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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 11

JUAN M. SILVA SANTOS,

Appellant.

20 Eagle Street
Albany, New York
January 9, 2025

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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1 CHIEF JUDGE WILSON: Good afternoon, everyone.
2 The first case on today's calendar is People v. Silva
3 Santos. Counsel?

4 MS. VASILY: Good afternoon. May it please the
5 court. Elizabeth Vasily, on behalf of Appellant, Mr. Juan
6 Silva Santos. I'd like to reserve two minutes for
7 rebuttal.

8 CHIEF JUDGE WILSON: Yes.

9 MS. VASILY: This court should strike the waiver
10 of the Shock program because it was an illegal part of the
11 sentence not authorized by statute. It permeated into the
12 - - -

13 JUDGE TROUTMAN: How is the Shock waiver in this
14 instance an illegal part of the sentence when there was no
15 order by the court?

16 MS. VASILY: It was in the court's order, Your
17 Honor. On the sentence and commitment order it says - - -

18 JUDGE TROUTMAN: Is everything in a sentencing
19 commitment a part of the sentence?

20 MS. VASILY: It is, Your Honor. But in - - -

21 JUDGE TROUTMAN: Every single - - - in every
22 instance, any notation written is a part of the sentence?
23 Is that your argument here?

24 MS. VASILY: Yes, Your Honor. Because the
25 sentencing commitment order has the sentence, the length,

1 any conditions of that sentence.

2 JUDGE TROUTMAN: And here, what did the court
3 order?

4 MS. VASILY: The court ordered waiver of Shock
5 participation, which - - -

6 JUDGE TROUTMAN: Did the court order waiver, or
7 did it give information that a waiver had been executed?
8 Is - - - and is there a difference?

9 MS. VASILY: It ordered the waiver because that
10 is what it said on the sentencing commitment sheet. And it
11 was - - -

12 JUDGE TROUTMAN: It said waiver - - - it said
13 Shock waived or ordered waived. Is that what you're
14 saying?

15 MS. VASILY: It says waiver of Shock
16 participation on the sentencing commitment sheet. And it's
17 also - - - orally, the court said that as well at
18 sentencing.

19 JUDGE TROUTMAN: What - - - there are two avenues
20 for participation in Shock; is that correct?

21 MS. VASILY: That's correct.

22 JUDGE TROUTMAN: The court itself can order that
23 the defendant be able to participate, correct?

24 MS. VASILY: Yes, Your Honor.

25 JUDGE TROUTMAN: And then there's another avenue

1 that it can be directed through DOCCS?

2 MS. VASILY: Yes, Your Honor.

3 JUDGE TROUTMAN: And so are you arguing that the
4 court both ordered - - - exercised its own power, that the
5 defendant be denied Shock and then, somehow, prohibited
6 DOCCS to consider same?

7 MS. VASILY: So as Your Honor stated, there is
8 court-ordered Shock. And that's not really at issue here -
9 - -

10 JUDGE TROUTMAN: Okay.

11 MS. VASILY: - - - because the court did not
12 order Shock. What is at issue here is that the court
13 ordered the Department of Corrections to not put Mr. Silva
14 into the program later on. And that's where we get into
15 territory that is illegal, because the courts cannot tell
16 the Department of Corrections what they can and can't do.

17 JUDGE TROUTMAN: But you say that because it's on
18 the commitment?

19 MS. VASILY: It's on the commitment, Your Honor.
20 It was part of the sentencing.

21 JUDGE TROUTMAN: It's on the commitment that the
22 waiver, in fact, exists?

23 MS. VASILY: Yes, Your Honor.

24 JUDGE TROUTMAN: And then, you say that that
25 transposes it into an order that he not be able to

1 participate?

2 MS. VASILY: That's correct, Your Honor.

3 JUDGE TROUTMAN: Okay.

4 JUDGE SINGAS: And how does your position square
5 with Corrections Law, which says that Shock is a privilege
6 and not a right?

7 MS. VASILY: The Corrections Law - - - the
8 directive, Your Honor?

9 JUDGE SINGAS: Yeah.

10 MS. VASILY: So DOCCS has adapted that directive
11 in response to these waivers, but that is illegal and
12 that's improper. DOCCS is clearly responding to these
13 orders that it received on the sentence and commitment
14 orders, that say waiver of Shock. So in response, they are
15 conforming - - -

16 JUDGE TROUTMAN: Can DOCCS, irrespective of the
17 existence of the waiver, order participation in Shock, if
18 the defendant made an application?

19 MS. VASILY: Yes. DOCCS can make its own
20 decisions.

21 JUDGE TROUTMAN: And was an application made here
22 that was - - - and then thereafter denied by DOCCS?

23 MS. VASILY: It was not, Your Honor, because of
24 the waiver in this case. So the waiver prohibited Mr.
25 Silva to apply for the program. And because of that, he

1 did not apply for the program. And because of that, DOCCS
2 was unable to - - -

3 JUDGE TROUTMAN: Was that a prohibition by the
4 court or the claimed waiver by him?

5 MS. VASILY: It's a prohibition by the court,
6 Your Honor.

7 JUDGE TROUTMAN: Okay.

8 JUDGE SINGAS: I'm looking at 867 sub 5 where it
9 says, "Participation in the Shock incarceration program
10 shall be a privilege."

11 MS. VASILY: Yes, Your Honor, it is certainly a
12 privilege. Not everybody gets to be in the Shock program.
13 There's a very rigorous selection process. It's a rigorous
14 application process.

15 JUDGE SINGAS: Right. So why isn't that just
16 part of the prosecution's offer that was accepted as part
17 of any plea bargain negotiation?

18 MS. VASILY: Because here it became part of the
19 sentence, Your Honor. And because it's part of the
20 sentence, that was improper. It has to be authorized by a
21 statute. That's what - - - that's how it works here.

22 JUDGE SINGAS: Well, you say it's part of the
23 sentence, but the judge didn't sentence him not to
24 participate in Shock? The parties agreed that there was a
25 plea offer. He was looking at an A-1 or an A-2, and they

1 said, we're offering you nine years, and you don't
2 participate in Shock. Is that acceptable? And presumably
3 he said, yes, and that's why we're here.

4 So you - - - you can call it a - - - that he was
5 sentenced to it. But I think the facts demonstrate that
6 really it was just part of a plea bargain negotiation. And
7 isn't there value to us upholding plea bargains?

8 MS. VASILY: Some things are conditions of plea
9 bargains, Your Honor, and some things are conditions of
10 sentence, and some are both. And here this was both. And
11 the reason this was a problem was because of the latter,
12 because this was a condition of the sentence. New York
13 State law needs to authorize all sentences. We don't want
14 judge - - - judges free-wheeling and making up sentences on
15 the go. So because of that, if Shock program waiver
16 participation was proper, and was a proper part of the
17 sentence, that needed to be listed in the authorized
18 dispositions in the Penal Law, and it wasn't.

19 JUDGE SINGAS: I don't think our judges make up
20 sentences as they go. I think they have the right to
21 accept a plea bargain or not accept a plea bargain. In
22 this case, they did. I think a judge, if somebody pleads
23 to an indictment, can come up with a suitable plea offer.
24 So I'm having problems reconciling your position with the
25 authority that the judge has as well.

1 MS. VASILY: Judges only have the authority to
2 sentence individuals to whatever sentences the legislature
3 has prescribed. That's how it works here in New York.

4 JUDGE TROUTMAN: So essentially, are you arguing
5 that the court sentenced him to a term of incarceration and
6 sentenced him not to participate in Shock? Is that
7 essentially what you're saying?

8 MS. VASILY: That's what I'm saying, Your Honor.
9 Yes. And it would be a slippery slope, Your Honor, because
10 if - - - if this was permitted, then prosecutors could plea
11 bargain and judges could order no rec time, no geographic
12 transfer requests, no work release, no good time credit.
13 It's a slippery slope, and the line has to be drawn
14 somewhere. And that's here.

15 CHIEF JUDGE WILSON: So with regard to that, I
16 understood - - - maybe I misunderstood. But I understood
17 you to be making a additional argument, sort of. That even
18 if this was not a part of the sentence but was just part of
19 the plea, there's a public policy element. And that your
20 argument that I thought you were making, was this was
21 against public policy because it was taking a decision that
22 should be made by DOCCS out of the hands of DOCCS and into
23 the prosecutor and defendant to some degree's hands?

24 MS. VASILY: Yes, Your Honor. We're also making
25 that argument. That public policy makes this an illegal

1 sentence. And the public policy would prohibit defendant's
2 - - -

3 CHIEF JUDGE WILSON: Well, I guess what I was
4 getting at is it might make it an illegal sentence, but
5 even if it's not part of the sentence, it might make it an
6 illegal, unenforceable waiver?

7 MS. VASILY: Absolutely, Your Honor, that as
8 well. And public policy would prohibit these waivers.
9 This is a great program. It has reduced recidivism and
10 saved 1.3 billion taxpayer dollars.

11 JUDGE SINGAS: And do you think this program was
12 instituted for people like this defendant who's a major
13 drug trafficker?

14 MS. VASILY: Your Honor, if DOCCS decides that
15 they want to place Mr. Silva or anybody in the program,
16 then that's the - - - that's a person that should be in the
17 program. That decision, though, is left for DOCCS. And
18 here it was taken away from DOCCS.

19 CHIEF JUDGE WILSON: Counsel - - -

20 JUDGE TROUTMAN: Well, it's interesting that you
21 raised that. In the prior statute, only DOCCS could put a
22 person in Shock. The court couldn't even order it. Here,
23 the change created two avenues, and you're somehow saying
24 that the court is encroaching on a right DOCCS always had,
25 just because they note the existence of a claimed waiver of

1 participation?

2 MS. VASILY: Yes, Your Honor. So before the 2009
3 amendments, DOCCS was the only entity that could control
4 Shock, and everybody knew that. And that's why the
5 legislature made the 2009 amendment to allow DOCCS - - -
6 the courts to court order Shock.

7 CHIEF JUDGE WILSON: Do you know if there were
8 Shock waivers before the 2009 amendment, in plea
9 agreements?

10 MS. VASILY: There were instances, Your Honor,
11 where the parties tried to bargain for placement into
12 Shock. And courts found that that was illegal because the
13 courts can't go into territory that's authorized to DOCCS.

14 But after the 2009 amendment - - -

15 CHIEF JUDGE WILSON: I was - - - I was asking
16 something a little different. Before the 2009 amendment,
17 do you know if there were instances where there was a plea
18 agreement that included a waiver of Shock?

19 MS. VASILY: I don't know, Your Honor. Not that
20 I'm aware of.

21 JUDGE TROUTMAN: I have another question then.
22 So before the change, when the court would write that it
23 recommends that DOCCS consider Shock, was that likewise an
24 ordered part of the sentence?

25 MS. VASILY: Recommendations are entirely

1 different, Your Honor. So if this was merely a
2 recommendation that the judge said, I recommend this
3 individual not be in the Shock program because of the plea
4 bargain, then that would be permissible. What crosses the
5 line here is the order. Because that takes something out
6 of the hands of DOCCS, and it's always been in DOCCS'
7 hands. And that's why the 2009 amendment - - -

8 JUDGE TROUTMAN: So did it say, I order he not
9 participate by virtue of the waiver?

10 MS. VASILY: Yes.

11 JUDGE TROUTMAN: Or did it simply note there is
12 the existence of this waiver?

13 MS. VASILY: It noted that there was - - - it
14 ordered waiver of the Shock program, Your Honor.

15 JUDGE TROUTMAN: You're concluding because it's a
16 part of the sentencing commitment that it - - - it's noted
17 in the commitment, it becomes part of the order?

18 MS. VASILY: Yes, Your Honor.

19 And before 2009, DOCCS was the only entity that
20 had control of Shock placement. And so the legislature
21 added one specific avenue for courts to order Shock, but
22 they didn't add an avenue for courts to take away Shock.
23 And that's because they wanted to expand the participation
24 in this program. This program is extraordinarily
25 beneficial.

1 So in 2009, the legislature said, let's provide
2 another avenue: courts ordering it. But nothing in that
3 said that courts could take it away. And in order for that
4 to be possible, there needs to be that authorized
5 disposition in a statute somewhere. And there isn't. So
6 because it isn't, that's an illegal sentence.

7 And public policy supports this. We want DOCCS
8 to be making these decisions. This is their territory.
9 This is what they observe in the individuals. It
10 encourages good behavior while incarcerated. We have a
11 system and a balance - - -

12 JUDGE TROUTMAN: Could DOCCS make a decision for
13 the defendant's participation or denial if there is no
14 application to participate?

15 MS. VASILY: No, Your Honor. It is initiated
16 with an application. And that is because of course, nobody
17 would be forced into the Shock program, and it would be
18 more efficient to not consider applications.

19 JUDGE TROUTMAN: And the participation in Shock
20 is dependent upon the defendant wholly embracing the
21 requirements and what's needed in order for the benefits
22 that you cited earlier to, in fact, work. Right?

23 MS. VASILY: Yes, Your Honor. That's how Shock
24 works. It trades additional years of incarceration for
25 therapy, for substance abuse counseling. It equips

1 individuals with the tools that they need to be better
2 situated to reenter society.

3 JUDGE SINGAS: And what about the public policy
4 of plea bargaining? Like in this case, where he's looking
5 at life on an A-1 and he gets nine years? Is there value
6 to that? And does that outweigh the value of a Shock
7 program?

8 MS. VASILY: There is to a certain extent, Your
9 Honor. But plea bargaining can't contain illegal
10 sentences, and that's what this is. So there needs - - -

11 JUDGE GARCIA: But if we find for you - - - to
12 put another spin on that - - - in the future, if there if
13 they're - - - if the people are faced with this choice,
14 they have two choices if they really don't want this
15 defendant in Shock, A-1 or - - - right? That's it. A-1.
16 You don't get this bargain because that may be the deal
17 breaking point for them, right?

18 MS. VASILY: We can't speculate, Your Honor. But
19 if the prosecution - - -

20 JUDGE GARCIA: Not speculation. If - - - I'm
21 giving you a hypothetical. So if the prosecutor says I
22 think this person who's a major drug trafficker cannot get
23 Shock treatment, that would be beyond the pale. And they
24 can't waive it, so now the only way to prevent that is A-1,
25 right?

1 MS. VASILY: If the prosecution really has a
2 problem - - -

3 JUDGE GARCIA: That is a legal sentence?

4 MS. VASILY: If they have a problem with the
5 Shock program potentially shaving 2.5 years off of an
6 individual sentence, then clearly they have a problem with
7 the program and they need to take that up with the
8 legislature.

9 JUDGE GARCIA: Well, they have a problem with
10 going from nine years to six and a half on an - - - on this
11 particular crime. So their choices at that point are not
12 nine versus six and a half. It's nine versus - - - it's A-
13 1. Six and a half versus A-1. You - - - there's no choice
14 for them. So in this case, should we just undo the plea -
15 - -

16 MS. VASILY: In this case, Your Honor, part of
17 what a sentence means is that DOCCS is going to make some
18 judgment calls down the road - - -

19 JUDGE GARCIA: Should we give that choice - - -

20 MS. VASILY: - - - whether that's good time
21 credit - - -

22 JUDGE GARCIA: - - - back into the plea
23 bargaining process here? Should we put this back to where,
24 okay, it's either A-1 or - - - you know, that's it.

25 MS. VASILY: I can't speak for the prosecutors,

1 Your Honor, but this is a program that has worked in the
2 past. And if this is a possibility, the prosecutor should
3 adapt their plea bargaining process to allow for that to
4 happen.

5 CHIEF JUDGE WILSON: But I guess, Judge Garcia,
6 maybe is asking you about the remedy here. That is,
7 suppose we rule your way, why isn't the right result to
8 vacate the plea and put the parties back in their pre-plea
9 state?

10 MS. VASILY: There's no automatic right to plea
11 vacatur, Your Honor. And in this case, the proper remedy
12 is to strike the waiver.

13 CHIEF JUDGE WILSON: But why is that? I mean,
14 people presumably struck their bargain knowing that - - -
15 or believing that they would have a benefit from this
16 provision, right? And as Judge Garcia says, they might
17 have offered something different. And maybe it wouldn't
18 have been A-1, maybe it would have been A-2, but - - -
19 right? Why shouldn't we put the parties back in their
20 position? I understand your client doesn't want that and
21 has asked us not to do that, and that makes me wonder
22 whether the - - - whether we have a live issue here?

23 MS. VASILY: To answer the first part of your
24 question. The remedy here - - - the prosecution has
25 already received the benefit of their bargain because Mr.

1 Silva's merit release date is up for this month. So
2 conceivably, the prosecution - - -

3 CHIEF JUDGE WILSON: Well, they've received the
4 benefit of a bargain that they struck under the
5 misimpression that a part of the bargain was something they
6 could enforce. And you're asking us to take that - - - I
7 mean - - - you know, if you bought a house and it turned
8 out that somebody took the kitchen away, you wouldn't think
9 that you'd gotten the benefit of your bargain.

10 MS. VASILY: Mr. Silva would have been eligible
11 for the Shock program in January of 2024. So that's a year
12 ago. If this case was taking place a year ago, then
13 perhaps it would be different. But because a year - - -

14 CHIEF JUDGE WILSON: But he would have - - - he
15 would have been eligible for the Shock program a year ago
16 under the sentence that he pled to, which is maybe not the
17 sentence he would have been offered. Right?

18 MS. VASILY: In this case, Your Honor, Mr. Silva
19 could be released in a month under merit release. So the
20 prosecution knew very well he could be released this early.
21 So whether he was released - - - he - - - he's released
22 from the Shock program this early or from merit release
23 this early, it's a distinction without a difference. So
24 there's really no - - - they received the benefit of their
25 bargain. Like I said, if this was a year ago, then maybe

1 we would be in different territory.

2 JUDGE RIVERA: So what benefit does the defendant
3 get? Let's say we reverse. Is it just strike that? He
4 can now apply? And let's say they would accept him. What
5 is he getting?

6 MS. VASILY: Yes, Your Honor. So his conditional
7 release date is July 2026. So if this - - - if this was
8 struck from the sentencing commitment order, he could apply
9 to the program, he could do the program, and he could be
10 released before his conditional release date.

11 JUDGE RIVERA: How early? Do you know?

12 MS. VASILY: It would - - - the program is six
13 months. So you know, six months in advance, whenever the
14 program starts.

15 JUDGE RIVERA: Thank you.

16 JUDGE GARCIA: But isn't that going to the Chief
17 Judge's question still, though? Because if you - - - they
18 knew that - - - they knew there's a possible merit release
19 and what the possible grounds would be for that, and they
20 accepted that. But they didn't accept you could apply for
21 this program, do this, and get out. So it's a different
22 bargain. It's not the same. It's not, oh, they were - - -
23 just goes by the release date. Doesn't it also go by the
24 avenues he has to attain that date?

25 MS. VASILY: The prosecution seems most concerned

1 with the length here, Your Honor, of the time incarcerated.
2 So whether he's getting released on merit or getting
3 released - - -

4 JUDGE GARCIA: So to accept a narrow avenue of
5 merit, it's one thing, right? Okay. We accept the risk
6 that he may be released early, and that's not what they
7 want. But now they are accepting an additional avenue to
8 do that, and they don't want to do that. That was part of
9 their bargain.

10 MS. VASILY: It was a very - - - it's a narrow
11 avenue as well, that Mr. Silva would be placed in this
12 program by DOCCS. But either way, they knew there was a -
13 - -

14 JUDGE HALLIGAN: But whether it's narrow - - - I
15 think the question is whether it's narrow or not, wasn't
16 that the terms of the bargain that they struck? And so
17 shouldn't everybody be put back in the position they
18 started?

19 MS. VASILY: No, Your Honor. Because there's no
20 automatic right to plea withdrawal. The prosecution
21 received the benefit of their bargain because Mr. Silva
22 didn't get out two and a half years early. There's no
23 world that that's happening. And - - -

24 CHIEF JUDGE WILSON: So let me ask you the other
25 part of my question then. See if we can try this. Suppose

1 we were to decide that the remedy here would be vacatur of
2 the plea, and everybody's put back into their pre-plea
3 position. Suppose we were going to hold that,
4 hypothetically? Is there then a live issue for us?
5 Because your client doesn't want us to vacate the sentence
6 in that case.

7 MS. VASILY: That's right.

8 CHIEF JUDGE WILSON: So is there a live issue if
9 we were to decide that?

10 MS. VASILY: Yes, Your Honor. Because - - -
11 because just because Mr. Silva doesn't necessarily want an
12 affirmance or not, it would still be an important issue for
13 this court to decide. Especially given that it's - - -

14 CHIEF JUDGE WILSON: But if we were to decide
15 that the remedy would be vacating the plea, you don't want
16 us to vacate the plea, and the People don't want us to
17 vacate the plea. So where's the live issue in that
18 circumstance?

19 MS. VASILY: That Mr. Silva could want to do the
20 Shock program still, and an illegal waiver is preventing
21 him from the program.

22 JUDGE HALLIGAN: But that's a route available, I
23 think, only if the plea isn't vacated, right?

24 MS. VASILY: That's right.

25 JUDGE HALLIGAN: And so I'm not sure how that's

1 responsive to the Chief Judge's question of how a live
2 issue would remain if our view was that was appropriate,
3 given that you say you don't want the plea vacated?

4 MS. VASILY: Regardless, this is an issue that's
5 capable of repetition and evading review, and this court
6 should nevertheless decide it. It needs to be a long
7 enough sentence for this to be before this court. This is
8 an example. These waivers clearly occur throughout the
9 State of New York, and it's still an important issue that -
10 - -

11 JUDGE HALLIGAN: So even if it would result in
12 vacatur of the - - - of your client's plea, you would have
13 us decide it under the mootness exception? And that result
14 would obtain?

15 MS. VASILY: This court should reach a conclusion
16 on the legal issue under the mootness exception. We don't
17 ask for plea vacatur in this case, and I don't believe the
18 prosecution is asking for that either.

19 JUDGE HALLIGAN: But we might conclude
20 nonetheless I assume, that it was appropriate. But I take
21 it you're saying, even if that were correct and that was
22 the result, you would have us decide the legal question
23 anyway?

24 MS. VASILY: Yes, Your Honor. And numerous other
25 cases: Davis, Thomas, Shanks, Bradshaw - - - they're cited

1 in my reply - - - all have struck the waiver in - - - in -
2 - -

3 JUDGE GARCIA: I don't understand how we could do
4 that. If we say the remedy is vacatur of the plea and you
5 say, well, you should decide the issue anyway. Then we go
6 ahead and decide the issue anyway. Then we're going to
7 vacate the plea. Either we're going to vacate the plea or
8 we're not. We're not going to say we're going to decide
9 the issue for you, but give you a different remedy, right?

10 So if we decide, if we were to do that, that
11 vacatur is appropriate and you all go back and work this
12 out in a plea negotiation under these rules, then if you
13 don't let us do that, how do we decide the issue? Because
14 otherwise you're getting the benefit of the decision
15 without taking the remedy that would come along with that
16 decision.

17 MS. VASILY: Our position is that this court can
18 strike the waiver and that that would be a proper remedy.

19 I'll reserve the rest of my time for rebuttal.

20 CHIEF JUDGE WILSON: Thank you.

21 MR. SEEWALD: May it please the court. Andrew
22 Seewald for the People. Good afternoon, Your Honors.

23 JUDGE TROUTMAN: Do you agree here that the only
24 things the court could do is either order participation in
25 Shock or deny the right to do so, as to its own power?

1 MR. SEEWALD: I'm sorry? That - - - that this
2 court?

3 JUDGE TROUTMAN: No.

4 MR. SEEWALD: No.

5 JUDGE TROUTMAN: If the sentencing court when - -
6 - when the request was made to participate in Shock, in
7 spite of the claimed waiver, the court had two avenues.
8 The court could grant and order it or deny. Were those the
9 only two avenues available? Or could it also then order
10 that Shock not allow him to participate?

11 MR. SEEWALD: Well, I'm not sure that I
12 completely understand the question. But I'll try to - - -
13 I'll try to answer it. I'm sorry.

14 JUDGE TROUTMAN: I want to make sure you
15 understand the question. The question is, what was the
16 power of the trial court with respect to the defendant's
17 request to participate in Shock?

18 MR. SEEWALD: Right. The - - - I believe the
19 power of the trial court was to accept the plea bargain or
20 not. The trial court did not have to accept the terms of
21 the plea bargain and approve it. But - - - so the trial
22 court could have rejected the plea bargain as a whole and
23 ask the parties - - -

24 JUDGE TROUTMAN: And ordered participation,
25 correct?

1 MR. SEEWALD: Not - - - no. Because the
2 defendant - - - what's important - - - one of the important
3 things to consider in this case is that the defendant was
4 nominally eligible for Shock only because of the plea
5 bargain in the first place. So he was charged with A-1
6 felonies that made him ineligible for Shock.

7 JUDGE TROUTMAN: That is clear. What he said
8 was, I did the waiver, but in spite of the waiver, would
9 you let me participate anyway?

10 MR. SEEWALD: Right.

11 JUDGE TROUTMAN: So you're saying because there
12 was a bargain, the court no longer had the power to order
13 Shock?

14 MR. SEEWALD: The court wouldn't have had the
15 power to order Shock without undoing the plea bargain, as
16 it - - - as it - - -

17 JUDGE TROUTMAN: Or letting the - - -

18 MR. SEEWALD: - - - that is, in its entirety - -
19 -

20 JUDGE TROUTMAN: - - - the people out of the
21 bargain?

22 MR. SEEWALD: I'm sorry. The - - -

23 JUDGE TROUTMAN: Or letting the people out of the
24 bargain.

25 MR. SEEWALD: Or letting the people out of the

1 bargain. It was - - - this was a condition of the bargain.
2 And the defendant fundamentally wants the benefit of that
3 bargain without accepting all the conditions.

4 JUDGE TROUTMAN: But do you like - - - do you
5 agree that the court had no - - - has no authority to order
6 DOCCS not to participate? The DOCCS avenue of allowing
7 participation is separate and distinct, as opposed to the
8 court ordering participation.

9 MR. SEEWALD: That's correct. When an eligible
10 defendant makes an application to the sentencing court for
11 participation in Shock, the only decision for the court at
12 that point is whether to say yes to the application or by
13 saying no, not ordering the defendant to be - - - to - - -
14 or ordering DOCCS not to ever place the defendant in Shock.

15 All the court is doing is saying that the court
16 is not ordering DOCCS to place the defendant into Shock.

17 JUDGE HALLIGAN: So who is then the waiver
18 operating on? The court? The defendant? DOCCS?

19 MR. SEEWALD: Well, ultimately the - - - it's
20 operating on the defendant. It - - - he controls the
21 process of Shock application in the first place. And he
22 agreed in this case not to apply for Shock.

23 JUDGE HALLIGAN: So if he comes back and he says,
24 notwithstanding the waiver, I would like to be allowed to
25 apply, you said that the court - - - I believe you said the

1 court could not do that unless - - - I suppose, the People
2 could consent, or the People would be allowed the
3 opportunity of vacatur of the plea. So does the waiver
4 then strip the court of authority to allow the defendant to
5 to participate in Shock?

6 MR. SEEWALD: I suppose, yes, as a part of the
7 entire plea bargain. If the - - -

8 JUDGE HALLIGAN: That's what I mean, yes.

9 MR. SEEWALD: Yes. So the court was in the
10 position of approving the entire plea bargain or not. And
11 I would note that the defendant never claimed, when he
12 raised the possibility of Shock, he said I'd like Shock or
13 some other program. And when he raised that possibility,
14 the court said that, well, I can't give that to you because
15 it's the - - - it's not part of the plea bargain. The
16 People - - - or it would be contrary to the plea bargain
17 that - - -

18 JUDGE TROUTMAN: What do you say with respect to
19 the claim that by notating the waiver on the judgment of
20 conviction, that the court ordered that he not be able to -
21 - - that Shock couldn't let him participate?

22 MR. SEEWALD: Well, I would just point out that
23 the commitment papers themselves, towards the - - - there's
24 a place for the court to check a box that would have said
25 Shock incarceration ordered. The court didn't check that

1 box, obviously. At the bottom of the commitment papers - -
2 - and this is at the appellant's appendix at page 3.
3 There's a space that - - - there's a space under the word
4 "remarks" where the court printed "Waiver of Shock program
5 participation." So the court put that in - - - noted that
6 in the commitment papers. But - - -

7 JUDGE CANNATARO: Why would a court note that in
8 the commitment papers? Because I want to get back to the
9 question you got a little while ago about who is this
10 agreement operative on? And I heard you say earlier that
11 the options available to the court, when it was presented
12 with a plea bargain that included a waiver, was either to
13 accept the plea bargain or reject the plea bargain, but not
14 to pick it apart. You don't get a line item veto on a plea
15 bargain.

16 But my question really is, would that waiver then
17 operate on DOCCS to the extent that if the answer is no,
18 that the defendant could apply for Shock at DOCCS,
19 notwithstanding the waiver in the plea bargain?

20 MR. SEEWALD: Well, I think the ultimate question
21 is we don't really know what DOCCS would do with this
22 waiver other - - - because the defendant never applied.

23 JUDGE CANNATARO: So that's a different case.

24 MR. SEEWALD: So that would be a different case.
25 If the defendant had applied - - -

1 JUDGE HALLIGAN: But what's your position as to
2 whether DOCCS could grant a waiver - - - could grant him
3 permission to participate in that circumstance?

4 MR. SEEWALD: I don't really know, Your Honor.

5 CHIEF JUDGE WILSON: Well, wait a minute.

6 MR. SEEWALD: I don't - - -

7 JUDGE HALLIGAN: But it - - -

8 JUDGE RIVERA: Oh, yeah.

9 JUDGE HALLIGAN: I mean, I - - - I think what
10 we're asking you about is, what's the scope of the waiver,
11 in your view? I'm not asking you to - - - you know, opine
12 on what you think DOCCS might or might do. But does the
13 waiver, as you understand it, prohibit DOCCS from allowing
14 him to participate if he went and applied? And if he did
15 go and apply, and your view is that the waiver operates on
16 the defendant, and the defendant then is acting in
17 violation of the terms of the waiver, then what next?

18 MR. SEEWALD: Well, we do know that DOCCS, by its
19 own internal directive, does honor the waivers that are - -
20 - this type of waiver that's entered as part of a plea
21 bargain.

22 JUDGE CANNATARO: So they bind themselves to the
23 waiver that's contained in the bargain?

24 MR. SEEWALD: Yes. Part of their - - - their - -
25 - yes.

1 JUDGE HALLIGAN: And if the defendant nonetheless
2 applied to participate to DOCCS, what, in your view would
3 the consequence be, if any? If the defendant has waived
4 the right to do that, but nonetheless applies?

5 MR. SEEWALD: Well, I - - - the question would be
6 whether DOCCS would then uphold would - - - would - - -
7 would actually honor the waiver. What they would do with
8 the defendant's application as a whole?

9 JUDGE HALLIGAN: Right.

10 MR. SEEWALD: And we don't really know that in
11 this case, obviously. Not only because - - -

12 JUDGE TROUTMAN: So do you agree that DOCCS,
13 independent of the plea bargaining process, has their own
14 power to accept or reject participation if an application
15 is made?

16 MR. SEEWALD: Yeah. I think the key words there
17 were, "if an application is made". And so - - - and
18 obviously here an application was never made.

19 CHIEF JUDGE WILSON: Wait, so you think that - -
20 - sorry. You think that DOCCS has the ability to disregard
21 the plea waiver? Legal ability?

22 MR. SEEWALD: Your Honor, I'm uncomfortable
23 giving a - - - a commit - - -

24 CHIEF JUDGE WILSON: Well, let me try it this
25 way. I mean, you bargain for these things, you want them.

1 And that's because you believe the DOCCS will honor them,
2 not the DOCCS will disregard them. No?

3 MR. SEEWALD: Of course. Of course. And - - -
4 and so the aspect - - -

5 CHIEF JUDGE WILSON: And presumably, if DOCCS
6 took an adverse position, you would run in there and say,
7 wait a minute, this guy's got a plea waiver? Is that
8 right?

9 MR. SEEWALD: The expectation of the People - - -

10 CHIEF JUDGE WILSON: Shock waiver.

11 MR. SEEWALD: - - - of course, in this case was
12 that the waiver - - -

13 CHIEF JUDGE WILSON: Not just in this case - - -

14 MR. SEEWALD: - - - would be - - - would be
15 honored.

16 CHIEF JUDGE WILSON: - - - in - - - in any. I
17 mean, this is not the only case where you've asked for a
18 Shock waiver, fair?

19 MR. SEEWALD: That's correct.

20 CHIEF JUDGE WILSON: And all of the time that you
21 ask for it, you're expecting it's going to be enforced,
22 otherwise, it wouldn't have any value to you.

23 MR. SEEWALD: That's correct.

24 CHIEF JUDGE WILSON: Okay.

25 MR. SEEWALD: That's correct. And - - -

1 JUDGE RIVERA: But what would be your recourse if
2 they didn't?

3 MR. SEEWALD: If they didn't, then that would
4 change the plea bargaining posture in any case like this.

5 JUDGE GARCIA: But wouldn't - - -

6 JUDGE RIVERA: I understand for the future that
7 that might affect the policies in your office, I get that.
8 But I'm asking it - - - let's say he had applied, they
9 think he's an appropriate candidate, they accept him.
10 Would you have any recourse under those circumstances?

11 MR. SEEWALD: I'm not sure. I'm not sure whether
12 they would ask for the view of the prosecutor's office - -
13 -

14 JUDGE RIVERA: Let's say they did, you give them
15 your view, and they say, well, we're not persuaded. Do you
16 have any recourse?

17 MR. SEEWALD: I - - - I don't think so. I don't
18 know that - - -

19 JUDGE GARCIA: Can you ask for the plea back? I
20 mean, isn't the application itself a violation of the plea?

21 MR. SEEWALD: I suppose that - - - that's true.
22 If the defendant is waiving his right to apply for Shock,
23 then - - - and then, goes ahead and does that anyway. I
24 don't know if - - - I think we'd have to find out what
25 DOCCS would actually do with that application. In this

1 particular case - - -

2 JUDGE GARCIA: It isn't what they do with it.
3 It's the act of asking for it that's the violation, isn't
4 it?

5 MR. SEEWALD: Sure. That - - - yes. That would
6 be in violation of the plea agreement.

7 JUDGE CANNATARO: Well, that would suggest to me
8 then that the waiver has absolutely nothing to do with the
9 sentence. Wouldn't you agree?

10 MR. SEEWALD: Right. I think - - - yes. That
11 it's a - - - it's an agreement that the defendant entered
12 into as part of the plea bargain. And the court noted it
13 in the sentencing order. But I would agree, yes - - -

14 JUDGE CANNATARO: Exist independently of the
15 sentence. If you could go back to court and say, hey, he
16 waived this and now he's applying for DOCCS - - - he's
17 applying for the Shock program at DOCCS. It's really got
18 nothing to do with the sentence at all?

19 MR. SEEWALD: I - - - yes.

20 JUDGE HALLIGAN: But I take it you're saying,
21 though, that you could enforce it by way of seeking vacatur
22 of the plea because the defendant violated it? So to that
23 extent, it seems like it is enforceable. No?

24 MR. SEEWALD: Right. I suppose that would be
25 correct, Your Honor. That we could go back to the trial

1 court and argue that he had - - -

2 JUDGE HALLIGAN: And - - -

3 MR. SEEWALD: - - - violated the plea agreement.

4 JUDGE HALLIGAN: - - - if we were to - - - to
5 disagree with you, what's your position on what the
6 appropriate remedy would be? Would it be vacatur of the
7 plea or no?

8 MR. SEEWALD: I believe the appropriate remedy
9 would be vacatur of the plea.

10 JUDGE HALLIGAN: And that would be what you would
11 seek in that event? What you would ask us to do?

12 MR. SEEWALD: Yes. We would ask that the case be
13 remanded back to the plea court where - - - yes. Because I
14 - - - because I think fundamentally - - -

15 JUDGE RIVERA: Can I just clarify? Was - - -
16 just to clarify, I'm sorry. Was the waiver not to apply to
17 the court either? I mean, it clearly is - - - don't apply
18 to DOCCS. Was it also don't apply to the court either?

19 MR. SEEWALD: The court - - - the waiver was to
20 not apply for Shock, and it didn't specify whether to apply
21 to the court or to apply to DOCCS.

22 JUDGE RIVERA: So then it's ambiguous and
23 unenforceable? Or do you have a position on whether or not
24 it applied to the court?

25 MR. SEEWALD: I would note that in the

1 defendant's reply brief, they've tried to draw a
2 distinction between DOCCS-ordered Shock incarceration and
3 judicial-ordered Shock incarceration. And they concede
4 that judicial-ordered Shock incarceration is waivable. And
5 so - - - but I would submit that the question is - - - that
6 that's splitting a hair that shouldn't be split.

7 The question is whether a defendant can waive his
8 own right to apply for Shock under either avenue - - -

9 JUDGE RIVERA: Well, did he apply here to the
10 court? I'm just - - -

11 MR. SEEWALD: I'm sorry?

12 JUDGE RIVERA: He applied here to the court,
13 yeah?

14 MR. SEEWALD: I - - - I - - -

15 JUDGE RIVERA: Yes?

16 MR. SEEWALD: - - - don't know if his - - - if
17 what he said at sentencing should be considered an
18 application.

19 JUDGE RIVERA: Okay. Let's assume - - - let's
20 get the hypothetical. That someone signs this waiver,
21 doesn't say if it's the court and/or DOCCS. They apply to
22 the court. And if the court had complied with the request,
23 granted the request. Right? Would not the ADA seek to
24 withdraw the offer?

25 MR. SEEWALD: Right. I think the answer - - -

1 JUDGE RIVERA: So that would be because the ADA
2 thinks that the court is bound, right?

3 MR. SEEWALD: Well, because the parties had
4 reached an agreement about what the overall sentencing
5 parameters should be.

6 JUDGE RIVERA: Yeah. But if they had requested,
7 and the court didn't grant it because they felt bound? I
8 assume you wouldn't say, oh, they breached it by just
9 asking you. Because what you care about is whether or not
10 the individual actually gets to participate in Shock?

11 MR. SEEWALD: I think that what would be fair to
12 say, I can't speak for the motivations of the individual
13 prosecutor who is handling this case. And I would note
14 that this was a special - - -

15 JUDGE RIVERA: Well, I thought that was clear
16 from your briefing? That - - - I - - - then I
17 misunderstood your briefing.

18 MR. SEEWALD: What - - - what I - - -

19 JUDGE RIVERA: I thought your argument in the
20 briefing was that you wanted this person to serve nine
21 years. Did I misunderstand the brief?

22 MR. SEEWALD: No, not at all. That's correct,
23 Your Honor.

24 JUDGE RIVERA: That's correct. But you already
25 know that he might not serve nine years, regardless of

1 Shock?

2 MR. SEEWALD: That's true.

3 JUDGE RIVERA: Right?

4 MR. SEEWALD: That - - - that is true.

5 JUDGE RIVERA: You have no control over that?

6 MR. SEEWALD: That - - - that's true. But I
7 think what the - - - the - - -

8 JUDGE RIVERA: So it's not really in that way,
9 you can't say that - - - this is the sine qua non of this
10 agreement was that the prosecutors in that office
11 absolutely needed him to serve nine years?

12 MR. SEEWALD: But what we - - - what we knew for
13 sure was that if he had - - - if he applied for Shock and
14 was put in Shock, that that would have the near certainty
15 of reducing his effective sentence by two and a half years.
16 And what we know is that the overall sentencing - - - the
17 overall sentence that the defendant would serve, even
18 allowing for the provisions that apply to every defendant
19 and every inmate. That the People and the defendant, and
20 ultimately, the court that approved the plea, were all
21 satisfied that a nine-year sentence was an appropriate plea
22 bargain and an appropriate sentence for what was an
23 incredibly serious case.

24 JUDGE RIVERA: With an understanding that he
25 might never serve nine?

1 MR. SEEWALD: I - - - yes. I mean that
2 understanding is - - -

3 JUDGE RIVERA: Regardless of Shock. Regardless
4 of Shock.

5 MR. SEEWALD: - - - built - - - built - - - I
6 think that understanding is built into every sentence.
7 Everyone knows going into the sentence, it - - - it - - -
8 when we negotiate a sentence, what the defendant in that
9 case - - -

10 JUDGE HALLIGAN: In other words - - -

11 MR. SEEWALD: - - - would actually end up
12 serving.

13 JUDGE HALLIGAN: - - - there might be other
14 avenues that would result in him serving less time, but not
15 the avenue of Shock participation?

16 MR. SEEWALD: Exactly. That's exactly right,
17 Your Honor. And in this case - - -

18 JUDGE RIVERA: So I - - - so if I'm just
19 understanding this a little bit clearer. As a policy
20 matter, I mean, your office would decide whatever it wants
21 to do. If indeed we were to agree with them that you can't
22 enter these waivers, you can't require these waivers for
23 the plea, the reality is you enter pleas not knowing that
24 you're going to get the full time anyway. So Shock is just
25 one of these other types of avenues that might reduce the

1 period of time?

2 MR. SEEWALD: I would say it's different from
3 some of those other avenues. It's not just one of the many
4 avenues. It's different in a few different ways. Number
5 one, it's triggered by the defendant's application, whether
6 to the court or to DOCCS.

7 JUDGE RIVERA: DOCCS, right.

8 MR. SEEWALD: Number two, the statute describing
9 Shock specifically describes it as a privilege, and in that
10 sense it's different from early release and from other
11 considerations.

12 Number three, I would note that things like early
13 release, one of the primary - - - the - - - purposes for
14 early release is for DOCCS to - - - is that it's a tool for
15 DOCCS to help manage discipline and order within the
16 prison. Being able to give time off for good behavior is
17 something that is important to DOCCS.

18 And I would note that in the Washington State
19 Supreme Court case that my adversary cites in its reply
20 brief, the - - - where the Washington court said that you
21 couldn't negotiate a - - - or the court couldn't order as
22 part of a sentence, that the defendant give up the right to
23 early release. It was that orderliness function or purpose
24 that the - - - that the court recognized in early release.

25 So that's different from Shock incarceration.



1 That's not the - - - Shock incarceration has a different
2 rationale than early release and some of these other
3 programs.

4 And I would just point out also that DOCCS itself
5 obviously does not regard a waiver of Shock as an
6 encroachment upon its own authority and its own ability to
7 manage the orderliness of its facilities. Because they
8 have stated that they will honor these waivers. So I think
9 that's very telling in a claim where - - - in a case where
10 the defendant's primary claim is that the waiver of Shock
11 was itself - - - was illegal, was invalid because of some
12 separation of powers issue that it encroaches on the
13 authority of DOCCS. Even DOCCS does not regard it as an
14 encroachment upon its own authority.

15 So in this case, where this was a knowing,
16 voluntary part of a plea bargain that was extremely
17 beneficial to the defendant. Where, for possession of over
18 fifty pounds of heroin and fentanyl, millions of dollars in
19 drug transactions, this defendant was able to obtain a
20 sentence of nine years rather than the fifteen to life that
21 he faced, I would ask the court in this case to uphold the
22 validity of the waiver.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. SEEWALD: Thank you very much.

25 MS. VASILY: We have a system here in New York



1 that when individuals are sentenced, after the sentencing
2 DOCCS then takes control of programing, of good time
3 credit, work release, and the Shock program.

4 JUDGE TROUTMAN: Because the court commits the
5 defendant to the custody of DOCCS?

6 MS. VASILY: Yes, Your Honor.

7 JUDGE TROUTMAN: They have control over
8 everything at that point?

9 MS. VASILY: Yes, Your Honor. And if the
10 prosecution really takes such issue with the possibility
11 that DOCCS after a very rigorous assessment of the welfare
12 of the community and the applicant and community safety,
13 thinks this defendant should be in the program, then they
14 have a problem with the Shock program, and they should take
15 that up with the legislature and - - -

16 JUDGE HALLIGAN: Can they just have a concern
17 about the length of the sentence, not the quality or
18 efficacy of the program?

19 MS. VASILY: But that is Shock, Your Honor. It's
20 the balance between the length of the sentence in exchange
21 for a very rigorous workout therapy - - -

22 JUDGE HALLIGAN: I mean, in this particular - - -
23 I mean, in this particular case. They may have been
24 looking at what the bottom line number was, seems to me?

25 MS. VASILY: Yes, Your Honor. But DOCCS also

1 considers this particular case. They consider the facts of
2 the case. They consider the crime. They consider
3 everything.

4 JUDGE HALLIGAN: I mean in striking - - - I
5 mean, in striking the plea bargain in the first instance?

6 MS. VASILY: Sorry, Your Honor?

7 JUDGE HALLIGAN: I mean in striking the plea
8 bargain in the first instance, that may have been what was
9 motivating the concern with Shock?

10 MS. VASILY: Yes, Your Honor. DOCCS ultimately
11 will make that judgment call, and the prosecution just has
12 to defer to DOCCS at that point.

13 JUDGE GARCIA: It's clear that applying to DOCCS
14 violates the waiver, right? I mean, it's clear?

15 MS. VASILY: Yes. Yes.

16 JUDGE GARCIA: So they made this deal based on
17 this waiver; you're saying we should be able to apply any
18 way, and you can apply. But then they can come in and say
19 you violated the terms of your plea agreement because you
20 have violated the terms of your plea agreement.

21 MS. VASILY: Yes.

22 JUDGE GARCIA: So why don't they get the bargain
23 back?

24 MS. VASILY: In violating the terms of the
25 sentencing commitment sheet? Yes - - - yes, Your Honor.

1 Traditionally - - -

2 JUDGE GARCIA: No. He violated the terms of the
3 waiver. I mean, this waiver was part of the agreement that
4 they struck, and you violated it by applying to DOCCS. And
5 they should be able to go in and then say, we didn't get
6 the benefit of our bargain. We want the deal back.

7 MS. VASILY: Yes, Your Honor. Traditionally, in
8 cases, the remedy could be plea withdrawal. But there's no
9 automatic right to plea withdrawal. And here, under these
10 facts, it - - - it's just not necessary to cure the error.
11 The court can just strike the waiver, and that can cure the
12 error. And especially here - - -

13 JUDGE HALLIGAN: Well, your adversary has just
14 told us that they think the appropriate remedy would be
15 vacatur of the plea. I don't think told us that that was
16 required, but that that was what they think would be
17 appropriate. So why would it not be appropriate here?

18 MS. VASILY: The prosecution is not asking for
19 plea withdrawal. They're asking for a remand for the
20 possibility of plea withdrawal. They're not asking for it
21 right now.

22 JUDGE HALLIGAN: And in your view, even that
23 would not be appropriate?

24 MS. VASILY: No, Your Honor.

25 JUDGE HALLIGAN: And why is that?

1 MS. VASILY: Because this court can cure the
2 error by striking the illegal waiver, which has happened in
3 other cases, as cited as my reply brief - - -

4 CHIEF JUDGE WILSON: Now, see that - - - if you
5 think of this as a sort of contracting matter. And to me -
6 - - you know, I was a commercial lawyer, that would make
7 some sense if the - - - the benefit they lost was small in
8 comparison to - - - you know, what they got. But this is a
9 nine-year sentence and a two-and-a-half-year reduction,
10 which is a pretty big chunk of what they got.

11 So you know, thinking of it that way, I would
12 think it seems like putting the parties back in a
13 bargaining position is - - - if it's just, you know, made a
14 month difference out of a nine-year sentence, maybe you're
15 right.

16 MS. VASILY: Absolutely, Your Honor. And that
17 goes back to the argument I was making where this actually
18 isn't two and a half years in this particular case, because
19 two and a half years ago was last July. Here - - -

20 JUDGE SINGAS: But it was when the plea was made.

21 MS. VASILY: Yes.

22 JUDGE SINGAS: You're looking backwards at it.
23 At the time when they were asking for that waiver and your
24 client agreed to it, right? It's very - - - it was in a
25 very different posture than it is right now looking

1 backwards.

2 MS. VASILY: Yes, Your Honor. But at this point,
3 when we analyze whether the prosecution received the
4 benefit of their bargain or not, the earliest Mr. Santos -
5 - - Mr. Silva would be getting out would be a year in
6 advance of his CR date, conceivably based on Shock program
7 participation. So it's not two and a half years.

8 So when Judge Wilson was talking about - - - you
9 know, big or small values relative to the length of the
10 sentence, it's really only the issue of an extra year,
11 which would have this very rigorous and strenuous program
12 that's been proven to reduce recidivism and help substance
13 abuse.

14 JUDGE SINGAS: And the People might love that
15 program for other defendants. They just don't want it for
16 this defendant. And in fact, the legislature said that A-
17 1's and A-2's are exempt from it. So they're saying we're
18 following what the legislature said. We don't want him to
19 have Shock, but we'll give you the benefit of a nine-year
20 sentence. I don't understand why it has to be - - - then
21 forget the Shock program. They might love the Shock
22 program for any number of defendants. It might actually be
23 an excellent program.

24 MS. VASILY: In this case, it - - - it's really
25 that DOCCS may consider the defendant for the program. And

1 that the prosecution just needs to let that happen if
2 that's what DOC want - - - DOCCS wants. They can't
3 micromanage every single aspect of the incarceratory
4 experience.

5 JUDGE HALLIGAN: Yeah. But the point is not
6 that. I think the point is, that there was an agreement as
7 a part of the plea bargain not to apply.

8 MS. VASILY: Yes.

9 JUDGE HALLIGAN: Not - - - you know, not a
10 question of whether there's some micromanaging of DOCCS'
11 implementation of the program.

12 MS. VASILY: Yes, Your Honor. And in this case,
13 this isn't - - - you know, three years before Mr. Silva's
14 getting released. So it's not that type of benefit, pure
15 sentence-wise from the program.

16 I see I'm out of time. If there are no further
17 questions.

18 CHIEF JUDGE WILSON: Thank you.

19 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Juan M. Silva Santos, No. 11 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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