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October 4, 2013

New York Court of Appeals
20 Eagle Street
Albany, New York 12207-0365

Re: People v. Dwight DeLee
No. APL 2013-00229
Rule 500.11 Letter Brief of *Amici Curiae*

To this Honorable Court:

Lambda Legal Defense and Education Fund, Inc., the Center on the Administration of Criminal Law at New York University's School of Law,¹ Transgender Legal Defense and Education Fund, Inc., the Anti-Defamation League, the Lesbian, Gay, Bisexual, and Transgender Community Center in New York City, the Transgender Alliance, the New York City Gay and Lesbian Anti-Violence Project, Inc., and the Empire State Pride Agenda, as *amici curiae*,² respectfully submit this letter brief in support of the People's appeal to this Court, which seeks to reinstate the jury's verdict and the defendant's conviction of manslaughter in the first degree as a hate crime.

¹ The Center on the Administration of Criminal Law is affiliated with New York University's School of Law, but does not purport to present the school's institutional views, if any.

² *Amici's* Statements of Interest are attached as Exhibit A.

The question for this Court is whether it was conceivable for the jury, under the instructions given to it by the trial court, to have concluded that when DeLee committed a hate crime by killing Lateisha Green, he did not also (and simultaneously) commit a “non-hate” crime. Under this Court’s precedents and under the charges as instructed to the jury, such a conclusion was not only conceivable, but logical. Respectfully, this Court should correct the gross miscarriage of justice that occurred when the jury’s verdict was set aside as inconsistent, and reverse the Appellate Division majority’s conclusion to the contrary. The decision below erred by evaluating the elements of the crimes as enumerated by statute, rather than as instructed to the jury. The majority’s opinion is not logical – if manslaughter is not a lesser-included offense of hate-crime manslaughter, then how can it be that a conviction of the latter must be accompanied by a conviction of the former? Are those accused of hate crimes, unlike those accused of other crimes, entitled to acquittal unless they are convicted twice? That cannot be.

Moreover, for the legislature’s expressed goal of ensuring that hate crimes are addressed responsibly to be achieved, our State’s trial courts and criminal practitioners need guidance regarding the proper method of instructing a jury for a hate crimes offense (or offenses) in a multi-count indictment.

Finally, it is well-documented that hate crimes cause widespread harm to people targeted because of bias, to others who share the targeted characteristic, and to our entire community. It is of critical importance, therefore, that our criminal justice system – in this case, and in all hate crime prosecutions – fulfill the legislature’s purpose by holding people who commit hate crimes accountable.

Statement of Facts

Amici rely on the facts as set forth in Appellant’s prior submissions, which explain that the jury convicted the defendant of manslaughter in the first degree as a hate crime based on evidence that he (1) aimed a rifle into a car occupied by three people he perceived as gay, (2) said “We don’t play that faggot shit” and “Get you faggots, get out of here ... get the f*** out of here,” and (3) pulled the trigger, shooting the bullet into Lateisha Green’s chest that killed her (Trial Transcript [T.] at 551, 573).³

³ The victim, Lateisha Green, is referred to in court records as Moses Cannon. Ms. Green was a transgender woman and referred to herself using female pronouns. *Amici* will therefore refer to the victim as Lateisha Green and use female pronouns when referring to her. Moreover, under New York law, a person commits a hate crime when he or she commits a specified offense and “intentionally selects the person against whom the offense is committed ... in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, *regardless of whether the belief or perception is correct.*” N.Y. Penal Law § 485.05 (2013) (emphasis added). The accuracy of Dwight DeLee’s perception of Ms. Green’s gender and sexual orientation is therefore immaterial under § 485.05. When a Sikh is assaulted because he or she is wrongly perceived to be Muslim, it is a hate crime. When a transgender woman is killed because she is perceived to be a gay man, that, too, is a hate crime.

Argument

I. The Jury's Verdict Was Not Inconsistent

As this Court has explained, in evaluating a verdict on a multi count indictment for inconsistency, courts are to refrain from a wholesale review of the trial evidence and instead confine the examination to the specific jury charge given in that particular case, and determine whether, under those instructions, the verdict is a “theoretical impossibility.” *People v. Muhammad*, 17 N.Y.3d 532, 540 (2011), citing *People v. Tucker*, 55 N.Y.2d 1 (1981). Based on the instructions on the two homicide counts that were actually given to the jury by the trial court below, it was possible for the jury to have understood the hate-crime and non-hate-crime homicide counts to be alternatives, rather than the latter being an “otherwise included” charge of the former. Accordingly, the verdict in this case was, in fact, *not* inconsistent and should be reinstated.

As this Court painstakingly explained in *Muhammad*,

a verdict is repugnant only if it is legally impossible *under all conceivable circumstances* for the jury to have convicted the defendant on one count but not the other. If there is a possible theory under which a split verdict could be legally permissible, it cannot be repugnant, regardless of whether that theory has evidentiary support in a particular case. In this context, the apparently illogical nature of the verdict – as opposed to its impossibility – is viewed as a mistake, a compromise or the exercise of mercy by the jury, none of which undermine a verdict as a matter of law.

17 N.Y.3d at 540-41 (emphasis added) (citations omitted).

Under *Muhammad* and *Tucker*, courts conduct a comparison between or among the elements as instructed on the purportedly inconsistent counts, *see* 17 N.Y.3d at 540, and when doing so, courts have also considered the jury's questions about the charge, and the court's supplemental instructions in response to those questions. *See, e.g., People v. Loughlin*, 76 N.Y.2d 804, 805 (1990). Ultimately, the reviewing court is to decide whether, after reviewing the jury instructions as given in their totality – even accounting for the impact of any mistakes or omissions in the trial court's instructions – the jury *must* have reached an inherently self-contradictory verdict. *See, e.g.,* 17 N.Y.3d at 532.

Because the nature of this review is so specific, this Court's analysis in *Muhammad* is instructive. There, the jury acquitted the defendant⁴ of attempted murder and second-degree weapon possession, but convicted him of first-degree assault, which had been charged on the theory that the defendant caused serious physical injury to the victim by means of a deadly weapon. *Muhammad* at 536. Defendant objected to the verdict, arguing that the weapon possession acquittal was inconsistent with the first degree assault conviction as charged. *Id.* The trial court theorized that the jury could have concluded that the defendant possessed the

⁴ This Court's opinion in *Muhammad* actually resolved the appeals of two cases, defendant Muhammad's case and another case, *People v. Hill*. The facts in *Hill* are essentially identical to the facts in *Muhammad*. Hill was charged with assaulting his victim with a hammer. *Id.* at 537. The jury acquitted Hill of the third-degree weapons charge (possessing the hammer) but convicted him of second-degree assault, which required proof that he assaulted the victim with the hammer. *Id.* The purported inconsistencies and the jury instructions presented the same issues in both cases, and this Court reconciled the verdicts in both cases.

gun without criminal intent earlier in the evening, prior to the shooting, and upheld the verdict. *Id.* at 537.

At first blush, there might appear to be inconsistency between those verdicts. How, for example, can someone intentionally injure a person with the very weapon that a jury has found the accused did not possess with the intent to use unlawfully? Based solely on that analysis of the elements and the evidence, the acquittal of the weapons charge might seem to negate the weapons element embedded in the assault charge. But this Court reconciled the verdicts, based on its review of the instructions as actually given, viewed from a theoretical perspective, without regard to the evidence presented at trial. *Id.* at 540. This Court found that as the jury was charged, it was possible for the jury to acquit the defendants of a weapon possession and nevertheless convict on a weapon-theory assault: the former contains an essential element (possession) that the latter does not; and the jury did not receive a supplemental instruction that would have (properly) informed it that the defendant could be convicted of weapon possession if he had formed an intent to use the weapon illegally at *any* time the weapon was in the defendant's control – including the instant the weapon was used against the victim. *Id.* at 542. This Court recognized that had it been given that more detailed charge, the jury might properly have convicted on both the weapons and assault charges, but explained that “because the jurors were not informed about this principle, it is entirely

conceivable that they misunderstood the timing fact of the *mens rea* requirement and separated the charges into two different temporal periods” – and, based on that hypothesis, the verdict was reconciled. *Id.* at 543.

In this appeal, this Court is asked to apply *Tucker* and *Muhammad* to a somewhat unusually structured statute in our penal code – the hate crimes statute. In the context of this case, the essential questions for the Court reviewing a claimed inconsistent verdict under *Tucker* and *Muhammad* are:

1. In light of this particular jury charge, in the unique context of the application of a hate crime enhancement, must the jury have reached an inconsistent verdict?
2. Is there is a possible theory or conceivable circumstances (regardless of evidentiary proof) under which the hate crime homicide conviction, and the non-hate crime homicide conviction, could be legally consistent?

With a thorough examination of the full charge, including the supplemental charges, and questions, the jury’s decision can and should be reconciled. It is apparent, and more than conceivable given the content of the instructions, that the jury members believed they had to – or, at least, were permitted to – make an “either/or” decision about whether DeLee killed Green with a bias motive, or whether he killed her without such a motive. The jury decided clearly that this was

a hate crime, and that DeLee killed Green *because* he perceived her as gay, and it rejected other theoretical motives other than bias for that homicide.

Under *Tucker* and *Muhammad*, when attempting to reconcile disparate verdicts it is inadequate to extract excerpts from the court's instruction because doing so fails to convey the full body of information that was (and, in some respects, was not) imparted to the jury. The instructions must be read as a whole, including the jurors' questions and the court's responses and supplemental instructions. When read together, those instructions make apparent that, as in *Tucker* (where the court's failure to include an element had the effect of essentially reconciling what would have been an inconsistent verdict), *see Tucker* at 9, and as in *Muhammad* (where the court's failure to explain the continuing nature of the possessory crime led to confusion and mistake but a conceivable verdict), *see Muhammad* at 541-42, the verdict can be reconciled. The court's instructions included portions conveying that there were two decision-tracks: (1) murder and the lesser included offenses *with* the bias element and (2) murder and the lesser include offenses *without* it. Given the court's instructions, the jury may have chosen one track, and avoided the other, rather than vote in a manner that it perceived as redundant (because it had already convicted DeLee of homicide) or inconsistent (because it had convicted DeLee of hate-crime-homicide, and he therefore could not have committed homicide without a hate-crime motive). In the

final analysis, it is clear that the jury's verdict as to manslaughter in the first degree as hate crime can be reconciled – even if illogical under the elements when evaluated independently of the trial court's instructions – and that the two verdicts may well have been the product of their compromise or even their exercise of mercy as to the non-hate crime counts, all of which this Court has explained are permissible, and none of which should undermine the legality of their guilty verdict. *Muhammad* at 540; *Tucker* at 7.

As *amici* address in point II below, there is a paucity of guidance to trial courts regarding the treatment of the additional elements associated with a hate crime offense or offenses in a multi-count indictment. In some respects, the underlying specified offense functions as a lesser included offense relative to the hate elements, but in other respects it does not. Indeed, in the Fourth Department's opinion below, not only did the majority and minority disagree on how to treat it, but the majority evaluated the verdicts by treating the two counts as something heretofore unidentified in the law: an “included but not lesser offense.” First, the majority explains that manslaughter is wholly encompassed within hate-crime manslaughter – which is quite similar to a lesser included offense. *See People v. DeLee*, 108 A.D.3d 1145, 1147-48 (4th Dep't 2013). Yet the majority also holds that the jury was properly instructed to consider both counts because non-hate manslaughter is *not* a “lesser included” offense of hate-crime manslaughter. *See id.*

at 1147-48. The two conclusions are in tension, if not direct conflict. Nor is there any clear guidance in the existing criminal jury instructions to assist trial courts, attorneys, and juries as to how to treat the specified offenses as such. *See* New York State Unified Court System Criminal Jury Instructions 2nd for Penal Law § 485.05, *available at* <http://www.nycourts.gov/judges/cji/2-PenalLaw/485/485-05.pdf>. The jury instructions in this case attempted to fit a more novel offense – a hate crime – into the more standard approaches of instructing juries on how to deal with multi-count indictments, including alternate and additional theories and offenses. Regardless of how this Court might direct trial courts to handle similar instructions in the future, the jury in this case did, in fact, reconcile those counts in its verdict.

The substantive part of the charge begins at page 698 of the transcript of the court's charge. (T. 698). The trial court explained the elements of murder in the second degree as a hate crime. (T.699). The court instructed the jury that if it found the defendant guilty of second degree murder as a hate crime, not to consider any of the hate/manslaughter lesser included offenses, but to instead proceed to Count Two, the "regular," non-hate, second-degree murder charge. (T. 702). Then the jury was instructed that, if it found the defendant not guilty of second degree murder as a hate crime, to proceed to consider first-degree manslaughter as a hate crime. (T. 703).

The jury was next instructed on the elements of first-degree manslaughter as a hate crime. (T. 703). The jury was told that if it found the defendant guilty of first-degree manslaughter as a hate crime, it should not consider the remaining lesser manslaughter charge but rather proceed to Count Two, the “regular,” “non-hate” second-degree murder charge – and begin with the most serious charge. (T. 704).

But how could the jury convict the defendant of first-degree manslaughter as a hate crime, after having acquitted him of second-degree murder as a hate crime, and then proceed to consider and possibly convict him of second degree murder? To do so, the jury would have to find, on the hate crime, that the defendant held animus towards the deceased because he perceived the victim to be gay, and intended only to seriously injure the victim but actually killed her because of her perceived orientation. Yet to convict of second-degree murder at the very same time, the jury would have to find that the defendant’s intent, free from anti-gay bias against his victim, really wished to kill the victim. Such an outcome would be difficult to reconcile indeed.

It is entirely plausible – indeed, it may be the most logical approach – for the jury to have understood those instructions as directing them to choose between two tracks: hate and non-hate. After instructing the jury that if it acquits the defendant

of first-degree manslaughter as a hate crime, it should consider the elements of second-degree manslaughter as a hate crime, the court states:

Irrespective of your verdicts regarding the crime of murder in the second degree as a hate crime, and the lesser included offenses of manslaughter in the first degree and manslaughter in the second degree as a hate crime, whether it be guilty or not guilty, you must next go to consider the Second Count of the indictment, murder in the second degree, and the lesser included offenses of manslaughter in the first degree and manslaughter in the second degree.

(T. 705). However, the court then proceeded to repeat the charges for second-degree murder and the manslaughter charges, explaining – and again reinforcing the “two-track” concept – that “[t]he Second Count of the indictment charges the same murder as alleged in the First Count, *but not as a hate crime.*” (T. 705-706) (emphasis added).

After deliberations commenced, the jury sent a note to the court stating “we need the definition of manslaughter, murder, hate crime.” (T. 732). The court responded as follows:

The best way I can define the difference between Count One, which is murder in the second degree as a hate crime, and the lesser included offenses of manslaughter in the first degree and manslaughter in the second degree as a hate crime, and Count Two, which is just murder in the second degree, and then the lesser included offenses of manslaughter in the first degree and manslaughter in the second degree, is one element. One element separates each of the charges. That element is when the person intentionally selects the person against whom the offense is committed, or intended to be committed in whole or in substantial part because of a belief or perception regarding the sexual orientation of a person, regardless of whether the belief or

perception is correct. That added element is not included in murder in the second degree, manslaughter in the first degree, or manslaughter in the second degree. It is only included in murder in the second degree as a hate crime, manslaughter in the first degree as a hate crime, and manslaughter in the second degree as a hate crime. There lies the difference between the two. That element.

(T. 733). The court then proceeded to re-read the charges for Count One as hate crimes, and, as to Count Two, stated

with regard to Count Two, murder in the second degree, and the lesser offenses of manslaughter in the first degree, and manslaughter in the second degree, they are exactly the same as the hate crime *without* the added element that the accused selected the person against whom the offense was committed or intended to be committed in whole or in part because of a belief or perception regarding the sexual orientation of a person regardless of whether the belief or perception is correct.

(T. 737-738) (emphasis added).

The jury's next note conveyed that it had homed in on the "hate" track, requesting to hear the difference between "manslaughter one and manslaughter two, as a hate crime only." (T. 739). Thereafter, the judge recharged the jury as to these charges, and ultimately the jury returned their verdict, convicting the defendant of manslaughter in the first degree and the weapons charge.

In *Muhammad*, the Court found that the trial court's omission of a charge that would have been proper and would have guided the jury in understanding that someone may form the intent to use a weapon unlawfully at the moment he removes it from his pocket and uses it to assault someone, in fact explained why

the jury resolved the assault and weapons charges differently. This case presents the same situation. The trial court could have instructed the jury in greater detail about alternate theories of *mens rea* and the interplay with the bias elements, but it did not, and so the jury's ultimately verdict reflects what they reasonably viewed was a choice between a hate *or* a "non-hate" crime. As the foreperson states in her affidavit,⁵ the jury members did not conclude that the defendant was "not guilty" of the elements of manslaughter in the second degree. Rather, they had already decided the defendant was the shooter, and that it was a hate crime. They felt returning a guilty verdict on the non-hate manslaughter charges was "unnecessary" or even "overkill." (Appendix submitted to the Appellate Division [A.], at 295).

By seeking reinstatement of the jury's verdict, *amici* do not ask this Court to return to the day of the verdict and guess what the jury intended. It is clear from the charge and the jury's verdict what it intended. The jury decided that the defendant committed a hate crime – not merely a senseless act of violence, but one specifically motivated by bias and hatred. The jury rejected all alternate theories associated with the "non-hate" charges, and *amici* respectfully request this court to reinstate its conviction of the defendant.

⁵ While the foreperson's affidavit is conclusive proof of the validity of the jury's guilty verdict as to manslaughter in the first degree as a hate crime, and of its reasonable belief under the content of the charge that convicting him of that crime resolved both Counts One and Two, the affidavit merely corroborates what is clear in the charge itself.

II. This case presents issues of statewide importance concerning New York's Hate Crimes statute that require guidance from this Court

This case involves the jury's determination that the defendant, after a verbal anti-gay tirade, ended Lateisha Green's life by shooting her at close range. Not surprisingly, the jury decided that the defendant took her life *because* he perceived her as a gay man. Beyond the dire consequences of the Fourth Department's decision to set aside that verdict – specifically, the release of the person whom the jury found guilty of first-degree manslaughter as a hate crime – this Court must also consider the important legal questions asked – but not answered – below, which concern the proper jury practice and procedure when an indictment includes hate crimes – or any sentencing enhancement offenses for that matter – in the context of a multi-count indictment. In light of the important issues presented in this case, *amici* respectfully request that this Court, in its decision in this case, either provide appropriate guidance to the State's trial courts and criminal practitioners, or refer the issue to the Committee on Criminal Jury Instructions to provide such guidance. To this end, while *amici* do not believe that this Court should delay reinstating the jury's verdict and the defendant's conviction, *amici* respectfully ask the Court to consider exercising its authority to terminate the expedited alternative review procedure now underway in this case, and at least hear oral argument and perhaps the views of other *amicus* stakeholders on that issue.

There are over 40 reported opinions interpreting or dealing with New York's hate crime statute, Penal Law § 485.05. *Amici* found at least one other case addressing the jury charge specifically, *People v. Pomie*, 55 A.D.3d 630 (2d Dep't 2008), in which the trial court addressed the jury charge very differently than the court did in *DeLee*,⁶ suggesting that our trial courts are following disparate practices.

Proper practice and procedure in relation to our hate crime statute is not the only area impacted by this case. There are other analogs to the hate crime statute in New York's Penal Law – that is, there are other sentence-enhancing statutes. They include, for example, the crimes of terrorism, N.Y. Penal Law § 490.25, and use of a child for a drug felony, N.Y. Penal Law § 220.28. Yet the existing criminal jury instructions do not address how our trial courts are to present any of these sentence-enhancing statutes through the court's charge or the verdict sheet when the indictment includes multiple counts and alternate theories.

New York's hate crime statute is modeled from the same Model Law, drafted by the Anti-Defamation League, as Wisconsin's hate crime statute. *See* Sponsor's Mem. at 1, Bill Jacket, L. 2000, ch. 107; *see also* Anti-Defamation

⁶ In *Pomie*, the court instructed the jury to resolve a first-degree assault charge (both as a hate and non-hate crime) first, then specifically instructed them not to move on to the lesser degree assaults (both hate and no-hate lesser charges) if they found the defendant guilty of either variation of the top count. *Id.* at 631. If that approach had been applied here, the *DeLee* jury would have been asked to vote on second-degree murder as a hate and non-hate crime first, then second-degree manslaughter as hate and non-hate crime, and so on. That is contrary to the jury charge and the verdict sheet in the instant case. *See* A. 288.

League, *ADL Introduction, Hate Crime Laws*, at

<http://www.adl.org/99hatecrime/intro.asp> (last accessed Oct. 4, 2013). Wisconsin appears to use a special verdict sheet to present the bias motive as an element to juries in criminal cases. *See, e.g., State v. Yang*, 265 Wis.2d 937, 664 N.W.2d 683 (Wis. App. 2003). Under those procedures, the jury is asked to resolve the underlying specified offense or offenses – for example, whether the accused is guilty of first-degree assault, or second-degree, or other lesser-included offenses, if any. Then, in what is essentially a separate, single interrogatory, the jury is asked to determine whether the prosecution has also proved the element(s) of the bias motive. *Id.*

Among the benefits of a special verdict sheet with a stand-alone interrogatory are: (1) should the sufficiency of the evidence of bias be attacked, the conviction for the specified offense will likely be preserved because it was separately decided; (2) the jury resolves the specified offense and degree (if there are lesser included offenses) and then moves on to the bias element in a logical, clear manner that does not invite confusion or inconsistency. Using the verdict sheet in the *Yang* case as a model, a special verdict sheet would instruct a jury to first consider the homicide charges, and if it convicted thereon – and only then – answer a special interrogatory asking “Was the victim intentionally selected in

whole or in substantial part because of a belief or a perception regarding the sexual orientation of a person regardless of whether the belief or perception is correct?”

While special verdict sheets are commonplace in civil cases, historically they were rare and even disfavored in criminal cases. *People v. Ribowsky*, 77 N.Y.2d 284 (1991). In fact, New York’s Criminal Procedure Law § 300.10 does not specifically provide for special verdict sheets, although § 300.10 gives additional instructions when dealing with the predicate crimes of an enterprise corruption charge. *See* N.Y. Crim. Proc. Law § 300.10 (2013). The sentiment against special verdict sheets, with our Penal Law’s evolving innovations, like sentencing enhancers, no longer matches reality.

Today, juries commonly return information beyond a simple “guilty” or “not guilty” in a wide range of criminal cases. Though these are often called “special verdicts,” they are not true special verdicts: they provide additional information that accompanies, but does not replace, the general verdict. This additional information can be fairly specific, such as the special designation “guilty but mentally ill,” or a verdict of criminal forfeiture, or more general, such as expanded verdict forms that list lesser-included charges or special interrogatories about facts underlying the verdict.

Note: Beyond “Guilty” or “Not Guilty”: Giving Special Verdicts in Criminal Jury

Trials, 21 Yale L. & Pol’y Rev. 263 (2003). In addition, our courts have recognized their value when they can be crafted as to actually benefit the defendant or assist the court and jury. *Ribowsky*, 77 N.Y.2d at 290-91.

The hate crime statute and other sentence-enhancing statutes are charges that require special consideration when charging the jury, when preparing a verdict sheet, and when addressing jury questions. In some ways, the relationship between the hate-crime enhancer and the specified offense to which it is tied does bear some resemblance to a crime and its lesser included offenses. Criminal Procedure Law § 1.20(37) defines a “lesser included offense” as: “when it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a “lesser included offense.” N.Y. Crim. Proc. Law § 1.20(37) (2013). The hate crime element cannot stand alone — it must be tied to the finding of guilt as to all the element of the specified offense. But the majority below reasoned, not without logic, that the homicide count was not (and should not have been charged as) a lesser-included offense of the hate-crime homicide — and instead treated it as a new hybrid, or “otherwise included” charge that nevertheless had to be consistent with a separate count. *See DeLee*, 108 A.D.3d at 1147-48.

Respectfully, this case, and the dearth of guidance available to trial courts in the context of a multi-count indictment, raises important questions regarding jury practice and procedure in connection with New York’s hate crime statute that this Court should address.

III. The documented harms inflicted by hate crimes make it particularly important that identified perpetrators are held accountable for their crimes.

There has been, and continues to be, an alarmingly high incidence of hate-motivated crime against the lesbian, gay, bisexual, and transgender (“LGBT”) community and other minority communities in New York. To this day, the LGBT community’s confidence in the ability of the criminal justice system to address and properly handle this violence is very low. When the legislature has taken steps to protect a marginalized population, such as it has in New York with the state’s hate crimes law, the purpose of the legislation must be fulfilled, and those who perpetrate hate-motivated violence must be held accountable under the law. For these reasons, it is particularly critical that this Court carefully consider the issues presented in the People’s briefing, restore the jury’s proper verdict, and give guidance to trial courts on the proper way to instruct juries in hate crime cases. Doing so will instill greater confidence that justice will be administered in these grievous cases, among all New Yorkers, and certainly within the LGBT communities so deeply affected by these crimes.

In New York State and nationally, law enforcement statistics consistently show LGBT people are overwhelmingly the targets of violent crimes motivated by bias and hate. The FBI’s most recent annual Hate Crime Statistics Act report documents that more than one in five hate crimes (1,293 of the 6,216 reported in

2011) were perpetrated against individuals on the basis of their sexual orientation, making that characteristic the second most frequently targeted, after race-based hate crimes. U.S. Department of Justice (DOJ), Federal Bureau of Investigation (FBI), Criminal Justice Information Services Division, *Hate Crimes Statistics 2011*, [hereinafter “FBI Hate Crimes Statistics 2011”], *Incidents and Offenses*, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/narratives/incidents-and-offenses> (last accessed Oct. 4, 2013). In New York in 2011, hate crimes motivated by sexual orientation also accounted for nearly 20 percent of all reported hate crimes, exceeded only by race-motivated and religion-motivated hate crimes. Division of Criminal Justice Services, Office of Justice Research & Performance, *Hate Crime in New York State, 2011 Annual Report*, 2 (Oct. 2012), [hereinafter “Hate Crime in New York State 2011”] at <http://www.criminaljustice.ny.gov/crimnet/ojsa/2011-hate-crime.pdf>. Of the hate crimes motivated by sexual orientation bias reported nationally in 2011, New York State alone accounted for 107 of the crimes, or more than seven percent. *FBI Hate Crimes Statistics 2011*, Table 13, at <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/tables/table-13>.⁷

⁷ In 2011, law enforcement agencies across the United States reported 1,293 hate crime incidents based on sexual orientation bias, consisting of 1,508 separate hate crime offenses (some incidents consisted of more than one hate crime offense – e.g., an aggravated assault and a robbery). Of those 1,508 offenses, 871 were classified as anti-gay-male, 168 were classified as anti-lesbian, 429 were classified as anti-gay, and 23 were classified as anti-bisexual. *FBI Hate*

The vast majority of hate crimes motivated by sexual orientation bias are personal rather than property-based, and often violent. Of the 107 hate crimes perpetrated on the basis of sexual orientation reported in New York in 2011, 81.5 percent were crimes against persons. *Hate Crime in New York State 2011*, at 3. Of those, 79.5 percent were specifically motivated by bias against gay men. *Id.*

Unfortunately, statistics surrounding hate crimes motivated by gender identity bias are less readily available. The FBI Hate Crime statistics do not currently expressly identify hate crimes motivated by biases based on gender identity or expression,⁸ but other data suggest that transgender people, particularly transgender women of color, are disproportionately the targets of hate-motivated violence.⁹ The National Coalition of Anti-Violence Programs (NCAVP), a national coalition of entities in eighteen states that works to address violence against and within LGBT and HIV-affected communities, solicits information about anti-LGBT and anti-HIV hate violence; in 2012, NCAVP reported that women of color comprised approximately 50 percent of all victims of LGBT/HIV-based homicide

Crimes Statistics 2011, Table 1, at <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/tables/table-1>.

⁸ Starting in 2014, the FBI's hate crime data publication will include reports of hate crimes motivated by gender and gender identity bias. Federal Bureau of Investigation, *Hate Crimes Accounting Annual Report Released*, (Dec. 10, 2012), <http://www.fbi.gov/news/stories/2012/december/annual-hate-crimes-report-released/annual-hate-crimes-report-released>.

⁹ An internationally-recognized Transgender Day of Remembrance, observed on November 20th each year, memorializes the lives lost to hate-motivated violence based on gender identity and expression. See International Transgender Day of Remembrance, <http://www.transgenderdor.org>.

reported to its affiliates. National Coalition of Anti-Violence Programs (NCAVP), *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2012*, 8 (released June 4, 2013) [hereinafter “NCAVP Report”], at http://avp.org/storage/documents/ncavp_2012_hvreport_final.pdf. Recent news reports reflect this ongoing trend of violence against the LGBT community, particularly against transgender women of color.¹⁰

These high rates of hate crimes against LGBT people are particularly injurious on an individual level because of their severe psychological impact on victims. Victims of hate crimes often suffer from more psychological distress than victims of comparable violent crimes. See American Psychological Association, Briefing Paper, *The Psychology of Hate Crimes*, 1 [hereinafter “The Psychology of Hate Crimes”], available at <http://www.apa.org/about/gr/issues/violence/hate-crimes-faq.pdf> (last accessed Oct. 4, 2013). The expressions of this psychological distress can include depression, stress, anxiety, anger, and post-traumatic stress disorder (PTSD). *Id.* These symptoms can interfere with a victim’s work and social life, and they can also contribute to substance abuse and violent behavior. *Id.* at 2.

¹⁰ These include reports of the murders, all within the last five months, of Islan Nettles and Fatima Woods in New York, Eyricka Morgan in New Jersey, Domonique Newburn and Melony Smith in California, Konyale Madden in Texas, and Diamond Williams in Pennsylvania. See Dani Heffernan, GLAAD, *Star-Ledger Newspaper Repeatedly Misgenders Trans Woman Killed in New Jersey*, Sept. 27, 2013, <http://www.glaad.org/blog/star-ledger-newspaper-repeatedly-misgenders-trans-woman-killed-new-jersey>.

The harms caused by hate crimes are not just limited to the direct victims of those crimes. In 2000, when the New York State Legislature enacted New York's Hate Crimes Law, it included express findings recognizing that hate crimes cause serious and widespread harms to individuals, communities, and society as a whole:

Hate crimes do more than threaten the safety and welfare of all citizens. They inflict on victims incalculable physical and emotional damage and tear at the very fabric of free society. Crimes motivated by invidious hatred towards particular groups not only harm individual victims but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs. Hate crimes can and do intimidate and disrupt entire communities and vitiate the civility that is essential to healthy democratic processes. [. . .] Therefore, our laws must be strengthened to provide clear recognition of the gravity of hate crimes and the compelling importance of preventing their recurrence.

N.Y. Penal Law § 485.00 (2013).

The “group to which the victim belongs” can include not only geographical communities – neighborhoods, schools, workplaces, and so on – but also demographic communities – racial groups, religions, sexual orientations, and so on. *The Psychology of Hate Crimes*, at 2. It may in fact be the perpetrator's intent to send a message to the community to which the victim belongs: a violent assault coupled with homophobic slurs, for example, sends a message that LGBT people are not welcome in certain areas. *See id.* If perpetrators go unpunished, that sends the further message that members of the victim's group may be subjected to crime with impunity. *See* Organization for Security and Co-operation in Europe (OSCE),

Office for Democratic Institutions and Human Rights (ODIHR), *Preventing and Responding to Hate Crimes: A Resource Guide for NGOs in the OSCE Region* (2009), at <http://www.osce.org/odihr/39821?download=true> (last accessed Oct. 4, 2013).

It is easy to see, then, why hate crime protections are important to the LGBT community. The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, 18 U.S.C.A. § 249, which provides for enhanced penalties against those who perpetrate violence directed at the gay, lesbian, bisexual, and transgender community, was originally introduced in the House and Senate in 1997 but was not signed into law until twelve years later on October 28, 2009. *See* Federal Bureau of Investigation, *Matthew Shepard/James Byrd, Jr., Hate Crimes Prevention Act of 2009*, http://www.fbi.gov/about-us/investigate/civilrights/hate_crimes/shepard-byrd-act-brochure (last accessed Oct. 4, 2013). In the years leading up to the enactment of the Matthew Shepard Act, a survey of the LGBT community placed the issue of hate crime laws as a top policy priority. National Gay and Lesbian Task Force and the National Center for Transgender Equality, *Policy Priorities for the LGBT Community Pride Survey* (2006), p. 4. Similarly, a 2011 survey of transgender people showed that enactment of hate crime laws that expressly address bias based on gender identity or expression is a top policy priority, alongside employment discrimination

protections and equal access to health care. National Gay and Lesbian Task Force and the National Center for Transgender Equality, *National Transgender Discrimination Survey*, 178 (2011), at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

Yet even after enactment of a hate crime law in New York, many other states, and at the federal level, and notwithstanding the vast and grievous harms that hate crimes cause, many victims of hate crimes are reluctant to report them. According to the National Crime Victimization Survey, from 2007 to 2011, the most common reason respondents gave for not reporting violent hate crimes to the police was “a belief that police could not or would not help.” Bureau of Justice Statistics, *Hate Crime Victimization, 2003-2011*, 6 (2013) at <http://www.bjs.gov/content/pub/pdf/hcv0311.pdf>.¹¹

The United States Supreme Court, quoting William Blackstone, recognized that “it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness,” in deciding the constitutionality of Wisconsin's hate crime statute. *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993) (internal quotation marks and citations omitted). The Court also recognized that hate crimes can be particularly

¹¹ Of the respondents to the NCAVP Report, 23 percent of the surviving victims of LGBT/HIV-motivated hate crimes reported that police did not even take their complaint. NCAVP Report, at 20.

“destructive of the public safety and happiness” and that “according to the State and its amici, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.” *Id.* The hate crime of which the jury convicted the defendant caused all of the harms that the Supreme Court recognized and that the New York Legislature sought to address by enacting the Hate Crimes Law. It caused the death of Lateisha Green; it caused Lateisha’s family and friends immeasurable grief; it rocked the City of Syracuse, Onondaga County, and the State of New York; and it sent shockwaves through the LGBT community. *See* John Mariani, *Friends, Family Honor Murder Victim LaTeisha Green*, Syracuse.com (July 11, 2009), http://www.syracuse.com/news/index.ssf/2009/07/friends_family_honor_murder_vi.html. (last accessed Oct. 4, 2013)

Affirming the Appellate Division’s decision vacating that conviction would be a grave miscarriage of justice that would subvert the jury’s plain intent. As explained in Section I above, this Court should reinstate the jury’s verdict convicting the defendant, because that verdict was not inconsistent and can be easily reconciled. Allowing the person who shot Lateisha Green to walk free would frustrate the purpose of New York’s Hate Crimes Law, working in exact opposition to the Legislature’s two stated goals of enhancing punishment and deterring future hate crimes. And it would not only dishonor Ms. Green’s memory

but also cause her family unfathomable grief by revoking the solace they had in knowing that her killer had been brought to justice. This appeal presents the Court with both the obligation to reach the correct legal conclusion and the opportunity to give both Ms. Green's family and the LGBT community renewed faith in the justice system.

CONCLUSION

The jury's verdict convicting the defendant of committing a hate crime by killing Lateisha Green was logical. It was legal. And to the Syracuse community, the jurors in that courtroom that day reached a verdict that also meted out that rare commodity that our legal system strives for but all-too-rarely achieves: justice.

For the foregoing reasons, and for the reasons set forth in the People's submissions to this Court and below, *amici* respectfully request that this Court reinstate the jury's verdict and the defendant's conviction of manslaughter in the first degree as a hate crime, and direct that the defendant surrender to the trial court to serve his sentence.

Dated: New York, New York
October 4, 2013

By: 

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Pride Agenda, the Transgender Alliance,
and the New York City Gay and Lesbian
Anti-Violence Project, Inc.

STATEMENTS OF INTEREST OF *AMICI CURIAE*

Headquartered in New York, Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people (“LGBT”) and people living with HIV through impact litigation, education and public policy work. With roots in New York State since its founding in 1973, Lambda Legal has participated as counsel or amicus in scores of cases involving the rights of people to work and live their lives free of discrimination because of their sexual orientation, gender identity or HIV status, including many cases heard by this Court, the Supreme Court of the United States and other courts across the nation. Our cases before this Court have often involved the proper interpretation of statutory provisions. *See, e.g., People v. Plunkett*, 19 N.Y.3d 400 (2012) (holding that saliva of a person living with HIV cannot constitute a “dangerous instrument” within the meaning of New York’s Penal Law), *Debra H. v. Janice R.*, 14 N.Y.3d 576 (2010) (holding that as a matter of comity extended to Vermont civil unions, the civil union of New York residents established one partner’s legal parentage of child born to other partner during their civil union); *Hernandez v. Robles*, 7 N.Y.3d 338 (2006) (finding no constitutional violation from denying right to marry to same-sex couples under New York statutes, and holding that legislature has plenary authority to grant right to marry); *Levin v. Yeshiva Univ.*, 96

N.Y.2d 484 (2001) (interpreting New York City's Human Rights Law to permit challenge by same-sex domestic partners to university housing policy excluding them from married student housing); *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201 (1989) (holding that surviving life partner of deceased leaseholder qualified as "family member" entitled to protections of New York rent control laws). Lambda Legal has a particular interest in this case because LGBT people are disproportionately targeted by hate-motivated violence. Lambda Legal won an early landmark case involving a highly- publicized hate crime against a transgender man, *Brandon v. County of Richardson*, 264 Neb. 1020 (Neb. 2002) (holding that a sheriff could not avoid liability for his abusive interrogation and failure to protect a transgender man who had been raped and, days after reporting that crime, was murdered by the same perpetrators). Lambda Legal is committed to ensuring that the criminal justice system fairly enforces laws, such as New York's Hate Crimes Law, enacted to protect the communities we serve, so that those who commit hate crimes are held accountable.

The Center on the Administration of Criminal Law at New York University's School of Law ("the Center") is an apolitical advocacy organization and think-tank dedicated to promoting good government practices in the criminal

justice system.¹ The Center analyzes important issues of criminal law to promote best practices. It pursues this mission in three main arenas: academia, the courts, and public policy debates. Through the Center's academic component, the Center researches criminal justice practices at all levels of government and produces scholarship on criminal justice issues. The litigation component uses the Center's research and experience with criminal justice practices to inform courts in important criminal justice matters. The public policy component applies the Center's criminal justice expertise to improve practices in the criminal justice system and enhance the public dialogue on criminal justice matters. The Center is the first and only organization dedicated to defining good government practices in criminal prosecutions. No other organization is dedicated to improving prosecution practices through research, litigation, and the improvement of public policy.

Transgender Legal Defense & Education Fund is committed to ending discrimination based upon gender identity and expression and to achieving equality for transgender people through public education, test-case litigation, direct legal services, and public policy efforts. Transgender women like Lateisha Green face alarming rates of violence. On average, a transgender person is killed once a month in the United States. New York's Hate Crimes Law provides explicit protection against sexual-orientation-based hate violence, but does not

¹ The Center on the Administration of Criminal Law is affiliated with New York University's School of Law, but does not purport to present the school's institutional views, if any.

include such protection when hate violence is based upon an individual's gender identity or expression. Nevertheless, Lateisha Green's killer was convicted of manslaughter in the first degree as a hate crime when an Onondaga County jury determined that he shot Lateisha to death at point-blank range because he thought she was gay. The verdict was only the second hate crime conviction for the killing of a transgender person in the United States, and the first in New York State. There have been none since. The verdict provided a measure of justice for Lateisha Green, her family and the LGBT community in New York State. It should be upheld.

The Anti-Defamation League ("ADL") was founded in 1913 to combat anti-Semitism and other forms of discrimination, to advance goodwill and mutual understanding among Americans of all creeds and race, and to secure justice and fair treatment to all. Today, ADL is one of the world's leading civil and human rights organizations combating anti-Semitism and all types of prejudice, discriminatory treatment and hate. Since its inception 100 years ago, it has been ADL's mission to combat religious, racial, and ethnic prejudice and to develop and implement programs to fight anti-Semitism and bigotry. To that end, ADL drafted the model hate crime law ("ADL Model Law") over 30 years ago. Since then, 45 states and the District of Columbia have enacted hate crime laws. Many of these states, including New York, patterned their laws after the ADL Model Law. *See*

Sponsor's Mem. at 1, Bill Jacket, L. 2000, ch. 107 (acknowledging that Section 1 of the New York Hate Crimes Act "is patterned after model legislation drafted by the Anti-Defamation League"). In addition, the passage of the Matthew Shepard and James Byrd, Jr. Hate Crime Prevention Act—the most important, comprehensive and inclusive federal hate crime law—is a direct result of ADL's leadership in this area. ADL has an encyclopedic knowledge of hate crimes and hate crimes legislation, including the reasons why hate crime laws are necessary. Moreover, having drafted the Model Law on which the New York Hate Crimes Act was patterned, ADL brings an important perspective before this Court regarding the law and its implementation.

The Lesbian, Gay, Bisexual & Transgender Community Center in New York City ("The Center"), is the largest LGBT multi-service organization on the East Coast and the second largest LGBT community center in the country, offering many programs for the LGBT community and welcoming 6,000 unique individuals per week. Far too many of the Center's constituents have faced ridicule and even violence aimed at them because they are LGBT. Consistent with its mission of supporting the LGBT community, the Center joins in this letter due to its strong belief that LGBT people must be able to live their lives free of violence and harassment regardless of where they choose to reside.

The Empire State Pride Agenda is New York's statewide lesbian, gay, bisexual and transgender (LGBT) civil rights and advocacy group. Our mission is to win equality and justice for LGBT New Yorkers and our families. We recognize that while significant cultural, legal and governmental advances have led to greater equality for LGBT New Yorkers, we and our families remain highly vulnerable without the vast majority of rights and protections that most New Yorkers take for granted. Through our education, organizing and advocacy programs, we work toward creating a broadly diverse alliance of LGBT people and our allies in government, communities of faith, labor, all sectors of the workforce and other social justice movements to achieve equality for LGBT New Yorkers and the broader goals of social, racial and economic justice.

The Transgender Alliance is a support and advocacy group for transgender persons centered in Syracuse, New York, with over 500 individual members and 17 organizational members from across upstate New York.² The Alliance meets regularly with transgender persons of all ages from the Syracuse area, many of whom have been affected by the murder of Lateisha Green and who are at risk for further violence. Our organization provides the local transgender community with

² The organizational members include but are not limited to the Transgender Alliance of Central New York, Spectrum of Buffalo N.Y., the Buffalo Belles, the Rochester Trans Group, the Rochester Grrlz, the Genesee Valley Gender Variants, the Self Made Men, the Southern Tier Transgender Alliance, the Western New York Couples Group, the Mid-Hudson Valley Transgender Association, the Northeast Gender Alliance, Transgeneration, Straight Parents of GLBTQ Children and the Transgender Health Initiative.

assistance in coping with the violence and discrimination they are subjected to on a daily basis. The man convicted of killing Lateisha Green is, pending the outcome of this appeal, free to walk the streets of Syracuse, and as the largest transgender support and advocacy group for transgender persons in upstate New York, with our home offices located in Syracuse, our organization has a vital interest in the outcome of this appeal and, more broadly, in ensuring that those who commit violence against people who are LGBT are held accountable for their crimes. It is the lives and safety for our people who are most directly affected by the outcome of this case.

The New York City Gay and Lesbian Anti-Violence Project, Inc. ("AVP") is a nonprofit direct service and public policy organization. Founded in 1980, AVP's mission is to empower lesbian, gay, bisexual, transgender, queer ("LGBTQ") and HIV-affected communities and allies to end all forms of violence through organizing and education, and to support survivors through counseling and advocacy. AVP is the largest LGBTQ and HIV-affected anti-violence organization in the United States providing services to LGBTQ survivors of violence. AVP serves thousands of LGBTQ and HIV-affected survivors of violence each year and provides hundreds of training to institutions such as the courts, law enforcement, social service providers and community-based organizations annually.

Collectively, *amici* share a strong concern that affirmance of the Appellate Division majority's decision and order setting aside a jury verdict finding the defendant guilty of first-degree manslaughter as a hate crime will mean that the person who killed Lateisha Green will not be punished for that crime, despite the fact that the jury's verdict was reasonable under the instructions it was given. *Amici* also seek to bring to the Court's attention information regarding the serious and ongoing problem of anti-LGBT violence, against which New York's Hate Crimes Law should be faithfully enforced. *Amici* also submit precedent demonstrating that the Appellate Division majority erred in concluding that the jury's verdict was inconsistent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), *amici curiae* hereby disclose that they do not have any corporate parents, subsidiaries or affiliates.

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF
NEW YORK,

Appellant,

— vs. —

DWIGHT R. DELEE,

Respondent.

Case No. APL-2013-00229

Onondaga County Index No.
2009-0376

Appellate Division Fourth
Department Docket No. KA 09-
02479

**AFFIRMATION OF SERVICE
OF NOTICE OF MOTION OF
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.,
ET AL. FOR LEAVE TO
APPEAR AND FILE
LETTER BRIEF AS *AMICI
CURIAE* AND PROPOSED
AMICI LETTER BRIEF**

Thomas W. Ude, Jr., a member of the Bar of the State of New York,
subscribes and affirms under penalty of perjury that he is a person over the age
of eighteen years who is not a party to this action and that on October 4, 2013,
he served the

- Notice of Motion of Lambda Legal Defense and Educational Fund, Inc.,
the Center on the Administration of Criminal Law at New York
University's School of Law, Transgender Legal Defense and Education
Fund, Inc., the Anti-Defamation League, the Lesbian, Gay, Bisexual, and

Transgender Community Center in New York City, the Empire State Pride Agenda, the Transgender Alliance, and the New York City Gay and Lesbian Anti-Violence Project, Inc. for Leave to Appear and File a Brief as *Amici Curiae*, and the Affirmation of Thomas W. Ude, Jr. in Support, and

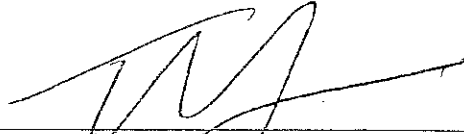
- Proposed Brief of Lambda Legal Defense and Educational Fund, Inc., the Center on the Administration of Criminal Law at New York University's School of Law, Transgender Legal Defense and Education Fund, Inc., the Anti-Defamation League, the Lesbian, Gay, Bisexual, and Transgender Community Center in New York City, the Empire State Pride Agenda, the Transgender Alliance, and the New York City Gay and Lesbian Anti-Violence Project, Inc. as *Amici Curiae*,

upon each party's attorney by dispatching one true copy thereof by Federal Express, an overnight delivery service, for overnight delivery to the address designated by each attorney for that purpose as follows:

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Dated: New York, NY
October 4, 2013

A handwritten signature in black ink, appearing to read 'T. Ude, Jr.', written over a horizontal line.

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