

**The Theodore Roosevelt Inn of Court  
Criminal Practice Presentation**

**Prosecutions under RICO**

**&**

**The Weinstein and Diddy Prosecutions**

**Monday, February 23, 2026**

**Time: 5:30 p.m.**

**Location: Meyer Suozzi Law Firm**

**990 Stewart Avenue - Suite 300**

**Garden City NY 11530**

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## Presenter Bios

(\*denotes Program Chair)

**Elizabeth Byrnes** is a second-year law student at St. John's University School of Law, where she serves as the Co-Director of Internal Affairs for the Women's Law Society and as a Junior Staff Member on the St. John's Law Review. She holds a B.A. in English, History, and Adolescent Education from Siena College, graduating *summa cum laude*. Elizabeth has focused her studies on education law and completed a summer associate position at Guercio & Guercio in New York during the summer of 2025.

**Elizabeth M. Daitz\*** is the Assistant Commissioner of Police for the Suffolk County Police Department. She drives strategic planning, implementation, and innovation, positioning Suffolk County to be one of the most innovative, efficient, effective and equitable law enforcement agencies while serving over 1.5 million residents across 913 square miles. She previously served as Executive Director, Civil Litigation and Executive Director, Strategic Initiatives for the NYPD. From 2019-2020, Elizabeth served as a White House Fellow in the Office of the Chief of Staff to the President. Elizabeth began her career at the Office of the Corporation Counsel of the City of New York, where she handled multiple high profile federal civil rights cases. Elizabeth is a graduate of the Honors College at Adelphi University and St. John's University School of Law. Elizabeth is the Vice President of the White House Fellows Foundation and Alumni Association, co-chair of the New York City Bar Association Task Force Sub-Committee on Artificial Intelligence and Civil Liberties, and a founding member of the National Association of Professional Staff in Public Safety.

**Sean Fusco** is a part-time second-year law student at Hofstra University, he is also an employee of the Nassau County Traffic and Parking Violations Agency as a Project Coordinator, a position he's held since 2023. Sean holds a Bachelor of Arts degree in English from Albertus Magnus College, where he graduated magna cum laude in 2020. Last summer Sean was a legal intern in the Nassau County Attorney's Office, specifically in the litigation bureau in keeping with his public interest experience.

**Kevin Kearon, Esq.\*** is a criminal defense and trial lawyer and founding partner of the Garden City litigation firm, Barkett Epstein Kearon Aldea & LoTurco. He is an '85 graduate of St. John's University School of Law and a former Nassau County Assistant District Attorney. He is a past president of the Nassau Criminal Courts Bar Foundation and former chair of the Nassau County Bar Association's Ethics Committee and Technology and Practice Management Committee.

**Nancy J. Krosser, Esq.** is a litigator with experience in both civil and criminal law. She currently serves as General Counsel to Sherman Specialty Company, an international wholesaler and importer of promotional products for clients in the pharmaceutical, hospitality and banking sectors among others. Working with 100+ employees in Jericho and Albany, she advises on contracts, strategic affiliate agreements and joint ventures, USPTO filings, and collections. Nancy began her legal career as an associate at Abrams Fensterman, LLP where she gained valuable trial experience. She earned her law degree from Touro College Jacob D. Fuchsberg Law Center, where she was the recipient of the New York State Bar Association Writing Award

and the CALI Academic Excellence Award. She is also a graduate of The American University in Washington, DC. Nancy is an active member of several professional organizations including The New York State Bar Association, The Nassau County Bar Association, Theodore Roosevelt American Inn of Court and Yashar Hadassah. Deeply committed to her community, Nancy serves on the Board of Trustees of Congregation L'Dor V'Dor in Oyster Bay, NY and The Board of Northwell Health, Pediatric Behavioral Health Initiative. She has been a member of the Inns for many years and joined at the suggestion of her mom, Luise M. Klein, Esq., who was an enduring member and passionate supporter of its mission.

**Joseph Lo Piccolo** is a Nassau County Criminal Defense Attorney with nearly 30 years of experience in State and Federal criminal defense. Prior to entering private practice, he worked for 6 years at The Legal Aid Society of New York, Criminal Defense Division, Queens County. At last count, he has tried over 125 criminal cases to verdict, including dozens of homicides. Joseph is graduate of Hofstra University School of Law and The Pennsylvania State University.

**Euna Park** Currently, Euna Park works in Queens Family Court as a Magistrate, handling complex family court matters by ruling on motions, facilitating settlements, managing evidence, and determining findings of fact and law. Previously, she worked in law enforcement as a Chief in the Richmond County District Attorney's office. As the Chief, Ms. Park led a team of Assistant District Attorneys in investigating and prosecuting financial crimes and fraud cases. She also assisted in investigations of several high-profile cases involving trafficking, homicide, and domestic violence. Euna graduated from Maurice A. Deane Hofstra University School of Law in 2001. She is admitted to both the New York and New Jersey bars.

**Arianne C. Philemy** is a third-year student at St. John's University School of Law, where she serves as Vice President of the Black Law Student Association, Associate Articles Editor for the Journal of Civil Rights & Economic Development, and a member of the Polestino Trial Advocacy Institute (Mock Trial Team). She is the recipient of the Aequitas Scholarship and has developed a strong interest in litigation and trial advocacy. Arianne previously worked as a Summer Associate at Akerman LLP in Fort Lauderdale, where she assisted in trial preparation, conducted legal research, and supported the drafting of motions and pleadings. Before law school, she worked as a paralegal, gaining hands-on experience in discovery, motion practice, and court proceedings. She earned her B.A. from Wesleyan University, double majoring in Government (American Politics) and African American Studies. At Wesleyan, she received the W.E.B. DuBois Prize for academic excellence in African American Studies and the Rich Prize for excellence in composition and delivery.

**Alex Sussman** is a 3L candidate at Touro Law Center and a Senior Staff member of the Moot Court Honors Board. He currently serves as an intern for the Honorable Matthew J. D'Emic, Administrative Judge of the Brooklyn Supreme Court, where he assists with judicial administration and criminal matters. Alex's diverse legal background includes a summer internship with the Nassau County District Attorney's Office and a criminal defense externship at Collins, Gann, McCloskey & Barry. Before law school, he spent a year as a law clerk at Leav & Steinberg, supporting plaintiffs' personal injury litigation. A graduate of SUNY Binghamton,

Alex brings a well-rounded perspective on New York's criminal and civil justice systems to his burgeoning legal career.

# **Program Agenda**

**Introduction** by Kevin Kearon, Esq. - **6:00 p.m. to 6:05 p.m.**  
**(approx. 5 minutes)**

**Sketch 1 of 3 - People v. Harvey Weinstein Case – Part One – Prosecution’s Internal Debate re Use of Prior Uncharged Sex Crimes Evidence Under Molineux and Sandoval Theories –** Fictionalized depiction of Manhattan District Attorney’s Office internal deliberations regarding the use of evidence of prior uncharged sex crimes **6:05 p.m. to 6:45 p.m. (approx. 40 minutes)**

**Sketch 2 of 3 - People v. Harvey Weinstein Case – Part Two – Defense Voir Dire –** Demonstration of Potential Defense Jury Selection/Voir Dire in a notorious rape and sex abuse case. **6:45 p.m. to 7:15 p.m. (approx. 30 minutes)**

**Sketch 3 of 3 - RICO and US v. Sean Combs Case – Prosecution’s Internal Debate at US Attorney’s Office for the SDNY–**in the Sean “Diddy” Combs case regarding merits of pursuing RICO theory. **7:15 p.m. to 7:45 p.m. (approx. 30 minutes)**

## **Molineux, Sandoval and Weinstein**

There are historical cases—both Federal and in New York, that we all know. We often hear their names—Roe, Brady, Miranda, Mapp and many others. These are prominent cases through which we have learned legal history and for some, use in our practice. For New York State Criminal trial practitioners, Molineux is such a case. People v Molineux, 168 N.Y. 264, 61 N.E. 286 (N.Y. 1901), is a turn of the twentieth century landmark case related to the issue of uncharged crimes and their use as evidence in a criminal trial.

The core of every criminal case is the constitutional principle that all persons accused of crimes are presumed innocent, and must receive a fair trial, where the prosecution must prove a persons guilt beyond a reasonable doubt. Molineux involved a case where evidence of an uncharged crime was allowed in at the trial of Roland Molineux, leading to a conviction. It was later overturned on appeal, with the Court of Appeals finding that the allowance of that evidence prejudiced the jury as it appeared to be evidence regarding the accused propensity to commit a crime, rather than relevant evidence on whether the accused had committed the actual crime he was on trial for.

Over the years, the Molineux Rule came to stand for the argument that certain evidence of prior crimes or prior bad acts may be admissible on trial, during the People's case in chief, if it fell into certain limited categories. Practitioners refer to this as M.I.M.I.C.: Motive, Identification, absence of Mistake, Intent, and Common Scheme or Plan. If evidence of a prior uncharged crime or prior bad act could prove someone also committed this crime, then it may be admissible for that purpose. The People would still be required to prove this crime beyond a reasonable doubt, overcoming the presumption of innocence. An example would be if someone left a calling card when they committed a prior crime and in this new case, the same calling card was left at the scene of the crime. That would be evidence of a common scheme or plan to commit the prior crime, as well as the present crime. These are not strict criteria, and the rule has been broadened over the years, however it has always been an area ripe with legal challenges, appeals and a great deal of scrutiny, as evidenced in the Court of Appeals decision in People v. Weinstein.

The #MeToo movement started via social media in 2006 but came to national prominence in 2017, when actress Alyssa Milano urged people to share experiences of harassment, particularly following allegations against Harvey Weinstein. At the time, Mr. Weinstein was the head of a major award winning motion picture studio and a well know movie mogul throughout the 2000's, until these accusations came to light. His case(s) became the quintessential posterchild of the #MeToo movement, encouraging actors and actresses, as well as employees in all areas of work, throughout the world, to speak out about the negative and even criminal experiences and acts they may have suffered while working under a supervisor, superior or other person in a position of power for an industry or workplace.

The trial of Harvey Weinstein involved allegations of rape and criminal sexual assault by two specific persons against Mr. Weinstein. In the pre-trial proceedings, the People sought to introduce similar allegations by three other women in an attempt to defeat potential defenses of Mr. Weinstein. Applying the Molineux rule, the defense opposed but the trial court granted the use of the testimony. Essentially, the jury would now hear evidence of five women accusing Mr. Weinstein, rather than just the two that had testified in the grand jury, leading to the specific charges against Mr. Weinstein.

The People also sought to bring forth other prior bad acts of Mr. Weinstein, should he testify, related to his conduct with women and others, in an effort to show his true nature and that the credibility of his testimony should be called into question based upon the evidence brought forth from these prior bad acts. This application was made pursuant to *People v. Sandoval*, 34 N.Y.2d 371 (1974). Sandoval, another landmark New York case for state criminal practitioners, is different from Molineux in that it only applies IF the defendant chooses to take the stand in his own defense, something he or she is not obligated to do under the Fifth Amendment. However, it is also broader than Molineux in that it includes prior bad acts which may not be criminal in nature. A prejudice v. probative value test is generally applied in this ruling to avoid creating an unfair trial for the accused. In the Weinstein case, the trial court allowed dozens of prior bad acts to be raised on cross-examination,

which was well less than the nearly one hundred they sought to ask questions about.

The Weinstein trial was one of the hottest national daily topics from announcement of the grand jury indictment through the verdict and sentencing. Articles in mainstream media, posts on social media, interviews and host chats on talk shows were largely focused on this case as well as law review articles and many other legal publications. Additional charges were brought in Los Angeles during the pendency of the New York trial. He was convicted in New York in February 2020 of sexual assault in the first degree and rape in the third degree and later sentenced to 23 years in prison.

Molineux can be a slippery slope for a trial court and a jury. It is very difficult for a jury to hear evidence of uncharged crimes and not be swayed regarding the charges in front of them. Courts may give limiting instructions. Prosecutors are cautious in their closing arguments not to rely too heavily on this evidence as it can be seen as a propensity argument – he did those things, so he must have done these things – in other words, a general tendency to commit that type of crime. The defense will try to minimize the value, which is like trying to tell a jury to ignore the elephant in the room. The court will not reference the uncharged crimes in their jury charge, yet the jury has already heard the testimony and the damage is done. It can be a legal issue fraught with risk and reward.

In People v Weinstein, 42 N.Y. 3d 439 (2024), the N.Y.S. Court of Appeals reversed one of the more high profile trial convictions of the early 21<sup>st</sup> century and brought Molineux into the spotlight for practitioners of all areas of law, as well as the public at large. This was more than just a law journal decision and became the talk of major network morning shows, national news, podcasts and social media. The American public reacted with strong emotional positions regardless of the legal rules and procedures which the decision was based upon. While many thought that “of course other people should be allowed to share what he had done to them,” they found out that the law plays by a different set of rules not driven by common sense, mass outrage or general opinion.

As indicated above, the basic concepts of the Molineux case arise from the idea that while each criminal case should be determined on the relevant facts and law, there are certain exceptions which may allow evidence from outside the immediate case to be introduced. A divided Court of Appeals found that the introduction of evidence related to the three other women unduly prejudiced Mr. Weinstein, preventing him from receiving a fair trial on the charges before the jury. They also found the Sandoval ruling was an abuse of discretion as a matter of law – to the extent it allowed the prosecution to cross-examine Weinstein about numerous uncharged acts that did not bear on his credibility.

Weinstein was tried again in New York in 2025 and was convicted a second time on some counts and had a mistrial declared on others due to a deadlocked jury on those counts.

## **Weinstein Case Summary and Civil RICO Charge**

Former Hollywood film producer Harvey Weinstein was convicted of two felony sex crimes - sexual assault in the first degree and rape in the third-degree in Manhattan Supreme Court in early 2020. Weinstein's trial stemmed from accusations by several women alleging that they were victims of his abuse. Dozens of women came forward to accuse Weinstein of sexual assault but many of the claims dated too far back to be prosecuted. Four of the individuals who accused Weinstein of abuse but were not able to bring claims were able to testify at trial about their alleged assaults. The jury's ultimate verdict was based on the testimony of the two principal accusers, namely a former production assistant and a former aspiring actress who worked with Weinstein.

Weinstein was convicted on February 24, 2020, but he was acquitted of more serious charges that could have resulted in a lifelong prison term. These charges include predatory sexual assault and first-degree rape. This verdict, despite Weinstein's acquittal of some significant charges, was a landmark in the #MeToo movement, representing a shift where many women were able to come forward about sexual harassment and assault experienced in the workplace. Weinstein's conviction followed that of Bill Cosby, who was convicted of three counts of aggravated sexual assault in 2018. Prosecutors believed this to be a breakthrough for survivors of sexual assault.

In April of 2024, the New York Court of Appeals overturned Weinstein's 2020 convictions on the basis that the judge erred by allowing testimony from women about allegations that were not a part of the case. This testimony provided evidence of prior bad acts

but permitted the jury to potentially convict him based on his general predatory behavior rather than the elements of the specific crimes. The result was an order for retrial.

Weinstein's retrial was held in 2025. A new jury found Weinstein not guilty of an additional sexual assault charge but convicted him on one count of first-degree sexual assault. Weinstein remains incarcerated and is serving an additional sentence of 16 years from a separate conviction in Los Angeles on sexual assault and rape charges.

In addition to the criminal prosecution of Weinstein, there was civil litigation including a class action lawsuit filed by several women alleging violation of RICO. In late 2017, multiple women filed a class action RICO lawsuit in federal court against Weinstein and others affiliated with his company alleging a criminal enterprise. The main contention in the lawsuit was that members of Weinstein's company were aware that he was engaging in predatory sexual conduct and concealed it rather than making any effort to stop it.

The complaint alleged not only cover ups from inside members of the company, but also outside counsel, claiming that several attorneys and law firms were aware of and covered up Weinstein's misconduct. Some counts included in the RICO suit were witness tampering, mail and wire fraud, intentional infliction of emotional distress, and negligent infliction of emotional distress. The women who brought the suit depicted a network of sorts with several complicit producers concealing the predatory behaviors of Weinstein. Ultimately, this suit was dismissed in 2018.

**Endnotes:**

[“Harvey Weinstein Guilty of Rape and Sex Assault but Acquitted of Most Serious Charges”](#);

Time.

[“Harvey Weinstein’s 2020 Rape Conviction Overturned by New York Appeals Court”](#); NBC

News.

[“Harvey Weinstein Guilty of Sexual Assault after New York Trial”](#); BBC.

[“The Weinstein Company And Other Face RICO Claim In Wake Of Sexual Assault ‘Cover](#)

Ups”; Forbes.

[“Judge Dismisses RICO Class Action Case Against Harvey Weinstein”](#); Variety.

## Summary of Articles re Combs and Weinstein Trials

### Combs:

**Article #1:** [“Key Moments from the Closing Arguments at Sean ‘Diddy’ Combs’ Sex Trafficking Trial”](#); Associated Press (2025, June 29)

This article, written by Michael R. Sisak and Larry Neumeister, discusses the closing arguments from the Sean Combs trial. In their closing argument, the government alleged that Combs “coerced, threatened and sometimes viciously forced” two of his previous partners to engage in sexual actions with sex workers. The prosecution pointed to testimony from one of Combs’ previous partners, Cassie Ventura, where she discussed “freak-offs,” during which she was forced to sexually perform. Furthermore, Assistant U.S. Attorney Slavik discussed Combs’ alleged arson and kidnapping in the government’s closing, demonstrating repeated violations of the law.

In response, defense attorney Agnifilo portrayed the prosecutors as overreaching and at risk of criminalizing private adult behavior. Agnifilo painted the seizing of copious amounts of baby oil and lubricant as irrelevant, dismissing it as evidence that there was nothing less than outstanding to discover about Combs’ business ventures. The defense largely focused on the case being an unjust intrusion into the private lives of adults, and an unfair, targeted attack on Combs. Judge Subramanian agreed with the prosecution that framing the case as a prejudiced attack on Combs went too far.

**Article #2:** [“Combs’ Racketeering Acquittal Was a Rare Misfire for a Powerful Law”](#); New York Times (2025, July 5)

This article, written by Benjamin Weiser and Hurubie Meko, focuses on the implications of Combs’ acquittal on his RICO conspiracy charge and what it signals about the statute’s use. Several prosecutors who followed the case expressed that Combs’ acquittal was an anomaly, and the verdict would not be a deterrent in the use of RICO for high-profile sexual abuse crimes. Weiser and Meko explain that many prosecutors value RICO as a tool. The authors explain that “between the 2018 and 2022 fiscal years, about 98 percent of RICO cases ended in a conviction....” Weiser and Meko demonstrate the power of RICO by describing its main use of tying together strings of allegations of crime and misconduct, creating one single narrative out of several different offenses, as evidenced by its most well known use to dismantle crime syndicates.

On the other hand, some defense attorneys felt that the Combs verdict draws attention to the way in which prosecutors have used RICO to “prop up weak cases.” One attorney named in the article stated that he hoped Combs’ acquittal would have a “chilling effect” on the uses of RICO moving forward. Ultimately, prosecutors still hope to see RICO employed as a tool to prosecute sex crimes aggressively as it effectively permits the government string together allegations of misconduct that stretch back decades.

**Article #3:** [“Sean ‘Diddy’ Combs’ lawyers acknowledged abuse in successful trial strategy”](#); Reuters (2025, July 2)

Luc Cohen discusses Combs' defense team utilizing less than ideal facts and evidence about prior instances of domestic violence, acknowledging the existence of bad behavior and arguing to the jury that they bear no direct connection to the consenting decisions of Combs' two adult ex-girlfriends in their sexual escapades. The strategy of this argument was to enable his defense team to show that the lack of fear, force, or coercion could exonerate Combs from the sex trafficking allegation brought against him. If the defense could show the two women volunteered to engage and were free to leave these acts then the prior instances of abuse (although not ideal in the overall portrayal of their client) are not relevant.

The key point the defense is making is that the burden of proof to be met on a sex trafficking charge is not met by the facts. Whether Combs has been abusive in the past does not factor in if he was not abusive in getting these women to participate in the freak-offs. Two separate issues to the defense, and that separation yielded positive returns as Combs was acquitted of the sex trafficking charges in July of 2025.

**Article #4:** The Trial of Sean Combs: What you need to know"

(<https://www.npr.org/2025/05/12/nx-s1-5393912/sean-combs-diddy-trial-sex-trafficking>)

Sean Combs, the influential music mogul who played a pivotal role in bringing hip-hop to the mainstream pop through Bad Boy Records and building a billion-dollar business empire in the process, is currently facing a federal criminal trial in Manhattan. The 55-year-old, also known as Diddy, has pleaded not guilty to charges of racketeering conspiracy, sex trafficking, and transportation to engage in prostitution. Prosecutors allege that for two decades, Combs utilized his professional influence and wealth to sexually traffic and abuse women, often orchestrating elaborate, drug-fueled sexual marathons known as "freak offs". If found guilty of all charges, Combs faces the possibility of spending the rest of his life in prison.

The legal floodgates opened following a 2023 civil lawsuit filed under a post #MeToo lookback law by Combs' former girlfriend, Cassie Ventura, who is expected to be a major witness in the federal case. Evidence against him includes a video of Combs physically attacking Ventura in a hotel hallway, an incident for which he previously issued a public apology on social media. By charging him with racketeering, the government aims to prove that Combs' entire business infrastructure and employees were used to facilitate and conceal his criminal conduct, a legal strategy similar to those used in the trials of R. Kelly and Young Thug. This high-profile trial is anticipated to last between eight and ten weeks, with opening arguments scheduled for May 12, 2025.

**Article #5:** What is the RICO Act and why is Sean Combs Charged With Violating It

(<https://abcnews.go.com/US/rico-act-sean-combs-charged-violating/story?id=122457863>)

(2025, July 2)

The article explains that federal prosecutors charged Sean Combs under the RICO Act by alleging that his legitimate business empire functioned as a criminal enterprise, enabling crimes such as sex trafficking, bribery, arson, and witness tampering through employees and associates. It also outlines how RICO allows prosecutors to link multiple crimes over time into a

single conspiracy charge, giving them broader evidentiary reach and potentially harsher penalties if Combs is convicted.

## **Weinstein:**

**Article #1:** [“Harvey Weinstein Guilty of Rape and Sex Assault but Acquitted of Most Serious Charges”](#); Time, Feb 24, 2020.

Written by Melissa Chan at the conclusion of Harvey Weinstein’s trial, she analyzes the verdict - convicted of sex assault and rape in the third degree, acquitted of predatory sexual assault and of first-degree rape charges. Weinstein’s trial had significant social implications through the #MeToo movement. Manhattan District Attorney Vance explained that prosecutors were focused on the victory of Weinstein’s charges, not the unsecured convictions because of the positive impact the convictions would have for victims of sexual assault in America.

The article notes some details behind the jury’s verdict. For example, it explains that the jury found that the encounter between Weinstein and the woman he was convicted of raping was non-consensual. However, they did not find that it involved physical compulsion, hence their recommendation to convict for third-degree rather than first-degree rape. The trial primarily featured the testimony of two women, despite dozens of other women accusing Weinstein of sexual assault. The dates of these alleged incidents were too far in the past under the statute of limitations to be prosecuted. In his closing argument, one of Weinstein’s attorneys stated that the prosecution created an “alternative universe” with their narrative of Weinstein’s behavior.

**Article #2:** [“Weinstein’s Lawyer Wrote An Article Addressing Jurors. The Judge is Unhappy.”](#); NY Times, Jan Ranson, Feb 18 2020.

In this article, Ranson details an interesting – albeit unusual – and some may describe as unethical event that occurred during Weinstein’s 2020 New York trial. Weinstein’s lead defense attorney Donna Rotunno penned an opinion piece that appeared in Newsweek Magazine just as deliberations were set to begin. In it she implored the jurors to “do what they know is right”. The lead prosecutor in the case, Joan Illuzi was displeased, alleging jury tampering. Subsequently, the judge instructed Weinstein’s defense counsel to refrain from talking to the media until after a verdict was reached. This was not the first time Rotunno made public comments about the trial. In the past, she had criticized Weinstein’s accusers in interviews and participated in a podcast where she dismissed the experiences of Weinstein’s victims.

The article also details the beginnings of the jury’s deliberation. The jurors sent notes to the judge asking for definitions of specific legal terms, explanations of statutes of limitations, and even requested a layout of Weinstein’s Manhattan loft to better understand some of the testimony given by one of Weinstein’s victims during the trial.

**Article #3:** Legal Intelligencer: How RICO Plays a Role in the World of Harvey Weinstein and #MeToo Edward Kang, January 25, 2018.

(<https://www.khflaw.com/news/legal-intelligencer-rico-plays-role-world-harvey-weinstein-metoo>)

The Racketeer Influenced and Corrupt Organizations Act (RICO), originally enacted in 1970 to combat the American Mafia, has evolved into a powerful tool for addressing business fraud and corruption, as seen in the high-profile civil litigation against Harvey Weinstein. In 2017, a class-action lawsuit alleged that Weinstein and his associates formed a "Weinstein Sexual Enterprise" to facilitate sexual misconduct and silence victims through witness tampering and fraud. Civil RICO claims are highly attractive to plaintiffs because they offer treble damages plus attorney fees, often pressuring defendants to settle for millions of dollars to avoid catastrophic financial exposure. Despite the potential for large payouts, winning a civil RICO case is exceptionally difficult, with very few plaintiffs surviving the early stages of litigation. Success requires meeting heightened pleading standards under Rule 9(b), where plaintiffs must provide specific details—the "who, what, when, where and how"—of the alleged predicate acts based on fraud. Furthermore, plaintiffs must establish proximate cause by proving a direct causal link between the racketeering activity and their specific injuries, rather than just showing that the harm was foreseeable. Because of these strict requirements, many cases are dismissed before they ever reach a jury.

**Article #4:** Rose McGowan Files Racketeering Lawsuit Against Harvey Weinstein, Rolling Stone Magazine. Jon Blistein, October 23, 2019. (<https://www.rollingstone.com/culture/culture-news/rose-mcgowan-racketeering-lawsuit-harvey-weinstein-902817/>)

Rose McGowan has filed a federal racketeering lawsuit against Harvey Weinstein and his various legal and intelligence associates, alleging they formed a "Weinstein-Protection Enterprise" to systematically silence and discredit her. The suit claims this group engaged in a pattern of racketeering and intimidation to prevent McGowan from revealing an alleged 1997 rape after she teased on Twitter information widely believed to be connected to Weinstein. The suit alleges tactics such as professional sabotage, planting illegal drugs, and hiring the firm Black Cube (an Israeli intelligence firm) to surreptitiously record and spy on her. While Weinstein's defense team has dismissed the suit as a meritless attempt by a "publicity-seeker" to gain money, McGowan maintains that her life was upended by a sophisticated team designed to intimidate and silence victims. She claims both Amazon Studios and America Media, Inc., (publisher of the National Enquirer) among others were acting in concert with Weinstein to obtain information and discredit McGowan.

## Sean “Diddy” Combs Trial

- a. In September of 2024, an indictment was filed against Sean “Diddy” Combs by the Federal Government containing five criminal counts. Count 1 alleged a racketeering conspiracy in violation of the *RICO act* (18 USC 1962(d)). Counts 2 and 4 alleged sex trafficking of Cassandra Ventura and “Jane Doe” two long-term girlfriends of Combs (18 USC 1591 (a)(1)). Counts 3 and 5 alleged violations of the Mann Act, a federal law that makes it a crime to transport People across state lines for illegal sexual activity (18 USC §2421).
- b. On counts 1, 2, and 4 Combs was acquitted by the jury but was convicted on counts 3 and 5. For those convictions Combs received a 50-month sentence, which he is currently serving, in addition to five years of supervised release and a \$500,000 fine.
- c. **SUPPRESSION OF EVIDENCE:** Combs’ defense team filed several motions seeking to suppress evidence gathered in four separate executed search warrants, resulting in searches of: Combs’ iCloud accounts, his Los Angeles and Miami residences, Combs himself, and two of his cell phones.
  - i. The first argument made for suppression was based upon the assertion that the warrants were illegally obtained – and demanded a *Franks* hearing (Citing *Franks v. Delaware*, 438 US 154 (1978)). A *Franks* hearing is a pretrial hearing that examines the truthfulness or completeness of a search warrant affidavit. Combs’ lawyers claimed the affiant who made the request for a search warrant did so while intentionally being misleading about the reason for the warrant. If they could prove the warrant application was

made in bad faith, then anything found during the searches could be suppressed. According to the district court, Combs failed to meet that burden of proof and the motion to suppress was denied.

ii. The second argument made for suppression was that the warrants were unconstitutional by way of being too general/not particular enough to be valid. The particularity requirements are threefold; (1) a valid warrant must identify the specific offense for which the police have established probable cause, (2) the warrant must describe the place to be searched, and (3) the warrant must specify the items to be seized and their relation to the designated crime. Combs' argument did not critique the particularity of each specific search warrant, but rather the generality of the objective search warrants as a whole. He argued that the reasoning for any of the searches was too general to be valid and constitutional, but the court did not agree and did not suppress any evidence based on either argument.

d. **RICO ACQUITTAL:** The RICO charges against Combs depended heavily on evidence of force, threat or coercion to prove the necessary elements found in the appropriate statute (§1962(d)). If there was sufficient proof of coercion in the interstate sexual escapades in the affidavits, the prosecution could have potentially proved the interstate and enterprise elements of the RICO statutes. However, the correspondence between Combs and the two women portrayed a consensual, albeit intense, agreement to engage in the "freak-offs" with apparently no limitation.

i. Because the correspondence appeared to show to the jury that these women were not under any duress to participate, the required force, threat and

coercion apparently were not proved to the jury's satisfaction beyond a reasonable doubt resulting in an acquittal on the RICO charge.

United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part I. Crimes (Refs & Annos)

Chapter 96. Racketeer Influenced and Corrupt Organizations (Refs & Annos)

18 U.S.C.A. § 1961

§ 1961. Definitions

Effective: June 25, 2022

[Currentness](#)

As used in this chapter--

(1) “racketeering activity” means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of [title 18, United States Code: Section 201](#) (relating to bribery), [section 224](#) (relating to sports bribery), [sections 471, 472, and 473](#) (relating to counterfeiting), [section 659](#) (relating to theft from interstate shipment) if the act indictable under [section 659](#) is felonious, [section 664](#) (relating to embezzlement from pension and welfare funds), [sections 891-894](#) (relating to extortionate credit transactions), [section 932](#) (relating to straw purchasing), [section 933](#) (relating to trafficking in firearms), [section 1028](#) (relating to fraud and related activity in connection with identification documents), [section 1029](#) (relating to fraud and related activity in connection with access devices), [section 1084](#) (relating to the transmission of gambling information), [section 1341](#) (relating to mail fraud), [section 1343](#) (relating to wire fraud), [section 1344](#) (relating to financial institution fraud), [section 1351](#) (relating to fraud in foreign labor contracting), [section 1425](#) (relating to the procurement of citizenship or nationalization unlawfully), [section 1426](#) (relating to the reproduction of naturalization or citizenship papers), [section 1427](#) (relating to the sale of naturalization or citizenship papers), [sections 1461-1465](#) (relating to obscene matter), [section 1503](#) (relating to obstruction of justice), [section 1510](#) (relating to obstruction of criminal investigations), [section 1511](#) (relating to the obstruction of State or local law enforcement), [section 1512](#) (relating to tampering with a witness, victim, or an informant), [section 1513](#) (relating to retaliating against a witness, victim, or an informant), [section 1542](#) (relating to false statement in application and use of passport), [section 1543](#) (relating to forgery or false use of passport), [section 1544](#) (relating to misuse of passport), [section 1546](#) (relating to fraud and misuse of visas, permits, and other documents), [sections 1581-1592](#) (relating to peonage, slavery, and trafficking in persons),<sup>1</sup> [sections 1831 and 1832](#) (relating to economic espionage and theft of trade secrets), [section 1951](#) (relating to interference with commerce, robbery, or extortion), [section 1952](#) (relating to racketeering), [section 1953](#) (relating to interstate transportation of wagering paraphernalia), [section 1954](#) (relating to unlawful welfare fund payments), [section 1955](#) (relating to the prohibition of illegal gambling businesses), [section 1956](#) (relating to the laundering of monetary instruments), [section 1957](#) (relating to engaging in monetary transactions in property derived from specified unlawful activity), [section 1958](#) (relating to use of interstate commerce facilities in the commission of murder-for-hire), [section 1960](#) (relating to illegal money transmitters), [sections 2251, 2251A, 2252, and 2260](#) (relating to sexual exploitation of children), [sections 2312 and 2313](#) (relating to interstate transportation of stolen motor vehicles), [sections 2314 and 2315](#) (relating to interstate transportation of stolen property), [section 2318](#) (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), [section 2319](#) (relating to criminal infringement of a copyright), [section 2319A](#) (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), [section 2320](#) (relating to trafficking in goods or services bearing counterfeit marks), [section 2321](#) (relating to trafficking in certain motor vehicles or motor vehicle parts), [sections 2341-2346](#) (relating to

trafficking in contraband cigarettes), [sections 2421-24](#) (relating to white slave traffic), [sections 175-178](#) (relating to biological weapons), [sections 229-229F](#) (relating to chemical weapons), [section 831](#) (relating to nuclear materials), (C) any act which is indictable under [title 29, United States Code, section 186](#) (dealing with restrictions on payments and loans to labor organizations) or [section 501\(c\)](#) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under [section 157](#) of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in [section 2332b\(g\)\(5\)\(B\)](#);

(2) “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) “person” includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) “enterprise” includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) “pattern of racketeering activity” requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) “unlawful debt” means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) “racketeering investigator” means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) “racketeering investigation” means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) “documentary material” includes any book, paper, document, record, recording, or other material; and

(10) “Attorney General” includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by

the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

### CREDIT(S)

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941; amended Pub.L. 95-575, § 3(c), Nov. 2, 1978, 92 Stat. 2465; Pub.L. 95-598, Title III, § 314(g), Nov. 6, 1978, 92 Stat. 2677; Pub.L. 98-473, Title II, §§ 901(g), 1020, Oct. 12, 1984, 98 Stat. 2136, 2143; Pub.L. 98-547, Title II, § 205, Oct. 25, 1984, 98 Stat. 2770; Pub.L. 99-570, Title I, § 1365(b), Oct. 27, 1986, 100 Stat. 3207-35; Pub.L. 99-646, § 50(a), Nov. 10, 1986, 100 Stat. 3605; Pub.L. 100-690, Title VII, §§ 7013, 7020(c), 7032, 7054, 7514, Nov. 18, 1988, 102 Stat. 4395, 4396, 4398, 4402, 4489; Pub.L. 101-73, Title IX, § 968, Aug. 9, 1989, 103 Stat. 506; Pub.L. 101-647, Title XXXV, § 3560, Nov. 29, 1990, 104 Stat. 4927; Pub.L. 103-322, Title IX, § 90104, Title XVI, § 160001(f), Title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 1987, 2037, 2150; Pub.L. 103-394, Title III, § 312(b), Oct. 22, 1994, 108 Stat. 4140; Pub.L. 104-132, Title IV, § 433, Apr. 24, 1996, 110 Stat. 1274; Pub.L. 104-153, § 3, July 2, 1996, 110 Stat. 1386; Pub.L. 104-208, Div. C, Title II, § 202, Sept. 30, 1996, 110 Stat. 3009-565; Pub.L. 104-294, Title VI, §§ 601(b)(3), (i)(3), 604(b)(6), Oct. 11, 1996, 110 Stat. 3499, 3501, 3506; Pub.L. 107-56, Title VIII, § 813, Oct. 26, 2001, 115 Stat. 382; Pub.L. 107-273, Div. B, Title IV, § 4005(f)(1), Nov. 2, 2002, 116 Stat. 1813; Pub.L. 108-193, § 5(b), Dec. 19, 2003, 117 Stat. 2879; Pub.L. 108-458, Title VI, § 6802(e), Dec. 17, 2004, 118 Stat. 3767; Pub.L. 109-164, Title I, § 103(c), Jan. 10, 2006, 119 Stat. 3563; Pub.L. 109-177, Title IV, § 403(a), Mar. 9, 2006, 120 Stat. 243; Pub.L. 113-4, Title XII, § 1211(a), Mar. 7, 2013, 127 Stat. 142; Pub.L. 114-153, § 3(b), May 11, 2016, 130 Stat. 382; Pub.L. 117-159, Div. A, Title II, § 12004(a)(3), June 25, 2022, 136 Stat. 1328.)

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### Footnotes

1 So in original.

18 U.S.C.A. § 1961, 18 USCA § 1961

Current through P.L. 119-59. Some statute sections may be more current, see credits for details.

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United States Code Annotated  
Title 18. Crimes and Criminal Procedure (Refs & Annos)  
Part I. Crimes (Refs & Annos)  
Chapter 96. Racketeer Influenced and Corrupt Organizations (Refs & Annos)

18 U.S.C.A. § 1962

§ 1962. Prohibited activities

Currentness

**(a)** It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of [section 2, title 18, United States Code](#), to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

**(b)** It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

**(c)** It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

**(d)** It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

**CREDIT(S)**

(Added [Pub.L. 91-452, Title IX, § 901\(a\)](#), Oct. 15, 1970, 84 Stat. 942; amended [Pub.L. 100-690, Title VII, § 7033](#), Nov. 18, 1988, 102 Stat. 4398.)

18 U.S.C.A. § 1962, 18 USCA § 1962

Current through P.L. 119-59. Some statute sections may be more current, see credits for details.

United States Code Annotated  
Title 18. Crimes and Criminal Procedure (Refs & Annos)  
Part I. Crimes (Refs & Annos)  
Chapter 96. Racketeer Influenced and Corrupt Organizations (Refs & Annos)

18 U.S.C.A. § 1963

§ 1963. Criminal penalties

Effective: December 1, 2009

[Currentness](#)

**(a)** Whoever violates any provision of [section 1962](#) of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law--

**(1)** any interest the person has acquired or maintained in violation of [section 1962](#);

**(2)** any--

**(A)** interest in;

**(B)** security of;

**(C)** claim against; or

**(D)** property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of [section 1962](#); and

**(3)** any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of [section 1962](#).

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

**(b)** Property subject to criminal forfeiture under this section includes--

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section--

(A) upon the filing of an indictment or information charging a violation of [section 1962](#) of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

*Provided, however,* That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to--

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to--

- (1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;
- (2) granting petitions for remission or mitigation of forfeiture;
- (3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;
- (4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;
- (5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and
- (6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

- (i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may--
  - (1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or
  - (2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.
- (j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.
- (k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under [Rule 15 of the Federal Rules of Criminal Procedure](#).
- (l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent

practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant--

(1) cannot be located upon the exercise of due diligence;

- (2) has been transferred or sold to, or deposited with, a third party;
- (3) has been placed beyond the jurisdiction of the court;
- (4) has been substantially diminished in value; or
- (5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

#### CREDIT(S)

(Added [Pub.L. 91-452, Title IX, § 901\(a\)](#), Oct. 15, 1970, 84 Stat. 943; amended [Pub.L. 98-473, Title II, §§ 302, 2301\(a\)](#) to (c), Oct. 12, 1984, 98 Stat. 2040, 2192; [Pub.L. 99-570, Title I, § 1153\(a\)](#), Oct. 27, 1986, 100 Stat. 3207-13; [Pub.L. 99-646, § 23](#), Nov. 10, 1986, 100 Stat. 3597; [Pub.L. 100-690, Title VII, §§ 7034, 7058\(d\)](#), Nov. 18, 1988, 102 Stat. 4398, 4403; [Pub.L. 101-647, Title XXXV, § 3561](#), Nov. 29, 1990, 104 Stat. 4927; [Pub.L. 111-16, § 3\(4\)](#), May 7, 2009, 123 Stat. 1607.)

18 U.S.C.A. § 1963, 18 USCA § 1963

Current through P.L. 119-59. Some statute sections may be more current, see credits for details.

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2025 WL 2778966

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

UNITED STATES of America,

v.

Sean **COMBS**, Defendant.

24-CR-542 (AS)

|

Signed September 30, 2025

**Attorneys and Law Firms**

Emily Anne Johnson, Madison Reddick Smyser, Mary Christine Slavik, Meredith Foster, Mitzi Steiner, Assistant U.S. Attorneys, Matthew Raffi Shahabian, Maureen Ryan Comey, Olga I. Zverovich, DOJ-United States Attorney's Office, New York, NY, for United States of America.

OPINION AND ORDER

ARUN SUBRAMANIAN, United States District Judge:

\*1 After an eight-week trial, a jury convicted Sean **Combs** of two counts of transporting people for prostitution under the Mann Act. Dkt. 447. Before the government rested its case, **Combs** moved for acquittal under Rule 29. Tr. 7352; Fed. R. Crim. P. 29. The Court reserved its decision under Rule 29(b), and **Combs** renewed his motion after the verdict. Tr. 7391; Dkt. 485. He also moved for a new trial under Rule 33. Dkt. 485; Fed. R. Crim. P. 33(a). For the following reasons, both motions are **DENIED**.

**BACKGROUND**

The government first indicted **Combs** in September 2024 for violations of the Mann Act, for sex trafficking, and for a racketeering conspiracy. Dkt. 2. In its third and final indictment, the government's case was built on **Combs's** actions beginning in 2004 and continuing over the next two decades. Dkt. 209 ¶¶ 1, 6, 13, 17. The government alleged that **Combs** arranged for and paid men to travel across the United States and internationally to have sex with **Combs's** girlfriends, Cassie Ventura and Jane. *Id.* ¶¶ 12, 18, 20. Further, the government alleged that **Combs** transported Ventura and Jane to have sex with those men,

gave them illegal drugs, and physically abused them. *Id.* This, the government argued, was all the product of the “**Combs** Enterprise”—a criminal organization comprised of **Combs**, his businesses, and his employees. *Id.* ¶¶ 7, 11. On the government's telling, that organization existed for lots of reasons: not only to run “a global business in the media, entertainment and lifestyle industries,” but also to “fulfill[ ] the personal desires of **Combs**, particularly those related to **Combs**’[s] sexual gratification.” *Id.* ¶ 11 (capitalization altered).

The case went to trial. After the government rested, **Combs** moved for acquittal. Tr. 7352. That motion focused mostly on racketeering and sex trafficking but also contested the Mann Act charges. Tr. 7352–91. With respect to the Mann Act, **Combs** argued that the escorts who testified didn't travel across state lines, that they disavowed that they were paid for sex or engaged in prostitution, and that they sometimes were paid even when they didn't have sex. Tr. 7390–91. The Court withheld its decision, and the charges went to the jury. Tr. 7391.

The jury agreed with **Combs** about the sex-trafficking and racketeering charges, acquitting him on both. Dkt. 447. But it disagreed with **Combs** about the Mann Act, finding him guilty. *Id.* **Combs** now renews his Rule 29 motion and also moves for a new trial under Rule 33. Dkt. 485; Fed. R. Crim. P. 29(c)(1), 33(a).

**LEGAL STANDARDS**

“[O]n the defendant's motion” a court “must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” Fed. R. Crim. P. 29(a). Evidence is insufficient to sustain a conviction only if it is “nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt.”  *United States v. Cuti*, 720 F.3d 453, 461 (2d Cir. 2013) (citation omitted). As the Second Circuit has explained, “[a] defendant challenging the sufficiency of the evidence bears a heavy burden, because the reviewing court is required to draw all permissible inferences in favor of the government and resolve all issues of credibility in favor of the jury verdict.”  *United States v. Kozeny*, 667 F.3d 122, 139 (2d Cir. 2011).

\*2 Under Federal Rule of Criminal Procedure 33, “[u]pon the defendant's motion, the court may vacate any judgment

and grant a new trial if the interest of justice so requires.” *Fed. R. Crim. P. 33(a)*. “Generally, the trial court has broader discretion to grant a new trial under *Rule 33* than to grant a motion for acquittal under *Rule 29*, but it nonetheless must exercise the *Rule 33* authority ‘sparingly’ and in ‘the most extraordinary circumstances.’ ” *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001) (quoting *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)). “In the exercise of its discretion, the court may weigh the evidence and credibility of witnesses. At the same time, the court may not wholly usurp the jury’s role.” *United States v. Autuori*, 212 F.3d 105, 120 (2d Cir. 2000) (internal citation omitted). “The defendant bears the burden of proving that he is entitled to a new trial under *Rule 33*, and before ordering a new trial pursuant to *Rule 33*, a district court must find that there is ‘a real concern that an innocent person may have been convicted.’ ” *United States v. McCourty*, 562 F.3d 458, 475 (2d Cir. 2009) (quoting *Ferguson*, 246 F.3d at 134). Accordingly, “the court must ‘examine the entire case, take into account all facts and circumstances, and make an objective evaluation,’ keeping in mind that the ‘ultimate test’ for such a motion is ‘whether letting a guilty verdict stand would be a manifest injustice.’ ” *United States v. Landesman*, 17 F.4th 298, 330 (2d Cir. 2021) (quoting *United States v. Alston*, 899 F.3d 135, 146 (2d Cir. 2018)).

## DISCUSSION

**Combs** makes two types of arguments under *Rule 29*: legal ones about the correct definition of prostitution, and factual ones about the evidence at trial. On *Rule 33*, he argues that the evidence on the acquitted counts prejudiced the jury on the counts of conviction.

### I. *Rule 29* Legal Arguments

The legal arguments in **Combs’s** *Rule 29* motion turn on what the word “prostitution” means in the Mann Act. The Act has two clauses. Both share the same act element: transporting somebody in interstate or foreign commerce. *18 U.S.C. § 2421(a)*. But they have different intent requirements. The first clause—the one at issue here—requires that the defendant intend that the transported person “engage in prostitution.” *Id.* The second clause—a broader catchall—requires that the defendant intend for the transported person to engage in “any

sexual activity for which any person can be charged with a criminal offense.” *Id.* Together, they read:

“Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense ....” *Id.*

At trial, **Combs** proposed that the jury instructions define prostitution as “engaging in sexual activity for money or its equivalent.” Dkt. 273 at 56 (citing Black’s Law Dictionary and state law definitions). The Court adopted **Combs’s** definition in its instructions to the jury, which proceeded to convict **Combs** under that definition. Dkts. 424 at 49 (jury charge); 447 (verdict). Then **Combs** changed his mind. Now he argues that his proposed definition was wrong all along. Dkt. 486 at 25–37. Prostitution, he says, instead requires either that the defendant have a commercial motive, that the buyer has sex with the seller, or both. *Id.* at 25. That would mean that there was never any prostitution involving **Combs**, who lacked a financial motive and didn’t directly have sex with any of the men he hired. On his telling, applying a broader definition would create constitutional problems. These arguments don’t hold water for the reasons below.

#### A. **Combs** didn’t forfeit or waive these challenges

The first question is whether **Combs** can bring a legal challenge to his conviction on a *Rule 29* motion. The government contends that **Combs** should have made his challenges earlier under *Rule 12* (and so he forfeited them) and that the instruction given to the jury on the definition of prostitution was of his own devising (and so he waived any claim of error). Neither argument persuades the Court.

\*3 *First*, **Combs** can bring his legal challenges under *Rule 29* despite not raising them earlier. These challenges are routinely made and decided by courts in this circuit, including the Second Circuit itself. *See, e.g., United States v. Soler*, 759 F.3d 226, 228–29 (2d Cir. 2014); *United States v. Dennis*, 132 F.4th 214, 227–29 (2d Cir. 2025); *United States v. Lopez*, 143 F.4th 99, 105–06 (2d Cir. 2025).

*Second*, **Combs** didn’t waive his arguments concerning the definition of prostitution by proposing the instruction the Court gave. To be sure, this case involves an unusual series of events. **Combs** proposed the instruction, the Court adopted it, and now **Combs** says that it was wrong the whole time.

Ordinarily, the invited-error doctrine would bar this kind of challenge to the instructions. See [United States v. Boyle](#), 2010 WL 4457240, at \*10–11 (S.D.N.Y. Oct. 27, 2010) (on a Rule 33 motion); [United States v. Klein](#), 216 F. App'x 84, 90 (2d Cir. 2007) (on appeal). But [Combs](#) argues that his Rule 29 motion doesn't challenge the jury instructions but instead turns on what the definition of prostitution *should be*. On that view, the jury instructions aren't relevant to his arguments.

[Combs](#) is right. In *Musacchio v. United States*, the Supreme Court held that “[a] reviewing court’s limited determination on sufficiency review ... does not rest on how the jury was instructed.” [577 U.S. 237, 243 \(2016\)](#). Though that holding addressed only whether the Due Process Clause requires that an appeals court abide by erroneous jury instructions given below that *advantaged* a defendant, the Second Circuit extended that reasoning shortly afterward. In [United States v. Blaszcak](#), it held that this principle also applied when the jury instructions *disadvantaged* a defendant. [947 F.3d 19, 31 \(2d Cir. 2019\)](#), *vacated on other grounds*, [141 S. Ct. 1040 \(2021\)](#). There, like here, the defendant failed to object to the jury instructions but then challenged the evidence based on a different interpretation under Rule 29. *Id.* Relying on *Musacchio*, the Second Circuit held that “[i]n answering this question, [it] was not bound the district court’s jury instruction.” *Id.* Separately from this line of cases, the Second Circuit recently got to the same place in *United States v. Dennis*, addressing a Rule 29 challenge even though it turned on a limiting definition that the defendant didn’t insist be included in the jury instructions. [132 F.4th at 228–35](#). The Court did find the defendant’s Rule 33 challenge to those instructions forfeited, *id.* at 235, but [Combs](#) isn’t making that kind of argument here. These cases support [Combs’s](#) contention that the *actual* jury instructions aren’t relevant to his Rule 29 challenge. So he isn’t barred from now arguing that the Mann Act means something different.

### B. [Combs’s](#) newly proposed definition of prostitution is wrong

[Combs](#) argues that prostitution, properly defined, has two elements absent from this case. First, the defendant must have a financial motive. Second, the exchange of money for sex must be bilateral—whoever pays for the sex must engage in it. Both arguments share a similar structure. Each posits that the definition of prostitution at the time of the Mann Act’s passage was overbroad in some respect; then each suggests a way to narrow that definition to avoid potential constitutional

problems. If [Combs](#) is right, then his convictions, even on an alternative theory like aiding and abetting, should be reversed because no prostitution occurred at all. But both arguments fail. [Combs](#) got it right the first time: The correct definition of prostitution in the Mann Act is sex in exchange for money or its equivalent. And that definition poses no constitutional problem.

#### 1. Prostitution means sex for sale

\*4 To any modern reader, the plain meaning of prostitution is sex for sale. Every modern dictionary the Court consulted says the same thing. See, e.g., *Prostitution*, Oxford English Dictionary (“the practice or occupation of engaging in sexual activity with someone for payment”); *Prostitution*, Merriam Webster (“the act or practice of engaging in sex acts and especially sexual intercourse in exchange for pay”); *Prostitution*, Black’s Law Dictionary (12th ed. 2024) (“The practice or an instance of engaging in sexual activity for money or its equivalent; commercialized sex.”).

The Mann Act’s history doesn’t suggest that a different definition applies. True, in 1917, the Supreme Court indicated that prostitution as used in the statute could be “for hire or without hire.” [United States v. Caminetti](#), [242 U.S. 470, 486 \(1917\)](#). And that appears to reflect how the word was used at the time. See, e.g., Black’s Law Dictionary (2d ed. 1910) (defining “prostitution” as “common lewdness; whoredom”). But the Court walked away from that expansive definition three decades later in *Cleveland v. United States*, recognizing that prostitution “normally suggests sexual relations for hire.” [329 U.S. 14, 17 \(1946\)](#). And while *Cleveland* didn’t explicitly overturn *Caminetti*, its definition of prostitution was key to its reasoning. [Id.](#) at 17–18 (reasoning that “debauchery” differs from “prostitution” in the statute because debauchery doesn’t require payment). That was the Supreme Court’s last word on the matter before 1986.

In 1986, Congress amended the Mann Act, cementing the commonsense definition of prostitution. It struck the entirety of [§ 2421\(a\)](#) and reenacted it, re-inserting the prostitution clause but cutting the law’s “anachronistic features” like the “debauchery” and “immoral purpose” provisions. [H.R. Rep. No. 99-910 at 3](#); Child Sexual Abuse and Pornography Act of 1986, [Pub. L. 99-628, 100 Stat. 3511-12](#). Congress is presumed to have been aware of the *Cleveland* Court’s interpretation of prostitution and to have adopted it when re-

enacting the statute. [Aetna Life Ins. Co. v. Big Y Foods, Inc.](#), 52 F.4th 66, 75 (2d Cir. 2022). That definition is also what prostitution unambiguously meant at the time of amendment: “an act of sexual intercourse or any unlawful sexual act for hire.” *Prostitution*, Black’s Law Dictionary (5th ed. 1979); *Prostitution*, Black’s Law Dictionary (6th ed. 1990) (“act of performing ... a sexual act for hire”); *Prostitution*, Oxford English Dictionary (2d ed. 1989) (“The offering of the body to indiscriminate lewdness for hire.”); *Prostitution*, Webster’s New Collegiate Dictionary (9th ed. 1983) (“[T]he act or practice of indulging in promiscuous sexual relations esp. for money.”).<sup>1</sup>

To think that Congress instead wanted to revert to *Caminetti*’s expansive definition of prostitution disregards the entire purpose of the amendment. It eliminated provisions that had been criticized—as **Combs** criticizes them now—for their alarming scope. [Caminetti](#), 242 U.S. at 496–97 (McKenna, J., dissenting); [Cleveland](#), 329 U.S. at 21–22 (Rutledge, J., concurring). It would make little sense for Congress to get rid of those provisions but, at the same time, preserve a sweeping definition of prostitution with the same effect. *See* [Ali v. Federal Bureau of Prisons](#), 552 U.S. 214, 222 (2008) (“The amendment is relevant because our construction ... must, to the extent possible, ensure that the statutory scheme is coherent and consistent.”). Using the older, *Caminetti*-era meaning of prostitution “would undo what Congress plainly sought to achieve when it scrapped” the debauchery and immoral purpose provisions. [San Francisco v. EPA](#), 604 U.S. 334, 349 (2025).

\*5 So, consistent with prostitution’s ordinary meaning, how the *Cleveland* Court understood it, the judicial state of play when Congress last amended the provision, and how Congress would have understood the term at the time of amendment, the right definition is the one **Combs** proposed at trial and that the Court used in its jury instructions: engaging in sexual activity for money or its equivalent.

But **Combs** isn’t satisfied with that definition. He says that prostitution has two additional requirements, neither of which is grounded in the text of the statute, the meaning of prostitution at the time of the Mann Act’s enactment in 1910, or its meaning when the statute was amended in 1986. For the following reasons, the Court rejects **Combs**’s proposed additional requirements.

### 2. A defendant need not have a financial motive

**Combs** first argues that prostitution in the Mann Act requires that a defendant have a financial motive. There’s nothing in the text of the statute to support this requirement, and it doesn’t make any sense in this context. **Combs** wasn’t convicted of prostitution, but rather transporting others for prostitution. **Combs** seems to be conflating two things: the definition of prostitution and the motive of the defendant who transports somebody for prostitution. The statute requires only the “intent that [the transported person] engage in prostitution.”

[18 U.S.C. § 2421\(a\)](#). **Combs**’s argument imposes an additional mental-state requirement for *the transporter* and grafts it onto the word “prostitution”—a word that by itself doesn’t contemplate anybody but the parties involved in the sex act. What happened in this case was transportation for prostitution even under **Combs**’s understanding of the term: **Combs** transported the escorts (who were financially motivated) and intended for them to engage in prostitution. Whether **Combs** himself was financially motivated never enters the calculus. There’s no basis to adopt **Combs**’s proposed financial-motive requirement for defendants in Mann Act cases.

### 3. A bilateral exchange of money for sex is not required

**Combs** also argues that prostitution is a strictly bilateral transaction. One party pays the other for sex, then those same two parties have sex. That definition would narrow prostitution almost out of existence. It would exclude any situation in which a person pays a third party (like a brothel) to have sex with an employee. To support that narrow construction, **Combs** invokes a series of state-court decisions that he says adopt his definition. Putting aside that none of these decisions interprets the Mann Act (as the government points out), these cases aren’t good evidence of the meaning of the word prostitution. To the extent that these cases are relevant, they stand only for the proposition that states have defined prostitution differently within their statutes.

The cases can be grouped into two general categories. The first group is the masturbation cases. In each of these a defendant either masturbated in front of somebody else for money or offered to. *See, e.g.*, [People v. Greene](#), 441 N.Y.S. 2d 636 (Crim. Ct. 1981); [Commonwealth v. Bleigh](#), 586 A.2d 450 (Pa. Sup. Ct. 1991); [State v. Turnpaugh](#), 741 N.W. 2d 488 (Wisc. Ct. App. 2007); [State v. Mayfield](#),

900 P.2d 358 (N.M. Ct. App. 1995).<sup>2</sup> In each, the defendant was charged with violating a state prostitution statute. *Id.* Each of those statutes defined prostitution in a way that the court interpreted to require sexual contact between the people involved. *Greene*, 441 N.Y.S. at 40–41 (citing state law that defined prostitution as “sexual conduct with another person in return for a fee”); *Bleigh*, 586 A.2d at 453 (interpreting prostitution to exclude “self-masturbation for hire without any physical contact between performer and viewer”); *Turnpaugh*, 741 N.W. 2d at 489 (interpreting the phrase “nonmarital sexual intercourse for anything of value”); *Mayfield*, 900 P.2d at 360 (interpreting “sexual act for hire” where state law defined a “sexual act” as “sexual intercourse, cunnilingus, fellatio, masturbation of another, anal intercourse or the causing of penetration to any extent ... of another”).

\*6 **Combs** argues that these cases show that prostitution requires a bilateral exchange of money for sex. Not so. These cases involved the question of whether there's prostitution when there's no sexual contact at all between the participants. That isn't at issue here given that there's no question that Ventura, Jane, and the escorts had sex. The cases didn't address whether prostitution requires a bilateral exchange of money and sex between only those participants, as **Combs** insists. And even if they were relevant, these cases didn't turn on the bare word “prostitution,” but instead on the definitions provided in each statute.

The second group of cases concerns strip clubs and commercial voyeurism. A few of these cases simply aren't relevant. One did nothing but note that some forms of commercial voyeurism are distinct from prostitution. *See* *Smoot v. State*, 729 S.E. 2d 416, 426 (Ga. Ct. App. 2012). In another, a court held that a dancer didn't engage in prostitution with a patron who touched the clothing covering her genitals, because Missouri law required touching of “the genitals themselves.” *State v. Burgess*, 669 S.W.2d. 637, 639 (Mo. Ct. App. 1984). But again, recall that **Combs's** proposed definition of prostitution turns on whether the money and sex flow between the same people, not whether sexual touching happens *at all*. And notably in *Burgess*, the statute didn't require a bilateral exchange of sex and money, but covered situations where “something of value [is] received by the person *or by a third person*,” *id.* at 639 (emphasis added), undermining **Combs's** argument.

Two other cases in this category appear more relevant on first blush. In *State v. Taylor* and *Wooten v. Superior Court*, courts in Arizona and California confronted the setup of a theater or club where customers could pay to watch employees touch each other sexually. *808 P.2d 314* (Ariz. Ct. App. 1990); *113 Cal. Rptr. 2d 195* (Ct. App. 2001). In *Taylor*, the Arizona court held that the charged employee—who engaged in the touching with another dancer—was “legitimately prosecuted under Arizona's prostitution statutes,” which required “sexual conduct with another person.” *808 P.2d at 316, 319*. That was so even though the defendant didn't pay the other dancer, undermining **Combs's** proposed construction. And just as in *Burgess*, the Arizona statute made clear that the fee arrangement could be with the person engaged in the sex “or any other person.” *Id.* at 316. So that case also cuts against **Combs**.

Next, in *Wooten*, the California court held that the purveyors of a similar club weren't involved in prostitution. *113 Cal. Rptr. 2d at 204–05*. Unlike *Taylor*, a combination of the statutory definition of prostitution and prior caselaw led to the conclusion that “California's statute was not written sufficiently broadly to encompass a sexual transaction for a customer who engages only as voyeur.” *Id.* at 205 (citing *Taylor*, *808 P.2d at 316*). That's the conclusion that **Combs** would have this Court reach for the Mann Act as well. But he doesn't explain why the definition of prostitution in a California statute and interpreted by a California state court should control the definition of prostitution in a federal statute. That problem is exacerbated by the array of definitions used by the states—why should one control above all others? Indeed, in *Wooten* itself, the court observed that Wisconsin courts had adopted a broader interpretation of that state's laws that would include instances where a third party paid for the sex, such as a businessman paying someone to have sex with his client, demonstrating that these state decisions are state specific. *Id.* at 434 (“If California's statute contained the language that was included in Wisconsin's statute, the sexual conduct alleged herein could constitute prostitution.”).

\*7 Finally, in *People v. Paulino*, a New York trial court addressed a challenge mounted by a purveyor of sex for hire to his conviction for promoting prostitution. 2005 N.Y. Misc. LEXIS 3430 (N.Y. Sup. Ct. Aug. 4, 2005). The New York law

at issue, he argued, should apply also to pornographers—and, because it wasn't enforced against pornographers, his case was selective prosecution in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at \*4, \*6. The court rejected that argument because it would “eradicate[ ] the traditional bilateral notion of prostitution, which entails A paying B for sexual activity to be performed on A.” *Id.* at \*8. The Court isn't persuaded by this interpretation. *Paulino* reasoned that under New York law, a bilateral exchange of money for sex is required, drawing inferences from prior New York cases and a practice commentary (which itself does not address the bilateral-exchange issue directly). It cites no authority for its assertion that this is the “traditional” definition more generally. *Paulino* instead begins with the premise that pornography simply could not be covered by the definition and works backward to explain why. Some of its reasoning rested on the definition it divined from New York authorities, while other parts rested on the premise that a corporation enjoys First Amendment protection while a brothel doesn't. *See id.* at \*12–13.<sup>3</sup>

### C. Defining prostitution as sex for money doesn't create constitutional problems

**Combs** argues that any definition of prostitution broader than the one he suggests would create constitutional problems. Specifically, he says that the statute would be void for vagueness, violate substantive due process rights, create “federalism problems,” and violate the First Amendment. Dkt. 486 at 35. Even though he makes all his arguments under the auspices of statutory interpretation, he also mounts a standalone challenge to his conviction under the First Amendment. None of these arguments is persuasive.

#### 1. Void for vagueness

A statute is void for vagueness if it: (1) “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits,” or (2) “authorizes or even encourages arbitrary and discriminatory enforcement.”

🚩 *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010). As his counsel confirmed at argument, **Combs** challenges the Mann Act as applied to him. Arg. Tr. at 13. When, as here, the “statute is judged on an as applied basis, one whose conduct is clearly proscribed by the statute cannot successfully challenge it for vagueness.” 🚩 *United States v. Nadi*, 996 F.2d 548, 550 (2d Cir. 1993).

**Combs** argues that the Act is void for vagueness for four reasons. First, because the word prostitution has come to mean different things over time—for example, from *Caminetti* in 1917 to *Cleveland* in 1946. Second, because the statute doesn't include a definition. Third, because states have defined it differently over time. And fourth, because the Act hasn't been used before to prosecute somebody in **Combs's** position. The Court takes each in turn.

*First*, the word's changing nature has little to do with **Combs's** challenge. His argument is that the outer boundaries of the word's meaning have changed. On his account, the definition was previously so broad that it encompassed general lewdness, divorced from any transaction. And since then, the definition narrowed to require the exchange of money. But neither of these changes has moved his activities in or out of statute's ambit. To be sure, some other defendant, in some other case, might have a voidness argument to make. But **Combs** doesn't show that the Mann Act's text doesn't plainly apply to *him*, where the evidence showed that he transported escorts for them to have sex for money.

*Second*, the lack of a definition isn't a problem. As the government notes, “a statutory term is not impermissibly vague simply because it lacks a statutory definition.” *United States v. Concepcion*, 139 F.4th 242, 250 (2d Cir. 2025). “To be sure, the absence of a statutory definition can be a relevant consideration in the void-for-vagueness inquiry.” *Id.* But “the plain meaning of the statute's wording” along with “a scienter requirement” can “defeat a vagueness challenge.” *Id.* (cleaned up). As discussed earlier, the plain meaning of prostitution is sex for money. Paying an escort to have sex with somebody is exactly the kind of activity that “a person of ordinary intelligence” would have “fair notice” is meant by prostitution. *Id.* at 251. And on top of that, the Mann Act's scienter requirement also cuts against vagueness; a defendant must transport somebody “knowingly” and “with intent” that they engage in prostitution. 🚩 18 U.S.C. § 2421(a); *see also Concepcion*, 139 F.4th at 250.

\*8 *Third*, the state-law definitions that **Combs** raises aren't relevant. Though the Mann Act has a provision that integrates state law, that isn't the one that **Combs** was convicted under. *See* 🚩 18 U.S.C. § 2421(a); Dkts. 424, 447. If **Combs's** argument is that a constellation of conflicting state laws renders the federal term vague, this presents two further problems. The first is that, as has been already discussed at length, the state-law cases that **Combs** cites don't conflict

with the definition the Court used, and even if they did, they interpreted statutes with different language. The second is that, even if there were a conflict, the Court is skeptical that a federal statute could be de-fanged by state laws that occupy a similar field; the principles of preemption and intergovernmental immunity run in the other direction.

*Fourth*, it makes no difference that this statute may not have been applied this way before by the government. **Combs** argues that he's "the only person ever convicted" under the Mann Act for his conduct. Dkt. 486 at 12.<sup>4</sup> He cites Department of Justice guidance against charging prostitution customers under the Mann Act. *Id.* at 21–23. But "criminal laws are for courts, not for the Government, to construe." **Abramski v. United States**, 573 U.S. 169, 191 (2014). And "the fact that defendant is the first person to be prosecuted under [a provision for specific conduct] does not render [the] provision vague." *United States v. Harmon*, 2021 WL 1518344, at \*8 (D.D.C. Apr. 16, 2021); *see also United States v. Ulbricht*, 31 F. Supp. 3d 540, 565 (S.D.N.Y. 2014). That's especially true where, as here, the defendant's conduct fits squarely into the statute's text.

### 2. Substantive due process

**Combs** fails to show that his conviction implicates any right or liberty interest protected by the Fifth Amendment. He argues that laws banning prostitution "are hard to square" with Supreme Court decisions recognizing substantive-due-process rights related to sexual activity. In doing so, he leans on two cases that are inapposite. First, he cites *Obergefell v. Hodges*, which concerned only the right to marriage, not any specific right to participate in sexual activity. **576 U.S. 644** (2015). Second, he leans more heavily on *Lawrence v. Texas*, which did concern sexual activity. **539 U.S. 558** (2003). But as the government points out, the *Lawrence* court explicitly wrote that it wasn't addressing prostitution. **Id.** at 578 ("This case does not involve ... prostitution."). **Combs's** argument is cabined to suggestive, inferential support from authorities like these. He doesn't invoke the *Glucksberg* test, provide any "careful description of the asserted fundamental liberty interest," or explain why the right to pay somebody for sex is "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." **Washington v. Glucksberg**, 521 U.S. 702, 721 (1997) (citation and internal quotation marks omitted).

### 3. Federalism

**Combs** relies on *Ciminelli v. United States* for the proposition that the scope of a federal statute should be narrowed when it governs "a vast array of conduct traditionally policed by the States." **598 U.S. 306, 316** (2000) (quoting **Cleveland v. United States**, 531 U.S. 12, 27 (2000)). Because the states regulate prostitution, he says, the word "prostitution" should be read as narrowly as possible. This argument misapplies the federalism canon. The canon, as deployed in *Ciminelli* and elsewhere, requires Congress to "convey[ ] its purpose clearly" before it's "deemed to have significantly changed the federal-state balance in the prosecution of crimes." **Cleveland**, 531 U.S. at 25 (citation and internal quotation marks omitted). That's met here. The statute criminalizes the *interstate* transport of people for prostitution, a concern that could hardly be "traditionally policed by the States." **Ciminelli**, 598 U.S. at 316; *accord Western Union Telegraph Co. v. Call Pub. Co.*, 181 U.S. 92, 100 (1901) ("This court has often held that the full control over interstate commerce is vested in Congress, and that it cannot be regulated by the states."). Moreover, even if prostitution were traditionally regulated by states, Congress's intention to criminalize activity related to prostitution is crystal clear from its use of the word "prostitution" in the statute. There's no ambiguity there.

### 4. The First Amendment

**\*9 Combs** argues that because he's an amateur pornographer and consumer of pornography, his conviction violates his First Amendment rights. That argument fails for two reasons.<sup>5</sup>

*First*, **Combs's** conduct is not protected by the First Amendment. First Amendment protection applies "only to conduct that is inherently expressive." **Rumsfeld v. F. for Acad. and Inst. Rts., Inc.**, 547 U.S. 47, 66 (2006). Conduct is inherently expressive if there's both "an intent to convey a particularized message" and the "likelihood was great that the message would be understood by those who viewed it." **Texas v. Johnson**, 491 U.S. 397, 404 (1989) (citation and quotation marks omitted). Though film is an expressive medium protected by the First Amendment, "at some point, it must certainly be true that otherwise illegal conduct is not made legal by being filmed." **California v. Freeman**, 488 U.S. 1311, 1313 (1989) (O'Connor, J., in chambers); *see also Rumsfeld*, 547 U.S. at 66 ("If combining speech

and conduct were enough to create expressive conduct, a regulated party could always transform conduct into ‘speech’ simply by talking about it.”). And the same goes for the desire to view a pornographic performance—at some point, illegal activity can’t be laundered into constitutionally protected activity just by the desire to watch it. **Combs’s** conduct goes far beyond that point. Evidence at trial showed that when **Combs** filmed he didn’t typically give notice ahead of time or ask for consent, as a film producer would; and that he masturbated, suggesting that the purpose was his immediate sexual gratification. Tr. 569 (no notice or consent to film), 4818 (same), 565 (masturbation). In fact, he sometimes participated in the sexual activities. The evidence showed that **Combs** “and the escort would both ... have intercourse” with Ventura at the same time. Tr. 560. And after Ventura or Jane finished having sex with an escort, **Combs** would have sex with Ventura or Jane, often while the escort’s semen was still on their body. Tr. 4626–27. At other times, Ventura would “put [the men’s] semen on [**Combs**], “usually on his chest, on his nipples.” Tr. 561.

**Combs’s** incidental filming resembles the facts of *Arcara v. Cloud Books, Inc.*, in which a bookstore could be shut down to combat the prostitution happening on its premises. [478 U.S. 697 \(1986\)](#). Even though that restriction affected the distribution of pornographic materials, the shutdown didn’t implicate the First Amendment. [Id. at 706–07](#). The Court “underscored the fallacy of seeking to use the First Amendment as a cloak for obviously unlawful ... sexual conduct by the diaphanous device of attributing protected expressive attributes to that conduct.” [Id. at 705](#). In concurrence, Justice O’Connor emphasized that “[a]ny other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment.” [Id. at 708](#) (O’Connor, J., concurring).

\*10 Against that, **Combs** relies on three state court cases; none moves the needle. First is the *Paulino* case from New York, discussed earlier. Yes, the *Paulino* court worried about the consequences of extending prostitution laws to commercial pornography. *Paulino*, 2005 N.Y. Misc. LEXIS 3430, at \*12. But **Combs** didn’t engage in anything resembling the adult-film distributors that *Paulino* assumed would be “shielded by the First Amendment.” *Id.* at \*13. Recall that **Combs** doesn’t bring a facial challenge, but instead only challenges the statute as applied to him. Arg. Tr. at 13.

That means that just as *Paulino* confronted a factual situation far from the core of any protected activity, so too does this Court.

The other two are cases where prostitution convictions were invalidated based, at least in part, on free-speech considerations: *People v. Freeman*, a California Supreme Court case that held that a California statute on prostitution would violate the First Amendment if applied to a pornographer, [46 Cal. 3d 419 \(1998\)](#), and *State v. Theriault*, a New Hampshire Supreme Court case involving a defendant who paid to videotape sex between other people, [960 A.2d 687 \(N.H. 2008\)](#). But in both cases, the courts’ free-speech concerns arose from the fact that the defendant’s purpose was to film a performance, not sexual arousal or gratification. That isn’t the case here. See [Freeman](#), [46 Cal. 3d at 424–25](#) (“There is no evidence that defendant paid the acting fees for the purpose of sexual arousal or gratification, his own or the actors. Defendant, of course, did not himself participate in any of the sexual conduct.”); [id. at 429](#) (“the acts of alleged ‘prostitution’ in this case were not crimes independent of and apart from payment for the right to photograph the performance”); [Theriault](#), [960 A.2d at 689–90](#) (there was “no evidence or allegation that the defendant acted with the purpose of sexual arousal or gratification”).

*Second*, even if **Combs’s** conduct falls under the First Amendment’s protection, his conviction doesn’t violate it. If speech is implicated, then the Mann Act is a content-neutral restriction that has an incidental effect on speech. Such restrictions are analyzed under the *O’Brien* test. [United States v. O’Brien](#), [391 U.S. 367, 377 \(1968\)](#); [City of Erie v. Pap’s A.M.](#), [529 U.S. 277, 296 \(2000\)](#). The *O’Brien* test is satisfied if (1) the government has the power to enact the law, (2) it furthers an important or substantial government interest, (3) that interest is unrelated to the suppression of expression and (4) the restriction is no greater than essential to further the government interest. [City of Erie](#), [529 U.S. at 296–301](#).

**Combs** challenges only the second prong: whether the law furthers an important or substantial government interest. At the outset, the government “has a strong interest in controlling prostitution within its jurisdiction.” *Freeman*, [488 U.S. at 1313](#) (O’Connor, J., in chambers); see also *Kilgore v. City*

of *South El Monte*, 3 F.4th 1186, 1192 (9th Cir. 2021) (“[T]here is no question that curtailing prostitution ... is a substantial government interest.”); *Paulino*, 2005 N.Y. Misc. LEXIS 3430, at \*14 (“[P]rostitution carries with it a host of ills including AIDS, venereal diseases, drugs, pimping, loan sharking, physical abuse and rape.”). Add to that the significant federal interest in halting the interstate sex trade, which may be associated with all manner of other criminal conduct. Contrary to **Combs's** assertion, his own activities implicated many of these concerns. While paying for sex, he enabled commercial prostitution, distributed illegal drugs, and was physically violent.

\*11 Against that, **Combs** argues that “[t]he government's proffered interest in ‘controlling prostitution’ is not implicated in this unprecedented case” because there are no minors involved. Dkt. 499 at 24. He asserts that the legislative history around the 1986 amendment to the Mann Act “made clear” that “the statute was not intended to apply to transportation of fully consenting adult males.” Dkt. 486 at 52. His evidence consists entirely of (1) a citation to the title of the act that included this amendment (the “Child Sexual Abuse and Pornography Act of 1986”) and (2) the House Report summarizing the act's purposes. *Id.* That the title and legislative history focused on children is unsurprising when one of the act's primary functions was to create new child pornography crimes. But at the same time, Congress amended § 2421(a) in a way that obviously included more than just conduct involving minors. Pub. L. 99-628, 100 Stat. 3511-2 (criminalizing transport for “any sexual activity for which any person can be charged with a criminal offense”). And looking to the rest of the text of § 2421(a), it plainly isn't limited to minors, who are specifically addressed in a different section.

Compare § 18 U.S.C. § 2421(a) (“Whoever knowingly transports any individual ....”) with § 18 U.S.C. § 2423(a) (“A person who knowingly transports an individual who has not attained the age of 18 years ....”).

Finally, though **Combs** doesn't mention the fourth prong of *O'Brien*, the Court notes that the Mann Act isn't broader than necessary. “The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest.” *Ward v. Rock Against Racism*, 491 U.S. 781, 782–83 (1989). The first requirement is plainly met here, as the law works to curb the

sex trade. And the second is also met because the law applies specifically to interstate transport, not more broadly to sex for hire itself.

\* \* \* \* \*

**Combs** is right that the Mann Act's text and application have changed over the last century. But that has little relevance to his conduct, which sits at the heartland of the Act's legitimate proscriptions. Unsurprisingly then, his conviction raises no constitutional problem.

## II. There was sufficient evidence to convict under the definition adopted

**Combs's** fact-based challenge also fails. He argues that the evidence wasn't sufficient to convict him under the definition of prostitution used at trial. To sustain a conviction under the Mann Act, “one of the dominant purposes” of the transportation must be for the transported individual to “engage in prostitution.” *United States v. Miller*, 148 F.3d 207, 211–13 (2d Cir. 1998) (interpreting the same language in § 2422). “It need not have been his only purpose or motivation, but it must have been more than merely incidental.” *Id.* at 211. **Combs's** arguments all sound in the same tenor: that even if he paid escorts and they had sex with Ventura or Jane, he didn't intend to pay for sex at the time of interstate travel. Dkt 486 at 38 (citing *United States v. Broxmeyer*, 616 F.3d 120, 129 (2d Cir. 2010)). Instead, he meant to pay only for their time. If they ended up having sex on that time (and even if that was foreseeable), it wasn't the object of the transaction.

To support that framing, **Combs** argues that the evidence at trial showed that sex was never part of the bargain. He points to evidence that the agencies that provided the escorts didn't advertise themselves as selling sex for money. Instead, they offered “time and companionship.” Tr. 7057. Or alternatively, dancing and stripping services, but not sex. Tr. 1928–29. During the negotiation, **Combs** wasn't privy to any of the details other than “what [are] we doing” and “who's available.” Tr. 540. One of the escorts “wouldn't have thought twice to think that [it] was prostitution.” Tr. 312. Another, who massaged Ventura, was there only to “create what [he] called a sexy scene.” Tr. 1895. At least one of the escorts also had sex with Ventura without payment and felt romantically attached to her. Tr. 274, 379–80, 1924–26. Finally, Jane and Ventura

sometimes described the escorts are “entertainers” paid “to entertain.” Tr. 479.

\*12 The problem for **Combs** is that the Court “defer[s] to ... the jury's choice of the competing inferences that can be drawn from the evidence.” [United States v. Griffith](#), 284 F.3d 338, 348 (2d Cir. 2002) (quoting [United States v. Morrison](#), 153 F.3d 34, 49 (2d Cir. 1998)). And a great deal of evidence supported the competing inference that a dominant purpose of the transport was to pay for sex.

First, evidence at trial showed that both parties to the transactions acted as if they were engaging in prostitution. Each side worried that the other side was undercover police, a concern that wouldn't be relevant if **Combs's** intent hadn't been to pay for sex. At least one escort asked **Combs** whether he was a cop and **Combs** had Ventura ask multiple escorts the same. GX 3A-111 (“Hey, are you a cop?”); Tr. 530 (Ventura: “Sean wanted me to clarify if the person was a cop.”). And **Combs** believed that the escorts were frequently being tested for [sexually transmitted diseases](#) as part of their job. Tr. 4590 (Jane: “He just said, why [wear a condom?] ... [T]hese guys are safe. They get tested all the time.”). Second, Ventura testified that the escorts were paid to ejaculate and to have sex with her, contrary to **Combs's** contention that they were paid for their time and companionship. Tr. 532 (“Q: For the escorts who you interacted with, what were they paid thousands of dollars to do? A: To ejaculate, to finish.”); Tr. 533 (“Q: For all the dancers you interacted with, what were they paid ... to do? A: To entertain and to also ultimately have intercourse with me.”). Even the escort that **Combs** claims testified that he “wouldn't have thought twice to think it was prostitution” explicitly stated that he was paid money for sex and wasn't paid when he couldn't “sexually perform.” Tr. 274, 246 (“Q: What did Cassie Ventura give you money for in around 2012? A: To have sex with her.”). Jane testified that multiple men were routinely paid by Sean after they finished having sex with her. Tr. 4815–18. Third, their compensation was tethered to their performance at that job: “[W]hen escorts ejaculated without having been told to do so,” **Combs** “wasn't pleased by their performance” and they “would take less money.” Tr. 561; *see also* GX 3A-103. And fourth, even though some escorts also spent time with Ventura and **Combs** outside of sexual activity, others engaged in sexual activity on every single trip with both Ventura and Jane. Tr. 256 (“Q: Every time you met with Ms. Ventura and Mr. **Combs**, what was the purpose of the meeting? A: To have sex with Cassie.”); Tr. 4681 (“Q: Jane, in a typical hotel

night, how would intercourse with an entertainer end? A: With them finishing on me.”); Tr. 4737 (“Q: At the end of each hotel night with Kabrale, what, if anything, did you give to Kabrale? A: Money.”).

**Combs's** other arguments fall flat. Yes, much of this evidence comes from after the escorts traveled. But it's still relevant and probative of **Combs's** intent beforehand. [United States v. Goffer](#), 721 F.3d 113, 124 (2d Cir. 2013) (“Subsequent acts are frequently probative as to intent.”). And to be sure, some of the escorts may have had mixed motives, as **Combs** points out. But the evidence still supported that **Combs** intended to pay the escorts for sex and that the escorts indeed had sex and got paid. Finally, even if the government relied on some circumstantial evidence, it also presented direct evidence in the form of Ventura's and Jane's testimony. And, in any event, “[a] jury's verdict may be based entirely on circumstantial evidence.” [United States v. Rutigliano](#), 790 F.3d 389, 402 (2d Cir. 2015) (quoting [Goffer](#), 721 F.3d at 124). There was also sufficient evidence admitted at trial of interstate transport (of escorts, of Ventura, and of Jane) for paid sex. *See, e.g.*, GX 1402; GX 1406. For this reason, **Combs's** argument that the escorts who testified at trial didn't themselves travel between states isn't grounds for granting relief.

### III. No new trial is warranted under Rule 33

\*13 **Combs** says that he should get a new trial under [Rule 33](#) because his [RICO](#) and sex trafficking counts shouldn't have been joined together with the Mann Act counts. *See Fed. R. Crim. P. 14*. The evidence introduced to prove the former, he says, spilled over and prejudiced the jury against him on the latter. *See* [United States v. Hamilton](#), 334 F.3d 170, 181–82 (2d Cir. 2003) (discussing “retroactive misjoinder”). These challenges are difficult to prevail on. As a general matter, a [Rule 33](#) motion “should be granted only with great caution and in the most extraordinary circumstances.” [Sanchez](#), 969 F.2d at 1414. And on top of that, a defendant arguing prejudicial spillover “bears an extremely heavy burden.” [Griffith](#), 284 F.3d at 351. A court considers: (1) “whether the evidence that related to the **dismissed** charges was of a type that would incite or arouse the jury into convicting the defendant,” (2) “the similarities and differences between the evidence relating to the **dismissed** charges and the evidence relating to the remaining charges,” and (3) “the strength of the government's case on the remaining counts.” *Id.* (quotation marks and citations omitted).

The government argues that these factors shouldn't come into play, and that **Combs's** argument should be “summarily rejected” because there's “no precedent for a new trial based on retroactive misjoinder following a split jury verdict.” Dkt. 493 at 53. Putting aside whether that's correct (**Combs** disagrees), it's certainly correct that **Combs** is asking the Court to find retroactive misjoinder in an unusual circumstance. He says that the evidence that was introduced on the **RICO** and sex-trafficking charges prejudiced him on the Mann Act counts. But he was acquitted on the **RICO** and sex-trafficking counts. So his claim is that the jury was prejudiced against him because of the evidence of racketeering and sex trafficking, but still didn't find him guilty of those same counts. As **Combs** concedes, the Second Circuit has never found spillover prejudice when the jury acquitted the defendant on the allegedly prejudicial charges. That's for good reason. “The absence of such spillover is most readily inferable where the jury has convicted a defendant on some counts but not on others.” [Hamilton](#), 334 F.3d at 183. When “the jury was able to distinguish between counts or between defendants, and to assess separately the evidence pertinent to each, [there's] no basis for concluding that a new trial [is] warranted.” *Id.* As a result, the typical articulation of retroactive misjoinder is that it kicks in only after “later developments—such as a district court's **dismissal** of some counts for lack of evidence or an appellate court's *reversal* of less than all convictions—render the joinder improper.” [Id.](#) at 181 (quoting [United States v. Jones](#), 16 F.3d 487, 493 (2d Cir. 1994)) (emphasis added). Neither of these scenarios ponders a split verdict.

Nevertheless, the Court declines to “summarily reject” **Combs's** argument without reaching the test. Dkt. 493 at 53. Applying the relevant factors, **Combs** fails to carry his “heavy burden” of showing spillover prejudice. [Griffith](#), 284 F.3d at 351.

The Court takes the factors in reverse order, starting with the third: the strength of the government's case. As described earlier, the government at trial presented overwhelming evidence of **Combs's** guilt under the Mann Act on many occasions with respect to both Ventura and Jane. That evidence consisted of testimony from Ventura and Jane, testimony from the escorts involved, and evidence from text messages and emails. The government proved its case many times over. That by itself might be enough to dispose of **Combs's** challenge. But the other factors don't do much to help **Combs** either. He concedes that under the second factor “if the inflammatory evidence would have been admissible anyway on a separate trial for the remaining counts” then his “claim of spillover prejudice likely fails.” Dkt. 486 at 59. That narrows any factual challenges to evidence unrelated to the Mann Act charges, like arson or forced labor, to give a few examples. But on the first factor, it isn't at all clear that this evidence worked to incite the jury or prejudice **Combs**. It weighs heavily that the jury declined to convict him on any of the counts related to that conduct. Had the prejudice indeed been so great, one would expect a jury to convict on the most relevant counts before it could spill over and infect the others. A new trial is not warranted.

## CONCLUSION

\*14 For these reasons, **Combs's** motion under [Rules 29](#) and [33](#) is **DENIED**.

The Clerk of Court is directed to terminate Dkt. 485.

SO ORDERED.

## All Citations

Slip Copy, 2025 WL 2778966

## Footnotes

- Combs** offers a slightly different account of this history, which focuses on a summary order that the Supreme Court issued in 1954. In *Amadio v. United States*, the Court vacated a Seventh Circuit decision that affirmed a Mann Act conviction. [348 U.S. 892 \(1954\)](#). Neither this two-sentence summary order nor the opinion below have anything to do with the definition of prostitution in the Mann Act. In *Amadio*, the defendant was convicted

under the “immoral purpose” provision.  [United States v. Amadio](#), 215 F.2d 605, 607–08 (7th Cir. 1954). And the problem the Supreme Court (and dissent below) appeared to identify was that the indictment wasn't tethered to the statutory language. *Id.* (Major, C.J., dissenting); [Amadio](#), 348 U.S. at 892.

2 **Combs** also cites  [Metwally v. City of New York](#), 187 N.Y.S. 3d 719 (App. Div. 2d 2023), but this case cites the law examined by *Greene* in passing and is otherwise irrelevant to the definition of prostitution.

3 Like *Paulino*, some of **Combs's** cited cases invoke First Amendment concerns. See, e.g.,  [People v. Freeman](#), 46 Cal. 3d 419 (1988). Those issues are discussed below.

4 The government disagrees, pointing to Mann Act convictions where, like **Combs**, the transporting defendant lacked a financial motive. See, e.g., [United States v. Wheeler](#), 444 F.2d 385, 388 (10th Cir. 1971);  [Forrest v. United States](#), 363 F.2d 348, 349 (5th Cir. 1966).

5 **Combs** doesn't make a facial overbreadth challenge, but the Court notes anyway that the definition of prostitution as sex for hire is unlikely to have “presumptively impermissible applications ... [that] far outnumber any permissible ones.”  [United States v. Stevens](#), 559 U.S. 460, 481 (2010). “Invalidation for overbreadth is strong medicine that is not to be casually employed.”  [United States v. Williams](#), 553 U.S. 285, 293 (2008) (cleaned up and citations omitted).

42 N.Y.3d 439

Court of Appeals of New York.

The PEOPLE of the State of New York, Respondent,

v.

Harvey WEINSTEIN, Appellant.

No. 24

|

Decided April 25, 2024

**Synopsis**

**Background:** Defendant was convicted in the Supreme Court, New York County, James Burke, J., of criminal sexual act in the first degree and rape in the third degree and was sentenced to consecutive terms of 20 years and three years, respectively. Defendant appealed. The Supreme Court, Appellate Division, 207 A.D.3d 33, affirmed. Defendant was granted leave to appeal, and he appealed.

**Holdings:** The Court of Appeals, Rivera, J., held that:

[1] tolling provision of five-year statute of limitations for rape, under which statute of limitations was tolled while defendant was outside of state following commission of offense, did not distinguish between residents and nonresidents, and it did not contain any requirement that tolling period apply once authorities knew that crime had been committed;

[2] even a single day's absence from New York counted toward total of 200 days defendant was absent from state following commission of offense, including periods lasting up to two weeks, under tolling provision of five-year statute of limitations for rape;

[3] victim testimony during prosecution's case-in-chief, detailing sexual assaults defendant allegedly committed against them before and after alleged offense conduct, had impermissible propensity purpose, and therefore trial court should not have admitted it;

[4] testimony that served to persuade jury that, if defendant had attempted to coerce other women into nonconsensual sex, then he did same to victims on dates and under circumstances as charged, was pure propensity evidence and it was inadmissible against defendant;

[5] trial court abused its discretion when it ruled that defendant, who did not have any criminal history, could be cross-examined about prior, uncharged alleged bad acts and despicable behavior that was immaterial to his in-court credibility;

[6] defendant was deprived of "self-standing" constitutional right to fair trial, requiring new trial; and

[7] erroneous Molineux witnesses' testimony, and erroneous Sandoval ruling, was not harmless, and therefore new trial was required.

**Reversed** and new trial ordered.

Singas, J., filed dissenting opinion, in which Garcia and Cannataro, JJ., concurred.

Cannataro, J., filed dissenting opinion, in which Garcia and Singas, JJ., concurred.

**Procedural Posture(s):** Appellate Review; Trial or Guilt Phase Motion or Objection.

West Headnotes (42)

- [1] **Criminal Law** — Innocence  
**Criminal Law** — Right of defendant to fair trial in general  
**Criminal Law** — Necessity and scope of proof

Every person accused of crime is constitutionally presumed innocent and entitled to fair trial and opportunity to present defense. U.S. Const. Amends. 6, 14; N.Y. Const. art. 1, § 6.

1 Case that cites this headnote

- [2] **Criminal Law** — Showing bad character or criminal propensity in general

Accused has right to be held to account only for crime charged and, thus, allegations of prior bad acts may not be admitted against them for

sole purpose of establishing their propensity for criminality.

2 Cases that cite this headnote

[3] **Criminal Law** 🔑 Purposes for Admitting Evidence of Other Misconduct

**Witnesses** 🔑 Defendant in Criminal Prosecution

**Witnesses** 🔑 Impeachment of Criminal Defendant

Prosecution may not use prior convictions or proof of prior commission of specific, criminal, vicious or immoral acts other than to impeach accused's credibility; a court has the solemn duty to diligently guard these rights regardless of the crime charged, the reputation of the accused, or the pressure to convict.

[4] **Sex Offenses** 🔑 Bodily Contact; Penetration  
**Sex Offenses** 🔑 Force or Coercion

To establish first-degree criminal sexual act and first-degree rape, the prosecution must prove beyond a reasonable doubt that a defendant used forcible compulsion, to engage in oral or anal sexual conduct, or sexual intercourse.

[5] **Criminal Law** 🔑 Absence, nonresidence, or concealment of accused

Tolling provision of five-year statute of limitations for rape, under which statute of limitations was tolled while defendant was outside of state following commission of offense, did not distinguish between residents and nonresidents, and it did not contain any requirement that tolling period apply once authorities knew that crime had been committed.

🚩 N.Y. CPL § 30.10(2)(b) (former); 🚩 N.Y. CPL § 30.10(4)(a)(i); 🚩 N.Y. Penal Law § 130.25(3).

[6] **Statutes** 🔑 Plain Language; Plain, Ordinary, or Common Meaning

The plain text of a statute is the best indicator of legislative intent and thus the proper starting place in discerning its meaning.

[7] **Criminal Law** 🔑 Absence, nonresidence, or concealment of accused

Even a single day's absence from New York counted toward total of 200 days defendant was absent from state following commission of offense, including periods lasting up to two weeks, under tolling provision of five-year statute of limitations for rape. 🚩 N.Y. CPL § 30.10(2)(b) (former); 🚩 N.Y. CPL § 30.10(4)(a)(i); 🚩 N.Y. Penal Law § 130.25(3).

[8] **Criminal Law** 🔑 Preliminary Proceedings

Defendant's preserved claim that tolling provision of five-year statute of limitations for rape did not exclude period of time during which police were unaware of commission of offense itself did not have sufficient factual record to permit appellate review of question underlying his claim, since record did not contain any evidence regarding when police became aware of allegations that gave rise to charged counts.

🚩 N.Y. CPL § 30.10(2)(b) (former); 🚩 N.Y. CPL § 30.10(4)(a)(i); 🚩 N.Y. Penal Law § 130.25(3).

[9] **Criminal Law** 🔑 Sex offenses, incest, and prostitution

**Criminal Law** 🔑 Sex offenses

**Criminal Law** 🔑 Misconduct subsequent to charged offense

Victim testimony during prosecution's case-in-chief, detailing sexual assaults defendant allegedly committed against them before and after alleged offense conduct, had impermissible propensity purpose, and therefore trial court should not have admitted it in defendant's trial on charges of first-degree criminal sexual act, first-degree rape, third degree rape, predatory

sexual assault, since victim testimonies were not equivocal on issue of consent.  N.Y. CPL § 30.10(4)(a)(i);  N.Y. Penal Law §§ 130.25(3),  130.35(1),  130.95(2).

- [10] **Criminal Law**  Showing bad character or criminal propensity in general  
**Criminal Law**  Relevancy

Evidence of a defendant's uncharged crimes or prior misconduct is not admissible if it logically cannot be connected to some specific material issue in the case, and tends only to demonstrate the defendant's propensity to commit the crime charged.

5 Cases that cite this headnote

- [11] **Criminal Law**  Innocence  
**Criminal Law**  Other Misconduct as Evidence of Offense Charged in General  
**Criminal Law**  Reasonable Doubt

The rule that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that they are guilty of the crime charged, is the product of that same humane and enlightened public spirit which, speaking through the common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until they have been proven guilty beyond a reasonable doubt.

- [12] **Criminal Law**  Other Misconduct as Evidence of Offense Charged in General

Jurisprudence under  *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 begins with the premise that uncharged crimes and prior misconduct are inadmissible and, from there, carves out exceptions.

1 Case that cites this headnote

- [13] **Criminal Law**  Relevancy  
**Criminal Law**  Materiality  
**Criminal Law**  Burden of proof

Prosecution has burden of showing that uncharged crimes or prior misconduct is connected logically to some specific material issue in the case and directly relevant to it in order for it to be admissible under  *Molineux*.

2 Cases that cite this headnote

- [14] **Criminal Law**  Relevancy  
**Criminal Law**  Materiality  
**Criminal Law**  Burden of proof

The prosecution has the burden of showing direct relevance of evidence of uncharged crimes or prior misconduct to some specific material issue in the case, in order for it to be admissible under  *Molineux*.

2 Cases that cite this headnote

- [15] **Criminal Law**  Relevancy

When proffered  *Molineux* evidence is relevant to some material fact in case, other than defendant's propensity to commit crime charged, it is not to be excluded merely because it shows that defendant had committed other crimes.

1 Case that cites this headnote

- [16] **Criminal Law**  Other offenses  
**Criminal Law**  Review De Novo

In reviewing a  *Molineux* ruling, the court engages in a two-step process: first, it evaluates whether the prosecution has identified some issue, other than mere criminal propensity, to which the evidence is relevant, which is a question of law, not discretion, and is reviewed de novo; second, if the evidence is relevant to an issue aside from propensity, the court determines whether its probative value exceeds the potential for prejudice resulting to the defendant.

4 Cases that cite this headnote

[17] **Criminal Law** 🔑 Other offenses

The trial court's decision to admit **Molineux** evidence on the basis that its probative value exceeds the potential for prejudice resulting to the defendant may not be disturbed on appeal simply because a contrary determination could have been made or would have been reasonable; rather, it must constitute an abuse of discretion.

6 Cases that cite this headnote

[18] **Criminal Law** 🔑 Prejudicial effect and probative value

Any substantial doubt regarding how to strike a neat balance between possible prejudice to the defendant, and indispensability of the challenged **Molineux** evidence to the prosecution's case should weight the scales in favor of the defendant.

[19] **Criminal Law** 🔑 Evidence of other offenses and misconduct

If an appellate court concludes that the trial court abused its discretion by admitting **Molineux** evidence, the appellate court must determine whether the error was harmless or requires a new trial.

1 Case that cites this headnote

[20] **Criminal Law** 🔑 Other Misconduct Showing Intent

When it comes to **Molineux**, evidence sought to be introduced to prove a defendant's intention in the crime charged, the probative balance generally has warranted admission of this evidence only where the acts involved in the crimes charged are equivocal so that intention is not easily inferred from the acts alone.

[21] **Criminal Law** 🔑 Other Misconduct Showing Intent

**Molineux** evidence of prior criminal acts to prove intent often will be unnecessary, and therefore should be precluded even though marginally relevant, where intent may be easily inferred from the commission of the act itself.

1 Case that cites this headnote

[22] **Criminal Law** 🔑 Sex offenses, incest, and prostitution

**Criminal Law** 🔑 Misconduct subsequent to charged offense

Evidence during prosecution's case-in-chief, bolstering credibility of victims by showing that other women maintained relationships with defendant—some sexual—before and after alleged assaults giving rise to instant charges, even after he made unwanted sexual demands, to show defendant's forcible intent, had impermissible propensity purpose and therefore trial court should not have admitted it in defendant's trial on charges of first-degree criminal sexual act, first-degree rape, third degree rape, predatory sexual assault, since victims testified that defendant used force and, thus, his intent to commit crime would have been established if jury believed their accounts and concluded that force was used. **N.Y. CPL § 30.10(4)(a)(i)**; **N.Y. Penal Law §§ 130.25(3), 130.35(1), 130.95(2)**.

[23] **Criminal Law** 🔑 Other Misconduct as Evidence of Offense Charged in General

When the Court of Appeals limits **Molineux** or other propensity evidence, it does so for policy reasons, due to fear of the jury's human tendency to more readily believe in the guilt of an accused person when it is known or suspected that they have previously committed a similar crime.

1 Case that cites this headnote

**[24] Criminal Law** 🔑 Rape trauma

Testimony from prosecution's expert, explaining to jury that her professional work with sexual assault victims led her to conclude that many victims often maintained contact with their attackers out of fear attacker would retaliate, provided non-propensity evidence to address what some jurors might have seen as counterintuitive acts by victims when they continued to interact with defendant, and contextualized conduct associated with rape trauma, in defendant's trial on charges of first-degree criminal sexual act, first-degree rape, third degree rape, predatory sexual assault.

📄 N.Y. CPL § 30.10(4)(a)(i); 📄 N.Y. Penal Law §§ 130.25(3), 📄 130.35(1), 📄 130.95(2).

**[25] Witnesses** 🔑 Particular cases in general

Trial court abused its discretion when it ruled that defendant, who did not have any criminal history, could be cross-examined about prior, uncharged alleged bad acts and despicable behavior that was immaterial to his in-court credibility, and which did not serve any purpose other than to display for jury defendant's loathsome character, in defendant's trial on charges of first-degree criminal sexual act, first-degree rape, third degree rape, predatory sexual assault, since ruling necessarily and impermissibly impacted defendant's decision whether to take stand in his defense and thus undermined fact-finding process, which turned on the credibility of the parties. 📄 N.Y. CPL § 30.10(4)(a)(i); 📄 N.Y. Penal Law §§ 130.25(3), 📄 130.35(1), 📄 130.95(2).

**[26] Witnesses** 🔑 Defendant in Criminal Prosecution

**Witnesses** 🔑 Determination as to accusation or conviction of crime; hearing

Under 📄 *Sandoval*, trial court may make advance ruling as to use by prosecution of prior convictions or proof of prior commission of

specific criminal, vicious or immoral acts for purpose of impeaching defendant's credibility.

**[27] Criminal Law** 🔑 Showing bad character or criminal propensity in general

When evidence of other crimes does not have any purpose other than to show that defendant is of criminal bent or character and thus likely to have committed crime charged, it should be excluded.

## 2 Cases that cite this headnote

**[28] Witnesses** 🔑 Prejudicial effect

**Witnesses** 🔑 Prejudicial effect

A trial court must strike a balance between probative worth of evidence of prior specific criminal, vicious or immoral acts on issue of defendant's credibility on the one hand, and on the other the risk of unfair prejudice to defendant, measured both by impact of such evidence if it is admitted after their testimony and by effect its probable introduction may have in discouraging them from taking stand on their own behalf; this category of evidence will always be detrimental to the defendant and will have a propensity to influence the jury or the court.

**[29] Witnesses** 🔑 Prejudicial effect

**Witnesses** 🔑 Prejudicial effect

To ensure that the defendant is not deprived of a fair trial by the admission of evidence of prior specific criminal, vicious, or immoral acts on the issue of defendant's credibility, a court must consider whether the evidence will have a disproportionate and improper impact on the triers of fact, and undesirably deter the defendant from taking the stand and thereby deny the jury or the court significant material evidence.

**[30] Witnesses** 🔑 Prejudicial effect

**Witnesses** 🔑 Prejudicial effect

In weighing prejudice to the defendant's right to a fair trial by the admission of evidence of prior specific criminal, vicious, or immoral acts on

the issue of defendant's credibility, an important consideration may be the effect on the validity of the fact-finding process if the defendant does not testify out of fear of the impact of the impeachment testimony for reasons other than its direct effect on their credibility—as where the defendant would be the only available source of material testimony in support of their defense.

**[31] Criminal Law** 🔑 Credibility and impeachment

Court of Appeals reviews  *Sandoval* determinations for abuse of discretion.

1 Case that cites this headnote

**[32] Criminal Law** 🔑 What constitutes other misconduct

**Witnesses** 🔑 Defendant in Criminal Prosecution

**Witnesses** 🔑 Impeachment of Criminal Defendant

Prior crimes and vicious and immoral conduct evidence includes that which shows willingness or disposition on part of particular defendant voluntarily to place advancement of their individual self-interest ahead of principle or of interests of society, because such proof may be relevant to suggest defendant's readiness to do so again on witness stand.

**[33] Witnesses** 🔑 Defendant in Criminal Prosecution

**Witnesses** 🔑 Impeachment of Criminal Defendant

Courts must be judicious in resting  *Sandoval* rulings upon prior crimes and vicious and immoral conduct evidence, lest acts of common selfishness lead to the notion that defendant may well disregard an oath and resort to perjury if they believe that to be in their self-interest; this basis for admitting  *Sandoval* evidence is, by its terms, broad and vague, and so courts must be judicious in resting  *Sandoval* rulings upon

it, lest acts of common selfishness lead to mini-trials on the defendant's character that distract the jury from the crimes charged.

**[34] Witnesses** 🔑 Defendant in Criminal Prosecution

**Witnesses** 🔑 Prejudicial effect

Under  *Sandoval*, the question for trial courts at all times is whether the evidence shows a defendant's lack of in-court veracity; if so, the evidence may be admitted—but only if not unduly prejudicial—for the limited purpose of attacking credibility.

**[35] Witnesses** 🔑 Impeachment of defendant as witness in criminal prosecution

Trial courts have a responsibility to carefully balance the prosecution's interest in attacking the defendant's credibility against the defendant's constitutional rights to a fair trial and to testify on their own behalf. U.S. Const. Amend. 14.

**[36] Criminal Law** 🔑 Evidence of other offenses and misconduct

**Criminal Law** 🔑 Witnesses

Defendant was deprived of “self-standing” constitutional right to fair trial in sexual assault prosecution, even if proof of guilt was overwhelming, by  *Molineux* witnesses’ testimony that bolstered complainants’ testimony, thereby impacting jury's credibility determination, and  *Sandoval* ruling that allowed prosecution to cross-examine defendant about defendant's behavior that was loathsome but was not type of conduct that would assist jury in measuring his credibility on the stand, and thus served to discourage defendant from exercising his rights to present defense and testify on his behalf, and therefore new trial was required. U.S. Const. Amends. 6, 14; N.Y. Const. art. 1, § 6;  N.Y. CPL § 30.10(4)(a)(i);  N.Y. Penal Law § 130.25(3),  130.35(1),  130.95(2).

**[37] Criminal Law** 🔑 Evidence of other offenses and misconduct

A **Molineux** error may be found harmless where the proof of the defendant's guilt, without reference to the error, is overwhelming and where there is no significant probability that the jury would have acquitted the defendant had it not been for the error.

3 Cases that cite this headnote

**[38] Criminal Law** 🔑 Witnesses

A **Sandoval** error may be found harmless where the proof of the defendant's guilt, without reference to the error, is overwhelming and where there is no significant probability that the jury would have acquitted the defendant had it not been for the error.

1 Case that cites this headnote

**[39] Criminal Law** 🔑 Grounds in general

In assessing harmless error, all trial errors are considered cumulatively.

**[40] Criminal Law** 🔑 Evidence of other offenses and misconduct**Criminal Law** 🔑 Witnesses

Erroneous **Molineux** witnesses' testimony that bolstered complainants' testimony, and erroneous **Sandoval** ruling that allowed prosecution to cross-examine defendant about his loathsome behavior which was not type of conduct that would assist jury in measuring his credibility on the stand, was not harmless, and therefore new trial was required; even if evidence against defendant was regarded as overwhelming, there was significant probability that, absent trial court's erroneous **Molineux** ruling, jury would have acquitted defendant because case turned on very close question of credibility and erroneous **Sandoval**

determination might have affected defendant's decision whether to testify and provide critical information. **N.Y. CPL § 30.10(4)(a)(i); N.Y. Penal Law §§ 130.25(3), 130.35(1), 130.95(2).**

**[41] Criminal Law** 🔑 Witnesses

Harmless-error analysis in context of **Sandoval** does not involve speculation as to whether defendant would have testified if legal error had not occurred.

**[42] Criminal Law** 🔑 Showing bad character or criminal propensity in general

No person accused of illegality may be judged on proof of uncharged crimes that serve only to establish the accused's propensity for criminal behavior; at trial, a defendant stands to account for the crimes as charged.

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**OPINION OF THE COURT**

RIVERA, J.

\*443 [1] Every person accused of a crime is constitutionally presumed \*444 innocent \*\*697 \*\*\*537 and entitled to a fair trial and the opportunity to present a defense (see U.S. Const Amend VI, XIV; NY Const art I, § 6; [Estelle v. Williams](#), 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 [1976] [“The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment” and “(t)he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice”]; [Crane v. Kentucky](#), 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 [1986] [“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment ... or in the Compulsory Process or Confrontation clauses of the Sixth Amendment ... the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense’ ”], quoting [California v. Trombetta](#), 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 [1984]).

[2] [3] Under our system of justice, the accused has a right to be held to account only for the crime charged and, thus, allegations of prior bad acts may not be admitted against them for the sole purpose of establishing their propensity for criminality (see [People v. Molineux](#), 168 N.Y. 264, 61 N.E. 286 [1901]). Nor may the prosecution use “prior convictions or proof of the prior commission of specific, criminal, vicious or immoral acts” other than to impeach the accused's credibility ([People v. Sandoval](#), 34 N.Y.2d 371, 374, 357 N.Y.S.2d 849, 314 N.E.2d 413 [1974]). It is our solemn duty to diligently guard these rights regardless of the crime charged, the reputation of the accused, or the pressure to convict (see [Boyd v. United States](#), 116 U.S. 616, 635, 6 S.Ct. 524, 29 L.Ed. 746 [1886] [“It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon”]).

Defendant was convicted by a jury for various sexual crimes against three named complainants and, on appeal, claims that he was judged, not on the conduct for which he was indicted, but on irrelevant, prejudicial, and untested allegations of prior bad acts. We conclude that the trial court erroneously admitted testimony of uncharged, alleged prior sexual acts against persons other than the complainants of the underlying crimes because that testimony served no material non-

propensity purpose. The court compounded that error when it ruled that defendant, who had no criminal history, could be cross examined about those allegations as well as numerous allegations of misconduct that portrayed defendant in a highly prejudicial light. The synergistic effect of these errors was not harmless. The only evidence against defendant was the complainants’ testimony, and the result of the court's rulings, \*445 on the one hand, was to bolster their credibility and diminish defendant's character before the jury. On the other hand, the threat of a cross-examination highlighting these untested allegations undermined defendant's right to testify. The remedy for these egregious errors is a new trial.

However, we reject defendant's claim that the third-degree rape prosecution was untimely under [CPL 30.10](#) because, as a New York resident, his brief absences from the State before the authorities were aware of the crime did not toll the limitations period. Defendant's argument finds no support in the statutory text. Therefore, the trial court properly discounted the days defendant was continuously outside the state and correctly held that the prosecution was not time-barred. Defendant may be retried on this count.

I.

A.

[4] Defendant Harvey [Weinstein](#) was charged with: one count of first-degree \*\*698 \*\*\*538 criminal sexual act under [Penal Law § 130.50\(1\)](#), based on allegations that, on July 10, 2006, defendant forcibly performed oral sex on Complainant A in his New York City apartment; one count of first-degree rape under [Penal Law § 130.35\(1\)](#) and one count of third-degree rape under [Penal Law § 130.25\(3\)](#), based on allegations that, on March 18, 2013, defendant engaged in forcible intercourse and oral sex with Complainant B; and two counts of predatory sexual assault under [Penal Law § 130.95\(2\)](#), based on allegations that defendant engaged in the attacks against Complainants A and B after having raped Complainant C—in either 1993 or 1994.<sup>1</sup> The court denied defendant's motion to dismiss the third-degree rape charge as untimely, concluding that under [CPL 30.10\(4\)\(a\)\(i\)](#), the statute of limitations was properly tolled during the time defendant was continuously outside New

York State. Defendant was tried before a single jury on all counts.

At the time of the alleged crimes and at the time of the trial, defendant was a well-known, powerful man within the entertainment industry, having produced several award winning and highly profitable films. The prosecution's theory of the case was that defendant abused his power to take advantage of aspiring female actors, like complainants, to coerce them into unwanted sexual encounters. According to the prosecution, the quid pro quo of assisting them with their careers in exchange for sexual favors on demand was both common behavior and a well-known secret throughout the film industry. When his victims resisted his sexual demands, the prosecution argued, defendant used force. Traumatized by defendant's sexual assaults, and fearing retaliation, the complainants never reported the attacks and continued personal and professional relationships with him for years afterwards.

Before trial, the court granted the prosecution's application to admit certain testimony of uncharged crimes and miscellaneous bad acts as an exception to the **Molineux** rule, prohibiting such evidence, to establish defendant's intent and his understanding of the complainants' lack of consent. Thus, Complainant B could testify about defendant's uncharged sexual assaults against her before and after the charged rape and her awareness of defendant's abusive and threatening behavior, and three other women (the "**Molineux** Witnesses") could testify regarding defendant's sexual misconduct towards them years before and after the charged offenses involving Complainants A and B.

The court also granted, in large part, over defendant's objection, the prosecution's **Sandoval** application to cross-examine defendant on a broad range of uncharged bad acts should he testify. Pursuant to this ruling, the prosecution was permitted to ask about, for example, **\*\*699 \*\*\*539** whether defendant: directed a witness to lie to defendant's wife; filed an application for a passport using a friend's social security number; told a woman he "could harm her professionally" but could also offer her a book publishing opportunity; used his entertainment company's budget for personal costs; withdrew from a business deal and **\*447** asked others to cease its funding; hid a woman's clothes; insisted that members of his staff falsify a photo for a movie poster by photoshopping a female actor's head on another woman's nude body; told a private intelligence firm to

manipulate or lie to people; scheduled a business meeting in 2012 with a woman under false pretenses; induced executives to lie on his behalf; made threats and committed acts of violence against people who worked for him; abandoned a colleague by the side of the road in a foreign country; physically attacked his brother; threatened to cut off a colleague's genitals with gardening shears; screamed and cursed at hotel restaurant staff after they told him the kitchen was closed; and threw a table of food. The court also permitted the prosecution to cross-examine defendant about the details of the sexual assault allegations described by the **Molineux** Witnesses during the prosecution's case-in-chief.

## B.

After the court denied defendant's motion to dismiss the third-degree rape charge as time-barred, the case proceeded to trial. Complainant A testified that she had known defendant since 2004 when she met him in a hotel room to discuss a job opportunity she later accepted, during which he made comments about her body and asked her for a massage, which she refused. Sometime later, defendant unsuccessfully propositioned her to travel abroad with him and, at one point, "barged" into her apartment. Two years later, defendant invited Complainant A to a film premiere in Los Angeles and, the day before she was to travel, asked her to his New York hotel room. When she arrived, defendant "lunged" at her to kiss her. She said, "no, no, no" and tried to push him away, but defendant pulled her back towards him and "kiss[ed] and fondl[ed] her." She attempted to flee, but defendant used "his weight and his body" to lead her into the bedroom, where he pushed her "with his body" until she fell backward onto the bed. She recalled that she tried several times to get up, but each time defendant pushed her back. She "kick[ed]" and "push[ed]" to "get away," but defendant held her arms by her wrists and laid on top of her, holding her down. After she gave up struggling, he "forced himself on [her] orally."

After she returned to New York, defendant again asked her to his hotel room where, according to Complainant A, he "grabbed" her by the arm and led her "straight towards the **\*448** bed." She testified that she "laid there" and "didn't resist physically" as defendant "had intercourse with [her]" while calling her derogatory names. Despite feeling "embarrassed" and unsure of "how to deal with it," Complainant A maintained a "professional connection" with defendant because she "wanted a job." Over the next two-

and-a-half years, she met defendant in London to “pitch him an idea” and sent him friendly e-mails thanking him for his “support” and signing off with: “Lots of love, [A].”

Complainant B testified that she wanted to act since childhood and first met defendant at a party in February 2013, where defendant expressed interest in her career. Defendant subsequently took her to exclusive Academy Awards parties and dinners. Later that same month, defendant invited Complainant B to his hotel room in Los Angeles, California and, when she entered, grabbed both of her arms and tried to kiss her “like crazy” and then sexually assaulted her. Afterwards, she decided to initiate a “real relationship” with defendant and saw him regularly, engaging in consensual oral sex with him. Complainant B testified that, during their relationship, defendant attempted to persuade her to have a sexual interaction with himself and another actress but both women were uncomfortable, and Complainant B left the room. During the defense’s cross-examination of Complainant B, the prosecution successfully moved to present the other woman’s testimony about this incident and her testimony corroborated Complainant B’s description.

Complainant B also testified that, in March 2013, she and some friends met defendant for breakfast in a Manhattan hotel. Defendant arrived early and booked a room. Once in the room, Complainant B argued with defendant, saying that they did not “have time” for anything sexual. She stated that she twice tried to leave, but defendant “blocked” her by putting his hand on the door above her head and “slam[ming]” it shut. Defendant told her to undress in a “sharp and angry” tone and when she hesitated, defendant “grab[bed] her hand” and held it to “force” her to undress. When Complainant B was completely naked, defendant told her to lie down on the bed and, after disrobing in the bathroom, he got on top and had intercourse with her.

Complainant B explained that she maintained a friendly relationship with defendant afterwards out of fear for her personal safety and professional prospects. When defendant discovered she was dating another actor, he told her: “[Y]ou owe me one more time” and “drag[ged]” her into his Los Angeles hotel room. Complainant B pleaded “no, please, no,” but defendant “lunged” at her and “ripped” her pants off, leaving scratches on both legs. He then forcibly performed oral sex on her, forced her to reciprocate, and forcibly had intercourse with her. She maintained a friendly relationship with defendant during the years that followed, which included

consensual sexual relations and emails telling defendant that she loved him.

Complainant C, an established Hollywood actor, testified that she met defendant during the early 1990s and that he played a role in her becoming addicted to drugs at that time. Sometime during the 1993–1994 winter, they had dinner together and he left her at her Manhattan apartment. A half hour later, he returned, pushed his way inside, grabbed her near the collar, “led [her] into” the bedroom, and “shoved [her] on the bed.” Complainant C explained that she was “[p]unching him” and “kicking him,” but defendant restrained her hands above her head and “raped” her “while [she] was trying to fight, but [she] could not fight anymore because he had [her] [h]ands locked.” Complainant C also testified that, later in 1994, defendant repeatedly called her and sent cars to her hotel room while the two were in London and, the following year, “tricked” her into agreeing to make another film that she did not know his company was producing.

### C.

The three **Molineux** Witnesses, testified about defendant’s individual unwanted sexual advances towards them. Witness 1 stated that she met defendant in 2004 at a Manhattan nightclub while she was working as an actor and defendant said he could help her career. Sometime in 2004 or 2005, she met defendant in a hotel room for a networking event. Defendant led her to the bedroom, where he suddenly put his hand up her skirt and tried to put his hand inside her vagina and apologized when she pulled away. A few weeks later, she agreed to meet defendant at another hotel where, clothed in a bathrobe, he told her that he would sign contracts for her to work only if she had sex with him and his assistant, but then told her he was joking and that she would “never make it in this business” unless she changed her attitude.

Witness 2 testified that she met defendant during the summer of 2005 while she was an aspiring actor working as a cocktail server at a Manhattan lounge. Defendant gave her his contact information and then, minutes later, “grabbed” her by the arm and led her upstairs to a deserted terrace, where he “pulled” her so that she was facing him and masturbated. A week or two later, Witness 2 was invited to read for a part at defendant’s production company but, while in the waiting room, was told that defendant wanted to see her at his apartment. When she arrived, defendant grabbed her arms

and threw her on his bed before removing her clothes and having intercourse with her as she “just froze” and “looked off.” Witness 2 explained that defendant was “a heavy man” who “weighed [her] down.” Defendant then drove Witness 2 back to the studio, but she was not allowed to audition and did not get the part.

Witness 3 testified that she met defendant in February 2013 in Los Angeles, where she was working as an actor. Another actor friend of hers invited her to a Beverly Hills hotel to discuss a film script. Defendant invited the two to continue the conversation inside his room and, once inside, led Witness 3 into a bathroom as the friend closed the door behind them. She then testified in detail about how defendant undressed as she nervously laughed before he pulled down her dress and masturbated, despite her protests, while grasping her breast and asking her how else he could know whether she could act. The prosecution admitted photographs of the dress she had been wearing into evidence.<sup>2</sup>

Following the testimonies of these three **Molineux** Witnesses, the trial court instructed the jury that this evidence “must not be considered for the purpose of proving that the defendant had a propensity or predisposition to commit the crimes charged.” The court further explained that the prosecution introduced the **Molineux** Witnesses to the jurors “for [their] consideration on the question of whether the defendant intended to engage in the sexual acts, and whether each of the complaining witnesses consented.” During the final charge to the jury, the court reiterated that the testimonies of the **Molineux** Witnesses “was offered for [its] consideration on the issues of forcible compulsion and lack of consent.”

The prosecution also presented testimony from a forensic psychiatrist and an expert on [rape trauma syndrome](#). She described how sexual assault victims may behave in ways **\*451** towards their attackers that persons unfamiliar with the syndrome might consider counterintuitive. She attempted to dispel certain rape myths, including that most rapes are committed by strangers and that “credible” victims promptly report attacks and discontinue relationships with their attackers. She further testified that traumatic events narrow the brain’s ability to focus on specific details, yielding clearer memories of such events.

**\*\*702 \*\*\*542** Defendant did not testify on his behalf but, during cross-examination of the complainants and

during closing argument, defense counsel questioned the credibility of the complainants by highlighting their continued personal and professional relationships with defendant and Complainant B’s admission that she continued a consensual sexual relationship with defendant after her alleged March 2013 rape. Defendant also presented testimony, as limited by the court, from a psychologist specializing in human memory who testified that exposure to falsehoods regarding a traumatic incident leads to the formation of false memories, which themselves could fade with time. She also testified that asking a traumatized person to remember the trauma could cause additional stress that further impairs their memory of the event.<sup>3</sup>

The jury acquitted defendant of both counts of predatory sexual assault and the first-degree rape count, and convicted him of first-degree criminal sexual act for the July 10, 2006 Complainant A charge and third-degree rape for the March 18, 2013 Complainant B charge. The court sentenced defendant to consecutive terms on each count, an aggregate 23 years in prison, followed by five years post-release supervision.

The Appellate Division affirmed (**207 A.D.3d 33, 170 N.Y.S.3d 33 [1st Dept. 2022]**). The court concluded, as relevant here, that the tolling provisions of **CPL 30.10(4)** applied and the third-degree rape prosecution was timely commenced. The court also concluded that the trial court properly admitted the **Molineux** testimonies to show that defendant’s sole interest in the complainants was sexual and their consent was irrelevant to him because, during his prior experiences with the **Molineux** Witnesses he had, as he had done with complainants, expressed an interest in helping them and yet they “reacted negatively to defendant’s advances” **\*452** (**id. at 65, 170 N.Y.S.3d 33**). This “demonstrate[d] to the jury that defendant knew that a woman would not consent to having sex with him merely as a quid pro quo for the assistance he could provide them in their professional career” (**id.**). The court observed that the amount of **Sandoval** material on which the trial court permitted the prosecution to cross-examine defendant had he testified was “unquestionably large” but that “all of the material allowed by the court was unquestionably relevant” because “[a]llegations that defendant solicited lies or deception went directly to his credibility” and “[h]is abusive or violent behavior in business settings ‘reflected a

willingness to place [his] self-interest above the interests of another person' ” (¶ *id.* at 68–69), quoting *People v. Wells*, 51 A.D.3d 403, 403, 857 N.Y.S.2d 115 [1st Dept 2008]). A Judge of this Court granted defendant leave to appeal (38 N.Y.3d 1154, 174 N.Y.S.3d 30, 194 N.E.3d 737 [2022]).

## II.

[5] Defendant claims that his third-degree rape conviction should be **reversed** because the prosecution was commenced beyond ¶ CPL 30.10(2)(b)'s then-applicable five-year statute of limitations (see CPL former 30.10[2][b]).<sup>4</sup> The prosecution of \*\*703 \*\*\*543 this count was undisputedly commenced 69 days after expiration of that limitations period, but the prosecution argued that ¶ CPL 30.10(4)(a) tolled certain periods when defendant was not in New York. Defendant claims the tolling provision does not apply here because it applies only to nonresidents, he was not continuously outside the state within the meaning of the statute, and, in any case, ¶ CPL 30.10(4) does not apply to those periods when law enforcement is unaware of the crime.

[6] “The plain text of a statute is the best indicator of legislative intent and thus the proper starting place in discerning its meaning” (*Town of Irondequoit v. County of Monroe*, 36 N.Y.3d 177, 182, 139 N.Y.S.3d 609, 163 N.E.3d 477 [2020]); see also ¶ *People v. Cahill*, 2 N.Y.3d 14, 117, 777 N.Y.S.2d 332, 809 N.E.2d 561 [2003] [(T)he plain meaning of the statutory text is the best evidence of legislative intent and, in fact, the only authoritative basis for interpretation”). The Court has “eschewed efforts to rewrite the statute to achieve what a court or advocate perceives to be a better outcome” ¶ *People v. Anonymous*, 34 N.Y.3d 631, 643, 123 N.Y.S.3d 41, 145 N.E.3d 924 [2020]) and has cautioned that, “[w]here a statute describes the particular situations in which it is to apply, \*453 and no qualifying exception is added an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded” (*Matter of Alonzo M. v. New York City Dept. of Probation*, 72 N.Y.2d 662, 665, 536 N.Y.S.2d 26, 532 N.E.2d 1254 [1988]) [internal quotation marks omitted]; see also McKinney's Cons Laws of NY, Book 1, Statutes, ¶ § 363 and the cases cited therein [(“A) court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit

to enact.... (A) court cannot, by implication, read or supply in a statute a provision which it is reasonable to suppose the Legislature intentionally omitted”).

¶ Section 30.10 (4)(a) provides, in pertinent part, that, “[i]n calculating the time limitation applicable to commencement of a criminal action,” the time period “shall not” include “[a]ny period following the commission of the offense during which (i) the defendant was continuously outside this state or (ii) the whereabouts of the defendant were continuously unknown and continuously unascertainable by the exercise of reasonable diligence” (¶ CPL 30.10[4][a]). Nowhere does this provision distinguish between residents and nonresidents and we cannot read into the statute a limitation not adopted by the legislature (see *Matter of Alonzo M.*, 72 N.Y.2d at 665, 536 N.Y.S.2d 26, 532 N.E.2d 1254). If the legislature intended this tolling provision to apply only to nonresidents or that courts should factor residency into a tolling analysis, it would have said so expressly, as have several other jurisdictions.<sup>5</sup>

Defendant argues that ¶ CPL 30.10(4)(a) has only been applied to cases involving nonresidents, relying principally on ¶ *People v. Knobel*, where a nonresident defendant remained continually outside of New York, which this Court concluded thereby tolled the limitations period, adding that “all periods of a day or more that a nonresident defendant is out-of-State should be totaled and toll the Statute of Limitations” (¶ \*\*704 \*\*\*544 94 N.Y.2d 226, 230, 701 N.Y.S.2d 695, 723 N.E.2d 550 [1999]). However, the ¶ *Knobel* Court did not hold that ¶ CPL 30.10(4)(a) is limited to nonresidents, and the fact that \*454 ¶ *Knobel* and other courts have had occasion to apply the statute to nonresidents is simply a consequence of the particular facts of those cases. Nor does the statute contain any requirement that the tolling period apply once authorities know that a crime has been committed and, as with defendant's proposed exclusion for New York residents, we reject defendant's invitation to rewrite the statute to provide such limitation.

[7] [8] We also reject defendant's contention that he was not “continuously outside this state” during his brief absences from New York. This argument is based, in part, on his erroneous and now squarely rejected interpretation that ¶ CPL 30.10(4)(a) should not apply to residents. To the extent defendant advocates for a lengthy temporal floor,

**Knobel** instructs to the contrary, as the Court there held that “all periods of a day or more” during a defendant’s absence from the state “should be totaled and toll the Statute of Limitations” (*id.*). Logically, then, even a day’s absence counts. Moreover, defendant’s absences would count even under his reading: he was outside of New York for a total of 200 days, including periods lasting up to two weeks. Defendant’s policy arguments in support of his interpretation of the tolling provision are properly left to the legislature, the only body constitutionally authorized to enact and amend the statute.<sup>6</sup>

As the courts below properly concluded, defendant was outside of New York within the meaning of **CPL 30.10(4)(a)** for a period of time that tolled the statute of limitations, and, therefore, the third-degree rape prosecution was timely commenced.

### III.

#### A.

[9] Defendant argues that admission of the **Molineux** Witnesses’ testimonies detailing sexual assaults he allegedly committed against them before and after the alleged offense conduct ran **\*455** afoul of **Molineux** and its progeny. We agree that this challenge has merit. Indeed, we reject the prosecution’s theory, accepted by the Appellate Division and the dissenters here, that this testimony showed defendant’s state of mind to use forcible compulsion against complainants and his understanding of their lack of consent. That analysis, if adopted, would eviscerate the time-tested rule against propensity evidence, which, in criminal cases, serves as a judicial bulwark against a guilty verdict based on supposition rather than proof, on “collateral matters or [ ] because of [a defendant’s] past” or on the defendant’s “bad character” alone (**People v. Alvino**, 71 N.Y.2d 233, 241, 525 N.Y.S.2d 7, 519 N.E.2d 808 [1987]).

[10] [11] In **Molineux**, the Court reaffirmed that the “general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either **\*\*705** **\*\*\*545** as a foundation for a separate punishment, or as aiding the

proofs that [they are] guilty of the crime charged” (**168 N.Y. at 291**, 61 N.E. 286). The purpose of the rule is simple: “[E]vidence of a defendant’s uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate the defendant’s propensity to commit the crime charged” (**People v. Denson**, 26 N.Y.3d 179, 185, 21 N.Y.S.3d 179, 42 N.E.3d 676 [2015] [internal quotation marks omitted]). The rule “is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until [they have] been proven guilty beyond a reasonable doubt” (**Molineux**, 168 N.Y. at 291, 61 N.E. 286).

To illustrate the universal acceptance of the rule and “the reasons upon which it rests,” **Molineux** quoted its earlier decisions and those of other state courts (**168 N.Y. at 291**, 61 N.E. 286). For example, the **Molineux** Court noted, as far back as *Coleman v. People*, the Court had explained:

“The general rule is against receiving evidence of another offence. A person cannot be convicted of one offence upon proof that [they] committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that [they] had committed another of a similar character, or, indeed, of any character; but the injustice of **\*456** such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offences to produce conviction for a single one” (*id.* at 292, 61 N.E. 286, quoting 55 N.Y. 81, 90 [1873]).

The Court also observed that, the following decade in **People v. Sharp**, Judge Peckham observed in a separate opinion that “[t]he general rule is that when a [person] is put upon trial for one offense [they are] to be convicted, if at all, by evidence which shows that [they are] guilty of that offense alone, and that, under ordinary circumstances, proof of [their] guilt of one or a score of other offenses in [their] lifetime is wholly excluded” (*id.*, quoting **107 N.Y. 427, 467, 14 N.E. 319 [1887]** [Peckham, J.]). The **Molineux** Court

recalled that, a few years later, Judge Peckham authored the majority opinion in *People v. Shea* explaining:

“ ‘The impropriety of giving evidence showing that the accused had been guilty of other crimes merely for the purpose of thereby inferring [their] guilt of the crime for which [they are] on trial may be said to have been assumed and consistently maintained by the English courts ever since the common law has itself been in existence. Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of [their] whole past life, [their] tendencies, [their] nature, [their] associates, [their] practices, and, in fine, all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such course is pursued than where it is omitted. The common law of England, however, has adopted another and, so far as the party accused is concerned, a much more merciful doctrine. By that **\*\*706 \*\*\*546** law the criminal is to be presumed innocent until [their] guilt is made to appear, beyond a reasonable **\*457** doubt, to a jury of 12[ ]. In order to prove [their] guilt it is not permitted to show [their] former character or to prove [their] guilt of other crimes, merely for the purpose of raising a presumption that [they] who would commit them would be more apt to commit the crime in question’ ” (147 N.Y. 78, 99, 41 N.E. 505 [1895], citing *Sharp*, 107 N.Y. at 427, 14 N.E. 319).

The *Molineux* Court also cited cases from Massachusetts and Pennsylvania that were to a similar effect (see 168 N.Y. at 293, 61 N.E. 286, citing *Commonwealth v. Jackson*, 132 Mass. 16, 19 [1882] [noting “the general rule that limits the trial to the immediate act for which the defendant is indicted”]; *Shaffner v. Commonwealth*, 72 Pa. 60, 65 [1872] [“It is a general rule that a distinct crime, unconnected with that laid in the indictment, cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt, on the ground, that having committed one crime, the depravity it exhibits makes it likely [they] would commit another”]).

[12] *Molineux* recognized exceptions by which evidence of other crimes could be used to prove the charged crime when such evidence “tends to establish (1) motive; (2) intent; (3)

the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; and (5) the identity of the person charged with the commission of the crime on trial” (168 N.Y. at 293, 61 N.E. 286). Although this list is not exhaustive (see *Denson*, 26 N.Y.3d at 185, 21 N.Y.S.3d 179, 42 N.E.3d 676), the Court’s *Molineux* jurisprudence “begin[s] with the premise that uncharged crimes are inadmissible and, from there, carve[s] out exceptions” (*People v. Resek*, 3 N.Y.3d 385, 390, 787 N.Y.S.2d 683, 821 N.E.2d 108 [2004]).

[13] [14] [15] In order to be admissible, *Molineux* evidence must “logically be connected to some specific material issue in the case” and be “directly relevant” to it (*Cass*, 18 N.Y.3d at 559–560, 942 N.Y.S.2d 416, 965 N.E.2d 918). The prosecution has the burden of showing this direct relevance (see *Denson*, 26 N.Y.3d at 185, 21 N.Y.S.3d 179, 42 N.E.3d 676, citing *Cass*, 18 N.Y.3d at 560, 942 N.Y.S.2d 416, 965 N.E.2d 918). In other words, “evidence of a defendant’s uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate the defendant’s propensity to commit the crime charged” (*Denson*, 26 N.Y.3d at 185, 21 N.Y.S.3d 179, 42 N.E.3d 676 [internal quotation marks **\*458** omitted]). When “the proffered *Molineux* evidence is relevant to some material fact in the case, other than the defendant’s propensity to commit the crime charged, it is not to be excluded merely because it shows that the defendant had committed other crimes” (*id.* [internal quotation marks omitted]).

[16] [17] [18] [19] In reviewing a *Molineux* ruling, the Court engages in a two-step process. First, it evaluates whether the prosecution has “identif[ied] some issue, *other than mere criminal propensity*, to which the evidence is relevant” (*People v. Hudy*, 73 N.Y.2d 40, 55, 538 N.Y.S.2d 197, 535 N.E.2d 250 [1988]). This “is a question of law, not discretion” and we review it de novo (*People v. Telfair*, 41 N.Y.3d 107, 114, 207 N.Y.S.3d 439, 231 N.E.3d 385 [2023]). Second, if the evidence is relevant to an issue aside from propensity, the Court determines whether its “probative

value exceeds the potential for prejudice resulting to the defendant” (¶ *Alvino*, 71 N.Y.2d at 242, 525 N.Y.S.2d 7, 519 N.E.2d 808). At this step, “the trial court’s decision to admit \*\*707 \*\*\*547 the evidence may not be disturbed simply because a contrary determination could have been made or would have been reasonable. Rather, it must constitute an abuse of discretion as a matter of law” (*People v. Morris*, 21 N.Y.3d 588, 597, 976 N.Y.S.2d 682, 999 N.E.2d 160 [2013]). However, “any substantial doubt” regarding how “to strike a neat balance between possible prejudice to the defendant, and indispensability of the challenged evidence to the [prosecution’s] case ... should weight the scales in favor of the defendant” (¶ *People v. Stanard*, 32 N.Y.2d 143, 147, 344 N.Y.S.2d 331, 297 N.E.2d 77 [1973]). If the Court concludes that the trial court abused its discretion by admitting ¶ *Molineux* evidence, the Court must determine whether the error was harmless or requires a new trial (*see e.g.* ¶ *People v. Leonard*, 29 N.Y.3d 1, 8, 51 N.Y.S.3d 4, 73 N.E.3d 344 [2017]).

The ¶ *Molineux* ruling here fails at Step 1. The trial court admitted the evidence to show defendant’s forcible intent when he had sexual relations with complainants, rebut his claim of consent, and explain why complainants were “hesitant to report these assaults.” The prosecution argues that “the unusual nature of the entertainment industry ... and defendant’s then-outsized role in [it],” popular “ ‘misconceptions’ about the behavior of sexual assault victims,” and the complainants’ acceptance of favors from him and, in one case, their continued consensual sexual relations with defendant following the assaults rendered their testimonies “equivocal” on the issue of defendant’s intent. Thus, the prosecution contends, the trial court properly admitted the three ¶ *Molineux* Witnesses’ testimonies to show his unlawful intent.

We disagree and conclude that, as a matter of law, the trial court erroneously held that the prosecution showed that \*459 the ¶ *Molineux* Witnesses’ testimonies were necessary for a non-propensity purpose (*see* ¶ *Hudy*, 73 N.Y.2d at 55, 538 N.Y.S.2d 197, 535 N.E.2d 250). First, the complainants’ respective testimonies were not “equivocal” on the issue of consent. Complainant A described a violent, forcible sexual assault as well as her efforts to resist by kicking and pushing defendant. Complainant B testified that defendant physically blocked her attempt to leave the hotel

room in March 2013 and that, when she did not comply with his demand that she undress, he grabbed her hand to force compliance. Complainant C testified that defendant lunged at her and that, when she tried to walk away, defendant used his weight to lead her to the bedroom where she fell backward onto the bed. She tried to leave but he pushed her back. She kicked and pushed to get away, but defendant used physical force to hold her down with her hands above her head and then forced himself on her as she cried and continued to say “no.”

There is no equivocality regarding consent when a person says “no” to a sexual encounter, tries to leave, and attempts to physically resist their attacker before succumbing to the attacker’s brute physical force. No reasonable person would understand such behavior as having communicated anything other than their rejection of sexual activity. Indeed, a contrary proposition perversely turns the concept of consent on its head. Simply put, there is nothing consensual about the conduct complainants described. Thus, even though the prosecution contends (and the Appellate Division agreed) that the jury could believe complainants’ recollections of the sexual attacks yet still believe that defendant thought they were consenting to the sex, we conclude that such is inconceivable. Complainants’ descriptions of events belie \*\*708 \*\*\*548 any such equivocation in the moment.<sup>7</sup>

[20] [21] [22] Nor did the fact that complainants maintained relationships with defendant—some sexual—before and after the alleged assaults \*460 giving rise to the instant charges necessitate introduction of the ¶ *Molineux* Witnesses’ testimonies to show defendant’s forcible intent. As the Court has explained, where the crime requires the prosecution to prove forcible compulsion, “[t]he intent required is the intent to perform the prohibited act—i.e. the intent to forcibly compel another to engage” in the sexual act (*People v. Williams*, 81 N.Y.2d 303, 317–318, 598 N.Y.S.2d 167, 614 N.E.2d 730 [1993]). And, when it comes to ¶ *Molineux*, “evidence sought to be introduced to prove a defendant’s *intention* in the crime charged, the probative balance has generally warranted admission of this evidence only where the acts involved in the crimes charged are equivocal so that intention is not easily inferred from the acts alone” (*People v. McKinney*, 24 N.Y.2d 180, 184, 299 N.Y.S.2d 401, 247 N.E.2d 244 [1969] [internal quotation marks omitted]). In other words, “evidence of prior criminal acts to prove intent will often be unnecessary, and therefore should be precluded even though marginally relevant, where intent may be easily inferred from the commission of the

act itself” (¶ *Alvino*, 71 N.Y.2d 233, 242, 525 N.Y.S.2d 7, 519 N.E.2d 808 [1987]). Here, this proposed basis for admitting the ¶ *Molineux* Witnesses’ testimonies is a candid acknowledgement that the true purpose of this evidence was to bolster complainants’ credibilities by showing that others behaved similarly towards defendant even after he made unwanted sexual demands. Of course, this is an impermissible propensity purpose and the trial court therefore should not have admitted the evidence (see ¶ *Molineux*, 168 N.Y. at 291, 61 N.E. 286).

[23] In reaching this legal conclusion, we take no “step backwards from recent advances in our understanding of how sex crimes are perpetrated and why victims sometimes respond in seemingly counterintuitive ways” (Cannataro, J., dissenting op. at 488, 223 N.Y.S.3d at 569, 248 N.E.3d at 729) and we do not “shut[ ]our eyes to the enduring effect of rape culture on notions of consent, and intent,” (Singas, J., dissenting op. at 477–478, 223 N.Y.S.3d at 561, 248 N.E.3d at 721) as the respective dissents assert.<sup>8</sup> On the contrary, consistent ¶709 ¶549 with our judicial role, our analysis is ¶461 grounded on bedrock principles of evidence and the defendant’s constitutional right to the presumption of innocence and a fair trial. Judge Singas would ignore these principles because, in her view, they fail to account for how rape myths distort jurors’ perceptions of victims, and corrupt the deliberative process (see *id.* at –477 – 484, 223 N.Y.S.3d at 560 – 66, 248 N.E.3d at 720 – 26).<sup>9</sup> But justice for sexual assault victims is not incompatible with well-established rules of evidence designed to ensure that criminal convictions result only from the illegal conduct charged. Indeed, just as rape myths may impact the trier of fact’s deliberative process, propensity evidence has a bias-inducing effect on jurors and tends to undermine the truth-seeking function of trials.

Thus, “[w]hen we limit ¶ *Molineux* or other propensity evidence, we do so for policy reasons, due to fear of the jury’s ‘human tendency’ to more readily ‘believe in the guilt of an accused person when it is known or suspected that [they have] previously committed a similar crime’ ” (¶ *People v. Brewer*, 28 N.Y.3d 271, 276, 44 N.Y.S.3d 339, 66 N.E.3d 1057 [2016], quoting ¶462 ¶ *People v. Ventimiglia*, 52 N.Y.2d 350, 359, 438 N.Y.S.2d 261, 420 N.E.2d 59 [1981], citing ¶ *Molineux*, 168 N.Y. at 313, 61 N.E. 286).

[24] And while the ¶ *Molineux* rule addresses jurors’ reliance on propensity evidence, contrary to the dissenters’

suggestion, we have a means to address jurors’ possible disinclination to believe sexual assault victims who act in ways that appear contrary to the jurors’ experiences or views (see Cannataro, J., dissenting op. at 491–493, 223 N.Y.S.3d at 570 – 72, 248 N.E.3d at 730 – 32; Singas, J., dissenting op. at 488, 223 N.Y.S.3d at 569, 248 N.E.3d at 729). The proper method for dispelling rape myths in “nuanced and complex” cases (Singas, J., dissenting op. at ¶710 ¶550 485–486, 223 N.Y.S.3d at 485–86, 248 N.E.3d at 726–27) is the one deployed by the prosecution here: educating jurors about rape myths and social misperceptions about sexual assault with expert testimony explaining rape trauma and survivor responses (see ¶ *Taylor*, 75 N.Y.2d at 288–289, 552 N.Y.S.2d 883, 552 N.E.2d 131).<sup>10</sup> Specifically, testimony from the prosecution’s expert provided non-propensity evidence that addressed what some jurors might have seen as counterintuitive acts by complainants when they continued to interact with defendant, and contextualized conduct associated with rape trauma. As the expert explained to the jury, her professional work with sexual assault victims led her to conclude that many victims often maintain contact with their attackers out of fear the attacker will retaliate. That testimony was particularly crucial here.

Judge Singas asserts that this Court’s decision will have adverse effects on other prosecutions. She claims, for example, that “instances in which a trafficker repeatedly leverages workers’ undocumented status to coerce them into sex, or a restaurant manager withholds tips from his employees unless they perform sexual acts” will become “a series of individual ‘credibility contests’ and unrelated ‘misunderstandings’ ” (Singas, J., dissenting op. at 487, 223 N.Y.S.3d at 568, 248 N.E.3d at 728). However, cases involving such “repeated” conduct likely would feature—much like this case did—direct evidence in the form of testimony from multiple complainants. Judge Singas assumes, with no empirical data, that few such cases involve evidence aside from victim ¶463 testimony. In fact, many trafficking cases feature much more than that (see e.g. ¶ *People v. Lamb*, 37 N.Y.3d 1174, 1175–1177, 1187–1188, 162 N.Y.S.3d 288, 182 N.E.3d 1080 [2021] [Singas, J., concurring] [summarizing sex trafficking case featuring evidence of online advertisements, phone records, emails, and photographs of unconscious victims, in addition to victim testimony]). The ¶ *Molineux* rule has not and will not, based on its application to this appeal, present an obstacle to prosecution of such cases, notwithstanding Judge Singas’ exaggerated claims to the contrary.

Moreover, this was not a single-victim prosecution where there arguably is a heightened risk that rape myths could impair the jury's factfinding and credibility determinations. Instead, three complainants testified to defendant's violent actions on different occasions, years apart, and how they behaved toward him long afterwards. There also were significant differences between complainants and the  **Molineux** Witnesses. All three complainants had long-term relationships with defendant, whereas the  **Molineux** Witnesses each interacted with defendant for brief periods. And Complainant B explained that she maintained a consensual sexual relationship with defendant following the alleged criminal conduct, whereas none of the  **Molineux** Witnesses testified about consensual sex with defendant at all.

**\*\*711 \*\*\*551** Nor, as the prosecution contends, did “the unusual nature of the entertainment industry” and defendant's stature within it require admission of the  **Molineux** Witnesses' testimonies to show defendant's forcible intent or awareness of complainants' lack of consent during the alleged crimes. According to this argument, defendant might have thought complainants consented in order to advance their careers. The argument has a historical basis:

“The casting couch—where, as the story goes, aspiring actresses had to trade sexual favors in order to win roles—has been a familiar image in Hollywood since the advent of the studio system in the 1920s and '30s. Over time, the phrase has become emblematic of the way that sexual aggression *has been normalized* in an industry dominated by powerful men” (Ben Zimmer, ‘Casting Couch’: *The Origins of a Pernicious Hollywood Cliché*, *The Atlantic* [Oct. 16, 2017], available at <https://www.theatlantic.com/entertainment/archive/2017/10/casting-couch-the-origins-of-a-pernicious-hollywood-cliche/543000/> [last accessed Apr. 4, 2024]).

**\*464** This perverse quid pro quo—i.e., “unwanted sexual relations imposed by superiors on subordinates at work”—however, is not unique to the entertainment industry and “is centuries old” (Reva B. Siegal, “A Short History of Sexual Harassment” in Catherine A. MacKinnon, *Directions in Sexual Harassment Law* at 3 [2004]). Within such a dynamic, an employer, supervisor, executive, or coworker with some power either offers to help—or agrees not to hinder—a victim's career—a historical reality especially for

women because of the historical subjugation of women and their exclusion from positions of influence and power (*see* Marion Crain and Ken Matheny, *Sexual Harassment and Solidarity*, 87 *Geo Wash L Rev* 56, 71 [2019] [“(Q)uid pro quo harassment ... occurs when a supervisor with the power to grant job-related rewards or impose discipline conditions the receipt of the reward or threatens discipline contingent on the victim's willingness to confer sexual favors (e.g., ‘sleep with me and I'll promote you’ or ‘sleep with me or I'll fire you’”)]; *id.* at 74 [“(M)uch gender-based harassment, especially hostile work environment harassment, is not driven by sexual desire and may not even be sexual in content. Instead, it takes the form of undermining women's competence to perform their jobs’ ”] [footnote omitted]; *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 *Harv L Rev* 1449, 1454 [1984] [“(Q)uid pro quo sexual harassment, is harassment that forces an employee to choose between acceding to sexual demands or forfeiting job benefits, continued employment, or promotion”] [footnote omitted]). But this is all irrelevant to whether defendant intended to use force during the course of the alleged offense conduct (*see Williams*, 81 N.Y.2d at 317–318, 598 N.Y.S.2d 167, 614 N.E.2d 730). Here, complainants testified that defendant used force and, thus, his intent to commit the crime would have been established if the jury believed their accounts and concluded that force was used. But the  **Molineux** Witnesses' prior experiences with defendant had no bearing on whether defendant used force against complainants.

Testimonies from three individuals about their own unwanted sexual encounters with defendant were therefore “unnecessary” ( **Alvino**, 71 N.Y.2d at 242, 525 N.Y.S.2d 7, 519 N.E.2d 808). Instead, the testimony served to persuade the jury that, if he had attempted to coerce those three witnesses into nonconsensual sex, then he did the same to the victims on the dates and under the circumstances as charged. That is pure propensity evidence and it is inadmissible against a criminal **\*\*712 \*\*\*552** defendant under  **Molineux** and its century-old progeny (*see Hudy*, 73 N.Y.2d at 55, 538 N.Y.S.2d 197, 535 N.E.2d 250).

**\*465** This case bears some noteworthy similarities to  **People v. Vargas**, 88 N.Y.2d 856, 644 N.Y.S.2d 484, 666 N.E.2d 1357 (1996). There, the complainant told the police that the defendant followed her into her apartment building and dragged her to the rooftop where he raped and sodomized her ( *id.* at 857, 644 N.Y.S.2d 484, 666

N.E.2d 1357). She testified that, thinking it would later facilitate his apprehension, she exchanged phone numbers with the defendant and agreed to meet him the next day at his apartment, where she had consensual sex with him (¶ *id.*). The defendant told police that he met the victim in the neighborhood and that she took him to the rooftop of her apartment building, where they had consensual sex (¶ *id.*). The trial court ruled that, given the defendant's consent defense, the prosecution could, under ¶ *Molineux*, present testimony from four other women that the defendant had committed sexual misconduct against them, and, in response, the defendant abandoned his consent defense and a jury later convicted him on a host of counts, including first-degree rape (¶ *id.* at 857–858, 644 N.Y.S.2d 484, 666 N.E.2d 1357; see also ¶ *People v. Vargas*, 215 A.D.2d 415, 416, 626 N.Y.S.2d 507 [2d Dept 1995] [listing the convicted counts]). This Court **reversed** his conviction on various sexual offenses, holding that the trial court wrongly admitted the testimonies of the other women to show the defendant's intent (¶ *id.* at 858, 644 N.Y.S.2d 484, 666 N.E.2d 1357). The Court's analysis there applies with equal force here:

“[T]wo starkly contrasting scenarios were presented, with only credibility in issue. If the trier of fact believed defendant's version of events, complainant consented to a sexual encounter with him on the night of February 22, 1992. If the trier of fact found complainant more credible, defendant used force and threats to rape her, with intent readily inferable from the acts alleged. As in ¶ *Hudy*, 73 N.Y.2d at 56, 538 N.Y.S.2d 197, 535 N.E.2d 250, the prior misconduct evidence was relevant only to lend credibility to complainant by suggesting that, because defendant had engaged in sexual misconduct with others, he was likely to have committed the acts charged. The evidence therefore was improperly ruled admissible” (¶ *id.*).

Judge Singas attempts to distinguish ¶ *Vargas* because that case involved a “stranger rape” and chides us for not doing the same (Singas, J., dissenting op. at 475–476, 481–482, 223 N.Y.S.3d at 559–60, 563–65., 248 N.E.3d at 719–20, 723–25). Here, of course, we engage in a straightforward analysis that applies ¶ *Vargas*’s animating legal principles. Thus, it is Judge Singas—not this Court—who “misses” the relevant point (*id.* at 481, 223 N.Y.S.3d at 563–64, 248 N.E.3d at 723–24) that here, \*466 as in ¶ *Vargas*, defendant's

intent was “easily inferred from the commission of the act[s] [themsel[ves]]” as recounted by complainants in a case that boiled down to a credibility contest for the jury to evaluate (¶ 88 N.Y.2d at 858, 644 N.Y.S.2d 484, 666 N.E.2d 1357).

In sum, we conclude that the testimony from the ¶ *Molineux* Witnesses was unnecessary to establish defendant's intent and served only to establish defendant's propensity to commit the crimes charged. Neither the prosecution nor the trial court “identif[ied] some issue, *other than mere criminal propensity*, to which the evidence is relevant” (¶ *Hudy*, 73 N.Y.2d at 55, 538 N.Y.S.2d 197, 535 N.E.2d 250), and therefore its admission during the prosecution's case-in-chief was error.

## B.

[25] Defendant also claims that the trial court's ¶ *Sandoval* ruling violated his \*\*713 \*\*\*553 right to testify. For the reasons we discuss below, the trial court abused its discretion when it ruled that defendant, who had no criminal history, could be cross-examined about prior, uncharged alleged bad acts and despicable behavior which was immaterial to his in-court credibility, and which served no purpose other than to display for the jury defendant's loathsome character. The ruling necessarily and impermissibly impacted defendant's decision whether to take the stand in his defense and thus undermined the fact-finding process in this case, which turned on the credibility of the parties.

[26] [27] [28] [29] [30] [31] Under ¶ *Sandoval*, a trial court may “make an advance ruling as to the use by the prosecution of prior convictions or proof of the prior commission of specific criminal, vicious or immoral acts for the purpose of impeaching a defendant's credibility” (¶ 34 N.Y.2d at 374, 357 N.Y.S.2d 849, 314 N.E.2d 413 [internal citations omitted]). “When evidence of other crimes has no purpose other than to show that a defendant is of a criminal bent or character and thus likely to have committed the crime charged, it should be excluded” (¶ *People v. Schwartzman*, 24 N.Y.2d 241, 247, 299 N.Y.S.2d 817, 247 N.E.2d 642 [1969]). The trial court must strike a balance “between the probative worth of evidence of prior specific criminal, vicious or immoral acts on the issue of the defendant's credibility on the one hand, and on the other the risk of unfair prejudice to the defendant, measured both by the impact of such evidence

if it is admitted after [their] testimony \*467 and by the effect its probable introduction may have in discouraging [them] from taking the stand on [their] own behalf” (Sandoval, 34 N.Y.2d at 375, 357 N.Y.S.2d 849, 314 N.E.2d 413). This category of evidence “will always be detrimental to the defendant” and “will have a propensity to influence the jury or the court” (id. at 376, 357 N.Y.S.2d 849, 314 N.E.2d 413). Thus, to ensure that the defendant is not deprived of a fair trial the court must consider whether the evidence will “have a disproportionate and improper impact on the triers of fact,” and “undesirably deter the defendant from taking the stand and thereby deny the jury or the court significant material evidence” (id.). “In weighing prejudice to the defendant’s right to a fair trial, an important consideration may be the effect on the validity of the fact-finding process if the defendant does not testify out of fear of the impact of the impeachment testimony for reasons other than its direct effect on [their] credibility—as where the defendant would be the only available source of material testimony in support of [their] defense” (id. at 378, 357 N.Y.S.2d 849, 314 N.E.2d 413). We review Sandoval determinations for abuse of discretion (see People v. Walker, 83 N.Y.2d 455, 459, 611 N.Y.S.2d 118, 633 N.E.2d 472 [1994]).

[32] [33] [34] Prior crimes and vicious and immoral conduct evidence includes that which shows “a willingness or disposition on the part of the particular defendant voluntarily to place the advancement of [their] individual self-interest ahead of principle or of the interests of society,” because such proof “may be relevant to suggest [the defendant’s] readiness to do so again on the witness stand” (Sandoval, 34 N.Y.2d at 377, 357 N.Y.S.2d 849, 314 N.E.2d 413). In other words, even if the evidence did not “necessarily involve[ ] an act of dishonesty—like perjury, fraud, bribery and similar offenses,” evidence that the defendant committed a “ruthless” act “voluntarily and deliberately” supports the notion, that the defendant “may well disregard an oath and resort to perjury if [they] believe[ ] that to be in [their] self-interest” (People v. Bennette, 56 N.Y.2d 142, 148, 451 N.Y.S.2d 647, 436 N.E.2d 1249 [1982]). This basis for admitting Sandoval evidence is, by its terms, broad and vague. Accordingly, courts must be judicious in resting Sandoval rulings upon it, lest acts of common selfishness lead to mini-trials on the defendant’s character that distract the jury from the crimes charged. The question for trial courts at

all times is whether the evidence shows a defendant’s “lack of in-court veracity” (Sandoval, 34 N.Y.2d at 377, 357 N.Y.S.2d 849, 314 N.E.2d 413). If so, the evidence may be admitted—but \*468 only if not unduly prejudicial—for the “limited purpose of attacking credibility” (id. at 373 n 1, 357 N.Y.S.2d 849, 314 N.E.2d 413).

Here, the trial court’s Sandoval ruling—to the extent it permitted the prosecution to cross-examine defendant about bullying and fits of anger towards employees, restaurant workers, and business associates—was an abuse of discretion.<sup>11</sup> Defendant had no criminal history, many of the acts approved for cross-examination by the court were not criminal in nature and had little if any “probative value as to [defendant’s] lack of in-court veracity,” while also prejudicing the jury against defendant (id. at 377, 357 N.Y.S.2d 849, 314 N.E.2d 413). Far in excess of what Sandoval and its progeny allow, the court ruled that the prosecution could ask defendant details about whether he allegedly: verbally abused an employee and also threw food at another worker; bullied, overworked and verbally abused his personal assistant; pulled out of business deals; threw staplers and other objects at people; punched his brother at a business meeting; threatened executives in his office; and photoshopped the head of an actress onto the nude body of another without consent.

[35] Without question, this is appalling, shameful, repulsive conduct that could only diminish defendant’s character before the jury. But Sandoval does not legitimize destroying a defendant’s character under the guise of prosecutorial need. Quite to the contrary, because trial courts have a responsibility to carefully balance the prosecution’s interest in attacking the defendant’s credibility against the defendant’s constitutional rights to a fair trial and to testify on their own behalf (see id. at 376–378, 357 N.Y.S.2d 849, 314 N.E.2d 413).

Judge Cannataro attempts to cast our correction of this piece of the Sandoval ruling as a byproduct of a general “ ‘disagreement with the ultimate outcome of the trial court’s discretionary balancing determination’ ” (Cannataro, J., dissenting op. at 495, 223 N.Y.S.3d at 573, 248 N.E.3d at 733, quoting Walker, 83 N.Y.2d at 459, 611 N.Y.S.2d 118, 633 N.E.2d 472). The nuance of our holding, which actually leaves much of the trial court’s Sandoval determination intact, is more than enough to show that he is mistaken.

This is not a case where “the trial court might have been more discriminating” but was nonetheless within its discretion (¶ *Walker*, 83 N.Y.2d at 458, 611 N.Y.S.2d 118, 633 N.E.2d 472). Rather, the trial court here abused its discretion as a matter of law when it ruled that the prosecution could cross-examine defendant on a broad \*469 swath of uncharged misconduct that did not bear on his credibility. Far from “invert[ing]” ¶ *Sandoval*,” as Judge Cannataro charges (Cannataro, J., dissenting op. at 496, 223 N.Y.S.3d at 574, 248 N.E.3d at 734), we heed it in its original form and apply it straightforwardly to rectify a branch of a ruling that necessarily “undesirably deter[red] the defendant from taking the stand” and thereby “den[ied] the jury ... significant material evidence” (¶ *Sandoval*, 34 N.Y.2d at 376, 357 N.Y.S.2d 849, 314 N.E.2d 413).

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[36] The ¶ *Molineux* and ¶ *Sandoval* rulings had a synergistic effect that deprived defendant of his right to a fair trial. This was a case—like many other sexual assault prosecutions—where the complainant and the defendant are the only ones who know for certain what happened. Here, the ¶ *Molineux* witnesses’ testimony bolstered complainants’ testimony, thereby impacting the jury’s credibility determination. As the Appellate Division observed, the evidence of uncharged acts would show that defendant demanded sexual favors from aspiring female actors, in return for promises of help with their careers, regardless of their agreement to this quid pro quo. The testimony of the three ¶ *Molineux* Witnesses—although framed as evidence of defendant’s intent to use forcible compulsion and his awareness of the victims’ lack of consent—was, in courtroom reality, evidence of his propensity to commit the crimes charged. This was not the sole error of constitutional dimension. The erroneous ¶ *Sandoval* ruling allowing the prosecution to cross-examine defendant about allegations of charged and uncharged bad acts was breathtakingly inclusive of behavior that was loathsome but not the type of conduct that would assist the jury in measuring his credibility on the stand. The ruling thus served to discourage defendant from exercising his rights to present a defense and testify on his behalf. Together these errors deprived defendant of the “self-standing” constitutional right to a fair trial, “and proof of guilt, however overwhelming,

can never be permitted to negate this right” (¶ *People v. Crimmins*, 36 N.Y.2d 230, 238, 367 N.Y.S.2d 213, 326 N.E.2d 787 [1975]; see also ¶ *Estelle*, 425 U.S. at 503, 96 S.Ct. 1691).

[37] [38] [39] [40] Even if that were not the case, and if we assumed that these errors were subject to our nonconstitutional harmless-error analysis, we would not deem them harmless.<sup>12</sup> A ¶ *Molineux* error “may be found harmless where ‘the proof of the defendant’s \*470 guilt, without reference to the error, is overwhelming’ and where there is no ‘significant probability ... that the jury would have acquitted the defendant had it not been for the error’” (¶ *People v. Arafet*, 13 N.Y.3d 460, 467, 892 N.Y.S.2d 812, 920 N.E.2d 919 [2009], quoting ¶ *Crimmins*, 36 N.Y.2d at 241–242, 367 N.Y.S.2d 213, 326 N.E.2d 787). The standard applied to nonconstitutional ¶ *Sandoval* errors is substantively the same (see ¶ *People v. Grant*, 7 N.Y.3d 421, 424, 823 N.Y.S.2d 757, 857 N.E.2d 52 [2006] [citation omitted]). Finally, in assessing harmless error, the Court considers all trial errors “cumulatively” (¶ *People v. Wing*, 63 N.Y.2d 754, 756, 480 N.Y.S.2d 317, 469 N.E.2d 835 [1984]).

Here, “the whole case turned on a very close question of credibility”—the core choice the jury had to make was whether to believe the complainants’ respective versions of events (¶ *People v. Williamson*, 40 N.Y.2d 1073, 1074, 392 N.Y.S.2d 255, 360 N.E.2d 933 [1976]; cf. ¶ *Benn v. Greiner*, 402 F.3d 100, 106 [2d Cir. 2005] [reversing habeas grant because the “case did not present a ‘he said, she said’ scenario of two persons, one of whom claimed a sexual encounter was consensual and the other of whom claimed it was not-a scenario in which the exclusion of cross-examination regarding past unverified accusations might well have contributed to the jury verdict in a substantial and injurious way”]). Moreover, the jury had to consider evidence that, both before and after the \*\*716 \*\*\*556 alleged offense conduct, complainants were outwardly friendly with defendant and maintained personal contacts—and in the case of Complainant B, a years-long relationship that included consensual sex. The jury then had to weigh this evidence against defendant’s expert evidence about the effects of trauma on memory and the prosecution’s expert’s testimony that, contrary to public misperceptions about how “credible” victims respond, sexual assault survivors often exhibit this same behavior.

[41] Even if we were to regard the evidence against defendant as “overwhelming,” there remains a “ ‘significant probability’ that, absent the trial court’s erroneous **Molineux** ruling, the jury would have acquitted the defendant” (*Arafet*, 13 N.Y.3d at 467, 892 N.Y.S.2d 812, 920 N.E.2d 919, quoting *Crimmins*, 36 N.Y.2d at 241–242, 367 N.Y.S.2d 213, 326 N.E.2d 787). And, though “harmless-error analysis in the context of **Sandoval** ‘does not involve speculation as to whether a defendant would have testified if the legal error had not occurred’ ” (*Grant*, 7 N.Y.3d at 425, 823 N.Y.S.2d 757, 857 N.E.2d 52, quoting *People v. Williams*, 56 N.Y.2d 236, 240, 451 N.Y.S.2d 690, 436 N.E.2d 1292 [1982]), the erroneous **Sandoval** determination here “might have affected \*471 defendant’s decision whether to testify and provide critical information” (*Williams*, 56 N.Y.2d at 241, 451 N.Y.S.2d 690, 436 N.E.2d 1292). Thus, neither error was harmless.

#### IV.

“How different is our own common law, which is the product of all the wisdom and humanity of all the ages. Under it the accused comes into a court of justice, panoplied in the presumption of innocence, which shields [them] until [their] guilt is established beyond a reasonable doubt. [Their] character can be thrown into the balance by no one but [themselves]. The incidents of [their] life, not connected with the crime charged, are [their] sacred possession. [They] face[ ] [their] accuser in the light of a distinct charge, with the assurance that no other will be, or can be, proved against [them]” (**Molineux**, 168 N.Y. at 310, 61 N.E. 286).

[42] These words are no less true and vital today as they were when first written by this Court in 1901. Over a century later, we reaffirm that no person accused of illegality may be judged on proof of uncharged crimes that serve only to establish the accused’s propensity for criminal behavior. At trial, a defendant stands to account for the crimes as charged. Proof of prior crimes and uncharged bad acts are the rare exception to this fundamental rule of criminal law.

Similarly, under **Sandoval**, cross-examination of the defendant with allegations concerning prior convictions or proof of prior “specific criminal, vicious or immoral acts” is impermissible except to the extent it bears on the defendant’s

credibility. Thus, it is an abuse of judicial discretion to permit untested allegations of nothing more than bad behavior that destroys a defendant’s character but sheds no light on their credibility as related to the criminal charges lodged against them.

The trial court’s rulings ran afoul of these time-honored rules of evidence. Accordingly, the order of the Appellate Division should be **reversed**, and a new trial ordered.

SINGAS, J. (dissenting):

Fundamental misunderstandings of sexual violence perpetrated by men known to, and with significant power over, the women they victimize are on full display in the majority’s opinion. By whitewashing the \*\*717 \*\*\*557 facts to conform to a he-said/she-said narrative, by ignoring evidence of defendant’s manipulation and premeditation, which clouded issues of intent, and by failing to recognize that the jury was entitled to \*472 consider defendant’s previous assaults, this Court has continued a disturbing trend of overturning juries’ guilty verdicts in cases involving sexual violence. The **Molineux** rule—created by this Court—has never been static. Instead, its use has evolved over time to meet the challenges of complex criminal prosecutions. Unfortunately, in the context of sexual assault, that evolution lapses today with a decision that has all but ended the use of **Molineux** evidence in such cases. I fully join Judge Cannataro’s dissent but write separately to highlight how the majority’s determination perpetuates outdated notions of sexual violence and allows predators to escape accountability.

The overarching issue presented by this case is whether the trial court properly admitted evidence of defendant’s prior sexual assaults. Whether such **Molineux** evidence—i.e., evidence of a defendant’s prior crimes and other bad acts—is admissible is guided by a two-step analysis. First, a court must consider whether the evidence is relevant to a material issue other than defendant’s criminal propensity (e.g., intent). If the evidence is relevant for an appropriate purpose, the court must then determine whether it should be excluded for other reasons, such as its lack of probative value or risk of undue prejudice (see *People v. Denson*, 26 N.Y.3d 179, 185–186, 21 N.Y.S.3d 179, 42 N.E.3d 676 [2015]). Remarkably, the majority holds that the proffered evidence fails at “Step 1,” concluding that evidence of defendant’s past sexual assaults was irrelevant to this case (majority

op. at 458, 223 N.Y.S.3d at 546–47, 248 N.E.3d at 706–07). The majority does not hold, under “Step 2,” that this evidence was too overwhelming, too dissimilar from the charged crimes, too remote in time, or too prejudicial. Rather, it concludes that additional evidence of defendant’s intent is not relevant to the issues the jury needed to decide, as a matter of law, because no rational person could accept the victims’ testimony recounting the violence committed against them and have any lingering doubts as to defendant’s state of mind.

While the majority’s holding may, at first glance, appear to endorse a utopic vision of sexual assault prosecution in which a victim’s word is paramount, the reality is far bleaker. Critically missing from the majority’s analysis is any awareness that sexual assault cases are not monolithic and that the issue of consent has historically been a complicated one, subject to vigorous debate, study, and ever-evolving legal standards (see [People v. Regan](#), 39 N.Y.3d 459, 475–482, 191 N.Y.S.3d 265, 212 N.E.3d 282 [2023, Singas, J., dissenting]). By ignoring the legal and practical realities of proving a lack of consent, the majority has crafted a naïve narrative: that within the most fraught and intimate settings, intent **\*473** is readily apparent, and issues of consent easily ascertained. This conclusion deprives juries of the context necessary to do their work, forecloses the prosecution from using an essential tool to prove intent, ignores the nuances of how sexual violence is perpetrated and perceived, and demonstrates the majority’s utter lack of understanding of the dynamics of sexual assault. Because New York’s women deserve better, I dissent.

### I.

Defendant was charged with one count of criminal sexual act in the first degree, one count of rape in the first degree, one count of rape in the third degree, and two counts of predatory sexual assault. An element of each is “that the sexual act was committed without consent of the victim” **\*\*718 \*\*\*558**

([Penal Law § 130.05\[1\]](#)). Defendant’s theory throughout the case was that the victims consented to the sexual acts, and that he had ongoing, quid pro quo relationships with them. His position was that his victims were using him, a Hollywood producer of immense stature and influence, to further their careers—that his victims willingly exchanged sexual favors for professional ones—and the parties shared this understanding. The defense drew the jury’s attention to the jobs defendant secured for his victims, the roles they

auditioned for, the scripts they sent him, the parties and movie premieres they asked to attend, and the things he bought for them. In the world the defense painted for the jury, “[s]he was going to do anything she needed to do to have the career that she wanted to have.” Simply put, “this is not a sexual assault. This is someone who agrees to do what has then been discussed.” The manner in which the case was defended made this point clear—in defendant’s mind, these were consensual transactions and she “made him believe that [she] wanted to be there.”

### A.

Because consent was at the heart of this case, the People necessarily had to demonstrate a lack of it. The People may prove “that the sexual act was committed without consent of the victim” through evidence of forcible compulsion ([Penal Law § 130.05\[1\]](#)).<sup>1</sup> “The intent required is the intent to perform the prohibited act—i.e., the intent to forcibly compel another to **\*474** engage” in the sexual act (*People v. Williams*, 81 N.Y.2d 303, 316–317, 598 N.Y.S.2d 167, 614 N.E.2d 730 [1993]).<sup>2</sup> A finding of intent to forcibly compel “necessarily” involves a finding “that [a] defendant[ ] believed the victim did not consent to the sexual activity” (*id.* at 317, 598 N.Y.S.2d 167, 614 N.E.2d 730 [emphasis added]).

Accordingly, in order to prove forcible compulsion, the People were required to demonstrate not only that defendant used force, but that defendant used force believing that the victim did not consent. Indeed,

“it is possible, albeit unlikely, for a complainant to testify truthfully that she did not consent to sexual intercourse and that the defendant raped her, and the defendant to raise an honest defense of mistake in that he believed she was consenting and, therefore, that he lacked the intent required for rape. Under New York law, a good faith mistake that negates the mens rea necessary to commit a crime is a defense. In such a situation, if the jury believes both parties, it must acquit the defendant” (Richard de Simone & Steven Y. Yurowitz, New York [Criminal Law § 7:2](#) [6 West’s N.Y. Prac Series, Dec. 2023 update] [emphasis omitted]).

The People therefore sought to prove defendant’s “intent to forcibly compel” his victims ( **\*\*719 \*\*\*559** *Williams*, 81 N.Y.2d at 317, 598 N.Y.S.2d 167, 614 N.E.2d 730)—and necessarily the absence of any mistake as to consent—through the testimony of witnesses regarding their

experiences of nonconsensual encounters with defendant under similar circumstances. After interviewing “over 100 people,” the prosecution limited their application to five witnesses. The trial court further winnowed this evidence to three witnesses and granted the People’s application.

## B.

This Court decided [People v. Molineux](#), 168 N.Y. 264, 61 N.E. 286 (1901) more than a century ago, “but its foundation remains unchanged: a criminal case should be tried on the facts and not \*475 on the basis of a defendant’s propensity to commit the crime charged” ([People v. Rojas](#), 97 N.Y.2d 32, 36, 735 N.Y.S.2d 470, 760 N.E.2d 1265 [2001]; see [People v. Cass](#), 18 N.Y.3d 553, 559, 942 N.Y.S.2d 416, 965 N.E.2d 918 [2012]). “‘[T]he familiar [Molineux](#) rule states that evidence of a defendant’s uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate the defendant’s propensity to commit the crime charged.’” ([Denson](#), 26 N.Y.3d at 185, 21 N.Y.S.3d 179, 42 N.E.3d 676, quoting [Cass](#), 18 N.Y.3d at 559, 942 N.Y.S.2d 416, 965 N.E.2d 918; see [People v. Frumusa](#), 29 N.Y.3d 364, 369, 57 N.Y.S.3d 103, 79 N.E.3d 495 [2017]). But “evidence of uncharged crimes and prior bad acts may be admitted to prove the specific crime charged when it tends to establish” a defendant’s “intent” ([Cass](#), 18 N.Y.3d at 560, 942 N.Y.S.2d 416, 965 N.E.2d 918; see [Denson](#), 26 N.Y.3d at 185, 21 N.Y.S.3d 179, 42 N.E.3d 676) or “state of mind” ([People v. Ingram](#), 71 N.Y.2d 474, 476, 527 N.Y.S.2d 363, 522 N.E.2d 439 [1988]). “Admission of such proof—where intent cannot be inferred from the act or where [the] defendant claims [they] acted innocently—is founded on the law of probabilities. The theory is that the more often the act constituting the crime has been done, the less the likelihood that it could have been done innocently, as if by chance” ([id.](#) at 479, 527 N.Y.S.2d 363, 522 N.E.2d 439). “It is the duplication of the inculpatory conduct which makes the innocent explanation improbable” ([id.](#) at 480, 527 N.Y.S.2d 363, 522 N.E.2d 439; cf. [People v. Caban](#), 14 N.Y.3d 369, 375, 901 N.Y.S.2d 566, 927 N.E.2d 1050 [2010] [“a defendant who is repeatedly negligent in the same way may be found to be unable or unwilling to learn

from (their) mistakes”]). When “the proffered [Molineux](#) evidence is relevant to” intent, “it is not to be excluded merely because it shows that the defendant ha[s] committed other crimes” ([Cass](#), 18 N.Y.3d at 560, 942 N.Y.S.2d 416, 965 N.E.2d 918).

Whether [Molineux](#) evidence is admissible to prove a defendant’s intent depends on whether “intent may be easily inferred from the commission of the act itself” ([People v. Alvino](#), 71 N.Y.2d 233, 242, 525 N.Y.S.2d 7, 519 N.E.2d 808 [1987]). Where a defendant’s intent is obvious from the action itself, evidence that the defendant engaged in similar conduct on prior occasions is not necessary to shed light on defendant’s state of mind. But “where the act itself is equivocal and, unless accompanied by some guilty knowledge, the transaction would not be criminal,” a culpable mental state is not readily inferable from the commission of the act ([id.](#) at 242–243, 525 N.Y.S.2d 7, 519 N.E.2d 808). When “evidence that [the] defendant did the act may allow no ready inference of [the] defendant’s guilty state of mind” ([id.](#) at 243, 525 N.Y.S.2d 7, 519 N.E.2d 808), [Molineux](#) evidence may be admitted as additional proof.

**\*\*720 \*\*\*560** A guilty mens rea may be easily inferred where, for example, a defendant puts a gun to a victim’s head and pulls the trigger \*476 (see [People v. Katz](#), 209 N.Y. 311, 328, 103 N.E. 305 [1913]) or in the context of a violent stranger rape, like that in [People v. Vargas](#), 88 N.Y.2d 856, 644 N.Y.S.2d 484, 666 N.E.2d 1357 (1996). In [Vargas](#), the defendant followed his victim, a woman he had never met before, into her apartment building, “pinned her in the corner, threatened to kill her, blindfolded her[,] and dragged her to the roof landing where he raped and sodomized her” ([id.](#) at 857, 644 N.Y.S.2d 484, 666 N.E.2d 1357). Under those circumstances, it is difficult, if not impossible, to ascribe any intention to the perpetrator other than a guilty one (see [People v. Leonard](#), 29 N.Y.3d 1, 8, 51 N.Y.S.3d 4, 73 N.E.3d 344 [2017] [“defendant’s alleged action of touching the victim’s vagina” while the victim was unconscious was “not an ‘equivocal’ act capable of being understood” as innocently committed]).

Intent is not so clear from a defendant’s actions alone, however, when they are subject to an “innocent

explanation” (see [Ingram](#), 71 N.Y.2d at 480, 527 N.Y.S.2d 363, 522 N.E.2d 439). For example, in [Ingram](#), the defendant was present at a gas station during a robbery and drove the getaway car. Because the defendant asserted that he was only there to buy gas and had no idea that his passenger was going to commit a robbery, we held that [Molineux](#) evidence of his involvement in a similar robbery was properly admitted as relevant “to refute [his] claim of an innocent state of mind” ([id.](#)). Rather than limiting the jury to viewing the defendant's actions in a siloed context, the jury was permitted to consider his prior criminal behavior when evaluating whether his presence at the gas station was indeed innocent.

Perhaps the area of criminal prosecution with the most inscrutable mens rea determination is that of acquaintance sexual assault.<sup>3</sup> As our understanding of acquaintance assault has grown, the need for [Molineux](#) evidence to aid the jury has become more apparent. These cases require exacting consideration of each party's mental state at each stage of the relevant encounters: What did each intend and what did each know of [§ 477](#) the other's intentions? It is within this context that the trial court allowed the jury to hear instances of defendant's prior sexual assaults to aid them in determining if defendant perpetrated sexual violence or if he indeed thought that he had his victims' consent to behave as he did.

## II.

“[R]ape is a crime that is permeated by misconceptions” ([People v. Taylor](#), 75 N.Y.2d 277, 288, 552 N.Y.S.2d 883, 552 N.E.2d 131 [1990]). Indeed, sexual assault cases are mired in complex relationship and power dynamics and shadowed by archaic social and cultural attitudes about sexual violence (see Meagen M. Hildebrand & Cynthia J. Najdowski, *The Potential Impact of Rape Culture on Juror Decision Making: Implications for Wrongful Acquittals in Sexual Assault Trials*, 78 Alb L Rev 1059, 1078 [2015] [citing studies [§ 721](#) [§ 561](#) which find that jurors with higher levels of rape myth acceptance are more likely to acquit in sexual assault trials]). The defense sought to capitalize on these pervasive rape myths,<sup>4</sup> and rape culture at large, asking the jury to believe that, despite their words and actions, the victims were consenting. Failing to confront this

difficult reality, the majority instead characterizes this case as “boil[ing] down” to a simple “credibility contest” (majority op. at 465–466, 223 N.Y.S.3d at 552–53, 248 N.E.3d at 712–13).<sup>5</sup> The majority does this despite the fact that defendant himself, by orchestrating how these encounters played out, created the very ambiguity concerning his state of mind that the majority will not allow the People to negate (see [People v. Valentin](#), 29 N.Y.3d 150, 157, 53 N.Y.S.3d 592, 75 N.E.3d 1153 [2017]; [Cass](#), 18 N.Y.3d at 561, 942 N.Y.S.2d 416, 965 N.E.2d 918; [Ingram](#), 71 N.Y.2d at 479, 527 N.Y.S.2d 363, 522 N.E.2d 439). Consequently, the majority not only ignores how this case was [§ 478](#) litigated but shuts its eyes to the enduring effect of rape culture on notions of consent, and intent.

### A.

“[R]esearch across law, sociology[,] and psychology has suggested that jurors may be influenced in their deliberations by a number of extra-legal stereotypes about ‘appropriate’ socio-sexual [behavior],” including the victim's conduct “in the lead-up to the incident” and “the existence of any previous flirtation or intimacy with the defendant” (*Reacting to Rape* at 202–203; see Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance–Rape Cases*, 158 U Pa L Rev 729, 761 [2010]).<sup>6</sup> Consequently, what one juror perceives as a “lack of consent” another may not. And when one juror concludes that a reasonable person in the defendant's position would have understood the complainant's actions as indicating a lack of consent, another may not. Indeed, defense strategy in sexual assault cases may take advantage, as the defense sought to do here, of societal misconceptions about sexual violence and enlarge or create ambiguity around a defendant's state of mind and what actions a defendant may have perceived as indicating consent (see ‘Rape Myths’ and a ‘Reasonable Belief’ of Consent at 766; Dominic Willmott et al., *Jury Decision–Making in Rape Trials: An Attitude Problem?*, in David A. Crighton & Graham J. Towl, *Forensic Psychology* [§ 722](#) [§ 562](#) 94, 105–106 [3d ed 2021]).<sup>7</sup>

Antiquated notions of sexual violence persist, consciously and unconsciously, throughout our population and within jury pools. This Court has already recognized the disconnect between our social norms and our professed social values and acknowledged the influence of toxic rape mythology on

jurors' conceptions of consent (see [Taylor](#), 75 N.Y.2d at 288–289, 552 N.Y.S.2d 883, 552 N.E.2d 131 [holding that expert testimony regarding “rape trauma syndrome” is \*479 admissible under certain circumstances]). Considering the intricacies of the victims' testimony here, it is clear that there were numerous opportunities for rape myths to insidiously work their way into the jury's analysis of defendant's state of mind and importantly, into their analysis of whether he reasonably understood that his victims were conveying a lack of consent.

Ostensibly, we live in a culture where “no means no” and that is the end of the conversation. In practice, when a woman says “no,” some hear “yes,” “not yet,” or “convince me” (see Douglas N. Husak & George C. Thomas, III, *Rapes Without Rapists: Consent and Reasonable Mistake*, 11 Phil Issues 86, 95–96 [2001]; Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women's Token Resistance to Sex*, 54 J Personality & Soc Psych 872, 872 [1988]). Pursuant to the myth that a “no” may actually be an invitation, some believe that “[a]ggressive or violent tactics are part of the ordinary seduction” (see Sarah Gill, Note, *Dismantling Gender and Race Stereotypes: Using Education to Prevent Date Rape*, 7 UCLA Women's LJ 27, 46 [1996]). As a result, many view consent as something to be negotiated, bargained for, or coerced. In one mock jury study evaluating conceptions of sexual assault and their impact on criminal prosecutions, jurors,

“[f]ocusing on the degree of verbal resistance offered by the complainant, ... also often questioned whether the complainant had ‘done enough to say no’ in simply telling the defendant to ‘stop’ and ‘get off’ her .... Such comments were often accompanied by conjecture that the defendant may have believed—reasonably, in the opinion of many jurors—that the complainant was a willing sexual partner” (see Louise Ellison & Vanessa E. Munro, *A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study*, 13 New Crim L Rev 781, 791 [2010]).

Jurors consider more than verbal and physical expressions of resistance: they consider their form and degree, and whether other actions by the victim may have negated any resistance. Even where a victim “may communicate that he or she does not consent, the jury may still look for objective signs of non-consent, such as resistance and use

of force” (see Becky Farley, Note, \*480 *A Perpetrator's Paradise: Outdated Sexual Assault Statutes Provide Minimal Protection to Survivors Who are Victimized in Common Sexual Assault Scenarios*, 17 Wyo L Rev 315, 338 [2017]). This very Court once required a victim to exert “the greatest effort of which she is capable therein, to foil the pursuer” for such rape to qualify as a legal offense ( [People v. Dohring](#), 59 N.Y. 374, 383 [1874]). Though New York has “eliminated resistance as an element of rape, ... the requirement of resistance, and the corresponding presumption of consent if resistance is absent, persists” (see Lisa Avalos, *Seeking Consent and the Law of Sexual Assault*, 2023 U Ill L Rev 731, 735 [2023]). Even where a victim asserts physical resistance, “jurors continue to be skeptical” where the victim “did not resist to their satisfaction” (I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L Rev 826, 863 [2013]). And even where a victim asserts physical and verbal resistance, jurors will consider whether the victim ceased resistance at some point. While decades of research informs us that this is an entirely normal response to the trauma of sexual violence (see Sunda Friedman TeBockhorst et al., *Tonic Immobility Among Survivors of Sexual Assault*, 7 Psych Trauma: Theory Rsch Prac & Poly 171 [2015]), the problematic belief persists that a victim's “freezing up” during the encounter is indicative of consent (Jen Percy, *What People Misunderstand About Rape*, N.Y. Times, Aug 22, 2023, available at <https://www.nytimes.com/2023/08/22/magazine/immobility-rape-trauma-freeze.html> [last accessed Apr. 15, 2024]).

Jurors also consider whether the victim's other actions “sen[t] coded signals of sexual interest,” including whether the victim willingly met her attacker and, if so, whether it was in a private, intimate setting (see *Reacting to Rape* at 207). Victims of color are especially disadvantaged, through the intersection of rape and racial mythology, by harmful stereotypes that ascribe heightened sexuality to these victims (see *Real Women, Real Rape* at 863–865; Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 Buff L Rev 1, 84–86, 89, 93–96 [1999]) and characterize them as “ ‘less harmed by an assault’ ” (*Real Women, Real Rape*, at 867, quoting Gary D. LaFree et al., *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 Soc Probs 389, 401–402 [1985]). Additionally, jurors will look to the nature of the parties' relationship and, specifically, whether they had consensual sexual \*481 encounters in the past which “provides an opening through which judgments

about the (mis)communication of signals of sexual interest are introduced” (*A Stranger in the Bushes* at 789). The “generalized consent” concept postulates that “consent to prior sexual intercourse either indicates consent to subsequent intercourse or suggests a greater likelihood that the defendant reasonably believed the victim consented to the later encounter. This notion effectively creates a presumption of consent to sexual intercourse on any specific occasion that the victim must somehow negate” (Note, *Acquaintance Rape and Degrees of Consent: “No” Means “No,” But What Does “Yes” Mean?*, 117 Harv L Rev 2341, 2342 [2004] [footnote omitted]).<sup>8</sup>

**\*\*724 \*\*\*564** The majority misses this point entirely when it draws exaggerated, and frankly confounding, parallels between the facts of this case and those in **Vargas**.

The sexual violence in **Vargas**, as described earlier, fits within the prototypical construct of “real” rape—“a sudden, surprise attack by an unknown, often armed, sexual deviant [which] occurs in an isolated, but public, location, and the victim sustains serious physical injury, either as a result of the violence of the perpetrator or as a consequence of her efforts to resist the attack” (*A Stranger in the Bushes* at 783). “Real” rape does not implicate the same issues as acquaintance assaults. Indeed, here, because the victims know defendant, they are forced to contend with heightened scrutiny of their actions that draws on the problematic rape myths delineated above (see Nicholas J. Little, Note, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 Vand L Rev 1321, 1332–1333 [2005] [explaining why jurors are more likely **\*482** to believe claims of non-consent in cases of “real” rape]).<sup>9</sup>

Casting this case and **Vargas** in the same light allows the majority to conclude that it is as easy for this jury to find that the victims were raped as it was for the jury in **Vargas** to draw that same conclusion.

## B.

This discussion of rape myths is not merely theoretical. Beyond being deeply rooted societal attitudes that jurors have to grapple with, the defense encouraged the jurors to apply these attitudes to the facts of this case. Defense counsel emphasized to the jury that Victim B, according to her own testimony, did not exert physical resistance in that she did not “tr[y] to push [defendant] off of her in any way.” Defense

counsel further implored the jury to adopt the mindset that Victim B’s initial verbal resistance was disingenuous or fleeting. Victim B testified that she initially told defendant, “We don’t have time,” consistent with her testimony that “[o]ftentimes before we would engage in something sexual, there was a negotiation and me trying not to do something.” But defense counsel emphasized that Victim B stopped saying no quickly after the encounter began and then, according to her testimony, “what does she do? Gets naked and lays on the bed.” The prosecution further had to contend with the fact that Victim A also ceased resistance at some point; that, according to her testimony, she “checked out” and “endure[d] it.”

Defense counsel also argued that the victims’ actions demonstrated their sexual interest. Playing on the myth of generalized consent, the defense hinted or outright asserted that the victims had prior, consensual sexual encounters with defendant. Defense counsel stated that Victim A had been “to Harvey’s apartment alone to spend time with him” one night and “[t]hey ha[d] a nighttime meeting in a bar [on another] .... I want you to think about what that meeting was really about.” With respect to Victim B, the defense **\*\*725 \*\*\*565** posed, “[W]hy does [defendant] get a room at the Doubletree? ... [B]ecause he was going to **\*483** see the woman he was having a sexual relationship with.” The defense noted their past sexual encounters, asking Victim B about a time that she had “put lotion in [her] hand and put it on [defendant’s] back ... [w]hile he is laying on the bed” on one occasion. The defense further asked Victim B whether she “never wanted to have sex with” defendant and was “lying to [defendant] every single time [she] engaged in sexual activity with him that [she] didn’t want to have” and whether she was lying when she had previously told defendant that one encounter was “the best [she] ever had.” Counsel concluded, “Well, you made him believe that you wanted to be there, isn’t that right?” “You are allowing all this to happen .... Manipulating him to make him think that you wanted to see him by sending him e-mails, by going to meet with him and by engaging in consensual sexual acts?” “As manipulated as you felt, you manipulated Harvey **Weinstein** every time you continued to see him after each individual sexual encounter.” The defense asked her, “You decided to go out with a married man, correct? ... You decided to have sexual relations with [him]?” Defense counsel also emphasized that both victims willingly met defendant in the intimate settings of his apartment or hotel. Indeed, when asking Victim A “about [her] decision to go over to the Soho apartment,” the defense confirmed, “Well, you did go there, correct?” “[Y]ou decide[d] to go?” With regard to Victim B, defense counsel asked, “[Y]ou didn’t make the choice to walk

out the door? ... You made the choice to go up to the hotel room?”

Defendant's quid pro quo theory inserted another innocent explanation of defendant's conduct for the jury to consider and put the professional favors that defendant granted his victims at the forefront of the case. Regarding Victim A, the defense asserted that “[s]he cared [about her relationship with defendant] because she was using him for jobs. She cared because she wanted him to fly her places.” Defense counsel reiterated that defendant secured a production position for Victim A on his company's television show; that the day after the incident, Victim A flew to Los Angeles on a ticket paid for by defendant's company; and that she traveled back to New York two weeks later, again on defendant's company's dime. Regarding Victim B, the defense asserted that she was using defendant for her career and “we know that's exactly what she was doing.” “[S]he made a choice that she wanted to be in his world. She made a choice she wanted the life that he could potentially provide for \*484 her.” Defense counsel told the jury that on the day of the incident with Victim B, she did a reading for the opportunity to be cast in one of defendant's movies. Additionally, defendant came to the hotel the morning of the rape at the request of Victim B, to do her a favor and meet her friend who was an agent in the industry. The defense asked Victim B, “[Y]ou didn't want that stigma” of “sleeping with Harvey Weinstein ... [b]ut you wanted the benefit of what the action got you?” This line of questioning suggested to the jury that because defendant offered professional rewards, the sex was necessarily consensual.

Confronted with the defense's arguments, it was entirely possible for the jury to believe the victims' accounts of defendant's actions while at the same time accepting defendant's assertion that he believed this was a consensual transaction. In this circumstance, even if the jury believed the victims when they said that they resisted, it would have to acquit defendant. Nonetheless, the majority holds that the facts here were simple to parse, and that \*\*726 \*\*\*566 defendant's prior sexual assaults (where his quid pro quo understanding failed) were irrelevant to the issues of intent and consent.

### III.

Viewed in proper context, in light of our contemporary understanding of acquaintance sexual violence, the proffered

¶ **Molineux** testimony unquestionably had a “natural tendency to disprove defendant's specific claim as to h[is] state of mind” (¶ *People v. Bradley*, 20 N.Y.3d 128, 134, 958 N.Y.S.2d 650, 982 N.E.2d 570 [2012] [internal quotation marks and some brackets omitted]) and “make[ ] the innocent explanation improbable” (¶ *Ingram*, 71 N.Y.2d at 480, 527 N.Y.S.2d 363, 522 N.E.2d 439). As the unanimous Appellate Division aptly explained, the ¶ **Molineux** witnesses

“described an arc of events where defendant met her, flattered her by expressing his willingness to help her advance her career in Hollywood, and then put in motion a plan where he could be alone with her. As soon as it was opportune, he made an overt sexual advance for which there was no indication that there was consent” (¶ 207 A.D.3d 33, 65, 170 N.Y.S.3d 33 [1st Dept. 2022]).

The evidence thus demonstrated “that defendant did not see the women as romantic partners or friends, and that his interest \*485 in them and their talents was feigned” (¶ *id.*). Further, “defendant's goal at all times was to position the women in such a way that he could have sex with them, and that whether the women consented or not was irrelevant to him” (¶ *id.*).

These ¶ **Molineux** witnesses' negative reactions to defendant's sexual advances elucidated for the jury that defendant was fully aware that he could not assume consent simply because women crossed the threshold to his apartment or hotel room. Their testimony explained the idiosyncrasies of the entertainment industry that allow assaults to be perpetrated by influential and powerful men against young and relatively powerless aspiring actresses, such that the jury could better assess how defendant would have perceived the victims' actions. The evidence showcased a “repetition, duplication[,] and similarity of defendant's acts” which has “a direct bearing on the question of premeditated intent” (¶ *Cass*, 18 N.Y.3d at 563, 942 N.Y.S.2d 416, 965 N.E.2d 918).

“[T]he reason defendant invited the victim[s] to his apartment” or hotel room necessarily informed the jury's analysis of “whether he had the requisite intent, i.e.,” the intent to forcibly compel his victims to engage in sexual acts (see ¶ *Denson*, 26 N.Y.3d at 186, 21 N.Y.S.3d 179, 42 N.E.3d 676). The People's theory was that defendant

orchestrated these moments to be alone with women in an intimate setting, “lured in on false promises of professional help” to a private location commonly used for business meetings in the entertainment industry, in order to sexually assault them. But defendant posited the innocent explanation that he was simply following through on a mutually agreed upon rendezvous for a consensual quid pro quo exchange and they came to his hotel room or apartment fully aware it was to have sex with him. Indeed, referencing one such meeting, defense counsel skeptically asked Victim A, “You wanted to pitch a project to [defendant]? ... You wanted to meet with him in a hotel room and pitch a project to him?”

The **Molineux** witnesses’ testimony went to the heart of this issue and, notably, explained for the jury the unique facet of the entertainment industry in which screen tests and meetings would often occur in these intimate settings. Moreover, because they rejected his sexual advances in similar situations, the People **\*\*727 \*\*\*567** could use this testimony to undermine defendant’s quid pro quo theory.

In sum, the facts of this case are equivocal, and defendant’s state of mind subject to numerous interpretations—layer after layer of nuance, opportunity after opportunity for rape culture to rear its ugly head. Properly considering the realities against **\*486** which sexual assault cases are presented to a jury, and the myriad of experiences, beliefs, and attitudes that jurors bring with them into the courtroom, it is clear that a jury could fully accept the victims’ recounting of events and still find defendant did not possess the requisite mens rea. As such, defendant’s culpable state of mind was not so easily inferred, and the **Molineux** evidence was admissible to aid the jury’s understanding of his intent. The fact that the jury convicted defendant of third-degree rape against Victim B but acquitted him of first-degree rape lays bare the majority’s error, and refutes its theory that, if it accepted Victim B’s testimony, the jury would have to find forcible compulsion and convict defendant of first-degree rape. Ultimately, it is the rejection of any subtlety in this case which leads the majority to its erroneous conclusion that resolving defendant’s intent merely involved a binary choice—believe the victims’ testimony and convict defendant or disbelieve it and acquit—and that any other evidence on that topic was “irrelevant” to anything but defendant’s criminal propensity (*see* majority op. at 444, 464, 223 N.Y.S.3d at 536–37, 551–52, 248 N.E.3d at 696–97, 711–12). But how can this issue be “irrelevant” when defendant’s very theory rests on the perceived consent flowing from the quid pro quo nature of these sexual encounters?

The majority references the testimony of the People’s expert witness which offered the jury critical information to dispel some of the rape myths identified above, including misconceptions about victims exerting verbal and physical resistance to an attacker. But the majority falls on the sword it claims to wield against rape myths when it claims that the expert’s testimony negates the need for **Molineux** evidence here. The majority acknowledges that the expert provided testimony relevant to explain “what some jurors might have seen,” as a result of misconceptions about sexual violence, “as counterintuitive acts by complainants” and thus acknowledges that the victims’ actions could be perceived as unclear (majority op. at 462 223 N.Y.S.3d at 550, 248 N.E.3d at 710). This inevitably raises the question: if it was appropriate to introduce this testimony to address the equivocality of the victim’s actions, why was it not appropriate to introduce evidence to address how the defendant may or may not have perceived the equivocality of the victim’s actions?

Moreover, the majority’s conclusion that the **Molineux** evidence was not necessary because the People had other evidence to dispel rape mythology—specifically, the expert testimony and the “testimony from multiple complainants”—further **\*487** demonstrates its misunderstanding of **Molineux** (*see* majority op. at 462, 223 N.Y.S.3d at 549–50, 248 N.E.3d at 709–10). Whether **Molineux** evidence is cumulative is patently not an appropriate consideration under “Step 1,” because it has no bearing on whether defendant’s state of mind was open to multiple interpretations and thus, on whether the evidence was relevant (*see* **People v. Hudy**, 73 N.Y.2d 40, 55, 538 N.Y.S.2d 197, 535 N.E.2d 250 [1988]). Given that the majority disposes of the trial court’s **Molineux** ruling on “Step 1,” the majority renders its own discussion of “Step 2” considerations, such as the probative value of the **Molineux** evidence or its prejudicial impact, academic. Additionally, “it is immaterial that the People could establish a prima facie case without the **\*\*728 \*\*\*568** disputed [**Molineux**] evidence. They were not bound to stop after presenting minimum evidence but could go on and present all the admissible evidence available to them” (**Alvino**, 71 N.Y.2d at 245, 525 N.Y.S.2d 7, 519 N.E.2d 808).

Sexual assault cases necessarily require a jury to understand a defendant's awareness of a victim's lack of consent. Proof of this intent falls within the core class of evidence that **Molineux** took great care to distinguish from evidence simply demonstrating a defendant's criminal propensity. But today, this Court elides these two categories, effectively foreclosing the introduction of **Molineux** evidence in sexual assault cases and denying juries relevant evidence. Demonstration of a defendant's culpable state of mind is often a difficult task in any prosecution (see **Ingram**, 71 N.Y.2d at 479, 527 N.Y.S.2d 363, 522 N.E.2d 439). But where jurors enter a courtroom to adjudicate a sexual assault case, carrying with them deeply entrenched attitudes toward sexual violence, this can be a most daunting task. The **Molineux** intent exception was designed to combat such evidentiary challenges.

The majority appears oblivious to, or unconcerned with, the distressing implications of its holding. Men who serially sexually exploit their power over women—especially the most vulnerable groups in society—will reap the benefit of today's decision. Under the majority's logic, instances in which a trafficker repeatedly leverages workers' undocumented status to coerce them into sex, or a restaurant manager withholds tips from his employees unless they perform sexual acts becomes a series of individual “credibility contests” and unrelated “misunderstandings.” After today's holding, juries will remain in the dark about, and defendants will be insulated from, past criminal acts, even after putting intent at issue by claiming consent. Ultimately, the road to holding defendants accountable for sexual assault has become significantly more difficult.

#### \*488 IV.

With today's decision, this Court continues to thwart the steady gains survivors of sexual violence have fought for in our criminal justice system (see **People v. Cerda**, 40 N.Y.3d 369, 199 N.Y.S.3d 887, 223 N.E.3d 308 [2023] [**reversing** a first-degree sexual abuse conviction against a child victim by rejecting the trial court's application of the Rape Shield Law]; **Regan**, 39 N.Y.3d 459, 191 N.Y.S.3d 265, 212 N.E.3d 282 [**reversing** a first-degree rape conviction on an expanded application of pre-indictment delay doctrine and dismissing the indictment]). Forgotten are the women who bear the psychological trauma of sexual violence and the scars

of testifying again, and again. This erosion of precedent, born from a refusal to accept that crimes of sexual violence are far more nuanced and complex than other crimes, comes at the expense and safety of women. Until we recognize and account for these differences, we cannot claim to dispense fairness and justice for all.

CANNATARO, J. (dissenting):

The adjudication of sex crimes occupies a challenging space in the evolution of American criminal law. Rooted in centuries of deeply patriarchal and misogynistic legal tradition, progress toward a more enlightened and evidence-based approach to the prosecution of rape and related crimes perpetrated predominantly against women has been both challenging and sporadic, with most meaningful progress achieved only over the past 50 years (see **People v. Regan**, 39 N.Y.3d 459, 475–482, 191 N.Y.S.3d 265, 212 N.E.3d 282 [2023] [Singas, J. dissenting]). Today's majority decision represents an unfortunate step \*\*729 \*\*\*569 backwards from recent advances in our understanding of how sex crimes are perpetrated and why victims sometimes respond in seemingly counterintuitive ways, endangering decades of progress in this incredibly complex and nuanced area of law. I must therefore dissent.

As the jury heard in this case through the testimony of the People's expert witness in the area of rape trauma, a commonly held misconception is that the majority of sex offenses involve an assault perpetrated against a woman by an unknown male—the stereotypical stranger in a dark alley who isolates his victim or waits for her to be alone before launching a violent assault. But, as the jury also heard in this case, we now know that most sex crimes are perpetrated by acquaintances—sometimes intimate acquaintances—of the victims. These crimes present a host of difficulties in terms of producing competent proof of guilt, as the victims frequently delay \*489 reporting, especially to the authorities, and often maintain relationships with their abusers out of fear, manipulation or the prospect of societal opprobrium.

These complex psychological and sociological dynamics were at play here. The trial court permitted the People to introduce the testimony of three additional women who had been subjected to the same kind of manipulation and intimidation by defendant, so that the jury could gain a better understanding of his intent and his knowledge of their lack of consent. This evidence, which, as the verdict demonstrates,

was carefully parsed by the jury, is the type of evidence that our well-developed [Molineux](#) jurisprudence permits. The trial court also ruled that if defendant chose to testify, the People could cross-examine defendant on three categories of prior bad acts that established defendant's willingness to advance his own interests at the expense of others, and was therefore directly relevant to the jury's assessment of defendant's credibility. The trial court's [Molineux](#) and [Sandoval](#) rulings reflect sensitivity to the nature of the charges, the circumstances of the case, and potential prejudice from admission of the proffered evidence. There was no abuse of discretion in either ruling. The Appellate Division order should be affirmed.

### I.

Under our well-settled [Molineux](#) rule ([People v. Molineux](#), 168 N.Y. 264, 61 N.E. 286 [1901]), “[e]vidence of a defendant's prior bad acts may be admissible when it is relevant to a material issue in the case other than defendant's criminal propensity” ([People v. Dorm](#), 12 N.Y.3d 16, 19, 874 N.Y.S.2d 866, 903 N.E.2d 263 [2009]). We have set forth an illustrative list of permissible uses for such evidence, including to prove a defendant's motive or intent (*see id.*). Where there is a proper nonpropensity purpose for the evidence at issue, “it is not to be excluded merely because it shows that the defendant had committed other crimes” ([People v. Cass](#), 18 N.Y.3d 553, 560, 942 N.Y.S.2d 416, 965 N.E.2d 918 [2012]). Rather, its admissibility “rests upon the trial court's discretionary balancing of probative value and unfair prejudice” ([Dorm](#), 12 N.Y.3d at 19, 874 N.Y.S.2d 866, 903 N.E.2d 263). “[U]nder our [Molineux](#) jurisprudence, we begin with the premise that uncharged crimes are inadmissible and, from there, carve out exceptions” ([People v. Resek](#), 3 N.Y.3d 385, 390, 787 N.Y.S.2d 683, 821 N.E.2d 108 [2004]). This rule of exclusion, however, “is not an absolute ... [and] gives way when evidence of prior crime is probative of the crime now charged” ([People v. Ventimiglia](#), 52 N.Y.2d 350, 359, 438 N.Y.S.2d 261, 420 N.E.2d 59 [1981]; [People v. Allweiss](#), 48 N.Y.2d 40, 46–47, 421 N.Y.S.2d 341, 396 N.E.2d 735 [1979]).

**\*490 \*\*730 \*\*\*570** We have recognized that “[e]vidence of prior criminal acts to prove intent will often be unnecessary, and therefore should be precluded even though marginally relevant, where intent may be easily inferred from the commission of the act itself. It may be admitted to prove intent, however, when proof of the act falls short of demonstrating that the defendant acted with a particular state of mind and where proof of a prior act is relevant to that issue” ([People v. Alvino](#), 71 N.Y.2d 233, 242, 525 N.Y.S.2d 7, 519 N.E.2d 808 [1987] [citations omitted]). Stated otherwise, proof of other crimes may be admissible “[w]hen defendant's criminal intent cannot be inferred from the commission of the act or when defendant's intent or mental state in doing the act is placed in issue” ([People v. Ingram](#), 71 N.Y.2d 474, 479, 527 N.Y.S.2d 363, 522 N.E.2d 439 [1988]).

Here, prior to trial, the court granted the People's application to introduce three categories of [Molineux](#) evidence. The first category permitted complaining witness B to testify that defendant committed two uncharged instances of sexual assault against her—one before and one after the charged offense. The second category permitted three additional witnesses to testify that defendant committed sex offenses against them under similar circumstances to the charged offenses. Under the third category, complaining witnesses A and B were permitted to testify about their observations of defendant's threatening, abusive and manipulative conduct toward others.

The evidence in the first and third categories was properly admissible in the exercise of the trial court's discretion under our settled [Molineux](#) jurisprudence. As to the first category, a prior assault by a defendant that is observed or experienced by the victim can be admissible on the issue of the victim's state of mind—consent and use of force—and to explain a delay in reporting (*see* [People v. Tas](#), 51 N.Y.2d 915, 916, 434 N.Y.S.2d 978, 415 N.E.2d 967 [1980]). Moreover, “when appropriate—as here, in light of the [intimate] relationship between defendant and complainant—evidence of a defendant's prior abusive behavior toward a complainant may be admissible to prove the element of forcible compulsion in a rape case” ([People v. Cook](#), 93 N.Y.2d 840, 841, 688 N.Y.S.2d 89, 710 N.E.2d 654 [1999]). With respect to the third category, testimony by the complaining witnesses about their observations of other bad acts by defendant was relevant to explain their delayed

disclosure (see [People v. Nicholson](#), 26 N.Y.3d 813, 829–830, 28 N.Y.S.3d 663, 48 N.E.3d 944 [2016]). There was no error **\*491** or abuse of discretion in the trial court's admission of either of these categories of [Molineux](#). The majority does not contend otherwise.

The category of evidence subject to dispute is the admission of the testimony from the three additional [Molineux](#) witnesses. In their [Molineux](#) application, the People initially sought to call five additional witnesses in their case-in-chief, arguing that their testimony was relevant to the contested issues of lack of consent and forcible compulsion. The court precluded the People from introducing testimony from two of the proposed witnesses but otherwise granted the application. The trial court permitted these additional witnesses to testify to rebut defendant's claim of consent and to demonstrate his intent to forcibly compel the complaining witnesses to engage in sexual acts with him—specifically, by engineering situations in which he could be alone with women, through an offer of professional assistance, giving the encounters the ostensible appearance of being consensual. Consistent with this ruling, the court gave the jury limiting instructions as to the purpose of the [Molineux](#) witnesses' testimony—that these witnesses **\*\*731 \*\*\*571** were not the complaining witnesses in the case and that their testimony “was not offered and must not be considered for the purpose of proving that the defendant had a propensity or predisposition to commit the crimes charged in this case. It was offered as evidence for your consideration on the issues of forcible compulsion and lack of consent.”

When a defendant's intent in a sexual assault case is unequivocal, it is improper to introduce evidence that he has previously committed other similar acts (see [People v. Leonard](#), 29 N.Y.3d 1, 8, 51 N.Y.S.3d 4, 73 N.E.3d 344 [2017]). The majority views this as one of those cases, pointing out that there was testimony from complaining witness B that would have allowed the jury to conclude—as it did—that she did not consent to sexual contact with defendant with respect to the charged offense. However, there was also testimony that allowed defendant to argue that he reasonably believed she consented—specifically, that she undressed, lay down on the bed and waited for him to come out of the bathroom. Although the majority finds it “inconceivable” that the jury could believe the complaining witness and still find that defendant reasonably believed she consented (majority op. at 459, 223 N.Y.S.3d at 547–48, 248 N.E.3d at 707–

08), that is the precise argument defendant made to the jury **\*492** and it is the argument the People had to rebut.<sup>1</sup> The majority's approach fails to account for the nuances present in a relationship of this type. Given the witness's description of the encounter and their consensual sexual activity both before and after the charged offense, the lines simply were not that clear.

Thus it follows that [People v. Vargas](#), 88 N.Y.2d 856, 858, 644 N.Y.S.2d 484, 666 N.E.2d 1357 (1996), involving a sexual encounter between strangers where “two starkly contrasting scenarios were presented, with only credibility in issue,” is not controlling. In that case, the jury could have either believed the victim's testimony that the interaction was a violent sexual assault by a stranger, or credited the defense that it was a consensual sexual encounter. There was no ambiguity stemming from the context of an ongoing relationship (see e.g. [Cook](#), 93 N.Y.2d at 841, 688 N.Y.S.2d 89, 710 N.E.2d 654) and the defendant's intent could easily be inferred from the act itself. We therefore held that the evidence of the defendant's prior sexual misconduct was inadmissible because it “was relevant only to lend credibility to complainant by suggesting that, because defendant had engaged in sexual misconduct with others, he was likely to have committed the acts charged” ([88 N.Y.2d at 858, 644 N.Y.S.2d 484, 666 N.E.2d 1357](#); see also [People v. Hudy](#), 73 N.Y.2d 40, 56, 538 N.Y.S.2d 197, 535 N.E.2d 250 [1988], *abrogated on other grounds by* [Carmell v. Texas](#), 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 [2000]).

Here, particularly with respect to complaining witness B, with whom defendant had an intimate relationship, those stark contrasts were not presented.<sup>2</sup> With complaining **\*\*732 \*\*\*572** witness B, defendant's intent was squarely in issue and, given the context of their ongoing relationship, the nature of defendant's actions was “subject to varying interpretations” ([People v. Bagarozzy](#), 132 A.D.2d 225, 236, 522 N.Y.S.2d 848 [1st Dept 1987]). That is, there is no doubt that he intended to have sexual contact with both victims, but there was considerable ambiguity as to whether he intended to force himself on complaining witness B against her will, a conclusion that the jury ultimately rejected. In these circumstances, **\*493** the People were permitted to introduce evidence that these were not transactional “quid pro quo” interactions made in exchange for defendant's professional assistance, but were situations devised by defendant to engage in sexual activity regardless of whether the victims consented.

“Because there [was] a proper nonpropensity purpose, the decision whether to admit evidence of defendant's prior ... acts rests upon the trial court's discretionary balancing of probative value and unfair prejudice” (*People v. Brewer*, 28 N.Y.3d 271, 276, 44 N.Y.S.3d 339, 66 N.E.3d 1057 [2016]). Evidence that is probative of a defendant's guilt will always be prejudicial to some degree, “[b]ut the probative value of a piece of evidence is not automatically outweighed by prejudice merely because the evidence is compelling” (*id.* at 277, 44 N.Y.S.3d 339, 66 N.E.3d 1057). It is also important to note that the jury acquitted defendant of the top three counts—two counts of predatory sexual assault and one count of first-degree rape—all of which required proof of forcible compulsion, one of the permissible uses of the testimony from the *Molineux* witnesses. This at least suggests that the *Molineux* evidence did not overwhelm the jury or poison the panel against defendant. There was no abuse of discretion as a matter of law in the trial court's determination with respect to the balancing of probative value against prejudicial effect.

## II.

Under *People v. Sandoval*, the trial court may permit the People to cross-examine a defendant who chooses to testify with evidence of the defendant's “prior convictions” and any “vicious or immoral acts” that bear on the defendant's credibility (34 N.Y.2d 371, 374, 357 N.Y.S.2d 849, 314 N.E.2d 413 [1974]). The trial court makes this determination by balancing “the probative worth of [the] evidence” with respect to defendant's credibility against “the risk of unfair prejudice to the defendant, measured both by the impact of such evidence if it is admitted after his testimony and by the effect its probable introduction may have in discouraging him from taking the stand on his own behalf” (*id.* at 375, 357 N.Y.S.2d 849, 314 N.E.2d 413). Prejudice to the defendant must also be considered against “the potential prejudice to the prosecution and the fact-finding process of denying the jury access to probative, perhaps even crucial, evidence of the defendant's credibility” (*People v. Bennette*, 56 N.Y.2d 142, 147, 451 N.Y.S.2d 647, 436 N.E.2d 1249 [1982]). While such proof should be excluded where its sole purpose is to demonstrate that a defendant's generally bad or criminal character makes it more \*494 likely that they committed the charged offense, it “should be admitted if

the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility” (*Sandoval*, 34 N.Y.2d at 376, 357 N.Y.S.2d 849, 314 N.E.2d 413). Bad acts that show “[a] demonstrated determination deliberately \*\*733 \*\*\*573 to further self-interest at the expense of society or in derogation of the interests of others go[ ] to the heart of honesty and integrity” and are “relevant to suggest [a] readiness to do so again on the witness stand” (*id.* at 377, 357 N.Y.S.2d 849, 314 N.E.2d 413).

The quantum of evidence admitted under *Sandoval* will depend on the nature of the charged conduct and the history of the individual defendant. There was much to work with here: The volume of evidence in the People's *Sandoval* application encompassed three categories of prior bad acts relevant to defendant's credibility, including general “bad acts,” uncharged sexual assaults (some similar to the charged offenses), and defendant's abusive behavior towards others. Asserting that the credibility of the respective parties was the “critical and ultimate issue” in the case, the People argued that these proffered acts demonstrated, as *Sandoval* material must, that defendant would put his own interests above those of society.

The trial court, best positioned to assess the admissibility of such proof based on “the facts and circumstances of the particular case before it” (*People v. Hayes*, 97 N.Y.2d 203, 207, 738 N.Y.S.2d 663, 764 N.E.2d 963 [2002]), was cognizant of the effect this type of evidence could have upon a jury (*see People v. Walker*, 83 N.Y.2d 455, 459, 611 N.Y.S.2d 118, 633 N.E.2d 472 [1994]). The trial court carefully considered each proffered act and its potential for prejudice, excluding the most prejudicial portions—allegations by nontestifying witnesses relating to sexual misconduct—as “too prejudicial,” as well as other acts deemed too remote in time, too general, or too similar to the charged offenses. The court also limited questioning on certain acts, permitting the People to question defendant about instances demonstrating a willingness to further his own interests at the expense of others while at the same time precluding the People from asking defendant about portions of those acts that had to do with sexual misconduct. Applying our well-settled jurisprudence, the Appellate Division concluded that the trial court's ruling was

a provident exercise of its discretion (see [207 A.D.3d 33](#), [69, 170 N.Y.S.3d 33 \[1st Dept 2022\]](#)).

In our prior cases, our inquiry would end there. Until today, we considered the [Sandoval](#) ruling a “largely, if not completely [ ] discretionary determination for the trial courts and fact-reviewing \*495 intermediate appellate courts,” and would only intervene where “the trial court ha[s] either abused its discretion or exercised none at all” ([Walker](#); [83 N.Y.2d at 458–459](#), [611 N.Y.S.2d 118](#), [633 N.E.2d 472](#) [quotation marks and citations omitted]). And until this case, claims which present “nothing more than a disagreement with the ultimate outcome of the trial court's discretionary balancing determination ... d[id] not furnish a cognizable ground for intervention by this Court” ([id.](#) at [459](#), [611 N.Y.S.2d 118](#), [633 N.E.2d 472](#)).

Today, the majority intervenes for this defendant, reassessing the proof, making its own unwarranted balancing of interests, and essentially exercising the discretion heretofore reserved for the trial court.<sup>3</sup> Purporting to follow [Sandoval](#) “and its progeny” (majority op. at [468](#), [223 N.Y.S.3d at 554](#), [248 N.E.3d at 714](#)), the majority ignores that we have consistently \*\*734 \*\*\*574 “declined to prescribe fixed rules prohibiting or allowing the use for credibility purposes of prior offenses based solely upon the potentially inflammatory impact of the crime or the victim involved” ([Bennette](#), [56 N.Y.2d at 147](#), [451 N.Y.S.2d 647](#), [436 N.E.2d 1249](#)) and have never approved “per se rules requiring preclusion because of the age, nature and number of a defendant's prior crimes” ([Walker](#); [83 N.Y.2d at 459](#), [611 N.Y.S.2d 118](#), [633 N.E.2d 472](#)). Even where “the trial court might have been more discriminating” ([People v. Williams](#), [12 N.Y.3d 726](#), [727](#), [877 N.Y.S.2d 731](#), [905 N.E.2d 605 \[2009\]](#) [quotation marks and citation omitted]), the sheer number of prior bad acts and the fact that some were remote in time “are matters of substance that may properly be considered by the trial court but are not appropriate bases for this Court to second-guess the trial court's conclusion” ([Walker](#); [83 N.Y.2d at 459](#), [611 N.Y.S.2d 118](#), [633 N.E.2d 472](#)).

The majority concludes that proffered evidence—acts the majority describes as “appalling, shameful, repulsive conduct”—would “only diminish defendant's character

before the jury” and the trial court's ruling would “legitimize destroying a defendant's character under the guise of prosecutorial need” (majority op. at [468](#), [223 N.Y.S.3d at 554](#), [248 N.E.3d at 714](#)). But “a criminal defendant who chooses to testify, like any other civil or criminal witness, may be cross-examined \*496 regarding prior crimes and bad acts that bear on credibility, veracity or honesty, ... even in the sensitive area of sex offenses” ([Hayes](#), [97 N.Y.2d at 207–208](#), [738 N.Y.S.2d 663](#), [764 N.E.2d 963](#); see also [Bennette](#), [56 N.Y.2d at 147–148](#), [451 N.Y.S.2d 647](#), [436 N.E.2d 1249](#) [rejecting lower court's “inflexible rule prohibiting the prosecutor from impeaching the defendant's credibility by cross-examination on prior sexual offenses” and explaining that “(a) person ruthless enough to sexually exploit a child may well disregard an oath and resort to perjury if he perceives that to be in his self-interest”]). Despite this longstanding approach, the majority instead inverts [Sandoval](#) (see [34 N.Y.2d at 376](#), [357 N.Y.S.2d 849](#), [314 N.E.2d 413](#) [“specific criminal, vicious or immoral conduct *should* be admitted if the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility”] [emphasis added]), rolling back the People's ability to present relevant evidence that bears directly on defendant's credibility in the name of preserving defendant's “character before the jury” (majority op. at [468](#), [223 N.Y.S.3d at 554](#), [248 N.E.3d at 714](#)). Much like the majority's grave error with respect to the [Molineux](#) testimony, the majority fails to understand the importance of this particular form of credibility evidence in a case where defendant seeks to convince the jury that he had consent and that his accusers are simply lying.<sup>4</sup>

Chief Judge [Wilson](#) and Judges [Barros](#) and [Clark](#) concur. Judge [Singas](#) dissents in an opinion, in which Judges [Garcia](#) and [Cannataro](#) concur. Judge [Cannataro](#) dissents in a separate dissenting opinion, in which Judges [Garcia](#) and [Singas](#) concur. Judges [Troutman](#) and [Halligan](#) took no part.

Order **reversed** and a new trial ordered.

#### All Citations

42 N.Y.3d 439, 248 N.E.3d 691, 223 N.Y.S.3d 531, 2024 N.Y. Slip Op. 02222

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## Footnotes

- 1 All the counts include a component of intent to commit the act charged without the victim's consent (see *People v. Williams*, 81 N.Y.2d 303, 316–317, 598 N.Y.S.2d 167, 614 N.E.2d 730 [1993]; *People v. Worden*, 22 N.Y.3d 982, 984, 980 N.Y.S.2d 317, 3 N.E.3d 654 [2013]). To establish first-degree criminal sexual act and first-degree rape the prosecution must prove beyond a reasonable doubt that a defendant used forcible compulsion, to engage in “oral or anal sexual conduct” (*Penal Law* § 130.50[1]), or “sexual intercourse” (*Penal Law* § 130.35[1]). To establish third-degree rape the prosecution must prove beyond a reasonable doubt that a defendant “engage[d] in sexual intercourse with another person without such person's consent” (*Penal Law* § 130.25[3]). Predatory sexual assault requires the prosecution prove beyond a reasonable doubt, as relevant here, that a defendant committed either first-degree rape or first-degree criminal sexual act and first-degree rape, first-degree criminal sexual act, or aggravated first-degree sexual abuse (see *Penal Law* § 130.70) “against one or more additional persons” (*Penal Law* § 130.95[2]).
- 2 Defendant was tried in California for this conduct against Witness 3, but the jury failed to reach a verdict.
- 3 Defendant also proffered testimony of an expert on human memory but did not call them to the stand after the court limited both proposed experts' testimonies to memory flaws in recovering traumatic events and precluded specific testimony about sexual assault memories.
- 4 The statute was subsequently amended to its current version, which sets a 20–year limitations period or 10 years from when the crime is reported, “whichever is earlier” (*CPL* 30.10[a–2]; L 2019, ch 315, § 2).
- 5 See e.g. AK ST § 12.10.040(a); AZ ST § 13–107(D); CT ST § 54–193(e); Idaho Code Ann § 19–404; ILCS CH 720 § 5/3–7 (a)(1); Ind Code Ann 35–41–4–2(h)(1); IA ST § 802.6(1); MA ST 277 § 63; MI ST 767.24(11); MN ST § 628.26(1); MT ST 45–1–206(1); ND ST 29–04–04; NM ST § 30–1–9; OK ST T 22 § 153; OR ST § 131.145(2)-(3); SD ST § 23A–42–5; TN ST § 40–2–103; WA ST 9A.04.080 (2)(1); WI ST 939.74(3).
- 6 Relying on *People v. Quinto*, 77 AD 3d 76, 907 N.Y.S.2d 59 (2010) and quoting from *People v. Jordan*, defendant claims, as he did before Supreme Court, that that *CPL* 30.10(4)(a) “cannot be read to exclude the period of time during which the police are unaware of the commission of the offense itself” (43 A.D.3d 1076, 1077, 842 N.Y.S.2d 60 [2007]). Although this claim is preserved, the record contains no evidence regarding when the police became aware of the allegations that gave rise to the charged counts, leaving us without “a factual record sufficient to permit appellate review” of the question underlying his claim (see *People v. Kinchen*, 60 N.Y.2d 772, 774, 469 N.Y.S.2d 680, 457 N.E.2d 786 [1983]).
- 7 Even the treatise that Judge Singas quotes comments that “it is possible, *albeit unlikely*, for a complainant to testify truthfully that she did not consent to sexual intercourse and that the defendant raped her, and the defendant to raise an honest defense of mistake’ ” (Singas, J., dissenting op. at 474, 223 N.Y.S.3d at 558, 248 N.E.3d at 718, quoting Richard de Simone & Steven Y. Yurowitz, New York *Criminal Law* § 7:2 [6 West's N.Y. Prac Series, Dec. 2023 update]). Based on complainants' accounts here, any claim by defendant that he made a mistake in the moment would have been implausible and, perhaps for this reason, that was not his defense. In that respect, Judge Singas's reference to this class of cases is irrelevant.

- 8 Judge Singas discusses various academic theories redefining consent. They are not the law. Moreover, as two law journal student notes Judge Singas references observe (see Singas, J., dissenting op. at 481 n. 8, 223 N.Y.S.3d at 563 n. 8, 248 N.E.3d at 723 n. 8), as part of an effort to combat campus sexual assault, the legislature in 2015 imposed on institutions of higher learning a uniform definition of “affirmative consent” which “is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity” that “can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity” but under which “[s]ilence or lack of resistance, in and of itself” is insufficient ([Education Law § 6441\[1\]](#)). This definition is not part of the Penal Law and, indeed, some commentators have highlighted potential constitutional problems that might arise from its importation into the criminal law (see e.g. Aya Gruber, [Consent Confusion](#), 38 *Cardozo L Rev* 415, 449–451 & n 176 [2016] [contending that, when integrated into the criminal law, “strict affirmative consent standards criminalize a significant amount of wanted, consensual sex” that might violate substantive due process under [Lawrence v. Texas](#) (539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 [2003])]).
- 9 Judge Singas correctly acknowledges that “[v]ictims of color are especially disadvantaged, through the intersection of rape and racial mythology, because of harmful stereotypes that ascribe heightened sexuality to these victims” (Singas, J., dissenting op. at 480, 223 N.Y.S.3d at 563, 248 N.E.3d at 723). However, racial and ethnic stereotypes and express and implicit bias also play a significant role in the failures of our criminal legal system, as “men of color ... are still more likely than white men to be falsely accused, falsely arrested[,] ... [a]nd, yes, even falsely convicted” (Hon. Barbara Madsen, [Racial Bias in the Criminal Justice System](#), 47 *Gonz L Rev* 243, 245 [2012]. Erosion of our precedents that limit the introduction of uncharged conduct in the manner our dissenting colleagues suggest would only amplify the risk that biased jurors would justify a vote to convict defendants of color on such uncharged conduct in cases where the evidence supporting the charged conduct is weak—an all too real phenomenon (see Brandon L. Garrett, [Judging Innocence](#), 108 *Colum L Rev* 55, 66 [2008] [observing that a study of the first 200 defendants exonerated by DNA evidence, “73% of innocent rape convicts were Black or Hispanic, while one study indicates that only approximately 37% of all rape convicts are minorities”]; see also Death Penalty Information Center, *DPIC Special Report: The Innocence Epidemic* [Feb. 18, 2021] at 19, available at <https://dpic-cdn.org/production/documents/pdf/The-Innocence-Epidemic.pdf?dm=1683576587> [last accessed Mar. 28, 2024] [study concluding that “63.8% of wrongfully convicted death-row exonerees are people of color, 53.5% of whom are Black”]). Hollowing out the [Molineux](#) rule will not end systemic racism, but it may very well exacerbate societal injustices replicated within our courts.
- 10 Judge Singas misconstrues our acknowledgment of this [Molineux](#)-compliant technique for combating rape myths as a “conclusion that the [Molineux](#) evidence was not necessary” and that it was “cumulative” in light of this “other evidence to dispel rape mythology” (Singas, J., dissenting op. at 486–487, 223 N.Y.S.3d at 567, 248 N.E.3d at 727). At no point does our analysis turn the admissibility of the [Molineux](#) Witnesses’ testimonies on the availability of other evidence to accomplish this same end. Rather, we hold that their testimonies served no non-propensity purpose as a matter of law. Incidentally, the [Molineux](#) Witnesses did not dispel rape myths anyway, given that they *rejected* defendant’s advances.
- 11 The remainder of the [Sandoval](#) ruling was a proper exercise of the court’s discretion.
- 12 Because we are ordering a new trial, we do not address defendant’s claim that the trial court violated the Federal and State Constitutions when it declined, first, to discharge a prospective juror and then again once the juror was seated.

- 1 As to third-degree rape, in addition to forcible compulsion, the People may prove a lack of consent under a different subsection by demonstrating that “the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor’s situation would have understood such person’s words and acts as an expression of lack of consent to such act under all the circumstances” (Penal Law § 130.05[2][d]).
- 2 “‘Forcible compulsion’ means to compel by either” the “use of physical force” or “a threat, express or implied, which places a person in fear of immediate death or physical injury to [themselves] or another person, or in fear that [they] or another person will immediately be kidnapped” (Penal Law § 130.00[8][a], [b]).
- 3 The difficulties posed to prosecutions of acquaintance sexual assault are reflected in the lower conviction rates of these crimes as compared to conviction rates of stranger sexual assault (see Kristen McCowan et al., *A Rape Myth in Court: The Impact of Victim–Defendant Relationship on Sexual Assault Case Outcomes*, 26 Berkeley J Crim L 155, 174 [2021] [“ample research suggests that jurors are far more likely to convict in stranger rape cases than in acquaintance rape cases” (emphasis omitted)]; Claire R. Gravelin et al., *Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors*, 9 Frontiers Psych, No. 2422 at 2 [2019] [“acquaintance rape cases have a lower probability of conviction in the courts than those that fit with a stranger rape script”]).
- 4 Rape myths are the “prescriptive beliefs about the scope, causes, context and consequences of sexual aggression that serve to deny, downplay[,] or justify sexually aggressive [behavior] of (usually) men against (usually) women” (see Joseph Briggs & Russ Scott, ‘Rape Myths’ and a ‘Reasonable Belief’ of Consent, 27 Psychiatry Psych & L 750, 765 [2020]; see also Alexa Sardina & Alissa R. Ackerman, *Restorative Justice in Cases of Sexual Harm*, 25 CUNY L Rev 1, 7–8 [2022]).
- 5 Even that credibility determination hinges on factors beyond whether the victim has demonstrated herself to be a truthful witness, for the perception of a victim’s credibility is influenced by antiquated expectations of how victims should act, both during the crime and at trial (see generally Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences*, 167 U Pa L Rev 399 [2019]; Louise Ellison & Vanessa E. Munro, *Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility*, 49 Brit J Criminology 202, 211 [2009]).
- 6 Rape myth usage is a problem that extends beyond jurors, as one recent study found that “[r]ape myths do appear to be a common and widely used discourse in sexual assault cases” among American state appellate judges (see Holly Boux, *“If You Wouldn’t Have Been There That Night, None of This Would Have Happened to You”*: Rape Myth Usage in the American Judiciary, 40 Women’s Rts L Rep 237, 259 [2019]).
- 7 Notably, “the impact of prejudicial attitudes and misconceptions surrounding rape have been so well documented within past research, that judges in England and Wales now routinely instruct jurors in rape trials to avoid drawing upon such myths and extra-legal influence [while] judging the case” (*Jury Decision–Making in Rape Trials* at 102).
- 8 The growing movement toward an affirmative consent standard, or a “yes means yes” standard, reflects the shortcomings of a system which requires a victim to proactively express a lack of consent (see generally Eric Sandoval, *The Case for an Affirmative Consent Provision in Rape Law*, 94 ND L Rev 455 [2019]; Michelle Lewis, Note, *University Adjudication of Sexual Assault: How Affirmative Consent Can Help Close the Gap*, 23 Sw J Intl L 351 [2017]; Chandler Delamater, Note, *What “Yes Means Yes” Means for New York Schools: The Positive Effects of New York’s Efforts to Combat Campus Sexual Assault Through Affirmative Consent*, 79 Alb L Rev 591 [2016]). Recognizing that the public’s varied opinions regarding the method and manner in which victims must express their lack of consent clouds these issues, the legislature enacted a requirement

that New York colleges and universities adopt an affirmative consent standard in their codes of conduct ([Education Law § 6441\[1\]](#)). If the majority's unrealistic view of how consent plays out in intimate settings were true, this legislative action and other ongoing conversations around consent standards would be largely unnecessary.

- 9 The impact of these rape myths on whether a victim receives justice goes beyond what happens in the courtroom and affects a victim's decision of whether to report the crime in the first instance (see Jessica Woodhams et al., *Behavior Displayed by Female Victims During Rapes Committed by Lone and Multiple Perpetrators*, 18 Psych Pub Poly & L 415, 418 [2012]; Kathleen Daly & Brigitte Bouhours, *Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries*, 39 Crime & Just 565, 572–573 [2010]).
- 1 Defense counsel argued in summation that, “even if we look at her testimony and her testimony alone about what happened there that night or that day. Even if you believe every word she says about what happened in that hotel room, it does not rise to the level of a rape.”
- 2 Even if the testimony could be deemed inadmissible on the issue of forcible compulsion as to complaining witness A, it was still admissible as to complaining witness B, as well as to defendant's knowledge of complaining witness A's lack of consent. Defendant failed to preserve any argument with respect to the “imprecision of the court's limiting instructions” as to complaining witness A (see [Ingram](#), 71 N.Y.2d at 478 n 1, 527 N.Y.S.2d 363, 522 N.E.2d 439; [People v. Cohen](#), 5 N.Y.2d 282, 290, 184 N.Y.S.2d 340, 157 N.E.2d 499 [1959]).
- 3 The majority also appears to quietly endorse a new requirement that material admitted under [Sandoval](#) be limited to acts that amount to criminal conduct, arguing that “[d]efendant had no criminal history” and that the admitted acts included those “not criminal in nature” (majority op. at 468, 223 N.Y.S.3d at 554, 248 N.E.3d at 714). This would amount to a significant and novel limitation on [Sandoval](#), one which the language of [Sandoval](#) itself prohibits (see [Sandoval](#), 34 N.Y.2d at 373, 357 N.Y.S.2d 849, 314 N.E.2d 413; see also [People v. Kennedy](#), 47 N.Y.2d 196, 205, 417 N.Y.S.2d 452, 391 N.E.2d 288 [1979] [[Sandoval](#) considerations “are to be applied to cross-examination into alleged immoral, vicious, or criminal acts, regardless of whether those acts resulted in convictions”])).
- 4 I agree that defendant's remaining arguments are without merit for the reasons stated by the Appellate Division.

Court of Appeals of New York

April 29, 1974, Argued ; June 19, 1974, Decided

No Number in Original

**Reporter**

34 N.Y.2d 371 \*; 314 N.E.2d 413 \*\*; 357 N.Y.S.2d 849 \*\*\*; 1974 N.Y. LEXIS 1478 \*\*\*\*

The People of the State of New York, Respondent, v.  
Augustin Sandoval, Appellant

**Prior History:** [\*\*\*\*1] *People v. Sandoval*, 40 A D 2d 952, affirmed.

Appeal, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 27, 1972, which affirmed a judgment of the Supreme Court (Aaron E. Koota, J.), rendered in Kings County upon a verdict convicting defendant of murder.

**Disposition:** Order affirmed.

**Core Terms**

cross-examination, vicious, prior conviction, credibility, trial court, impeach, immoral act, prejudicial, issue of credibility, witness stand, veracity, commission of a crime, impeach testimony, probative value, probative worth, honesty

**Case Summary**

**Procedural Posture**

Defendant appealed an order from the Appellate Division of the Supreme Court in the Second Judicial Department (New York), which affirmed his conviction for murder and a prospective ruling that limited the prosecution's impeachment, in cross-examination of defendant, to prior specific criminal, vicious, and immoral acts.

**Overview**

Defendant was indicated for common law murder. Immediately prior to jury selection, defense counsel requested that the trial court, in its discretion, prohibit the use of prior crimes or convictions to impeach

defendant's credibility if he decided to testify. After considering defendant's various prior charges and convictions, the trial court ruled on which prior convictions could be used for impeachment as well as those requiring exclusion. Defendant was convicted, and he appealed, asserting abuse of discretion in those determinations. The court found that defendant's contentions lacked merit. Rather, the court commended the trial court for its handling of defense counsel's request and for the manner in which it derived the prospective rulings, carefully balancing the evidence's probative value with the danger of prejudice presented to defendant. Recognizing a broadening of discovery in criminal procedure, the court set some boundaries to the scope of previously permitted cross-examination.

**Outcome**

The appellate division's order affirming defendant's murder conviction was affirmed; prospective rulings limiting the prosecutor's reference to defendant's prior specific criminal, vicious, and immoral acts during cross-examination impeachment was proper because it recognized broadened discovery in criminal procedure and growing awareness there might be undue prejudice to defendants from unnecessary, immaterial development of previous misconduct.

**LexisNexis® Headnotes**

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

Criminal Law & Procedure > Trials > Witnesses > Criminal Records

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > General Overview

Evidence > ... > Credibility of Witnesses > Impeachment > Prior Conduct

█ The introduction, by way of contradiction, of independent proof of a prior conviction in the event of the denial of such conviction by the defendant or any other witness is authorized pursuant to █. That statute is not addressed to questions of when and to what extent a defendant may be cross-examined concerning prior convictions.

Civil Procedure > Judicial Officers > Judges > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Motions in Limine

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

Criminal Law & Procedure > Trials > Judicial Discretion

Evidence > ... > Impeachment > Convictions & Other Criminal Process > General Overview

Evidence > ... > Credibility of Witnesses > Impeachment > Prior Conduct

█ The nature and extent of cross-examination have always been subject to the sound discretion of the trial judge. In exercise of that discretion, a trial judge may make an advance ruling as to the use by the prosecutor of prior convictions or proof of the prior commission of specific criminal, vicious or immoral acts for the purpose of impeaching a defendant's credibility.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > ... > Credibility of Witnesses > Impeachment > Prior Conduct

█ The rules governing the admissibility of evidence of other crimes represent a balance between the probative value of such proof, and the danger of prejudice which it presents to an accused. When evidence of other crimes has no purpose other than to show that a defendant is of a criminal bent or character and thus likely to have committed the crime charged, it should be excluded.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Motions in Limine

Evidence > ... > Credibility of Witnesses > Impeachment > Prior Conduct

Evidence > ... > Examination > Cross-Examinations > General Overview

█ The particular limitations of proof must always depend on the individual facts and circumstances of each case. Such determination will best be made by the trial court. The procedural vehicle therefor would be a motion, accompanied in rare instances, in the discretion of the judge to whom the motion is made, by an appropriate evidentiary hearing. The defendant should be free, but not subject to compulsion, to give relevant and material proof, in affidavit form or in person, and, of course, such proof may never be introduced on trial or otherwise used against him in the pending case. In most cases, but not necessarily in all cases, a pretrial motion is preferable. Thereby, the defendant with definitive advance knowledge of the scope of cross-examination as to prior conduct to which he will be subjected, can decide whether to take the witness stand. Revelation of the impeachment testimony and announcement of the trial court's ruling in advance of trial are consistent with the objectives today of broad pretrial discovery and disclosure. The sensitive, informed reconciliation of the interests of the People and the rights of the defendant must here as in other instances, be committed principally to the reviewable discretion of the trial court, to be exercised in the light of all the facts and relevant circumstances disclosed in the given case.

Evidence > ... > Credibility of Witnesses > Impeachment > Prior Conduct

█ Evidence of prior criminal, vicious or immoral conduct will always be detrimental to the defendant. Similarly, it does not advance analysis to note that such evidence will have a propensity to influence the jury or the court; that objective and purpose attend the introduction of all evidence. The issue to be resolved has a double aspect in determining whether the defendant will be deprived of a fair trial. Will the testimony to be elicited in cross-examination have a disproportionate and improper impact on the triers of fact? Will the apprehension of its introduction undesirably deter the defendant from taking the stand and thereby deny the jury or court significant material evidence?

Evidence > ... > Credibility of Witnesses > Impeachment > Prior Conduct

Evidence of prior specific criminal, vicious or immoral conduct should be admitted if the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility. Lapse of time, however, will affect the materiality if not the relevance of previous conduct. The commission of an act of impulsive violence, particularly if remote in time, will seldom have any logical bearing on the defendant's credibility, veracity or honesty at the time of trial. Further, proof of such a crime may be highly prejudicial and inadmissible when it has no purpose other than to show that a defendant is of a criminal bent or character and thus likely to have committed the crime charged.

Evidence > Admissibility > Conduct Evidence > Habit & Routine Practices

Evidence > ... > Credibility of Witnesses > Impeachment > Prior Conduct

To the extent that the prior commission of a particular crime of calculated violence or of specified vicious or immoral acts significantly reveals a willingness or disposition on the part of the particular defendant voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand. A demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others goes to the heart of honesty and integrity. On the other hand, crimes or conduct occasioned by addiction or uncontrollable habit, as with alcohol or drugs, unless independently admissible to prove an element of the crime charged, may have lesser probative value as to lack of in-court veracity.

Evidence > ... > Credibility of Witnesses > Impeachment > Prior Conduct

Commission of perjury or other crimes or acts of individual dishonesty, or untrustworthiness such as offenses involving theft or fraud, bribery, or acts of deceit, cheating, breach of trust, will usually have a very material relevance for purposes of impeaching a criminal defendant, whenever committed. By contrast, a prosecutor should rarely, if ever, be permitted to question a criminal defendant as to prior traffic violations.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

Criminal Law & Procedure > Trials > Witnesses > Impeachment

In weighing prejudice to a defendant's right to a fair trial, an important consideration may be the effect on the validity of the fact-finding process if the defendant does not testify out of fear of the impact of the impeachment testimony for reasons other than its direct effect on his credibility - as where the defendant would be the only available source of material testimony in support of his defense.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Motions in Limine

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Criminal Law & Procedure > Trials > Judicial Discretion

Criminal Law & Procedure > Trials > Witnesses > Criminal Records

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > General Overview

Evidence > Inferences & Presumptions > General Overview

In cases where a criminal defendant seeks to limit the use of prior convictions by a prosecutor for purposes of impeachment, the defendant shall inform the court of prior convictions and misconduct which might unfairly affect him as a witness in his own behalf. The trial court in its discretion and in the interests of justice shall then determine whether and to what extent the particular defendant has met his burden, and it is his, of demonstrating that the prejudicial effect of the admission of evidence thereof for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion.

## Headnotes/Summary

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### Headnotes

**Crimes -- proof of prior convictions -- in exercise of sound discretion Trial Judge may make advance**

**ruling as to use by prosecution of prior convictions or proof of prior commission of specific criminal, vicious or immoral acts to impeach defendant's credibility; procedural vehicle should be motion and in rare instances hearing -- while precise guidelines cannot be laid down, general principles stated.**

1. In the exercise of sound discretion a Trial Judge may make an advance ruling as to the use by the prosecutor of prior convictions or proof of the prior commission of specific criminal, vicious or immoral acts to impeach a defendant's credibility. A balance must be struck between the probative worth of evidence of such acts on the issue of credibility and the risk of unfair [\*\*\*\*2] prejudice to a defendant, measured by the impact of such evidence if admitted after his testimony and by the effect its probable introduction may have in discouraging him from taking the stand on his own behalf. The procedural vehicle should be a motion, accompanied in rare instances in the discretion of the Judge, by an evidentiary hearing. The defendant should be free to give relevant and material proof, by affidavit or in person, and such proof may never be introduced on trial or otherwise used against him in the pending case.

2. While precise guidelines cannot be laid down, from the standpoint of the prosecution the evidence should be admitted if it will have material probative value on the issue of defendant's credibility, veracity or honesty on the witness stand. From the standpoint of the defendant it should not be admitted unless it will have such probative worth or, even though it has such worth, if to lay it before the jury or court would otherwise be so prejudicial as to call for its exclusion. Lapse of time will affect the materiality if not the relevance of previous conduct. The trial court in its discretion and in the interests of justice should determine whether [\*\*\*\*3] the defendant has met his burden of demonstrating that the prejudicial effect of the admission of such evidence would so outweigh the probative worth on the issue of credibility as to warrant its exclusion.

3. [REDACTED] (subd. 1), while relevant, is not addressed to questions of when and to what extent a defendant may be examined concerning prior convictions.

**Counsel:** *Henry J. Boitel and Thomas J. Todarelli* for appellant. I. Defendant was deprived of a fair trial by the court's improper limitation of defendant's right to impeach the character and perception of the drug addict witnesses, and by the court's charge to the jury in this regard. (*People v. Lubrien, 19 A D 2d 641.*) II. Defendant was deprived of a fair trial by the prosecutor's

improper and unfair attempts to impeach the only defense witness. III. Defendant was deprived of a fair trial by various instances of prejudicial comments by the prosecutor. IV. Defendant was deprived of a fair trial when the court required that defense motions at the end of the People's case and at the end of the entire case be made in the presence and hearing of the jury. V. Defendant was deprived of a fair trial by the denial [\*\*\*\*4] of his motion to foreclose the prosecution from impeaching him by reference to certain prior convictions if he decided to testify in his own behalf. ([REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].)

*Eugene Gold, District Attorney (Robert C. Bernius and Helman R. Brook of counsel),* for respondent. I. Appellant was allowed sufficient latitude to cross-examine the prosecution witnesses concerning their use of narcotics. ([REDACTED]; [REDACTED]; [REDACTED]; *People v. Lubrien, 19 A D 2d 641.*) II. The cross-examination of appellant's witness was not improper. ([REDACTED]; [REDACTED].) III. Appellant was not prejudiced by comments made by the prosecutor during trial and in summation. Moreover, error in the summation was not preserved for appeal. ([REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].) IV. The procedure followed by the trial court with respect to appellant's motions at the end of the People's case and at the conclusion of the entire case was proper. ([REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].) V. The trial court's decision to permit cross-examination of appellant as to two prior convictions was not an abuse of discretion. ([REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].)

**Judges:** Jones, J. Chief Judge Breitel and Judges Jasen, Gabrielli, Wachtler and Stevens concur; Judge Rabin taking no part.

**Opinion by:** JONES

## Opinion

[\*373] [\*\*415] [\*\*\*852] We affirm the order of the Appellate Division. In doing so we take the occasion to approve and comment on the procedure made available to defendant in this case to obtain a prospective ruling limiting the prosecutor's reference, in cross-examination [\*\*\*\*6] impeachment of defendant, to prior specific criminal, vicious and immoral acts.

This defendant was indicated for common-law murder. Immediately prior to selection of the jury, counsel for defendant made a motion to the trial court requesting it, in its discretion, to prohibit the use of prior crimes or convictions to impeach the credibility of defendant if he decided to testify. The trial court then considered the various prior charges against defendant and the crimes of which defendant had been convicted to the extent they were then made known to the court. The trial court ruled that the District Attorney could use a 1964 conviction of disorderly conduct and a 1965 conviction of assault in the third degree and could inquire as to the underlying facts with respect to either. At the same time the court ruled that he would not permit use of a 1960 charge of contributing to the delinquency of a minor, 1963 and 1965 convictions of driving while intoxicated, a 1965 arrest for felonious assault resulting in dismissal, a 1965 traffic violation, and a 1967 charge of gambling. We agree with the Appellate Division that there was no abuse of discretion in these rulings. We find no merit [\*\*\*\*7] in the other contentions advanced on behalf of defendant, and accordingly we affirm his conviction.

It is appropriate, however, to consider the procedural and substantive rights of a defendant to obtain a prospective ruling as to the permissible scope of his cross-examination concerning prior commission of specific criminal, vicious and immoral acts, on the basis of which, *inter alia*, he will decide whether to take the witness stand in his own defense.<sup>1</sup>

<sup>1</sup>We do not refer here to the extent to which independent, direct proof of previous criminal, vicious or immoral acts on the part of the defendant may be admissible either to rebut character evidence introduced by the defendant or to establish material elements of the crime charged within the holdings of [redacted] and its progeny. Such issues are distinct and involve considerations and factors with which we are now concerned. We only observe, as we indicated in [redacted] that

[\*\*\*\*8] [\*374] [\*\*\*853] Initially we note that [redacted] (subd. 1), while relevant to the subject under consideration, now merely authorizes [redacted] the introduction, by way of contradiction, of independent proof of a [\*\*416] prior conviction in the event of the denial of such conviction by the defendant or any other witness. It "is not addressed to questions of when and to what extent a defendant may be cross-examined concerning prior convictions" (Denzer, Practice Commentary, McKinney's Cons. Laws of N. Y., Book 11A, [redacted], p. 256). Section 2444 of the former Penal Law (which was in effect repealed by the Revised Penal Law effective September 1, 1967), by contrast was addressed to the scope of cross-examination as well as of independent proof and embraced the conviction of any crime but explicitly excluded conviction for a traffic infraction. (Cf. [redacted].)

[redacted] The nature and extent of cross-examination have always been subject to the sound discretion of the Trial Judge ([redacted], cert. den. 396 U.S. 846). We now hold that in exercise of that discretion a Trial Judge may, as the Trial Judge in this case did, make [\*\*\*\*9] an advance ruling as to the use by the prosecutor of prior convictions or proof of the prior commission of specific criminal, vicious or immoral acts for the purpose of impeaching a defendant's credibility (cf. [redacted]; see [redacted]; [redacted]; [redacted], cert. den. 394 U.S. 947; [redacted]; [redacted]).<sup>2</sup>

[\*375] As we wrote in *People v. [\*\*\*\*10] Schwartzman* ([redacted]): [redacted] "The rules

procedural orderliness would generally mandate that *Molineux* evidence be adduced by the prosecution during its direct case (pp. 249-250). The procedures we discuss below have nothing to do with such evidence or with the proffer of inquiry or evidence with respect to such acts admissible under the rule of the *Molineux* and *Schwartzman* cases even if precluded for the more limited purpose of attacking credibility.

<sup>2</sup>We note that the so-called *Luck* doctrine has now been replaced by a statute in the District of Columbia ([redacted] [Supp. IV, 1971, pp. 276-277]). For the discretionary determination by the Trial Judge there has been substituted a categorical rule which, subject to a 10-year exclusion for remoteness, allows impeachment by any felony conviction, but limits impeachment by misdemeanors to crimes involving dishonesty or false statement.

governing the admissibility of evidence of other crimes represent a balance between the probative value of such proof and the danger of prejudice which it presents to an accused. When evidence of other crimes has no purpose other than to show that a defendant is of a criminal bent [\*\*\*854] or character and thus likely to have committed the crime charged, it should be excluded." Thus, a balance must here be struck between the probative worth of evidence of prior specific criminal, vicious or immoral acts on the issue of the defendant's credibility on the one hand, and on the other the risk of unfair prejudice to the defendant, measured both by the impact of such evidence if it is admitted after his testimony and by the effect its probable introduction may have in discouraging him from taking the stand on his own behalf.

█ The particular limitations of proof must always depend on the individual facts and circumstances of each case. Such determination will best be made by the trial court. The procedural vehicle therefor would be a motion, accompanied in rare instances, in the discretion of the Judge to whom the motion is made, by [\*\*\*\*11] an appropriate evidentiary hearing. The defendant should be free (but not subject to compulsion) to give relevant and material proof, in affidavit form or in person, and, of course, such proof may never be introduced on trial or otherwise used against him in the pending case.

In most cases, as in this case, but not necessarily in all cases, a pretrial motion will be preferable. (Cf. █.) Thereby, the defendant with definitive advance knowledge of the scope of cross-examination as to prior conduct to which he will be [\*\*417] subjected, can decide whether to take the witness stand. Revelation of the impeachment testimony and announcement of the trial court's ruling in advance of trial are consistent with the objectives today of broad pretrial discovery and disclosure.

The sensitive, informed reconciliation of the interests of the People and the rights of the defendant must here as in other instances, be committed principally to the reviewable discretion of the trial court, to be exercised in the light of all the facts and relevant circumstances disclosed in the given case. We do not suggest that precise guidelines can be laid down. [\*\*\*\*12] A [\*376] frame of reference may be described, however, within which the responsibility of *ad hoc* discretion should be exercised. Such frame of reference should be understood as illustrative and suggestive rather than categorical or mandatory.

In the fact-finding process, the function, in cross-examination, of evidence of a defendant's prior criminal, vicious or immoral acts (unless such evidence would be independently admissible to prove an element of the crime charged) is solely to impeach his credibility as a witness (█; Richardson, Evidence [10th ed.], § 498). From the standpoint of the prosecution, then, the evidence should be admitted if it will have material probative value on the issue of defendant's credibility, veracity or honesty on the witness stand. From the standpoint of the defendant it should [\*\*\*855] not be admitted unless it will have such probative worth, or, even though it has such worth, if to lay it before the jury or court would otherwise be so highly prejudicial as to call for its exclusion. The standard -- whether the prejudicial effect of impeachment testimony far outweighs the probative worth of the [\*\*\*\*13] evidence on the issue of credibility -- is easy of articulation but troublesome in many cases of application.

At the threshold it must be recognized as inevitable, and thus not determinative, that █ evidence of prior criminal, vicious or immoral conduct will always be detrimental to the defendant. Similarly, it does not advance analysis to note that such evidence will have a propensity to influence the jury or the court; that objective and purpose attend the introduction of all evidence. The issue to be resolved has a double aspect in determining whether the defendant will be deprived of a fair trial. Will the testimony to be elicited in cross-examination have a disproportionate and improper impact on the triers of fact? Will the apprehension of its introduction undesirably deter the defendant from taking the stand and thereby deny the jury or court significant material evidence?

█ Evidence of prior specific criminal, vicious or immoral conduct should be admitted if the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility. Lapse of time, however, will affect the materiality if not the relevance of previous conduct. [\*\*\*\*14] The commission of an act of impulsive violence, particularly [\*377] if remote in time, will seldom have any logical bearing on the defendant's credibility, veracity or honesty at the time of trial. Further, proof of such a crime may be highly prejudicial and inadmissible when it "has no purpose other than to show that a defendant is of a criminal bent or character and thus likely to have committed the crime charged" (█). █ To the extent, however, that the prior commission of a particular crime of calculated

violence or of specified vicious or immoral acts significantly revealed a willingness or disposition on the part of the particular defendant voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand. A demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others goes to the heart of honesty [\*\*418] and integrity. On the other hand, crimes or conduct occasioned by addiction or uncontrollable habit, as with [\*\*\*\*15] alcohol or drugs (again, unless independently admissible to prove an element of the crime charged, see [REDACTED]), may have lesser [\*\*\*856] probative value as to lack of in-court veracity (cf. [REDACTED], *supra*).

[REDACTED] Commission of perjury or other crimes or acts of individual dishonesty, or untrustworthiness (e.g., offenses involving theft or fraud, bribery, or acts of deceit, cheating, breach of trust) will usually have a very material relevance, whenever committed. By contrast, questions as to traffic violations should rarely, if ever, be permitted. (Compare former Penal Law, § 2444 with [REDACTED], [REDACTED], and new [REDACTED], 3.)

From another aspect, cross-examination with respect to crimes or conduct similar to that of which the defendant is presently charged may be highly prejudicial, in view of the risk, despite the most clear and forceful limiting instructions to the contrary, that the evidence will be taken as some proof of the commission of the crime charged rather than be reserved solely to the issue of credibility. Thus, in the prosecution of drug charges, interrogation as to prior [\*\*\*\*16] narcotics convictions (unless proof thereof is independently admissible) may present a special risk of impermissible prejudice because of the widely [\*378] accepted belief that persons previously convicted of narcotics offenses are likely to be habitual offenders ([REDACTED]). On the other hand, proof of prior convictions of perjury or other crimes of individual dishonesty should usually be admitted on trial of another similar charge, notwithstanding the risk of possible prejudice, because the very issue on which the offer is made is that of the veracity of the defendant as a witness in the case.

[REDACTED] In weighing prejudice to the defendant's right to a fair trial, an important consideration may be the effect on the validity of the fact-finding process if the defendant

does not testify out of fear of the impact of the impeachment testimony for reasons other than its direct effect on his credibility -- as where the defendant would be the only available source of material testimony in support of his defense.

Obviously there are other relevant factors and considerations, to be identified and refined in the vitality and sagacity of the common-law [\*\*\*\*17] process. In each case [REDACTED] the defendant shall inform the court of prior convictions and misconduct which might unfairly affect him as a witness in his own behalf. The trial court in its discretion and in the interests of justice shall then determine whether and to what extent the particular defendant has met his burden, and it is his, of demonstrating that the prejudicial effect of the admission of evidence thereof for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion.

[\*\*\*857] This case reflects a recognition of the principles underlying broadened discovery in criminal procedure and a growing awareness that there may be undue prejudice to a defendant from unnecessary and immaterial development of previous misconduct. To that extent therefore it sets some boundaries to the scope of cross-examination permitted in the past (cf. [REDACTED], *supra*).

Order affirmed.

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1. [REDACTED]

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Court of Appeals of New York

June 17, 1901, Argued ; October 15, 1901, Decided

No Number in Original

**Reporter**

168 N.Y. 264 \*; 61 N.E. 286 \*\*; 1901 N.Y. LEXIS 879 \*\*\*

The People of the State of New York, Respondent, v.  
Roland B. Molineux, Appellant

**Prior History:** [\*\*\*1] Appeal from a judgment of the Court of General Sessions of the Peace in and for the city and county of New York, rendered February 16, 1900, upon a verdict convicting the defendant of the crime of murder in the first degree.

**Disposition:** Judgment of conviction reversed and new trial ordered.

**Core Terms**

poison, box, handwrite, kill, murder, genuineness, indictment, package, powder, mail, bottle, commission of a crime, general rule, inquest, mercury, guilt, cyanide, tend to prove, letter box, arsenic, seltzer, bromo, died, rend, common law, innocence, charged crime, envelope, dose, extraneous

**Case Summary**

**Procedural Posture**

Defendant was accused of the murder of a victim who had ingested cyanide of mercury that defendant had allegedly mailed to another person. Evidence regarding a previous crime allegedly committed by defendant was admitted at trial, and the Court of General Sessions of the Peace in and for the City and County of New York convicted defendant, who appealed.

**Overview**

The primary question on appeal was whether evidence was admissible about the killing of one of defendant's alleged prior victims. The State claimed that there was a connection between the two crimes so as to justify proof of the former in support of the latter. Defendant disputed the claim and urged that the trial court erred in permitting comparison of the handwriting on the poison

package mailed to the intended victim with exemplars supplied by defendant. The court held that none of the evidence tending to prove the poisoning of the first victim was relevant or competent to prove the murder of the victim in the instant case. That the two crimes were parallel in means employed did not identify defendant as the murderer of the second victim. There was no legal connection between the two cases. The trial court did not err in receiving into evidence handwriting exemplars for comparison with a handwritten address on the package delivered to defendant's intended victim. Defendant had the legal right to refuse to write the exemplars, defendant instead acceded to the request, and there was no ground upon which the writings produced could be excluded.

**Outcome**

The judgment of conviction was reversed because the trial court erred in admitting the evidence concerning the killing of the alleged prior victim. The cause was remanded for a new trial.

**LexisNexis® Headnotes**

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview  
Evidence > Rule Application & Interpretation

■ The State cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection  
Evidence > Relevance > Preservation of Relevant

168 N.Y. 264, \*264; 61 N.E. 286, \*\*286; 1901 N.Y. LEXIS 879, \*\*\*1

Evidence &gt; Exclusion &amp; Preservation by Prosecutors

Evidence &gt; Admissibility &gt; Conduct Evidence &gt; Prior Acts, Crimes &amp; Wrongs

When a man is put upon trial for one offense he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded. The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one.

Evidence &gt; Admissibility &gt; Conduct Evidence &gt; Prior Acts, Crimes &amp; Wrongs

Evidence &gt; ... &gt; Credibility of Witnesses &gt; Impeachment &gt; Bias, Motive &amp; Prejudice

Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.

Evidence &gt; Admissibility &gt; Conduct Evidence &gt; Prior Acts, Crimes &amp; Wrongs

In every criminal trial when proof of motive is an essential ingredient of the evidence against a defendant, the motive to be established is the one which induced the commission of the crime charged.

Criminal Law &amp; Procedure &gt; ... &gt; Fraud &gt; False Pretenses &gt; Elements

Criminal Law &amp; Procedure &gt; ... &gt; Stolen Property &gt; Receiving Stolen Property &gt; Elements

Criminal Law &amp; Procedure &gt; Criminal Offenses &gt; Acts &amp; Mental States &gt; General Overview

Criminal Law &amp; Procedure &gt; Criminal Offenses &gt; Acts &amp; Mental States &gt; Actus Reus

Criminal Law &amp; Procedure &gt; ... &gt; Acts &amp; Mental States &gt; Mens Rea &gt; General Intent

Criminal Law &amp; Procedure &gt; ... &gt; Acts &amp; Mental States &gt; Mens Rea &gt; Knowledge

Criminal Law &amp; Procedure &gt; ... &gt; Acts &amp; Mental States &gt; Mens Rea &gt; Willfulness

Evidence &gt; Admissibility &gt; Conduct Evidence &gt; Prior Acts, Crimes &amp; Wrongs

Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. When a crime is clearly proven to have been committed by a person charged therewith, the question of motive may be of little or no importance. But criminal intent is always essential to the commission of crime. There are cases in which the intent may be inferred from the nature of the act. There are others where willful intent or guilty knowledge must be proved before a conviction can be had. Intent is of the essence of the crime, and previous offenses of a similar character by the same person may be proved to show intent.

Criminal Law &amp; Procedure &gt; ... &gt; Stolen Property &gt; Receiving Stolen Property &gt; General Overview

Criminal Law &amp; Procedure &gt; ... &gt; Stolen Property &gt; Receiving Stolen Property &gt; Elements

Criminal Law &amp; Procedure &gt; Criminal Offenses &gt; Acts &amp; Mental States &gt; General Overview

Criminal Law &amp; Procedure &gt; Criminal Offenses &gt; Acts &amp; Mental States &gt; Actus Reus

Criminal Law &amp; Procedure &gt; ... &gt; Acts &amp; Mental States &gt; Mens Rea &gt; Knowledge

Evidence &gt; Admissibility &gt; Conduct Evidence &gt; Prior Acts, Crimes &amp; Wrongs

In a case where the defendant is charged with having received stolen property, guilty knowledge is the gravamen of the offense and scienter may be proven by other previous similar acts.

Criminal Law &amp; Procedure &gt; ... &gt; Homicide, Manslaughter &amp; Murder &gt; Murder &gt; General Overview

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > Actus Reus

█ If A undertakes to kill B, and in the attempt kills C, the crime committed is no less a murder than it would have been if B had been killed.

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

█ While the early English cases have gone to great lengths in the admission of testimony tending to establish other crimes than the one charged, it is clear that the only two theories upon which the rulings therein have been attempted to be, or could be defended are, first, that the killing may have been accidental, or, second, that the cause of death was in doubt.

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

█ To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both.

Criminal Law & Procedure > Criminal Offenses > General Overview

Evidence > Relevance > General Overview

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

█ No separate and isolated crime can be given in evidence. In order that one crime may be relevant as evidence of another, the two must be connected as parts of a general and composite scheme or plan. Thus the movements of the accused prior to the instant of the crime are always relevant to show that he was making preparations to commit it. Generally, when several similar crimes occur near each other, either in time or locality, it is relevant to show that the accused, being present at one of them, was present at the other if the crimes seem to be connected. Some connection

between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received.

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

█ Where one crime is committed to prepare the way for another, and the commission of the second crime is made to depend upon the perpetration of the first, the two become connected and related transactions, and the proof of the commission of the first offense becomes relevant to show the motive for the perpetration of the second.

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

█ If the evidence be so dubious that the judge does not clearly perceive the connection between the prior crime and the one for which the defendant was indicted, the benefit of the doubt should be given to the defendant instead of suffering the minds of the jurors to be prejudiced by an independent fact carrying with it no proper evidence of the particular guilt. A mere official charge of crime puts the accused upon his defense. His history is an open book, every page of which may be read in evidence by the prosecution.

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

█ When the evidence of an extraneous crime tends to identify the person who committed it as the same person who committed the crime charged in the indictment, it is admissible.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Presumption of Innocence

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

168 N.Y. 264, \*264; 61 N.E. 286, \*\*286; 1901 N.Y. LEXIS 879, \*\*\*1

Evidence > Admissibility > Conduct Evidence > Prior Acts,  
Crimes & Wrongs

█ The very fact that it is much easier to believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime proves the dangerous tendency of such evidence to convict, not upon the evidence of the crime charged, but upon the super-added evidence of the previous crime. Hence United States courts have been proverbially careful to subject such evidence to the most rigid scrutiny, and have invariably excluded it in cases where its relevancy and competency was not clearly shown.

Evidence > Admissibility > Conduct Evidence > Prior Acts,  
Crimes & Wrongs

█ When evidence of an extraneous crime is admissible to prove the crime for which a defendant is on trial, it is not necessary to prove every fact and circumstance relating to the extraneous crime that would be essential to sustain a conviction thereof. But it cannot require serious argument to show that such evidence, to be admissible, must be relevant and competent to the issue on trial.

Evidence > Admissibility > Scientific  
Evidence > Handwriting

█ Comparison of handwriting is competent only in a case in which the disputed writing is the subject-matter of the issue to be tried, and never when it is only evidentiary; in other words, that comparison may be made when the disputed writing is the fact in issue, but not when it is merely a fact relevant to the issue.

Evidence > Relevance > Relevant Evidence

Evidence > Admissibility > Scientific  
Evidence > Handwriting

█ Whenever it is relevant, according to the general rules of evidence, to prove that any person had or had not written a particular paper, such proof might be made either (1) by witnesses who had seen the paper written, or to whom it had been acknowledged, or (2) by witnesses familiar with the handwriting of the person charged to be the writer, and who were able to testify from their familiarity with his handwriting to a belief

respecting the genuineness of the handwriting in question, or (3) by what has come to be known as comparison of hands, which could be made at common law by witnesses, or by the court or jury without the aid of witnesses, between the disputed writing and other writings already in evidence for other purposes.

Evidence > Relevance > Preservation of Relevant  
Evidence > Exclusion & Preservation by Prosecutors

Evidence > Admissibility > Scientific  
Evidence > Handwriting

█ See 1880 N.Y. Laws ch. 36, § 1.

Evidence > Admissibility > Scientific  
Evidence > Handwriting

█ See 1888 N.Y. Laws ch. 55, § 1.

Evidence > Relevance > Preservation of Relevant  
Evidence > Exclusion & Preservation by Prosecutors

Evidence > Admissibility > Scientific  
Evidence > Handwriting

█ If a disputed handwriting is itself either a fact in issue, or a fact relevant to the issue, it may be proved by the means pointed out by the statutes. If it is neither in issue nor relevant to the issue it must be excluded.

Evidence > Relevance > Preservation of Relevant  
Evidence > Exclusion & Preservation by Prosecutors

Evidence > Admissibility > Scientific  
Evidence > Handwriting

█ Writings created post litem motam are inadmissible in favor of a party creating them.

Evidence > Admissibility > Scientific  
Evidence > Handwriting

█ The genuineness of a writing may be established (1) by the concession of the person sought to be charged with the disputed writing made at or for the purposes of the trial, or by his testimony; (2) or by witnesses who saw the standards written, or to whom, or in whose hearing, the person sought to be charged

acknowledged the writing thereof; (3) or by witnesses whose familiarity with the handwriting of the person who is claimed to have written the standard enables them to testify to a belief as to its genuineness; (4) or by evidence showing that the reputed writer of the standard has acquiesced in or recognized the same, or that it has been adopted and acted upon by him in his business transactions or other concerns.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Evidence > Inferences & Presumptions > General Overview

Evidence > Admissibility > Scientific Evidence > Handwriting

█ Since common-law evidence is competent to establish the genuineness of a writing sought to be used as a standard of comparison, it is apparent, in the absence of a statutory rule as to the degree of proof to be made, that the general rule of the common law as to the sufficiency of evidence must prevail. In civil cases the genuineness of such a paper must be established by a fair preponderance of the evidence and in criminal cases beyond a reasonable doubt. Writings proved to the satisfaction of the court by the methods and under the rules adverted to, may be used as standards for purposes of comparison with a disputed writing, subject, however, to the qualification that writings which are otherwise incompetent, should never be received in evidence for purposes of comparison.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

█ See N.Y. Const. art. I, § II.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview

Evidence > Admissibility > Scientific Evidence > Handwriting

█ The sufficiency of the proof given of the genuineness of the papers offered as standards is a preliminary point to be determined in the first instance by the court before permitting the papers to go to the jury. If the court, having regard to the rules adverted to, adjudge the papers genuine, it then becomes the duty of

the jury in its turn, at the proper time, before making comparison of a disputed writing with the standards, to examine the testimony respecting the genuineness of the latter and to decide for itself, under proper legal instructions from the court, whether their genuineness has been established.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Evidence > Admissibility > Scientific Evidence > Handwriting

█ Comparisons of handwriting with standards produced in court, whether at common law or under the statutes, may be made by witnesses, or by the court or jury without the aid of witnesses.

Criminal Law & Procedure > ... > Grand Juries > Self-Incrimination Privilege > General Overview

█ If a person who testifies at an inquest does so simply as a witness, he has none of the rights or immunities of a party. When a person testifies at an inquest as an accused or arrested party, his testimony cannot be used against him upon a subsequent trial of an indictment growing out of the inquest, unless his testimony has been voluntarily given after he has been fully advised of all his rights and has been given an opportunity to avail himself of them. When a person testifies simply as a witness and not as a party, his testimony can be used against him even though he is afterwards indicted and tried for the commission of the crime disclosed by the inquest.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

█ The law presumes that a party who is called upon to testify as a mere witness knows his rights. He may decline to testify to anything that may tend to incriminate him.

## Headnotes/Summary

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### Headnotes

1. Murder -- Evidence -- General Rule as to Proof of Other Crimes -- Exceptions to Rule. The general rule of

evidence applicable to criminal trials is that the prosecution cannot prove against a defendant any crime not alleged in the indictment either as a foundation for a separate punishment or as aiding the proofs that he is guilty of the crime charged, and while the exceptions thereto cannot be stated with categorical precision, generally speaking and for the purposes of the case under review, proof of another crime is competent to prove the specific crime charged only when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other; (5) the identity of the person charged with the commission of the crime on trial.

[\*\*\*2] 2. Motive. Whenever proof of motive is an essential ingredient of the evidence against the defendant in a criminal trial, the motive to be established is the one which induced the commission of the crime charged in the indictment, and evidence which tends to prove the commission by him of a similar crime, but does not tend to establish the specific motive underlying the crime charged or a motive common to both crimes, does not come within the first exception and is incompetent.

3. Felonious Intent. Where felonious intent may be inferred from the character of an act done at a time and under circumstances which preclude the possibility of its being innocently done, and such evidence fails to throw any light upon the act or does not support or strengthen the inference, it does not come within the second exception and is incompetent.

4. Absence of Mistake or Accident. Where there is no uncertainty as to the cause of death, which is proved to have been the administration of a deadly poison, known to be such and clearly and positively identified, and the same circumstances which establish a felonious intent clearly negative the possibility of an accidental killing, such evidence does [\*\*\*3] not come within the third exception and is incompetent.

5. Common Scheme or Plan. Where such evidence fails to establish a system between the two crimes or a connection as parts of a general or composite plan or scheme or such a relation to each other as to show a common motive or intent running through both, so that the proof of the former crime does not tend to prove the latter, it does not come within the fourth exception and is incompetent.

6. Identity. The mere fact that two crimes are parallel as to the methods and means employed in their execution does not serve to identify the defendant as the person guilty of the latter crime unless it may be inferred from its similarity to the former, and in a case where it is not shown conclusively that he committed the former crime and that no other person could have committed the crime charged, such an inference is not justifiable, and, therefore, evidence of the former crime does not come within the fifth exception and is incompetent.

7. Evidence of Similar Crime Inadmissible When the Facts Relating Thereto Do not Bring it within the Enumerated Exceptions. Upon the trial of an indictment for the murder of a person whose death was [\*\*\*4] the result of an attempt to kill a third person and was caused by the latter's innocent administration of a rare and deadly poison which had been feloniously sent him through the mails, on a Christmas eve, in a box of the kind used in sending gifts, which contained besides the bottle in which the poison was disguised with a harmless powder in common use, a silver bottle holder into which the bottle fitted and an empty card envelope, evidence which tends to connect the defendant with the alleged killing of another person some time before by means of the same poison mixed with a medicinal powder claimed to have been sent him through the mail, is incompetent, where upon examination of the facts it must be held that it does not tend to establish a motive for the crime charged, the intent with which it was committed, the absence of mistake or accident, a common scheme or plan embracing the commission of both crimes so related to each other that proof of the one tends to establish the other or the identity of the defendant; and, therefore, the events connected with the alleged former crime are not so related to the crime charged as to form an exception to the general rule excluding such [\*\*\*5] proof and thus bring it within one of the above-enumerated exceptions, and the reception of such evidence constitutes reversible error.

8. Declarations of Victim of Former Crime to his Physician as to Receipt of Medicinal Powder through the Mail Incompetent. Even if such evidence were competent the declarations of the victim of the former crime to his physician that he had received the box of medicinal powder claimed to have contained the poison, through the mails, are incompetent and their admission constitutes reversible error.

9. Common-Law Rule as to Comparison of Handwriting. Under the common-law rule permitting comparison between a disputed writing and genuine writings already





scheme. ( [REDACTED] ) Evidence of the death of Barnet and the circumstances thereof was admissible upon the broad ground of establishing motive. ( [REDACTED]; *Stout v. People*, 4 Park. Crim. Rep. 71.) The felonious [\*\*\*15] signing of the names of Barnet and Cornish to the several letters, orders and papers in evidence constituted the crime of forgery in the third degree. (Penal Code, § 514, subd. 2, § 525; [REDACTED].) The evidence of the previous death of Barnet was admissible to prove that the defendant knew the substance administered to Mrs. Adams to be poison -- to show guilty knowledge and purpose and to repel any inference of mistake. ( *Reg. v. Heesom*, 20 Eng. Rep. [Moak's Notes] 384.) Evidence of the death of Barnet and the circumstances pertaining to it was admissible as affecting the illness of Cornish and to show the cause of Mrs. Adams' death. ( [REDACTED]; [REDACTED]; [REDACTED]; *Rex v. Clewes*, 4 Carr. & Paine, 221; [REDACTED]; *People v. Wood*, 3 Park. Crim. Rep. 681; [REDACTED].) There was no error in the admission of the opinions of experts on the questions of handwriting. (Lawson on Exp. & Opinion Ev. [2d ed.] 422, 423; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; *Johnson v. Hicks*, 1 Lans. 151; [REDACTED]; *Roe v. Roe*, 8 J. & S. 1; [REDACTED]; [REDACTED]; Rogers on Expert Testimony [2d ed.], 321.) The only object of chapter 36 of the Laws of 1880 was to allow other writings, not in other respects material to the case, to be introduced in evidence solely for purposes of comparison. (Underhill on Ev. 201, § 140; [REDACTED]; [REDACTED]; [REDACTED]; Lawson on Exp. & Opinion Ev. [2d ed.] 424.) The amendment of 1888 permits the introduction for the purposes of comparison, not only of specimens of the genuine handwriting of the person whose signature is in question, but specimens of the handwriting of any person claimed on the trial to have made the disputed writing. ( [REDACTED]; [REDACTED]; 157 N. Y. 715; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].) An expert, whose knowledge of handwriting in general is derived from experience, science and skill, and whose knowledge of the defendant's handwriting is derived from an inspection of the disputed writing and a comparison thereof with the genuine writing of the

defendant, may be permitted to express an opinion thereon. ( [REDACTED]; Rogers on Exp. Testimony [2d ed.], 309, § 130; [REDACTED]; [REDACTED]; Lawson on Exp. & Opinion Ev. [2d ed.] 382, 433; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].) Several alleged disputed writings may be compared together where it appears that they are all disguised writings and purport to be written by different persons, for the purpose of showing that the disguises are all alike, and, therefore, evidently written by the same person. ( [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].) There was no error committed in admitting the writings which were made by the defendant at the request of the expert witness Kinsley, and which were introduced by the People as standards of comparison. ( [REDACTED]; [REDACTED].) The act of 1880-1888 is constitutional. ( [REDACTED]; *Gardiner v. People*, 6 Park. Cr. Rep. 155; [REDACTED]; [REDACTED].) There is nothing in the claim that the defendant's evidence before the coroner was not legally admissible on the trial. (Code Crim. Pro. § 776; [REDACTED]; [REDACTED]; [REDACTED].) The charge of the court was absolutely correct, and there was no error committed in its refusals to charge. [\*\*\*19] ( [REDACTED]; [REDACTED].) There was no error in either the opening or closing address of the assistant district attorney to the jury. ( [REDACTED]; [REDACTED]; *Kenyon v. Kenyon*, 88 Hun, 211; [REDACTED]; [REDACTED]; [REDACTED].) There was no material error committed in the rulings on the trial, either in the admission or the exclusion of evidence. ( [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].)

**Judges:** Opinion by Werner, J., with whom Bartlett and Vann, JJ., concur; O'Brien, J., in mem.; Parker, Ch. J., Gray and Haight, JJ., concur in result, and dissent only as to the admissibility of the evidence tending to prove

the poisoning of Barnet; Parker, Ch. J., and Gray, J., writing; Haight, J., concurring with Parker, Ch. J.

**Opinion by:** WERNER; O'BRIEN

## Opinion

[\*272] [\*\*286] In various forms and in [\*\*\*20] several separate counts the indictment herein charges the defendant with the [\*273] crime of murder [\*\*287] in the first degree. The substance of the charge is that defendant killed one Katharine J. Adams while engaged in the commission of a felony upon and against the body of one Harry S. Cornish. The agency charged to have been employed for this purpose is cyanide of mercury, a rare and deadly poison, which is said to have been sent through the mails by the defendant to said Cornish with the intent that it should be taken by the latter. Direct evidence was adduced upon the trial to establish the fact that Cornish received by mail a package which contained cyanide of mercury, and that he innocently administered to said Katharine J. Adams a portion of its contents, thereby causing her death. The legal questions which it is our duty to consider upon this appeal cannot be intelligently discussed without a clear understanding of the complicated facts and circumstances upon which the prosecution seeks to sustain the judgment of conviction against the defendant. In the effort to simplify the recital of these facts and circumstances we shall classify them into the several separate [\*\*\*21] co-ordinate groups to which they belong, without reference to their chronological relation to each other, and without discussing the competency of the evidence by which they are claimed to have been established.

The facts which bear immediately upon the death of Katharine J. Adams and its cause are as follows: On the morning of December 24, 1898, Cornish received through the mail a package in which was found a pale blue box containing a silver bottle holder and a blue bottle bearing a "bromo seltzer" label and filled with a powder purporting to be "bromo seltzer." The bottle fitted into the bottle holder. Accompanying these articles was a small envelope of the kind in general use for inclosing cards which are sent with gifts. There was no card in the envelope. Cornish, believing that some person had sent him a Christmas gift and finding no card, recovered the outside wrapper of the package, which had been thrown into the waste basket, and found written upon it the address "Mr. Harry Cornish,

Knickerbocker Athletic Club, Madison Avenue and Fourty-fifth St., New York City." [\*274] He cut, or tore, this address from the wrapper and placed it in his desk together with the envelope, [\*\*\*22] the bottle and silver bottle holder. On the following day, December 25, 1898, Cornish, who was a member of the household of Katharine J. Adams, mentioned the receipt of these articles to the latter and her daughter, Mrs. Rodgers, and on the 27th of December, 1898, he took them home with him and exhibited them to the same persons. As a result of the conversation which ensued, Cornish presented the silver bottle holder to Mrs. Rodgers, who had other toilet articles resembling it in design. Cornish placed the "bromo seltzer" bottle on the dresser in his room and retired for the night. On the next morning, December 28, 1898, Cornish arose shortly before nine o'clock and went to the door for his morning paper. In passing the kitchen door he observed Mrs. Adams with her head bandaged and a few minutes later Mrs. Rodgers informed Cornish that her mother had a headache and asked him for some of the "bromo seltzer" he had brought home. Cornish gave the bottle to Mrs. Rodgers who attempted to open it, without success, and she thereupon returned it to Cornish requesting him to do so. He opened the bottle and, after reading the directions upon the label, he poured a teaspoonful of the contents [\*\*\*23] into a glass held by Mrs. Adams and stirred it while she poured water upon it from another glass. After the dose had been prepared Mrs. Adams drank from it. As she put down the glass she commented upon the peculiar taste of the mixture, whereupon Cornish remarked "why that stuff is all right" and swallowed a portion of what remained in the glass. Meanwhile Mrs. Adams had started for the kitchen and in less than a minute Mrs. Rodgers called from the bathroom for help for Mrs. Adams. As Cornish arose from his chair, to respond to the summons, his "knees went out from under him," but by an effort he succeeded in reaching Mrs. Adams just as she dropped to the floor in a state of collapse. Cornish, being unable to lift Mrs. Adams, the daughter called a Mr. Hovey, who was in the house, and together they carried Mrs. Adams to a couch in the dining room. Cornish despatched a hallboy for a physician, [\*275] returned for his coat and hat, picked up the bottle from which the dose had been taken and ran to a neighboring druggist who gave him "aromatic spirits of ammonia" with directions for administering it. Cornish returned to the house and Dr. Hitchcock closely followed him. The [\*\*\*24] doctor hurried to Mrs. Adams who was breathing hard, her face overspread with a dark blue pallor and exhibiting evidence of great pain. Restorative measures were employed without avail, and upon the arrival of Dr.

Potter, who had also been sent for, Mrs. Adams was dead. During the period which elapsed between the taking of the dose and the death of Mrs. Adams, Cornish had been retching and trying to vomit. After the death of Mrs. Adams Dr. Hitchcock went in to see Cornish who told him that Mrs. Adams had taken a dose of "bromo seltzer" and handed the bottle to the doctor. Mrs. Rodgers informed Dr. Hitchcock that Cornish had taken some of the same stuff that Mrs. Adams had taken. The doctor put his finger into the bottle and, extracting some of the powder, tasted it. He detected the odor of almonds which is characteristic of the cyanogen group of poisons, of which prussic acid is the base. He began to feel ill and took whisky to counteract the effect of the powder. Dr. Hitchcock then took possession of the "bromo seltzer" bottle, the silver bottle holder and the address. He and Cornish left the house together and went to an undertaker. There [\*\*288] they separated, the [\*\*\*25] doctor returning to his home and Cornish going down town to see Assistant District Attorney McIntyre to notify him of Mrs. Adams' death. After seeing McIntyre, Cornish called upon a personal friend named Yocum, a chemist by profession, who noticed that Cornish looked ill and prevailed upon him to take a drink of whisky, which he was not able to retain. Then Cornish proceeded to the office of his cousin Louis H. Cornish, who was also a cousin of Mrs. Rodgers, the daughter of Mrs. Adams, and informed him of the latter's death. From thence Cornish went to the Knickerbocker Athletic Club, where he lay down upon the bed in Yocum's room. During the whole of his trip down [\*\*276] town and return Cornish had been ill, the journey being marked by frequent interruptions necessitated by the condition of his stomach and bowels. Soon after arriving at the club house he sent for Dr. Phillips, who could not be found immediately, and Dr. Coffin, who happened to be in the club house, was requested to see Cornish. He found Cornish in bed belching gas from his stomach, and his bowels and stomach considerably distended. The patient's pulse was weak and intermittent. There was no odor which [\*\*\*26] the doctor recognized. He diagnosed the case as one of "gastric enteritis." He sent for stomach and rectal tubes and while waiting for them Dr. Phillips arrived. The two doctors, Phillips and Coffin, treated Cornish. The latter was pale and ashen. He had the appearance of having passed through a long illness. The first police officer to arrive at the Adams house was Patrolman Palmer. This was in the afternoon of December 28th, 1898. From there he went to Dr. Hitchcock and got the "bromo seltzer" bottle, the bottle holder and the address taken from the wrapper. These he turned over to Dr. Weston, the coroner's physician.

The latter visited the Adams house and viewed the body of Mrs. Adams. On the following day, December 29th, 1898, Captain McClusky, chief of the detective bureau of New York, took charge of the police investigation. On the same day Dr. Weston performed an autopsy on the body of Mrs. Adams, as a result of which he later concluded that the death of Mrs. Adams was due to poisoning which resulted from hydrocyanic acid, or one of its salts, which is produced by the combination of cyanide of mercury with the ingredients of bromo seltzer. On the following day, December [\*\*\*27] 31st, 1898, Prof. Withaus, an expert chemist, made an analysis of the contents of the "bromo seltzer" bottle and later reported that it contained a mixture of bromo seltzer and cyanide of mercury. The same chemist also analyzed the sediment of the glass from which the dose administered to Mrs. Adams, and tasted by Cornish, had been taken. This was found to contain cyanide of mercury. The organs of Mrs. Adams were also subjected to an analytical examination by Prof. Withaus, [\*\*277] which demonstrated that Mrs. Adams had died from mercuric cyanide poisoning. A pathological examination of these organs by Dr. Ferguson disclosed the presence of corrosive poison which he described as cyanogen or prussic acid, which is a poison resulting from cyanide of mercury. The death of Mrs. Adams and its immediate cause were, therefore, clearly established.

The logical and orderly narration of this gruesome tragedy naturally leads, next, to a consideration of the facts and circumstances which are relied upon by the prosecution to connect the defendant with the death of Mrs. Adams. We will first address ourselves to those which have no relation to handwriting or to the commission of any other [\*\*\*28] crime than the killing of Mrs. Adams.

In 1898 the defendant was thirty-one years of age. He had not only a liberal general education, but sufficient knowledge in chemistry to be the superintendent in the business of Morris Hermann & Company, who were manufacturers of dry colors in Newark, N. J. He had been employed in this capacity since 1893, and before that had been in charge of colormaking for the firm of C. T. Reynolds & Company of which his father was a member. He had studied chemistry for two years at Cooper Union. He had a good chemical library and a well-equipped laboratory which contained Prussian blue, chrome yellow, English vermilion, dry mercury, arsenic and other chemicals from which various poisons, including cyanide of mercury, could be produced. From these facts the prosecution argue that defendant had the knowledge, skill and means to produce the poison

which killed Mrs. Adams.

Cornish was athletic director in the Knickerbocker Athletic Club in 1898, and had held this position since January, 1896. At that time defendant was a member of the club and of its house committee. In January, 1896, difficulties arose between the defendant and Cornish over the conduct [\*\*\*29] of one French, an athletic member of the club. This was followed in April, 1897, by trouble over an amateur circus which was given under the auspices of the club. Molineux had charge of the [\*278] arrangements, and complained because Cornish had ignored and disobeyed his instructions. Cornish had been superintendent of the club and manager of the club restaurant. Defendant complained that the restaurant and baths were not being properly conducted. Cornish's authority was thereafter reduced to the training of the club teams and the management of athletics. Then came the trouble over the "Weefers" letter written by Cornish in August, 1897, and in which the latter reflected upon Mr. Weeks, a director of another athletic club. The defendant, having come into possession of this letter, requested that the matter be brought to the attention of the house committee, and suggested that Cornish be reprimanded or discharged. This request was not complied with, and then, through defendant's [\*\*289] efforts, a dinner was given to Mr. Weeks by Mr. Ballantine, a leading spirit and principal stockholder in the club, at which various club officials and the defendant were present, and [\*\*\*30] apologies were tendered to Mr. Weeks. Early in 1897, Hughes, chairman of the house committee, told the defendant that Cornish had said that defendant had made his money as a rumseller or by keeping a place of questionable repute. Defendant insisted that this matter, together with other grievances, be investigated by the club. Some investigation was made, but, as Cornish denied having made the statements attributed to him, no further action was taken. The defendant continued to agitate the alleged shortcomings and misdeeds of Cornish until he finally told Adams, the secretary of the club, that if Cornish did not leave the club he would leave. Cornish was retained in the club, and on December 20th, 1897, the defendant resigned. After his resignation, and on the same evening, the defendant and Cornish met on the stairs of the club house. Cornish called the defendant a vile name and taunted him with his failure to procure Cornish's discharge. Defendant's resignation was followed by an explanatory letter from him to Secretary Adams, dated September 24th, 1897. This was followed by a letter from defendant to a Dr. Austen, inclosing a copy of the "Weefers" letter and dwelling upon [\*\*\*31] the conduct

of [\*279] Cornish. After this, in October, 1898, the defendant met one Heiles at the New York Athletic Club, told him of the "Weefers" letter and complained of the action of the board of governors of the Knickerbocker Athletic Club. On this occasion the defendant referred to Cornish as a low, vile, bad man, and spoke of the latter's assertion that defendant had kept a disreputable house. On November 9th, 1898, the defendant wrote to his friend Sheffler, inclosing a copy of the "Weefers" letter and referring to the fact that "Cornish is in" and he is out. These are the facts and circumstances narrated in mere outline that are relied upon by the prosecution as evidence of the motive which the defendant is said to have had against the life of Cornish and of the intent with which the poisoned bromo seltzer was sent to the latter. As further bearing upon defendant's connection with this murder it was shown that the silver bottle holder which was contained in the package received by Cornish had been purchased on the 21st day of December, 1898, at Hartdegan & Co.'s store in Newark, N. J., which was only a short distance from the factory of Herrman & Co., where the defendant [\*\*\*32] was employed. The defendant was seen in the vicinity of the Hartdegan store on that day, but the clerk who made the sale of the bottle holder said the defendant is not the man who bought it. The box which contained the bottle and bottle holder was a "Tiffany" box, and the envelope was such as are used at Tiffany's to inclose cards which are sent with gifts. The defendant had an account at Tiffany's, and made a purchase there in December, 1898. There are no particulars regarding this purchase except that it was in the stationery department. The so-called poison package was mailed at the general post office on the afternoon of December 23rd, 1898, at an hour when it was customary for the defendant to be in the post office district on his return from Newark to New York.

At this point it will be observed that if the case had been tried upon the theory that the only crime which the defendant had committed was the killing of Mrs. Adams in the attempt to poison Cornish, the next and final step in the case of the [\*280] prosecution would have been to prove the defendant's connection with the handwriting of the address upon the poison package. But, as a part of the theory or theories [\*\*\*33] upon which the prosecution sought to connect the defendant with the killing of Mrs. Adams, evidence was offered and received to show that the defendant was responsible for the previous killing of one Henry C. Barnet, who came to his death at the Knickerbocker Athletic Club house on the 10th day of November, 1898.

The facts and circumstances upon this branch of the case, as established at the trial, which relate directly to the death of Barnet, are substantially as follows: Barnet had been a member of the Knickerbocker Athletic Club for a number of years, and in 1898 was living at the club house. Barnet was taken ill on the 28th day of October, 1898. He was first attended by Dr. Phillips, the same physician who subsequently attended Cornish. Dr. Phillips only attended Barnet on the first day of his illness, and Dr. Douglass then took charge of the patient and attended him until his death on November 10th, 1898. In the death certificate issued by Dr. Douglass "cardiac asthenia, caused by diphtheria," was assigned as the cause of Barnet's death. Dr. Douglass was given a box which was found in Barnet's room and purported to contain "Kutnow" powder, and the latter told the former [\*\*\*34] that he had received it by mail, had taken a dose of it, and he thought that was the cause of his trouble. Barnet also told Dr. Phillips that he had taken a dose of "Kutnow" powders and ascribed his trouble to that. Dr. Douglass took possession of this box on November 4th, 1898, and gave it to Guy P. Ellison, a chemist, who made a qualitative analysis and concluded that the "Kutnow" powder contained cyanide of mercury. The box was returned to Dr. Douglass with the chemist's report as to its contents, and thereupon the nurse in charge of Barnet was directed to search for the wrapper. No wrapper was ever found. On the 3rd day of January, 1899, Dr. Douglass delivered to Captain McClusky the box taken from Barnet's room. On the [\*\*290] 4th day of January, 1899, Captain [\*281] McClusky delivered it to Prof. Withaus. The latter made an analysis of its contents and found it to contain "Kutnow" powder and cyanide of mercury. On the 28th day of February, 1899, the body of Barnet was exhumed at Greenwood cemetery in the presence of Dr. Douglass, Prof. Withaus, Dr. Weston and others. Prof. Withaus made an analysis of the liver, kidneys and other organs in the body and found [\*\*\*35] cyanide of mercury. Dr. Loomis, a pathologist, made a post-mortem examination and expressed the opinion that Barnet died from poisoning by mercury. Dr. Smith, who consulted with Dr. Douglass on the day of Barnet's death, was of the same opinion. Dr. Ferguson testified that the cause of this death was cyanide of mercury and Dr. Potter concurred in that opinion. The discrepancy between the cause of death assigned in the death certificate of Dr. Douglass and the conclusions which followed the analyses of the deceased Barnet's organs and the contents of the "Kutnow" powder box, is sought to be accounted for by the explanation that mercuric poisoning at certain stages develops the symptoms of diphtheria and by various other matters which are not essential to this

statement. The death of Barnet was, therefore, clearly established, and the alleged cause thereof was proved by evidence which, if competent, would warrant the conclusion that it was due to mercuric cyanide poison.

As to the motive which the defendant is said to have harbored for the killing of Barnet, the prosecution gave evidence which, it was claimed, tended to show that the defendant was jealous of Barnet's attentions [\*\*\*36] to the woman with whom the defendant was in love. In that behalf the facts, as presented by the prosecution and in part sustained by the evidence, are substantially as follows: In the summer of 1897 the defendant met Miss Cheeseborough at Portland, Maine. His attentions to her, which were immediate and marked, continued during their visit in Portland and were renewed after the return of Miss Cheeseborough to New York city. The defendant and Barnet were both members of the Knickerbocker [\*282] Athletic Club and apparently good friends. In the fall of 1897 the defendant presented Barnet to Miss Cheeseborough at the Metropolitan Opera House. At this time the latter lived in apartments in the "Marie Antoinette" in New York city, but in a few weeks she took a room in the house of Mrs. Bell at No. 251 W. 75th street, New York city, where she remained until January, 1898. At this point in the chronology of the relations between the defendant and Miss Cheeseborough certain evidence was introduced by the prosecution which was afterwards ordered stricken from the record by the court, but for the purpose of preserving the continuity of the narrative of this branch of the case, and [\*\*\*37] because certain questions have been raised concerning this evidence, it will be inserted here as though it had remained in the record. One Rachel Green, a colored woman who was employed at No. 251 W. 75th street, from November 2nd, 1897, to May 1st, 1898, testified that when she went to this house in November, 1897, Miss Cheeseborough and a man whom she thought she was able to identify as the defendant, occupied the same room under the names of Mr. and Mrs. Cheeseborough, and that the only time she ever heard the name of Molineux mentioned there was on an occasion when a parcel came from a drug store addressed to that name. This witness further testified that in January, 1898, the "Cheeseboroughs" left the house of Mrs. Bell together. William Williams, who washed windows and took care of the furnace at the house of Mrs. Bell in 75th street from the autumn of 1897 to May, 1898, pointed from the witness stand to the defendant as a man whom he had seen at Mrs. Bell's on several occasions. He gave further and more explicit testimony upon the subject but that was stricken out as hearsay. Minnie Betts, another

colored woman, testified that she lived with Mrs. Bellinger at 257 West End [\*\*\*38] avenue, and that in January, 1898, Miss Cheeseborough came to live there and remained until June, when she went away for the summer and returned in the fall. This witness testified that the first time she ever heard the name of Molineux was about a week before the defendant and Miss Cheeseborough were married, in November, 1898. [\*283] This witness also described a man, not the defendant, who frequently called on Miss Cheeseborough at Mrs. Bellinger's house. During her examination this witness was shown a visiting card and a photograph which were used in connection with the name of Barnet in such a way as to leave no doubt in the minds of the jury that the caller whom she had been trying to describe was in fact Barnet. The defendant himself testified, at the coroner's inquest upon the death of Mrs. Adams, that Barnet called upon Miss Cheeseborough, took her to dinners, theatres and other places of amusement and sent her flowers. On one occasion she went to an entertainment given by the Knickerbocker Athletic Club as the guest of Barnet, and while there was one of a number who visited Barnet's room and drank wine. The defendant says that on the occasion referred to Barnet [\*\*\*39] escorted Miss Cheeseborough at his request. The defendant admitted that he had proposed marriage to Miss Cheeseborough in the winter of 1897, and that his offer had been declined. Three or four days before Barnet's death Miss Cheeseborough wrote him a letter expressing her solicitude over his illness. This letter was couched in language from which it could easily be inferred that there existed between Miss Cheeseborough and Barnet an attachment stronger than mere platonic friendship. The defendant, in testifying before the coroner, stated that [\*\*291] when he learned of Barnet's illness he communicated the fact to Miss Cheeseborough and it was agreed between them that the latter should send Barnet some flowers. The defendant also asserted that he bought the flowers himself, and, although he assumed that a card or letter would be sent with them, he never knew of the letter above referred to. Barnet died November 10th, 1898. About two weeks later the defendant wrote to a friend with whom he had expected to take tea on the following Sunday evening, asking to be excused because of his sudden and romantic engagement to be married on the succeeding Tuesday. On the 29th day of [\*\*\*40] November, 1898, nineteen days after Barnet's death, the defendant and Miss Cheeseborough were married. [\*284] From this evidence bearing upon the alleged relations of the defendant and Barnet to Miss Cheeseborough it is contended by the prosecution that the defendant was

jealous of Barnet because of the apparent favor with which the latter's attentions had been received by Miss Cheeseborough and that this was the mainspring of the motive which prompted the killing of Barnet.

The foregoing outline of the facts which conclusively establish the death of Barnet and Mrs. Adams, respectively, and which tend to prove the cause thereof, and of the circumstances which are relied upon to connect the defendant therewith, naturally leads us, next, to a consideration of the other related facts and circumstances which are said to bear upon the handwriting of the poison package address and upon defendant's connection with the murder of both Barnet and Mrs. Adams.

We will first consider the "Barnet" letter box and its correspondence. One Nicholas Heckmann testified, in substance, that in May, 1898, he kept private letter boxes for rent at No. 257 W. 42nd street, New York city. On Friday, [\*\*\*41] May 27th, 1898, shortly after six o'clock, the defendant came to his place and rented a letter box in the name of H. C. Barnet. Defendant was given a ticket for box 217. Defendant called about twenty times after that and the witness delivered to him the mail addressed to H. C. Barnet, the general nature of which was patent medicine of various kinds. One package was described as being marked "Kutnow powder" and another "Von Mohl's Calthos." The witness identified a box which came to box 217 some time in June, 1898, but was never called for and was delivered to the district attorney, who procured it to be analyzed. Late in the summer of that year the real H. C. Barnet received through the mail, at his office in the Produce Exchange, a box marked "Calthos" containing a number of pink capsules. The medicine bearing this name was advertised as a remedy for impotence. A similar package was found in Barnet's desk after his death. Some of the mail addressed to this box 217 was never called for. [\*285] Part of it consisted of four letters, the envelopes of three of which bore the post office box number of Von Mohl & Co., of Detroit, and the fourth of which bore the post office [\*\*\*42] box number of Dr. Fowler, of Moodus, Conn. These were marked 58, 61, 62 and 63 in the so-called prime series. Nine letters and communications were written in the name of H. C. Barnet. These, together with five "Barnet" envelopes, comprise the so-called "Barnet" series and are marked B, B<2>, C, F, H, I, J, K, M, N, O, P, Q and R respectively. "B" is an order for Dr. Rudolphe's specific for impotence, received by Dr. Fowler June 1st, 1898, and "B<2>" is the envelope in which it was mailed. "C" is a letter to the Marston Remedy Co., dated May 31st,

1898, writing for one month's treatment for the same trouble. "F" is a letter to Cameron & Co., received by them June 1st, 1898, asking for "Book," and "J" is the envelope in which it was mailed. "H" is a letter to Marston & Co., received by them June 6th, 1898, asking for marriage guide, and "K" is the envelope in which it was mailed. "I" is the so-called "diagnosis blank" sent by Marston & Co. in answer to the request for marriage guide, and returned to Marston & Co. on the 4th or 5th of June, 1898, in the name of Barnet, but filled with answers which are said to accurately describe the defendant and not Barnet. "M" is a letter [\*\*\*43] to Von Mohl & Co., received by them June 1st, 1898, requesting "five days' treatment," and "N" is the envelope in which it was mailed. "O" is a letter to the "Sterling Remedy Co.," received by them June 6th, 1898, asking for "Book." "P" is a letter to G. B. Wright, Marshall, Mich., written about June 1st, 1898, asking for prescription, and "R" is the envelope in which it was mailed. It may be noted in passing that none of these "Barnet" letters contain any reference to any powder or substance which was used or, so far as appears, could be used, in mixing with, or in the administration of, the poison by which Barnet and Mrs. Adams are alleged to have been killed.

We now come to the "Cornish" letter box and the correspondence written in the name of Cornish. One J. J. Koch [\*286] testified that in December, 1898, he had for five years conducted a letter box agency at 1620 Broadway under the name of the Commercial Co. He was also the proprietor of the "Studio Publishing Co.," under which name an advertising agency was conducted at the same place. Under date of December 31st, 1897, the defendant, through his secretary, Mr. Allen, wrote upon the business stationery of Morris Hermann [\*\*\*44] & Co. to the Studio Publishing Co. for a sample copy of the paper. In July, 1898, Koch sent to defendant a printed circular upon which attention was called to the private letter box agency which was being conducted at No. 1620 Broadway, in connection with the advertising business. During the week of December [\*\*292] 12th, 1898, the defendant made inquiry of Koch about renting a private letter box for a friend. No box was rented on that day. On December 21st, 1898, a box was rented to a man, not the defendant, under the name of H. Cornish. Four pieces of mail were received at this box addressed to "H. Cornish." One was a sample box of "Kutnow" powder. The second was a circular letter from Von Mohl & Co. The third was a sample box of "Calthos," manufactured by Von Mohl & Co. Koch testified that by mistake all of these were placed in a different box than that assigned to H.

Cornish and remained in the wrong box until January 14th, 1899, when Koch delivered them to Captain McClusky. The fourth was a letter bearing the name of Frederick Stearns & Co., Detroit, Mich., upon the envelope. This was seen by Koch and placed in the "Cornish" box. It was not there on January 14th, [\*\*\*45] 1899, when the others above referred to were delivered to Captain McClusky. It was called for by some unknown person in the absence of Koch. The discovery of this "Cornish" mail led to investigations as the result of which Exhibits "D," "E" and "G," written in the name of "Cornish" came into the hands of the police authorities. Exhibit "D" is a letter signed "H. Cornish," addressed to Frederick Stearns & Co., Detroit, Mich., and received by that firm December 24th, 1898, stating in substance that one A. A. Harpster had applied to the writer for [\*287] a position as collector and requesting a line in reply to be sent to 1620 Broadway, New York city. At this point it may be stated that Harpster was a man who had formerly been in the employment of Stearns & Co., and had subsequently been employed at the Knickerbocker Athletic Club, where he was very friendly to Cornish and had incurred the ill-will of the defendant because of his adherence to Cornish in the difficulties between the latter and the defendant. At the time the "Cornish" letter was written to Stearns & Co. Harpster was employed by Ballantine & Co., and had not applied to any one for the position of collector. Upon [\*\*\*46] this feature of the case it also appeared that in October, 1898, the defendant met one Heiles who had been employed at the Knickerbocker Athletic Club at the time when Barnet, Cornish, Harpster and the defendant were all connected with it. At that time the defendant requested Heiles to arrange to have a letter written to Stearns & Co., asking for information regarding Harpster. The defendant explained to Heiles that the purpose for which he wished to use this letter was to procure Harpster's discharge if the reply from Stearns & Co. should be suitable for that purpose. Heiles did arrange to have such a letter written about October, 1898, and a reply was received which was given to Heiles, who showed it to the defendant. The defendant said he was too busy to look at it then, and told Heiles to keep it. Heiles kept the letter until after the arrest of the defendant, when he destroyed it. "Exhibit E" is a letter signed "H. Cornish," received by "Kutnow Bros." December 22nd, 1898, and requesting that a sample of salts be sent to 1620 Broadway, New York city. Exhibit "G" is a letter signed "H. Cornish," received by "Von Mohl & Co.," the manufacturers of "Calthos," requesting said [\*\*\*47] firm to send "five days' trial" to 1620 Broadway, New York city. This letter was received from Von Mohl & Co. by Witte, assistant chief of police in Cincinnati, and by him

turned over to Captain McClusky. Each of these three letters, Exhibits "D," "E" and "G," was written upon a peculiar paper of "egg-blue" tint, bearing a "tri-crescent emblem." The same kind of [\*288] paper was used for the so-called "Burns" letter (Exhibit 2) which was received June 1st, 1898, by one Agnes Evans, acting for Dr. James Burns, who was requested to "send remedy" to Roland Molineux, Jersey street, Newark, N. J. The defendant admits having written the "Burns" letter. In this connection it is proper to refer to the evidence of Mary Melando, the forewoman at Hermann & Co.'s factory in Newark, N. J. She took care of the defendant's rooms. Upon the trial she was shown People's Exhibits "D," "G" and "E" and "Exhibit 2." She said she had seen paper like that in the drawer of the sideboard in the defendant's room at the Newark factory. She saw about a half dozen sheets as late as October, 1898. The witness took three sheets of this paper for her own use and left about three sheets of it in the drawer [\*\*\*48] of the sideboard. It also appears in the case that paper like this was on sale at four of the large department stores in New York city and at two stores in Newark, N. J., at one of which, that of Plumb & Co., the firm of Hermann & Co. had an account. The foregoing writings, called the "Barnet" letters and the "Cornish" letters, were used in the case for the avowed purpose of connecting the defendant with the murder of Mrs. Adams. As a part of the theory or theories upon which these writings were admitted in evidence certain genuine and proved or conceded writings of the defendant, of the "real" Barnet and of the "real" Cornish were received in evidence.

This brings us to a statement of that branch of the evidence by which the prosecution claims to have established the culminating proof that the defendant was the writer of the address (Ex. A) upon the poison package received by Cornish. The evidence upon the subject of handwriting proceeds along several distinct lines, and the history of each will be stated separately. On the 29th day of December, 1898, the day after Mrs. Adams' death, one of the newspapers in New York city published what was called a *fac simile* of the poison [\*\*\*49] package address. It is known in the case as defendant's "Exhibit 12." This was seen by John D. Adams, the secretary, and [\*289] Andre Bustanoby, the superintendent [\*\*293] of the Knickerbocker Athletic Club. After seeing this Mr. Adams found some letters in the handwriting of the defendant which were on the files of the club. These were shown to Bustanoby. Both men were familiar with the defendant's handwriting, and were struck with the resemblance between "Exhibit A," the poison package address, and

"Exhibit 12," the newspaper copy. On December 30th, 1898, Adams showed Cornish Exhibit 12 and a number of the defendant's letters with the signatures turned down. Among the latter were Exhibits 20, 21, 22 and 24, which are part of the series of defendant's conceded handwritings. As a result of this interview Cornish telephoned to Captain McClusky. Adams and Bustanoby testified that "Exhibit A" was in the handwriting of the defendant. One Martin, who had been teller of the Essex County National Bank of Newark, N. J., where the defendant had an account, said he had known the latter's signature for four years and, from his knowledge thereof, as well as his experience in [\*\*\*50] comparing and scrutinizing handwritings, he concluded that the writing on "Exhibit A" was that of the defendant. These three are the only witnesses who testified to a belief that the defendant was the writer of the address of the poison package, based upon a personal knowledge of defendant's handwriting.

We now come to the testimony of the experts in handwriting. This fills so large a space in the record, and the conclusions arrived at are based upon so many different and even divergent points and theories, that it would be practically impossible to refer to this branch of the case in detail. It is, moreover, unnecessary for our purposes to do more than to refer to the methods upon which the conclusions of the handwriting experts are based, in order to decide whether error was committed upon this branch of the case. There were fourteen experts, of whom nine were men who had made the study of handwriting a profession, and the remaining five held various positions in banks which required an expert knowledge [\*290] of signatures. They were all agreed that the defendant wrote the address upon the wrapper of the poison package. For the purpose of arriving at these conclusions [\*\*\*51] they were permitted to use, and rely upon, all of the several writings which have been referred to in the foregoing statement. These writings may be classified as follows:

1. Exhibit "A," known as the poison package address.
2. The so-called "Barnet" letters written in the name of H. C. Barnet.
3. The so-called "Cornish" letters written in the name of H. Cornish.

All of these together consist of Exhibits "A" to "R" inclusive, and are known as the lettered exhibits.

4. The conceded handwritings of the defendant which are known as the numbered exhibits and consist of Exhibits "1" to "63" inclusive. These numbered exhibits include the so-called "request writings" of the defendant and letters conceded to have been written by him. The history of the "request writings," briefly stated, is, that on the 17th day of

February, 1899, the defendant, at the request of the police department, wrote in the office of the district attorney, in the presence of Assistant District Attorney Osborne, Mr. Weeks, defendant's counsel, Police Sergeant McCafferty and the experts Kinsley and Carvalho. It had been planned to have these writings consist of copies of the poison package address (Exhibit "A") [\*\*\*52] and other papers in the case, which were to have been made from typewritten memoranda prepared by Kinsley and by him sent to Mr. Osborne. The latter having mislaid the same, Kinsley dictated from memory and the defendant wrote. The result was not satisfactory to Mr. Kinsley and at his request the defendant, with his counsel, Mr. Weeks, called at the office of Kinsley on the 20th day of February, 1899, and there wrote the "request writings," Exhibits 3, 4, 6, 7, 8, 9 and 10. For the sake of brevity we have omitted from the foregoing statement many details of fact and evidence, besides those relating to the subject of handwriting, because they are not essential to the proper disposition of the principal legal questions in the case. For the same reason we will refrain from discussing many of the minor grounds of error assigned [\*291] by the defendant, which are so numerous and diversified that a consideration of them, *seriatim*, would only serve to becloud the larger and more comprehensive questions which, according to our views, are decisive of the case.

First in order, if not in importance, is the question whether any evidence was admissible concerning the alleged killing [\*\*\*53] of Barnet. This question may be considered without referring to the specific objections or exceptions of the defense because it was raised so often and in so many ways that it would involve profitless reiteration and prolixity to dwell upon each objection and exception.

As has been disclosed by the foregoing statement of facts, evidence was received upon the trial tending to connect the defendant with the felonious killing of Barnet, for the purpose of proving his guilt of the crime of poisoning Mrs. Adams, which was the offense charged in the indictment. The general rule of evidence applicable to criminal trials is that [REDACTED] the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged. (1 Bishop's New Crim. Pro. sec. 1120.) This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at

least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit [\*\*\*54] which, speaking through our common [\*\*294] law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt. This rule, and the reasons upon which it rests, are so familiar to every student of our law that they need be referred to for no other purpose than to point out the exceptions thereto. The rule itself has been stated and discussed in this court in a number of cases, but we will cite only a few. In [REDACTED] it was said: "The general rule is that [REDACTED] when a man is put upon trial for one offense [\*292] he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded." In [REDACTED] it is laid down as follows: "The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be [\*\*\*55] easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one." In [REDACTED] the rule is thus stated: "The impropriety of giving evidence showing that the accused had been guilty of other crimes merely for the purpose of thereby inferring his guilt of the crime for which he is on trial may be said to have been assumed and consistently maintained by the English courts ever since the common law has itself been in existence. Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of his whole past life, his tendencies, his nature, his associates, his practices, [\*\*\*56] and in fine all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such a course is pursued than where it is omitted. The common law of England, however, has adopted another, and, so far as the party accused is concerned, a much more merciful doctrine. By that law the criminal

is to be presumed innocent until his guilt is made to appear beyond a reasonable doubt to a jury of [\*293] twelve men. In order to prove his guilt it is not permitted to show his former character or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question." The highest court of Massachusetts has said: "The objections to the admission of evidence as to other transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it, and by [\*\*\*57] showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him." ( [REDACTED] [REDACTED].) The court of last resort in Pennsylvania thus states the rule: "It is the general rule that a distinct crime unconnected with that laid in the indictment cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt on the ground that having committed one crime, the depravity it exhibits makes it likely he would commit another. Logically, the commission of an independent offense is not proof in itself of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged; it, therefore, predisposes the mind of the juror to believe the prisoner guilty." ( [REDACTED] [REDACTED].)

The exceptions to the rule cannot be stated with categorical precision. [REDACTED] Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends [\*\*\*58] to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial. (Wharton on Crim. Ev. [9th ed.] sec. 48; [\*294] Underhill on Ev. sec. 58; Abbott's Trial Brief, Crim. Trials, sec. 598.)

Let us now endeavor to apply to the case at bar each of these exceptions to the general rule.

*First.* As to motive.

It is obvious that [REDACTED] in every criminal trial when proof of motive is an essential ingredient of the evidence against a defendant, the motive to be established is the one which induced the commission of the crime charged. This is too simple for discussion. To hold otherwise would be to sanction the violation of the general rule under the guise of an exception to it. What was the motive assigned for the defendant's alleged attempt to kill Cornish? Hatred, engendered by quarrels between them, in which Barnet took no part, and of which, so far as the record shows, he had no knowledge. What was the motive [\*\*295] which is said to have [\*\*\*59] moved the defendant to kill Barnet? Jealousy caused by the latter's intervention in the love affair of the former. The mere statement of these two motives suffices to show that they have no relation to each other and that the evidence which tends to prove the killing of Barnet throws no light upon the motive which actuated the attempt upon the life of Cornish. So apparent, indeed, is this diversity of motive in the two cases that the learned counsel for the People upon the argument herein abandoned the claim that there was anything in common between them and ingeniously sought to create a single motive out of the alleged forgeries by the defendant of the names of Barnet and Cornish. Of course no inferences can be drawn from these alleged forgeries without assuming that the "Barnet" and "Cornish" letters were all properly received in evidence and proven to have been written by the defendant. We will, therefore, assume that all of these letters were properly in evidence, that they were written by the defendant, and that he was, therefore, guilty of the crime of forgery in the use of each of these names. Is there anything in any of the Barnet letters which sheds a ray of light upon [\*\*\*60] the question of motive for the attempt to kill Cornish? Not [\*295] a word. We are at a loss to understand what probative force there is in the "Barnet" letters which does not also inhere in the "Cornish" letters. If the "Barnet" letters were forged, so were the "Cornish" letters. If the latter bore no intrinsic evidence of motive against the life of Cornish this was equally true of the former. It will thus be seen that under no hypothesis, upon no assumption, can the "Barnet" letters be held to contain any evidence as to the motive for the attempt to kill Cornish that is not also to be found in the "Cornish" letters. What has been said about the "Barnet" letters is true of all the evidence relating to the alleged killing of Barnet. Even if it be admitted that it proves the commission of an independent crime with an adequate motive behind it, it contributes nothing to the subject of motive in the case at bar. Although it seems unnecessary to cite authorities in support of the statement that whenever motive is to be established it

must be the motive which underlies the crime charged, we will briefly refer to a few cases which illustrate the rule. In [REDACTED] the defendant was charged with the murder of one W. The alleged motive was defendant's desire to possess the wife of the deceased. On the trial evidence was received to show that eleven days after the death of W. the defendant and the wife of the deceased appeared before a clergyman in Michigan to be married. Defendant there took an oath that there was no legal objection to the marriage. Although this evidence tended to prove the commission, by the defendant, of another crime than that for which he was on trial, this court said, "this evidence tended to prove that the motive which operated upon the prisoner was the desire to possess W.'s wife; that his passion for her was so absorbing that he was determined to overcome all obstacles standing in his way." In *Stout v. People* (4 Park. Crim. Rep. 132) the crime charged was murder. On the trial evidence was received of an incestuous connection between the defendant and his sister, the wife of the deceased. This was held to be competent even if it did prove the commission of another [\*296] crime, for it tended to disclose the motive which prompted the defendant to get rid of the deceased. In [REDACTED] the defendant was on trial for the murder of one of his children. Two other indictments were then pending against him for the murder of his wife and another child. Evidence was received to support the theory that the motive for the killing of all was to open the way for a second marriage, which was consummated a few days after the last death. This was held proper, because the motive was the same in each case. In [REDACTED] the defendant was accused of the murder of his wife. The marriage had been secretly performed. Evidence of abortions, performed upon his wife by the defendant, were held to be admissible to show defendant's efforts to keep the marriage a secret, and as tending to show a motive for the poisoning of the wife when secrecy was no longer possible or the alliance had become burdensome. So, on the trial of a husband for the murder of his wife, evidence of criminal proceedings against the defendant for failure to support his family, made ten months before the murder, was properly held admissible upon the question of motive. (*People v. Otto*, 4 N. Y. Crim. Rep. 149.) In another case the defendant was charged [\*\*\*63] with the murder of his brother's wife. The brother, his wife and two children were poisoned with arsenic. The brother and his wife died, but the attempt upon the lives of the children failed. Thereupon the defendant procured himself to be appointed the guardian of his brother's children and then

commenced to create and utter various false and forged claims against his brother's estate. The theory of the prosecution was that the defendant coveted his brother's estate, and in order to gain possession of it conceived the plan to murder those who stood in his way; that failing in the attempt to kill the children, he attempted to accomplish his object by forgery. It was held that evidence was properly received of all the crimes involved in this theory, as it was relevant upon the existence of motive for the commission of the crime charged. (*People v. Wood*, 3 Park. Crim. Rep. 681.) Cases of this [\*297] character might be multiplied indefinitely, but enough have been cited to show that when evidence of extraneous crimes has been held competent upon the existence of [\*\*296] motive, it has been either the specific motive which underlay the particular crime charged, or [\*\*\*64] a motive common to all of the crimes sought to be proved.

*Second.* As to intent.

In the popular mind intent and motive are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. [REDACTED] Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. When a crime is clearly proven to have been committed by a person charged therewith, the question of motive may be of little or no importance. But criminal intent is always essential to the commission of crime. There are cases in which the intent may be inferred from the nature of the act. There are others where willful intent or guilty knowledge must be proved before a conviction can be had. Familiar illustrations of the latter rule are to be found in cases of passing counterfeit money, forgery, receiving stolen property and obtaining money under false pretenses. An innocent man may, in a single instance, pass a counterfeit coin or bill. Therefore, intent is of the essence of the crime, and previous offenses of a similar character by the same person may be proved to show intent. ([REDACTED]; *Commonwealth v. Bigelow*, 8 Metc. 235; *Commonwealth v. Stone*, 4 Metc. 43; *Helm's Case*, 1 City Hall Rec. 46; *Smith's Case*, 1 City Hall Rec. 49; *Coffey's Cases*, 4 City Hall Rec. 52; *Dougherty's Case*, 4 City Hall Rec. 166.) So [REDACTED] in a case where the defendant is charged with having received stolen property, guilty knowledge is the gravamen of the offense and *scienter* may be proven by other previous similar acts. ([REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].)

In cases of alleged forgery of checks, etc., evidence is admissible to show that at or near the same time [\*298] that the instrument described in the indictment was forged or uttered the defendant had passed, or had in his possession, similar forged instruments, as it tends to prove intent. ( [REDACTED]; [REDACTED]; *Reg. v. Colclough*, 15 Cox Crim. Cas. 92.) On the trial of an indictment for obtaining goods by false representations, similar representations made by the [\*\*\*66] defendant to creditors from whom goods had been previously purchased by him were held admissible to prove intent. ([REDACTED].) It will be seen that the crimes referred to under this head constitute distinct classes in which the intent is not to be inferred from the commission of the act and in which proof of intent is often unobtainable except by evidence of successive repetitions of the act.

The intent ascribed to the defendant in the alleged killing of Mrs. Adams was to kill Cornish. This is precisely the same as though he had succeeded in committing the particular crime he had planned. [REDACTED] If A undertakes to kill B, and in the attempt kills C, the crime committed is no less a murder than it would have been if B had been killed. The agency employed to encompass the death of Cornish was cyanide of mercury, a poison so rare and deadly that it is not kept on sale in places where strychnine, arsenic and other poisons are sold. It was disguised in an effervescent salt called "bromo seltzer" which is a much used remedy for headache and other trifling human ills. The bottle containing this mixture was carefully prepared to create the impression that it contained [\*\*\*67] nothing but the harmless "bromo seltzer." It was accompanied by a silver bottle holder into which the bottle fitted. Both of these articles were inclosed in a box of the kind used in the sending of gifts. An empty card envelope was added to create the impression that it was a gift, and that the sender had forgotten to inclose his card. It was sent by mail on the eve of Christmas when, according to the universal custom of this country, gifts are exchanged in this manner, and when even the most cautious and prudent person might have taken counsel of his generosity rather than [\*299] his suspicions. Could such a foul and cunningly devised act have been innocently done? Could proof of any number of repetitions of this act add anything to the conclusive inference of criminal intent which proof of the act itself affords? Can it be possible that in the face of such irrefragable *indicia* of murderous intent it is still necessary or proper to prove the commission of other similar crimes to establish intent? These questions

carry their own answers. If intent may not be inferred from such an act as this, then there is no such thing as inference of intent from the character of [\*\*\*68] the act. Let us suppose this to be a case in which evidence of felonious intent could properly be derived from proof of the commission, by the defendant, of other similar crimes. The supposition necessarily implies the establishment of the extraneous crime, by legal and competent evidence, before it can be referred to in support of the theory that it proves the guilty intent with which the crime charged was committed. We shall have occasion to show further on that this cardinal essential is lacking in the evidence which relates to the death of Barnet, and that there is no competent evidence in the case which connects the defendant with the sending of the poison to Barnet. But assuming, for present purposes, that there is competent evidence which tends to show that the defendant was the sender of the poison in both instances, how does the sending of poison to Barnet prove the intent with which the poison was sent to Cornish? It is to be remembered that we are now dealing solely with the subject of intent and not with the rebuttal of possible mistake or accident. In this connection it is also to be borne in mind [\*\*297] that the practice of receiving evidence of other offenses, [\*\*\*69] to prove intent in cases of passing counterfeit money, etc., is a departure from the usual rules of criminal evidence, justified and necessitated by the peculiar nature of these crimes. A man may innocently pass counterfeit money. For this reason evidence of other similar acts by the same person, although not conclusive, may be received to establish intent. It is true that a person may innocently poison another, but that possibility will be discussed under the [\*300] appropriate head of accident and mistake. Eliminating these latter factors from the inquiry, there can be no such thing as innocent poisoning. We have, then, two cases of poisoning as separate and distinct as two cases of shooting. Could it be successfully urged that the shooting of one person by another could be proved to show the intent with which the latter shot a third person at a different time and for a distinct cause? Certainly not, unless it were also established that the two shootings were so connected in time, place and circumstance as to make them part of one common plan or design. The latter subject will also be further discussed under its appropriate head. Throughout the length and breadth of [\*\*\*70] the testimony relating to the death of Barnet there is not a suggestion or a fact which throws any light upon the intent with which the poison was sent to Cornish, or which serves to support or strengthen the inferences as to intent which may be drawn from the evidence tending to show that the

defendant sent the poison to Cornish.

*Third.* As to the possibility of mistake or accident, or doubt as to the cause of death.

There are cases in which the possible or probable defense of accident or mistake may be rebutted upon the direct case of the prosecution; or in which the doubtful cause of the particular death may be established by other previous similar deaths. As most of these are poisoning cases they are of special interest and importance here. The fact that the earlier English reports are more prolific in such illustrations than all of our modern reports is probably explained by the great progress in medical science which has not only materially reduced the number of deaths from poisoning by mistake or accident, but has practically annihilated the possibility of death from poisons so subtle and obscure as to baffle investigation. In *Regina v. Garner and Wife* (3 Foster [\*\*\*71] & Finl. 681) the prisoner Garner had been previously married, and his former wife had died in March, 1861. Prior to that date his second wife had been a servant in the house. The prisoner's mother resided with him after the second marriage. [\*301] The mother's death occurred in December, 1861, and it was clearly proved that she died from arsenical poisoning. Garner, who dealt in milk, also sold arsenic for agricultural purposes. There was evidence of the administration, by the prisoner, to the deceased, of articles of diet in which arsenic might be concealed and of the symptoms of poisoning which followed. But there was also evidence that three horses, one of them belonging to Garner, had been poisoned by arsenic, and that some of his customers against whom he harbored no ill-will had shown symptoms of arsenical poisoning. To prove the willful administration of the poison to Garner's mother, and to rebut the theory of accident, it was held proper to receive evidence as to the circumstances of his former wife's death. In *Regina v. Cotton* (12 Cox Crim. Cas. 400) the defendant was charged with poisoning her stepchild, the son of her deceased husband, who was insured [\*\*\*72] for her benefit. Shortly before his death the child had been attended by a parish doctor, who had prescribed morphia, prussic acid and bismuth in medicinal doses. It was shown that the doctor kept prussic acid, bismuth and arsenic in separate bottles on the same shelf. The bismuth was in the form of sub-carbonate of bismuth, which, the doctor said, was sometimes adulterated with arsenic, but only in minute quantities. It also appeared that shortly before the death of the child a mixture of soft soap and from four to six drachms of arsenic had been used for cleansing

furniture and certain parts of the house. There was testimony tending to show that when this mixture was dried by exposure to the air it would release particles of the arsenic, amounting to three hundred grains, which would float about in the room and could be inhaled and absorbed into the system by means of the lungs, but not through the stomach. Under these circumstances evidence was offered by the prosecution and received by the court to show that two other children of the defendant and one Mattrass, a lodger, had died within a few months of each other with symptoms of arsenical poisoning; that their bodies had [\*\*\*73] been exhumed and arsenic had been [\*302] found in the organs of each of them. The evidence was received on the authority of *Regina v. Geering* (18 L. J. Mag. Cas. 215), where the defendant was tried for the murder of her husband, the cause of whose death was not free from doubt. Three sons had died at about the same time, all exhibiting the same symptoms. The court held that evidence of the other three deaths was competent to show that all were due to arsenical poisoning, and the domestic history of the family was admissible to enable the jury to determine whether the poisoning was accidental or not. In *Regina v. Heesom* (14 Cox's Crim. Cas. 40) the defendant was charged with the murder of her child by poison on October 3rd, 1877, and also with the murder of her mother by the same means on November 5th, 1877. She was indicted for both offenses. On the trial for the murder of her child evidence was received to show that she had poisoned her mother and another of her children. It appeared that the accused held insurance upon the lives of the three alleged victims. The [\*\*298] court, after some hesitation, admitted evidence as to the two previous deaths, [\*\*\*74] citing *Regina v. Geering* as authority, and saying, "If there had been no case on the point I would have paused to consider whether the evidence could be received; but after the decision quoted and with which I am quite satisfied, I have no doubt that it is competent to show that the death of the child was not due to the accidental taking of arsenic." In *Makin v. Attorney-General for New South Wales* (17 Cox's Crim. Cas. 704) the defendant, who kept a "baby farm," was indicted for the murder of an infant, Horace Murray. The Murray child was found buried in a garden attached to defendant's house. The bodies of other children were found buried in the same garden and the gardens attached to other houses previously occupied by the defendant. Here, again, the authority of *Regina v. Geering* (*supra*) was invoked and evidence of other similar deaths was received. In *Regina v. Roden* (12 Cox's Crim. Cas. 630) the defendant was indicted for the murder of her child, an infant nine days old, whose

death was caused by suffocation while [\*303] he was in bed with his mother. The defense was accident. To rebut this defense testimony was received to show that [\*\*\*75] five other children of the defendant had all died in infancy. The prisoner was acquitted, however, upon the testimony of a physician, who said the child might have been accidentally suffocated by the mother overlaying it or by the covering on the bed. In *Regina v. Flannagan and Higgins* (15 Cox's Crim. Cas. 403) the defendants, who were sisters, were indicted for murdering the husband of the defendant Higgins by arsenical poisoning. The defendants had also been indicted for the murder of Margaret Jennings, John Flannagan and Mary Higgins, apparently members of the same family. Evidence of the previous deaths was received "with a view to showing, not that the defendants had feloniously poisoned the deceased, but that the deceased had, in fact, died by poison administered by some one." In [REDACTED] the defendant was indicted and prosecuted for the murder of one Ella Maly, who died of strychnine poisoning. The evidence tended to show that the defendant was enamored of Dr. Mitchell, in whose family she lived as a servant, and was jealous of his attentions to Maly. Evidence was received to show the circumstances of Mrs. Mitchell's death, which [\*\*\*76] occurred prior to the death of Maly, for the purpose of showing that the latter was not accidental. In the case of [REDACTED] the defendant was accused of causing the death of his wife by arsenical poisoning. On the trial evidence of the death of the wife's mother was admitted to show that arsenic had been administered to both of them in pursuance of a design on defendant's part to obtain their property. This evidence was held to be competent to show the defendant's purpose and intent, the system by which that purpose was to be accomplished, and also to rebut the theory of accident, suicide or the negligent or ignorant administration of arsenic either by the defendant or his wife. In [REDACTED], on prosecution for manslaughter in committing an abortion, where the proof of the killing was circumstantial, [\*304] and the theory of the defense was that the premature birth was due to accidental causes, it was held proper to receive evidence that the respondent had performed other abortions in the same house. There are other cases of similar character in which this kind of evidence was not received. These will [\*\*\*77] not be referred to as our only purpose in citing the foregoing authorities under this head is to show the radical difference between the cases which must be relied upon by the prosecution and the case at bar. [REDACTED] While the early English cases have gone to

great lengths in the admission of testimony tending to establish other crimes than the one charged, it is clear that the only two theories upon which the rulings therein have been attempted to be, or could be defended are, first, that the killing may have been accidental, or, second, that the cause of death was in doubt. In the one instance proof of other deaths in the same family, under similar circumstances and identical symptoms, may have been the only evidence obtainable to prove a felonious killing; in the other instance the uncertainty as to the cause of death could, possibly, have been removed by evidence of previous deaths in the same family circle, under conditions which would make the cumulative evidence of all the deaths cogent proof of the cause of the particular death charged in the indictment. No such case is presented here. The poison used is clearly and positively identified. The analyses of the contents of the bromo [\*\*\*78] seltzer bottle, the glass from which a portion thereof was taken by the victim and of her internal organs, point unerringly to the swift and terrible agent of death employed by the murderer. The poison is rare, subtle, deadly. It is mixed with a harmless powder of common use, contained in a bottle, labeled and prepared with the design to deceive the recipient. It is accompanied by other articles calculated to induce the belief that they are component parts of a gift from a friend. It is sent by mail on the eve of that great holiday when the spirit of generosity and good-will pervades the land; when friendships are renewed and enmities are forgotten; when distrust and suspicion are allayed by the higher [\*305] and kindlier impulses of human nature. Was this poison sent by mistake or accident? Are not utter depravity, venomous malignity, murderous design, fiendish cunning, indelibly stamped upon every fact and circumstance connected with the act? It would be a travesty upon our jurisprudence to hold that, in a case of such appalling and transparent criminality, it could [\*\*299] ever be deemed necessary or proper to resort to proof of extraneous crimes to anticipate the [\*\*\*79] impossible defense of accident or mistake. The same irrefutable logic of fact and circumstance that establishes felonious intent as clearly negatives the possibility of accident or mistake.

*Fourth.* As to a common plan or scheme.

It sometimes happens that two or more crimes are committed by the same person in pursuance of a single design or under circumstances which render it impossible to prove one without proving all. [REDACTED] To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must

be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both. Underhill in his work on Criminal Evidence (Sec. 88) thus states this exception to the general rule: [REDACTED] "No separate and isolated crime can be given in evidence. In order that one crime may be relevant as evidence of another, the two must be connected as parts of a general and composite scheme or plan. Thus the movements of the accused prior to the instant of the crime are always relevant to [\*\*\*80] show that he was making preparations to commit it. Hence, on a trial for homicide, it is permissible to prove that the accused killed another person during the time he was preparing for or was in the act of committing the homicide for which he is on trial. And, generally, when several similar crimes occur near each other, either in time or locality, as, for example, several burglaries or incendiary fires upon the same night, it is relevant to show that the accused, being present at one of them, was present at the other *if the crimes seem to be [\*\*306] connected*. Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received. This connection must clearly appear from the evidence. Whether any connection exists is a judicial question. If the court does not clearly perceive it, the accused should be given the benefit of the doubt and the evidence rejected. The minds of the jurors must not be poisoned and prejudiced by receiving evidence of this irrelevant and dangerous description." The compendium just quoted, of the exception now under discussion, [\*\*\*81] is so accurate and concise that no other text writers will be cited, although there are many of them. There is, indeed, no room for discussion in regard to the general principles upon which evidence is admitted to show that a defendant is guilty of other felonies or misdemeanors than the one upon which he is tried. As stated in [REDACTED], "whether the evidence in any particular case comes within the well-known exceptions to the general rule is often the difficult question, and not as to what the rule itself really is."

Before advertent to the facts and circumstances upon which the prosecution rests its claim that there is such a connection between the alleged killing of Barnet and the killing of Mrs. Adams as to justify proof of the former in support of the latter, we will pursue the course hitherto adopted in citing some authorities upon which the prosecution rely and which illustrate and limit the

exceptions to the general rule. In *Goersen v. Commonwealth (supra)* the deaths of the defendant's mother-in-law and wife, respectively, were connected by evidence tending to show defendant's design to obtain possession of their property. There [\*\*\*82] was a single motive, intent and purpose. In [REDACTED], which is known as one of the "Molly Maguire" cases, the defendants were on trial for a murder which had been preceded by a highway robbery in which they were implicated. Evidence was received to show that the defendants were members of a secret society which had for its object the commission [\*\*307] of various crimes, such as beatings, arsons, robberies and murders, and the protection of its members from arrest and punishment by secreting them, aiding them to escape and otherwise. This was held to be competent to show that the crime charged was within the scope of the purposes for which the conspirators were banded together and to explain and corroborate other testimony which bore directly upon the commission of the crime charged. In [REDACTED]; *affd.*, 154 N. Y. 770) the crime charged was arson in the first degree for burning a building in New York city. It appeared that in August, 1891, the defendant had a house in New York city containing some furniture. The furniture was removed to a house in Newark, N. J. The defendant stated to an accomplice, [\*\*\*83] who was a witness for the prosecution, that his object in removing the furniture was to have it insured in the name of Seltzer, because he, the defendant, had been blacklisted by the insurance companies and could not get it insured in his own name. On January 4th, 1892, the house in New York was burned, and a few days before that the furniture in Newark had also been burned. It was held that evidence in respect to the Newark fire was competent upon the ground that both arsons were perpetrated with a single object and motive and in pursuance of the same plan. The court said: [REDACTED] "Where one crime is committed to prepare the way for another, and the commission of the second crime is made to depend upon the perpetration of the first, the two become connected and related transactions, and the proof of the commission of the first offense becomes relevant to show the motive for the perpetration of the second." In [REDACTED] [\*\*300] the defendant was indicted and tried for the crime of robbery in the first degree. The evidence disclosed that a number of masked men entered the apartment of the janitor of a bank and forcibly took from him the key to the bank. The [\*\*\*84] bank was burglarized on the same occasion. The two crimes were held to be so connected that evidence of the burglary was deemed

competent to connect the defendant with the robbery. In [REDACTED] the [\*308] defendant was convicted of the crime of arson in the third degree. The specific charge was that defendant had burned a barn belonging to the man by whom he had been employed as coachman and gardener. The defendant had been discharged from this position. A poisonous preparation had been kept in the barn for use in destroying insects in the garden. The defendant knew of this. Evidence was received to show that on the night of the fire and before it occurred, a span of horses, a pony and a cow had been poisoned and died. This evidence was held competent as tending to prove that the injury to the animals was done by the incendiary and as a part of the same criminal scheme which resulted in the destruction of the barn. In [REDACTED] the defendant was convicted of arson in attempting to burn a hotel of which he had been an inmate. The evidence, which was circumstantial, pointed to the defendant as the guilty [\*\*\*85] person. Evidence was offered and received to show that two days after the first attempt, which had proved abortive, the defendant was apprehended with combustible materials in his possession, under circumstances which strongly indicated a second attempt at burning the hotel. The evidence was held to be competent to show a renewed purpose to accomplish the crime previously attempted and to identify the person who made both attempts. In approving of this ruling the court quoted with approval the statement in [REDACTED], that "to make one crime evidence of another a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor by a connection which shows that he who committed the one must have done the other." There are other cases where two or more crimes are so connected that it is impossible to distinguish them and proof of all, in the effort to establish one, is a part of the *res gestae*. Illustrations of this class will be found in [REDACTED] in which defendant killed a [\*\*\*86] man and his wife, at the same time and place, under circumstances showing that both were committed by [\*309] the same person; and in [REDACTED], where the defendant murdered his two children in the same bed and at the same time.

Without further multiplying the cases which exemplify and support the exception to the general rule, that extraneous crimes may be proven to establish the specific crime charged, when all are shown to have

been committed in pursuance of a common design, or when they are so connected that evidence of one tends to prove the other, we will now quote from a single authority which clearly and succinctly prescribes the limitations of this exception and the reasons for careful judicial discrimination in its application. In *Shaffner v. Commonwealth* (*supra*) the highest court of Pennsylvania said: "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor by a connection which shows that he who committed the one must have done the other. Without [\*\*\*87] this obvious connection it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence it is obvious it should not be received, unless the mind plainly perceives that the commission of one tends, by visible connection, to prove the commission of the other by the prisoner. [REDACTED] If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner instead of suffering the minds of the jurors to be prejudiced by an independent fact carrying with it no proper evidence of the particular guilt." This statement voices the key note of the distinction between the civil law and our own more merciful common law. Under the former there is no presumption of innocence. A mere official [\*310] charge of crime puts the accused upon his defense. His history is an open book, every [\*\*\*88] page of which may be read in evidence by the prosecution. Every crime or indiscretion of his life may be laid bare to feed the presumption of guilt. How different is our own common law, which is the product of all the wisdom and humanity of all the ages. Under it the accused comes into a court of justice, panoplied in the presumption of innocence, which shields him until his guilt is established beyond a reasonable doubt. His general character can be thrown into the balance by no one but himself. The incidents of his life, not connected with the crime charged, are his sacred possession. He faces his accuser in the light of a distinct charge, with the assurance that no other will be, or can be, proved against him.

Let us now endeavor to make a practical application of these principles to the case at [\*\*301] bar,

remembering that the subjects of motive, intent, accident and mistake have already been discussed, and that the subject of identity remains for separate consideration. Mrs. Adams was killed on the 28th day of December, 1898. The cause of the latter's death was clearly established by evidence connected with a definite motive and unmistakable intent. The only mistake [\*\*\*89] or accident that was possible did in fact happen. The intended victim innocently administered the poison to another. We are, therefore, to consider whether the killing of Mrs. Adams and the alleged killing of Barnet were part of a common plan or scheme, or were so connected that evidence of the death of Barnet and its cause tended to prove the murder of Mrs. Adams. Barnet died on the 10th day of November, 1898. Subsequent events proved that he died of mercuric poisoning. There was no evidence tending to connect the defendant with the sending of the poison to Barnet, except the inference which may be drawn from the assumption that it was sent by mail, and this assumption is based upon the utterly incompetent statement of Barnet to his physicians. The motive for the alleged killing of Barnet is so distinct from the motive assigned for the crime charged in the indictment that [\*311] a new and common motive is sought in the alleged forgeries of the defendant, and this, as we have seen, is the creation of counsel upon the argument of the appeal, never having been suggested upon the trial. The motive against Barnet, exploited upon the trial, was without the support of evidence [\*\*\*90] since a large part of the testimony upon that subject was stricken from the record. But assuming for present purposes that the prosecution did in fact prove all that it sought to prove, it is impossible to perceive any legal connection between the two cases. Barnet was said to have been poisoned because he had interfered in the defendant's love affair. Cornish was to be poisoned because he had incurred the hatred of the defendant as the result of quarrels between them over club matters. Barnet died November 10th, and Mrs. Adams died seven weeks later. Let us suppose that the defendant, having a motive for the killing of Barnet, had shot and killed him in November, 1898; and that in darkness of night on the 28th day of December, 1898, some one had shot and killed Mrs. Adams while she was near to Cornish; that in a subsequent investigation it had transpired that defendant also had a different motive for killing Cornish, thus creating the suspicion that the bullet which killed Mrs. Adams had been intended for Cornish, could it be shown that the defendant shot Barnet to prove that he shot Mrs. Adams? The two deaths were caused by the same means, at different times, inspired by separate [\*\*\*91] motives, and charged against one

person. Is there any connection between the two crimes?

It is said that the connection is established by the "Barnet" and "Cornish" letter box correspondence. Let us assume for the present that the "Barnet" letters were competent for all the purposes for which they were used. Referring to the "Barnet" correspondence and its incidents, it appears that the defendant rented a letter box in the name of Barnet. Through it the letters addressed to Barnet were received. There is no suggestion of Cornish in the renting of the box or in any of the communications which passed to and fro in the name of Barnet. When the defendant undertakes [\*312] to describe a person who is not Barnet, as it is said he did in the "diagnosis blank," he describes himself. Seven months later, and six weeks after the death of Barnet, the defendant rents a letter box in the name of Cornish. This was the medium under cover of which the "Cornish" correspondence was sent and received. Neither in the renting of this box nor in any of the letters addressed to or written in the name of Cornish is there any reference to the Barnet case. Where is the connection between them? [\*\*\*92] It is argued that it exists in the similarity of the methods employed in the two cases and in the identity of the remedies written for in both names. It is true that "Calthos" and "Kutnow" powder were found among the belongings of Barnet. The same things were found in the letter box agency of Koch, addressed to Cornish, but placed in the wrong box and, therefore, never delivered until given up to the police. What do these things prove? Simply this: that if the same person was operating through both boxes he was employing similar means for different ends or for some common purpose not disclosed by this record. The methods referred to are as identical as any two shootings, stabbings or assaults, but no more so. In this connection it may be well to remember that "Kutnow" powder was not written for in the name of Cornish until the 21st day of December, 1898, the very day on which the bottle holder was purchased which exactly fitted the bottle of "bromo seltzer" containing the poison sent to Cornish. This would indicate that when the "Cornish" letter was written, asking for a sample of "Kutnow" salts, the vehicle had already been chosen for the poison that was to be sent Cornish. [\*\*\*93] While this fact would not necessarily be inconsistent with the poisoner's efforts to obtain other materials to effect his designs if the "bromo seltzer" should fail, it remains true that whatever was done in December had reference to the death of Cornish and not of Barnet, the latter having died in November. It is also urged that the poison which

caused the death of Mrs. Adams was one which could only be secretly and successfully produced and administered by a person who had the requisite [\*313] knowledge and skill, and, therefore, it was proper to show the use of the same poison in a previous case. Other evidence had been properly admitted to show that the defendant had the [\*\*302] knowledge, skill, appliances and opportunity to produce the poison used in the Adams case. It is as plain as that two and two make four that the man who could produce it in one case could do so in another. But the naked fact that the same means were used in the two cases simply proves that two distinct crimes may have been committed by the same person by similar means. There is not a fact or circumstance in the Barnet case that, taken by itself, legitimately tends to prove any essential fact [\*\*\*94] in the Adams case until we come to the subject of the handwriting of the "Barnet" and "Cornish" letters, and that will be considered under the head of handwriting evidence.

*Fifth.* As to identity.

Another exception to the general rule is, that [REDACTED] when the evidence of an extraneous crime tends to identify the person who committed it as the same person who committed the crime charged in the indictment, it is admissible. There are not many reported cases in which this exception seems to have been affirmatively applied. A far larger number of cases, while distinctly recognizing its existence, have held it inapplicable to the particular facts then before the court. The reason for this is obvious. In the nature of things there cannot be many cases where evidence of separate and distinct crimes, with no unity or connection of motive, intent or plan, will serve to legally identify the person who committed one as the same person who is guilty of the other. [REDACTED] The very fact that it is much easier to believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime proves the dangerous tendency of such evidence to convict, not upon the [\*\*\*95] evidence of the crime charged, but upon the superadded evidence of the previous crime. Hence our courts have been proverbially careful to subject such evidence to the most rigid scrutiny, and have invariably excluded it in cases where its relevancy and competency [\*314] was not clearly shown. As was said in [REDACTED] such evidence "tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime, which it cannot be supposed he is or will be in proper condition to meet or explain, and which necessarily tend to very

gravely prejudice him in the minds of the jury upon the question of his guilt or innocence." Such evidence gives opportunity for the conviction of an accused person upon mere prejudice instead of by evidence showing the actual commission of the crime for which a defendant is on trial. It compels a defendant to meet an accusation not charged in the indictment, which he might successfully refute if given the opportunity to do so, unembarrassed by other issues. Before applying the exception under discussion to the case at bar, let us examine a few authorities which illustrate the theory upon which [\*\*\*96] evidence of previous crimes is admissible to identify the person who is charged with the commission of the crime set forth in the indictment. In [REDACTED] the defendant was convicted of a murder committed by him while burglariously entering the house of the deceased. Evidence was received tending to show that the defendant had committed a prior burglary at which he had stolen a knife and chisel, and still another burglary at which he had stolen a pistol. The evidence also tended to show that the burglary at the house of the deceased had been committed by means of the knife and chisel, and that the deceased had been killed with the pistol which the defendant had previously stolen. It will be seen at once that there was such a palpable connection between the several crimes referred to that the identification of the means used in the commission of the crime charged, while incidentally proving the defendant guilty of other crimes, also directly identified him as the person who was guilty of the murder. In [REDACTED] the defendant, a ship joiner, was indicted for burning the buildings of one Ackerman. The charred remains [\*\*\*97] of a box, of peculiar construction and equipment, were found on the ground beside one of these [\*315] buildings. After the fire the defendant fled from the state. Soon thereafter his shop was searched and certain tools and materials were found which, upon inspection and comparison, tended to show that the box found at Ackerman's buildings had been made in the defendant's shop from the materials and with the tools that were there. Another box of similar design, material and workmanship had been previously found at a church nearby, under conditions indicating an attempt at incendiarism. Comparison was made between the box first found and a piece of wood in defendant's shop, and it was shown that they had been, originally, parts of the same piece of wood. An anonymous letter which had been sent to the municipal authorities, threatening general incendiarism, was shown to have been written by the defendant. The admission of the evidence relating to the box found at the church was upheld on

the ground that "it tended to show that the defendant was possessed of the requisite skill, materials, tools and opportunity to have made the box used at the Ackerman fire," and in connection [\*\*\*98] with said letter, "to show that the defendant made both boxes with the single motive" expressed in the letter. As proof of the crime there charged depended wholly upon circumstantial evidence, the mere finding of the box at Ackerman's buildings was not sufficient to establish either motive or intent. Evidence of other attempts at arson was, therefore, necessary and competent to establish these essential elements of the crime charged. Such evidence was, of course, not rendered incompetent because it [\*\*\*303] also tended to identify the defendant as the person who was guilty of that crime. In [REDACTED] a robbery committed by masked men was followed by burglary of a bank. The janitor of the bank had been robbed of the key thereto by these men. Evidence of the burglary was held proper to identify those known to have been implicated therein with the persons who had committed the robbery. In *Rex v. Clewes* (4 Car. & Payne, 221), a *nisi prius* case, imperfectly reported, there was a question of identity. A. was indicted for the murder of H. The theory of the prosecution [\*\*\*316] was that A. having malice against P., hired H. to murder him; [\*\*\*99] that H. having committed the murder, but having been detected in the act, A. murdered H. to prevent the discovery of his (A.'s) guilt. In each of the last two cases there was an immediate and direct connection between the crime charged and the extraneous crime proved. In the first case the burglary of the bank, by men who were known, with the key of which the janitor had been robbed, directly identified the burglars as the masked men who but a moment before committed the robbery which was charged in the indictment. In the second case, proof that the defendant hired H. to murder P., and that H. was detected in the act, was cogent evidence that the same man who had hired the assassin had a motive for getting rid of him when his confession seemed imminent. What is there in the evidence of the alleged killing of Barnet that tends to identify the defendant as the person who poisoned Mrs. Adams? Assuming Barnet to have been killed by the defendant, the crime has its own separate motive, intent and plan. This is equally true of the crime charged in the indictment. The mere fact that the two crimes are parallel as to the methods and means employed in their execution does not serve to [\*\*\*100] identify the defendant as the poisoner of Mrs. Adams unless his guilt of the latter crime may be inferred from its similarity to the former. Such an inference might be justified if it had been shown conclusively that the defendant had killed Barnet

and that no other person could have killed Mrs. Adams. But no such evidence was given. The evidence tended to show that the defendant had the knowledge, skill and material to produce the poison which was sent to Cornish. But he was not shown to be the only person possessed of this knowledge, skill and material. Indeed, it is common knowledge that there are many such persons. Therefore, the naked similarity of these crimes proves nothing. It is said that the renting by the defendant of two letter boxes, one in the name of Barnet and the other in the name of Cornish, and the correspondence which passed through them, proves that the man who rented both boxes and [\*\*\*317] carried on the correspondence is the same man who committed both murders. Let us see how logical this deduction is. As we have shown, there is nothing in common between the subject-matter of the Barnet correspondence and the Cornish correspondence except the fact [\*\*\*101] that in the main it all relates to advertised remedies for impotence. There is one letter in each series in which the writer sends for "Calthos." One "Cornish" letter asks for a sample of "Kutnow" powder. A box of this powder is found in the "Barnet" letter box and another is found in the "Cornish" letter box. Assuming Barnet to have been poisoned with cyanide of mercury contained in "Kutnow" powder administered to or taken by him, it is clear that the package found in the "Barnet" letter box did not contain the powder used for that purpose, and it is equally clear that no one is shown to have written for "Kutnow" powder in the name of Barnet. The "Kutnow" powder found in the "Cornish" letter box could not have been placed there until after the poisoner had decided to use "bromo seltzer" in the Cornish case, for the bottle holder was purchased on the same day that the "Cornish" letter box was rented, and that was seven weeks after the death of Barnet. All that is shown by the character of this correspondence is that defendant used the names of Barnet and Cornish to carry it on and that it related generally to a common subject not connected with either of the alleged murders. As [\*\*\*102] the contents of none of the letters in the one series contain any reference to or throw any light upon the matters referred to in the other series, it is difficult to understand how the letters in the Barnet series tend to identify the murderer of Mrs. Adams. As briefly as possible, we have discussed each of the five foregoing exceptions to the general rule in the effort to exclude them, one by one, from application to the case at bar. If, as we think, we have successfully eliminated each of them, then they are all removed from the case, and it necessarily follows that none of the evidence tending to prove the poisoning of Barnet was relevant or competent to prove the murder of Mrs. Adams.

[\*318] Before leaving this point it may be added that even if the evidence relating to the death of Barnet were generally competent for the purpose of proving the murder of Mrs. Adams, yet there was fatal error in the admission of the statements made by Dr. Douglass as to what Barnet had told him with reference to receiving the box of "Kutnow powder" by mail. This evidence was clearly incompetent. It may be conceded for the purposes of this discussion that [REDACTED] when evidence of an extraneous [\*\*\*103] crime is admissible to prove the crime for which a defendant is on trial, it is not necessary to prove every fact and circumstance relating to the extraneous crime that would be essential to sustain a conviction thereof. But it cannot require serious argument to show that such evidence, to be admissible, must be relevant and competent to the issue on trial. There was, therefore, no competent testimony in the [\*304] case that Barnet ever received "Kutnow" powder through the mail, and as there was nothing in the "Barnet" correspondence to show that the defendant had ever written for "Kutnow" powder in the name of Barnet or in any other name until the Cornish letter of December 22nd, 1898, was written, the record is barren of evidence which tends to connect the the defendant with the killing of Barnet. At this point it is proper to observe, also, that even if it could have been proper to prove two distinct crimes with separate motives, there was an utter absence of evidence of motive in the Barnet case. The evidence of the witness Rachel Green, to the effect that the defendant and his wife had lived together before their marriage, was stricken out upon the court's own motion, [\*\*\*104] on the ground that the district attorney had not connected it with the defendant nor made it material to the case at bar as he had promised to do. This evidence was, however, not stricken out until it had been in the case a full month, and even then the district attorney was permitted to present the case to the jury precisely as though the evidence had been retained.

As to the evidence of handwriting.

For the purpose of proving that the defendant wrote the address upon the package of poison received by Cornish, the [\*319] prosecution offered and the court admitted, as standards of comparison, three classes of writings. The first class consisted of fifty-six specimens of defendant's handwriting gathered from various places and in sundry ways, and conceded by him at the trial to be his genuine handwriting. The second class consisted of the so-called "request writings," seven in number, admitted to have been written by the defendant under the circumstances disclosed in the statement of facts.

The third class consisted of nine so-called "Barnet" letters, five "Barnet" envelopes and three so-called "Cornish" letters. These Barnet and Cornish letters, although unlike in many [\*\*\*105] respects, and introduced in part for different purposes, may be classed together in considering the questions arising out of the exceptions taken to the rulings of the court upon the subject of comparison of handwriting.

The facts upon which the prosecution based the charge that the defendant had written the writings of the third class, and the facts necessary to be understood in considering the admissibility of the writings of the second class, briefly recapitulated, are as follows: On the 27th day of May, 1898, the defendant rented a letter box in the name of H. C. Barnet from one Heckman, who kept a private letter box agency at No. 257 W. 42nd street, New York city. The nine "Barnet" letters consist of Exhibits B, C, F, H, I, M, O, P and Q. The envelopes consist of Exhibits B<2>, J, K, N and R. These letters were addressed to various manufacturers of proprietary medicines for remedies. None of them referred in terms to any fact or circumstance connected with the death of Mrs. Adams. All of these letters are said by the experts to disclose certain peculiarities of handwriting which also appear in the "Cornish" letters, in the poison package address and in the conceded writings [\*\*\*106] of the defendant. One of these, the "diagnosis blank," written in the name of Barnet, is said to describe the defendant and not Barnet. The "Cornish" letters embrace Exhibits D, E and G. Exhibit D is one addressed to Stearns & Co., asking for information about Harpster. Exhibit E is a letter to Kutnow Bros., asking for a sample of salts, and [\*320] Exhibit G is the letter to Van Mohl & Co., asking for "five days' trial." As we have seen, these three letters were written upon the egg-blue, tri-crescent paper, which was also used in writing the "Burns" letter (Exhibit 2), which paper was of the same character and description as that seen by the witness Melando in the drawer of the sideboard in the defendant's room at the Hermann factory in Newark. The second class consists of the so-called "request writings," embracing Exhibits 3, 4, 6, 7, 8, 9 and 10, written by the defendant in the presence and at the suggestion of Kinsley, the handwriting expert who had been retained by Capt. McClusky as early as the 1st day of January, 1899. The admission by the trial court of these standards of comparison raises interesting and important questions which will be considered in their order.

[\*\*\*107] The first point made by the defendant is that comparison of the address upon the poison package

could not be made with any other writings whatever under the statutes regulating the subject in this state. When the genuine writings of the defendant, known in the case as the "conceded writings," were offered by the prosecution as standards of comparison, the defendant objected to them upon the ground that [REDACTED] comparison of handwriting is competent only in a case in which the disputed writing is the subject-matter of the issue to be tried, and never when it is only evidentiary; in other words, that comparison may be made when the disputed writing is the fact in issue, but not when it is merely a fact relevant to the issue. The disposition of this objection goes to the foundation of the People's case, and requires a statement of the rule at common law and of its statutory modifications.

There is some difference of opinion among the highest courts of the several states concerning the extent to which comparison of handwritings may be made at common law. The rule long established in England, which was adopted in this state and existed until the enactment of the statute of 1880, was briefly [\*\*\*108] this: [REDACTED] Whenever it was relevant, according to the general rules of evidence, to prove that any person had or had not written a particular paper, such proof might be made [\*321] either (1) by witnesses who had seen the paper written, or to whom it had been [\*\*305] acknowledged, or (2) by witnesses familiar with the handwriting of the person charged to be the writer, and who were able to testify from their familiarity with his handwriting to a belief respecting the genuineness of the handwriting in question, or (3) by what has come to be known as comparison of hands, which could be made at common law by witnesses, or by the court or jury without the aid of witnesses, between the disputed writing *and other writings already in evidence for other purposes*. It has often been pointed out that the second class of evidence above mentioned is, equally with the third, a comparison of hands, for in the second class the witnesses compare the disputed writing with a standard or exemplar present in their own minds. It has never been doubted, however, that the second class of evidence was admissible whenever, within the accepted rules of evidence, it became relevant to determine whether [\*\*\*109] a particular person wrote a disputed paper. The third class, consisting of direct comparison made by or in the presence of the tribunal charged with the determination of the fact, was limited in England and in this state to comparison between documents properly in evidence for other purposes. Comparison might be made between such documents and the disputed writing in order to determine whether the writer of the other documents was also the writer of the disputed paper;

but that was the extent of the rule. No document could be introduced merely as a standard of comparison with the disputed writing. (*Doe v. Newton*, 5 Ad. & El. 514; *Doe v. Suckermore*, 5 Ad. & El. 703; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].)

It will be seen, upon an examination of the decisions establishing the common-law rule in England and in this state, that the idea that a disputed writing must be the very fact in issue in order that comparison may be made between it and other writings already properly in evidence for other purposes than [\*322] comparison, finds no [\*\*\*110] support in the rule itself, or in any of the reasons which led to the formulation of that rule. If it has any foundation it must be in the statutes regulating the subject of comparison of handwriting.

The first statute in this state upon the subject is chapter 36 of the Laws of 1880, entitled "An act to amend the law of evidence and practice on civil and criminal trials," and is as follows: [REDACTED] "Section 1. Comparison of a disputed writing, with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute.

"Section 2. This act shall take effect immediately."

It is obvious that the purpose of this enactment was to enlarge and not in any wise to narrow the rule established at common law. The latter was generally felt to be too inelastic, as it frequently excluded from the consideration of the court testimony which common experience proved to be helpful. As early as 1854 the restrictions of the common-law rule had been thrown off [\*\*\*111] in England by statute. (17 & 18 Vict. chap. 125, sec. 27, 103; 28 Vict. chap. 18, sec. 1, 8.)

The statute of 1880 is almost *verbatim* like the English statute of 1854. So far as our research has gone we have been unable to find any suggestion that the statute was intended to limit comparisons which, at common law, could be made concerning any writing relevant to the issue to writings which were themselves facts in issue, except a *dictum* presently to be noticed. Such a construction cannot be given the statute without assuming that the legislature, while intending to broaden the common-law rule, actually made it much narrower.

The statute of 1880 was first considered by this court in [REDACTED]). That was an appeal from a decree admitting a will to probate. The questions before this court were whether the surrogate had properly admitted [\*323] genuine specimens of the testator's handwriting to be used by expert witnesses as standards with which to compare the signature to the will, and had properly rejected specimens of the writing of a person charged to have forged the will. This court held that the rulings were clearly right under the [\*\*\*112] statute. Ruger, Ch. J., said: "This act was evidently intended to enlarge the rules of evidence and extend the facilities for testing the handwriting of a party, the genuineness of whose signature was disputed, beyond the opportunities afforded by the then existing rules." (p. 75.) The learned chief judge, in the following paragraph, added a sentence which appears to be the foundation of the defendant's argument against the admissibility of the comparisons made in the case at bar between the "conceded writings" and the address upon the poison package, namely: "*The disputed writing referred to in the statute relates only to the instrument which is the subject of controversy in the action, and the specimens of handwriting admissible thereunder are those of the person purporting to have executed the instrument in controversy.*" (p. 75.) This is a slender foundation for the defendant's argument. The observation made by the learned judge must be confined to the facts before the court; further than that it was unnecessary to the decision and not binding upon the court.

The decision in *Peck v. Callaghan* was made in 1884, and in 1888 the legislature, evidently in order to avoid [\*\*\*113] the construction confining the standards of comparison to the genuine handwriting of the person purporting [\*\*306] to have executed the disputed instrument, enacted [REDACTED] chapter 555 of the Laws of 1888, which is as follows: "Section 1. Section 2 of chapter 36 of the Laws of 1880, entitled 'An act to amend the law of evidence and practice on civil and criminal trials,' is hereby amended so as to read as follows:

"Section 2. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person, claimed on the trial to have made or executed the disputed instrument, or writing, shall be permitted and submitted to the court and jury in like manner. [\*324] But nothing within contained shall affect or apply to any action or proceeding heretofore commenced or now pending.

"Section 2. This act shall take effect immediately."

The act of 1888 does not repeal or supersede the act of 1880, but enlarges the operation of the latter by admitting evidence of the kind which it was thought had been decided in *Peck v. Callaghan* to be inadmissible under the statute of 1880. In other words, it authorized evidence which would [\*\*\*114] establish forgery of the disputed writing by a particular person. We see nothing in either of the statutes which have been quoted to justify the construction attempted to be placed upon them by the defendant, while the whole history of the subject at common law and under the statutes of Great Britain and this state requires the contrary view.

The precise question appears never to have been decided in any of the courts of this state, probably for the reason that the bar have deemed the statutes too plain to warrant so fanciful a construction as the defendant's counsel attempts to give them here. We think it too clear for extended argument that the "disputed writing" referred to by the statutes is any writing which one party upon a trial seeks to prove as the genuine handwriting of any person, and which is not admitted to be such, provided that the writing is not inadmissible under other rules of evidence. The statutes were clearly intended to remove the restriction which at common law limited the comparison of a disputed writing, either with other writings put in evidence for other purposes than comparison, or with standards existing in the minds of witnesses familiar with the handwriting [\*\*\*115] of the person sought to be charged with the disputed writing. The class of disputed writings which may be proved upon the trial of an issue has neither been enlarged nor restricted. The admissibility of such disputed writings depends upon other rules than either the common law or the statutory rules respecting comparison of handwriting. [REDACTED] If a disputed handwriting is itself either a fact in issue, or a fact relevant to the issue, it may be proved by the means pointed out by the statutes. If it is neither in issue nor relevant to [\*325] the issue it must be excluded, not because the statutes of 1880 and 1888 have anything to do with the question, but because, according to fundamental rules, it can have no bearing upon the controversy.

Although similar statutes are in force in several of the states, no such construction as is contended for by the defendant here has ever been suggested, so far as we have been able to ascertain. In this connection it is significant that comparisons between disputed writings merely evidentiary in character and accepted standards

have been sanctioned in a number of cases before this court, some of which have passed its scrutiny although it had the [\*\*\*116] power of correcting errors not pointed out by exceptions. ( [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].)

It is, of course, beyond dispute that the People's Exhibit A, the address upon the poison package, is an important link in the chain of evidence tending to connect some person with the killing of Mrs. Adams. It is a fact relevant to the issue, the fact in issue being whether the defendant killed Mrs. Adams. The defendant's contention is that if he were on trial for having forged Exhibit A (were such a thing possible), then Exhibit A would be the fact in issue and might be compared with the "conceded writings" in order to establish the charge that the defendant wrote Exhibit A. But, since the fact in issue is the defendant's responsibility for the death of Mrs. Adams, and Exhibit A is only a link in the chain tending to connect him with the death, no such comparison can be resorted to. We think we have demonstrated the fallacy [\*\*\*117] of this argument and have already given it more space than it merits.

Another objection made by the defendant at the trial to the standards of comparison admitted by the court was the so-called "request writings." The circumstances in which those writings were made by the defendant have already been detailed. [\*326] We are of the opinion that it was not error to receive them in evidence. When they were produced the inquest into the circumstances of Mrs. Adams' death was in progress. The defendant was suspected, as he knew, of being the murderer, and was under subpoena to testify at the inquest. Nevertheless, he was not in custody, nor had a formal charge been made against him. It is strongly urged upon us that, owing to the publicity of the case and the known suspicion of the police and prosecuting authorities against the defendant, he could not safely have refused Kinsley's request to produce specimens of handwriting; that such refusal would have subjected him [\*\*307] to criticism; that it would have augmented suspicion in the public mind and incited the attacks of certain newspapers which appear to have tried the case to their own satisfaction without awaiting the [\*\*\*118] more tedious processes of the law. But the court cannot admit the argument. The defendant had the legal right to refuse to write for Kinsley. He preferred to accede to

the latter's request, and we can discover no ground upon which the writings thus produced can be excluded from the case. If, as we have held in another part of this opinion, the defendant's testimony at the coroner's inquest, which he attended under subpoena and where he was obliged to choose between claiming his privilege against self-incrimination and testifying fully, is admissible, *a fortiori* these "request writings" are competent.

[REDACTED] Writings created *post litem motam* are inadmissible in favor of a party creating them. (Chamberlayne's Best on Ev. 236; [REDACTED].) But we have found no case holding that such writings should be excluded when offered by the adverse party, except *Reg. v. Crouch* (4 Cox. Cr. Cas. 163) which was decided before the English statute of 1854, and [REDACTED], in which the decision, although made after the passage of our own statute of 1880, was based upon the law as it stood when the controversy arose. It is to be [\*\*\*119] observed, moreover, that in the latter case there were peculiar facts which would have justified the exclusion of the writings there offered in evidence [\*327] even if the statute had been in existence when the action was commenced.

The third objection made by the defendant to the standards of comparison adopted at the trial is to the admission of the "Barnet" letters and "Cornish" letters. The "Barnet" letters were undoubtedly admitted in the first instance to support the charge that the defendant had killed Barnet, and the "Cornish" letters to sustain the charge that he murdered Mrs. Adams. Both were subsequently treated as evidence tending to connect the defendant with each of the crimes said to have been committed by him. All of these letters were also used as standards of comparison from which to determine who wrote the poison package address. They may, therefore, be considered together for the purpose of review under this head. The statutes of 1880 and 1888 provide that the comparison of a disputed writing may be made with *any* writing proved to the satisfaction of the court to be genuine. The words "proved to the satisfaction of the court" are to be construed [\*\*\*120] in the light of the obvious purpose for which these statutes were enacted. At common law a paper properly in evidence for general purposes can be compared with a disputed writing, but only when the genuineness of the handwriting of the former is admitted or proved beyond a reasonable doubt. (Chamberlayne's Best on Ev. 239; *Doe v. Newton*, 5 Ad. & El. 514; 1 Greenleaf on Ev. [14th ed.] 578; [REDACTED]; [REDACTED].)

██████████; ██████████.) Since these statutes were designed to amplify and broaden the commonlaw rule by permitting the use of genuine writings as standards of comparison, even when they are not competent or relevant for other purposes, it must be assumed that the language prescribing the manner in which the genuineness of such writings is to be established was carefully and deliberately chosen by the legislature. While it is obvious that the words "proved to the satisfaction of the court" do not invest the trial court with a mere personal discretion which is to be exercised without reference to rules of evidence, it is equally [\*328] plain that the failure of these statutes to prescribe the precise [\*\*\*121] method or degree of proof necessary to establish the genuineness of a writing for purposes of comparison with a disputed writing renders it necessary to resort to the general rules of the common law for that purpose. Thus ██████████ the genuineness of a writing may be established (1) by the concession of the person sought to be charged with the disputed writing made at or for the purposes of the trial, or by his testimony; (2) or by witnesses who saw the standards written, or to whom, or in whose hearing, the person sought to be charged acknowledged the writing thereof; (3) or by witnesses whose familiarity with the handwriting of the person who is claimed to have written the standard enables them to testify to a belief as to its genuineness; (4) or by evidence showing that the reputed writer of the standard has acquiesced in or recognized the same, or that it has been adopted and acted upon by him in his business transactions or other concerns.

██████████ Since common-law evidence is competent to establish the genuineness of a writing sought to be used as a standard of comparison, it is apparent, in the absence of a statutory rule as to the degree of proof to be made, that the general rule of the common [\*\*\*122] law as to the sufficiency of evidence must prevail. In civil cases the genuineness of such a paper must be established by a fair preponderance of the evidence and in criminal cases beyond a reasonable doubt. Writings proved to the satisfaction of the court by the methods and under the rules adverted to, may be used as standards for purposes of comparison with a disputed writing, subject, however, to the qualification that writings which are otherwise incompetent, should never be received in evidence for purposes of comparison.

It is, therefore, sufficient to say with reference to the "Barnet" and "Cornish" letters that the general rule on the subject of handwriting-expert testimony which we have laid down herein will properly guide the trial court

in the disposition of the questions which may arise as to them upon another trial.

[\*329] It was further urged at the bar in behalf [\*\*308] of the defendant that the statutes of 1880 and 1888 authorizing comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine are unconstitutional because in conflict with ██████████ of this state, which provides that [\*\*\*123] ██████████ "trial by jury in all cases in which it has been heretofore used shall remain inviolate forever."

The argument, in brief, is that this provision of the Constitution requires the submission to the jury in every case properly triable by jury, of every material fact relied upon to establish the allegations in controversy. It is unnecessary to go into an extended examination of the question. We are clearly of the opinion that these statutes are not unconstitutional and that the proper construction of the statutes requires the submission to the jury of the genuineness of the standards with which the disputed writing is compared. The word "court" in the statutes is used in its generic sense, and includes both judge and jury in a case where a jury is present. It is significant that the statute of 1880, which was obviously copied from the statute of Great Britain enacted in 1854, substitutes the word "court" for the word "judge." We are not aware that it has ever been decided even in England by any court of great authority that the ultimate decision concerning the genuineness of the standards of comparison must not be made by the jury. Be that as it may, however, such a decision would [\*\*\*124] not, in view of the difference between the powers of the legislature in Great Britain and in this state, and the significant difference in the phraseology of the statutes, serve as a guide to the interpretation of our statutory enactments upon the subject. We have not been referred to and have not found any decision of this court to the effect that the judge presiding at the trial has the final decision concerning the genuineness of the writings offered as standards of comparison. We see nothing in the language of Peckham, J., in ██████████ ██████████) which is opposed to the views above expressed. As between a construction [\*330] which would withdraw from the jury the important question of the genuineness of the standards, and a construction which submits their genuineness first to the judgment of the judge and, upon his acceptance of them, ultimately to the decision of the jury, which must find within the rules above laid down that they are genuine before it can use them, or regard any evidence based upon them, we prefer and are bound to accept

the latter construction.

█ The sufficiency of the proof given of the genuineness of the papers offered as standards [\*\*\*125] is a preliminary point to be determined in the first instance by the court before permitting the papers to go to the jury. If the court, having regard to the rules adverted to, adjudge the papers genuine, it then becomes the duty of the jury in its turn, at the proper time, before making comparison of a disputed writing with the standards, to examine the testimony respecting the genuineness of the latter and to decide for itself, under proper legal instructions from the court, whether their genuineness has been established.

We are aware that a contrary conclusion respecting the duty of the court to submit the genuineness of the standards of comparison to the jury has been reached in Vermont (█) and apparently in Massachusetts (█). We are convinced, however, that the sounder rule is the one we have stated.

It may be added that █ comparisons with standards produced in court, whether at common law or under the statutes, may be made by witnesses, or by the court or jury without the aid of witnesses. (*Cobbett v. Kilminster*, 4 Fost. & Fin. 490; █; █.)

Another point urged upon our attention by counsel for the defense is that the learned trial court erred in admitting in evidence upon the trial the testimony of the defendant given at the coroner's inquest. This question must be decided for the guidance of the court below upon another trial. When [\*\*\*331] this testimony was offered in evidence by the district attorney the defendant's counsel interposed the objection that it had not been shown that the defendant was advised of his rights at that time, and had not been warned of his rights by the coroner. What were the defendant's rights at the inquest? If the defendant, when he attended the inquest, was under arrest or formal accusation for the murder of Mrs. Adams, he was entitled to be informed of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings were had. (Sec. 188, Code Crim. Pro.) This section is in terms applicable only to examinations before a magistrate. It is, however, merely a codification of the common-law rule, and this court has held that when a person is called upon to testify at a coroner's inquest, [\*\*\*127] convened to

inquire into a crime, for the commission of which such person is then under arrest, or upon which he has been formally accused, he occupies the same position, and he has the same rights, as though he were before an examining magistrate. (█.) So, on the other hand, █ if the person who testifies at the inquest does so simply as a witness, he has none of the rights or immunities of a party. This is the foundation of the rule which is now firmly established in this state -- that when a person testifies at an inquest as an accused or arrested party, his testimony cannot be used against him upon a subsequent trial of an indictment growing out of the inquest, unless his testimony has been *voluntarily* [\*\*\*309] given after he has been fully advised of all his rights and has been given an opportunity to avail himself of them. (█.) The logical and necessary corollary of that part of the rule stated is that when a person testifies simply as a witness and not as a party, his testimony can be used against him even though he is afterwards indicted and tried for the commission of the crime disclosed by [\*\*\*128] the inquest. (█; █.)

What was the situation at the coroner's inquest held upon the death of Mrs. Adams? It appears that the inquest was [\*\*\*332] commenced on the ninth day of February, 1899. The defendant attended the inquest, was sworn and testified pursuant to a subpoena issued to him by the coroner on the 10th day of February, 1899. The inquest was concluded on the 27th day of February, 1899, and the defendant was arrested at its close upon a warrant charging him with the murder of Mrs. Adams. When the defendant's counsel, upon the trial, interposed the preliminary objection to the admission of evidence of the testimony given by the defendant at the inquest, the learned trial court very properly allowed an examination into the proceedings at the inquest for the purpose of determining whether the defendant had testified as a party or as a witness. (█.) The ground of defendant's complaint in this behalf upon this appeal, is that he was not given the opportunity to show that he was in fact an accused party at the inquest and that his rights as such had not been [\*\*\*129] recognized by the coroner. Many pages of the record are filled with the proceedings in this regard showing that from the outset of the inquiry into this subject the district attorney objected to the questions of defendant's counsel; that many of these objections were sustained and that the court by frequent interventions prevented defendant from completing the questions which he had started to

frame. The sole purpose of this inquiry was to ascertain a few facts which were matters of record, and of which it was necessary for the court to become informed, to enable it to pass upon the admissibility of the testimony then offered in evidence. It is obvious that the facts to be ascertained were of paramount importance as compared with the method by which that was to be accomplished. Even if, as must be admitted, many of the questions of defendant's counsel were wide of the mark, a few well-directed suggestions or questions from the court would speedily and clearly have elicited the desired information and thus have avoided the tedious and confusing proceedings which mark this portion of the record. Notwithstanding all this, however, it is plain that the defendant was not under arrest [\*\*\*130] or accusation when he testified [\*333] before the coroner. It appears that Cornish had testified on the opening day of the inquest. In the course of his testimony he referred to an interview with Captain McClusky, during which he stated to the latter his suspicion that the defendant had sent him the poison package. Without the support of other facts which came to light later in the inquest this suspicion, expressed by Cornish, could not have been a sufficient basis for charging the defendant with the commission of this crime. It further appears that the defendant attended the inquest and testified thereat pursuant to a subpoena issued to him by the coroner, and that defendant was threatened with punishment for contempt if he refused to testify. The coroner had the right to issue a subpoena for defendant and to punish him if he disobeyed it. (Sec. 776, Code Crim. Pro.)

■ The law presumes that a party who is called upon to testify as a mere witness knows his rights. He may decline to testify to anything that may tend to incriminate him. This the defendant could have done had he chosen to claim his privilege. Having failed to do so he cannot now complain.

The record further [\*\*\*131] discloses that the defendant sought to show that the district attorney in his summing up to the coroner's jury stated that he had from the beginning suspected the defendant of the commission of the crime, but had pretended to suspect Cornish so as to lull the defendant into a sense of security and thus get him to testify. This statement, if made, was after the defendant had testified. Whether it was true or not, or whether the district attorney's suspicions were well or ill-founded are matters of no consequence, for they could have had no influence on the *status* of the defendant when he testified. We, therefore, conclude that no material error was committed in respect to the general admission in evidence upon the trial of the defendant's testimony given before the coroner. We do not pass

upon the separate objections to specific portions of this testimony, as these may not be presented upon another trial.

Among the questions urged upon our attention there are [\*334] several which may be grouped together for the purpose of such brief consideration as we deem it necessary to give them. They are (1) that the court erred in its charge to the jury and in its refusal to charge [\*\*\*132] the requests submitted by counsel for the defendant; (2) that prejudicial error was committed in the opening and summing up of the district attorney; (3) that the trial court erred in admitting incompetent evidence and excluding competent evidence over the objection of the defendant; and (4) that the defendant did not receive that fair and impartial trial to which he is entitled under the law.

The first and third of these points need not be discussed. Many of the exceptions taken to the charge, the refusals to charge and the rulings admitting [\*\*310] or excluding evidence have been disposed of in the conclusions that the "Barnet" evidence was inadmissible and that the rules governing expert evidence upon the subject of handwriting were not properly applied, and many other exceptions will be obviated by the different course which another trial of this case will necessarily take.

The claims of defendant's counsel that "error was committed in the opening and summing up of the District Attorney," and that "the defendant did not receive that fair and impartial trial to which he is entitled under the law," have been so urgently presented that we should be inclined to discuss in detail [\*\*\*133] the many grounds of error assigned under these heads, were it not impossible to do so, fairly and impartially, without a full and critical review of the twelve thousand folios of this record for that sole purpose. Such a review would extend this opinion beyond all reasonable and useful limits, and in view of the result reached we deem it unnecessary to discuss or decide the questions raised as to the conduct of the recorder and the district attorney upon the trial.

And, finally, counsel for the defendant contends that the verdict of the jury is not supported by the evidence. In view of the fact that a reversal of the judgment herein is required by the decision reached upon the two questions discussed in the earlier pages of this opinion, it would be obviously unprofitable [\*335] and improper, in the face of the new trial which must be had, to express our views upon the weight of the whole

evidence, and we, therefore, pass defendant's fourth point without further mention.

In conclusion we desire to express our sense of obligation to counsel for both the prosecution and the defense upon this appeal for the fairness and ability with which the case was presented, and for the diligence [\*\*\*134] in research and painstaking arrangement of details which have contributed so materially to lighten the labors of the court.

The judgment of the court below should be reversed and a new trial ordered.

O'Brien, J. There can be no doubt that the People were permitted upon the trial of the defendant, now under review, to give proof of the commission by him of two distinct crimes, namely, the poisoning of Barnet and the poisoning of Mrs. Adams. The only crime charged in the indictment was the murder of the latter. We all agree that a vital part of the testimony with respect to the death of Barnet and its cause was mere hearsay and incompetent. Whether any proof bearing upon the sickness and death of Barnet, or the defendant's connection with it, was admissible upon the trial of the case at bar is a much broader and more important question. The defendant was indicted for feloniously causing or procuring the death of Mrs. Adams, and the fact, if it be a fact, that at some other time and place he also caused the death of Barnet, is not admissible to prove the offense charged. That is certainly the general rule established by abundant authority and founded upon the plainest principles [\*\*\*135] of reason and justice.

The only question upon which there is an opportunity for minds to differ is whether the events connected with Barnet's sickness and death are so related to the case at bar as to form an exception to the general rule and thus bring the proof that was given at the trial within some one of these recognized exceptions.

The issue in this case was whether the defendant was guilty [\*336] of causing the death of Mrs. Adams, and not whether he was guilty of causing the death of Barnet. In a more specific sense the issue was whether he sent upon its errand of death, through the mail, the package from which the deceased, through mistake, took the deadly poison that killed her, or to be still more specific, the issue was whether the defendant wrote the direction upon the package with the felonious intent to transmit it by mail to Cornish. If the address upon the package was in fact written by the defendant all the elements of the crime were to be deduced from the

*maxim res ipsa loquitur*. The events constituting the history of Barnet's sickness and death did not prove, or tend to prove, the fact that the defendant wrote the address upon the poison package that [\*\*\*136] eventually came to the hands of Mrs. Adams, and that was the material issue at the trial.

The death of Mrs. Adams resulted from poison administered by her own hand, but the real author of her death was the person who made use of the mail to transmit to some one the deadly substance that produced death. In any inquiry concerning the identity of the author of a great crime, where the evidence is purely circumstantial, the human mind instinctively adopts processes in arriving at results that are not sanctioned by the rules of evidence. The hardened and habitual criminal is more likely to be suspected than one who had never committed a crime before. If the party suspected committed a similar crime before by the same or similar means, or a series of such crimes, proof of these facts goes far to establish his guilt in the popular mind of the offense charged and for which he is on trial; and yet nothing is better established than the rule that the vicious character of a person on trial for a specific offense cannot be shown, unless he himself makes his character or the events of his life a subject of inquiry by becoming a witness in the case. No matter how notorious a criminal the party [\*\*\*137] on trial may be, neither his general reputation nor other specific offenses can legally be proven against him as evidence of his guilt of the offense charged. That such proof is persuasive and has great influence when introduced, upon [\*337] courts and juries, cannot [\*\*311] be doubted; but the law does not permit it to be given upon the trial of an issue concerning the guilt or innocence of the party on trial for a specific offense. The reason is that such proof does not bear upon the issue in the case, and hence it is misleading, since it does not follow that a party who has committed one crime, or many, is guilty of some other crime for which he is on trial.

It is said that the evidence culminating in Barnet's death tends to identify the defendant as the author of the death of Mrs. Adams; but that is only another way of asserting the general proposition that the commission by the defendant of one crime tends to prove that he committed another crime, and no matter in what form, or how often that proposition is asserted, or how persuasive and plausible it may appear, it is erroneous and misleading, since it violates a salutary principle of the law of evidence which should [\*\*\*138] be applied in all cases without regard to the question of actual guilt or innocence. If the guilty cannot be convicted without

breaking down the barriers which the law has erected for the protection of every person accused of crime, it is better that they should escape rather than that the life or liberty of an innocent person should be imperilled. I think the evidence relating to Barnet's sickness and death would not for a moment be considered competent but for the fact that it creates a strong impression upon the mind that the author of his death must also be the author of Mrs. Adams' death, since in both cases death was caused by similar means. We may attempt to deceive ourselves with words and phrases by arguing that it is admissible to prove intent, or identity, or the absence of mistake, or something else in order to bring the case within some exception to the general rule; but what is in the mind all the time is the thought, so difficult to suppress, that the vicious and criminal agency that caused the death of Barnet also caused the death of Mrs. Adams. The rule of law that excludes the evidence for such a purpose may be, and probably is, contrary to the tendency of the [\*\*\*139] human mind, but since the law was intended to curb the speculations of the mind and to guard the accused from [\*338] the result of error in its operation, I am for maintaining the law in all its integrity and not for undermining it by qualifications that rest upon no reasonable or logical basis.

The cases cited to show that proof of Barnet's death was admissible to prove that the defendant wrote the address upon the package sent to Cornish have all been explained in the opinion of Judge Werner, and it is unnecessary to comment upon them further than to say that in my opinion none of them apply to the case at bar. When these cases and all the considerations urged in behalf of the People have been given due weight, it is still safe to say that the question as to the competency of the proof is by no means clear, but at best is very doubtful, and, therefore, the accused, and not the prosecution, should be given the benefit of that doubt. It is so difficult for the human mind to discard false theories that assume the disguise of truth, and so easy to substitute suspicions and speculations for evidence of facts that proof of the general bad character of the accused, or of participation [\*\*\*140] in other crimes, which is practically the same thing, would no doubt be of great aid to the People in procuring a conviction for the specific offense charged in the indictment. Such proof in a doubtful case might turn the scale against the accused, but the law, for obvious reasons, does not permit it, and it is dangerous to subvert the rule upon the vague theory that it *identifies* the accused as the author of the offense charged, which means nothing more than that it proves, or tends to prove, that he is guilty.

If the defendant procured or caused the death of Barnet, he is liable to be indicted and tried for that offense, but it is contrary to the plainest principles of justice to require him, when accused of poisoning Mrs. Adams, to clear himself from all suspicion of participation in another crime of the same character. If the Barnet evidence was properly admitted in the case it must follow that in every case proof of other crimes is admissible, since in every case it can be said, as it is said in this, that proof of the other crime identifies the accused as the real author of the crime charged.

[\*339] If the defendant wrote the address upon the poison package that [\*\*\*141] was sent to Cornish then he is identified, but proof that at another time he sent another package to Barnet proves nothing in regard to the address. All it proves is that possibly he was capable of the wicked act charged in the indictment, and that is only another way of proving his general bad character, not even by reputation, but by a specific act, which all agree is not admissible.

While the chain of proof to connect the defendant with the poisoning of Barnet is fatally defective in that there is no competent testimony to show that he ever sent to him by mail or otherwise the bottle of Kutnow powders which it is said contained the poison, yet if the missing link had been supplied it would only make the proof all the more dangerous and incompetent. The defendant was required to answer the charge of causing the death of Mrs. Adams, and not the charge of causing the death of Barnet; but by the whole course of the trial and the rulings of the court he was really and substantially required to answer both charges, and since this constitutes a clear error of law the defendant is entitled to have the judgment of conviction reversed, and as this [\*\*312] may possibly result in a new [\*\*\*142] trial it is scarcely within the province of this court to express any opinion upon the facts.

Comparison of a disputed writing with a writing shown to be genuine is allowed now by the statute. (Laws 1880, ch. 36; Laws 1888, ch. 555.) It is not very clear what the legislature meant in these statutes by the words "disputed writing," and while I think the construction given to these acts by my brethren is quite liberal, notwithstanding the rule that statutes changing the common law are to be strictly construed, yet I am disposed to concur in their view, since it is based on the ground that any other construction would render the legislation practically useless.

**Concur by: PARKER; GRAY**





.) And this conclusion has been followed in this court recently in three cases by expression quite as comprehensive. In [REDACTED], where it is said: "Evidence of other transactions, otherwise material or relevant, is not inadmissible merely because [\*\*\*152] it tends to prove another crime;" and in [\*\*314] [REDACTED], where the court carefully stated the rule in its entirety in two sentences, as follows: "It is an elementary principle of law that the commission of one crime is not admissible in evidence [\*345] upon the trial for another, where its sole purpose is to show that the defendant has been guilty of other crimes, and would, consequently, be more liable to commit the offense charged. But if the evidence is material and relevant to the issue, it is not inadmissible because it tends to establish the defendant's guilt of a crime other than the one charged;" and [REDACTED] is to the same effect. Here we have a broad and comprehensive test -- one that looks toward justice: Do the facts constituting the other crime actually tend to establish one or several elements of the crime charged? If so, they may be proved. Measured by this test it was competent for the People to show that Barnet came to his death through cyanide of mercury contained in a dose of Kutnow powder taken from a box received by him through the mails, in view of the facts and circumstances [\*\*\*153] proved tending strongly to show that one mind conceived and one hand executed all of the details of both crimes.

But I shall not discuss the evidence from that point of view, for it is my purpose to attempt to show that even if we assume the contention to be sound that the People can prove facts constituting another crime only when they are within one of the exceptions enumerated, the Barnet evidence is clearly within the fifth enumerated exception in that it tends to establish "the identity of the person charged with the commission of the crime on trial." There are features of the evidence that bear upon two of the other exceptions, but for the sake of brevity only the one named will be considered.

In the prevailing opinion, after a preliminary discussion of the facts relating to the death of Mrs. Adams, it is said: "The next and final step in the case of the prosecution would have been to prove the defendant's connection with the handwriting of the address upon the poison package." This done, it is conceded that a *prima facie* case would have been established on the part of the People. Evidence to that effect was given by three lay witnesses and also by a number of handwriting [\*\*\*154] experts. But the People were not

obliged to stop there. If there were other evidence tending [\*346] to show that the defendant sent the poison package to Cornish, it was the duty of the prosecuting officer to present it to the court and the jury. Of course no one saw the person who sent the package mail it and, aside from the proof of the handwriting, resort had necessarily to be had to circumstantial evidence to prove who was the sender.

The package sent to Cornish contained a bromo seltzer bottle filled with bromo seltzer in which had been put cyanide of mercury, and Mrs. Adams on taking a dose from that bottle for sick headache obtained such a quantity of cyanide of mercury as to lose her life. Cornish also took a small dose but it did not prove fatal. Cyanide of mercury is a rare and unusual poison, not kept on sale by druggists generally as strychnine and many other poisons are, and the books of the medical and chemical professions record only five cases, prior to these, of death by that poison. Dr. Phillips, a physician who was called to see Cornish, suspected that he had taken cyanide of mercury because of the similarity between the symptoms displayed by him and [\*\*\*155] those exhibited by Barnet, whom he had treated a little over a month previous. The fact that an attempt had been made upon the lives of two persons within so brief a period by this rare and unusual poison naturally suggested to those whose duty to the state it was to find the murderer if possible that it would quite likely appear that one person sent both packages. The autopsies showed that both Barnet and Mrs. Adams died from that poison, and in the Kutnow powder of which Barnet told his physician he had partaken was found cyanide of mercury.

On May 27th, 1898, a letter box was hired from one Heckman in the name of H. C. Barnet. Barnet did not rent it, and Heckman positively identified the defendant Molineux as the man who did rent it and gave his name as H. C. Barnet. To that letter box was sent, among other things, patent medicines, to which other reference will be presently made. Some one in the name of Barnet wrote to the Marston Remedy Company a letter inclosing five dollars with a request that he be sent one month's treatment for impotency, and the address [\*347] of the letter box which Molineux had rented in the name of Barnet was given. In reply the Marston Remedy [\*\*\*156] Company sent a blank diagnosis sheet, addressed to H. C. Barnet at that private letter box as requested, with directions that the questions thereon be answered. The author of the answers to the questions in that diagnosis blank gave the following description of himself: (1) single man; (2) thirty-one

years of age; (3) chest measurement thirty-seven inches; (4) waist measurement thirty-two inches; (5) there had been consumption in his family; (6) business sedentary; (7) contemplating matrimony; (8) eyes and complexion "yellowish;" (9) seeking treatment for impotency. This in no respect described the real H. C. Barnet, who was a large man weighing one hundred and eighty pounds, but according to the People's evidence it described Molineux with perfect accuracy. He was single; was thirty-one years of age in the very month the letter was written; his tailor had measured him less than two months before and testified his chest measurement was thirty-seven inches and his waist measurement thirty-two inches; **[\*\*315]** the death certificate of his maternal grandmother showed that she died of consumption; his business was sedentary; he was contemplating matrimony; the jury had an opportunity **[\*\*\*157]** to observe his eyes and complexion, which the People contend are "yellowish," and he was seeking a remedy for impotency, for on June 1st, 1898, Molineux wrote a letter to Dr. James Burns, signing his own name, inclosing twenty-five cents and directing that a remedy be sent to his Newark address. Both the letter and the envelope were put in evidence, and it was shown that the remedy was for impotency. There was also evidence that the diagnosis blank was in the handwriting of the defendant, and it needs no argument to support an assertion that the jury had the right to find from all this evidence that Molineux was the man who used this letter box and used the name of Barnet for his own purposes. According to the claim of the People, then, Molineux positively identified himself as the renter of the letter box and the seeker after remedies **[\*348]** for impotency in the Barnet case, and Heckman identified him as positively.

The identity of Molineux in the Barnet case being established, the People were at liberty to show that the facts and circumstances in the Barnet case and the Cornish case were of such a character that they must necessarily have resulted from the action of a single **[\*\*\*158]** mind. To have shown that would necessarily have identified the defendant as the criminal actor in the attempt to poison Cornish. It turned out that before the attempt to poison Cornish was made some one hired a private letter box in his name, and, as in the Barnet case, it was not hired by Cornish, nor for him. Now, while Molineux personally hired the box in Barnet's name at Heckman's, he did not personally hire the box at Koch's, at 1620 Broadway, which was hired in Cornish's name. But it seems that Koch, in addition to renting private letter boxes to persons who had personal and confidential correspondence which they wished to

keep out of the regular channels of their mail matter, sent out a publication called the "Studio," and on December 31st, 1897, about a year before the death of Mrs. Adams, Molineux wrote a letter to "Editor 'Studio,'" in which he asked for a copy of the paper. About six months later Koch sent Molineux some circulars relating to his business and one of them described his private letter boxes. Between December 12th and 17th, 1898, Molineux called on Koch at his place of business and talked about the letter boxes, but said he was not prepared to make an **[\*\*\*159]** arrangement for one as he only called for a friend. A few days later and on December 21st another man called and rented a box in the name of H. Cornish, but Koch testified when Cornish stood up in court that he -- Cornish -- was not the man who rented the box.

After the hiring of the box some one wrote for Kutnow powders in the name of H. Cornish and directed that they be sent to the letter box at 1620 Broadway which the stranger had hired, and the letter was written on the same kind of blue paper, with a tri-crescent emblem at the top, as Molineux used in his letter to Dr. James Burns on June 1st asking for a **[\*349]** remedy for impotency. The Kutnow powders were sent to 1620 Broadway in pursuance of the request, but by mistake were placed in the wrong box. A letter was also written on the blue stationery with the tri-crescent emblem as in the other cases to Von Mohl & Company, of Cincinnati, requesting a five days' trial of their remedy for impotency, the address given being 1620 Broadway. This letter was not written by Cornish. "Calthos" was the name of the remedy of Von Mohl & Company and a box of it was sent to H. Cornish at 1620 Broadway. Some person other than Cornish, **[\*\*\*160]** but in his name, sent a letter, also written on blue paper with the tricrescent emblem as in the other instances referred to, to Frederick Stearns & Company, of Detroit, Michigan, concerning one A. A. Harpster, in which the address of H. Cornish was given as 1620 Broadway. I shall not refer further to the Harpster incident, which is one of considerable importance as disclosed by the record, other than to say in passing that Harpster was a great friend of Cornish, and had taken sides with him in Cornish's controversy with Molineux, thus arousing the enmity of Molineux, who took other steps looking to his injury beside writing the letter referred to asking for confidential information in relation to Harpster from his former employers, if he did write it.

Cornish received through the mails a bottle of bromo seltzer containing cyanide of mercury, a dose of which resulted in the death of Mrs. Adams. Molineux was a

chemist and a manufacturer of dry colors, and kept large quantities of prussian blue and other dry colors from which cyanide of mercury can be made. Three lay witnesses, who were familiar with the handwriting of Molineux, testified that the letters signed "H. Cornish," to [\*\*\*161] which reference has been made, as well as the Barnet letters and the answers in the diagnosis blank, were in the handwriting of Molineux. And the testimony of a number of prominent experts in handwriting is to the same effect. But aside from that testimony there is to be gleaned from the letters themselves and the circumstances surrounding and attending their writing very strong evidence that one [\*350] brain conceived and carried out both schemes. In each case the letter box was hired in the name of the intended victim; in each, remedies for impotency were written for in the name of the intended victim; both the Cornish and the Barnet letters were undated; both series of letters, as well as the address on the poison package, contained misspelled words; in each case a rare [\*\*316] poison -- cyanide of mercury -- was employed; in both cases the mails were used to convey the poison to the intended victims; in both cases samples of Kutnow powder were written for, and were received at both boxes; Calthos, a remedy for impotency, was also received at both boxes; Barnet and Cornish were members of the same club, and the poison sent to each was contained in a simple headache remedy [\*\*\*162] in ordinary use. These facts and circumstances standing wholly uncontradicted and unexplained, as they do in this record, force the mind almost irresistibly to the conclusion that the same man desired the death of both Barnet and Cornish and plotted and worked to accomplish it. Certainly a jury are at liberty to draw that inference, and if they do the conclusion will necessarily follow that Molineux was the criminal actor in the Cornish case, because he was positively identified as the actor in the Barnet case both by the testimony of Heckman and by Molineux's description of himself in the diagnosis blank.

The evidence in the Barnet case, therefore, tends to identify Molineux as the sender of the poison package in the Cornish case, thus supporting the evidence of the lay and expert witnesses who testified that the address on the poison package sent to Cornish was in the handwriting of Molineux. The Barnet evidence, therefore, is strictly within one of the exceptions referred to in the prevailing opinion. It is said in [REDACTED] that the People have the right, when it is material, to give proof of the facts constituting another crime and have it [\*\*\*163] submitted to the jury under proper instructions, although such proof may be

inconclusive, and if this view of a unanimous court in that case should be followed the Barnet evidence would be competent, although [\*351] direct proof of the sending of the Kutnow powders through the mails should not be made out on the retrial.

This argument, however, has proceeded on the assumption that, in order to justify the retention of the evidence relating to the Barnet crime, it is necessary to establish every element relating thereto, which necessarily includes the receipt by Barnet of Kutnow powders through the mails. Hearsay evidence to that effect was admitted by the court and its admission was error, but we cannot assume that on the new trial which is about to be ordered the People will not be able to establish that fact by competent evidence, and great care should be taken not to close the door against such evidence, if it exists, for that justice which the safety of society requires and the law demands has not as yet been meted out to the murderer of Mrs. Adams.

Gray, J. I think the judgment of conviction should be reversed and that the defendant should have a new trial, for error [\*\*\*164] in the admission of testimony relating to declarations made by Barnet to his physician of his having received through the mail Kutnow powders, of his having taken a dose of them and of his condition being due to that fact. In any view, such evidence was quite incompetent and, of course, prejudicial to the defendant. With respect to the evidence relating to the death of Barnet, with some hesitation, I have reached the conclusion that it was admissible, within the recognized exceptions to the rule, which excludes proof by the prosecution of another crime. Unless the evidence was relevant to connect the defendant with the commission of the crime charged in the indictment, it was immaterial and its effect could not have been other than prejudicial to his case. But it is well established that evidence of facts, which show, or tend to show, the commission of another crime, is not for that reason inadmissible against the defendant, if they tend to prove his guilt under the indictment. If these other damaging, or criminating, facts throw any light upon motive, or intent; if they establish the absence of mistake, or accident; [\*352] if they exhibit a scheme, involving the commission [\*\*\*165] of several crimes; or if they may become a means of identification of the person charged with the commission of the crime on trial, they become admissible for the purpose.

The theory of the prosecution was that the defendant had caused Barnet's death by poison from motives of jealousy and had attempted to poison Cornish from

motives of hatred provoked by personal conflicts and quarrels. It is plain that there could be no common motive and the theory of the prosecution could only become serviceable, if the evidence relating to the commission of a former crime would identify the defendant as the common perpetrator of both crimes. In my opinion, all of the exceptions to the general rule of evidence mentioned may be eliminated, as of useless consideration, except that which makes all legal evidence admissible for the identification of the defendant. I cannot perceive its relevancy for the purpose of proving intent, or the absence of mistake, or accident. The defendant was shown to be familiar with the use of chemicals and to have all the opportunities to concoct the particular poison, which Cornish received through the mail and from the taking of which Mrs. Adams subsequently died. [\*\*\*166] If the evidence showed that he had sent this bottle, containing its poisonous compound, to Cornish, the felonious intention would be evident and there would be no room for the idea of ignorance, mistake, or accident. It would be unnecessary to enter upon the proof of the other criminating facts, in order to supply those elements of a case. Neither is it conceivable that the Barnet evidence would be admissible to prove a scheme, which involved the commission of further crimes in connection with the killing of Barnet. There [\*\*317] was no pretense of that. But there may be sufficient in the circumstances of Barnet's death to furnish support for the theory that the same person committed both crimes and, with other circumstances testified to, to tend to an identification of the defendant. The rarity of the deadly drug used, within a few weeks, in both cases; its concealment in the same kind of powders, as taken by Mrs. Adams and as found in Barnet's [\*353] room after his death, and the use of the mail by the sender of the poison, in connection with the evidence showing, or tending to show, that defendant made use of the names of Barnet and of Cornish, in the hiring and use [\*\*\*167] of private letter boxes, for various purposes, including the procuring of patent medicines, all of these facts would, if competently proved, have a tendency to show a unity, or similarity, of mental plan and operation, and bear upon defendant's identification, however inconclusive in themselves. While, for the reasons I have briefly assigned, I think the evidence relating to Barnet's death was not inadmissible for the prosecution's case, the admission of the testimony of the physicians, as to what Barnet told them about the reception and the taking of the powders, was distinct error and, in view of the nature of the case made, one which cannot be overlooked. It was objectionable as being hearsay evidence and as not told for the purpose of treatment.

Without that testimony there was no evidence that Barnet received any Kutnow powder containing the poisonous admixture through the mail, or that he took any of it, except as might be inferred from the autopsy performed upon his body some time after Mrs. Adams' death. If those material facts should be competently proved upon another trial, I am of the opinion that the circumstances of Barnet's death would be within the province of the [\*\*\*168] jury to pass upon as determining, in connection with all the other facts and circumstances, whether the same person poisoned Barnet and attempted to poison Cornish, and whether they pointed conclusively to the defendant as the criminal agent.

As to the handwriting evidence, I concur with Judge Werner's construction of the statutes; but, while conceding the admissibility of opinion evidence as to handwriting, I am, nevertheless, indisposed to concede to it such evidentiary character and strength as, like a fact, to constitute a link in the chain of circumstantial evidence, upon which a capital conviction shall depend. Such evidence is entitled to be considered by the jury as corroborative of other evidence, connecting the defendant with the commission of the crime.

[\*354] In view of the responsibility imposed upon this court in capital cases, I think that the circumstances relied upon to support the defendant's conviction should be such as, when considered with the opinion evidence, to convince the mind of its absolute correctness.

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End of Document

[REDACTED]

Current through changes received through January 22, 2026.

***USCS Federal Rules Annotated > Federal Rules of Evidence > Article IV. Relevance and Its Limits***

## **Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons**

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The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

### **History**

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Jan. 2, 1975, *P. L. 93-595*, § 1, 88 Stat. 1932; April. 26, 2011, eff. Dec. 1, 2011.

Annotations

### **Notes**

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#### **HISTORY; ANCILLARY LAWS AND DIRECTIVES**

##### **Other provisions:**

**Notes of Advisory Committee on Rules.** The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, *Relevancy Unraveled*, 5 Kan. L. Rev. 1, 12-15 (1956); Trautman, *Logical or Legal Relevancy — A Conflict in Theory*, 5 Van. L. Rev. 385, 392 (1952); McCormick § 152, pp. 319–321. The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. “Unfair prejudice” within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

The rule does not enumerate surprise as a ground for exclusion, in this respect following Wigmore’s view of the common law. 6 Wigmore § 1849. Cf. McCormick § 152, p. 320, n. 29, listing unfair surprise as a ground for exclusion but stating that it is usually “coupled with the danger of prejudice and confusion of issues.” While Uniform Rule 45 incorporates surprise as a ground and is followed in Kansas Code of Civil Procedure § 60-445, surprise is not included in [REDACTED] or New Jersey Rule 4, though both the latter otherwise substantially embody Uniform Rule 45. While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a

**USCS Federal Rules Annotated > Federal Rules of Evidence > Article IV. Relevance and Its Limits**

## **Rule 404. Character Evidence; Other Crimes, Wrongs, or Acts**

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**(a) Character Evidence.**

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for a Defendant or Victim in a Criminal Case.* The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) *Exceptions for a Witness.* Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

**(b) Other Crimes, Wrongs, or Acts.**

(1) *Prohibited Uses.* Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) *Notice in a Criminal Case.* In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

## **History**

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[REDACTED]

Current through changes received through January 22, 2026.

***USCS Federal Rules Annotated > Federal Rules of Evidence > Article IV. Relevance and Its Limits***

## **Rule 413. Similar Crimes in Sexual-Assault Cases**

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**(a) Permitted Uses.** In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

**(b) Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

**(d) Definition of "Sexual Assault."** In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in [REDACTED]) involving:

- (1) any conduct prohibited by 18 U.S.C. chapter 109A;
- (2) contact, without consent, between any part of the defendant's body—or an object—and another person's genitals or anus;
- (3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;
- (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
- (5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).

## **History**

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Sept. 13, 1994, *P. L. 103-322*, Title XXXII, Subtitle I, § 320935(a), *108 Stat. 2136*; April 26, 2011, eff. Dec. 1, 2011.

Annotations

## **Notes**

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### **HISTORY; ANCILLARY LAWS AND DIRECTIVES**

**Other provisions:**

**Effective date of section:**

**Other provisions:**

[REDACTED]

Current through changes received through January 22, 2026.

***USCS Federal Rules Annotated > Federal Rules of Evidence > Article IV. Relevance and Its Limits***

## **Rule 414. Similar Crimes in Child-Molestation Cases**

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**(a) Permitted Uses.** In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

**(b) Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

**(d) Definition of "Child" and "Child Molestation."** In this rule and Rule 415:

**(1)** "child" means a person below the age of 14; and

**(2)** "child molestation" means a crime under federal law or under state law (as "state" is defined in [REDACTED]) involving:

**(A)** any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

**(B)** any conduct prohibited by 18 U.S.C. chapter 110;

**(C)** contact between any part of the defendant's body—or an object—and a child's genitals or anus;

**(D)** contact between the defendant's genitals or anus and any part of a child's body;

**(E)** deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

**(F)** an attempt or conspiracy to engage in conduct described in subparagraphs (A)–(E).

## **History**

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Sept. 13, 1994, *P. L. 103-322*, Title XXXII, Subtitle I, § 320935(a), *108 Stat. 2136*; April 26, 2011, eff. Dec. 1, 2011.

Annotations

## **Notes**

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### **HISTORY; ANCILLARY LAWS AND DIRECTIVES**

**Other provisions:**

**Effective date of section:**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

SEAN COMBS,  
a/k/a "Puff Daddy,"  
a/k/a "P. Diddy,"  
a/k/a "Diddy,"  
a/k/a "PD,"  
a/k/a "Love,"

Defendant.

SEALED INDICTMENT

24 Cr.

**24 CRIM 542**

COUNT ONE  
(Racketeering Conspiracy)

The Grand Jury charges:

Overview

1. For decades, SEAN COMBS, a/k/a "Puff Daddy," a/k/a "P. Diddy," a/k/a "Diddy," a/k/a "PD," a/k/a "Love," the defendant, abused, threatened, and coerced women and others around him to fulfill his sexual desires, protect his reputation, and conceal his conduct. To do so, COMBS relied on the employees, resources, and influence of the multi-faceted business empire that he led and controlled—creating a criminal enterprise whose members and associates engaged in, and attempted to engage in, among other crimes, sex trafficking, forced labor, kidnapping, arson, bribery, and obstruction of justice.

2. SEAN COMBS, a/k/a "Puff Daddy," a/k/a "P. Diddy," a/k/a "Diddy," a/k/a "PD," a/k/a "Love," the defendant, operated his business, headquartered at various times in Manhattan and Los Angeles, under a variety of United States-based corporate entities, including Bad Boy

Entertainment, Combs Enterprises, and Combs Global (collectively, the “Combs Business”). Corporate entities in the Combs Business included, among other things, record labels, a recording studio, an apparel line, an alcoholic spirits business, a marketing agency, and a television network and media company.

3. At all times relevant to this Indictment, SEAN COMBS, a/k/a “Puff Daddy,” a/k/a “P. Diddy,” a/k/a “Diddy,” a/k/a “PD,” a/k/a “Love,” the defendant, engaged in a persistent and pervasive pattern of abuse toward women and other individuals. This abuse was, at times, verbal, emotional, physical, and sexual. As part of his pattern of abuse, COMBS manipulated women to participate in highly orchestrated performances of sexual activity with male commercial sex workers. At times, COMBS, and others acting at his direction, made arrangements for women and commercial sex workers to fly to COMBS’ location. COMBS ensured participation from the women by, among other things, obtaining and distributing narcotics to them, controlling their careers, leveraging his financial support and threatening to cut off the same, and using intimidation and violence.

4. Physical abuse by SEAN COMBS, a/k/a “Puff Daddy,” a/k/a “P. Diddy,” a/k/a “Diddy,” a/k/a “PD,” a/k/a “Love,” the defendant, was recurrent and widely known. On numerous occasions from at least in or about 2009 and continuing for years, COMBS assaulted women by, among other things, striking, punching, dragging, throwing objects at, and kicking them. These assaults were, at times, witnessed by others and included one instance at a Los Angeles hotel in or about March 2016, which was captured on video and later publicly reported, where COMBS kicked, dragged, and threw a vase at a woman as she was attempting to leave. When a member of the hotel security staff intervened, COMBS attempted to bribe the staff member to ensure silence.

COMBS' violence was also not limited to these women. It extended to his employees, witnesses to his abuse, and others.

5. SEAN COMBS, a/k/a "Puff Daddy," a/k/a "P. Diddy," a/k/a "Diddy," a/k/a "PD," a/k/a "Love," the defendant, used the Combs Business, including certain employees, to carry out, facilitate, and cover up his abuse and commercial sex. Those employees—including security staff, household staff, personal assistants, and high-ranking supervisors—and other close associates acted as COMBS' intermediaries, and their conduct was facilitated and assisted by COMBS' control of the Combs Business.

#### The Combs Enterprise

6. From at least in or about 2008, through on or about the date of the filing of this Indictment, SEAN COMBS, a/k/a "Puff Daddy," a/k/a "P. Diddy," a/k/a "Diddy," a/k/a "PD," a/k/a "Love," the defendant, and others known and unknown, were members and associates of a criminal organization (the "Combs Enterprise" or the "Enterprise"). Members and associates of the Combs Enterprise engaged in, and attempted to engage in, among other activities, sex trafficking, forced labor, interstate transportation for purposes of prostitution, coercion and enticement to engage in prostitution, narcotics offenses, kidnapping, arson, bribery, and obstruction of justice.

7. The Combs Enterprise, including its leadership, its members, and its associates, constituted an "enterprise," as defined by Title 18, United States Code, Section 1961(4), that is, a group of individuals associated in fact, although not a legal entity. The Combs Enterprise consisted of: (i) SEAN COMBS, a/k/a "Puff Daddy," a/k/a "P. Diddy," a/k/a "Diddy," a/k/a "PD," a/k/a "Love," the defendant; (ii) entities within the Combs Business, including but not limited to Bad

Boy Entertainment, Combs Enterprises, and Combs Global; (iii) individuals employed by and associated with the Combs Business; and (iv) others known and unknown.

8. The Combs Enterprise constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the Combs Enterprise. The Combs Enterprise was engaged in, and its activities affected, interstate and foreign commerce. The Combs Enterprise operated in the Southern District of New York and elsewhere.

9. At all times relevant to this Indictment, SEAN COMBS, a/k/a “Puff Daddy,” a/k/a “P. Diddy,” a/k/a “Diddy,” a/k/a “PD,” a/k/a “Love,” the defendant, was the leader of the Combs Enterprise.

10. SEAN COMBS, a/k/a “Puff Daddy,” a/k/a “P. Diddy,” a/k/a “Diddy,” a/k/a “PD,” a/k/a “Love,” the defendant, and others known and unknown, participated in unlawful and other activities related to the conduct of the Combs Enterprise’s affairs. These individuals included certain Combs Business employees, such as members of COMBS’ security staff, household staff, personal assistants, and high-ranking supervisors, as well as other close associates of COMBS.

#### Purposes of the Combs Enterprise

11. The purposes of the Combs Enterprise included the following:

a. Operating a global business in the media, entertainment, and lifestyle industries, including, among other things, record labels, a recording studio, an apparel line, an alcoholic spirits business, a marketing agency, and a television network and media company;

b. Preserving, protecting, promoting, and enhancing the power, reputation, and brand of SEAN COMBS, a/k/a “Puff Daddy,” a/k/a “P. Diddy,” a/k/a “Diddy,” a/k/a “PD,” a/k/a “Love,” the defendant, as a musician, entrepreneur, and figure in the entertainment industry;

c. Enriching members and associates of the Enterprise, including its leader, COMBS, and in particular those who demonstrated loyalty to COMBS and willingness to conceal his crimes;

d. Preserving, protecting, promoting, and enhancing the power of the Combs Enterprise, including the power of its leader, COMBS, through violence, use of firearms, threats of violence, coercion, and verbal, emotional, physical, and sexual abuse;

e. Fulfilling the personal desires of COMBS, particularly those related to COMBS' sexual gratification, including through the exploitation of women and the use of commercial sex workers;

f. Enabling COMBS and other members and associates of the Combs Enterprise to engage in unlawful acts of violence, including sexual violence; sex trafficking; forced labor; interstate transportation for purposes of prostitution; coercion and enticement to engage in prostitution; narcotics distribution; and other crimes, and concealing the commission of such acts;

g. Securing absolute loyalty from members of the Combs Enterprise, including through acts of violence and threats; and

h. Protecting the Combs Enterprise and its members and associates, including COMBS, from detection and prosecution by law enforcement authorities through acts of intimidation, manipulation, bribery, and threats of retaliation against individuals who witnessed the crimes committed by members and associates of the Enterprise.

#### Means and Methods of the Enterprise

12. Among the means and methods by which SEAN COMBS, a/k/a "Puff Daddy," a/k/a "P. Diddy," a/k/a "Diddy," a/k/a "PD," a/k/a "Love," the defendant, and other members and

associates of the Combs Enterprise conducted and participated in the conduct of the affairs of the Combs Enterprise included the following:

a. COMBS, and other members and associates of the Combs Enterprise, wielded the power and prestige of COMBS' role at the Combs Business to intimidate, threaten, and lure female victims into COMBS' orbit, often under the pretense of a romantic relationship. COMBS then used force, threats of force, and coercion, to cause victims to engage in extended sex acts with male commercial sex workers that COMBS referred to as, among other things, "Freak Offs." Freak Offs were elaborate and produced sex performances that COMBS arranged, directed, masturbated during, and often electronically recorded. In arranging these Freak Offs, COMBS, with the assistance of members and associates of the Combs Enterprise, transported, and caused to be transported, commercial sex workers across state lines and internationally. Freak Offs occurred regularly, sometimes lasted multiple days, and often involved multiple commercial sex workers. During Freak Offs, COMBS distributed a variety of controlled substances to victims, in part to keep the victims obedient and compliant. Sometimes unbeknownst to the victims, COMBS kept videos he filmed of victims engaging in sex acts with commercial sex workers. After Freak Offs, COMBS and the victims typically received IV fluids to recover from the physical exertion and drug use.

b. Members and associates of the Combs Enterprise, including high-ranking supervisors, security staff, household staff, personal assistants, and other Combs Business employees, facilitated the Freak Offs by, among other things, booking hotel rooms for the Freak Offs; stocking the hotel rooms in advance with the required Freak Off supplies, including controlled substances, baby oil, lubricant, extra linens, and lighting; cleaning the hotel rooms after the Freak Offs to try to mitigate room damage; arranging for travel for victims, commercial sex

workers, and COMBS to and from Freak Offs; resupplying COMBS with requested supplies; delivering large sums of cash to COMBS to pay the commercial sex workers; and scheduling the delivery of IV fluids. In or about March 2024, during searches of COMBS' residences in Miami, Florida and Los Angeles, California, law enforcement seized various Freak Off supplies, including narcotics and more than 1,000 bottles of baby oil and lubricant.

c. COMBS subjected victims to physical, emotional, and verbal abuse to cause the victims to engage in Freak Offs. COMBS maintained control over his victims through, among other things, physical violence, promises of career opportunities, granting and threatening to withhold financial support, and by other coercive means, including tracking their whereabouts, dictating the victims' appearance, monitoring their medical records, controlling their housing, and supplying them with controlled substances. During and separate from Freak Offs, COMBS, among other things, hit, kicked, threw objects at, and dragged victims, at times, by their hair. These assaults often resulted in injuries that took days or weeks to heal. COMBS also threatened victims' careers and livelihoods, including if they resisted participating in Freak Offs. Victims believed they could not refuse COMBS' demands without risking their financial or job security or without repercussions in the form of physical or emotional abuse. COMBS also used the sensitive, embarrassing, and incriminating recordings that he made during Freak Offs as collateral to ensure the continued obedience and silence of the victims.

d. Members and associates of the Combs Enterprise, including COMBS' security personnel, at times carried firearms. On more than one occasion, COMBS himself carried or brandished firearms to intimidate and threaten others, including victims of and witnesses to his abuse. In or about March 2024, during searches of COMBS' residences in Miami, Florida and

Los Angeles, California, law enforcement seized firearms and ammunition, including three AR-15s with defaced serial numbers, as well as a drum magazine.

e. Members and associates of the Combs Enterprise enabled COMBS' control over victims by following his directions regarding financial payments to victims, advancing or suppressing the victims' career opportunities, and acquiring the controlled substances COMBS used to keep the victims compliant. Members and associates of the Combs Enterprise at times witnessed COMBS' violence toward the victims, or the victims' injuries caused by Combs, without intervening. Instead, members and associates of the Combs Enterprise helped conceal the violence and abuse by, among other things, assisting COMBS in monitoring and preventing victims from leaving locations, such as hotels or COMBS' residences. These occasions included instances in which a victim was required to remain in hiding—sometimes for several days at a time—to recover from injuries COMBS inflicted, without being publicly observed. Members and associates of the Combs Enterprise also assisted COMBS in locating and contacting victims who attempted to flee his abuse.

f. When employees, witnesses to his abuse, or others threatened COMBS' authority or reputation, COMBS and members and associates of the Enterprise engaged in acts of violence, threats of violence, threats of financial and reputational harm, and verbal abuse. These acts of violence included kidnapping and arson. In addition, on multiple occasions, COMBS threw both objects and people, as well as hit, dragged, choked, and shoved others.

g. When COMBS' authority or reputation was threatened by the possibility of negative publicity or legal or law enforcement action against him, including in or about late 2023 following public allegations of COMBS' crimes, COMBS and members and associates of the Enterprise pressured witnesses and victims, including through attempted bribery, to stay silent and

not report what they experienced or knew to law enforcement. On phone calls, COMBS and other members and associates of the Enterprise, among other things, provided these victims and witnesses with a false narrative of events in an effort to conceal COMBS' crimes. COMBS caused these calls to be recorded on at least two occasions.

#### The Racketeering Conspiracy

13. From at least in or about 2008, through on or about the date of the filing of this Indictment, in the Southern District of New York and elsewhere, SEAN COMBS, a/k/a "Puff Daddy," a/k/a "P. Diddy," a/k/a "Diddy," a/k/a "PD," a/k/a "Love," the defendant, and others known and unknown, being persons employed by and associated with the Combs Enterprise described in paragraphs 6 through 12 of this Indictment, an enterprise engaged in, and the activities of which affected, interstate and foreign commerce, knowingly combined, conspired, confederated, and agreed together and with each other to violate the racketeering laws of the United States, to wit, Title 18, United States Code, Section 1962(c), that is, to conduct and participate, directly and indirectly, in the conduct of the affairs of the Combs Enterprise through a pattern of racketeering activity, as that term is defined in Title 18, United States Code, Sections 1961(1) and 1961(5), consisting of:

a. multiple acts involving kidnapping, chargeable under the following provisions of state law: California Penal Code § 207 (kidnapping), California Penal Code §§ 21(a), 664 (attempt), California Penal Code § 31 (aiding and abetting), and California Penal Code § 182 (conspiracy);

b. multiple acts involving arson, chargeable under the following provisions of state law: California Penal Code § 451 (arson), California Penal Code §§ 21(a), 664 (attempt), California Penal Code § 31 (aiding and abetting), and California Penal Code § 182 (conspiracy);

c. multiple acts involving bribery, chargeable under the following provisions of state law: California Penal Code § 137(a) (bribery of a witness), California Penal Code §§ 21(a), 664 (attempt), California Penal Code § 31 (aiding and abetting), and California Penal Code § 182 (conspiracy);

d. multiple acts indictable under Title 18, United States Code, Section 1512 (relating to tampering with a witness, victim, or an informant);

e. multiple acts indictable under Title 18, United States Code, Sections 1589 and 2 (relating to forced labor);

f. multiple acts indictable under Title 18, United States Code, Sections 1591 and 2 (relating to sex trafficking);

g. multiple acts indictable under Title 18, United States Code, Sections 2421, 2422, and 2 (relating to transportation and inducement to travel for purposes of prostitution and other illegal sexual activities); and

h. multiple offenses involving the possession with intent to distribute, or distribution of narcotics and controlled substances, including cocaine, oxycodone, alprazolam, 3,4-Methylenedioxymethamphetamine, 4-Bromo-2,5-dimethoxyphenethylamine, gamma hydroxybutyric acid, and ketamine, in violation of Title 21, United States Code, Sections 841(a)(1), (b)(1)(C), (b)(1)(E), (b)(2), and 846 (distribution and possession with intent to distribute and conspiracy to do the same), and Title 18, United States Code, Section 2 (aiding, abetting, and willfully causing).

14. It was a part of the conspiracy that SEAN COMBS, a/k/a "Puff Daddy," a/k/a "P. Diddy," a/k/a "Diddy," a/k/a "PD," a/k/a "Love," the defendant, agreed that a conspirator would

commit at least two acts of racketeering activity in the conduct of the affairs of the Combs Enterprise.

Notice of Special Sentencing Factor

15. From at least in or about 2009, up to and including in or about 2018, in the Southern District of New York and elsewhere, as part of his agreement to conduct and participate in the conduct of the affairs of the Combs Enterprise through a pattern of racketeering activity, SEAN COMBS, a/k/a "Puff Daddy," a/k/a "P. Diddy," a/k/a "Diddy," a/k/a "PD," a/k/a "Love," the defendant, agreed to, in and affecting interstate and foreign commerce, knowingly recruit, entice, harbor, transport, provide, obtain, advertise, maintain, patronize, and solicit by any means a person, knowing and in reckless disregard of the fact that means of force, threats of force, fraud, and coercion, as described in Title 18, United States Code, Section 1591(e)(2), and any combination of such means, would be used to cause the person to engage in a commercial sex act, in violation of Title 18, United States Code, Section 1591(a)(1) and (b)(1).

(Title 18, United States Code, Section 1962(d).)

**COUNT TWO**  
**(Sex Trafficking by Force, Fraud, or Coercion)**  
**(Victim-1)**

The Grand Jury further charges:

16. From at least in or about 2009, up to and including in or about 2018, in the Southern District of New York and elsewhere, SEAN COMBS, a/k/a "Puff Daddy," a/k/a "P. Diddy," a/k/a "Diddy," a/k/a "PD," a/k/a "Love," the defendant, in and affecting interstate and foreign commerce, knowingly recruited, enticed, harbored, transported, provided, obtained, advertised, maintained, patronized, and solicited by any means a person, knowing and in reckless disregard of the fact that means of force, threats of force, fraud, and coercion, as described in Title 18, United

States Code, Section 1591(e)(2), and any combination of such means, would be used to cause the person to engage in a commercial sex act, and attempted, aided and abetted, and willfully caused the same, to wit, COMBS recruited, enticed, harbored, transported, and maintained a person (“Victim-1”), and attempted, aided and abetted, and willfully caused Victim-1, to engage in commercial sex acts, knowing and in reckless disregard of the fact that Victim-1 was engaging in commercial sex acts as a result of force, fraud, and coercion.

(Title 18, United States Code, Sections 1591(a)(1), (b)(1), 1594(a), and 2.)

**COUNT THREE**  
**(Transportation to Engage in Prostitution)**

The Grand Jury further charges:

17. From at least in or about 2009, up to and including in or about 2024, in the Southern District of New York and elsewhere, SEAN COMBS, a/k/a “Puff Daddy,” a/k/a “P. Diddy,” a/k/a “Diddy,” a/k/a “PD,” a/k/a “Love,” the defendant, knowingly transported an individual in interstate and foreign commerce with intent that the individual engage in prostitution, and attempted, aided and abetted, and willfully caused the same, to wit, COMBS transported, aided and abetted, and willfully caused the transportation of female victims and commercial sex workers in interstate and foreign commerce on multiple occasions with the intent that they engage in prostitution.

(Title 18, United States Code, Sections 2421(a) and 2.)

**FORFEITURE ALLEGATIONS**

18. As a result of committing the offense alleged in Count One of this Indictment, SEAN COMBS, a/k/a “Puff Daddy,” a/k/a “P. Diddy,” a/k/a “Diddy,” a/k/a “PD,” a/k/a “Love,” the defendant, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 1963, any and all interests the defendant acquired or maintained in violation of Title 18, United

States Code, Section 1962; any and all interests in, securities of, claims against, and property or contractual rights of any kind affording a source of influence over, the enterprise named and described herein which the defendant established, operated, controlled, conducted, and participated in the conduct of, in violation of Title 18, United States Code, Section 1962; and any and all property constituting and derived from proceeds obtained, directly and indirectly, said offense, including but not limited to a sum of money in United States currency representing the amount of proceeds traceable to the commission of said offense.

19. As a result of committing the offense alleged in Count Two of this Indictment, SEAN COMBS, a/k/a "Puff Daddy," a/k/a "P. Diddy," a/k/a "Diddy," a/k/a "PD," a/k/a "Love," the defendant, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 1594, any and all property, real and personal, involved in, used, or intended to be used to commit or to facilitate the commission of said offense and any and all property traceable to such property; any and all property, real and personal, constituting or derived from proceeds obtained, directly or indirectly, as a result of said offense, including but not limited to a sum of money in United States currency representing the amount of property involved in said offense and proceeds traceable to the commission of said offense.

20. As a result of committing the offense alleged in Count Three of this Indictment, SEAN COMBS, a/k/a "Puff Daddy," a/k/a "P. Diddy," a/k/a "Diddy," a/k/a "PD," a/k/a "Love," the defendant, shall forfeit to the United States, pursuant to (i) Title 18, United States Code, Section 2428, any and all property, real and personal, constituting or derived from proceeds obtained, directly or indirectly, as a result of said offense; and any and all property, real or personal, that was used or intended to be used to commit or facilitate the commission of said offense, and (ii) Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461, any

and all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of said offense, including but not limited to a sum of money in United States currency representing the amount of proceeds traceable to the commission of said offense.

**Substitute Assets Provision**

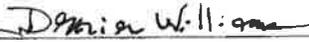
21. If any of the above described forfeitable property, as a result of any act or omission of the defendant:

- a. cannot be located upon the exercise of due diligence;
- b. has been transferred or sold to, or deposited with, a third person;
- c. has been placed beyond the jurisdiction of the Court;
- d. has been substantially diminished in value; or
- e. has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 18, United States Code, Section 1963(m), Title 21, United States Code, Section 853(p), and Title 28, United States Code, Section 2461(c), to seek forfeiture of any other property of the defendant up to the value of the above forfeitable property.

(Title 18, United States Code, Section 981;  
Title 18, United States Code, Section 1594;  
Title 18, United States Code, Section 1963;  
Title 18, United States Code, Section 2428;  
Title 21, United States Code, Section 853;  
Title 28, United States Code, Section 2461.)

  
FOR PERSON

  
DAMIAN WILLIAMS  
United States Attorney