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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 144

EDDIE THOMPSON, JR.,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
September 3, 2013

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 SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 144, People v.  
2 Thompson.

3 Counsel, would you like any rebuttal time,  
4 counsel?

5 MR. WEINER: I would like to reserve two  
6 minutes, Your Honor.

7 CHIEF JUDGE LIPPMAN: Two minutes, sure.  
8 Go ahead.

9 MR. WEINER: This case is huge. There are  
10 a collection of ca - - - issues, but I'm not sure  
11 which issues - - -

12 CHIEF JUDGE LIPPMAN: Let's talk about the  
13 issue - - -

14 MR. WEINER: - - - that the court wants me  
15 to address.

16 CHIEF JUDGE LIPPMAN: Let - - - let me - -  
17 - this is what I want you to address first. What  
18 about the issue of the composition of the jury? In  
19 other words, do - - - do - - - does the jury - - -  
20 must the jury reflect the - - - the ethnic or a - - -  
21 you know, the - - - the - - -

22 MR. WEINER: The four - - - the four - - -  
23 the fact that there were four - - -

24 CHIEF JUDGE LIPPMAN: Doesn't that - - -

25 MR. WEINER: - - - four blacks in the pool

1 - - -

2 CHIEF JUDGE LIPPMAN: Yes; does there have  
3 to be a match or is it per se that if you have a  
4 percentage of minorities that is nowhere near the  
5 percentage in the community, does that mean, per se,  
6 that it's - - - that there's a problem? That - - -

7 MR. WEINER: It means that some - - -

8 CHIEF JUDGE LIPPMAN: Could one argue that  
9 there needs to be a match?

10 MR. WEINER: There needs - - -

11 CHIEF JUDGE LIPPMAN: Is that a good  
12 argument?

13 MR. WEINER: There's - - - there's a good  
14 argument that there has to be some relationship to  
15 reality as to what the community represents.

16 CHIEF JUDGE LIPPMAN: What kind of real - -  
17 - where do you draw the line? If you have - - -

18 MR. WEINER: That's the question for the  
19 court. In - - -

20 CHIEF JUDGE LIPPMAN: If you have a jur - -  
21 - okay. If you have a jury pool or a group that's  
22 brought in or from which it's brought in that has  
23 ninety percent Caucasian, and you have a population  
24 that is ninety percent African American. Does that -  
25 - - is - - - would that - - -

1 MR. WEINER: Something is wrong.

2 CHIEF JUDGE LIPPMAN: - - - per se be no  
3 good?

4 MR. WEINER: Something is wrong.

5 CHIEF JUDGE LIPPMAN: Okay, where do you  
6 draw the line between that situation and a situation  
7 where it's not an exact match?

8 MR. WEINER: An exact match doesn't always  
9 happen. It may - - -

10 CHIEF JUDGE LIPPMAN: And it doesn't have  
11 to happen, right?

12 MR. WEINER: It doesn't have to happen, but  
13 some - - -

14 CHIEF JUDGE LIPPMAN: What does have to  
15 happen?

16 MR. WEINER: - - - will have to happen as  
17 there has to be a relationship to what the community  
18 represents.

19 CHIEF JUDGE LIPPMAN: How do we know  
20 whether it's representative of the population?

21 MR. WEINER: The - - - I - - -

22 CHIEF JUDGE LIPPMAN: And I don't know the  
23 an - - - that's not a rhetorical question.

24 MR. WEINER: The issue - - - I understand  
25 that, Your Honor.

1 CHIEF JUDGE LIPPMAN: How do we know?

2 MR. WEINER: The issue was raised by  
3 counsel below. He never - - - he called it a Ba - -  
4 - a Batson issue. It isn't a Batson issue. It's a -  
5 - - it's a question as to what - - - how do you  
6 handle this in a community - - -

7 CHIEF JUDGE LIPPMAN: How do you handle it?

8 MR. WEINER: And he - - - and - - -

9 CHIEF JUDGE LIPPMAN: Or how should we  
10 handle it?

11 MR. WEINER: The issue - - - he never se -  
12 - - he had never seen as you - - - as you - - - it's  
13 clear from the record, he never saw the jurors till  
14 they came in. He - - - the court asked him - - - he  
15 never - - - and then for the first time he saw - - -  
16 he saw the fact there are only four. He said it's  
17 two, the judge said it's four.

18 CHIEF JUDGE LIPPMAN: Right.

19 MR. WEINER: Whatever - - - what - - - four  
20 blacks out of a hundred. But that is not  
21 representative of Kingston, and it is not  
22 representative of the community. It may - - - the  
23 community - - -

24 JUDGE PIGOTT: Not representative of  
25 Kingston, did you say?

1 MR. WEINER: Of the Ulster County.

2 JUDGE PIGOTT: You - - - okay.

3 MR. WEINER: Of Ulster County, which is - -

4 -

5 JUDGE SMITH: Well, what is - - - what

6 would be - - - what percentage would be

7 representative?

8 MR. WEINER: I had to go to Wikipedia, Your  
9 Honor. And it said about seven to nine percent.

10 JUDGE ABDUS-SALAAM: Well, counsel, is it  
11 sufficient for a lawyer to say, it's not  
12 representative, but I don't know what the percentage  
13 is?

14 MR. WEINER: Well, again, unfortunately,  
15 I'm the appellate lawyer, and I don't - - - the - - -  
16 perhaps the local - - - the trial lawyer should have  
17 said - - - had to be more blacks in representative -  
18 - -

19 JUDGE PIGOTT: Well, it has to be in  
20 writing, doesn't it? You're talking about a 270.10  
21 challenge here.

22 MR. WEINER: Yes, but again, when the issue  
23 first popped up, he didn't get the opportunity - - -  
24 when you say the que - - - that's their defense.

25 JUDGE PIGOTT: But it's conceivable in

1 cases such as this, that knowing that you have a - -  
2 - that's why I asked you about Kingston. If this - -  
3 - if this - - - if you're looking for a Kingston  
4 jury, you could make the motion saying you want a  
5 city jury, not a county jury - - -

6 MR. WEINER: Right.

7 JUDGE PIGOTT: - - - because the city is a  
8 certain percentage and the county is a certain  
9 percentage less. And you need that kind of evidence  
10 in order to make the petition to the court, don't  
11 you?

12 MR. WEINER: Yes, Your Honor. But he never  
13 had the opportunity in reality in this case, to make  
14 - - - to make such a motion.

15 CHIEF JUDGE LIPPMAN: But say - - - say for  
16 - - -

17 MR. WEINER: The issue was raised, and the  
18 first time he - - - the - - - as they admitted, they  
19 never - - - he never saw the - - -

20 CHIEF JUDGE LIPPMAN: But counsel, come  
21 back to the question I asked you originally.

22 MR. WEINER: What is say - - - what's the  
23 percentage?

24 CHIEF JUDGE LIPPMAN: Say it's - - - say -  
25 - - say it is two percent or say it's one percent of

1 the - - - on the - - - within the jury pool here, and  
2 say that it's ten percent, that's about what this is.  
3 Forget the county/city issue. What happens - - -  
4 say, it's two percent or one percent and ten percent,  
5 what - - - what do we do about it? Is that - - -

6 MR. WEINER: That's - - -

7 CHIEF JUDGE LIPPMAN: Is that no good - - -

8 MR. WEINER: I would say that one - - -

9 CHIEF JUDGE LIPPMAN: - - - if you have the  
10 statistics?

11 MR. WEINER: - - - one to two percent are  
12 no good. If it's - - -

13 CHIEF JUDGE LIPPMAN: If it's ten on the  
14 other side?

15 MR. WEINER: If it's ten on the other side,  
16 it should be seven, eight, five, you know, a higher  
17 number. It should - - -

18 CHIEF JUDGE LIPPMAN: And do we draw a  
19 precise percentage where it's no good, and where it's  
20 good?

21 JUDGE SMITH: Are you really saying there  
22 has to be a quota of minority jurors?

23 MR. WEINER: I'm saying there has to be a  
24 representation to understand the - - -

25 JUDGE SMITH: But a fixed number - - - a

1 fixed minimum number?

2 MR. WEINER: There has to be a minimal  
3 standard. There has to be some possibility of  
4 getting that - - -

5 CHIEF JUDGE LIPPMAN: And on what ba - - -

6 JUDGE RIVERA: So where's the right to that  
7 proportionality?

8 MR. WEINER: Pardon?

9 JUDGE RIVERA: Where's the right to that  
10 proportionality?

11 MR. WEINER: It's not in the con - - - as I  
12 think I cite in my brief, there are studies that have  
13 said that when there's a different racial  
14 composition, there's a different - - - there's a  
15 different outlook for - - - for the defendant. When  
16 there are more blacks on the pool, the blacks get a  
17 more - - - it comes out more even as to the  
18 conviction between whites and blacks.

19 CHIEF JUDGE LIPPMAN: Counsel, say we agree  
20 with you. Say that - - - that you're right. How do  
21 you know when it - - - when it works and when it  
22 doesn't, besides just saying I know it when I see it,  
23 that ten percent, two percent - - -

24 MR. WEINER: Unfortunately, you're going to  
25 have to follow Judge - - - Justice Stewart's remark

1 "I know it when I see it." And I think in this - - -

2 CHIEF JUDGE LIPPMAN: So sometimes the just  
3 stark difference in the representation is enough.

4 MR. WEINER: Yeah. This was just stark.  
5 This was completely - - - and there is something  
6 wrong there, that the same issue is raised only two -  
7 - - again, two years earlier in another case that  
8 went up to this - - -

9 CHIEF JUDGE LIPPMAN: Well, this issue has  
10 been raised around - - -

11 MR. WEINER: Right, and it's - - -

12 CHIEF JUDGE LIPPMAN: - - - the state in  
13 legal and from a policy perspective.

14 MR. WEINER: And I think from policy - - -

15 CHIEF JUDGE LIPPMAN: So I'm trying to draw  
16 out of you what - - -

17 MR. WEINER: And I - - - and my position -  
18 - -

19 CHIEF JUDGE LIPPMAN: - - - what is the  
20 legal test that we should use? How do we get there?  
21 Assuming that - - - assume, for the sake of argument,  
22 that we'd all agree at some point there's something  
23 wrong. How do you get there? What's - - - what's  
24 the basis for legal - - -

25 MR. WEINER: I think the basis should be -

1 - - again, this is a gut reaction, Your Honor.

2 CHIEF JUDGE LIPPMAN: Yeah.

3 MR. WEINER: I think it should be at least  
4 fifty or sixty percent of what the standard is in the  
5 community. It could be 120 percent; it could be 60  
6 percent, but there has to be some reality based on -  
7 - - that's - - - again, that's a gut feeling, or - -  
8 -

9 JUDGE SMITH: Before - - - before you run  
10 out of time, could you discuss the - - - the failure  
11 to use the preemptory challenge on Juror Perk (ph.)?

12 MR. WEINER: That - - - again, Your Honor,  
13 the issue was there. He saw it. Counsel - - - it  
14 was - - - he saw the issue. He laid out all the  
15 facts. He raised it, and then he realized he goofed.  
16 He said, I made - - - I - - -

17 JUDGE SMITH: He said "I should have my  
18 head examined".

19 MR. WEINER: "I should have my head  
20 examined".

21 JUDGE SMITH: But does that - - - I mean,  
22 but he - - - what - - - it's a little hard to under -  
23 - - did - - - can you - - - how do we know what he  
24 meant by that?

25 MR. WEINER: I - - -

1 JUDGE SMITH: Was he - - - was he really  
2 just saying, well, I'm taking a chance and maybe I'm  
3 crazy?

4 MR. WEINER: No, he was not take - - - he  
5 did not say he was taking a chance. He was saying he  
6 - - -

7 JUDGE SMITH: Sometimes we say, I should  
8 have my head examined, even though we don't really  
9 think - - - you know, he wasn't really asking the  
10 court for an order for a medical examination.

11 MR. WEINER: Again, I've never met the man,  
12 but I really think what happened was he did not - - -  
13 at the time of - - - under all the stress and  
14 excitement, he did not go forward with a preemptory  
15 challenge, which he should have.

16 JUDGE SMITH: How do we know he didn't just  
17 have a hunch that maybe this juror, even though he is  
18 the prosecutor's old pal, maybe he'll be good for me?

19 JUDGE READ: He did say, didn't he, that  
20 he'd known the DA to be wrong?

21 MR. WEINER: Surely, but that - - - that's  
22 when he - - - they were jesting. And that - - -  
23 again, I think in several cases, this court has  
24 stated - - -

25 JUDGE RIVERA: Or maybe he was jesting when

1 he said, "I should have my head examined".

2 JUDGE READ: And that what - - - it is true  
3 that your client wasn't convicted of the top counts,  
4 so I guess he did think the DA was wrong.

5 MR. WEINER: I'm not - - - he was convicted  
6 for quite serious counts.

7 JUDGE SMITH: Yeah, but - - - but you know,  
8 getting manslaughter when you shot somebody two times  
9 is - - - is not bad.

10 MR. WEINER: Well, it was accidental, Your  
11 Honor.

12 JUDGE SMITH: Oh.

13 CHIEF JUDGE LIPPMAN: Counsel, before you  
14 go, what about the domestic violence poster?

15 MR. WEINER: That troubled me enormously.

16 CHIEF JUDGE LIPPMAN: Tell us why?

17 MR. WEINER: It troubled me because this  
18 woman - - - again, who I think was probably a friend  
19 of - - - of all the jurors, she was the only one - -  
20 - her kids had attended preschool with the trial  
21 attorney. She was the one that came up and - - - and  
22 raised it. And it was right around the corner. And  
23 everybody saw it. But they - - - but nobody said  
24 anything. They probably saw it, because they all had  
25 to walk past the place.

1 JUDGE ABDUS-SALAAM: Where does it come  
2 from? Where does that information that it was right  
3 around the corner come from?

4 MR. WEINER: Counsel agrees to that, and I  
5 did a - - - I did - - - and I did a map - - - again,  
6 I - - - in my brief, I went to MapQuest as to where  
7 it was; it was right around the corner. I think on  
8 my - - - I went - - - unfortunately, I had to do a  
9 lot of work on this, as you know, it was the trial  
10 attorney.

11 JUDGE GRAFFEO: Did the judge ask the  
12 jurors if they had seen the poster?

13 MR. WEINER: No. She raised the issue and  
14 the court did not pursue - - - the court did not  
15 proceed to ask - - - to order - - -

16 JUDGE RIVERA: Is that because defense  
17 counsel said I don't want - - - I want this - - -

18 MR. WEINER: Yeah, counsel said I don't  
19 want it, and I think the reason he may have said it  
20 was he - - - and he didn't want to upset this juror.  
21 Again, I'm trying to get into his psyche, but this is  
22 - - - the woman who raised it was - - - what whom - -  
23 - the lady who he probably thought was his most  
24 friendly - - - friendly witness. Her kids attended  
25 preschool with him - - - his kids, and they didn't

1 know each other otherwise.

2 JUDGE RIVERA: So under those  
3 circumstances, what should've the judge have done?

4 MR. WEINER: I think what the judge should  
5 have done is the judge should have polled the  
6 individual with all the jurors, and say, did you see  
7 anything? Now, the case - - - one of the cases that  
8 I cited in my brief, the Court of - - - the Appellate  
9 Division - - -

10 CHIEF JUDGE LIPPMAN: Counsel, finish off;  
11 your time is up. Go ahead.

12 MR. WEINER: Yeah, has just been reversed  
13 by the Court of Appeals in Connecticut. In the  
14 current case the court said you don't have to poll  
15 it, because it wasn't called to everybody's att - - -  
16 nobody saw it, and nobody raised it. And - - - but  
17 they said the court should - - - may issue a ruling  
18 that at every time, say, if you see anything, you  
19 should call it to my attention - - - call it to my  
20 attention. That's what happened.

21 CHIEF JUDGE LIPPMAN: Okay, counsel, you'll  
22 have your rebuttal.

23 MR. WEINER: Thank you.

24 CHIEF JUDGE LIPPMAN: Let's hear from your  
25 adversary.

1 MS. LAMB: Good afternoon, Your Honors.

2 With respect to the first argument made - - -

3 CHIEF JUDGE LIPPMAN: Yeah, the jury  
4 composition. What's the - - - what's - - - do you  
5 think - - -

6 MS. LAMB: First of all - - -

7 CHIEF JUDGE LIPPMAN: - - - is the test  
8 here?

9 MS. LAMB: - - - the statute sets forth a  
10 written procedure that such a challenge is not - - -

11 CHIEF JUDGE LIPPMAN: Yeah, but on a - - -  
12 but from a policy perspective. Answer the question  
13 that at least I asked your adversary. Can there be  
14 an circumstance where the representation vis-a-vis  
15 the community is so out of sync that you can't go  
16 forward with the jury that is - - -

17 MS. LAMB: Well, the standard is as is  
18 whether or not the procedures used to draw the jury  
19 panels - - -

20 CHIEF JUDGE LIPPMAN: Say it's - - - say  
21 it's .001 percent of the - - - of the panel, and the  
22 - - - and in the community, it's 50 percent. Can - -  
23 - can you get anywhere with that, or is it's just  
24 there's not a legal basis to throw it out? That's  
25 all I'm driving at.

1 MS. LAMB: I don't believe it's a legal  
2 basis, Your Honor.

3 CHIEF JUDGE LIPPMAN: You don't? You do  
4 not believe?

5 MS. LAMB: Well, if in - - - I believe it  
6 was 1980- - - - 1987, where there was a written  
7 challenge to compositions of jury panels on People v.  
8 Gregory ZZ; the case was before the Appellate  
9 Division, Third Department. And that is where all of  
10 the testimony came out. The Commissioner of Jurors  
11 testified as to the procedures that he follows in  
12 drawing jury pools, and the Appellate Division found  
13 that the procedures were properly complied with.

14 JUDGE SMITH: You - - - you would admit, I  
15 suppose, that in the case the Chief put earlier,  
16 where it's not the - - - the community is ninety  
17 percent - - - is ninety percent black and the jury  
18 pan - - - and the venire turns out to be ninety  
19 percent white. That would suggest that something was  
20 wrong, that somebody's doing something wrong there.

21 MS. LAMB: I would suggest that there are  
22 times, but the fact here - - -

23 JUDGE SMITH: But I - - - but you're - - -  
24 as I understand what you're saying, is short of - - -  
25 short of such a gross disproportion that it suggests

1 an intentional discrimination - - -

2 MS. LAMB: Exactly, Your Honor.

3 JUDGE SMITH: - - - then the chips fall  
4 where they may. If you get an all white jury, you  
5 get all white - - - black jury, doesn't matter.

6 MS. LAMB: Well, here, it was a little bit  
7 strange. Judge Sise, even though he knew from the  
8 outset that there hadn't been a written challenge to  
9 the panel, invited - - - told the jurors, told the  
10 defense attorney, well, why doesn't he view the  
11 assembled panel - - -

12 JUDGE SMITH: Go take a look.

13 MS. LAMB: - - - which is - - - which is  
14 not consistent with what the statute requires. And  
15 even though he entertained the oral challenge, the -  
16 - - it was not preserved by virtue of the fact that  
17 the statute says by failure to make a written channel  
18 - - - challenge, it is such a challenge to - - -

19 JUDGE SMITH: Well, but it's hard to make a  
20 written challenge if you don't get any notice in  
21 advance.

22 MS. LAMB: Well, we're talking about the  
23 public defender of Ulster County, a seasoned defense  
24 attorney who's tried many cases in that courtroom,  
25 picked many jurors. If this alleged under-

1 representation was consistent throughout, he could  
2 certainly have collected facts, submitted data, and  
3 made a written challenge, say - - -

4 JUDGE PIGOTT: That didn't - - - that - - -

5 MS. LAMB: - - - I've had enough of this.

6 JUDGE RIVERA: What would be the  
7 information you would have gotten in advance of this  
8 particular jury? What - - - what would have put him  
9 on notice beforehand to prep him to do what - - -

10 MS. LAMB: Well, there probably, Your  
11 Honor, would have been nothing that would have put  
12 him on notice, except his expertise and experience  
13 trying cases in - - -

14 JUDGE RIVERA: The list doesn't indicate  
15 anyone's race.

16 MS. LAMB: No, the list absolutely doesn't  
17 - - -

18 JUDGE RIVERA: There's nothing you can see  
19 until you walk in the room.

20 MS. LAMB: The Commissioner of Jurors  
21 provided that list, although it was not consistent  
22 with what is ordinarily done in Ulster County. But  
23 the list - - - you're right - - - absolutely just  
24 says with a name.

25 JUDGE RIVERA: Until you walk into the

1 courtroom, you will not know - - - potentially, just  
2 by observation which may not tell you fully what the  
3 race - - -

4 MS. LAMB: Well, of course, at that point,  
5 he could have said, Your Honor, I'd like a  
6 continuance to gather some information as to the  
7 procedures used, whether or not I'm - - -

8 CHIEF JUDGE LIPPMAN: There have been cases  
9 that - - - Judge Pigott mentioned it before where an  
10 attorney will say the city is different than the  
11 county, and I want a jury that's more representative  
12 of the city.

13 MS. LAMB: That's correct.

14 CHIEF JUDGE LIPPMAN: Is that okay? That's  
15 appropriate to say?

16 MS. LAMB: Well, they're not in charge of  
17 impaneling the jurors.

18 CHIEF JUDGE LIPPMAN: I understand that. I  
19 understand that.

20 MS. LAMB: I mean, what defense - - -

21 JUDGE PIGOTT: Well, let me suggest to you  
22 this: 270.10 requires something in writing, and I -  
23 - - that's not a bad rule necessarily. But in many,  
24 many counties, most African Americans live in the  
25 city. If the crime happens in the city, the victim's

1 in the city, the defendant's in the city, and they  
2 say they want a city jury. The Commissioner of  
3 Jurors comes in and says, we don't draw that way; all  
4 we do is draw countywide.

5 MS. LAMB: Exactly.

6 JUDGE PIGOTT: You're absolutely diluting  
7 the panel of the juror of - - - let's call them peers  
8 that the victim, the defendant wants in terms of his  
9 or her jury. And that type of a motion, a 270.10  
10 motion, saying that you're drawing from a white  
11 county, when - - - when the whole thing here happened  
12 in a - - - in a substantially African American or  
13 minority city, means that we should get a jury there.  
14 Would that be an appropriate motion in your view?

15 MS. LAMB: It would be an appropriate  
16 motion, Your Honor. I'd like to point out that this  
17 crime did not happen in the city of Kingston. It  
18 happened in a small - - - in Milton - - -

19 JUDGE PIGOTT: Yeah.

20 MS. LAMB: - - - which is a small - - - so  
21 it might not have been something that the public  
22 defender was even thinking about. This crime did not  
23 happen in the city.

24 JUDGE SMITH: All right. What about the  
25 preemptory challenge? Didn't - - - wasn't it

1 obviously a mistake, I mean - - - well, let me start  
2 this way. Hadn't the judge committed - - - very  
3 likely committed error when he denied the challenge  
4 for cause?

5 MS. LAMB: Well, the issue of whether or  
6 not the judge likely committed error is not preserved  
7 for review by virtue of the fact - - -

8 JUDGE SMITH: Well, okay, but that - - -  
9 but he asked. That's - - - isn't that the problem?  
10 Wasn't it a blunder not to preserve that for review?

11 MS. LAMB: You mean by failing to exercise  
12 the preemptory challenge?

13 JUDGE SMITH: Yes, yeah, yeah. Shouldn't -  
14 - -

15 MS. LAMB: No - - -

16 JUDGE SMITH: Let's assume - - - I suggest  
17 to your adversary that maybe the defense lawyer likes  
18 the juror. Fine. But doesn't he have to also to be  
19 thinking, hey, wait a minute. I've got a very tough  
20 case here. The judge has just made what looks like  
21 reversible error. I better preserve it.

22 MS. LAMB: Well, again, I think we have to  
23 look to the fact that the public defender here was no  
24 novice. He was a seasoned criminal defense attorney  
25 who picked many jurors.

1                   JUDGE SMITH: Yeah, we've said - - - we've  
2                   said that sometime - - - we've had cases where a  
3                   first class lawyer makes one mistake, and the mistake  
4                   costs his client his liberty, and we say that's  
5                   ineffective assistance. Was this - - - was this such  
6                   a mistake?

7                   MS. LAMB: Absolutely not, Your Honor. I  
8                   believe - - - just recently in Bar - - - in People v.  
9                   Barboni, this Court recognized that jury selection is  
10                  an inherently strategic par - - - is an inherent - -  
11                  - is an inherently strategic intuitive part of the  
12                  process.

13                  JUDGE SMITH: But I'm actually - - -

14                  JUDGE RIVERA: But he had already indicated  
15                  he didn't want him.

16                  MS. LAMB: Well, he indicated, actually,  
17                  that he was a - - - he - - - the public defender  
18                  initially said that he was acceptable after closed  
19                  questioning. He got him to admit that he had known  
20                  the District Attorney to be wrong before, and that  
21                  it's quite possible that a prosecutor in his passion  
22                  and zeal to present his case, that you could be  
23                  talking about an innocent man. Juror Perks said  
24                  absolutely.

25                  JUDGE SMITH: But is - - - but - - - but

1 aren't we talking about two different things? I can  
2 understand the point that maybe he likes that juror;  
3 fine. And that it was not a mistake to have that  
4 juror sit, but what about - - - but what about  
5 waiving the chance for a reversal? That's different.  
6 I mean, it's - - - he wasn't - - - he couldn't  
7 rationally have been so eager to have this wonderful  
8 juror on the panel that he would throw away  
9 reversible error, in a case where you - - - where  
10 there's a strong case of murder against your client.  
11 He's lucky to get manslaughter.

12 MS. LAMB: Well, again, Your Honor, I think  
13 it goes to, we don't know what the public defender  
14 saw when he entered that courtroom. We don't know  
15 looking out upon that expectant face of the juror  
16 pool that there was something - - -

17 JUDGE SMITH: Is it really - - -

18 MS. LAMB: - - - about Juror Perks - - -

19 JUDGE SMITH: That he - - - that he - - -

20 MS. LAMB: - - - that he obviously liked.

21 JUDGE SMITH: That - - - that juror is not  
22 just acceptable but is that juror is so wonderful  
23 that to have him as one of the twelve, I'm going to  
24 give up my chance to get a conviction reversed on  
25 appeal?

1 MS. LAMB: Well, that is something I  
2 believe that the defense attorney - - - I believe  
3 when he walked back to counsel table - - - I know Mr.  
4 Kossover - - - that he had a big smile on his face  
5 when he said "I should have my head examined". I  
6 left the - - - he knew exactly what he was doing.

7 JUDGE SMITH: Well, well, he - - -

8 MS. LAMB: And - - -

9 JUDGE SMITH: What do you think he was  
10 doing? You think - - - you think he knew that he had  
11 just blown the chance to complain of the challenge  
12 for cause?

13 MS. LAMB: I think he knew exactly what he  
14 was doing. I think he made a calculated decision to  
15 keep this juror on the jury.

16 JUDGE SMITH: In making that - - - in  
17 making that decision - - -

18 MS. LAMB: The defendant was acquitted of  
19 the top counts.

20 JUDGE SMITH: In making that decision, did  
21 he not overlook the Appellate implications of his  
22 decision?

23 MS. LAMB: He may have overlooked the  
24 Appellate imp - - - but for the greater good of the  
25 jury. I think he was also trying to make a point to

1 the jury. I certainly don't think he was not  
2 exercising a preemptory challenge to bring ridicule  
3 upon himself or the Office of the Public Defender.

4 CHIEF JUDGE LIPPMAN: Counsel, you're  
5 almost finished. How about the domestic violence  
6 poster?

7 MS. LAMB: Yes. The court, after question  
8 - - - gave both sides an opportunity to question the  
9 juror. It is very clear that they were more  
10 interested in the location of the poster. The court  
11 directed the DA to have the poster taken down for the  
12 remainder of the trial. It is - - - I would not  
13 concede that even though it was close by, it was on a  
14 - - - on another street. It was not - - -

15 CHIEF JUDGE LIPPMAN: So the judge took  
16 care of it, in your opinion?

17 MS. LAMB: Absolutely. And it's not  
18 preserved, because the defense attorney never  
19 challenged the scope or intensity of the court's  
20 inquiry, and is - - -

21 CHIEF JUDGE LIPPMAN: Okay, counsel.  
22 Thanks.

23 MS. LAMB: Thank you.

24 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

25 MR. WEINER: Yes. First of all, with

1 respect to the scope as to where the distance was, if  
2 you take a look at page 33 of my - - - my brief, it  
3 says it was at .0 - - - .06 miles according to my  
4 MapQuest.

5 JUDGE ABDUS-SALAAM: That wasn't presented  
6 to the trial court, was it?

7 MR. WEINER: No, it was not.

8 JUDGE ABDUS-SALAAM: This was after the  
9 trial.

10 MR. WEINER: This is my - - -  
11 unfortunately, I had to do my own research, Your  
12 Honor. And it was 0.06 - - - it was just around the  
13 corner, which was - - - and it - - - it was at 1 - -  
14 - 0.06.

15 JUDGE RIVERA: Well, but the judge  
16 acknowledged that he would have addressed this if he  
17 had known.

18 MR. WEINER: Right, right, right.

19 JUDGE RIVERA: So obviously he thought  
20 there was something to be concerned about.

21 MR. WEINER: And we all - - - we all  
22 recognize that. And then with respect to the list -  
23 - - the list. It said - - - and then the court said,  
24 they do not give a list. This is, again, the  
25 appendix, pages 103. They don't give a list to

1 counsel of the potential jurors, and then it goes - -  
2 - and then it says - - -

3 JUDGE RIVERA: But how would that have  
4 helped you to know there might be a racial  
5 discrepancy or the proportion would be so out of  
6 whack it would be trouble?

7 MR. WEINER: It does - - - I have no way of  
8 knowing that, Your Honor. I have no way of knowing  
9 that. But they don't give a list. And then before -  
10 - - when we argue about the writing, he says, Mr.  
11 Kossover, we've now received a copy of the list. And  
12 then he said, do you wish to be heard? And he said,  
13 no - - - have you seen the panel? And then he said,  
14 yes, I have. And then, they've objected. And then  
15 he - - - and then he said - - - and then the court  
16 said, okay, I'm going to - - - and then the court, as  
17 soon as - - - soon thereafter, he says, well, the  
18 application is denied. No opportunity to do any sort  
19 of writing. Nobody wants - - - there was no chance -  
20 - -

21 JUDGE SMITH: I don't - - - I'm a little  
22 puzzled. What in this business about the jury panel,  
23 the composition of the panel, justifies us in  
24 reversing this conviction?

25 MR. WEINER: It was not racially

1 representative of the community.

2 JUDGE SMITH: It was not - - -

3 MR. WEINER: Not racially representative of  
4 the community. He did not receive a jury of his  
5 peers. He should have had some blacks - - - African  
6 Americans - - -

7 JUDGE RIVERA: And where's the right to  
8 that particular representation?

9 MR. WEINER: Yes.

10 JUDGE RIVERA: Where's - - - where do you  
11 find the right to represent - - -

12 MR. WEINER: And that's the issue that  
13 Judge Lippman and I were discussing, what is - - -  
14 what is the percentage - - - what is the percentage?

15 CHIEF JUDGE LIPPMAN: Okay, thank you both.  
16 Appreciate it.

17 MR. WEINER: Thank you very much, Your  
18 Honor.

19 CHIEF JUDGE LIPPMAN: Thank you.  
20 Appreciate it.

21 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Eddie Thompson, Jr., No. 144 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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