

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 76

DARRELL SPENCER,

Appellant.

20 Eagle Street
Albany, New York
May 30, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

SUSAN H. SALOMON, ESQ.
CENTER FOR APPELLATE LITIGATION
Attorney for Appellant
120 Wall Street, 28th Floor
New York, NY 10005

ERIC C. WASHER, ADA
BRONX COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
198 East 161st Street
Bronx, NY 10451

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 76, The People of the
3 State of New York v. Darrell Spencer.

4 MS. SALOMON: Good afternoon, Your Honors. I'd
5 like to reserve three minutes for rebuttal, please.

6 CHIEF JUDGE DIFIORE: Did you say three?

7 MS. SALOMON: Thank you.

8 CHIEF JUDGE DIFIORE: Three?

9 MS. SALOMON: Yes.

10 CHIEF JUDGE DIFIORE: You may.

11 MS. SALOMON: Yes, Susan Salomon for Mr. Spencer.
12 It's been a long-held requirement by this court that a
13 juror must be able to set aside his or her emotions and be
14 able to deliberate the case dispassionately and fairly. We
15 believe it was also paramount in this particular case,
16 given the emphasis by the parties and the court during voir
17 dire of the potential for emotions to override the - - -
18 that ability in this case.

19 JUDGE RIVERA: Counsel, you're not - - -

20 MS. SALOMON: Yes?

21 JUDGE RIVERA: - - - challenge - - - challenging
22 the sufficiency of the court's inquiry and colloquy - - -

23 MS. SALOMON: Yes.

24 JUDGE RIVERA: - - - with this juror - - -

25 MS. SALOMON: Yes.

1 JUDGE RIVERA: - - - correct? You're only - - -
2 this is based solely on the actual words spoken.

3 MS. SALOMON: Yes, by this - - - by this juror,
4 yes. The words spoken. And we believe that this juror, as
5 indeed the Appellate Division majority found, was honest,
6 was forthright, and was clear about what was troubling her.

7 JUDGE GARCIA: Counsel, the - - - the standard
8 for discharging a seated juror is "grossly unqualified".
9 And - - - and I think anybody who reads this - - - there's
10 a troubling transcript here, and the back and forth
11 continues for a time and there's never - - - I think as you
12 focus very appropriately in your - - - your papers, there's
13 never an unequivocal statement that, yes, I can put this
14 aside. There's kind of a cut off, and - - - and some other
15 back and forth.

16 But what I'm somewhat concerned about is "grossly
17 unqualified" is - - - is a high standard, and if you look
18 at our cases, it's talked about where a juror expresses
19 racist views, right, that would interfere with their
20 ability to be fair. Here, rather than looking at the
21 unequivocal I can be, looking at what the juror has said is
22 the problem. It seems to be very different than what we've
23 ever found as grossly unqualified, in the sense that I
24 can't separate my emotions from the case. And obviously
25 there are things in this case that would be disturbing to

1 anyone, and just in terms of the nature of the crime.

2 So my concern is how do we fit that
3 representation within our case law on "grossly
4 unqualified"?

5 MS. SALOMON: Well, I think, first, as this
6 court's other cases have said, for example, Mejias - - - I
7 hope I'm pronouncing it correctly. The court gave as an
8 examples, but as examples only, of things that would render
9 a juror grossly unqualified. It's not a closed list.

10 So if you start, for example, from all the other
11 areas of the law, where we require jurors to be able to
12 deliberate fairly, and the court is very wary of things
13 that can harm that - - - can - - - can nullify that.
14 Prosecutorial summations, for example, that seek to arouse
15 emotions. Evidence itself that can unduly seek to arouse
16 emotions.

17 So the fact that here, this was not, as I said,
18 an exogenous issue of - - - of bias, where it was
19 something, for example, in Rodriguez that happened to the
20 juror externally. This is something, again, that was so
21 central to voir dire itself, to the initial selection of
22 jurors, to the evidence that they're allowed to hear, and
23 the arguments they're allowed to hear, to the closing
24 arguments, to the actual court's final charge to jurors - -

25 -

1 JUDGE FAHEY: So - - - so - - -

2 MS. SALOMON: - - - which tell them - - - I'm
3 sorry.

4 JUDGE FAHEY: You hit on a - - - you hit on a - -
5 - an interesting point for me is are - - - is your argument
6 - - - it - - - the weakness in the argument seems to me,
7 and you can address this, is - - - is that you're seeking
8 to apply a standard that would apply to voir dire to a
9 juror at the close of deliberations. I'd like you to
10 address that, because that seems to me - - - because this
11 seems like an extension of Rodriguez, only because in
12 Rodriguez the lady was so explicit in her particular bias.

13 MS. SALOMON: Well, the reason I - - - I - - -
14 yes, grossly unqualified, again - - - let - - - let's use
15 Rodriguez, if I might, as a counterpoint.

16 JUDGE FAHEY: Sure.

17 MS. SALOMON: And there, yes, that juror was
18 questioned about, as I said, an exogenous bias, and she was
19 asked about it because it was something that happened apart
20 from the trial. But one can obviously be biased and - - -
21 and not be able to deliberate fairly because of things that
22 are within the juror, his or herself.

23 JUDGE FAHEY: See - - -

24 JUDGE STEIN: But what - - - what if - - - how
25 did this juror indicate in any way that type of bias? It -

1 - - what - - - what I feel is - - - may be missing here is
2 any indication of how - - - she talks about her emotions,
3 but she doesn't say how that might affect her ability to
4 apply - - - to find the facts and apply the laws the judge
5 gave her. And that's - - - that's - - - that's I think the
6 - - - the link here that's a little bit loose.

7 MS. SALOMON: Okay, well, first, I would say that
8 the fact that, as she does say repeatedly, her emotions are
9 impeding or actually nullifying her ability to deliberate
10 fairly on the fact and the law, and she says it over and
11 over, and she says she would be violating her oath. The
12 fact that she was not explicitly asked about, well, which
13 way is it going, I think if Your Honor is - - - is
14 suggesting that, or asking her to get into the particulars,
15 there's a danger there, because once you start going down -
16 - - I think, any judge, I think, who - - - who might go
17 down that road, would then start getting into the
18 particulars of the deliberative process, which - - - which,
19 again, you're not supposed to do. And - - -

20 JUDGE FAHEY: But aren't we creating a danger, if
21 we say that it's - - - it's - - - you - - - you weren't
22 explicit in - - - in the error, and - - - and yet we're
23 reading into it, because of what you told us, in essence,
24 that this is an emotional decision and it's difficult to
25 make, and - - - and you're having a hard time with it

1 because of the emotion involved in the decision, without a
2 specific disqualifying admission. How are we not simply
3 implying or inferring, rather than - - - and then from that
4 step saying that was a gross violation?

5 MS. SALOMON: Well, I guess I would say that, for
6 example, these comments - - - comments such as this, or
7 comments not as - - - as - - - I - - - I wouldn't say
8 strident, but as just explicit and - - - and repetitive,
9 would obviously exclude a juror from the outset. This
10 court's Johnson cases say that Rodriguez and others - - -
11 other cases make that clear. You cannot follow your oath
12 to deliberate without passion, prejudice, or sympathy.

13 JUDGE FAHEY: So your argument is she wouldn't
14 have been on the jury to begin with.

15 MS. SALOMON: Oh, absolutely not. In fact, there
16 were jurors who were - - - who were - - -

17 JUDGE FAHEY: Let's accept that as true.

18 MS. SALOMON: Yes.

19 JUDGE FAHEY: Let's accept that as true.

20 MS. SALOMON: Yes.

21 JUDGE FAHEY: But a different standard applies
22 now.

23 MS. SALOMON: Well, again, it's - - - it's
24 grossly unqualified in the - - - because this juror has
25 said - - - she has said herself, and there's no question

1 about her honesty - - - this was not a juror who didn't
2 want to serve. This was a juror - - -

3 JUDGE FAHEY: I - - - I agree. That's - - -

4 MS. SALOMON: - - - if you look, who wanted to
5 serve - - -

6 JUDGE FAHEY: That's true.

7 MS. SALOMON: - - - who said she could not do
8 this. She could not follow her oath to deliberate fairly.
9 We don't know which way it went. If she was, in fact, I
10 guess a wild card. No - - -

11 JUDGE RIVERA: Well, put it - - -

12 MS. SALOMON: - - - no one asked.

13 JUDGE RIVERA: Counsel, I'm just a little - - -

14 MS. SALOMON: Yes.

15 JUDGE RIVERA: - - - confused about sort of this
16 whole colloquy you have going on with the bench.

17 MS. SALOMON: I'm sorry?

18 JUDGE RIVERA: Doesn't - - - doesn't the judge
19 ask or say to the juror that you would need to decide the
20 facts as you see them and apply the law as I've stated it
21 to you. And doesn't the juror then respond, "But that's
22 what I've been trying to do" - - -

23 MS. SALOMON: Right.

24 JUDGE RIVERA: - - - "and that's why I've come to
25 this conclusion that I can't; I don't have it in me." What

1 else would this juror have to say? And I'll ask the same
2 question to the People.

3 MS. SALOMON: I - - -

4 JUDGE RIVERA: That is the question. Can - - -
5 can you decide the facts and can you apply the law as I
6 give it to you? And she says - - -

7 MS. SALOMON: No.

8 JUDGE RIVERA: - - - I thought I could, but I
9 can't, and I'm telling you I can't.

10 MS. SALOMON: I - - - I - - - no. Other - - -
11 no. No, I - - - my answer to Your Honor is no. She was as
12 clear as she could be.

13 JUDGE WILSON: I'm also struggling a little with
14 why we're sort of limiting "grossly unqualified" to bias,
15 and maybe we're not, but if you had a juror who was fast
16 asleep, I think you would conclude that person's not
17 biased, perhaps, but they're not fit to be a juror, and you
18 would excuse them even if deliberations had started.

19 MS. SALOMON: Yes.

20 JUDGE WILSON: And - - - and there's a case like
21 that - - -

22 MS. SALOMON: Yes, yes.

23 JUDGE WILSON: Probably one of ours.

24 MS. SALOMON: Yes. This is a juror, again, Your
25 Honor, I agree, who could not follow her oath as a juror.

1 A juror who cannot follow her oath, as she said over and
2 over, she could not do, is not qualif - - - is no longer
3 qualified to serve. She said she couldn't do it.

4 And if I might, unless the court has more
5 questions, I would just discuss the other two points - - -

6 CHIEF JUDGE DIFIORE: Please.

7 MS. SALOMON: - - - for a moment. On the
8 intoxication question, obviously my adversary and I
9 disagree with the reading of this court's cases, and
10 obviously this court is the final arbiter of what this
11 court's cases say, but our position is that this court has
12 never held that if a defendant is clear about the amount of
13 drugs or alcohol or other mind-altering substances, let's
14 say, he has imbibed, the timing, the - - - the - - - the
15 nature, and all of that, that, if that is adequate, the
16 fact that there is not also some other objective or some
17 other indication that the person is, let's say, not acting
18 purposefully, or is acting purposefully, or isn't otherwise
19 somehow rendered diminished, that - - - that that - - -
20 that the first part isn't adequate enough to get an
21 intoxication charge.

22 JUDGE STEIN: Well - - - well, the bottom line, I
23 think, is that there has to be another - - - enough
24 evidence - - -

25 MS. SALOMON: Right.

1 JUDGE STEIN: - - - that it interfered with the
2 ability to form the requisite intent and all of those
3 things that you're talking about, and - - - and what we - -
4 - what we may have indicated is that self-serving,
5 uncorroborated, general statements by the defendant, him or
6 herself, are not enough. And the question here is what
7 more is there in this case?

8 MS. SALOMON: Well, again, I guess I would say,
9 Your Honor, that I would respectfully take some issue with
10 a - - - a defendant's statements necessarily themselves
11 eliminating the possibility because it is the defendant
12 testifying. I mean, I think, again, the Court has also
13 said that it's a low threshold. The defendant's
14 credibility is for the jury to assess.

15 So if you have a client as here, and I - - - I
16 know this court asked to hear the client's videotaped
17 statement, which the jurors also asked to hear. That
18 statement, like - - - like his written statement, talked
19 about the specifics of his intoxication. Specifically he
20 thought that the deceased may have spiked the - - - the
21 second round of marijuana that they had - - - that he had,
22 in any event, at 4 a.m. And I believe he's on - - - heard
23 on that video to say several times, he was mad high, he was
24 high, he didn't know what was going on, his head was
25 pounding. And he just - - - he sort of lost - - - lost his

1 mind.

2 JUDGE RIVERA: Doesn't he then contradict that by
3 describing what he does after the murder?

4 MS. SALOMON: Well, again, Your Honor, now - - -
5 now we get into the could it - - - could it have
6 subsequently - - - could he have subsequently engaged in -
7 - - in, you know, directed conduct. Now we all know, for
8 example, people who are drunk drivers, who may purposefully
9 or seemingly be engaged in directed conduct, but again,
10 we're simply talking in this instance about intoxication
11 that can negative specific intent, and not all ability to
12 get up and actually engage in - - - in other conduct.

13 CHIEF JUDGE DIFIORE: Thank you, counsel. You
14 can save your Payton argument for your rebuttal time.

15 MS. SALOMON: Thank you, Your Honor.

16 CHIEF JUDGE DIFIORE: Counsel?

17 MS. SALOMON: Sorry, sorry.

18 MR. WASHER: May it please the court, Eric Washer
19 for the Bronx County District Attorney's Office. I would
20 like to start with the colloquy, because it's - - - it's
21 not something that's preserved for this court's review. We
22 do have to focus, as some of the judges have noted, on
23 specifically what the juror's said. But I think it's
24 important to note that she had the opportunity to express
25 what was bothering her, what was the source of her

1 emotions. And she never did. She never clearly stated
2 that there was something, some sort of bias that was going
3 to prevent her from rendering an impartial verdict.

4 JUDGE RIVERA: But is it what matters for
5 purposes of the rule of law, what the consequences are as
6 opposed to the motivation? I mean, again, I'll say it to
7 you exactly what I said to - - - to defense counsel.
8 Doesn't that language, that question from the judge, or
9 that statement from the judge, that her - - - the juror's
10 duty is to decide the facts as you see them, apply the laws
11 that I've said it to you, and her response, "That's what
12 I've been trying to do, and that's why I've come to this
13 conclusion that I can't; I don't have it in me." Does it
14 really matter why she doesn't have it in her when she's
15 saying I cannot do that?

16 MR. WASHER: Well, I think that - - -

17 JUDGE RIVERA: That it's her duty and obligation
18 as a juror.

19 MR. WASHER: It's - - - that is her duty. And
20 her duty is also to decide the case. I mean, at - - - at
21 the end of that question that you quoted from, Judge
22 Mogulescu says "That's your only concern" - - - to apply
23 the facts that she's found to the law - - - "and if you
24 have done that, that's - - - then you've done your job."
25 And later on he - - - he comes back to that. He says I

1 want to encourage you to go back with your fellow jurors
2 and deliberate and exchange your ideas, and then she says -
3 - - and I think this is important too. She says, "I don't
4 think that we can."

5 I think that what Judge Mogulescu thought, and he
6 was in the best position to know, and I think that's why
7 this court has said repeatedly in the Buford line of cases,
8 that judges have a lot of discretion in making these kinds
9 of determinations, because they're very fast paced.

10 CHIEF JUDGE DIFIORE: So did she ever give an
11 unequivocal assurance that she could be fair and impartial?

12 MR. WASHER: Well, I don't think she had to, Your
13 Honor, because that unequivocal assurance comes into play
14 when there's some sort of invidious bias that comes out - -
15 -

16 JUDGE FAHEY: But what if she had as opposed to a
17 bias against the defendant, she had a bias in favor of the
18 defendant. She didn't want to put somebody - - - anybody
19 in jail. It seems like a reasonable reading of what was
20 being said there. Wouldn't she have to give an unequivocal
21 assurance that she could rule for the People as much as she
22 could for the defendant?

23 MR. WASHER: I - - - I think that would be true
24 if she had made that clear, but she certainly didn't.

25 JUDGE FAHEY: So - - - so take a step back then.

1 Once again, to Judge DiFiore's question. Wouldn't she have
2 to - - - you wouldn't you have to point to somewhere in the
3 record where there was an unequivocal assurance that the
4 juror was able to do that?

5 MR. WASHER: I - - - I don't think you would have
6 to on the facts of this case, because it's - - - it's
7 different when you compare it to Rodriguez. Certainly in
8 that case, you needed - - - I - - - I don't even think an
9 unequivocal assurance would have saved the juror in that
10 case, based on what she said.

11 But that's where this court initially said if you
12 have some sort of invidious bias against the defendant or
13 some kind of racially motivated bias, then the only way
14 that that juror can continue to deliberate is if she can
15 say unequivocally to the court, I can set all that to the
16 side.

17 But that's not what we have - - - what happened
18 here. And I - - - I think it is important to look at this
19 in context. This was a long case. The defendant
20 testified. He very emphatically asserted his innocence.
21 He actually proposed that it was his ex-girlfriend who - -
22 - who committed this crime. So it was a lengthy case.

23 This was fourth day of deliberations and the
24 juror calls the clerk first thing in the morning, and says
25 what do I have to do to be excused? And I think that

1 there's no question that at that point, she could have felt
2 overwhelmed. She could have felt, you know, drained by the
3 whole process, by the weight of the decision that she had
4 to make, and she just didn't want to go forward with it.
5 And that's - - - that's really what Judge Mogulescu thought
6 the import of what she was saying was. And when he
7 communicated that, that interpretation of her remarks - - -

8 JUDGE WILSON: I don't know. He - - - he says -
9 - - he says that this is the first time in his forty-five
10 years as a judge and lawyer before that, that anything like
11 this as ever happened. So I mean, there are long
12 deliberations. Jurors get tired of deliberating but he
13 even seemed to think based on that comment that he was
14 witnessing something very different from, I'm just tired
15 with this case.

16 MR. WASHER: Well, I think he thought that it was
17 unusual because he thought that she was saying that I - - -
18 I - - - I know what the facts are, but I just can't bring
19 it - - - bring myself to say guilty. Now, I don't know if
20 that is really something that's so uncommon. I mean, there
21 are lot of cases, particularly in the Appellate Division,
22 that talk about the fact that very heated deliberations,
23 even where people are raising their voices, they're angry,
24 that - - - that's not something that - - - that's actually
25 to be expected. I mean, the - - - the jury instructions

1 talk about this. The Allen instruction talks about this.

2 So to the extent that the juror was feeling
3 emotional at this time in this case, which was a very
4 serious case, very disturbing factual allegations, I - - -
5 the fact that she became emotional at that point, I don't
6 think makes her irretrievably unqualified. Now if she had
7 said something like this during voir dire, I think Ms.
8 Salomon is correct. At that point, someone who is just a
9 dubious partiality, the judge should probably err on the
10 side of dismissing this person.

11 But it's very different once the jurors are
12 sworn. And that's why the gross lack of qualification stan-
13 - - - standard is important. It serves two interests.

14 JUDGE RIVERA: Why is that? You're in voir dire,
15 it's speculation. So what you think you can and cannot do.
16 Now she's actually saying I've tried to do it, and I - - -
17 I've reached this conclusion, I can't. This is now certain
18 - - -

19 MR. WASHER: But I think - - -

20 JUDGE RIVERA: - - - as opposed to, well, I'm not
21 sure; I think I could, maybe I can't. I don't know.

22 MR. WASHER: But to the extent that she's saying,
23 Your Honor, what Judge Mogulescu thought she was saying,
24 that I just don't have it in me to make this decision. She
25 does - - -

1 JUDGE WILSON: She - - - she actually says I took
2 an oath that I can't abide by now.

3 MR. WASHER: Like she took an oath to decide the
4 case, Your Honor. And I think at this point, she's saying,
5 I don't think I have it in me to do that. But that would
6 not be disqualifying, some sort of momentary, you know,
7 lack of certainty as to her ability to decide - - - to
8 decide the case would not be disqualifying. There's
9 nothing about that that means she cannot render a par - - -
10 an impartial verdict. So again, I think context is
11 important and I think that Judge Mogulescu was in the best
12 - - - best situation to make this determination.

13 Again, the standard, gross lack of qualification.
14 It's very high by design. Ms. Salomon talks about the fact
15 that it protects the defendant's right to have a jury in
16 whose selection he's had a voice. That's true. But it - -
17 - it also by the same token present - - - prevents serious
18 disruptions of trials, which is what would have happened
19 here based on just speculation about what might have been
20 bothering her.

21 I think Judge Fahey pointed out that - - - that
22 we don't know what was bothering her. She had the
23 opportunity to say so.

24 JUDGE RIVERA: Isn't the real problem the
25 alternates had been dismissed and you're left with only a

1 mistrial?

2 MR. WASHER: I - - - I don't think there's any
3 question that that's something that the court had in mind,
4 but I don't think that's necessarily problematic because I
5 think that he did conduct a thorough colloquy with her.

6 The juror, actually I think - - - I think Judge
7 Garcia had mentioned the fact that perhaps the court
8 interrupted the juror, but I think there are also points,
9 at least one, where she interrupts him. So I - - - I think
10 she had the opportunity to explain to the court there was
11 something that really bothered her, that really made her
12 biased, made her unable to render an impartial verdict, she
13 had the opportunity to say so. She didn't.

14 And this court's cases have been clear, that
15 state - - - equivocal statements that make - - - that - - -
16 that engender the possibility or the speculation of
17 impartiality, that's not enough to dismiss a sworn juror.

18 JUDGE RIVERA: So - - - so you're saying the rule
19 we should clarify in this case, because you think it's
20 already the rule. The rule that we should clarify in this
21 case is that there should be an inquiry as to what is the
22 motivation. Why has she reached this conclusion, for
23 example, in this case?

24 MR. WASHER: Well, I think to the - - -

25 JUDGE RIVERA: What drives her?

1 MR. WASHER: Well, I - - - I don't think this
2 case would necessarily be an appropriate vehicle for that,
3 simply because no one asked the judge to do anything more.
4 And, you know, Buford makes clear that defense counsel has
5 an opportunity to participate - - -

6 JUDGE RIVERA: Yes, but let's say for future
7 cases, is that how we could avoid - - -

8 MR. WASHER: Well, not necessarily, because I do
9 agree with Ms. Salomon that judges are often - - - loathe
10 to get into that sort of thing. They may not want to start
11 delving into details from jurors that might get into the
12 nitty gritty of - - - of deliberations. I think that they
13 want to - - - they want to be probing, but they also want
14 to be tactful, and that's - - - that's the rule that - - -
15 that Buford talks about.

16 JUDGE RIVERA: Right, but in this case, this is
17 not about the deliberations, right? In that - - - in that
18 sense, it's - - - it - - - or do you disagree? Isn't the
19 point that she's saying what - - - what's inside her, that
20 her ability to do this as opposed to what someone else has
21 said, or the dynamics of the deliberative process?

22 MR. WASHER: Well, I think what she's saying, it
23 could have been both. I mean, her - - - her saying, you
24 know, I don't think that I can come to a decision. You
25 know, I don't think - - - as I said, I don't think we can,

1 when the judge encouraged her to continue and ex - - -
2 exchanging ideas with her fellow jurors. That it could
3 have been both. It could have been something - - - it
4 could have been her own reluctance to decide this case. It
5 could have been something unpleasant happening during the
6 deliberative process, it was something that was stressful.
7 That certainly would be logical based on the fact that
8 they're coming now into the fourth day of deliberations
9 after a lengthy trial.

10 CHIEF JUDGE DIFIORE: Counsel, if we were to find
11 on this record that the juror was un - - - unable to be
12 fair and impartial, is there anything beyond a motion for a
13 mistrial that defense counsel would have to posit to the
14 court to preserve the issue?

15 MR. WASHER: I - - - I think that he preserved
16 the issue by saying that, in his opinion, she was grossly
17 unqualified. I think that he could have perhaps inquired
18 further. If he thought that there was something that she
19 was about to say or that something that could have been
20 drawn out of her that might have clarified the nature of
21 her concern, and counsel had the opportunity to do that in
22 this case, but he didn't avail himself of it.

23 Just quickly as to the intoxication point. I
24 don't think there's any reasonable view of the evidence in
25 this case that the defendant was so intoxicated that he

1 couldn't form the intent to kill or to seriously injure the
2 victim in this case. You know, when - - - there's just no
3 way to parse the statements that he gave where you can get
4 to that point for - - - that the jury could have got to
5 that point.

6 First, they would have had to conclude that he
7 wasn't telling the truth on the stand when he emphatically
8 accused his ex-girlfriend of killing the - - - the victim
9 in this case. And then they would have had to go on and
10 say, well, we believe some of the self-sorbing - - -
11 serving portions of his statement that talk about him being
12 high, but we'll give him a pass on the other statements
13 which were clearly false. For example, he talks about the
14 fact that the victim, Jamia Hazel, was the one who really
15 responded negatively to this marijuana that they supposedly
16 smoked. But we know from toxicology analyses that she
17 didn't smoke that marijuana.

18 He also talks about the - - - the fact that he
19 stabbed the victim a coup - - - a couple of times. Well,
20 we know that he stabbed her three dozen times. There's
21 simply no way that the jury was going to parse the
22 statements that way and find, well, he was - - - we - - -
23 we believe him when he said he was high, but we're
24 discounting all of the other statements that are
25 demonstratively false.

1 And it's also just important to remember that
2 this would - - - would have been the third alternative
3 defense submitted in this case. The first was, of course,
4 the defendant didn't do it. The second was, if he had, he
5 had been justified - - - he was justified. And the third
6 would have been, well, if he did it, I did it intention - -
7 - I couldn't have formed the requisite intent because I was
8 so intoxicated. Those three defenses were all at odds with
9 each other. There's just no reasonable probability the
10 jury would have accepted intoxication.

11 So in short, the judgment should be affirmed.
12 Thank you, Your Honors.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 Counsel?

15 MS. SALOMON: Just a few words, if I might, on
16 the juror question. I think it bears mention that during
17 the colloquy itself, the prosecutor, the on-the-ground
18 person didn't make the arguments that are being made now by
19 my adversary. And in fact, the only arguments that he
20 advances or the only suggestions are implying his
21 recognition that the juror needs somehow to be instructed
22 further about how emotions belong elsewhere in the case.

23 So I think he was highly aware that this juror
24 was - - - was severely compromised. And again, she didn't
25 talk about what was going on in the jury room, vis-à-vis

1 other jurors. It was about her. She herself was not
2 qualified. Counsel did preserve it by saying this juror is
3 no longer qualified to be a juror in this case.

4 JUDGE GARCIA: Counsel, just to - - - to - - -

5 MS. SALOMON: Yes.

6 JUDGE GARCIA: - - - go back and we don't have a
7 lot of time, but to go back to something, I think, Judge
8 Fahey touched upon earlier. We have had a number of cases
9 where the People have successfully challenged a sitting
10 juror and we've reversed. So whatever rule we make today
11 for you will apply to People's challenges to jurors going
12 forward, right?

13 MS. SALOMON: Well, again, we have - - - we've
14 said that - - - and I think what this - - - this court
15 recognized in Rodriguez itself that when there is a
16 challenge and depending on who's making it, different
17 rights might be implicated.

18 JUDGE GARCIA: But they have a right to a fair
19 trial, right?

20 MS. SALOMON: Yes, yes, yes, but I would also say
21 here, that in a way, no matter what the standard is,
22 whether it's abusive discretion, question of law - - -

23 JUDGE GARCIA: So just to go back to my question
24 of - - -

25 MS. SALOMON: Yes, I'm sorry. I'm sorry.

1 JUDGE GARCIA: - - - wouldn't the rule apply to
2 the People as well that we make today?

3 MS. SALOMON: Yes, because I think it's - - -
4 it's a rule of fairness. This is a juror - - -

5 JUDGE GARCIA: Right.

6 MS. SALOMON: - - - who cannot follow the law.
7 And the law is, I think as various members of the court
8 have stated, the ability to follow the court's instructions
9 and decide the case without sympathy, passion, or bias.

10 JUDGE GARCIA: So in a case where a juror came
11 out and was indicating I can't separate my emotions, but it
12 was fairly clear that meant, you know, this is such a
13 sympathetic case to me, a sympathetic defendant. The
14 People, if we make the rule that you want us to make, could
15 challenge that juror as grossly unqualified.

16 MS. SALOMON: Yes, yes, they could, because
17 again, one is supposed to argue a case dispassionately.
18 Now again, this court has also said that when it is the
19 prosecution who is making the challenge over the
20 defendant's objection that there are - - - that there is a
21 heightened standard possibly for them. We raise that here,
22 that where - - - where it's again a - - - a prosecution
23 challenge over a defense objection or vice versa. When the
24 People are - - - are - - - are the - - - are the moving
25 party, and the defendant is objecting, the defendant might

1 have heightened - - - does have heightened rights there.
2 This court has said that.

3 Here, though, we're - - - this - - - this is
4 something that is affecting the defendant's rights and I
5 think nobody wants a juror who cannot follow the law.

6 On the - - - on the question of intoxication,
7 again, I just might point out, this was an odd verdict.
8 This jury was out for four days, and despite the thirty-
9 eight stab wounds, acquitted the defendant of murder. So
10 the jury obviously did have issues about his mental
11 culpability, I think. I think that's fair to say. Had
12 they been given an intoxication charge, they would have
13 had, I think, more appropriate tools to be able to deal
14 with that.

15 On the Payton question, if I might. Here, we
16 believe that the case needs to be remanded for - - - for a
17 Harris, or an attenuation hearing. And the reason is that
18 the prosecution did not meet its burden of going forward,
19 which the hearing court judge found it was obliged to do.
20 So there's no question about - - - about what the issue is
21 here. And our point is simple. Start out with the - - -
22 the testifying officer said, perfectly fine, Payton - - -
23 you know, no Payton violation. We knocked on the door.
24 The defendant answered it. We asked him to step out,
25 Payton solved.

1 JUDGE STEIN: Why doesn't this boil down to a
2 credibility - - -

3 MS. SALOMON: Well - - -

4 JUDGE STEIN: - - - determination?

5 MS. SALOMON: Well, again, because here, I - - -
6 I think be - - - because you have here a - - - when the - - -
7 - when the detective is then asked on direct - - - on - - -
8 I'm sorry, on cross, about whether or not he and his
9 partner had his guns drawn, he said he couldn't remember.

10 JUDGE STEIN: Okay, but does - - - doesn't that
11 go to his credibility?

12 MS. SALOMON: Well, I think at this point, it
13 goes to whether going forward he's established that it was
14 this anodyne little - - - you know, encounter, a perfectly
15 voluntary encounter as opposed to one affected by force,
16 and also - - -

17 JUDGE STEIN: Would it have been okay if the guns
18 were drawn after he was outside in the hallway and they had
19 - - -

20 MS. SALOMON: So afterwards - - - and - - - and
21 after - - - after the arrest - - -

22 JUDGE STEIN: That would be okay?

23 MS. SALOMON: Yes, yes.

24 JUDGE STEIN: Okay.

25 MS. SALOMON: But in order to - - -

1 JUDGE STEIN: So if he was out there, he was - -
2 - they - - - they were getting the cuffs on him, and - - -
3 and he looked up and then he saw guns.

4 MS. SALOMON: After he's - - - after he's cuffed,
5 yes, that - - - that would be. That would - - - we
6 wouldn't have a complaint about that. But that was not
7 what was asked and that was not what the officer said he
8 couldn't remember. And in fact, he also was a little
9 wrong, you know, short on the facts, about the number of
10 other officers who were present.

11 So now we have more officers in uniform, and when
12 the defendant opens the door, the prospect of guns already
13 being drawn. That, as this court held, in Marely (sic) - -
14 - Minley does raise very clearly the prospect of a
15 nonvoluntary departure from the apartment and a Payton
16 violation and a need for a remand. Thank you.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 (Court is adjourned)

19

20

21

22

23

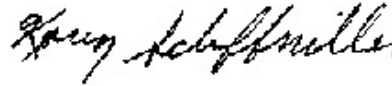
24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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. Darrell Spencer, No. 76 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: June 04, 2017