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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 20

LESLIE K. OLDS,

Appellant.

20 Eagle Street
Albany, New York
February 11, 2021

Before:

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

Appearances:

MICHAEL S. DEAL, ESQ.
LEGAL AID BUREAU OF BUFFALO, INC.
Attorney for Appellant
290 Main Street, Suite 350
Buffalo, NY 14202

LAURA T. JORDAN, ADA
NIAGARA COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
Niagara County Court House
175 Hawley Street
Lockport, NY 14094

Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: This is appeal number 20 on
2 today's calendar, The People of the State of New York v.
3 Leslie Olds.

4 Counsel?

5 MR. DEAL: Thank you. Good afternoon, Your
6 Honor. May it please the court, my name is Michael Deal of
7 the Legal Aid Bureau of Buffalo, representing defendant-
8 appellant Leslie Olds. Before we begin, I would like to
9 reserve two minutes for rebuttal, please, if I may.

10 CHIEF JUDGE DIFIORE: Of course, of course.

11 MR. DEAL: I - - -

12 CHIEF JUDGE DIFIORE: You may pro - - -

13 MR. DEAL: I'm sorry, Judge?

14 CHIEF JUDGE DIFIORE: You may proceed.

15 MR. DEAL: Thank you.

16 I would just like to start with a comment on the
17 preservation issue raised by the People and - - - and - - -
18 and decided in the lower court - - - the intermediate
19 appellate court. And that is, as set forth in our
20 pleadings, that I believe this situation falls squarely
21 within the prescriptions of CPL 47 - - - 470.05(2). Recall
22 or - - - or we should note from the outset, this was a
23 normal sentencing argument in - - - in every respect until,
24 of course, the sentence was pronounced.

25 And what I mean by that is, this is the type of



1 appearance that, at least until our pause here last year,
2 occurred probably every working day in the State of New
3 York, meaning - - -

4 JUDGE STEIN: Can I ask a question?

5 CHIEF JUDGE DIFIORE: Judge Stein?

6 JUDGE STEIN: Yeah. Here, though, it - - - I
7 mean, you had a plea agreement, right? And the plea
8 agreement had no sentencing promises, right? And so my
9 question with regard to preservation - - - I have a number
10 of questions, but - - - with regard to preservation is, is
11 how did your client put the court on notice that it could
12 not, as a matter of constitutional law, impose a term of
13 incarceration?

14 As I read the transcript, the - - - the attorney
15 was arguing he shouldn't get a sentence of incarceration,
16 and here are all the reasons, and then goes on to say, but
17 if you're going to give him a term of incarceration, he
18 shouldn't get the max, and so on and so forth. So it - - -
19 it sounded to me more like a fairness argument than
20 anything that would put the court on notice that, you know,
21 we're talking about a potentially vindictive sentence here
22 and a matter of - - - of due process.

23 So that - - - that's my question about
24 preservation.

25 MR. DEAL: Sure. And I'll clarify. I was that



1 attorney. So - - -

2 JUDGE STEIN: Okay. I'm sorry, yeah.

3 MR. DEAL: I - - - I was not the original
4 attorney at trial in the Town of Lewiston, but I - - - I
5 came on board pre-sentence and have stayed on for years.
6 But in - - - in answer - - - to answer your question,
7 Justice Stein, one, it - - - it - - - it presupposes the
8 necessity of putting the court on notice that - - - that
9 there's a potential constitutional violation for a sentence
10 it's going to impose. And - - - and I don't agree that
11 that's a nec - - - necessary requirement.

12 But having said that, it - - - it - - - it's
13 clear that - - -

14 JUDGE FAHEY: Judge, could I jump in for one
15 second?

16 CHIEF JUDGE DIFIORE: Judge Fahey?

17 JUDGE FAHEY: Yeah.

18 Mr. Deal, just on that first point you raised - -
19 - I just wanted to go to that before you got off of it.
20 Isn't that why you would normally make a motion to withdraw
21 the plea to preserve that argument then?

22 MR. DEAL: The cases, Judge Fahey, that have - -
23 - were relied upon in the intermediary appellate court and
24 by the People relative to motions to vacate pleas or
25 withdraw pleas - - -



1 JUDGE FAHEY: You're talking about when you were
2 at county court?

3 MR. DEAL: Yes.

4 JUDGE FAHEY: Right. Okay, go ahead.

5 MR. DEAL: I'm sorry, when I was at county court.

6 JUDGE FAHEY: Sure. It's fine.

7 MR. DEAL: Those cases were all dependent - - -
8 or all related to situations where there was a committed-to
9 sentence and that based on some failure of the defendant to
10 follow a condition that the court imposed at the time of
11 taking the plea, that the court, at the time of sentencing,
12 then decided it could not maintain its previous commitment,
13 and needed to deviate from that commitment.

14 And I believe that the - - - the reason for
15 requiring a motion to vacate at that time, is because
16 there's, in effect, a contractual relationship, specified -
17 - - specific, rather, to the issue of sentencing, and then
18 to properly litigate whether or not deviation would be
19 appropriate, you need to - - - to - - - to put that before
20 the sentencing court to litigate it. And therefore, if you
21 just go forward with sentencing in that situation, and the
22 court deviates, and then you challenge later on appeal, you
23 haven't properly preserved the issue.

24 Here, and then to - - - to kind of fold back into
25 Justice Stein's question, yes, there was a plea agreement,



1 in the sense that there was a decision made to file the
2 special - - - or prosecutor's information, and that Mr.
3 Olds would plead guilty, but there was no discussion as to
4 sentence at all. It's - - - the sentence was left open, if
5 you will.

6 JUDGE STEIN: But I - - - I don't know if that
7 works in - - - in your client's favor. To me, that
8 suggests that - - - that it was, you know - - - it - - - it
9 - - - he was willing to take that chance.

10 MR. DEAL: Well, he was willing to take that
11 chance but for an imposition of an illegal sentence. And -
12 - - and I don't believe that it was - - - I was required to
13 put the - - - the sentencing court on notice formally by
14 filing a motion that that imposition of the maximum
15 sentence for - - - for that charge, which was one year of
16 incarceration, you know, was unconstitutional.

17 And - - - and I'll go back to what - - - you said
18 you read the transcript, and the very first words that I
19 uttered relative to sentencing in the transcript, which is
20 at page 24 of the appendix, was, "I believe the court
21 should not impose a term of incarceration from the outset,
22 and I'll tell you why." And then, as you noticed, I went
23 through the various arguments, of why.

24 But let's skip ahead to page 27 of the appendix,
25 where I - - - I - - - I mention specifically, "Nothing has



1 occurred of any significance from the time he was put on
2 probation before to now that would warrant a deviation from
3 a probationary sentence." I then spec - - - within a few
4 lines, reference specifically imposition of a maximum
5 sentence.

6 So I - - - I - - - I - - - without having said,
7 I'm warning you, justice - - - you know, trial justice,
8 that you're about to - - - you know, consideration of a - -
9 - of a carceral sentence here is a - - - is a
10 constitutional violation, I - - - I made the argument
11 without referencing those several words. I - - - I don't
12 think it was necessary to file the motion to vacate that
13 plea, to formally raise that argument, for the reasons I
14 said before. But I - - - I made the argument without
15 couching it in constitutional terms to begin with.

16 JUDGE STEIN: Can I ask a different question?

17 MR. DEAL: Having said that, I - - - I think it
18 falls within the - - - the - - - the - - -

19 JUDGE STEIN: Chief Judge, may I ask a different
20 question? If - - -

21 CHIEF JUDGE DIFIORE: Judge Stein?

22 JUDGE STEIN: Assuming that we were to find your
23 - - - your argument preserved, on what basis should we find
24 that you - - - there was a presumption of vindictiveness
25 here and - - - and/or actual vindictiveness here?

1 MR. DEAL: Sure. So - - - well, this is a unique
2 fact pattern for this issue. I haven't found any case that
3 has this type of fact pattern, where there was a trial - -
4 - a conviction after trial, rather, an imposition of
5 probationary sentence, nonincarceral, which is overturned
6 on appeal, and then a plea, where the sentence is pro - - -
7 is the maximum term allowed by law, without any affirmative
8 declaration on the record as to why.

9 So I - - - I think that that fact pattern alone
10 raises the issue, for sure, in - - - in the sense that
11 after a trial, where a victim testified - - - a minor
12 victim, by the way, testified, that the probation - - - or
13 that the sentencing court at that time determined probation
14 was an appropriate sentence.

15 JUDGE FEINMAN: So Chief, if I may?

16 CHIEF JUDGE DIFIORE: Yes, Judge Feinman?

17 JUDGE FEINMAN: So you're - - - you're asking us
18 to - - - to compare what transpired at the Lewiston Town
19 court and, you know, what transpired at the subsequent - -
20 - you know, when it was transferred to a different town
21 court. But how do we compare these two sentences - - - my
22 - - - my concern has to do with the record actually before
23 us.

24 How do we compare these two sentences if we don't
25 even have the record of the first sentence? You know, how



1 many years' probation did he get? Now, I know there are
2 secondary sources, such as the pre-sentence report, and
3 there are various statements in your briefs, but we don't
4 actually have a record as to what transpired the first time
5 around.

6 And should - - - if we assume that the first
7 sentence was six years' probation, do we compare that to
8 the term of one-year incarceration, and does it matter if
9 it was ten years' probation? Or - - - you know, something
10 - - - you know, how do you decide which is worse, ten
11 years' probation versus one year's incarceration?

12 You know, in my experience, both as a defense
13 lawyer and as a criminal court judge, a lot of people would
14 rather take the so-called bullet of one year, especially if
15 you're going to be eligible for release after sixty days on
16 conditional release, than go through an extended probation
17 sentence, where they're going to be constantly dragged in
18 for a violation of probation or - - - and subject to
19 resentencing.

20 So I know I've got - - - I've thrown a lot of
21 things at you, and let's see if you can sort it out.

22 MR. DEAL: Well, I - - - I - - - I believe the
23 gist of what you're - - - you're saying, Justice Feinman,
24 is that there - - - there should be or - - - or there - - -
25 whether or not there is an equivalency between any term of



1 probation and an incarceral sentence, and if so, can you
2 parse out, you know, whether it depends on a longer term of
3 probation, or a shorter term, or - - - or et cetera.

4 And I don't disagree with you. I'm sure - - - I
5 know there's an - - - certainly anecdotal evidence of
6 criminal defendants who have chosen to do - - - do their
7 time and not go on probation. It's not a rule of thumb by
8 any stretch. I mean, I can tell you that with - - - with
9 surety Mr. Olds did not want to go to jail, period.

10 CHIEF JUDGE DIFIORE: Thank you, Counsel. Thank
11 you, Counsel.

12 Counsel?

13 MS. JORDAN: Thank you, Your Honor. Laura Jordan
14 on behalf of the Niagara County District Attorney's Office.
15 Talking first about the preservation issue, while there
16 was, you know, a lengthy argument by defense counsel prior
17 to the pronouncement of sentence against incarceration,
18 there was no objection made. There was no motion to vacate
19 the judgment of conviction after the sentence was
20 pronounced.

21 As I pointed out in my brief, the case law has
22 been consistent throughout the departments, and this court
23 has declined to review it, that that is required. This
24 court has discussed - - - also in some of the cases cited
25 by those Department cases, the need for finality in a



1 criminal case that - - -

2 JUDGE STEIN: Judge, may I ask a quick question
3 on that?

4 CHIEF JUDGE DIFIORE: Judge Stein?

5 JUDGE STEIN: I just want to clarify your - - -
6 your position. Are you saying that either an objection or
7 a motion to vacate would suffice? Or are you saying that
8 you have to have the motion to vacate?

9 MS. JORDAN: I would say you have to have the
10 motion to vacate, but we didn't have either in this case.

11 JUDGE STEIN: Okay. But that's - - - that's not
12 what the Appellate Division cases seem to indicate, right?
13 They seem to indicate - - - a lot of times they say, well,
14 the defendant neither did this nor that. So - - - so if we
15 were to - - - to agree with the Appellate Division rule, it
16 would - - - it would suffice if either one was - - - was
17 done, right?

18 MS. JORDAN: Yes, Your Honor. And - - - but in
19 this case, I submit we didn't have either of those
20 situations.

21 JUDGE STEIN: Thank you.

22 JUDGE FAHEY: Judge - - -

23 JUDGE RIVERA: Judge, if I may ask?

24 JUDGE FAHEY: Oh, go ahead.

25 CHIEF JUDGE DIFIORE: Yes, Judge Rivera?



1 JUDGE RIVERA: I'm just - - - I'm just going - -
2 - want to clarify this way you're thinking about
3 preservation. So if his argument is the sentence is
4 illegal, because it's vindictive, he's got to make a motion
5 to withdraw, saying, judge, you've just been vindictive; so
6 let me withdraw - - - I want to move to withdraw the
7 sentence. Is that your position?

8 MS. JORDAN: Not if the sentence itself would be
9 illegal, but I guess my position isn't - - -

10 JUDGE RIVERA: So why - - - why isn't a
11 vindictive sentence - - - if that's the argument - - - they
12 may not win on the merits, but that's the argument - - -
13 why isn't that an illegal sentence that then doesn't - - -

14 MS. JORDAN: Because - - -

15 JUDGE RIVERA: - - - as I assume you were going
16 to say, is not subject to the rule of preservation?

17 MS. JORDAN: Right. So it's not a - - - I would
18 say it would fall more under the cases that I've cited in
19 my brief, in that it's an enhanced sentence, based on the
20 fact that he won the appeal the first time, not an illegal
21 sentence, which would fall under the need for preservation.

22 JUDGE FAHEY: Judge - - -

23 JUDGE RIVERA: If we just - - - let me just - - -

24 CHIEF JUDGE DIFIORE: Yes, Judge Fahey?

25 JUDGE FAHEY: Go ahead.



1 JUDGE RIVERA: If I could just follow up on that,
2 Judge?

3 JUDGE FAHEY: Sure. Go ahead.

4 JUDGE RIVERA: Yeah.

5 CHIEF JUDGE DIFIORE: Judge Rivera?

6 JUDGE RIVERA: Thank you very much.

7 So, if - - - if we did not agree with you on
8 that, and we decided it was an illegal sentence, does that
9 mean there is no longer a preservation issue in the case?

10 MS. JORDAN: I would think so, yes, Your Honor.

11 JUDGE RIVERA: Thank you.

12 CHIEF JUDGE DIFIORE: Judge Fahey?

13 JUDGE FAHEY: Just taking a step off preservation
14 for a second. The argument here is that it's an
15 enhancement - - - it's an illegal enhancement by - - - it's
16 unconstitutional. So what - - - what objective facts in
17 the record would you point to that would justify the
18 court's not reimposing probation and imposing a term of
19 incarceration?

20 MS. JORDAN: So there was information in the PSI
21 about the approximate six months that this defendant had
22 been on probation from the time of the first sentence - - -

23 JUDGE FAHEY: Um-hum.

24 MS. JORDAN: -- until - - - until that case was
25 overturned. And when he was on probation, he did not



1 perform well. He did not engage in the - - -

2 JUDGE FAHEY: Well, what does that - - - what
3 does that mean?

4 MS. JORDAN: He didn't engage in the treatment
5 that he was supposed to engage in. The probation officer
6 also said that he was very disruptive to the other
7 probationers that she was supervising whenever he would
8 come in. And those were the reasons that the probation
9 department pointed to as to why he would not be - - -

10 JUDGE FAHEY: There were some things that I saw
11 in the record, and - - - I saw things like there a couple
12 of failures to appear, a threatening letter to a judge,
13 he's terminated from his SO treatment for - - - sex
14 offender treatment for refusal to attend, and there were
15 inappropriate remarks to the victim. And I'm not sure if
16 they're part of the record or not. They may have just been
17 in a letter and shouldn't really be applied against this
18 defendant. But are - - - were those facts relied upon by -
19 - - by the judge in this case?

20 MS. JORDAN: I guess, we have to assume so, Your
21 Honor.

22 JUDGE FAHEY: And who - - - you say that because
23 it was in the PSR?

24 MS. JORDAN: It was in the PSI. There was quite
25 a bit of discussion by defense counsel prior to sentencing



1 about the PSI. The trial court indicated that they had
2 read it. Even referencing the - - - the polygraph, which
3 they said that they were going to ignore, so they did make
4 some reference to those - - - some specific parts of the
5 PSI. Although, they didn't lay out all of those reasons,
6 you know, admittedly on the record, at the time the - - -
7 the court pronounced sentence.

8 JUDGE FAHEY: I see. Okay. Thanks.

9 MS. JORDAN: And I guess going to that - - -

10 JUDGE GARCIA: May I ask a question, Chief Judge?

11 CHIEF JUDGE DIFIORE: Yes, Judge Garcia?

12 JUDGE GARCIA: What I'm struggling with, I guess,
13 to get back to some of the other preservation questions,
14 and tying in to what Judge Fahey just asked, is, it seems
15 to me if you have an illegal sentence, you have a plea, a
16 sentence is imposed beyond the term permitted by law.
17 That's one issue, and we can look at that and determine by
18 the plea - - - specific penal provision whether it's
19 illegal or not.

20 But in a case like this, in a vindictive
21 sentence, where really now, as - - - as Judge Fahey was
22 exploring, trying to figure out what in the record and what
23 the judge relied on, in a case where the specific
24 vindictiveness objection wasn't made. And to me, that's a
25 much different situation in terms of an illegal sentence or

1 a sentence that shouldn't have been imposed than you would
2 have from a straightforward application of the rules as to
3 what term a specific defendant could get for this crime.

4 So it's very hard for me to parse out
5 preservation from what's in the record because as I read
6 this transcript, there was never an objection made on
7 vindictiveness before or after the sentence was imposed.

8 MS. JORDAN: Right. And the only point that that
9 gets prop - - - brought up then is at the appellate
10 process. And I mean, it's our position, we're not even at
11 a point of vin - - - vindictiveness. I mean, the simple
12 fact that it was overturned on appeal and he received a
13 harsher sentence, you know, that alone isn't enough to even
14 trigger the vindictiveness argument.

15 We had a completely different judge and a
16 completely different court looking at the facts
17 differently. We didn't have any motivation, you know, to
18 punish would be my submission. The - - - the first court
19 never saw the initial trial. There wasn't a second trial.
20 There wasn't any reason to, you know, sort of "punish" the
21 defendant for making the victim go through it a second
22 time.

23 So I don't even think - - - you know, I would
24 submit that we don't even reach the point of vindictiveness
25 in this case because of the circumstances under which he



1 was sentenced the second time.

2 If there are no further questions, I would rest
3 on my brief, Your Honors. Thank you.

4 CHIEF JUDGE DIFIORE: Thank you, Counsel.

5 Mr. Deal?

6 MR. DEAL: Thank you.

7 And just to - - - to very briefly touch on the -
8 - - the last couple of points.

9 Justice Garcia referenced the situation as no
10 objection specific to vindict - - - vindictiveness having
11 been made. Again, our position is that objection was made
12 under CPL 470.05(2), where a dis - - - an argument was made
13 specifically for a nonincarceral and certainly non-maximum
14 sentence. That there was no conduct occurring since the
15 time of the original sentencing. And - - - and - - - and
16 that - - - that happens in terms of sentences every single
17 day here.

18 So that's an objection. And as Justice DiFiore
19 mentioned - - - or rather, I'm sorry, Justice Stein
20 mentioned, that the case law relative to enhanced
21 sentencing from the Appellate Divisions all say objection
22 or motion to vacate. Well, they say one or the other. And
23 I believe this falls clearly under the - - - the objection
24 language, the preservation language in 470.05.

25 JUDGE RIVERA: Judge, if I may - - - if I may ask



1 a question?

2 MR. DEAL: Yes.

3 CHIEF JUDGE DIFIORE: Judge Rivera?

4 JUDGE RIVERA: Yes, thank you. Okay.

5 So Counsel, you - - - before said it's an illegal
6 sentence. I asked Ms. Jordan about that. Her position - -
7 - of course, her office's position - - - her position is
8 that it's not an illegal sentence, and Judge Garcia has
9 already pointed to this also, of course, in the traditional
10 sense. It's just an enhancement. He got - - - he got
11 time. He got more than what he anticipated. So how - - -
12 what is your response to that?

13 MR. DEAL: Well, I think it's an illegal sentence
14 because it's vindictive. I think it's clear it's
15 vindictive. And - - - and - - - and you know, Ms. Jordan
16 said in an answer regarding what was the - - -

17 JUDGE FEINMAN: But are there - - - are there
18 cases where we have characterized a vindictive sentence,
19 using the term "illegal sentence"? Because I - - - I think
20 as a general understanding, illegal sentence means one not
21 authorized, like, by the sentencing guidelines or the
22 sentencing statutes. And - - - and so I'm just curious if
23 you're aware of any case where we have said that vindictive
24 and illegal are synonymous?

25 MR. DEAL: I - - - I have - - - I'm not aware. I



1 - - - I - - - I do - - - I do not believe that that has
2 been said, that specifically. That - - - I - - - I do know
3 that the - - -

4 JUDGE RIVERA: Is a vindictive sentence
5 constitutionally permissible?

6 MR. DEAL: No. It is not. It is a violation of
7 the due process provisions - - -

8 JUDGE GARCIA: Well, isn't - - -

9 CHIEF JUDGE DIFIORE: Judge Garcia?

10 JUDGE GARCIA: Yeah.

11 CHIEF JUDGE DIFIORE: Judge Garcia?

12 JUDGE GARCIA: The - - - the problem that I think
13 that Judge Feinman's getting at, which I asked your
14 adversary, is we need to find record facts in order to
15 determine this is an illegal sentence. It isn't you pled
16 to X, you got a sentence of Y, that's not authorized by the
17 statute. I think that's - - - just means you gamble.

18 Here, in order for us to reach the conclusion
19 you'd like us to that it's an illegal sentence, we need to
20 see what the judge relied upon, and a simple objection that
21 this is vindictive would have, you would think, then
22 prompted an explanation of the judge's reasons for giving
23 what you're terming an enhanced sentence, and we're arguing
24 about that, but that to me is the real difference between
25 requiring the objection in this case, so the court has



1 something to look at, rather than, well, that's what we
2 meant, and there's no record. Did he rely on the PSI? Did
3 he rely - - - we don't know - - - then it is to say, okay,
4 it's an illegal sentence, and all we have to do is look at
5 the penal law and look at the sentencing provisions.

6 MR. DEAL: I - - - I'm saying it's a vindictive
7 sentence. I'm saying generally that vindictive sentences
8 are illegal. And - - - and the - - - the issue here is,
9 the way you - - - you phrased it - - - is the issue that
10 runs through the whole problem to begin with, which is the
11 judge did not say what he relied upon, period. And - - -
12 and I get your - - - your point, Justice Garcia. Had there
13 been an objection specifically grounded on vin - - -
14 vindictiveness, that that may have allowed the judge the -
15 - - to respond in kind.

16 JUDGE GARCIA: Right.

17 MR. DEAL: The - - - the facts of the matter
18 would have been that the very sentencing argument I made,
19 which is - - - by the way, I made the argument twice - - -
20 it's a - - - basically the same argument that I made for a
21 copy of a presentence report and an adjournment of
22 sentencing. But the argument reaches every single factual
23 issue that he did not address as - - - as a reason for his
24 sentence. So - - -

25 JUDGE STEIN: May I ask one more question, Judge?



1 CHIEF JUDGE DIFIORE: Judge Stein?

2 JUDGE STEIN: What - - - besides the fact that
3 the sentence imposed an incarceration - - - a period of
4 incarceration, and the first sentence did not, what do you
5 point to in the record to show that there was any
6 vindictiveness here?

7 MR. DEAL: What I point to in the record is - - -
8 is, one, the denial of - - - of my request for an
9 adjournment, the denial of my request for a copy to be made
10 of the pre-sentence report. Those are just dismissed out
11 of hand, in the face of the very factual bases that I made
12 to the judge in terms of sentencing.

13 Additionally, the circumstances itself that help
14 the presumption arise in the first place, where you have a
15 clearly nonincarceral sentence of probation and a SORA
16 determination, versus the maximum sentence imposed, without
17 any explanation by the judge as to why he's imposing the
18 sentence.

19 And - - - and that's - - - that's the true
20 failure here, is that this judge did not say why. Not only
21 why should Mr. Olds have gone to jail, he didn't say why
22 the maximum sentence. He didn't say anything as simple as,
23 I adopt everything that you said, Mr. Deal, regarding the
24 pre-sentence report; I disagree with you; here's my
25 sentence. He - - - he didn't say that.



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All he said was, I have to be the heavy. I have no idea what that means in that context, other than, I'm going to punish you, and you're in front of me right now. And that's the way I took that - - - that phrase. And that's why I think that there's evidence of vindictiveness, because we're looking for things in the record to show he wasn't vindictive, and the problem is, he didn't tell us what he relied on at all. Nothing. And so - - -

CHIEF JUDGE DIFIORE: Thank you, Counsel.

MR. DEAL: - - - we can't assume for him. Thank you.

(Court is adjourned)



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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 The People of the State of New York v. Leslie K. Olds, No. 20 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: February 21, 2021

