To be Argued by:
DONNA ALDEA
(Time Requested: 25 Minutes)

New York Supreme Court
Appellate Division – Second Department

Docket No.: 2017-02494

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

MAYER HERSKOVIC,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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Kings County Clerk's Indictment No. 2883/14

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT
----------X
THE PEOPLE OF THE STATE OF NEW YORK,

- against -

MAYER HERSKOVIC,

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

STATEMENT PURSUANT TO RULE 5531 OF THE C.P.L.R.

1. The indictment number of this case is 2883/2014 (Kings County).

2. The full names of the original parties are the People of the State of New York against Mayer Herskovic. There has been no change of parties on appeal.

3. This action was commenced in the Supreme Court, Kings County.

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

5. This appeal seeks reversal of the judgment convicting the appellant of Gang Assault in the Second Degree (P.L. §120.06), Unlawful Imprisonment in the First Degree (P.L. §135.10), and Menacing in the Third Degree (P.L. §120.15), and dismissal of the indictment.

6. This appeal is from a March 16, 2017 judgment of conviction.

7. This appeal is prosecuted on the original record pursuant to 22 N.Y.C.R.R. §670.9(d)(viii).

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BRIEF FOR DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

Defendant-Appellant Mayer Herskovic appeals from a March 16, 2017 judgment of the Supreme Court, Kings County, convicting him, after a bench trial, of Gang Assault in the Second Degree (P.L.§120.06), Unlawful Imprisonment in the First Degree (P.L.§135.10), and Menacing in the Third Degree (P.L.§120.15) and sentencing him to concurrent terms of four years' incarceration and three years' post-release supervision on the assault charge, one year on the unlawful imprisonment charge, and ninety days on the menacing charge (*see* Commitment Order, in Court File) (Chun, J). Mayer was granted a stay of execution of judgment pending this appeal by order dated March 16, 2017 (Miller, J), and is currently released on bail. Timely notice of appeal was filed.

FACTUAL AND LEGAL BACKGROUND

MAYER'S BACKGROUND

Mayer Herskovic is twenty-three years old, and has a young wife and two children under the age of three, who depend on him exclusively for financial support (*see* Sentencing Memorandum, in Court File). To this end, he has been continuously employed, since the age of nineteen, and currently works at an HVAC company for fifty-two weeks a year, with almost no vacation, and an annual income of less than $25,000 (*id.*). In his spare time, Mayer does volunteer work in his community through the Mekimi organization, singing and dancing to entertain seriously ill children in hospitals and homecare, and driving their families to medical appointments to help ease their burden (*id.*). Together with his wife and kids, he lives in a modest apartment in Williamsburg, Brooklyn (*id.*). He has no prior criminal record or arrests, and no prior contact with the criminal justice system (*id.*).

THE INDICTMENT

On April 22, 2014, Mayer was indicted, along with co-defendants Abraham Winkler, Aharon Hollender, Joseph Fried, and Pinchas Braver, for Gang Assault in the First Degree (P.L.§120.07), Gang Assault in the Second Degree (P.L.§120.06), Assault in the Second Degree (P.L.§120.05[1]), Unlawful Imprisonment in the

First Degree (P.L.§135.10), Unlawful Imprisonment in the Second Degree (P.L.§135.05), Assault in the Third Degree (P.L.§120.00[1]), and Menacing in the Third Degree (P.L.§120.15) (Kings County Indictment Number 2883/14). The charges were based on allegations that Mayer was part of a group of 15-20 Hasidic men that assaulted Taj Patterson on December 1, 2013.

Although witnesses had physically identified Mayer's co-defendants as participants in the assault, the charges were dropped against Hollender and Fried, and Winkler and Braver were offered and accepted pleas to unlawful imprisonment -- as a misdemeanor -- in full satisfaction of the indictment. They were sentenced to three years' probation and 150 hours of community service. Mayer was never offered a plea deal or reduction.

THE TRIAL

On August 29, 2016, Mayer proceeded to trial before the Honorable Danny K. Chun. He waived a jury.

The Events of December 1, 2013

On the morning of December 1, 2013, at approximately 4 a.m., Taj Patterson was returning home from a night out partying with friends at a bar, club, and on a Party Bus (T302-04).[1] He was a habitual marijuana user, who had smoked "a

[1] Page numbers preceded by a "T" are to the transcript of defendant's trial. References to

blunt" that afternoon, had been drinking alcohol throughout the night, and had greater than a .215 blood alcohol content (T303,340,344,24-25,532-33).[2]

As Patterson walked down Flushing Avenue, alternating between the street and sidewalk, pushing in the mirrors of parked cars, he was observed by Louis Baez and Wolf Hershkowitz, who were driving by (T431,433). Believing that Patterson had broken the mirrors, Baez made a call to report the vandalism (T434), and then jumped out of the car to confront Patterson (T434-35). Hearing Baez scream something at him, but unable to make out the words, Patterson began to run, and Baez chased him (T306-07,357).

Soon, Joel Itzkowitz, a prominent member of the Shomrin -- a local community watch group -- joined the chase (T475-76,488,497). And then a third man joined (T308). By the time Patterson got to the corner of Bedford and Flushing Avenue, about a dozen Hasidic men had converged on his location from all directions, blocking his path (T308). They were all wearing white shirts, yarmulkes, and had long curls (T328-29). Most were wearing black suits (T174,328-29). Some were wearing navy windbreakers with yellow lettering --

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documents in the "Court File" are part of the original record that has been transferred to this Court. Appellants will gladly provide copies of any such documents to this Court, upon request.

[2] That BAC -- nearly three times the legal limit for impairment -- was based on a blood test taken at 5:30 a.m., and was, thus, lower than it would have been at the time of the incident at 4:00 a.m. (*see* T532-33,535-36).

Shomrin uniform jackets (T174,479). Many had glasses; most had beards (T479). To Patterson, they all "look[ed] the same" (T369).

Patterson ran into the street, banging on car windows, but no one let him in (T310-11). Returning to the sidewalk, he "gave up," and was surrounded by the crowd (T311).

According to Patterson, he was grabbed by the collar, spun around, and pinned to a gate, with a Hasidic man holding each of his arms (T312-13). In front of him, the three men that had originally chased him began to punch him in the face, chest, and stomach, with the "ringleader" -- who was wearing glasses and a beard -- standing in the middle of the trio (T313). The rest of the crowd surrounded them, blocking Patterson's view of the street (T312). At one point, Patterson broke his arm free and landed a few punches; he hit the ringleader hard (T388-89), and then the ringleader shoved his thumb in Patterson's eye (T314, 390). Patterson screamed, and was knocked to the ground. The original three men and the two that had been holding his arms began to kick him, as the other 15-20 men surrounded them (T315).[3]

[3] Other witnesses' accounts differed somewhat from Patterson's in this regard. Wolf Hershkowitz, for instance, testified that he saw the group of 15-20 men surrounding Patterson, but not touching him, and then Patterson grabbed and broke Joel Iskowitz's glasses (T448,477,497) and "all hell broke out" (T448).

The ringleader then kicked Patterson in the side of the face, and Patterson saw a flash of white (T317-18). That same man removed Patterson's sneaker and threw it on the roof of a nearby building (T319,337-38). Although at trial Patterson was not able to identify this man, nor any others, he was adamant that the ringleader was one of the three men that had originally chased him, and that this was the same man who had poked his eye, kicked him in the head, and grabbed his sneaker (T337-38). He also acknowledged that he had previously testified that this man was *not* Mayer Herskovic (T411).[4]

At the time of this incident, Jose Guzman was driving home with his friends Mariano Ortiz and Fesah Rollins. As they approached Flushing Avenue, they saw a group of at least 15-20 Hasidic Jews who were jumping up and down, stomping, and seemed to be celebrating something (T604-06). But as they got closer, they saw Patterson roll out of the crowd on the ground, so they pulled over and jumped out of the car (T605). Guzman saw the group "kicking, stomping, punching, and pulling" on Patterson, and asked, "What the hell is going on?" (T557). One man, whom Guzman subsequently identified as Aharon Hollander (T588-89), was at

[4] Surveillance video introduced into evidence at trial clearly showed the three men who had originally chased Patterson; and *none of them was Mayer Herskovic* (People's Trial Exh. 4). Two of those men -- Louis Baez and Joel Itzkowitz -- were *never charged* with the assault or even arrested (T282).

Patterson's feet, kicking and stomping him, and he told Guzman, "don't worry about it … he hit us first" (T557).[5]

As Rollins called 911 (T594), Guzman jumped in the middle of the fray, pushed everybody out of the way, and shielded Patterson (T557-58). Meanwhile, other passerbys, including Evelyn Keys, a NYC Bus Driver, also stopped and exited their cars (T166-75). At this point, the Shomrin radioed that they found no damage to any car mirrors (T444), and the crowd quickly began to disperse, with people running away and getting into cars (T450,560-61). Rollins and Guzman tried to take pictures of the men as they were scattering, but they were covering their faces (T561,607). Still, Rollins was able to take pictures of one of the men's license plates (T561,582). That car did *not* belong to Mayer Herskovic.

By the time the police arrived, the crowd of Hasidic men had dispersed (T561). Guzman, Rollins, and Keys stayed on the scene, and provided information to police (T562-63). Shortly thereafter, an ambulance arrived and took Patterson to the hospital (T14-15,177,563).

[5] Nevertheless, despite this eyewitness testimony, the prosecution dropped the charges filed against Hollander.

Patterson's Injuries

Medical testimony established that Patterson had suffered an orbital fracture, which left him permanently blind in his right eye (T49,53). Aside from the injury to his eye, Patterson had abrasions on his knees, and a bruise on his right flank (T528). Notably, he did not have any other fractures, contusions, or imprints on the rest of his body, as would be expected from an assault by more than one person (T527). According to the testimony of defendant's medical expert, Patterson's injuries were "absolutely ... not consistent" with an assault by ten or more people (T530). The People's experts rendered no opinion on this point.

The DNA Testing of Patterson's Sneaker

On December 7, 2013, six days after the incident, police recovered a sneaker from the roof of a building on Flushing Avenue, which Patterson identified at trial as the shoe that had been taken off his foot by the "ringleader" during the assault (T236-37,421). The sneaker was sent to OCME for both fingerprint and DNA analysis, but only DNA testing was done (T275).[6]

Although, upon visual inspection, no blood or other staining was observed on the sneaker, Troy Holder, the OCME analyst, swabbed a 3-inch by 6-inch area

[6] It is unclear why the fingerprint analysis was not conducted, or who made the decision to countermand the order. No discovery was provided to the defense on this issue.

of the heel, and then processed that swab to extract the DNA (T160).[7]

The total quantity of DNA recovered from the heel was only 97.9 picograms, which was "significantly lower" than the 500-1000 picograms that are optimal to permit "reliable results" according to the test-kit manufacturer's recommendation (T134,92,692), and was even less than 101 picogram minimum-threshold required just to run the test (T134).[8] Thus, according to the People's expert, "you would typically say its insufficient" to continue testing past this "quantitation" stage (T93).

High Sensitivity Testing

Nevertheless, pursuant to OCME's own internal policies for "high sensitivity testing" -- not used to develop evidence for criminal cases by any other public lab in the country (T136,697), and contrary to the test-kit manufacturer's reliability guidelines and the intended use of their kits (T135) -- the analyst continued to the next step: amplification. As he explained,

> "our laboratory looked and said, we know DNA is there right? *We have to say it's insufficient* because no one had ever went into that realm, so can we actually get reliable results from looking below that manufacturer's base of 100[?] So, we validate it high sensitivity

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[7] DNA is present in the nucleus of our cells, including those found in blood, saliva, semen, and skin (T91). During the "extraction" stage, any cells that had been picked up on the swab were broken apart, releasing the DNA from within their nuclei (T91).

[8] The defense expert testified that the manufacturer's minimum testing-threshold was 125 picograms (T693).

> testing. That will take us into that lower range of testing. *We're using the same instruments. We're using the same kits. We've just tweaked the protocols...*" (93) (emphasis added).

Specifically, in High Sensitivity Testing (HST)[9] the analyst makes up for the deficient quantity of DNA in the *actual* sample by putting it through three additional "amplification" cycles, so as to create significantly more *copies* of the DNA extracted from the sample, and, thus, a sufficient quantity of DNA to be tested (T91-92,95). In thus "tweak[ing] the protocols," however, the reliability of the test results are diminished. Thus, this method has been shown to produce an increase in stochastic effects (inconsistent results when different parts of the sample are tested), drop-ins (the presence of alleles that should not be there), drop-outs (the absence of alleles that should be present), and stutter (echoes of alleles) (T700-01;793).[10]

Accordingly, as explained at trial by the defense expert, the reliability of HST has recently been seriously questioned by courts and experts (*id.*). Profiles created with high sensitivity analysis are deemed unsuitable for upload in the national CODIS databank; the FBI lab, among others, refuses to use it; and it has

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[9] This is also called "Low Copy Number" testing ("LCN").

[10] An "allele" is one of a pair of genes that appear at particular locations on the DNA molecule.

been denied admissibility in at least two recent criminal cases under the *Frye*[11] test. *See* T731, 847, discussing *People v. Collins & Peaks*, 49 Misc.3d 595 (Kings Co. 2015) (decided together).[12] Indeed, shortly after defendant's trial, OCME discontinued use of this method (*see* 9/19/16 OCME Memorandum, in Court File, announcing that High Sensitivity Testing would be discontinued as of January 1, 2017).[13]

The results produced by the High Sensitivity Testing conducted in this case revealed the presence of a "non-deducible mixture" of DNA from the heel of the sneaker, which came from *at least* two people, whose individual DNA profiles could not be determined (T102). Every other criminal lab in the nation would deem this result -- even if it had come from standard testing rather than HST --

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[11] *Frye v. U.S.*, 54 App. DC 46 (1923); *see also People v. Wesley*, 83 N.Y.2d 417 (1994) (explaining applicability of *Frye* test in New York).

[12] Given that the prosecutor had not yet provided the defense with critical discovery material on the DNA testing as of August 22, 2016 -- the day before trial was scheduled to commence (*see* 8/22/16 Letter, in Court File) -- and the court's acquiescence in a less-than-one-week adjournment to allow defense counsel to review the material and prepare with his experts, defense counsel did not move for a *Frye* hearing in this case (*see* 9/7/16 Letter, in Court File). However, counsel did elicit these cases finding lack of general acceptance of reliability during the experts' testimony, and did argue to the trial court on summation that this should impact the weight of the DNA evidence and create reasonable doubt (T731,847). Thus while issues relating to the *admissibility* of the DNA evidence were not litigated at trial and preserved for appellate review, the lack of *reliability* of this evidence for legal sufficiency purposes and weight of the evidence review was raised before the trial court and preserved for appeal.

[13] A copy is also publicly available online at :
http://www.identacode.org/916_OCME_Implementing_New_Technologies_Final_to_customers.pdf

inconclusive; but OCME had created its own proprietary software program, the Forensic Statistical Tool (FST), to "give meaning" to these results (T88).

The Forensic Statistical Tool

The People's experts acknowledged that the FST cannot be used to "match" a DNA profile to an individual (T88,115). Thus, it does not make-up for the absence of a "deducible mixture" that could be used to generate a profile; nor does it permit such conclusion to be drawn from a "non-deducible mixture" (*id.*). Rather, it is simply an application of statistics to calculate whether one scenario, which is input and defined by the analyst, is more or less likely than another scenario, whose parameters are similarly analyst-defined (T114-15,708-09,800).

The database of statistical data used by OCME to calculate this "probability ratio" for the analyst-defined scenarios was created and compiled by OCME based on population data, drop-out rates, degradation rates, and other factors (T708-09). Although FST has only been subjected to validation studies by OCME, those studies show at least a .03 margin of error rate (the defense expert testified it was .08), which means that for every 10,000 queries against the database, there are three (or eight) false positive indications (T737-38,759).

Because of a lack of adequate testing and validation, and a failure to show its general acceptance in the scientific community, the defense expert at trial

explained that FST testimony had been deemed inadmissible under the *Frye* standard by at least one court, in two separate trials. *See* T731, discussing *People v. Collins and Peaks*, 49 Misc.3d at 595. Shortly after Mayer's trial, the OCME discontinued use of this method, too (*see* 9/19/16 OCME Memorandum, in Court File, announcing that "[T]he OCME plans to entirely cease using … FST on new casework on or around January 1, 2017").[14]

Application of the HST/FST Analysis in this Case

As the People's experts acknowledged, regardless of its *general* reliability, the probability ratio generated by the FST software in any *particular* case is wholly dependent on the accuracy of the assumptions and parameters input by the analyst (T800, 709, 155).

In this case, for purposes of FST comparison, the analyst assumed that only two donors had contributed to the DNA mixture recovered from the heel of the sneaker (T108). Although this assumption was inconsistent with the presence of five alleles at several individual locations, which would necessarily require at least three donors,[15] the analyst explained that pursuant to OCME protocols, those

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[14] Publicly available online at:
http://www.identacode.org/916_OCME_Implementing_New_Technologies_Final_to_customers.pdf

[15] Each person has two alleles (one from the mother, and one from the father) at each of the fifteen designated "loci" -- or locations on the DNA molecule -- that are reviewed by the analyst. Each allele is expressed as a number. So, for example, an individual could have a 14,

additional alleles were not "confirmed" through repetition, and could be ignored (T108).

Specifically, the analyst explained that to compensate for the various reliability problems with High Sensitivity Testing (drop-ins, drop-outs, stutter, unreliable peak heights, stochastic variation, etc.), the OCME splits up the extracted DNA into three parts, and runs *three* tests, instead of the single test used for standard DNA testing. Only the alleles that appear in at least two of the three runs are deemed to have "some basis" and not be "a fluke" (T107).[16] These "confirmed" alleles make up the "composite" profile (T108). And, here, the composite profile of the mixture on the sneaker showed no more than four alleles at any location, consistent with a two-person mix. Thus, the analyst chose to rely on the composite for his FST assumption that there were only two donors to the mix on the sneaker (T108).

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15 at one location, and a 12, 12 at another. As there are ten or fifteen possibilities at each location (T144), individuals frequently have two of the same alleles at a location, or share one or more alleles at a given location with another individual. So if two separate people both have a 14, 15 at one location, their mixed profile would show a 14, 15. If one had 14, 15, and another had 14, 16, their mixed profile would show 14, 15, 16. But because each person can contribute at most two discrete alleles at any location, the presence of more than four alleles at a location necessarily indicates *at least* three donors (T90-91,105,152).

[16] Holder: "it's not a fluke that they're in the sample" ... "we're seeing two amps representing them. So there's some basis for coming up with that particular allele there" (107).

But, as the defense expert explained, if Mayer Herskovic's DNA profile is compared to the "composite," he would have to be *excluded* as a possible donor, because his unique alleles are missing from two locations (T708).[17]

However, the People's analyst avoided this result. For having used *only* the "confirmed" alleles in the composite to conclude that this was a *two person mixture* for purposes of creating his FST scenarios, the analyst then input *all of the "fluke" alleles,* appearing in *any of the three repetitions,* into his assumptions for purposes of calculating the statistical likelihoods with the FST tool (T120). As explained by the defense expert, this made no sense, and rendered the results "meaningless" (T709); for if *all* the alleles are considered, then this *cannot* be a two person mixture, thereby negating the first assumption. And if it is a two person mixture based on the composite, then Mayer Herskovic would necessarily be excluded as a donor (T709).

Nevertheless, using these internally inconsistent premises, the People's analyst ran two scenario comparisons. First, the analyst asked, was the DNA on the sneaker more likely to be a two-person mix of Mayer Herskovic and some unknown unrelated person; or was it more likely to be a mix of two random people from the population? The program calculated that the mix on the sneaker was

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[17] Specifically, at the location designated D7, Mayer's alleles are 10, 11, but the composite has only a 10. And at the location designated D16, Mayer's alleles are 11, 12, but the composite profile is 9, 11 (*see* chart in Point I[B][2], *infra*).

695,000 times more probable if it was Mayer and an unknown person than two unknowns (T118). As the defense expert explained, this first statistic, while sounding impressively high, was wholly irrelevant to this case -- because one of the donors in the mix was obviously Taj Patterson, who not only owned and wore the sneaker, but whose alleles were both fully present in every single locus of the composite (T713). Thus, there simply was no scenario where this was Mayer and an unknown or two unknowns. This was a misleading and false set up, which rendered a wholly meaningless statistic.[18]

Second, (but still using the inconsistent premise of a two person mix based on the composite, and then including the unreliable "fluke" alleles that had been eliminated from the composite to calculate the probability likelihood) the analyst asked, was the DNA on the sneaker more likely to be a two person mix of Taj and Mayer, or Taj and some unknown unrelated person? The program calculated that it was 133 times more probable if this was Taj and Mayer, rather than Taj and an unknown (T118). Without knowing the probability of "Taj and an unknown," however, this likelihood ratio was similarly meaningless, the defense expert explained (*id.*). For 133 times more likely than one in a million, for example, is

[18] In this regard, the defense expert highlighted that it was interesting that the analyst never ran the probability of Taj and an unknown versus two unknowns. For that was the necessary value for his comparison (T713).

still only 133 in a million -- or less than .01 percent. Without knowing the value of the ratio being multiplied by 133, there simply can be no mathematical result at all.

Conceded Limitations on DNA Results

The People's experts acknowledged that regardless of the test used, even the presence of a person's matched, confirmed, and complete DNA profile on an object (none of which existed here) can *still* only tell you so much.

For instance, the People's analyst acknowledged that all of our nucleated cells contain the same DNA, and, thus, the testing cannot identify the *source* of the DNA -- blood, saliva, skin cells, etc. (T91,151). Nor can it determine how long ago the DNA had been deposited, as it can last days, months, or years (T129). Thus, even assuming that Mayer's DNA was present on the heel of the shoe, there would be no way to know if got there from Mayer touching the shoe, and thereby leaving a few skin cells behind, or from Patterson stepping on the street where Mayer had spit earlier in the day, or on some other day.

The People's expert also acknowledged that there are different means by which DNA can be transferred to an object. In "primary transfer," a person's DNA can be transferred to an object they touch. So, the expert explained, if I touch a

cup, my DNA might be on the cup (T803).[19] In "secondary transfer," a person's DNA can wind up on an item they never touched. Thus, the expert explained, if I shake your hand, then I touch a cup, your DNA can be deposited on the cup through me (T803). In "tertiary transfer" the connection is even more remote: I touch a doorknob. Then you touch the doorknob. Then you touch a cup. My DNA winds up on the cup (T803). According to the People's expert, "The FST does not consider this. And there is no DNA test out there that tells you how DNA was transferred onto an item." (T804). Thus, even assuming, *arguendo,* that Mayer's DNA *was* actually on Patterson's sneaker, according to the People's own experts, this could not, standing alone, prove that Mayer had ever touched the sneaker (*id.*).

Yet here, this DNA evidence did stand alone. It was the People's *only* proof against Mayer. There was no other testimony or physical evidence whatsoever even placing him at the scene, let alone suggesting that he had participated in the assault.

Summation and Charge

In spite of the testimony of their own experts, and the absence of any other proof whatsoever that Mayer was even present during the Patterson assault -- let alone a contributor to Patterson's injuries -- the prosecutor argued on summation

[19] But not necessarily; for not every touch contact with an item leaves DNA behind (T128,693). Thus, the *absence* of DNA does not permit a conclusion that the item was *not* touched by the individual.

that the DNA on the sneaker conclusively proved Mayer's guilt: "the only way that mixture is *possible*, is in *any way possible*, is if this defendant was not only involved in the attack, but if he was the one who pulled that shoe and threw it up *immediately*" (T875).

Although the evidence was purely circumstantial, neither party requested, and the court did not consider, the mandatory circumstantial evidence charge (T656).

Verdict and Sentence

On September 23, 2016, Mayer was acquitted of Gang Assault in the First Degree, but convicted of Gang Assault in the Second Degree (P.L.§120.06), Unlawful Imprisonment (P.L.§135.10), and Menacing (P.L.§120.15).

Although he had no criminal record whatsoever; although Probation recommended a split sentence -- less than the legal minimum of 3 ½ years (*see* Pre-Sentence Report, in Court File), in spite of his strong family ties, history of community service, and the letters filed by citizens, friends, and neighbors on his behalf (*see* Sentencing Memorandum and enclosures in Court File) -- and in stark contrast to their decision not to even pursue charges against *identified* participants in the assault, including the likely "ringleader," Joel Iskowitz, and to extend jail-free plea offers to others -- the People asked the court to sentence Mayer to five

years in prison. On March 16, 2017, the court sentenced him to concurrent terms of four years' incarceration and three years' post-release supervision on the assault charge, one year on the unlawful imprisonment charge, and 90-days on the menacing charge (*see* Commitment Order, in Court File).

ARGUMENT

INTRODUCTION

As fully discussed below, Mayer's convictions are legally insufficient and against the weight of the credible evidence. His trial was irreparably tainted by the court's failure to weigh the evidence under the standard applicable for circumstantial evidence, and by the prosecution's summation arguments mischaracterizing and misstating the DNA evidence in the case. Not merely a legal technicality, Mayer's appeal asserts his actual innocence, in a case where his guilt was based *solely* and *literally* on the thinnest of reeds -- a few human cells in a "non-deducible mixture" on the heel of a sneaker, which, according to the People's own experts, could not be matched to Mayer, and were deposited in an unknown way, at an unknown time, from an unknown source that might not have been Mayer at all. Such a conviction should not be permitted to stand.

POINT ONE

THE PEOPLE'S EVIDENCE WAS LEGALLY INSUFFICIENT AND THE CONVICTION WAS AGAINST THE WEIGHT OF THE CREDIBLE EVIDENCE.

It is well settled that the standard for reviewing the legal sufficiency of the evidence in a criminal case is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Contes*, 60 N.Y.2d 620, 621 (1983); *People v. Andersen*, 118 A.D.2d 716, 717 (2d Dept. 1986). In reviewing a jury's verdict, however, this Court is not limited to sufficiency review; rather, in a case where a different verdict would not have been unreasonable, this Court must also conduct a weight-of-the-evidence analysis, effectively sitting as a thirteenth juror to "weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony" at trial. *People v. Danielson*, 9 N.Y.3d 342, 348 (2007); *People v. Bleakley*, 69 N.Y.2d 490, 495 (1987); *People v. McMitchell*, 110 A.D.3d 923, 924 (2d Dept. 2013).

Here, it is beyond cavil that a different verdict would not have been unreasonable. The People's case against Mayer was starkly and uncommonly weak, both with respect to the elements of the assault charge, and with respect to

the proof of his identity as one of the men who was present -- let alone participated -- in the assault. Neither the factual nor scientific evidence in this case can sustain Mayer's convictions.

A. The People Failed to Prove Both the Causation and Intent Elements of Gang Assault in the Second Degree.

Pursuant to section 120.06 of the Penal Law, "a person is guilty of gang assault in the second degree when, with intent to cause physical injury to another person and when aided by two or more other persons actually present, he causes serious physical injury to such person ..." (P.L.§120.06). "Serious physical injury," in turn, is defined as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." P.L.§10.00(10).

While the statute does not require that the people "aiding" the primary actor share the actor's intent to sustain the *actor's* conviction, it does not permit the *aids* to be found guilty of gang assault unless they too are primary actors, possessing the requisite *intent* and also *causing* the injury. *See People v. Sanchez*, 13 N.Y.3d 554 (2009); *see also* William C. Donnino, Practice Commentary to Article 120 ("the *sine qua non* of assault under the Penal law is that, at the least, the actor must cause physical injury").

In this case, the "serious physical injury" suffered by Taj Patterson was the loss of the vision in his right eye, sustained as a result of the fracture to his orbital socket.[20] According to Taj Patterson, he sustained two blows to that eye -- both inflicted by the same single person -- the "ringleader" (T337-38). First, this man shoved his thumb in Taj's eye, and then this *same man* kicked him on the right side of his head, causing him to see white (T314,317-18). While Patterson was not able to identify the "ringleader," he was adamant that this man was one of the *original three men* that had chased him (T337-38), and he acknowledged that he had previously testified that this man was *not* Mayer Herskovic (T411). In fact, Patterson's testimony on this point was corroborated by the surveillance video introduced into evidence at trial, which shows the three men chasing Patterson, *none of whom is Mayer Herskovic* (People's Trial Exh. 4). It was corroborated by the testimony of eyewitness Wolf Hershkowitz, who described Joel Iskowitz at the center of the chase and the fray (T448,477). And the trial court itself recognized that Mayer was *not* one of these three aggressors (Sentencing: 13-14, explaining that "the people who stomped on [Patterson], who chased him in the beginning" and who "clearly [had] an intent to cause Serious Physical Injury" were "not on trial before me").

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[20] The only other injury sustained by Patterson was a bruise to his side and scrapes on his knee (T528), which do not rise to the level of serious physical injury.

Although the trial court acknowledged that Mayer was *not* one of the three men who began the chase, who stomped on Patterson, and who intended to, and did, cause serious physical injury to Patterson, it nevertheless convicted Mayer of second-degree assault because it found that "he was involved, he participated" in the incident (Sentencing: 13-14). Even assuming that Mayer's presence at the scene was established by the DNA evidence at trial (but *see infra*, subpoint B for discussion of this issue), the trial court's legal conclusion that this could sustain a conviction of second-degree gang assault is incorrect as a matter of law for two reasons.

First, there was simply no proof that Mayer *caused* the only serious physical injury sustained by the victim in this case -- the injury to his eye. Indeed, as discussed above, there was affirmative proof that this injury was caused by only one man -- the "ringleader" -- and that Mayer was *not* that man; and, in fact, the trial court so found. But under the statute, a person must *cause* serious physical injury to be guilty of second-degree gang assault (*see* P.L. §120.06: "...when aided by two or more other persons actually present, *he causes* serious physical injury to such person ..."). Here proof of the causation element was wholly lacking, and affirmatively controverted by the evidence and the trial court's findings. Mayer was, at most, one of the two "aids" that the statute requires in order for the charges

against the main actor to be elevated to a gang assault. *See People v. Sanchez*, 13 N.Y.3d at 554. But he himself could not be guilty of the offense because, unlike the main actor, he did not cause the injury. *See People v. Darrow*, 260 A.D.3d 928, 929 (3d Dept. 1999) ("appropriate standard is whether the defendant's conduct was a sufficiently direct cause of the victim's injury"). And as the People did not charge this count under an acting-in-concert theory (*see* Indictment, in Court File), Mayer could not be found guilty for another participant's commission of the *actus reus* by aiding him and sharing his intent (*see* P.L.§20.00). Thus, as the People's proof of the causation element was wholly lacking -- actually, affirmatively negated by the People's evidence -- the charge simply cannot be sustained.

Second, there was no evidence whatsoever that Mayer intended to cause physical injury, thus resulting in a fatal deficiency in the People's proof of the *mens rea* element of the gang-assault offense. On this point, the trial court explicitly found that Mayer did not intend to cause serious physical injury (Sentencing: 13-14). But it should have gone further; because there was no evidence whatsoever that Mayer intended to cause any injury at all. Even assuming he was present in the very large group of Hasidic men at the scene (although, as discussed *infra,* subpoint B, there was no proof of this, either), most

of the twenty Hasidic men at the scene were not involved in the actual assault, and never made contact with Patterson at all.[21] Thus, while intent can be gleaned from a defendant's words or conduct, and the trier of fact "is entitled to infer that a defendant intended the natural and probable consequences of his acts," (*People v. Barboni*, 21 N.Y.3d 393, 405 [2013]; *People v. Getch*, 50 N.Y.2d 456 [1980]), this presumption simply cannot apply where the People's case is completely silent on what, if anything, defendant said or did during the assault. Thus, in the absence of any testimony about Mayer's acts, and with no statements, confessions, admissions, or other evidence showing Mayer's intent, the People's proof failed on this necessary element as well.

Therefore, because the People failed to prove either the causation or intent element of second-degree gang assault, the judgment convicting Mayer of this offense should be reversed and this count of the indictment dismissed.

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[21] Not only does logic so dictate, as only the men at the center of the large crowd could physically reach Patterson, but the medical testimony corroborated this (T530: medical evidence inconsistent with blows inflicted by large group of people). Indeed, the District Attorney has already made plain his conclusion that not every participant in the crowd was criminally culpable, as he dismissed charges against several men who were physically identified as being part of the surrounding "gang" during the assault, and did not even pursue charges against other members of the gang, including those seen on video chasing Patterson (*see supra*, FN 4, 5).

B. The People's DNA Evidence was Utterly Incompetent to Prove Mayer's Participation in the Charged Crimes or Even His Presence at the Scene.

Beyond the problems with the assault conviction, and requiring reversal of *all* the charges, there was no proof that Mayer was present at the scene at all. In this regard, although trial witnesses did identify several of the men involved in the incident, *not a single witness* identified Mayer as having been present on that night. He was *not* one of the people seen on any of the surveillance tapes put into evidence. He was *not* one of the people photographed by Rollins and Guzman. He did *not* own any of the cars that were observed or photographed at the scene. He did *not* make any inculpatory statements or admissions to the police. In fact, he was *not even a member* of the Shomrin or one of their "buffers."

Unable to illuminate the truth with evidence, the People attempted to blind the trier of fact with "science," which they claimed proved that Mayer's DNA was on the sneaker, and that this, in turn, proved that he was the man that took the sneaker and threw it to the roof during the assault. But, contrary to the People's (mis)characterization of the expert testimony, there was no scientific evidence whatsoever that proved -- or was even competent to prove -- that Mayer had ever touched Taj Patterson's sneaker. In fact, the People's own experts admitted that they *could not match* Mayer's DNA to that found on the sneaker; and more importantly, that *even if they could match it, that would still not prove that Mayer*

ever personally touched the shoe. As this is all the People offered to prove identity, their proof was fatally and grossly deficient.

1. The People's Own Experts Acknowledged that Even a Conclusive Match to Mayer's DNA on the Victim's Sneaker Would be Incompetent to Place Mayer at the Scene of the Assault.

Assuming, *arguendo*, that Mayer's DNA was actually on the sneaker (which, as discussed *infra*, subpoint 2, is itself unsupported), this would still not permit an inference that Mayer had ever touched the shoe.

In this regard, the People's DNA experts acknowledged that the testing cannot identify the source of the DNA -- blood, saliva, skin cells, etc. (T91,151). Nor can it determine how long ago the DNA had been deposited (T160,129 [not unusual to recover DNA years, months, days after deposit]). And, crucially, the People's expert explained that an individual's DNA can be deposited on an item that the individual *never touched*: either through secondary transfer (touching a person who touches the object), or tertiary transfer (touching a surface that is then touched by another person who then touches the object at issue) (T803). As emphatically stated by the *People's expert*: "The FST does not consider this. And there is no DNA test out there that tells you how DNA was transferred onto an item" (T804; *see also* T160 [unable to say how DNA made contact with the shoe]).

Of course, in some cases, the presence of a suspect's DNA might, standing alone, be sufficient to establish his identity as the perpetrator because its source or location is incriminating and otherwise unexplainable (*ie.*, blood stains at a crime scene, or semen inside a victim's body); but here, that is not the case. In this instance, the DNA on Patterson's shoe did not come from any visible blood droplet, which would prove that its donor had been injured near the object, and could thereby support his involvement in the fight. Nor was it on an item or area that would normally be shielded from contact with other people's biological matter, like a victim's underwear or the sheets in a bedroom. Here, the DNA consisted of a few invisible and indeterminate cells on the heel of Patterson's sneaker -- an area that is completely exposed to the public, that scrapes against dirty surfaces on buses and trains, and that makes contact with the pavement where people spit as they walk down the street.

Moreover, the utter incompetence of the scientific evidence to prove -- or even suggest -- that Mayer had touched the shoe is further complicated by the testimony of the People's experts establishing that the presence of DNA on a surface does *not* require or suggest primary contact, nor establish immediacy. So, if sometime before the assault, Mayer shook hands with Patterson's assailant, that would account for Mayer's DNA on the shoe (*see* T803). If Mayer had turned a

doorknob, which was subsequently touched by Patterson's assailant before the assault, then Mayer's DNA could wind up on the shoe (T803-04). And these scenarios are not just implausible or improbable speculations that fly in the face of the other evidence, or have one-in-one-million odds. Rather, these scenarios are *consistent* with the extremely small quantity of genetic material -- just a few cells -- recovered from the sneaker. They are *consistent* with Patterson's own acknowledgement that the man who threw the sneaker was one of the original three men, and was *not* Mayer. They are *consistent* with the absence of any eyewitness testimony or surveillance identifying Mayer as a participant, and the absence of any other proof whatsoever establishing his presence at the scene. They are *consistent* with all of the scientific testimony in this case, from the mouths of the People's own experts.

Thus, under these circumstances, the People's DNA evidence -- their *only* evidence in this case -- even if accepted as conclusively establishing that Mayer's DNA was actually on the sneaker, is still legally insufficient as a matter of law. *See People v. Person*, 74 A.D.3d 1239, 1240-41 (2d Dept. 2010) (Where "DNA was found 'on a . . . readily moveable object [it is] of questionable probative value . . . unless the proof showed [it was left] . . . only during the commission of the crime"); *see also People v. Collins*, 150 A.D.2d 476 (2d Dept. 1989) (fingerprint

recovered from jewelry box exposed in public area outside complainant's apartment was legally insufficient to establish guilt beyond a reasonable doubt); *People v. Jacob*, 55 A.D.2d 961, 961-62 (2d Dept. 1977) (evidence that fingerprint was recovered from window louvers that could only be reached by scaling a 12 foot wall would not warrant conviction, where the location of the prints did not point ineluctably to defendant's guilt and there was no testimony as to how long the prints had been present).

In short, DNA is a very powerful, and very valuable, law enforcement tool; but it must be properly understood and fairly limited to what it can prove. *See People v. Wright*, 25 N.Y.3d 769, 783-84 (2015). Here, even assuming that Mayer's DNA was on the sneaker, in the absence of any other evidence placing him at the scene, it was incompetent to prove -- by the admission of the People's own experts -- that he touched that shoe during the assault, or at any other time. And as this DNA evidence was the sum total of the People's whole case against Mayer, even viewed in the light most favorable to them, it simply cannot sustain a conviction. *See People v. Person*, 74 A.D.3d at 1240-41.

2. The People's Scientific Evidence Was Incompetent to Establish that Mayer's DNA was on the Sneaker.

But, here, the problem runs deeper. For the People never even proved that Mayer's DNA was actually on the shoe.

Setting aside, for the moment, issues regarding the reliability of the HS testing used by the People, which would impact the weight of the experts' conclusions, and just accepting the evidence on its face, as required for sufficiency analysis, the People's proof was wholly incompetent to prove that Mayer's DNA was on the shoe. In this regard, the People's DNA expert acknowledged that the DNA recovered from the heel of the sneaker was a "non-deducible mixture" from which no "match" could be made (T113). In terms of proof, that equals none.

But while facts are stubborn things, statistics are much more pliable. So to explain this (non-)result, the People resorted to statistical analysis through the OCME's proprietary FST tool. Much has been said of statistics in general, almost none of it good: "There are three kinds of lies: lies, damned lies, and statistics" (Mark Twain); "Torture numbers, and they'll confess to anything" (Gregg Easterbrook); "Statistics are like bikinis. What they reveal is suggestive, but what they conceal is vital" (Aaron Levenstein); "The average human has one breast and one testicle" (Des McHale). Even worse has been said of the FST tool in particular. *See People v. Collins*, 49 Misc.3d at 577-582 (explaining different

grounds for criticism). But, assuming for the moment the tool's general reliability, the manner of its use in this case not only failed to prove a likelihood that Mayer's DNA was on the sneaker, it actually illuminated the fact that, pursuant to consistent application of the OCME's own standards, Mayer would actually have to be *excluded* as a possible match.

In this regard, in setting up the FST comparison, the People's analyst explained that although the presence of five alleles at multiple loci would indicate the presence of a mixture from at least three people (T152), OCME protocols dictated that he could ignore the stray alleles to run his FST scenarios, because they were not present on the "composite profile" (T107,108). The composite profile contains only those alleles that are found in two out of the three repetitions, because only these are the "confirmed" alleles; or, as explained by the People's expert, only these have some assurance that "it's not a fluke that they're in the sample" ... "we're seeing two amps representing them. So there's some basis for coming up with that particular allele there." (T107).

But if only the alleles in the "reliable composite" profile are used, then Mayer would have to be *excluded* as a donor, because his alleles are not present at D7 and D16 (*see* chart below, and defense expert testimony at T708):

Loci	Taj	Mayer	Heel Rep 1	Heel Rep 2	Heel Rep 3	Composite
D8	13, 14	14, 14	10,12,13,14,15	10,12,13,14	13,14	10,12,13,14
D21	30, 32.2	29, 30	29,30,31.2,32.2	27,29,30,32.2	29,30,31.2,32.2	29,30,31.2,32.2
D7	10,10	10, 11	9,10	10	10,11	10
CSF	11,11	11, 12	8,10,11,12	11,12	11	11,12
D3	16,16	14, 14	14,15,16	14,16	14,15,16	14,15,16
THO1	6,7	9, 9.3	6,7,8,9,9.3	3,6,7,9,9.3	6,7,9,9.3	6,7,9,9.3
D13	11,11	12, 14	11,13,14	11,12	11,12,14	11,12,14
D16	9,11	11, 12	9,11,12	9,10	9,11,13	9,11
D2	21,22	17, 19	21	17,19,20,22	21,22	21,22
D19	13,14	14, 16	12,13,14,16	12,13,14	12,13,14,15,16	12,13,14,16
VWA	15,19	15,18	15, 18, 19	15,17,18,19	15,17,18,19	15,17,18,19
TPOX	6,8	8,10	6,8,10	6,8	6,8,9,10	6,8,10
D18	12,14	13,14	12,14	12,14	12,13,14	12,14
D5	10,11	11,11	10,11	10,11	10,11	10,11
FGA	24,24	21,22	21,22,24,27	21,22,24	24	21,22,24

But that is just the tip of the iceberg. Assuming, as the analyst did for his final FST comparison, that one of the donors to the DNA on the sneaker was Taj Patterson (which would not only be expected, as it was his shoe, but is strongly supported by the data showing the presence of *both* of his alleles at *every* locus in the composite), subtraction of Taj Patterson's DNA profile from the composite would yield a partial profile of the second donor that would be *grossly inconsistent* with Mayer Herskovic, because Mayer's unique alleles would not only be *missing* at *eleven of the 15 loci* (*see* chart below at D8, D21, D7, CSF, D16, D2, D19, VWA, TPOX, D18, D5), but the alleles actually present at five of the loci *could not have come from Taj*, and also *could not have come from Mayer*, meaning that they had to come from a different donor (*see, e.g.*, D8, showing presence of 10 and

12 in composite, which could not come from either Mayer or Taj; D21, showing presence of 31.2, which could not come from either Mayer or Taj; D3, showing presence of 15, which could not come from either Mayer or Taj; D19, showing presence of 12, which could not come from either Mayer or Taj; VWA, showing presence of 17, which could not come from either Mayer or Taj).

Loci	Taj	Composite (C)	C minus Taj	Mayer
D8	13, 14	10,12,13,14	10,12	14, 14
D21	30, 32.2	29,30,31.2,32.2	29,31.2	29, 30
D7	10,10	10	--	10, 11
CSF	11,11	11,12	12	11, 12
D3	16,16	14,15,16	14,15	14, 14
THO1	6,7	6,7,9,9.3	9,9.3	9, 9.3
D13	11,11	11,12,14	12,14	12, 14
D16	9,11	9,11	--	11, 12
D2	21,22	21,22	--	17, 19
D19	13,14	12,13,14,16	12,16	14, 16
VWA	15,19	15,17,18,19	17,18	15,18
TPOX	6,8	6,8,10	10	8,10
D18	12,14	12,14	--	13,14
D5	10,11	10,11	--	11,11
FGA	24,24	21,22,24	21,22	21,22

Thus, using the "reliable" composite to conclude that this was a two donor mix, and the expert's reasonable assumption that one donor was Taj, the second donor *conclusively* could *not* have been Mayer.

The probability ratios cited by the expert at trial -- that it was 695,000 times more likely that the non-deducible mix was Mayer and an unknown donor than two

unknown donors, and that it was 133 times more likely that the mix was Taj and Mayer rather than Taj and an unknown donor -- were based on a logical fallacy that had been created by the analyst when he entered the data: he simultaneously relied on two inconsistent assumptions to create his FST scenarios. Initially, he assumed that the non-repeating alleles in the three runs were unreliable "flukes" and, thus, ignored them in concluding that the sample was a two person mixture rather than a three person mixture (T108). But then he added those same unreliable, unconfirmed, "fluke" alleles back into the mix to run the probabilities (T120). In other words, he tried to have his cake and eat it too.

While sufficiency review requires that the evidence be viewed in the light most favorable to the prosecution, it does not require blind adherence to an expert opinion that is demonstrably based on inconsistent assumptions and logical fallacies. Here, the expert's opinion is meaningless, but his testimony and explanation is illuminating, for it proves, beyond any measure, that when only the reliable, consistent alleles in the composite are considered, and the "flukes" excluded as they should be, the mixed profile generated in this case is a two-person mix that is *perfectly* consistent with the DNA of Taj Patterson, as one would expect, and wholly inconsistent with that of Patterson and Mayer together (*see* chart above).

Finally, from the standpoint of a weight of the evidence analysis, it bears noting that neither the High Sensitivity DNA testing conducted by the OCME in this case, nor the FST software should be deemed reliable. As conducted here, the HS testing violated the test-kit manufacturer's reliability protocols dictating that samples under 101 picograms were not sufficient for comparison (T93, 134). The use of these "same instruments" and "same kits", in a manner in which they were "not designed" to be used, by merely "tweak[ing] the protocols" (T93,135), is highly disturbing in a criminal case, where a man's liberty hangs in the balance. And it is particularly troubling where, as here, this is the *only* shred of evidence in the People's case. In fact, as acknowledged by the People's experts, the HS testing used here has demonstrable reliability issues, including increases in stochastic effects, drop-ins, drop-outs, stutter, and increased error rates (T793,700-01). The question of whether OCME's protocols -- requiring three test runs instead of one and reference to only the composite profile -- sufficiently compensate for these issues is unclear.[22] Certainly, as elicited at trial, many experts don't think so. In fact, HST profiles are deemed unsuitable for upload into the national CODIS databank, the FBI lab refuses to run them, the OCME is the only criminal lab in the

[22] And, of course, even assuming that the OCME's HST protocols *are* sufficient to compensate for the reliability problems acknowledged by the People's experts, this is really irrelevant here, where those same protocols -- requiring three runs and use of only the "reliable" composite -- were ignored by the expert in drawing his ultimate conclusion.

nation to use it, and the OCME itself has discontinued such testing (T136; *see also* OCME Memorandum, in Court File and FN 13, 14). Indeed, at least one court has recently found the precise method used here *so unreliable* that it did not even pass the *Frye* test for admissibility (*See People v. Collins & Peaks*, 49 Misc.3d at 595) -- let alone have sufficient weight, *standing alone,* to tip the scales in favor of conviction.

So, too, the reliability of the FST software has been seriously questioned by experts and courts alike. While the general mathematical principles upon which it is based are clear and uncontroversial, the databank used by OCME for its underlying statistical data has been questioned, and the reliability of its internal validation studies disputed. *See People v. Collins & Peaks*, 49 Misc.3d at 613-21 (summarizing criticisms). In this regard, it is more than a little disturbing that the OCME's statistics are based on only 480 DNA mixtures, obtained from only 61 individual contributors (*id.* at 618). And of this limited number of mixtures, only 11 involved mixtures derived from contributors of the same race, substantially undermining the validity of the error rates for people in this category (*id.*). Moreover, the FST program is seriously limited when it comes to the variables that can be considered in creating the likelihood ratio. For instance, here, assuming that the DNA on Patterson's sneaker was a mixture of his and his assailant's, that

person would almost certainly have been a Hasidic Jew, from the same ethnic background and insulated neighborhood as Mayer, and likely sharing many of the same ancestors. This information would be highly relevant, as it would account for an exponentially greater likelihood of shared alleles, and "could well skew a likelihood ratio dramatically." *Collins*, at 619-20; *see also United States v. Chischilly*, 30 F.3d 1144, 1155, 1157 (9th Cir. 1994) (explaining in the context of random match probability that a sub-structured population that remains homogenous through intermarriage and is underrepresented in the population used for comparison may inflate the odds of a random match). Yet, the program has no way to factor this into its probability calculations, thus spitting out an impressive, but misleadingly high, number that is based on inapplicable data relating to gene frequencies in the general Caucasian population, rather than the pertinent data of the gene frequency in the Hasidic population present in Williamsburg, which more accurately represented the closed universe of the possible group of Patterson's assailants.[23] For this reason, and others, FST, too, has been deemed so unreliable

[23] Ironically, in this case, the number was, actually, still not so impressive. In the realm of DNA probabilities, where random match probabilities are typically 1 to several *trillions*, the expert's conclusion here -- that it was only 133 times more likely that DNA was a mixture of Taj and Mayer than Taj and an unknown donor -- is remarkably low. And the probability is mathematically meaningless without knowing the likelihood that the mixture was Taj and an unknown donor, which was never run by the analyst. If that unknown probability was only 1 in 1 million, then 133 times more likely would still be only 133 in 1 million -- approximately one tenth of one percent (.0133 %). To rest a criminal conviction *solely* on such a probability, as was

that it did not even pass muster for admissibility under the extremely low threshold of the *Frye* standard (*See Collins, supra*). And, like HST, it too has been, unsurprisingly, discontinued by the OCME (*see* 9/19/16 OCME Memorandum, in Court File, and *supra*, FN 13, 14). While Judge Dwyer's holding in *Collins* has not yet been followed, nor reviewed by an appellate court, his well-reasoned decision is very powerful here. For, here, the question is not whether the evidence should be *admissible* -- requiring a very low threshold of proof -- but whether, once admitted, the weight of such evidence, *standing alone on the scale*, is sufficiently persuasive to rob a man of his freedom, and his children of their father.

* * *

W.I.E. Gates once said, "Do not put your faith in what statistics say until you have carefully considered what they do not say." Here, the People's scientific proof is silent on the only questions that matter. However it is dressed up and spun, it cannot say whether Mayer ever touched that sneaker. And, thus, it adds nothing to the case. As this is all the proof the People even purport to have, their case is legally insufficient as a matter of law and against the weight of the credible evidence. The judgment of conviction on every count should be reversed for failure to prove identity, and the indictment dismissed.

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done here, is dangerous and disturbing, and such proof is facially insufficient as a matter of law.

POINT TWO

THE COURT FAILED TO EVALUATE THE EVIDENCE UNDER THE STANDARD REQUIRED FOR SOLELY CIRCUMSTANTIAL CASES.

It is well settled that trial courts *must* deliver the full circumstantial evidence charge in prosecutions based wholly on circumstantial evidence. *See People v. Edwards*, 23 A.D.3d 1140 (4th Dept. 2005). And notwithstanding defendant's failure to request such charge or except to the charge as given, the inadequacy of a circumstantial evidence charge will constitute prejudicial error, requiring reversal and a new trial, in cases where the evidence, though legally sufficient to support a defendant's conviction, is not overwhelming. *People v. Burnett*, 41 A.D.3d 1201 (4th Dept. 2007); *People v. Schachter*, 6 A.D.3d 111 (1st Dept. 2004); *People v. Isidore*, 158 A.D.2d 933 (4th Dept. 1990).

Differing from the standard charge in several respects, the circumstantial evidence charge requires the trier of fact to apply a more rigorous reasoning process, which first mandates that, not just guilt, but the existence of any material "facts upon which an inference of guilt can be drawn must be proven beyond a reasonable doubt," and then goes on to prohibit the trier of fact from drawing any inference of guilt from such facts unless "the inference of guilt is the only one that can fairly and reasonably be drawn from the facts," and "the evidence excludes

beyond a reasonable doubt every reasonable hypothesis of innocence." Thus, under this standard, "if there is a reasonable hypothesis from the proven facts consistent with the defendant's innocence, then [the trier of fact] must find the defendant not guilty." *See* CJI2d, Circumstantial Evidence.[24]

Here, the trial court did not apply this standard in evaluating the People's case, although the proof was entirely circumstantial (T656). And under the circumstances of this case, the court's error in this regard cannot be deemed harmless. Even assuming, *arguendo*, that the People's proof could have been

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[24] *Available at* www.nycourts.gov/judges/cji/1-General/CJI2d.Circumstantial_Evidence.pdf

> Because circumstantial evidence requires the drawing of inferences, I will explain the process involved in analyzing that evidence and what you must do before you may return a verdict of guilty based solely on circumstantial evidence.
>
> Initially, you must decide, on the basis of all the evidence, what facts, if any, have been proven. Any facts upon which an inference of guilt can be drawn must be proven beyond a reasonable doubt.
>
> After you have determined what facts, if any, have been proven beyond a reasonable doubt, then you must decide what inferences, if any, can be drawn from those facts.
>
> Before you may draw an inference of guilt, however, that inference must be the only one that can fairly and reasonably be drawn from the facts, it must be consistent with the proven facts, and it must flow naturally, reasonably, and logically from them.
>
> Again, it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence.
>
> If there is a reasonable hypothesis from the proven facts consistent with the defendant's innocence, then you must find the defendant not guilty.

deemed legally sufficient (*see Jackson v. Virginia*, 443 U.S. at 307; *People v. Contes*, 60 N.Y.2d at 620), it was certainly not "overwhelming," as required to stave off reversal following an inadequate circumstantial evidence charge. *See People v. Burnett*, 41 A.D.3d at 1201 (reversing for error in circumstantial evidence charge even though proof of guilt was legally sufficient); *People v. Isidore*, 158 A.D.2d at 933 (same).

Moreover, while the application of these principles to a bench trial seems to present an issue of first impression, logic dictates that the error is equally prejudicial in this context. *See, e.g., People v. Haines*, 139 A.D.2d 591 (1988) (reversing conviction where court's comment during bench trial suggested that it might have considered an improper factor in reaching a verdict, and evidence was not overwhelming). There is no question that the trial court did not charge itself on, and did not apply, the circumstantial evidence standard; it was neither requested by the parties, nor identified by the trial judge as one of the charges it would consider (*see* Charge Conference at T654-56). Thus, just as a court's failure to provide an adequate circumstantial evidence charge to a jury is reversible error, regardless of whether the charge was requested, because in a non-overwhelming case, the defendant is clearly prejudiced thereby, so too is such error equally

prejudicial at a bench trial; especially one resting on proof as slim as in this case. Accordingly, reversal is required.

POINT THREE

THE PROSECUTOR MISREPRESENTED THE SCIENTIFIC EVIDENCE REGARDING THE ONLY PIECE OF EVIDENCE IN THE PEOPLE'S CASE.

Courts have long recognized the profound influence that scientific evidence has at a trial, "with the weight of an impressively credentialed expert behind it," and the care that must be exercised to prevent its misuse. *See Parker v. Mobil Oil Corp.*, 7 N.Y.3d, 434, 447 (2006). But more than any other form of scientific evidence, DNA evidence holds a "unique status within the criminal justice system" having a capacity to persuade the trier of fact of a defendant's guilt "unlike anything known before," and operating to shroud the prosecution's case with a "mystical aura of definitiveness" that renders it virtually "invincible." *People v. Wright*, 25 N.Y.3d 769, 783-84 (2015), *quoting* Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 Fordham L.Rev. 1453, 1469 (2007); Joel D. Lieberman et al, *Gold v. Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence?*, 14 Psychol. Pub. Pol'y & L. 27, 27 (2008). Because of its incredible persuasive force, and "the

potential danger posed to [a] defendant when DNA evidence is presented as dispositive of guilt," it is essential that defense attorneys, prosecutors, and courts vigilantly guard against mischaracterization and misuse of this scientific evidence. *People v. Wright*, 25 N.Y.3d at 783.

Thus, a prosecutor's misrepresentation on summation of the scientific import of DNA evidence will constitute misconduct, and a defense attorney's failure to object to that error -- even standing alone -- will constitute clear and prejudicial error, requiring reversal on appeal. *Id.* 780-84; *see also People v. Rozier*, 143 A.D.3d 1258 (4th Dept. 2016) (reversing conviction based on prosecutor's uncorrected exaggeration of the significance of DNA evidence during summation); *People v. Ramsaran*, 141 A.D.3d 865 (3d Dept. 2016) (reversing conviction where defense counsel failed to object to government's misleading and improper characterization of DNA testimony).

Here, as in *Wright, Rozier*, and *Ramsaran*, the prosecutor egregiously misrepresented the significance of the DNA evidence in this case, not only exaggerating what had been proven, but affirmatively contradicting the testimony of his own experts. In this regard, both of the People's DNA experts acknowledged that the testing cannot identify the *source* of the DNA -- blood, saliva, skin cells, etc. (T91,151). Nor can it determine how long ago the DNA had

been deposited (T129,160). And, crucially, the experts also acknowledged that a person's DNA can be deposited on an item that they *never touched*: either through secondary transfer (touching a person who touches the object), or tertiary transfer (touching a surface that is then touched by another person who then touches the object at issue) (T803). As emphatically stated by the People's expert: "The FST does not consider this. And there is no DNA test out there that tells you how DNA was transferred onto an item." (T804).

Yet on summation, the prosecutor first suggested that it had been proven that defendant's DNA was on the "non-deducible mixture" on the sneaker (which it had not been), and then, even more egregiously, stated: "the *only* way that mixture is *possible*, is in *any way possible*, is if this defendant was not only involved in the attack, but if he was the one who pulled that shoe and threw it up *immediately*" (T875, emphasis added).

Although, bereft of any other proof at all of defendant's guilt, this is what the People *needed* to prove to secure a conviction, there was absolutely no record support for this statement. To the contrary, the testimony of the People's own witnesses contradicted this declaration. As previously discussed, according to the People's own experts, even the *confirmed* presence of Mayer's DNA on the shoe -- which the People did not have here -- could not prove that he had ever touched it,

and was certainly not the only "possible" way it could have gotten there. Patterson could have stepped in Mayer's saliva on the street; Mayer could have shaken hands with the person who grabbed Patterson's sneaker; or that person could have touched a surface that Mayer had previously touched, and then grabbed Patterson's sneaker. The People offered no proof whatsoever to dispel any of these possibilities, which were explicitly acknowledged by their own experts. Thus, their characterization of the scientific evidence -- their only evidence -- was simply false.

POINT FOUR

THE PEOPLE'S FAILURE TO PROVIDE CRITICAL DNA DISCOVERY MATERIAL UNTIL THE EVE OF TRIAL, AND THE TRIAL COURT'S FAILURE TO GRANT DEFENSE COUNSEL AN ADEQUATE ADJOURNMENT TO REVIEW THE COMPLEX SCIENTIFIC MATERIAL WITH HIS DNA EXPERTS, DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL.

Defendant's Demand for Discovery, specifically requesting disclosure of all reports or documents relating to scientific testing pursuant to C.P.L. §240.20(1)(c), was filed on June 25, 2014 (*see* Omnibus Motion, in Court File). As of August 22, 2016 -- more than two years after the demand, and less than one week before the start of trial -- the People had still failed to provide the defense with a significant amount of key discovery material that they were statutorily obligated to disclose,

including the "notes of the lab technician who performed the DNA testing as well as the tests themselves and the process by which the results were obtained." *See* Attny. Fried's 8/22/16 Letter, in Court File. As defense counsel explained, he "was given only the results, and that alone, cannot be evaluated." *Id.*[25] Although defense counsel had diligently attempted to obtain the discovery to which he was entitled, "repeatedly try[ing] in vain to obtain the information on [his] own" and "reach[ing] out to the People by telephone, email and hard copy letter" his efforts "were ignored completely." *Id.*

The prosecutor's disclosure of the critical DNA materials on August 23rd -- resulting in the court's granting defense counsel a less-than-one-week adjournment to allow him to consult with an expert and prepare the defense -- was simply insufficient given the complexity of the scientific evidence in this case and the very limited number of experts familiar with the OCME's HST and proprietary FST software, which was not used by any other lab in the country (*see* Attny. Fried's 9/7/16 Letter, in Court File: "That is clearly not enough time for us to evaluate,

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[25] In addition to this critical discovery material, as of this date, the People had also failed to disclose any of the grand jury minutes, numerous statements of witnesses to law enforcement, and numerous police investigation reports and inter-agency correspondence relating to the case, which, according to defense counsel, were "essential to the defense" and placed him in the "predicament of not being able to fully prepare for trial." *Id.* Indeed, counsel explained, "it would be an insurmountable hurdle for the defense ... if we only learn of all of this essential information on the eve of trial, without having the benefit of time to review, evaluate and vet out." *Id.*

confer with an expert, and get ready for trial when we were also given all the unredacted DD5's, Grand Jury testimony, and several hours' worth of recorded statements a day or two later"). Indeed, it was not until September 7, 2016, with the People's case concluded, that the defense first completed its review of the belatedly-disclosed DNA discovery, and realized the need to call an expert witness to reveal the fallacies in the OCME analysis, who could "conclusively eliminate Mr. Herskovic as a contributor to the DNA mixture that was recovered from the sneaker." (*Id.*)

Then, further compounding this extreme prejudice to the defense, the trial court denied expert status to Arthur Young, the DNA expert initially proffered by the defense, on the grounds that he did not have a Master's Degree, had been fired from a job for unknown reasons, and that his c.v., which highlighted that he had been qualified as an expert in forensic biology more than 100 times, omitted that he had been denied expert status on one occasion (*see* T648-49; *see also* Attny. Fried's 9/12/16 Letter, in Court File). Not only was this ruling erroneous (*see Steinbuch v. Stern*, 2 A.D.3d 709 [2d Dept. 2003] [holding that court improperly disqualified proffered expert for lack of medical degree, and explaining that trial court should assess expert status based on professional background, training, study, and experience; other factors should go to the weight of the expert's testimony]),

but, more significantly, it further prejudiced counsel's ability to defend against the DNA evidence in this case. Now, once again, at the conclusion of the trial, defense counsel was left scrambling to find a new expert, who could both be available on a day's notice, and who was familiar with the OCME proprietary FST software (*see* Attny. Fried's 9/12/16 Letter, in Court File, detailing difficulties).

Stymied by this combination of circumstances, and again without time to adequately consult and prepare with the new DNA expert he had retained -- who was ultimately afforded less than a week to review the extensive DNA material in this case (T653-54) -- counsel could not provide the meaningful representation on this critical issue to which defendant was constitutionally entitled. *See People v. Benevento*, 91 N.Y.2d 708, 714 (1998); *People v. Baldi*, 54 N.Y.2d 137 (1981). And this manifested in multiple omissions throughout the trial, with a devastating cumulative impact on the outcome of this case.

First, having received the critical DNA discovery material less than a week before trial, and with inadequate time to review it with his expert, counsel did not make a *Frye* motion to challenge the admissibility of the DNA evidence. Far from a frivolous motion, with little chance of success, which cannot furnish the basis for a finding of a deprivation of meaningful representation (*see People v. Caban*, 5 N.Y.3d 143, 152 [2005]), such motion had a significant likelihood of success at this

Brooklyn trial, where another highly respected Brooklyn Judge had recently held, in a very thoroughly reasoned decision, that both the HST and FST analyses conducted by the OCME were not sufficiently reliable to pass muster under *Frye*'s general reliability standard. *See People v. Collins & Peaks*, 49 Misc.3d at 595. On these facts, counsel's failure to make the motion violated defendant's constitutional rights to counsel and a fair trial, both because the motion had a colorable chance of success, and because a favorable outcome would have operated to deprive the People of their *only* evidence in this paper-thin case. *See People v. Bilal*, 27 N.Y.3d 961 (2016) (reversing for counsel's failure to move for suppression of physical evidence that was key to People's case, even without finding that such motion would necessarily be successful).

Moreover, the prejudice is even more patent here; for, even assuming, *arguendo*, that the trial court would have *refused* to adopt *Collins'* holding that the OCME's HST and FST analysis lacked sufficient general reliability under the *Frye* standard, it still could have -- and clearly should have -- found that the *manner* in which the analyst input the parameters for the FST comparisons in Mayer's *particular* case -- first ignoring "fluke" allelles for the purpose of assuming a two-person mixture, and then adding in those same "unreliable" allelles in order to avoid the necessary elimination of Mayer as a possible donor to the sample (*see*

Point I,B,2, *supra*) -- would have, itself, rendered the expert's FST conclusions inadmissible at trial. *See People v. Wesley*, 83 N.Y.2d 417, 429 (1994) (explaining that after consideration of general reliability under *Frye*, the inquiry shifts to "the specific reliability of the procedures followed to generate the evidence proffered and whether they establish a foundation for the reception of the evidence at trial").

Thus, had the *Frye* motion been granted pursuant to the *Collins* decision, and the HST and FST analyses deemed unreliable, then the People would have had no DNA testimony at all, and, thus, no case. But even if *Collins* had *not* been followed here, and HST and FST found generally reliable, with only the *specific application* of this analyst's improper use of the FST tool precluded, the People still would have been left with no evidence against Mayer. For with the FST comparison precluded, all the analyst would have been able to say based on his HST analysis is that the sample on the heel of Patterson's shoe was a non-deducible mixture, from which no conclusions about Mayer could be drawn. Accordingly, under these circumstances, where the motion had a strong chance of success *irrespective of whether the trial court followed Collins*, and where such victory would have mandated dismissal of the People's case, counsel's failure to challenge the admissibility of the DNA evidence deprived Mayer of meaningful representation and a fair trial. *People v. Bilal*, 27 N.Y.3d at 961.

Second, to the extent that the People might argue before this Court that defendant's legal sufficiency claims were not presented to the trial court with sufficient specificity to preserve them for appeal,[26] this too would constitute a deprivation of the right to effective assistance of counsel in this case. For had the trial court fully understood and considered the legal sufficiency arguments presented here (Point I, *supra*), it would have been legally required to issue a trial order of dismissal. *See* CPL §290.10(1).

Third, counsel's failure to ask for a circumstantial evidence charge, though not fatal to the merits of the appellate claim on this point (*see* Point II, *supra*), could not have been motivated by any possible strategy, and, under the facts of this case, almost certainly altered the outcome of the trial. *See People v. Burnett*, 41 A.D.3d 1201 (4th Dept. 2007); *People v. Schachter*, 6 A.D.3d 111 (1st Dept. 2004); *People v. Isidore*, 158 A.D.2d 933 (4th Dept. 1990). On this remarkably weak evidence, where there was no identification, inculpatory statement, or any other

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[26] The defense does not, however, concede that trial counsel's motion for a trial order of dismissal was insufficient to preserve the legal sufficiency claim. In his oral and written motions, counsel properly argued that the People had failed to prove the elements of the crime, and that the DNA evidence was insufficient in quality and reliability to establish Mayer's identity (*see* Motion for Trial Order of Dismissal at T596-97,809-810 and in 9/7/16 letter, in Court File). Thus, counsel's motion should be deemed sufficient to preserve the legal sufficiency claims raised herein. But, in any event, even if unpreserved, this Court could still reach the legal sufficiency claims in the interest of justice, and should do so here where there is a very real danger that an innocent man has been convicted. And, of course, it must evaluate the weight of the evidence, which would also require reversal and dismissal of the indictment for the same reasons.

evidence placing Mayer at the scene, and where the DNA evidence was not a "match" to Mayer's profile, and was, in any event, by the admission of the People's own experts, incompetent to establish how and when the DNA wound up on Patterson's shoe, and whether Mayer had any direct contact with the shoe, it is inconceivable that any trier of fact -- let alone an experienced trial judge -- would have found that "the inference of guilt is the *only one* that can fairly and reasonably be drawn from the facts," and "the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence" as would have been required to find Mayer guilty under the proper standard. *See* CJI2d, Circumstantial Evidence, FN 24, *supra.*

Fourth, counsel's failure to object to the prosecutor's gross misstatement of the DNA evidence on his summation had no strategic purpose in a bench trial, and, by acquiescing to the validity of the prosecutor's mischaracterization of this critical evidence, certainly prejudiced the defense in this case. *See supra*, Point III; *see also People v. Rozier*, 143 A.D.3d 1258 (4th Dept. 2016) (reversing conviction based on prosecutor's uncorrected exaggeration of the significance of DNA evidence during summation); *People v. Ramsaran*, 141 A.D.3d 865 (3d Dept. 2016) (reversing conviction where defense counsel failed to object to government's misleading and improper characterization of DNA testimony).

Accordingly, viewed in totality, the combination of these omissions, even if caused by circumstances that counsel could not control, nevertheless operated to deprive defendant of meaningful representation and a fair trial. And, thus, reversal is required on this ground as well.

POINT FIVE

IN THE EVENT THIS COURT AFFIRMS ANY OF THE CONVICTIONS IN THIS CASE, IT SHOULD EXERCISE ITS DISCRETION, IN THE INTEREST OF JUSTICE, TO REDUCE MAYER'S SENTENCE TO THE STATUTORY MINIMUM.

Although sentencing is primarily a function of the trial court, *People v. Felix*, 58 N.Y.2d 156, 161 (1983), "the Legislature has empowered [this Court] to modify sentences 'as a matter of discretion in the interest of justice.'" *People v. Suitte*, 90 A.D.2d 80, 85-86 (2d Dept. 1982), quoting C.P.L.§470.15(3). This Court's power to "substitute [its] own discretion for that of a trial court" does *not* depend on any finding that a trial court has abused its discretion in imposing a sentence. *Id.* Instead, this Court has explained, the power is necessary to "rectify sentencing disparities, reach extraordinary situations, and effectively set sentencing policy." *Id.*

Here, even if it cannot be said that Judge Chun abused his discretion in sentencing Mayer to four years' incarceration on the assault and concurrent terms of one year on the unlawful imprisonment and 90-days on the menacing charges,

rather than the minimum sentences of three and one-half years for the assault (*see* P.L.§70.02[3][b]) and non-incarceratory terms on the lesser counts (*see* P.L.§§60.01[2],[3]; 65.00; 65.05; 65.20, authorizing probation, conditional discharge, or unconditional discharge) -- the imposition of anything more than the minimum sentence was, nevertheless, harsh and excessive in view of Mayer's background and the circumstances of this case, and warrants reduction in the interest of justice.

First, Mayer's background warrants reduction of his sentences to the statutory minimums. Mayer is twenty-three years old, and has a young wife and two children under the age of three, who depend on him exclusively for financial support (*see* Sentencing Memorandum, in Court File). To this end, he has been continuously employed, since the age of nineteen, and currently works at an HVAC company, where he works fifty-two weeks a year, with almost no vacation, earning less than $25,000 per year (*id.*). He was born, raised, and has lived modestly in Williamsburg, Brooklyn his entire life, surrounded by his friends and family. He has remarkably strong community ties, as evidenced by the many letters submitted by his neighbors, friends, and rabbi, and has long been active in community organizations, volunteering his time to assist troubled youths and gravely ill children and their families (*id.*). He has never been arrested, has no

criminal record, and has never had any contact with the criminal justice system (*id.*).

Second, the circumstances of this case warrant reduction of Mayer's sentence to the statutory minimum. Without minimizing in any way the harm to Mr. Patterson caused by the brutal assault upon him, and the pain and loss he endured, Mayer's sentence was unduly harsh in view of the trial court's finding of the limited role he played in this incident. Even pursuant to the trial court's findings, Mayer was at most a peripheral member of the crowd. He did not intend to cause serious physical injury to Patterson, and was not one of the men who inflicted those injuries (*see* Sentencing: 13-14). Yet, ironically, the men who were seen on the surveillance video chasing Patterson, who were identified by the victim and eyewitnesses as the primary assailants who held him down and beat him -- including the "ringleader" who inflicted the permanent injuries to Patterson's eye -- were not even *charged* by the prosecution with any crime. And the other men who were initially charged, some of whom, unlike Herskovic, were members of the Shomrin, and against whom there was testimonial and video evidence, were either offered misdemeanor pleas with sentences of community service, or had their cases dismissed outright. The prosecution's grossly disparate treatment of Mayer -- who played the most minor role, if any; against whom the People had the least

evidence; and to whom they offered no plea deal at all -- simply cannot be legitimately reconciled here. Any prison sentence is grossly disproportionate here; but certainly justice cannot permit one greater than the minimum to stand.

Indeed, Mayer's background and the circumstances of his conviction are so extraordinary that they resulted in probation recommending a split sentence, with a maximum prison term of six months or less, even though a minimum sentence of three and one-half years was statutorily required (*see* Sentencing: 10; Pre-Sentence Report, in Court File).

Thus, to the extent that this Court's power to substitute its own discretion for that of the sentencing court was granted by the Legislature as a "*necessary*" check and balance on the system -- to enable it to "rectify sentencing disparities, reach extraordinary situations, and effectively set sentencing policy" (*Suitte, supra*) -- it is necessary here. Accordingly, to the extent that, notwithstanding the arguments raised on this appeal, this Court nevertheless affirms any portion of Mayer's judgment of conviction, it should reduce the sentence on any remaining counts to the minimum permissible by law, and, if possible, to a non-incarceratory term.

CONCLUSION

For the reasons discussed above, appellant's judgment of conviction should be reversed.

Respectfully submitted,

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