there's a
22 strong - - - this is on page - - - the record - - -
23 record 119 to 20 - - - to 120. "There is a strong
24 likelihood in the relatively near future, in the next
25 year, two years he'll" - - -

1 JUDGE PIGOTT: That's conclusion that he
2 made. Is - - - is that before or after the cross-
3 examination, because I thought he'd backed off an
4 awful lot by the time the cross-examination was over.

5 MR. BRADY: I - - - with the - - - was that
6 on dir - - - cross or direct?

7 JUDGE PIGOTT: He - - - he had said it
8 twice, I think.

9 MR. BRADY: I - - -

10 JUDGE PIGOTT: I think - - - I think back
11 on redirect it was - - - it was - - - anyway, the - -
12 - the point - - -

13 MR. BRADY: I - - - I don't know if it was
14 on cross or direct.

15 JUDGE PIGOTT: - - - the point is that
16 whatever he says is what was said before to Judge
17 Kloch and Kloch decided that SIST was what he was
18 going to do.

19 MR. BRADY: Um-hum.

20 JUDGE PIGOTT: Nothing - - - there's
21 nothing that changed in that thirty days, other than
22 the fact that he - - - that he had a bad attitude, I
23 guess, and - - -

24 MR. BRADY: That's not - - - that's not - -
25 - that's not correct, Your Honor.

1 JUDGE PIGOTT: He - - - he was - - -

2 MR. BRADY: First - - - first of all, he
3 was - - - Dr. - - -

4 JUDGE PIGOTT: Wait a minute. Wait a
5 minute. Wait a minute. All right, let me do this.
6 He molested no one. He talked to no one. Etu said
7 he hasn't even been in contact with - - - with - - -
8 with children that he knew of. There was - - - there
9 - - - there was nothing there, and it just seemed to
10 me that if the guy falls off the wagon, you put him
11 back on him. You don't - - - you don't undo what
12 Judge Kloch did just thirty days before. Why - - -
13 why wouldn't somebody go back to Kloch and say let's
14 have a hearing about this, Judge?

15 MR. BRADY: Well, first of all, I'd like to
16 clear something up. Dr. Etu was not the expert who
17 testified three months before that - - - that - - -

18 JUDGE PIGOTT: Oh, was that Kirshner?

19 MR. BRADY: Yes, so that's a different - -
20 - that's a different doctor who found that - - -

21 JUDGE PIGOTT: Guess it is.

22 MR. BRADY: - - - he - - - he was a
23 dangerous sex offender requiring confinement. And -
24 - - and interestingly enough, all - - - it was Dr.
25 Etu's opinion here that he was a dangerous sex

1 offender requiring confinement, but there was no
2 evidence cont - - - to the cont - - -

3 JUDGE PIGOTT: But, Mr. Brady, do you
4 understand - - -

5 MR. BRADY: There was no evidence to the
6 contrary presented.

7 JUDGE PIGOTT: Do you under - - - do you -
8 - - do - - - do you understand that if - - - if - - -
9 if we have a trial and I'm found negligent and I've
10 got to pay you money and I don't pay you money, you
11 know, you - - - you - - - I can't go back and say by
12 the way, Judge Kloch found me negligent but he was
13 wrong, and that's why I'm not paying the money and so
14 I want another trial. They're going to say no, you
15 should have appealed. You didn't appeal, therefore,
16 you're stuck with the judgment you get.

17 MR. BRADY: Your Honor - - - Your Honor is
18 suggesting that we trumped up this - - - these - - -
19 this petition - - -

20 JUDGE PIGOTT: No.

21 MR. BRADY: - - - because we were unhappy -
22 - -

23 JUDGE PIGOTT: You're being - - - you're -
24 - - you're being too defensive. What I'm suggesting
25 to you is that there's no evidence here that he did

1 anything of a sexual nature within the thirty days,
2 and that what SIST is supposed to do, eighty-two
3 times apparently, is - - - is help him, you know, so
4 that he can stay in the community, and my only
5 question is where's the evidence that they did that?

6 MR. BRADY: There's - - - Your Honor,
7 there's no - - - the statute doesn't require evidence
8 of sexual reoffending or actual evidence that he - -
9 - that - - - that - - - that - - - that he did a - -
10 - a - - - a sexual offense. The - - - the statute -
11 - -

12 CHIEF JUDGE LIPPMAN: What does it require?

13 MR. BRADY: The statute only - - -

14 CHIEF JUDGE LIPPMAN: What - - - what if he
15 has a - - -

16 MR. BRADY: This is - - -

17 CHIEF JUDGE LIPPMAN: - - - he - - - he had
18 a bad month and SIST, apparently, had a lot to do
19 with the bad month.

20 MR. BRADY: It would - - -

21 CHIEF JUDGE LIPPMAN: What's the change in
22 - - -

23 MR. BRADY: Well - - -

24 CHIEF JUDGE LIPPMAN: - - - circumstance
25 that now leads to him being committed?

1 MR. BRADY: Let me - - - maybe I can state
2 this ano - - - another way.

3 CHIEF JUDGE LIPPMAN: Yes, say it.

4 MR. BRADY: No one - - - no one who's under
5 SIST should be confined as a result of a SIST
6 violation. All a SIST violation does, under the
7 statute, is it triggers - - - if a - - - if a parole
8 officer has reasonable cause to believe there's a
9 SIST violation, it triggers a reevaluation. It
10 triggers a - - - which - - -

11 CHIEF JUDGE LIPPMAN: And upon the
12 reevaluation, what showed a change in circumstance
13 related to his inability to control his sexual
14 behavior?

15 MR. BRADY: Thank you for the question.
16 It's - - -

17 CHIEF JUDGE LIPPMAN: What's the answer?

18 MR. BRADY: - - - the December 13th meeting
19 where he refuses to participate. He tells his
20 treatment team that he won't - - - won't abide by the
21 conditions of SIST and he won't participate in
22 treatment. At that point, Your Honor - - - at that
23 point the treatment team discharged him, because he
24 refused to participate in treatment, and at that
25 point, Your Honor, the parole officer said well, what

1 am I going to do? Now he's been discharged from the
2 treatment team. The hands were tied.

3 JUDGE ABDUS-SALAAM: Counsel, could I - - -
4 I need to - - -

5 MR. BRADY: The - - - he tied the hands of
6 the treatment team - - -

7 JUDGE ABDUS-SALAAM: Could I ask you again
8 - - - counsel.

9 CHIEF JUDGE LIPPMAN: Judge Abdus-Salaam.

10 JUDGE ABDUS-SALAAM: Could I ask again
11 where in the record is this December 13th meeting?

12 MR. BRADY: Where in the record is the
13 December 13th meeting? It's - - - it's referred to
14 both in the petition and in - - - in the testimony of
15 Dr. Etu and the testimony of - - - of Mr. Ken
16 Duszynski who was the forensic director of Mid-Erie
17 and who - - - who was the one who decided that he had
18 to be discharged because he - - - because he had
19 communicated that he would not abide by the
20 conditions or SIST - - - of SIST or communicate in
21 treatment.

22 JUDGE PIGOTT: He - - -

23 MR. BRADY: And that was - - - that was the
24 material thing that changed, because now you have
25 someone who's already been adjudicated, you know.

1 JUDGE PIGOTT: Before you go - - -

2 MR. BRADY: He's under a verdict of mental
3 abnormality.

4 JUDGE PIGOTT: Before you go - - - before
5 you go - - - if - - - if that's true - - - let's - -
6 - let's assume - - - let's take it out of this case.
7 You got the - - - you got a similar situation like
8 this. Is there any way that the - - - the person,
9 the respondent, can get a new team? I mean can he
10 make a claim that, you know, this person, you know,
11 doesn't like me or this person is whatever, and - - -
12 and I'm not getting the treatment that I want from
13 these - - - from these people.

14 MR. BRADY: Under the - - - under the Mid-
15 Erie Treatment Services, which - - - where - - - who
16 was treating him, and who had actually treated him in
17 the past when he was on parole, they have grievance
18 procedures that you can file. He could have - - - if
19 he was dissatisfied with the - - - with the treatment
20 team, he could have filed a grievance procedure.

21 JUDGE PIGOTT: Was he aware of that?

22 MR. BRADY: I - - - I don't know. I assume
23 that they - - - you know, I - - - I don't know. I
24 don't know, and I don't know what he communicated to
25 his parole officer about that. But - - - but the

1 December 13th meeting is critically important,
2 because that's what changed. That's what started,
3 you know - - -

4 CHIEF JUDGE LIPPMAN: Okay, counsel.

5 MR. BRADY: - - - this going. They - - -
6 and I - - - and I would just say that the - - - that
7 the core, the thing that has to be decided at the
8 hearing isn't whether he violated. You - - - he
9 could - - - he could have violated, but if he's - - -
10 if - - - if he - - - if there's not evidence that
11 he's a dangerous sex offender requiring confinement,
12 he shouldn't be confined.

13 CHIEF JUDGE LIPPMAN: Okay.

14 MR. BRADY: But - - -

15 CHIEF JUDGE LIPPMAN: Let - - - we
16 understand your argument. Let's hear from your
17 adversary.

18 MR. BRADY: Thanks.

19 CHIEF JUDGE LIPPMAN: Counselor, what about
20 the December 13 meeting?

21 MS. BENNETT: Two things. I respectfully
22 disagree with how he characterized the meeting. It
23 was from the testimony of only Mr. Duszynski. Dr.
24 Etu wasn't present at that meeting, so very little
25 reliable direct information.

1 But Mr. Duszynski, the director of Mid-Erie
2 then, did testify about it. And it was a lot more
3 about attitude and their concern that he wasn't
4 taking ownership for being late and for some of his
5 difficulty with getting back with Ms. Curtis (ph.),
6 who was a counselor he had been familiar with.

7 JUDGE SMITH: Is it - - - is it not a
8 permissible judgment for, really, ultimately for the
9 court or for a psychiatrist to make, that when a guy
10 with - - - who has, in his life, committed some
11 pretty bad crimes has a bad attitude towards
12 supervision, that - - - that - - - that it's
13 dangerous to leave him in the community?

14 MS. BENNETT: But he - - - it was just his
15 screening. He hadn't even gotten treatment yet, and
16 I think Judge Kloch does call it correctly when he
17 said - - -

18 JUDGE SMITH: It sort of - - - it sort of
19 looks like he was - - - he did better without
20 treatment than with it, from all I can tell.

21 MS. BENNETT: Well, and - - - yeah, and
22 it's going to be - - -

23 CHIEF JUDGE LIPPMAN: Is it - - - is it
24 your contention that it's their animus that caused
25 this?

1 MS. BENNETT: That caused the discharge
2 from treatment?

3 CHIEF JUDGE LIPPMAN: At the - - - the - -
4 - at the meeting, that there's some kind of animus
5 going on?

6 MS. BENNETT: There's bad blood between
7 that. That was fairly clear.

8 CHIEF JUDGE LIPPMAN: So that - - - so that
9 is your conten - - - then this wasn't necessarily a
10 really bad attitude, but there was some kind of a
11 back and forth that triggered the bad attitude is
12 your contention?

13 MS. BENNETT: I'm thinking they both had a
14 bad attitude.

15 JUDGE PIGOTT: Well - - -

16 CHIEF JUDGE LIPPMAN: And the - - - I'm
17 sorry, go ahead.

18 JUDGE PIGOTT: No, no, please.

19 CHIEF JUDGE LIPPMAN: The judge's
20 conclusion about animus, was he referring to that?

21 MS. BENNETT: He's referring to that. I
22 mean that's for sure.

23 CHIEF JUDGE LIPPMAN: Judge Pigott.

24 JUDGE PIGOTT: Well, Mr. Brady pointed out
25 at that meeting he said he would not participate in

1 treatment, and he was not going to participate.

2 MS. BENNETT: And I disagree. That's not
3 true.

4 JUDGE PIGOTT: You're saying that's not
5 what the record shows?

6 MS. BENNETT: No, I think that's not what
7 Judge Kloch found, and I think if you look at the
8 entire record, what you see is him saying his
9 opinion. He said something with Dr. Etu, like, you
10 know what, I really wasn't very happy to be back on
11 SIST. I wasn't happy to be back - - - brought back
12 in on Article 10.

13 And the last thing I'll say on this is that
14 Judge Kloch called it. He said the - - - about that
15 meeting in December. "The conclusion of this chapter
16 was authored before it occurred." He pulled back the
17 curtain on the relationships of these parties, and -
18 - - and I don't think it's fair to say well, it was
19 critical because he wasn't compliant. No, he had a
20 bad attitude, and so they did.

21 CHIEF JUDGE LIPPMAN: Okay.

22 MS. BENNETT: Thank you.

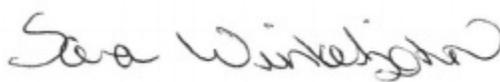
23 CHIEF JUDGE LIPPMAN: Thank you both,
24 appreciate it.

25 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of State of New York v. Michael M., No. 224 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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