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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF GENTIL,

Respondent,

-against-

No. 158

MARGULIS,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
October 14, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
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:

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

GARNETT H. SULLIVAN, ESQ.  
LAW OFFICE OF GARNETT H. SULLIVAN  
Attorneys for Respondent  
1080 Grand Avenue  
Suite 200  
South Hempstead, NY 11550

Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 158, People v.  
2 Margulis.

3 Counsel, would you like any rebuttal time?

4 MS. TALCOTT: Two minutes, please.

5 CHIEF JUDGE LIPPMAN: Sure, go ahead,  
6 counsel.

7 MS. TALCOTT: Thank you. Good afternoon,  
8 may it please the court, my name is Nancy Talcott,  
9 and I'm here on behalf of the appellants in this  
10 matter, the Honorable Ira J. Margulis, and the Office  
11 of Richard A. Brown, District Attorney of Queens  
12 County.

13 The defendant in this case received the  
14 relief he requested prior to the discharge of the  
15 jury. The defendant request - - -

16 CHIEF JUDGE LIPPMAN: Counsel, are you  
17 saying that - - - that he consented to the retrial on  
18 II and III?

19 MS. TALCOTT: At the least. He consented  
20 to a retrial to all, actually, but II and III were  
21 the only counts - - -

22 CHIEF JUDGE LIPPMAN: Right.

23 MS. TALCOTT: - - - before the Appellate  
24 Division, so, yes. And it's clear that he consented.

25 CHIEF JUDGE LIPPMAN: How so? How did - -

1 - how did he do it? Explain.

2 MS. TALCOTT: He consented - - -

3 CHIEF JUDGE LIPPMAN: By doing what? Yeah.

4 MS. TALCOTT: One, he requested that a  
5 deliberating juror be dismissed; that's beyond  
6 dispute that this juror became unfit to serve.  
7 Defendant does not take issue with that.

8 CHIEF JUDGE LIPPMAN: Right.

9 MS. TALCOTT: Does not take issue with the  
10 fact that he refused to consent to an alternate. The  
11 only legal option at that point is to declare a  
12 mistrial. Now, at the same time - - -

13 JUDGE PIGOTT: Can't - - - can't you go  
14 with - - -

15 JUDGE STEIN: What about going with eleven  
16 jurors?

17 JUDGE PIGOTT: Yeah.

18 MS. TALCOTT: You could. He did not  
19 request that. And at - - -

20 JUDGE STEIN: Does he have to re - - -  
21 request it or does - - - does the court have to  
22 explore it?

23 MS. TALCOTT: There's - - - there's no  
24 catechism a court has to go through, there's no list  
25 a court has to proffer before a defendant, nor should

1           it be expected to consider that sua sponte where  
2           there's absolutely no indication from the defendant  
3           that such a rarely invoked remedy is wanted, and - -  
4           - and that's - - - that's one of the few alternatives  
5           that's solely up to the defendant, unlike declaring a  
6           mistrial, giving an Allen charge, where the court has  
7           some discretion.

8                     The defendant did not indicate that he  
9           wanted it; in fact, he indicated otherwise. By  
10          moving to have the juror declared unfit, he had to  
11          have known that was going to result in a mistrial by  
12          statute, 270.35.

13                    JUDGE PIGOTT: But - - - but you seem to be  
14          - - - in - - - in saying that, you seem to be  
15          suggesting that he - - - he shouldn't have agreed  
16          that the juror should be dismissed.

17                    MS. TALCOTT: Absolutely not, but coupled  
18          with that - - - and it was at the same time when the  
19          judge said okay, do I have a motion - - - he makes  
20          that motion at the same time. He makes a separate  
21          and distinct motion for the court to take a partial  
22          verdict only on Count I.

23                    JUDGE PIGOTT: Right.

24                    MS. TALCOTT: By failing to make a similar  
25          request regarding Counts II and III, that confirms he

1 was impliedly consenting to a mistrial and therefore  
2 a retrial on those specific counts.

3 His conduct after - - - not even after. Be  
4 - - - before the actual discord - - - discharge - - -  
5 they have these colloquies and it's decided they're  
6 going to discharge the juror. But before the juror  
7 is actually discharged, the Appendix A-26 and 27, the  
8 court says to him, since you're not going to consent,  
9 we're going to have to declare a mistrial and I'm  
10 going to have to retry the entire case. The  
11 defendant says nothing; he can then change his  
12 decision, all right, well, maybe I won't move to mis  
13 - - - to declare him unfit now. Maybe we should we  
14 have a further colloquy.

15 JUDGE PIGOTT: Well, that - - - that may -  
16 - - I forget now what the - - - I mean, if the juror  
17 can't serve - - - I mean, if - - - if because of  
18 what's going on in his or her life or whatever, says  
19 I just - - - you know, I - - - you're not getting a -  
20 - - a - - -

21 MS. TALCOTT: Right.

22 JUDGE PIGOTT: - - - a fair juror here,  
23 Judge, I - - - I - - - I have to leave, all of a  
24 sudden what burdens fall on the defendant and don't  
25 fall on the People?

1 MS. TALCOTT: Well, the burd - - - if  
2 defendant wasn't satisfied with that, he certainly  
3 could have asked for further colloquy. He made a  
4 strategic decision.

5 JUDGE PIGOTT: Well, no, no, I - - - I  
6 think you're missing my point. I - - - you're making  
7 it sound, at least to me, like this mean old  
8 defendant consented to this juror being discharged  
9 and that was wrong.

10 MS. TALCOTT: Absolutely not.

11 JUDGE PIGOTT: Okay, so we - - - we agree  
12 that a juror - - -

13 MS. TALCOTT: Right.

14 JUDGE PIGOTT: - - - under certain  
15 circumstances, perhaps this one, it's absolutely the  
16 right thing for - - - for that juror to be  
17 discharged. What then makes the defendant somehow do  
18 something you didn't like? I - - - I'm missing it.  
19 He can say - - -

20 MS. TALCOTT: Well, it said - - - it said  
21 he consented to the mistrial, at least with respects  
22 with to Count II and III, by engaging in that, which  
23 was entirely proper.

24 JUDGE PIGOTT: Did he say that? Did he say  
25 I want a mistrial with respect to II and III?

1 MS. TALCOTT: Well, legally, that was the  
2 only option. No, but he - - -

3 JUDGE PIGOTT: Is that a no?

4 MS. TALCOTT: Overtly, no.

5 JUDGE PIGOTT: Okay.

6 MS. TALCOTT: Impliedly, yes, by - - -

7 JUDGE PIGOTT: Did he say he wanted a  
8 partial verdict on the first one?

9 MS. TALCOTT: Yes. In fact - - -

10 JUDGE PIGOTT: Okay, so he said that.

11 MS. TALCOTT: He - - - yes.

12 JUDGE PIGOTT: Okay.

13 MS. TALCOTT: So by failing to so move with  
14 respect to Count II and III, or ask for any inquiry  
15 with respects to Counts II and III - - -

16 JUDGE PIGOTT: Did the People?

17 MS. TALCOTT: No, nor was it warranted.

18 There was absolutely no indication of a verdict on  
19 Counts II and III. In fact, the only indication was  
20 the opposite.

21 JUDGE PIGOTT: Well, I - - - I - - - maybe  
22 you're misunderstanding me or I'm misunderstanding  
23 you, but it seems like we have a juror that's leaving  
24 and all of a sudden, everything falls to the  
25 defendant; it's the defendant's fault if there's a

1           mistrial, it's the defendant's fault if there isn't a  
2           partial verdict, it's the defendant's fault on any  
3           prac - - - practice or procedure that occurs  
4           thereafter, and the People are standing right there.

5                    JUDGE ABDUS-SALAAM:   Could I - - - could I  
6           just sort of piggyback on that, and what - - - what  
7           part does failing to consent to substituting an  
8           alternate juror play in this?

9                    MS. TALCOTT:   By fail - - - well, by  
10          failing to consent to an alternate juror, coupled  
11          with asking for a partial verdict, it - - - it - - -  
12          it forces a mistrial and - - -

13                   JUDGE ABDUS-SALAAM:   And agree - - - and  
14          agreeing to let the - - -

15                   MS. TALCOTT:   Right.

16                   JUDGE ABDUS-SALAAM:   - - - juror who should  
17          have been discharged because he was - - -

18                   MS. TALCOTT:   Absolut - - -

19                   JUDGE ABDUS-SALAAM:   - - - unqualified to  
20          serve any longer?

21                   MS. TALCOTT:   Right, and because of that,  
22          because of the situation where finality hasn't been  
23          reached, which would be an absolute bar under double  
24          jeopardy, you have certain circumstances, like this  
25          one, where there's manifest necessity where a final

1 verdict has not been reached and a retrial is not  
2 necessarily barred by manifest - - -

3 JUDGE PIGOTT: Could the judge have granted  
4 a partial verdict?

5 MS. TALCOTT: Could he have? Yes, he  
6 didn't have to.

7 JUDGE PIGOTT: All right, well, the - - - I  
8 guess the reasoning by the defendant is, well, we had  
9 twelve jurors, Judge, and they - - - and they  
10 deliberated and they have a partial verdict, let's  
11 hear it, and the judge said no.

12 MS. TALCOTT: Right. And that, in and of  
13 itself, was proper, there was no declaration - - -

14 JUDGE PIGOTT: Well, you say it's proper,  
15 but what I - - - I'm getting back to what the  
16 defendant - - -

17 MS. TALCOTT: Okay.

18 JUDGE PIGOTT: I mean, he - - - he wants to  
19 say, you know, I - - - I'd like to know what the hell  
20 is going on in this first, you know, the Count I and  
21 then let's see what happens after that, and then if  
22 they came back and found him guilty, maybe he says  
23 then I'm - - - then I'm - - - it's over. If they  
24 find him not guilty, then he's got two, maybe there's  
25 a plea involved or there - - - there's something, but

1 the - - - the idea it seems to me that all of the - -  
2 - all of the onus is falling on the defendant at this  
3 point seems strange. I would think that the Peop - -  
4 - the People would have an opinion with respect to  
5 some of this.

6 MS. TALCOTT: Well, the People asked that  
7 there not be a verdict taken on Count I because there  
8 wasn't a declaration that there had in fact been a  
9 verdict. Counts II and III are almost pushed to the  
10 side. He's - - - he's basically consented to the  
11 mistrial and retrial with respect to those and kind  
12 of bifurcated them himself by requesting only a  
13 partial verdict as to Count I.

14 JUDGE RIVERA: Let's - - - let's go back to  
15 the alternatives. Is - - - is the only alternative  
16 proceeding with eleven jurors?

17 MS. TALCOTT: Absolutely not.

18 JUDGE RIVERA: What were the other  
19 alternatives?

20 MS. TALCOTT: Well, the - - - the court did  
21 consider having the juror continue. They - - - they  
22 discussed him having the phone, but okay, it - - - it  
23 sounded tragic, let's call him out there.

24 JUDGE RIVERA: Okay.

25 MS. TALCOTT: So implicit in that, he did

1 consider having him continue.

2 JUDGE RIVERA: Okay.

3 MS. TALCOTT: A number of arguably lengthy  
4 colloquies, which indicate - - -

5 JUDGE RIVERA: What about waiting until  
6 Monday, it's Friday?

7 MS. TALCOTT: Okay.

8 JUDGE RIVERA: Maybe the brother's okay?

9 MS. TALCOTT: Again, defendant waived any  
10 such claim when he sought the discharge of the juror  
11 that Friday morning and refused to substitute knowing  
12 the circumstances. He had heard - - -

13 JUDGE RIVERA: How - - - I'm sorry, how  
14 does that waive, why don't we wait and see if this  
15 same juror whose - - - who doesn't know yet if his  
16 brother is seriously injured, if he can proceed, he's  
17 waiting for the phone call?

18 MS. TALCOTT: And the defendant was aware  
19 of that.

20 JUDGE RIVERA: Right.

21 MS. TALCOTT: This came after the colloquy  
22 regarding - - -

23 JUDGE PIGOTT: Were the People aware of  
24 that?

25 MS. TALCOTT: Excuse me?

1 JUDGE PIGOTT: Were the People aware of  
2 that?

3 MS. TALCOTT: Yes, I think the People were  
4 okay with the mistrial.

5 JUDGE PIGOTT: Could the People - - -

6 JUDGE RIVERA: Yeah, but I'm - - -

7 JUDGE PIGOTT: Could the People have said  
8 what Judge Rivera's suggesting is why don't we give  
9 it a couple days, Judge, and pick up on Monday and  
10 see how everything goes?

11 MS. TALCOTT: They could have, but  
12 defendant moved to have the juror dismissed. And he  
13 doesn't take issue - - -

14 JUDGE FAHEY: So he has to - - -

15 MS. TALCOTT: - - - with that dismissal.

16 JUDGE RIVERA: Upon - - - upon - - - upon  
17 the court asking, right. So the question is - - -  
18 but the question is whether or not the court  
19 considered the alternatives. Does the record reflect  
20 that the court considered this as a possible  
21 alternative?

22 MS. TALCOTT: I think by asking him, you  
23 know, have you gotten in touch with the uncle, when  
24 might you hear from them - - - and again, this is  
25 where the discretion is important given the

1 circumstances of this case. This was some oil rig  
2 injury in Spain. He's trying to contact relatives in  
3 some remote areas in Brazil. Given the logistics and  
4 the fact that - - -

5 JUDGE RIVERA: I guess it's Friday, what's  
6 the difference between declaring the mistrial Friday  
7 and declaring it Monday and maybe by Monday you know?

8 MS. TALCOTT: Maybe you do, and maybe you  
9 put off - - -

10 JUDGE RIVERA: Like when - - - when - - -  
11 when the standard is very high, "manifest necessity."

12 MS. TALCOTT: Right.

13 CHIEF JUDGE LIPPMAN: Do we even get to  
14 that issue? Do we really have to get into whether he  
15 considered the alternatives?

16 MS. TALCOTT: No, because he waived - - -

17 CHIEF JUDGE LIPPMAN: I mean, do we reach  
18 that? If you - - - if you - - - if there's a waiver,  
19 that issue is academic, right?

20 MS. TALCOTT: Yes, it is.

21 CHIEF JUDGE LIPPMAN: Okay, let's go to  
22 your adversary and then - - -

23 MS. TALCOTT: Okay.

24 CHIEF JUDGE LIPPMAN: - - - you'll have  
25 your rebuttal.

1 Counselor.

2 MR. SULLIVAN: I'm Garnett Sullivan, I  
3 represent Estevan Gentil, the petitioner-respondent.

4 CHIEF JUDGE LIPPMAN: Coun - - - counsel,  
5 talk about the waiver, because we - - - we don't even  
6 reach the other issue if - - - if your client waived.

7 MR. SULLIVAN: There was no waiver.

8 CHIEF JUDGE LIPPMAN: Why not?

9 MR. SULLIVAN: There was no waiver. At no  
10 point was a mistrial requested, it was never - - -

11 CHIEF JUDGE LIPPMAN: You - - - you don't  
12 think there was an implied waiver here?

13 MR. SULLIVAN: No, there was no finding - -  
14 - first of all, an implied waiver is a - - - is a  
15 factual question.

16 CHIEF JUDGE LIPPMAN: But if you ask for a  
17 partial verdict on I, what about II and III?

18 MR. SULLIVAN: Well, a partial verdict was  
19 not - - - the judge did not permit that alternative.  
20 That was not - - - that alternative was not granted.  
21 It is - - - it is for the court to exp - - - the  
22 trial court to explore all the possible alternatives.  
23 It's not a burden on the defendant. As I understand  
24 the case law, the court has an obligation to explore  
25 all reasonable - - -

1 CHIEF JUDGE LIPPMAN: What about - - -

2 MR. SULLIVAN: All - - -

3 CHIEF JUDGE LIPPMAN: What about Mc - - -  
4 like McFadden and those cases? I mean, isn't this  
5 like an - - - an implied waiver?

6 MR. SULLIVAN: I don't believe there has  
7 been - - - there was a - - - in McFadden, I believe  
8 there was a factual finding - - -

9 CHIEF JUDGE LIPPMAN: Yeah.

10 MR. SULLIVAN: - - - of an implied waiver  
11 at the court below. Neither the Appellate Division  
12 nor the court below - - - and the court rendered a  
13 decision, the trial court, and at no point did the  
14 court indicate or even imply that there was any  
15 waiver - - -

16 CHIEF JUDGE LIPPMAN: What - - -

17 MR. SULLIVAN: - - - by the defendant.

18 CHIEF JUDGE LIPPMAN: - - - could you have  
19 been saying about II and III?

20 MR. SULLIVAN: Pardon me?

21 CHIEF JUDGE LIPPMAN: What could you have  
22 been saying about II and III?

23 MR. SULLIVAN: By asking for a partial  
24 verdict?

25 CHIEF JUDGE LIPPMAN: Yeah.

1 CHIEF JUDGE LIPPMAN: What - - - what - - -  
2 what did you think was going to happen with II and  
3 III?

4 MR. SULLIVAN: All I know at that point is  
5 that the juror was being discharged. There was an  
6 indication that they had arrived at a verdict on one  
7 count, and all I said and requested was before you  
8 discharge this juror, before this juror is  
9 discharged, let's hear what that verdict was.

10 JUDGE PIGOTT: Because at that point you've  
11 got a twelve-member jury that's reached a verdict on  
12 one count?

13 MR. SULLIVAN: That is correct.

14 JUDGE PIGOTT: And it's conceivable - - -  
15 not always true, that the - - - the juror that's  
16 about to leave is probably the best juror the  
17 defendant had or thought he or she had in a given  
18 case and didn't want to lose that juror without at  
19 least the partial verdict, and - - - and your point,  
20 I guess, is that you ought to at least be entitled to  
21 that and if you're not entitled to that, the judge  
22 ought to fashion some form of - - - of relief.

23 MR. SULLIVAN: Right, it's at that point my  
24 request was for a partial verdict. At that point, it  
25 is for the court, before it declares a mistrial, to

1 determine what are the reasonable alternatives, exp -  
2 - - explore them all. The only alternative - - -

3 JUDGE STEIN: Well, Count I has been  
4 dismissed. How - - - how - - - how does that affect  
5 whether there's a retrial on - - - on Counts II and  
6 III?

7 MR. SULLIVAN: Well, I followed the  
8 procedure of Robles which is, the indictment is  
9 dismissed because the verdict was not taken. We  
10 don't know what that verdict would have been.

11 JUDGE STEIN: We don't know what the  
12 verdict would have been, assuming - - - and - - - and  
13 we don't know for sure that there was a verdict on  
14 Count I; the - - - the jury never said we have a  
15 verdict on Count I.

16 MR. SULLIVAN: Absolutely.

17 JUDGE STEIN: But assuming that there was,  
18 clearly you can't be retried on that count. How does  
19 that affect Counts II and III?

20 MR. SULLIVAN: Well, again, because the  
21 jury never indicated that they had a verdict, and as  
22 in Robles, where in Robles, actually, they found a  
23 note indicating the jury - - - sorry, the - - - the -  
24 - - the jury verdict sheet had an indication of the  
25 act - - - actual count that they - - - they - - - the

1 jury had arrived on, that they had acquitted on a  
2 particular count. And the correct remedy as the  
3 court - - - and the - - - the Robles has been  
4 accepted by this court, or at least has been cited by  
5 this court and other courts in other states,  
6 including Connecticut in State v. Tate, where the  
7 entire indictment was dismissed because of the danger  
8 of double jeopardy. The court cannot go back and try  
9 to surmise what he the thought the jury - - -

10 JUDGE STEIN: But - - - but - - -

11 MR. SULLIVAN: - - - was thinking - - -

12 JUDGE STEIN: But here, the - - - we know  
13 the - - - the jury said they couldn't reach a verdict  
14 on II and III. It's not surmising; they told - - -  
15 they told the court that.

16 MR. SULLIVAN: Again, I would say it's no  
17 different than in Robles when the court indicated  
18 that a decision had been made on one count. They  
19 determined - - - they knew which count it was. It  
20 was on the verdict sheet. But again, the only way to  
21 take a verdict is in accordance with the CPL 310  
22 procedures. And in essence, what the court is doing  
23 is substituting itself and - - - and rendering a  
24 verdict as to what it believed the jury had  
25 concluded, and I don't think that that's a proper

1 approach to - - - to render in a verdict. It - - -  
2 it has to be taken in open court - - -

3 JUDGE STEIN: So they - - - but here, I  
4 thought the court said regardless of whether it was  
5 acquittal or - - - or - - - or a conviction, I should  
6 have granted you the partial verdict, so I'm giving  
7 you the benefit of the doubt. I don't think the  
8 court said I think - - - I know what the jury was  
9 going to do. I don't think there was any indication  
10 of that.

11 MR. SULLIVAN: Well, we don't know what  
12 happened from the time of - - - the note was sent out  
13 indicating that we can't agree on two counts, until  
14 the time that a mistrial was declared.

15 JUDGE STEIN: How - - - how long of a time  
16 was that?

17 MR. SULLIVAN: Well, it was into another  
18 day. There was a charge, an Allen charge was given,  
19 they deliberated for some period of time, and then  
20 the following day they started deliberating again;  
21 then the note came out about the - - - the gentleman  
22 who had the problem.

23 CHIEF JUDGE LIPPMAN: What did you do when  
24 the judge started to set a date for retrial?

25 MR. SULLIVAN: Well, at - - - at that

1 point, I had requested the partial verdict; that's  
2 what I had done.

3 CHIEF JUDGE LIPPMAN: Don't - - - don't you  
4 have to say anything when he starts to set a date for  
5 mistrial - - - for - - - for retrial?

6 MR. SULLIVAN: I don't know that I had an  
7 obligation at that time. As I understand it - - -

8 CHIEF JUDGE LIPPMAN: But what - - - what  
9 about - - - what about the Marte case?

10 MR. SULLIVAN: Pardon me?

11 CHIEF JUDGE LIPPMAN: Marte case?

12 MR. SULLIVAN: In that case - - -

13 CHIEF JUDGE LIPPMAN: Isn't that where the  
14 - - - where the lawyer just stood silent when the  
15 judge started to set the date for mistrial - - -

16 MR. SULLIVAN: Well, no, the - - - he was  
17 much more silent - - -

18 CHIEF JUDGE LIPPMAN: This retrial, I mean?

19 MR. SULLIVAN: He was much more silent than  
20 I was, Judge. I specif - - - I asked for a specific  
21 remedy which was, Judge, I will agree to the juror  
22 being disc - - - juror being discharged, but a  
23 partial verdict before you do that. That was the  
24 remedy that I sought in accordance with Robles.

25 CHIEF JUDGE LIPPMAN: But what about II and

1 III?

2 MR. SULLIVAN: Well, I - - - we never  
3 addressed II and III. My request was for a re - - -  
4 a decision to be obtained from the jury with respect  
5 to whichever count they had decided on. And again,  
6 we don't know what really happened between the time  
7 the note was sent out and - - -

8 JUDGE RIVERA: But you only asked about  
9 Count I?

10 MR. SULLIVAN: Well - - -

11 JUDGE RIVERA: Even though you're - - -  
12 you're saying that there - - - that there was a  
13 certain lapse of time between when they first said we  
14 - - - we can't reach anything on Count II and III and  
15 - - - and when the note comes out about the juror  
16 who's under some serious stress and can't continue.

17 MR. SULLIVAN: I - - - I - - -

18 JUDGE RIVERA: Did you - - - did you ask  
19 about Counts II and III?

20 MR. SULLIVAN: I think what I - - -

21 JUDGE RIVERA: I thought you only asked for  
22 the partial verdict on Count I.

23 MR. SULLIVAN: I think what I said, Judge,  
24 "In view of the note sent out by the jury" before - -  
25 - re - - - "regarding their inability to decide on

1 two counts, which means they decided on one count, I  
2 believe the court should accept" a part - - - "a  
3 verdict as to the count upon which a verdict has been  
4 - - - may have been reached." So I didn't specify -  
5 - -

6 JUDGE RIVERA: You must have meant Count I,  
7 though.

8 MR. SULLIVAN: Well, it's - - - it's an  
9 assumption, it's an assumption. I don't know that we  
10 know that.

11 JUDGE FAHEY: Isn't that because in the  
12 note it said we had - - - we weren't able to reach on  
13 II and III, and they didn't specify whether or not  
14 they had reached on I or not, but because they hadn't  
15 reached on II or III, you're saying you inferred it?

16 MR. SULLIVAN: It's an inference. It's an  
17 inference. It's a reasonable inference, but we don't  
18 really know - - -

19 JUDGE ABDUS-SALAAM: What could have  
20 happened - - -

21 MR. SULLIVAN: - - - because the judge  
22 never took that verdict.

23 JUDGE FAHEY: Okay.

24 JUDGE ABDUS-SALAAM: - - - if - - - if the  
25 judge had taken the verdict, depending upon what it

1 was, I guess, whether it was guilty or not guilty,  
2 what would have happened with II and III?

3 MR. SULLIVAN: If the judge had taken a - -  
4 - a partial verdict, I assume there would be a  
5 retrial on the other two counts, I - - - I don't  
6 know. There could have been a plea bargain, there -  
7 - - many things could have happened.

8 JUDGE ABDUS-SALAAM: Right, I understand,  
9 so when - - - when the judge said, we're going to  
10 proceed to a retrial, I think what you agreed to was  
11 another date, September 9th, I think both you and the  
12 prosecutor. You're the trial counsel, right? I - -  
13 - I think the - - - the record says that September  
14 9th would be the date would to retry the case.

15 MR. SULLIVAN: At that point, the judge had  
16 already made his decision, and that was on his own  
17 motion, it was not at my request. The judge had made  
18 a decision at that point. He said that he was - - -

19 JUDGE STEIN: There are lots of times when  
20 judges make decisions, and you have an obligation to  
21 stand up and say I object.

22 MR. SULLIVAN: Well - - -

23 JUDGE STEIN: Or I - - - I request  
24 something else.

25 MR. SULLIVAN: I believe that when I

1 requested the taking of a partial verdict, I believe  
2 that I did what I - - - what was appropriate, because  
3 that was the issue here.

4 JUDGE STEIN: Is that the - - -

5 MR. SULLIVAN: It was a partial verdict;  
6 that's the only reason we're here.

7 JUDGE STEIN: But did you do anything to  
8 address Counts II and III?

9 MR. SULLIVAN: No, we never - - - I never  
10 even referred to any particular count when I asked  
11 the motion - - - when I made the motion for - - -

12 JUDGE FAHEY: Doesn't the CPL say that if  
13 you take a partial verdict and then you get the  
14 partial verdict, it - - - it's 310-something, that  
15 you can go forward then and re - - - and - - - and  
16 continuing deliberating and try the other cases? You  
17 can do that, right?

18 MR. SULLIVAN: That's correct, and the  
19 court - - -

20 JUDGE FAHEY: So - - - so let me just  
21 finish this. So my thought - - - did anybody suggest  
22 that here? Was there ever anything - - -

23 MR. SULLIVAN: No. No, it was not  
24 suggested, and again, that's where the issue comes in  
25 of the court having this obligation to inquire into

1 all reasonable alternatives.

2 JUDGE FAHEY: So - - - so the only  
3 reasonable alternative at that point would have been  
4 for the court to go forward with an eleven-member  
5 jury, assuming Juror number 5, whatever their number  
6 was, was properly excused, and that you would have  
7 had to consent to, then, to the eleven-member jury,  
8 which you refused to do, right?

9 MR. SULLIVAN: No, no.

10 JUDGE FAHEY: Okay.

11 MR. SULLIVAN: That issue never came up.

12 The only request was - - -

13 JUDGE FAHEY: So, well, what my - - -  
14 here's my point. Whose affirmative obligation - - -  
15 because this is the only way it would have been  
16 resolved - - - whose affirmative obligation would it  
17 have been to say, we - - - we will try it with eleven  
18 jurors? Is it the court's or is it the defendant?  
19 Because in the case that sets the standard for the  
20 eleven-member jury, I thought the defendant - - -  
21 Gajadhar, I think, is the name of the case - - -  
22 affirmatively requested to go forward with the  
23 eleven-member jury. So whose obligation is it?

24 MR. SULLIVAN: The obligation is on the  
25 court, as I understand the - - - the precedent, to

1 explore all reasonable alternatives, Mr. - - -  
2 counsel for the defense, would you consent with your  
3 client - - - just like he asked - - -

4 JUDGE FAHEY: Right.

5 MR. SULLIVAN: - - - would you consent to  
6 substitution of an alternative juror?

7 JUDGE FAHEY: You see what I'm saying,  
8 though, the only alternative left at that point, once  
9 - - - let's say you took a partial verdict - - -  
10 would have been the eleven-member jury to go forward.  
11 And so now the question is, in the only case law that  
12 we have, the defense attorney requests to go forward  
13 with the eleven-member jury. I'm not sure that that  
14 established a precedent that you're obliged to, but I  
15 want to know what your position is on it.

16 MR. SULLIVAN: Right, I don't - - - I - - -  
17 again, I believe the obligation is on the court,  
18 before you do something as - - - as - - - as severe  
19 as a mistrial, to explore all reasonable  
20 alternatives.

21 JUDGE ABDUS-SALAAM: And coun - - - and  
22 counsel, you don't think that the court, had it asked  
23 whether you would go forward - - - you had already  
24 consented to letting the juror go, and you were  
25 refusing to consent to substituting an alternate. So

1           that only leaves the eleven-member jury if you want  
2           to go forward with the jury that you selected  
3           already. And - - - and so your - - - your position  
4           is that the court then had to ask, would you go  
5           forward with an eleven-member jury, or you don't have  
6           to say, well, we'd like to go forward with an eleven-  
7           member jury?

8                         MR. SULLIVAN: I don't believe that's the  
9           defendant's obligation. The request was made with  
10          respect to the alternate - - - substituting the  
11          alternate juror; my client would not consent to that  
12          for whatever the reason might be about that  
13          particular alternate juror.

14                        JUDGE ABDUS-SALAAM: And so your position  
15          is, because the court didn't ask to - - - whether you  
16          wanted to proceed with an ele - - - eleven-member  
17          jury, it did not explore all the available or  
18          reasonable alternatives?

19                        MR. SULLIVAN: That is correct, along with  
20          something that was mentioned earlier which would have  
21          been to adjourn until Monday - - -

22                        CHIEF JUDGE LIPPMAN: Okay, counsel.

23                        JUDGE ABDUS-SALAAM: Did you - - -

24                        CHIEF JUDGE LIPPMAN: I'm sorry.

25                        JUDGE ABDUS-SALAAM: - - - bring that up in

1 the - - -

2 MR. SULLIVAN: No, I didn't bring that up.  
3 But again, I don't believe the - - - the burden is on  
4 - - -

5 CHIEF JUDGE LIPPMAN: Okay, counsel. Okay,  
6 thank you.

7 Counsel, rebuttal.

8 MS. TALCOTT: Not only did defendant not  
9 ask the trial court for an adjournment or to proceed  
10 with eleven jurors, he never raised it in his motion  
11 to dismiss.

12 JUDGE PIGOTT: Why didn't you - - -

13 MS. TALCOTT: He never raised it - - -

14 JUDGE PIGOTT: I - - I - I - I just - - -  
15 you know, I - - - this happens, you're not alone, you  
16 know, all of a sudden the People stand silent. They  
17 don't say, why don't we wait until Monday, Judge;  
18 they don't say, why don't we go an eleven-member  
19 jury, Judge; they don't say, why don't we go non-  
20 jury, Judge. They - - - they - - - they apparently  
21 do nothing and then the - - - the defendant and - - -  
22 and defense counsel may be - - - I mean, they may be  
23 involved in a whole lot of stuff going on as to, you  
24 know, what's going on with the jury. I mean, there's  
25 a lot that goes on in a judg - - - in a - - - in an

1 attorney's mind. And I think counsel's point is, you  
2 got a judge sitting there who ought to be doing what  
3 you're now saying the defendant had to do.

4 MS. TALCOTT: The judge did engage in  
5 considering alternatives by this extensive colloquy.  
6 The defendant, now for the first time before this  
7 court, which is not appropriate, brings up this  
8 adjournment and eleven jurors. He didn't even raise  
9 that in the motion to dismiss.

10 JUDGE PIGOTT: I think - - - I think we  
11 brought that up and - - - and maybe no - - -

12 MS. TALCOTT: Well - - -

13 JUDGE PIGOTT: - - - it didn't - - - it  
14 didn't occur to anyone. But I - - - but the point I  
15 think we're trying to make is, you know - - - well,  
16 at least that I am, is that I don't know why the  
17 People aren't involved in this discussion.

18 MS. TALCOTT: The People were involved.  
19 The People actually did not want a partial verdict,  
20 everybody agreed the juror was unfit, so the People -  
21 - -

22 JUDGE RIVERA: So - - - so what's your  
23 strongest - - -

24 MS. TALCOTT: - - - impliedly consented to  
25 a mistrial on all counts, I guess.

1                   JUDGE RIVERA: What - - - what's your  
2 strongest case, or maybe you have more than one, for  
3 why it's his burden to - - - to have a laundry list  
4 to present to the judge of - - - of how we can  
5 resolve this situation - - -

6                   MS. TALCOTT: Well - - -

7                   JUDGE RIVERA: - - - so that we can avoid  
8 the mistrial, potentially.

9                   MS. TALCOTT: Gajadhar just makes clear  
10 that eleven members is an option. It doesn't impose  
11 on the court any duty to raise that option or any  
12 other. In fact, what Gajadhar stands for is that - -  
13 -

14                  JUDGE RIVERA: Well, in that case there was  
15 no opportunity to have that discussion - - -

16                  MS. TALCOTT: Right - - -

17                  JUDGE RIVERA: - - - right, because the - -  
18 - didn't the defendant seek that?

19                  MS. TALCOTT: Yes, and - - -

20                  JUDGE RIVERA: So there's no really  
21 opportunity in that case to determine who carries  
22 that burden. Do you have another case?

23                  MS. TALCOTT: No, but I would like to say,  
24 if - - - if I might, what Gajadhar also says, when  
25 the defendant makes a choice, be it eleven jurors or

1 here, a mistrial on Counts II and III, there are  
2 consequences. And a defendant cannot then back out  
3 of a choice he - - -

4 JUDGE RIVERA: Right, but the question is -  
5 - -

6 MS. TALCOTT: - - - strategically made.

7 JUDGE RIVERA: - - - the question is before  
8 you get to the - - - the - - - the mistrial, is there  
9 something else that the court should have done and  
10 should have explored?

11 MS. TALCOTT: The court explored numerous  
12 options. Should it have sua sponte raised eleven?  
13 No, just like there's no burden on the court to say,  
14 you want a bench trial before we proceed? You know,  
15 there are different alternatives - - -

16 JUDGE RIVERA: And again, the reason, as -  
17 - - as I said, what's - - - what's the legal basis  
18 for that argument that you're making, that  
19 proposition that it's not on the court, it's on the  
20 defendant?

21 MS. TALCOTT: It's exclusively in the  
22 control of the defendant, so it's incumbent on the  
23 defendant to indicate in some way that it might be a  
24 possibility.

25 JUDGE RIVERA: Because the defendant is the

1           one who knows what - - - what he or she is willing to  
2           accept. Is that what you mean?

3                   MS. TALCOTT: Exactly. It's an alternative  
4           rarely invoked by the defendants, and it's not  
5           pursued with any regularity, so a court wouldn't be  
6           on notice - - -

7                   CHIEF JUDGE LIPPMAN: Okay, counsel.

8                   MS. TALCOTT: - - - that it would have to  
9           raise it sua sponte.

10                   CHIEF JUDGE LIPPMAN: Thanks, got you.  
11           Thank you both.

12                   MS. TALCOTT: So accordingly, the Appellate  
13           Division decision granting him additional windfall  
14           should be reversed.

15                   CHIEF JUDGE LIPPMAN: Thanks, appreciate  
16           it, both of you.

17                           (Court is adjourned)

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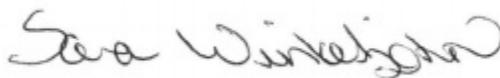
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Gentil v. Margulis, No. 158 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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