CONFIDENTIAL

To be argued by
David Billingsley

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JUAN CACERES,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT JUAN CACERES

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PRELIMINARY STATEMENT

This is an appeal from a judgment rendered on April 13, 2011, by the Supreme Court, New York County. Juan Caceres was convicted after trial of one count of rape in the second degree, N.Y. Penal Law § 130.30(1), one count of endangering the welfare of a child, N.Y. Penal Law § 260.10(1), and one count of criminal contempt in the second degree, N.Y. Penal Law § 215.50(3). He was acquitted of predatory sexual assault against a child, N.Y. Penal Law § 130.96. Mr. Caceres was sentenced to seven years' imprisonment and 10 years' post-release supervision on the rape count and one year on the misdemeanor counts, all to be served concurrently.

Justice Carol Berkman provided over the pre-trial hearing. Justice Bruce Allen presided over the trial and sentencing. Timely notice of appeal was filed. No stay of execution has been sought.

QUESTIONS PRESENTED

1. Where the prosecution introduced highly prejudicial testimony regarding an uncharged allegation of sexual abuse from the complainant without a hearing as to its admissibility, was Mr. Caceres's right to a fair trial violated?

2. Where, in summation, the prosecution vouched for the credibility of its witnesses and shifted the burden of proof onto Mr. Caceres, including by characterizing Mr. Caceres's defense as that of a conspiracy to frame him, was Mr. Caceres's right to a fair trial violated?

3. Where the complainant gave inconsistent, contradictory, uncorroborated, and implausible testimony as to the alleged offenses, and admitted to repeatedly falsifying allegations of abuse against her parents over many years, were the verdicts for second-degree rape and endangering the welfare of a child against the weight of the evidence?

INTRODUCTION

Juan Caceres's conviction resulted from only the latest in a series of false allegations of abuse by the complainant, Vanessa Barrientos, against her parents. The Administration for Children's Services (ACS) had repeatedly investigated the complainant's false allegations from 2002 to 2009. These fabrications included the complainant saying that her parents had beaten her with a hammer when in fact she had been biting herself, and that her mother had tried to smother her with a pillow and broken her nose. In this case, the complainant's spurious allegations escalated. She claimed that her father, Mr. Caceres, had engaged in oral sex and sexual intercourse with her, beginning when she was in the sixth grade.

Mr. Caceres's convictions for rape in the second degree, endangering the welfare of a child, and criminal contempt in the second degree must be reversed and a new trial ordered. First, the trial court should have granted defense counsel's motion for a mistrial after the prosecution elicited testimony from the complainant about an uncharged allegation that Mr. Caceres had touched her vagina in an elevator years prior to the charged incidents. This was a blatant violation of the prohibition that evidence of uncharged crimes may not be introduced without a hearing to determine whether its probative value outweighs its prejudicial effect. The trial court properly concluded that this testimony should have been excluded but denied the defense's motion for a mistrial, offering to strike the testimony instead. This remedy could not have cured the extremely prejudicial effect of this testimony, but instead would have

only reminded the jurors of the inflammatory testimony. The prosecution then capitalized on the violation by focusing on this improperly admitted testimony in summation.

Mr. Caceres was also deprived of a fair trial when, during summation, the prosecution repeatedly vouched for the credibility of its witnesses and shifted the burden of proof to Mr. Caceres. In particular, the prosecution repeatedly argued that Mr. Caceres could only be acquitted if he proved that there was a conspiracy to frame him, concocted by the complainant's family, the police and the District Attorney's Office. It also indicated that the jury must conclude that prosecution's witnesses were lying to acquit Mr. Caceres.

Moreover, this Court should find that the verdicts for second-degree rape and endangering the welfare of a child were against the weight of the evidence because the complainant's testimony was simply not credible. Mr. Caceres was convicted of second-degree rape based on the complainant's testimony that he had sex with her in January 2010, but her testimony about this event was inconsistent with the account she gave when she first reported the allegations. The complainant also alleged an ongoing course of sexual abuse prior to January 2010, which was the basis of Mr. Caceres's conviction for endangering the welfare of a child. But, unsurprisingly given her admitted pattern of false accusations against her parents, her testimony was often implausible, contradictory, or refuted by other evidence. Significantly, there was no physical evidence to corroborate her claims.

STATEMENT OF FACTS

A. Juan Caceres was charged with several counts of sexually abusing his daughter.

1. Mr. Caceres's Background.

Before his arrest in this case, Juan Caceres was a major organizer for CECOMEX, a non-profit community organization that worked with the Mexican community of New York City. T. 296, 389, 912.[1] The organization was staffed largely by volunteers. T. 898, 900. CECOMEX assisted community members with many issues, including landlord-tenant, employment, immigration, or business-related matters. T. 295-97. CECOMEX maintained an office on 110th Street in Manhattan at the time of Mr. Caceres's arrest, T. 53, 188-89, and previously maintained an office on 116th Street. T. 164, 335.

2. Charges and Pre-trial Proceedings.

On February 1, 2010, Mr. Caceres was indicted with one count of predatory sexual assault against a child, one count of rape in the second-degree, one count of criminal sexual act in the second-degree, and one count of endangering the welfare of a child. *See* Indictment No. 473-2010 (hereinafter, "Indictment"). These charges stemmed from allegations by his daughter, Vanessa Barrientos, that he had engaged in oral sex and sexual intercourse with her beginning in 2007, when she was 11 years old,

[1] Citations preceded by "T." refer to the trial proceedings, which occurred on January 18, 2011 through February 3, 2011; citations preceded by "VD." refer to voir dire proceedings, which occurred on January 10, 2011 through January 14, 2011; and citations preceded by "S." refer to the sentencing proceedings, which occurred on March 1, 2011.

until January 2010. *See* Indictment at 1-2; T. 81 (complainant's date of birth is October 18, 1995). The charge of second-degree rape in the indictment alleged a single act of sexual intercourse with the complainant "on or about January 9, 2010." Indictment at 1. Mr. Caceres was also charged with criminal contempt in the second degree for allegedly violating an order of protection barring him from communicating with the complainant's mother, Carmen Barrientos.[2] *See* Indictment at 3; People's Exh. 3.

Prior to trial, the court held a *Molineux* hearing at which the prosecution moved to introduce recanted allegations of abuse made by Sharon Caceres, Mr. Caceres's other daughter. VD. 33-47. The court denied the prosecution's application. T. 65.

B. Trial.

1. The Complainant's Testimony.

a. The Complainant Alleged a Course of Sexual Abuse with Many Contradictory or Inconsistent Details.

At trial, the complainant testified that, as of 2008, she, her mother, and her older siblings Usenia and Oliver Barrientos, and Mr. Caceres, all shared a one-bedroom apartment at 402 East 92nd Street in Manhattan. T. 84, 88, 99-101, 403, 656. Mr. Caceres typically shared the apartment's bedroom with Carmen Barrientos. T. 269; 697. Mr. Caceres was not a part of the complainant's early childhood; she remembers first meeting her dad when she was approximately four years old, and he moved in permanently when the complainant was in sixth grade. T. 91-92, 97.

[2] Both the complainant and her mother Carmen have the same last name. Thus, to avoid confusion, Vanessa Barrientos is referred to as "the complainant" and her mother as "Ms. Barrientos."

The complainant testified that Mr. Caceres's sexual conduct with her initially began when he showed her a pornographic movie around when she was in the fifth grade, and later escalated to him performing oral sex on her. T. 103-17, 126, 132-34. She testified that her father began having sexual intercourse with her on a regular basis at the end of the summer before seventh grade. T. 145-46. She said that sexual intercourse with him became like a "basic routine" occurring almost every weekend. T. 148, 167. She claimed that he would have sexual contact with her usually in the living room of the apartment around midday. T. 105, 145, 338.

The complainant also claimed that Mr. Caceres had sex with her in the CECOMEX offices during the daytime, starting in "the summer of sixth grade," first by bringing her with him to the 116th Street office, then later to the 110th Street office. T. 164, 166. She testified that the 110th Street office consisted of two rooms, with no door separating the front room from the back room, only a hallway. T. 336-37. The complainant also testified that many people came and went from the office, including members of the public who sought assistance from CECOMEX. T. 296-97. The complainant also testified that members of the organization frequently brought their children to the office. T. 294-95.

The complainant said that Mr. Caceres always used condoms. T. 156. She said he kept them in a black bag that also contained "sex movies," vibrators, and lubricant. T. 158-59. She said Mr. Caceres stored the black bag in his car. T. 345. She testified at one point that the condoms were black-labeled NYC condoms. T. 151, 261. The

complainant said she had seen the NYC condoms in a box in the CECOMEX office before, and that CECOMEX gave them out for free to teenagers. T. 153-54, 367-68, 370. But on cross-examination, she admitted that she told police that Mr. Caceres had used Trojan brand condoms that he had purchased from Duane Reade. T. 368. She also later contradicted her statement that the condoms had been kept in a black bag in the car when she instead said that they were kept in a cabinet or a drawer. T. 365.

The complainant also claimed that on one occasion Mr. Caceres took her and her half-sister Sharon to a hotel for a night. T. 171. She said that Mr. Caceres purchased alcohol for them and that she and Sharon both got drunk. T. 173. She said that she did not remember what happened, but the next morning she woke up naked and her sister was on the bed asleep. T. 174-75. She said that she vomited repeatedly in the car on the way home. T. 175.

The complainant testified that after this incident, she did not drink alcohol. T. 393. However, on cross, defense counsel showed her a photograph in which she was holding a beer bottle that she had posted on her MySpace account. T. 393. The complainant then said that, on that occasion, she had asked her father if she could have a beer and he allowed her to. T. 393-95. She said that she had "two sips." T. 394.

The complainant also testified that her father kept pictures of her without clothing on his computer at CECOMEX, on a USB drive, and on a CD. T. 182-83, 428-29, 444-45.

b. The Complainant Had Repeatedly Fabricated Allegations of Violent Abuse Against Her Parents in the Past

The complainant admitted to having a longstanding habit of making up claims that her parents had abused her. This behavior occurred on multiple occasions between 2002 and 2009.

In 2002, the complainant told staff at her school that her parents had beaten her with a hammer. T. 311-13. She had marks on her arm that presumably appeared to be injuries. *Id.* When she was taken to the doctor to be examined, the doctors realized that the marks were self-inflicted bite wounds. T. 312. At trial, the complainant admitted that she had "made the whole story up." T. 315. She said she had lied because she was upset that her father wanted her to do her homework and got angry when she did not. T. 315.

The complainant admitted engaging in similar behavior in 2003. During her testimony she acknowledged that she made up an allegation on September 4, 2003, T. 316, although she was not questioned about the details. The complainant justified her lies by saying this behavior was the result of having "made mistakes" because she was "little." T. 320.

But she again made false accusations in 2009 when she was approximately 14 years old. Then, the complainant's guidance counselor reported "an incident involving [the complainant's] parents to [ACS]," and "as a result, they came to [her] home to investigate[.]" T. 323. Defense counsel referred to a document that apparently refer-

enced the complainant's allegation that her parents were drinking excessively and using drugs, although the complainant denied those specific allegations on the witness stand. T. 322-25. But she admitted that an investigator came to her home in December 2009 to inquire about something she told her guidance counselor about her parents. T. 322-23. She then told the investigator that there were no problems in her household, that she had "kind parents" whom she "enjoyed being with," and she made no mention of abuse. T. 323-24. She then spoke privately with the investigator at school the next day after being pulled out of class, and again denied any abuse by either parent. *Id.*

On direct examination, the complainant admitted that, also in 2009, she lied to her neighbor and said her mother had tried to smother her by putting a pillow over her face and had broken her nose. T. 140-41. She testified that she did not know why she made up the story. T. 140. However, on cross-examination, when defense counsel referred to ACS documents documenting this incident, she suddenly denied telling anyone her mother put a pillow over her face. T. 317-18.

The complainant also testified that she had told an ACS investigator that on one occasion Mr. Caceres drove home from a party drunk, with the complainant, her siblings, and her mother in the car. T. 323, 325-26. She said that her mother made him pull over and they walked home. T. 326. But her mother, who would later testify, denied recalling any such incident. T. 745-46.

c. The Complainant's Testimony Contradicted Her Statements to Police and Medical Personnel About the Alleged Incident of Sexual Intercourse with Mr. Caceres in January 2010.

The complainant testified that the last time Mr. Caceres had sex with her was on January 10, or January 11, 2010. T. 232. She said she remembered that it was a Saturday and that "it was a week before Martin Luther King Day." T. 232. The complainant also claimed to recall specific details of the day Mr. Caceres last had sex with her and the days immediately thereafter. She said that she initially refused to have sex with him, but eventually capitulated after he agreed that it would be the last time he would touch her. T. 235. But she said that after they had sex, he nonetheless continued to touch her on the vagina "like almost every day," "whenever he could[.]" T. 236-37.

She testified that the last time Mr. Caceres touched her vagina was January 17 in the CECOMEX office. T. 237. When asked how she knew it was on January 17, she insisted, "Because I remember." T. 237. The complainant testified with specificity about this incident. She said that she was using the computer in the office when Mr. Caceres went to get a drink of water and then "came like right behind me and then he like covered – Like he leaned over and he like tried – Like he touched me." T. 238. She said that he touched her on the vagina, after which she leaned forward and "covered [her]self." T. 237-38. She said that she was angry after this incident because her father had promised he would not touch her after January 10. T. 238. The complainant said that a few days later, on Martin Luther King, Jr. Day, she told her mother

"like the main parts like my dad had sexual intercourse with me." T. 239. The complainant's mother took her to Metropolitan Hospital to be examined, after which the hospital referred her to a Child Advocacy Center. T. 258-59.

d. A Report of a Medical Examination at Metropolitan Hospital Contradicted the Complainant's Testimony About the Last Incidents of Sexual Contact.

The prosecution introduced into evidence a report from Metropolitan Hospital dated January 20, 2010—thus right after the complainant told her mother that Mr. Caceres had sexually abused her. *See* People's Exh. 2. According to the report, the complainant said that the "most recent episode" of abuse "was just after 1/1/10 and was exclusively vaginal intercourse; [the complainant] denies anal intercourse or any other forms of assault." People's Exh. 2, "Chart Review Print" dated June 28, 2010, Initial Consult OB/GYN MD Consult dated Jan. 19, 2010 at 1. The same report contains a note dated January 20, 2010 saying the complainant said that the "last assault [was a] 'few days after New Year[']s.'" *Id.* at 2 (quotation in original). A few pages later, another note dated January 19, 2010 states that the complainant claimed that "yesterday when she was in her pyjamas her biological father touched her private parts." People's Exh. 2, "Chart Review Print" dated Jan. 18, 2010, ED MD Initial Note dated Jan. 18, 2010 at 1.

e. The Complainant Alleged That Mr. Caceres Emailed Her an Erotic Story in English About Incest, But Gave Contradictory Details Relating to When It was Sent and How She Received It.

The complainant also testified that in December 2009, her father emailed her stories about father-daughter incest to her Yahoo e-mail account. T. 183-84. She said that she deleted two of the stories after Mr. Caceres directed her to, but "got distracted and [] forgot to delete" the third one. T. 184-85. The complainant said that she was in the CECOMEX office when her father sent the email she forgot to delete, and that just before he sent it, he "said, oh, I'm sending you an email." T. 433. It "popped up right then and there," and she "read it right there, when the email came." *Id.* She said this occurred in the daytime, "like, early afternoon, somewhere around, after like midday." *Id.* She said that her reaction after reading it was that she "looked over at [Mr. Caceres] and I'm like, really, why did you send this to me; he was just like, it was something to read." T. 434.

A printout of the email was introduced into evidence. *See* People's Exh. 30, Printout of Email dated Dec. 2, 2009. It indicated that it was sent from the email address soloparejas@msn.com and was sent to dominimexgirl@yahoo.com. *Id.* The name of the sender was listed as "Pepe y Karolina." *Id.* Although the complainant had said it was sent and received in the middle of the day, the exhibit indicated that the email had been received at 12:56 AM. *Id.* The email's subject line was "Read This" and it told a story, which spanned several pages and was entirely in English, of a father engaging in incestuous sexual acts with his daughter. *Id.* But earlier the complain-

ant had testified that Mr. Caceres speaks only Spanish with her. T. 340. When asked, the complainant agreed that Mr. Caceres speaks "a little broken English, but that's about as far as it gets[.]" T. 340.

John Forames, a forensic analyst who searched CECOMEX computers, later testified that internet search terms "solo parejas has [sic] MSN dot com" had been typed in on a computer at the CECOMEX offices. T. 954. Although other references to that email address had been found on the CECOMEX computers, Mr. Forames said that there was "not really enough information" to know how or why the references had appeared. T. 956.

Tracy Ingle, the senior director of outreach for global criminal compliance for Microsoft, testified that the registration name associated with soloparejas@msn.com was "Pepe y Karolina," the name of the sender of the email. T. 616, 632; People's Exh. 30. The phone number associated with the account was 917-912-3877, T. 620, which had no apparent connection to Mr. Caceres. According to the complainant, Mr. Caceres's phone number was 347-397-0366. T. 249. Additionally, the MSN.com account registration information listed the subscriber's birthdate as August 3, 1969. T. 632. Mr. Caceres's date of birth is April 13, 1967. Crim. Compl. at 2.

f. The Prosecution Solicited Testimony About the "Elevator Incident" and the Court Denied the Defense's Motion for a Mistrial.

During the complainant's direct testimony, the prosecutor asked her whether Mr. Caceres had "ever touch[ed] you on your body in a way that you didn't like[.]" T.

136. She responded that when she was eight years old, Mr. Caceres had touched her "in my private area" while they were in an elevator and he was "kind of drunk[.]" T. 136. She claimed that she told her mother about the incident but that her mother dismissed it. T. 137-40. She claimed that the authorities became involved later, after she told her downstairs neighbor "Peaches" about the incident. T. 137. She said that officials came to her house and "talk[ed] to me about what I had told Peaches, and like they put me in a bedroom and they were checking for bruises and stuff." T. 137. Afterward she was taken to the hospital and "interrogated," at which point she recanted the allegation. T. 138. She said that she recanted because her mother did not believe her and she wanted her mother to stop being angry with her. T. 139-40; *see also* T. 139 (testifying that she "got in trouble with mom" for "telling lies to people").

It was this during portion of her testimony that the complainant admitted to having lied to authorities about her mother breaking her nose by smothering her with a pillow. T. 139-40. The complainant testified that while her allegation involving the pillow was a lie, her claim that her father had touched her inappropriately in an elevator was true. *Id.*

After the complainant testified about the elevator incident, defense counsel moved for a mistrial, noting that the prosecution never made a *Molineux* application to admit this testimony about an uncharged crime. Defense counsel argued that the testimony "greatly prejudiced" Mr. Caceres. T. 177. The prosecution argued that the testimony was not subject to *Molineux* because it was "being offered to explain…the rela-

tionship between the defendant and the witness," and to "explore the clear credibility issues that the defense has already raised from the beginning of this trial." *Id.* The trial court reserved decision on the mistrial motion. T. 177-78.

The next day, defense counsel supplemented their[3] mistrial motion by citing to several cases that show that a limiting instruction could not sufficiently cure the prejudice caused by the admission of the inappropriate testimony. T. 206-10 (citing *People v. Ventimiglia*, 52 N.Y.2d 350 (1981); *People v. Fleegle*, 295 A.D.2d 760 (3d Dep't 1992); *People v. Intelisano*, 188 A.D.2d 881 (3d Dep't 1992); *People v. Barranco*, 174 A.D.2d 343 (1st Dep't 1991)). Relying on these cases, counsel also argued that a mistrial was even more appropriate given that the "elevator incident" had been in the jurors' minds overnight. T. 209-10. "It's now been sitting in this jur[y's] minds for the last twelve plus hours, or more," counsel noted, "that this is actually an ongoing [sic] pattern that this defendant has a propensity." T. 210.

Counsel also contended that the prosecution was well aware that they were going to ask the complainant about this incident and, by not including it in their pre-trial *Molineux* application, they "did so at their own peril." T. 209-10. Counsel further stated that the prejudice to the defense from the testimony could not be "overcome" given that the elevator incident allegedly occurred three years before the events at issue at trial. T. 210.

[3] Mr. Caceres was represented by two attorneys.

The prosecutor argued that the incident was not introduced to show Mr. Caceres's propensity towards sexual abuse, but rather that the complainant was credible. T. 212. She argued that the complainant's mother's disbelief as to the elevator incident explained why the complainant waited so long to report her father's abuse for the charged offenses. T. 212.

The prosecution also noted that the defense had failed to object to the testimony at the time that it was given. T. 211. Defense counsel responded that they had been shocked when they heard the testimony and did not know what the complainant was talking about. T. 215-16; *see also* T. 217 ("[W]e were just shocked[.]"); T. 220 (same).

Finally, the parties disputed whether the ACS records that had been provided to the defense as part of discovery included information of the elevator incident. While the prosecution claimed that they did, T. 211-12, 218, both defense attorneys emphatically claimed that the elevator incident was not mentioned in the records. T. 216-17, 219-20.[4]

The court ruled that the elevator incident "should not have been admitted because we should have had a pretrial proceeding concerning that testimony." T. 220. But it denied the defense's motion for a mistrial and instead offered to strike the tes-

[4] After the court issued a ruling on the mistrial motion, the prosecution noted that an ACS report dated September 4, 2004 said that "the father has touched the child in her vaginal area for sexual gratification." T. 222. Defense counsel noted that there was no mention of this occurring in an elevator or of the complainant telling her mother about this incident. T. 222-23.

timony and to give a curative instruction to the jury "not to speculate and to disregard that testimony." T. 220. Defense counsel declined this remedy, explaining that they feared that striking the testimony would preclude them from cross-examining the complainant about the incident. T. 221-22. They also argued that they did not believe the court's remedy would cure the error because "it's very hard for [jurors] to remove things from their mind, once it's been placed in their mind, and especially given a case which has such strong emotions as the one which is before this particular jury." T. 221. Defense counsel thus renewed the motion for a mistrial, which the trial court again denied. T. 222-23.

2. Expert Testimony Regarding an Examination of the Complainant Did Not Corroborate the Complainant's Account.

Both the prosecution and the defense called experts to testify about a physical examination of the complainant performed at the Child Advocacy Center at Metropolitan Hospital on February 1, 2010. *See* People's Exh. 1, Record of Examination at Child Advocacy Center.

The prosecution called Dr. Jocelyn Brown, a child abuse pediatrician and professor of clinical pediatrics, who had performed the examination. T. 474, 483. Despite the complainant's testimony that her father last had sex with her as recently as a week before Martin Luther King, Jr. Day, Dr. Brown's examination found that the complainant's hymen showed no signs of "acute or chronic trauma," and she found no vaginal bleeding or bruises. T. 492-93. Dr. Brown said she found an "indentation," in

the hymen, which was a "concavity or irregularity that doesn't go all the way down to the base of the hymen." T. 493. Dr. Brown testified that the indentation could either be "normal" or it could be a sign of sexual abuse. T. 493-94. She testified that if the hymen had suffered "blunt trauma," it would result in a "transection." T. 493. In that case, there would be "not just an indentation but a complete cleft," referred to as a "V cleft." T. 493. Having not examined the complainant previously, Dr. Brown said she could not determine the reason for the indentation in her hymen. T. 494.

Dr. Gary Medows, a pediatrician who testified as an expert for the defense, also testified that the complainant's hymen had a serrated edge and "slight depression." T. 861. Like Dr. Brown, he testified that the depression could have been present from birth since irregularities in the hymen can be "normal." T. 861-62, 887, 890. Dr. Brown stated that there was no such thing as a "virginity test," because a high percentage of sexually active girls had been found to have a hymen that appeared to be intact. T. 490. But Dr. Medows noted that these girls might not have experienced full penetration, which could result in a change to the appearance of the hymen. T. 888. He testified that "if somebody is having sexual intercourse with full penetration for a long period of time, they will have damage to the hymen," such as "a laceration" or "stretching." T. 888-89.

Dr. Brown said that her findings were consistent with a history of sexual abuse, but she then suggested said that "consistent" and "conclusive" had essentially the same meaning. T. 509-10. She suggested that this was because the inconclusive find-

ings about the hymen could not be taken "in isolation," noting that the complainant's past reports of vaginal bleeding suggested sexual abuse. T. 504. Dr. Medows, however, testified that vaginal bleeding can have "numerous causes," including an infection. T. 865. Dr. Brown's testimony did not note any attempt to rule out other causes for the reported vaginal bleeding.

Dr. Brown also noted that when she asked the complainant about "behavioral or emotional symptoms," the complainant said she was "not very hungry" at the time of the examination. T. 486-87. Dr. Brown said only that she "looked into" whether this indicated depression, but said nothing else about this. *Id.* Finally, Dr. Brown mentioned that the complainant did not report suicidal ideation, a symptom that "is common in a child having sexual abuse[.]" T. 486-87.

3. Detective Hernandez's Testimony.

Detective Hernandez of the New York City Police Department was the lead investigator on the case. T. 68. He testified that he spoke to the complainant for approximately half an hour at Metropolitan Hospital on January 18, 2010, just after she reported the abuse. T. 38-40. The next day, Detective Hernandez listened in (from a separate room) as the complainant was interviewed by a forensic interviewer at the Child Advocacy Center. T. 40-42. When asked by defense counsel whether he was aware that the complainant alleged that Mr. Caceres had sexual intercourse with her on January 4, 2010, the detective responded, "Yes. Right after New Year[']s." T. 72.

Detective Hernandez obtained search warrants for Mr. Caceres's apartment and for the CECOMEX office at 110th Street.[5] T. 46. At neither location did the police find any condoms or other contraceptives. T. 66-67. Additionally, the police seized several hard drives, a laptop, some CDs, and papers; none of them contained nude pictures of the complainant. T. 46, 53-54, 66-67.

During Detective Hernandez's testimony, the prosecution entered into evidence 12 NYC condoms, which were still wrapped. *See* Photograph of People's Exh. 12. The detective said that he "receive[d]" these condoms on January 30, 2010 from a forensic interviewer at the Manhattan Child Advocacy Center. T. 62-63. The condoms were not recovered from any search. T. 62. Rather, Detective Hernandez was told that they were given to the interviewer by the complainant. T. 62-63.

4. Carmen Barrientos's Testimony.

The testimony of Carmen Barrientos, the complainant's mother, was guarded and unfocused, much of it relating to information about her family and her relationship with Mr. Caceres. *See*, *e.g.*, T. 686-89, 692-94 (several pages of discussion of the time period prior to and just after complainant was born); T. 735-38, 741-47 (Ms. Barrientos repeatedly stating that she does not remember information or does not understand questions during cross examination); T. 703-14 (describing her reactions in the days following the complainant's accusations in January 2010).

[5] Det. Hernandez refers to the office address as "307 East 10th Street" here, however this is presumably an error, as the elsewhere the address is referred to as 110th Street. *See* T. 53, 188-89.

What her testimony did establish was that Ms. Barrientos married Mr. Caceres in 2008, but he moved into her apartment with her and her children in 2001. T. 686, 694. The complainant said Ms. Barrientos's daughter Usenia had lived with her until about 2008. T. 681-82. With Usenia living there, a total of five people, including the complainant, her mother, Mr. Caceres and Oliver (Ms. Barrientos' son), lived in their one-bedroom apartment. T. 697.

Ms. Barrientos testified that she did not see any signs of tension between Mr. Caceres and the complainant, nor did she notice any signs of emotional disturbance, such as "cry[ing] uncontrollably." T. 735.

Ms. Barrientos stated that she never saw any "black bag" with vibrators and other sexual paraphernalia in her or Mr. Caceres's car, as the complainant had described. T. 747. However, she did testify that the items the complainant claimed the black bag contained, such as sex toys and pornography, were kept in the house because Ms. Barrientos and Mr. Caceres used them in their sex life. T. 729-32.

Ms. Barrientos also said that it was she who had given the NYPD the condoms the complainant claimed Mr. Caceres used to have sex with the complainant. T. 722-23. These condoms also could have been seen by the complainant in the apartment because Ms. Barrientos stated that she would often bring home boxes of condoms from CECOMEX and send them to her mother, where "two young boys live." T. 725.

Ms. Barrientos claimed she did not remember the complainant's false allegations that she was beaten with a hammer. T. 741. But she did remember another set of false allegations made to ACS by the complainant, when she was in the fourth or fifth grade. T. 766. Ms. Barrientos stated that "[ACS] would go to check because Vanessa had told them – had told them a little lie that I had hit her and then because of that they were seeing if the investigation, if it was true or not." T. 766.

As mentioned above, Ms. Barrientos also did not recall an incident involving her demanding that Mr. Caceres pull over because he was too drunk to drive, as the complainant had described. T. 745-46.

5. Oliver Barrientos's Testimony.

Oliver Barrientos, the complainant's half-brother, lived in the apartment with Mr. Caceres, the complainant, Ms. Barrientos (his and the complainant's mother), and Usenia (his and the complainant's sister) when he first moved to the United States in April 2008. T. 523, 527-28. He testified that on three occasions he came home early from work to find the apartment's door locked with the chain, preventing him from opening it. T. 532. Usually, he said, the door was locked with two security locks but the chain was not used. *Id.* He said that on the first and third occasions, he saw Mr. Caceres using the computer when he tried to open the door. T. 643-44, 648. On the second occasion, Mr. Caceres opened the door wearing a towel, after which he went into the apartment's bedroom for approximately 15-20 minutes. T. 647-48, 660. Oliver said that he "didn't think much of the fact that [Mr. Caceres] opened the door in a

towel." T. 660. He also acknowledged that at the time, Mr. Caceres, Ms. Barrientos, and the complainant all shared the bedroom, and that he did not see what the complainant had been doing in the room T. 660-61. He also said that Mr. Caceres did not seem surprised to see Oliver home at that time. *Id.*

6. Search of CECOMEX computers.

John Forames, a forensic analyst in the Computer Forensics Unit at the New York County District Attorney's Office, testified that he had recovered data relating to incest pornography from the CECOMEX 110th Street office computers. T. 928, 935-36, 939-40; *see also* T. 54-57 (computers given to NYPD Computer Forensic Unit were all recovered from CECOMEX 110th Street office pursuant to search warrant). He testified that he conducted a "keyword" search on a laptop and several hard drives found in the CECOMEX offices. T. 939-40. The keywords included "Dominimex girl," "soloparejas," and "incest." *Id.*

Prior to his testimony, the defense moved to preclude the introduction of most of the evidence introduced through Mr. Forames because the search results lacked dates or times indicating when the files were created or accessed. T. 924-26; *see* People's Exhs. 47, 49. They argued that it was therefore impossible to know when the pornography had been viewed. *Id.* Counsel also argued that this evidence was irrelevant and highly prejudicial. T. 924, 926. The prosecution responded that the defense's arguments go to the weight of the evidence, not its admissibility. T. 924-26. The court agreed and denied the defense's application. T. 926.

Mr. Forames testified that he found "nothing of significance" on most of the media he searched. T. 934, 936, 938. Two computers, entitled "PC-2" and "PC-3," returned lists of files indicating that the computers had been used to search for incest pornography. T. 941-48. On PC-2 and PC-3, the keyword search returned lists of files showing that someone had conducted internet searches for incest pornography. PC-2 had a user account entitled "Juan," but there was no other information to indicate who had created the account. T. 975. PC-3 had a user account entitled "Juan Caceres," which had the password "FISH." T. 967. Mr. Forames said that a file showing a search for "incest facts.com" was created on January 8, 2010, at 4:46:29 AM, and was last accessed on January 14, 2010 at 3:16:27 AM. T. 943. This indicated the website had been visited sometime between those two dates, but it was not possible to tell exactly when. T. 943. Although there were many files referencing incest pornography in the search results, this file was the only one on PC-2 with a corresponding date or time. *See* People's Exh 47. The files from PC-3 were created or accessed between 2006 and 2009, but predominantly in 2008. *See* People's Exh. 49.

Mr. Forames did not provide in his testimony the complete list of keyword searches he used. T. 939 (referring to multiple "set[s]" of keywords searched, but only giving a few examples of search terms). He admitted that the report of the search results admitted into evidence was merely a summary of the original results of the search. T. 981-82. He also did not "remember exactly how many keywords were found on PC3[,]" T. 981, and also admitted that he deleted results he, his supervisors,

and the prosecutors determined to be "false positives," as well as those they did not consider "relevant." T. 981-82.

7. Witnesses Consistently Testified That the CECOMEX Offices Were Small and Open to the Public, and That They Saw Nothing Inappropriate Between Mr. Caceres and the Complainant.

Three people who frequented the CECOMEX office where Mr. Caceres worked testified at trial: Maria Sanchez and Sandra Perez, two of the organization's most frequent volunteers, and Dalia Tapia, Ms. Sanchez's daughter. T. 792, 794, 808-09, 892-94. They testified that most volunteers had keys to the office, and they frequently entered the office. T. 812, 900. The volunteers worked variable hours and were not required to report to anyone or give notice when they went into the office. T. 813, 923. Many volunteers brought their children with them. T. 794-95, 817-18, 899. Sometimes the organization's members arrived very early in the morning, late at night, or on weekends, and several people often stayed overnight. T. 812, 818, 901. Maria Sanchez explained that the office was very small, the door was usually wide open, and one could see all the way to back of the office as soon as he or she stepped in. T. 819-20.

Although the complainant claimed Mr. Caceres had sex with her in the middle of the day in the CECOMEX office, T. 164, 166, 338, none of these witnesses testified to seeing anything inappropriate between Mr. Caceres and the complainant. Ms. Sanchez never saw Mr. Caceres and the complainant alone together in the office. T. 828. Nor did she ever perceive any noticeable change in the complainant's behavior.

T. 830. Dalia Tapia was friends with the complainant and saw her around the office from time to time, including on the weekend. T. 794-95. She said that the complainant never indicated that she was afraid of her father, nor did she seem depressed. T. 799. Ms. Perez also noticed no signs of "problems or tension." T. 903.

8. A CECOMEX Volunteer Habitually Used the Computers to Access Pornography From 2008 Until September 2010.

Ms. Sanchez testified that everyone in the organization had access to the CECOMEX computers, which were networked. T. 820-21. According to Ms. Perez, although people tended to use the same computers, they were permitted to use "[w]hatever computer was open, if anybody needed to use it they were able to use the computer." T. 901. Ms. Sanchez testified that a man named Eloy Ruiz, who often slept in the office overnight, had been caught using the computers to search for pornography in the past. T. 822-24. Mr. Ruiz would "search a lot of it. Whenever he would come in early in the morning." T. 822. The pornography was "every kind of different pornography," including that which featured "horses." T. 833. Mr. Ruiz viewed so much pornography that computer viruses associated with it caused all the computers in the office to freeze up. T. 822. Ms. Sanchez testified that Mr. Ruiz's pornography habit peaked in 2008, but he continued to visit the office through September of 2010—months after Mr. Caceres's arrest. T. 825.

9. Summations.

During summation, defense counsel highlighted numerous reasons to doubt the complainant's credibility. Counsel noted that the complainant had a long history of fabricating complaints resulting in ACS investigations. T. 1003-04. Counsel argued that the complainant was forced to lie about her allegations of sexual abuse against Mr. Caceres because, unlike on previous occasions when she fabricated complaints against her parents, her claims this time "ran ahead of her so fast, got out of control so quickly, she couldn't retract it, so she became entrenched in this." T. 1002. He argued that the complainant's knowledge about sex came from her having encountered condoms, pornography, or other sexual materials around the apartment, rather than abuse by her father. T. 1012-13.

Counsel also noted that Mr. Caceres is alleged to have sex with the complainant at times and in places where he would have been easily caught, such as in the apartment in the middle of the day when Oliver Barrientos would come home, or at very busy times in the CECOMEX office. T. 1002, 1021-22. He noted that the complainant's story about her father's drunk driving was not recalled by her mother, even though the complainant said her mother was present during the incident. T. 1005. He pointed out that that no black bag with sex paraphernalia was ever found, despite the complainant's assertion that Mr. Caceres stored paraphernalia related to sex in it. T. 1012. Defense counsel also noted that Dr. Brown's testimony was, at most, equivocal

about whether the examination of the complainant's hymen evidenced sexual penetration. T. 1026-29.

Defense counsel also highlighted the fact that the story about incest the complainant claimed to have received by email was in English, including the subject line "Read this," even though Mr. Caceres speaks only broken English and everyone in the family spoke Spanish with each other. T. 1016-17. He pointed out that the email indicated that it had been sent near 1:00 AM, not in the middle of the day, as the complainant had testified. T. 1015-16. Defense counsel also argued that Eloy Ruiz was more likely responsible for the pornography-related files found on the CECOMEX computers. T. 1017-19.

The prosecutor's closing argument primarily focused on establishing that the complainant was credible. T. 1036. She pointed to the fact that Ms. Barrientos and the complainant agreed on the date that the complainant told her mother that Mr. Caceres had abused her, T. 1038-39, and to the complainant's demeanor while testifying. T. 1046. The prosecutor said that the question for the jury was "whether this [case] is a big conspiracy between the Barrientos family, the police, and the District Attorney." T. 1035. She also stated that the jury had to decide "either that everybody is out to frame [Mr. Caceres] in order to get something in return or Juan Caceres, the defendant, actually committed these horrible crimes." T. 1035.

The prosecutor also argued that the complainant should be believed because she had not made more extreme accusations, such as claiming that Mr. Caceres beat

her or threatened to kill her. T. 1062-63. She also told the jury to "think of some of the things that you would expect to hear if this were a conspiracy," such as the complainant saying that Mr. Caceres "threatened to kill Oliver too if he told anyone [that he came home to find the door chained and Mr. Caceres in a towel]." T. 1062-63. The prosecutor also argued that the complainant "wanted to make up what was happening to her, she would have had an answer to everything." T. 1048. Additionally, the prosecutor said to the jury, "In your gut, you know it's the truth. You know it in your head. You know it, you just know it." T. 1045. The prosecutor also suggested that the complainant had no motive to lie, saying that "what she gains is nothing" from testifying. T. 1043; *see also T.* 1045 (prosecutor saying "[the complainant] gains nothing from this.").

The prosecutor also relied heavily on the "elevator incident"— which the court had previously ruled should never have been admitted — to explain why the complainant's testimony was trustworthy. T. 1052-53. She argued, citing this incident, that Mr. Caceres had previously abused the complainant, but her mother did not believe her because at "about nine years old she probably wasn't that articulate about what was happening." T. 1053. She said the complainant's later denial of the story was a "false recantation." T. 1053. The prosecutor told the jury that the elevator incident "set the stage for her, for her father to take advantage," because as a result of that incident "[n]o one is going to ever to going to look at what she says and honestly think that she's telling the truth." T. 1053. The prosecutor also urged the jury to see "that

history play[ed] out" in the charged crimes, and that it should use that history to figure out whether the complainant was "telling the truth." T. 1053-54.

The prosecutor also cleverly called attention to the fact that Mr. Caceres did not testify. She said, "The last thing I want to touch on is that, although the defendant didn't testify, absolutely his right. He did put on a case." T. 1079.

10. Verdict.

The jury found Mr. Caceres not guilty of predatory sexual assault against a child. T. 1128-29. They found him guilty of rape in the second degree, endangering the welfare of a child, and criminal contempt in the second degree. *Id.*

C. Sentencing.

At the sentencing proceeding on March 1, 2011, the complainant and her mother made statements, S. 3-7. Afterward, Mr. Caceres made a statement maintaining his innocence. S. 12-18. The court then sentenced him to seven years' imprisonment followed by 10 years' post-release supervision on the second-degree rape conviction, to run concurrently with one year of imprisonment on the misdemeanor counts. S. 18-19.

ARGUMENT

POINT I

JUAN CACERES'S CONVICTION MUST BE REVERSED DUE TO THE INTRODUCTION OF THE COMPLAINANT'S HIGHLY PREJUDICIAL TESTIMONY THAT MR. CACERES HAD SEXUALLY ABUSED HER YEARS PRIOR TO THE CHARGED INCIDENTS.

A mistrial was the only appropriate remedy where the prosecution introduced, without a pretrial hearing on its admissibility, the complainant's testimony about an uncharged allegation that her father touched her vagina in an elevator several years prior to the charged crimes. *See People v. Ventimiglia*, 52 N.Y.2d 350, 359 (1981); *People v. Gautier*, 148 A.D.2d 280, 283-84 (1st Dep't 1989); *People v. Barranco*, 174 A.D.2d 343, 344 (1st Dep't 1991). The trial court properly agreed with the defense that the complainant should not have been allowed to testify about these allegations because they should have been subject to a *Molineux* hearing. T. 220-23. But the court abused its discretion when it failed to grant a mistrial over defense counsel's strenuous objection, instead offering to strike the testimony and give a curative instruction. *Barranco*, 174 A.D.2d at 344. As the defense argued, this remedy—offered a day after the testimony was introduced—was insufficient to erase the highly prejudicial impact of the inadmissible testimony. To the contrary, it would have just reminded the jurors of the inflammatory testimony. Thus, by denying the defense's request for a mistrial, the trial court deprived Mr. Caceres his fundamental due process right to a fair trial. U.S. Const. Am. XIV; N.Y. Const. Art. I, § 6.

Evidence of uncharged crimes is generally inadmissible and cannot be admitted solely to show the accused's propensity toward criminal conduct. *People v. Molineux*, 168 N.Y.2d 264, 313 (1901); *People v. Resek*, 3 N.Y.3d 385, 390 (2004). "The rule excluding evidence of uncharged crimes is based upon the human tendency more readily 'to believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime.'" *Ventimiglia*, 52 N.Y.2d at 359 (quoting *Molineux*, 168 N.Y. at 313). Evidence of an uncharged crime is admissible only when it is both relevant to a pertinent issue at trial (other than to establish a defendant's criminal propensity), and the probative value of the evidence outweighs the risk of prejudice to the defendant. *People v. Till*, 87 N.Y.2d 835, 836 (1995); *see also Resek*, 3 N.Y.3d at 389–90. The risk of undue prejudice is particularly great when the uncharged act is "similar in nature" to the charged crime. *People v. Foster*, 295 A.D.2d 110, 113 (1st Dep't 2002).

Because of the strong risk of prejudice, the accused is entitled to a ruling by the court outside the presence of the jury to determine whether such evidence is admissible. *Ventimiglia*, 52 N.Y.2d at 361-62. It is improper for the prosecution to elicit the testimony and wait for the defense to object. *Id.* If the prosecution introduces the testimony without a hearing, there is not only a great risk of erroneous admission of the testimony, but the accused is deprived of a fair trial "even if his objection is sustained, in view of the questionable effectiveness of cautionary instructions in removing prior crime evidence from consideration by jurors." *Id.*

A. A New Trial is Mandated Because the Prosecution Elicited Extremely Prejudicial Uncharged Allegations of Sexual Abuse From the Complainant Without a *Ventimiglia* Hearing.

The risk of undue prejudice resulting from uncharged allegations of sexual abuse is so great that if such testimony is improperly received, the remedy should be a new trial. In *People v. Gautier*, 148 A.D.2d 280, 281-82, 285-88 (1st Dep't 1989), this Court held that testimony that the defendant, who was accused of raping his two daughters, had either raped or sexually abused them prior to and after the charged incidents was inadmissible under *Molineux*. Recognizing that the testimony was problematic, the trial court had issued several limiting instructions *sua sponte* to the jury to ignore the inadmissible testimony, but it denied the defense's mistrial motion. *See id.* at 287. Nonetheless, this Court reversed the conviction, finding that "the import of the [inadmissible] testimony would not have been lost upon the jury." *Id.* at 282.

Similarly, a new trial was ordered in *People v. Fleegle*, 295 A.D.2d 760, 761 (3d Dep't 1992), where the defendant was charged with 31 counts each of rape, sodomy, and sexual abuse of a minor girl. No hearing was sought by the prosecution to determine the admissibility of testimony that the defendant had begun abusing the complainant years before the charged offenses. *Id.* at 762-63. Although there was no objection by the defense at trial, the Third Department found that the defendant's right to a fair trial was violated by the prosecution's admission of the testimony without a *Ventimiglia* hearing and without any limiting instructions from the lower court. *Id.* at 762; *see also People v. Intelisano*, 188 A.D.2d 881, 883-84 (3d Dep't 1992) (where defend-

ant was charged with rape and the prosecution introduced testimony that he had beaten and choked the victim for months prior to the first charged offense, the lower court's failure to conduct a hearing prior to admission of the evidence, as well as its failure to give a limiting instruction, warranted reversal, even though the error was unpreserved).

Additionally, this Court has held that a trial court abuses its discretion when it fails to grant a mistrial after allowing the introduction of uncharged crime evidence to remain unaddressed overnight. In *Barranco*, 174 A.D.2d at 344, the defendant was charged with a drug sale and the prosecution conceded prior to trial that a police officer's testimony that he discovered 11 vials of cocaine in the lobby of the building where the defendant lived was inadmissible under *Molineux*. Yet the officer nonetheless testified to discovering the vials. *Id.* Defense counsel immediately moved for a mistrial, but the court reserved decision until the next day, when it denied the motion and issued a curative instruction. *Id.* This Court held that the denial was an abuse of discretion, noting that it was "particularly significant that the jurors had [the officer's] testimony in their minds overnight before they were given the curative instruction to disregard it." *Id.* "Because the resulting prejudice was too great to be countermanded by a curative instruction, it was an abuse of discretion to deny defendant's motion for a mistrial." *Id.* at 345.

Here, the prosecution's introduction of the complainant's testimony about the alleged "elevator incident," T. 216, was a flagrant violation of *Molineux* and *Ventimiglia*

that mandates reversal and a new trial. Without seeking a hearing as to the testimony's admissibility (even though it had requested a *Molineux* hearing related to other allegations, VD. 33-47), the prosecution here elicited testimony from the complainant that Mr. Caceres had touched her "in [her] private area," T. 136-40, in an elevator when the complainant was about eight years old. This alleged incident would have occurred around 2003, about four years prior to the beginning of the first charged offense in 2007. *See* Indictment at 1 (alleging offenses began in 2007); T. 81 (complainant born October 18, 1995).

Defense counsel moved for a mistrial following this testimony and the court reserved decision until the next day. T. 177-78. The next day, defense counsel again argued that the introduction of the testimony mandated a mistrial, citing *Ventimiglia, Fleegle, Intelisano,* and *Gautier*. T. 206-10. Counsel noted that the court's decision to wait until the next day to determine how to handle the admission of the highly prejudicial testimony was especially problematic since the jurors sat with the inflammatory information overnight. T. 209-10.

The trial court ruled that the elevator incident should not have been admitted because there should have been a pre-trial hearing to determine its admissibility. T. 220. But the court denied the defense's motion for a mistrial, instead offering to strike the testimony and offer a curative instruction to the jury "not to speculate and to disregard that testimony." T. 220. Defense counsel declined this remedy, noting that the

damage had already been done, and again sought a mistrial, but the court refused to grant one. T. 220-23.

As the trial court properly concluded, Mr. Caceres was entitled to a hearing outside the presence of the jury to determine whether the allegation that he had previously sexually abused his daughter was more any probative than prejudicial. He was deprived of a fair trial when the prosecution completely disregarded this requirement, surprising the defense during the complainant's testimony. T. 215-17, 220. Given the extreme prejudice that inured to Mr. Caceres through the introduction of the testimony, a mistrial was the only appropriate remedy. *See Gautier,* 148 A.D.2d at 283-84; *Fleegle*, 295 A.D.2d at 761; *Intelisano,* 188 A.D.2d at 883-84.

The prejudice was compounded by the fact that, as in *Barranco*, 174 A.D.2d at 344, the trial judge offered to give a limiting instruction a day after the inadmissible testimony was already heard by the jury. Indeed, the prejudice here is even greater than it was in *Barranco*, since Mr. Caceres was accused not of selling a small amount of drugs, but of raping his daughter multiple times over the course of several years. Any suggestion that he had tried to touch the complainant inappropriately before the charged incidents was extremely prejudicial, especially because the uncharged allegation is "similar in nature" to the charged offenses. *Foster*, 295 A.D.2d at 113.

As counsel argued below, at best a curative instruction would have been useless, and at worst, it would have served only to remind the jury of the inadmissible testimony. The Court of Appeals has recognized the "questionable effectiveness of cau-

tionary instructions" when compared to the "human tendency more readily 'to believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime.'" *Ventimiglia,* 52 N.Y.2d at 359-62 (*quoting Molineux,* 168 N.Y. at 313). Accordingly, defense counsel strenuously objected to the court's proposal to instruct the jury to disregard the testimony, because "it's very hard for [the jury] to remove things from their mind, once it's been placed in their mind, and especially given a case which has such strong emotions as the one which is before this particular jury." T. 221. The nature of the accusations, along with the proposal of a curative instruction a day too late, ensured that "[n]o curative instruction could remedy the prejudice which inevitably resulted from the jury hearing" the elevator incident testimony. *Barranco*, 174 A.D.2d at 344-45. Only a new trial can correct the deprivation of fundamental fairness that occurred here.

B. Admission of the alleged elevator incident testimony was far from harmless.

The admission of the highly prejudicial testimony of an uncharged sex crime was not harmless. As described in detail below, *see* Point III *infra*, the complainant suffered from serious credibility issues that called the veracity of her entire account into question. "The primary duty of the fact finder in this case was to determine whether the victim's statements describing the incestuous act[s] charged in the indictment were credible." *People v. Lewis*, 69 N.Y.2d 321, 327-28 (1987) (ordering new trial after finding that the error was not harmless where defendant was accused of incest with teen-

age daughter and inadmissible *Molineux* testimony was introduced); *see also Intelisano*, 188 A.D.2d at 884 (holding that admission of uncharged crime evidence was not harmless, where the case "turned heavily on issues of credibility"). This created a "serious danger that the jury used [the elevator incident testimony] to draw the impermissible inference" that Mr. Caceres "probably did it before, so he probably did it this time too." *People v. Hudy,* 73 N.Y.2d 40, 56 (1988) (uncharged accusations of sexual molestation by one child, to bolster the allegations of eight other boys, were inadmissible under *Molineux* and not harmless).

The Court especially should not find the error harmless since the prosecutor capitalized on its egregious *Molineux* violation by highlighting it during summation to make an argument about Mr. Caceres's propensity for sexual abuse. She argued that the incident in the elevator "set the stage for her, for her father to take advantage," since her mother's reaction to the testimony made her think, "No one is going to believe her ever." T. 1053. She further reminded the jury that the complainant insisted during her testimony that the elevator incident was true. T. 1053. "It happened," the prosecutor argued. T. 1053. The prosecutor also relied on the elevator incident to argue that the jurors could conclude that the complainant was telling the truth when she stated that "history play[ed] out" in the charged crimes. T. 1053-54. In other words, the prosecutor argued that the complainant's testimony should be believed because Mr. Caceres allegedly got away with a similar uncharged crime in the past. These were clear appeals to Mr. Caceres's alleged propensity for sexual abuse to resolve the com-

plainant's credibility problems; they cannot have been harmless because they "fall[] within the core of what the *Molineux* rule prohibits and should therefore have been excluded." *Hudy,* 73 N.Y.2d at 56.

Further, the introduction of this testimony was not harmless because the testimony lacked any probative weight due to its lack of substantiation. *See Lewis*, 69 N.Y.2d at 324, 327-28 (unsubstantiated testimony that complainant's father forced her to have sex more than 10 times prior to the charged offense of incest was not probative because "a witness cannot buttress her own testimony by making further unsubstantiated accusations"). Since "the [complainant's] testimony was the principal evidence of the crime," it is not harmless to allow the complainant's alleged "cumulation of defendant's criminal acts [to] seriously prejudice [the] defendant in the eyes of the jury." *Id.* at 328.

As in *Lewis*, the "principal evidence of the crime" was the complainant's testimony, and the prosecution incorrectly argued that the unsubstantiated allegation bolstered her severely damaged credibility. *Id.* Therefore, the admission of the elevator incident testimony was not harmless because the jury might have used it "to resolve any doubts it otherwise might have had." *Hudy*, 73 N.Y.2d at 56.

* * *

In sum, by denying the defense's request for a mistrial, the trial court allowed the prosecution to, proverbially, have its cake and eat it too. The prosecution surprised the defense with the introduction of this highly prejudicial testimony. Then it

relied heavily on the testimony in summation, capitalizing on the defense's desire not to have the court highlight the damaging evidence by striking it and issuing a limiting instruction. Because the denial of the defense's motion for a mistrial violated Mr. Caceres' right to a fair trial, this Court must reverse his conviction. U.S. Const. Am. XIV; N.Y. Const. Art. I, § 6.

POINT II

JUAN CACERES WAS DEPRIVED OF A FAIR TRIAL WHEN THE PROSECUTION REPEATEDLY VOUCHED FOR THE CREDIBILITY OF ITS WITNESSES AND ATTEMPTED TO SHIFT THE BURDEN OF PROOF TO MR. CACERES IN SUMMATION.

During her summation, the prosecution repeatedly engaged in misconduct. She frequently vouched for the credibility of her witnesses and shifted the burden of proof to the defense. These egregious instances of prosecutorial misconduct violated Mr. Caceres' fundamental due process right to fair trial and require this Court's reversal of his conviction. U.S. Const. Am. XIV; N.Y. Const. Art. I, § 6.

A. The Prosecution Repeatedly Vouched for the Credibility of Its Witnesses During Summation, Depriving Mr. Caceres of a Fair Trial.

A defendant does not receive a fair trial when the prosecution vouches for the credibility of the prosecution's witnesses in summation. *People v. Collins*, 12 A.D.3d 33, 37 (1st Dep't 2004) (citing *People v. Bailey*, 58 N.Y.2d 272 (1983)) (reversing defendant's conviction in the interest of justice). This Court and others have repeatedly recognized that "the weight of the prestige of the office [of the District Attorney] and its image of disinterestedness may impose upon a defendant's right to an impartial trial." *Id.*; *see also People v. Ortiz*, 33 A.D.3d 432, 433 (1st Dep't 2006) (conviction reversed in the interest of justice where the "prosecutor repeatedly vouched for the credibility of . . . two key witnesses with approving references to their status as law enforcement officials"); *People v. Mehmood*, 112 A.D.3d 850, 853 (2d Dep't 2013) (prosecutor imper-

missibly vouched for the credibility of a witness based on his position as a law enforcement officer).

1. The Prosecution Impermissibly Argued That the Jury Could Only Acquit Mr. Caceres If It Believed Law Enforcement and the District Attorney's Office Were Framing Mr. Caceres.

This Court held in *Collins* that a prosecutor may not vouch for its witnesses by arguing that a defense could only be believed if all the prosecution witnesses were lying. *Id.* at 37-38. There, the prosecution had argued that the jury "could not believe defendant's testimony that he was merely doing the undercover a favor by helping him buy drugs unless it believed that all the undercovers were lying[.]" *Id.* The Court reversed the conviction, finding that such vouching for the prosecution witnesses' credibility "[e]xceed[ed] the bounds of legitimate advocacy." *Id.* at 37; *see also People v. Forbes*, 111 A.D.3d 1154, 1158-59 (3d Dep't 2013) (reversing where prosecutor's other misconduct "pale[d] in comparison to his statement that [to acquit], the jury…had to accept that there was a far-reaching conspiracy to convict defendant…," which included the prosecutor going along with every witness lying and required law enforcement witnesses to risk their careers); *People v. Jones*, 134 A.D.3d 1588, 1589 (4th Dep't 2015) (reversing in the interest of justice where prosecution improperly characterized the defense as being based on "a big conspiracy" against defendant by the prosecution and its witnesses); *People v. Roman*, 150 A.D.2d 252, 255 (1st Dep't 1989), *vacated by reason of appellant's death*, 153 A.D.2d 812 (1989) (prosecution improperly vouched for its

witness by asking "Why would he come into Court and frame Antonio Roman now?").

In summation here, the prosecutor made a similarly problematic argument. She told the jurors that they must decide whether there was a "big conspiracy between the Barrientos family, the police and the District Attorney's office to concoct charges against [Mr. Caceres]." T. 1035. And she further presented the jury with a dichotomy, saying that "it's either that everybody is out to frame him in order to get something in return or Juan Caceres, the defendant, actually committed these horrible crimes." T. 1035.

These arguments improperly vouched for the credibility of the prosecution's witnesses by implying that the jury should not believe that the District Attorney's office, together with the police, would get involved in a "conspiracy" to "frame" Mr. Caceres. T. 1035. The prosecution's statement was an appeal to the "prestige of the office," and its "perceived disinterestedness." *Collins*, 12 A.D.3d at 37-38; *see also Jones*, 134 A.D.3d at 1589. As they did in *Collins* and *Jones*, the prosecution's arguments here deprived Mr. Caceres of a fair trial, requiring reversal.

2. The Prosecutor Vouched for the Credibility of the Complainant Herself.

A prosecutor may not argue in summation that its witness must be telling the truth because the witness had not made additional or more extreme accusations. *Collins*, 12 A.D.3d at 37-38. In *Collins*, the prosecutor said that a police officer could not

be lying because he did not make it "rock solid and really frame this defendant," by "plant[ing] drugs on him" or "plant[ing] money." *Id.*; *see also Roman*, 150 A.D.2d at 256-57 (prosecution engaged in impermissible vouching for police officers by saying that if they had intended to frame the defendant "they could have come up with a gun; they could have put finger prints on it. They could have said he confessed. They could have gotten more witnesses").

In summation here, the prosecutor engaged in this misconduct. She argued that if the complainant really wanted to frame Mr. Caceres, then "why not make it sound like something you would hear at the movies," such as that Mr. Caceres "smacked" and "whipped" her, or that "he really did use the vibrators on her," or threaten to kill her or Oliver Barrientos. T. 1061-62. The prosecutor further argued that the complainant's testimony would have been *more* consistent if she were lying, because if the complainant "wanted to make up what was happening to her, she would have had an answer to everything." T. 1048. The prosecution also insisted that the complainant had no motive to lie when she stated that by testifying, "what [the complainant] gains is nothing. She gains absolutely nothing." T. 1043. *See also* T. 1045 (prosecutor saying, "[The complainant] has nothing to gain out of this. And so why did she come here?").

Likewise, it is well settled that a prosecutor may not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence. *Bailey*, 58 N.Y.2d at 277; *People v. McReynolds*, 175 A.D.2d 31, 32 (1st Dep't 1991) (reversing in the interest of justice where prosecutor offered personal assurance that the testimony

produced was credible); *People v. Pagan*, 2 A.D.3d 879, 880-81 (2d Dep't 2003) (reversing in the interest of justice where prosecutor repeatedly vouched for complainant's credibility, stating that he was "candid" and being "forthright"); *Forbes*, 111 A.D.3d at 1158 (holding that the prosecutor's comment "He's telling the truth" during summation was "clearly impermissible"). In this case, the prosecutor vouched directly for the complainant's credibility by insisting that the complainant must be telling the truth because "[i]n your gut, you know it's the truth. You know it in your head. You know it, you just know it." T. 1045. Just as a prosecutor cannot suggest to the jury that the complainant's testimony has a "ring of truth," it is impermissible for her to argue that a juror knows her testimony is true in their gut. *See People v. Griffin,* 125 A.D.3d 1509, 1510 (4th Dep't 2015) (reversing in the interest of justice because prosecutor repeatedly vouched for the complainant, including saying the [complainant's statements] have "the ring of truth"). These additional instances of misconduct further demonstrate that reversal is required.

B. The Prosecution Shifted the Burden of Proof Onto Mr. Caceres By Arguing That the Jury Could Acquit Only If It Found That the Prosecution Witnesses Engaged in a "Conspiracy" or an Attempt to "Frame" Him, and By Drawing Attention to the Fact That He Did Not Testify.

"[I]nstructing the jury that in order to find a defendant not guilty it must find that the prosecution witnesses lied is an impermissible attempt to shift the burden of proof from the People to the defendant." *Collins*, 12 A.D.3d at 38 (internal quotations omitted); *accord People v. Cantoni*, 140 A.D.3d 782, 786-87 (2d Dep't 2016) (holding that

it was "clearly improper and prejudicial" to argue or imply that jurors were required to believe the defense testimony, and believe that prosecution witnesses were lying, in order to form reasonable doubt, warranting reversal in the interest of justice); *People v. Porter*, 136 A.D.3d 1344, 1346-47 (4th Dep't 2016) (citing *People v. Morgan*, 75 A.D.3d 1050, 1053-54 (4th Dep't 2010)) (reversing in the interest of justice where prosecution shifted burden of proof by suggesting that an acquittal would require the jury to find a conspiracy by law enforcement). A prosecutor also may not "attempt to shift the burden by implying that the defendant has an obligation to introduce evidence." *Collins*, 12 A.D.3d at 38; *see also Ortiz*, 116 A.D.2d at 532 (impermissible for prosecution to imply that defendant had obligation to introduce evidence disproving complainant's allegations); *People v. Pugh*, 258 A.D.2d 674, 675 (2d Dep't 1999) (*citing People v. Bull*, 218 A.D.2d 663, 665 (2d Dep't 1995)) (prosecutor in summation improperly shifted burden of proof by arguing defendant had to prove that the complainant was mistaken and the investigating detective lied).

Here, the prosecution engaged in this same misconduct when it mischaracterized Mr. Caceres's defense as one of a "big conspiracy" to "frame" him. These statements deprived Mr. Caceres of a fair trial because they implied that Mr. Caceres had failed to meet an obligation to introduce evidence in his defense. *Collins*, 12 A.D.3d at 38. *See also* T. 1062-63 (prosecutor telling the jury to "think of some of the things you would expect hear if this were a conspiracy"). "The prosecutor erred...[by] implying that the jury was entitled to acquit only if it disbelieved the evidence actually present-

ed. The jury was, of course, also obligated to acquit if it found the evidence, even if completely reliable, insufficient to establish each element of the crimes charged beyond a reasonable doubt." *People v. Levy*, 202 A.D.2d 242, 245 (1st Dep't 1994).

Finally, the prosecutor also shifted the burden of proof when it sought to have the jury draw a negative inference from the fact that Mr. Caceres had not testified. *See People v. Harte*, 29 A.D.3d 475, 476 (1st Dep't 2006) (reversing where prosecutor "invited the jury to 'wonder why [defendant] chose not to testify'"). A prosecutor may not rely on the "implication [that the] defendant failed to testify and thereby deprived the jury of an opportunity to test [the defendant's] version of the story." *People v. LaDolce,* 196 A.D.2d 49, 54 (4th Dep't 1994). Here, the prosecutor stated during summation that "[A]lthough the defendant didn't testify, absolutely his right[,] [h]e did put on a case," after having previously implied that his case was not sufficient to prove the "conspiracy" against him. T. 1079. Although the prosecutor chose her words carefully, there can be no doubt that they were intended to draw negative attention to Mr. Caceres's exercise of his right not to testify. There was no other reason for the prosecutor to mention the fact that Mr. Caceres had not testified. This prosecutorial misconduct is yet another reason for reversal.

C. Due to the prosecutor's egregious errors in summation, this Court should reverse Mr. Caceres's conviction in the interest of justice.

The prosecution's numerous instances of misconduct in summation warrant reversal and a new trial. Although defense counsel did not object to these statements,

they were so egregious that this Court should reverse in the interest of justice, as courts have done many times before. *See McReynolds*, 175 A.D.2d at 32; *Ortiz*, 33 A.D.3d at 432; *Porter*, 136 A.D.3d at 1346; *Griffin*, 125 A.D.3d at 1510; *Jones*, 134 A.D.3d at 1589; *Forbes*, 111 A.D.3d at 1158 n.6; *Pagan*, 2 A.D.3d at 880. Reversal in the interest of justice is warranted where the misconduct "has caused such substantial prejudice to the defendant that he…has been denied due process of law." *Griffin*, 125 A.D.3d at 1511-12 (internal quotation omitted). Substantial prejudice occurs where, as here, persistent and repeated "improper remarks pass without objection or admonishment, and few curative instructions are given." *Id.* at 1512 (quoting *People v. Casanova*, 119 A.D.3d 976, 979 (3d Dep't 2014)).

There is also a risk of substantial prejudice where a different result might have been reached without the misconduct. *Id.* at 1511-12. As discussed below, Point III *infra*, the complainant had severe credibility issues. Here, the prosecution's vouching for the credibility of its witnesses and shifting the burden onto Mr. Caceres risked causing the jury to resolve its doubts about the complainant's testimony in favor of the prosecution. Thus, reversal in the interest of justice is warranted because these "numerous" and "compounded" instances of misconduct allowed the prosecution to escape the fundamental burden of proving Mr. Caceres's guilt beyond a reasonable doubt. *Porter*, 136 A.D.3d at 1346.

POINT III

THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE THE COMPLAINANT'S TESTIMONY WAS INCONSISTENT, CONTRADICTORY, IMPLAUSIBLE, AND UNCORROBORATED AND THEREFORE WHOLLY INCREDIBLE.

Mr. Caceres's conviction turned entirely on the credibility of the complainant, and she was simply not credible. The complainant admitted that she had repeatedly made up serious allegations of abuse against both of her parents, indicating that she was perfectly capable of making up allegations of sexual abuse against her father. T. 140-41, 311-25. That all of her allegations in this case were false is illustrated by the fact that her testimony about the details of the last time her father had sex with her, which she claimed was in January 2010, was contradicted by medical and police records from when she first reported the allegations. Since Mr. Caceres' conviction for second-degree rape—the only felony of which he was convicted—was for having sex with the complainant in January 2010, *see* Indictment at 1, this Court should set aside that verdict as against the weight of the evidence and dismiss the indictment. Likewise, because all of the complainant's testimony allegations were not credible, it should set aside his conviction for endangering the welfare of a child.

This Court must review the weight of the evidence to determine whether, "based on all the credible evidence, a different finding would not have been unreasonable." *People v. Bleakley*, 69 N.Y.2d 490, 495 (1987); *see also* N.Y. Crim. Proc. Law § 470.15(5). "'[E]ven if all the elements and necessary findings are supported by some

credible evidence, the court must examine the evidence further.'" *People v. Cahill*, 2 N.Y.3d 14, 57-58 (2003) (quoting *Bleakley*, 69 N.Y.2d at 495). As the Court of Appeals has explained, "the weight of the evidence examination … requires[] the court to affirmatively review the record; independently assess all of the proof; substitute its own credibility determinations for those made by the jury in an appropriate case; determine whether the verdict was factually correct; and acquit a defendant if the court is not convinced that the jury was justified in finding that guilt was proven beyond a reasonable doubt." *People v. Delamota*, 18 N.Y.3d 107, 116-17 (2011) (internal citations omitted). When "the trier of fact has failed to give the evidence the weight it should be accorded, then the appellate court may set aside the verdict." *Bleakley*, 69 N.Y.2d at 495 (citation omitted).

A. The Second-Degree Rape Conviction was Against the Weight of the Evidence Because the Complainant's Testimony Contradicted the Claims She Made to Police and Hospital Staff in January 2010.

New York courts have found verdicts in rape cases against the weight of the evidence where the complainant gave testimony that was inconsistent with the account given at the time of the alleged offense. In *People v. Zephyrin*, 52 A.D.3d 543, 543-44 (2d Dep't 2008), the court found that the complainant's testimony alleging that her husband raped her was "contradictory and incredible" because it "was not consistent with what she told police officers on the day of the incident," and there was no other evidence to support the conviction.

Likewise, the only evidence of the alleged rape in this case was the complainant's contradictory testimony. Mr. Caceres was convicted of second-degree rape based on the allegation that "on or about January 9, 2010," he had sexual intercourse with the complainant, who was 14 years old at the time. T. 1113 (jury charge); Indictment at 1. But the complainant's testimony about her father's behavior in January 2010 contradicted what she told medical staff and the police right when she first reported the alleged abuse—in January 2010.

On the witness stand, the complainant claimed that her father last had sex with her on January 10, or January 11, 2010. T. 232. When asked why she knew it was one of these two dates, she said that she specifically remembered that it was a Saturday and a "week before Martin Luther King Day." T. 232. January 9, 2010 was a Saturday,[6] which is likely why that is the date in the indictment.

However, the complainant's testimony at trial (and presumably to the grand jury) was contradicted by what she told the staff at Metropolitan Hospital who examined her right after she first reported the abuse. According to a report dated January 20, 2010, she said that the "most recent episode [of abuse] was *just after* 1/1/10 and was exclusively vaginal intercourse; [patient] denies anal intercourse or any other forms of assault." People's Exh. 2, "Chart Review Print" dated June 28, 2010, Initial Consult OB/GYN MD Consult dated Jan. 19, 2010 at 1 (emphasis added). The same

[6] *See* "Calendar for January 2010," timeanddate.com, www.timeanddate.com/calendar/monthly.html?year=2010&month=1.

report reiterates that the complainant said Mr. Caceres last assaulted her a "few days after New Year[']s." *Id.* at 2. January 9, 10 or January 11 are significantly more than a "few days" after New Year's.

Additionally, the complainant must have related a date much closer to New Year's when Detective Hernandez was investigating her allegations. When asked by defense counsel whether he was aware that the complainant alleged that Mr. Caceres had sexual intercourse with her on January 4, 2010, the detective responded, "Yes. Right after New Year[']s." T. 72. Detective Hernandez interviewed the complainant on January 18, 2010—the day she reported the abuse—and listened to a forensic interview with the complainant at the Child Advocacy Center on January 19, 2010. T. 38-42. Therefore, his testimony further indicates that she had initially told officials in January 2010 that that the last time Mr. Caceres had sex with her was right after New Year's, likely on January 4.

A 14 year old can be expected to know the difference between "a few days after New Year's" (or January 4), and a week before Martin Luther King Day (or January 9, 10, or 11). In fact, the complainant testified at trial that she remembered in specific detail the final time that her father had sex with her. *See* T. 233-35 (testifying that Mr. Caceres begged her to have sex and she acquiesced only after he said it would be the last time). The discrepancy between her trial testimony and what she told officials right after she reported the abuse shows that her story was false.

In other words, the complainant's statements right after she reported the abuse differed significantly from those she made on the stand. These discrepancies cannot be explained away by lapses in memory. Rather, they reveal that the complainant's testimony—and particularly with regard to any sexual act in January 2010—is untrustworthy.

As a result, this Court should set aside Mr. Caceres' conviction for second-degree rape because "the jury failed to accord the evidence the weight it should have been accorded." *See People v. Gonzalez*, 84 A.D.3d 1400, 1401 (2d Dep't 2011) (reversing conviction for endangering the welfare of a child based on sexual abuse allegations because complainant was clearly found to be incredible and should have been acquitted on all charges).

B. The Endangering the Welfare of a Child Verdict Was Against the Weight of the Evidence Because There Were Numerous Reasons to Believe That the Complainant's Testimony Was Entirely Fabricated.

1. The Prosecution Expert's Examination Was Inconsistent with the Alleged Course of Sexual Abuse.

Courts have repeatedly reversed verdicts as against the weight of the evidence where there is no medical evidence to support incredible testimony from the complainant. In *People v. Franco,* 11 A.D.3d 710, 710-11 (2d Dep't 2004), the court held that the verdict was against the weight of the evidence where the complainant testified that she was "continually subjected to vaginal and anal intercourse," but "the medical evidence showed that she had an intact hymen with one discontinuity[.]" *Id.* The de-

fense expert also testified that "her physical condition was inconsistent with that of a young girl who had been repeatedly penetrated anally and vaginally by an adult male." *Id.* Another verdict convicting the defendant of sexual conduct against a child was held to be against the weight of the evidence where there was "no medical evidence or proof of social maladjustment to support the allegation that sexual acts occurred before the complainant was 11 years old[.]" *People v. Otway*, 71 A.D.3d 1052, 1053-55 (2d Dep't 2010); *see also People v. Madison*, 61 A.D.3d 777, 778-79 (2d Dep't 2009) (reversing rape verdict as against the weight of the evidence after noting that physical evidence corroborating complainant's account was absent).

Here, the prosecution expert, Dr. Jocelyn Brown, examined the complainant and found nothing to indicate that she had engaged weekly in sexual intercourse for years, as the complainant claimed. The complainant testified that sexual intercourse with Mr. Caceres was a "basic routine," occurring almost every weekend. T. 148, 167. But, as in *Franco*, 11 A.D.3d at 710-11, Dr. Brown found that her hymen had "no acute or chronic trauma." T. 492-93. The only notable finding was that the hymen had an "indentation at [the] 6:00 [position]." T. 492-94. This indentation was a "concavity or irregularity that doesn't go all the way down to the base of the hymen." T. 493. Dr. Brown testified that if a "blunt trauma" had occurred to the hymen, such as with penile penetration, typically one would find "*not just* an indentation but a complete cleft, [which] we refer to as a V cleft," which was not found. T. 493 (emphasis added). And here, also as in *Franco*, the defense expert, Dr. Gary Medows, testified that with re-

peated full penetration from sexual intercourse, the hymen would eventually rupture. T. 888-89; *see Franco*, 11 A.D.3d at 710-11.

Both experts agreed that it was not possible to know the cause of the apparent indentation in the complainant's hymen. Dr. Brown conceded that it could be "normal," and it was certainly not proof of penetrating trauma. T. 504. She also testified that "you may have concavity in the hymen of a teenager and that may be normal for her." T. 494. Likewise, Dr. Medows testified that the indentation could have been congenital. T. 861-62.

The only other physical symptom the complainant reported was vaginal bleeding on two occasions. T. 496-97. Dr. Medows testified that such bleeding can have many causes, including infections or fibroids. T. 865. Dr. Brown also questioned the complainant about emotional or behavioral systems. T. 486-87. The only finding she reported was that the complainant said that she was "not very hungry" at the time of the examination, T. 487, which could have been the result of any number of causes. The complainant also denied suicidal ideation, a symptom which, according to Dr. Brown, "is common in a child having sexual abuse[.]" T. 486-87.

The physical evidence here fails to corroborate the complainant's otherwise incredible account. The lack of a complete cleft or rupture to the hymen discredits the complainant's claim that she had had sexual intercourse "every weekend" since the summer before seventh grade. T. 145, 148. The lack of physical evidence that she was "continually subjected to vaginal…intercourse," combined with an absence of any

clear indication of behavioral or emotional symptoms that would result from years of sexual abuse further indicates that her account was false. *Franco*, 11 A.D.3d at 710-11; *Otway*, 71 A.D.3d at 1053-55.

2. The Complainant Had a Long History of Falsifying Abuse Allegations Against Her Parents.

This case also bears similarity to *Madison,* in which there was evidence of the complainant's attempts to have rape allegations falsified. *See Madison*, 61 A.D.3d at 778-79 (instant messenger conversations showed complainant attempted to convince another person to falsify allegations against defendant). This was not the first time that the complainant had invented detailed—but false—claims that her parents had severely harmed her, leading authorities to investigate. In 2002, she told staff at her school that injuries to her arms resulted from her parents beating her with a hammer, but it turned out that the complainant was actually biting herself. T. 311-13. At trial, the complainant admitted that she had "made the whole story up" about being beaten with a hammer. T. 315. She also admitted to falsifying allegations in 2003. T. 316. And, yet again, in 2009, she told a neighbor that her mother had broken her nose while trying to smother her with a pillow, but she admitted on the stand that the "pillow and the nose [allegation] was a lie and it didn't happen[.]" T. 140-41.

The complainant's mother also testified to other false allegations by the complainant, and contradicted the complainant's claims. Ms. Barrientos recalled a period

of regular visits from ACS to investigate "a little lie that [she] had hit [the complainant]" that the complainant told around 2006 or 2007.[7] T. 766.

The complainant's allegations caused ACS to investigate her family again in December 2009, when she claimed her parents drank excessively. T. 323. On the stand, the complainant denied specifically mentioning alcohol consumption, T. 323, but her mother testified that ACS had come to investigate whether she drank excessively. T. 741. The complainant admitted that when ACS came, she twice told investigators that there was no abuse or inappropriate behavior, including when her parents were not present with her and the investigator. T. 323-24. At trial, the complainant may have found herself caught in another lie: Ms. Barrientos also did not remember the incident the complainant described in which Ms. Barrientos forced Mr. Caceres to stop driving because he was too drunk. T. 325-26, 745-46.

Although the complainant attempted to explain the 2002 incident as the product of having "made mistakes" when she "little," T. 320, this pattern of lies against her parents spanned seven years and continued as late as December 2009—only a month before she accused Mr. Caceres of sexual abuse. T. 323. Defense counsel therefore rightly argued in summation that her allegations in this case were only the latest escalation in long history of false accusations, but in this instance, the situation

[7] Ms. Barrientos stated that the complainant told this lie when she was in fourth or fifth grade. T. 766. Since the complainant was in ninth grade at the time of the trial in 2011, this implies that the complainant claimed her mother hit her in about 2006 or 2007. T. 1, 82.

"got out of control so quickly, she couldn't retract it, so she became entrenched in this." T. 1002.

3. The Complainant's Testimony Featured Numerous Other Contradictions and Lacked Corroboration.

When the complainant's testimony is uncorroborated, self-contradictory, and inconsistent with other witnesses' testimony, courts have repeatedly set aside convictions for sexual abuse and sexual assault as against the weight of the evidence. *See People v. McMitchell*, 110 A.D.3d 923, 923-925 (2d Dep't 2013) (complainants and their mother gave "contradictory and inconsistent testimony," including about details regarding circumstances of alleged course of sexual abuse by defendant, leading court to find conviction to be against the weight of the evidence); *Zephyrin,* 52 A.D.3d at 534 (rape conviction was against the weight of the evidence where complainant's testimony contradicted testimony of police officers and her own earlier account); *Otway*, 71 A.D.2d at 1054-55 (conviction of course of sexual conduct against a child was against the weight of the evidence where "the conviction rested solely on the credibility of the complainant, and her testimony was inconsistent and not definite as to specific acts or times of the alleged sexual assaults"); *Madison*, 61 A.D.3d at 778 (noting that complainant's account not corroborated by other testimony or physical evidence and reversing as against the weight of the evidence); *Franco,* 11 A.D.3d at 710-11 ("Once the trial court discredited the complainant's testimony, the record was devoid of any evidence that the defendant made contact with the complainant 'for the purpose of grati-

fying sexual desire of either party.'"). Here, the complainant's testimony featured many inconsistencies and contradictions both within her own testimony and with that of other witnesses, and generally lacked corroboration.

The complainant claimed that Mr. Caceres had sex with her in places where they could have been easily discovered, but in the several years she claimed Mr. Caceres abused her, this never happened. The CECOMEX office on 110th Street, where the complainant claimed that Mr. Caceres had sex with her on multiple occasions, consisted of two rooms with no door separating them, and one could easily see the entire office upon entering. T. 336-37, 902. Volunteers often came and went from the office without notice to Mr. Caceres, and worked variable hours including on weekends, late at night, and early in the morning. T. 812-13, 818, 901, 921-23. Yet, the three witnesses who frequented the CECOMEX office testified that they saw nothing that indicated anything inappropriate was occurring between Mr. Caceres and the complainant. T. 794-95, 799, 828, 830, 903.

Likewise, in 2008, five people lived in the family's one-bedroom apartment, including Mr. Caceres, the complainant, Oliver Barrientos, Ms. Barrientos, and Usenia T. 88, 99-101, 403, 656. The complainant indicated the abuse occurred on a weekly basis, almost always in the living room. T. 104-05, 148, 156, 167. Yet Ms. Barrientos testified that she never noticed any signs of emotional disturbance in the complainant nor any tension between Mr. Caceres and the complainant. T. 735.

Oliver Barrientos testified that he once came home from work to find the apartment door locked with the chain, after which Mr. Caceres opened the door wearing a towel. T. 532. He said that Mr. Caceres and the complainant came out of the bedroom and left the apartment approximately 15-20 minutes later. T. 647-48, 660. But this occurrence did not indicate any sexual abuse. Mr. Caceres did not seem surprised to see Oliver, who was coming home from work at the normal time. T. 660. Mr. Caceres also shared the bedroom with the complainant and her mother at the time, so it made sense that he would be in the bedroom. T. 661. Oliver also testified that he did not see anything that occurred inside the bedroom, nor did he think much of seeing Mr. Caceres in a towel. T. 660-61.

Moreover, just as the complainant's testimony contradicted her statements from January 2010 about when Mr. Caceres last had sex with her, her testimony also contradicted other details she gave to police in January 2010 about the alleged prior course of abuse. The complainant first stated that Mr. Caceres used black NYC brand condoms during sex, which she said the CECOMEX office gave out for free, T. 151, 153-54, but then admitted she told the police that he purchased Trojan condoms from Duane Reade. T. 368.

The condoms in evidence the complainant claimed Mr. Caceres used were given to Det. Hernandez through a police interviewer by Ms. Barrientos, who found them in her own car. T. 61-62, 723-24. But they may have been left there by Ms. Barrientos herself, since she testified that she regularly sent condoms to her family in the

Dominican Republic. T. 725. The complainant also first claimed that the condoms were kept in black bag that was stored Mr. Caceres's car, T. 158-59, 345, but later insisted that the condoms were kept in a cabinet or a drawer in the apartment, T. 365-66. These inconsistencies reveal that she was making up details each time she was asked, especially because no black bag was ever found. T. 66-69 (NYPD did not recover any black bag after search warrants); T. 747 (complainant's mother never found any black bag in the car).

The complainant also testified that she never drank alcohol prior to the incident where she claimed her father got her and her sister drunk at a hotel, and that she never drank alcohol after it. T. 393. But defense counsel showed her a photo she had posted to her MySpace account with her holding a beer. T. 393-94. She then admitted that she asked her father if she could have it, and that she did drink from it. T. 394-95.

Furthermore, she testified that Mr. Caceres took nude pictures of her, and kept vibrators, pornography and lubrication in the black bag in the car. T. 182-83, 428-29, 444-45. But Detective Hernandez obtained search warrants for the CECOMEX office and Mr. Caceres's apartment and found no nude pictures of the complainant on any of the digital media that were seized, nor did he find any black bag with sexual paraphernalia. T. 46, 53-54, 66-69.

The Metropolitan Hospital report contradicted the complainant's testimony as well. According to the report, the last incident of sexual assault was sexual intercourse a "few days after New Year[']s." People's Exh. 2, "Chart Review Print" dated June 28,

2010, Initial Consult OB/GYN MD Consult dated Jan. 19, 2010 at 2. But the complainant testified that after Mr. Caceres had sex with her on January 10 or 11, he continued to touch her on the vagina "like almost every day," "whenever he could," until January 17, 2010. T. 236-37.

During her testimony, the complainant claimed to recall specific details about this persistent touching, none of which she reported to Metropolitan Hospital. For instance, she said that on January 17, in the CECOMEX office, Mr. Caceres touched her vagina by reaching over while she was sitting in a chair at a computer. T. 237-38. She said that was she angry that he had promised he would stop, but he had not, after which she told her mother about Mr. Caceres's abuse. T. 238-39. But the medical report contains a note saying that the complainant was seen on January 18 and that she claimed that "yesterday" [*i.e.*, on January 17] Mr. Caceres touched her while she was "in her pyjamas." People's Exh. 2, "Chart Review Print" dated Jan 18, 2010, ED MD Initial Note dated Jan. 18, 2010 at 1. Thus, her testimony and the medical note contain different sets of facts about the same event. Namely, she did not mention being in her pajamas on the witness stand (nor is it likely that she wore her pajamas to the CECOMEX office).

4. Other Evidence Regarding Files Related to Incest Pornography Searches and an Email Mr. Caceres Allegedly Sent to the Complainant Lacks Connection to Mr. Caceres and Must Be Disregarded.

a. Incest Pornography Search Files Could Have Resulted From Eloy Ruiz's Long-Term, Habitual Use of the Office Computers for Pornography.

Although the prosecution entered a forensic report listing files that indicated the CECOMEX office computers had been used to search for incest pornography, these files likely came from another volunteer, Eloy Ruiz. T. 822-24. Mr. Ruiz had been repeatedly caught using the CECOMEX computers to view pornography "whenever he would come in early in the morning." T. 822. Mr. Ruiz had been using the computers for pornography since at least 2008, and he worked at CECOMEX until September 2010, overlapping with the period that the complainant claimed Mr. Caceres sexually abused her by several years. T. 825.

Tellingly, the majority of the files had no dates or times associated with them. *See* People's Exh. 47, 49. The files that did have dates or times were consistent with Mr. Ruiz's use of the computers. *See* People's Exh. 49 (dates and times associated with files occurring late at night or early in the morning, and largely between 2007 and 2009); T. 825 (Mr. Ruiz's pornography habit was at its height in 2008). There was also nothing to indicate who was actually using the computers when the files were created. T. 972 (forensic analyst testifying that it was not possible to tell how many different people had access to various user accounts on CECOMEX computers).

Although the search files showed specific references to incest, the volunteer Maria Sanchez observed that Mr. Ruiz was interested in "every kind of different pornography," including perverse or extreme kinds of pornography, such as that which featured "horses." T. 833. Furthermore, the forensic analyst may have deleted anything that could have distinguished between users. Mr. Forames admitted that a larger list of keywords had been generated as a result of the search, and he, in conjunction with the prosecution and his supervisors, deleted what they did not consider "relevant." T. 981-82. Thus, the list of files in evidence may have been tailored to appear as though it resulted from someone specifically interested in incest, when it actually reflects only a subset of Mr. Ruiz's interest in "every different kind of pornography." T. 833.

The complainant also claimed that Mr. Caceres sent her an email relating a story about father-daughter incest, but there was no evidence that the email address belonged to Mr. Caceres. The sender email address was soloparejas@msn.com. *See* People's Exh 30. The name of the sender, and the name registered with this address was "Pepe y Karolina." People's Exh. 30; T. 632. The phone number registered with the account was not Mr. Caceres's. *See* T. 620 (phone number registered with account was 917-912-3877); T. 249 (Mr. Caceres's phone number is 347-397-0366). The MSN.com account registration information listed the subscriber's birthdate as August 3, 1969. T. 632. Mr. Caceres's date of birth is April 13, 1967. Crim. Compl. at 2. Nothing showed that Mr. Caceres had ever used the address. T. 956 (some references to email address

appeared on CECOMEX computers but forensic analyst could not determine what they meant).

Significantly, the email and its subject line were entirely in English. *See* People's Exh. 30. Yet, the complainant testified that Mr. Caceres conversed with her only in Spanish, and speaks only a "little broken English." T. 340.

Second, the complainant claimed that she received the email "like, early afternoon, somewhere around, after like midday." T. 433. She said Mr. Caceres told her he was sending her an email, and then he sent it. T. 433. The email then "popped up right then and there," and she "read it right there, when the email came." T. 433. Yet the email indicated that it was received in the middle of the night, at 12:56 AM. *See* People's Exh. 30.[8]

In sum, this Court should deem unpersuasive the evidence relating to the CECOMEX computers and the email that the complainant claimed she received from Mr. Caceres. While they were highly prejudicial, they were not probative because the

[8] There was some confusion introduced by the prosecution as to whether 12:56 AM really meant 5:56 AM or 8:56 PM the previous day, since other printouts of information related to the time the email was received showed the timestamp as "5:56:00 GMT -500." *See* T. 1016 (defense counsel explaining timestamp, refuting the prosecution's earlier suggestion that the email was received around 9 PM). GMT refers to Greenwich Mean Time. *See* "UTC – The World's Time Standard", timeanddate.com, www.timeanddate.com/time/aboututc.html. An email sent from the Eastern Standard Time Zone (EST) will have the time zone listed as "-0500" in the header of the email, which indicates that Eastern Time is 5 hours behind Greenwich Mean Time. *See* "EST – Eastern Standard Time / Eastern Time (Standard Time)", www.timeanddate.com/time/zones/est. 5:56 AM Greenwich Mean Time would therefore be 12:56 AM Eastern Standard Time. Accordingly, a screenshot of the complainant's email account and the printout of the email itself shows that the email was received at 12:56 AM. *See* People's Exhs. 30, 45E, 45F. In any case, the time stamp did not show that the email was received in the "early afternoon" or "right after midday" as the complainant claimed. T. 433.

prosecution did not show any link to Mr. Caceres. Indeed, they could only have misdirected the jury from the complainant's severe lack of credibility.

As a final note, the jury acquitted Mr. Caceres of predatory sexual assault on the basis of the same incredible testimony that supported his charges for second-degree rape and endangering the welfare of a child. Courts have repeatedly found verdicts to be against the weight of the evidence when the same incredible testimony supporting the charges the jury acquitted on were the sole basis for the charges the jury convicted on. *See People v. Fisher,* 104 A.D.3d 868, 869-70 (2d Dep't 2013) ("Once the jury discredited the complainant's testimony with respect to the charges of rape and criminal sexual act, the record was devoid of any evidence that the defendant 'knowingly act[ed] in a manner likely to be injurious to the physical, mental or moral welfare of a child…."); *Otway*, 71 A.D.3d at 1053-55 (jury had acquitted defendant on numerous related counts of child sexual abuse, indicating that the complainant was wholly incredible); *Gonzalez*, 84 A.D.3d at 1401 (verdict was against the weight of the evidence on several counts where same incredible testimony supported acquittal on three other counts); *Franco*, 11 A.D.3d at 710 (guilty verdict against the weight of the evidence where "[i]t [was] clear that the trial court acquitted the defendant of the nine remaining sex offenses based on the credibility of the witnesses").

The verdicts convicting Mr. Caceres of second-degree rape and endangering the welfare of a child were therefore against the weight of the evidence. This Court should set aside these verdicts and dismiss those charges of the indictment.

CONCLUSION

For the foregoing reasons, this Court must reverse Mr. Caceres's conviction and order a new trial, or in the alternative, this Court should set aside the verdicts for second-degree rape and endangering the welfare of a child as against the weight of the evidence and dismiss those charges of the indictment.

Dated: New York, New York
June 29, 2018

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ADDENDA

Supreme Court of the State of New York
Appellate Division: First Department

The People of the State of New York, Respondent, — against — Juan Caceres, Defendant-Appellant.	Ind. No. 473-2010

Statement Pursuant to Rule 5531

1. The indictment number in the court below was 473-2010.
2. The full names of the original parties were "The People of the State of New York" against "Juan Caceres."
3. This action was commenced in Supreme Court, New York County.
4. This action was commenced by the filing of an indictment.
5. This is an appeal from a judgment of conviction rendered on April 13, 2011, by Supreme Court, New York County. Mr. Caceres was convicted after trial of one count of rape in the second degree, N.Y. Penal Law § 130.30(1), one count of endangering the welfare of a child, N.Y. Penal Law § 260.10(1), and one count of criminal contempt in the second degree, N.Y. Penal Law § 215.50(3). Mr. Caceres was sentenced to seven years' imprisonment and ten years' post-release supervision on the rape count and one year on the remaining counts, all to be served concurrently. Justice Carol Berkman presided over the pre-trial hearing. Justice Bruce Allen presided over the trial and sentencing. Timely notice of appeal was filed. No stay of execution has been sought. Mr. Caceres has been released following the completion of his sentence of imprisonment.
6. Mr. Caceres has been granted leave to appeal as a poor person on the original record and typewritten briefs.

Supreme Court of the State of New York
Appellate Division: First Department

The People of the State of New York, Respondent, — against — Juan Caceres, Defendant-Appellant.	Ind. No. 473-2010

Printing Specification Statement

1. The following statement is made in accordance with First Department Rule 600.10.

2. Juan Caceres's brief was prepared with Microsoft Word 2010 with Garamond typeface 14 point in the body and 12 point in the footnotes.

3. The text of the brief has a word count of 17,144, as calculated by the processing system and is 67 pages.