*To be Argued by:*
BARRY KAMINS
*(Time Requested: 15 Minutes)*

# New York Supreme Court

## Appellate Division—First Department

**Appellate Case No.: 2020-00590**

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

– against –

HARVEY WEINSTEIN,

*Defendant-Appellant.*

## BRIEF FOR DEFENDANT-APPELLANT

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New York County Clerk's Indictment Nos. 2335/18 and 2673/19

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases:**

**Statutes & Other Authorities:**

**SUPREME COURT OF THE STATE OF NEW YORK**
**APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT**

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**New York County Indictment Nos. 2673/2019, 2335/2018**

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**THE PEOPLE OF THE STATE OF NEW YORK,**

**Respondent**

**v.**

**HARVEY WEINSTEIN,**

**Defendant-Appellant.**

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# BRIEF FOR APPELLANT

## INTRODUCTION

Appellant Harvey Weinstein appeals from a judgment of the Supreme Court, New York County (James Burke, J.) rendered on March 11, 2020. He was convicted after a jury trial of Criminal Sexual Act in the First Degree [Penal Law Section 130.50(1)] and Rape in the Third Degree [Penal Law Section 130.25(3)], and was sentenced to consecutive terms of twenty and three years of imprisonment, respectively. Appellant was remanded on the day the jury returned its verdict. On

April 2, 2020, Appellant filed his Notice of Appeal. On October 12, 2020, Appellant moved for a stay of execution of judgment pending the determination of his appeal. That motion was denied on October 19, 2020 (Angela Mazzarelli, J.). Appellant remains incarcerated at Wende Correctional Facility, a maximum security prison in Alden, New York.

On appeal, appellant argues that he was (I) denied his constitutional right to be tried by an impartial jury when the trial court denied appellant's challenge for cause of a juror who had written an autobiographical book about the predations of older men against younger women, and who lied about the substance of the book during *voir dire,* and again denied appellant's motion to discharge the same juror as grossly unqualified when the juror lied to the court about reading and reviewing books on line during the trial about the very same topics involved in the trial; (II) denied his right to a fair trial by the trial court's *Molineux* and *Sandoval* rulings, which also violated his Sixth Amendment right to be tried only upon charges brought by a Grand Jury and his Fifth Amendment right to testify; (III) deprived of his constitutional rights to a fair trial and to present a defense when the trial court precluded, *inter alia,* the defendant's experts from testifying on the very same subject matter that it had permitted testimony by the People's expert and permitted the People's expert to bolster the credibility of the complainants to prove crimes occurred. (IV) denied his constitutional right to due process when it permitted

appellant to be tried on first and third degree rape charges that were insufficient as a matter of law and time-barred, respectively; (V) denied his constitutional right to due process when the trial court permitted appellant to be charged with an alleged rape that was time-barred in connection with two predatory sexual assault charges; (VI) denied his constitutional right to a fair trial where his convictions were against the weight of the properly admitted evidence, and so weak that the trial court's errors could not be deemed harmless; and (VII) received a sentence that was harsh and excessive.

## PRELIMINARY STATEMENT

Harvey Weinstein's alleged behavior toward women in the film industry became a *cause celebre* in 2017. Advocacy journalists published many unvetted allegations against Mr. Weinstein; within months, a new movement was spawned, known under the meme, #MeToo. The vast majority of the allegations described so-called inappropriate, but noncriminal behavior. As a result, Mr. Weinstein was ultimately fired from the company he built, and those who claim they were victimized by sexual importunities are suing for financial compensation. A man who once stood as a giant in Hollywood is now scorned and treated as a pariah. The Manhattan District Attorney's Office set up a hotline and began a years-long investigation into every aspect of Mr. Weinstein's life, i.e., his financial dealings,

his interactions with employees, and his interpersonal relationships with women dating back thirty years. This prosecution was the result.

Mr. Weinstein was indicted on five charges: two counts of Predatory Sexual Assault, (a class A-2 felony); Criminal Sexual Act in the First Degree (a class B felony); Rape in the First Degree (a class B felony); and Rape in the Third Degree (a class E felony). He was acquitted of both counts of Predatory Sexual Assault, as well as Rape in the First Degree. However, he was convicted of Criminal Sexual Act in the First Degree, which required a determinate jail sentence of from five to twenty-five years in jail, and for which he was sentenced to 20 years imprisonment and five years of post-incarceration supervision. He was also convicted of Rape in the Third Degree which carried a maximum sentence of one and a third to four years, for which he was sentenced to three years imprisonment, to run consecutive to the 20 year sentence.

Mr. Weinstein's conviction of one count of Criminal Sexual Act in the First Degree (a class B felony) and Rape in the Third Degree (a class E felony), arose out of two separate incidents of alleged sexual assault in 2006 and 2013, respectively, with two women with whom he indisputably had consensual sexual relationships. Their testimony and the documentary evidence of their relationships with Mr. Weinstein, even in the light most favorable to the People, suggest that under the totality of the circumstances described by the complainants, these two incidents were

also consensual at the time. Their explanations of why they capitulated, continued to see him, have sex with him, email him, introduce him to their parents and friends, and request favors from him are implausible, but the trial court lent them a venire of credibility by permitting over vociferous objection, expert testimony from a psychiatrist that such behaviors were commonplace for victims of sexual assault and that such victims do not lie and never forget, while it precluded the defense from admitting expert testimony to rebut her claims. Reflecting the "MeToo corollary, #Believe women" which quickly became, "believe all women," this so-called expert testimony undermined the reality that in cases such as these, the truth can be illusive given the passage of time and, in this case, the near-universal condemnation of Mr. Weinstein across all media platforms.

The criminal prosecution commenced with charges as to alleged victims-Jessica Mann and Lucia Evans (May 30, 2018 Indictment), which subsequently grew to three victims-Mann, Evans, and Miriam Haley (July 2, 2018 Indictment), but then was quickly reduced to two (Mann and Haley) when it was revealed that the lead investigator, Detective Nicolas DiGaudio, had purposefully sought to hide compelling evidence that the allegations of Lucia Evans, were untrue. Notably, in the July 2, 2018 Indictment the prosecution absurdly charged the defendant with two separate counts of predatory sexual assault based on the exact same two charges and the court ruled that this was legal. Nevertheless, left with only the allegations of

Mann and Haley, both of whom had had consensual relationships with Weinstein, to support their indictment, and the questionable ruling by the trial court to permit two counts of predatory sexual assault on the same two charges, the prosecutors added to a bill of particulars, a nearly *thirty year old* allegation of rape by an actress with some name recognition (Annabella Sciorra), as an alternative predicate crime for both counts of predatory sexual assault. When the judge precluded the use of this allegation as a predicate crime for the predatory sexual assault charges, on the basis that it had not been presented to the Grand Jury, the prosecutors re-presented the case on the eve of trial, this time predicating both counts of predatory sexual assault only on the then-*26 year old*, time-barred crime of rape in the first degree. Notwithstanding the fact that this statute had ***never*** been used in New York to import a time-barred offense into a criminal prosecution, the trial court permitted the use of the predicate crime, thereby creating the first of many trials within the trial.

Notwithstanding that the trial would already involve three entirely separate instances of alleged sexual assault, the prosecution moved to admit additional uncharged crimes evidence. The trial court not only erroneously permitted four women (Dawn Dunning, Tarale Wulff, Lauren Young, and Emanuella Postacchini) to testify to six instances of alleged uncharged sexual misconduct by Mr. Weinstein, but permitted Jessica Mann (the complaining witness in the rape charges stemming from an incident in 2013) to testify to two additional instances

of alleged sexual misconduct-one of which occurred nearly a year after the charged incident. As a result, Mr. Weinstein was tried not only for alleged criminal acts charged in the indictment, but also for his alleged propensity to behave in ways that evinced licentiousness in his relationships with women.

Mr. Weinstein was tried in a venue, the atmosphere of which was permeated with negative publicity about him and his alleged relationships with women, an atmosphere reminiscent of the carnival-like conditions the Supreme Court condemned in the Sam Sheppard case, *Sheppard v. Maxwell*, 384 U.S. 333 (1966). Mr. Weinstein had a right to a fair trial by an impartial jury. The trial court should have exercised the utmost vigilance in protecting this most important right of the defendant. Instead, the trial court was cavalier in its obligation to safeguard this right and the consequences for Mr. Weinstein were disastrous.

Aware of the highly volatile and prejudicial atmosphere, Mr. Weinstein filed not one, but two, Change of Venue motions with this Court. The first was filed on August 16, 2019. At that time, the trial was scheduled to commence on September 9, 2019. That motion was denied. In the interim, the trial was adjourned until January 6, 2020, due to the prosecution's decision to return to the Grand Jury for a superseding indictment.

Once the trial commenced, it was clear that the jury would be facing a daily

barrage of improper influence and outright intimidation. On the very first day of trial, California state prosecutors held a highly publicized press conference to unveil charges against Mr. Weinstein in their jurisdiction. This only increased the media firestorm, but the trial court refused to delay the trial. Prospective jurors ran a gauntlet at the entrance of the courthouse and in the hall outside the courtroom itself, and were subjected to activists who were giving speeches, chanting and carrying placards declaring Weinstein guilty, not to mention scores of media representatives from around the world. Inside the courtroom and during *voir dire*, chants of "rapist" by organized protesters were heard from the open windows, and an alarming percentage of the venire admitted that they could not give Mr. Weinstein a fair trial. Even prospective jurors who claimed in court that they could be fair, revealed their bias against him on social media. All of this was brought to the attention of the trial judge who refused to acknowledge any possible prejudice inuring to the defendant from either the charges unveiled with great fanfare in California or the intimidation tactics in and around the courthouse. Hence, motions to delay the trial due to the new charges in California and for individual, sequestered *voir dire*, given the intense publicity in and around the courthouse, were denied.

On the second day of trial, the court threatened to jail Mr. Weinstein for life because Mr. Weinstein had been seen handing his cell phone and ankle monitor device to his attorneys *before* the judge entered the courtroom. The court asked Mr.

Weinstein, "Is this really the way you want to land up in jail for the rest of your life by texting in violation of a court order, is it"(T: 37)? A motion for the judge's recusal was denied.

The defense filed a renewed motion for a change of venue in the First Department, however the trial court would not allow the defense the opportunity to return to the Appellate Division before the jury was sworn, although the Appellate Division had specifically granted the defense the right to do so (T: 828-9). The motion also sought a pause in jury selection while this Court considered the new request. The motion was denied.

Set against this backdrop, we have identified the following errors, most of which are of constitutional magnitude which we submit require reversal.

## QUESTIONS PRESENTED

I. Was the Defendant Denied his Constitutional Right to an Impartial Jury When the Trial Court, After the Defendant Had No Peremptory Challenges Remaining, Denied the Defendant's Challenge For Cause of a Juror Who had Written an Autobiographical Book About the Predations of Older Men Against Younger Women and Lied About it in *Voir Dire*, and Then Denied Defendant's Motion to Discharge the Juror as Grossly Unqualified When, During the Trial, She Lied to the Court About

Reviewing a Book the Content of Which Mirrored the Subject Matter of the Trial?

II. Did the Trial Court's *Molineux* and *Sandoval* Rulings Deprive the Defendant of His Right to a Fair Trial, His Right To Be Tried only on Charges Brought By a Grand Jury, and His Right to Testify on His Own Behalf?

III. Did the Trial Court Deprive the Defendant of His Constitutional Rights to Present Evidence and to a Fair Trial When it Precluded the Defendant from Presenting Expert Testimony on Topics About Which the People's Expert was Permitted to Testify and Permitted the People's Expert to Bolster the Credibility of the Witnesses and to Offer Evidence to Prove That the Crimes In This Case Occurred, such as That Rape Victims Do Not Lie?

IV. Did the Trial Court Err When it Admitted Evidence at Trial and Permitted the Jury to Deliberate on First and Third Degree Rape Charges That were Insufficient as Matter of Law and Time-Barred, Respectively, in Connection with the March 18, 2013 Incident?

V. Did the Trial Court Err When it Admitted Evidence at Trial of, and Permitted the Jury to Deliberate on, a Time-Barred First Degree Rape Accusation to Support Predatory Assault Charges?

VI. Was the Verdict Against the Weight of The Evidence and was the Evidence Supporting the Verdict so Weak that the Trial Court's Erroneous Rulings Could not be Adjudged Harmless?

VII. Was the Sentence Harsh and Excessive?

## THE EVIDENCE AT TRIAL

The conviction for Criminal Sexual Act in the First Degree involved the complainant Miriam Haley. The allegation was that on July 10, 2006, fourteen years ago, Mr. Weinstein performed oral sex on her while in a bedroom at his Soho apartment.

Haley and Weinstein first met socially through a mutual friend at the premier of the movie, Aviator, in 2004 (T: 1553, 1630).[1] In May 2006, they met again at a "boat party" at the Cannes Film Festival in France (T: 1556, 1632). At the time, Weinstein was not married. There, Haley told Weinstein that she was moving to New York City and was looking for work (T:1556), despite the fact that Haley knew it was illegal for her to work in the U.S. because she did not have a work visa or any employment authorization documents (T:1568, 1643, 1644-5). Haley later met him in his hotel room, where Haley testified that Weinstein complimented her on her appearance and asked her for a massage which she declined (T:1557-59). She then took down his personal phone number on hotel note paper (T: 1639-40). According to Haley, these benign overtures caused her, then a 29 year old woman (T: 1723) who had been living on her own since the age of 17, to "burst into tears" after she

[1] Page references denoted by "T" refer to the trial transcript.

left the hotel with his personal phone number in hand (T: 1561-3, 1639). Nevertheless, there followed "other conversations" between her and Weinstein that she could not recall (T: 1643), after which Haley accepted Weinstein's help in obtaining short-term employment as a production assistant for a Weinstein Company production, Project Runway, already underway in New York (T: 1566). Mr. Weinstein provided this help notwithstanding Haley's testimony that she rejected his advances in the hotel room (T: 1566).

Once in New York, Haley's 2006 calendar indicated that she called Weinstein's office.[2] Mr. Weinstein made no effort to contact Ms. Haley during her short stint as a production assistant in New York City (T: 1568, 1753). It was Haley who again reached out to Weinstein in June 2006, after the production concluded and Haley's job had ended (T:1648). On June 27th, she and Weinstein went on a date at the Mercer Hotel (T: 1571, 1648-9), and she visited him again in his office where he lent her a book (T: 1574-5, 1650) and drove her home (T: 1577, 1650-1). According to Haley, Weinstein told her he was going to Paris for fashion week and invited her to join him. Days later, Weinstein stopped by Haley's apartment and she testified that he asked her again if she wanted to accompany him to Paris, but that she declined (T: 1582, 1653).

Haley continued to meet and communicate with Weinstein but could not recall where or what they talked about, only remembering that she had returned his book (T: 1594). Around this time, Haley wanted to visit a friend in California who was

[2] Notably, there were numerous cross outs on her calendar for which she had no explanation of information related to her involvement with Weinstein in Cannes, New York, California, and London (T: 1637, 1644, 1648, 1695-6, 1712-13, 1716).

due to give birth and Weinstein, according to Haley's email, "kindly offered" to purchase Haley a ticket to California so that she could stay with her friend for two weeks (T: 1595-6, 1662-3).[3] This offer was made just days before Haley would visit Weinstein at his apartment. Again, this was established by documentary evidence as Haley could not recall when, and under what circumstances, she requested that he buy her a plane ticket to California for July 11, 2006, although her calendar indicated that she was purchasing baby clothes for the trip as early as June 24th (T: 1662-5). Haley wanted a "professional slash social" relationship with Weinstein (T:1579). Apparently that meant dating, asking for favors, and accepting personal gifts.

Weinstein went to Paris where he was photographed with Georgina Chapman, who he would later marry. On July 10, 2006, Weinstein returned from Paris. That very same evening, Haley testified that she visited Weinstein at his apartment in Soho. She was driven to the apartment by Weinstein's driver (T: 1597, 1677, 1681). She testified that she recalled seeing an article about Weinstein and Georgina Chapman in a copy of the New York Post that was in the car and thought he had "planted it there" for her to see it, but denied that she told the District Attorney that she thought he had done so to make her jealous (T: 1679). Haley testified that the District Attorney's notes of her statements on 2018 were inaccurate (T: 1680, 1761-2, 1765-66). In fact, there was no such article in the July 10th New York Post, but in a July 11 edition of the New York Post there was a mention of Weinstein and Chapman together at fashion week (T: 1680).

[3] Haley testified that Weinstein bought her the ticket so that she could attend a premier on July 11, but her letter to Weinstein's assistant indicates that she was happy to fly to California on July 12, 2006, indicating that the premier could not have been the purpose of the trip.

At Weinstein's apartment, they sat on the sofa, talked and watched television (T: 1599, 1688). Weinstein tried to kiss her. Haley testified that she said, "no, no," and pushed Weinstein away, but that Weinstein persisted. Haley testified that she stood up and attempted to back away. She stated that she backed into a bedroom and fell backward onto the bed (T: 1599-1600, 1688-92). Haley testified that she initially struggled, but then "checked out" and did not struggle or attempt to leave because she imagined that Mr. Weinstein's driver might have been waiting outside (T: 1602, 1607, 1689-93). She testified that she told Weinstein that she was on her period and not to "go there" or "do that," when he pulled out her tampon and placed his mouth on her vagina (T:1602-3). Haley had no recollection about what followed or how she got home, but recalled that the driver was not outside when she left (T: 1603-4). (This act was the basis upon which Weinstein was convicted of Criminal Sexual Act in the First Degree.)

The next day, July 11, Weinstein sent his driver to pick up Haley at her apartment to drive her to the airport and she had no concerns about accepting the ride, despite claiming that she had thought the driver would prevent her escape from Weinstein's apartment just hours earlier (T: 1595, 1680, 1693-4). She flew to Los Angeles on the plane ticket purchased for her by Weinstein (T: 1595). While in California she continued communicating with Weinstein (T: 1609-10). Haley returned from Los Angeles on July 24th on another plane ticket purchased by Weinstein (T: 1610). On July 26th, Haley met Weinstein at the Tribeca Grand Hotel where *she admitted that she had consensual sex with him*. [In her initial meetings with the District Attorney's Office and first grand jury testimony she "didn't recall"

(T: 1709-10) much about this encounter because her memory was "not very detailed" and the triste occurred "a very long time ago," but by the time of trial she recalled more details (T: 1614, 1701, 1704-09, 1726-7)].[4] Her calendar indicated that Weinstein offered to pay for her flight to London when they met at the Tribeca Grand, although she could not recall requesting or being given this generous gift (T: 1710-11), but then, in an apparent effort to minimize the generosity of the gift remembered that the tickets were "on miles" (T: 1713-14). Barely a week later, Haley then flew to London, again on a ticket purchased for her by Weinstein (T: 1710-14).

Haley's 2006 summer roommate, Liz Entin, testified that Haley told her about what happened on the night of July 10th and was not the same the rest of the summer (T: 1801-02). [Notably, the prosecution did not turn over Entin's August 2019 Grand Jury testimony until January 27, 2020, at which point the trial was well underway (T: 1767).] Her story tracked the narrative for public consumption crafted by Haley and her civil attorney, Gloria Allred, who appeared together in a press conference and television interviews, which Entin admitted seeing on line (T:1814-5). Entin's testimony was demonstrably false in many particulars that strayed beyond the public narrative. For example, she claimed that Haley was more "withdrawn, "less vital," and spent more time in her room after July 10, 2006 (T: 1801-2), whereas in fact, Haley was not even in New York after that day, having flown to California the following morning for two weeks and to London on August 2nd for good, nor, in all

[4] In fact, by the time of trial, the prosecutors had recast this consensual sexual encounter into one in which Haley did not want to have sex and that defendant "knew she didn't want to but she didn't fight." Prosecutor's Opening statement (T: 992).

likelihood, was Entin, who "traveled frequently" (T; 1795); she testified that Haley worked for Weinstein for five months (T: 1804) when, in fact, Haley worked for the Weinstein Company just two or three weeks; she claimed that Haley went to Weinstein's apartment on a work "errand" when Haley was, in fact, no longer working for the Weinstein Company (T: 1811). And she did not know that Haley had had consensual sex with Weinstein that summer, although she recalled a party she attended with Haley at which Weinstein put his arm around Haley in her presence.

Once back in London, Haley continued to seek out Weinstein. Emails established that on September 8, Haley tried to meet up with Weinstein in London, and demonstrated a desire to see Weinstein again, stating, "if you are coming back anytime soon, please let me know" (T: 1717-19) and that she met him at the Claridge's Hotel in London on November 6, 2006 (T: 1617, 1720-22, 1730).

Haley continued to reach out to defendant by telephone and email for social and work-related reasons (T: 1623-24, 1731). She reached out to him in early February 2007 (T: 1721, 1724, 1728-30) and, in another email on February 19, 2007, she thanked Mr. Weinstein for his "kind offer to help," told him that his "support" was "very much appreciated" and signed "Lots of Love, Miriam," indicating that she may have met with him again (T: 1731-2); According to documentary evidence, at Cannes in 2007, Haley reached out to Weinstein to let him know she was in town and asked him for tickets to a show (T: 1733-4); she called him in Cannes in 2008 and sent him an email on June 27, 2008, in which she wrote, "Great to see you;" reminisced about their time spent together in the summer of 2006, "just to remind

you what a genius I am-didn't I tell you that was a great idea like, three years ago, at the mercer bar…hmm"; and signed "Lots of love, Miriam" (T: 1624-8, 1738). She reached out again in an email on February 5, 2009, with the words, "I haven't seen you in so long. How are you?" and told him that she was saving to become a yoga instructor and signed off, "Peace and Love, Miriam"(T: 1618, 1737). Over the years, Haley would send Weinstein scripts (T: 1738-39).

When stories about Weinstein's alleged indiscretions with women emerged in the press in October of 2017, Haley read about them and wanted to "lend [her] support" so she contacted Gloria Allred (T: 1620, 1740), a plaintiff's attorney, and the two of them embarked on a media tour (T: 1619-20, 1707, 1739). She did not pay Allred for her services (T: 1743), but together, they held a press conference (T: 1707, 1741) in which Haley aired a selective retelling of her relationship with Mr. Weinstein for public consumption which excluded, *inter alia*, any reference to her consensual sex with Mr. Weinstein, and Allred importuned Weinstein to reach out through his lawyers to offer "more than an apology" – an obvious pitch for money (T: 1742-5). Haley then appeared on several major networks for interviews, with Allred by her side, to publicize her narrative, always excluding her part in a consensual sexual relationship. Only after these appearances, did Haley speak to the District Attorney's Office (T: 1707-08). Haley denied learning from her civil attorney that unless she brought criminal charges, the statute of limitations barred her from suing Weinstein (T: 1743). Haley denied that she planned to sue Weinstein, but insisted that her conversations with Allred on the topic were "confidential" (T: 1747-8). Allred sat in a front row near the jury during the entire trial, and delivered

press conferences on the court house steps on a regular basis. On October 30, 2020, Haley sued Weinstein. 1:20-cv-09109-JPC *Haley v Weinstein.*[5]

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The conviction for Rape in the Third Degree involved the complainant Jessica Mann, a long-time paramour of Weinstein. She testified that on March 18, 2013, Weinstein had sex with her in a hotel room at the DoubleTree Hotel in lower Manhattan. Despite the fact that she alleged no force, the trial court permitted the jury to consider first degree rape and predatory sexual assault based on this incident. The jury acquitted Weinstein of the charge of first degree rape and predatory sexual assault in connection with this incident, but found him guilty of the lesser charge of third degree rape which was time-barred. *See Point IV, infra*

Mann met Weinstein at a party in California in January of 2013 through her friend, Talita Maia, who testified that Mann openly flirted with Weinstein at the party (T: 2394, 3301, 3303). Maia recalled Mann flirting with Weinstein, putting her arm around Weinstein, pinching his cheek, and remarking that he was "so cute"

[5] In fact, the timeliness of Haley's civil complaint, at the time she made her criminal complaint, could only have been predicated on the criminal prosecution. *See* Complaint at 50-51, 1:20-cv-09109-JPC *Haley v Weinstein*:

> The criminal action against Weinstein for violating Penal Law section 130.50(1) by sexually assaulting Ms. Haley in the July 10, 2006 Rape terminated on March 11, 2020 when he was sentenced to prison for committing that offense. Plaintiff's claim is therefore timely brought under CPLR § 215(8)(b), which provides that "[w]henever it is shown that a criminal action against the same defendant has been commenced with respect to the event or occurrence from which a claim governed by this section arises, and such criminal action is for . . . criminal sexual act in the first degree as defined in section 130.50 of the penal law . . . the plaintiff shall have at least *five years from the termination of the criminal action* as defined in section 1.20 of the criminal procedure law in which to commence the civil action . . . ."

(T: 3303, 3334). She recalled them leaving together and then emerging later that evening from a "secluded area" (T: 3304). Shortly thereafter, Mann met him again at a bookstore where he bought her several books (T: 2317). She went to dinner with Weinstein at an Italian restaurant and again at the Peninsula Hotel (T: 2317, 2409-11). On that occasion, Weinstein invited her to go to his hotel room, where she agreed to give him a massage (T: 2206-08, 2322, 2409). Maia recalled that Mann was "very happy" after this date and that Mann had told Maia that she sang for Weinstein (T: 3308). After that, she met Weinstein again for tea or coffee somewhere in Beverly Hills (T: 2213). Maia recalled attending another dinner with Weinstein and Mann at that time on Melrose in Beverly Hills (T: 3307).

During the Oscar parties, Mann engaged in a threesome with Weinstein and another woman, Emanuela Postacchini (T: 2246-8, 3349). Around the same time, Mann engaged in other threesomes with friends, and was dating several people (T: 2315-2316). According to Maia, Mann was "very curious about girls" and, afterwards, told Maia how gorgeous Postacchini was. Mann, wrote a blog about the incident, entitled the "Failed Threesome." (T: 2314, 2329-33). The following evening, after an Oscar party where she had been drinking (T: 2217-18), Mann and Maia met Weinstein in the bar at the Montage Hotel in Beverly Hills (T; 2215). They both joined him in his hotel room where Maia waited in the sitting area (T: 2219, 2344), while Weinstein and Mann retreated to the bedroom. According to Maia, Mann and Weinstein asked her to come up and wait in the sitting area and that Mann was "already seeing him" at this point (T: 3309) and "happily" followed Weinstein into the bedroom (T: 3332). In the bedroom, Weinstein and Mann engaged in oral

sex (T: 2222-4). Mann testified that she really did not want to, but that she faked an orgasm (T: 2224, 2345).[6] Mann told Maia," he went down on me" and "I told him it was the best I ever had" (T: 2224-5, 2427, 2449, 3320, 3324, 2344).

According to Mann, she "made the decision to be in a relationship with [Weinstein]" (T: 2232, 2335) and Maia understood them to be in a "relationship" (T: 2326-8, 3323). Despite the fact that she knew Weinstein was married and had children, she thought it was going to be a "real relationship." (T: 2233). She saw Weinstein often between their first date in and their meeting in New York on March 18, 2013, and engaged in consensual sexual activity (T: 2244-6, 2324-5). Maia testified that "[Mann] was always saying good things about [Weinstein], she never said anything bad" and "she never seemed upset" (T: 3348-9).

In March 2013, Mann and a friend, Tommy Richards, flew to New York City from Los Angeles to see a Broadway show. She personally invited Weinstein, with whom she was admittedly involved in a consensual sexual relationship, to meet her, Maia, and Richards, for brunch at the DoubleTree Hotel on March 18, 2013 (T: 2254). Weinstein arrived early and Mann met him in the lobby (T: 2255). He registered for a room at the front desk and Mann accompanied him to the room (T: 2256). Once there, Mann testified that she told Weinstein that they did not have any time before brunch and tried to open the door, but she testified that he "blocked the door" (T: 2256-7). She testified that her "worst fear" was that her friends were going to find out about her sexual relationship with Weinstein (T: 2257, 2342-3), although Maia already knew by Mann's own admission (T: 2449, 2487). Mann

[6] This testimony was admitted by the court as part of its expansive Molineux ruling.

testified that Weinstein told her to take off her clothes and she did so. Naked, she laid on the bed while Weinstein went into the bathroom and she waited for his return (T: 2259). Upon his return, they engaged in sexual intercourse (T: 2259). (This act was the basis upon which Weinstein was charged with first and third degree rape, as well as one count of predatory sexual assault, and was convicted of third degree rape.) They then joined Maia and Richards for brunch (T: 2262).

Maia and Richards were called by the defense. Both said that they detected nothing amiss at the brunch (T: 3315) and Richard recalled that Weinstein and Mann were "friendly" toward one another (T: 3459-60) and that Weinstein invited Mann to stay an extra night in New York and that Mann accepted his invitation (T: 3461). In fact, Mann told Richards that she was going to stay an extra day in New York, courtesy of Weinstein ( T: JM 2489; TR 3460-1), and appeared perfectly "normal," "her every day self" (T: 3462-4) . She and Maia met with Julie Oh of the Weinstein Company that afternoon and then went to a movie screening for August Osage County that evening, courtesy of Weinstein (T: 2264, 2496-7). She slept at Maia's apartment in Jersey City that night and declined an invitation to meet Weinstein in the city. Mann claimed that she slept in a closet on the floor, but Maia testified that Mann slept on the couch (T: 2264, 3319). The following day, Mann knew it was Weinstein's birthday and met him at a hotel (T: 2493-95, 2497). Afterwards, she was picked up at the Doubletree Hotel, where she had a room paid for by Weinstein, and driven to JFK airport and from LAX to her home, also courtesy of Weinstein (T: 2499-2500).

Back in Los Angeles, Weinstein got Mann a job cutting hair at the Peninsula

(T: 2278, 2508-10, 2525) and they continued their sexual relationship (T: 2278). On the evening of April 12, Mann emailed Weinstein, "I appreciate all you do for me. It shows" (T: 2408-09). In September 2013, she wrote to Weinstein, "Miss you big guy," (T: 2528). In an email to Weinstein in November 2013, Mann thanked Weinstein for his "unfailing support and kindness" in connection with her romantic relationship with another man (T: 2542). Nevertheless, their sexual relationship continued until at least 2016 (T: 2299, 2456-7).

On January 5, 2014, Mann told Weinstein that the haircut she had given him the previous day looked good only because of his "smile and beautiful eyes" (T: 2549). On February 19, 2014, Mann emailed Weinstein, offering to cut his hair again for the Oscars (T; 2668). Around the same time, Mann testified that she visited Weinstein in his room at the Peninsula Hotel and told him that she was in a relationship with someone else and he raped her (T: 2286, 2360).[7] On June 16, 2014, Mann's boyfriend, Eddie, texted Mann to ask her if she told Harvey about him and Mann responded, "He blessed me and wanted me to have happiness" and that "he was always kind to me. Was curious who you were and would tease me wondering but I left it personal to me" (T: 2634). When her boyfriend said that Harvey was vindictive she responded, "I have never seen and experienced firsthand his vindictiveness"(T: 2635). These text messages contradicted her trial testimony.[8]

In April 2014, she emailed him to tease him that she had heard he wore a hat all week after she had cut his hair (T: 2556). Indeed, Mann's large volume of emails

[7] On cross examination, Mann testified that this incident occurred "a long period of time" after the incident in New York that formed the basis of the charges (T: 2360).

[8] This incident allegedly occurred in the winter of 2014, nearly a year after the charged incident. The trial court permitted Mann to testify to this incident in its *Molineux* decision discussed *infra.*

to Weinstein over the course of their consensual sexual relationship that spanned five years (T: 2360, 2649, 2747-8) were replete with "flattery" and "compliments" (T: 2268). Five times over the course of years through 2017 (T: 2702), Mann changed her cell number and made sure to give her new number to Weinstein unsolicited (T: 2418, 2522, 2680, 2702). She told Maia repeatedly that Weinstein was her "spiritual soulmate" (T: 3323) and was "always going to see him" (T: 3324).

Mann initiated flirtatious exchanges with Weinstein, arranged to meet with him alone, have him meet her mom and her friends, and met his children (T: 2438-41, 2445-7, 2511, 2520, 2531). She confided in him about her father's illness and death (T: 2561); repeatedly reached out to Weinstein to get together (T: 2644, 2676, 2680, 2684, 2696); asked him for personal favors such as a personal membership to the Soho House (T: 2671-2); help with her outstanding traffic tickets and an expired car registration (T: 2674-8); help finding an apartment (T: 2700); and obtaining invitations to parties (T 2682). Mann also traded on her personal relationship with Weinstein by trying to get him to invest in a business deal (T: 2694); and introducing him to a film producer in exchange for having her name listed in the "credits" for the film (T: 2740).

Mann had dinner with Weinstein July 12, 2014 (T: 2641), and on July 26, 2014, reached out to him by email just to say "Hi" (T: 2643). On August 17, 2014, Mann sent Weinstein an email in which she reminded him that he is supposed to let her know when he will be in LA (T: 2644). On August 22, 2014, Mann and Weinstein met for a drink (T: 2646). And Mann arranged to meet Weinstein again on September 3, 2014 (T: 2647). Shortly after that Mann traveled to Berlin where

she continued to email Weinstein and sent him a photo of herself (T: 2650). After her return from Berlin, on September 14, 2014, Mann emailed Weinstein asking to get together (T: 2652, 2654). She wrote, "went through a break-up. Was hoping for dinner with you" (T: 2654). When Mann emailed Weinstein that she had been ill, Weinstein responded, "Hope you are feeling well" (T: 2657)

In January of 2015, Mann was in Washington state. She and Weinstein exchanged emails in which Mann told Weinstein about her father's illness and Weinstein responded, "let me know how I can help" (T: 2661). When Mann emailed Weinstein that her father had died on January 23, 2015, he responded, " I send to you my deepest condolences. Please let me know if there is anything I can do" (T: 2662-3). On February 15, 2015, Mann emailed Weinstein at 2:20am to ask him when he would be in LA and if he would take her out for dinner and a drink (T: 2663-4). On February 17, 2015, Weinstein invited Mann with a guest to two Oscar parties and she enthusiastically accepted (T: 2665). On April 27, 2016, Mann met Weinstein in his room at the Peninsula Hotel in Beverly Hills, immediately after which she wrote to him, "I feel so fabulous and beautiful. Thank you for everything" (T: 2685). On February 23, 2017, Mann emailed Weinstein, asking for a favor: she wanted him to help her to obtain a membership to the Soho Club in LA and Weinstein responded that he was "happy" to do it . (T: 2671-2)

That Mann continued having consensual sex with Weinstein after the incident that was the basis of the charges until at least 2016, was known by the prosecutors, but not disclosed to the defense prior to trial as required by *Brady v. Maryland, 373 U.S. 83 (1963)* and its progeny (T: 2302-08, 2383). In September 2016, Weinstein

was invited to be Mann's date at Maia's January 21, 2017 wedding (T: 3322, 3353-4).[9] Mann thought the last time she had sex with Mr. Weinstein was when his mother died in November of 2016 (T: 2689). But on February 2017, Mann reached out to Weinstein for help in finding her an apartment in New York and wrote, "I love you, always do, but I hate feeling like a booty call" (T: 2700).

At trial, Mann testified that she did not remember when things happened in her relationship with Weinstein (T: 2360-1, 2446). She refused to commit to a timeline of events (T: 2357-63, 2458, 2482, 2556); could not remember who she emailed a timeline to and refused to say how many lawyers she consulted ( T 2396, 2744). Indeed she repeatedly claimed she did not remember things and, as a result, avoided answering questions (T: 2540, 2542-3, 2548). In fact, she insisted, "I will not attach a timeline" (T: 2557). She admitted lying about matters great and small (T: 2394-4) and otherwise deceiving her friends (T: 2339, 2341) and her mother (T: 2439) about her relationship with Weinstein; deceiving Weinstein about how she felt about him; and manipulating him in repeatedly having sex with him over many years ( T: 2343, 2347-8, 2352. 2419, 2433-4, 2449, 2459, 2472, 2488, 2512).

Mann engaged in therapy through an online company called "Relationship Reinvented." In June and July of 2014, Mann sent several emails to Relationship Reinvented about Weinstein. She never told them that Weinstein had assaulted her (T: 2640); rather she referred to their relationship as a friendship (T: 2639). On July 13, 2014, she told her therapist how happy she was to have gone to dinner with

[9] Mann and Maia's friendship ended in 2016 (3351). Maia explained, "I don't dislike Jessica. Jessica did things in my life that [] impacted my life in a very negative -- in a terrible, terrible way and I wish I didn't have to go through that" (T: 3321).

Weinstein and that Weinstein "always extended his hand to help" (T: 2641)

Like Haley, Mann accused Weinstein of rape only after allegations of sexual improprieties by Mr. Weinstein were made by others in October of 2017 in highly publicized articles in *The New York Times*, *The New Yorker*, and elsewhere. At that time she was admitted to a New York Hospital where heavily redacted records indicate long term psychiatric problems and a possible diagnosis of borderline personality disorder (T: 2745-6). Notably, the People's expert, Dr. Barbara Ziv, had testified that borderline personality disorder is a "severe psychiatric disturbance" (T:1440, 1444) and it was one of the reasons Dr. Ziv had found an alleged sexual assault victim, in another case, lacking in credibility. Mann had exhibited the traits commonly associated with this diagnosis. She exhibited dramatic fluctuations in mood, self-image and behavior including disassociation and suicidal ideation (T: 2746-7); had a history of troubled relationships with friends and family (e.g., T: 2566, 2741) due to misperceptions regarding the moods and behaviors of others (e.g., T: 2488-9, 2500); a history of self-harm (T: 2746) and claims of past victimization dating back to her teen years (T: 2640). Specifically, she claimed that she was raped by someone in her church. (T: 2640)

Like Haley, Mann consulted with attorneys as early as November 2017, who explained to her that a civil case was barred by the statute of limitations, but that she could pursue a criminal case in New York. She denied knowing that this avenue could revive a civil claim in New York (T: 2743-5).

Annabella Sciorra testified that Weinstein raped her in her Grammercy apartment in 1993, but that she did not know it was rape at the time (T: 1154, 1244)

and that he tried to meet with her in London the following year (T: 1173). Her attorney, Gloria Allred was present in the courtroom for her testimony (T: 1288-9). Over objection, the People were permitted to introduce evidence that Weinstein had hired investigators in response to the deluge of media reporting about his personal life in 2017, and that Sciorra's name appeared on an otherwise redacted list of names of men and women who knew Weinstein and could vouch for him (T: 1330). Sciorra's old friend, Paul Feldscher, was called by the defense and he testified that he recalled Sciorra telling him that she had had sex with Weinstein at the time and that she had not said that she was raped (T: 3102), but Rosie Perez claimed that Sciorra had told her that she had been. Weinstein was acquitted of the predatory assault charges predicated on this rape charge.

**The Molineux Evidence**

Dawn Dunning testified that in 2004, Weinstein, in the presence of his female assistant, asked her to have sex with him and his assistant in exchange for movie roles and, when Dunning declined, told her that she would never make it in Hollywood (T: 1870-2). She also testified that on an earlier occasion, Mr. Weinstein had put his hand up her skirt and his fingers into her vagina as they sat side by side on a bed in a hotel room during a shoot (T: 1865). Dunning claimed that she had never told anyone about this second allegation until just before trial - not her boyfriend, the DA, nor the numerous journalists to whom she gave interviews (T: 1848,1946). In addition, over defense objection (T: 1972-6), Dunn's live-in boyfriend at the time, Lincoln Davies, testified that she was upset when she returned from a meeting with Weinstein on some unspecified occasion in 2004 (T: 2101-02).

Tarale Wulff testified that in 2005, she accompanied Weinstein to an unused terrace on a restaurant rooftop where he masturbated in front of her (T: 1967-8, 2022). Maurizio Ferrigno, the restaurant manager, testified over defense objection (T: 2075) that he was not sure if he remembered seeing Wulff and Weinstein ascend the stairs to the restaurant roof on an unspecified occasion 15 years earlier, but that he was there because the prosecutors told him that that was what happened (T: 2131). Shortly thereafter, Wulff was invited to the Weinstein Company for an audition and, from there, was driven to Weinstein's apartment where she had sex with Weinstein (T: 1990-2). She vaguely recalled the latter episode, testifying that he led her to his bed and that she said "I can't," and he responded that he had had a vasectomy. Wulff never told Weinstein that she did not want to have sex with him (T: 2069). Afterwards, she and Weinstein drove back to the Weinstein Company together (T: 2049-50). In October 2017 she reached out to a lawyer because she "wanted to help the girls" who were making accusation against Weinstein (T: 1996-7). Subsequent discovery established that Wulff had little recollection of the circumstances of having sex with Weinstein when she first reported her story to the DA by way of her civil attorney, Douglas Wigdor (T: 2005, 2036, 2042-3).[10] In

[10] Wulff did not initially recall having sex with Weinstein (T: 2042) in her initial interview with the DA in October 2017, and the DA's office documented that her memory was so "fragmented," that they could not make a case (T: 2072-3). One week later she began seeing a trauma therapist (T: 2044). Even in an interview with the DA in September of 2018 (T: 2039), Wulff was "still struggling to remember the act that took place" but just knew they had sex (T: 2042-3, 2067)

fact, she did not even remember the year it allegedly occurred until speaking to a friend named Gloria Busse[11] (T: 2006) . Instead, she went to a "trauma therapist" fifty-five times to try to "remember" what happened (T: 2046-2070).

Based on the People's *Molineux* proffer, Lauren Young was expected to testify that in February of 2013, an acquaintance named Claudia Salinas, locked her inside a hotel bathroom where the defendant prevented her from leaving and masturbated in front of her.[12] By the time of trial, however, Young's story had changed. At trial, over the course of two days (T: 2900-3056), Young testified that she followed Weinstein into a hotel bathroom and stood in the bathroom while Weinstein showered quickly and then unzipped her dress, touched her breasts and masturbated in front of her (T: 2923-26). She testified that Salinas was present, hovering on the other side of the closed bathroom door. Contrary to what Young initially told the DA, Young admitted that Salinas never pushed her into the

[11] During Wulff's testimony, the defense learned that Wulff's friend, Gloria Busse (whose name had not been disclosed to the defense), recalled having lunch with Wulff and Weinstein at the Mercer Hotel in 2005 (T: 2166-78, 2383-5). The defense moved for a mistrial based on this *Brady* violation (T: 2015, 2384-6). The trial court directed the District Attorney to make Busse available to the defense and permitted the defense to recall Wulff (T: 2383-6). Efforts by the defense to speak to Busse and to secure her attendance for trial were unsuccessful as she was out of state and refused to speak with them, and the defense maintained that the *Brady* violation had therefore not been cured (T: 3443). Both motions for a missing witness charge and a mistrial were denied.

[12] The Court permitted Young to testify notwithstanding that on January 6, 2020, the LA District Attorney filed a felony complaint charging the defendant with crimes arising out of Young's allegations, merely revising its *Sandoval* ruling to preclude the prosecutor from questioning the defendant about the incident. This ruling put Mr. Weinstein in the position of making the Hobson's choice between asserting his *Fifth Amendment* privilege not to respond to questions about this incident and his *Sixth Amendment* right to present a defense.

bathroom, nor locked her in the bathroom, and that she (Young) never banged on the door to escape (T: 3027, 3052-3). The dress Young wore that night materialized for the first time during the trial and was admitted in evidence despite the defense objecting that it had been afforded no time to examine the dress for exculpatory evidence (T: 2898). Young's friend, Ryan Beatty, testified that he remembered that Young was upset one night after meeting with Weinstein (T: 3066). The defense called Claudia Salinas who adamantly denied that Young's account had ever happened (T: 3366).[13]

As part of its *Molineux* ruling, the Court also permitted Mann to testify to two other sexual encounters with the defendant that she claimed were nonconsensual. The first was alleged to have occurred two months prior to the charged incident. Mann claimed that the defendant performed oral sex on her in a Los Angeles hotel room with her friend, Talita Maia, nearby. The second occurred almost a year after the charged incident. In this second incident, Mann testified that Weinstein forced her to have sex with him in another Los Angeles hotel room after she told him that she was in a relationship (T: 2286-88).[14]

[13] The prosecutor continued its character assassination of Mr. Weinstein in its cross-examination of Salinas, prompting defense counsel to object. Defense counsel moved for a mistrial based on "the cross-examination of Ms. Salinas, which has been a constant sort of a way for the state to attempt to get character evidence in through a witness inappropriately, there is no reason [the prosecutor] should have gotten into whether or not Mr. Weinstein was ethical or a bully. That had nothing to do with her direct examination" (T: 3436-7).

[14] Although she testified that she did not remember when this happened (T: 2360-1, 2560, 2667, 2731), she told the prosecutors in an email that it was likely to have happened in early January 2014 (T: 2734), close to a year *after* the incident in New York that was the subject of the charges.

At trial, and over repeated objections, Mann testified that Weinstein would "talk very dirty about fantasies and things" and compare her to other actresses that he told her were doing "kinky, dirty things with him" and asked to film her (T: 2234); that he would ask her if she liked his big fat Jewish dick" (T: 2236); that he looked "deformed and intersex" (T: 2237)[15]; peed on her once in the shower (T: 2239); was "dirty" and "smelled like shit" (T: 2241).[16]

In addition, the court permitted Mann to testify that she had witnessed Weinstein bully the staff at a hotel restaurant in LA in 2016 and that Weinstein had told her that he could send people to her dad's house with bats on some unspecified occasion after the incident in New York when she told him that she was having issues with her dad "for the limited purpose of explaining Ms. Mann's delay in reporting the sexual assaults and to show her state of mind." (T: 2243, 2311)

Emanuela Postacchini, testified over strenuous objection and a motion for a mistrial by the defense ( T: 2376, 2585-89), *in the middle of Mann's cross-examination*, to corroborate that Mann had engaged in a threesome with the defendant and Postacchini in February of 2013, although no one had suggested otherwise.[17] At trial, Postacchini testified that Weinstein invited her to the Montage

[15] The People were permitted to introduce photographs of Weinstein's genitalia for *no purpose* other than to shame Weinstein.

[16] The court never required Mann to specify when in her five-year sexual relationship anything actually occurred, much less in relation to the charged incident, despite repeated objections (e.g. T: 2278, 2280-2).

[17] Mann testified that she had run out of the room crying. The defense cross-examined Mann on a blog she had written about the incident in which Mann also described that she had run out of the room crying. The Court permitted Postacchini to testify that she had engaged in a

Hotel for a drink and then brought her to a room where she met Mann. There, Weinstein was "directing" them "to do something together" and Mann ran out crying (T: 2595-2600). Postacchini testified that she saw Mann crying in a fetal position, but admitted that she had not told the DA that the first time she was interviewed (T: 2610). As predicted by the defense and despite the trial court's cautionary instruction that the testimony elicited was to be about "consensual activity" (T: 2378), Postacchini's testimony provided the prosecutor more *Molineux* fodder. She testified that Weinstein did not force her or Mann to do anything, but volunteered that she felt "manipulated" (T: 2608). Postacchini testified that she had had sex with Weinstein on a previous occasion when he showed up in a robe and asked for a massage (T: 2611). Ignoring the court's limiting instructions, the prosecutor asked Postacchini if she felt "tricked" and she said she did (T: 2623). Again drilling down on the very issue that the court had ruled could not be addressed, the prosecutor also asked Postacchini if she ever wanted to have sex with Weinstein, and Postacchini replied that she did not and that she felt "frustrated by the situation" (T: 2622).

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"threesome" with Weinstein and Mann which made Postacchini uncomfortable (T: 2372). The court reasoned that even if it were *Molineux* evidence, it had "the very probative value delineating the history and nature of the power relationship between the defendant and Jessica Mann" (*emphasis added*) (T: 2376-7).

In addition, there was effectively, additional *Molineux* evidence by virtue of the fact that charges based on three separate incidents were being tried together. Thus, the three complaining witnesses (Mann, Haley, and Annabella Sciorra) constituted *Molineux* witnesses as to one another. The trial court neither considered this issue in its *Molineux* rulings, nor did it give the jury any instructions as to how to use this evidence in evaluating the separate charges before it. The trial judge did not even instruct the jury that the three charged incidents were separate and distinct, and that evidence of guilt as to one of the incidents may not be considered as evidence of guilt as to the other incidents *(see, 1 CJI [N.Y.] 5.39, p. 239).*

**Expert Testimony**

Dr. Barbara Ziv, a hired gun (T: 1358), testified over defendant's objection on behalf of the People on the third day of testimony about "rape myths." She claimed to have evaluated over a thousand sex offenders and over a thousand victims of sexual assault and rape (T: 1344-5). She identified herself as a forensic psychiatrist (T: 1342) who evaluated credibility in specific cases of sexual assault for purposes of civil and criminal litigation (T: 1342). Despite not being board certified in forensic psychiatry (T: 1346, 1356), she claimed to use "the literature pertaining to sexual assault," "the characteristics of individuals who have been

sexually assaulted" "in terms of behaviors before, during, and after sexual assault" (T: 1347-8) to determine whether someone had been sexually assaulted.

Dr. Ziv claimed to have "always been qualified" to testify as an expert in both forensic psychiatry and in "sexual assault victim behavior" (T: 1350). However, she explained, for purposes of her testimony in this trial, "I've been hired to provide information and education about sexual assault, victim behavior in sexual assault, rape trauma in sexual assault" (T: 1358). Over defense objection, Dr. Ziv was permitted to use the term "rape" to cover all forms of sexual assault and to apply her testimony, by extension, to allegations of all sexual assault (T: 1344). Over objection, she defined "rape trauma" as a "legal term" "involving the experience of sexual assault and the individual who has been sexually assaulted, their responses to that." (T: 1359). She testified that rape myths were the "preconceived notions" people have about rape that are "usually wrong" and that she has been permitted to testify as an expert on such myths for 20 or 30 years (T: 1359). They include "commonly held beliefs about perpetrators, victims, aftermath of sexual assault" and are "culturally dependent," which she explained meant that they vary depending on time and place (T: 1360).

Over objection, the People were permitted to introduce in evidence a power point (*People's Exh 57*) entitled "Rape Myths." created by Dr. Ziv (T: 1361).[18] Over objection, Dr. Ziv was then permitted to lecture to the jury in narrative form with the aid of her power point projected on an enormous screen less than five feet from the jury box. She identified several "myths" she claimed existed in the culture about sexual assault victims and then editorialized about them.

The first "myth," according to Dr. Ziv, was that "Rape and sexual assault is most commonly perpetrated by a stranger. This is not true" She testified that at least 85% of rapes are committed by someone known to the victim, such as an acquaintance, a relative, or a domestic partner," who are "the most common perpetrators of sexual assault" (T: 1361). Next she stated, that "Another common rape myth is that victims of sexual assault resist their assailants. This is not true" (T: 1362, 1377). She testified that most of the research on the behaviors about which she was testifying is done concerning the "rare" situation of stranger rape which can include weapons and multiple assailants and that even in those cases only between 20% to 40% of victims "resist their assailants" by "shout[ing]out, scream[ing], yelling, that "very few people run and physically resist other than struggling [which] is also quite rare" and that the "most common type of physical

[18] Only later, outside presence of the jury did the court change its ruling, deciding that Exhibit 57 was a demonstrative exhibit and would not be admitted in evidence (T: 1434).

resistance…when faced with a stranger rape is kicking" (T: 1362). She concluded that women would be even less likely and not more likely to resist rape by an acquaintance (T: 1362-3).

Another rape myth that she claimed was "absolutely untrue" was that victims of sexual assault promptly report the assault. The "vast majority" do not, she testified (T: 1363). She specifically, stated that it could be years before a victim will report the crime, if they ever do (T: 1363). Dr Ziv testified that while not reporting the rape, victims will tell a friend. With Jessica Mann clearly in mind, the prosecutor pointedly asked Doctor Ziv about individuals who may not have close connections in life, and whether those people may not report a rape to anybody, even a friend (T: 1386). Ziv chimed in, "absolutely and it is not uncommon" (T: 1386). This was clearly an effort to bolster the credibility of Mann who had engaged in a five-year sexual relationship with Weinstein, bragged about it to friends and family, and had told no one that he had raped her.

Another "common misconception, according to Dr. Ziv is that "victims of sexual assault don't have contact with the perpetrator following the sexual assault" (T: 1363). She told the jury that, in fact, it is "extremely common;" it is "the norm" (T: 1363-4) "they almost always do" (T: 1367). She elaborated that such contact could range from texting to emailing to continuing or even developing a sexual relationship that did not exist before (T: 1364), bolstering the testimony the

People's witnesses by naming all the specific ways in which the witnesses had continued in their relationships with the defendant.

At this point she offered a discursive explanation of the reasons why women might behave this way and referred to "the carrot and the stick" to explain "how perpetrators gain compliance" (T: 1364). The "stick aspect of why do women continue to have contact with the perpetrator" was elaborated upon as follows: "I don't want it to get worse, I don't want this individual who had sexually assaulted me to ruin my reputation, ruin my friendships, put my job in jeopardy…God forbid they ruin the rest of my life, make it impossible for me to go on" (T: 1365). These concerns can arise from the act itself in which the perpetrator over-powers the victim and "actual and even implied threats." In this way Dr. Ziv characterized not just the victim, but the perpetrator. Tracking the facts of the case closely, Ziv noted that "sometimes what happens is a second sexual assault occurs" (T: 1367). She emphasized that to even question why an alleged rape victim acted in a certain way during the encounter or afterwards was simply "out of touch" because they don't do what people think rape victims do (T: 1441).

Dr. Ziv testified that it was a "myth" that "one can determine whether someone has been raped by her behavior" (T: 1368, 1431). When asked about this, Dr. Ziv categorically stated, "No, one cannot." (T: 1431). This "myth," like the others was in large writing on a slide for the jury to see (T: 1431). She explained

that real victims, "comply;" "give false statements;" say they are menstruating or have an STD; and "their facial expression may not reveal that they are horrified" (T: 1369). Then, in the aftermath, they may retreat; become more withdrawn or outgoing or even promiscuous; and engage in self-harm such as cutting, burning themselves, drinking or using drugs, just to name a few behaviors (T: 1369). They may even deny that a rape has occurred (T: 1422). Again, she referred to "studies" involving only stranger rape that showed that there were "hundreds of behaviors" engaged in by rape victims (T: 1369).

Dr. Ziv drove her point home by telling the jury that none of these post-assault behaviors are probative of whether a sexual assault occurred because actual victims act in all these ways (T: 1369). Hence, Dr. Ziv was telling the jury that their role in evaluating the evidence was circumscribed by an outcome determinative set of "scientific" parameters that essentially precluded them from evaluating the evidence and, instead, directed a credibility finding in a purported victim's favor.

Dr Ziv was then permitted to testify about the effects of trauma and how memory of trauma is stored in the brain, notwithstanding a defense objection that she had not given notice nor had she been qualified as an expert in this area at all (T: 1371). Dr. Ziv instructed the jury that any deficiencies in a witnesses' memory of trauma is due to the fact that they are remembering only what is important for

survival and that those memories remain for "a very long time" (T: 1372-5). Over objection, she described the operation of memory specifically in the context of sexual assault, testimony about which the prosecution had not given notice and about which *the defense foremost memory expert was precluded from giving testimony* (T: 1373-75). She used a slide entitled "enhanced attention to those factors that are significant to survival" (T: 1378). In fact, she even instructed the jury that the "passage of time" "does not impact memory of the assault" (T: 1377). "People tend to remember… the core elements of the trauma pretty clearly," she told them (T: 1377). Over objection, Dr. Ziv recounted a story about a woman who was sexually assaulted thirty years ago but still remembered that she waited to hear the click of the door shutting behind her assailant "because she knew then that the guy was out of the house and her babies were safe" (T: 1379). This was highly prejudicial testimony plainly calculated to engender sympathy from the jury for the victims about whom she was testifying and, by inference, those alleged victims who would testify at trial.

Dr Ziv went on to explain that any false information elicited from a victim is the fault of the interviewer not letting the victim "control their own memory" (T: 1378). This testimony had prejudicial implications for cross-examination itself as a foundational element of due process in criminal trials. She stated that even when

an alleged sexual assault victim changes her story over time, this just means she is "testing the water" because she is ashamed (T: 1431-2).

Dr. Ziv vouched for the District Attorney when she testified over objection that she "assumed" the DA's office had done its investigation in the case (T: 1439). On cross examination Dr. Ziv stated that she had begun working with the prosecutor after she had testified "in a similar way" at the "Cosby trial" (T: 1381). This reference to the Cosby trial was, of course, intended to prejudice the defendant by suggesting a comparison of defendant's trial with the allegations involved in another high-profile case. She claimed that she had never read any articles about Harvey Weinstein (T: 1382), yet admitted participating in a panel discussion entitled "Dealing with the #MeToo Plaintiff Who is Currently Employed" just a few months earlier (T: 1354).

On cross examination Dr. Ziv was asked whether, in her forensic practice, she considered whether a motive to lie involving secondary gain such as money, attention, and fame on the part of an alleged victim in assessing whether an allegation of sexual assault was true (T: 1390). On redirect the prosecutor was permitted to ask Dr Ziv over objection**,** *"Do many women allege that they have been raped or sexually assaulted for secondary gain?" Her answer was a definitive "no"* (T: 1438). Effectively, she was stating that women do not lie about rape. She supported this position by explaining to the jury that she based her

forensic assessments of whether someone is credible on the very information she had provided them, i.e., "whether the allegations comported with the patterns of behavior of victims *and perpetrators* described in the literature" *(emphasis added)* (T: 1439). (Of course, she had just told the jury that, with respect to victim behavior, there were no patterns and that you could not tell from victim behavior whether the victim was being truthful.) She stressed that forensic evidence "in a case like this" could be evidence from other women that experience the same thing, i.e., "a pattern of behavior of the perpetrator that is consistent with the allegations" (T:1429). This testimony was in direct contradiction to the instructions given the jury on the use of the *Molineux* evidence. *See Point II, supra*.

Dr. Ziv made the following statement in a report she had given to the prosecutor concerning the subject matter of her testimony: "Because of embedded rape myths, society acts as if it believes that all women are ready and willing to have sex at any time, with anyone unless they unequivocally and forcibly refuse, preferably multiple times in the presence of a witness who can vouch for them" (T: 1406-7). She claimed, "Individuals who allege sexual assault are routinely told, challenged and told that it is consensual. And that implies, so it doesn't matter that the woman didn't want to have sex. It doesn't matter what the woman did before she had sex. It doesn't matter that she tried not to have sex. Once the sexual act happened, all of a sudden, it's up to her to prove that she didn't want it, so that's

what I mean by that statement" (T: 1407-8). This commentary shifted the burden of proof, as it implied that the burden should not rest with the People to prove their case.

Dr. Ziv was asked by defense counsel to explain her findings in a rape case in which she was hired by the defense. In that case she had concluded that the allegations of the alleged rape victim were, in fact, false. She explained that she based that opinion on the fact that the woman had a "severe psychiatric disturbance," "a severe mental illness" (T: 1440) which she diagnosed as "borderline personality disorder" (the diagnosis indicated in Mann's hospital records) and that her story had changed over time (T: 1444).

The trial court permitted Ziv to testify about voluntary or consensual unwanted sex even though it had ruled that the defense expert could not. She testified that it was a "ridiculous concept and it is not a consent that is accepted in any field that I know of" (T: 1425). She then testified that you can have sex as an exchange, "but those parameters are set up beforehand. There is an expectation that you have agreed to this exchange." When asked if someone could have regrets about transactional sex, she stated, "No, I don't think that that is a common experience," "it certainly isn't common" (T: 1426). Asked if "somebody could have a consensual sexual relationship and then years later, read a news article or hear about an individual and think how could I have had a consensual sexual

relationship with a bad person," Ziv replied, "That can happen but then there is evidence of consent. Then there is evidence of consent which does not come after sex, it comes before." She then volunteered, "To consent you have to agree before the event that you want sex" (T: 1428). In this way, Dr Ziv transformed a question about relabeling experiences based on new information to legal instruction about what constitutes consent. Obviously, a person does not need "evidence" for consent in consulting their own memory and Dr. Ziv was clearly instructing the jury improperly on what constitutes consent.

The defense objected and requested a mistrial on the ground that Dr. Ziv's went beyond victim responses into testimony offered to prove the crimes occurred (T: 1535). This evidence is discussed in *Point III, infra.*

Dr. Elizabeth Loftus, one of the country's foremost experts on human memory (T: 3184-88), and Dr. Deborah Davis were precluded by the court from testifying about the very subjects about which Dr. Ziv had been given free reign, although their CVs, provided to the court, established their knowledge and expertise:

> The court will not allow testimony on the following subjects: Special issues of memories specifically for sexual[ly] or potentially, [] sexual interactions, including sexual consent communications, causes of original misunderstandings of sexual intentions and causes of distortion in sexual interactions. The phenomena known as quote, voluntary unwanted sex, end quote, responses to sexual assaults, including discussion of statistics regarding the frequency of reactions such as the failure to report, the late reporting, continuing contact with the allege[d] perpetrator and the

> frequency of false reporting and methods of studying of such rates and why any rates obtained through such methods are unreliable and statistical analysis of the data upon which Dr. Ziv testimony relies.

(T: 3173-4).

In response to clarification, the trial court insisted that neither defense counsel nor the expert was permitted to reference memory for sexual interactions, much less mention the word sex. Defense counsel argued that since the trial concerned memories for sexual events, there was no reason why the defense expert could not talk about memory for such events, as the plaintiff's expert was permitted to do. Defense counsel even showed the trial court a transcript of a trial concerning allegations of sexual assault by a physician at which Dr. Loftus had testified (T: 1373-74). The trial court insisted that the defense expert simply could not testify about memory in the context of anything sexual (T: 3176-77).

Due to the court's ruling, Dr. Davis did not testify. Dr. Loftus testified about how memory works and the factors that can influence and distort memory over time; that traumatic events are not immune from such influences (T: 3214); that memories that conjure up emotions are not more likely to be true (T: 3216); and that confidence in one's memory correlates less with accuracy over time and as memory is influenced and distorted by post-event suggestions (T: 3216-17). She described a phenomenon known as the "misinformation effect" in which particularly biased or misleading information can cause a transformation or contamination of a memory (T: 3188); a process known as "relabeling" wherein

people exposed to misinformation will relabel their own memory as one involving trauma and aggression that had not actually occurred (T: 3215). She was *not* permitted to reference sex, sexual interactions, or sexual abuse in her testimony about memory (e.g. T: 3210-11) and was cut off by the court even when no objections were made (e.g. T: 3211).

**The Sandoval Ruling**

Finally, Mr. Weinstein was prevented from exercising his constitutional right to testify due to the court's *Sandoval* ruling. That ruling permitted the prosecutor to question Weinstein about the following allegations, in the event he were to exercise his right to testify. The allegations were anonymous at the time of the ruling and remained so, save for those made by *Molineux* witnesses, Mann, and Sciorra, whose names were later disclosed to the defense.

> 1) That defendant used Witness #1's social security number to apply for and receive a passport *in 1998*;
>
> 2) Defendant's communication with Black Cube, "an organization that generated content designed to publicly discredit and shame the defendant's sexual assault victims," to the extent the prosecutor could tie defendant to dishonest acts;
>
> 3) According to Witness # 2, on a regular basis over the course of many years, the defendant compelled witnesses to lie to his wife.
>
> 4) Witness #3 alleged that she met the defendant in 2012 and that she attended a meeting with the defendant and his staff at his office in New York, ostensibly to discuss a possible business partnership, but that after the meeting, the group took the elevator downstairs but everyone except for the defendant and Witness # 3 got off the elevator before the lobby indicating to her that he had set up the meeting "under false pretenses."

5) Jessica Mann observed the defendant bullying staff members of the Mr. C Hotel in Los Angeles *in early 2016*. The defendant wanted to be served a meal in the hotel's restaurant late one evening. When the defendant was told that the kitchen was closed, he became irate, screaming, and cursing, and demanded that the kitchen be opened. He told the staff that he was in the process of buying the hotel and that everyone currently employed would be fired.

6) Sometime in 2013, when Jessica Mann told the defendant that she was having problems with14 her father, the defendant said that he could send some men with baseball bats to her father's house, as he had previously done for a well-known actress whom he identified.

7) When Witness #5 called the defendant in 1991 to confront him about having committed a crime, he demanded that she tell the other woman not to report the crime. (The trial court precluded mention of the specific crime).

8) In 1993, the defendant drove Annabella Sciorra from a party to her home in New York City and then left. A short time later, the defendant returned and knocked on her door. When Sciorra opened the door, the defendant pushed her into the apartment and immediately began to undress. The defendant ignored Sciorra's refusal to have sex with him and pushed her into her bedroom and onto her bed. She attempted to escape by using both of her hands to hit the defendant and by kicking him with her legs, but the defendant held her down with her arms above her head, forced her legs open with his knees, and forcibly raped her. He then forcibly performed oral sex on her as she begged him to stop.

9) In 1994 or1995, Sciorra was staying in a hotel while filming a movie in London. The defendant sent her messages and repeatedly sent company cars to pick her up even though she made clear her refusal to see him.

10) One night, the defendant banged on Sciorra's hotel room door and screamed for her to open it. She refused and he eventually left.

11) In May 1997, when Sciorra was at the Cannes Film Festival promoting a movie, the defendant knocked on her door at 5:00 a.m. one morning, wearing only his underwear and holding a bottle of baby oil. As soon as Sciorra opened the door and saw the defendant, she immediately retreated into her room and pressed several service call buttons, which caused the defendant to leave.

12) In 2004, the defendant took the hand of Tarale Wulff, a waitress at Cipriani, and led her into a stairwell where he blocked her from leaving and masturbated in front of her. On another occasion at around the same time, someone from the defendant's company called and told Wulff that the defendant wanted her to come in and read a script. She went to the company offices where she was led outside to a waiting car. She was driven to the defendant's Manhattan apartment where, despite her protestations, the defendant had sexual intercourse with her.

13) In 2004, the defendant arranged to meet Dawn Dunning, an aspiring actress, at a hotel room in New York City for a proposed business meeting. When the witness arrived at the hotel, the defendant's assistant was present in the lobby and told Witness # 14 to go up to the defendant's room. The defendant was wearing a bathrobe that opened. He told the wit-ness that he would give her three movie contracts if she would have a "threesome" with the defendant and his assistant. When the witness declined, the defendant became angry and screamed directly into her face that she "will never make it in this business if you don't do this." Dunning became frightened and ran out into the hallway to escape from the defendant.

14) In 2013, at the direction of the defendant, a woman brought Lauren Young to the hotel where the defendant was staying in Los Angeles, purportedly so that the defendant could review a script that Young had written. Shortly after they began their conversation in a lounge adjacent to the lobby, the defendant said that he wanted to finish talking about the script upstairs in his suite. Because the defendant said that he was in a rush and would have to cut the meeting short, Young agreed to go upstairs. The defendant, Young, and the escorting woman proceeded to the defendant's hotel suite. As the defendant was speaking to Young about her script, he walked into the bathroom so she followed him to hear what he was saying. The escorting woman shut the bathroom door after Young went inside, leaving her alone with the defendant. The defendant blocked Young from leaving, attempted to remove her dress, and masturbated in front of her. Young banged on the door and was only able to flee because, after the defendant ejaculated, the escorting woman opened the door. (This proffer proved to be inaccurate based on the evidence at trial, in that Young admitted she was not locked in the bathroom by Salinas, was not freed by Salinas, and did not bang on the door in an attempt to exit the bathroom)

15) In 2013, the defendant was repeatedly verbally abusive to Witness # 16, an assistant to the defendant. The defendant threatened to physically hurt

him, made him get out of a car on the side of the road, and abandoned him while on a business trip outside of the United States.

16) After the publication of articles in 2017 alleging the defendant's sexual abuse of various woman, and after the defendant was fired by the Weinstein Company, he called Witness #17 and asked him to let people in who would remove computers and files from the company's offices. This witness also observed the defendant meeting personally with representatives of Black Cube.

17) In the mid-1990s, the defendant asked Witness # 18, a business executive, to lie for him in both personal and professional matters.

18) Witness # 19, a business executive and former close confidante of the defendant, observed a pattern of conduct by the defendant including lying. This witness also observed the defendant, during a business meeting in front of multiple witnesses, stand up and physically attack his brother, Bob Weinstein, punching him so hard that he bled a great deal and was briefly unconscious.

19) Witness # 20, a long-term executive at Miramax, witnessed specific incidents in which defendant pulled out of business deals and threatened to stop funding (H: 146) and described specific acts of financial mismanagement, including "burying" personal costs with the company's budget for specific projects.

20) Witness # 22, who recently worked as a Weinstein family personal assistant, was bullied, overworked, and verbally abused by the defendant. She observed him throwing staplers and other objects at people, and witnessed him threatening female assistants "all the time." The defendant repeatedly screamed and cursed at Witness # 22, on one occasion calling her an offensive word  in front of a celebrity while she was trying to navigate the defendant's schedule.

21) In 2015, the defendant threatened to punch Witness # 23, and said he would kill him.  On another occasion, the defendant told Witness # 23 that he would send someone to his office to cut off his genitals with gardening shears.

22) Witness # 26 was an executive in the defendant's companies from the 1990s through 2017. He reported that the defendant threatened him on multiple occasions and he observed the defendant threaten others physically

and professionally. The defendant asked Witness #26 to lie for him when Ronan Farrow's article about the defendant's sexual abuse of women was published in the New Yorker. In addition, the defendant threatened to expose Witness# 26 for a minor dispute with another employee if the witness would not lie for him.

23) In the late 1980s, Witness # 31, an employee, was verbally abused by the defendant who, at a morning meeting at the Cannes Film Festival, threw a table full of food on top of him.

24) In 2007, Witness # 32 was an assistant traveling with the defendant. One day in the backseat of a car, the defendant got angry and physically assaulted the witness. When the witness indicated that he would report him, the defendant told the witness that he could never tell anyone and that no one would ever believe him. When the witness quit his job over this incident, the defendant had another employee follow the witness in an attempt to convince him not to report the defendant's actions.

*April 26, 2019 Sandoval Hearing at pages 141-148*

On November 22, 2019, the People requested that the trial court permit them to question the defendant on eleven *additional* bad acts should the defendant elect to testify. On December 17, 2019, the court ruled that while the People could not inquire about specific sexual allegations, they could ask the defendant about the following:

25) Defendant told Witness #35 that he "could harm (Witness #35) professionally, but offer[ed] her a book publishing opportunity."

26) "[T]hrew objects at (Witness #39) at his office in New York and that (Witness #39) observed the defendant throw objects at (Witness #39's) coworkers."

27) "[W]hen an actress refused to be photographed nude [and] the defendant insisted that they photoshop the actress's head on another woman's body."

28) Could inquire about the defendant hiding the clothes of Witness #44. Absurdly, the trial court stated that the People could not include allegations regarding sexual activities in this inquiry.

## POINT I

## MR. WEINSTEIN WAS DENIED HIS CONSTITUTIONAL RIGHT TO BE TRIED BY A FAIR AND IMPARTIAL JURY WHEN THE COURT REFUSED TO DISMISS A JUROR FOR CAUSE AFTER HIS PEREMPTORY CHALLENGES WERE EXHAUSTED AND PERMITTED HER TO REMAIN ON THE JURY, EVEN AFTER IT WAS WELL ESTABLISHED THAT SHE LIED ABOUT MATTERS MATERIAL TO HER FITNESS TO SERVE.
## (U.S. CONST. AMENDS. VI, XIV; N.Y. CONST. ART VI, § 18A)

Mr. Weinstein's right to a fair and impartial jury was denied when, after exhausting his peremptory challenges, the trial court refused to excuse for cause Juror No. 11 even though she repeatedly deceived the court and the parties about the subject matter of a "deeply personal" book she authored that contained strong themes and implicit opinions about sexual predation of older men. Juror No. 11 was unqualified to sit as a juror, notwithstanding any promise by her to be fair. In addition, based on the imminent publication of her book, she had a pecuniary motive to convict the defendant.

Although the defense raised legitimate questions about whether Juror No. 11 was fit to serve, the trial court failed to discharge its constitutional obligation to conduct a full inquiry to ensure that the juror was capable of rendering a fair and impartial verdict. Because of the unprecedented pre-trial publicity and concerted

effort by the media (and others) to breed public contempt for Mr. Weinstein, the trial court had a heightened responsibility to ensure that Mr. Weinstein's constitutional right to a fair and impartial jury was honored. But when confronted with indisputable evidence that Juror No. 11 was actually prejudiced against Mr. Weinstein, the trial court abdicated its constitutional responsibilities and refused to apply the minimal safeguards that would be expected even in a case where the accused was unknown to the public

As Justice Black stated in *In re Michael,* 326 U.S. 224, 228 (1945): "[I]t is difficult to conceive of a more effective obstruction to the judicial process than a juror who has prejudged the case." Juror No. 11's fixation with matters of consent and predatory older men *and* her lack of candor about it, raises troubling questions about whether she prejudged Mr. Weinstein's guilt and whether she had a personal agenda to see him convicted. Allowing Juror No. 11 to participate in the deliberations did not merely obstruct the judicial process, it single-handedly obliterated it.

### A. The Improper Seating of Juror No. 11 and The Additional Failure to Remove Her During The Trial

On January 10, 2020, during *voir dire*, the defense raised an issue about Juror No. 11's lack of candor in her responses to her juror questionaire, in a letter to the Court, seeking, *inter alia*, individual sequestered *voir dire*, which was denied. *See January 10, 2020, letter to the Court and January 20, 2020, letter to the Court at*

*page 1-2 in which relevant portions of January 10, 202, letter to the Court is quoted*. The defense informed the Court that the juror had authored a book, to be published in the summer of 2020,[19] about women who, according to Juror No. 11's personal webpage, "negotiate fraught friendships, sexuality, class and *predatory older men* on the journey from innocence to independence." (*emphasis added*). *Id.* The defense pointed out to the Court that one of the questions asked of all venire persons in their questionnaire was the following: "Is there anything else that you believe the judge and the parties should know about your qualifications to serve as a fair and impartial juror in this case?" Juror No 11, a Harvard graduate, answered, "No." *See Juror No. 11's questionnaire attached as an exhibit to January 20, 2020 letter to the court.*. Clearly, the fact that the prospective juror had written a book that involves sexual relationships between woman and "predatory older men" – the very accusation against Mr. Weinstein – is something that should have been disclosed, even absent a direct question. For reasons that seem obvious even then, however, she wanted to sit as a juror on this specific case and avoid disclosing anything that would prevent her from doing so.

On Friday, January 17, 2020, after the defense had exhausted all of its peremptory challenges and had been denied additional challenges by the court, Juror No. 11 was seated in the final panel of prospective jurors. Defense counsel attempted to elicit truthful answers from the prospective juror about topics discussed in her not-yet-published book:

[19] The book was published on July 14, 2020, under the title *Age of Consent* (Viking, 2020). On February 8, 2020, defendant moved this Court to permit an enlargement of the record to include excerpts from the book, but that motion was denied.

| | |
|---|---|
| MR. CHERONIS: | Ma'am, are you an author? |
| PROSPECTIVE JUROR: | Yes, I am. |
| MR. CHERONIS: | And are you currently writing a book or about to publish a book? |
| PROSPECTIVE JUROR: | I am. |
| MR. CHERONIS: | Can you tell us the name of the book? |
| PROSPECTIVE JUROR: | Age of Consent. |
| MR. CHERONIS: | Can you tell us what that book is about? |
| PROSPECTIVE JUROR: | Yes. It's about parents and teenagers. The three main characters are teenage girls and their parents and their struggle. |
| MR. CHERONIS: | Does it have anything to do with predatory older men? |
| PROSPECTIVE JUROR: | *All three girls have some relationship with an older man but it's not a predatory situation at all.* |
| MR. CHERONIS: | When is that book coming out? |
| PROSPECTIVE JUROR: | July 14th. |
| MR. CHERONIS: | *Was there any press about it, about it being about predatory older man?* |
| PROSPECTIVE JUROR: | *Not that I am aware of*. There hasn't been very much press about it. |
| MR. CHERONIS: | Okay. Did you do any research into predatory older men or victims of sexual assault in writing that book? |
| PROSPECTIVE JUROR: | *I didn't because of – it's really not about that.* |
| MR. CHERONIS: | *Does it have anything to do with sort of individuals who may, young women, who may be involved with older men that may be considered predatory?* |
| PROSPECTIVE JUROR: | *No*. |

T: 879-881. *(emphasis added)*

After the foregoing exchange, defense counsel challenged Juror No. 11 for cause (T: 895-8), but the trial court declined to excuse Juror No. 11, stating that he

"accept[ed] her answers under oath" that the book "is not about predatory older men" (T: 895). Juror No. 11 was subsequently sworn in as juror.

Defense counsel continued to develop new information about Juror No. 11's book that raised questions about whether she possessed a state of mind that precluded her from serving as a juror and whether she had actively misled the court about the contents of her book. Critically, defense counsel disclosed to the trial court in a January 20, 2020 letter that Juror No. 11's publisher, Penguin Random House was promoting *Age of Consent* while Juror No. 11 was seated as a juror and that Penguin's website described *Age of Consent* as a book involving "predatory male teachers," and "sexual relationships with older men and the power adults hold over them.[20]" Of particular concern, Juror No. 11's literary agent, the Cheney Agency, was promoting *Age of Consent* alongside and to the same audience as the highly-publicized book - *She Said: Breaking the Sexual Harassment Story that Helped Ignite a Movement* which chronicled allegations of sexual misconduct against Mr. Weinstein. Perhaps most troubling, defense counsel discovered an article in *The Atlantic* in which Juror No. 11 had, herself, characterized *Age of Consent* as a "deeply personal story," suggesting that the book was, at least in part,

[20] www.penguinrandomhouse.com/books617875/age-of-consent-by-amanda-brainer/

autobiographical.[21] This admission raised even more questions about whether Juror No. 11 had concealed information about her own experiences with "sexually predatory men" that might affect her ability to serve as a fair and impartial juror and whether she had answered other questions on the juror questionnaire honestly, such as, "have you, a family member, or a close friend ever been the victim of physical or sexual abuse, either as a child or adult."

Before the panel was sworn in, defense counsel moved alternatively for a mistrial or for the court to excuse Juror No. 11 for cause. Defense counsel argued that if the court was disinclined to excuse Juror No. 11 on the existing record, it should conduct an evidentiary hearing to further explore the contents of Juror No. 11's book and whether she had been candid with the court. Defense counsel further moved the court to order Juror No. 11 to produce her book for inspection. *See Defendant's Letter to the Court*, January 20, 2020.

The trial court denied the application but agreed to question Juror No. 11 in the presence of counsel about her website's characterization of the book *(T: 952-54)*. When confronted with a copy of her website, Juror No. 11 admitted that her

[21] On January 7, 2020, *The Atlantic* published an opinion piece about the life and death of writer Elizabeth Wurtzel, who before her death, published a searing #MeToo condemnation of Harvey Weinstein. Juror No. 11 was quoted in *The Atlantic* article, stating "[Wurtzel] helped me tell *my deeply personal story*, albeit in novel form." *See* https://www.theatlantic.com/entertainment/archive/2020/01/liz-wurtzels-glorious-messy-life/604606/ A copy of the article was provided to the trial court in support of defense counsel's motion to excuse Juror No. 11 for cause.

website accurately described the book as involving "predatory older men" but stated that she had not remembered that the website described the characters in that manner when she was first questioned about the book during *voir dire.* Notably, *her* explanation fails to account for why *she denied* that her book involved predatory older men when pointedly asked in *voir dire*, irrespective of how it may have been characterized by others. She claimed that although there were older predatory male characters in the book, their relationships with high school protagonists were "consensual." Juror No. 11 insisted that her book was fictional, but the court did not press her to explain why she told *The Atlantic* that *Age of Consent* was her deeply personal story. Over defense counsel's objection, the trial court refused to excuse Juror No. 11 or conduct an evidentiary hearing before swearing in the jury. The court also declined to order Juror No. 11 to produce her book for inspection.[22]

On February 14, 2020 as Mr. Weinstein's trial was underway, defense counsel again moved to discharge Juror No. 11 after discovering that at the exact same time she was hearing evidence in Mr. Weinstein's case, she was reading and

[22] Had the trial court simply ordered Juror No. 11 to provide a copy of her manuscript for *in camera* review, the court would have learned that Juror No. 11 was untruthful when she told the court that her book had nothing to do with predatory men. As a critic for the *The New Yorker* observed, "[t]he elephant in the room and it is baked into the title of the novel . . is the seduction of teenage girls by older men which occurs repeatedly in the novel, older men, fifteen year old girls, sixteen year old girls – seduction is one word, I think today we call it rape." https://www.youtube.com/watch?v=4ZgqDXBs4l8

reviewing books on-line that centered on issues of consent and older predatory men (T: 3809-3817). Specifically, on January 29, 2020, Juror No. 11 posted an on-line review (in the middle of trial no less) about a book she was reading called *My Dark Vanessa*. The book concerned the sexually inappropriate relationship of a 42-year-old teacher and his 15-year-old student. Juror No. 11 commented that "the repulsiveness of her predator and her entrapment in the relationship" were, *inter alia,* what she "liked about the book." Juror No. 11 was also reading and posting about a book entitled *Le Consentement* during Mr. Weinstein's trial. Involving themes shockingly analogous both to those pedaled by the prosecution at trial and to those in Juror No. 11's own book, *Le Consentement* is a 1980s memoir about a teenager who was sexually abused by a famous author, 36 years her senior, whose status and influence shielded him from the consequences of his predatory behavior.[23]

After bringing this new and troubling information to the attention of the trial court, the court stated that it was going to "dump" Juror No. 11 (T: 3853, 3855-6).[24] In response to objections by the prosecutor, the trial court posited, "[w]hy is it simply not the better part of valor to excuse her now, given that if there is a

[23] A copy of Juror No. 11's on line posts about *My Dark Vanessa* and *Le Consentement* were provided to the Court (T: 3809).

[24] The court's statement that he intended to "dump" Juror No. 11 was made off the record. The statement was attributed to the court by defense counsel on the record and the court did not dispute the attribution (T: 3853).

conviction in this case or an acquittal in this case, her presence on the jury is a distraction and now even potentially more so?" The prosecution persisted in its objection, prompting further questioning of Juror No. 11 by the trial court – this time in open court over defense counsel's objection (T: 3855-6) .

During the colloquy, Juror No. 11 adamantly, defensively, and unequivocally denied reviewing any books on-line:

> The Trial Court: I understand during the course of the trial you reviewed some books on-line about various topics such as child abuse, predatory--
>
> Juror No. 11 *I have not. I have not."*
>
> (T: 3815).

Because the court's questioning of Juror No. 11 was imprecise and confusing, Juror No. 11 avoided answering for her on-line activity which showed that during trial she was reading and posting about books that centered on issues of sexual predatory behavior and consent – the same issues that were being raised *at* the trial for which she was supposed to be serving as a fair and impartial juror free of any preconceived views of the case. Although the court initially seemed ready to concede that Juror No. 11 was not qualified to serve as a juror in the case, the court ultimately refused to excuse her, exacerbating the prejudice to Mr. Weinstein by

confronting Juror No. 11 in open court with an allegation of inappropriate conduct that she surely deduced was lodged by defense counsel.

### B. The Trial Court Abused Its Discretion By Failing to Excuse Juror No. 11 For Cause Where A Substantial Risk Existed that She Possessed a Prejudicial State of Mind That Precluded Her From Rendering a Fair and Impartial Verdict and Where the Record Reflects that She Made Material Misrepresentations about Her Qualifications to Serve.

The record as summarized above reflects that Juror No. 11 was unqualified to sit as a juror at Mr. Weinstein's trial from the start and should have been excused for cause upon defense counsel's discovery that she had misrepresented the subject matter of the book she had authored and was publishing at the time she was serving as a juror. Juror No. 11 was statutorily prohibited from serving as a juror where the record, taken as a whole, reflects that her state of mind precluded her from rendering an impartial verdict. The trial court's failure to remove her for cause was a denial of Mr. Weinstein's constitutional right to trial by a fair and impartial jury.

A defendant has a constitutional right to be tried by an impartial jury. U.S.C.A. Const. Amends. VI, XIV; McKinney's Const. Art. I, §6; *Duncan v. Louisiana,* 391 U.S. 145, 153 (1968); *People v. Torpey,* 63 N.Y.2d 361, 365 (1985). As the United States Supreme Court held in *Irwin v. Dowd,* 366 U.S. 717, 722 (1961), "the right to a jury trial guarantees to the criminal accused a fair trial by a panel of impartial and 'indifferent' jurors . . . This is true, regardless of the

heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies . . . a juror who has formed an opinion cannot be impartial." *See also, People v. Harding,* 44 A.D.2d 800, 801 (1st Dept. 1974) ("[i]t is elemental that every defendant in a criminal has a constitutional right to an impartial jury . . . The preservation of the integrity of the judicial process requires a trial by a jury above all and any suspicion of prejudice.")

In this context, "Due Process means a jury capable and willing to decide the case solely on the evidence before it, and a trial court ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrence when they happen." *Smith v. Phillips,* 455 U.S. 209, 217 (1982). As this court has observed, the constitutional protections afforded the accused at trial, such as the presumption of innocence and the prosecutor's heavy burden of proving guilt beyond a reasonable doubt are of little value unless those who are called to decide the defendant's guilt or innocence are free of bias. *People v. Southall,* 156 A.D.3d 111 (1st Dept. 2017) *quoting People v. Ivery,* 9 A.D.2d 712 (4th Dept. 1983).

In high-profile cases, a trial court's obligation to ensure that a jury is untainted by negative pre-trial publicity is enhanced. *Chandler v. Florida,* 449 U.S. 560, 574 (1981). Trial courts have a heightened obligation to ensure juror impartiality, particularly when media coverage is predominantly sensational or inflammatory. *See, e.g., Sheppard v. Maxwell,* 384 U.S. 333, 362 (1966); *Estes v.*

*Texas,* 381 U.S. 532, 577-80 (1965) (Warren, C.J. concurring); *Levine v.* 764 F. 2d 590, 596 (9th Cir. 1985); *United States v. Simon,* 664 F. Supp. 780, 789 (S.D.N.Y. 1987) As the United States Supreme Court observed long ago:

> Due Process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused."
> *Sheppard v. Maxwell,* 384 U.S. 333, 362 (1966).

A trial court's obligation to ensure a fair and impartial jury is more critical than ever where, as a result of social media, pre-trial publicity in high-profile cases can be ubiquitous; the average person simply has no choice but to consume media every day, all day.

Pursuant to CPL 270.20(1)(b), a court must accept a challenge for cause when a prospective juror "has a state of mind that is likely to preclude her from rendering an impartial verdict based upon the evidence adduced at trial." "Most if not all jurors bring some predispositions, of varying intensity, when they enter the jury box. It's only when it is shown that there is a substantial risk that such predispositions will affect the ability of the particular juror to discharge his responsibilities (a determination committed largely to judgment of the Trial Judge with his peculiar opportunities to make a fair evaluation) that his excuse is warranted." *People v. Johnson,* 94 N.Y.2d 600, 613 (2000). Where there is

evidence that a prospective juror's state of mind is likely to preclude him from rendering an impartial verdict, the juror must state unequivocally that he or she would be able to render verdict based solely on the evidence adduced at trial. But that "unequivocal assurance" may not suffice when a prospective juror has demonstrated dishonesty in responding to questions on matters that relate to her qualifications to serve. *Southall, supra.*

In order for the parties and the court to assess a juror's qualification, a prospective juror has a duty to truthfully answer all questions posed to her that might bear on her qualifications; a juror may not omit material facts that reflect on the prospective juror's ability to render an impartial verdict. *People v. Rosen,* 275 N.Y. 627 (1937). As this Court held in *Southall,* "actual bias may be demonstrated, *inter alia,* by failure "to answer honestly a material question on *voir dire*," concealing material information from the court, or by manifesting a predisposition in favor of prosecution." *Southall,* 156 A.D.3d at 121 (internal citations omitted) Upon finding that such a juror has withheld such information, the normal "unequivocal assurance" is not sufficient; rather the juror should be discharged. *Id*. *see also, People v. McGregor,* 179 A.D.3d 26 (1st Dept. 2019) (relying on *Southall* for the proposition that actual bias is inferred from fact of concealment of material information, notwithstanding juror's subjective belief that she could be fair.)

Here, even before Juror No. 11 was questioned by the parties, defense counsel discovered evidence that demonstrated a substantial risk that Juror No. 11 had "actual bias" against Mr. Weinstein, making it impossible for her to carry out her duty to render a verdict based solely on the facts adduced at trial. As discussed at length, *supra,* Juror No. 11 had authored and was in the process of publishing a book that she *herself* and her publisher had described as involving "predatory men" and their power over the young women they exploited. When asked about the content of her book, Juror No. 11 simply lied, telling the court that it had nothing to with "young women who may be involved with older men that may be considered predatory."

When confronted with her blatant misrepresentation, Juror No. 11 doubled-down on her dishonesty, implausibly claiming that she had forgotten that she had previously described her book in that manner and was unaware of how her publisher had described it. Given the opportunity to spin her book anew, Juror No. 11 opted for more half-truths, telling the parties and the court that the book was about high school students having relationships with predatory older men but that the relationships were "consensual." Again, it is difficult to imagine that Juror No. 11, a Harvard graduate with an apparent appetite for books about predatory men, truly held the belief that a high school girl *could* have a consensual sexual relationship with an adult male.

These facts, standing alone, demand a new trial for Mr. Weinstein. But there is more. Defense counsel presented evidence to the court in the form of Juror No. 11's own admission that her book was, in fact, autobiographical. (Wurtzel's "fearlessness" "helped me tell *my* deeply personal story, albeit in novel form" *(see Footnote 22, supra).* Incredibly, Juror No. 11 was reading books during trial that focused on predatory relationships between older men and girls and even posted an on-line review of one of those books. Unsurprisingly, Juror No. 11 was most impressed with the author's ability to describe the "repulsiveness of her predator" and a teenager's "entrapment in the relationship."

These facts, brought to the attention of the trial court, should have prompted an immediate excusal of Juror No. 11 for cause. Indeed, the trial court's failure to grant the cause motion was especially unjustified where alternate jurors were available to step up, and the court admitted on the record that Juror No. 11 had become a "distraction." By excusing the juror, the trial court would merely have been following the direction of the Court of Appeals which has cautioned that "[a] trial court should lean toward disqualifying a prospective juror of dubious impartiality" when such a juror is challenged for cause. *People v. Buford,* 69 N.Y. 2d 290, 298 (1987). This is especially the case whereas here, the public outcry for the defendant's conviction was pervasive and loud.

Instead, the trial court engaged in an imprecise and superficial inquiry of Juror No. 11 that failed to adequately explore the juror's bias and rationale behind her continued deceptions. Additionally, the court failed to obtain clarification about whether her book reflected a *personal* experience that would bear further on her qualifications as a juror. After Juror No. 11 flat-out denied posting a review of the book *My Dark Vanessa* in the face of undeniable proof of her on-line activity, the trial court refused to get to the truth of the matter. The court asked no probing questions of Juror No. 11 and did not follow-up on her ambiguous responses, nor did it provide defense counsel the opportunity to inquire. Inexplicably, the trial court refused to order the juror to simply produce her book for an *in camera* inspection which would have revealed, then and there, that the book *was* about sexually predatory men and that Juror No. 11 had taken great pains to conceal that information from the parties.

New York Criminal Procedure Law §270.35 states, in pertinent part, that if at any time after the trial jury has been sworn and before the rendition of its verdict, the court finds as a result of a "reasonably thorough inquiry" from "facts unknown at the time of the selection of the jury that a juror is grossly unqualified to serve in the case or has engaged in misconduct of s substantial nature, but not warranting the declaration of a mistrial, the court must discharge such juror." *People v. De La Rosa*, 233 A.D.2d 257 (1st Dept. 1966). The trial court's failure to adequately inquire also

ran afoul of the Due Process clause of the United States Constitution. *Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due Process means a jury capable and willing to decide the case solely on the evidence before it, and a trial court ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrence when they happen.") Indeed, because Mr. Weinstein's trial was nothing short of a media feeding-frenzy with the public clamoring for a conviction, the trial court had a unique responsibility to conduct the necessary inquiry to ensure that every member of Mr. Weinstein's jury remained fair and impartial. Rather than conduct the necessary hearing to ensure that Juror No. 11 was fair and impartial, the court turned a blind eye to the signs of her obvious prejudice.

The trial court was on notice that Juror No. 11 had demonstrated repeated dishonesty about the contents of her book *Age of Consent.* Her willingness to deceive raised grave questions, not just about her qualifications as a juror, but whether she had an agenda, personal or pecuniary, to serve as a juror in this high-profile case. A hearing could have revealed, for example, that Juror No. 11 (a first-time author) hoped that her participation in the conviction of Mr. Weinstein would allow for more effective marketing of her book which shared many of the same themes as the trial. On the other hand, her participation in the acquittal of Mr. Weinstein would have proved disastrous to her marketing campaign directed at the #MeToo movement. Frankly, the fact that Juror No. 11 and the authors of the book *She Said* shared a literary agent should have

prompted the court to conduct an evidentiary hearing to explore the juror's motives for misleading the court about her book and her suspiciously strong desire to serve as a juror on this case. The trial court's failure to excuse Juror No. 11 or even conduct a meaningful inquiry violated Mr. Weinstein's constitutional guarantee of a fair and impartial trial, and because Mr. Weinstein depleted all of his peremptory challenges, he is now entitled to a new trial. *See People v. McGregor*, 179 A.D.3d at 32 *citing People v. Crimmins*, 36 N.Y.2d 230, 238 (1975).

## POINT II

## THE TRIAL COURT'S *MOLINEUX* AND *SANDOVAL* RULINGS DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL UPON CHARGES BROUGHT BY A GRAND JURY AND TO TESTIFY ON HIS OWN BEHALF. (U.S. CONST. AMEND. V, VI, XIV; NY CONST. ART 1 SECTION 6)

### A. Weinstein Was Stripped of the Presumption of Innocence When the Trial Court Allowed the Jury to Hear Excessive and Disparate *Molineux* Evidence that Served No Legitimate Non-Propensity Purpose and Was Designed Solely to Breed Contempt for Weinstein and Distract the Jury from Fairly Evaluating the Evidence on the Charged Offenses.

#### 1. The *Molineux* Rulings

Weinstein's trial was overwhelmed by excessive, random, and highly dubious prior bad act evidence, none of which shed light on disputed issues

relevant to the charged offenses. *See Evidence At Trial* section at pp. 27-33, *supra*. Because the evidence on the charged offenses was weak, the prosecution inundated the jury with copious tales of alleged misconduct (much of which was not criminal in nature) that served no legitimate evidentiary purpose but merely depicted Weinstein as loathsome. The *Molineux* evidence presented at Weinstein's trial did not assist the jury in determining whether he committed the charged offenses, it merely persuaded the jury that it didn't matter. Simply put, the prosecution tried Weinstein's character not his conduct. Forced to defend a half-dozen mini-trials involving belated allegations of sexual misconduct by women with strong incentives to recollect their experiences inconsistent with reality, Weinstein was stripped of the presumption of innocence and the prosecution relieved of its burden of proof. The incalculably prejudicial evidence had no proper non-propensity purpose and served only to distract the jury from legitimate weaknesses in the prosecution's case on the charged offenses.

The American criminal justice system was designed to convict defendants based upon their conduct – not on their general character. As such, evidence of uncharged crimes or bad acts is generally prohibited unless the evidence is offered for some purpose other than to raise an inference that a defendant has a criminal propensity. *People v. Molineux*, 168 N.Y. 264, 291-294 (1901). Under *Molineux* jurisprudence, courts begin from the premise that uncharged crimes are

*inadmissible. People v. Resek,* 3 N.Y.3d 385, 390 (2004); *People v. Frumusa,* 29 N.Y. 3d 364, (*Molineux* evidence is presumptively inadmissible unless it is relevant to some material issue in the case). If the prosecution can identify a non-propensity purpose for the uncharged bad act evidence, a court must then weigh the evidence's probative value against its potential for undue prejudice. *People v. Cass,* 18 N.Y.3d 553, 560 (2012).

To be clear, before a court considers the prejudicial effect of introducing uncharged bad act evidence, it must *first* determine whether such evidence is admissible under a *Molineux* exception, that is, whether the evidence is *relevant* to some disputed matter at issue. Simply because other bad act evidence may fall into a *Molineux* exception, it does not automatically follow that such evidence is admissible unless the evidence makes a *fact in dispute* more or less likely. If the prosecution *can* identify a proper purpose that is at issue in the case as opposed to one that can be inferred from the act itself and explain how the evidence is relevant, the court is then tasked with determining whether the probative value of the evidence is outweighed by the risk of undue prejudice. *See People v. Leonard,* 29 N.Y.3d 1, 8, (2017).

On April 26, 2019, the court ruled from the bench that the prosecution would be permitted to introduce significant *Molineux* evidence at trial through three unnamed women, now known to be Dawn Dunning ("Dunning"), Tarale Wulff

("Wulff"), and Lauren Young ("Young"). The court also permitted, complainant Jessica Mann to testify about two additional uncharged sex acts with Weinstein that she alleged were non-consensual. At trial, the court further permitted Mann to testify about other consensual sexual activities with Weinstein that could be viewed as repugnant and to call Emanuella Postacchini to purportedly corroborate a sexual escapade with Jessica Mann and Weinstein through which the prosecution, incredibly, was able to introduce even *more Molineux* evidence over objection. All told, well over *half* of Mr. Weinstein's trial centered on uncharged allegations of misconduct and miscellaneous bad character evidence.

As set out below, *none* of the *Molineux* evidence presented at Weinstein's trial served a legitimate non-propensity purpose. And even if the prosecution had derived a valid theory of admissibility for introduction of the *Molineux* evidence, its probative value would have been outweighed by the risk of undue prejudice. Critically, the prosecution had no need for *any Molineux* evidence, let alone a mountain of it, where Weinstein was already facing the herculean task of simultaneously defending against multiple sexual assault charges by three different women.

Initially, the trial court admitted the *Molineux* evidence to prove (1) an intent to forcibly compel and (2) lack of consent and, in rendering its determination from the bench on April 26, 2019, failed to articulate any basis for its decision (H: 80),

much less did it articulate how the probative value of the allegations outweighed the enormous prejudice to the defendant. *People v. Cass*, 18 N.Y.3d 553, 560 (2012).

The defendant, in an Omnibus Motion dated October 10, 2019, asked, *inter alia*, that the trial court reconsider its *Molineux* decision. In its written decision dated December 16, 2019, the trial court ruled that the "'uncharged crime' evidence proffered by the People is admissible as it is relevant evidence for the non-propensity purpose of establishing the defendant's intent to use forcible compulsion and the complainant's lack of consent" and "for the purpose of assisting the jury in understanding the relationship between the defendant and [Mann]." As to the *Molineux* witnesses (Lauren Young, Tarale Wulff, and Dawn Dunning), the trial court explained its decision to admit this evidence as follows:

> The uncharged acts in the People's Molineux application rebuts the defendant's claim of consent and demonstrates the defendant's intent to commit these crimes. The crux of the People's Molineux application is that these encounters were a ruse, in order to "snare his victim." (People's Molineux motion pp.26-27). In the proffered Molineux applications, the consistent theme is that the defendant used his business stature in the movie industry to lure women to believe that he would connect them to careers in the entertainment industry. The invitation came in the form of a business opportunity, a book or script that she should read, or a movie that she should see; each suggestion a little different yet creating a false opportunity to put the women in a position to believe that he was interested in them on a professional level and could give them "entre" into his world. Knowing that these women did not voluntarily seek his company in order to engage in sexual acts, the defendant created an "engineered situation" where he could be alone with them and then sexually assault them. Later, the defendant

> would find a "good deed" to make them feel as though they were beholden to him, holding the power to make or break their careers, which in turn made these women hesitant to report these assaults.

*Molineux* Decision, December 16, 2019, pp.8-9 (*emphasis added*).

This ruling borrowed, *verbatim,* the prosecutor's April 26, 2019, hearing argument (H:37) which pathologized commonplace, noncriminal courting behaviors into a criminal scheme, e.g., offers to assist with career goals, flattery, gifts, not to mention that the sexual encounters occurred in private. In doing so, the trial court effectively added a type of common scheme rationale to its reasoning which is wholly unsupported by case law. In this way, the trial court grounded its ruling in, and permitted the prosecutor to argue that, a myriad of uncharged conduct evinced an intent to have sex "by trick," although sex by trick is not an element of any crime charged here. The only intent relevant for purposes of the element of forcible compulsion is the intent to use force or the threat of force. As will be addressed below, it is unnecessary and improper to use *Molineux* evidence to prove intent to use force because such intent, if it exists, is evinced by the conduct itself.

## 2. The Molineux Evidence was Not Admissible For Any Legitimate Non-Propensity Purpose.

### *a. Molineux Testimony from Dunning, Wulff, and Young Was Simply Not Relevant to the Question of Whether Haley and Mann Consented to the Sexual Conduct that Formed the Basis of the Charged Offenses.*

With no analysis, the trial court summarily concluded that testimony from Dunning, Wulff, and Young about their alleged sexual experiences with Weinstein

was admissible to support the complainants' claims that the sexual encounters that formed the basis of the charged offenses were not consensual. The court failed to explain how Dunning, Wulff, and Young's stories of non-consensual sex was relevant to the question of whether Haley, Mann, and/or Sciorra consented to their sexual encounters with Weinstein. It should be obvious that one person's lack of consent to a sexual overture is neither relevant nor probative of another person's lack of consent to a sexual overture by the same individual. *People v. Vargas,* 88 N.Y.2d 856 (1996). If it were otherwise, a defendant could present testimony from sex partners willing to testify about their past consensual sexual activity with the defendant to prove that the sex acts that formed the basis of the charged offenses *were* consensual. Because one woman's claim that she did not consent to a sexual encounter says absolutely nothing about whether an entirely different woman consented to a sexual act, this *Molineux* testimony was neither relevant nor admissible "to show lack of consent" by Haley and Mann.

Had Weinstein claimed that he mistakenly assessed Haley and Mann's ability to consent, perhaps an argument could have been made that prior accusations against Weinstein, to which he claimed to mistakenly assess someone's ability to consent, would be relevant under an absence of mistake theory. But Weinstein never asserted a mistake defense to the charges against him. Indeed, as defense counsel's cross-examinations and arguments revealed,

Weinstein maintained that his sexual encounters with Haley and Mann were fully consensual and their belated claims to the contrary were nothing more than ill-motivated falsehoods and distorted memories. Thus, the contested issue that the jury was asked to decide was whether the complainants were credible when they alleged that they did not consent. Whether three or thirty other women claimed they did not consent to sex with Weinstein is simply irrelevant to whether the complainants consented.

In *People v Vargas*, an instructive case, the Court of Appeals held inadmissible prior sexual misconduct evidence on the grounds that it only served to lend credibility to the complainant by suggesting that because the defendant engaged in sexual misconduct with others, he was likely to have committed the sexual assault charged. 88 N.Y.2d at 858. There, the prosecution offered testimony from several women who claimed that the defendant accosted them, demanded sex, fondled them, and engaged in other sexually deviant behavior. Like the trial court did here, the trial court in *Vargas* ruled the evidence admissible to rebut the defendant's consent defense. The Court of Appeals reversed, finding that the evidence merely bolstered the complainant's story by showing that because defendant "did it once, he would do it again," – the exact purpose for which the evidence is forbidden. Had the trial court pressed the prosecution to pinpoint its theory of admissibility it would have recognized that, as in *Vargas*, the *only* (and

improper) purpose for this *Molineux* evidence was to show that because Weinstein allegedly engaged in sexual conduct with three other women without their consent, he must have done so with respect to the complainants.

*b. Dunning, Wulff, and Young's Testimony Was Not Relevant to Show Weinstein's Intent to Forcibly Compel Haley, Particularly Where the Women Did Not Allege Any Forcible Compulsion by Weinstein.*

*i. Intent Was Not an Issue*

The trial court also allowed the testimony of Dunning, Wulff, and Young under a theory that their testimony was relevant to show that Weinstein "forcibly compelled" Haley, Mann, and Sciorra during their 2006, 2013, and 1993 sexual encounters, respectively. Intent is one of the "well-recognized, non-propensity purposes for which uncharged crimes may be relevant." *People Valentin*, 29 N.Y. 3d 150, 155 (2017). Where guilty knowledge or unlawful intent is in issue, evidence of other similar acts is admissible to negate the existence of an innocent state of mind." *In re Estate of Brandon*, 55 N.Y. 2d 206, 211 (1982). The focus here is not on the actual doing of the act, for the act is proved or not by other evidence. Rather, the element in issue is the actor's state of mind, and evidence of other similar acts is admitted under this exception because no particular intent can be inferred from the nature of the act committed. *Id*. For example, the intent exception has often been applied where fraud is alleged because intent rarely can be established by direct evidence. *Id*.

At the outset, intent was simply not "at issue" in this case, notwithstanding that Weinstein's defense was that he did not physically force Haley to engage in sexual activities in his Soho apartment in 2006.[25] The question in dispute was whether Haley's allegations of physical force happened at all. If the jury believed that it did, than Weinstein's intent would be easily inferred from the commission of the act itself obviating any need to use *Molineux* evidence to prove intent, *Vargas,* 88 N.Y.2d at 858 (observing that "evidence of prior misconduct to prove intent is unnecessary, where intent may be easily inferred from the commission of the act itself.) Put differently, if the jury believed that Haley "struggled" with Weinstein and that he used force have oral sex with her, his *intent* would be obvious. There is no scenario under which that conduct, *if believed,* could be construed as innocent. Accordingly, the stories of Dunning, Wulff, and Young had no relevance to any issue *in dispute.*

If for example, Weinstein claimed that he used physical force against Haley in some type of consensual act of "rough sex," his *intent* could be at issue and arguably prior similar acts might be admissible to negate Weinstein's claim of "innocent" intent. But Weinstein presented no evidence to that effect; rather he

[25] Clearly, intent to forcibly compel was not "at issue" in the Mann allegations where she, herself, did not allege forcible compulsion and the jury found none – notwithstanding that the prosecution overcharged this offense. Nor was it at issue in the 1993 alleged rape of Sciorra, whose testimony, had it been believed, made out the element of forcible compulsion.

maintained that Haley fabricated her claims of forcible compulsion, leaving it to the jury to decide whether it happened it all – not whether Weinstein had acted with an "innocent" intent.

*ii. The Molineux Witnesses Did Not Allege Forcible Compulsion*

Even if it *could* be said that intent was a disputed issue in this case, the prosecution's use of Dunning, Wulff, and Young's testimony had no ability to shed light on Weinstein's "state of mind" since these accusers did not even allege forcible compulsion. Under the intent exception there must be sufficient similarities between the prior uncharged bad acts and the charged offense to permit the introduction of the other crimes evidence. No such similarities exist between Haley's allegation from 2006 which included a claim, albeit shaky, of forcible compulsion, Mann's allegation of 2013 that involved no claim of force at all, and Sciorra's claim of force, and the accusations of Dunning, Wulff, and Young *who made no claims of forcible compulsion*. As none of these *Molineux* accusers alleged that Weinstein used physical force against them, even if their dubious tales were true, their testimony would not be relevant or admissible for a non-propensity purpose.

*c. Dunning, Wulff, and Young's Testimony Was Not Admissible under a Common Plan or Scheme Exception.*

The trial court further justified the admission of Dunning, Wulff, and Young's testimony on the basis that it demonstrated a common plan or scheme.

The trial court observed that there was a consistent theme in which the "the defendant used his business stature in the movie industry to lure women to believe that he would connect them to careers in the entertainment industry. . . Knowing that these women did not voluntarily seek his company in order to engage in sexual acts, the defendant created an "engineered situation" where he could be alone with then and then sexually assault them." *Molineux* Decision, December 16, 2019, pp.8-9

The common plan or scheme exception is simply inapplicable in this case. Nonetheless, the court's commentary reflected its strong reliance on this theory as a basis for admission, notwithstanding binding legal precedent that precluded him from doing so.

Under the "common scheme or plan" exception, evidence of collateral acts may be admitted to show that the collateral acts are sufficiently connected with the act in issue such that each forms a part of a common plan on the part of the actor to achieve some ultimate result. *Brandon, supra,* 55 N.Y. 206, 212 (1982). Unlike the intent exception, mere similarity between the acts is an insufficient predicate for admissibility under the common scheme or plan exception. Rather, "[some] connection between the [acts] must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received." *Id*.

As the record aptly reflects, Dunning, Wulff, and Young's allegations bore virtually no similarities to the charged offenses other than that all included some type of alleged sexual misbehavior and all the women had some connection with (or desire to be connected with) the movie industry. But more importantly, the record is devoid of any evidence showing that the prior bad acts alleged by the women were linked to the charged offenses as part of an overarching plan with the goal of accomplishing a particular purpose. To put a finer point on it, when Weinstein allegedly engaged in sexual conduct with Dunning, Wulff, and Young in 2004, 2005, and 2013 respectively, he certainly was not contemplating his sexual encounter with Haley in 2006, his sexual encounter with Mann in 2013, or his sexual encounter with Sciorra in 1993. The alleged sexual acts had no connection to one another and were not perpetrated as part of an over-arching plan. As such, the common plan and scheme exception simply has no applicability to this case and could not provide a basis for admitting the *Molineux* evidence.

As the foregoing demonstrates, testimony from Dunning, Wulff, and Young served no legitimate non-propensity purpose. Putting aside the prejudicial effect of this evidence which will be addressed below, the evidence was introduced under the guise of legitimate *Molineux* exceptions when, in fact, it was rank propensity evidence.

*d. Mann's Testimony Regarding Prior and Subsequent Non-Consensual Acts of Sex with Weinstein Was Not Relevant to any Disputed Issue and Was Therefore Inadmissible to Show Mann's Lack of Consent or to Demonstrate Weinstein's Intent to Forcibly Compel Her on the Occasion Charged.*

At the outset, Mann's prior and antecedent claims of alleged non-consensual activity with Weinstein was wholly irrelevant to show that Mann did not consent to sex on March 18, 2013. As the Court of Appeals has held, testimony by a complainant that the defendant had sexually assaulted them on another occasion is propensity evidence, tending only to show that defendant committed the charged crime because he had done it before. *People v. Leonard*, 29 N.Y.3d 1, 7 (2017).

Furthermore, the fact that Mann claimed that she did not consent to sex with Weinstein in early 2013 in connection with the oral sex incident and her claim that Weinstein forcibly raped her in 2014, is plainly irrelevant to the question of whether she consented to sex with Weinstein in March 2013 in a hotel room in the DoubleTree Hotel. Mann had a five-year relationship with Weinstein. Even taking her at her word, Mann concedes that she had consensual sex with Weinstein on numerous occasions. Her own testimony drives home the point that a claim of non-consensual sex on one occasion is irrelevant to show that a woman consented to sexual conduct on an entirely different occasion.

Similarly, Weinstein's mental state or "intent" to forcibly compel is simply not an issue in this case where Weinstein did not allege that he used force accidentally or without ill-intent as to the charged offense, but rather maintained

that no forcible compulsion occurred at all. Importantly, Mann's testimony regarding the charged offense did not involve allegations of physical force (hence the jury's rejection of the charge of first degree rape as to Mann). Even if Mann had alleged that Weinstein "physically forced" sexual activity upon her in the DoubleTree Hotel (*e.g.*, holding her down, threatening to hurt her), which she did not, his intent would be manifest obviating any need to demonstrate intent through *Molineux* evidence. In short, Weinstein's mental state as to the forcible compulsion element was not a disputed issue in the case. Thus, it is entirely unclear how Mann's prior or subsequent sexual actions with Weinstein, one of which did not even involve a claim of physical force, was relevant to demonstrate that Weinstein *intended* to use force in connection with the charged offenses. As with Dunning, Wulff, and Young's testimony, Mann's testimony regarding these alleged prior and subsequent occasions of non-consensual sex were merely designed to persuade the jury that it should *believe* Mann's patently unbelievable tale and to punish Weinstein for vague uncharged crimes and general brutish behavior.

e. *The Litany of Additional Bad Act Evidence Regarding Weinstein's Alleged Sexual Behavior Was Not Admissible Under Any Legitimate Theory of Admissibility, Including the Non-Existent Exception of "Giving the Jury an Understanding."*

In addition to the mountain of *Molineux* evidence described above, the trial court also permitted the prosecution to introduction testimony about unrelated sexual activities that were neither criminal nor non-consensual but were,

nonetheless, highly prejudicial. This testimony included, *inter alia*, an incident during which Weinstein allegedly urinated on Mann in the shower; a threesome between Weinstein, Mann, and Emanuella Postacchini; a sexual act between Weinstein and Postacchini that was not forced but, according to Postachhini, left her feeling "frustrated;" and commentary by Mann that Weinstein had "kinky" and "dirty" sexual proclivities. Although the trial court justified the admission of this testimony on the vague basis that it gave the jury an "understanding" of Weinstein's relationship with Mann, the evidence amounted to nothing more than impermissible bad character evidence.

Weinstein's relationship with Mann was not in dispute where Mann testified at length about her relationship with Weinstein. The jury learned through Mann that she had consensual experiences with Weinstein, and she further claimed, that she had three separate experiences that were non-consensual in nature . Mann's testimony about consensual threesomes and urination in the shower added nothing to the jury's understanding of Weinstein's relationship with her and was offered solely to paint Weinstein as a deplorable human being, concerned only with his own sexual gratification rather than the feelings of his consensual partners. Moreover, Postachinni's own account of her consensual sex with Weinstein (that she now apparently regrets) was relevant to absolutely nothing. Thus, the trial court's analysis was contrary to *Molineux* and its progeny and ran afoul of a

number of constitutional guarantees including the presumption of innocence and the prosecution's burden of proof.

### 3. Even If Some *Molineux* Evidence Was Proffered for a Legitimate Non-Propensity Purpose, Its Probative Value Was Nil as Compared to Its Prejudicial Effect and Still Should Have Been Excluded.

As argued above, *none* of the uncharged prior bad act evidence identified above was admitted for a legitimate non-propensity purpose. But even *if* the prosecution had successfully identified a proper basis for the admission of the evidence, its probative value was outweighed by its prejudicial effect, particularly where the prosecution had the benefit of built-in *Molineux* evidence as a result of simultaneously trying Weinstein for three unrelated sexual crimes before the same jury. Indeed, Weinstein suffered unquantifiable prejudice by the admission of over a dozen unproven and uncharged accusations of sexual misconduct that spanned over 20 years – notwithstanding the trial court's limiting instructions to the jury. When considering the evidence *cumulatively*, its probative value diminished exponentially as compared to its overwhelming prejudicial effect.

The trial court had an obligation to subject the proffered *Molineux* evidence to "the most rigid scrutiny" wherein it balances the probative value of the evidence against its potential for unfair prejudice. *Molineux*, 168 N.Y. at 314; *People v. Alvino*, 71 N.Y.2d 233, 241-42 (1987) "Prejudice involves both the nature of the crime . . . and the difficulty faced by the defendant in seeking to rebut the

inference which the uncharged crime [invites]." *People v. Robinson,* 68 N.Y. 2d 541, 549 (1986). After all, "[i]t is much easier to believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime." *People v. Allweiss*, 48 N.Y.2d 40, 48 (1979).

Here, the trial court failed to subject the cumulative body of prior bad act evidence to "the most rigid scrutiny" as required under the law. Arguably, the trial court had a heightened obligation to conduct a thoughtful and impassive "unfair prejudice" analysis given the extraordinary negative media coverage of Weinstein that prompted the witnesses to make the allegations at issue in the first place, and the outsized influence of the #MeToo movement on the trial. A scrupulous balancing test between the probative value of the evidence versus its prejudicial effect was never more important, and the trial court shirked its responsibilities in this regard.

The trial court's limiting instructions could not have cured the prejudice suffered by Weinstein, no matter how many times they were repeated because there *was* no way for the jury to consider the *Molineux* evidence other than for the forbidden propensity purpose. Courts and commentators generally agree that uncharged misconduct evidence can have a decisive impact on criminal trials because of its influence on a jury's factfinding process. McCandless, Jason L., *Note: Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of*

*Federal Rules of Evidence 413 and 414,* 5 Wm. & Mary Bill of Rts. J. 689, 712-713 (Summer 1997). The risk of jury misdecision seems particularly acute when a court admits prior bad evidence of sexual misconduct. *Id*. It has the capacity to impact the jury in the following ways: surprise, misestimation, confusion of the issues, arousal of punitive instincts and interference with the guilt determination standard. *Id*. *See also, Boyd v. United States*, 142 U.S. 450 (1892). Weinstein sought no special treatment at his trial but expected the trial court to protect his constitutional guarantees with the same vigor as any other defendant. The record reflects a troubling abdication of that responsibility where in the media circus of the #MeToo movement, the court discarded widely-accepted principles of law to justify the admission of prohibited bad character evidence and made no effort to mitigate the unfair prejudicial effect of this evidence. Because Weinstein's trial was a trial of his character, there can be no confidence that the verdicts returned against Weinstein were based on findings of proof beyond a reasonable doubt on the charged offenses. Accordingly, Weinstein is entitled to a new trial that is not tainted by excessive evidence of his purported bad character.

### 4. The Admission of *Molineux* Evidence in this Case was Tantamount to a Constructive Amendment of the Indictment

The vast amount of uncharged criminal conduct that the trial court permitted the People to offer in evidence in their case-in-chief, together with the People's fanciful theory of premeditated predation by trick, violated defendant's most

fundamental state and federal constitutional right that he not be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. *U.S. Const. amend. V, N.Y. State Const. Art 1 Section 6.*

CPL Section 200.70 prohibits the People from amending an indictment that changes the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed such indictment *or that otherwise tends to prejudice the defendant on the merits*. In *People v. Grega*, 72 N.Y.2d 489 (1988), the Court of Appeals held that pursuant to CPL Section 200.70 and *Article I Section 6 of the New York State Constitution*, the prosecutor cannot usurp the powers of the grand jury and that the crimes for which the defendant is tried are the *same* crimes for which he was indicted and not some alternative seized upon by the prosecution. *Grega* at 496. Proof at trial that varies from the indictment compromises two of the essential functions of a grand jury: Notice to the accused and the exclusive power of the grand jury to determine the charges. "The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away" [*Stirone v. United States*, 361 U.S. 212, 218-219 (1960)] and "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself" (*id. at 215-216*).

Here, the defendant was charged by the Grand Jury on July 2, 2018, for

conduct based on three incidents with three women (Mann, Haley, and Lucia Evans). After the trial court dismissed the charge in connection with Evans based on information that Detective Nicholas DiGaudio had encouraged a witness not to come forward with information that the incident was consensual, the prosecution added a third uncharged offense, an alleged 1993 rape of Annabella Sciorra, to its amended bill of particulars. Two and a half months later, the trial court ruled admissible the allegations of Dunn, Wulff, and Young, alleging four additional uncharged crimes or bad acts of a sexual nature and an additional two uncharged sexual crimes, including an alleged forcible rape, by Mann. Before trial, Dunn added another accusation of sexual misconduct that the trial court permitted, and then additional, numerous instances of *Molineux* bad act evidence was admitted during the trial through Postacchini, Mann, Haley, and Sciorra. The People spun a theory of culpability based on uncharged crimes and bad acts that had no logical connection to the three incidents charged in the indictment, save the impermissible connection of sexual misconduct as bearing upon propensity. Without the uncharged *Molineux* evidence, the trial would have been vastly different, i.e., the defendant would have been given the fair trial to which he was entitled on charges brought by the grand jury, and not on additional charges improperly admitted into evidence by the court.

The difference between an amendment of an indictment and a variance is explained as follows:

An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or, in effect, by prosecutor or court after the grand jury has last passed upon them. A variance occurs when the charging terms of the indictment are left unaltered but the evidence offered at trial proves facts materially different from those alleged in the indictment.

*Gaither v. United States*, 134 U.S. App DC 154, 413 F.2d 1061, 1071 (1960).

Here, the evidentiary rulings by this Court effectively altered the charges for which the defendant was tried by permitting the prosecution to broaden its case against defendant to the point that the indictment reflected *less than a quarter* of the charges for which the defendant was called to answer.

In *Ex parte Bain* 121 US 1 (1887), the Supreme Court held,

If it lies within the province of a court to change the charging part of the indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury as a prerequisite to a prisoner's trial for a crime and without which the Constitution says 'no person should be held to answer,' may be frittered away until its value is almost destroyed.

*Id. at* 10.

In *Bain*, the Supreme Court explained the Fifth Amendment rationale for these rules stating, "any other doctrine would place the right of the citizen which were intended to be protected by the constitutional provision at the mercy or control of the court or prosecuting attorney. *Ex parte Bain at* 13 [*see Us v Miller*, 471 US 130, 142 (1985)] (overruling *Bain* to the extent that it held that a *narrowing* of an indictment constitutes an "amendment" that renders the indictment void; but

continued to maintain that a *broadening* of such an indictment would render the indictment void). What has never been overruled is that a court cannot permit a defendant to be tried on charges that are not contained in the indictment against him. *Stirone v U.S.*, 361 U.S. at 217.

It is axiomatic that propensity evidence invites a jury to do just that. And the more evidence of uncharged crimes that bear on propensity introduced at trial, the more likely it is that a jury will "misfocus, *if not base its verdict*, on a defendant's prior (uncharged) crimes rather than on the evidence or lack of evidence related to the case before it." *People v Rojas*, 97 N.Y.2d 32 (2001). This court's *Molineux* decision virtually ensured that the defendant would be convicted, not on the charges brought by the grand jury, but on the volumes of inflammatory bad act evidence, the probative value of which rests only on its impermissible use as evidence that defendant is predisposed to commit the very crimes with which he is charged. Thus, Weinstein was convicted of uncharged crimes in violation of his state and federal constitutional rights that he not be tried for such crimes except on a presentment or indictment by a grand jury.

## B. Weinstein Was Denied his Constitutional Guarantees Under the Fifth, Sixth, and Fourteenth Amendments to the Constitution Where the Trial Court Ruled that If Weinstein Exercised His Right to Testify, the Prosecution Would be Permitted to Cross-Examine Him About Dozens of Remote, Highly Prejudicial, and Unsubstantiated Allegations of Assorted "Bad Acts."

Although Weinstein desired to testify on his own behalf and reminded the judge that he knew this (S: 58)[26], he was effectively prevented from doing so when the trial court guaranteed his conviction by ruling that if he took the stand, the prosecution would have *carte blanche* to put before the jury, twenty-eight alleged prior bad acts spanning the past thirty years (*see Evidence At Trial* section for specific bad acts at *pp. 46-51, supra).* To compound matters, the court's ruling deprived Weinstein of the ability to prepare for the onslaught of allegations or defend against them. Thus the trial court's *Sandoval* ruling not only resulted in a violation of Plaintiff's constitutional right to present a defense and testify on his own behalf, it deprived him of his constitutional Due Process guarantees. Finally, the trial court's *Sandoval* ruling in conjunction with its admission of irrelevant and excessive *Molineux* evidence destroyed even the semblance of a fair trial.

The trial court ruled that if Weinstein testified on his behalf, the prosecution would be permitted to cross-examine him about twenty-eight alleged prior bad acts

[26] Page references preceded by "S" are to the transcript of the Sentencing Proceeding held on March 11, 2020. At that time, Weinstein reminded the court, "You know [] I wanted to testify, but they told me all these things the District Attorney just said would come in my way before I testified" (S: 58).

purportedly lodged by scores of witnesses, many of whom were unidentified and unknown to Weinstein at the time of trial. (H: 145-148). The trial court conducted no inquiry to determine the veracity of the claims nor did it make any precise determinations about whether the claims bore on Weinstein's credibility, veracity or honesty. The accusations were far-reaching and broad in scope; some dated back decades and involved bizarre claims of nothing more than brutish behavior that had nothing to do with sexual misconduct or Weinstein's credibility. Other allegations involved vague claims that Weinstein had threatened or lied or engaged in abusive or quasi-abusive conduct toward his employees, acquaintances, and even his own brother. Weinstein was given no reasonable advance notice of many vaguely worded allegations while the prosecution was afforded the opportunity to ambush Weinstein with these accusations should he take the stand. None of the allegations formed the basis of any prior criminal charges or conviction but constituted nothing more than bare allegations untested by the adversarial process.

Not only did the trial court open the floodgates to the introduction of scores of accusations of dubious veracity, it further ruled that if Weinstein took the stand, the prosecution would have unfettered latitude to cross-examine him about the damning *Molineux* evidence that had already been placed into evidence in the prosecution's case in chief. Put simply, the trial court's *Sandoval* ruling left

Weinstein no choice but to remain silent against his will or take the stand and suffer the legal equivalent of suicide.[27]

The trial court's failure to give sufficient consideration to the overwhelming prejudice Weinstein would suffer if forced to face cross-examination concerning scores of allegations of misbehavior (both criminal and non-criminal in nature), not only was an abuse of discretion but stripped Weinstein of his most cherished constitutional guarantees. In determining a *Sandoval* application, a Court must strike a balance between the probative worth of evidence of prior bad acts on the issue of the defendant's credibility on the one hand and, on the other, the risk of unfair prejudice to the defendant, measured both by the impact of such evidence, if admitted after defendant's testimony, and by the effects its probable introduction may have in discouraging defendant from taking the stand. *People v. Bowles*, 132 A.D.2d 465, 466 (1st Dept. 1987); *See People v. Sandoval*, 34 N.Y.2d 371, 375 (1974).

Here, the trial court accorded no consideration to the prejudicial impact that would ensue from allowing the People to question defendant about so many

[27] Defense counsel explained to the court the effect of the *Sandoval* ruling on defendant's ability to testify: "The People will say, you know, did you do this absurd thing that we know that's not true? Mr. Weinstein says no. And they ask, did you do this absurd thing? No. Did you do that absurd thing? No. Although, Your Honor will instruct the jury that the comments of counsel are not to be evaluated by the jury in their deliberations, it would just be a cumulative point of poisoning the jury. They will have heard it" (*Sandoval* hearing: 138-9).

allegations of purported bad behavior or the likelihood that the ruling would effectively preclude Weinstein from testifying in his own defense. Introduction of a veritable tsunami of bad act evidence was clearly designed to keep Weinstein off the stand since no reasonable jurist could conclude that a jury would be capable of using the evidence for a non-propensity purpose. In short, the trial Court's *Sandoval* ruling was more damaging to the defendant than was appropriate or necessary for the jury's evaluation of his credibility. *See People v. Wright*, 121 A.D.3d 924 (2d Dept 2014); *People v. Bowles*, 132 A.D.2d at 467.

The trial court's *Sandova*l ruling was not simply a garden-variety trial error but amounted to a constitutional violation of epic proportions, denying Weinstein of his right to testify in his own defense, a right guaranteed by the *Fourteenth Amendment Due Process Clause* ("it is one of the rights essential to due process of law in a fair adversary process"); the compulsory process clause of the *Sixth Amendment* ("even more fundamental to a personal defense than the right of self-representation"); and the *Fifth Amendment* (a "necessary corollary … to the guarantee against compelled testimony"). *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987). Defense counsel recognized the constitutional implications of the trial court's ruling, stating "the Court's *Sandoval* ruling all but ensured that the defendant, a man with no prior arrests, much less criminal convictions, will not be able to take the stand in his own defense." *See Defendant's Motion to Reargue*

*Molineux, May 28, 2019*. And, even apart from the defendant's claim that the trial court's *Sandoval* ruling deprived him of his right to testify, the *Sandoval* ruling constituted such an abuse of discretion as to deny the defendant a fair trial.

When combined with the Court's *Molineux* ruling, as discussed above, the People were afforded an unparalleled, unheard of, opportunity to introduce a mountain of uncharged crimes and bad act evidence. *See People v. Coe*, 95 A.D.2d 685 (1st Dept. 1983); *People v. Williams,* 56 N.Y.2d 236 (1982). The People's case comprised highly prejudicial evidence involving charges that were time-barred or legally insufficient and improper propensity evidence. The People improperly bootstrapped the testimony of Sciorra, Mann, Dunn, Wulff, Young, and Postacchini, thereby permitting highly prejudicial evidence that had no place in this trial on the single charge of criminal sexual act in the first degree (Haley) properly before the jury. In effect, the Court permitted the evidence at trial to devolve into a tail (uncharged, time-barred and legally insufficient charges) wagging the dog (a single facially sufficient count in the indictment), thereby depriving the defendant of a fair trial and the chance, with the world watching, not simply to defeat the charges against him, but to defend against the most vile allegations - allegations which Mr. Weinstein denies to this day.

## POINT III

## THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT (1) PRECLUDED THE DEFENDANT FROM OFFERING EXPERT TESTIMONY ON TOPICS TESTIFIED TO BY THE PEOPLE'S EXPERT AND (2) PERMITTED THE PEOPLE'S EXPERT TO BOLSTER THE CREDIBILITY OF THE PEOPLE'S WITNESSES [U.S. CONST AMEND. VI AND XIV; CHAMBERS V. MISSISSIPPI, 410 U.S. 284 (1973)]

The case before the jury hinged on the credibility of three women whose allegations were made years after the incidents were alleged to have occurred and only after the media vilified Mr. Weinstein, even as it lauded those who came forward with grievances about him. Due to the trial court's *Molineux* and other evidentiary rulings (discussed *supra*), the case grew to encompass the allegations of seven women and more than a dozen separate instances of sexual misconduct. Despite the plethora of evidence against Mr. Weinstein that was admitted at trial, the trial court committed two reversible errors with respect to the expert testimony.

First, the trial court permitted an expert witness (Dr. Ziv) to make sweeping generalizations that bolstered the credibility of the alleged victims. In testifying about rape trauma syndrome, Dr. Ziv was permitted to give generalized data about rape that was offered to bolster the credibility of the witnesses and to prove the crimes occurred. (see the *Evidence At Trial* section, *supra, pp. 33-43,* for a

summary of Dr. Ziv's testimony). Specifically, the trial court erred in permitting the People's expert to testify that women do not falsely report rape and that their memories of rape do not fade over time; that women are usually raped by an acquaintance, delay reporting the rape for years, do not physically or verbally resist, and continue or even develop sexual relationships with the perpetrators thereafter. Notably, some "myths" associated with rape were referenced by the Court of Appeals in *People v. Taylor*, 75 N.Y.2d 277 (1990), thirty-one years ago, and defense counsel requested a *Frye Hearing* to determine, *inter alia*, if "myths" identified by Dr. Ziv are the product of generally accepted principles and methods that are valid today. *Defendant's Omnibus Motion, October 10, 2019.* That request was denied. Dr. Ziv's testimony, aided by the prosecutor's pointed questioning and summation tactics, tracked the evidence in the case, thereby further bolstering the credibility of the witnesses with the impermissible result of tending to prove that the crimes occurred, thereby depriving the defendant of a fair trial.

The trial court also committed reversible error when it precluded a defense expert from testifying about the very topics the People's expert was permitted to expound upon; precluded the defense experts from offering testimony about the methodologies used in the data upon which Dr. Ziv's testimony relied; and precluded the defense from offering expert testimony about memory of sexual encounters.

These limitations imposed on the scope of the defendant's expert testimony effectively precluded the defense from calling Dr. Deborah Davis, a foremost social psychologist and author of over one hundred scholarly articles and book chapters concerning memory, suggestion and suggestibilty, sexual communications and sexual assault, who had provided expert testimony in hundreds of cases. *See Defendant's Notice to Introduce Expert Testimony of Dr. Davis.* It also had the effect of preventing the testimony of Dr. Elizabeth Loftus, perhaps one of the most acclaimed memory experts in the country today, from discussing memory for sexual encounters, thereby permitting the prosecutor to marginalize Loftus's testimony as having nothing to do with the trial. This limitation of the defense expert testimony was a violation of defendant's constitutional right to present witnesses in his own defense. *U.S. Const. 6th, 14th Amends*; *see, Ronson v. Commissioner of Correction,* 604 F.2d 176, 178 (*2d Cir. 1979)*; s*ee also, People v. Berk*, 88 N.Y.2d 257, 266 (1996).

### A. Procedural History, Evidence, and Summation Tactics Concerning Expert Testimony

On January 18, 2019, the People filed its *Notice of Intent* to introduce "expert testimony on sexual assault and rape trauma syndrome." The People claimed that their expert testimony was necessary to "dispel several myths about sexual assault" including that victims are usually raped by strangers, promptly report their crimes, display symptoms of trauma, and avoid communicating and

associating with their attacker. Defendant objected to Dr. Ziv's proffered testimony. Nevertheless, the trial court granted the People permission to call Dr. Ziv. *See April 26, 2019 hearing* at pp. 156-57.

On October 10, 2019, the defendant filed his omnibus motion in which he gave notice of his intent to introduce expert testimony on human memory; the factors that are understood to influence and distort memory for events including sexual communications and interactions and for voluntary unwanted sex (i.e. sex voluntarily engaged in without sexual desire). The defendant also sought to introduce expert testimony on the methodologies used to gather the data on which Dr. Ziv was intending to rely in her testimony concerning the frequency of false reporting, failure to report, delayed reporting, and continuing contact with the alleged perpetrator. The defendant also moved to limit or preclude the People's expert testimony because the potential value in her testimony was far outweighed by its potential for undue prejudice and for a *Frye* Hearing to determine its admissibility. The trial court ruled the testimony of the People's expert admissible without limitation and without a *Frye* hearing, and *denied the defendant the right to introduce any expert testimony on the data used and relied upon by the People's expert. Decision November 26, 2019.*

The trial court permitted the defendant to introduce expert testimony on "the general operation of human memory," "the factors that are understood to

influence or distort memory," "the nature of motivational and suggestive influences that can cause memory distortion," and "on the subjects of whether memories of traumatic events are immune from factors that decay or distort memories, whether memories can be improved or enhanced over time, whether memories that conjure up emotions are more likely to be true, and whether there exists a correlation between how confident a person is in their memory and the accuracy of that memory" (*see* the *Evidence At Trial* section, *supra, pp. 43-45,* for a summary Dr. Loftus's testimony). However, the trial court precluded the defendant from introducing testimony regarding "special issues of memory specifically for sexual or potentially sexual interactions" *Id*. At trial, the trial court expanded its ruling to preclude any mention of the word "sex" in the testimony of the defendant's expert Dr. Elizabeth Loftus, who unlike Dr. Ziv, was required to give her testimony in a vacuum that suggested to the jury that it bore no relation to the issues of memory pertaining to the case on trial.

In August 2019, the People re-presented two counts of predatory sexual assault to the Grand Jury. Only after the defendant filed its October 10, 2019 omnibus motion in connection with this new indictment did the People disclose that Dr. Ziv had testified in that Grand Jury. Much of her testimony in the Grand Jury served only to prove that crimes occurred and to bolster the credibility of the witnesses. She testified that *women do not lie about rape,* specifically testifying

that only 2% of rapes are false reports; she gave legal instruction to the grand jury on what constitutes consent to engage in sexual interactions; she testified to data establishing that most rapes are committed by acquaintances and discussed offender characteristics in the context of why women might chose not to report a rape and instead, choose to continue or even commence a relationship with the perpetrator thereafter and that most women do not physically resist; and she testified that women engage in self-harm after they have been raped.

On December 5, 2019, the defendant filed a motion to dismiss the indictment based on this newly disclosed and improper expert testimony before the grand jury or, in the alternative, to limit or preclude Dr. Ziv's testimony at trial and sought a *Frye* Hearing. On December 16, 2019, the trial court denied defendant's motion to dismiss the indictment; refused to limit Dr. Ziv's testimony at trial, "[e]ven if it would have been better had the People eliminated or limited the testimony of Dr. Ziv from their presentation;" adhered to its prior ruling admitting testimony about sexual assault and rape trauma syndrome; and denied a *Frye* Hearing. *See Court's December 16, 2019 Decision.* Hence, Ziv's Grand Jury testimony proved to be a prelude to her trial testimony.

Not surprisingly, the People's expert testified at trial as she had in the Grand Jury, and augmented her testimony with opinions about memory for sexual assault and voluntary unwanted sex (topics the court had ruled off-limits for the defense

experts), and how and how not to evaluate the credibility of alleged victims of sexual assault. While the People denied that their expert would vouch for anyone's credibility, her testimony amounted to just that. Her testimony bolstered the credibility of the complaining witnesses including the *Molineux* witnesses and was utilized to prove that the crimes actually occurred, thereby usurping the traditional province of the jury. *See People v. Knupp,* 179 A.D.2d 1030, 1031–1032 (4th Dept. 1992) ("challenged testimony was improperly admitted, inasmuch as it was introduced primarily to prove that the charged crimes took place") Exacerbating the harm done by this testimony was the trial court's rulings in connection with the defense expert testimony which was unfairly limited. These, standing alone, operated to deprive defendant of a fair trial and thus warrant reversal. *People v. Ruiz,* 159 A.D.3d 1375, 1376 (4th Dept. 2018). Together with the *Molineux* and *Sandoval* rulings, these rulings afforded defendant no chance of obtaining a fair trial consistent with due process.

Magnifying the prejudice to defendant from Dr. Ziv's testimony was the prosecutor's use of it in summation to argue that the women were credible, their memories inviolable, and that the crimes actually occurred. She repeatedly directed the jury to supplant its role as factfinder with Dr. Ziv's "science" (T: 3704), rhetorically asking, "What did Dr Ziv say?" (T: 3704) or "what did the Doctor say?" (T: 3710) in arguing that the women acted in conformity with the

testimony given by Dr. Ziv and that their testimony was therefore credible. (T: 3704, 3710, 3712, 3735, 3745, 3753-4, 3757-3758, 3766, 3768). For example, she argued that the Doctor said that women have "subsequent contact with their perpetrator" because, quoting Dr. Ziv, "They want to get on with their lives" (T: 3704); that a memory for a traumatic event does not fade with the passage of time (T: 3712); that perpetrators make their victims feel stupid and belittled which causes the victims not to "stick up for themselves" and to "blame themselves" (T: 3735). Discussing Haley's decision to have sex with the defendant again, the prosecutor told them that Ziv says she did it because she felt like "damaged goods." (T: 3768). She categorically stated that it was a "rape myth" that the victim has done something to cause this. Echoing Dr. Ziv, she stated, "It is not true" (T: 3735).

She told them to "harken back to Barbara Ziv" to explain why Haley's testimony was demonstrably false but was still credible. "When you experience a traumatic event you remember what's important because that is stored in a different part of our brain" (T: 3745); about Wulff, she argued, "Doctor Ziv says you try to forget but you can't" (T: 3757) and "what does Dr. Ziv say about core memory," "the elements of the trauma are pretty clear" (T: 3758); "Dr Ziv knows how the brain works and where it stores the memory of a traumatic event and that it stays with you" (T: 3766).

### B. The Court Committed Reversible Error by Permitting Unchecked Expert Testimony That Bolstered the Credibility of The People's Witnesses and Sought to Establish That The Crimes Charged Occurred.

Thirty-one years ago, New York's highest court analyzed the scientific literature on rape trauma syndrome and held that although "[t]here is no single typical profile of a rape victim ... the relevant scientific community has generally accepted that rape is a highly traumatic event that will in many women trigger the onset of certain identifiable symptoms...." *People v. Taylor*, 75 N.Y.2d 277, 292 (1990).[28] The *Taylor* case affirmed the propriety of admitting expert testimony in

[28] At that time, the Court of Appeals made a *temporal* assessment of the need for expert testimony concerning rape trauma syndrome for *limited* purposes "[b]ecause cultural myths still affect common understanding of rape and rape victims and because experts have been studying the effects of rape upon its victims *only* since the 1970's, we believe that patterns of response among rape victims are not within the ordinary understanding of the lay juror." *Taylor* at 289. Thus, the admissibility of such testimony, in the first instance, is predicated on a showing that certain false beliefs or "myths" abide in the culture today. Notably, the trial court denied a request for a *Frye* hearing to determine whether these "myths" referenced by the Court of Appeals thirty-one years ago in *Taylor* remain rooted in any belief system in 2020 America. In fact, there is every reason to believe that they do not as the past ten years have seen significant transformations in due process on American college campuses, in courts of law, and the broader culture that shift the burden of proof to those accused of sexual assault to prove their innocence. What American today has not heard of date rape or believes that women cannot be raped by an acquaintance or their intimate partner or even their spouse? Despite the fact that the admissibility of such testimony is culturally dependent and that American culture has changed quite drastically since *Taylor*, culminating with the hashtags, *#MeToo, #Believeallwomen*, and the routine public shaming of public figures on the mere accusation of sexual improprieties, the trial

some cases concerning the syndrome at a rape trial to explain unusual conduct of the victim immediately after the attack. It did not, however, sanction the wholesale admission of expert testimony on the prevalence, characteristics, and credibility of all types of allegations of sexual assault, as was permitted here. *See People v. Bennett*, 79 N.Y.2d 464, 473 n. 3 (1992) (expressly questioning the admissibility of expert testimony on the subject of rape trauma syndrome where the instant allegations concern lesser, *non-consensual sexual conduct*, as opposed to *forcible rape*).

Further, the Court of Appeals held that in evaluating the admissibility of testimony concerning rape trauma syndrome, the trial court should consider the reason why the testimony is offered, its relevance and its potential for prejudice. *Taylor*, 75 N.Y.2d at 292. The Court of Appeals cautioned that "unchecked admission of expert testimony in this area has peculiar dangers." Id. at 282. It may be admitted under certain circumstances to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand (*People v. Carroll*, 95 N.Y.2d 375, 387 [2000]), but it is *not* admissible when it inescapably bears on proving that a rape occurred. *Taylor* at 293. When it is introduced to

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court permitted this testimony without any evaluation of whether and to what extent it was still warranted.

prove the crime took place, its helpfulness is outweighed by the possibility of undue prejudice. *Id.*

Case law has recognized two specific sources of unfair prejudice unique to potential expert testimony regarding rape trauma syndrome and other similar subjects: (1) the danger that such expert testimony will be used to prove that an incident in fact occurred; and (2) its use in an attempt to bolster the credibility of the complaining witnesses. Both are categorically improper. *Id.* (expert testimony improper where it "bears solely on proving that a rape occurred"); *see Bennett*, 79 N.Y.2d at 472 (expert testimony related to complainant's reaction as the incident unfolded improper as it does not relate to unusual post-rape behavior); *People v. Mercado*, 188 A.D.2d 941, 943 (3rd Dept.1992*)* (expert testimony improper where it constituted "an impermissible comparison of the complainant's behavior with that commonly associated with victims of these crime"); *People v. White*, 4 Misc.3d 797, 800-801(N.Y. Sup. Ct. 2004) (George, J.) (expert testimony on battered woman syndrome improper "because of the profound danger that the jury will infer from the expert testimony that the defendant committed the crime charged or that the jury will unduly use expert testimony to improperly bolster the complainant's credibility").

The trial court failed to heed the warning of the above precedent and, as a result, Dr. Ziv's testimony caused such undue prejudice to Mr. Weinstein that the

conviction must be reversed. The following are examples of her impermissible testimony:

1. *Dr. Ziv's Testimony Constituted Inadmissible Bolstering To Prove the Crimes Actually Occurred*

Dr. Ziv was permitted to deliver a lecture to the jury that encompassed not merely rape trauma syndrome for the purpose of explaining unusual post-event behavior, but generalized data about rape that was offered for no reason other than to bolster the credibility of the witnesses and to prove the crimes occurred. To permit expert testimony in a rape trial that women do not lie about rape and deny the defense expert the opportunity to explain the data relied upon for this conclusion constitutes the most obvious and egregious form of prejudice to the defendant, deprived him of a fair trial and replacing it with a sham.

*a. Women do not lie about rape.*

Certainly the single most egregious of Dr. Ziv's statements was her testimony that women do not falsely report rape for secondary gain. This testimony was intentionally elicited by the prosecutor. This was the functional equivalent of her improper grand jury testimony that it was a "myth commonly held that people lie about rape."[29] Notably, no New York court has ever recognized any such study or

[29] In the Grand Jury, Dr. Ziv testified as follows:

opinion as satisfying *Frye*, nor would it as it clearly usurps the primary function of the jury in evaluating credibility. (The trial court denied defendant's request for a *Frye* hearing.)

Those concerns aside, this testimony was substantively improper because its only purpose was to prove incidents in fact occurred by bolstering the credibility of the complaining witnesses. *See, e.g., Taylor* at 293; *Bennett* at 472. The obvious and only plausible inference to draw from Dr. Ziv's testimony regarding the infrequency, if not nonexistence, of false reporting is that when a report is made, it is true. In other words, its clear design is to prove that an incident occurred, and to bolster the complainant's credibility in making an allegation. Suffice to say, this testimony substantially and necessarily prejudiced the jury, as it originally did the Grand Jury.

Moreover, Dr. Ziv's testimony on false reporting was highly prejudicial when coupled with her testimony about her role as a forensic psychiatrist, in which

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Dr. Ziv: The other rape myth commonly held is that people lie about rape. It's not true. Most people, the rate of false reporting is actually very low depending on the study, somewhere between two and four percent.

Again, later, when initially brought up by a grand juror, the prosecutor asked the following question, and Dr. Ziv gave the following answer:

Prosecutor: Doctor, a member of the Grand Jury would like you to just clarify something, or to just repeat it, perhaps you had indicated how often there is false reporting in rape cases. You gave a percentage. What was that percentage for false reporting percentage?

Dr. Ziv: Two to four.

Prosecutor: Percent?

Dr. Ziv: Percent

(Ziv's Grand Jury at pp. 48-49, 55 is attached as Exhibit A to Defendant's December 5, 2019 Motion to Dismiss.

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she characterized herself as an expert in credibility and stated that the very data she was sharing with the jury was what she based her opinion on in her role as a forensic psychiatrist. And notably, the prosecutor argued to the jury that it was implausible to believe that the women who testified had any reason to testify falsely, particularly noting that Haley had no plans to sue for money, although public court filings demonstrate that her testimony was false. 1:20-cv-09109-JPC *Haley v Weinstein.*

*b. Women are usually raped by someone they know*

Similarly, Dr. Ziv's testimony regarding the "myth" that victims are usually raped by strangers is obviously not a feature of rape trauma syndrome. It bears no relation to explaining unusual post-event behavior of a victim, but invariably bears on whether the assaults in fact took place and, because each witness who testified knew Mr. Weinstein, whether Mr. Weinstein assaulted them. The specific statistics Dr. Ziv cited present additional problems including that the defense was not provided the data that allegedly supported these statistics and that the defense was precluded from offering expert testimony to explain to the jury the methodologies used to create such data and to identify other data reflecting other, better methodologies. *See People v. Keindl*, 68 N.Y.2d 410, 422 (1986) (Held that the range of psychological reactions of child victims who suffer from sexual abuse at

the hands of their stepparents is not a subject matter within the ken of the typical juror, and therefore may be addressed by expert testimony *where the defendant was not prevented* from impeaching the People's expert, or *from presenting his own expert*).

*c. Rape victims engage in self-harm and feel like "damaged goods"*

Dr. Ziv also testified that women who have been raped engage in self-harm and perceive themselves as "damaged goods." She testified that "[y]ou often hear women who have been sexually assaulted say they feel like damaged goods, they feel like I'm used goods anyway, why not" (T:1366). This testimony tracked the evidence in the case and was used in summation to bolster the credibility of the complaining witnesses concerning cutting, which was a form of self-harm allegedly engaged in by Sciorra and Mann, and to explain why Haley had sex with Weinstein two weeks after she claimed he assaulted her. This area of testimony was again not disclosed by the state in its notice, nor shown to conditionally satisfy *Frye*. Moreover, it is the very sort of evidence found to be inadmissible by the Court of Appeals. In the companion case to *Taylor*, *People v. Banks*—the Court of Appeals concluded that expert opinion that a person exhibited symptoms associated with rape trauma syndrome would be inadmissible because it bore solely on proving that a

rape had occurred, and defendant would be unacceptably prejudiced by this type of rape trauma syndrome evidence (*Taylor* at 293, *supra).*

Even if this testimony contained some marginal relevance separate from proof that the crimes occurred, otherwise relevant evidence is improper where it is outweighed by the danger of undue prejudice. *Mazella v. Beals*, 27 N.Y.3d 694, 710 (2016). Appeals to sympathy for the alleged victims is one well-recognized source of undue prejudice.[30] *See People v. Caruso,* 246 N.Y. 437 (1927); *People v. LaValle*, 3 N.Y.3d 88, 113 (2004) ("jurors have an obligation to decide the issues in the case "in a judicial temper . . . . [a]ppeals to sympathy or prejudice can but be harmful") (internal citations and quotations omitted). Indeed, Due Process is violated "when victim impact evidence is introduced that 'is so unduly prejudicial that it renders the trial fundamentally unfair.'" *United States v. Whitten*, 610 F.3d 168, 190 (2d Cir. 2010) (*quoting Payne v. Tennessee*, 501 U.S. 808, 825 (1991)); *United States v. Copple*, 24 F.3d 535, 545-46 (3rd Cir. 1994) (evidence of a victim's loss should be excluded when it amounts to "victim impact testimony"); Thus, it follows that expert testimony concerning alleged victims engaging in self-harm and feeling like "damaged goods" was improper as it was not the proper

[30] Dr. Ziv's testimony, permitted over objection, about a woman's memory that "her babies were safe" at the time of a thirty-year old rape was another such instance of an appeal to sympathy (T: 1379).

subject of expert testimony and unduly inclined the fact-finder to decide the relevant matters before it based upon sympathy and passion.

*2. Dr. Ziv Addressed Topics Concerning Sexual Assault That Were Not Beyond The Common Understanding of Lay Jurors*

The Court permitted Dr. Ziv to testify on matters even where not beyond the common understanding of lay jurors. The fact that victims can be raped by people they know and the reasons why victims might continue to communicate or interact with someone who sexually assaulted them are simply not, nor have they ever been found to be, beyond the common understanding of typical jurors. This testimony was given solely as it pertained to the incidents themselves and not because they fell within any permissible bounds of "unusual" post-event behavior. Indeed, counsel argued-and the People never disputed- that there was nothing about the witnesses' post-incident behavior that was "unusual," counterintuitive, or irrational - and certainly nothing about their behavior that the typical juror is incapable of understanding based upon his or her day-to-day experiences. Rather, the rationale behind making a conscious, informed decision not to make a public accusation or to continue a relationship with the defendant were explained by the witnesses, and it was for the jury to decide whether it found the complainants' explanations credible. There was no need to permit the pathologizing testimony of an expert to explain something well within the jury's common-sense and lived experiences.

*See, e.g.*, *People v. White*, 4 Misc.3d at 799-81 (holding, *inter alia*, expert testimony regarding battered women syndrome to explain a complainant's nine-week delay in disclosing abuse where "none of the facts apparent in this particular case [were] outside of a jury's common sense and logic" was error).

*3. Dr. Ziv's Testimony About Victim Behavior During The Alleged Assaults Was Not A Proper Topic For Expert Testimony*

Dr. Ziv's testimony did not simply aide the jury in understanding "unusual" or counterintuitive behavior, actions, or symptoms of a sexual assault victim after the fact, but sought to prove that "a rape occurred" by instructing the jury about victim behaviors during the alleged assault. *Taylor at 293*; *see also Bennett at 472* (expert testimony was improper where it "concerned the victim's behavior as the sexual attack unfolded"). In this vein, Dr. Ziv testified extensively regarding the frequency with which women physically resist perpetrators of rape and sexual assault. Relying on data derived from incidents of stranger rape, Dr. Ziv gave statistics regarding the prevalence of various forms of resistance, and told the jury that victims of acquaintance rape would be even less likely to offer any resistance. She testified about screaming and kicking specifically, both of which would be a rare occurrence according to Dr. Ziv. This testimony bore no relation to explaining unusual post-event behavior, but invariably bore on the taking place of an assault

itself by bolstering the credibility of the witnesses who had offered little or no resistance in the sexual encounters they described.

*4. Dr. Ziv's Testimony Improperly Addressed Perpetrator Behavior.*

Dr. Ziv's commentary on behaviors associated with perpetrators ("the carrot and the stick" and "how perpetrators gain compliance"-T: 1364) tracked the victim's testimony concerning defendant's conduct, and the prosecutor on summation urged the jury to conclude that defendant's interactions with the victim fit the description of a typical perpetrator's conduct as described by Dr. Ziv. Such expert testimony on perpetrator behavior is only admissible to the extent it bears on the need to explain victim behavior. *People v. Williams,* 20 N.Y.3d 579, 584 (2013). Here, it was used for the purpose of proving that the complainants were sexually assaulted. *See People v. Duell,* 163 A.D.2d 866 (4th Dept. 1990) *See also People v. Ruiz*, 159 A.D.3d 1375, 1376–77 (4th Dept. 2018).

*5. Dr. Ziv Supplanted the Role of the Jury By telling The Jury That it Could Not Determine Credibility, Supplanted the Role of Defense Counsel by Instructing the Jury that it was "Out of Touch" to Ask an Alleged Victim to Explain Her Conduct and Bolstered the Prosecution by Suggesting that the Prosecutor Had Done its Job.*

Dr. Ziv instructed the jury that it was a "myth" that "one can determine whether someone has been raped by her behavior" (T: 1368, 1431). She testified

that in her role as a forensic psychiatrist, she evaluated whether alleged victims and perpetrators were credible and that she based her forensic assessment of whether someone is credible on "whether the allegations comported with the patterns of behavior of victims *and perpetrators* described in the literature" (T: 1439). (Of course, she had also told the jury that with respect to victim behavior, there *were no* patterns; that you could not tell from victim behavior whether the victim was being truthful; and that rape victims do not lie.) Hence, Dr. Ziv was telling the jury that their role in evaluating the evidence was circumscribed by an outcome determinative set of "scientific" parameters that essentially precluded them from evaluating the evidence and, instead, directed a credibility finding in a purported victim's favor. Those parameters included that rape victims give false statements, change their stories, appear calm, comply, withdraw, become promiscuous, drink and use drugs, to name a few.

Dr. Ziv stressed that forensic evidence "in a case like this" could be evidence of perpetrator behavior based on testimony of other women that experience the same thing, i.e., "a pattern of behavior of the perpetrator that is consistent with the allegations" (T:1429). This testimony was in direct contradiction to the instructions given the jury on the use of the *Molineux* evidence. *See* Point II, supra

Dr. Ziv cautioned that to even question why an alleged rape victim acted in a certain way during the encounter or afterwards was simply "out of touch" because they don't do what people think rape victims do (T: 1441). This testimony was a categorical rejection of the role of cross-examination and jury deliberation in evaluating the evidence in this case. Dr Ziv went on to explain that any false information elicited from a victim is the fault of the interviewer not letting the victim "control their own memory" (T: 1378). This testimony had prejudicial implications for cross-examination itself as a foundational element of due process in criminal trials. She stated that even when an alleged sexual assault victim changes her story over time, this just means she is "testing the water" because she is ashamed (T: 1431-2).

Dr. Ziv even vouched for the prosecution by stating over objection that she "assumed" the DA's office had done its investigation in the case (T: 1439). The inference was, of course, that the jury could rely upon that assumption, too.

*6. Dr. Ziv Was Permitted to Testify About Memory for Sexual Assault, Voluntary Unwanted Sex, and Consent - Matters as to Which She Was Not Qualified to Testify And As to Which the Defense Experts Were Barred*

Dr. Ziv also testified extensively regarding memory for sexual assault – a topic forbidden by the trial court to be explored by the defense experts and a topic as to which Ziv had not been qualified to testify. She testified that memories of sexual

assault do not fade over time. She was even permitted to tell the jury about a case in which a sexual assault victim had perfect memory recall of the core events around an incident that had taken place thirty years earlier, tracking the time frame for the Sciorra allegation perfectly. The People, having not even disclosed this area of Dr. Ziv's testimony in its notice, *inter alia*, had made no showing that these opinions conditionally satisfy the requirements of *Frye* or that Ziv was qualified to testify about them. Moreover, the trial court precluded the significantly more qualified defense experts, Dr. Davis and Dr. Loftus, from opining on this very topic, *i.e.*, "special issues of memory specifically for sexual or potentially sexual interactions." Thus, the defendant was prevented from impeaching the People's expert, or from presenting his own (*People v. Cronin, supra*, 60 N.Y.2d 430, 432 (1983); *Selkowitz v. County of Nassau,* 45 N.Y.2d 97, 103 (1978); *see, e.g., People v. Benjamin R.*, 103 A.D.2d 663, 669 (4th Dept. 1984)*; People v. Keindl*, 68 N.Y.2d 410, 422 (1986).

Similarly, the trial court permitted Dr. Ziv to testify on the topic of voluntary unwanted sex ("a ridiculous concept,"[31] in Ziv's words – T:1425), while precluding the defense experts from doing so. In this vein, Dr. Ziv instructed the jury on the

[31] Of course, there is nothing "ridiculous' about the concept of consensual unwanted sex. The prosecutor, herself, described it for the judge in an effort to justify her failure to disclose to the defense that Mann had admitted to engaging in consensual sex with Mr. Weinstein on numerous occasions: "They knew that exactly what she testified to, that at some point in time she felt that she was in a relationship with him and although she didn't want sex, she was not forced to have sex" (T: 2304) And again, "Judge, she never said she wanted to have sex with Harvey Weinstein. She said she had sexual contact with Mr. Weinstein that was not coercive. Everyone knew that, that was clear in everything we handed over to them" (T:2305).

definition of consent for sexual encounters just as she had done in the Grand Jury. Her trial testimony was categorically improper, as was her Grand Jury testimony before it. Lack of consent is a legal term defined by Penal Law § 130.05. It provides, in relevant part, that lack of consent results from: 2.(a) Forcible compulsion; or . . . (c) Where the offense charged is sexual abuse or forcible touching, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim *does not expressly or impliedly acquiesce in the actor's conduct*; or (d) Where the offense charged is rape in the third degree as defined in subdivision three of section 130.25, or criminal sexual act in the third degree as defined in subdivision three of section 130.40, in addition to forcible compulsion, circumstances under which, at the time of the act of intercourse, oral sexual conduct or anal sexual conduct, *the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances.* Dr. Ziv's definition of consent is considerably broader than the definition provided by §130.05. It thus constituted an erroneous legal instruction, exacerbated by the imprimatur of a purported expert.

*7. The Prosecutor in Her Summation Amplified The Prejudice to Mr. Weinstein Resulting From Dr. Ziv's Improper Testimony*

The prosecutor's pointed questioning of her expert and her repeated use of the expert's testimony in summation further prejudiced the defendant. *People v. Williams,* 20 N.Y.3d 579, 584 (2013) (expert testimony exceeded permissible

bounds when the prosecutor tailored questions to include facts to the particular case at trial, having the prejudicial effect of implying that the expert found the testimony of this particular complainant to be credible—even though the witness began his testimony claiming no knowledge of the case before the court). As summarized above, the prosecutor repeatedly argued to the jury the evidence was supported by Dr. Ziv's framework in which no alleged victim's behaviors can ever be questioned and all roads lead to conviction.

Dr. Ziv was allowed to testify *carte blanche* before the jury without any regard to the scope of her disclosure notice, constraints set by the law as to proper areas of testimony, or regard for the actual law that governed the proposed charges. Her testimony bore on the ultimate question of whether defendant was guilty which should have been left for the jury to decide and is not a subject matter beyond the ken of the ordinary juror, requiring expert testimony.

### C. The Trial Court Committed Reversible Error By Precluding the Defendant From Offering Expert Testimony On Topics Testified To By The People's Expert Witness.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'*"* *(Nevada v. Jackson,* 569 U.S.505 [2013] *quoting Crane v. Kentucky,* 476 U.S. 683, 690, [1986*]; see Holmes v. South Carolina,* 547 U.S. 319, 324 [2006]*; People v. Carroll,* 95 N.Y.2d 375, 385

[2000] ). *People v. DiPippo*, 27 N.Y.3d 127, 135 (2016*).* Mr. Weinstein was afforded no such opportunity by the trial court here.

The trial court precluded Dr. Deborah Davis and Dr. Elizabeth Loftus from testifying on certain specified subject areas because it claimed those subjects and opinions were not demonstrated to be "generally accepted within the relevant scientific community." Order, p. 10. On these topics, the trial court should have held a *Frye* hearing. See *People v. LeGrand*, 8 N.Y.3d 449, 457-58 (2007). Instead, it made a wholesale ruling to preclude the defense experts from testifying about sexual assault, notwithstanding that it allowed the People's expert to cover all the topics about which the defense experts were barred.

The trial court's decision to preclude expert testimony by the defense on the topic of memory for sexual interactions was predicated on two sentences quoted out of context from a scholarly article co-authored by the defendants' experts. The sentence read, "Though the circumstances of sexual interactions—and particularly those involving intoxicated participants—provide fertile ground for memory failure and distortion, little memory research has directly addressed memory for sexual interactions. Here, we hope to provide a call to arms for memory researchers to dive into this complicated, challenging, yet vitally important arena." *See Court's Decision on Defendant's Omnibus Motion, November 26, 2019 quoting* Deborah Davis & Elizabeth Loftus, *Remembering Disputed Sexual*

*Encounters: A New Frontier for Witness Memory Research*, 105 J Crim. L. And Criminology 810, 816 (2016).

The paragraph preceding this statement referenced by the court, and indeed the entire beginning of the article makes abundantly clear that its authors are referring to *memory for sexual consent communications* specifically, and *not* to *memory for sexual interactions*, generally. Even more specifically, the title of the article and the content make clear that they are referring to adult sexual assault allegations, with emphasis on the impact of intoxication on memory for sexual consent. Regarding memory for sexual interactions, more generally, there is a very extensive body of research addressing a variety of types of memories and types of sexual events. The defendant's proffered experts have both contributed to this literature extensively, as indicated by their CVs which were filed with the trial court and which reference the work of many, many other scholars on these topics. And they have each testified regarding the vast scientific literature on memory for both child and adult sexual interactions. The trial court's decision to bar defense expert testimony on this issue, while permitting the People's expert to ramble on about topics without having given notice or establishing its validity under *Frye*, was a reversible error.

Moreover, that error was compounded by the fact that the defense experts were not permitted to explain to the jury the methods used in developing the data

that Dr. Ziv relied upon and to introduce data that she had overlooked. Without expert testimony, the defense was at disadvantage in arguing to the jury that Dr. Ziv's sweeping generalizations were not supported by the best science. In that context, it should be pointed out that science is a method, a process, and not a set of facts handed down by someone deemed to be sole arbiter of the facts. Unfortunately, the court's rulings resulted in the People's expert being permitted to pontificate about her opinions, cherry-picking data to comport with those opinions, and allowing it all to masquerade as "science" or "truth." By not permitting the defense to challenge this testimony by allowing its own expert to testify on the very subjects about which the People's expert was permitted to testify, the court denied the defendant his right to present a defense and denied the jury the information it needed to evaluate fairly the testimony of the People's expert. This left the jury little choice but to accept her testimony, thereby ceding its role to the People's expert.

### D. The Defendant Was Further Denied His Constitutional Right to Present a Defense When, Inter Alia, the Prosecution Withheld Exculpatory Evidence, and the Trial Court Precluded the Defense from Calling Police Officer DiGaudio to Testify.

With the assistance of the New York Police Department, the New York Attorney General's Office and the Los Angeles Police Department, the People undertook a two-year long investigation into every aspect of Mr. Weinstein's life. Given the prosecution's theory, presented to the jury in the form of expert

testimony that the defense was precluded from rebutting, that women do not lie about rape, it was incumbent upon the People to share with the defense any information that they had that women had come forward with falsifiable allegations concerning Mr. Weinstein. Indeed, such information was *Brady* irrespective of whether they had made a decision not to charge the defendant with crimes based on such allegations. No such discovery was ever made available to the defense.

Nevertheless, the conduct of Detective DiGaudio, the lead investigator on the case, demonstrated that the People were in fact in possession of such evidence. Detective DiGaudio withheld evidence that Evans had lied about her sexual interaction with Weinstein, leading the prosecutors to dismiss a charge from the initial indictment to avoid the trial court granting the defense motion to dismiss. *Proceeding, October 11, 2018*. Lucia Evans had alleged that Weinstein forced her to perform oral sex on him in 2004. Weinstein was charged with criminal sexual act in the first degree based on her testimony. However, in September 2018, prosecutors disclosed that a woman who was with Evans at the time of the alleged assault had given DiGaudio a contradictory account and that DiGaudio had instructed the woman to keep quiet. "Less is more," he told the witness.

Then it emerged that Jessica Mann had told DiGaudio that she did not want to disclose certain information on her cell phones. DiGaudio allegedly told her to

delete anything that she did not want the prosecutors to see. Detective DiGaudio also interviewed Talita Maia, a critical witness that the prosecutor chose not to call (T: 3361-2). Given DiGaudio's involvement with the investigation and prosecution of Mr. Weinstein, the defense had every right to call him to explore critical issues related to the investigation and the existence of exculpatory evidence that women had, in fact, lied about Mr. Weinstein having sexually assaulted them and the prosecution knew it, contrary to their expert's testimony.

Nevertheless, the trial court ruled that the defense could not call Detective DiGaudio to testify, thereby preventing the defense from presenting to the jury the biased nature of the investigation conducted by the law enforcement and the prosecution from its inception. Following Mann's testimony, the defense renewed its motion to call Detective DiGaudio. "Based on Jessica Mann's testimony, I ask to be allowed to call Nicholas DiGaudio" (T:3269, 3434) The court responded "Okay. I have ruled on that."

Defense counsel urged the trial court to reconsider its ruling based on Mann's testimony.

> [A] New York police detective was improperly attempting to ask Ms. Mann to either hide evidence or do something inappropriate, we believe that Mr. Weinstein has a Constitutional Right to call Detective DiGaudio … It is our position that this is evidence tending to show that Nicholas DiGaudio during the course of his investigation undertook an effort to, essentially, cover evidence, hide evidence and it *calls the integrity of the investigation into question*…Their lead investigator, who is not testifying, there hasn't been

> one police officer in this case to testify and the reason that that is being done is to hide from the jury to some extent the true scope of this investigation and what actually occurred. When you have a police officer who is telling the key witness in this case, it is okay to not turn over evidence to the DA, we think that's something that goes to the credibility, not only of the state's case in its entirety but we want to find out if Jessica Mann was being honest about things…there is no reason why this Court should not allow us to call Detective DiGaudio, present him before this jury, subject him to direct and cross-examination regarding the nature of his dealings with Jessica Mann, telling her to hide evidence…So we think that there is no basis to deny us to call Detective DiGaudio in order to fully probe what his role was in telling one of the key witnesses in this case to either destroy or hide evidence.

(T 3434-6)

The court responded, "The application to call him is denied. The application for the mistrial is denied" (T: 3439-40).

Predictably, the prosecution took full advantage of this limitation imposed on the defendant by arguing in summation that DiGaudio's misconduct, about which defendant was precluded from obtaining evidence by way of Det. DiGaudio's testimony or his disciplinary file, was probative of Mann's credibility:

> PROSECUTOR: Now, a New York City detective goes to get the phones and Jessica expresses fear. She's uncomfortable about all of her personal information being given away. She specifically is uncomfortable about naked photos on her phone. A New York City detective told her something he probably should not have, definitely should not have. He said all right, look, delete those things. He never said delete evidence, he said delete those things, we just won't tell Joan.
> MR. CHERONIS: Objection.
> THE COURT: Overruled.

PROSECUTOR: Delete it and we won't tell Joan. After all, Jessica Mann is providing her phones for evidence with regards to the defendant. What does Jessica Mann do? A detective is telling her delete it, don't worry about it. What does she do? She gets a lawyer, she gives over her phone with full consent, that is why you are seeing what you are seeing in this courtroom. She gave you that.
MR. CHERONIS: Objection.
THE COURT: Overruled.

(T: 3772-3)

Defense counsel objected and requested a mistrial, stating, " For some reason Ms. Illuzzi decided to actually get into what Mr. DiGaudio probably said or did. As the Court knows, we asked several times to call Detective DiGaudio, and the State in their closing argument made representations about what he may have done or probably did" (T: 3799). The prosecution stated, "what I said about Nick DiGaudio was that he may have done something wrong, he probably did something wrong, that is what I said. He was doing something wrong, and that is all I said about that." In fact, she said far more, effectively using the court's shield as a sword.

This is yet one more example in which the court foreclosed the defense from developing its theory of this case.

The defense was also precluded from presenting evidence to the jury that the defendant's impaired physical appearance and his use of a walker was not a ruse designed to hoodwink the jury as had been suggested in the press and stated by the prosecutors. Defense counsel stated,

> [D]uring jury selection there were some questions about Mr. Weinstein's physical well-being. It has been reported on incessantly about his walker, about his ability to stand and walk for extensive periods of time. We may be seeking to call his surgeon who testified that he did, in fact, have a laminectomy. That he is, in fact, injured. We are making no argument, nor will we, that 2013 or 2006 or any of the relevant periods of time throughout the course of this case that his back or his condition made it impossible for him to commit the crimes alleged.

(T: 3437)

The court responded, "Stop reading the newspapers." Defense counsel replied, "It's got nothing to do with me reading the newspapers. I also asked that you, during jury selection when they pointed at Mr. Weinstein and said, do you think a man like this could commit a crime, and they are talking about his physical nature, they are talking about the fact that he looks [enfeebled] right now. At the end of the day he is hurt and [enfeebled]. If the jury thinks he is faking it, it could be a problem. That's why we think it is [relevant] (T: 3438). Even the prosecutor implicitly acknowledged the relevance of this issue when she stated that the court should permit her to argue in summation that the walker was a "prop" because "that is what it looks like" (T: 3505).

The trial court's decision to run cover for the prosecution when discovery violations including *Brady* violations, were uncovered, effectively denied the defendant his right to present his defense. The prosecutor failed to disclose that Wulff's friend, Gloria Busse, recalled that Wulff had gone to lunch with Weinstein in 2005, contrary to Wulff's testimony that her association with Weinstein was

limited to the two instances she shared with the jury. Although this *Brady* violation emerged midtrial and Busse was out of state and refusing to cooperate, the court denied the defendant even so much as a missing witness charge, merely allowing the defense to recall Wulff.

More damaging was the prosecution's failure to turn over Haley's roommate's grand jury testimony before trial, although the court had ruled that the new discovery rules governed. Thus the defense learned for the first time that Liz Entin would testify that she was in New York on the night Haley claimed she was assaulted and that Haley had come directly home to tell her. Obviously, had the defense known that such testimony was to be given, it would have had the opportunity to investigate whether Entin, who traveled frequently, was actually in New York on that date. Again, no consequences beyond the prosecutor's strategic advantage followed from this discovery violation.

And, of course, the trial court's *Sandoval* ruling was the ultimate denial of defendant's right to present a defense, as it deprived him of his right to testify. *See Point II, Supra.*

Another example of the trial court's obstructionist rulings, is the trial court's eleventh hour decision not to charge the jury on the tolling provision relied on by the prosecution to prosecute the defendant for third degree rape, although it had represented through the entire trial that it intended to do so. Discussed in *Point IV,*

*infra*, this tolling provision addresses a question of fact as to whether the defendant, a resident of New York, was continuously outside the state within the meaning of the statute. By yanking this from the jury, the trial court denied the defendant his right to present his statute of limitations defense to the jury.

These examples demonstrate the trial court's unwillingness to permit the defendant to present any defense to the jury, while permitting the prosecution to develop a theory of the case that was based on uncharged, salacious allegations and improper expert testimony.

## POINT IV

## THE DEFENDANT'S CONVICTION FOR THIRD DEGREE RAPE SHOULD BE REVERSED AND THE CHARGE DISMISSED AS TIME-BARRED BECAUSE THE TOLLING PROVISIONS CONTAINED IN CPL 30.10 ARE NOT APPLICABLE TO THE DEFENDANT WHO WAS A RESIDENT OF NEW YORK DURING THE STATUTORY TIME PERIOD.

Defendant was convicted of Rape in the Third Degree based upon conduct alleged to have occurred on March 18, 2013. Under the applicable statute of limitations, the defendant should have been charged with that crime by March 18, 2018. CPL 30.10(2)b. He was not. Rather, the defendant was charged by felony complaint on May 25, 2018, 68 days after the expiration of the statute of limitations. The defendant moved to dismiss the charge as time-barred.

The People conceded that the applicable statute of limitations for this offense was five years, but argued that the tolling provision contained in CPL Section 30.10(4)a(i) extended the limitations period and justified the filing of the third degree rape charge. Because the defendant was a New York resident during the entire pendency of the statutory period, the tolling provision contained in CPL Section 30.10(4)a(i) did not apply to him. Nor did CPL 30.10(4)a(ii) apply here because no report of the alleged crime had been made prior to the expiration of the statutory period and, even if it had been, the defendant's whereabouts were neither continuously unknown nor continuously unascertainable with the exercise of due diligence.

Nevertheless, relying specifically on CPL 30.10(4)a(i), the People claimed that the defendant "spent over 200 days outside the state" during the applicable five-year period. *People's Response, September 12, 2018 at page 15.* In fact, the vast majority of those days involved short, roundtrip excursions to and from JFK airport in New York, where the defendant resided.

The defendant provided the Court with evidence that he was a resident of New York during the statutory period and argued that CPL 30(4)a(i) does not apply to New York residents. The Court held that the tolling statute applied irrespective of Mr. Weinstein's residence in New York during the applicable period; the length of travel involved; and the fact there was no attempt to ascertain

the whereabouts of defendant during the period at issue. By so ruling the Court essentially held that all periods of absence (even a day) of a New York resident as to whom no crime is even reported, toll a statute of limitations in a criminal case.

At trial, the People introduced into evidence defendant's travel records and the defense introduced evidence that defendant lived in New York City during the period of time at issue.[32] The Court drafted instructions to the jury concerning the question of fact as to whether Mr. Weinstein was "continuously" outside the state within the meaning of the statute, but then decided to remove the instruction from his proposed charge after the close of the evidence despite a defense objection (T: 3689). In doing so the Court held that the issue was a question of law (T: 3691).

CPL 30.10(4)a(i) is a tolling provision that excludes "any period following the commission of the offense during which (i) the defendant was continuously outside this state." The Court of Appeals has held that this tolling provision applies to *non-residents*. *People v. Knobel,* 94 N.Y.2d 226, 228-230 (1999*); see People v. Cruciani*, 63 Misc.3d 226 (Sup Ct NY Co 2019*); see also People v. Chase,* 299 AD2d 597, 598-99 (3d Dept 2002); *People v. Ferrari,* 155 Misc.2d 749, 754 (Co Ct Ulster Co 1992).

[32] "Defendant Weinstein purchased a single family home at 13 Bank Street, New York, New York on July 10, 2006.Weinstein sold the single family home at 13 Bank Street, New York, New York, on March 27, 2018 (*Stipulation* T:3485).

The Hon. Mark Dwyer discussed the holding of *Knobel* in *People v. Cruciani*. 63 Misc.3d 226. He noted that CPL 30.10(4)a(i) applies to *non-residents* because its intent "is to account for absences that make it difficult to bring a New York criminal to justice*"* (Id. at 233), and that it has not been held to apply to New York residents who depart from New York for even lengthy periods "that do not, for practical purposes, prevent the authorities from locating them," or even New York residents who make only "occasional returns." *Id.* Here, the People's own submission corroborates the defendant's status as a resident of New York and depicts the defendant departing from New York for short periods on business, often just a couple days at a time, as one who has made New York his home. Indeed, the People claim that their chart shows that the defendant was not in New York 264 days over a five year period, an average of about 52 days a year; traveling accounted for only one-seventh of his time. In all that time, the longest trip was for no more than 23 days. Only 2 trips were for three weeks (this includes the 23-day trip); 6 were for about two weeks and the vast majority were for one or two days at a time. His travel, invariably punctuated by departures and returns to his home state, do not raise even the specter of the kind of absences that might convert a resident to non-resident status for purposes of C.P.L. 30.10(4)a(i), and no New York court has so held. On the contrary, such travel is fairly typical for many New Yorkers who spend weekends out of state in country homes, and travel for

business and pleasure, not to mention those New Yorkers who commute to work in neighboring states.

In contrast, in *Knobel*, the defendant was a nonresident of New York and had only spent 114 days out of 1825 days *in* New York. The Court emphasized that "the focus of the tolling provision of C.P.L. 30.10 is '*the difficulty of apprehending* a defendant who is outside the state.' Thus, all periods of a day or more that a *nonresident* defendant is out-of-State should be totaled and toll the statute of limitations." *Knobel* at 230. This implicitly acknowledges that the tolling provision presumes an effort by law enforcement that has been frustrated by a defendant's absences from the state, as was the case in *Knobel*. Here, the defendant is not only a resident, but the vast majority of his trips are for a couple of days and his travel itinerary depicts a New York resident who leaves and returns to his residence in New York City. There would have been no difficulty whatsoever for the People to have apprehended the defendant in the statutory period had they wanted to. And the People cannot credibly claim otherwise.

For *residents* of New York, the appropriate tolling provision, if one were to be applicable at all, is C.P.L. 30.10(4)a(ii) which states that the statute of limitations can be tolled only when "the whereabouts of the defendant were continuously unknown, and were continuously unascertainable by the exercise of due diligence." But this tolling provision is inapplicable here for two related

reasons: (1) The complainant had not reported the alleged crime during the statutory period and therefore the People cannot credibly claim that they attempted to locate Mr. Weinstein and were unable to do so during the statutory period; and (2) The defendant's whereabouts were neither continuously unknown nor continuously unascertainable by the exercise of due diligence, especially since Mr. Weinstein was a public figure whose whereabouts were frequently reported and whose home address in New York City was a matter of public knowledge.

The Court of Appeals has held that CPL 30.10(4)a(ii) applies to the time during which the whereabouts or the identity of a defendant remains unknown, "notwithstanding intense police efforts to identify and find him." *People v. Seda* 93 N.Y.2d 307 (1999). However, the tolling provision does not apply during "the period of time…which the police are unaware of the commission of the offense itself." *People v Jordon*, 43 A.D3d 1076 (2d Dept. 2007); *People v. Quinto*, 77A.D.3d 76, 85 (2d Dept. 2010) ("CPL 30.10(4)a(ii) does not apply to toll the statute of limitations for the period of time between when the defendant's conduct was alleged to have occurred and the complainant's report to the police") . The statute "carefully balance[s] the general policy in favor of avoiding prosecution of stale cases against the countervailing policy of ensuring that law enforcement officers have sufficient time to bring *suspected* criminals to justice," by permitting the People to "benefit from the toll for *only* those periods during which the

defendant's whereabouts remained unknown *and* were unascertainable through the exercise of reasonable diligence." *Seda* at 311. Thus, C.P.L. 30.10(4)a(ii) does not apply here.

Here, the defendant's whereabouts were known and easily ascertainable and there was no effort on the part of the People to locate him for the simple reason that Mann had not made any allegation that a crime had occurred. This is obviously a different situation from one in which the police are diligently looking for the perpetrator of a crime either because they cannot locate him or because they do not know his identity. *See People v. Seda,* 93 N.Y.2d 307 (1999*).* And, as noted above, this was also the case in *Knobel* in which the police were looking for the perpetrator of a specific crime (detonating an explosive device) during the entire pendency of the statutory period. *People v. Knobel*, 94 N.Y.2d at 227.

In contrast, Mr. Weinstein's scenario is precisely the situation in which a statute of limitations is supposed to apply to protect a defendant from stale claims of alleged criminal conduct never even reported to the police or the People until after the expiration of the statute. As the Court of Appeals made clear in *Seda,*

> Statutes of limitations serve several purposes -they "protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time"; they "minimize the danger of official punishment because of acts in the far distant past"; and they "encourage[e] law enforcement officials promptly to investigate suspected criminal activity.

*Seda, citing Toussie v United States,* 397 U.S. 112 114-115 (1970).

Even if CPL 30.10(4)a(ii) did apply here, the issue of whether any of Mr. Weinstein's trips from New York could be counted as a "continuous" absence within the meaning of that tolling provision constituted a question of fact for the jury. The Court's eleventh hour decision to take this issue away from the jury was, therefore, error. Accordingly, the third degree rape conviction should be reversed and that count of the indictment should be dismissed.

## POINT V

## THE COURT ERRED IN REFUSING TO DISMISS THE PREDATORY SEXUAL ASSAULT COUNTS THAT WERE PREDICATED ON AN UNCHARGED, TIME-BARRED SEXUAL ASSAULT ALLEGED TO HAVE OCCURRED IN 1993, THEREBY PERMITTING EVIDENCE OF THIS CRIME AND ASSOCIATED *MOLINEUX* EVIDENCE BEFORE THE JURY (U.S. CONST. AMEND. VI, XIV; EX POST FACTO CLAUSE)

### A. Introduction

As mentioned above, Mr. Weinstein was indicted on five charges. Two of the counts were Predatory Sexual Assault. In each of those counts, the defendant was charged with a predicate or aggravating crime. The predicate crime elevated the severity of the offense to an A-2 felony.

In July of 2018, during an initial presentation to the Grand Jury, the People went to great lengths to instruct the Grand Jury that it could not consider a first-

degree criminal sexual act charge from 2004 as an aggravating crime for purposes of predatory sexual assault. They likely reasoned at the time that the predatory assault statute, enacted in 2006, could not be applied retroactively to include uncharged crimes predating the statute's passage

By October of 2018, the 2004 charge had been dismissed. The People, in an effort to bolster their case, bootstrapped a new allegation to an amended bill of particulars as an "additional offense" for the two counts of predatory sexual assault. As a result, the new predatory counts were now supported by a 26-year-old rape allegation by Sciorra, an aging film star—an allegation so old that Sciorra, at trial, could not remember when it allegedly happened—and so old that the statute of limitations governing it had expired decades earlier.

Mr. Weinstein, through counsel, moved to strike the amended bill of particulars on several grounds. The Court agreed that the People had usurped the function of the grand jury by charging Mr. Weinstein with this crime without having presented it to the grand jury.

As a result, on August 13, 2019, the People announced that they would be re-presenting their case to a new Grand Jury so it would have the "benefit of hearing the testimony of the remaining witness." By indictment filed 2673/2019 on August 21, 2019, Mr. Weinstein was charged with two counts of predatory sexual assault. The sole predicate offense for both counts was the 1993 alleged rape of Ms. Sciorra.

This course of action left the remaining two counts of predatory sexual assault as exclusively reliant on the legal propriety of charging the 1993 rape—an allegation for which there is no dispute that, standing alone, it would be barred by the statute of limitations. In addition, the crime predates the enactment of the predatory sexual assault statute, which was June 23, 2006. The defendant again moved to dismiss these charges as an *ex post facto* violation because this retroactive application of P.L. § 130.95, the predatory sexual assault statute, was improper to revive this time-barred crime and because the lack of specificity violated due process and fair notice. The Court denied defendant's motion, thereby permitting the People to introduce additional prejudicial evidence that should never have been part of this trial.

The fact that Mr. Weinstein was acquitted of both counts of predatory sexual assault was small consolation to the defendant. Having heard evidence of a crime that should never have been permitted at trial in the first place, the jury was thereby improperly exposed to evidence that most likely led to a compromise verdict. Sciorra's testimony was replete with names of famous actors, movies, and Hollywood lore. Likewise, her friend, Rosie Perez, who testified on her behalf, is an actress with considerable name recognition.

In sum, these predatory sexual assault charges, like the *Molineux* evidence and the first and third degree rapes charges of Mann (insufficient as a matter of law

and time-barred, respectively), should not have been part of the trial, and their admission prejudiced the defendant and denied him a fair trial.

## B. Discussion

### 1. The Predatory Sexual Assault Counts were an *Ex Post Facto* Violation Because They Improperly Resurrected a Time-Barred Prosecution.

Article 1, Section 10, Clause 1 of the Constitution to the United States provides that "no State shall pass any *ex post facto* law." For well over two centuries, the Supreme Court has recognized that the *Ex Post Facto* Clause applies to criminal prohibitions. *See Calder v. Bull,* 3 U.S. 386 (1798). It is equally well-settled that the *Ex Post Facto* Clause forbids resurrection of a time-barred state criminal prosecution. *Stogner v. California*, 539 U.S. 607 (2003). In *Stogner*, the Supreme Court specifically held that "a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution." *Id.* at 632-633.

In *Stogner*, *supra* at 612, the Supreme Court also noted that liberty is protected by preventing governments from enacting statutes with "manifestly unjust and oppressive" retroactive effects. Citing precedent, it observed that retroactive application of a recently revised statute of limitations period to time-barred crimes is "unfair and dishonest," a denial of "fair warning," and a failing of the government "to play by its own rules." Further, the Supreme Court presciently noted that

retroactive laws invite "arbitrary and potentially vindictive legislation," and "violent acts which might grow out of the feelings of the moment." *Id*. Thus, the Supreme Court recognized three situations in which retroactive application of a criminal law is prohibited: (1) where a new criminal limitations period is created; (2) where prosecutions of previously time-barred crimes are allowed; and (3) where a criminal statute is passed after the prior limitation periods had expired. *Id*. at 610; *see also Collins v. Youngblood*, 497 U.S. 37 (1990) (recognizing that a statutory increase in punishment amounts to an impermissible ex post facto law). As will be discussed, each is present here.

In this matter, the statute criminalizing predatory sexual assault was enacted on June 23, 2006. In order to satisfy the statute, the People offered proof of a never-before-charged 1993 first degree rape allegation that had been time-barred since 1998. In plain application, the People used the predatory sexual assault statute as a means to charge Mr. Weinstein with a crime as to which the statute of limitations had run. *See People v. Burroughs*, 108 A.D.3d 1103, 1105 (4th Dept. 2013) (citing *Stogner* in recognizing that it is "well established that a change to the statute of limitations may not be retroactively applied to revive charges that are *already* time-barred" and dismissing time-barred sodomy charges).

In 2006, the legislature amended the Criminal Procedure Law to eliminate the statute of limitations for certain crimes including Rape in the First Degree. In doing

so, however, the Legislature specifically provided that this provision only applied to offenses committed on or after the effective date of the law, i.e., June 23, 2006 (L. 2006, Ch. 3, Sec. 1). The amendment above applied to certain crimes committed after 2006 and to offenses *that were not yet time-barred* by the date of its enactment. Thus, the five-year statute of limitations for Rape in the First Degree (the Sciorra allegation) that was applicable in 1993 [*See* C.P.L. § 30.10 (*formerly* 2(b)], was still controlling, and required that the charge be brought by 1998. The filing of this indictment, or even the initial bill of particulars, did not occur until more than twenty years had elapsed since that benchmark. As such, by attempting to revive a time-barred prosecution, the predatory sexual assault counts violate the *Ex Post Facto* Clause.

Moreover, the additional offense at issue here—the alleged 1993 rape of Sciorra—is wholly distinguishable from the type of status crimes, aggravating crimes, or continuing crimes that have historically survived an *ex post facto* challenge. To be clear, a conviction for predatory sexual assault in this matter required the People to prove beyond a reasonable doubt that Mr. Weinstein committed the predicate crime, i.e., the alleged rape of Sciorra. The statute indisputably requires that the jury find him guilty of the additional offense—one that is separate, apart, and entirely distinct from the sex offense formally described in the indictment itself. *See People v Lancaster*, 143 A.D.3d 1046, 1048 (3d Dept. 2016)

(recognizing that predatory sexual assault requires that the jury find the defendant guilty of the additional offense).

The New York Criminal Instructions regarding the elements of Penal Law §130.95(2) cogently recognizes that the additional offense is an individual, isolated, and indeed *separate* offense upon which the predatory sexual assault charge is based. By utilizing this new statutory offense to revive a time-barred charge, these predatory sexual assault charges amount to an *ex post facto* violation. The fact that the statute requires that Mr. Weinstein be proven guilty of an additional, separate crime as to which there is now no statute of limitations, does not permit the People to use a time-barred crime to satisfy the requirement of proof beyond a reasonable doubt of the additional crime. A contrary view would theoretically permit the criminal prosecution of any time-barred crime, so long as it was prosecuted as a part of a new law that included additional charges that were not time-barred. There is simply no precedent for this, i.e., there has not been a single instance in which an independently time-barred criminal act has been constitutionally revived through the passage of a new substantive law. And there is simply no justification for allowing the predatory sexual assault statute to violate this principle.

### 2. The Predatory Sexual Assault Counts were Applied Retroactively in the Absence of a Plainly Manifest Legislative Intent, Which Intent Would Have Been a Constitutional Violation of The *Ex Post Facto* Provision.

The crime of predatory sexual assault was enacted on June 23, 2006. *See* L. 2006, ch. 107, § 1. Nothing in the statute or accompanying legislation indicates a legislative intent to apply this law retroactively to crimes predating its enactment. It is a fundamental, axiomatic rule of statutory construction that laws addressing non-procedural matters cannot be retroactively applied absent a plainly manifested legislative intent to that effect. As the New York Court of Appeals has stated, laws dealing with non-procedural matters, such as the provision at issue here, "are *not* to be applied retroactively *absent a plainly manifested legislative intent to the effect*." *People v. Behlog*, 74 N.Y.2d 237, 240 (1989)(*quoting People v. Oliver*, 1 N.Y.2d 152, 157[1956]).[33]

[33] *People v. Weinberg*, 83 N.Y.2d 262 (1994*)* is illustrative of the inapposite scenario where the New York Legislature did in fact manifest an intent to establish retroactive application. In *Weinberg*, the Court of Appeals held that a statute establishing a felony offense of repeated failure to file a tax return was not applied retroactively and was not an unconstitutional *ex post facto* law as applied to a defendant where the first two non-filings occurred before the statute's effective date, but were not time-barred and, in fact, constituted separate charges in the indictment. *Id.* at 266-67. It reasoned that the defendant did not "commit" the offense until the third non-filing, which came after the effective date of the statute, as the defendant had fair warning that the third non-filing would result in criminal liability. *Id*. at 631; *see also* McKinney's Tax Law § 1802*;* U.S. Const. art. 1, § 9, Cl. 3. The Court would not likely have reached this conclusion had the prior filings been time-barred and had the Legislature not passed a companion bill providing for an immediate, three-month, one-time-only amnesty period. *See id.* In other words, even if the tax law was being applied retroactively, the Legislature's intent to permit this application was plainly apparent. Indeed, as the Court noted, the immediate amnesty would have been unnecessary had the new legislature not intended the new law to apply to the pre-enactment two years of non-filing. *Weinberg,* 83 N.Y.2d

In *People v Partridge*, 173 A.D.3d 1769, 1770 (2019), the Fourth Department provided another clear recognition that the Legislature did not intend to allow for retroactive application of the predatory sexual assault statute, as it held that predatory sexual assault crimes are insufficient as a matter of law if the underlying predicate crime occurred prior to the effective date of the statute.

In sum, the conduct charged in the two counts of predatory sexual assault consists of an independent crime that is time-barred by the statute of limitations. This is a distinction that carries critical significance for the retroactivity analysis, and ultimately, precludes retroactive application of the predatory sexual assault statute.

Suffice to say, it was manifestly unjust to permit the use of a new statute, i.e., predatory sexual assault, to resurrect a long-since time-barred crime. In any event, retroactive application of the predatory sexual assault statute to revive a time barred offense violated the *Ex Post Facto* Clause. The fact that Mr. Weinstein was acquitted of both counts of predatory sexual assault cannot erase the prejudice that resulted from the admission of this evidence at trial, especially when combined with the volume of uncharged bad-act evidence discussed above. Having heard evidence of

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at 266. This amnesty bill marks an important distinction between the law at issue in *Weinberg* and the instant matter, as no such corresponding manifestation of legislative intent—either by companion bill or other means—is present here. Moreover, as has been discussed, the prior two years of non-filings in *Weinberg*, were prosecuted as separate offenses within the same indictment, whereas the prior crime at issue here was categorically barred from independent prosecution.

a crime that should never have been permitted at trial, the jury was thereby improperly exposed to evidence that most likely impacted its credibility determinations concerning the other charges and may well have led to a compromise verdict.

## POINT VI

## THE VERDICTS OF GUILT WERE AGAINST THE WEIGHT OF THE EVIDENCE AND, AS TO THIRD DEGREE RAPE, WAS INSUFFICIENT AS A MATTER OF LAW

This Court is authorized to review the evidence and reverse a factual determination on the ground that it is against the weight of the evidence. *See CPL Section 470.15; People v Danielson 9 NY3d 342 (2007); People v Romero, 7 NY3d 633, 636 (2006); People v. Rojas, 80 AD3d 782 (2d Dept. 2011).* In performing a weight of the evidence analysis this Court, while conducting a de-novo review, sits, in effect, as a "thirteenth juror." *People v Cahill, 2 NY3d 14, 58 (2003).*

A review extends not only to the elements of the crime, but also as to questions relating to credibility. While affording deference to the fact finder's opportunity to view the witnesses, hear the testimony and observe demeanor, this Court still must evaluate the weight, quality and persuasiveness of that testimony and any conflicting inferences therefrom. In the end, the Court must decide whether, based

upon the weight of the credible evidence, the jury was justified in finding the defendant guilty beyond a reasonable doubt. *People v. Danielson, 9 NY3d 342 (2007).*

Unlike legal sufficiency, a "weight of the evidence analysis involves a discretionary balancing of many factors based upon the court's common sense reaction to the evidence in light of its collective experience," *People v. Cahill,* 2 NY3d 14, 58 (2003), and "if based on all the credible evidence a different finding would not have been unreasonable, then the appellate court must, like the trier of fact below, 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony.'" *People v. Bleakely,* 69 NY2d 490, 495 (1987). Moreover, a weight of the evidence review requires that "even if all the elements and necessary findings are supported by some credible evidence, the court must examine the evidence further" *Id. quoting People ex rel., McCracken v. Miller,* 291 N.Y. 55 (1955*),* and decide whether the trier of fact has given the evidence the weight it should be accorded. *People v. Mateo,* 2 N.Y.3d 383 (2004*).*

The defendant was convicted of third degree rape and first degree criminal sexual act based on the allegations of two women, both of whom had consensual sexual relationships with the defendant. As it is argued, *supra,* that the trial court's evidentiary and legal rulings concerning expert testimony, *Molineux* and *Sandoval*

deprived the defendant of a fair trial, it is important to recognize here just how flimsy the evidence was that resulted in these convictions without considering the improperly admitted testimony. Accordingly, this weight of the evidence review will not include testimony by Mann, admitted under *Molineux*, in which she alleged that months *after* the March 18, 2013 incident upon which charges were based, the defendant raped her in California. Nor will it include the *Molineux* evidence permitted by way of minitrials concerning uncharged, non-forceable sexual interactions with other women, nor, again, the bolstering testimony of the People's expert witness, all discussed *supra*. Instead, the focus here is on evidence, such as it was, upon which the convictions could have relied.

To begin, the evidence upon which the defendant's conviction for third degree rape was based was insufficient as a matter of law, much less did it support the trial court's decision to charge first degree rape. These charges and the associated evidence should never have been part of the trial. Yet, the court denied the defendant's motion to dismiss the charges on insufficiency grounds and on statute of limitation grounds with respect to third degree rape (discussed *supra*) and, again, denied the People's motion for a judgment of acquittal at the close of the People's case (T: 2365, 3084). Notably, not even a jury inundated with improperly admitted, prejudicial evidence was able to find forcible rape based on Mann's testimony as none was even alleged.

As for the third degree rape charge which was time barred and for which the defendant was convicted, the evidence amounted to Mann's testimony that she had not wanted to have sex with the defendant on March 18, 2013, but did so anyway. Mann testified that she was involved in a consensual sexual relationship with the defendant that began in late 2012 and continued until 2017 – the year negative reports about the defendant emerged. She decided to have this relationship even though as early as February 8, 2013, she knew he was married, and Mann thought a sexual relationship with Weinstein was a good idea because she had "left [her] religion" and thought he had an "open relationship" with his wife (T: 2327-8). People who were her friends at the time considered him her "boyfriend" (T: 2335-6).[34] On March 18, 2013, Mann invited the defendant to meet her at a hotel in New York City. Mann had been seeing the defendant frequently for sex during this period. When the defendant arrived, Mann met him in the lobby and then accompanied him to a room in the hotel where they had sex. Incomprehensibly, she testified that she went with the defendant to the room so that she could immediately turn around and leave the room and that they quarreled at the door briefly because she did not want her friends to know about the relationship. She testified that he told her to take her clothes off and that she did so and then waited

[34] None of these people were friends by the time of trial, as Mann was pathologically incapable of maintaining relationships over time – a symptom of Borderline Personality Disorder. *See below.*

for him on the bed, unclad, while he went to the bathroom. Upon his return, they engaged in sexual relations. She did not testify that she resisted by word or deed. Obviously, she could have simply left while the defendant was in the bathroom, but chose to remain. Immediately afterwards, they joined friends for brunch in the hotel (T: 2256-60). This testimony was insufficient as a matter of law to establish third degree rape, much less first degree rape, which the trial court also charged.

Moreover, the evidence established that Mann's demeanor immediately after this triste was nothing if not jovial, as she shared a brunch with the defendant and two friends in the hotel restaurant. Mann's former friends, Talita Maia and Tommy Richards, were not called by the People. Notably neither of these witnesses had remained friends with Mann, as the evidence reflected that she was unable to sustain romantic, platonic or familial relationships. Both witnesses testified that they detected nothing in Mann's demeanor at lunch that would indicate that she had just been raped. Indeed, Richards, her traveling companion, recalled that she asked him if he wouldn't mind if she stayed on in New York with the defendant rather than return to California that day with Richards as planned.

Mann's sexual relationship with the defendant continued unabated. She met the defendant the very next day before leaving for California at his expense. Less than a month later, she emailed the defendant, "I appreciate all you do for me. It shows" (T: 2407-8). Mann, herself, testified that the last sexual encounter she recalled

having with the defendant was in 2016 (T: 2383), although she insisted that she had no memory for dates. The documentary evidence in the form of emails between the defendant and Mann prove, however, that the relationship continued through 2017 when Mann, herself, told the defendant that she wanted to be more to him than a "booty call" (T: 2388, 2299). The People can hardly deny this as they claim their failure to disclose to the defense that Mann admitted to a long term consensual sexual relationship involving innumerable, specific incidents of consensual sex was not a *Brady* violation because "everyone knew that she had other sexual encounters with the defendant that were not forced" (T: 2305) from these very emails.[35] Emblematic of their relationship was an April 27, 2016, email indicating that Mann met the defendant in a hotel room and another email, four hours later in which Mann wrote to the defendant, "I feel so fabulous and

[35] The defense moved for a mistrial (T: 2387 -88). "What part of the Government's obligations under Brady don't we understand here. When a witness says I had a relationship with Mr. Weinstein and describes sexual encounters they are claiming are not forced, how does that not trigger a duty to turn that over to the defense, and we want that before we begin our cross examination of Jessica Mann. We are entitle[d] to that and asking for a mistrial based on yet another discovery Brady violation" (2305-9). The trial court denied the defense motions, refusing even to require the Prosecutor to disclose *Brady* material prior to cross-examination of Mann (2309-10).

And Mann, herself:
Q You never wanted to have sex with Mr. Weinstein.
A No, I did not.
Q Even when you say it was consensual, correct?
A Correct.
Q So you were lying to him every single time you engaged in sexual activity with him that you didn't want to have?
A There were times where I did pretend to role play with him? (T: 2324-5)

beautiful, thank you for everything," and another in which she told her ex-boyfriend that the defendant was "everything" to her and referred to having been raped by someone else! Indeed, there were volumes of emails between Mann and the defendant during the years of their relationship that depicted a consensual relationship and none that suggested otherwise (T: 2360). On five separate occasions over their five year relationship, Mann reached out to the defendant to give him a new phone number so that he could continue to contact her (T: 2418).

There was compelling evidence that Mann suffered from Borderline Personality Disorder, that could well explain her trial testimony. Evidence of this fact was found in her heavily-redacted medical records and her testimony on the stand. In the fall of 2017, Mann was hospitalized for mental illness. The heavily redacted medical records of Jessica Mann's hospitalization indicated that the doctors believed that a diagnosis of borderline personality disorder was appropriate. Borderline Personality Disorder is a condition that makes it difficult for a person to regulate their emotions, and can lead to significant challenges with interpersonal relationships. A person with Borderline Personality Disorder may lie to distort reality into something that fits with the emotions they are feeling, rather than the facts. This describes precisely what Mann did. Angry that the relationship with Weinstein was not what she envisioned, she distorted it to fit her feelings of rejection. Mann testified that she thought that her relationship with the defendant

was going to be a “real relationship” but it ended up being “degrading “ (T: 2233); that it became “him wanting to see me and just needing a fix like a drug addict” (T: 2234-5); and that she felt like she was being “discarded” after she “served her purpose” (T: 2240). This was also not the first time that Mann had claimed that she had been raped or otherwise abused, as she also claimed she was raped by someone in her church in Washington.

Moreover, Mann’s testimony revealed numerous instances of lying and deceptive behavior toward virtually everyone in her life. Mann hid from her friends the nature of her relationship with the defendant (T: 2339); hid from Tommy Richards that she was sleeping with the defendant (T: 2341); lied to her boyfriend, Eddie, about the nature of her relationship with the defendant; lied to the defendant about her desire to have sex with him, which she called “role-playing” (T: 2324-5; 2419); lied to her mother (T: 2439); lied to detectives (T: 2398): pretended to enjoy sex with the defendant, faking orgasms, and telling the defendant that her orgasm was “the best she ever had” (T: 2343); to name just a few. These example assume that she was not lying on the stand, of course, which is a dubious assumption.

Dr. Ziv diagnosed a self-professed rape victim with Borderline Personality Disorder in her role as a forensic psychiatrist and attributed her finding that the person lacked credibility directly to that diagnosis. Mann exhibited all the

symptoms of this disorder-a long history of failed relationships with friends and family, self-harm, dissociative behavior ("I do disconnect"), paranoia, emotional instability (T: 2745-2747), and malingering. This illness seriously calls into question the propriety of a verdict reliant on the testimony of someone so impaired.

The conviction of first degree criminal sexual act was also based on weak testimony, that strains credulity. Mimi Haley socialized with Weinstein in the summer of 2006. In June, Weinstein "kindly offered" to fly her to California. On July 10, 2006, the evening before Haley was to fly to California, Haley testified that she went to Weinstein's apartment. He began kissing her and backed her into a bedroom (T: 1606) where he engaged in oral sex with her. Haley testified that she attempted to stop him (T: 1601-02), but then allowed him to perform oral sex on her, his head between her legs in a vulnerable position. She claimed that she "endured" it because she thought Weinstein's driver might be standing guard at the door ready to prevent her escape. Haley was conveniently unable to recall important details about her interactions with Weinstein before, during, and after the incident, that might have shed light on the true nature of the incident, but the prosecutor's expert gaslit the significance of Haley's memory lapses when she directed the jury that women do not forget what is important or lie about sexual assault. *See Point III, supra.* Based on this testimony of a sexual encounter that occurred 14 years earlier and about which Haley had not come forward until

allegations were being made about the defendant in the press, Weinstein was convicted of first degree criminal sexual act and sentenced to twenty years imprisonment.

Haley's subsequent actions do not comport with her claim of assault, nor did Weinstein's actions reflect those of a person who had committed a sexual assault. For her part, her decision less than two weeks later, immediately upon her return to New York, to meet Weinstein in a hotel room and engaged in consensual sexual relations with him, was perhaps the most incongruous. Weinstein's decision to continue to treat Haley to invitations and amenities reflects that he believed he was on good, even romantic, terms with Haley. In fact, documentary evidence demonstrated a consensual relationship between them in which Weinstein was, *inter alia*, paying for airline tickets for Haley to travel to California and to London both before and after these two sexual encounters and efforts by both Haley and Weinstein to meet up in London later that same summer.

Unlike Mann, Haley had a friend, Elizabeth Entin, who claimed to recall Haley telling her about the incident in the summer of 2006. Notably, the People did not turn over Entin's Grand Jury testimony until after trial had commenced, *during* the cross-examination of Haley (T: 1837) and just one day before Entin, herself, took the stand in violation of the new discovery rules that were in effect and contrary to the People's repeated representations to the trial court and in their certificate of

readiness that they had met their discovery obligation under *CPL* 245 and *Brady* (T: 1767, 1816-17, 1837).[36] Moreover, this late disclosure deprived the defense of an opportunity to investigate whether Entin's testimony, that she was in New York on July 10, 2006, was true.

Entin's testimony corroborated Haley's testimony only to the extent that it mirrored Haley's public statements about the fourteen-year-old incident. Entin, of course, had seen Haley in the media doing press conferences and television interviews with her attorney, Gloria Allred, by her side, so it is not surprising that her testimony mirrored the story put out by Haley for public consumption in advance of trial (T: 1814-15). Entin, however, tried to minimize this by claiming that she didn't really "pay attention" because she "knew her story" and had friends who had been on television before (T: 1815).

Beyond the version of events put out by Haley for public consumption, Entin's testimony revealed that she knew little, if anything, about Haley's relationship with Weinstein and chose to fill in the gaps with details that she thought would be helpful. For instance, she claimed that Haley worked for Weinstein for five months (T: 1804) and that Haley told her that she went to the apartment on July 10, for work.(T: 1800, 1811) In fact, Haley worked for the

[36] Entin's Grand Jury testimony reflected for the first time, *inter alia*, that Haley had a boyfriend that summer who stayed in their apartment often.

Weinstein Company a mere two or three weeks (T: 1567) and was no longer working for Weinstein when she initiated further social interactions with Weinstein. She testified that Haley told her that she went to the defendant's apartment and "he started rubbing her shoulders, kissing her, and she said no, no; and then he wouldn't stop. And she said I'm on my period, and he said I don't care; at which point he threw her down and she was still saying stop. And he pulled off her underwear, pulled out her Tampon, and went down on her while she was saying no" (T: 1800). She testified that she told Haley that it sounded like rape and that she should call a lawyer (T:1800). This was, of course, the story that Haley had told in press conferences and on television prior to trial, and therefore one that anyone could have repeated.

She claimed that Haley changed after this happened, became "withdrawn," "more nervous, significantly less vital," and spent a lot more time in her room (T: 1801-02). In reality, Haley traveled to California the following day, spent two weeks there (T: 1809), came back, met Weinstein for sex, and almost immediately left for London for good. Hence, there was no period of time when Entin would have observed that Haley had changed. Moreover, Entin did not know anything about Haley's relationship with the defendant, not that she pursued him and met him for drinks, not that he flew her to California (T: 1820), not that she slept with him a second time; not that he flew her to London (T: 1809, 1817). Thus, this

witness provided weak corroboration for this version of events, which was well-publicized prior to trial.

The rest of the evidence at trial involved expert testimony, *Molineux* evidence, and evidence of time-barred charges addressed in Points II-V, *supra*. Without the voluminous improper and prejudicial evidence, it cannot be said that the jury would have found the defendant guilty on this thin evidence.

If an appellate court concludes that there has been such error on the part of the trial court as to have operated to deny any individual defendant his fundamental right to fair trial, it must reverse the conviction and grant a new trial without regard to any evaluation as to whether the errors contributed to defendant's conviction. *People v. Crimmins, 36 N.Y.2d 230, 237-238 (1975).* In any event, as the evidence in this case was far from overwhelming, there exists the very real danger that the jury improperly considered the evidence against the defendant cumulatively. *Id.* *See People v. Harris*, 51 A.D.2d 937 (1st Dept. 1976); *see also People v. Littlejohn*, 125 A.D.2d 710, 710–11 (2d Dept. 1986). Accordingly, the judgment must be reversed and a new trial ordered.

## POINT VII

## THE DEFENDANT'S SENTENCE WAS UNDULY HARSH AND EXCESSIVE

The defendant was sentenced to consecutive terms of twenty and three years of imprisonment, as well as, five years of post-release supervision, for his convictions of Criminal Sexual Act in the First Degree [Penal Law Section 130.50(1)] and Rape in the Third Degree [Penal Law Section 130.35(3)]. We submit that the sentence was unduly harsh and excessive under all circumstances.

Although trial courts are afforded discretion in imposing sentences for convicted criminals, "[a]n intermediate appellate court has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances." *People v. Delgado,* 80 N.Y.2d 780, 783 (1992). The court's sentence review power may be exercised in the interest of justice, even where a trial court has not abused its discretion. *People v. Suitte,* 90 A.D.2d 80,86 (2nd Dept. 1982).

A sentence should reflect the four widely accepted objectives of criminal punishment: deterrence, rehabilitation, retribution, and isolation. *People v. Notey,* 72 A.D.2d 279, 282 (2nd Dept. 1980). In addition to the four objectives of punishment, the trial judge should be guided "by the criterion that a minimum amount of confinement should be imposed 'consistent with the protection of the

public, the gravity of the offense and the rehabilitative needs of the defendant.'" *People v. Notey*, 72 A.D.2d 279, 282-83 (2nd Dept. 1980).

In assessing the proper sentence, the law has consistently recognized the significance of the defendant's background, including his or her employment history, respect for the law, and upbringing. *See People v. Kuramura*, 148 A.D.2d 331, 331 (1st Dept. 1989) (finding that defendant's sentence was unduly harsh in light of the fact that the defendant was 35 years old at the time of sentence, had a history of gainful employment, and had no prior arrests or convictions). The defendant's current circumstances are also relevant; it is widely accepted in New York that "the punishment should fit the offender and not merely the crime." *Williams v. New York*, 337 U.S. 241, 247 (1949); *see People v. Johnson*, 252 N.Y. 387, 392 (1930).

Sadly for Mr. Weinstein, the trial court's sentence reflects not on Mr. Weinstein, the man, and the conduct for which he was convicted, but on Mr. Weinstein the media villain. We ask that this Court consider whether a 68 year-old man by *any other name*, with no criminal record, a lifetime of professional contributions in his field; an unparalleled history of charitable work; and serious medical conditions would have been sentenced so harshly for acts that involved no violence and no injury to the complainants, and where both complainants continued to have voluntary sex with the defendant. We think not.

Without rehashing the evidence in this case, it is important to recognize that in the more than fourteen instances admitted in evidence by the trial court of some form of sexual conduct by the defendant, ranging from requests for massages and sex to actual sexual interactions, not a single one involved actual violence or a threat of violence. Not a single complainant nor any woman who has ever accused Mr. Weinstein in the press ever claimed physical injuries or sought medical attention for any such injuries. Moreover, the time-barred third degree rape for which Mr. Weinstein was convicted is a nonviolent offense and the jury specifically rejected the charge of first degree rape in connection with that incident, having obviously determined that there was no forcible compulsion involved. In addition, the jury rejected the time-barred charge of forcible rape that was improperly used as a predicate charge, as evidenced by its acquittal on both counts of predatory sexual assault.

Thus, the sentence of twenty years hinged on the first degree criminal sexual act conviction against Haley fourteen years ago. A less "forcible" incident of forcible sex is difficult to imagine. Haley said that she visited Weinstein at his apartment where he kissed her, maneuvered her into a bedroom and held her down as he put his mouth on her vagina and that she "endured" it because she thought Mr. Weinstein's driver might be standing guard at the door ready to prevent her escape. Haley met Weinstein at a hotel for sex less than two weeks later. For this,

Mr. Weinstein received twenty years imprisonment, fifteen years more than the minimum sentence permitted and just five years less than the maximum allowable.

We submit that on these facts alone, no man whose name is not Harvey Weinstein would have been sentenced so harshly. As pointed out by the defense at sentencing, according to the New York State Corrections and Community Supervision Division report based on 2018 statistics, the mean sentence for a conviction wherein the top count is the same as here, is 8 and a half years, and this mean takes into account sentences for repeat felons whose crimes involve weapons and injuries (S: 31). Obviously the mean is much lower for first time felons. In fact, Judge Burke himself had sentenced a defendant, less than eighteen months earlier, who was convicted of first degree rape based on far more egregious behavior, to a sentence that was twelve and a half years more lenient than the twenty year sentence imposed here for first degree criminal sexual act (S: 33-35). Indeed, Mr. Weinstein was sentenced more harshly than many defendants convicted of homicide. These facts alone reveal the injustice of this sentence, more reflective of "mob justice" than it is of any punishment consistent with fairness.

In addition, Mr. Weinstein's sentence was excessive given his employment background, philanthropic efforts, and family history. Mr. Weinstein grew up in a lower-middle-class family in Electchester, which is a rent-controlled community

opposite the city projects of Pomonok, Queens. He attended John Bowne High School and subsequently began his college education at the University of Buffalo. When Mr. Weinstein's father passed away, he dropped out of the University of Buffalo in order to support his family. Years later, Mr. Weinstein received an honorary degree from the University of Buffalo.

In his career, Mr. Weinstein produced films that brought exposure to the difficulties of individuals who were deprived of equal opportunities. For example, in *The Butler* (2013), Nelson Mandela's *Long Walk to Freedom* (2013), and *Fruitvale Station* (2013), Mr. Weinstein raised awareness of racial injustices. Mr. Weinstein focused on mental illnesses such as bipolar disorder in *Silver Linings Playbook* (2012); childhood trauma in *Good Will Hunting* (1997); speech impediments in *The King's Speech* (2010); and disfigurement in *The English Patient* (1996). In 1997, he drew attention to antisemitism and fascism in *Life is Beautiful* (1997). Additionally, he was involved in the production of documentary films that shed light on important societal ills, such as the healthcare crisis (*Sicko, 2007*); wrongful convictions (*Thin Blue Line*, 1998); and sexual assault on campus (*The Hunting Ground*, 2015). Mr. Weinstein received numerous LGBT awards and accolades for his film *Bully* (2011), which exposed the tragic effect of bullying in schools. In short, Mr. Weinstein's films engendered empathy and recognition for those who are victimized by injustices and for those who suffer disabilities that

society has stigmatized. Ironically, this case is an example of what can happen when society chooses to stigmatize an individual and fairness is swept aside.

In addition to producing influential films, Mr. Weinstein has also been an avid philanthropist, supporting more than 20 charities in New York City and around the world. In 2001, Mr. Weinstein organized the Concert for New York, which raised $100 million for firemen, policemen, first responders, and others who suffered tragic losses as a result of 9/11. When hurricane Sandy hit in 2012, Mr. Weinstein organized a charitable concert and raised $77 million for its funds for its victims, including those who lost their homes and businesses. Moreover, Mr. Weinstein was on the board of Robin Hood, a charitable foundation the mission of which is to alleviate suffering caused by poverty and disasters in New York City. That organization raised $2.5 billion dollars for projects, schools, vocational programs, shelters, help for the homeless, and the provision of care for the poor. Additionally, Mr. Weinstein donated $1 million of his personal money and was actively involved in Paul Newman's Hole in the Wall Gang charity which provides medically supervised summer camps and programs free of charge to children with serious illnesses.

Mr. Weinstein's philanthropic efforts extended beyond borders. He was one of the early organizers of AMFAR, an AIDS organization that raised over $170 million over the course of twenty-five years at the Cannes Film Festival in France.

He also organized two events for Nelson Mandela, raising millions of dollars for The Nelson Mandela Children's Fund. The fund seeks to help victims of the AIDS crisis, focusing its attention on individuals up to age twenty-two, with a special focus on orphans. Active on issues of poverty, AIDS, juvenile diabetes, and multiple sclerosis research, Mr. Weinstein dedicated significant efforts to alleviate suffering, even as he attained enormous professional success in film production.

Currently, Mr. Weinstein is sixty-nine years old. He was married to his former wife, Georgina Chapman, for ten years. They have two children, ages seven and ten years old. Despite their divorce in 2018, Mr. Weinstein continued to share custody of his young children with Ms. Chapman until he was remanded to state prison. Mr. Weinstein also has three adult children, ages eighteen, twenty-two and twenty-five, from his previous marriage of seventeen years to Eve Chilton. Mr. Weinstein deeply loves all of his children.

Finally, Mr. Weinstein's sentence was excessive in light of his fragile health status. Mr. Weinstein suffers from a number of serious medical conditions and has been under the care of numerous doctors for the past few years. He currently takes approximately twenty different medications. *See Medical Records* filed with the court.

In December of 2019, Mr. Weinstein underwent a bilateral laminectomy as a

result of injuries he sustained in an automobile accident in August 2019. The surgery was unsuccessful. Mr. Weinstein endures spinal stenosis, peripheral neuropathy, and a drop foot, and requires further back surgery to ameliorate these afflictions.

In addition, Mr. Weinstein suffers from diabetic retinopathy resulting from his long-term diabetes. He has wet macular degeneration in his left eye which requires close monitoring and intravitreal injection every four to eight weeks. Mr. Weinstein has begun to lose sight in this eye because he has not received the necessary injections; failure to monitor and treat this condition can result in blindness. Mr. Weinstein's also suffers from severely impaired vision in his right eye, which requires surgery for a cataract.

After the verdict and prior to sentencing, Mr. Weinstein was transferred from Rikers Island to Bellevue Hospital where he underwent cardiac surgery. He was given a stent but continues to suffer from an enlarged aorta and an enlarged prostate.

Mr. Weinstein's health has significantly deteriorated since incarceration and it is no exaggeration to say that his current sentence is not merely life imprisonment, but a death sentence.

## CONCLUSION

The foregoing demonstrates that Mr. Weinstein convictions should be reversed, the third degree rape charge dismissed as time-barred, and a new trial ordered on the single count of first degree criminal sexual act based on the July 10, 2006 incident. In particular, the evidence that Juror No. 11 repeatedly lied to the court about matters material and relevant to her fitness to serve on the jury is indisputable, and deprived Mr. Weinstein of his constitutional right to be tried by an impartial jury in whose selection he was effectively denied a voice. Nothing is more basic to the criminal process than that right. *U.S.C.A. Const. Amends. 6, 14; McKinney's Const. Art. 1, § 2. People v. Johnson*, 94 N.Y.2d 600 (2000). Moreover, the plethora of evidence of other alleged crimes and bad acts admitted at trial and made fair game pursuant to the inclusion of time-barred and legally insufficient charges and the Court's *Molineux* and *Sandoval* rulings, respectively, violated Mr. Weinstein's right to be tried only on the charges for which he was indicted, and to testify on his own behalf. *U.S.C.A. Const. Amends. 5, 6, 14*. Finally, the scope of the expert testimony on rape and the trial court's refusal to permit expert testimony by the defense on the very subjects about which it permitted the prosecution's expert to testify deprived the defendant of his constitutional rights to a fair trial and to present a defense. *U.S.C.A Const. Amends. 6, 14.*. These constitutional violations mandate a reversal on both convictions and a dismissal of the charge of third degree rape.

Dated: April 2, 2021
New York, New York

**AIDALA, BERTUNA & KAMINS, PC**
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## PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

*Type.* A proportionally spaced typeface was used, as follows:

| | |
|---|---|
| Name of typeface: | Times New Roman |
| Point size: | 14 |
| Line spacing: | Double |

*Word Count.* By Permission of the Court, the total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 43,368.

Dated: April 2, 2021
New York, New York

**STATEMENT PURSUANT TO CPLR § 5531**

# New York Supreme Court

## Appellate Division—First Department

PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

– against –

HARVEY WEINSTEIN,

*Defendant-Appellant.*

1. The indictment numbers of the case in the court below are 2335/18 and 2673/19.

2. The full names of the original parties are as set forth above. There have been no changes.

3. This proceeding was commenced in Criminal Court, New York County.

4. The action was commenced by the filing of an indictment.

5. The nature and object of the action involves Criminal Sexual Act in the First Degree and Rape in the Third Degree.

6. This appeal is from a Judgment of Conviction, rendered March 11, 2020 which sentenced Defendant to consecutive terms of twenty and three years imprisonment and five years post-release supervision.

7. This appeal is on the full original record.

# Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

HARVEY WEINSTEIN,

Defendant.

----------X

NOTICE OF APPEAL

Ind.: 2335/2018
2673/2019

SIRS:

PLEASE TAKE NOTICE, that the defendant HARVEY WEINSTEIN, hereby appeals to the Appellate Division of the Supreme Court, First Judicial Department from the judgment of conviction rendered against him on the 11th day of March, 2020, convicting him of Criminal Sexual Act in the First Degree and Rape in the Third Degree and said defendant appeals from each and every part of said judgment of conviction and sentence thereon, as well as from the whole thereof.

Dated: New York, New York
March 12, 2020

Yours, etc.
***Aidala, Bertuna & Kamins, PC***
By:

ARTHUR AIDALA, ESQ.
*Attorney for Defendant*
546 5th Avenue, 6th Floor
New York, New York 10036
(212) 486-0011

TO: CYRUS VANCE
District Attorney
New York County

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

HARVEY WEINSTEIN,

Defendant.

----------X

AFFIDAVIT OF SERVICE

Ind. : 2335/2018
2673/2019

STATE OF NEW YORK )
ss.:
COUNTY OF KINGS )

I, ***CHRISTINA PESCE,*** being duly sworn, deposes and says:

That I am not a party to the action; I am over 18 years of age and reside in Kings County, New York.

That on April 3, 2020, I served the within **NOTICE OF APPEAL** via electronic email transmission on the following:

NEW YORK COUNTY DISTRICT ATTORNEY
Email address: appealsmtns@dany.nyc.gov

DATED: New York, New York
April 3, 2020

CHRISTINA PESCE

Sworn to before me this
3rd day of April, 2020

Notary Public

DOMENICK NAPOLETANO
Notary Public, State of New York
Registration #02NA5043030
Qualified In Kings County
Commission Expires May 1, 20 23

# Uniform Sentence & Commitment

# UNIFORM SENTENCE & COMMITMENT

UCS-854 (10/2018)

STATE OF NEW YORK
SUPREME COURT, COUNTY OF NEW YORK
PRESENT: HON. JAMES BURKE

Court Part: 99
Court Reporter: RANDY BERKOWITZ
Superior Ct. Case #: 2335-2018

The People of the State of New York
-vs-
**HARVEY WEINSTEIN**
Defendant

| SEX | D.O.B. | NYSID NUMBER | CRIMINAL JUSTICE TRACKING NUMBER |
|---|---|---|---|
| M | 03/19/1952 | 06581138Z | |

| Accusatory Instrument Charge(s): | Law/Section & Subdivision: |
|---|---|
| 1 CRM SEX ACT 1* | 130.50(1) |
| 2 | |
| 3 | |
| 4 | |

Date(s) of Offense: 07/10/2006 to

THE ABOVE NAMED DEFENDANT HAVING BEEN CONVICTED BY | ○ PLEA *OR* ◉ VERDICT |, THE MOST SERIOUS OFFENSE BEING A | ◉ FELONY *OR* ○ MISDEMEANOR *OR* ○ VIOLATION |, IS HEREBY SENTENCED TO:

| Crime | Count No. | Law Section and Subdivision | SMF, Hate or Terror | Minimum Period | Maximum Term | ☐ Definite (select: D, M or Y) ☑ Determinate (in years) * * | Post-Release Supervision |
|---|---|---|---|---|---|---|---|
| 1 CRM SEX ACT 1* | 2 | 130.50(1) | | ____ years | ____ years | 20 Years | 5 years |
| 2 RAPE 3* | 5 | 130.25(3) | | ____ years | ____ years | 3 Years | 5 years |
| 3 | | | | ____ years | ____ years | | ____ years |
| 4 | | | | ____ years | ____ years | | ____ years |
| 5 | | | | ____ years | ____ years | | ____ years |

* * NOTE: For each DETERMINATE SENTENCE imposed, a corresponding period of POST-RELEASE SUPERVISION MUST be indicated [PL § 70.45].

☐ Counts _____ shall run **CONCURRENTLY** with each other ☑ Count(s) 2 shall run **CONSECUTIVELY** to count(s) 5

☐ Sentence imposed herein shall run **CONCURRENTLY** with _____, and/or **CONSECUTIVELY** to _____

☐ Sentence imposed herein shall include a **CONSECUTIVE** _____ term of | ○ **PROBATION** *OR* ○ **CONDITIONAL DISCHARGE**|, with an Ignition Interlock Device condition, that shall commence upon the defendant's release from imprisonment [PL § 60.21]

☐ Conviction includes: **WEAPON TYPE:** _____ and/or **DRUG TYPE:** _____

☐ Charged as: ○ an **ADOLESCENT OFFENDER** [CPL § 1.20(44)] *OR* ○ a **JUVENILE OFFENDER** [CPL § 1.20(42)] – age on crime date: _____

☐ Adjudicated a **YOUTHFUL OFFENDER** [CPL § 720.20]

☑ Court certified the Defendant a **SEX OFFENDER** [Cor. L § 168-d]

☐ Execute as a sentence of **PAROLE SUPERVISION** [CPL § 410.91]

☐ **CASAT** ordered [PL § 60.04(6)]

☐ Re-sentenced as a **PROBATION VIOLATOR** [CPL § 410.70]

☐ **SHOCK INCARCERATION** ordered [PL § 60.04(7)]

**As a:** ☐ Second ☐ Second Violent ☐ Second Drug ☐ Second Drug w/prior VFO ☐ Predicate Sex Offender ☐ Predicate Sex Offender w/prior VFO ☐ Second Child Sexual Assault ☐ Persistent ☐ Persistent Violent **FELONY OFFENDER**

| Paid | Not Paid | Deferred (If deferred, court must file written order [CPL § 420.40(5)]) | | |
|---|---|---|---|---|
| ○ | ◉ | ○ | Mandatory Surcharge | $ 300.00 |
| ○ | ○ | ○ | Fine | $ |
| ○ | ◉ | ○ | DNA Fee | $ 50.00 |
| ○ | ○ | ○ | DWI/Other: _____ | $ |

| Paid | Not Paid | Deferred (If deferred, court must file written order [CPL § 420.40(5)]) | | |
|---|---|---|---|---|
| ○ | ◉ | ○ | Crime Victim Assistance Fee | $ 25.00 |
| ○ | ○ | ○ | Restitution | $ |
| ○ | ◉ | ○ | Sex Offender Registration Fee | $ 50.00 |
| ○ | ◉ | ○ | Supplemental Sex Off. Victim Fee | $ 1,000.00 |

**THE DEFENDANT SHALL BE AND HEREBY IS COMMITTED TO THE CUSTODY OF THE:**

◉ NYS Department of Corrections and Community Supervision (NYS DOCCS) until released in accordance with law, and being a person sixteen (16) years or older sentenced to a period of incarceration in excess of one (1) year not presently in the custody of NYS DOCCS, the | ○ **COUNTY SHERIFF** *OR* ◉ **NEW YORK CITY DEPARTMENT OF CORRECTION**| is directed to deliver the defendant to the custody of NYS DOCCS as provided in 7 NYCRR Part 103.

○ NYS Department of Corrections and Community Supervision (NYS DOCCS) until released in accordance with law, and being a person sixteen (16) years or older sentenced to a period of incarceration in excess of one (1) year presently in the custody of NYS DOCCS, defendant shall remain in the custody of NYS DOCCS.

○ Sheriff to be lodged in a place certified by the Office of Children and Family Services and the State Commission on Corrections as a specialized secure juvenile detention facility for older youth in accordance with law, being an **Adolescent Offender** sentenced to a term of incarceration of one (1) year or less.

○ NYS Office of Children and Family Services to be lodged in a juvenile detention facility for the reception of children, but subject to transfer to the NYS Department of Corrections and Community Supervision (NYS DOCCS), in accordance with law, being a **Juvenile Offender** at the time the crime was committed.

○ _____ County Jail/Correctional Facility

**TO BE HELD UNTIL THE JUDGMENT OF THIS COURT IS SATISFIED.**

**REMARKS:** MEDICAL ATTENTION REQUIRED

**Pre-Sentence Investigation Report** Attached: ◉ YES ○ NO ☐ **Amended Commitment:**

**Order of Protection** Issued: ○ YES ◉ NO Original Sentence Date _____

**Order of Protection** Attached: ○ YES ◉ NO

Commitment, Order of Protection & Pre-Sentence Report received by Correctional Authority as indicated:

_____
Official Name

_____
Shield No.

03/11/2020 — Date
MILTON TINGLING — Clerk of the Court
by: _____ — Signature
SENIOR CT CLERK — Title