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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF NEW YORK STATE OFFICE OF
VICTIM SERVICES,

Respondent,

-against-

No. 6

RAUCCI,

Appellant.

20 Eagle Street
Albany, New York 12207
January 3, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with number 6, New York State Office of Victim
3 Services v. Raucci.

4 Counselor? Do you want any rebuttal time,
5 counselor?

6 MR. PIERCE: Yes, Your Honor. I'd like to
7 reserve two minutes, please.

8 CHIEF JUDGE LIPPMAN: Two minutes. Go
9 ahead. You've got it; let's get started.

10 MR. PIERCE: Thank you, Your Honor. May it
11 please the court, my name is Alan Pierce. I
12 represent Steven and Sheila (sic) Raucci on this
13 matter.

14 I submit to you that this case is a
15 straightforward case of statutory interpretation. We
16 have the 2001 amendments to the Son of Sam Law. The
17 petitioner - - - and the Third Department agreed - -
18 -

19 CHIEF JUDGE LIPPMAN: Why doesn't the - - -
20 why should or shouldn't the Son of Sam Law supersede
21 whatever has gone before it, including the Social
22 Security Law.

23 MR. PIERCE: I - - -

24 CHIEF JUDGE LIPPMAN: Yes, go.

25 MR. PIERCE: It does not, Your Honor,

1 because first of all, we have no evidence in the
2 statute or the legislative history at all, indicating
3 that it is to supersede either Section 110 - - -

4 CHIEF JUDGE LIPPMAN: Does it have to say
5 so specifically?

6 MR. PIERCE: Not necessarily. But under
7 the heavy burden that this court has established for
8 superseding existing statutes by implication or in
9 silence, it's a very heavy burden.

10 JUDGE READ: Well, what about the language?
11 It says, "All funds received from any source," and
12 then it has two specific exclusions, and only two.

13 MR. PIERCE: Yes, Your Honor.

14 JUDGE READ: So how do you get around that
15 when you talk about the plain language in statutory
16 interpretation?

17 MR. PIERCE: But one of - - - for example,
18 one of those two exemptions is first ten percent of
19 any civil recovery. And the legislature put that
20 exemption, not surprisingly, in CPLR 5205. Well,
21 there already are exemptions for pension funds in
22 CPLR 5205(c) and (d). So what the legislature did
23 here was they added to the exemptions already
24 existing, both in the CPLR and in Section 110.

25 JUDGE SMITH: Well, but suppose we look at

1 it differently. Suppose we say that these - - - that
2 the definition of funds of a convicted person means
3 everything, including pension funds. So what? Where
4 does it say that they can be levied on?

5 MR. PIERCE: It doesn't.

6 JUDGE SMITH: I mean, isn't that your
7 better argument, that there's a - - - it's not a
8 question of how you reconcile the conflict; there's
9 no conflict. There's no substantive provision in the
10 Son of Sam Law.

11 MR. PIERCE: Well, I certainly don't want
12 my client's funds frozen in his inmate account. I
13 don't think that - - -

14 JUDGE SMITH: Where does the Son of Sam Law
15 say they can be frozen?

16 MR. PIERCE: Well, if you get an
17 injunction. And the stat - - -

18 JUDGE SMITH: It says you can get any
19 preliminary relief otherwise available to the
20 plaintiff.

21 MR. PIERCE: Right.

22 JUDGE SMITH: Which is the same - - - the
23 Attorney General can get today the same relief that
24 the plaintiff could have got before the law was
25 passed. So what? The plaintiff couldn't have frozen

1 them; how can the Attorney General?

2 MR. PIERCE: I don't think they can. I
3 certainly agree. I don't think they can.

4 JUDGE GRAFFEO: Could your client have
5 assigned his pension benefits to his wife?

6 MR. PIERCE: Could he have assigned them?
7 I'll be honest with you. I don't know the answer to
8 that question. Here, he obviously - - - he granted a
9 power of attorney to her. She cashed those checks.
10 As you know, I submit, she's got a marital right or
11 interest in the pension funds.

12 JUDGE PIGOTT: Does or does not?

13 MR. PIERCE: She does.

14 CHIEF JUDGE LIPPMAN: What about the inmate
15 account? Isn't that kind of weird or strange that -
16 - - to have it put in there and to have an
17 injunction? What - - - how do you react to all of
18 that? Is that something that they can do?

19 MR. PIERCE: I don't think they can.

20 CHIEF JUDGE LIPPMAN: Yes.

21 MR. PIERCE: I don't see any authority for
22 this - - - the unique relief which I think the
23 Supreme Court said was unprecedented, what they asked
24 for.

25 CHIEF JUDGE LIPPMAN: Couldn't they take it

1 directly from the wife? Is there any reason they
2 couldn't take it?

3 MR. PIERCE: Well, they - - - they didn't
4 want to. They didn't name her.

5 CHIEF JUDGE LIPPMAN: No, but assuming that
6 they had some claim on those funds, could they just
7 take those funds, if it went to the wife? We know
8 they can't take it when it's in the - - - when it
9 hasn't been distributed yet, right?

10 MR. PIERCE: Well, they concede that.

11 CHIEF JUDGE LIPPMAN: Okay.

12 MR. PIERCE: Yes.

13 CHIEF JUDGE LIPPMAN: So would it make more
14 sense to go to the wife and try and get those funds?
15 And is there any rationale that you could see to take
16 - - - to get it into the inmate fund and then take it
17 from there?

18 MR. PIERCE: Well, I - - - I'll try to
19 answer that, Your Honor. I don't know that they
20 could go against her directly, because I don't think
21 the statute necessarily allows that. I - - -

22 CHIEF JUDGE LIPPMAN: So where do they go?
23 How do they do it? If they can't take it from the
24 wife, and if they can't take it from the inmate fund,
25 how would they get the money - - - they can't take it

1 from the pension fund - - - how do they get it, then?

2 MR. PIERCE: Well, they wouldn't. Again -
3 - -

4 CHIEF JUDGE LIPPMAN: Assuming they're
5 entitled to it.

6 MR. PIERCE: If I assume that the Son of
7 Sam Law did supersede these provisions.

8 CHIEF JUDGE LIPPMAN: Yes.

9 MR. PIERCE: And just - - - I submit, Your
10 Honor, that "it's necessary" isn't a valid line of
11 authority for the argument that we need this relief.
12 I mean, the cases they've cited for this unique
13 relief to have it deemed that the money goes in that
14 account.

15 JUDGE SMITH: Suppose the Son of Sam Law
16 does - - - well, suppose Section 110 does apply - - -
17 110 applies to the funds. The funds get - - - the
18 funds get paid out to her. She puts them in a bank
19 account. I guess they're still exempt in the bank
20 account, under the theory they're still pension
21 funds?

22 MR. PIERCE: Yes.

23 JUDGE SMITH: Then what happens if now she
24 uses it to buy a car or she uses it to buy him a - -
25 - I don't know - - - an electric razor, anything? Is

1 the car - - - is what she buys exempt?

2 MR. PIERCE: I can say - - - Your Honor, I
3 don't know the answer to that question.

4 JUDGE SMITH: I mean, even - - - yes, but
5 forget about the Son of Sam Law - - -

6 MR. PIERCE: The statute really - - -

7 JUDGE SMITH: - - - even without the Son of
8 Sam Law, there would come a point at which the
9 proceeds of a pension have been used or intermingled
10 or converted into some other form. And then they
11 would be possible to levy, right?

12 MR. PIERCE: Well, certainly - - - there
13 certainly would be some circumstances where that
14 might be the case. I mean, if she's buying groceries
15 with the money, which I suspect she was - - -

16 JUDGE SMITH: Um-hum. In theory - - - in
17 theory the state could levy on the groceries if she's
18 on the way home from the store?

19 MR. PIERCE: I'm not saying they could.
20 But I guess at some point, perhaps, they could. But
21 here we've got basic funds, money going toward - - -
22 the petitioner certainly hasn't asserted that they're
23 trying to trace it in that - - - in that form.

24 JUDGE SMITH: They say - - - they want an
25 order to say that it's deemed - - - he is deemed to

1 have instructed the retirement system to send it to
2 his inmate account. How is that different from the
3 court telling the retirement system to send it to the
4 inmate account?

5 MR. PIERCE: Well, it is the court doing
6 that. It's - - - I believe. Well, it's the court
7 saying I'm going to deem it as if you did that. But
8 I don't see - - -

9 JUDGE SMITH: Maybe I should ask your
10 adversary - - -

11 MR. PIERCE: - - - I don't see - - -

12 JUDGE SMITH: - - - as for you it's a
13 softball question.

14 MR. PIERCE: - - - I don't see any
15 authority for that remedy other than, well, it's
16 necessary because of the circumstances here. And I
17 do appreciate that, and I understand it. And
18 frankly, I don't think I - - - I don't know that I
19 would think that was as horrible an answer if the
20 statute clearly didn't apply to these pension funds.

21 But I submit here, when you've got a
22 situation where - - - I think two things are very
23 telling. One is that we already had exemptions:
24 Retirement and Social Security Law Section 110 and
25 the CPLR. They've been on the books for decades.

1 The fact that they created - - -

2 CHIEF JUDGE LIPPMAN: The statute could
3 have said, "unless otherwise provided by law", right?

4 MR. PIERCE: Absolutely. And we know the
5 legislature knew how to do that here, because they
6 did it. In one specific instance, they said - - -
7 notwithstanding the provisions of the Estates, Powers
8 and Trusts Law in the CPLR, the statute of
9 limitations shall be; but - - -

10 JUDGE SMITH: And I kee - - - but I'm still
11 hung up - - - suppose they wanted to do that.
12 Suppose they wanted to write a "notwithstanding"
13 clause to make their intention clear, where in this
14 statute would they have put it?

15 MR. PIERCE: I think they would have put it
16 in there, either in the "all funds" language or in
17 the definition - - -

18 JUDGE SMITH: But that's just in the
19 definition. You can't put a "notwithstanding" clause
20 in a definition.

21 MR. PIERCE: No. It would have been in
22 what you could reach: profits of the crime - - -

23 JUDGE SMITH: But there isn't - - - but the
24 statute doesn't say anything about what you can
25 reach.

1 MR. PIERCE: Well, they certainly did it
2 with respect to the statute of limitations.

3 JUDGE SMITH: Yes. Isn't this essentially
4 - - - isn't the Son of Sam Law essentially a statute
5 of limitations exception?

6 MR. PIERCE: I believe - - -

7 JUDGE SMITH: And you can put all the
8 "notwithstanding" language in there you want, it's
9 still a statute of limitations exception.

10 MR. PIERCE: I believe it is. I believe it
11 is, Your Honor.

12 JUDGE GRAFFEO: There - - - did you find
13 anything in the legislative history that addresses
14 this issue, one way or the other?

15 MR. PIERCE: Absolutely nothing.

16 JUDGE GRAFFEO: So from a policy
17 perspective, separate - - - since there isn't
18 anything in the legislative history, why is what
19 you're proposing the better course for this court to
20 take?

21 MR. PIERCE: I think it is because under
22 this court's precedents, in particular, Local
23 Government Assistance Corp. and the other case I
24 relied on heavily in the reply brief, Vatore - - - if
25 I'm saying it correctly - - - v. Commissioner of

1 Consumer Affairs, the rules indicate that you don't
2 lightly assume that the legislature is just by
3 implication overruling something that's - - -

4 CHIEF JUDGE LIPPMAN: What about the fact
5 that - - -

6 MR. PIERCE: - - - that's been said.

7 CHIEF JUDGE LIPPMAN: - - - the statute is
8 so many years later? You know, Son of Sam Law is
9 fifteen years later than the earlier provisions; what
10 does that tell you?

11 MR. PIERCE: If it specifically addressed
12 pensions in some fashion whatsoever, and talked about
13 pensions, that might - - -

14 CHIEF JUDGE LIPPMAN: If they wanted to
15 carve out - - -

16 MR. PIERCE: - - - other than - - -

17 CHIEF JUDGE LIPPMAN: - - - if they wanted
18 to carve out pensions, though, they could have said
19 that clearly, right?

20 MR. PIERCE: But they didn't - - - I guess
21 they could have, but it would have been redundant,
22 Your Honor, because they already did carve out
23 pensions. They carved it out decades earlier in the
24 Retirement and Social Security Law in the CPLR.
25 There was absolutely - - -

1 CHIEF JUDGE LIPPMAN: But Judge Graffeo was
2 just asking you, what is the intent of the Son of Sam
3 Law, and why wouldn't one conclude that the policy
4 thrust of this is that crime victims take precedence?
5 Why wouldn't you give it that kind of broad reading,
6 given its - - - a statute comes by in a later year
7 after certain events, then is amended to even make it
8 broader over the years. Why wouldn't one assume that
9 that's really the policy direction that the state was
10 taking, and that's why we have this legislation?

11 MR. PIERCE: I think that's what the Third
12 Department did. They made an assumption. And - - -

13 CHIEF JUDGE LIPPMAN: Why wouldn't you
14 make- - -

15 MR. PIERCE: - - - it's really - - -

16 CHIEF JUDGE LIPPMAN: - - - why wouldn't
17 you make that policy assumption?

18 MR. PIERCE: Because what telling signs
19 there are here, if any, point to the opposite
20 direction. That we have existing - - -

21 JUDGE GRAFFEO: What's unfair about it, if
22 you were to say that the Son of Sam statute was a
23 later articulation of public policy and it supersedes
24 the pension? What's unfair about that?

25 MR. PIERCE: I think what - - -

1 JUDGE GRAFFEO: That's why I'm trying to
2 get at. Why are - - - why is what you're proposing
3 the better direction for our court to take?

4 MR. PIERCE: It's the better direction,
5 Your Honor, because it follows the principles that
6 this court has established for dealing with
7 legislative intent in this circumstance. So it
8 continues the precedents of the court - - -

9 JUDGE SMITH: So you're saying that the
10 policy - - - the policy you're trying to call our
11 attention to is the policy of reading the statutes
12 the way they're written, rather than - - - but the -
13 - - you're not saying it's a bad idea, as a matter of
14 policy, to reach these funds; you're just saying the
15 legislature has to do it.

16 MR. PIERCE: I think it is - - - I was
17 about to say, I think it is a bad idea. And I think
18 the perfect example here is that the Third Department
19 took the idea of well, we're going to give these
20 crime victims a super-creditor status. And they
21 looked at the law dealing with the spouse's right to
22 pension benefits in this court's decision in
23 Majauskas, if I'm saying it correctly. And that's
24 turning the whole thing on its head.

25 CHIEF JUDGE LIPPMAN: But isn't this the -

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MR. PIERCE: It's Shelley Raucci who's lost the use of this pension fund.

CHIEF JUDGE LIPPMAN: - - - but isn't this a unique, broad-based statute that's very unusual in its singling out crime victims as worthy of getting these funds. Isn't this an unusual statute?

MR. PIERCE: It is, Your Honor. And they get two very substantial benefits. The state's now looking for a third. One, they get a very extended statute of limitations, up to the point of what we would call a discovery rule for civil. I mean, when you discover there's some money, now the statute starts to run. It could be years and years later. And the second thing is, they don't even have a judgment yet, and the money is frozen.

JUDGE PIGOTT: If - - - let's assume there was somebody involved in investments and he was involved in a Ponzi scheme, and in the course of doing all of that, he set up one of the greatest 401(k)s you ever saw. And then he got convicted and he goes to jail. Can you attach his 401(k)?

MR. PIERCE: I think you can, Your Honor. Those are the examples that this legislative history gave of people who sold artwork, inherited money,

1 made money. There was an example in the legislative
2 history of some noted criminal who apparently, from
3 prison, I don't know how, I guess I don't understand
4 - - -

5 JUDGE PIGOTT: Well, doing it from prison
6 is one thing. But I'm just suggesting that you might
7 have some - - - you know, a pretty articulate
8 criminal who says - - - I know that I'm going to jail
9 pretty soon, so if I take all this money and stick it
10 in a pension fund, nobody can get it.

11 MR. PIERCE: Oh, in the pension fund.
12 Well, I guess I view these statutes as protecting the
13 individual's - - - his pension. I guess you're
14 saying that that's what this individual did too.

15 JUDGE PIGOTT: Right.

16 MR. PIERCE: I'm just not as familiar with
17 how to do that.

18 JUDGE PIGOTT: Well, your - - - if your
19 client were to divorce this gentleman, she'd have a
20 fifty-percent interest that couldn't be touched,
21 right, under Majauskas?

22 MR. PIERCE: I believe so. And my concern
23 is, if this is affirmed, we're setting up an
24 incredible situation that there's nothing in the
25 legislative history that would suggest - - - we're

1 going to have crime victims fighting spouses, because
2 spouses are going to start divorce actions as soon as
3 somebody gets indicted.

4 JUDGE PIGOTT: Well, your - - - can you
5 make a distinction between that and sending the money
6 to OTB? I mean, the prisoner - - - forgetting this
7 person - - - but anybody in jail who says, I've got
8 this pension fund coming and I'm just going to send
9 it over to my Western New York OTB, and I can bet
10 with impunity, because no one can touch it, because
11 it was once blessed by being a pension.

12 MR. PIERCE: Well, I would submit, Your
13 Honor, that that is the statutory scheme that the
14 legislature has created. And I think, if we're going
15 to - - -

16 JUDGE PIGOTT: If money never changes
17 character, I mean, once you get it from the
18 comptroller as a pension fund, you can do whatever
19 you wish with it, and no one can get it?

20 MR. PIERCE: Well, I think that gets into
21 the hypothetical that Judge Smith was asking in terms
22 of how far down the road could it, maybe, be taken,
23 depending on how it's spent or what happens with it.
24 And I submit that those are not necessarily here.

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 MR. PIERCE: Thank you.

2 CHIEF JUDGE LIPPMAN: Okay. You'll have
3 rebuttal.

4 Counselor?

5 MR. DEMUTH: May it please the court.
6 Thank you, Your Honors. Owen Demuth for the
7 respondent, Office of Victim Services.

8 Your Honors, the statutory reference to
9 "all funds and property received from any source",
10 means just that. It would definitely include Mr.
11 Raucci's pension - - -

12 CHIEF JUDGE LIPPMAN: But what about the
13 statute that's on the books? Why would we assume
14 that such an important right, which is pension funds
15 being sacrosanct in so many regards - - - why
16 wouldn't we assume that if the legislature wanted to
17 supersede that, it would have made that clear?

18 MR. DEMUTH: We know that Section 110 is
19 nonetheless superseded, and the Son of Sam Law is
20 sufficiently clear, both from that statutory language
21 I just quoted, but also from the equally unequivocal
22 legislative history of the statute. Judge Graffeo,
23 you had asked about legislative history - - -

24 JUDGE SMITH: Stick with the statutory
25 language for a minute. You quoted the language from

1 the definition section, didn't you?

2 MR. DEMUTH: Yes, as part of the definition
3 of fund - - -

4 JUDGE SMITH: And where - - - so you say
5 that these funds, pension funds, are funds of a
6 convicted person. Now, where does it say all funds
7 of a convicted person are subject to process,
8 regardless of exemptions? Or even - - - forget about
9 regardless of exemptions. Where does it say all
10 funds of a convicted person are subject to process?

11 MR. DEMUTH: It does not say that. It
12 doesn't need to say that, Your Honor.

13 JUDGE SMITH: Well, I mean - - - so I guess
14 this is the question I was asking Mr. Pierce before.
15 Before you get to the question of whether they have
16 to put in a "notwithstanding" clause, where would you
17 put it? Is there any substantive provision in this
18 statute at all that makes anything subject to
19 process?

20 MR. DEMUTH: I believe - - - I believe the
21 statute is substantive. I don't know where you - - -
22 I'm not - - - like counsel, here, I'm not exactly
23 sure where it would belong. But I think the bottom
24 line is, it does not need - - -

25 JUDGE SMITH: Doesn't need - - -

1 MR. DEMUTH: - - - nor does a
2 "notwithstanding" clause need - - -

3 JUDGE SMITH: - - - but doesn't there have
4 to be some - - - I mean, I can understand, if you've
5 got a statute that says pensions are exempt, and
6 you've got a statute that says a victim can levy on
7 any of a criminal's property, then you've got a
8 question whether the second one creates an exception
9 to the first. My problem is, I don't see the second
10 statute. Where does it say that funds of a convicted
11 person may be levied on?

12 MR. DEMUTH: It does not.

13 JUDGE SMITH: So you want us to imply that,
14 and then imply that it overrides Section 110?

15 MR. DEMUTH: I don't - - - I think you
16 could take the statute as a whole, and the considered
17 policy judgment that it reflects.

18 CHIEF JUDGE LIPPMAN: Are you reading into
19 it to get to that policy direction? In other words,
20 we understand what the purpose of the Son of Sam Law
21 was, but how - - - what do you have to do to get
22 there that goes beyond the face of the statute? And
23 are you adding on to the words of the statute to make
24 this connection to the policy direction?

25 MR. DEMUTH: I don't think we're adding on

1 to the words of the statute. I think to do
2 otherwise, to read the exemption in 110 as applying
3 here, would be doing that. Because we have - - - we
4 know from the legislative history and from the
5 statute, that when - - - the legislature here was
6 certainly aware of the other statutes. And it knew
7 that when it wanted to create - - -

8 CHIEF JUDGE LIPPMAN: Yes, but that cuts -
9 - -

10 MR. DEMUTH: - - - an exemption, it did so
11 specifically.

12 CHIEF JUDGE LIPPMAN: - - - but that cuts
13 both ways, doesn't it? If they're aware of it - - -

14 MR. DEMUTH: It could cut both ways. If
15 this particular statute, this later-enacted
16 specialized statute, which created, for the first
17 time, a special class of creditors - - - crime
18 victims, and give them rights that did not exist in
19 common law, it might have cut against; it might be
20 more of a difficult question.

21 JUDGE PIGOTT: But that's the - - -

22 MR. DEMUTH: Given - - -

23 JUDGE PIGOTT: - - - that's the issue,
24 though. It reads like - - - what I picture is,
25 you've got some really nasty person - - - let's not

1 talk about this defendant, but somebody who does
2 something notorious. And ten years from now,
3 somebody decides to make a movie out of it, and he's
4 going to get some royalties out of the movie.

5 Now, the statute of limitations on any
6 civil suit against that person would have long
7 expired, but for 632(a)(3). What else does 632(a)(3)
8 do?

9 MR. DEMUTH: It also - - - you know, you're
10 right. In many ways, it isn't a remarkable statute
11 in that it really - - - it gives - - - well, the most
12 important thing, I guess, aside from the statute of
13 limitations, is it gives and states as its primary
14 goal, the right to a state agency - - - here the
15 Office - - - to seize money that might otherwise the
16 crime victims would not know anything about, which
17 might be - - -

18 JUDGE SMITH: Where does it give anybody
19 the right to - - -

20 MR. DEMUTH: - - - dissipated or wasted - -
21 -

22 JUDGE SMITH: - - - seize any money?

23 MR. DEMUTH: - - - before - - -

24 JUDGE SMITH: Where does it give anybody
25 the right to seize any money?

1 MR. DEMUTH: Well, I believe you can
2 certainly read that in the statute, Your Honor, by -
3 - - it's giving - - - it's giving the - - - by giving
4 the Office injunctive powers. The only way to read
5 the statute, I believe, is to give - - -

6 JUDGE SMITH: It says "the same powers that
7 a plaintiff would otherwise have had."

8 MR. DEMUTH: Right. But it's giving them
9 the powers to move for an injunction before a
10 complaint has even been filed, upon notice from the
11 crime victims. And they - - - and in order to read
12 the statute - - -

13 JUDGE SMITH: And where a plaintiff could
14 have done so.

15 MR. DEMUTH: A plaintiff could have done so
16 as well. But this is a safeguard, because it
17 recognizes that in the normal situation, an inmate -
18 - - a potential civil - - - a potential general
19 creditor would not know about these funds coming into
20 an inmate's hands, long after he's - - -

21 CHIEF JUDGE LIPPMAN: Putting - - -

22 MR. DEMUTH: - - - been incarcerated.

23 CHIEF JUDGE LIPPMAN: - - - putting aside
24 the language of the statute, why is it better, from a
25 policy perspective, that the crime victim, for

1 instance, takes precedence over the wife, in this
2 case? What's the public-policy argument for that?

3 MR. DEMUTH: The public-policy argument,
4 Your Honor - - - and I think I want to clarify - - -
5 is that crime victims - - - where, you know, a
6 pensioner, as this court has held, in a normal case,
7 not involving the Son of Sam Law, protects the
8 pensioner from - - - and the family, which would be
9 the wife - - - from improvidence - - - from their own
10 improvidence and misfortune.

11 But a person such as Mr. Raucci, who has
12 been - - - who stands convicted of violent crimes - -
13 -

14 CHIEF JUDGE LIPPMAN: But I - - -

15 MR. DEMUTH: - - - would not be subject.
16 And the policy judgment is that in such a situation,
17 there's a much more compelling policy interest in
18 favor of the crime victim.

19 JUDGE SMITH: You - - -

20 JUDGE GRAFFEO: Would it really work that
21 way, though? I mean, I don't think you disagree that
22 if these people had a QDRO - - - well, a qualified
23 domestic relations order - - - and that had been
24 executed, say, before this crime was even committed,
25 such that she was receiving fifty percent of his

1 pension directly from the retirement system, you
2 would not be able to claim that that money came under
3 the ambit of the Son of Sam Law, would you?

4 MR. DEMUTH: No, Your Honor. Just as with
5 the equitable distribution statute.

6 JUDGE GRAFFEO: So what would prevent
7 anyone convicted in the future of just assigning
8 their pension to their wife, or in trust to their
9 children?

10 MR. DEMUTH: I don't think that they would
11 necessarily prevent them. But I don't think it would
12 prevent the Office from moving to recover.

13 CHIEF JUDGE LIPPMAN: Why didn't you go
14 directly against the wife, here? Why do you go to
15 the inmate fund? Why did you do that? And what is
16 the rationale for that?

17 MR. DEMUTH: The - - -

18 CHIEF JUDGE LIPPMAN: Do you not think you
19 can take it from the wife? Is that the idea?

20 MR. DEMUTH: Yes, Your Honor. The
21 rationale and the reason why we crafted the
22 injunction the way that we did - - - which, by the
23 way, as you had said, I believe, Your Honor - - - it
24 really is no different than something that a court,
25 given its broad equitable jurisdiction could order -

1 - -

2 JUDGE SMITH: Exactly like an attachment of
3 the - - - a garnishment of the money in the hands of
4 the retirement system, isn't it?

5 MR. DEMUTH: Right. Very similar. So what
6 we're doing here - - -

7 JUDGE SMITH: But you crafted it that way
8 to make it look like it wasn't a garnishment.

9 MR. DEMUTH: Well, we did it for two
10 reasons, Your Honor. The first was, of course, to
11 ensure - - -

12 CHIEF JUDGE LIPPMAN: Once it was paid - -
13 - but answer my question. Once it was paid to the
14 wife, could you get those funds?

15 MR. DEMUTH: Our belief is that it would be
16 either impossible or incredibly difficult; and that
17 is because it's going - - - she's getting it via
18 power of attorney. That itself does not prevent the
19 Office. But it's going to her, personally. She's
20 putting it in her personal accounts.

21 The access is ensured once we know that
22 it's going to Raucci himself. So really all we're
23 doing here is we're not telling the comptroller to
24 really pay somebody direct - - - pay somebody
25 differently. It's still going to Raucci.

1 JUDGE SMITH: You're getting - - -

2 MR. DEMUTH: The difference is it's going
3 to be in the account.

4 JUDGE SMITH: - - - you're getting the
5 advantage you get from a garnishment.

6 MR. DEMUTH: I believe, yes, on very
7 similar footing there, Your Honor. And the other
8 reason, of course, is to avoid interfering with the
9 comptroller's authority to manage the pension plan.
10 So you wait till it's paid out. And now we have an
11 order that it would go to his inmate account, where -
12 - - and in that situation, it is reachable by the
13 Office, and then ultimately - - -

14 JUDGE GRAFFEO: The chief judge asked you
15 about the public policy underlying your position.
16 Why is it that the Son of Sam Law should take
17 precedence over the spouse and children's need for a
18 source of income? Take it away from this case and
19 look at another case where you could have young
20 children involved.

21 MR. DEMUTH: Well, Your Honor, I don't
22 think we're actually asking the court to decide that
23 - - -

24 JUDGE GRAFFEO: And the spouse was not
25 involved in the criminal conduct.

1 MR. DEMUTH: - - - and the main - - - I
2 understand the question, Your Honor. And the main
3 reason why I don't think that question that we're
4 directly pitting Mrs. Raucci's rights against the
5 rights of crime victims, is because all we're - - -
6 the only issue here for the court is the main
7 threshold issue of whether the pension is even on the
8 table, whether it's even reachable. But - - -

9 JUDGE GRAFFEO: Except we have the fact
10 that despite the init - - - despite the adoption of
11 the original statute and then the amendment, the
12 legislature never mentions pension one way or the
13 other.

14 MR. DEMUTH: It doesn't mention. But
15 because the language is so sweeping, so broad, it did
16 not mean to - - - it did not need to. I'm sorry.
17 There did not need to be a "notwithstanding" clause.
18 And a good ex - - - the best example that I can give
19 of that is the equitable distribution law in 236(v).
20 That is a very large, complex statute that give
21 rights that had never existed before. And yet there
22 is nothing in that statute that says "notwithstanding
23 Section 110" or, you know, "nonetheless".

24 And yet this court has consistently
25 interpreted it to mean that Section 110 does not

1 protect a pension, or at least part of a pension,
2 from being part of a distributive order to the
3 nonemployee spouse.

4 JUDGE GRAFFEO: In the definitional
5 section, where you have your "all funds" language - -
6 -

7 MR. DEMUTH: Yes.

8 JUDGE GRAFFEO: - - - there's two
9 exclusions: the child support and earned income.
10 And then earned income is defined in (1)(f).

11 MR. DEMUTH: That's right.

12 JUDGE GRAFFEO: Do - - - is it all that
13 clear that pension does not fall under that umbrella
14 of earned income?

15 MR. DEMUTH: I believe it's clear - - -

16 JUDGE GRAFFEO: Income derived - - -

17 MR. DEMUTH: - - - for - - - on - - -

18 JUDGE GRAFFEO: - - - from one's own labor.

19 MR. DEMUTH: Several reasons why, Your
20 Honor, that that distinction and the Third
21 Department, I think, correctly stated the correct
22 rule with respect to that, that the unearned versus
23 earned income distinction applies only to the notice
24 provisions. And there are ample notice provisions in
25 the statute.

1 In other words, if it's earned income and
2 the person is a parolee, which might also be subject
3 to the Son of Sam Law, and they're getting paychecks,
4 we're taking the onus off the employer to have to
5 consistently give notice. But that distinction is
6 not relevant and notice isn't really at issue here.

7 And another reason that this distinction
8 would not prevent the Office for acting is what I had
9 said before, that in order to read the statute
10 properly, we have to read it as giving the Office and
11 its injunctive powers and reading them as coextensive
12 - - - their powers to enjoin as coextensive with the
13 victims' rights to collect.

14 And the Senate Memo provides clear evidence
15 of that, that all forms of earned and unearned income
16 are always recoverable by the crime victims.

17 And the third answer, Your Honor, why that
18 distinction does not apply here and would not stop
19 the Office from enjoining the pension, is that a
20 pension is not earned income. Everything that we see
21 from the way it's treated in Federal Internal Revenue
22 Code and the New York Tax Law, treat pensions as
23 unearned income. So we think that that is just
24 completely irrelevant to the issue at hand.

25 JUDGE SMITH: Let me - - - if I could turn

1 the subject. Did you preserve the argument you're
2 now making?

3 MR. DEMUTH: Yes, Your Honor. That issue
4 was preserved. And I think, again, the Third
5 Department - - -

6 JUDGE SMITH: Your petition actually says,
7 almost in so many words, that 110 does apply.

8 MR. DEMUTH: I think it was careful to say
9 it might apply while the - - -

10 JUDGE SMITH: Well - - -

11 MR. DEMUTH: - - - money is still in the
12 pensioner's control - - -

13 JUDGE SMITH: - - - you limited its
14 application to funds still in the hands of the
15 retirement system. And I'm not so sure these are
16 such funds. But you did say - - -

17 MR. DEMUTH: But the over - - -

18 JUDGE SMITH: - - - it applied.

19 MR. DEMUTH: - - - the reason why we're
20 here and the overriding issue of what statute trumps
21 which, that the Son of Sam Law supersedes, was
22 certainly preserved. It was not only raised - - - we
23 believe it was raised in our papers, in our memos of
24 law - - - but also by the counsel of record for Mrs.
25 Raucci, who was counsel in front of the Supreme

1 Court.

2 JUDGE SMITH: Can you preserve a - - - I
3 mean, I understand you can preserve an issue - - - an
4 issue is preserved if the judge reaches it. But here
5 he specifically didn't reach it, because he said you
6 didn't argue it. Justice McDonough.

7 MR. DEMUTH: Justice McDonough made that
8 finding. We believe that was incorrect, and that the
9 Third Department's reversal of that - - -

10 JUDGE SMITH: But you can see - - -

11 MR. DEMUTH: - - - was the correct one.

12 JUDGE SMITH: - - - I mean, I don't know.
13 I can see where he got that impression, where you say
14 in your petition - - -

15 MR. DEMUTH: Well - - -

16 JUDGE SMITH: - - - "Pursuant to Retirement
17 and Social Security Law Section 110, it would appear
18 the retirement funds at issue are not subject to
19 execution, garnishment, attachment."

20 MR. DEMUTH: Your Honor, since the Rauccis
21 are not arguing that there was no preservation, I'd
22 be happy to provide the court with a copy of our
23 Third Department brief, where that issue was
24 something he - - -

25 JUDGE SMITH: Oh, I'm sure you made it in

1 the Third Department. But don't you have to preserve
2 it at the - - - for the first instance?

3 MR. DEMUTH: I think it's always been a
4 part of this case, Your Honor. It's been raised by
5 them. They said from the very beginning - - -

6 JUDGE SMITH: Can they preserve it for you,
7 if a court doesn't reach it?

8 MR. DEMUTH: I think it makes it part of
9 the case. And I believe that we reached it as well,
10 in our papers, our memos of law primarily, which were
11 - - - we had attached excerpts to the Third
12 Department but not here, because we didn't see
13 preservation as an issue. I don't think there's any
14 disagreement between the parties as to that.

15 But one last thing I just wanted to say is
16 the important thing here is although we believe that
17 the Son of Sam Law is extremely broad, it reaches
18 everything as a matter of law, and the initial
19 temporary injunctive application by the Office,
20 equity is always a part of this case.

21 And the Supreme Court, as it would in any
22 other plenary action where there's a PI in play,
23 always has the equitable jurisdiction to consider the
24 individual circumstances, not just of the pensioner,
25 with the convicted person and his family, but also of

1 the crime victim.

2 JUDGE PIGOTT: I don't - - - I'm not sure I
3 understand that.

4 MR. DEMUTH: Well, Your Honor, there may be
5 a decision - - -

6 JUDGE SMITH: You're saying - - -

7 MR. DEMUTH: - - - the legal issue that
8 we're - - -

9 JUDGE SMITH: - - - the court doesn't have
10 to - - - they don't have to throw the widow and
11 children out in the snow on Christmas Eve, even if
12 they have the power to.

13 MR. DEMUTH: Absolutely. There can be an
14 application - - - there could have been an
15 application here, but there never was one. Ms.
16 Raucci - - -

17 CHIEF JUDGE LIPPMAN: There has to be
18 clarity in the statute, right? I mean, you can't
19 have the statute interpreted wildly differently in
20 different courtrooms, right?

21 MR. DEMUTH: Right. We just want the court
22 to reach the threshold legal issue of whether
23 pensions - - -

24 CHIEF JUDGE LIPPMAN: That's why we're
25 here, right? To determine - - -

1 MR. DEMUTH: Right. What happens - - -

2 CHIEF JUDGE LIPPMAN: - - - what the
3 statute holds.

4 MR. DEMUTH: - - - afterwards, whether
5 circumstances where a showing could be made, and you
6 could move under 6314 to vacate or modify an
7 injunction that's in place - - -

8 JUDGE PIGOTT: I mean, obviously, this
9 one's fairly high profile. But there's a lot of
10 people that go to jail that have pensions: police
11 officers, firefighters, civil servants of some sort
12 or another. You're not suggesting that the judge can
13 say, well, based on my equitable powers, even though
14 this person's severely injured and should be enti - -
15 - I'm deciding that they can attack the pension; and
16 in the next case say, yeah, I kind of like this
17 person, I think they can.

18 MR. DEMUTH: I don't know I'm going that
19 far, that it would create such wide extremes like
20 that, Your Honor. I'm just saying that once this
21 court reaches what we believe to be the right answer,
22 that a pension is part of the funds - - -

23 JUDGE PIGOTT: But then you get into - - -
24 there are, for example, cases where a public servant
25 can lose their pension in a disciplinary or as a

1 result of having committed a crime. Would we then
2 see down the road, you coming in and saying - - -
3 please don't do that, because we want to grab that
4 pension? In other words, you're trying to keep the
5 pension so you can grab it for whoever your victim
6 may be of somebody who's been convicted of a crime,
7 who let's say, is a civil servant with a fairly
8 substantial pension.

9 And they could lose it as a result of the
10 crime, but you wouldn't want them to. You'd want to
11 say wait, don't do that. Let's work out a plea so we
12 can grab that pension and use it for something else.

13 MR. DEMUTH: That's something that I admit,
14 I have not considered. All I'm saying is that a
15 determination that the pension is subject to the Son
16 of Sam Law and the Office's injunctive powers would
17 not prevent additional equitable factors from being
18 reached by Supreme Court - - -

19 CHIEF JUDGE LIPPMAN: Okay, counsel.

20 MR. DEMUTH: - - - either in - - - thank
21 you very much.

22 CHIEF JUDGE LIPPMAN: Thank you, counselor.
23 Rebuttal, counsel?

24 MR. PIERCE: Very briefly, Your Honor. I
25 would note that we've been talking about the

1 protection for spouses and dependents. And in fact,
2 the legislature put that in CPLR 5205 also; (c)(4)
3 provides a specific proviso about allowing - - -
4 where you can get into the pension for the spouse and
5 the children. They didn't do that here for crime
6 victims. They didn't do it.

7 And really, coming back to the statute
8 here, we don't have a legislative intent here. And
9 best example - - -

10 CHIEF JUDGE LIPPMAN: What is the
11 legislative intent, in your view?

12 MR. PIERCE: It was to broaden the reach of
13 monies available. And the examples were many.

14 JUDGE PIGOTT: You think this is a statute
15 of limitations?

16 MR. PIERCE: It's a statute of limitations.
17 And I've forgotten what I said earlier. They have
18 the two - - - oh, and potentially - - - well, and I
19 say, they can grab the money, but that's if they can
20 do it under the CPLR, I think as Judge - - - but this
21 is a remedial procedural.

22 I think the best example here is the 2011
23 pension forfeiture law, which I think maybe Judge
24 Pigott, you were just referring to about, hey, don't
25 forfeit his pension, because we want to grab it for a

1 victim. And when the legislature wanted to do
2 something to - - - they did it there. They put that
3 forfeiture provision in Retirement and Social
4 Security Law, Section - - - they created a new
5 article in it. And they put in the broad provision
6 that said "notwithstanding any other provision of law
7 to the contrary". They didn't amend 110. They
8 didn't need to. Because when they created that new
9 article, they put in the general proviso.

10 So when they wanted to override it on a
11 pension - - - and clearly, they were, with a pension
12 forfeiture statute - - - they knew how to do it. We
13 don't have anything like that here.

14 CHIEF JUDGE LIPPMAN: So do you think that
15 without that provision across the board, in any such
16 cases, that that's the interpretive - - - if they
17 don't put a "notwithstanding" provision in, that's
18 dispositive?

19 MR. PIERCE: It's a very telling thing,
20 along with the fact that they - - - one of the
21 exemptions, as I started and I'll close now with - -
22 - when they took the ten percent civil recovery and
23 put it in CPLR 5205, it's very hard to think that
24 they weren't aware of 5205 when they amended 5205 to
25 put in one of the new exemptions - - -

1 CHIEF JUDGE LIPPMAN: Okay, counselor.

2 MR. PIERCE: - - - they created.

3 CHIEF JUDGE LIPPMAN: Thanks, counsel.

4 MR. PIERCE: Thank you, Your Honor.

5 CHIEF JUDGE LIPPMAN: Thank you both.

6 Appreciate it.

7 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of New York State Office of Victim Services v. Raucci, No. 6 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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