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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 32

DARIUS DUBARRY,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
February 11, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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1 CHIEF JUDGE LIPPMAN: 32, People v.  
2 Dubarry.

3 Counsel, you want any rebuttal time?

4 MS. CORSI: Five minutes, Your Honor,  
5 please.

6 CHIEF JUDGE LIPPMAN: Five minutes. Go  
7 ahead. You're on.

8 MS. CORSI: Thank you. I'm Denise Corsi of  
9 Appellate Advocates, and I represent the appellant,  
10 Mr. Darius Dubarry. I'd like to begin with the  
11 submission of the murder counts in the conjunctive.

12 CHIEF JUDGE LIPPMAN: Should this have been  
13 in the alternative? Is that your position,  
14 basically?

15 MS. CORSI: Absolutely, Your Honor.

16 CHIEF JUDGE LIPPMAN: Why - - - why does it  
17 have to be in the alternative?

18 MS. CORSI: Because as a result, he  
19 incurred double - - -

20 CHIEF JUDGE LIPPMAN: Is that Gallagher?

21 MS. CORSI: Well, actually, here, Your  
22 Honor, it has more to do with - - - with Perez and  
23 transferred intent.

24 CHIEF JUDGE LIPPMAN: Go ahead.  
25 Transferred intent, go ahead.

1 MS. CORSI: Yes. Mr. Dubarry incurred  
2 double liability for a single death, and there are  
3 real consequences.

4 CHIEF JUDGE LIPPMAN: For a single outcome?  
5 Is that what you're saying?

6 MS. CORSI: Yes, for a - - -

7 CHIEF JUDGE LIPPMAN: Go ahead.

8 MS. CORSI: - - - single outcome. And  
9 there are real consequences to suffering double  
10 liability, even if he got concurrent - - - even  
11 though he got concurrent time. First of all, whether  
12 and when a defendant gets parole, one of the factors  
13 is the seriousness of the offense. And common sense  
14 dictates that if you are convicted of two counts of  
15 murder that may very well be considered a more  
16 serious offense in the - - - in the eyes of the  
17 parole board.

18 CHIEF JUDGE LIPPMAN: Why - - - but explain  
19 to us why he can't be convicted of the - - - these  
20 two different - - - the depraved indifference and the  
21 intention.

22 MS. CORSI: Be - - -

23 CHIEF JUDGE LIPPMAN: Why - - - why - - -  
24 what's - - - what makes it impossible from your  
25 perspective?

1 MS. CORSI: What makes it impossible is the  
2 - - - the - - - the intentional murder count was  
3 dependent on the doctrine of transferred intent. And  
4 transferred intent was never meant to - - - to be a  
5 means to impose double liability. Transferred intent  
6 is only so - - - is supposed to be employed only so  
7 that a defendant who misfires or has some happy  
8 accident doesn't escape liability for harming  
9 somebody.

10 JUDGE READ: So are you - - -

11 CHIEF JUDGE LIPPMAN: Transferred intent is  
12 no different than anything else in this case?

13 MS. CORSI: Pardon?

14 CHIEF JUDGE LIPPMAN: The fact that it's  
15 transferred intent doesn't change the fact that you  
16 can't be guilty of both?

17 MS. CORSI: Well, no. You - - - one - - -

18 CHIEF JUDGE LIPPMAN: Is that what you're  
19 saying?

20 MS. CORSI: Assuming that someone can hold  
21 two states of mind, what differentiates this case  
22 from others is that this court has said that  
23 transferred intent should not be employed to double  
24 someone's liability.

25 JUDGE READ: So what are you - - -

1 MS. CORSI: And that has very real  
2 consequences.

3 JUDGE READ: So are you saying,  
4 essentially, it might technically fit but it does - -  
5 - it goes against the grain of the intent behind or  
6 the - - - the - - - the reason for transferred  
7 intent?

8 MS. CORSI: Absolutely, Your Honor. Double  
9 liability, it just doesn't make sense when there's  
10 one wrong here. Double liability makes sense when -  
11 - - when a defendant harms the target, actually harms  
12 the target and actually harms the bystander.

13 JUDGE PIGOTT: Other than parole, what  
14 other - - - what - - - what are the other effects  
15 that you see?

16 MS. CORSI: Well, if the person is lucky  
17 enough to get paroled, housing and employment  
18 opportunities will certainly - - - will certainly get  
19 affected. If he's ever prosecuted again, the fact  
20 that he has two prior murder convictions will  
21 certainly come up in a Sandoval hearing.

22 JUDGE PIGOTT: This sort of - - - you know,  
23 it - - - it - - - it struck me as the reverse of what  
24 we were going through in - - - in our DIM journey.  
25 Because there you had people saying, you know, I did

1           this intentionally. I shot him right in the head and  
2           I meant to kill him, and I got convicted of depraved  
3           indifference. You got to dismiss that and I was  
4           acquitted of this, so I'm walking out of here.

5                         JUDGE READ: They didn't say that until  
6           after they were convicted.

7                         JUDGE PIGOTT: That's right.

8                         JUDGE READ: Yeah.

9                         JUDGE PIGOTT: It was rather teeth-grinding  
10          stuff.

11                        JUDGE READ: Yeah.

12                        JUDGE PIGOTT: Now we've got somebody who  
13          is convicted of DIM because he apparently had a  
14          depraved indifference to - - - to human life, and a  
15          guy that was intending to shoot somebody, and that  
16          intent gets transferred to the same person. I see  
17          your point of, you know, how do you kill a person  
18          twice, essentially. But why doesn't that get cured  
19          some other way than us giving him a whole new trial  
20          on this thing? In other words, I would think that  
21          the DA, maybe he'll answer this, would agree to  
22          dismiss one of them and - - - and let you go to jail  
23          on whichever one you choose.

24                        MS. CORSI: Well, because the problem here,  
25          Your Honor, is that that jury actually convicted him

1 of both. So then it's an arbitrary choice, and  
2 there's no statute to guide the court on which to  
3 dismiss.

4 JUDGE PIGOTT: Can we - - - can we give it  
5 to the defendant to choose?

6 MS. CORSI: No, Your Honor. What the  
7 defendant asked for was that the counts be submitted  
8 in the alternative, and that's what he's entitled to  
9 on appeal.

10 JUDGE PIGOTT: Isn't that the point,  
11 though?

12 CHIEF JUDGE LIPPMAN: So - - -

13 JUDGE PIGOTT: I mean - - - I'm sorry,  
14 Judge.

15 CHIEF JUDGE LIPPMAN: No, go ahead. Go.

16 JUDGE PIGOTT: The - - - the - - - the  
17 point is he's saying yeah, I killed her. And yeah,  
18 it was one or the other. So give me a trial on the  
19 whole darn thing.

20 MS. CORSI: Well, Your Honor, Mr. Dubarry  
21 is not saying that.

22 JUDGE PIGOTT: Okay.

23 MS. CORSI: He actually presented a  
24 justification defense as to intentional murder. And  
25 as we argued in our other point, he is not guilty of

1           depraved indifference murder.

2                   CHIEF JUDGE LIPPMAN:  You - - - you agree  
3           that if they had done it alternatively they very  
4           might have gotten a conviction on one or the other.

5                   MS. CORSI:  Perhaps, Your Honor, since he -  
6           - -

7                   CHIEF JUDGE LIPPMAN:  I mean that is not  
8           inconceivable that one of these things he would have  
9           been guilty of.

10                   MS. CORSI:  It's not inconceivable, but Mr.  
11           Dubarry - - -

12                   CHIEF JUDGE LIPPMAN:  Given the outcome.

13                   MS. CORSI:  - - - did have viable defenses  
14           that he presented at trial and that we pursued on  
15           appeal as to each of - - -

16                   JUDGE STEIN:  But the jury's rejected those  
17           defenses.  Do - - - are you saying that the outcome  
18           might have been different if he had only been - - -  
19           if he had been charged in the alternative?  That he  
20           would have been - - - he would have been acquitted of  
21           one of those charges?

22                   MS. CORSI:  Well, Your Honor, the point is  
23           is that he is suffering or he will - - -

24                   JUDGE RIVERA:  Well, was just - - - was  
25           justification applied to all the counts?

1 MS. CORSI: No, Your Honor, just to  
2 intention.

3 JUDGE RIVERA: Okay. So what count was it  
4 not applied to?

5 MS. CORSI: To the depraved indifference  
6 murder, because he's not entitled to it under  
7 depraved indifference murder.

8 JUDGE RIVERA: All right.

9 MS. CORSI: The remedy here is a new trial  
10 because that's - - - because he was entitled to  
11 submission in the alternative ab initio.

12 JUDGE PIGOTT: I - - - I'm just - - - I'm  
13 just - - -

14 JUDGE RIVERA: So let's talk - - - can we  
15 talk about that? I just want to be clear, because I  
16 think I've - - - I'm - - - I have misunderstood the  
17 argument you were presenting in the briefs based on  
18 what you've said today. Because I thought in part -  
19 - - I - - - I understand the argument you're making  
20 now. But I thought, in part, that you were arguing  
21 that you cannot, based on our prior case law, have a  
22 death that's a consequence of a mens rea of intent  
23 and depraved indifference, as they're separate mens  
24 rea, simultaneously. It's one or the other whether  
25 it's my original intent to kill this bystander or a

1 transferred intent. It doesn't matter, either way  
2 it's intent. And that's the mens rea. And it's  
3 either the intent or it's the depraved indifference  
4 mens rea. I thought that was part of your argument.  
5 Have I misunderstood you?

6 MS. CORSI: No, you haven't, Your Honor.

7 JUDGE RIVERA: Okay.

8 MS. CORSI: But the reason we can  
9 distinguish Mr. Dubarry's case from the other cases  
10 like that, for instance Baker, is that in those other  
11 cases, transferred intent was not a part of any - - -  
12 of - - - was not an element or not part of any of the  
13 elements in the - - - the ultimate convictions of  
14 those defendants. I'd like to turn to preservation  
15 on that point.

16 CHIEF JUDGE LIPPMAN: Turn - - - go ahead.  
17 Turn to it.

18 MS. CORSI: When the parties were reviewing  
19 the verdict sheets, defense counsel specifically  
20 asked the court direct the jury to skip over Count  
21 III, intentional murder, if they come back with a  
22 guilty verdict on depraved. This was a plain request  
23 for a submission in the alternative. And by deciding  
24 to submit those counts in the conjunctive, the court  
25 necessarily decided - - -

1 CHIEF JUDGE LIPPMAN: The court basically  
2 had to consider it.

3 MS. CORSI: Yes, exactly. In order to  
4 exercise any sort of discretion, he has to decide in  
5 the first place whether he has any discretion to  
6 exercise. I'd like to turn to the Geraci point.

7 CHIEF JUDGE LIPPMAN: Go ahead.

8 MS. CORSI: The People did not present  
9 evidence that reached the very high standard of clear  
10 and convincing evidence. They had to prove that my  
11 client knowingly acquiesced to the misconduct that  
12 resulted in Mr. Francois' unavailability. That he  
13 was the potential beneficiary is simply not enough.

14 JUDGE ABDUS-SALAAM: Counsel, haven't we -  
15 - - haven't we also said that that's somewhat of a  
16 flexible standard in that - - - in Smart I think we  
17 said that, that circumstantial evidence can be used  
18 to determine whether a threat has been made against a  
19 witness to prevent that witness from coming into  
20 court?

21 MS. CORSI: But the circumstantial evidence  
22 can't add up to mere speculation that he's  
23 responsible - - -

24 JUDGE ABDUS-SALAAM: If it was - - -

25 MS. CORSI: - - - and that's what we have

1 here.

2 JUDGE ABDUS-SALAAM: All right, okay. So  
3 what - - - that's what I wanted to ask you. What's  
4 missing from our - - - the circumstantial? I know  
5 this is different than Smart, because the witness  
6 actually - - - we had telephone calls from jail and  
7 so on.

8 MS. CORSI: That's the key thing. In most  
9 of the cases, if you look at the Appellate Division  
10 cases cited in the briefs and at Smart, most of the  
11 time what you have is evidence of communication with  
12 the outside, whether it be recordings of calls from  
13 Rikers or a corrections officer who overhears a  
14 discussion between the defendant and someone else  
15 over the phone or in person. We don't have that  
16 here. We don't have any communication at all with  
17 the outside.

18 JUDGE ABDUS-SALAAM: What if we had - - -  
19 what - - - what if the - - - the sister and the  
20 cousin or whoever came to the witness and said that  
21 guy, Bellamy, who told Mr. Dubarry to get out of the  
22 way when someone was coming after him with a gun?  
23 Would that be enough?

24 MS. CORSI: Your Honor, at least in that  
25 circumstance the person was - - - would be identified

1 as a known associate. All we have is a threat by  
2 someone who belongs to the same religion.

3 JUDGE FAHEY: Well, you know - - -

4 MS. CORSI: Which is just offensive to  
5 assume that Mr. Dubarry is responsible for the  
6 misconduct of somebody in - - - you know, of his  
7 faith.

8 JUDGE FAHEY: You - - - you may be right.  
9 You may be right. What I'm wondering if there's - -  
10 - if the error is harmless, because I thought they  
11 were three other witnesses to testify to him  
12 shooting?

13 MS. CORSI: This is not harmless in the  
14 least. The People specifically - - -

15 JUDGE FAHEY: Okay, just slow down.

16 MS. CORSI: Oh, I'm sorry.

17 JUDGE FAHEY: Just address my point, would  
18 you. Just - - - just go to am I correct in that that  
19 there were three other witnesses that testified on  
20 that and said that he fired the gun?

21 MS. CORSI: There were two eyewitnesses,  
22 Sanders and Murphy. And your question goes to Mr.  
23 Murphy. The People relied on Mr. Murphy to - - - to  
24 make Mr. Dubarry the initial aggressor. And in her  
25 summation the prosecutor referred to Mr. Murphy as

1 slick, reluctant to inculcate anybody, and evasive.  
2 Yet, she relied on him to say that the defendant  
3 fired first while the codefendant had his hand in his  
4 pocket.

5           However, the People twice argued that Mr.  
6 Francois corroborated Mr. Murphy. She said he  
7 corroborated Murphy because he said the defendant  
8 began the shooting. She recounted the grand jury  
9 testimony in which he said the defendant took two  
10 steps down and fired. There were no shots before  
11 that. And she labeled Mr. Francois as an independent  
12 witness who corroborated Mr. Murphy.

13           JUDGE FAHEY: Thanks.

14           CHIEF JUDGE LIPPMAN: Okay, counsel.

15           JUDGE FAHEY: Thank you.

16           CHIEF JUDGE LIPPMAN: Go ahead, counsel.

17           You're up.

18           MR. ROSS: May it please the court my name  
19 is Thomas Ross. I represent the respondent in this  
20 case. The defendant here failed to preserve her  
21 claim that the depraved indifference and the  
22 intentional murder counts should have been submitted  
23 in the - - -

24           CHIEF JUDGE LIPPMAN: What about the judge?  
25 Didn't the judge by necessity deal with all of this?

1 MR. ROSS: No, Your Honor. When - - -

2 CHIEF JUDGE LIPPMAN: Why not?

3 MR. ROSS: Counsel points out to where the  
4 defense attorney there talked about how it was a  
5 preference to, if you convict this, skip over. But  
6 that - - - he was not saying that - - - that they had  
7 to do that as a matter of law or under Gallagher.  
8 That's just a - - - a preference.

9 JUDGE PIGOTT: Let's assume she - - - let's  
10 assume it had been preserved. Does - - - does this  
11 make sense?

12 MR. ROSS: Yes, it does, Your Honor.

13 JUDGE PIGOTT: How?

14 MR. ROSS: Because - - - because we're  
15 dealing here with different states of mind versus  
16 different outcomes.

17 JUDGE PIGOTT: Right. But we got one dead  
18 person, and she's got two - - - she's got two murder  
19 convictions.

20 MR. ROSS: But we have a - - - but it's  
21 only because of the legal fiction of transferred  
22 intent.

23 JUDGE PIGOTT: I know. But - - -

24 MR. ROSS: We're not talking about the - -  
25 - there's no factual fiction here.

1                   JUDGE PIGOTT: But why do we want to do  
2 this? I mean why - - - even if it's only the - - -  
3 the - - - the question of parole or something like  
4 that. Why - - - why do we want to do this when we  
5 know one person's dead, he did it, and he either did  
6 it through transferred intent or depraved  
7 indifference, and get rid of the other one? Then - -  
8 - then you wouldn't have to come all the way to  
9 Albany.

10                   MR. ROSS: Because there's - - - people are  
11 convicted of - - - of multiple counts of the same  
12 count all the time. For - - - for instance, there's  
13 depraved indifference murder and - - -

14                   CHIEF JUDGE LIPPMAN: Yeah, but they can't  
15 be mutually exclusive, you know. You can't have two  
16 counts, one outcome - - - how - - - it's the same  
17 real question that Judge Pigott is asking you.  
18 Doesn't make any sense just looking at it, standing  
19 back from it, why does it - - - why do you want it?  
20 Why do you want him to have to - - - why didn't - - -  
21 isn't it more logical to do it in the alternative?  
22 Chances are you're going to get a conviction in one  
23 of the two. Why isn't that enough?

24                   MR. ROSS: Because under Gallagher it's - -  
25 - it's an impossibility to have reck - - -

1           recklessness and intent toward the same victim. Here  
2           we do not have that. As a matter of fact - - - and  
3           like I'm saying, transferred intent is a matter of  
4           law but - - -

5                         JUDGE PIGOTT: But let's put yourself - - -  
6           I mean you're in the courtroom and somebody says what  
7           - - - what they said here. You know, can you do the  
8           alternative. Why wouldn't the DA say that's the only  
9           way it makes sense, judge? We got one dead person  
10          and - - - and we think this person did it and it's  
11          either transferred intent or DIM. And charge them in  
12          the alternative.

13                        MR. ROSS: Because this is not a Gallagher  
14          situation where it - - - where it's - - - it's  
15          mutually exclusive.

16                        JUDGE PIGOTT: I know. I - - - I'm - - -  
17          I'm trying to get away from the case law that always,  
18          you know, seems to cloud these things.

19                        MR. ROSS: Okay.

20                        JUDGE PIGOTT: But wouldn't it have made -  
21          - - wouldn't it have made - - -

22                        MR. ROSS: But - - - but - - - but just on  
23          - - - on a practical matter, you - - - you would say  
24          the same thing if someone was charged with felony  
25          murder and depraved indifference murder. And we've

1 had cases where someone was convicted of both. We've  
2 also had cases where someone was convicted of  
3 intentional murder and felony murder, and nobody says  
4 that that's double liability. There's one victim in  
5 each of those cases. So this should be no different  
6 having depraved indifference and intentional murder.  
7 There's no difference between that at all. Plus  
8 there's - - -

9 JUDGE STEIN: In felony murder and in  
10 intentional murder they're both intent. They're - -  
11 - they're not inconsistent.

12 MR. ROSS: But - - - but the - - - the  
13 states of mind here are not inconsistent. Ordinarily  
14 they are when you talk about the same victim. But  
15 here the intent to kill was the intent to kill the  
16 codefendant. The recklessness was not against the  
17 codefendant. The recklessness was against the actual  
18 victim and anybody else who was on that sidewalk.  
19 That's why this is different from Gallagher. That's  
20 why they should - - -

21 JUDGE RIVERA: Right. I - - - I - - - I  
22 see your argument, but I think the - - - the point on  
23 the other side is that the way you have structured  
24 that is - - - makes no sense, because the - - - those  
25 mens rea for the outcome of the death of the

1 bystander cannot coexist. The jury has to choose one  
2 or the other for this particular outcome, this crime,  
3 this murder.

4 MR. ROSS: But in Suarez v. Byrne this  
5 court - - -

6 JUDGE RIVERA: I mean as you say,  
7 transferred intent is a fiction anyway. And it's a  
8 fiction that has boundaries.

9 MR. ROSS: But as in Suarez v. Byrne - - -

10 JUDGE RIVERA: Yeah.

11 MR. ROSS: - - - this court distinguished  
12 Robinson by saying you don't look at the ultimate  
13 result of - - - of what happened. You look at what  
14 is the result that's associated with the - - - for  
15 the person's state of mind. The result associated  
16 with this person's intent was to kill - - -

17 JUDGE READ: If we don't - - - if we don't  
18 agree with you, is the only thing we can do send to  
19 it back for a new trial?

20 MR. ROSS: No, and that's one - - - another  
21 reason why it does make sense to proceed this way,  
22 because as a practical matter, it's important for us  
23 to have both counts. Because let's look at the  
24 second part, which she hasn't argued, which was that  
25 the evidence supposedly was legally insufficient of

1 the depraved indifference murder. Now let's say that  
2 these - - - these charges were submitted in the  
3 alternative. The con - - -

4 CHIEF JUDGE LIPPMAN: What's the answer to  
5 Judge Read's question?

6 JUDGE READ: If we don't agree with you.

7 MR. ROSS: Yes.

8 JUDGE READ: Okay. If we don't agree with  
9 you and we say yeah, the defendant's right. These  
10 things should have been charged not - - - you know,  
11 in the alternative. What do we - - - what - - - what  
12 are our options in terms of remedies?

13 MR. ROSS: We would be very - - - very  
14 prejudiced in the remedy because - - -

15 JUDGE READ: What are - - - just what are  
16 our options? Do we have to reverse and remand for a  
17 new trial? Is that our only option, or can we do as  
18 Judge Pigott was sort of suggesting, maybe do  
19 something that would allow you to pick one?

20 MR. ROSS: No, you'd have to re - - -  
21 remand for a new trial. And - - -

22 JUDGE READ: So you agree with your  
23 opponent on that? We'd have to reverse and remand  
24 for a new trial?

25 MR. ROSS: Yes. But - - - but that sort of

1 shows how unfair it is, because let's assume that  
2 they were - - - they were presented in the  
3 alternative.

4 JUDGE RIVERA: Well, only unfair because  
5 it's not in the alternative. If you had done it in  
6 the alternative they might have picked one over the  
7 other.

8 MR. ROSS: If - - - but if they would have  
9 picked depraved indifference murder - - -

10 JUDGE RIVERA: Yes.

11 MR. ROSS: - - - then that would have been  
12 an - - - an acquittal on the intentional murder. Now  
13 let's say here on appeal - - -

14 JUDGE RIVERA: That - - - that's in the  
15 alternative. The answer is - - -

16 MR. ROSS: That's what happens in the  
17 alternative. But - - - but let's say on appeal that  
18 the depraved indifference murder gets thrown out on -  
19 - - on the grounds of - - -

20 JUDGE READ: Well, that's - - - I guess  
21 that's - - -

22 MR. ROSS: - - - legally insufficient  
23 evidence.

24 JUDGE READ: That's - - -

25 JUDGE RIVERA: That's always the risk.

1 JUDGE READ: That's the risk you take,  
2 particularly, you're pretty - - - I think you - - -

3 MR. ROSS: But then - - -

4 JUDGE READ: The DAs are pretty aware of it  
5 after this odyssey we've gone through the past  
6 several years on DIM.

7 MR. ROSS: But on the other hand, but then  
8 you still would have had the defendant being - - -  
9 the only count left would have been the attempted  
10 murder - - - intentional murder, a Class B felony  
11 when he actually really would have been guilty of the  
12 Class A felony - - -

13 JUDGE PIGOTT: But - - - but - - - but - -  
14 -

15 MR. ROSS: - - - of intentional murder on  
16 the - - -

17 JUDGE RIVERA: You're just arguing you  
18 couldn't prove the intent. And that - - - that's  
19 your burden.

20 MR. ROSS: No, we could prove both.

21 JUDGE PIGOTT: But I mean - - - but the  
22 point is, I mean, you're saying well, if - - - if - -  
23 - if - - - if he gets - - - if he gets convicted of  
24 DIM and it gets appealed and gets reversed how tragic  
25 is that. Well, that's your job to convict him of the

1 thing with sufficient evidence. I mean you can't  
2 blame the courts if they reverse you on an - - - on  
3 an issue that you didn't have sufficient evidence.

4 MR. ROSS: But we had suff - - -

5 JUDGE PIGOTT: You're - - - you're  
6 essentially saying to us, you know, because we don't  
7 trust you courts, we want to - - - we want to convict  
8 him of three murders, if we can. And if you knock  
9 out two we've still got him.

10 MR. ROSS: But we had sufficient evidence  
11 on both the intentional grounds and the depraved  
12 indifference.

13 JUDGE PIGOTT: I know that. But what I'm  
14 saying is one of your arguments seemed to be we do  
15 this because we don't trust courts. You're - - -  
16 you're going - - - you're going to throw out a - - -  
17 a DIM and now the guy's going to walk. Well, we went  
18 through that.

19 MR. ROSS: Well, we - - - like I say, we -  
20 - - we never know what might happen. The law might  
21 change and - - - and - - -

22 CHIEF JUDGE LIPPMAN: What do you mean by  
23 that? Only kidding. Go ahead.

24 JUDGE READ: Yeah? Well, I think - - - I  
25 think - - - I think that's a fair comment given our

1 DIM jurisdiction - - - juris - - - jurisprudence.

2 MR. ROSS: Like I say - - - like I say,  
3 under 300.40(3)(a), when counts are not - - - are - -  
4 - are not inconsistent - - - and they're not  
5 inconsistent, you know, and the intent and the  
6 depraved and the recklessness here is not  
7 inconsistent in this kind of a - - - a situation,  
8 because the intent is toward a specific person. And  
9 - - -

10 CHIEF JUDGE LIPPMAN: It's hard to  
11 understand.

12 MR. ROSS: Frankly - - -

13 CHIEF JUDGE LIPPMAN: We know what you're  
14 saying. We understand your argument.

15 MR. ROSS: I know - - -

16 CHIEF JUDGE LIPPMAN: It's hard to see that  
17 they're not inconsistent when, again, one outcome.

18 MR. ROSS: But - - - but - - -

19 CHIEF JUDGE LIPPMAN: One dead person.

20 MR. ROSS: Well, maybe if I - - - if I can  
21 switch it outside the homicide cases to show another.  
22 Take robbery in the - - - in the first degree. Now  
23 one element of robbery in the first degree is if you  
24 cause serious physical injury to - - - to the victim.  
25 Another element of robbery in the first degree is you



1 sets out those two things to punish two states of  
2 mind. I mean, let's face it, there - - - there is  
3 actually a deterrent effect to this because here the  
4 defendant was - - -

5 JUDGE PIGOTT: He's never going to try to  
6 shoot somebody in a wild fashion again.

7 MR. ROSS: That's right. He's going to - -  
8 - I'm serious.

9 JUDGE PIGOTT: Okay.

10 MR. ROSS: He's - - - he's going to - - -

11 JUDGE PIGOTT: He's going to aim better?

12 MR. ROSS: By - - - by shooting somebody  
13 where he's endangering other persons he's creating  
14 more of a menace to society than if he tries to shoot  
15 somebody in an isolated situation where he's not  
16 endangering anybody else but - - - but the intended  
17 target. And that's what he did here. He - - -

18 JUDGE ABDUS-SALAAM: Counsel, could I - - -

19 MR. ROSS: He was shooting at the intended  
20 target - - -

21 CHIEF JUDGE LIPPMAN: Judge Abdus-Salaam,  
22 go ahead.

23 JUDGE ABDUS-SALAAM: Could - - - could I  
24 just direct your attention a little bit away now from  
25 the intentional versus depraved indifference to the -

1           - - you know, the witness tampering.

2                   MR. ROSS:  Yes.

3                   JUDGE ABDUS-SALAAM:  And why we should  
4 affirm that?

5                   MR. ROSS:  Well, because the circumstantial  
6 evidence shows that it only could have come from this  
7 defendant.  The - - -

8                   JUDGE ABDUS-SALAAM:  What's that  
9 circumstantial evidence?

10                   MR. ROSS:  The witness, Markenzie Francois,  
11 was in federal custody for one year.  His family  
12 visited him weekly throughout that year.  And they  
13 never complained about any threats from Israelites or  
14 anybody not until like the day before the Sirois  
15 hearing, and that was in the last week that the  
16 People revealed their witnesses to the defense.  And  
17 that was only in court.  So the - - - the information  
18 could have only come from the defendant.  We don't  
19 know how he communicated with his - - - his cohorts  
20 in the Israelites.

21                   JUDGE STEIN:  Is that enough?  Is it enough  
22 just to convey the information that - - - that these  
23 people are - - - are going to be testifying to  
24 someone who maybe somebody else heard it and decided  
25 they didn't like it?

1                   MR. ROSS: But then who has the most  
2                   incentive to want to harm the witnesses, somebody  
3                   just on their own deciding on their own to do it?

4                   JUDGE STEIN: Well, maybe there's a  
5                   solidarity. I mean we - - - you know, we know all  
6                   about gangs and - - - and different groups that just  
7                   stand behind each other. So, you know, maybe  
8                   somebody from this group said, you know, our - - -  
9                   our brother is being threatened here and - - - and -  
10                  - - and we're going to do something about it.

11                  MR. ROSS: That's exactly - - - well,  
12                  that's exactly true. The defendant probably just  
13                  told his - - - his cohorts and said, you know,  
14                  Markenzie Francois is being a wit - - - witness. I  
15                  mean why did he have to tell him that in - - - in any  
16                  event? But just - - - that's probably all he had to  
17                  tell them and he knew that they were going to go act  
18                  on his behalf. That's enough to - - - to show - - -

19                  JUDGE RIVERA: Sounds like a lot of  
20                  speculation.

21                  MR. ROSS: But why would anybody else - - -

22                  JUDGE RIVERA: Is that enough to - - - to  
23                  allow this grand jury testimony in, this - - - this  
24                  speculation it must have been, couldn't be anybody  
25                  else, the Israelites couldn't have acted on their

1 own?

2 MR. ROSS: But the Israelites would have  
3 not have known Francois was going to be a witness  
4 unless this defendant actually told him to. Because  
5 it was not - - -

6 JUDGE STEIN: You don't know that.

7 JUDGE RIVERA: But I - - - I think the  
8 point was just mere telling them, is that enough to  
9 get you to the point where you say - - -

10 MR. ROSS: Well - - -

11 JUDGE RIVERA: - - - that he is encouraging  
12 or he's the one behind this - - -

13 MR. ROSS: If this organization - - -

14 JUDGE RIVERA: - - - intimidation?

15 MR. ROSS: - - - acts like a gang, as  
16 Justice Stein was describing, just the mere fact that  
17 he - - - he reveals this name, there's just this  
18 understanding they're going to - - - that they're  
19 going to act on his behalf.

20 JUDGE RIVERA: Again, it's a lot of  
21 speculation.

22 JUDGE ABDUS-SALAAM: You're saying that he  
23 revealed the name.

24 MR. ROSS: But it - - -

25 JUDGE ABDUS-SALAAM: You're - - - you're

1           specu - - - counsel, you're speculating that he  
2           revealed the name. What if his sister or a cousin or  
3           somebody let slip somewhere in the neighborhood that  
4           he was - - - that Francois was going to be testifying  
5           as opposed to the defendant giving up the name?

6                     MR. ROSS: Well, it happened in such a - -  
7           -

8                     JUDGE ABDUS-SALAAM: Because we don't know  
9           that - - -

10                    MR. ROSS: - - - a short period of time.  
11           We're talking about only a week and it happened only  
12           in court. And it was - - - like I said, it's with  
13           the - - - the Israelites which is just some group  
14           that the defendant belonged and was active in this  
15           group.

16                    JUDGE ABDUS-SALAAM: That's a lot of - - -  
17           that's - - - that's a lot of circumstance. But isn't  
18           the standard clear and convincing?

19                    MR. ROSS: Yes, well, we say that that is  
20           clear and convincing. If you looked at the incentive  
21           that the defendant had to - - - you know, he's facing  
22           a life sentence. There's - - - you know, anybody  
23           who's acting on his behalf, you know - - -

24                    JUDGE RIVERA: But when did the eyewitness  
25           know they were going to testify?

1 MR. ROSS: The eyewitness didn't - - -

2 JUDGE RIVERA: Or the family to know?

3 MR. ROSS: He - - - he - - - he had no idea  
4 until that morning when he was - - -

5 JUDGE RIVERA: The family wouldn't have  
6 known in advance?

7 MR. ROSS: No, the family had no way of - -  
8 - because the eyewitness didn't tell the family. He  
9 didn't tell any of his inmates, didn't tell anybody  
10 of - - - of it. But even if you don't agree that  
11 there was clear and convincing evidence, it - - - it  
12 was harmless error. Just to go over a few things.

13 CHIEF JUDGE LIPPMAN: Fine.

14 MR. ROSS: First of all, there were three  
15 witnesses who - - - who said that the defendant fired  
16 the initial shot. You had Art - - - Artis Murphy  
17 said that the shots came from - - - from - - - from  
18 Bedford Avenue. The defendant was towards Bedford  
19 Avenue. The codefendant was toward Franklin Avenue.  
20 The first shots came from Bedford Avenue according to  
21 Murphy and according to Sanders.

22 And Herb Greenwood, who was not involved in  
23 this, he was looking down from the - - - the building  
24 next door. He heard shots coming from Bedford  
25 Avenue. He looked out the - - - the window and then

1 saw the codefendant who was right below him, not  
2 towards Bedford Avenue. Then he saw the codefendant  
3 starting to - - - to fire his shots. You had  
4 Markenzie - - - well, Francois, of course, he didn't  
5 actually see who was shooting first but - - - but  
6 furthermore - - -

7 CHIEF JUDGE LIPPMAN: Counsel, finish your  
8 thought. Your - - - your light is on.

9 MR. ROSS: Oh, okay. Also, the - - - you  
10 can just tell from the - - - just from the video.  
11 There was no question that - - - that the defendant  
12 was involved, because he was caught on videotape  
13 doing it. And the - - - the only issue at trial was  
14 - - - was justification. And Francois' testimony had  
15 no - - - no relevance as to the justification issue.  
16 For - - - on all those circumstances it was harmless  
17 error.

18 CHIEF JUDGE LIPPMAN: Thanks, counsel.  
19 Counsel, rebuttal.

20 MS. CORSI: Yes, Your Honors. Regarding -  
21 - -

22 JUDGE RIVERA: What about this point that  
23 Francois' testimony has nothing to do with the  
24 justification counts?

25 MS. CORSI: Well, it does, Your Honor,

1           because part of the assessment of justification is  
2           whether Mr. Dubarry was the initial aggressor and  
3           whether he could have retreated in complete safety.  
4           And the video makes plain that Mr. Dubarry left  
5           himself vulnerable on the walkway just, you know,  
6           hanging around smoking while the codefendant took a  
7           tactical position behind a pillar. Sanders says - -  
8           - and it's very clear from Mr. Sanders' testimony  
9           that he displayed his weapon first.

10                         Regardless of whether Mr. - - - Mr. Dubarry  
11           fired first or not, he displayed his weapon first.  
12           And that - - - that makes him the initial aggressor.  
13           And the People heavily rely on Mr. - - - on Mr.  
14           Dubarry - - - excuse me, on Mr. Francois' grand jury  
15           testimony to bolster Mr. Murphy's testimony that  
16           Dubarry - - - excuse me, that the codefendant had his  
17           hand in his pocket when Mr. - - - when Mr. Dubarry  
18           fired. I'd also - - - regarding - - - did I answer  
19           your question, Your Honor?

20                         JUDGE RIVERA: Yes, thank you.

21                         MS. CORSI: Thank you. Regarding the  
22           Geraci point, very tellingly Mr. Ross says the  
23           defendant probably just told somebody. The standard  
24           here is not probably. It's clear and convincing  
25           evidence, because we're talking about the right to

1           confront the witnesses against you. And Geraci goes  
2           on about how precious that right is and how only  
3           under very limited circumstances with evidence that's  
4           stronger than probably more so than not will we deny  
5           the person that right.

6                         Now, with respect to the - - - the timing  
7           of the Rosario, lots of people could have known that  
8           Mr. Francois was, at the very least, a potential  
9           witness. The police spoke to Mr. Francois before he  
10          went into federal detention. This was a big  
11          building. There were a lot of people outside. There  
12          were at least four or five floors in this building.  
13          A lot of people were interviewed by the police. Any  
14          person could - - - and - - - and actually Mr.  
15          Francois, what he did witness he witnessed because  
16          his cousin called him on the phone and said hey, go  
17          to the window. There's something going down.

18                        JUDGE RIVERA: Yeah, but he says there's  
19          something about the timing.

20                        MS. CORSI: Right.

21                        JUDGE RIVERA: That makes this not the kind  
22          of purely speculative inference that - - - that  
23          you're suggesting.

24                        MS. CORSI: Right, but Mr. Francois at the  
25          Geraci hearing, he plainly stated, and I'm referring

1 to the pages of the appendix 435 to 436, he did not  
2 know when these threats were made. Yes, he - - -  
3 there was testimony that his family visited weekly.  
4 His family. We don't know about these particular  
5 siblings. Family could be your great uncle from  
6 Nebraska came by. Who knows? That's the point. We  
7 don't know. There's a lot of guesswork here, and you  
8 can't deny somebody the right to confront the  
9 witnesses against them based on guesswork.

10 Mr. - - - only the court said that the  
11 threats were made yesterday, the court, not the  
12 witness. But the court - - - I think the court was  
13 mistaken because the - - - the - - - the - - - the  
14 threats were reported the day before the hearing.  
15 There was no testimony that the threats were actually  
16 made the day before the hearing. If I could - - -

17 JUDGE RIVERA: So - - - so you're saying  
18 it's possible the threats were made way in advance  
19 but the family somehow waited a period of time?

20 MS. CORSI: Absolutely. They may not have  
21 realized how significant it was. They could have  
22 conferred, they said you know what, he's got - - -  
23 he's got enough trouble on his mind being in federal  
24 detention. We don't have to worry about him - - -  
25 you know, anybody threatening him. Or - - - or they

1           could have been - - -

2                         JUDGE RIVERA:   Then why - - - why tell him  
3           that day?

4                         MS. CORSI:   We don't know.   That's the  
5           point.   We don't know.   There's simply not enough on  
6           the record to - - - to - - - to - - - we don't get a  
7           pile that leads up to clear and convincing evidence.  
8           This is too important of a right to deprive based on  
9           speculation that because Mr. Dubarry and the person  
10          who supposedly made these threats that were made, we  
11          don't know when, by we don't know who except that he  
12          was an Israelite.   It's simply not enough.

13                        If I could quickly address preservation on  
14          the mutual combat point.

15                        CHIEF JUDGE LIPPMAN:   Go - - - go ahead.

16                        MS. CORSI:   When - - - when defense counsel  
17          requested a justification charge on depraved  
18          indifference he specifically said there was no  
19          evidence of mutual combat.   He could not have been  
20          clearer, regardless of the context in which he made -  
21          - - he made that statement.   He drew the court's  
22          attention to the lack of evidence on mutual combat.  
23          And, again, if I may - - -

24                        CHIEF JUDGE LIPPMAN:   Finish off,  
25          counselor.   Go ahead.

1 MS. CORSI: Thank - - - thank you. During  
2 the postponed motion to dismiss, which was postponed  
3 with the People's acquiescence and the court's  
4 approval, the defense counsel twice stated that  
5 returning fire under the circumstances where he was  
6 followed out and confronted with a gun did not  
7 constitute reckless conduct. The reckless conduct  
8 here was engaging in mutual contact - - -

9 CHIEF JUDGE LIPPMAN: Okay, counsel.

10 MS. CORSI: - - - combat.

11 CHIEF JUDGE LIPPMAN: Thank you. Thank you  
12 both. Appreciate it.

13 MS. CORSI: Thank you.

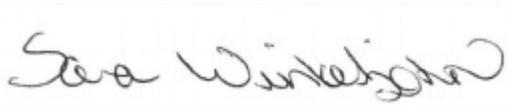
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I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Darius Dubarry, No. 32 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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