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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

STANLEY A. BROWN,

Appellant.

No. 117  
(papers sealed)

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20 Eagle Street  
Albany, New York 12207  
June 04, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 117.

2 (Pause)

3 CHIEF JUDGE LIPPMAN: Counselor - - -

4 MR. DAVISON: Good afternoon, Your Honors.

5 CHIEF JUDGE LIPPMAN: Would you like any  
6 rebuttal time?

7 MR. DAVISON: Could I have two minutes,  
8 please?

9 CHIEF JUDGE LIPPMAN: Two minutes, sure.

10 MR. DAVISON: Thank you, Your Honor. There  
11 are - - - I'm Mark Davison, representing Stanley  
12 Brown on this appeal.

13 The appeal raises two issues, both of which  
14 involve the allocation of the burden of proof that  
15 this court addressed last year in the Gillotti case.

16 CHIEF JUDGE LIPPMAN: What was the test  
17 that the Appellate Division used?

18 MR. DAVISON: Well, the - - - the Appellate  
19 Division affirmed without a writing, but I think this  
20 court can - - -

21 CHIEF JUDGE LIPPMAN: Well, how do we know  
22 what test they used?

23 MR. DAVISON: I - - - I think all the court  
24 needs to do is look at the - - - at the standard that  
25 a court - - - that the court department applied

1 before this court decided Gillotti, including in the  
2 Gillotti case itself, and after - - - after in - - -  
3 in a case, a particular case, the Scott case, before  
4 Mr. Brown's case came up, an attorney specifically  
5 raised the issue of the Wyatt case from the Second  
6 Department, which was the - - - the preeminent case  
7 at the time. And the Fourth Department's reaction  
8 was to put a cf. to that in - - - to Wyatt in this -  
9 - -

10 JUDGE PIGOTT: Well, it's easy to tell. I  
11 mean, it's not in this one, but it was clear and  
12 convincing before, then there was this one, and it  
13 was clear and convincing after.

14 MR. DAVISON: It was clear and convincing  
15 after, right up until this court's decision in  
16 Gillotti.

17 JUDGE PIGOTT: Do you have a preservation  
18 issue with respect to your particular case?

19 MR. DAVISON: I - - - I don't believe so,  
20 because the - - the - - when this court has said that  
21 that there's a preservation problem, it's been  
22 because there was no request for a downward departure  
23 at all. And here, the trial counsel did specifically  
24 request a downward departure, cited to a Second  
25 Department case, and - - - and I submit that it would

1 have been unreasonable to expect - - -

2 JUDGE RIVERA: But the cite to the Second  
3 Department case wasn't for the standard, was it?

4 MR. DAVISON: It was - - -

5 JUDGE RIVERA: Or rather to the merits of  
6 it?

7 MR. DAVISON: It was - - - it was to the  
8 merits of the - - - of the downward departure issue.  
9 But I submit that the - - - that the trial judge in  
10 this case was a - - - in Jefferson County, within the  
11 Fourth Department, the trial judge was constrained -  
12 - -

13 JUDGE ABDUS-SALAAM: Well, are we to assume  
14 that the trial judge always follows what the  
15 Appellate Division or even the Court of Appeals says?

16 MR. DAVISON: I would like to think that  
17 they do, but I - - -

18 JUDGE ABDUS-SALAAM: If they're aware of  
19 it.

20 MR. DAVISON: As far as I'm aware, they - -  
21 - they - - - they - - - they do the best they can.

22 JUDGE READ: But you didn't argue, did you,  
23 about the proper standard to be applied in the lower  
24 court?

25 MR. DAVISON: There was - - - there's no -

1 - no argument in the record of - - - about the  
2 application of the proper standard. But I - I submit  
3 that asking - - - that that would - - - would create  
4 an unreasonable preservation requirement on - - - on  
5 the trial attorney. The trial attorney would - - -  
6 would have to not only flag the issue, but - - - but  
7 ask the trial judge to follow the law in the Second  
8 Department, in this case, and - - - and not the law  
9 as it had been outlined by the Fourth Department.

10 The - - I - I think, by - - - by raising  
11 the downward departure issue, I think that trial  
12 counsel satisfied the preservation requirement that  
13 this court alluded to in Fazio, which was a companion  
14 case to Gillotti, and in - - - in the Johnson case,  
15 at 11 NY3d, where the - - - the - - the preservation  
16 problem was the failure to request the downward  
17 departure at all.

18 The - - - the - - - I believe this case has  
19 to go back not just to the Fourth Department to  
20 address this issue, but I believe it has to go back  
21 so that the trial court can address it as well. In  
22 particular - - -

23 JUDGE RIVERA: What - what - what's the  
24 merits of the argument, though? What supports the  
25 downward departure, under the correct standard, as

1 we've decided in Gillotti?

2 MR. DAVISON: The correct standard is - - -  
3 for downward departure, is preponderance of the  
4 evidence, from Gillotti. And I think that it's best  
5 illustrated by the - - - the second issue in this  
6 case, which is the certificate of relief from  
7 disabilities. Mr. Brown's trial attorney pointed out  
8 that there had been a certificate issued in this case  
9 by the same judge.

10 JUDGE PIGOTT: Was that on the DWI?

11 MR. DAVISON: On the DWI. It was I - - I -  
12 - - I believe the DWI was '97 or '99. The  
13 certificate was handed down in 2002, and - - -

14 JUDGE ABDUS-SALAAM: Did the certificate  
15 apply to sex offender registration, as opposed to  
16 what we normally expect the certificate to apply to,  
17 for example, employment or some other civil  
18 situation?

19 MR. DAVISON: License, to vote - - -

20 JUDGE ABDUS-SALAAM: Yeah, license or  
21 something like that. So are you - - - you're saying  
22 that it would apply in this context in SORA?

23 MR. DAVISON: I think it does, under the  
24 language of Section 701. It - - - it - - - it  
25 applies for - - - to relieve you - - - to relieve a

1 convicted felon of any - - - any disability, not - -  
2 - not just for employment or - - - or licensing.

3 JUDGE STEIN: I'm a little confused. I  
4 thought in the trial court you were arguing about  
5 double - - - double dipping between factors 9 and 11,  
6 when it came to the DWI. And I know that the  
7 certificate was mentioned, but was there any argument  
8 that it raised the presumption of rehabilitation, and  
9 that the presumption had to be rebutted, or anything  
10 of that nature at all?

11 MR. DAVISON: Not - - - not in - - - in  
12 that level of detail, but - - - but I think that it -  
13 - - it was - - - that was the point of what counsel  
14 was trying to say, that this - - - that Mr. Brown was  
15 - - - was being assessed points twice, both under - -  
16 - I forget the factor number now for alcohol and  
17 substance abuse, but also because his prior felony  
18 happened to be a DWI, and - - - and I think the point  
19 that the trial counsel was trying to make was that  
20 this - - - the certificate relieved the disability of  
21 that DWI conviction and he shouldn't be assessed the  
22 - - - the extra points under that factor 9 as well.

23 JUDGE STEIN: By the way, was the  
24 certificate ever presented? Was it ever - - -

25 MR. DAVISON: I - - I - - As far as I could

1 tell, it was not presented. I attached it to my  
2 reply brief so that this court could see it, but I -  
3 - - the - - - the - as I pointed out in my reply  
4 brief, it was the same judge who had granted the  
5 certificate. The - - - when the attorney alluded to  
6 the fact of the certificate, no one challenged it.  
7 No - - - there was nothing to rebut it. And I think  
8 that puts this case within Gillotti, because he met  
9 his burden of going forward with a preponderance of  
10 the evidence. He put it out there, and no one did  
11 anything - - -

12 JUDGE FAHEY: Mr. Davison - - -

13 MR. DAVISON: - - - about it.

14 JUDGE FAHEY: - - - in Gillotti - - - to be  
15 within Gillotti - - - I thought in Gillotti that they  
16 requested a downward departure but didn't request a  
17 standard, and you're saying we're within - - - we're  
18 a little bit better than that; we're within that  
19 framework in terms of preservation, right?

20 MR. DAVISON: Yes.

21 JUDGE FAHEY: Is that what you're arguing?

22 MR. DAVISON: Yes, we're - - - we're within  
23 the Gillotti framework. We are - - - we're outside  
24 of the Fazio framework, where it wasn't preserved,  
25 and we have a situation where the trial court ought

1 to have made findings, as it - - - as it is required  
2 to do under Section 168-n of the corrections law, and  
3 it didn't make a finding - - -

4 JUDGE STEIN: Counselor, a question. If we  
5 - - if we took away the fifteen points under factor  
6 9, which is the prior felony case with a DWI, would  
7 that change the presumptive risk - - -

8 MR. DAVISON: It - - -

9 JUDGE STEIN: - - - level?

10 MR. DAVISON: It would not change the  
11 classification; he's still - - - it would bring him  
12 down to - - - I believe it's 100 and - - - 120  
13 points, still above the 110 required for a level 3.  
14 But it puts him in a better position when he's asking  
15 the judge for a discretionary departure. If you're  
16 that close to a level 2, then, you know, maybe this  
17 other stuff will - - -

18 CHIEF JUDGE LIPPMAN: I'm sorry; Judge  
19 Abdus-Salaam.

20 JUDGE ABDUS-SALAAM: You mentioned  
21 discretion, and that's what I wanted to ask you  
22 about, counsel, because bringing up the certificate,  
23 then you mentioned a couple of times that it was the  
24 same judge who was now the SORA judge who had granted  
25 your client a certificate of relief from

1 disabilities. And so isn't there this alternative  
2 theory that the judge did exercise discretion,  
3 regardless of what standard the judge used to assess  
4 the departure, assuming it was preserved - - - I'm  
5 not suggesting that I agree that it was, but assuming  
6 it was, didn't the court exercise discretion, and  
7 isn't the court allowed to exercise discretion in  
8 denying or granting a departure?

9 MR. DAVISON: I would - - - I would agree,  
10 except to the extent that as - - - as this court said  
11 last month in the Dempsey case, that when you've got  
12 a certificate, when you've got proof of  
13 rehabilitation, the court has to at least address it,  
14 and - - - and whether - - - I think it was an error  
15 of law for the court not to address it at all.

16 JUDGE READ: You mean on the record?

17 MR. DAVISON: On the record, yes.

18 JUDGE READ: Even though you concede he  
19 probably knew about it?

20 MR. DAVISON: He probably knew about it,  
21 because he had signed it - - -

22 JUDGE READ: Right.

23 MR. DAVISON: - - - and it was brought to  
24 his attention, but he didn't - - - he didn't address  
25 it on the record.

1 JUDGE RIVERA: But yeah - - -

2 MR. DAVISON: He didn't exercise - - -

3 JUDGE RIVERA: I thought your point is he  
4 knows about it, but he may not necessarily think he  
5 can take it into consideration.

6 MR. DAVISON: Well, the - - -

7 JUDGE RIVERA: Did I misunderstand?

8 MR. DAVISON: It - - - it does appear, on  
9 this record, that he - - - he may not have thought  
10 that he could take it into consideration, but the - -  
11 - from Mr. Brown's perspective, it is that it was out  
12 there and no one addressed it. And - - -

13 CHIEF JUDGE LIPPMAN: Okay, counselor.

14 MR. DAVISON: - - - and somebody should - -  
15 -

16 CHIEF JUDGE LIPPMAN: Thank you, counselor.

17 MR. DAVISON: Okay.

18 CHIEF JUDGE LIPPMAN: Counselor?

19 MS. MOORE: Good afternoon. May it please  
20 the court. Hannah Moore, New York Prosecutor's  
21 Training Institute, of counsel for the Jefferson  
22 County District Attorney's Office.

23 I want to talk first about preservation,  
24 because I think that's really important in this case.

25 JUDGE PIGOTT: Well, there's an old phrase;

1 I can't remember the whole thing, but in the  
2 Appellate Division where there are - - - there are  
3 issues that simply can't escape review and don't need  
4 any further explication than appear on the record.  
5 Now, if we have a case here where it's very clear  
6 that - - - that the standard is preponderance, and  
7 it's very clear that the Appellate Division has  
8 consistently used clear and convincing, wouldn't it  
9 just make sense, rather than expect another  
10 procedure, I mean, to just clear that up and send it  
11 back and let them make their decision based upon the  
12 correct standard, since they're now following  
13 Gillotti?

14 MS. MOORE: I don't think so in this case,  
15 because I think the danger here is that we - - - we  
16 don't know, from anything stated, what was used. But  
17 we do know the strength of - - - or weakness, rather,  
18 of the evidence that was before the court.

19 JUDGE PIGOTT: Well, I'm not suggesting the  
20 evidence, and I know there's talk about a lot of  
21 rehabilitation and things like that. I'm simply  
22 saying, do we say to the Fourth Department, you know,  
23 you've been doing this for a very long time wrong, I  
24 see you've got it fixed now, but all the ones you did  
25 wrong, we're going to leave there; you can - - - you

1 can just - - - don't worry that you messed up, that  
2 you - - - that you used the wrong law; we're going to  
3 cover it for you.

4 MS. MOORE: No, I don't think so, because  
5 one of the dangers - - -

6 JUDGE PIGOTT: You're better off sending it  
7 back and saying make the right - - - and they may do  
8 exactly what you're suggesting, they may think I  
9 don't care if it's clear and convincing or beyond a  
10 reasonable doubt; this is going to be - - - this is  
11 going to be a level 3. But they ought to at least be  
12 able to do that, right?

13 MS. MOORE: Well, I think here the  
14 evidence, you know, as a matter of law, was  
15 insufficient. I think that evidence that the  
16 defendant put forth failed under either preponderance  
17 or clear and convincing.

18 CHIEF JUDGE LIPPMAN: But why wouldn't - -  
19 why wouldn't - I think what the judge is saying to  
20 you, why wouldn't we make crystal clear that this is  
21 the standard that even you have acknowledged you have  
22 to use now, do it under that standard, and if the  
23 evidence is no good, fine. What is - - - what is the  
24 harm, and yet it would seem that there's some good to  
25 come out of making sure that we make clear to them

1           that all this time you've been using the wrong  
2           standard.

3                       MS. MOORE:   The harm, first of all, is that  
4           the - - - the defendant in this case, at this point,  
5           could have actually asked for a subsequent downward  
6           modification where the standard would be clear and  
7           convincing.  So by, sort of, allowing this kind of  
8           playing of the system where the issue - - -

9                       JUDGE PIGOTT:  He's got to be playing the  
10          system somehow if somebody let him get up here.

11                      MS. MOORE:  - - - this issue was not  
12          preserved, and now he's able to get sent back under  
13          the lower standard, it sets up this kind of duality  
14          that doesn't make sense.

15                      JUDGE PIGOTT:  Well, you could make the  
16          argument, Ms. Moore, that - - - what you're doing is  
17          you're standing here saying I know there's five  
18          judges in Rochester that would prefer for me to make  
19          the decision, and I'm - - - and I want to, on behalf  
20          of the Appellate Division, say we don't want to use  
21          the right standard in this case.

22                      MS. MOORE:  Well, I think, importantly,  
23          here, there's no indication that the wrong standard  
24          was used, first of all.

25                      CHIEF JUDGE LIPPMAN:  Counsel, you really

1 have serious doubt as to what standard was used?

2 MS. MOORE: I - - - I do, because I think  
3 at the - - -

4 JUDGE PIGOTT: Well, there's a couple  
5 people on this court that probably are going to think  
6 that they probably did the clear and convincing.

7 MS. MOORE: And that's - - - and that's  
8 fine, because, again, under either standard, the  
9 evidence is important here. This is a case - - -

10 JUDGE READ: So are you saying it would  
11 just be an exercise in futility to send it back and  
12 have the Appellate Division apply the right standard?

13 MS. MOORE: Well, I think that, should this  
14 court infer that the wrong standard was used, that,  
15 yes, the correct action there would be go back to the  
16 - - - to the Fourth Department.

17 JUDGE RIVERA: Why is the evidence  
18 insufficient? Why has he not got something that is  
19 at least a colorable basis for arguing for the  
20 downward departure?

21 MS. MOORE: Because here, first of all,  
22 most of the evidence that we're talking about, as my  
23 opponent said, was actually not before the SORA  
24 court, and I think that's very important. Neither  
25 the specific arguments, nor the specific evidence

1 that we're now talking about, were actually in front  
2 of the SORA judge. And I think - - - and also - - -

3 JUDGE RIVERA: You mean the certificate?

4 MS. MOORE: I'm sorry?

5 JUDGE RIVERA: You mean the certificate?

6 MS. MOORE: Both the certificate as well as  
7 the claim relating to the change in relationship with  
8 the victim. The changed order of protection was also  
9 not before the SORA court, so - - -

10 JUDGE RIVERA: So the certificate, that  
11 judge ordered it, right?

12 MS. MOORE: Yes, right. And again, that  
13 goes to the - - - points to the fact that this SORA  
14 court knew the evidence, knew the case before it, and  
15 took all of that into consideration as - - -

16 JUDGE RIVERA: Well, is it clear that the  
17 judge understood that - - - if it - - - if it were to  
18 be the case - - -

19 MS. MOORE: Um-hum.

20 JUDGE RIVERA: - - - that the judge could  
21 take into consideration the certificate?

22 MS. MOORE: Yes.

23 JUDGE RIVERA: Is there something to let us  
24 know that?

25 MS. MOORE: Well, yes, because this - - -

1 this judge, both the hearing record makes clear, the  
2 defendant spoke to the court and detailed some of  
3 these instances, and the court - - - there's no  
4 indication, in fact - - - excuse me, the indication  
5 is that the court knew the defendant's history with  
6 alcohol, knew the prior felonies. And again, even if  
7 you remove those fifteen points, the defendant was  
8 still a presumptive level 3.

9 JUDGE RIVERA: By the way, is there  
10 something else to support the fifteen points other  
11 than the DWI?

12 MS. MOORE: Well - - -

13 JUDGE RIVERA: Is there another - - Is  
14 there evidence of a history otherwise?

15 MS. MOORE: There is, although the - - -  
16 the fifteen points is for a prior felony, so the only  
17 prior offense - - -

18 JUDGE RIVERA: Was that one.

19 MS. MOORE: - - - eligible was that one,  
20 right.

21 JUDGE RIVERA: Okay.

22 MS. MOORE: And in fact, the defendant also  
23 talked about his - - - you know, his treatment since  
24 he was incarcerated. He was actually not assessed  
25 any points based on his - - - his behavior while

1           incarcerated. And - - -

2                         JUDGE PIGOTT: Have you - - have you done  
3           SORA hearings?

4                         MS. MOORE: I have not, personally.

5                         JUDGE PIGOTT: Because one of - - - one of  
6           the concerns you have is that there's - - - they are  
7           so cursory, because the judge doesn't care. I mean,  
8           you've got a sex offender; he's going to 3. Now, I'm  
9           being cynical, and - - - and I'm not suggesting  
10          that's what happens all the time. But on occasion,  
11          when somebody says I've been through chemical  
12          dependency therapy successfully, I've been to, you  
13          know, a number of things, I've done all of this  
14          stuff, it ought to be brought in front of the judge,  
15          and - - - and some of that built-in bias, that I  
16          think I would have if I was doing SORA hearings, can  
17          get tapered a little bit, because all of this comes  
18          before the judge. And - - - and that's why, it would  
19          seem to me, that, A, you make it preponderance and  
20          not - - - and not clear and convincing, which - - -  
21          which reduces the - - - you know, gives you a better  
22          view, as a - - - as a judge on the things. And then  
23          you do listen to the stuff.

24                         JUDGE ABDUS-SALAAM: But, counsel, your  
25          point is that the judge did hear all of this - - -

1 MS. MOORE: Absolutely.

2 JUDGE ABDUS-SALAAM: - - - and made a  
3 discretionary decision - - -

4 MS. MOORE: Right.

5 JUDGE ABDUS-SALAAM: - - - to not grant the  
6 downward departure.

7 MS. MOORE: This was an extensive hearing.  
8 This was not a cursory hearing. This was an instance  
9 where, as I said, the defendant - - - in the records  
10 before you, pages and pages of testimony.

11 I'd also argue this is a sexually violent  
12 offender. This is somebody who molested two of his  
13 children. Actually, according to some of the  
14 document provided by the defendant in the briefs  
15 here, potentially a third child as well; that's  
16 mentioned in the order of protection that was  
17 modified. One of the daughters, the abuse started at  
18 the age of three, continuing till she was nine. So  
19 there - - - the - - - the court - - - the SORA court,  
20 though, clearly understood its role, which was not  
21 just to rubber-stamp the determination of the board,  
22 which recommended a level 3.

23 JUDGE RIVERA: Sure. But the points mean  
24 something. So his point is - - - or his argument is,  
25 in part, that if a certain amount of these points,

1 even if they won't take - - - take this particular  
2 defendant out - out of the level 3, automatically get  
3 him out because of the points score, it gets him  
4 closer to the 2, and maybe that that point, the  
5 argument has perhaps - - - is - is more compelling to  
6 the judge, the closer you move. How many of these  
7 arguments have we heard about being very close to the  
8 line, that that makes a difference? Why is that not  
9 a strong argument on his part?

10 MS. MOORE: Well, I think in this  
11 particular case, because the defendant, by statute,  
12 is a sexually violent offender, which is not in the  
13 court's discretion, so he's going to be, you know,  
14 reporting for life. So the consequences - - - I'm  
15 not sure how much, you know, it matters whether he's  
16 a 3 or 2, in terms of - - -

17 JUDGE FAHEY: Well it matters where they  
18 can live and mobility - - -

19 MS. MOORE: Right, frequency - - -

20 JUDGE FAHEY: - - - and things like that.

21 MS. MOORE: - - - those kind of things.

22 JUDGE FAHEY: So I understand why they  
23 would make it. You know, it's a - - - anybody who  
24 looks at the record, and I'm sure all the judges  
25 would agree with that, it's a - - - you can

1 understand why the SORA court made the ruling. The  
2 question here is, did the Appellate Division apply  
3 the right standard and is there a record here for us  
4 to allow it, to admit it, and have it be applied.  
5 It's going to be a difficult case, I think, to get  
6 the Appellate Division to change - - -

7 MS. MOORE: Um-hum.

8 JUDGE FAHEY: - - - the determination, but  
9 the question is the standard, which is - - - just  
10 needs to be consistent. We're concerned more with  
11 the law, I think, than with, you know, the individual  
12 inequities in this particular case. There's - - -  
13 there's a broader principle, I think.

14 MS. MOORE: And I understand that, and I  
15 think, again, we come back to preservation, because  
16 the - - - the concern here is that, as I think, you  
17 know, counsel explained, these records about the  
18 standard were never put forth before the court, and -  
19 - -

20 JUDGE FAHEY: I wonder, though, is that - -  
21 - did you look at Gillotti and - - -

22 MS. MOORE: Yes.

23 JUDGE FAHEY: And what do you - - - how do  
24 you - - - do you distinguish the preservation here  
25 from that?

1 MS. MOORE: Well, I think that the  
2 difference in Gillotti is that it was very clear in  
3 the record that the incorrect, we now know, standard  
4 was used.

5 JUDGE FAHEY: Um-hum.

6 MS. MOORE: Here we don't have that. And I  
7 think that it's important that, because the defense  
8 counsel would have known at the time that there was a  
9 conflict between the departments - - - I mean, that  
10 is how things get changed, quite frankly.

11 JUDGE PIGOTT: But I don't mean to keep  
12 picking on you for this, but if they do clear and  
13 convincing five times in a row - - -

14 MS. MOORE: Um-hum.

15 JUDGE PIGOTT: - - - then they don't say  
16 anything but they do this one, and then the - - - and  
17 then the next five they do clear and convincing, do  
18 you think in the middle they did a preponderance?

19 MS. MOORE: I don't know, on this record,  
20 but I think if you're counsel, you're making the  
21 argument that they should.

22 JUDGE RIVERA: But - - - and - - - just to  
23 piggyback on what Judge Pigott's saying, certainly,  
24 if they're going to deviate from the standard that  
25 they've applied over and over, one would think they'd

1 do more than write one sentence.

2 MS. MOORE: Again, I think the point of  
3 preservation, counsel - - - or my opponent suggested  
4 that it was some new preservation rule. I would  
5 argue it's simply the preservation rule, and that the  
6 importance of that is to effect change for the  
7 direction that we see - - -

8 JUDGE RIVERA: Regardless of what's going  
9 on in the Fourth Department, defense counsel wants to  
10 - - - knows about this split - - -

11 MS. MOORE: Yes.

12 JUDGE RIVERA: - - - they should raise it  
13 every single time, even if they think they don't have  
14 - - -

15 MS. MOORE: Absolutely.

16 JUDGE RIVERA: - - - any hope of getting  
17 that - - -

18 MS. MOORE: Because - - -

19 JUDGE RIVERA: - - - panel to make a choice  
20 based on a lower standard.

21 MS. MOORE: Absolutely, because then when  
22 we get here, you have the record to decide that case.  
23 And that's not the case here.

24 CHIEF JUDGE LIPPMAN: Okay, counselor,  
25 thanks.

1 MS. MOORE: Thank you.

2 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

3 MR. DAVISON: Yes, Your Honor, two things.  
4 First, I'd like to pick up on the point that Judge  
5 Pigott and Judge Rivera mentioned that it is  
6 important that this be adjudicated and not rubber-  
7 stamped.

8 JUDGE PIGOTT: Well, let me argue against  
9 my own point; I've never seen a written decision,  
10 from a judge, as Judge Martusewicz did here, and as -  
11 - - as Ms. Moore points out, a rather extensive  
12 record. I mean, quite often, you know, you go in and  
13 you say, Judge, this is what we've got, and he says I  
14 don't care what you've got and you're going to get a  
15 3 and that's that and you have a right to appeal.  
16 But this was pretty extensive, don't you agree?

17 MR. DAVISON: Well, it's extensive to the  
18 extent that they let Mr. Brown talk for a long time.  
19 But there was no testimony. There was - - - there  
20 was - - - it was just - - - it was just argument of  
21 counsel. And - - - and they let him talk, and then  
22 the judge said, I don't think you've shown me enough  
23 for a downward departure without saying what that  
24 standard was.

25 JUDGE ABDUS-SALAAM: Counsel, does there

1 have to be testimony? From whom? I'm - - - are you  
2 saying experts have to come in or - - - because isn't  
3 it usually arguments of counsel, and if the defendant  
4 wants to - - - the defendant is usually there and  
5 wants to say something, that's what the judge hears.

6 MR. DAVISON: I'm not saying that there  
7 have to be experts or - - - or testimony. I believe,  
8 in fact, that the SORA statute and guidelines don't  
9 contemplate bringing the victims in; that - - -  
10 that's out of bounds. But - - -

11 JUDGE PIGOTT: If you were correcting me, I  
12 was speaking as if there was testimony and you were  
13 telling me there was not.

14 MR. DAVISON: But it's - - - well, I'm just  
15 - - - I - - - I wasn't trying to; I'm - - - I'm  
16 trying to point out that it - - - that it wasn't - -  
17 - that it - - -

18 JUDGE PIGOTT: I'm not offended.

19 MR. DAVISON: Okay - - - that - - - that it  
20 is important. And I'd also point out that it's very  
21 important to Mr. Brown; he and his son are actually  
22 here in the courtroom today; they came down from - -  
23 - from Watertown for this, because it's important to  
24 him to - - - to - - - to realize that - - - that his  
25 case is being taken seriously by the courts.

1                   And I'm - - - my second point was on a  
2                   related topic. You know, we talk about preservation  
3                   at the - - - at the Appellate Division. I - - - I  
4                   know Judge Pigott and Judge Fahey are aware, but I'm  
5                   not sure if the other judges are; oral argument is  
6                   not allowed in SORA cases at the Fourth Department.  
7                   So it - - - it's kind of difficult to - - - to - - -  
8                   to elucidate on something when your - - -

9                   JUDGE STEIN: It could be in your brief.

10                  JUDGE ABDUS-SALAAM: But it could be in the  
11                  brief.

12                  MR. DAVISON: Oh, yeah, you can put it in  
13                  your brief, yes.

14                  JUDGE READ: And you didn't, I don't think  
15                  - - -

16                  MR. DAVISON: But it's - - -

17                  JUDGE READ: - - - did you?

18                  MR. DAVISON: But oral argument is not  
19                  contemplated.

20                  JUDGE READ: But you did not put it in the  
21                  brief, did you?

22                  MR. DAVISON: I did put it in the brief. I  
23                  - - - well, I alluded to the fact that the Second  
24                  Department had this - - - had this different  
25                  standard. I didn't run with it any further than

1           that, perhaps out of a sense that - - - that it  
2           wasn't going to go anywhere; it wasn't going to  
3           change them.

4                        CHIEF JUDGE LIPPMAN:   Okay, counselor.  
5           Thanks.

6                        MR. DAVISON:    Thank you.

7                        CHIEF JUDGE LIPPMAN:   Thank you both.  
8           Appreciate it.

9                        (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 People v. Stanley A. Brown, No. 117, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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