SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM, PART 99
----------X
THE PEOPLE OF THE STATE OF NEW YORK

- against -

[redacted]
Notice of Omnibus Motion,
Indictment No. 2673 / 2019
2335 / 2018

HARVEY WEINSTEIN,
Defendant.
----------X

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

Sirs:

Please Take Notice, that upon the annexed Affirmation of **Damon M. Cheronis, Esq.**, an attorney at law practicing *pro hac vice* in the State of New York, duly affirmed on the 10th day of October 2019, upon the indictment, exhibits, supporting papers and all proceedings herein, defendant, **Harvey Weinstein,** will move this Court on November 7, 2019, to grant the relief requested herein as follows:

I. Dismiss the predatory sexual assault counts because they are time-barred in violation of the ex post facto clause; and lack specificity in violation of due process and fail to provide fair notice; and preclude specified *Molineux* witnesses from testifying as their allegations also lack the requisite specificity;

II. Dismiss the predatory sexual assault counts due to the abuse of the grand jury process in the re-presentment of charges to the grand jury;

III. Suppress evidence illegally obtained or derived from a February 23, 2018 search warrant;

IV. Compel discovery and otherwise order compliance with C.P.L. § 245 *et seq.*; and permit release and inspection of the grand jury minutes;

V. Limit or preclude the testimony of the state's proffered expert witness;

VI. Permit introduction of the expert testimony of Dr. Deborah Davis on memory and factors that lead to memory distortion of disputed sexual encounters;

VII. Preclude the testimony of specific *Molineux* witnesses based on certain discovery;

VIII. Modify the protective order to unseal the identities of the complainants;

IX. Inspect or release the grand jury minutes and to dismiss or reduce each count in the indictment; and

X. Permit the filing of additional motions as the Court may deem appropriate, within a reasonable time to be set by this Court, following receipt of materials and information allowed by the Court as a result of the within motion, together with such other and further relief as this Court may deem just and proper.

Respectfully submitted,

Damon M. Cheronis

Damon M. Cheronis
Ryan J. Levitt
Law Office of Damon M. Cheronis
140 S. Dearborn Street Suite 411
Chicago, IL 60603
(312) 663-4644
damon@cheronislaw.com
ryan@cheronislaw.com

Donna A. Rotunno

Donna A. Rotunno
Law Offices of Rotunno & Giralamo
140 S. Dearborn St. Suite 411
Chicago, Illinois 60603
T: 708-615-9400
law1127@yahoo.com

Arthur L. Aidala

Arthur L. Aidala, Esq.
Barry Kamins, Esq.
Diana Fabi Samson, Esq.
John Esposito, Esq.
Aidala, Bertuna & Kamins, P.C.
546 Fifth Avenue
New York, New York 10036
(203) 486-0011

Dated: New York, New York
October 10, 2019

Cyrus Vance
District Attorney
New York County

Attn: Joan Illuzzi-Orbon, A.D.A.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM, PART 99
----------X
THE PEOPLE OF THE STATE OF NEW YORK

[redacted]

- against -

Indictment No. 2673/2019
2335/2018

HARVEY WEINSTEIN,

Defendant.
----------X

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

DEFENDANT'S OMNIBUS PRETRIAL MOTIONS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authority

DEFENDANT'S OMNIBUS PRETRIAL MOTIONS

Defendant, **Harvey Weinstein,** by and through his attorneys, **the Law Office of Damon M. Cheronis, the Law Offices of Rotunno & Giralamo,** and **Aidala, Bertuna & Kamins, P.C.,** pursuant to C.P.L. § 255.20, the Due Process and Effective Assistance of Counsel Provisions of the Constitution to the United States, analogous provisions contained in the Constitution of the State of New York, and the other authority cited herein, respectfully submits his omnibus pretrial motions.

I. Motion to Dismiss Counts One and Two of the Indictment; and Preclude the Testimony of Certain Molineux Witnesses

Pursuant to the Due Process and Effective Assistance of Counsel Provisions of the Constitution to the United States, analogous provisions contained in the Constitution of the State of New York, as well as other authority cited herein, Mr. Weinstein, through counsel, respectfully moves the Court to dismiss counts one and two of the indictment, and to preclude the testimony of certain *Molineux* witnesses [redacted] and [redacted] as described further herein.

A. Background

Counts One and Two of the Indictment charge Mr. Weinstein with committing predatory sexual assault in violation of Penal Law § 130.95(2). Specifically, Count One alleges that on or about July 10, 2006, in the County of New York, Mr. Weinstein committed the crime of criminal Sexual Assault as defined in Penal Law § 130.50(1) in that he engaged in oral sexual conduct by forcible compulsion with a person known to the grand jury, and further, that he engaged in the crime of Rape in the First Degree, Criminal Sexual Act in the First Degree, and Aggravated Sexual Abuse in the First Degree as defined in Penal Law § 130 *et seq.* against one or more additional persons. Count Two alleges that on or about March 18, 2013, in the County of New York, Mr. Weinstein committed

the crime of Rape in the First Degree as defined in Penal Law § 130.35(1) in that he engaged in sexual intercourse by forcible compulsion with a second person known to the grand jury, and further, that he engaged in the crime of Rape in the First Degree, Criminal Sexual Act in the First Degree, and Aggravated Sexual Abuse in the First Degree as defined in Penal Law § 130 *et seq.* against one or more additional persons. Mr. Weinstein is also charged with Criminal Sexual Act in the First Degree, Rape in the First Degree, and Rape in the Third Degree, in violation of Penal Law §§ 130.50(1), 130.35(1), and 130.25(1), as described in the indictment and based upon the same allegations discussed above.

In a Bill of Particulars filed under seal on August 22, 2019, the state indicated that the additional offense *i.e.* the "one or more additional persons" for both counts of predatory sexual assault is the same, single individual- [redacted] The state indicated that the alleged conduct involving Mr. Weinstein and [redacted] occurred on the approximate date of "the winter season spanning 1993-1994," the approximate time was "nighttime," and the location was 60 Gramercy Park North, New York, New York.

Mr. Weinstein, through counsel, now moves the Court to dismiss counts one and two of the indictment on the following grounds[1]: (1) the retroactive application of the predatory sexual assault statute to revive a time barred offense violates the Ex Post Facto Clause; (2) the predatory sexual assault counts violate both state and federal Due Process and principles of fair notice as the additional offense alleged in the Bill of Particulars fails to provide reasonably sufficient particulars of the allegation; and (3) allowing the testimony of *Molineux* witnesses [redacted] and [redacted] would also

[1] For purposes of appellate review, Mr. Weinstein, through counsel, reincorporates and reasserts any and all prior, outstanding arguments advanced in support of dismissal, to the extent they remain applicable.

violate Due Process and principles of fair notice as those offenses as alleged in the Bill of Particulars also fail to provide reasonably sufficient particulars of the allegation.

B. Dismissal is Required for the Counts of Predatory Sexual Assault as the Retroactive Resurrection of a Time-Barred Offense Constitutes an Ex Post Facto Clause Violation.

i. Background

In July of 2018, the state went to great lengths to instruct the grand jury that it could not consider a first-degree criminal sex act charge from 2004 as an aggravating crime for purposes of predatory sexual assault. It reasoned at the time that the 2006 statute 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 state, in an effort to bolster its 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 predatory counts were now supported by a 26-year-old rape allegation—an allegation so old that the complainant could not remember when it allegedly happened—and so old that even the statute of limitations governing it had expired decades earlier.

Mr. Weinstein, through counsel, subsequently moved to strike the amended bill of particulars on several grounds. The Court agreed that the state had usurped the function of the grand jury by charging Mr. Weinstein with this crime but not presenting it to the grand jury. As a result, it found his other arguments moot.

On August 13, 2019, the state 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. As mentioned, the sole, additional offense for both counts was the 1993 rape alleged by [redacted] as the Court had dismissed the predatory sexual assault charges contained in

Indictment 2335/2018 in which other aggravating crimes were charged. This course of action left the remaining two counts of predatory sexual assault as exclusively reliant on the legal propriety of [redacted]'s alleged rape in 1993—an allegation for which there is no dispute that, standing alone, it is barred by the statute of limitations and predates the enactment of the predatory sexual assault statute, Penal Law § 130.95. For the reasons that follow, retroactive application of § 130.95 is improper to revive this time-barred crime, and constitutes an ex post facto violation. Therefore, the state should be precluded from introducing evidence or testimony regarding this offense, and dismissal of the predatory sexual assault charges is required.

ii. Discussion

a. The Ex Post Fact Clause Prohibits Resurrection of 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, the Court 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. It requires proof beyond a reasonable doubt of a never-before-charged 1993 first degree rape allegation that has been time-barred since 1998. In plain application, the state cannot use the predatory sexual assault statute as a means to charge Mr. Weinstein with a crime as to which the statute has run. *See People v. Burroughs*, 108 A.D.3d 1103, 1105 (N.Y. App. Div. 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).

The legislature has made explicit its application of this holding in § 5(a) of the 2006 legislative amendment to the SOL statute, C.P.L. § 30.10:

> [S]ections one and two of this act shall apply to offenses committed on and after such date as well as to offenses committed prior thereto, provided that such sections one and two of this act shall not apply to offenses committed prior to such date on which the prosecution thereof was barred under the provisions of section 30.10 of the criminal procedure law in effect immediately prior to such date.

In 1993, the statute of limitations applicable to Rape in the First Degree, a Class B felony, was 5 years. *See* C.P.L. § 30.10 (*formerly* 2(b)). The new law governing statutes of limitation was passed at that same time as the new legislation creating the new crimes of predatory sexual assault. *See* L. 2006, ch. 3, § 1. The new SOL law applied to crimes committed after its effective date and to offenses *that were not yet time-barred. See id.; see also Burroughs*, 108 A.D.3d at 1104. Thus, an alleged 1993 rape would have had to have been prosecuted 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 [redacted]—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 requires the state to prove beyond a reasonable doubt that Mr. Weinstein committed the crime of Rape in the First Degree against [redacted] in 1993. *See* Penal Law § 130.95(2). 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 (N.Y. App. Div. 2016) (recognizing that predatory sexual assault requires that the jury find the defendant guilty of the additional offense).

This point finds illustration in the New York Pattern Jury Instruction setting forth the elements of predatory sexual assault, Penal Law § 130.95(2). The instruction specifically notes that "[t]his crime requires the commission of *separate* sex acts," which are identified as "Sex Act I" and

"Sex Act II." *Id.* (emphasis added). It then sets forth the isolated elements of each offense required to be proven beyond a reasonable doubt, which for Count One, would read as follows:

Sex Act I

> That on or about July 10, 2006, in the County of New York, the defendant, Harvey Weinstein, committed the crime of Criminal Sexual Act in the First Degree, in that he engaged in oral sexual conduct with [CW1] by forcible compulsion.

Sex Act II

> That on or about [the wintertime of 1993/1994], in the County of New York, the defendant, Harvey Weinstein, committed the crime of rape in the first degree[2] in that he engaged in sexual intercourse with [redacted] by forcible compulsion.

Suffice to say, the New York Pattern Jury Instruction regarding the § 130.95(2) elements cogently recognizes that the additional offense is an individual, isolated, and indeed *separate* offense upon which the predatory sexual assault charge is based, as opposed to a status crime, aggravating crime, or continuing part of another offense.

Examining this charge in the context of the lesser included offense analysis persuasively demonstrates the legal infirmity of categorizing the additional offense as a status, aggravating, or continuing crime, as opposed to a separate, independent offense. It also reveals the presence of additional constitutional concerns that manner of charging presents.

C.P.L. § 1.20(37) defines a "lesser included offense" as "[w]hen it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a 'lesser included offense.'"

---

[2] The amended bill of particulars filed on August 22, 2019 does not specify the nature of this alleged sex crime as the previously stricken bill of particulars had. While the details above were taken from the stricken February 2019 bill of particulars, counsel formally requests that the state be required to furnish these omitted particulars.

In *Hopper v. Evans*, 456 U.S. 605, 611 (1982), the Supreme Court recognized, as it did in *Beck v. Alabama*, 447 U.S. 625 (1980), that so long as there is some evidence to warrant a jury instruction on a lesser offense, due process *requires* one be given. New York has codified this rule in C.P.L. § 300.50, which, in subsection (1)-(3) states the following:

> 1. In submitting a count of an indictment to the jury, the court in its discretion may, in addition to submitting the greatest offense which it is required to submit, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater. If there is no reasonable view of the evidence which would support such a finding, the court may not submit such lesser offense. Any error respecting such submission, however, is waived by the defendant unless he objects thereto before the jury retires to deliberate.
>
> 2. If the court is authorized by subdivision one to submit a lesser included offense and is requested **by either party to do so**, it must do so. In the absence of such a request, the court's failure to submit such offense does not constitute error.
>
> 3. The principles prescribed in subdivisions one and two apply equally where the lesser included offense is specifically charged in another count of the indictment. (emphasis added).

Here, there is no need to conduct the analysis with respect to whether the additional offense comprising the predatory sexual assault charge is a lesser included offense, as the Appellate Division has already plainly recognized as much. *See, e.g., People v. Haideri*, 141 A.D.3d 742, 745 (N.Y. App. Div. 2016) ("rape in the first degree is in fact a lesser included offense of predatory sexual assault in that the former is an element of the latter and defendant could not have committed the latter without also committing the former"); *People v. Ortiz*, 95 A.D.3d 1140, 1140 (N.Y. App. Div. 2012) ("[a]s the defendant argues and the People correctly concede, criminal sexual act in the first degree and rape in the first degree are lesser-included offenses of predatory sexual assault"); *People v. Scott*, 61 A.D.3d 1348, 1350 (N.Y. Sup. Ct. 2009) ("the predatory sexual assault count charged rape in the first degree as one of its elements and, as charged in the indictment, the elements of the predatory

sexual assault with respect to rape in the first degree are precisely those required for rape in the first degree").

It follows, then, that at trial, making the extremely safe assumption that there is at least some evidence to disbelieve either the allegation of CW1 or CW2, the defense or the prosecution will be entitled *as a matter of right* to have the jury instructed on the lesser included offense of the [redacted] 1993 rape allegation. In other words, the use of [redacted] 1993 rape allegation as an additional offense within the predatory sexual assault counts creates an independent avenue for standalone consideration and criminal judgment of that time-barred offense. Moreover, even though conviction of a lesser offense is deemed an acquittal of the greater offense, per § 300.50(4), a conviction of either predatory sexual assault counts does in fact constitute a legal conviction for the [redacted] 1993 rape allegation. As an aside, although just as important, allowing this time-barred offense to serve as the additional offense would prove all the more impermissible given that it effectively forces Mr. Weinstein to choose between his right to an acquittal acquired by the expiration of the applicable limitations period, or due process right to have the jury consider conviction for a lesser offense.

In any event, in plain point of fact, by utilizing a new statute to revive a time-barred charge, the 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 render the application of the statute to the crime-barred charge permissible given that the statute was enacted only after the limitations period long since accrued. 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 not a single instance in which an independently time-barred criminal act

has been constitutionally revived through the passage of a new substantive law, nor does sufficient justification exist for allowing the predatory sexual assault statute to become the first.

b. Retroactive Application of the Predatory Sexual Assault Statute is Further Prohibited Given the Absence of a Plainly Manifested Legislative Intent.

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 (N.Y. Ct. App. 1989) (quoting *People v. Oliver*, 1 N.Y.2d 152, 157 (N.Y. Ct. App. 1956)).

In *Behlog*, as in *Oliver*, the Court noted:

> [t]here is an exception, however, when the Legislature passes an ameliorative amendment that *reduces* the punishment for a particular crime. In such a case "the law is settled that the lesser penalty may be meted out in all cases decided after the effective date of the enactment, even though the underlying act may have been committed before that date." The rationale for this exception is that by mitigating the punishment the Legislature is necessarily presumed—absent some evidence to the contrary—to have determined that the lesser penalty sufficiently serves the legitimate demands of the criminal law. Imposing the harsher penalty in such circumstances would serve no valid penological purpose. *Id.* at 240 (quoting *Oliver*, *supra*) (footnotes omitted).

Here, by contrast, the intent of the legislature was to stiffen the penalties for repeat sexual offenses, as the new crime is an A-II felony, which carries the possibility of harsher penalties than the individual, underlying crimes comprising the offense. Since the legislature did not manifest an

intent to have this law apply retroactively, and the law is not ameliorative, the Court should dismiss the predatory sexual assault counts as an improper retroactive application of the law.

People v. Weinberg, 83 N.Y.2d 262 (N.Y. Ct. 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 repeat 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. *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, sec. 9, cl. 3. The Court would not likely have reached this conclusion were it not for the fact that the Legislature 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 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 is categorically barred from independent prosecution. That is, the *res gestae* of the crime in *Weinberg* was the *repeated* failure to file a tax return, and thus not completed

until the third non-filing after the statute's passage. Here, instead, two wholly distinct, temporally-isolated acts are at issue, one of which is categorically time-barred from prosecution by the expiration of the applicable limitations period.

In *People v Partridge*, 173 A.D.3d 1769, 1770 (Sup. Ct. N.Y. June 14, 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.

At bottom, *Weinberg* and *Partridge* underscore the point that the pre-enactment conduct alleged in the amended bill of particulars comprises independent elements of the charged crime yet amounts to the commission of a separate 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.

c. The Necessity of Dismissal is Further Supported by the Rationale Underlying the Limitations on Retroactivity, Statutes of Limitations, and the Ex Post Facto Clause.

The instant matter provides a stark demonstration of the necessity and rationale underlying the limitation on retroactive application of criminal laws, the enactment of statutes of limitations, and the constitutional prohibition against ex post facto laws. Mr. Weinstein, like all defendants, is entitled to the presumption of innocence and is endowed by law with the full panoply of his rightful defenses, including the protections afforded by formerly-effective limitations periods. This right is as much a substantive right in a criminal case as any other defense capable of assertion, as it creates an absolute bar to prosecution. *See People ex rel. Reibman v. Warden of County Jail*, 242 A.D.2d 282, 284 (N.Y. App. Div. 1934). Again, the purpose of limitation periods is to afford immunity from

punishment. *People v. Steiger*, 154 Misc. 538, 541 (1935). Indeed, courts across the country have recognized that expiration of a statute of limitations confers an absolute right of acquittal. *See, e.g.*, *People v. Stone*, 374 Ill. App. 3d 980, 986 (Ill. App. Ct. 2007) (quoting *People v. Anderson*, 53 Ill. 2d 437, 440-41 (Ill. S. Ct. 1973) ("a legislative body can extend the period of limitations . . . so long as the extended period does not apply to any case in which the accused has acquired . . . a right to acquittal through the running of the original statute"), as has New York Jurisprudence. *See, e.g.*, *People v. Kohut*, 30 N.Y.2d 183, 192 (N.Y. Ct. App. 1970); *People v. Hines*, 284 N.Y. 93 (N.Y. Ct. App. 1940) (recognizing that statutes of limitations create a bar to prosecution and are not merely statutes of repose as in civil cases); *People v. Seda*, 93 N.Y.2d 307 (N.Y. Ct. App. 1999) (recognizing that statutes of limitations protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and they minimize the danger of official punishment because of acts in the far-distant past); *see also Toussie v. U.S.*, 397 U.S. 112 (1970) (same); *United States v. Scharton*, 285 U.S. 518, 522 (1932) ("recognizing that statutes of limitations are "'to be liberally interpreted in favor of repose'").

Suffice to say, it would be manifestly unjust to permit the use of a new statute 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 violates the Ex Post Facto Clause. Thus, dismissal of Counts One and Two is required.

C. Dismissal is Required for the Counts of Predatory Sexual Assault as the Allegations Lack Specificity Such That They Violate Due Process and Fail to Provide Fair Notice.

i. Legal Standard

The Fifth Amendment to the Constitution of the United States guarantees that no individual shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The right to due process implies that the accused must be afforded notice as well as a "meaningful opportunity to defend" him or herself. *See Hovey v. Elliot*, 167 U.S. 409, 416-20 (1897). Providing defendants with sufficient detail regarding the date and time of the acts he or she is alleged to have committed is a basic, fundamental component of this right: "[o]ne has a right to know the time of his alleged criminal act." *See, e.g., People v. Parkinson*, 43 N.Y.S.2d 690, 692 (1943). As the Supreme Court has summarized:

> In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right to be informed of the nature and cause of the accusation. The indictment must set forth the offence with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged; and every ingredient of which the offence is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading, that, where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition, but it must state the species,—it must descend to particulars. The object of the indictment is,—first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

United States v. Cruikshank, 92 U.S. 542, 544 (1875) (internal quotations omitted); *see also Russell v. United States*, 369 U.S. 749, 768-69 (1962).

To ensure that defendants be afforded sufficient notice, the New York Legislature has codified in C.P.L. § 200.95 the requirement that the state furnish a written bill of particulars specifying "items of factual information which are not recited in the indictment and which pertain to the offense charged."[3] In fact, the state is generally required to specify in a bill of particulars "the alleged date, time, location and general nature of the [sexual] misconduct," as it was in *People v. Thompson*, 27 A.D.3d 888, 889-890 (N.Y. App. Div. 2006). In any event, such bills are required in any situation where providing one will further the ends of promoting justice, and avoiding unfair surprise at trial. *People v. Cavalier*, 57 Misc.2d 695 (1968); *see also People v. Morris*, 61 N.Y.2d 290, 294 (N.Y. Ct. App. 1984) ("consideration must be given to whether the period of time, as designated in the accusatory instrument, serves the function of protecting defendant's constitutional right to be informed of the nature and cause of the accusation") (internal quotations omitted); *People v. Iannone*, 45 N.Y.2d 589, 598 (N.Y. Ct. App. 1978) ("where the indictment itself provides a paucity of information . . . [trial courts] must be vigilant in safeguarding the defendant's rights"); *People v. Villini*, 59 N.Y.2d 781, 783 (N.Y. Ct. App. 1983).

In *Morris*, the defendant was indicted in April 1981 for sexual crimes involving a six-year-old child that were alleged to have occurred "in the month of November 1980," which was subsequently narrowed to having occurred between November 7, 1980 and November 30, 1980. *Morris*, 61 N.Y.2d at 294. In considering a challenge to the lacking specificity of the allegations, the Court of Appeals began by noting that "it is important that the indictment charge the time and place and nature and circumstances of the offense with clearness and certainty . . . [i]n order for a defendant to make his defense with all reasonable knowledge and ability and to have full notice of the charge." *Id.* at 295

[3] The Legislature has restated and reincorporated this requirement into C.P.L. § 245.20(r), effective January 1, 2020, by mandating that the state disclose "[t]he approximate date, time and place of the offense."

(internal quotations omitted). While recognizing that the standard is "reasonableness" and case-specific, it ultimately denied the defendant's challenge, particularly in light of the fact that two sexual acts were alleged over a 24-day period against a five-year-old and a six-year-old, "notwithstanding that it would be easier to prepare an alibi defense if the exact date and time of the offense were known and provided." *Id.* at 295-98.

Following *Morris*, the sole situation in which a relaxed level of specificity in describing the date of the offense has been permitted is where the victim was a minor child. *See, e.g., People v. Ames*, 96 A.D.3d 867, 867-68 (N.Y. App. Div. 2012) (lack of specificity did not deprive defendant of fair notice where the offense involved a child-victim, crimes of a repetitive and clandestine nature, and continuous, long-term abuse); *People v. Weekes*, 71 A.D.3d 1065, 1065 (N.Y. App. Div. 2010) (same), *People v. Peters*, 187 A.D.2d 883, 884 (N.Y. App. Div. 1992) (upholding indictment charging sexual offenses for teacher of a 13-year-old minor); *People v. Duboy*, 150 A.D.2d 882, 884 (N.Y. App. Div. 1989) (noting "time is not a substantive element of the charged crimes, the indictments specified months, seasons or other more specific time frames and the victims were relatively young, we would find no reversible error").

Even so, the Appellate Division reached a different result in *People v. Cobey*, 184 A.D.2d 1002 (N.Y. App. Div. 1992). In *Cobey*, the defendant was charged in an eleven-count indictment with rape, sodomy, sexual abuse, and endangering the welfare of a child. *Id.* at 1002. The indictment accused the defendant of committing certain criminal acts "during" October of 1986, November of 1987, July of 1988, and February of 1989. *Id.* After the defendant moved for a bill of particulars specifying the approximate time, date, and place of each alleged incident, and the trial court denied his eventual motion to require the state to produce such a bill, the Appellate Division eventually

found reversible error in the bill's denial. *Id.* at 1003. It recognized that the refusal to provide "specific information concerning the time and place of the alleged . . . acts," beyond the month timeframe listed in the indictment, "is beyond cavil," and that "a defendant has a basic and fundamental right to be informed of the charges against him so that he will be able to prepare a defense." *Id.* (internal citations omitted). Thus, it ordered a new trial. *Id.*

Consistent with *Cobey*, New York courts have routinely required that notice be given as to the precise date in cases involving allegations of criminal sexual conduct, and particularly where the victims are not minors. As stated in *People v. Britt*, 48 Misc.2d 705, 706-07 (N.Y. Sup. Ct. 1965):

> Rape is not a continuing crime and our courts have held that a defendant is entitled to know not only the particular offense for which he is indicted but also the time or the approximate time at which the alleged offense occurred. This is particularly true when the crime involved is rape, and there is no question but that the court may require that a defendant be given sufficient particulars so that he may prepare adequately his defense. It has been urged that particularly where an alibi defense may be used by the defendant such as is claimed in this case that he should be furnished with the exact date of the alleged occurrences. Courts have compelled the service of bills of particulars in rape cases and required the People to set forth the dates, time and place of each and every act of sexual intercourse alleged in the indictment.[4]

(internal citations omitted); *see also, e.g., People v. Beauchamp*, 541 N.Y.2d 639, 641 (N.Y. Ct. App. 1989) (dismissing sexual offense charges on the ground that "the time period during which the crimes were alleged to have occurred . . . was so excessive that it was unreasonable"); *People v. Keindl*, 68 N.Y.2d 410, 417 (N.Y. Ct. App. 1986) ("the [law] requires not only that each count specify a time when or during which the crime was committed") *superseded by statute on other grounds*; *People v. Fort*, 141 N.Y.S. 290, 292 (N.Y. Sup. Ct. 1955) ("[t]he defendant is entitled to a bill of particulars setting forth the date, time and place where each act of sexual intercourse alleged in the indictment

[4] The defense is actively attempting to investigate a potential alibi defense to [redacted] claim and expressly reserves Mr. Weinstein's right to present such a defense at trial.

occurred"); *People v. Watt*, 81 N.Y.2d 772, 775 (N.Y. Ct. App. 1993) (remanding for consideration of case-specific factors after the Appellate Division found a five-month window for the offense *per se* unreasonable).

ii. Discussion

The instant charges pertaining to [redacted] fall squarely on the side of cases finding an impermissible lack of specificity, and *Cobey* in particular. Here, the date of the offense averred in the bill of particulars is substantially broader than that in *Cobey*, as it alleges an ill-defined, roughly five-month "wintertime" period, whereas the state in *Cobey* was able to narrow the alleged acts to specific, one-month periods. Further, *Cobey* involved a child-victim, for whom the state may be permitted broader leeway in identifying the time of the offense, *see, e.g. Morris*, 61 N.Y.2d at 296, whereas [redacted] was an adult at all relevant times. Further still, the conduct in *Cobey* continued to February of 1989, and the Appellate Division issued its opinion on June 5, 1992. While the date of the indictment is unclear, it was brought within three years of the alleged conduct, and almost certainly much sooner. Here, by contrast, the ill-specified date of the alleged acts occurred no sooner than approximately 25 years after [redacted] was first disclosed in the state's February 13, 2019 bill of particulars, which serves to further deprive Mr. Weinstein of the reasonable opportunity to prepare a defense.

For similar reasons, neither *Beauchamp* nor *Morris* support finding the specificity of [redacted] allegation to be sufficient. While *Beauchamp* involved a broader, nine-month timeframe in which the allegation occurred, the allegations involved multiple acts against the same "young children" as young as four-years-old, and the charges were brought no less than four years after the alleged offense, though likely much sooner. Even so, the Court of Appeals found dismissal required in *Beauchamp*. In *Morris*, the Court of Appeals upheld charges brought five months after the alleged event involving

a five-year-old and a six-year-old victim who narrowed the alleged acts to having occurred within a 24-day period. Here, as mentioned, this allegation involves an adult complainant claiming criminal sexual conduct that occurred on an unspecified, single evening within an approximate five-month timeframe at least approximately 25 years ago. Those facts place the instant lacking specificity well beyond the permissible circumstances found in *Morris*, and even the impermissible circumstances present in *Beauchamp*.

Thus, as the state has included [redacted]'s allegation as the *only* predicate offense for each of the two counts of predatory sexual assault in the new indictment, dismissal of Counts One and Two is required.

D. Molineux Witnesses [redacted] and [redacted] Should Also be Precluded from Testifying as Their Allegations Lack the Requisite Specificity.

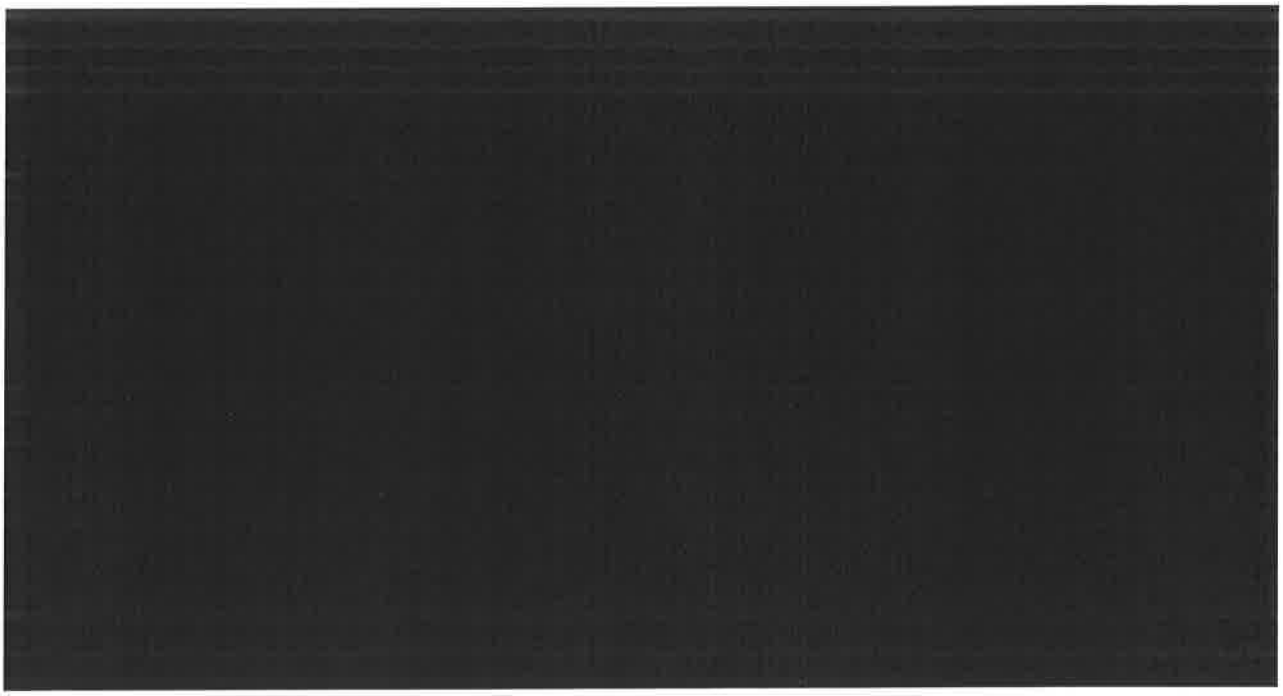
Along the same lines as [redacted] *Molineux* Witnesses [redacted] and [redacted] should be precluded from testifying as their allegations also lack sufficient particularity regarding the date of the alleged crime. According to the state's August 22, 2019 bill of particulars, the criminal sexual conduct alleged with Complainant [redacted] occurred "during the spring of 2004," in the "evening," at "[a] hotel near Park Avenue in Midtown Manhattan." The criminal sexual conduct alleged with Complainant [redacted] occurred "between May 2005 – July 2005," during the "afternoon," at 76 Crosby Street, New York, New York.

C.P.L. § 240.43 mandates that "the prosecutor shall notify the defendant of all *specific* instances of a defendant's prior uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial."

Counsel has not located any dispositive case law discussing the requisite level of specificity regarding *Molineux* allegations, as opposed to charged conduct, in the context of sexual offenses. *Cf.*

People v. Cook, 48 Misc.3d 774, 776 (N.Y. Sup. Ct. 2015) ("[t]he [state] shall provide defendant reasonable notice in advance of the Sandoval hearing of the *specific* criminal convictions or other bad acts which they intend to use as impeachment material") (emphasis added); *People v. Laracuente*, 21 A.D.3d 1389, 1390 (N.Y. App. Div. 2005) (declining to review challenge to specificity of *Molineux* notice where the error was not preserved).

Regardless, common sense and plain logic dictate that [redacted] and [redacted]'s allegations lack reasonable specificity such that their testimony should be precluded. First, despite the fact that their allegations do not comprise any portion of the charged conduct in this matter—even though the state has indicated it will be used to directly establish elements of the charged conduct—these allegations are no less important for the state to establish, and the defense to rebut. From the *Molineux* Hearing in particular, the Court is well aware of the emphasis that the state will place on this and other *Molineux* testimony to establish its case. Indeed, as it averred in its *Molineux* application, it believes



[redacted]. Suffice to say, the *Molineux* evidence in this case is going to prove so significant that, even if not the case in other situations, the specificity of its notice should be held to the same standard as required for the charged conduct.

And on that point, the allegations involving these two *Molineux* witnesses indisputably lack reasonable specificity. [redacted]s allegation spans an entire season, the "spring of 2004," notice was first given approximately fourteen years after the alleged conduct, and she, too, is now and was at the time an adult complainant. Likewise, the alleged conduct involving [redacted] is broadly claimed to have occurred at some point over an approximate three-month period, was first disclosed approximately thirteen years after the alleged conduct occurred, and [redacted] was also an adult at all relevant times. Following the argument set forth above with respect to [redacted] these allegations contain an impermissible lack of specificity as to the date of the alleged conduct.

Moreover, the fact that there are now potentially three separate allegations deficient in the same manner that Mr. Weinstein must defend against serves to only heighten and compound the concerns underlying the constitutionally and statutorily mandated notice requirements. Thus, [redacted] and [redacted] testimony must be precluded.

E. Conclusion

Based on the foregoing, Mr. Weinstein, through counsel, respectfully requests that the Court enter an order dismissing counts one and two of the indictment and precluding the state from eliciting the testimony of *Molineux* witnesses [redacted] and [redacted] at trial.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM, PART 99
----------X
THE PEOPLE OF THE STATE OF NEW YORK

- against -

HARVEY WEINSTEIN,
Defendant.
----------X

POINT II: ATTORNEY AFFIRMATION IN SUPPORT OF MOTION TO DISMISS THE PREDATORY SEXUAL ASSAULT COUNTS AS AN ABUSE OF THE GRAND JURY PROCESS
Indictment No. 2673 / 2019
2335 / 2018

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

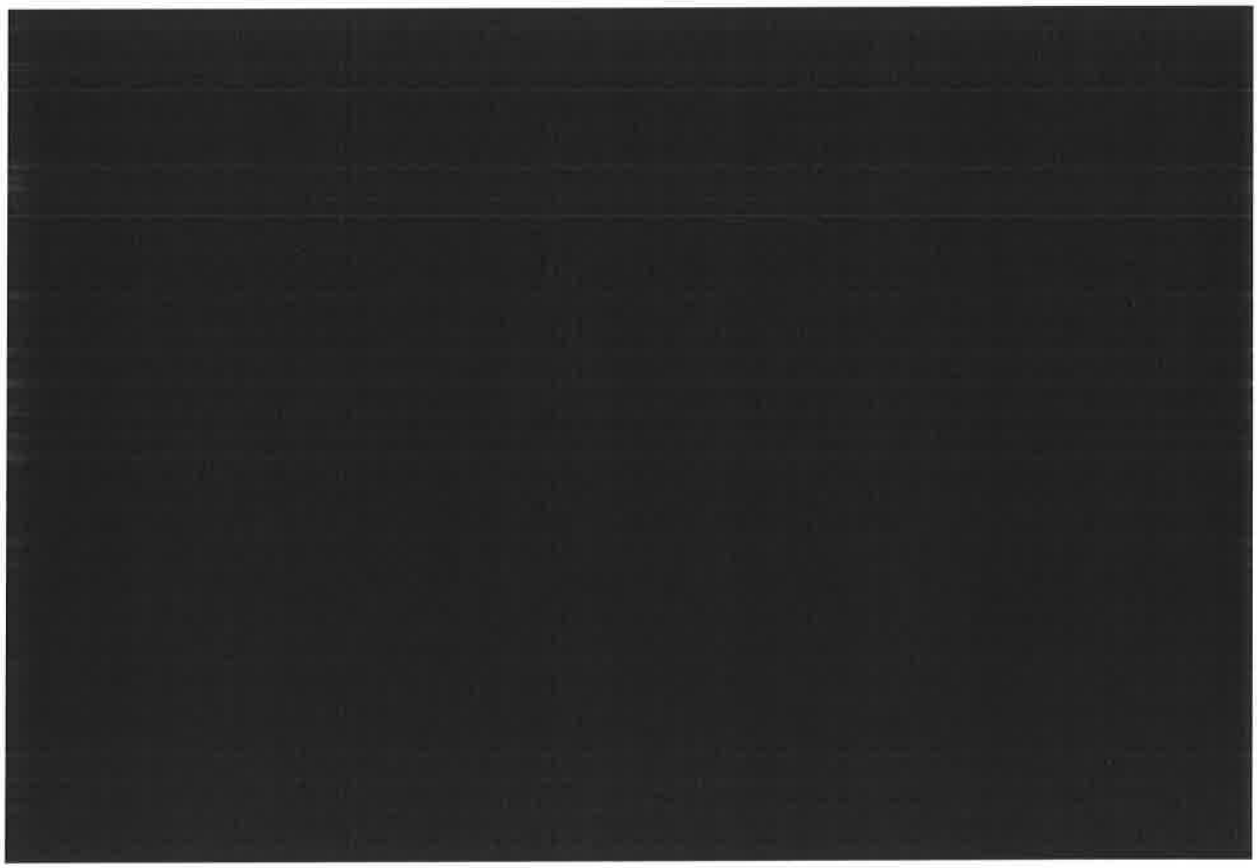
Damon M. Cheronis, attorney at law, has been sponsored to practice in the courts of New York State, affirms the following to be true under penalty of perjury:

1. I am Principal of the law firm, the **Law Office of Damon M. Cheronis**, and one of the attorneys for defendant **Harvey Weinstein**. I make this affirmation in support of a motion dated October 10, 2019 seeking dismissal of the charges against Mr. Weinstein as described further herein.

2. On August 8, 2019, the Court granted Mr. Weinstein's motion to strike the amended bill of particulars as an improper amendment of the indictment because it changed the theory of the prosecution as reflected in the evidence before the grand jury which filed the indictment, and "a defendant may only be tried on the crimes charged in the indictment as limited by the Bill of Particulars." The court held that the amended bill of particulars, which added "an additional person for which no evidence was offered to the grand jury," "amount[ed] to a 'constructive amendment' of the indictment and usurped the role of the grand jury." August 8, 2019 Order at p. 11.

3. Mr. Weinstein's motion to dismiss certain charges on other grounds, including that they were barred by the applicable statute of limitations, was thus deemed moot and not ruled upon. *Id.*

4. By letter dated August 13, 2019, the state informed the Court and defense counsel that they intended to re-present the case to a new grand jury "to cure any deficiency in the charges given to the grand jury." In an attempt to explain such deficiencies, the state indicated that the witness "did not come forward until the grand jury presentation was concluded." On the contrary,



[5] [redacted] is the complainant whose alleged 1993 rape forms the additional offense for each of the predatory sexual assault counts contained in the state's August 22, 2019 Bill of Particulars. Upon information and belief, [redacted].

5. By letter dated August 14, 2019, counsel for Mr. Weinstein sent a letter to the Court asking it to stay the grand jury action unless and until the state received permission from the Court to re-present and to rule on motions to preclude the 1993 charge, as they were no longer moot. Counsel further requested clarity as to what charges where being re-presented.

6. By letter dated August 15, 2019, the state responded that they were not required to ask permission from the Court because judicial permission is required only in cases where the first grand jury hearing the evidence has rejected its proposed charges as insufficient. In doing so, the state ignored the fact that the Court had dismissed the charge in the amended bill of particulars as a constructive amendment of the indictment, effectively concluding that there was insufficient evidence in the grand jury; that the prior grand jury had been instructed not to consider a 2004 crime in count six as an additional offense for the predatory sexual assault counts; and that count six had been voluntarily dismissed in an effort to avoid dismissal by the Court due to exculpatory evidence disclosed by the People on September 12, 2018.

7. In the same letter to the Court dated August 15, 2019, the state also disagreed that this course of action constituted the fourth time that it had charged Mr. Weinstein, notwithstanding the fact that it charged Mr. Weinstein by felony complaint on May 25, 2018, by indictment on June 30, 2018, and by superseding indictment on July 2, 2018. Thus, this latest re-presentment proved to be the fourth time that the state attempted to charge Mr. Weinstein. Finally, the state maintained that any decision on Mr. Weinstein's prior motion was premature at the time, notwithstanding that C.P.L. § 210.20(f) precluded the state from re-presenting a time-barred charge pursuant to C.P.L. § 30.10.

8. The grand jury subsequently voted to return a true bill, and on August 26, 2019, Mr. Weinstein was arraigned on the new indictment. Moments before the arraignment, counsel for Mr. Weinstein was handed the new indictment, a voluntary disclosure form identifying the additional offense on which both counts of predatory sexual assault were based, and a motion to consolidate the two indictments. The motion to consolidate did not include a motion to dismiss any counts in the previous indictment; rather, it requested joinder of the counts.

9. Having not had an opportunity to read and discuss either the indictment or the motion to consolidate, counsel for Mr. Weinstein did not agree to consolidation at that time, and the Court did not dismiss the previous counts, although it offered to do so if counsel for Mr. Weinstein would agree to the consolidation of the indictments.

10. By letter dated August 29, 2019, counsel for Mr. Weinstein asked that the Court, pursuant to C.P.L. § 200.80, dismiss the superseded predatory sexual assault counts in the previous indictment—which was required at the time of arraignment—regardless of the state's motion to consolidate.

11. On September 6, 2019, the Court granted consolidation and dismissed the prior counts "on the application of the People." September 6, 2019 Order.

12. Mr. Weinstein, through counsel, respectfully submits that the state's third presentation to the grand jury without prior Court authorization was improper. Moreover, the state's actions constituted an abuse of the grand jury process. This abuse of process included the following actions: (1) the state's submission of evidence of a charge after its dismissal by the Court without prior authorization; (2) the state's submission of a charge that was time-barred and as to which the Court was required to deny authorization; and (3) the state's resubmission of charges after the state

had instructed the prior grand jury not to consider a 2004 charge to support the predatory sexual assault counts which, under *People v. Wilkins*, 68 N.Y.2d 269 (N.Y. Ct. App. 1986), is the functional equivalent of a dismissal by the grand jury pursuant to CP.L. § 190.75.

Memorandum of Law

At common law, there was no limit to the power of the prosecutor to resubmit charges to the same or different grand juries. *See Wilkins*, 68 N.Y.2d at 273. In practice, the breadth of this power invited abuse by prosecutors who could resubmit charges previously dismissed by a former grand jury to a more compliant one. *See id.*; *People ex rel. Lalley v. Barr*, 259 N.Y. 104, 108 (N.Y. Ct. App. 1932). In response, the Legislature enacted several provisions over the years in the Criminal Procedure Law to check such abuses. *See, e.g., People v. Cade*, 74 N.Y.2d 410, 414 (N.Y. Ct. App. 1989).

As a result, a number of statutory limits on a prosecutor's authority to re-present charges to a grand jury now exist today. C.P.L. § 210.20 contains one such limitation, which relates to the prosecutor's authority to re-present an indictment or any count therein after it has been dismissed by the trial court. It limits re-presentment in situations where: (a) such indictment or count is defective, within the meaning of § 210.25; (b) the evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense; (c) the grand jury proceeding was defective, within the meaning of § 210.35; or (i) dismissal is required in the interest of justice, pursuant to § 210.40.

In those instances, "the court may, *upon application of the people*, in its discretion authorize the people to submit the charge or charges to the same or another grand jury." *Id.* "In the absence of authorization to submit or resubmit, the order of dismissal constitutes a bar to any further

prosecution of such charge or charges, by indictment or otherwise, in any criminal court within the county." *Id.*

Here, the Court's ruling dismissing the charges in the amended bill of particulars, which it deemed a "constructive amendment of the indictment," effectively and necessarily was predicated on the lack of sufficient evidence presented the grand jury. Thus, the Court's ruling functionally operated as a dismissal pursuant to C.P.L. § 210.20(b). The state was therefore required by statute to seek authorization from the Court to re-submit the charge. Having not done so, the Court's dismissal constitutes a bar to any further prosecution. Notably, the Court could have also dismissed the charge pursuant to C.P.L. § 210.20(a) because it was defective within the meaning of § 210.25(3), as the statute was unconstitutional as applied to a time-barred crime. The same is true for § 210.25(2) given that the court lacked jurisdiction over Mr. Weinstein due to the passage of the applicable statute of limitations.

Moreover, the Court could not have given authorization even if the state had sought as much prior to re-presentment. When a dismissal is based upon the fact that "[t]he prosecution is untimely, pursuant to section 30.10 or . . . [t]here exists some other jurisdictional or legal impediment to conviction of the defendant for the offense charged," then "such authorization may *not* be granted." C.P.L. § 210.20.

Here, the Court effectively dismissed the 1993 allegation based on insufficient evidence in the grand jury and deemed the untimeliness argument for dismissal moot. A request for authorization to resubmit, however, could not have been granted because the prosecution of a 1993 rape is untimely under the relevant statute of limitations pursuant to C.P.L. § 210.20(f). The state's actions deprived the Court of the ability to make such a ruling.

The dismissal of count six of the prior superseding indictment created a separate basis that required the state to seek authorization from the Court to re-present their case. That the state was permitted to dismiss that count after Mr. Weinstein had already moved to dismiss it does not change the fact that such dismissal triggered the statutory authorization requirements necessary for re-presentment. *See People v Credle*, 17 N.Y.3d 556 (N.Y. Ct. App. 2011) (holding that a prosecutor's withdrawal of charges, under certain circumstances, operates a dismissal for purposes of requiring authorization to submit to a new grand jury).

Another limitation on a prosecutor's authority to re-present a case to the grand jury relates to the authority of a prosecutor to re-present in the absence of a court ruling. *See* C.P.L. § 190.75. § 190.75(1) states, in pertinent part, "if upon a charge that a designated person committed a crime . . . the evidence before the grand jury is not legally sufficient to establish that such person committed such crime . . . the grand jury must dismiss the charge." C.P.L. § 190.75(3) further provides that "[w]hen a charge has been so dismissed, it may not again be submitted to a grand jury unless the court in its discretion authorizes or directs the people to resubmit such charge." In *Cade, supra* at 415, the Court of Appeals held that "a court order was not necessary for resubmission "unless there was an initial refusal by a grand jury to indict or a prior court dismissal of the indictment. . . and that "the action does not impair the integrity of the grand jury proceedings or risk prejudice to the defendant."

The Court of Appeals has made clear, however, that "[a]lthough the statute, read literally, requires the People to obtain judicial permission for the resubmission of charges only where the charges have been actually dismissed, it has long been the law that a charge may, under certain

circumstances, be deemed 'dismissed' within the meaning of CPL 190.75(3) when a prosecutor prematurely takes the charge from the grand jury." *Id.* at 557–58. The Court continued:

> In so doing, we allowed that subsequent prosecutorial decisions respecting the re-presentation of withdrawn charges could, notwithstanding the absence of an actual dismissal by vote of the grand jury, be subject to the strictures of CPL 190.75(3)—namely, that dismissed counts may not be re-presented without judicial leave and that they may be re-presented only once. *Id.* at 559.

Here, the state's decision at the time of the previous grand jury presentation to instruct the grand jury *not* to consider count six for purposes of the predatory sexual assault counts is the functional equivalent of a dismissal of that charge for purposes of triggering the rules limiting a prosecutor's authority to re-present evidence in the absence of court authorization. *Id.* at 557–58; *Wilkins*, 68 N.Y.2d at 269.

Finally, the state's decision to instruct the grand jury regarding only a time-barred additional offense to support the two counts of predatory sexual assault, which was based on the same underlying crimes charged previously, was an abuse of the grand jury process insofar as the state improperly attempted to shield the prior indictment from consideration. This, too, served to usurp the role of the grand jury in deciding the appropriate charges to bring.

Conclusion

As described herein, the state's actions both impaired the integrity of the grand jury proceeding and not only risked prejudice to the defendant—which is all that is required—but did in fact prejudice Mr. Weinstein. *See Cade*, 74 N.Y.2d at 415. Accordingly, at a minimum, the predatory sexual assault counts in the consolidated indictment should be dismissed.

III. Motion to Suppress Evidence Illegally Obtained From a February 23, 2018 Search Warrant

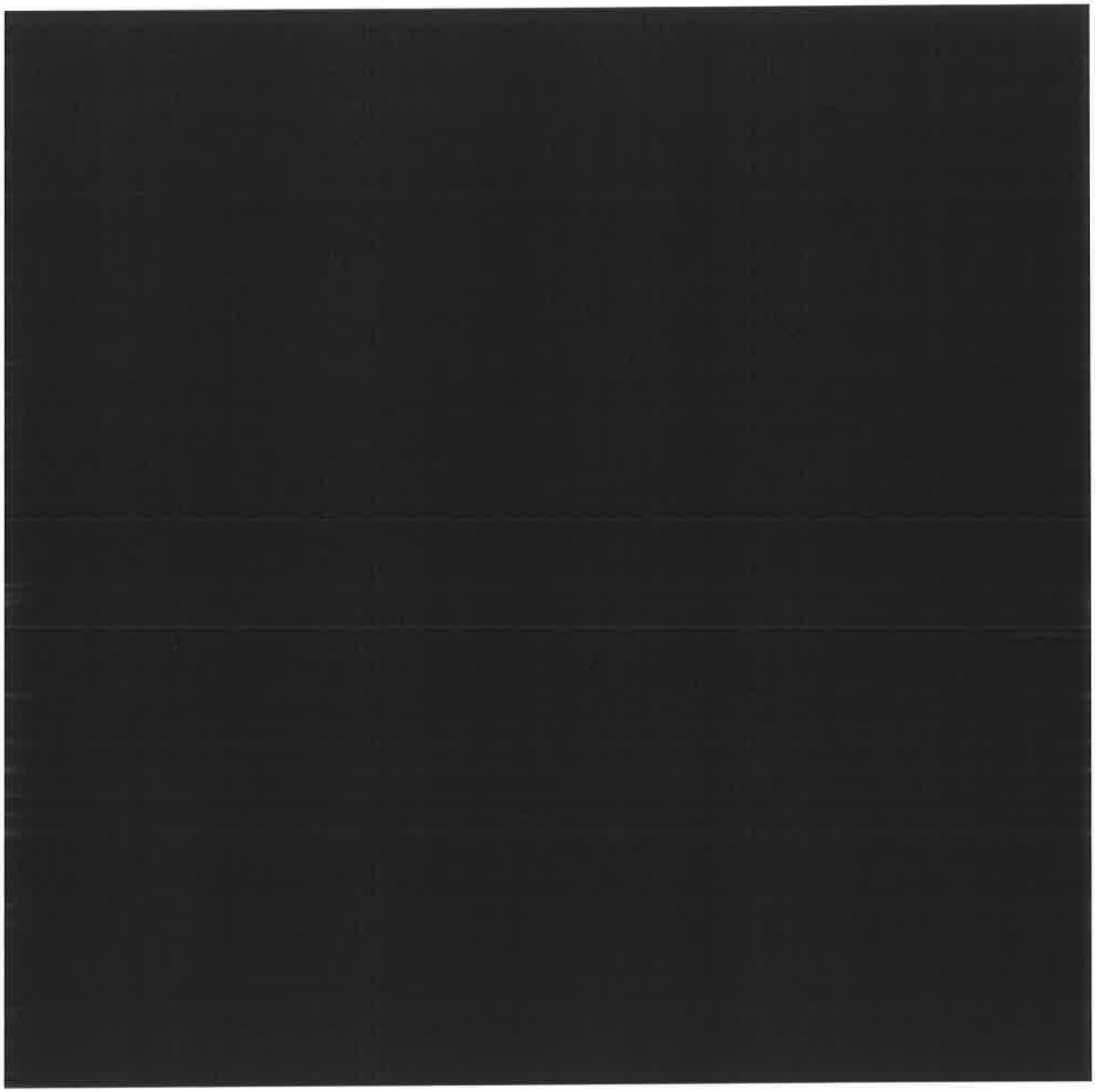
Pursuant to C.P.L. §§ 690 *et seq.* and 710 *et seq.*, the Search and Seizure, Due Process, and Effective Assistance of Counsel Provisions of the Constitution to the United States, analogous provisions contained in the Constitution of the State of New York, *Brinegar v. United States*, 338 U.S. 160 (1949), and the other authority cited herein, Mr. Weinstein, through counsel, respectfully moves this Court to suppress against him in this, and any other criminal proceeding, evidence illegally obtained or derived from the February 23, 2018 search warrant; and further reserves his right to request a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978).

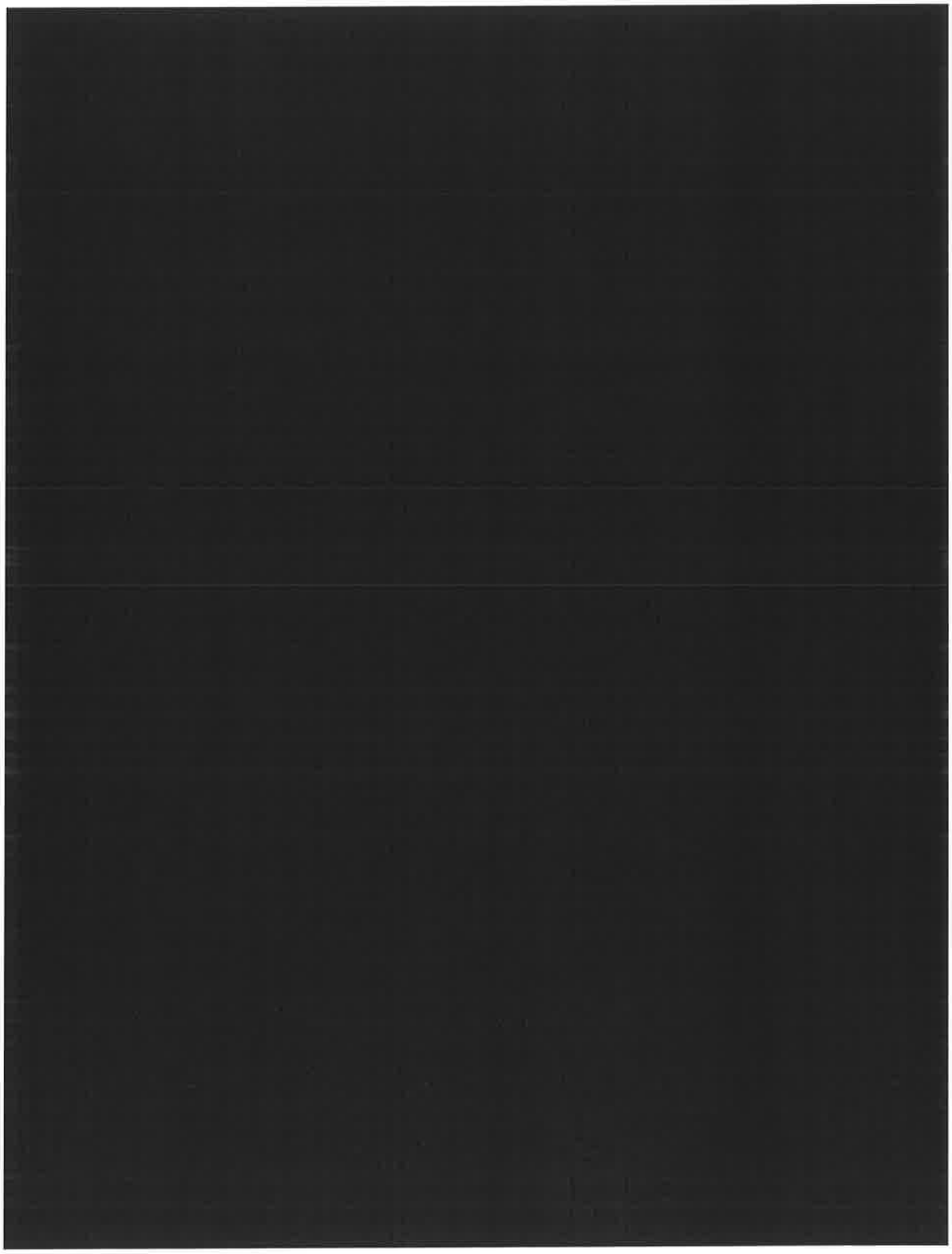
A. Background

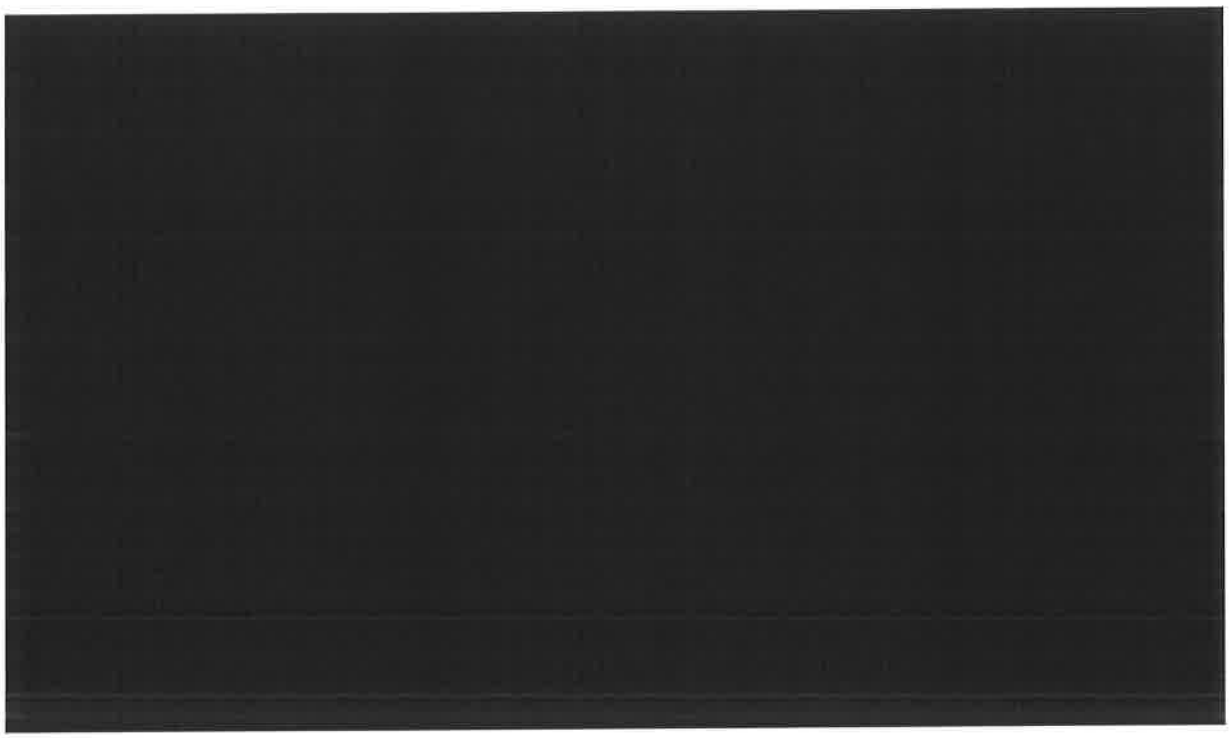
1. On February 23, 2018, the since-removed lead detective for this investigation, Detective Nicolas DiGaudio, submitted an affidavit in support of a warrant to search [redacted]

[redacted]

[redacted]







11. This Court, Judge James M. Burke, signed the warrant on the same day, February 23, 2018.[9] The state may seek to use evidence or fruits derived therefrom in its case-in-chief at trial.

B. Discussion

i. Legal Standard

12. The Fourth Amendment to the United States Constitution provides for "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and that this right "shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

13. Echoing the Fourth Amendment, C.P.L. § 690.10 permits law enforcement to seek a warrant to seize personal property only if reasonable cause exists to believe the property "[h]as been used or is possessed for the purpose of being used, to commit or conceal the commission of an offense," or "[c]onstitutes evidence or tends to demonstrate that an offense was committed." Defendants are permitted to move to suppress such evidence if he or she "is aggrieved by [the] unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered against him [or her] in a criminal action." C.P.L. § 710.20. The substance of all definitions of probable cause is "reasonable grounds for belief of guilt." *Brinegar*, 338 U.S. at 175; *People v. Schnitzler*, 18 N.Y.2d 457, 459 (N.Y. Ct. App. 1966). Probable cause "exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Id.* (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

14. With regard to search warrants, the affidavit must not only relate facts that would cause a reasonable person to believe that a crime has been committed, but those facts must also cause a reasonable person to believe that evidence can be found in the place to be searched. *Illinois v. Gates*, 462 U.S. 213 (1983). The determination of whether probable cause exists is based on the totality of circumstances. *Id.* at 239; *People v. Graham*, 211 A.D.2d 55, 58 (N.Y. App. Div. 1995). Conclusory statements, as opposed to the recitation of specific facts, are insufficient to establish probable cause. *See Nathanson v. United States*, 290 U.S. 41 (1933); *People v. P.J. Video Inc.*, 68 N.Y.2d 296, 306 (N.Y. Ct. App. 1986).

15. In addition to the probable cause requirement, the Fourth Amendment also imposes a "particularity requirement," which demands that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV; *People v. Thompson*, 51 Misc.3d 693, 702 (N.Y. Sup. Ct. 2016). In *People v. Brown*, 96 N.Y.2d 80 (N.Y. Ct. App. 2001), the Court of Appeals found a search warrant authorizing the seizure of four specific items relevant to the defendant's alleged theft of a tractor along with "any other property the possession of which would be considered contraband" to be overbroad with respect to the particularity clause. In *People v. Yusko*, 45 A.D.2d 1043 (N.Y. App. Div. 1974), a warrant authorizing the search "for dangerous drugs including, but not limited to cocaine, heroin and marijuana as well as narcotics paraphernalia" was overbroad because the warrant affidavit provided probable cause to believe only that a letter containing cocaine would be recovered. In *People v. Couser*, 303 A.D.2d 981 (N.Y. App. Div. 2003), the Appellate Division found a warrant authorizing the seizure of "papers of [defendant]" relating to a specific homicide to be overbroad. The Court found the police had probable cause to search for three specific items and that this right did not permit the inference that they had probable cause to search for others. *Id.*

16. And most importantly, in *Thompson*, the state sought emails through a warrant in which the probable cause statement described a fraud scheme alleged to have occurred only in October and November 2009. *Thompson*, 51 Misc.3d at 707-08. In reviewing the warrant, Judge Conviser observed that the "affidavits provided no argument that emails outside this period might be relevant." *Id.* at 708. Even so, the warrant permitted seizure of *all* of the defendant's emails. *Id.* Quoting the Second Circuit, the court recognized that "there must be a heightened sensitivity to the particularity requirement in the context of digital searches" because the government, by necessity,

must make at least a cursory examination of numerous non-responsive communications to discover the particular content authorized by a warrant." *Id.* (quoting *United States v. Galpin*, 720 F.3d 436 (2d Cir. 2013)). Thus, it concluded the warrant was facially overbroad. *See also People v. Darling*, 95 N.Y.2d 530 (N.Y. Ct. App. 2000) ("[t]he particularity requirement reinforces the constitutional design by which the Judge and not the officer fixes the scope of the search. To minimize invasiveness, the Fourth Amendment requires that the Judge's directive be specific enough to leave no discretion to the executing officer").

17. Searches conducted pursuant to a warrant facially lacking in probable cause do not necessarily result in suppression of the fruits of such a search. As the Supreme Court announced in *United States v. Leon*, 468 U.S. 897 (1984), suppression is not appropriate where law enforcement acts in good-faith reliance upon a search warrant ultimately found to be unsupported by probable cause where the warrant was obtained from a neutral and detached judge, free from obvious defects other than non-deliberate errors in preparation and contains no material misrepresentations. *Id.* At the very least, the *Leon* exception is inapplicable in the following situations: (1) where the judge who issued the warrant was misled by information in the affidavit that the affiant knew was false or would have known was false except for the affiant's reckless disregard of the truth; (2) where the issuing judge wholly abandoned the judicial role; (3) where the affiant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the warrant was so facially deficient that the executing officers cannot reasonably presume it to be valid. *Id.*

18. Under *Franks*, if a defendant can demonstrate by a preponderance of the evidence that the signatory of a warrant affidavit made a false statement (or omitted a material fact) either intentionally or with reckless disregard for the truth, then a court will consider whether the content

of the affidavit, setting aside the false material (or including the omitted material), is sufficient to establish probable cause.

ii. The Fruits of the Search Should be Suppressed as the Complaint Lacked Sufficient Probable Cause.

19. In the first instance, the fruits of the search should be suppressed as the warrant lacked probable cause to search the entirety of the [redacted]s. As mentioned, the warrant sought permission [redacted] may exist, let alone facts sufficient to establish the existence of probable cause for that timeframe, any belief in the warrant's validity was objectively unreasonable. *Leon* is for that reason unavailing. Counsel therefore requests that the Court suppress in this, and any other criminal proceeding, any [redacted]

[redacted]

iii. Counsel Reserves the Right to Supplement This Motion With a Request for a Hearing Pursuant to *Franks v. Delaware*.

21. As set forth in the contemporaneously filed motion to compel discovery, there is a potentially significant volume of materials to which the defense is still seeking access. For example, pursuant to C.P.L. § 245.20(1)(k), counsel submits the state is required to produce any information or materials that "provide a basis for a motion to suppress evidence . . . irrespective of whether the prosecutor credits the information," "expeditiously" and "without delay." This material includes not [redacted], but any information that bears on his credibility as the affiant, as well as any and all information and materials pertaining to the purported [redacted]. Should such additional materials be produced subsequent to the filing of this motion, and in the event that they form a basis for requesting a hearing pursuant to *Franks v. Delaware*, *supra*, counsel will be promptly seeking leave to file such a motion on Mr. Weinstein's behalf. In the interim, Mr. Weinstein, through counsel, offers notice of his intention to reserve the right to do so.

C. Conclusion

22. Based on the foregoing, Mr. Weinstein, through counsel, respectfully requests that the Court suppress against him in this, and any other criminal proceeding, evidence illegally obtained from the February 23, 2018 search warrant; and further reserves his right to request a hearing pursuant to *Franks v. Delaware*, *supra*.

IV. Renewed Motion to Compel Discovery

Pursuant to C.P.L. § 245 *et seq.*, the Due Process and Effective Assistance of Counsel Provisions of the Constitution to the United States, analogous provisions contained in the Constitution of the State of New York, the principles enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *Agurs v. United States*, 427 U.S. 97 (1976), and *United States v. Bagley*, 473 U.S. 667 (1986), as well as other authority cited herein, Mr. Weinstein, through counsel, respectfully moves this Court to issue an order requiring the state to disclose any previously undisclosed evidence, information, documentation or materials known to the state or in its possession, custody, control, or the existence of which is known or by the exercise of reasonable diligence may become known, as described further herein.

A. Background

1. On August 12, 2019, counsel filed an affirmation in support of his request to compel discovery of certain materials specified therein. Those requests included, in summary: (1) [redacted] This request has been fully briefed and is awaiting ruling.

2. In the interim, the state returned to the grand jury and obtained Indictment No. 2673 / 2019. On August 26, 2019, Mr. Weinstein was arraigned on the new charges. At that time, *inter alia*, the trial date was adjourned until January 6, 2020.

3. On April 12, 2019, the New York Legislature repealed the presently-applicable statutory discovery scheme, C.P.L. § 240.10 *et seq.*, and replaced it with a new article, C.P.L. § 245 *et seq.* Both actions take effect and carry the force of law on January 1, 2020—five days prior to the presently scheduled trial date.

4. On September 26, 2019, the defense provided the District Attorney's Office with a formal request for all discovery to which Mr. Weinstein is entitled under § 245 *et seq.* A copy of that letter is attached hereto as Exhibit B. As of the date of this filing, the District Attorney's Office has not provided a substantive response. Mr. Weinstein, through counsel, now renews his request for the aforementioned materials set forth in his August 12, 2019 filing, moves the Court to order the state to produce any and all materials that Mr. Weinstein is entitled to under § 245 *et seq.*, and to order the District Attorney's Office to otherwise fully comply with the provisions set forth therein.

B. Discussion

5. As mentioned, § 245 *et seq.* takes effect January 1, 2020. The new law applies to any case pending on January 1, 2020, regardless of when it was commenced. The current discovery rules, C.P.L. § 240 *et seq.*, were expressly repealed with the passage of this Act and will lose the force of law on the same date prior to trial, January 1, 2020.

6. Importantly, when the New York Legislature implemented C.P.L. § 240 *et seq.*, it specifically directed as part of the legislation that the Act would be effective January 1, 1980, "except that the court may limit the application of any provision or provisions in actions which commenced prior thereto where such application would not be feasible or would work injustice." *See* L. 1979, ch. 412, § 4; *People v. Copicotto*, 50 N.Y.2d 222 (N.Y. 1980). The new law does *not* include any such limitation, which can be construed only as an intentional omission. *See, e.g., People v. Tychanski*, 78

N.Y.2d 909 (N.Y. Ct. App. 1991) ("[t]he failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended").

7. Moreover, at the very least, the state will be obligated by § 245.50, to file its certificate of compliance with the provisions of § 245 *et seq.*—including §§ 245.10 and 245.20(f)—prior to trial or else be deemed not ready for trial. The timing provisions, which the state will be required to certify compliance with, effectively stretch back well into the calendar year of 2019 through operation of the August 26, 2019 arraignment. To avoid any issues or delays, undersigned counsel prefers this and other such discovery matters be addressed as soon as practicable. Moreover, this matter is now being addressed with ample time and notice for the state to provide the soon-to-be required discovery.

8. Thus, in addition to the aforementioned requests described in the August 12, 2019 filing, Mr. Weinstein, through counsel, requests that the Court order compliance with the provisions of § 245 *et seq.* This request includes, but is not limited to, the following:

§ 245.10: Timing of Discovery

9. **§ 245.10(1)(a).** obligates the state to provide all required materials generally within 15 calendar days of the arraignment, and in any event "as soon as practicable." Given the unique posture this case presents in, *i.e.* the arraignment occurred well over 15 days ago, yet § 245.10 does not carry the force of law until January 1, 2020, the defense requests that the state be required to immediately and fully discharge its discovery obligations under § 245—especially given that it has been aware of the defense's request since September 26, 2019.

§ 245.20: Automatic Discovery

10. **§ 245.20(1)(b).** This provision requires production of all transcripts of the testimony of individuals who have testified before the grand jury within fifteen calendar days of the

arraignment. The defense respectfully requests that production of this material be ordered immediately.

11. **§ 245.20(1)(c).** This subsection creates a new disclosure requirement that the District Attorney's Office has not complied with to date. The defense further notes that this provision effectively requires the state to include "a designation . . . as to which of those persons may be called as a witness," in addition to simply providing the defense with the "names and adequate contact information for *all* persons . . . the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto" (emphasis added).

12. **§ 245.20(1)(d).** This provision has likewise yet to be complied with. Moreover, it is important to note that it applies to all law enforcement personnel who have relevant information, and regardless of whether the state intends to call that individual at trial, although the state is further required to divulge that information as well.

13. **§ 245.20(1)(e).** This provision contains perhaps one of the most significant changes to the discovery process. The District Attorney's Office is now required to provide, within the time constraints of § 240.10, "*all* statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to any potential defense thereto, including all police reports, notes of police and other investigators, and law enforcement agency reports" (emphasis added). There are certainly voluminous materials falling within this provision. Counsel further submits that this subsection should be read in tandem with the obligations set forth in § 245.20(1)(k), which expressly requires production of evidence or information to "impeach the credibility of a testifying prosecution witness" within 15 calendar days of the arraignment.

14. **§ 245.20(1)(f).** As noted in the contemporaneously described motion *in limine* to preclude the state from eliciting its proffered expert testimony, the defense submits that the state's expert notice dated January 18, 2019, was inadequate, even under the law as it stood before. Now, of course, expert disclosure requirements have broadened considerably, and indisputably beyond what the state has previously provided. Counsel thus requests the Court order the state to provide amended or supplemental notice that complies with § 245.20(f).

15. **§ 245.20(g).** This subsection requires that the state, in addition to tendering all recordings within the meaning of this subsection, provide an indication as to what, if any, it intends to introduce at trial.

16. **§ 245.20(1)(h)–(m).** Counsel reiterates Mr. Weinstein's request for the materials contemplated by these subsections, and notes the fact that Subsection (k) is not simply a codification of the state's *Brady* obligations–but much broader–and through operation of § 245.10, should already have been fully complied with. Furthermore, as referenced in the contemporaneously filed motion to suppress evidence, the state is required under § 245.20(1)(k) to produce any information or materials that "provide a basis for a motion to suppress evidence . . . irrespective of whether the prosecutor credits the information." Further still, this subsection contains a more stringent, organic timing provision requiring "expeditious" production, without "delay . . . [if such information] is obtained earlier than the time period for disclosure" under § 245.10. Counsel will further note that

This obligation, as with all provisions under § 245, should be discharged "with a presumption of openness in favor of disclosure." § 245.20(7).

17. **§ 245.20(1)(n).** To the extent there remain previously untendered warrant-related materials, production should occur immediately. Counsel will also draw attention to the state's obligation under § 245.55, and the fact that those obligations should be discharged with greater diligence—not just in light of the serious misconduct that has already been conceded during the course of the investigation into Mr. Weinstein—but further, in light of the City of New York's Department of Investigation's March 27, 2018 report regarding a number of serious inadequacies discovered with respect to the procedures and practices of the N.Y.P.D.'s Special Victims Unit—including readily observable limitations with its electronic case management system. *See id.* at p. 33.

18. **§ 245.20(1)(o).** Counsel reiterates Mr. Weinstein's request for compliance with this subsection, which effectively requires production of the state's exhibit list.

19. **§ 245.20(1)(p) – (t); (2); (3).** Again, counsel reiterates Mr. Weinstein's request for all applicable materials falling within these provisions.

20. **§ 245.35(3).** In light of the already-disclosed misconduct of former-lead Detective Nicholas DiGaudio, counsel requests that the Court exercise its discretion under this provision to order the state to file:

> an additional certificate of compliance that states that the prosecutor and/or an appropriate named agent has made reasonable inquiries of all police officers and other persons who have participated in investigating or evaluating the case about the existence of any favorable evidence or information within paragraph (k) of subdivision one of section 245.20 of this article, including such evidence or information that was not reduced to writing or otherwise memorialized or preserved as evidence, and has disclosed any such information to the defendant.

21. **§ 245.20(5).** The state has previously withheld and/or redacted a significant volume of material. To the extent it wishes to persist in withholding such material or refuses to furnish new, unredacted copies, counsel requests that the Court order the state to adhere to the procedures set forth in this provision; namely, to move for a protective order setting forth the basis for its declination with notice to the defense.

22. Finally, counsel submits that the instant motion is necessitated by the Supreme Court's decisions in *Agurs, supra*, and *Bagley, supra*. In those decisions, the Supreme Court enunciated the standard of review to be applied in cases of non-disclosure of favorable evidence, distinguished between cases in which specific requests for such information were made prior to trial and cases in which general requests or no requests were made. In *Bagley*, the Court held that the test for materiality of such non-disclosed evidence was the same, familiar standard—evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

23. The *Bagley* Court recognized, however, that "the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the non-disclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption." *Bagley*, 473 U.S. at 682-683. Therefore, "[t]he reviewing court should assess the possibility that [the preparation or presentation of the defendant's case may have been adversely affected] in light of the totality of the circumstances and with the awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." *Id.* at 683. It is requested that the Court's order, requiring the state to produce

such evidence, also provide that the state is under a continuing obligation to furnish all such evidence which comes to its attention during the preparation and trial of this case. Thus, this information is further necessary well in advance of trial so that counsel may adequately prepare for trial pursuant to his Sixth Amendment right to effective assistance of counsel.

C. Conclusion

24. Based on the foregoing, Mr. Weinstein, through counsel, renews his request for the aforementioned materials set forth in his August 12, 2019 filing, and moves the Court to order the state to produce any and all materials that Mr. Weinstein is entitled to under § 245 *et seq.*, to order the District Attorney's Office to otherwise comply with the provisions set forth therein, and to order the release and inspection of the grand jury minutes.

V. Motion In Limine to Preclude or Limit the Testimony of the State's Proffered Expert Witness.

Pursuant to the Due Process and Effective Assistance of Counsel Provisions of the Constitution to the United States, analogous provisions contained in the Constitution of the State of New York, as well as other authority cited herein, Mr. Weinstein, through counsel, respectfully moves this Court to enter an order precluding or limiting the testimony of the state's proffered expert witness, Dr. Barbara Ziv.

A. Background

In a notice filed under seal on January 18, 2019, the state indicated that it intends to call Dr. Barbara Ziv, a forensic psychiatrist, as an expert in the field of sexual assault. The notice began by describing Dr. Ziv's qualifications, which are listed in full in her *curriculum vitae* attached thereto as Exhibit 1. The state indicated, based both on Dr. Ziv's educational and professional background, that it will elicit testimony from her on specific topics. It claimed that those topics are documented in "the literature" yet embrace concepts that are beyond the common knowledge of the average juror's comprehension, such as: "(a) reasons why a victim will delay in disclosing a sexual assault, (b) factors that determine whether and how a victim will continue to communicate and/or interact with her attacker after an assault, and (c) a victim's lack of outward signs of trauma following an assault." *Id.* at p. 2. The state did not provide any definition or information concerning what "literature" Dr. Ziv would be relying upon. It did, however, aver that Dr. Ziv's testimony "is necessary to dispel several myths about sexual assault that continue to be prevalent in today's society, including the beliefs that (a) victims are usually raped by strangers, and that after the fact, rape victims (b) promptly report the crime to authorities, (c) display symptoms of trauma, and (d) never thereafter communicate or associate with their attackers." *Id.*

Before discussing how, in its view, New York case law supports the admission of Dr. Ziv's testimony, the state conceded:

> Dr. Ziv's testimony will be educational and explanatory in nature; she will not express an opinion on the above matters as they relate to this case, nor will she comment on the credibility of any of the complainant. She will not be asked to conclude that a complainant was sexually abused because she exhibited certain behaviors. Nor will she opine as to whether or not the defendant committed the crimes charged.
>
> Dr. Ziv's testimony will be based upon her approximately 30 years of experience in the field of forensic psychiatry and sexual assault, and on her research and writing.[11] The expert testimony offered in this case will only explain issues as they relate to the dynamics of sexual assault. *Id.*

Later, in attempting to demonstrate the relevance of this testimony, the state argued:

> Dr. Ziv's testimony is highly relevant to issues in the instant case that are certainly beyond the ken of an average juror. The victims in this matter did not disclose the assaults for several years. The defendant controlled and held most, if not all, of the power in their inter-actions. They also, to varying degrees, continued to interact with the defendant after the assaults occurred and their immediate reactions to the assaults may be inconsistent with how the jurors expect someone to behave in such circumstances. Jurors may evaluate the credibility of the complainants based on assumptions that victims of sexual assault will promptly report the abuse, will shun the abuser, and will exhibit obvious signs of psychological harm. Scientific studies demonstrate otherwise, and this is precisely what Dr. Ziv will explain to the jury.
>
> Indeed, Dr. Ziv's testimony is especially relevant in light of the defendant's very public efforts to undermine the complainants by employing the very same assumptions that her research and experience show are unfounded. The defendant, in his numerous filings with this Court and in various public statements, has repeatedly stated that because the complainants failed to timely report the assaults, continued to communicate and associate with him, and showed no outward signs of trauma, they must be lying. These propositions are contradicted by studies and evidence that are generally accepted in the scientific community. To require the people and the complainants to endure these arguments without an opportunity to rebut them would be unfair under the particular circumstances of this case. *Id.* at pp. 4-5.

[11] Although the state expressly indicated that Dr. Ziv's opinion testimony will be based, in part, on her own research and writing, it appears that Dr. Ziv has never conducted any relevant research or writing on the topic areas or subject matter that she will be testifying regarding. Dr. Ziv admitted as much during her April 10, 2018 testimony in the Bill Crosby trial, *Commonwealth v. Cosby*, No. 3932-16, and none are listed in her 11-page *curriculum vitae* attached as an exhibit to the state's notice.

Undersigned counsel has since reached out to Dr. Ziv in an attempt to gain an understanding as to what "literature" and other scholarly materials she will be basing her testimony. In response, Dr. Ziv indicated only that she will be relying on "relevant scholarly literature in the field," without specifying the "field" to which she was referring, that the "articles and books" she relies upon while teaching "number in the hundreds," and that such articles "are readily available on PubMed and books can be found on-line or in a library." In other words, Dr. Ziv responded in such vague and general terms so as to effectively offer no clarification.

For the reasons set forth below, Mr. Weinstein, through counsel, respectfully requests that the Court enter an order precluding or limiting the testimony of Dr. Barbara Ziv.[12]

B. Discussion

i. Legal Background

The New York Court's Evidence Committee's Guide to Rule 701(1) of the New York Rules of Evidence effectively summarizes the foundational requirements for expert opinion testimony. It states that such testimony is permitted where a properly qualified expert offers an opinion concerning specialized knowledge if:

> (a) the subject matter is beyond the knowledge or understanding, or will dispel misconceptions, of a typical finder of fact; and
>
> (b) the testimony will help the finder of fact to understand the evidence or determine a fact in issue, especially when the facts cannot be stated or described in such a

[12] Former counsel for Mr. Weinstein previously filed a notice of opposition to Dr. Ziv's proffered testimony. [redacted]. Respectfully, prior counsel did not raise these arguments concerning Dr. Ziv in their specificity or in any manner of detail; prior counsel did not have access to the evidence and information that is, in part, relied upon as the basis of this motion; the state has subsequently re-presented the case to the grand jury and received a new indictment; new disclosure requirements have subsequently taken effect given the trial's adjournment until January 6, 2019; and, of course, evidentiary objections can still be raised up to and during trial.

manner as to enable the finder of fact to form an accurate judgment about the subject matter.

Where the subject matter of expert testimony is not based on personal experience, it must be or have been established that:

(a) there is general acceptance within the relevant scientific community of the validity of the theory or principle underlying the procedure, test, or experiment;

(b) there is general acceptance with-in the relevant scientific community that the procedure, test, or experiment is reliable and pro-duces accurate results; and

(c) the particular procedure, test, or experiment was conducted in such a way as to yield an accurate result. N.Y. R. Evid. 701(2).

Even so, the State of New York has long been skeptical of the use of expert testimony; and in particular, the deleterious impact "hired guns" can have on the fair and just determination of any given cause. As Justice William Allen described nearly a century-and-a-half ago:

> As a rule, witnesses must state facts, and not draw conclusions, or give opinions. It is the duty of the jury, or court, to draw conclusions from the evidence, and form opinions upon the facts proved. The cases in which opinions of witnesses are allowable, constitute exceptions to the general rule, and the exceptions are not to be extended or enlarged, so as to include new cases, except as a necessity to prevent a failure of justice, and when better evidence cannot be had. *Teerpenning v. Corn Exch. Ins. Co.*, 43 N.Y. 279, 281 (N.Y. Ct. App. 1871).

And, as Justice Earl cautioned still well over a century ago:

> The rules admitting the opinions of experts should not be unnecessarily extended. Experience has shown that it is much safer to confine the testimony of witnesses to facts in all cases where that is practicable and leave the jury to exercise their judgment and experience upon the facts proved. Where witnesses testify to facts they may be specifically contradicted, and if they testify falsely, they are liable to punishment for perjury. But they may give false opinions without the fear of punishment. It is generally safer to take the judgments of unskilled jurors than the opinions of hired and generally biased experts. *Ferguson v. Hubbel*, 97 N.Y. 507, 514 (N.Y. 1884).

Keeping with these principles, over the years, the permissible bounds of expert opinion testimony have been substantially curtailed, and limited to situations where "the jury may be aided,

but not displaced of its fact-finding function . . . where there is reason to suppose that such testimony will elucidate some material aspect of the case that would otherwise resist comprehension by jurors of ordinary training and intelligence." *People v. Inoa*, 25 N.Y.3d 466, 472 (N.Y. Ct. App. 2015) (citing *People v. Cronin*, 60 N.Y.2d 430, 432-33 (N.Y. Ct. App. 1983) ("admissibility turns on whether, given the nature of the subject, 'the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable'")) (internal citations omitted). Ultimately, it is for the trial court "to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness." *Id.* at 433.

ii. The State's Notice is Inadequate and Insufficient as a Threshold Matter.

a. Legal Standard

As a threshold matter, counsel respectfully submits that the state's notice of its intent to elicit Dr. Ziv's purported expert opinion testimony on the subject of sexual assault is inadequate and insufficient under the current rules, but even more so under C.P.L. § 245 *et seq.* It is the latter that will be effective come trial and should govern this analysis. Even though the state's notice was filed on January 18, 2019, § 245 *et seq.* takes effect January 1, 2020. The new law applies to any case pending on January 1, 2020, regardless of when it was commenced. The current discovery rules, C.P.L. § 240 *et seq.*, were expressly repealed with the passage of this Act and will lose the force of law.

It is also noteworthy that when the New York Legislature implemented C.P.L. § 240 *et seq.*, it specifically directed as part of the legislation that the Act would be effective January 1, 1980,

"except that the court may limit the application of any provision or provisions in actions which commenced prior thereto where such application would not be feasible or would work injustice." *See* L. 1979, ch. 412, § 4; *People v. Copicotto*, 50 N.Y.2d 222 (N.Y. Ct. App. 1980). The new law does *not* include any such limitation, which can be construed only as an intentional omission. *See, e.g., People v. Tychanski*, 78 N.Y.2d 909 (N.Y. Ct. App. 1991) ("[t]he failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended").

Moreover, at the very least, the state will be obligated by § 245.50, to file its certificate of compliance with the provisions of § 245 *et seq.*—including §§ 245.10 and 245.20(f)—prior to trial or else be deemed not ready for trial. The timing provisions of course, which the state will be required to certify compliance with, stretch back well into the year 2019. To avoid any issues or delays, the defense prefers this and other such discovery matters are addressed as soon as practicable. Moreover, this matter is now being addressed with ample time and notice for the state to provide the soon-to-be required discovery. Absent compliance, the state should be procedurally barred from calling this witness at trial.

Thus, the state is obligated to disclose "the name, business address, current curriculum vitae, a list of publications, and all proficiency tests and results administered or taken within the past ten years of each expert witness whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, and all reports prepared by the expert that pertain to the case." C.P.L. § 245.50(f). Moreover, such as with Dr. Ziv, where no report is prepared, the state is further obligated to produce "a written statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." *Id.*

b. Discussion

Here, the state referenced the fact that Dr. Ziv will be discussing the aforementioned topics that "are documented in the literature," without providing any further definition as to what "literature" she and the state intend to refer to. *See* State's Notice, p. 2. It also referenced the fact that Dr. Ziv will be relying on her own research and writing. *See id.* As described above, *supra* n. 1, Dr. Ziv has not in fact conducted any relevant research or writing on the topic areas of her testimony that will inform or otherwise ground her opinions.[13] The state further indicated that Dr. Ziv will be relying on the aforementioned, unspecified "literature," as well as her "30 years of experience in the field of forensic psychiatry and sexual assault." *Id.* In doing so, it drew no distinction between what areas of testimony will be based on her education and academic materials, what will be predicated on her practical experience, and what will be derived from both academic and clinical expertise—as is required. Next, and perhaps most importantly, the state did not offer any indication as to what Dr. Ziv's opinions will in fact entail; instead, it provided only the "topics" on which she will opine, and four generic "myths" her testimony is intended to dispel. *See id.* at p. 2, 4-5.

Suffice to say, the state's disclosure fails to comport with § 245.20(f) or otherwise provide a basis sufficient to even conditionally satisfy the foundational requirements as described by Rule 701.

[13] As the subject matter of Dr. Ziv's testimony is based "on her research and writing," as well as "experience in the field of forensic psychiatry," and yet not case-specific, but general, entirely "educational" and is offered only to "explain issues as they relate to the dynamics of sexual assault," virtually every prior statement of Dr. Ziv's on the subject *generally*—whether in a prior writing or research (as the state specifically references), a television appearance, former testimony, etc.—falls within the state's disclosure obligation as set forth in *People v. Rosario*, 9 N.Y.2d 286 (N.Y. Ct. App. 1961). *See People v. Lamb*, 59 Misc. 3d 699 (2018) (Marcelle, J.) (citing *People v. Asario*, 21 N.Y.3d 677, 362-83 (N.Y. Ct. App. 2013) (recognizing expert witness statements fall within the purview of *Rosario*)). To be clear, counsel is formally demanding the production of any and all such material.

Thus, counsel respectfully requests that the Court enter an order precluding Dr. Ziv's testimony in its entirety absent a sufficient disclosure.

iii. A *Frye* Hearing is Necessary to Determine Whether Dr. Ziv's Proposed Testimony is the Product of Generally Accepted Principles and Methods.

There is no dispute that "[a]bsent a novel or experimental theory, a *Frye* hearing is generally unwarranted." *People v. Brooks*, 31 N.Y.3d 939, 941 (N.Y. Ct. App. 2018). Nor does counsel disagree that the need for a *Frye* hearing is generally obviated where an expert intends to base his or her opinion on personal training or experience. *People v. Oddone*, 22 N.Y.3d 369, 275 (N.Y. Ct. App. 2013). A simple reference to "personal experience" does not, however, end the inquiry. As former Justice Robert S. Smith observed:

> We acknowledge that it may not be possible to draw a neat line between scientific principles and experience-based testimony. Indeed, it has been observed that the many cases applying *Frye* to evidence based on scientific principles shed little light on exactly what a "scientific principle" is . . . We do not imply that an expert is allowed to say anything he or she likes to a jury if the statement is prefaced by the words "in my experience." To allow an expert to say, based only on his or her alleged experience, that smoking does not cause lung cancer or that baldness is related to the phases of the moon would be to tolerate the admission of junk science and to undermine the basic purpose of *Frye*. *Id.*

To resolve this concern, the Court of Appeals guides trial courts to consider "the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case." *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 447 (N.Y. Ct. App. 2006). Foundation, in turn, is lacking if "there is simply too great an analytical gap between the data and the opinion proffered." *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762, 781 (N.Y. Ct. App. 2014) (internal quotations and citations omitted). The trial court's determination on this point should turn on whether the expert's opinion sufficiently relates

to existing data or, to the contrary, "is connected to existing data only by the *ipse dixit* of the expert." *People v. Brooks*, 31 N.Y.3d 939, 941 (N.Y. Ct. App. 2018).

Given the inadequacy of the state's disclosure, it follows that the Court and counsel are left with no means of making a discriminating appraisal as to whether Dr. Ziv's opinions—whatever they may be—require a *Frye* hearing or otherwise satisfy the necessary foundational requirements for the use of expert opinion testimony. As mentioned, the state has not indicated the substance of Dr. Ziv's testimony, but primarily the "topics" that her opinions will cover. Nor has the state indicated what areas of her testimony will be supported by "literature," and which will be supported by her "practical" experience. This is a standalone reason to require a *Frye* hearing, again, absent a more sufficient disclosure.

As to the specific topics, counsel has not located any New York case law, and the state has not cited any, recognizing a list of "factors" that "determine whether and how a victim will continue to communicate and/or interact with her attacker after an assault" that are generally accepted within the relevant scientific community. Instead, the state refers to these "factors" having been documented in "literature," but again, does not cite any authority or even actual literature to support its assertion. *See* State's Notice, p. 2.

Nor has the state demonstrated that the belief that "victims are usually raped by strangers" or "never thereafter communicate or associate with their attackers" are both misconceptions "supported by literature," or that any studies contained in said "literature" are the product of generally accepted scientific principles or methods, or again, what "literature" it is referring to in the first instance. *See id.* In the same vein, the state's failure to specify what "symptoms of trauma"

victims, in turn, often fail to display, or the prevalence of social beliefs to the contrary, wrecks upon the same foundational rocks necessitating a *Frye* hearing.

To be clear, to counsel's knowledge, no New York court has recognized any of the specific topic areas referenced above as satisfying the foundational requirements of *Frye*. Nor did the state—the proponent of this evidence—identify any such holding in its notice.

Moreover, in *People v. Bennett*, 79 N.Y.2d 464 (N.Y. Ct. App. 1992), the Court of Appeals considered the propriety of expert testimony regarding "rape trauma syndrome," the same umbrella term that loosely describes the collection of topics, behaviors, reactions, etc. that Dr. Ziv is being offered to opine about. It noted that, while the parties did not initially raise the issue, there remains an open question as to whether the propriety of expert testimony on the subject of rape trauma syndrome is affected where the instant allegations concern lesser, *non-consensual sexual conduct*, as opposed to *forcible rape*. *Id.* at 473 n. 3. As the Court is aware from both the [redacted] For this reason alone, as well as those articulated above, counsel respectfully requests that the Court hold a *Frye* hearing.

iv. The Subject Matter of the Proposed Expert Testimony is Not Beyond the Common Understanding of a Typical Juror.

Counsel submits that Dr. Ziv's opinion testimony should be barred because it will not touch upon behaviors, reactions, symptoms, etc. that are beyond the knowledge or understanding of a typical or ordinary juror, as: the CW's post-event behaviors and reactions are inapposite the behaviors Dr. Ziv will describe; and the specific topic areas of the "misconception" that "victims are usually raped by strangers" and "factors" that "determine whether and how a victim will continue to

communicate and/or interact" with her attackers are not and have never been found to be beyond the ordinary ken of typical jurors.

a. Legal Standard

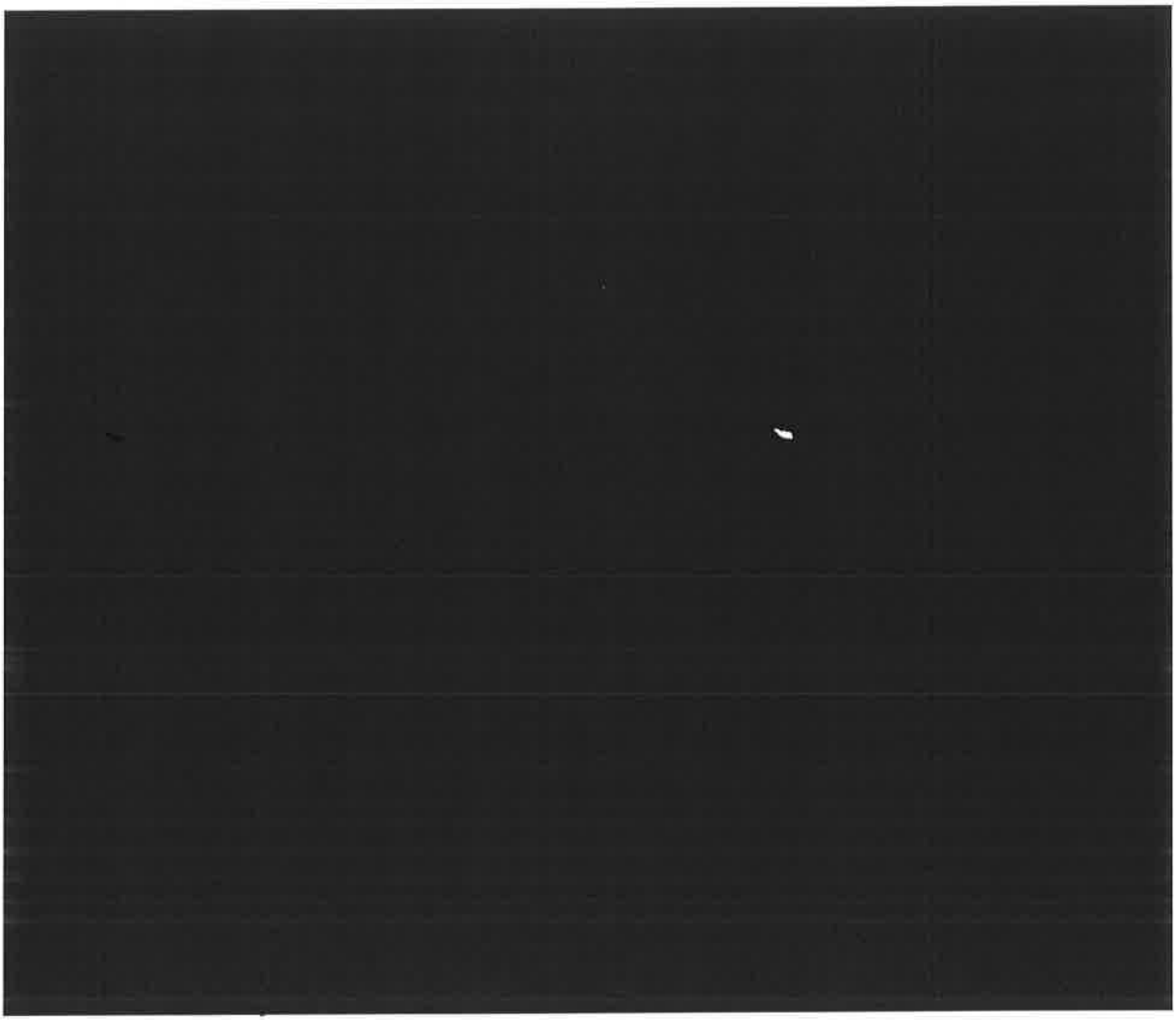
As discussed herein, New York jurisprudence reflects a long-held distrust of the use of expert opinion testimony: "[i]t is generally safer to take the judgments of unskilled jurors than the opinions of hired and generally biased experts." *Ferguson*, 97 N.Y.2d at 514; *see also Teerpenning*, 43 N.Y. at 281. With that sentiment in mind, this state has long imposed a "necessity" requirement limiting the use of experts, which, in contemporary times, has been subsumed by the requirement that such opinions "help clarify an issue calling for professional or technical knowledge, possessed by the expert, and beyond the ken of the typical juror." *Bennett*, 79 N.Y.2d at 473 (internal quotations and citations omitted); *see also, e.g.*, *People v. Rivers*, 18 N.Y.3d 222, 228 (N.Y. Ct. App. 2011) ("[t]he guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror"); *People v. LeGrand*, 8 N.Y.3d 449, 455-456 (N.Y. Ct. App. 2007) ("[a] court's exercise of discretion depends largely on whether jurors, after the court considers their day-to-day experience, their common observation and their knowledge, would benefit from the specialized knowledge of an expert witness") (internal quotations omitted); *People v. Keindl*, 68 N.Y.2d 410, 422 (N.Y. Ct. App. 1986) ("[o]pinion testimony of an expert witness is admissible where the conclusions to be drawn depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence"). Due to the serious risk of prejudice that exists with respect to expert testimony on the subject of rape trauma syndrome and related matters, such testimony has been admitted only where it relates to *unusual*, or counterintuitive, *post-assault behaviors* exhibited by

victims. *See, e.g., People v. Taylor*, 75 N.Y.2d 277, 293 (N.Y. Ct. App. 1990); *Bennett*, 79 N.Y.2d at 472. Ultimately, it is for the trial court "to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness." *Cronin*, 60 N.Y.2d at 433.

b. The Specific Facts of this Case, Including the CWs' Post-Event Behaviors, are Not Beyond the Common Understanding of Ordinary Jurors.

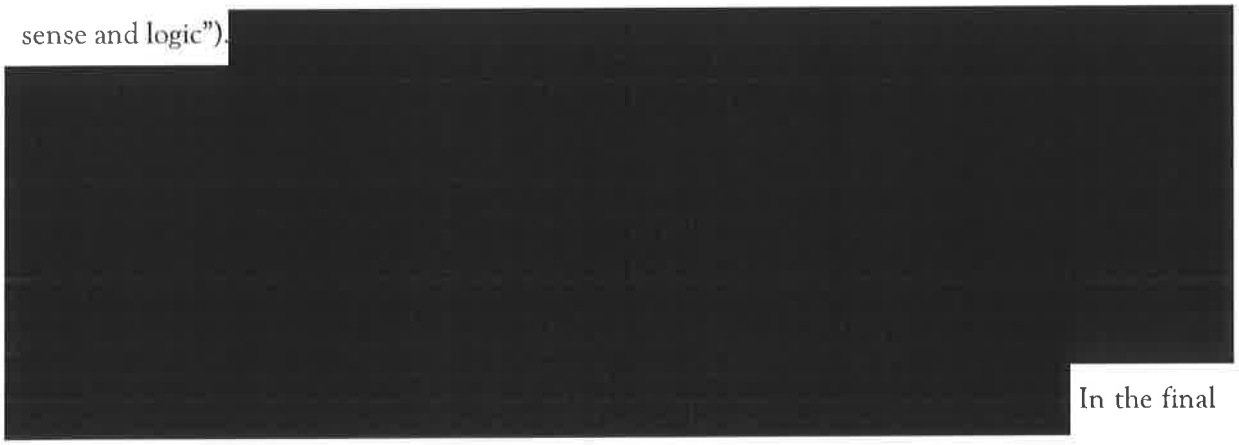
Although expert opinion testimony concerning rape trauma syndrome may be admissible in limited situations, its "usefulness as a fact-finding device [may be] limited." *Taylor*, 75 N.Y.2d at 293. For that reason, and given the high degree of prejudice such testimony may carry, the determination regarding its admissibility is necessarily "fact-intensive." *Bennett*, 79 N.Y.2d at 473. Turning to the instant matter, then, it becomes clear after considering the actual post-event behaviors the CWs will testify to, the nature of the alleged assaults, their claimed relationships with Mr. Weinstein, and other relevant circumstances likely to be adduced at trial, that the behaviors, actions, responses, etc. of the CWs will not at all be prone to misconception or beyond the understanding of common jurors; rather, such testimony would prove readily understandable, regardless of whether it is accepted or not.

First, and while in no way conceding the admissibility of such evidence, the state and its complainants will likely attempt to attribute their delayed disclosure, maintenance of a relationship with Mr. Weinstein, and other traditional credibility concerns to Mr. Weinstein's perceived power and influence. For example, [redacted]



The foregoing reveals that there is nothing "unusual," counterintuitive, or irrational about the CWs' alleged post-incident behavior—and certainly nothing about their behavior that the typical juror is uncapable 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 against Mr. Weinstein, is plain and obvious, and demonstrates that there is no need to allow the state's career expert to explain something well within the jury's common-sense and lived experiences. *See, e.g., People v. White*, 4 Misc.3d 797, 799-81 (N.Y. Sup. Ct. 2004) (George, J.) (holding, *inter alia*, expert

testimony regarding battered women syndrome to explain a CW'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").



In the final analysis, the jury will be capable of grasping the theories put before it: either these CWs were rationally afraid and reticent of Mr. Weinstein and the repercussions of making an accusation against an individual as powerful, influential, and connected as he is, or they did not report him to authorities because there was nothing criminal to report to authorities. As the Court noted in *White*, 4 Misc.3d at 803 n. 5, any lingering concern regarding the particular beliefs of any given prospective juror can be cured by either party during the course of the intensive *voir dire* process.

c. The "Misconception" that "Victims Are Usually Raped by Strangers" and "Factors that Determine Whether and How a Victim Will Continue to Communicate and/or Interact" With Her Attackers.

The ostensible misconception that "victims are usually raped by strangers," or conversely, the notion that sexual assault victims are usually raped by individuals with whom they are familiar, and various factors that determine whether and how a victim will continue to communicate and/or interact with an attacker are both proposed areas of testimony for Dr. Ziv that, notwithstanding the other arguments advanced herein, should be precluded, as those topics themselves are within the common understanding of a typical juror.

As to the "factors," the state has not specified what "factors" Dr. Ziv will in fact be referring to. Certainly counsel, the Court, and ordinary jurors alike could all come up with a list of such factors based on common sense and everyday logic alone. Absent further definition from the state—or any definition at all—the Court and counsel are left without a basis to assess the necessity of Dr. Ziv's proposed testimony on this topic, whatever it may be, and thus it should be conditionally barred.

But moreover, the state has not cited any authority recognizing these subjects to be beyond the common understanding of ordinary jurors, and nor could it. *See, e.g., Taylor, supra* (*inter alia*, upholding rape trauma syndrome testimony regarding a victim's subsequent demeanor and unwillingness to identify attacker); *Bennett*, 79 N.Y.2d at 464 (*inter alia*, upholding the use of expert testimony to explain "unusual" post-assault behavior); *People v. Spicola*, 16 N.Y.3d 411, 453 (N.Y. Ct. App. 2011) (admitting expert testimony on "CSAAS" to explain minor's six or seven year delay in disclosing assault); *People v. Mercado*, 188 A.D.2d 941, 942-43 (N.Y. App. Div. 1992) (finding expert testimony regarding rape trauma syndrome improper to show "the manifestations of sexual abuse that the [complainants'] exhibit"); *White*, 4 Misc.3d at 800-801) (recognizing, *inter alia*, greater possible need of such testimony in cases involving minors as opposed to adults); *Keindl*, 68 N.Y.2d at 422 (permitting expert testimony regarding delayed disclosure); *People v. Carroll*, 95 N.Y.2d 375, 387 (N.Y. Ct. App. 2000) (permitting expert testimony regarding CSAAS in order to explain delayed disclosure); *People v. Abrams*, 232 A.D.2d 240 (N.Y. App. Div. 1996) (upholding expert testimony explaining post-incident behavior); *People v. Maymi*, 198 A.D.2d 153 (N.Y. App. Div. 1993) (upholding expert testimony explaining why victim would disclose to boyfriend but not her mother until two weeks later).

In any event, both of these topic areas embody plain concepts that typical jurors, by listening to the evidence, applying their day-to-day experiences, and carefully scrutinizing the parties' arguments, will logically grasp without the need of the state's hired expert. Thus, the state should be precluded from eliciting this testimony notwithstanding any other arguments advanced herein.

v. The Potential Value of Dr. Ziv's Testimony is Substantially Outweighed by the Danger of Unfair Prejudice.

a. Introduction

Although *Taylor*, *supra*, is often cited as the seminal case recognizing the admissibility of expert testimony regarding rape trauma syndrome, in that opinion, the Court of Appeals nonetheless cautioned that such testimony's "usefulness as a fact-finding device is limited." *Id.* at 293-294. It further noted in that opinion, and further still in *Bennett*, that the admissibility of such testimony *always* requires a "fact-intensive" determination as to whether such testimony's potential value outweighs the possibility of undue prejudice to the defendant. *Bennett*, 79 N.Y.2d at 473. Under the facts of this case, the balancing tilts heavily in favor of exclusion, and moreover, as will be described further herein, categorically requires that Dr. Ziv's testimony be precluded. First, Dr. Ziv's proffered testimony is of little, if any relevance or value in this cause, given that the CWs' responses and behaviors, if believed, are entirely rational and within the ordinary understanding of common jurors, and will conflict with Dr. Ziv's pathologizing testimony that will necessarily be superimposed onto CWs she has never met, examined, or ever had any interaction with. Second, as to prejudice, New York Courts have recognized two specific sources of prejudice unique to expert testimony on rape trauma syndrome: (1) the danger that such expert testimony will be used to prove an incident in fact occurred; and (2) its use in an attempt to bolster the credibility of the CWs. Both are categorically improper. Here, as will be discussed, [redacted]

[redacted] amount to an impermissible commentary on CW2's behaviors and interactions *at the time of the charged conduct.*[14] For the same reason, the specific topic area of [redacted] So, too, even before turning to the facts of this case, will Dr. Ziv's testimony attempting to dispel the myth that "victims are usually raped by strangers."

b. Legal Standard

As touched upon above, although *Taylor*, *supra*, is the seminal case authorizing the admission of expert opinion testimony concerning rape trauma syndrome, it was not without its proscriptions and limitations. In *Taylor*, shortly after the complainant was raped, the same evening, she told her mother and identified the defendant, but then initially told the police that she did not know who her attacker was. *Id.* at 282. A prosecution expert testified about rape trauma syndrome to explain "why the complainant might have been unwilling during the first few hours after the attack to name the defendant," and to demonstrate that "it was common for a rape victim to appear quiet and controlled following an attack" in order to rebut the inference that because she was not excited or upset she was fabricating the incident. *Id.* at 283.

In *Banks*, the minor complainant told her grandmother about the rape the following day, and had experienced nightmares, cold sweats, a fear of returning to school, and a fear of leaving the home. *Id.* at 284. The state called a rape trauma syndrome expert "in an effort to establish that

[redacted]

forcible sexual contact had occurred," by showing that "the complainant was demonstrating behavior that was consistent with the response exhibited by rape victims," but not to "counter the inference that the complainant consented to the incident," since the complainant was 11-years-old. *Id.*

After describing the phenomena and behaviors associated with rape trauma syndrome, as well as various sources recognizing the validity of the syndrome, the Court of Appeals held that "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." *Id.* at 286. It noted, however:

> We are aware that rape trauma syndrome is a therapeutic and not a legal concept. Physicians and rape counselors who treat victims of sexual assault are not charged with the responsibility of ascertaining whether the victim is telling the truth when she says that a rape occurred. That is part of the truth-finding process implicated in a criminal trial. We do not believe, however, that the therapeutic origin of the syndrome renders it unreliable for trial purposes. Thus, although we acknowledge that evidence of rape trauma syndrome does not by itself prove that the complainant was raped, we believe that this should not preclude its admissibility into evidence at trial when relevance to a particular disputed issue has been demonstrated. *Id.* at 287.

As "the reason why the testimony is offered will determine its helpfulness, its relevance and its potential for prejudice," *id.* at 292, the Court, as it necessarily must have, then turned to the facts of the case before it. In *Taylor*, the Court held that the expert testimony regarding why the complainant was fearful of disclosing the assailant's name was proper because it is not within the ordinary understanding of the jury, and that such "evidence provides a possible explanation of the complainant's behavior that is consistent with her claim that she was raped." *Id.* at 292-93. For the same reason, and to rebut the defense inference on the point, the Court likewise held expert testimony concerning her calm demeanor following the attack to be proper. *Id.* at 293.

In *Banks*, however, introduction of the expert testimony was "clearly error." *Id.* The Court noted that "this evidence was not offered to explain behavior that might appear unusual to a lay juror not ordinarily familiar with the patterns of response exhibited by rape victims," and that "it

inescapably bears solely on proving that a rape occurred." *Id.* Before concluding, the Court further explained its holding as follows:

> Although we have accepted that rape produces identifiable symptoms in rape victims, we do not believe that evidence of the presence, or indeed of the absence, of those symptoms necessarily indicates that the incident did or did not occur. Because introduction of rape trauma syndrome evidence by an expert might create such an inference in the minds of lay jurors, we find that the defendant would be unacceptably prejudiced by the introduction of rape trauma syndrome evidence for that purpose alone. We emphasize again that the therapeutic nature of the syndrome does not preclude its admission into evidence under all circumstances. We believe, however, that its usefulness as a fact-finding device is limited and that where it is introduced to prove the crime took place, its helpfulness is outweighed by the possibility of undue prejudice. Therefore, the trial court erred in permitting the admission of expert testimony regarding rape trauma syndrome under the facts present in *Banks*. *Id.* at 293-94.

In *Bennett*, *supra*, the Court considered the propriety of expert testimony regarding rape trauma syndrome after the complainant was raped by a police officer. She testified, *inter alia*, to having been pulled over by the officer and non-consensually fondled, following him to a station, and her subsequent fears and beliefs regarding the futility and danger of escape. *Id.* at 464. She also testified as to her post-incident symptoms, including being unable to eat or sleep, and contacting a local rape crisis center two days later. *Id.* at 467. At trial, the expert answered a number of hypotheticals, including how a rape victim would react both during and after the alleged assault. *Id.* at 472.

The Court held, citing *Taylor*, that the expert's testimony concerning the complainant's post-incident "unusual" behavior was proper. *Id.* at 472. It noted, however, that the expert's testimony touching on the complainant's reaction as the incident unfolded is distinguishable from rape trauma syndrome, as it did not exclusively explain *post-rape* behavior. *Id.* Having reversed on other issues, the Court instructed, without ruling, that the foundation for such testimony should be reconsidered by the trial court.

In further discussing the propriety of such expert testimony, the Court reiterated that expert evidence is proper to help "clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror," but that "expert opinion is inadmissible when introduced merely to prove that a sexual assault took place," or to "bolster a witness's credibility." *Id.* at 473 (citing, in part, *People v. Ciaccio*, 47 N.Y.2d 431 (N.Y. Ct. App. 1979)). In describing the proper inquiry, the Court stated the following:

> [S]hould similar expert testimony be proffered at a retrial of this case, and objection voiced, the trial court would be called upon to make two determinations not previously made: first, whether the evidence has the requisite scientific basis, and second, whether its potential value outweighs the possibility of undue prejudice to defendant or interference with the jury's province to determine credibility. In that these determinations are fact-intensive, and the outcome may vary with the scope and form of actual questioning, at this juncture we merely identify the issues, which—contrary to the observation of the Appellate Division—were not addressed in *Taylor*. *Id.*

In *White*, 4 Misc.3d at 797, Justice George observed that New York Courts generally consider the following factors in weighing the admissibility of expert testimony regarding battered woman syndrome:

> (1) whether the evidence presented by the expert witness has the required scientific basis for admission, (2) whether the jurors are not able to evaluate and draw conclusions from the evidence based on their day-to-day experiences, their common observation and their knowledge, and would benefit from the specialized knowledge on an expert witness, and (3) whether the probative worth of the expert's testimony outweighs the possibility of undue prejudice to the defendant or interferes with the jury's province to determine credibility.

It further noted the propriety of limiting expert opinion testimony regarding the complainant's status as a battered woman "because of the profound danger that the jury will infer from the BWS testimony that the defendant committed the crime charged or that the jury will unduly use BWS testimony to improperly bolster the complainant's credibility." *Id.* at 800-801.

The Court ultimately precluded the state's expert from testifying as to why a battered woman would delay reporting because "none of the facts apparent in this particular case outside of a jury's common sense and logic." *Id.* It further noted that the danger of the jury misunderstanding children's behavior is far greater than that of adults, and with respect to battered women, such testimony creates the possibility of inferring the presence of past, uncharged crimes. *Id.* Thus, such testimony "is inadmissible as a matter of law where it is used as an affirmative weapon against a defendant," and would contravene the protections afforded by *Molineux*. *Id.* Finally, on the facts before it, the Court found that the ability to understand the complainant's delay was "well within [the jury's] bounds and exercise of common sense." *Id.* at 802.

The foregoing discussion is not simply academic. As described, a careful weighing of the relevance or value of such expert testimony against its potential prejudicial effect—including whether the testimony tends to prove whether or not a rape in fact occurred or amounts to commentary on a CW's credibility—takes on heightened necessity given the inherent dangers such testimony presents.

c. The Potential Value or Relevance of Dr. Ziv's Testimony is Minimal, if Any.

As to the substance of the balancing itself, Dr. Ziv's proposed testimony has minimal value, if any, given the specific facts of the instant matter. Counsel described above the manner in which the CWs' anticipated testimony and explanation for the post-event behavior, such as their explanation for delaying disclosure to the extent that they did, or why they chose to remain on positive terms with Mr. Weinstein, etc., will center on their purported fear of Mr. Weinstein's power, influence, as based on their own experiences, beliefs, and perceptions of how such actions would affect their careers. If accepted, given that such fear would prove eminently rational, logical, and

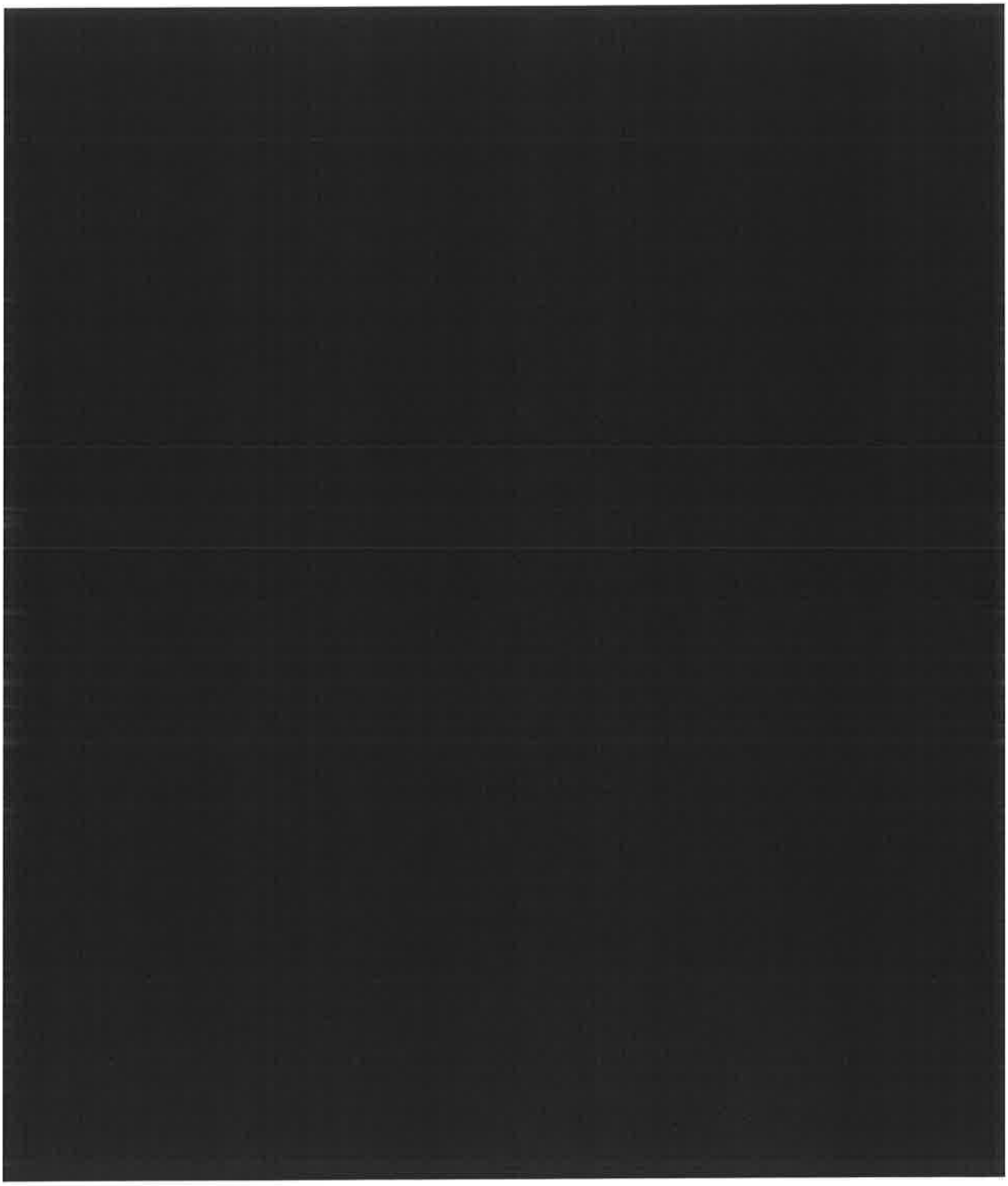
even expected, their post-event reactions, behaviors, and symptoms are more than capable of being understood by the jury. That point itself undermines the potential relevance or value of Dr. Ziv's proffered testimony.

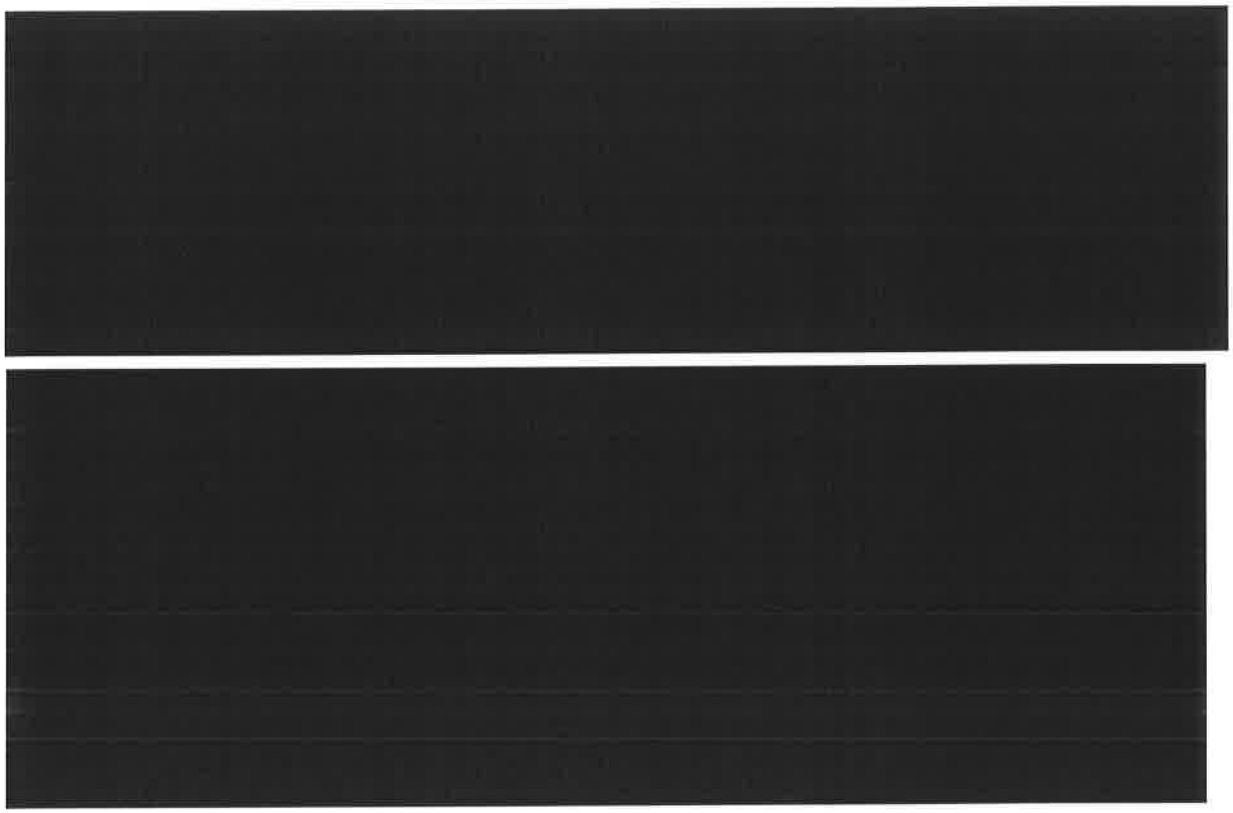
But moreover, by offering a third rail explanation of ostensibly misunderstood, "unusual" trauma symptoms not even grasped by the CWs themselves—and offered through an expert who has never treated, never examined, or never even spoken to these CWs—the risk of juror confusion amplifies beyond acceptable limits. Suffice to say, Dr. Ziv's intentional and necessary ignorance of the facts of the instant matter further removes her testimony of whatever conditional relevance the state may have otherwise claimed for it.

d. The Danger of Unfair Prejudice Substantially Outweighs Any Value of Dr. Ziv's Testimony.

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 an incident in fact occurred; and (2) its use in an attempt to bolster the credibility of the CWs. Both are categorically improper. *See, e.g.*, *Taylor*, 75 N.Y.2d at 293 (expert testimony improper where it "bears solely on proving that a rape occurred"); *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); *Mercado*, 188 A.D.2d at 943 (expert testimony improper where it constituted "an impermissible comparison of the complainants' behavior with that commonly associated with victims of these crime"); *White*, 4 Misc.3d at 800-801 (expert testimony on battered woman syndrome improper "because of the profound danger that the jury will infer from the BWS testimony that the defendant committed the crime charged or that the jury will unduly use BWS testimony to improperly bolster the complainant's credibility").

In accordance with the Court's ruling on the state's request to admit *Molineux* evidence,





Thus, such testimony does not simply aide the jury in understanding "unusual" or counterintuitive behavior, actions, or symptoms of a sexual assault victim *after the fact*, but will go to CW2's state of mind *at the time of the charged conduct*, such as explaining her understanding of the ostensibly non-consensual nature of the interaction, her willingness to put herself in a private, let alone suggestive environment with Mr. Weinstein, lack of resistance, etc., and for that reason, invariably will "bear[ ]. . . on proving that a rape occurred." *Banks*, 75 N.Y.2d at 293; *see also Bennett*, 79 N.Y.2d at 472 (expert testimony was improper where it "concerned the victim's behavior as the sexual attack unfolded," such as why she would follow her attacker to the private location while knowing his intentions and after an earlier assault, why she did not seek the help of potential witnesses, or resist during the rape itself, etc.)

Along the same lines, expert testimony explaining the specific topic area regarding continued communications and interactions between a victim and the attacker necessarily amounts to expert testimony that, again, impermissibly pertains to *the incident itself*, as opposed to the permissible bounds of "unusual" post-event behavior.

Finally, regardless of the facts of this case, expert testimony concerning the topic area of dispelling the misconception that "victims are usually raped by strangers" is categorically improper. Indeed, under any conceivable set of facts, as here, this testimony has nothing to do with explaining post-event behavior, but again, relates invariably to the taking place of an assault itself. Thus, Dr. Ziv should not be permitted to opine on this topic, notwithstanding the other arguments advanced herein.

vi. Alternatively, the State Should be Precluded from Eliciting the Testimony of Dr. Ziv Prior to the Testimony of the CWs.

If the Court finds it necessary to defer ruling on the fact-specific issues raised herein; namely, hearing the degree to which the CWs are consistent or inconsistent with their sworn testimony before the grand jury recounted above, the state should be precluded from eliciting the testimony of Dr. Ziv prior to calling the CWs in its case-in-chief. Otherwise, should Dr. Ziv testify, or testify to a scope of opinions that is later deemed improper, the only remedy available may be to declare a mistrial. *Cf. People v. Shaulov*, 25 N.Y.3d 30 (N.Y. Ct. App. 2015). All parties certainly have a vested interest in avoiding that scenario.

C. Conclusion

For the reasons discussed herein, Mr. Weinstein, through counsel, respectfully requests that the Court preclude or alternatively limit the state's proffered expert opinion testimony of Dr. Barbara Ziv.

VI. Defendant's Notice of His Intent to Elicit Expert Testimony Regarding the Cause of Distorted Memory of Disputed Sexual Encounters.

Pursuant to the Due Process and Effective Assistance of Counsel Provisions of the Constitution to the United States, analogous provisions contained in the Constitution of the State of New York, as well as other authority cited herein, Mr. Weinstein, through counsel, hereby provides notice of his intent to call Dr. Deborah Davis to offer expert opinion testimony at trial.

A. Factual Background

The defense intends to call Dr. Deborah Davis as expert witnesses at trial. Dr. Davis is a social psychologist. She has published over 100 scholarly articles and book chapters, including many focusing on four relevant areas: memory; suggestion and suggestibility; sexual communication; and sexual assault. She has co-authored treatises with Dr. Elizabeth Loftus on memory issues as they relate to the accuracy and reliability of memory in the context of sexual consent in disputed sexual encounters. Dr. Davis has consulted and provided expert testimony in hundreds of cases. Dr. Davis's curriculum vitae is attached hereto as Exhibit C.

The testimony of Dr. Davis will concern matters beyond the common knowledge of the jury. Specifically, her testimony will concern factors, many of which are counterintuitive and thus beyond common perception, that affect the accuracy and reliability of memory in disputed sexual encounters. These factors include the initial misinterpretations of sexual consent communications, motivated memory distortion, and the impact of suggestion caused by post-event information, also known as the "misinformation effect."

First, Dr. Davis will address the general operation of memory. Her testimony on this topic may include the basic processes of encoding, storage and retrieval, as well as the nature of motivational and suggestive influences that can distort memory and cause it to change over time.

She will also address processes that can lead to the formation of fully false memories for events that never happened. She will address in detail processes occurring after an original event that can change memory for that event. These include the influence of information acquired after the fact, both from specific individuals and from media and broader culture, as well as the internal motivations of the recollecting individual and the potentially distorting effects of mere efforts to remember.

Second, Dr. Davis will discuss special issues of memory specifically for sexual or potentially sexual interactions. These include what is known about sexual consent communications, causes of original misunderstandings of sexual intentions, and causes of distortion in memory for sexual consent communications over time. In this context, she will specifically address the phenomenon of "voluntary unwanted sex" *i.e.* sex that is undesired, but that the person chooses to engage in, and why such sexual encounters are susceptible to inaccurate memories.

Dr. Davis may also address other topics such as responses to sexual assault, which will include discussion of statistics regarding the frequency of reactions such as the failure to report, delayed reporting, continuing contact with the alleged perpetrator, and the frequency of false reporting. She will specifically address the methods for studying such rates, and why many rates obtained through such methods are unreliable.

This testimony is especially relevant in this matter because the allegations concern conduct that occurred many years—and in one instance decades—ago; the allegations have been made in a social context where the allegations of others are known and widely discussed; the allegations have unfolded in the context of the now prevalent "#MeToo" movement narrative that Mr. Weinstein had victimized women; and, as the state itself asserts, the crucial issue for the jury is whether the complainants consented to sexual acts with Mr. Weinstein on the occasions in question. As the

witnesses' abilities to accurately recall the events in question are central to the issue of whether their testimony is reliable, Dr. Davis's anticipated testimony on how memory functions and the processes that are known to distort memory is critical to the jury's ability to fairly evaluate this case, especially given it concerns matters beyond common or lay understanding.

Dr. Davis will not express any opinion as to the credibility or reliability of the testimony of any particular witness in the case, nor will she be asked to opine as to whether Mr. Weinstein committed the crimes with which he is charged. Rather, her testimony will touch upon factors that can influence and distort memories of disputed sexual encounters that are generally accepted in the scientific community and may bear upon the reliability of a given memory concerning a disputed sexual encounter. Based on her impressive professional credentials and knowledge of factors that may cause memory distortions in cases of disputed sexual encounters, Dr. Davis has the scientific background and knowledge to testify on this topic. *See Matott v. Ward*, 48 N.Y.2d 455, 455-456 (N.Y. Ct. App. 1979).

B. Memorandum of Law

The testimony of an expert witness is admissible when it can "help clarify an issue calling for professional or technical knowledge, possessed by the expert, and beyond the ken of the typical juror." *De Long v. Erie County*, 60 N.Y.2d 296, 307 (N.Y. Ct. App. 1983) (internal citations omitted).

Courts in this state have long permitted expert testimony on psychological factors influencing memory, including post-event information, corroboration and conformity, and the lack of correlation between confidence and accuracy. *See People v. Drake*, 7 N.Y.3d 28, 31 (N.Y. Ct. App. 2006) ("studies about the potential effect of post event information on the reliability of any eyewitness identification are, in fact, generally accepted as scientifically valid"); *see also LeGrand*, 8

N.Y.3d at 458 (confirming that principles such as the effect of post-event information on memory, confidence malleability, and correlation between confidence and accuracy, are all generally accepted in the relevant scientific community).

Where, as here, a case turns on the reliability of testimony concerning consent to sexual conduct occurring many years and even decades prior, and there is little or no corroborating evidence of either consent by the complainants or the use of force by Mr. Weinstein, it would prove an abuse of discretion for the Court to exclude expert testimony on these matters given that: (1) it is relevant to the accuracy and reliability of the witnesses' memories of facts probative of lack of consent and the use of force; (2) based on principles that are generally accepted within the relevant scientific community; (3) proffered by a qualified expert; and (4) on a topic beyond the ken of the average juror. *People v. Abney*, 13 N.Y.3d 251, 267-68 (N.Y. Ct. App. 2009); *LeGrand*, 8 N.Y.3d at 458.

Expert testimony, like all proffered testimony, must be relevant in order to be admissible. Evidence is relevant if it has any tendency to prove any material fact. *People v. Alvino*, 71 N.Y.2d 233, 241 (N.Y. 1987); *People v. Mateo*, 2 N.Y.3d 383, 425 (N.Y. Ct. App. 2004). Suffice to say, the proffered testimony of Dr. Davis is highly relevant as it is directly relevant to one of if not the central issue in this case *i.e.* whether the complainants engaged in consensual sexual acts with Mr. Weinstein.

To elaborate, Dr. Davis's testimony will be based on principles that are well-established and widely accepted in psychology. *See People v. Wesley*, 83 N.Y.2d 417, 422 (N.Y. Ct. App. 1994). For example, the prevalence of the "misinformation effect," which occurs when an individual's recall of episodic memories becomes less accurate due to post-event information, is well-established and

accepted within the relevant scientific community. So, too, is confidence malleability, and the lack of correlation between confidence and accuracy in memories subject to post-event internal and external influences. Testimony regarding the aforementioned psychological factors that may influence the reliability of witness testimony has been routinely admitted in New York courts. *See, e.g., Abney, supra, LeGrand, supra.*

These factors—and how they may influence memory—is beyond the ken of the average juror. As stated in *People v. Young*, 7 N.Y.3d 40, 45 (N.Y. Ct. App. 2006), "a court's exercise of discretion should depend largely on whether 'specialized knowledge' of the expert can give jurors more perspective than they receive from their day-to-day experience, their common observation and their knowledge." The way in which memory functions, and how factors such as sexual consent communications, post-event information, self-esteem maintenance, and corroboration and collaboration may impair and distort memory, constitutes specialized knowledge. This knowledge is, in many respects, counterintuitive. Accordingly, expert testimony on those topic areas can certainly provide jurors more perspective than that predicated on lay knowledge and experience.

Moreover, in evaluating the reliability of the complainants' testimony concerning lack of consent and force, it is important that the jury understand that the issue is not simply credibility in the sense of whether the complainants' are telling the truth as they believe it to be; rather, they will be asked to consider based on all the evidence whether the complainants' testimony is truthfully given, but unreliable based on the factors, such as post-event information that can distort memory. Without this expert testimony, the jury will lack important information necessary to fairly evaluate the evidence.

Finally, this testimony is especially necessary in order to place the state's proffered expert testimony in proper context. The state indicated that Dr. Ziv will testify as to "(a) reasons why a victim will delay in disclosing a sexual assault, (b) factors that determine whether and how a victim will continue to communicate and/or interact with her attacker after an assault, and (c) a victim's lack of outward signs of trauma following an assault." Dr. Davis's testimony would provide information concerning the statistical basis for the state's evidence and a proper psychological framework within which to understand any such factors. Absent a framework that grounds memory-distorting factors from initial sexual consent miscommunications to post-event information, the jury will be left with a distorted and incomplete perception of the psychological factors relevant to this case.

This evidence will not prejudice the state nor mislead the jury as Dr. Davis will not be in any way commenting on the credibility or reliability of any witness and the jury is free to determine the weight it will accord such testimony.

C. Conclusion

For the reasons stated above, Mr. Weinstein, through counsel, gives notice of his intent to call Dr. Davis as an expert witness at trial.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM, PART 99
----------X
THE PEOPLE OF THE STATE OF NEW YORK

- against -

HARVEY WEINSTEIN,
Defendant.
----------X

POINT VII: ATTORNEY AFFIRMATION IN SUPPORT OF (VII) MOTION TO PRECLUDE TESTIMONY OF SPECIFIC MOLINEUX WITNESSES BASED ON DISCOVERY
Indictment No. 2673 / 2019
2335 / 2018

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

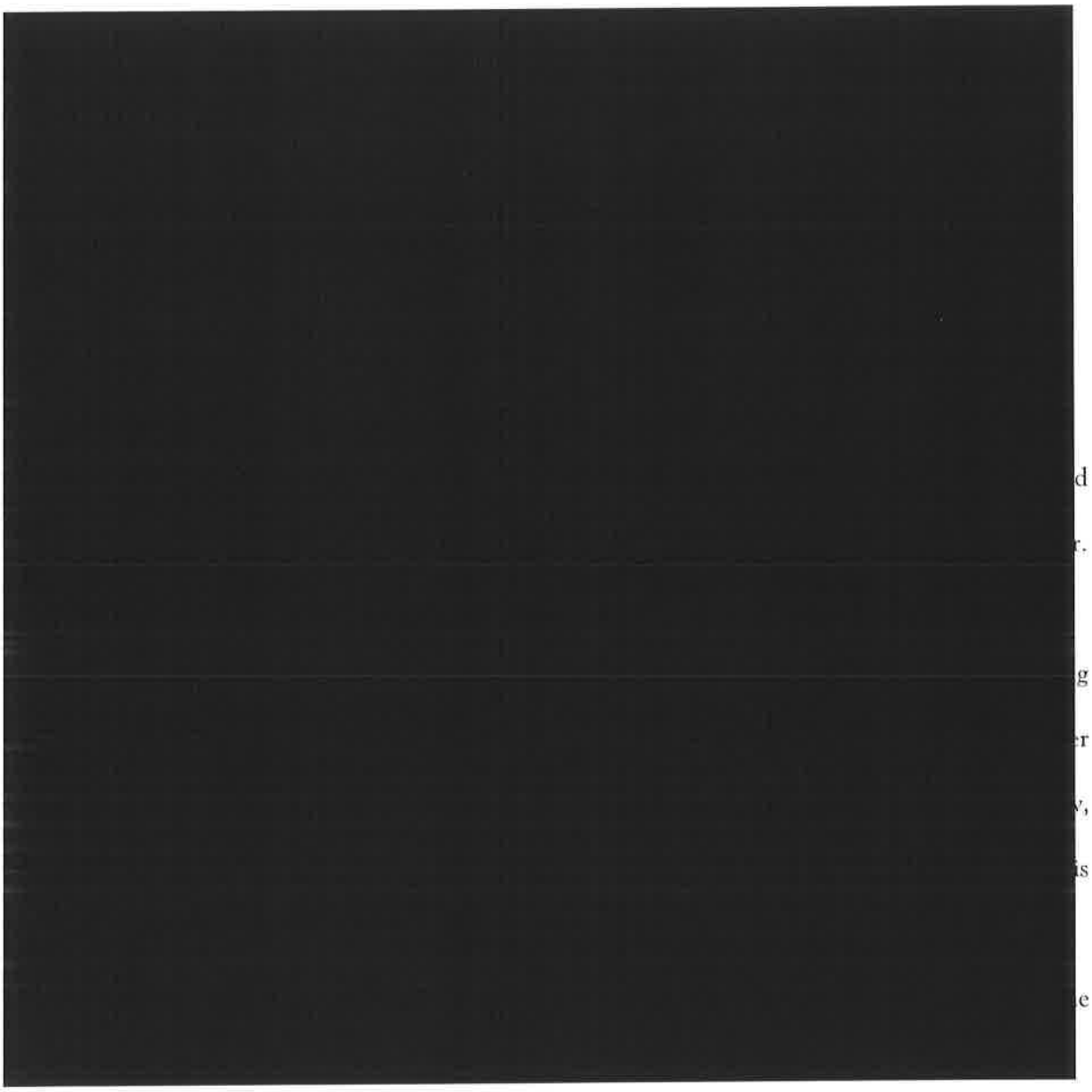
Damon M. Cheronis, attorney at law, has been sponsored to practice in the courts of New York State, affirms the following to be true under penalty of perjury:

1. I am Principal of the law firm, the **Law Office of Damon M. Cheronis**, and one of the attorneys for defendant **Harvey Weinstein**. I make this affirmation in support of a motion dated October 10, 2019 requesting that the Court issue an order precluding the testimony of two *Molineux* witnesses based upon disclosures not known to the defense at the time of the *Molineux* hearing.

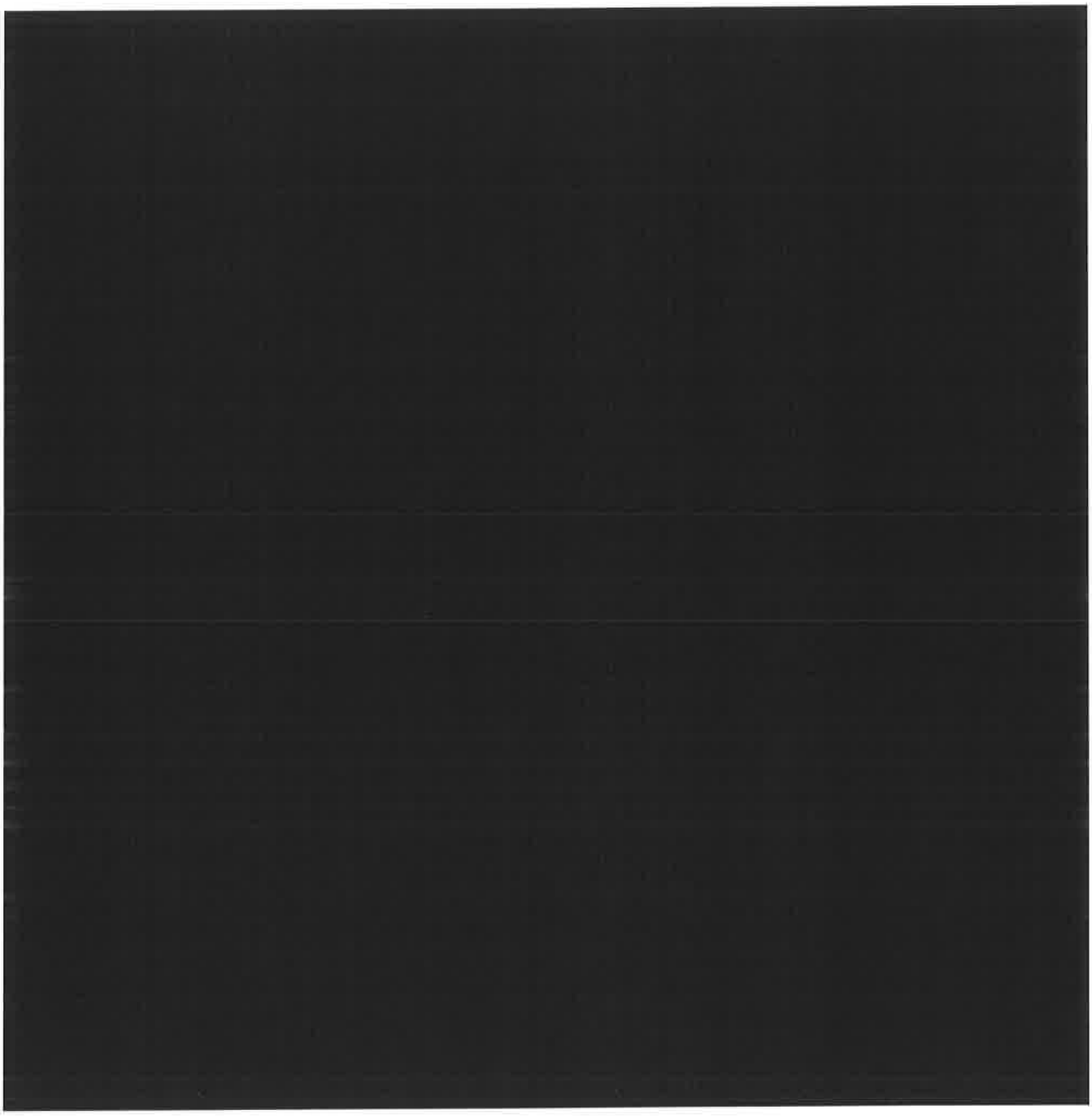
2. On April 26, 2019, the Court held a *Molineux* hearing in which it heard arguments,

[redacted]

[redacted]



6. Months after the *Molineux* hearing, the state turned over discovery related to *Molineux* witness



9. Based on these two disclosures, Mr. Weinstein, through counsel, respectfully requests that the Court preclude the testimony of [redacted]. and [redacted]. should be precluded from testifying as she has added new allegations that were not disclosed to the Court or the defense at the time the Court ruled on the admissibility of her testimony. [redacted] should be precluded from testifying

based upon her use of what appears to be suggestive psychotherapy to recover memories of the incident about which she would testify; that is, techniques that render testimony unreliable and thus inadmissible.

Memorandum of Law

A. [redacted] Should be Precluded from Testifying as Her New, Additional Allegation Causes the Undue Prejudice of the Molineux Evidence to Outweigh its Probative Value.

To determine whether *Molineux* evidence may be admitted in a particular case, the trial court must engage in a two-part inquiry. *Alvino*, 71 N.Y.2d at 242; *People v. Allweiss*, 48 N.Y.2d 40, 46–47 (N.Y. Ct. App. 1979). First, the state must identify some material issue, other than the defendant's criminal propensity, to which the evidence is directly relevant and second, if the requisite showing is made, the trial court must then weigh the evidence's probative value against its potential for undue prejudice to the defendant. *See id.* If the evidence has substantial probative value and is directly relevant to the non-propensity purpose for which it is offered, and the probative value of the evidence outweighs the danger of prejudice, then the court may admit the evidence. *See, e.g., People v. Cass*, 18 N.Y.3d 553, 560 (N.Y. Ct. App. 2012); *Allweiss*, 48 N.Y.2d at 46–47; *People v. McKinney*, 24 N.Y.2d 180, 184 (N.Y. Ct. App. 1969).

The second part of the two-part inquiry necessarily depends, in the first instance, upon an accurate and complete disclosure of the evidence sought to be admitted. It is a discretionary determination made by the Court concerning the probative value and the potential for prejudice arising from the actual evidence. In situations in which a witness makes an allegation of other bad acts subsequent to the Court's *Molineux* ruling, the state commits error by eliciting such information at trial, but failing to seek an advance, supplemental ruling. *See People v. Minott*, 208 A.D.2d 395,

395 (N.Y. App. Div. 1994) ("[t]he prosecutor erred in failing to seek an advance ruling to supplement the Molineux ruling").

Revisiting the Court's ruling in this situation is necessary given that, as discussed above, the Court's initial *Molineux* ruling involves a careful balancing of many factors, including the quantity of the other crimes evidence as compared to the charged conduct, so as to avoid "a trial within a trial." *See People v. Larkins*, 108 A.D.3d 1210, 1212 (N.Y. App. Div. 2013); *People v. Robinson*, 68 N.Y.2d 541, 550 (N.Y. Ct. App. 1986); *People v. Harris*, 117 A.D.3d 847, 872 (N.Y. App. Div. 2014) (Miller, J., dissenting) (discussing the "recognized danger of subjecting a defendant to a trial within a trial"); *cf. Shephard v. United States*, 290 U.S. 96, 104 (1933) ("[w]hen the risk of confusion is so great as to upset the balance of advantage, the evidence goes out").

Now, of course, since the Court took considerable effort to strike a proper balance as required by *Molineux* and Rule 403, the state, through [redacted] has tilted the scales, and improperly so. Echoing arguments advanced previously, introduction of such evidence would prejudice Mr. Weinstein, risk juror confusion as the other crimes evidence has now grown significantly—without proper review and observation of the procedural safeguards *Molineux* affords—and overwhelms the evidence of the charged conduct in a manner that ultimately risks the return of a verdict not predicated on proof beyond a reasonable doubt as to the elements of the charged offenses, but based on passion and emotion resulting from the uncharged, inflammatory allegations that in any event carry minimal relevance, if any. Thus, the Court should preclude [redacted] from testifying pursuant to *Molineux*.

B. [redacted] Should be Precluded from Testifying Because She May Have Engaged in Memory Recovery Therapy That Renders her Testimony Unreliable.

i. Legal Standard

Mr. Weinstein, through counsel, also requests the Court revisit its *Molineux* ruling with respect to witness [redacted] and ultimately preclude her testimony, as it appears she has engaged in memory recovery therapy rendering her testimony unreliable and thus inadmissible. New York Courts have long recognized that therapy used to recover memories renders those memories inherently untrustworthy and that evidence derived therefrom should not be admissible. As the appellate division has stated, memories enhanced or recovered in therapeutic settings "should be viewed with skepticism given the oftentimes suggestive therapeutic environment." *People v. Murphy*, 235 A.D.2d 933, 934 (N.Y. App. Div. 1997). Use of hypnosis, in particular, has not gained general acceptance in the scientific community as a reliable method of restoring a witness' recollection of an event. For this reason, testimony of a witness concerning hypnotically produced recollections is inadmissible in a criminal trial as a matter of law. *People v. Schreiner*, 77 N.Y.2d 733, 738 (N.Y. Ct. App. 1991); *People v. Hughes*, 88 A.D.2d 17 (N.Y. App. Div. 1982). These holdings are logical, given that such therapeutic procedures may cause the witness to be susceptible to suggestion; to confabulate or intentionally fabricate incidents in order to fill memory gaps or to please the therapist; and to be convinced of the accuracy of the false memory, resulting in testimony given with confidence and the ring of truth, when neither is warranted, thereby unfairly impairing the defendant's ability to cross-examine that witness. *People v. Tunstall*, 63 N.Y.2d 1, 7 (N.Y. Ct. App. 1984); *Schreiner, supra*; *Hughes*, 59 N.Y.2d at 546, ("[t]he major difficulty, of course, is that a witness who has been hypnotized acquires an increased confidence in his [or her] recollections, presumably greater than the witness who has experienced a suggestive identification, which could inhibit the

defendant's right of cross-examination. The problem is greatest when the hypnotist suggests to the person under hypnosis that a certain event occurred").

Given the inherent untrustworthiness of memories derived from such therapeutic practices, the Court of Appeals has directed that the state should give a defendant pretrial notice if it intends to call a witness known to have been hypnotized at some time prior to trial. *Hughes*, 59 N.Y.2d at 546. In that event, a pretrial hearing is required, at which the state carries the burden of demonstrating by clear and convincing proof that the testimony of the witness as to her pre-hypnotic recollection is distinguishable and severable from those recollections derived from therapy; that they will be reliable; and that there will be no substantial impairment of defendant's right of cross-examination. *Id.* at 547. Such a hearing is referred to as a "Hughes/Tunstall" hearing. *See People v. Levy*, 179 A.D.2d 730, 731 (N.Y. App. Div. 1992).

Furthermore, even in situations where pre-hypnotic suggestions could be isolated from those that are derived from the therapy, prejudice remains in the form of the increased confidence that exists as a byproduct of the therapy, as such confidence cannot be excised. *See id.* (holding that "the People failed to demonstrate by clear and convincing evidence that there was no substantial impairment of the defendant's right of cross-examination caused by the hypnotized complainant's increased confidence in her recollections"). Finally, if a witness known to have been hypnotized is found competent to testify, defendants have the option at trial of introducing proof with respect to hypnotic or therapeutic procedures followed as well as expert testimony concerning the potential effect of hypnosis or psychotherapy on the witness' recollections. *Hughes,* 59 N.Y.2d at 523.

ii. Discussion

In approximately August of 2019, the state produced an email to the defense. *See* Exhibit E.

[redacted] Thus, counsel respectfully submits that the state's failure to disclose such fundamental and critical information bearing on the credibility and reliability of [redacted] testimony—so much so that New York Jurisprudence has recognized that its use necessitates a unique pretrial hearing—is reason alone to preclude it.

Counsel also submits that the state's disclosure is further deficient in that it lacked sufficient information [redacted]

In any event, in the first instance, the fact that [redacted]

alleged encounters with Mr. Weinstein that have not been distorted by the memory recovery techniques employed by the therapist.

Regardless, because this *Molineux* witness was offered by the state without appropriate and required disclosures concerning her competency and reliability as a witness, and because her lack of competency relates to suggestive therapy that renders her testimony unreliable and prejudicial, her testimony should be precluded. In the alternative, counsel requests the Court hold a *Hughes/Tunstall* hearing.

Conclusion

Based on the foregoing, Mr. Weinstein, through counsel, respectfully requests that the Court enter an order precluding the testimony of previously admitted *Molineux* witnesses [redacted] and [redacted] and in the alternative, with respect to [redacted] hold a *Hughes/ Tunstall* hearing.

Respectfully submitted,

Damon M. Cheronis

Dated: October 10, 2019
New York, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM, PART 99
----------X
THE PEOPLE OF THE STATE OF NEW YORK

- against -

HARVEY WEINSTEIN,
Defendant.
----------X

POINT VIII:
ATTORNEY AFFIRMATION IN SUPPORT OF MOTION TO MODIFY THE PROTECTIVE ORDER TO UNSEAL THE IDENTITIES OF THE COMPLAINANTS
Indictment Nos. 2673 / 2019
2335 / 2018

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

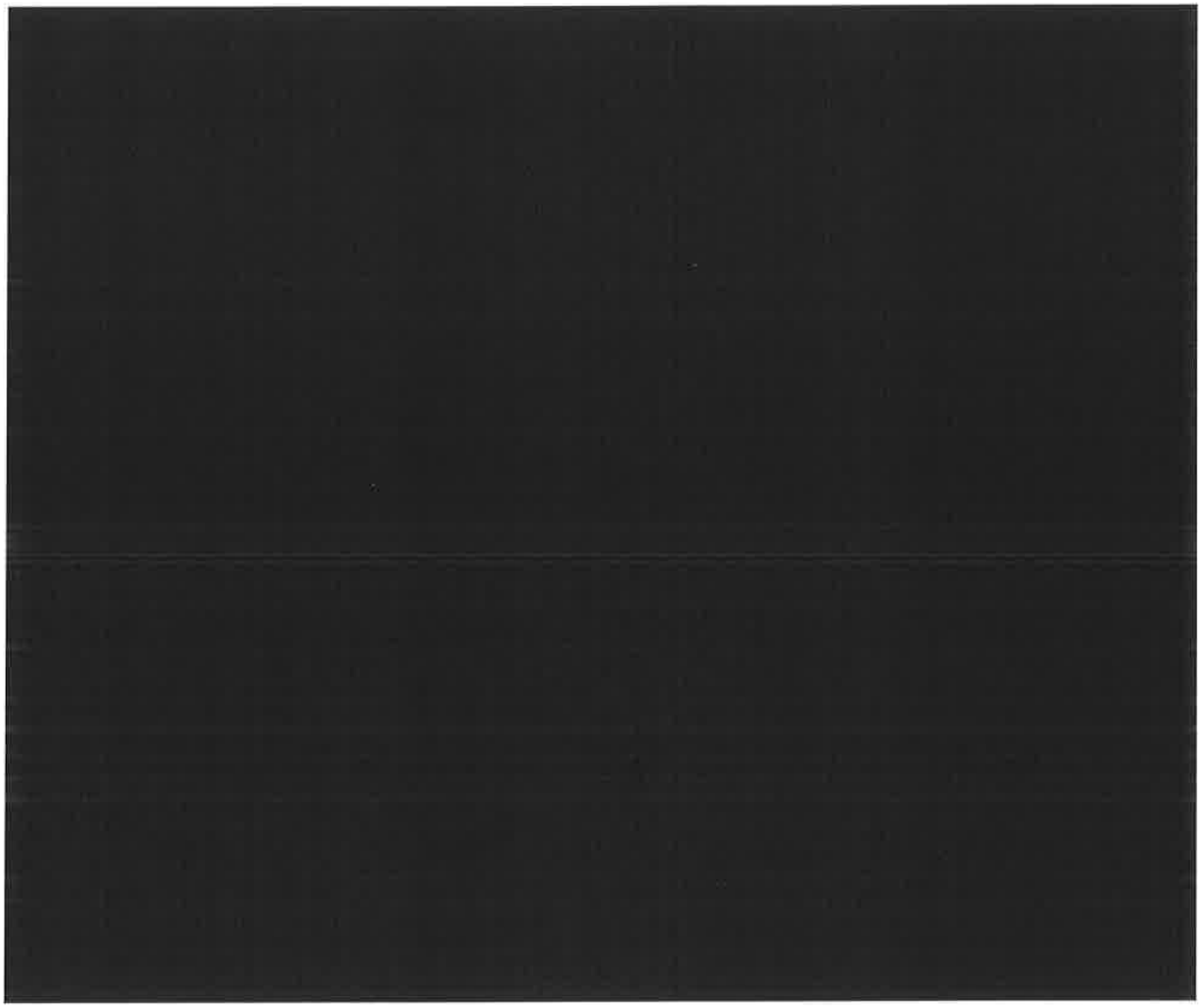
Damon M. Cheronis, attorney at law, has been sponsored to practice in the courts of New York State, affirms the following to be true under penalty of perjury:

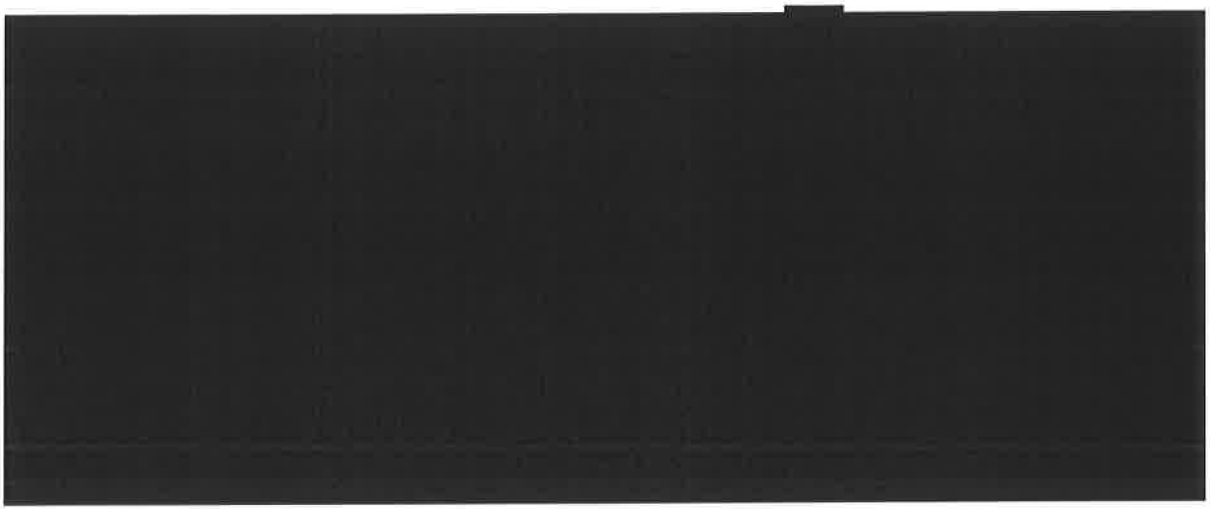
1. I am Principal of the law firm, the **Law Office of Damon M. Cheronis**, and one of the attorneys for defendant **Harvey Weinstein**. I make this affirmation in support of a motion dated October 10, 2019 requesting that the Court modify the protective order to unseal the names of the complainants as described herein.

2. The Court currently has a broad sealing order in place regarding the identities of the complaining witnesses. Counsel respectfully submits that the sealing order is unnecessarily overbroad as it relates to three accusers who have made public statements about the subject matter of their testimony. Those individuals are CW2, the complainant in count 2 of Indictment 2335/2018 and count one of Indictment 2673/2019; [redacted] the complainant in the aggravating crime in both surviving counts of predatory sexual assault contained in Indictment 2673/2019; and [redacted]

[redacted]

3. All three of these witnesses made public statements accusing Mr. Weinstein of the conduct that is at issue in this matter.





7. It stands to reason that these witnesses have waived any right to anonymity and confidentiality by disclosing their identities and airing their allegations on the largest, national forums available. In the process, they have jeopardized Mr. Weinstein's ability to receive a fair trial. By unsealing their identities, the defense will be allowed to diligently investigate these now-public claims and effectively prepare for trial. Moreover, unsealing the identities of the additional, non-public complaining witnesses will also prove necessary in order to permit the defense a reasonable opportunity to locate and interview witnesses containing information relevant to their disputed claims. Counsel thus requests an order permitting as much.

Memorandum of Law

A court may, upon the state's motion, "issue a protective order denying, limiting, conditioning, delaying or regulating discovery" C.P.L. § 240.50. Such a protective order must be predicated upon "good cause," which may include "constitutional limitations, danger to the integrity of physical evidence or a substantial risk of physical harm, intimidation, economic reprisal, bribery or unjustified annoyance or embarrassment to any person or an adverse effect upon the legitimate

needs of law enforcement, including the protection of the confidentiality of informants, or any other factor or set of factors which outweighs the usefulness of the discovery." *Id.* If good cause is shown, such an order "limiting, conditioning, delaying or regulating discovery may, among other things, require that any material copied or derived therefrom be maintained in the exclusive possession of the attorney for the discovering party and be used for the exclusive purpose of preparing for the defense or prosecution of the criminal action." *Id.*

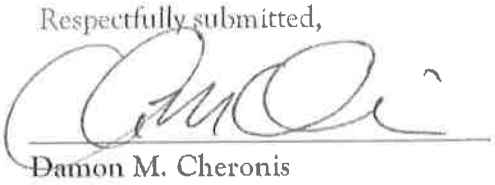
The three witnesses described in the affirmation have made voluntary, public statements accusing the defendant of the very conduct about which they will be testifying. In plain point of fact, there can be no good cause to protect their identities or the subject matter of their testimony from the public. Such "protection" is being used as a sword and not a shield, since not only the witnesses, but the public at large, has been free to name them and discuss their testimony. The only persons not permitted to identify the witnesses and comment on their public allegations has been Mr. Weinstein and members of his defense team. This reality creates an impractical situation antithetical to the legal bases and justifications underlying the issuance of protective order.

Furthermore, the protective order concerning the names of the complainants who have not made public statements in this case has prejudiced Mr. Weinstein to date. Upon information and belief, if the public learned the identity of the not-already-public accusers, additional witnesses with relevant information could likely be located and identified.

Conclusion

Based on the foregoing, Mr. Weinstein, through counsel, respectfully requests that the Court enter an order modifying its existing protective order to unseal the identities of the complaining witnesses.

Respectfully submitted,



Damon M. Cheronis

Dated: October 10, 2019
New York, New York

IX. Motion to Inspect or Release the Grand Jury Minutes and to Dismiss or Reduce Each Count in the Indictment.

Mr. Weinstein, through counsel, respectfully requests the Court inspect the grand jury minutes and dismiss each count of the indictment or in the alternative reducing the charges pursuant to the provisions of C.P.L. §§ 210.20, 210.35 and the remaining provisions of said Article; and release the grand jury minutes to the defendant pursuant to C.P.L. § 210.30 and C.P.L. 245.20.

X. Motion for Leave to Filed Additional Pretrial Motions

Pursuant to the Due Process and Effective Assistance of Counsel Provisions of the Constitution to the United States, analogous provisions contained in the Constitution of the State of New York, as well as other authority cited herein, Mr. Weinstein, through counsel, respectfully moves the Court for leave to file additional motions as may be deemed appropriate, and within a reasonable amount of time after receipt of additional materials precipitating any such motion, together with such other and further relief as this Court may deem just and proper.

XI. Conclusion

Based on the foregoing, Mr. Weinstein, through counsel, respectfully requests that the Court grant the foregoing motions and order the relief requested therein.

Respectfully submitted,

Damon M. Cheronis

Damon M. Cheronis
Ryan J. Levitt
Law Office of Damon M. Cheronis
140 S. Dearborn Street Suite 411
Chicago, IL 60603
(312) 663-4644
damon@cheronislaw.com
ryan@cheronislaw.com

Donna A. Rotunno

Donna A. Rotunno
Law Offices of Rotunno & Giralamo
140 S. Dearborn St. Suite 411
Chicago, Illinois 60603
T: 708-615-9400
law1127@yahoo.com

Arthur L. Aidala

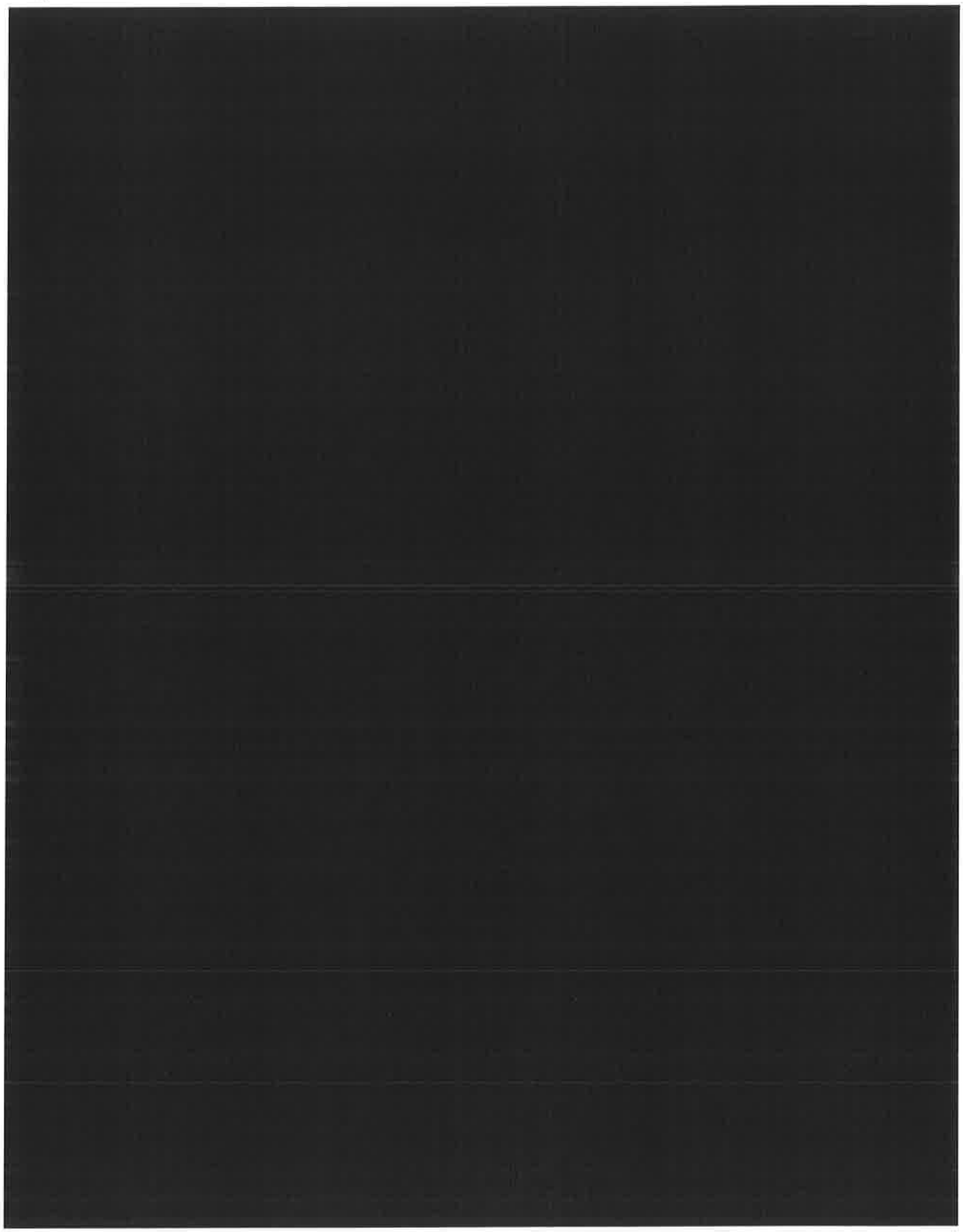
Arthur L. Aidala, Esq.
Barry Kamins, Esq.
Diana Fabi Samson, Esq.
John Esposito, Esq.
Aidala, Bertuna & Kamins, P.C.
546 Fifth Avenue
New York, New York 10036
(203) 486-0011

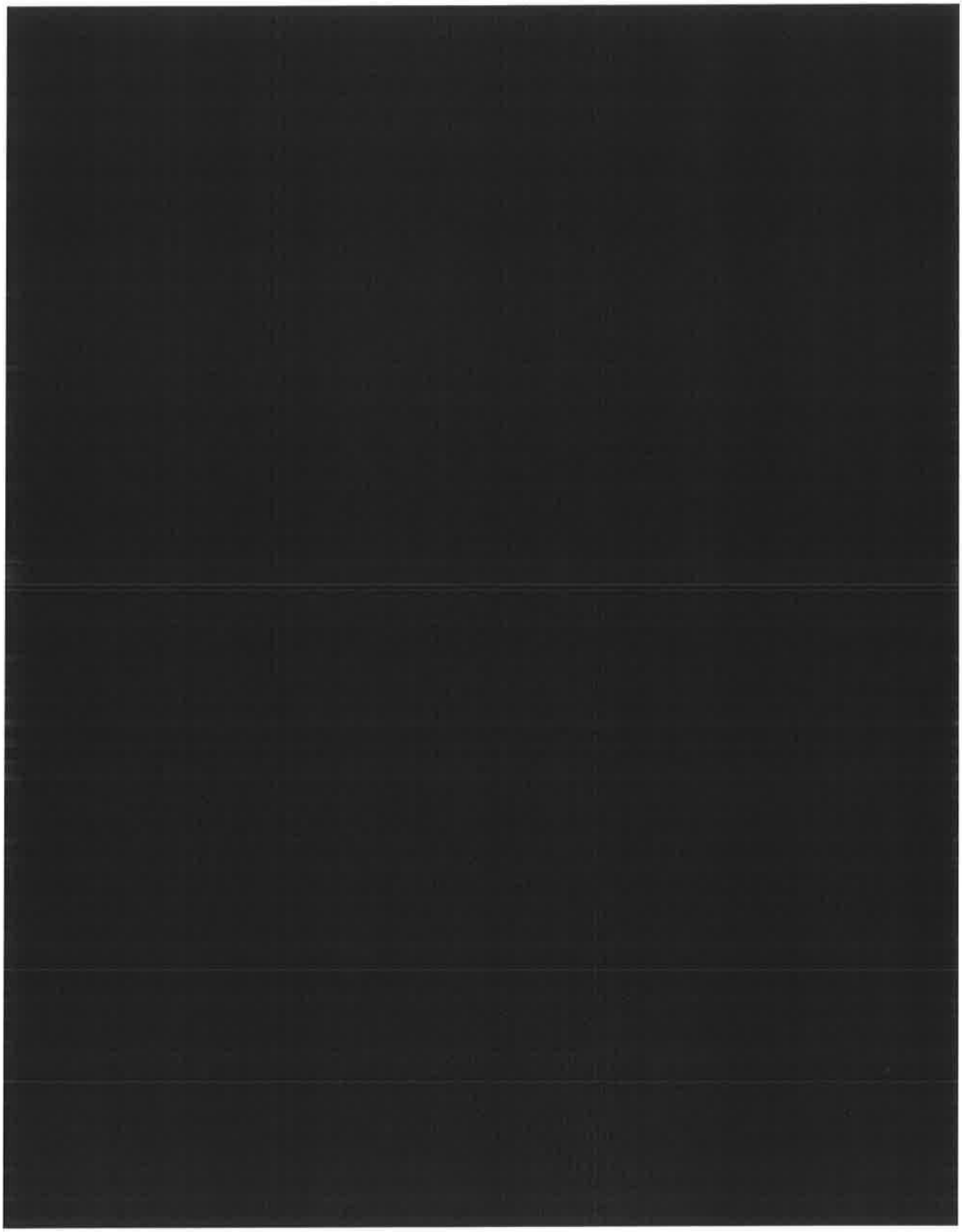
Dated: New York, New York
October 10, 2019

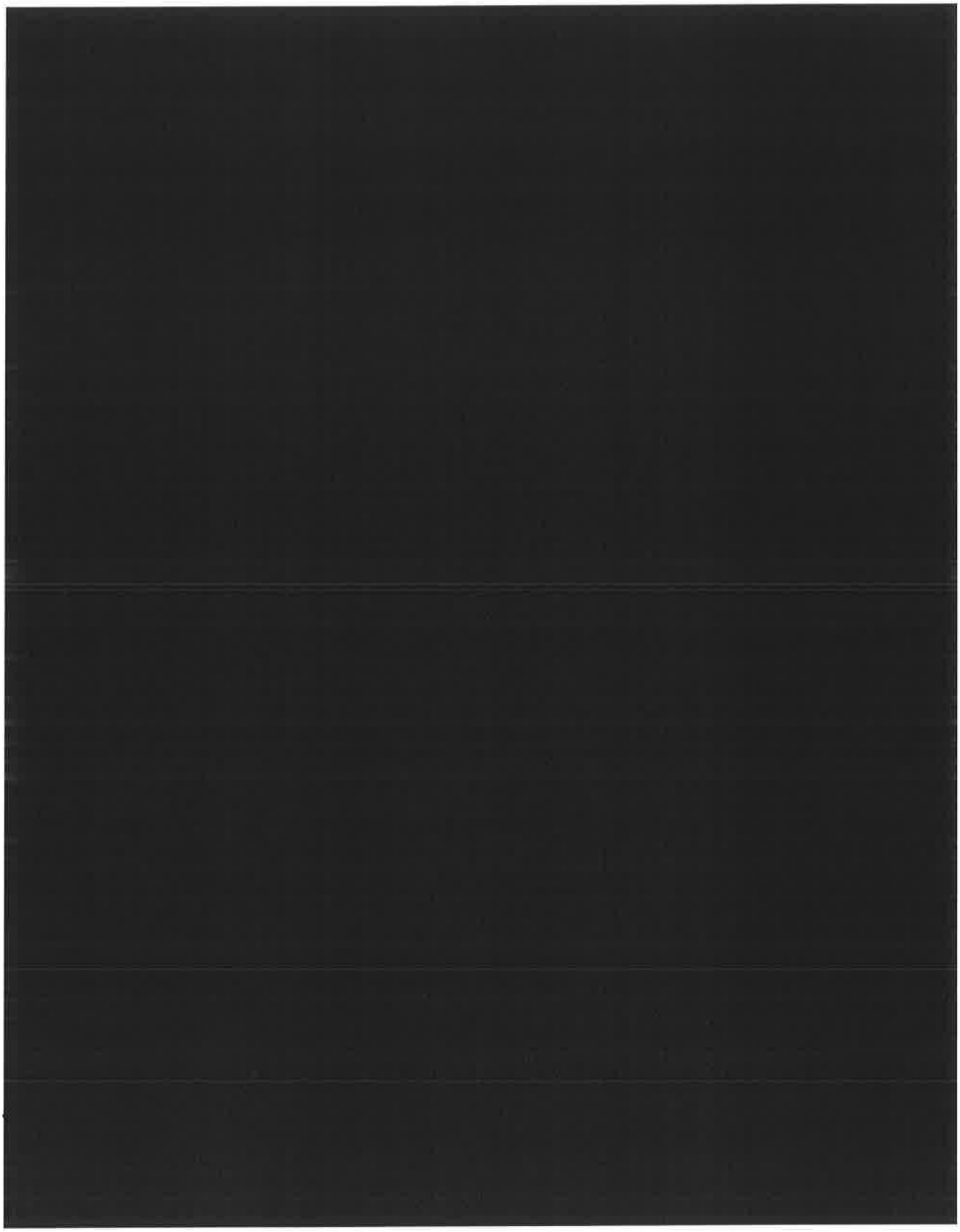
Cyrus Vance
District Attorney
New York County

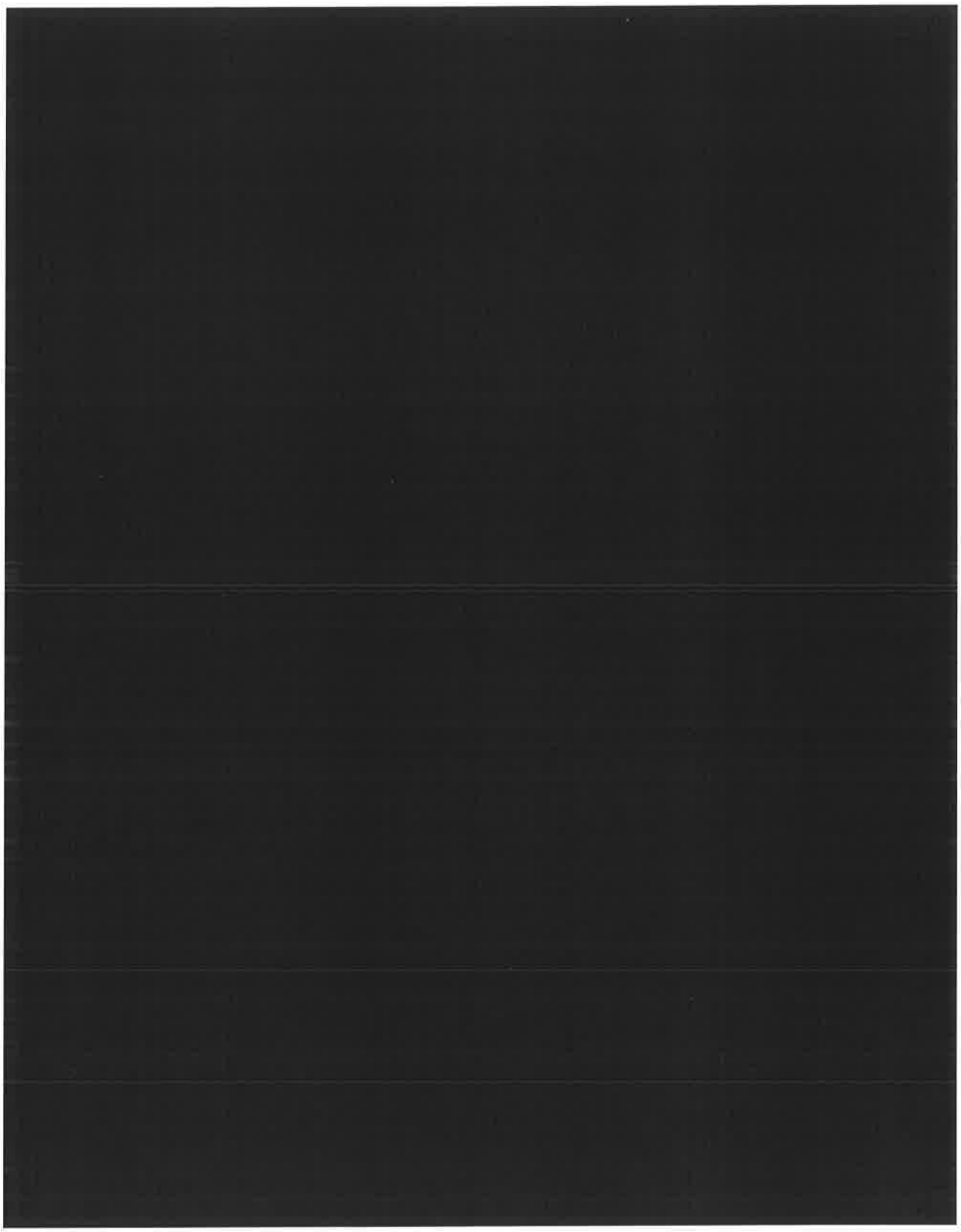
Attn: Joan Illuzzi-Orbon, A.D.A.

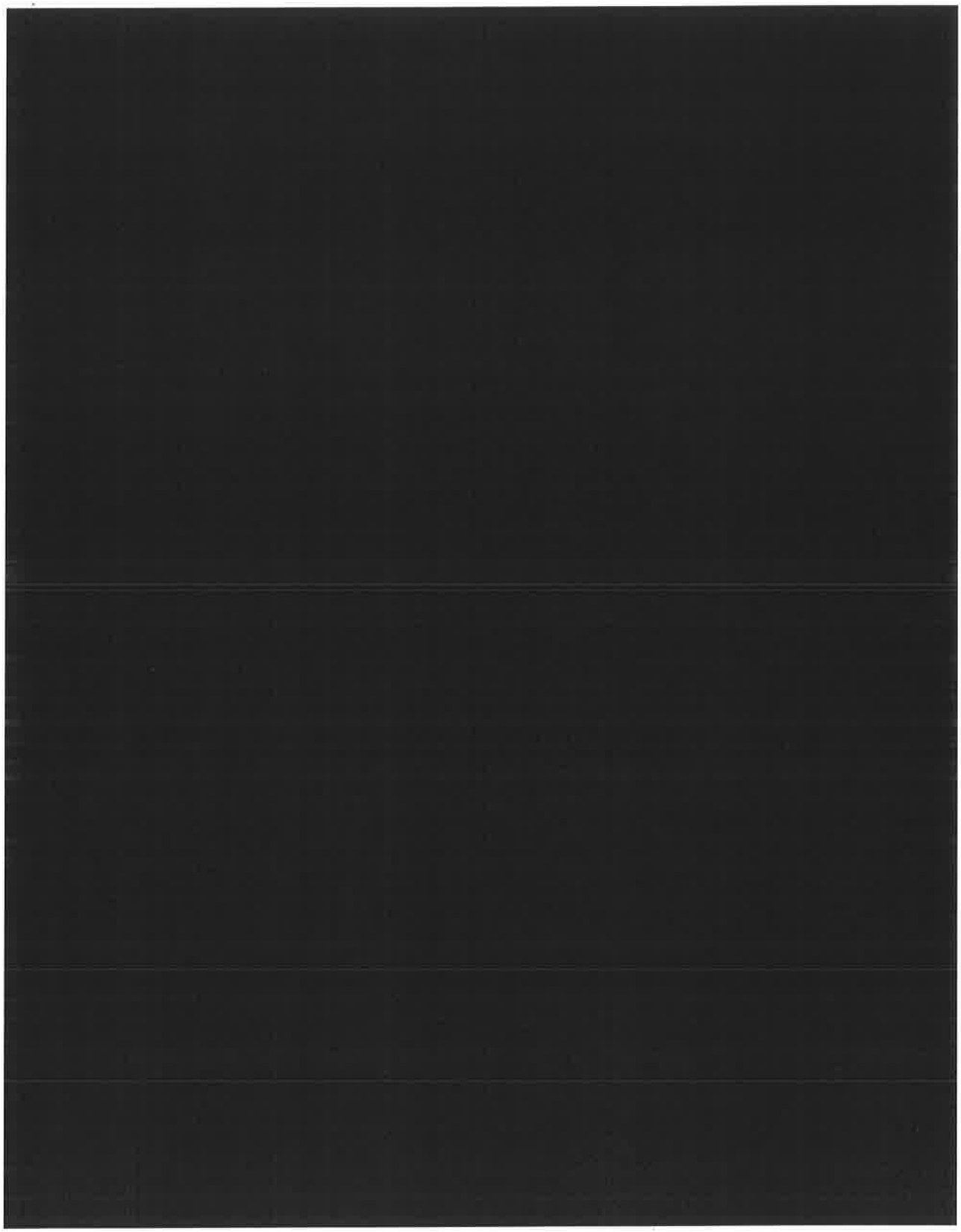
EXHIBIT A

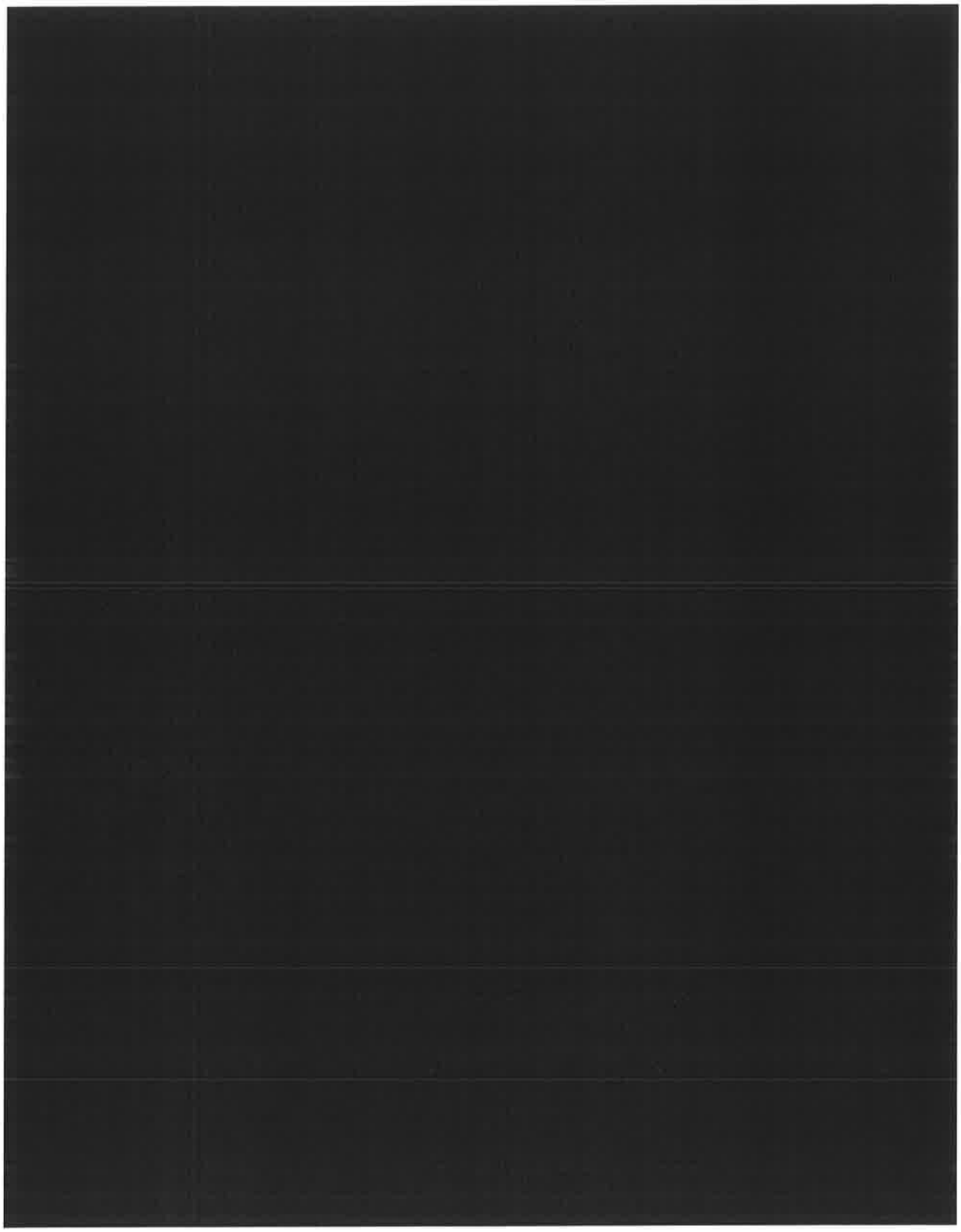


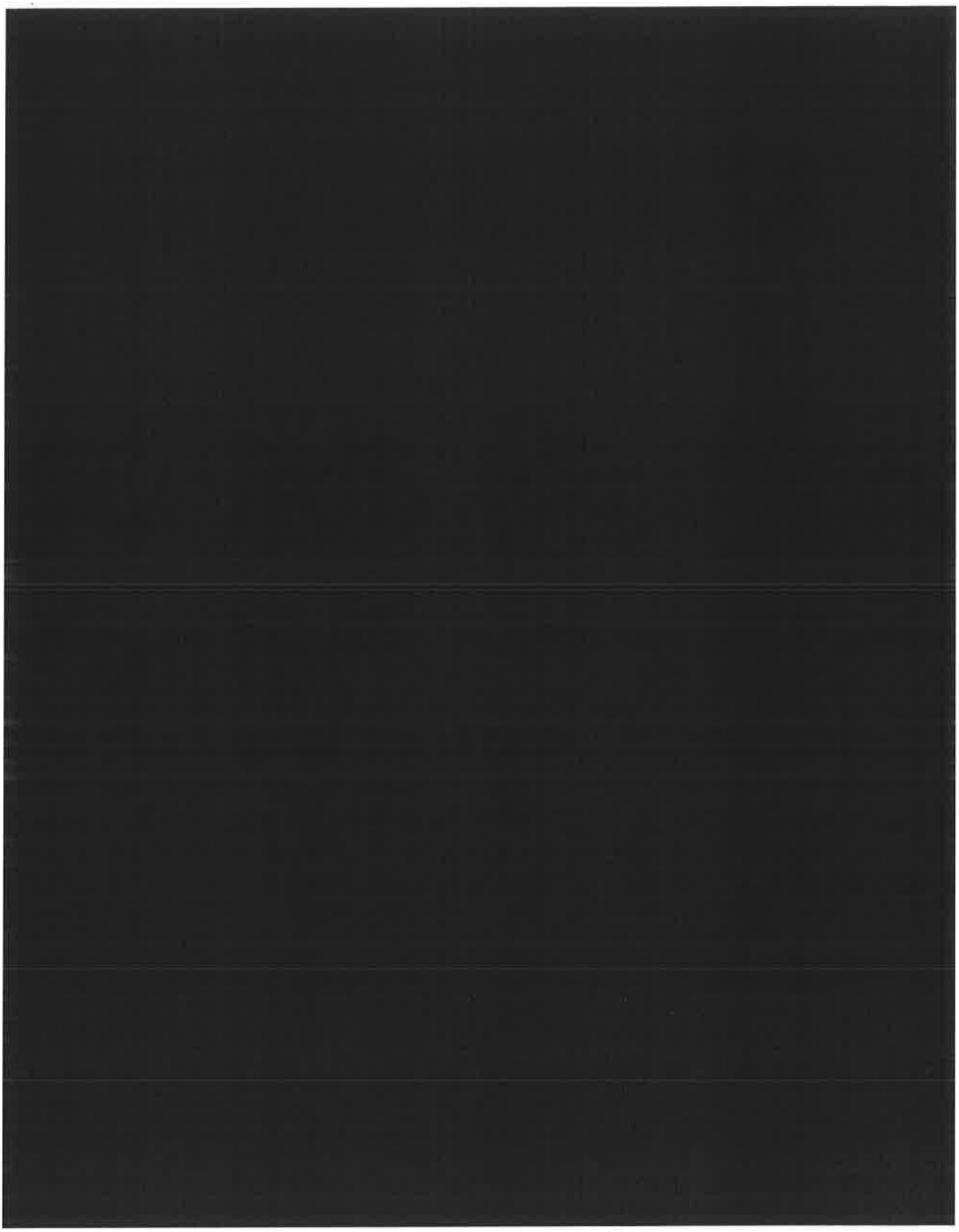












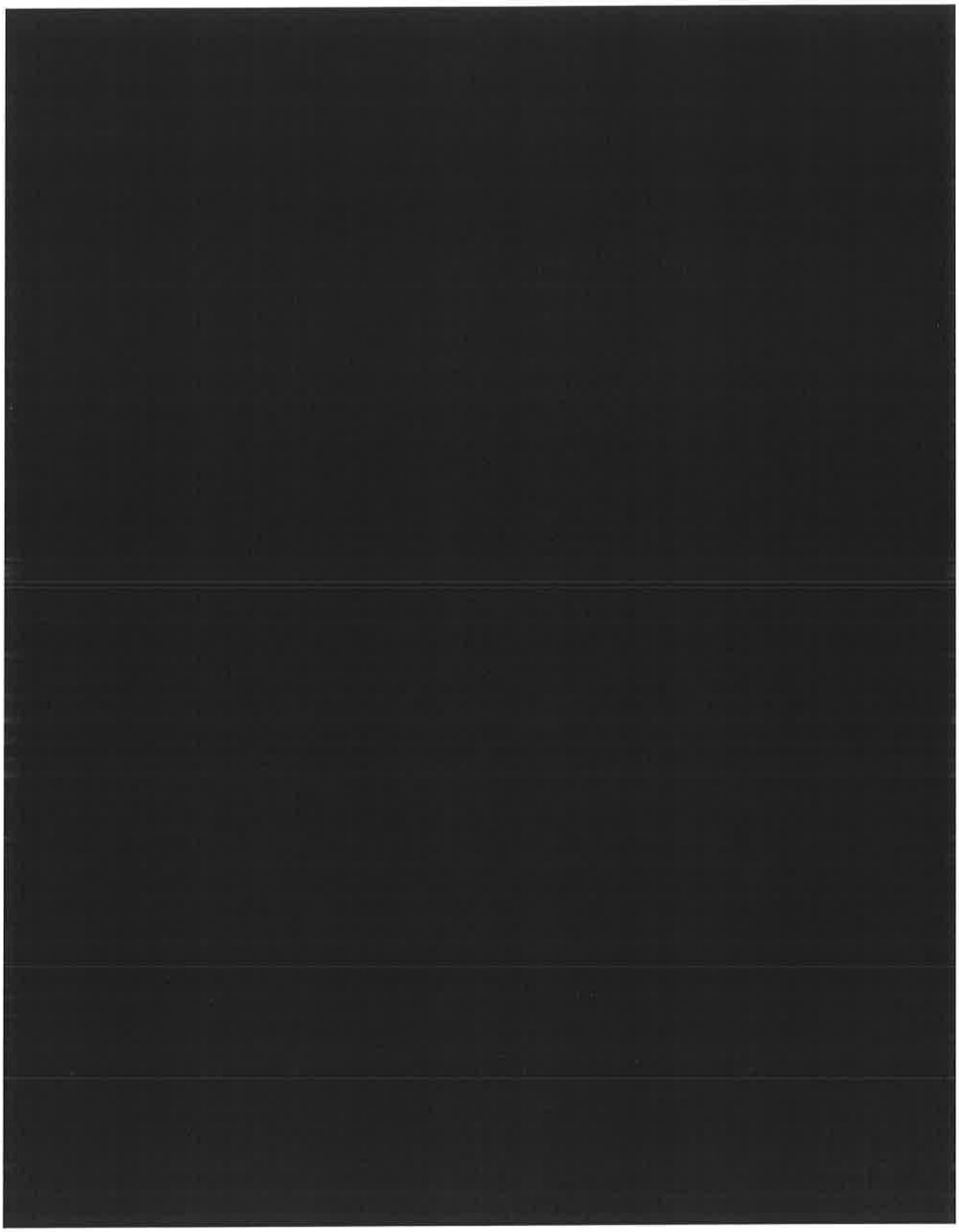


EXHIBIT B

THE LAW OFFICES OF
DAMON M. CHERONIS

140 South Dearborn, Suite 411
Chicago, IL 60603

(312) 663 4644
(312) 277 1920 Fax
www.cheronislaw.com

September 26, 2019

Via Electronic Delivery

Ms. Joan Illuzi-Orbon, Esq.
New York County District Attorney's Office
One Hogan Place
New York, New York 10013

Re: People v. Weinstein, 2335 / 2018: C.P.L. § 245 *et seq.*

Dear Ms. Illuzi-Orbon,

I am writing in reference to my client, Harvey Weinstein. On August 26, 2019, at the arraignment, Judge Burke adjourned trial until January 6, 2020. As I am sure you are aware, on April 12, 2019, the New York Legislature repealed the presently-applicable statutory discovery scheme, C.P.L. § 240.10 *et seq.*, and replaced it with a new article, C.P.L. § 245 *et seq.* Both actions take effect and carry the force of law on January 1, 2020—five days prior to the instant trial commencing. Thus, I am formally requesting any and all discovery to which Mr. Weinstein is entitled under C.P.L. §§ 245.20 and 245.60 within the time constraints provided by § 245.10.

While, as just mentioned, I am requesting any and all discovery to which Mr. Weinstein is entitled under § 245, I wish to draw your attention to a number of provisions therein, which I believe obligate your office to furnish additional materials and information or take additional action.

C.P.L. § 245.10: Timing of Discovery

§ 245.10(1)(a) obligates the state to provide all required materials generally within 15 calendar days of the arraignment, and in any event "as soon as practicable." Given the unique posture this case presents in, *i.e.* the arraignment occurred well over 15 days ago, yet § 245.10 does not carry the force of law until January 1, 2020,[1] we ask that you immediately provide us with your position as to when you intend to fully discharge your discovery obligations under § 245.

[1] Even so, prior to trial commencing, you will be required to serve a certificate of compliance averring that you have complied with all obligations set forth in § 245, as described in § 245.50, or risk the Court declaring your office not ready under C.P.L. § 30.30, in addition to other possible sanctions and remedies. This certificate will have the practical effect of requiring your office to comply and represent your compliance with § 245's organic timing provisions, regardless of its delayed effective date.

§ 245.20: Automatic Discovery

§ 245.20(1)(b). This provision requires production of all transcripts of the testimony of individuals who have testified before the grand jury within fifteen calendar days of the arraignment. It is unclear based on your communication with Ms. Fabi Samson, as to when your office intends on complying with this provision. We are formally requesting all such materials be provided immediately.

§ 245.20(1)(c). This is a new disclosure requirement that your office has not complied with to date. I will further note that this provision effectively requires you to include "a designation . . . as to which of those persons may be called as a witness," in addition to simply providing the defense with the "names and adequate contact information for **all** persons . . . the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto." It is our position that this pertains to the numerous statements taken from witnesses you interviewed and referenced in the Molineaux hearing regardless of whether you intend on calling them at trial.

§ 245.20(1)(d). This provision has likewise yet to be complied with. Moreover, it is important to note that it applies to *all* law enforcement personnel who have relevant information, and regardless of whether the state intends to call that individual at trial, although you are required to divulge that point as well.

§ 245.20(1)(e). This provision contains perhaps one of the most significant changes to the discovery process. Your office is now required to provide, within the time constraints of § 240.10, "*all* statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to any potential defense thereto, including all police reports, notes of police and other investigators, and law enforcement agency reports." There are certainly voluminous materials falling within this provision, and we look forward to discussing when we can expect compliance. I would further direct you to be sure to read this provision in tandem with your obligations set forth in § 245.20(1)(k), which expressly requires production of evidence or information to "impeach the credibility of a testifying prosecution witness" within 15 calendar days of the arraignment.

§ 245.20(1)(f). We believe your expert notice dated January 18, 2019, was inadequate, even under the law as it stood before. Now, of course, your expert disclosure requirements have broadened considerably, and indisputably beyond what you have previously provided. Please let us know when you will be producing an amended or supplemental notice that complies with C.P.L. § 245.20(f).

§ 245.20(g). Please note that in addition to tendering all recordings within the meaning of this subsection, you are also required to provide an indication as to what, if any, you intend to introduce at trial.

§ 245.20(1)(h)—(m). Counsel again reiterates Mr. Weinstein's request for the materials contemplated by these subsections. I will further draw your attention to the fact that Subsection (k) is not simply a codification of your *Brady* obligations—but much broader—and through operation of § 245.10, should already have been fully complied with.

§ 245.20(1)(n). Please let us know if there are additional warrant-related materials not previously produced, and when we can expect them. In discharging your obligations under this subsection, I will additionally refer to § 244.55, in light of the City of New York's Department of Investigation's March 27, 2018 report regarding a number of serious inadequacies discovered with respect to the procedures and practices of the N.Y.P.D.'s Special Victims–including readily observable limitations with its electronic case management system. *See id.* at p. 33.

§ 245.20(1)(o). Counsel will simply reiterate Mr. Weinstein's request for compliance with this subsection, which effectively requires the production of your exhibit list.

§ 245.20(1)(p) – (t); (2); (3). Again, counsel reiterates Mr. Weinstein's request for all applicable materials falling within these provisions.

§ 245.40(3). In light of the provisions contained herein, including this specific provision, we are requesting you inform us how, i[redacted]

§ 245.20(5). In light of the significant volume of materials that you have redacted or withheld entirely, I believe it is necessary to draw your attention to § 245.20(5). To the extent your office elects to persist in withholding material falling under § 245.20, as well as declining to provide unredacted copies of previously tendered materials, you are formally required to notify the defense in writing and with specificity what materials have been withheld, and under what subsections of § 245.20 those materials fall. *See* § 245.10(1)(a); 245.10(5); 245.70. Further, in making any determination as to your position, at least before requiring us to litigate any matter, please keep in mind that you are legally required to indulge a "presumption in favor of disclosure." § 245.10(7).

Sincerely,

/s/ Damon M. Cheronis
Damon M. Cheronis

EXHIBIT C

VITA

Deborah Davis, Ph.D.

Professor, Department of Psychology/296
University of Nevada; Reno, Nevada 89557
(775) 722-7779 debdavis@unr.edu

EDUCATION

H.S.	Spring Branch High School: Houston, Texas June, 1968
B.A.	University of Texas: Austin, Texas June, 1970
Ph.D.	Ohio State University; Columbus, Ohio August, 1973

EMPLOYMENT HISTORY

1971-73	National Institute of Mental Health Pre-doctoral trainee in social psychology Ohio State University; Columbus, Ohio
1973-75	Post-doctoral research associate Ohio State University; Columbus, Ohio
1975-77	Assistant Professor, Psychology Department Southern Illinois University; Carbondale, Illinois
1977-78	Assistant Professor, Psychology Department Georgia State University; Atlanta, Georgia
1978 -	Psychology Department University of Nevada; Reno, Nevada
1982-1988	Chair, Interdisciplinary Doctoral Program in Social Psychology, UNR
1986-2011	President, Sierra Trial & Opinion Consultants

2012-Present Faculty of the National Judicial College

1981-2012	Clarinetist, Reno Chamber Orchestra
1981-2005	Clarinetist, Reno Philharmonic Orchestra

MEMBERSHIPS IN PROFESSIONAL ORGANIZATIONS

Association for Psychological Science
American Psychology and Law Society
Society of Personality and Social Psychology
Society of Applied Social Psychology
Society of Experimental Social Psychology

TEACHING EXPERIENCE

UNDERGRADUATE

Introduction to Psychology
Introduction to Social Psychology
Theories of Social Psychology
Research Methods in Social Psychology
Adolescent Psychology
Mate Selection and Marital Satisfaction
Statistics
Pseudoscience
Psychology and Law
Prejudice and Discrimination
Personality
Experimental Psychology
Attitudes and Persuasion
Memory on Trial
Social Influence

GRADUATE

Social Psychology
Psychology and Law
Research Methods
Theories of Social Psychology
Intraindividual Processes
Analysis of Social Interaction
Language and Conversation
Memory on Trial
Social Influence
Attachment and Close Relationships
Social Skills
Prejudice and Discrimination
Attitudes and Persuasion
Memory and Social Cognition
Practical Experience with Research Design
Special Topics in Social Psychology
Forensic Psychology

RESEARCH, THESIS & DISSERTATION SUPERVISION

1975 to Present-- Supervised individual research projects, theses and dissertations for Graduate students in psychology.

1988 to Present-- Supervise theses and dissertations for Master's and Ph.D. in Judicial Studies candidates at the National Judicial College in Reno.

GUEST LECTURER

1988 to Present Periodic guest lecturer at the National Judicial College on issues and research in the area of Psychology and Law; Member, Thesis or Dissertation Committees for Judges in Master's or Ph.D. Programs in Judicial Studies

CONTINUING LEGAL EDUCATION

Northern Nevada Women's Attorneys (1988)
Carson City Bar Association (1988)
Nevada Association of Defense Counsel (1989)
Washington D. C. Women's Bar Association (1989)
Washington D. C. Association of Defense Counsel (1989)
American Trial Lawyer's Seminar, Lake Tahoe (1989)
Inns of Court, Reno (1989, 1990, 1994, 1995, 1996, 1997, 1998, 2000)
New York Bar Association (1996)
National College of Trial Advocacy (Association of Trial Lawyers of America) (1996)
Journal of Air Law and Commerce Symposium (2001)
Washoe County Public Defenders (2001, 2002, 2003)
Washoe County Bar (2009)
National Defender Investigator Association (2002; 2008; 2010)
Northern California Defender Investigator Association (2003)
California Attorneys for Criminal Justice (2004, 2005)
Indiana Public Defender Association (2004)
Missouri State Public Defender Winter Workshop (2005)
Texas Criminal Defense Lawyers Association (2004; 2014)
Edison Electric Institute Claims Committee (2004)
National Seminar for Federal Defenders (2005)
Association of American Law Schools (2006)
Nevada Bar Association, Las Vegas & Reno (2006)
Baton Rouge, LA; Shreveport, LA (2007) (Arranged by Judges and Private Attys)
National Judicial College Master's/Ph.D Program, Reno (2007, 2009, 2010, 2013, 2014)
Tennessee Association of Criminal Defense Lawyers, Nashville (2007)
Osgood Hall Law School, Toronto, Canada (2007)
National Counsel of Juvenile and Family Court Judges (2008, 2011, 2012)
Law and All That Jazz CLE Seminar, New Orleans (2008)
(Louisiana Association of Criminal Defense Lawyers)
Expert Symposium, U.S. Army Jag Attorneys, New Orleans (2011)
Wisconsin Association of Criminal Defense Attorneys (2012)
National Judicial College Seminar on Children and the Law (2012)
Louisiana Investigator Association (2012)
Winning Strategies Seminar (Federal Public Defenders) (2014)
U.S. Military Defense Counsel Training Conference (2014)
Texas Criminal Defense Association (2014)
National Judicial College Decision Making Training (2013, 2014, 2015, 2016)

EDITORIAL ACTIVITIES

EDITOR

1991- Editor and publisher of "**FROM THE MIND'S EYE**". From The Mind's Eye was a newsletter designed to report social science research on law and courtroom psychology.

EDITORIAL BOARDS

1970-1973 Representative Research in Social Psychology.
1980-1988 Journal of Experimental Social Psychology.
1985-1988 Journal of Personality and Social Psychology.
2008 -2014 Personal Relationships
2007 -2015 Journal of Behavior Analysis of Offender and Victim Treatment and Prevention

AD-HOC REVIEWING

JOURNALS

Journal of Personality and Social Psychology
Journal of Experimental Social Psychology
Personality and Social Psychology Bulletin
Journal of Applied Social Psychology
Journal of Research in Personality
Journal of Personality
Social Psychology Quarterly
Psychological Review
Psychological Bulletin
International Journal of Aging and Human Development
Body Image: An International Journal of Research
Human Communication Research
Evolutionary Psychology
Personal Relationships
European Journal of Social Psychology
Representative Research in Social Psychology
Journal of Behavior Analysis of Offender and Victim Treatment and Prevention
Journal of Experimental Psychology: Applied
Applied Cognitive Psychology
Journal of Forensic Psychology Practice
Psychology, Public Policy and Law
Psychology, Crime and Law
Behavioral Sciences and the Law
Law and Human Behavior

GRANTING AGENCIES

National Science Foundation
National Institute of Mental Health
Canadian Research Council
Israel Science Foundation

GRANTS RECEIVED

2012-13 "Flying under the radar: Undermining resistance to investigative interviewing through interviewer priming, social ostracism and self-affirmation" DOJ/FBI $175,000

PUBLICATIONS

Rerick, P.O., Livingston, T.N., & Davis, D. (in press). Rape and the jury. In W.O. O'Donohue, C. Cummings, & P. Schewe (Eds.), *Handbook of Sexual Assault and Sexual Assault Prevention.* New York, NY: Springer

Wood, E. G., Rikkonen, K., & Davis, D. (in press). Defining, communicating and interpreting sexual consent. In W.O. O'Donohue, C. Cummings, & P. Schewe (Eds.), *Handbook of Sexual Assault and Sexual Assault Prevention.* New York, NY: Springer

Davis, D., Rerick, P. Livingston, T.. & Villalobos, J. G. (under review). Does apology=confession: Perceptions of Suspect Apologies During "Pretext" Calls From an Accuser.

Davis, D., & Reisberg, D. (in press). The psychologist as trial consultant. In C. T. Stein & J. N. Younggren (Eds.), *Forensic Psychology in Military Courts.* Washington, DC: American Psychological Association.

Reisberg, D. & Davis, D. (in press). The psychologist as courtroom educator. In C. T. Stein & J. N. Younggren (Eds.), *Forensic Psychology in Military Courts.* Washington, DC: American Psychological Association.

Livingston, T., Rerick, P., Villalobos, J. G., & Davis, D. (in press). Deception induced confession: Strategies of police interrogators and their lay collaborators. In T. Docan-Morgan (Ed.), *Palgrave Handbook of Deceptive Communications.*

Davis, D., & Loftus, E. F. (in press). Recovered memories. In N. Andreasen, J. Geddes, G. Goodwin (Eds.), *New Oxford Textbook of Psychiatry* (3rd Edition). Oxford University Press

Follette, W. C., Leo, R. A., & Davis, D. (2018). False confessions. In E. Kelley (Ed.) *Representing people with mental disabilities: A criminal defense lawyer's best practices manual* (pp. 95-124). American Bar Association.

Wood, E. F., & Davis, D. (i2018). Perceptual, Cognitive, and Social Foundations of

Eyewitness Identifications: Why Do Identifications Go Wrong? In G. Goodman (Ed.), *The Wiley Handbook of Autobiographical Memory, Autism Spectrum Disorder, and the Law.* New York, Wiley.

Nirider, L., Davis, D., & Leo, R. A. (in press). Disputed criminal confessions: Challenges of Litigation. In Lorandos, D.s (Ed.) *The Litigator's Handbook of Forensic Medicine, Psychiatry & Psychology.* Egan, Minnesota: WEST, a Thomson Reuters Company.

Davis, D., & Loftus, E. F. (2018). Eyewitness Science in the 21st Century: What Do We Know and Where Do We Go From Here? In Phelps, E., & Davachi, L. (Eds.), *Steven's Handbook of Experimental Psychology: Volume 1: Learning and Memory.* John Wiley.

Davis, D., Soref, A., Villalobos, J. G., & Mikulincer, M. (2016). Priming states of mind can affect disclosure of threatening self information: Effects of self affirmation, mortality salience, and attachment orientations. *Law and Human Behavior.*

Davis, D., & Leo, R. A. (2016). A damning cascade of errors: Flaws in US Homicide Investigations. In F. Brookman & M. Maguire (Eds.), *Handbook of Homicide.* New York: Wiley-Blackwell.

Davis, D., & Loftus, E. F. (2016). Remembering disputed sexual encounters: A new frontier for witness memory research. *Journal of Criminal Law and Criminology* (Invited Contribution), 105 (4), 811-851.

Villalobos, J. G. & Davis, D. (2016). Interrogation and the minority suspect: Pathways to true and false confession. In M. Miller & B. Bornstein (Eds.) *Advances in Psychology and Law* (Vol. I). New York: Springer.

Costanzo, M., Blandon-Gitlin, I. & Davis, D. (2016). The content, purpose, and effects of expert testimony on interrogations and confessions. In M. Miller & B. Bornstein (Eds.) *Advances in Psychology and Law* (Vol. II). New York: Springer.

Davis, D., & Leo, R. A. (2016). Stereotype threat and the special vulnerabilities of sexual abuse/assault suspects to false confession. In R. Burnett (Ed.) *Vilified: Wrongful allegations of person abuse.* Oxford: Oxford University Press.

Villalobos, J. G., Davis, D., & Leo, R. A. (2016). His Story, Her Story: Sexual miscommunication, motivated remembering, and intoxication as pathways to honest false testimony regarding sexual consent. In R. Burnett (Ed.) *Vilified: Wrongful allegations of person abuse.* Oxford: Oxford University Press.

Wylie, L. E., Patihis, L., McCuller, L. L., Davis, D., Brank, E. M., Loftus, E. F., & Bornstein, B. H. (2014). Misinformation effects in older versus younger adults: A meta-analysis and review. In M. P. Toglia, D. F. Ross, J. Pozzulo, & E. Pica (Eds) *The Elderly Eyewitness in Court,* UK: Taylor & Francis.

Davis, D., Leo, R. A. & Williams, M. J. (2014) Disputed interrogation techniques in America: True and False Confessions and the Estimation and Valuation of Type I and II Errors. Cooper, S (Ed.), *Controversies in Innocence Cases in America.*

Perez, L., Ghiglieri, M., & Davis, D. (2014). Coyotes. In Levine, T. R. (Ed.), *Encyclopedia of Lying and Deception.* Thousand Oaks, CA: Sage.

Ghiglieri, M., Bell, V., & Davis, D. (2014). Justice. In Levine, T. R. (Ed.), *Encyclopedia of Lying and Deception.* Thousand Oaks, CA: Sage.

Bell, V., Villalobos, J. G., & Davis, D. (2014). Attorneys. In Levine, T. R. (Ed.), *Encyclopedia of Lying and Deception.* Thousand Oaks, CA: Sage.

Williams, M. J., Perez, L., & Davis, D. (2014). Conspiracies. In Levine, T. R. (Ed.), *Encyclopedia of Lying and Deception.* Thousand Oaks, CA: Sage.

Bell, V., Ghiglieri, M., & Davis, D. (2014). Duping delight. In Levine, T. R. (Ed.), *Encyclopedia of Lying and Deception.* Thousand Oaks, CA: Sage.

Villlalobos, J. G., Ogundimu, O., & Davis, D. (2014). Magic tricks. In Levine, T. R. (Ed.), *Encyclopedia of Lying and Deception.* Thousand Oaks, CA: Sage.

Botton, S. R., & Davis, D. (2014). Piltdown man. In Levine, T. R. (Ed.), *Encyclopedia of Lying and Deception.* Thousand Oaks, CA: Sage.

Villalobos, J. G., Williams, M. J., & Davis, D. (2014). Law enforcement. In Levine, T. R. (Ed.), *Encyclopedia of Lying and Deception.* Thousand Oaks, CA: Sage.

Williams, M. J., Villalobos, J. G., & Davis, D. (2014). Confessions. In Levine, T. R. (Ed.), *Encyclopedia of Lying and Deception.* Thousand Oaks, CA: Sage.

Davis, D. & Leo, R. A. (2014). The problem of police-induced false confession: Sources of failure in prevention and detection. In. S. Morewitz & M. L. Goldstein (Eds), *Handbook of Forensic Sociology and Psychology* (pp.47-75) . NY: Springer.

Davis, D., & Leo, R. A. (2014). The Problem of False Confession: Causes and Consequences. In J. Albanese (Ed.), *The Encyclopedia of Criminology and Criminal Justice.*

Pathitis, L., Loftus, E. F., & Davis, D. (2014). Memory and Self-Deception. In Levine, T. R. (Ed.), *Encyclopedia of Lying and Deception.* Thousand Oaks, CA: Sage.

Pathitis, L., Loftus, E. F., & Davis, D. (2014). Recovered memories: Deceiving Oneself and Others. In Levine, T. R. (Ed.), *Encyclopedia of Lying and Deception.* Thousand Oaks, CA: Sage.

Davis, D., & Loftus, E. F. (2014). "Repressed" and "Recovered" Memories: Myth or Reality? In R. L. Cautin & S. O. Lilienfeld (Eds.), *The Encyclopedia of Clinical Psychology.* New York: John Wiley & Sons.

Aronson, E. & Davis, D. (2014). Self-justification. In Levine, T. R. (Ed.), *Encyclopedia of Lying and Deception.* Thousand Oaks, CA: Sage.

Davis, D. & Villalobos, J. G. (2014). Language and the Law: Illustrations from Cases of Disputed Sexual Consent. In T. Holtgraves (Ed.), *Handbook of Language and Social Psychology.* Oxford: Oxford University Press.

Davis, D., & Leo, R. A. (2012). Acute suggestibility in police interrogation: Self-regulation failure as a primary mechanism of vulnerability. In A. Ridley, F. Gabbert, & La Rooy, D. J. (Eds.), *Suggestibility in legal contexts: Psychological research and forensic implications.* New York: Wiley.

Davis, D., & Leo, R. A. (2012). To Walk In Their Shoes: The Problem of Missing, Misrepresented and Misunderstood Context in Judging Criminal Confessions. *New England Law Review, 46 (4),* 737-767.

Davis, D., & Leo, R. A. (2012). "Interrogation-related regulatory decline:" Ego-depletion, self-regulation failure, and the decision to confess. *Psychology, Public Policy and Law, 18(4),* 673-704.

Porter, L. S., Keefe, F. J., Davis, D., Rumble, M., Scipio, C., & Garst, J. (2012). Attachment styles in patients with lung cancer and their spouses: Associations with patient and spouse adjustment. *Supportive Care in Cancer, 20,* 2459-2466.

Davis, D., & Loftus, E. F. (2012). The Dangers of Eyewitnesses for the Innocent: Learning from the Past and Projecting Into the Age of Social Media. *New England Law Review, 46 (4),* 769-809.

Davis, D., & Loftus, E. F. (2012) Inconsistencies between law and the limits of human cognition: Applications to eyewitness identification. In L. Nadel & W. Sinnott-Armstrong (Eds.), *Memory and the law* (pp 29-58). Oxford University Press.

Davis, D. & Leo, R. A. (2012). Interrogation through Pragmatic Implication: In L. Solan & P. Tiersma (Eds.), *The Oxford Handbook on Language and Law* (pp. 354-366). Cambridge: Oxford University Press.

Davis, D. & Leo, R. A. (2011). Three Prongs of the Confession Problem: Issues and Proposed Solutions. In Epstein, J. (Ed.) *The future of evidence* (pp. 233-264). Westlaw.

Nelson, K. J., Laney, C., Fowler, N. B., Knowles, E. D., Davis, D. & Loftus, E. F. (2011).

Change blindness can cause mistaken eyewitness misidentification. *Legal and Criminological Psychology, 16, 62-74.*

Davis, D., Leo, R. A., & Follette, W. C. (2010). Selling confession: Setting the stage with the "Sympathetic Detective with a Time-Limited offer. *Journal of Contemporary Criminal Justice, 26(4) 441-457.* (INVITED FOR SPECIAL ISSUE)

Davis, D., & Leo, R. A. (2010). Overcoming judicial preferences for person versus situation-based analyses of interrogation induced confessions. *Journal of the American Academy of Psychiatry and the Law, 38(2), 187-194.* (INVITED PAPER).

Davis, D. (2010). Lies, *Damned Lies,* and the Path from Police Interrogation to Wrongful Conviction. M. H. Gonzales, C. Tavris, & J. Aronson, (Eds.), *The scientist and the humanist: A festschrift in honor of Elliot Aronson (211-247).* New York: Psychology Press.

Leo, R. A., & Davis, D. (2009). From false confession to wrongful conviction: Seven psychological processes. *Journal of Psychiatry and Law (Special Issue on Interrogations and Confessions), 38 (Spring/Summer, 2010),* 9 - 56.

***Reprinted in Begam, A. (Ed.) (2010). *Law and Justice* (pp. 59-98). Nagarjuna Hills, Punjagutta, India: Amicus Books: Icfai University Press.

Davis, D. (2009). Attachment and sex. In H. Reis & S. Sprecher (Eds.) *The Encyclopedia of Human Relationships.* Thousand Oaks, CA. Sage.

Davis, D., & Loftus, E. F. (2009). The scientific basis of testimony regarding recovered memories of sexual abuse. In K.S. Douglas, J. L. Skeem & S. O. Lilienfeld (Eds.) *Psychological Science in the Courtroom: Controversies and Consensus* (pp. 55-79). New York: Guilford Press.

Follette, W. C., & Davis, D. (2009). Termination of psychotherapy and medication. In W. T. O'Donohue & M. A. Cucciare (Eds.), A clinician's guide to the termination of psychotherapy. Routledge. Oxford, UK.

Davis, D., & Loftus, E. F. (2009). Expectancies, Emotion and Memory Reports of Visual Events: Applications in the Legal System. In J. R. Brockmole (Ed.)., *The visual world in memory* (178-214). Psychology Press. (A volume in Psychology Press' *Current Issues in Memory* series: Series Editor: Robert H. Logie).

Follette, W. C. & Davis, D., (2008). Clinical practice and the issue of repressed memories: Avoiding an ice patch on the slippery slope. In W. T. O'Donohue and S. Graybar (Eds.), *Handbook of Contemporary Psychotherapy: Toward an Improved Understanding of Effective Psychotherapy* (pp. 47-73). Thousand Oaks, CA: Sage.

Davis, D. & McVean, A. (2008). Theory and methods for studying the influence of

unconscious processes: Illustrations from attachment and terror management research. In W. T. O'Donohue and S. Graybar (Eds.), *Handbook of Contemporary Psychotherapy: Toward an Improved Understanding of Effective Psychotherapy (75-115)*. Thousand Oaks, CA: Sage.

Davis, D. (2008) Selling confession: The interrogator, the con man, and their weapons of influence. *Wisconsin Defender, 16 (1),* 1-16.

Davis, D., Loftus, E. F., Vanous, S., & Cucciare, M. (2008). *"Unconscious transference"* can be an instance of change blindness. *Applied Cognitive Psychology, 22,* 605-623.

Follette, W. C., Davis, D., & Leo, R. A. (2007). Mental health status and vulnerability to interrogative influence. *Criminal Justice* (A publication of the American Bar Association). Special symposium on mental health and the law: *22 (3),* 42-49.

Porter, L. S., Davis, D., & Keefe, F. J. (2007). Attachment and pain: Recent findings and future directions. *Pain, 128,* 195-198.

Davis, D., & Loftus, E. F. (2007). Internal and external sources of distortion in adult witness memory. In M. P. Toglia, J. D. Read, D. R. Ross, & R. C. L. Lindsay (Eds.), *Handbook of Eyewitness Memory (*Vol. 1): *Memory for Events (pp. 195-237).* Mahwah, NJ: Erlbaum.

Davis, D., & Friedman, R. D. (2007). Memory for conversation: The orphan child of witness memory researchers. In M. P. Toglia, J. D. Read, D. R. Ross, & R. C. L. Lindsay (Eds.), *Handbook of Eyewitness Memory (*Vol. 1): *Memory for Events, (pp. 3-52).* Mahwah, NJ: Erlbaum.

Davis, D., & Leo, R. A. (2006). Psychological weapons of influence: Applications in the interrogation room. *Nevada Lawyer, 14,* 14-18.

Davis, D., Shaver, P. R., Widaman, K. E., Vernon, M. L., Beitz, K., Follette, W. C. (2006). "I Can't Get No Satisfaction:" Insecure attachment, Inhibited Sexual Communication, and Dissatisfaction. *Personal Relationships, 13,* 465-483.

Davis, D., & Leo, R. (2006). Strategies for prevention of false confessions. In M. Kebbell & G. Davies (Eds.), *Practical psychology for forensic investigations and prosecutions (pp. 121-150).* New York: John Wiley.

Loftus, E. F. & Davis, D. (2006). Recovered memories. *Annual Review of Clinical Psychology, 2, 469-498.*

Davis, D. (2006). Attachment-related pathways to sexual coercion. In Mikulincer, M., & Goodman, G. (Eds.), *Dynamics of Romantic Love: Attachment, caregiving and sex, (pp. 293-336).* New York: Guilford.

Davis, D. & Loftus, E. F. (2006). Psychologists in the forensic world. In S. I. Donaldson, S. D. E. Berger, & K. Pezdek (Eds.), *The rise of applied psychology: New frontiers and rewarding careers (pp. 171-200).* Mahwah, NJ: Erlbaum.

Davis, D., & Loftus, E. F. (2005). Age and functioning in the legal system: Victims, witnesses and Jurors. In Y. I. Noy & W. Karwowski (Eds.), *Handbook of human factors in litigation* (pp. 11-1 to 11-53). New York: CRC Press.

Davis, D., Kemmelmeier, M., & Follette, W. C. (2005). Conversational memory on trial. . In Y. I. Noy & W. Karwowski (Eds.), *Handbook of human factors in litigation* (pp. 12-1 to 12-29). New York: CRC Press.

Davis, D., Shaver, P. R., & Vernon, M. L. (2004). Attachment style and subjective motivations for sex. *Personality and Social Psychology Bulletin,* 30, 1076-1090.

Davis, D., & Follette, W. C. (2004). Jurors CAN be selected: Non information, misinformation and their strategic use for jury selection. In W. T. O'Donohue, E. Levensky (Eds.) *Handbook of forensic psychology* (782-805). New York, Elsevier Academic Press.

Davis, D., & O'Donohue, W. T. (2004). The road to perdition: "Extreme influence" tactics in the interrogation room. In W. T. O'Donohue, E. Levensky (Eds.) *Handbook of forensic psychology* (pp. 897-996). New York, Elsevier Academic Press.

Davis, D., & Loftus, E. F. (2004). What's good for the goose cooks the gander: Inconsistencies between the law and psychology of voluntary intoxication and sexual assault. In W. T. O'Donohue & E. Levensky (Eds.) *Handbook of forensic psychology* (pp. 997-1032) New York, Elsevier Academic Press

Davis, D., & Follette, W. C. (2003). Toward an empirical approach to evidentiary ruling. *Law and Human Behavior, 27 (6),* 661-684.

Kemmelmeier, M., & Davis, D., & Follette, W. C. (2003). Seven sins of misdirection? Ethical considerations and constraints surrounding the use of deception in research.. In O'Donohue, W., & Ferguson, K. (Eds.) *The Handbook of Professional Ethics for Psychologists.*. Sage: Thousand Oaks.

Follette, W. C., Davis, D., & Kemmelmeier, M. (2003). Ideals and realities in the development and practice of informed consent. In O'Donohue, W., & Ferguson, K. (Eds.) *The Handbook of Professional Ethics for Psychologists.*. Sage: Thousand Oaks.

Davis, D., Shaver, P. R., & Vernon, M. L. (2003). Physical, emotional and behavioral reactions to breaking up: The roles of gender, age and attachment style. *Personality and Social Psychology Bulletin, 29,* 871-884.

Davis, D., & Follette, W. C. (2002) Rethinking probative value of evidence: Base rates, intuitive profiling and the *post*diction of behavior. *Law and Human Behavior, 26,* 133-158.

Loftus, E. F., & Davis, D. (2002). Dispatch from the recovered memories legal front. *Psychiatric Times. (April), 14, 54.*

Davis, D., & Lesbo, M. V. (2002). Sculpting the body beautiful: Attachment style, neuroticism, and use of cosmetic surgeries. *Sex Roles, 47,* 129-138.

Davis, D., & Follette, W. C. (2001). Foibles of witness memory in high profile/traumatic cases. *Journal of Air Law and Commerce, 66*, 1421-1549. (Published by the Southern Methodist University Law Review). Also published in *Proceedings of the Journal of Air Law and Commerce Symposium*

****Reprinted in the Defense Law Journal 2003, 52, 609-736*

Davis, D., & Follette, W. C. (2001). "*DIPP*ing" in the jury pool: Designing voir dire questions to *D*iagnose, *I*ngratiate, *P*ersuade, and *P*rocure the jury you want. *Proceedings of the Journal of Air Law and Commerce Symposium.*

Davis, D., Loftus, E. F., & Follette, W. C. (2001). How, when, and whether to use informed consent for recovered memory therapy. *Journal of the American Academy of Psychiatry and the Law, 29,* 148-159.

Davis, D., Davis, D., & Lesbo, M. (2000). Personal control as a determinant of bet size and type of bets in casino craps games. *Journal of Applied Social Psychology, 30*, 1224-1242.

Davis, D., Follette, W. C., & Merlino, M. L. (1999). Seeds of Rape: Female behavior is probative for females, definitive for males. *Psychological Expertise and Criminal Justice*, 101-140. Washington, D. C.: American Psychological Association.

Davis, D. (1996). Jury selection in the 90's: Perspectives of a trial consultant. *Torts, Insurance & Compensation Law Section Journal, 25* (1), 18-26.

Davis, D. (1992). Smiling faces sometimes tell lies. *Orange County Lawyer*, April.

Davis, D. (1992). Editor, Special Issue "Free press versus fair trial: Behavioral research on the effects of pretrial publicity." *From The Mind's Eye, 1*, (3).

Davis, D. (1991). Facing justice and judging faces: What do they have in common? In D. Davis (Ed.) *From the Mind's Eye. 1* (1).

Davis, D. (1991). Making the best use of physical characteristics in court. In D. Davis (Ed.), *From the Mind's Eye. 1* (1).

Davis, D. (1991). Standards of proof: Do jurors distinguish? In D. Davis (Ed.), *From the Mind's Eye. 1* (1).

Davis, D. (1991). In the jury box: Tips for jury selection. In D. Davis (Ed.), *From The Mind's Eye. 1* (1).

Davis, D. (1991). Death by procedure: Biasing effects of considering the harshest verdict first. In D. Davis (Ed.), *From The Mind's Eye,* 1, (1).

Davis, D. (1991). Deep pockets and bleeding hearts: Is Robin Hood alive and well in the American Jury? In D. Davis (Ed.), *From The Mind's Eye*, 1, (1).

Davis, D. (1991). Physicians and other high status defendants: with greater privilege goes greater responsibility. In D. Davis (Ed.), *From the Mind's Eye, 1,* (1).

Davis, D. (1991). Criminal juries and the leniency bias. In D. Davis (Ed.), *From the Mind's Eye, 1,* (1).

Davis, D. (1991). Human judgment and the hindsight bias. In D. Davis (Ed.), *From the Mind's Eye, 1,* (2).

Davis, D. (1991). To catch a liar: Are professionals more skillful? In D. Davis (Ed.), *From The Mind's Eye, 1,* (2).

Davis, D. (1991). Day in the life videos, the next generation: Bumps, cracks, and other accidents in waiting. In D. Davis (Ed.), *From The Mind's Eye, 1*, (2)

Davis, D. (1991). Half full or half empty: There is a difference (Or so we think!). In D. Davis (Ed.), *From The Mind's Eye, 1,* (2).

Davis, D. (1991). The importance of timing: Defense opening is most effective at the first opportunity. In D. Davis (Ed.), *From The Mind's Eye, 1,* (2).

Davis, D. Brochure, Sierra Trial and Opinion Consultants.
(Educational brochure, copyrighted and published by Sierra Trial and Opinion Consultants).

McGovern, K., & Davis, D. (1989). False allegations of child sexual abuse: Is there a problem? *Nevada Family Law Review*, February.

Davis, D. (1989). Flying with radar: Use of mock jury research to target critical issues and fine tune trial strategy. *Inter Alia: Journal of the State Bar of Nevada, 54*, (3).

Davis, D., & Olmsted, J. (1988). Trial consulting services: The winning edge from litigation support technology. *Inter Alia: Journal of the State Bar of Nevada, 53 (2)*, 14-17.

Davis, D., & Ostrom, T. M. (1984). Attitude measurement. In R. J. Corsini (Ed.), *Wiley Encyclopedia of Psychology*. New York: Wiley, Vol. 1, 97-99.

Davis, D. & Holtgraves, T. (1984). Perceptions of unresponsive others: Attribution, attraction, understandability, and memory for their utterances. *Journal of Experimental Social Psychology, 20,* 383-408.

Davis, D. (1982). Determinants of responsiveness in dyadic interaction. In W. Ickes & E. S. Knowles (Eds.), *Personality, roles, and social behavior* (85-139). New York: Springer-Verlag.

Davis, D. (1981). Implications for interaction versus effectance as mediators of the similarity-attraction relationship. *Journal of Experimental Social Psychology, 17*, 96-116.

Davis, D., & Perkowitz, W. T. (1979). Consequences of responsiveness in dyadic interaction: Effects of probability of response and proportion of content-related responses on interpersonal attraction. *Journal of Personality and Social Psychology, 37*, 534-550.

Davis, D., & Brock, T. C. (1979). Heterosexual physical pleasuring: Effects of the recipient's status and responsiveness. *Journal of Experimental Social Psychology, 15*, 217-228.

Ostrom, T. M., & Davis, D. (1979). Idiosyncratic weighting of trait information in impression formation. *Journal of Personality and Social Psychology, 37,* 2025-2043.

Davis, D., & Martin, H. J. (1978). When pleasure begets pleasure: Recipient responsiveness as a determinant of physical pleasuring between heterosexual dating couples and strangers. *Journal of Personality and Social Psychology, 36*, 767-777.

Davis, D., Rainey H. C., & Brock, T. C. (1976). Physical pleasuring: Effects of sex combinations, recipient attributes, and anticipated future interaction. *Journal of Personality and Social Psychology, 33,* 89-106.

Davis, D., & Brock, T. C. (1975). Use of first person pronouns as a function of increased objective self-awareness and performance feedback. *Journal of Experimental Social Psychology, 11,* 381-388.

Davis, D., & Wicklund, R. A. (1973). An objective self-awareness analysis of communication sets. In S. Duval & R. A. Wicklund, *A theory of objective self-awareness.* New York: Academic Press, 180-186.

Davis, D., & Ostrom, T. M. (1973) Trait implication in impression formation. *Proceedings, LXXXI Annual Convention,* American Psychological Association, 195-196.

Jellison, J. M., & Davis, D. (1973). Relationships between perceived ability and attitude extremity. *Journal of Experimental Social Psychology, 27,* 430-436.

Davis, D., & Brock, T. C. (1972). Paradoxical instigation of self-criticism by inordinate praise. *Proceedings, LXXX Annual Convention. American psychological association,* 191-192.

Ostrom, T. M., Edwards, J. D., Rosenblood, L. K., & Davis, D. (1972). Communication discrepancy and attitude change: a bibliography of research and theory. *Catalog of Selected Documents in Psychology, 2*, 64-84.

PRESENTATIONS

NATIONAL MEETINGS

Davis, D., & Jellison, J. M. (1972). Relationships between perceived ability and attitude extremity. Eastern Psychological Association, Boston.

Davis, D., & Brock, T. C. (1972). Paradoxical instigation of self criticism by inordinate praise. American Psychological Association, Honolulu.

Davis, D., & Ostrom, T. M. (1973) Trait implication in impression formation. American Psychological Association, Montreal.

Davis, D., Ostrom, T. M., & Caldwell, J. (1973). Meaning shift and the set size effect. Western Psychological Association, Anaheim.

Davis, D., & Brock, T. C. (1973) Heightened self-awareness, self-esteem, and egocentric thought. Eastern Psychological Association, Washington, D. C.

Davis, D., & Brock, T. C. (1974). Social determinants of physical pleasuring: Effects of the relative status of the pleasurer and the recipient. Western Psychological Association, San Francisco.

Davis, D., Brock, T. C., & Rainey, H. G. (1974). Social determinants of physical pleasuring: Effects of the attractiveness and responsiveness of the recipient. Eastern Psychological Association, Philadelphia.

Ostrom, T. M., & Davis, D. (1975). Stimulus interaction in impression formation. Eastern Psychological Association, New York.

Davis, D. (1975). Use of first person pronouns as a function of increased objective self-awareness and prior feedback. Eastern Psychological Association, New York,.

Davis, D., & Perkowitz, W. T. (1977) Effects of responsiveness in a verbal exchange on interpersonal attraction. American Psychological Association, San Francisco.

Martin, H. J., & Davis, D. (1977) Effects of sex, responsiveness, and relationship meaningfulness on physical pleasuring. American Psychological Association, San Francisco.

Davis, D. (1978). Similarity, interaction, and interpersonal attraction. American Psychological Association, Toronto, Canada.

Davis, D. (1978). Instrumental conditioning of conversational behavior: Responsiveness is rewarding. American Psychological Association, Toronto, Canada.

Davis, D., Holtgraves, T., Kasmer, J., & Ginsburg, G. (1982). Self-consciousness, attitudes, subjective norms, and behavioral intentions. American Psychological Association, Washington, D. C.

Davis, D. (1982). Information-processing consequences of responsiveness in dyadic interaction. Nags Head Conference on Social Cognition, Nags Head, North Carolina. (Invited address).

Davis, D. (1982). Antecedents and consequences of responsiveness in dyadic interaction. Nags Head Conference on Naturalistic Studies of Social Interaction, Nags Head, North Carolina. (Invited address).

Holtgraves, T., & Davis, D. (1983). Perceptions of unresponsive others: Attributions, attraction, understandability, and memory for their utterances. Western Psychological Association, San Francisco, California.

Holtgraves, T., & Davis, D. (1983). Processing efficiency of responsive and unresponsive content. American Psychological Association, Anaheim, California.

Davis, D. (1983). Moderators of the consequences of responsiveness in dyadic interaction. Nags Head Conference on Social Cognition, Nags Head, North Carolina. (Invited address).

Davis, D. (1983). When unresponsive behavior is not so bad. Nags Head Conference on Interpersonal Relations, Nags Head, North Carolina.

Davis, D. (1984) Antecedents and consequences of responsiveness in dyadic interaction. Southwestern Psychological Association, New Orleans. (Invited Address)

Davis, D. (1984) Antecedents and consequences of responsiveness in dyadic interaction. International Communications Association, San Francisco. (Invited Address).

Dewitt, J. S., Davis, D., Naseth, G. J., & Carney, A. (1984). Moderators of the consequences of responsiveness in communication. International Communications Association, San Francisco. (Invited address).

Davis, D. (1984) Speech acts and planning in conversation. Symposium; International Communications Association, San Francisco. (Invited to organize and chair this symposium)

Davis, D., & Droll, D. (1984). Toward a psychology of forgiving. American Psychological Association, Toronto. (Invited address).

Holtgraves, T. M., & Davis, D. (1984) Attributional consequences of responsiveness in conversation. American Psychological Association, Toronto. (Invited address).

Davis, D. (1984). The role of responsiveness in interpersonal relations. Society of Experimental Social Psychology. Snowbird Resort, Utah. (Invited address).

Davis, D., & Droll, D. (1985). Relative power, accounts and apologies as determinants of forgiving. American Psychological Association, Los Angeles.

Carney, A., Davis, D., & Lipparelli, M. A. (1986). A reformulation and extension of Brown and Levinson's theory of politeness. Western Psychological Association, Los Angeles.

Carney, A., Dewitt, J. S., & Davis, D. (1986). Effects of stereotypes, order of presentation, and familiarity on person memory. Western Psychological Association, Los Angeles, 1986.

Davis, D., Carney, A., & Dewitt, J. S. (1986). Comprehension and face as determinants of listener responsiveness in conversation. American Psychological Association, Washington, D. C.

Davis, D. (1986). Chair, session entitled "The social relations model." American Psychological Association, Washington, D. C.

Davis, D. (1986). Effects of listener status and familiarity, and the magnitude of request on use of polite form in conversation. Hags Head Conference on Groups, networks and organizations, Nags Head, North Carolina. (Invited address).

Davis, D. (1987). Psychology and the legal system. Society of Experimental Social Psychology, Charlottesville, Virginia.

Lewis, E. W., & Davis, D. (1988). The attribution of responsibility: An application to the legal system. Western Psychological Association, San Francisco.

Gastanaga, L., Greenstein, F., Kaplan, M., Pearlman, A., Price, N., Robbins, R., Wentzel, S., & Davis, D. (1988). Verbal assertiveness: A theoretical review and reformulation. Western Psychological Association, San Francisco.

Davis, D., Rippens, P., & Foushee, R. (1989). Public knowledge and beliefs concerning child sex abuse. Western Psychological Association, Reno.

Davis, D. (1989). Chair, session on "Opportunities for research support for AIDS related projects." Western Psychological Association, Reno.

Lewis, E. W. & Davis, D. (1992). Mitigating circumstances in sentencing: The effect of attributional complexity. American Psychology and Law Society, San Diego.

Davis, D., & Ostler, T. (1992). Erotophobia, sex guilt and biased jurors. American

Psychology and Law Society, San Diego.

Lewis, E. W., & Davis, D. (1992). Effects of attributional complexity, authoritarianism, and empathy on sentencing. Rocky Mountain Psychological Association, Boise.

Savoy, S. O., Coker, R., Misselli, V., Mifflin, J., & Davis, D. (1992). Juror reactions to sex applications of hypnosis in the legal system. Rocky Mountain Psychological Association, Boise.

Ostler, T., & Davis, D. (1992). Erotophobia, sex guilt and reactions to sex related crimes. Rocky Mountain Psychological Association, Boise.

Davis, D., & Lesbo, M. (1997). May to December: A theory of mate selection across the life span. Society of Experimental Social Psychology, Toronto, Canada, October, 1997.

Lesbo, M., Davis, D., & Sundahl, I. (1997). Age and sex differences in advertising for mates. Rocky Mountain Psychological Association, Reno, April, 1997.

Sundahl, I., Davis, D., & Lesbo, M. (1997). Perceptions of control and bet size: A naturalistic study of casino craps. Rocky Mountain Psychological Association, Reno, April, 1997.

Davis, D., & Lesbo, M. (1999). The role of sexuality stereotypes in judgments of rape among women of four races. Northwest Conference on Memory and Cognition, May 1999.

Davis, D., Follette, W. C., & Merlino, M. L. (1999). Seeds of rape: Female behavior is probative for females, definitive for males. Psychological Expertise and Criminal Justice: A conference for Psychologists and Lawyers (Jointly sponsored by APA and ABA). Washington, DC, October.

Davis, D., & Lesbo, M. (2000). Gender, attachment and physical, emotional and behavioral reactions to breakups. Western Psychological Association, Portland, Oregon, April, 2000.

Davis, D., & Follette, W. C. (2000). Attachment, marital interaction: The four horsemen and their first cousins. Western Psychological Association, Portland, Oregon, April, 2000.

Davis, D., & Follette, W. C., (2000). Attachment style and emotional expression in close relationships. Western Psychological Association, Portland, Oregon, April, 2000.

Davis, D., & Lesbo, M. (2000). Gender, attachment and subjective motivations for sex. Western Psychological Association, Portland, Oregon, April, 2000.

Davis, D. (2001). Factors compromising witness memory in high profile/traumatic cases. SMU Air Law and Commerce Symposium, Dallas, February.

Davis, D., & Follette, W. C. (2001). "*DIPP*ing" in the jury pool: Designing voir dire questions to *D*iagnose, *I*ngratiate, *P*ersuade, and *P*rocure the jury you want. SMU Air Law and Commerce Symposium, Dallas, February.

Davis, D., Follette, W. C., & Lesbo, M. V. (2001). Adult attachment style and the experience of unwanted sex. Western Psychological Association, Maui, Hawaii, May.

Davis, D. Lesbo, M. V., Fuhrel, A., & Barkewai, Z. (2001). May to December: Determinants of romantic relationship motivation across the lifespan. Western Psychological Association, Maui, Hawaii, May.

Davis, D., Follette, W. C., & Vernon, M. L., Shaver, P. R. (2001). Adult attachment style, extent and manner of expression of sexual needs. Western Psychological Association, Maui, Hawaii, May.

Davis, D., & Follette, W. C. (2001). Fallacies of post hoc heuristic reasoning in the judicial system. Western Psychological Association, Maui, Hawaii, May.

Follette, W. C., & Davis, D. (2001). Rethinking the rules of evidence: Empirical determination of "Probative value" of evidence. Western Psychological Association, Maui, Hawaii, May.

Davis, D. (2001). Victim syndrome evidence in court: Heuristic reasoning from diagnosis to verdict. Western Psychological Association, Maui, Hawaii, May.

Davis, D., & Goodis, J. (2001). Does consent to alcohol equal consent to sex? American Psychological Association, San Francisco, August.

Davis, D., & Lesbo, M. V. (2001). Sculpting the body beautiful: Attachment style and use of plastic surgery. American Psychological Association, San Francisco, August.

Vanous, S., & Davis, D. (2001). Motive evidence: Probative or just prejudicial? Rocky Mountain Psychological Association, Reno, April.

Vanous, S., & Davis, D. (2002). Cultural stereotypes of motive, means and how to cover up a crime. Rocky Mountain Psychological Association, Salt Lake City, April.

Davis, D. (2002). Memory on trial. Federal Public Defender Investigator Association, Portland, Oregon, April.

Davis, D. (2002). Toward empirical standards for evaluation of the admissibility of evidence. Society of Experimental Social Psychology, Columbus, Ohio, October.

Davis, D., Follette, W. C. (2003). Attachment, terror management, and end-of-life caregiving/receiving. *Compassionate Love Conference*, sponsored by the International Association of Relationship Research and the Fetzer Foundation.

Davis, D. (2004). Attachment, sexual motivation and sexual behavior. *Society of Personality and Social Psychology.*

Davis, D. (2004). Attachment and sexual pathology. *International Association of Relationship Research.* Bloomington, Indiana.

Davis, D. (2004). Sex in service of attachment and caregiving. *Dynamics of Romantic Love: Attachment, Caregiving, and Sex.* Davis, California.

Davis, D. (2004, January). Attachment and end-of-life caregiving. Invited address: Duke University Medical School.

Davis, D., Knaack, D., Lopez, P., Koyama, M., White, B., Bailey, D. & Kusal, T. (2005). Memory for Threats in Conversation Enhanced by Later Knowledge of Violence Between Participants. *American Psychological Society*, Los Angeles, CA.

Davis, D., Vanous, S., & Cucciare, M. (2005) Unconscious Transference as an Instance of 'Change Blindness.' *American Psychological Society,* Los Angeles, CA.

Shaver, P. R., Schachner, D. A., Gillath, O., & Davis, D. (2005). Interrelations of the Attachment and Sexual Behavioral Systems. Symposium Title:Research on Sexual Motives: Implications for Sexual Behavior and Intimate Relationships. *American Psychological Association.*

Rumble M, Keefe F, Porter L, Miller J, Davis D, Scipio C, Garst J, Peterson B. Relationship of marital attachment style to symptoms,self-efficacy and psychological distress in patients with lung cancer and their spouses. Poster presented at the annual meeting of the American Pain Society, San Antonio, TX, May 2006.

Davis, D. (2006). Confession evidence. *Association of American Law Schools.* Washington, D. C. (January) (Invited Address).

Davis, D., Leo, R. A., Knaack, D., Bailey, D. A. (2006). Sympathetic detectives with time limited offers: Effects on perceived consequences of confession. Association for Psychological Science. New York, May..

Davis, D., Vernon, M. V., & Shaver, P. R. (2006). How do we cause our relationships to fail? The role of attachment style. *Association for Psychological Science,* New York, May.

Davis, D., Carlen, L. & Gallio, J. (2006). Attachment, rape supportive attitudes, and

perceived validity of claims in three rape scenarios. *Association for Psychological Science.* New York, May.

Nelson, K. J., Laney, C., Le, A. J., Fowler, N. B., Knowles, E. D., Davis, D., & Loftus, E. F. (2007). Change blindness can cause mistaken eyewitness identifications. *Association for Psychological Science.* Washington, D.C., May.

Davis, D., Weaver, T., Leo, R. A. (2007). Effects of failed polygraph results on true and false confessions. *American Psychological Association,* San Francisco, CA., August.

Davis, D., Leo, R. A., Follette, W. C. (2007). Effects of interrogation tactics on recommendation of false confession for the innocent. *Interrogations and Confessions.* El Paso, TX: September.

Davis, D. (2007). The problem of false confessions: Policy considerations and the issue of type I and type II outcome errors in interrogations.

Davis, D. & Follette, W. C. (2007). Blowing smoke and selling snake oil: Sources of invalidity and exaggeration in expert testimony; Osgoode Hall Law School, Toronto, CA, November. (Invited address).

Davis, D., Leo, R. A., & Follette, W. C. (2008). Recommending false confession for the innocent. *American Psychology-Law Society.* Ft. Lauderdale, Fl: March.

Davis, D., (2009) Society of Experimental Social Psychology, Academic, "Interrogation through pragmatic implication", Accepted, Society of Experimental Social Psychology, Portland, Maine, October.

Davis, D. (2009), Lowman, J., Sigilloa, A., Association for Psychological Science, Academic, "Age and perceived net benefits of romantic relationships", Accepted, Association for Psychological Science, San Francisco, May.

Davis, D. (2009), Sigilloa, A., Lowman, J., Association for Psychological Science, Academic, "Attachment and perceived advantages and disadvantages of romantic relationships", Accepted, Association for Psychological Science, San Francisco; May..

Davis, D., Hernandez, J., Follette, W. C., Leo, R. A. (2010). "Interrogation through pragmatic implication: Communicating beneficience and promises of leniency. Society for Personality and Social Psychology, Las Vegas, Nevada, January.

Hernandez, O., Draper, C., Davis, D., & Leo, R. (2010). Stage setting in police interrogation: Interactive effects of a "pretext" for interrogation and "minimization." American Psychology-Law Society, Vancouver, Canada; March.

Davis, D. (2010). Jury decisions and experience (Panel Moderator). *Western Social*

Science Association. Reno, NV: April

Davis, D. (2010), Inconsistencies between law and the limits of human cognition., Society of Experimental Social Psychology, Minneapolis, MN. (October).

Davis, D., Sigilloa, A. Lowman, J. (2010). Adult attachment style and strategies of social influence., Western Psychological Association, Cancun. (April).

Davis, D., (2010). "Law is an Ass: Ignorance and stubbornness in applications of psychology to law", Invited, Memory and the Law: National Science Foundation, Tuscon Arizona. (February 2010).

Williams, M. J., & Davis, D. (2012, April). Authoritarian personality moderates the deleterious effects of ostracism. Rocky Mountain Psychological Association, Reno, NV.

Davis, D. (2012). Identity threat in the interrogation room: How do suspects behave when they don't expect to be believed? International Conference on Investigative Interviewing. Nicolet, Canada.

Davis, D., Mikulincer, M., Soref, A., Villalobos, G., Ogundimu, O., Perez, L., Ghiglieri, M., & Williams, M. J. (2013, October). *Effects of self-affirmation, mortality salience, attachment security, and ostracism on self-disclosure of negative personal information*. Paper session presented at the meeting of the High-Value Detainee Interrogation Group, Washington, D.C.

Davis, D., Williams, M. J., & Villalobos, J. G. (2013, March). *Interrogation-related regulatory decline: The roles of prior effort and stereotype threat.* Paper session presented at the meeting of the Western Psychological Association, Reno, NV.

Villalobos, J. G., Williams, M. J., & Davis, D. (2013, January). *Self-regulation and the perceived wisdom of false confession to murder.* Poster session presented at the meeting of the Society for Personality and Social Psychology, New Orleans, LA.

Williams, M. J., Villalobos, J. G., & Davis, D. (2013, April). The Other "L" (Lobotomoy) Effect: Determinants and Consequences of Impaired Executive Control in Suspects. Paper presented at the 93rd Annual Convention of the Western Psychological Association. Reno, NV.

Davis, D., Williams, M. J., & Villalobos, J. G. (2013, March). Interrogation-Related Regulatory Decline: The Roles of Prior Effort and Stereotype Threat. Paper presented at the 2013 American Psychology-Law Society conference. Portland, OR.

Villalobos, J. G., Williams, M. J., & Davis, D. (2013, January). Self-Regulation and the Perceived Wisdom of a False Confession to Murder. Society for Personality and Social Psychology. New Orleans, LA.

Davis, D., Williams, M. J., & Villalobos, J. G. (2013). Interrogation-related regulatory decline: The roles of prior effort and stereotype threat. American Psychology-Law Society. Portland, OR.

Leo, R. A., & Davis, D. (2013). To walk in their shoes: The problem of recognizing false confessions. American Psychology-Law Society. Portland, OR.

Davis, D. (2013). Where Lucifer Thrives: Situational forces impairing interrogator judgment and strategy. Western Psychological Association. Reno, NV.

Williams, M. J., Villalobos, J. G., & Davis, D. (2013). The other L (Lobotomy) effect: Determinants and consequences of impaired executive control in suspects. Western Psychological Association. Reno, NV.

Davis, D., Mikulincer, M., & Soref, A. (2014). Flying under the radar II: Using face and contextual primes to undermine resistance to out-group interviewers. American Psychology-Law Society, New Orleans, LA.

Davis, D., Mikulincer, M., & Soref, A. (2014). Flying under the radar I: Priming states of mind can increase or decrease disclosure of sensitive personal information. American Psychology-Law Society, New Orleans, LA.

Davis, D. (2015). Causes of Wrongful Conviction: Law Enforcement Bias, Error and Coercion, Invited, Vanguard Court Watch. (October).

Davis, D., (2015). Implicit Bias: Are There Solutions? Decision Making, Academic, Workshop, Invited, National Judicial College. (July 2015).

Davis, D. (2015), Minorities in interrogation, Invited, American Psychology Law Society. (March).

Davis, D. (2015), , "Strengths and weaknesses of interrogation methods: Implications for true and false confessions", Invited, The Center for American and International Law. Establishing Innocence or Guilt - Causes of and Solutions to Wrongful Convictions, (2015).

Villalobos, J. G. (2016). The psychological consequences of stereotype threat and interrogation-related regulatory decline Western Psychological Association.

Davis, D. (2016). Addressing the Implicit Bias Problem, Academic, Workshop, "Solutions to the problem of implicit bias? Reality or fantasy?", Invited, National Judicial College. (March 27).

This was a workshop organized by the National Judicial College to design an online course designed to help reduce implicit racial bias among judges. The participants met and

designed the course content during the two day workshop

Davis, D. (2016). Theorizing Sexual Consent Processes, Academic, Conference, "Remembering Disputed Sexual Encounters", Invited, University of Texas, Austin. (March 18).

**This was a 45 minute invited keynote address

Wood, E. F. Davis, D. (2016). Perceived and actual probative and definitive value of sexual behaviors in college students: Which behaviors have most potential for miscommunication?" Society for Personality and Social Psychology. (January 28).

Davis, D., (2016). Remembering Disputed Sexual Encounters", Society of Personality and Social Psychology. (January 28).

***I was the invited keynote speaker for the Sexuality Preconference

Wood, E. F., & Davis, D. (2017). "Perceived versus actual links between intoxication and sexual availability", American Psychology Law Society. (March).

Davis, D. (2017), Workshop for Marine Jag Attorneys, Non-Academic, Workshop, "Investigating and defending cases of false confession", Invited, Marines. (December)

Wood, E. F., Miller, M., Davis, D. (2017) "Understanding the shift from 'no means no' to 'yes means yes': Investigating interpretations of affirmative consent policies in a community sample", American Psychology Law Society. (March).

Davis, D. (2017), "What do we know about causes and impact of false confessions and where do we go from here?" Association of American Law Schools. (January).

Livingston, T. N., Rerick, P. O., & Davis, D. (2018, May). *The effect of caller threats on guilt ratings in a "pretext" phone call.* Poster presented at the annual meeting of the Association for Psychological Science, San Francisco, CA.

Rerick, P. O., Livingston, T. N., & Davis, D. (2018, May). *Mock jurors' interpretations of apologies in a pretext call.* Poster presented at the annual meeting of the Association for Psychological Science, San Francisco, CA.

Rikkonen, K. J., Livingston, T. N., Rerick, P. O., & Davis, D. (2018, May). *Mortality salience predicts perceived interrogator beneficence and wisdom of suspect confession.* Poster presented at the annual meeting of the Association for Psychological Science, San Francisco, CA.

Rerick, P. O., Livingston, T. N., & Davis, D. (2018, April). *A validated measure of heterosexual men's perceptions of women's sexually probative behaviors.* Poster presented at the annual meeting of the Western Psychological Association, Portland, OR.

Livingston, T. N., Rerick, P. O., & Davis, D. (2018, March). *Sexual arousal predicts men's perceptions of women's sexual intent.* Poster presented at the annual meeting of the American Psychology-Law Society, Memphis, TN.

Livingston, T. N., Rerick, P. O., Villalobos, J. G., Clark, J., Gbenjo, P., & Davis, D. (2018, April). *Racial- and perpetrator-victim stereotypes in child sexual abuse cases.* Poster presented at the annual meeting of the Western Psychological Association, Portland, OR.

INTERNATIONAL MEETINGS

Davis, D., & Brock, T. C. (1976). Determinants of interpersonal physical pleasuring. International Congress of Psychology, Paris, France.

Davis, D. (1980). A "rewards of interaction" interpretation of the similarity-attraction relationship: Theory and data. International Congress of Psychology, Leipzig, East Germany.

Davis, D. (1980). Antecedents and consequences of responsiveness in dyadic interaction. International Congress of Psychology, Leipzig, East Germany.

Davis, D., & Holtgraves, T. M. (1983). Responsiveness, understanding and memory in dyadic interaction. Interamerican Congress of Psychology, Quito, Ecuador.

Kelley, L., Davis, D., & Wood, J. (1984) Status, physical attractiveness and popularity as elicitors of responsiveness from others. International Congress of Psychology, Acapulco, Mexico.

Davis, D., Kelley, L., Wood, J., & Steronko, R. (1984). Consequencias evolucionarias de responsividad materna y peterna: amour proprio y punto internal de control. International Congress of Psychology, Acapulco, Mexico.

Davis, D., Dewitt, J. S., & Carney, A. (1985). Las limitaciones en algunas reglas de conversacion: Cuando se espera y se condona el comportamiento no responsivo. Interamerican Congress of Psychology, Caracus, Venezuela.

Davis, D., & Lewis, E. W. (1988). The attribution of responsibility within the American legal system. XXIV International Congress of Psychology, Sydney Australia.

Davis, D., Wentzel, S., Robbins, R., Price, N., Pearlman, A., Kaplan, M., Greenstein, F., & Gastanaga, L. Verbal assertiveness in conversation. XXIV International Congress of Psychology, Sydney, Australia, 1988.

Davis, D., Rippens, P., & Foushee, R. (1989). Public beliefs about child sexual abuse. Interamerican Congress of Psychology, Buenos Aires, Argentina.

Davis, D., Ostler, T., & McBride, G. (1989). Verbal and nonverbal flirting techniques. Interamerican Congress of Psychology, Buenos Aires, Argentina.

Davis, D. & Leontauras, A. (1995). Dating preferences and practices across the lifespan. Interamerican Congress of Psychology, Puerto Rico. (Invited Address).

Davis, D., Lesbo, M., Adams, R., Shelton, N., Lindquist, M. (1998). The role of stereotypes regarding sexuality in judgements of rapes among women of four races. 24th Annual Congress of Applied Psychology, San Francisco, CA, August, 1998.

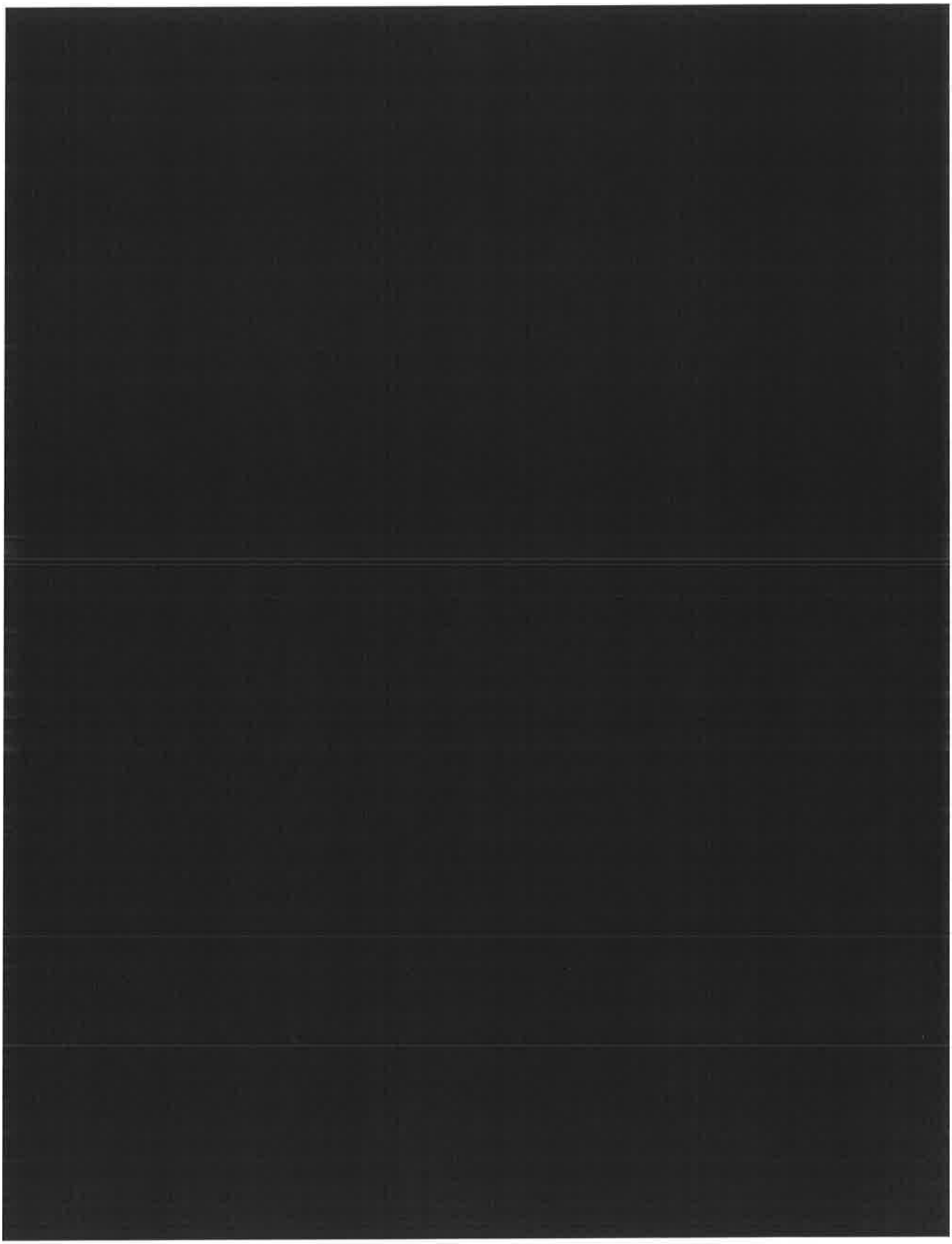
Sundahl, I., Davis, D., & Lesbo, M. (1998). Personality and preferences for casino games. 24th International Congress of Applied Psychology, San Francisco, CA, August, 1998.

Davis, D., & Lesbo, M. (1998). Female wardrobe choices and sexual intent: Female intent and male interpretation. 24th International Congress of Applied Psychology, San Francisco, CA., August, 1998.

Davis, D., & Lesbo, M. (1998). Use of the Internet for cross-cultural survey research: A study of life-span mate selection. 24th International Congress of Applied Psychology, San Francisco, CA, August, 1998.

Davis, D., Lesbo, M. & Thoroughgood, A. J. (1999). The role of stereotypes of female sexuality in rape. Northwest Conference on Memory and Cognition, Victoria, Canada, May 1999.

EXHIBIT D



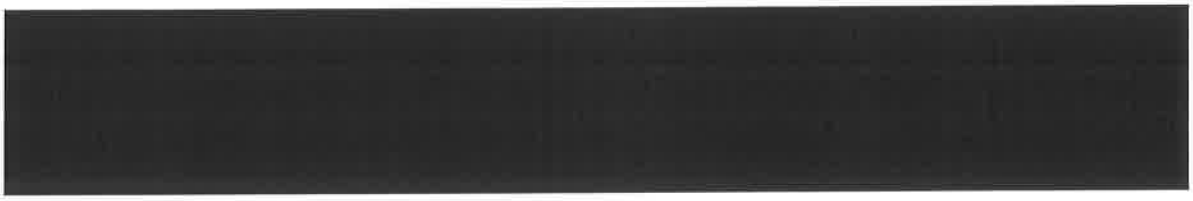


EXHIBIT E

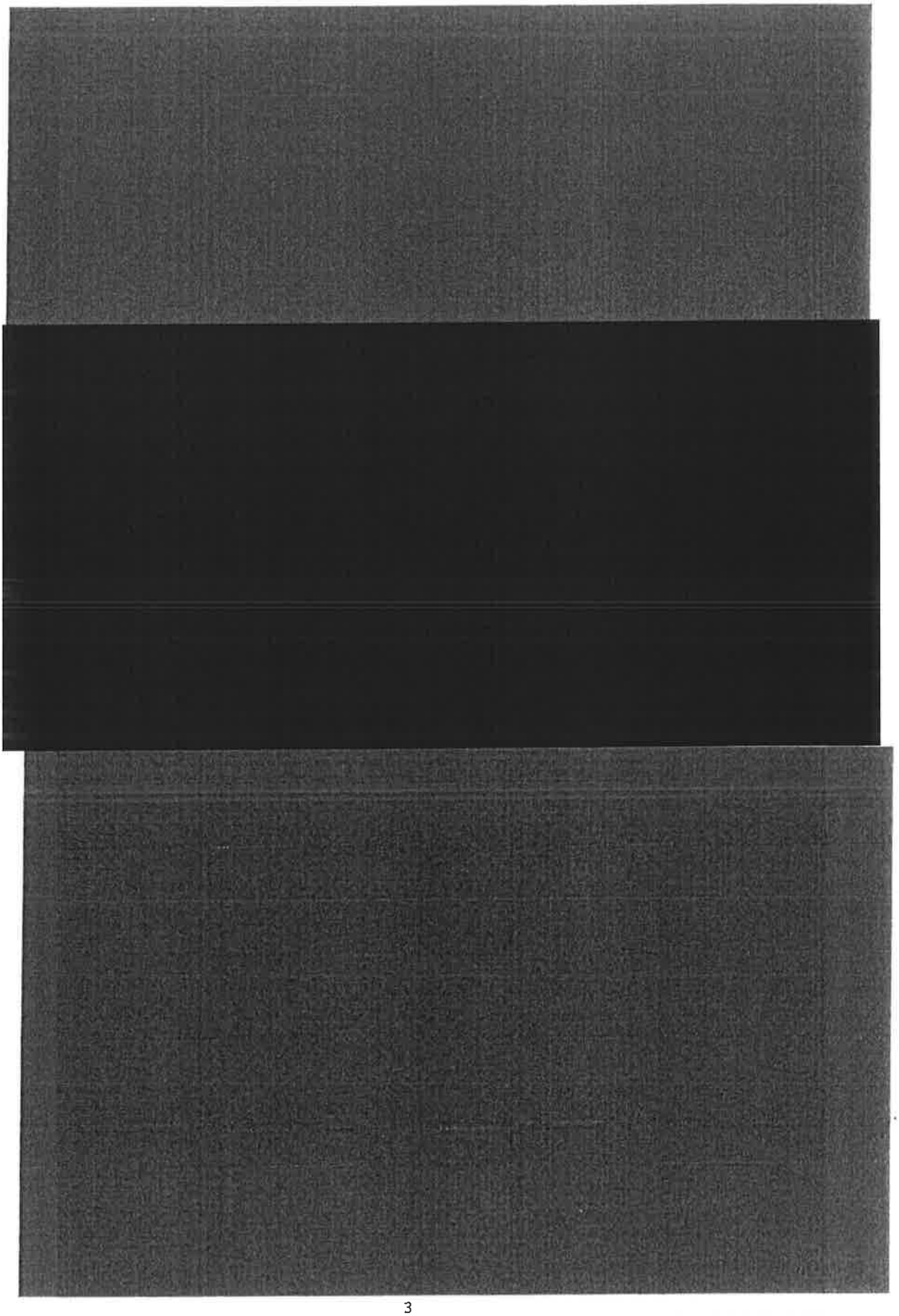


EXHIBIT F