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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against- NO. 40

FLESCH (JOHNATHON T.),

Appellant.

20 Eagle Street
Albany, New York
April 14, 2026

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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Official court Transcriber

1 CHIEF JUDGE WILSON: The next case is People v.
2 Flesch.

3 MR. PORTER: May I reserve one minute for
4 rebuttal, please?

5 CHIEF JUDGE WILSON: Yes.

6 MR. PORTER: Thank you.

7 My name is Scott Porter; may it please the court,
8 and I represent the appellant, Johnathon Flesch, in this
9 case. This court should vacate Mr. Flesch's sentence and
10 remit to county court for resentencing before a different
11 judge, for one of two reasons.

12 The first is that the prosecutor, the district
13 attorney, breached the sentencing agreement.

14 JUDGE RIVERA: Well, are you talking about the
15 newly appointed - - - or newly elected, excuse me - - -

16 MR. PORTER: Yes, yes. I am.

17 JUDGE RIVERA: - - - district attorney? But that
18 person was disqualified, so they have no authority to make
19 a recommendation.

20 MR. PORTER: Which is why he breached the
21 agreement. And - - -

22 JUDGE RIVERA: But he has no authority to do so
23 once he's disqualified, right? And a special prosecutor is
24 appointed. That's the person with authority to either
25 breach or accord with the agreement.

1 MR. PORTER: Well, Your Honor, I'm - - - I know -
2 - - I understand the question, and that's the second
3 reason, which is that his comments unduly influenced the
4 sentencing breach.

5 JUDGE RIVERA: It's like, whose comments now?

6 MR. PORTER: The district attorney's.

7 JUDGE RIVERA: Thank you.

8 MR. PORTER: And when I say district attorney, I
9 mean Mr. Nabinger. When I say special prosecutor - - -

10 JUDGE RIVERA: The newly elected, yes.

11 MR. PORTER: - - - I mean, Mr. Mashewske.

12 JUDGE RIVERA: Mr. Thank you.

13 MR. PORTER: But to go back to Mr. Nabinger's
14 comments standing alone constituting a breach - - -

15 JUDGE RIVERA: Um-hum.

16 MR. PORTER: The - - -

17 JUDGE GARCIA: Was that original sentence an
18 illegal sentence, if it had been imposed?

19 MR. PORTER: Yeah - - -

20 JUDGE GARCIA: The original agreed-upon sentence.

21 MR. PORTER: Yes and no. It was illegal from the
22 standpoint that straight probation is not an authorized
23 sentence for the offense that Mr. Flesch pled guilty to,
24 but shock probation is the lawful sentence.

25 JUDGE GARCIA: But the original - - -

1 JUDGE CANNATARO: But that wasn't the agreed - -
2 -

3 JUDGE GARCIA: The original sentence was
4 probation, no? Just straight probation?

5 MR. PORTER: Yes, it was, but when he was
6 supposed to be sentenced on February 14th, he had five-and-
7 a-half months in custody at that point.

8 JUDGE GARCIA: But at that point, did the DA
9 object to the shock probation?

10 MR. PORTER: This did not arise until March 29th,
11 when the judge wrote his letter to counsel.

12 JUDGE RIVERA: Yes. And then the special
13 prosecutor said they were comfortable with shock probation.

14 JUDGE GARCIA: Right.

15 JUDGE RIVERA: And then Defendant submits a - - -
16 submission to the court that says that the Shock probation
17 would indeed accord with the expectations of the defendant.
18 So again, I'm having difficulty seeing where there is - - -
19 the prosecutor has reneged on the offer, certainly.

20 Specifically, as he's already pointed out, it's
21 an illegal sentence that they've agreed to, so you can't
22 get that. But otherwise, it seems that the parties agreed
23 to something that satisfies the expectations of the
24 defendant. The fact that the court wasn't willing to
25 impose that sentence is a different issue.

1 MR. PORTER: I want to go back to the district
2 attorney.

3 JUDGE RIVERA: Okay.

4 MR. PORTER: Because when he told the judge that
5 he did not want the plea agreement to move forward, the
6 judge took that to heart and said, I will allow you to
7 withdraw your plea.

8 JUDGE RIVERA: Um-hum.

9 MR. PORTER: And it was at that point, it was
10 discovered that Mr. Nabinger had an obvious, blatant
11 conflict of interest, and he had to be - - -

12 JUDGE TROUTMAN: So are you suggesting it doesn't
13 matter that subsequently that prosecutor was replaced?

14 MR. PORTER: It does matter if the court is not
15 going to simply adjudicate the district attorney's comments
16 as a breach standing alone, and we look at what transpired
17 after he was disqualified. I understand that the thrust of
18 the People's position and the - - - and the questions I've
19 been asked so far is that Mr. Flesch was returned to the
20 status quo ante after Mr. Nabinger - - -

21 JUDGE HALLIGAN: But so why shouldn't we view it
22 that way? It seems to me your argument turns on assessing
23 the consequences at the time the statement is made and
24 asking, for example, whether Tindle requires that he be
25 allowed sentencing before a different judge, as opposed to

1 looking at it in the entirety of the proceedings. So why
2 are you correct?

3 MR. PORTER: Because Tindle and Santobello stand
4 for the proposition that when there is a plea agreement,
5 which includes a sentencing promise by the prosecutor - - -

6 JUDGE HALLIGAN: But I'm not sure that answers
7 the question of the - - - the question of what the - - -
8 the time is at which we should consider the question. My
9 recollection - - - tell me if I'm remembering - - -
10 misremembering, is that those cases don't involve this kind
11 of circumstance where the DA is disqualified and then
12 replaced by someone else who takes a different position,
13 right?

14 MR. PORTER: Right.

15 JUDGE HALLIGAN: So the issue of what the proper
16 point in time is at which to analyze whether the remedy is
17 sufficient, I don't think we've answered. So why do it at
18 that juncture, as opposed to taking into account what
19 happens later?

20 MR. PORTER: Because those cases stand for the
21 proposition that the sentencing promise should be
22 fulfilled, and the defendant has a right to be sentenced
23 pursuant to that agreement. And when the promise is not
24 fulfilled - - -

25 JUDGE CANNATARO: This defendant was never going

1 to get sentenced pursuant to that agreement.

2 MR. PORTER: He could have been sentenced to
3 shock probation.

4 JUDGE RIVERA: And again, we're back to that - -
5 - that the special prosecutor initially said that they were
6 comfortable with that, so I don't understand where the
7 prosecution reneges on the - - - what otherwise would be an
8 appropriate sentence given that the original agreement, the
9 recommended sentence, is illegal. I mean, what was the
10 prosecutor supposed to do, come in and recommend an illegal
11 sentence?

12 MR. PORTER: Are you referring to the district
13 attorney?

14 JUDGE RIVERA: Yes. Well, I think they're
15 disqualified, but go with that. That's okay.

16 MR. PORTER: Well, I - - - he - - - I submit that
17 he didn't know that it was an illegal sentence.

18 JUDGE CANNATARO: What about the special
19 prosecutor? Do you think the special prosecutor should
20 have said, yes, I don't want to breach the agreement, so I
21 recommend that you impose this illegal sentence?

22 MR. PORTER: The special prosecutor was never put
23 in that position.

24 JUDGE CANNATARO: Because they agreed to shock.

25 MR. PORTER: I think the record shows, Your



1 Honor, that the special prosecutor did not unequivocally
2 address this question whether he agreed to shock probation
3 or not.

4 JUDGE CANNATARO: Didn't the special prosecutor
5 say something like, we think Shock probation would be
6 appropriate, or something like that?

7 MR. PORTER: I do not recall reading that in the
8 letter because on March 29th was the first time that this
9 illegality issue came up. And they were - - -

10 JUDGE RIVERA: Well, the discussion of the shock
11 comes up in the discussion once the special prosecutor is
12 appointed, where the court, under the mistaken belief that
13 they could pursue a probation sentence, says, but I'm not
14 going to give straight probation if he's not going to get
15 mental health services. And that discussion was really
16 about how whether or not the court could in some way ensure
17 that he was get - - - going into Monroe County's Mental
18 Health Treatment Court, and that was really what the
19 discussion was back and forth, and they adjourned to figure
20 that out. And you're correct, in the interim, the court
21 realizes for itself that, no, I can't impose any probation,
22 that that would be illegal. Yes.

23 But in that appearance, during that appearance,
24 the court does say - - - and by the way, the probation
25 department does recommend shock - - right, the shock - - -

1 the Shock program, a split sentence, and that's when the
2 special prosecutor says we would agree to that.

3 MR. PORTER: Again, I do not recall the special
4 prosecutor unequivocally saying that he would agree to
5 Shock probation, because that came up at the same time that
6 the judge indicated that he was going to enhance Mr.
7 Flesch's sentence.

8 JUDGE RIVERA: Let me say if the - - - if they
9 did, if - - - since you're not agreeing - - - since you say
10 that's not your recollection, let's say the court reads the
11 record a different way; do you lose?

12 MR. PORTER: No, I submit that I do not lose
13 because - - -

14 JUDGE RIVERA: Okay.

15 MR. PORTER: - - - because of the breach and - -
16 -

17 JUDGE RIVERA: It still falls on the district
18 attorney?

19 MR. PORTER: On the district attorney, and - - -
20 and that his breach carried over and unduly influenced the
21 judge.

22 JUDGE CANNATARO: So let - - - can we - - -
23 because I see your light is on, can we just talk about the
24 remedy for the breach? The Santobello remedy or even
25 Tindle? It seems - - - I read those cases as saying that

1 the preferred remedy for that kind of breach is to offer
2 the defendant their plea back.

3 I know that there are circumstances like those in
4 Tindle where that doesn't seem good enough, and then they
5 make this additional requirement of resentencing in front
6 of another judge. But here, not only did the judge
7 disqualify the person you identify as the breacher of the
8 agreement but then, pursuant to Santobello, offered the
9 defendant his plea back. So why isn't everything that's
10 required legally here?

11 MR. PORTER: I'm asking the court to remit for
12 resentencing.

13 JUDGE CANNATARO: No, but I'm saying when the
14 court offers the defendant their plea back, that's all I
15 see Santobello is requiring. It doesn't also say you must
16 then send it back for resentencing in front of a different
17 judge.

18 MR. PORTER: But the court offering Mr. Flesch
19 the opportunity to withdraw his plea happened in the
20 context of the enhanced sentence. That did not arise in
21 the context of the breach.

22 JUDGE CANNATARO: I'm not sure why that affects
23 the question I'm asking, which is the court did what it's
24 legally required to do, offer defendant his sentence back.
25 It mentioned that they weren't going to give the

1 recommended sentence, but still offered him the plea back.

2 MR. PORTER: And that's correct, and Mr. Flesch
3 declined to withdraw his plea.

4 JUDGE CANNATARO: So why isn't that enough? Why
5 haven't all the requirements of Santobello been met in that
6 circumstance?

7 MR. PORTER: Because, again, the sentencing
8 promise was breached by the district attorney.

9 JUDGE RIVERA: What do you envision would happen
10 upon resentencing? Because he can't get straight
11 probation, right?

12 MR. PORTER: Humpty Dumpty can't be put together
13 again, and circumstances have changed dramatically. His
14 conditional release date is January 3rd, 2027.

15 JUDGE RIVERA: Um-hum.

16 MR. PORTER: By the time a decision is rendered
17 by this court, he'll have about three years in, and that's
18 going to play a large part in terms of what, if he was
19 granted the relief, what the parties would advocate for and
20 - - - and - - -

21 JUDGE RIVERA: So time served.

22 MR. PORTER: It's - - - if I was his counsel, I
23 would probably advise my client of that, but the boat - -

24 JUDGE RIVERA: Excuse me.

25 MR. PORTER: - - - has left the dock, and I

1 understand that. But it goes back to the comments made by
2 the district attorney and whether it infected the court's
3 consideration of the case, and if the court agrees with me
4 - - -

5 JUDGE RIVERA: But resentencing, could the - - -
6 the new - - - the different judge start from scratch?
7 They're not limited to the shock probation kind of
8 argument, right?

9 MR. PORTER: He could - - - first of all, he
10 could assess the credibility of - - - of the judge's
11 evaluation of the sentencing factors.

12 JUDGE RIVERA: Um-hum.

13 MR. PORTER: He could make his own decisions - -
14 -

15 JUDGE RIVERA: Um-hum.

16 MR. PORTER: - - - of whatever weight, to put on
17 those factors and - - -

18 JUDGE RIVERA: Recognizing that straight
19 probation is not available because that would be illegal.

20 MR. PORTER: Correct, correct.

21 JUDGE RIVERA: Okay.

22 CHIEF JUDGE WILSON: Thank you.

23 MR. TUNNEY: Good afternoon, Your Honors. May it
24 please the court, my name is John Tunney, representing the
25 People. And I'd like to see if I could characterize the

1 appellant's position. It starts with the - - - notion that
2 the newly-elected district attorney, as characterized,
3 breached the plea agreement. He - - -

4 JUDGE RIVERA: Do you dispute the - - - do you
5 dispute that?

6 MR. TUNNEY: Slightly. He asked if he - - - he
7 said it - - - if - - -

8 JUDGE RIVERA: Well, the plea agreement was
9 probation, and there's this discussion of the Mental Health
10 Court. Let's just hold that - - -

11 MR. TUNNEY: Exactly.

12 JUDGE RIVERA: - - - on the shelf for a moment.
13 And he comes in and says, I don't - - - that's a - - - I
14 have a problem with that.

15 MR. TUNNEY: He did. And he said, if I am able -
16 - -

17 JUDGE RIVERA: Um-hum.

18 MR. TUNNEY: - - - to withdraw consent - - -

19 JUDGE RIVERA: Um-hum.

20 MR. TUNNEY: - - - I would like to do that. And
21 of course, in the first instance, the trial judge - - -

22 JUDGE RIVERA: Why is that not an attempt to - -
23 -

24 MR. TUNNEY: Well - - -

25 JUDGE RIVERA: - - - undo the agreement?

1 MR. TUNNEY: Oh, it is. It absolutely is. But
2 what all of this discussion does not consider is the role
3 the judge plays. That is, the judge's agreement to the
4 initial plea - - - plea terms is conditional. Conditional
5 until the moment of sentence; at which time, the judge is
6 commanded to consider all the facts that have been brought
7 to the court's attention - - -

8 JUDGE RIVERA: But that wouldn't - - -

9 JUDGE GARCIA: But isn't that always the case?

10 MR. TUNNEY: That's always the case.

11 JUDGE GARCIA: But isn't that always the case,
12 even where we say it has to go back and get resentenced? I
13 mean, what's different about that?

14 MR. TUNNEY: The difference - - -

15 JUDGE GARCIA: What's the point that's relevant
16 here?

17 MR. TUNNEY: The difference is that the district
18 attorney's comments were ineffective. They - - -

19 CHIEF JUDGE WILSON: Well, how do we know that?

20 MR. TUNNEY: Well, because the sentencing judge
21 told us. In the letter he wrote on March 29th, he listed
22 the factors that led him to believe that the original
23 agreement, not only to being literally illegal, was
24 inappropriate, given what he had learned about the criminal
25 history of the defendant, and the attitude of the victims,

1 the victim impact statement in the presentence
2 investigation report.

3 JUDGE RIVERA: Yeah, but isn't the case law that
4 if, indeed, the prosecutor reneges on the sentencing
5 recommendation that it doesn't matter if the court says,
6 well, I didn't pay attention to that.

7 MR. TUNNEY: Well - - -

8 JUDGE RIVERA: That was not a factor in my
9 ultimate decision.

10 MR. TUNNEY: Two things. One, the defendant,
11 depending on what the court's going to do, has the option
12 of withdrawing his plea, which of course he had multiple
13 times in this situation.

14 The judge in this case said, based on the
15 information that I've learned, I'm unwilling to implement
16 the original agreement. And as a consequence, clearly Mr.
17 Flesch has the opportunity, the right, to withdraw his
18 plea.

19 And Judge Wilson, you asked, how do we know that?

20 CHIEF JUDGE WILSON: Um-hum.

21 MR. TUNNEY: Unless we are to fail to accept the
22 trial court's assertion of his reasons, we know that he did
23 not consider the comments of the district attorney.

24 CHIEF JUDGE WILSON: Do we also know at some
25 point - - - I may be misremembering the record, but that

1 the trial judge at an earlier point said, the reason that
2 I'm willing to agree to this is because both the
3 prosecution and defense counsel have agreed to the
4 sentence. Did he say that?

5 MR. TUNNEY: I believe he said that the reason he
6 originally agreed - - -

7 CHIEF JUDGE WILSON: Um-hum.

8 MR. TUNNEY: - - - was because the parties had
9 agreed.

10 CHIEF JUDGE WILSON: Right, and that was a good
11 enough reason for him at that time.

12 MR. TUNNEY: At that time.

13 CHIEF JUDGE WILSON: Um-hum.

14 MR. TUNNEY: But as - - -

15 CHIEF JUDGE WILSON: And then the - - -

16 MR. TUNNEY: - - - as the court is - - -

17 CHIEF JUDGE WILSON: - - - and then the district
18 attorney said, actually, this isn't good enough. I'd like
19 to withdraw it. And then, he gave us a list of reasons
20 that are different.

21 MR. TUNNEY: Yes. It did not include any
22 reference to what the district attorney had said. The
23 district attorney, who, by the way, of course, has been
24 long disqualified from the case. The - - -

25 JUDGE CANNATARO: But isn't that what Tindle says

1 you can't do? You know, just because you come up with an
2 alternative set of reasons now that you no longer have the
3 district attorney's consent, that - - - that we don't
4 accept that. That, you know, we can't - - - we don't just
5 automatically say, well, okay, that's it. They - - - we
6 have a substitute set of reasons now.

7 MR. TUNNEY: Your Honor, I'm not sure I
8 understand the question.

9 JUDGE GARCIA: So in the usual case, you know,
10 the fact scenario is the parties come to an agreement two
11 to four years, let's say. And the DA says I'm not going to
12 recommend a sentence. I'll stay silent. You argue what
13 you're going to argue. They get in front of the judge, and
14 the DA says, you know what? Three years would be great.

15 And then, the arguments start, and the judge
16 says, you know, you can't - - - you're breaching the
17 agreement, but you know what? I've thought about it. And
18 I, on my own, would come to the decision that three years
19 is appropriate. And I believe the case law says that's not
20 good enough. It has to go back to a different judge,
21 because we can't be sure that you didn't arrive at that
22 three-year figure because the DA, inappropriately, in
23 breach of the agreement, suggested it.

24 And how is this different - - - forgetting our
25 discussion about the later Shock therapy agreement, how is

1 the initial scenario different than that?

2 MR. TUNNEY: In several ways. There was no
3 effective withdrawal from the original plea agreement. The
4 court repeatedly offered Mr. Flesch the opportunity to
5 withdraw his plea, which is essentially the Tindle
6 situation.

7 JUDGE HALLIGAN: But that's not clear, is it? I
8 mean, Tindle, I think, is a case where the court says that
9 the defendant isn't entitled to withdraw the plea and can
10 be resentenced before another judge. But why is it that if
11 the defendant can withdraw his plea, that gives the
12 defendant the benefit of the bargain, as opposed to
13 resentencing before a different judge?

14 MR. TUNNEY: Again, I apologize. I - - - I - - -

15 JUDGE HALLIGAN: Let me try again.

16 MR. TUNNEY: Please, thank you.

17 JUDGE HALLIGAN: So it seems to me the case we
18 have here, right, the defendant is given an opportunity to
19 withdraw the plea and declines.

20 MR. TUNNEY: Yeah.

21 JUDGE HALLIGAN: And instead says, setting aside
22 these other issues about Shock and - - -

23 MR. TUNNEY: Um-hum.

24 JUDGE HALLIGAN: - - - and what the second
25 prosecutor says. I'm not sure I have his last name

1 correctly. He says I want instead to be resentenced before
2 a different judge, right? Does Tindle make clear that
3 either of those options are sufficient and that the judge
4 can decide which one? Seems to me that's your position.

5 MR. TUNNEY: It's my recollection that indeed the
6 judge - - - in a situation in which a defendant may be
7 restored to the pre-plea position that that's - - -

8 JUDGE HALLIGAN: But how is that getting the
9 benefit of the bargain, which is what Tindle says is
10 required? Why isn't the benefit of the bargain
11 resentencing before a different judge on the same plea?

12 MR. TUNNEY: I don't believe he's entitled to the
13 benefit of the bargain. The bargain had been rejected by
14 the court as - - -

15 JUDGE CANNATARO: And is that because - - -

16 MR. TUNNEY: - - - as it was entitled to do.

17 JUDGE CANNATARO: Is that because the bargain was
18 flawed at the outset, or is that because it was rejected by
19 the court at some point, much later in the proceedings?

20 MR. TUNNEY: I believe it was both. Clearly - -
21 -

22 JUDGE HALLIGAN: So let's assume we disagreed
23 with you on both of those points, suppose we did.

24 MR. TUNNEY: Um-hum.

25 JUDGE HALLIGAN: Then would the benefit of the

1 bargain still be withdrawal of the plea as opposed to
2 resentencing? Why would that be?

3 MR. TUNNEY: That's a good question and a
4 difficult question. If you disagree - - - if you find that
5 the attempt to withdraw consent by the DA infected - - -

6 JUDGE HALLIGAN: Um-hum.

7 MR. TUNNEY: - - - the court's ultimate sentence
8 in spite of a specific assertion that it did not, then I
9 think I would agree. There would be a - - -

10 CHIEF JUDGE WILSON: So - - - so - - -

11 MR. TUNNEY: - - - it probably would be
12 appropriate to remand for resentencing before a different
13 judge.

14 CHIEF JUDGE WILSON: A particularly troubling
15 thing about this, at least optically, is that the reason
16 that the newly-elected district attorney was disqualified
17 was because he had been counsel for Mr. Flesch.

18 MR. TUNNEY: Correct.

19 CHIEF JUDGE WILSON: And so the trial judge might
20 think - - - who knows what the trial judge thinks - - -
21 thought, I don't know. I can't read his mind. He might
22 think, as his - - - as his defense lawyer, he may know
23 something that I don't know. And when he comes to court
24 and says, actually, I don't want this deal, there's some
25 extra weight to be given to that. That is, in a sense, a

1 breach of the attorney-client privilege. And this, at
2 least from the perspective of the fair administration of
3 justice, it doesn't smell too good.

4 MR. TUNNEY: I won't disagree with that. But the
5 answer, I believe, is - - - lies in the disqualification of
6 that prosecutor, and the commands imposed on trial judges
7 to assess the situation that exists as of the time of
8 sentence and to fashion the appropriate sentence. And if
9 the prior agreement is inconsistent with that conclusion,
10 it's his obligation to reject it, gives the defendant the
11 opportunity to withdraw his plea - - - and - - -

12 JUDGE RIVERA: So your red - - - your red light
13 is on. Let me - - - let me ask you this. Put aside this
14 conflict issue - - -

15 MR. TUNNEY: Um-hum.

16 JUDGE RIVERA: - - - that the district attorney
17 had. Let's just - - - the hypothetical. The prosecutor
18 and defendant enter a plea agreement with a recommended
19 sentence. The judge says, I accept it. You wanted it. He
20 takes the plea, sets a sentencing date. In the interim,
21 the prosecutor realizes that the sentence that they would
22 recommend and that's been agreed to cannot be imposed. It
23 would be an illegal sentence.

24 MR. TUNNEY: Um-hum.

25 JUDGE RIVERA: How should the prosecutor address

1 that scenario? What should the prosecutor do when they
2 appear at sentencing or in advance, you know?

3 MR. TUNNEY: Indicate that and - - -

4 JUDGE RIVERA: To the court.

5 MR. TUNNEY: To the court.

6 JUDGE RIVERA: It's come to our attention that,
7 indeed - -

8 MR. TUNNEY: And - - - and - - -

9 JUDGE RIVERA: - - - the recommended sentence is
10 illegal.

11 MR. TUNNEY: And that there would then be a
12 resulting discussion among the parties and the court to
13 fashion, either, if they're able to fashion an acceptable
14 legal resolution, they do it. If they're not, the
15 defendant's restored to his pre-plea position and the case
16 marches on.

17 CHIEF JUDGE WILSON: Thank you.

18 MR. PORTER: When the district attorney made his
19 initial appearance on February 14th, the judge had not
20 shared any of his views as it related to the sentencing
21 factors. He didn't flag any of the factors he wrote about
22 in his letter on March 29th. And when the district
23 attorney told the court that he did not want this plea
24 agreement to go further, he wanted a harsher sentence, the
25 judge said you had the right to withdraw from the plea

1 agreement. He's disqualified because of the conflict.

2 Next court appearance, March 27th, special
3 prosecutor appears. The judge adhered to his view, stating
4 that, and I quote, the district attorney can change his
5 view on sentencing, unquote.

6 JUDGE RIVERA: Yes, he was mistaken and later
7 realized that he was mistaken. But at that particular
8 appearance, the judge - - - the - - - at least, defense
9 counsel argues that the prosecutor is still willing to move
10 forward with the agreed-upon sentence. The special
11 prosecutor. And the court is considering probation, again,
12 under the mistaken understanding that the judge could
13 impose such a sentence, but is stuck on this question of
14 the defendant's mental health needs, and I'm not sure we
15 can get the Mental Health Court for him to participate in
16 that treatment court. So it doesn't seem that the district
17 attorney's statements influence the judge at all; does that
18 matter?

19 MR. PORTER: No. I respectfully disagree. I
20 think, either, this was the fault of the district attorney,
21 or it's something that the judge perceived on his own.

22 He was - - - he did not misspeak as to the law.
23 I submit that he was just mistaken about the law because
24 when Mr. Flesch was finally sentenced, the judge said that
25 it is appropriate for the district attorney not to withdraw

1 from the plea agreement, but to advocate for a different
2 sentence, which is not the law, obviously.

3 So when all through - - -

4 JUDGE RIVERA: But I'm not referring to that.
5 I'm referring to the point that the judge is working with
6 counsel, at least engaging in a discussion with counsel as
7 to how the judge might actually impose the agreed-upon
8 sentence. It strikes me that the DA's statements had no
9 influence on the court.

10 MR. PORTER: The point I want to make - - -

11 JUDGE RIVERA: Um-hum.

12 MR. PORTER: - - - is that we have here, I
13 submit, a blatant - - -

14 JUDGE RIVERA: Um-hum.

15 MR. PORTER: - - - violation of the plea
16 agreement. And then in all three instances, the court
17 indicating that the district attorney, the prosecutor,
18 either had the right to withdraw from the plea or to
19 advocate for a harsher sentence.

20 JUDGE GARCIA: The difference to me, though,
21 seems here you have an initial illegal sentence, right? So
22 assume, yes, what happened in - - - originally with the
23 disqualified prosecutor is a violation. But now at some
24 point after that, the court realizes I cannot legally
25 sentence this defendant to that sentence. Now, what does

1 the court have to do under your rule?

2 MR. PORTER: The defense counsel answered your
3 question, which is to ask to point out under Collier that
4 Mr. Flesch had a legitimate interest in Shock probation.
5 Substitute the word "Shock" for "straight", you have a
6 lawful sentence. He had time served at that point.

7 JUDGE GARCIA: And then the judge has to accept
8 that at this point or disqualify himself or herself?

9 MR. PORTER: Who - - - who?

10 JUDGE GARCIA: The judge. At that point, does
11 the judge have to say, well, I don't know if that's a good
12 sentence or not, because I already heard this, and it
13 tainted me.

14 MR. PORTER: Well, when he raised this, the judge
15 had already indicated he was going to impose - - - likely
16 impose the enhanced sentence.

17 JUDGE GARCIA: But in your world, what would, in
18 your view, if we hold this way, what would the judge at
19 that point have to do? Just ship this to another judge
20 right there?

21 MR. PORTER: Yes, yes. I think, based on the
22 violation and based on the judge's comments regarding the
23 DA's right to make these arguments or to withdraw from the
24 plea, I think there has to be a do-over.

25 JUDGE RIVERA: But what if the judge - - - what

1 if the judge said, yes, I agree with you, counsel. That
2 would be basically the equivalent to the recommended
3 sentence. But now that I've looked at the presentence
4 report, I've thought about this a little bit more. I've
5 looked at your criminal history. I've decided that that
6 would not be an appropriate sentence. The judge can't do
7 that?

8 MR. PORTER: I think that - - - I think the
9 district attorney's breach tainted the judge. I think - -
10 - I don't think you can separate the two.

11 JUDGE RIVERA: Okay, but you - - - but I thought
12 before you agreed that, let's say, that there was a
13 resentencing, that the next judge, however - - -

14 MR. PORTER: Resentence.

15 JUDGE RIVERA: - - - could reject the probation
16 and decide. I - - I just - - -

17 MR. PORTER: I think it did - - -

18 JUDGE RIVERA: - - - I'm sorry, not - - -

19 MR. PORTER: I think - - -

20 JUDGE RIVERA: - - - the probation, the Shock or
21 something to that effect is - - - is not appropriate.

22 MR. PORTER: I think - - - I think the new judge
23 could do that.

24 And the last point I want to make, the special
25 prosecutor, when Mr. Flesch was sentenced, said he had no



1 objection to five-years' imprisonment. That's a violation
2 of the plea agreement, whether it's straight probation or
3 Shock probation. He was going along with what the court
4 was doing. So from beginning to end there was - - -

5 JUDGE RIVERA: But that was only after the court
6 - - - the special prosecutor initially said he would accept
7 the Shock program. It's only once a judge writes that
8 extensive letter to both counsel, explaining that there is
9 no way he's going to give probation and sets out reasons
10 that - - -

11 MR. PORTER: I understand.

12 JUDGE RIVERA: - - - counsel then says, well, I'm
13 not going to object to whatever you think is appropriate.

14 MR. PORTER: I understand.

15 JUDGE RIVERA: Yeah.

16 MR. PORTER: Thank you.

17 CHIEF JUDGE WILSON: Thank you.

18 (Court is adjourned)

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

I, Dani Lewter, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Flesch (Johnathon T.), No. 40 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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