

1 COURT OF APPEALS

2 STATE OF NEW YORK

3 -----

4 PEOPLE,

5 Respondent,

6 -against-

No. 181

7 ROBERT C. HALTER,

8 Appellant.

9 -----

20 Eagle Street

Albany, New York 12207

September 13, 2012

11 Before:

12 CHIEF JUDGE JONATHAN LIPPMAN

13 ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK

14 ASSOCIATE JUDGE VICTORIA A. GRAFFEO

15 ASSOCIATE JUDGE SUSAN PHILLIPS READ

ASSOCIATE JUDGE ROBERT S. SMITH

16 ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

ASSOCIATE JUDGE THEODORE T. JONES

17 Appearances:

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24 Official Court Transcriber

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1 CHIEF JUDGE LIPPMAN: People v. Halter.

2 Counselor, do you want any rebuttal time?

3 MR. DAVIS: Two minutes, please.

4 CHIEF JUDGE LIPPMAN: Two minutes. Sure.

5 Go ahead.

6 MR. DAVIS: Timothy Davis appearing for Mr.  
7 Halter. In this case, Robert Halter called the  
8 police and asked for help in locating his thirteen-  
9 year-old daughter. And at trial, the People used the  
10 Rape Shield Law in an effort not to protect the  
11 complainant from questions about her sexual conduct,  
12 but in an effort to prevent Mr. Halter from  
13 introducing evidence of her sexualized behavior - - -

14 JUDGE CIPARICK: Well, how is this - - - at  
15 trial, there was a lot of evidence and a lot of  
16 testimony about her Myspace page, about her dad  
17 lecturing to her about staying out late, about boys,  
18 about having run away from - - - running away from  
19 home, about the police coming to get her at the boy's  
20 house. There's even testimony that her father had  
21 told her she had turned into a whore and that she was  
22 angry at her dad.

23 So all - - - most of what you're asking for  
24 was there at this bench trial before this judge. So  
25 what more do you want? You would have liked him to

1 be specific about sexual encounters with this boy or  
2 with other boys?

3 MR. DAVIS: No. What essentially the court  
4 allowed Mr. Halter to do was introduce half a  
5 defense. The defense here was that the daughter,  
6 [name redacted], had a motive to fabricate. She was  
7 angry that her father had told her she couldn't  
8 behave in a certain fashion and was also angry that  
9 she - - -

10 CHIEF JUDGE LIPPMAN: So how did the  
11 Myspace and the - - - how she dressed, relate to that  
12 defense?

13 MR. DAVIS: Two ways. First, it makes her  
14 motive to fabricate stronger. If her father has a  
15 valid reason to be concerned that her behavior is  
16 inappropriate for any thirteen-year-old, such that a  
17 father would be concerned about this, that  
18 strengthens his case because then she would have  
19 knowledge, or at least belief, there's a chance she  
20 could be removed from her mother's home.

21 But also what it does is it shows that her  
22 father is not acting like you might expect a jealous  
23 husband might, or he's acting like a pervert, with  
24 his thumb over her, saying you can't dress in this  
25 fashion, you can't do these things, because he's the

1           one who wants to have a sexual relationship with her.

2                   JUDGE GRAFFEO: Well, the evidence got in  
3           that she was at this boy's house all night, I take  
4           it, correct, because the police found her there.

5                   MR. DAVIS: Well - - -

6                   JUDGE GRAFFEO: So it seems to me, the only  
7           thing that's missing is that you wanted to introduce  
8           that apparently either she did or perhaps she had sex  
9           with this particular boy. But you've got quite a few  
10          other instances that would certainly - - - could  
11          contribute to her fabricating this. So - - -

12                  MR. DAVIS: But the problem is that all  
13          that - - -

14                  JUDGE GRAFFEO: - - - I mean, do we need to  
15          cast aside the Rape Shield Law in this type of case?

16                  MR. DAVIS: First of all, the Rape Shield  
17          Law, I would argue, doesn't apply to the Myspace  
18          postings and her photograph and her statements. The  
19          Rape Shield Law would only apply to what happens at  
20          the boy's house.

21                  JUDGE GRAFFEO: Right.

22                  JUDGE CIPARICK: And that's all that was  
23          precluded.

24                  JUDGE GRAFFEO: That's what we're talking  
25          about.

1 JUDGE CIPARICK: Everything else came in.

2 MR. DAVIS: No. The actual content of the  
3 Myspace page didn't come in. What came in was the  
4 fact that the father said that he was disgusted by  
5 what came into the - - - what she had posted on her  
6 Myspace page, was disgusted by the way she dressed.  
7 But the actual way she dressed never came in.

8 And that's significant, because what  
9 happened at the end of direct examination of [name  
10 redacted] and also at the end of redirect, she said  
11 specifically, I was never sexual with any guys. I  
12 was tired of being accused of things I didn't do. So  
13 what happens is, the People, then, are allowed to  
14 present Mr. Halter as basically this controlling  
15 pervert who's trying to manipulate his daughter and  
16 argue - - - and the People argue in closing and say  
17 do you really believe that he was trying to parent  
18 this girl. They were able to argue that because they  
19 hadn't been able - - -

20 JUDGE CIPARICK: I mean, we may agree with  
21 you and say that the evidence would have been  
22 relevant. But he certainly was able to put before  
23 the judge - - - because this was a bench trial - - -  
24 to put before the judge his claim that her anger may  
25 have caused her to fabricate this, because she wanted

1 to get rid of her father, because she was afraid that  
2 she was going to be put away at the Villa, or  
3 someplace, where she was - - - for wayward girls, or  
4 whatever.

5 MR. DAVIS: Yes.

6 JUDGE CIPARICK: So - - -

7 MR. DAVIS: But the problem is that her  
8 actual behavior never actually came in. Why he was  
9 angry never actually came in.

10 JUDGE SMITH: Well, let me - - - could I -  
11 - - if I could go back to Judge Graffeo's question?

12 MR. DAVIS: Yes.

13 JUDGE SMITH: Did you - - - I mean, what  
14 was - - - as I understand it, she testified - - - she  
15 was permitted to ask and she testified that they  
16 found her at noon the next day at the boy's house.  
17 They didn't actually say that she spent the night - -  
18 - I mean, he asked the question, didn't you spend the  
19 night in his room, and the judge sustained an  
20 objection, right?

21 MR. DAVIS: Yes.

22 JUDGE SMITH: Now, you might - - - in a  
23 nonjury trial, you might think the judge figured it  
24 out. Does that matter? Does it matter that it's a  
25 nonjury trial; obviously he knew?

1 MR. DAVIS: No. First of all, the court  
2 was - - - we presume that the judge follows the law  
3 in a bench trial.

4 JUDGE SMITH: Yes. So - - -

5 MR. DAVIS: So if the judge is saying - - -

6 JUDGE SMITH: - - - you're saying we have  
7 to presume that even if he knew it, he also  
8 instructed himself to disregard it and did disregard  
9 it?

10 MR. DAVIS: That's correct.

11 JUDGE SMITH: Yes.

12 MR. DAVIS: And in everything that the - -  
13 - what's very significant in this case is that  
14 everything that the defense tried to introduce, the  
15 photograph where she was wearing revealing clothing  
16 on the Myspace page, and her sexualized comments on  
17 the Myspace page, none of it actually - - - not only  
18 did it not come in; the judge never even allowed  
19 defense counsel to give an offer of proof as to  
20 actually what it should have been or what it actually  
21 was. So there's no way to presume that this court  
22 had any knowledge of what - - - how bad this Myspace  
23 page actually was.

24 JUDGE SMITH: Do we - - - is there - - - do  
25 we decide this exactly as we would at a jury trial,

1 if it were a jury trial?

2 MR. DAVIS: In this case, yes.

3 JUDGE SMITH: It's - - - I guess I'm  
4 struggling with that. If the evidence gets in - - -  
5 if evidence that shouldn't get in gets in, and it's a  
6 bench trial, there are a lot of cases that say well,  
7 the judge knows the law, so it doesn't matter. But  
8 does it work in reverse when the evidence is kept  
9 out?

10 MR. DAVIS: It has to.

11 JUDGE CIPARICK: And when there's been an  
12 offer of proof to the judge. The judge does know  
13 what the evidence is that you want to put in there.

14 MR. DAVIS: Right. But in this case, the  
15 judge doesn't know that.

16 JUDGE SMITH: Okay. But suppose he did. I  
17 mean, suppose - - - I mean, even if there's an offer  
18 of proof, you still have the argument, don't you?  
19 The judge is supposed to do what you're supposed to  
20 do. He knows the evidence, but he's supposed to  
21 disregard it.

22 MR. DAVIS: Well, the problem here in this  
23 case goes back to the Williams case I discussed in my  
24 brief, where the court never actually states why it  
25 is he's keeping out the evidence. You have to sort



1 of parse and look at the statements actually made by  
2 the court to determine whether the court was saying  
3 this is actually protected by the Rape Shield Law, or  
4 this is not protected, but is not relevant.

5 JUDGE SMITH: But did - - - I see that  
6 point. But trial counsel never said, Judge, look at  
7 that subsection. You have discretion. I want you to  
8 admit it under that subsection.

9 MR. DAVIS: Well, I think it's clear from  
10 the - - - there's two applications here. And they -  
11 - - or two - - - or at least two or three. And the  
12 first application before trial is I want to get into  
13 what happens at this boy's house while she's  
14 supposedly there from 7 p.m. till 10 a.m.

15 JUDGE SMITH: I mean, it's perfectly clear  
16 that he wanted to get it in, and the judge kept it  
17 out.

18 MR. DAVIS: Yes.

19 JUDGE SMITH: I'm not saying that's not  
20 preserved. I'm saying you make a subtler argument,  
21 which says that he never - - - he didn't act as  
22 though he had discretion. Wasn't the lawyer supposed  
23 to say, Judge, you've got discretion? If the lawyer  
24 was thinking he's not exercising his discretion,  
25 isn't he supposed to say, Judge, you're missing

1 something. This is a discretionary ruling?

2 MR. DAVIS: Well, I think one thing that's  
3 clear from this record is that every time defense  
4 counsel tried to make it clear to the court why this  
5 should come in, the court says I'm not going to argue  
6 it; I made my ruling.

7 JUDGE PIGOTT: He, yeah, he was a little  
8 bit of a sword of Damocles. But if I understand what  
9 you're saying, just making it a little simpler, if  
10 the defendant wanted to say she retaliated against me  
11 because I told her she had to be in by 7 and she  
12 wasn't in by 7, no one's going to buy that. They're  
13 going to say no kid's going to be that upset that  
14 they would do that.

15 If, on the other hand, you say well, I  
16 didn't like what was on her Myspace page, and me and  
17 as an ignorant dad thinks we're talking about a game  
18 of Angry Birds, but you wanted to bring in - - - the  
19 defense wanted to bring in the fact of the way she  
20 was dressed, that she was apparently soliciting older  
21 - - - whether she had sex with them or not, she was  
22 soliciting older boys; she was doing things that any  
23 parent would have been really upset about and any kid  
24 could conceivably be really upset about if he or she  
25 were being prevented from doing what she wanted, and

1           that never got to the trier of fact.

2                       MR. DAVIS:   That's correct.   And what  
3           happened then was the defense - - - excuse me, the  
4           People, then, were able to take advantage of that and  
5           say - - - blame all of her behavior on the abuse,  
6           instead of the fact that she was simply an out-of-  
7           control thirteen-year-old.

8                       CHIEF JUDGE LIPPMAN:   Okay, counselor.

9                       MR. DAVIS:   Thank you.

10                      CHIEF JUDGE LIPPMAN:   Let's hear from your  
11           adversary.

12                      JUDGE CIPARICK:   Is the issue of the  
13           recantations before us in any way?   That motion was -  
14           - -

15                      MR. KAEUPER:   No, no, Your Honor.

16                      JUDGE CIPARICK:   - - - denied.   That's not  
17           before us?

18                      MR. KAEUPER:   That's correct, Your Honor.  
19           And - - -

20                      JUDGE CIPARICK:   Did that play a factor  
21           here?   Is that a factor for us to consider here at  
22           all?

23                      MR. KAEUPER:   I don't think so.   I mean, I  
24           think there's an obvious reason for a daughter to  
25           want her father out of prison.   And it was very clear

1           in this case that although she wanted to - - - she  
2           felt she needed to make these accusations to get him  
3           to stop the abuse, but she didn't want him to go to  
4           prison.

5                       JUDGE PIGOTT: Well, you say that. And  
6           that really gets down to the nub of it. And you  
7           know, I get Rape Shield. I know you don't want to  
8           denigrate a victim and use that to somehow absolve  
9           the defendant. You don't want to say this is a slut,  
10          this is a pig, this is a whore, or anything like  
11          that. I get that.

12                      But when you've got a father who says what  
13          he wanted to put in, what's the problem? What's the  
14          problem with saying she's on Myspace doing this  
15          stuff, when it's a fact? I mean, it's not a  
16          characterization. I mean, you can see the Myspace  
17          page. You can see the stuff where she has  
18          photographs of herself posted, where she's trying to  
19          attract older boys, that she's lying about her age  
20          and things like that.

21                      What's wrong with letting a court, a trier  
22          of fact, know, as Mr. Davis said, you've got an out-  
23          of-control teen here? This is what I'm trying to do,  
24          and she's fighting tooth and nail not to. I mean,  
25          why is that Rape Shield?

1                   MR. KAEUPER: Well, I think first of all,  
2                   there's a lot of evidence in here about her being an  
3                   out-of-control young woman. I don't think that's  
4                   really an issue - - -

5                   JUDGE PIGOTT: No, no. But you want to get  
6                   to her motive to lie.

7                   MR. KAEUPER: Right.

8                   JUDGE PIGOTT: And so it's - - -

9                   MR. KAEUPER: So her motive to lie has to  
10                  do with her subjective state of mind. She testifies:  
11                  I knew he would put me in the Villa. He made that  
12                  threat to me, and I knew he'd make good on it.

13                  JUDGE SMITH: She also testified,  
14                  "Question: Why did you tell her on that date?" This  
15                  is the date she disclosed the abuse. "Answer:  
16                  Because my dad called me yelling at me and he was,  
17                  like, accusing me of being sexual with guys when I  
18                  wasn't."

19                  Why didn't that open the door?

20                  MR. KAEUPER: Well, there was no objection;  
21                  there was no - - -

22                  JUDGE SMITH: No objection? Nothing  
23                  objectionable about the testimony. But why didn't  
24                  that open the door?

25                  MR. KAEUPER: There was no claim that it

1 opened the door. I mean, maybe the defense could  
2 have - - -

3 JUDGE SMITH: Isn't his whole point that  
4 because - - - that it was critical in this case what  
5 her conduct was that led him to yell at her and that  
6 it may have motivated the criticism?

7 MR. KAEUPER: I don't think that was ever  
8 the claim made at trial. The claim at trial was that  
9 she was trying to protect this boy from a charge of  
10 statutory rape. I think defense counsel makes that  
11 very - - -

12 JUDGE SMITH: He did say that. But - - -  
13 or she, I guess, was the trial counsel. But wasn't  
14 she also saying that it goes to her motive to  
15 fabricate?

16 MR. KAEUPER: Yes. The protecting him from  
17 a potential charge of statutory rape - - -

18 JUDGE SMITH: Nothing about his being angry  
19 at her because - - - her being angry at him because  
20 he accused her falsely of being sexual? That's  
21 exactly what she said.

22 MR. KAEUPER: Well, I mean, she - - - I  
23 guess maybe I don't understand the question. But  
24 it's - - -

25 JUDGE SMITH: I mean, it's a simple - - -

1 put aside preservation for a moment. Maybe it's  
2 preserved, maybe it's not. Assume it's preserved.

3 MR. KAEUPER: Okay.

4 JUDGE SMITH: Victim is asked: "Why did  
5 you accuse him on that date of raping you" Answer:  
6 "Because he falsely accused me of having sex."

7 How can the defendant not be allowed to  
8 litigate the question of whether the accusation was  
9 false?

10 MR. KAEUPER: Well, I mean, I think her  
11 motive to fabricate doesn't change whether it's - - -

12 JUDGE SMITH: So you're saying even apart  
13 from preservation, when she says I wasn't having sex  
14 with - - - I wasn't being sexual with guys, and she  
15 says that that was part of her motive for making the  
16 charge, the defendant may be barred from disproving  
17 the statement?

18 MR. KAEUPER: Well, I don't know how she's  
19 going to disprove that statement. I mean, the  
20 request by the defense was to ask her - - -

21 JUDGE SMITH: Well, you could start with,  
22 weren't you spending the night with Joey in his room.

23 MR. KAEUPER: Right, well - - -

24 JUDGE SMITH: That's a question that was  
25 asked and objected to.

1                   MR. KAEUPER: That's correct. Right. That  
2 question was - - - the objection was sustained as to  
3 whether she'd spent the entire room in his room.

4                   JUDGE PIGOTT: But who are we shielding  
5 there, I guess? I mean, I'm missing it. I mean,  
6 you've got to - - - I mean, let's presume this guy is  
7 innocent until he gets convicted. I mean, he's  
8 saying I'm a father who wants to protect my daughter.  
9 And there's these big, grizzly guys out there that  
10 are five and six years older than she is, taking  
11 advantage of her, and she doesn't get it. And I'm  
12 trying to impress upon her that she should get it.  
13 She gets mad and attacks me.

14                  MR. KAEUPER: Right. And I think all of  
15 that motive to fabricate gets out. She testified  
16 he's threatening me to put me in the Villa. He says  
17 this over and over again. I know he's going to make  
18 good on it.

19                  JUDGE PIGOTT: And there's reason - - - and  
20 there's no basis for it. That's what she's saying.  
21 She's saying he's making all these threats, and there  
22 was no basis for it whatsoever. In fact, he was  
23 probably doing that because he was sexually abusing  
24 me and wanted to keep me from talking. And he wants  
25 to say no, there's all this other stuff.



1                   If she had put nude pictures of herself on  
2 Myspace, would they get in?

3                   MR. KAEUPER: I think those would be  
4 protected by the Rape Shield Law.

5                   JUDGE PIGOTT: And yet, if my daughter did  
6 that, when I came down off the ceiling, I'm not sure  
7 what I would do.

8                   MR. KAEUPER: Well, but again I think - - -

9                   JUDGE SMITH: Well, how - - - why does the  
10 - - - I thought the Rape Shield Law, just as it  
11 applies to clothing, is just for her dressing  
12 provocatively to - - - you're not allowed to say  
13 anymore, she was wearing a short skirt so it was fine  
14 for me to rape her. That's - - - but here, that has  
15 nothing to do with what happened here.

16                   MR. KAEUPER: Well, but I think the claim -  
17 - - and it's very clear, when she tries to get into  
18 it in cross-examination, the claim here is this  
19 Myspace page is a come-on to older men. She says  
20 this is - - -

21                   JUDGE SMITH: Yes, but not - - - no claim  
22 that it was a come-on to the defendant.

23                   MR. KAEUPER: No, no, no. Certainly not.

24                   JUDGE PIGOTT: That's the point. The point  
25 is he's got a - - - is he's got a motive to do what

1 he does in terms of trying to punish her. And she's  
2 saying it's not true. She doesn't - - - he doesn't  
3 have a motive, except that he abused me. And so he  
4 was - - -

5 MR. KAEUPER: Well, but he - - - but he  
6 doesn't know it either. I mean, he has no more  
7 information about whether she's actually having sex  
8 with this boy than - - -

9 JUDGE PIGOTT: And he doesn't care. He  
10 doesn't care. He wants to say I saw the Myspace  
11 page. I saw the - - - her pretending to be older  
12 than she is, soliciting older boys, and none of that  
13 could come in.

14 MR. KAEUPER: Right. So whether he's right  
15 or not makes no difference, because he's the - - -

16 JUDGE PIGOTT: The judge - - - the judge  
17 doesn't know that that's what he's doing. All he  
18 thinks is, okay, she's got a Myspace page; so does  
19 every other kid in the world. And they're all out  
20 there playing Angry Birds and sending notes to each  
21 other. I'm not going to let that in if you're going  
22 to talk about sex.

23 MR. KAEUPER: Well, he doesn't - - - he  
24 doesn't let the actual photos in. But the general  
25 contents of this page are very clear from the record.

1 JUDGE PIGOTT: Well, if I got my notes  
2 right, he wouldn't let it in.

3 MR. KAEUPER: Well, he wouldn't let in a  
4 particular photo, but it's clear that the Myspace  
5 page contains provocative photos of her. He refers  
6 to it as disgusting and so forth. And I think this,  
7 in some ways, goes maybe to Judge Smith's question  
8 about - - -

9 JUDGE PIGOTT: Let me interrupt you just  
10 for a minute. It says - - - my note says, however  
11 defense counsel was not allowed to elicit whether the  
12 Myspace page contained content about sex or about  
13 boys, the nature of the photographs of herself that  
14 [name redacted] had posted on Myspace, whether she  
15 was trying to attract older people, i.e., boys on  
16 Myspace, whether she had boyfriends who were older  
17 than she was, whether she posted on Myspace that she  
18 had three boyfriends, whether she spent the night at  
19 Joey's, whether she had told her mother that she had  
20 been out all night with a sixteen-year-old, or how,  
21 precisely, she dressed. None of that came in.

22 MR. KAEUPER: Right. But all of those  
23 questions were asked, and then objections were  
24 sustained. Which - - -

25 JUDGE SMITH: But does it matter - - -

1 JUDGE PIGOTT: I see what you're saying.

2 JUDGE SMITH: - - - what does it matter  
3 that it was a nonjury trial?

4 MR. KAEUPER: Well, because I think here we  
5 have the judge making a discretionary call. So the  
6 judge, as both controller of the law and as fact-  
7 finder is in the perfect position to say, okay, you  
8 just told me what the evidence is going to be. Now,  
9 is it important to my decision as fact-finder - - -

10 JUDGE SMITH: Okay, well, maybe. But - - -  
11 I see that point. And it probably describes the  
12 reality very much. I can see logically he's saying,  
13 look, I understand this girl was not absolutely the  
14 most Victorian of children, and I don't want you  
15 harassing her for a half an hour on the subject. I  
16 get it.

17 But technically, isn't your adversary right  
18 when he says we have to assume that if he kept it out  
19 of evidence, he paid no attention to it, whether he  
20 knew it or not?

21 MR. KAEUPER: Right. But we also have to  
22 assume that he's considering that potential evidence  
23 and its effect on - - -

24 JUDGE PIGOTT: Well, that would be - - -

25 MR. KAEUPER: - - - the defense of motive -

1           - -

2                   JUDGE PIGOTT:   - - - that would be error.

3                   JUDGE SMITH:   I think not.   If he thinks  
4                   it's barred by the Rape Shield Law, he should not be  
5                   considering its effect on him at all.

6                   MR. KAEUPER:   But not in the sense of  
7                   determining the facts, but in terms of making the  
8                   decision of whether it comes in.   If he's looking at  
9                   this evidence and says boy, if that comes in, I'm  
10                  going to find that she fabricated - - -

11                  JUDGE SMITH:   What about - - -

12                  MR. KAEUPER:   - - - he's going to let it  
13                  in.

14                  JUDGE SMITH:   - - - what about the - - -  
15                  how's the Appellate Division supposed to review the  
16                  facts if he keeps it all out because he doesn't think  
17                  it's - - - he says maybe it's admissible, but it  
18                  doesn't do it for me, and I'm the fact-finder, so I'm  
19                  keeping it out.   What about the Appellate Division?

20                  MR. KAEUPER:   I think you judge it based  
21                  upon the specific request made.   And here, what we  
22                  have is maybe she was having sex with this boy, and  
23                  if she was having sex with this boy, maybe she was  
24                  afraid of a statutory rape charge for no reason.

25                  JUDGE PIGOTT:   No, no, no, no, no.   No.   He

1 was that upset because of all of this stuff, and  
2 that's why he got so angry with her, and that's why  
3 she reacted the way she did, because she knew what he  
4 knew was true. And he - - - and she may end up in  
5 Villa. And the way to operate to prevent that is to  
6 get him out of the house. That's what the - - -

7 MR. KAEUPER: I see the red light, but can  
8 I answer the question?

9 CHIEF JUDGE LIPPMAN: Go ahead. Go ahead.

10 MR. KAEUPER: I think that would be true if  
11 - - - I mean, if he knew that she was having sex,  
12 that might be a different case. He doesn't know  
13 whether she's having sex. He's thinking she may be  
14 having sex. And we get out the fact that he thinks  
15 she may be having sex. He says after she comes back,  
16 I told her we need to go to Planned Parenthood. All  
17 this stuff about what he's thinking comes out. And  
18 everything comes out about what he's threatening her  
19 and what she thinks about the reality of those  
20 threats.

21 JUDGE SMITH: What he says he's thinking  
22 comes out. She says he's lying. I was not having -  
23 - - I was not being sexual with boys. In fact, he's  
24 just an abuser trying to cover up. Shouldn't the  
25 finder of fact have all the evidence that's relevant

1 to decide whether that's true or not?

2 MR. KAEUPER: Well, I mean, that's what  
3 would have come out if he had been able to ask the  
4 question. He would have asked the question, and she  
5 would have said no. It would have been the same.

6 CHIEF JUDGE LIPPMAN: Okay.

7 JUDGE SMITH: But how do we know that?

8 CHIEF JUDGE LIPPMAN: Judge Smith, go  
9 ahead.

10 JUDGE SMITH: How do we - - - I mean, yeah.  
11 Actually, if he asked the question, did you spend the  
12 night in Joey's room, she might not have said no.  
13 She might very well have said yes.

14 MR. KAEUPER: I could be wrong, but I think  
15 there may be an indication in the record that she  
16 denies that - - -

17 JUDGE SMITH: Okay. But I guess what I'm  
18 really saying is, isn't he allowed to make her say no  
19 and see how believable it is and test it and - - -  
20 look, for all we know, he's Perry Mason who in seven  
21 questions on cross-examination, she could be saying  
22 oh, I lied, I made up the whole thing.

23 MR. KAEUPER: I don't think so. I think  
24 here the Rape Shield has to protect this. He gets  
25 out enough of the motive to lie; the fact that this

1           would have been relevant to that is not, I think, the  
2           standard for the Rape Shield. And if that were the  
3           standard, the result would have been different - - -

4                   JUDGE SMITH: So you're - - -

5                   MR. KAEUPER: - - - in Williams or Halbert.

6                   JUDGE SMITH: - - - so you say the Rape  
7           Shield does keep out relevant evidence?

8                   MR. KAEUPER: Absolutely.

9                   JUDGE SMITH: There's got to be a limit to  
10          that. It can't keep out very relevant evidence, can  
11          it?

12                  MR. KAEUPER: Absolutely. And if he had  
13          actually been deprived of being able to really mount  
14          this defense - - - but I submit that he did mount  
15          this defense of motive to fabricate.

16                  CHIEF JUDGE LIPPMAN: Okay, thank you.

17                  MR. KAEUPER: Thank you.

18                  CHIEF JUDGE LIPPMAN: Thanks, counselor.  
19          Counselor?

20                  MR. DAVIS: Just two things. First, this  
21          court decided in 1979 in Mandel that a swinger  
22          photograph was not protected by the Rape Shield Law.  
23          So a person posting even a completely naked  
24          photograph of themselves on Myspace, even engaged in  
25          some sort of autoerotic behavior, would not be





1       early on about the 440. And what's the relevance  
2       there? I mean, she did recant. I mean, is it part  
3       of your argument that maybe a better cross-  
4       examination, she wouldn't have had to, because she  
5       would have told a different story at the trial?

6               MR. DAVIS: Well, yes. I mean, in this  
7       particular case, where had defense counsel been able  
8       to cross-examine her as to what actually happened  
9       during those fifteen hours with Joey - - - and in  
10      this case, this is distinguishable from Halbert which  
11      the People cite, because in that case, this court  
12      said that there was both an emotional and a sexual  
13      relationship with this third party, and the defendant  
14      was allowed to get into the emotional relationship.  
15      So she was allowed to - - - defense counsel was  
16      allowed to cross-examine the person that she moved  
17      out of her mother's house because she was in love  
18      with this nineteen-year-old boy. All that was  
19      precluded was the sexual aspect.

20             Here, for most of the day, whatever her  
21      activities were, the court refused to allow defense  
22      counsel to get into it at all. This is a case, just  
23      like Davis v. Alaska and Olden v. Kentucky, where the  
24      defendant - - -

25             CHIEF JUDGE LIPPMAN: Go ahead, counselor.

1 Finish your thought.

2 MR. DAVIS: - - - where the defendant,  
3 knowing that she's protected by the statutory shield,  
4 says stuff that is - - - if either is not ridiculous  
5 on its face, certainly could be probed through cross-  
6 examination and be shown to - - -

7 CHIEF JUDGE LIPPMAN: Okay, thanks.

8 MR. DAVIS: - - - marginally. Thank you.

9 CHIEF JUDGE LIPPMAN: Appreciate it. Thank  
10 you both.

11 (Court is adjourned)

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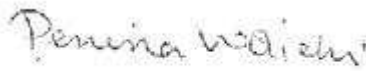
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## C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Robert C. Halter, No. 181 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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