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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 40

YASIF SIMS,

Appellant.

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20 Eagle Street  
Albany, New York  
March 14, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Amanda M. Oliver  
Official Court Transcriber

1 CHIEF JUDGE WILSON: Afternoon. The first case  
2 on today's calendar is People v. Sims.

3 Counsel?

4 MS. MCCARTHY: Thank you, Your Honor.

5 My name is Noreen McCarthy, and I represent Mr.  
6 Sims in his appeal of his conviction out of St. Lawrence  
7 County. May it please the court and opposing counsel.

8 I notified the court this morning that Mr. Sims  
9 had been released. I just learned it this morning.

10 CHIEF JUDGE WILSON: And I was going to ask you,  
11 Counsel, if that affects what you might - - - as I  
12 understand - - - let me put it this way. As I understand  
13 your appeal, every form of relief we might give, you would  
14 end up with essentially a, you know, a vacation of - - -  
15 vacatur of the judgment and a new trial.

16 MS. MCCARTHY: Correct

17 CHIEF JUDGE WILSON: And I'm not certain whether  
18 you know, or whether Mr. Sims would want any relief at this  
19 point.

20 MS. MCCARTHY: I think that he would, Your Honor.  
21 But I - - - I have to be honest, I haven't talked to him  
22 today. I have to actually find him. But I can update the  
23 court on that after. But he did indicate before that he  
24 was interested in that, so.

25 CHIEF JUDGE WILSON: Okay.



1 JUDGE GARCIA: Counsel, you are not asking us  
2 then to give you specific performance of the originally  
3 agreed-upon sentence because that seems like it would be  
4 moot at this point?

5 MS. MCCARTHY: Right. That I do believe is moot.  
6 I would agree with that.

7 JUDGE RIVERA: Well, has he completed the  
8 sentence or he's out on some conditional release. What - -  
9 - do you know?

10 MS. MCCARTHY: He's on parole for another five  
11 years. His sentence included five post.

12 JUDGE GARCIA: Would that be the same if it was  
13 the original sentence or the sentence that was imposed - -  
14 - I mean, the original agreed upon sentence? I'm sorry.

15 MS. MCCARTHY: It's a good question. I'm not  
16 sure. I can check on that too.

17 JUDGE RIVERA: I guess whether it's mandatory  
18 under the - - - the law, right?

19 MS. MCCARTHY: But it might mean, though, that if  
20 he ended up getting resentenced or his parole revoked, that  
21 he might have a longer sentence. So - - -

22 JUDGE RIVERA: Um-hum.

23 JUDGE GARCIA: Understood.

24 CHIEF JUDGE WILSON: Right. That's why I was  
25 asking.

1 MS. MCCARTHY: - - - because he did serve - - -  
2 yeah, he did serve, actually, exactly six years. I  
3 checked, he was originally arrested in December of 2017.  
4 So in that respect, I guess it's not moot.

5 JUDGE RIVERA: Um-hum.

6 MS. MCCARTHY: The Outley issue.

7 JUDGE RIVERA: You're saying the Outley issue is  
8 not moot?

9 MS. MCCARTHY: I think it's not moot if that  
10 sentence is still being - - -

11 JUDGE RIVERA: Because he's on PRS; is that what  
12 you're saying?

13 MS. MCCARTHY: Pardon me?

14 JUDGE RIVERA: Because he's on PRS?

15 MS. MCCARTHY: Yeah, because if it gets violated,  
16 then - - -

17 JUDGE RIVERA: Yeah.

18 MS. MCCARTHY: - - - he still has that hanging  
19 over his head. b

20 JUDGE RIVERA: He's back.

21 MS. MCCARTHY: That's right. And that's actually  
22 all he would have hanging over his head at this point, is  
23 that one year.

24 JUDGE RIVERA: Thank you.

25 CHIEF JUDGE WILSON: And what - - - I'm sorry. I

1 thought you were going - - - up here. Sorry.

2 I thought you were saying it was not moot because  
3 were he granted a new trial, he could conceivably be  
4 acquitted?

5 MS. MCCARTHY: No, I was - - - I had been  
6 thinking that what we would have possibly asked for, or if  
7 the court had found in our favor, that they might give  
8 specific performance, which I think would have been one of  
9 the options. And I don't think that that obviously - - -  
10 well, it could work, obviously, because again, if he gets  
11 violated, then he does have that one year hanging over his  
12 head.

13 JUDGE RIVERA: Then do you want the plea vacated?

14 MS. MCCARTHY: I think at this point we would  
15 like the plea vacated, yes. But I think that that is up to  
16 the court to make that decision on this, what it thinks is  
17 appropriate. I think either way, if the court finds that -  
18 - -

19 JUDGE TROUTMAN: And that is under - - - it's  
20 understood that he could face greater?

21 MS. MCCARTHY: Only - - - I - - -

22 JUDGE TROUTMAN: If he were - - - if there were a  
23 trial instead of the plea - - -

24 MS. MCCARTHY: Right.

25 JUDGE RIVERA: Um-hum.

1 JUDGE TROUTMAN: - - - he could face more time?

2 MS. MCCARTHY: But that would be - - - any - - -  
3 any time that would happen, whenever you appeal, if you - -  
4 -

5 JUDGE TROUTMAN: Oh, that's understood.

6 MS. MCCARTHY: - - - a plea. Yeah, so - - -

7 JUDGE TROUTMAN: It's just the fact that he's out  
8 right now - - -

9 MS. MCCARTHY: Right.

10 JUDGE TROUTMAN: - - - one would pause.

11 MS. MCCARTHY: Right. He probably doesn't want  
12 to go back. I agree.

13 JUDGE RIVERA: Like any other human being.

14 MS. MCCARTHY: Right. I'm sure he's celebrating.  
15 So I've considered two issues on that point, one  
16 to be interrelated. One, was there a breach of the  
17 agreement. And I think if there's - - -

18 JUDGE TROUTMAN: So what exactly was the  
19 agreement?

20 MS. MCCARTHY: Yeah. So the agreement was for  
21 six years, and I believe five post. I'm - - - I'm just  
22 going to put that out there.

23 JUDGE TROUTMAN: And were there conditions  
24 preceded?

25 MS. MCCARTHY: The conditions were initially they

1 gave the original Parker warning. But the defendant balked  
2 at that, and he balked at it, and you got a picture  
3 yourself in negotiation for any kind of contract and said,  
4 well, wait a minute, you know, I've been getting these  
5 threats that if I take this deal, they're going to ticket  
6 me. And he explained to the court later, oh, I'm kind of  
7 outspoken, and that's why they would do this.

8 And - - - and he hesitated, and the court said,  
9 well, okay, relax, calm down, you know, and gave him what I  
10 call the revised Parker warning. And the revised Parker  
11 warning was just because you get a ticket, I'm not - - -  
12 that doesn't mean you're - - - you will lose the benefit of  
13 your bargain. He said, I'm going to take a look at it.  
14 Attorney Massey's going to have a chance to respond. And  
15 then he gave them very specific instances where he'd say,  
16 you know, look, you get in a fight, an unprovoked violence  
17 or something, then you're going to lose your bargain.

18 And - - - and to me, that was, you know, you're  
19 negotiating a contract and the contract - - -

20 JUDGE TROUTMAN: So are you - - - is it your  
21 argument that the court limited the things that could  
22 violate the agreement?

23 MS. MCCARTHY: I think, number one, the court  
24 specifically said, consistent with Outley, that if you just  
25 get a ticket, you're not going to get violated, or I'm not

1           - - - you're not going to lose the benefit of your bargain.  
2           But I think the court also said, look, if it's some stupid  
3           little thing that you get a ticket for, you're not going to  
4           lose the benefit of the bargain.

5                    JUDGE TROUTMAN: Basically, the court said it  
6           depends, I'll look at it.

7                    MS. MCCARTHY: I'll look at it. But it was very  
8           specific and it didn't say anything other than this  
9           unprovoked violence. But, of course, we can all imagine  
10          instances that would warrant that.

11                   JUDGE TROUTMAN: And that could not be an example  
12          of things that could in fact trigger it.

13                   MS. MCCARTHY: It could be. But the court didn't  
14          say that. It said, you know - - -

15                   JUDGE GARCIA: It just seems to be - - - and I'm  
16          sorry - - - in the record that the court is giving examples  
17          of the type of inquiry, right?

18                   MS. MCCARTHY: Um-hum.

19                   JUDGE GARCIA: So I'm not going to just do this.  
20          You know, you get the ticket, your lawyer will have a  
21          chance to respond. If it's these types of things, this,  
22          you know, may be very abbreviated, if you punch somebody in  
23          the face who cut in front of a line or whatever the  
24          examples - - -

25                   MS. MCCARTHY: Right.



1 JUDGE GARCIA: - - - were. But then after that,  
2 as I recollect in the transcript, the court then says, and  
3 you can't violate any of the prison rules?

4 MS. MCCARTHY: Right. But that's what he was  
5 found not guilty of by the prison board. One of the - - -  
6 there were four charges, the sexual harassment one, they  
7 found insufficient or without merit - - -

8 JUDGE GARCIA: Um-hum.

9 MS. MCCARTHY: - - - and they did not find him  
10 guilty of failing to follow the jailhouse rules. That - -  
11 - those were the two - - -

12 JUDGE GARCIA: No. But what - - - didn't - - -  
13 what they find him guilty of violate the rules of conduct  
14 of the - - -

15 MS. MCCARTHY: No.

16 JUDGE GARCIA: - - - prison?

17 MS. MCCARTHY: They found him guilty of - - -

18 JUDGE RIVERA: Harassment.

19 MS. MCCARTHY: - - - harassment, and I forgot the  
20 other one.

21 JUDGE RIVERA: Violating the rules.

22 JUDGE TROUTMAN: And the harassment - - -

23 MS. MCCARTHY: I thought - - - no, the - - -

24 JUDGE RIVERA: Violating the rules.

25 MS. MCCARTHY: I thought the violating the rules,

1 they found him not guilty.

2 JUDGE TROUTMAN: But the - - - the harassment, it  
3 wasn't a penal law harassment, correct?

4 MS. MCCARTHY: Right. And that's the other  
5 thing, is that none of these were - - -

6 JUDGE TROUTMAN: So it had to be prison rule?

7 MS. MCCARTHY: Had to be what?

8 JUDGE TROUTMAN: A prison rule that he violated.

9 MS. MCCARTHY: Well, yes, you could look at it  
10 that way. I - - - I - - - I can see your point on that  
11 one, certainly.

12 JUDGE RIVERA: I'm sorry. You're right. It's  
13 not the rules; it's disrespecting the officer.

14 MS. MCCARTHY: Yes, it was the disrespect, and  
15 you can say that those were all rules of the jail. But the  
16 specific one about not following the jailhouse rules, and  
17 he says, oh, I have no problem not violating the jailhouse  
18 rules. And he never did before and never did after.

19 I think the problem here is - - - and going  
20 straight into Outley, and - - - and why we have Outley is  
21 that - - - is this due process issue. And so we can say  
22 these specific things about, well, where - - - did he  
23 commit these four offenses or not - - - or was the judge  
24 referring to those four offenses when we're talking about  
25 the - - - the promise the court had made. But in the end,

1 the court really based its decision to not commit to its  
2 agreement on those two complaints issued by the  
3 correctional officers.

4 JUDGE GARCIA: They weren't complaints. They  
5 were findings, right?

6 MS. MCCARTHY: Well, the two correctional  
7 officers filed these complaints.

8 JUDGE GARCIA: Right.

9 MS. MCCARTHY: And the disciplinary board held a  
10 disciplinary hearing where, back then, the defendant wasn't  
11 entitled to have counsel. He was by himself. Those  
12 officers did not show up. The complaints weren't signed.  
13 They weren't sworn to - - -

14 JUDGE GARCIA: Were any of those arguments made  
15 to the trial court?

16 MS. MCCARTHY: No. What was - - - no, actually  
17 they weren't. But they might have been made to the  
18 disciplinary board had the defendant at that time had the  
19 right to an attorney. Today, we do, but back then, he did  
20 not.

21 And so, to me, it seems in terms of Outley and  
22 whether the court complied with that, which I think is very  
23 intertwined with whether or not the court broke its promise  
24 to not renege just based on the fact that you get a ticket,  
25 is that's where you get this balancing. And it's hard to

1           imagine in any court of law in this country that somebody  
2           is brought before the court based on a complaint by a  
3           police officer that is not signed, not sworn to, for which  
4           there's no corroborating evidence, and the police officer -  
5           - -

6                        JUDGE RIVERA:  So - - - so what should the court  
7           have done?

8                        MS. MCCARTHY:  I think the court, at that point,  
9           when we know before the disciplinary board that the police  
10          - - - the correction officers didn't show up, I think if  
11          you have this balance, said the balance that these were  
12          malicious and baseless, which is what Outley talks about,  
13          is obviously clear in the record because he'd been  
14          threatened before.  If he had raised this afterwards and  
15          said, oh, by - - - by the way, judge, I was threatened, but  
16          he didn't.  He said it beforehand.  And then you've got  
17          these correctional officers who couldn't even sign anything  
18          swearing to what they were alleging.

19                       JUDGE HALLIGAN:  But defense counsel didn't  
20          dispute that he said what he was alleged to have said; did  
21          - - - did defense counsel, I thought not?

22                       MS. MCCARTHY:  He - - - he did not do any  
23          investigation as far as I know.  I didn't see any request -  
24          - - any subpoena requests for anything.  And I think you're  
25          right, he tried to argue to the court.  He took the

1 position that look, judge, even if this was true, you can't  
2 - - - you know, that's not what you had said to begin with.

3 I think the problem for this defendant at that  
4 time, and maybe is true of most people going before  
5 disciplinary boards in a prison, is the guys don't show up,  
6 the correctional officers don't show up. There's no  
7 evidence because there's no video, there's no witness. How  
8 is he to defend against this?

9 JUDGE GARCIA: But none of that was presented to  
10 the sentencing court?

11 MS. MCCARTHY: It - - -

12 JUDGE GARCIA: No - - - the defense lawyer, the  
13 defendant didn't say I wasn't represented, and my client  
14 wasn't represented, I want these people to come in here and  
15 testify as to these incidents. No request was made. In  
16 fact, as Judge Halligan was saying, it was - - - the  
17 conduct was fairly conceded.

18 MS. MCCARTHY: Yeah. Well, that's an issue going  
19 to ineffective assistance of counsel, I think, because had  
20 he at least issued a subpoena to the prison to get any - -  
21 - or the jail to get any kind of surveillance or notes or  
22 anything else, that might have been helpful, and had he  
23 made these kind of arguments, perhaps, that would have been  
24 helpful. Had he called - - - I - - - I kept thinking about  
25 what would have happened if he had called those

1           correctional officers to testify? So either they would  
2           have to continue, I'm going to assume these are lies  
3           because they wouldn't sign it, and they wouldn't swear to  
4           it, to testify - - -

5                    JUDGE HALLIGAN: Well, but if - - - if they were  
6           clearly not truthful, why would defense counsel not have  
7           contested the truthfulness?

8                    MS. MCCARTHY: How do they prove that in a  
9           situation like this, where there's no video and there's no  
10          witnesses.

11                   JUDGE HALLIGAN: But - - - but there's not even,  
12          as I read the record, correct me if I'm wrong, there's not  
13          even any indication - - - you know, defense counsel didn't  
14          say, for example, what you're saying now, I believe, right?  
15          You're suggesting that perhaps those statements were not  
16          true.

17                    MS. MCCARTHY: Right.

18                    JUDGE HALLIGAN: I didn't see any indication  
19          along those lines.

20                    MS. MCCARTHY: No, I didn't see anything either  
21          in the record.

22                    The best what - - - that we have is after when  
23          the defendant gets to speak, and he has the statutory right  
24          to speak at the very end, and the judge has already made up  
25          his mind, it's the defendant who tries to tell the judge,

1           hey, you know, look, look at the coincidence, they do that  
2           the very day that I, you know, enter my plea. They had  
3           been threatening me with that. I just think there's - - -  
4           there's overwhelming evidence that these were malicious and  
5           baseless. And if the court had carefully considered this  
6           and really done a more thorough inquiry as he was obligated  
7           to do under Outley, some of that would have been fleshed  
8           out here.

9                         I think the court - - - I agree that the defense  
10           attorney failed in his obligation here, but I can see that  
11           he might have been thinking, what's the point, they're  
12           going to get up there and say the same thing. There's no  
13           evidence to be found here to help this guy. But the court  
14           still had an obligation to look at everything here, to look  
15           at the fact that they were not signed, that there was - - -  
16           that they didn't show up, you know, that they had  
17           threatened, and that it was the very same day. And you  
18           have those four things over here, and this is the side  
19           that's - - - is it malicious and baseless? Well, that's  
20           pretty heavy. And then you've got only their statements.

21                         JUDGE SINGAS: But you never argued about the  
22           adequacy of the hearing. Again, your - - -

23                         MS. MCCARTHY: Yeah.

24                         JUDGE SINGAS: - - - your two arguments were it  
25           was involuntary because the court gave him an inaccurate

1 sentencing range, and it was insufficient because his  
2 statement to the probation department cast doubt on whether  
3 he was guilty. I mean, it's - - - it's very different.

4 MS. MCCARTHY: I - - - are you saying did I or  
5 did they? I mean, I think I did - - -

6 JUDGE SINGAS: Did they.

7 MS. MCCARTHY: Yeah.

8 JUDGE SINGAS: Is it preserved, I guess, is what  
9 we're getting at.

10 MS. MCCARTHY: Oh, I think it was preserved  
11 because - - - I think it's simple enough to preserve this  
12 where he starts and says, you know - - - the defense  
13 attorney says, well, that's not the warning that you gave,  
14 and now you're violating, you're not being consistent with  
15 the warning that you gave. And when the defendant gets up  
16 and says, wait a minute, judge, obviously, these are bogus  
17 because they were done the very same day, and remember we  
18 told you that I have been threatened. And I - - - so I  
19 think in that respect to the best that he could, even the  
20 defendant tries to preserve it.

21 JUDGE RIVERA: And before that - - -

22 MS. MCCARTHY: And - - -

23 JUDGE RIVERA: - - - after saying these - - -  
24 this is not - - -

25 MS. MCCARTHY: Yeah.



1 JUDGE RIVERA: I take your point, that counsel  
2 gets up and says this is not really the bargain, right?

3 MS. MCCARTHY: Is not what?

4 JUDGE RIVERA: This is not really the bargain,  
5 right, that's some version of what you're arguing defense  
6 is saying before the defendant gets up when counsel is in  
7 this colloquy with the court. Doesn't counsel also remind  
8 the court that he had the - - - that counsel had put before  
9 the judge at the time of the plea that defendant was  
10 concerned about getting the ticket.

11 MS. MCCARTHY: Right.

12 JUDGE RIVERA: In addition, he'd not done  
13 anything before this, not done anything after this  
14 incident. So it is - - -

15 MS. MCCARTHY: That's right.

16 JUDGE RIVERA: - - - a reminder of the prior - -  
17 -

18 MS. MCCARTHY: He does remind him, which is the  
19 only way that we know it, because on the June 21st status  
20 hearing, that - - -

21 JUDGE RIVERA: Well, can you infer from that that  
22 counsel is also saying to the court, you really have to  
23 look behind these - - -

24 MS. MCCARTHY: Right.

25 JUDGE RIVERA: - - - complaints, it seems more

1 than coincidence.

2 MS. MCCARTHY: Right. I agree with you a hundred  
3 percent.

4 And in terms of the preservation - - - I think my  
5 time has expired, but - - -

6 CHIEF JUDGE WILSON: Go ahead and continue.

7 MS. MCCARTHY: I was just going to say that  
8 Parker says preservation - - - you don't have to preserve  
9 this. And so I'm not sure that preservation is really the  
10 issue here. I think it was factually preserved, but Parker  
11 and the other cases say it wasn't because it renders his  
12 plea involuntary. And you don't have to preserve that one.

13 And then we have the waiver that clearly would  
14 not have covered this if the court did unlawfully or  
15 improvidently breach its commitment and impose a sentence  
16 that would have been an unlawful sentence to impose. And  
17 so the waiver doesn't cover that.

18 And then again, we get back to whether it was a  
19 voluntary or involuntary plea.

20 So we would ask at this point to have the plea  
21 vacated.

22 CHIEF JUDGE WILSON: Thank you. You don't - - -  
23 I interrupted you, Counsel, at the beginning, and I forgot  
24 to ask if you wanted rebuttal time, so I'll give you two  
25 minutes.

1 MS. MCCARTHY: Thank you, very much.

2 MR. GIBBONS: Good afternoon, Your Honors. May  
3 it please the court, James Gibbons for the People.

4 I'll start on the mootness point just for a  
5 moment. We fully agree this case is not moot. I'll  
6 commend to this court's attention a SCOTUS case, that is, I  
7 believe, on point. It's Pennsylvania v. Mimms. The cite  
8 is 434 U.S. 106. It's 1977. And SCOTUS said, I believe  
9 it's footnote three, said that even if the sentence is  
10 completely served, which is not our case here, he is still  
11 on PRS, even if the sentence is completely served, a direct  
12 appeal is not mooted because there are continuing  
13 collateral legal consequences. And SCOTUS said, in that  
14 case, what if Mimms reoffends, that would be a predicate  
15 felony. And so this is not moot.

16 All of that said, let's turn to the Outley issue.  
17 Now, this case - - - this claim is unreserved. And I  
18 believe my esteemed opponent actually just conceded it's  
19 unreserved. Your Honor asked, were any of these arguments  
20 made below, and the candid answer is, no, none of these  
21 arguments were presented below. But even despite that,  
22 appellant actually got everything Outley promises. That's  
23 because Outley promises two things.

24 First, if you deny the alleged misconduct, you'll  
25 have the opportunity to show that the allegation lacks



1 foundation. And that's what happened here. The court read  
2 into the record the allegations that were contained in the  
3 PSR, and then turned to counsel and said, would you like to  
4 address whether or not I'm bound by my commitment made at  
5 the plea proceeding. And counsel then presented a number  
6 of arguments - - -

7 JUDGE TROUTMAN: So if he wanted to call  
8 witnesses at that point?

9 MR. GIBBONS: He could ask to do that, certainly,  
10 Your Honor. But there's nothing in the - - - he certainly  
11 didn't ask to do that. And there's nothing in the record  
12 to indicate that that was something that either counsel or  
13 even appellant until he then got the sentence wanted to do.

14 JUDGE TROUTMAN: But is it your argument that he  
15 was put on notice that that opportunity - - - that he had  
16 an opportunity to give the court something to consider with  
17 respect to the allegation?

18 MR. GIBBONS: One hundred percent, Your Honor,  
19 that's exactly correct. The court opened the floor. He  
20 made the arguments he wanted to make. They didn't carry  
21 the day. So now he's got a whole new passel of new  
22 arguments for this court to consider.

23 JUDGE CANNATARO: And what about the argument  
24 that between the statements of counsel, and something that  
25 was said off the record, which we have some inkling of what

1 might have been said off the record, that that was enough  
2 to alert the court that it needed to look more deeply into  
3 the nature of these charges and the way that they were  
4 adjudicated?

5 MR. GIBBONS: Your Honor is entirely right that  
6 we're not totally sure exactly what happened, but - - -

7 JUDGE CANNATARO: If that's - - - it's - - - you  
8 get the impression it's something along the lines that he  
9 said, I knew that if I went to the facility, I was going  
10 to get ticketed?

11 MR. GIBBONS: Yes. And the - - - the answer to  
12 that is, is that - - - that turns to then the second point  
13 of what Outley promises. Outley promises that if you do  
14 dispute any aspect of the allegations against you, the  
15 court has to have a legitimate basis to believe the  
16 misconduct occurred. And we have that here. Yes,  
17 appellant made some argument that somehow it was  
18 essentially a selective prosecution argument. He says,  
19 well - - - he didn't dispute that these words came out of  
20 his mouth, but he said, well, I'm a boisterous and  
21 opinionated person and they don't like that. So this had  
22 never been a sexual conversation with a female officer  
23 before. I had made similar comments to the female officer  
24 before, but I hadn't gotten written up for it now, and I  
25 was only written up because of the plea. And he - - - he -

1 - - the court was then required to at least listen to that  
2 argument, right? That's what Bank says. That's what  
3 Fiammegta says.

4 JUDGE CANNATARO: Is there a obligation beyond  
5 just listening, would that trigger more on the part of the  
6 court?

7 MR. GIBBONS: Well, the court has to have a  
8 legitimate basis. So let's look at what's on the other  
9 side of the ledger, right? We've got the PSR itself, which  
10 has got detailed statements from two mutually corroborating  
11 witnesses. We've got the jail disciplinary hearing.

12 JUDGE SINGAS: Yeah, well, what weight should we  
13 give that, if any, to that hearing?

14 MR. GIBBONS: Well, that is a - - - a hearing at  
15 which appellant had the opportunity to be heard there, as  
16 well. Appellant was entitled under - - - I don't know how  
17 much of this is actually in the record about exactly the  
18 procedural safeguards there, because, again, this is an  
19 underdeveloped record, because there was never a challenge  
20 to the jail disciplinary hearing procedures, but appellant  
21 was entitled to seek to present witnesses or seek to  
22 present - - -

23 JUDGE HALLIGAN: But the correctional officers  
24 didn't testify; is that right that, is - - -

25 MR. GIBBONS: That - - -

1 JUDGE HALLIGAN: - - - there any question about  
2 that?

3 MR. GIBBONS: They didn't testify in court here.  
4 And to the best of my knowledge, they didn't testify - - -

5 JUDGE HALLIGAN: Right.

6 MR. GIBBONS: - - - at the jail disciplinary  
7 hearing, which is - - -

8 JUDGE HALLIGAN: I meant at the disciplinary  
9 hearing.

10 MR. GIBBONS: - - - different from whether  
11 appellant could have demanded that they testify. He never  
12 asked for that.

13 JUDGE RIVERA: But they never signed the - - -  
14 the ticket or documentation charging him?

15 MR. GIBBONS: The - - - the PSR is a fax, and I  
16 don't know whether the original documents that the officers  
17 completed were ever signed. I know that we don't have a  
18 signature. But I don't know that we can necessarily infer  
19 from that no signature ever touched the page.

20 And then - - - now, in - - - in addition to all  
21 that, we've got appellant admitting, and this is pages 76  
22 and 77 of the appendix, we've got appellant himself out of  
23 his own mouth, effectively conceding that these words had  
24 come out of his mouth and were directed to the female  
25 officer. And I know that appellant now is saying, well,

1 that was a denial or an adamant denial. Again, he was  
2 found to have violated two provisions of jail rules, sexual  
3 harassment - - -

4 JUDGE RIVERA: I'm sorry, what - - - can you  
5 quote for me what you say is his concession that he said  
6 the words that - - -

7 MR. GIBBONS: Well, this is - - - I'm sorry, Your  
8 Honor.

9 JUDGE RIVERA: - - - they alleged he had said to  
10 the female officer?

11 MR. GIBBONS: He - - - he does not explicitly  
12 say, I uttered those words. You're right, Your Honor. But  
13 what he does say is, that I don't consider that harassing  
14 because me and the female officers had had multiple prior  
15 conversations, and it had never been a sexual conversation  
16 prior to that.

17 But here's a key point. The - - - that might  
18 potentially go to whether the allegations contained in the  
19 PSR rise to the level of harassment in appellant's  
20 particular evaluation of that term. He doesn't dispute the  
21 disrespect charge. Again, the - - - the PSR details how  
22 the female officer repeatedly told him to desist from this  
23 conduct. The male officer came over and said two or three  
24 times, you must stop speaking to the female officer, you  
25 must go back to work. Appellant's response was to turn to





1 the male officer, and say, you mind your own business.

2 JUDGE HALLIGAN: But - - - but even if you were  
3 to read it as you're proposing, I'm not sure how it would  
4 disprove what I think someone suggested was a selective  
5 prosecution type response.

6 MR. GIBBONS: It doesn't disprove that, Your  
7 Honor. But in light of - - -

8 JUDGE HALLIGAN: And - - - and that was something  
9 he alluded to on the front end, right? He essentially  
10 said, they're going to write me up.

11 MR. GIBBONS: That - - - well, that is what  
12 counsel later said that - - - that appellant said. We  
13 don't actually have that conversation on the record, but  
14 we're - - -

15 JUDGE HALLIGAN: Yeah.

16 MR. GIBBONS: - - - not disputing that something  
17 to that effect occurred.

18 It - - - that appellant's statement at sentencing  
19 doesn't disprove the selective prosecution argument. But,  
20 again, the Parker warnings were not, "comply with the jail  
21 rules unless you get selectively written up for it, in  
22 which case it doesn't count", right? All of appellant's  
23 arguments below were the conduct alleged in the PSR  
24 shouldn't count for the purpose of rescinding the  
25 sentencing promise, and the court had a legitimate basis

1 that no matter what we might think of the officer's  
2 decision to write him up on this particular occasion, or  
3 whatever pattern of conduct he had before then, the words  
4 contained in the PSR, appellant's statements as quoted,  
5 which he does not dispute the accuracy of, are scandalous.

6 CHIEF JUDGE WILSON: Do you think that the  
7 revised Parker warnings, if we want to call them that,  
8 restricted the court's ability, the universe of things the  
9 court might have been able to consider a violation, at all,  
10 or it's just unenforceable?

11 MR. GIBBONS: Neither of those two things, Your  
12 Honor. It didn't restrict it. And if I could just go to  
13 the exact - - -

14 CHIEF JUDGE WILSON: So - - - so - - -

15 MR. GIBBONS: - - - text of that warning because  
16 - - -

17 CHIEF JUDGE WILSON: - - - so just to be sure - -  
18 -

19 MR. GIBBONS: - - - I think the words matter.

20 CHIEF JUDGE WILSON: Okay. Then maybe - - - let  
21 me see if I understand. So your position, I think, is that  
22 the revised Parker warnings are no different than the  
23 original Parker warnings?

24 MR. GIBBONS: Not in substance, Your Honor.

25 CHIEF JUDGE WILSON: Okay.



1 MR. GIBBONS: The - - - at the plea, the court  
2 starts off with saying, you must comply with the jail  
3 rules. Those are his words - - - the court's words. And  
4 then gives four examples, and then a catchall, says, you  
5 cannot break the jail rules. You cannot - - - all of these  
6 are direct quotes. You cannot break the jail rules. You  
7 cannot get involved in a fight. You cannot promote some  
8 contraband. You cannot disrespect the corrections  
9 officers. And then this catchall, whatever it may be,  
10 right? Don't - - - again, don't treat these examples as  
11 the universe of - - - of potential violations. Jail rules  
12 are jail rules, you have to comply with all of them even if  
13 I haven't listed them all.

14 Appellant says, can I comment on that, sir? They  
15 have a - - - the court says, no, you can't comment on it  
16 right now. You talk to your lawyer, and then you can  
17 approach. They approach after consulting. They go in - -  
18 - after the off-the-record conversation, the court says,  
19 well, let me explain it to you this way. What's happened  
20 in the past is defendants would think that because they got  
21 promised a sentence, they can do whatever they want without  
22 consequence and thereby disrupt the security of the  
23 correctional facility.

24 And then the court gives an explanation of the  
25 potential procedure and is clearly giving an explanation of

1 what an Outley inquiry looks like, right? If you come in  
2 here and there's an allegation of misconduct, you're - - -  
3 Mr. Massey, defense counsel, will get an opportunity to  
4 address it. I will take a look at it. But if it - - -

5 JUDGE HALLIGAN: So - - -

6 MR. GIBBONS: - - - turns out that you did X - -  
7 -

8 JUDGE HALLIGAN: So to that point, and picking up  
9 on - - - on the Chief's question, when the judge says so  
10 the mere fact that you might get a ticket doesn't  
11 automatically mean that you are going to lose your  
12 commitment, your position is that that doesn't restrict  
13 what he promises he'll do or qualify the initial Parker  
14 warning at all?

15 MR. GIBBONS: The only potential qualification -  
16 - -yes, Your Honor, is the - - - the answer to that. The  
17 only potential qualification is that the court did ensure  
18 that if there was a dispute about what appellant did, there  
19 would be an Outley inquiry. But there was no dispute here  
20 about what appellant did, so - - -

21 CHIEF JUDGE WILSON: But isn't that always the  
22 rule?

23 JUDGE HALLIGAN: So you read - - - you read the  
24 fact that you might get a ticket doesn't automatically mean  
25 you'll lose your commitment as simply promising that you'll

1 get an Outley hearing?

2 MR. GIBBONS: That - - - that is - - - well, an  
3 Outley inquiry, Your Honor, that is my - - -

4 JUDGE HALLIGAN: Pardon me, yeah.

5 MR. GIBBONS: - - - my read of this. And,  
6 indeed, that's exactly - - -

7 JUDGE HALLIGAN: Not - - - not that - - - that  
8 he's indicating that a de minimis violation is something  
9 that he might let pass?

10 MR. GIBBONS: No, Your Honor, I - - - I don't  
11 read that as suggesting that a de minimis violation would -  
12 - - would be allowed to pass, but we really don't have to  
13 reach that question, because I don't think there's any  
14 plausible argument that the conduct here is de minimis,  
15 right? It violates the you shall not disrespect  
16 corrections officers. And again, the conduct here, it is  
17 egregious. And it is indicative that he's more than just a  
18 boisterous and opinionated person.

19 JUDGE CANNATARO: Is this just a difference of  
20 opinion between the opposing sides? The argument made at  
21 the eventual Outley inquiry was that when you talked with  
22 him about the Parker instruction, you gave him examples of  
23 - - - I'm paraphrasing what defense counsel said, but you  
24 gave him examples of serious violations and not serious  
25 violations. And this is more like a not serious violation

1 so, therefore, you should not give him any sort of enhanced  
2 sentence here.

3 MR. GIBBONS: That was one of the arguments that  
4 counsel made, yes.

5 JUDGE CANNATARO: And I hear you saying now that  
6 that was actually never part of the instruction that was  
7 given by the court. And I'm looking at the language and,  
8 honestly, I don't know what it means. I'm going to - - -  
9 I'm going to read just a little further down from where you  
10 were. The court says, but if it turns out, based on what  
11 is presented, that you got in a fight with another inmate,  
12 and you punched some kid out because he cut in front of you  
13 in a line for some - - - for the phone or for a computer,  
14 that you just hauled off and hit him, well, then, I'm going  
15 to look at that and say, you lost your right to the  
16 commitment. But - - - and here's the phrase that I have a  
17 problem with, if it is something close, I'm going to take a  
18 look at it. I have a problem with it because I don't know  
19 what it means.

20 MR. GIBBONS: I think it's clarified by - - - if  
21 you continue reading down the very same page, Your Honor -  
22 - -

23 JUDGE CANNATARO: Yes.

24 MR. GIBBONS: - - - the court reiterates, "but  
25 you still have to comply with the jail rules". I don't

1 read that as necessarily ruling out the possibility that a  
2 truly technical, de minimis violation, maybe the court  
3 would have chosen, in its discretion, not to rescind the  
4 sentencing promise. And, of course, the court has the  
5 discretion to overlook a violation of the plea agreement  
6 and to still hand down the same sentence. That's why an  
7 Outley violation can't actually occur until the sentence is  
8 handed down, of course. If the court said - - -

9 JUDGE TROUTMAN: And did - - -

10 MR. GIBBONS: - - - how dare you say this - - -

11 JUDGE TROUTMAN: And Counsel, did the court here  
12 give consideration to actually what he was alleged to have  
13 done?

14 MR. GIBBONS: Absolutely, Your Honor. The court  
15 made very clear on the record that it was disturbed by the  
16 specific allegations here, not merely the fact that there  
17 was an alleged violation of jail rules, but the specific  
18 conduct here. And that was eminently reasonable on these  
19 facts.

20 JUDGE RIVERA: Did - - - did that include the  
21 ones that he was not found guilty for?

22 MR. GIBBONS: The only thing he - - - there were  
23 - - - there was a dismissal of the failing to abide by  
24 administrative directives. And then there was a finding  
25 that there was no evidence to support an infraction of

1 solicitation or of compulsion to engage in sexual acts.

2 And, again, read the - - -

3 JUDGE GARCIA: I'm sorry, Counsel. Those two  
4 that they didn't find evidence to support, were - - - were  
5 they based - - - those charges based on the same conduct?

6 MR. GIBBONS: Yes, they were based on the same  
7 conduct, but that was clearly the right call. And it  
8 doesn't involve a determination that the officers were  
9 incredible, because if you go through, there's nothing in  
10 there that actually constituted a solicitation. It is, if  
11 anything, the opposite. It is offensive and disgusting,  
12 but it is not a solicitation to engage in a sexual act.

13 Your Honors, I - - - if - - - I'm more than happy  
14 to address any of the other issues in the briefs, but I do  
15 want to just point out on the preservation point, very  
16 quickly, is that so much of this record is underdeveloped.  
17 The - - - again, what counsel should have been able to  
18 present at an evidentiary hearing, we don't know, because  
19 there's never been an effort to develop the record. But if  
20 appellant wants to do a 440 motion, that record can get  
21 developed and then a court of law can pass on it. But  
22 until that happens, there's nothing to review.

23 Thank you, Your Honors.

24 CHIEF JUDGE WILSON: Thank you.

25 MS. MCCARTHY: Four times the court told the





1           defendant, if you get a ticket - - - just because you get a  
2           ticket, you're not going to lose the benefit of your  
3           bargain.

4                   JUDGE GARCIA:   Isn't that right, though?

5                   MS. MCCARTHY:   Yes.

6                   JUDGE GARCIA:   I mean, isn't that always right?

7                   MS. MCCARTHY:   Absolutely.   Absolutely.

8                   JUDGE GARCIA:   Then what's - - - I mean, I'm  
9           trying to understand what's misleading or different about a  
10          standard warning here, because just because you get a  
11          ticket - - - if you say I didn't do it, yeah, of course,  
12          you're going to get an inquiry.   I think - - -

13                   MS. MCCARTHY:   Right.

14                   JUDGE GARCIA:   - - - everyone would agree, if you  
15          just got a ticket, and you lose the benefit of your  
16          bargain, that's probably not going to hold up.

17                   MS. MCCARTHY:   I think that's absolutely right.  
18          And the case that we cite out of the Third Department says  
19          exactly that, as well.   And that goes back to the arrest.  
20          If - - - and even Parker says that - - -

21                   JUDGE GARCIA:   But the - - - the argument here is  
22          you didn't just do this based on the fact that the  
23          defendant got a ticket.   You looked at it.   You looked at  
24          the underlying conduct.   You gave the lawyer a chance to  
25          make a presentation.   I think if the judge had just come in

1 and said, you got a ticket and I'm giving you seven years,  
2 then you have a violation.

3 MS. MCCARTHY: But the court did do that, in  
4 fact, on June 21st, 2018, what was supposed to be the  
5 sentencing date - - -

6 JUDGE GARCIA: But they gave him three months to  
7 prepare for the later proceeding.

8 MS. MCCARTHY: I didn't catch that part of it,  
9 honestly. Later, he says - - - when he walks in later - -  
10 - or they start the sentencing later, the judge says, I  
11 told you I was no longer bound by my commitment, I told you  
12 that on June 21st, during that status hearing. And, in  
13 addition, he did base it simply on the fact that the  
14 tickets were issued. And we have - - - that's where I  
15 respectfully disagree with my counsel here. When he keeps  
16 saying he did these things - - -

17 JUDGE RIVERA: Well, if that's true, why - - -  
18 why go through what appears to be the underlying conduct?  
19 If it's just the mere fact that tickets were issued, what  
20 does it matter the substance of the ticket?

21 MS. MCCARTHY: It doesn't matter.

22 JUDGE RIVERA: Okay. But all I'm saying is,  
23 isn't there in the record that the judge did discuss some  
24 of the substance of the tickets?

25 MS. MCCARTHY: The judge read from the tickets.

1 That isn't really an inquiry, and the judge had an  
2 obligation to make sure that those allegations were based  
3 on reliable evidence. And it is not reliable evidence to  
4 have a document that is not signed and not sworn to where  
5 the witnesses don't show up.

6 JUDGE SINGAS: But if it comes from a result of a  
7 hearing at - - - at the correctional facility, isn't a - -  
8 - a judge allowed to rely on that?

9 MS. MCCARTHY: I think then you have to look at  
10 the hearing, and say they didn't show up to the hearing and  
11 they never signed - - -

12 JUDGE SINGAS: If a judge - - -

13 MS. MCCARTHY: - - - these documents.

14 JUDGE SINGAS: If a judge is comfortable with  
15 that?

16 MS. MCCARTHY: Does that really satisfy due  
17 process? And in any court of law, other than this  
18 instance, or a disciplinary hearing at a jail, which is,  
19 quite frankly, probably why we changed the law here in New  
20 York, and these guys now are entitled to counsel.

21 JUDGE TROUTMAN: But at the inquiry, did he make  
22 those arguments that they weren't signed and they didn't  
23 testify?

24 MS. MCCARTHY: They didn't make those specific  
25 arguments, but they did make other arguments to suggest

1 that they were - - - what they were arguing was these are  
2 not reliable. The defendant argued this is not reliable  
3 because they previously had threatened me. They did it the  
4 very same day. Why would I do something like that. He was  
5 challenging it. He's not a lawyer. He's not a defense  
6 attorney. He was doing the best he could when his attorney  
7 wasn't actually doing that.

8 I mean, at a minimum, I think the attorneys  
9 should have at least issued a subpoena to the jail to say,  
10 do you have any video on this, you know.

11 JUDGE RIVERA: Is there some question as to  
12 whether or not these tickets were actually signed?

13 MS. MCCARTHY: Not as far as I know.

14 JUDGE RIVERA: Was that certain?

15 MS. MCCARTHY: And there's nothing in the record  
16 that they were ever signed. And I think we have to go by  
17 the record. So I have no idea. But the probation office  
18 gave it to the court unsigned, the court went by unsigned.  
19 If the court had some concerns, they should have gotten the  
20 signed ones. You know, I think that that's the problem  
21 here. Where - - -

22 JUDGE TROUTMAN: Isn't it the problem that it  
23 wasn't brought to the court's attention, that one was  
24 contesting the allegations because they weren't signed, and  
25 then the court could probably - - - possibly be prompted to

1 say, would you like a hearing with respect to same?

2 MS. MCCARTHY: Okay. So that's a very good  
3 point. The defense attorney does not raise that, doesn't  
4 point that out. However, when I read Outley, it says the  
5 court must conduct a hearing, and the court must assure  
6 itself that the allegations are based on reliable evidence.  
7 It does not say the defense attorney has to ask for that  
8 hearing or it's waived. I've not found a single case that  
9 says that. Maybe they're out there - - -

10 JUDGE TROUTMAN: That may be true - - -

11 MS. MCCARTHY: - - - but I didn't see it.

12 JUDGE TROUTMAN: - - - but if the court is  
13 satisfied, then the court wasn't asking for anything else.

14 MS. MCCARTHY: But if that court - - - is that  
15 due process for the court to be satisfied based on that?  
16 In any court of law, let's say you have a domestic violence  
17 case, right, and the complainant makes - - - files a  
18 petition or complaint in the criminal court that somebody  
19 is harassing her, but she doesn't sign that complaint, it's  
20 not sworn to, and she doesn't show up for the hearing, what  
21 is the first thing that the court is going to do? They're  
22 going to dismiss it outright.

23 And even in New York, I'm just - - -

24 JUDGE TROUTMAN: But usually that is brought to  
25 the attention of the court at the time, and a motion is

1 made, and the court acts accordingly.

2 MS. MCCARTHY: But the court would be obligated  
3 to do it on its own. If they get a petition that's not  
4 filed - - - I mean, that's not signed, not sworn to, and  
5 they don't show up, they would just dismiss it.

6 In fact, in New York, I was thinking about this,  
7 in New York, if you get a speeding ticket, you have the  
8 right to ask for the deposition. And if you don't get that  
9 signed deposition from the - - - the patrol officer within  
10 thirty days, your case gets dismissed.

11 So I can't think of a single time, except in a  
12 situation like this where the defendant has already pled  
13 guilty, he's already agreed to his part of the bargain, and  
14 then the court says, oh, no, no, I'm sorry, I've got this  
15 thing over here. Whether or not your due process rights  
16 are taken care of or protected, we don't care. But that's  
17 what Outley does. Outley was designed to protect the due  
18 process rights after somebody pleads guilty.

19 So I respectfully disagree that we can just read  
20 those allegations and say they are true. I think that  
21 that's the problem here. We cannot just read those  
22 allegations and say, that's true, and so he should have  
23 gotten an extra year, because who in this court would want  
24 to be convicted based on an unsigned, unsworn document  
25 where the person doesn't show up.

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CHIEF JUDGE WILSON: Thank you, Counsel.

MS. MCCARTHY: Thank you.

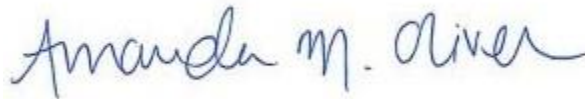
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C E R T I F I C A T I O N

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of Yasif Sims v. The People of the State of New York, No. 40 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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