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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

ANTONIO MARTINEZ,

No. 160
(Papers Sealed)

Appellant.

20 Eagle Street
Albany, New York 12207
October 14, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
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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1 CHIEF JUDGE LIPPMAN: 160, People v.
2 Martinez.

3 Counsel, would you like any rebuttal time?

4 MR. KLEM: Two minutes, please.

5 CHIEF JUDGE LIPPMAN: Two minutes, go
6 ahead, counsel.

7 MR. KLEM: Good afternoon, Your Honors,
8 David Klem for appellant Antonio Martinez. I think
9 the question before this court is how to give
10 practical effect to the Constitutional command that a
11 defendant not be penalized for exercising his right
12 to trial.

13 CHIEF JUDGE LIPPMAN: How - - - how was the
14 defendant penalized?

15 MR. KLEM: Because the defendant here was
16 given a sentence after trial that was grossly
17 disparate.

18 CHIEF JUDGE LIPPMAN: But isn't that the -
19 - - the judge's discretion based on what she sees in
20 front of her and what she's allowed to do under the
21 law? Because you turn down a plea - - - what case do
22 you have that says because you turn down a plea and
23 later you get a much harsher sentence after that
24 plea, that there's some kind of presumption of
25 vindictiveness on the judge's part?

1 MR. KLEM: I think there's three sets of
2 cases - - -

3 CHIEF JUDGE LIPPMAN: Yes, tell us.

4 MR. KLEM: - - - that support that
5 proposition.

6 CHIEF JUDGE LIPPMAN: And as close as you
7 can to this particular situation.

8 MR. KLEM: Yes, I'll go in depth in - - -
9 in this court's case, but before I get to that, let
10 me point out the cases in my brief which show that
11 the Appellate Divisions have uniformly found that to
12 be the rule and the highest courts in the states that
13 have looked at that - - - in particular I'll draw
14 your attention to the D'Antonio case from
15 Connecticut, the Wilson case from Florida, and the
16 Hall case from Montana - - - all support that. But
17 in terms of - - -

18 CHIEF JUDGE LIPPMAN: All support, what, a
19 presumption of vindictiveness?

20 MR. KLEM: That a presumption of
21 vindictiveness arises in this circumstance when the
22 sentence after trial is so grossly disproportionate
23 to the plea offer.

24 JUDGE RIVERA: Does - - - does it matter if
25 the judge has engaged some way in the plea

1 negotiations?

2 MR. KLEM: It does; that's one of the
3 factors to look at in the analysis, and I think - - -

4 JUDGE RIVERA: Did - - - did the judge here
5 do that?

6 MR. KLEM: Yes, the judge did so, perhaps
7 even to an unconstitutional degree. The court here
8 was extensively involved in not merely suggesting the
9 - - - the sentence, but in persuading the defendant
10 to take it.

11 CHIEF JUDGE LIPPMAN: So what are the other
12 levels of your - - - your precedent or cases that you
13 want to refer to?

14 MR. KLEM: The last one I think is this
15 court's own decision in Miller. In - - - Miller was
16 a circumstance where there was a plea that was
17 vacated on appeal, that was set aside on appeal. The
18 defendant then went to trial and got a higher
19 sentence, it was four to twelve with the plea, it was
20 seven - - -

21 CHIEF JUDGE LIPPMAN: Is that an analog - -
22 - an analogous situation to here?

23 MR. KLEM: I - - - I think that's directly
24 analogous. The only - - -

25 CHIEF JUDGE LIPPMAN: How so?

1 MR. KLEM: The only difference in Miller is
2 that here, the defendant didn't take the plea, but
3 why should that matter where in Miller, the defendant
4 took the plea that was vacated - - -

5 CHIEF JUDGE LIPPMAN: Is this - - -

6 MR. KLEM: - - - and then the defendant - -
7 -

8 CHIEF JUDGE LIPPMAN: Let me ask you
9 another question. Is something wrong with the judge
10 saying look, think very carefully about the plea
11 that's being offered; that, you know, if you don't
12 take it and you go to trial, you don't know - - - I
13 don't know that you're going to get that kind of plea
14 from this judge if you go to trial. Is it - - - is
15 that something inherently wrong with that?

16 MR. KLEM: No, but it shows the judge's
17 involvement in the - - - in the plea bargaining
18 process.

19 CHIEF JUDGE LIPPMAN: Yeah, but if - - -

20 MR. KLEM: And the judge here went further.

21 CHIEF JUDGE LIPPMAN: Okay, hold up. But
22 if - - - if there's nothing inherently wrong with it
23 and then they don't take the plea and then you have a
24 trial, and she does - - - but she said that gee, I
25 don't know if you're going to get anything

1 approaching what you had - - - you have offered in
2 this plea, what's wrong with that?

3 MR. KLEM: Because it's unconstitutionally
4 burdening a defendant's right to trial - - -

5 CHIEF JUDGE LIPPMAN: In every - - -

6 MR. KLEM: - - - unless that - - -

7 CHIEF JUDGE LIPPMAN: In every case?

8 MR. KLEM: - - - unless that sentence is
9 based on something other than the fact that the
10 defendant went to trial.

11 CHIEF JUDGE LIPPMAN: Gee, but - - - but -
12 - -

13 MR. KLEM: Not in every case.

14 JUDGE STEIN: Well, here there were
15 factors, weren't there? I mean, the victim came a
16 couple of times and really put her, you know, heart -
17 - - heart out on the table and how it affected her
18 and - - - and all this stuff. Couldn't that be one
19 factor and one difference?

20 MR. KLEM: It might have, had the court
21 said that that was some of the reasons that the court
22 was relying on. I'm not sure that would justify a
23 one-to-two - - -

24 JUDGE ABDUS-SALAAM: Didn't the court say,
25 though, beforehand, when the court asked the

1 defendant to seriously consider this generous, very
2 generous, plea offer? You know, if the witness - - -
3 you're sparing this - - - this child witness from
4 coming in to testify and if that person then comes in
5 to testify or if something happens during the trial
6 that we don't know about now - - - I thought the
7 judge said all of that before the - - - the defendant
8 chose to go to trial?

9 MR. KLEM: But what the judge didn't
10 explain was why such a grossly disparate sentence of
11 ten to twenty years was warranted when the court had
12 found that probation was warranted. It's not that
13 this arises - - -

14 JUDGE STEIN: Well, the - - -

15 MR. KLEM: - - - in every case.

16 JUDGE STEIN: - - - the court couldn't
17 grant probation after trial if he was convicted of -
18 - - of the - - - the top crime and - - - and she
19 explained that, correct?

20 MR. KLEM: Yes.

21 JUDGE STEIN: So - - -

22 MR. KLEM: But she could have given a
23 three-to-six year sentence, which would not be at all
24 grossly disparate with the pre-trial offer. What's
25 different - - -

1 JUDGE RIVERA: But she did indicate that
2 depending on what the testimony was and what the - -
3 - what the evidence - - - what the - - - what, if
4 anything, he'd be convicted of, that would determine
5 the length of the sentence?

6 MR. KLEM: It - - - it would. I mean, the
7 defendant here was - - -

8 JUDGE RIVERA: Didn't - - - she didn't
9 suggest that she was going to be on the low end. She
10 obviously suggested you're not going to see anything
11 like this.

12 MR. KLEM: But I - - - I don't think that
13 suggestion beforehand that, you know, you're going to
14 get slammed, that you're going to fall off a cliff
15 after trial, helps the People in this case.

16 JUDGE PIGOTT: What - - - what should the
17 judge have done then?

18 MR. KLEM: I think it's the opposite.

19 JUDGE PIGOTT: In - - - in your view, you
20 say that because the judge participated in the pre-
21 trial negotiations, there's an obligation on the
22 court?

23 MR. KLEM: I think the obligation on the
24 court stems from when it's going to impose a grossly
25 disparate sentence - - -

1 JUDGE PIGOTT: It's okay. I - - - I - - -
2 I - - -

3 MR. KLEM: - - - and - - - and - - -

4 JUDGE PIGOTT: I understand where you're
5 coming from.

6 MR. KLEM: And - - -

7 JUDGE PIGOTT: You - - - you don't know my
8 question yet.

9 MR. KLEM: I apologize.

10 JUDGE PIGOTT: The - - - the - - - it's
11 okay. The - - - so I'm trying to picture where the
12 court says all right, you've got an offer of
13 probation on a rape case. I would think that the
14 court might say I'm not accepting probation on a rape
15 cause, but that's not what happened here. And the
16 judge says, you know, for some reason, the People are
17 going to let you walk out of here if you plead to
18 rape second, or whatever it is, and - - - but that
19 does not - - - are you saying that she then has to
20 say, but that does not affect me and my sentencing
21 parameters should you be convicted?

22 MR. KLEM: No, I think at the time of
23 sentencing is where the error occurs. Here at the
24 time of sentencing when the court was going to impose
25 a grossly disparate sentence and when defense counsel

1 specifically said - - -

2 JUDGE ABDUS-SALAAM: It's only grossly
3 disparate, counsel, if you look at what the People
4 were offering which the judge could not offer, the
5 judge couldn't offer probation in this case. The
6 judge doesn't offer anything; it's the People who
7 offer. So the people offered this particular
8 defendant something that, you know, some of us are
9 questioning whether that was even a - - - you know,
10 the right offer to make in a case like this, but then
11 the defendant doesn't take it and goes to trial when
12 the defendant has been notified by the judge, who's
13 going to be trying the case, that, you know, you're
14 not likely to see anything like this if you go to
15 trial and get convicted, because you don't know
16 what's going to happen in a trial, things come out in
17 the trial.

18 So I - - - really, bottom line is, isn't
19 this more an excessive sentence case than it is a
20 case about whether there's been some kind of
21 Constitutional violation? I mean this - - -

22 JUDGE FAHEY: Yeah.

23 JUDGE ABDUS-SALAAM: - - - this happens all
24 the time in plea bargaining and if the person doesn't
25 take the plea, they - - - they go to trial; they're

1 facing a lot - - - you know, a lot more excessive or
2 harsher sentence if you go to trial because we have
3 mandatory sentencing.

4 MR. KLEM: There's two things that take
5 this out of the normal case. One, obviously this is
6 a type of disparity that we never see. This is an
7 enormous disparity. And two is that defense counsel
8 here at sentencing said be careful, Judge, you can't
9 give him that ten-to-twenty sentence - - - ten-to-
10 twenty year sentence, because it's so grossly
11 disparate, unless you explain the reasons. And it
12 was that objection - - -

13 JUDGE FAHEY: Well, okay, all right. But
14 taking a step back, I - - - I understand there - - -
15 there is a disparity, no question, the grossly part.
16 But going back how do - - - there are many cases,
17 they are replete in your brief and everywhere else,
18 of - - - of Appellate Divisions making alterations in
19 sent - - - sentences but they all have interest of
20 justice jurisdiction. We don't. And there's no
21 United States Supreme Court case that - - - that
22 supports your position and - - - and I just - - - I
23 know of no Court of Appeals case that supports your
24 position.

25 So in essence, you're asking us to create a

1 new standard to be applied here and - - - and I'm
2 having a difficult time finding the basis for it.
3 Let me say I've only been here nine months, but I
4 wish we did have interest of justice jurisdiction. I
5 think many times we all feel that way, but we don't.
6 And you only get once interest of justice review and
7 that's at the Appellate Division, not here.

8 MR. KLEM: So - - - so let me be clear
9 about what rule I'm asking this court - - -

10 JUDGE FAHEY: Okay.

11 MR. KLEM: - - - to impose which isn't, you
12 know, a reduction of sentence because we think it's
13 excessive in this case. The rule is that when
14 there's a grossly disparate sentence that's going to
15 be imposed or is imposed and when defense counsel
16 specifically objects to that, the court is under an
17 affirmative obligation to explain the reasons for
18 that.

19 JUDGE FAHEY: Where's the basis for our
20 authority to do that?

21 MR. KLEM: I think that comes from the
22 Miller case and the whole line of cases that suggest
23 that a presumption of vindictiveness arises in
24 certain circumstances and once that presumption of
25 vindictiveness arises, it's up to the sentencing

1 judge - - -

2 JUDGE STEIN: But aren't those cases - - -

3 MR. KLEM: - - - to dispel that notion.

4 JUDGE STEIN: - - - where we

5 retrospectively look back and say okay, given the

6 circumstances, we find it to be grossly disparate?

7 Whereas how - - - at what - - - how does the judge

8 know when he or she is - - - is giving - - - is - - -

9 is imposing sentence, is this grossly disparate or is

10 this just a little bit more or is this a moderate

11 amount more or - - - I mean, where - - - where does

12 that judge draw the line? So basically, aren't you

13 asking us that whenever a judge imposes a sentence

14 that's more than the plea offer, that judge has to

15 explain why?

16 MR. KLEM: I - - - I'm not asking for that

17 rule.

18 JUDGE STEIN: But where do you draw the

19 line?

20 MR. KLEM: And - - - and I agree, there may

21 be some difficult circumstances in drawing the line;

22 this is not one of them. This sentence is so

23 disparate from probation - - -

24 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's

25 - - -

1 MR. KLEM: - - - that it's not one of those
2 cases.

3 CHIEF JUDGE LIPPMAN: Let's hear from your
4 adversary and then you'll have a chance to come - - -

5 MR. KLEM: Thank you.

6 CHIEF JUDGE LIPPMAN: - - - come back on
7 that issue.

8 Counsel?

9 MS. HUMMEL: May it please the court,
10 Jordan Hummel for the Office of the District
11 Attorney, Bronx County.

12 CHIEF JUDGE LIPPMAN: Counsel, is it - - -
13 is it grossly disparate in relation to the - - - the
14 plea deal? On its face it seems that it was a very,
15 very, very attractive plea deal and a very, very
16 harsh sentence. How do you equate the two, and what
17 is your view as to when and when there is not a
18 presumption of vindictiveness?

19 MS. HUMMEL: Our view is that there is no
20 presumption of victiv - - - vindictiveness in this
21 case because - - -

22 CHIEF JUDGE LIPPMAN: In this case or in
23 this situation, in general?

24 MS. HUMMEL: In this situation where you
25 are because - - -

1 CHIEF JUDGE LIPPMAN: Go ahead.

2 MS. HUMMEL: - - - a plea - - -

3 CHIEF JUDGE LIPPMAN: Where you turn down a
4 plea deal and then - - -

5 MS. HUMMEL: Yes, because there is no
6 disparity here. There are no two sentences to
7 compare. You're comparing - - -

8 JUDGE FAHEY: And that - - - that was the
9 situation in Miller, wasn't it? Weren't they
10 comparing two sentences bef -- - a retri - - - a
11 trial - - - a retrial after an appeal.

12 MS. HUMMEL: Yes, so that in Miller - - -

13 JUDGE FAHEY: Yeah, and this wasn't - - -
14 it wasn't a reaction to a plea offer but actually a
15 separate determination.

16 MS. HUMMEL: Yes, in Miller, there had been
17 a plea, the defendant appealed, and then there was a
18 trial. So there - - -

19 CHIEF JUDGE LIPPMAN: So how was Mil - - -
20 how was Miller different than this situation?

21 MS. HUMMEL: Miller's different here
22 because the plea was never accepted in this case, so
23 the only sentence that we have is the indeterminate
24 sentence.

25 JUDGE RIVERA: Well, did the judge

1 indicate, I'd never accept that plea?

2 MS. HUMMEL: She didn't indicate that she
3 would never accept - - -

4 JUDGE RIVERA: Wasn't she encouraging him
5 to take the plea?

6 MS. HUMMEL: I think that the judge - - -

7 JUDGE RIVERA: Doesn't that suggest I'm
8 going to give you that sentence?

9 MS. HUMMEL: No, I think that the judge was
10 just laying out the options for the defendant.

11 JUDGE PIGOTT: Where were the People in
12 this? I - - - I - - - I mean the People had indicted
13 this case - - -

14 MS. HUMMEL: Yes.

15 JUDGE PIGOTT: - - - had done all the
16 investigation, you know, was - - - were all set, and
17 based upon everything the People knew, they said we
18 will give you probation. And it seems to me that
19 that's an indication of either the weakness of your
20 case or something, all right. But you were willing
21 to let this predator-rapist, who's now serving twenty
22 years, get on a bus tomorrow, and I don't - - - I'm -
23 - - I - - - I kind of understand what the - - - what
24 the dissenting judge was saying that - - - that how
25 do you do this? How do you - - - how do you say this

1 - - - this rapist can be out among our children and
2 everything by taking this plea, but if he exercises
3 his right to go to trial, we're putting him away
4 until 2036?

5 MS. HUMMEL: I think that highlights why
6 it's inappropriate to compare plea offers to post-
7 conviction sentences.

8 JUDGE PIGOTT: No, I'm asking where the - -
9 - where the DA was in this? You're missing my point.

10 MS. HUMMEL: The - - -

11 JUDGE PIGOTT: I'm - - - I'm saying you - -
12 - you, the district attorney - - -

13 MS. HUMMEL: Yes.

14 JUDGE PIGOTT: - - - said this - - - this
15 person is entitled to probation.

16 MS. HUMMEL: Um-hum.

17 JUDGE PIGOTT: He should get probation,
18 probation, probation. And he said well, I'm going to
19 trial because I don't think I'm innoc - - - I'm - - -
20 I'm - - - I'm even guilty of this, or whatever his
21 reason was, and now all of a sudden you're not
22 objecting to a twenty-year sentence on somebody that
23 you believe should be on the street today.

24 MS. HUMMEL: Well, I think that there were
25 a lot of considerations that went into the plea. One

1 of them being, you know, the vulnerability of the
2 victim and not making her go through the process of a
3 trial. Another being the strength of the evidence;
4 this case was coming ten years later from somebody
5 who was only six years old at the time and is now
6 sixteen or eighteen at trial and sentencing. So I
7 think there were questions about how the witness
8 would appear on the stand, if the jury would accept
9 her credibility, not making her go through the entire
10 process.

11 JUDGE PIGOTT: Yeah, and in many - - - in
12 many cases that I'm familiar with, or we are, if - -
13 - if there is a plea of this nature, quite often the
14 judge or the People or someone says, you know, let's
15 get a - - - let's get a PSI, let's - - - let's - - -
16 let's - - - you know, if - - - if the PSI comes back
17 the way you, the People, say it does, then I'll grant
18 this sentence or not.

19 MS. HUMMEL: Um-hum.

20 JUDGE PIGOTT: To - - - to your knowledge,
21 was anything like that done here where the judge had
22 before her, you know, the - - - the history of this
23 defendant such that, you know, she could make a - - -
24 you know, a reasonable determination as to whether
25 she was going to accept probation?

1 MS. HUMMEL: Not to my knowledge. I think
2 at this stage, the defendant had vehemently said he
3 would not accept a plea, did not want to - - - to
4 accept a plea, didn't propose an alternative plea.
5 He said repeatedly that he wouldn't accept it. I
6 think the judge was just putting it on the record,
7 perhaps to stave off a future claim that he didn't
8 know that there was a plea offer or wasn't sure of
9 the terms. So I think the judge was just informing
10 the defendant.

11 CHIEF JUDGE LIPPMAN: Well, this isn't an
12 unusual scenario, right? I mean, judges often say
13 listen, you don't take this plea, you don't know
14 what's going to happen or these are very serious
15 charges. I mean, by its nature, plea deals are kind
16 of coercive in nature, aren't they, by, you know, the
17 judge's - - -

18 MS. HUMMEL: No, I don't think they have to
19 be. It's just - - - it's - - -

20 CHIEF JUDGE LIPPMAN: You don't think by
21 their very nature, plea deals are coercive? Please.

22 MS. HUMMEL: I think it offers, you know,
23 an alternative for the defendant like in this case -
24 - -

25 CHIEF JUDGE LIPPMAN: Yes, but that's a

1 polite way of saying they're coercive by definition.

2 JUDGE RIVERA: The - - - the threat of - -
3 - of incarceration or extensive incarceration is
4 always what hangs over that defendant, right?

5 MS. HUMMEL: Well, yes, and there will be a
6 difference, and that's appropriate because the
7 defendant is pleading. Here the offer was to a D
8 felony and he ends up getting convicted of a B
9 felony, so two levels up with a violent
10 classification. It just - - - it does explain the
11 difference between where the court could not have
12 offered probation after the sentence and once the
13 People - - -

14 CHIEF JUDGE LIPPMAN: How did the - - - did
15 the judge explain what she did? Did - - - what did
16 she say? What - - - what - - - what justified, from
17 what was in front of her, this lengthy sentence that
18 wouldn't - - - that would deter any view that maybe
19 this was vindictive - - - vindictiveness?

20 MS. HUMMEL: At the original sentencing,
21 she spoke about both of the attorneys' statements,
22 the victim's statement about the im - - - impact to
23 her and to society; she looked at the letters that
24 defendants supplied, and the pre-sentence report.
25 And then in the resentencing she said, you know, I

1 have spoken about all of that, I'm not going to go
2 into it further, but given the victim's statement
3 openly mocking - - - or given the defendant's
4 statement openly mocking the victim and calling her
5 an actress, she said, you know, if I was en - - -
6 encouraged to give you any leniency, I am not after
7 that statement, and I looked at the evidence, I
8 presided over the trial.

9 So she explained that this was based on the
10 evidence presented at trial, what the defendant was
11 convicted of, and to the extent - - - with his
12 statement, his lack of remorse and taking
13 responsibility and those were appropriate
14 considerations and a sufficient record to show this
15 was not vindictive.

16 CHIEF JUDGE LIPPMAN: Okay.

17 MS. HUMMEL: If there are no further
18 questions - - -

19 CHIEF JUDGE LIPPMAN: Anything else,
20 counsel?

21 MS. HUMMEL: No, if there are no further
22 questions, we ask that the judgment be affirmed.

23 CHIEF JUDGE LIPPMAN: Okay, thank you,
24 counsel.

25 Rebuttal, counsel.

1 MR. KLEM: Thank you.

2 JUDGE PIGOTT: Mr. Klem, the flip side of
3 what we've been discussing is that you do have a
4 defendant who says I don't think she's going to show
5 so I'm not taking any plea. Or I don't think that,
6 you know, a - - - a number of - - - it's a gamble.
7 In other words, the defendant, not necessarily in
8 this case but in other cases, can say, you know, I
9 don't care what you offer me, I'm not doing it
10 because I got - - - I've - - - I've got inside
11 information that that victim isn't showing up. And
12 then when the victim shows up, you go, oh, my
13 goodness.

14 MR. KLEM: Our position is not that the
15 sentence could never be imposed. Our position is
16 simply that there must be an explanation that
17 otherwise - - -

18 CHIEF JUDGE LIPPMAN: What - - - what about
19 the explanation that - - - that your adversary just
20 recited as to what she said - - -

21 MR. KLEM: There was no - - -

22 CHIEF JUDGE LIPPMAN: - - - at the original
23 sentence and - - -

24 MR. KLEM: There was - - - there was no
25 explanation provided as to the disparity. What the

1 court said - - - it's on page - - -

2 CHIEF JUDGE LIPPMAN: What do you want her
3 to say? What would she say about the disparity?

4 MR. KLEM: I understand that there was a
5 plea bargain offer made to you of probation. In this
6 case it's not appropriate for me to give you
7 probation and the ten-to-twenty year sentence is
8 appropriate for - - -

9 JUDGE ABDUS-SALAAM: Would that only apply
10 - - -

11 MR. KLEM: - - - for these reasons.

12 JUDGE ABDUS-SALAAM: - - - where the - - -
13 the trial judge knew about the plea bargain? Because
14 often the trial judge, the one who presides over the
15 trial, is not the same judge who was involved in plea
16 proceedings, or there could have been another judge
17 who was involved in the plea proceedings. So are we
18 to impose some obligation for the judge to find out
19 whether there had been some plea proceeding?

20 MR. KLEM: No, I mean it - - - it's a
21 presumption of vindictiveness which arises by the
22 defendant's exercise of his Constitutional right to
23 trial.

24 CHIEF JUDGE LIPPMAN: Counsel, what's - - -
25 what's the rule?

1 MR. KLEM: The court - - -

2 CHIEF JUDGE LIPPMAN: What's the rule?

3 When is there the presumption of vindictiveness - - -

4 MR. KLEM: The - - -

5 CHIEF JUDGE LIPPMAN: - - - with a plea
6 that was turned down?

7 MR. KLEM: There - - - there's two situa -
8 - - there's two factors that go into when it arises.
9 There needs to be a grossly disparate sentence
10 imposed after a trial from the plea offer and
11 secondly, there must be an objection, defense counsel
12 saying, Your Honor, you're burdening the defendant's
13 right to trial, and then the presumption arises which
14 can be defeated by the court putting on the record
15 rationales for that and record - - - and by demanding
16 that the court does that, that helps our appellate
17 practice.

18 CHIEF JUDGE LIPPMAN: So really, you want a
19 - - - a rule that - - - that the judge has to explain
20 the disparity in view of - - -

21 MR. KLEM: When - - - when called upon to
22 do so by defense counsel.

23 CHIEF JUDGE LIPPMAN: Okay.

24 JUDGE RIVERA: And that - - -

25 JUDGE ABDUS-SALAAM: Now - - -

1 JUDGE RIVERA: - - - just to clarify. So
2 that explanation is not merely, I believe what I've
3 heard warrants this kind of sentence, but also I
4 believe that you're - - - what you were offered in
5 the plea is not what's warranted?

6 MR. KLEM: I - - - I don't know if it
7 necessarily - - -

8 JUDGE RIVERA: I thought that's what you
9 were saying.

10 MR. KLEM: - - - needs to include both of
11 those.

12 JUDGE RIVERA: Because it seems - - - it
13 seems like on this record she's explained the latter
14 and you're upset about - - - or the - - - the former,
15 but she - - - you're upset that she didn't explain
16 the latter. That is to say, she said based on what
17 I've heard, this is the sentence that - - - that
18 should be imposed.

19 MR. KLEM: I - - - I don't - - -

20 JUDGE RIVERA: But didn't say when you
21 started out - - - you said, well, she didn't say I
22 know you've gotten a particular plea that you turned
23 down and therefore, I'm - - - I'm not going to give
24 you that plea because.

25 MR. KLEM: I - - - I don't think the court

1 in this situation even did the former. If you look
2 at the - - - the sentencing minutes at pages 154 and
3 155, you see the court saying I'm not making any
4 comment on it. I'm going to do what I'm lawfully
5 allowed to do, period, with one strike - - -

6 JUDGE RIVERA: But she referred back to the
7 first sentencing.

8 MR. KLEM: With a referral back to the
9 first sentence which was the court talking about, you
10 know, the - - - D.R. being brave to have come forward
11 the court praying for D.R. It wasn't about - - -

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 MR. KLEM: - - - what sentence would be
14 appropriate.

15 JUDGE ABDUS-SALAAM: Could I just ask one
16 question?

17 CHIEF JUDGE LIPPMAN: Judge Abdus-Salaam.

18 JUDGE ABDUS-SALAAM: Just for
19 clarification, the - - - the rule that you propose,
20 counsel, that - - - where does that apply, only when
21 the trial judge is the same judge who was involved in
22 plea proceed - - - proceedings or is that every judge
23 who then convicts a - - - is presiding over a trial
24 where defendant is convicted and gives them a
25 sentence that is harsher than a plea bargain?

1 MR. KLEM: I think it certainly applies in
2 a circumstance where the judge is involv - - - the
3 same judge is involved in the plea negotiation.

4 JUDGE ABDUS-SALAAM: And would that be the
5 only time it would apply as opposed to - - -

6 MR. KLEM: Perhaps.

7 JUDGE ABDUS-SALAAM: - - - as opposed to
8 two different judges?

9 MR. KLEM: It - - - it - - - it certainly
10 applies in the circumstance we have here where the
11 court was intimately involved in it and in fact
12 trying to push this plea bargain.

13 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
14 you both.

15 MR. KLEM: Thank you.

16 CHIEF JUDGE LIPPMAN: Appreciate it.

17 (Court is adjourned)

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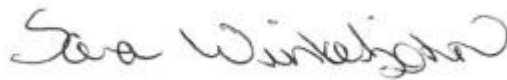
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Antonio Martinez, No. 160 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: October 18, 2015