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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 33

VINCENT ZEH,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
February 11, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 33, People v. Zeh?  
2 Counsel?

3 MR. EFFMAN: May it please the court, two  
4 minutes.

5 CHIEF JUDGE LIPPMAN: Two minutes, you have  
6 it. Go ahead.

7 MR. EFFMAN: Okay, Norman Effman  
8 representing the appellant. In reviewing ineffective  
9 assistance claims, I seem to note at least four  
10 different standards, and I'll start with the oldest,  
11 farce and mockery. I don't think that still holds  
12 water, but in any event, I think Judge Smith and I  
13 went to law school about the same time, so I'm  
14 familiar with it.

15 But then we have this - - - the federal  
16 standard, of course, of Strickland. And then we have  
17 the New York standard of Baldi and Rivera. And then  
18 we have Turner. And I would submit, Your Honors,  
19 that in this particular case, no matter which  
20 standard we are using, including Turner, that this is  
21 a poster-child for ineffective assistance of  
22 counsel.

23 JUDGE GRAFFEO: Well, this was - - - this  
24 was the third pre-trial attorney, correct?

25 MR. EFFMAN: He originally had - - -

1 JUDGE GRAFFEO: And at the time he had two  
2 - - -

3 MR. EFFMAN: Yes, he had a private attorney  
4 at the beginning.

5 JUDGE GRAFFEO: - - - attorneys before  
6 this. And those - - - those - - - one of those was  
7 more temporally involved with the - - - with the  
8 Brady material. So why is it that this particular  
9 attorney is more responsible than the previous two  
10 attorneys?

11 MR. EFFMAN: Well, I don't know if it makes  
12 a difference who's responsible. The - - the point is  
13 that nobody brought any pre-trial motions in this  
14 case.

15 JUDGE SMITH: How - - - how do we know that  
16 - - - that the pre-trial motions would have done any  
17 good?

18 MR. EFFMAN: You're talking about Turner,  
19 really, in that this - - - even if it's just one  
20 error, the failure to bring pre-trial motions, is so  
21 egregious as for there to be a constitution - - -

22 JUDGE SMITH: Well - - - well, the motion -  
23 - - the motion that looks most promising, maybe, is a  
24 motion to suppress your client's statements. And  
25 you've got an affidavit from the lawyer saying, yeah,

1 we talked about that, and decided we were better off  
2 with the evidence in.

3 MR. EFFMAN: That affidavit, I think,  
4 eliminates the need for any 440 hearing, because it  
5 puts forth a strategy which is absolutely irrational.  
6 But - - -

7 JUDGE PIGOTT: I was trying to figure out  
8 what - - - you know, what strategy it is that you  
9 say, well, I'm not going to have a suppression,  
10 because I might have to put my client on the stand.  
11 Most of the time you don't, and at least you'd like  
12 to find out what the police are going to say and how  
13 they're going to say it. And half the time they get  
14 crossed over on what they say.

15 MR. EFFMAN: There is absolutely no  
16 strategic reason that any defense lawyer would buy  
17 into based on the affidavit that this attorney put  
18 in.

19 Judge, if I can answer your question about  
20 - - - I - - -

21 JUDGE ABDUS-SALAAM: Sorry, counsel, before  
22 you - - - before you go there, based on the statement  
23 that you just made, if the strategy ultimately is to  
24 put the client on the stand at trial - - -

25 MR. EFFMAN: Yes.

1                   JUDGE ABDUS-SALAAM: - - - aren't you  
2                   jeopardizing that ability by having to, perhaps, put  
3                   the person on the stand during a suppression hearing  
4                   and then opening him to impeachment?

5                   MR. EFFMAN: Let me take a step back,  
6                   because I don't think the real issue here is  
7                   necessarily a suppression hearing. The original  
8                   decision from the Third Department on the direct  
9                   appeal, I think, focused on what the real issue is,  
10                  and that's People v. Cohen, which is a little bit  
11                  different than simply a suppression hearing regarding  
12                  the twenty-six hours of interrogation where there was  
13                  no confession, but inconsistencies.

14                  There's also six search warrants that were  
15                  issued by local magistrates during the time of  
16                  interrogation, none of which were challenged, and all  
17                  of which resulted in the only damning evidence that  
18                  was presented by the People, the bloodstained - - -

19                  JUDGE SMITH: Well, is there any reason to  
20                  think there's anything wrong with any of those search  
21                  warrants?

22                  MR. EFFMAN: Yes, and again, that's - - -  
23                  that's pointed out in the direct appeal brief, as to  
24                  why each of these warrants is suspect based on the  
25                  fact that they're based on hearsay, that there's no

1 reliability. But, Judge, if I can get back to the  
2 Cohen Issue - - -

3 CHIEF JUDGE LIPPMAN: Counselor, isn't this  
4 an unusual case, though, with the nine years, and now  
5 - - - and now coming in and - - - with the - - - with  
6 the original sense of, at least, concern of the  
7 Appellate Division and - - - and the nine years, and  
8 then - - - and then when it goes to the county court  
9 and then up again, nothing is really explored that  
10 further explores it. Isn't the whole thing kind of  
11 odd?

12 MR. EFFMAN: It's about an odd a case as  
13 I've seen.

14 CHIEF JUDGE LIPPMAN: Okay.

15 MR. EFFMAN: When the Third Department had  
16 the original appeal, it directed a 440 motion - - -

17 CHIEF JUDGE LIPPMAN: Yeah, I know.

18 MR. EFFMAN: - - - and directed assignment  
19 of counsel. Counsel was assigned and nothing  
20 happened for six years.

21 CHIEF JUDGE LIPPMAN: Yeah, it's odd.

22 MR. EFFMAN: But - - - but let me - - - I  
23 really want to focus on one - - -

24 JUDGE SMITH: Will you back to the question  
25 you keep trying to get back to?

1 CHIEF JUDGE LIPPMAN: Yes, yes.

2 MR. EFFMAN: I want to get to - - -

3 CHIEF JUDGE LIPPMAN: Answer Judge Smith,  
4 go ahead.

5 MR. EFFMAN: By the way, I was here all  
6 day.

7 CHIEF JUDGE LIPPMAN: Good. Okay. As a  
8 reward, you can answer Judge Smith.

9 MR. EFFMAN: Okay. So before the April  
10 11th murder of the estranged wife, a month earlier -  
11 - - three weeks earlier - - - the defendant gets  
12 arrested for a fake suicide. He's charged with  
13 reckless endangerment and menacing. He's arraigned  
14 on March 18th on that charge with counsel, in fact,  
15 the same lawyer that initially represented him on the  
16 homicide charge, Peter - - - it's not Peter Neufeld  
17 (ph.), but Neuman, I think, all right.

18 So he has a lawyer. He's arraigned on that  
19 charge. The same law enforcement agents that were  
20 involved in that fake suicide because it's - - - he  
21 was depressed; his wife had left him, so it all is in  
22 the same transactional aspect of - - - he's angry  
23 with his wife for leaving him.

24 The same law enforcement agents utilize  
25 that arrest and that scenario in interrogating him.

1           They knew about it.  It's not that they should have  
2           known about it.  They knew about the fact that he was  
3           arrested within three weeks prior to this murder on a  
4           charge relating to the same victim - - -

5                     JUDGE SMITH:  Yeah, but what - - - where -  
6           - - So what?  What does - - - what does that prove?

7                     MR. EFFMAN:  The right to counsel had  
8           attached.

9                     JUDGE SMITH:  Oh, I see what you're saying.

10                    MR. EFFMAN:  Okay, which is the Cohen case.  
11           And by the way, the Cohen case was decided by this  
12           court in October, and the attorney that handled this  
13           trial was retained in December.  It was a hot-button  
14           issue, the fact that the right to counsel attaches if  
15           you have one arrest, a second arrest, based on - - -  
16           close in time, same transaction.  How could you not  
17           know that?

18                    JUDGE SMITH:  Well - - - well, let me ask  
19           you this?  Was he - - - did you really make an  
20           adequate submission on the 440 motion?  All you do is  
21           you quote the Third Department.  I mean, shouldn't -  
22           - - shouldn't you have been putting some facts in?

23                    MR. EFFMAN:  Yes, yes.  I should have.  And  
24           - - - but what facts can I put forth?  Only the facts  
25           that I was aware of.  My client only knows - - - he

1 talks to his lawyer, and - - - and the lawyer says,  
2 this is our strategy. So the client goes along with  
3 it.

4 JUDGE PIGOTT: Did you get Sussman's file?

5 MR. EFFMAN: I did not get Sussman's file,  
6 but - - - but, you know, we have something better.  
7 We have Sussman on a sworn affidavit saying what his  
8 strategy was - - -

9 JUDGE PIGOTT: Yeah, but they're picking on  
10 you for your --- the sufficiency of your original - -  
11 -

12 MR. EFFMAN: I know that. So - - -

13 JUDGE PIGOTT: You're saying he cured it  
14 with his - - -

15 MR. EFFMAN: He cured it, because - - -

16 JUDGE PIGOTT: - - - response.

17 MR. EFFMAN: - - - you know, first of all,  
18 it always bothers me when a defense counsel throws  
19 his client under the bus, and says dismiss to 440; I  
20 did everything right. I think the real issue here  
21 was not necessarily his ability as a trial lawyer,  
22 because he was good as a trial lawyer. It was his  
23 failure to do - - - if it was a doctor, and he had a  
24 great operation, but forgot to sterilize the  
25 instruments, the patient is still dead. And in this

1 case, that's exactly what happened.

2 The failure to bring pre-trial motions on  
3 the Cohen issue, number one, where counsel had  
4 attached - - - he had a right to counsel. Even the  
5 consent for the searches would be eliminated by the  
6 fact that all of this came about after the right to  
7 counsel had attached and he didn't have a lawyer to  
8 make any waivers.

9 CHIEF JUDGE LIPPMAN: What's the - - -  
10 what's the remedy here, counsel?

11 MR. EFFMAN: The remedy here is really to  
12 reverse the conviction. It does not need a new  
13 hearing, because we already know - - - when the Third  
14 Department heard the direct appeal - - -

15 JUDGE SMITH: All right. Do you ask for a  
16 hearing in the alternative?

17 MR. EFFMAN: Of course, but - - - why  
18 wouldn't I? But on the - - - on the other hand, the  
19 - - - the Third Department said, gee, this is really  
20 nuts, but we really can't speculate. Maybe he did  
21 have a strategy. Okay? But now we know the answer  
22 to that. He told us what his strategy was. His  
23 strategy was I didn't make any motions, because I had  
24 twenty-six hours of interrogation, no confession, and  
25 I'm going to convince this jury, because I'm such a

1 great lawyer.

2 JUDGE SMITH: But you - - -

3 CHIEF JUDGE LIPPMAN: So you're saying on  
4 its face that strategy is - - - is not a strategy?

5 MR. EFFMAN: I don't know - - - let's put  
6 it this way. If one of my lawyers in the Public  
7 Defender's office evoked that strategy, he or she  
8 would not be there the next day.

9 JUDGE SMITH: Is it that ridiculous? I  
10 mean, with hindsight, of course, it looks like a bad  
11 idea, maybe even then it wasn't a brilliant idea, but  
12 what he's saying is, look, this guy took a real  
13 pounding from the police and he never - - - he never  
14 confessed. He never said he did it. There might be  
15 some stupid things in that interrogation, but I think  
16 it's going to help me with the jury to see how well  
17 this guy held up all those hours. Isn't that - - -  
18 isn't that a judgment that a lawyer, after consulting  
19 with his client, can make?

20 MR. EFFMAN: What he never answers, Your  
21 Honor, is why he did not bring motion to suppress the  
22 search warrants, which have absolutely nothing to do  
23 with testimony of his client.

24 JUDGE ABDUS-SALAAM: But - - - but,  
25 counsel, didn't your client invite the police to come

1 and search his house when they showed up to tell him  
2 that something had happened to his estranged wife?

3 JUDGE GRAFFEO: Didn't he say, I'm leaving  
4 the door - - -

5 JUDGE ABDUS-SALAAM: Why would he - - -  
6 yeah.

7 JUDGE GRAFFEO: - - - open for you?

8 MR. EFFMAN: He absolutely said that, and  
9 he said it when he was pre-Mirandized. There was no  
10 Miranda warnings. The police came to his house. He  
11 had counsel already involved in his case. And this  
12 was an uncounseled statement, uncounseled consent.  
13 He could not give consent under the Cohen case of  
14 this court.

15 JUDGE ABDUS-SALAAM: So if we find that  
16 this was not sufficiently similar - - - the murder  
17 was not sufficiently similar to the suicide, and  
18 counsel did not - - - the right to counsel did not  
19 attach, then the warrant issue goes away?

20 MR. EFFMAN: I don't think any of the  
21 issues go away, all right. I think that it is  
22 absolutely unreasonable and it's egregious error not  
23 to at least bring forth the fact that this defendant  
24 had a lawyer prior to the interrogation on a case  
25 closely related in time, the same incident, because -

1 - - and by the way, that particular incident, the  
2 fake suicide attempt, was actually part of the  
3 indictment on which this defendant was tried.

4 So that's how closely related it is. It  
5 was dismissed after the People's case. But the  
6 reckless endangerment/menacing, whatever the original  
7 charges were in the suicide attempt, were part of  
8 this indictment. That's how closely related they  
9 were.

10 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's  
11 - - - let's hear from you adversary, and then you'll  
12 have your rebuttal.

13 MR. EFFMAN: Thank you, your Honor.

14 MS. SPRATT: May it please the court, I'm  
15 Jacqueline Spratt, and I represent the respondent,  
16 the People of the State of New York.

17 CHIEF JUDGE LIPPMAN: Counsel, what about  
18 the earlier incident, and the fact that it was in the  
19 indictment, and - - - and, you know, and the fact of  
20 the representation. Doesn't it seem to you odd that  
21 - - - that he can just go and do - - - make whatever  
22 admissions or say go explore the house, in light of  
23 what happened, and the same people being involved - -  
24 -

25 MS. SPRATT: We - - -

1 CHIEF JUDGE LIPPMAN: - - - on the law  
2 enforcement side? Isn't that - - -

3 MS. SPRATT: Your Honor, under the Cohen  
4 standard, those - - -

5 CHIEF JUDGE LIPPMAN: Doesn't that have a  
6 little bit of an aroma of something bad?

7 MS. SPRATT: No, Your Honor. When you look  
8 at the underlying facts of the - - - let's call it  
9 the February incident - - -

10 CHIEF JUDGE LIPPMAN: Yes.

11 MS. SPRATT: - - - where he faked suicide -  
12 - -

13 CHIEF JUDGE LIPPMAN: Yeah, yeah.

14 MS. SPRATT: - - - it did not involve the  
15 victim in this case. It did not occur at the  
16 victim's home.

17 CHIEF JUDGE LIPPMAN: Why was it included,  
18 though, later on?

19 MS. SPRATT: Your Honor, as I would believe  
20 that would be to give the jury the full flavor of the  
21 defendant that was being tied up in homicide.

22 CHIEF JUDGE LIPPMAN: Yeah, but it must  
23 have some relationship to what's going on if you  
24 include it?

25 MS. SPRATT: Well, the relationship would

1 be that the theory of the case was the defendant was  
2 so motivated, so jealous, and so enraged that this  
3 woman had a new boyfriend - - -

4 JUDGE PIGOTT: Well, it sounds like you're  
5 making the argument - - -

6 MS. SPRATT: - - - that he went to the  
7 great extent - - -

8 JUDGE PIGOTT: - - - that Mr. Effman's  
9 making, which is that - - - that he had a lawyer on  
10 this thing that he was so motivated about and so  
11 intent on doing, et cetera.

12 MS. SPRATT: But he did not - - - the cases  
13 weren't so closely intertwined that the questioning  
14 on the murder would have necessarily elicited  
15 questioning about the suicide.

16 JUDGE SMITH: The - the question is how can  
17 they - - - how can they be closely enough intertwined  
18 that they can be indicted together, but not closely  
19 enough intertwined that one - - - that the lawyer on  
20 one is the lawyer on the other?

21 MS. SPRATT: Because the standard under  
22 Cohen is different from the standard of whether you  
23 want, as a prosecutor, to have an incident before the  
24 jury when you're trying to convict on the homicide.

25 CHIEF JUDGE LIPPMAN: Yeah, but you're

1 saying you can have it both ways. You're saying it's  
2 intertwined.

3 MS. SPRATT: No, Your Honor, I don't  
4 believe it is intertwined for the purposes of Cohen.

5 CHIEF JUDGE LIPPMAN: You're saying it's  
6 just there for context and it has really - - - it  
7 doesn't have a relationship?

8 MS. SPRATT: Yes, it was not that - - - the  
9 suicide - - - or excuse me, the menacing incident  
10 where he faked suicide was not a crucial element of -  
11 - -

12 JUDGE PIGOTT: But if you're making - - -

13 MS. SPRATT: - - - the statements that were  
14 obtained pursuant to the homicide.

15 JUDGE PIGOTT: If you're making that  
16 argument - - -

17 MS. SPRATT: Yes.

18 JUDGE PIGOTT: - - - and Mr. Effman's  
19 making the opposite argument, who should be deciding  
20 that? A judge. And yet there was no motion. There  
21 was no - - - there was no attempt to bring the very  
22 issue that you're arguing and Mr. Effman's arguing in  
23 front of us, to the nisi prius court in the first  
24 instance.

25 MS. SPRATT: Your Honor, I don't believe

1           that motion would have been successful.

2                       JUDGE PIGOTT: Well, let's see, and - - -  
3           and - - - I don't mean to test you personally, but  
4           I've never heard of a murder case where somebody  
5           hasn't brought motions. I mean, Perry Mason maybe,  
6           but - - -

7                       MS. SPRATT: Your Honor, the defense  
8           counsel here, as stated in his affidavit, had  
9           strategic reasons - - -

10                      CHIEF JUDGE LIPPMAN: Do you think that  
11           affidavit - - -

12                      MS. SPRATT: - - - for not pursuing the  
13           motions.

14                      CHIEF JUDGE LIPPMAN: Do you think that  
15           affidavit helps you?

16                      MS. SPRATT: I think the affidavit gives  
17           this court - - -

18                      CHIEF JUDGE LIPPMAN: It lays out a - - -

19                      MS. SPRATT: -- helps the court.

20                      CHIEF JUDGE LIPPMAN: It lays out a  
21           coherent strategy that helps in terms of your  
22           position?

23                      MS. SPRATT: If you look at that  
24           affirmation in the context and the full facts of the  
25           totality of this case. And if - - -

1                   JUDGE PIGOTT: Well, I did, and what struck  
2 me was that the judge kept saying that what Mr.  
3 Effman had submitted was conclusory, and apparently  
4 what Mr. Sussman didn't - - - when - - - you know,  
5 when he said things like I thoroughly reviewed 1,000  
6 pages of Brady material at jury selection.

7                   And all I know is that when I look at  
8 Brady, I mean, it's not just, you know, does this say  
9 my client's innocent, but it gives you leads; it  
10 gives you ideas; it gives you theories that then you  
11 can use in the defense of your client. And to say  
12 that you can do that overnight during jury selection,  
13 and 1,000 pages, which I - - -

14                  MS. SPRATT: Well, Your Honor - - -

15                  JUDGE PIGOTT: - - - was amazing to me.

16                  MS. SPRATT: - - - my opponent had an  
17 opportunity to refute the affirmation.

18                  JUDGE PIGOTT: Wait a minute. No, what I'm  
19 saying is, Sussman, all he said was, I looked at it  
20 thoroughly. That's conclusory. I'm not - - - I'm  
21 not - - - when I'm trying to weigh things, the judge  
22 here seemed to think that what the defendant brought  
23 under 440 was conclusory, and I think what the - - -  
24 what the People did was too.

25                  MS. SPRATT: Well, it is the defendant who

1 had the burden under 440 to allege facts.

2 JUDGE RIVERA: How - - - how would he  
3 refute - - - you say he had an opportunity to refute.  
4 What - - - what opportunity are you thinking of?

5 MS. SPRATT: Well, the defendant could have  
6 submitted allegations that the conversations that  
7 Sussman reported did not occur, or that he did not  
8 agree with this strategy.

9 JUDGE SMITH: Yeah, but if it - - - if it  
10 did occur, couldn't the lawyer still have been - - -  
11 I mean, if you give your client absolutely terrible  
12 advice, and the clients says, yeah, I'll follow it,  
13 you could still be an ineffective lawyer.

14 MS. SPRATT: Yes, but that's not what  
15 happened here, Your Honor.

16 JUDGE SMITH: Well, that's what he says it  
17 is. He says the advice - - - he says the advice not  
18 to challenge the confession was absolutely awful and  
19 he al- - -

20 MS. SPRATT: Your Honor, I believe - - -

21 JUDGE SMITH: - - - and he also says that  
22 the - - - the - - - it's utterly unexplained why no  
23 other motions got made.

24 MS. SPRATT: Your Honor, if the court were  
25 to look at -- and with all due respect, I'm certain

1 the court has - - - when you look at the full facts  
2 of this case, this victim was found with more than  
3 twenty vicious stab wounds.

4 JUDGE PIGOTT: Let's assume that. But when  
5 - - - when the lawyer says "I felt that it might well  
6 adversely affect his ability to testify in his own  
7 defense at trial," the reason why he didn't want to -  
8 - - want to bring a suppression. I can't figure that  
9 out. I've done suppression hearings a lot. And  
10 sometimes the only people to testify are the officer.  
11 I'm not necessarily going to put my client - - - my  
12 defendant on the stand. I mean, I don't know what  
13 he's going to say.

14 But I sure, as heck, can ask these officers  
15 and anybody else involved what happened, when it  
16 happened, how it happened, et cetera, and even if  
17 it's not suppressed, learn things.

18 MS. SPRATT: Your Honor, there's no  
19 indication because the defendant did not submit any  
20 factual allegations - - -

21 JUDGE PIGOTT: No, no, you're missing my  
22 point.

23 MS. SPRATT: - - - that there was anything  
24 improper.

25 JUDGE PIGOTT: You're missing my point.



1 effectiveness of counsel.

2 MS. SPRATT: Well, I think there are two -  
3 - - if I may address two separate things. First, I  
4 would submit that the lack of factual allegations  
5 here shows that the defendant did not meet his burden  
6 as a preliminary threshold matter - - -

7 JUDGE PIGOTT: Why are you opposing it so  
8 strongly?

9 MS. SPRATT: - - - under the 440.

10 JUDGE PIGOTT: I mean, isn't it possible  
11 that what - - - that what Mr. Sussman did was bad? I  
12 mean, that not - - - not having - - - not bringing an  
13 omnibus motion, not - - - not having a suppression  
14 hearing, not having a Huntley, not - - - I mean, all  
15 of that - - - I mean, why not say let's do it? Let's  
16 find out if, you know, in fact, there was a fair  
17 trial here?

18 MS. SPRATT: Because it wasn't consistent  
19 with the defense theory of the case. And the defense  
20 theory of the case was a continuation of what the  
21 defendant did on the night of his arrest. The  
22 defendant was a strong-willed - - - I submit, if you  
23 look at the record, you will find that he was very  
24 self-possessed, strong-willed, and he said to New  
25 York State troopers, come on in; you want to search

1 my house?

2 JUDGE PIGOTT: Well, that's true but there  
3 were - - - there were issues like whether he took the  
4 kids to get icy pops or whether he got icy pops and  
5 brought them back. And the test - - -

6 MS. SPRATT: Yeah.

7 JUDGE PIGOTT: - - - the testimony was six-  
8 or eight-year-old versus what he - - - who knows?  
9 You know, where his tire tracks were and where they  
10 weren't. I mean, it just seemed to me that there  
11 were things that could be explored, to make sure  
12 there's a fair trial, and that - - - and that we've  
13 got the right guy.

14 MS. SPRATT: But there was no requirement.  
15 The court has never said that a defense attorney must  
16 make - - -

17 JUDGE RIVERA: Okay.

18 MS. SPRATT: - - - must submit suppression  
19 motions.

20 JUDGE RIVERA: So let's - - - let's go back  
21 to your point about whether or not he satisfied his  
22 burden. What if your - - - the attorney's  
23 affirmation is so weak and suspect, and raises a  
24 question as to whether or not this could ever satisfy  
25 this question of the tactic. Why isn't that enough

1 to get the defendant the opportunity to put that to  
2 the test at the hearing?

3 MS. SPRATT: Well, that's not the - - -

4 JUDGE RIVERA: Why doesn't he, at a  
5 minimum, get the hearing?

6 MS. SPRATT: Because there were no facts in  
7 dispute. And if you look at counsel's prior filings,  
8 and I believe in the submission to this court, he - -  
9 -

10 JUDGE RIVERA: But no, I thought that - - -

11 MS. SPRATT: - - - concedes that.

12 JUDGE RIVERA: Well, I may have  
13 misunderstood, but I thought his dispute was no  
14 attorney in their right mind would - - - would  
15 proceed with this tactic - - -

16 MS. SPRATT: But that's not - - -

17 JUDGE RIVERA: - - - of not trying to  
18 suppress.

19 MS. SPRATT: Yes, Your Honor. That's not a  
20 factual dispute. That's an argument. There was no -  
21 - - there were no facts in dispute for a hearing. It  
22 essentially boiled down to - - -

23 JUDGE SMITH: Well, but it's - - - you  
24 would admit that this way of handling a criminal  
25 case, making no motions, is kind of unusual?

1 MS. SPRATT: It is, Your Honor, but - - -

2 JUDGE SMITH: Wait a minute. Is it - - -

3 on the face of it, shouldn't you at least hold a

4 hearing and get the guy in there and say, hey, how -

5 - - why did you do it this way and let someone cross-

6 examine him?

7 MS. SPRATT: Not if that hearing is

8 inconsistent with your strategy.

9 CHIEF JUDGE LIPPMAN: Especially when the -

10 - when the AD has said from the up - - - from the

11 beginning of this, that there's a real question here

12 as to whether there's ineffective assistance. They

13 suggest the 440.

14 MS. SPRATT: Yes.

15 CHIEF JUDGE LIPPMAN: I mean, and - - - and

16 this is the way it plays out, without really ever

17 exploring, you know, the bottom line issue where

18 other than this affidavit, that says that, again,

19 everything I did was right; this is my strategy. We

20 just accept that at face value. Isn't the end game

21 here to see whether there's ineffective assistance?

22 MS. SPRATT: Well, there was not

23 ineffective assistance of counsel here, because there

24 was a strategic reason. In part, when you look at

25 the Third Department's decision - - -

1 JUDGE PIGOTT: You keep saying that, and  
2 I'm still trying to find the strategic reason.

3 MS. SPRATT: Because the defense was, I was  
4 a cooperative guy.

5 JUDGE PIGOTT: No, no, my - - -

6 JUDGE RIVERA: But - - - but - - - but  
7 obviously, you see there's some - - -- there's some  
8 concern about this strategy that's presented in this  
9 affirmation. Doesn't the defendant at least get an  
10 opportunity to put that to the test at a hearing at -  
11 - - at just a minimum?

12 MS. SPRATT: Your Honor, he did not refute  
13 any of the facts in that - - - in the affirmation. I  
14 - - - there - - - I don't believe that there are any  
15 facts to be resolved.

16 JUDGE RIVERA: Well, he says there's no - -  
17 - there's no - - -

18 JUDGE GRAFFEO: If we - - -

19 JUDGE RIVERA: - - - there's no strategy  
20 that makes any sense.

21 JUDGE GRAFFEO: If - - - if we disagree  
22 with you - - -

23 MS. SPRATT: If you dis - - -

24 JUDGE GRAFFEO: - - - what's the benefit of  
25 having a hearing as opposed to the reversal?

1 MS. SPRATT: Well, as I've stated, Your  
2 Honor, I don't believe that a hearing - - -

3 JUDGE GRAFFEO: You want a - - - what's - -  
4 - what's going to come out that we don't know, at a  
5 hearing?

6 MS. SPRATT: Your Honor, I don't believe  
7 that anything more would come out. The strategy was  
8 consistent with what the defendant wanted it to be -  
9 - -

10 CHIEF JUDGE LIPPMAN: So no - - - no  
11 hearing - - -

12 MS. SPRATT: - - - and it made sense in the  
13 context - - -

14 CHIEF JUDGE LIPPMAN: - - - and we should  
15 decide either way? You don't want a hearing.

16 MS. SPRATT: If the court feels - - -

17 CHIEF JUDGE LIPPMAN: You - - - that's not  
18 even - - -

19 MS. SPRATT: - - - that a hearing is  
20 required, we'd welcome that instead of a reversal,  
21 yes.

22 JUDGE GRAFFEO: So if we - - - if we  
23 disagree with you, then it would be a reversal,  
24 you're saying.

25 MS. SPRATT: No, I would say if you agree

1 with - - - with the People's position that no  
2 reversal is required, because there's been no  
3 ineffective assistance.

4 JUDGE SMITH: So you agree with your  
5 adversary, on that.

6 JUDGE RIVERA: So is your - - - your - - -  
7 I'm sorry.

8 JUDGE SMITH: Yeah, no hearing as long as I  
9 win, yeah.

10 JUDGE RIVERA: So - - - I'm sorry. Is your  
11 position that as long as defense counsel - - - the  
12 counsel that he's complaining about - - - puts  
13 forward this affirmation, says that - - - that was a  
14 tactic; I discussed it with him, everything's good,  
15 you don't get a hearing, not even to at least explore  
16 that and challenge that.

17 MS. SPRATT: He provided a strategic  
18 reason, and under this court's jurisprudence, that's  
19 - - -

20 JUDGE SMITH: What - - - what - - -

21 MS. SPRATT: - - - what's required.

22 JUDGE SMITH: Why can't - - - why can't  
23 they at least test on cross-examination the  
24 credibility of - - - of what the lawyer said?

25 MS. SPRATT: Because he did nothing - - -

1 the defendant did nothing to - - -

2 JUDGE SMITH: The defendant - - -

3 MS. SPRATT: - - - to refute the  
4 allegations.

5 JUDGE SMITH: The defendant - - - I mean,  
6 this is - - - this is a question of whether - - - of  
7 what was going through the lawyer's mind. It's a  
8 little easier to put in a affidavit that makes you  
9 sound like you knew what you were doing, than to  
10 stand up to cross-examination and still sound like  
11 you knew what you were doing. And the defendant - -  
12 - the defendant can't put in an affidavit saying I  
13 know what was in his mind.

14 MS. SPRATT: No, but the defendant did not  
15 allege any facts - - -

16 JUDGE ABDUS-SALAAM: If he had said - - -

17 MS. SPRATT: - - - that would have even  
18 merited suppression of any - - - the defense has  
19 talked about the - - -

20 JUDGE ABDUS-SALAAM: If he - - -

21 MS. SPRATT: - - - search warrants.

22 JUDGE ABDUS-SALAAM: If defendant had said  
23 we didn't discuss that strategy at all, my lawyer  
24 just, you know, decided to do that, would that have  
25 been a - - -

1 MS. SPRATT: Yes, that would have been a -  
2 - -

3 JUDGE ABDUS-SALAAM: - - - sufficient  
4 refutation?

5 MS. SPRATT: - - - factual dispute, Your  
6 Honor. But the - - - counsel hasn't submitted any  
7 basis - - -

8 CHIEF JUDGE LIPPMAN: Okay, counsel.

9 MS. SPRATT: - - - for why suppression  
10 would have been warranted.

11 CHIEF JUDGE LIPPMAN: Thanks, counsel.  
12 Appreciate it.

13 Counsel, rebuttal?

14 MR. EFFMAN: Your Honor said - - -

15 JUDGE RIVERA: Counsel, what about this  
16 last point where - - - where she's saying, you didn't  
17 even dispute that the defendant did not have that  
18 conversation with the lawyer, and didn't approve of  
19 this strategy?

20 MR. EFFMAN: First of all, when you have a  
21 lawyer, and a lawyer tells you, you're going to take  
22 the stand, and I'm not bringing any hearings; this is  
23 the way we're going to do it; your the patient.  
24 You're not the doctor. The lawyer's advising you  
25 that this is a strategy. Now, we're not talking fail

1 strategy; we're talking no strategy. We're talking  
2 something that is outside the bounds of any  
3 practicing defense attorney that I'm aware of, that  
4 that would be a strategy.

5 What good would it be for Mr. Zeh to say,  
6 he didn't tell me that or he did tell me that. It's  
7 irrelevant as to whether he told him that. A  
8 hearing, I don't think it - - -

9 JUDGE GRAFFEO: Couldn't he at least have  
10 said, I didn't understand the strategy that was  
11 presented if he didn't want to deny having the  
12 conversation? It sounds like you're saying he - - -  
13 that he didn't want to deny having the conversation -  
14 - -

15 MR. EFFMAN: No, to tell you the truth,  
16 what - - -

17 JUDGE GRAFFEO: - - - but that he didn't  
18 understand the strategy. I mean, shouldn't there be  
19 something that's presented to the court that's more  
20 specific?

21 MR. EFFMAN: I would - - -

22 JUDGE GRAFFEO: Is it a good rule to just  
23 say that - - -

24 MR. EFFMAN: I would like to, but - - -

25 JUDGE GRAFFEO: - - - that if - - - if an

1           appellate court doesn't agree with this strategy,  
2           then you get a reversal?

3                   MR. EFFMAN:   Well, you know, when you're  
4           dealing with strategy, you know, a client has the  
5           right to testify or not testify.  A client has a  
6           right to plead or not plead.  The lawyer makes all  
7           the other decisions.  And this is a decision as to  
8           how we're going forward.  We have a guy who has got a  
9           limited exposure to the criminal justice system, just  
10          that one prior arrest that just went to an  
11          arraignment.  He happens to be illiterate, but that's  
12          besides the point.  The - - -

13                   JUDGE GRAFFEO:  I understand what you're  
14          saying in regards to this particular defendant.  I'm  
15          looking more at the rule, what - - - what's the  
16          ramification of this decision if we agree with you,  
17          where no particular facts were presented to the  
18          court?

19                   MR. EFFMAN:   Well, the facts that were  
20          presented to the court were based on Mr. Sussman's  
21          affidavit, which reveals the one issue that the Third  
22          Department was unclear about, whether there was a  
23          legitimate strategy in this case.  And that affidavit  
24          satisfies our burden, because there was no legitimate  
25          strategy.

1 CHIEF JUDGE LIPPMAN: Counsel, you started  
2 to come back to a rehearing. What were you going to  
3 say about the rehearing?

4 MR. EFFMAN: If there was - - - if there  
5 was a hearing in this case?

6 CHIEF JUDGE LIPPMAN: Yeah.

7 MR. EFFMAN: All right. It certainly would  
8 be nice to be able to cross-examine Mr. Sussman as to  
9 whether there's any legitimate strategy not to  
10 challenge a search warrant, or not to bring up the  
11 right to counsel aspects of this case. But - - -

12 JUDGE PIGOTT: Well, I'd think you'd want  
13 to know what's in that 1,000-page Brady material.  
14 That's an awfully lot of reading material.

15 MR. EFFMAN: I don't know if I'd like to  
16 read that, Judge, at this point. But - - -

17 CHIEF JUDGE LIPPMAN: But you - - -

18 MR. EFFMAN: - - - but we'll - - -

19 CHIEF JUDGE LIPPMAN: But your backup  
20 position is the hearing?

21 MR. EFFMAN: Oh, of course. But - - - and  
22 again, I emphasize the fact that in this case, the  
23 primary evidence against Mr. Zeh was the DNA blood  
24 evidence discovered as a result of the seizure of  
25 articles based on six town justice search warrants,

1 and all of the arguments with respect to the lack of  
2 validity of those warrants was made to the Third  
3 Department in the brief, and it's outlined in the  
4 original direct appeal brief.

5 So it's all there as part of this record,  
6 but the reality is, there is absolutely no strategy  
7 whatsoever that I'm aware of, where you wouldn't  
8 bring up the right to counsel argument on Cohen, or  
9 you wouldn't challenge the search warrants, one way  
10 or the other - - -

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 MR. EFFMAN: - - - period.

13 CHIEF JUDGE LIPPMAN: Thank you both.

14 MR. EFFMAN: Thank you.

15 CHIEF JUDGE LIPPMAN: Appreciate it.

16 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Vincent Zeh, No. 33 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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