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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 189

DWIGHT D. DELEE,

Respondent.

20 Eagle Street
Albany, New York 12207
October 15, 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 SHEILA ABDUS-SALAAM

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: And we're going to
2 start today on number 189, People v. DeLee.

3 Counselor, do you want any rebuttal time?

4 MR. MAXWELL: One minute, please.

5 CHIEF JUDGE LIPPMAN: Yes, go ahead.

6 MR. MAXWELL: Thank you, Judge.

7 CHIEF JUDGE LIPPMAN: You're on.

8 MR. MAXWELL: James Maxwell for the People.
9 We're here today, the People bring this appeal to
10 this court asking you to reverse the decision made by
11 the four-to-one majority at the Appellate Division,
12 and reinstate the conviction of Dwight DeLee for
13 manslaughter in the first degree.

14 We do so with confidence that this court,
15 either as an application of its present case law in a
16 way that it makes sense or with - - - or - - -

17 CHIEF JUDGE LIPPMAN: Counsel, what was the
18 - - - what was the jury thinking in the verdict at
19 issue?

20 MR. MAXWELL: Well - - -

21 CHIEF JUDGE LIPPMAN: What was the
22 reasoning behind it at least as far as you contend or
23 can dis - - - discern?

24 MR. MAXWELL: Um-hum, in some of these type
25 of cases we don't know. Here we do know. We have a

1 statement from the foreperson of the jury. The per -
2 - - the foreperson explained exactly what their
3 approach was and - - -

4 CHIEF JUDGE LIPPMAN: Can we - - - can we
5 surmise from what the foreman says as to what the
6 rest of the jurors are thinking or were thinking?

7 MR. MAXWELL: Yes, Your Honor. We can
8 surmise what they were thinking both from the way
9 they deliberated, the questions they were asked, and
10 how they were instructed and from that statement,
11 which was presented to the court, after the fact,
12 about - - -

13 CHIEF JUDGE LIPPMAN: But he's one juror,
14 though, right?

15 MR. MAXWELL: At least one juror, poss - -
16 - possibly more, because when it was presented, the
17 assistant district attorney who presented it said
18 that he had spoken with several of the jurors. They
19 all had that same view. The defense didn't say oh,
20 no, let's have a hearing or no, we disagree - - -

21 CHIEF JUDGE LIPPMAN: Your contention was
22 all of it put together, in your mind, tells you what
23 they were thinking or what that verdict meant?

24 MR. MAXWELL: Yeah, and more - - - more to
25 the point, Your Honor, that we don't have the core

1 concern that this - - - this court identified in
2 People v. Tucker that a person has been convicted of
3 a crime despite the jury finding that it might be - -
4 -

5 JUDGE SMITH: Is that - - - is that the way
6 we deal with inconsistent verdict problems, ask the
7 jury - - - after the jury's been discharged, you go
8 around asking them and see what then - - - you have
9 them tell us what they thought?

10 MR. MAXWELL: Well, Your Honor, it is in
11 the sense that there - - - I see this as more of a
12 question of a different chronology than would have
13 been contemplated under the CPL but not an issue of
14 substance. And let me explain. Had the court said
15 okay, hold everything; we're going to send the jury
16 back in, we would have gotten this information before
17 the verdict was accepted.

18 JUDGE SMITH: And as - - - as - - - as no
19 doubt the jur - - - you would admit that's what the
20 judge should have done?

21 MR. MAXWELL: Well, no, Your Honor. It's
22 one of the things he could have done. But the way he
23 instructed the jury, to reverse course at that point
24 would have been to say all that I've been telling you
25 for two days about to consider these separately,

1 we're going to - - -

2 CHIEF JUDGE LIPPMAN: Counsel, wasn't what
3 he told the jury confusing?

4 MR. MAXWELL: It was - - -

5 CHIEF JUDGE LIPPMAN: Wouldn't - - -

6 MR. MAXWELL: It was susceptible - - -

7 CHIEF JUDGE LIPPMAN: Wouldn't - - - if you
8 were a juror, wouldn't you find it a little bit
9 confusing, what the judge was saying?

10 MR. MAXWELL: I think there - - -

11 CHIEF JUDGE LIPPMAN: I'm not saying
12 dispositive necessarily, but confusing to some
13 degree?

14 MR. MAXWELL: I think it's - - - it could
15 be open to two interpretations: an interpretation
16 that a lawyer might give it and an interpretation
17 that a human being might have given it.

18 JUDGE GRAFFEO: But was there a charge
19 conference here? Did the attorneys and the judge
20 talk about the charge?

21 MR. MAXWELL: Yes, Your Honor. I don't
22 have a page reference right at hand but there was a
23 brief discussion and the - - -

24 JUDGE GRAFFEO: Did the defense object to
25 this instruction?

1 MR. MAXWELL: No, Your Honor. The - - -
2 what I'm remembering from the record is there was a
3 point where the judge said here's my verdict sheet.
4 Let me know if you want any changes. No changes
5 asked for.

6 JUDGE READ: What about - - -

7 MR. MAXWELL: The verdict sheet reflects
8 the - - - this consider Count I and its lesser
9 inclusions. Regardless of what you find on that, you
10 must then go to Count II. It would have contemplated
11 going from manslaughter - - - say hypothetically,
12 manslaughter second, convicted as a hate crime, and
13 then go up to murder - - - murder second as a non-
14 hate crime and contemplated a guilty verdict on both
15 of those.

16 CHIEF JUDGE LIPPMAN: Judge - - - Judge
17 Read.

18 JUDGE READ: Yeah, you - - - you - - - you
19 mentioned People v. Tucker. What about People v.
20 Muhammad?

21 MR. MAXWELL: In Tucker and in People v.
22 Muhammad and Hill, which were decided together, you -
23 - - this court talked about looking at the elements
24 as the jury was instructed. And if you're going to
25 look at that - - - I submit if you're going to look

1 at the elements as instructed, you should also look
2 at how the elements were instructed in relation to
3 each other and in relation to how you proceed from
4 one count to another. What - - -

5 JUDGE SMITH: Is there anything that was
6 actually - - - any actual error in the charge?

7 MR. MAXWELL: Other than it should have
8 been or could have been more precise.

9 JUDGE SMITH: But isn't - - - isn't - - -
10 if it's confusing, isn't that - - - if - - - if a
11 confusing charge leads to an inconsistent verdict,
12 isn't the cure for that for the judge to tell the
13 jury, look, you were confused. You didn't understand
14 me, straighten it out?

15 MR. MAXWELL: Well, Your Honor, I think our
16 trial judge didn't feel that that was the case at
17 all. He's told them from the - - -

18 JUDGE SMITH: Oh, well, that's - - - that -
19 - - that - - - that - - - yeah, that's that - - - and
20 - - - and your adversary's saying that's error.

21 MR. MAXWELL: Well, it could have - - -
22 what - - - what he said at the time, I - - - he
23 didn't say send the jury back in. He said I think
24 it's inconsistent, didn't explain why.

25 CHIEF JUDGE LIPPMAN: Counsel, but there

1 were so many things he could have done - - -

2 MR. MAXWELL: Oh, yes.

3 CHIEF JUDGE LIPPMAN: - - - other than what
4 he did.

5 MR. MAXWELL: And I - - -

6 CHIEF JUDGE LIPPMAN: So - - - so why isn't
7 that, at this point, there was so much error that you
8 just - - - you just can't leave it to the imagination
9 when - - - when there's a really - - - a substantive
10 issue that certainly raises to the forefront as to
11 whether the elements were - - -

12 MR. MAXWELL: Right.

13 CHIEF JUDGE LIPPMAN: - - - you know, could
14 possibly have been proven.

15 MR. MAXWELL: I beg to differ.

16 CHIEF JUDGE LIPPMAN: Go ahead.

17 MR. MAXWELL: And here's why.

18 CHIEF JUDGE LIPPMAN: Go.

19 MR. MAXWELL: It's - - - the Fourth
20 Department even said that it's - - - that the verdict
21 being reasonable and logical is of no moment. And
22 that, I think, makes no sense. To say that the - - -
23 they're complying with the spirit and the - - - and
24 the - - - and the letter of the law. They say that's
25 immaterial. No, I think the way to look at it is you

1 look at this charge, as the jury obviously
2 interpreted it, as requiring them to reach a verdict
3 on the - - - the - - -

4 JUDGE READ: But you're saying they - - -
5 they understood it that they were given a choice?

6 MR. MAXWELL: Yes.

7 JUDGE READ: They either found him guilty
8 of a - - - a hate crime - - -

9 MR. MAXWELL: Yes.

10 JUDGE READ: - - - or a non-hate crime.

11 MR. MAXWELL: Yes, if you look at pages
12 1279 to 1280 where the judge told them the - - - this
13 is one homicide. It's the same homicide. And the
14 only difference between the two is this hate crime
15 motivation. That's the - - -

16 JUDGE READ: So they - - - they understood
17 if they convicted one they had to acquit of the
18 other?

19 MR. MAXWELL: Yes, or that - - -

20 JUDGE SMITH: He - - -

21 MR. MAXWELL: - - - they may convict - - -

22 JUDGE SMITH: He did - - - he did also
23 explain the elements correctly of each crime.

24 MR. MAXWELL: Yes.

25 JUDGE SMITH: And, indeed, he did - - - he

1 - - - he told them that to find him guilty of a hate
2 - - - of - - - of manslaughter as a hate crime, he
3 had to - - - he had to - - - he had to have committed
4 manslaughter.

5 MR. MAXWELL: Yes, and where - - - where it
6 fell down is this transition from one count to
7 another. For instance - - -

8 JUDGE SMITH: I can - - - I can see how
9 it's - - - I'm - - - I guess I'm not sure if you - -
10 - you answered my question. Was it - - - was it
11 wrong or just confusing? You're saying confusing but
12 not wrong?

13 MR. MAXWELL: Correct, or - - - or not so
14 much confusing as - - - as perhaps susceptible to - -
15 - to more than one interpretation.

16 CHIEF JUDGE LIPPMAN: Yeah, but if it's - -
17 - if it's perhaps susceptible to more than one
18 interpretation, and then when it comes out it, at
19 least on its surface, doesn't seem to make sense,
20 isn't the story over at that point?

21 MR. MAXWELL: No, Your Honor, because it
22 made sense to the trial judge. It made sense to the
23 jury, and we know that from the statement of this
24 juror.

25 JUDGE PIGOTT: Yeah, but what are you going

1 to do - - - how you going to write this if you're
2 writing the opinion, Mr. Maxwell, so that - - - that
3 Mr. Rothschild doesn't come back here in a year and
4 say remember what you did in People v. DeLee? Well,
5 this is the other foot. And - - - and it's a
6 confusing charge and this conviction's got to be
7 overturned for exactly the reason that you, that Mr.
8 Maxwell argued in DeLee?

9 MR. MAXWELL: What I say, Your Honor, is
10 you look at the way the judge - - - the jury ins - -
11 - reacted to this that they ha - - - they were
12 instructed correctly on how to deal with lesser
13 includeds, and then they told very definitely that -
14 - - that the murder second as a non-hate crime was
15 not a lesser included. It was to be - - - to be
16 dealt with separately.

17 JUDGE ABDUS-SALAAM: Well, should it have
18 been - - -

19 MR. MAXWELL: Now what you - - -

20 JUDGE ABDUS-SALAAM: - - - should it have
21 been, counsel, a lesser included?

22 MR. MAXWELL: I think there's a strong
23 argument that it could be. I don't think you have to
24 decide that - - -

25 JUDGE SMITH: You - - - you did not ask if

1 he's - - -

2 MR. MAXWELL: - - - to decide this case in
3 our favor.

4 JUDGE GRAFFEO: Except - - - ex - - -
5 except that, regardless of what we decide about this
6 charge - - -

7 MR. MAXWELL: Um-hum.

8 JUDGE GRAFFEO: - - - we also have a
9 responsibility to tell the trial bench how they
10 should charge these hate crimes to - - - as the judge
11 just said - - -

12 MR. MAXWELL: Yes.

13 JUDGE GRAFFEO: - - - to avoid this problem
14 in the future. So what's your recommendation for a
15 best practice charge - - -

16 MR. MAXWELL: The best practice should - -
17 -

18 JUDGE GRAFFEO: - - - to avoid this
19 problem?

20 MR. MAXWELL: The best practice should be
21 similar to the situation where there's an intentional
22 murder and there's a depraved mind murder, to
23 instruct the jury to first consider the - - - the
24 hate crime, for example - - -

25 JUDGE GRAFFEO: And then stop?

1 MR. MAXWELL: - - - and - - - and then, if
2 guilty, move on to the weapons charge, bypass the
3 nonhate crime.

4 CHIEF JUDGE LIPPMAN: Okay, counselor.

5 MR. MAXWELL: I think that would solve the
6 problem.

7 CHIEF JUDGE LIPPMAN: You'll have your
8 rebuttal. Let's - - -

9 MR. MAXWELL: Thank you.

10 CHIEF JUDGE LIPPMAN: Let's hear from your
11 adversary.

12 MR. ROTHSCHILD: Good afternoon, Your
13 Honors. Phil Rothschild for Mr. DeLee.

14 CHIEF JUDGE LIPPMAN: Counsel, why can't we
15 make sense of this verdict?

16 MR. ROTHSCHILD: I think the verdict - - -
17 this verdict essentially was repugnant. The
18 acquittal on manslaughter in the first degree
19 necessar - - -

20 CHIEF JUDGE LIPPMAN: But what if they took
21 it in the - - - in the - - - in the way that your
22 adversary says, that they took the - - - the hate
23 crime and then when they got to this - - -

24 MR. ROTHSCHILD: Well, basically, the
25 opposing counsel - - - I don't want to put words in

1 his mouth, but opposing counsel's asking this court
2 to take a - - - a view of repugnancy which this court
3 essentially said no to in - - - in Tucker.

4 JUDGE SMITH: You mean you're - - - you're
5 saying that - - - that Tucker rejects the whole idea
6 of, look, we know what they meant?

7 MR. ROTHSCHILD: Absolutely, Your Honor,
8 because it - - - playing off of Powell in the Supreme
9 Court, one of the concerns in that court was that it
10 was going to invade the province of the jury. And
11 for compelling public policy reasons - - -

12 JUDGE SMITH: You would concede that this
13 is a - - - if you were going to play the we-know-
14 what-they-meant game, this would be a pretty good
15 case for it?

16 MR. ROTHSCHILD: No. Actually, no, Your
17 Honor, because, I mean, the - - - the belief also in
18 Powell was that somehow the - - - the equal
19 possibility test that the - - - the acquittal on one
20 of the charges must have been through mistake,
21 compromise, or lenity, that's never been proven. And
22 I would submit that we don't know for sure whether
23 that was the case here.

24 JUDGE GRAFFEO: Well, specifically, where
25 did the judge err in the charge here?

1 MR. ROTHSCHILD: Well, the charge was - - -
2 as I said, this charge was proper. I mean I don't
3 believe even opposing counsel says that it was
4 improper. It may have been confusing, but recall
5 that in Tucker this court said that you view the
6 repugnancy through the light of the elements of the
7 crime as charged, regardless of the accuracy of that
8 charge. This charge did not compel a - - - a
9 inconsistent verdict, as you have with the - - -

10 JUDGE SMITH: In fact, you - - - in fact,
11 if you - - - if you read it, if - - - if you - - - if
12 a lawyer reads this charge with care, it's clearly -
13 - - it clearly told them not to do what they did,
14 didn't it?

15 MR. ROTHSCHILD: Multiple times the court
16 said irrespective of your verdict on the manslaughter
17 as a hate crime, you still have to consider
18 manslaughter - - -

19 JUDGE SMITH: Okay, see, now, the - - - he
20 - - - he says, I guess, that the word irrespective
21 means that you can convict on one and acquit on the
22 other.

23 MR. ROTHSCHILD: I would submit, Your
24 Honor, that basically - - - that's counter to the - -
25 - the Fourth Department found - - -

1 JUDGE SMITH: You - - - you - - - you - - -
2 you - - - you take it to mean that whatever you find
3 on the first one you've got to go on and consider the
4 second?

5 MR. ROTHSCHILD: You still have to consider
6 it, absolutely.

7 JUDGE GRAFFEO: So how do we avoid this
8 problem in the future?

9 MR. ROTHSCHILD: Well, I think the - - -

10 JUDGE GRAFFEO: If the charge is perfectly
11 fine?

12 MR. ROTHSCHILD: I think - - - well, the -
13 - - the charge, whether it's confusing or not, I
14 think the - - - the easiest way to avoid this problem
15 in the future is have the trial court do what it's
16 supposed to, which is when it's - - - you know, when
17 it's notified - - - when - - - when the jury's
18 confused and they come back with a verdict that's
19 clearly repugnant, and if defense counsel objects - -
20 - and we know that defense counsel doesn't always
21 object, the court simply has - - - it's a very simple
22 obligation - - - under - - - by statute and by case
23 law to remit the matter back to the jury for further
24 deliberation and a consistent verdict.

25 That - - - and they're saying well, we

1 don't like that now. The People are saying we don't
2 like that because the verdict didn't come out as we
3 wanted. The fact is these two verdicts were
4 absolutely irreconcilable because, clearly,
5 manslaughter in the first degree was an element of
6 manslaughter.

7 JUDGE ABDUS-SALAAM: Well, could we have
8 avoided - - - or could the trial judge have avoided
9 the irreconcilability if the non-hate crimes were
10 lesser includeds of hate crimes?

11 MR. ROTHSCHILD: Well, Your Honor, first of
12 all, there was no objection to the charge. And as
13 far as whether it was or wasn't, I mean, the fact is
14 I think this court in Tucker said it - - - it doesn't
15 matter whether it's a lesser included or not a lesser
16 included. The fact is it's how it's charged. And I
17 believe in Carbonell, I think it was a - - - a - - -
18 a larceny as part of robbery. And that was not - - -
19 if it were charged in the alternative, clearly you
20 have a different result, but that's not what was done
21 here.

22 JUDGE RIVERA: Is it - - -

23 JUDGE READ: Is that what should have been
24 done? Would that - - - would that fix it?

25 MR. ROTHSCHILD: I think that prob - - -

1 perhaps, but, I mean, that's not the situation we
2 have today.

3 JUDGE READ: No, I understand that.

4 MR. ROTHSCHILD: Yeah.

5 JUDGE READ: But we have to worry, as you
6 know, for giving guide - - - we have to worry about
7 giving guidance to future trial judges in future
8 trials.

9 MR. ROTHSCHILD: I think the first piece of
10 guidance should be to the trial courts. When the
11 defense counsel gets up and objects and says this is
12 repugnant, not just say okay, thank you. We'll - - -
13 we'll talk about it - - -

14 JUDGE PIGOTT: That - - - that's the key
15 there, right? If the judge had simply said, you
16 know, reinstructed the jury, this - - - we - - - you
17 wouldn't be here?

18 MR. ROTHSCHILD: Absolutely, Your Honor,
19 absolutely. But the fact is because of that, because
20 we have a verdict - - - I mean, this court has said
21 allowing, you know - - -

22 JUDGE ABDUS-SALAAM: But if the trial judge
23 reinstructed the jury the same way that the trial
24 judge instructed the jury in the first place, we
25 might be right back here.

1 MR. ROTHSCHILD: Well, that's true, Your
2 Honor. However, hopefully - - -

3 JUDGE SMITH: Could - - - could - - - could
4 the judge have told the jury look, you're giving me
5 two verdicts here and they're inconsistent. Go
6 straighten it out?

7 MR. ROTHSCHILD: I think that's exactly
8 what the trial judge should have - - - should have
9 done.

10 CHIEF JUDGE LIPPMAN: That the best
11 practice?

12 MR. ROTHSCHILD: I think that is best
13 practice, Your Honor. I mean with - - -

14 CHIEF JUDGE LIPPMAN: With all the
15 different variations that the judge might have done
16 here - - -

17 MR. ROTHSCHILD: Well, the real - - -

18 CHIEF JUDGE LIPPMAN: - - - the best thing
19 - - - assuming that the - - - the charge was not
20 incorrect but was a little bit confusing or a lot
21 confusing - - -

22 MR. ROTHSCHILD: Okay.

23 CHIEF JUDGE LIPPMAN: - - - the real thing
24 that the judge should have done was say go back this
25 - - - you can't have this?

1 MR. ROTHSCHILD: Absolutely, Your Honor.

2 And - - - and I understand - - -

3 JUDGE GRAFFEO: Well, the amici makes some
4 recommendations for a different format for the
5 charges. Do you agree with any of the
6 recommendations?

7 MR. ROTHSCHILD: I think that right now the
8 issue before me, at least what I - - - what I looked
9 at was whether or not this charge was proper or
10 improper because - - -

11 JUDGE GRAFFEO: I know, but we look beyond
12 the particular case that we have.

13 MR. ROTHSCHILD: I think - - - in this
14 case, I think the charge was proper. And I think,
15 although it may - - - People may - - - the reality
16 is, if - - - if you look at it, there are three - - -
17 four different possibilities: acquit on both,
18 convict on both, acquit on one convict on the other,
19 or - - - or vice versa.

20 JUDGE PIGOTT: Was there a position stated
21 by the People at the time that the defense lawyer
22 stood up and said this is inconsistent?

23 MR. ROTHSCHILD: No, Your Honor. There was
24 no - - - to my recollection, there was no such - - -
25 you know, the reality is, in this case, allowing such

1 verdicts, as this court has said in Tucker, allowing
2 such verdicts to stand is not inc - - - just
3 inconsistent with justice but actually repugnant to
4 it. The rule ensures that a person is not convicted
5 of a crime where the jury has actually found he did
6 not commit an essential - - -

7 JUDGE SMITH: So - - - so you - - - you - -
8 - you - - - you - - - you obviously don't think - - -
9 you don't want us to accept Mr. Maxwell's invitation
10 to - - - to abandon Tucker and Pow - - - and adopt
11 Powell instead?

12 MR. ROTHSCHILD: Well, absolutely not, Your
13 Honor, because I believe that this court had adopted
14 Tucker for a reason. And the reason is due process
15 and the belief that - - -

16 JUDGE SMITH: Yeah, but - - - but - - - but
17 - - - but now he's saying and look what it got us
18 into.

19 MR. ROTHSCHILD: Well - - -

20 JUDGE SMITH: Aren't - - - aren't - - -
21 aren't - - - aren't we better off with - - - isn't -
22 - - doesn't the Powell rule make a certain amount of
23 sense?

24 MR. ROTHSCHILD: I would submit not, Your
25 Honor. Not if there's a belief that the - - - the

1 person who's convicted, the - - - it's a very
2 disquieting thought to have a person convicted of a
3 crime where one of the elements has clearly not been
4 proven as a matter of law.

5 JUDGE ABDUS-SALAAM: Counsel, isn't it also
6 a kind of disturbing thought that the pers - - - if -
7 - - if the jury understood the court's charge, as the
8 People say, and they did intend to convict your
9 client for the hate crime but they thought it was
10 overkill to convict him of the manslaughter, is it
11 just that someone could have committed the crime that
12 the jury thought they committed and nothing happens
13 with that?

14 MR. ROTHSCHILD: It - - - they - - -

15 JUDGE ABDUS-SALAAM: Is that justice?

16 MR. ROTHSCHILD: I think it goes back to
17 the concept of - - - of the equally possible verdict
18 that - - - that was talked about in Powell, or
19 perhaps Dunn, the reality is we don't know that for
20 sure. And - - - and it requires us to speculate.
21 And that - - - as I - - - as - - - as Judge Smith
22 noted, I mean, that - - - that would basically
23 invited a host of defense attorneys - - -

24 JUDGE SMITH: We used - - - we used to spec
25 - - -

1 JUDGE RIVERA: What - - - I'm sorry.

2 JUDGE SMITH: We used to speculate under
3 Tucker, too. We - - - you know, or - - - or - - - or
4 even maybe it's not even speculating. But you - - -
5 you'd have to do this imaginative reconstruction or
6 maybe the jury didn't find that the gun was operable.
7 I mean, is that really any - - - any - - - are you
8 going to get more justice that way than just
9 following the Powell rule?

10 MR. ROTHSCHILD: I think, Your Honor - - -
11 I think, if I understand the question, the - - - the
12 - - - the problem in this case is basically the
13 People don't like the result.

14 JUDGE SMITH: Well, I guess, let me - - -
15 let me - - - let me refine the question. Seems to me
16 there are two obvious ways to do it. One is to
17 figure out what they really meant, and if we do that,
18 you lose. And the other is to say we don't care that
19 it's consistent or inconsistent; we're going to stick
20 what they found. If you do - - - if we do that, you
21 lose. What - - - but - - - but - - - but in Tucker
22 we've chosen a middle way of saying we will - - - we
23 will go - - - we will follow an exercise in which we
24 compare the elements and only the elements. And if
25 they don't match, then - - - then it's repugnant and

1 no matter how inconsistent they really are, otherwise
2 we'll uphold them. What's - - - what's good about
3 that way of doing it?

4 MR. ROTHSCHILD: I think what's good is it
5 protects the idea - - - I mean if - - - if the
6 question is hate crimes, I believe that hate crimes
7 are terrible things. But the reality is they still
8 have to be viewed out of the same lens that we look
9 at all crimes, whether or not there's due process,
10 whether each and every element has been proven beyond
11 a reasonable doubt.

12 JUDGE READ: Well, I guess it's more of a
13 bright-line rule. Is that what you mean?

14 MR. ROTHSCHILD: Well, I - - - I think it's
15 - - - yeah, and it's - - - it's - - - the, basically
16 the bright-line rule has operated against defense - -
17 - defendants and defense counsel for years.

18 JUDGE SMITH: So you're - - - you're - - -
19 you're - - - you - - - what you just said implies
20 that we should abandon Tucker but in the other
21 direction. We should go back to the - - - the - - -
22 cases like Haymes, I guess, where we look at the
23 whole record and say what did - - - did - - - did
24 they - - - is this really inconsistent or not.

25 MR. ROTHSCHILD: Well, for the purposes of

1 this trial - - - I mean for the purposes of this
2 appeal - - -

3 JUDGE SMITH: You - - - you're - - - you're
4 fine with Tucker right now?

5 MR. ROTHSCHILD: I'm fine with Tucker. I'm
6 fine with Tucker. In this - - - in this court,
7 basically, the - - - also the People have asked for
8 the abandonment. I - - - I submit that they've not
9 presented any good policy reasons in contravention of
10 the ones I put in my brief and the ones I've stated
11 today.

12 CHIEF JUDGE LIPPMAN: Counsel, what's the
13 significance of the foreperson's affidavit?

14 MR. ROTHSCHILD: I think there is no
15 significance. I think it represented a clear
16 invasion into the - - - I mean, first of all,
17 speculation as to what they were thinking was
18 improper. But I think the obtaining of the fore - -
19 -

20 CHIEF JUDGE LIPPMAN: Does it say anything
21 else than what he was thinking?

22 MR. ROTHSCHILD: First of all, it's one of
23 the twelve jurors. We don't know that for a fact.
24 And it - - - it - - - and it's actually a total
25 invasion into the jury's province, which was

1 complained about in Tucker and in Dunn and in Powell,
2 and specifically, what - - - why this court adopted
3 the rule in Tucker - - -

4 JUDGE ABDUS-SALAAM: But wasn't there a
5 jury note sent out - - -

6 MR. ROTHSCHILD: - - - to avoid that.

7 JUDGE ABDUS-SALAAM: - - - when the jurors
8 were deliberating about whether they should - - -
9 which - - - which counsel they should be considering?

10 MR. ROTHSCHILD: Well, I believe the note -
11 - - the problem is, yes, they did send out a note.
12 But I believe that it requires a bit of speculation.
13 What did they really mean by that because I don't
14 believe there's any - - - I mean, this court in
15 Tucker said we want to get away - - -

16 JUDGE ABDUS-SALAAM: Doesn't that support
17 the jury forewoman's view of what the jury thought
18 they were doing?

19 MR. ROTHSCHILD: I don't believe so, Your
20 Honor. Not in light of the - - - the crimes as
21 charged. Specifically, when the court tells them
22 look, you know, you have to consider these things
23 separately and independently.

24 JUDGE RIVERA: Coun - - -

25 MR. ROTHSCHILD: No matter what you decide

1 on the hate crime - - -

2 JUDGE RIVERA: Coun - - -

3 MR. ROTHSCHILD: - - - you still got to
4 come back and decide.

5 JUDGE RIVERA: Coun - - - counsel, can I
6 perhaps come at a question Judge Smith asked
7 previously but from a different place. If - - - if
8 the charge on the hate crime says it's - - - it's the
9 underlying crime plus this animus, doesn't that
10 really then make out his case that they must have
11 understood I am already finding the defendant guilty
12 of this other crime and I'm finding the animus - - -

13 MR. ROTHSCHILD: No, Your Honor - - -

14 JUDGE RIVERA: - - - given that definition?

15 MR. ROTHSCHILD: Your Honor, no, because,
16 as I - - - to reiterate, the - - - one of them
17 involved a mutually exclusive thought process,
18 depraved indifference versus - - - and clearly, that
19 is an improp - - - improper charge.

20 JUDGE RIVERA: Um-hum.

21 MR. ROTHSCHILD: Here we have, essentially,
22 an extra element. Which this court talked about
23 elements: A, B, C.

24 JUDGE RIVERA: Um-hum.

25 MR. ROTHSCHILD: And identical to another

1 charge: A, B, C. But that also has element D. Now
2 each one of those elements must be proven beyond a
3 reasonable doubt and - - -

4 JUDGE SMITH: So you - - - you - - - I
5 mean, in theory, they could have acquitted on
6 manslaughter because they thought he didn't prove
7 intent to cause serious physical injury. And then
8 when they got to the hate crime they forgot that that
9 element had to be proved so they got a diff - - - I
10 mean, theoretically, that could be, but yeah, not
11 very likely.

12 MR. ROTHSCHILD: I - - - I - - - not in
13 this case, Your Honor, because it was clearly set out
14 in the - - - in - - - in - - - in the charge, as
15 charged to the jury, that you have to find
16 manslaughter in the first degree. And verbatim the
17 words were used word-for-word this is how you define
18 manslaughter in the first degree.

19 JUDGE GRAFFEO: If we agree with you,
20 what's the remedy you're recommending?

21 MR. ROTHSCHILD: I think the remedy is the
22 remedy that this court set out in Tucker and
23 Muhammad, which is - - - which is, basically, reverse
24 and dismiss because what - - - what alternative does
25 this court have? You can't remit it back to the

1 trial judge because it has to be a finding of fact,
2 and you can't have the jury come back three years
3 after the fact for - - -

4 CHIEF JUDGE LIPPMAN: Okay, counselor.

5 JUDGE SMITH: Why - - - why - - -

6 CHIEF JUDGE LIPPMAN: Sorry, Judge Smith.

7 JUDGE SMITH: - - - can't there be - - -
8 you - - - oh you're saying there has to be a
9 dismissal because the - - - the - - - the verdict on
10 simple manslaughter is collateral estoppel as to the
11 hate crime?

12 MR. ROTHSCHILD: Yes, Your Honor. I mean -
13 - -

14 JUDGE SMITH: So there can't - - - there
15 can't even be a new trial here?

16 MR. ROTHSCHILD: There can't, Your Honor.
17 Because - - - because double jeopardy applies.

18 CHIEF JUDGE LIPPMAN: Okay.

19 MR. ROTHSCHILD: And double jeopardy should
20 be a factor.

21 CHIEF JUDGE LIPPMAN: Thanks, counselor.

22 MR. ROTHSCHILD: Thank you.

23 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

24 MR. MAXWELL: Very quickly on your last
25 question about remedy, I think that if we're going to

1 freeze everything at the moment the - - - the verdict
2 came in and not look at the juror's statement - - -
3 which I think we should, but if we're not, then we
4 should go back to 300.50 of the CPL, paragraph 1,
5 that allows the court to reconvene the jury, to
6 either - - -

7 CHIEF JUDGE LIPPMAN: You're going to
8 reconvene the jury?

9 MR. MAXWELL: Yes.

10 JUDGE GRAFFEO: Three years later?

11 JUDGE SMITH: This - - - this - - - this
12 jury? Call them all up and say - - -

13 MR. MAXWELL: Or - - - or - - -

14 CHIEF JUDGE LIPPMAN: That make any sense
15 whatsoever?

16 MR. MAXWELL: If you look at the entire
17 statute, it also allows the court to order a retrial.
18 And I think that - - -

19 CHIEF JUDGE LIPPMAN: Why doesn't double -
20 - -

21 MR. MAXWELL: Again, I say that only as a -
22 - -

23 CHIEF JUDGE LIPPMAN: Why doesn't double
24 jeopardy kick in?

25 MR. MAXWELL: Because if we're going to

1 pretend that - - - that this verdict should not have
2 been accepted we should go back to the point in time
3 where the verdict was accepted.

4 JUDGE PIGOTT: Well, two things. First,
5 you know, I - - - I asked Mr. Rothschild because the
6 DA didn't - - - the DA either stood silent or agreed
7 that this is not repugnant. And - - -

8 MR. MAXWELL: Until - - - but in the 330
9 motion we made a detailed response.

10 JUDGE PIGOTT: Yeah, but you didn't do it
11 at the time when it - - - when it would have been
12 helpful.

13 MR. MAXWELL: Right.

14 JUDGE PIGOTT: And then with respect to
15 your - - - to your juror - - -

16 MR. MAXWELL: Well - - -

17 JUDGE PIGOTT: - - - you know, your - - -

18 MR. MAXWELL: - - - Your Honor, may - - -
19 may I address that real quickly?

20 JUDGE PIGOTT: Well, sure.

21 MR. MAXWELL: The judge, to our view, the
22 view of our prosecutor, was accepting the verdict
23 properly. Because the court - - - the jury was told
24 the difference between these two is this one element.
25 If you've got all those elements you go with murder

1 with a hate crime.

2 JUDGE PIGOTT: You got to live or die with
3 that argument. I mean you can't - - - you can't now
4 make a different argument.

5 MR. MAXWELL: Well - - -

6 JUDGE PIGOTT: I mean you got to say that,
7 yes, you can acquit somebody of manslaughter and
8 still convict them of manslaughter plus.

9 MR. MAXWELL: Because of the way the jury
10 was instructed. That's all I want - - - wanted to
11 inject.

12 JUDGE PIGOTT: Okay, now with respect to
13 the jurors, the troubling thing about that is jury
14 affidavits, juror affidavits, when they say somebody
15 brought in a dictionary or somebody was talking or
16 saying - - - that's what you normally expect. To - -
17 - to have a juror say this is the way we were
18 deliberating really violates the whole confidence of
19 the jury, doesn't it?

20 MR. MAXWELL: There's a rule against
21 impeaching the jury's verdict. But this is
22 supporting the jury's verdict.

23 JUDGE PIGOTT: Well, you're saying it's
24 supporting it and - - - and - - -

25 MR. MAXWELL: Of course it is.

1 JUDGE PIGOTT: Well, yeah, but, I mean,
2 there - - - there's eleven more out there that may
3 disagree. I - - -

4 MR. MAXWELL: Well, again, it was presented
5 to the court as the foreperson and that other jurors
6 concurred with this. And the defense didn't say
7 whoa, wait a minute, let's get a - - - all twelve
8 back.

9 JUDGE PIGOTT: Well, just - - - again, turn
10 it around, Mr. Maxwell. Let's assume Mr. Rothschild
11 comes in next month with a case in which he's got a
12 juror that says and by the way, the whole time
13 they're talking about this all he talked about was
14 race. And even though, you know, they - - - we - - -
15 we came up with a guilty verdict, the fact of the
16 matter is that it was racially motivated. Are we
17 going to listen to that?

18 MR. MAXWELL: No, Your Honor. But I think
19 the difference is - - - and there is a difference
20 between a juror simply explaining a verdict and a
21 juror trying to impeach a verdict or having bought -
22 - - buyer's remorse or trying - - - being bought off.

23 JUDGE SMITH: Well, he's - - - well, he is
24 - - - he's impeaching the acquittal on - - - on mans
25 - - - on simple manslaughter, isn't he - - - or she?

1 MR. MAXWELL: She's explaining it and I
2 think that - - - I - - - what if the judge had thrown
3 it out?

4 JUDGE SMITH: Well, she's explaining that
5 it was a mistake.

6 MR. MAXWELL: A mistake - - - she's - - -
7 she's explaining it as why they didn't go for it
8 because they - - - what they felt. And I think
9 that's logical - - -

10 JUDGE SMITH: I mean can we go ba - - -

11 MR. MAXWELL: - - - on the way they're
12 instructed.

13 JUDGE SMITH: Can we go - - - go back to
14 double jeopardy for one minute. I mean you - - - you
15 - - - you are arguing, in the alternative, that if we
16 reject everything else you say we can order a new
17 trial on the hate crime count?

18 MR. MAXWELL: As a backup, as a fallback,
19 yes.

20 JUDGE SMITH: Yeah, and we - - - you - - -
21 we - - - and - - - and that that new trial be only on
22 the hate crime count not on the one on which he was
23 acquitted, I assume?

24 MR. MAXWELL: The statute reads that the
25 court would - - - would throw out - - - for instance,

1 the murder would be gone. And probably you're right
2 that it would be on the hate crime.

3 JUDGE SMITH: Yeah, I mean, well, forget
4 about the - - - the - - - the stat - - - I shouldn't
5 - - - we shouldn't forget about the statute, let's
6 worry about the Constitution for a minute.

7 MR. MAXWELL: Um-hum.

8 JUDGE SMITH: The Constitution would be a
9 problem if you wanted to retry him on simple
10 manslaughter when twelve people have said he's not
11 guilty of it.

12 MR. MAXWELL: Perhaps, but - - -

13 JUDGE SMITH: But - - - but - - - but
14 you're saying that the Constitution's not a problem
15 when - - - when the two - - - yeah, that - - - that
16 the - - - he's not - - - that you're not collaterally
17 estopped from trying him again for a hate crime
18 because he hasn't been acquitted of that. And the
19 fact that it's - - - that there's a verdict logically
20 inconsistent with conviction, well, that's canceled
21 out by the one you've got?

22 MR. MAXWELL: Right, well, that - - -
23 again, I emphasize I'm only making that as a
24 fallback.

25 JUDGE SMITH: And we do understand that.

1 MR. MAXWELL: And - - - and - - - I - - - I
2 - - - just - - - Judge Abdus-Salaam mentioned
3 justice. No justice has been done if this person
4 we've - - - overwhelmingly evidence of - - - proven
5 by overwhelming evidence that he committed a hateful
6 homicide goes unacc - - - unpunished, unconvicted.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.
8 Thanks.

9 Thank you both. Appreciate it.

10 (Court is adjourned)

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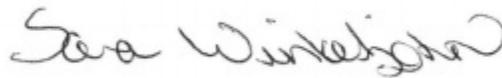
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Dwight R. DeLee, No. 189 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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