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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF ERIC SMITH,

Respondent,

-against-

No. 168

HONORABLE RICHARD A. BROWN,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
September 17, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE ABDUS-SALAAM

Appearances:

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Sara Winkeljohn  
Official Court Transcriber

1  
2 CHIEF JUDGE LIPPMAN: The matter of Smith  
3 v. Brown, number 168.

4 Counselor, you want any rebuttal time?

5 MS. GROSS MARKS: Yes, Your Honor. Please  
6 two minutes for rebuttal.

7 CHIEF JUDGE LIPPMAN: Two minutes for  
8 rebuttal. Go ahead.

9 MS. GROSS MARKS: May it please the court,  
10 Jill Gross Marks for Richard Brown, District  
11 Attorney. Defendant has no Constitutional right to a  
12 jury of eleven. This is per - - - a permissive  
13 provision, not mandatory. And - - -

14 CHIEF JUDGE LIPPMAN: They do have for  
15 twelve, right?

16 MS. GROSS MARKS: The right as to twelve,  
17 yes, Your Honor.

18 CHIEF JUDGE LIPPMAN: Okay.

19 JUDGE SMITH: The - - - the - - - the  
20 People do not have a right to veto a - - - a - - - a  
21 jury of eleven, do they?

22 MS. GROSS MARKS: Well, the - - - the  
23 People are certainly allowed to weigh in, but it's up  
24 to the judge. And it's in the judge's discretion,  
25 and that's actually been the law for quite some time.

1 JUDGE SMITH: Yeah, but isn't it - - -  
2 isn't it clear from Gajadhar, or however you  
3 pronounce it, that although the judge has discretion,  
4 the - - - it's perfectly appropriate for the  
5 defendant to say I think I got a better shot with  
6 this jury than the next one, so I'm going to take  
7 these eleven?

8 MS. GROSS MARKS: No, actually not. It's  
9 not a unilateral option.

10 JUDGE SMITH: Isn't that what Gajadhar  
11 says, that - - - that - - - that the - - - we were  
12 trying to - - - that the - - - the defendant should  
13 have that option?

14 MS. GROSS MARKS: No, Your Honor, I think  
15 not. I think in Gajadhar the court said of course  
16 the Constitution authorizes waiver only with approval  
17 - - - approval of the trial judge. So it's an - - -  
18 it's a option that the defendant can assert and  
19 request, but it still is vested in the trial judge.

20 CHIEF JUDGE LIPPMAN: Ultimately, it's in  
21 the judge's discretion?

22 MS. GROSS MARKS: Pardon me?

23 CHIEF JUDGE LIPPMAN: Ultimately, it's in  
24 the judge's discretion?

25 MS. GROSS MARKS: It's in the judge's

1 discretion, that's right.

2 JUDGE ABDUS-SALAAM: Counsel, is that why  
3 in this case the defendant was asked to consent to  
4 the - - - anoth - - - a twelve-person jury as opposed  
5 to eleven-person jury if he agreed to let the  
6 alternate go?

7 MS. GROSS MARKS: Well, we don't know what  
8 was in the judge's mind. But certainly the judge  
9 felt that especially since there had been a deadlock  
10 note, and that was the timing of the discharge of the  
11 alternate, yes, the judge was saying okay. We're  
12 going to discharge this alternate, but you understand  
13 that if we lose another juror there will no - - -  
14 will be a retrial?

15 JUDGE RIVERA: But is the judge - - -

16 MS. GROSS MARKS: Wasn't - - -

17 JUDGE RIVERA: - - - is the judge's basis  
18 the consent?

19 MS. GROSS MARKS: Pardon me?

20 JUDGE RIVERA: Is the judge's basis here  
21 the consent?

22 MS. GROSS MARKS: Is the judge what the  
23 consent?

24 JUDGE RIVERA: I'm sorry, the - - - the  
25 basis for the judge here ordering the mistrial the

1 consent?

2 MS. GROSS MARKS: There is consent here,  
3 Your Honor.

4 JUDGE RIVERA: No, I'm sorry. I - - - I'm  
5 not being clear. Is that the judge's stated reason  
6 for the mistrial? You've already agreed to it in the  
7 past?

8 MS. GROSS MARKS: The court did not come  
9 out and say that, but I think the record is clear  
10 that that was part of what was in the judge's mind.

11 JUDGE SMITH: Wasn't - - - wasn't the  
12 consent given immediately after the judge says to him  
13 if we lose a juror there has to be a new trial?

14 MS. GROSS MARKS: Yes, Your Honor. That's  
15 the - - -

16 JUDGE SMITH: That was - - - he was wrong  
17 about that. That was misinformation.

18 MS. GROSS MARKS: Well, he wasn't saying  
19 there has to be. He's saying if you are going to  
20 consent to the removal - - - to the discharge of the  
21 second alternate, then there will be a retrial.

22 JUDGE SMITH: You - - - you interpret that  
23 not as a mistake of law - - - I mean I - - - I - - -  
24 when I read it, I thought the judge was just  
25 mistaken. He hadn't - - - he didn't realize under

1 Gajadhar that there - - - there was a possibility of  
2 taking eleven. But you read it as essentially a  
3 bargain between the judge - - -

4 MS. GROSS MARKS: That's right.

5 JUDGE PIGOTT: - - - and - - - and the  
6 defendant.

7 MS. GROSS MARKS: That's right, Your Honor.

8 JUDGE SMITH: Which the judge says okay,  
9 I'll release the alternates, but I want a deal with  
10 you that you're not going to take an eleven-person  
11 jury?

12 MS. GROSS MARKS: That's right. We - - -

13 JUDGE SMITH: And that - - - is that okay?  
14 Can the judge do that?

15 MS. GROSS MARKS: I think so. I think the  
16 judge has the right - - -

17 JUDGE SMITH: And don't you think even if  
18 he's going to do it, shouldn't he do some pre - - -  
19 some sort of clearer explaining than he did - - -

20 MS. GROSS MARKS: Well, after - - -

21 JUDGE SMITH: - - - that he's offering that  
22 bargain?

23 MS. GROSS MARKS: Sorry, after all, the  
24 defendant didn't object at all. He said that's fine.

25 JUDGE SMITH: Well, the juror - - - well,

1 the - - - maybe the defendant was dumb like me and  
2 thought - - - and - - - and thought the judge was  
3 just telling him what the law was?

4 MS. GROSS MARKS: In reading the - - - the  
5 record, I don't believe the judge was saying you must  
6 consent to this. He was saying if we're going to  
7 discharge the alternate, especially given that we  
8 already have a deadlocked jury, I'm not comfortable  
9 going ahead with eleven. We already know that we  
10 have a problem with this - - -

11 JUDGE SMITH: Okay, but why - - -

12 MS. GROSS MARKS: - - - jury.

13 JUDGE SMITH: Shouldn't - - - shouldn't the  
14 judge have made clear that the - - - that the  
15 defendant understood that that's what he's saying, if  
16 indeed he was? I'm not persuaded he was saying. But  
17 if he was saying it, shouldn't he have said it in  
18 words - - - in unmistakably plain language?

19 MS. GROSS MARKS: We don't know what the  
20 judge was thinking at that time, Your Honor.

21 JUDGE SMITH: Exactly, that's the problem.

22 MS. GROSS MARKS: But there's nothing illeg  
23 - - - there's nothing improper about the judge asking  
24 for a quid pro quo. If I'm going to discharge the  
25 second alternate - - -

1 CHIEF JUDGE LIPPMAN: What was the defense  
2 counsel thinking about - - -

3 MS. GROSS MARKS: Pardon?

4 CHIEF JUDGE LIPPMAN: What was the defense  
5 counsel thinking about what the judge said?

6 MS. GROSS MARKS: Again, we're going into  
7 the minds of defense counsel. I don't know. We  
8 already had a deadlock.

9 CHIEF JUDGE LIPPMAN: I can say I - - - I  
10 agree this person has to be discharged. I want an  
11 eleven-person trial?

12 MS. GROSS MARKS: Well, that was after the  
13 second consent.

14 CHIEF JUDGE LIPPMAN: Don't have a right to  
15 it, but they can want it, right?

16 MS. GROSS MARKS: There were two consents.  
17 The first consent occurred, which Judge Smith pointed  
18 out, after there was a deadlock note, and the judge  
19 said look, I'm going to have to release the second  
20 alternate. But in doing so, I need your consent that  
21 we're not going to be able to go ahead. It's going  
22 to be a retrial if we lose another juror. Then going  
23 forward, after we have this gross misconduct - - -

24 CHIEF JUDGE LIPPMAN: Right.

25 MS. GROSS MARKS: - - - which was



1 unquestionably gross misconduct - - -

2 CHIEF JUDGE LIPPMAN: Right.

3 MS. GROSS MARKS: - - - now we have the  
4 judge saying okay, we're going to release him. Is it  
5 - - - do you agree? And the defense counsel says  
6 unquestionably, this defendant needs - - -

7 CHIEF JUDGE LIPPMAN: Unquestionably, this  
8 guy - - -

9 MS. GROSS MARKS: Right.

10 CHIEF JUDGE LIPPMAN: - - - this juror has  
11 to go.

12 MS. GROSS MARKS: So he consents. So - - -

13 JUDGE SMITH: You say - - - you say that's  
14 a waiver?

15 JUDGE ABDUS-SALAAM: That's - - -

16 MS. GROSS MARKS: Based on - - - yes.

17 JUDGE SMITH: Well, how - - - how can that  
18 be a waiver? It was - - - it was obviously right.  
19 Is he supposed to - - - is he supposed to try to tell  
20 the judge that that wasn't gross misconduct when it  
21 was?

22 MS. GROSS MARKS: Having already consented  
23 to a retrial if we lose a juror, now defendant is  
24 consenting and saying okay.

25 JUDGE SMITH: By the way, I - - - I

1 understand - - - I think I understand your argument  
2 about the first consent. You're saying there's a  
3 second consent because the de - - - the defense  
4 lawyer acknowledged that this juror had to be  
5 released? He obviously had to be released, didn't  
6 he?

7 MS. GROSS MARKS: He can't now have - - -

8 JUDGE SMITH: What - - - what's your answer  
9 to that one? Did that juror have to be released?

10 MS. GROSS MARKS: Yes.

11 JUDGE SMITH: So what - - - so how can the  
12 jur - - - how can the defense lawyer be waiving  
13 anything by acknowledging that obvious fact?

14 MS. GROSS MARKS: It's only in concert with  
15 the earlier consent.

16 JUDGE SMITH: You - - - you're really  
17 depending entirely - - -

18 MS. GROSS MARKS: He cannot now change his  
19 mind.

20 JUDGE SMITH: You're really depending  
21 entirely on the first waiver, aren't you?

22 MS. GROSS MARKS: Well, it's the first  
23 waiver that's operative, yes. And - - - and then  
24 after the second waiver - - -

25 CHIEF JUDGE LIPPMAN: So you're saying he

1           couldn't even argue - - - based on the first waiver  
2           he can't even argue for eleven-person jury now?

3                       MS. GROSS MARKS:   That is our position,  
4           yes.   That having done that - - -

5                       JUDGE ABDUS-SALAAM:   What if the  
6           prosecution hadn't objected to an eleven-person jury?  
7           Are you saying that the court would have held the  
8           defendant to his original agreement that you're  
9           claiming was made by consenting to an elev - - - a  
10          twelve-person jury if the second alternate was let  
11          go?

12                      MS. GROSS MARKS:   Well, there was a second  
13          entirely independent reason for the judge's action,  
14          and that was not only that we can't go to eleven  
15          because you've consented to it, but this jury was  
16          tainted to its heart.   The fundamental - - -

17                      JUDGE PIGOTT:   I don't know how you reached  
18          that.   Because that - - - that was so - - - that was  
19          hard to find in the - - - in the transcript, because  
20          everybody said yeah, he's gone and no, he doesn't  
21          affect me.   And, you know, and we're fine?

22                      MS. GROSS MARKS:   Well, the two judges - -  
23          - the two - - - the two jurors who said they - - -  
24          they weren't bothered by it; the judge had no  
25          confidence in this jury.   And - - -

1 JUDGE PIGOTT: Well, that doesn't make any  
2 difference. Be - - - see that - - - you said earlier  
3 that the judge wasn't comfortable with eleven. What  
4 difference does it make to him unless - - - or her,  
5 unless it's stated on the record? Because I know if  
6 I think this guy's guilty and this jury's going south  
7 on us, I think I'll declare a mistrial because he's  
8 going to get off if this thing continues?

9 MS. GROSS MARKS: Well, I don't think it  
10 was a whim quite - - - quite like you're describing.  
11 I may have used the word feeling, but the record is  
12 clear that there was - - -

13 JUDGE SMITH: But you - - - you said the  
14 judge has no confidence in this jury. Is a judge who  
15 lacks confidence in the jury allowed to declare a  
16 mistrial for that reason?

17 MS. GROSS MARKS: Well, based on what  
18 occurred here, sure. There was misconduct. The - -  
19 - the Juror 11 brought in - - -

20 JUDGE GRAFFEO: But there wasn't - - -  
21 there wasn't any questioning of any of the other  
22 jurors, was there, to provide a basis that he was  
23 concerned that there was some kind of infection in  
24 the jury?

25 MS. GROSS MARKS: Well, the three jurors

1           who he did question were fairly consistent in very -  
2           - - in several very key areas, number one, Juror 11  
3           after a deadlock goes and speaks to an attorney  
4           friend, then he comes in, and he has no bones about  
5           it. He said well, it was hypothetical.

6                    JUDGE GRAFFEO: But shouldn't - - -  
7           shouldn't the judge have tried to determine if any of  
8           those other jurors were influenced by that  
9           conversation?

10                   MS. GROSS MARKS: Well, the jury had  
11           already shown it was in - - - unable to follow  
12           instructions. Not one of those jurors told the judge  
13           look, we have a problem. We have outside information  
14           coming in now.

15                   JUDGE PIGOTT: He didn't - - - he didn't  
16           put that on the record either, did he?

17                   MS. GROSS MARKS: Pardon?

18                   JUDGE PIGOTT: He didn't put that on the  
19           record either?

20                   MS. GROSS MARKS: The - - - I think the  
21           judge felt that the record spoke for itself. And  
22           that in determining that the misconduct went to the  
23           heart and integrity of the jury process and under no  
24           circumstances could he possibly - - -

25                   JUDGE PIGOTT: He didn't say that. And - -

1 - and what - - - what sits in the back of my mind is  
2 this defen - - - most defendants don't like juries.  
3 I mean their - - - their - - - their win-loss record  
4 is rather small. But this one did, and he said I'm  
5 willing to go with the eleven. Proof went in fine.  
6 I - - - you know, maybe then it was - - - something  
7 happened in the trial that want - - - that wanted to  
8 go his way. And I'm - - - I'm trying to think who  
9 then gets to decide that it's not?

10 MS. GROSS MARKS: Well, this was an  
11 impermissible procedural advantage that he was trying  
12 to get having had a window, a peek, into what was  
13 going on in deliberations. He knew that - - -

14 JUDGE PIGOTT: Is that the reason then?

15 MS. GROSS MARKS: Oh, sure.

16 JUDGE PIGOTT: All right, so - - -

17 JUDGE SMITH: Oh, whoa - - - whoa - - -  
18 wait a minute. What the - - - the window, the peek  
19 into deliberations was that outside information came  
20 to the jury. If there was anything, it was favorable  
21 to the prosecution. How does that give the defense  
22 an unfair advantage?

23 MS. GROSS MARKS: Absolutely, and the juror  
24 who was - - - who was propagating that and saying it  
25 came from an attorney and stating it in a very

1 authoritative way is the one that was kicked off.

2 And the jury - - -

3 JUDGE SMITH: Yeah, so what - - - what  
4 obviously happened here was a pro - - - that - - -  
5 that in a deadlocked jury one of the - - - one of the  
6 - - - what obviously looks like a prosecution juror  
7 has suddenly disappeared.

8 MS. GROSS MARKS: Yes.

9 JUDGE SMITH: You can see - - -

10 MS. GROSS MARKS: Exactly.

11 JUDGE SMITH: You - - - you - - - you - - -  
12 yeah. That - - - is that ground for a mistrial?

13 MS. GROSS MARKS: Well, it's not just that  
14 the pro-prosecution juror disappeared. It's that  
15 Juror 12 was near tears. They were - - - a big part  
16 of what was going on in deliberations - - -

17 JUDGE SMITH: But is - - - is a juror near  
18 tears a manifest necessity for a mistrial?

19 MS. GROSS MARKS: No, not alone by itself.  
20 But the basis for her frustration was not the  
21 evidence. The - - - these jurors were focusing not  
22 on the evidence, not on the record, but on what Juror  
23 11 had done.

24 JUDGE RIVERA: But she had been vindicated.

25 MS. GROSS MARKS: Pardon?

1 JUDGE RIVERA: She had been vindicated.

2 MS. GROSS MARKS: She felt vindicated - - -

3 JUDGE RIVERA: She came out. She reported  
4 it.

5 MS. GROSS MARKS: - - - that's true.

6 JUDGE RIVERA: The juror is discharged.

7 That's - - -

8 MS. GROSS MARKS: But now the jury - - -

9 JUDGE RIVERA: She's on cloud nine.

10 MS. GROSS MARKS: - - - is all caught up in  
11 what Juror 11 did. And hmm, I was right. He  
12 shouldn't have done that. Not what the evidence said  
13 or what - - -

14 JUDGE SMITH: How - - - how do you know the  
15 jury's - - - how do you know the jury's all caught up  
16 in it if you only talked to two and they don't - - -  
17 and - - - and one of them doesn't look all that  
18 caught up at all. She says I just came along to keep  
19 the other one company.

20 MS. GROSS MARKS: Well, in fact, they - - -  
21 if they weren't - - - first of all, they went around  
22 the table, and the jurors said we went around the  
23 table. Everyone weighed in. And after doing that  
24 what did the jury do? They sent out a note asking  
25 for clarification based on what jury - - - Juror 11



1           said, not based on the law or the evidence. They  
2           were trying to figure out what is possession, which  
3           is what Juror 11 was saying. Oh, it just comes down  
4           to possession. No one said anything in that second  
5           note about we have had an outsider bring in  
6           influence. It was only - - -

7                         JUDGE ABDUS-SALAAM: I know your time's up,  
8           but could you comment on the - - - your - - - your  
9           claim that this is now too late? That there's a  
10          statute of limitations problem on this Article 78  
11          claim?

12                        MS. GROSS MARKS: Yes, thank you, Your  
13          Honor. I mean, the court has said that a defendant  
14          need not bring the motion to dismiss on double  
15          jeopardy grounds. But in this instance where - - -  
16          where the clock was already ticking against the  
17          People, defendant had, I believe, four months or  
18          forty-five days in which to bring the - - - the  
19          motion to dismiss for double jeopardy defense. He  
20          didn't do that - - -

21                        JUDGE SMITH: Do you - - - do you - - - do  
22          you accept as correct - - -

23                        MS. GROSS MARKS: - - - and when - - -

24                        JUDGE SMITH: - - - the Appellate Division  
25          cases Johnson and Taub that seemed to say that some -



1 Thanks.

2 MS. GROSS MARKS: Thank you very much.

3 CHIEF JUDGE LIPPMAN: Counselor?

4 MR. MEGARO: May it please the court, my  
5 name is Patrick Michael Megaro. I represent Eric  
6 Smith. And just to very briefly touch on Your  
7 Honor's point, there is a - - - an actual double  
8 jeopardy motion pending in the Queens County Supreme  
9 Court now. So if this case does not go well for us -  
10 - -

11 JUDGE SMITH: But you - - - but you - - -  
12 but you say - - - you say that this claim is - - -  
13 this is not time barred?

14 MR. MEGARO: It's not time barred and for  
15 the exact reasons that the Appellate Division said.  
16 The District Attorney has every intention of moving  
17 forward; otherwise we obviously wouldn't be here  
18 today. And it's - - - there is no final - - -

19 JUDGE SMITH: But what - - - what about the  
20 - - - what about the Holtzman against somebody case  
21 that - - - which was our court, which we seem to say  
22 there is a four-month statute on this.

23 MR. MEGARO: The Holtzman v. Marrus case,  
24 which comes out of Brooklyn, actually dealt with a  
25 motion in limine on the part of the People - - -

1           against the People to - - - precluding the People  
2           from bringing in certain testimony. That is a final  
3           order by the court which, of course, would be  
4           reviewable. The - - - in that case, the People sat  
5           on it for way too long after that order was entered  
6           then commenced an Article 78 petition. And in that  
7           case this court said - - -

8                         JUDGE SMITH: Well, isn't this - - - isn't  
9           this - - -

10                        MR. MEGARO: - - - because it was an actual  
11           order - - -

12                        JUDGE SMITH: Isn't this an order directing  
13           a new trial, although - - - well, it may not be  
14           final, but it's an order by a court, presumably  
15           reviewable. Why - - - why couldn't you have brought  
16           it in four months?

17                        MR. MEGARO: Because well, the reality of  
18           the situation is, as - - - as always, it - - - it  
19           boils down to a question of money. But also this is  
20           a continued threatened prosecution, not by the court,  
21           but by the District Attorney. It's against the  
22           District Attorney to preclude them from retrying the  
23           case.

24                        JUDGE GRAFFEO: So how long could you have  
25           waited?

1                   MR. MEGARO: Well, up until the point where  
2 a trial actually seems like it's imminent. The  
3 problem is that the speedy trial structure in this  
4 state, as I think we're all painfully aware, allows  
5 for these interminable delays and constant  
6 adjournments where defendants - - -

7                   JUDGE ABDUS-SALAAM: Well, isn't that all  
8 the more reason you'd want to stay anything going  
9 forward and get to court right away and try to stay  
10 them from going forward with it?

11                   MR. MEGARO: No, because - - - no, Your  
12 Honor, because a - - - a speedy trial dismissal is  
13 much less prone to challenge by the District Attorney  
14 than something like this. When defendants are  
15 constantly conditioned to return to court adjournment  
16 after adjournment, year after year, month after  
17 month, they get conditioned to think that nothing is  
18 ever going to happen. And I tell you this coming  
19 from a - - - from the standpoint of a trial attorney  
20 who's appeared on cases over and over and over.  
21 Nothing seems like it's going to happen until it does  
22 happen.

23                   And certainly here, where there's a  
24 two-year lag between the mistrial and the time that  
25 the District Attorney's actually going to try the

1 case, there's many, many opportunities for a speedy  
2 trial dismissal along the way. That would make the  
3 most sense, because in that situation most of the  
4 time speedy trial dismissal is very clear on its face  
5 and is almost unappealable, but this is certainly - -  
6 -

7 JUDGE PIGOTT: May I ask you - - -

8 MR. MEGARO: - - - not the case.

9 JUDGE PIGOTT: - - - a question with  
10 respect to, you know, the court inquired whether the  
11 trial should proceed with eleven. Is it your  
12 position that - - - that he shouldn't have asked?

13 MR. MEGARO: Well, he absolutely should  
14 have asked because the law - - -

15 JUDGE PIGOTT: So is it then your position  
16 that the DA doesn't have a - - - a voice?

17 MR. MEGARO: Yes, Your Honor, because the  
18 right to trial by jury or the waiver of that right is  
19 a personal right of the defendant and the defendant  
20 alone. The court does not have veto power over that  
21 right. Nor - - -

22 JUDGE SMITH: There's some - - -

23 MR. MEGARO: - - - does the District  
24 Attorney.

25 JUDGE SMITH: It does require the consent

1 of the court to waive a jury, doesn't it?

2 MR. MEGARO: No, Your Honor. Actually, it  
3 req - - - the - - - the court is required to employ  
4 certain procedural safeguards to ensure that the  
5 defendant understands exactly what he's doing. And  
6 that's the Duchin case that was cited by the People  
7 and myself where this court said - - -

8 JUDGE SMITH: Wait, we - - - we said in  
9 Gajadhar, "Of course the constitution authorizes  
10 waiver only with the approval of the trial judge."  
11 We went on to - - - to say some things I was asking  
12 your adversary about that suggests that the - - - the  
13 - - - the - - - the defendant has quite a lot of  
14 leeway. But he ha - - - you have to have the judge's  
15 approval, don't you?

16 MR. MEGARO: No, Your Honor.

17 CHIEF JUDGE LIPPMAN: Judge has no  
18 discretion?

19 MR. MEGARO: The judge has no discretion to  
20 limit a defendant's right to the free exercise of  
21 trial by jury. And that's what this court said in  
22 Duchin.

23 JUDGE READ: So the judge has no discretion  
24 to say no, you can't go forward with eleven if the  
25 defendant wants to do that?

1 MR. MEGARO: That's correct. That's  
2 because - - -

3 JUDGE GRAFFEO: Even if the judge had  
4 polled some other jurors and they appeared to have an  
5 inability to review the facts - - -

6 MR. MEGARO: That, I think would be - - -

7 JUDGE GRAFFEO: - - - and the law properly?

8 MR. MEGARO: That I think would be - - -

9 JUDGE GRAFFEO: The judge still can't - - -

10 MR. MEGARO: - - - a separate issue.

11 JUDGE GRAFFEO: - - - do anything about it?

12 MR. MEGARO: No, that would be a separate -  
13 - - that would be a separate scenario. I'm talking  
14 about simply pure right.

15 JUDGE SMITH: Then in - - - in that case,  
16 it wouldn't matter if it was eleven or twelve if you  
17 had manifest necessity?

18 MR. MEGARO: I'm sorry, Your Honor?

19 JUDGE SMITH: If you had manifest necessity  
20 for a new trial - - - for a mistrial he could call a  
21 mistrial whether it was eleven or twelve?

22 MR. MEGARO: Right, that's correct.

23 CHIEF JUDGE LIPPMAN: So at - - - so at  
24 eleven it's the - - - it's the defendant's right?

25 MR. MEGARO: Yes, because if a defendant



1 has the right - - - the - - - the unfettered right,  
2 as this court said in Duchin, to waive all twelve,  
3 this court said you cannot prevent a defendant from  
4 waiving his right to trial by jury. He can elect to  
5 proceed with a bench trial. If you can waive all  
6 twelve, you can waive one.

7 JUDGE PIGOTT: Can you waive nine?

8 JUDGE SMITH: What - - - how - - - what did  
9 we mean when we said in - - - in Gajadhar, "Of course  
10 the Constitution authorizes waiver only with the  
11 approval of the trial judge"? And it's - - -

12 MR. MEGARO: The - - - the approval is to  
13 follow the strict procedural requirements that the  
14 CPL and the consti - - - the New York State  
15 Constitution are, which is to obtain a waiver in  
16 writing on the record, fully allocute the defendant  
17 to that waiver, and make sure that he understands  
18 exactly what he's doing by waiving whether it's one  
19 juror, whether it's two jurors, whether it's all  
20 twelve.

21 JUDGE SMITH: There are - - - the - - - we  
22 do refer from time to time to a waiver made in good  
23 faith. What do we mean by that?

24 MR. MEGARO: Certainly, Duchin actually  
25 provides that exact definition. And the improper



1           that would be bad faith by the defendant, because  
2           he's - - - he - - - he's - - - he's man - - - he's -  
3           - - he's using it to manipulate the jury in my  
4           hypothetical?

5                       MR. MEGARO:  It - - - it - - - it would be  
6           probably bad faith more so to procure a mistrial than  
7           it would just to proceed with the eleven, but I guess  
8           that would be very facts - - - that - - - that  
9           scenario would have to depend very much on the facts.  
10          In this case, there really was no consent.  Counsel  
11          objected all of - - - the entire way when the issue  
12          came to a head.

13                      JUDGE ABDUS-SALAAM:  Well, what - - - what  
14          was the consent?  What was - - - was it proper for  
15          the judge to ask for the defendant's consent to  
16          release the alternate juror only if the defendant  
17          would go forward with a twelve-member jury?

18                      MR. MEGARO:  No, because the - - - the  
19          statement that this would have to be retried is  
20          incorrect.  It didn't have to be retried, as this  
21          court made clear in - - - in - - -

22                      JUDGE SMITH:  So you - - - you - - - you -  
23          - - you - - - you read as - - -

24                      MR. MEGARO:  - - - I'm going to butcher the  
25          name, Gajadhar.

1                   JUDGE SMITH:   - - - you - - - you read the  
2                   statement as - - - as I - - - as I was telling your  
3                   adversary, I read it as a - - - as a - - - as a  
4                   mistake of law rather than as a bargain?

5                   MR. MEGARO:   That's correct.   And - - - and  
6                   - - - and even if it were not a mistake of law it  
7                   would be impermissible to condition the free exercise  
8                   of the right to trial by jury on - - - you know, the  
9                   - - - excuse - - - excusing one of the alternates or  
10                  not.   And that's - - - I mean that's - - - that would  
11                  be interfering with that - - -

12                  JUDGE PIGOTT:   I don't know about that.

13                  MR. MEGARO:   - - - individual's free  
14                  exercise.

15                  JUDGE PIGOTT:   You're - - - you're saying  
16                  that the judge has no discretion about dis - - -  
17                  discharging alternates?

18                  MR. MEGARO:   No, the judge does have  
19                  discretion.

20                  JUDGE PIGOTT:   So you're saying - - -  
21                  you're saying that - - - that - - - that if - - - if  
22                  he asks and you say I'm - - - you know, I'm - - - I'm  
23                  willing to go with twelve and then you don't and you  
24                  want to go with eleven, that somehow that's okay?   I  
25                  mean if the judge says I'm not discharging the - - -

1 the alternates, can you say I'm going to object,  
2 judge, because by - - - by doing that you're going to  
3 make me try twelve. And I want - - - I'm hoping for  
4 eleven?

5 MR. MEGARO: Well, I - - - I think that's a  
6 - - - a very unlikely scenario, in my opinion. But -  
7 - -

8 JUDGE PIGOTT: It is.

9 JUDGE SMITH: You - - - you - - - you could  
10 imagine a case where a judge said - - - it was the  
11 other way around where the judge says you want to  
12 discharge the alternate, I'll discharge her. But I  
13 want to know that if we lose one of these twelve  
14 you'll take eleven?

15 MR. MEGARO: That would be - - -

16 JUDGE SMITH: That'd be okay, wouldn't it?

17 MR. MEGARO: No, that would not.

18 JUDGE SMITH: No?

19 MR. MEGARO: That would not because the  
20 defendant has the right to twelve. The defendant has  
21 the right to eleven. The defendant has the right to  
22 none.

23 JUDGE PIGOTT: I'm not sure that's right.  
24 I - - - you know, I - - - I - - - I get the - - - the  
25 beginnings. But can you - - - can you go in and say,

1 Judge, I've had a lot of thought about this and we  
2 want a jury of three?

3 MR. MEGARO: I think you can as long as - -  
4 -

5 JUDGE PIGOTT: Really?

6 MR. MEGARO: I - - - I - - - I think - - -

7 JUDGE PIGOTT: Isn't that making a joke out  
8 of the jury system? I mean, there's a reason we have  
9 twelve - - - we used to say men - - - tried and true.  
10 There's a reason we picked twelve. There's a reason  
11 twelve is - - - there's a reason there's six on  
12 misdemeanors. And we - - - and that was an issue  
13 because we - - - we just decided to do that. And - -  
14 - and you want to say, Judge, I - - - I want you and  
15 that one juror and then I'm happy?

16 MR. MEGARO: Yeah, well, in - - - in that  
17 scenario, I - - - I can't think of any scenario where  
18 anybody in their right mind would say something like  
19 that. But if the defendant so chose and it was not  
20 to procure some crazy perm - - - impermissible  
21 strategic advantage, then that would be okay.

22 JUDGE RIVERA: Counsel, can you - - -

23 CHIEF JUDGE LIPPMAN: So - - - so - - - so  
24 Constitutional right to eleven even if the judge  
25 believes that the eleven are tainted?

1 MR. MEGARO: No, onl - - - the taint is a  
2 separate issue.

3 CHIEF JUDGE LIPPMAN: Yeah?

4 MR. MEGARO: There is a Constitutional  
5 right to eleven. Here there was no real taint and  
6 there's - - - there's no record of any taint, because  
7 there was never any polling of the jury and - - - and  
8 that only two jurors that he - - -

9 CHIEF JUDGE LIPPMAN: But - - - but he  
10 talked to two or three or whatever it was, the three  
11 of the jurors, right?

12 MR. MEGARO: One - - - one of whom was the  
13 offender and was removed, yes.

14 CHIEF JUDGE LIPPMAN: Right, so why  
15 couldn't the judge conclude that the rest of the jury  
16 is tainted?

17 MR. MEGARO: Because there's no record of  
18 it. The only inc - - - and the law is very clear.  
19 When there is a hint of juror misconduct, the  
20 preferred course of action, as urged by trial counsel  
21 here, is to make a full inquiry, whether that's in a  
22 group or one at a time.

23 CHIEF JUDGE LIPPMAN: Why wouldn't it - - -  
24 why wouldn't it have been futile to - - - to poll the  
25 rest of the jurors?

1 MR. MEGARO: Why wouldn't it have - - -  
2 would have - - -

3 CHIEF JUDGE LIPPMAN: Why wouldn't - - -  
4 why wouldn't it be futile for him to have then gone  
5 to the other - - - all of the jurors then?

6 MR. MEGARO: Certainly, because the other -  
7 - - the other nine jurors could have repeated exactly  
8 what the one woman who emphatically stated I heard  
9 what Juror number 11 said, I heard what you said,  
10 Your Honor. I'm going to listen to you. I did not  
11 listen to him. And that's why we col - - -  
12 collectively signed a note and we nominated Juror  
13 number 12, or whoever she was, to be the spokesperson  
14 to come out and tell you.

15 JUDGE RIVERA: So then your - - - your  
16 light is red.

17 MR. MEGARO: Yes.

18 JUDGE RIVERA: So just very briefly, so  
19 then your position is re - - - regardless of what has  
20 gone on in that courtroom, the - - - the judge - - -  
21 even if the judge believes that because, in this  
22 case, his - - - his directive to inform him if  
23 anyone, of course, has failed to comply with his  
24 directive, has gone out and talked to someone else  
25 and brought that into the courtroom - - - even if - -



1 - even if - - - if that judge has lost trust, doesn't  
2 think the jurors will really follow him, he still  
3 have to make the inquiry?

4 MR. MEGARO: Still has to do something,  
5 yes.

6 JUDGE RIVERA: Is there any kind of case  
7 where that might not be necessary? Any kind of  
8 scenario based on what has gone on that the judge  
9 could feel, as the Chief Justice just said - - - it's  
10 futile to go through this exercise because there's no  
11 way this jury - - - there's no way to cure this.  
12 There's no way this jury will follow any of my rules?

13 MR. MEGARO: I've been through this before,  
14 a fistfight between two jurors in the jury room.

15 JUDGE SMITH: Or what about the case where  
16 the jury has been told about an inadmissible  
17 confession?

18 MR. MEGARO: With the ca - - - I'm sorry,  
19 Your Honor, what?

20 JUDGE SMITH: Where the jury has been told  
21 about an inadmissible confession. I think that was  
22 one of the cases we actually had. They didn't have  
23 to - - - they didn't poll the jury to say can you  
24 disregard the confession. They said they're tainted.  
25 Go away.

1                   MR. MEGARO: I - - - I think the - - - the  
2 better course of action would be to poll the jury.  
3 Did you consider this? Can you put it out of your  
4 mind? Yes or no?

5                   CHIEF JUDGE LIPPMAN: The better course or  
6 required?

7                   MR. MEGARO: I'm sorry?

8                   CHIEF JUDGE LIPPMAN: If the judge feels  
9 that it's his responsibility and that that jury is  
10 tainted, the better course or he must poll the entire  
11 jury?

12                  MR. MEGARO: Yes, because we don't want to  
13 throw the baby out with the bathwater.

14                  JUDGE ABDUS-SALAAM: Why is - - -

15                  JUDGE SMITH: I mean personally, I - - - I  
16 thought - - - I thought that there was that - - -  
17 that case whose name I can't remember is inconsistent  
18 with this. But are you really saying that if all  
19 twelve jurors look you in the eye and say, oh, I can  
20 disregard the fact that I know this guy confessed,  
21 that you have to believe them? I mean I - - - isn't  
22 it kind of common knowledge or - - - or common sense  
23 that no matter what they say, if they heard a  
24 confession it's - - - they're tainted?

25                  MR. MEGARO: Yes, but we engage in this

1 legal fiction all the time with jury selection and  
2 everything else that's - - -

3 JUDGE SMITH: And is - - - isn't your  
4 better argument that - - - that having heard what - -  
5 - you know, having heard one juror say I called my  
6 lawyer and he said focus on the gun, that that isn't  
7 exactly like a confession?

8 MR. MEGARO: No, I - - - I think it's very  
9 different. It's - - - it's a statement. It's not a  
10 question of fact. It's more a misstatement of law.  
11 And that's why the jury sent out a note saying could  
12 you clarify because obviously somebody's injected  
13 some new law into this deliberation about it.

14 JUDGE RIVERA: Well - - - well, isn't the -  
15 - - the - - - the other - - -

16 JUDGE ABDUS-SALAAM: Tell us why - - -

17 JUDGE RIVERA: I'm sorry. I'm sorry.

18 CHIEF JUDGE LIPPMAN: Go ahead.

19 JUDGE ABDUS-SALAAM: Why is a fistfight  
20 between two jurors a - - - a lot more - - - would - -  
21 - would require a mistrial rather than what has  
22 happened here where all the jurors have heard this  
23 erroneous law and may have been tainted by it?

24 MR. MEGARO: Why would a fistfight be  
25 worse?

1                   JUDGE ABDUS-SALAAM: Why - - - why would  
2                   that be automatically - - - why would that  
3                   automatically lead to a mistrial?

4                   MR. MEGARO: I think that at that point  
5                   that the jury becomes so divisive. And obviously the  
6                   - - - the tempers and emotions would flare so much  
7                   that nobody would be able to con - - - nobody would  
8                   be able to focus on the task at hand, and certainly,  
9                   not the two people fighting or whichever group of  
10                  supporters they did. At that point the trial would  
11                  be a complete wash.

12                  JUDGE GRAFFEO: If the judge did what  
13                  you're sug - - - what you're asking us to claim that  
14                  he should have done, would you be back here or would  
15                  some other defense attorney be back here claiming  
16                  this jury was tainted?

17                  MR. MEGARO: No, because if there was a  
18                  full and complete record where each and every juror -  
19                  - - each and every juror said this did not affect me.  
20                  I have listened to your law, Your Honor, and we - - -  
21                  we have accepted your law not what Juror number 11  
22                  has told us, there would be a very, very clear record  
23                  of - - - of no taint and no misconduct whatsoever.

24                  JUDGE READ: Well, he wouldn't necessarily  
25                  have to believe them.

1 JUDGE GRAFFEO: So there has to be a  
2 mandatory polling then you're saying?

3 MR. MEGARO: I believe polling is  
4 necessary, but - - -

5 JUDGE READ: They wouldn't nec - - - the  
6 judge wouldn't necessarily have to believe that,  
7 would he?

8 MR. MEGARO: I - - - I think you'd be hard  
9 pressed not to accept it.

10 CHIEF JUDGE LIPPMAN: What if he couldn't  
11 believe it? In other words, he says to himself, he's  
12 the judge. He says this jury is tainted. I spoke to  
13 three of them. We know everyone was exposed to this.  
14 It can't be that the jury can say I'm going to - - -  
15 I'm going to be able to get around this and - - -  
16 judge still doesn't have that - - - that ability to  
17 do that?

18 MR. MEGARO: In this particular scenario,  
19 no, I don't think so, because it would be very  
20 difficult for a judge to say I understand what you're  
21 telling me under oath, each and every one of you  
22 individually, but I can't believe all eleven - - -  
23 all eleven of you. I'm going with my gut instinct  
24 rather than what you told me.

25 CHIEF JUDGE LIPPMAN: Well, it's - - - it

1           could be more than gut ins - - - instinct. In other  
2           words, it could be a very reasoned decision based on  
3           the fact that one juror told the others that here's  
4           the answer a lawyer told me. And - - - and, you know  
5           - - - and they're all going to have to say I'm  
6           putting that totally out of my mind. Judge says  
7           based on - - - on - - - on my judgment, on my seeing  
8           what's going on here and speaking to the three  
9           jurors, I don't have to hear from the others. It  
10          would not be a - - - again, it would be futile to - -  
11          - to do that.

12                         MR. MEGARO: Well, the - - - the - - - the  
13          problem is that supp - - - that presupposes that that  
14          one juror's incorrect statement of the law was  
15          actually heard and considered by all of the other - -  
16          - all the others in the court - - - in the jury room.  
17          When you have twelve people together, there's always  
18          pockets of people that are talking amongst  
19          themselves. They may not have heard it. He may have  
20          - - - have expressed this - - -

21                         JUDGE PIGOTT: You - - - you've picked  
22          juries, right?

23                         MR. MEGARO: I'm sorry?

24                         JUDGE PIGOTT: You've picked juries - - -

25                         MR. MEGARO: Yes.

1                   JUDGE PIGOTT: - - - personally? You ever  
2 talk to a juror and say now you're telling me,  
3 without question, that you can be fair and they stare  
4 you right in the eye and say absolutely?

5                   MR. MEGARO: Yes, many times.

6                   JUDGE PIGOTT: Can you believe them?

7                   MR. MEGARO: No, not always.

8                   JUDGE PIGOTT: That's - - -

9                   MR. MEGARO: And that's when I exercise a  
10 peremptory strike.

11                  JUDGE PIGOTT: Judges run into the same  
12 thing at some point.

13                  MR. MEGARO: So - - -

14                  CHIEF JUDGE LIPPMAN: And you got - - -

15                  MR. MEGARO: And I - - - and I think trial  
16 judges don't have peremptory strikes so - - - thank  
17 you very much.

18                  CHIEF JUDGE LIPPMAN: Okay, thanks,  
19 counselor.

20                  Counselor, rebuttal?

21                  MS. GROSS MARKS: Yes, just very quickly  
22 based on your question.

23                  CHIEF JUDGE LIPPMAN: Is that what your - -  
24 - what you think, that - - - that the judge did all  
25 he had to do by speaking to the three?

1 MS. GROSS MARKS: Yes, I don't think  
2 there's a - - - there's a script for what the judge  
3 has to do. There's no specific rule that the - - -

4 CHIEF JUDGE LIPPMAN: Well, what if all the  
5 others said it's okay? You know, I - - - I'm - - -  
6 I'm not troubled by it. I didn't hear it, whatever?

7 MS. GROSS MARKS: Again, the - - - the case  
8 whose name I don't remember where the judge, even  
9 during the initial voir dire, does not have to take a  
10 - - - a juror at his or her word. And indeed, the  
11 standard is much higher. These jurors said I think I  
12 can. That's not enough for an expurgatory oath. And  
13 the other juror said well, I wasn't even listening.  
14 Well, she hardly knew what the law was. She wasn't  
15 even aware that there was a problem. She wasn't - -  
16 -

17 JUDGE RIVERA: Are you saying it's not - -  
18 - it's not possible for the judge not only have - - -  
19 to have polled but perhaps have given curative  
20 instructions? This is not the kind of problem that  
21 can be cured through further direction from the  
22 judge? Is that your position?

23 MS. GROSS MARKS: Absolutely.

24 JUDGE RIVERA: Why not?

25 MS. GROSS MARKS: Because this jury had



1 already shown itself unable to follow instructions,  
2 and the judge - - -

3 JUDGE ABDUS-SALAAM: Why do you say that?  
4 Is it because they didn't come immediately to the  
5 judge as soon as - - - they said stop to Juror number  
6 11. Don't tell us. The judge told us we can't do  
7 any outside investigation and you're coming in here,  
8 so don't say another word?

9 MS. GROSS MARKS: I think that's right - -  
10 -

11 JUDGE ABDUS-SALAAM: Is that - - - is that  
12 the reason?

13 MS. GROSS MARKS: - - - Judge Abdus-Salaam,  
14 yes. I do. I think that's what should have  
15 happened. I think instead of Juror 11 and Juror 12  
16 getting into this back and forth about you should  
17 have done it. I didn't do it. Why did you do that?  
18 She should have said don't even tell me what you  
19 heard. That's a problem. We're not supposed to  
20 listen to outside advice. Let's call the judge. But  
21 instead, they went back and forth, sent out a note  
22 for clarification, more back and forth. And then  
23 finally, the note comes out but it's the - - - only  
24 signed by two jurors. So they were belated and the  
25 rest of them, whatever. Twelve minus three, that

1 none of those were in even the same boat.

2 I just wanted to note quickly that the  
3 judge's discretion in terms of a defendant's right to  
4 a jury by twelve and - - - and his waiver of it.  
5 We've seen this also in the context of waiving a jury  
6 trial and going to a bench trial. We've seen it when  
7 a - - - when a defendant would like to take a plea  
8 and sometimes it's not accepted by the court. So  
9 there are other circumstances.

10 CHIEF JUDGE LIPPMAN: But the judge always  
11 has discretion?

12 MS. GROSS MARKS: That's correct. And I  
13 would also like to say that there were - - -

14 JUDGE SMITH: Are there cases that say that  
15 the judge can refuse a jury waiver, an out-and-out  
16 jury waiver?

17 MS. GROSS MARKS: I don't know if it uses  
18 the word "refuse," but rej - - - yes. In - - - in  
19 effect, if it's - - - the judge has discretion. If  
20 it's an impermissible procedural advantage or if it  
21 sees some other reason that it can articulate why it  
22 should reject the waiver.

23 JUDGE PIGOTT: Well, a jury - - - waiving a  
24 jury is not a procedural advantage for anybody. It -  
25 - - it - - - I think - - - I think what - - - what

1           you mean to say is the judge can say if you want to  
2           go nonjury, you're not going nonjury in front of me.  
3           And - - - and I'm getting off this case. Is that - -  
4           -

5                         MS. GROSS MARKS: That's true.

6                         JUDGE PIGOTT: Okay, but - - -

7                         MS. GROSS MARKS: Well, in the - - - in the  
8           Duchin case and the other ones, there was a - - -  
9           there was an issue, which was raised by counsel,  
10          about codefendants not prevailing on a severance  
11          motion and then trying to say okay, well, then I'll  
12          go - - - I'll go bench. And I believe in that  
13          instance the judge would not accept defendant's  
14          attempted waiver.

15                        CHIEF JUDGE LIPPMAN: Okay.

16                        MS. GROSS MARKS: Thank you very much.

17                        CHIEF JUDGE LIPPMAN: Thank you both.

18          Appreciate it.

19                        (Court is adjourned)

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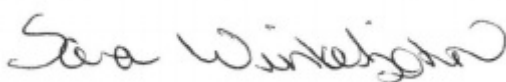
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Eric Smith v. Honorable Richard A. Brown, No. 168 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

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Date: September 21, 2014