SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 6, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Moskowitz, DeGrasse, Freedman, JJ.

9123 The People of the State of New York, Respondent, Ind. 4974/80

-against-

Clifford Jones,
Defendant-Appellant.
- - - - -
The Innocence Project,
Amicus Curiae.

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Cleary Gottlieb Steen & Hamilton LLP, New York (Ryan T. Becker of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David M. Cohn of counsel), for respondent.

Weil Gotshal & Manges LLP, New York (Howard B. Comet of counsel), for amicus curiae.

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Order, Supreme Court, New York County (James A. Yates, J.), entered on or about October 19, 2010, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction of the same court (Alfred Kleiman, J.), rendered July 6, 1981, affirmed.

Defendant has not established that the newly discovered DNA evidence "is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to [him]" (CPL 440.10[1][g]). Defendant

was convicted of the murder of one person and the rape of another person during a 1980 incident. Thirty years later, mitochondrial DNA testing of 3 of 18 hairs retrieved from a hat left at the scene by the perpetrator, and of fingernail scrapings from the murder victim, indicated that neither the tested hairs nor the fingernail scrapings were defendant's. We find, however, that a new trial would not be warranted even if such evidence were accepted as proof that the hairs and scrapings originated from a person or persons other than defendant.

The sole identifying witness was the rape victim. Although defendant points out a few weaknesses in the People's case (such as the victim's drug use), her lineup and in-court identifications of defendant were unusually strong and reliable. She observed defendant and conversed with him for about 15 minutes under good lighting conditions, at a time when defendant had not yet displayed a weapon and the situation had not yet become stressful. She provided a detailed description that included the condition of defendant's teeth (one tooth, she testified, was "chipped and he had a gap between his teeth"). At the close of the People's case, defendant was directed, over objection, to display his teeth to the jury. Tellingly, defense counsel made no mention of the teeth during his summation, but the prosecutor, in his closing argument, highlighted this point,

without objection from the defense.[1] A police report in the record, dated June 2, 1980 (the date of the crime), states that the victim described the perpetrator as having "spaces between teeth [and] one tooth chipped in front."

Given the strength of the evidence, the two portions of the DNA evidence, even when viewed collectively, would not have created the probability of a more favorable verdict. There are multiple explanations for the presence of hairs other than defendant's on the hat found at the scene. Most obviously, the hairs could have belonged to a person other than the perpetrator who wore the hat before the incident. In fact, given that the laboratory that tested the hairs on defendant's behalf noted in its report that the hairs were not all of the same color, and that only 8 of the 18 hairs were curled, there is good reason to believe that the hairs did not all come from the same individual.[2] Moreover, as the People point out, it is not clear

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[1]The prosecutor argued to the jury:

> "She described him down to his teeth. It's in the record; spaces between his teeth and a chipped tooth.
>
> "Well, the defendant stood up before you this morning and he opened his mouth and you saw, I submit, the spaces between his teeth. This is part of the record; it's evidence like any other evidence."

[2]In addition, one nonhuman (probably feline) hair was found on the hat.

from the 1981 laboratory report's ambiguous description of certain hairs (including those tested by defendant) as being from "under [the] hat band" that the hairs came from inside the hat (and, thus, from a person who wore it); indeed, the same report described other hairs (not tested by defendant) as being from "inside" the hat. In this regard, the hat was given to the police after the crimes by a civilian who had handled it. As for the fingernail scrapings, the trial evidence did not establish that the murder victim scratched his assailant, and there were potential alternative sources for the DNA material under his fingernails.

Defendant urges that a hearing was required to resolve the parties' factual disputes concerning the reliability of the mitochondrial DNA evidence. In deciding a CPL 440.10 motion, a hearing to develop additional facts is not "invariably necessary"; rather, CPL 440.30 contemplates that a court will make an initial determination on the written submissions whether the motion can be decided without a hearing (*People v Satterfield*, 66 NY2d 796, 799 [1985]). Here, we find that even if the reliability of the evidence is assumed, defendant still did not establish a legal basis for ordering a new trial. Accordingly, the factual disputes in this case were not material, and defendant was not prejudiced by the absence of a hearing.

In taking the position that the motion should not have been denied without a hearing, the dissent relies on the People's failure to submit in admissible form their expert analysis impeaching the integrity of the testing procedures performed on the hairs by the commercial laboratory defendant engaged and the conclusiveness of the results of that testing.[3] In so doing, the dissent simply assumes that the results of the testing of the hairs from the hat proffered by defendant, taken at face value, would have "create[d] a probability that . . . the verdict would have been more favorable to the defendant" had those results been placed in evidence at trial (CPL 440.10[1][g]). As previously noted, however, the test results, assuming their accuracy for present purposes, prove, at most, only that 3 of the 18 hairs retrieved from the hat that the perpetrator wore while committing the crimes came from an individual other than defendant. Needless to say, even if the testing results are taken at face value (as we must do at this juncture), this is far from conclusively exculpatory evidence.

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[3]While the People's objections to the testing results proffered by defendant (to which defendant offered no expert rebuttal) would have sufficed to support summary denial of the motion had they been presented by way of an expert affidavit, the dissent is correct to the extent it argues that the People's expert analysis cannot provide the basis for denying the motion until it is presented in admissible form.

Contrary to the dissent's deprecation of the rape victim's identification of defendant, this was a very strong eyewitness identification case. The victim interacted with the perpetrator for 15 minutes in a transaction that was initially nonviolent and consensual, and she observed the perpetrator's face at close quarters in broad daylight. Any discrepancies in the victim's descriptions of the perpetrator (for example, concerning his hairstyle or skin tone) were of the kind that ordinarily arise in criminal trials; the defense argued these points to the jury, which found them unpersuasive. Moreover, far from lacking corroboration, the victim's identification of defendant was corroborated by the appearance of his teeth when displayed at trial. Viewing the evidence in the light most favorable to the People, we must infer from the jury's verdict that the appearance of defendant's teeth was consistent with the descriptions the victim gave to the police and in her testimony.[4]

Given the strength of the evidence against defendant, there is no reason to believe that the results of testing 3 strands of hair (out of 18 retrieved from the hat worn by the perpetrator) would have resulted in a verdict more favorable to defendant had

[4]Notably, defendant was directed to display his teeth to the jury only after the court itself first viewed defendant's teeth.

those results been received into evidence at trial.[5] Again, since the source of the hairs could have been anyone who wore or handled the hat before the crimes were committed, or a person who handled the hat thereafter (including the civilian who turned it over to the police), the perpetrator was not necessarily the source of the hairs that were tested (*see Steward v Grace*, 362 F Supp 2d 608, 622 [ED Pa 2005] [defendant was not entitled to DNA testing of a hair sample from a jacket worn by the perpetrator during the commission of the crime because "the hair could have ended up on the jacket in numerous ways either before or after the murder"]; *People v Smith*, 245 AD2d 79 [1st Dept 1997] [even if DNA testing would show that semen from a rape kit was not defendant's, that result would not have affected the verdict because the victim testified that she had engaged in intercourse with her boyfriend shortly before the rape and that she did not know whether defendant ejaculated during the rape], *lv denied* 92 NY2d 86 [1998]). Moreover, to reiterate, 15 of the hairs from the hat were not tested — not due to any objection by the People, which provided all 18 hairs to defendant, but presumably by choice of his counsel — and there is no reason to assume that

[5]We note that the dissent does not rely on the results of the testing of the material retrieved from the fingernails of the murder victim.

defendant was not the source of some or all of the untested hairs (s*ee Brown v Mississippi*, 2011 WL 4386453, *5 [ND Miss 2011] [DNA testing did not exculpate petitioner where testing of several hairs "produced inconclusive results, and many others were not tested at all"]).[6]

Finally, the dissent overlooks the fact that CPL 440.10(1), by providing that the trial court "may" grant a motion to vacate a conviction based on newly discovered evidence, entrusts the determination of such a motion to the court's discretion (*see People v Samandarov*, 13 NY3d 433, 436 [2009] [Court of Appeals reviews decisions to deny hearings on CPL article 440 motion "for abuse of discretion"]). On this record, we find that the trial court providently exercised its discretion in summarily denying defendant's motion.

All concur except Moskowitz and Freedman, JJ. who dissent in a memorandum by Freedman, J. as follows:

[6]It is not clear why the dissent believes that Supreme Court should have ordered "further DNA testing." The People voluntarily provided defendant with all 18 hair samples from the hat.

FREEDMAN, J. (dissenting)

I respectfully dissent, because I believe the motion court should have granted defendant further DNA testing and held an evidentiary hearing before determining his motion under CPL 440.10. In 1981, defendant was convicted in connection with a heinous criminal event. He served three decades in prison before being paroled. He has consistently maintained his innocence and desire to clear his name. In 2010, new DNA tests indicated that defendant was not the source of hair samples that were obtained from the perpetrator's hat. This evidence, coupled with the fact that the People's case against defendant relied solely on a single eyewitness identification some four months after the incident, was, I believe, sufficient for the motion court to grant the application for further DNA testing and an evidentiary hearing.[1]

Defendant was convicted of raping a woman, R, and stabbing to death a man in an apartment building on the afternoon of June 2, 1980. R, a heroin addict who had taken the drug earlier that day and was supporting herself as a prostitute, had entered the building with the assailant to find a place to engage in sexual

[1]The Innocence Project, which provides legal and related services to indigent prisoners who may be exonerated by post-conviction DNA evidence, has filed a brief as amicus curiae on behalf of defendant.

activity. When police officers arrived at the crime scene after the assailant fled, R described him to the officers as a brown-complexioned male wearing a baseball cap, with an Afro hairstyle, a chipped tooth, and a gap between his teeth. The blood-covered cap that the assailant wore was recovered from the ground floor of the building.

R was treated at a hospital, where a rape kit consisting of fluids and other physical evidence was prepared. When police officers questioned R at the hospital, she at one point repeated that her assailant had an Afro hairstyle but at another point said he wore braids.

On September 24, 1980, R identified defendant from a photo array. On October 25, 1980, defendant voluntarily appeared at a precinct house and participated in a lineup. On that day, defendant wore neither an Afro hairstyle nor braids. R identified him at the lineup. At a pretrial suppression hearing, R acknowledged that she was under the influence of heroin when she made both identifications.

The trial commenced in April 1981. The People were not able to introduce any physical evidence connecting defendant with the rape or murder. In fact, none of the items introduced into evidence, which included the perpetrator's baseball cap, the bloody knife, blood scrapings, and the rape kit, connected

defendant with the crimes. The People relied solely on R's courtroom identification of defendant as the assailant. At the People's request, as part of its case, and over defense counsel's objection, defendant showed his teeth to the jury. The trial record does not include any description of defendant's teeth.

On April 15, 1981, the jury found defendant guilty of first-degree rape, second-degree murder, and first-degree attempted robbery, and in July 1981, he was sentenced to an indeterminate prison term of 18 years to life on the murder count and concurrent lesser sentences on the remaining counts. This Court affirmed, and the Court of Appeals denied leave to appeal (91 AD2d 874 [1st Dept 1982], *lv denied* 58 NY2d 1119 [1983]). He served nearly 30 years before being paroled.

In 2008, defendant moved under CPL 440.30(1-a)(a)(1) for post-conviction forensic DNA testing of any existing physical evidence. In response, the People searched their records and reported that the majority of the physical evidence, including the rape kit and the knife, had been destroyed. However, the People located and produced two pieces of physical evidence, namely, 18 fragments of human hair from the assailant's baseball cap and scrapings from under the murder victim's fingernails. Thereafter, the People permitted defendant to engage a private laboratory at his own expense to test three hair fragments using

mitchondrial DNA (mtDNA) analysis, a sophisticated identification technique that had been developed after defendant's trial and conviction. This process analyzes the genetic material found in the mitochondria within a subject's cells, which material is inherited directly from the subject's mother. Under ideal conditions, mtDNA testing can restrict the possible source of genetic material to one individual and his or her maternal ancestors.

The laboratory compared the three hair fragments from the baseball cap with a sample of defendant's hair. In a February 2010 report, the laboratory concluded that while all three fragments probably came from the same person, the hair could not have been defendant's.

In April 2010, defendant moved under CPL 440.10 for an order vacating his judgment of conviction and directing a new trial on the ground that the mtDNA test results constituted newly discovered exculpatory evidence that could with reasonable probability have changed the verdict. Defendant argued further that R's identification at trial was unreliable and outweighed by the mtDNA evidence.

Defendant also relied on the Office of the Chief Medical Examiner's new DNA test of the fingernail clippings from the murder victim. The test revealed that one clipping contained DNA

from the victim and at least one unidentified person, but none of defendant's DNA. Three other fingernail clippings indicated DNA that was consistent with the victim's, but the examiner could not draw any conclusion about the source of any other DNA.

In opposition, the People argued that the laboratory's mtDNA analysis was flawed and its results were inconclusive. The People stated in their papers that two experts had reviewed the laboratory's findings at the prosecutor's request and found that the laboratory's testing methodology deviated from accepted scientific protocols and the laboratory manipulated the data to reach a favorable conclusion for defendant. No affidavits by the experts were submitted.

In its October 2010 order, the motion court summarily denied the CPL 440.10 motion without conducting an evidentiary hearing, on the ground that defendant's new evidence probably would not have produced a different trial result (*see People v Salemi*, 309 NY 208, 216 [1955], *cert denied* 350 US 950 [1956]). Accepting the People's criticisms of the mtDNA tests, the court rejected the significance of the results, finding they had "limited evidentiary value" and failed to exonerate defendant. The court added that even if the results showed that the three tested hairs

were not defendant's, the hairs "[did] not constitute a common pool of evidence" because 15 other hairs from the hat were not tested. As to defendant's argument that the DNA evidence undermined R's credibility, the court noted that R had identified defendant more than once and given a description that, despite some discrepancies, "capture[d] his features in a general way."

Defendant's conviction was based solely on an identification by a single witness nearly four months after the event. That witness provided various inconsistent descriptions of the perpetrator immediately after the incident. Defense counsel explored some of the weaknesses of the identification at trial. However, the physical evidence did not connect defendant to the crimes, and another witness to the crime was unable to identify defendant as the perpetrator.

New York courts have recognized the unreliability or fallibility of eyewitness identification and the danger of allowing it to be the sole basis for a criminal conviction (*see e.g. People v LeGrand*, 8 NY3d 449 [2007]; *People v Abney*, 13 NY3d 251 [2009]; *People v Russell*, 99 AD3d 211, 215 [1st Dept 2012]; *State v Henderson*, 27 A3d 872 [NJ 2011]).

CPL 440.10(1)(g) provides for vacatur of a conviction based on newly discovered evidence "of such character as to create a

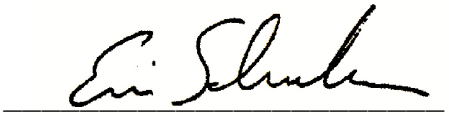
probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant." If the defendant produces post-conviction evidence favorable to him or her, CPL 440.30(5) requires the court to "conduct a hearing and make findings of fact essential to the determination [of the motion]." Only in limited circumstances where the defendant has failed to make a prima facie showing can the motion be summarily denied.

Here, defendant met his initial burden by offering sworn evidence of mtDNA analysis showing that the hairs from the perpetrator's hat were not his. The rebuttal offered by the People, in the form of an attorney's affirmation containing hearsay statements questioning the reliability of the mtDNA test results, is insufficient to discredit defendant's evidence. The question whether, as the People claim, the laboratory's procedures were flawed or its results were inconclusive is an issue of fact, and should not have been summarily determined. Rather, the parties should have been provided the opportunity to present expert testimony to explain or challenge mtDNA testing

and the laboratory's specific test procedures and results. Accepting defendant's proposal to have the remaining hairs tested would have produced extremely useful information for the court.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 6, 2013



DEPUTY CLERK

Gonzalez, P.J., Tom, Acosta, Richter, JJ.

9511 Elizabeth Rodriguez, Index 8786/07
Plaintiff-Respondent,

-against-

DRLD Development, Corp., et al.,
Defendants,

NCJ Development Inc.,
Defendant-Appellant.

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Kral Clerkin Redmond Ryan Perry & Van Etten, LLP, Melville (James V. Derenze of counsel), for appellant.

Raskin & Kremins LLP, New York (Andrew Metzar of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered April 13, 2012, which, to the extent appealed from, denied that branch of defendant NCJ Development Inc.'s motion for summary judgment that sought dismissal of plaintiff's causes of action for violations of Labor Law § 240(1) and § 241(6), and granted plaintiff's cross motion for partial summary judgment on her Labor Law § 240(1) claim, unanimously modified, on the law, to deny plaintiff's cross motion under Labor Law § 240(1), and otherwise affirmed, without costs.

Plaintiff was assigned to tape and polish installed sheetrock walls on the first floor of a construction project. She tripped on a metal cable, dislodging a pile of sheetrock

boards, which stood approximately eight feet high and were leaning against a wall, not in use. Plaintiff attempted to stop boards from falling with her hands and head, but she could not support their weight, and suffered injuries.

The Supreme Court correctly held that section 240(1) applies to this case even though the sheetrock that fell upon plaintiff was located on the same first-floor level as plaintiff (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]), and was not being hoisted or secured (*see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 98 AD3d 864, 865-866 [1st Dept 2012]). We find no inconsistency between plaintiff's deposition testimony and her averment that at the time the sheetrock fell on her, it was leaning against the wall and resting atop blocks of wood approximately two feet high, a sufficient height differential to implicate § 240(1)'s protections (*see Lelek v Verizon N.Y., Inc.*, 54 AD3d 583, 584 [1st Dept 2008]).

However, plaintiff was not entitled to summary judgment on her § 240(1) claim (*Wilinski*, 18 NY3d at 11). Here, as in *Wilinski*, there is a "potential 'causal connection between the object[s'] inadequately regulated descent and plaintiff's injury'" (*id.* quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 605 [2009]). Nevertheless, it cannot be determined, on the extant record, whether plaintiff's injuries were proximately

caused by the lack of a safety device of the kind required by Labor Law § 240(1) (*Wilinski*, at 11).

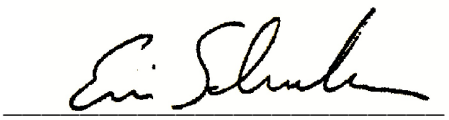
The court correctly determined that triable issues of fact also exist as to whether defendant violated Industrial Code (12 NYCRR) § 23-1.7(e)(2) and § 23-2.1(a)(1), which are proper predicates for plaintiff's Labor Law § 241(6) claim (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). As for § 23-1.7(e)(2), issues of fact exist as to whether the cable upon which plaintiff tripped immediately before the sheetrock fell on her was an inherent part of the construction of the building or "debris" (*id.*). Indeed, defendant asserted that it, as well as defendant Nautica Plumbing & Heating Corp., had cleaned the premises before plaintiff's employer performed the sheetrock work.

As for 12 NYCRR 23-2.1(a)(1), although defendant correctly argues that there has been no testimony that the sheetrock boards blocked a passageway, walkway, stairway or thoroughfare, the fact that the sheetrock fell on plaintiff raises an issue of fact as to whether the boards were stored in a "safe and orderly manner" (*id.*; *see Castillo v 3440 LLC*, 46 AD3d 382 [1st Dept 2007]).

We have considered defendant's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 6, 2013



DEPUTY CLERK

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Feinman, JJ.

10487N Delmo Walters, Index 302844/10
Plaintiff-Respondent,

-against-

Fafa Sallah, et al.,
Defendants-Appellants.

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Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for appellants.

Law Offices of Nelly Stotland & Associates, P.C., Forest Hills (Patrick J. McGrath of counsel), for respondent.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered April 12, 2012, which, insofar as appealed from as limited by the briefs, in this action for personal injuries resulting from a motor vehicle accident, denied defendants' motion to compel plaintiff to provide authorizations to obtain his medical records pertaining to his preexisting arthritis and for his disability records from the Social Security Administration, unanimously reversed, on the law and the facts, without costs, the motion granted, and the matter remanded for further proceedings in accordance with this decision.

Plaintiff seeks to recover damages for permanent injuries allegedly sustained to his knee and wrist in an automobile

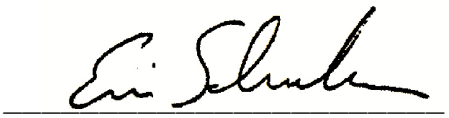
accident, which continue to be aggravated by sitting, walking, and bending. He also alleges he suffered a serious injury in that he was unable to perform substantially all his usual daily functions for at least 90 out of 180 days following the accident. Essentially, defendants seek medical records to determine whether there is any preexisting arthritis or medical disability, exclusive of the alleged injury to plaintiff's left knee and wrist, which would be the cause of plaintiff's inability to perform substantially all of his usual daily activities.

Defendants met their burden of showing that the requested records relating to plaintiff's arthritis and disability are relevant to a physical condition that plaintiff placed "in controversy" through his deposition testimony and bill of particulars, and which he also reported to defendants' examining chiropractor (*see Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]; *Pirone v Castro*, 82 AD3d 431 [1st Dept 2011]). However, because of the potentially tangential nature of the discovery involved, we remand to Supreme Court for a determination of the nature of

the arthritis and disability plaintiff suffers, and to exercise its discretion to limit the discovery to reasonable parameters, including as to time frame and relevant parts of the body.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 6, 2013



DEPUTY CLERK

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10230 Russian American Foundation, Inc., et al., Plaintiffs-Appellants, Index 151314/12

-against-

Daily News, L.P., et al., Defendants-Respondents.

Mintz & Gold LLP, New York (Steven G. Mintz of counsel), for appellants.

Matthew A. Leish, New York, for respondents.

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered December 17, 2012, which, in this action alleging, inter alia, libel, granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff Russian American Foundation, Inc. (RAF) is a nonprofit corporation that promotes Russian culture within the United States. RAF was founded by plaintiffs Marina Kovalyov, its president, and Rina Krishner, Kovalyov's daughter. Kovalyov is also the vice president of Firebird Productions, Inc., a consulting firm that specializes in public relations within the Russian-American community.

On October 2, 2011, defendant Daily News, L.P., published an article about a bribery scandal involving former State Senator Carl Kruger. The headline, as it appeared on the front page of

the print edition, read: "PAY UP! Sen. Kruger's a bribe-taking machine, feds charge.'[1] On the Daily News website, the article bore the headline: "State Sen. Carl Kruger's list of bribes for political favors continues to grow: FBI."

The two sub-headlines of the article in the print and digital editions read: "FBI documents show many payments to B'klyn pol's shell firms" and "Ch-ching, he's listening!" Between the sub-headlines was a photograph of Kovalyov with the caption: "Marina Kovalyov, of Firebird Productions, got $50,000 in taxpayer grants from Kruger in 2007 & 2008." The website edition of the article did not include Kovalyov's photograph or the caption; it showed a photograph of Kruger with the caption: "FBI records show that State Senator Carl Kruger accepted payment [from] various shell companies in exchange for political favors."

The article, written by defendant Robert Gearty, states that Kruger accepted a bribe from a land developer in Brooklyn.

> "[The land developer] is part of a growing parade of locals the FBI believes bribed Kruger to win his political largesse, newly released court papers show.
>
> "The group includes a Russian arts group seeking taxpayer money, a Diamond District dealer trying to open an adult day care center, and an insurance broker who would benefit from a bill Kruger sponsored mandating that all doctors buy malpractice insurance.

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[1]The headline in the digital edition read: "Pay up! City pol a bribe-taking machine, feds charge."

> "All made payments to shell companies affiliated with Kruger, the longtime Brooklyn Democrat who faces federal charges of exacting bribes to grant political favors, court papers said.
>
> " Kruger was indicted in March and is set for trial in January, charged with taking bribes to facilitate a hospital merger and to smooth the way for a developer.
>
> "As his case progresses, more evidence has emerged that paints a broader portrait of his malfeasance, prosecutors said.
>
> "Much of this shows up in an FBI affidavit that surfaced in court only last month."

The article then lists several "[e]xamples cited in the court papers," including that "Marina Kovalyov and her daughter, Rina Kirshner, run the Russian American Arts Foundation, which got the taxpayer money, and Firebird Productions, which made $199,000 in payments between 2006 and [2010]."

The Daily News website maintains a "Topics" page, whereby readers can search for content about particular persons or entities. On the Topics page for RAF, the following headline appeared under RAF's name: "Editorials: The bids are rigged." Below the headline, the page read: "When city government puts contracts or grants out to bid, New Yorkers have every right to expect that all qualified applicants will have the same chance of winning an award." A link ("Read more") brought the reader to an

editorial, originally published in the print edition on July 24, 2011, that discussed New York City Council Speaker Christine Quinn's "corrupt member-item system," whereby Quinn awarded discretionary funds to council members. According to the editorial, council member Domenic Recchia secured funds for RAF, among other entities, via the member-item system.

In March 2012, plaintiffs commenced this action against Gearty, the Daily News and Kevin Convey, the News's editor-in-chief, alleging eight libel causes of action and a cause of action for negligent hiring with respect to Convey. As to the latter, the complaint alleged that Convey had a proclivity for publishing falsehoods, as was demonstrated during his tenure as editor-in-chief of the Boston Herald, when the Supreme Court of Massachusetts found the Herald liable for publishing falsehoods.

Defendants moved to dismiss the complaint on the ground that all of the published material was absolutely privileged under Civil Rights Law § 74, which protects "the publication of a fair and true report of any judicial proceeding." Supreme Court granted the motion, and we affirm.

It is undisputed that all statements claimed to be libelous are part of a "report of [a] judicial proceeding" (Civil Rights Law §74) since the article reports on court papers, i.e., the FBI affidavit. The first and second causes of action, which allege

that the shell firm headline was libelous to Kovalyov, were correctly dismissed because plaintiffs failed to plead that the headline was false. Indeed, the FBI affidavit establishes that the headline is true, thus the statement is privileged under Civil Rights Law § 74 (*see Omansky v Penning*, 101 AD3d 514, 515 [1st Dept 2012]).

The third and fourth causes of action allege that the photograph caption was libelous to Kovalyov. However, although the caption could be seen to imply that Kovalyov received taxpayer grants for her personal use, rather than on RAF's behalf, "the language used [in an article] should not be dissected and analyzed with a lexicographer's precision" (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 68 [1979]). The challenged caption is "substantially accurate" (*see id.* at 67).

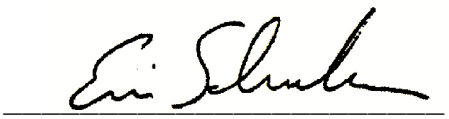
The fifth, sixth, and seventh causes of action allege that the article was libelous to all plaintiffs. However, the article is a quintessential example of the type of speech that Civil Rights Law § 74 was intended to protect (*see Holy Spirit Assn.*, 49 NY2d at 67*; Lacher v Engel*, 33 AD3d 10, 17 [1st Dept 2006] ["Comments that essentially summarize or restate the allegations of a pleading filed in an action are the type of statements that fall within section 74's privilege"]).

The eighth cause of action, allegedly libelous to RAF and premised on the "bids are rigged" headline on the website topics page, was correctly dismissed because the headline does not refer to RAF and could not be deemed to be about RAF (*see Julian v American Bus. Consultants,* 2 NY2d 1, 17 [1956]). Reading the headline within the context of the editorial as a whole confirms that the challenged statement is not about RAF (*see Aronson v Wiersma*, 65 NY2d 592, 594 [1985]).

In view of the foregoing, plaintiffs have failed to allege that they have suffered any harm, and therefore the ninth cause of action, for negligent hiring, cannot stand (*see Sheila C. v Povich*, 11 AD3d 120, 129 [1st Dept 2004]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 6, 2013



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Acosta, J.P., Saxe, Renwick, Richter, Clark, JJ.

10375 The People of the State of New York, Ind. 4514/10
Respondent,

-against-

Eddie Moise,
Defendant-Appellant.

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Cardozo Criminal Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow of counsel), for respondent.

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered May 17, 2011, as amended June 7, 2011, reversed, on the law, and the matter remanded for a new trial.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
David B. Saxe
Dianne T. Renwick
Rosalyn H. Richter
Darcel D. Clark, JJ.

10375
Ind. 4514/10

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The People of the State of New York,
Respondent,

-against-

Eddie Moise,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered May 17, 2011, as amended June 7, 2011, convicting him, after a jury trial, of criminal possession of a weapon in the second and third degrees, criminal sale of a firearm in the third degree and unlawful possession of ammunition, and imposing sentence.

Cardozo Criminal Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow and Sheryl Feldman of counsel), for respondent.

RICHTER, J.

Defendant's conviction in this case arises out of the sale of a gun and ammunition to an undercover police officer. Defendant was not apprehended immediately after the sale, but rather was arrested about a week later. Defendant's identity was confirmed by the undercover based on his review of a photograph. Prior to the *Wade* hearing, the People submitted an ex parte affirmation in support of their motion for a protective order pursuant to CPL 240.50 and 240.90(3), and we have reviewed that affirmation on appeal. Without disclosing the details of that sealed affirmation, we note the People contended that disclosure of the full circumstances preceding the identification would reveal information about the identity of another individual, and create a substantial risk for non-law enforcement persons. The People further contended there was a risk of intimidation, and an adverse effect upon the legitimate needs of law enforcement, including safety of witnesses, if defendant was not excluded from the *Wade* hearing. They requested that the *Wade* hearing be conducted ex parte or, in the alternative, with defendant's attorney present on the condition that the attorney not be allowed to discuss the testimony or any corresponding *Rosario* material with defendant. In response to this request, the hearing court granted the motion and excluded defendant from the

Wade hearing. The court allowed defense counsel to be present and to participate, and at the conclusion of the hearing, denied the motion to suppress the undercover's identification. The hearing minutes were sealed.

In *People v Castillo* (80 NY2d 578 [1992], *cert denied* 507 US 1033 [1993]), the Court of Appeals recognized that there may be exceptional circumstances in which a defendant's right to participate in the proceeding may yield to the need to impose safety precautions. In *People v Frost* (100 NY2d 129 [2003]), the Court again upheld the trial court's right to conduct ex parte proceedings, emphasizing this should be done only in limited circumstances. Upon our review of the sealed record in this case, we are satisfied that exceptional circumstances justified defendant's exclusion from the courtroom during the *Wade* hearing, and that the exclusion did not violate defendant's constitutional or statutory right to be present. The People showed that defendant's presence would compromise the safety of an undercover officer and others, and undermine legitimate law enforcement objectives. The court's exclusion order was properly tailored to these concerns, and defendant's attorney was allowed to participate fully. Defendant's counsel offered no alternatives to the court's order, other than that defendant be present

throughout the *Wade* hearing.[1]

Although we find no error in the court's handling of the *Wade* hearing, we conclude defendant's right to a public trial was violated by the exclusion of defense counsel's colleague during the trial testimony of the undercover.[2] In *People v Echevarria* (21 NY3d 1 [2013]), the Court of Appeals emphasized that there is a presumption of openness and that violation of the right to a public trial is not subject to harmless error analysis. Thus, if there is a violation in this case, reversal is mandated.

Here, the court ruled that during the testimony of the undercover, the courtroom would be closed to the general public but that defendant's grandmother and his girlfriend could be present.[3] Defense counsel specifically told the court that associates from his office wanted to attend, and the court confirmed they could be present. During the undercover's testimony, an attorney from defense counsel's office tried to enter the courtroom, but he was barred by the court officer who had been stationed at the door. The officer went into the

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[1] On appeal, defendant does not offer any alternatives to his exclusion nor can we identify any.

[2] A supervisor of the prosecutor also was excluded.

[3] Defendant also asked about another relative, but there was no further discussion or a ruling about that person.

courtroom to speak with the sergeant inside, and when the officer returned, he told the attorney that the sergeant had confirmed the courtroom was closed and the lawyer could not enter.

The attorney's exclusion was brought to the court's attention the next day and defense counsel sought a mistrial. The court denied the request acknowledging the closure order had been violated, but stated the burden was on the excluded attorney to take some further action, such as calling the captain or the major, once the officer and the sergeant refused to admit him.

On appeal, the People neither dispute the closure order was violated nor do they argue the excluded attorney had no right to be in the courtroom. Instead, they maintain that the court officer's actions did not violate the right to a public trial because they were the result of a ministerial mistake in carrying out the court's order. The People's argument ignores the fact that it was the court's order that resulted in the closure in the first place. Having issued the order, the court was obligated to ensure that procedures were in place to ensure it was properly carried out. Moreover, the problem was compounded when the officer entered the courtroom, and the sergeant, who was in the courtroom, gave the same erroneous information. The officer and the sergeant usurped the judicial function, which resulted in an improper closure of the trial (*see People v Khalek*, 91 NY2d 838

[1997] [instruction by court officer's supervisor to deliberating jury was improper usurpation of judicial function and warranted reversal]; *People v Flores*, 282 AD2d 688 [2d Dept 2001] [court officer usurped judge's role by responding to juror question and not informing the court of the issue]).

The trial court improperly imposed a burden on the party seeking entry to take additional action, such as calling the captain or major in charge of the court, or calling the courtroom at the lunch recess. The attorney who sought entry had no such burden. Moreover, the attorney was not only denied entry by the officer, but a sergeant confirmed his exclusion. Having been denied admission twice, the attorney did not have to go searching for another higher level supervisor, nor was he obligated to call the court. In fact, it would have been entirely reasonable for the attorney to assume that the sergeant, who was in the courtroom, had consulted with the court and was acting on the court's behalf.

Furthermore, there is nothing in the appellate jurisprudence that requires the excluded person to pursue additional remedies before a defendant can claim a violation of the right to a public trial. "This right 'has long been regarded as a fundamental privilege of the defendant in a criminal prosecution'" (*People v Martin*, 16 NY3d 607, 611 [2011], quoting *People v Jelke*, 308 NY

56, 61 [1954]). The People argue that defendant's trial counsel never established that the trial strategy or conduct of the trial would have been different had counsel's colleague been admitted. Such an argument ignores the fact that there is a per se rule of reversal when the right to a public trial is violated, regardless of prejudice (*Martin*, 16 NY3d at 613). In *Martin*, the Court, in considering the prosecution's argument that the closing of the courtroom was so inconsequential that it was trivial, focused not on what the excluded person would have contributed, but rather looked at what was occurring in the courtroom during the time the defendant's father was excluded. Many of the cases in which courts have reversed based on the violation of the right to a public trial involve family members or individuals personally connected to the defendant, who obviously cannot contribute legal expertise to the defense case (*see e.g. People v Floyd*, 21 NY3d 892 [2013] [defendant's mother erroneously excluded from jury selection]; *People v Nazario*, 4 NY3d 70 [2005] [defendant's drug counselor improperly excluded from otherwise closed courtroom]; *People v Tejada*, 222 AD2d 353 [lst Dept 1995] [defendant's immediate family improperly excluded during undercover's testimony]).

Here, the undercover was the critical witness, and excluding defense counsel's colleague from the courtroom during this time

was not inconsequential. Furthermore, defense counsel explained that the excluded attorney was his officemate, with whom he had consulted about the case. The court also acknowledged that the excluded attorney had substantial experience in criminal defense cases. Although there would have been a problem even if the attorney had no such experience or connection to the case, the exclusion here was particularly troubling because defense counsel alerted the court that his colleagues might be coming, and the excluded attorney could have been of assistance to defense counsel during this critical phase of the trial (*see People v Morales*, 240 AD2d 595 [2d Dept 1997] [reversal required where defense counsel's supervisor excluded during undercover's testimony]).

People v Peterson (81 NY2d 824 [1993]), relied on by the People, does not warrant a different result than the one reached here. In *Peterson*, the brief closing was not noticed by any of the participants. In contrast, here, defense counsel brought the closing to the court's attention during the trial, and unlike *Peterson*, the record shows that an individual was actually excluded.

The remedy chosen by the court, to give the excluded attorney a copy of the transcript of the undercover's testimony, failed to cure the constitutional error. The appellate case law

does not discuss this as a possibility because it is the exclusion itself that violates the constitution. Courts are presumed to be open and while the trial court here had the right to partially close the courtroom during the undercover's testimony, it acknowledged it had no basis for excluding another lawyer from defense counsel's office. Contrary to the People's argument, the exclusion of defense counsel's colleague interfered with the very purpose of the requirement of a public trial. The requirement that the courtroom be open whenever possible and that closure orders be narrowly tailored "is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions" (*Waller v Georgia*, 467 US 39, 46 [1984] [internal quotation marks omitted]). Excluding defense counsel's experienced colleague, who was familiar with the case, deprived defendant of his right to have this person present to assess the undercover's testimony, and enabled the People to present the undercover's testimony without the salutary effects of extra scrutiny.

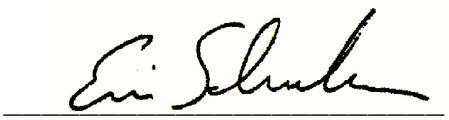
Accordingly, the judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered May 17, 2011, as amended June 7, 2011, convicting defendant, after a jury trial,

of criminal possession of a weapon in the second and third degrees, criminal sale of a firearm in the third degree and unlawful possession of ammunition, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years followed by five years postrelease supervision, should be reversed, on the law, and the matter remanded for a new trial.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 6, 2013



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