SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 25, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3357 Dennis T. Palmeri, Jr., Index 650501/13
Plaintiff-Appellant,

-against-

Wilkie Farr & Gallagher LLP,
Defendant-Respondent.

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Ansell Grimm & Aaron, P.C., New York (Joshua S. Bauchner of counsel), for appellant.

Lupkin & Associates PLLC, New York (Jonathan D. Lupkin of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered November 5, 2015, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny in part defendant's motion for summary judgment, and reinstate the first cause of action for breach of fiduciary duty, and otherwise affirmed, without costs.

In January 2001, nonparty Ramius Securities LLC hired plaintiff Dennis T. Palmeri, Jr. to serve as manager of its stock lending securities department. At some point in 2007, the

Financial Industry Regulatory Authority (FINRA)[1] began a regulatory investigation seeking information on the use of so-called finders in Ramius's stock lending business. In December 2007, after having received information from Ramius in response to its initial requests, FINRA served both Ramius and plaintiff with letter requests for additional information regarding transactions that had included a finder's fee.

In preparing his responses to the FINRA request, plaintiff conferred with Ramius's General Counsel and its Chief Operating Officer, both of whom were attorneys. Plaintiff alleged that the GC and the COO informed him they were "there as his counsel," allegedly leading plaintiff to believe that an attorney-client relationship was formed.

Plaintiff left Ramius's employ in 2008. In early 2009, plaintiff retained defendant Willkie Farr & Gallagher LLP to represent him in connection with the FINRA investigation. Before undertaking any representation of plaintiff, defendant informed plaintiff that Ramius, which was then a client of defendant, would not accept any situation in which defendant was adverse to Ramius. At the same time, defendant noted that it did not foresee any set of circumstances in which plaintiff would be

[1] The investigation began under the auspices of the National Association of Securities Dealers, the predecessor to FINRA.

adverse to Ramius. Defendant sent plaintiff an engagement letter dated January 14, 2009; the letter made no mention of any conflict of interest arising from defendant's representation of both plaintiff and Ramius, nor did it enumerate the rights plaintiff would have if he and Ramius were to become adverse. Approximately one month afterward, in connection with the same FINRA investigation, Ramius also retained defendant to represent it and certain of its current or former employees.

On or about January 27, 2009, defendant represented plaintiff during his investigative examination before FINRA. In June 2009, however, defendant informed plaintiff that defendant could no longer represent him because of a conflict of interest concerning defendant's concurrent representation of Ramius and its current and former employees, and unilaterally terminated its representation of him on June 25, 2009. By letter dated September 23, 2009 from defendant to FINRA, defendant appeared to shift to plaintiff all or most of the responsibility for any alleged violations of FINRA's rules.

In January 2010, Ramius entered into a letter of acceptance, waiver, and consent (AWC) with FINRA; defendant negotiated the letter on Ramius's behalf. The AWC absolved Ramius and its employees of further liability.

On or about December 1, 2010, FINRA commenced a

disciplinary proceeding against plaintiff, alleging that he had made false and misleading statements to Ramius's chief compliance officer during the FINRA investigation, thus causing Ramius to give inaccurate responses to FINRA.

The hearing on the disciplinary proceeding was held on June 28 and 29, 2011. In the months leading up to the hearing, defendant communicated with FINRA about matters related to the hearing, such as testimony to be given by Ramius employees. Moreover, at the hearing, defendant was present on behalf of Ramius and Ramius employees who testified.

By decision dated on or about November 18, 2011, the hearing panel dismissed the complaint, finding that FINRA had failed to prove by a preponderance of the evidence that plaintiff had violated FINRA rules. The panel also determined that certain of the Ramius employees who testified were not credible. On February 15, 2013, upon FINRA's appeal, the National Adjudicatory Council for FINRA upheld the hearing panel's dismissal of the FINRA complaint against plaintiff.

In the complaint in this action, dated February 15, 2013, plaintiff asserted causes of action against defendant for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, gross negligence, professional negligence, breach of contract, and breach of the implied covenant of good faith and fair

dealing. Plaintiff alleged that defendant, during its representation of Ramius in the FINRA investigation, shifted all responsibility for any alleged violations of FINRA's rules to him, suggesting that plaintiff undertook certain wrongful actions without Ramius's knowledge. Plaintiff further asserted that defendant disclosed to FINRA his internal, privileged communications with Ramius's counsel, thus causing FINRA to assert charges against Palmieri. Moreover, plaintiff alleged that defendant disclosed information that it had learned during the time it represented him. Plaintiff also alleged that the FINRA complaint was primarily based on privileged statements he had made to counsel at Ramius, and that these statements were also disclosed during the course of Willkie's representation of Ramius after it ceased representing him.

Defendant moved under CPLR 3212 to dismiss the complaint as time-barred and for failure to state a claim. Plaintiff cross-moved for summary judgment in his favor. In its decision, which it read into the record, the IAS court found that all six of plaintiff's claims were premised on the same operative facts and sought identical monetary damages. Accordingly, the IAS court "merged" plaintiff's claims for gross negligence, breach of contract and breach of the implied covenant of good faith and fair dealing into his legal malpractice claim, leaving for

consideration only that claim and claims based on breach of fiduciary duty.

The IAS court then dismissed both claims as untimely. Because plaintiff sought purely monetary damages, the court applied the three-year statute of limitations to the breach of fiduciary duty claim, rather than the six-year period. The court held that the claim was time-barred, since plaintiff filed it in February 2013, more than three years after defendant represented him from January through June 2009.

To begin, the motion court properly dismissed plaintiff's claims for gross negligence, breach of contract, and breach of the implied covenant of good faith and fair dealing as duplicative of his legal malpractice claim, given that they are all based on the same facts and seek the same relief (*Sun Graphics Corp. v Levy, Davis & Maher, LLP*, 94 AD3d 669 [1st Dept 2012]).

Plaintiff's claim for legal malpractice, in turn, is untimely. Claims for legal malpractice are subject to a three-year statute of limitations and accrue when the malpractice is committed, not when the client learns of it (*Lincoln Place, LLC v RVP Consulting, Inc.*, 70 AD3d 594 [1st Dept 2010], *lv denied* 15 NY3d 710 [2010]; CPLR 214[6]). Plaintiff's legal malpractice claim first accrued on or about June 25, 2009, when defendant

terminated its legal representation of him, but continued to represent Ramius in the ongoing FINRA investigation. He did not, however, file his claim until February 15, 2013, more than three years later.

In addition, the motion court correctly dismissed the claim for aiding and abetting a breach of fiduciary duty, as plaintiff is collaterally estopped from relitigating the question of whether an attorney-client relationship existed between him and his employer's in-house counsel. The identical issue was decided in the FINRA proceeding and plaintiff had a full and fair opportunity to litigate it before FINRA (*see Jeffreys v Griffin*, 1 NY3d 34, 39 [2003]; *Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 255 [2013]).

However, the IAS court should have permitted the breach of fiduciary duty claim to proceed. The IAS court correctly noted that the claim was subject to a three-year statute of limitations. The court was mistaken, however, in finding that the allegedly wrongful conduct ended on June 25, 2009, when defendant unilaterally terminated its representation of plaintiff. On the contrary, defendant's conduct extended through at least June 29, 2011, during which time it represented Ramius and its employees in their participation at plaintiff's FINRA disciplinary hearing.

Here, plaintiff alleges not only that defendant breached its fiduciary duty when it terminated its professional relationship with him, but also when, until at least June 2011, it acted in a manner directly adverse to his interests. Where there is a series of continuing wrongs, the continuing wrong doctrine tolls the limitation period until the date of the commission of the last wrongful act (*Harvey v Metropolitan Life Ins. Co.*, 34 AD3d 364 [1st Dept 2006]; *see also Ring v AXA Fin., Inc.*, 2008 NY Slip Op 30637[U] [Sup Ct, NY County 2008] [applying continuing violations doctrine to General Business Law § 349 claim where initial payments occurred outside statute of limitations but "the insurer [] continued to bill, and ... [plaintiff] ... continued to pay" within three years of filing suit]).

Here, plaintiff has presented evidence of a "continuing wrong," which is "deemed to have accrued on the date of the last wrongful act" (*Leonhard v United States*, 633 F2d 599, 613 [2d Cir. 1980], *cert denied* 451 US 908 [1981]; *Harvey*, 34 AD3d at 364). Indeed, the record contains evidence sufficient to create an issue of fact as to whether defendant breached its fiduciary obligations to plaintiff after June 2009 and well into June 2011 during its ongoing representation of the Ramius parties.

For example, as noted, the record contains evidence that in the early portion of 2011, defendant helped Ramius identify

witnesses who would testify against plaintiff at his FINRA disciplinary hearing. Similarly, defendant was present on behalf of Ramius and Ramius employees who testified at plaintiff's FINRA hearing on June 28 through 29, 2011 – a hearing at which the employees gave testimony that was generally adverse to plaintiff's interests. This evidence is sufficient for a fact-finder to determine that defendant breached its duty of loyalty to plaintiff, a former client (*see Cooke v Laidlaw, Adams & Peck*, 126 AD2d 453, 456 [1st Dept 1987] [ethical standards applying to the practice of law impose a continuing obligation upon lawyers to refuse employment in matters adversely affecting a client's interests, even if the client is a former client]).

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

ENTERED: JULY 25, 2017

CLERK

Friedman, J.P., Sweeny, Renwick, Manzanet-Daniels, Andrias, JJ.

3517 The People of the State of New York, Ind 4964/11
Respondent,

-against-

Devontae McUllin,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

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Appeal from judgment, Supreme Court, New York County (Thomas Farber, J.), rendered January 22, 2013, convicting defendant, upon his plea of guilty, of burglary in the first degree (two counts) and attempted rape in the first degree, and sentencing him to concurrent terms of 13 years, unanimously held in abeyance, and the matter remitted for a *Mapp/Dunaway* hearing to determine whether defendant was arrested without probable cause and, if so, what evidence, if any, should be suppressed on the ground that it was obtained as the result of such unlawful arrest.

Defendant was indicted on the charges to which he ultimately pleaded guilty based on an incident that occurred at approximately 11:30 a.m. on October 11, 2011, at an apartment in a building on West 130th Street in Manhattan. According to the

felony complaint, which was signed by a police detective at about 3:50 p.m. on October 13, 2011, the victim told the police that she had been attacked by a knife-wielding "unknown male" she had discovered in her bedroom; the attacker had fled when another person tried to open the door to the room. While the victim herself apparently was unable to tie defendant to the crime, the complaint states that another informant told the police — at an unspecified time — that he or she had

> "observed the defendant i) standing on the fire escape of the above-stated location [of the crime], ii) remove a knife from his backpack and place said knife in his pants, and iii) climb through a window of the above-stated apartment."

According to the complaint, a knife was recovered from the crime scene.

The People's voluntary disclosure form (VDF) states that defendant was arrested at 11:22 a.m. on October 13, 2011, and that he was identified by an unnamed witness as a suspect through a lineup conducted at 11:25 a.m. on October 13, 2011 (i.e., three minutes after the arrest).[1] The VDF states that both the arrest and the identification took place at 221 East 123rd Street, which is the address of a police station, and identifies two items of physical evidence in the People's possession, a knife and

[1]The VDF also discloses that a second witness, also unnamed, failed to identify defendant from a lineup on October 13.

"pants." The VDF also discloses that, before the stated time of the arrest (11:22 a.m. on October 13), defendant had made two statements to a police detective, both at the same police station, the first statement at 11:30 p.m. on October 12 (the night before the arrest) and the second at 7:15 a.m. on October 13 (slightly more than four hours before the arrest). Accordingly, it appears from the VDF that defendant somehow arrived at the police station on the night of October 12, 2011, was questioned, presumably spent the night at the station, was questioned again early the next morning, and was formally placed under arrest around midday. The VDF provides no information about the manner in which defendant came to be present at the police station on the night of October 12, 2011, or the basis on which he came to the attention of the police on that day.[2]

In his omnibus motion seeking various forms of relief, defendant sought to suppress certain of the evidence against him — physical evidence described as "various clothing items recovered from the defendant," his statements to the police on October 12 and 13, and the lineup identification that had been

[2]Again, the complaint, which was signed on the afternoon of October 13, after defendant had been placed under arrest, does not state when the informant who allegedly observed defendant on the fire escape of the victim's apartment provided that information to the police.

obtained on October 13 — on various grounds, including, as relevant to this appeal, the claim that this evidence was obtained as the result of the police having unlawfully seized defendant's person at his home, without probable cause, on October 12, 2011, which seizure allegedly violated his constitutional rights (US Const, 4th, 14th Amends; NY Const, art I, § 12). In the alternative to an order suppressing all "tangible or testimonial fruits of his seizure and search by the police," defendant sought hearings on the issues raised, including a *Huntley* hearing on the voluntariness of his statements to the police and a *Wade* hearing on the propriety of the lineup identification.

In support of his contention that he had been unlawfully seized at his home on October 12, 2011, without probable cause, defendant, through his counsel, averred:

> "Based on the limited information available to the defense, the defendant states that he was in his home on October 12, 2011. The police arrived at his home, and entered without his permission, or the permission of any member of the household. On information and belief, the police did not possess a search and/or arrest warrant. At the time that he was seized, searched and arrested by the police[,] he had not been engaging in any unlawful or suspicious conduct, and was not in possession of any contraband. He was not acting in an illegal or suspicious manner prior to being detained by police authorities. He was seized, searched and arrested by the police without a warrant or probable cause."

Defendant stated that it was difficult for him to meet his statutory obligation under CPL 710.60(1) to provide sworn allegations of fact controverting the People's facts, because the People had not disclosed how he had been identified as a suspect before he was arrested. In this regard, defendant, through his counsel, further averred, in pertinent part (citations and paragraph numbers omitted):

> "The defendant is at a substantial informational disadvantage, in that he has not been informed by the prosecution as to the circumstances of his seizure by the police. The People have informed the defendant that he is accused of various crimes allegedly committed the day before [his alleged seizure], but have not informed the defendant which police officers seized the defendant . . . . The defendant challenges the reliability and basis of knowledge of any informant who may have transmitted any information to the police, on which the police officers may have relied in seizing, searching and arresting the defendant.
>
> "Also, the prosecution has not informed the defendant whether the seizing officers had relied upon any information provided by civilian witnesses, or, if so, the identity, reliability or basis of knowledge of any such witnesses, or the content of any such information or description of the defendant. No witness information is included in the People's Voluntary Disclosure Form, which is to date the only source of information about the People's evidence that has been provided to the defense.
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> "In the absence of the foregoing information or any other information regarding the circumstances of the defendant's initial seizure by the police, requiring probable cause, the defendant is not in a position to controvert with greater specificity the basis for his seizure by the police."

In their opposition to the omnibus motion, the People did not specifically address defendant's claim that he had been arrested at his home on October 12. Rather, the People averred in conclusory fashion that "defendant was arrested lawfully," and "controvert[ed] all allegations to the contrary," without offering any factual detail. Although defendant's claims about his arrest are seemingly at odds with the VDF's statement that he was arrested at a police station at 11:22 a.m. on October 13, the People concluded that he was not entitled to a hearing on the suppression motion "because the defendant's motion does not establish a factual dispute requiring a hearing." To the extent defendant's motion sought additional factual discovery, the People took the position that the VDF had already "provide[d] all of the pretrial discovery to which the defendant is entitled."

By order entered on or about January 10, 2012, Supreme Court, as relevant to this appeal, granted defendant a *Wade* hearing (on the propriety of the procedure by which the identification evidence had been obtained) and a *Huntley* hearing (on the voluntariness of his statements) but denied him any relief based on the claim that the police had lacked probable cause to arrest him. With respect to the branch of the motion seeking to suppress physical evidence as the fruit of an allegedly unlawful arrest (*see Mapp v Ohio*, 367 US 643 [1961]),

the court stated that "[d]efendant's factual allegation[s] are insufficient in light of the information contained on the felony [complaint] and in the VDF," but granted defendant "leave to renew upon appropriate papers within 14 days of the date of the date [sic] of this order or such further time as approved by the Court." With respect to the branch of the motion seeking to suppress defendant's statements as the fruit of an allegedly unlawful arrest (*see Dunaway v New York*, 442 US 200 [1979]), the court stated that "[d]efendant has failed to present factual allegations sufficient to support such relief," without granting leave to renew.

After the court rendered the foregoing decision, but before the *Huntley*/*Wade* hearing had been held, defendant pleaded guilty as indicated. He now appeals from the ensuing judgment of conviction, arguing principally that Supreme Court erred in summarily denying him a hearing on his motion to suppress evidence on the ground that it was obtained as the result of an arrest made without probable cause. For the reasons discussed below, we conclude that, given the limited information available to him, defendant made sufficient factual allegations to place at issue whether the People had probable cause to arrest him, whenever the arrest occurred. Accordingly, we hold the appeal in abeyance pending a hearing to determine that issue and, if it is

resolved in defendant's favor, the extent to which the People's evidence (including physical evidence, defendant's statements, and the lineup identification) should be suppressed as the fruit of an arrest made without probable cause.

Initially, we note that, to the extent defendant was otherwise entitled to a suppression hearing to determine whether he was arrested without probable cause, he did not forfeit that right by pleading guilty before a *Huntley*/*Wade* hearing was held or by failing to renew the *Mapp* branch of his motion. Under the circumstances of this case, neither the court's grant of a *Huntley*/*Wade* hearing nor its grant of leave to renew the *Mapp* motion negated the finality of the January 10, 2012, order, insofar as that order denied the branch of defendant's suppression motion based on the alleged illegality of his arrest (*see* CPL 710.70[2] ["An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty"]). The legality of the arrest depends upon whether, at the time of the arrest, the police had probable cause to believe that defendant committed the crime, a matter that would not have been at issue — and that defendant therefore would not have been entitled to explore — in the *Huntley*/*Wade* hearing, dealing with the voluntariness of

defendant's statements and the propriety of the lineup procedures used to identify him (*see People v Bryant*, 8 NY3d 530 [2007] [remitting the matter for a *Mapp/Dunaway* hearing, which had been erroneously summarily denied, although the defendant had pleaded guilty before availing himself of the *Huntley/Wade* hearing he had been granted]). As for the court's grant of leave to renew ("within 14 days") the branch of defendant's suppression motion seeking to suppress physical evidence based on the alleged illegality of the arrest (but not the branches of the motion seeking to suppress statements and identification on the same ground), defendant could not legitimately move for renewal without additional facts to plead (*see* CPL 710.40[4]; CPLR 2221[e]). Given that the People, in opposition, had taken the position that they had already provided defendant with all of the pretrial discovery to which he was entitled, and given further that the court's order did not direct the People to produce any additional information concerning the basis for the arrest, a renewal motion would have been futile, and defendant should not be penalized for not having made one. Accordingly, the January 10, 2012, order, insofar as it denied the branches of defendant's suppression motion challenging the legality of his arrest, was final, and is subject to review upon defendant's appeal from the ensuing conviction upon his guilty plea.

Having established that defendant is entitled to appellate review of this issue, we find that his factual allegations suffice to entitle him to a hearing on whether his arrest was supported by probable cause, in view of the dispute concerning the time and place of his arrest (i.e., whether it occurred at his home on October 12 or at the police station on October 13) and the People's failure to disclose "the factual predicate for [defendant's] arrest" (*Bryant*, 8 NY3d at 534), whenever it occurred, or to explain how defendant "came to be at the station house [where the People claim he was arrested] in the first place" (*People v Jones*, 73 AD3d 662, 663 [1st Dept 2010]).[3] Given the limited information available to him, "defendant's allegation that the police lacked probable cause or reasonable suspicion to believe that he was involved in any criminal activity was sufficient to warrant a hearing" (*id.*).

"Hearings [on suppression motions] are not automatic or generally available for the asking by boilerplate allegations" (*People v Mendoza*, 82 NY2d 415, 422 [1993]; *see* CPL 710.60[1] [suppression motion papers "must contain sworn allegations of

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[3]According to the VDF, defendant's lineup identification did not occur until three minutes *after* his arrest on October 13. Thus, even if defendant was not arrested until October 13 at the police station, as the People claim, the People have not yet disclosed the factual predicate for the arrest.

fact . . . supporting (the) grounds" of the motion]). The sufficiency of a defendant's factual allegations "should be evaluated by (1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information" (*id.* at 426). "In determining the sufficiency of a defendant's factual allegations, a court must read defendant's suppression motion in the context of the case. Further, '[w]hether a defendant has raised factual issues requiring a hearing can only be determined with reference to the People's contentions'" (*Bryant*, 8 NY3d at 533, quoting *Mendoza*, 82 NY2d at 427). In this regard, "a court must consider 'the degree to which the pleadings may reasonably be expected to be precise in view of the information available to defendant'" (*Bryant*, 8 NY3d at 534, quoting *Mendoza*, 82 NY2d at 429).

Under the foregoing principles, the Court of Appeals held in *Bryant* — in a case presenting a fact pattern similar to that presented here — that the People cannot refuse to disclose the factual predicate for an arrest and, at the same time, oppose holding a suppression hearing on the ground that the defendant has not alleged specific facts controverting the factual predicate for his arrest. The *Bryant* defendant claimed that he had been arrested at a particular time "in a building where he resides and away from where the crime took place," while the

People claimed that the defendant had been arrested several hours later, at a police station, "after he had been identified by their witness and had made statements to the police" (8 NY3d at 533). The Court held that the defendant was entitled to a *Mapp/Dunaway* hearing, noting that, as in this case, the time of the arrest was in dispute, with no basis alleged for the arrest "if [as he claimed] defendant was arrested before his arrival at the police station" (*id.* at 533-534). In this regard, the Court observed that "defendant . . . lacked critical information only the People could provide — i.e., the factual predicate for his arrest. Because defendant lacked this information, he was not in a position to allege facts disputing the basis for his arrest" (*id.* at 534). The Court concluded: "[D]efendant's lack of access to information precluded more specific factual allegations and created factual disputes, the resolution of which required a hearing" (*id.*).

This Court followed *Bryant* in *People v Jones* (73 AD3d 662 [1st Dept 2010], *supra*), in which we held that the summary denial of a suppression motion had been erroneous because

> "[d]efendant clearly raised a factual issue as to when and where he was arrested, or otherwise taken into custody, so as to raise a Fourth Amendment issue (*see People v Mendoza*, 82 NY2d 415, 426 [1993]). Although the voluntary disclosure form could be interpreted as stating that defendant was arrested at a police station, immediately after being identified in a

> lineup, defendant's motion averred that he was arrested on the street approximately eight hours before the lineup took place and that, at the time of his arrest, he was not engaging in any behavior suggestive of illegal activity. Even if defendant was not formally arrested for the crimes of which he was convicted until after the lineup, this did not explain how he came to be at the station house in the first place. The People did not disclose whether defendant was placed in a lineup based on information linking him to the robbery (and what that information was), or whether he was in custody for some other reason (*see People v Bryant*, 8 NY2d 530, 533-534 [2007]). Under these circumstances, defendant's allegation that the police lacked probable cause or reasonable suspicion to believe that he was involved in any criminal activity was sufficient to warrant a hearing" (73 AD3d at 663).

Similarly, in *People v Wynn* (117 AD3d 487 [1st Dept 2014]), we held that the court had erred in denying the defendant a hearing on her motion "to suppress statements and physical evidence as fruits of an allegedly unlawful arrest" where, "[a]lthough the People provided defendant with extensive information about the facts of the crime and the proof to be offered at trial, they provided no information whatsoever . . . about how defendant came to be a suspect, and the basis for her arrest, made hours after the crime at a different location" (*id.* at 487-488). Given the *Wynn* defendant's "complete lack of relevant information," we held that her "conclusory" denial of probable cause for her arrest "was sufficient to state a basis for suppression and raise a factual issue requiring a hearing" (*id.* at 488; *accord People v Terry*, 144 AD3d 531 [1st Dept 2016];

People v Vasquez, 200 AD2d 344, 347-349 [1st Dept 1994] [where the defendant had been "arrested at a time and place remote from the murder for which he was charged," and, at the time of his suppression motion, "had utterly no notion as to what the arresting officers knew which would have furnished a predicate for their seizure of him," the defendant's "allegations that he had not been doing nothing wrong at the time of the arrest and that he did not believe the arrest to have been supported by probable cause were adequate to sustain the motion at least to the extent of a hearing"], *lv denied* 84 NY2d 873 [1994]).

Here, under the foregoing case law, defendant's claim that he was arrested without probable cause at his home on October 12, 2012, at which time "[h]e was not acting in an illegal or suspicious manner," although conclusory, was sufficient to entitle him to a hearing on the legality of his arrest and the admissibility of any evidence derived therefrom. It is undisputed that the arrest, whether it occurred on October 12 or (as the People claim) on October 13, took place "at a time and place remote from the [crime] for which [defendant] was charged" (*Vasquez*, 200 AD2d at 347). The People, through the VDF, asserted that defendant was arrested around midday on October 13, at a police station, after giving statements at the same police station that morning and the previous night. Thus, at a minimum,

defendant has raised a factual dispute concerning the time of his arrest. Further, the People provided defendant with no information at all as to how, by their account, he came to be at the police station in the first place, nor did they disclose the basis on which he first came to the attention of law enforcement in this investigation.[4] Indeed, the People have not even set forth the basis for defendant's arrest on October 13, since, according to the VDF, the lineup identification occurred after he was arrested. Assuming in the People's favor that the times of the arrest and the lineup identification were inadvertently transposed in the VDF, we still do not know what information and events led to defendant's presence at the police station.[5] While the complaint states that a witness told the police that he or she had observed defendant handling a knife on the fire escape outside the crime scene, the People did not disclose when the witness gave this information to the police.[6] In sum, in this

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[4]Defendant, of course, takes the position that he came to be at the police station because the police had unlawfully seized him on October 12.

[5]Needless to say, a lineup identification that occurred on October 13 could not explain how the police came to be interested in talking to defendant on October 12, much less provide a factual predicate for an arrest on the latter date.

[6]Obviously, if the witness first identified defendant at the lineup conducted at the police station on October 13, information from that witness, standing alone, could not explain defendant's

case, as in *Bryant*, because "defendant lacked . . . information [about the grounds for his arrest], he was not in a position to allege facts disputing the basis for his arrest" (8 NY3d at 534). Accordingly, his denial of probable cause for his arrest suffices to require a hearing.[7]

Because the issue raised by defendant's suppression motion was whether the police had probable cause to arrest him at the time the arrest was made, based on the information then in their

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presence at the police station in connection with the investigation of this particular crime. Further, since the complaint does not set forth a description of defendant by this witness, defendant would not have been able to controvert the People's allegations by providing a description of his own appearance at the time of the crime, which the People argue should have been set forth in his motion papers. Even if the complaint had set forth a description of defendant by the witness, such a description would cast no light on the question of whether the witness provided such information to the police before or after defendant was arrested.

[7]*People v France* (12 NY3d 790 [2009]) and *People v Bazemore* (40 AD3d 228 [1st Dept 2007], *lv denied* 9 NY3d 863 [2007]), on which the People rely, are inapposite, as in each of those cases the People disclosed the factual predicate relied upon to establish probable cause (*see France,* 12 NY3d at 791 ["Despite having sufficient information from the felony complaint and the voluntary disclosure form concerning the factual predicate for his arrest, defendant failed to dispute that the victim told the police that he had been robbed by the defendant, that the victim identified him to the police, and that defendant admitted possessing a pawnshop receipt for the stolen goods"]; *Bazemore*, 40 AD3d at 228 ["Defendant's general and conclusory allegations failed to address the highly specific factual information supplied by the People in the felony complaint and voluntary disclosure form concerning defendant's conduct"]).

possession — a question distinct and separate from the question of defendant's guilt or innocence — defendant had no obligation to include in his motion papers a denial of the charges against him. A defendant moving to suppress evidence "must either deny participating in the [alleged criminal] transaction *or suggest some other grounds for suppression*" (*People v Jones*, 95 NY2d 721, 726 [2001] [internal quotation marks omitted; emphasis in original]). Indeed, the Court of Appeals noted in *Jones* that its earlier case law "explicitly recognized that, even with a concession of involvement in criminal activity on the motion, a defendant could still raise a sufficient factual basis to challenge the legality of an arrest to merit a hearing" (*id.*; *see also Mendoza*, 82 NY2d at 431 ["defendant's participation in the (criminal) sale — even if expressly admitted — would not foreclose all possible challenges to the subsequent search and arrest"]). As this Court has observed, "Whether or not the defendant knew he had done something illegal was not the relevant issue in determining whether there had been an unreasonable search and seizure; it was rather whether the *police* knew a sufficient amount about any transgressions by the defendant to render their intrusion upon him legal" (*Vasquez*, 200 AD2d at 348 [emphasis in original]). Thus, it is of no moment that defendant, in moving to suppress the evidence obtained as a

result of his allegedly unlawful arrest, did not deny committing the alleged crime.

Finally, we reject defendant's request that we order that the scope of the hearing that we are granting him extend beyond the questions of whether he was arrested without probable cause and, if so, what evidence should be suppressed as the fruit of such an unlawful arrest. Defendant has either forfeited or failed to preserve his suppression claims under all other theories.

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

ENTERED: JULY 25, 2017

CLERK

Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3616 Paul Giordano, Index 305060/10
Plaintiff-Appellant-Respondent,

Rachel Giordano,
Plaintiff,

-against-

Tishman Construction Corp.,
Defendant-Respondent-Appellant.

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Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for appellant-respondent.

Segal McCambridge Singer & Mahoney, Ltd., New York (Christian H. Gannon of counsel), for respondent-appellant.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered January 15, 2016, which, to the extent appealed from as limited by the briefs, granted defendant's motion for renewal and reargument and thereupon denied plaintiffs' underlying cross motion for partial summary judgment on the Labor Law §§ 240(1) and 241(6) claims and adhered to the prior determination denying defendant's motion for summary judgment dismissing those claims, unanimously affirmed, without costs.

"[T]he fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law § 240(1)," and when "there are questions of fact as to whether the [structure] provided adequate protection," summary judgment is

not warranted (*O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017]). In this case, plaintiff Paul Giordano fell 30 feet from scaffolding during construction on the Freedom Tower at 1 World Trade Center, when he stepped on a pipe brace that suddenly gave way. Although he was wearing a harness and double lanyard, the record presents issues of fact as to whether the scaffolding itself provided adequate anchoring points at which to tie off, and whether Giordano could have used his double lanyard to remain tied off at all times. Thus, under these circumstances, summary judgment to either party on the Labor Law § 240(1) claim, and the § 241(6) claim premised on a violation of Industrial Code (12 NYCRR) § 23-1.16, is precluded by issues of fact as to whether Giordano was provided with "proper fall protection, namely, an appropriate place to . . . attach his harness" (*cf. Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 402 [1st Dept 2017] [finding that defendants failed to "sufficiently refute() plaintiff's testimony that there was no place for him to tie off the harness" (*id.* at 403)]; *Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013] [finding that "while plaintiff was wearing his safety harness, there was no appropriate anchorage point to which the lanyard could have been tied-off"]; *Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 565 [1st Dept 2008] [determining that "defendants failed to come forward with evidence to rebut

plaintiff's expert's conclusion" and that none of defendants' witnesses "indicate(d) that there was an adequate 5,000-pound anchorage point available to plaintiff while he was performing the work in question"). Because there are issues of fact as to whether Labor Law § 240(1) was violated, the issue of whether Giordano was the sole proximate cause of the accident (because he unhooked his lanyard) cannot be determined as a matter of law (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

The court, in this case, providently exercised its discretion in granting defendant's motion for renewal and reargument (*see generally Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]; *Scannell v Mt. Sinai Med. Ctr.*, 256 AD2d 214 [1st Dept 1998]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: JULY 25, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, JJ.

3645 The People of the State of New York, Respondent, Ind. 3485/11

-against-

Ray Diaz, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered May 8, 2014 convicting defendant, after a jury trial, of criminal sexual act in the first degree and sexual abuse in the first degree, and sentencing him to an aggregate term of 23 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the conviction of criminal sexual act in the first degree to a term of 13 years, and otherwise affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence.

Defendant argues that the convictions should be vacated as unsupported by legally sufficient evidence and against the weight

of the evidence, because the jury inconsistently found him guilty on the criminal sexual act and sex abuse counts, but not responsible by reason of mental disease or defect on other counts charging burglary and robbery. He contends that the mental disease or defect defense should have been established as to all counts because all the charged acts were part of a single, brief chain of events, in which his mental condition could not have changed. He thus argues that the convictions should be replaced by insanity acquittals.

Regardless of whether it is viewed as a legal insufficiency claim or a repugnant verdicts claim, defendant's argument that the alleged inconsistency in the verdict rendered it legally defective was not raised at a time when it could have been cured by resubmission to the jury, and it is thus unpreserved (*see generally People v Gray*, 86 NY2d 10, 20-21 [1995]). In any event, as defendant appears to concede, the verdict was not legally repugnant (*see People v Muhammad*, 17 NY3d 532, 540 [2011]), because, under the court's charge, the jury could have found the affirmative defense established as to the burglary and robbery counts but not the criminal sexual act and sex abuse counts (*see People v Justice*, 173 AD2d 144 [4th Dept 1991]). As for the claim of insufficiency, we do not find that the factually mixed verdict undermines the convictions. "Factual inconsistency

and legal insufficiency are analytically distinct," and "an acquittal is not a preclusive finding of any fact, in the same trial, that could have underlain the jury's determination" (*People v Abraham*, 22 NY3d 140, 146-147 [2013]). There is no reason to apply different principles when the mixed verdict consists of a combination of convictions and insanity acquittals. While we may consider an alleged factual inconsistency in a verdict in performing our weight of the evidence review (*see People v Rayam*, 94 NY2d 557, 563 n [2000]), and weight of the evidence arguments do not require preservation (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]), we find it "imprudent to speculate concerning the factual determinations that underlay the verdict" (*People v Horne*, 97 NY2d 404, 413 [2002]; *see also People v Hemmings*, 2 NY3d 1, 5 n [2004]).

All of defendant's challenges to the court's charge are concededly unpreserved, and we do not find any mode of proceedings errors exempt from preservation requirements (*see People v Thomas*, 50 NY2d 467, 472 [1980]). We decline to review any of these claims in the interest of justice.

As an alternative holding, we also reject them on the merits. The charge, which followed the Criminal Jury Instructions, sufficiently conveyed to the jury the principle that unanimity was required in order to reject defendant's

affirmative defense (*see People v Alejandro*, 127 AD3d 434 [1st Dept 2015], *lv denied* 26 NY3d 1142 [2016]). The court was not required to instruct the jury that it must find defendant not responsible on all counts if it found him not responsible on any count, because this affirmative defense could be "susceptible of partial, rather than total, success or failure" (*Justice*, 173 AD2d at 147). Finally, the instructions, viewed as a whole, did not convey to the jurors that once they reached a finding of guilt on a count, they were not permitted to revisit that determination.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal.

In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard

of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case. We have observed that an application to resubmit a mixed verdict to the jury may reasonably be deemed by counsel to be "futile, or even counterproductive" (*People v Ortiz*, 100 AD3d 419, 420 [1st Dept 2012], *lv denied* 20 NY3d 1014 [2013]). We also find that the absence of objections to the court's charge did not deprive defendant of effective assistance, since nothing in the instructions at issue was constitutionally deficient or caused defendant any prejudice. Similarly, we do not find that any lack of preservation may be excused on the ground of ineffective assistance.

Finally, as to defendant's third point on appeal, we find the sentence excessive to the extent indicated *(see People v Delgado*, 80 NY2d 780, 783 [1992]).

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

ENTERED: JULY 25, 2017

CLERK

Acosta, P.J., Tom, Kapnick, Kahn, Gesmer, JJ.

3423-
3424 The People of the State of New York, Respondent,

-against-

William Rodriguez,
Defendant-Appellant.

Ind. 5471/09
9/13

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Seymour W. James, Jr., The Legal Aid Society, New York (Anita Aboagye-Agyeman of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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Order, Supreme Court, New York County (Richard D. Carruthers, J.), rendered March 19, 2014, judgment same court and Justice, rendered May 12, 2013, as amended May 20, 2014, affirmed.

Opinion by Kahn, J. All concur except Acosta, P.J. and Gesmer, J. who dissent in an Opinion by Acosta, P.J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Peter Tom
Barbara R. Kapnick
Marcy L. Kahn
Ellen Gesmer JJ.

3423-
3424
Ind. 5471/09
9/13

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The People of the State of New York,
Respondent,

-against-

William Rodriguez,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered March 19, 2014, convicting him, after a jury trial, of burglary in the second degree, and imposing sentence, and the judgment of the same court and Justice, rendered May 12, 2013, as amended May 20, 2014, convicting him, upon his plea of guilty, of burglary in the first degree (five counts), robbery in the first degree (five counts), robbery in the second degree (two counts), kidnapping in the second degree (six counts), and endangering the welfare of a child (two counts), and imposing sentence.

Seymour W. James, Jr., The Legal Aid Society,

New York (Anita Aboagye-Agyeman of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista and Patrick J. Hynes of counsel), for respondent.

KAHN, J.

On this appeal, we are asked to decide whether the judgment convicting defendant of burglary in the second degree (the burglary conviction), following a jury trial, should be vacated on the grounds that the verdict was unsupported by legally sufficient evidence, or that the verdict did not comport with the weight of the evidence, or that defendant was deprived of his right of confrontation at trial. Should we answer that question in the affirmative, we are further asked to determine whether the judgment convicting defendant, upon his plea of guilty, of various counts in a separate indictment (the plea conviction), should also be vacated on the ground that defendant's guilty plea was induced by a promise that his sentences for the burglary and the plea convictions would run concurrently. Additionally, we are asked to decide whether the sentences imposed for both convictions were excessive. For the reasons that follow, we hold that both judgments should be affirmed and that the sentences imposed were not excessive.

I. *Burglary Conviction*

A. Legal Insufficiency and Weight of the Evidence Claims

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's identity as

the burglar was strongly established by the match of his known DNA to the DNA found on wire cutters that had been stored within the glass enclosure on the victim's rooftop deck but were found tucked between cushions on the sofa in her apartment after the burglary (*see People v Harrison*, 22 AD3d 236, 236 [1st Dept 2005] [rejecting sufficiency and weight claims where "(t)he proof connecting defendant with the crime consisted almost entirely of DNA evidence," which "was particularly powerful and established defendant's identity beyond a reasonable doubt"], *lv denied* 6 NY3d 754 [2005]).

B. Confrontation Clause Claim

1. Defendant's Contention

Defendant claims that he was deprived of his Sixth Amendment right of confrontation under the federal and state constitutions by the introduction into evidence at trial of laboratory reports of DNA testing linking him to the crime based solely upon the testimony of Melissa Huyck, a criminalist from the New York City Office of the Chief Medical Examiner (OCME) who was not among the analysts who performed, witnessed or supervised the testing. Defendant's Confrontation Clause claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it. However, we find that an extended discussion of the merits is warranted.

2. Legal Standards

As the accused in a criminal prosecution, a defendant has the right to be confronted with the witnesses who bear testimony against him (*Crawford v Washington*, 541 US 36, 51 [2004]). Therefore, "[a]s a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness" (*Bullcoming v New Mexico*, 564 US 647, 657 [2011]).

"[A] statement will be treated as testimonial only if it was 'procured with a primary purpose of creating an out-of-court substitute for trial testimony'" (*People v Pealer*, 20 NY3d 447, 453 [2013], *cert denied* __ US __, 134 S Ct 105 [2013], quoting *Michigan v Bryant*, 562 US 344, 358 [2011]; *see Davis v Washington*, 547 US 813, 822 [2006] ["(Statements) are testimonial when the circumstances objectively indicate that . . . the primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution"]).
Our Court of Appeals has set forth a test to be used in determining whether a report was prepared for such a "primary purpose" and is, therefore, testimonial. The "primary purpose" test consists of four factors:

> "'(1) whether the agency that produced the record is independent of law enforcement; (2) whether it reflects objective facts at the time of their recording; (3) whether the report has been biased in favor of law enforcement; and (4) whether the report accuses the defendant by directly linking him or her to the crime'" (*People v Pealer*, 20 NY3d at 454, quoting *People v Brown*, 13 NY3d 332, 339-340 [2009]; *see People v Freycinet*, 11 NY3d 38, 41 [2008]).

Recently, in *People v John* (27 NY3d 294 [2016]), our Court of Appeals reaffirmed the centrality of the primary purpose test for Confrontation Clause purposes (at 307 ["(W)e have deemed the primary purpose test essential to determining whether particular evidence is testimonial hearsay requiring the declarant to be a live witness at trial"]).

3. Supreme Court's Trial Rulings

Notably, at trial, before OCME criminalist Huyck testified concerning the DNA testing performed in this case, the People sought a ruling from the court on the scope of evidence it would permit them to introduce from the OCME and Huyck about the DNA testing. Defense counsel argued against the introduction of reports of conclusions reached by nontestifying examiners, and urged that the admissible evidence from OCME's files should be limited to the pages of documents reflecting raw data that had been personally reviewed and initialed by Huyck.

Supreme Court's ruling was as follows:

"The raw data, the data concerning the [DNA] testing

> comes in. What [Huyck] did comes in. All the other stuff about police reports and other material is out."

Immediately after issuing that ruling, Supreme Court reiterated and clarified the ruling in the following manner:

> "So the raw data made by the people who actually did the test is admissible. As far as the data is concerned, what this witness [Huyck] did is admissible, not the other conclusions by these other individuals."

Huyck then proceeded to testify concerning the testing of DNA material taken from the wire cutters and the development of the DNA profile of an unknown male donor denominated as Male Donor A. Later that same day, before Huyck testified as to the DNA testing of the buccal swabs taken from defendant, Supreme Court further explained and clarified its earlier ruling. So much of that clarification as is relevant here is as follows:

> "[M]y intention is to permit only the raw data contained in these files so that ultimately Miss Huyck will ultimately use it to testify about her own comparisons to go before the jury. Only that data is to be considered evidence with respect to these files, and all extraneous material contained in the files, including . . . opinions of nontestifying examiners and experts[,] must be deleted."

Supreme Court's rulings were in keeping with the requirements of the *Crawford* rule as established under the case law in effect at that time. They adhered to federal constitutional standards by limiting the admission of statement evidence proffered in conjunction with Huyck's testimony to

relevant evidence that either "was not prepared for the primary purpose of accusing a targeted individual" (*Williams v Illinois*, 567 US 50, __, 132 S Ct 2221, 2243 [2012]) or consisted of "testimonial statements by [a] declarant[] [Huyck] who [was] . . . subject to cross-examination" (*id.*, 567 US at __, 132 S Ct at 2238). In this regard, Supreme Court's rulings presaged *People v John* (27 NY3d 294 [2016], *supra*) by ensuring that Huyck's testimony would pertain to her role as a criminalist "who used . . . her own independent analysis on the raw data, as opposed to a testifying analyst functioning as a conduit for the conclusions of others" (*id.* at 315).[1] Moreover, *John* did nothing to change the standards set forth by *Crawford* and its progeny (*see generally id.* at 303-312).

4. The OCME Laboratory Reports

In this case, three OCME laboratory reports derived from DNA testing, accompanied by documents reflecting associated raw data,

[1] "OCME places criminalists in four grades, from level 1 for the least experienced to level 4 for full-time supervisors" (*People v Corey*, 52 Misc 3d 987, 989 n 2 [Sup Ct NY County June 27, 2016]). In this case, Huyck, who had been a Criminalist II when she testified in *John* (*see* 27 NY3d at 300) but had become a Criminalist III by the time of the DNA testing in this case, independently reviewed every page of the raw data she received, including the machine-generated graphs and the edit sheets, as evidenced by the appearance of her initials on every such page, and made her own determinations as to the validity of the raw data generated by the less experienced Criminalist I analysts.

were introduced into evidence at trial. The first laboratory report concerned the DNA profile of an unknown male donor generated from DNA material extracted from the wire cutters found in the victim's apartment. It was dated January 2, 2013 and Huyck is listed on it as "Analyst." The second report discussed the generation of defendant's DNA profile based upon buccal swabs taken from defendant once he was identified as the suspect. Huyck's initials appear on the report as "Interpreting Analyst" and as the individual who checked the profile against the Local DNA Index System (LDIS) database. The third report, comparing the DNA profiles of the unknown male donor and defendant, was signed by Huyck as "Analyst," and reported her own conclusion that the two DNA profiles reflected in the first and second reports were a match.

The events leading to the development of the DNA profile of the unknown male donor, which were the subject of the first laboratory report, began when a pair of wire cutters was found on the couch of the burglary victim's living room by the police, who vouchered it in a sealed plastic bag for DNA testing. It was sent to the OCME laboratory, where its handles were swabbed for DNA material. The DNA material was then tested using polymerase chain reaction (PCR) DNA typing. PCR DNA typing involves four steps: "extraction (to release the DNA from any cells),

quantitation (to determine how much DNA was present), amplification (to make millions of copies of the specific locations, or loci of the DNA, to be tested)" and electrophoresis, in which "the analyst uses an electrophoresis instrument and a sophisticated software program . . . to produce an electropherogram, which graphically depicts the peaks of the DNA analysis" (*John*, 27 NY3d at 300). Forensic analysts then review and routinely edit the machine-generated profiles by removing false peaks appearing in the data (*People v Rawlins*, 10 NY3d 136, 145 [2008], *cert denied* 557 US 934 [2009]).[2] From this testing, a DNA profile of an unknown single male donor of DNA material, "Male Donor A," was developed. There followed the first OCME laboratory report, which discussed the generation of the profile of Male Donor A and its suitability for uploading

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[2] False peaks may, as in this case, include "stutter," "a common 'echo' effect appearing on the DNA profile — usually one allele before its true allele, or less frequently, just after" (*People v Collins*, 49 Misc 3d 595, 606 [Sup Ct Kings County July 2, 2015]), or "pull-ups," which are caused by the failure of an improperly calibrated machine to distinguish among dye colors, in an effort to ensure that the software did not mistakenly remove true alleles (*see* John M. Butler, Fundamentals of Forensic DNA Typing at 213 [2010], cited in *John*, 27 NY3d at 298).

The editing process, which, according to Huyck, was, at the time of the editing in this case, undertaken solely by analysts whose titles are Criminalist I (*see* note 1, *supra*), involves a routine manual inspection of machine-generated graphs and elimination from those graphs of any false peaks, including stutters and pull-ups.

into state and local DNA databanks, such as LDIS, and appended documents reflecting the raw data generated by OCME analysts.

A review of the first laboratory report through the lens of the four-factor *Pealer/Brown* "primary purpose" test demonstrates the nontestimonial nature of the laboratory report on the DNA profile of "Male Donor A."

With respect to the first *Pealer/Brown* factor, independence of the reporting agency from law enforcement, according to Huyck, the testifying criminalist who is listed on that report as "Analyst," OCME, her agency, is not affiliated with the New York Police Department or the Office of the New York County District Attorney. Rather, it is affiliated with the New York City Department of Health and Mental Hygiene. Moreover, the degree of OCME's independence from law enforcement in each given case is appropriately measured by the function the agency performs in that case. For example, in *People v John*, where evidence recovered at a crime scene was submitted to OCME for performance of DNA testing in furtherance of the prosecution of a known suspect in a pending criminal action, OCME's role was not independent of the police and prosecutors (27 NY3d at 308 n 5). Here, by contrast, OCME's role at that point was that of a scientific agency performing DNA testing on physical evidence at a time when there was neither an identified suspect nor a pending

criminal action. Thus, under the circumstances presented in this case, OCME acted independently of law enforcement.

With respect to the second *Pealer/Brown* factor, a review of the report in question reveals that it reflects objective facts at the time of their recording. Indeed, the fact that the report consists of "merely machine-generated graphs, charts and numerical data" presented without subjective analysis is an indication that the report is not testimonial in nature (*see People v Brown*, 13 NY3d at 340).

With regard to the third factor of the *Pealer/Brown* test, because the report does not name defendant or any other suspect, it is not biased in favor of law enforcement.

Concerning the fourth *Pealer/Brown* factor, because the DNA profile of Male Donor A was developed at a time when no suspect had been identified, the report names neither defendant nor any other suspect, and it does not accuse defendant by directly linking him to the crime (*see People v Freycinet*, 11 NY3d at 42 [report not testimonial where it "did not directly link defendant to the crime"]). Thus, the DNA profile of Male Donor A is analogous to "the original DNA profiles in *Brown* and *Meekins*," which, as the *John* Court observed, "would not be considered testimonial hearsay . . . when the suspect was unknown and the defendant was later identified on a 'cold hit' from the CODIS

[Combined DNA Index System] database" (*People v John*, 27 NY3d at 310). Therefore, the report on the DNA profile of "Male Donor A" was not prepared for the "primary purpose of creating an out-of-court substitute for trial testimony" and is nontestimonial in nature (*Pealer*, 20 NY3d at 454; *Brown*, 13 NY3d at 339-340; *see People v Alcivar*, 140 AD3d 425, 427 [1st Dept 2016], *lv denied* 28 NY3d 1070 [2016], quoting *Rawlins*, 10 NY3d at 159 [DNA testing report not testimonial where "'test results, *standing alone*, shed no light on the guilt of the accused,' . . . notwithstanding that they provided circumstantial evidence of guilt in light of other evidence"] [citation omitted]).

The events resulting in the development of the DNA profile of defendant, which was the subject of the second OCME laboratory report, began when the DNA profile of Male Donor A was uploaded into the local OCME DNA databank, which detected a possible match with a DNA profile already recorded in that databank. The profile of Male Donor A was then sent to the New York State Department of Criminal Justice Services, which provided defendant's name as that of the person whose DNA profile apparently matched that of Male Donor A. This information led to defendant's arrest, after which the People moved for leave to perform buccal swab DNA testing of defendant, which Supreme Court granted. Buccal swabs were then taken from defendant and the DNA

material was tested using four-step PCR DNA typing. A DNA profile of defendant was generated from those swabs. The second laboratory report followed. That report concerns the generation of the DNA profile of the known defendant, and appended documents reflecting raw data generated by the testing analysts, each page of which was reviewed by Huyck.

On appeal, defendant does not challenge the second laboratory report on Confrontation Clause grounds or with regard to the manner in which the DNA testing of the buccal swab samples taken from him was performed by OCME. Accordingly, the situation presented in this case is completely different from that presented in *Williams v Illinois*, as referenced in *John*, because in this case the proof that the buccal swab samples were taken from defendant was unchallenged (*see John*, 27 NY3d at 306, citing *Williams v Illinois*, 567 US at ___, 132 S Ct at 2228). Furthermore, the *John* Court distinguished *Williams* from cases such as *Bullcoming v New Mexico* (564 US 647 [2011]) and *Melendez-Diaz v Massachusetts* (557 US 305 [2009]), where, as here, "the forensic reports of the nontestifying analysts were introduced into evidence for the truth of the matter asserted" (*John*, 27 NY3d at 306).[3] In fact, the second report does not purport to

[3] *People v Goldstein* (6 NY3d 119 [2005]), cited in *John* (27 NY3d at 306), is unlike this case, in that there the foundational

establish defendant's involvement in criminal activity (*see Davis v Washington*, 547 US at 822).

The third OCME laboratory report, which was prepared by Huyck and lists her as the analyst, reports Huyck's review and comparison of the DNA profiles of Male Donor A and defendant and states her conclusion that the two profiles are a match.

Applying the four-factor *Pealer/Brown* test to the third report, at the time it was generated, OCME was acting in the role of assisting the police and prosecutors in developing evidence for use at trial. A review of this report reveals that it does not reflect objective facts at the time of its recording, but instead reflects Huyck's conclusions upon review of the raw data associated with the testing leading to the development of the two DNA profiles. By matching the DNA profile of Male Donor A with that of defendant, this report, in effect, accuses defendant of the burglary, and therefore is biased in favor of law enforcement. Further, the report could have served as "an out-of-court substitute for trial testimony" (*Pealer*, 20 NY3d at 454 [internal quotation marks omitted]). Therefore, this report is testimonial in nature. The report was, nevertheless, admissible, because Huyck was the analyst who prepared it, and she appeared

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facts upon which the expert testimony was based were not admitted into evidence (*see Goldstein*, 6 NY3d at 127-129).

at trial and was subject to cross-examination (*see Williams v Illinois*, 567 US at ___, 132 S Ct at 2238).

With respect to any evidentiary concerns, hearsay analysis does not bar admission of the OCME reports. Huyck testified that all DNA analysis done at the OCME laboratory, which would include the analysis performed in this case, is documented and recorded. She further testified that the OCME laboratory has a business duty to keep such records, that the notes and reports of the observations of DNA testing analysts are recorded contemporaneously with the making of the observations, and that the notes and reports are made and kept by the OCME laboratory in the ordinary course of business. Thus, the DNA reports in question in this case were admissible as business records (*see* CPLR 4518; *Brown*, 13 NY3d 332, 341 [2009]).

We are mindful of the *John* Court's warning of the danger of admitting scientific reports as business records because such records may be sufficiently formal, even though not provided under oath, to be deemed testimonial, and, therefore, constitutionally inadmissible on Confrontation Clause grounds (see *People v John*, 27 NY3d at 312). In this case, however, both the report on the profile of Male Donor A and the report on the possible match of Male Donor A with a profile in the CODIS database were prepared before defendant was suspected of or

charged with the crime. Thus, neither of those reports was sufficiently accusatorial and formal to be deemed testimonial. Although the third report, concerning the match of those two DNA profiles, is testimonial in nature, it was, nonetheless, admissible for the reasons we have already stated.

The view of our dissenting colleagues is that the admissibility of the DNA reports in this case would require the testimony of at least one analyst who had direct personal knowledge of the DNA testing used to prepare each of these reports. Among the phases of the DNA testing performed in this case was CODIS's identification of the DNA profile of the unknown suspect developed by the OCME laboratory, Male Donor A, as a possible match with a DNA profile maintained by CODIS. Thus, the logical consequence of the dissenters' view would be that, in this case and in all such cases, CODIS analysts with personal knowledge of that phase of the DNA testing would be required to testify as to how CODIS determined that there was a possible match of the DNA profile of the unknown suspect with a DNA profile in the CODIS database. The dissenters' view that any "analyst who actually did the testing" must testify would impose further restrictions on such evidence far beyond those contemplated by the Court of Appeals in *John*, requiring the testimony of any laboratory analyst anywhere in the country who

had at any time developed and transmitted a DNA profile to CODIS for matching purposes. As the *John* Court explained, however, imposing such a requirement in all such cases would prove impracticable and unwieldy (27 NY3d at 312-313 ["Clearly, not every person who comes in contact with the evidence . . . must be produced"]). Rather, the standard could be met if "an analyst who witnessed, performed or supervised the generation of defendant's DNA profile, *or who used his or her independent analysis on the raw data*, as opposed to a testifying analyst functioning as a conduit for the conclusions of others, [were] available to testify" (*id.*, 27 NY3d at 315 [emphasis added]).

5. Huyck Conducted an Independent Review and Drew her own Conclusions, in Contrast with *John*

Huyck's role in this case was that of a criminalist who performed an independent review of the raw data generated by the testing analysts (*see John*, at 315). Thus, in this case the respective roles of the analysts who performed the DNA testing and final stage editing and the testifying criminalist who reviewed the resulting raw data differ greatly from those of the analysts and reviewing criminalist under the circumstances presented in *John*. In contrast with the situation in *John*, here, Huyck herself conducted an independent review of the raw data derived from the testing of the DNA material derived from both

the physical evidence and from defendant's person, and was not merely "functioning as a conduit for the conclusions of others" (*id.* at 315). Put otherwise, in this case, as in *Brown*, and in contrast to *John*, Huyck, the expert witness, "testified that any conclusions or opinions she reached from the raw data . . . were her own" and were not merely conclusions of others with whom she agreed (*id.* at 310, citing *Brown*, 13 NY3d at 337). Upon her own examination of the machine-generated graphs and raw data in this case, Huyck concluded that the two DNA profiles were a match. Her conclusion, based upon her own "separate, independent and unbiased analysis of the raw data," was reflected in the OCME laboratory report bearing her name as analyst as well as in her own testimony at trial (*see id.* at 311). Here, in contrast to her testimony in *John*, Huyck did not base her testimony "solely on the reports of the nontestifying analysts [which were then] admitted into evidence for their truth." (*id.* at 310).

Additionally, in this case, the role played by the Criminalist I analysts who edited the machine-generated electropherograms was merely to perform the routine function of editing out any false peaks that may have appeared. Thus, in contrast with *John*, in this case, as in *Brown*, the function performed by the editing analysts was merely ministerial in nature, similar to that of a court clerk who routinely rejects an

unsigned affidavit. This is a function that any trained clerk is equipped to undertake and does not involve "application of expertise or judgment" or "skilled interpretation of . . . data" (27 NY3d at 311). And here, in contrast with *John*, Huyck's role as a higher ranking criminalist was to conduct an independent review of a report "consist[ing] of merely machine-generated graphs, charts and numerical data" (*Brown*, 13 NY3d at 340). Like the report in *Brown*, the raw data reviewed by Huyck in this case was devoid of any "conclusions, interpretations or comparisons . . . since the technicians' use of the typing machine would not have entailed any such subjective analysis" (*id.*). And, here, as in *Brown*, Huyck "interpreted the profile of the data represented in the machine-generated graphs; and she made the critical determination linking defendant to this crime" (*id.*). Thus, in this case, as in *Brown*, the only apparent subjective analysis made of the raw data and DNA profiles provided by the analysts was that of Huyck, who compared the two sets of raw data and DNA profiles and made the determination linking defendant to the crime.

Notably, although defense counsel had ample opportunity to object that Huyck's testimony veered beyond the scope of Supreme Court's ruling, she never did so. This further indicates that the People's evidence was well within the bounds of Supreme

Court's ruling, and, accordingly, the applicable constitutional standards. Moreover, defense counsel had a full and fair opportunity to cross-examine Huyck, and did so.

The dissenters' concern with Huyck's failure to personally witness OCME's employment of safeguards in conducting DNA testing in this case, such as gowning up with mask, hair net, gloves and lab coat and cleaning the bench top and utensils to be used in the examination with bleach and ethanol, is misplaced. Such considerations do not implicate Confrontation Clause concerns, since they are not testimonial statements against the accused; they merely affect the weight to be given by the jury to the evidence in question, not its constitutional admissibility.

Thus, defendant was not deprived of his right of confrontation by the trial testimony or by the introduction into evidence of the laboratory reports of the OCME criminalist who conducted a "separate, independent and unbiased analysis of the raw data" (*John*, at 311). Accordingly, reversal on this ground is not warranted.

II. *Plea Conviction*

In view of our conclusion that defendant's claims in the burglary conviction case do not warrant reversal, defendant's alternative argument in the plea conviction case that this Court should also afford him the opportunity to withdraw his guilty

plea because it was induced by a promise that the aggregate sentence imposed for that conviction would run concurrently with his sentence for the burglary conviction, is without merit (*cf. People v Fuggazzatto*, 62 NY2d 862, 863 [1984] [vacating plea because it was "induced by the understanding that the sentence would be concurrent with the sentence imposed for [another] conviction"]).

III. *Excessive Sentence Claims*

Defendant also claims that the sentences imposed for his convictions were excessive. There is no basis for a reduction of the sentences, since the mitigating factors cited by defendant are outweighed by the seriousness of the instant offenses and defendant's criminal record.

Accordingly, the judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered March 19, 2014, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 20 years to life, and the judgment of the same court and Justice, rendered May 12, 2013, as amended May 20, 2014, convicting defendant, upon his plea of guilty, of burglary in the first degree (five counts), robbery in the first degree (five counts), robbery in the second degree (two counts), kidnapping in the second degree (six counts), and endangering the

welfare of a child (two counts), and sentencing him to a concurrent aggregate term of 25 years to life, should be affirmed.

All concur except Acosta, P.J., and Gesmer, J. who dissent in an Opinion by Acosta, P.J.

ACOSTA, J. (dissenting)

The majority ruling is a transparent attempt to circumvent the controlling Court of Appeals decision in *People v John* (27 NY3d 294 [2016]). The *John* Court held that the testimony of the testifying criminologist (Melissa Huyck – who also testified in the present case) and DNA reports admitted into evidence pursuant to her testimony violated defendant's right to confront the analysts who actually generated the DNA profiles. Huyck merely reviewed the reports of the other OCME analysts, who did not testify, including the numerical DNA profiles generated after an editing process, saw that the necessary people had signed off, and agreed with their conclusions. The Court of Appeals explained that "Huyck was acting purely as a surrogate witness. . . in vouching for the accuracy of the DNA profiles," since "[h]er conclusory testimony in this regard was based solely on the reports of the nontestifying analysts that were admitted into evidence for their truth and not based on a separate, independent and unbiased analysis of the raw data" (*id.* at 310-311).

This case is virtually indistinguishable from *John*, because Huyck admitted in her testimony here that she did not conduct the DNA analysis, and merely assumed that it was done properly. More importantly, the majority concedes that the third DNA report admitted into evidence, which compared Male Donor A's DNA with

defendant's DNA and thus secured a conviction in this case, is testimonial in nature. This is particularly troubling, because defendant was convicted of burglary in the second degree and sentenced to 20 years to life in a case where the only evidence linking him to the burglarized apartment was DNA evidence found on a pair of wire cutters. Therefore, I strenuously disagree with my colleagues who appear bent on doing an end run around *John*.

Here, Melissa Huyck testified that defendant's DNA evidence was found on the wire cutters. She testified that the profile generated from the wire cutters was used to identify defendant. She also testified that defendant's DNA was then taken for purposes of making a comparison. As in *John*, she did not do any of the testing herself, and candidly admitted that she assumed it was done properly. Through her testimony, three DNA reports were entered into evidence supporting her testimony as well as a chart comparing defendant's DNA profile to the DNA profile found on the wire cutters.

Although the majority insists that Huyck's testimony was proper because it focused only on raw data, it completely misses the point. She compared DNA profiles that may or may not have been generated properly. She had no way of knowing except by blind faith that her colleagues, who actually tested the DNA

evidence but did not testify at trial, followed the established protocol. As noted above, *John* specifically rejected this approach as surrogate testimony that violates a defendant's constitutional right to confrontation (*John*, 27 NY3d at 310-311). Moreover, any emphasis by the majority "on formalism for the admissibility of business records is particularly unwise in the area of scientific reports, as the certification requirement can be easily subverted by a simple omission in the format of the documents, with a design to facilitate their use as evidence in a criminal trial" (*John*, 27 NY3d 312 [DNA reports that are testimonial in nature must be analyzed in terms of Confrontation Clause violations rather than simply being admitted as business records]). In other words, the Confrontation Clause trumps the business records exception. A review of the facts and relevant case law supports the conclusion that defendant's right to confrontation was violated.

The complainant lived by herself in an apartment on the top floor of a building in lower Manhattan. She had lived there since April 2011. She had a private rooftop deck, consisting of an open area and a glass-enclosed office containing a couch, a table, chairs, and a bookcase. On the morning of August 23, 2012, complainant traveled to Philadelphia to teach a class. She left her apartment in its normal condition, with the front door

locked and all of the windows closed.

Complainant returned home around 12:30 a.m. on August 24 and saw that her front door was ajar; someone appeared to have rummaged through her rooms. She then noticed that her jewelry was missing from a drawer in the front bedroom closet. The contents of boxes that had been stored in the closet of the master bedroom were strewn across the floor.

Complainant called the police to report a break-in. She avoided touching things in her apartment aside from the aforementioned drawer. Police Officers Digena and Hennessy arrived at Complainant's apartment in response to a radio report of a burglary. The police canvassed the apartment while avoiding touching anything, then went up to the roof. They saw a propane tank, which did not belong to Complainant, next to the skylight, in an area that was supposed to be inaccessible.

The police called the Evidence Collection Unit, which sent Detective Jose Segura and Officer Stephen Schuldner the following morning. Complainant had avoided cleaning or touching anything in her apartment since discovering the break-in.

During the investigation conducted by Segura and Schuldner, Complainant noticed that her wire cutter, which she described as a pair of pliers, was wedged between the cushions of the sofa in her living room. She testified that there was no legitimate

reason for the wire cutter to be there, since she had not brought it into the apartment since she had last used it, two months earlier. She had bought it online and used it to install fencing on her rooftop deck, then left it in the bookcase in her rooftop office. While wearing latex gloves and a mask, Officer Schuldner vouchered the wire cutter in a sealed bag for DNA testing. Schuldner did not dust the wire cutter for fingerprints, because he wanted to preserve any DNA. He collected a sample of Complainant's DNA, in case the wire cutter contained DNA from both her and the perpetrator.

Schuldner dusted for fingerprints on both sides of the door to the apartment, the broken glass from the skylight, the bathroom walls, and the drawers from which jewelry was missing, but failed to find any fingerprints sufficient to be collected and tested. He noted that sometimes fingerprints cannot be collected or tested because they have been smudged.

Detective Segura searched for witnesses by knocking on other apartment doors in the building, and checked a surveillance camera located in the front of the building, but to no avail. No suspect was identified in the investigation of the building.

Melissa Huyck, a criminalist at the Office of the Chief Medical Examiner (OCME), testified as an expert in DNA analysis. Huyck testified that under office policy, each step of DNA

testing conducted by OCME was observed by a witness, each DNA test was performed twice, and all results and analysts' conclusions were recorded. She also testified that she did not know if the policy had been followed in this case and that there were no records indicating if office policy had been followed. Any DNA profile compiled by OCME was uploaded to, among other things, a national database called the Combined DNA Indexing System (CODIS). Huyck noted that NYPD's paperwork on the vouchered wire cutter did not refer to any suspect.

She also testified that on October 14, 2012, OCME criminalist Michael Kuhn, who did not testify at trial, performed an analysis of the wire cutter that revealed a "significant amount of DNA" belonging to only one male donor on its handles. The handles contained five or six times more than the minimum amount of DNA required for testing, which suggested that the donor had used the tool "[f]orcefully or for a decent amount of time." This profile was uploaded to CODIS in December 2012 or January 2013. Shortly after, CODIS informed OCME of a possible match between the DNA recovered from the wire cutter and a certain DNA profile. OCME confirmed that the two profiles were a match, at which point CODIS, per standard procedure, informed OCME that defendant was the person whose DNA profile had been provided to OCME from the database.

According to Huyck, Detective Michael McCready, who also did not testify, collected a swab from inside defendant's mouth and sent it to OCME, which used the sample to compile a profile of defendant's DNA. Huyck noted that she "didn't perform the lab work," and "just did the review of the results." She testified that as a Criminalist III she was being retrained so that she could do the lab work in the future, and that when the lab work was done in the present case, only "Criminalist I were responsible for those duties." In fact, her duties did not include supervising the work of others. However, Huyck "compared the known DNA profile of [] defendant to the profile developed from the swab on the wire cutters," and determined that "[t]hey were the same DNA profile," since they were "an exact match," based on looking at the numbers assigned to all 15 tested DNA locations, which were the same in both. Huyck testified that one would "expect to see this profile in approximately one in greater than 6.8 trillion people," i.e., about once if there were 1,000 copies of planet Earth, with its approximate population of 6.8 billion.

In contrast, a profile compiled from Complainant's DNA sample did not match any of the DNA on the wire cutter. Huyck testified that DNA left by Complainant on her wire cutter could have been replaced by a subsequent user of the wire cutter, or

her DNA could have been diminished by sun or rain. Huyck further testified that the amount of DNA a person leaves on an object when touching it, known as a "primary transfer," depends on various factors, including how many times the person handles the object, how long the person spends touching the object, the cleanliness of the person's hands, how many skin cells the person typically sheds, and whether the person was perspiring at the time. A "secondary transfer" occurs when DNA left on an object by a person is later transferred to a different object; for example, if a person sneezes onto a pair of gloves, and the gloves later touch an object, the person's DNA may be transferred to the latter object.

Detective Segura testified that defendant was arrested after receiving a fax from OCME identifying defendant as "a perpetrator or someone of interest for this case." Complainant testified that she did not know defendant and had never given him permission to enter her apartment or remove her belongings from her apartment.

Defendant did not present any evidence at trial. The jury convicted defendant of second-degree burglary.

Defendant contends that he was deprived of his right to confront his accusers by Huyck's testimony on the DNA testing, since Huyck was at best generally knowledgeable about OCME's DNA

testing based on her experience as an OCME criminalist, but was not one of the analysts who conducted the testing. Although defendant's Confrontation Clause claim is unpreserved,[4] I believe that reversal in the interest of justice is warranted, because the only evidence linking defendant to the burglary was the DNA evidence at issue.

"Testimonial statements of witnesses absent from trial" are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine" (*Crawford v Washington*, 541 US 36, 59 [2004]). A statement is testimonial "only if it was procured with a primary purpose of creating an out-of-court substitute for trial testimony" (*People v Pealer*, 20 NY3d 447, 453 [2013], *cert denied* __ US __, 134 S Ct 105 [2013] [internal quotation marks omitted]). The following factors should be considered in determining whether such a primary purpose existed:

> "(1) whether the agency that produced the record is independent of law enforcement; (2) whether it reflects

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[4]Defense counsel failed to object to the admission of Huyck's testimony and there was no strategic or other legitimate explanation for this failure (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Indeed, counsel was aware that the witness did not conduct the tests herself, because the prosecutor informed the court and the defense about this before Huyck testified. The right to effective assistance of counsel can be violated "by even an isolated error. . . if that error is sufficiently egregious and prejudicial" (*see Murray v Carrier*, 477 US 478, 496 [1986]).

> objective facts at the time of their recording; (3) whether the report has been biased in favor of law enforcement; and (4) whether the report accuses the defendant by directly linking him or her to the crime" (*id.* at 454) (internal quotation marks omitted).

Applying this standard in *People v John* (27 NY3d 294 [2016], *supra*), where Huyck also testified in the same capacity as she did in the present case, the Court of Appeals found that defendant's confrontation rights were violated. In *John*, the police arrested the defendant in response to a report that he had pointed a gun at someone just outside his apartment building; the police sent DNA recovered from a gun found in the building's basement to OCME; and the police attached a report to the vouchered gun informing OCME that the defendant had been arrested for possessing the gun (*id.* at 298). Huyck testified at the defendant's trial about the methods used by nontestifying analysts, which were contemporaneously reviewed by her. The Court of Appeals found that the DNA reports were testimonial because OCME generated and analyzed the DNA profiles "in aid of a police investigation of a particular defendant charged by an accusatory instrument and created for the purpose of substantively proving the guilt of a defendant in his pending criminal action" (*id.* at 308). The Court of Appeals stated that

> "[t]he primary purpose of the laboratory examination on the gun swabs could not have been lost on the OCME analysts, as the laboratory reports contain[ed] the police request for

> examination of the gun swabs on the basis that the 'perp' handled the gun and repeatedly identif[ied] the samples as 'gun swabs,'" and some "documents in the OCME file refer[red] to the suspect (defendant) by name" (*id.* at 308).[5]

Further, in *John*, Huyck merely testified that she had "reviewed the reports of the other OCME analysts, including the numerical DNA profiles generated after an editing process, saw that the 'necessary people' had signed off and agreed with their conclusions"; the Court of Appeals found that this "cursory testimony vitiated defendant's right to confront the analysts who actually generated the DNA profiles" (*id.* at 310). The Court of Appeals explained that "Huyck was acting purely as a surrogate witness ... in vouching for the accuracy of the DNA profiles," since "[h]er conclusory testimony in this regard was based solely on the reports of the nontestifying analysts that were admitted into evidence for their truth and not based on a separate, independent and unbiased analysis of the raw data" (*id.* at 310-

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[5] The Court of Appeals further found that the DNA reports were "sufficiently formal to be considered testimonial," since they set forth "facts prepared to be used as critical evidence at a criminal trial," and "every person who prepared the information in the laboratory reports had a business duty to do so truthfully and accurately" (*id.* at 312). The Court of Appeals also noted that "the independent nature of [OCME] does not exclude it from the primary purpose test," "since the predominant purpose of OCME's Forensic Biology Department is to provide DNA testing on crime scene evidence for the New York City Police and prosecutors" (*id.* at 308 n 5).

311). Notably, "Huyck opined that the two obviously identical series of [15] numbers, represented in box score form, were a match and that the source of the two DNA profiles were the gun and defendant" (*id.* at 301) -- which also occurred in the instant case. Accordingly, the Court of Appeals concluded that "at least one analyst with the requisite personal knowledge" was required to testify (*id.* at 313).

The instant case is controlled by *John*. To be sure, here OCME compiled the profile of the DNA recovered from the wire cutter before any suspect had been identified. However, that fact alone is insufficient to distinguish this case from *John*, where OCME was informed of the suspect's name from the outset. OCME in this case eventually compared the DNA profiles recovered from the wire cutter and provided by CODIS, determined that they were an exact match, and so informed CODIS. At that point, in accordance with the standard CODIS procedure, OCME was informed of the identity of the person whose DNA profile had been analyzed by OCME, for the purpose of linking defendant to the burglary. OCME further carried out that purpose by sending a fax to the police identifying defendant as "a perpetrator or someone of interest" in this case, and the police then arrested defendant, apparently based on that information.

This case is distinguishable from *Williams v Illinois* (__ US

__, 132 S Ct 2221 [2012]) a rape case in which the prosecutor called an expert who testified that a DNA profile compiled by a private laboratory from a vaginal swab from the victim "matched a profile produced by the state police lab using a sample of [the defendant]'s blood" (__US at __, 132 S Ct at 2227). The defendant objected that he did not have an opportunity to cross-examine anyone involved in preparing the private lab's report. A plurality opinion by Justice Alito (Alito was joined by Chief Justice Roberts and Justices Kennedy and Breyer and, in part, by Justice Thomas) found that the expert's testimony did not violate the *Crawford* rule, for two reasons: first, the expert could testify based on documents that were not themselves in evidence, and, second, under the primary purpose doctrine, the original DNA testing did not involve a targeted individual. Justice Thomas concurred with respect to the first reason. However, the majority of our Court of Appeals in *John* noted that the evidence would not be admissible on that theory under New York law:

> "First, [the Supreme Court plurality in *Williams v Illinois*] concluded that the fact that the source of the DNA profile was found on the semen from the victim's vaginal swabs was not a fact admitted into evidence, as the lab report setting forth this information had not been admitted, and the expert's reference to that fact was not offered for the truth of the matter asserted therein. Pivotally, the Court opined that since this was a bench trial, the trier of fact, which was a judge and not a layperson, would understand this evidentiary distinction (*see* 567 US at__, 132 S Ct at 2234-2235), i.e., that the factual statements had been 'related

> by the expert solely for the purpose of explaining the assumptions on which [his or her] opinion rest[ed]' (567 US at __, 132 S Ct at 2228). Since the expert's opinion evidence of a DNA match in *Williams* had no relevancy without proof that the defendant's DNA profile was derived from the vaginal swabs from the rape victim and that the DNA profile was accurate, and neither foundational fact was admitted into evidence, this opinion testimony was inadmissible under New York law (*see People v Goldstein*, 6 NY3d 119, 127-129 [2005])" *(People v John*, 27 NY3d 294, 305-06 [2016]).

And, significantly, Justice Thomas did not join Justice Alito as to the second reason, so it did not garner a majority.

Here, by contrast, defendant does not merely challenge testimony about a DNA profile created by an entity unaware of any suspect, but instead challenges the use of an expert witness to provide "nothing more than surrogate testimony to prove" the accuracy of OCME's conclusion that defendant's DNA matched the DNA found at the crime scene (*John*, 27 NY3d at 309). After all, Huyck testified that OCME employees other than herself received a possible match from CODIS, the national database, and CODIS identified defendant to OCME only after OCME employees other than Huyck confirmed that his DNA profile matched the sample from the wire cutter.

The majority makes much of the trial court's ruling that only raw data could come in so that Huyck could make a comparison. But just as in *John*, where the Court of Appeals noted that although it had "previously held that certain DNA

laboratory reports were raw data or machine generated[,] Huyck's testimony and the laboratory reports admitted into evidence prove otherwise" (*John*, 27 NY3d at 309-310 [citation omitted]). Here, Huyck testified that the analysis of the DNA found on the wire cutter, when submitted to CODIS, led CODIS to identify defendant by his DNA; not surprisingly, defendant's DNA sample then matched the sample found on the wire cutter. She also testified that someone else did the DNA testing. In fact, as noted above, she testified that as a Criminalist III she was being retrained so that she could do the lab work in the future, and that when the lab work was done in the present case, only "Criminalist Is were responsible for those duties." In short, regardless of the wording of the ruling, Huyck's testimony and the laboratory reports admitted into evidence in this case violated defendant's right to confront the analyst who actually did the testing (*John*, 27 NY3d at 310 [Huyck's "cursory testimony vitiated defendant's right to confront the analysts who actually generated the DNA profiles"]). Huyck had not "witnessed, performed or supervised the generation of defendant's DNA profile," nor had she "used . . . her independent analysis on the raw data" (*id.* at 315). Rather, just as in *John*, Huyck was merely acting as a surrogate witness. Indeed, on direct, when asked whether the OCME's safeguards were utilized in this case, she responded, "I didn't

personally examine them, but I would assume that the analyst did that." The majority trivializes the safeguards imposed by OCME, by referring to them as "gowning up" and "cleaning"; the safeguards also include, as Huyck testified, having a second person observe the testing process, using positive and negative controls, performing the test twice, and checking equipment. Those safeguards are what make the test results reliable and therefore admissible.

Furthermore, the People's argument that "the OCME report ... consist[ed] of merely machine-generated graphs, charts and numerical data, involving no conclusions, interpretations, comparisons or subjective analysis" was strongly rejected by the Court of Appeals in *John*:

> "We will not indulge in the science fiction that DNA evidence is merely machine-generated, a concept that reduces DNA testing to an automated exercise requiring no skill set or application of expertise or judgment. Likewise, the sophisticated software programs require trained analysts who engage in skilled interpretation of the data ... to construct the DNA profile. Even Huyck conceded that the testing and reviewing analysts independently make these necessary and qualitative judgments by applying the laboratory's thresholds when using the software" (27 NY3d at 311).

The People's observations that Huyck was well experienced and defendant had the opportunity to cross-examine her are insufficient, because the Confrontation Clause entitled him to

cross-examine at least one analyst with direct personal knowledge of the DNA testing (*see John*, 27 NY3d at 313).

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

ENTERED: JULY 25, 2017

CLERK