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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 204

PATRICK MORGAN,

Appellant.

20 Eagle Street
Albany, New York 12207
November 16, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 204, the People of
3 the State of New York v. Patrick Morgan.

4 Good afternoon, counsel.

5 MS. SALOMON: Good afternoon, Your Honor.

6 With the court's permission, I would like to
7 reserve two minutes - - -

8 CHIEF JUDGE DIFIORE: Two?

9 MS. SALOMON: - - - for rebuttal, please. Yes.

10 CHIEF JUDGE DIFIORE: You may.

11 MS. SALOMON: We contend that there were two
12 very serious errors that occurred in this case at the most
13 crucial time of the case, during deliberations.

14 We believe that each independently requires a
15 reversal, but they also worked with a prejudicial synergy.

16 After this jury declared itself hung and got,
17 what we acknowledged was, a perfectly fine Allen charge,
18 it was balanced, the jury then came back two hours later
19 and came in with what the foreperson said was a unanimous
20 verdict. Polling revealed it was not. The two jurors who
21 disagreed with it were therefore, as we put it, outed.

22 It was therefore encomp - - -

23 JUDGE RIVERA: Counsel, if the court had just
24 said, I'm sending you back, I gave you my instructions a
25 couple of hours ago, proceed with deliberations; have you

1 got a violation at that point?

2 MS. SALOMON: If he would have said that - - -

3 JUDGE RIVERA: Yes, and then didn't go into
4 detail on one - - -

5 MS. SALOMON: - - - yes.

6 JUDGE RIVERA: - - - we'll call it one Allen
7 prong - - -

8 MS. SALOMON: Yes.

9 JUDGE RIVERA: - - - for the moment.

10 MS. SALOMON: Yes, we would - - - that
11 would have been perfectly acceptable because that
12 would have been - - -

13 JUDGE RIVERA: Saying less would have been
14 okay.

15 MS. SALOMON: Well, not just that, Your
16 Honor, but because it would have been in an explicit
17 reference to the charge that I just gave you - - -

18 JUDGE RIVERA: It was complete.

19 MS. SALOMON: - - - a couple of hours ago
20 which was the acceptable balanced hung jury
21 discussion. Instead - - - and in fact, I'm glad you
22 did say that, because that instruction itself also
23 included the unanimity instructions. So - - -

24 JUDGE GARCIA: But you didn't even want
25 that instruction, right? The earlier instruction you

1 didn't even ask for.

2 MS. SALOMON: Well - - -

3 JUDGE GARCIA: I think both parties didn't
4 want the judge to instruct the jury about continuing
5 to deliberate, and the kind of a reduced Allen
6 charge. And he, the judge, as I understand that, sua
7 sponte decided to give the - - -

8 MS. SALOMON: The first time around.

9 JUDGE GARCIA: But now, you're saying that
10 that was the right charge then, right?

11 MS. SALOMON: Well, that was the right
12 charge then, but - - - but our error that we're
13 talking about is what is appropriate now.

14 JUDGE GARCIA: And you, at this point, ask
15 for a mistrial.

16 MS. SALOMON: That was among the relief
17 that counsel - - -

18 JUDGE GARCIA: Well, first you asked for a
19 mistrial.

20 MS. SALOMON: Yes. But - - -

21 JUDGE GARCIA: And then the judge gives
22 them this instruction - - -

23 MS. SALOMON: Yes.

24 JUDGE GARCIA: - - - and they leave.

25 MS. SALOMON: And then after that - - - but

1 - - - but to that, counsel then engages with the
2 court in a lengthy colloquy that it is set out in our
3 appendix at 230 - - -

4 JUDGE STEIN: Before you get to that, I'm
5 just - - - I'm having a hard time understanding - - -

6 MS. SALOMON: Okay.

7 JUDGE STEIN: - - - what you think was
8 coercive - - -

9 MS. SALOMON: Okay.

10 JUDGE STEIN: - - - about the court saying,
11 I'm sending you back to try to attempt - - - I think
12 he's used the word attempt - - - to reach a unanimous
13 verdict. What is coercive about that?

14 MS. SALOMON: What is - - - what was wrong
15 - - -

16 JUDGE STEIN: What needs to be balanced in
17 that?

18 MS. SALOMON: What was wrong with that was
19 in what counsel asked for, and no one complained
20 about it being late or anything else, so that is
21 waived, and the court knew what counsel was asking
22 for, was a resurrection of what the court had given
23 the first time around, which was - - -

24 JUDGE STEIN: But the court said we don't
25 need to do that.

1 MS. SALOMON: - - - you can stick to your
2 beliefs.

3 JUDGE STEIN: My understanding is - - -

4 MS. SALOMON: I'm sorry.

5 JUDGE STEIN: - - - is that you need the
6 balancing - - -

7 MS. SALOMON: Right.

8 JUDGE STEIN: - - - when you suggest to
9 them that they must reach a verdict, or when you
10 single out the dissenting jurors, or something of
11 that nature, then it needs to be balanced. Here, I
12 just don't understand - - -

13 MS. SALOMON: Okay.

14 JUDGE STEIN: - - - what needed to be
15 balanced when all that was said was, I'm going to
16 send you back because it needs to be unanimous, and I
17 want you to attempt to reach a unanimous verdict.

18 MS. SALOMON: Well, I would say, in these
19 particular circumstances, once you've had a hung
20 jury, once then you've had identified jurors would
21 disagree with the verdict, then, as this court noted
22 in Kisoan, where you have to - - - where they labeled
23 - - - what would have been an intelligent suggestion
24 there to be solicitous of the two jurors who are in
25 the minority there, what you have here is the need

1 for balance because - - -

2 JUDGE STEIN: Well - - - well, what are we
3 balancing - - -

4 MS. SALOMON: Okay. What we're balancing
5 is - - -

6 JUDGE STEIN: - - - that's the question.

7 MS. SALOMON: - - - the repeated statement
8 in the charge that all twelve jurors must agree, I'm
9 not going to accept this, I'm going to order that you
10 go back and resume in an attempt to reach a unanimous
11 verdict. That is where all twelve agree.

12 All that is said there is the emphasis on
13 unanimity. What needs to be balanced against that is, and
14 especially - - - especially where you have identified
15 jurors in the minority who don't agree, that you have the
16 right to stick to your beliefs, that you don't need to
17 reach your verdict.

18 JUDGE RIVERA: So you're saying the message
19 that was sent, because one verdict had already come
20 out that was not unanimous - - -

21 MS. SALOMON: That's correct.

22 JUDGE RIVERA: - - - is that you all have
23 to be unanimous. Get there whichever way you want,
24 but you all have to be unanimous - - -

25 MS. SALOMON: It was - - -

1 JUDGE RIVERA: - - - as opposed to, if you
2 don't reach unanimity, somebody is going to come back
3 and say, I just can't sign off that verdict.

4 MS. SALOMON: Well, what - - - what - - -
5 yes, what we're saying is, effectively, this was
6 almost a repetition of the hung-jury declaration. We
7 have - - - we have a jury that was given a balanced
8 charge the first time around. And then, we don't
9 know what went on in that jury room, but obviously,
10 ultimately, two of those jurors summoned their
11 courage to say, yeah, we heard all that but we don't
12 agree; it's not our unanimous verdict, we don't
13 agree. So at that point, heightened judicial
14 sensitivity was required.

15 JUDGE STEIN: But we can't assume that
16 because they just heard that balanced charge a couple
17 of hours earlier, not the day before, or three days
18 before, a couple of hours earlier, we can't assume
19 that they - - - that they heard and understood that -
20 - - that charge?

21 MS. SALOMON: Well, first, the fact that
22 they were given that balanced charge when they were
23 given it, and then they come out, and they obviously
24 haven't - - - there's been an announcement of the
25 unanimous verdict, but it's not being rendered - - -

1 JUDGE GARCIA: But they followed the
2 charge.

3 MS. SALOMON: But - - - but this - - - I'm
4 sorry.

5 JUDGE GARCIA: They followed the charge. I
6 mean, they came out and they said, no, that's not my
7 verdict, so they were following the earlier charge.

8 MS. SALOMON: But - - - but the charge that
9 was subsequently given though, it referenced the
10 final charge. Not - - - not the one that they had
11 just heard. It referenced only when I - - - before I
12 sent you out to deliberate, my closing instructions
13 to you were how to deliberate. If you look at those
14 instructions, in fact, they say nothing about stick
15 to your beliefs; it's just got - - - unanimity.

16 JUDGE RIVERA: How - - - how coerced could
17 they be? They went on to deliberate for quite some
18 time.

19 MS. SALOMON: As - - - as the case has
20 recognized, and this court has recognized in Aponte,
21 that the length of deliberations are not - - - is not
22 dispositive. Obviously, it can lend help or support
23 in finding a coercion, but the fact of length doesn't
24 mean that the charge itself that was given is fine.
25 The - - -

1 JUDGE FAHEY: No, but it does go to
2 coerciveness, doesn't it?

3 MS. SALOMON: No. What it - - - what it
4 could say is, and as I think that the - - - the
5 circuit - - - the circuit has recognized, and I
6 always cite it - - - because I think it is - - - it's
7 supportive of what this court said in Aponte, and
8 gives teeth to it. Why is it that it's not
9 dispositive? Because we don't know what goes on in
10 that jury room.

11 And the fact is, those two jurors who
12 finally summoned the courage during polling to say,
13 no, it's not us, but how do we know? Should we judge
14 a verdict by their fortitude, or what goes on, or - -
15 -

16 JUDGE STEIN: So you're advocating the rule
17 that whenever there is a split verdict - - -

18 MS. SALOMON: When - - - yes.

19 JUDGE STEIN: - - - then the entire Allen
20 charge - - -

21 MS. SALOMON: I'm not saying the entire
22 Allen charge. This is - - - this is what I'm saying.
23 In this particular case, and we do have a governing
24 statute, 310.80, where when a jury renders a
25 defective verdict such as this, for example, it can

1 simply tell jurors, resume your deliberations.

2 That's neutral; it says nothing.

3 But when you have somebody, as here, the judge
4 who doesn't do that, but now just simply focuses on, you
5 need a unanimous verdict, try to do that, you need twelve,
6 if you are going to go that route, if a judge is, then you
7 do need to hew, to balance, which is - - - and make - - -
8 give a gesture toward the prior instruction that you gave
9 about, you don't need to absolutely come in with a
10 verdict, and remember what I said, do not surrender
11 conscientiously held beliefs simply for the view of - - -

12 JUDGE ABDUS-SALAAM: Counsel, you have - -
13 - you had - - - you seem to be saying there are two
14 different issues here, right. There is the deadlock
15 that happened before, and now the not unanimous
16 verdict. But they happen - - - you seem to be saying
17 that they happened in such succession that they kind
18 of get merged together.

19 MS. SALOMON: I'm not - - - I'm not saying
20 that in this way. Because we have - - - what we have
21 now are different circumstances, and that's what's
22 critical.

23 We now have, when the jury renders the defective
24 verdict, we now have the public identification of minority
25 jurors.

1 If anything, they should be given - - - if,
2 again - - - if the judge is going to go the route of doing
3 more than simply saying resume deliberations, which then
4 would be without making any choice about, you shouldn't -
5 - - that - - - that explicitly is saying, or implicitly is
6 saying, remember what I told you before, a couple of hours
7 ago when you were deadlocked. It's not saying, don't - -
8 - don't use those instructions; it's just simply saying,
9 resume deliberations.

10 But whereas here you have a judge who is then
11 emphasizing the need for unanimity for a verdict, if
12 you're going to do that, and the circumstances here now
13 where you've got identified jurors in the minority, it's
14 then incumbent to have a balanced instruction that says to
15 them and - - - and you shouldn't, again, as I said, there
16 is no need to give up, and you shouldn't give up
17 conscientiously held beliefs simply to achieve that
18 unanimity.

19 It's all the more important, and as the case has
20 recognized, as this court noted would be an intelligent
21 suggestion in Kisoan, to have jurors be told that they
22 don't need to give up their conscientiously held beliefs.

23 And as I said, because they - - - because they
24 deliberated for a while, we - - - we don't know. I mean,
25 obviously, we have the - - - ultimately we have the

1 verdict that we have. Maybe they just, you know, they
2 finally just gave up. Remember - - - you know, this judge
3 said, try to have a unanimous verdict, and that's what's
4 important. If I - - -

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MS. SALOMON: Okay.

7 CHIEF JUDGE DIFIORE: Counsel.

8 MS. RENO: May it please the court,
9 Catherine Reno from the Offices of the Bronx County
10 District Attorney.

11 JUDGE STEIN: Wouldn't it have been
12 different here if the court had said, you need a
13 unanimous verdict, so I'm going to have you go back
14 and continue your deliberations until you reach a
15 unanimous verdict. Would that have been a different
16 story?

17 MS. RENO: Yes, that would be - - - that
18 would be very different.

19 Here, the court made clear that they only needed
20 to attempt to reach any unanimous verdict.

21 JUDGE STEIN: So that's - - - that's what
22 you say is saving this instruction, essentially.

23 MS. RENO: Yes, yes, absolutely. The court
24 didn't imply that a unanimous jur - - - verdict was
25 required, they had to reach one, they - - - the court

1 simply asked to them to continue to attempt to reach
2 that - - -

3 JUDGE ABDUS-SALAAM: There had been no
4 deadlock before, and the court hadn't given them an
5 Allen charge, and then the jury reaches a verdict
6 which is not unanimous, would you say that 310.80,
7 just go back and deliberate would be sufficient?

8 MS. RENO: It would be sufficient in that
9 case. The - - - there - - - the trial courts have a
10 lot of discretion in this area, and CPL 310.80 simply
11 asks - - - simply requires that the court just send
12 the jurors back and ask them to continue
13 deliberating.

14 JUDGE ABDUS-SALAAM: But now that there has
15 been a deadlock just before, sometime before, and
16 then a non-unanimous verdict, nothing different?

17 MS. RENO: No, there isn't any requirement.
18 The fact that it's a deadlock note or a non-unanimous
19 verdict, it's up to the trial court, in its
20 discretion, to look at all the circumstances of the
21 case and the context to determine what type of charge
22 to deliver.

23 For instance, here, it had delivered the
24 full comprehensive Allen charge ninety minutes prior
25 to this - - - this non-unanimous verdict. So it was

1 up to the trial court to decide whether to give to
2 another comprehensive - - -

3 JUDGE RIVERA: Right. But then - - - but
4 then they heard that, they heard that instruction,
5 let's say they took it to heart, they went in, they
6 deliberate, they come out, and they're not unanimous.
7 Isn't that their understanding of that instruction
8 being, we're trying to reach unanimity, we can't,
9 this is the best we can do, and here we are. And
10 then the judge says, you have to go back.

11 And I understand your point that the judge
12 says, attempt to reaching a unanimous verdict, but
13 that's only after having said very clear, I told you
14 that your verdict, as to any count of the indictment
15 that you consider, must be unanimous; that is all
16 twelve jurors must agree. Therefore, I'm not going
17 to accept this verdict.

18 I mean, that sounds like a very strong statement
19 from the judge - - -

20 MS. RENO: Well - - -

21 JUDGE RIVERA: - - - after people have come
22 back having heard the Allen charge, having heard the
23 instructions - - -

24 MS. RENO: Right. But that - - -

25 JUDGE RIVERA: - - - that you've got to get

1 to twelve.

2 MS. RENO: But this verdict wasn't
3 unanimous. They said they had reached the verdict,
4 and in actuality, all twelve didn't agree. So it
5 seems to reflect more of a confusion, perhaps, on the
6 part of the jury.

7 JUDGE RIVERA: As to what constitutes a
8 verdict?

9 MS. RENO: Exactly. And that's why the
10 court said in its supplemental charge here, that
11 means all twelve of you agree. The court - - -

12 JUDGE GARCIA: Because they came out and
13 they said, we have a verdict, right? And then they
14 said it was ten to two.

15 MS. RENO: Right. So it probably reflects
16 confusion because before, when they had been
17 deadlocked, they sent a note saying that they were
18 hung. So that shows that they understood they could
19 do that if they felt that they were hung and unable
20 to continue deliberating further.

21 JUDGE RIVERA: But why not give the other
22 part of this - - - why not?

23 MS. RENO: It's not required in this case.

24 JUDGE RIVERA: What's the concern?

25 MS. RENO: Well, they are - - - the court

1 didn't ask the jurors to reexamine their own views or
2 target the minority jurors at any point. So there's
3 no need for this to balance because there's nothing
4 for it to counterbalance. The court isn't giving
5 them any kind of coercive instruction.

6 JUDGE RIVERA: Well, two people have - - -
7 I think several people already said, two people are
8 now publicly visible as not being in agreement with
9 the other ten. So they are going back into that room
10 knowing that they are the holdouts, or they are the
11 minority at that point, right?

12 MS. RENO: Yes, but again - - -

13 JUDGE RIVERA: That's a coercive
14 environment, isn't it?

15 MS. RENO: It would be - - - well, first of
16 all - - -

17 JUDGE RIVERA: Isn't the judge sending them
18 to a coercive environment without making clear that
19 they need not fold?

20 MS. RENO: Well, they had - - - the court
21 had already done that just ninety minutes prior.
22 It's - - - it's really - - -

23 JUDGE RIVERA: But before - - - before they
24 had publicly admitted that they were the minority.

25 MS. RENO: Right. But the jurors can be

1 trusted to follow instructions. I mean, it's up to
2 the trial court's discretion.

3 JUDGE RIVERA: Yes, they can, and the
4 instruction is, "I told you that your verdict, as to
5 any count, that you must be unanimous. All must
6 agree. I'm not going to accept this verdict. Go
7 bring me a verdict."

8 MS. RENO: Well, it didn't - - - the court
9 did not say, bring me a verdict; the court asked them
10 to attempt to reach a verdict. And the - - - the
11 jury's response showed that it wasn't a coercive
12 charge.

13 JUDGE RIVERA: Right. But isn't it - - -

14 MS. RENO: They were in there for eight
15 hours.

16 JUDGE RIVERA: Isn't really the sentence
17 you're referring to about the attempt to reach a
18 unanimous verdict really his explanation apropos to
19 your argument before, that it seems like they just
20 didn't understand what's a verdict, so the judge is
21 telling me, that's where all twelve jurors agree as
22 to any count submitted to you. He's explaining that.
23 He's saying, that's the verdict. Verdict means
24 twelve; go get me a verdict.

25 MS. RENO: He's saying - - - he says, "I'm

1 going to order that" all - - - "that the twelve
2 jurors go back to the jury room, resume your
3 deliberations in an attempt to reach a unanimous
4 verdict."

5 JUDGE RIVERA: "That is - - -"

6 MS. RENO: "That is where all - - -"

7 JUDGE RIVERA: "- - - where all twelve
8 jurors agree.

9 MS. RENO: Correct.

10 JUDGE RIVERA: Isn't that an attempt to
11 explain to the jury what they - - -

12 MS. RENO: What they should attempt to do.

13 JUDGE RIVERA: - - - didn't appreciate.
14 What they didn't appreciate, which is that ten out of
15 twelve isn't a verdict.

16 MS. RENO: Right. And he's asking them to
17 attempt to reach that verdict, where all twelve of
18 them agree. So again, it should be - - - it should
19 be pointed out that we're not sure what the two - - -

20 JUDGE RIVERA: You don't think that puts
21 pressure on the other two to fold, or to persuade the
22 other ten to agree with them - - -

23 MS. RENO: No.

24 JUDGE RIVERA: - - - because that's what
25 gets you a verdict, twelve?

1 MS. RENO: No, because the court is only
2 asking that they attempt to do that. It doesn't
3 matter that the court knows the breakdown. There's
4 absolutely no case law that says the court, once it
5 knows the numerical breakdown, has to give this - - -

6 JUDGE RIVERA: You mean to say, if we don't
7 get to that, it's fine?

8 MS. RENO: If - - -

9 JUDGE RIVERA: If you cannot get to that,
10 it's fine?

11 MS. RENO: No, there's no requirement.

12 JUDGE RIVERA: You don't think this is
13 sending a message, you have to keep working until you
14 get a verdict? He's not - - - I agree with you, he's
15 not - - - the judge is not suggesting what should be
16 the verdict.

17 MS. RENO: Right. But no, there's no - - -
18 case law doesn't require that. And again, because it
19 didn't obligate any jurors to reexamine his or her
20 views, in light of the other jurors, whether that's
21 the minority or the majority reconsidering, and we
22 don't know here what these two holdouts, if - - -
23 they could very well be holding out for a higher
24 conviction, for a conviction on murder two.

25 We have - - - we don't have a record here;

1 defendant has not provided a sufficient record to
2 show that we can assume that they were holding out
3 for an acquittal.

4 CHIEF JUDGE DIFIORE: Counsel, do you care
5 to address the jury's request to hear the defense's
6 summation?

7 MS. RENO: I do, Your Honor, thank you.

8 Defendant here is belatedly raising an
9 ineffective assistance of counsel claim as a subterfuge to
10 obtain review of his admittedly unpreserved claim that the
11 trial court erred in refusing to read back the defense
12 summation.

13 This - - - this issue isn't reviewable on direct
14 appeal, as the Appellate Division found, we need to have a
15 440.10 motion in this case. There is no time bar, it
16 would be very easy for defense to file that, and it
17 wouldn't the force the court to consider this based on
18 supposition and conjecture.

19 JUDGE RIVERA: But doesn't the record - - -
20 what - - - what is it that you think is not clear
21 about the record? Right. The judge is say, that's
22 not evidence, and the defense attorney is saying,
23 you're right; that's not evidence.

24 MS. RENO: Well, it is in evidence. It's a
25 correct statement of law.

1 because it's not evidence, I won't have it read back?

2 MS. RENO: We don't know. It's - - -

3 JUDGE RIVERA: What - - - what do you
4 think, "I just read", means? What do you think this
5 means?

6 MS. RENO: It doesn't - - - it doesn't
7 necessarily mean that the court - - - the court
8 didn't expressly say, I'm not going to read it back,
9 because it's not evidence, so I can't read it back.
10 We can't know.

11 JUDGE RIVERA: Let's say I don't agree - -
12 - let's say I don't agree with you. What - - - or
13 the court doesn't agree with you.

14 MS. RENO: Okay.

15 JUDGE RIVERA: What's your next argument?

16 MS. RENO: Well, this issue is not
17 reviewable, so if we bring it back into the realm of
18 ineffective assistance of counsel, even if defendant
19 would have raised this objection, the court likely -
20 - - or even if the court would have given the read
21 back, it's not clear that - - - it's not so decisive.
22 Defendant can't show a link between having the read
23 back and the verdict in this case.

24 They continued to deliberate, they asked for
25 other evidence to be read back, so we don't know that this

1 was such a determinative issue. We don't know which
2 jurors asked for the read back, we don't know why they
3 asked for the read back.

4 All of it is pure speculation. So this isn't a
5 clear-cut issue like a meritorious statute of limitations
6 claim, or something to that extent where it's very clear
7 that one error on behalf of - - - by counsel tainted the
8 entire representation.

9 Defendant was acquitted on the top count in this
10 case; he was acquitted of murder two. Counsel was
11 effective, and this simply isn't the type of single error
12 that - - - that provide - - - excuse me, was ineffective.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 Ms. Salomon?

15 MS. SALOMON: Yes. First, with respect, if
16 I might, with the juror coercion issue, yes, there is
17 case law that supports our position. *Smalls v.*
18 *Batista*, obviously, in our main brief, and also in
19 our reply brief.

20 This court's noting in *Kisoon*, for example,
21 that it would have been an intelligent suggestion for
22 counsel to have requested solicitude for the two
23 jurors in the minority, and that they need not give
24 up conscientiously held beliefs.

25 Also, all of the other federal cases that have

1 trucked with this issue have all, when they have affirmed
2 had done so because the instruction, when jurors were
3 singled out, referenced, explicitly referenced the other
4 instructions that talked about no need, and please do not
5 give up your conscientiously held beliefs. Every single -
6 - -

7 JUDGE GARCIA: But could that be a function
8 of how long ago that instruction was given? I mean,
9 isn't it really a facts and circumstances case? So
10 if the instruction is half hour before, do you maybe
11 not have to say those magic words as if its two days
12 before, and you say, remember that instruction I gave
13 you two days ago.

14 I mean, it can't be that those are just the
15 magic words you always have to put in there no matter
16 how recently the jury was instructed on that issue.

17 MS. SALOMON: Well, the fact is that they
18 were instructed on there in this case, and then they
19 came back with a defective verdict. So whatever it
20 was, it didn't - - - it didn't work.

21 JUDGE GARCIA: But you could say it did - -
22 -

23 MS. SALOMON: Now, we have a new
24 circumstance.

25 JUDGE GARCIA: - - - it did work - - -

1 MS. SALOMON: Well - - -

2 JUDGE GARCIA: - - - because if you poll
3 the jury, and they said, yes, and then later they
4 came in and said, I felt coerced and I had to say,
5 you know, yes, then it wouldn't have worked. But
6 here, they didn't give up those beliefs, and in fact,
7 in open court, adhered to them.

8 MS. SALOMON: So well - - - and the fact
9 that they did, they therefore required some support
10 by the court, not a reference to simply unanimity
11 instructions, which is the one that they heard
12 predominantly in this case. They heard it at the
13 final instructions before they were sent out, they
14 heard it at the hung jury determination, and then
15 they heard it again. That's the one thing that they
16 repeatedly heard.

17 But as these cases discussed, Smalls in
18 particular, and then other cases that have followed
19 it, again, talk about, we need to look at things from
20 the minority jurors' point of view, having been
21 outed.

22 With respect to the read back request, I think I
23 addressed in my reply brief that we've not raised a
24 subterfuge claim; we're perfectly entitled to raise
25 ineffective assistance here. Everybody was just wrong on

1 the law. Velasko has been this court's law since 1991. A
2 quick Westlaw little charge (sic), you know, little search
3 would have - - - would have picked up the case
4 immediately.

5 Also, defense counsel had no strategy; he just
6 was ignorant of the law. This court's decision in Nesbitt
7 controls on that. Even if there could have been strategy,
8 the fact is he betrayed he had none.

9 JUDGE STEIN: Well, didn't he say something
10 like, you know, whatever you decide I'll, you know,
11 I'll - - - so - - - so doesn't that indicate that he
12 may have realized that there was - - - that there was
13 some discretion there?

14 MS. SALOMON: No. No, Your Honor.
15 Everybody is singing out of the same hymn book, which
16 is, it's not evidence. And all he says is, I know
17 it's not evidence. So he's just agreeing with the
18 other two parties, well, the court and the DA, who
19 have all said, it's just not evidence. So it's just
20 - - -

21 JUDGE RIVERA: And what's the effect on the
22 verdict?

23 MS. SALOMON: I'm sorry?

24 JUDGE RIVERA: What's the effect on the
25 verdict?

1 MS. SALOMON: Well, we don't - - - we don't
2 need to show that. I mean, that is - - - that's
3 quite a hurdle. However, in this case, when you
4 have, during deliberations, a jury who comes out, you
5 know, again after this - - - this debacle, I would
6 say, with the instructions, you then have a request,
7 and they keep asking for evidence.

8 So this is not a situation where they are just
9 relying on summations; they've been trying to deal with
10 the evidence, they had a myriad of requests. And then the
11 come back and they say, we would like to hear the defense
12 summation. And by the way, I think any defense attorney
13 would be - - - I mean, just say, yes, just say, yes. That
14 would be your defense position. Let someone else say why
15 they shouldn't get it.

16 JUDGE STEIN: Well, couldn't the defense
17 attorney have thought, well, if they read back my
18 summation, then the People are going to want them to
19 read back their summation?

20 MS. SALOMON: Well, Your Honor, I think the
21 answer to that would be, number one, you know, fight
22 your battles as you get them. I would say if they
23 came back - - - this is what the jury asked for. As
24 we know, juries don't always ask for everything from
25 - - -

1 JUDGE STEIN: But aren't you then - - -

2 MS. SALOMON: Well - - -

3 JUDGE STEIN: Aren't you then second-
4 guessing strategies - - -

5 MS. SALOMON: No.

6 JUDGE STEIN: - - - when you say that?

7 MS. SALOMON: No. There was no strategy.
8 He - - - he betrayed ignorance of the law.

9 JUDGE STEIN: Well, that's the question
10 that maybe a 440 might - - -

11 MS. SALOMON: Right.

12 JUDGE STEIN: Might - - -

13 MS. SALOMON: I don't think so here, Your
14 Honor.

15 JUDGE GARCIA: Maybe the way the notes were
16 coming out - - -

17 MS. SALOMON: Of course.

18 JUDGE GARCIA: - - - or what the
19 deliberations were, he might not want his summation
20 read back if he's arguing different things, he's - -
21 -

22 MS. SALOMON: Okay. If he's- - - -

23 JUDGE GARCIA: - - - anticipating that
24 they're not looking at it.

25 MS. SALOMON: If he said - - - but if he

1 said, I don't want it - - - if that's what he wanted,
2 he need only have said it. Otherwise, he simply
3 rolled the dice because he said to the court, I'll be
4 happy to do whatever you like. Maybe the court might
5 have changed its mind. This was not some nefarious,
6 oh, I hope he'll say, yes, or maybe he means, no.
7 No, he said - - -

8 JUDGE GARCIA: Isn't - - -

9 MS. SALOMON: - - - I don't know the law.

10 JUDGE GARCIA: - - - strategy, as Judge
11 Stein was saying, our there possible reasons that he
12 could have not wanted a read back?

13 MS. SALOMON: No, it's - - - that would be
14 an unreasonable strategy. When you have jurors who
15 are struggling, and they've come back, and they asked
16 for it twice. They ask for it, they made sure, they
17 said, and can we please have the defense summation.
18 Had they then got - - - somebody then asked for the
19 People, so you might have opposed, and they said,
20 they didn't ask for that.

21 On the other hand, we do know, we have a juror
22 who is interested in the defense summation, so at least
23 given that.

24 JUDGE FAHEY: You know, I just want to
25 acknowledge the validity, the actual validity of your

1 argument. I think that 310.30 does, in some way,
2 support your argument. But I'm having difficulty
3 with the preservation part of it and then whether or
4 not it's ineffective.

5 But the argument itself, the language seems
6 to say that the court may - - - anything that's
7 pertinent. So this seems to fall within that
8 category. But you're having a much more difficult
9 time on the preservation argument.

10 MS. SALOMON: Well, Your Honor - - - I'm
11 sorry, with - - -

12 JUDGE FAHEY: With the preservation point,
13 I think. And then whether or not this error is
14 sufficient to get you over the hurdle.

15 MS. SALOMON: Are you talking about with
16 respect to the ineffectiveness itself?

17 JUDGE FAHEY: Yeah, yeah.

18 MS. SALOMON: Well, again, we would just
19 need to say that the court would have read it. In
20 other words, had the court - - - we know that we
21 don't we had a non-exercise of discretion - - -

22 JUDGE FAHEY: Um-hum.

23 MS. SALOMON: So under Cronin itself, which
24 is the lead case of this court about that, there - -
25 - you don't need to show that the - - - the judge,

1 under a proper exercise of discretion, would've
2 necessarily done so in your client's favor. But
3 here, we have all the arguments, certainly, that
4 would have augured for a ruling in the defendant's
5 favor.

6 There was nothing wrong with this summation.
7 This was actually quite a complex case, including even
8 whether there was conduct that was not intentional or
9 whether there was a struggle over the gun. The judge
10 actually said that in granting the request to charge
11 second-degree manslaughter.

12 So we have a complex case. We don't have a jury
13 making this request, basically in lieu of dealing with the
14 evidence. They've had gazillion requests for the
15 evidence, said they would just like to hear something that
16 they haven't heard for five days.

17 JUDGE FAHEY: Um-hum.

18 MS. SALOMON: It's been a long time, and it
19 was very complicated.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MS. SALOMON: Thank you.

22 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Patrick Morgan, No. 204 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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