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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 106

WILLIAM HENDERSON,

Appellant.

20 Eagle Street
Albany, New York 12207
June 01, 2015

Before:

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's go to 106,
2 People v. Henderson.

3 Counsel, you want any rebuttal time?

4 MR. ABBATOY: Yes, Judge. Two minutes,
5 please.

6 CHIEF JUDGE LIPPMAN: Go ahead.

7 MR. ABBATOY: David Abbatooy for William
8 Henderson. Mr. Henderson presents two reasons for
9 this court to reverse the felony murder conviction.
10 First, the prosecutor - - -

11 CHIEF JUDGE LIPPMAN: Why did he go in - -
12 - what was the intent of the - - - the burglary?

13 MR. ABBATOY: The intent of the burglary
14 was to commit a homicide, as Mr. Henderson said when
15 he grabbed the knife out of the butcher block, I'm
16 going to kill him.

17 CHIEF JUDGE LIPPMAN: So if that was the
18 intent and then he carried it out, ultimately, why -
19 - - why doesn't it make sense - - - why - - - why
20 can't it be - - - why can't the burglary be the - - -
21 the predicate for - - - for the felony murder?

22 MR. ABBATOY: Well, there's - - - there's
23 two reasons. Those facts show us that there's two
24 reasons.

25 CHIEF JUDGE LIPPMAN: I mean that that was

1 the intent and it was carried out.

2 MR. ABBATOY: Right. The - - - the first
3 reason why that doesn't make out a valid crime is
4 that essentially he committed the burglary to
5 effectuate the homicide, not the opposite, which is
6 what the statute requires. The statute requires him
7 to do something to effectuate the killing to further
8 the accomplishment of the underlying felony.

9 JUDGE PIGOTT: That's why you're arguing
10 Cahill?

11 MR. ABBATOY: That's why we argue Cahill
12 and Langston, the Second Circuit case that I think
13 kind of distills out that particular aspect.

14 CHIEF JUDGE LIPPMAN: Yeah, but Cah - - -

15 JUDGE RIVERA: But didn't Cahill
16 specifically say we're not - - - we are not deciding
17 whether or not the same analysis applies with respect
18 to felony murder?

19 MR. ABBATOY: I think what - - - well,
20 first off, in Cahill, the - - - the Cahill - - -

21 CHIEF JUDGE LIPPMAN: Matter that Cahill's
22 a capital case?

23 MR. ABBATOY: It doesn't. And I - - - I
24 can - - - and I can tell you why, but I think - - -

25 CHIEF JUDGE LIPPMAN: What about Miller

1 while you're answering all the questions? Go ahead.

2 MR. ABBATOY: Okay. The - - - Miller is
3 just factually different here, and I think this court
4 said that quite clearly in People v. Lucas, and - - -
5 and it even said that when deciding Cahill, I think,
6 that - - -

7 JUDGE FAHEY: You got a tough argument
8 there, though. You're - - - you're trying to say
9 that your - - - your - - - your precedent's under
10 Cahill, which is a pretty rarified and exclusive kind
11 of situation whereas Miller is a much more run-of-
12 the-mill, if you will, ordinary kind of crime.

13 MR. ABBATOY: Well, he - - -

14 JUDGE FAHEY: Particularly because of the
15 penalty, the death penalty issue. So it's - - - I
16 think you have a tougher argument there. I think you
17 have to - - - you have to be able to address Miller,
18 I think, directly.

19 MR. ABBATOY: Here's why Miller doesn't
20 apply, and here's why I think you have a - - - an
21 even bigger problem on the felony murder side than
22 you did - - -

23 JUDGE RIVERA: And - - - and don't forget I
24 still want to know why you seem to think Cahill has
25 answered this question, and I don't think it does.

1 MR. ABBATOY: Okay. And - - - and I think
2 I can do both of these - - -

3 JUDGE RIVERA: Yeah, okay.

4 MR. ABBATOY: - - - at the same time.

5 JUDGE RIVERA: Good.

6 CHIEF JUDGE LIPPMAN: Very good, counsel.
7 Go ahead. Do that.

8 MR. ABBATOY: The reason - - -

9 JUDGE RIVERA: Good job.

10 MR. ABBATOY: The reason why Miller doesn't
11 apply is because of the very reason that you
12 explained in Lucas, and Lucas says the problem that
13 we identified in Cahill is that this single intent is
14 - - - is the issue that repeats itself. In Miller
15 you have two different intents and two different
16 victims, which is why it makes sense to punish Mr.
17 Miller more harshly than you would punish Mr.
18 Henderson here.

19 JUDGE ABDUS-SALAAM: So - - -

20 MR. ABBATOY: The crime elevates.

21 JUDGE ABDUS-SALAAM: So if Mr. - - - if Mr.
22 Miller had killed the victim that he initially
23 assaulted, your position would be that that would not
24 be the basis for a felony murder?

25 MR. ABBATOY: It would essentially be - - -

1 JUDGE ABDUS-SALAAM: Didn't occur then.

2 MR. ABBATOY: - - - just what we have here
3 and just what we had in Cahill. And to get back to
4 Judge Rivera's question here and to go back I think
5 to what Judge - - - Judge Fahey said as well, I think
6 the reason why Cahill just applies just as strongly
7 here and the reason why the capital murder context
8 doesn't really matter is because the same reason why
9 you said essentially in Cahill to limit it, that this
10 is a capital case and we're limiting it to capital
11 cases, applies under the felony murder statute, or
12 the felony murder interpretation, and here's the
13 reason.

14 When you decided Cahill you said the Eighth
15 Amendment requires us to limit and narrow these
16 classes of people who are elig - - - eligible for
17 capital murder, because we don't want to expand that,
18 that's against the Eighth Amendment. But that's the
19 - - - that's a - - - the same rule applies to
20 statutory interpretation. In People v. Hedgeman you
21 said that we're not supposed to interpret statutes so
22 that we expand criminal punishment beyond that - - -
23 that which can be fairly assigned to somebody. And
24 when I read that holding in Hedgeman and I look back
25 at cases I cite in my brief like Brown and Cassidy

1 and Geas - - - Geaslen that talk about crimes not
2 being - - - an underlying crime not being quote
3 "meaningfully independent" of the - - - essentially
4 the aggravating factor that's trying to ratchet us up
5 only from homicide up to - - -

6 JUDGE RIVERA: So let - - - let me - - -

7 MR. ABBATOY: - - - murder - - -

8 JUDGE RIVERA: - - - ask about that
9 independence from a different angle, getting back to
10 what you first said. You said the intent is to
11 commit a homicide, but that's not what the defendant
12 said, right?

13 MR. ABBATOY: He said I'm going to kill
14 him.

15 JUDGE RIVERA: The defendant said - - - I -
16 - - I thought the defendant said I wanted to hurt
17 him, I didn't mean to kill him. Did I miss something
18 in the record?

19 MR. ABBATOY: No, you didn't, Judge. He
20 does say that.

21 JUDGE RIVERA: So how is it I intended to
22 kill when he's saying specifically I didn't mean to
23 kill?

24 JUDGE STEIN: And does it matter that the
25 jury didn't find intent to kill?

1 MR. ABBATOY: I think it doesn't matter
2 that the jury didn't find intent to kill. I think
3 the issue with regard to whether or not - - - if you
4 want to accept that he - - - first off, if you want
5 to accept that he only entered to assault, I think
6 that gets us to a reversal on the issue of the charge
7 down on the man two. Because if you're going to
8 accept that as the fact that is the most favorable to
9 the prosecutor, and I don't think it is, I think the
10 fact most favorable to the prosecutor under the
11 Bleakley note is - - -

12 CHIEF JUDGE LIPPMAN: In simplest term, why
13 isn't the homicide in furtherance of the burglary?

14 MR. ABBATOY: Because he didn't - - -
15 because the burglar - - - the homicide was the object
16 of the burglary. He did not commit the homicide to
17 make the burglary happen. In fact the - - - the
18 burglary was this - - - what - - - was what this
19 court refers to as essentially preliminary - - -

20 JUDGE RIVERA: Well, aft - - -

21 MR. ABBATOY: - - - or preparatory.

22 JUDGE RIVERA: - - - after killing him, he
23 left. It's not like he went and looked for these
24 drugs and the money, right?

25 MR. ABBATOY: Right. And we see - - -

1 JUDGE RIVERA: He didn't look for any of
2 this. He ran out - - -

3 MR. ABBATOY: Right. And we see cases just
4 like that - - -

5 JUDGE RIVERA: - - - to go as quickly as he
6 could to try and make it on the highway.

7 MR. ABBATOY: Right. And we - - - and
8 that's how we know it's a single-intent type case
9 like Cahill and like Lucas distills out of all this.
10 We have cases where there are two intents like
11 Miller, and that's what makes it different. We have
12 a Fourth Department case, Couser, that also is a we
13 go in to kill one person and we kill another person.
14 Those are the kinds of separate intents that I think
15 Lucas contemplated when it discussed Cahill, and
16 those are the kind of separate intents that we like
17 to see when we, essentially in the penal law, ignore
18 - - -

19 JUDGE RIVERA: So say I - - - I - - -

20 MR. ABBATOY: - - - a mens rea.

21 JUDGE RIVERA: So say I go in to kill him,
22 I'm actually successful in doing so. That's not
23 felony murder. That's - - - that's a homicide,
24 that's a murder, but it's not felony murder?

25 MR. ABBATOY: It's some - - - and it's some

1 form of homicide.

2 JUDGE RIVERA: The purpose, the goal, the
3 aim is to kill the person I successfully killed?

4 MR. ABBATOY: Yes. And the reason why you
5 should be just as concerned about this scenario as
6 you were in Cahill about not expanding the class of
7 people that are eligible for this is that felony
8 murder is a - - - is a good rule, but it allows us to
9 essentially eliminate any kind of mens rea from the
10 crime, and we elevate a normal what might be in this
11 case just a manslaughter to a much more serious crime
12 on par with the most serious crime in the penal law
13 without any kind of mens rea.

14 JUDGE READ: Now how could this be a
15 manslaughter? Explain to me that.

16 MR. ABBATOY: Well - - -

17 JUDGE READ: How you get there.

18 MR. ABBATOY: The - - - the prosecutor
19 presented evidence on his case-in-chief that Mr.
20 Henderson said I only meant to hurt him like he hurt
21 me, which was non - - - a nonlethal force injury.

22 JUDGE READ: But there was a five-inch
23 blunt-tipped knife - - - there was a blunt-tipped
24 knife that went five inches into his torso. That
25 takes quite a bit of force, doesn't it?

1 JUDGE FAHEY: I'm sorry, Judge.

2 CHIEF JUDGE LIPPMAN: Go ahead.

3 JUDGE FAHEY: Just one - - - one quick
4 question.

5 MR. ABBATOY: Sure.

6 JUDGE FAHEY: If you're successful in
7 reversing the felony murder count, he's still left
8 with first-degree manslaughter, correct?

9 MR. ABBATOY: Yes.

10 JUDGE FAHEY: So it's twenty-five is on the
11 first-degree manslaughter, right, as opposed to
12 twenty-five to life?

13 MR. ABBATOY: Yes. And we also ask for a
14 new trial, though, on the - - - the charge down issue
15 on that same subject.

16 JUDGE FAHEY: On the charge down to second-
17 degree manslaughter?

18 MR. ABBATOY: Yes.

19 JUDGE FAHEY: I see. Okay.

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

22 Counsel?

23 MR. CARUSONE: Thank you, Your Honor. May
24 it please the court, Jason Carusone with the Warren
25 County District Attorney's Office. The proof here is

1 sufficient. That was the initial argument in point
2 one, that there was insufficient proof and that the
3 People had not provided sufficient proof that this
4 murder was carried out in furtherance or in the
5 course of and in furtherance of a burglary. And I
6 think where this can get confusing is because
7 burglary, unlike many of the enumerated statutes that
8 we have, those ones that lift up felony murder, has a
9 separate requirement that someone enter a building
10 with the intent to commit a crime therein.

11 JUDGE PIGOTT: What was the crime?

12 MR. CARUSONE: I - - - I believe the crime
13 in this case was some level of assault, Your Honor.

14 JUDGE PIGOTT: Wasn't that exactly what he
15 did?

16 MR. CARUSONE: It was, yes. It was exactly
17 what he - - -

18 JUDGE PIGOTT: So how does that - - - why
19 is that not a merger? It - - - it - - - as - - - as
20 your opponent argues in Miller, you know, you killed
21 the other guy.

22 MR. CARUSONE: Right. And - - - and - - -
23 and I think Miller basically - - - if you look at the
24 way Miller's written, it indicates that there is a
25 special place and protection that occurs. And merger

1 - - - I would agree that merger would apply if you
2 were talking about an assault that didn't occur
3 inside of the residence.

4 JUDGE PIGOTT: If this - - - all right.
5 Yeah. If this happened out on the street, what
6 happens?

7 MR. CARUSONE: If this happens out on the
8 street you don't have felony murder, unless there was
9 some other - - -

10 JUDGE PIGOTT: I - - - I mean it - - - it
11 just seems to me all you're saying is because he
12 crossed the threshold with the same intent that he
13 had, you know, if he - - - if he crossed the curb,
14 but because he crossed the threshold that becomes
15 felony murder as opposed to straight murder?

16 MR. CARUSONE: Yes. And it's because of
17 the way the statute's written. The statute and it's
18 - - - I think this case can be distinguished from
19 Cahill, Cahill does have some restrictions on those
20 enumerated felonies. They don't include all
21 burglaries, it's burglary second, burglary first,
22 amongst some of the others. And what I think makes
23 burglary so unique is because to have a burglary you
24 have to have some underlying intent. It may be an
25 intent to possess drugs, as he had in his first

1 entry. It may be an intent to assault, as he
2 claimed, the defendant claimed.

3 JUDGE PIGOTT: But you're saying it's the
4 same whether he's on - - - if - - - if he's on the
5 sidewalk it wouldn't be this, but because it was - -
6 - he crossed a threshold, it is?

7 MR. CARUSONE: Absolutely. And - - -

8 JUDGE PIGOTT: So what's the - - - I mean
9 so what do you say, there's special intent, there's a
10 special something. What - - - what's the special
11 other than the - - -

12 MR. CARUSONE: Oh.

13 JUDGE PIGOTT: - - - other than the place,
14 right?

15 MR. CARUSONE: Oh. Of the enumerated
16 felonies that are part of felony murder, most of them
17 don't require the intent to commit a crime therein,
18 that language doesn't exist. So when you look at a
19 robbery, it's a robbery, there's not some other
20 crime. With burglary, it's that unlawful entry with
21 the intent to commit a crime therein, and the way
22 it's written is any crime. It doesn't say any crime
23 except assault, any crime except drug possession.

24 JUDGE FAHEY: But that - - - that's the
25 fund - - - the fundamental philosophical concept

1 under - - - underneath felony murder is the murder
2 took place in the commission of another crime, but
3 here this is the only one, like you say, of a crime
4 that requires trespass plus. It only - - - it's the
5 only one that requires two crimes to - - - to - - -
6 to complete the first crime. You see what I'm
7 saying, to complete the burglary?

8 MR. CARUSONE: Well, I would disagree. I
9 think it requires one crime, which it might - - -
10 well, you're right. The entry - - -

11 JUDGE FAHEY: Yeah. There's - - - there's
12 that problem, you see what I'm saying? The other
13 problem is you take it a step further, you can't have
14 one intent for both the homicide and the - - - the
15 burglary.

16 MR. CARUSONE: I - - - I think the entire
17 felony murder statute, when we're talking about
18 felony murder in the second degree, is based on one
19 criminal intent that then it's a fiction, that
20 carries over to the felonious debt.

21 JUDGE PIGOTT: So why - - - why have it?
22 In other words, you - - - you got the guy for this
23 homicide, and for some reason you want to say if he
24 was - - - if he was going into the apartment to get
25 his Sports Illustrated back, not - - - not felony

1 murder, but because he's going in to do exactly what
2 he said he's going to do, that's a felony murder and
3 not just a murder.

4 MR. CARUSONE: Well, first of all, I - - -
5 I think appellant argues that his intent was to kill
6 this guy, an intentional killing.

7 JUDGE PIGOTT: Right.

8 MR. CARUSONE: This case, as was pointed
9 out, went to a jury trial initially. He was
10 acquitted of that. A jury of his peers said that
11 wasn't his intent. He did not intend to kill. In
12 fact, they found that the intent was to assault. So
13 there are different intents. There's - - - there's
14 not just the - - -

15 JUDGE PIGOTT: Because of that - - - bec -
16 - - because, I mean, you're saying, well, you really
17 weren't that bad a guy. You know you weren't going
18 over there to kill. You were going over there just
19 to beat him up. But because you were doing that, now
20 you get felony murder and you're doing twenty-five
21 anyway.

22 MR. CARUSONE: And I think the distinction
23 is it's not that he went to beat him up. That's not
24 the issue here. It's that he went inside a building
25 with the intent to commit a crime. As Miller really

1 lays out, the legislative purpose of felony murder is
2 a protection, and - - - and it goes through and
3 explains there are significant - - -

4 JUDGE PIGOTT: That's what I mean. If - -
5 - if he's going in to steal a guy's Pepsi out of the
6 machine, apparently that's a felony murder. If he's
7 going in to get his Sports Illustrated, it's not,
8 because it's his magazine. That's not what this
9 whole business is about, and - - - and to say that
10 because - - - because he's going in to kill him and
11 we think - - - and - - - or the jury thought he
12 wasn't going in to kill him he's only going in to
13 assault him, that raises the level. That makes - - -
14 it - - - it seems like it's turning the law on its
15 head.

16 MR. CARUSONE: I think it's - - - it's
17 following the law exactly as the legislature
18 intended. If you look at the way it's written, it's
19 - - - it lists the enumerated felonies.

20 JUDGE PIGOTT: But do you see Miller? So I
21 mean doesn't Miller make a whole lot more sense?

22 MR. CARUSONE: I agree with Miller, yes. I
23 think Miller supports the verdict in this case and -
24 - -

25 JUDGE PIGOTT: No. Because Miller, you

1 know, I'm coming to shoot you and I shoot him. That
2 - - - so I get a felony murder on him, but that - - -
3 that's - - - that makes some felony murder sense.
4 But if I'm coming to shoot you and I shoot you, I - -
5 - I don't understand why that becomes a felony
6 murder. It's just a plain - - - plain old felony.

7 MR. CARUSONE: Okay. Well, let me, if I
8 could, explain. When we looked at the Cahill case,
9 it's been described, the court's looked it and
10 described it as murder plus, and that's why there
11 were two intents required. When you look at the
12 felony murder statute in the second degree, as is
13 applied here, the intent crime is burglary.

14 What just makes burglary unique is that it
15 has to have some other crime. And so as the court's
16 explaining, if his intent was to steal something and
17 he killed and caused - - - and he caused the death,
18 not intentionally, but caused the death of Duncan
19 Chambers in this case, felony murder. But if he goes
20 in with a little more anger and he wants to assault
21 Duncan Chambers and he causes his death, somehow that
22 should get pulled out of this scenario. I - - - I
23 recognize that the Miller facts are slightly
24 different in that there were two individuals, but the
25 Miller court indicated that when someone is in the

1 confines of their home there's a special protection
2 that's afforded to them. And it was - - -

3 CHIEF JUDGE LIPPMAN: Bot - - - bottom line
4 of your argument legislative intent?

5 MR. CARUSONE: Yes, legislative - - -

6 CHIEF JUDGE LIPPMAN: The statute is clear
7 and that's the intent of the legislature?

8 MR. CARUSONE: The - - - the statute lays
9 out - - -

10 CHIEF JUDGE LIPPMAN: Whether we - - - I -
11 - - I think what we're all grappling around trying to
12 make sense out of it, but this has to do with the
13 particular nature of burglary and why it's in there,
14 right? That you have to go into someone's home, so
15 if that's the intent, that's the intent and it's
16 different than if it happens on the street or
17 wherever because of that built-in protection, in your
18 mind, that the legislature intended?

19 MR. CARUSONE: In my mind and in the
20 statutory scheme. It lists any form of burglary,
21 including just a building, there's a special
22 protection that's been created by the law, and it's
23 listed these enumerated felonies.

24 CHIEF JUDGE LIPPMAN: And that it's in your
25 - - - from your perspective that assault doesn't take

1 it out of that statutory scheme?

2 MR. CARUSONE: Yes. And the reason is
3 because the statutory scheme desc - - - which defines
4 burglary says any crime. I - - - I think, you know,
5 the public thinks norm - - - normally of a larceny,
6 people go in to steal.

7 JUDGE RIVERA: But is that a way to get
8 around assault having been removed from the statutory
9 scheme previously?

10 MR. CARUSONE: It's not and - - -

11 JUDGE RIVERA: Is - - - isn't that what
12 you're doing, just getting around what was
13 specifically a legislative choice to remove assault
14 as one of the crimes?

15 MR. CARUSONE: No, and I - - - and if I
16 could explain. As we said on the street, this
17 assault on the street is not a felony murder case.

18 JUDGE RIVERA: Um-hum.

19 MR. CARUSONE: It clearly cannot be because
20 - - -

21 JUDGE RIVERA: Um-hum.

22 MR. CARUSONE: - - - assault's been
23 removed.

24 JUDGE RIVERA: Um-hum.

25 MR. CARUSONE: It's the fact that the - - -

1 a person went with intent to commit a crime therein.

2 JUDGE PIGOTT: I think - - - I think on the
3 street if - - - if - - - if you say well, he - - - he
4 - - - he assaulted him and then he killed him so it's
5 a felony murder two.

6 MR. CARUSONE: You think that it is?

7 JUDGE PIGOTT: No.

8 MR. CARUSONE: Oh.

9 JUDGE PIGOTT: I - - - I - - - that's what
10 I'm saying. At some point, you know, when you go
11 kill somebody you're done, and you can't say well,
12 you know, when you came in to kill him, that was one
13 crime and now ev - - - you - - - you had no intent to
14 kill him even though you buried a knife in his chest,
15 it's felony murder and we have to - - - we don't have
16 to prove intent.

17 MR. CARUSONE: Well, the whole felony
18 murder structure is that you don't have to prove that
19 it was an intentional homicide, correct. And whether
20 it's - - - you went in for a petty larceny and you're
21 in the furtherance of that and you caused a death or
22 you went in to assault the individual and caused a
23 death, it would be a change in the - - - in the
24 legislative structure if you were to modify that.

25 JUDGE ABDUS-SALAAM: Could I just ask this

1 question - - -

2 MR. CARUSONE: Yes.

3 JUDGE ABDUS-SALAAM: - - - about in
4 furtherance of going into the building. So what if
5 Mr. Chambers had been killed in the hallway as
6 opposed to in his own apartment?

7 MR. CARUSONE: Okay.

8 JUDGE ABDUS-SALAAM: Would you still say
9 it's a felony murder?

10 MR. CARUSONE: If he was not - - - if he
11 was inside a building - - -

12 JUDGE ABDUS-SALAAM: Right.

13 MR. CARUSONE: - - - and the - - - the - -
14 - and the entry was unlawful in that location, the
15 way this particular apartment was there was an ex - -
16 - there was an outside and an inside. There wasn't a
17 hallway in the structure of this particular building,
18 but if he was in a place that he, meaning Henderson,
19 lawfully could be, then you don't have the burglary.

20 JUDGE ABDUS-SALAAM: Right.

21 MR. CARUSONE: And then you would have a
22 manslaughter and you would have some other charges,
23 but you would not have felony murder. You must have
24 that enumerated felony, the burglary in this
25 particular case.

1 CHIEF JUDGE LIPPMAN: Okay. Thanks,
2 counsel.

3 JUDGE RIVERA: I - - - I'm sorry. Can I
4 just - - -

5 CHIEF JUDGE LIPPMAN: I'm sorry, Judge
6 Rivera.

7 JUDGE RIVERA: I see you still got a couple
8 minutes left, can you address the manslaughter in the
9 second-degree lesser-included offense question?

10 MR. CARUSONE: Yes. It - - - and that's
11 very much a fact-based analysis, and I think this
12 court in - - - I - - - I want to make sure I've got
13 my case wrong - - - right, is Rivera - - -

14 JUDGE RIVERA: Um-hum.

15 MR. CARUSONE: - - - addressed this, and in
16 the Rivera case the facts weren't quite as compelling
17 as they are here. In that case there was actually
18 the defendant made claims that he had act - - - that
19 he was just waving a knife around. He had made
20 claims and testified at trial about those events. In
21 this case the defendant very specifically voiced his
22 intent. He gave a written statement to the
23 investigator at the - - - hours after his arrest
24 where he admitted I stabbed him, I only did it once.
25 He also then testified at the initial trial, which

1 was a part of the record of the second trial, and he
2 said, as I think you had indicated, I'm not going to
3 lie. I went in there to hurt him.

4 JUDGE STEIN: Well, could - - - could the
5 jury have found he didn't mean to hurt him that badly
6 and - - - and - - - and the victim fell and that's
7 how this deep puncture?

8 MR. CARUSONE: I - - - I would argue that
9 that's not a reasonable view of the evidence. And
10 the reason I - - - I say that is the medical
11 examiner's testimony described that wound. And one
12 of the things that was described, the court will
13 recall, is the entry point and how it was the same
14 width as the actual blade and how it was a clean
15 entry and it went all the way five inches through
16 skin, through lung, and then through organs into the
17 aorta. That's inconsistent with everything that we
18 have in this particular case. And when making that
19 determination on the charge down, there has to be a
20 reasonable view of the evidence, and I submit that
21 there wasn't in this case.

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

24 MR. CARUSONE: Thank you.

25 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

1 MR. ABBATOY: Thank you, Judge. I'd like
2 to address two issues that came up during my
3 opponent's argument. First is the legislative intent
4 issue that appears to be on the court's mind. This
5 court has never had any difficulty dealing with
6 something of the same problem that we have in this
7 case way back when when the felony murder statute
8 said that any crime could form the basis of a - - -
9 of a felony murder, including assault, and we have
10 all kinds of cases going back to the Morahan case
11 where Judge Cardozo said that we have to look at
12 whether or not the substantive crime is essentially
13 meaningfully independent of the true crime that is
14 being charged here. And I suggest that you can deal
15 with this in the same way that you dealt - - - you
16 dealt with those old cases because the same problem
17 that was left with that - - - with the older merger
18 problem remains in this one part of the burglary
19 statute - - - or this one part of how burglary
20 applies to felony murder.

21 JUDGE STEIN: Well, the - - - but the
22 difference is, and I think as counsel explained, that
23 if - - - if you - - - if you - - - that the burglary
24 presents an additional factor, an additional basis
25 above and beyond the crime itself. In other words,

1 it's - - - it's - - - it's a different crime. It may
2 be the same intent used for both crimes, but it - - -
3 but it's not the same as if they were outside on the
4 sidewalk.

5 MR. ABBATOY: Right.

6 JUDGE STEIN: Then there is no underlying
7 crime at all. There's no burglary. There's just an
8 assault.

9 MR. ABBATOY: The problem - - - the problem
10 that the government faces in this case is this. The
11 - - - the crime that's underlying the burglary is an
12 assault, and the only thing that allows the
13 government to - - -

14 JUDGE STEIN: But if the legislature wanted
15 to exclude, that they knew how to do that, didn't
16 they?

17 MR. ABBATOY: Perhaps.

18 JUDGE STEIN: I mean they did - - - that's
19 what they did before. They intentionally changed the
20 statute.

21 MR. ABBATOY: But - - -

22 JUDGE STEIN: And they said we're not
23 limiting the basis for the burglary, so - - -

24 MR. ABBATOY: Of course the legislature was
25 also aware of this court's continuous application of

1 the merger doctrine, so I'd suggest that that is
2 known within the structure of the statute. The
3 problem that present itself - - -

4 JUDGE RIVERA: Well, it doesn't address the
5 question of in furtherance of, of what that language
6 means.

7 MR. ABBATOY: No, that's ess - - - that's
8 essentially a different issue, I think here, that
9 remains static throughout the penal law. This is
10 kind of without regard to this double counting. But
11 to get back to Judge Stein's point here, I think the
12 real issue that should concern the court is that
13 without this assault, this burglary is just a
14 misdemeanor.

15 And the only thing that allows the
16 government to get out of proving some sort of mens
17 rea underlying this homicide is the notion that there
18 is an imputed felonious intent to the - - - to the
19 homicide. Here when you impute a felonious intent to
20 the homicide you impute an assault which is excluded.
21 So if the - - - you're going to pay attention to the
22 legislative history and the legislative intent issue,
23 I suggest that excluding assault is what you should
24 be concerned about.

25 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank

1 you.

2 MR. ABBATOY: Thank you.

3 CHIEF JUDGE LIPPMAN: Thank you both.

4 Appreciate it.

5 (Court is adjourned)

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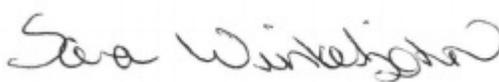
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. William A. Henderson, No. 106 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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