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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 72

HASAHN D. MURRAY,

Appellant.

20 Eagle Street
Albany, New York
September 7, 2022

Before:

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

Appearances:

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1 ACTING CHIEF JUDGE CANNATARO: Our next appeal is
2 No. 72, People v. Hasahn Murray.

3 MS. EVERETT: May it please the court, Abigail
4 Everett for Appellant, Hasahn Murray. I'd like to request
5 two minutes for rebuttal, please, Your Honor.

6 ACTING CHIEF JUDGE CANNATARO: You may have two
7 minutes.

8 MS. EVERETT: Under CPL 270.35, when the trial
9 judge discharges a sitting juror, the judge has two courses
10 of action. If an alternative juror's available, the judge
11 must seat the alternate juror. Otherwise, the judge must
12 grant a mistrial.

13 The issue here is what did the legislature mean
14 by that word, having an alternate juror available. If you
15 look at the statutory scheme in general of the CPL you'll
16 see that there's a dichotomy, that the legislature makes
17 clear they see a difference between a discharged juror and
18 an available juror.

19 First - - -

20 JUDGE GARCIA: Is - - - Counsel, is another way
21 to really put that - - - whatever available means, and it
22 may mean different things in different contexts, discharge
23 is - - - they're mutually exclusive, right? So a
24 discharged juror can't be available - - -

25 MS. EVERETT: That's my - - -



1 JUDGE GARCIA: - - - right?

2 MS. EVERETT: - - - my position, Your Honor, yes.

3 JUDGE GARCIA: So whatever the overall definition
4 of available for service, in another context, might be
5 related to something other than discharge, right, maybe
6 they're late, maybe they're whatever, absent, discharge to
7 me, to your point, seems to have a very different
8 application, a different relationship to available for
9 service. And I think those are the provisions that you go
10 through in your brief.

11 MS. EVERETT: Right.

12 JUDGE GARCIA: You know, the death penalty
13 provision, the - - - it's discharge versus available for
14 service.

15 MS. EVERETT: Right. They're two different
16 things and the legislative view has articulated in the
17 statute - - - and in fact, you'll also see - - - it's a
18 little to the side, but the CPLR, as well, as we said,
19 talks about - - -

20 JUDGE RIVERA: Is it possible to read a discharge
21 as a form of unavailability?

22 MS. EVERETT: Could you repeat that, Your Honor?

23 JUDGE RIVERA: Is it possible to read it as
24 discharge is a form of availability, is a subset?

25 JUDGE WILSON: Of unavailability.



1 JUDGE RIVERA: Of unavailability - - -

2 MS. EVERETT: I'm not - - -

3 JUDGE RIVERA: - - - thank you.

4 MS. EVERETT: Of unavailability, yes - - -

5 JUDGE RIVERA: That's my apologies.

6 MS. EVERETT: - - - I think so, Your Honor.

7 That's correct.

8 And when you look at it from the juror's point of
9 view, they're told they're discharged. That's a very
10 important communication to the juror. How is a juror - - -
11 when you retain a juror that's available, you continue
12 judicial supervision and - - -

13 JUDGE RIVERA: Let me - - - I'm sorry to
14 interrupt you. Let me ask you this. If - - - just to
15 clarify for myself, to confirm here, the judge discharged,
16 right, the alternate jurors before deliberations started -
17 - -

18 MS. EVERETT: Right.

19 JUDGE RIVERA: - - - is that correct?

20 MS. EVERETT: That's correct.

21 JUDGE RIVERA: If the judge had sent them to
22 deliberate, and then had discharged the juror, then as I
23 think Justice Renquist - - - Renquist, excuse me - - -
24 Renwick mentioned CPL 270.30, subparagraph 1, kicks in,
25 right, where - - - where you would not have been able to do



1 this because you've only got two options at that point?

2 MS. EVERETT: Right. The - - - the three - - -

3 JUDGE RIVERA: I'm - - - I'm - - - I'm just
4 saying - - -

5 MS. EVERETT: - - - 270 - - -

6 JUDGE RIVERA: - - - isn't the problem that the
7 judge - - - in part, that the problem - - - the judge
8 discharged the alternate jurors before deliberations had
9 commenced. And so we're in this place where we're trying
10 to figure out what do you do when 270.30, subparagraph 1,
11 doesn't apply?

12 MS. EVERETT: Right. I mean, it's not our
13 argument, and that's why there's not a preservation
14 argument - - -

15 JUDGE RIVERA: Yeah.

16 MS. EVERETT: - - - that the error was
17 discharging them - - -

18 JUDGE RIVERA: Um-hum.

19 MS. EVERETT: - - - before deliberation, before
20 the juror would sit in the deliberations. But you can see
21 from 270.35(1) that the legislature anticipated that if the
22 judge makes the discretionary determination to have
23 alternate jurors, that you keep them until deliberations
24 start because otherwise if the - - - and you need consent
25 at that point - - - because otherwise, you're risking a



1 double jeopardy problem.

2 JUDGE GARCIA: Could you consent to do this after
3 the jury starts deliberating? You've dismissed the
4 alternates, and the defendant, you know, same things
5 happens, but the defense - - - the defendant on the record
6 executes the written document and says, I'm waiving, and
7 I'm - - - I want the alternate back and they bring the
8 alternate back in the same circumstances we have here?

9 MS. EVERETT: Well, yes, I think if I'm
10 understanding that if the defendant waived the provision of
11 the CPL and agreed that the judge could bring the alternate
12 back then - - - I mean, it's not this case, but I - - -
13 probably you could have a waiver in that situation.

14 ACTING CHIEF JUDGE CANNATARO: Counsel, quick
15 question about the effect of the discharge. If - - - as
16 happened here, if before the jury is charged, the judge
17 turns to the alternates and says, you're discharged. Now,
18 you know, somebody with a lot of foresight says, hold on a
19 minute, judge, that's a really bad idea because something
20 like this might happen. Are there takebacks on that? Can
21 the judge undo the discharge or is the deed now done?

22 MS. EVERETT: Well, I think that gets to the
23 whole de minimis issue that was very prominent in the
24 Appellate Division decision. It's - - - it's not - - - I
25 want to make clear, I don't believe what happened here is



1 de minimis because they've left the courthouse, and we're
2 talking about a significant amount of time.

3 But there are cases in the Appellate Division
4 where the judge says, discharge the juror - - - the whole
5 jury, not even an alternate, and the defense lawyer could
6 have said, wait, you forgot to poll them. And the judge
7 could say, oh, yes, you know - - -

8 JUDGE SINGAS: Yeah, but why not - - - why not
9 leave that to the discretion - - -

10 MS. EVERETT: Right.

11 JUDGE SINGAS: - - - of the trial judge? Isn't
12 the trial judge the best situated person to determine
13 whether someone's available for service, especially if the
14 legislature hasn't defined it? And after a thorough
15 inquiry, isn't it reasonable for us to say to a trial
16 judge, what do you think, because - - -

17 MS. EVERETT: No, I don't agree with that.

18 JUDGE SINGAS: - - - because if it's a bright line
19 rule, then where do we - - - where is that bright line? Is
20 it after two minutes, is it after fifteen, is it once they
21 leave the courtroom, once they leave the - - - outside the
22 courthouse; why not just leave it to a judge's discretion,
23 the trial judge?

24 MS. EVERETT: Because - - - there are a couple
25 reasons. One, it's not fair to the jurors. They're told



1 they're discharged. These are citizens who have been
2 summoned to the courthouse, and they're told they're
3 discharged. They go home, they return to their private
4 lives, and then they get a call from a judge saying, oh,
5 sitting juror violated her obligation, she spoke about the
6 case, did you do that? Oh no, Your Honor. The legislature
7 - - -

8 ACTING CHIEF JUDGE CANNATARO: Well, didn't the
9 judge ask - - -

10 MS. EVERETT: - - - it's in our interest - - -

11 ACTING CHIEF JUDGE CANNATARO: The judge asked,
12 and said, are you willing to come back?

13 MS. EVERETT: Yes.

14 ACTING CHIEF JUDGE CANNATARO: And they said - -
15 - they both said - - -

16 JUDGE SINGAS: They could have said no.

17 ACTING CHIEF JUDGE CANNATARO: Yeah. They both
18 said, yeah, I can come back.

19 MS. EVERETT: I know, Your Honor, but - - -

20 JUDGE TROUTMAN: But - - - with - - -

21 MS. EVERETT: - - - as a policy - - -

22 JUDGE TROUTMAN: - - - respect to juries - - -
23 jury duty, it's start with a summons. You - - - you get a
24 summons, and the summons says, you're available until we
25 tell you you're discharged. And in this particular



1 instance, this juror had been a sworn alternate, given
2 admonishments about behavior, et cetera, but once you give
3 - - - you tell a person they're discharged, they're no
4 longer then covered by those requirements.

5 MS. EVERETT: Correct.

6 JUDGE TROUTMAN: So it becomes rather dicey - - -

7 MS. EVERETT: Correct.

8 JUDGE TROUTMAN: - - - to say - - - I can call on
9 the phone, and say, come back, and it's okay, just come on
10 back in.

11 MS. EVERETT: Right.

12 JUDGE TROUTMAN: No harm, no foul.

13 MS. EVERETT: Right. That would be our position,
14 Your Honor, because it just serves the - - - the judicial
15 system better to have clarity so that these lay people who
16 are told they're discharged know they're no longer under
17 court supervision, they can return to their private lives.

18 I'd like to point out, Respondent talks about the
19 advantage that's been recognized of leaving things to the
20 discretion of judges. But as Judge Renwick decided in the
21 - - - in her dissent, that the discretionary determination
22 of whether a person is committed in proper conduct is very
23 fact-based. It really is a very important role for the
24 judge to play to determine what happened.

25 Here, you're discharged, you've left the



1 courtroom - - -

2 JUDGE SINGAS: So your example - - -

3 MS. EVERETT: - - - so you're no longer under
4 supervision, you don't need a judge to engage in - - -

5 JUDGE SINGAS: So in your example with - - - you
6 forget to poll the jury, and fifteen seconds have elapsed,
7 because the word discharge was uttered, it ends?

8 MS. EVERETT: That's not my position, no, but the
9 - - -

10 ACTING CHIEF JUDGE CANNATARO: Is there room for
11 a - - -

12 MS. EVERETT: - - - issue is - - -

13 ACTING CHIEF JUDGE CANNATARO: - - - for a de
14 minimis exception?

15 MS. EVERETT: Excuse me.

16 ACTING CHIEF JUDGE CANNATARO: Is there room for
17 a de minimis exception?

18 MS. EVERETT: I think there is room for it
19 because my position is as long they're still in the
20 courtroom, they're still under the supervision of the
21 judge. The judge could see what's happening. It's very
22 different to say, take back immediately - - -

23 JUDGE GARCIA: But isn't that going to lead to -
24 - - to litigation over - - - and I know I'm preaching to
25 the choir here - - - but litigation over, and I think



1 Justice Sotomayor mentioned this in Dietz in a different
2 context, civil jury, but you know, did they step out of the
3 courtroom, did they go to the restroom, did they talk to a
4 court officer in the courtroom, and aren't we going to
5 start to have that type of hearing on, you know, what does
6 it mean to be in the courtroom?

7 MS. EVERETT: Well, I certainly - - -

8 JUDGE GARCIA: And again, I think this is - - -

9 MS. EVERETT: - - - because - - -

10 JUDGE GARCIA: - - - alternate jurors.

11 MS. EVERETT: - - - because it's certainly not
12 our position that - - - we have no problem with the court
13 having a bright line rule that once the judge says
14 discharged, that's it.

15 But I just am trying to stress that this case
16 doesn't require the court to have that bright line rule,
17 that we are comfortable if the court thinks it appropriate
18 to have a de minimis.

19 JUDGE WILSON: I don't - - -

20 ACTING CHIEF JUDGE CANNATARO: Thank you,
21 Counsel.

22 JUDGE WILSON: I'm sorry.

23 ACTING CHIEF JUDGE CANNATARO: Go ahead.

24 MS. EVERETT: I'm sorry.

25 JUDGE WILSON: I'm sorry. I don't really



1 understand why leaving the courtroom or leaving the
2 courthouse is a - - - is a reasonable line to draw for a de
3 minimis exception if there is to be one. Because the
4 regular jurors leave at the end of the day. And the
5 alternates leave at the end of the day.

6 MS. EVERETT: Yes, Your Honor.

7 JUDGE WILSON: So, I mean - - -

8 MS. EVERETT: But there's a big distinction.

9 JUDGE WILSON: Yeah.

10 MS. EVERETT: When people leave at the end of the
11 day, they're told you're still under obligation not to
12 discuss the case, not to look at media, not to go to the
13 scene, all those - - - what is that - - -

14 JUDGE TROUTMAN: Admonishments.

15 MS. EVERETT: - - - those admonishments that are
16 in the CPL.

17 JUDGE WILSON: Right.

18 MS. EVERETT: That - - - it's clear to the jurors
19 what their role is. They are still jurors. And that's why
20 we don't require them to be sequestered still.

21 This is very different. They're told,
22 quote/unquote, you are discharged, another what six or
23 seven years, often - - - it didn't happen in this case - -
24 - but often, the judge says, you may go and talk - - -

25 JUDGE WILSON: It doesn't really turn on where



1 the juror has gone or to what they might have been exposed.
2 In - - - in your view, it turns on what they've been told
3 as to their - - -

4 MS. EVERETT: What they've been told.

5 JUDGE WILSON: - - - obligation.

6 MS. EVERETT: And - - - and I would say just as a
7 policy matter, I - - - that it does become dicey once they
8 leave the courthouse and you don't know what they're doing.

9 But the bottom line is that they're told they're
10 discharged. They shouldn't have to worry - - - they can do
11 whatever they feel like, they're private citizens.

12 ACTING CHIEF JUDGE CANNATARO: Thank you,
13 Counsel.

14 MR. MICHAELS: May it please the court, Alexander
15 Michaels, on behalf of the People.

16 The trial judge in this case providently
17 exercised her discretion - - -

18 JUDGE TROUTMAN: So discharge doesn't mean that
19 their obligations of service is over?

20 MR. MICHAELS: Our position here is that that is
21 not an on and off switch. That's a discretionary
22 determination in the same way that every other
23 determination under this particular statutory provision has
24 been lending - - - has lend itself to discretionary
25 implementation.



1 The statute - - -

2 JUDGE TROUTMAN: So if - - - if the judge says,
3 come back after two days, that's fine?

4 MR. MICHAELS: No, not necessarily. It depends
5 on the relevant - - - relevant functional considerations
6 that apply in the case.

7 JUDGE TROUTMAN: So the problem of the bright
8 line issue that was discussed, it can keep moving further
9 and further away from a question to the juror as to what is
10 my status?

11 MR. MICHAELS: The - - - the problem - - - the -
12 - - the idea that there is a problem, like, out of bound
13 here, is actually a red herring. Because the situation
14 we're talking about is an ongoing trial. And in the
15 context of an ongoing trial - - -

16 JUDGE TROUTMAN: There is an ongoing trial. But
17 with respect to that juror, I - - - I've received a jury
18 summons. It says, until you are discharged. When you're
19 discharged, you're free to go. And it tells you that. So
20 in this particular instance, you're saying it's up to the
21 judge as to when you're discharged?

22 MR. MICHAELS: The - - -

23 JUDGE TROUTMAN: They can take it back at any
24 time?

25 MR. MICHAELS: Well, the idea is that there's



1 flexibility here, the same way there is flexibility in
2 every other provision in that particular subsection of the
3 statute.

4 JUDGE GARCIA: But Counsel, isn't part of the
5 problem with that argument - - - I understand it, available
6 for service, you're arguing, look, qualified, judges have
7 discretion, but this court has treated, and the statute
8 treats, alternates differently, right? There are
9 restrictions on alternates, there's our case law tying some
10 of those restrictions to the state constitution, now in the
11 CPL, as well. And there's the language that your adversary
12 points to, pretty - - - making clear in the argument it
13 goes that discharge and available service are not
14 compatible terms here.

15 JUDGE TROUTMAN: Um-hum.

16 JUDGE GARCIA: So while a jury might get
17 dismissed for five minutes and, oh, no, we need to correct
18 something, or even a juror, I think is one Appellate
19 Division case, is in a - - - you know, wrong - - - you
20 know, dismissed in error. These are alternates. And - - -
21 and we treat alternates differently. The statute treats
22 them differently, and we treat them differently.

23 MR. MICHAELS: When the statute treats them
24 differently, if it wants to create a bright line rule, it
25 absolutely can. And it does so, right? It does treat them



1 differently in the context of when the jury is retiring to
2 deliberate, it creates a bright line rule as to the fact
3 that the defense needs to consent in writing to substitute
4 an alternate at that stage.

5 ACTING CHIEF JUDGE CANNATARO: But Counsel, would
6 you agree that there is no procedure in the CPL for un-
7 discharging a juror?

8 MR. MICHAELS: The CPL - - - CPL 270.30 does not
9 get into any of the details of any of these kind of things.

10 ACTING CHIEF JUDGE CANNATARO: That to me seems
11 like a pretty strong indication that that's not done. You
12 - - - you don't discharge a juror and then - - - except
13 maybe for some extreme de minimis circumstance, suddenly re
14 - - - re-impanel them.

15 MR. MICHAELS: Well, to the extent that you want
16 to entertain the idea of an extreme de minimis
17 circumstance, that allows you to consider functional
18 considerations as to what it means to discharge a jury.
19 That sort of approach demonstrates that the second that a
20 judge says, you are discharged, that does not immediately
21 and irrevocably render that person unfit for future
22 service.

23 JUDGE TROUTMAN: But if we look at the facts
24 here, that person left the courthouse after being told that
25 they were discharged - - -



1 MR. MICHAELS: But - - -

2 JUDGE TROUTMAN: - - - to resume their life. And
3 normally, you can speak to whomever you please or not, you
4 can read what you want at that point; isn't it risky to
5 start saying, well, you were discharged, but maybe you
6 might get a phone call?

7 MR. MICHAELS: If the judge had not gotten ample
8 assurances, unequivocal assurances in response to very
9 detailed questioning on those exact subjects, then, yes, we
10 would have a problem here.

11 JUDGE TROUTMAN: And it doesn't matter what the
12 defendant thinks?

13 MR. MICHAELS: No. If - - - the judge has
14 discretion in this area. The judge asked them extensively
15 whether they had discussed the case with anybody else,
16 whether they had formed an - - -

17 JUDGE TROUTMAN: So it's solely the judge's call
18 to un-discharge a juror, is what you're saying?

19 MR. MICHAELS: Yes. Judges have discretion as to
20 how to handle these alternates and - - -

21 JUDGE TROUTMAN: And so that's the rule you would
22 like us to have - - - adopt?

23 MR. MICHAELS: It not a rule. It would be a
24 matter of the judge providently exercising his or her
25 discretion. And of course, it would be reviewable on



1 appeal for abuse of discretion, as well.

2 JUDGE GARCIA: Isn't - - -

3 JUDGE RIVERA: Doesn't your approach discourage
4 punctiliousness by the judge, carefulness by the judge, in
5 deciding at what point in time to discharge?

6 MR. MICHAELS: No - - -

7 JUDGE RIVERA: And as already been stated, the
8 more we go down that road, the more you're going to have
9 those kinds of opportunities?

10 MR. MICHAELS: I - - - this approach - - -

11 JUDGE RIVERA: Now it's a few hours. The next
12 case it's twenty-four hours. The next case is I went on
13 vacation, I didn't discuss it with anyone because I wanted
14 to forget everything that went on, and I was gone for a
15 month. Right?

16 MR. MICHAELS: This case does not present that
17 concern.

18 JUDGE RIVERA: Um-hum.

19 MR. MICHAELS: Because - - - and in comparable
20 situations in the future, a judge would not want to take
21 the risk that, of course, an alternate, immediately after
22 being excused, to call the alternate and say - - - and says
23 I'm coming back, and - - - and can no longer - - -

24 JUDGE WILSON: Aren't - - - aren't we - - -

25 MR. MICHAELS: - - - return for service after



1 that.

2 JUDGE WILSON: - - - dealing with an
3 extraordinarily rare situation? I mean, I - - - does this
4 really happen, because you needed two things to happen in a
5 very short period of time. You needed the judge to
6 discharge the jurors before - - - discharge the alternates
7 before charging the jury, which is not what the CPL says,
8 right? And you need evidence sufficient to disqualify one
9 of the seated jurors to show up in that little interspace,
10 basically, at lunch, right, in this little period. Does
11 this really happen?

12 MR. MICHAELS: This does not happen often. But
13 there's a broader principle at stake here, and that is that
14 trial judges need discretion to deal with the anomalous
15 scheduling issues that constantly arise.

16 JUDGE TROUTMAN: Trial judges, it's true, trial
17 judges do need discretion. But this is not just a
18 scheduling issue. This goes to the administration of
19 justice and the defendant's right to have jurors that are
20 suited at a particular point in time to render a decision
21 on his or her case. It's not just the judge gets to decide
22 we're going to adjourn before lunch, after lunch, or - - -
23 or something of the like, or we'll resume after the
24 holiday. This is much more substantial than that.

25 MR. MICHAELS: Right. But as long as we're



1 talking about functional considerations, we should be able
2 to consider whether this alternate was, in fact, able to
3 serve fairly and impartially. And every answer to every
4 question indicates that he was.

5 JUDGE WILSON: But this really goes back to Judge
6 Rivera's question, I think, which is that if the rule is a
7 bright line, this juror's discharged, that's it, won't all
8 trial judges then wait until they've charged the seated
9 jurors to discharge the alternates? Isn't that what will
10 happen, and isn't - - - is that a bad thing?

11 MR. MICHAELS: Well, no, because these situations
12 sometimes arise in circumstances that can't be anticipated.
13 And the Brown case actually illustrates that point well.

14 In the Brown case, what happened was that the
15 judge did wait until the regular jurors were about to - - -
16 set to deliberate, retire to deliberate - - -

17 JUDGE WILSON: Um-hum.

18 MR. MICHAELS: - - - to discharge the alternate.
19 And then before the alternates had actually left the
20 courthouse, they had left the room, I believe, and not the
21 courthouse, they realized that one of the remaining jurors
22 was no longer fit to serve, although deliberations had not
23 yet, in fact, begun. And so at that point, they were able
24 to call that person back, call the alternate back, and
25 reconstitute the jury.



1 And the point there was that there was no way
2 that there was a miscarriage of justice in the situation.
3 The interest in justice - - - interest of justice would
4 have been in no way served by insisting upon a wasteful
5 resource and have to refile - - -

6 JUDGE TROUTMAN: And here you're talking about
7 someone actually leaving the courthouse and going home?

8 MR. MICHAELS: Yes, absolutely. And to Judge
9 Wilson's point, their location does not necessarily affect
10 their fitness to continue service. In fact, remaining in
11 court for many alternate jurors would be a more problematic
12 thing to do because - - -

13 JUDGE TROUTMAN: But what you emphasized on the
14 other case was the timing of when things occurred. It was
15 before the jury had begun to deliberate, and that juror had
16 not left.

17 Time does become important on the ability of that
18 juror not to - - - or - - - or the fact that that juror
19 continues to refrain from being tainted by being exposed,
20 or even saying something, like, hello, to a witness or - -
21 - or a party because parts of the admonishments is you
22 don't even want to give the appearance that you're not
23 fair.

24 So it becomes much more difficult in what you're
25 asking us to do here is to not only not have a bright line,



1 but to keep moving it - - - the goalpost.

2 MR. MICHAELS: Well, just to be clear as to the
3 timing matter, in that Brown case, it was another
4 lunchbreak situation, so there was actually a significant
5 interval timewise between when the alternate was excused
6 and when the alternate was reinstated.

7 But to get to the other idea of - - - sorry, I -
8 - - I wanted to return quickly to one of the things that
9 Judge Wilson touched on about the admonitions that are
10 normally - - - or the timing of when alternate jurors are
11 normally excused. There is no prohibition in the CPL for
12 excusing alternate jurors at an earlier stage. It's not as
13 though trial judges are required to excuse them only when -
14 - -

15 ACTING CHIEF JUDGE CANNATARO: But wouldn't we -
16 - -

17 JUDGE WILSON: The point is - - -

18 ACTING CHIEF JUDGE CANNATARO: - - - want to
19 encourage that?

20 JUDGE WILSON: - - - the point is that if there -
21 - - right. The point is if there is a bright line rule of
22 the sort that Counsel has - - - is asking for, judges
23 wouldn't do that. They would - - - the statute says, after
24 the jury has retired to deliberate, they would wait until
25 the jury has retired to deliberate to discharge the



1 alternates.

2 MR. MICHAELS: Yeah, well, and the point here - -
3 -

4 JUDGE WILSON: Do you think this problem could
5 never occur?

6 MR. MICHAELS: Yes. Well, it - - - it actually
7 did occur in Brown, right?

8 JUDGE WILSON: Well - - -

9 MR. MICHAELS: That's a situation where - - -

10 JUDGE WILSON: Well, then that may be a - - -
11 Brown may be not be correctly decided then because it
12 doesn't say once they start deliberating. It - - - the
13 statute says after they retire to deliberate, right? So
14 once they retire - - -

15 JUDGE SINGAS: But Counsel - - -

16 JUDGE WILSON: - - - to deliberate - - -

17 JUDGE RIVERA: Essentially, if I'm understanding
18 you, even though you've said otherwise, you're - - - you
19 are essentially taking the position that a judge may
20 rescind or reverse a discharge order? You may - - - you
21 may take the position there are very few circumstances
22 under which they could do that - - -

23 MR. MICHAELS: Um-hum.

24 JUDGE RIVERA: - - - and that this is an example
25 where they could do that. But this sounds to me like what



1 you're arguing, that the statute doesn't prohibit that?

2 MR. MICHAELS: Yeah, our - - - our position is
3 that when the judge utters the word discharge - - -

4 JUDGE RIVERA: Yes.

5 MR. MICHAELS: - - - the juror or alternate juror
6 does not immediately and irrevocable become unavailable for
7 future service. And that's exactly how this court has
8 determined - - -

9 JUDGE RIVERA: Well, then what does discharge
10 mean?

11 MR. MICHAELS: Discharge does mean something. It
12 means that the juror is excused. And of course, it may
13 mean as a practical matter, that the juror does - - - then
14 does go make other plans.

15 JUDGE RIVERA: So - - - so then should what the
16 judge do, say, you're discharged, thank you, but I might
17 call you in ten minutes, just so you know.

18 MR. MICHAELS: No. The judge need not do that
19 because, of course, that's incredibly unlikely to occur.
20 But in the off chance that it does occur - - -

21 JUDGE RIVERA: Except you've already cited two
22 cases where it has.

23 MR. MICHAELS: What's that? Sorry.

24 JUDGE RIVERA: You've already talked about two
25 cases where it has, right? In Brown - - -



1 MR. MICHAELS: Yes. Twice over the last twenty
2 years - - -

3 JUDGE RIVERA: - - - and this one. So it
4 happens.

5 MR. MICHAELS: But - - - but the - - - the - - -

6 JUDGE RIVERA: That we know of, that got
7 affirmed.

8 MR. MICHAELS: In the off change that that does
9 occur, judges should be able to avoid a wasteful and
10 resource of potential mistrial.

11 In this case in particular, you have three
12 different defendants. You have more than a dozen
13 witnesses. You have more than a week of trial proceedings.

14 JUDGE RIVERA: You might avoid that by waiting
15 'til the deliberative process, right?

16 MR. MICHAELS: But - - - and if the information
17 had come in, you know, slightly later, right after the
18 jurors had been discharged - - - the alternates had been
19 discharged there, we'd have the same problem.

20 The point is, judges need discretion to deal with
21 these kinds of situations when they do arise.

22 JUDGE RIVERA: Yes, but there's a statute for
23 that if the deliberations have proceeded, right?

24 MR. MICHAELS: Yes - - -

25 ACTING CHIEF JUDGE CANNATARO: Thank you - - -



1 MR. MICHAELS: - - - there is a bright line rule
2 in that setting, but there is not a bright line rule that
3 applies here.

4 ACTING CHIEF JUDGE CANNATARO: Thank you,
5 Counsel.

6 MS. EVERETT: I'd like to finish by giving Judge
7 Renwick her due in - - -

8 JUDGE RIVERA: I'm pronouncing it incorrectly,
9 thank you.

10 MS. EVERETT: - - - she talks about, in her
11 dissent, the - - - you know, the unfairness of having a - -
12 - she used the word limbo. And that's really what
13 Respondent is advocating here to tell somebody they're
14 discharged and then keep them in limbo, that everybody in
15 the courtroom, all the parties, the judge, the lawyers
16 understand this person may be called back, but nobody lets
17 the alternate juror know that they aren't really
18 discharged.

19 JUDGE TROUTMAN: So it could be arbitrary?

20 MS. EVERETT: Right. So I just would urge the
21 court not to - - -

22 JUDGE RIVERA: Well - - -

23 MS. EVERETT: - - - enable that situation.

24 JUDGE RIVERA: Yes. And you certainly, for the
25 reasons you've already stated, have - - - have the statute



1 in many ways - - - the plain language of the statute on
2 your side because it talks about alternate jurors and
3 discharge. I mean, these are two separate categories, you
4 can't - - -- - -

5 MS. EVERETT: Yes, Your Honor.

6 JUDGE RIVERA: - - - you can't be in service when
7 you are discharged.

8 JUDGE GARCIA: What about if the alternate didn't
9 know? So let's say the alternate doesn't show up, and - -
10 - you can - - - I think your adversary said, discharge an
11 alternate for other reasons. So the alternate doesn't show
12 up one day, and the judge says, you - - - the alternate
13 that didn't show up is discharged. The alternate walks
14 into the courtroom.

15 MS. EVERETT: Well, at that - - - to some extent
16 - - -

17 JUDGE GARCIA: Is that the limbo or not?

18 MS. EVERETT: - - - that's getting to the de
19 minimis. If you want - - - and then again, how far down
20 the road - - -

21 JUDGE GARCIA: It isn't de minimis - - -

22 MS. EVERETT: - - - are we going.

23 JUDGE GARCIA: - - - it's just different. It's -
24 - - let's say, ten minutes later, but the alternate never
25 knew they were discharged, so they come back in.



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MS. EVERETT: There is a case with a regular juror where the judge - - - the trial judge - - -

JUDGE GARCIA: Right.

MS. EVERETT: - - - the Appellate Division thought that the juror had not shown up and discharged. And then the - - - somebody pointed out, well, no, no, the juror's here. And - - -

JUDGE GARCIA: I guess the point is, though, can you be in limbo if you don't know it?

MS. EVERETT: I see your point. Maybe not. Okay.

Thank you, Your Honor.

ACTING CHIEF JUDGE CANNATARO: Thank you, Counsel.

(Court is adjourned)



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

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Hasahn D. Murray, No. 72 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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