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

New York Supreme Court
Appellate Division – Second Department

Docket No.: 2013-11049

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

SIMON WATTS,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

BARKET EPSTEIN KEARON ALDEA &
LOTURCO, LLP
Attorneys for Defendant-Appellant
666 Old Country Road, 7th Floor
Garden City, New York 11530
(516) 745-1500

Queens County Clerk's Indictment No. 2219/10

TABLE OF CONTENTS

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

----------x

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

SIMON A. WATTS, :

Defendant-Appellant.

----------x

STATEMENT PURSUANT TO CPLR 5531

1. The indictment number in the court below was 2219-2010.

2. The full names of the original parties are the People of the State of New York against Simon A. Watts. The parties have not changed on appeal.

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

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

5. This appeal seeks reversal of the judgment convicting Appellant, after a jury trial, of three counts of Course of Sexual Conduct Against a Child in the Second Degree, two counts of Sexual Abuse in the First Degree, Forcible Touching, and five counts of Endangering the Welfare of a child, and sentencing him to an aggregate prison term of 35 years' incarceration (Aloise, J.).

6. This appeal is from a November 6, 2013 judgment of conviction.

7. This appeal is being prosecuted on the original record pursuant to 22 NYCRR §670.9(d)(viii).

QUESTIONS PRESENTED

1. Did the trial court violate Appellant's right to present a defense and his due process right to a fair trial by ruling that counsel's credibility challenges on cross-examination relating to witnesses' pecuniary interest in the outcome of the case as a result of their pending multi-million dollar civil lawsuits would "open the door" to the People's elicitation of unfounded, uncharged allegations that Appellant had been accused of abusing *ten* other children?

2. Was the evidence legally insufficient and the jury's verdict against the weight of the evidence as to Appellant's conviction of Sexual Abuse in the First Degree and Forcible Touching with respect to Matthew Graham, where, viewed in the light most favorable to the People, the evidence showed only that Appellant briefly and lightly brushed his hand against Graham's fully-clothed crotch area, without making any comment, and without any other evidence of intent?

3. Did the cumulative effect of numerous additional errors violate Appellant's due process right to a fair trial where:

    a. the trial court denied defense counsel's request for an adverse inference charge with respect to the People's failure to preserve a witness's 911 call, and then precluded counsel from using the SPRINT report from the call to impeach the witness with a prior inconsistent statement;

    b. the trial court denied defense counsel's request for a missing witness charge with respect to the outcry witness of the first child to come forward with allegations against Appellant;

    c. the trial court curtailed valid avenues of cross-examination regarding the background, experience, and family circumstances of certain alleged victims -- factors all relevant, according to the People's expert, to assessing the credibility of the children's claims;

    d. the trial court permitted improper bolstering testimony from the People's expert child psychologist;

    e. the trial judge personally read back requested testimony to the jury during deliberations; and

f. the prosecutor made numerous improper and prejudicial remarks during summation?

4. In view of Appellant's spotless record, strong character recommendations, family background, his contributions to his community, and the sentence of probation offered to him by the People in exchange for a plea prior to trial, was Appellant's 35-year prison sentence harsh and excessive and an abuse of discretion where the trial court imposed five identical maximum determinate prison terms on each felony count, without regard for any of the individual circumstances of each charge, and then directed that all of the sentences run consecutively?

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

----------x

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

:

SIMON A. WATTS, :

Defendant-Appellant. :

----------x

BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

Appellant, Simon A. Watts, appeals from a November 6, 2013 judgment of the Supreme Court, Queens County, convicting him of three counts of Course of Sexual Conduct Against a Child in the Second Degree, two counts of Sexual Abuse in the First Degree, Forcible Touching, and five counts of Endangering the Welfare of a Child, and sentencing him to consecutive terms of seven years' incarceration and ten years' post release supervision on each of the Sexual Conduct and Sexual Abuse convictions, and concurrent one year sentences on each of the misdemeanor counts, for an aggregate sentence of 35 years' incarceration and 50 years of post-release supervision (Aloise, J). Appellant is currently incarcerated

pursuant to this judgment. Timely notice of appeal was filed. Appellant had no co-defendants at trial.

FACTUAL AND LEGAL BACKGROUND

INTRODUCTION

In September of 2007, Appellant, Simon A. Watts, began teaching at P.S. 15, starting with third grade in 2007, and then fourth grade from 2008 to 2010 (K'Tori: 1002). Over the course of these three years, Appellant's reputation as a teacher soared. A caring husband and parent of two young children himself,[1] Appellant was an organized and attentive teacher, and under his guidance, students learned their materials, and their standardized test scores steadily increased (M.Graham: 422; Thompson: 653; K.Hutson: 491; V.Hutson: 516; B.Walters: 598; Watts: 1081). Appellant was also highly regarded and respected by his colleagues, co-workers, and the school principal, quickly becoming the "go to" source for other teachers and school administrators (Thompson: 656). The principal even selected Appellant's photograph to appear on the cover of the teacher's handbook (Watts: 1079).

But Appellant was a strict and demanding teacher (M.Graham: 422; Watts: 1067). He assigned difficult homework, he disciplined students when they did not

[1] At the time of trial, Appellant had been married to his wife for eight years, and the couple had a seven year-old son and a five year-old daughter (Watts: 1064; Probation Report, in Court File).

complete their work or when they talked or misbehaved in class, and he also sent students to the principal, or called their parents to report problems and to make sure they stayed current with their work -- especially around exam time (Bermudez: 327-28; B.Walters: 530-31, 576-80; D.Walters: 611-12). Some students did not like this. Hailey Bermudez was such a student.

THE PEOPLE'S CASE

Hailey Bermudez's Complaint

In the spring of 2010, Hailey was midway through the fourth grade, and she was going through a difficult time at home. Her parents were divorced, and although she was supposed to see her father, he rarely made time to visit with her (Bermudez: 354; Obregon: 386-89). Hailey did not have any friends outside of school (Obregon: 393), and her mother, Marina Obregon, was very busy with work and with caring for Hailey's sister, Janira, who had been born with cerebral palsy and was in a wheelchair, and who, at that time, was undergoing several surgeries and needed much of her mother's attention (Bermudez: 325; Obregon: 368-69, 375, 397).[2]

School was not easy for Hailey either. Hailey complained to her mother that Appellant was a "mad man" and would often yell at her for talking in class (Bermudez: 327-28). Additionally, Hailey was struggling academically, having

[2] In 2013, at the time of trial, Janira was attending school, studying law (Bermudez: 325).

missed "a lot of school" that spring, because she frequently accompanied her mother and sister to surgeries, therapies, and appointments (Obregon: 411). Exacerbating these issues, the stressful ELA exams were coming up (Obregon: 394-95, 411-12). These were a "big deal" in the school, which was struggling to raise its ranking, resulting in extra efforts by the faculty to boost students' performance (Darcelin: 636-37), and extra academic pressure put on Hailey at home, as her mother sent her to Saturday school and did extra work with her at home (Obregon: 394-95, 411-12).

Against this backdrop, in March of 2010, with the exams approaching, Appellant asked Hailey to plan to have lunch in the classroom one day so that he could work with her to help her catch up (Bermudez: 334-35). Obregon, however, was "suspicious" and "worried" about her daughter being alone with a male teacher, and told Hailey that she was not allowed to privately meet with Appellant (Bermudez: 334-35, 356; Obregon: 394-95).[3]

[3] Aside from Obregon openly expressing suspicion and worry to Hailey regarding Appellant's intentions and the impropriety of Hailey being alone with him just days before Hailey's report that Appellant had sexually abused her, there was other significant evidence regarding Hailey's exposure to such ideas prior to her accusation. Both Hailey and Obregon testified that they regularly watched Law and Order together -- and had been doing so "for years," since the show started -- including episodes showing little girls as victims of sexual abuse (Bermudez: 361-362; Obregon: 391-93). Moreover, around this time, Hailey was also apparently exhibiting other indicia of sexual awareness, which -- as explained by the People's own expert -- is important to an evaluation of an alleged victim's credibility (Meltzer: 864-67). Nevertheless, when counsel attempted to elicit that Hailey's mother was concerned that Hailey touched herself, and would yell at her for doing so (Obregon: 404), the court precluded any inquiry on the subject (Obregon: 405-06).

Shortly thereafter, on March 9, 2010 -- a day that Janira had been scheduled to have a surgery that was unexpectedly postponed, and Hailey had been sent to school (Obregon: 397) -- Hailey accused Appellant of sexually abusing her; thereby setting in motion a spiral of events that ultimately led to rumors, accusations by other students, Appellant's suspension, multi-million-dollar lawsuits against the school district, and Appellant's conviction and imprisonment for thirty-five years.

Specifically, according to Hailey, Appellant had been screaming in class that day like a "mad man" (Bermudez: 356; 363), and had called her up to his desk when she was done with her work (Bermudez: 329). Even though all the other students were in the classroom facing Appellant's desk (Bermudez: 340-41), even though other faculty members and administrators would frequently come into the classroom, unannounced (Bermudez: 354), and even though Appellant's desk was immediately across from the door to the classroom -- so that a person standing in the doorway would be looking straight at the desk through the waist-high windows in the door (Bermudez: 357; Thompson: 791) -- Hailey claimed that while she was standing at the desk, reading words out loud, Appellant grabbed her right hand, placed it on his penis, on top of his clothes, and told her to hold him tight (Bermudez: 329, 335).[4] Then, according to Hailey, Appellant told her to go back

[4] When asked what his penis felt like, Hailey replied, "nasty" (Bermudez: 330).

to her seat, and asked her what kind of candy she liked.[5] She told him that she liked Hershey's, and continued her school day. She did not tell anyone what happened; but could not explain why (Bermudez: 346).

After school, at around 3:00 pm, Hailey's mother picked her up, and they went to the park (Obregon: 397). Hailey did not tell her mother what had happened at school (Bermudez: 330, 346).

That evening, at around 6:30 to 7:00 pm, Hailey's mother went to the store to buy milk. While she was out, Hailey called her mother crying, saying that she did not want to go to school the next day (Obregon: 370). Obregon told her they would talk when she got home (Obregon: 370).

While her mother was out, Hailey allegedly told her sister, Janira, what had happened that day (Bermudez: 346).[6] According to Hailey, Janira was confused, or thought it was a joke, and did not believe her (Bermudez: 346, 358).[7]

---

[5] In the grand jury, Hailey testified that she knew Appellant had tried to bribe her "because on the TV a lot of people bribe kids" (Bermudez GJ: 20).

[6] Hailey did not specify exactly what she told Janira (Bermudez: 346).

[7] There was substantial evidence casting doubt on the nature of Hailey's "outcry" to Janira on that day, which suggested that she had actually only reported that Appellant grabbed and hurt her hand -- not any sexual touching (*see* Proceedings: 645, 923-25; Bermudez: 359). Nevertheless, the People did not call Janira to testify -- despite their acknowledgment that she was the outcry witness, and was clearly within their control (*see* Opening: 289), and the court denied Appellant's timely request for a missing witness charge (Proceedings: 831, 1127).

When Obregon returned from the store, Hailey told her that she did not want to go school the next day, and that her hand was hurt, because Appellant had squeezed her wrist (Bermudez: 346-47, 359, 367). According to Hailey, Janira then told her to tell their mother exactly what she had reported earlier, and Hailey allegedly did so (Bermudez: 346-47). Although Hailey's mother -- much like Janira -- also was not sure if Hailey was telling the truth (Obregon: 372, 398),[8] she called an acquaintance, who was a teacher, and who advised them to call the police (Bermudez: 347; Obregon: 371). As a result, Obregon called 911.[9] Police Officers came to her home to interview Hailey, and then took Hailey, Obregon, and Janira to the Safe Horizons office on Queens Boulevard, where they were extensively interviewed by Detective Wylie, an investigator at the Queens County Child Abuse Squad, as well as medical personnel until 1:00 or 2:00 a.m. (Bermudez: 347; Obregon: 373, 398-99; Wylie: 965-67).[10]

---

[8] Previously in a deposition, Obregon testified she believed her daughter right away (Obregon: 372, 398).

[9] The 911 recording was not preserved by law enforcement (Proceedings: 645), but the SPRINT report indicated that Obregon had actually only reported that Appellant had hurt Hailey's hand, and *had not* made any allegations of sexual abuse during the call (Proceedings: 645, 923-24). Nevertheless, the court denied counsel's request for an adverse inference charge with respect to the destroyed 911 recording; then refused to allow counsel to enter the SPRINT report into evidence to confirm that when Hailey's mother called the police, she complained that her daughter had been physically -- not sexually -- assaulted; and then also refused defense counsel's request to call the police officers who responded to the 911 call as witnesses (Proceedings: 923-27).

[10] Det. Wylie was called by the defense, not the prosecution. She testified that she did not record her interview with Hailey, explaining that no interviews are recorded in Queens County (Wylie:

The next day, Appellant called Obregon at work, inquired about Hailey's absence from school, and asked Obregon to let Hailey know that her homework would be available on the school's website, "Study Island" (Obregon: 373-74).[11] According to Obregon, although Hailey had been absent in the past, this was the first time she had ever received a telephone call. After work, she therefore called the Board of Education and made a complaint (Obregon: 373-74).

Less than two weeks later, Obregon contacted her civil attorney, who had successfully won a large sum of money for her in two prior lawsuits (Obregon: 385-86). According to Obregon, she pursued the civil suit against the school district because she had spoken to Principal Antonio K'Tori after the incident, and he allegedly told her that she should have come to him first, because he "wouldn't make it a big deal" (Obregon: 376). Obregon further claimed that K'Tori told her that "he knew about something going on like two years ago" with Appellant (Obregon: 376, 398-99) [12] -- an accusation Obregon testified she allegedly

---

976, 995), and she also did not interview Janira (Wylie: 974), despite the fact -- as acknowledged by the People -- that Hailey made her first outcry, not to her mother, but to her sister (Opening: 289; Obregon: 385).

[11] Appellant, who testified in his own defense, recalled calling Hailey and two other students up to his desk on March 9, 2010 (Watts: 1102-03), and he likewise recalled calling Hailey's mother the following day to explain that Hailey had missed some days from school, and it was critical that she was able to access the materials on Study Island, given that the ELA exam was approaching (Watts: 1106, 1071, 1073).

[12] Principal K'Tori, who testified for the defense, acknowledged receiving a phone call from Obregon, but adamantly denied telling her that Appellant had ever been accused of abusing a student previously at another school (K'Tori: 1035).

confirmed when she looked in the newspaper and found out that five years earlier, in 2005, Appellant "was molesting two little girls in another school in Brooklyn, Canarsie" (Obregon: 376).[13]

Following Hailey's accusations, Obregon decided not to send Hailey to school for the next two weeks during Janira's surgery and recovery (Bermudez: 347-48; Obregon: 375) -- precisely as Hailey had requested just prior to making her accusations against Appellant (Obregon: 370). When Hailey returned to school, Appellant was no longer there, and Hailey had a new teacher (Bermudez: 348).

The Additional Outcries in the Aftermath of Hailey's Complaint

After Hailey's complaint, Appellant was immediately removed from the school, which was a "big deal," as rumors spread and students, teachers, and even the principal were talking about it (B.Walters: 588-90; Thompson: 740). Then, on April 14, 2010, approximately one month later, three fifth grade classmates, Brittany Walters, Kelsey Hutson, and Nevaeh Thompson -- friends who ate lunch together, sat together in class, and sometimes even had to be separated for talking

---

[13] Defense counsel objected vigorously to Obregon's testimony about her conversation with the principal, and her gratuitous and inflammatory statements about what she had read in the newspaper, but the court overruled the objection, and then denied counsel's application for a mistrial, citing its prior ruling that any mention by the defense of the complainants' pending civil lawsuits would "open the door" to evidence of Appellant's uncharged crimes, as it tended to show the motivation for the suit (Obregon: 375-77, 385-86; Proceedings: 269; *see also infra,* "Motions and Evidentiary Rulings").

to one another too much (K.Hutson: 502; B.Walters: 576, 580, 587) -- complained to their teacher, Martine Darcelin, that Appellant had abused them as well during the third and fourth grade school years (B.Walters: 580; Darcelin: 618-19). The girls admitted they had all shared stories about what Appellant had done to them prior to telling Darcelin (K.Hutson: 486, 489; B.Walters: 559-62, 587; Thompson: 683-84, 739-40), and within a week of the girls' complaints, on April 20, 2010, Appellant was arrested. Two days later, on April 22, 2010, the school conducted an assembly with all students on the topic of safe and unsafe touching, and that very same day a male student, Matthew Graham -- a fifth-grade classmate of Brittany, Kelsey, and Nevaeh -- wrote a letter to the principal alleging that Appellant had touched his penis (M.Graham: 429).

Brittany Walters's Complaint

In the spring of 2010, Brittany Walters was in fifth grade, but knew Hailey Bermudez from a talent class they shared. Appellant had been Brittany's third and fourth grade teacher, and though her grades improved under his guidance, she did not like him (B.Walters: 598-99). Brittany was not a strong student, and she thought Appellant was mean (B.Walters: 577). In fourth grade, she got in trouble for not finishing her homework, and had to stay after school, which she found unfair (B.Walters: 577). Brittany thought Appellant assigned too much work, and testified that Appellant would yell at her if she did not complete it, or if she talked

back to him, and would then assign her extra homework (B.Walters: 578-79). Appellant also used to talk about his family, kids, and wife in class; and Brittany -- who lived with her grandparents, and whose parents had not been in her life since shortly after her birth -- did not like this either (B.Walters: 578, 604-05). At least once or twice a week, Appellant would call Brittany's grandparents when she did not do her work, and she would get in trouble at home as a result (B.Walters: 578-79).

Accordingly, after Appellant had been removed from school, and with rumors flying following Hailey's allegations of sexual abuse, Brittany, too, made a complaint (B.Walters: 556-57).

Brittany testified that one day when she was in third grade, during the 2007-2008 school year, as she sat by Appellant at his desk while he was checking her work, Appellant put her hand on his penis over his clothing and moved it back and forth. She testified that she tried to move her hand away, but he kept putting it back (B.Walters: 533-34, 537); and she described what she felt as "soft and disgusting" (B.Walters: 540). She also testified that Appellant told her not to tell anybody (B.Walters: 540-41).[14]

[14] Brittany also described other times when Appellant called her to his desk during class and pinched the right side of her butt (B.Walters: 543).

Brittany acknowledged that at the time of this alleged incident, another teacher, Ms. Wilmott, co-taught the class with Appellant, and was present every day; but she claimed that when it happened, Wilmott was in the front of the classroom checking the work of other students (B.Walters: 542).[15] Additionally, Alicia Aragon, a paraprofessional, was also present in Appellant's third grade classroom from Monday to Friday working with a student one-on-one; the principal, Antonio K'Tori, along with other teachers, would randomly come into Appellant's classroom, typically unannounced; and at any given time, Appellant's classroom door -- which contained a window -- might be opened or closed (B.Walters: 581; M.Graham: 446-47; K.Hutson: 476-77, 481; Thompson: 674, 668, 673-74).

Brittany also claimed that on another occasion in fourth grade, while she was in the after-school program, her friend Kelsey told her that Appellant wanted her to come to his classroom. When she got to the classroom, Appellant told Brittany she was the new closet monitor. The two then went to the closet, whereupon Appellant unzipped his pants, took out his penis, let her touch it, and had her move her hand back and forth (B.Walters: 546-51). She described his penis as soft, brown, and shaped like a popsicle (B.Walters: 550).

[15] In his third grade classroom, Appellant's desk was located in the back of the room, while Wilmott's desk was in the front, facing Appellant's desk, and the student desks were set up in the middle of the classroom, aligned in rows when testing was going on and in groups, with views of both desks, at all other times (K.Hutson: 476; B.Walters: 527-28; Thompson: 712-13; Wilmott: 943).

Explaining why she did not come forward sooner, Brittany claimed that she had been scared to tell her grandmother about what happened, "because she would act crazy," and go to the principal (B.Walters: 555-56). Instead, she simply told her grandmother that Appellant was mean to her and hit her on her butt; but her grandmother did nothing about it (B.Walters: 593-94).[16] However, upon hearing about Appellant's removal from the school, Brittany started to think about what had happened between her and Appellant. One day when she began to cry, Ms. Darcelin called her into the hallway to talk, and she told Darcelin that Appellant had abused her (B.Walters: 556-58; Darcelin: 622-23).

Kelsey Hutson's Complaint

Kelsey, like Brittany, claimed that in the third and fourth grades, Appellant had inappropriately touched her, too (K.Hutson: 469-70, 478). The first time, she recalled, was in the beginning of third grade, when Appellant called her up to his desk and started touching her upper thigh, as the other students were doing silent work at their seats (K.Hutson: 478). After that, she testified, Appellant would call her up to his desk three to four times per week, sometimes placing his hand on her thigh, her lower back area, or her butt, as she sat in a chair beside him (K.Hutson: 479), and sometimes telling her that he loved her and that she was his girlfriend

[16] Brittany's grandmother acknowledged that Brittany told her Appellant hit her on her butt, but stated that Brittany never made a complaint about Appellant that was sexual in nature; instead she learned of Brittany's complaint from the school principal (D.Walters: 608-10).

(K.Hutson: 480). Kelsey further recalled a few times when Appellant placed his hand on her private area, over her clothes, and moved his hand back and forth from left to right (K.Hutson: 481); at other times, she stated, Appellant would have her touch his thigh, near his private area, as he again told her he loved her and called her his girlfriend (K.Hutson: 482). Kelsey even claimed she had seen Ms. Wilmott place her hand on Appellant's thigh -- maybe once per week -- when the two were in the back of the classroom (K.Hutson: 505-06). Still, Kelsey was clear at trial that she never touched Appellant's penis.[17]

Explaining why she did not come forward until fifth grade, Kelsey claimed that she tried to tell her mother about what was happening at the end of third grade, but was afraid of what her mother might say, and was only able to tell her that Appellant sort of scared her, and that she did not like him (K.Hutson: 485).[18] Then, in the spring of 2010, the day Brittany started crying in class, Ms. Darcelin

[17] In stark contradiction to her trial testimony, Kelsey claimed in the statement she wrote at school that not only did she touch Appellant's penis, but that Appellant also told her to shake it faster and faster (K.Hutson: 493-96). On redirect examination, the prosecutor asked Kelsey if it was true that Appellant stated "shake it faster, faster," and she answered that it was true (K.Hutson: 508); however on re-cross-examination, Kelsey stated that she did not remember (K.Hutson: 510-11). Kelsey also did not recall the claim she made in her videotaped statement that the abuse was happening everyday (K.Hutson: 496); nor did she recall ever seeing -- or stating that she saw -- Nevaeh up at Appellant's desk with her hands under the desk, looking down, a claim she had made in previous testimony (K.Hutson: 499-500).

[18] According to Kelsey's mother, Kelsey did say in fourth grade that Appellant was touching her -- although not inappropriately -- and did complain that she did not want Appellant as a teacher anymore. However, Ms. Hutson did not think much of her daughter's complaint because Appellant was a good teacher, and she figured Appellant was just being friendly (V.Hutson: 516).

called Kelsey out of the classroom -- after she finished speaking with Brittany -- explained to Kelsey what Brittany had told her, and asked Kelsey if it was true. Kelsey answered that it was true, and told Darcelin that Nevaeh was also involved. So Darcelin then told Kelsey to call Nevaeh out of the classroom (K.Hutson: 488).

Nevaeh Thompson's Complaint

Nevaeh was the fourth student to make allegations against Appellant, and her trial testimony was startlingly different from previous accounts she had given about the abuse. Neveah testified that one day in December of third grade, Appellant called her up to his desk, took his penis out of his pants, placed her hand on it as she sat beside him on a stool, and told her that if she told anyone, something bad would happen (Thompson: 656, 661). She claimed that he guided her hand, making it go up and down, and when he finished, he told her to go back to her seat. When asked what she meant by "when he finished," she responded -- for the first time ever -- "he would ejaculate on the floor," explaining "he did it himself," and "would take [her] hand off . . . start penetrating his penis himself, and then . . . ejaculate on the floor." When asked what she meant by "penetrating," she stated, "[u]p and down on his penis" (Thompson: 656-57). Nevaeh then claimed -- again, for the first time ever -- that this happened almost every day, except for days when the students were being tested (Thompson: 658), and she claimed that once Appellant had finished, he would either use a tissue to wipe up

his ejaculate and then squirt hand sanitizer on the floor (Thompson: 663-64), or use his foot to clean it up (Thompson: 727).[19]

In the fourth grade, Nevaeh testified, Appellant did not call her up to his desk for much of the year, but then started up again in April, and continued to call her up to his desk two to three times per week until June (Thompson: 665-67, 711).

Explaining why she -- like Kelsey and Brittany -- did not come forward until fifth grade, Neveah claimed that she had tried to tell an assistant principal, Ms. Brown, about the abuse in third grade, but was scared and merely told Brown that Appellant had been bothering her (Thompson: 665, 676).[20] In April of 2010, however, the day Brittany started crying, Ms. Darcelin called Nevaeh out of class after speaking with Brittany and Kelsey, and Nevaeh then -- like her friends -- told Darcelin that Appellant had sexually abused her (Darcelin: 627; Thompson 680-81).

[19] This testimony surprised even the prosecutor, who told the jury during her opening statement, "you are not going to hear [the students] come in here and say it happened every day" (Opening: 294). Neveah acknowledged that she had never previously used the word ejaculate or mentioned anything about liquid coming out of Appellant's penis in any prior statements -- explaining that she learned the word in middle school health class (Thompson: 669, 726). And, likewise, the first time Nevaeh ever mentioned anything about Appellant using tissues or his foot to clean ejaculate off the floor was during her testimony at trial (Thompson: 711). Nevaeh also incredibly testified that sometimes, as she was seated next to Appellant at his desk and the abuse was occurring, other teachers would come into the classroom and have a conversation with Appellant without noticing that anything out of the ordinary was taking place (Thompson: 730-33).

[20] In the statement Nevaeh wrote at school, she made the contradictory claim that she had in fact told Brown that Appellant had been abusing her and some of her classmates (Thompson: 747-50).

Matthew Graham's Complaint

Unlike Brittany, Kelsey, and Neveah, Matthew was in Appellant's 2007-2008 third-grade class only (M.Graham: 422, 446). Furthermore, he was the only one of the five children who did not come forward until after Appellant's April 20, 2010 arrest, after a letter had been sent home to parents and the school had conducted an assembly, and after the case had begun to garner media attention (M.Graham: 429).[21] Matthew's testimony also differed from the other students in that he had no recollection of Appellant calling students up to his desk (M.Graham: 447-49). He was friends with Nevaeh, Kelsey, and Brittany, and he testified that Neveah had previously told him that Appellant had touched her (M.Graham: 430-33).

According to Matthew, one time at the end of the 2010 school year, sometime between April and June, he, Nevaeh, and another student -- Justin Castro -- were helping Appellant clean up the classroom after school. Nevaeh had gone to the bathroom to get water to wash the chalkboard materials, and Justin had finished sweeping and left the room. When Matthew finished sweeping, Matthew went over to Appellant, who told him "good job," gently touched his penis over his clothing, and then gave him a Hershey bar. Matthew testified that the whole

[21] Matthew wrote a letter to the principal detailing his complaint on April 22, 2010, the same day the school conducted an assembly with the students to address safe and unsafe touching.

encounter lasted five or six seconds (M.Graham: 423-27), and that this was the only time anything like this had ever happened (M.Graham: 443).[22]

Explaining why he -- like the others -- did not come forward sooner, Matthew stated he really did not know what to do about what happened, so he just let it go; and although he initially did not want to tell anybody, he eventually told his parents after he saw the news that Appellant had been arrested (M.Graham: 428-29). Matthew's father, on the other hand, maintained that his son never spoke to him about what happened; instead, he learned of his son's complaint from the school (D.Graham: 454-55).

The People's Expert Witness

Dr. Ann Meltzer, a forensic psychologist specializing in the area of child abuse, explained that delayed disclosure is a very common feature of child sexual abuse cases, especially where the child knows the perpetrator (Meltzer: 845-46), and she set forth a host of reasons why a child might not reveal the abuse immediately.[23] She explained that sometimes a child will make a partial

[22] Notwithstanding Matthew's trial testimony, the prosecutor told jurors during her opening and closing statements that the evidence showed that Appellant had "held," "pulled," and "rubbed" Matthew's penis (Opening: 291; Summation: 1196).

[23] As Meltzer's examples all tracked the complainants' trial testimony -- sometimes exactly -- defense counsel objected to the testimony whenever it improperly mirrored the facts of Appellant's case (Meltzer: 899). Meltzer, for example, testified that an abuser often holds a position of authority over a child, like a teacher over an elementary school student -- just like the relationship between Appellant and his alleged victims (Meltzer: 848); she explained it was common for an abuser to use candy as bribes -- just as Appellant was alleged to have done

disclosure, revealing only a little bit about what happened as the child feels comfortable or begins to remember events from the past, and sometimes a child will choose to tell someone who the child thinks will not be shocked or disbelieve the child, like a therapist or a school counselor (Meltzer: 851-52). She also testified that when a child's abuser is an authority figure, someone the child has to see every day, or someone for whom the child has some positive feelings, the child will rarely cry out for help or fight back (Meltzer: 853-54).

Meltzer testified that in her experience, false allegations typically arise where there is a custody or visitation dispute in a family, and she stated it is also more common with younger pre-school aged children, who tend to be more malleable and coachable, as well as adolescents, who might fabricate allegations of sexual abuse to get themselves out of a situation or to extract vengeance (Meltzer: 861). She further explained that when trying to determine if a child's allegations are true, it is important to consider what the child says about what happened,

---

(Meltzer: 848); she testified many children have positive feelings about their abuser and may not want to get the abuser in trouble -- Neveah, Kelsey, and Matthew all testified they liked Appellant and felt that he was a good teacher (Meltzer: 847); she testified abusers often tell children not to tell anyone and to keep the abuse a secret -- again, just as Appellant is alleged to have done with certain children in this case (Meltzer: 849); she testified about the psychosexual development of elementary school children between the ages of eight and eleven -- the same age as Appellant's alleged victims -- explaining that such children are generally not apt to discuss matters of a sexual nature (Meltzer: 860); she testified that some perpetrators abuse both genders -- as Appellant was alleged to have done (Meltzer: 862); and she testified that school age children can generally appreciate the concept that there are consequences to their actions (Meltzer: 862). The court, however, overruled each of counsel's objections (Meltzer: 848, 849, 860, 862, 899).

whether what the child is describing is beyond the child's sexual knowledge for the child's age, whether the child is clear and consistent, and whether there might be other explanations for the child's account of events (Meltzer: 879-80).

Finally, Meltzer stated it is important for an interviewer to get to know the child, learn about the child's background, including who the child lives with and what types of family relationships exist, find out if the child has been exposed to any sexual activity or has been taught about sex, and verify whether there has been sexual abuse within the family or if the child has made any prior complaints (Meltzer: 864-67). And she also stated it is important to have a neutral interviewer, who does not simply ask questions to confirm what the interviewer believes to be true (Meltzer: 883-84). Lastly, Meltzer testified it is preferable that a parent not be present when a child is interviewed -- as Obregon claimed to have been during Hailey's interview -- in case the parent has in some way been influencing the child (Meltzer: 893-94, 911-12).

THE DEFENSE CASE

Ms. Wilmott, the special education teacher who co-taught Appellant's third grade class during the 2007 through 2008 school year, was in the classroom every day, and while she could not remember whether Appellant had a practice of calling students up to his desk, she testified that she never saw Appellant act inappropriately with any of the children (Wilmott: 935-40).

Ms. Aragon, a paraprofessional, was also in Appellant's third grade classroom Monday through Friday, from April to June of the same school year, working with a student one-on-one (Wilmott: 937, 945; Aragon: 955-56; K'Tori: 1008-09), and she, like Wilmott, testified that she never saw Appellant touch another student or otherwise act inappropriately (Aragon: 956).

Dr. K'Tori, the principal of P.S. 15 since 2005, regularly walked the halls, and during the school year, he would visit all the classrooms, including Appellant's classroom, almost daily (K'Tori: 1009-10, 1015). Sometimes his visits were announced, such as prior to a formal observation, while most other times, they were not (K'Tori: 1010-11); sometimes he would just stand at the door and look through the window, unnoticed, and at other times he would actually go inside, observe Appellant teaching, and speak with Appellant (K'Tori: 1049-51, 1057-58). K'Tori testified that after Appellant was arrested, a company called Safe Touch came to the school to conduct an assembly with the children and educate them about safe touches and unsafe touches (K'Tori: 1031). On cross-examination by the People, K'Tori testified that there were "definitely over 10" children -- and possibly more than "14 or 15" children -- at Hailey's school that came forward after Hailey's accusation with complaints against Appellant (K'Tori: 1053-54).[24]

[24] This testimony, too, was permitted under the court's contested ruling that the defense had "opened the door" to such testimony (*see, infra*, "Motions and Evidentiary Rulings").

Taking the stand in his own defense, Appellant described himself as a strict disciplinarian, admitting that sometimes he would yell (Watts: 1067, 1091). He explained that he had his students sign behavior contracts, which listed the rewards and consequences of certain actions, that he vigorously prepared his students for testing and assigned a lot of homework, and that it was his practice to call a student's home whenever he felt it was necessary (Watts: 1072-73).

Appellant acknowledged that he would sometimes call students up to his desk, especially during testing time so he could speak to the students privately (Watts: 1090, 1093-94), and he stated that he did so much more frequently in his fourth grade class (Watts: 1097, 1102). When he did have a student up to his desk, the student would stand -- not sit -- beside him (Watts: 1095-97); and while sometimes he would hold a student's arm gently as he spoke with the student, he denied ever touching any student inappropriately (Watts: 1098, 1068-69).

MOTIONS AND EVIDENTIARY RULINGS

The Admission of Uncharged-Crime Evidence

The People chose not to make a *Molineux* application[25] for permission to introduce evidence of prior crimes or bad acts on their direct case. This included approximately eight to ten additional complaints against Appellant from P.S. 15

[25] *People v. Molineux*, 168 N.Y.264 (1901); *see also People v. Ventimiglia*, 52 N.Y.2d 350 (1981).

students, which surfaced after Hailey Bermudez's accusation, but which the People decided not to pursue or charge (Proceedings: 4-5).

The People did make a *Sandoval* application,[26] seeking permission to cross examine Appellant, should he choose to testify, regarding an allegation that years earlier, in 2005, he had improperly touched a ten-year-old female student at another school, which was closed as "unsubstantiated" (Proceedings: 16-17, 20). Defense counsel opposed the application arguing that the 2005 allegation was investigated and deemed "unfounded" (Proceedings: 21-23), and the court ruled that the People were precluded from eliciting this on both their direct case (Proceedings: 17), and on cross examination of defendant (Proceedings: 23).

Following the court's rulings on these issues, at the next court appearance, the People moved to "preclude" the defense from even "mention[ing]" the complainants' pending multi-million-dollar civil lawsuits against Appellant and the school district (Proceedings: 36-37),[27] and argued, alternatively, that if counsel did inquire about the suits, this should be deemed to open the door to the elicitation of Appellant's prior uncharged crimes. Specifically, the prosecutor stated, "[i]f counsel wants to inquire about [the civil suits] I think the witnesses should be

[26] *People v. Sandoval*, 34 N.Y.2d 371 (1974).

[27] This was a reversal of the People's earlier position where they acknowledged that the civil suits were proper areas of cross-examination for the defense, and sought only to limit testimony about the amount of the suits (Proceedings: 12-13).

allowed to discuss the fact that the reason they brought the suit is because [Appellant] had done it before and the school was on notice, not just that he did it on these particular occasions. The basis for the suit is that the school system knew about it" (Proceedings: 37).

Defense counsel objected to the proposed restriction on Appellant's confrontation rights, and to the People's improper attempt to circumvent the court's *Molineux* and *Sandoval* rulings through a "back door" (Proceedings: 39-40), arguing that the witnesses' vested pecuniary interest in the outcome of Appellant's criminal case -- *i.e.*, that his conviction would help them gain millions of dollars in a related, pending, civil action -- "obviously would hold great weight on their credibility," and that exposing this fact in no way opened the door to the People's elicitation of "highly prejudicial" and "unsubstantiated" allegations that Appellant had perpetrated uncharged crimes against other young victims (Proceedings: 41). Specifically, counsel argued that while prior allegations against Appellant might have bearing on the *school's* prior knowledge, and thus, on the complainants' ability to satisfy this unrelated element of their civil cause of action against the school, Appellant's prior uncharged crimes had absolutely nothing to do with the complainants' credibility or motive to fabricate in *this case* -- which was the only relevance of the lawsuits. Thus, the lawsuits -- relevant to show the witnesses' pecuniary interest in the outcome of the criminal case, and thereby

impeach their credibility -- had no relation whatsoever to the existence of any prior uncharged crimes, which, while relevant to the success of any cause of action against the school, bore no relation at all to the witnesses' credibility (Proceedings: 39-41).[28]

Over counsel's objection, the court ruled that if the defense "opened the door" by eliciting evidence of the witnesses' pending civil law suits, the court would permit the People to explore any factor that was an impetus for filing those suits -- including the witnesses' knowledge of any other allegations against Appellant (Proceedings: 42, 269).

Subsequently, the court permitted the People to elicit testimony, on their direct case, that the school principal had told Marina Obregon that "he knew about something going on like two years ago" and that Obregon then "read the newspaper" and confirmed that Appellant "was molesting two little girls in another school in Brooklyn, Canarsie" in 2005 (Obregon: 376). Although counsel promptly objected and moved for a mistrial (Obregon: 376, 378), the court denied

[28] Raising the issue again after jury selection, defense counsel argued that there was "no connection" between defendant's right to challenge the witnesses' credibility because of their pending civil suits and the People's ability to elicit prejudicial evidence of Appellant's prior bad acts and uncharged crimes (Proceedings 257) -- it was "apples and oranges" (Proceedings: 261). Counsel also highlighted that aside from the lack of any evidentiary connection, the allegations of prior abuse were unsubstantiated, and their probative value was thus far outweighed by their potential to prejudice the jury (Proceedings: 261-62). And she objected to the court's restriction on her cross-examination by giving her "a Hobson's choice" of *either* foregoing her right to impeach the witnesses *or* avoiding the People's improper elicitation of unsubstantiated evidence of prior crimes, when, by law, Appellant was constitutionally entitled to do both (Proceedings: 260-61).

Appellant's motion, ruling that counsel had "opened the door" to the uncharged crimes evidence by mentioning the lawsuits in her opening statement and by cross-examining Hailey Bermudez -- the People's first witness -- about whether she was aware of a lawsuit and had spoken to a lawyer (Obregon: 379; *see also* Opening: 313; Bermudez: 355, 360).

The People subsequently elicited -- again on their direct case -- testimony that Dorette Walters, Brittany's grandmother, had also read something about Appellant in the Daily News (D.Walters: 608-09).

And later, the People elicited testimony from the school principal that there were "definitely over 10" children -- and possibly more than "14 or 15" children -- at Hailey's school that came forward after Hailey's accusation with complaints against Appellant (K'Tori: 1053-54).

Other Evidentiary Rulings

Following Obregon's trial testimony -- claiming that she told police during the 911 call that her daughter, Hailey, had reported that Appellant placed her hand on his penis -- defense counsel requested an adverse inference charge for the People's failure to preserve the 911 call; the court denied this application (Proceedings: 645). Alternatively, counsel sought to impeach Obregon by introducing the SPRINT report from the 911 call, which showed that Obregon

actually told police that Hailey was physically, not sexually, assaulted; but the court precluded counsel from doing this, too (Proceedings: 923-25).

Throughout the proceedings, the court curtailed avenues of defense counsel's cross-examination regarding the background, experience, and family circumstances of certain alleged victims, despite the testimony of the People's expert that such factors were relevant to assessing the credibility of the children's claims (Obregon: 404-06; Wylie: 971-74; Thompson: 760-65, 771-72, 801-02; Proceedings: 771-72, 810-13, 816-19).

The court also denied defense counsel's request for a missing witness charge with respect to Janira Obregon, Hailey's prompt outcry witness (Proceedings: 831, 1127).

And the court overruled defense counsel's multiple objections during the testimony of the People's expert child psychologist on the grounds that certain portions of the testimony were too closely tailored to the facts of the case and, therefore, improperly bolstered the credibility of the alleged victims (Meltzer: 848, 849, 860, 862, 899).

The Motion for a Trial Order of Dismissal

At the conclusion of the People's case, counsel moved for a trial order of dismissal of the charges relating to Matthew Graham, arguing that testimony that Appellant had briefly and gently touched Graham's penis over his clothing,

without any comment or other indicia of intent, was not sufficient to make out the sexual gratification element of Sexual Abuse in the First Degree, nor the elements of Forcible Touching (Proceedings: 920-21), and that the People could not satisfy these elements by "bootstrap[ing] one complainant's allegations of a sexual act on to the other complainant's allegations" (Proceedings: 920-21). The People argued that the sexual gratification element "can be inferred," and the court denied the motion (Proceedings: 922).

Counsel renewed the motion to dismiss at the conclusion of all the evidence, and the court again denied it (Proceedings: 1121-22).

ARGUMENT

POINT ONE

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS TO PRESENT A DEFENSE AND A FAIR TRIAL BY ERRONEOUSLY RULING THAT IF COUNSEL CROSS-EXAMINED ANY PARENT OR COMPLAINANT ABOUT A CIVIL LAWSUIT THE FAMILY WAS PURSUING -- TO IMPEACH THE WITNESS'S CREDIBILITY -- THE PEOPLE WOULD BE PERMITTED TO ASK WHETHER ALLEGATIONS THAT APPELLANT HAD ABUSED OTHER CHILDREN HAD MOTIVATED THEIR CIVIL SUITS. U.S. CONST. AMEND VI, XIV; N.Y. CONST. ART. I, §6.

Prior to opening statements, the trial court ruled that if defense counsel raised the fact that the parents of three of the alleged victims were seeking civil damages in connection with Appellant's prosecution, this would open the door for the People to elicit any factor that was an impetus for the civil suits -- including the witnesses' knowledge of any other allegations of abuse by Appellant (Proceedings: 42, 269). Strenuously objecting to the court's ruling, and properly asserting her right to cross-examine the People's witnesses about matters relating to their credibility, defense counsel nevertheless mentioned the fact that there were pending lawsuits during her opening statement (Opening: 313) and then questioned Hailey -- the People's first witness -- about her lawyer and statements she had made to her lawyer about the case (Bermudez: 355, 360). As a result, the court allowed the People to elicit evidence on their direct case of an uncharged and unsubstantiated allegation made by a student at another school against Appellant in

2005 (Obregon: 376; D.Walters: 608-09), as well as the existence of uncharged allegations that Appellant had either abused or otherwise inappropriately touched at least ten additional students at P.S. 15, in addition to those named in the indictment (K'Tori: 1053-54). The court's rulings in this regard absolutely crippled the defense; they resulted in the improper admission against Appellant of uncharged -- and unreliable -- bad acts that were virtually identical to the crimes for which he was on trial, and, thus devastatingly prejudicial; and they irreparably prejudiced Appellant's rights to present a defense, to cross-examine witnesses, and to a fair trial.

A. The trial court placed an impermissible restraint on defense counsel's right to cross-examine witnesses on matters affecting their credibility, thereby violating Appellant's right to present a defense and his right to a fair trial.

The Supreme Court has described cross-examination as "the principal means by which the believability of a witness and the truth of his testimony are tested," *Davis v. Alaska*, 415 U.S. 308, 316 (1974), and has long recognized the right of cross-examination as "implicit in the constitutional right of confrontation." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) ("The rights to confront and cross-examine witnesses … have long been recognized as essential to due process"); U.S. CONST. AMEND. VI, XIV; N.Y. CONST., ART. I, §6; *see also* CPL §60.15(1) (protecting the statutory right of all defendants in criminal proceedings to cross-examine every witness called by the state). Thus, while a trial court

retains discretion to impose reasonable limitations on cross-examination to prevent confusion, repetitive testimony, or a harassing interrogation, the court may not preclude counsel from attempting to elicit testimony regarding a witness's credibility, bias, prejudice, or motive to lie. *Davis*, 415 U.S. at 316. *See also Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *People v. Ashner*, 190 A.D.2d 238 (2d Dept. 1993).

Indeed, "exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination," *Green v. McElroy*, 360 U.S. 474 (1959); and in this respect, "[a] general rule has evolved to the effect that the trial court should allow cross-examination and the airing of evidence with respect to a witness's pending, or even contemplated, suit against the defendant." *United States v. Gambler*, 662 F.2d 834, 837 (D.C. 1981); *see also People v. Bruno*, 77 A.D.2d 922 (2d Dept. 1980) (finding error where trial court refused to allow defendant to counter complainant's denial of interest in prosecution with evidence that complainant had taken action in contemplation of commencement of a civil lawsuit against defendant); *People v. Abranko*, 162 Misc.2d 739 (2d Dept. 1994) (stating while a court may in its discretion disallow evidence regarding the amount of damages sought in a civil suit, it is "incumbent upon the trial court to permit cross-examination of complainant concerning the existence of said suit"); *see also State v. Tiernan*, 941 A.D.129 (Sup Ct. Rhode

Island, 2008) (reversing conviction where trial court erroneously precluded counsel from asking complainant whether he intended on seeking monetary damages from the defendant). "A pending civil suit, or even a contemplated suit, arising out of the same incident that gave rise to the criminal charges is almost always relevant to the credibility of a prosecuting witness because it gives [the witness] a financial interest in the outcome of the criminal prosecution." *State v. Whitman*, 429 A.2d 203, 205 (Me. 1981); *see also People v. Casiano*, 148 A.D.3d 1044 (2d Dept. 2017) (finding trial court unduly restricted defendant's cross-examination of complainant in violation of defendant's right to present a defense where defense had a good faith basis to establish motive to fabricate testimony); *People v. Bartello*, 243 A.D.2d 483 (2d Dept. 1997) (finding limitation on defendant's cross-examination of complainant improperly curtailed defendant's ability to challenge accuracy and truthfulness of his testimony); *People v. Loftin*, 71 A.D.3d 1576 (4th Dept. 2010) (trial court's ruling precluding defendant from cross-examining victim about matters affecting her credibility was not harmless).

Here, at the time of trial, the parents of Hailey Bermudez, Brittany Walters, and Nevaeh Thompson were not simply contemplating lawsuits against Appellant, the principal, and other institutional defendants; rather, they and their children were actively litigating civil claims -- seeking millions of dollars -- based on the very conduct that gave rise to Appellant's criminal prosecution. It was, therefore,

neither speculative nor remote for counsel to present to the jury -- as part of Appellant's theory of defense -- the possibility that the parents of the children who had elected to pursue these claims viewed a criminal conviction as a way to bolster their actions for civil damages, which in turn could have motived both the parents and the children to testify inaccurately, to embellish, or to otherwise relate a skewed or tailored version of events.

Nevertheless, the court ruled that if counsel so much as mentioned the pending civil lawsuits, the People would be permitted to elicit overwhelmingly prejudicial -- and wholly unfounded -- allegations that Appellant had previously been accused of inappropriate sexual touching at another school years earlier, and that numerous other students from P.S. 15 -- who were not the subject of any pending criminal charges -- had also made complaints against Appellant. This presented counsel with an impossible choice, which she accurately characterized as a "Hobson's choice," or no choice at all: (a) forgo a key line of attack on the credibility of the victims and their parents, and, in turn, the argument that the potential for financial gain was driving the parents to pursue these false allegations, or (b) reveal to the jury that Appellant had been accused of abusing a child previously at another school and was also the subject of numerous other uncharged complaints (Proceedings: 260-61). The trial court's ruling, in other words, was tantamount to a preemptive -- and indisputably improper -- restraint on Appellant's

right to cross-examine witnesses about their possible bias and motive to fabricate; and it was, therefore, also a violation of Appellant's right to present a complete defense and his right to a fair trial. *See People v. Ocampo*, 28 A.D.3d 684 (2d Dept. 2006) (reversing sodomy and sexual assault conviction where trial court prevented counsel's good-faith line of cross-examination aimed at establishing a motive to fabricate in violation of defendant's right to present a defense).

B. The trial court's ruling that counsel "opened the door" to otherwise inadmissible, unsubstantiated, and prejudicial testimony of Appellant's abuse of ten other children was contrary to basic rules of evidence, and violated Appellant's due process right to a fair trial.

The trial court's ruling was not only erroneous in that it placed a stifling and impermissible restraint on Appellant's confrontation rights, it was also a gross misapplication of the evidentiary concept of "opening the door," in that neither the questions counsel posed to Hailey Bermudez or Marina Obregon, nor the statements she made in her opening argument -- under any plausible evidentiary theory -- could have possibly opened the door to the admission of evidence that Appellant was previously accused of abusing a student at another school, or that other students at P.S. 15 -- who were not the subject of any criminal charges -- had also levied similar accusations against Appellant. *See People v. Hudy*, 73 N.Y.2d 40 (1988).

The Court of Appeals has held that when deciding whether a defendant has 'opened the door' to otherwise inadmissible evidence, the trial court should consider whether, and to what extent, the evidence or argument that is said to have opened the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression. *People v. Massie*, 2 N.Y.3d 179, 184 (2004); *see also People v. Rosario*, 17 N.Y.3d 501 (2011) (counsel's use of the word 'story' during her opening statement, even if suggesting a recent fabrication, did not create a misleading impression that opened the door for the People to elicit evidence on their direct case that alleged sexual abuse victim had complained about the defendant in a note to her boyfriend); *People v. Richardson*, 95 A.D.3d 1039 (2d Dept. 2012) (reversing conviction where trial court erroneously ruled defendant opened the door to otherwise inadmissible hearsay); *People v. Fisher*, 104 A.D.3d 868 (2d Dept. 2013) (defendant did not open door to cross-examination concerning former students' allegations that defendant had acted inappropriately toward them in a sexual way where counsel asked defendant, in reliance on pre-trial ruling, whether defendant had ever been accused of having an inappropriate sexual relationship with a student).

Here, counsel firmly and correctly asserted that there was no connection whatsoever between a defendant's right to challenge witnesses' credibility by

cross-examining them about their financial interest in the outcome of the criminal case as a result of their pending civil lawsuits, and the prohibition on the People's ability to elicit prejudicial and unfounded testimony that defendant had been accused of abusing at least ten other children; this was, as counsel argued, "apples and oranges" (Proceedings: 257-58, 260-62). While prior instances of abuse, if known to the school, would have furnished a legal basis for the witnesses' civil lawsuits against the school, and might have increased the chances of the lawsuits' success, this simply failed to explain, mitigate, or relate in any way to the witnesses' financial interest in the outcome of Appellant's criminal trial. By informing the jury that some of the witnesses had filed civil lawsuits -- and that the witnesses therefore had a financial interest in the outcome of the proceedings -- counsel in no way suggested to the jury that Appellant had never been accused of engaging in such conduct in the past; nor did counsel otherwise mislead jurors with respect to material issues of disputed fact, or unfairly provide them with incomplete information that only evidence of Appellant's uncharged crimes could correct. *Compare People v. Reid*, 19 N.Y.3d 382, 389 (2010).

Thus, the court's ruling that counsel's mere mention of the civil suits opened the door to the People's elicitation of otherwise inadmissible uncharged-crime evidence that Appellant had sexually abused nearly a dozen other children was, from an evidentiary perspective, clearly erroneous.

C. The court's ruling enabled the People to present overwhelmingly prejudicial and otherwise inadmissible propensity evidence against Appellant, and, in the context of this trial, cannot be deemed harmless.

Counsel -- as indicated above -- concisely analogized the connection between an accused's right to cross-examine witnesses on a pecuniary interest in the outcome of the trial affecting their credibility and the admissibility of Appellant's alleged prior bad acts as "apples and oranges" (Proceedings: 261). Counsel further argued, however, that because the prior allegations against Appellant had been unsubstantiated, the prejudicial effect of revealing them to the jury far outweighed any possible probative value (Proceedings: 260-62). Under the circumstances, in other words, the only purpose of admitting these unfounded allegations was an impermissible one, which has been universally condemned by courts in every jurisdiction: to establish that Appellant had a propensity to sexually abuse children. In the context of this trial, which hinged *solely* on credibility, this error cannot be deemed harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967); *People v. Crimmins*, 36 N.Y.2d 230 (1975).

On this point, the facts of *People v. Hudy*, 73 N.Y.2d at 40, bear discussion. In *Hudy*, the defendant was a remedial math teacher at an elementary school, when the younger brother of one of his former students, Matthew, told his mother that he had heard about a teacher who put his hands down boys' pants. When the mother questioned Matthew, the boy confirmed that the defendant had fondled him and

had abused other boys as well. In an effort to confirm the allegation, Matthew's mother contacted the mother of one of the other boys in Matthew's class; the next day the two boys discussed the matter on the school bus; and rumors about the defendant's misconduct quickly spread throughout the school. Within three weeks, the police had obtained inculpatory evidence from eight of Hudy's students, and he was indicted for numerous counts of sexual abuse.

The boys at Hudy's trial, in much the same way as the students at Appellant's trial, testified that the defendant fondled them as they stood behind his desk getting help with their schoolwork. Counsel's theory of defense in *Hudy*, similar to that here, was that the charges against the defendant were the product of rumor and conspiracy, that Matthew had lied to his younger brother and then felt compelled to adhere to his story when confronted, and that the story then spread and incited other students to make similar unfounded accusations. To support this theory, defense counsel cross-examined each student about whether he had discussed the abuse with other students, whether he had heard other students talking about it, and whether he had heard about the police investigation. To rebut the defense that the charges against the defendant were the product of rumor and conspiracy, the court then permitted the People to call an additional witness -- a former student of the defendant who had since moved to another state -- to testify

that this student had also been fondled by the defendant at the defendant's desk, before Matthew ever came forward with his accusation. *Id.* at 45-47.

The Court of Appeals reversed Hudy's conviction and stated -- in no uncertain terms -- that the evidence concerning the defendant's prior uncharged misconduct with a former student had no relevance to any material issue in the case, tended only to demonstrate the defendant's criminal propensity, and should have been excluded. *Id.* at 54. Specifically, the Court stated that the "defendant's conduct toward [the former student] in the past has no legitimate, legally cognizable bearing on the truthfulness of the other children's allegations." *Id.* at 55. Instead, the Court explained, the prior uncharged act was simply propensity evidence suggesting that if the defendant had abused one boy, he would do it again, and that he therefore probably abused the children who had testified against him at trial. *Id.* at 56. Furthermore, the Court found that notwithstanding the fact that eight other boys had recounted essentially the same story of abuse, the evidence that the defendant had abused another boy -- before the rumors started -- was highly prejudicial; it created a serious danger that the jury drew the inference that if the defendant did it before, he probably did it again, and the error in admitting it, therefore, was not harmless. *Id.*

Here, just as in *Hudy*, the trial court committed reversible error by ruling that the defense's proper challenges to the credibility of certain witnesses somehow

opened the door to otherwise inadmissible -- and extremely prejudicial -- evidence that Appellant had been accused of abusing other students. However, unlike in *Hudy*, where reversal was required because of evidence of *one* other allegation of abuse, here the People were permitted to elicit evidence that Appellant had abused at least *ten* other children. Indeed, as a result of this error, the jury was permitted to hear testimony that Marina Obregon had read newspaper articles making the unfounded and unsubstantiated claim that in 2005 -- years before the charged crimes -- Appellant "was molesting two little girls in another school in Brooklyn, Canarsie" (Obregon: 375-76). Then, exacerbating the prejudice, the prosecutor was permitted to likewise elicit from Dorrette Walters, Brittany's grandmother, that she, too, read something about Appellant in the Daily News (D.Walters: 608-09).

Later, during the People's cross-examination of Principal K'Tori, the prosecutor elicited the devastatingly prejudicial testimony that after the assembly, "one, two, three, four, five, six, seven, eight more students c[a]me forward with complaints about [Appellant]" (K'Tori: 1031). The prosecutor then twice repeated the fact that there were eight more complainants who came forward after the assembly -- going as far as naming certain students, and she questioned K'Tori -- as she had done with Brittany Walter's grandmother and Hailey Bermudez's

mother -- about whether he became aware of other complaints against Appellant after reading stories in the newspaper (K'Tori: 1034).

Clearly emboldened by the court's improper evidentiary ruling, the prosecutor asked K'Tori whether it was true that he told Obregon that he had been aware for two years that Appellant had been accused of having inappropriate contact with children in the school -- a claim K'Tori denied (K'Tori: 1035); she asked whether it was true that K'Tori was being sued because he had prior knowledge of Appellant's behavior (K'Tori: 1036); she asked again whether it was true that K'Tori was aware that allegations had been made against Appellant prior to 2007 (K'Tori: 1052); and finally, she asked whether it was true that a total of *fourteen* children had actually come to K'Tori with various complaints against Appellant (K'Tori: 1053). K'Tori stated that he knew the number was more than ten, but did not know what became of these other allegations, and the jury was therefore left to speculate -- without any information regarding the nature or extent of these other allegations -- that Appellant had committed numerous other deviant and predatory crimes against other young students (K'Tori: 1053-55).

This line of questioning was wholly impermissible, and its prejudicial effect insurmountable, for it improperly suggested to jurors that they should believe the children who testified against Appellant at trial because Appellant had also abused a host of other children and, thus, had a propensity to commit the charged crimes.

See People v. Gibbs, 126 A.D.3d 1409 (4th Dept. 2015) (reversing sexual assault conviction where allegations of defendant's prior sexual abuse against victim's mother and another woman were not inextricably interwoven with the charged crime and the prejudicial effect of the allegations outweighed any probative value); *People v. Peters*, 187 A.D.2d 883 (2d Dept. 1992) (reversing sexual abuse conviction where other acts testimony regarding defendant high school gym teacher's prior consensual sexual relationship with 17-year-old female student on school grounds was relevant only to show defendant's propensity and its prejudicial effect outweighed any probative value); *People v. Jackson*, 136 A.D.2d 866 (3d Dept. 1988) (reversing first-degree rape conviction where trial court admitted highly prejudicial evidence of prior uncharged acts of sexual intercourse between nine-year-old victim and defendant).

Moreover, the trial court's admission of the uncharged-crime evidence in this case is even more disturbing because the allegations were either unproven, deemed unfounded, or otherwise determined by the People not to warrant additional criminal charges. *See State v. Floyd Y.*, 22 N.Y.3d 95 (2013) (admission of unreliable hearsay evidence in civil commitment proceeding that defendant had abused four prepubescent children violated defendant's due process rights). Indeed, perhaps recognizing this, and the lack of any permissible evidentiary purpose, the People actually chose to forgo a *Molineux* application for permission

to introduce such evidence on their direct case. Their subsequent elicitation of this evidence on their direct case, with the trial court's approval, turned this fundamental rule of evidence on its head, irreparably prejudicing the defense.

Likewise, under the circumstances of this case, this Court should reject any argument by the People that, notwithstanding the prejudicial impact of such error, it should nevertheless be deemed harmless in view of the "overwhelming" evidence against Appellant, consisting of the trial testimony of five children. First, any such argument is conclusively dispelled by *Hudy*, where *eight* children testified against the defendant on the People's case, but the Court of Appeals found that the error of permitting the People to elicit evidence of *one* prior allegation of abuse was not harmless. *See, e.g., People v. Hudy*, 73 N.Y.2d at 56. Here, the People's case against defendant was substantially weaker, but the magnitude of the error -- eliciting not one, but *ten* other allegations of abuse -- was ten times as great.

Indeed, here, the People's case was not "overwhelming" in any sense of the word. Their case was not founded on incontrovertible forensic evidence or medical testimony, on videotaped documentation, or even upon a confession. To the contrary, it presented a pure credibility contest between Appellant and his accusers, whose testimony -- that much of the abuse happened in the middle of class, with faculty members coming in and out of the classroom unannounced, with

other students present in the classroom, and with another aide or teacher present -- often strained credulity (Bermudez: 340-41, 354, 357; B.Walters: 542, 581; M.Graham: 446-47; K.Hutson: 476-77, 481; Thompson: 674, 668, 673-74, 730-33, 791).

Additionally, most of the students had clear motives to embellish or to fabricate: some were experiencing issues in their home lives; some had been exposed to sexual subject matter, either on television or because of alleged abuse within their family; some were struggling academically; some had behavior problems and harbored strong negative feelings toward Appellant; and some were being subjected to multiple depositions by attorneys, examinations by medical doctors, and influence from their parents (*see*, Factual and Legal Background, *supra*, detailing backgrounds of Hailey Bermudez, Brittany Walters, Neveah Thompson, and Kelsey Hutson).

Indeed, underscoring their credibility issues, some of the students' stories dramatically changed over time. Neveah, for example, claimed *for the first time at trial* that Appellant had been ejaculating on the floor *every day* while class was in session (Thompson: 656-58); and Kelsey, despite initially claiming that Appellant had her shake his penis, testified at trial that she never actually touched it (K.Hutson: 493, 494-96).

Similarly, the circumstances under which each of the children disclosed the alleged abuse gave rise to the possibility that the children had exaggerated their claims, or otherwise fabricated them entirely. Hailey, for example, was experiencing the stress of her sister's illness, and the pressure of exams, and she did not want to go to school; Brittany, Kelsey, and Nevaeh were all friends who only came forward to Ms. Darcelin after discussing the rumors about Appellant's removal from the school, and only after Darcelin called them out of class to specifically inquire; and Matthew did not make a claim against Appellant until after Appellant's arrest had been noticed in the media, and after the school conducted an assembly with the students about safe and unsafe touching. Plus, the community protests that took place at the school in the wake of the abuse allegations fueled feelings of anxiety, anger, disbelief, and other confusing emotions -- for both students and parents -- that no doubt influenced the children psychologically over time.

Thus, on these facts, the court's decision to admit the uncharged-crime evidence so skewed the playing field between the government and Appellant that it eviscerated the defense. Without it -- and given the implausibility that conduct as brazen as ejaculating on the floor almost every day in a classroom full of students and other teachers would have gone unnoticed -- there was, indeed, good reason that the jury might have otherwise credited Appellant's denial of any wrongdoing.

Had defense counsel been able to cross-examine the complainants about their pending lawsuits, and elicit testimony about what the families stood to gain financially -- without thereby revealing that numerous other children had made allegations against Appellant -- the entire evidentiary landscape of the trial would have been different. The People's proof would have been confined to the testimony of Hailey, Brittany, Kelsey, Nevaeh, and Matthew, and counsel could have elicited for jurors that Hailey's mother, Neveah's mother, and Brittany's grandmother -- witnesses whose credibility went virtually unchallenged due to the court's restrictive evidentiary rulings, and whose children made the most serious of the accusations -- each had a very powerful financial incentive to see Appellant convicted.

In this alternative setting, the facts defense counsel *was* able to elicit, which tended to suggest that some of the allegations had been exaggerated or fabricated -- *i.e.*, that Brittany, Kelsey, and Nevaeh admitted to hearing rumors and discussing them before coming forward; that Brittany hated Appellant, resented his family, was struggling in school, and was being considered for special education at Appellant's urging; that Neveah's sister had been molested by her uncle; and that Hailey was exposed to sexual material on television at home, had a mother who was already suspicious of Appellant and paying far less attention to her than to her disabled sister, and was far behind in her school work and wanted to stay home --

would have surely resonated more powerfully with the jury. Instead, the points defense counsel was able to make were completely overshadowed by the specter that Appellant had been serially abusing children for some time, and that he was, therefore, likely guilty of abusing the children who testified against him at trial. Jurors' desire to avoid acquitting a pedophile, in other words -- notwithstanding any doubt defense counsel was able to raise about the veracity of the students' claims -- overshadowed their ability to make a careful and considered credibility determination.

For these reasons, the proof of Appellant's guilt was in no way overwhelming, and the trial court's decision to permit the People to elicit the unsubstantiated 2005 allegations, as well as the allegations that ten additional elementary school students also made complaints against Appellant, was not harmless beyond a reasonable doubt; that is to say, had the court not made this error, which so grievously impacted Appellant's right to present a defense and his due process right to a fair trial -- as guaranteed to him by the United States Constitution -- there is a significant possibility that the verdict would have been more favorable to Appellant. *People v. Crimmins*, 36 N.Y.2d at 240-41 (*citing Chapman v. California*, 386 U.S. at 18) ("however overwhelming may be the quantum and nature of other proof, the error is not harmless under the Federal test

if 'there is a reasonable possibility that the error might have contributed to the conviction'").[29]

* * *

In sum, Obregon -- like Brittany Walters' grandmother and Nevaeh Thompson's mother -- was seeking monetary damages from the school and the city because she believed that her daughter, whom she had entrusted to their care, had been sexually abused. The fact that her civil lawsuit was pending -- and that Appellant's conviction at the criminal trial would solidify her chance at a multi-million-dollar recovery in that civil suit -- is what was relevant to her credibility; her reasons for bringing the civil suit against the school, or her ability to demonstrate the civil element of the School's prior knowledge based on prior allegations that had been made against Appellant, had no bearing whatsoever on her credibility. Accordingly, the trial court's ruling that defense counsel's proper challenge to witnesses' credibility opened the door to the People's elicitation of testimony regarding Appellant's numerous prior uncharged assaults on other children violated Appellant's right to present his defense and his right to a fair trial; and in view of the overwhelming prejudice it engendered, in this trial based

[29] This error is of constitutional dimension, thus *Chapman*'s standard applies; however, even if the Court concludes that the error is not of constitutional dimension, there is also a significant *probability*, for the reasons herein articulated, that the verdict would have been more favorable to Appellant had the error not occurred. *People v. Kello*, 96 N.Y.2d 740 (2001); *People v. Crimmins*, 36 N.Y.2d at 241-42.

solely on credibility, the error cannot be deemed harmless. Thus, Appellant's conviction must be reversed and the case remanded for a new trial.

POINT TWO

THE EVIDENCE OF APPELLANT'S GUILT OF SEXUAL ABUSE AND FORCIBLE TOUCHING WITH RESPECT TO MATTHEW GRAHAM WAS LEGALLY INSUFFICIENT, AND THE VERDICT AS TO THESE COUNTS WAS AGAINST THE WEIGHT OF THE EVIDENCE. U.S. CONST. AMEND XIV; N.Y. CONST. ART. I, §6.

At the conclusion of the People's direct case -- and then again at the conclusion of all the evidence -- defense counsel moved to dismiss the sexual abuse and the forcible touching counts with respect to Matthew Graham on the ground that the evidence failed to make out the elements of each offense (Proceedings: 920, 1121); *see also* C.P.L. §290.10; §470.15(4)(b). Specifically, counsel maintained that the evidence failed to establish that Appellant had intentionally touched Matthew's penis, or that he had acted for the purpose of gratifying himself sexually, and the People could not simply bootstrap the allegations made by the other children onto Matthew's testimony for the purpose of satisfying these elements of the crimes (Proceedings: 920-21). The court denied the motion, and this, too, was error.

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, with respect to Matthew Graham, Appellant was charged with one count of Sexual Abuse in the First Degree (Count Five) and one count of Forcible Touching (Count Six). To sustain the sexual abuse charge, the People were required to prove that Appellant subjected Matthew to "sexual contact" -- defined as "any touching of the sexual or other intimate parts of a person . . . for the purpose of gratifying sexual desire of either party." P.L. §130.65 and §130.00(3). To sustain the forcible touching charge, the People were required to prove that Appellant "intentionally, and for no legitimate purpose, forcibly touche[d]" -- including "squeezing, grabbing, or pinching" -- Matthew's "sexual or other

intimate parts for the purpose of degrading or abusing [him]; or for the purpose of gratifying [Appellant's] sexual desire." P.L. §130.52(1).

The question of whether a person is seeking sexual gratification is generally a subjective inquiry that can be inferred from the nature of the acts in question and the circumstances under which those acts occurred. *See*, *e.g.*, *People v. Willis*, 79 A.D.3d 1739 (4th Dept. 2010) (inferring that defendant grabbed the victim's breast for the purpose of sexual gratification where defendant placed his hands on his crotch prior to touching the victim); *People v. Beecher*, 225 A.D.2d 943 (3d Dept. 1996) (inferring that defendant acted for sexual gratification where defendant placed his hand on the victim's thigh and genitalia and posed sexual questions to the child while requesting that the child not tell anyone).

In this case, however, the facts and circumstances surrounding Matthew's allegations -- standing alone -- could not lead any rational trier of fact to conclude that Appellant touched Matthew for sexual gratification; nor, indeed, that he intentionally touched Matthew's penis at all.

First, contrary to the prosecutor's arguments to jurors during opening and summation -- that Appellant "held," "pulled," and "rubbed" Matthew's penis (Opening: 291; Summation: 1196) -- Matthew did not testify to any of these things. Instead, Matthew's testimony was very clear that one day after school, when he had finished sweeping up the classroom, and had gone to Appellant's desk to get a

candy bar as a reward, Appellant "gently touched" Matthew's penis over his clothing -- briefly -- and then gave him a Hershey bar (M.Graham: 423-27). He did not claim that Appellant said anything to him or made any noises; that Appellant directed him to touch him back or to reciprocate; or that Appellant acknowledged the touch in any way, by either his words or actions. Nor did Matthew testify that he was upset by what happened, or that he felt sad or scared. Furthermore, the fact that Appellant gave Matthew a Hersey bar is of no moment; Matthew had just finished helping to sweep up Appellant's classroom, and there was nothing nefarious about his receipt of a reward for his work -- indeed, Matthew approached the desk in the first instance because he expected one.

Second, the action of quickly and gently touching the intimate body part of another person, without any accompanying words or conduct, is just as, if not more, likely to be the result of incidental or accidental conduct, especially where children are involved, as they are typically less coordinated, less aware of personal space, more likely to move about, and more likely to require hands-on guidance at times, especially in a classroom setting. Thus, on these facts -- and without resorting to consideration of the allegations advanced by the other students -- it simply could not have been readily inferred by a rational finder of fact that from a quick, gentle touch, with no other elaborating description or conduct, Appellant

acted for the purpose of satisfying a sexual desire or with the intent to abuse or degrade Matthew.

Accordingly, this Court should reverse Appellant's conviction of these counts, and dismiss counts five and six of the indictment.

POINT THREE

THE TRIAL COURT COMMITTED A NUMBER OF ADDITIONAL ERRORS, WHICH CUMULATIVELY DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL. U.S. CONST. AMEND XIV; N.Y. CONST. ART. I, §6.

While some errors, standing alone, are insufficient to warrant reversal of a defendant's conviction, the cumulative effect of a series of such errors can nevertheless work to effectively deprive a defendant of his constitutionally guaranteed right to a fair trial. *People v. Mattocks*, 100 A.D.3d 930 (2d Dept. 2012); *People v. Andre*, 185 A.D.2d 276 (2d Dept. 1992) (finding cumulative effect of errors deprived defendant of a fair trial); *People v. Sepulveda*, 105 A.D.2d 854 (2d Dept. 1984) (cumulative effect of errors, including trial court's failure to permit impeachment on a critical issue and prosecutorial improprieties deprived defendant of a fair trial). Here, in addition to the trial court's most egregious error, set forth in Point I, the court committed additional errors, which -- when considered together, and in combination with the unfair comments made by the

prosecutor during her summation -- further deprived Appellant of his right to a fair trial.

A. The trial court improperly denied defense counsel's request for an adverse inference charge with respect to the People's failure to preserve Obregon's 911 call to police, and then precluded counsel from using the SPRINT report to impeach Obregon with her prior inconsistent statement on a critical issue.

After the jury was sworn, and prior to opening statements, the People provided counsel with a SPRINT report that memorialized the 911 call Obregon made to police on March 9, 2010, and showed that, contrary to her trial testimony, Obregon had reported only physical -- not sexual -- abuse. Counsel moved for a negative inference with respect to the loss of the 911 recording, but the court, without explanation, denied the application (Proceedings: 923). Counsel subsequently made an application to introduce the SPRINT report into evidence as an inconsistent statement -- or to call as witnesses the police officers who received Obregon's call -- but the trial court denied these applications as well, ruling that any inconsistency between Obregon's trial testimony regarding what she told police and what the 911 call indicated she *actually* reported was a collateral matter and not the proper subject of impeachment (Proceedings: 645, 923-27). This was error; for if the trial court was not going to permit counsel to impeach Obregon with the SPRINT report of her call to police, nor allow her to call the officers who heard and responded to the complaint, the court should have instructed the jury that

it could draw an adverse inference against the People because they failed to preserve the recording. The unreasonable denial of both applications violated Appellant's right of confrontation and his right to present a defense, and it contributed cumulatively to the deprivation of his right to a fair trial. U.S. CONST. AMEND. VI, XIV; N.Y. CONST., ART. I, §6.

In *People v Handy*, 20 N.Y.3d 663, 669 (2013), the Court of Appeals held that where a defendant, using reasonable diligence, requests evidence that is reasonably likely to be material, and that evidence has been destroyed by agents of the State, the jury should be told that it may draw an inference in defendant's favor. Indeed, just as the People have a duty to produce *Rosario* material, they also have a correlative "obligation to preserve evidence until a request for disclosure is made" *People v. Kelly*, 62 N.Y.2d 516, 520-21 (1984) (where the defendant is prejudiced by the People's failure to exercise the necessary care to preserve evidence, the court must impose an appropriate sanction). On the other hand, an adverse inference instruction may not be required where there is no bad faith on the part of the People and the loss of evidence does not prejudice the defendant. *See, e.g.*, *People v. Bailey*, 24 A.D.3d 106 (1st Dept. 2005) (holding adverse inference charge for failure to preserve 911 tape not required where defendant was able to make effective impeachment use of the SPRINT report); *People v. Hagen*, 247 A.D.2d 405 (2d Dept. 1998) (adverse inference charge for loss of 911 tapes not

required where defendant, despite being in possession of reports of 911 calls, was unable to identify a single source of cross-examination that was foreclosed).

Here, the record is clear that Obregon's 911 call was not preserved by law enforcement, and that a key component of counsel's defense was that Obregon -- a woman who was suspicious of her daughter's interactions with male teachers at school (Bermudez: 334-35, 356; Obregon: 394-95), and frequently watched episodes of Law & Order with her two young daughters, including episodes about cases involving little girls and boys as victims (Bermudez: 362) -- transformed her daughter's complaint that Appellant had squeezed her wrist too hard into a complaint that was sexual in nature, and that this initial distortion was the catalyst that incited other students to come forward with similar false allegations.

Nevertheless, the court would not permit counsel to attempt to impeach Hailey through her mother (Proceedings: 925-27); it denied counsel's request for an adverse inference charge and her request to call the responding officers (Proceedings: 645), and it precluded counsel from introducing the SPRINT report into evidence as a prior inconsistent statement (Proceedings: 923-25), which would have enabled counsel to cast doubt on the accuracy of Obregon's testimony at trial -- *i.e.*, that she absolutely told police when she called 911 that her daughter's teacher put her hand on his penis (Obregon: 382). By doing so, the court prevented what would have otherwise been an effective avenue of cross-examination, and

kept from the jury relevant and important facts bearing on the trustworthiness of crucial testimony -- the allegations first made to police by the first witness to file a complaint against Appellant. *See People v. Ashner*, *supra* (reversing conviction where trial court's curtailment of cross-examination deprived jurors of the benefit of the defense theory and prevented them from making "an informed judgment as to the weight to place on [the witness's] testimony which provided 'a crucial link in the proof ... of [the defendant's] act'"); *Gordon v. United States*, 344 U.S. 414, 423 (1953); *United States v. Pedroza*, 750 F.2d 187, 195 (2d Cir. 1984) ("Wide latitude should be allowed . . . when a government witness in a criminal case is being cross-examined by the defendant").

In sum, Obregon's call to the police was not collateral, and counsel's ability to impeach her trial testimony with respect to what she told police upon learning of her daughter's complaint was central to Appellant's defense. Accordingly, the combined effect of denying counsel's request for an adverse inference charge, precluding counsel from exploring the inconsistency on cross-examination and introducing the SPRINT report, and denying counsel's application to call the responding officers as witnesses, was error. *People v. Sepulveda*, 105 A.D.2d 854 (2d Dept. 1984) (finding deprivation of right of confrontation and a fair trial where trial court refused to permit counsel to impeach prosecution's principal witness with alleged prior inconsistent statement which would have directly contradicted

witness's testimony as to whether defendant was person who shot the victim); *People v. Rufrano*, 220 A.D.2d 701 (2d Dept. 1995) (reversing conviction where trial court precluded counsel from cross-examining the complainant about specific events of the purported crime in order to discredit his version of those events).

B. The trial court erroneously denied defense counsel's request for a missing-witness charge with respect to Janira Obregon.

Before the People rested, and during the court's charge conference, counsel made an application that if the People did not call Janira Obregon, Hailey's outcry witness, the court should give a missing-witness charge (Proceedings: 641, 824, 924-25, 1122-24). In response, the People argued that any testimony from Janira would be inadmissible hearsay; they maintained that she could not provide any material information relevant to the trial; and they contended that given Janira's medical condition, there was simply no reason to drag her into court (Proceedings: 824-25). The court agreed, and denied counsel's request (Proceedings: 1127). This was error as well.

"The rule in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Graves v. United States*, 150 U.S. 118, 121 (1893). Accordingly, "[u]nder certain circumstances, the failure of a party to produce at trial a witness who presumably has evidence that would 'elucidate the

transactions,' requires a trial court, upon a timely request, to instruct the jury that an unfavorable inference may be drawn from the failure of the party to call such witness." *People v. Gonzalez*, 68 N.Y.2d 424, 427 (1986); *People v. Rodriguez*, 38 N.Y.2d 95, 98 (1975). This instruction -- a missing-witness charge -- is appropriate where the party seeking the instruction can show that the uncalled witness is available, the witness is knowledgeable about a material issue in the case, and the witness would naturally be expected to provide favorable noncumulative testimony to the party that has elected not to call him. *People v. Gonzalez*, 68 N.Y.2d at 427; *People v. Estela*, 151 A.D.3d 1075 (2d Dept. 2017) (finding error where trial court denied missing witness charge request with respect to outcry witness in child sex abuse prosecution); *People v. Badine*, 301 A.D.2d 178 (2d Dept. 2002) (reversing first-degree sodomy conviction where trial court denied counsel's request for a missing-witness instruction with respect to the complaining child's mother).

Here, Appellant made the requisite showing; he was entitled to the instruction; and the trial court's denial of the charge was error, which contributed cumulatively to the deprivation of Appellant's right to a fair trial. Janira was the first person Hailey told about what Appellant had done to her (Bermudez: 289; 346). She was a witness who would naturally be expected to give testimony favorable to the People and in support of her sister. And she was also available

and indisputably in the People's control. *See People v. Marsalis*, 22 A.D.3d 866 (2d Dept. 2005) (reversing conviction where defendant was erroneously denied a missing-witness charge with respect to the victim's brother). Counsel identified possible discrepancies between what Hailey told her sister and her mother, and what was ultimately relayed to police and prosecutors (Proceedings: 645, 923-25), and Janira's recollection of Hailey's initial disclosure when she got home from school was, therefore, neither cumulative nor collateral. Moreover, Obregon's claim at trial -- namely, that she was certain that she told the police during the call that Hailey's teacher had grabbed her daughter's hand very hard and put it on his private part (Obregon: 382) -- was, as argued immediately above, contradicted by the SPRINT report, which indicated that Obregon had reported a non-sexual physical assault (Proceedings: 645), by Hailey's testimony that when she told Janira what happened, Janira did not take it seriously (Bermudez: 346, 358), and by Obregon's acknowledgement that when Hailey subsequently called her crying, she said only that she did not want to go to school the next day (Obregon: 370). Thus, had the People called Janira as a witness, counsel would have been able to explore Hailey's demeanor, and query whether she had complained that Appellant had physically hurt her hand, or whether her complaint against him had truly been sexual in nature.

Additionally, despite her illness (M. Obregon: 368-69, 375, 397), there was no evidence that Janira was unavailable or unable to come to court because of her medical condition. While the People did indicate that Janira used a wheelchair, there was also testimony that Janira was attending school to study law (Bermudez: 325), and the People proffered no evidence to establish that Janira was unavailable or physically incapable of coming to court.

Finally, the People's argument that Janira's testimony would have been hearsay was belied by their simultaneous admission that Janira was Hailey's outcry witness (Opening: 289). The People, in other words, could have easily invoked the prompt-outcry exception to the rule against hearsay had they so chosen. *See People v. McDaniel*, 81 N.Y.2d 10 (1993).

In sum, given Appellant's theory of defense, in light of the other restraints the court placed on counsel's ability to subject the People's case to meaningful adversarial testing, and given that the evidence against Appellant was not overwhelming, the significance of this error cannot be minimized. *Compare People v. Estela*, *supra* (erroneous denial of missing-witness charge harmless where evidence of guilt was overwhelming). Hailey Bermudez's complaint triggered Appellant's removal from the school, it catalyzed an emotionally charged investigation, replete with rumor and innuendo, and it set in motion the series of events that would change Appellant's life forever. As such, the circumstances of

Hailey's outcry were critically important, and the court should have instructed the jury that Janira -- had she been called -- would have testified favorably for the defense.

C. The trial court improperly curtailed valid avenues of cross-examination regarding the background, experience, and family circumstances of certain alleged victims -- factors all relevant, according to the People's expert, to assessing the credibility of the children's claims.

The People's expert child psychologist, Ann Meltzer, testified that when interviewing a child who has made a complaint of sexual abuse, the interviewer should get to know the child, inquire about the child's background, including with whom the child lives and what types of family relationships exist, determine whether the child has been exposed to any sexual activity or has been taught about sex (Meltzer: 864-66), and verify whether there have been any incidents of sexual abuse within the family or whether the child ever made any prior complaints (Meltzer: 867). Nevertheless, the trial court precluded defense counsel from exploring these issues as they related to Hailey Bermudez, the student whose complaint set the investigation into motion, and as they related to Nevaeh Thompson, the student who claimed at trial -- for the first time ever -- that not only had Appellant engaged her in inappropriate and abusive touching, but that he had actually ejaculated behind his desk in a classroom full of students almost every day

while another teacher was in the room. This was yet another example of the trial court's improper restraint of counsel's ability to present Appellant's defense.

It is well established that "the trial courts have broad discretion to keep the proceedings within manageable limits and to curtail exploration of collateral matters" *see People v. Hudy*, 73 N.Y.2d at 56. However, "[a] court's discretion in evidentiary rulings is circumscribed by the rules of evidence and the defendant's constitutional right to present a defense." *People v Carroll*, 95 N.Y.2d 375, 385 (2000); *People v Grant*, 60 A.D.3d 865 (2d Dept. 2009); *People v Ocampo*, 28 A.D.3d at 684; *Chambers v. Mississippi*, 410 U.S. at 295 ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations").

Here, the court first precluded defense counsel from making certain inquiries of Marina Obregon about her daughter's behavior at home, sustaining the prosecutor's objections when counsel attempted to confront Obregon with statements she made to the doctor at the child advocacy center that she was concerned about Hailey and how she did sexual things to herself (Obregon: 404-06). This was error, for while a trial court may impose reasonable limits on the cross-examination of a child victim concerning the victim's knowledge of sexual activities, *People v. Rosado*, 283 A.D.2d 196 (1st Dept. 2001), the court must permit the defendant -- consistent with his confrontation rights -- to cross-examine

the People's witnesses' about matters affecting their credibility. *See People v. Rosovich*, 209 A.D.2d 554 (2d Dept. 1994).

Second, the court unreasonably limited counsel's cross-examination of Nevaeh Thompson. Every day in third grade, Nevaeh's grandmother babysat her and her cousins (Thompson: 760-65), and while Neveah was entrusted to the care of her grandmother, Nevaeh's uncle -- whom Nevaeh's mother accused of molesting Nevaeh's older sister -- was also present. Defense counsel argued that she should be permitted to inquire whether Nevaeh had knowledge of the allegations that her uncle had abused her sister, or whether she may have learned the meaning of words like 'ejaculate' or what a penis looks like because of the accusation made against her uncle; but when counsel asked whether Nevaeh's uncle was with her at her grandmother's house, the court sustained the prosecutor's objection, later telling counsel, "[t]he record is clear on that, and we are not going to even touch that area" (Proceedings: 771-72, 817-18).[32]

Similarly, although Nevaeh's mother's boyfriend, Godfrey, came to live with Nevaeh and her sisters, the court would not permit defense counsel to explore Nevaeh's feelings about Godfrey, despite the fact that her mother and Godfey had been involved in a domestic violence incident and that Nevaeh's mother

[32] The court also sustained the prosecutor's objection during counsel's opening statement, when counsel argued that the evidence would show that one of the alleged victims -- Neveah Thompson -- was at times entrusted to the care of an uncle who had abused her sister (Opening: 300-01).

nevertheless entrusted Nevaeh at times to Godfrey's care (Thompson: 801-02; Proceedings: 810-12). Nor would the court permit defense counsel to question Nevaeh's mother, Salome Stewart, about her own arrest history (Proceedings: 811, 813, 819).

These lines of questioning were relevant, they bore on credibility, and the inquiries should have been permitted. The backgrounds of the children and their families were important considerations in evaluating the circumstances under which the alleged abuse was disclosed. Moreover, as a matter of basic fairness, where the court permitted the People to call all of the children's caregivers, under the guise that their testimony was necessary to establish their children's dates of birth[33] -- and then allowed the People to elicit favorable facts about the parents' professions, backgrounds, and lifestyles -- counsel should likewise have been granted some latitude to impeach these witnesses' credibility (Proceedings: 816). Instead, by curtailing these valid avenues of cross-examination, the court further preventing counsel from developing an important part of Appellant's defense, and

[33] The defense repeatedly objected to the bolstering of the children's testimony through their parents, and demanded an offer of proof as to their testimony (*see, e.g.* Proceedings: 415, 451, 512, 810-11). The People argued that the parents' testimony was necessary to "establish the birthdates" of the testifying children -- who were, at the time of trial, teenagers, and that the teenagers were not able to testify to their birthdates because "they did not remember their births," they only knew the dates because they had been told, and their testimony about their birthdates therefore would have been "hearsay" (Proceedings: 512). Notwithstanding the obvious legal and logical infirmities of the People's argument, the trial court agreed with the People, first permitting them to call the parents for this purpose; then allowing the People to inquire far beyond this question; then overruling Appellant's objections; and then precluding Appellant from cross-examining the parents about their backgrounds or their children's lives at home.

this error, too, contributed cumulatively to the deprivation of Appellant's right to a fair trial.

D. The trial court erred by permitting improper bolstering testimony from the People's expert child psychologist.

During Dr. Meltzer's testimony, defense counsel objected to instances when the prosecutor elicited testimony from the doctor that was tailored to include specific facts of the case on the ground that the testimony suggested to jurors that Meltzer -- despite having not interviewed the children personally -- found their testimonies to be credible (Meltzer: 848, 849, 860, 862, 899). The court, however, overruled each of counsel's timely and proper objections, further exemplifying the tenor of the proceedings, which was to restrain defense counsel's vigorous advocacy, while simultaneously granting tremendous latitude to the People. The court thereby committed further error, which contributed cumulatively to the deprivation of Appellant's right to a fair trial.

The Court of Appeals has made clear that expert testimony concerning both the behavior of sexual abuse victims -- and the behavior of sexual abusers -- is beyond the ken of a typical juror and relevant to explain why a child might not immediately report sexual abuse as part of Child Sexual Abuse Accommodation Syndrome (CSAAS). *People v. Spicola*, 16 N.Y.3d 441 (2011); *People v. Williams*, 20 N.Y.3d 579 (2013). This type of expert testimony cannot, however,

be tailored through hypothetical questions to include facts concerning the specific allegations of abuse in a particular case, as such testimony tends to improperly imply that the expert finds the testimony of a particular victim credible. *Williams*, 20 N.Y.3d at 584. "Such testimony [goes] beyond explaining victim behavior that might be beyond the ken of a jury, and ha[s] the prejudicial effect of implying that the expert found the testimony of [a] particular complaining to be credible" even where the expert makes clear that he or she has no particular knowledge about the facts of the case and has not interviewed the alleged victims. *Id.* (agreeing with defendant's contention that the expert's testimony improperly bolstered the People's proof that defendant was the perpetrator).

In *Williams*, the defendant was charged with various sex crimes pertaining to separate incidents involving two twelve-year-old girls. During the relevant time-period, the defendant had been living with his girlfriend and her twin twelve-year-old daughters, and the mother's sister -- who was also twelve-years-old and lived nearby -- frequently spent the night with the twins in their bedroom. Eventually, the sister reported to an assistant principal at her school that the defendant was sexually abusing her, and the defendant was ultimately indicted for abusing the girl and one of her nieces. At trial, the prosecutor presented the expert witness with a series of hypothetical questions that mirrored the girls' testimony, and asked if

various facets of the testimony were consistent with CSAAS. He asked, for example:

> Now, Doctor, is it consistent with the syndrome of a child living in her own home with a man who is her mother's live-in boyfriend, is it consistent with a syndrome that this man would have this child straddle him . . . that this child would not call out to another child similar in age who is sleeping in the very next room?"

Id. at 583. The court overruled defense counsel's objections to this type of questioning, and the defendant was found guilty on all counts. The Court of Appeals agreed with the defendant's contention that the expert's testimony exceeded permissible bounds, but concluded the error was harmless because of the overwhelming evidence of the defendant's guilt.[34]

Here, as in *Williams*, Dr. Meltzer's testimony went beyond "educating the jury on a scientifically recognized pattern of secrecy, helplessness, entrapment, and accommodation experienced by the child victims," as it closely tracked the facts of Appellant's case, and therefore improperly bolstered the victims' testimony. Although Meltzer testified that she had neither met nor treated any of the victims, the prosecutor presented questions to Meltzer that were very closely tailored to details provided in the child witnesses' testimony, and clearly designed to elicit

[34] Here, unlike the defendant in *Williams*, Appellant is not arguing that the court's error in this respect, standing alone, is sufficient to warrant reversal of his conviction. Rather, he maintains that the court's error contributed cumulatively to the deprivation of his constitutional right to a fair trial. However, it should be noted that while the evidence in *Williams* was deemed "overwhelming" as it involved detailed, credible testimony of sexual abuse that was *independently corroborated by forensic medical findings*, in this case, as previously discussed, the People's evidence was not overwhelming (*see supra*, Point I C).

impermissible bolstering testimony. For example, the prosecutor asked Meltzer, "Would an elementary age child see a teacher as an authority figure?" (Meltzer: 848); she asked whether an express admonition by the perpetrator instructing the child not to tell might contribute to the secrecy (Meltzer: 849); she asked, "Is it possible for someone to forget a detail about an event now that they remembered three years ago?" and whether forgetting a detail means the abuse didn't happen (Meltzer: 855); she asked whether the "timeframe between eight and ten years old is a time when children are not apt to discuss matters of a sexual nature" (Meltzer: 860); and she asked, "In your professional practice, have you encountered perpetrators who have abused children of both genders" (Meltzer: 862). Except for the question regarding a child forgetting details about the abuse, defense counsel objected to each of these questions, and the court uniformly overruled her objections.

As a result, Meltzer testified that a sexual abuser often holds a position of authority over a child, like a teacher over an elementary school student -- just like the relationship between Appellant and his alleged victims (Meltzer: 848); she explained it was common for an abuser to use candy as bribes -- just as Appellant was alleged to have done (Meltzer: 848); she testified many children have positive feelings about their abuser and may not want to get the abuser in trouble -- Neveah, Kelsey, and Matthew all testified they liked Appellant and felt that he was a good

teacher (Meltzer: 847); she testified abusers often tell children not to tell anyone and to keep the abuse a secret -- again, just as Appellant is alleged to have done with certain children in this case (Meltzer: 849); she testified about the psychosexual development of elementary school children between the ages of eight and eleven -- the same age as Appellant's alleged victims -- explaining that such children are generally not apt to discuss matters of a sexual nature (Meltzer: 860); she testified that some perpetrators abuse both genders -- as Appellant was alleged to have done (Meltzer: 862); and she testified that school age children can generally appreciate the concept that there are consequences to their actions (Meltzer: 862).

Overall then, notwithstanding the fact that Dr. Meltzer made clear that she had no particular knowledge about the facts of the case and had not interviewed the alleged victims (Meltzer: 842-46), the clear implication of Meltzer's testimony was an improper one: that the testimony of the alleged victims in Appellant's case was credible. Counsel's efforts to alert the court to this impropriety were rebuked, and this, too -- considered cumulatively -- contributed to the deprivation of Appellant's right to a fair trial.

E. The trial judge erred by personally reading back testimony requested by the deliberating jury on two occasions, and by improperly charging the jury regarding "sexual contact" and "sexual gratification."

The trial court also committed multiple errors during its charge to the jury, which further contributed to cumulatively deprive Appellant of a fair trial.

First, during deliberations, the court -- as opposed to the stenographer -- read back to the jurors requested portions of Appellant's and Matthew Graham's testimony. This was error; for it risked suggesting to the jurors, however subtly, that the court might be aligned with one party over the other.

While a defendant's right to a fair trial does not necessarily foreclose a trial judge's assumption of an active role in the resolution of the truth, a judge must nevertheless be mindful of his words, actions, and demeanor and remain "scrupulously free from and above even the appearance or taint of partiality." *People v. DeJesus*, 42 N.Y.2d 519, 523 (1977). If a judge participates as a reader during a read-back of testimony, for example, -- effectively assuming the role of a witness or inquiring counsel -- the judge "may unwittingly and erroneously convey to the jury that the court is aligned with the party or counsel whose role the court has assumed in the read-back." *People v. Brocket*, 74 A.D.3d 1218, 1221 (2d Dept. 2010). Thus, as a general matter, "a trial judge should shun engaging in read-backs of testimony," for "in the usual case, it is easy enough for a judge to assign the task to non-judicial court personnel and thereby avoid any risk of

creating a misperception in the minds of the jurors." *People v. Alcide*, 21 N.Y.3d 687 (2013); *People v. Baranov*, 121 A.D.3d 706, 708 (2d Dept. 2014).

Here, shortly after commencing deliberations, the jury sent the court a note asking: "Can we hear Mr. Watt's testimony, which classroom he was in and where." Judge Aloise stated, "[The court reporter] found a few lines," he relayed the proposed read-back to the parties, and he then brought the jury into the courtroom, read their request into the record, and read the jury the requested portion of Appellant's testimony (Deliberations: 1243-45). Not long thereafter, the jury sent out another note asking: "What was Matthew's testimony regarding the after school program and the treats," and after telling jurors he had discussed the jury's request with the attorneys, Judge Aloise -- again -- elected to conduct the read-back himself (Deliberations: 1246).

The next day, citing *People v. Brocket*, 74 A.D.3d 1218 (2d Dept. 2010) and *People v. Facey*, 104 A.D.3d 788 (2d Dept. 2013), counsel objected to the court's practice of conducting his own read-backs, and pointed out that when the judge was reading back Matthew's testimony, counsel was forced twice to interject when the court omitted an important word for the defense. Unaware of the nature of his error, Judge Aloise simply stated, "It's been my policy forever," and he agreed to have the court stenographer conduct any additional read-backs (Deliberations: 1249-50). While defense counsel's objection was delayed, it was unquestionably

error for the trial judge to personally read back this critical testimony, and in view of his errors, and the need for counsel to correct him in front of the jury, it cannot be said that such error was not prejudicial.

Second, the court erred during its charge to the jury when defining "sexual contact," and again during deliberations when defining, in response to the jury's request, the element of "sexual gratification," by instructing the jury in both instructions that these elements could be fulfilled by "the emission of ejaculate by the actor on any part of the victim clothed or unclothed" (Proceedings: 1227, 1257-1258). In response to that instruction, defense counsel argued that there was "no testimony that there was any emission of ejaculate … upon any part of the victim" (Proceedings: 1260), and then the prosecutor agreed that the court's instruction should not have included this language at all, because it pertained to a separate theory of sexual abuse that was not applicable in Appellant's case (Deliberations: 1261). The court responded, "Thank you very much" (Deliberations: 1261); however the error -- and any confusion it engendered -- was not corrected, as the jury had already sent a note that it had a verdict (Proceedings: 1261).

Viewed cumulatively in the context of the proceedings overall, these errors, too, may have tainted the verdict.

F. The prosecutor, during closing arguments, denigrated the defense, vouched for the credibility of the People's witnesses, misstated the evidence, and improperly shifted the burden of proof.

Throughout her closing argument, the prosecutor denigrated the defense, vouched for the credibility of her witnesses, misstated the evidence, made improper burden shifting comments, and at one point, even made comments that tended to usurp the role of the court. These improprieties were extremely prejudicial -- especially in light of the multiple ways in which the court restrained Appellant's ability to confront the People's case -- and this Court should therefore review them in the interest of justice, as they contributed to the deprivation of Appellant's right to a fair trial. *People v. Pagan*, 2 A.D.3d 879 (2d Dept. 2003) (cumulative effect of prosecutor's improper comments deprived defendant of his right to a fair trial).

First, counsel began her closing statement by disparaging counsel's animated style of advocacy and the sense of outrage she expressed to the jury on behalf of her client, who maintained his innocence, asking jurors, "Justice requires screaming? That's what justice requires, screaming at you, inviting you to guess about things that you didn't hear any evidence about? Is that what justice requires?" (Summation: 1170; *see also* Summation: 1174, "There's a number of things that counsel was yelling about, was flailing her arms about . . . ."). Furthermore, the prosecutor demeaned the arguments counsel advanced in support

of Appellant's defense, characterizing them repeatedly -- at least seven times throughout her summation -- as mere "distractions." *See People v. Lopez*, 96 A.D.3d 1621 (4th Dept. 2012) (stating it is improper to refer to theories of the defense as a "distraction"); *People v. Spann*, 82 A.D.3d 1013 (2d Dept. 2011) (reversing conviction and ordering a new trial where -- even though claim was partially unpreserved -- cumulative effect of prosecutor's improper comments during summation, including repeatedly referring to defendant's evidence as a "distraction" deprived defendant of a fair trial). The prosecutor told jurors, for example, "You need to put to the side the distractions counsel has just talked to you about" (Summation: 1174); she characterized counsel's suggestion that flawed interview techniques had been used in the case as "another distraction" (Summation: 1177); she characterized the question of why Appellant was not arrested immediately after Hailey's complaint as "a distraction" (Summation: 1180); and she, on two additional occasions, reminded jurors that counsel's theories of defense were mere distractions that jurors should simply put aside (Summation: 1181) ("So let's put all of these distractions aside, okay. And let's focus on what the real defense is here. Because you can't just -- well, you can just get up and yell about a lot of things that might, you know, when you hear one thing or another you might say, oh, that sounds good, okay, maybe it's that"); (Summation: 1212) ("There's been a lot of argument from both sides. I ask you

now to focus only on the actual evidence in this case. To put aside the distractions and to put aside the theories that are not supported by the evidence . . . .").

Similarly, the prosecutor exceeded the bounds of fair comment by twice characterizing counsel's arguments as "ridiculous." *People v. Gordon*, 50 A.D.3d 821 (2d Dept. 2008) (stating the characterization of the defense as "ridiculous" has been frequently disapproved); *People v. Hernandez*, 92 A.D.2d 875 (2d Dept. 1983) (prosecutor's argument that defendant brought witness to court to tell a ridiculous story to establish an alibi went beyond fair comment and unduly prejudiced defendant). With respect to counsel's suggestion that some of the students may have coordinated their stories, the prosecutor stated, "I mean it's ridiculous. That's ridiculous. They'd have to be lying to their parents. Not just to the police and prosecutors -- who cares about lawyers -- lying to their parents . . . ." (Summation: 1183), and later, in response to counsel's suggestion that perhaps Kelsey's parents did not fully believe their daughter, the prosecutor stated to jurors, "I mean, is that the most ridiculous thing you ever heard?" (Summation: 1185). These repeated comments were deliberate, they were pervasive, and they were improper.

Second, the prosecutor improperly vouched for the credibility of the People's witnesses. *See People v. Spence*, 92 A.D.3d 905 (2d Dept. 2012) (reversing conviction where prosecutor attempted to bolster credibility of a

witness); *People v. Whitehurst*, 87 A.D.2d 896 (2d Dept. 1982) (finding error where prosecutor improperly presented his own belief as to the truth of the testimony of the State's witnesses); *People v. Moye*, 52 A.D.3d 1 (1st Dept. 2008) (reversing conviction where prosecutor vouched for credibility of police witnesses). Responding to counsel's argument that Obregon was fabricating Hailey's claim, for example, the prosecutor first asked jurors, "So is she making that up? I don't think so, ladies and gentlemen" (Summation: 1190), and later, she told the jury, "I submit to you, she didn't make it up. Of course she didn't" (Summation: 1191). Further, in urging jurors to believe each of the children who testified, the prosecutor stated, "These kids had no motives against [Appellant]" and "These kids have no reason to lie about him. None" (Summation: 1173). Finally, with respect to Darcelin, the prosecutor likewise told jurors, "She has no reason to be anything but truthful with you" (Summation: 1205).

Third, the prosecutor made multiple statements regarding what the jury would need to believe in order to find that the defendant was *not* guilty, thus effectively shifting the burden of proof. *See People v. Forbes*, 111 A.D.3d 1154 (3d Dept. 2013) (reversing conviction in the interest of justice where, despite ample evidence, the prosecutor improperly told jurors they would have to believe there was a conspiracy against the defendant in order to find him not guilty); *People v. Casanova*, 119 A.D.3d 976 (3d Dept. 2014) (reversing conviction were

prosecutor advised jury it would have to believe police misconduct had occurred in order to acquit defendant). The prosecutor told jurors that their job was "to really think through what it would take for these defenses to be true" (Summation: 1182), and she repeatedly reminded jurors throughout her summation about what would need to be true in order for the allegations against Appellant to be the result of some conspiracy, as counsel alleged. She stated, for example, "[n]ow, if this is true . . . that means the parents are playing this all up and none of this really happened" (Summation: 1185); she argued the jury would have to believe that the parents -- as part of the conspiracy -- convinced the kids to lie to the teachers, the police, the District Attorney, stating, "That's what you would have to believe" (Summation: 1186); she told jurors that they would have to believe that even though the students were lying, two of the girls endured vaginal exams, again stating, "That's what you would have to believe, that they just went along with this" (Summation: 1186); she mocked the idea that Obregon fed any sexual details to her daughter, which she then committed to memory and went along with the store, repeating, "That's what you'd have to believe" (Summation: 1190-91); and finally, in urging jurors to credit the children's allegations over Appellant's defense, the prosecutor argued, "You have to think that those five children are sick, and evil, and twisted if you really believe that they would come into this courtroom

and say these things about [Appellant] if they weren't true, to make these kinds of charges against somebody if they weren't true" (Summation: 1209).

Fourth, the prosecutor mischaracterized the evidence on a point critical to Appellant's convictions of Counts Five and Six, relating to Matthew Graham. Notwithstanding Graham's trial testimony that Appellant had "gently touched" his penis over his clothing, only once, and very briefly (M.Graham: 423-27), which could have been consistent with an accidental brush, rather than an intentional touching; the prosecutor inaccurately told jurors during her summation that Graham had testified that defendant had "rubbed his penis" (Summation: 1196), which implied a repeated, more forcible, and *necessarily intentional* action, that clearly satisfied the statutory definition of the offense.

And the prosecutor made other factual misrepresentations as well. For example, she argued to the jury that Kelsey was credible because she "didn't change her story" and had consistently stated that Appellant never had her actually touch his penis (Summation: 1195). Contrary to the People's representations, however, Kelsey had indicated in the statement she wrote at school that Appellant *did* have her touch his penis, and that he had told her to shake it faster and faster (K.Hutson: 493-96, 508).

Finally, the prosecutor twice usurped the function of the court by giving jurors legal instruction. First, with respect to why the People did not call Wylie,

the prosecutor told jurors, "We just can't call the detective to repeat everything the kid said. It's not legal, we're not allowed to do that" (Summation: 1179).[36] And then, in urging jurors to reject the arguments counsel proffered in Appellant's defense, the prosecutor stated, "You can't ask a jury to find somebody not guilty based on a maybe" (Summation: 1188). This argument was doubly improper. Not only did it usurp the court's role in giving legal instruction, but it also shifted the burden of proof, and articulated an incorrect standard. A "maybe," after all, can mean a reasonable doubt, which mandates an acquittal.

In sum, while summations are rarely perfect, the prosecutor's closing argument in Appellant's case included certain pervasive themes -- namely, that counsel's style or demeanor should justify discrediting the defense case; that the defense theory was "ridiculous" and merely a "distraction"; and that the *defense* needed to prove certain facts to permit the jury to find Appellant not guilty. Cumulatively, the prosecutor's remarks -- as outlined herein -- exceeded the bounds of fair comment, and contributed overall to the deprivation of Appellant's right to a fair trial. Thus, viewed cumulatively in the context of this trial, they support reversal of Appellant's conviction in the interest of justice.

---

[36] On this point, the prosecutor's representation to the jury about why the People *were not allowed* to call Detective Wylie was not only misleading and incorrect; it was also disingenuous. The People, after all, defended their right to call the parent or guardian of each of child for the purported reason of establishing the child's date of birth (*see, e.g,*. Proceedings: 512; *see also* 415, 451, 810-11); however, in reality, the People called the parents in a rather transparent effort to bolster the credibility of the children.

POINT FOUR

THE TRIAL COURT'S IMPOSITION OF THE MAXIMUM DETERMINATE PRISON TERM FOR EACH OF THE FIVE COMPLAINANTS -- AND ITS DIRECTION THAT THE SENTENCES RUN CONSECUTIVELY TO EACH OTHER -- CONSTITUTED AN ABUSE OF DISCRETION AND RESULTED IN A SENTENCE THAT WAS HARSH AND EXCESSIVE.

Appellant had no previous criminal history; he was a devoted husband and the father of two young children, aged five and seven; he had family supporting him in court throughout the trial; and prior to the imposition of sentence, seventeen separate individuals submitted letters in his support, collectively describing him -- with admiration -- as a man who had pulled himself out of a difficult and abusive childhood, worked closely with church ministries throughout the duration of his life, committed himself to self-improvement through education, matured into a man that others respected and relied upon, and become a devoted husband and father to his two children (Sentencing: 15-16; *see also*, Letters of K. Maloney, J. Ansah, C. Crawford, O. Breland, and O. Jones, in Court File).

Given Appellant's background -- together with the multitude of other considerations that factor into pre-trial offers made by the prosecution -- the People concluded that a *non-jail sentence* of probation would be an adequate and appropriate punishment for Appellant's crimes, and offered Appellant a sentence

of probation in exchange for his guilty plea prior to trial (Sentencing: 14).[38] Appellant, however, staunchly maintained his innocence, and exercised his right to go to trial, resulting in the court's sentencing him to the maximum aggregate determinate prison term of 35 years -- seven consecutive years for the course of sexual conduct convictions pertaining to Nevaeh Thompson, Kelsey Hutson, and Brittany Walters, and seven years for the first-degree sexual abuse convictions pertaining to Hailey Bermudez and Matthew Graham. This sentence was harsh, excessive, and an abuse of discretion. The court failed to consider the differences in the qualitative nature of Appellant's conduct with respect to each complainant; it did not factor in Appellant's background and lack of any criminal history; it ignored principles of proportionality as well as the four primary objectives of punishment; and, ultimately, by imposing the maximum seven-year term on each of the five counts, the court effectively exercised no discretion at all. Accordingly, this Court should reduce Appellant's sentence -- as a matter of discretion and in the interest of justice -- and either order the sentences to run concurrently to each other, or otherwise direct that Appellant's sentence be reduced, to comport with principles of proportionality, to the minimum determinate prison sentence on each count.

[38] Pursuant to P.L. §70.80(4)(b), the court may sentence a defendant convicted of a Class D felony sex offense to probation in accordance with the provisions of P.L. §65.00.

The determination of an appropriate sentence in any case is a sensitive exercise of discretion that requires careful consideration of the crime charged, the particular circumstances of the individual before the court, and the purpose of a penal sanction, *i.e.*, societal protection, retribution, rehabilitation, and deterrence. *People v. Farrar*, 52 N.Y.2d 302, 305 (1981); P.L. §1.05. "Quite simply, the court must perform the delicate balancing necessary to accommodate the public and private interests represented in the criminal process." *Farrar*, 52 N.Y.2d at 305. *See also People v. Notey*, 72 A.D.2d 279 (1980), *citing* ABA Standards Relating to Sentencing Alternatives and Procedures, Approved Draft, §2.2 ("In setting sentence, the Trial Judge should be guided not only be the four objectives of punishment, but also by the criterion that a minimum amount of confinement should be imposed 'consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant'"). Furthermore, while a sentence can have a variety of justifications, including incapacitation, deterrence, retribution, or rehabilitation, the concept of proportionality is central to the Eighth Amendment. *See Graham v. Florida*, 560 U.S. 48 (2010); *People v. Notey*, 72 A.D.2d at 282. A sentence, in other words, may constitute a cruel and unusual punishment where it is "'cruelly' excessive, that is, grossly disproportionate to the crime for which [it is] exacted." *People v. Brathwaite*, 263 A.D.2d 89 (2d Dept. 2000), *quoting People v. Thompson*, 83 N.Y.2d 477, 479 (1994); *Harmelin v.*

Michigan, 501 U.S. 957, 997-98 (1991) (reaffirming principle that gross disproportionality of a sentence of imprisonment violates the Eighth Amendment's Cruel and Unusual Punishment Clause).

Thus, while the sentencing determination of the trial court is typically afforded great respect, section 470.15(6)(b) of the Criminal Procedure Law vests this Court with "broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances," even if it is otherwise legal. *People v. Delgado*, 80 N.Y.2d 780 (1992). The Court may exercise this power in the interest of justice and without deference to the sentencing court, and it may "substitute [its] own discretion even where a trial court has not abused its discretion." *People v. Edwards*, 37 A.D.3d 289 (1st Dept. 2007). Moreover, while a sentence is not necessarily unduly harsh or excessive simply because it is more severe than the sentence that was proposed as part of a plea agreement (*see, e.g.*, *People v. Williams*, 286 A.D.2d 858 [4th Dept. 2001]; *People v. Patterson*, 106 A.D.2d 520 [2d Dept. 1984]), where the trial court fails to engage in a measured consideration of the crime charged, the particular circumstances of the offender, and the purpose of a penal sanction, the sentence imposed is owed little deference. *People v. Suitte*, 90 A.D.2d 80 (2d Dept. 1982).

Here, Appellant was convicted of three counts of Course of Sexual Conduct against a Child and three counts of Sexual Abuse in the First Degree -- all D

felonies, with a sentencing range of two to seven years. P.L. §70.80(4)(a)(iii). The court, however, imposed the maximum seven-year term on each count, thereby failing to differentiate in any way between Appellant's conduct with respect to each child, despite the fact that the instances of abuse were qualitatively very different. The single instance of quickly brushing a student's penis over clothing on one isolated occasion, for example -- as was the case with Matthew Graham -- is drastically different than the charges that Appellant had Nevaeh Thompson rub his penis every day in class throughout the school year until he ejaculated on the floor. Appellant's conduct with respect to Neveah also differed substantially from his conduct with respect to Hailey, Kelsey, and Brittany. Hailey claimed Appellant had her touch his penis one time over his clothing; Kelsey testified Appellant never actually had her touch his penis, but that he would frequently rub her back and her buttocks, call her his girlfriend, rub his hand over her clothed private parts, and sometimes place her hand on his thigh; and Brittany described two distinct acts: one in third grade, when Appellant had her rub his penis over his clothes in the back of the classroom, and a second in the after-school program, when Appellant took his penis out and showed it to her in the closet. There were, in other words, real differences between Appellant's offense conduct with respect to each child, and the court's knee-jerk imposition of the maximum term on each of the top five

counts demonstrated a complete failure to engage in any sort of measured consideration of the nature of the offenses and principles of proportionality.

The record, however, not only indicates an utter failure on the part of the trial court to take into account the substantive differences between the offense conduct with respect to each child, the record also suggests that the court was motivated at sentencing -- in large part -- by a desire to retaliate against Appellant for exercising his right to proceed to trial. *People v. Hurley*, 75 N.Y.2d 887 (1990); *People v. Hodge*, 154 A.D.3d 963 (2d Dept. 2017) (reducing sentence where after defendant refused offer of definite one-year sentence, court sentenced him to seven years and admonished him for putting the complainant through the ordeal of trial); *compare People v. Williams*, 218 WL 3384224 (3d Dept. 2018) (by not raising it at sentencing, defendant failed to preserve his claim that his sentence was imposed in retaliation for exercising his constitutional right to trial).

At sentencing, after the People asked for consecutive time, counsel reminded the court that the People had offered Appellant probation prior to trial, and asked that the court not punish Appellant -- who maintained his innocence -- for exercising his constitutional rights (Sentencing: 14, 16). When counsel concluded her statement, and asked the court to impose the minimum sentence, the court told counsel:

> Before I sentence your client, I would like to first tell you this: I have never, ever, ever taken into consideration any plea offers made prior

> to trial. When I do my sentencing after trial, there are so many factors that go in to plea bargaining in terms of sparing witnesses from testifying, embarrassment, and prolonging the effects of the crime, that once a case goes to trial, they are completely off the board by that point. So I don't take that into consideration.

(Sentencing: 17). The court then -- after televising its hostility toward Appellant for "prolonging" the effects of his crimes -- offered its opinion that the evidence was totally overwhelming, described Appellant's conduct as deviant, disturbing, predatory, and reprehensible, and imposed upon Appellant the maximum sentence permissible by law -- a sentence greater than that which is often imposed in cases where a defendant repeatedly rapes, or even causes the death, of another human being; or even of multiple people (Sentencing: 18). This was retaliatory, and it was an abuse of discretion; for while the conduct for which Appellant was convicted is no doubt disturbing and deserving of punishment, the court's aggregate sentence was clearly disproportionate to the gravity of his offenses.[39]

Moreover, Appellant's 35-year sentence was also harsh and excessive in light of his background -- an important sentencing factor to which the court here gave no consideration whatsoever. As indicated, Appellant was a husband and a father. He enjoyed tremendous support throughout his ordeal from family, friends, and members of his spiritual community, and he had never been convicted of any

[39] In fact, as part of the People's closing argument that the students would have made up more serious allegations had they been lying, the prosecutor stated, "quite frankly, as far as these cases go, it's fairly limited acts by the defendant" (Summation: 1194).

crime. These factors, however -- just like the testaments to Appellant's otherwise exemplary character -- were completely ignored by the trial court. In one letter provided to the court in Appellant's support, for example, a friend of Appellant's for over twenty years described him as "a confidante," "a mediator," and "a problem-solver," and expressed admiration for the way he took care of his family (Letter of V. Mayers); Appellant's sister-in-law recounted how she and Appellant worked closely in various ministries in the church over the years, described him as a great father and a loving husband, and urged the court to consider the fact that Appellant's two small children needed him (Letter of T. Jones-Pinnock); and another friend of Appellant for over twenty years recounted how active and helpful Appellant was in their church and with the music ministry, describing him as "a decent man at the core" (Letter of S. Pinnock). A retired NYPD officer and former member of the child abuse squad, who had also come to know Appellant through the church, pleaded with the court to impose the minimum sentence and give Appellant the opportunity to get help (Letter of D. Jones); a cousin of Appellant's wife, who grew up with Appellant, described him as "a stand-up guy with a huge heart" who taught him how to play an instrument and who had showed him and his family nothing but generosity and hospitality over the years (Letter of K. Jones); and still, another female friend of nineteen years described Appellant as highly respected by friends and family and stated she trusted him around children of all

ages (Letter of O. Breland). Appellant had earned a Bachelor's degree in psychology from the College of Staten Island, a Master's degree in education from Brooklyn College, and an Administration and Supervision degree from Touro College (Appellant: 1065); he was active in his community, assisting with the Food Harvest Program and other community related initiatives (Letter of O. Breland); his father-in-law, who was also a pastor, stated that Appellant had raised his children to follow rules and to love and help others, and had also been supporting his mother since the death of his father (Letter of O. Jones); and another friend stated of Appellant: "he was "the kind of person that opens his doors at any time in a time of need whether it be for advice, an ear to listen, or a good home cook meal." [sic] "I have seen him be nothing but a great husband, father, teacher, and friend daily" (Letter of C. Crawford).

In sum, while severe sanctions are a valid expression of society's condemnation of a given offense, the sentence imposed by the trial court was disproportionate to the gravity of Appellant's crimes, it failed to differentiate qualitatively between the instances of abuse, and it gave no consideration whatsoever to the legitimate societal interest of rehabilitation or to Appellant's completely clean record and significant contributions to his community, family, and society. As such, as a matter of discretion and in the interest of justice, the

Court should reduce Appellant's sentence, and direct that he be resentenced to the minimum determinate prison term of two years on each felony count.

CONCLUSION

For the reasons set forth above, Appellant's conviction of Sexual Abuse in the First Degree and Forcible Touching should be reversed with respect to Matthew Graham, and those counts dismissed; a new trial should be ordered on the remaining counts; or, alternatively, Appellant's 35-year sentence should be reduced as a matter of discretion and in the interest of justice.

Respectfully submitted,

BARKET EPSTEIN KEARON
ALDEA & LOTURCO, LLP
666 Old Country Road, Suite 700
Garden City, New York 11530
(516) 745-1500
Counsel for Defendant-Appellant

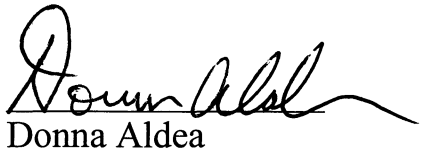
DONNA ALDEA
DANIELLE MUSCATELLO
of Counsel

September 12, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief was prepared on a computer using 14 point Times New Roman typeface with double spacing between lines. I further certify that the brief contains a total number of 22,639 words, including point headings and footnotes, but excluding the table of contents, table of citations, proof of service, certificate of compliance, and other material excluded under this Court's rules.

Dated: September 12, 2018
Garden City, New York 11530



Donna Aldea
Danielle Muscatello