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COURT OF APPEALS

STATE OF NEW YORK

THE STATE OF NEW YORK,

Respondent,

-against-

No. 53

ROBERT F.,

Appellant.

20 Eagle Street
Albany, New York 12207
March 23, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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CHIEF JUDGE LIPPMAN: So why don't we begin with number 53. Counselor, do you want any rebuttal time?

MR. RISELVATO: One minute, please, Your Honor.

CHIEF JUDGE LIPPMAN: One minute. Okay. Go ahead, you're on.

MR. RISELVATO: May it please the court, Timothy Riselvato for the appellant, Robert F.

Your Honors, the Supreme Court erred when it permitted the State's expert to testify via video conferencing. Article 10 has no provision that permits electronic - - -

CHIEF JUDGE LIPPMAN: What's the - - - what's the great harm here in this case on the testimony - - - testifying by remote?

MR. RISELVATO: Well, the harm is that as this court has said, live testimony is not the same as electronic testimony. There's a real - - -

CHIEF JUDGE LIPPMAN: Well, what - - - what was the damage done here though?

JUDGE READ: In this particular case, not just as a general rule?

MR. RISELVATO: Well, here - - -

1 JUDGE READ: In other words, why wasn't any
2 error harmless?

3 MR. RISELVATO: Well, no error was
4 harmless, first, because the judge insisted that the
5 testimony be heard. He said without this testimony,
6 I'd be asked to be put on blinders - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but did the
8 judge refer to that testimony in his ultimate
9 decision? Didn't it have to do, basically, with the
10 - - - being a stranger and the extra point and all of
11 that, that the judge didn't - - -

12 MR. RISELVATO: Essentially, the intent - -
13 -

14 CHIEF JUDGE LIPPMAN: - - - did not give
15 that extra point, and I don't think referred to the
16 relatively short testimony of the doctor. So in that
17 context, the question that Judge Read and I are
18 asking you, what's - - - where's the harm in this
19 case?

20 MR. RISELVATO: Well, he didn't
21 specifically refer to it, although he didn't
22 specifically discount it either.

23 CHIEF JUDGE LIPPMAN: But it seems like he
24 might have discounted it, wouldn't it?

25 MR. RISELVATO: Well, there's no reason - -

1 -

2 CHIEF JUDGE LIPPMAN: Or doesn't it matter,
3 from your perspective?

4 MR. RISELVATO: There's no reason not to
5 take the court at its word that it said I need this
6 to paint a complete picture of this individual's risk
7 to recidivate.

8 JUDGE RIVERA: But didn't he refer to the
9 lower score?

10 MR. RISELVATO: Ultimately, in his
11 decision, he did.

12 JUDGE RIVERA: So - - - so how did it
13 affect that decision, if he's actually, in his
14 findings of fact, he's referring to the lower score.

15 MR. RISELVATO: Well, I don't - - -

16 JUDGE RIVERA: Or have I misunderstood his
17 decision?

18 MR. RISELVATO: It's speculation as to how
19 it ultimately affected it. When he was on record, he
20 said I need this testimony.

21 JUDGE READ: Well, maybe after he heard it,
22 he decided he didn't need it.

23 MR. RISELVATO: Well, that - - - this was -
24 - - this is for us to speculate. On the record - - -

25 JUDGE RIVERA: But how - - - how can that

1 be? His decision - - - I'm sorry - - -

2 CHIEF JUDGE LIPPMAN: No, go ahead.

3 JUDGE RIVERA: That's what his decision
4 says that - - - that she scored him at 7 on a Static-
5 99 and scored him at 6 on the Static-99-R. And that
6 was the original score in 2009, correct?

7 MR. RISELVATO: Correct.

8 JUDGE RIVERA: She doesn't make any
9 reference in here that she subsequently said I would
10 have scored a different score based on this
11 information.

12 MR. RISELVATO: Right. I don't know why he
13 didn't do that. Again, it - - -

14 JUDGE RIVERA: Or it could be - - -

15 MR. RISELVATO: - - - it's speculation.

16 JUDGE RIVERA: - - - he didn't - - -

17 MR. RISELVATO: However, I will say that
18 there's also the fact that he was deprived - - -
19 appellant was deprived of his statutory right to
20 examine under oath any witness that should testify
21 against - - -

22 JUDGE PIGOTT: Let's assume for a minute
23 that the roles had been reversed, that - - - that the
24 information that was now going to come out was
25 beneficial to your - - - to your client; in other

1 words, because of what was said, you'd like to recall
2 this same witness or another witness to testify for
3 you on this one, small, discrete thing, which is the
4 Static-99 score changes, and it changes favorably to
5 my - - - to my client. Would you think the court
6 would be wrong to say well, you know, Mr. Respondent,
7 because I realize it's an expense for you to bring
8 your expert all the way in from Rochester, et cetera,
9 you know, I'll let him testify or her testify from -
10 - - by video. Do you think he'd be wrong - - - would
11 you then say, Judge, I'm going to object. I think I
12 have to bring him in and I think I have to spend
13 2,500 bucks to bring him here?

14 MR. RISELVATO: I think that's what the
15 legislature contemplated.

16 JUDGE PIGOTT: So you would say I'm going
17 to have to say something adverse to my client here,
18 Judge, but you cannot take my client's expert witness
19 testimony by video. I'm sorry, but it's going to
20 hurt my client, but that's what I've got to do?

21 MR. RISELVATO: Well, I might leave that
22 for the other side to make the objection.

23 JUDGE PIGOTT: I'm ready for him too.
24 Don't worry.

25 MR. RISELVATO: Right.

1 JUDGE PIGOTT: I'm just - - -

2 MR. RISELVATO: But - - - but the fact is,
3 the legislature contemplated it. And when - - - when
4 they actually amended Article 10 in 2012, they gave
5 one exception for when electronic appearances are
6 permissible.

7 CHIEF JUDGE LIPPMAN: The judge has no
8 discretion in this situation?

9 MR. RISELVATO: I would say the way that
10 the - - -

11 CHIEF JUDGE LIPPMAN: If it had been - - -
12 I take it your position is, this isn't an
13 extraordinary circumstance that warranted - - -
14 assume that there was just an absolute necessity to
15 do it, the judge has no discretion?

16 MR. RISELVATO: I would say pursuant to how
17 the legislature amended this statute, no. Because
18 they provided one exception; that's at the pre-trial
19 probable - - -

20 JUDGE RIVERA: Is good cause a different -
21 - - is good cause a different standard than the
22 standard set out in Wrotten?

23 MR. RISELVATO: I'm sorry?

24 JUDGE RIVERA: Is - - - is the good cause
25 standard that's set out - - - set out in the Mental

1 Hygiene Law 10.08(I)(i), is that a different standard
2 from what this court - - -

3 MR. RISELVATO: In fact it - - -

4 JUDGE RIVERA: - - - articulated in - - -

5 MR. RISELVATO: It's very different from
6 Wrotten, because in Wrotten, the standard was, it's
7 an exceptional procedure to be used in exceptional
8 circumstances, and it requires a case-specific
9 finding and - - -

10 JUDGE RIVERA: So why can't - - -

11 MR. RISELVATO: - - - necessity.

12 JUDGE RIVERA: - - - why can't the
13 amendment be read to mean that except for the
14 provisions that are referred to in 10.08(I)(i) - - -
15 or (1) excuse me - - - that the standard set out in
16 Wrotten applies, that it's only for the probable
17 cause hearing that the good cause standard applies?

18 MR. RISELVATO: Well, it's not just a good
19 cause standard. That's - - - that's the good cause
20 standard for allowing an electronic appearance. So
21 the legislature crafted one exception. They say
22 electronic appearances only at pre-trial probable
23 cause hearings, where the standard is so low - - -

24 JUDGE ABDUS-SALAAM: That's it? There can
25 never be any electronic appearance at all, other than

1 in that one exception?

2 MR. RISELVATO: Well, given that they
3 carved one exception, traditional rules of statutory
4 interpretation say that there can't be any other
5 implied exceptions.

6 JUDGE PIGOTT: Well, the Second Department
7 went off on the C.P.L.R. 4011, and, and - - - in
8 terms of sequence of trial, and, and said within - -
9 - within reason, you know, a judge can make these
10 kind of determinations. Do you think they were wrong
11 in citing to the C.P.L.R.?

12 MR. RISELVATO: Essentially, they took the
13 direct opposite approach of the traditional rule of
14 statutory interpretation. They said, well, if it
15 doesn't say we can't do it, then we can do it.
16 Traditionally, the statutes - - - when you read a
17 statute, if it doesn't say you can do it - - -

18 JUDGE FAHEY: This is a little different,
19 though, because they - - - they relied on the
20 judiciary law that give did the judge some
21 flexibility?

22 MR. RISELVATO: Well, some flexibility - -
23 -

24 JUDGE FAHEY: It was more of a conflict
25 between statutes, at least the analysis, than what

1 you normally have.

2 MR. RISELVATO: Only to the extent that the
3 court already had the power to do something.

4 JUDGE FAHEY: Um-hum.

5 MR. RISELVATO: It never had - - - the
6 court never had the power to authorize electronic
7 testimony because of the way the legislature crafted
8 the singular exception in 10.08.

9 CHIEF JUDGE LIPPMAN: Counselor - - -

10 JUDGE FAHEY: What if the - - - what if the
11 court had made a determination and said there are
12 either extraordinary circumstances or good cause?
13 How would that change your analysis?

14 MR. RISELVATO: Well, in that event - - -
15 you know, this is our - - - our alternative argument
16 is that even assuming that a court did have the power
17 to authorize electronic testimony, here they didn't
18 even make an allegation of extraordinary
19 circumstances. They didn't put anything on the
20 record as to why their doctor couldn't show up, as
21 far as - - -

22 CHIEF JUDGE LIPPMAN: Assuming the record
23 had been better, let's say that they put on the
24 record that the doctor is in Rochester or wherever
25 she was, or it was her last week of work, or whatever

1 the rationale was; still the judge has no discretion?

2 MR. RISELVATO: I would say, yes, the judge
3 does not have discretion in that circumstances. But
4 if this court should see it differently, in the
5 alternative, it would still need to prove - - -

6 CHIEF JUDGE LIPPMAN: You're saying that
7 would be a better argument, if - - - if there had
8 been a better record?

9 MR. RISELVATO: If there had been a better
10 record - - - here they didn't even put anything on.
11 There was just nothing. The court authorized this
12 video conferencing with nothing on the record to show
13 why it was necessary.

14 JUDGE RIVERA: So I - - - I was a little
15 unclear about the record. So initially, when - - -
16 when the government says they want to - - - to call
17 Dr. Peterson, I know there's a long colloquy, I know
18 Robert F.'s attorney objects and then says
19 specifically, and I object to the video conferencing.

20 MR. RISELVATO: Um-hum.

21 JUDGE RIVERA: And then as I - - - maybe
22 I'm missing something - - - as I understood it, at
23 the - - - at the hearing, the scheduled hearing,
24 February 17th, whenever it is, there is no other
25 mention of any objection. It moved forward.

1 MR. RISELVATO: It seemed to - - - it
2 seemed to me that appellant's trial counsel was
3 anticipating maybe they were going to try to do that
4 electronically. But so that's why he - - -

5 JUDGE READ: Or - - - or maybe they had
6 conversations that weren't on the record?

7 MR. RISELVATO: That's also possible.

8 JUDGE RIVERA: Because I thought the judge
9 signed the subpoena?

10 MR. RISELVATO: I'm sorry?

11 JUDGE RIVERA: I thought the judge ordered
12 her to show up?

13 MR. RISELVATO: He did.

14 JUDGE RIVERA: Yeah.

15 MR. RISELVATO: I believe he ordered her to
16 show up, but there was nothing said overruling that
17 objection or explaining why video testimony needed to
18 be - - - I'm sorry, testimony needed to be had
19 electronically. It was simply not - - -

20 JUDGE RIVERA: Did counsel need to object
21 again?

22 MR. RISELVATO: I don't think so. No, he
23 put his objection to the electronic testimony very
24 clearly on the record. And there was nothing to show
25 why his objection shouldn't stand.

1 CHIEF JUDGE LIPPMAN: Okay, thanks,
2 counsel.

3 MR. HARROW: May it please the court, Jason
4 Harrow for the State. Your Honors, just as a
5 preliminary matter, as we said in our letter to the
6 court last week, this case is actually moot, because
7 Robert F. had another dispositional hearing. His
8 expert has actually reversed his dispositional
9 recommendation. And he is now confined pursuant to
10 that order.

11 JUDGE STEIN: Why would - - - assuming it
12 is moot, why wouldn't this be an exception to the
13 mootness doctrine? I mean, this isn't the first time
14 that this has been raised or is likely to be raised,
15 is it?

16 MR. HARROW: It's not the first time that
17 this issue has been raised, but there's a simple - -
18 -

19 JUDGE STEIN: And - - - and the time frame,
20 given the - - - the framework of these proceedings,
21 and the time within which you can get a second or
22 third or fourth bite at the apple, so to speak, why
23 wouldn't this almost always evade review, certainly
24 by this court, if not by an intermediate appellate
25 court?

1 MR. HARROW: Sure. It doesn't, for two
2 simple reasons, Your Honor. The first is that Robert
3 F., in fact, did not have to file a discharge
4 petition here. So that's up to the respondent after
5 the annual review.

6 JUDGE STEIN: So his only alternative would
7 be not to seek release when he's entitled to do that
8 - - -

9 MR. HARROW: Well - - -

10 JUDGE STEIN: - - - and wait for a
11 determination?

12 MR. HARROW: In part, perhaps, Your Honor.
13 And that's not strange at all, because there's - - -
14 in order to preserve appellate rights, if he truly
15 thinks that the original determination was wrong, he
16 shouldn't try to seek to get out in another way.

17 JUDGE PIGOTT: I would - - - I would think
18 you'd want this case up here. I mean, if you - - -
19 if there's a case that could lean your way, it's one
20 that's - - - you know, that's rebuttal testimony,
21 essentially, with one discrete issue.

22 If you want to come up on another case
23 where - - - where you've got electronic testimony in
24 your case-in-chief and say yes, it's okay for a
25 psychiatrist to testify from 1,200 miles away, not

1 subject to being in the courtroom with the defense -
2 - - or with the respondent, I think you'd have a
3 tougher row to hoe, don't you? I would - - - I would
4 think you'd want to argue this particular case and
5 not the next one.

6 MR. HARROW: Well, Judge Pigott, you're
7 right. We do like this case. We - - - we think we
8 have a strong case here. And - - - and to turn to
9 the merits, that's because courts do have discretion
10 to take testimony by video - - -

11 CHIEF JUDGE LIPPMAN: Even when - - - even
12 when the statute was changed to allow this kind of
13 testimony in the probable cause but - - - and wasn't
14 changed in the dispositive hearing?

15 MR. HARROW: Absolutely. That's - - -

16 CHIEF JUDGE LIPPMAN: Why? Why - - - why
17 wouldn't we interpret it the way we ordinarily do,
18 that if they don't - - - if it's not there they don't
19 - - - they're not allowing for it?

20 MR. HARROW: This court rejected that exact
21 line of reasoning, Your Honor, in - - - in Wrotten.
22 That's what the dissent - - -

23 JUDGE PIGOTT: Let's talk about Wrotten for
24 a minute. Wrotten, you had a - - - you had a party.
25 It was - - - it wasn't an expert that was going to

1 testify, it was - - - it was the victims in a - - -
2 in a crime who had valid medical reasons why they
3 couldn't come. And there was a grand - - - you know
4 - - - search to see under what conditions that would
5 be. This isn't a party. It's a - - - it's an expert
6 that apparently - - - not to pick on the Attorney
7 General - - - the argument could be made, you should
8 have put this in, in your - - - in your case-in-
9 chief, and for some reason, you didn't.

10 And now you want to say well, let's - - -
11 let's change the rules for us, because even though it
12 says "preliminary hearing" and we're on the
13 dispositional side, where the - - - where the penalty
14 comes in, where someone can be incarcerated for a
15 longer period of time than they were originally, we
16 want to - - - we want to just wink at that and let
17 our expert testify from - - - from 1,200 miles way.

18 MR. HARROW: Well, I don't think that's
19 quite what the record says, Your Honor. What the
20 record says is that our attorney below simply wanted
21 to clarify the true Static score and the basis for
22 that, and was willing to do so on the papers.

23 The judge, after a brief colloquy, wanted
24 in-per - - - wanted personal testimony. And because
25 of the unique - - -

1 CHIEF JUDGE LIPPMAN: Yeah, but where's the
2 - - - but isn't this different than Wrotten? Where's
3 the good cause here and the clear and convincing, and
4 all of that? Even if you use the Wrotten test, does
5 this case meet it?

6 MR. HARROW: It does, Your Honor. The
7 record - - -

8 CHIEF JUDGE LIPPMAN: It does? Why does it
9 meet it?

10 MR. HARROW: It does because the record is
11 clear that Dr. Peterson was hundreds of miles away in
12 Rochester. The test - - -

13 JUDGE PIGOTT: Well, I don't think
14 Rochester's that far away. I don't think it would be
15 that difficult - - - in fact, I sometimes joke with
16 my colleagues who live in New York, that it's easier
17 for me to get to New York from Buffalo than it is
18 from Albany, because, there's an airplane. So she
19 could have been there within an hour, could have
20 testified, and then flown home and been home for
21 supper. Don't you think?

22 MR. HARROW: That's not what I'm told
23 happens as a regular practice. When experts come
24 down from Rochester, it co - - - it's at substantial
25 expense. There's often waiting in court. It's

1 somewhat unpredictable.

2 CHIEF JUDGE LIPPMAN: Yeah, yeah. But how
3 do we know that? It's in - - - it's in her resume.
4 It's not - - - they didn't make any big deal about it
5 on the record here, right?

6 MR. HARROW: Well - - -

7 CHIEF JUDGE LIPPMAN: Aside from being in
8 the resume.

9 MR. HARROW: Chief Judge Lippman, the big
10 deal that was made on the record, which - - - which
11 admittedly, you know, could be a more thorough
12 record, but I think the - - - the fact - - - the
13 basic facts are there, which is that she was in her
14 last week of employment, and so clearly finishing up
15 a lot of other things, including dealing with other
16 patients who are not in the Article 10 process.

17 JUDGE PIGOTT: You're ma - - - you're
18 making two arguments there, it seems to me. You're
19 making the argument that you're making now, which is
20 this was extraordinary circumstances, or at least
21 leaned that way, as opposed to saying well, it's a
22 long way away, and they have to sit around in court,
23 and they have to wait.

24 That's an argument that you can make for
25 your case-in-chief. And I don't think you want to

1 argue that you can put in your case-in-chief by
2 electronic video, do you?

3 MR. HARROW: That - - - that's not our
4 position here, Your Honor. That - - - and we don't
5 think that a decision in this case would implicate
6 that. What this decision implicates is the court's
7 inherent power, and power under Judiciary Law 2(b)
8 to, in limited circumstances, for good cause shown,
9 ge - - - and given all the circumstances, I think
10 it's important here - - -

11 CHIEF JUDGE LIPPMAN: Are you also arguing
12 harmless error?

13 MR. HARROW: Absolutely. And - - - and as
14 the Court asked during my friend's argument to begin,
15 there is - - - it's pretty clear that the judge
16 didn't even rely on this disputed testimony, and so
17 the harmless error argument - - -

18 CHIEF JUDGE LIPPMAN: So even if it was
19 wrong for the judge to let it in, you - - - you think
20 you'll still - - - you still should prevail?

21 MR. HARROW: Absolutely. Though I really
22 don't think it was wrong here. I think this was a
23 valid use of the limited discretion that courts do
24 have in order to take testimony by video.

25 CHIEF JUDGE LIPPMAN: Yeah, well, maybe

1 we'd be - - - if we find that way, maybe we'd be
2 making the discretion too broad in a situation where,
3 again, there is no provision in the statute as
4 opposed to a probable cause hearing.

5 MR. HARROW: There's not, Chief Judge
6 Lippman. But I don't think that's what has occurred
7 in the lower courts, in the wake of Wrotten. Wrotten
8 was five, six years ago. Just as in - - - just as
9 here, the Criminal Procedure Law has a provision for
10 taking video testimony. In fact, Article 65 is quite
11 comprehensive and detailed, just like 10.08(I) is.

12 CHIEF JUDGE LIPPMAN: Yeah, but this is - -
13 - you're arguing that this fits the exceptional
14 circumstances?

15 MR. HARROW: I - - -

16 CHIEF JUDGE LIPPMAN: I mean, that's really
17 what you're arguing, that this is truly exceptional
18 and - - - and that the case was made out in the - - -
19 on the record?

20 MR. HARROW: On the record, it may not be
21 the most exceptional circumstance that has ever
22 occurred. No doubt. But given the limited nature -
23 - -

24 CHIEF JUDGE LIPPMAN: That's probably a
25 fair assessment. Keep going, though.

1 MR. HARROW: But given the limited nature
2 of the testimony - - - because I think what Wrotten
3 says is this is in the court's discretion. And
4 courts who make discretionary decisions often balance
5 all the circumstances.

6 JUDGE ABDUS-SALAAM: Counsel, when was the
7 statute amended to include a good cause standard for
8 the probable cause hearing? Wasn't that after
9 Wrotten?

10 MR. HARROW: It was; 2012, Your Honor.

11 JUDGE ABDUS-SALAAM: Okay. And so wasn't
12 there some version of the bill that included
13 testimony by video conference at the dispositional
14 hearing, at some point?

15 MR. HARROW: I think there were
16 negotiations about that, you know, some party wanted
17 it - - -

18 JUDGE ABDUS-SALAAM: That - - - that
19 portion didn't make it into the final bill, did it?

20 MR. HARROW: It did not. The only portion
21 that's in the bill is the 10.08(I).

22 JUDGE ABDUS-SALAAM: That was after
23 Wrotten?

24 MR. HARROW: It was after Wrotten. But I
25 don't think - - -

1 JUDGE ABDUS-SALAAM: What - - - what should
2 we make of that?

3 MR. HARROW: I think that what the court
4 can make of that is that the legislature there struck
5 a balance and said that in a particular class of
6 cases, that is probable cause hearings, it's often
7 appropriate to take testimony by video. And - - -
8 and they had a relatively low good cause standard,
9 which is simply remote testimony.

10 But that doesn't change the background
11 principle that applies, that comes from Wrotten, and
12 that has existed for a long time, which is - - -

13 JUDGE PIGOTT: Well, the principle - - - I
14 think you've got to rest on preliminary hearing
15 versus a substantive hearing, with respect to, in
16 this case, whether or not this man is going to be
17 confined for an unknown period of time. He - - - the
18 preliminary hearing is just exactly that, right? Is
19 there - - - is there reasonable cause to believe.
20 And much like the criminal situation, preliminary
21 hearings are exactly that, they're preliminary and
22 they're generally summary to some degree.

23 But when you get into the substantive part,
24 it seems, just as Judge Abdus-Salaam is suggesting, I
25 think, that there's more to it. You know, this

1 person is facing substantial confinement time. And
2 we don't want to make light of that.

3 MR. HARROW: No question. And that's why
4 we're not arguing for - - - here for a rule that
5 would permit all testimony at dispositional hearings
6 to be taken by video. Only in the narrow and
7 appropriate circumstances with good cause, like here.

8 And if I may, just to add one additional
9 point? I want to assure the court that this - - -

10 JUDGE ABDUS-SALAAM: Good cause - - - is
11 that the standard you're seeking? Good cause, not
12 exceptional circumstance? I'm confused about which
13 standard you're proposing.

14 MR. HARROW: Sure. I think good cause in
15 dispositional hearings, given essent - - - especially
16 that the finder of fact here is - - - is a judge and
17 not a jury, that's appropriate. That comes from the
18 civil rules. That comes from other places.

19 But just one final point to close. I want
20 to assure the court that this is not an attempt by
21 the State to try to regularly introduce video
22 testimony. In fact, the way the scheme now works has
23 been shifted, so that the evaluators are much closer
24 to the trial site, because often Article 10
25 respondents get moved around, as we've seen.

1 again, I think we come back to the issue we were
2 asking you at the beginning, when you talk about
3 speculation, it certainly doesn't appear that that
4 rebuttal, that ten-minute or ten-page rebuttal
5 testimony had a great deal to do with what happened.
6 It really doesn't - - - you wouldn't know it from the
7 record. That's for sure.

8 MR. RISELVATO: Well, the last thing we
9 have from the judge on record saying is I need this
10 to paint - - -

11 CHIEF JUDGE LIPPMAN: Yeah, yeah. But I'm
12 saying in his decision, he didn't come near it, as
13 far as one could see.

14 MR. RISELVATO: He also didn't say that - -
15 - he didn't outright reject the - - -

16 JUDGE PIGOTT: Mr. Harrow makes the point,
17 you know, the - - - and I think he's right, that his
18 experts are generally closer to the - - - to the
19 respondent than yours. And sometimes the respondents
20 have to go far - - - farther, you know, to get an
21 expert, sometimes out-of-state on these things.

22 So wouldn't it be - - - wouldn't it inure
23 to respondents' benefits, not necessarily yours in
24 this particular case, to say there ought to be some
25 discretion within the court, if I can't get my - - -

1 let's assume for a minute that after Dr. Peterson
2 testified, you did want to bring your person in and
3 say what she said was absolute poppycock, and you
4 couldn't afford to bring him in. Wouldn't you like
5 to give the judge at least, you know, room to say,
6 you know, I'd like to have my - - - my client - - -
7 my expert testify?

8 MR. RISELVATO: It would be best if it
9 didn't come in at all, so that we wouldn't have to do
10 that.

11 Again, it's our client who is facing
12 indefinite confinement. And he has the right to
13 confront the witnesses, in person, against him.
14 Their convenience simply can't trump that fundamental
15 due process right to examine someone in person and to
16 get to the core - - -

17 CHIEF JUDGE LIPPMAN: Okay, counsel.
18 Thanks. Appreciate it.

19 MR. RISELVATO: Thank you.

20 CHIEF JUDGE LIPPMAN: Thank you both.

21 (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 The State of New York v. Robert F., No. 53 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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