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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 216

BRANDON MCFADDEN,

Respondent.

20 Eagle Street
Albany, New York 12207
November 13, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Okay, number 216,
2 People v. Brandon McFadden.

3 Counselor, do you want any rebuttal time?

4 MS. FENN: Yes, Your Honor. Two minutes,
5 please.

6 THE COURT: Two minutes. Go ahead.

7 MS. FENN: For appellant Richard A. Brown,
8 Danielle Fenn. May it please the court.

9 Defendant waived his double jeopardy
10 protection when he explicitly opted for a mistrial
11 and partial verdict on the misdemeanor count, after
12 being told by the court that he could be retried on
13 felony counts. This court has held that defendants
14 can waive their double jeopardy protections pursuant
15 to C.P.L. Section 344 - - -

16 CHIEF JUDGE LIPPMAN: Counselor, how is
17 there double jeopardy in this case, given what went
18 on in the courtroom? Did the substitute counsel
19 actually acquiesce in the mistrial?

20 MS. FENN: In this case, when the first
21 jury note came that they were - - -

22 CHIEF JUDGE LIPPMAN: On the counts; on the
23 possession with intent?

24 MS. FENN: Yes, Your Honor, there was a
25 waiver. After the first jury note, counsel suggested

1 the partial verdict, but said that it would be in the
2 discretion of the court. And then when there was
3 that later jury note, where Juror Number 5 wanted to
4 be excused, defendant explicitly asked for a
5 mistrial.

6 JUDGE PIGOTT: Was this just a mistake on
7 everyone's part? Because it seems rather statutory
8 that, you know, that if you're convicted of the
9 lesser, that you're acquitted of the greater.
10 Wouldn't you agree? So it seems odd that you would
11 take the verdict saying he's guilty of the lesser,
12 and then - - - but I've already granted a mistrial on
13 the greater, and therefore we're going to go to trial
14 on those.

15 MS. FENN: Your Honor, in this case, the
16 jury should have been instructed to acquit first.
17 But in this case, that didn't happen. And like in
18 People v. Echevarria, there - - - this court held
19 that it was the defendant's actions prior to the
20 partial verdict that waived double jeopardy
21 protections.

22 JUDGE CIPARICK: These are separate counts
23 on the indictment, correct?

24 MS. FENN: Yes, Your honor.

25 JUDGE CIPARICK: So they were not charged

1 in the alternative; they were charged - - - the jury
2 was given all three of them to consider?

3 MS. FENN: Yes, Your Honor. They were just
4 read to the jury. There were no instructions about
5 which order they should consider them. But in - - -

6 JUDGE CIPARICK: But you concede that the
7 misdemeanor count is a lesser included of the felony
8 count? It's the same - - - the same drugs were
9 involved?

10 MS. FENN: Yes. It was the same colony of
11 drugs.

12 JUDGE CIPARICK: Okay.

13 MS. FENN: And it is a lesser included of
14 the possession with intent to sell - - - I'm sorry,
15 yes - - - which should have been - - -

16 JUDGE SMITH: How is this case any diff - -
17 - how is this case different from Fuller?

18 MS. FENN: In Fuller, which was refined in
19 Echevarria, the court said that once a defendant is
20 acquitted, he can't waive double jeopardy
21 protections. But in this case, as in Echevarria,
22 it's the defendant's actions prior to the partial
23 verdict. In this case, the court gave the defendant
24 two options: either take the partial verdict and
25 continue deliberations, or a partial verdict and a

1 mistrial.

2 And the court, in response to a question by
3 the prosecutor, said there's no prejudice to the
4 People for the defendant to be retried on the
5 remaining counts. Defendant never said anything. He
6 never challenged that statement.

7 JUDGE SMITH: Well - - -

8 JUDGE GRAFFEO: Does the rec - - - does the
9 record indicate that defense counsel understood he
10 was, in your words, "acquiescing" to a retrial?

11 MS. FENN: Your Honor - - -

12 JUDGE GRAFFEO: He never come out and says
13 that, does he?

14 MS. FENN: He never specifically says that.
15 But after the statement that the People can retry the
16 defendant on the felony counts, he doesn't say
17 anything.

18 JUDGE SMITH: But that's - - -

19 MS. FENN: And in later action - - -

20 JUDGE SMITH: - - - but that's true in
21 Fuller, too. I'm reading from Fuller: "The trial
22 judge, upon the prosecutor's suggestion and without
23 objection by defendant, accepted a partial verdict."
24 What's the difference?

25 MS. FENN: In this case, like in

1 Echevarria, it's the defendant's actions before the
2 partial verdict, that he was told he could be
3 retried, and he specifically decided to take the
4 partial verdict and retrial instead of the partial
5 verdict and continued deliberations. And his later
6 actions, after the partial verdict, confirm that he
7 knew he was going to be retried. The court told the
8 jury that another jury would have to hear this case,
9 and defense counsel said that he needed to order the
10 minutes for the retrial.

11 JUDGE SMITH: But that was - - - that was
12 after the - - - that was after the mistrial that he
13 said that, wasn't it?

14 MS. FENN: Yes, Your Honor. So that
15 doesn't - - -

16 JUDGE SMITH: And we also said - - - I
17 mean, Fuller seems to have all the bases covered.
18 Fuller says you can't waive it after you've been
19 acquitted.

20 MS. FENN: Yes, Your Honor. In this case,
21 his later statements about the retrial and ordering
22 the minutes for the retrial only confirm what
23 happened before the partial verdict, which was the
24 waiver. When he knew that he would be retried - - -

25 JUDGE SMITH: Can you quote the words by

1 which he waived?

2 MS. FENN: It's when he opted for the
3 partial verdict and the mistrial, after already being
4 informed that he would be retried. It's a
5 combination of those two when given the choice. And
6 in this time - - - it was a strategic decision.

7 JUDGE CIPARICK: Did you raise this
8 argument below? Did you raise this argument in the
9 trial court?

10 MS. FENN: That he waived?

11 JUDGE CIPARICK: Have you preserved this
12 argument in the trial court, this waiver argument?

13 MS. FENN: This is an argument that doesn't
14 need to be preserved. Waivers in appellate - - -

15 JUDGE CIPARICK: And why is that?

16 MS. FENN: Waiver is something that's
17 raised in appeal just to alert the appellate court
18 that they should enforce it against the waiving
19 party.

20 CHIEF JUDGE LIPPMAN: Are you saying this
21 is a waiver or an implied waiver?

22 MS. FENN: Well, it's an implied waiver.
23 And like in Echevarria, the defendant made a
24 decision, and it was a strategic decision. Here, by
25 taking the partial verdict and mistrial - - -

1 CHIEF JUDGE LIPPMAN: Assume that there's
2 no waiver. Why, on the merits, should you prevail?

3 MS. FENN: Well, in this case, this court
4 has repeatedly held that when a defendant requests a
5 mistrial and there's no prosecutorial or judicial
6 misconduct, double jeopardy concerns are not
7 generally implicated.

8 CHIEF JUDGE LIPPMAN: Even given the lesser
9 - - -

10 MS. FENN: And here the defendant - - -

11 CHIEF JUDGE LIPPMAN: - - - included here,
12 that it's so obviously a lesser included?

13 MS. FENN: Your Honor, even based on that,
14 because the way the jury was charged, they weren't
15 informed that it was a lesser included, so they
16 just - - - that's why this situation arose. And in
17 this case - - -

18 CHIEF JUDGE LIPPMAN: You agree, in the
19 normal circumstance, where you have an acquit first
20 direction, that's different?

21 MS. FENN: Yes, Your Honor. In that case,
22 the jury would never have reached the misdemeanor
23 count unless they - - -

24 JUDGE PIGOTT: That gets back to my
25 original question. Because at one point, I think,

1 the trial court said to the defendant, you didn't ask
2 for a charge like you're now claiming and now making
3 this motion. And I'm wondering whose fault - - - I
4 mean, I shouldn't say fault - - - but how'd we get
5 into this? I mean, shouldn't this have been very
6 clear from the court on his instructions that you
7 have to, you know, start with the greater charges and
8 then move down, rather than have it happen the way
9 this happened?

10 MS. FENN: Yes, Your Honor. It should have
11 been charged to acquit first.

12 JUDGE PIGOTT: So who should bear the
13 burden, then? Let's assume that that was an error on
14 the part of the court. Who should bear the burden of
15 that error?

16 MS. FENN: Well, in this case, as in
17 Echevarria, where there wasn't an acquit first
18 instruction, in that case this court held that the
19 defendant's actions before the partial verdict waived
20 his double jeopardy claim.

21 JUDGE SMITH: But he said something there.
22 He said there's no Fuller problem.

23 MS. FENN: Yes, Your Honor. In Echevarria
24 - - -

25 JUDGE SMITH: I mean, here - - -

1 MS. FENN: - - - the prosecutor - - -

2 THE COURT: - - - here, all the defense
3 lawyer says is, "Your Honor, I spoke to my client,
4 and at this time defense would ask for a mistrial."
5 Is that the waiver?

6 MS. FENN: Your Honor, in Echevarria, the
7 prosecutor brought up Fuller, and defense counsel
8 said I don't think Fuller applies; I don't think
9 that's a problem. But here, although the parties
10 didn't cite Fuller, there was - - - it was addressed
11 whether there would be a retrial when the prosecutor
12 - - -

13 JUDGE SMITH: Can I bring you back to my
14 other question? I mean, the words, "At this time
15 defense would ask for a mistrial," are there any
16 other words he spoke in which you find a waiver, or
17 are those the words?

18 MS. FENN: It's the knowledge that he would
19 be retried along with his request for a mistrial - -
20 -

21 JUDGE SMITH: But those - - -

22 MS. FENN: - - - that constitute - - -

23 JUDGE SMITH: - - - but those are the only
24 words you can quote that you would - - - in which you
25 would find a waiver?

1 MS. FENN: Yes, Your Honor. There's
2 nothing else in the record. But that's sufficient,
3 because he knew he was going to be retried. He never
4 said, I object to that; I don't think I should be
5 retried. He said - - - he requested a partial
6 verdict after already being told - - -

7 CHIEF JUDGE LIPPMAN: Counselor, one last
8 question. Is there any significance to the fact that
9 you had a substitute counsel here?

10 MS. FENN: Your Honor, in this case,
11 defendant never raised a claim below that there was a
12 substitute counsel. And he fully consented to it.
13 And before he requested a mistrial, there was an
14 opportunity for the attorney to speak with the
15 defendant.

16 CHIEF JUDGE LIPPMAN: Okay, counselor.
17 You'll have your rebuttal.

18 I'm sorry, Judge Ciparick.

19 JUDGE CIPARICK: Can I ask one question. I
20 just want to ask one question. You've asked that the
21 misdemeanor count be reinstated.

22 MS. FENN: Yes, Your Honor.

23 JUDGE CIPARICK: Isn't that problematic
24 under LaFontaine and Concepcion?

25 MS. FENN: Those cases deal with appellate

1 courts upholding decisions on claims or reasons that
2 trial courts specifically rejected. And in this
3 case, it's not a situation where that would apply.
4 But the People claimed below that the Appellate
5 Division should have reinstated it, or the Appellate
6 Division could have reduced it. In cases where
7 there's insufficient evidence, Appellate Divisions
8 routinely will reduce it to a misdemeanor count or
9 reduce it to a lesser included. And the People
10 submit that the Appellate Division could have
11 properly either reduced the felony to a misdemeanor
12 or reinstated the misdemeanor claim, which would put
13 defendant in the status quo ante, instead of the
14 situation now where he has a windfall - - -

15 CHIEF JUDGE LIPPMAN: Okay, counselor.

16 MS. FENN: - - - with no conviction.

17 CHIEF JUDGE LIPPMAN: Okay.

18 MS. FENN: Thank you.

19 CHIEF JUDGE LIPPMAN: Thank you counselor.

20 Counselor? Counselor, why isn't this a
21 waiver?

22 MS. MCNAMARA: Good afternoon, Your Honors.

23 The circumstances in this case fall squarely within
24 this court's holding in Fuller. Even if - - - first
25 of all, the Echevarria decision held that it was a

1 forfeiture, not a waiver. A forfeiture is more of an
2 invited error.

3 JUDGE PIGOTT: If you look at it globally,
4 he could not have gotten luckier than having been
5 convicted of possession seventh, it seems to - - - if
6 he'd been acquitted of the misdemeanor, he'd be
7 facing a trial on the two felonies. But because he
8 got convicted of the misdemeanor, thinking he's going
9 to trial on the - - - because he asked for the
10 mistrial, he's now going to go to trial on the two
11 felonies where they hung; the judge then saying,
12 well, the possession seventh is the lesser included
13 of the felony, so I'm going to sua sponte dismiss
14 that one, you're going to trial on the two; and now,
15 the two are dismissed because there's an implied
16 acquittal. And the implied acquittal is wholly
17 dependent upon the conviction on the possession
18 seventh, which now has been dismissed, because the
19 judge said it was a lesser included.

20 MS. MCNAMARA: Well, I think - - -

21 JUDGE PIGOTT: Where did we go through the
22 looking glass on this?

23 MS. MCNAMARA: I think I'd just like to
24 point out that there's no indication that defense
25 counsel even heard the judge's passing comment that

1 he would be retried on both of those counts. It came
2 after they already had a discussion about whether or
3 not - - -

4 JUDGE PIGOTT: Well, he ordered the
5 transcript, so he must have read it.

6 MS. MCNAMARA: Well, but the People are
7 claiming that at that time he knew, before the - - -
8 because if it had been in the transcripts afterwards,
9 then clearly he's already been acquitted, and we're
10 in the exact same situation in Fuller. There's no
11 indication that when he said it in the court that he
12 knew about it.

13 Second, there was going to be a mistrial on
14 this - - - or excuse me - - - a retrial on the sale
15 count. So the actions that occurred after the
16 acquittal, being that he ordered the transcripts,
17 that he - - - the judge said, well, let's set up a
18 date for the retrial; there was going to be a retrial
19 regardless. The fact - - - when the judge made the
20 comment that he was going to be retried on both
21 counts, he did not invite comment - - -

22 JUDGE SMITH: But shouldn't the defense
23 lawyer have said, Judge, I'd be delighted to have a
24 mistrial, and I want you to know that I'm not waiving
25 my double jeopardy rights that may come from the

1 partial verdict?

2 MS. MCNAMARA: That's absolutely not
3 required. This court has never held that - - -

4 JUDGE GRAFFEO: What about - - - the
5 Berkman case doesn't apply here?

6 MS. MCNAMARA: It absolu - - -

7 JUDGE GRAFFEO: Where we indicated that you
8 have to voice an objection - - -

9 MS. MCNAMARA: Yeah - - -

10 JUDGE GRAFFEO: - - - when the judge
11 declares a mistrial?

12 MS. MCNAMARA: Sure. That case is both
13 factually and legally different. Factually, in that
14 case, the court specifically invited comment from
15 defense counsel. Everyone was aware of the
16 situation. He was going to declare a mistrial, and
17 he gave defense counsel an opportunity. That did not
18 occur here. Right after the judge made the comment,
19 the conversation had ended and he brought the jury
20 back in. No one responded to that comment, and he
21 didn't - - -

22 JUDGE SMITH: But this is a mistrial that
23 your client or his lawyer specifically wanted.

24 MS. MCNAMARA: Well, whether or not he
25 consented to or - - -

1 JUDGE SMITH: He asked for it.

2 MS. MCNAMARA: Whether or not he consented
3 to the mistrial does not matter here. In Fuller, the
4 defense counsel also essentially consented to the
5 mistrial. And this court held that that does not
6 mean that he couldn't be - - -

7 JUDGE SMITH: You're saying he consented to
8 the mistrial, but not to be retried?

9 MS. MCNAMARA: Right. And that goes back
10 to the question about Berkman. The legal issue in
11 that case is entirely and separate. It deals with a
12 situation where you have unresolved counts. And the
13 courts are - - - the language that this court has
14 held when referring to that situation is not that
15 they're waiving their double jeopardy claim; it's
16 that double jeopardy is not implicated - - -

17 CHIEF JUDGE LIPPMAN: Counsel, assuming - -
18 -

19 MS. MCNAMARA: - - - because it has not - -
20 -

21 CHIEF JUDGE LIPPMAN: - - - assume we agree
22 with you, for the sake of argument, that there's no
23 waiver. How do you prevail on the merits here, you
24 know, given the situation that there was no acquit
25 first charge; the judge didn't ask them to consider

1 it in the alternative; how do you prevail?

2 MS. MCNAMARA: Well, Fuller has already
3 answered that question. In Fuller, there was no
4 Boettcher instruction as there was not here. Defense
5 counsel did not object to it there as he did not
6 object to it here. And Fuller held that that doesn't
7 matter. By operation of law and under settled double
8 jeopardy principles, you cannot be retried on a
9 resolved count. And that greater was deemed
10 acquitted and deemed resolved once they took the
11 verdict on the lesser.

12 CHIEF JUDGE LIPPMAN: So regardless of what
13 happened in the courtroom, that's what the law is?

14 MS. MCNAMARA: Well, the only exception is
15 the exception that this court made in Echevarria,
16 which is an entirely different circumstance. The
17 defense counsel there - - - well, when they discussed
18 taking a partial verdict, the ADA specifically
19 objected and said, no, no, no; we can't do that,
20 because if we do, it's going to preclude the
21 possibility of a conviction on the greater. At that
22 point they didn't know if the jury had deadlocked on
23 any of the counts, they just knew that they had
24 reached a partial verdict.

25 And then defense counsel assured the court,

1 that won't happen here. Fuller doesn't apply. The
2 jury can go forward in continuing those counts. And
3 indeed, he did not object when, in that case, the - -
4 - right after they took the partial verdict, they
5 continued deliberations. That was a strategic move.

6 So the only exception is if defense
7 counsel's action is a forfeiture, really, of the
8 right. If defense counsel's actions before the trial
9 court make it clear that he is saying, this does not
10 apply to me - - -

11 JUDGE GRAFFEO: Well, to avoid this
12 guessing whether it's a forfeiture or not, why
13 shouldn't we adopt a rule that says you've got to
14 voice an objection - - -

15 MS. MCNAMARA: Well - - -

16 JUDGE GRAFFEO: - - - based on double
17 jeopardy?

18 MS. MCNAMARA: - - - yes. This court has
19 never held that an implied waiver would apply to this
20 situation; only in situations that I was saying
21 earlier, considered under Berkman, where the issue is
22 really regarding unresolved counts. And double
23 jeopardy is not implicated because it hasn't been
24 terminated.

25 In this situation, once - - - an acquittal

1 is final, even if it's egregiously erroneous. Once
2 an acquittal occurs, jeopardy has terminated. And
3 therefore going forward, I mean, that's the
4 prohibition of - - -

5 CHIEF JUDGE LIPPMAN: There's an implied
6 acquittal - - -

7 MS. MCNAMARA: - - - double jeopardy.

8 CHIEF JUDGE LIPPMAN: There's an implied
9 acquittal, or under the law, it's an acquittal,
10 period?

11 MS. MCNAMARA: Well, it's an implied
12 acquittal under the law, because the statute says
13 that if there is an acquittal of the lesser - - - or
14 excuse me - - - if there's a conviction of the
15 lesser, then the greater is deemed - - -

16 JUDGE SMITH: But this is a deemed - - -

17 MS. MCNAMARA: - - - an acquittal.

18 JUDGE SMITH: - - - acquittal?

19 JUDGE CIPARICK: Of a greater - - -

20 MS. MCNAMARA: It's deemed an acquittal.

21 But regardless of who - - -

22 JUDGE SMITH: I mean, putting - - -

23 MS. MCNAMARA: - - - acquittals can come
24 about in various ways.

25 JUDGE SMITH: Putting - - -

1 MS. MCNAMARA: From a jury - - -

2 JUDGE SMITH: - - - putting aside Fuller,
3 which I realize may be tough to do, couldn't we - - -
4 isn't it possible to say that that - - - that it's
5 not deemed an acquittal when the jury specifically
6 says we're not acquitting him - - - says we're
7 disagreed?

8 MS. MCNAMARA: Well, that was the situation
9 in Fuller. And this court held that - - -

10 JUDGE SMITH: I was afraid you were going
11 to say that.

12 MS. MCNAMARA: Because trial courts are
13 required to give the - - - because acquit first is
14 the rule in New York, regardless of whether the jury
15 - - - excuse me - - - actually finds guilt or
16 innocence, it doesn't matter.

17 JUDGE PIGOTT: Well, that gets us back to
18 the beginning where, if he'd been acquitted of
19 possession seventh, he'd be in worse shape than if
20 he'd been convicted, right? I mean the way this
21 thing has now developed. Because if he'd - - - if
22 he'd been acquitted of seven, there'd be no problem
23 retrying him on possession third.

24 MS. MCNAMARA: Well, if he had been - - -

25 JUDGE PIGOTT: Because they said they were

1 hung.

2 MS. MCNAMARA: I think that there would
3 actually be another objection to that, perhaps not
4 under double jeopardy, but if - - -

5 JUDGE SMITH: And if the jury found he
6 never possessed cocaine - - -

7 MS. MCNAMARA: Right.

8 JUDGE SMITH: - - - it's kind of hard to
9 find that he possessed it with intent to sell?

10 MS. MCNAMARA: Exactly. And he was
11 acquitted on the sale count when he - - -

12 JUDGE PIGOTT: Right, second trial.

13 JUDGE CIPARICK: Second. What about the
14 reinstatement of the misdemeanor count? Can that be
15 done? I mean, that's the alternative relief that
16 they're seeking.

17 MS. MCNAMARA: Yes. This - - - this court
18 only has the power to review the legality of the
19 corrective action taken by the Appellate Division.
20 And in this case, what the Appellate Division did,
21 which it found that there was a double jeopardy
22 violation, it took the appropriate action in that
23 case, which is to dismiss the count.

24 Now, the People are arguing that they have
25 discretion to fashion remedies. That may be true.

1 But this court does not have the power to review, you
2 know, if they have the discretion, if they should
3 have done something - - -

4 JUDGE SMITH: But did they - - - did they
5 think they had the discretion? I mean, it doesn't
6 look to me as though they said we exercise our
7 discretion not to reinstate the misdemeanor.

8 MS. MCNAMARA: Well, they didn't say
9 anything at all. They just ordered the appropriate -
10 - -

11 JUDGE SMITH: Well, couldn't - - -

12 MS. MCNAMARA: - - - and legal - - -

13 THE COURT: - - - couldn't we send it back
14 to them and tell them they've got discretion to do it
15 if they want to do it?

16 MS. MCNAMARA: No, because this court can
17 only review whether a corrective action is legal.
18 And in order to make that determination, you would
19 have to find that what they did was illegal. And - -
20 -

21 JUDGE SMITH: Well, suppose - - - suppose
22 they had said, the People asked us to reinstate the
23 misdemeanor count; we hold that we have no discretion
24 to do that. And if they're wrong, we could reverse
25 that, right?

1 MS. MCNAMARA: If - - - if they had said
2 they had no discretion - - - well, it's the People's
3 - - -

4 JUDGE SMITH: You know what my next
5 question's going to be, is, can't we interpret this -
6 - - their opinion in this case, as saying essentially
7 that?

8 MS. MCNAMARA: Well, even though the judge
9 has the discretion to fashion remedies, there's not a
10 single case the People have cited where when there's
11 a double jeopardy violation, that the only remedy is
12 to dismiss. The real error here, with this lesser,
13 is that what should have happened is they should have
14 sentenced the defendant on it after the first trial,
15 like they did in Fuller. That didn't happen.

16 For whatever reason, they went to the
17 second trial, and they still had this conviction out
18 there. So when, at the second trial, when the judge
19 went to sentence him, he had these two counts, and
20 given that, clearly dismissed the lesser. But, you
21 know, just because there's some messy procedural
22 stuff does not mean that the Appellate Division did
23 not order the correct action when they dismissed the
24 count.

25 CHIEF JUDGE LIPPMAN: Okay, counselor.

1 Thank you.

2 MS. MCNAMARA: Thank you.

3 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

4 MS. FENN: Just briefly. Defendant now
5 argues for the first time that there was no
6 indication that defense counsel heard the court's
7 comment that defendant could be retried if there was
8 a mistrial. There's no indication that defense
9 counsel didn't hear it.

10 And if we assume that defense counsel
11 didn't hear it, how would we ever know, or how would
12 the People ever prove, that anyone in the courtroom
13 heard it? There was a record, and defendant never
14 challenged that record.

15 Also, the Berkman case is applicable. It's
16 a different legal issue about implied consent. But
17 it stands for the idea that defense counsel can't
18 lull the court into a sense of complacency by
19 remaining silent, because otherwise a defense
20 attorney could just stay silent during an O'Rama
21 conference, not say anything, all the while
22 anticipating a future objection when the court's
23 action couldn't be undone. So in this case - - -

24 JUDGE SMITH: But isn't that exactly what
25 happened in Fuller? The defense counsel sat silent

1 until after the action couldn't be undone, and he
2 won?

3 MS. FENN: Yes, Your Honor. But in
4 Berkman, which is a more recent case, this court has
5 shown that it's important - - - the defendant - - -
6 defense counsel's actions in all of these colloquies
7 are important. Because otherwise, the attorney could
8 just wait to a time where the court couldn't undo its
9 actions and then object. And this court in Berkman
10 said that no, a defense counsel has to meaningly
11 (sic) participate in the colloquies; and that's what
12 happened here.

13 Defense counsel participated in these
14 colloquies. Defendant made a decision and waived his
15 double jeopardy rights.

16 CHIEF JUDGE LIPPMAN: Okay, thanks
17 counselor.

18 MS. FENN: Thank you.

19 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Brandon McFadden, No. 216 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

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Date: November 20, 2012