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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

DANIEL A. LUDWIG,

No. 166
(Papers sealed)

Appellant.

PEOPLE,

Respondent,

-against-

WILLIAM CULLEN,

No. 167
(Papers sealed)

Appellant.

20 Eagle Street
Albany, New York 12207
September 17, 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

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1
2 CHIEF JUDGE LIPPMAN: People v. Ludwig and
3 People v. Cullen.

4 Counselor, would you like rebuttal time?

5 MR. SHIFFRIN: Please, Your Honor. Two
6 minutes, please.

7 CHIEF JUDGE LIPPMAN: Two minutes, go
8 ahead. You're on.

9 MR. SHIFFRIN: May it please the court,
10 Brian Shiffrin on behalf of Daniel Ludwig. The
11 admission over objection of hearsay testimony from
12 the complainant's mother and brother of the
13 complainant's detailed allegations of sex crimes
14 committed by Mr. Ludwig and of the complainant's
15 statements to them that these allegations are true
16 and "I'm not kidding", impermissibly and
17 prejudicially bolstered the complainant's
18 credibility.

19 For more than a hundred years this court
20 has held that it's impermissible to introduce hearsay
21 prior consistent statements which bolster a
22 complainant's credibility and the - - -

23 JUDGE SMITH: But couldn't the same
24 objection have been made to the victim's testimony to
25 the same conversation?

1 MR. SHIFFRIN: The victim's testimony was -
2 - - was qualitatively different, Your Honor. The
3 victim's testimony at appendix pages 115 and 116 is I
4 - - - I - - - I - - - her testimony was I sort of
5 told my brother what happened and then I told my
6 mother what happened. No - - - no details, and she
7 didn't say, as - - - as they - - - they repeated,
8 either the details of - - - that - - - of the sex act
9 or that "I said to them it's true, it's true, it's
10 true". That's the mother's testimony over a victim.

11 JUDGE SMITH: Well, it's obv - - - I - - -
12 I can see why you're more - - - why - - - why you
13 feel you were hurt more by the brother's and the
14 mother's testimony than by the child's, the - - - the
15 girl's. But didn't you open the door? I mean, we -
16 - - or can - - - can you be charged with having
17 opened the door by not objecting the first time?

18 MR. SHIFFRIN: Re - - - respectfully, Your
19 Honor, this is similar to in People v. Rosario, which
20 - - - in which this court reversed for pri - - - for
21 the admission of prior consistent statement. In
22 footnote 3 the court pointed out there was not an
23 objection to the note coming in, but there's - - -
24 but it was prejudicially reversible error to allow
25 the testimony of the person - - - the cousin, I

1 believe, who had the conversation.

2 So the fact that - - - that - - - that
3 without objection the testimony came in, I answered
4 the - - - answered the question how - - - how this
5 all started in terms of investigation. So none of
6 that's needed anymore, but none of those details come
7 in. It should be pointed out that - - - that - - -
8 and this is critical, because this testimony comes in
9 for the - - - the testimony from the mother and
10 brother had to be coming in for the truth. We know
11 that for three separate reasons. One, there was no
12 limiting instruction with respect to the mother's
13 testimony that the girl told her in detail the sex
14 act, and she repeatedly said it was true. There was
15 no - - -

16 JUDGE GRAFFEO: Would that have made a
17 difference here? Would that have cleansed the - - -

18 MR. SHIFFRIN: Well, actually, that's
19 leading to my secondary reasons.

20 JUDGE GRAFFEO: - - - testimony?

21 MR. SHIFFRIN: The - - - the - - - the
22 testimony, which is the instruction with regard to
23 the brother, was only with respect to the smell,
24 isn't for the truth, that no instruction with respect
25 to the brother as to the - - - as to the sex act or

1 the "I'm not kidding". But on - - - on - - - in
2 respect to your question, Your Honor, the - - - no,
3 it would not have made a difference but for two - - -
4 for a few separate reasons. The - - - for instance,
5 first of all, this is the type of test - - -
6 testimony which should never come in, the detail - -
7 - detailed allegations, even when there's a proper -
8 - -

9 JUDGE GRAFFEO: Well, I think that was
10 going to be my next question. Is there anything
11 these two witnesses could have said, or you feel
12 their testimony, in total, was an error?

13 MR. SHIFFRIN: They had no - - - was - - -
14 they had no - - - nonhear - - - hearsay information.
15 They - - - there - - - there was - - -

16 JUDGE READ: So they couldn't say - - -
17 they couldn't say any - - -

18 JUDGE GRAFFEO: There's - - - there's
19 nothing they can say that is - - - that explains the
20 timing of the complaint by the child or the
21 circumstances of when the investigation started?

22 MR. SHIFFRIN: A - - - a - - - a few things
23 with respect to that. First of all, the - - - the
24 timing of the complaint already came out through the
25 complainant's un - - - unobjected-to testimony. They

1 had nothing to add to that. Neither of them
2 testified that they - - - they contacted the police.
3 Indeed, the mother said she didn't contact the
4 police. The brother never testify - - - was never
5 asked of that. The - - -

6 JUDGE SMITH: And are you - - - are - - -
7 are you saying that the - - - well, first of all,
8 you're not saying there's nothing they could say.
9 You - - - you're say - - - it was okay for them to
10 testify to the statement about the smell?

11 MR. SHIFFRIN: Yes, and - - - and - - - and
12 that's the - - -

13 JUDGE SMITH: You didn't object to that?

14 MR. SHIFFRIN: That's correct.

15 JUDGE SMITH: But - - - but - - - but - - -
16 but you're also saying that as to the - - - as to the
17 statement, the answer to the question, how do you
18 know, the - - - the answer to that, you're saying,
19 had no possible purpose except it's true?

20 MR. SHIFFRIN: It had no possible purpose,
21 and there was no limiting instruction with either - -
22 - with - - - with respect to having no or - - -

23 JUDGE SMITH: Well, if there - - - if
24 there'd been a limiting instruction, I'm confused - -
25 -

1 MR. SHIFFRIN: I - - -

2 JUDGE SMITH: - - - to what you - - - what
3 do think they should do?

4 MR. SHIFFRIN: I don't think it should come
5 in, because the - - - the - - - how - - - how do you
6 know and - - - and the details, which don't come in
7 with prompt complaint exception, don't come in with
8 the recent fabrication exception, you can't over - -
9 - you can't disregard that, first of all. It's when
10 a type - - - type of testimony - - -

11 JUDGE SMITH: Okay, I'm - - - I'm trying to
12 ask what I think is a softball question. Am I right
13 in thinking that there's no possible purpose except
14 the - - - except the truth of the matter stated for
15 putting in those statements?

16 MR. SHIFFRIN: Yes - - - yes, Your Honor.
17 The - - - the testimony that "it's true, it's true,
18 it's true", cannot be considered for anything other
19 than truth, even if there had been a limiting
20 instruction. That's - - - that's the essence of our
21 point. The testimony that "I'm not kidding" can only
22 come in for that purpose, and no other purpose was
23 asserted.

24 Over the course of litigation, in the
25 different stages of appeal, four separate theories

1 were - - - were - - - had been put forth by the
2 People. First, at trial they argued it was relevant
3 for the witnesses' state of mind. The witnesses'
4 state - - - witnesses' state of mind, the brother's
5 state of mind, is simply irrelevant. We - - - we - -
6 - the - - - it was not put in issue here. And if the
7 witness - - - if - - - if the recipient of
8 prejudicial hearsay, state of mind always can - - -
9 can come in, there's no rule - - - there's no rule on
10 these prior consistent statements. We just
11 overturned the rule.

12 Same on appeal, the Appellate Division
13 affirmed on a different theory which is to show how
14 the investigation began, which, again, was not
15 asserted at the trial court, wasn't a holding of the
16 trial court in - - - for - - - putting aside
17 LaFontaine and Concepcion, the jury was never
18 instructed this comes in for how the investigation
19 began. There - - - there - - - and there's no
20 testimony about any police officers getting involved.
21 It just nev - - - nev - - - never happened here.

22 The - - - on appeal they had two more
23 rationales. They argue as to refute recent
24 fabrication claims. Again, never rose to the trial
25 level, never reached by the trial level. But even if

1 it had been, the motive to fabricate, first of all,
2 preexisted, the - - - that - - - that statement,
3 number one. Number two, with - - - with recent
4 fabrication re - - - refutation, you can't get into
5 details of the allegations, which came in here. And
6 number three, there was no limiting instruction to
7 the jury about that. That - - - that has to fall.

8 And the final theory that they urge now is
9 to complete the narrative. The narrative of this
10 claim occurred fourteen months prior to - - - to - -
11 - to the statement. This - - - this is not
12 completion of the narrative. This was repetition of
13 the narrative. The - - - this was not interwoven in
14 - - - into the crime itself.

15 JUDGE SMITH: Is it - - - is it possible
16 that your - - - that your client gets an advantage
17 from the way it came - - - came in? That is, having
18 the somewhat less powerful statement of the child of
19 what - - - as to what she said, which came in without
20 objection. You like that because it fixes the time,
21 and you make the argument, ah, that's just the time
22 she wanted to spend the vacation with her brother.
23 Then the more compelling testimony you object to.
24 Could you be accused of trying to - - - to cherry-
25 pick the testimony?

1 MR. SHIFFRIN: Respectfully no, Your Honor,
2 because it's not - - - it's not that I'm trying to
3 keep out - - - under no circumstances, even if the
4 complainant had not testified, can the - - - can the
5 details of what she said come - - - come in. That's
6 - - - the - - - none of the exceptions this court has
7 ever - - - has ever - - - has ever held exist with
8 respect to prior consistent statement testimony - - -

9 JUDGE SMITH: Well, what about, you know -
10 - -

11 MR. SHIFFRIN: - - - and the details come
12 in.

13 JUDGE SMITH: - - - how - - - why - - - why
14 was what little she - - - I - - - I agree with you
15 that she didn't say much. But why was what little
16 she did say - - - she says I told my dad. Or I'm
17 sorry, I told my mom about what - - - about what
18 happened with my dad. Or I told my brother about
19 what happened with my dad. Why isn't that just as
20 objectionable in principle as the stuff you're
21 complaining about now?

22 MR. SHIFFRIN: It - - - it - - - well, my
23 own answer is it could have objected to, but it's not
24 as - - - your question is as objectionable? What - -
25 - what happened in - - -

1 JUDGE SMITH: I - - - oh, I don't mean it's
2 prejudicial. But it's - - - it's - - - but it's
3 objectionable on exactly the same ground?

4 MR. SHIFFRIN: In - - - in part on the same
5 grounds. It's objectionable be - - - because it's
6 prior consistent statement. But - - - but without
7 revealing the details and without saying over and
8 over again that "it's true, it's true, it's true",
9 "I'm not kidding". The - - - the impact is - - - is
10 far - - - is far less. The - - - in - - -

11 JUDGE SMITH: Well, I guess what I'm saying
12 is is it okay for you to let in the low-impact stuff
13 because you like the timing, and it helps you, and
14 then when it becomes high-impact you can say I
15 object?

16 MR. SHIFFRIN: But it's - - - it's not a
17 question of - - - of - - - of letting in. The - - -
18 the - - -

19 JUDGE PIGOTT: Well, can't your answer to
20 that be yes?

21 MR. SHIFFRIN: The answer's - - - is yes,
22 Your Honor. The - - - thank you, Your Honor. The -
23 - - the - - - because the - - - the prejudice is - -
24 - is so great and - - - and there's no - - - there's
25 the - - - whether or not the testimony of the

1 complainant came in has no impact on whether this
2 court should find it reversible error to permit the
3 mother and brother to - - - to testify, as they did,
4 as to the details and - - - and to her repeating over
5 - - - over again how it was true, the - - - this
6 court in held in People v. Kozlowski that - - - that
7 it crosses the line to - - - for witnesses to say
8 either directly or indirectly, to - - - to imply that
9 they believe a witness. That's what happened here
10 with the mother and brother. The - - - the essence
11 of their testimony is if they - - - if they're
12 questioning her, we believe her. That is
13 impermissible. Indeed, when the grandmother
14 attempted to testify- - -

15 CHIEF JUDGE LIPPMAN: The victim's
16 statement is really the only - - - the only real
17 evidence, right?

18 MR. SHIFFRIN: It's the only real evidence.
19 That's why - - - thank you.

20 CHIEF JUDGE LIPPMAN: So - - - so your
21 argument, we keep repeating that over and over again?

22 MR. SHIFFRIN: Yes, and which is the very
23 rationale - - - this court has stated repeatedly why
24 it's - - - it's error to permit prior consistent
25 statements.

1 JUDGE SMITH: Well, I mean, it isn't just
2 hu - - - I mean, you - - - you really wouldn't be as
3 upset about it if it were nothing but straight
4 repetition of her trial testimony. But the whole
5 dramatic scene of her blurting this out to her
6 brother, and her brother and her mother almost
7 tormenting her to get it out of it, that obviously
8 makes her seem more credible, doesn't it?

9 MR. SHIFFRIN: I - - - I - - - I disagree
10 with the predicate. I think it make - - - make - - -
11 it makes it worse. But I would - - - I would still
12 be upset, because the repetition of even just of her
13 prior testimony as to the details of the sexual act
14 is very, very prejudicial. Repetition doesn't
15 increase trustworthiness. This court has said this
16 numerous times in cases of - - - none of those cases
17 are cited by the People.

18 JUDGE SMITH: Well, I mean, I - - - I mean,
19 I - - - yeah. You may remember, I - - - I - - - I've
20 said some things about, you know, repetition doesn't
21 increase trustworthiness but juries can figure that
22 out. Aren't - - - you - - - you're hurt by more than
23 the repetition here. You're hurt by the fact this is
24 very powerful evidence?

25 MR. SHIFFRIN: Absolutely, Your Honor.

1 CHIEF JUDGE LIPPMAN: Okay.

2 MR. SHIFFRIN: Thank you, Your Honor.

3 CHIEF JUDGE LIPPMAN: Counsel?

4 MR. DUNHAM: May it please the court,
5 Matthew Dunham appearing once again.

6 CHIEF JUDGE LIPPMAN: How - - - counselor,
7 how can it be okay that this keeps coming together?
8 The victim's statements are really what this is all
9 about, and it keeps coming in, coming in in different
10 forms and ways, some, as Judge Smith says, theatr - -
11 - theatrical. But it's repeated over and over again.
12 How could that not be prejudicial?

13 MR. DUNHAM: Well, it's - - - I think it's
14 not prejudicial, or if it - - - well, if it was
15 prejudicial, it was the defense's own fault because
16 they threw the doors wide open to this line of
17 testimony during their opening statement and during
18 their cross-examination of the victim. In the
19 opening statement, the defense counsel states, she
20 says, "This victim told her brother what happened.
21 She told her mother what happened. She told the CPS
22 worker. She told a counselor from Catholic Family
23 Center. She told the East Rochester Police. She
24 told the prosecutor, and then she went to grand jury
25 and told her story."

1 JUDGE SMITH: Was - - - hadn't - - - hadn't
2 some of that already been mentioned in the People's
3 opening statement?

4 MR. DUNHAM: Well, some of it was
5 mentioned. But I think the - - - the fact that the
6 counsel picked up on it and used this and went down
7 this line - - - and then I - - - if I could, just the
8 way she finishes it off then, defense counsel says,
9 "I don't think you're going to hear that anyone along
10 the line ever questioned the truthfulness of her
11 allegations until she got here." Implying this
12 witness is lying, and I'm going to expose it on
13 cross-examination. I think at that point the door
14 had been thrown open, and I think it continues - - -

15 JUDGE SMITH: How - - - the opening the
16 door usually is used when there's something - - -
17 when - - - when there's some unfairness or in this
18 case, there'd be unfairness to the People. How - - -
19 what - - - what is the unfairness in his making that
20 argument and then later objecting to the boy's and
21 the mother's testimony?

22 MR. DUNHAM: Well - - -

23 JUDGE SMITH: I mean, it sounds to me like
24 all he's doing is failing - - - failing to pro - - -
25 I mean if, indeed, he thinks all this testimony is

1 going to help him and he's keeping it out, he's
2 hurting himself.

3 MR. DUNHAM: Well, I - - - I think that's
4 part of - - - they kind of wanted it both ways, and I
5 think the court, Your Honor, touched on that a little
6 bit during defense counsel's argument. No, she - - -
7 defense counsel wanted this to come in her own way.
8 She didn't want it to come in - - - all - - - she
9 wanted certain information in. She didn't object to
10 some stuff, and then she wanted to be able to cut it
11 off when she wanted to cut it off. But - - -

12 JUDGE SMITH: Explain how it's - - - how
13 this is - - - explain the unfairness to the People of
14 doing it that way.

15 MR. DUNHAM: Well, the unfairness is that
16 the - - - that the jury doesn't hear the full story.
17 What they hear is this witness has fabricated - - -

18 JUDGE SMITH: Well - - - well, the jury's
19 not supposed to hear un - - - inadmissible evidence.

20 MR. DUNHAM: Well, and it - - - and it may
21 have been inadmissible under the current rules prior
22 to defense counsel coming forward and saying she's
23 lying. But once the defense counsel says she's
24 lying, and I - - - I don't know if she used the words
25 - - -

1 JUDGE SMITH: Does - - -

2 MR. DUNHAM: - - - exactly. She danced
3 around it a little bit.

4 JUDGE SMITH: Well, you - - - you're saying
5 - - - you - - - you're talking - - - you're saying
6 that it comes under to rebut recent fabrication?

7 MR. DUNHAM: Yes.

8 JUDGE SMITH: But how - - - but what - - -
9 what - - - what - - - but the motive to fabricate it
10 had already arisen?

11 MR. DUNHAM: You're saying by the - - - by
12 the People's - - -

13 JUDGE SMITH: By - - - by the time of the
14 out-of-court statement.

15 MR. DUNHAM: Well, but - - - well, I still
16 think it comes in that way because it's - - - well,
17 what they're saying is this whole thing was a
18 fabrication. And that from the outset - - -

19 JUDGE SMITH: Yeah. Yeah, they're saying
20 it's a fabrication. But the - - - you can't rebut
21 that by saying she said it twenty times, unless the
22 first nineteen were at a time before that she had any
23 motive to fabricate. And then you can say it. But I
24 - - - I don't see where that - - - that applies here.

25 MR. DUNHAM: Well, even - - - you know, we

1 - - - we have other arguments here, as well, if - - -
2 if - - - if it doesn't apply - - -

3 JUDGE SMITH: Let me ask you - - - I'm sure
4 you do. But let me - - - what was the basis on which
5 the courts below let this in? I mean they didn't say
6 opening the door. What did they say?

7 MR. DUNHAM: No, they - - - they - - - I
8 think they agreed with the People's argument that
9 this goes to the - - - the effect that it had on the
10 brother, and - - - and what he did next and how this
11 - - -

12 JUDGE SMITH: Why - - - why is it - - - why
13 does the jury have to know the effect on the brother
14 and what the brother did next other than - - - other
15 than tell the mother, which is just as inadmissible
16 as - - - as the first thing. Why - - - why - - - why
17 is there anything the jury was supposed to know about
18 what the - - - what narrative were you completing?

19 MR. DUNHAM: Well, we're completing the
20 narrative of - - - of how - - - of how this
21 investigation got started and how this case came to
22 be, which I think was highly relevant in this case.

23 JUDGE SMITH: I mean is - - - is it
24 generally the rule that you can - - - you - - - you -
25 - - you can - - - and if your ordinary criminal case

1 someone comes to the police and says oh, Joe Jones
2 robbed Harry Smith around the corner, you can - - -
3 can you put it on the ca - - - on the People's case
4 hearsay statements about whether - - - the police
5 tell everything about how the investigation got
6 started? Anonymous witnesses came to me and said
7 this crime happened?

8 MR. DUNHAM: I think there's a limit to it.
9 And I - - - I think - - -

10 JUDGE SMITH: I would - - - I would have
11 thought there was an absolute rule against it.

12 MR. DUNHAM: Well, I think one of the
13 issues in this case is - - - is defense counsel's
14 lack of preservation of some of these particulars in
15 some of these issues. Defense counsel let in quite a
16 bit of testimony before objecting and - - -

17 JUDGE PIGOTT: You can do that, though.
18 Yeah, I mean you can - - - you can let evidence in
19 that, you know, may be helpful to you even though it
20 - - - it may be objectionable. I mean if - - - if
21 the - - - if the defense wants to do that and you
22 want to sit back and let them do it, that's perfectly
23 fine. But at some point, usually when it starts to
24 hurt, you can object. That - - - I mean there's - -
25 - there's nothing that says because you failed to

1 object to a hearsay statement yesterday you can no
2 longer object to hearsay statements today?

3 MR. DUNHAM: Correct, the defense - - - I
4 would agree the defense can make strategic decisions
5 along the way. I think what I'm getting at is that
6 if we really pare down what was objected to and what
7 is preserved, I think it's - - - it's not as - - - as
8 much as it sounds, and I think defense counsel wants
9 it to sound like she preserved all of this. What - -
10 - first of all, she never objected on the grounds
11 that it was bolstering. She objected that it was
12 hearsay.

13 JUDGE SMITH: Is - - - ought - - - isn't
14 bolstering just another way of saying hearsay? I
15 mean isn't - - - isn't the bolstering rule a
16 subcategory of the hearsay rule?

17 MR. DUNHAM: It is. It is, but I think
18 that defense counsel should be required to specify.
19 Especially when, in this case, the court seems to be
20 being - - - it was a bit confused possibly by - - -
21 by the objection.

22 JUDGE PIGOTT: Because I thought that you
23 could object that it was hearsay, and then whoever is
24 offering that proof has to prove that there's an
25 exception to the hearsay rule.

1 MR. DUNHAM: Yes, and then I think, in this
2 case, the - - - the off - - - the prosecutor offered
3 one up. And I think that - - - then it kind of - - -
4 this whole issue kind of went down a road that it
5 seemed that maybe the issue was being missed. And I
6 - - - I don't think the court was grasping the issue.
7 And at that point, I think it's incumbent upon
8 defense counsel to say hold on, judge. I'm not
9 objecting because of this reason. What I'm trying to
10 say is this. And even if they don't use the word
11 "bolstering" it just - - - it never went down that
12 road. And - - - and - - - and the court should have
13 had the opportunity to correct this error, if it was
14 error, or make a ruling and it just never got that
15 opportunity.

16 CHIEF JUDGE LIPPMAN: Okay, thanks,
17 counselor.

18 MR. DUNHAM: Thank you.

19 CHIEF JUDGE LIPPMAN: Rebuttal, counselor?

20 MR. SHIFFRIN: A few quick points, Your
21 Honor. First of all, the pre - - - People below
22 never preserved either the argument that there was a
23 door opening by the defendant with - - - with respect
24 to his opening statement. Or - - - and never argued
25 at the trial court that this testimony should come in

1 to re - - - to refute a recent fabrication claim.
2 This is - - - the - - - nei - - - neither of those
3 arguments were made either at the trial court or at
4 the Appellate Division. And - - - and the People's
5 pres - - - preservation requirements are the same as
6 the defendant's.

7 Second, the defense counsel did not argue
8 recent fabrication in - - - in her opening statement.
9 The only attorney who mentioned fabrication in the
10 opening was the prosecutor at the appendix pages 80-
11 - - - 82 through 85. That was - - - the prosecution
12 starts off first and talks about fabrication, not the
13 defense attorney.

14 Third, if we adopt the position of the
15 People that - - - well, if it shows how - - - how the
16 investig - - - investigation came about, again, we -
17 - - we've just ended the rule. Because in every case
18 there's an investigation, so you'll always let in
19 prior consistent statements.

20 And finally, the objection is correctly - -
21 - is a hearsay objection. Bolstering is the
22 prejudicial impact of the admission of impermissible
23 hearsay. And therefore, the correct objection is
24 hearsay. Thank you, Your Honors.

25 CHIEF JUDGE LIPPMAN: Okay, thank you.

1 Counselor on Cullen?

2 MS. McDERMOTT: Two minutes for rebuttal,
3 please.

4 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
5 ahead.

6 MS. McDERMOTT: May it please the court,
7 Kristen McDermott from the Hiscock Legal Aid Society
8 for William Cullen. This case is actually very
9 similar to Ludwig. Here the Fourth Department found
10 that the prior consistent statements from the
11 complainant's mother and her counselor were not
12 admitted for their truth. The difference - - -

13 JUDGE SMITH: I mean it's similar to it,
14 but I don't see that - - - that it had the kind of
15 impact in your case that it had in - - - in Ludwig.

16 MS. McDERMOTT: I mean, in - - - in terms
17 of the counselor's testimony, it was just pure
18 repetition. The mother's testimony did add the layer
19 - - -

20 JUDGE SMITH: Did you object to the
21 counselor's testimony?

22 MS. McDERMOTT: Yes, the counselor - - -

23 JUDGE SMITH: Oh, you did the counselor's,
24 but you didn't object to her, to - - - to the victim,
25 telling that she told the counselor?

1 MS. McDERMOTT: Right, the counselor's and
2 the mother's were objected to. The complainant's
3 came in without objection. The - - - the mother's
4 testimony did add a layer of double hearsay to the
5 whole thing where she testified that both complainant
6 and the counselor told her about the disclosures. So
7 that was actually additional information.

8 JUDGE SMITH: But if that hadn't happened -
9 - - I mean what's the jury supp - - - the jury knows
10 that sometime before the trial the victim told
11 somebody about this. Big news, she told her
12 counselor and her mother. So what? I mean you don't
13 have the kind of story that you have in Ludwig of the
14 - - - the - - - the - - - the - - - the child sort of
15 blurting out this revealing statement and her mother
16 and brother working on her to get her to - - - to - -
17 - to - - - which would - - - bolsters her credibility
18 enormously. You don't have the kind - - - that kind
19 of thing here.

20 MS. McDERMOTT: I mean, we might have a
21 more difficult harmless error argument, but I don't
22 think that that means - - -

23 CHIEF JUDGE LIPPMAN: Well, you also have
24 his own letters, right - - -

25 MS. McDERMOTT: Yes.

1 CHIEF JUDGE LIPPMAN: - - - that
2 incriminate him? Doesn't that put this case in a
3 very different context than the other one?

4 MS. McDERMOTT: Well, I mean, I think this
5 - - - this was not harmless, if - - - if that's what
6 Your Honor's saying. This case was largely based on
7 the complainant's credibility. Even the letters were
8 based on her credibility. I mean, those five letters
9 that were in the group home - - -

10 CHIEF JUDGE LIPPMAN: Right.

11 MS. McDERMOTT: - - - only came from her.
12 The sixth letter has a very strange history that
13 doesn't make a lot of sense in the context of the
14 case. And I think it's very likely that a jury
15 pretty much dis - - - disregarded that letter,
16 because it just doesn't make a whole lot of sense.

17 CHIEF JUDGE LIPPMAN: So you think the
18 letters are irrelevant to what went in?

19 MS. McDERMOTT: Not completely irrelevant,
20 but I think that her credibility is still paramount
21 here.

22 JUDGE SMITH: The sixth - - - I was - - - I
23 was - - - I was confused myself about that sixth
24 letter. Was that letter actually written earlier in
25 time - - - or it's apparently written earlier in time

1 than all the events that were the subject of the
2 indictment?

3 MS. McDERMOTT: It seems like it would have
4 to have been, because although Michelle (ph.) Cullen
5 turned it over in September 2008, much later, she's
6 claimed to have found it in her house when
7 complainant and Mr. Cullen moved out. Now,
8 complainant had never seen the letter, and she's
9 claimed that the first act of rape didn't happen for
10 four months after they moved out - - -

11 JUDGE SMITH: So the - - -

12 MS. McDERMOTT: - - - of the house.

13 JUDGE SMITH: So the - - - the inference
14 would be that the defendant wrote it and never sent
15 it?

16 MS. McDERMOTT: That - - - I mean but - - -
17 but he would have had to have written it after moving
18 out of the house. Written a very, very incriminating
19 - - -

20 JUDGE SMITH: Sure - - - but it sure makes
21 him sound like a rapist.

22 MS. McDERMOTT: No, and - - - and on its
23 face it appears as an incriminating piece of
24 evidence, but when you look into the story you
25 realize it doesn't make any sense in the context.

1 The - - - the only explanation would be that he would
2 have to bring an incriminating letter to his
3 ex-wife's house where complainant nev - - - didn't
4 live, never visited, and just place it there for
5 someone to find.

6 So I - - - I know that the jury was aware
7 of the timing of this letter and the problems with
8 it, because there actually was a jury note asking to
9 hear about when complainant saw Exhibit 3-A. So I
10 think it's very likely that the jury may have picked
11 up on this. And - - - and the fact is that it really
12 all comes back to her credibility. Because if they -
13 - - if they said okay, we can't rely on that note - -
14 -

15 CHIEF JUDGE LIPPMAN: But isn't - - - in -
16 - - in your case isn't there less repeated discussion
17 of the - - - of the specific details of what went on
18 here? Isn't it a little different what - - - what
19 came in here as opposed to the other case?

20 MS. McDERMOTT: It - - - it is different,
21 but I don't think that that makes it admissible.

22 JUDGE READ: Well, there's not much beyond
23 the fact of the disclosure and the timing of the
24 disclosure.

25 MS. McDERMOTT: Well - - -

1 JUDGE READ: There's really no detail about
2 the disclosure?

3 MS. McDERMOTT: Right, there - - - there
4 wasn't any detail.

5 JUDGE READ: That's still objectionable?

6 MS. McDERMOTT: It is. I mean that's pure
7 prompt outcry right there. Prompt outcry is just the
8 fact and the nature of the disclosure.

9 CHIEF JUDGE LIPPMAN: Yeah, but the impact
10 of it - - - as Judge Smith said, the impact of it is
11 - - - is so much less, isn't it?

12 MS. McDERMOTT: It may be less, but I don't
13 think that it's nothing. I think that it is
14 prejudicial. I think that bringing in a counselor
15 who's a professional witness, who has probably some
16 more credibility with the jury than the complainant
17 does, and having her repeat the fact that there was a
18 disclosure. And the - - - to have the mother say
19 that the counselor repeated the disclosure to her. I
20 think all of this - - - this repetition really could
21 go to convincing the jury that this disclosure meant
22 something, that this enhances, bolsters the
23 complainant's credibility.

24 Even to the extent that the prejudice here
25 is lower than it was in Ludwig, the probative value

1 is pretty much nothing. There's - - - there's no
2 probative value to these statements at all. So even
3 in just a traditional probative versus prejudicial
4 analysis, there's no reason to admit these statements
5 at all. So they really never should have come in.

6 CHIEF JUDGE LIPPMAN: Anything else,
7 counselor?

8 MS. McDERMOTT: If I could address
9 ineffectiveness - - -

10 CHIEF JUDGE LIPPMAN: Sure.

11 MS. McDERMOTT: - - - very quickly.

12 CHIEF JUDGE LIPPMAN: Go ahead.

13 MS. McDERMOTT: There were several critical
14 errors that defense counsel made in this case. I
15 think importantly, he elicited evidence of dozens of
16 uncharged rapes.

17 JUDGE SMITH: Wasn't - - - wasn't he - - -
18 I mean, it may - - - may not have been very
19 successful, but wasn't it re - - - an attempt to - -
20 - to - - - to get her to testify to such a ghastly
21 story that no one would believe it?

22 MS. McDERMOTT: I don't think so. I think
23 it's clear from the way it came out that that was not
24 a strategy because he said isn't it true that you
25 testified yesterday that it was every day? That was

1 just a false statement. He was just confused about
2 what she had testified to. He then repeated that, by
3 the way, in summation saying I believe she testified
4 that it was every single day. So he - - - I think he
5 was just - - - he was just confused about what had
6 happened. But I also don't think that that would be
7 re - - - a remotely reasonable strategy to get the
8 complainant to accuse your client of ten - - -

9 JUDGE SMITH: I mean but if you - - - if
10 you - - - if you can get the - - - yeah, I mean, if -
11 - - if you can get the complainant to accuse your
12 client of being, you know, part of the 9/11
13 conspiracy or something, obviously, you've undermined
14 the - - - the complainant's credibility. Wasn't this
15 an unsuccessful attempt to achieve something like
16 that?

17 MS. McDERMOTT: I mean, I don't believe so,
18 but even if it was, these statements were not
19 inherently incredible. There's nothing about - - -
20 this wasn't a 9/11 conspiracy claim. Her saying
21 we've lived alone in a house for two weeks, the two
22 of us and he raped me two to three times a week.
23 That's - - - there's nothing really all that
24 incredible about that, and the jury may very well
25 have believed her. And the danger there is - - - is

1 just as in Molineux evidence is that the jury will
2 convict just because they think he's a bad guy.

3 JUDGE SMITH: But - - - what about the
4 problem that the jury, the only - - - yeah, if the
5 jury is not inclined to bel - - - I mean it - - - it
6 all - - - it all depends on her credibility, anyway.
7 If the jury thinks she's credible, you don't need all
8 these extra three rapes a week. If the jury doesn't
9 think she's credible, she's not going to be any more
10 credible when she testifies to a million more rapes.

11 MS. McDERMOTT: Well, I think the problem
12 there is that there was an issue here with regard to
13 the time periods of the Counts III through VI. And
14 so ev - - - even if the jury may have thought well,
15 that couldn't have happened during the December visit
16 because of what the caseworker said, they may have
17 been more inclined to just throw up their hands and
18 not care about the time periods because this is
19 somebody raping his daughter up to forty times. Why
20 would they care whether that criminal sexual act - -
21 -

22 JUDGE SMITH: The logical conclusion of
23 that argument, though, would be that the error would
24 be harmful only as to Counts IV through VI.

25 MS. McDERMOTT: It - - - it's possible.

1 It's possible. Although I do think it probably had
2 an effect on - - - on everything.

3 In addition, this case is very similar to
4 Fisher in that counsel didn't object to a slew of
5 prosecutorial misconduct that I think was very, very
6 harmful in this case. The DA said - - - asked the
7 jury to bring justice for the victim, made comments
8 such as her mother may have failed her, her father
9 definitely failed her. Let's not let the criminal
10 justice system do the same. That's very, very
11 improper and very prejudicial. It had no relevance
12 in this case.

13 And finally, as we alluded to, the failure
14 to object to the amend - - - the constructive
15 amendment of the indictment and - - - and make any
16 preju - - -

17 JUDGE SMITH: And - - - and what is it that
18 you call constructive amendment? That's the charge
19 to the jury?

20 MS. McDERMOTT: Right, well, that's - - -

21 JUDGE SMITH: What did - - - what did the
22 judge tell them about the time period?

23 MS. McDERMOTT: The - - - the judge
24 expanded it for both Counts III and IV and V and VI.

25 CHIEF JUDGE LIPPMAN: That really represent

1 the big - - - a big deal to expand it?

2 MS. McDERMOTT: For Counts V and VI,
3 definitely. Because there's a very good chance that
4 because counsel didn't make a prejudice argument
5 there, Mr. Cullen may have been acquitted of those
6 because the jury may have found that the December
7 visit - - -

8 JUDGE SMITH: What - - - what is - - - what
9 is the - - - what prejudice could he have complained
10 of?

11 MS. McDERMOTT: Well, the entire - - - I
12 mean there was a - - - the big part of the defense
13 strategy here was time periods, saying, you know - -
14 -

15 JUDGE SMITH: Well, I mean, I - - - I
16 understand that he complained of the fact that he - -
17 - they - - - they could convict - - - he's obviously
18 more likely to convict. That's why the judge did it.
19 What's the unfairness? How is it - - - how - - - how
20 - - - how did this operate to make the trial less
21 fair?

22 MS. McDERMOTT: The - - - the defense
23 wasn't prepared to have to prove that Mr. Cullen
24 didn't rape the complainant during the November
25 visit. And - - - and - - - or, I'm sorry, commit the

1 criminal sexual act during the November visit. So by
2 expanding the time periods, all of a sudden the
3 defense had to scramble and come up with the fact
4 that this couldn't have happened during the November
5 visit, when before they had only prepared to say this
6 couldn't have happened during this December visit,
7 which never happened. Thank you.

8 CHIEF JUDGE LIPPMAN: Okay, counselor.

9 MR. MAXWELL: James Maxwell for the People.
10 Good afternoon, may it please the court.

11 CHIEF JUDGE LIPPMAN: Go - - - go ahead.

12 MR. MAXWELL: Just to go into the second
13 issue very briefly, I hope. The - - - the attorney
14 had to answer the judge, and he answered with candor.
15 And he felt that no, he couldn't assert prejudice.
16 And I don't think it would serve any purpose to
17 remand for another trial for maybe to get a lawyer
18 who wouldn't have candor.

19 JUDGE SMITH: I mean, some - - - not - - -
20 not - - - not - - - there are some generally ethical
21 lawyers who wouldn't be quite that candid in that
22 situation. Is that not - - -

23 MR. MAXWELL: But he shouldn't be penalized
24 for being candid. And the judge I think had already
25 indicated he was going to charge the jury what about

1 - - - about the concept of on or about. And it was
2 part of the case that the - - - the thirteen year old
3 wasn't great on dates, and that was part of the case.
4 I think if you look at the overall performance of the
5 defense attorney, it was meaningful and that that
6 issue should be rejected.

7 JUDGE SMITH: Explain - - - explain why the
8 - - - why the - - - the - - - her disclosures to the
9 counselor and the mother were admissible?

10 MR. MAXWELL: Okay, I'd point you to your
11 own writing, there's a concurrence and dissent in
12 People v. Rosario.

13 JUDGE SMITH: Well, you - - - you persuaded
14 me - - -

15 MR. MAXWELL: Right.

16 JUDGE SMITH: - - - but you've got six
17 other people you've got to work on.

18 MR. MAXWELL: All right, well, let me give
19 it a shot.

20 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

21 MR. MAXWELL: The - - - the reading of your
22 case there in tandem with People v. Torrel Smith,
23 your more recent case where six of you talked about
24 letting in hearsay through the police officer on the
25 description, I think dovetails into leading this

1 court to take a short step, but an important step, in
2 letting the trial judges know that they should have
3 some discretion and some authority to let in some of
4 this evidence that I think should come in in - - - in
5 cases like this.

6 Now here, the evidence that came in was
7 extremely minor. The evidence through the mom was
8 virtually nonexistent. It's almost comical to see
9 the - - - our - - - my pros - - - my brother
10 prosecutor trying to get the witness to say yes, she
11 told me over the phone that dad woke up - - - she
12 woke up and dad was next to her naked, and she just
13 didn't go there. Okay, so we didn't really get
14 anything in through mom.

15 Then with the counselor, the judge took
16 control of the questioning and made a very narrow
17 inquiry. Was there a disclosure by the victim that
18 the - - - the dad did some sexual misconduct? What
19 date was it? It was a very limited thing immediately
20 followed by the judge saying this is not evidence
21 that he's done anything wrong. And he says well,
22 it's hearsay, but it's coming in to show what the
23 witness did. And again says it's not evidence he did
24 anything wro - - - he did anything wrong.

25 So it's emphatic that this is - - - this is

1 - - - well, what I think what he meant by saying it's
2 hearsay that it was - - - and if it was hearsay it
3 wasn't coming in at all - - - that it was coming in
4 for a nonhearsay purpose, a really minor purpose. As
5 is - - - as is clear from the record, that witness
6 really didn't - - - the - - - the counselor named
7 Gould, she really didn't do much other than recover
8 the letters and she did relay - - -

9 JUDGE SMITH: Was - - - was the evidence
10 overwhelming? And do you need - - - do you need that
11 extra - - - that sixth letter to make it
12 overwhelming?

13 MR. MAXWELL: I think it was - - - it was
14 overwhelming even with just the five letters and
15 perhaps even without the letters. And - - -

16 CHIEF JUDGE LIPPMAN: But the letters
17 certainly help?

18 MR. MAXWELL: The letters, he - - - he
19 looks - - -

20 JUDGE SMITH: The - - - the - - - the - - -
21 the sixth - - - the sixth letter is possibly the most
22 disgusting thing you could imagine.

23 MR. MAXWELL: Yes.

24 JUDGE SMITH: Although it doesn't - - - as
25 far as I know, doesn't refer to any rape in the time

1 period in the indictment?

2 MR. MAXWELL: Right, but I think you have
3 to look at the big picture. And how that letter got
4 from one place to another, it is curious.

5 CHIEF JUDGE LIPPMAN: What's your
6 speculation as to how it got there?

7 MR. MAXWELL: But it's still his
8 handwriting. It's still his codes - - -

9 CHIEF JUDGE LIPPMAN: So how's it there?
10 You don't know?

11 MR. MAXWELL: Well, it - - - it's his code
12 words for various things. It's - - -

13 JUDGE SMITH: Is - - - is - - - is the
14 reason that - - - is the reason that both sides find
15 this so inexplicable is that maybe it discredits both
16 the defendant and the complaining witness? That, in
17 fact, there was much more relationship - - - there
18 was a relationship at a time that she never testified
19 to?

20 MR. MAXWELL: That's possible, and it's
21 possible - - - I mean we had to try and identify - -
22 - because she was over twelve and we couldn't use the
23 course of criminal - - - course of sexual
24 conduct-type offense, we had to try and isolate
25 individual instances. There were many more

1 instances. And children, even getting into their
2 teenage years, can't always pinpoint when things
3 started, when things stopped, what was going on when.
4 But I would like to suggest seven reasons why you
5 should adopt Judge Smith's rule for - - - for - - -

6 CHIEF JUDGE LIPPMAN: Go ahead, kick them
7 off.

8 MR. MAXWELL: Give me - - - just give me -
9 - - give me about a minute.

10 CHIEF JUDGE LIPPMAN: Go ahead.

11 JUDGE PIGOTT: Well, there's only six of
12 us. Well, go ahead.

13 MR. MAXWELL: Well, he's going to have to
14 stay with you on this.

15 JUDGE PIGOTT: Okay.

16 CHIEF JUDGE LIPPMAN: Go ahead, seven
17 reasons.

18 MR. MAXWELL: All right, number one, it's
19 going to be like a David Letterman thing but there
20 are only seven. The jury, once they hear it from the
21 victim, they would naturally expect to hear it from
22 the mother, from the counselor, and it doesn't really
23 add much but it really could make the jury wonder if
24 we didn't - - - don't even call those witness or we
25 call mom, we don't even ask her. So one is the jury

1 would expect it. It's fair to the jury for them to
2 hear it.

3 Two is that it explains the conduct of the
4 third party, which wasn't real vital in this case but
5 could be in another.

6 Three is that it's not admitted for - - -
7 if it's not admitted for the truth, then under the
8 Torrel Smith case that some reasoning - - - if it's -
9 - - if it comes in through the victim as non - - -
10 for nonhearsay purposes or as nonhearsay it should
11 come in through the third parties as well.

12 Fourth, it harmonizes with the child sex
13 abuse accommodation syndrome evidence, which is
14 admissible and part of these type of cases.

15 Fifth, it counterbalances the - - - there
16 was delay so she must be disbelieved argument that -
17 - - that happens in some of these cases and was going
18 on here.

19 Next, it - - - it's similar to the
20 reasoning behind the prompt complaint rule. That is,
21 without it is the jury going to be left wondering,
22 gee, can we really believe this person?

23 Seventh, it's fair to give a complete
24 picture whether you call it - - -

25 JUDGE SMITH: And how many - - - how many

1 of those seven arguments were made - - - did the
2 prosecution make at trial?

3 MR. MAXWELL: Well, the problem is, and you
4 know, that when the judge called the parties up to
5 the bench and had a - - - a little talk about this
6 when the mom was testifying, he goes back on the
7 record and says I'm going to limit it but I'm going
8 to let the - - - the - - - some limited testimony for
9 the reasons I just discussed at the bench and because
10 they already heard it from the - - - from the - - -
11 from the - - -

12 JUDGE SMITH: So - - - so in theory every
13 one of those arguments could have been made - - -

14 MR. MAXWELL: Yeah.

15 JUDGE SMITH: - - - and they'll never know?

16 MR. MAXWELL: Never know. Then the other -
17 - - and then when the other witness, Abigail Gould,
18 testified the only reason he gave was it explains
19 what she did.

20 So that is the state of the record. I
21 admit it, perhaps that we should have done more.
22 Perhaps the defense should have made a record. It's
23 not preserved, in my view, when the judge - - -
24 there's an objection and the judge says I'm going to
25 limit, but I'm going to give - - - give some to each

1 side.

2 And it is very limited to the point where
3 we never really got anything out of mom. And the - -
4 - under the People v. Heide that I cite, in those
5 circumstances the defense should have come back and
6 said well, I'm not satisfied with just getting it
7 limited and so it's not preserved.

8 The other thing I would suggest before I -
9 - - before I yield the floor is that it - - - it
10 should come in. And the judge could give a curative
11 instruction or a limiting instruction to explain to
12 the jury that - - - you know, in case there's some
13 concern that the jury is somehow going to think
14 because of repetition they're going to believe it
15 that, you know, the mere fact that it's said, the
16 mere fact that it's repeated, doesn't mean that the
17 person who's this third-party witness actually saw
18 what happened.

19 And you could give a very brief instruction
20 on it from the trial - - - for the - - - the trial
21 court to give a very brief instruction and move on.
22 I think these two cases, Ludwig and this one, show
23 judges, trial judges, kind of unsure. I think
24 they're - - - they're - - -

25 JUDGE RIVERA: Does - - - does it matter

1 who says it? Just going back to that point about I
2 think your adversary's suggesting it matters who says
3 it. Perhaps they speak with an authoritative voice.
4 Does that matter?

5 MR. MAXWELL: I think it does matter, but I
6 think - - - I think you also should - - - should
7 consider juror expectations. If - - - if the - - -
8 the child or the teenager says it happened and I told
9 my mom or I told my counselor, I think the jury's
10 going to expect - - - you called the counselor and
11 they - - - they don't say that the child said this?
12 Not - - - not just - - - not because it - - - it's
13 true or not true just because she said it, but how
14 come they didn't ask that person? Or - - - and then
15 they're not so much authoritative as they're kind of
16 the - - - the explanation of how it came out.

17 And was she halting, was she angry,
18 demeanor. Well, if you're going to argue from the
19 defense side that you shouldn't believe her because
20 it was a delay, well, let's be fair to the jurors and
21 to the People. Let's let it all out there. Let's
22 show how it came out. What was going on when it came
23 out? I think, in fairness, we should have been able
24 to do a lot more with the counselor and with mom in
25 this trial. And I think that the trial was very fair

1 to the defendant.

2 CHIEF JUDGE LIPPMAN: Okay, counselor.

3 Thanks.

4 MR. MAXWELL: Thank you. I'd ask you to
5 affirm.

6 CHIEF JUDGE LIPPMAN: Thank you.

7 Counselor, rebuttal?

8 MS. McDERMOTT: First, I'd just like to
9 point out, as Your Honor was alluding, this is not
10 preserved. As in Rosario, if the DA's urging that
11 this court change the law, that's something that
12 requires preservation.

13 But I think if this court is inclined to
14 change this longstanding rule against prior
15 consistent statements, this is not the case to do it.
16 In this case - - -

17 CHIEF JUDGE LIPPMAN: If we don't - - - if
18 we don't change it, you win?

19 MS. McDERMOTT: Yes.

20 CHIEF JUDGE LIPPMAN: You should win the
21 case?

22 MS. McDERMOTT: I - - - yes, because there
23 was - - - there was - - -

24 CHIEF JUDGE LIPPMAN: In the context of
25 this case what came in, the - - - the incriminating

1 letters. You still feel that it's not overwhelming?

2 MS. McDERMOTT: I do. I - - - it's - - -
3 it's not harmless error here just because I think it
4 all comes back to complainant's credibility. And
5 when you're bolstering her credibility, you just - -
6 - I mean we just don't know what effect that had on
7 the jury. And it's likely that it had a big effect.
8 And so I - - - I don't think that the evidence is
9 overwhelming here.

10 I'd just like to point out I think that my
11 adversary referred to the limiting instruction that
12 was given. That limiting instruction was, I think,
13 more confusing than helpful because it said that it
14 explained the subsequent conduct of the witness.
15 That - - - the - - - there was no subsequent conduct
16 of the counselor for it to explain. There was
17 nothing else the jury heard that the counselor did.
18 So I don't think that that could have possibly helped
19 them to know how to use the evidence.

20 Just - - - I'd just like to say again, over
21 - - - overruling the longstanding prohibition against
22 prior consistent statements I think would be a bad
23 idea. I think the current rule is a good one. There
24 are two exceptions that I think serve a very good
25 purpose, and they - - - they strike a good balance

1 against - - - between the defendant's right to a fair
2 trial and the DA's ability to fairly present his
3 case. And under the principles of stare decisis you
4 need a compelling reason to abandon long-existing
5 rules, and I don't think that we have that here.

6 CHIEF JUDGE LIPPMAN: Okay, counselor.

7 MS. McDERMOTT: Thank you.

8 CHIEF JUDGE LIPPMAN: Thanks. Thank all of
9 you.

10 (Court is adjourned)

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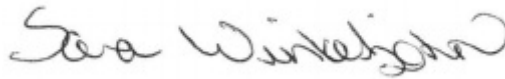
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Daniel A. Ludwig, No. 166, and People v. Cullen, No. 167 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

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Date: September 20, 2014