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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

PRINCE CLARK,

Appellant.

No. 205

20 Eagle Street
Albany, New York
November 16, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next appeal on today's
2 calendar is appeal number 205, the People of the State of
3 New York v. Prince Clark.

4 Good afternoon, counsel.

5 MS. POWELL: Good afternoon, Your Honors. My
6 name is De Nice Powell, and I'm here representing Prince
7 Clark on this appeal. This is a case in which the twenty-
8 one-year-old - - -

9 CHIEF JUDGE DIFIORE: Would you like some
10 rebuttal time?

11 MS. POWELL: Yes, I would. Two minutes, thank
12 you, Your Honor. This is a case - - -

13 CHIEF JUDGE DIFIORE: How many minutes?

14 MS. POWELL: Two.

15 CHIEF JUDGE DIFIORE: Two, yes.

16 MS. POWELL: This is a case in which the twenty-
17 one-year-old Prince Clark, who's charged with murder,
18 disagreed with his attorney about the theory of defense
19 that should go to the jury. Instead of pursuing the
20 defense that his professional knowledge, skill, and
21 judgment informed counsel should be advanced, defense
22 counsel deferred to the defendant - - -

23 JUDGE RIVERA: Counsel, counsel. But isn't a
24 justification defense an argument or an - - - an admission
25 into pub - - - to the public, to that jury in that court

1 yes, I killed this person? But I - - - I shouldn't be held
2 accountable for it in the sense I shouldn't have criminal
3 liability for it, but yes, I killed this person. Isn't
4 that the equivalent of that choice about whether or not to
5 plead guilty or not guilty that - - - that I know you
6 concede is strictly - - -

7 MS. POWELL: Fundamental. Absolutely.

8 JUDGE RIVERA: - - - but strictly within the
9 control of the defendant. What - - - why is it not the
10 same thing?

11 MS. POWELL: It's not the same thing, Your Honor.
12 A justification defense is an ordinary defense. It
13 actually puts the People - - - it - - - it places the
14 burden on the People to prove beyond a reasonable doubt
15 that the defendant did not act in self-defense. The - - -

16 JUDGE ABDUS-SALAAM: But would the justification
17 defense have applied to the assault charge, counsel?

18 MS. POWELL: As to the first victim, Gamard
19 Talleyrand?

20 JUDGE ABDUS-SALAAM: Right.

21 MS. POWELL: No.

22 JUDGE ABDUS-SALAAM: So the defendant said I
23 don't - - - it's not me. I don't - - - this is a
24 misidentification. I basically want to roll the dice on
25 getting acquitted for everything, not just the murder but

1 for the assault too. And if the justification defense
2 wouldn't apply to the assault, doesn't his, you know,
3 decision to stick with the misidentification make some
4 sense?

5 MS. POWELL: It may very well make some sense,
6 Your Honor. But the question here, fundamentally, is who
7 makes that decision. Is it the decision of defense counsel
8 or is it the - - - the decision for the defendant himself?
9 So it - - - it really turns on whether or not this decision
10 as to the - - - the theory of defense that goes to the jury
11 is, in fact, a fundamental one or is it one of a matter of
12 strategy or tactic? So I think we have to look at - - -

13 JUDGE ABDUS-SALAAM: Or is it something in
14 between?

15 MS. POWELL: Well, at this point, I think we
16 start with Jones v. Barnes in where the court, the Supreme
17 Court, actually was faced with - - - with this very
18 question, where do we divide the - - - the decision-making
19 power between - - - as between the defendant and defense -
20 - - defense counsel? And the court said - - - you know,
21 the court acknowledged that in an adversarial criminal
22 justice system that, in fact, the attorney has a superior
23 ability to make certain decisions to protect a defendant's
24 rights to a fair trial and to just overall fairness. And
25 the court basically, in sum and substance, held that what's

1 mandated by the Constitution is a lawyer-centered model of
2 representation.

3 JUDGE ABDUS-SALAAM: But if the lawyer here - - -

4 MS. POWELL: And within that model - - -

5 JUDGE ABDUS-SALAAM: Excuse me, counsel. If the
6 lawyer here had decided to go against his client's wishes
7 and at some point, either at the beginning, before the - -
8 - the court instructed the jury and asked for the
9 justification defense, let the judge instruct the jury on
10 that, or at the point where the jury sent out a note asking
11 about self-defense and justification, given that defense -
12 - - or given that instruction and then the defendant had
13 gotten convicted of either of these charges, wouldn't we
14 still be here? Wouldn't he be complaining that the - - -
15 the lawyer actually went against his wishes and decided on
16 a defense that he didn't want?

17 MS. POWELL: He may well be complaining about
18 that. However, he would be wrong. The question, again, is
19 whether or not a counsel, to be effective, can defer a
20 nonfundamental, strategic, tactical decision to his client.
21 That's the bottom line.

22 CHIEF JUDGE DIFIORE: Okay, Ms. Powell. So how,
23 as a practical matter, would the def - - - would they
24 assert the defense of justific - - - raise a defense of
25 justification?

1 MS. POWELL: In this case?

2 CHIEF JUDGE DIFIORE: Yes. In this case.

3 MS. POWELL: It was - - - it was quite - - - it
4 would have been quite easy, in fact. With - - - even with
5 - - - in the absence of defense counsel's advocacy without
6 any mention self-defense in his opening, which he didn't
7 even make, or in his closing statements. The jury saw it
8 itself from the - - - the People's own evidence. The
9 People put in a videotape, a surveillance tape, that - - -
10 that basically laid out what occurred, showed in clear
11 terms what occurred leading up to the fatal shooting.

12 And based on that tape and also, obviously, the
13 incident that led up to it, the - - - you know, two
14 witnesses that discussed the various acts that led up to
15 the fatal shooting, the jury saw, without even an
16 instruction, that this case involved justification. So
17 yes, counsel could have very easily, even though, you know,
18 if the defendant, you know, decided he wanted to exercise
19 his right not to testify, the - - - the justification
20 defense would have been charged. And in fact, the
21 Appellate Division, both the majority and the dissent, had
22 no problem finding that, you know, when you look at the
23 evidence in a light most favorable to the defense - - -

24 JUDGE STEIN: Are you familiar with the - - -

25 MS. POWELL: - - - that justification was what

1 should have been charged.

2 JUDGE STEIN: Are you familiar with our - - -

3 MS. POWELL: Or could have been charged.

4 JUDGE STEIN: - - - our decision in Henriquez and
5 also Rossborough where we talked about a defendant's right
6 to waive the right to effective assistance of counsel?

7 MS. POWELL: I'm aware of Henriquez and that case
8 is completely distinguishable. In Henriquez, as opposed to
9 here, Mr. Henriquez basically instructed his lawyer to do
10 nothing, and then when coun - - - when the court went
11 through basically the Faretta warnings, he - - - he was
12 nonresponsive.

13 JUDGE STEIN: Well, here - - -

14 MS. POWELL: In that scenario - - -

15 JUDGE STEIN: Here, in a - - - in a sense, that's
16 what the defendant did. He instructed his attorney to do
17 nothing with respect to a justification defense that the
18 attorney thought was possibly a good defense. So - - - and
19 there was a very thorough colloquy here. I mean so - - -

20 MS. POWELL: Very thorough what?

21 JUDGE STEIN: A very thorough colloquy. So - - -
22 so instead of creating this situation where the attorney is
23 damned-if-he-does and damned-if-he-doesn't, should we - - -
24 I mean, you know, under Henriquez why shouldn't we say that
25 he knowingly volun - - - and voluntarily and intelligently

1 waived his right to have his attorney make that
2 determination?

3 MS. POWELL: Your Honor, the question here is - -
4 - I mean Henriquez is comp - - - a complete instruction to
5 do nothing.

6 JUDGE STEIN: Well - - - well, but let's just say
7 - - -

8 MS. POWELL: Here basically the defendant wants -
9 - -

10 JUDGE STEIN: - - - we disagree that there's a
11 distinction there. Then - - -

12 MS. POWELL: But here the defendant is - - -

13 JUDGE STEIN: Did he do that? Did he waive it?

14 MS. POWELL: No. The defendant is basically
15 directing his attorney to - - - to press his pro se
16 defense. And this court has - - -

17 JUDGE STEIN: No, no, no. He wasn't asking him
18 to - - - he could have pressed that defense anyway. He was
19 asking him to refrain from pressing another defense.

20 MS. POWELL: Right.

21 JUDGE STEIN: That's - - - that's the part of
22 this that we're talking about.

23 MS. POWELL: He's - - - he's asking - - - Mr.
24 Clark was insisting and, in fact, in the end, was
25 successful in compelling this attorney to - - - to press a

1 ludicrous mis-ID defense and not press the - - - the
2 defense that was - - - that this evidence has - - -

3 JUDGE STEIN: I don't know. I - - - I still have
4 that videotape. I don't think that was ludicrous.

5 JUDGE FAHEY: I was going to say that too. I
6 watched the videotape and to be honest, this was a very
7 intelligent defendant. And I think it - - - it appeared,
8 in looking at the whole record, like he was able to weigh
9 quite effectively for a nonlawyer, I thought, the
10 difference between justification, which involves, on some
11 level admitting before the jury - - - even if he doesn't
12 testify, you're correct. You're still admitting that the -
13 - - the crime took place and you did it and the
14 misidentification.

15 Particularly, I was struck on the tape by two
16 things. First, it - - - it was difficult, I thought, to
17 clearly see a person's face in the videotape, particularly
18 of the shooting in - - - in the hallway. And so I thought
19 well, that's at least a rational decision for somebody to
20 say. And the other thing was is that justification seemed
21 to be - - - to be so hard to argue in the shooting where
22 you've got that test, we've got a two-part test, subjective
23 and objective. And here, it looked like the - - - the
24 victim was on the ground and the person doing the shooting
25 shot him a number of times. So in other words, it wasn't a

1 one-shot reaction to it. So for those two reasons, it
2 seemed to be a very rational decision.

3 MS. POWELL: Judge - - -

4 JUDGE FAHEY: So it doesn't - - - that doesn't
5 address your point which is that it wasn't his call to
6 make. It was somebody else's call to make.

7 MS. POWELL: And I think - - - I think that's the
8 fundamental thing that this court has to - - -

9 JUDGE FAHEY: Yeah.

10 MS. POWELL: - - - has to - - -

11 JUDGE FAHEY: But you see what I'm saying?

12 MS. POWELL: Well, I - - - I would disagree.

13 JUDGE FAHEY: Okay.

14 MS. POWELL: The - - - it's not just the tape
15 that's involved. I mean for the mis-ID defense to be
16 successful, the - - - the jury would have to, basically,
17 ignore the fact this defendant's friend of many years
18 identified as the man on the tape. But the tape itself
19 shows quite clearly that Mr. Clark is attempting to retreat
20 into his own home. He is not waving or brandishing the
21 gun. And these two fellows, Mr. Wisdom and the
22 unidentified other actually pursued my client into his own
23 home. And it is at that point once they actually entered
24 the lobby that they attacked him. And at that point, they
25 slammed him against the wall and attempted, the jury could

1 infer, to take the gun away. And if that's not self-
2 defense - - -

3 CHIEF JUDGE DIFIORE: Thank you, Ms. Powell.
4 Counsel.

5 MR. TWERSKY: Good afternoon. My name is Sholom
6 Twersky, and I represent the respondent. Your Honors, you
7 don't have to decide whose call it is because, based on the
8 state of the law at the time, counsel, even if he did defer
9 and even if thought it was the defend - - - it was the
10 defendant's call and not his, that was reasonable because
11 this is simply an ineffective assistance of counsel case.
12 This is not Colville (ph.) which was a trial court error.
13 This is simply was it reasonable for the defense counsel to
14 - - - and if we assume - - - and we don't concede that, but
15 if we assume if he simply deferred, was that reasonable.

16 Exact - - - almost exactly one month before
17 defendant's trial the Appellate Division decided Colville
18 and said we can't decide between what the - - - the
19 submission lesser-included offenses whether it's
20 fundamental and therefore, defendant's call or whether it's
21 tactical and defense counsel's call. Then one month later,
22 defendant's trial. Defense counsel makes his decision and
23 allegedly defers to defendant's decision to go mis-ID
24 rather - - - and rather than justification. Two years
25 later, this court decides Colville, reverses the Appellate

1 Division decision, and in that decision says we've now
2 resolved the uncertainty in the law.

3 JUDGE STEIN: But doesn't - - -

4 MR. TWERSKY: And - - -

5 JUDGE STEIN: Doesn't your argument assume that
6 there was a strategy here? I mean it seems to me that the
7 record is pretty clear that - - - that counsel did not
8 think that he had any discretion whatsoever in - - - in how
9 to - - - in how to try this case.

10 MR. TWERSKY: I would disagree with that, Your
11 Honor. If you look at it, counsel - - -

12 JUDGE STEIN: Well, why would he - - - if he did,
13 why would he bring it up? Why would he bring it up in the
14 first place?

15 MR. TWERSKY: Your Honor, what - - - what he
16 brought up, if you look at A-3 41 in the record, what
17 counsel brings up is prior to that, he kept - - - he knew
18 this is a very weak case for him. He knew he couldn't get
19 a complete acquittal, whether with justification or - - -
20 or mis-ID because of the nature of this evidence. So he
21 kept trying to get him to plead guilty. When the defendant
22 kept saying I didn't do it, I don't want to plead guilty,
23 then what did he do? He said go EED. At least you'll only
24 get a manslaughter on the - - - on the counts regarding - -
25 - regarding the - - - regarding Wisdom. And what does

1 defendant say? This is defense counsel's recounting their
2 conversation to the court. I said go EED, and he said I
3 don't want EED; I don't want justification; I don't want
4 you saying - - - suggesting anything that is - - - that
5 it's me on that video surveillance video or on that - - -

6 JUDGE RIVERA: Did he understand that - - -

7 MR. TWERSKY: - - - surveillance tape.

8 JUDGE RIVERA: Did he understand the - - - the
9 possible result, what possible verdict there might be if,
10 indeed, he was successful on justification? Did he
11 understand that?

12 MR. TWERSKY: Your Honor - - -

13 JUDGE RIVERA: What does the record show?

14 MR. TWERSKY: The record shows that he kept
15 saying I'm completely innocent.

16 JUDGE RIVERA: But isn't he trying to get off?
17 Do - - - do you think he understood what - - - if he was
18 successful on justification, what the result might be?

19 MR. TWERSKY: This seemed like a very
20 sophisticated defendant because the fact is that - - -

21 JUDGE RIVERA: Well, his lawyer didn't get it so
22 I'm not so sure.

23 MR. TWERSKY: Well, the - - - I'm not so sure
24 about that either, Your Honor, because what I mean is that
25 the defense counsel - - - it's not so clear that defense

1 counsel didn't realize, you know what, between these two
2 weak defenses I better go with mis-ID and not
3 justification.

4 JUDGE RIVERA: Okay.

5 MR. TWERSKY: Because you never hear out of the
6 defense counsel's mouth why he thinks - - -

7 JUDGE RIVERA: I guess I'm asking a different
8 question. Does the record show that - - - that this
9 defendant understood the - - - the possible result of being
10 successful on a justification defense. You might think the
11 record doesn't show that. I'm just asking.

12 MR. TWERSKY: The defense - - - what the record
13 shows is that defendant was adamant, and as the Appellate
14 Division said, that he wanted to announce to the world that
15 he was completely innocent. That would have - - -

16 JUDGE RIVERA: Well, and he wanted to get off the
17 charges.

18 MR. TWERSKY: Exactly. And - - - and that would
19 have applied to Talleyrand, as well. But the - - - a
20 reasonable defense counsel would have realized that
21 justification wouldn't have gotten anything but a - - - an
22 acquittal, if it could work, on the - - - on the murder
23 counts but not on Talleyrand's counts and also nothing
24 regarding the weapons possession count where justification
25 wouldn't apply. So the fact is that what this - - -

1 JUDGE RIVERA: But is there anything in the
2 record to suggest the defendant understood that and waived
3 that, that that was in the balance?

4 MR. TWERSKY: There's - - - there's nothing
5 specific in the record that shows that other than him
6 remaining adamant that he didn't want his - - - his
7 attorney - - -

8 JUDGE RIVERA: Does that mean that maybe he has a
9 440 on that, whether or not he really understood this
10 choice?

11 MR. TWERSKY: Your Honor, if this - - - if this
12 court wouldn't find that there's enough objectively to see
13 that the defense attorney reasonably opted, because he
14 doesn't express his sub - - - subjective reasons as to
15 exactly what he thought about - - - about justification,
16 this court should apply an objective standard. And to say
17 that based on some of the comments that were made by this
18 court why justification was - - - was not as good as mis-ID
19 when you have a grainy video. When you have what the
20 Appellate Division says you - - - the images are indistinct
21 on where the defense counsel, quite effectively, argued in
22 summation that Mitlan (ph.), who was the only person who
23 identifies defendant as being on that surveillance tape,
24 might very well have been coached.

25 However, if this court would find that there

1 isn't sufficient evidence in this record then yes, a 440
2 might be appropriate way to sort of flesh out exactly what
3 all the specifics of defense counsel's rationale was. But
4 the fact is that there is no reasonable probability that
5 even if a justification charge had been given in this case
6 that the - - - first of all, there's no reasonable view of
7 the evidence so that it should have even been charged. And
8 even if you want to say it should have been charged,
9 there's nothing to say that the jury would have bought it.
10 Defendant was the initial aggressor regarding the deadly
11 physical force. There's no way around it. As the
12 Appellate Division said - - -

13 JUDGE STEIN: Well, hadn't he retreated from the
14 initial encounter, though, and then he was going back into
15 his - - - into his apartment and - - - and the victim came
16 after him?

17 MR. TWERSKY: After - - - after he had first
18 retreated to his apartment, after he had been simply beaten
19 up, he then comes out again, Mitlan says shaking with
20 anger.

21 JUDGE STEIN: I thought they have a - - - they
22 have another interaction. But then he - - - then he goes
23 back. He walks away, and he's chased and he's attacked.

24 MR. TWERSKY: Your Honor, deadly physical force
25 cannot be used in the face of regular physical force. All

1 you have with - - -

2 JUDGE STEIN: Well, unless he thought that this -
3 - - that he was going to grab the gun from him and use it
4 to shoot him.

5 MR. TWERSKY: Your - - - Your Honor, you have
6 Wisdom rushing him. You have nothing in Wisdom's hand.
7 Nothing to say Wisdom is armed. And then the - - -

8 JUDGE STEIN: My - - - my point only is is that
9 is there not some reasonable view of the evidence that
10 could have led a jury to - - -

11 MR. TWERSKY: Even if there is a reasonable view
12 of the evidence, even once they're struggling against the
13 wall, we're talking about a matter of ten seconds where
14 defendant then shoots Wisdom, the unarmed Wisdom, six
15 times. So there's no reasonable probability that even if
16 the jury had been instructed on justification, that they
17 would have acquitted the defendant of the counts related to
18 - - - related to Wisdom. So under those circumstances, the
19 - - - the People would argue that defendant has failed to
20 show that counsel was ineffective in this case and the
21 conviction should be affirmed.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 Ms. Powell.

24 MS. POWELL: Just a few things, Your Honor. Yes.
25 The - - - the colloquy between the court and Mr. Prince

1 when he talked about the remedy that would follow from a
2 successful justification charge was completely misleading.
3 The court - - - he basically talked about EED with
4 justification and suggested to this client, my client, that
5 if he were, in fact, successful with the justification
6 defense that it would end up in a manslaughter conviction.
7 That's number one.

8 And number two, my adversary talks about the - -
9 - the Appellate Division decision in Colville and that
10 somehow, you know, counsel might have been confused by that
11 and should have followed that. The fact of the matter is
12 that in Colville the court - - - the decision specifically
13 says that the court - - - that the defense counsel
14 acquiesced to the defendant's decision. So - - - so this -
15 - - the Colville Appellate Division decision should not
16 have been controlling in any way in the - - - in - - - with
17 respect to my counsel.

18 With respect to whether or not the justification
19 defense would have worked, my adversary talks about being
20 shot six times. Yes. He was. But you have to look at the
21 circumstances under which those - - - those six shots were
22 fired. It was a tussle, a struggle. And in fact, the - -
23 - Wisdom's accomplice joined in and began to kick him. So
24 how the gun went off, we don't know. It may very well have
25 been triggered as a result of - - -

1 JUDGE RIVERA: You don't have much time left.
2 Can you quickly turn to the jury charge issue?

3 MS. POWELL: With respect to the jury charge
4 issue, this - - - the court has an obligation under 300.10
5 and 310. - - - under the statute, to meaningfully respond
6 to a jury's - - - juror's proper request. In this case,
7 the jury specifically asked for, in essence, a
8 justification charge. At that point, the court had no
9 discretion as to whether or not to give an answer to that
10 charge. Instead, what the court did was basically charge
11 justification out of the case. And he specif - - - he
12 specifically told this jury that you are to talk about - -
13 - you are to decide whether or not Mr. Clark intended to
14 kill and - - - and justification just simply is not your
15 concern. In fact, when - - -

16 JUDGE STEIN: Doesn't that have to be preserved?

17 MS. POWELL: Well, Judge, I think that under this
18 court's jurisprudence, I think it's Gonzalez, the court
19 said that's actually - - -

20 JUDGE FAHEY: Well, most recently, though, we had
21 People v. Mack.

22 MS. POWELL: I'm sorry?

23 JUDGE FAHEY: People v. Mack is - - - is most
24 recent, and it - - - it makes the argument that - - - I
25 think it makes it more difficult for you, though. I think

1 you have to preserve under Mack, this prong of the jury
2 note.

3 MS. POWELL: Is - - - I'm sorry. I'm not that
4 familiar with Mack. Is Mack an O'Rama case?

5 JUDGE FAHEY: It - - - yes, it's relatively new.
6 Yeah.

7 MS. POWELL: That's what I - - - yeah. But this
8 is not, and I think that court in Gonzalez announced the
9 rule that, you know, under 310.30 the court must give a
10 meaning - - - a meaningful response to a proper jury
11 question. And given - - -

12 JUDGE STEIN: But isn't it analogous to O'Rama in
13 that in O'Rama that statute, likewise, says what the court
14 must do, but we have found that that has to be preserved
15 and raised as long as counsel is - - - knows what the jury
16 has requested. So - - -

17 MS. POWELL: Right.

18 JUDGE STEIN: - - - why would that not apply
19 here?

20 MS. POWELL: If - - - and also, I should note,
21 that defense counsel objected to, in the end, the court's
22 informing this jury that justification was not their
23 concern. And to - - - to that extent, it is preserved.

24 JUDGE STEIN: Okay.

25 CHIEF JUDGE DIFIORE: Thank you, Ms. Powell.

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JUDGE FAHEY: Thank you.

(Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Prince Clark, No. 205 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: November 22, 2016