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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 25

NICHOLAS BROOKS,

Appellant.

20 Eagle Street
Albany, New York
February 7, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Number 25 on the calendar,
2 the People of the State of New York v. Nicholas Brooks.

3 MS. WOLFE: Good afternoon, Your Honors. May it
4 please the court. I am Susan Wolfe. Jeffrey Hoffman and I
5 represent Nicholas Brooks.

6 The trial court in this case - - -

7 CHIEF JUDGE DIFIORE: Counsel, may I interrupt a
8 moment? Do you care to reserve any rebuttal time?

9 MS. WOLFE: Yeah, thank you. Two minutes
10 rebuttal.

11 CHIEF JUDGE DIFIORE: Yes.

12 MS. WOLFE: Thank you.

13 The trial court in this case - - -

14 JUDGE RIVERA: Counsel, what - - - what's the
15 challenge to the Frye that's preserved for our
16 consideration?

17 MS. WOLFE: The challenge to the Frye is that
18 there was a Frye. There were motions, extensively
19 litigated motions, explaining why there should be no Frye
20 hearing, including the fact that the issues were not novel.
21 And then once the Frye hearing was granted, the court - - -
22 the judge let it go on for hundreds of pages. Defense
23 counsel objected at the very beginning, when the first
24 witness, Dr. Catanese, was called, that the questioning of
25 him about every aspect of the People's case and the autopsy



1 was beyond the scope of - - - of - - - of the - - - what
2 Frye is supposed to determine.

3 JUDGE STEIN: And if you're right, if that was
4 all error, why isn't it harmless error?

5 MS. WOLFE: It's not harmless error for this
6 reason. It was a full dress rehearsal of the defense case.
7 This was the defense witness, the defense expert. And the
8 judge - - -

9 JUDGE STEIN: Do you think there's a reasonable
10 probability that - - - or a possibility - - - probability
11 that it would have come out any differently if that hadn't
12 happened?

13 MS. WOLFE: Yes. It is - - - as with some
14 errors, it's an unmeasurable harm. But if you look at what
15 happened - - - take, for example, what if a judge had ruled
16 that the defense could only call a witness if the People
17 got to interview that witness first.

18 JUDGE GARCIA: But are you saying the harm, then,
19 that we analyze, in the harmless error, is the fact that
20 they had this free discovery, or are you tying it to a
21 ruling that was made at the Frye stage?

22 MS. WOLFE: I'm tying it - - - I'm tying it to
23 the granting of the Frye and then the conduct of the Frye.

24 JUDGE GARCIA: If you go to Judge Stein's
25 question of what is the harm we're going to analyze in the



1 harmless-error analysis - - -

2 MS. WOLFE: Right.

3 JUDGE GARCIA: - - - if we get there, what would
4 the harm be? Would it be free discovery for hundreds of
5 pages, and something specific in that examination that was
6 used, or would it be one of the judge's Frye rulings?

7 MS. WOLFE: Well, the - - - the Frye rulings are
8 a separate thing because they flowed from the Frye hearing.
9 So let me just try to answer both your questions. It was
10 an invasion of the defense camp, and what was gained by the
11 prosecution by that was the ability, at trial, an enor - -
12 - excuse me, an enormous trial advantage. And - - -

13 JUDGE GARCIA: But let's say - - - let's say this
14 went without a Frye hearing - - - and I'm curious the
15 answer here - - - and the witness starts to testify, and
16 the People are objecting. What does the judge do at that
17 point? There's no foundation for this. There's no basis
18 for this. What does the judge - - - there's a jury sitting
19 here. What is the process at that point?

20 MS. WOLFE: The judge has the parties up at the
21 bench, hears what they have to say, and determines either
22 that it's not admissible or that it goes to weight and not
23 admissibility.

24 JUDGE GARCIA: And why shouldn't the judge be
25 able to have the discretion to do that before the jury is



1 in the box?

2 MS. WOLFE: The answer is - - -

3 JUDGE GARCIA: Based on what the filings have
4 been, and if there's a reasonable basis for objecting to
5 certain things, why couldn't you do that before you get to
6 the middle of trial?

7 MS. WOLFE: Because that would mean that in every
8 case you would have a Frye hearing at which - - -

9 JUDGE FAHEY: You wouldn't have a Frye hearing in
10 every case. What you'd have is you'd have a motion in
11 limine to restrict the kind of evidence that would go in.
12 And the court would make a determination as to whether or
13 not this witness had a foundation for the questions that
14 were going to be proffered, which it seems to me may have
15 been the - - - if there's an error here, the error is - - -
16 is that, that it wasn't done in that procedure, which it
17 would be a foundational procedure, not a Frye procedure.
18 And there seems to be some confusion about the - - - the
19 nomenclature that should be applied here. And that seems
20 to be, arguably, applied incorrectly.

21 So if that was the case, though, I guess the
22 question we have to ask, and Judge Garcia was getting at
23 it, what difference would it make because, if we called it
24 foundation and the court went forward and got a responding
25 affidavit and then he took some testimony to try and see if



1 there was a proper foundation, wouldn't that be the same
2 thing as the Frye - - - what was called a Frye hearing,
3 maybe incorrectly?

4 MS. WOLFE: Not in this case.

5 JUDGE FAHEY: Why not?

6 MS. WOLFE: Because the Frye hearing went far
7 beyond - - -

8 JUDGE FAHEY: When you're saying the - - -

9 MS. WOLFE: - - - some aspect - - -

10 JUDGE FAHEY: Slow down.

11 MS. WOLFE: Go ahead.

12 JUDGE FAHEY: So you're saying the length of the
13 hearing and the amount of discovery that was given would -
14 - - would be much more than you would normally get in a
15 motion in limine.

16 MS. WOLFE: Far more.

17 JUDGE FAHEY: Um-hum.

18 MS. WOLFE: And it - - - it encompassed all
19 aspects of credibility. The Frye hearing was - - -
20 consumed more pages than the trial testimony and the cross,
21 and it gave them a trial advantage - - -

22 JUDGE STEIN: Was there any cross based on
23 inconsistent statements, for example, between what was said
24 in - - - in the Frye hearing and - - - what was testified
25 to in the Frye hearing and what was testified to at trial?



1 MS. WOLFE: Yes, there were. I believe it
2 happened a number of times, and there were questions that
3 weren't asked because the - - - the prosecutor was able to
4 determine that the answer would not be favorable to them at
5 trial. This was discovery. This was discovery that the
6 People wouldn't be entitled to by statute, and by receiving
7 it, they gained a huge trial advantage which deprived Mr.
8 Brooks - - -

9 JUDGE FEINMAN: So - - -

10 MS. WOLFE: - - - of a fair trial.

11 JUDGE FEINMAN: - - - let's assume all of that's
12 true. What - - - what I am struggling with is why the
13 error, assuming it was error, is not harmless, and why
14 isn't the overwhelming evidence of the defendant's guilt
15 here that, you know, would allow us to affirm?

16 MS. WOLFE: Sure. And I'm - - - I - - - I can
17 give you a chronology and a list of why the - - - and - - -
18 and I just want to add that we're talking about a six - - -
19 a - - - a right to present a defense, a Constitutional
20 error. So the standard would be - - -

21 JUDGE FEINMAN: But that wasn't necessarily how
22 it was preserved, was it?

23 MS. WOLFE: It was preserved as objecting to the
24 discovery and the advantage. In the pre-trial motions, it
25 was.



1 JUDGE FEINMAN: The point is nobody said to Judge
2 Wittner, wait a minute; you're - - - you're impinging on
3 the - - - the Constitutional right to present a defense.

4 MS. WOLFE: Not with respect to - - -

5 JUDGE FEINMAN: It's interesting - - -

6 MS. WOLFE: - - - this issue.

7 JUDGE FEINMAN: - - - but I don't think that was
8 ever articulated at that level. So - - - so I want an
9 answer to my question - - -

10 MS. WOLFE: Okay.

11 JUDGE FEINMAN: - - - which is why isn't any
12 error harmless?

13 MS. WOLFE: It - - - because if you look at the
14 evidence in this case, you have two experts. The People's
15 expert is certain of the conclusion that she presents. The
16 defense expert testifies that there's a very important
17 factor, which is the lack of fluid in the - - - in the
18 sphenoid sinus, which weighs against a finding of forcible
19 drowning. He also testifies that there was an absence of
20 certain marks on the deceased's neck, which would be there,
21 he would expect to be there if this were a strangulation,
22 and forcing her and strangling her under water, and as a
23 result that she drowned. He testified that there is no way
24 to - - - and I believe Dr. Sampson also testified that
25 there is no way to tell how long those bruises had been



1 there over - - - you know, over a twenty-four hour period,
2 they could have occurred, and there's no way to tell.

3 JUDGE FEINMAN: It's not clear, though, when you
4 say he testified and she testified, you're talking about at
5 the trial now, right?

6 MS. WOLFE: Yes.

7 JUDGE FEINMAN: All right. So all of this is in
8 front of the jury.

9 MS. WOLFE: Yes.

10 JUDGE FEINMAN: Go on.

11 MS. WOLFE: And I'm - - - I'm addressing Your
12 Honor's question of - - - of why there isn't overwhelming
13 evidence. There was a paramedic and a police officer, who
14 discovered the deceased, who testified that they did not
15 see injuries. There were - - - there was testimony about
16 injuries from the CPR that occurred.

17 She was - - - and most importantly, there was the
18 testimony about how the deceased was acting spacey in sort
19 of a drunken - - - and I don't mean alcohol because alcohol
20 wasn't the issue - - - in a drunken manner, and she had
21 said that she had taken a sleeping pill. And the jury
22 really focused on this. And her DA was on - - - and her
23 DNA was on the controls of the - - - of the bathtub, the
24 faucets of the bath - - -

25 JUDGE FEINMAN: And I think his was - - -



1 MS. WOLFE: - - - bathtub.

2 JUDGE FEINMAN: - - - someplace also in - - - in
3 the shower, wasn't it?

4 MS. WOLFE: Yeah, I mean, there was a - - - there
5 was a shower body, apparently, and his was on one of the
6 handles of that.

7 JUDGE FEINMAN: Um-hum. Okay.

8 MS. WOLFE: But the water was coming out of the
9 faucet, the handles of which her DNA was found. This is -
10 - - is not overwhelming evidence such - - - such that, had
11 the People not had such an advantage, there would still be
12 a conviction. And I - - - you know, I should - - - I
13 should move to the - - - the precluded evidence because
14 that is as or more important. And that was - - - excuse me
15 - - - the - - - the preclusion of the defense expert's
16 testimony that he would expect to see, ninety percent of
17 the time, a damage to a certain part of the neck if there
18 had been strangulation.

19 CHIEF JUDGE DIFIORE: What was the basis for that
20 opinion he was offering?

21 MS. WOLFE: Excuse me. The basis for that was
22 his experience. He was an ME, a medical examiner, for
23 thirty years. He had - - -

24 CHIEF JUDGE DIFIORE: How many drowning cases did
25 Dr. Wetli have?



1 MS. WOLFE: He - - - he worked on hundreds of
2 drowning cases. And based on that experience - - - and it
3 - - -

4 CHIEF JUDGE DIFIORE: Drowning in which the
5 manner of death was homicide?

6 JUDGE FAHEY: I thought the record said one.

7 MS. WOLFE: There was a forcible drowning, yes,
8 one forcible drowning, one more than the People's expert,
9 and hundreds of drowning cases. And - - -

10 JUDGE GARCIA: But wasn't he actually allowed to
11 testify at trial that if the victim had been forcibly
12 drowned he would have expected to find this this sinus
13 filled with water? Isn't that essentially the testimony
14 that you're arguing should have come in?

15 MS. WOLFE: That - - - you know, that's sort of a
16 pretty wishy-washy thing to say. I mean, we, as
17 professionals, clients, patients, they want percentages.
18 They want their - - - their professional - - -

19 JUDGE STEIN: What's the foundation for that
20 percentage? If he had - - - if he had investigated one
21 forcible drowning, how could he - - - where does ninety
22 percent come from? Isn't - - - isn't that partly what the
23 hearing was about?

24 MS. WOLFE: It comes - - - again, it comes from
25 the sum total of his experience. He's worked - - - he has



1 worked and supervised other medical examiners in both New
2 York - - -

3 JUDGE FEINMAN: So let me ask - - -

4 MS. WOLFE: - - - and Florida.

5 JUDGE FEINMAN: So let me ask you this. If I
6 have a malpractice case, a legal malpractice case, and it's
7 an appellate malpractice case - - - I'm not suggesting
8 anything - - - but can I just say, well, you know, ninety
9 percent of the cases a criminal defendant loses on appeal.
10 Can I throw that out without any sort of actual study of
11 success rates?

12 MS. WOLFE: Experience would inform that kind of
13 - - - of estimation, of that kind of percentage. And it's
14 probably close to right, although I think it's - - -

15 JUDGE FEINMAN: I don't know.

16 MS. WOLFE: - - - more.

17 JUDGE FEINMAN: I haven't thought about it, but -
18 - -

19 MS. WOLFE: But experience - - - an expert is
20 allowed to give that kind of - - - of evaluation. People -
21 - - jurors want it. They want to know more than: well,
22 what does "expect" mean.

23 CHIEF JUDGE DIFIORE: It has to be tethered to
24 something, doesn't it?

25 MS. WOLFE: And again, it's tethered to his



1 experience over the course of thirty years of what he's
2 seen. And that - - - you know, and there is cross-
3 examination. And that's what - - -

4 JUDGE RIVERA: Is your point that - - - yes, is
5 your point that whether or not the jury should take that
6 into account, and it weighs for something - - -

7 MS. WOLFE: Right.

8 JUDGE RIVERA: - - - is what they can explore on
9 cross, but they can't keep you from asking him about it and
10 him opining on it; is that your point?

11 MS. WOLFE: It weighs for something. It comes
12 from an eminently credible source. And the - - - and the
13 People are free to use cross-examination to show what - - -
14 what underlies that estimation. And a jury can weigh,
15 well, you know, he's a really smart guy, but he really
16 didn't have much of a basis to say it, and it was wrong and
17 it was error for the judge to preclude it.

18 And then the other important area that was
19 entirely precluded, which is was defense counsel's ability
20 to cross-examine, question the defense expert and cross-
21 examine the People's experts about the drug testing that
22 was done. Imagine a situation where defense counsel is
23 precluded from questioning the operator of a Breathalyzer
24 about whether it was calibrated. Nope, just sorry. The
25 People's witness has testified, there's a reason to



1 question it - - -

2 CHIEF JUDGE DIFIORE: So does it matter that he's
3 - - -

4 MS. WOLFE: - - - you may at cross-examination.

5 CHIEF JUDGE DIFIORE: - - - not a toxicologist?

6 MS. WOLFE: What?

7 CHIEF JUDGE DIFIORE: Does it matter - - -

8 MS. WOLFE: Excuse me?

9 CHIEF JUDGE DIFIORE: Does it matter that he's
10 not a toxicologist?

11 MS. WOLFE: It doesn't because, first of all, and
12 I - - - this isn't a new argument; it's in the - - - in the
13 appendix. It's - - - but not in the briefs. He was - - -
14 if you look at his CV, he was accredited by the American
15 Board of Toxicologists. So his experience included working
16 with toxicologists and supervising them over the course of
17 his thirty years' experience.

18 CHIEF JUDGE DIFIORE: A medical examiner would
19 have a supervisory control over the toxicologist in the
20 lab, no?

21 MS. WOLFE: Yes.

22 CHIEF JUDGE DIFIORE: Yeah.

23 MS. WOLFE: And he would be discussing cases with
24 them on an ongoing basis, so he - - - he was qualified to
25 give that testimony. And I know that the Appellate - - -



1 JUDGE STEIN: Aren't we basically being - - -
2 aren't you asking us to - - - to say that the trial judge
3 abused his discretion in - - - in determining that this
4 area would be speculative? Isn't that essentially what
5 you're asking us to do?

6 MS. WOLFE: I'm - - - yes, but - - - but abuse of
7 discretion as a matter of law. There was no basis in law
8 for - - - for the trial judge to make the rulings that she
9 did. Defense counsel was precluded from asking any
10 questions at all about the drug testing. And the drug - -
11 - and the - - - and the issue of drugs in the deceased's
12 system was extremely important here.

13 JUDGE FEINMAN: Well, wait a minute. Wasn't Dr.
14 Wetli allowed to testify regarding the possible sedative
15 effects of the victim's pills and - - - and, you know,
16 basically got the whole synergy thing in front of the jury?

17 MS. WOLFE: Yes, and I should clarify. I'm
18 talking about - - - I'm talking about something a little
19 bit differently - - - different, which is to be able to
20 rebut the People's position that none of these drugs would
21 have caused sedation and would have caused her to be, you
22 know, in a position where she might slip under the water.
23 And the toxicologist testified that, you know, she seemed
24 perfectly fine to me, even though a video showed her
25 walking into a wall.



1 So in order to rebut that, one, you have Wetli's
2 testimony that the synergy between these drugs could have
3 had the result that he described. And two, if the People
4 are right, then there must be another drug out there
5 because there must be - - - what's the explanation for her
6 behavior?

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 MS. WOLFE: Thank you.

9 CHIEF JUDGE DIFIORE: Counsel?

10 Counsel, why the Frye hearing?

11 MR. COHN: Good afternoon, Chief Judge DiFiore.

12 CHIEF JUDGE DIFIORE: Good afternoon.

13 MR. COHN: May it please the court. So Your
14 Honor, what - - - what the trial judge did here was
15 perfectly consistent with what the law allows judges to do
16 in any number of cases, and whether you want to call it a
17 Frye hearing, or as Judge Fahey suggested, perhaps a
18 hearing on a motion in limine, this was an - - -

19 JUDGE RIVERA: Well, it was a Frye hearing.

20 MR. COHN: Right.

21 JUDGE RIVERA: So what's the basis for it?

22 MR. COHN: Well, Your - - -

23 JUDGE RIVERA: Because your - - - your expert
24 sees the - - - the medical report and a medical opinion and
25 their expert has a different one? I thought that's what we



1 put to the jury to decide which expert they're going to
2 believe.

3 MR. COHN: Well, Your Honor, the trial judge has
4 the - - - the right, actually the responsibility to make
5 threshold rulings. First, the trial judge has the - - -
6 the responsibility to make sure that scientific evidence
7 opinion testimony, which is being put before the jury - - -

8 JUDGE RIVERA: But this is my point. Isn't the
9 only reason that becomes in contention because the People's
10 position is that their expert disagrees with your expert?

11 MR. COHN: No, Your - - -

12 JUDGE RIVERA: That can't possibly be the basis
13 for a Frye hearing?

14 MR. COHN: No, Your Honor. Just because somebody
15 is a former medical examiner or - - - or is a doctor who's
16 qualified, in some sense, in medicine, doesn't mean that
17 that doctor can get up and say anything in the world they
18 want that has some relationship to the medical field.
19 There has to be a scientific basis for what the doctor is
20 going to say in court. And here we have a situation - - -

21 JUDGE STEIN: But it can sometimes be based on
22 experience.

23 MR. COHN: Yes, Your Honor. And in fact this
24 court recognized that in - - -

25 JUDGE STEIN: So why - - - why wasn't that the



1 case here?

2 MR. COHN: Well, here the only things that the
3 doctor was precluded from testifying about were - - - were
4 opinions that were not based either on science or on his
5 experience. And - - - and that was why it was a very
6 limited preclusion, as was pointed out in some of the - - -

7 JUDGE FEINMAN: Why isn't it enough to say, you
8 know, after thirty-something years, in ninety percent of
9 the cases I would expect to see that? You know, after all,
10 you know, as experienced as an appellate lawyer on behalf
11 of the People, you could probably predict that you would
12 have a certain percentage of success.

13 MR. COHN: And I could say that, Your Honor,
14 because I've argued a hundred appeals, or you might be able
15 to say that because you sat on hundreds of cases, thousands
16 of cases, perhaps. Here the doctor wanted to say ninety
17 percent of the time we see damage to the - - - the
18 posterior central neck structures, and he couldn't even
19 remember a case where - - - where he had a strangulation
20 where - - - where that occurred. So this is not somebody
21 who is saying, yes, I - - -

22 JUDGE FAHEY: But what if - - - what if - - -
23 would it make a difference if this was a foundation issue
24 as opposed to a Frye issue? Wouldn't it really - - - it
25 wouldn't really affect the outcome for you, one way or the



1 other, would it? We'd really be getting into the - - -
2 whether or not the court abuses discretion in the way it
3 conducted the hearing and the amount of testimony it took.

4 MR. COHN: Right. Well, Your Honor, I would
5 submit that if the issue - - - if the problem with what
6 happened is that the court should have called it a hearing
7 on a motion in limine instead of a Frye hearing, then that
8 would be harmless error.

9 JUDGE FAHEY: All right.

10 JUDGE FEINMAN: Okay. But so let's say, you
11 know, it should have been called - - - you know, whether
12 you want to call it a hearing pursuant to Cornell or, you
13 know, any of these other civil cases, it doesn't really
14 matter so much, in my mind, what you call it. How do you
15 get to ask some of these questions that were asked, for
16 three days and five hundred pages, and haven't we then
17 turned this hearing into a deposition of an expert, which
18 may be allowed in New Jersey in civil cases, but we don't
19 allow that in New York?

20 MR. COHN: Well, Your Honor, actually, to put
21 things in context, Dr. Wetli was only on the stand for
22 parts of two days during the hearing. It was not - - - the
23 hearing spanned five days; it was not five full days. Dr.
24 Wetli was on the stand for parts of two days. The first
25 two days of the hearing, the defense didn't even bring Dr.



1 Wetli in. They tried to bring in the other expert, Dr.
2 Catanese. And the only purpose of his testimony was to
3 say, well, Dr. Wetli's analysis was fine, and you don't
4 even have to call him at the hearing. They were trying to
5 avoid even having Wetli appear at the hearing. Wetli was
6 on the stand for two days in testimony that took up about
7 300 pages.

8 300 pages, as - - - as Your Honors know, is not
9 an excessive amount of testimony for, say, a suppression
10 hearing, any number of pre-trial proceedings, a Frye
11 hearing in a complicated case. This is a Frye hearing in a
12 homicide case with a - - - with a trial transcript that was
13 thousands of pages. There were very serious issues - - -
14 concerns raised to the court about whether the medical
15 testimony being proffered had any basis in science and had
16 any relationship to this case at all or whether it was just
17 something that was being offered as a way to try to create
18 some reasonable doubt in a case where there was absolutely
19 overwhelming evidence of the defendant's guilt.

20 JUDGE STEIN: Okay. Talking about overwhelming
21 evidence and other evidence, we - - - we've not - - - just
22 to distract you before your - - -

23 MR. COHN: Yeah.

24 JUDGE STEIN: - - - time runs out, on one other
25 issue, which - - - which is of concern to me, and that is



1 the evidence of the threat. So didn't the People argue at
2 trial that it was admissible as an admission to a party
3 opponent, or as part of the background hearsay exception,
4 and if that's the case, wasn't it admitted as - - - for - -
5 - for the truth?

6 MR. COHN: Well, Your Honor, Judge Wittner made
7 clear at the close of the evidence that all of the victim's
8 out-of-court statements were admitted only because she made
9 those statements and not for their truth. So - - -

10 JUDGE STEIN: But never - - - but she - - - she
11 did make specific - - - give specific instructions to
12 specific testimony but not to the threat, did she?

13 MR. COHN: I don't recall offhand if there was a
14 specific comment made after the admission of the threat. I
15 do know that, at the close of the evidence, that Judge
16 Wittner made clear that all of the victim's out-of-court
17 statements - - - and the way we know about that threat is
18 because the victim made an out-of-court statement to two of
19 her friends about the threat; in the excitement of the
20 moment, or of the short aftermath when she had been
21 threatened, she called two of her friends, frantic about
22 what had happened. The - - -

23 JUDGE FAHEY: Well, weren't there - - - am I
24 correct, is the number nine witnesses testified on hearsay
25 statements that the defendant made?



1 MR. COHN: There - - - that the victim made,
2 you're talking about?

3 JUDGE FAHEY: Yes.

4 MR. COHN: Well, first - - -

5 JUDGE FAHEY: I'm sorry.

6 MR. COHN: First, Your Honor, as the Appellate
7 Division held, this was not - - - or as, as Judge Wittner
8 instructed the jury, this was not hearsay because it was
9 not put in for its truth. It was only put in, as Judge
10 Wittner instructed - - -

11 JUDGE FAHEY: Well, every single witness that I
12 read here said that he was a messy unemployed stoner.

13 MR. COHN: And in fact - - -

14 JUDGE FAHEY: All nine of them, I think,
15 testified that way.

16 MR. COHN: And in fact, Your Honor, the defendant
17 admitted that he - - - that he loved to smoke marijuana,
18 and - - -

19 JUDGE FAHEY: Um-hum.

20 MR. COHN: - - - and he admitted that in letters
21 he wrote to the - - - the victim. And - - -

22 JUDGE FAHEY: I thought, though, it was - - - it
23 was being offered for defendant's unacceptable drug use and
24 the breakdown of the relationship. That's why - - -

25 MR. COHN: Right.



1 JUDGE FAHEY: - - - I thought it was being
2 offered.

3 MR. COHN: The rea - - - it was offered to show
4 the victim's state of mind and to show what brought her to
5 the point where she finally - - -

6 JUDGE FAHEY: Let me ask you this, though.

7 MR. COHN: - - - broke up with him.

8 JUDGE FAHEY: Nine witnesses?

9 JUDGE RIVERA: But why are we even - - -

10 JUDGE FAHEY: Excuse me.

11 JUDGE RIVERA: - - - getting there?

12 JUDGE FAHEY: Excuse me. Nine witnesses?
13 Doesn't it seem like an excessive number? I mean, two or
14 three and then you give a limited instruction to the jury,
15 but I've never seen nine witnesses on the same point - - -

16 MR. COHN: Well - - -

17 JUDGE FAHEY: - - - offering hearsay statements.

18 MR. COHN: Well, Your Honor, first, again, our
19 contention is this was not hearsay because the - - -
20 because of the instructions given to the jury. It was for
21 state of mind; it was not for the truth.

22 And - - - and Your Honor, this was an exercise of
23 discretion by the trial judge who has control of the trial,
24 to decide, in her discretion, what evidence was probative
25 and what evidence would be overly prejudicial. Here we



1 have a situation where the defense theme was that these - -
2 - the victim and the defendant were in a committed
3 relationship and they just had some minor spats. What - -
4 - what the prosecutor was trying to show was that that was
5 not the case here. Although the victim expressed her love
6 for the defendant various times, she also had grave doubts
7 about the relationship and the - - -

8 JUDGE RIVERA: Yeah, but that's very different
9 from that statement of: I'm going to kill you. Right? I
10 mean, sort of a tumultuous relationship is one thing, where
11 there's not some other evidence of violence or
12 aggressiveness. But once you have that statement, isn't -
13 - -

14 MR. COHN: Right.

15 JUDGE RIVERA: - - - isn't that the one that, as
16 Judge Stein says, troubles her. Isn't that the one that's
17 extremely problematic here? And that is for its truth.

18 MR. COHN: Well, Your Honor, it actually was not
19 admitted for its truth; like all of the victim's out-of-
20 court statements, it was admitted to show her state of
21 mind. And it was actually particularly important - - -

22 JUDGE RIVERA: That she was afraid of him?

23 JUDGE FEINMAN: - - - and I keep saying that.
24 Her state of mind about what? That - - -

25 JUDGE FEINMAN: That she was afraid? What - - -



1 MR. COHN: Exactly. Exactly. And this was one
2 of the reasons why it took her so long to finally - - -

3 JUDGE STEIN: But that's not what - - - that's
4 not what you argued to the jury, for one thing.

5 MR. COHN: Well, Your Honor, the - - - the
6 summation - - -

7 JUDGE STEIN: You said it was an admission.

8 MR. COHN: Your Honor, the summation did argue
9 the state-of-mind theory to the jury.

10 JUDGE STEIN: On the threat?

11 MR. COHN: On - - - I don't - - -

12 JUDGE STEIN: I know it was argued on the other -
13 - - on the other evidence, but not on the threat.

14 MR. COHN: Well, Your Honor, it was part of the
15 background. It was - - - it was part of - - - it was part
16 of the background of the entire dynamic of the situation.

17 JUDGE STEIN: And is part of the background
18 exception in this context to the hearsay - - -

19 MR. COHN: We're - - -

20 JUDGE STEIN: - - - rule?

21 MR. COHN: Your Honor, we're not arguing this - -
22 - we're arguing - - - that is not presented in this case.
23 Now, there have been other cases, in fact, in - - - in
24 People - - - now, this is not a hearsay case, but say in
25 People v. Dorm, for instance, this court has recognized



1 that the background of a relationship between intimate
2 partners is extremely relevant and probative in a domestic
3 violence prosecution, and it's - - - it's part of the
4 background that - - - that shows motive and intent. This
5 court has recognized that in previous cases.

6 JUDGE FEINMAN: So that brings us to a different
7 issue, which is, okay, maybe you could do that, but is that
8 an exception to the hearsay rule, or do you still have to
9 get it in in some other admissible form?

10 MR. COHN: Well, Your Honor, if I may answer that
11 in two parts, I'd appreciate the opportunity. First, once
12 again, under the judge's instructions in this case, it was
13 not hearsay, because all of the victim's out-of-court
14 statements were admitted just for the fact that she said
15 them, not for their truth.

16 Now, in the situation where maybe there is a
17 hearsay issue, there have been cases, perhaps Bierenbaum,
18 in the First Department, where the First Department has
19 said there could be a situation where reliable hearsay
20 could be admitted under the catch-all hearsay exception in
21 a situation like this.

22 JUDGE STEIN: Did the Appellate Division refer to
23 that case here?

24 MR. COHN: The Appellate Division did cite
25 Bierenbaum.



1 JUDGE STEIN: Is that the only case - - -
2 reported case in which that was - - - that rule was
3 applied?

4 MR. COHN: I - - - I don't believe so. I believe
5 there are other cases, but I don't - - -

6 JUDGE WILSON: And the Third and Fourth
7 Department reject Bierenbaum, right?

8 MR. COHN: I believe that's correct. I believe
9 that's correct. But I - - - I don't think Bierenbaum is
10 that controversial a case because it's talking - - - it's
11 not saying there's a catch-all hearsay - - - there's always
12 a hearsay exception for threats. What it's saying is that
13 if you have a situation where there's reliable probative
14 hearsay and the judge goes through the balancing analysis
15 and says, in this particular case, under these particular
16 facts, the probative value and the reliability of this
17 evidence outweighs the potential for prejudice. Then the
18 judge exercises his or her discretion and lets the evidence
19 in.

20 JUDGE FEINMAN: Where did - - -

21 JUDGE STEIN: Did the judge go through that
22 balancing - - -

23 JUDGE FEINMAN: Yeah, where did the judge do
24 that?

25 JUDGE STEIN: - - - with the eleven witnesses and



1 the threat?

2 MR. COHN: Well, Your Honor, in the context of
3 this heavily-litigated case where - - - where the defense
4 was actually trying to raise misleading impressions about
5 the evidence, not just the evidence of the relationship but
6 the medical evidence as well, it was trying to inject the -
7 - - the notion before the jury that the victim was taking
8 Ativan, which there was no evidence of, was - - - was
9 seeing psychiatrists. There was a - - - a lot going on in
10 this case where the defense was trying to push the
11 boundaries of - - - of probative evidence and admissible
12 relevant evidence, both in terms of the facts of the case
13 and in terms of the expert testimony.

14 JUDGE WILSON: It sounds like a fight fire with
15 hearsay exception.

16 MR. COHN: Well, Your Honor, again, it was not
17 hearsay, and - - - and even if it - - -

18 JUDGE RIVERA: Let's say we disagree with you and
19 this evidence should not have gone in, what's left to
20 persuade us that there's overwhelming evidence of guilt?

21 MR. COHN: All right. Well, Your Honor, first,
22 the circumstances under which the victim was discovered.
23 She was wearing a turtleneck sweater. She was - - -

24 JUDGE RIVERA: But was that the turtleneck she
25 wore when she came? They didn't bring any bags, right?



1 This is the clothes she walked into the hotel with?

2 MR. COHN: I believe so, Your Honor.

3 JUDGE RIVERA: Thank you.

4 MR. COHN: Yes. She was wearing a turtleneck
5 sweater, she was wearing a Rolex watch, and she was wearing
6 underwear. And - - - and she was fully clothed in the
7 bath. There was evidence that she hated baths. In fact,
8 there was evidence that it - - - she was annoyed by the
9 fact that the defendant would take baths in her apartment.
10 The notion that she would walk in, voluntarily, to a bath,
11 fully clothed, and accidentally drown was, in fact, as the
12 defense expert witness, as Dr. Wetli said, bizarre. He
13 understood that - - -

14 JUDGE RIVERA: Okay. But where do you get the -
15 - -

16 MR. COHN: - - - that was bizarre.

17 JUDGE RIVERA: Where do you get the evidence that
18 he's the murderer?

19 MR. COHN: There - - - there's only one person
20 with the opportunity to commit the murder, aside from the -
21 - - the hotel staff member who delivered the ice, which
22 nobody thinks is a suspect. The surveillance videos show
23 that the defendant, after going to get something to eat at
24 the restaurant - - - and by the way, this was after they
25 had an argument which was overheard by a hotel staff, which

1 might have been when the strangulation occurred. But after
2 that point, he goes out to eat.

3 He comes back at 1:48 in the morning. At 2:11 in
4 the morning, the - - - the hotel receives the first report
5 of a water leak. At 2:19, the defendant is then downstairs
6 at the front desk where he meets David Raleigh, the - - -
7 the bystander who he goes out and has drinks with in an
8 attempt to create an alibi.

9 So there's this eight-minute gap between when the
10 water leak is first reported and when the defendant is then
11 seen at the front desk and leaves the apartment. There's
12 no other plausible conclusion than the fact that he was in
13 the apartment when the bathtub was run. The - - - the
14 timing just doesn't work any other way, for the bathtub to
15 run, to overflow, and then for a leak to go down all the
16 way to a lower floor and - - - and be reported.

17 JUDGE GARCIA: Well, from the time of check-in
18 until the time they discover the body, what's the period?

19 MR. COHN: They check in a little after midnight,
20 and the body is discovered at 2:51 a.m.

21 JUDGE WILSON: And counsel, the bathtub is
22 actually physically in the room. It's not separated from
23 the bed or anything else in the room by a wall; is that
24 right?

25 MR. COHN: I don't - - -



1 JUDGE WILSON: There's a picture in the record.

2 MR. COHN: Yeah, I'm - - - I'm not sure, Your
3 Honor. It's - - - it's a hotel room. I think it's just in
4 the bathroom. This is a hotel room in the bathroom.

5 And also - - - so that the time line is 12:43
6 a.m., they're in the room. The hotel employee, Ms.
7 Stephens, overhears this loud argument after which she
8 hears nothing. 12:46 a.m., so three minutes later, the
9 busboy comes to the hotel room to deliver the ice that the
10 defendant had ordered when they checked in. He only sees
11 the defendant. He doesn't hear or see anybody else at that
12 point. So - - - and that's why there's a strong inference
13 that at 12:43 a.m., that's when the victim was actually
14 strangled, knocked unconscious but not killed.

15 12:48 a.m., the defendant goes downstairs and
16 inquires about can I get food. 12:53 a.m., he orders two
17 meals, has them delivered to the restaurant, but he shows
18 up at the restaurant alone and barely eats his food and - -
19 - and looks, according to the hotel employees, distraught.
20 1:48 a.m., he goes back to the room. 2:11 a.m., there's a
21 complaint from the fourth floor about the water leak. 2:30
22 - - - sorry, 2:19, the defendant leaves the - - - the
23 hotel. 2:36, there's a second water leak complaint. 2:51,
24 the hotel employees trace the leak to the defendant and the
25 victim's room and they find the body.



1 There's nobody else who goes in and out of the
2 room. There's only one person. Assuming that a crime was
3 committed, there's only one person who had committed this
4 crime. And - - - and that's why the defense expert goes
5 out of his way to try to raise some insinuation, no matter
6 how much of a stretch it is, that this could have been an
7 accidental death and that somehow she decided, even though
8 she hates baths, to go into the bathtub fully clothed,
9 wearing a turtleneck sweater and a Rolex watch, and then
10 accidentally drowns because of a combination of drugs that
11 she had been taking for years with no adverse effects.

12 And this also goes back to - - - to the judge's
13 rulings about whether there could be cross-examination on
14 other possible drugs. The defendant doesn't actually have
15 any theory that there is another drug out there that could
16 have caused this. The defense just wants to raise
17 speculative assertions that, oh, maybe it was this drug,
18 maybe it was that drug.

19 This - - - this court has held that a defendant
20 is not allowed to put on speculative third-party
21 culpability evidence. This is the same kind of thing. The
22 trial judge has the discretion to say, look, under the
23 circumstances, this is too speculative. This is - - - this
24 is just like any other evidentiary determination. If the
25 judge determines that under the - - - under the



1 circumstances, balancing the probative value against the
2 prejudicial effect and - - - and the general considerations
3 in governing a trial, that there's a limit to how far you
4 can go. And - - -

5 CHIEF JUDGE DIFIORE: Thank you, Mr. Cohn.

6 MR. COHN: Thank you.

7 CHIEF JUDGE DIFIORE: Ms. Wolfe?

8 MS. WOLFE: Thank you, Your Honors. There's a
9 number of ways in which I could respond to each of the
10 aspects of the People's case, and the defense lawyer did
11 that in his summation. But a very important point I want
12 to make sure to make is that the evidence from - - - it was
13 eleven, not nine - - - the evidence from these character
14 witnesses - - -

15 JUDGE STEIN: By the way, did you object to the
16 fact that there were eleven witnesses?

17 MS. WOLFE: There was an - - - there was a motion
18 in limine about this, so the - - - the - - -

19 JUDGE STEIN: About the number of witnesses?

20 MS. WOLFE: Not the number.

21 JUDGE STEIN: Did - - - when the - - - when the
22 judge started to give a curative instruction did you say,
23 judge, this is enough, or the curative instruction isn't
24 sufficient, or anything like that? I didn't see anything
25 of that nature in the record.



1 MS. WOLFE: I thought there was a lot of
2 discussion about, you know, how this - - - this kind of
3 evidence shouldn't - - - shouldn't be admitted. But she -
4 - -

5 JUDGE STEIN: Well, at all.

6 MS. WOLFE: At all, right.

7 JUDGE STEIN: The nature of the objection was
8 none of this should come in, not that - - - not that you -
9 - - you can't have this - - -

10 MS. WOLFE: The no - - -

11 JUDGE STEIN: - - - much or - - -

12 MS. WOLFE: I can't - - -

13 JUDGE STEIN: - - - so that it's cumulative or
14 anything.

15 MS. WOLFE: Right. I can't - - -

16 JUDGE STEIN: Okay.

17 MS. WOLFE: My recollection of what's in the
18 record on that isn't sufficient for me to be able to answer
19 it but - - -

20 JUDGE STEIN: Sorry I interrupted you.

21 MS. WOLFE: - - - this evidence was offered for
22 the truth. In his opening statement, the prosecutor said
23 Nicholas Brooks has a history of patronizing prostitutes.
24 In his closing, the prosecutor said: this is an unlikely
25 couple; she was accomplished; he didn't have a job; he had



1 no ambition; he sat around smoking. And it went even
2 farther than that. It was presented for the truth. And
3 not - - - not only was it the testimony of the - - - of
4 these friends, but the People called on the - - - on the
5 issue of whether Mr. Brooks had used prostitutes. The
6 People called a computer expert to show that he had
7 accessed a adult web site. They also offered texts between
8 Mr. Brooks and his roommate, nothing to do with the
9 deceased, about buying marijuana.

10 JUDGE RIVERA: Counsel, let's say all of that's
11 out - - - you heard the People's very quick summary of the
12 evidence that, nevertheless, would have shown,
13 overwhelmingly, that the defendant is guilty. What's - - -

14 MS. WOLFE: There was - - -

15 JUDGE RIVERA: - - - your response to that?

16 MS. WOLFE: There was no camera and no one in
17 that room. For things like - - -

18 JUDGE RIVERA: But no one went in the room other
19 than the three people.

20 MS. WOLFE: This isn't an ID - - - this isn't - -
21 - this isn't a question of maybe someone else did it. This
22 is accidental - - - the question of whether it was an
23 accidental death. So for instance, the - - -

24 JUDGE RIVERA: That's the defendant's theory,
25 yeah.



1 MS. WOLFE: - - - the People say that it's crazy
2 that she would get into a bathtub fully closed - - -
3 clothed. Well, that is all part of - - - of trying to
4 determine whether the drug testing in this case was
5 sufficient because she's clearly shown on the video as
6 someone who's spacey and - - - and walking into a wall.
7 She has - - -

8 JUDGE RIVERA: So the theory is that she turned
9 on the tub - - -

10 MS. WOLFE: The theory is - - -

11 JUDGE RIVERA: - - - because she's spaced out on
12 the drugs?

13 MS. WOLFE: - - - she turned on the tub, she got
14 - - - she let the tub fill up. It started to overflow, but
15 you couldn't see.

16 JUDGE RIVERA: She was not too spacey to know to
17 turn on the tub and have the water run, but she was - - -

18 MS. WOLFE: Correct.

19 JUDGE RIVERA: - - - too spacey to stay away from
20 falling in?

21 MS. WOLFE: I'm sorry, Your Honor?

22 JUDGE RIVERA: Right? Isn't that the theory?
23 She's not spaced out enough that she knows how to turn on a
24 faucet, knows how to turn on this tub, prepare the tub, but
25 she's too spaced out to avoid drowning in the tub?



1 MS. WOLFE: She - - - because once she gets into
2 the tub - - -

3 JUDGE RIVERA: But she's spaced out enough to do
4 something that everyone who knows her says this woman would
5 never do.

6 MS. WOLFE: That's exactly when you do things
7 people say you wouldn't do, when you're not in your - - -
8 in your - - - in the state of mind where, you know, you
9 remember that you don't like certain things.

10 JUDGE RIVERA: Well enough to turn on the tub.

11 MS. WOLFE: Yes, well enough to turn it on, of
12 course.

13 JUDGE WILSON: And so when, on the time line, did
14 she die?

15 MS. WOLFE: She died - - - I don't think - - -
16 it's not on the time line because we don't know.

17 JUDGE WILSON: Where would - - - where would you
18 place it?

19 MS. WOLFE: I would place it - - - there's a
20 period of time between the time he - - - he goes to have
21 something to eat and when they find her, because there was
22 testimony that you couldn't - - - you know, there was a - -
23 - a bath curtain, you couldn't see into the bathtub, and
24 also that the water hadn't overflowed enough to have come
25 out into the living area. So because, I mean - - - I mean,

1 of course the government - - - the People are going to
2 argue it went this way, which is a series of inferences.
3 And the defense have a different series of inferences based
4 in - - - and a strong part of that, and an important part
5 of that were the - - - was the influence of drugs. And he
6 was precluded from being able to develop that.

7 JUDGE FEINMAN: But was there any evidence in
8 either Wetli or Sampson's testimony that would have allowed
9 an inference that she slipped and it was, you know, based
10 on the bruising or anything of that nature?

11 MS. WOLFE: It's - - - I think I recalled - - - I
12 recall some testimony from Wetli about the bruises and that
13 they could correspond to someone slipping.

14 CHIEF JUDGE DIFIORE: Thank you, counsel.

15 MS. WOLFE: Thank you.

16 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of the People of the State of New York v. Nicholas Brooks, No. 25, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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