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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 12

VICTOR GONZALEZ,

Appellant.

20 Eagle Street
Albany, New York 12207
January 9, 2014

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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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: All right. People v.
2 Gonzalez, number 12.

3 Counselor, would you like any rebuttal
4 time?

5 MR. MILLER: Two minutes, Your Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes. Go
7 ahead.

8 MR. MILLER: May it please the court.
9 Mathew Miller from Davis Polk & Wardwell, in
10 association with The Bronx Defenders, for Victor
11 Gonzalez.

12 Victor Gonzalez had a right to an extreme
13 emotional disturbance jury instruction at his trial.
14 He also had a Constitutional right not to have his
15 statements to the People's psychiatrist used against
16 him. The trial court forced him to choose between
17 these two rights - - -

18 CHIEF JUDGE LIPPMAN: Why didn't - - -

19 MR. MILLER: - - - at the - - -

20 CHIEF JUDGE LIPPMAN: Why didn't one waive
21 the other, which is basically what the court was
22 saying?

23 MR. MILLER: Your Honor, the - - - in order
24 to waive a Fifth Amendment right - - -

25 CHIEF JUDGE LIPPMAN: Go ahead.

1 MR. MILLER: - - - at trial, according to
2 the Supreme Court's most recent holding in Cheever v.
3 Kansas, and as the People concede in footnote 8 of
4 their brief, a defendant has to first offer evidence
5 at trial to - - -

6 CHIEF JUDGE LIPPMAN: And what does Cheever
7 say that's relevant to this discussion?

8 MR. MILLER: Cheever says that if a
9 defendant speaks to a government psychiatrist, those
10 statements are protected by the Fifth Amendment, and
11 they may come into evidence on rebuttal. Cheever
12 suggests a Constitutional ceiling on when the
13 prosecution may use those statements on rebuttal.

14 JUDGE SMITH: The Supreme Court has never
15 directly decided, has it, whether if you plead
16 insanity or extreme emotional disturbance and don't
17 put on evidence, whether that's enough to - - - to
18 permit the - - - the government to examine you?

19 MR. MILLER: That's right; they never
20 decided that directly, but what they have decided, in
21 Cheever and in Buchanan, is that in both of those
22 cases the prosecution was allowed to introduce the
23 evidence because the defendant had affirmatively
24 introduced evidence - - -

25 CHIEF JUDGE LIPPMAN: That's the key,

1 right? You've got to affirmatively introduce it?

2 MR. MILLER: That's right, Your Honor, and
3 in this case, contrary to the trial court's ruling,
4 Mr. Gonzalez never affirmatively introduced evidence,
5 he never offered - - -

6 JUDGE SMITH: Your theory, as I understand
7 it, is you never get to the Constitutional question
8 because the statute says you've got to offer
9 evidence.

10 MR. MILLER: The statute says you have - -
11 - the statute does not get triggered until evidence
12 is offer - - - the defendant offers evidence.

13 JUDGE SMITH: And why does that not apply -
14 - - why did he not, by saying I want to be charged,
15 effectively offer evidence - - - offer the evidence
16 of his own statements?

17 MR. MILLER: Your Honor, offer has plain
18 meaning under the - - - in the evidentiary context;
19 it means to affirmatively introduce evidence into the
20 record. We make that argument in our briefs, and
21 tellingly, the People don't respond to the plain
22 meaning argument - - -

23 JUDGE PIGOTT: In doing so - - -

24 MR. MILLER: - - - directly.

25 JUDGE PIGOTT: - - - essentially what

1 you're saying is that you have a case like this one,
2 and the People put in their - - - their evidence, and
3 - - - and the defense makes a determination, at some
4 point, like when the - - - when the statement comes
5 in by the defendant, that - - - because this is an
6 affirmative defense; it has to be asserted, right?
7 You can't - - - so you, at some point - - - the
8 defense, at some point, has to say we're asserting an
9 EED defense, right? And - - - and your argument, I
10 guess, is that that can be done within the context
11 and confines of the People's proof, period, and you
12 don't necessarily have to go to 250 to - - - and get
13 into all of that.

14 MR. MILLER: I think that's right, and
15 trial court held that in People v. McKenzie, that the
16 jury must be instructed on the EED defense when the
17 evidence reasonably supports it. That's what Mr.
18 Gonzalez did here. At the close of the People's case
19 he - - -

20 JUDGE GRAFFEO: And why is what you're
21 proposing - - - why is it fair to the jury to not
22 hear the People's rebuttal to the charge?

23 MR. MILLER: The jury - - - the People here
24 created the entire record in this case. They had
25 responsibility - - -

1 JUDGE GRAFFEO: Right, but there was a
2 statement by the defense attorney that he was
3 withdrawing the notice, so to lead the People to
4 think that EED was not going to be a subject of the
5 case, that your - - - that the defense was going to
6 rely on justification, correct?

7 MR. MILLER: That's correct, Your Honor,
8 but as the People noted below, on page - - -

9 JUDGE GRAFFEO: So - - -

10 MR. MILLER: - - - 393 - - -

11 JUDGE GRAFFEO: So where was their
12 opportunity to address EED?

13 MR. MILLER: The People had the opportunity
14 - - - it was - - - the EED is only in this case
15 because of the People's decision. The People
16 conceded below, on page 393 of the appendix, that
17 when Mr. Gonzalez withdrew his 250.10 notice, he was
18 only withdrawing his ability to present psychiatric
19 evidence, not his ability to assert the defense. And
20 in this case - - -

21 JUDGE GRAFFEO: So you're saying they could
22 have presented psychiatric testimony even though the
23 defense attorney said I'm not going to rely on EED;
24 I'm just going to rely on justification?

25 MR. MILLER: No, Your Honor. We think that

1 - - -

2 JUDGE GRAFFEO: No, they can only put it in
3 under the statutory scheme as rebuttal, correct?

4 MR. MILLER: That's right, and because Mr.
5 Gonzalez never introduced any evidence in this case,
6 the People do not have the opportunity to introduce
7 rebuttal evidence. It's simply unfair - - -

8 JUDGE RIVERA: But so - - -

9 JUDGE GRAFFEO: But you've asked for - - -

10 JUDGE RIVERA: So it sounds - - -

11 JUDGE GRAFFEO: But you've asked for a
12 charge as if you did put EED evidence in.

13 MR. MILLER: We've asked for a charge
14 because, as this court held, the evidence reasonably
15 supported the defense.

16 JUDGE RIVERA: Well - - -

17 CHIEF JUDGE LIPPMAN: You're saying from
18 the People's - - - their evidence - - -

19 MR. MILLER: That's right, Your Honor.

20 CHIEF JUDGE LIPPMAN: - - - you're saying,
21 is your argument.

22 JUDGE SMITH: You're saying you don't need
23 a notice to ask for the charge.

24 MR. MILLER: That's correct, Your Honor.

25 JUDGE RIVERA: Okay. So if I understand

1 where you were going before, you're saying they had
2 the - - - they had the evidence, it was their
3 decision to put it into - - - excuse me. They had
4 the material, it was their decision to put the
5 confession videotape into evidence, they knew the
6 contents, they could have, what, responded to it and
7 rebutted it themselves? That's what I'm not clear
8 about.

9 MR. MILLER: The People made a tactical
10 decision in this case - - -

11 JUDGE RIVERA: Right.

12 MR. MILLER: - - - to put the videotaped
13 statement into evidence. They could have proven
14 their case-in-chief without the use of the videotaped
15 evidence. They - - - they thought that, on balance,
16 the videotaped evidence was more helpful than harmful
17 to them.

18 JUDGE SMITH: Well, they - - -

19 MR. MILLER: And - - -

20 JUDGE SMITH: - - - it'd be unusual to try
21 a murder case without putting in the defendant's
22 confession, wouldn't it?

23 MR. MILLER: There were two statements in
24 this case, Your Honor. There was a videotaped
25 statement and a written statement. They could have

1 decided to put the written statement into the record.
2 They knew that the videotaped - - - they knew, or at
3 least should have known, the videotaped statement
4 constitute - - - contained the elements of the
5 extreme emotional disturbance mitigating defense.

6 JUDGE SMITH: Well, okay - - -

7 JUDGE RIVERA: So you're saying their only
8 choice was not to use it, as opposed to use it and
9 then try to somehow use some other evidence, not - -
10 - not the psychiatrist's testimony but some other
11 evidence to undermine a potential EED defense?

12 MR. MILLER: I think they had a choice not
13 to use the evidence. We think that in trying to use
14 Mr. Gonzalez's Fifth Amendment protected statements,
15 that certainly was not permissible, and that in this
16 circumstance it would have been an abuse of
17 discretion to allow the People to rebut their own
18 evidence - - -

19 JUDGE READ: Well, I think your - - -

20 MR. MILLER: - - - with new evidence.

21 JUDGE READ: - - - I think your question to
22 Judge Rivera's question is probably yes. You're
23 saying that once they made the choice to put the
24 videotape in and they knew the videotape might form
25 the basis for a request for a charge, that was it;

1 they couldn't put the psychiatrist's report in, they
2 couldn't rebut it.

3 MR. MILLER: Unless - - - unless the
4 defendant put on additional evidence, which he never
5 did.

6 JUDGE SMITH: So you're saying they have no
7 right to rebut themselves?

8 MR. MILLER: That's correct, Your Honor. I
9 think it's a fundamental principle - - -

10 JUDGE SMITH: But what about - - - yeah,
11 suppose you're right that - - - that - - - that the
12 defendant, if he'd never submitted a notice, they
13 never could have put anything in, but he did submit a
14 notice and they did examine him and they had the
15 right to examine him. What, in the statute, says
16 that when that has happened, they lose the right to
17 use it just because the defendant withdrew his
18 notice?

19 MR. MILLER: The - - - the statute doesn't
20 say anything about the People being able to introduce
21 evidence in rebuttal.

22 JUDGE SMITH: And, essentially, use isn't -
23 - - you could make an argument that use isn't
24 governed by - - - by 250.10.

25 MR. MILLER: Use by the People?

1 JUDGE SMITH: Yeah, the use of the - - -
2 the 250.10 just tells you when the - - - when the
3 People get the examination. If they lawfully get it,
4 why shouldn't they be allowed to use it?

5 MR. MILLER: Because it is a fundamental
6 principle that the People - - - and unfair to the
7 defendant that the People don't get to introduce
8 evidence on rebuttal of their old evidence. Mr.
9 Gonzalez never introduced any evidence here. It's a
10 fundamental principle of the adversary system that
11 you get to reduce (sic) - - - introduce rebuttal
12 evidence in rebuttal of defense evidence. That's why
13 the statute - - -

14 JUDGE PIGOTT: Did you find any cases that
15 said - - - let's assume that this thing went forward
16 in a little bit different way where the 250 notice
17 was not withdrawn, where you asserted what you
18 asserted, and then you decided - - - you know, you're
19 looking at the whole thing and you think that the EED
20 defense has been properly presented, albeit in the
21 People's case, and you say I'm not calling - - - not
22 calling Dr. Doaks (ph.). Do they have a right,
23 still, to call Dr. - - -

24 MR. MILLER: I - - -

25 JUDGE PIGOTT: - - - their doctor?

1 MR. MILLER: I don't think the People have
2 the right to introduce new evidence on rebuttal in
3 contravention of their own evidence, particularly - -
4 -

5 JUDGE PIGOTT: No, no, I'm - - -

6 MR. MILLER: - - - when - - -

7 JUDGE PIGOTT: - - - I'm thinking
8 procedurally. In other words, it goes along the way
9 it looks like it's going along in this case - - -

10 MR. MILLER: Right.

11 JUDGE PIGOTT: - - - only there's not that
12 - - - there's not that earlier decision not to - - -
13 not to - - - to withdraw the 250 notice. So the 250
14 notice is there.

15 MR. MILLER: Yes.

16 JUDGE PIGOTT: Everybody knows it's going
17 on. For one reason or another, your doctor doesn't
18 show up or you make a tactical decision not to call
19 him, and so - - - or her. And when you do that, does
20 that then preclude the People from using their
21 doctor? In other words, once you don't use yours,
22 they can't use theirs?

23 MR. MILLER: If the defendant never puts on
24 any evidence, there's nothing for the People to
25 rebut.

1 JUDGE PIGOTT: Okay.

2 MR. MILLER: And - - -

3 JUDGE PIGOTT: You mentioned that.

4 MR. MILLER: - - - if there are Fifth
5 Amendment protected statements in the People's
6 purported rebuttal evidence, they can't come in until
7 the defendant waives his Fifth Amendment rights.

8 CHIEF JUDGE LIPPMAN: Okay, counselor,
9 thanks.

10 MR. MILLER: Thank you.

11 CHIEF JUDGE LIPPMAN: Counselor?

12 MR. CODDINGTON: May it please the court.
13 I'm Peter Coddington on behalf of the People.

14 CHIEF JUDGE LIPPMAN: Counselor, why isn't
15 his Fifth Amendment rights violated - - -

16 MR. CODDINGTON: No, okay - - -

17 CHIEF JUDGE LIPPMAN: - - - by your using
18 his own - - -

19 MR. CODDINGTON: - - - I think - - -

20 CHIEF JUDGE LIPPMAN: - - - statements
21 against him.

22 MR. CODDINGTON: - - - before we get to
23 that question, you have to answer the jurisdictional
24 question. I mean, I think by withdrawing the request
25 for EED, he's waived it.

1 CHIEF JUDGE LIPPMAN: Why does that waive
2 his Fifth Amendment right?

3 MR. CODDINGTON: Well, because we don't
4 know what the psychiatrist is going to say. I mean,
5 if there is a Fifth Amendment, just for the purposes
6 of - - -

7 CHIEF JUDGE LIPPMAN: Assume there is,
8 yeah.

9 MR. CODDINGTON: Okay. Assuming there is,
10 it only comes into play if the defendant uses - - -
11 or excuse me, the psychiatrist speaks to the
12 defendant's statements. I mean, if he doesn't speak
13 to something the defendant told him, there's no
14 incrimination. There's no use of the Fifth Amendment
15 - - -

16 CHIEF JUDGE LIPPMAN: He's drawing whatever
17 conclusions he does based on what the defendant told
18 him, no?

19 MR. CODDINGTON: Well, maybe, maybe not.
20 Who knows?

21 JUDGE SMITH: You mean, you're saying that
22 you can call the psych - - - you got an exam - - - a
23 statutory examination of the defendant, and you want
24 to call the psychiatrist who examined him, and maybe
25 - - - maybe he'll testify without regard to his

1 examination, and he'll just talk about general
2 principles of emotional disturbance?

3 MR. CODDINGTON: Or what the defendant
4 looked like, or lots of things that - - -

5 JUDGE PIGOTT: Or the statement he gave - -
6 -

7 MR. CODDINGTON: - - - aren't necessarily
8 the Fifth Amendment.

9 JUDGE PIGOTT: Or the statement he gave.

10 JUDGE SMITH: Did you make an offer of
11 proof to that effect below?

12 MR. CODDINGTON: Well, no, we didn't - - -
13 this didn't come up. This is - - - this is why I
14 think that the - - -

15 JUDGE SMITH: I mean - - -

16 MR. CODDINGTON: - - - the Fifth Amendment
17 claim is waived.

18 JUDGE SMITH: - - - wasn't - - - wasn't - -
19 - wasn't everyone assuming below that you wanted to
20 call the psychiatrist to testify about his
21 examination of the defendant?

22 MR. CODDINGTON: Oh, sure.

23 JUDGE SMITH: And wasn't that in fact true?
24 I mean, shouldn't we assume that too?

25 MR. CODDINGTON: Well, but he withdrew the

1 notice. I mean, he took the defense out of the case.

2 JUDGE SMITH: Okay. And you say he's not
3 entitled to the charge - - - he wasn't entitled to
4 the charge in the first place?

5 MR. CODDINGTON: Oh, I think he might have
6 been entitled to the charge. I mean, based on the
7 statement - - -

8 JUDGE SMITH: Well, you're saying you think
9 - - -

10 MR. CODDINGTON: - - - "I lost my mind".

11 JUDGE SMITH: I'm sorry. Are you saying
12 his withdrawal of the notice disentitled him to the
13 charge?

14 MR. CODDINGTON: Yes, correct.

15 JUDGE SMITH: Even so - - - so even a
16 defendant who puts on no case must give a notice if
17 he wants to rely on an EED defense?

18 MR. CODDINGTON: Oh, yes; the statute says
19 that.

20 JUDGE SMITH: How does that square with the
21 plain language of the statute which says offer - - -
22 it talks about offering psychiatrist evidence?

23 MR. CODDINGTON: Well, it's a spin on our
24 evidence. I mean, remember, by statute, EED - - -

25 JUDGE SMITH: Is it - - - why is spinning

1 your evidence the same as offering his own, if the
2 statute uses the word "offer"?

3 MR. CODDINGTON: Because EED is out of the
4 case without notice, and - - -

5 JUDGE SMITH: But that's your conclusion.

6 MR. CODDINGTON: What?

7 JUDGE SMITH: That's your conclusion. Why
8 do you - - - where in the statute does it say that?

9 MR. CODDINGTON: Well, the statute - - - I
10 mean, Almonor says you can't introduce the defendants
11 unless you give notice.

12 JUDGE SMITH: I thought it said - - -

13 JUDGE ABDUS-SALAAM: But they have - - -

14 JUDGE SMITH: - - - you can't introduce
15 psychiatric evidence unless - - - you can't offer
16 psychiatric evidence. And isn't "offer" a term of
17 art that lawyers understand?

18 MR. CODDINGTON: Well, yes, but I mean,
19 spinning our evidence, I think is an already - - -

20 CHIEF JUDGE LIPPMAN: Yours is the only
21 evidence.

22 MR. CODDINGTON: Excuse me?

23 CHIEF JUDGE LIPPMAN: Yours is the only
24 evidence.

25 MR. CODDINGTON: Correct.

1 CHIEF JUDGE LIPPMAN: So what do you mean
2 spinning your evidence? It's obviously based on your
3 evidence.

4 MR. CODDINGTON: Well, I mean, if you look
5 at the defendant's videotape, I mean, he was speaking
6 in terms of justification at the time.

7 JUDGE PIGOTT: You said before you thought
8 he might be entitled to the EED.

9 MR. CODDINGTON: He's entitled to a charge.
10 He - - - well - - -

11 JUDGE ABDUS-SALAAM: And didn't we decide
12 in McKenzie that you didn't have to give notice?
13 There wasn't any notice in McKenzie and he was
14 entitled to the EED.

15 MR. CODDINGTON: Well, yeah, but I think
16 McKenzie, on the retrial, is going to assume rebuttal
17 and the whole rest of it.

18 JUDGE PIGOTT: But let - - -

19 JUDGE ABDUS-SALAAM: Well, that's a
20 retrial, but on the first case - - -

21 JUDGE PIGOTT: Let me - - - just in terms
22 of basic fairness - - -

23 MR. CODDINGTON: Yeah.

24 JUDGE PIGOTT: - - - I mean, you're putting
25 together a case, the People are putting together a

1 case, and this is the case they've put together, and
2 it's - - - it's at least arguable that there is an
3 extreme emotional disturbance issue in this case. I
4 would think you, as the People, would want the jury
5 to make the right decision, and if there's a
6 possibility that this defendant was suffering from
7 EED at the time, they should be told that they had
8 that opportunity and they should render an
9 appropriate verdict. You, arguing obviously the
10 opposite side of that, saying regardless of what he
11 says - - -

12 MR. CODDINGTON: No - - -

13 JUDGE PIGOTT: - - - here before the police
14 - - -

15 MR. CODDINGTON: No, no, no, no, no, no,
16 our position below is simply that we should be able
17 to rebut it. We should be able to call our
18 psychiatrist. No, we agreed below he could get the
19 defense.

20 JUDGE PIGOTT: Okay. But then we're really
21 down to what 250 says, which says you're entitled to
22 do that if they're going to offer it, as Judge Smith
23 was talking about - - -

24 MR. CODDINGTON: Yeah, right.

25 JUDGE PIGOTT: - - - and if they're not

1 offering it, you can't use it.

2 MR. CODDINGTON: Well, the statement - - -
3 I mean, the evidence here is the defendant's
4 statement to the assistant district attorney. He
5 said I lost my mind. I mean, that's problem one.

6 JUDGE SMITH: Yeah, but they didn't offer
7 it.

8 MR. CODDINGTON: What?

9 JUDGE SMITH: You offered it.

10 MR. CODDINGTON: Well, we offered it but
11 without the defense. I mean, the defense wasn't in
12 the case. It was - - - we were offering it - - -

13 JUDGE RIVERA: You had a choice at this
14 point. You had a choice. You knew the content. You
15 knew the potential interpretation of the content.
16 You made a choice. He's saying - - -

17 MR. CODDINGTON: Well - - -

18 JUDGE RIVERA: - - - once you've made that
19 choice, he's now entitled to request the charge.

20 MR. CODDINGTON: Well, I mean, the way the
21 case is tried, the charge wasn't part of the case. I
22 mean, it wasn't on the People's radar; it wasn't on
23 anybody's radar until the charge conference, at which
24 point - - -

25 JUDGE RIVERA: I guess he's arguing why

1 wasn't it on your radar, if you knew the contents of
2 the videotape?

3 MR. CODDINGTON: Because it was - - -

4 JUDGE RIVERA: And actually, it strikes me
5 that - - -

6 MR. CODDINGTON: Because - - -

7 JUDGE RIVERA: - - - the ADA and defense
8 counsel had actually been discussing this back and
9 forth.

10 MR. CODDINGTON: Yeah, they had been. I
11 mean, we have - - - have a right to notice. The
12 notice of the case is going to be in there. The jury
13 has the right to hear - - - hear a voir dire on the -
14 - -

15 JUDGE RIVERA: Well, I thought defense
16 counsel asked are you putting on the videotape.

17 MR. CODDINGTON: Excuse me?

18 JUDGE RIVERA: I thought defense counsel
19 asked - - - maybe I'm not - - -

20 MR. CODDINGTON: Yeah, we - - -

21 JUDGE RIVERA: - - - remembering the record
22 correctly.

23 MR. CODDINGTON: - - - said we would, yes.
24 Yeah, we did. And if he said we were going to offer
25 EED, we would have offered the tape. I mean, that

1 wasn't the problem.

2 JUDGE SMITH: Yeah, but what we're debating
3 or what you're debating, I guess, is whether you're
4 entitled to notice of his - - - of his - - - to pre-
5 trial notice of his request for a charge.

6 MR. CODDINGTON: Well - - -

7 JUDGE SMITH: I mean, I could imagine a
8 statute that says that, but I don't see where this
9 statute says it.

10 MR. CODDINGTON: Well, no, the charge here
11 is EED, and the statute does say we're entitled to -
12 - he said so in Almonor.

13 JUDGE PIGOTT: Well, it's an affirmative
14 defense - - -

15 MR. CODDINGTON: Yeah, right.

16 JUDGE PIGOTT: - - - so obviously you are.

17 MR. CODDINGTON: Right.

18 JUDGE PIGOTT: You said earlier, and I'm
19 curious about this, let's assume that you have this
20 doctor and he doesn't - - - he does the examination.

21 MR. CODDINGTON: Right.

22 JUDGE PIGOTT: All right? You now want to
23 offer him and the defense objects, and you say, all
24 right, we will not use anything that this defendant
25 said to this doctor in that examination - - -

1 MR. CODDINGTON: Okay.

2 JUDGE PIGOTT: - - - but we're going to ask
3 this doctor to testify as to his professional opinion
4 with respect to the statements that were made by the
5 defendant in the course of this investigation and
6 give his opinion as to whether or not he was
7 suffering from EED. Right? And that would not be a
8 Fifth Amendment problem?

9 MR. CODDINGTON: I don't think so, no.

10 JUDGE PIGOTT: Okay.

11 MR. CODDINGTON: No, I don't think - - -
12 and that's why I think that the issue is really
13 waived in this case because we don't know what the
14 psychiatrist would have said.

15 JUDGE GRAFFEO: If 250.10 really only
16 applies to the introduction of psychiatric - - -

17 MR. CODDINGTON: Yeah.

18 JUDGE GRAFFEO: - - - testimony, so that it
19 really doesn't apply to what we're dealing with in
20 this case, which is - - -

21 MR. CODDINGTON: Yeah.

22 JUDGE GRAFFEO: - - - the use of the
23 defendant's statement, is there any case law, is
24 there any precedent that you've been able to find
25 that would say what should be the proper procedure in

1 light of that?

2 MR. CODDINGTON: I'm not sure I understand
3 the question.

4 JUDGE GRAFFEO: If we look at the statute
5 as just being a notice provision - - -

6 MR. CODDINGTON: Right.

7 JUDGE GRAFFEO: - - - versus the offering
8 of psychiatric evidence - - -

9 MR. CODDINGTON: Right.

10 JUDGE GRAFFEO: - - - and that's not really
11 what we have here; what we have is the use of the
12 defendant's confession - - -

13 MR. CODDINGTON: Well, but it was - - -

14 JUDGE GRAFFEO: - - - is there any other
15 case law that addresses - - -

16 MR. CODDINGTON: Well, Diaz a little bit;
17 you wrote the opinion. I mean, he can testify as to
18 his mental state, but he doesn't get the charge.

19 JUDGE SMITH: Well, but he - - - but he
20 didn't testify.

21 MR. CODDINGTON: No, but I mean - - -

22 JUDGE SMITH: And he didn't offer any
23 evidence - - -

24 MR. CODDINGTON: No, but I mean - - -

25 JUDGE SMITH: In Diaz, the - - - the word

1 "offer" wasn't a problem; he offered something. He
2 offered his own testimony. Here you have to say
3 "offer" means "spin".

4 MR. CODDINGTON: Yes, right. And I am
5 saying "offer" means "spin", because I mean, 250.10
6 took the defense out of the case. The defense was -
7 - -

8 JUDGE SMITH: Would it have been so hard
9 for you to - - - to - - - he puts on no evidence - -
10 -

11 MR. CODDINGTON: Yeah.

12 JUDGE SMITH: - - - and asks for a charge
13 in extreme emotional disturbance; is it so hard to
14 make the common sense argument, look what this guy
15 did here; this wasn't (sic) an extreme emotional
16 disturbance?

17 MR. CODDINGTON: Well, he could have made
18 the argument, sure.

19 JUDGE SMITH: I mean, weren't you - - - I
20 guess what I'm really saying is weren't you asking
21 for trouble by insisting on trying to get this
22 psychiatrist in?

23 MR. CODDINGTON: No, I don't think so.
24 Why? I mean, the statute gives us the right to rebut
25 him. This was not part of the case.

1 JUDGE SMITH: A right to rebut a guy who
2 doesn't put on a case?

3 MR. CODDINGTON: Yes. Yes. He's putting a
4 spin on our evidence. I mean, the statement was
5 offered in support of justification. I mean, if you
6 look at the whole statement: The guy beat me up, we
7 had a fight, I lost my mind, you know, and I kept
8 hitting him. I mean, that's it; it's three
9 statements, or rather three phrases in the midst of,
10 I forgot what, a forty-minute statement, something
11 like that. I mean, these are just three phrases in a
12 statement that was justification.

13 JUDGE PIGOTT: Well - - -

14 MR. CODDINGTON: This is how the case was
15 tried.

16 JUDGE PIGOTT: - - - yeah, but I mean, kind
17 of the post-homicide activities could point someone
18 in a direction of someone suffering from EED.

19 MR. CODDINGTON: Well, no, his statement at
20 the time was he was trying to protect Mrs. Estrada.
21 I mean, he didn't want the police coming down and
22 hurting - - -

23 JUDGE SMITH: Nothing stopped you from
24 saying all of this so the jury.

25 MR. CODDINGTON: Excuse me?

1 JUDGE SMITH: You could have said all of
2 this to the jury - - -

3 MR. CODDINGTON: Yes, we could have - - -

4 JUDGE SMITH: - - - you didn't need a
5 shrink to say this.

6 MR. CODDINGTON: - - - and in fact we did,
7 in fact, I mean, a lot of that. But I mean, you
8 know, this is EED; the defense is out of the case by
9 statute. I mean, 250.10 says so. You said so in
10 Diaz.

11 JUDGE RIVERA: But you have - - -

12 MR. CODDINGTON: What?

13 JUDGE RIVERA: Following on what - - -

14 MR. CODDINGTON: Yeah.

15 JUDGE RIVERA: - - - Judge Smith is saying,
16 the reality is even without the charge, you've got to
17 be commenting on this language where he's saying - -
18 -

19 MR. CODDINGTON: Yeah.

20 JUDGE RIVERA: - - - I'm out of control
21 anyway.

22 MR. CODDINGTON: Yeah, right, we did, but
23 in the context of a justification defense. I mean,
24 there wasn't a psychiatric spin, EED affirmative
25 defense, you know, reduce it to manslaughter. I

1 mean, it was an all or nothing; I'm either justified
2 or I'm not. That was our summation. And we
3 commented on the evidence.

4 CHIEF JUDGE LIPPMAN: Okay, counselor.

5 MR. CODDINGTON: Okay.

6 CHIEF JUDGE LIPPMAN: Thanks, counselor.

7 Counselor, rebuttal?

8 MR. MILLER: Briefly, Your Honor. I think,
9 as the court has indicated, section 250.10 does not
10 say that failure to provide notice doesn't let the
11 defense go to the jury; it says that the penalty for
12 failing to provide notice is a preclusion of the
13 defendant offering psychiatric evidence. Mr.
14 Gonzalez never did that in this case.

15 Mr. Gonzalez and the People in this case
16 would have been in exactly the same position before
17 the jury. They would have both been able to argue;
18 Mr. Gonzalez, based on a record he had no hand in
19 creating - - -

20 JUDGE PIGOTT: If the case goes in, as Mr.
21 Coddington points out, the way it did, and at the end
22 of the People's case it occurs to the defense that
23 there's sufficient evidence here that you're entitled
24 to an EED defense and then - - - and so you assert
25 that for the first time, which is an affirmative

1 defense that has to be asserted, so you do; what's
2 wrong with the People saying, fine, we now know that
3 that's an issue; we're going to call Dr. Doaks. And,
4 as he points out, we're not going to use the
5 statement because he doesn't use his, but we are
6 going to have this doctor testify as to his opinion
7 with respect to the statements made by the defendant
8 in the context of this crime.

9 MR. MILLER: That would violate the
10 fundamental principle that the People don't have the
11 opportunity to rebut their own evidence.

12 JUDGE PIGOTT: That's the only reason, is
13 that because you think that their evidence shows an
14 EED, that they can't then put in more evidence to
15 show that it doesn't?

16 MR. MILLER: That's right; the People
17 don't have the opportunity - - - the rebuttal statute
18 says - - -

19 JUDGE SMITH: You also say there's a Fifth
20 Amendment problem.

21 MR. MILLER: There's a Fifth Amendment but
22 the hypothetical - - -

23 JUDGE PIGOTT: He took it out.

24 MR. MILLER: - - - is that there is no
25 Fifth Amendment issue. The rebuttal statute says the

1 People may introduce rebuttal evidence of defense
2 evidence. Mr. Gonzalez never offered any defense
3 evidence in this case and there's nothing to rebut.

4 CHIEF JUDGE LIPPMAN: Okay. Thank you.

5 MR. MILLER: Thank you.

6 CHIEF JUDGE LIPPMAN: Thank you both.

7 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of The People of the State of New York v. Victor Gonzalez, No. 12, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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