To be argued by:
Joel B. Rudin, Esq.
(15 minutes requested)

Queens County Indictment No. 2516-2013
Appellate Division No. 2016-8053

NEW YORK SUPREME COURT
APPELLATE DIVISION—SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

JOHN KING,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK, :

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- against - : A.D. No. 2016-8053

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Defendant-Appellant. :

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22 NYCRR § 1250.11(d)(1) STATEMENT

1. This appeal is from a judgment of the Supreme Court, Queens County, by the Honorable Ira Margulis, rendered July 6, 2016, convicting appellant, after a jury trial, of rape in the first degree, in violation of P.L. § 130.35(4).

2. The Court imposed a determinate sentence of 23 years in prison, to be followed by 5 years of post-release supervision.

3. No application for a stay of execution of judgment pending determination of the appeal has been made.

4. There is no outstanding order issued pursuant to CPL § 460.50.

5. There were no codefendants in the trial court.

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QUESTIONS PRESENTED

I.A. Did the trial court violate King's constitutional rights to be present, to counsel, and to a public trial—thus requiring automatic reversal—by examining the complainant *ex parte* to decide whether to strike testimony she had given about her psychiatric history?

> (Because Appellant did not affirmatively waive his right to be present, this objection is preserved. As to other rights, the court explicitly stated that the defense had its objection and the defense moved for a mistrial.)

I.B. Did the court's striking of the complainant's testimony about her bipolar disorder and depression violate King's constitutional confrontation rights?

> (Appellant moved for a mistrial immediately after the court struck this testimony and the court stated that the defense had its objection.)

II.A. After the People failed to timely provide notice of their intent to use at trial an alleged, seven-year-old statement by King, did the court err in refusing to preclude the statement, as required by CPL § 710.30?

> (Upon finally receiving notice of the statement, two years late and immediately before trial, King timely moved to preclude it.)

II.B. Did the court err in admitting King's statement under *Molineux*?

(Appellant made timely objections to the People's *Molineux* application.)

III.A. Did the People violate King's constitutional confrontation rights by introducing testimony about DNA and serology findings that their expert neither generated nor arrived at through independent review of raw electronic data?

(Appellant timely objected to this testimony.)

III.B. Did the court err in admitting the expert's opinion, which lacked any scientific basis, that alleged semen stains revealing no DNA came from Appellant?

(Appellant timely objected to this testimony.)

IV. Did the People violate *Brady v. Maryland*, 373 U.S. 83 (1963), and *People v. Vilardi*, 76 N.Y.2d 67 (1990), by (a) suppressing information about the complainant's psychiatric history that the court had ordered disclosed, (b) redacting medical records apparently showing the complainant had a sexually transmitted disease when she claimed she had no sexual experience, and (c) delaying disclosure of evidence of the complainant's previous false rape accusations?

(Appellant made timely objections to these *Brady* violations.)

V. Considered individually or cumulatively, do the above errors require the conviction to be reversed either because they are *per se* reversible or were not harmless?

SUPREME COURT OF THE STATE OF NEW YORK
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JOHN KING,	:	
Defendant-Appellant.	:	

BRIEF FOR DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

In 2004, C.P., then 12 years old, reported to police in Queens that a man had forced her into his car and raped her.[1] Later the same day, she recanted. She explained she had made up the story to avoid getting in trouble for staying out late. The police closed the case.

Nine years later, John King, 20 years old at the time of the alleged incident, was charged with C.P.'s statutory rape. He was indicted based upon a cold DNA "hit" from a single semen stain on C.P.'s sweatpants.

[1] The complainant's name has been abbreviated to protect her privacy.

This appeal is from a judgment of conviction for rape in the first degree, and 23-year sentence, entered against King on July 6, 2016, in the Supreme Court, Queens County, by the Honorable Ira Margulis, Justice, following a jury trial. At that trial, erroneous rulings by the court unfairly buttressing the complainant's credibility and denying King basic constitutional and statutory rights were crucial to his conviction.

First, the court violated King's structural constitutional rights to be present, to be assisted by counsel, to have the public observe the trial, and to confront his accuser. It did so by privately questioning C.P., *outside the presence of King and his counsel*, about the critical issue of C.P.'s psychiatric history and use of antipsychotic medication, and by then abruptly striking from the record cross-examination about these issues that already had occurred in front of the jury. Such Star Chamber proceedings have been outlawed since 1641.

Second, the court let the People elicit an extraordinarily damaging statement King had made many years earlier during an unrelated investigation, even though the People failed to provide the requisite pretrial notice and King invoked the Criminal Procedure Law's automatic preclusion provision.

Third, the court allowed the People to further violate King's Confrontation Clause rights by erroneously letting their DNA expert testify to findings of *non-*

testifying analysts and, further, to invade the jury's province by speculating that King was the source of alleged semen stains *in which no DNA had been detected*.

Fourth, the court permitted the People to get away with suppressing critical *Brady* material, some of which the court had explicitly ordered the People to disclose. The suppressed evidence concerned C.P.'s psychiatric history, prior false rape accusations, and sexual behavior with others, and obviously was material given the centrality to the case of C.P.'s credibility.

King has filed a timely notice of appeal. He is imprisoned at the State Correctional Facility, Shawangunk.

FACTS

A. The Alleged Rape and the Initial Investigation

On June 10, 2004, police received a 911 call reporting that C.P. had been raped (96-97, 115-16).[2] She was taken by ambulance to Jamaica Hospital in Queens, arriving about 4:18 a.m. (623). A physician found no signs of trauma or injury but collected evidence for a rape kit (624-27). C.P. told the doctor she had been vaginally penetrated "from behind" (631). She told police a man had forced her into his car at knifepoint to engage in oral and vaginal sex (476, 509). The perpetrator, she said, was a black male with dark skin; she gave no other

[2] Numbers in parentheses refer to pages in the trial transcript. Citations to other transcripts are in parentheses and prefixed with the date of the proceeding.

description (127-28, 513-14). She claimed she could not see the man's face "due to rain and drizzle" (511), but a short time later she "changed the story up" (477), as she put it, and said the man "had a mask over [his] face" (478; *see* 518).

Then, while still at the hospital, she recanted it all. She told police that "nothing ever happened" (478) and that, in reality, she had "stayed too late" at a "friend's house" and "made the story up so [she] would not get in trouble" with her family (521). Based on this recantation, the assigned detectives closed the case the same day of the alleged rape (401-02).

Almost 10 years later, on October 4, 2013, John King was charged with first-degree statutory rape and three lesser counts. *See* Indictment. The lesser counts were dismissed before trial as untimely. *See* Order on Def. Omnibus Mtn., Dec. 19, 2013, at 1-2. In a pretrial motion, the People alleged that the New York City Office of the Chief Medical Examiner ("OCME") had generated a male DNA profile from C.P.'s clothing and, using the state DNA database, had matched the profile to King. *See* Aff. in Support of Request for DNA Order, Oct. 9, 2013, ¶ 10.

After the first two attempts to try King ended in mistrials during jury selection, the trial that led to the present conviction was held in May 2016.

B. Police Officer Troiano Conducts the Initial Investigation, Interviewing C.P.

Police Officer Kelly Troiano testified at this trial that she responded to Jamaica Hospital on June 10, 2004, at 4:30 a.m., interviewed C.P., and collected a

rape kit and clothing, which she submitted for forensic processing (97-102). She testified that C.P. had described the perpetrator as a black male stranger with dark skin but did not give any height, weight, eye color, hair color, hair length, hair style, or clothing (127-28, 132).

C. C.P. Makes an 'Outcry' to Friend Roseann Wilson

Roseann Wilson, an adult friend of C.P.'s when the incident allegedly occurred (147-52), testified that C.P. rang her doorbell about 3 a.m. and said, "a man raped me … in an alley" (153-54). Wilson called 911, and C.P. was taken away in an ambulance (155-56). On cross-examination, Wilson said C.P. had told her the perpetrator was a stranger (244).

D. King's Unnoticed, Seven-Year-Old Statement Is Introduced Over His Motion to Preclude

In November 2015, more than two years after indictment, the People disclosed Detective Justin Hughes as a trial witness (11/12/15 at 7). Asked for an offer of proof, the People said they intended to use a statement Hughes claimed to have elicited from King in January 2009 (*id.* at 27-28; *see* 1/21/16 at 196). At that time, King was being detained on suspicion of a rape unrelated to C.P.; Hughes elicited the statement when he took the opportunity to question King about an unrelated homicide (1/26/16 at 223) (for which King was cleared (Trial Tr. 317)). Following King's 2009 indictment for the unrelated rape, the People noticed King's statement and the court upheld its voluntariness after a suppression hearing.

Ultimately, that prosecution ended with King's plea to two misdemeanor counts (1/26/16 at 223-24), and so King did not appeal the suppression ruling.

Upon finally receiving notice in this case, *two years late*, of the People's intention to use King's nearly seven-year-old statement, King moved for the preclusion he was entitled to under CPL § 710.30, which requires such notice to be served within *15 days* of arraignment (11/12/15 at 29). The People, citing no authority, contended they did not have to give notice in this case because they had provided it in the earlier, unrelated prosecution (*id.* at 28, 30); the court agreed (11/16/15 at 58-59).

The statement, as Hughes eventually conveyed it at trial, was as follows:

> [King] stated to us, I have a problem….
>
> … He said, I'm sick. You were right when you said to me that I don't feel comfortable around women my own age. He said he enjoyed having sex with young girls, 13, 14 and 15…. He said that he would drive around in his BMW to schools, to the bus stops near schools, shopping centers near schools where they would be hanging out. He portrayed himself to be a 16 year old high school student and that he had a lot of money, and he would show them money, and he would sweet talk them into his car (311-12).

While unmoved by King's notice argument, the court initially excluded the statement because "the prejudice to [King] would outweigh the probative value" (1/21/16 at 52). However, the court reversed itself when the People moved to introduce the statement as prior similar "act" evidence under *People v. Molineux*,

168 N.Y. 264 (1901). It rejected the defense objection that the statement was impermissible criminal-propensity evidence (1/28/16 at 257-68, 276-77; Decision & Order, Feb. 29, 2016, at 5, 6).

After Detective Hughes testified to the statement at trial (280-87, 311-12), the court, while asking the jury not to consider it as evidence of King's "propensity or predisposition," instructed the jury it could consider the statement as it pertained to King's "intent, his motive and … any lack of mistake" (317; *see* 1203).

E. The Assigned Detective Admits the Police Lost the Case File

Detective Philmore Angol was assigned after the DNA cold hit (367). He testified that he found the original DD5s on microfiche but was unable to find the original file, and thus had no copy of other important items, including the aided card, the 911 call, and the SPRINT report (368, 372-75).

Angol testified that, after King became a suspect in the alleged rape of C.P., C.P. failed to appear for a scheduled meeting with Angol and an ADA, saying "she had too many issues going on in her life and d[id] not wish to proceed with the case" (404). Contrary to C.P.'s testimony (discussed below), in which she claimed she named King as her assailant, Angol denied that C.P. ever mentioned King's name, either at the meeting with the ADA or during Angol's other discussions with her (403-04, 415, 429).

F. C.P.'s Prior False Rape Allegations

On the eve of the first trial date, two years after the indictment, the People revealed, as part of their *Rosario* disclosure, a 2004 DD5 by a Detective Echevarria in which C.P. appeared to admit two prior false rape allegations, additional 2004 reports in which C.P.'s family members confirmed the false rape allegations, and a handwritten notation by Detective Angol that C.P.'s "mom says she thought [C.P.] was pregnant by the step-dad" (11/12/15 at 35-39; 1/20/16 at 9-11). When the People disputed that C.P. had admitted making false rape allegations to Echevarria, the court instructed them to have Echevarria, now retired in Florida, clarify the source of his information (11/12/15 at 40-41).[3] The prosecutor then reported that Echevarria no longer remembered the case (1/28/16 at 280-81).

C.P. began her testimony by trying to preemptively address the issue of the false rape allegations, telling the jury her adopted father in fact twice sexually molested her when she was eight (450). On cross-examination, C.P. admitted her "whole family" believed she was "always" lying and, following ACS's investigation of her allegations against her adopted father, believed she also was lying about the 2004 rape for which King eventually was charged (491).

[3] The defense pointed out the DD5 stated it was "based upon an interview with the complainant" and "sa[id] very clearly that the complainant made two prior false allegations of rape" (1/20/16 at 35), while the People contended the DD5 was merely "a summary by the detective" of the information he had gathered about the case (*id.* at 38).

G. C.P. Accuses King but Admits Lies, Inconsistencies, and a Recantation

C.P. testified that, on June 7, 2004, she was walking home from school when a man spoke to her from his car (455-56). She told him she was 14 years old (457). The man introduced himself as John King and said he was 16 years old (456). He gave C.P. his phone number before they parted (457). She called him the next day and they chatted (458).

On June 9, C.P. was at home when one of her cousin's friends asked her to go pick up Chinese food (459). She went, and while the food was being prepared, called King from a payphone (460). He showed up about two minutes later and offered to drive her back home (461).

According to C.P., King, whom she identified in the courtroom (485), told her to get in the back seat (462). He drove for a while and then down an alleyway (463-64). C.P. testified that King parked, climbed into the back seat, laid her down, and got on top of her while she faced up (468-71). She testified she told him to stop, but he pulled down her pants and underwear and, lying "on top of" her, forced his penis into her vagina (472). (This contradicted C.P.'s 2004 allegations that the perpetrator had penetrated her "from behind" (631) and also forced her to perform oral sex (476).) King climbed back into the driver's seat, and C.P. discovered "a lot of blood" on her bottom and on the car seat (473). King then dropped her off a block away from Roseann Wilson's house (474).

At Wilson's house, C.P. testified, she told Wilson she had been raped and Wilson saw "blood all over [C.P.'s] pants" (475). (Wilson gave no such testimony.) Wilson called 911 (475).

C.P. testified that she "lie[d]" to police, telling them a man threatened her at knifepoint and forced her to perform not just vaginal but also oral sex (476). She said she told this lie to make her family believe "that something really happened" (476). At Jamaica Hospital, C.P. again lied to police, claiming she had not seen the perpetrator's face because he was wearing a mask (478).

C.P. acknowledged that, when she was interviewed a third time, she "totally recanted" (478).

Although C.P. insisted King had given her his full name and phone number, she admitted on cross-examination that she never gave this information to the police (504-07). She also admitted lying to the police that she "could not see the perpetrator's face due to rain and drizzle" (511) and that the rapist was a stranger (514). When she recanted, she told police she had "made the story up so [she] would not get in trouble" for staying out late (521).

Contrary to Detective Angol's testimony that he had spoken with C.P. several times, including at the D.A.'s office, and that C.P. never named John King, C.P. denied knowing who Angol was and claimed she did provide King's name when she met with the ADA (558-59, 574).

While, in her 2004 statement to Officer Troiano, C.P. said the rapist had "[d]ark skin" (128), she testified at trial that her own skin was brown, not "dark," and King's skin was lighter than hers (458, 514). While she told Troiano the rapist drove a silver car, she testified the car was black (458, 808).

H. The People Disobey the Court's Order to Find Out Whether C.P. Used Antipsychotic Medication and the Court, After Interviewing C.P. *Ex Parte*, Strikes Psychiatric Impeachment Evidence from the Record

Long before trial, the defense tried to develop evidence concerning C.P.'s psychiatric history and its possible relationship to her accusations. It requested such information in its pretrial omnibus motion, *see* Aff. in Support of Def. Omnibus Mtn., Nov. 7, 2013 ("Omnibus Mtn."), at unnumbered pages 13-14, and again a month before the first trial date (10/15/15 at 16). The court instructed the People: "if you find there was a … psychiatric history with respect to [C.P.], I'll ask for you to get those records for an in-camera inspection" (*id.*).

As the first trial was set to begin, the prosecutor disclosed handwritten notes that Detective Angol "took when he was interviewing the complainant" (11/12/15 at 6-7). The notes contained the following notation: "Should have been on medication major depression. Abilify, Seroquel, Zoloft. Hospital in Jacobi Medical Bronx" (Trial Tr. 19). Defense counsel argued these notes showed C.P. had "some kind of mental … disorder" and again demanded disclosure of her psychiatric history (11/12/15 at 39). However, the prosecutor repeatedly represented "[t]here is

no psychological history" (*id.* at 40; *see* 5/12/16 at 7). While he submitted for *in camera* review records from C.P.'s hospitalization after the alleged rape (11/12/15 at 34-42; 11/16/15 at 74-75), he never produced to the court or disclosed to the defense any other records or information about C.P.'s psychiatric history.

On the eve of the third trial, defense counsel, still seeking disclosure, noted that "Abilify and Seroquel are antipsychotic drugs … [suggesting] some sort of psychiatric history" and accused the People of avoiding their *Brady* obligations (17, 20). The court ruled the defense "[wa]s entitled" to disclosure of C.P.'s "psychiatric history" (21), but the prosecutor represented that C.P. had denied using these medications "at or around the time of this incident" (39). After the People failed to make any disclosure, the court told defense counsel it would "give [him] somewhat wide discretion to question the complainant about this" (39).

However, when defense counsel cross-examined C.P. about whether she had ever received psychiatric treatment, the court reneged, ruling that the defense could ask only about treatment C.P. had received at the time of the alleged rape or at the time of her trial testimony, and disallowing any questioning about the substantial period in between, including 2013, when she claimed to have first named King as the perpetrator (525-28). The court also barred questioning about a "psychological evaluation" of C.P. at the hospital after the alleged rape because, according to the People, a social worker rather than a doctor had performed it (528-29).

When testimony resumed, C.P. admitted that, in 2008, she had been diagnosed with bipolar disorder and depression (534). She said she had received psychiatric treatment the "whole time" she was in foster care, from age 16 until age 21 (535); this meant that C.P., who was born in February 1992, *see* Passport, People's Trial Exhibit 4, was still receiving treatment in 2013, when she first identified King (572-74). Then, a moment later, C.P. said her treatment had lasted "almost eight years" (535), meaning that it actually began when she was approximately 13, just a year after the alleged rape. C.P. denied the prosecutor had asked about her use of the medications listed in Detective Angol's notes (536).

Outside the jury's presence, defense counsel argued that the People had violated the court's order under *Brady* to ask C.P. about, and to disclose, her history of psychiatric treatment (542-43). The prosecutor responded that he had asked C.P. whether she had "any conditions that would impair her ability to perceive, recall or relate the information at the time of the incident" (544)—a much more limited inquiry that let the witness subjectively determine what to disclose.

Defense counsel moved to strike C.P.'s entire testimony and requested her psychiatric records before continuing to cross-examine her (546-47). He also moved for a mistrial (547). Initially, the court denied these applications (547). However, after briefly discussing another matter, the court, returning to the defense *Brady* application, stated:

> Counsel, you made the application. What I propose to do, based on the witness's testimony, is question her in camera, without either attorney being present, on the record, to be sealed and question her about the time that she was taking medication for any psychological issues that she had and determine whether … what she was suffering from and her treatment would be relevant for the jury to hear with respect to her credibility (553-54).

When the court and C.P. emerged from chambers, the court, rather than rule simply on the defense *Brady* application, declared the following:

> After a thorough inquiry of the complaining witness, I find that there is no showing that her mental health is material to the jury's assessment of her credibility, and even if it was some connection found, … it would be so remote that it would just be ground for confusion of the jury.
>
> *So … I'm going to strike all her testimony with respect to her mental—to her psychiatric history and instruct the jury they are to disregard it* (554-55 (emphasis added)).

Before the defense could object, the court added: "Counsel, you have your exception." *Id.* Defense counsel immediately moved for a mistrial, which the court denied (555). When the jury returned, the court instructed it to disregard "any testimony with respect to this witness and her psychological treatment" (557).

I. Over Defense Objection, the People's DNA Expert Gives Opinion Testimony Based Upon Testing Done by Others or Based Upon No Scientific Evidence at All

In 2014, after King's indictment, the prosecution obtained King's buccal swab (355-57) and announced that his DNA profile matched the profile generated in 2004 from a single semen stain on C.P.'s sweatpants (10/15/15 at 11-12). The

prosecutor acknowledged there was either no or insufficient DNA in the rest of the allegedly detectable semen—on C.P.'s underwear and tank top, and on vaginal and anal swabs—to make any match (*id.*). At trial, the People called an OCME criminalist, Lisa Dziegielewski, as a forensic expert to testify about the DNA and semen evidence.

1. The Court Allows Dziegielewski to Testify to DNA and Semen Findings She Played No Role in Generating and Did Not Independently Review

Before Dziegielewski testified, the prosecutor claimed Dziegielewski had "made the profile" of King, apparently meaning the 2014 DNA profile generated from King's buccal swab (5/12/16 at 33). As to the 2004 DNA findings, the prosecutor claimed Dziegielewski had "gone back to the file" and drawn "her own conclusions" about the 2004 findings after analyzing the computerized "raw data" (*id.* at 33, 35). However, regarding the 2004 findings of the alleged presence of semen on C.P.'s clothing and vaginal and anal swabs, the prosecutor conceded that Dziegielewski had *not* conducted any "independent examination" of raw data underlying those findings (650).

Defense counsel moved, under the Confrontation Clause, to preclude Dziegielewski from testifying about the 2004 DNA and semen findings that had been made by other, non-testifying analysts (5/12/16 at 34-35; Trial Tr. 648-49). However, the court allowed the testimony based on the People's representation that

Dziegielewski "came to her own conclusions" (173-74; *see* 650-51).

Dziegielewski's testimony turned out not to support, and at times to significantly contradict, the People's proffer, but the court allowed it anyway. Regarding the 2004 DNA findings, Dziegielewski conceded she played no role in 2004 in generating them (686-87, 736, 742). Other analysts had made those findings—i.e., of no male DNA in the semen they claimed to detect on the vaginal and anal swabs (694, 755-56), incomplete male DNA in the underwear and tank top semen stains (695-96, 698), and a full male DNA profile in one semen stain, item 3B, on C.P.'s sweatpants (699, 714). Dziegielewski did claim, on direct, that she reviewed "every test that was done in this particular case" and "drew [her] own conclusions" about the 2004 DNA findings (683). However, on cross-examination, she conceded that the other analysts' case files from 2004 that she had reviewed "contain[ed] the electropherogram *after* it was edited" and "printed"; she did not review the "*pre-edited*" raw electronic data using "[t]he computer" (745 (emphasis added)). Thus, her conclusions about the 2004 DNA findings were not independent of the non-testifying analysts' findings, but instead were based on her acceptance of their conclusions. Indeed, she produced no paperwork documenting any independent conclusions, claiming she had "save[d]" them "in [he]r mind" (734).

As to the 2014 DNA profile from King's buccal swab, which Dziegielewski compared to the 2004 profile to make a match, she never claimed to have directly

participated in generating that profile. The only testimony she gave that appeared to indicate what role she played regarding the 2014 DNA profile was her claim that she had independently reviewed "every test" in King's case (683).[4] However, as just noted, this review was not, in fact, "independent," as she claimed.

Finally, as to the semen findings, Dziegielewski again conceded she had played no role, in 2004, in other analysts' conclusions (736) that semen was present on C.P.'s vaginal and anal swabs and on C.P.'s underwear, tank top, and sweatpants (693-94, 697, 699). Nor did she claim that she had independently analyzed the raw data underlying the other analysts' conclusions. Indeed, over defense counsel's "continuing objection" (696), Dziegielewski read to the jury the other analysts' findings directly from their 2004 reports (696-98).

2. The Court Allows Dziegielewski's 'Expert' Opinion that King Was the Source of Semen from Which No DNA Profile Was Generated

Given the absence of any DNA match for any semen besides sweatpants stain 3B, the defense moved to preclude as "speculative" any testimony or argument that any other alleged semen stain or trace came from King (1/20/16 at

[4] On cross-examination, Dziegielewski also testified that the OCME had matched King's DNA to sweatpants stain 3B as early as 2009, after obtaining King's DNA from a bottle he drank from during his interrogation by Detective Hughes (772). Defense counsel, having failed to preclude Dziegielewski's testimony about non-testifying analysts' findings, elicited this information so he could argue in summation that the People's failure to indict King until 2013 despite this 2009 match showed that the DNA evidence was not enough to prove King's guilt (1119).

17; *see* 11/12/15 at 53-54; 5/12/16 at 21). The prosecutor countered that he "would only ask the jury to make [a] reasonable inference based on the evidence" (1/20/16 at 17)—that is, he would make argument only. Accordingly, the court ruled as follows:

> THE COURT: … My decision is that *[the prosecutor], during summations*, I think that would be proper conclusion for him *to urge The Jury to reach*, as you can argue the opposite.
>
> [DEFENSE COUNSEL]: *There can't be testimony brought out regarding that* because everything was inconclusive or not enough DNA.
>
> THE COURT: *The testimony may be brought out it was inconclusive or not enough DNA, as you put it, but that's that.*

(5/12/16 at 21-22 (emphasis added)).

However, during opening statements, the court allowed the prosecutor, over strenuous defense objection (60-65, 81-85), to tell the jury that the People's DNA expert would *testify* to her opinion that "the semen *all* came from one male" (64 (emphasis added)).

Before Dziegielewski gave this testimony, defense counsel again objected (700-03). He said he had received no pretrial notice about such "expert" testimony, and the defense DNA expert was now unavailable for consultation about how to respond; the court denied his motion for a mistrial (705).

Dziegielewski then testified that one male donor was the source of all the semen—sweatpants stain 3B, containing the complete male DNA profile; the

underwear and tank top stains, in which partial DNA was detected; and, crucially, the vaginal and anal swabs, on which *no DNA* was detected (708). Dziegielewski did not explain how her expertise in DNA analysis gave her any specialized knowledge about the source of semen in which no DNA had been found. On cross-examination, she acknowledged that in a 2014 report she had stated, contrary to her trial testimony: "it cannot be determined if [King] is or is not the source of" the underwear and tank top stains (751; *see* 752-53).[5]

In her remaining testimony, Dziegielewski admitted that, in 2004, OCME analysts had detected an allele from the tank top semen stain that belonged to neither C.P. nor King, suggesting the possibility of another semen contributor (765-66). She claimed, however, that "protocols have changed" since 2004 and, without elaborating, that this allele was an "artifact" rather than DNA (762-63).

J. A Doctor at Jamaica Hospital Finds No Visible Signs of Trauma But Testifies this Does Not Rule Out Rape

Dr. Sara Rebecca Storch testified that, in 2004, she was an OBGYN resident at Jamaica Hospital (615, 621). On June 10, 2004, she examined C.P. and found "no obvious signs of trauma or injury" (622-24). She believed blood found inside C.P.'s vaginal vault to be menstrual blood (625, 627). On cross-examination,

[5] Notably, in the grand jury, the People had presented a different OCME analyst, whose testimony they refused to disclose to the defense (11/12/15 at 42).

Storch testified that (contrary to C.P.'s trial testimony) C.P. reported having been penetrated "from behind" (631). Storch testified that, although C.P.'s hymen was not intact, Storch found "no evidence of … recent injury" or "any acute tears" there (633-34). Asked whether she had found "any physical evidence consistent with a 12 year old girl being raped by a grown man," Storch testified, "Nothing visible to the naked eye" (636). On redirect-examination, she testified that she had never seen a vaginal injury when examining a reported rape victim, although "[o]ccasionally [she] found bruises elsewhere" (637).

The defense called Dr. Fred Hurst, a board-certified OBGYN of 50 years (811-12). Hurst opined that the lack of visible vaginal injuries was inconsistent with "a 12 year old virgin having been forcibly entered from the rear" (832-34). On cross-examination, Hurst agreed that "if semen was found on this patient's vaginal swab," then "someone ejaculated in her vagina" via "penetration" (844). On redirect-examination, Hurst testified that, based on C.P.'s timeline of events, semen should have been visible in her vagina, but the examining physician had not observed semen (880). Hurst also testified that semen could remain in the vagina, but not be visible to the naked eye, for several days (881), suggesting the possibility that semen on C.P.'s vaginal swab came from someone other than King.

In rebuttal, the People called Dr. Jaime Hoffman-Rosenfeld, a pediatric medicine and child sexual abuse expert, who opined that the absence of injury

recorded in C.P.'s medical records was not inconsistent with sexual assault (925, 947, 962-65).

K. C.P.'s Redacted Medical Records Apparently Identify a Sexually-Transmitted Disease, but the Court Refuses to Order them Unredacted

C.P.'s hospital records were admitted in evidence and the defense sought to publish them to the jury (890). Before trial, the defense had requested disclosure of test results in the records, which the People had redacted, evidently because they showed that C.P. had tested positive for a sexually-transmitted disease ("STD") (05/12/16 at 62-63). The defense now renewed this request. It noted that the results appeared in sequence with negative results for two STDs (925-28). The People claimed the redacted material concerned a "prior medical condition" that "doesn't *necessar[il]y* get contracted by sexual contact" (927 (emphasis added)), thus implicitly acknowledging that the condition could be an STD. Nevertheless, the court refused to order the redactions removed (928).

The court did grant the People's request to redact the notation, "Cousins say that patient has made two rape allegations in the past" (906-07).

L. The People's Summation Emphasizes Dziegielewski's Opinion Testimony and King's Statement

In summation, the defense argued that C.P.'s credibility was crucial to the jury's verdict (1093-94), but that, due to her inconsistent stories about the alleged

rape, ultimately ending in a recantation, and her history of lying to her family, she was not credible (1098, 1128-36).

Although C.P. was 24 when she testified at trial (446), the prosecutor argued it was not "fair" to "judge a 12-year-old" for her inconsistent stories and recantation and characterized her as a "lost soul looking for friendship" (1154, 1168). Contending that "science doesn't lie" (1157, 1176), he repeatedly cited Dziegielewski's objected-to testimony that there was a DNA match between King and stain 3B and that *all* the semen, including on the vaginal swab, came from King, thereby proving the intercourse element of rape (1157-58, 1180-81).

The prosecutor spent two transcript pages emphasizing King's statement admitting he was "sick" and "like[d] to have sex with underage girls" (1162-63).

M. Verdict and Sentencing

The jury asked for "all DNA report[s]" and portions of Dziegielewski's testimony, including her "testimony regarding the results of the vaginal and anal swabs" (1218, 1246-47; *see* 1243-58). The prosecutor agreed not to publish the 2004 OCME file, containing the DNA and semen findings, because "the reports in and of itself [sic]"—as opposed to Dziegielewski's "own opinions and conclusions"—were "from another analyst that didn't testify" (1230-31). Defense counsel again moved to strike Dziegielewski's testimony about other analysts'

findings (1231). The court denied the application but told defense counsel, "You still have your objection to the criminologist's testimony in its entirety" (1232).

Late in the second day of deliberations, the jury found King guilty of first-degree rape (1265-68). On July 6, 2016, the court sentenced King to 23 years in prison (7/6/16 at 13-14).

ARGUMENT

POINT I

THE COURT'S STRIKING OF C.P.'S TESTIMONY ABOUT HER PSYCHIATRIC HISTORY BASED UPON AN *EX PARTE* PROCEEDING REQUIRES AUTOMATIC REVERSAL

A. The *Ex Parte* Examination Denied King His Rights to Be Present, to Counsel, and to a Public Trial

1. The Legal Principles Governing these Rights

In New York, "a defendant has a constitutional and statutory right to be present at all material stages of a trial." *People v. DePallo*, 96 N.Y.2d 437, 443 (2001); *see also People v. Antommarchi*, 80 N.Y.2d 247, 249 (1992) (citing N.Y. Const., art. I, § 6; and CPL § 260.20). The Federal Due Process Clause also guarantees the right to be present when it "would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987); *see id.* at 736-39 (Confrontation Clause also implicated).

"Proceedings where testimony is received are material stages." *People v. Turaine*, 78 N.Y.2d 871, 872 (1991). This includes suppression hearings, *People v. Anderson*, 16 N.Y.2d 282, 288 (1965); examinations of police officers to determine whether to reveal an informant's identity, *People v. Ortega*, 78 N.Y.2d 1101, 1102 (1991); and examinations of prosecution witnesses regarding witness intimidation, *Turaine*, 78 N.Y.2d at 872. By contrast, "legal determination[s] unrelated to trial issues" that do "not involve evidentiary testimony" are not material stages—e.g., an examination to determine a child's testimonial competence. *People v. Morales*, 80 N.Y.2d 450, 457 (1992).

Ex parte witness examinations also "trifle with the constitutional right to confrontation and the right to counsel." *People v. Carr*, 25 N.Y.3d 105, 110 (2015) (quoting *People v. Goggins*, 34 N.Y.2d 163, 169 (1974)); *see Marshall v. Rodgers*, 569 U.S. 58, 62 (2013); *Stincer*, 482 U.S. at 736-39. Accordingly, "courts must not examine witnesses about nonministerial matters in camera without counsel present" absent "a substantial justification" for doing so. *Carr*, 25 N.Y.3d at 110. The Court of Appeals has found a "substantial justification" only when a witness's or juror's physical safety was at stake. *See id.* at 111-12.

In *Carr*, the Court of Appeals reversed a murder conviction where "the People's star witness" was examined *ex parte* after failing to appear for trial. *Id.* at 113. The witness claimed he had a migraine but denied substance abuse. *Id.* at 108.

The Court found that this examination, far from involving a merely ministerial "scheduling matter," "concerned [the] witness's health (both mental and physical)," which the trial court "knew defense counsel would address during cross-examination." *Id.* at 114. It thus "violated defendants' right to counsel … to deny defense counsel physical access to the proceeding and to refuse to create a record of the proceeding for use in cross-examination." *Id.*

Similarly, in *Matter of Tracy C.*, this Court ordered a new trial because "the [trial] court conducted a conference with [a prosecution] witness, outside the presence of the defendant or his attorney." 186 A.D.2d 250, 251 (2d Dep't 1992). The conference (as in Appellant's case) "occurred during the witness's testimony, which was a material stage of the trial." *Id.* at 252. Similarly, in *People v. Robbins*, this Court ordered a new trial because the trial court held a "conference with a People's witness outside the presence of the defendant and his counsel." 198 A.D.2d 451, 452 (2d Dep't 1993).

Ex parte proceedings also may violate a defendant's "fundamental" right to a public trial, guaranteed by the First and Sixth Amendments. *People v. Frost*, 100 N.Y.2d 129, 137 (2003). Non-public proceedings are allowed only when the so-called "*Waller* factors" are met:

> "[1] [The movant] must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must

> consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure."

Id. (quoting *Waller v. Georgia*, 467 U.S. 39, 48 (1984)). "[A] trial court must articulate its reasons for ordering closure on the record," making "findings specific enough" to allow appellate review. *People v. Clemons*, 78 N.Y.2d 48, 52 (1991) (quoting *Waller*, 467 U.S. at 45).

The violation of any of these rights so basic to society's concept of a structurally fair trial—the right to be present, to counsel, or to a public trial—*automatically* requires the conviction to be reversed. *People v. Mehmedi*, 69 N.Y.2d 759, 760 (1987); *Carr*, 25 N.Y.3d at 112; *People v. Echevarria*, 21 N.Y.3d 1, 11 (2013).

2. The *Ex Parte* Examination Here Violated King's Rights

Under the above case law, the court's questioning of C.P., the prosecution's star witness, about her psychiatric history and its relationship to her accusation of King, in order to determine whether to strike testimony she already had given about this subject, was plainly a material stage of trial. By conducting this proceeding outside of King's presence, the trial court unquestionably violated his constitutional right to be present.

The *ex parte* proceeding also violated King's absolute right to counsel. This violation was every bit as egregious as in *Carr*. In *Carr*, as here, the trial court inquired *ex parte* into a key prosecution witness's mental health. But the *Carr*

proceeding was at least arguably "ministerial," as it concerned the witness's failure to appear at trial. Here, the purpose of the examination was not ministerial but, as it turned out, was to decide whether to *strike C.P.'s trial testimony, already received by the jury, about her psychiatric history*. The court offered no "substantial justification" for this extraordinary procedure, and there was none. Moreover, by sealing the recording of the examination, the court denied defense counsel any ability to challenge the basis for the court's ruling, which the court never articulated, or to attempt to use before the jury any statements C.P. had made.

Finally, the court violated King's right to a public trial. It never articulated *any* reasoning about *any* of the requisite *Waller* factors. Neither the prosecutor nor C.P. even requested a non-public examination. Nor was there any persuasive argument that the *ex parte* proceeding was necessary to spare C.P. embarrassment, since she already had testified openly about her psychiatric history (before it was struck) and the uncomfortable topics of the alleged rape and her previous victimization.

That the *ex parte* examination was recorded does not cure the court's error. In *Carr*, the constitutional defect in examining the witness *ex parte* was exacerbated because no transcript was available to the defense for "use in cross-examination." 25 N.Y.3d at 114. Similarly, in *Matter of Tracy C.*, there was "no

transcribed record" of the *ex parte* conference. 186 A.D.2d at 251. Here, too, the defense had no access to the sealed, untranscribed record of the proceeding.

3. Appellant's Claim is Preserved

After striking, without warning, C.P.'s testimony based upon the *ex parte* proceeding, the court said the defense had its "exception" before counsel could object. The defense then moved for a mistrial, which was denied. Based on this record, King's present claims are preserved.

First, "the right to be present … need not be preserved by objection." *People v. Velasquez*, 1 N.Y.3d 44, 47-48 (2003). While it "may be waived," *id.*, such waiver is valid only if, "at a minimum, [the accused is] informed in some manner of the nature of the right … and the consequences" of relinquishing it, *People v. Parker*, 57 N.Y.2d 136, 141 (1982). King made no such waiver. The court held the *ex parte* examination without explaining that it was contemplating striking C.P.'s testimony and without explaining King's rights to him or requesting King's consent.

As for the rights to counsel and to a public trial, King had no notice that the court might strike C.P.'s testimony; he thus had no ability to object to an *ex parte* conference being held to consider such a ruling. Counsel was told only that the court would question C.P. to decide whether to order disclosure of *Brady* material that the defense had requested and that the People had withheld—that is, to accord

the defense a benefit. *Compare* *People v. Contreras*, 12 N.Y.3d 268, 272-73 (2009) (upholding *ex parte* proceeding for such a purpose).

After the court unexpectedly struck C.P.'s testimony, it relieved the defense of any obligation to object by stating, "Counsel, you have your exception" (555). No specific objection is required when the court tells the defendant "[y]ou have an exception." *People v. Chestnut*, 19 N.Y.3d 606, 611 n.2 (2012). "The law does not require litigants to make repeated pointless protests after the court has made its position clear." *People v. Mezon*, 80 N.Y.2d 155, 161 (1992). Even so, the defense here did move for a mistrial. Its claim of error is preserved.

B. The Court's Ruling Also Denied Appellant His Confrontation Rights

The Confrontation Clause guarantees "the opportunity of cross-examination." *Fuentes v. Griffin*, 829 F.3d 233, 247 (2d Cir. 2016) (quoting *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974)). This includes the right to use "psychiatric evidence raising questions about the witness's biases and the reliability of his or her testimony." *Id.* at 248; *see* *People v. Knowell*, 127 A.D.2d 794, 795 (2d Dep't 1987) (reversing murder conviction where court "refus[ed] to allow any cross-examination" about a witness's "long history of psychiatric problems").

Indeed, a defendant is entitled to cross-examine a prosecution witness about the very illnesses from which C.P. suffered: bipolar disorder and depression. *See* *People v. Kiah*, 156 A.D.3d 1054, 1057-58 (3d Dep't 2017). Bipolar disorder "can

severely impair those who suffer from it," *Siederbaum v. City of New York*, 309 F. Supp. 2d 618, 621 (S.D.N.Y. 2004), causing "irrational[ity]" and "marked impairment of cognition, behavior and judgement," *Apple v. Apple*, 66 F. Supp. 2d 465, 467 (W.D.N.Y. 1999). "[C]hronic depression" can cause "emotional instability," "excessive anger," "interpersonal problems," and "distorted self-perception." *Fuentes*, 829 F.3d at 250 (quoting American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders* (4th Ed.) at 347). Evidence of such conditions may be crucial to show a witness's cognitive impairments or to support the inference that a complainant's instability influenced her to fabricate an accusation. *See id.* at 240, 252.

While courts may "impose reasonable limits" on the scope of cross-examination, *People v. Corby*, 6 N.Y.3d 231, 238 (2005) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)), they may not categorically foreclose cross-examination concerning a witness's biases or cognitive impairments, *see Van Arsdall*, 475 U.S. at 679; *Henry v. Speckard*, 22 F.3d 1209, 1214-15 (2d Cir. 1994); *Harper v. Kelly*, 916 F.2d 54, 56-57 (2d Cir. 1990).

A Confrontation Clause violation requires reversal unless "it is harmless beyond a reasonable doubt." *Corby*, 6 N.Y.3d at 238.

Here, the defense was entitled to cross-examine C.P. about her diagnosed bipolar disorder and depression to show how those conditions may have distorted

her perception or memory or caused her to fabricate her accusations. As to the latter, C.P. told police she had made up the rape to avoid being disciplined for coming home late (521), and she testified she had previously told bizarre lies for similar reasons (496-99). Evidence of her psychiatric treatment—with serious antipsychotic medication, for equally serious disorders, over at least *eight years*, beginning soon after the alleged rape and lasting through the year in which she accused King—would have supported the argument that C.P. really did fabricate her allegation that King had sexual intercourse with her or that, at the very least, her claimed recollection could not be trusted and thus there was reasonable doubt.

Defense counsel clearly preserved King's Confrontation Clause objection (528-29, 554-55).

POINT II

THE ADMISSION OF KING'S ALLEGED STATEMENT REQUIRES REVERSAL BECAUSE IT VIOLATED CPL § 710.30'S PRECLUSION REQUIREMENT AND THE RULE AGAINST CRIMINAL-PROPENSITY EVIDENCE

The court committed two errors in admitting King's alleged seven-year-old statement, either of which independently requires reversal. First, after the People violated CPL § 710.30 by giving King no notice of their intent to use the statement, the court erred in refusing to preclude it. Second, the court erroneously granted the People's *Molineux* application to use the statement in their case in chief.

A. CPL § 710.30 Required Preclusion of the Statement

CPL § 710.30 provides that "[*w*]*henever* the people intend to offer at a trial" a statement by the accused that "if involuntarily made would render the [statement] suppressible," they "*must* serve upon the defendant a notice of such intention" "within fifteen days after arraignment." CPL § 710.30(1)-(2) (emphasis added). Later notice is permissible only upon a showing of "good cause." CPL § 710.30(2). Absent either timely notice or good cause, the statement *must* be precluded from trial. CPL § 710.30(3); *see* *People v. O'Doherty*, 70 N.Y.2d 479, 483 (1987).[6]

"The timing, notice, and 'good cause' requirements of CPL § 710.30 have all been strictly construed by the Court of Appeals." *People v. Phillips*, 183 A.D.2d 856, 858 (2d Dep't 1992). Thus, noncompliance requires preclusion no matter what; "prejudice plays no part in the analysis." *People v. Lopez*, 84 N.Y.2d 425, 428 (1994). This is because the statute reflects "not only considerations of fairness to the defendant, but also concerns for the efficient conduct of criminal prosecutions." *O'Doherty*, 70 N.Y.2d at 488.

The present case called for a straightforward application of § 710.30's clear language. The People gave King *no* notice that they intended to introduce his statement, let alone the required 15 days' notice, evidently planning to spring the

[6] The exception recognized in the statute where a defendant moves to suppress after receiving late notice does not apply here, where no such motion was made.

statement on him mid-trial. After counsel moved to preclude the statement under § 710.30, neither the trial court nor the People cited any recognized exception to the statute. The court was *required* to preclude the statement.

The court's given reason for denying King's motion to preclude was that King had received notice of the same statement years earlier, during a previous, unrelated prosecution, had litigated the voluntariness of it, and had lost (11/12/15 at 30; 11/16/15 at 58-60; Order, Feb. 29, 2016, at 3). But neither the court nor the prosecutor cited any authority for this position (11/16/15 at 58), and there is none.[7] King knew that detectives claimed he had made a statement, just as most defendants know when they are alleged to have made statements. But just like those other defendants, King was entitled to notice that the People intended to *use* this statement in *this* case, which would trigger his 45-day deadline for moving to suppress it. *See* CPL § 255.20(1). By not providing such notice, the People frustrated the Legislature's statutory scheme for the pretrial litigation of admissibility issues.

King was also entitled to notice so he could contest, in a timely and orderly manner with full briefing, the People's argument that collateral estoppel barred

[7] The court cited two plainly inapplicable cases, *People v. Dillon*, 30 A.D.3d 1135 (1st Dep't 2006) and *People v. Kirkland*, 89 N.Y.2d 903 (1996) (1/20/16 at 30). Each applied the statutory exception to preclusion where—unlike this case—the defendant has moved to suppress despite the People's notice violation.

another *Huntley* hearing. In fact, the case law is clear that collateral estoppel does *not* apply. The Court of Appeals has doubted whether this doctrine ever applies against criminal defendants, *see* *People v. Aguilera*, 82 N.Y.2d 23, 29-31 (1993), and has held that, even where a suppression issue has once been decided against a defendant, he is entitled to contest the same issue in a subsequent prosecution by submitting additional evidence, such as his own testimony, *see* *People v. Plevy*, 52 N.Y.2d 58, 65-66 (1980).[8]

Even if the principle of collateral estoppel applied, its requirements were not met here. The estopped party must have had "a full and fair opportunity to litigate" the issue, *People v. Goodman*, 69 N.Y.2d 32, 38 (1986) (internal quotation marks omitted), including the opportunity to appeal the ruling, *see* *In re JP Morgan Chase Bank, N.A.*, 135 A.D.3d 762, 763 (2d Dep't 2016), and an interest in doing so, *see* *Plevy*, 52 N.Y.2d at 65. King had no opportunity to appeal the prior *Huntley* ruling, because the case in which it was issued was dismissed (11/16/15 at 64). After the People re-presented the felony charges, they offered him a misdemeanor plea which, under the Queens D.A.'s practice, required a written appeal waiver;[9] he thus had neither the incentive nor the right to appeal.

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[8] A defendant might decide not to testify in one case, but make a different decision, given the different facts and stakes, during a second, unrelated prosecution.

[9] In King's prior prosecution, unlike in this case, the People recognized the absolute nature of the notice requirement: when they obtained a second indictment, *they again*

Additionally, collateral estoppel applies only where the issue has "been determined by a valid and final judgment," *Goodman*, 69 N.Y.2d at 37 (internal quotation marks omitted), but a pretrial suppression ruling is "interlocutory in nature," *McGrath v. Gold*, 36 N.Y.2d 406, 412 (1975), and "cannot be given preclusive effect," *Owens v. Treder*, 873 F.2d 604, 608 (2d Cir. 1989).

B. King's Alleged Statement Should Also Have Been Precluded as Prohibited Propensity Evidence to Which No *Molineux* Exception Applies

1. The Applicable Law

Evidence of similar uncharged crimes is generally "excluded for policy reasons" to prevent conviction based on a defendant's "bad character or propensity toward crime." *People v. Arafet*, 13 N.Y.3d 460, 464-65 (2009) (quoting *People v. Alvino*, 71 N.Y.2d 233, 241 (1987)). Such evidence "is presumptively inadmissible," *People v. Frumusa*, 29 N.Y.3d 364, 369 (2017), but may be introduced if "relevant to some issue other than the defendant's criminal disposition," *Arafet*, 13 N.Y.3d at 465 (internal quotation marks omitted). A "nonexhaustive" list of such issues—the "so-called *Molineux* exceptions"—includes "(1) intent, (2) motive, (3) knowledge, (4) common scheme or plan, or

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served CPL § 710.30 notice, despite the earlier *Huntley* determination (11/16/15 at 64-65). This gave King the opportunity to again move to suppress (*id.* at 65). King's appeal waiver is available in the public court file for Indictment No. 1972/2011; Appellant will provide it to the Court upon its request.

(5) identity of the defendant." *Id.* (internal quotation marks omitted); *see* *People v. Molineux*, 168 N.Y. 264, 293 (1901).

A "two-part inquiry" governs the admissibility of *Molineux* evidence. "[F]irst, the proponent … must identify some material issue, other than the defendant's criminal propensity, to which the evidence is directly relevant." *People v. Cass*, 18 N.Y.3d 553, 560 (2012). Second, the court must find that "the probative value of the evidence outweighs the danger of prejudice." *Id.* "[E]vidence will not be admitted if it 'is actually of slight value when compared to the possible prejudice.'" *Arafet*, 13 N.Y.3d at 465 (quoting *People v. Allweiss*, 48 N.Y.2d 40, 47 (1979)).

The first step of this inquiry is a question of law to be reviewed *de novo*, while the balancing step is reviewed for abuse of discretion. *Cass*, 28 N.Y3d at 560 n.3. The party proffering *Molineux* evidence bears the burden of establishing its admissibility. *People v. DiPippo*, 27 N.Y.3d 127, 138 (2016).

2. As a Matter of Law, None of the *Molineux* Exceptions Apply

The prosecutor argued in summation that King's alleged statement was relevant to his "intent" and "motive" (1161), and the court instructed the jurors it was relevant to King's "intent," "motive," and "lack of mistake" (317; *see* 1203). The court clearly erred in admitting the statement for these purposes.

Intent and absence of mistake. These related exceptions apply only where

"criminal intent cannot be inferred from the commission of the act or when defendant's intent or mental state in doing the act is placed in issue." *People v. Ingram*, 71 N.Y.2d 474, 479 (1988). In this case, involving statutory rape, intent was not even an element. King's defense was that he did not have intercourse with C.P. at all, not that he did so without intending to or by "mistake."

Motive. This exception applies only when the past act is tightly "interwoven" with the charged crime, or where the defendant's motive to commit a *particular* crime helps identify him as the perpetrator; for example, a defendant's involvement in an uncharged robbery attempt may establish his motive for shooting a police officer during flight. *See People v. Till*, 87 N.Y.2d 835, 836-37 (1995). Here, King's admitted interest in *other* underage girls did not tend to establish his motive to have intercourse with C.P. in particular. It established only his propensity.

* * *

Before trial the People also cited, and the trial court accepted, additional *Molineux* exceptions: "identity," "common scheme or plan," and "controvert[ing] any innocent explanation" for King's DNA being on C.P.'s sweatpants (1/26/16 at 230, 234; 1/28/16 at 270-71, 276-77; Order, Feb. 29, 2016, at 4-6). These exceptions were so patently inapplicable that neither the court in its charge nor the People in summation mentioned them. Just in case, we address them:

Identity/modus operandi. For this exception to apply, the past and present actions must be "unusual enough to compel the inference that the defendant committed both." *People v. Agina*, 18 N.Y.3d 600, 603 (2012) (quoting *People v. Beam*, 57 N.Y.2d 241, 251 (1982)). The People made no such showing here. King's *modus operandi*, according to the statement, was to lure girls with money to have unforced sex. But C.P. never claimed this happened; rather, she alleged that he violently forced her into sex. *See People v. Carter*, 31 A.D.3d 1167, 1168 (4th Dep't 2006) (previous consensual sexual encounter improperly admitted where complainant alleged defendant "forcibly sodomized" him). Further, such luring is not unique, which is why children are warned not to get in cars with strangers offering enticements. Finally, contrary to their identity argument, the People contended during the charging conference that, given the DNA evidence and C.P.'s own courtroom identification, "the issue is not identity" (1041).

Common scheme or plan. This exception applies only where there "exist[s] a single inseparable plan"; evidence of a "repetitive pattern" is not enough. *People v. DeGerolamo*, 118 A.D.3d 23, 28 (1st Dep't 2014) (quoting *People v. Fiore*, 34 N.Y.2d 81, 85, 87 (1974)). If, as here, the uncharged act "was not committed to effect" the commission of the charged act, the exception does not apply. *Id.*

To "controvert any innocent explanation" for King's DNA on C.P.'s sweatpants. This novel exception, for which neither the court nor the People cited

any authority, does not justify admission of the statement. That King admitted to, in the detective's words, liking "sex" with teenage girls, does not address whether King had *intercourse* with C.P. The statement establishes only King's sexual interest and propensity, not that such interest invariably resulted in the forced intercourse that C.P. alleged.

Since, as a matter of law, none of the *Molineux* exceptions apply, the court's contrary decision was erroneous.

3. The Court Abused Its Discretion in Finding that the Probative Value of the Statement Outweighed Its Potential for Undue Prejudice

Even if some *Molineux* exception applied, the trial court improvidently exercised its discretion at step two: balancing the statement's probative value against its likely prejudicial impact. Under any conceivable exception, the statement was "of slight value when compared to the possible prejudice" to King. *Arafet*, 13 N.Y.3d at 465 (internal quotation marks omitted). As the People themselves asserted in disclaiming any issue regarding identity, they already had their expert's testimony that King's DNA was in semen found on C.P.'s sweatpants. This, in their view, established that he had some kind of "sex" with C.P. His statement did nothing to prove that the "sex" included intercourse.

The prejudice to King, however, was grave. Most jurors would be disgusted by his alleged statement that he was "sick" and would entice underage girls into

"sex." Our society has a "special opprobrium … for sex offenders." *Baba-Ali v. State*, 24 Misc. 3d 576, 583 (Ct. Cl. 2009). Moreover, King's lawyer could not effectively cross-examine the detective about the context in which the statement was elicited to challenge whether it was made at all, was accurately described, or should be rejected as involuntary. This was because the interrogation occurred while King was under the intense stress of a homicide investigation (which ultimately exonerated him). The court recognized this highly prejudicial double-bind when it initially excluded the statement (1/21/16 at 52-53). Defense counsel's dilemma was no less severe when the court admitted the statement under *Molineux*.

POINT III

OCME ANALYST DZIEGIELEWSKI'S OPINIONS ABOUT THE DNA AND SEROLOGY EVIDENCE OVERSTEPPED THE PROPER LIMITS OF EXPERT TESTIMONY AND VIOLATED KING'S CONFRONTATION RIGHTS

OCME criminalist Dziegielewski's testimony was improper in two independent ways. First, her testimony about other analysts' DNA and semen findings violated the Confrontation Clause because, contrary to binding Court of Appeals precedent, she neither participated in generating those findings nor independently analyzed the underlying raw electronic data. Second, she gave an improper "expert" opinion, lacking any scientific basis, that *all* the semen detected

by other analysts on C.P.'s clothes and in the rape kit came from King, even though only one stain produced a DNA match.

A. Dziegielewski's Testimony About Other Analysts' DNA and Serology Findings Violated King's Confrontation Rights

1. To Satisfy the Confrontation Clause, an Expert Witness Must Have Either Participated in Generating the Forensic Findings at Issue or Independently Analyzed the 'Raw Data' Underlying the Findings

The Confrontation Clause "prohibits the admission of testimonial statements made by a nontestifying [prosecution] witness," unless that witness is unavailable and the accused had a previous chance to cross-examine her. *People v. Austin*, 30 N.Y.3d 98, 104 (2017); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009).

The results of forensic testing are "testimonial," *Melendez-Diaz*, 557 U.S. at 317-18, even if drawn from seemingly reliable "machine-produced data," like a simple blood-alcohol test, *Bullcoming v. New Mexico*, 564 U.S. 647, 661 (2011). While a splintered Supreme Court held in *Williams v. Illinois*, 567 U.S. 50 (2012), that an expert had properly testified about DNA results she played no role in generating, no five Justices agreed on a rationale. Therefore, "Supreme Court precedent before *Williams*"—i.e., *Melendez-Diaz* and *Bullcoming*—still controls. *United States v. James*, 712 F.3d 79, 95-96 (2d Cir. 2013). The Second Circuit has "distill[ed] from this pre-*Williams* case law" that forensic results are testimonial if

"the primary purpose of a reasonable analyst in the declarant's position would have been to create a record for use at a later criminal trial." *Id.* at 94.

The New York Court of Appeals, too, has affirmed "the continued viability of the *Bullcoming* and *Melendez-Diaz* decisions" after *Williams*. *People v. John*, 27 N.Y.3d 294, 311 (2016). Applying these precedents, the Court applies the following standard to DNA testimony:

> [A] defendant [i]s entitled to cross-examine the analyst who either [1] "performed, witnessed or supervised the generation of the critical numerical DNA profile" or [2] who "used his or her independent analysis on the raw data" to arrive at his or her own conclusions.

Austin, 30 N.Y.3d at 104 (quoting *John*, 27 N.Y.3d at 314-15).

To satisfy the second option—"independent analysis on the raw data"—the testifying witness must have "[1] [performed] an independent analysis of the *computer imaging from the software* used for calling the alleles and [2] record[ed] their separate and distinct analysis" of the allele calls. *John*, 27 N.Y.3d at 313-14 (emphasis added). "[R]aw electronic data" is unintelligible "machine output," *People v. Gills*, 52 Misc. 3d 903, 905 & n.1 (Sup. Ct. Queens Cty. 2016), that is stored digitally, "in a unique *.fsa file," *People v. Jones*, 55 Misc. 3d 743, 745 (Sup. Ct. Bronx Cty. 2017).[10] A "trained analyst[]" must use "computer software"

[10] ".fsa" is simply "a file extension that indicates the file format." *Jones*, 55 Misc.3d at 745 n.5.

to interpret this data and "construct the DNA profile," which includes a manual "editing process." *John*, 27 N.Y.3d at 310-11.[11]

Thus, the Court in *John* ordered a new trial where the testifying DNA expert had merely "reviewed the reports of … other OCME analysts … generated after an editing process"—that is, after reviewing the paper case files only. *Id.* at 310. Later controlling decisions have similarly found Confrontation Clause violations where the People failed to establish that their expert had reviewed the computerized raw electronic data rather than the paper case files. In *People v. Tsintzelis/Velez*, Nos. 17 and 18, 2020 WL 1355707 (N.Y. Mar. 24, 2020), the expert testified in one case that she "review[ed]" and "interpreted" "each and every portion" of the DNA testing, Def.'s Br. in *Velez* at 18-19; in the other, she "responded 'yes' when asked … if she reviewed the electronic raw data," but did not elaborate, Def.'s Br. in *Tsintzelis* at 22, 42. The Court ordered new trials. *Tsintzelis/Velez*, 2020 WL 1355707, at *1. Such "thin testimony," not explaining what the expert's review "practically entailed," failed to meet the "People's burden to present the proper witnesses" under *John*. *Id.* at *2 (Rivera, J., concurring). Similarly, in *People v. Jones*, 179 A.D.3d 948, 949 (2d Dep't 2020), this Court held DNA testimony

[11] A defense expert may use different software than the OCME, *see Gills*, 52 Misc. 3d at 906, which may "call[] some of the prosecution's results into question," *People v. Alvarez*, 38 A.D.3d 930, 934 (3d Dep't 2007). The Legislature recently acknowledged this importance of raw electronic data by requiring prosecutors to obtain and disclose it to the defense. *See* CPL § 245.20(1)(j).

improper where the expert's "involvement was limited to 'review[ing] all the paperwork in the file[s],'" Def.'s Br. at 16.[12]

While earlier Court of Appeals cases suggested that forensic findings made "before [the defendant] was ever a suspect in the crime" may not be testimonial, *Austin*, 30 N.Y.3d at 104 (discussing *People v. Brown*, 13 N.Y.3d 332, 340 (2009)), *John* repudiated this definition of "testimonial," as it is "narrower than the one stated in *Bullcoming*," *John*, 27 N.Y.3d at 306, 311. *Bullcoming*, decided after *Brown*, rejected the argument that forensic findings made under "a non-adversarial public duty" are non-testimonial; instead, it held that a document "made in aid of a police investigation[] ranks as testimonial." *Bullcoming*, 564 U.S. at 664. In *Williams*, five Justices again rejected the argument that, to be testimonial, a "statement must be meant to accuse a previously identified individual." 567 U.S. at 135 (opinion of Kagan, J.); *id.* at 114 (opinion of Thomas, J.) (finding no basis "for limiting the confrontation right to statements made after the accused's identity became known"); *see also Melendez-Diaz*, 557 U.S. at 313 (rejecting the argument that forensic findings are testimonial only if they "directly accuse" the defendant).

[12] The *Velez* and *Tsintzelis* briefs are available on the Court of Appeals website at https://www.nycourts.gov/ctapps/courtpass. The *Jones* briefs are on file in this Court. The briefs are cited because the decisions do not discuss the relevant facts about the experts' improper testimony.

2. The DNA Findings of Non-Testifying OCME Analysts Were Improperly Admitted in this Case

For the People's DNA evidence to be probative of King's guilt, they had to introduce two sets of results: (1) the male DNA profile generated in 2004 from sweatpants stain 3B, and (2) the DNA profile later generated from a known sample from King, which allegedly matched the 2004 profile. For *either* profile to be admissible, the People had to present a witness who either participated in generating the profile or independently reviewed the underlying raw electronic data. The People failed to establish that their DNA expert, Lisa Dziegielewski, did either of these things for either profile.

First, Dziegielewski admitted she did not generate the 2004 DNA findings. *See* p. 16, *supra*. As for the 2014 (and 2009, *see* p. 17 n.4, *supra*) known profiles of King, Dziegielewski never directly stated what role, if any, she played; however, her testimony clearly implied she played no direct role but rather, as with the 2004 findings, only reviewed other analysts' findings, *see* pp. 16-17, *supra*. Therefore, for her testimony about *any* of the DNA results to be admissible, she had to have independently reviewed the raw electronic data.

Although the People initially claimed Dziegielewski did this, her testimony made clear she did not. The words "raw data" came up only once during her testimony, when she perfunctorily agreed with the leading question that, at least as to stain 3B, she had reviewed the raw data (707). However, she then admitted she

did not use computer software to review the pre-edit data and call the alleles, as clearly required by *John*. Instead, she merely reviewed *other analysts' post-edit, paper reports*. *See* pp. 16-17, *supra*. Thus, just as in *John*, *Velez/Tsintzelis*, and *Jones*, the People here failed to show that their expert independently reviewed the raw electronic data. Those controlling cases require reversal.

Reversal is also required because Dziegielewski never recorded her own, supposedly independent DNA findings, another requirement of *John*. King's counsel repeatedly asked for such documentation and never received it; Dziegielewski claimed her conclusions were "save[d] mentally" (734). The only reports she signed, admitted as People's Exhibit 7, simply contained her comparisons of the 2004 profile to the 2009 and 2014 profiles; neither indicated that she herself generated either profile or reviewed the raw electronic data.

That King was not yet a suspect in 2004 does not make the 2004 DNA findings non-testimonial. As we have shown, *John* made clear that this is irrelevant under the binding precedent of *Bullcoming*. But even if, *arguendo*, the 2004 results were admissible on this basis, the 2009/2014 findings were not, as they were generated from known samples from King once he was a suspect, and the 2004 results were meaningless without a known profile to compare them to. *See* *Austin*, 30 N.Y.3d at 100-02, 105 (reversing conviction based on improper admission of

DNA profile from post-arrest buccal swab, regardless of whether DNA findings from crime-scene evidence were properly admitted).

3. The 2004 Serology Findings of Non-Testifying Analysts Also Were Improperly Admitted

Even absent DNA findings, the very presence of semen—on C.P.'s tank top, underwear, sweatpants and, crucially, vaginal and anal swabs—was important evidence corroborating her allegations of sexual contact and intercourse. However, Dziegielewski's testimony about these semen findings by another analyst also violated King's confrontation rights, as defense counsel argued (648-49).

The People essentially conceded that, on this topic, Dziegielewski was an improper surrogate witness for non-testifying analysts. During jury deliberations, the People agreed that the 2004 OCME report containing the semen findings should not be published to the jury, because it contained another analyst's conclusions, and only Dziegielewski's "own opinions and conclusions" could be "properly received" in evidence (1231). Meanwhile, the People previously had conceded that Dziegielewski did *not* independently examine, or thus reach her own conclusions about, the 2004 semen findings (650). It follows that her testimony about the presence of semen violated the Confrontation Clause.

The People's only argument for the admissibility of the semen findings was that they were non-testimonial since they were made before King was a suspect (649). But as explained above, *Bullcoming* and *John* foreclose this argument.

B. Dziegielewski's Testimony that All the Semen Came from a Single Source Was Not Based Upon Any 'Scientific' Expertise and Was Thus Improperly Admitted

Dziegielewski also should have been precluded from opining that all the semen found in 2004 came from a single male, King. She was no more qualified to give this opinion than the lay jurors.

Expert testimony is admissible only where it "would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." *People v. Williams*, 20 N.Y.3d 579, 583-84 (2013) (quoting *De Long v. Cty. of Erie*, 60 N.Y.2d 296, 307 (1983)). It must be based on "a scientific 'principle or procedure [that] has gained general acceptance in its specified field.'" *People v. Brooks*, 31 N.Y.3d 939, 941 (2018) (quoting *People v. Wesley*, 83 N.Y.2d 417, 422 (1994)). This avoids "the danger in allowing unreliable or speculative information … to go before the jury with the weight of an impressively credentialed expert behind it." *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 447 (2006). A trial court's decision to admit expert testimony is reviewed for abuse of discretion. *Williams*, 20 N.Y.3d at 584.

Here, it was improper for the People to elicit Dziegielewski's "expert" opinion that "there is one semen donor in this case"—including, crucially, the semen from the vaginal swab (708) on which "no male DNA" was found (755-56). This opinion was based not on scientific knowledge but rather on Dziegielewski's

lay assumption that C.P. had no sexual contact with anyone else and thus all the alleged semen must have come from one person. Indeed, in summation, the prosecutor argued this was "the common sense answer" (1157). But "[a] matter of common sense, of course, belies the need for expert opinion." *Babcock v. Cty. of Oswego*, 169 Misc. 2d 605, 610 (Sup. Ct. Oswego Cty. 1996).

Dziegielewski's unscientific "expert" opinion was uniquely prejudicial where DNA evidence already gave "the prosecutor's case … an aura of invincibility." *People v. Wright*, 25 N.Y.3d 769, 783 (2015) (internal quotation marks omitted). Moreover, as defense counsel complained, the People ambushed the defense (176). Before trial, they provided no report containing the conclusion Dziegielewski would eventually give and, after the court seemingly precluded such testimony and the prosecutor said he would not offer it, he did so anyway. *See* pp. 17-19, *supra*. The People exacerbated the prejudice by forcefully relying upon the improper testimony in summation (1157, 1158, 1180). Defense counsel objected at each juncture, contending it was too late for him to consult with the defendant's own DNA expert, who was by then out of town and unavailable. *See* p. 18, *supra*. The People's conduct should not be tolerated.

POINT IV

THE PEOPLE VIOLATED *BRADY* AND *VILARDI* BY DISCLOSING NOT AT ALL, OR LATE, EVIDENCE CONTRADICTING C.P.'S CLAIMED SEXUAL INEXPERIENCE, PROVING SHE HAD A TROUBLING PSYCHIATRIC HISTORY, AND SHOWING SHE HAD MADE PRIOR RAPE ALLEGATIONS THAT WERE FALSE

Prosecutors, as "public officers," must "deal fairly with the accused and be candid with the courts." *People v. Steadman*, 82 N.Y.2d 1, 7 (1993). These duties, "rooted in the concept of constitutional due process," are "given substance by the *Brady* decision," which obligates prosecutors to timely disclose "evidence in its possession that is favorable to the accused." *Id.* (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). Timely means early enough for the defendant "to use it in a meaningful fashion" at trial. *People v. Wagstaffe*, 120 A.D.3d 1361, 1363 (2d Dep't 2014).

A *Brady* violation exists where (1) evidence "either exculpatory or impeaching" (2) was "suppressed by the prosecution," and (3) "prejudice arose because the suppressed evidence was material." *People v. Giuca*, 33 N.Y.3d 462, 473 (2019) (internal quotation marks omitted).

Under federal law, evidence is material if it "undermine[s] confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Under the New York State Constitution, evidence that the defense specifically requested is material if there is

"a reasonable possibility" that the non-disclosure "contributed to the verdict." *People v. Vilardi*, 76 N.Y.2d 67, 77 (1990). Where multiple items have been improperly withheld, materiality is assessed cumulatively. *Kyles*, 514 U.S. at 421.

In this case, the People suppressed three obviously significant categories of specifically requested information and, as we discuss in Point V, *infra*, this was material to the outcome of the trial.

First, the People inexcusably suppressed information about C.P.'s psychiatric history that the court had *ordered* them to disclose. Following defense counsel's specific request for C.P.'s psychiatric history, the court ruled that the defense was "entitled" to this information and directed the People to find out if C.P. had such a history, to obtain her psychiatric records, and to disclose such material to the defense or at least submit it for *in camera* review. The People evaded this order. C.P. testified that the prosecutor never asked about her mental health history. The prosecutor, contradicting his star witness, represented that he did ask her something, but only artfully worded questions likely to elicit negative answers—whether *she* believed she had any conditions that affected her perception or memory—and he failed to submit any records for *in camera* review. *See* pp. 11-13, *supra*.

The People were not entitled to withhold, deliberately avoid knowledge of, or falsely deny information the court had ordered them to obtain and disclose,

whether they agreed with the court's order or not. *See, e.g.*, *People v. Clausell*, 182 A.D.2d 132, 134 (2d Dep't 1992) (*Brady* violation where Queens prosecutor was "ordered" to "inquire as to the existence of [police] reports and to produce them" but falsely claimed they "did not exist"); *People v. Baba-Ali*, 179 A.D.2d 725, 730 (2d Dep't 1992) (*Brady* violation where Queens prosecutors withheld exculpatory medical records "they were under court order to" produce).[13]

Second, the People violated *Brady* and *Vilardi* by redacting medical records showing C.P. likely suffered from an STD, despite a specific defense request for this evidence (5/12/16 at 62-63). The People's "explanation"—that the redacted condition "doesn't *necessar[il]y* get contracted by sexual contact" (927 (emphasis added))—was an acknowledgement that it might have been so contracted. C.P. denied in her testimony that she was sexually active before the alleged rape, and evidence that this was false not only would have impeached her credibility but also

[13] The court's ruling ordering disclosure was well supported, even if the prosecutor, due to his deliberate avoidance, lacked actual knowledge of C.P.'s psychiatric history at that moment. "[T]he government's duty to disclose under *Brady* reaches beyond evidence in the prosecutor's actual possession." *People v. Garrett*, 23 N.Y.3d 878, 887 (2014) (internal quotation marks omitted); *see, e.g.*, *People v. Novoa*, 70 N.Y.2d 490, 498 (1987) (prosecutor violated *Brady* by failing "to discover and disclose" a witness's cooperation agreement with another prosecutor's office because of her "disinclination" to seek such information); *People v. Rutter*, 202 A.D.2d 123, 131 (1st Dep't 1994) (Bronx prosecutor violated *Brady* by withholding exculpatory material in possession of the Philadelphia police to which she had "access"); *People v. Velasquez*, 49 Misc. 3d 265, 271 (Crim. Ct. Bronx Cty. 2015) (once a prosecutor "knows or has reason to know that a crucial prosecution witness has [a psychiatric] condition," she must obtain and disclose the information).

would have shown that the semen allegedly found on her could have come from a third party, not King.[14]

Third, the People delayed disclosure, until it was too late, of Detective Echevarria's DD5 documenting C.P.'s apparent admission to falsely reporting two rapes, even though the defense had, in November 2013, requested "all reports" of investigating officers. Omnibus Mtn. at unnumbered page 13. When the People finally disclosed the DD5, shortly before trial, Echevarria could no longer recall the basis for the report. The defense was entitled to have the DD5 when Echevarria still remembered the source of information or, at least, in time to "investigate additional avenues of exculpatory or impeaching evidence" based on the DD5. *Wagstaffe*, 120 A.D.3d at 1364 (citing *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002)); *see also, e.g.*, *People v. Rutter*, 202 A.D.2d 123, 132 (1st Dep't 1994) (*Brady* violation where witness's "statements could no longer be used by defense counsel for impeachment" due to late disclosure).

[14] The court's refusal to order the redactions removed does not cure the *Brady* violation. *See* *People v. Rivera*, 138 A.D.2d 169, 175 (1st Dep't 1988).

POINT V

THE ABOVE ERRORS EITHER REQUIRE AUTOMATIC REVERSAL OR, IF HARMLESS-ERROR ANALYSIS APPLIES, THE PEOPLE CANNOT MEET THEIR BURDEN OF SHOWING HARMLESSNESS

As we have shown, some of the errors that occurred in this trial automatically require reversal without regard to prejudice—specifically, the denial of King's absolute constitutional rights to be present, to counsel, and to a public trial. *See* Point I.A, *supra*. As to Appellant's other constitutional claims, *see* Points I.B, II, III.A, and IV,[15] the People must show that the errors were harmless beyond a reasonable doubt, a heavy burden. *See* *People v. Crimmins*, 36 N.Y.2d 230, 237 (1975).[16] As to the non-constitutional error, *see* Point III.B, *supra*, the People cannot show there is "no significant probability" that it contributed to the guilty verdict. *Arafet*, 13 N.Y.3d at 467 (internal quotation marks omitted).

Prejudice from all errors must be considered cumulatively. *See* *People v. Wisniewski*, 133 A.D.2d 357, 359 (2d Dep't 1987). The errors in this case are

[15] Although Point II involves application of statutory preclusion, the trial court's ruling that Appellant had no right in this case to contest the voluntariness of his statement denied him his constitutional right to do so. Additionally, by admitting the statement even though it constituted criminal propensity evidence, the court denied Appellant his constitutional right to a fair trial.

[16] The *Vilardi* materiality standard and the constitutional harmless error standard are identical. For convenience, we apply the *Vilardi* standard in our discussion of harmless error. *See, e.g.*, *People v. Brownlee*, No. 1239, 2020 WL 1225440, at *1 (4th Dep't Mar. 13, 2020).

clearly prejudicial because they go directly to the elements of the charge and each key piece of proof.

The only direct evidence that King had sexual intercourse with C.P. was her testimony. She told wildly inconsistent stories, contradicted other witnesses regarding significant details, recanted, then un-recanted many years later. Evidence explaining why she might have made false allegations, or that her allegations were not reliable, was critical to the defense. At the same time, essential to the prosecution was wrongfully admitted corroborative evidence, without which there was nothing but C.P.'s inherently suspect testimony.

We begin with the forensic evidence. Had the court properly applied the Confrontation Clause and precluded non-scientific "expert" testimony, OCME criminalist Dziegielewski would not have testified that semen was detected on C.P.'s vaginal and anal swabs and clothing, that King's DNA was found on a stain on C.P.'s sweatpants, and that all the semen, including in C.P.'s vagina, came from one person. There would have been no support for C.P.'s claims that sex occurred, that it involved intercourse, and that King was responsible.

Next is the effect of the erroneous admission of King's statement. By failing to provide the required notice and then misleading the court into finding that King was bound by a nearly seven-year-old lower-court determination in a different case, the People deprived King of his right to a prompt judicial determination, in

this case, of the statement's voluntariness. No jury could have dispassionately and fairly considered the rest of the evidence after hearing King's own statement that he had a "sick" propensity for sex with minors.

The court's striking of C.P.'s testimony about her psychiatric history, a denial of King's absolute constitutional right to confrontation, not only violated structural procedural rights built into the Federal and State Constitutions but also was substantively prejudicial. C.P.'s bipolar disorder and depression, together with eight years of treatment with antipsychotic medication—beginning shortly after the alleged incident and lasting at least until the year she claimed King was the perpetrator—provided a strong basis for the defense to argue that her testimony, influenced by her disorders, was contrived, exaggerated, or otherwise unreliable.

Finally, the cumulative impact of the People's myriad *Brady*/*Vilardi* violations was material to the trial's outcome. The suppressed evidence painted a radically different picture of C.P. as a deeply disturbed young woman who had made false rape allegations in the past, who was sexually active at age 12, and who had serious psychiatric disorders that might have caused her to misperceive, misremember, exaggerate, or fabricate her allegations against King.

It was significant that, when C.P. first recanted, she told police she had been afraid to come home late without a story and had made up the alleged rape. The possibility that she had an STD, which the People deliberately suppressed, would

have enabled the defense to explore whether, contrary to her testimony, she had been sexually active and had come home late not because she had been raped by King, but because she had a willing sexual experience, short of intercourse or with some other boy, that she had exaggerated in order to clear herself of blame. C.P.'s own testimony was consistent with her pursuing such interactions—she claimed she exaggerated her age so King would take an interest in her (457) and twice took the initiative to call him after they met (457, 460). The suppression of the STD results and other evidence belying C.P.'s professed naivety, including her past false rape allegations, deprived the defense of powerful arguments for innocence or at least reasonable doubt.

The defendant's burden under *Vilardi* is to show only a reasonable *possibility* that withheld evidence would have affected the outcome, and thus, as in *People v. Knowell*, it is enough that unproduced psychiatric or medical records "*might contain* material bearing on the reliability and accuracy of the witness's testimony." 127 A.D.2d at 794 (emphasis added). The People's failure to disclose C.P.'s psychiatric history and records also was material because timely disclosure "would have provided defense counsel with an opportunity to seek an expert opinion" regarding the relevance of her disorders to aid his relevancy argument to the court and his presentation to the jury. *Fuentes*, 829 F.3d at 249.

CONCLUSION

The egregious constitutional and other errors that plagued this trial deeply affected its fairness and the reliability of the result. Because dispassionate consideration by the jury was especially difficult given the heinous rape charge, fair process was essential to a just and reliable outcome. Because that process did not occur, King's conviction and 23-year sentence should be reversed and a new trial held. If any error complained of above was not properly preserved, we request that the Court review it under its interest-of-justice jurisdiction.

Respectfully submitted,

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