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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

PHILLIP COUSER,

No. 166
167

Appellant.

Appellate Division, Fourth Department
The Hon. Samuel L. Green Courtroom
50 East Avenue
Rochester, New York 14604
October 14, 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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1 CHIEF JUDGE DIFIORE: So the first appeals on our
2 calendar this morning are numbers 166 and 167 in the matter
3 of the People of the State of New York v. Phillip Couser.

4 Counsel.

5 MR. HOBBS: Good morning, Your Honors; may it
6 please the court, I'm James Hobbs on behalf of the
7 appellant, Phillip Couser. I would like to reserve four
8 minutes for rebuttal.

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. HOBBS: There are - - - there are two appeals
11 in this case and they present two different sets of issues.
12 So I want to try to address both of them. I plan to spend
13 a few minutes on the sentences for the trial convictions
14 and then I do want to address the problems with Mr.
15 Couser's Alford plea address entered after the trial was
16 over.

17 With respect to the first issue, the evidence
18 showed that Mr. Couser attempted to rob a group of people
19 who were walking together and that he initiated this group
20 robbery only through group-directed acts. He turned - - -

21 JUDGE PIGOTT: Is this - - - is this a law
22 question? The - - - the judge, it seemed to me, went
23 through in pretty good detail why he was giving consecutive
24 and concurrents. And is - - - is your argument that even
25 though he was doing that that he was legally incorrect in

1 doing so?

2 MR. HOBBS: Correct. There - - - there is - - -
3 as a matter of law, there wasn't evidence to - - - to
4 separate and impose consecutive sentences under Penal Law
5 70.25(2). Penal Law 70.25(2) - - -

6 JUDGE GARCIA: But counsel. I'm sorry to
7 interrupt to you, but it seems to me if you have Ramirez
8 from this court that says you can have consecutive
9 sentences for robbing, essentially, a Brink's truck, right.
10 And one is robbery of a guard, robbery of the gun. A
11 second count that was run consecutively is robbery of
12 another guard, robbery of a gun. Why isn't that analogous
13 to this case?

14 MR. HOBBS: It's not analogous because those two
15 guards involved very separate uses of force. Essentially,
16 in Ramirez the defendant pointed the gun at the two guards.
17 One guard immediately was subdued. He - - - he, I believe,
18 got to the ground and gave up his gun. The other guard
19 engaged in a firefight. The other guard stepped away or
20 tried to walk away, shot back, and there was guns - - -
21 there were bullets fired back and forth. That's a much - -
22 -

23 JUDGE GARCIA: But why doesn't that go to Judge
24 Pigott's about isn't this really a question of fact then?

25 MR. HOBBS: I don't think so. The - - - the fact

1 is there were - - - I mean with respect to the Appellate -
2 - - the attempted robberies, there was no dispute at the
3 Appellate Division - - - or at least the Appellate Division
4 held that these acts were indistinguishable, that he
5 pointed the gun at a group of people and he issued commands
6 to that group of people and that there was no
7 individualized display of firearm.

8 JUDGE ABDUS-SALAAM: So if he - - - if he had
9 requested or demanded that each person get to the ground,
10 you would say that that would clear the consecutive - - -

11 MR. HOBBS: Potentially. If he had turned to one
12 person and said you get on the ground and then walked up to
13 another person and said you get on the ground and so forth,
14 then you would have distinguishing actions. You'd have,
15 basically, a crime that's walking along a path and then
16 branches where it addresses one person and then addresses
17 another person and then addresses another person.

18 JUDGE ABDUS-SALAAM: But what if the person in
19 the back of the group didn't hear him initially, that he
20 was speaking to the group?

21 MR. HOBBS: You know, I mean, that's a - - -

22 JUDGE ABDUS-SALAAM: And just followed what
23 everybody else did?

24 MR. HOBBS: I'm not sure - - - the - - - what we
25 need to first set is what - - -

1 JUDGE ABDUS-SALAAM: That's your separate act?

2 MR. HOBBS: - - - the number of actions that Mr.
3 Couser took, not necessarily the behavior of the victims.

4 JUDGE ABDUS-SALAAM: Of if somebody hesitated?

5 MR. HOBBS: If someone - - - if that then
6 prompted an additional act directed particularly at that
7 victim - - -

8 JUDGE ABDUS-SALAAM: So they all had to - - -

9 MR. HOBBS: - - - then we'd have a different
10 case.

11 JUDGE ABDUS-SALAAM: You know, because they all
12 got to the ground at the same time you're saying it's the
13 same act?

14 MR. HOBBS: In response to - - - I'm saying
15 because he - - - he issued one set of commands on this
16 record. We don't have any evidence that there were
17 separate commands. If it took one person longer to get
18 down on the ground but he didn't take any additional act, I
19 think we're on the same.

20 CHIEF JUDGE DIFIORE: Counsel, does your argument
21 not ignore the fact that the aggravating element of the
22 robbery is the display of the weapon to the victim and that
23 thus there are separate victims there? Isn't that
24 minimizing those separate acts and sort of according a
25 group discount for the group?

1 MR. HOBBS: I'd say - - - I'd say two things.
2 First, I don't - - - I don't think I'm ignoring the fact
3 that it's a display of a firearm that - - - that aggravates
4 this crime. In fact, that's one of the actions that's
5 indistinguishable - - -

6 CHIEF JUDGE DIFIORE: As to each individual
7 victim who has to perceive the display of the weapon - - -

8 MR. HOBBS: Correct.

9 CHIEF JUDGE DIFIORE: - - - and the fear, the
10 elevated fear that that causes.

11 MR. HOBBS: Sure. There are - - - because Penal
12 Law 70.25(2) turns on the number of actions that the
13 defendant takes, there are going to be a lot of cases where
14 you have multiple victims but only one sentence. There are
15 - - - there's a case out of the Appellate Division cited in
16 my briefs where a defendant drives his car into a police
17 car that contains two officers. It's one action, it's two
18 separate assaults, two victims. Sentences had to be
19 concurrent because the defendant only took one set of
20 actions against them. You could say that discounts the - -
21 - the injury suffered, the fear suffered by the officer,
22 but that - - - that's not the way the legislature asks us
23 to look at these cases. The legislature directs our
24 attention to the number of actions that the defendant took
25 and whether or not those actions can be divided up.

1 There's nothing on this record that allows us to divide up
2 the way he pointed the gun. The testimony was he pointed
3 it at the group, not that he pointed it one person, then he
4 pointed it another and - - - and so forth.

5 CHIEF JUDGE DIFIORE: Then move us to the
6 McKnight analysis.

7 MR. HOBBS: The McKnight analysis, I believe
8 McKnight is the case in which the - - - the defendant shot
9 multiple - - -

10 CHIEF JUDGE DIFIORE: Splayed his gun.

11 MR. HOBBS: - - - multiple gunshots, right?

12 CHIEF JUDGE DIFIORE: Um-hum.

13 MR. HOBBS: So that's - - - this is the way - - -
14 you have different outcomes with different sets of multiple
15 victims. If the defendant takes one action against a group
16 of victims, you're going to have concurrent sentences
17 required. But if the defendant shoots multiple bullets,
18 whether or not he intended to - - - intent isn't at issue.
19 That's - - - that's clear from McKnight and other cases.
20 The issue is the number of actions they've taken. And so
21 if he shoots the gun multiple times and that results in
22 multiple victims, then you can have consecutive sentence
23 because the defendant took multiple actions. It's - - -
24 that's the way the legislature asks us to - - -

25 JUDGE GARCIA: You have convictions here for

1 attempted robbery, which the Appellate Division then ran
2 concurrently.

3 MR. HOBBS: Correct.

4 JUDGE GARCIA: And attempt - - - and a robbery.

5 MR. HOBBS: Um-hum.

6 JUDGE GARCIA: Doesn't that suggest that they're
7 separate acts? Doesn't there necessarily have to be
8 something else to have a completed robbery?

9 MR. HOBBS: There did have to be a taking. But
10 that additional act is not sufficient under the - - - under
11 Penal Law 70.25(2).

12 JUDGE GARCIA: And what's the case law support
13 for that?

14 MR. HOBBS: The case support, there are multiple
15 cases in which you have an additional act of taking in
16 which the sentences have to be concurrent. Laureano is a
17 case out of the Court of Appeals in which the defendant
18 committed a manslaughter, killed a victim, and the - - -
19 that act constituted the use of force necessary to complete
20 the - - - or to - - - to start the robbery. But then the
21 defendant also took the victim's property, so that was - -
22 - that's - - -

23 JUDGE GARCIA: That's the same victim, right?

24 CHIEF JUDGE DIFIORE: A single victim.

25 MR. HOBBS: - - - in addition - - - it is the

1 same victim. You've got in Battles - - - or no, not
2 Battles, I'm sorry, Ramirez. The other element of - - -
3 the other aspect of that case, there was an aspect in which
4 there were two guards, but there was also the robbery of a
5 guard and the robbery of the truck. Those are takings from
6 two different victims.

7 JUDGE GARCIA: But that, as I understand it, was
8 it was a taking from one victim but they had said - - -
9 they had found that that was also a taking from the company
10 that the victim was driving for, right?

11 MR. HOBBS: Well, - - -

12 JUDGE GARCIA: The other victim was the owner of
13 the truck - - -

14 MR. HOBBS: True, but there was an additional act
15 against another. There was the taking of the gun from the
16 guard was the robbery of the guard. The take - - - the
17 robbery from the - - - the company, the separate victim,
18 yes, it wasn't a person there in the - - - in the literal
19 human sense but it was a corporate person there and it did
20 involve a separate act of taking money from the truck.

21 JUDGE GARCIA: But again, it's a - - - it's a
22 victim issue almost to me, that one. Because the - - -
23 you're saying the victim is the owner of the funds in the
24 truck but the act is exactly the same. The act of robbing
25 those guards is the same act as robbing the company because

1 the company technically isn't there as a victim. They own
2 the funds. It would, you know, if somebody has my wallet
3 and gets robbed and they take my wallet and I'm a victim.
4 It almost seems analogous to that to me.

5 MR. HOBBS: I mean, I don't see that. It is a
6 separate act of taking from - - - the property from the
7 truck. That wasn't the guard's property. That wasn't what
8 was stolen. That wasn't what completed the robbery against
9 the guard.

10 JUDGE PIGOTT: I don't - - - I don't mean to take
11 you off your case but you wanted to argue the Alford part
12 of it.

13 MR. HOBBS: I do. And thank you very much. I
14 was about to try to turn to that, and I appreciate it.
15 Okay. With respect to the - - - the Alford plea, after the
16 trial was over, Mr. Couser entered an Alford plea to the
17 charge of attempted intentional felony murder. He always
18 denied that he committed this crime. That was the - - -
19 basically the whole reason he went to the first trial and
20 was prepared to go to the second trial to contest this
21 again. The only reason the record shows for him entering
22 this plea is to avoid the risk of another consecutive
23 sentence.

24 JUDGE GARCIA: But isn't it your - - - this is an
25 ineffective assistance claim, right?

1 MR. HOBBS: I want to focus, actually, on point
2 three. I mean the - - - the sentencing point that I makes
3 in points two and point three runs together - - - runs
4 through both points.

5 JUDGE GARCIA: But the Alford plea is an
6 ineffective assistance claim?

7 MR. HOBBS: The Alford plea on the record is - -
8 - is deficient on its own whether or not you find
9 ineffective - - - whether or not you fault counsel or not.

10 JUDGE FAHEY: So - - - so how will we do that?
11 If - - - if it's not ineffective assistance, you're saying
12 you could still vacate and go back to a trial on the
13 attempted murder charge. How would you do that? Give me
14 the logic of that.

15 MR. HOBBS: Sure. An Alford plea requires the
16 court to ensure two things, that the defendant is making a
17 voluntary and rational decision, a choice among his - - -
18 his potential options at that point, and that there's
19 strong evidence of - - - of guilt.

20 JUDGE STEIN: And what's missing here?

21 MR. HOBBS: The volun - - - the idea that this
22 was a rational - - - there's record support for this being
23 a rational decision.

24 JUDGE STEIN: Well, there was a pretty extensive
25 colloquy, right?

1 MR. HOBBS: Not by the defendant.

2 JUDGE STEIN: Well, - - -

3 MR. HOBBS: The - - - the colloquy was conducted
4 entirely with counsel. There was almost nothing said by
5 the defendant on the - - -

6 JUDGE STEIN: Yeah. But haven't we held
7 repeatedly that as long as the - - - that counsel can make
8 the statements but - - - but the defendant has to be asked
9 do you understand this, is this what you want to do. And
10 didn't that take place here?

11 MR. HOBBS: That didn't take place. There was no
12 questions to - - - to confirm that he was making a - - -
13 that he understood the proceedings, no questions to confirm
14 that he wasn't under the influence of any drugs or alcohol,
15 hadn't been made any threats or promises. There were no
16 questions to confirm that he understood the trial rights he
17 was waiving. None of that happened. But then, also, we
18 have on the record a, at best, oversimplification of what
19 the risks of a consecutive sentence are at trial. I think
20 it's flat wrong, but at best, it's a - - - it's an
21 oversimplification. There was nothing to confirm that he
22 understood the consequences that might occur at trial and
23 the fact that he might have an argument for current
24 sentence - - - sentencing.

25 JUDGE STEIN: Well, there - - - there certainly

1 was a full discussion of - - - of what the proof was
2 against him and - - - and the likelihood of his being
3 convicted on a retrial and all that.

4 MR. HOBBS: Right.

5 JUDGE STEIN: Doesn't that factor into it?

6 MR. HOBBS: I'm - - - that is - - - I suppose
7 that's - - - that's a helpful fact that - - -

8 JUDGE FAHEY: I guess what I - - - the problem
9 I'm having is - - - is how to distinguish between the
10 ineffective assistance claim - - - all right, I get that.
11 They gave - - - he gave him the wrong information. That's
12 your argument. The problem there is that you've got the
13 trial judge and the Fourth Department. Even if we
14 overturned them, is it ineffective assistance if the Fourth
15 Department agreed with his underlying analysis and logic?
16 So then you get to the Alford claim. And in the Alford
17 claim, if it's not ineffective assistance in how he gave
18 his plea, then I'm having a hard time as seeing it now as
19 KVI, knowing and voluntary and intelligent.

20 MR. HOBBS: The - - - it was the court's
21 obligation to ask whether he understood the risks that he
22 would - - -

23 JUDGE FAHEY: So it's not ineffective assistance
24 of counsel, it's the entire proceeding, including the
25 court?

1 MR. HOBBS: That's correct.

2 JUDGE FAHEY: Okay. That's your argument.

3 MR. HOBBS: That's correct.

4 JUDGE FAHEY: I see.

5 MR. HOBBS: Just - - - I see my time is up, but
6 just one case in which is similar to this is People v.
7 Hill, it's a 2011 decision from this - - - this court.

8 JUDGE FAHEY: Right. But that's the only - - -
9 that's the only one that seemed to be going that way in
10 terms of the analysis. It seemed like all the other
11 Appellate Division authority - - - well, I should say all
12 the other Appellate Division authority kind of favored you.
13 Hill seemed to be going the other way, the Second
14 Department case.

15 MR. HOBBS: No. The - - - the Court of Appeals
16 decision in Hill, though - - -

17 JUDGE FAHEY: I see.

18 MR. HOBBS: - - - was one where the defendant as
19 not asked whether he was making a - - - he understood that
20 he was making a choice to avoid a harsher consequence - - -

21 JUDGE FAHEY: Sure.

22 MR. HOBBS: - - - after trial.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MR. HOBBS: Thank you.

25 CHIEF JUDGE DIFIORE: Counsel.

1 MS. WOLFORD: Good morning; may it please the
2 court, Kelly Wolford on behalf of the People. First, I'll
3 address the consecutive sentence issue because I do think
4 that it directly impacts the Alford plea situation. And
5 Your Honor, I do agree that the argument made by the
6 defendant here is, in fact, giving a group discount for the
7 robbery or attempted robbery of five - - -

8 JUDGE FAHEY: But that really wasn't your
9 argument, was it? I'm having a - - - I'm having a little
10 difficult time and maybe you can clarify it for me. But it
11 seems that - - - that you're arguing that there's a - - -
12 there's a different analysis between the first degree and
13 second-degree murder. And - - - and that in your brief you
14 argue that first-degree murder is - - - we should be
15 looking at the mens rea which is different than I read
16 Laureano for consecutive sentences and the test there. But
17 with second-degree murder we should be looking at the actus
18 reus, at the act itself. Is - - - is that your argument?
19 Or are you - - - or are you saying something else?

20 MS. WOLFORD: With respect to the Alford plea and
21 whether or not the sentence for attempted murder first
22 would have run consecutive, there's - - - it's actually a
23 two-part argument. One would be that there are two
24 separate actus reus with respect to intentional felony
25 murder, which does not exist in felony murder under murder

1 two where the felony supplants the intent or the - - - the
2 mens rea element where you can't have felony murder under
3 murder two without the underlying robbery. When you have
4 murder one, however, you have the felony of, in this case,
5 robbery but then you have a completely separate act of
6 intentional or here, attempted intentional, murder.

7 So you have to have the intent to commit the
8 robbery or attempted robbery and then you have to have the
9 separate act of actually intending to commit the murder.
10 So we have two different actus reus where if you go back to
11 murder second, where there's no intentional murder element
12 to that crime and you have no mens rea for - - - for the
13 murder, it's supplanted by the underlying felony. We have
14 a separate situation. So there's only one actus reus in
15 murder second where there's two in intentional felony
16 murder. Then - - -

17 JUDGE FAHEY: I've - - - I have never seen that
18 argued anywhere. This is something - - -

19 MS. WOLFORD: That's why we're here I think.

20 JUDGE FAHEY: Okay. It's creative. I got to
21 give you credit there, anyway. I got to give you credit.
22 But - - -

23 MS. WOLFORD: If I'm nothing else, Judge, I can
24 be creative.

25 JUDGE FAHEY: Well, you got to give somebody

1 credit for that.

2 JUDGE PIGOTT: Ms. Wolford, going back - - - I
3 know you want to talk about the beginning of this thing.
4 When you look at what happened, in your view, could the
5 judge have made these all concurrent?

6 MS. WOLFORD: He could have.

7 JUDGE PIGOTT: So this is all discretionary?

8 MS. WOLFORD: Absolutely.

9 JUDGE PIGOTT: And - - - and we've got to decide
10 why a judge would say even though you got these people on
11 the ground and you're doing what you're doing and you only
12 took the purse and - - - and the gunshot grazed one person,
13 he can parse these out and add up to forty-eight years as
14 opposed to what would be a much smaller, I forget what it -
15 - - if they're all concurrent, what it would be, about
16 fifteen?

17 MS. WOLFORD: He could have done twenty - - - if
18 he got the maximum sentence on the one completed robbery,
19 he could have done twenty-five. He was given eighteen on
20 that and then the judge then took the rest of the time and
21 kind of parsed out, per victim, a different sentence. That
22 was - - - each one of those sentences was less than the
23 maximum that was available for each of the charges.

24 JUDGE PIGOTT: It just seemed strange to me that,
25 you know, if you - - - we have - - - we have our predicates

1 and our persistence and all of those make sense. But here
2 we're saying because of what you did in the park, I'm
3 deciding that you're going to do forty-eight years for
4 stealing a purse and nick - - - and I don't want to say
5 nicking somebody with a gun, I mean it was not a nice thing
6 to do. But it just seemed like a broad discretion on the
7 part of the judge. And you were saying that yeah, they can
8 do that - - -

9 MS. WOLFORD: Absolutely.

10 JUDGE PIGOTT: - - - or they can make it
11 concurrent.

12 MS. WOLFORD: Well, and I think, ultimately, the
13 first issue we have to get by is whether or not legally he
14 was authorized to impose consecutive time. And in this
15 particular case, he was legally authorized to impose
16 consecutive time. And if we go back and we take a look at
17 the record and we see what happened in the park that night,
18 to say that there is only one - - - in essence, what
19 defendant is arguing is there's only one robbery. There
20 just happened to be five people there.

21 JUDGE FAHEY: Well, no. Not really. I mean what
22 he's arguing is - - - is that you could have charged him
23 with another kind of attempted murder. But the way you
24 charged attempted murder here - - - the way you charged him
25 here, you know, you could have charged felony murder in a

1 different way or you could have charged him with
2 intentional murder and not felony murder. And if you had
3 charged him with intentional murder and not felony murder,
4 then there would be no question of the stacking here. It
5 would be a straightforward.

6 MS. WOLFORD: Okay.

7 JUDGE FAHEY: But that's not the way you charged
8 him. It because you charged the felony murder that we're
9 in the situation that we have to look at the underlying
10 felony and see if that, in and of itself, can be
11 distinguished.

12 MS. WOLFORD: Right.

13 JUDGE FAHEY: That's why we're in this situation.

14 MS. WOLFORD: Okay. So two separate issues, I
15 think, Your Honor. The one with respect to whether or not
16 the five counts of one completed robbery and four attempts
17 can be run consecutively to each other and then the
18 separate issue of whether or not that intentional attempted
19 felony murder can run - - -

20 JUDGE FAHEY: That's correct.

21 MS. WOLFORD: - - - consecutive to any of those.
22 Now just briefly, I'll come back to your question, Judge
23 Pigott - - - but just briefly on the - - - the intentional
24 - - - attempted intentional felony murder. Okay. That - -
25 - that charge was the one that they hung on and is,

1 ultimately, the Alford plea is over. At the point in time
2 when he makes a decision to plead to that charge, we are at
3 the point in time where we have to retry that case.

4 And I do understand that during the first trial
5 we did not specify the underlying robbery or attempted
6 robbery that was the predicate for the - - - the robbery.
7 However, we're facing a second trial now. And at this
8 point in time, we can fix that. We can specify that it was
9 Mark Lewis who was the attempted robbery victim and that he
10 was the one that was shot. And then we would avoid the
11 problem that he's arguing now without a doubt. We wouldn't
12 even have to get into whether or not everything was
13 consecutive because the shooting of Mark Lewis and the
14 robbery of him would clearly be consecutive to the theft of
15 the purse.

16 JUDGE FAHEY: Yeah. But - - - but we're talking
17 about felony murder here. So - - - so I don't - - -

18 MS. WOLFORD: Well, it's intentional felony
19 murder.

20 JUDGE FAHEY: Right.

21 MS. WOLFORD: And he was convicted of attempted
22 robbery of Mark Lewis. Okay?

23 JUDGE FAHEY: Um-hum.

24 MS. WOLFORD: So if Mark Lewis is the person
25 who's shot and Mark Lewis is the - - - also the victim of

1 the attempted robbery and that is clarified to the jury on
2 retrial, that can run consecutively to the time that he was
3 given for the completed robbery of Julie Belknap. That is
4 clear. And we can do that on the second trial, and we
5 don't - - - we're not bound by what happened during the
6 first trial. So actually, the - - - the attorney was a
7 hundred percent correct in giving the advice that he could
8 get consecutive time if he went to trial, which then takes
9 away the ineffective assistance claim. So the Alford plea,
10 besides the fact that we're all here today still arguing
11 about this years later, clearly, the attorney was correct
12 in giving him the advice he could face consecutive time.
13 And then the decision was rational to take the plea to the
14 minimum on that charge and then run it concurrent with the
15 time that he was already sentenced to.

16 Now going back to the robbery and the attempted
17 robberies, we have five people who are laying on the
18 ground. Every single one of them testified that the
19 defendant waved his gun at all of them. Now as I hear
20 defendant's argument, if he stopped at you and then you and
21 then you and then you and then you then we have five.
22 Those would be five robberies. Those would be consecutive
23 time because they're distinct acts. I pointed at you, and
24 I stopped. I pointed at you and I stopped. But here, we
25 have one robbery because he does this instead of saying man

1 in the tie, on the ground; woman with the earrings, on the
2 ground. This is - - - this is what he's saying separates
3 this case from Ramirez, the fact that it was a continuous
4 pointing of the gun. Every single one of those people said
5 the gun was pointed at us as a group, it wasn't pointed at
6 individ - - - one individual. Julie Belknap says it was
7 pointed right in her face. Clearly, it's pointed at Mark
8 Lewis, who is shot in the head. Every single one of them
9 who came in and testified said it was pointed at the group.
10 That he was waving it around. That doesn't make it one
11 robbery.

12 JUDGE ABDUS-SALAAM: So counsel, it wouldn't
13 matter how many people? What if - - - what if there had
14 been ten people and then each of those were run
15 consecutively? We have - - - here, you know, that - - -
16 that would net this guy maybe fifty years or more in jail
17 just for robbery when, you know, nobody died here. I agree
18 with Judge Pigott.

19 MS. WOLFORD: Right.

20 JUDGE ABDUS-SALAAM: This was a horrible incident
21 but nobody died.

22 MS. WOLFORD: Well, and you know, Your Honor,
23 with all due respect, the - - - the law in this is really
24 kind of messy. And part of it is because it does come down
25 to some very, very specific factual determinations in each

1 trial.

2 JUDGE FAHEY: Well, doesn't it ultimately come
3 down to the second prong of the Laureano test which is the
4 separate and distinct prong? This ultimately comes down to
5 that, right?

6 MS. WOLFORD: Whether they're separate and
7 distinct acts - - -

8 JUDGE FAHEY: Right.

9 MS. WOLFORD: - - - between them? Yes.

10 JUDGE FAHEY: Yeah.

11 MS. WOLFORD: And here we have - - -

12 JUDGE FAHEY: But the problem I had was that
13 that's not really the way I thought - - - saw you - - - saw
14 you arguing it. I thought you were arguing it on - - - on
15 the old mens rea first-degree murder versus second, and you
16 really weren't arguing it that way.

17 MS. WOLFORD: I think that argument was an
18 attempt to distinguish it from the cases on the second-
19 degree murder cases. And like I said there's two arguments
20 with respect to that.

21 JUDGE FAHEY: And that's where all the Appellate
22 Division authority is so that's why you were doing that?

23 MS. WOLFORD: Right.

24 JUDGE FAHEY: I see.

25 MS. WOLFORD: And then if we go back to the

1 concurr - - - the robbery, quite frankly, I think the
2 Appellate Division got it wrong in running the - - - the
3 one completed robbery cons - - - consecutively to the two -
4 - - the four attempts and then running all of those
5 concurrently. Because I think that the record - - - there
6 was record support for the judge's decision to run those
7 terms consecutively given the facts as he found them - - -
8 or as the jury found them at this trial.

9 JUDGE PIGOTT: How long did this whole thing take
10 - - -

11 MS. WOLFORD: It - - -

12 JUDGE PIGOTT: - - - from the time that he
13 accosted these five kids and - - - I don't know if I should
14 call them the kids, but - - -

15 MS. WOLFORD: It took - - - it took a very short
16 period of time. All of them say they don't know exactly,
17 how long but all of them will say it's very quickly.

18 JUDGE PIGOTT: Does that bother you at all - - -

19 MS. WOLFORD: It was very quick.

20 JUDGE PIGOTT: - - - that because - - - the judge
21 says that because you did this with this one, I'm giving -
22 - - I'm giving you fifteen plus five and on this one, I'm
23 giving you ten plus five, and all this adds up to forty-
24 eight years in jail.

25 MS. WOLFORD: Right. Well, what we don't want to

1 discount - - -

2 JUDGE PIGOTT: Doesn't that bother you at all?

3 MS. WOLFORD: - - - Your Honor, is the fact that
4 in this case that would be whether or not he abused his
5 discretion in his sentencing. And fact - - - that would be
6 a factual issue not the underlying legal issue which, quite
7 frankly, is very important to the State. Not because of
8 the facts of this case but because it really does affect
9 consecutive sentencing law across the state whether or not,
10 under circumstances like this, it is separate acts.
11 Because there can be much more significant things that
12 happen to people under these circumstances.

13 JUDGE PIGOTT: Like what?

14 MS. WOLFORD: What if - - - what if the person at
15 the end of the line had a heart attack because she was so
16 scared?

17 JUDGE PIGOTT: We'll talk about that later.

18 MS. WOLFORD: I have no idea why that - - - but
19 there's many, many, many circumstances that can - - -

20 JUDGE PIGOTT: But you can charge that. Just
21 picking up what Judge Fahey is saying you decide how you
22 want to charge these things.

23 MS. WOLFORD: Right.

24 JUDGE PIGOTT: And that - - - and those things
25 occur. But it just seems to me that - - - and I don't mean

1 to - - - to take this lightly but I mean, you're putting
2 somebody away from fifty years because of - - - nobody
3 knows, I mean a five or ten minute thing where nobody - - -
4 nobody died.

5 MS. WOLFORD: Right.

6 JUDGE PIGOTT: And in fact the gentleman that was
7 shot, I mean, it was a grazing - - -

8 MS. WOLFORD: It was a graze wound. Well, - - -

9 JUDGE PIGOTT: That doesn't - - - doesn't that
10 trouble you?

11 MS. WOLFORD: It doesn't trouble me, Judge,
12 because basically what could happen here is ultimately that
13 is the sentencing - - - sentencing court's discretion. And
14 here, he could have received the minimum on each one of
15 those charges and there's no mandatory consecutive. It's
16 discretionary consecutive.

17 JUDGE PIGOTT: Minimum - - -

18 JUDGE STEIN: So what if there were a hundred
19 people? What if he walked into - - -

20 MS. WOLFORD: Well - - -

21 JUDGE STEIN: - - - the mall or the - - - or the
22 train station or the grocery station and waved it around
23 and said okay, everybody down? Okay.

24 MS. WOLFORD: Well, and I was thinking of that,
25 Your Honor, because I was thinking of the circumstance,

1 where we see it in the movies or if somebody walks into a
2 bank. There's a whole lot - - - all these people are here.
3 But I want to rob you. I want to rob this teller.
4 Everybody else is closed. And I walk into the back and I
5 say everybody on the ground but then I go right to you and
6 I stay with you and you're the only focus of my attention.
7 When I've got your money, I leave. Completely separate
8 from what happened here where during this whole event he's
9 saying on the ground, I'm going to kill every one of you.
10 He shoots - - - he steals your purse and he shoots you in
11 the head and he's waving the gun around at everybody who is
12 very close to each other. If those people had been behind
13 in the park watching, there wouldn't be a robbery.

14 JUDGE GARCIA: So what if, while he's at the
15 teller window, he says and all you behind me give me your
16 wallets while I'm doing this?

17 MS. WOLFORD: Then he has separate robberies.

18 JUDGE FAHEY: Your reading of the statute,
19 though, just to go back to the fundamental question which
20 is a question of - - - of what's just, is - - - is a life
21 sentence, right? Isn't that your reading of the statute
22 that - - - that we're at because it's intentional murder,
23 because it's felony murder it's a one, it's murder one, so
24 we're talking to life, right?

25 MS. WOLFORD: Correct.

1 JUDGE FAHEY: Okay. So we're back to Judge
2 Pigott's question, which seems to be the heart of the
3 question, it is the Court of Appeals, so is that just?

4 MS. WOLFORD: Well, with respect to the felony
5 murder conviction, it's a - - - it's a mandatory life
6 sentence. He got the minimum for his record on that - - -
7 on that term.

8 JUDGE FAHEY: So would that explain the reasoning
9 behind going for that as opposed to murder two and it would
10 have got capped at twenty-five?

11 MS. WOLFORD: As a prosecutor?

12 JUDGE FAHEY: Um-hum.

13 MS. WOLFORD: There's many reasons why you would
14 do that, and it would depend on the circumstances of each
15 case. It wouldn't necessarily be to get life on the end,
16 although that is obviously a factor if you feel someone
17 deserves that. But in the same - - - in the same vein, we
18 have an individual who every single person testified that
19 he brandished the weapon, they heard him cock the weapon,
20 he - - - that it seems from the record that Mr. Lewis was
21 slow to get down, and as he's getting down he gets shot in
22 the back of the head. He's lucky he flinched and it's a
23 graze wound because he's clearly shot in the back of the
24 head. And then depending on which - - - there's a little
25 bit of a conflict in the testimony whether the purse was

1 taken before or after. But quick frankly, after that he
2 takes off. So I think what ends up happening - - - oh, I -
3 - - I'm sorry.

4 JUDGE FAHEY: You see what I mean, though, by - -
5 -

6 CHIEF JUDGE DIFIORE: Ms. Wolford, do you want to
7 move to - - - to the Alford plea?

8 MS. WOLFORD: I do want to move to the Alford
9 plea just quickly. I think we've addressed some of it with
10 respect to I don't believe that counsel was ineffective or
11 counsel gave wrong advice that undermined the voluntariness
12 of the plea. I think the record was very clear it was a
13 knowing, intelligent, and voluntary waiver. And that,
14 although it's an Alford plea which I know is not
15 necessarily beloved by the court, the court here did the
16 right thing in how it went through the entire factual
17 colloquy and the entire legal colloquy. And ultimately,
18 the record's very clear that he understood there was a
19 great possibility of him being convicted of intentional
20 felony murder after trial based on the original trial
21 results.

22 JUDGE RIVERA: Was it - - - what did he ask the
23 defendant? What did the judge ask during that colloquy of
24 the defendant? Because he says that's - - - on this part
25 of his argument regarding the Alford plea - - -

1 MS. WOLFORD: Well, - - -

2 JUDGE RIVERA: - - - that's where he says the
3 judge - - - the colloquy is defective.

4 MS. WOLFORD: Well, and I think that's actually
5 not what he wrote in his brief. He com - - - there's a
6 completely separate argument in the brief that has nothing
7 to do with that. But I think that what does happen - - -

8 JUDGE RIVERA: I think he did say that the
9 colloquy was not good enough.

10 MS. WOLFORD: He's - - -

11 JUDGE RIVERA: And I think he did say it's
12 involuntary - - -

13 MS. WOLFORD: He's saying - - -

14 JUDGE RIVERA: - - - because you don't have
15 anything in this record to show that this defendant
16 understood the consequences of the plea.

17 MS. WOLFORD: Which - - -

18 JUDGE RIVERA: But anyway, you tell me why - - -
19 why the record is - - - is good enough.

20 MS. WOLFORD: The record clearly goes through - -
21 - I mean we're talking about whether or not he has already
22 - - - whether or not they understood that he could get
23 consecutive time. That's been the continuous theme. It is
24 written and the court goes over that and it goes over that
25 with counsel. Defendant is present with counsel. There is

1 clearly discussion back and forth.

2 JUDGE RIVERA: But does the record show he
3 understood otherwise all - - - all the other rights that he
4 was forfeiting as a result? He was waiving as a result?

5 MS. WOLFORD: Yes. It does sufficiently - - - it
6 does sufficiently - - -

7 JUDGE RIVERA: Where - - - where did the judge
8 ask of that? Or where is it in the record that you see it?

9 MS. WOLFORD: Your Honor, I'm sorry. I need - -
10 - I'm going to need to look at the record because that was
11 not actually argued at - - - at no point in time did he
12 argue that there was a Boykin's right violation. There was
13 no argument - - - the argument was completely focused on
14 whether or not the - - -

15 JUDGE RIVERA: You're saying it's not preserved?

16 MS. WOLFORD: It's - - - it's definitely not
17 preserved and it - - -

18 JUDGE RIVERA: This argument is not preserved.

19 MS. WOLFORD: - - - was completely not argued
20 until this morning. So I apologize. I don't have that - -
21 -

22 JUDGE RIVERA: No. That's okay.

23 MS. WOLFORD: - - - fresh in my head. But he did
24 go through the part that was argued which was the
25 understanding of the defendant as to the strength of the

1 People's case and his likelihood of conviction after trial
2 and the defendant making a voluntary decision even though
3 the defendant had maintained his innocence with respect to
4 the intentional element of the attempted murder that he - -
5 - that was covered during the Alford colloquy. And as we
6 argued in our answer to point three, Alford, by its nature,
7 the defendant's not admitting his guilt to all of the
8 elements of the crime. So the fact that he negates an
9 element there, that's expected in an Alford plea. But he
10 then says I understand that I would probably lose in that
11 argument and I'm willing to take the consequences anyway
12 given the beneficial plea bargain.

13 CHIEF JUDGE DIFIORE: Thank you, Ms. Wolford.

14 MS. WOLFORD: Thank you.

15 CHIEF JUDGE DIFIORE: Mr. Hobbs.

16 JUDGE PIGOTT: Mr. Hobbs, isn't that true, and
17 from your own experience, sometimes you just don't want
18 your client to say a whole lot when - - - when they plea?

19 MR. HOBBS: You may not want them to say a whole
20 lot but that doesn't mean that that's the right way for it
21 to be done. That may mean you have an involuntary plea. I
22 mean - - -

23 JUDGE PIGOTT: But that doesn't rise to the level
24 of mode of proceedings error or anything, does it?

25 MR. HOBBS: Well, it - - - it is an error that

1 this - - - this court can reach as a matter of law. I
2 don't think it's ever been characterized as a mode of
3 proceedings error but in cases like Lopez and Mox and so
4 forth, if there's a defect in the proceedings, if there's a
5 defect that shows that the plea was not potentially fully
6 understood - - -

7 JUDGE PIGOTT: Well, then how do we know that?

8 MR. HOBBS: - - - then I think it'd raise - - -

9 JUDGE PIGOTT: Wouldn't - - - wouldn't a 440 suit
10 the defendant better in a situation like this to explain
11 why in his view his lawyer was somehow ineffective?

12 MR. HOBBS: No. And this - - - this record, the
13 - - - the explanation of the sentencing risks if he went
14 back to trial were stated on the record and it was
15 erroneous or, at best, oversimplified. And there was just
16 not a single question asked to clarify that with the
17 defendant. There was not a single question asked if he
18 even understood the advice of counsel that he received,
19 much less whether or not it was actually - - -

20 JUDGE PIGOTT: Well, we don't know that. That's
21 my point. In other words, is he going to say that or is
22 his lawyer going to back him up or is he going to - - - we
23 discussed all of this and I made it very clear to him I
24 don't want to hear a peep out of you because I'm going to
25 handle this with the judge and Alford's a complicated thing

1 and so we're going to run through it and do you have any
2 questions. And then at the end, you know, he didn't seem
3 to be particularly upset with his guilty plea.

4 MR. HOBBS: It's the court's obligation to ask
5 these questions. That - - - I mean the same thing could be
6 said of a case like Mox where the - - - the counselor, the
7 defendant - - - defense counsel answered the questions
8 about the defense that was being waived and said yeah,
9 we're going to waive that defense. That's fine. This
10 court held that that's not enough. You need to ask the
11 defendant if they know that they're waiving their defense.
12 Similarly, the same thing's for here. He needed to ask Mr.
13 Couser whether or not he understood what the sentencing
14 risks were if he went from - - - and he was making a
15 rational decision to avoid those sentencing risks. I mean
16 there's just no - - - I mean the attorney gets up there and
17 says it but we have no idea whether Mr. Couser understood
18 it.

19 JUDGE RIVERA: Is that - - - that's the only part
20 that's defective? She is correct then that that's the only
21 argument you're basing this on about - - -

22 MR. HOBBS: Yes.

23 JUDGE RIVERA: - - - the plea, this part of the -
24 - - your argument - - -

25 MR. HOBBS: I believe that that - - -

1 JUDGE RIVERA: The plea - - - about the plea
2 being involuntary?

3 MR. HOBBS: That is a fundamental defect in this
4 plea but the - - - the plea on its - - - on its whole is
5 deficient, and I made that argument both in my - - - in my
6 opening brief and then more fully in the reply brief. I
7 cite Boykin.

8 JUDGE FAHEY: I think the question is, though, is
9 - - - I think this is an important question because it's
10 either a pure legal question or - - - or it can be enhanced
11 by the record. And because your argument is the record's
12 inadequate as to the plea, that would favor a 440. But if
13 - - - if it's a pure legal question on the questions that
14 were asked and there has to be some deficiency in what the
15 defendant was asked to respond to by the court,
16 particularly, or - - - or offered proof that was it failed
17 to be offered by counsel. One of those two things had to
18 happen. Is that - - - is that correct?

19 MR. HOBBS: That's correct.

20 JUDGE FAHEY: Is that what you're arguing?

21 MR. HOBBS: It does have to be - - -

22 JUDGE FAHEY: So it's a pure legal question? You
23 weren't arguing there's some - - - there's some place that
24 we can point to in the record? You're just saying there's
25 a deficiency in the record that shows that - - - that the

1 legal question wasn't addressed.

2 MR. HOBBS: Right. The deficiency is at least as
3 clear as it was in Serrano, a 1965 case, where this court
4 held an Alford plea was inadequate and - - - and Hill where
5 this court held the same thing. It's also at least as
6 deficient as Lopez and Mox.

7 JUDGE RIVERA: Could you respond to her
8 hypothetical about the bank?

9 MR. HOBBS: The bank. The bank involved a
10 robbery of - - - of the teller with a bunch of people
11 standing in the background.

12 JUDGE RIVERA: Correct. Walk in, show the gun,
13 shoot the gun, whatever - - -

14 MR. HOBBS: I'm not sure what the - - - the crime
15 against the people in the - - - in the background are.
16 There - - - there is no attempted robbery being charged
17 there. It - - - there wasn't - - - there wasn't any
18 attempt to rob those people. So I - - - you know, is it
19 menacing? I'm not sure what the crime would be there but
20 you'd have to look at what the elements of that crime would
21 be and then look at those.

22 I - - - I do want to respond to the - - - the
23 idea that, you know, if he had paused at each person and
24 made a separate threat to each of them. Potentially, that
25 could distinguish the crimes but this is where the law gets

1 fuzzy. How - - - how far into it can we get before we
2 start distinguishing separate acts? And I - - - I admit
3 that that is a difficult question under this law but it is
4 the question that's put to us. You know, and when it's
5 enough is a question for a different case. This case is -
6 - -

7 JUDGE GARCIA: Isn't the question, though, really
8 for the trial judge who heard all the testimony about the
9 acts and listens every day to this and - - - and
10 understands the situation from sitting through the trial.
11 And again, going back to, I think Judge Pigott's point,
12 isn't this a question of fact more than law?

13 MR. HOBBS: I don't - - - I don't think this case
14 presents a question of fact because there was no such
15 distinguishing evidence. And when you look at what - - -

16 JUDGE GARCIA: You're saying it's fuzzy, and I
17 think fuzzy to me means you really have to parse, I think
18 as you're saying, the facts of the case and did the person
19 pause, did they move on. If I'm a trial judge sitting
20 through the testimony of however many victims you had here,
21 I certainly would think I have a better basis for doing
22 that an appeals court looking back as a matter of law.

23 MR. HOBBS: What I was suggesting is that it
24 could be fuzzy if there was evidence of - - - of pauses and
25 evidence of separate threats to carry out the robberies.

1 Here there was no such evidence. The reason the sentencing
2 court gave for distinguishing these sentences and imposing
3 different sentences was not about separate acts that Mr.
4 Couser took. They were about how acts impacted into the
5 victims. In fact, one person had property taken,
6 accounting for one. The fact that Mr. Lewis got shot after
7 the robbery was complete, which was clearly held to be not
8 part of this robbery, that's supported by this court's
9 decision in Rodriguez, that was his justification for - - -
10 for heightening that sentence. The explanation for a ten-
11 year sentence on one of the attempted robberies and five-
12 year sentence on the attempted robberies, I don't - - - I
13 don't understand and there doesn't seem to be a good
14 explanation about that.

15 CHIEF JUDGE DIFIORE: Thank you.

16 MR. HOBBS: None of it was separate acts.

17 CHIEF JUDGE DIFIORE: Thank you, Mr. Hobbs.

18 (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. Phillip Couser, No. 166, 167 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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