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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent, (Papers Sealed)

-against-

No. 152

WILLIE L. WRAGG,

Appellant.

20 Eagle Street
Albany, New York 12207
October 13, 2015

Before:

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 152, People v.
2 Wragg.

3 One second, counsel.

4 Counsel, go ahead. Would you like any
5 rebuttal time?

6 MS. GORMAN: Yes, Your Honor, one minute.
7 Shirl - - -

8 CHIEF JUDGE LIPPMAN: One minute, go ahead.

9 MS. GORMAN: Shirley Gorman for Mr. Wragg,
10 if - - - Willie Wragg, if it please the court. This
11 case demonstrates two things that are unfortunately
12 not uncommon in child sex crime cases, and that is
13 when a prosecutor's tactics and misconduct go
14 unchecked, that constitutes the ineffective
15 assistance of counsel, and that was true in the
16 Fisher case and true in this court's Wright decision
17 from July 1st of this year. And this case also
18 demonstrates that the legislature gives prosecutors
19 discretion in child sex crime cases to avoid the
20 worst sentences, gives them a safety valve. This
21 legislation started out as mandatory for all second
22 child sexual abuse offenders, assault offenders, and
23 it was a life sentence. It was to be sentenced as an
24 A-1, and this is the statute that - - -

25 JUDGE ABDUS-SALAAM: Are you talking about

1 the CPL now, counsel, or the Penal Law?

2 MS. GORMAN: The Penal Law.

3 JUDGE ABDUS-SALAAM: The Penal Law.

4 MS. GORMAN: The Penal Law. But that's - -
5 - the - - - the Penal Law section came in with the
6 CPL section, and the CPL section said what all of the
7 other laws say which is, if information available to
8 the court or to the prosecutor prior to sentencing
9 shows this person might be a second offender, a
10 persistent violent felony offender, the People must
11 file a statement. This statute was changed; that
12 language was deleted to say before trial commences,
13 if information's available to the People, they may
14 file, and that - - -

15 CHIEF JUDGE LIPPMAN: So we have to
16 strictly construe that?

17 MS. GORMAN: I believe you do because I
18 believe it was a deliberate choice and it was for
19 legitimate reasons. Because these sentences are so
20 harsh, if a prosecutor wants to prosecute someone
21 without using that status, it gives them the ability
22 to do that.

23 JUDGE STEIN: But doesn't the Penal Law say
24 that if the requirements are met of the - - - the
25 previous crimes, previous convictions, that they must

1 be sentenced - - - receive an enhanced sentencing?

2 MS. GORMAN: It says they must be sentenced
3 if the procedure in 400.19 is used, and the procedure
4 in 400.19 is the process that says it may be filed.
5 So I submit that if a prosecutor looks at a case and
6 says I want a plea out of this case and I know I'm
7 not going to get it if this person is treated as a
8 second child sexual assault offender, so I'm not
9 filing that thing, I am going to arrange a plea
10 bargain where he's treated as an ordinary second
11 offender.

12 JUDGE ABDUS-SALAAM: Was Mr. Wragg offered
13 a plea in this case or did he seek one?

14 MS. GORMAN: No, and it's clear on - - - at
15 the record on page 591 - - -

16 JUDGE RIVERA: No - - - no to which?

17 MS. GORMAN: Hum?

18 JUDGE RIVERA: No to which? Does he want -
19 - -

20 MS. GORMAN: No, neither. There was no
21 mention at any point in this record about any plea
22 from arraignment until sentencing.

23 JUDGE ABDUS-SALAAM: So he wasn't
24 evaluating anything about whether to take a plea or
25 to go to trial?

1 MS. GORMAN: Right, but his attorney - - -

2 JUDGE ABDUS-SALAAM: He was always planning
3 to go to trial?

4 MS. GORMAN: Yes.

5 JUDGE ABDUS-SALAAM: And - - - and your
6 position is 70.07 of the Penal Law says he must be
7 sentenced as a - - - a predicate offender for this
8 type of crime only if the prosecutor abides by CPL
9 400.19?

10 MS. GORMAN: And files before a trial.

11 JUDGE ABDUS-SALAAM: And where's this - - -

12 JUDGE STEIN: Well, why does that - - - I'm
13 sorry.

14 CHIEF JUDGE LIPPMAN: Judge Abdus - - -
15 Judge Abdus-Salaam.

16 JUDGE ABDUS-SALAAM: I - - - I just, you
17 know - - -

18 MS. GORMAN: And again, in - - - at 591 in
19 the record, this lawyer says this never came up, we
20 never talked about this status at all. And there are
21 reasons to require the People to provide that notice
22 before the trial commences.

23 JUDGE STEIN: But how does your - - - how
24 does your - - - your theory of this apply if - - -
25 because the stat - - - 400.19 says "any time before

1 trial commences." So what if the plea bargaining
2 process has already taken place and there's a plea
3 and - - - and it's never mentioned or anything, do -
4 - - when - - - when does this come into play then?

5 MS. GORMAN: For - - - for a plea, I submit
6 they don't have to file it, and for a trial they
7 don't have to file it. They may file it, they may
8 choose not to file it to treat this offender that
9 way. But - - -

10 JUDGE STEIN: But what if they - - - what
11 if they make an offer, it's rejected, and they say
12 okay, now we're going to trial and now we're going to
13 - - - we're - - - we're - - - we're going to - - -

14 MS. GORMAN: Perfectly appropriate, and I
15 think that's a safety valve.

16 JUDGE STEIN: But how does that - - - how
17 does that effectuate the purpose that you say is for
18 the timing of all this?

19 MS. GORMAN: That's the safety valve for
20 them to work a plea if they need one with regular
21 status, but if they have to go forward with trial, to
22 use the higher stakes and it puts the defendant on
23 notice and it avoids retaliation after the trial.

24 JUDGE PIGOTT: Well, there's - - - there's
25 two questions that arise with that, Ms. Gorman. One

1 of them is that if - - - if the plea isn't being
2 worked out, they can file it at any time before jury
3 selection, so if the plea falls apart and they say,
4 hey, your loss, we're filing it, you - - - you have
5 nothing to say. I - - - I - - - I get concerned that
6 you say it's - - - it's a - - - it's a - - - I don't
7 want to say a tactic, but it's a - - - it's a weapon
8 that the People can use, but - - - and you're
9 insisting that they - - - they use it. You're saying
10 from now on, if the Court of Appeals says so, file
11 that notice every single time, because, you know, if
12 you - - - if you don't, the Court of Appeals is going
13 to say you can't. So if I was the DA if - - - and we
14 were to find your way, I'd - - - I'd photocopy them.

15 MS. GORMAN: Well, I think that's the
16 People's argument is that it's required in every
17 single case. My argument, it's never required. It's
18 discretion for the People like sexual misconduct
19 versus rape.

20 JUDGE PIGOTT: No, but what I'm saying is
21 you're - - - you're suggesting to us that we make a
22 decision favorable to your client that will then tell
23 the People, under no circumstances are you not to
24 file, because even though it says discretionary, the
25 Court of Appeals is going to throw you out of court

1 if you don't file it. You can always withdraw it,
2 but file it. And I'm not sure that that's what we
3 want to do.

4 MS. GORMAN: Well, I'm not sure they can
5 withdraw it; there's no statutory authority to
6 withdraw it.

7 JUDGE PIGOTT: Why would you object?

8 MS. GORMAN: Well, of course, no one would
9 object, but - - -

10 JUDGE PIGOTT: So yes, they can withdraw
11 it.

12 MS. GORMAN: Well, I would submit they have
13 to file it before trial to show that they're not
14 being vindictive; to make sure that the attorney's
15 behavior, the defense attorney - - - if I'm a defense
16 attorney and they haven't filed this notice but they
17 can and I'm in a middle of a trial and I'm worried
18 that my decisions somehow are going to result in them
19 invoking that power, I would be very concerned.

20 JUDGE RIVERA: But counsel let - - -

21 MS. GORMAN: I think that's a good reason
22 to - - -

23 JUDGE RIVERA: Counsel, let me just ask
24 you; let - - - let's just stay with the text as
25 opposed to speculating about anything. So let - - -

1 as I take it, some of - - - some of what you've said
2 strikes me as a little bit of speculation, but let me
3 just stay with the text. So tell me why this - - -
4 this attempt to harmonize these two sections does not
5 make sense.

6 70.07 is mandatory; once someone is
7 convicted who falls in this category, it's mandatory
8 enhancement, you have to follow the procedures to get
9 this mandatory enhancement, and that means that they
10 have to file the statement. And all that 419 - - -
11 400.19 does is set out the procedure, but it allows
12 the possibility for the prosecutor to file the
13 statement before someone is convicted, because 70.07
14 only applies to someone who's convicted. All that
15 400.19(2) - - - I believe it's (2) - - - does is
16 allow for them to file this statement before someone
17 is convicted. Why - - - why can't you harmonize
18 these two statutes this way?

19 MS. GORMAN: Well, because the legislature
20 changed the language that's in every other statute
21 like this. And they used language that is in no
22 other statute, "may". And so they were changing the
23 law, they were allowing the People - - - nothing
24 would prevent the People from filing it in a second
25 felony offender now before a trial. So why use may?

1 People's argument.

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 MS. GORMAN: Thank you.

4 CHIEF JUDGE LIPPMAN: You'll have your
5 rebuttal.

6 Counsel.

7 MR. KAEUPER: Yes, Your Honor, Geoffrey
8 Kaeuper for the People, and that - - - that is indeed
9 my argument and - - - and said better than - - - than
10 I've managed to say it.

11 JUDGE ABDUS-SALAAM: But what's the
12 purpose, counsel, of - - - of the "may" or the
13 discretion as opposed to "must file"?

14 MR. KAEUPER: Right, I think - - - I think
15 it - - - it has to do with the fact that these are
16 very harsh punishments, and so this - - - this allows
17 for a procedure where you can adjudicate that before
18 the trial so the defendant then - - - you know, if -
19 - - if there's a question about whether or not the -
20 - - these provisions would apply to - - - to the
21 defendant after a conviction, the defendant can
22 figure that out ahead of time and - - - and he can
23 have an accurate assessment of his exposure before
24 going to trial.

25 JUDGE ABDUS-SALAAM: But that didn't happen

1 here because no statement was filed before the trial.

2 MR. KAEUPER: That's - - - that's correct,
3 and if - - - and - - - and so - - - I mean, that is -
4 - - the - - - the prosecutor, by not filing a
5 statement - - - and this - - - this is true
6 regardless of what predicate says - - - the
7 prosecutor, by not putting the defendant's exposure
8 on the record, leaves - - - leaves herself open to a
9 potential - - - what is it, Lafler v. Cooper and
10 Missouri v. Frye problem. We get those 440s all the
11 time where the defendant says, hey I - - - I was
12 misadvised about my exposure ahead of time, and so
13 that can be a problem. Here, I don't think there was
14 any - - - any consideration on either side about a -
15 - - about a plea. So I think that didn't really come
16 in - - -

17 JUDGE PIGOTT: That's this case. The - - -
18 the - - - you know, the - - - the - - - we - - -
19 we've got to deal with this statute and it seems to
20 suggest that you do it before trial, and in fact it
21 says so. So Ms. - - - Ms. Gorman had a - - - a look
22 at it that's a little bit different and - - - and I -
23 - - and I can see that. You know, halfway through
24 the trial, you guys decide, you know, I think we
25 really got this case in the bag, we're now going to

1 file it, and we're going to put this guy away for a
2 lot longer than we would have at the beginning when
3 we weren't sure we had a - - - as strong a case.

4 I pictured it - - - I don't know if I'm
5 thinking like a legislator or what - - - as saying,
6 if that first one is not like the second one, if, for
7 whatever reason, the - - - the - - - the child was -
8 - - the circumstances were much different, they say
9 we're - - - we're not going - - - we're not going to
10 press this, you know, we're - - - we're just going to
11 go for the - - - you know, for the one, they make
12 that determination early and then - - - then they're
13 done.

14 MR. KAEUPER: But that's only if it's
15 discretionary. I mean, I - - - I don't think it's
16 discretionary. So if it's not discretionary, then -
17 - - I mean, the defense attorney has an obligation to
18 - - - and that's - - - that's the Coop - - - the
19 Lafler v. Cooper - - - the - - - the defense attorney
20 has an obligation to inform his client about his - -
21 - his accurate exposure and so forth, so you just
22 don't have to adjudicate it necessarily beforehand.

23 JUDGE PIGOTT: I'm missing that. You said
24 it's not discretionary?

25 MR. KAEUPER: I - - - I don't think it is

1 discretionary. I think 70.07 makes it mandatory. If
2 - - - if you are a predicate, it - - - you - - - you
3 must be sentenced as predicate. And I think counsel
4 - - - counsel says that it says something like you
5 must if the CPL provisions apply. If you look at - -
6 - if you compare 70.07 versus the other predicate
7 sentencing statutes in - - - in Article 70, the other
8 ones actually say something closer to that. This one
9 starts out and it says, if - - - if you have a
10 predicate - - - some - - - something like if you have
11 a predicate conviction, you must be, whereas the
12 other ones say, if the CPL procedures in 400-whatever
13 it is for each one are met, then you must be. Here
14 it's more emphatically this - - - a - - - a predicate
15 must be sentenced as a predicate.

16 JUDGE PIGOTT: But - - -

17 JUDGE ABDUS-SALAAM: Counsel also said - -
18 - I'm sorry.

19 JUDGE PIGOTT: No, please.

20 JUDGE ABDUS-SALAAM: Counsel also said that
21 70.07 applies if the statement has been filed under
22 400.19, but I didn't see that anywhere in the
23 statute. Are - - - are - - - is that anywhere in the
24 statute? I don't see it.

25 MR. KAEUPER: No, no, I don't think - - -

1 no, I don't think the - - - the - - - that - - - that
2 it says that - - - it has - - - it has - - - the - -
3 - he has to be sentenced as a predicate if the People
4 have filed a - - - a pre-trial statement, no.

5 JUDGE RIVERA: Well, 70.07(3) says "The
6 provisions of section 400.19 of the CPL shall govern
7 the procedures that must be followed to determine
8 whether a person who stands convicted" - - -

9 MR. KAEUPER: Right.

10 JUDGE RIVERA: Right?

11 MR. KAEUPER: Right, yeah. And - - -

12 JUDGE RIVERA: You still got the must there
13 and the shall.

14 MR. KAEUPER: Right.

15 JUDGE RIVERA: Yeah, it's saying these are
16 the procedures you've got to follow.

17 MR. KAEUPER: Right. Right, but - - - but
18 again, we have that - - - you have that may in
19 400.19. I mean, I think if - - -

20 JUDGE STEIN: So is subdivision 3 talking
21 about, you know, what - - - in order to make the
22 determination of whether you're a predicate - - -

23 MR. KAEUPER: Right.

24 JUDGE STEIN: - - - those are the
25 procedures you follow?

1 MR. KAEUPER: Right, ab - - - absolutely,
2 and I think if - - - if the - - - if the import here
3 is that the People get to choose and the - - - and
4 so, I mean, this is a very strange way to construct a
5 statute that has that - - - that outcome. I - - - I
6 - - - I certainly wouldn't argue that this is the - -
7 - the most perfectly crafted statute that makes it
8 super easy, but - - - but I think that the - - -

9 JUDGE ABDUS-SALAAM: The other statutes,
10 counsel, where the - - - the People are required or
11 may file prior to sentencing, is there anything
12 precluding the People from filing a statement before
13 a trial, pre-trial?

14 MR. KAEUPER: What - - - what do you mean?

15 JUDGE ABDUS-SALAAM: In - - - in one of the
16 statutes that says it must be filed before
17 sentencing.

18 MR. KAEUPER: You could file a statement
19 but - - - but the court wouldn't do anything with it.
20 Whereas - - - whereas as I read 400.19, you - - - the
21 - - - the court can then adjudicate that question.

22 JUDGE RIVERA: It trigger - - - it triggers
23 the possibility of a hearing and so forth - - -

24 MR. KAEUPER: Correct.

25 JUDGE RIVERA: - - - if there's a challenge

1 from the defendant.

2 MR. KAEUPER: Correct, and that's - - - and
3 that's, I think, the - - - the difference really in
4 the - - - in the CPL procedures on - - - on those
5 points.

6 JUDGE RIVERA: Just to clarify, it may be a
7 - - - a request for you to be repetitive.

8 MR. KAEUPER: Okay.

9 JUDGE RIVERA: What would be the reason
10 that a prosecutor would indeed do this before the
11 trial commences?

12 MR. KAEUPER: Try to get a plea.

13 JUDGE RIVERA: So to negotiate the plea?

14 MR. KAEUPER: Yeah.

15 JUDGE RIVERA: So the two of you - - -

16 MR. KAEUPER: Yeah, yeah.

17 JUDGE RIVERA: - - - agree on that that
18 that's - - -

19 MR. KAEUPER: Yeah.

20 JUDGE RIVERA: - - - that's really to try
21 and encourage the plea agreement?

22 MR. KAEUPER: Yeah, yeah. And I think in
23 that sense allowing that to be adjudicated ahead of
24 time can - - - can be efficient. You - - -

25 JUDGE RIVERA: To avoid the trial?

1 MR. KAEUPER: Right.

2 JUDGE PIGOTT: Well, let's suppose you
3 didn't have this law, this CPL section. Are you
4 suggesting that - - - that - - - that somehow the DA
5 couldn't say hey, by the way, you know, your client
6 was convicted of - - - of - - - of this - - - this
7 same felony charge three years ago and if - - - and
8 if - - - you can take a plea now or if you don't, you
9 know, he's going to get sentenced as a second felony
10 offender?

11 MR. KAEUPER: I mean, the - - - the
12 prosecutor could say that, sure.

13 JUDGE PIGOTT: Sure, so why - - - so - - -
14 so I don't understand why we - - - we would put a
15 section in the law that says the DA can do what it's
16 always done?

17 MR. KAEUPER: No - - - no, because - - -
18 because the hearing is the - - - is the issue, you
19 can adjudicate it at a hearing which you otherwise
20 wouldn't be able to.

21 JUDGE PIGOTT: Well, before the - - -
22 before the - - -

23 MR. KAEUPER: With - - - with the court
24 making a determination. When they're - - -

25 JUDGE PIGOTT: Before the trial.

1 MR. KAEUPER: What?

2 JUDGE PIGOTT: Before - - - before the
3 trial.

4 MR. KAEUPER: Correct.

5 JUDGE PIGOTT: And you're saying that we
6 can ignore that?

7 MR. KAEUPER: I - - - I'm sorry, I guess I
8 mis - - -

9 JUDGE PIGOTT: You're saying - - - you're
10 saying we can ignore that; that - - - that the DA can
11 say, we're not doing that because we don't want to
12 have a hearing, we want to convict the guy and then
13 we'll have - - - you know, then we'll say he's a
14 second felony offender.

15 MR. KAEUPER: Right.

16 JUDGE PIGOTT: So we go back to, why is the
17 statute there then?

18 MR. KAEUPER: I guess I'm - - - I guess I'm
19 not understanding the - - - the question, because I
20 don't - - -

21 JUDGE PIGOTT: If - - - if you can always
22 take a plea, you don't need it for a plea. If you
23 can al - - -

24 MR. KAEUPER: No, no. I'm - - - I'm saying
25 I - - - I think you do - - - you - - -

1 JUDGE PIGOTT: Stick with me.

2 MR. KAEUPER: I'm sorry.

3 JUDGE PIGOTT: If you - - - if - - - if you
4 can always use it at sentencing, you don't need it,
5 so there's no reason in the world for 400.19 to be in
6 there, it seems to me, other than the fact that
7 everyone knows at the beginning of the trial that
8 we're talking about a second felony offender on a sex
9 abuse case.

10 MR. KAEUPER: Yeah, and - - - and to allow
11 you to - - - to potentially adjudicate the question
12 of - - - of predicate status before - - - before
13 trial at - - - at a hearing presided over by the
14 judge.

15 JUDGE RIVERA: Well, it provides some
16 benefit if - - - if perhaps the defendant has some
17 credible challenge - - -

18 MR. KAEUPER: Right, exactly.

19 JUDGE RIVERA: - - - to the fact that
20 they're a predicate off - - - offender.

21 MR. KAEUPER: Exactly, I mean the - - -

22 JUDGE RIVERA: And they want to clarify
23 this beforehand because that may change the plea
24 negotiation posture of the case.

25 MR. KAEUPER: Abs - - - absolutely, most -

1 - -

2 JUDGE PIGOTT: So if that's the ca - - -

3 MR. KAEUPER: I'm sorry.

4 JUDGE PIGOTT: If that's the case, then,
5 then it's a very important benefit to the defendant
6 that you should not be ignoring.

7 MR. KAEUPER: Well, I mean, no, because the
8 - - - the - - - again, I go - - - go back to the
9 defense attorney has an obligation to his client to
10 exp - - -

11 JUDGE PIGOTT: I know, but if I'm
12 understanding what Judge Rivera asked you was, it
13 gives a benefit to the defendant to find out, you
14 know, what - - - what's going to be coming by
15 challenging that - - - that - - - that first offense,
16 and you said, exactly, you can challenge - - - you
17 know, they can challenge the first offense before
18 they get into the trial. So it's a benefit to them
19 and you're saying, but we don't have to do that at
20 all, we don't have to file at all, because it's just
21 there.

22 MR. KAEUPER: Right, but - - - but we do -
23 - - but if we don't file it, we do it as some risk is
24 - - - is my point.

25 JUDGE PIGOTT: What's the risk?

1 MR. KAEUPER: He - - - that he may have a -
2 - - an ineffective assistance claim on a 440 by
3 saying I didn't know I was - - - I was going to be
4 facing predicate. I mean, we get those claims all
5 the time.

6 JUDGE PIGOTT: So we should - - - we should
7 protect you by - - - by finding in favor of Ms.
8 Gorman.

9 MR. KAEUPER: I - - - I think - - - I think
10 you should interpret 70.07 the way I think it was
11 intended, which is to make this mandatory and to not
12 give - - - give discretion on - - - I mean, these - -
13 - you know, we're talking about people who repeat
14 sexual abuse of children. I mean, we are - - - we
15 are talking - - -

16 JUDGE RIVERA: Let - - - let me ask you,
17 counsel, 400.19(2) says, "When information available
18 to the people prior to the trial against a child
19 indicates that a defendant may have", is there any -
20 - - any point in time when you do not have such
21 information before trial?

22 MR. KAEUPER: Geez, I mean, I - - - you
23 know, I - - - I would think we would generally know
24 the criminal history of the defendant before trial
25 and certainly should.

1 JUDGE ABDUS-SALAAM: And in this case,
2 there was a Sandoval hearing so there you would - - -

3 MR. KAEUPER: Right.

4 JUDGE ABDUS-SALAAM: - - - everybody knew,
5 correct?

6 MR. KAEUPER: Correct, correct.

7 JUDGE ABDUS-SALAAM: But what - - - then
8 why was it such - - - why was it so hard for the
9 court to get you to file - - - the People to file the
10 statement?

11 MR. KAEUPER: I - - - I can't answer that
12 why - - - and why, you know, there's that - - - that
13 appearance after the adjournment and it's still not
14 filed and I - - - I can't explain that at all.

15 CHIEF JUDGE LIPPMAN: Okay.

16 MR. KAEUPER: Thank you.

17 CHIEF JUDGE LIPPMAN: Thanks, counsel.

18 Rebuttal, counsel.

19 MS. GORMAN: If I may address the
20 ineffectiveness, this attorney did what the attorney
21 did in Wright, which is undermine his own strategy,
22 his own theory of defense, by proving - - - by tell -
23 - - allowing proof, by telling jurors that this child
24 witness had made an identification three weeks after
25 the crime, when they should not have heard that.

1 JUDGE STEIN: Why isn't that legitimate
2 strategy? I mean, is - - - isn't is sort of assumed
3 that there must have been an identification made?
4 Otherwise - - -

5 MS. GORMAN: I - - -

6 JUDGE STEIN: - - - how would we know it
7 was him?

8 MS. GORMAN: I'm not sure jurors would
9 assume that, particularly when you have the neighbor
10 daycare provider saying, I gave them a name when they
11 gave me a - - -

12 JUDGE ABDUS-SALAAM: So Tiffany (ph.)
13 didn't testify here that when they went to the
14 greenhouse and knocked on the door, the victim said
15 that's him, initially?

16 MS. GORMAN: Yes.

17 JUDGE ABDUS-SALAAM: So she testified - - -
18 so there was - - - that may - - - you know, defense
19 counsel knew that that might come out and - - -

20 MS. GORMAN: Well, that - - -

21 JUDGE ABDUS-SALAAM: - - - that was an - - -
22 -

23 MS. GORMAN: - - - that was a different
24 person.

25 JUDGE ABDUS-SALAAM: I understand.

1 MS. GORMAN: That was not my client.

2 JUDGE ABDUS-SALAAM: That's the point.

3 MS. GORMAN: Right.

4 JUDGE ABDUS-SALAAM: The whole defense was
5 a misidentification.

6 MS. GORMAN: Right.

7 JUDGE ABDUS-SALAAM: And if the victim
8 initially identified someone else, then wouldn't it
9 be strategic for defense counsel to bring up the jury
10 well, you know, you can't believe this child because,
11 you know, she's - - - she's going to misidentify - -
12 -

13 MS. GORMAN: But you're telling - - -

14 JUDGE ABDUS-SALAAM: - - - my client.

15 MS. GORMAN: - - - them - - - you're
16 telling them that three weeks after the crime, she
17 picked your client, and that's something they would
18 not know because it was only by photo array, and that
19 testimony was wholly inadmissible.

20 CHIEF JUDGE LIPPMAN: Okay, counsel.

21 MS. GORMAN: Thank you, Your Honor.

22 CHIEF JUDGE LIPPMAN: Thank you. Thank you
23 both.

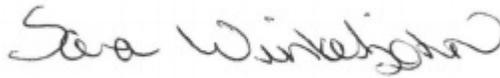
24 (Court is adjourned)

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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. Willie L. Wragg, No. 152 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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