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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF THE STATE OF NEW YORK,

Respondent,

-against-

ENRIQUE D.,

No. 168
(Papers Sealed)

Appellant.

20 Eagle Street
Albany, New York 12207
September 12, 2013

Before:

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: State of New York v.
2 Enrique D.

3 MS. ISHEE: May I have two minutes for
4 rebuttal, please, Your Honor?

5 CHIEF JUDGE LIPPMAN: Two minutes;
6 absolutely. Go ahead.

7 MS. ISHEE: Good afternoon. May it please
8 the court, my name is Sadie Ishee, and I represent
9 appellant, Enrique D.

10 This case is really quite simple, the
11 statute, Mental Hygiene Law 10.08(g) grants an
12 Article 10 respondent the right to call witnesses on
13 his behalf. The United States Constitution, as the
14 U.S. Supreme Court has recognized, grants a person -
15 - -

16 CHIEF JUDGE LIPPMAN: What's wrong with the
17 decision that - - - that those witnesses should be -
18 - - as the judge said, should - - - what they say
19 should come in through the expert? What's - - -
20 what's wrong with that?

21 MS. ISHEE: Well, the most basic thing that
22 is wrong with that is that that is an unprecedented
23 extension of the professional reliability exception.
24 I know that this court will be dealing more directly
25 with the professional - - -

1 CHIEF JUDGE LIPPMAN: Yes.

2 MS. ISHEE: - - - reliability exception
3 later today. But whatever it has meant to date, it
4 certainly has never meant that an expert should go
5 out of his way to learn more hearsay information
6 after he has already rendered an opinion in a written
7 report, after trial has already begun, and - - - in
8 order to circumvent the - - -

9 JUDGE PIGOTT: The rationale seemed to - -
10 -

11 MS. ISHEE: - - - witness' live testimony.

12 JUDGE PIGOTT: - - - be, if I - - - if I
13 understand it right, that - - - that this witness was
14 going to testify as to facts which would be more
15 meaningful to the trier of fact in the context of a
16 professional judgment. It - - - I'm sorry, go ahead.

17 MS. ISHEE: I don't think that is
18 necessarily the case, Your Honor. Basically, the
19 facts that this witness would have testified to would
20 have been relevant - - - directly relevant to both of
21 the two prongs of the mental abnormality - - -

22 JUDGE SMITH: What's - - - what's the - - -

23 MS. ISHEE: - - - definition.

24 JUDGE SMITH: - - - relevance?

25 MS. ISHEE: The relevance is twofold.

1 Number one, he was diagnosed with a condition called
2 paraphilia NOS non-consent, which as this court knows
3 from its decision in Shannon S., is a highly
4 controversial diagnosis. It is a diagnosis that has
5 been - - -

6 JUDGE SMITH: Okay, but how does - - - how
7 does Ms. Nieves' (ph.) testimony prove that he didn't
8 have this disease?

9 MS. ISHEE: Well, as the scientific
10 articles that were cited by both experts that were
11 relied upon by both experts that were entered into
12 evidence in this case make absolutely clear, evidence
13 from consensual sexual partners is highly relevant to
14 determining whether or not this diagnosis is properly
15 ascribed.

16 JUDGE SMITH: Well, I - - -

17 JUDGE ABDUS-SALAAM: Why is that - - -

18 JUDGE SMITH: - - - walk us through the
19 logic.

20 MS. ISHEE: Okay. So a consensual - - -
21 it's actually, I would say, in three respects.
22 Number one, the respects that are specifically
23 discussed in the articles, a consensual sexual
24 partner might be able to testify about the fantasy
25 life that was engaged in by the consensual partners,

1 for example, rape fantasies that were acted out.

2 JUDGE ABDUS-SALAAM: Does that have to do
3 with the definition of what paraphilia NOS non-
4 consent is?

5 MS. ISHEE: Yes, Your Honor, absolutely.
6 This is - - - it's a re - - - any paraphilia not
7 otherwise specified is - - -

8 JUDGE SMITH: So, this - - -

9 MS. ISHEE: - - - a recurrent - - -

10 JUDGE SMITH: - - - this lady would testify
11 - - - I'm sorry. I didn't mean to cut off your
12 answer. Did you get an answer to your question?

13 Go ahead, finish your answer to the
14 question?

15 JUDGE ABDUS-SALAAM: She said yes. We've
16 been trying to get people to say yes or no all day.
17 She said yes.

18 JUDGE SMITH: Okay, but if I understand
19 right, what - - - what you're saying, Ms. Nieves
20 could say no, he wasn't into - - - he wasn't into
21 coercion or force at all.

22 MS. ISHEE: Yes.

23 JUDGE SMITH: But does the fact that he
24 wasn't into it with her prove that he didn't have a
25 mental abnormality that he - - - that he had an inten

1 - - - a tendency to coerce other people?

2 MS. ISHEE: Well, again, there are nu - - -
3 several elements to the definition of paraphilia NOS
4 that I think are significant here. It's not only
5 that he didn't coerce her, it's also that he was able
6 to engage in consensual sex, that he was aroused to
7 consensual sex.

8 It is also that the - - -

9 JUDGE SMITH: The inference - - -

10 MS. ISHEE: - - - definition - - -

11 JUDGE SMITH: - - - from that is that he
12 was not - - - that it wasn't the nonconsensual aspect
13 of it that aroused him with the other partners?

14 MS. ISHEE: That's correct. And that is in
15 line with what the scientific articles say is
16 significant about consensual partners.

17 JUDGE GRAFFEO: Would - - - if she had been
18 allowed to testify, would that open the door to the
19 State bringing in the twenty or two dozen some-odd
20 other sexual partners he had that might have
21 testified to something entirely different about his
22 behavior?

23 MS. ISHEE: I think the State had the right
24 to bring in all of those sexual partners if they
25 wanted to regardless of whether or not she testified.

1 I - - - you know, any question as to the relevance of
2 an individual witness' testimony would be resolved by
3 the trier of fact, and it's possible that they would
4 have been redundant. But I frankly think it would
5 have been - - -

6 JUDGE SMITH: There would come a point
7 where you would admit the court could exclude them as
8 cumulative?

9 MS. ISHEE: Yes, there would come a point
10 when I would admit the court - - -

11 JUDGE PIGOTT: Your bigger point is, if I
12 understand it correctly, is not whether or not Ms.
13 Nieves - - - you know, what the weight of her
14 testimony would have been to the trier of fact, but
15 the fact that this court seemed to say that that type
16 of testimony isn't available to a respondent at all?

17 MS. ISHEE: Yes, that is precisely the
18 problem. The statute says unequivocally that it is,
19 and the court said unequivocally that it's not. And
20 I think the Appellate Division really misunderstood
21 the issues in this case. Because as this court - - -

22 CHIEF JUDGE LIPPMAN: Well, it's hard to
23 understand. This paraphilia NOS, it's not really a
24 recognized diag - - - it's fuzzy enough, I guess,
25 what I'm saying, without a restriction - - -

1 restricting what you could hear about it.

2 MS. ISHEE: I absolutely agree. And I
3 think this court was crystal clear about that in its
4 Shannon S. decision. If I could just quote from the
5 Shannon S. decision for a moment? This court said,
6 "Any issue pertaining to the reliability of
7 paraphilia NOS, as a predicate condition for a
8 finding of mental abnormality, has to be viewed as a
9 factor relevant to the weight to be attributed to the
10 diagnosis, an issue properly reserved for resolution
11 by the fact finder."

12 JUDGE SMITH: Okay, but Ms. Nieves isn't
13 going to tell the jury that paraphilia NOS isn't a
14 good diagnosis.

15 MS. ISHEE: No. What she is going to shed
16 light on, though, is the validity of that diagnosis
17 on the facts of this case.

18 JUDGE SMITH: Well, she - - - I mean, am I
19 - - - am I - - - maybe I'm - - - am I right in saying
20 what you're essentially trying to prove in this case
21 is no, I'm not - - - I don't have paraphilia; I'm - -
22 - I don't coerce people because I have an urge to
23 coerce them; I coerce them because I'm a rapist - - -

24 MS. ISHEE: Essentially, yes.

25 JUDGE SMITH: - - - it's my choice.

1 MS. ISHEE: And this court - - -

2 JUDGE SMITH: Maybe not a lot of jury
3 appeal in that argument, but that's the argument.

4 MS. ISHEE: No, but a lot of Constitutional
5 appeal, Your Honor. This court, again, referring
6 back to Shannon S., and I really think this case is
7 sort of a mirror image of Shannon S., because this
8 court, in Shannon S., recognized that there is an
9 imperfect fit between the DSM and the legal
10 definition of mental abnormality.

11 And what doctors do, what psychiatric - - -
12 psychiatric experts do, is they diagnose under the
13 DSM. And what the jury is asked to do in an Article
14 10 case is not that. It is asked, on the one hand to
15 determine whether that diagnosis fits within the
16 legal framework for mental abnormality. It is also
17 asked to look at the additional question of whether
18 there's serious difficulty in controlling behaviors.

19 JUDGE PIGOTT: But one of the points that
20 your opposition makes is that - - - that the points
21 where the experts disagreed were not the areas where
22 Ms. Nieves could have offered relevant testimony, so
23 it doesn't make any difference.

24 MS. ISHEE: I just don't think that's true,
25 Your Honor. I think both experts relied on these two

1 articles. And I think the articles make clear, and I
2 think also both experts' testimony made clear, that
3 what you need for this diagnosis is more than the
4 fact of the convictions themselves.

5 JUDGE READ: So your position is, then,
6 this was an abuse of discretion by the judge not to
7 let this testimony in? And - - -

8 MS. ISHEE: Yes.

9 JUDGE READ: - - - and that was enough to
10 make the trial unfair.

11 JUDGE SMITH: Do you admit he had
12 discretion?

13 MS. ISHEE: Well, I don't think that there
14 was discretion to exclude this relevant evidence,
15 because there was no - - - you know, the rule in New
16 York State is that any relevant evidence is
17 admissible unless its admission violates some
18 exclusionary rule. And I don't think this evidence
19 does.

20 JUDGE SMITH: Well, he - - -

21 JUDGE READ: So if he wouldn't - - -

22 JUDGE SMITH: - - - why - - -

23 JUDGE READ: Sorry.

24 JUDGE SMITH: Sorry.

25 JUDGE READ: Go ahead.

1 JUDGE SMITH: I understand your point that
2 the - - - that the judge - - - that the judge
3 couldn't exclude this testimony just because he was
4 going to let it in through the expert. But why did
5 the - - - why did the expert never testify to it?
6 Why didn't you let the expert - - - why didn't you
7 ask the expert what Ms. Nieves said?

8 MS. ISHEE: Well, Your Honor, this - - -

9 JUDGE SMITH: Your answer is you didn't
10 have to. But nevertheless, why didn't you do it?

11 MS. ISHEE: My light is on - - - I could
12 answer the question, if you'd like me to.

13 CHIEF JUDGE LIPPMAN: Answer the question,
14 yes.

15 MS. ISHEE: Okay. It's a twofold answer.
16 One is, this is not in the record, but she didn't
17 speak English, and he didn't speak Spanish, and this
18 ruling was made in the middle of trial, and there was
19 not time to find an interpreter.

20 JUDGE SMITH: Well, what's the second - - -

21 MS. ISHEE: I know it's - - -

22 JUDGE SMITH: - - - reason?

23 MS. ISHEE: Okay.

24 JUDGE SMITH: There are a few Spanish
25 interpreters - - -

1 MS. ISHEE: The second - - - okay.

2 JUDGE SMITH: - - - out there.

3 MS. ISHEE: The more compelling reason, I
4 think, is that he did not diagnose her with
5 paraphilia NOS. This was not relevant to his
6 diagnosis, because he did not diagnose her with this
7 condition.

8 JUDGE SMITH: I understand.

9 MS. ISHEE: Under these articles, it would
10 be highly relevant to determine whether that
11 diagnosis was accurate. So I think really the
12 State's expert, Dr. Harris - - -

13 JUDGE SMITH: So you're saying - - - you're
14 saying it related only to the underlying facts, and
15 it had nothing to do with Dr. Bard's (ph.) opinions.
16 In Dr. Bard's opinion, there was no such - - - there
17 was no such diagnosis and it doesn't matter what Ms.
18 Nieves says?

19 MS. ISHEE: That was an aspect of Dr.
20 Bard's opinion. He did also say that you - - - if
21 you were to attribute this diagnosis to someone, you
22 would need more than just the facts of the
23 convictions themselves.

24 JUDGE SMITH: But Ms. - - - yeah, but
25 you're saying Ms. Nieves couldn't - - - you're saying

1 basically Ms. Nieves' testimony was relevant to the
2 fact-finder, but it was irrelevant to Dr. Bard?

3 MS. ISHEE: Yes. It may have been relevant
4 to Dr. Harris, the State's expert, but - - -

5 CHIEF JUDGE LIPPMAN: Okay.

6 MS. ISHEE: - - - it was not relevant to -
7 - -

8 CHIEF JUDGE LIPPMAN: Thanks, counselor.

9 MS. FIGUEREDO: May it please the court,
10 Valerie Figueredo for the State.

11 CHIEF JUDGE LIPPMAN: Counsel, why - - -
12 why shouldn't they be able to put in this testimony,
13 forgetting the fact that they appear to be entitled
14 to do it? They want to show that - - - that this guy
15 may be a recidivist, but he's not driven by, you
16 know, this particular diagnosis. Why shouldn't they
17 be able to do that by putting in witness who would go
18 to that point? Why possibly would they - - - would
19 they not be able to do it?

20 MS. FIGUEREDO: We're not arguing for a
21 categorical rule barring all lay witnesses. In - - -

22 CHIEF JUDGE LIPPMAN: Yeah, but why is it
23 wrong in this case to let them do it?

24 MS. FIGUEREDO: In this case it was wrong
25 because based on the proffer offered to Supreme

1 Court, for the relevance - - - for the offered
2 relevancy of Naomi N.'s testimony, the Supreme Court
3 reasonably concluded that the more appropriate
4 presentation of that evidence to demonstrate its
5 relevancy - - -

6 CHIEF JUDGE LIPPMAN: On what basis? What
7 - - - how can they just say the more appropriate - -
8 - they have a right to introduce those witnesses.
9 You think they don't have a right?

10 MS. FIGUEREDO: It depends on the context
11 of the case.

12 JUDGE PIGOTT: Well, the - - -

13 MS. FIGUEREDO: In this case - - -

14 JUDGE PIGOTT: - - - the direct quote from
15 the State was - - - in objecting to this, you argued
16 against - - - not you personally, but they argue
17 against civilian witnesses on the issue of mental
18 abnormality, whether he's got serious difficulty
19 controlling his behavior.

20 "That determination must be based upon the
21 testimony of experts, and I would object to any
22 civilian witnesses being called."

23 MS. FIGUEREDO: That is the objection the
24 trial - - - the trial attorney raised below. That is
25 not what we argue now. We are not seeking a

1 categorical rule. The Supreme Court - - -

2 JUDGE PIGOTT: So he was - - - was he wrong
3 in making this - - - I shouldn't say making - - -
4 obviously he could make the objection - - - but that
5 you would - - - you would not sustain an objection on
6 that ground today?

7 MS. FIGUEREDO: We would not sustain an
8 objection on that ground. We do not argue that lay
9 witnesses are completely irrelevant. It depends on
10 the context of the particular case.

11 JUDGE ABDUS-SALAAM: But why is this
12 witness - - -

13 MS. FIGUEREDO: In this case - - -

14 JUDGE ABDUS-SALAAM: - - - not relevant?

15 MS. FIGUEREDO: - - - in this case, the
16 ruling was made pre-trial, and based on the limited
17 proffer offered for her relevancy, the Supreme Court
18 reasonably concluded that Naomi N.'s live testimony
19 was not necessary.

20 JUDGE ABDUS-SALAAM: But didn't the court
21 also reserve decision on the issue, and maybe would
22 allow the testimony at some point after - - - after -
23 - -

24 MS. FIGUEREDO: That's correct - - -

25 JUDGE ABDUS-SALAAM: - - - the pre-trial in

1 limine - - -

2 MS. FIGUEREDO: - - - the court gave a
3 concession to Enrique D.'s trial attorney to
4 demonstrate the relevancy of Naomi N.'s testimony
5 through Dr. Bard's testimony.

6 JUDGE PIGOTT: Yeah. His statement - - -

7 MS. FIGUEREDO: But - - -

8 JUDGE PIGOTT: - - - the court's statement
9 was that "the girlfriend's opinion would not be
10 relevant and that any information she possessed
11 should come out in the proper way through defense
12 experts."

13 MS. FIGUEREDO: And it's important to - - -

14 JUDGE PIGOTT: Do you agree with that?

15 MS. FIGUEREDO: - - - it's important to
16 understand that statement in the context in which it
17 was made, which is in a pre-trial ruling before any
18 of the experts or any other witnesses testified.

19 JUDGE ABDUS-SALAAM: So the court didn't
20 know whether Dr. Bard had ever even interviewed Naomi
21 N.?

22 MS. FIGUEREDO: At that point, the court
23 did not know what evidence it would see, so it did
24 not know whether Dr. Bard found her testimony or her
25 - - - the facts of her relationship with Enrique D. -

1 - -

2 CHIEF JUDGE LIPPMAN: Counsel, but isn't it

3 - - -

4 JUDGE ABDUS-SALAAM: So - - -

5 CHIEF JUDGE LIPPMAN: - - - isn't it

6 obvious that court testimony is better than hearsay?

7 I mean, how - - - how difficult is this? I mean, why

8 would that be - - - not be so obvious?

9 MS. FIGUEREDO: In the context of the
10 initial - - -

11 CHIEF JUDGE LIPPMAN: In the - - - in the
12 context of this court, testimony is not better than
13 hearsay?

14 MS. FIGUEREDO: Naomi N.'s live testimony
15 was not necessary here, because the reason we - - -

16 CHIEF JUDGE LIPPMAN: But it - - - but it
17 would be okay for the doctor to - - - to say what - -
18 - if he had spoken to her, to say what she would say.
19 Does that make any sense to you?

20 MS. FIGUEREDO: If Dr. Bard had interviewed
21 Naomi N. and found the details of her relationship
22 with Enrique D. relevant to his psychiatric
23 diagnosis, he could have testified to that. And
24 counsel for - - -

25 JUDGE PIGOTT: Well, let's assume what Ms.

1 Ishee said was the case, and she said it might have
2 been relevant to your expert. And your expert said
3 "Paraphilia NOS non-consent is a catchall diagnosis
4 for problems with sexual arousal that don't fit any
5 category. And the defendant's arousal by coercive
6 sexual behavior is what - - - that's what his problem
7 is, and there's no evidence other than the sexual
8 offenses themselves."

9 So based upon the fact that he had been a
10 convicted sex abuser, he says he - - - his sexual
11 proclivity is coercion. Would it not make some sense
12 to have someone come in and say, we have great sex
13 and it's not coerced at all?

14 MS. FIGUEREDO: No, because as Dr. Bard
15 testified, it is very common for sex offenders to
16 engage in consensual sexual relationships even while
17 offending.

18 JUDGE PIGOTT: But Harris said the
19 opposite, and that's what you're trying to - - -
20 that's who the defense is trying to defeat by saying
21 - - - he - - - Dr. Harris says it has to be coercive;
22 I'm here to tell you that our sex is not.

23 MS. FIGUEREDO: Dr. Harris opined that
24 based on the pattern of offenses, Enrique D. met the
25 criteria for paraphilia NOS dia - - - NOS non-consent

1 - - -

2 JUDGE SMITH: And one - - - and one of - -
3 - I mean, the central criterion is that co - - - it
4 is coercion itself is something that he needs to
5 arouse him, yes?

6 MS. FIGUEREDO: That's correct. Dr. Harris

7 - - -

8 JUDGE SMITH: And you say - - - you have to
9 come - - - someone come in and say he doesn't need -
10 - - he gets aroused very easily with no coercion.
11 Why is that not relevant?

12 MS. FIGUEREDO: It is not relevant, because
13 as both experts testified, it is common for these
14 offenders to have sex and still be aroused while
15 committing these sexual offenses. So the fact that
16 he was able to engage in twenty-six other - - - other
17 consensual relationships - - -

18 JUDGE SMITH: Even if - - - even if - - -
19 even if a million experts said it, couldn't a jury
20 find that - - - that if he does - - - if he does get
21 aroused without coercion, maybe he doesn't have a
22 disease where he needs coercion?

23 MS. FIGUEREDO: Even if that were the case,
24 that was not a reason proffered to Supreme Court for
25 the admissibility of Naomi N.'s testimony. They

1 focused on the fact of whether Nao - - - of whether
2 he ever had offended against Naomi N. And Dr. Bard,
3 in concluding that Enrique D. did not have paraphilia
4 NOS, also focused on just the existence of their
5 consensual relationship. The details of that
6 relationship were - - -

7 JUDGE ABDUS-SALAAM: Doesn't that tell you -
8 - -

9 MS. FIGUEREDO: - - - not relevant - - -

10 JUDGE ABDUS-SALAAM: - - - counsel, that
11 there is maybe some relevance, more than a little
12 bit, to whether this particular man, for the jury's
13 purposes, may not have paraphilia NOS, because he
14 does get aroused by consensual sex as well as the
15 other?

16 MS. FIGUEREDO: And the - - - and the jury
17 knew of those consensual relationships, and the State
18 did not dispute them. So it was perfectly acceptable
19 for Supreme Court to conclude that this fact, which
20 was already in evidence, and which was undisputed,
21 did not need to be further - - -

22 JUDGE PIGOTT: Then why do you care? It
23 would seem to me that it's no big deal. Bring her
24 in. Maybe she's a very persuasive witness. You
25 don't know how large or how expansive her testimony

1 may have been. There may have been withering cross
2 examination by the State that - - - that crushed any
3 testimony she brought in. But the idea of bringing
4 it in, it seems to me, as a matter of law - - -
5 because it seemed to me the court was saying as a
6 matter of law you can't bring civilian witnesses in -
7 - - would be wrong. And I think you agree with that.

8 But that being said, then the witness ought
9 to come in. And the weight is left to the trier of
10 fact, the jury.

11 MS. FIGUEREDO: That may be the case. But
12 given the facts of this case, they are now trying to
13 overturn a unanimous jury verdict after a full trial
14 based on offered testimony that was not even relevant
15 to their - - -

16 CHIEF JUDGE LIPPMAN: Yeah, but the - - -

17 MS. FIGUEREDO: - - - own expert - - -

18 CHIEF JUDGE LIPPMAN: - - - but the trier
19 of fact has to determine whether there's a mental
20 abnormality here. And - - -

21 MS. FIGUEREDO: And - - -

22 CHIEF JUDGE LIPPMAN: - - - and wouldn't
23 this help them? That's what's at issue. That's what
24 they're trying to decide, whether - - - a mental
25 abnormality predisposing him to a certain kind of

1 conduct. How could this not be relevant?

2 MS. FIGUEREDO: Even if the court were
3 convinced that the existence of the relationship was
4 minimally relevant, that fact is undisputed and known
5 by the jury. So it did not impact the jury's
6 decision in any way. It didn't even impact Dr.
7 Bard's diagnosis, because Dr. Bard did not - - -

8 JUDGE SMITH: You're arguing harmless
9 error?

10 MS. FIGUEREDO: We would argue that it
11 would be - - - it would be harmless error, that the
12 jury would have reached the same verdict regardless
13 of Naomi N.'s testimony, because the existence of
14 those twenty-six relationships were known to them and
15 undisputed.

16 CHIEF JUDGE LIPPMAN: Yeah, but as Judge
17 Pigott said, maybe she's a very persuasive witness.
18 Why would you say that? This is a critical issue on
19 whether he has this mental abnormality. Whether your
20 expert or their expert disagrees, or whatever,
21 there's a fundamental question that the jury has to
22 decide.

23 MS. FIGUEREDO: Even if the court believed
24 that Naomi N. would have been a more persuasive
25 witness, it was certainly within Supreme Court's

1 discretion to determine how - - - the best
2 presentation of that evidence. And in the context of
3 the limited proffer - - -

4 JUDGE SMITH: Isn't - - - can you cite any
5 case anywhere in which - - - in which it's been held
6 that it's - - - that you can produce evidence only
7 through a third party and not through the declarant,
8 where hearsay is preferred to direct testimony?

9 MS. FIGUEREDO: We're not - - - we're not
10 arguing for a categorical rule in that sense.

11 JUDGE SMITH: Okay. Well, can you - - -
12 can you cite - - - is there any case, categorical or
13 noncategorical that's ever held that except for this
14 one?

15 MS. FIGUEREDO: Well, in the - - - in the
16 context of People v. Goldstein, the court does permit
17 an expert to testify to information which they
18 determine is a basis for their diagnosis. And in
19 this case, if Dr. Bard had interviewed Naomi N., and
20 found the details of that relationship relevant to
21 his - - -

22 JUDGE RIVERA: But why does that foreclose
23 bringing in Naomi?

24 MS. FIGUEREDO: It does - - - we're not
25 saying it would always foreclose the bringing in the

1 live testimony of a lay witness. What we're saying
2 is that here, in this case, Supreme Court, given the
3 reasons it was provided for her independent live
4 testimony, it was not an abuse of discretion for the
5 court to say your - - - this is normally the type of
6 information the expert - - -

7 JUDGE ABDUS-SALAAM: But counsel, wasn't
8 the - - - wasn't the court already making a
9 determination, according to what you said, that it
10 could only come in through Dr. Bard, without even
11 knowing whether Dr. Bard had even ever interviewed
12 Naomi N., or any of the other part - - - consensual
13 sex partners? So how could the court make that
14 decision that it could only come in through Dr. Bard?
15 Wouldn't that be coercing Dr. Bard to interview her
16 so that the testimony could come in?

17 MS. FIGUEREDO: The court said - - - said
18 clearly that it would reserve its judgment and would
19 permit - - - it was a concession permitting Enrique
20 D. to demonstrate the relevancy of Naomi N.'s
21 testimony through Dr. Bard.

22 There was a subsequent ruling where the
23 court finally says I'm not going to permit it. But
24 certainly, if Enrique D. had found - - - had tried to
25 have - - -

1 JUDGE ABDUS-SALAAM: So what would Dr. Bard
2 have had to say in order for the court to determine
3 that Naomi N. should testify or not?

4 MS. FIGUEREDO: If Dr. Bard has based his
5 conclusion on the absence of sexual fantasies and
6 urges and would then have interviewed Naomi N., and
7 Naomi N. would have said I've been in a relationship
8 for X years, X months, and during that time he never
9 engaged in these sexual fantasies or urges, then the
10 Supreme Court, based on that information, could have
11 ruled, perhaps this is relevant. But that was not
12 what happened here.

13 CHIEF JUDGE LIPPMAN: Based on what the
14 expert said?

15 MS. FIGUEREDO: Based on what the expert
16 relied on in reaching his psychiatric diagnosis.

17 CHIEF JUDGE LIPPMAN: Then maybe she comes
18 in? Is that the way this works?

19 MS. FIGUEREDO: That is not the way it
20 works. Naom - - - if - - -

21 CHIEF JUDGE LIPPMAN: You're saying she
22 could still come in and testify, but only after the
23 expert said what she said?

24 MS. FIGUEREDO: In the initial phase of the
25 Article 10 proceeding, where the question is

1 fundamentally diagnostic, the experts' testimony
2 would be the most important aspect or most important
3 evidence. So to demonstrate to the judge or to the
4 trier - - - to the trier of fact that the information
5 is relevant, it would be necessary for the expert to
6 explain how he used that information in reaching his
7 - - -

8 CHIEF JUDGE LIPPMAN: Article 10 is a
9 pretty serious proceeding, isn't it?

10 MS. FIGUEREDO: Yes.

11 JUDGE GRAFFEO: The statute's not limited
12 to only calling expert witnesses, is it?

13 MS. FIGUEREDO: It is not. In - - - in
14 10.08(g) the respondent does have the opportunity to
15 call and examine witnesses. But that does not mean -
16 - -

17 JUDGE RIVERA: He could have testified,
18 correct?

19 MS. FIGUEREDO: I'm sorry?

20 JUDGE RIVERA: He can testify?

21 MS. FIGUEREDO: Enrique D. did testify.
22 And he can testify.

23 JUDGE RIVERA: Right. And he can.

24 CHIEF JUDGE LIPPMAN: But is - - - is - - -

25 JUDGE RIVERA: So why - - - when, then,

1 can't he call her to testify?

2 MS. FIGUEREDO: We're not saying that he
3 can't. What we're saying is that in this - - - in
4 this instance, Supreme Court, based on the reasons
5 that were given to it for her independent live
6 testimony, reasonably concluded that the information
7 which was already undisputed - - -

8 CHIEF JUDGE LIPPMAN: So basically his
9 liber - - - his liberty is dependent on this hearsay
10 coming through the doctor, and he has no right to
11 just say, you know, this really may rebut what
12 they're talking about in terms of my diagnosis. He
13 can't just call - - - I mean, I know you're saying
14 it's a discretionary decision. But it sounds more
15 like a decision that he can't call civilian
16 witnesses.

17 MS. FIGUEREDO: That - - - that's not
18 correct. He can call civilian witnesses - - -

19 CHIEF JUDGE LIPPMAN: You think the judge
20 had an open - - -

21 MS. FIGUEREDO: - - - if he can demonstrate
22 - - -

23 CHIEF JUDGE LIPPMAN: - - - mind and it was
24 just discretionary given the context that he wouldn't
25 allow him at that point?

1 MS. FIGUEREDO: That - - - the judge very
2 clearly - - - it was a pre-trial ruling - - -

3 CHIEF JUDGE LIPPMAN: Okay.

4 MS. FIGUEREDO: - - - and very clearly says
5 I will maintain an open mind.

6 CHIEF JUDGE LIPPMAN: Okay, counselor.
7 Thank you.

8 MS. FIGUEREDO: Thank you.

9 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

10 MS. ISHEE: Your Honor, this court in
11 Blades discussed the well-established policy
12 preference for live witness testimony instead of less
13 reliable substitute suffered only through narrow
14 exceptions.

15 JUDGE PIGOTT: This is part one of a two-
16 party phase in these things.

17 MS. ISHEE: Yes.

18 JUDGE PIGOTT: I mean, all this - - - all
19 this determines is if he has the abnormality.
20 Whether or not he goes free or is subject to SIST or
21 whatever, comes later. It doesn't - - - the State
22 puts on an expert. They do not call the victims.
23 You know, he had three previous criminal convictions.
24 Conceivably they could call those people in and put
25 them through another gauntlet of describing what this

1 man did to them at a certain time. They don't. They
2 do it all through an expert.

3 This judge seems to have decided the same
4 thing on your side saying, you know, we're going to
5 have an expert on the State relating to the victims
6 that - - - that resulted in his - - - in his being
7 convicted and sentenced. You now can put in any
8 witnesses you want through your expert. Then we
9 determine whether he's suffering from his - - - from
10 an abnormality. Then we'll go on to the other part.

11 So it's - - - there's an argument to be
12 made, it seems to me, that there's a balancing there,
13 and why - - - and doesn't it make some sense?

14 MS. ISHEE: Your Honor, I think that that
15 balancing is just contrary to the statute. The
16 statute says he has the right to call witnesses on
17 his behalf. It doesn't say that there's some kind of
18 balancing depending on how much the experts rely on
19 them.

20 JUDGE PIGOTT: Ms. Figueredo was now
21 saying, you know, I'll grant you that. But in this
22 particular case, why doesn't it make sense to just
23 have the two experts testify as to what they know?
24 Because all we're doing is diagnosing, now. We're
25 not saying who struck John.

1 MS. ISHEE: I think that hearsay is just
2 not as reliable as live witness testimony.

3 JUDGE SMITH: It is - - - it is - - -

4 MS. ISHEE: I think - - -

5 JUDGE SMITH: - - - it is theoretically
6 possible, isn't it, that there's testimony - - - you
7 could have a witness' testimony that would be
8 irrelevant unless the expert first testified and
9 explained why it was important?

10 MS. ISHEE: I think it is theoretically
11 possible that that could be the case. I don't think
12 - - -

13 JUDGE SMITH: Why is it not - - -

14 MS. ISHEE: - - - that this witness - - -

15 JUDGE SMITH: - - - true here?

16 MS. ISHEE: I think it's not true here
17 because the facts that she would have testified to
18 were well within the understanding of - - -

19 JUDGE SMITH: You're really saying - - -

20 MS. ISHEE: - - - the - - -

21 JUDGE SMITH: - - - I guess, that what she
22 was - - - her testimony was made relevant, not by - -
23 - not by Bard's opinion, but by Harris?

24 MS. ISHEE: Yes, exactly.

25 CHIEF JUDGE LIPPMAN: Okay.

1 Go ahead. I'm sorry. Did you want to
2 finish up?

3 MS. ISHEE: No.

4 CHIEF JUDGE LIPPMAN: Good. All right.

5 Thank you both.

6 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of the State of New York v. Enrique D., No. 168 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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