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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 200

RODOLFO HERNANDEZ,

Appellant.

20 Eagle Street
Albany, New York 12207
November 15, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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1 CHIEF JUDGE DIFIORE: Final matter on this
2 afternoon's calendar is appeal number 200, the People
3 of the State of New York v. Rodolfo Hernandez.

4 MS. PERVUKHIN: Good afternoon.

5 JUDGE RIVERA: Good afternoon.

6 MS. PERVUKHIN: My name is Anna Pervukhin
7 for Rodolfo Hernandez. I'd like to reserve three
8 minutes for rebuttal with the court's permission.

9 CHIEF JUDGE DIFIORE: You may.

10 MS. PERVUKHIN: The People in this case are
11 seeking to radically expand the scope of the excited
12 utterance exception to the hearsay rule. The court
13 has made clear in Edwards that declarations that are
14 prompted by repeated suggestive questions may very
15 well lack the reliability that's inherent in the
16 rule.

17 JUDGE ABDUS-SALAAM: What if the question
18 repeated is, what happened?

19 MS. PERVUKHIN: Well, Your Honor, that's -
20 - - that scenario bears new resemblance to the - - -

21 JUDGE ABDUS-SALAAM: No, but would it - - -
22 forget about what the scenario - - -

23 MS. PERVUKHIN: Yes.

24 JUDGE ABDUS-SALAAM: My question is, what
25 if the question repeated is, what happened?

1 MS. PERVUKHIN: Okay. If it was just the
2 question that was repeated, what happened, I think
3 that there's a point at which the repetition of the
4 same question over and over again, a question that if
5 asked one time would be neutral, if it's repeated
6 hundreds of times, at some point, we must know
7 becomes suggestive, and pressures a response that
8 might not otherwise have been forthcoming.

9 JUDGE RIVERA: Does it matter that the - -
10 - the - - -the person that's being asked the question
11 has particular communicative challenges?

12 MS. PERVUKHIN: Well, yes. I think that
13 certainly some degree of leeway is reasonable in this
14 type of situation. And I think that no one is saying
15 that what the parents did in this case was incorrect;
16 that they did anything wrong. I mean, it's perfectly
17 natural that the parents question this little girl
18 and initiated an investigation, and I think that if
19 the People had chosen to put the complainant on the
20 stand, they might have had an argument for having
21 some of what they've elicited come in as a prompt
22 outcry.

23 But I think we can all sympathize with the
24 prosecution's reluctance to call this little girl. But
25 choices have consequences.

1 JUDGE STEIN: Is it relevant that - - -
2 that the child came off the bus, into the house, and
3 was hysterical through the entire questioning by her
4 parents, and that didn't change through that period
5 of time?

6 MS. PERVUKHIN: Your Honor, that's
7 certainly one of the relevant factors, but it's not
8 the only relevant factor.

9 And another significant factor that this court
10 has acknowledged is relevant in Edwards is the nature and
11 suggestiveness of the questions. And what you have here -
12 - -

13 JUDGE STEIN: But - - - but isn't that
14 considered in the context of the situation; I guess
15 that's really what my question is.

16 MS. PERVUKHIN: Of course.

17 CHIEF JUDGE DIFIORE: Okay.

18 MS. PERVUKHIN: Of course. But even - - -
19 even assuming that this little girl was consistently
20 hysterical throughout the multiple-hour period of
21 time that she was questioned, although, as an aside,
22 we learned at trial that, in fact, that was not the
23 case, because she was calm initially at the hospital.
24 And I believe that babysitter testified that she was
25 calm when she first got off the bus; she didn't start

1 crying until later.

2 But even setting that aside, you have three
3 major bouts of questioning here. Shortly after 3 o'clock,
4 the mom sees this little girl, she's hysterical. She asks
5 many open-ended questions. She gave for well over a dozen
6 different questions that she asked. And she stated that
7 she repeated those questions multiple times. And she
8 acknowledged that she was agitated, which is
9 understandable. And she acknowledged that she encouraged
10 - - -

11 CHIEF JUDGE DIFIORE: Isn't the fact that
12 the child was hysterical, doesn't that suggest that
13 she was unable to fabricate - - -

14 MS. PERVUKHIN: Well, Your Honor - - -

15 CHIEF JUDGE DIFIORE: - - - that she was
16 inconsolable and she was just repeating it?

17 MS. PERVUKHIN: Your Honor, nobody is
18 accusing this little girl of fabricating anything;
19 that is absolutely not our argument. Whether or not
20 someone is fabricating is just one of the factors
21 that's relevant to the excited utterance - - -

22 JUDGE FAHEY: Can we take a step back?
23 Wouldn't she have to do this - - - if you are looking
24 at this case, wouldn't you first off separate the
25 questions that were asked at the home and the

1 questions that were asked at the hospital? I think -
2 - - so let's just talk about the questions at the
3 home. And there, we're talking about the questions
4 themselves that were asked. For them to be
5 suggestive, we'd have to look to the inherent
6 reliability in the - - - in the specific questions
7 that were asked by the parents. And what I think of
8 is, are the questions themselves suggesting answers?
9 If they were asking him, did so and so, name a
10 particular person, and did the defendant or anyone
11 else do something to you.

12 In other words, suggesting an answer to
13 someone who's developmentally disabled, and you could
14 - - - then you may be able to argue that there's an
15 unreliability in the answer.

16 But there's no proof like that here. The
17 questions themselves - - - that's why Judge
18 Abdus-Salaam's question about what happened, that
19 kind of a question contains within it, and the
20 questions that were asked to the child there don't
21 seem to contain within them any unreliability that's
22 inherent to the question.

23 MS. PERVUKHIN: Your Honor, looking at the
24 actual questions that were proposed, in fact, they
25 did suggest answers.

1 CHIEF JUDGE DIFIORE: Um-hum.

2 MS. PERVUKHIN: I think that what's really
3 striking about the - - -

4 CHIEF JUDGE DIFIORE: Give me an example.

5 MS. PERVUKHIN: Okay. So I think what's
6 really striking, I think it might be clearer if I
7 give an example of what they didn't ask. So - - -

8 JUDGE FAHEY: No, no. Just give me an
9 example of what they asked - - -

10 MS. PERVUKHIN: Okay. The example is they
11 asked her - - -

12 JUDGE FAHEY: - - - that you think is
13 unreliable.

14 MS. PERVUKHIN: Okay.

15 JUDGE FAHEY: All right.

16 MS. PERVUKHIN: They asked her if something
17 happened. They asked her whether someone screamed at
18 her, and they asked her if someone did something to
19 her.

20 JUDGE FAHEY: Um-hum.

21 MS. PERVUKHIN: And all of those questions
22 presupposes an assumption that something happened,
23 that someone - - -

24 JUDGE FAHEY: I see. So the question for
25 us then is, are those questions inherently

1 unreliable.

2 MS. PERVUKHIN: Well, the question is
3 whether or not those questions were suggestive, and I
4 think it's very striking - - -

5 JUDGE ABDUS-SALAAM: How are these
6 questions, counsel, different from what happened?
7 Because asking someone what happened suggests that
8 something did happen. And you said, if one were
9 asked what happened - - -

10 MS. PERVUKHIN: Yes.

11 JUDGE ABDUS-SALAAM: - - - without
12 repetition that might be okay.

13 MS. PERVUKHIN: Well, Your Honor, I think
14 it depends on the circumstances of the case. If you
15 look at the prior case law, very often someone is
16 coming to the scene of a crime, they want to help
17 someone, and it's absolutely crystal clear what
18 happened. And they're just seeking to help that
19 person.

20 Here, you have a little girl who's crying, who's
21 hysterical, she goes to the hospital. At the hospital, we
22 find out that she's running a fever, that she has a
23 previous history of urinary tract infections, that she has
24 symptoms that are not inconsistent with another urinary
25 tract infection, and we don't know exactly what the status

1 of that infection was, because the doctor never completed
2 her analysis.

3 JUDGE RIVERA: So is your complaint that
4 the parent should have asked - - - the mother should
5 have asked, what's wrong, as opposed to, what
6 happened?

7 MS. PERVUKHIN: I think that this would be
8 a different case, perhaps, if the parents have asked,
9 are you in pain, are you crying because you're in
10 pain, does something hurt, that somebody, you know,
11 hurt you, do you feel sick, do you feel hot.

12 There's a lot of different directions that the
13 parent's questioning could have gone in, and the
14 questioning that they - - -

15 JUDGE RIVERA: That's a lot to expect of a
16 parent when their child is coming in hysterical, and
17 you're concerned about them.

18 MS. PERVUKHIN: Your Honor, nobody is
19 saying that the parents' questions were incorrect.
20 Nobody is saying that they shouldn't have questioned
21 her, or even that whatever statements were elicited
22 could never come into court. If the People had
23 chosen to put this little girl on the stand, there's
24 an argument that that was the earliest opportunity
25 that she had to communicate what she chose to

1 communicate.

2 But the People chose not to put her on. And
3 when they made that choice, consequences flow from that
4 choice. And one of the consequences is that they have to
5 meet this other burden. They have to - - - it's the
6 People's burden, and they have the burden of showing that
7 in fact this was not an outcry; this was an excited
8 utterance.

9 And that's a very special exception to the
10 hearsay rule. Hearsay is presumptively inadmissible, and
11 this scenario represents a truly radical departure from
12 anything that this court has ever accepted as an excited
13 utterance.

14 Now, I had started talking about the time line
15 here of the questioning. And it's fact intensive, but
16 it's important to really emphasize that after the dozens
17 of questions that the mother asked this child and the
18 encouragement that she gave her, there was another bout of
19 questioning. So she calls the father, the father comes
20 in, she calls the preschool, then the father questions her
21 and asks her multiple questions. And then they all go to
22 the hospital.

23 And then, this is, you know, I think that they
24 get to the hospital at around 4:15, she has this very
25 traumatic exam, we learn from the defense expert that, in

1 fact, the pediatrician here unfortunately did not follow
2 the proper protocols, and this was a very upsetting exam
3 for this little girl. And then the People said - - -

4 JUDGE FAHEY: You mean they didn't use a
5 rape kit?

6 MS. PERVUKHIN: Well, it wasn't just that
7 there was - - - that they didn't utilize a rape kit,
8 I think that what the defense expert had said is that
9 there are people who are trained to question children
10 in these situations, they come in, they engage in
11 play therapy, they use dolls, and they're able to put
12 children at ease, and perhaps elicit a more reliable
13 response.

14 Now here, nothing like that happened. And after
15 this very traumatic experience, the parents question the
16 little girl for ten more minutes. Now, that's like this
17 entire oral argument is ten minutes. That's a really long
18 estimate. And it could have even have been longer,
19 because the exam was at 4:15, we don't know exactly how
20 long it took, but the parents didn't leave the hospital
21 until 7:00. And what were they doing from the end of the
22 exam until they left?

23 That whole time, they were trying to get to the
24 bottom of it. And I think the fact that they were trying
25 to get to the - - -

1 JUDGE ABDUS-SALAAM: The child never
2 changed her answer, did she? She only gave one
3 answer; didn't she?

4 MS. PERVUKHIN: Well, Your Honor, that's
5 not quite right because what happened was the
6 "answer" came into evidence piecemeal. It was like
7 different pieces of a jigsaw puzzle. It didn't come
8 together until she was at the hospital. At first,
9 she said, "Senior Bus", but we don't really know what
10 that meant. And I think that that's really
11 significant.

12 JUDGE STEIN: But then she also made the
13 licking motion. Wasn't that when she was talking to
14 her father at home?

15 MS. PERVUKHIN: Right.

16 JUDGE STEIN: Okay. So that's way - - -
17 that's before the hospital.

18 MS. PERVUKHIN: Right. Correct. But
19 again, that came in filtered through her parents and
20 interpreted by her parents. And there's a certain
21 ambiguity to what she was saying.

22 Now, if you look at other statements of children
23 that come in potentially - - -

24 JUDGE STEIN: But - - - but are we talking
25 about ambiguity here? Isn't that for the jury to

1 decide what her statements meant? We're only talking
2 about whether the statements come in.

3 MS. PERVUKHIN: Your Honor, I think that
4 there is - - - I think that once the jury heard these
5 statements, they were significantly kind of altered
6 and improved on, inadvertently, by the parents.

7 So what happens is, if you look at the - - -
8 compare the hearing testimony with the trial testimony,
9 the hearing testimony, there's dozens of questions. At
10 trial, they reduced the number of questions that they tell
11 the jury about, making it seem like this response is more
12 unequivocal.

13 And then look at what happens at the summation.
14 At the summation, the prosecutor filters this again. She
15 makes it sound even more clear. So the true ambiguity is
16 really lost on the jury. The prosecutor says, she told
17 her mother what happened. The prosecutor claims that she
18 said, Mr. Bus, in response to the question, why is your
19 underwear down; that never happened.

20 She - - - she says that the complainant set her
21 mother straight, and then she said, Mr. Bus, in response
22 to the question, did someone touch you. And then the
23 prosecutor flat out says, this is an - - - a 730. She
24 says, she came home from school claiming her bus driver
25 licked her.

1 So she really made it sound like there was no
2 ambiguity there.

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 MS. PERVUKHIN: The statements that the - -
5 - that the - - -

6 CHIEF JUDGE DIFIORE: Thank you.

7 MS. PERVUKHIN: Okay.

8 CHIEF JUDGE DIFIORE: Counsel.

9 MS. GRADY: Good afternoon. May it please
10 the court. My name is Anne Grady, I represent the
11 People of the State of New York in this matter.

12 Far from asking the court for any expansion of
13 the exception of the hearsay rule of excited utterance,
14 this case presents the question of a routine evidentiary
15 ruling by Justice Rooney that absent them showing that it
16 was an abuse of discretion as a matter of law is presumed
17 correct on appeal.

18 He carefully examined the parents, both parents
19 in his pretrial hearing, he then examined, as he was
20 supposed to do, as Edwards requires, the nature of the
21 startling event, the amount of time that had elapsed, and
22 the activities of the declarant in the interim to
23 ascertain if there had been a significant opportunity to
24 deviate from the truth.

25 He went on to note that the decisive factor is

1 whether the surrounding circumstances reasonably justify
2 the conclusion that the remarks were not made under the
3 impetus of studied reflection.

4 That's page A144 to 47, Justice Rooney pretty
5 much quoting Edwards.

6 So then he looked at those factors in this case.
7 First, the nature of the startling event here is a three-
8 and-a-half year old speech delayed, not cognitively
9 delayed, speech-delayed girl behind the tinted windows of
10 a school bus for up to a half an hour. To this day, we
11 don't actually know the full extent of what she endured
12 during that half an hour.

13 She then - - - her parents testified to the
14 hysteria that this produced. She was breathing
15 erratically, if at all, she was behaving throughout the
16 rest of the day in a manner uncharacteristic for her, and
17 then the time line.

18 The statements occurred first within minutes or
19 seconds of the event as she is coming off the school bus
20 and talking to mom, to father, within the first fifteen to
21 thirty minutes, and then at the hospital, less than four
22 hours later. And do - - -

23 CHIEF JUDGE DIFIORE: So to that point, Ms.
24 Grady, at the hospital, is it problematic to admit -
25 - - to have admitted those statements after the mom

1 and dad had questioned her, and perhaps even spoke
2 about the incident in front of her?

3 MS. GRADY: No, because that's not the
4 test. The test is whether the stress of the
5 situation has abated such - - - such that she could
6 have engaged in studied reflection.

7 So the argument is that there was some sort of
8 medical malpractice committed by the pediatric emergency
9 room doctor.

10 JUDGE PIGOTT: No, I think, as I understand
11 it, following up what the Chief Judge said, I think
12 sometimes we tend to get it backwards and we start,
13 you know, we start saying, well, you know, have
14 things calm down. The question is whether or not,
15 you know, that was an excited utterance. Regardless
16 of what was going on.

17 And it seems to me that excited utterance
18 has gotten stretched an awful long way from the time
19 when somebody says, ouch, you know, or, oh my god, or
20 something like that, to, you know, an hour-and-a-half
21 two hours later after an exam, and the parents ask
22 questions and you say it's still an excited
23 utterance.

24 MS. GRADY: It has, but not by this case.
25 Your Honor is correct. Marx was 1959 when this court

1 stretched excited utterance is beyond res gestae or
2 present sense impressions.

3 JUDGE PIGOTT: Yeah, and we're sorry about
4 that.

5 And it was Brown, actually, after Edwards, that
6 discussed that it is the most clear case on point
7 regarding time and intervening causes. The passage of
8 time alone is not dispositive. All of these are relevant,
9 these are all relevant factors, but none of them make
10 Judge Rooney's ruling an abuse of discretion as a matter
11 of law.

12 JUDGE FAHEY: Well, let's say - - - I think
13 - - - was it Brooks was two-and-a-half hours, I can't
14 remember, I think that was the case, Brooks two-and-
15 a-half hours. Let's say it was error, so is it
16 timeless?

17 MS. GRADY: It's absolutely harmless.

18 JUDGE FAHEY: Only as to the hospital, now.
19 I'm not talking about the questioning at home.

20 MS. GRADY: Then it is all the more
21 harmless - - -

22 JUDGE FAHEY: Um-hum.

23 MS. GRADY: - - - because it was
24 duplicative. If we're only talking about the
25 hospital, harmless error as applied to the hospital

1 statement - - -

2 JUDGE FAHEY: Well, I say the hospital
3 because of the time delay. That's why I said that.

4 MS. GRADY: I understand. Because if - - -
5 if the court were to conclude that because of the
6 passage of time, more specifically, that because of
7 the stress and distress had abated, and she was calm
8 enough for studied reflection such that that
9 statement should not have come in as an excited
10 utterance, that's the test - - -

11 JUDGE PIGOTT: Which statement are you
12 talking about?

13 MS. GRADY: - - - then it is all the more
14 harmless.

15 JUDGE PIGOTT: Sorry. What statement are
16 you talking about now?

17 MS. GRADY: I think the question is how
18 harmless was the hospital statement.

19 JUDGE PIGOTT: And that statement is what?

20 MS. GRADY: That was the only time that she
21 connected the licking to her vagina.

22 JUDGE PIGOTT: What is the statement?

23 MS. GRADY: Her statement - - - the parents
24 asked her, let me get to the time line. The mother -
25 - - this is after the - - - the vaginal exam, and she

1 is hysterically crying, and now the parents are alone
2 with the child, she continues to say, "Senior Bus".
3 Mother asks whether "man bus" had touched her, and
4 the child nodded. That's duplicative. The mother
5 asked where, the child did not respond.

6 The parents both asked what he had done. She
7 made the licking motion, again - - -

8 JUDGE PIGOTT: All right.

9 MS. GRADY: - - - duplicative. And then to
10 answer your question, the parents asked where, and
11 she, at this point, takes the child's - - - the mom's
12 hand and puts it to her vagina.

13 CHIEF JUDGE DIFIORE: All right.

14 MS. GRADY: That's the statement.

15 JUDGE PIGOTT: Why is that a statement, as
16 opposed to a person observing somebody do something?

17 MS. GRADY: Oh, we're not argu - - - we're
18 not trying to dispute that gestures that communicate
19 facts count as utterances - - -

20 JUDGE PIGOTT: What I'm saying is that I'm
21 kind of agreeing with you in the sense that if I
22 said, you know, I saw this little girl do something,
23 you can cross-examine me all you want about that.
24 Whether I saw it, whether it was distance, whether it
25 was time, to say that that's somehow hearsay because

1 I saw it, I - - - I just miss it. I miss - - - I
2 miss the threshold to say this is an exception to the
3 hearsay because I saw her move her tongue.

4 MS. GRADY: Only bec - - - I guess I - - -
5 I would agree with Your Honor if it - - -

6 JUDGE PIGOTT: If it helps.

7 MS. GRADY: - - - if it helps. Frank - - -
8 to be - - - to be, you know, mercenary about it, but
9 I have to, in all intellectual honesty admit, we
10 offered that for the truth of the - - - of what it
11 communicated, which is, he licked my vagina. That's
12 the reason we're offering that. And so it would be,
13 I think - - -

14 JUDGE PIGOTT: That's - - - that - - - all
15 right. I guess that - - -

16 MS. GRADY: - - - disingenuous perhaps - -
17 -

18 JUDGE PIGOTT: So it seems to me that - - -
19 that I - - -

20 MS. GRADY: - - - if I try to say that was
21 mere - - -

22 JUDGE PIGOTT: Let me finish. I think - -
23 - I get it that one of them testifies as to what she
24 did, and you can cross-examine her about that, and
25 then the second thing that she did. Now, the

1 conclusion that you could - - - that you reach as a
2 result of that, which is that she was sexually
3 abused, is something that it would seem to me goes to
4 the weight of the thing after cross-examination. And
5 I - - -

6 MS. GRADY: That's fair.

7 CHIEF JUDGE DIFIORE: And I don't think
8 it's - - -

9 MS. GRADY: That's fair. They - - -
10 perhaps Your Honor is right - - - is more accurate
11 that we were asking the jury to draw an inference
12 from a gesture, and that that's not the same as an
13 utterance or a communication. The - - -

14 JUDGE STEIN: But in any event, he was
15 acquitted of the criminal sexual act.

16 MS. GRADY: That is correct.

17 JUDGE STEIN: Which would have been the
18 charge that related to that, wouldn't it?

19 MS. GRADY: That is correct. What he is
20 convicted of is any contact over or under clothing
21 for - - - for the purpose of sexual gratification.
22 So even the defense's theory that the DNA found in
23 her panties could've been transferred if he had
24 sneezed and then touched her, he's still as guilty as
25 if these statements had never come in.

1 These state - - - if the point - - - the
2 statement regarding putting mom's hand over her
3 vagina is - - - did not contribute to the verdict,
4 which is actually the Constitutional test. The
5 evidence for a non-Constitutional evidentiary ruling
6 error is, of course, simply whether the - - - the
7 remaining evidence is legally sufficient to sustain
8 the charges, which as Your Honor is pointing out, of
9 course they were.

10 JUDGE STEIN: Which standard is it?

11 MS. GRADY: It's the non-Constitutional
12 test. The - - - any Constitutional claim is not
13 preserved for appellate review. This was a simple
14 evidentiary ruling, the kind that we entrust the
15 judges to make.

16 CHIEF JUDGE DIFIORE: Ms. Grady, do you - -
17 - you disagree with the rule that was announced in
18 Sullivan, the Third Department case?

19 MS. GRADY: I do, Your Honor, and so do
20 every other court that's considered the question that
21 I could find. That was, I want to say 1985 or 1989,
22 but it does continue to work mischief. Thank you for
23 bringing that up.

24 CPL 60.20 is about whether a child may testify
25 in court with or without an oath. It's a statutory rule

1 about children testifying in court.

2 The child here did not testify in court, and so
3 it was irrelevant; it is irrelevant. Trial testimony, of
4 course, is about past events. We want to assess the
5 child's ability to recall and accurately report past
6 events.

7 Everything we want, at that point is studied
8 reflection is entirely - - - is apples and oranges from
9 the excited utterance exception, which is about whether
10 the person was incapable of studied reflection. And of
11 course, children, that's their forte. They - - - they are
12 very good reporters of their current distresses, or
13 hunger, or pain.

14 A child can be, if anything, more accurate in
15 the time a - - - while they are still living and reliving
16 this traumatic event, more accurate and more reliable at
17 that point in time than two years later, after - - - after
18 she has been prepped for trial.

19 So - - -

20 CHIEF JUDGE DIFIORE: So those issues
21 conflate competency and veracity; is that what you're
22 saying?

23 MS. GRADY: Yes. Yes. The - - - and - - -
24 yes. I think it's just simply, they are so
25 diametrically opposed and are thinking about

1 different purposes that they have no application.

2 I mean, in this case, the judge did have the
3 benefit of hearing this trial and seeing her, and he
4 concluded that she seemed like a perfectly ordinary
5 five-year-old. And she - - - he did find that she had
6 sufficient intelligence and capacity to justify reception
7 of her testimony as unsworn testimony.

8 So if anything, it does help my case, but it is
9 not relevant really, and I think Hetrick did not give the
10 court a square opportunity to divide these two bodies of
11 law, and I think this case does give the court that
12 opportunity, and it would be very beneficial to clarify
13 both areas of law.

14 CHIEF JUDGE DIFIORE: Thank you, counsel.

15 MS. GRADY: Thank you.

16 CHIEF JUDGE DIFIORE: Ms. Pervukhin.

17 MS. PERVUKHIN: Several things. First of
18 all, I think it's notable that there is no case that
19 this court or - - - has handed down where anywhere
20 near this number of questions has been sanctioned as
21 non-suggestive non-repetitive. It's been one, or
22 two, or three questions; you have dozens of
23 questions, even at home. And if you look at the
24 hospital, it may be many dozens of questions.

25 The time issue. What matters is whether at that

1 time, the person is been continually questioned. In
2 Brown, the person was in a coma. Here, you have this
3 continued suggestive questioning that really demands some
4 sort of a response.

5 I think that the People's argument that this
6 little girl was not cognitively delayed is unethical. As
7 they know, although it was not part of the record on
8 appeal, there was material that was part of the Supreme
9 Court file that stated that she had cognitive delays, and
10 also, the People's old submissions admitted that she had a
11 "developmental delay". But I'm going to leave that aside.

12 JUDGE GARCIA: But counsel, I'm sorry, just
13 to clear something up on the record for me. This
14 victim was found capable to give unsworn testimony?

15 MS. PERVUKHIN: Correct.

16 JUDGE GARCIA: Okay.

17 MS. PERVUKHIN: She was found capable of
18 giving unsworn testimony, but that's also something
19 that's very troubling. If you have a situation where
20 parents can question someone in multiple locations
21 asking any kind of questions, you know, that they
22 want, as long as they don't suggest a particular
23 perpetrator. And there's no outer bound for how long
24 they can continue this.

25 And also, the child doesn't - - - their

1 capacity to testify is irrelevant. Well, that
2 creates a real incentive for people to do an
3 end-around around the confrontation clause and never
4 call a child. Why ever call a child; why ever even
5 have a prompt outcry? Just have the parents come in,
6 whatever questions they ask we can assume they're
7 reasonable, and have the excited utterance come in.

8 So that completely eviscerates the whole
9 point of the excited utterance rule. The whole point
10 is that hearsay is presumptively inadmissible. And
11 you have this exception that the entire purpose of
12 the exception, as this court stated in Edwards, is to
13 make sure that you have this reliability test.

14 In this case, it's not about veracity, and the -
15 - -the rules that this - - - that - - - that the
16 prosecutor discussed regarding veracity aren't applicable
17 to this case. What matters is what happens later in
18 Edwards towards the end, where the court talks about, you
19 know, suggestive questioning, and extended questioning,
20 and whether or not this was truly a spontaneous - - - was
21 this a spontaneous event.

22 There's no sense in which this was a spontaneous
23 event. And given this little girl's difficulties and how
24 suggestible she was, we see how many times she changed her
25 answers when she was prompted to say something differently

1 by the prosecutor. During the 60.20 hearing, he asks her,
2 do you want a red pen, she says, yes. He says, or a blue,
3 she says, okay, blue.

4 This is a little girl who was being asked
5 questions that suggested that some things that someone had
6 done something to her, which may not have been the case,
7 this could have - - - her symptoms were consistent with
8 the urinary tract infection, she had a fever, okay, and
9 she's being subjected to this relentless barrage of
10 suggestive questions, and comes out with statements that
11 in and of themselves would be quite, I think, quite
12 difficult to interpret.

13 We're really relying on the adults to - - -to
14 interpret these statements and - - - and clarify them.
15 And they are imposing their own meaning onto that.

16 So I think that expanding the excited utterance
17 rule in this way sets a very dangerous precedent. They
18 could lead to a lot of unjust - - - a lot of unjust
19 convictions.

20 CHIEF JUDGE DIFIORE: Thank you.

21 MS. PERVUKHIN: Thank you.

22 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Rodolfo Hernandez, No. 200 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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