COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 160

HERMAN BANK,

Appellant.

PEOPLE,

Respondent,

-against-

No. 161

HERMAN H. BANK,

Appellant.

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20 Eagle Street
Albany, New York 12207
September 15, 2016

Before:

CHIEF JUDGE JANET DIFIORE
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
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Karen Schiffmiller
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CHIEF JUDGE DIFIORE: Next on the calendar is - - - are appeals number 160 and number 161, People of the State of New York v. Herman Bank.

MR. ISSEKS: May it please the court, my name is Robert Isseks and I represent the appellant, Herman Bank, on his appeal from the denial of his 440.10 motion.

CHIEF JUDGE DIFIORE: Counsel, would you like rebuttal time?

MR. ISSEKS: Yes, thank you, Your Honor. I forgot to ask for that. May I have two minutes?

CHIEF JUDGE DIFIORE: Yes, you may.

MR. ISSEKS: Thank you.

CHIEF JUDGE DIFIORE: You're welcome.

MR. ISSEKS: I know I'm repeating myself because I repeated myself in the briefs, but I can't imagine a case where there are stronger objective indications of prejudice than this case. This is not a case, where, for example, the defendant files a 440.10 motion and asks the court to accept his representation - - -

JUDGE GARCIA: Well, it would be stronger if you had a plea offer, right?

MR. ISSEKS: I don't think so, no.

JUDGE GARCIA: No?

MR. ISSEKS: No.

JUDGE GARCIA: If there's a definite plea offer on the table that was misinterpreted by the defense lawyer and there was evidence of that, it would not be stronger than your case?

MR. ISSEKS: I don't think so. I don't think it makes any difference at all. I - - - what - - - what - - -

JUDGE STEIN: How - - - how about if you - - - if you brought one of the ADAs and said, the reason I - - - I didn't make a plea offer was because it was made very clear to me that - - - that - - - that the defendant, you know, wouldn't accept one. Would that be - - - would that be easier - - -

MR. ISSEKS: Well, perhaps, but - - -

JUDGE STEIN: - - - and make it stronger?

MR. ISSEKS: I suppose that would be an admission by the People of prejudice, yes.

JUDGE STEIN: Okay.

MR. ISSEKS: And - - - and - - - so forgive me - - -

JUDGE STEIN: And - - - and that didn't - - -

MR. ISSEKS: - - - if I've overstated it.

JUDGE STEIN: That didn't happen here.

MR. ISSEKS: No, that didn't happen here.

JUDGE GARCIA: Or if the judge said I - - -

MR. ISSEKS: But maybe I'm stating the - - -

JUDGE GARCIA: - - - I would have given you a plea offer, but unfortunately in this case the judge is dead - - -

MR. ISSEKS: Right.

JUDGE STEIN: - - - by the time the 440's brought, right?

MR. ISSEKS: Correct. I - - - I'm guilty of hyperbole. I - - - I've overstated the case a bit by saying that there couldn't be anything stronger.

JUDGE GARCIA: Perhaps.

MR. ISSEKS: But what I am - - - what I wanted to do is compare it to the kind of case that we normally see, which is where after the judgment of conviction is entered, the defendant represents to the court that he would have been interested in a plea had he known that a plea was possible. Then - - -

JUDGE STEIN: But - - - but that - - - but that doesn't get you to the - - - to the point of that there was any possibility that there could have been a plea, either on the part of the People, and

here it's to the contrary. There's testimony that there - - - there would not have been anything offered and - - - and a number of reasons were given, and the - - - and the judge at sentencing said why he thought that the maximum sentence was called for here, so there's just - - - I don't see anything in the record that would - - - that would lead to a reasonable possibility that - - - that a satisfactory plea would have been offered here.

MR. ISSEKS: Well, again, the - - - the - - - the question, of course, is whether or not this record undermines the confidence that a person would have in the outcome of this case. Putting it more precisely: if Bank had a reasonably competent attorney, if he - - - if he had an attorney who correctly advised him of his sentence exposure, correctly advised him of what a plea range was, and was actually negotiating a plea for him, and if they didn't get one from the DA, then went to the district - - - to the court to ask for some consideration for leniency, knowing that his client, knowing that Bank was interested in a plea bargain that carried a - - - a sentence of somewhere around four to twelve years.

JUDGE ABDUS-SALAAM: So I'm - - - you - - - you - - -

MR. ISSEKS: Is there no - - -

JUDGE ABDUS-SALAAM: Counsel, you've indicated a couple or three things, but they're all surrounding the - - - the plea negotiation that your client wished that his counsel had engaged in, correct? There - - - there were two or three things that counsel - - - you just related that counsel did not do - - -

MR. ISSEKS: Right.

JUDGE ABDUS-SALAAM: - - - around attempting to get a plea bargain for his - - - his client. Le - - - let's say that that's - - - that was an error. I - - - I'm not suggesting I agree with it, but let's say it was an error. Was it the type of error that was dispositive? Was this a Turner-type of error where the counsel was so ineffective on this single error that we should say that counsel was ineffective here - - - provided ineffective assistance?

MR. ISSEKS: Absolutely. Absolutely. First of all - - -

JUDGE ABDUS-SALAAM: Is it dispositive? What - - - what - - - if he had tried to get a plea and didn't get one, would that be dis - - - a dispositive error?

MR. ISSEKS: No, no, he - - - it'd be - - - if the attorney - - - I'm - - - if I understand Your Honor's question, if this attorney understood the sentence - - - proper sentencing, and he did the best he could to get a plea offer that was acceptable to his client, and he wasn't successful, no, that wouldn't be anything.

JUDGE ABDUS-SALAAM: But - - - but so - - - the reason that this attorney did not seek a plea was because he misunderstood the law, correct?

MR. ISSEKS: In sequence.

JUDGE ABDUS-SALAAM: So that's a single error, right?

MR. ISSEKS: Well, it's - - - it's quite an error, yeah.

JUDGE ABDUS-SALAAM: Yeah, it is - - - it is a big error. Wait - - - wait - - -

MR. ISSEKS: He did not - - - he did not engage in plea bargaining.

JUDGE ABDUS-SALAAM: But would it have led - - - if he had engaged in plea bargaining, would it have led to the plea with - - - with a surer - - - a sure thing that it would have led to the plea that his client was looking for?

MR. ISSEKS: I can't say it's a sure thing

that it would have led to a plea - - -

JUDGE ABDUS-SALAAM: Okay.

MR. ISSEKS: - - - but that's not the standard.

JUDGE ABDUS-SALAAM: And that's dispositive - - - whether the error would be dispositive or not under Turner, right?

MR. ISSEKS: The - - - the - - -

JUDGE ABDUS-SALAAM: That's the standard.

MR. ISSEKS: The question is whether there's a reasonable probability that had he been effective, had he engaged in plea-bargaining, that the outcome would have been different.

JUDGE PIGOTT: And what - - - what makes - - -

MR. ISSEKS: That's the sole question.

JUDGE PIGOTT: What makes that probable?

MR. ISSEKS: I'm sorry?

JUDGE PIGOTT: What makes it probable? What are the facts that you say would - - - makes this probable?

MR. ISSEKS: Well, again, first we have - - - we know that the - - - and it's undisputed; it's unrefuted that the defendant, Bank, was looking for a plea, somewhere around four to twelve years, which is

not that much less than the maximum. We know that for a fact.

JUDGE PIGOTT: Um-hum.

MR. ISSEKS: We - - - we also know that, as the Supreme Court says, that ninety-four percent of the convictions, state convictions in this country are by plea.

JUDGE PIGOTT: Right.

MR. ISSEKS: So just as a matter of probabilities, the - - - it's - - -

JUDGE PIGOTT: Well, you don't - - - you don't - - - you don't - - - you can't make that argument, right?

MR. ISSEKS: Why not?

JUDGE PIGOTT: Because you got to find cases where people are high on cocaine going down the road at an outrageous amount of speed and kill two people. How many of those take pleas and - - - what's that's percentage?

MR. ISSEKS: I - - - I - - - I don't - - -

JUDGE PIGOTT: Because - - - because I - - - I - - -the - - - the testimony here is the DA wasn't going to approve one. That does not surprise me. And - - - and that's - - - that's why I'm wondering when you get the - - - it's not possible;

it's probability and - - - and that's a big hurdle to overcome, it seems to me.

MR. ISSEKS: Well, I have - - - well, first, one of the issues that we raise on appeal, of course, is the county court's rejection of our offer of proof as to what goes on in the Monroe County courthouse, with respect to cases where the district attorney takes a no-plea position.

JUDGE FAHEY: You're talking about the conclusion of the public defender's testimony?

MR. ISSEKS: Yes.

JUDGE FAHEY: Gotcha. I - - - I understand that argument, but can I just take a step back for a second. Go ahead - - - do whatever you - - - go ahead.

It seems - - - in - - - in Perron, we're - - - we're talking about, essentially, a totality of the circumstances test. There's two parts to that. First, was his pre - - - was his representation objectively reasonable? I think it's clear to say it wasn't. Objectively, it fell below a reasonable person's standard. You expect an attorney to know what you're going to get when you talk to him about these things.

So let's say you meet prong one; that's

done. And then we go to prong two, and in prong two, that's a different - - - each question from the court seems to have been, how do you meet the harm requirement? How - - - how do you meet that and what do you point to that said you would have gotten this plea; you had a chance to get the plea. There was some possibility that you would have gotten the plea.

And if you take Ms. - - - Ms. Reilly out of - - - out of the occasion, because that's - - - that's - - - I understand that's part - - - that's part of your argument towards that. Is there anything else you can point us to beyond that?

MR. ISSEKS: Well - - - well, first, again, the problem - - - and why I think that maybe this case is stronger than where a plea offer had been made, but was erroneously rejected because of bad advice. There was no offer in this case. So what - - - what - - -

JUDGE FAHEY: Just tell me - - -

MR. ISSEKS: You asked the question, how do we know that he would have - - -

JUDGE FAHEY: No, my question to you is - - -

MR. ISSEKS: - - - that the court would have accepted his plea?

JUDGE FAHEY: No, no, that's not my question. My question to you is the second part of the test, you've got to meet a harm requirement. What do you want us to look at? What facts do you want us to say; these are the things that show that - - - how he was harmed by this, how we could have shown that he would have gotten this plea?

MR. ISSEKS: Again - - - again, I - - - I need to show that there's a probl - - - a reasonable probability - - -

JUDGE FAHEY: That's fine. That's fine.

MR. ISSEKS: - - - that he would have gotten some concession from the court.

JUDGE FAHEY: No, that's - - - that's fine. I - - - I think you're right about that. Tell me what things you want me to look at - - -

MR. ISSEKS: Well, again - - -

JUDGE FAHEY: - - - just as - - -

MR. ISSEKS: - - - I think you could - - - one thing that I think can be looked at and that is the overall percentage of cases that are pled out.

Number two, I think - - - because as - - - as the Supreme Court said, the reality is that criminal justice today, for the most part, a system of pleas, not a system of trials. And I think that

that's a very, very important backdrop to this court's evaluation as to whether or not what happened here undermines confidence in the outcome.

JUDGE FAHEY: Oh, I got that point. What else, though?

MR. ISSEKS: Again, the - - - the repeated - - - the repeated attempts by the defendant to get a plea.

CHIEF JUDGE DIFIORE: Thank you, counsel.

JUDGE FAHEY: I see, thank you.

MR. DAVIS: May it please the court, Counsel Timothy Davis, with Monroe County Public Defender, also on behalf of Mr. Bank. If I could also request two minutes for rebuttal?

CHIEF JUDGE DIFIORE: You may.

MR. DAVIS: Thank you.

CHIEF JUDGE DIFIORE: You're welcome.

MR. DAVIS: Mr. Bank was also denied the meaningful assistance of counsel in this manner and assured of conviction, quite frankly, as his attorney presented a psychiatric defense, relying solely on a pharmacist who was professionally incapable of establishing Mr. Bank's mental state at the time of the crash.

JUDGE STEIN: What - - - what choice did he

have? What - - - what options? What other options did defense counsel have by way of defense here?

MR. DAVIS: To not proceed with the affirmative defense. I mean, the - - - the problem is that by proceeding with the affirmative defense, there was - - -

JUDGE STEIN: Wasn't the proof - - -

MR. DAVIS: Excuse me?

JUDGE STEIN: Was it - - - wasn't there an awful lot of proof in support to - - - to show the use of the cocaine and - - - and I mean, it was, I think, basically undisputed that he was going the wrong way and - - -

MR. DAVIS: Undisputed - - - I'm sorry.

JUDGE STEIN: - - - two people were killed. So how - - - what would that have gained him?

MR. DAVIS: Well - - - well, first of all, I mean, I think - - - I don't think - - - need to show that he would have been acquitted if there had been some other su - - - defense pursued.

JUDGE STEIN: But you have to show that that it was - - - that they had strategic decision that - - -

MR. DAVIS: Yes.

JUDGE STEIN: - - - that - - - that there

was a better decision that he should have made, I suppose.

MR. DAVIS: The facts are undisputed in that Mr. Bank is going the wrong way, relatively high rate of speed, crashes into the other car, horrific crash, two people die, and one person injured. The whole issue is whether he was reckless or not. And the People's - - - their - - - their theory was that he was reckless because he had used a great deal of cocaine in the twelve hours or so preceding the crash.

So by pursuing this affirmative defense, what defense counsel basically did is took the few holes that the prosecution had, or possibly had and filled them in. Num - - -

JUDGE STEIN: What was that? What were - - - what were those holes? I mean, they had blood tests and - - - and - - -

MR. DAVIS: Well, they - - - well, they had a - - - they had a blood test. There was some issue the defense counsel did not really explore as to what that blood test actually showed. There was one - - - the - - - the initial test showed a certain number of micrograms per millimeter of the - - - of the defendant's blood, and then the expert sort of

extrapolated from two other substances found to - - - to actually say it was three times that.

But what happens is when - - - when the prosecution's expert, Dr. Beno testifies, she refers specifically to the defense pharmacist, Ms. Renka (ph.), who, based upon her interview with Mr. Bank, testified that he told her he had been using cocaine for twenty-eight hours preceding the crime.

JUDGE STEIN: Well, I understand that they had some additional evidence from - - - from Renka, but - - - but I - - - I'm saying without that evidence, didn't they still have a lot of evidence to prove it?

MR. DAVIS: They still had a lot of evidence that he had - - - I mean, it's undisputed. There - - - there was the crash, but not - - - it was not undisputed as to Mr. Bank's mental state.

The other problem that came in, that I think may have been even more crucial then the evidence of this cocaine binge for twenty-eight hours, is the fact that because all of Mr. Bank's medical records were made available to the State's psychiatrist, the prosecutor was able to close on the fact that Mr. Bank had been in two or three prior accidents, the preceding five years, all of which

involved his car running off the road or some other accident, where he'd been admitted to the hospital and had been under the influence of cocaine.

And as the prosecutor said specifically, recklessless mea - - - recklessness, excuse me, means knowing the consequences or the - - - or the risks, quite frankly, of your conduct and engaging in that. So he basically, what defense counsel did was - - - was tie the case up in a bow for the prosecution. He could have argued - - - and it's hard to tell exactly what - - - what defense counsel could have established if he had not pursued this, quite frankly, wrongheaded defense, because he didn't do it.

But there's no cocaine found in the car. It's clear from the prosecution's own experts that he did not believe - - - I think it was Dr. Jazinsky (ph.), did not believe that Mr. Bank was in a manic or hypomanic state, which were be expected if he were actually high on cocaine. Mr. Bank was not from Rochester. There was no proof that he was familiar with this intersection. And Trooper Lockey (ph.) testified that the responses Mr. Bank actually gave were, for the most part, understandable and appropriate.

So the only real evidence of - - - of use of cocaine comes with regard to this test, three or four hours later, where there's some issue as to exactly how much is in his blood. At that point, defense counsel, challenging the amount of cocaine in - - - in his client's blood, at that point, is akin to trying to shut barn door when the horse is already out. Once Dr. Beno has said that based upon the defendant's own statements to his expert, that he used cocaine for twenty-eight hours, using every three to five hours - - -

JUDGE GARCIA: Don't they have a reading on the - - - on the test? Isn't there a level of cocaine in his bloodstream, right?

MR. DAVIS: There is.

JUDGE GARCIA: So what - - - you know, yeah, oh, it was twenty-eight hours - - - it - - - whatever you did, and I think his excuse is a prostitute blew cocaine smoke in my mouth, but whatever you've done up to that point, has gotten you to this level of cocaine in your bloodstream that you were driving the wrong way on a street and killing two people. So I'm not sure I'm understanding where this makes a difference?

MR. DAVIS: Well, throughout the

prosecution's case and closing and the prosecution's witnesses, they used this term "cocaine binge" and that came solely from the testimony of - - -

JUDGE GARCIA: So if he hadn't been binging, but had a cocaine blood level of whatever he had here and went the wrong way and killed two people, if they hadn't proved he was binging, it would have made a difference?

MR. DAVIS: Well, I - - - I'm not saying it would have made a difference. What - - - what I'm saying is that, we can't tell what would have made a difference at this point because defense counsel did not pursue a defense where he simply challenged the prosecution's case.

JUDGE STEIN: Well, what was deficient about the defense? I - - - I think we should probably get to that also. I mean, she testified to a diagnosis. Does she, herself, have to make that diagnosis?

MR. DAVIS: Well, if she doesn't make it, nobody else does for the defense.

JUDGE STEIN: Well, but it - - - it was - - - it was in her - - - she - - - she testified that that was his diagnosis. It was - - - it was in the proof that that was - - - that was there. So - - -

MR. DAVIS: Well, she - - -

JUDGE STEIN: - - - what was deficient about her - - - her testimony?

MR. DAVIS: Well, her testimony is that when somebody has a mental illness and then takes Chantix and the mental illness is not treated, that - - - that it can throw the person into this manic or hypomanic state, where they then use cocaine. She presumably relied on this prior medical record that stated that Mr. Bank was bipolar.

Now I - - - I don't believe there's any basis for a pharmacist to rely on - - - on a medical record saying somebody's bipolar. But even if we say that she could rely on that particular statement, she cannot then state that Mr. Bank was in a hypomanic - - - manic or a manic state, based upon either the Chantix or untreated bipolar disorder. And the result - - - as a result, did not substantially - - - did not understand the nature or consequences of his acts. She couldn't testify to that. That takes a forensic psychiatrist.

And - - - and I would note in closing, that's the first thing the prosecutor talked about was the fact that they had called only a pharmacist, not a psychiatrist, and a pharmacist could not make

that diagnosis.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. DAVIS: I see my time's up. Thank you.

CHIEF JUDGE DIFIORE: Counsel?

MS. MERVINE: May it please the court, good afternoon. My name is Leah Mervine on behalf of the People of Monroe County. This is a case where the defendant's strategy failed. His attorney did not fail. And should the court wish, I - - - I will address the 440 issue first.

Here, it's the People's position that the defendant did not meet the burden to show that he had Strickland prejudice or even under the state standard that there would be prejudice to him.

JUDGE STEIN: Can - - - can a - - - a defendant ever show ineffective assistance of counsel in a case where no plea offer was made?

MS. MERVINE: Absolutely, they can.

JUDGE STEIN: When?

MS. MERVINE: Absolutely. And in this case, there is a unique set of circumstances.

JUDGE STEIN: Well, when can they? I first asked - - - answer that.

MS. MERVINE: Well, there is clear case law from the Supreme Court where the Laffler v. Cooper

and Missouri v. Frye line of cases show how this can happen throughout the states.

JUDGE PIGOTT: How about the State of New York? You got any ca - - - State of New York cases?

MS. MERVINE: In New York, there are cases where this issue has been raised, but not that I'm aware of where it's been successful. There are possibly could be cases, but in those cases what you would need is a clear plea offer that was not communicated to the defendant, and that there was something that the defense attorney did - - -

JUDGE STEIN: But that's where there was an offer. I mean, maybe it wasn't made to the defendant. I guess - - -

MS. MERVINE: Correct.

JUDGE STEIN: Does there have to be some proof that an offer was made somewhere to somebody in order to establish an effective assistance or can - - -

MS. MERVINE: I believe so, and I believe that could be a slippery slope, Judge Stein. I believe there could be situations where you could infer from a record. But here, I think - - - the important point that I wanted to reach with that is this was done by way of a - - -

JUDGE GARCIA: What did you - - - I'm sorry to interrupt you, but, you know, getting back to cite to Missouri v. Frye, doesn't Missouri v. Frye say the "defendant has to show a reasonable probability that the end result of the criminal process" would have been a more favor - - - "would have been more favorable by reason of a plea to a lesser charge or a sentence of less time."

MS. MERVINE: Absolutely.

JUDGE GARCIA: So there has to be some showing that it was reasonable to expect a better result, whether that's plea offer or something else.

MS. MERVINE: Absolutely, so if by way of that example, the plea offer was higher before a trial, certainly there would be no prejudice.

But in this case, I think it's really important for the court to understand that Mr. Bank testified at the 440 hearing that when he was remanded to custody after trial, he had spoken with his attorney who cleared up the fact that he was not facing consecutive sentencing, because Mr. Bank thought he was facing thirty-four years, and it was at that point, that he was willing to accept the four to twelve. But in that, he also consulted another attorney, Dave Murante, from Rochester and Mr.

Murante, according to Mr. Bank, advised him to remain silent at sentencing.

Therefore, it's the People's position under CPL 440.10(3)(a), that he would barred from this in any event. We're nine years after this collision; nearly a decade has elapsed since this horrific crash occurred. And the defendant purposefully remained silent about this at sentencing. Had he raised a 330 motion at that time, then he would have been able to have his attorney who was still alive at that point in time, and have Judge Connell who was still alive at that time, comment on what, if any, plea there would have been.

But I cannot impress enough to this court how incredibly tragic and horrific this crime was. This was a crime that offended our community's sensibilities and it was not a crime that our office would have ever extended an offer on. And I would just note in this case, Judge Connell was very clear that he wanted to give more than the maximum. And while we do respect separation of powers, the legislature in finding five to fifteen is sufficient for this crime, in our opinion, is very, very low.

JUDGE PIGOTT: Did the DA change in the time period from the time of the sentencing until the

time of the 440?

MS. MERVINE: The DA did not change, but the assistant had. And I think that's also a very important distinction. ADA Rodeman was the head of our DWI Bureau and the case was taken over relatively in its infancy by ADA Hahn, and she had the case pending for a year before her.

JUDGE PIGOTT: She seemed to indicate that - - - that the DA would not have approved a sentence - - -

MS. MERVINE: That is correct. The DA had - - -

JUDGE PIGOTT: Ho - - - ho - - - ho - - - but - - - so the same DA was there, and he or she could have said, you know, I would not have authorized a plea. Would that - - - there was no affidavit from the DA, right?

MS. MERVINE: That is correct, because there is no burden on the People to show that, but what Ms. Hahn did say is that she found it so offensive that she wouldn't have even brought it to Mr. Green, who was the DA of the County at that time period.

JUDGE GARCIA: Counsel, basic question, sorry for it. But can a - - - a judge offer a plea

deal without the approval of the district attorney?

MS. MERVINE: They - - - the court could undercut the People if the defendant pleaded to the full indictment to all of the counts, and then it would be up to the court to determine sentencing. But there's no indication in this case that Judge Connell would have taken this high-profile case in the community, where he himself said that five to fifteen is wholly insufficient, and that he would have under - - -

JUDGE GARCIA: Just to go back. I'm sorry I'm so basic. So the only way to do that would be the defendant pleads to the indictment?

MS. MERVINE: If the court approved it. So - - -

JUDGE GARCIA: But then he can't just plead to indictment anyway?

MS. MERVINE: The defendant could plead to the indictment ostensibly not knowing his sentence, but then I think you would really be looking at an ineffective - - -

JUDGE GARCIA: That would be a 440 one? But - - -

MS. MERVINE: - - - assistance.

JUDGE GARCIA: So let's say the judge

approves a plea to the indictment and then we'll just agree to a sentence; that's how it would work?

MS. MERVINE: It - - - correct. So I - - - ostensibly a defendant could plead to the entire indictment, come in at arraignment, and say I am guilty, plead guilty to every single count and then it would be completely up to the court to determine the sentence.

JUDGE GARCIA: And could a judge say, plead to the indictment and I'll give you twe - - - eight to twelve, or whatever?

MS. MERVINE: Absolutely. In this case, no, it couldn't be eight to twelve because that wouldn't be - - -

JUDGE GARCIA: But that would be - - -

MS. MERVINE: - - - within the - - -

JUDGE GARCIA: - - - a lower sentence would be.

MS. MERVINE: Correct. A judge could give whatever is within the law to give. However, that's not the case that this court has before it.

JUDGE GARCIA: No, I understand.

MS. MERVINE: So, in - - - in that sense, I - - I think it is very important, though, in this case, not knowing or - - - or knowing that there

really was no possibility of a plea, that there is no basis whatsoever for vacature.

And I also want to quickly touch on the fact that there is no remedy in this case, because there never was a plea offer. So the Supreme Court says the remedy is not to have the conviction vacated and that is very clear in Laffler v. Cooper. There, what the court's remedy was, was to take the case and require the People to offer what they had initially offered, and then left it up to the court to determine whether it would have accepted that offer, and if it would, then it could vacate the conviction and then give the promised sentence.

In this case, there is an impossibility that we have here. There was no offer made by the People. The People will never make an offer in this case.

JUDGE PIGOTT: What'd you think of the trial?

MS. MERVINE: Thank you. I will segue onto the second point. In terms of the trial, I think that this defense was the best defense that they had available. And I believe that the strategy failed; it was not the attorney.

And this defendant is asking this court

almost to create a per se rule and limit Criminal Procedure Law Section 250.10, by saying that a pharmacist cannot render an opinion as to whether somebody was suffering from a mental disease or defect. And that is not a limitation that has ever been placed on the law. The courts of this state have found that a pharmacist does fall within that purview and I've cited cases in that regard.

And in this case, I think it's really critical to understand that the defendant was a contemporary of the expert. He was a pharmacist. He went to the same pharmacy school. And I know there are indications in the direct appeal that this was something that was foisted on him. By it not being raised through a 440, I feel that those are inappropriate comments, but more than that, it's very clear that Dr. Renka, who is the pharmacist, was the best expert that was available in this matter.

And in this case, the People's rebuttal witnesses - - -

JUDGE ABDUS-SALAAM: Do you mean that, because that's the only expert they could get, or would you have expected this type of insanity defense or something like that or manic defense to be put forward by psychologists or psychiatrists?

MS. MERVINE: The People would not expect that based on the testimony of our rebuttal witnesses. They made no showing whatsoever that they couldn't find a witness who would make that statement. Therefore, it was wholly reasonable to use this defense. The defendant was - - - had a diagnosis. He was on Lexapro, and he was not taking his medication, and a pharmacist was an expert witness who could testify about it.

JUDGE FAHEY: I've - - - I've never seen a pharmacist testify to bipolar disorder in any context before.

MS. MERVINE: And Judge Fahey, it would be the People's supposition that she wasn't testifying as to the disorder. She was testifying as to the effects of the medication on the - - -

JUDGE FAHEY: So she - - - what you're saying is, she was testifying to the physical effects on a person with his condition, not to the existence of his condition?

MS. MERVINE: Correct, and I think that's really highlighted by Dr. Sasson's (ph.) testimony, who was our rebuttal witness. Dr. Sasson, he formed an opinion about Mr. Bank's diagnosis, but that was really wholly irrelevant to the trial, if you look

through. What - - - what the key is, is - - - was the defendant, in that moment in his vehicle as he was speeding down an exit ramp getting onto the highway high on cocaine, was he able to appreciate his actions?

And their defense was saying, from a pharmacologic perspective, he was not. It was not saying, oh, it was his bipolar disorder that had taken over his mind. They were saying it was these medications with his preexisting condition that pushed him into this hypomanic/manic state where he was unable to appreciate the fact that he had consumed cocaine.

And I would also note, they used Dr. Renka additionally - - - I - - - I do note there was some discussion of this. They did fight the extrapolation that was done by the People. Dr. Renka, in her testimony as a pharmacist, said that she believed that the extrapolation the People performed on the cocaine in the blood was insufficient, and therefore she felt that the levels of cocaine in his system were not at the level that the People claimed them to be.

But I - - - I think, going back to just sort of the verbiage of was he on a cocaine binge

versus was he high on cocaine is irrelevant. And I feel that even by putting on this affirmative defense, it wasn't extrapolating any more recklessness than the People's evidence showed. I don't believe there were any holes in this case, which is another reason that this case would not have been plea-bargained. Certainly, if there was some huge insufficiency in the case, that might need to be looked at.

But here the evidence was absolutely overwhelming from the eyewitness identifications, from them seeing the vehicle enter the highway at - - - on the exit ramp, from people swerving out of the way, from all of the testimony from all of the witness (sic), including the person who runs up to his car moments after the crash, sees him in the driver's seat, the indicia of impairment about his person, and then the cocaine results.

This was an overwhelming case. It was a tragedy for the community. It took the lives of an eighteen-year-old and twenty-year-old, who had a very, very promising future, and seriously injured a young woman. And there was nothing that was ineffective whatsoever about his counsel. In this case, it was a case of overwhelming proof.

JUDGE RIVERA: So if he had put forward of other horrific crimes that were plea-bargained down, would that have made a difference?

MS. MERVINE: If they were - - -

JUDGE RIVERA: On the plea side, on the 440.

MS. MERVINE: If they were sufficiently similar, if they were of the same time period, before the same judge, perhaps.

JUDGE RIVERA: It would have to be before the same judge?

MS. MERVINE: I think that's a question for this court to look at. It would be the People's position. Yes, it would have to be the same judge, because he would have to be in the same position that he was back in 2007. I don't think you can go back a decade later and recreate.

And I would ask this court to - - - to find that everything is firmly based in the record in this case, and that it really was a case of failed strategy, not of ineffective assistance of counsel. And I would ask that this court affirm the unanimous Fourth Department decision.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MS. MERVINE: In both matters, thank you.

CHIEF JUDGE DIFIORE: Counsel?

MR. ISSEKS: First, I - - - I think it's important for me to say that this court should not only focus on the federal standard for ineffective assistance, but also on the state standard for ineffectness - - - effective assistance, where prejudice is examined more generally, and it's the fairness of the process as a whole, rather than any particular impact on the outcome of the case.

Listening to my adversary's argument and the questions of this court, it would appear that their position is that if there's no offer made, then it's impossible for a defendant in Bank's situation, who has an ineffective attorney, who doesn't engage in plea-bargaining for him, to ever prove prejudice. And that's simply unfair. It's not fair for the defendant to be denied the opportunity to engage in the critical process of plea-bargaining. And for the court to say that he would have to prove that there was an offer out there to be accepted would result in a gross, gross unfairness, under the state's standard.

With respect to the question about whether or not it was reasonable to expect a better a result in this case, I submit that that's why our offer of

proof was so important. Again, I don't think that it's critical that the defendant show that in this particular kind of case, on these particular kinds of facts, I would have been given some concession by the judge. I think it's sufficient for the defendant to show from a - - -

JUDGE STEIN: Don't you think that they have to at least have had some experience before this particular judge - - -

MR. ISSEKS: I think - - -

JUDGE STEIN: - - - in any case?

MR. ISSEKS: I don't think that the - - - that - - - no, because again, it's - - - it's an objective question. It's not what - - - what is the - - - the subjectivity of that judge is not what's controlling. What's controlling is, what can we reasonably - - -

JUDGE STEIN: What if it was a judge that - - - that blanket would never agree to a - - - a plea to the indictment for less than the maximum? What - - - what if that was known about this particular judge?

MR. ISSEKS: Well, of course, that - - - that's not this case. I would say that if a district attorney had presented proof to that effect to rebut

the defendant's offer of proof, that the county court judges always offer concessions - - -

JUDGE PIGOTT: In - - - in your view - - -

MR. ISSEKS: - - - at least in a hundred cases they do that.

JUDGE PIGOTT: In your view, is - - - is - - - is - - - should we take into consideration - - - your opponent argues that, you know, it took him, what, seven years to bring this? In other words, you know, once he found out that his lawyer had said, gee, I made a mistake, and - - - and these - - - these don't have to be concurrent, and he knew that even before the sentencing, should he have - - - should we consider the fact that he didn't do that and he didn't bring this motion until after all these - - - all this time had passed?

MR. ISSEKS: First of all, I don't know if that - - - that - - - that point was properly raised in the briefs, but the answer to Your Honor's question is no. I mean, and - - - and to use a metaphor already used today, the horse was already out of the barn. There was some comment, I believe, made by the district attorney that it wasn't until after the conviction, after he learned what the real sentence disclosure was that he expressed a desire

for a four to twelve, and that's not - - - that's just not so.

Bank's email back in November of 2007 asked if Shapiro would tell Rodeman, I'm interested in four to twelve. The conviction wasn't until December 2008. So he was interested in - - - in this all along.

CHIEF JUDGE DIFIORE: Thank you, sir.

MR. ISSEKS: Thank you very much, Your Honor.

CHIEF JUDGE DIFIORE: Counsel?

JUDGE FAHEY: Counsel, could you just briefly address, why isn't this your motion, particularly on the particular witness conversation outside the record, strategic choice? Why isn't this properly a subject for a 440 motion? Obviously a different issue than Mr. Isseks' 440 motion.

MR. DAVIS: Because we can tell on - - - based upon the record the proceeding with this defense with this particular witness was ineffective. The People contend now that this was perhaps the best expert witness that the defense could have. There's no evidence of that. If there was a better expert out there, then perhaps counsel was ineffective for not finding that person; I have no idea. Our

argument, though, is that proceeding with this defense with this expert is not a strategy any reasonably competent attorney - - -

JUDGE GARCIA: But wouldn't that be something the attorney, who's now deceased, would say in a 440 hearing, this is why I got this expert, because I couldn't find anyone else. But there's nothing in your record to indicate why he - - - this witness was chosen.

MR. DAVIS: There's no way any reasonably competent attorney would have believed preceding with a pharmacist, instead of a forensic psychiatrist had any chance of - - -

JUDGE GARCIA: But if he couldn't get a forensic psychiatrist.

MR. DAVIS: Well, then he shouldn't have - - - then any reasonably competent attorney would have realized he had zero chance of winning. He was going to take what was already - - -

JUDGE GARCIA: He might have realized that anyway, and said my - - - my one chance is, I'm going to call this pharmacologist, who's the only witness I can get here. But we don't - - - I think to Judge Fahey's point - - - know any of that thought process here.

MR. DAVIS: Well, then - - - then it's basically - - - it's no longer a meaningful representation. It's a dog-and-pony show, because on - - - on the facts of this case, Mr. Bank had a better chance of being acquittal - - - acquitted, had defense counsel sat there quiet the entire time, never opened his mouth.

CHIEF JUDGE DIFIORE: Was it not a strategy to try to get out of the - - - into the - - - out of the recklessness range, and get into the crim-neg range?

MR. DAVIS: Well - - - well, the problem is by - - -

CHIEF JUDGE DIFIORE: It's not a legitimate strategy by defense counsel?

MR. DAVIS: No. I - - - I would say no, because in order to get - - - the only reason you're calling this witness is to present - - - get this affirmative defense, which gives you the burden of proving by a preponderance of the evidence this lack of capacity. So the problem is to get that evidence out, you're giving the prosecution all this other evidence of these prior accidents where you've used - - -

CHIEF JUDGE DIFIORE: Understood.

MR. DAVIS: - - - cocaine. So there's no reason that defense counsel - - - if that was his strategy, then it was even more wrongheaded than actually calling the pharmacist to do a psychiatrist's job.

JUDGE RIVERA: Is that because of the blood test? Because in your opinion, the blood test doesn't tell you anything - - -

MR. DAVIS: Well, the blood test - - -

JUDGE RIVERA: - - - on the cocaine use?

MR. ISSEKS: The - - - the blood test tells us that he was using cocaine. It doesn't tell us how much he was using over that time period. The blood tests alone - - - there's an argument to be made and what could have been made is that this was a - - - a negligent act as opposed to reckless. Showing use over twenty-eight hours definitely puts this - - - with his prior history - - - as a reckless act, not a negligent one.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. DAVIS: Thank you.

(Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Herman Bank, No. 160, and People v. Herman H. Bank, No. 161, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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