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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 206
(Papers sealed)

TERRELL ALLEN,

Appellant.

20 Eagle Street
Albany, New York 12207
October 23, 2014

Before:

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

Appearances:

ANGIE LOUIE, ESQ.
THE LEGAL AID SOCIETY
Attorneys for Appellant
199 Water Street
5th Floor
New York, NY 10038

NANCY FITZPATRICK TALCOTT, ADA
QUEENS COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
125-01 Queens Boulevard
Kew Gardens, NY 11415

Janice Brea
Official Court Transcriber

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CHIEF JUDGE LIPPMAN: 206, People v.
Terrell Allen.

Counsel, go ahead.

MS. LOUIE: One minute for rebuttal,
please.

CHIEF JUDGE LIPPMAN: One minute; sure. Go
ahead.

MS. LOUIE: May it please the court; my
name is Angie Louie for the appellant, Terrell Allen.

A jurisdictional error arose here when two
incidents were presented at the trial that could have
formed the basis of the attempted murder conviction.

The first incident occurred about ten
minutes prior to the fatal shooting, were there was
evidence presented - - -

JUDGE SMITH: Well, why do you say it's
jurisdictional?

MS. LOUIE: Because, Your Honor, the
indictment was clear that the grand jury charged Mr.
Allen with the second incident, where the gun
discharged, but missed - - -

JUDGE SMITH: Oh, so you - - - you say that
it's clear from the face of the indictment that it
was only the second shooting - - - only the second

1 attempt?

2 MS. LOUIE: Yes, Your Honor. It - - - both
3 the indictment and the bill of particulars talk about
4 the incident that occurred - - -

5 JUDGE SMITH: The attempted - - - I don't
6 have it in front of me. Essentially, that he
7 attempted to kill him by discharging the gun.

8 MS. LOUIE: Yes, Your Honor.

9 JUDGE SMITH: Well, that's - - - that could
10 mean he attempted to discharge the gun.

11 MS. LOUIE: Well, no - - -

12 JUDGE SMITH: You can attempt to kill
13 someone by discharging a gun without succeeding in
14 discharging the gun.

15 MS. LOUIE: Well, the - - - the language of
16 the indictment says, "attempted to cause the death of
17 Kevin Macklin by discharging a loaded firearm at and
18 in his direction."

19 CHIEF JUDGE LIPPMAN: Didn't this become
20 more obvious - - - if it's the case, didn't it become
21 more obvious after the evidence was presented that
22 there could be duplicity here?

23 MS. LOUIE: Yes, Your Honor - - -

24 CHIEF JUDGE LIPPMAN: But not necessarily -
25 - - from the face itself, it's pretty hard to say

1 that?

2 MS. LOUIE: From the face of the
3 indictment, it's clear that it was the second
4 incident that they were talking about. And actually,
5 all the - - -

6 JUDGE SMITH: Wouldn't that - - - wouldn't
7 that have raised a possible defense, that they
8 merged? I mean, usually - - - there's a strong
9 argument that if you point a gun at someone and shoot
10 him twice and miss the first time, you've committed
11 only one crime, not two.

12 MS. LOUIE: Absolutely, Your Honor. And -
13 - -

14 JUDGE SMITH: So why, if you were so - - -
15 if the defendant was so sure that's what he was being
16 charged with, why doesn't he say, wait a minute;
17 you're charging me with an attempt that should merge
18 into the consummated crime.

19 MS. LOUIE: He did, actually. In the
20 omnibus motion, the - - - Mr. Allen actually moved to
21 dismiss the attempted murder count, arguing that it
22 was multiplicitous, saying that this attempted murder
23 that happened in front of this porch - - -

24 CHIEF JUDGE LIPPMAN: Multiplicitous or
25 duplicitous?

1 MS. LOUIE: Multiplicitous.

2 CHIEF JUDGE LIPPMAN: Yeah.

3 MS. LOUIE: He argued that it was
4 multiplicitous because the two shots - - -

5 JUDGE SMITH: Means they were the same
6 crime.

7 MS. LOUIE: Exactly. The two shots were -
8 - -

9 CHIEF JUDGE LIPPMAN: Yeah, but that's a
10 different - - -

11 JUDGE SMITH: And you're saying that was a
12 meritorious motion.

13 MS. LOUIE: No, Your Honor. Actually, at
14 that point, because the People had responded and
15 said, absolutely not, these were two separate events,
16 and the - - - and the court denied the motion - - -

17 JUDGE PIGOTT: How did they explain two
18 separate events? The misfire and then the shooting,
19 or - - -

20 MS. LOUIE: Actually, they weren't very
21 clear. They actually just put in the bill of
22 particulars that - - - that - - - "acting in concert
23 with the co-defendant and with each aiding the other,
24 pointed a pistol at Kevin Macklin and attempted to
25 shoot Kevin Macklin, and thereafter did fire at Kevin

1 Macklin, striking him in the head."

2 JUDGE SMITH: Well - - - well, that sounds
3 - - - I mean, if - - - if attempted to kill him by
4 discharging is clear - - - is clear your way, surely
5 attempted - - - attempted to shoot is clear the other
6 way.

7 MS. LOUIE: No, Your Honor, actually - - -
8 because it was already litigated, and the trial
9 court, before the trial, had said this is not
10 multiplicitous; therefore, there was no notice that
11 this first incident could have been the attempted
12 murder conviction.

13 JUDGE SMITH: And when he found out, did he
14 stand up and scream?

15 MS. LOUIE: No, Your Honor, but - - -

16 JUDGE SMITH: Why not?

17 MS. LOUIE: He didn't need to. It was a
18 jurisdictional error.

19 JUDGE SMITH: Well, maybe out of excessive
20 caution, if he's really so surprised that they're
21 charging him with a crime - - - crime he never
22 thought was in the indictment, he might have
23 mentioned it to the judge?

24 MS. LOUIE: Well, a lot of times, these
25 uncharged - - - evidence of uncharged crimes come

1 out, and perhaps at that point, he didn't realize
2 that that was what the jury was being invited to
3 actually consider both - - -

4 JUDGE SMITH: And when, in your retelling
5 of this, does the light dawn that he's actually being
6 charged for the first shooting - - - the first
7 attempted shooting?

8 MS. LOUIE: During the opening, the
9 prosecution said - - - they describe both events and
10 said both of them - - - the first one was the
11 attempted murder, but there was also the second shot
12 - - -

13 JUDGE SMITH: And does the defendant, at
14 that point, say, Judge, this was not the crime I was
15 indicted for?

16 MS. LOUIE: No, but - - -

17 JUDGE SMITH: Well, why not?

18 MS. LOUIE: Because he didn't - - - he
19 didn't need to. He was proceeding along, and if you
20 look at the defense of the entire trial - - -

21 JUDGE SMITH: Wouldn't it be - - - whether
22 he needed to or not, wouldn't it be kind of normal
23 for a defense lawyer, who suddenly finds that the
24 prosecutor has opened on a crime that you don't think
25 is in the indictment, to sort of mention that fact?

1 MS. LOUIE: Perhaps, but he didn't in this
2 case.

3 JUDGE PIGOTT: Do you - - - are you - - -
4 when you say he didn't need to, are you saying
5 whether he did it by accident or whether he failed to
6 do it by accident or oversight or anything is
7 irrelevant, because, in your view, it's
8 jurisdictional?

9 MS. LOUIE: Yes, Your Honor.

10 JUDGE PIGOTT: All right. So it's not - -
11 - it's not that the defense lawyer was sitting there
12 saying, I should say something but I don't have to
13 because it's jurisdictional; it's just that he may
14 have missed it.

15 MS. LOUIE: You're right. You're
16 absolutely right. And - - -

17 JUDGE ABDUS-SALAAM: Well, what about when
18 the - - - the eyewitness, Ms. Hickson (ph.), I think,
19 the neighbor, testified about the first shooting - -
20 - or the first attempt?

21 MS. LOUIE: That was - - -

22 JUDGE ABDUS-SALAAM: Did the defendant
23 object at that point?

24 MS. LOUIE: No.

25 JUDGE ABDUS-SALAAM: Or ask for a mistrial,

1 because people were trying to try him on a
2 duplicitous charge?

3 MS. LOUIE: He didn't, and it could have
4 been - - - it could have been a mistake on the
5 defense counsel's - - - it could have been a mistake
6 of the defense counsel.

7 CHIEF JUDGE LIPPMAN: Doesn't he have to
8 raise it, though?

9 MS. LOUIE: No. He doesn't, actually.

10 CHIEF JUDGE LIPPMAN: Why not?

11 MS. LOUIE: Because this is a
12 jurisdictional error. It's a jurisdictional error
13 because it's unclear if the grand jury - - -
14 actually, it's pretty clear from the indictment that
15 the grand jury never charged Mr. Allen with the
16 attempted murder based upon the first event.

17 JUDGE GRAFFEO: So why could the judge - -
18 -

19 JUDGE ABDUS-SALAAM: Wouldn't the limiting
20 instruction from the judge, when this testimony came
21 out, have cured that problem?

22 MS. LOUIE: It - - - it could have cured
23 the problem, but they didn't ask for a limiting
24 instruction, and it could still be - - - it would
25 still be a problem here because the jury was invited

1 to find Mr. Allen guilty of either the first incident
2 or the second incident. So there's a possibility
3 that Mr. Allen was convicted based upon this first
4 incident, which the grand jury never charged him
5 with. And in fact - - -

6 JUDGE SMITH: Okay, that - - - but that,
7 theoretically, could have been true in Becoats, also,
8 that the - - -

9 MS. LOUIE: Well, no, actually. In
10 Becoats, it's different. Becoats is different
11 because it was clear from the face of the indictment
12 that the grand jury considered both, the forcible
13 stealing of the gun and/or the sneakers. So we know
14 that evidence was presented in Becoats of both the
15 gun and the sneakers, but here, we don't know if
16 evidence was presented of the first - - -

17 JUDGE SMITH: Yeah, but the risk you're
18 worrying about in Becoats, the jury - - - because
19 those two crimes were combined in one count, the jury
20 could have convicted on either one or half on one and
21 half on the other. That's the problem - - - that's
22 what he was complaining about.

23 MS. LOUIE: In Becoats, yes. But here - - -

24 -

25 JUDGE SMITH: About the same complaint

1 you're making here.

2 MS. LOUIE: No, Your Honor. Actually,
3 here, we're talking about the grand jury actually not
4 indicting Mr. Allen on attempted murder based upon
5 this first event. Because - - -

6 JUDGE SMITH: Now, we know that from the
7 text of the indictment or from the grand jury
8 minutes?

9 MS. LOUIE: From the text of the
10 indictment, because the indictment specifically says,
11 discharging of a firearm.

12 JUDGE SMITH: Suppose - - -

13 JUDGE GRAFFEO: Could - - -

14 JUDGE SMITH: Sorry; go ahead.

15 JUDGE GRAFFEO: Could the judge have
16 eliminated this problem in the charge?

17 MS. LOUIE: Yes, Your Honor, but - - - it
18 could have been eliminated in a charge.

19 JUDGE GRAFFEO: And how? What would have
20 been your recommendation?

21 MS. LOUIE: By telling the grand jury that
22 they're only supposed to consider the second missed
23 shot as the attempted murder. But - - - but - - -

24 JUDGE GRAFFEO: But defense counsel didn't
25 raise that at the charge conference?

1 MS. LOUIE: No, defense counsel didn't.
2 But that's why there's the problem; because the grand
3 - - - the jury could have convicted - - - because
4 there was no clarifying information, could have
5 convicted Mr. Allen based upon this first incident.
6 And even more - - -

7 JUDGE SMITH: Suppose we find that the - -
8 - suppose we think the indictment is ambiguous and
9 could refer to either event. At that point, is the
10 defect no longer jurisdictional?

11 MS. LOUIE: No, actually. Because - - -

12 JUDGE SMITH: See, I shouldn't have asked
13 that in a negative way. Is it jurisdictional or not,
14 if it's ambiguous?

15 MS. LOUIE: If it's - - - if it's
16 ambiguous, it's still - - - it's still a
17 jurisdictional problem, because you don't know what
18 the grand jury indicted Mr. Allen for.

19 JUDGE SMITH: Wasn't the indictment in
20 Becoats ambiguous?

21 MS. LOUIE: Yes and no, because it was
22 clear on the face of the indictment that they
23 considered both events. Here - - - here - - - here's
24 the problem here. The problem here is that the - - -
25 the prosecution could have presented evidence of this

1 first event that happened, and the grand jury decided
2 not to indict attempted murder based upon this first
3 event.

4 We don't know if that happened. They could
5 have rejected this and then decided that the
6 attempted murder had to be based upon the second
7 event.

8 So we're not even sure if evidence was - -
9 -

10 JUDGE SMITH: Well, isn't that - - - isn't
11 that almost the definition of ambiguity? Yeah, we're
12 not sure what they're talking about?

13 MS. LOUIE: No, we are sure that the grand
14 jury based the attempted murder charge on the second
15 event, because of the language of the indictment and
16 the bill of particulars. But we don't know if the
17 prosecution even presented the first event, or
18 perhaps they did present the first event and the
19 grand jury rejected it. Therefore, it could be a
20 situation where the prosecution had decided at trial
21 of bringing up both of these attempted murder - - -

22 CHIEF JUDGE LIPPMAN: Okay, counsel.

23 MS. LOUIE: - - - incidents.

24 CHIEF JUDGE LIPPMAN: Okay. Let's - - -
25 you'll have - - -

1 JUDGE ABDUS-SALAAM: Before she - - - could
2 I just ask - - -

3 CHIEF JUDGE LIPPMAN: Judge Abdus-Salaam.

4 JUDGE ABDUS-SALAAM: Because you spent so
5 much time on the duplicity, could you just briefly
6 talk about the multiplicity charge? You - - - you
7 have a multiplicity - - -

8 MS. LOUIE: Your Honor, we didn't raise it.

9 CHIEF JUDGE LIPPMAN: That's not before us,
10 right - - -

11 JUDGE ABDUS-SALAAM: Okay. All right.

12 CHIEF JUDGE LIPPMAN: - - - multiplicity?
13 Yeah. Okay.

14 Counsel.

15 MS. TALCOTT: Good morning, my name is
16 Nancy - - - good afternoon; sorry. My name is Nancy
17 Talcott. I'm here on behalf of the respondent, the
18 People.

19 CHIEF JUDGE LIPPMAN: Is it ambiguous on
20 its face?

21 MS. TALCOTT: No, it's not ambiguous on its
22 face, and before you even address whether it was, in
23 fact, duplicitous, you have to get over preservation.

24 JUDGE SMITH: So you - - - well, but - - -
25 okay. But you agree with her it's perfectly clear

1 what it means; you just think it means the direct
2 opposite of what she thinks it means.

3 MS. TALCOTT: Yes. And this - - -

4 JUDGE SMITH: It's funny how often that
5 happens.

6 MS. TALCOTT: This court made clear in
7 *Becoats*, claims that counts of an indictment are
8 duplicitous must be preserved.

9 The reasoning underlying *Becoats* - - -

10 CHIEF JUDGE LIPPMAN: It became obvious
11 later; still has to be preserved?

12 MS. TALCOTT: Yeah, because if it wasn't so
13 fundamental a flaw in *Becoats*, which addresses the
14 actual instrument itself, it cannot be more
15 fundamental a flaw in a case such as this.

16 JUDGE PIGOTT: Well, if the indictment is -
17 - - is - - - can be construed two different ways, as
18 obviously it has, and the bill of particulars is, as
19 Ms. Louie suggests, equally ambiguous, why wouldn't a
20 defense lawyer sitting there figure that, well,
21 they're going talk about the misfire because it's, as
22 they always say, completes the narrative. They're
23 going to talk about it in the context of what went on
24 that day, and that doesn't necessarily mean that it's
25 a count of the indictment until all of a sudden, it

1 becomes one.

2 MS. TALCOTT: Well, all the more reason to
3 raise it; if there was any question or any confusion,
4 he could seek to have it clarified, although we would
5 argue the indictment was, in fact, clear, based - - -

6 JUDGE PIGOTT: Assuming it was not, is
7 there a point in time when you think it was
8 absolutely obvious to the defense that - - - that - -
9 - that the misfire, as they call it, was - - - was
10 one of the counts, and therefore, preservation was
11 essential?

12 MS. TALCOTT: Beyond dispute - - -

13 JUDGE PIGOTT: Yeah.

14 MS. TALCOTT: - - - made clear at the
15 opening statement.

16 JUDGE PIGOTT: The DA's opening statement?

17 MS. TALCOTT: Which is a presentation of
18 the People's case - - -

19 JUDGE PIGOTT: Um-hum.

20 MS. TALCOTT: - - - and their theory,
21 because counsel noted that it wasn't evidence; no,
22 but it's a road map of the People's case, and clearly
23 set forth that that was the theory. He said, he took
24 the gun, fired; it didn't work - - - unsuccessful - -
25 - attempted murder.

1 JUDGE SMITH: Suppose it's the case that
2 she - - - she frames it as being, which is, let's
3 suppose the indictment says, in unmistakable terms,
4 he's charged with attempted murder for - - - in the
5 case where gun was fired and missed while he was on
6 the stoop, seconds before he was actually killed, and
7 at the - - - they decided that doesn't work, and at
8 trial, they proceed on a different theory and rely on
9 the other incident, and there's no objection. Is
10 that a jurisdictional error? Does that require
11 preservation?

12 MS. TALCOTT: No, because - - -

13 JUDGE SMITH: You mean, you can - - - you
14 can try someone for a crime that, clearly, the grand
15 jury never indicted on, and if it's not raised,
16 you're out of luck.

17 MS. TALCOTT: No, because the reasoning
18 underlying Becoats applies equally to a claim such as
19 - - -

20 JUDGE SMITH: But I'm - - - no, I'm not
21 talking - - - I'm not sure you have my hypothetical.
22 I'm not talking about a duplicitous indictment. I'm
23 talking about one where they clearly indict for one
24 crime and try him for a different one. Can they do
25 that?

1 MS. TALCOTT: Well, it could still be
2 remedied by a charge moving for dismissal or moving
3 to amend.

4 JUDGE SMITH: Yeah, yeah, but - - -

5 MS. TALCOTT: You could amend the
6 indictment.

7 JUDGE SMITH: Yeah, but aren't there some -
8 - - aren't there some things that are so - - - there
9 are such things as mode of proceedings errors. If -
10 - - if they arrest you or me tomorrow and try us on a
11 - - - for a felony which no grand jury has ever said,
12 it doesn't matter we - - - whether we object or not;
13 that's mode of proceedings error, right?

14 MS. TALCOTT: Right, but that would not be
15 the case here, in the claim of testimonial duplicity
16 - - -

17 JUDGE SMITH: Okay, not the case here; what
18 about - - - what about if she's right that the - - -
19 that the indictment - - - the grand jury never
20 indicted for the crime he was tried for. How is that
21 different from just picking up you and me?

22 MS. TALCOTT: Well, the indictment here did
23 - - - the indictment, the language makes a
24 distinction between the - - -

25 JUDGE SMITH: Okay, you're fighting - - - I

1 think you're fighting the hypothetical. I mean, take
2 - - - assume she's right. I understand it's hard for
3 you to - - -

4 MS. TALCOTT: Okay.

5 JUDGE SMITH: - - - accept that. Assume
6 she's right that the indictment says, in unmistakable
7 terms, we're charging him only with the second
8 shooting. Do they - - - do they have to raise that -
9 - - and you go ahead and try him for the first
10 shooting and they do not protest. Is that a mode of
11 proceedings error?

12 MS. TALCOTT: I would say, under the
13 reasoning of Becoats, no, and that the mode of
14 proceedings shouldn't expand to include that, because
15 the dangers are really parallel and it could be
16 remedied.

17 JUDGE SMITH: And what about - - - and what
18 about the case where there's no indictment at all;
19 they just decide they're going to try him one fine
20 morning. Is that mode of proceedings error?

21 MS. TALCOTT: Yeah, I think that would be.

22 JUDGE SMITH: What's the difference?

23 MS. TALCOTT: Because there, he's not put
24 on notice of anything. Here, there's just - - - like
25 you had pointed out, there's just some ambiguity.

1 JUDGE SMITH: He might have had a ton of
2 notice; it's not a notice problem. The problem is
3 the grand jury never indicted him.

4 MS. TALCOTT: Well, then I would go back
5 to, that's not the case here, where the indictment
6 made clear - - - basically on two points. They
7 didn't charge the co-defendant with the attempted
8 murder, which was borne - - - which was in line with
9 his statement, he didn't really participate or know
10 about the attempted murder. So the fact that two
11 different parties were charged and the different
12 language. The language of the attempted murder never
13 stated that it was luring him off the stoop. That
14 indicated it was the earlier incident.

15 JUDGE SMITH: Okay, and you may - - - maybe
16 you're right that it's unambiguous your way, but if
17 it's - - - suppose it's ambiguous. Who wins?

18 MS. TALCOTT: We do, because you would
19 still have to raise it once you are notified. Their
20 claim that it became duplicitous by the trial
21 testimony is belied by the record, because it's clear
22 by the language of the indictment. It was also made
23 clear in the motion practice, where they said,
24 "thereafter", indicating it was a separate incident,
25 which, in the motion practice, they also - - -

1 CHIEF JUDGE LIPPMAN: But if it became
2 clear with the trial evidence, they still need to
3 preserve it, though?

4 MS. TALCOTT: Yes.

5 CHIEF JUDGE LIPPMAN: Even if - - - if
6 they're right on that.

7 MS. TALCOTT: Yes. And the reasoning under
8 Becoats applies equally, because as the court noted
9 in Becoats, or in a claim of testimonial duplicity, a
10 defendant accused of multiple offenses might not care
11 how many counts they're faced with.

12 JUDGE SMITH: Is this - - - as I think
13 about it, is this really a - - - duplicity would be
14 if they said, he shot him once and then ten minutes
15 later, he shot him again, and they put it in the same
16 count. That's duplicitousness. Here, nobody's
17 saying they put two crimes in the same count. We're
18 just trying to figure out which one they put in.

19 MS. TALCOTT: Right. He's - - - he's
20 saying it's not clear what the attempted murder was -
21 - -

22 JUDGE SMITH: Yeah, I mean, isn't - - -
23 isn't - - -

24 MS. TALCOTT: - - - the misfire or the
25 miss.

1 JUDGE SMITH: - - - isn't a lack of clarity
2 something other than duplicitousness? I mean, the
3 classic duplicitousness is you did this and you did
4 that, and I treat it as one crime when it's two.
5 Here, there's no attempt at any point, as far as I
6 can see, to charge him with both crimes. It's just -
7 - - you're just fighting about which one they charged
8 him with.

9 MS. TALCOTT: No, and I don't think we
10 could have charged the - - - the missed shot. In
11 this second incident, the - - - under the dictates of
12 Alonzo, we couldn't have charged that separately.
13 That really was - - -

14 JUDGE SMITH: Doesn't - - - the fact that
15 you couldn't do it doesn't mean you didn't. People
16 have made errors before.

17 MS. TALCOTT: Right, but the other language
18 of the indictment makes clear that there wasn't,
19 because the co-defendant undoubtedly would have been
20 charged then, and the luring of the steps makes the
21 distinction between the two counts.

22 To let defendant claim duplicitousness, be
23 it facial or testimonial, for the first time on
24 appeal, enables them to make that choice at trial.
25 Then they could make the opposite choice on appeal.

1 And as in facial duplicity claims, defendants could
2 obtain a new trial on the basis of an error they
3 consciously chose to ignore - - - maybe it was
4 insignificant, or maybe they welcomed it - - - and
5 get a new trial based on an error - - -

6 JUDGE ABDUS-SALAAM: Is there any support
7 for defendant's position from the statement made by
8 the prosecutor at the sentencing, which the judge
9 agreed with, that this man committed two attempted
10 murders? Does that give them any support for their
11 duplicity argument?

12 MS. TALCOTT: No, because technically,
13 although we couldn't have charged it, he did try to
14 kill him the first time; he just missed. So I think
15 that was just an argument in terms of arguing for the
16 maximum sentence. No. Although under Alonzo, we
17 couldn't have charged that, he really did attempt to
18 kill him. Like I said, he just missed the first shot
19 on that second set of events.

20 JUDGE GRAFFEO: After the trial testimony
21 came in, could the People have asked for a different
22 charge that would have provided a bit more clarity
23 for the jury?

24 MS. TALCOTT: Yes; I think in the People's
25 mind, it was clear, especially from the opening where

1 he specifically said it. And the defendant could
2 have asked that the court charge it or marshal the
3 evidence to make it more clear. The defendant could
4 have moved to dismiss the count. The People could
5 have amended the indictment when faced with that.
6 There were any number of remedies that would have
7 afforded the defendant the protections that duplicity
8 tries to avoid.

9 And to the extent they claim, well, this
10 totally changed my defense, move for mistrial.
11 Although I don't know that he could have claimed that
12 here, because his claim was just that he wasn't the
13 shooter.

14 The remedies are more than adequate to
15 prevent the dangers posed by duplicitous counts,
16 including the potential for a non-unanimous verdict.
17 If the count is dismissed or the acts clarified
18 through a charge or through martialing the evidence,
19 the danger of duplicity or lack of notice is erased.
20 There's no reason to excuse the defendant from making
21 this motion or at the least, claiming insufficient
22 notice.

23 JUDGE SMITH: Wouldn't it have been a
24 better idea for the court to tell the jury, when it
25 charged on attempted murder, which incident he was

1 talking about?

2 MS. TALCOTT: It would be if it's not
3 clear.

4 JUDGE SMITH: Well, even - - - well, yeah.
5 But it's - - - it's so clear that you're here in the
6 Court of Appeals arguing about it. Maybe it would
7 have been a good idea for the judge to make it even
8 clearer?

9 MS. TALCOTT: He certainly could have, but,
10 you know, then we get claims where he improperly
11 martialled the evidence. So in light of the defense
12 not asking for it where it was clear, you know, it
13 could arguably go the other way as well.

14 And in this case, where the defendant was
15 made aware of the facts underlying each count
16 throughout the proceedings, it illustrates the
17 dangers this court warned about in Becoats, where
18 rather than make an objection where any number of
19 remedies could have been had, it would enable the
20 defendant to choose the opposite.

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

23 MS. TALCOTT: Thank you.

24 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

25 MS. LOUIE: Your Honors, there are plenty

1 of errors that this court has found jurisdictional
2 where defense counsel could have raised or objected
3 to. But the whole reason why they didn't need to do
4 that was because it goes to the fundamental
5 jurisdiction.

6 For example, in People v. Johnson, this
7 court found that it was a nonwaivable jurisdictional
8 defect to convict a defendant of an unindicted crime
9 of equal level to the crime for which he was
10 indicted. And there, it was a plea, so one could
11 argue that the defendant was getting a good deal out
12 of this, or a better deal, and had agreed to it. But
13 this court said, no, no; because the grand jury did
14 not actually indict him on - - -

15 JUDGE SMITH: Isn't that something
16 different - - - I mean, I understand your point, but
17 isn't that something different from com - - - wrongly
18 combining two crimes in one count; trying - - -
19 trying someone for a crime he was not indicted for at
20 all seems to be different from - - - from
21 duplicitous. That's - - - that's a - - - that's your
22 right to be indicted by a grand jury.

23 MS. LOUIE: Well, yes, but here, we're
24 talking about the same thing. He was never indicted
25 on this first incident ten minutes prior.

1 JUDGE SMITH: Okay, I guess - - - I guess
2 what I'm saying is if - - - if - - - if you're right
3 about that, if we think it's as clear as you do that
4 he was - - - that he was tried on a different crime
5 for what he was indicted on, I can see how that would
6 be jurisdictional. But what if the - - - the
7 indictment is merely ambiguous about which one it was
8 - - - it was referring to? Then don't you have to
9 preserve the problem? Don't you have to stand up and
10 say, Judge, clarify it for me?

11 MS. LOUIE: Only if it is ambiguous on the
12 face of the indictment and it is clear that the grand
13 jury had considered both of the events. Here it is
14 clear that this was not duplicitous on the face of
15 the indictment. The grand jury only considered and
16 charged Mr. Allen with the second event.

17 That's why, when this first event came
18 along and was presented at trial and the jury was
19 invited to actually convict him of attempted murder
20 on either this first event or the second event, and
21 it's unclear about that, because the grand jury had
22 never considered that - - - on the face of the
23 indictment it's clear, on the face of the indictment
24 and bill of particulars, the grand jury had never
25 considered that - - - it makes it a jurisdictional

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error, and this court should dismiss.

CHIEF JUDGE LIPPMAN: Okay, counsel; we understand your position. Thank you both.

MS. LOUIE: Thank you.

(Court is adjourned)

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

I, Janice Brea, certify that the foregoing transcript of proceedings in the Court of Appeals of Terrell Allen v. People, No. 206 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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