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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

GORDON GROSS,

No. 13
(papers sealed)

Appellant.

20 Eagle Street
Albany, New York 12207
January 12, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 JUDGE PIGOTT: Case number 13, People v.
2 Gordon Gross.

3 MR. SHIFFRIN: May it please the court - -
4 -

5 JUDGE PIGOTT: Mr. Shiffrin, good
6 afternoon.

7 MR. SHIFFRIN: Thank - - - if I may, I'd
8 like to request two minutes for rebuttal, please.

9 JUDGE PIGOTT: Yes, sir.

10 MR. SHIFFRIN: Thank you.

11 In this case in which a key to the defense
12 was to show the medical evidence made it unlikely
13 that the allegations were true, and to undermine the
14 credibility of the People's expert - - - expert's
15 testimony to the contrary, Mr. Gross was denied his
16 right to the effective assistance of counsel by his
17 attorney's failure to consult with an expert and her
18 resultant failure to counter the People's expert.

19 JUDGE STEIN: Counselor, how - - -

20 JUDGE PIGOTT: Will that - - -

21 JUDGE STEIN: Oh, go ahead.

22 JUDGE PIGOTT: I was going to - - - will
23 that broaden our view of ineffective assistance of
24 counsel?

25 MR. SHIFFRIN: No - - - no, Your Honor.

1 The - - - this court in the last two years, in People
2 v. Oliveras, and just a couple of months ago in
3 People v. Caldavado, held that there's a duty to
4 investigate. You - - - and if - - - there's a duty
5 to - - - to investigate when - - - when it's not
6 reasonable to not investigate.

7 In this case, it was not reasonable to - -
8 - to not investigate the significance of the medical
9 evidence. The explanation given by trial counsel for
10 not looking into why there was a normal finding - - -
11 by the way, this was a case where the allegations
12 weren't corroborated and the findings were - - - were
13 normal. She never looked into - - - into it. Her -
14 - - her stated allegation thing was I - - - I didn't
15 think the doctor would be allowed to testify.

16 The - - - she made a pre-trial motion - - -
17 in the record, pages 58 to 62 - - - seeking to
18 preclude the doctor's testimony citing no law.

19 JUDGE STEIN: Do - - - do we need to know
20 on - - - this is a 440 motion - - -

21 MR. SHIFFRIN: That's correct.

22 JUDGE STEIN: - - - right? And is there
23 anything that was presented on this 440 motion to
24 tell us whether, in fact, the - - - that the defense
25 attorney could have found an expert to say something

1 different?

2 MR. SHIFFRIN: The - - -

3 JUDGE STEIN: I mean, I don't see an
4 affidavit of an expert. I don't see - - - and - - -
5 and there's some publications and whatnot with no
6 foundation at all. How does that meet the burden - -
7 - even - - - even if theoretically you're right? How
8 - - - how does that meet the burden on that - - - on
9 that 440 motion?

10 MR. SHIFFRIN: This court has - - - has
11 never held that - - - in these circumstances, where
12 there's utter failure to investigate and prepare to
13 refute critical scientific testimony, that there's a
14 need to have an affidavit on an expert. In this
15 case, the motion and the supporting papers
16 established there was never a consultation with an
17 expert. As demonstrated by the cross-examination of
18 the People's expert, counsel failed to otherwise
19 educate herself to that - - - the understanding of
20 the evidence.

21 JUDGE STEIN: So - - - so - - -

22 JUDGE PIGOTT: To admit my own weakness in
23 that, I mean, if she knew that this expert is going
24 to say nothing, why would she spend money to get
25 somebody else to say the same thing?

1 MR. SHIFFRIN: The expert didn't say
2 nothing. That's critical. The - - - the issue here
3 was never - - - and this is important - - - the issue
4 here was never whether - - - whether the results were
5 consistent with abuse or no abuse. Definitionally,
6 normal results are consistent with no abuse, and
7 unless a hundred percent of people who were abused
8 have indicia of trauma, is also consistent with no -
9 - - with ab - - - with abuse.

10 The question is, how likely it is, for a
11 child who is repeatedly anally sodomized, to have no
12 indicia of trauma. And - - -

13 JUDGE FAHEY: Well, it's four years.

14 MR. SHIFFRIN: And the question is, after
15 four years.

16 JUDGE FAHEY: So, you're - - - the cases
17 that you're relying on - - - Gersten, Eze - - -
18 that's similar to Okongwu; I know that you'd argue
19 that same case in front of us in the Fourth
20 Department - - - Lindstadt, in - - - in the similar
21 theory. But - - - but in those cases, there was a
22 direct medical evidence that would've assisted in - -
23 - and some of them, I think, that there was actually
24 expert testimony that put together - - - that's not
25 what we're talking about here.

1 MR. SHIFFRIN: Well, first - - - a few
2 things on that.

3 JUDGE FAHEY: All right. Go ahead.

4 MR. SHIFFRIN: I - - - no, I'm sorry. I
5 didn't mean to cut you off, Your Honor.

6 JUDGE FAHEY: Go ahead, go ahead.

7 MR. SHIFFRIN: First of all, in a number of
8 those cases, in - - - in Pavel, Eze, and Lindstadt,
9 there was no affidavit in the 440, and the federal
10 courts granted the habe. But more importantly,
11 because of her lack of investigation of the
12 significance of the normal finding, the - - - the
13 cross-examination of the People's expert
14 affirmatively hurt Mr. Gross. And on direct
15 examination, all that that expert testified - - -
16 again, it was a motion to preclude, but no base - - -
17 legal basis - - - all the expert testified on direct
18 was that's consistent with.

19 On cross-examination, this attorney,
20 unfamiliar with the significance of the medical
21 findings, brought out twice testimony that eighty to
22 ninety - - - eighty to ninety percent of children who
23 were sexually abused have no indicia of trauma. That
24 testimony was - - - was affirmatively misleading and
25 prejudicial, because that testimony was not limited

1 to cases such as this with anal abuse, but rather,
2 the studies that have eighty to ninety percent
3 numbers deal with any sexual touching, oral sex, and
4 other - - - other types of sexual contact, and also
5 don't - - - aren't limited to cases with multiple
6 acts of - - - of sexual acts as opposed to a single.
7 The - - -

8 JUDGE STEIN: But don't - - - but don't we
9 need to know, in looking back, whether in fact,
10 there's something out there that would have said
11 otherwise?

12 MR. SHIFFRIN: Again, the - - - going back
13 the question as - - - as I cite the answer, but the
14 record show here was never consulted; a cross-
15 examination which because of her ignorance of the
16 medical findings having not - - - either in consult
17 an expert in this case, or - - - or otherwise
18 acquired the requisite expertise on this particular
19 issue of science, of medical science, directly shows
20 that there is literature out there suggesting that,
21 in fact, there's a much higher incident of - - - of
22 indicia of trauma.

23 JUDGE ABDUS-SALAAM: Are you talking about
24 the three articles, counsel?

25 MR. SHIFFRIN: But - - -

1 JUDGE ABDUS-SALAAM: Just those three
2 articles - - -

3 MR. SHIFFRIN: Yeah, which - - - which - -
4 -

5 JUDGE ABDUS-SALAAM: - - - with nothing - -
6 - are you suggesting there's other - - -

7 MR. SHIFFRIN: Oh, yes. There are - - -
8 there are - - -

9 JUDGE ABDUS-SALAAM: - - - evidence out
10 there? There are experts out there who - - -

11 MR. SHIFFRIN: There are experts. The
12 reason that - - - the reason I have some familiarity
13 because I - - - I had another one of these cases,
14 actually Jackson v. Conway, which is cited in - - -
15 in my brief. We had an ex - - - we ended up in
16 federal habe - - - in federal court retaining an
17 expert, so I don't need to necessarily hire an expert
18 in every single case, because eventually I acquired
19 the knowledge.

20 I'm not arguing that in every single case
21 where the People have an expert, there's a reflexive
22 responsibility for a defense attorney to have an
23 expert. What's required is for defense attorney to
24 have requisite expertise on an area that's critical.

25 JUDGE STEIN: So what - - - so - - - so the

1 rule that you're asking us to make is that in every
2 sex abuse case, there has to be - - - where there's
3 going to be an expert by the People, the defense has
4 to show that - - - that it made investigation; at
5 least that.

6 MR. SHIFFRIN: I - - - I - - - it's a
7 narrow - - - it's a narrow rule I'm - - -

8 JUDGE STEIN: Narrower.

9 MR. SHIFFRIN: In cases such as this, in
10 which there is no corroboration by - - - of the
11 complainant's testimony, the - - - except for the
12 complainant, the other seven prosecution witnesses
13 had no nonhear - - - no hearsay knowledge of the
14 case. The - - - there's no corroboration whatsoever.
15 The defendant testified and denied the allegations,
16 and - - -

17 JUDGE RIVERA: Yes, when it's her word
18 against his.

19 MR. SHIFFRIN: Her word against his - - -

20 JUDGE RIVERA: Her word against the
21 defendant's.

22 MR. SHIFFRIN: And there's med - - -
23 there's medical testimony - - - there's medical
24 evidence. The - - - the - - - in some cases, the
25 medical evidence is going to be used, as Judge - - -

1 Judge Fahey suggested, to suggest that there's - - -
2 there's corroboration. In those type of cases,
3 there's a need to be able to refute that.

4 In cases where the medical evidence is - -
5 - is, as here, a normal finding, it's important for
6 the defense attorney to have the knowledge - - - the
7 requisite knowledge to show, either through cross-
8 examination of the People's expert or by calling his
9 or her own expert, to demonstrate that it's not
10 likely that occurred.

11 JUDGE PIGOTT: Would you - - - would you
12 take some time on the bolstering? I think that was
13 one of your arguments.

14 MR. SHIFFRIN: Oh, sure. In - - - in - - -
15 in this case, in addition to the other issue, the - -
16 - the failure of trial counsel to utilize the
17 evidentiary rules to - - - with respect to prior
18 consistent statements - - - to try to limit the
19 admission and use of such statements for the truth
20 was prejudicial error. The - - - again, the first
21 witness for the People was the complainant, who
22 testified to telling six - - - six different people
23 about what happened to her, and then the other six
24 people testified.

25 At no point, was the jury ever told - - -

1 because defense attorney never asked - - - that this
2 was coming in for any limited purpose whatsoever, and
3 in summation, without objection, for eight full
4 pages, the District Attorney argued that the - - -

5 JUDGE RIVERA: But haven't - - - haven't we
6 said just this kind of testimony can be valid - - -
7 validly allowed in?

8 MR. SHIFFRIN: In People v. Ludwig, this
9 court held that when it comes in for the limited
10 purpose of - - - of showing how an investigation ca -
11 - - occurred or - - - or to complete the narrative,
12 and there was a limiting instruction, the - - - then
13 there's no violation of the rule. In this case - - -

14 JUDGE RIVERA: So the violation is the lack
15 of a limiting instruction?

16 MR. SHIFFRIN: No, it's a combination. The
17 - - - the - - - it was used solely for the truth.
18 There - - - at no point, was - - - was it ever argued
19 or urged - - -

20 JUDGE ABDUS-SALAAM: But didn't - - -
21 didn't - - - didn't defense counsel object when each
22 of the witnesses, who were called after the
23 complainant, tried to indicate what the complainant
24 told them, defense counsel objected, and those
25 objections were sustained, so that that information

1 never got before the jury, so all the jurors saw were
2 several people to whom the complainant said I told
3 something, but those witnesses did not - - -

4 MR. SHIFFRIN: The horse was already out of
5 the barn, because during the testimony of the
6 complainant, the first witness - - - she described
7 what she said to all the other witnesses. No
8 objection, no request at any point, that the - - -
9 that the jury be told that it only be - - - could be
10 used for purposes of completing a narrative to show
11 how the investigation was.

12 And then not only with no limiting
13 instruction - - - just to follow up on - - - on Judge
14 Rivera's question - - - there was no objection when
15 the district - - - when after the DA's summation used
16 - - - used this for the truth, there was no objection
17 when the court in - - - in instructions instructed
18 the jury in determining credibility to consider
19 whether or not there was any - - - any prior
20 consistent statements. I - - - the - - -

21 JUDGE FAHEY: Well - - -

22 MR. SHIFFRIN: - - - no objection to that
23 either.

24 JUDGE FAHEY: The way I - - - I understood
25 your argument was going farther than that. I

1 understood your argument as basically that the
2 completing-the-narrative exception of Ludwig, if it
3 was taken to this degree, would essentially swallow
4 the rule. And that - - - that when a prosecutor can
5 say somebody came in and told me this, to then bolt -
6 - - in - - - in argument, to - - - to support other
7 witnesses that have testified and said the same
8 thing, along with they testified this way consistent
9 with their grand jury testimony - - - I thought
10 that's where you were going.

11 MR. SHIFFRIN: Well, it is - - - it is
12 precisely where I'm going, because - - -

13 JUDGE RIVERA: But isn't that what we
14 specifically rejected in People v. Ludwig?

15 MR. SHIFFRIN: No - - -

16 JUDGE RIVERA: That was the position of the
17 dissent.

18 MR. SHIFFRIN: I was the attorney in
19 Ludwig. Unfortunately, I know it quite well. The -
20 - - great dissent. The - - - the problem - - - the
21 difference between this case and Ludwig, in Ludwig,
22 the jury was told when the - - - when the testimony
23 came in, because there was an objection, it cannot be
24 considered for the truth, and there was a limiting
25 instruction about what it could be used for.

1 JUDGE FAHEY: Well - - -

2 MR. SHIFFRIN: It was never argued for the
3 truth.

4 JUDGE FAHEY: Right. So - - - so - - - so
5 the clear distinction is the limiting instruction,
6 then, what Judge Abdus-Salaam was saying.

7 MR. SHIFFRIN: The absence of a limiting
8 instruction and given that absence, the DA using it
9 as though - - - the - - - almost the entire DA
10 summation was - - - was because she told all these
11 other people, she must be telling the truth. That's
12 - - - that's the opposite of using it to complete the
13 narrative. That's using prior consistent statements
14 for the truth without - - - without exception.

15 JUDGE ABDUS-SALAAM: So just so I
16 understand you, counsel, you're saying that counsel
17 was - - - defense counsel at trial was ineffective
18 because she did not or he did not object when the
19 complainant testified that I told several people what
20 happened to me, and should have objected to that,
21 number one, and then asked for a limiting
22 instruction, number two.

23 MR. SHIFFRIN: That's - - - that's correct,
24 Your Honor.

25 JUDGE ABDUS-SALAAM: And the other

1 witnesses who came along and said that the person - -
2 - that this complainant spoke to them without saying
3 what she told them, that doesn't really matter at
4 this point.

5 MR. SHIFFRIN: Well, it matters only
6 because it enhances the initial prejudice, and - - -
7 and additionally, without a - - - without objection,
8 she was asked by the district attorney about - - -
9 you testified at the grand jury and you - - - and you
10 knew it would be pre - - - it would be perjury to - -
11 - to testify falsely; again, no objection to that.

12 JUDGE PIGOTT: Thank you. Thank you, Mr.
13 Shiffrin.

14 Mr. Bressler?

15 MR. BRESSLER: Excuse me.

16 JUDGE PIGOTT: Are you plugged in? Take -
17 - - take your time.

18 MR. BRESSLER: You'll have to forgive me.
19 I've become a robotic lawyer.

20 JUDGE PIGOTT: Say, Mr. - - - Mr. Bressler,
21 can - - - can you hear us?

22 MR. BRESSLER: Sure.

23 JUDGE PIGOTT: Were you here on People v.
24 Herner?

25 MR. BRESSLER: I don't think so.

1 JUDGE PIGOTT: I think you were. I - - - I
2 only mention it - - -

3 MR. BRESSLER: I - - - what would - - - I
4 don't remember the case.

5 JUDGE PIGOTT: You were the DA, so.

6 MR. BRESSLER: Oh, well, then I guess I was
7 here.

8 JUDGE PIGOTT: Yeah, it was an interesting
9 case. That's the only reason I raise it.

10 MR. BRESSLER: May it please the court,
11 good afternoon. This is - - - after all, this is an
12 - - - an appeal from a motion - - - a denied motion
13 under 440, a coram nobis.

14 And a central issue - - - perhaps the only
15 issue - - - is whether or not the defendant was
16 deprived of his rights to an adequate lawyer. That's
17 really the issue, and the way you determine that is
18 you test the lawyer's efforts to see if what he did
19 or didn't do in some way deprived the - - - the
20 defendant of a fair trial.

21 JUDGE ABDUS-SALAAM: So what about what
22 your adversary just mentioned, counsel, that by
23 allowing the complainant to testify that she told
24 several people what happened to her, without
25 objection and without asking for a limiting

1 instruction, why isn't that enough?

2 MR. BRESSLER: Why - - -

3 JUDGE ABDUS-SALAAM: Why - - - why wasn't
4 that ineffective assistance?

5 MR. BRESSLER: You mean the - - - the
6 failure to object?

7 JUDGE ABDUS-SALAAM: Yeah, the failure to
8 object plus not requesting a limiting instruction.

9 MR. BRESSLER: All right. There's - - -
10 there's several reasons. In the first place, she's
11 telling what happened. She's the defen - - - she is
12 the victim. There is a cert - - - there has to be a
13 certain amount of - - - of byplay to allow her to
14 tell the jury what happened. We're dealing with a
15 ten-year-old girl, eleven at the time of trial.

16 JUDGE ABDUS-SALAAM: This was completing
17 the narrative.

18 MR. BRESSLER: I'm sorry?

19 JUDGE ABDUS-SALAAM: This was - - - this -
20 - - what she said was completing the narrative of how
21 the investigation got underway, or how everybody was
22 in court, is that what you're saying?

23 MR. BRESSLER: She really never said
24 anything that she didn't say originally. In other
25 words, she wasn't repeating herself, as I recall. It

1 wasn't bolstering. She was asked a question, and she
2 gave a narrative - - -

3 JUDGE RIVERA: But what about the other
4 witnesses?

5 MR. BRESSLER: Well, do you want - - - do
6 you want me to finish with this or I can - - -

7 JUDGE RIVERA: Oh, I'm sorry. I thought
8 you had moved on somewhat.

9 MR. BRESSLER: Oh, okay. So that as the
10 victim, she was telling what happened. There has to
11 be a certain amount of leeway involved in that. And
12 the fact that he didn't object - - - she didn't
13 object, she didn't object. The question is, does
14 that alone rise to the level of a deprivation of
15 rights?

16 JUDGE RIVERA: So not - - - not that alone,
17 because he raises the question of the other
18 witnesses. What about the other witnesses?

19 MR. BRESSLER: Okay, now let's - - - let's
20 get to the other witnesses. I have detailed what the
21 witnesses said in my brief, I believe, in one of the
22 points, point by point. The other witnesses for the
23 most part merely said, I interviewed her, she told me
24 what happened. At no time did they say she said A,
25 B, or C. On one or two or three occasions, it came

1 close to that, and there was an immediate objection,
2 showing that the attorney knew what she was doing and
3 was taking care of the necessary business. I
4 mentioned a couple of those in the brief that you
5 have.

6 JUDGE STEIN: Okay, can we - - -

7 MR. BRESSLER: So what happens is, you
8 really don't have a situation where witness A says
9 something that the other one said, which is hearsay;
10 then witness B was - - -

11 JUDGE RIVERA: So you're saying - - - so
12 you're saying, if these other witnesses had testified
13 to the actual abuse, if she had described the abuse,
14 and they then testified she told us this is what the
15 defendant did to her - - -

16 MR. BRESSLER: I don't think - - -

17 JUDGE RIVERA: - - - that that would have
18 been ineffective assistance? If - - - if he - - -

19 MR. BRESSLER: I don't know if it would
20 have been - - -

21 JUDGE RIVERA: - - - if he doesn't then
22 request a limiting instruction, is that the rule
23 you're suggesting?

24 MR. BRESSLER: That would have been
25 objectionable. I'm saying that this particular - - -

1 JUDGE RIVERA: And if he had objected and
2 not sought a limiting instruction, is the lawyer then
3 ineffective?

4 MR. BRESSLER: It depends on what the other
5 evidence is. It is certainly not correct according
6 to the hypothetical that you proposed, therefore it's
7 objectionable. If he doesn't object, you have to
8 look at the rest of the evidence and see - - -

9 JUDGE STEIN: Well, let - - - let's - - -

10 MR. BRESSLER: - - - consistent wi - - -
11 consistent with the - - - the cases, whether this is
12 just going back and criticizing or there really is
13 something substantive.

14 JUDGE STEIN: Well - - - well, let's look
15 at all of the evidence - - -

16 MR. BRESSLER: Okay.

17 JUDGE STEIN: - - - at the - - - the
18 representation as a whole. That's what we're
19 supposed to look at, correct?

20 MR. BRESSLER: Yes.

21 JUDGE STEIN: Okay. So let's assume that
22 the victim's testimony is perfectly appropriate to
23 complete the narrative. Let's assume that the other
24 witnesses' testimony doesn't go into the details of
25 the abuse that she reported and it's perfectly

1 appropriate, but then counsel fails to request a
2 limiting instruction and allows the prosecutor to - -
3 - to emphasize in closing arguments that this proves
4 that she's telling the truth, because she repeated it
5 so many times. Fails to object to that, fails to
6 request a limiting instructor - - - instruction.

7 When we look at the whole scenario, why
8 isn't that ineffective assistance?

9 MR. BRESSLER: Because you have to parse it
10 out.

11 JUDGE STEIN: Well, that's the question.
12 Do you have to parse it out?

13 MR. BRESSLER: Well - - -

14 JUDGE STEIN: Or are we looking at the
15 entirety of the representation?

16 MR. BRESSLER: With respect, you have to
17 decide that. But let me put it another way, you
18 should parse it out. I think Baldi says pretty much,
19 just picking the record apart to show what might have
20 been at fault is not enough. There has to be
21 something substantial that changed it, that deprives
22 the defendant of his rights to a fair trial.

23 And a fair trial in this case, the victim
24 testified, established the prima facie case. The
25 physician testified - - - and I hope that I have

1 enough time to go into that. The physician testified
2 as to what happened or didn't happen. The other
3 witnesses, for the most part, just gave the
4 narrative. The police, the so - - - the school
5 workers and so forth, they just told, this is what
6 happened.

7 At the summer - - - at the summation, the
8 prosecutor went a little overboard. There was no
9 objection. But the question is, does that by itself
10 rise to the level of ineffective assistance.

11 JUDGE STEIN: That's what I'm asking you.
12 I - - - I - - -

13 MR. BRESSLER: Okay, in order - - -

14 JUDGE STEIN: - - - put several things
15 together in - - -

16 MR. BRESSLER: I - - - I - - - I can see
17 that, but that's a question that has to be answered.
18 After all, people don't object for a lot of reasons.
19 Remember, you - - - this - - - I want to get into
20 this. An objection, when you're working a trial,
21 you're not talking about tactics; you're talking
22 about experience and judgment.

23 What happens is, a question is asked.
24 Immediately, the thighs flex, your head goes back,
25 you get ready to get up, because something in your

1 experience told me, that ain't right. And you then
2 have one second to decide, object or not object. One
3 of the reasons you may not want to object in a case
4 like this is the more you object, suddenly the jury
5 is listening, what's going on.

6 JUDGE STEIN: But - - - but here, counsel
7 allegedly told - - - trial counsel allegedly told the
8 440 counsel that there was no strategy.

9 MR. BRESSLER: Strategy. Okay, tactics.
10 Tactics are planning. You can't have tactics in one
11 second when you're waiting for a question to be
12 answered to decide whether to object. I - - - with
13 respect, I'd reject tactics. It's experience and the
14 - - - what the judgment on the motion - - -

15 JUDGE PIGOTT: Well, let me - - -

16 MR. BRESSLER: - - - on the moment.

17 JUDGE PIGOTT: Mr. Bressler, let me put it
18 this way, though. It - - - let's assume, you know,
19 one person gets on and testifies that, yeah, she
20 mentioned this at some point. About the third one,
21 wouldn't you make an objection to the court, and say,
22 judge, you know, I - - - I - - - this - - - this is -
23 - - this is just bolstering. I mean, it's time after
24 time after time that she said this happened, and - -
25 - and it's just saying - - - it's repeating the same

1 thing over and over.

2 MR. BRESSLER: It's an absolutely perfect
3 objection, and it also creates for the jury a repeat
4 of exactly what happened.

5 JUDGE PIGOTT: No, but aren't you saying -
6 - -

7 MR. BRESSLER: It may not be what he wants.

8 JUDGE PIGOTT: No, no, I'm suggesting you
9 say it in front of the - - - to the judge. Let me
10 approach the bench, Your Honor.

11 MR. BRESSLER: Oh, that's - - - yes.

12 JUDGE PIGOTT: Are we going to put up, you
13 know - - -

14 MR. BRESSLER: Altogether different
15 situation.

16 JUDGE PIGOTT: Now - - - now maybe that's
17 nitpicking, I - - - I - - -

18 MR. BRESSLER: Now the question becomes
19 then, not having done those two or three items that
20 we've discussed, does that rise to the level of un -
21 - - ineffective assistance. That's - - -

22 JUDGE FAHEY: Well, that's - - - that's - -
23 - we - - - we understand that's the question before
24 us, but how do - - - so maybe not the first time,
25 maybe not the second time. But I count six separate

1 instances where in what - - - we weren't dealing with
2 prompt outcry, we weren't dealing with an exception
3 like recent fabrication. We're dealing with
4 completing the narrative in the absence of a limiting
5 instruction or any objection, and the last two are
6 the two spoken of by the other judges, which are the
7 prosecutor's reference to grand jury testimony and
8 the summation itself.

9 Those two seem to go way beyond anything
10 that could be considered within the normal framework
11 that we see.

12 MR. BRESSLER: Well, then the question
13 becomes by not objecting, did he commit what
14 essentially - - - did - - - did he allow his
15 defendant to be convicted on something less than
16 proof. I - - - I - - - I don't think so.

17 JUDGE FAHEY: I - - - I don't want to - - -
18 I know you don't have much time. You want to get to
19 other issues, so go ahead. I didn't mean to - - -

20 MR. BRESSLER: Well, that may be the most
21 important issue. I want to talk about the doctor,
22 because that's really - - - and that'll take me
23 almost no time. The doctor was sworn and testified
24 as an expert to see what would happen. It's probable
25 that there's nothing there that's of any surprise to

1 anybody.

2 JUDGE PIGOTT: Is it - - - it is normal - -
3 - I - - - it struck me as odd that the People would -
4 - - would hire an expert after indictment. In other
5 words, I would think their case is together, you
6 know, at the time that they make a presentation, and
7 somehow later on, they decide they need a - - - they
8 need a doctor, who's going to say nothing.

9 MR. BRESSLER: Well, but it's not nothing.
10 It tells the jury that - - - this - - - there is no
11 objective evidence after the fact. That's critical,
12 because the anticipation would be they're going to
13 say nothing happened to her. There she is, she's
14 healthy as a - - - well, she's a young girl, and
15 she's perfectly healthy. There's no scars.

16 JUDGE PIGOTT: Well, wouldn't the People
17 have asked that question of themselves when they're
18 putting the case together? It - - - it just struck
19 me that one - - - you know - - -

20 MR. BRESSLER: Well, maybe there are
21 second thoughts - - -

22 JUDGE PIGOTT: But when you do - - -

23 MR. BRESSLER: - - - but the fact is, they
24 did it.

25 JUDGE PIGOTT: When you do disco - - -

1 disclosure and discovery, this would not have popped
2 up, right?

3 MR. BRESSLER: I - - - I don't know. I - -
4 - I think that there is - - - I think it did. I
5 think she was listed as a witness.

6 JUDGE PIGOTT: Okay.

7 MR. BRESSLER: I - - - I think - - - can I
8 have - - -

9 JUDGE PIGOTT: No, please - - - finish your
10 - - - finish your thoughts, certainly.

11 MR. BRESSLER: So what happened is the
12 doctor was asked initially a question to describe
13 what she did. And there was an immediate objection.
14 Now, the dissenters below said there was no
15 objection. That's simply incorrect according to the
16 record. It's in the brief; I've cited the page. She
17 asked the question, objection.

18 There was then a two-and-a-half page
19 discussion between counsel and the judge as to what
20 part was go - - - they went over everything. They
21 did - - - as to that legal issue. The judge said,
22 no, we're going forward with it. Once that happened,
23 there was an appeal; it was affirmed. Denial - - -
24 relief here was denied. That's the law of the case,
25 so that she could testify.

1 Now the question is, she already objected.
2 She preserved the issue for the appeal. What more
3 could she do? Was she supposed to then object every
4 time a question is asked? The judge would have - - -
5 well, I don't know what the judge would have done,
6 but some - - -

7 JUDGE ABDUS-SALAAM: What, counsel - - -
8 coun - - -

9 MR. BRESSLER: - - - would throw her out of
10 the courtroom.

11 JUDGE ABDUS-SALAAM: Counsel, what I
12 understand your adversary to be complaining about is
13 not just that defense counsel at trial didn't object
14 or didn't keep out Dr. Thomas-Taylor's (ph.)
15 testimony, but he - - - she didn't prepare any re - -
16 - real rebuttal or ability to cross-examine Dr.
17 Thomas-Taylor once it was clear that she was going -
18 - -

19 MR. BRESSLER: I'm glad you asked that - -
20 -

21 JUDGE ABDUS-SALAAM: - - - to be allowed to
22 testify.

23 MR. BRESSLER: I'm glad you asked that
24 question. Let's see what we have here. We have a
25 young girl, five years old. And between the next

1 five years, she is, according to her testimony, being
2 abused by anal intercourse, which is not normal
3 conversation, so I apologize.

4 We all know from our experience of the body
5 what the purpose of the anus and the rectum is.
6 There is a muscle in there called the sphincter
7 muscle and the job of that part of our body is to
8 keep things in that belong in and to expel things out
9 that belong out. It's flexible. It has to move
10 around and take a certain amount of pressure. The
11 doctor testified, there is no sign that she's
12 anything but normal, and I think she said, in ninety
13 percent of the cases, that's what you'd believe.

14 So they wanted to get that in before the
15 jury so that there's no speculation about it. That
16 doesn't require any particular knowledge. The
17 attorney is a - - - is a sophisticated adult. She
18 certainly knows what her own body parts do. She
19 would figure out what the child did. So if that's
20 the only issue - - - remember the doctor didn't
21 testify - - -

22 JUDGE STEIN: Would - - - would the
23 attorney - - -

24 MR. BRESSLER: - - - yes or no.

25 JUDGE STEIN: - - - would the attorney know

1 how long - - - if there - - - you know, whether
2 there's a difference be - - - between anal - - - I
3 mean, because the statistics given had to do with all
4 kinds of sexual abuse, not just anal, and maybe
5 there's a difference there; maybe there's more - - -
6 maybe there's more incidences of showing some
7 evidence of abuse, maybe we don't know how long - - -
8 if there was evidence, how long would it last. So
9 were - - - aren't these all things that - - - that
10 would have been appropriate to ask about?

11 MR. BRESSLER: Yes, and that's the - - - in
12 my view, the crux of the case, because what happens
13 is, we don't know anything but what the doctor told
14 us. The doctor testified. Where it - - - a
15 physician or somebody, an expert in that field,
16 should step forward and say to a reasonable degree of
17 certainty, within my experience, it doesn't happen in
18 ninety percent of the cases, it happens in ten, or it
19 - - - no evidence happens in - - - doesn't happen, to
20 contrast her.

21 You don't have that, and this is not an
22 appeal from conviction. This is a 490 - - - a 440.
23 So therefore, the question is, where - - - what
24 question of law are you being asked to decide? Are
25 you being asked to decide that simply by not having a

1 doctor present that there was a default?

2 JUDGE RIVERA: Well, I - - - I think
3 counsel's also arguing - - - maybe that would have
4 been the response, but the problem is, that trial
5 defense counsel didn't educate herself on what she
6 needed to, to be able to properly respond and prepare
7 for the cross of the expert. Putting aside whether
8 or not that educating of the defense counsel might
9 have resulted in defense counsel determining, I too
10 need an expert, put that question aside for the
11 moment, he says, you haven't even gotten to the
12 preliminary stage, where the attorney educates
13 themselves about - - -

14 MR. BRESSLER: What would be - - -

15 JUDGE RIVERA: - - - this area, so that
16 they know how to present a defense.

17 MR. BRESSLER: Yes, if you can show now
18 that what that expert would have testified to.
19 Suppose he would have testified exact - - -

20 JUDGE RIVERA: So what if he's just got all
21 the studies?

22 MR. BRESSLER: Well, since this is - - -
23 this is - - -

24 JUDGE RIVERA: Does he need an affidavit
25 from an expert saying, yes, I would have said the

1 studies say X, Y, and Z?

2 MR. BRESSLER: Since this is post-
3 conviction relief, the test is whether or not he was
4 deprived of some right. The only way to know that,
5 to get to the question of law, is to have an expert
6 contrast what the other doctor said - - -

7 JUDGE ABDUS-SALAAM: So - - - so - - -

8 MR. BRESSLER: - - - which hasn't been done
9 then, and isn't being done now.

10 JUDGE ABDUS-SALAAM: So counsel - - -

11 MR. BRESSLER: We're being asked - - -
12 you're being asked to decide on speculation and not
13 on fact.

14 JUDGE ABDUS-SALAAM: Well, what we're - - -
15 what we're being asked to decide is whether
16 essentially it was an abuse of the trial court's
17 discretion or the motion court's discretion to deny
18 this motion without a hearing. Isn't that what we're
19 being asked?

20 MR. BRESSLER: Well, you're talking about
21 the - - - the trial judge?

22 JUDGE PIGOTT: No, the 440.

23 JUDGE ABDUS-SALAAM: The motion court.

24 JUDGE RIVERA: The motion - - -

25 JUDGE ABDUS-SALAAM: The 440.

1 JUDGE RIVERA: The motion court.

2 MR. BRESSLER: I'm sorry?

3 JUDGE ABDUS-SALAAM: The - - - the motion
4 court on this 440.

5 MR. BRESSLER: Yes, Judge Nesbit (ph.).

6 JUDGE ABDUS-SALAAM: Yeah. So - - -

7 MR. BRESSLER: Okay.

8 JUDGE ABDUS-SALAAM: - - - the - - - the
9 court denied the 440 motion without a hearing, in
10 part because the court said you haven't provided Mr.
11 Defendant - - -

12 MR. BRESSLER: That - - - that's exactly
13 the other side of the coin. The judge said, what am
14 I deciding? Where is the expert that's going to
15 testify? Where is the basis of the test - - -

16 JUDGE ABDUS-SALAAM: Right, and that's what
17 I'm saying - - -

18 MR. BRESSLER: - - - of the error that you,
19 defendant, will bring to me so I can make a decision?

20 JUDGE ABDUS-SALAAM: And that's what I
21 asked - - -

22 MR. BRESSLER: It doesn't exist.

23 JUDGE ABDUS-SALAAM: - - - isn't that what
24 we're being asked to decide? Is - - - was it proper
25 for the judge to deny that motion without a hearing

1 and without giving the defendant an opportunity to -
2 - - to provide more information.

3 MR. BRESSLER: Okay. When you do that - -
4 - and I - - - I apologize - - - the central issue has
5 to be, is there a legal - - - is there a fact that
6 would raise a legal issue for you to decide that
7 legal issue was fractured and he was deprived of a
8 right based on it. Without that, you have nothing -
9 - - forgive me; I don't mean to be disrespectful.
10 You have nothing to go on. There's nothing there.

11 You are exactly in a position of the ju - -
12 - trial judge. When - - - when he was reviewing it,
13 he's saying, what am I just - - - what hearing - - -
14 what am I deciding? Give me an affidavit by somebody
15 who knows the facts, an expert who will testify to a
16 reasonable degree of medical certainty contrary to
17 what was at the trial, and then I'll give you a
18 hearing. It didn't happen. And it - - - it hasn't
19 happened here as well. So that - - -

20 JUDGE PIGOTT: Thank you. Oh - - -

21 MR. BRESSLER: I'm sorry?

22 JUDGE PIGOTT: I was going to thank you for
23 your argument, but if you want to wind up, please do.

24 MR. BRESSLER: Thank you, Your Honor. I -
25 - - I - - - the one thing I did want to mention and I

1 apologize is the - - - the lead case - - - and I just
2 closed it, Mat - - - I - - - I blanked on it. I'm
3 sorry.

4 JUDGE PIGOTT: Take your time.

5 MR. BRESSLER: How could I forget that
6 case? Baldi. People v. Baldi. The question on the
7 substantive issue is clear, but what - - - there is
8 no difference, in my view, when you're deciding it
9 now. You have to - - - in order for you to decide
10 that the lawyer failed in his duty, you have to know
11 what the good side was. What should he have done?
12 He should have brought an expert. Well, tell me what
13 the expert will say, I'll give you a hearing.

14 JUDGE PIGOTT: Thank you, sir.

15 MR. BRESSLER: Thank you very much.

16 JUDGE PIGOTT: Mr. Shiffrin?

17 MR. SHIFFRIN: Very briefly. But star - -
18 - starting at the end of Mr. Bressler's argument, as
19 a consequence of the failure to investigate and - - -
20 and be prepared, defense counsel first elicited the
21 eighty to ninety percent figure dealing with all
22 kinds of sexual abuse, and then - - -

23 JUDGE PIGOTT: But it - - - it strikes me,
24 she - - - Mr. Bressler points out that - - - that she
25 had - - - she had objected to the introduction of

1 preserved the argument, but she wasn't prepared - - -
2 but there is no argument that the doctor shouldn't
3 have been allowed to testify. There's every right -
4 - -

5 JUDGE PIGOTT: I don't know. It struck me.

6 MR. SHIFFRIN: There's every right.

7 There's two processes to the defense - - - to that
8 argument. One is, should the - - - should the doctor
9 be allowed to testify about the prior history
10 statements. That argument's preserved. We're not
11 talking about that.

12 JUDGE PIGOTT: I use - - - I used an
13 analogy when I was thinking about this case. It's
14 let's assume for a minute there's a murder, but
15 there's no body, and all they have is the testimony
16 of somebody who says, I'm telling you, the guy was
17 murdered. And I've said that to six different
18 people. And all these people get on and say, yeah,
19 he told me the guy was murdered. And then they put
20 somebody on who says every murder doesn't necessarily
21 produce a body. I have - - - I'm an expert in
22 criminology and I'm telling you that that - - - can
23 you get convicted of murder that way?

24 MR. SHIFFRIN: Again, in this case, where
25 there were two different aspects of the - - - of the

1 objection to the doctor's testimony; one is to her
2 repeating what the complainant said - - -

3 JUDGE PIGOTT: Right.

4 MR. SHIFFRIN: - - - that goes to the
5 bolstering. But in terms of the expertise, the
6 testimony that is - - - there's no reason, no basis
7 to - - - to preclude testimony that's consistent.
8 The fact that it's consistent is irrelevant. Of
9 course, indicia of trauma may or may not show. The
10 question is, again, how likely. There were no
11 questions asked in cross-examination of the expert af
12 - - - after she elicited this testimony, that eighty-
13 ninety percent, whether that pertained to anal
14 intercourse, whether - - - a - - - no question about
15 studies dealing with - - - with indicia of trauma in
16 anal intercourse, there's no testimony challenging -
17 - -

18 JUDGE FAHEY: Slow - - - slow - - - we know
19 what the testimony said there, so take a step back.

20 MR. SHIFFRIN: Okay.

21 JUDGE FAHEY: In the context of the 440,
22 Mr. Shiffrin.

23 MR. SHIFFRIN: Sure.

24 JUDGE FAHEY: Doesn't the defendant have to
25 establish that someone would come in, a medical

1 expert would have been tested - - - who - - - who
2 would have testified to say that they would expect to
3 see anal scarring or some forms of physical abuse in
4 - - - in a child four years after an incident of anal
5 sodomy. That's what - - - don't you need that? Is -
6 - - don't you need that on a - - -

7 MR. SHIFFRIN: Respectfully, no. What you
8 need - - -

9 JUDGE FAHEY: No, let me just finish.

10 MR. SHIFFRIN: I'm sorry.

11 JUDGE FAHEY: You know, you've got studies
12 which - - - I looked at them; they're very thin
13 gruel. And - - - and if you don't have anything
14 other than that, then why would the court - - - what
15 would the court hold a hearing on?

16 MR. SHIFFRIN: I'm - - - may - - -

17 JUDGE FAHEY: Go ahead.

18 MR. SHIFFRIN: I'll try to respond.

19 JUDGE FAHEY: Yeah.

20 MR. SHIFFRIN: The - - - the need for the
21 expert - - - pardon me. The need - - - the
22 requirements of the 440 is to - - - is - - - is to
23 show - - - and it was met - - - was to show that
24 there - - - that there was ineffective - - - failure
25 to investigate with respect to the medical evidence.

1 That was shown here because it was demonstrated, she
2 didn't consult and she was ill - - - ill prepared.

3 JUDGE FAHEY: But not - - - she doesn't
4 have to investigate if it's so - - - if there's no
5 possibility that that argument makes any sense at
6 all. Any comments to this approach when - - - you
7 got it - - - you've got to come in and say, no, she's
8 wrong.

9 MR. SHIFFRIN: But - - -

10 JUDGE FAHEY: You've got - - - let me
11 finish. There - - - Judge Pigott won't cut you off;
12 he'll let you respond. You know, he's good that way.
13 But no matter what, you still have to respond to that
14 at some point, and say, no. If - - - if she had
15 investigated, she would have found this. This expert
16 or this person - - - someone out there would have
17 said, this kind of scarring would be there four years
18 later. It's possible, and a twenty percent chance -
19 - - and a sixteen percent chance, whatever.

20 MR. SHIFFRIN: The - - - respectfully, I -
21 - - and I cited before in Lindstadt, there was no
22 such expert. In Eze, there was no such - - - no such
23 expert. In Pavel, there was no such expert.

24 JUDGE FAHEY: Right, but the circumstances
25 were - - -

1 MR. SHIFFRIN: The rea - - -

2 JUDGE FAHEY: - - - I - - - I remember some
3 of the cases, so - - -

4 MR. SHIFFRIN: The reason - - -

5 JUDGE FAHEY: Let me finish. They're
6 remarkably different and the facts and the facts are
7 remarkably different. The facts here are, four years
8 later, tough to show anything physically at all. How
9 does it make any sense that she would - - - that she
10 would think that she needed an expert to - - - to
11 contest an expert, who said it's not going to show
12 anything?

13 MR. SHIFFRIN: Because the - - - what
14 indicia of trauma that do show, scarring, fissures -
15 - -

16 JUDGE FAHEY: Right, within six months.

17 MR. SHIFFRIN: There's - - - there's no - -
18 -- there's nothing showing - - - the testimony - - -
19 indeed, the damaging testimony elicited by - - - by
20 the defense attorney that - - - that I wouldn't
21 expect to see that, there's not a single study to
22 support Dr. Thomas-Taylor's testimony on that. She
23 wasn't prepared to challenge her on that, because she
24 didn't do any investigation on this.

25 And - - - and they - - - you know, the

1 question was asked on - - - is there - - - are there
2 other studies - - - since the initial motion was
3 filed, there's been a number of - - - of other
4 studies dealing with - - - with indicia of trauma and
5 anal intercourse, and not surprisingly when children
6 are subject to anal intercourse, there's also sorts
7 of indicia of trauma that last.

8 The scarring doesn't go away, and the
9 scarring is one of the key indicia of trauma. And
10 she wasn't prepared to ask about that. And - - - and
11 she was also wasn't prepared to object to - - - she
12 wasn't prepared to do her job in a case where there
13 was no corroboration - - - no corroboration. She
14 allowed a weak case to appear as a strong case, and
15 therefore allow Mr. Gross to be convicted.

16 JUDGE RIVERA: Is it - - - is it overly
17 burdensome to ask counsel on a 440 to get that
18 affidavit from an expert?

19 MR. SHIFFRIN: I think it's a huge policy
20 issue. In cases - - - in most criminal cases in New
21 York State, people are poor. They're not entitled to
22 - - - to either assign counsel or assign experts. If
23 the - - - if the requirement for a person who - - - a
24 defendant who is deprived of his right or her right
25 to effective assistance of counsel is to have an - -

1 - have an affidavit, that - - - that requirement will
2 effectively keep poor people from bringing 440
3 motions for IAC on scientific issues.

4 JUDGE RIVERA: And the 440 - - - but - - -
5 so the judge grants the hearing, you're saying at
6 that point they'll get appointment of counsel,
7 they'll get resources. At that point - - -

8 MR. SHIFFRIN: Correct, Your Honor.

9 JUDGE RIVERA: - - - they can track down an
10 expert, prep the expert and call the expert.

11 MR. SHIFFRIN: Yes, Your Honor.

12 JUDGE PIGOTT: Thank you. Thank you, Mr.
13 Shiffrin.

14 MR. SHIFFRIN: Thank - - - thank you.

15 JUDGE PIGOTT: Thank you, Mr. Bressler.

16 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Gordon Gross, No. 13, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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