In the

Supreme Court of the United States

RUDOLPH SANTOBELLO,

Petitioner,

v.

NEW YORK,

Respondent.

No. 70-98

Washington, D. C.
November 15, 1971

Pages 1 thru 34

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The above-entitled matter came on for argument at 1:23 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O, DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR.,Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

IRVING ANOLIK, ESQ.,225 Broadway, New York, New York, 10007, for Petitioner.

DANIEL J. SULLIVAN, ESQ., Assistant District Attorney, Bronx, New York, for Respondent

C O N T E N T S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 98, Santobello against New York.

ORAL ARGUMENT BY IRVING ANOLIK, ESQ.

ON BEHALF OF PETITIONER

MR. ANTOLIK: Mr. Chief Justice, may it please the Court:

This case is here on certiorari, Appellate Division of the Supreme Court, State of New York, which affirmed a judgment of the Supreme Court, Bronx County, convicting Santobello, the Petitioner, of possession of gambling records in the second degree as a misdemeanor upon his plea of guilty.

The issue before this Court is whether or not absent a promise which admittedly was articulated by an Assistant District Attorney to refrain from any recommendation with respect to sentence, Santobello would have pled guilty in the first place. We maintain that is the only issue before this Court.

At the trial level, the Executive Assistant, Mr. Rotker, when asked whether or not a promise had been articulated, that is, when he was asked before the sentencing judge, said that the minutes of the plea did not reveal any such promise, although he had been personally present at the plea. Commendably, Mr. Sullivan, who is Chief of the Appeals Bureau of that Office, inquired of Assistant District Attorney

Greenfield, who had been also present at the plea of guilty with Mr. Rotker, he notified Mr. Sullivan that such a promise had indeed been made, and that in the briefs before this Court, as they were before the Appellate Division of the Supreme Court of New York, there is a confession that the promise had in fact been made and broken.

We respectfully maintain that had Mr. Rotker, the Executive Assistant, told Justice Gellinoff, who was the sentencing judge in this case, that the promise in fact had been made, one, Justice Gellinoff probably would have permitted withdrawal of the plea of guilty; or two, certainly under the American Bar Association standards, the District Attorney would have been bound to have assisted the defendant in withdrawing his plea of guilty. Instead, the impression was left with Justice Gellinoff that no such promise had been made.

The rectification of appeal was small solace to Santobello.

Now in the course of the proceedings--

Q Now the promise was that the prosecutor would make no recommendation as to sentence?

MR. ANOLIK: That is correct, Mr. Justice Stewart.

Q That was the length and breadth of it?

MR. ANOLIK:That is correct, and we maintain that that has a substantial influence, contrary to my illustrious

colleague here, we maintain that is a substantial influence upon a sentencing in court. In their briefs they maintain that judges are never influenced by recommendations or lack of recommendations of prosecutors.

Q But this particular charge said he wasn't influenced, didn't it?

MR. ANOLIK: That is quite true, Mr. Justice Stewart, he said that; but we maintain that what he said and the consequences of what he did are quite incompatible. We maintain that in White v. Gaffney, for example, the Tenth Circuit case which is adverted to, that there too the judge said he was not the least bit influenced. Since my colleague here went dehors the record, so to speak, in saying judges are never influenced, and incidentally he is my successor as Chief of the Appeals Bureau, in that office, I think that I can ask this Court to take judicial notice of the fact that judges are frequently influenced by what prosecutors say, so to say that it was de minimis or that the judge merely by articulating that he was not influenced, is of no solace because it begs the question. The issue here is not whether the sentence was fair; that's not the issue at all. But that seems to be what the Respondent is maintaining, that the sentence was fair. It was the maximum permitted under the law, and perhaps it was fair, but that is not the issue.

Q The issue is that when the prosecutor gives a promise of a quid pro quo for a plea of guilty, due process requires that he tell the court.

MR. ANOLIK: That is absolutely correct, Justice Stewart, and that is our position.

Now in the course of --

Q What is the remedy for that, then? Would the remedy be to send it back or under resentencing in circumstances where there was no recommendation; in other words, the promise fulfilled?

MR. ANOLIK: No, the remedy would be to permit the--

Q Well, why wouldn't that be delivery of the consideration of promise?

MR. ANOLIK: Well, it conceivably could be the delivery of the promise except that now, because of the notoriety which this case has achieved, we maintain it would be of no use. This case is extremely well known now in Bronx County.

Q What's the reason for the notoriety? What's the reason that the judge cannot be assumed to make a decision independently?

MR. ANOLIK: Well, a judge certainly can be assumed to make a decision independently. Justice Gellinoff gave no articulation of a promise at all had taken place. Quite possibly he might have given a year's sentence; that is entirely

possible. That is what he said at the time. However, that is merely speculation.

Q I thought he wanted to withdraw his plea?

MR. ANOLIK: He does want to withdraw his plea. That is exactly what he wants to do, Justice.

Q Then there would be a trial on the merits.

MR.ANOLIK: That's correct. That is the only remedy we're seeking here, is the right to withdraw his plea of guilty and to plead anew.

Q That doesn't necessarily mean that is the remedy that you would get.

MR. ANOLIK: That I realize, but by the same token, it would be the only fair remedy, because the fact remains that we are now trying to undo what has been done wrongly.

Q It's a question of whether you get specific performance or rescission.

MR. ANOLIK: That's correct, and we maintain that where there has been a misrepresentation, even if it was without malicious intent, and we're not alleging maliciousness here, even if it were without malicious intent, the only remedy is to permit the withdrawal of the plea of guilty.

Q That is rescission of the contract.

MR. ANOLIK: In effect, yes.

Q The Chief Justice was expressing the tentative view in his question that maybe what you wanted was specific

performance of the contract, that the prosecutor would make no recommendation.

MR. ANOLIK: And I recognize the possibility of that interpretation, but we are not asking for that. We feel under the circumstances of this case it would be unfair because you could not undo the publicity and notoriety that has taken place in this case.

Q Would it be acceptable to the reinstatement of the dismissed felony counts?

MR. ANOLIK: Oh, by all means, reinstatement of the felony counts would certainly follow, and that he would have to go to trial and face the possibility of a number of years in jail. We well recognize that. I communicated this to the Petitioner, and he's willing to take his chances on that.

Mr. Justice Blackmun, there's no question about that. He would have to face trial on the original felony counts.

Q I wanted to be sure; I didn't get it from your brief.

MR. ANOLIK: I want to make that quite sure that I am not asking that he be permitted to go to trial on a misdemeanor. That would be totally unfair, and I'm not trying to advocate such a procedure at all, Justice Blackmun.

The prosecutor in his brief, the Respondent's brief, indicates that during the course of these proceedings, and perhaps I should take one moment just to give you the

chronology of what occurred here. The defendant here had originally been indicted for two felonies involving gambling. He had made a motion to suppress evidence returnable June 17, 1969. On June 16, 1969, the day before the return day of that motion, he interposed a plea of guilty to the misdemeanor before Justice Marks. On the 17th, the motion to suppress evidence was apparently adjourned without any disposition. A lawyer by the name of Fruchtman represented the defendant during these times.

Subsequently, I believe it was September or October 1969, a different lawyer by the name of Aronstein was retained by the Petitioner herein, and he then apparently tried to revive the quiescent or dormant motion to suppress, and in the course of doing that he indicated that this Petitioner was unaware of certain rights which apparently was an incorrect statement. Now, if there had been an issue of credibility as to whether or not a promise had been made, note if there had not been a confession, but that a promise had been made and broken, then this factor would be significant in judging the credibility of the Petitioner, and we maintain that bringing this issue up is irrelevant completely, because it begs the question here; namely, that whether or not the credibility of the Petitioner is good or bad as to a collateral issue, the fact remains that by confession this issue was crystallized, namely, that the promise was made and broken. So to that

extent we just wish to distinguish that from the brief of the Respondent.

We also maintain that in this case, the District Attorney says well, this defendant has never indicated that he was innocent. Well, in our brief of course we say he is so maintaining, but if we look at what he was trying to do, and I think Mr. Justice Blackmun put his finger on it, here is a defendant who is asking that he be put back in status quo ante, that he be permitted to withdraw his plea of guilty and go to trial on the felonies. Obviously, if he were guilty and felt that he would certainly be convicted, I doubt that he would seek such a remedy, so I think that certainly circumstantially and inferentially he clearly indicates and has always indicated that he is innocent, and I think that too is an irrelevant aspect of this case because the Petitioner has made no doubt whatsoever as to what he is seeking here and no more and no less, of course.

At the time of the sentencing, and I might point out most respectfully to your Honors that the sentencing minutes begin at page 21-A of the Joint Appendix. Inadvertently it seems that the printer referred to it, continuing calling it plea. The sentence begins at 21-A of the Joint Appendix.

Now at the time of the sentencing here, which incidentally came on before a different justice than the justice

who accepted the plea of guilty. Justice Marks, as I had indicated, accepted the plea of guilty. He had retired at the end of 1969, and he then apparently was superseded in the capacity of sentencing judge, anyway, by Justice Gellinoff. The District Attorney argues in his brief, and there is no basis in the record for this incidentally, but he contends in his brief that Santobello received the functional equivalency of his promise. Now, I frankly fail to follow that line of reasoning, and I believe that it is a casuistic line of reasoning because there was no functional equivalency here. The Respondent says after all, Justice Gellinoff said, ipse dixit that he did not really pay any attention to the prosecutor.

Now we have to bear in mind that the prosecutor here, who was the Executive Assistant, I think second or third in command of that office, came in and made an impassioned plea for the maximum possible sentence under the law, adverting to matters clearly dehors the record, conceding in the record that he did not know what the probation report contained, linking this defendant with organized crime--whether or not there is such a thing in the probation report, I don't know, because I haven't seen it--

Q Is that all in the appendix?

MR. ANOLIK: Oh, yes. Yes.

Q It ends at 21?

MR. ANOLIK: Yes, but page 33, 34 and 35, I think you will find that, Mr. Chief Justice.

I think that that is very significant because, after all, we are not just dealing with a simple articulation of a statement. Page 30-A, the actual words "arraign" and "sentence" appear, so 21 and 30-A are just preliminaries, although it's part of the sentencing minutes, but 30-A begins the actually meat, so to speak, of the sentencing minutes, and I would point out, Mr. Chief Justice, that Mr. Rotker begins at page 32-A, and in the course of that, as I say, he brings in a number of things which were completely irrelevant, and I think the fact that he adverts to organized crime, adverts to the fact that this man had allegedly--or not allegedly, but had previously been convicted of a murder, which incidentally, as I understand it from knowledge of the co-defendant in that same case, a fellow by the name of Joseph Corbo(phonetic), the United States Court of Appeals had declared that a confession in the Corbo case had been involuntarily obtained, and it is my understanding that Santobello also reaped the benefit of that because were it not for that, he'd still be in jail. He was apparently given time served and got out after 11 or 12 years of that sentence. So he had previously been the victim of a coerced confession. It's true that a plea of guilty may not be an extra-judicial confession, but it is nonetheless an ultimate confession of

guilt, and when the prosecutor says that he was sophisticated, he may be correct to the extent that he knew what could happen to him because he had been victimized as the victim of a coerced confession, so we maintain that the all too often function of a prosecutor who perhaps sometimes is carried away by his zeal, of bringing in completely irrelevant inflammatory and prejudicial matter, to which the hapless defendant has no right to confront witnesses, can not come forward and say, "What's the basis of these allegations?" They are just articulated at the time of sentence, which was done here, and to say that a judge can sit by completely without being affected by that I say is a mental gymnastic which no judge in the world or very few judges could possibly perform, and just to paraphrase Judge Hand on that, and we maintain that is an important factor in this case.

Now in addition to the foregoing, the District Attorney in arguing further on his conception of functional equivalency states that we really should look into the issue of whether or not this man received a fair sentence, and with all due respect to the Respondent, I think that completely misses the point here. We're dealing now with a concept of whether or not the representation of the District Attorney, a public prosecutor, whether or not it is malicious or innocent, if he makes a representation, does he have the right to break that representation, if it in fact

induced a plea of guilty?

Justice Gellinoff permitted no hearing on this issue, though Mr.Aronstein said the trial attorney who was present at that time, was prepared to come forward and testify under oath that such a promise was made, and you must bear in mind, and I give the benefit of the doubt to Executive Assistant Rotker, you must bear in mind that at that time, Mr. Rotker made no inquiry of anyone as to whether a promise was, in fact, made. He merely said that there is nothing in the plea minutes to indicate it was made. Now that, frankly, from an experienced prosecutor is a very amazing statement, and perhaps this Court should be oriented to the extent of knowing what goes on at a plea bargaining session, which perhaps you know far better than myself, but at a plea bargaining session, unfortunately, there is a certain charade that is put on, and I don't think that my colleague would contest this; namely, that outside the presence of the sentencing judge, the prosecutor and the defense counsel get together and perhaps ask each other, well, how can we resolve this case? I recognize that this Court has said that plea bargaining was perfectly proper, and I'm not condemning it, but the point is that they decide that this case can be resolved by offering a plea of guilty to a misdemeanor which was done in this case.

But no attorney worth his salt, who is experienced

in the criminal field, and Mr. Aronstein at that time was a man of about seventy-five, who had been practicing criminal law for many, many years--no attorney worth his salt would accept a plea bargain without at least some conception as to what the possible sentence might be.

Now I might say that Justice Marks had a reputation of being a fairly lenient sentencer. Justice Gellinoff has a contrary reputation. The representation was elicited from Assistant District Attorney Greenfield that he would not in any way put the judge, so to speak, on a spot; that he would refrain from making any representation whatsoever or recommendation with respect to sentence, and in that context, this was communicated to the Petitioner, and that is the reason that he pled guilty.

Now you may wonder why it was that this was not put on the record. For some reason it is almost never put on the record. I might point out that in the allocution at the time of plea--not sentence, now, but plea--which is at pages 19 and 20 particularly of the Joint Appendix, for some reason and perhaps for good reason, the judge, Justice Marks, did not ask the Petitioner, "Was a promise made to you?" which is very unusual in New York, because that is almost always asked. In this case it was not asked. So we may well infer that even the judge, perhaps, was aware of the fact that a promise had been made. Now, if that were the case, of course

it would merely exacerbate the situation, but it is quite contrary to usual practice not to specifically inquire of a defendant who was taking a plea, "Were any promises made to you? Were any threats made to you?" In this case, neither of those two questions were ever put to Santobello.

The ABA standards, as I have adverted to already, clearly indicate what the responsibilities of the prosecutor are. Those ABA standards, the American Bar Association standards, were clearly violated. Again, I hasten to add, your Honors, I am not alleging malicious violation, because I have no reason to believe that it's malicious, particularly in view of Mr. Sullivan's very commendable admission that the promises were made, but I do think the damage has been done, and the only remedy of course, we would maintain, would be the remedy of permitting a withdrawal of the plea of guilty. Let him go to trial on the felonies, and if he's convicted of the felonies and serves many years, well, that's his problem. He has been made well aware of these facts.

Q This case began with the two felony charges that he was indicted on?

MR. ANOLIK: That's correct.

Q Then as a result of the plea bargain, he pleaded guilty to one misdemeanor?

MR. ANOLIK: That is correct.

Q Were the felony indictments dismissed then?

MR. ANOLIK: No, they were not. The procedure that would be followed when a plea of guilty is permitted to be withdrawn, is that the felony indictments would automatically be reinstated. He would have to go to trial on the felony indictments. I'm quite sure that my colleague, Mr. Sullivan, would not for a moment deny that fact.

Q And there would be no double jeopardy?

MR.ANOLIK: There would be no double jeopardy in my opinion, and as a matter of fact, I think that his bringing this proceeding to a withdrawal of the plea would be a waiver of such defense. Certainly I would not be a party to such a defense.

Q There's no question, as I get it, that the felony indictments are still outstanding?

MR. ANOLIK: No question about it, if there should be a reversal permitting him to re-plead, I don't think there is any question about that.

Q Looking at page 35 of the Appendix where the sentencing judge said in response to Mr. Aronstein's calling attention to the agreement which had not been fulfilled, he said, "I am not at all influenced by what the District Attorney says. It doesn't make a particle of difference what the District Attorney says he will do or doesn't do. I have here"--and then he goes on reading apparently from the presentence report, indicating that this man, as he

put it, was a professional criminal, a recidivist, and that the only way of halting his criminal activities was to put him away. That's the language that he used.

Q Now, in the face of that categorical language, you insist, as I understand it, that the judge would not have given this same sentence if the District Attorney had been absolutely silent?

MR. ANOLIK: Well, Chief Justice, I would say this. Perhaps he would have, perhaps he would not have--I don't know.

Q Who is the best judge of that, of those available, who can speak to it?

MR. ANOLIK: The judge himself, of course.

Q Now he didn't have much of a range here to work in, did he?

MR. ANOLIK: Yes, he did. He could have given him a suspended sentence, or anything up to a year.

Q I'm speaking of the difference in the range where you have no sentence to one year, or if you had one year to 20 years, that's the kind of range I'm talking about.

MR. ANOLIK: That's true. Well, I think, though, Chief Justice, that you are addressing yourself to the fairness of the sentence, and we --

Q I'm addressing myself to the whole problem.

MR. ANOLIK: Yes, I realize that.

Q I can understand you as an advocate wanting to compartmentize.

MR. ANOLIK: I'm not trying to avoid the question, believe me. I fully recognize the problem that you are posing, Mr. Chief Justice, but it would appear to me that this would go to the very heart of the bargaining process because in effect it would be establishing the precedent that a prosecutor could violate a promise, and as long as the sentencing judge says, "Well, it's true he violated a promise, but I'm not influenced by it anyway; I'm going to give him this maximum sentence anyway," I think that would go to the very gut of the plea bargaining process and render it a mockery. No defendant would feel safe in relying upon the promise of a prosecutor again, because of the fact he would know that the prosecutor could deliberately violate it, knowing that if he were lucky enough to put him before a tough judge, and bear in mind in this situation, the prosecutor picks the judge. When a judge retires, the calendar procedure in New York County and I believe it's the same in Bronx County, is that the judges are selected by the prosecutor; they are not automatically picked out of the lot, as are cases in the Southern District of New York. So it's quite something when a prosecutor can pick out a judge who he knows is tough, and that's what happened in this case, so it's quite something to consider.

MR. CHIEF JUSTICE BURGER: Mr. Sullivan.

ORAL ARGUMENT OF DANIEL J. SULLIVAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. SULLIVAN: Mr. Chief Justice and may it please the Court:

I know of course that this tribunal will look in my briefs for a statement of the legal position I have taken. As yet, I haven't heard it articulated. Perhaps more importantly, I haven't really heard much that resembles factually the case of Santobello against New York. I propose to go into that specific case.

Now to begin with, counsel has seemed to have some difficulty in focusing on just what the legal question is here. While we are not accused of trying to overreach in this case, the fact is that this record will demonstrate we don't have a prosecutor misconduct case at all. There is no proof on this record of any bad faith on our part. It has been disclosed to the court that when time permitted, we became aware of it, we disclosed the true fact here.

Now the legal question that I do see here is one of reviewing the exercise of judicial discretion; in other words, the judge at the sentencing level being asked permission to withdraw the plea, he acts vis-a-vis the situation, finding out now before he sentences the Petitioner, that perhaps such a promise has been made. Now I'll come back, hopefully, to that in a moment.

There's more in this record than even the sentencing judge was aware of. Of course I am aware of the powers of this Court to review the record in its entirety, and I submit to your Honors that if you look at this record, one thing becomes crystal clear, that this whole claim by the Petitioner can be fairly branded a sham. The fact of the matter is that there was never a viable sentence agreement, if we can analogize contract law; in other words, Santobello just never put any stock in this representation. You will recall how it came up. One Assistant District Attorney told his first counsel that he, the prosecutor, would remain taciturn at the time of sentence, Petitioner is given a misdemeanor plea, go ahead into the future, a different assistant is in the park, and he asks for a maximum sentence, which in this case was a year.

Now in support of my claim that I say the record demonstrates this, which I think can fairly be called a sham claim, I call the Court's attention to several things. From Santobello's perspective, he himself of course, with his prior murder conviction, was no greenhorn in the courts. He knew that certainly judges control sentences, and there was no judge privy to any of the promises made here. I have spoken already about the limited scope, and the nature of the promise itself I think has relevance here, when a man hopes a prosecutor remains taciturn at the time of sentence, he

isn't really opting for much in this situation. It's more, I would suggest, an expectancy or hope, than a promise, and I refer in my brief to several cases on that score.

Q Mr. Sullivan, where in the appendix to the record can we find the words of this promise, and the circumstances under which it was made, or does it all rest now just simply on a concession of view with your colleagues?

MR. SULLIVAN: The claim was made in the appellate division. What happened simply is that the fellow who was named in the record asked him if he had made this promise, and he said yes.

Q And that's all we have is just your concession? We don't know when, where or how?

MR. SULLIVAN: No, but I am willing to concede that the promise was made before the man pleaded. I know that to be a fact, and I think in this area I can certainly make the concession.

In short, the way I got it, counsel said, "Are you going to ask for anything at the time of sentencing," and the Assistant said, "No, I won't." That's Assistant A and then of course B comes into the picture at the actual time of sentence.

Q Do we even have that much in writing anywhere in the record?

MR. SULLIVAN: No, we do not, Mr. Justice Stewart.

No.

Q It is just your concession before the courts and here?

MR. SULLIVAN: Right, and the problem there was in a review of the record, whether we should m ake a concession or whether the hard balance, at least in our view we felt the man had not been overreached and thus proceeded. That's on 34-a of the Appellant's appendix.

Now, while characterizing the Petitioner here, I think I may fairly say on this record that he was engaged in judge shopping here. You've heard reference made to Justice Marks being lenient in his sentences and he had but one intent, this Petitioner, to stay out of jail. All right? I suggest to the Court perhaps that's the same kind of thread running through this case right up to now, despite the bravado respecting having to face future charges. Who knows what the future will bring?

But apropos of what I'm saying here that this was judge shopping and an effort to stay out of jail, you'll find that the record in the case, that Santobello's first option in this case was to move to suppress the tangible evidence that had been found on his person. Now he prefaced that several months until Justice Marks who usually is in New York County was in the Bronx; he timed it. As it happened, he takes a plea before Justice Marks. Now he withdrew

the motion. We never had any claim of innocence which has a very important bearing under the laws of New York State, because if a man makes such a claim, the actual pronouncement of sentence pretty much is you have to do something about it, let him vacate, or at least have a hearing.

So now, I say that's an indication he picked his judge and it looked like it was going along all right. The judge ordered a probation report. Now before Justice Marks with no preliminaries, no reporter, no preliminaries Justice Marks gets up and says for the record one line, "In view of the probation report, I'm putting this case over." I say that's an augury of things to come, that a justice, armed with a full probation report, now knows the background and Santobello knows the background. In short, there is very little hope even before Justice Marks, so what happens? A week goes by, we have a change in the defense lawyers, in comes Santobello the Petitioner with a battery of motions now, one of which is to withdraw the plea of guilty. In it among other things he swears in an affidavit that he didn't know he had a right to move to suppress, the fact being he already put in a sworn affidavit abandoning that claim.

We submit to the Court as evidence of the conduct of this man, that can be taken as prima facie evidence of perjury and more important in this context, the fact that what

was happening here was Santobello the Petitioner was trying to dupe the courts in New York State, and this case really is the other way around.

Q Trying to do what?

MR. SULLIVAN: Dupe. So I am suggesting to this Court and on this record that you may conclude that you have a _____ in short coming in here, looking for every advantage, not at all concerned with a claim of innocence which is nowhere in this case--I hear it now for the first time--and all he wants to do is walk away. What's avoiding incarceration? What's another mark against his particular background?

Q How much of the sentence if any has he served?

MR. SULLIVAN: Oh, I think a matter of days he'd get out on post-bail application, Mr. Chief Justice.

Now again, as I say, it's tangential to the case, that particular affidavit which is fairly susceptible to characterization as perjurious has somehow disappeared from the files of the New York Supreme Court. In any event, now, he reactivates his suppression motion in conjunction with this effort to withdraw his plea. Additionally, as I say, he doesn't trigger the New York law by making a claim of innocence. At that time we offered him a hearing, particularly as we put in our own opposing papers, to challenge the assertion about lack of knowledge of constitutional right.

However, Judge Marks decided that we didn't need that hearing and he put the case over.

Now, it's true it came on before Justice Gellinoff and on this record--I don't know myself and this record won't tell you how it got before him--characterization is that he's a tough sentencing judge. I don't see that there is any way that that can be determined on this record. But what can be --

Q Well, no judge could have been much tougher under this plea of guilty. He gave him the maximum sentence.

MR. SULLIVAN: He did, Mr. Justice Stewart, but we come again to this probation report which is before the court, and I am going to suggest shortly that really there was no alternative, and that Santobello knew this.

Now the sentencing proceeding itself was marked by an effort by the Attorney Aronstein to stall again, keep this man out of jail. I think you'll find it rather clear in the record. He starts mouthing some things about prior motions, about some comment that he didn't know what had happened, and there had been a ruling on it, all bogged down in that. I think the fair characterization of the episode is that this is a last ditch stand to stay out of jail.

Now never was there a formal motion. What happened was this: the man was sentenced, Santobello; Counsel Aronstein then brought up the subject of this prior promise.

Events happened very quickly now. The prosecutor said something about it not being reflected in the minutes. The prosecution or the defense, for that matter, really didn't get an opportunity to dwell on the subject or go into evidence, because the judge took over, so there was no opportunity to do any more, even if we wanted to. What the judge said, in essence, was promise or not, I wouldn't be affected because I've got an overriding probation report. I would have no alternative. There was silence, and you asked for the maximum. There is only one thing I can do. There is a quoted portion in the record of the probation report which is a plea to remove this man from the streets, and this court now has the full probation report, and of course would be in a better position than I to make an analysis of the propriety of that decision which, as I see it, is the question in this case. Usually this kind of thing comes up in a collateral post-conviction application. What happened here of course is that the sentencing judge was apprised of it.

Now there is a Tenth Circuit case that Mr. Anolik referred to, in which Kansas went along much the way I have been speaking, and the Tenth Circuit came into judgment, on reasoning I have some difficulty coping with. However, Kansas's approach was the matter of exercise of judicial discretion. The case involved, however, a light sentence without hope of parole, and while we'll never know, the point

is that the case was vacated, and the reason isn't clear. They talk in terms of the effectiveness of the promise. I don't see, really, what difference that would make because had we gone ahead and remained taciturn and he got no benefit from it hypothetically, then of course he would have gotten all that he opted for, bargained for, and that's what I say essentially that's what happened here. The judge is not privy to it; he's apprised of what happened. It was the judge's position there was nothing else he could do about it.

Now I think the biggest difference between this case and White and Gaffney and all, is there's no proof of reliance whatsoever in this case. As I said before, it has been suggested here that in reliance upon this assertion, promise to remain taciturn, that Santobello took the plea. You don't find that in the record at all, and if we were even to assume, this Court may exercise its powers over the fact that if Santobello were called to hearing--and I don't see that it would be necessary here--we assume he would testify that he relied on it--well, whether that is a fact or not, you have enough record evidence here, taking a broader view of the record, to reject that claim.

In constitutional terms of the narrower case, if you reject that argument, I suggest to your Honors that he did in fact get what I call the functional equivalency. Certainly the man's going to promise something, we have to live

up, we wouldn't be here--

Q Mr. Sullivan, you say on the presentence report, when we study it, we'll then know nothing else could be done but an actual sentence?

MR. SULLIVAN: Right, Mr. Justice Marshall, I say that --

Q Well, can I assume that the District Attorney had the same feeling?

MR. SULLIVAN: I think he would have gone in--

Q Why did he take his time arguing?

MR. SULLIVAN: I'm sorry, Mr. Justice?

Q Why did he make the statement that he had to make at the sentencing if he was so sure there was nothing else that Judge Marks could do but give him the maximum? He could have mooted this whole thing out, couldn't he?

MR. SULLIVAN: Mr. Justice Marshall, I think he could. He could have stopped, he could have checked it. I read this record, and there's no indication certainly that he knew what the other fellow had done, you see. As I say, it was very quick. The whole thing is a line or two in the record, and it's over.

Q Well, we can look at this presentence report which I've looked at, and you say we're all aware that there was nothing else he could do. I don't see why you have a presentation at all at the sentencing.

MR. SULLIVAN: Mr. Justice Marshall, I don't know either. I think myself that that would have been the case, but the focusing on what I believe to be the legal question--

Q What you are trying to do is find out what was in the state's attorney's mind, what was in the judge's mind--

MR. SULLIVAN: It's true this is not the conventional type record that comes up, but we are trying, I submit respectfully, to assess the exercise of discretion by the sentencing judge. That's what is reviewable here, and what I do know by record indications here, I respectfully submit that the exercise of that discretion cannot be faulted and in this context that the judge's going ahead in this fashion did not deprive the Petitioner of his constitutional rights.

Q Mr. Sullivan, if this case should go back, do you share opposing counsel's assurance that the felony charges would be reinstated?

MR. SULLIVAN: Mr. Justice Blackmun, I feel they will, yes.

Q] There's no limitations barrier or double jeopardy aspect that you know of?

MR. SULLIVAN: No, Mr. Justice. We've had cases on that. That wouldn't be so. May I suggest, Mr. Justice Blackmun, that you have virtually all you'd ever get in a

hearing of any kind presently in the record. All I can imagine would be added would be an assertion by Santobello that he relied upon this representation, and I just can't imagine what else would come up because constitutionally speaking, in my view at least, it makes no difference what the prosecutorial intendent was, and I say yes, a promise was not kept in this case, but in this record Santobello against New York, one may fairly conclude that that failure to literally comply, after all they mention it before sentence, would be an innocuous sort of thing in constitutional terms and the harmless error doctrine that we apply elsewhere would have a bearing here. In short, Santobello got what he bargained for. There are no guarantees in this kind of situation that you will stay out of jail.

In sum, then, I submit nothing in this case violates the declarations of the Court or anyone's norms of ethics respecting what happened to Santobello, and that this case can be affirmed.

Thank you.

REBUTTAL ARGUMENT BY IRVING ANOLIK, ESQ.

ON BEHALF OF THE PETITIONER

MR. ANOLIK: Mr. Chief Justice--

Q Let me ask you this before you start, Mr. Anolik. Would you suggest that if this case hypothetically were remanded for resentencing with fulfillment of the promise

before a different judge, that that new judge could not approach the matter with an open mind?

MR. ANOLIK: I would say that he could not, for two reasons.

Q It doesn't make any difference who he is?

MR. ANOLIK: Well, as I say, theoretically--

Q Is that your point?

MR. ANOLIK: Well, theoretically it is possible, Chief Justice, but I would say the fact is that the promise was made and broken, and this defendant relied upon the promise. Now under those circumstances, it would establish a very dangerous precedent to the plea bargaining system; namely, that a prosecutor--

Q That's something that we are capable of evaluating.

MR. ANOLIK: Oh, of course.

Q I'm just asking the direct question, I take it it's your position that no matter who the judge is, he can't fairly sentence this man just on the basis of the record without any recommendation?

MR. ANOLIK: I would say it is extremely difficult, Mr. Chief Justice, because I know of my own experiences in cases of a great deal of notoriety in New York, you maybe would have to get some out-of-state judge or something, and I think that in itself would be almost like a red flag, bringing in a judge from a different area. We maintain that

the only remedy here is to permit him to withdraw his plea and re-plead.

We also question whether or not the prosecutor here, if he wanted to be fair, once he found out this was coming to court, as the American Bar Association Standard 4.3 requires, enjoin in a motion to permit him to withdraw? And indeed the fact is that a motion to suppress if made is given great import. Under New York Law, 813 c of the Code of Court Procedure, a motion to suppress may be made consistently with the plea of guilty. It survives the plea of guilty, and in fact many times that is the way that a motion to suppress is crystallized, so there's nothing inconsistent whatsoever in having made a motion to suppress.

Q What would the maximum sentence be if your client were found guilty or pleaded guilty to the two original felonies?

MR. ANOLIK: Well, consecutive or concurrent punishment?

Q Maximum.

MR. ANOLIK: I believe it would be eight years altogether. It would be eight years, so it would be the theoretical maximum.

Q Four on each count?

MR. ANOLIK: Yes, and I think that certainly if he were completely guilty, he'd be out of his mind to be seeking

the relief which he has directed me to seek, so I think he was well aware of the exposure he has here, and nonetheless he has asked me to bring this petition on for him on appellate counsel, as you can appreciate, and we urgently ask this be done because of the fairness in this case and because of the damage it would do to the entire plea bargaining process, if this is permitted to stand, and we think it's the only fair thing to do under the circumstances, particularly in view of the commendable admission that the promise was made and broken.

At page 34-a by the way, of the record, the attorney specifically said, now if what Mr. Fruchtman--who is the trial lawyer--says is true, then the plea was obtained by fraud and deception by the District Attorney, if it was obtained on the express promise that the District Attorney would make no recommendations. It is right in the record, Mr. Justice Stewart, the fact that it was called to the attention of the court.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Anolik. Thank you, Mr. Sullivan.

The case is submitted.

(Whereupon, at 2:11 o'clock, p.m. the case was submitted.)