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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 161

DELROY COLVILLE,

Appellant.

20 Eagle Street
Albany, New York 12207
September 6, 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.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Colville.
2 Counselor, would you like any rebuttal
3 time?

4 MS. FAHEY: Three minutes, please.

5 CHIEF JUDGE LIPPMAN: Three minutes, sure.
6 Go ahead.

7 MS. FAHEY: Good afternoon. I'm Lynn
8 Fahey, representing Mr. Colville.

9 I hope I have time to address both of the
10 issues because I think they're both important and
11 interesting, but let me start with - - -

12 CHIEF JUDGE LIPPMAN: Start with the
13 lesser-included then.

14 MS. FAHEY: I'll start with the lesser-
15 included.

16 CHIEF JUDGE LIPPMAN: Go ahead.

17 MS. FAHEY: Absolutely, Judge. I think
18 there are numerous reasons to rest this decision with
19 defense counsel rather than with the defendant
20 personally. I think, at base, the whole purpose of
21 giving a defendant a right to counsel is to protect
22 him from his own decisions made out of ignorance, to
23 give him the benefit of counsel's tactical expertise,
24 as well as counsel's knowledge of the law, and that
25 this is an area that is just - - - is a tactical,

1 strategic call - - -

2 JUDGE SMITH: But isn't - - -

3 MS. FAHEY: - - - and it can be
4 complicated.

5 JUDGE SMITH: Doesn't the defendant know
6 one thing that his lawyer can never know, which is
7 the defendant knows how much the difference between
8 freedom and to enter in some intermediate term of
9 imprisonment means to him? He may say, if I've only
10 got a one-thousandth of one percent chance of an
11 outright acquittal here, I'm not going to do one
12 thing to diminish it because that's all I care about
13 is the faint hope of walking, a free person, out of
14 this courtroom.

15 MS. FAHEY: Well, Your Honor, if that were
16 what the defendant said in his conversations with the
17 attorney, that might very well convince the attorney,
18 okay, you know, on balance I thought we should get
19 the lessers, but since this is - - -

20 JUDGE SMITH: But if the attorney - - -

21 MS. FAHEY: - - - so important to him - - -

22 JUDGE SMITH: If the attorney listens - - -

23 MS. FAHEY: - - - I change my mind.

24 JUDGE SMITH: If the attorney listens to
25 that and says you're nuts - - -

1 MS. FAHEY: Right.

2 JUDGE SMITH: - - - then it's the
3 attorney's decision?

4 MS. FAHEY: I think it's the attorney's
5 decision because the whole purpose of the guarantee
6 is to protect the defendant from foolish decisions.

7 CHIEF JUDGE LIPPMAN: Why isn't this so
8 fundamental that it should be up to the defendant?

9 MS. FAHEY: Well, Your Honor, I don't think
10 it - - - it is fundamental. And let me point to a
11 couple of arguments that seem very little and - - -
12 maybe, but statutory arguments. You know, whenever
13 we have a right that is fundamental and is left to
14 the defendant, we have all sorts of protections in
15 the law. You can't plead guilty without being given
16 your Boykin rights and admitting your guilt and going
17 through the whole process. You can't waive your
18 right to a jury without going through a very specific
19 statutory procedure that's guaranteed to make sure
20 that you are knowingly and intelligently making that
21 decision, that you know what you're doing.

22 Here, the prosecutor, listening to what the
23 defendant was saying or maybe overhearing some of
24 what the defendant was saying, told the court: he's
25 indicating confusion here; he doesn't understand.

1 Nothing in the statute gives - - - that
2 controls lessers gives any of that kind of protection
3 to the defendant. So I think that that's something
4 that is very important here.

5 JUDGE CIPARICK: Well, defense counsel - -
6 -

7 MS. FAHEY: Also - - -

8 JUDGE CIPARICK: Defense counsel here was
9 very adamant that he advised his client that the
10 lesser-includes should be submitted to the jury - -
11 -

12 MS. FAHEY: That's right.

13 JUDGE CIPARICK: - - - and ultimately
14 deferred to his client's wishes not to have them
15 submitted. The court was going back and forth on it
16 also.

17 What should defense counsel have done here?

18 MS. FAHEY: Well, Your Honor, I don't think
19 counsel, in the end, actually deferred. I think the
20 court decided to defer. And defense counsel, being
21 asked over and over and over, is it your request,
22 finally said, well, all right, the defendant's
23 request is my request, or something like that.

24 JUDGE SMITH: Does it make a difference if
25 we think that defense counsel did defer, that if - -

1 - I mean, certainly there are some cases where the
2 defense counsel can properly say, I wouldn't do it if
3 I were you, but it's your life; I'll do it your way.

4 MS. FAHEY: Right. I think there's a
5 difference between defense counsel changing his view
6 based on factoring in what the defendant's wishes are
7 and defense counsel just throwing up his hands and
8 saying, well, do whatever you want, I'm abdicating my
9 role in this.

10 And I think here it's clear that there was
11 lots of conferring. You know, all sorts of things
12 say how difficult it is to explain tactical decisions
13 to defendants. And I mean, as a life-long defense
14 attorney, I can tell you, you spend a heck of a lot
15 of time trying to save your clients from themselves.
16 That's just a big part of defense counsel's job in
17 life. So, you know - - -

18 JUDGE JONES: But ultimately it is the
19 defendant's decision, is it not?

20 MS. FAHEY: No, here I don't think it is.
21 This is not like pleading guilty. This is not - - -
22 the other statutory problem here is - - -

23 JUDGE JONES: Suppose they had prevailed
24 and there was - - - defendant was acquitted of the
25 murder and say a hung jury on the other charges, how

1 would that factor into your analysis?

2 MS. FAHEY: I don't think that would factor
3 in at all. I think that what - - -

4 JUDGE JONES: But couldn't the defendant
5 make the argument that he would have been acquitted
6 completely had it not been for the lesser-included?

7 MS. FAHEY: And complain that his attorney
8 was making - - -

9 JUDGE JONES: Yes.

10 MS. FAHEY: - - - allowed to make the deci
11 - - -

12 JUDGE JONES: Yes.

13 MS. FAHEY: He might make that argument. I
14 think that argument would be wrong. I think this has
15 to be counsel's call.

16 If you look at the current ABA standard
17 commentary, if you look at some of the cases, such as
18 Gonzalez v. United States in the Supreme Court - - -

19 CHIEF JUDGE LIPPMAN: What about Petrovich?

20 MS. FAHEY: Yes, sir, okay. Let me - - -
21 Petrovich is different - - -

22 CHIEF JUDGE LIPPMAN: Why is it - - -

23 MS. FAHEY: - - - because Petrovich is EED.

24 CHIEF JUDGE LIPPMAN: I know.

25 MS. FAHEY: EED, first, is purely up to the

1 defense. If the defense does not want EED charged,
2 the DA can't get it charged, the court can't charge
3 it over the defendant's objection; lessers, very
4 different.

5 JUDGE SMITH: Why should that affect the
6 issue of who makes the decision, lawyer or client?

7 MS. FAHEY: Well, I think there's something
8 sort of basically illogical about saying that the
9 defendant has the sole and exclusive right to make
10 this decision when he can be overruled by the court,
11 he can be overruled by the DA. That doesn't seem to
12 make a whole lot of sense to me.

13 Also, in EED, that's a mitigating defense.
14 When you are talking about having a lesser submitted
15 to the jury, the theory is he might not be guilty of
16 the greater but only the lesser. When you're talking
17 about EED, it's basically guilty with an excuse. He
18 intentionally killed someone but there was a reason,
19 so show him mercy. And it's an affirmative defense
20 that the defense has to prove. Very difficult to do
21 that and to take on that burden without basically
22 admitting or singing to the jury to admit that you
23 killed someone intentionally. That's very different
24 from submitting a lesser where your theory is I'm not
25 guilty of the greater; I may be guilty of the lesser

1 but I'm not guilty of the greater. I think that's a
2 - - -

3 JUDGE SMITH: There are - - -

4 MS. FAHEY: - - - big difference.

5 JUDGE SMITH: There are cases - - - well, I
6 know Petrovich was a case where the lawyer gives the
7 advice and the defendant says, no, I'm not following
8 your advice. And the lawyer sticks to his guns and
9 makes the argument to the court, says my client
10 doesn't want me to do this but I'm asking you to do
11 it, Your Honor.

12 MS. FAHEY: Right.

13 JUDGE SMITH: Is that different from the
14 case we have here where the lawyer said I don't like
15 it but I'm going along with what my client wants?

16 MS. FAHEY: Well, I don't think he really
17 exactly said I'm going along with what my client
18 wants. I think by then the court had made it clear
19 that it was going with what the client wanted.
20 Defense counsel was still saying in my opinion it
21 should be charged. Even once they've redone the
22 verdict sheet and they've gone through this umptiump
23 (sic) times, the court asked, "Do you have an
24 objection to the verdict sheet?" And he says, "It
25 doesn't give the jury the charges that I requested.

1 As far as other objections, no." And then he says,
2 "Well, you requested this." And he says, "Well, the
3 defendant, through me, requested it." "Your advice
4 was different?" "Yes." And then finally he says,
5 "My request is consistent with the defendant's
6 request."

7 But I think by then the court has made it
8 very, very clear that it's deferring to the
9 defendant. It's talking to the defendant directly.
10 It's telling the defense attorney who's pleading for
11 - - - you know, "Let me confer with him some more,
12 this is so important." "All right, go back and find
13 out what - - - discuss with Mr. Colville what he
14 wants." And then the judge says, "Well, we've done
15 all we can, we've given him what he wants; we've
16 taken out what he doesn't want." So I think, you
17 know, this is not a situation where defense counsel
18 ever changes his mind. And he consults with the
19 defendant and he says - - -

20 JUDGE SMITH: Well, there's a difference
21 between changing your mind and acquiescing.

22 MS. FAHEY: Well, Your Honor, you know,
23 early in this conversation that they have, defense
24 counsel lays out and says, look, I feel very strong -
25 - - he makes clear how strongly he feels that the

1 lessers have to be charged. The client disagrees,
2 and he says to the judge, "I don't know where we go
3 from here, except I'm always guided by the court."
4 It seems at that point I think he's doing what's
5 absolutely appropriate. This court has not yet
6 decided who gets to make the call as to lessers.
7 He's saying here's the problem, Judge, you know, you
8 figure out what we're supposed to be doing, which I
9 think is actually the appropriate thing for him to
10 do. And then the judge starts dealing with the
11 defendant and talking about what the defendant wants
12 and says we have no choice but to do what the
13 defendant wants.

14 JUDGE READ: Can we talk about duty to
15 retreat?

16 MS. FAHEY: Certainly.

17 JUDGE READ: And could you explain for me,
18 Ms. Fahey, I'm not sure that I have fixed in my mind
19 what the layout was, as between the hall - - -

20 MS. FAHEY: Okay.

21 JUDGE READ: - - - the common area, the
22 bedrooms in this area?

23 MS. FAHEY: Okay. This was a brownstone-
24 type house. The third floor - - - there's nothing in
25 the record that makes clear how many floors, but

1 there are three mailboxes. There's nothing to
2 indicate that there's anything above the third floor
3 other than a rooftop or an attic or something.

4 So these people live on the third floor.
5 You come up the stairs this way. There's a hallway.
6 There are bedrooms off the hallway. This way there's
7 a sort of, like, an open doorway, and you go in here.
8 My client's bedroom is off this way. Here's the
9 kitchen. Here's the bathroom across the way. So
10 it's all very small. The kitchen is small. If
11 things start in the kitchen and tumble out, you're in
12 the hallway in seconds.

13 My client can't - - - has to go through
14 some part of the hallway to get to the bathroom, to
15 get to the kitchen, to get down the stairs to leave
16 the building. So basically, you know, he pays 400
17 dollars a month rent. That gets him his bedroom, but
18 it also gets him the use of, along with the other
19 four people who live on this floor, the use of the
20 kitchen, the use of the bathroom.

21 JUDGE READ: And the bedroom opens out into
22 the hallway?

23 MS. FAHEY: The bedroom - - - well, it's a
24 little odd because there's a - - - there's sort of,
25 like, a doorway. I'm not sure whether there's

1 actually a door on it but there's, like, a doorway,
2 and then there's sort of a further hallway. It's
3 almost like a little vestibule there.

4 JUDGE READ: Okay.

5 MS. FAHEY: Bathroom this way, his room
6 this way, kitchen here, rest of the hallway out this
7 way, stairs coming up into the rest of the hallway.

8 JUDGE SMITH: Can I back you up for a
9 moment? Was a duty to retreat charge warranted all?
10 Forget about the dwelling issue. Where does the duty
11 to retreat come into these facts? I had trouble
12 seeing it.

13 MS. FAHEY: Well, the judge charges that if
14 he - - - he had a duty to retreat if he knew - - -

15 JUDGE SMITH: I guess what my - - -

16 MS. FAHEY: - - - could do so safely.

17 JUDGE SMITH: - - - my question was, is
18 there a reasonable view of the evidence that
19 supported that he was under attack but could retreat
20 with safety?

21 MS. FAHEY: Oh, sure. His account, which
22 he gives consistently - - -

23 JUDGE SMITH: In his account he's locked in
24 a struggle with a guy hitting him with an ashtray.

25 MS. FAHEY: That's right.

1 JUDGE SMITH: Where's the evidence that he
2 could have got up and retreated?

3 MS. FAHEY: Well, the People's witnesses
4 claim that there was a breakup in this - - -

5 JUDGE SMITH: The People's - - -

6 MS. FAHEY: - - - and he could retreat.

7 JUDGE SMITH: On the People's witnesses'
8 version they don't have to worry about the duty to
9 retreat; they're two separate fights.

10 MS. FAHEY: Right.

11 JUDGE SMITH: On his version there's a
12 clinch, practically - - -

13 MS. FAHEY: Yes.

14 JUDGE SMITH: - - - the whole time.

15 MS. FAHEY: That's right.

16 JUDGE SMITH: In either one, where does the
17 duty to retreat arise?

18 JUDGE READ: Well, he did get it - - - just
19 to - - - he did get that charge on the assault,
20 right?

21 MS. FAHEY: No, he did not.

22 JUDGE READ: He didn't on either?

23 MS. FAHEY: No, no, he did not.

24 JUDGE READ: Okay.

25 MS. FAHEY: He did not. The jury was given

1 half of the duty to retreat charge. They were told
2 he had a duty to retreat if he could do it safely.
3 And in fact, the court actually adds - - -

4 JUDGE SMITH: My question is was it - - -

5 MS. FAHEY: - - - adds to that at some
6 point.

7 JUDGE SMITH: Yeah, I don't know if this
8 point was raised, but did the defense lawyer below
9 object to the giving of a duty to retreat charge?

10 MS. FAHEY: He did not object - - - I don't
11 believe he objected to giving the duty to retreat
12 charge, because if you bought at least some of what
13 the People's witnesses were saying, you would have a
14 duty to retreat issue. But if there was a duty to
15 retreat, then they had to consider, at least as a
16 factual matter, which is what defense counsel asked
17 for, whether he was in his dwelling, which would mean
18 he did not have a duty to retreat.

19 JUDGE CIPARICK: And what about the issue
20 of who was the initial aggressor? Was that - - -

21 MS. FAHEY: Well, that's a disputed issue
22 in the sense that there's no question that the
23 deceased is clobbering Mr. Colville on the head - - -

24 JUDGE CIPARICK: Right.

25 MS. FAHEY: - - - and he's bleeding and - -

1 - you know, he's - - - according to him, he's down
2 and nearly blacking out when he reaches up and grabs
3 and grabs the knife.

4 JUDGE CIPARICK: Um-hum.

5 MS. FAHEY: According to the People's
6 witnesses, though, there's a break and people are
7 separated and he goes and gets the knife and comes -
8 - -

9 JUDGE CIPARICK: Right - - -

10 MS. FAHEY: - - - and comes back.

11 JUDGE CIPARICK: - - - comes back.

12 MS. FAHEY: So, you know, that's the - - -

13 JUDGE GRAFFEO: The other assail - - - the
14 other person involved in this skirmish was not a
15 resident of the building?

16 MS. FAHEY: That's correct. He lived in
17 the building next door to this building. He had a
18 friend on the second floor that he went to visit that
19 night or something and the friend wasn't there so he
20 - - - he was also friends with Carl Jones and his
21 son, so he wandered up there and he - - -

22 JUDGE GRAFFEO: But we don't - - -

23 MS. FAHEY: - - - was sitting with Carl
24 Jones.

25 JUDGE GRAFFEO: But we don't have two

1 individuals claiming it's their dwelling?

2 MS. FAHEY: No. No. This was Mr.
3 Colville's dwelling. It seems to me clear that
4 certainly his bedroom was his dwelling; no question
5 about that. But the kitchen facilities that he
6 shared, the bathroom, and whatever he had - - -
7 hallway he had to traverse to get safely from his
8 bedroom to the bathroom and back. It seems to me it
9 all has to be part of his dwelling. I mean, this is
10 the way poor people live.

11 CHIEF JUDGE LIPPMAN: Okay, counsel.
12 Thanks.

13 MS. FAHEY: Thank you.

14 MS. BRUFFEE: Good afternoon, Your Honors.
15 Anthea Bruffee for the People.

16 The defense counsel was not ineffective and
17 the trial court didn't deny the defendant a fair
18 trial by finding that the defendant had the absolute
19 right to make the fundamental decision as to - - -

20 CHIEF JUDGE LIPPMAN: Doesn't that go
21 against the trend around the country and the ABA and
22 the national cases?

23 MS. BRUFFEE: There certainly are - - -
24 there is a split of authority based on the new - - -

25 CHIEF JUDGE LIPPMAN: But the prevailing -

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MS. BRUFFEE: - - - ABA rules and - - -

CHIEF JUDGE LIPPMAN: Yeah, the prevailing attitude seems to be - - -

MS. BRUFFEE: Based on the ABA - - -

CHIEF JUDGE LIPPMAN: - - - that it's a tactical decision.

MS. BRUFFEE: - - - rules, that is true. I think there are more cases - - -

CHIEF JUDGE LIPPMAN: Why, from a policy perspective, shouldn't it be a strategic decision?

MS. BRUFFEE: Because the defendant has the most interest in being able to control his own fate. This is a decision where - - -

CHIEF JUDGE LIPPMAN: Yeah, but here a lot of players play a role in this, right?

MS. BRUFFEE: Excuse me?

CHIEF JUDGE LIPPMAN: The judge, the prosecutor, a lot of people play a role - - -

MS. BRUFFEE: They do.

CHIEF JUDGE LIPPMAN: - - - in this particular question, right?

MS. BRUFFEE: They do, but the defendant is - - -

CHIEF JUDGE LIPPMAN: Why doesn't that - -

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MS. BRUFFEE: - - - the most - - -

CHIEF JUDGE LIPPMAN: - - - that take us
towards a view that it's a strategic decision - - -

MS. BRUFFEE: Well - - -

CHIEF JUDGE LIPPMAN: - - - rather than a -
- -

MS. BRUFFEE: - - - the defendant - - -

CHIEF JUDGE LIPPMAN: - - - fundamental - -

-

MS. BRUFFEE: Excuse me, Your Honor.

CHIEF JUDGE LIPPMAN: Yeah, go ahead.

MS. BRUFFEE: The defendant has the most to
gain or lose by this decision. He's the one whose
liberty is on the line. He's the one who knows
whether the risk is worth taking because, as Your
Honor was saying before, he's the one who knows
whether he care - - - well, not whether he cares - -
- whether it's very important for him to risk getting
a conviction or an acquittal by basically going for
broke.

CHIEF JUDGE LIPPMAN: Your adversary says
maybe you have to protect him from himself.

MS. BRUFFEE: Well, that's - - - actually,
in pleading guilty a defendant also may decide to

1 reject a guilty plea, even when counsel is saying
2 that this is his best bet to avoid a top count
3 conviction. Some decisions are so crucial and vital
4 to a defendant that the law gives the defendant a
5 right to exercise that.

6 JUDGE SMITH: Suppose this were a case
7 where the lawyer had made the decision - - - and they
8 seem to come up every now and then - - - the lawyer
9 had asked for the lesser-includeds, the judge had
10 given them, and the defendant later says, oh, he
11 never asked me; if he'd asked me I would have said I
12 don't want them. Would that be ineffective
13 assistance?

14 MS. BRUFFEE: It wouldn't be. It would be
15 ineffective if the defendant said I am objecting - -
16 -

17 JUDGE SMITH: Well, what if the defendant -
18 - -

19 MS. BRUFFEE: - - - if you don't.

20 JUDGE SMITH: What if the defendant after
21 the trial says, well, nobody asked me.

22 MS. BRUFFEE: Well, it would be better
23 practice - - -

24 JUDGE SMITH: Yeah, I know it would be
25 better practice.

1 MS. BRUFFEE: - - - for counsel to - - -

2 JUDGE SMITH: But my question is - - -

3 MS. BRUFFEE: - - - to certainly consult -

4 - -

5 JUDGE SMITH: Yes, does it logically follow
6 from your argument, it's so fundamental, that it's
7 ineffective not to discuss it with the defendant?

8 MS. BRUFFEE: The defendant should have the
9 right to. If he doesn't - - -

10 JUDGE SMITH: That's not my question.

11 MS. BRUFFEE: - - - discuss it - - - if he
12 doesn't discuss it he may or may not be ineffective.
13 It depends what the defendant's decision would have
14 been. So if the record - - -

15 JUDGE GRAFFEO: Isn't that - - -

16 MS. BRUFFEE: - - - is silent - - -

17 JUDGE GRAFFEO: Isn't that going to lead to
18 even more ineffective assistance claims?

19 MS. BRUFFEE: Well, it would lead to more
20 440 hearings, probably, but under Petrovich it
21 logically flows that a defendant should be given this
22 chance because after all, he should have the choice
23 as to whether he controls the chance that he will be
24 convicted or acquitted. In the plea case he has,
25 basically, total control over it. In the whether to

1 submit an affirmative defense of EED or whether to
2 decide that he wants to submit or not submit the
3 lesser, he has partial control.

4 JUDGE CIPARICK: From the People's
5 perspective, there may be a case where you, the
6 People would want a lesser-included submitted to the
7 court - - -

8 MS. BRUFFEE: Yes.

9 JUDGE CIPARICK: - - - because you may have
10 a weak case and you've made out some of the elements,
11 maybe not all of them.

12 MS. BRUFFEE: Right.

13 JUDGE CIPARICK: And so you have a
14 situation where the attorney is advocating for - - -

15 MS. BRUFFEE: Right.

16 JUDGE CIPARICK: - - - a lesser-included
17 and the client doesn't want one.

18 MS. BRUFFEE: Well - - -

19 JUDGE CIPARICK: It's probably in
20 everybody's - - -

21 MS. BRUFFEE: - - - the way the statute is
22 set up, of course, if there's a reasonable view - - -

23 JUDGE CIPARICK: View of the evidence.

24 MS. BRUFFEE: - - - of the evidence - - -

25 JUDGE CIPARICK: Yeah.

1 MS. BRUFFEE: - - - the People certainly
2 can request that.

3 JUDGE CIPARICK: Right.

4 MS. BRUFFEE: But that doesn't - - - it's
5 actually irrelevant to whether the defendant has the
6 right to request - - - to make this decision whether
7 to - - -

8 JUDGE SMITH: It doesn't seem - - - on it's
9 face it suggests this kind of a law is at least
10 strange to say that the prosecutor can veto what the
11 defendant wants but his own lawyer can't?

12 MS. BRUFFEE: Well, it's not really that
13 there's a veto; it's that the defendant should be
14 able to make this choice. I mean, that's what
15 happened in Petrovich. It's almost an exact
16 parallel. In Petrovich, the defendant wanted no
17 submission of EED because he wanted there to be only
18 three choices: guilty, not guilty or basically not
19 guilty by reason of a mental disease or defect. And
20 back then, if you were found fit, then you would get
21 out. So there were basically two choices.

22 Here, what the defendant wanted was
23 basically two choices. He wanted guilty or not
24 guilty. And he believed that the jury would find
25 that there was a reasonable doubt that he intended to

1 kill the victim. So he thought his chances were
2 good, and he was going to go with it.

3 JUDGE SMITH: Theoretically, if juries were
4 logical, perfect reasoning machines, that choice
5 would always be the right choice, wouldn't it? That
6 is, that the jury should acquit if it has reasonable
7 doubt about the top count, whether or not the lesser-
8 includeds are there?

9 MS. BRUFFEE: Yes.

10 JUDGE SMITH: So does that suggest that
11 it's never totally unreasonable for the defendant to
12 say I'm going to go all or nothing?

13 MS. BRUFFEE: Well, if there's a reasonable
14 view of the evidence supporting it, but only the
15 defendant - - -

16 JUDGE SMITH: Well, if there's no
17 reasonable - - -

18 MS. BRUFFEE: - - - can know - - -

19 JUDGE SMITH: If there's no reasonable view
20 of the evidence the problem doesn't come up because
21 the defendant can't get it if he wants it.

22 MS. BRUFFEE: Only the defendant can know
23 whether he wants to go for a compromised verdict.
24 And it seems to me that he has the most to gain or
25 lose from this decision, and he should be given the

1 choice.

2 JUDGE SMITH: Is this case, in your view, a
3 case of a lawyer acquiescing in the defendant's view,
4 or is it a case where the lawyer and the defendant
5 were saying different things?

6 MS. BRUFFEE: Well, the lawyer eventually
7 acquiesced. The lawyer explained to the defendant
8 what the elements were, what the punishments were,
9 and told the defendant that in his professional
10 opinion that these lessers should be submitted to the
11 jury. And then when the defendant repeatedly, like
12 four or five times on the record, insisted that he
13 did not want those lesser-included submitted, then
14 the defense counsel reasonably went along with the
15 decision.

16 JUDGE SMITH: Would it be a different case
17 if this were one, like in Petrovich, where the
18 defense lawyer said, well, I don't care what he
19 wants, Judge; I want you to give the lesser-
20 includeds.

21 MS. BRUFFEE: It would be a better case for
22 the defendant if the court and the defense counsel
23 said I don't care what the defendant wants, we're
24 putting this in, and then the defendant is convicted
25 of one of those lessers.

1 JUDGE SMITH: Let me - - - I think maybe
2 this is the same question, but I'm going to take it
3 from another angle. As I read the Appellate Division
4 decision, they don't decide - - -

5 MS. BRUFFEE: They don't.

6 JUDGE SMITH: - - - whether this is
7 fundamental or tactical. They say, assuming it's
8 tactical, the decision to acquiesce doesn't rise to
9 the level of effective assistance. Should we dispose
10 of the case in that way and not reach the question
11 that you're arguing?

12 MS. BRUFFEE: Well, either way, in my
13 opinion, the People would prevail because the defense
14 counsel acted reasonably. There was certainly some
15 evidence to support the defendant's choice. I mean,
16 he told the police and he also testified at trial
17 that he didn't intend to kill this victim. So it
18 wasn't totally off the wall that defense counsel
19 would go along with his client, especially since at
20 the time of his representation there was no binding
21 authority on him that this was a fundamental
22 decision, even if some of the case law goes the other
23 way in other places. So at the time of his
24 representation, Petrovich suggested that this is a
25 fundamental decision.

1 JUDGE SMITH: Well, if you assume that the
2 defense lawyer mistakenly believed that it was the
3 client's choice and not his, wouldn't that create an
4 ineffectiveness problem?

5 MS. BRUFFEE: Well, the record actually is
6 ambiguous as to whether that is the case. He doesn't
7 say my hands are tied; I'm going along with either
8 the court or defense counsel. So where the record is
9 ambiguous then you have to assume that counsel is
10 effective. So either way, I would say that counsel
11 is effective.

12 JUDGE SMITH: You say we can read the
13 record as counsel making the decision that much as he
14 disagreed with what the defendant said, it wasn't so
15 unreasonable that he - - -

16 MS. BRUFFEE: Yes.

17 JUDGE SMITH: - - - he was going to reject
18 it.

19 MS. BRUFFEE: Yes, I do. And I disagree
20 with defense counsel's reading of the part of the
21 record that suggests that he's just saying the court
22 can do it. Basically - - -

23 JUDGE CIPARICK: What is the role - - -

24 MS. BRUFFEE: - - - what he says - - -
25 sorry.

1 JUDGE CIPARICK: What is the role of the
2 court here?

3 MS. BRUFFEE: Pardon?

4 JUDGE CIPARICK: When you have this type of
5 dissension between counsel and his client, what
6 should the court do?

7 MS. BRUFFEE: Well, if - - - Your Honor, if
8 this Court finds that it's a fundamental decision,
9 the Court should, as in Petrovich, go along with what
10 the defendant wants.

11 If Your Honor finds that it's strategic and
12 you find that defense counsel, in another case, was
13 not - - - you know, just threw his hands up and said
14 well, whatever the defendant wants to do is fine, I
15 mean, that's a different case. So I guess it all
16 depends on what the facts are.

17 But here, I think that both the court and
18 defense counsel did the right thing because there was
19 some reasonable view of the evidence which supported
20 there what they did.

21 So just very briefly, if it was a strategic
22 decision, the defense counsel acted reasonably. If
23 it's a fundamental decision, this was a correct way
24 to go about things.

25 And with regard to the justification

1 charge, although the People are agreeing that a
2 justification charge with duty to retreat should have
3 been given, it was certainly overwhelmingly harmless
4 in this case because the evidence - - -

5 JUDGE SMITH: You mean the duty to retreat
6 should have been qualified by the dwelling exception?

7 MS. BRUFFEE: Yes, because the defendant
8 was clearly not in his dwelling. And just my
9 understanding of the record is that the defendant did
10 not have to go through the common hallway to get to
11 any common part. His bedroom was over here, then the
12 kitchen and the bathroom.

13 JUDGE SMITH: So you concede - - -

14 MS. BRUFFEE: So he didn't have to go
15 through.

16 JUDGE SMITH: - - - that the kitchen was
17 part of his dwelling?

18 MS. BRUFFEE: Yes, I think that it is.

19 JUDGE SMITH: But on his view, on his
20 testimony, there was only one struggle, which at
21 least began in the kitchen and somehow managed to not
22 get any blood on the kitchen floor, so at some point
23 it must have moved out of the kitchen.

24 MS. BRUFFEE: Right.

25 JUDGE SMITH: Is it - - - I can't quite

1 figure out where the duty to retreat supposedly arose
2 in the first place, but assuming there was one,
3 couldn't it have arisen in the kitchen?

4 MS. BRUFFEE: The stabbing occurred in the
5 hallway. Even under the most rosy view of the
6 defendant's statement, he says they tumbled around
7 and somehow - - - passive voice - - - the victim got
8 stabbed. So - - -

9 JUDGE SMITH: But I guess maybe I'm still
10 hung up on this preliminary problem which is why was
11 there a duty to retreat charge given at all? On what
12 view of the evidence did defendant have a duty to
13 retreat?

14 MS. BRUFFEE: Because you're saying he
15 couldn't have retreated? Is that - - -

16 JUDGE SMITH: If you believe him, he
17 couldn't have retreated. And if you believe the
18 People's witnesses, he wasn't retreating.

19 MS. BRUFFEE: The fight start - - -

20 JUDGE SMITH: He was attacking.

21 MS. BRUFFEE: He followed them out; that is
22 true.

23 JUDGE SMITH: So you would concede,
24 although it may not be preserved, that it was error
25 to give the retreat charge at all?

1 MS. BRUFFEE: The no - - - that the
2 defendant had no duty to retreat.

3 JUDGE SMITH: That he did have a - - -
4 yeah, yeah, yeah.

5 MS. BRUFFEE: Yes. We were conceding that.
6 But if Your Honor finds that your scenario is
7 correct, then I guess the People would withdraw their
8 concession, because if there was no requirement to
9 give that charge at all, then omitting the no duty to
10 retreat would not be error.

11 So anyway, just to go back to the
12 correction of the record, in the defendant's appendix
13 at 667, there's a picture of this hallway, and over
14 here is the kitchen, over here is his bedroom and
15 over here is the bathroom. The blood is definitely
16 outside in the hallway.

17 And under this court's decision in
18 Hernandez, the residence is somewhere where you can
19 basically exclude others. And the defendant could
20 not exclude others, or the people who lived with him
21 could not exclude others from this hallway because
22 basically you could walk up this hallway and then
23 knock on one of these doors and get into the
24 apartment, so - - -

25 JUDGE SMITH: You use that like any other

1 apartment building hallway?

2 MS. BRUFFEE: Yes, yes, so it's not a
3 dwelling.

4 And also, the second prong of the
5 justification charge was overwhelmingly - - - I'm
6 sorry, of justification was overwhelmingly disproved
7 because it was totally unnecessary for the defendant
8 to use the amount and brutality of force that he did.
9 I mean, he basically kept stabbing the person even
10 when he was down on the ground. I mean, the evidence
11 was just - - - the brutality was so overwhelming. I
12 mean, he eviscerated the guy. There was an eight-
13 inch stab wound. So certainly justification was
14 disproved in this case.

15 CHIEF JUDGE LIPPMAN: Okay, counselor.

16 MS. BRUFFEE: Thank you.

17 CHIEF JUDGE LIPPMAN: Thanks, counsel.

18 Counsel rebuttal?

19 JUDGE GRAFFEO: Can I ask you, is there any
20 explanation for why the ABA standards eliminate the
21 difference in the language from the second to the
22 third edition?

23 MS. FAHEY: There's no explanation that I
24 know of, but I think the explanation is Jones v.
25 Barnes was decided in between. The second edition

1 came out in 1980, the third edition came out in '93.
2 Jones v. Barnes was decided, I think, in '83 or '85
3 or something like that. So I think that's what
4 happened, where the Supreme Court kind of clarified
5 these issues are for the defendant; everything else
6 is tactical and rests with the attorney.

7 JUDGE SMITH: Couldn't it also have been
8 that the Van Alstine case in Georgia specifically
9 said we disagree with the ABA - - -

10 MS. FAHEY: That's right.

11 JUDGE SMITH: - - - it's possible that that
12 also - - -

13 MS. FAHEY: That might have influenced it
14 as well, yeah. But I suspect Jones v. Barnes was the
15 biggest influence.

16 If I could just start by addressing the
17 last point that my adversary made about the harmless
18 error here and the hallway. The hallway here is, it
19 seems to me, a red herring. The defendant is
20 entitled to the no duty to retreat if you're in your
21 dwelling charge if that makes sense in viewing the
22 evidence in the light most favorable to him. Most
23 favorable to him is this started in the kitchen and
24 it continued in one continuous tumble, wherever it
25 ended up, wherever the stabbing ended up. If it

1 started in the kitchen, as the People concede, was a
2 common area that was part of the dwelling of all
3 these people who lived on this floor, then it really
4 doesn't matter. He was entitled to the charge.

5 JUDGE SMITH: What about harmless error?

6 MS. FAHEY: Oh, Your Honor, the wounds were
7 not - - - there was one very severe wound from which
8 he died, a stab in the abdomen, no question about
9 that. The other wounds were all - - - there was one
10 stab in the hand, the others were all superficial
11 wounds all on his left side.

12 JUDGE SMITH: Okay. Isn't one enough?

13 MS. FAHEY: Oh, sure one is - - -

14 JUDGE SMITH: I mean, one wound like that?
15 I mean, when someone's attacking you with an ashtray?

16 MS. FAHEY: But Your Honor, if he's
17 flailing around with a knife and the guy still has
18 the ashtray, one may do it. In fact, the guy, after
19 the stab - - - after that one stab, the defendant - -
20 -

21 JUDGE SMITH: I guess my question - - -

22 MS. FAHEY: - - - backed off, the guy was
23 ambulatory still.

24 JUDGE SMITH: I guess my question is how
25 can a jury possibly find it to be justified, that I'm

1 justified, when someone's attacking me with an
2 ashtray, to ram a knife through his rib cage with
3 enough force to kill him?

4 MS. FAHEY: Well, Your Honor, if it's a
5 heavy ashtray, if he's being clunked on the head hard
6 enough that he's - - - the police say when they
7 arrived his face is - - - he's covered with blood,
8 that's not unreasonable, I think; they could find
9 that that is justified.

10 There are all sorts of credibility
11 questions with the People's witnesses here. And
12 there are - - - you know, if you think that no duty
13 to retreat charge should have been given, certainly a
14 charge shouldn't have been given that he had an
15 absolute duty to retreat without the dwelling
16 exception in there as part of it.

17 This was, after all, a thirty-nine year old
18 man who had never been in any kind of trouble before.
19 He was attacked and brutally bashed, bashed several
20 times, apparently, by a man who was only twenty years
21 old, was bigger than he was and who was so aggressive
22 that even after he left and he walked down the stairs
23 and the EMTs got there, he was so aggressive that the
24 EMTs had a hard time doing their job.

25 So I think if you look at what the jury did

1 with this case, three days of deliberations, asked to
2 rehear lots of testimony, the defendant's statements,
3 the defendant's videotape, pictures, all sorts of
4 things, and a recharge on justification and a
5 recharge on intent.

6 I don't think there's any question here
7 that if lessers had been charged, even if they had
8 rejected the justification defense in the end, after
9 three days of deliberating and obviously struggling
10 with it and struggling with who to believe, I don't
11 think there's any chance they would have convicted
12 this guy of intentional - - -

13 CHIEF JUDGE LIPPMAN: Okay.

14 MS. FAHEY: - - - murder.

15 CHIEF JUDGE LIPPMAN: Okay, counsel.

16 Thanks.

17 Thank you both.

18 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Delroy Colville, No. 161 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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