PETITION APPENDIX

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APPENDIX A

State of New York Court of Appeals

OPINION

No. 63
The People &c.,
Respondent,
v.
Tyrone Wortham,
Appellant.

Angie Louie, for appellant
David M. Cohn, for respondent.

FAHEY, J.:

On this appeal, we are first asked to determine whether a police officer's question to defendant regarding where he lived falls within the "pedigree exception" to the *Miranda* requirement. We conclude that it does. We nevertheless reverse and remit because no *Frye* hearing was held (*see Frye v United States*, 293 F 1013 [DC Cir 1923]) on the admissibility of statistical evidence generated by the forensic statistical tool (FST)

developed by the New York City Office of Chief Medical Examiner (OCME), where it is alleged that defendant was a contributor to a multiple-source DNA profile.

I.

In May 2011, police officers executed a search warrant at an apartment in Brooklyn. When the officers entered the apartment, defendant and his two young children were inside. Pursuant to police department policy, defendant was handcuffed. While still inside the apartment, a detective asked defendant his name, date of birth, address, height, and weight. Defendant stated that his children's mother let him stay at the apartment, motioning toward a bed in the living room. No *Miranda* warnings were given to defendant before those questions were asked. The detective asked defendant for his pedigree information before any contraband was found in the apartment. After defendant's departure from the apartment, the officers recovered weapons, drugs, and drug paraphernalia from a back bedroom. Defendant and a codefendant were jointly indicted and tried on several counts related to the possession of the firearms and controlled substances.

The admissibility of defendant's statement that he lived at the apartment was the subject of a pretrial suppression hearing. During that hearing, the detective who asked defendant for his "pedigree" information testified that it was the policy of the New York City Police Department to handcuff all adults found inside a location where a search warrant was to be executed, pat them down for weapons, ask them certain questions for identification purposes, and then transport them from the search warrant location to the precinct or central booking. The questions typically included the person's name, date of birth, address, height, and weight. The detective testified that all adults found inside a

searched location were asked those pedigree questions, regardless of whether contraband was ultimately found during the search, and the information was entered into the online booking system. If the individual was later arrested, the police would have pedigree information for the person under arrest. If that person was not later arrested, the information would still be entered into the online booking system in order to document that the individual had been in police custody at one point. The detective further testified that he followed this procedure with defendant. After the hearing, the suppression court ruled that defendant's statement that he lived in the apartment was admissible because it fell within the scope of the pedigree exception to the *Miranda* requirement.

Before trial, defendant moved to preclude expert testimony regarding the probability that he was a contributor to a multiple-source DNA sample, a statistic derived from the use of the FST, or, in the alternative, for a *Frye* hearing. The court denied defendant's motion without a *Frye* hearing. Defendant also moved for a severance on the eve of trial, which motion was denied. After a jury trial, defendant was convicted on all counts.

The Appellate Division affirmed the judgment (160 AD3d 431 [1st Dept 2018]). The Court concluded that the pedigree exception to *Miranda* applied and that the trial court properly denied defendant's motion to suppress his statement (*see id.* at 431). The Appellate Division further concluded that defendant's severance motion and his motion for a *Frye* hearing were properly denied (*see id.* at 432).

A Judge of this Court granted defendant leave to appeal (34 NY3d 940 [2019]). We now reverse.

II.

We first address defendant's contention that his suppression motion should have been granted because the pedigree exception to *Miranda* did not apply.

A.

Miranda warnings (*see Miranda v Arizona*, 384 US 436 [1966]) are required before a person in custody is subjected to interrogation by the police (*see Rhode Island v Innis*, 446 US 291, 297-302 [1980]; *People v Paulman*, 5 NY3d 122, 129 [2005]).[1] " 'The term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response' " (*Paulman*, 5 NY3d at 129, quoting *People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007 [1985]; *see Innis*, 446 US at 300-302).

Pedigree questions, also sometimes referred to as "booking questions," typically ask a suspect for identifying information such as name, date of birth, and address. These questions constitute custodial interrogation when they are posed to a suspect in custody (*see People v Rodney*, 85 NY2d 289, 292 [1995], citing *Pennsylvania v Muniz*, 496 US 582, 601-602 [1990] [plurality opinion]). Nevertheless, we have recognized an exception to *Miranda* for pedigree questions (*see Rodney*, 85 NY2d at 292; *People v Rodriquez*, 39 NY2d 976, 978 [1976]; *People v Rivera*, 26 NY2d 304, 309 [1970]). We explored the genesis and scope of the pedigree exception in *Rodney*. "The exception derives from the essential purpose of *Miranda*—to protect defendants from self-incrimination in response

[1] The People do not dispute that defendant was in police custody at the time he was questioned.

to questions posed as part of the investigation of a crime, as distinguished from noninvestigative inquiries" (*Rodney*, 85 NY2d at 292). Pedigree questions are an exception to *Miranda*—that is, a defendant's response to such questions is "not suppressible even when obtained in violation of *Miranda*"—when the questions are " 'reasonably related to the police's administrative concerns' " (*id.* at 292-293, quoting *Muniz*, 496 US at 601-602).

As a threshold matter, pedigree questions must be reasonably related to the police's administrative concerns for the pedigree exception to *Miranda* to apply (*see id.*). The exception may not apply in certain situations, however, even if the question is reasonably related to police administrative concerns. As we stated in *Rodney*, "the mere claim by the People that an admission was made in response to a question posed solely as an administrative concern does not automatically qualify that admission for the pedigree exception to *Miranda* or exempt the People from the necessity of supplying a CPL 710.30 notice" (*id.* at 293).

Our decision in *Rodney* has engendered some confusion regarding when the pedigree exception will apply. In that decision, the Court stated that the pedigree exception would not apply "if the questions, though facially appropriate, are likely to elicit incriminating admissions because of the circumstances of the particular case," or, stated another way, if the question is "reasonably likely to elicit an incriminating response from [the] defendant" (*id.* at 293-294). We also stated in *Rodney*, however, that the pedigree exception applied in that case because the question was "not a disguised attempt at investigatory interrogation" (*id.* at 294). *Rodney* requires clarification.

We agree with the Second Circuit's view that "[w]hether the information gathered turns out to be incriminating in some respect does not, by itself, alter the general rule that pedigree questioning" does not require *Miranda* warnings (*Rosa v McCray*, 396 F3d 210, 221 [2d Cir 2005], *cert denied* 546 US 889 [2005]). If the biographical questions are reasonably related to police administrative concerns, and thereby meet the threshold requirement for the pedigree exception to apply, the fact that the response given by the defendant may ultimately turn out to be incriminating at trial does not alter the analysis. To the extent that *Rodney* suggested otherwise when it stated that questions "reasonably likely to elicit an incriminating response" would not qualify for the pedigree exception (*see id.* at 294), we now clarify that simply because a pedigree question elicits an incriminating response does not preclude the application of the pedigree exception to *Miranda*.

We further conclude that the subjective intent of the officer may be relevant but is not dispositive. In other contexts, we have "acknowledge[d] the difficulty, if not futility, of basing the constitutional validity of searches or seizures on judicial determinations of the subjective motivation of police officers" (*People v Garvin*, 30 NY3d 174, 186 [2017] [internal quotation marks omitted]). The suppression court may consider the subjective intent of the officer in assessing whether the pedigree exception applies, but the inquiry itself must be objective (*see United States v Doe*, 878 F2d 1546, 1551 [1st Cir 1989] ["The question is an objective one; the officer's *actual* belief or intent is relevant, but it is not conclusive"]).

The primary purpose of *Miranda* is "to protect defendants from self-incrimination in response to questions posed as part of the investigation of a crime" (*Rodney*, 85 NY2d

at 292). The police are "entitled to make a reasonable inquiry as to the identity of the person they have taken into custody" (*Rivera*, 26 NY2d at 309; *see Rodney*, 85 NY2d at 292 [distinguishing "noninvestigative inquiries"]). As a result, when a defendant challenges the application of the pedigree exception, the proper inquiry for the suppression court is whether the police used pedigree questions as a guise for improperly conducting an investigative inquiry without first providing *Miranda* warnings.

We hold that the pedigree exception will not apply even if the pedigree question is reasonably related to police administrative concerns where, under the circumstances of the case, a reasonable person would conclude based on an objective analysis that the pedigree question was a "disguised attempt at investigatory interrogation" (*Rodney*, 85 NY2d at 294). Confining the scope of the pedigree exception to police inquiries that are "directed solely to administrative concerns" (*id.* at 293), but precluding application of the pedigree exception where an objective analysis demonstrates that the police are using the cover of pedigree questions to improperly conduct an investigative inquiry without *Miranda* warnings, is consistent with both our decision in *Rodney* and the policies underlying the *Miranda* rule.

B.

Applying those principles to the case before us, we conclude that the pedigree exception applied and that defendant's suppression motion was properly denied. The detective's testimony during the suppression hearing established the administrative purpose for seeking pedigree information from any adults found at a location where a

search warrant is to be executed: the police must know whom they have in custody (*see Rivera*, 26 NY2d at 309). The People thereby established the threshold basis for the pedigree exception to apply, i.e., the questions were reasonably related to the police's administrative concerns (*see Rodney*, 85 NY2d at 292).

We further agree with the People that the pedigree questions were not a disguised attempt at investigatory interrogation (*see id.* at 294). Notably, the police asked defendant his name, date of birth, and where he lived immediately after their entry to the apartment, before the apartment had been searched and before any contraband had been found. The detective further testified that it is standard practice for *all* adults found at a location where a search warrant is executed to be handcuffed and asked these pedigree questions, regardless of whether contraband is found during the search. That defendant's response ultimately turned out to be incriminating does not alter the conclusion that, at the time it was asked, the question was not a disguised attempt at investigatory interrogation by the police (*see id.*).

We have previously observed that "[a]sking a suspect for his name and address is neither intended nor likely to elicit information of a criminal nature" (*Rivera*, 26 NY2d at 309). Although there may be some circumstances where asking a suspect for core identifying information such as name, date of birth, and address will not qualify for the pedigree exception to *Miranda*, those circumstances will be rare. Here, the question posed to defendant regarding where he lived was reasonably related to the police's administrative concerns, and, under the circumstances, was not a disguised attempt at investigatory interrogation (*see Rodney*, 85 NY2d at 292-294). The pedigree exception to *Miranda*

applied, and no *Miranda* warnings were required before police asked defendant for this information. Defendant's suppression motion was properly denied.

III.

We nevertheless hold that reversal is warranted because the court abused its discretion when it denied defendant's motion for a *Frye* hearing with respect to the admissibility of evidence derived from the FST on a multiple-source DNA sample.

People v Williams (35 NY3d 24 [2020]) and its companion case, *People v Foster-Bey* (35 NY3d 959 [2020]), control here and require reversal.[2] There, we held under nearly identical circumstances that the trial courts had abused their discretion as a matter of law in admitting the results of DNA analysis conducted using the FST without first holding a *Frye* hearing (*see Williams*, 35 NY3d at 30; *Foster-Bey*, 35 NY3d at 961). We upheld the defendants' convictions on those appeals only because we concluded that the error was harmless (*see Williams*, 35 NY3d at 42-43; *Foster-Bey*, 35 NY3d at 961).

Williams contains our reasoning on the *Frye* issue with respect to the FST. In *Williams*, no *Frye* hearing had yet been held on the FST at the time of the underlying motion practice (*see Williams*, 35 NY3d at 35). In support of his motion, the defendant in *Williams* argued that the FST was a proprietary program developed and used only by OCME and had not been subjected to independent outside validation (*see id.* at 33). The People opposed the motion primarily by arguing that the FST was based on generally accepted mathematical formulas and had been approved by the DNA Subcommittee of the

[2] *Williams* and *Foster-Bey* were not yet decided when the trial court declined defendant's request for a *Frye* hearing.

New York State Commission on Forensic Science (*see id.* at 34-35).

We agreed with defendant that the trial court was required to hold a *Frye* hearing. We observed that the "FST is a proprietary program exclusively developed and controlled by OCME," and that the approval of the DNA Subcommittee was "no substitute for the scrutiny of the relevant scientific community" (*id.* at 41). The Court concluded that the defendant's papers had "adequately showed that OCME's secretive approach to the FST was inconsistent with quality assurance standards within the relevant scientific community" (*id.* at 41). In addition, we stated that the FST "should be supported by those with no professional interest in its acceptance" (*id*. at 42).

Williams and *Foster-Bey* are controlling here, and the People's attempt to distinguish this case is unavailing. Although low copy number (LCN) DNA evidence was at issue in those cases, we held, independently, that a *Frye* hearing was required with respect to *both* LCN DNA evidence and statistical DNA evidence derived from the FST (*see id.* at 38-42). The People's contention that the defendant's motion papers in *Williams* were more robust than defendant's motion papers here is without merit (*see id.* at 41-42).

Unlike *Williams* and *Foster-Bey*, the error here was not harmless. The statistical DNA evidence derived from use of the FST was the strongest evidence tying defendant to the contraband found in the apartment. The People's remaining evidence consisted of proof that defendant either lived at or was frequently present at the apartment itself and did not link him directly to the contraband. Moreover, the People emphasized the DNA evidence as proof of defendant's possession of the contraband. The evidence of defendant's guilt was not overwhelming without the DNA evidence, and there was a

significant probability that the admission of that evidence contributed to the verdict (*cf. id.* at 42-43).

Inasmuch as Supreme Court abused its discretion in failing to hold a *Frye* hearing, we remit to that court for a *Frye* hearing. If the court determines, after a *Frye* hearing, that the DNA evidence derived from the use of the FST is not admissible, defendant is entitled to a new trial. If the court determines after a *Frye* hearing that the evidence is admissible, defendant may challenge that determination on direct appeal.

We respectfully disagree with our dissenting colleague that this remedy is inappropriate or unconstitutional. As Judge Wilson concedes, we have employed a similar remedy on prior occasions (*see e.g. People v Bilal*, 27 NY3d 961, 961-962 [2016]; *People v Clermont*, 22 NY3d 931, 932-934 [2013]; *People v Hightower*, 85 NY2d 988, 990 [1995]; *People v Williamson*, 79 NY2d 799, 801 [1991]; *People v Millan*, 69 NY2d 514, 521-522 [1987]; *People v Coleman*, 56 NY2d 669, 671 [1982]).[3]

[3] Cases cited by our dissenting colleague where the People failed to establish the proper foundation for the admission of evidence during trial are distinguishable. "The *Frye* inquiry is separate and distinct from the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case" (*People v Brooks*, 31 NY3d 939, 941 [2018] [internal quotation marks omitted]). The People's failure to establish, during trial, the foundation for the admission of evidence is not subject to a pretrial judicial determination. If the People fail to establish the proper foundation for the admission of evidence during trial, the remedy must be a new trial at which the People may, if they so choose, attempt to establish the proper foundation. *People v Freeland* (68 NY2d 699 [1986]) falls into this category, as do many of the other New York state cases and cases from other jurisdictions cited by Judge Wilson.

By contrast, here, the error was the denial of defendant's request to hold a pretrial *Frye* hearing on the admissibility of the statistical DNA evidence derived from the use of the FST. At that pretrial hearing, it will be the People's burden to demonstrate the general acceptance of the FST by the relevant scientific community (*see Williams*, 35

This Court and the intermediate appellate courts are authorized to "take or direct such corrective action as is necessary and appropriate both to rectify any injustice to the appellant . . . and to protect the rights of the respondent" (CPL 470.20; *see* CPL 470.40 [1]). Consistent with that directive, we have ordered different corrective actions, including a conditional remand for a hearing by the trial court, based on the legal error at issue and the circumstances presented in each case (*see People v Carmona*, 37 NY3d 1016, 1017-1018 [2021]; *People Edwards*, 95 NY2d 486, 496 [2000]; *People v Serrano*, 93 NY2d 73, 78-79 [1999]).[4] Here, the error was the trial court's failure to exercise its gatekeeping role under *Frye* to determine the admissibility of the evidence generated by the FST. We do not yet know whether the DNA evidence was improperly admitted at trial because a *Frye* hearing was not held. The appropriate remedy in this case is a remittal to the trial court for a *Frye* determination. In the absence of that threshold determination, appellate review of the admissibility of the evidence and, concomitantly, whether the evidence was improperly admitted during trial, cannot be performed.

We agree with the Appellate Division that the trial court did not abuse its discretion in denying defendant's motion for a severance.

Accordingly, the order of the Appellate Division should be reversed and the case remitted to Supreme Court for further proceedings in accordance with this opinion.

NY3d at 40). The motion court will apply the same standard to evaluate that issue upon remittal as it would have applied had a pretrial *Frye* hearing previously been held.

[4] Courts in other jurisdictions have also recognized that the remedy ordered must be tailored to the circumstances presented in each particular case (*see e.g. United States v Bacon*, 979 F3d 766, 769-770 [9th Cir 2020]).

RIVERA, J. (dissenting in part):

I agree with the majority that the detective's question to defendant asking where he lived constituted an interrogation without *Miranda* warnings (*see Miranda v Arizona*, 384 US 436 [1966]). Statements obtained from individuals in custody before

informing them of their constitutional rights to remain silent and to have an attorney appointed if they cannot afford counsel cannot be used by the prosecution and are thus subject to suppression (*see id.* at 447). However, the majority is incorrect that the question falls within a "routine booking question exception" to *Miranda* as recognized by a plurality of the United States Supreme Court in *Pennsylvania v Muniz* (496 US 582, 601-602 [1990]) and acknowledged, under existing state precedent, by this Court in *People v Rodney* (85 NY2d 289, 293 [1995]). That exception is limited to questions that are intended solely for administrative purposes and not reasonably likely to elicit an incriminating statement under the circumstances of the case.

Here, during the execution of a warrant authorizing a search of an apartment for guns and drugs, a dozen officers forced the front door open and found defendant and his two children inside. Any person found in the apartment—whether the owner or someone with dominion and control over the area where the contraband was found—would be subject to prosecution for illegal possession (*see* Penal Law § 10.08 [8]; *People v Manini*, 79 NY2d 561, 573 [1992]). Nevertheless, upon entry to the apartment, one of the officers immediately handcuffed defendant and asked a series of questions, including where defendant lived. If the officer had asked defendant, "Do you live in this apartment where we are looking for drugs and guns?" the question undoubtedly would violate *Miranda*, rendering any response subject to suppression and inadmissible. The question actually put to defendant is the functional equivalent and demanded the same self-incriminating answer.

It was error not to suppress the statement, which allowed the prosecutor to argue at defendant's trial that the statement further established defendant's unlawful possession.

Under the facts of this case, the error was not harmless, as the statement was directly contradictory to defendant's claim that the contraband was not his and that he had no control over the room where it was found. The majority misinterprets *Rodney* as applied here and adopts a rule focused on the police officer's malintent, rather than on the likelihood that the question would elicit an incriminating answer. I dissent from this rewriting of *Rodney* and, based on the rule as announced in that case, I would reverse the conviction and order a new trial (*see People v Thomas*, 22 NY3d 629 [2014]).[1]

In *Rhode Island v Innis*, the United States Supreme Court concluded that *Miranda* warnings were required in advance of the use of "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" (446 US 291, 301 [1980]). The Court further clarified that such questioning "focuses primarily upon the perceptions of the *suspect*, rather than the intent of the police" (*id.* [emphasis added]). However, the officer's knowledge is not irrelevant and may be an additional factor in determining whether the police violated an individual's rights (*see id.* at 302 n 8). In *Muniz*, a plurality of the Court explained that *Innis* leads to the inexorable conclusion that custodial interrogation includes words or actions that the officer "knows or reasonably should know

[1] I agree, for the reasons discussed by the majority, that the lower court abused its discretion as a matter of law in denying defendant's request for a *Frye* hearing (*see* majority op at 9, citing *People v Williams*, 35 NY3d 24 [2020]). However, because that is not the sole error in this appeal, I have no occasion to opine on the proper remedy, as I conclude defendant is entitled to reversal and a new trial based on the suppression error. Nor is it necessary that I address the merits of defendant's severance claim, as this challenge is rendered academic by the fact that defendant cannot be retried with the original codefendant.

are likely to have the force of a question on the accused and therefore be reasonably likely to elicit an incriminating response" (496 US at 601 [internal quotation marks, citation, and alteration omitted]). The plurality determined that "routine booking questions"—questions seeking biographical information, including a suspect's name and address—asked while detaining a suspect are custodial interrogation because, as explained in *Innis*, interrogation is assessed from the suspect's perspective (446 US at 301). Nevertheless, the plurality concluded that, because the state court had determined that questions posed to Muniz "were requested for record-keeping purposes only, and therefore the questions appear[ed] reasonably related to the police's administrative concerns" (*id.* at 601-602 [internal quotation marks and citation omitted]), the questions fell within the routine booking exception.

In *Rodney*, this Court considered whether the People were required to give notice pursuant to CPL 710.30 of their intent to admit the defendant's statements in response to police questioning during booking (*see* 85 NY2d at 291).[2] In analyzing the specific question and circumstances of that case, the Court reaffirmed its prior recognition of an exception to the requirements of *Miranda* for "routine booking questions" and further noted that the United States Supreme Court and the federal circuits have limited the

[2] In *Rodney*, the Court noted that "the purpose of CPL 710.30 is to inform a defendant that the People intend to offer evidence of a statement to a public officer at trial so that a timely motion to suppress the evidence may be made," including on the ground that the statement was "obtained in violation of defendant's constitutional rights" (85 NY2d at 291-292). Thus, the Court's analysis in *Rodney* focused on defendant's "assertion that the questions posed during the booking process violated his constitutional right against self-incrimination and that he was therefore entitled to pretrial notice so that he could seek suppression" (*id.* at 292).

exception to questions "reasonably related to the police's administrative concerns" (*id.* at 292, citing *Muniz*, 496 US at 601-602, *United States v McLaughlin*, 777 F2d 388, 391-392 [8th Cir 1985], and *United States v Sims*, 719 F2d 375, 378 [11th Cir 1983]). The Court acknowledged that "[t]he exception derives from the essential purpose of *Miranda*—to protect defendants from self-incrimination in response to questions posed as part of the investigation of a crime, as distinguished from noninvestigative inquiries" (*id.* at 289 [citations omitted]). Thus, where routine booking questions serve only their intended administrative purpose, "defendant lacks a constitutional basis upon which to challenge the voluntariness of [their] statement" (*id.* at 293). Accordingly, "[s]tatements made in response to questions which are not directed solely to administrative concerns are subject to the requirements of CPL 710.30" (*id.*). "Similarly, the People may not rely on the pedigree exception if the questions, though facially appropriate, are likely to elicit incriminating admissions because of the circumstances of the particular case" (*id.*).

The majority does not merely "clarify" *Rodney* (majority op at 6). Instead, the majority reinterprets *Rodney* and limits that holding to situations where "the police are using the cover of pedigree questions to improperly conduct an investigative inquiry without *Miranda* warnings" (*id.* at 7). This reinterpretation departs from the explicit language of *Rodney*, which is concerned with questions likely to *elicit* incriminating responses—that is, questions that are, irrespective of the intention of the questioner, likely to provoke an incriminatory answer. The majority jettisons this language from *Rodney* and confines that case's holding only to those questions that are "disguised attempt[s] at investigatory interrogation" (majority op at 8, quoting *Rodney*, 85 NY2d at 294). In other

words, the majority improperly rewrites *Rodney* to focus only on incriminating answers affirmatively *solicited* by the authorities.

The majority's rule ignores the boundaries of the pedigree exception as expressly articulated in *Rodney*. But we are not free to avoid our precedent simply because the current majority disagrees with the rule as previously articulated (*see People v Bing*, 76 NY2d 331, 338 [1990] ["The doctrine (of stare decisis) . . . rests upon the principle that a court is an institution, not merely a collection of individuals, and that governing rules of law do not change merely because the personnel of the court change"]; *Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1 [2016] ["(I)n the rarest of cases, we may overrule a prior decision if an extraordinary combination of factors undermines the reasoning and practical viability of our prior decision"]; *People v Taylor*, 9 NY3d 129, 149 [2007] ["It is well settled that '(s)tare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process'"], quoting *Payne v Tennessee*, 501 US 808, 827 [1991]). Neither party has argued that the *Rodney* rule is unworkable or confusing. Indeed, *Rodney* did not hold that the police cannot ask these questions. If law enforcement wishes to use incriminating statements obtained from a person in custody, they merely need to spend a few seconds providing *Miranda* warnings. This straightforward procedure avoids litigation over whether a question—which the majority and the federal courts all acknowledge is interrogation in the first instance—falls within the booking questions exception.

The two-part rule announced in *Rodney* is clear: first, the booking question must be intended for administrative purposes only; second, when considered in context, the question cannot be likely to elicit an incriminating statement. Critical to defendant's challenge in this case, the Court in *Rodney* explained that "the mere claim by the People that an admission was made in response to a question posed solely as an administrative concern does not automatically qualify that admission for the pedigree exception to *Miranda*" (*id.*). The applicability of the exception must be assessed based on the question and the circumstances of the case.

Here, the interrogating detective made perfectly clear that his question was *not* "directed solely to administrative concerns" (*id.*). When asked how the police use pedigree information, he explained that "[i]t's used to put into the On-Line Booking System, you know, their names, dates of birth, where they live, *for prosecution*" (emphasis added). The majority nonetheless asserts, contrary to the detective's explanation, that his "testimony during the suppression hearing established the administrative purpose for seeking pedigree information" (majority op at 7).[3] But as the detective's testimony establishes, the question

[3] The detective's suppression hearing testimony reveals that his question, far from being directed "solely" to administrative concerns, was indeed designed to obtain information "for prosecution." The detective's trial testimony was even more specific. When asked, "What is the reason for taking somebody's pedigree?", the detective's first response was, "It's what we use to enter into the online booking system *to draw up formal charges and for prosecution*" (emphasis added). When asked to explain what "the online booking system" is, he continued, "It's the NYPD computer database that we use to enter their names, their addresses, their date of births *so the prosecution has the chance to prosecute*" (emphasis added). That is a far cry from "questions to secure the biographical data necessary to complete booking or pretrial services" (*Muniz*, 496 US at 601 [internal quotation marks and citation omitted]). While the majority purports to "[c]onfin[e] the scope of the pedigree exception to police inquiries that are 'directed *solely* to administrative

here cannot fall within the exception, even as redefined by the majority, because the officer admitted that the question was also intended for prosecutorial purposes.

Even assuming, for the sake of argument, that the question was intended for administrative purposes, the circumstances in which defendant was asked where he lived still constituted interrogation that is not exempt from *Miranda*. The question was not asked during booking but rather as part of what the detective, an investigator in the narcotics division, described as a policy of "cuff and toss," where, "during the execution of the search warrant," police "cuff[] people inside the location and toss[] them" into the "P van," that is, a vehicle that "transports prisoners to and from the location and/or the precinct to Central Booking."[4] At the suppression hearing, the interrogating detective testified that he had participated in thousands of narcotics-related arrests and hundreds of search warrant executions throughout his career. He therefore undoubtedly knew the purpose of the search warrant—i.e., to seize evidence of contraband relevant to the narcotics division, pursuant to a search warrant authorized after a judicial determination of probable cause—and, we must assume, understood the elements of the crime of unlawful possession, including on a theory of constructive possession. Moreover, after the police forcibly entered the

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concerns'" (majority op at 7, citing *Rodney*, 85 NY2d at 293 [emphasis added]), its conclusion here that the detective's question was purely administrative in nature is irreconcilable with his unambiguous admissions in the record that, when he asked the question, the detective had full knowledge that the statement might well be used to prosecute defendant.

[4] Defendant does not challenge the lawfulness of this policy apart from the admissibility of the statement regarding his living arrangements.

apartment, they encountered defendant, who was dressed only in athletic shorts and was the only adult supervising two young children. The detective's extensive background in executing narcotics-related search warrants coupled with defendant's seeming familiarity with the apartment are precisely the kind of circumstances "likely to elicit incriminating admissions" (*Rodney*, 85 NY2d at 293).[5] That is, asking a defendant, who appeared to be at least somewhat at home in the target apartment, "Where do you live?" is, under the circumstances, functionally equivalent to asking him, "Do you live in this apartment where we are looking for drugs and weapons?" Both are likely to elicit responses that would provide evidence in a prosecution for illegal possession. Accordingly, the prosecution could not rely on defendant's response, and it should have been suppressed.

[5] Indeed, the detective must have been aware of the particularly high likelihood of eliciting an incriminating admission because, as the prosecutor informed the suppression court at a sidebar conference, the detective had previously executed a search warrant at the apartment and was therefore familiar with the premises.

WILSON, J. (dissenting):

I agree with the majority that "the court abused its discretion when it denied defendant's motion for a *Frye* hearing with respect to the admissibility of statistical DNA evidence derived from FST" (majority op at 9). I further agree that, "[u]nlike *Williams* and

Foster-Bey, the error here was not harmless" (*id*. at 10). What do those two holdings, taken together, mean? They mean that Tyrone Wortham was convicted based on material evidence as to which the People failed to demonstrate admissibility. The inexorable conclusion is that there is, at present, no basis to sustain his conviction or subject him to the consequences of it. (Although Mr. Wortham was sentenced to 9 years of incarceration, so much time has elapsed between his conviction and this appeal that he has served his term of imprisonment and is now on post-release supervision.)

I concur in Judge Rivera's dissent but write separately because, for reasons completely unrelated to Judge Rivera's dissent, I disagree with the majority's remedy. The majority remits this case to the trial court to hold a *Frye* hearing and says that Mr. Wortham is entitled to a new trial only if, at the forthcoming *Frye* hearing, the trial court determines that the DNA evidence linking him to the pistol is inadmissible. Mr. Wortham is not entitled to having his conviction vacated today, the majority writes, because "[w]e do not yet know whether the DNA evidence was improperly admitted at trial because a *Frye* hearing was not held" (*id*. at 12). This is my point exactly. We know the evidence was improperly admitted, because no proper foundation for it was established. We do not know whether the People will be able to establish, *post hoc*, a justification for its admission. Under the majority's holding, Mr. Wortham remains convicted of a crime as to which we "do not know" whether there was a valid basis for conviction; when a conviction was obtained based on material evidence lacking a basis for admission at the time of trial, the remedy is not to continue to enforce the erroneously obtained conviction while giving the People a freestanding chance to demonstrate admissibility. The conviction should be

vacated, after which the People should be free to retry Mr. Wortham and, during the course of that new prosecution, attempt to demonstrate the admissibility of the DNA evidence in a *Frye* hearing should they choose to do so. We have no basis on which to enforce—even for a minute—Mr. Wortham's improperly obtained conviction pending the scheduling of a *Frye* hearing.

Put simply, because Mr. Wortham was convicted based on evidence admitted in error, what legal basis do we have to continue to enforce that conviction? It is true that this court has, without analysis or explanation, occasionally engaged in that practice previously,[1] but that does not render it constitutional.

I

Our system of criminal law rests on two foundational principles. First, that "there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law" (*Estelle v Williams*, 425 US 501, 503 [1976] [quoting *Coffin v United States*, 156 US 432, 453 (1895)]). Second, the People bear the burden of proving a defendant's guilt beyond a reasonable doubt, and "courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt" (*id*.).

[1] *See People v Bilal*, 27 NY3d 961, 962 (2016); *People v Clermont*, 22 NY3d 931, 934 (2013).

During any criminal trial, the People try to prove a defendant's guilt by offering incriminating evidence. That evidence comes in many forms—physical evidence, forensic evidence, testimonial evidence—but all evidence that is admitted at trial must meet certain criteria established by the rules of evidence. Those rules governing admissibility are our way of trying to make sure that all the evidence that a jury sees is reliable enough to be a basis for its verdict.

The rules of evidence are complicated, and the fast-paced nature of criminal trials demands that judges make many decisions very quickly. Mistakes are made. (If trial courts never made mistakes, we appellate judges would be out of business.) Sometimes the mistake is harmless. When a reviewing court determines that certain trial evidence was erroneously admitted, but concludes that, based on all of the other evidence offered during the trial, the "defendant's guilt is overwhelming and that there is no significant probability that the jury would have acquitted defendant had it not been for these errors" (*People v Williams*, 35 NY3d 24, 42-43 [2020]), the error does not require reversal of the conviction. But in other cases, such as this one, the mistake is not harmless. In those cases, the reviewing court finds there is "a significant probability" that the erroneously admitted evidence "contributed to the verdict" (majority op at 10-11 [citing *Williams*, 35 NY3d at 42-43]). I agree with the majority's conclusion that the erroneously admitted DNA evidence "was the strongest evidence tying defendant to the contraband found in the apartment" (*id.* at 10).

How then, after finding that erroneously admitted evidence contributed to Mr. Wortham's conviction, can the majority say that the existing conviction remains valid? There is no legal or constitutional basis for such a holding. With the foundational evidence knocked out from under it, Mr. Wortham's conviction falls and we return to square one: the People have not discharged their burden to prove Mr. Wortham's guilt beyond a reasonable doubt with admissible evidence, and Mr. Wortham is entitled anew to the presumption of innocence.

II

It is wholly within our power to vacate Mr. Wortham's conviction; we have granted that remedy many times before. For example, in *People v Johnson*, we reversed the defendant's conviction of rape, sodomy, and endangering the welfare of a child because the trial court erroneously admitted the victim's Grand Jury testimony without first holding a pretrial *Sirois* hearing (93 NY2d 254 [1999]). We held:

> "Here, it cannot be said that the evidence before the trial court so overwhelmingly established witness-tampering as to satisfy the clear and convincing standard and render a *Sirois* hearing superfluous. There was evidence of the victim's refusal to testify at trial, and evidence of the defendant's misconduct in attempting to silence her. On this record, however, defendant should have been afforded an opportunity to test the causal link between those two elements, as he requested, at a separate hearing. . . . At a *Sirois* hearing, defendant would have had an opportunity to challenge the People's evidence by raising questions as to defendant's role in securing the victim's unavailability at trial. The People contend that a hearing was unnecessary because the record as it stands establishes that defendant was responsible for procuring the victim's

> silence. . . . On these facts, we agree with the Appellate Division that the constitutionally guaranteed truth-testing devices of confrontation and cross-examination should not have been cast aside and the Grand Jury testimony admitted without a hearing or waiver by defendant"

(*id*. at 258-259). Accordingly, we affirmed the Appellate Division order "revers[ing] defendant's conviction" (*id*. at 257-258). We did not remit for a freestanding *Sirois* hearing while leaving the conviction undisturbed.

Similarly, in *People v Freeland*, we reversed a defendant's conviction of driving while intoxicated because the trial court admitted breathalyzer logs for which no proper foundation had been laid (68 NY2d 699, 701 [1986]). We held that "it was error to admit the [breathalyzer] test results and a new trial is required" (*id*.).

In each of these cases, we[2] reversed the challenged convictions because they were based on evidence that had been admitted at trial without a proper foundation having first

[2] Supreme Court and the Appellate Division also routinely grant this remedy (*see, e.g., People v Vanhoesen*, 31 AD3d 805, 808 [3d Dept 2006] ["Reversal is also required because the detective introduced hearsay testimony when he testified as to the drug-related meanings of terms and actions. . . . More information was required to establish a basis for the detective's specialized knowledge regarding how most drug transactions occur . . . . (N)o foundation for this testimony was introduced" (citations omitted)]; *People v Singer*, 236 NYS2d 1012, 1014 [NY Co Ct 1962] ["The qualifications of the police officer, Detective Dihrberg, who performed the blood alcohol test, are questionable, to say the least. . . . (N)o proper foundation was laid for either the results of the test or for the expression of the witness' opinion as to blood alcohol content. . . . (T)he erroneous admission of the blood test result require(s) that defendant be afforded a new trial"]; *People v Davidson*, 5 Misc 2d 699, 702-703 [NY Co Ct 1956] ["It may be that the use of the 'Drunkometer' will become so widespread that practical knowledge of its operation will become the portion of every person, but until it can be said that legally the accuracy and reliability of this device has become established and recognized, a reasonable and proper foundation for the use of its proof must be furnished. . . . Since the finding of guilty was predicated upon all of the evidence received at the trial of this action it cannot be said that

been laid. We did not merely remit for hearings that could potentially cure the error by establishing *post hoc* that the evidence was in fact admissible.

Here, vacating Mr. Wortham's conviction is the proper remedy. Moreover, the People have waived any argument to the contrary. Before the Appellate Division, Mr. Wortham requested that his conviction be vacated. The People did not, in the Appellate Division, dispute the proposition that if the trial court erred by refusing to hold a *Frye* hearing, reversal was required, nor did they make any mention of remittal until oral argument before our Court. Their argument is unpreserved.

III

By declining to vacate Mr. Wortham's conviction, we part ways with many of our sister state courts and a majority of federal circuit courts.[3]

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the receipt of the improper evidence did not affect the outcome. The judgment of conviction is reversed, the fine remitted, and a new trial ordered"]).

[3] *See, e.g., United States v Kaplan*, 490 F3d 110, 114 (2d Cir 2007) ("For the reasons set forth below, we agree that Kaplan's conviction on Counts One through Five must be vacated because the district court erred in admitting, without adequate foundation, lay opinion testimony regarding Kaplan's knowledge of the fraud and testimony regarding others' knowledge of the fraud, and that at least the first of these errors was not harmless"); *United States v Pelullo*, 964 F2d 193, 221-222 (3d Cir 1992) ("The district court erred in admitting numerous documents as well as the summaries prepared by Agent Wolverton. The documents were hearsay and the Government did not comply with the foundation requirements of Rule 803(6), the business records exception. . . . We conclude that these errors were not harmless and therefore we must reverse the convictions on all counts except count 54"); *United States v Garcia*, 752 F3d 382, 391-392 (4th Cir 2014) ("Despite the district court's careful attention to Agent Dayton's credentials as a decoding expert, however, we hold that the agent's testimony was fraught with error . . . [including] her

The Supreme Courts of California, Delaware, and New Mexico have reversed defendants' convictions for driving under the influence of alcohol when the trial courts admitted evidence relating to a novel field sobriety test, called the horizontal gaze nystagmus ("HGN") test, without first holding a *Frye* hearing (or its local equivalent). The Supreme Court of California affirmed the reversal of the defendant's conviction because the trial court erroneously declined to hold a *Kelly* hearing on whether HGN was generally accepted within the relevant scientific community (*People v Leahy*, 8 Cal 4th 587, 592 [1994]). Although the court found that a limited remand for a *Kelly* hearing was the

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failure to state on the record an adequate foundation for very many of her specific interpretations. . . . [W]e are constrained to hold that these flaws deprived Garcia of a fair trial, i.e., that the missteps were not harmless, and thus require vacatur of Garcia's convictions"); *United States v Baker*, 538 F3d 324, 332, 334 (5th Cir 2008) ("In light of the record as a whole, we conclude that the district court erred by admitting Exhibit 8 over Baker's objection that no foundation or predicate was offered. . . . For the foregoing reasons, we REVERSE Baker's conviction"); *United States v Freeman*, 730 F3d 590, 597, 600 (6th Cir 2013) ("Agent Lucas failed to explain the basis of his interpretations—what experience he had that the jurors themselves did not have—and therefore failed to lay a foundation under Rule 701. . . . Because it does not appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained, we vacate the conviction" [alteration, internal quotation marks, and citation omitted]); *United States v Le*, 272 F3d 530, 531 (8th Cir 2001) (per curiam) ("We need only consider one aspect of defendants' appeal in order to reverse each of their convictions and remand for further proceedings. Each defendant claims his conviction should be reversed, because the district court improperly admitted a drug laboratory report, absent the proper foundation. Their argument is well taken"); *United States v Mouzin*, 785 F2d 682, 693 (9th Cir 1986) ("In reviewing the government's foundation for the admission of this evidence under Federal Rule of Evidence 801(d)(2)(E), we cannot but note the similarities between the foundational deficiencies for the ledger and for the computer printout. . . . [W]e find the improper admission of the ledger and printout to be prejudicial error. . . . Accordingly, we reverse the defendant's convictions on these two counts based on the improper admission of the ledger and computer printout" [citations omitted]).

appropriate remedy, it nevertheless affirmed the judgment reversing the defendant's conviction:

> "We accept, however, the People's suggestion that an entire retrial of the case may be unnecessary. Instead, we will direct the Court of Appeal to reverse defendant's conviction and remand the case to the trial court for a *Kelly* hearing in accordance with our opinion. If, at the conclusion of the hearing, the trial court concludes there is sufficient basis to admit the HGN testimony previously presented, the court should reinstate the judgment without reintroducing such testimony. If the trial court determines the HGN evidence is inadmissible under *Kelly*, the court should order a new trial if the People so elect. If the judgment of conviction is reinstated, or a new trial ordered, appellate review will be available to the respective parties regarding the trial court's ruling, limited to any new issues not resolved in this opinion"

(*id*. at 610). Although the California Supreme Court remitted for a *Kelly* hearing, it did so *after* affirming the intermediate court's reversal of the defendant's conviction, which the intermediate court did without qualification. Thus, the difference between the remedy in *Leahy* and the remedy in this case is that the defendant was not subject to an improperly obtained conviction pending the ordered *Kelly*/*Frye* hearing.

The Supreme Court of Delaware also reversed a defendant's conviction, holding that the trial court "prejudicially erred by considering the HGN test without sufficient scientific medical expert foundation," and "[b]ecause the error was not harmless, . . . reverse[d] the appellant's conviction . . . and remand[ed] the case for a new trial" (*Zimmerman v State*, 693 A2d 311, 313, 317 [Del 1997]). The Supreme Court of Mexico likewise held that because "the HGN testimony should not have been admitted at trial

because it lacked the necessary *Alberico–Daubert* foundation," the defendant was "entitled to a new trial" (*State v Torres*, 1999-NMSC-010, ¶¶ 54-55, 127 NM 20, 36-37).

The Supreme Court of Nebraska reversed a defendant's conviction for driving under the influence of alcohol because it was based on evidence from another field test, an Intoxilyzer breath test, for which no proper foundation had been laid (*State v Baue*, 258 Neb 968, 975 [2000]). In that case, "[t]estimony adduced by the State established that when operating properly, the testing device generates both a digital readout and a printed test record card reflecting the alcohol content of the breath sample" (*id*. at 974). But when the officer administered the test on the defendant, "he obtained a digital readout . . . but no printout on the test record card" (*id*.). The Supreme Court of Nebraska held that "[b]ecause the State did not prove that the testing device was working properly at the time the . . . result was obtained, foundation for the result was not established, and the trial court erred in receiving the result in evidence over [the defendant's] objection" (*id*. at 974-975). The court held that this issue was "dispositive of the appeal" and that it was "required to reverse [the defendant's] conviction and remand the cause for a new trial" (*id*. at 977).

The Supreme Court of Utah reversed a defendant's conviction of forcible abuse, rape, forcible sodomy, and incest because "the trial judge erred in admitting certain testimony by expert witnesses called on behalf of the prosecution" (*State v Rimmasch*, 775 P2d 388, 389 [Utah 1989], sup by rule on other grounds in *State v Maestas*, 2012 UT 46, ¶ 121 n 137, 299 P3d 892, 930). The Supreme Court of Utah found that

> "Throughout the testimony of these key experts, which consumed almost two-thirds of the trial, little foundation was offered or demanded by the court as to the scientific basis for the profile of the typical sexually abused child, the ability of the profile to sort the abused from the nonabused with any degree of accuracy, or the ability of the experts to judge whether the daughter was telling the truth during the interviews"

(*id*. at 395). Because no "adequate foundation was laid for a determination that the evidence was reliable," and because "the improperly admitted testimony had a substantial impact on the verdict," the court held that the defendant's "conviction must be reversed and the matter remanded for retrial" (*id*. at 404, 408). Similarly, the Supreme Court of Oregon reversed a defendant's conviction of sexual abuse and attempted sodomy (*State v Henley*, 363 Or 284, 310 [2018]). In that case, "the trial court permitted a forensic interviewer to testify about defendant's behavior that may have constituted 'grooming' of the victim for sexual abuse if defendant had the requisite intent, without the state first establishing that the testimony about grooming was scientifically valid and reliable" (*id*. at 286). For that reason, the court found that it "must reverse defendant's conviction and remand the case to the trial court for further proceedings" (*id*. at 310).

Finally, earlier this year, the Supreme Judicial Court of Massachusetts reversed a defendant's conviction of armed assault with intent to murder and related charges (*Commonwealth v Davis*, 487 Mass 448, 450 [2021]). In that case, the defendant was on probation on a federal drug charge and wearing a GPS ankle monitor, which placed him in the vicinity of a shooting that took place when an unidentified man fired multiple shots through the window of a moving sedan (*id*. at 499). The Supreme Judicial Court of

Massachusetts held that the trial judge "abused his discretion in admitting the speed evidence, where the [GPS ankle monitor's] ability to measure speed had never been formally tested" and "[b]ecause this error was prejudicial," it "reverse[d] the defendant's convictions" (*id*. at 450).

IV

Any argument that remittal is the proper remedy because our Court has not yet determined whether the admission of the DNA evidence was erroneous is meritless. Such an argument looks at the issue from the wrong vantage point. The error warranting vacating Mr. Wortham's conviction occurred the moment the DNA evidence was admitted without foundation into his trial. Whether a proper foundation *could* have been laid for that evidence is another matter entirely, one that is subsequent to the fatal error here.

For virtually all evidence erroneously admitted for lack of foundation, whether testimonial, forensic or documentary, it is always theoretically possible that a better foundation could be laid if the People are given a second chance. That second chance does not come by sustaining the conviction pending a freestanding showing by the People that they have better foundational evidence than what they presented at trial; it comes by vacating the conviction and allowing the People to retry the defendant, at which time they may present their better foundational evidence (*see People v Price*, 29 NY3d 472, 480 [2017] ["(A)dmission of the photograph here lacked a proper foundation and, as such, constituted error as a matter of law. Furthermore, on the facts of this case, we cannot

conclude that the error was harmless. Accordingly, the order of the Appellate Division should be reversed and a new trial ordered" (citations omitted)]; *People v Quevas*, 81 NY2d 41, 42, 45-46 [1993] ["The sole issue on this appeal is whether the prosecutor laid a proper foundation for the introduction of identification testimony through a police officer. . . . The proper foundation was not laid . . . . Accordingly, the order of the Appellate Division should be reversed and a new trial ordered"]; *People v Ely*, 68 NY2d 520, 527 [1986] ["Because the foundation for the tapes was not sufficiently established, there must be a reversal and a new trial"]; *People v Kennedy*, 68 NY2d 569, 571 [1986] ["This appeal presents a novel application of the business records exception to the hearsay rule (CPLR 4518): two miniature pocket diaries, identified by the People's retained expert as the master records of a loanshark kept in the regular course of his business, were received in evidence in a prosecution against defendant to establish that he was the loanshark's silent partner. We agree with the Appellate Division that a sufficient foundation for those records was not established, and there must be a new trial"]). There is no reason that expert testimony as to which the People have failed to demonstrate the foundation necessary for admissibility should be treated any differently than any other form of evidence.

There is also no meaningful legal distinction between a lack of foundation demonstrated pretrial and a lack of foundation demonstrated during trial (majority op at 11-12 n 3). Why would a constitutional deprivation warranting a new trial occur when material foundationless evidence is erroneously admitted during trial but not when it is erroneously deemed admissible pretrial?

Setting aside constitutional arguments, the Criminal Procedure Law (CPL) also cuts against the meaningfulness of such a distinction. CPL 710.70(3) provides that a pretrial motion to suppress is the "exclusive method of challenging the admissibility of evidence upon the grounds specified in section 710.20"; CPL 710.20 does not include *Frye* or lack of foundation for testimony of any kind (including expert testimony), but rather concerns evidence that might be excludable because of police taint (*e.g.*, unlawful search and seizure, unlawful wiretapping, coerced confessions). The necessary conclusion is that all other types of foundational objections may be made either by a pretrial motion *in limine* or during trial. Thus, the CPL contemplates that an objection to a lack of general scientific acceptance could be made before or during trial. The majority's distinction, albeit *dicta*, means that if a defendant's meritorious challenge to a lack of foundation is raised pretrial, the People will get a freestanding do-over to establish foundation, whereas if the meritorious challenge is made during trial, the People will have to retry the entire case. Fundamentally, the majority's distinction is incompatible with the presumption of innocence and the People's burden to prove guilt beyond a reasonable doubt because it maintains a criminal conviction where an appellate court has determined the People, at trial, failed to prove the foundation necessary to admit evidence material to the defendant's conviction. Whether the error occurred pre-trial or mid-trial is of no constitutional moment.

As shown by our decisions, and the decisions of our sister state courts and federal circuit courts, vacating Mr. Wortham's conviction is the proper remedy, and it should be

an uncontroversial one. The trial court's error in admitting the DNA evidence without a *Frye* hearing deprived Mr. Wortham of his right to a fair trial (NY const art I, § 2; US Const, 6th, 14th Amends). In the face of that error, there is no lawful basis to maintain his conviction—even in some interim period pending a *Frye* hearing. Having determined that material incriminating evidence was improperly admitted at trial, the failure to vacate his conviction immediately is, quite simply, unconstitutional.

Order reversed and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein. Opinion Judge Fahey. Chief Judge DiFiore and Judges Garcia, Singas and Cannataro concur. Judge Rivera dissents in part in an opinion, in which Judge Wilson concurs in a separate dissenting opinion.

Decided November 23, 2021

APPENDIX B

Acosta, P.J., Tom, Oing, Moulton, JJ.

6215 The People of the State of New York, Respondent, Ind. 3148N/11

-against-

Tyrone Wortham, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

Tyrone Wortham, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Richard D. Carruthers, J. at jury trial and sentencing), rendered April 18, 2013, as amended April 22, 2013, convicting defendant of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree (two counts), criminal possession of a controlled substance in the third and seventh degrees, criminally using drug paraphernalia in the second degree (two counts), and endangering the welfare of a child (two counts), and sentencing him, as a second violent felony offender, to an aggregate term of 9 years, unanimously affirmed.

The hearing court properly denied defendant's motion to suppress a statement he made in response to an officer's pedigree

question. Although defendant acknowledged that he resided in the apartment where contraband was found, he was responding to a routine administrative question that was not a "disguised attempt at investigatory interrogation" (*People v Rodney*, 85 NY2d 289, 294 [1995]) and was not designed to elicit an incriminating response (*see People v Flagg*, 149 AD3d 513 [1st Dept 2017], *lv denied* 29 NY3d 1079 [2017]).

The trial court properly denied defendant's severance motion. The defenses of defendant and his codefendant were not in "irreconcilable conflict" (*People v Mahboubian*, 74 NY2d 174, 184 [1989]). Throughout the trial, the defenses were generally consistent. To the extent that one of the several theories raised by codefendant's counsel on summation tended to shift blame to defendant, there was no significant danger that "the conflict alone would lead the jury to infer defendant's guilt" (*id.*).

Defendant was not entitled to a hearing pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923]) to determine the reliability of forensic statistical tool DNA evidence (*see e.g. People v Gonzalez*, 155 AD3d 507 [1st Dept 2017]; *People v Lopez*, 50 Misc 3d 632 [Sup Ct, Bronx County [2015]; *People v Debraux*, 50 Misc 3d 247, 259 [Sup Ct, NY County 2015]).

Defendant's pro se 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]).

We have considered and rejected defendant's remaining pro se claims.

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

ENTERED: APRIL 5, 2018

CLERK

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM: PART 82
----------x

THE PEOPLE OF THE STATE OF NEW YORK — Indictment No. 3148/11

-against- — CPCS 3 & CPW 2

Huntley Hearing

TYRONE WORTHAM and SHAWANA HARRISON,

Defendants.

----------x

February 15th, 2013

100 Centre Street
New York, NY 10013

B e f o r e:

HONORABLE CHARLES H. SOLOMON,

Justice.

Appearances:

BRIDGET G. BRENNAN, ESQ.
Office of Special Narcotics, New York County
BY: NOWLES HEINRICH, ESQ.
ELIZABETH SHEETZ, ESQ.
Assistant District Attorneys

LEGAL AID SOCIETY
Attorney for Defendant Wortham
BY: PHILIP RAUSCH, ESQ., of Counsel

ENRICO DeMARCO, ESQ.
Attorney for Defendant Harrison

Joanne Fleming
Senior Court Reporter

(In open court)

THE CLERK: Calendar number three, Tyrone Wortham, Shawana Harrison.

THE COURT: Counsel, good morning.

Counsel, we have appearances from yesterday.

This is the hearing continued and all parties are present. The defendants are present.

When we're ready, let me ask, counsel, both sides, anything further on the hearing issues?

Defense?

MR. DeMARCO: No.

MR. RAUSCH: No, Judge.

THE COURT: Prosecution?

MR. HEINRICH: Your Honor, I did have a chance to look over the two or three cases provided by Mr. Rausch. One is People v. Rodney which --

THE COURT: That's the leading case.

MR. HEINRICH: It's the leading case.

THE COURT: Eighty-five New York 2d -- wait, when I'm speaking --

MR. HEINRICH: Sorry.

THE COURT: Please.

That's the case we discussed yesterday, the Court of Appeals, 85 NY, leading case in this area.

MR. HEINRICH: Yes.

THE COURT: Just give me one second.

Yes, I'm sorry.

MR. HEINRICH: I'm sorry, your Honor?

THE COURT: Mr. Heinrich, you were saying you had a chance to look at the cases?

MR. HEINRICH: Yes, your Honor. One of the cases of course is People versus Rodney. I think we discussed that enough yesterday.

I will just note, the other two are not at all relevant and/or binding on this Court. One is a Nassau County District Court opinion and the other one is a Fourth Department case, both are factual --

THE COURT: Which is the Fourth Department case?

MR. HEINRICH: Fourth Department case, your Honor, is People versus Flowers.

THE COURT: Flowers. I am aware of Flowers. Just for the record, that's 59 AD 3d 1141, 2009.

MR. HEINRICH: Yes, your Honor.

THE COURT: That's the citation.

MR. HEINRICH: It does involve a search warrant. Other than that, there is no factual distinction -- excuse me -- no factual analogy. At issue in Flowers was repeated questions from a police officer demanding from the defendant who owned a money -- excuse me -- who owned the money found in a drawer. That is far different than the question in

this case regarding pedigree information.

Who owned narcotics money found in the drawer was clearly asked to obtain inculpatory information. Much different than the present case where it was very simple pedigree information which, as the detective testified to, is necessary for administrative reasons in all search warrant executions and all arrests made by the NYPD.

The second case provided by defense counsel was People v. Singh, that is 12 Misc. 3d 952. This is a Nassau County District Court case. The questions examined in that case, it was a DWI case, and hours after the arrest, there were questions regarding how much alcohol had been consumed by the defendant.

Once again, in contrast to the present case, those questions were clearly meant to obtain inculpatory information, that it's administrative reasoning and rational behind those questions, far different from the pedigree questions asked by Detective Wood.

For those reasons, the People respectfully submit that these cases should not be considered by you, by your Honor, in determining the issue regarding the Huntley hearing.

Thank you.

THE COURT: Thank you.

Counsel, let me give you first my findings of fact

and conclusion of law.

This was a hearing that was conducted before me yesterday, and the one witness who testified at the hearing, Detective Brian Wood from Brooklyn North Narcotics, I find to be a credible witness, and my understanding of fact and conclusion of law are based upon his testimony.

Detective Wood testified that he's been on the police force for over sixteen years and has been involved in thousands of narcotic arrests over his career and has been involved in the execution of hundreds of search warrants.

On the date in question in this case, the detective was part of a team of officers executing a search warrant at [redacted] Alabama Avenue in Kings County, apartment 2A. The police entered the apartment on the date in question at approximately 6:30 p.m.

And this detective testified, his role, as he described it, was to cuff and toss and also the P van which is commonly referred to as the prisoner van. The cuff and toss, as he put it as part of his assignment, was to check all adult occupants of the apartment for weapons and to handcuff them while the search was being conducted by other members of the search warrant execution team.

Upon entry into the apartment, the only adult inside was the defendant Wortham, if I'm pronouncing that correctly, Mr. Rausch?

MR. RAUSCH: Yes.

THE COURT: He was inside in one of the bedrooms in the apartment and there were also two young children inside the apartment. Detective Wood said that they were both under ten years of age.

The defendant was immediately handcuffed as soon as the police entered the apartment. Detective Wood spoke to the defendant and asked him his name and other pedigree information. This conversation took place in the kitchen area of the apartment.

And Detective Wood testified that, under police department regulations, pedigree information is to be taken from every adult inside the premises that are being searched pursuant to a search warrant, whether they were arrested or not, for NYPD records and also to put it on the NYPD's on-line booking system.

In response to Detective Wood's questions, defendant said that his babies' mama lets him stay in the apartment and that he sleeps on a bed or mattress in the living room, and as he was telling this to Detective Wood, he nodded his head towards the area which was visible from the kitchen area.

Detective Wood stayed in the apartment approximately one half hour, until approximately 7:00 p.m., and then drove to the Seventy-Fifth Precinct.

As he was leaving the building, Detective Wood saw the defendant Harrison, whom he knew from a prior arrest, he observed her pull up near the building in a white Mercedes and saw her getting out of the car and walking toward [redacted] Alabama Avenue.

At approximately 7:40 p.m., while the detective was at the Seventy-Fifth Precinct, he received a phone call from one of the officers involved in the execution of the search warrant and was told that a firearm had been recovered inside the apartment and that the female who was on her way to the precinct should be placed under arrest because she had some connection to the apartment, or, as Detective Wood testified, he heard the officer say the tenant of record of the apartment.

When the defendant Harrison arrived at the Seventy-Fifth Precinct requesting the two children who had been brought to the precinct from the apartment, Detective Wood placed her under arrest.

In addition to the information he received in the phone call from another police officer, Detective Wood also knew that the defendant had an arrest warrant on an open summons case.

When the defendant Harrison arrived at the precinct, Detective Wood placed her under arrest and took pedigree information from her. The defendant Harrison said

she lived at [redacted] Alabama Avenue, apartment 2A, and also gave her date of birth. This information was required for the New York Police Department's on-line booking system.

Turning first to my legal conclusions with respect to Ms. Harrison, the general rule is, of course, that during arrest proceedings, the police are legally permitted to ask a defendant pedigree questions without advising that person of her Miranda rights. Leading case has been referred to yesterday and again today, People v. Rodney, the Court of Appeals, from 1995.

Here, the defendant was properly arrested based upon probable cause because of the phone call the detective had received from officers at the apartment where the search warrant was being executed, that the defendant Harrison was connected to the apartment and that she also should be arrested. And Detective Wood was legally permitted to rely on that information.

In addition to that, there is a separate basis for the arrest. There was a warrant outstanding concerning the summons complaint that Detective Wood knew about. So he was authorized to arrest the defendant Harrison on that as well.

Therefore, with respect to any answers given to the questions concerning pedigree by the defendant Harrison, those answers will be admissible at trial and the

defendant's rights were in no way violated by the questioning.

As to the co-defendant, Mr. Wortham, the motion to suppress the statement that he made inside the apartment on Alabama Avenue in response to Detective Wood's questions as to his name and where he lived is similarly denied.

The NYPD rule is that when a search warrant is being executed, every adult inside the apartment must be handcuffed and pedigree taken. This is for safety purposes. While the NYPD rule itself doesn't make the conduct lawfully proper, in this case, I find that Detective Wood properly handcuffed the defendant and asked him where he lived.

Under the general rule, even if a defendant is arrested inside the apartment and handcuffed, he can be asked pedigree questions. And that's certainly permissible. This defendant was not under arrest. In fact, there was no evidence, according to Detective Wood's testimony, that anything had been recovered at the time the defendant spoke to the detective.

So clearly the questions in this case were not designed to elicit an incriminating response from the defendant. And no ulterior motive can be attributed to Detective Wood since he wasn't even aware at the time he spoke to the defendant whether there was any contraband in the apartment.

I am aware of the case that was referred to this morning, Flowers, which I think is from the Fourth Department 2009. Certainly different facts and is not binding on this case.

Because of the police department's -- withdrawn. Because Detective Wood's conduct in speaking to the defendant Wortham inside the apartment was, in all respects, proper and the defendant's rights were in no way violated by the questions asked by the entry of the police into the apartment, the motion to suppress the pedigree statements that he made is denied.

Counsel, you have an exception, both of you, to my ruling.

Alright, this case is going to go to trial now, and I understand -- I know, Mr. DeMarco, you can't be here this afternoon, so we're talking about adjourning the case till Tuesday.

MR. DeMARCO: That's fine.

THE COURT: Monday is a legal holiday.

MR. DeMARCO: Thank you, your Honor.

THE COURT: Okay.

MR. DeMARCO: In light of the Court's admitting Mr. Wortham's statements, I will also file a motion to sever now.

THE COURT: I will certainly refer that to the

trial judge.

What is the basis of the severance motion?

MR. DeMARCO: Okay, so the basis of the severance motion is based on a Bruton issue. The statement in this case, as the Court referred to in its decision, where Wortham makes a statement that Ms. -- the babies' mother allows him to stay in the apartment and to sleep on a bed inside the living room, I'm going to submit to the Court that that's testimonial in nature and that my client would be denied her right to confront a witness in this case if Mr. Wortham chose in a joint trial not to take the stand and testify as it is his right not to do so.

THE COURT: Why is that?

MR. DeMARCO: I'm sorry?

THE COURT: Why is that? I don't understand the reasoning. How do we know this is the baby mama?

MR. DeMARCO: Well, because of the charges in the case and the evidence that's going to be presented in the case. There is an unlawfully endangering count. There are two counts in this case. The district attorney will present evidence in fact those two children in the apartment were Ms. Harrison's children and Mr. Wortham's children. There will be evidence presented in the district attorney case in support of those endangering welfare counts, that in fact these children belonged to these two defendants.

So, the reasonable inference that when he was referring to his babies' mother is that it's going to be that he's referring to Shawana Harrison. That is a reasonable inference to draw from the evidence.

THE COURT: How does that implicate her?

MR. DeMARCO: It implicates her to the extent that by him making a statement saying to the detective she allows me to stay in the apartment and sleep on a bed, it implicates her in that he is suggesting, or there's evidence tending to show, that she exercised control over the apartment or authority over the apartment, demonstrating one of the elements of the crime which is the element of possession. And that's why it would be prejudicial.

Now, I should say as an aside, and I included it in my motions, Mr. Wortham was in the hallway when I was interviewing my client, and he was away from me, denied that he ever made this statement to Detective Wood and he said it was a fabrication. I overheard him. He was away from me.

As an example to show the Court the prejudice that my client would suffer, if he did not take the stand and I wasn't able to question him, I would never be able to elicit the evidence or testimony that he ever made such a statement, that it was a fabrication. I can take a different tactic and argue in fact he's the one that has the primary control over the apartment and challenge him on that

basis. If he were to take the stand.

Again, I'm not able to confront him because he may exercise his right not to testify, and, in my opinion, since the statement is testimonial in nature and does offer or tend to have some showing that Ms. Harrison exercised control over the apartment, that it becomes testimonial in nature and it prejudices her rights to confront witnesses.

So, on, you know, U.S. versus -- Bruton versus U.S., I ask the Court to sever Ms. Harrison separately or empanel a separate jury.

THE COURT: Okay.

Mr. Rausch, anything you want to say?

MR. RAUSCH: Not about that, but I have my own motion that you asked me to prepare.

THE COURT: I wanted you to prepare?

MR. RAUSCH: Or that I needed to prepare, I should say.

THE COURT: You're filing that for a severance as well?

MR. RAUSCH: Correct.

THE COURT: The same grounds?

MR. RAUSCH: Different grounds, antagonistic defense, Judge, reconcilable defenses lead to prejudice.

You want me to file that with you or the trial judge?

APPENDIX D

IV of dv

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM: PART 82

THE PEOPLE OF THE STATE OF NEW YORK

-against-

TYRONE WORTHAM and SHAWANA HARRISON,

Defendants.

Indictment No. 3148/11

CPCS 3 & CPW 2

Huntley Hearing

February 14th, 2013

100 Centre Street
New York, NY 10013

B e f o r e:

HONORABLE CHARLES H. SOLOMON,
Justice.

Appearances:

BRIDGET G. BRENNAN, ESQ.
Office of Special Narcotics, New York County
BY: NOWLES HEINRICH, ESQ.
ELIZABETH SHEETZ, ESQ.
Assistant District Attorneys

LEGAL AID SOCIETY
Attorney for Defendant Wortham
BY: PHILIP RAUSCH, ESQ., of Counsel

ENRICO DeMARCO, ESQ.
Attorney for Defendant Harrison

Joanne Fleming
Senior Court Reporter

IV.

to May 26th, 2011, were you working that day?

A Yes.

Q Generally, do you recall what shift or tour you were working?

A Yes.

Q Will you tell us?

A Twelve-twenty-seven by twenty-one hundred hours, which is 12:27 p.m. by nine o'clock p.m.

Q Thank you.

Do you remember any --

THE COURT: 12:27 p.m.?

THE WITNESS: To nine o'clock p.m.

THE COURT: Nine at night?

THE WITNESS: Correct.

THE COURT: Go ahead.

Q Do you remember any or the officers or detectives you were working with that day?

A I remember Police Officer Solmonsohn.

Q Is his current rank now detective?

A Yes, he is.

Q Approximately -- withdrawn.

What was your team's assignment that afternoon?

A To execute a search warrant.

Q Do you recall the location where the search warrant was to be executed?

A Yes.

Q Will you tell us?

A [redacted] Alabama Avenue, apartment 2A.

Q Approximately how many people were involved in the execution of the search warrant that afternoon?

A I'd say approximately --

THE COURT: Detective, I take it -- we're in Manhattan now -- Alabama Avenue is in Brooklyn?

THE WITNESS: Kings County, correct.

THE COURT: You're assigned in New York -- Brooklyn North Narcotics, so you were in Brooklyn that day?

THE WITNESS: Correct.

THE COURT: Go ahead.

Q What part of Kings County is that location in?

A Brooklyn, East New York.

Q And approximately how many people were executing the search warrant on your team?

A I'd say approximately twelve.

Q Do you recall the general time when this search warrant was executed?

A 6:30 p.m.

Q What was your role during the execution of the search warrant?

A I was assigned cuff and toss and P van.

Q Cuff and toss, what does that mean?

THE COURT: Mr. Rausch, indicating, for the record, your client?

MR. RAUSCH: Yes.

THE COURT: Go ahead.

MR. HEINRICH: Thank you, your Honor.

Q Do you recall where you first saw Tyrone Wortham that afternoon?

A Yes.

Q Where?

A Inside of a bedroom.

Q Do you know approximately how many bedrooms are in that apartment?

A I believe there's four or five.

Q Did you have any type of conversation with Tyrone Wortham that afternoon?

A Yes.

Q Will you tell us the substance of the conversation?

A To take basic pedigree information as to his name, date of birth, address, height, weight.

Q What was the reason for doing that?

A It's for our records when we process the arrests and then enter them in the On-line Booking System.

Q And do you recall what information he gave regarding where he lived?

THE COURT: Detective, let me interrupt. Where

did this conversation take place?

THE WITNESS: Inside 2A, in the apartment.

THE COURT: Was he under arrest?

THE WITNESS: He was handcuffed at that time.

THE COURT: He was handcuffed by you or by somebody else?

THE WITNESS: Correct.

THE COURT: By somebody else?

THE WITNESS: I don't recall who handcuffed him.

THE COURT: Go ahead.

MR. HEINRICH: Thank you.

Q Do you recall what Mr. Wortham's response was in terms of where he lives?

A Yes.

Q Will you tell us?

A He stated that his baby's mother lets him stay there and he sleeps on a bed in the living room, and he motioned towards the bed that was inside the living room.

Q How was this information used by that team?

A Hm?

Q How was this pedigree information used by the NYPD?

A It's used to put into the On-line Booking System, you know, their names, dates of birth, where they live, for prosecution.

Q Is this type of information taken from every adult

enter the apartment?

A I believe it was 6:30 p.m.

Q And you found Mr. Wortham or Mr. Wortham was found by yourself as the sole adult in that apartment, correct?

A He was the only adult inside the apartment at that time.

Q Where was he --

THE COURT: Hold on.

Counsel, if you want to confer, that's fine, but I cannot have testimony and questioning at the same time.

MR. DeMARCO: I'm sorry.

THE COURT: Mr. Rausch, you want to ask the question again?

Q Where was he within the apartment itself?

A He was inside of a bedroom.

Q And there's several bedrooms, correct?

A Yes.

Q Where in terms of the apartment itself was that bedroom?

A If you entered the apartment, you are immediately inside the kitchen. When you walk straight, it would be the first bedroom you would encounter in a hallway.

Q How did you enter the apartment?

A Through the front door.

Q Was it open?

as to that statement itself in this hearing.

MR. HEINRICH: Correct, your Honor. The People will not be seeking to introduce that statement.

THE COURT: I'm only going to rule on the testimony --

MR. RAUSCH: Right.

THE COURT: -- that was given at the hearing. If there was a statement elicited, I will rule on it. If it's something not elicited, I guess I can't rule.

MR. RAUSCH: You can't.

THE COURT: Right.

Let me hear the legal argument about the statement testified to.

MR. RAUSCH: Apparently, Judge, the police officers went there that day to execute a search warrant which gives them the opportunity to search the premises for guns, drugs or anything like that. This particular case, prior to any arrest, apparently, Judge, in their own terms, they got pedigree information from my client.

The statement of which you heard was that co-defendant lets my client stay in the apartment, 2A, and allowed him to the sleep in a living room on a --

THE COURT: Let me -- when I'm speaking, please.

I heard this six or seven times already. Let me talk about the subject of what the hearing is.

MR. RAUSCH: Okay.

THE COURT: He's handcuffed. He's in the apartment. This detective talks to him to get pedigree information.

MR. RAUSCH: Yes.

THE COURT: And the defendant says to him, in substance, that his baby mama, baby mama, lets him stay there, lets him sleep there, sleeps on a bed in the living room, and he's in the kitchen area when he says this to the detective who testified, and he's, like, nodding towards that area which is visible from the kitchen area where the bed is in the living room.

That's the subject of the hearing. That's the statement that's established. The question is: Was it proper and lawful for the detective to question him like that, to get that information. So talk to me about the legal issues.

MR. RAUSCH: Judge, we know there is a pedigree exception to Miranda. But we also know there is an exception to the pedigree exception, and that's on the People v. Rodney and cases under that. People versus Ralph Rodney. I have a couple of other cases.

THE COURT: Okay. Tell me what your argument is.

MR. RAUSCH: The argument simply is when they asked him the pedigree information, they were there in a

situation where it's very likely that giving pedigree information such as I live here or I'm allowed to stay here and that I'm allowed to sleep in the living room on a mattress --

THE COURT: Bed, mattress, doesn't matter, does it?

MR. RAUSCH: No, it does not matter as far as this argument.

That while it's facially property, Judge, it's likely to elicit incriminating admissions because of the --

THE COURT: Suppose Mr. Heinrich says: Wait a second, there is a police department rule, policy for the safety of the officers involved, that when they go into premises, they handcuff everybody who's inside the premises subject of the search warrant execution and they get pedigree information from them, you're saying that it's improper to do that?

MR. RAUSCH: Judge, it may be a police department rule but it still has to pass muster.

THE COURT: You're saying it's improper?

MR. RAUSCH: That's correct, despite it being police department protocol.

THE COURT: Is there any authority you have for that? Because the pedigree exception is something else. Obviously if someone is under arrest, the police can ask

APPENDIX E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TRIAL TERM PT 81

THE PEOPLE OF THE STATE OF NEW YORK

INDICT # 3148/11

-against-

TYRONE WORTHAM and SHAWANA HARRISON
-Defendant.

100 Centre Street
New York, New York
March 05, 2013

B E F O R E:

THE HONORABLE RICHARD D. CARRUTHERS
JUSTICE OF THE SUPREME COURT
And a Jury

A P P E A R A N C E S:

FOR THE PEOPLE:

CYRUS R. VANCE, JR., ESQ.
DISTRICT ATTORNEY
New York County
One Hogan Place
New York, New York

BY: NOWLES HEINRICH, ESQ.
ELIZABETH SHEETS, ESQ.
Assistants District Attorney

FOR THE DEFENDANT:

BY: ENRICO DEMARCO, ESQ.

TRIAL TESTIMONY

BENITA WHITAKER
SENIOR COURT REPORTERS

and clothing?
A Yes, it is.
Q When you entered that bedroom, how did you enter into it?
A Through the door.
Q Was that door open or closed?
A It was open.
Q Where did you begin your search?
A In the closet.
Q Can you please describe that closet?
A It was floor to ceiling closet approximately 8 feet high, 6 or 7 feet wide with sliding doors in the front.
Q Was the door open when you entered --
MR. DEMARCO: Objection.
What door?
THE COURT: Rephrase it.
Q Was the closet with the sliding door open when you entered the bedroom?
A Yes, it was.
Q Was there a lock on the sliding door?
A No.
Q Can you please describe the design of the closet itself?
A There was a shelf approximately 6 feet high. Underneath the shelf was a bar running across the closet from

which the clothes were hanging from.

Q What type of clothing was hanging from that rod?

A Men's and women's clothing.

Q Eventually, did you search that closet?

A Yes, I did.

Q What did you recover?

A I recovered from the top shelf a cardboards box. I took the cardboard box off the top shelf and there was a Kahr .40 caliber hand gun on top of the box.

Q Did you pull down the cardboard box?

A Yes.

Q When you pulled it down from the shelf, what did you observe inside the box?

A I observed the handgun and the magazine.

Q Where was the handgun?

A On top of the contents of the box.

Q Where was the magazine?

A Next to the gun.

Q Now, this box, did it have a lock on it?

A No.

Q Did it have any packing tape or anything else over--

A No, it did not.

Q Was the box open or closed when you pulled it down?

A It was open.

Q Now, how do you know that the type of gun inside of

that box was a Kahr .40 caliber handgun?
A From the markings on the gun.
Q What markings are you referring to?
A The gun is engraved with the name and the caliber.
Q The magazine that you mentioned --
First of all, what is a magazine?
A A magazine is what you use to hold the ammunition.
Q And was there any ammunition inside of that magazine?
A Yes, there was.
Q How many bullets?
A There were six rounds.
Q What type of bullets were they?
A .40 caliber.
A How do you know that?
A The marking on the base of the round said .40 caliber.
Q Now, the handgun itself, were there any bullets inside of it?
A There was.
Q How many?
A There was one bullet in the chamber.
Q When you say "chamber," what do you mean?
A That's the part of the bullet, the part of the gun where the bullet goes when it's ready to be fired.
Q What type of bullet was it?
A .40 caliber.

A There was a small folding table that look liked it was being used as an end table.

Q And where was that in the bedroom?

A Next to the bed, between the bed and the closet.

MS. SHEETZ: People's 5 is being shown to the detective and to the jury.

Q Detective, do you see the folding table you just mentioned in People's Exhibit 5?

A Yes, I do.

Q Could you please describe where you see that?

A It's in the upper left portion of the picture, the brown wooden table with items on top of it.

Q And do you mind stepping down and pointing to that table?

(Witness complies and indicates).

MS. SHEET: The record should reflect the Detective has pointed to the top left corner of the photograph.

Q What, if anything, did you recover from that folding table?

A There was some mail.

Q How many pieces of mail, specifically?

A Five piece.

Q And whose name was the mail?

A There was one piece of mail with Tyrone Wortham,

[redacted] (sic) Alabama Avenue apartment 2A, and then there was four-- sorry -- [redacted] Alabama Avenue -- and then there was four pieces of mail with the name of Shawana Harrison at [redacted] Alabama, apartment 2A.

Q After you searched the nightstand or the end table, what did you do?

A Then I searched the bed.

Q And please describe the bed.

A Uh, it looked like a normal bed. It was made with sheets. It looked like it had been used regularly.

There was a platform bed as well and there were some drawers underneath the platform.

Q How many drawers were there?

A I believe there were two.

Q Did you look inside of those drawers

A Yes, I did.

Q Were there any locks outside of those drawers?

A No, there were not.

Q Approximately how far off the ground were those drawers?

A Six inches.

Q Did you find anything inside of them?

A Yes, I did.

Q Please explain to the jury what you found.

A In one of the drawers there was a plastic sandwich bag

containing a quantity of crack cocaine.

There was also two razor blades with crack cocaine residue on them; a plastic straw with crack cocaine residue, an electronic scale, and a box of empty plastic sandwich bags.

Q Now, the scale, straw, razor blades, and sandwich bags, are those consistent with paraphernalia that you mentioned on Tuesday that's commonly used to package crack cocaine?

A Yes, they are.

Q Did you find anything else inside of that drawer?

A No, I did not.

Q How about the other drawer underneath the bed?

A I do not remember specifically the items in the other drawer.

MR. RAUCH: I didn't hear your response.

THE WITNESS: Oh.

I don't remember specifically what was in the other drawer.

Q Detective did you continue to search bedroom number five after you looked under the bed?

A Yes, did.

Q Where did your search continue?

A There was a dresser standing in the opposite corner of the room from the closet.

Q Can you please describe that dresser?

A It was approximately five feet high standing with 4 or

5 drawers.

Q Approximately how far off the ground was the top drawer?

A About four and a half, five feet.

Q Were there any locks on those drawers?

A No, there were not.

Q What, if anything, did you recover from the dresser?

A From the top drawer I recovered 3, .40 caliber rounds which I could tell were .40 caliber from the markings on the base.

I recovered a New York State benefit identification card in the name Tyrone Wortham with his picture on it and an additional electronic scale.

Q Now, you mentioned that you recovered a benefit card, and it had the name Tyrone Wortham; is that correct?

A That's correct.

Q And that there was a photograph on it?

A Yes, there was.

Q Did that photograph match what Tyrone Wortham looked like on May 26, 2001?

A Yes, it did.

Q Did it match what he looks like today in the courtroom?

A Yes.

Q Now, was there anything else in that top drawer?

A Yes.
Q Why was he handcuffed?
A During the execution of search warrants we handcuff everybody we encounter because we don't know if they're a danger to us. We just handcuff for our own safety.
Q Are the children handcuffed?
A No.
Q What was the substance of the conversation you had with him?
A To take his basic pedigree information.
Q What is the reason for taking somebody's pedigree?
A It's what we use to enter into the online booking system to draw up formal charges and for prosecution.
Q If you wouldn't mind explaining to all of us, what is the online booking system?
A It's the NYPD computer database that we use to enter their names, their addresses, their date of births so the prosecution has the chance to prosecute -- has the pertinent information
THE COURT: Is that information what you'd refer to as "pedigree"?
THE WITNESS: All of the pedigree information is entered into that, correct.
THE COURT: Name, address, date of birth, that type of thing?

THE WITNESS: Yes.

Q You stated the purpose of the conversation with the defendant, Mr. Wortham, was to obtain pedigree information?

A That's correct.

Q Was one of the questions you asked Mr. Wortham, was it regarding where he lived?

A Yes.

Q Do you recall what his response was?

A When I asked him where he lived, he stated "here."

Q Excuse me?

A He stated, "Here."

Q Did he say anything else in regards to where he lived?

A When I asked him exactly where, he said his baby's mother lets him stay in a bed toward -- in the living room and he motioned with his head towards the living room.

Q Did you have a chance to look inside of the living room?

A I could see the living room from there, correct.

Q Did you see a bed?

A Yes.

Q When you were asking him this information, was your gun drawn?

A No.

Q Were you making any type of threats against Mr. Wortham?

A No.
Q What was his manner like at that point: Was he calm, was he upset?
A He was calm.
Q Did you have a chance to obtain his date of birth?
A Yes.
Q Off the top of your head, do you recall what his date of birth was?
A No.
Q Is there anything that would refresh your memory as to his date of birth?
A A copy of the pedigree.
Q Detective, I'd ask that a court officer hand you what's been marked for Identification purposes only as Exhibit number 20.
(Handed to the witness.)
A Okay.
Q After looking at that document, People's Exhibit 20 does that refresh your recollection as to Mr. Wortham's date of birth?
A Yes.
Q Would you tell us?
A August 26, 1979.
THE COURT: Does the witness need the exhibit aider?

MR. DEMARCO:

THE COURT: Come over to the side.

(At sidebar.)

MR. HEINRICH: There was a previous searcy warrant executed at the apartment that is how he's familiar with that apartment.

MR. RAUCH: I didn't know that.

THE COURT: So you're withdrawing--

MR. DEMARCO: I'm going to object because it opens up --

MR. RAUCH: I'm withdrawing that.

That question's withdrawn.

(Sidebar ended)

Q I believe you testified you had a brief conversation with Mr. Wortham when he was in the kitchen; correct?

A Correct.

Q Were you alone with him at that time?

A There was other officers in the apartment.

Q I mean in that kitchen I mean.

A There's possibly other officers in the kitchen.

I don't know. I don't recall.

Q And your testimony today is that --

What did he say to you exactly?

A When I asked him where he lived, he said, "Here."

Q Anything else?

A And I said, "Where exactly do you stay?" He said, "My baby's mother lets me sleep on the bed in the living room," and he motioned with his head towards the living room.

Q Now, when you testify in any proceeding, you try to give full and honest answers as you can remember; correct?

A That's correct.

Q And that would be true of a trial or of Grand Jury; correct?

A Correct.

Q Now, you testified at a Grand Jury on this case; correct?

A Correct.

Q You recall that, do you not?

A Yeah.

Q It was relatively soon after the arrest of my client; correct?

A I don't recall.

I don't know the date.

Q Now, you were asked --

Well, do you remember being asked the following questions and giving the following answer?

Page 27:

QUESTION: "And did you have a chance to encounter defendant Tyrone Wortham at that time?

ANSWER: Yes."

I'd come, stop by, visit, come see my kids.

Q Well let me get to that.

Did you visit apartment 2A at [redacted] Alabama Avenue in 2011?

A Yes, I have.

Q Is that the first year that you ever visited there?

A No.

Q When did you start visiting there?

A I started visiting there mostly 2001 when we first started dating.

Q Is that why you started going there?

A Yes.

Q Now, over the years, did you continue to go to that residence or not?

A Yes.

Q Why would that be?

A For my kids I was going over for.

Q How about after?

A Well, I stayed over with Shawana, visiting the kids also.

Q Did you ever go there to visit with your children when Shawana wasn't there?

A No.

Q Do you live there?

A No, I do not.

Q Did you ever tell the police officer that you lived there?

A I never told the officer I lived there.

Q So how long have you been involved with Ms. Harrison would you say?

A Since 2001.

Q Now, do you remember being arrested on May 26, 2011?

A Yes, I do.

Q Where were you when that happened?

A I was at [redacted] Alabama, apartment 2A, in my son room as the officers came in there and the officers took me out of there.

Q What were you doing at the time?

A At that time, I came over.

She called me. She just picked the kids up and I met her on the block at [redacted] Alabama where I came in the apartment with her, with the kids, where she stated she had to run to the supermarket where she left out of the house --

MR. DEMARCO: Objection hearsay.

THE COURT: Overruled.

A Yeah.

She went to the supermarket and I would say probably 15 minutes, as I'm sitting there with my daughter and my son showing me schoolwork, my son went to the bathroom. Before I could ask him what he's doing, I hear a loud thump and I hear

brothers, her cousin where I come visit Shawana where --

THE COURT: I'm sorry.

I can't hear you. Just speak louder.

THE DEFENDANT: I'm sorry.

A (Continuing).

-- where at [redacted] where Shawana, her mother, her brothers, where everybody was staying, where now her mother turned the apartment over to Shawana where her brothers and everybody still frequent the place. They still --

If I come visit my kids where some--some days where her brother be there or her cousin--her brother or her cousin -- where I stop. I may hold a conversation with them and I see my kids. That's about it.

Q Now, there's a back bedroom, correct?

A It's five bedrooms there.

Q You come in, you go in the furthest bedroom, we talked about that one.

A The first bedroom to --

Q The furthest bedroom from the back.

A Yes. Yes.

Q Did anyone live there at the time, as far as you know?

A As far as I know -- I can't say actually lived there --but I know that it's like her brother, her cousin where that used to be her brother room (sic) where he still come through where items of his and the cousins stay there.