Docket No. ____

IN THE SUPREME COURT OF THE UNITED STATES

TERENCE SANDY McCRAY,

Petitioner,

– against –

MICHAEL CAPRA, Superintendent,
Sing Sing Correctional Facility

Respondent.

PETITION FOR WRIT OF CERTIORARI

On Certiorari to the United States Court of Appeals
For the Second Circuit

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STATEMENT OF QUESTIONS PRESENTED

1. When a trial court in a criminal case reviews the complainant's psychiatric records for Brady material as required by Pennsylvania v. Ritchie, 480 U.S. 39 (1987) and its progeny, may it satisfy its Brady obligation by releasing an incomplete non-representative "sample" of those records which excludes the very information most useful to the defense, or is it required, as this Court stated in Ritchie, to disclose any and all records which "may" affect the outcome of the case?

2. Is the aforesaid "sampling" procedure an unreasonable application of Brady v. Maryland, 373 U.S. 83 (1963), Ritchie, and their progeny, within the meaning of the Antiterrorism and Effective Death Penalty Act ("AEDPA")?

3. Was the decision of the Second Circuit Court of Appeals in all respects properly made?

PARTIES TO THE PROCEEDING

The parties to the proceeding are petitioner Terence Sandy McCray and respondent Michael Capra, Superintendent, Sing Sing Correctional Facility.

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People v. McCray, 102 A.D.3d 1000 (N.Y. App. Div. 2013)

The decision of the Court of Appeals was an affirmance of the decision of the United States District Court for the Northern District of New York which denied petitioner Terence Sandy McCray's petition for Section 2254 habeas relief. The Section 2254 petition sought relief from an underlying New York State criminal judgment, rendered September 1, 2010, convicting petitioner upon jury verdict of one count of rape in the first degree and sentencing him to a determinate prison term of 22 years followed by five years of post-release supervision.

The order of the Second Circuit Court of Appeals dated September 15, 2022, which denied McCray's petition for rehearing *en banc*, is unreported.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) in that this is a petition for *certiorari* from a final judgment of the United States Court of Appeals for the Second Circuit in a civil case. The instant petition is timely because the Second Circuit's decision denying rehearing *en banc* was entered on September 15, 2022, less than 90 days before the filing of this Petition. There have been no orders extending the time to petition for *certiorari* in the instant matter.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. Const. Amend. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 2254 (in pertinent part)

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

[…]

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF FACTS

Petitioner Terence Sandy McCray was accused of rape in "a classic he-said, she-said" case in which, in the words of the majority at the New York Appellate Division, "it would not have been unreasonable for the jury to believe [McCray's] testimony that the sexual encounter was consensual." People v. McCray, 102 A.D.3d 1000, 1000, 1003 (3d Dept. 2013) ("McCray I"). "Many details [of the incident] were undisputed." Id. at 1000. The record reflects that McCray and the complainant, "an 18-year-old woman with an extensive history of psychiatric problems" met in April 2009 at an Albany bus stop and "talked extensively about various topics, including sex, while walking together." Id. After speaking on the phone a few times over the next several weeks, McCray called the complainant again on May 26, 2009 and invited her out. Id. at 1001. They visited McCray's house and a those of a couple of his friends, and the complainant admittedly "exchanged sexual innuendos" and "engaged in consensual kissing and fondling." Id.

"It is at this point that the testimony of [Mr. McCray] and the victim sharply diverges." Id. According to the complainant, she and McCray ended up at an abandoned house where he backed her up against a wall, started to forcibly kiss and grind against her, told her "you are going to give it to me or I'm going to take it," and engaged in a violent struggle that ultimately resulted in the complainant submitting to sexual intercourse. Id. at 1001-02. According to McCray, the complainant wanted to have sex and engaged in consensual intercourse with him in the abandoned house,

but then demanded money and grabbed his pants, leading to the struggle. Id. at 1002.

McCray then went to the home of his friend James Close, pounded on the door, and yelled for admittance. Id. According to Close, McCray looked like someone was chasing him and "implied that… there was female outside who was exposing herself to [him]." Id. McCray said he wanted to tell Close about the incident but, upon realizing that Close might own the abandoned house, changed his mind and left. Id.

Prior to trial, the trial judge conducted an *in camera* review of the complainant's psychiatric records and released a 28-page "sample" to defense counsel. (A106-07).[1] More than 5000 pages of records, however, were *not* disclosed. Among these records were, as described by various judges of the reviewing courts:

> * A record showing that at the age of 13 – i.e., five years before the incident at issue in this case – that the complainant reported being sexually assaulted by her father, "claim[ing] that he pinned her against a wall and tried to rape her, but she escaped." See People v. McCray, 23 N.Y.3d 193, 200 (2014) ("McCray II"). "The records show that her father had in fact been *physically* abusive, but they also show that the complainant's mother did not believe the charge of *sexual* assault was true," and one record reflects that the allegation is "unfounded." Id. (emphasis added). This allegation *was not* repeated "throughout numerous intake reports and mental health histories in the ensuing years" when the complainant was asked about past sexual abuse. See McCray I, 102 A.D.3d at 1015 (McCarthy, J., dissenting).

[1] Citations to "A" refer to the Appellant's Appendix submitted to the Second Circuit, which is Document 136 in the electronic docket for Second Circuit Case No. 18-2336 and which will be provided to this Court upon request.

* A report revealing that the complainant had a "very poor perception of reality," and noting her "distortions of her interpersonal relationships," see McCray II, 23 N.Y.3d at 207, 209 (Rivera, J., dissenting), including "offer[ing] sexual favors to make friends" and "bec[oming] extremely upset when these relationships did not last," McCray I, 102 A.D.3d at 1013-14;

* A record revealing that the complainant reported dissociative episodes, see McCray II, 23 N.Y.3d at 207, 209;

* A record indicating that "the complainant suffers from memory loss, has difficulty accurately recalling events, has a distorted view of interpersonal relationships and admits to lying. The same undisclosed document also reveals complainant's memory can be selective; she forgets good experiences with people if there are subsequent bad experiences," id. at 208. The memory loss including "significant *short term* memory loss." McCray I, 102 A.D.3d at 1012;

* A record indicating that when the complainant was "out of control," she sometimes had no recollection of events and only learned afterward what she did or said, see id.;

* Documents stating "that complainant's medical health condition will deteriorate as she grows older," McCray II, 23 N.Y.3d at 208;

* A document stating that the complainant had a desire to obtain her mother's trust, id. at 209;

* A record "indicating that the complainant confabulated stories about staff" at the institution where she was then housed. (A121); and

* Records indicating that the complainant "experienced flashbacks *to being sexually abused*,"

> including when "role playing with her boyfriend" (Doc. 194 at 11).

The 28 pages that *were* disclosed consisted in the main "of short, 'progress notes' or intake forms, generated by therapist or other health care practitioner, and do not reflect a full analysis of the complainant's condition." See McCray II, 23 N.Y.3d at 206, 207 (Rivera, J., dissenting). While some of them "suggest significant problems," they "do not adequately reveal the root causes or their impact over time on the complainant." Id. at 206.

The case proceeded to trial in Albany County Court in August 2010, with both petitioner and the complainant testifying. As noted by the dissent at the Second Circuit, the prosecutor made several summation arguments that were flatly contradicted by the withheld records – for instance, that someone as disturbed as the complainant "could not be manipulative and clear-headed and crafty" and that she could not possibly have engaged in "fantasy" (App. 36, 39).[2] The prosecutor also emphasized in summation the vulnerability shown by the records that were disclosed, arguing that McCray picked his victim because she was mentally disturbed and "nobody's going to believe [her]." (Id. at 5-6).[3] The jury, swayed by these arguments, convicted McCray of first-degree rape, and he was thereafter sentenced to a 22-year

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[2] Citations to "App." refer to the Appendix to this Petition.

[3] Petitioner does not suggest that these misrepresentations were intentional on the prosecutor's part, given that he also did not see the withheld records. It beggars belief, however, that the trial court, which *had* seen all the records, did not step in at that point.

determinate prison term.

McCray appealed as of right to the New York State Appellate Division and then, by permission, to the New York Court of Appeals, losing by one vote in each court (the margin was 3-2 in the Appellate Division and 4-3 in the Court of Appeals). The primary issue in each court was whether the nondisclosure of the withheld documents violated McCray's rights under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny.

The majority at the Appellate Division concluded that the trial court's disclosure of 28 pages of records "properly balanced the defendant's 6th Amendment right to cross-examine an adverse witness and his right to any exculpatory evidence against the countervailing public interest in keeping certain matters confidential" and that the withheld records would have been "redundant" or would have had "limited impact." McCray I, 102 A.D.3d at 1005-06. Judges McCarthy and Mercure strenuously dissented from the majority's holding. See id. at 1010-16. The dissenting judges stated that "contrary to the majority's assertion, criminal defendants are entitled to more than just a 'sample' of documents addressing a key witness's mental health problems that could affect his or her testimony." Id. at 1011. Moreover, they contended that the issue was not limited to whether the withheld records were admissible in evidence, but also encompassed the attorney's ability to "investigate information contained therein to determine if admissible evidence could be gathered or proper questions could be formulated." Id. at 1012. In a case that

was admittedly a "classic he-said she-said credibility determination," the defendant must be allowed to "consider and explore all legitimate avenues of information" relating to his defense, the complainant's testimony, and potential cross-examination. Id. at 1011-12. Moreover, upon analysis of particular withheld records, the dissent found that they revealed memory and cognitive orders not present in the "sample" and contained materials that cast doubt on the complainant's ability to perceive events accurately and/or testify truthfully, including but not limited to the false accusation against her father. Id. at 1013-16.

At the New York Court of Appeals, the majority found that the undisclosed documents were "cumulative or of little if any relevance to the case," and were "no clearer or more dramatic" an indictment of the complainant's credibility than what the defense already had. McCray II, 23 N.Y.3d at 198-99. The majority also found that the undisclosed documents' references "to the complainant's tendency to misremember or misunderstand events" were of little relevance because, in their words, the stark conflict in testimony made this a case where either the complainant or the petitioner *lied*, not one in which the claimant might have misremembered. Id. at 199. And while the majority found that the allegations of sexual assault against the complainant's father as the "strongest basis" for appeal, they concluded that such accusation as remote in time, against a family member rather than a stranger, and "nothing in the records indicates that [it was] fabricated" rather than being a misinterpretation or imagined incident. Id. at 200.

The three dissenting judges again differed starkly in their analysis and were particularly critical of the "sampling" process:

> Sample documents prove only the general principle that they embody. Assuming that other documents in the "larger whole or group" prove specific facts, those documents are not "cumulative" of the sample document… The risk attendant on selecting a "sample" from the universe of confidential records is that the undisclosed document may contain information about alternative diagnoses or treatment protocols even if the substantive content is representative of other documents containing the same underlying information but with different conclusions. Another risk is that the sample may lack a fuller and more nuanced description of the same information contained in the disclosed sample.
>
> Review of the complainant's disclosed and undisclosed documents illustrates the point. The majority of the documents disclosed to the defendant appear to consist of short, "progress notes" or intake forms, generated by a therapist or other health care practitioner, and do not reflect a full analysis of the complainant's condition. Some contain phrases which suggest significant problems, such as a history of auditory and visual hallucinations, poor impulse control and questionable judgment, but do not adequately reveal the root causes or their impact over time on the complainant. What are missing from the sample, and contained in the undisclosed documents, are narratives based on discussions and professional analysis of the complainant that provide a fuller picture of the complainant's mental health history and conditions and how they may affect her veracity as well as her ability to comprehend and accept reality…

Id. at 206-07.

The dissenting judges then emphasized, as did the dissent at the Appellate Division, that the undisclosed records contained information of significant value to

the defense that was not in the disclosed records. Id. at 208. These included documents revealing memory loss, admissions to lying, and selective memory including forgetting of good experiences where there are subsequent bad experiences. Id. The dissent focused particularly upon undisclosed documents reflecting both the complainant's tendency to confabulate and her history of untruthfulness, and disagreed with the majority's contention that one of the parties must be lying and that a tendency to fantasize (as opposed to lie) was thus irrelevant, noting *inter alia* that the complainant's confabulations and fantasies were directed at "interpersonal relationships" and evoked a sense of "distorted reality." Id. at 208-09.

Finally, the dissent noted that there was both a substantial similarity between the incident at bar and the complainant's allegations against her father and sufficient indicia that those allegations were untruthful. Id. at 209-10. Noting that "[t]he case as presented to the jury depended on whether the complainant and the defendant engaged in consensual sex," the dissent stated that "mental health records indicating that complainant has a history of lying or that her memory was unclear go to the truthfulness of her statements that she was raped by defendant." Id. at 210. Moreover, the dissent opined that full disclosure of the nature of the complainant's mental illness was necessary because, as noted above, the prosecutor argued that the *disclosed* aspects of her mental condition were proof of the defendant's guilt in a way that the withheld records would have refuted. Id. at 210-11.

Petitioner moved to reargue the Court of Appeals' decision, and his motion was

denied without opinion on September 18, 2014. People v. McCray, 24 N.Y.3d 947 (2014) ("McCray III").

McCray then timely petitioned for Section 2254 habeas relief in the Northern District of New York, arguing numerous grounds for relief including a Brady claim based on the withheld psychiatric records. (A12-17). On August 31, 2017, the district court issued a memorandum opinion denying the majority of petitioner's claims but assigning counsel and ordering further briefing on the Brady claim. (A18-52). After such briefing, by Amended Memorandum Decision dated July 24, 2018, the district judge found that in light of the "totality of the circumstances," it was "not unreasonable" for the state courts to conclude that the disclosed records provided an "appropriate sample" which was sufficient for Brady purposes. (App. 81-107). The district court did, however, issue a certificate of appealability on "whether the non-disclosure of the complainant's medical records violated Brady" (App. 106-07), which the Second Circuit later expanded to include a Confrontation Clause claim founded on the same records (ECF Doc. 56 in Second Circuit Case No. 18-2336).

Petitioner briefed and argued his appeal in the Second Circuit and, on August 17, 2022, again lost by one vote, with Judges Sullivan and Lynch voting to affirm the denial of habeas relief (App. 1-25) and Judge Jacobs dissenting (App. 26-48). The majority concluded that the Brady rule was "relative[ly] general[]," that the "sample" generally included the information detailed in the withheld records, and that it was reasonable for the state courts to conclude that the withheld records were cumulative

of the "sample." (App. 12-16). Judge Jacobs, however, offered an extraordinarily strong dissent, stating that "the miscarriage here is arresting and unprecedented. It is not easily thinkable." (App. 26).

First, Judge Jacobs opined that the state courts' writing-off of the withheld records as cumulative or irrelevant was "manifestly wrong." (App. 29). "The 28 pages that were disclosed demonstrate no more than that the complainant was vulnerable, which was a great boon to the prosecution," and indeed, "[t]he complainant's vulnerability… was the mainspring of the prosecution's case." (App. 29-30). Kept from McCray, and contained in the withheld records, was "[t]he complete defense" to the prosecution's vulnerability argument, namely "that the complainant had a distorted memory or a fragile sense of reality." (App. 31). Like the dissents at the New York Appellate Division and Court of Appeals, Judge Jacobs carefully analyzed the withheld records and discussed how they bore on the complainant's truthfulness, her tendencies to fantasize, her ability to accurately perceive, recall and relate the disputed events, and her sense of reality being distorted in ways directly relevant to those events. (App. 32-40). "At the risk of being obvious, the withheld documents would have corroborated the weaker specifics of McCray's testimony" and "allowed jurors to reconcile the conflicting accounts, treating his as true and hers as sincerely held delusion." (App. 40).

Judge Jacobs further noted, citing Kyles v. Whitley, 514 U.S. 419, 440 (1995), that Brady material "takes on force from cumulative effect," and therefore,

"sampling" of Brady material or sorting it by its "dramatic" potential is unacceptable. (App. 31). Judge Jacobs also cited Kyles for the proposition that "[t]he question is not whether the defendant would more likely than not have received a different verdict with the [withheld] evidence, but whether in its absence he received a fair trial," (App. 40). This McCray did not receive, not only because he was deprived of an opportunity to "turbocharge[]" his cross-examination of the complainant (App. 41) but because the state courts (and the Second Circuit majority) disregarded the fact that Brady material not only has intrinsic value but is also a "springboard for investigation" (App. 41-45).

In conclusion, Judge Jacobs emphasized two things. First, that the state courts unreasonably treated Brady "as a matter of discretion" when in fact "[f]ederal law affords no 'discretion' to withhold evidence that is constitutionally required to be produced." (App. 45-46). And second, that the due process violations in this case were so outrageous, and that McCray's conviction was indeed so unjust, as to be unethical for a prosecutor to continue defending. (App. 46-48).

Now, for the reasons set forth below, Petitioner seeks a writ of certiorari as to all issues raised before the courts below, and in particular, whether the "sampling" procedure used by the trial court and upheld by the state courts was an unreasonable application of Brady, Ritchie, and their progeny.

REASONS FOR GRANTING THE WRIT

IT WAS AN UNREASONABLE APPLICATION OF THIS COURT'S PRECEDENT TO DISCLOSE AN INCOMPLETE, NON-REPRESENTATIVE "SAMPLE" OF THE BRADY MATERIAL CONTAINED IN THE COMPLAINANT'S PSYCHIATRIC RECORDS RATHER THAN DISCLOSING ANY AND ALL RECORDS THAT "MAY" AFFECT THE OUTCOME OF THE TRIAL

1. Six appellate judges – two at the New York Appellate Division, three at the New York Court of Appeals, and one at the Second Circuit – have determined that petitioner McCray's conviction rests on an erroneous and unreasonable interpretation of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. Indeed, this case stands out not only for the state courts' egregious violation of the Brady rule in general but for their unreasonable interpretation of so many of this Court's subsequent Brady precedents. The state courts disregarded Pennsylvania v. Ritchie, 480 U.S. 39, 51-52, 61 (1987), which held that a criminal defendant is entitled to those of the complainant's medical records which show that his or her testimony may be "exaggerated or unbelievable," and that the records required to be disclosed include "information that *may*… chang[e] the outcome of [the] trial" (emphasis added). They disregarded the holdings of Kyles v. Whitley, 514 U.S. 419, 434-36, 440 (1995), that Brady materiality is not a sufficiency-of-the-evidence test which permits the withheld evidence to be weighed in the light most favorable to the prosecution and that the force of Brady material is cumulative. They disregarded United States v. Agurs, 427 U.S. 97, 111-13 (1976) and Wearry v. Cain, 577 U.S. 385, 392-93 (2016),

which held that that "if [a] verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." And they disregarded *all* the above cases, and more, in treating Brady disclosure as a matter of discretion and judgment rather than a constitutionally-mandated remedy to which criminal defendants are entitled.

The disclosure of a non-representative "sample" in this case violated so many of this Court's precedents in such an egregious manner that, if petitioner's conviction were allowed to stand, little would be left of them. Moreover, the *reasoning* used by the state courts in upholding McCray's convictions as well as the arguments made by the prosecution in support thereof – arguments that Judge Jacobs considered so indefensible as to be unethical – makes clear that there is a need for renewed guidance from this Court concerning the parameters of Brady, Ritchie and their progeny. It frequently happens that complainants in criminal cases have mental health records that bear on their ability to perceive, recall and recount events accurately; the constitutionally-required disclosure of such records is critical to the ability of defendants in such cases to present a defense; and the history of this case shows that both lower courts and prosecuting attorneys need to be reminded of how to handle them with respect for the rights of the accused.

2. In Brady v. Maryland, 373 U.S. 83, 87 (1963), this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment,

irrespective of the good faith or bad faith of the prosecution." The Court observed that "[a] prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant." Id. at 87-88. "That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice," even if the suppression "is not the result of guile." Id. at 88

In a series of subsequent decisions, this Court has refined both the scope of Brady disclosure and the meaning of the term "material to guilt or punishment." In Giglio v. United States, 405 U.S. 150 (1972), for instance, this Court held that the Brady obligation extends to evidence that would impeach the credibility of prosecution witnesses. "Where the reliability of a given witness may be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the] general [Brady] rule." Id. at 154. Thus, in a case where – as here – the government's proof "depended almost entirely" on the testimony of a single witness, that witness' credibility "was therefore an important issue in the case," and the jury was entitled to know of information bearing on it. Id. at 154-55.

The Giglio Court also expanded upon the relevant standard of materiality, adopting the same metric as in Napue v. Illinois, 360 U.S. 264, 271 (1959), i.e., that reversal is required where the withheld evidence "could in any reasonable likelihood have affected the judgment of the jury." See Giglio, 405 U.S. at 154.

In United States v. Agurs, 427 U.S. 97, 111-12 (1976), the Court held that the

Brady obligation existed regardless of whether or not a specific request for exculpatory evidence was made, but that where no such request was made, the standard of materiality was more than that required to overcome a claim of harmless error. Nevertheless, "the proper standard of materiality must reflect [an] overriding concern with the justice of the finding of guilt." Id. at 112. Since a finding of guilt is permissible only if proven beyond a reasonable doubt, "it necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." Id. "This means that the omission must be evaluated in the context of the entire record," and that "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." Id. at 113.

The next significant Brady decision was United States v. Bagley, 478 U.S. 667 (1985). The Bagley Court reaffirmed that, as held in Giglio, supra, "[i]mpeachment evidence… as well as exculpatory evidence, falls within the Brady rule," because "[s]uch evidence is favorable to the accused, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." Id. at 676. This Court "rejected any... distinction between impeachment evidence and exculpatory evidence" in terms of materiality. Id. Moreover, this Court also rejected any distinction between cases where a specific request was made for exculpatory evidence and those where no such request was made, finding that a "reasonable probability" standard of materiality applied in all cases. Id. at 682-83.

In Kyles v. Whitley, 514 U.S. 419, 434 (1995), this Court elaborated upon the meaning of "reasonable probability," noting that "[f]our aspects of materiality under Bagley bear emphasis." First, "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Id. "[T]he adjective [reasonable] is important," and "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id.

"The second aspect of Bagley materiality bearing emphasis… is that it is not a sufficiency of the evidence test." Id. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id. at 434-35. "The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict," and thus, the required showing is "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435.

"Third, we note that, contrary to the assumption made by the Court of Appeals, once a reviewing court applying Bagley has found constitutional error there is no need for further harmless-error review," because Bagley materiality includes a finding of harmfulness. Id. (citation omitted). And fourth, in determining materiality,

"suppressed evidence [is to be] considered collectively, not item by item." Id. at 436.

In Strickler v. Greene, 527 U.S. 263, 280-82 (1999), this Court summed up its Brady jurisprudence by opining that there are three "essential elements of a Brady violation," namely (i) suppression, (ii) of favorable evidence, (iii) that is material to guilt or punishment. This formulation, as well as the Bagley/Kyles definition of materiality, has been reiterated in numerous subsequent Supreme Court decisions. See, e.g., Wearry v. Cain, 577 U.S. 385, 392-93 (2016) (finding Brady violation where prosecutor failed to disclose impeachment evidence concerning the witness who provided "the only evidence directly tying [Wearry] to [the] crime" of which he was convicted, even though other impeachment evidence was available); Smith v. Cain, 566 U.S. 73, 75-76 (2012) (Brady violation occurred where impeachment evidence was withheld concerning the only eyewitness to the crime); see generally Cone v. Bell, 556 U.S. 449, 469-70 (2009) (summarizing the Brady standard); Banks v. Dretke, 540 U.S. 668, 698-99 (2004) (same).

Additionally, in Pennsylvania v. Ritchie, 480 U.S. 39 (1987), this Court applied Brady directly to the disclosure of a complaining witness' psychiatric records. In Ritchie, the defendant, who was charged with sexual crimes against a minor, requested certain files from the Pennsylvania Children and Youth Services ("CYS") agency. See id. at 43-44. The trial court "acknowledged that he had not examined the entire CYS file" but "accepted a CYS' representative's assertion that there was no medical report [concerning the complainant] in the record," and thus declined to order

CYS to disclose the file. Id. at 44.

This Court began its analysis by reiterating that "[o]f course, the right to cross-examine includes the opportunity to show that a witness is biased, *or that the testimony is exaggerated or unbelievable*." Id. at 51-52 (emphasis added). This Court found that the withholding of records was not a direct Confrontation Clause violation because it did not, in itself, limit the right to cross-examine the complainant. See id. at 52-54. However, it found that a congruent claim existed "by reference to due process." Id. at 56.

The Ritchie Court examined the contours of such a claim by reference to Brady, Agurs and Bagley, supra. See id. at 57. Recognizing a "public interest in protecting this type of sensitive information," this Court nevertheless found that this interest did not necessarily shield confidential records from disclosure in criminal prosecutions. See id. at 57-58. This Court held that Ritchie was entitled to have the CYS file reviewed *in camera* "to determine whether it contains information that probably would have changed the outcome of his trial," and that if such information existed, "he must be given a new trial." Id. at 58.[4] While this Court declined to hold that review by counsel, as opposed to the trial court, was required in all instances, it nevertheless stated that "Ritchie is entitled to know whether the CYS file contains information that *may* have changed the outcome of his trial had it been

[4] Although the Ritchie Court used the term "probably," its citation to Agurs and Bagley, plus its use of the phrase "may have changed the outcome" later in its decision, makes clear that the level of probability required is a reasonable probability.

disclosed." Id. at 61 (emphasis added).

3. Given the history of the Brady rule as described above, it is readily apparent that the state courts in this case were not only unreasonable in their interpretation of general Brady principles but in their application of several specific corollaries that this Court has attached to Brady. The very process of "sampling" exculpatory records – a process that has never been endorsed in *any* decision of this Court, including Ritchie – is inherently unreasonable in light of Kyles' holding that the force of Brady material is cumulative. The New York appellate courts' parsing of each individual record, weighing such records in a manner highly favorable to the prosecution, and concluding that each record in itself would not have been a silver bullet, is an unreasonable application of the same principle as well as the specific standards of materiality set forth in cases such as Agurs and Wearry. And this is all the more true when the "sample" is, as in this case, incomplete, non-representative, missing a large volume of useful information, and based on *ex ante* triaging of evidence by a trial judge who does not give due regard for how the records at issue might be used not only as evidence in themselves but as a foundation for investigation.

This Court has made clear that Brady materiality is something that can only be evaluated *ex post*. The fundamental question in determining materiality is "whether in [the withheld evidence's] absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 514 U.S. at

434. Favorable evidence is material if it "could reasonably be taken to put *the whole case* in such a different light as to undermine confidence in the verdict." Id. at 435 (emphasis added). And "suppressed evidence [is to be] considered collectively, not item by item." Id. at 436.

This is a determination that simply cannot be made *ex ante* – it is impossible to know what effect suppressed evidence might have on "the whole case" until the case is tried. At the time McCray's trial judge decided which psychiatric records to disclose and which to withhold, he could not have known the testimony that either the complainant or McCray would give or how the withheld records might dovetail with or undermine either account. For that matter, the trial court could not have known that the prosecutor would *sum up to the jury* with arguments that the withheld records would contradict. This is no doubt why, where as here a trial court examines psychiatric records *in camera* prior to trial, the court is required to disclose any materials that "*may*" affect the outcome of the case, rather than making judgment calls as to whether the records likely *would* do so. Ritchie, 480 U.S. at 61 (emphasis added).

A view of Brady that permits and deems reasonable such *ex ante* "sampling" would, in practical terms, leave little of the expansive rule this Court has emphasized time and again. And there is yet another aspect of the state courts' handling of this case that is not only an unreasonable transgression of a specific holding of this Court but goes to the very nature of Brady itself. Is Brady, as the panel majority

concluded, a matter of "judgment" that can be satisfied by a prosecutor or judge's *ex ante* assessment of its impact on a yet-untried case, and where, by disclosing a small "sample" of a large file, a prosecutor's office or court can leverage such partial disclosure into a claim that the remainder of the file does not meet constitutional standards of materiality? Or was Judge Jacobs right in rejecting this view:

> The Court of Appeals unreasonably reviewed the trial court's [nondisclosure] as a matter of discretion. *Federal law affords no "discretion" to withhold evidence that is constitutionally required to be produced.* The question is one of due process. *And there is no allowable discretion to deprive a criminal defendant of his right to due process.*

(App. 45-46) (citation omitted) (emphasis added).

Petitioner submits that this Court's precedent – which state courts are bound reasonably to apply, and which adds much specificity to the "general" rule – overwhelmingly supports Judge Jacobs' view. In Brady itself, this Court emphasized that suppression of evidence "material either to guilt or to punishment" violates due process "*irrespective* of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87 (emphasis added). Moreover, this Court has been at pains to note that in a close case where "the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt." Agurs, 427 U.S. at 113; Wearry, 577 U.S. at 392-93 (quoting Agurs). This Court has held explicitly that evidence impeaching a witness who provides the lynchpin of the prosecution's case may not be dismissed as immaterial or cumulative simply because that witness was impeached with other evidence. See

Wearry, 577 U.S. at 392-93.

Indeed, this very case shows how Brady would work if it were regarded simply as a matter of "judgment" and "discretion" – a narrow disclosure which, as Judge Jacobs pointed out, disregards both the dynamic process of criminal defense and the role of Brady material as a foundation for further investigation. Moreover, such disclosure is likely to be filtered through a prosecutorial mindset. The great majority of Brady decisions are made by prosecutors, and even in the cases like this one where the decision is made by a judge, it cannot be ignored that a disproportionate share of the criminal bench (including the trial judge in this case, who was an Albany County Assistant District Attorney from 1975 to 1977) are former prosecutors.[5]

The majority of both prosecutors and judges will, no doubt, endeavor to be impartial in their Brady disclosure, and certainly, petitioner does not suggest that the trial judge in this case was consciously partial. But it is universally acknowledged that bias can be unconscious. See Woods v. City of Greensboro, 855 F.3d 639, 641 & n.1 (4th Cir. 2017) ("many studies have shown that most people harbor implicit biases and even well-intentioned people unknowingly act on [preconceived] attitudes"). This is how it can happen that a defendant in a rape case will receive, under the guise of Brady disclosure, a "sample" that (as Judge Jacobs

[5] The courts "are not required to exhibit a naivete from which ordinary citizens are free." Dep't of Commerce v. New York, 139 S. Ct. 2551, 2575 (2019).

aptly pointed out) consists of records that highlight the complainant's vulnerability and make her sympathetic to the jury while hiding the records that show her untruthfulness, delusions, memory loss, tendencies to confabulate, flashbacks *specifically to sexual abuse* that *occur while having sex*,[6] and manipulative behavior.

4. In sum, the issues in this case – can Brady disclosure be satisfied by an unrepresentative "sample?" Is the selection of such "sample" a matter of *ex ante* "judgment" and "discretion?" Does the disclosure of the "sample" raise the bar for the remaining, undisclosed records to be regarded as material? May the "sample" be selected *ex ante* and not revisited when, for example, the prosecutor makes summation arguments to which the undisclosed records would give the lie? – are nothing short of fundamental to Brady functioning as a rule of due process. And the Second Circuit's resolution of those issues will influence future federal and state jurisprudence and will be taken as guidance even in cases not governed by the AEDPA. Before such a sweeping rewrite of Brady is permitted to become precedent, it should be considered by this Court.

Moreover, petitioner submits that this Court's guidance on these issues is particularly warranted in light of both the sheer strength of Judge Jacobs' dissent

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[6] As the panel majority stated and Judge Jacobs acknowledged, defendant did receive records that made reference to flashbacks; however, these records did not mention (as the withheld records did) that the flashbacks were specifically to the complainant being sexually abused by her father and that they occurred during consensual sex, which are matters of obvious relevance to this case where McCray claimed that a struggle over money followed a consensual sexual encounter.

and the sharp disagreement between judges all down the line. At each appellate court that has considered petitioner McCray's case, one more vote would have won him a new trial. At each such court, the dissent centered not only on narrow issues of law but on fundamental justice, emphasizing the unfairness of withholding, in a "he said, she said" case where the evidence was close, records highly pertinent to the accuracy and credibility of what "she said." And this culminated in Judge Jacobs' unprecedented conclusion – unique in the 24 years that the undersigned counsel has been litigating appeals – that, in light of what has become known since McCray's conviction, that conviction is so unjust as to be unethical for a prosecutor to continue defending it.

And not only in this case. The majority opinion at the Second Circuit and the majorities in the state appellate courts are in tension, not only with this Court's precedents cited supra, but with the Second Circuit's own prior precedential decision in Fuentes v. Griffin, 829 F.3d 233 (2d Cir. 2016) and the Tenth Circuit's holding in Browning v. Tackett, 717 F.3d 1092 (10th Cir. 2013), which *did* find that nondisclosure of a complainant's psychiatric records violated Brady to the point of being unreasonable under the AEDPA. The records in Tackett, showing that the complainant "blur[red] reality and fantasy," see Tackett, 717 F.3d at 1108, were very similar to those in this case. And the records in Fuentes, which concerned mood disorders, were if anything *less* impactful than the records in this case which bore directly on the complainants' tendencies to falsify and be delusional. And while, as

the panel majority correctly stated, Fuentes did not receive any disclosure at all until late in the trial, there is no real difference between no disclosure at all and disclosure of one half of one percent of a 5000-page file which omits any detail (and often even reference) to the complainant's untruthfulness, manipulativeness, reality-processing deficits, and selective memory. Moreover, Fuentes held that it is unreasonable under the AEDPA for the state courts not to "consider the unique importance of this evidence," see Fuentes, 829 F.3d at 252, which is inconsistent with the panel majority's decision to excuse the lack of such consideration here.

It is noted that Fuentes, like this case, was decided by a 2-1 majority. Split decisions on Ritchie issues, albeit not always under the AEDPA,[7] have also been issued by other courts. See, e.g., United States v. Arias, 936 F.3d 793, 799-800 (8th Cir. 2019) (holding, by a 2-1 majority, that the defendant was deprived of a fair trial by the trial court permitting the complainant to testify that she had been diagnosed with PTSD following her alleged rape but withholding the records surrounding that diagnosis); United States v. Robinson, 583 F.3d 1265 (10th Cir. 2009) (holding by 2-1 that the defendant was deprived of a fair trial where the trial court precluded him from cross-examining the complainant concerning his mental health history and use

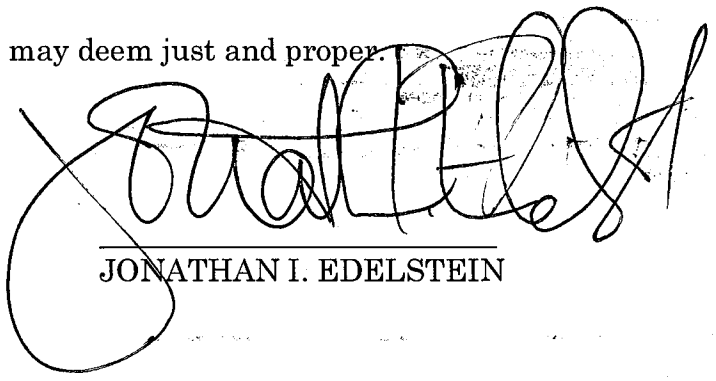
[7] Petitioner notes that, if this Court grants certiorari in this case, its holding will be binding on both AEDPA and non-AEDPA matters, because any finding that the state courts in this case acted unreasonably under the AEDPA standard would *ipso facto* mean that their holdings were erroneous under non-AEDPA standards of review. Thus, the utility of a certiorari grant in this case would not be limited to habeas petitions but would also provide the guidance that is needed more generally.

of prescription medications); Davis v. Litscher, 290 F.3d 943 (7th Cir. 2002) (holding by 2-1 that the Wisconsin courts did not act unreasonably in declining to examine the complainant's psychiatric records *in camera*, with the dissenting judge arguing strongly that the defendant's showing that the complainant was in a cocaine-induced delirium at the time of the alleged rape required such examination). Where six appellate judges have not only concluded but strongly concluded that McCray's conviction is constitutionally infirm and where numerous circuit judges in other matters have disagreed so sharply on the application of Brady and Ritchie to complainants' mental health records, it is clear that there is a deep and elemental divide as to how such records should be handled. Surely such a scope and intensity of disagreement among judges as to issues so fundamental to Brady jurisprudence means that there is a need for this Court to take up these issues once again.

CONCLUSION

WHEREFORE, in light of the foregoing, this Court should grant certiorari on all issues raised in this Petition and, upon review, should vacate the decision of the Second Circuit, grant Section 2254 habeas relief to the petitioner, and grant such other and further relief to the petitioner as it may deem just and proper.

Dated: New York, NY
December 13, 2022



JONATHAN I. EDELSTEIN

United States Court of Appeals
For the Second Circuit

August Term 2020

Argued: September 16, 2020
Decided: August 17, 2022

No. 18-2336

TERENCE SANDY MCCRAY,

Petitioner-Appellant,

v.

MICHAEL CAPRA, Superintendent, Sing Sing Correctional Facility,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of New York
No. 15-cv-1129, James K. Singleton, Jr., *Judge*.

Before: JACOBS, LYNCH, AND SULLIVAN, *Circuit Judges*.

Terence Sandy McCray appeals from a judgment of the United States District Court for the Northern District of New York (Singleton, *J.*) denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254, following his conviction in New York state court for first-degree rape. McCray argues principally that the state trial court violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and

the Sixth Amendment's Confrontation Clause by denying him full access to the victim-witness's mental health records. Because we conclude that the New York Court of Appeals's application of *Brady* and its progeny was not unreasonable and that there is no binding Supreme Court precedent stating that a defendant's right to confrontation extends to pretrial discovery, we **AFFIRM** the district court's judgment denying McCray's petition.

Judge Jacobs dissents in a separate opinion.

AFFIRMED.

JONATHAN I. EDELSTEIN, Edelstein & Grossman, New York, NY, *for Petitioner-Appellant*.

PRISCILLA STEWARD, Assistant Attorney General (Barbara D. Underwood, Solicitor General, and Nikki Kowalski, Deputy Solicitor General for Criminal Matters, *on the brief*), *for* Letitia James, Attorney General of the State of New York, New York, NY, *for Respondent-Appellee*.

RICHARD J. SULLIVAN, *Circuit Judge*:

Petitioner Terrence Sandy McCray appeals from a judgment of the United States District Court for the Northern District of New York (Singleton, *J.*) denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254, following his conviction in New York state court for first-degree rape. The underlying criminal

case was ultimately a credibility contest. According to the victim,[1] she was violently raped by McCray. According to McCray, he and the victim had consensual sex, the victim subsequently demanded money from him, he refused, she tried to steal his pants and his cash, a brief struggle ensued, and the victim left. The physical evidence – including photos of the victim's bruised face and the bite marks on McCray's arm – was consistent with both stories. Before trial, the prosecution informed McCray that the victim had a history of mental illness, which prompted McCray to request all of her mental health records. The trial court conducted an in camera review of the victim's full mental health records, which totaled more than 5,000 pages, and disclosed to McCray a twenty-eight-page sample that it deemed representative. At trial, the prosecution elicited testimony from the victim regarding her mental health, and the defense vigorously cross-examined her on that subject. The jury returned a guilty verdict.

On direct appeal in the New York state courts, McCray challenged the decision to provide him with only a sample of the victim's mental health records, arguing that doing so violated his right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963), and his right to confront his accuser under the Sixth

[1] Although the victim testified in open court, due to the nature of the crime against her and the content of the disputed records, we refrain from using her name in this opinion.

Amendment's Confrontation Clause. The New York Court of Appeals ultimately affirmed McCray's conviction, holding that the trial court did not err by providing a sample of the victim's mental health records and finding that the sample was sufficiently representative of the records as a whole. McCray subsequently petitioned for relief under 28 U.S.C. § 2254, which the district court denied.

We must decide whether the New York Court of Appeals unreasonably applied clearly established federal law as determined by the Supreme Court of the United States. We conclude that it did not. Because the New York Court of Appeals's application of *Brady* and its progeny was reasonable and there is no binding Supreme Court precedent providing that a defendant's right to confrontation extends to pretrial discovery in a criminal case, we **AFFIRM** the district court's denial of McCray's petition.

I. BACKGROUND

Both the victim and McCray testified that they met in 2009 and went on a date in Albany, New York. After an evening of exploring Albany, McCray led the victim to the home of one of his friends, who let the couple in and then immediately retired to his bedroom. Alone on the living room couch, McCray and the victim started kissing. The victim testified that McCray wanted to have sex

after about fifteen minutes, but she refused, telling McCray that it was too early in their relationship. When McCray pressed the point, the victim got angry with him and stormed out of the apartment. McCray chased her down on the street outside to apologize. The victim eventually accepted McCray's apology and proceeded to walk around Albany with him until about midnight. According to the victim, McCray then led her to an abandoned house, where he violently raped her.

After she left the abandoned house, the victim – then weeping and struggling to speak – called 911 from a nearby payphone. She told the operator that McCray had beaten her, made her beg for her life, and raped her. A police officer approached the victim while she was on the phone and saw blood on her clothes and face. Photographs taken later that morning and hospital records show that the victim had abrasions and bruises on her left arm and left cheek, as well as lacerations on the inside of her mouth. A DNA test on samples of semen recovered from the victim's vagina and breasts matched McCray's DNA.

A week later, an Albany County grand jury indicted McCray on the charge of first-degree rape. Before trial, the prosecution provided the defense with a synopsis of the victim's mental health history, including information about her hospitalizations; her diagnoses of bipolar disorder, epilepsy, Tourette's syndrome,

attention deficit disorder, and post-traumatic stress disorder ("PTSD"); and her histories of hypersexuality and auditory and visual hallucinations. The prosecution also disclosed the victim's allegations that she had been the victim of three prior sexual-abuse incidents. Following these disclosures, McCray sought all of the victim's mental health records relating to her testimonial capacity, memory, and/or credibility. The trial court directed that the records be submitted in camera so that it could review the records and determine which were material and needed to be disclosed to the defense. After reviewing more than 5,000 pages of the victim's mental health records, the trial court provided the defense with a twenty-eight-page sample it deemed representative of the relevant corpus of documents. On direct examination, the victim told the jury about her mental health diagnoses and the medications she took at the time of the incident. She was also cross-examined at length by defense counsel about her mental health status and treatment.

Following the prosecution's case, McCray elected to testify in his own defense. During that testimony, McCray disputed key portions of the victim's testimony and stated unequivocally that the sexual encounter was completely consensual. The jury ultimately returned a verdict finding McCray guilty of

first-degree rape. He was subsequently sentenced to twenty-two years' imprisonment.

McCray appealed to the Appellate Division, Third Department, which affirmed his conviction. *See People v. McCray* (*McCray I*), 958 N.Y.S.2d 511, 514 (3d Dep't 2013). He then appealed to the New York Court of Appeals, which also affirmed. *See People v. McCray* (*McCray II*), 23 N.Y.3d 193, 196 (2014). One of McCray's key arguments on direct appeal was that the trial court violated his confrontation and due process rights by refusing to provide him with the victim's full mental health records. The New York courts rejected this argument.

In 2015, McCray petitioned pro se for a writ of habeas corpus under 28 U.S.C. § 2254 in the Northern District of New York. The district court denied the petition, finding that the New York Court of Appeals's conclusion that the withheld documents were not material was not "unreasonable or contrary to *Brady* or its progeny." *McCray v. Capra* (*McCray III*), No. 15-cv-1129 (JKS), 2018 WL 3559077, at *11 (N.D.N.Y. July 24, 2018). The district court nonetheless granted a certificate of appealability on the sole question of whether the nondisclosure of the victim's mental health records violated *Brady*. McCray filed a counseled motion to expand the certificate of appealability to include the question of whether

the nondisclosure of the victim's mental health records also violated his Sixth Amendment right to confrontation, which this Court granted.

II. STANDARD OF REVIEW

We review the denial of a section 2254 petition de novo. *Scrimo v. Lee*, 935 F.3d 103, 111 (2d Cir. 2019). A federal court may not grant a writ of habeas corpus pursuant to section 2254 unless (1) the state court's decision was "contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States," or (2) the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d); *see also Harrington v. Richter*, 562 U.S. 86, 100 (2011). On a habeas petition under section 2254, we review the "last reasoned decision" by the state court, *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991), only for the "reasonableness" of its bottom-line "result," not the "quality of [its] reasoning," *Sellan v. Kuhlman*, 261 F.3d 303, 312 (2d Cir. 2001) (citation omitted). Thus, we extend considerable "deference" even to "deficient reasoning . . . , at least in the absence of an analysis so flawed as to undermine confidence that the constitutional claim has been fairly adjudicated." *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001) (internal citations

omitted). Put differently, our review under section 2254 is not "a substitute for ordinary error correction through appeal." *Richter*, 562 U.S. at 102–03 (citation omitted). Rather, it "functions as a guard against extreme malfunctions in the state criminal justice systems." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (internal quotation marks omitted).

A state court's decision is contrary to clearly established federal law when it "applies a rule that contradicts the governing law set forth in [Supreme Court caselaw] or . . . confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (internal quotation marks omitted); *see also Fuentes v. Griffin*, 829 F.3d 233, 244 (2d Cir. 2016). "[C]learly established law as determined by [the Supreme] Court refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Yarborough v. Alvarado*, 541 U.S. 652, 660–61 (2004) (internal quotation marks omitted). Under this standard, a federal court may not issue a writ of habeas corpus simply because it thinks the state court "applied clearly established federal law erroneously or incorrectly." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). Instead, relief is warranted under section 2254 only

"where there is no possibility fair[-]minded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Richter*, 562 U.S. at 102; *see also Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021); *Shinn v. Kayer*, 141 S. Ct. 517, 520 (2020). As the Supreme Court has noted, if this standard is difficult to meet, that is "because it was meant to be." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018) (quoting *Richter*, 562 U.S. at 102); *see also Burt v. Titlow*, 571 U.S. 12, 20 (2013).

III. DISCUSSION

McCray argues that the New York Court of Appeals unreasonably applied clearly established federal law in finding that the trial court's withholding of the victim's full mental health records did not violate his right to due process under *Brady* and his right to confront his accuser under the Sixth Amendment's Confrontation Clause. We discuss McCray's due process and Confrontation Clause claims in turn.

A. McCray's Due Process Claim

Due process requires disclosure of evidence that is "favorable to [the] accused" and "material either to guilt or to punishment." *Brady*, 373 U.S. at 87. So-called *Brady* material includes both evidence that is exculpatory and evidence

that can be used to impeach a prosecution witness whose credibility may be "determinative of guilt or innocence." *Giglio v. United States*, 405 U.S. 150, 154 (1972). Still, the prosecutor is not obligated to "deliver his entire file to defense counsel." *United States v. Bagley*, 473 U.S 667, 675 (1985) (plurality opinion); *see also Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[The Supreme Court] ha[s] never held that the Constitution demands an open file policy."). Only evidence that is *material* raises due process concerns. *See Wearry v. Cain*, 577 U.S. 385, 392 (2016) (citing *Brady*, 373 U.S. at 87); *Turner v. United States*, 137 S. Ct. 1885, 1888 (2017).

The "touchstone of materiality" is whether there is a "reasonable probability" that the result of the trial would have been different had the relevant evidence been disclosed to the defendant. *Kyles*, 514 U.S. at 434. A reasonable probability is "the likelihood of a different result [that] is great enough to undermine confidence in the outcome of the trial." *Smith v. Cain*, 565 U.S. 73, 75 (2012) (alterations and internal quotation marks omitted). The materiality of the undisclosed evidence is evaluated "in the context of the entire record." *Turner*, 137 S. Ct. at 1893. Although this determination is "legally simple," it can be "factually complex." *Id.*

The relative generality of the *Brady* rule interacts with the habeas standard in a way that is critical to McCray's case. As the Supreme Court has said:

> [T]he range of reasonable judgment may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. . . . The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

Yarborough, 541 U.S. at 664. The *Brady* rule is a general rule, as it does not identify specific materials that prosecutors must turn over to defendants, but rather asks – after the fact – whether the failure of those prosecutors to turn over certain evidence denied the defendant a fair trial – a question that is a matter of judgment rather than one with a clear, obvious answer.

McCray contends that "the nondisclosure of the [victim's] full medical records" violated his constitutional rights and constituted an unreasonable application of clearly established federal law, as determined by the Supreme Court. McCray's Br. at 34–35. Specifically, McCray asserts that the New York Court of Appeals incorrectly determined that (1) the trial court had provided him with a sufficient, representative sample of the victim's mental health records, (2) there was nothing in the undisclosed records suggesting that the victim had a tendency to make accusations she knew to be false, and (3) one of the suppressed documents – recounting that the victim had accused her father of sexual assault

and that the allegation was unfounded – was immaterial. Because we review the undisclosed evidence not piecemeal but cumulatively, *see Kyles*, 514 U.S. at 440–41, and because we address only the reasonableness of the state court's decision and not its rationale, *see Cruz*, 255 F.3d at 86, all three arguments merge into the first and can be addressed together.

As an initial matter, there is nothing in the Supreme Court's caselaw to suggest that providing only a sample of the victim's mental health records was improper. As noted above, the Supreme Court has "never held that the Constitution demands an open file policy," *Kyles*, 514 U.S. at 437, and not every document that could be used to impeach a witness is so devastating that depriving a defendant of it "undermine[s] confidence in the outcome of the trial," *Smith*, 565 U.S. at 75. Here, much of the victim's file was duplicative of those portions of the file that were produced. Given that redundancy and the fact that many of the documents in the file were otherwise irrelevant to the victim's credibility as a witness, it was not objectively unreasonable or an extreme malfunction of the state's criminal justice system for the state trial court to provide only a representative sample of the victim's mental health records. The question, then, is whether there was material information in the withheld documents. The New

York Court of Appeals answered that there was not. We hold that fair-minded jurists could agree with that conclusion.

The twenty-eight pages that were provided to McCray include a remarkable amount of information about the victim, including her history of hospitalizations for mental health episodes; information concerning her memory loss; her hypersexuality and sexually risky behaviors, including her history of sexual activity with older men; her poor judgment in sexual interactions; two previous incidents in which she alleged forced intercourse (one at age twelve with a sixteen-year-old male and one at age fourteen with a twenty-five-year-old male) and reported symptoms of significant trauma; her history of being physically abused by her father; her self-harming behaviors, including one incident where she carved a cross into her hand; her patterns of inappropriate and unsafe behaviors; her poor impulse control; her epilepsy; her psychotic symptoms, which include visual and auditory hallucinations; her violent responses to traumatic flashbacks of prior sexual abuse; the psychotropic medications that she was prescribed, as well as other treatments such as anger management, family therapy, and group therapy that she undertook; her erratic use of prescription medications and inconsistent compliance with her therapy programs; her "bizarre and

psychotic behaviors" and mood cycling from depressive to explosive; and her "explosive," "threatening," "aggressive," and even "rageful" behaviors when angry. Sealed R. at 429–55.

In addition to information contained in the pretrial disclosure to McCray, the victim testified on direct examination about her mental health diagnoses and the medications she had been taking at the time of the incident. On cross-examination, she reaffirmed that she had been diagnosed with PTSD and other mental illnesses, and that she had been treated at two different mental health facilities around the time of the events in question. More specifically, the victim testified that one of the reasons she had been receiving bipolar disorder medications was that she could become explosively angry and physically strike others. She conceded that she did not always take her medication and that she could not recall whether she had taken her medication on the night she was raped. She likewise testified that she had engaged in self-harm, including cutting herself, and that the marks the officers found on her arms after the rape were self-inflicted. Finally, the victim testified that she had visualized her deceased grandfather and that there have been times that she could sense the presence of dead people.

It is against this entire record that the state court needed to compare the withheld documents to determine whether they were material. *See Turner*, 137 S. Ct. at 1893. After conducting our own review of the undisclosed records, we conclude that the state court's decision to withhold them from the defense was not an unreasonable application of clearly established federal law. Between the sample provided to McCray and the victim's testimony in open court, McCray had ample material with which to impeach the victim's credibility at trial and more than sufficient information to prompt defense counsel to pursue the victim's mental health as a potential avenue for impeachment. Notwithstanding the victim's serious and tragic struggles with mental illness, the jury still found her to be credible. There is nothing in the undisclosed records that could further impeach the victim to such an extent that our "confidence in the outcome of the trial" would be compromised. *Smith*, 565 U.S. at 75.

McCray argues that our decision in *Fuentes* compels the opposite result. *See* 829 F.3d 233. *Fuentes* was a case in which "the witness's testimony [was] the only evidence that there was in fact a crime." *Id.* at 248. But unlike the defense in this case, the defense counsel in *Fuentes* did not have access to *any* of the witness's relevant mental health records until he came across a "Record of Consultation" as

he was leafing through the prosecution's trial exhibits during his summation. *Id.* at 240. At that point, it was far too late for the defense to use that information to impeach the witness. *See id.* at 249. McCray, in contrast, was provided with the victim's mental health records in advance of trial so that his attorneys had a sufficient opportunity to use them in preparing his defense and in cross-examining the victim. The victim also testified about her mental health on direct examination, which gave McCray's attorneys ample material with which to cross-examine her about her mental health condition and how it might affect her credibility. Therefore, *Fuentes* does not undermine our decision here.

The dissent argues that the trial court's decision to provide the twenty-eight-page sample was a "miscarriage" that "is arresting," "unprecedented," and "not easily thinkable." Dissent at 1. According to the dissent, McCray was "wholly denied the right to defend himself" and sentenced "without a trial that anyone can now deem fair." *Id.* at 23. Indeed, the dissent insists the state's defense of McCray's conviction is so "disreputable" that, "[w]ere [Judge Jacobs] a lawyer for the [s]tate, [he] would not have been able to sign the brief it filed on this appeal." *Id*. But whatever the dissent's subjective views on the propriety of signing the state's brief, that is not the standard we are required –

or permitted – to apply on a challenge pursuant to section 2254. Our inquiry is instead an objective one, which turns on whether the undisclosed information was so obviously material that no "fair[-]minded jurist could []agree on the correctness of [the trial court's] decision" to withhold it. *Ritcher*, 562 U.S. at 101 (internal quotation marks omitted). We are not persuaded that this high standard has been met.

First, the dissent argues that the disclosed documents provided the defense with only the broad argument that people with mental illnesses cannot be relied on to tell the truth. Dissent at 4. But the full account of the disclosed documents suggested far more than that. While the dissent states that only a "single disclosed document . . . involves misperception," *id.* at 7, the defense in fact possessed thirteen different documents that touch on a wide variety of issues relating to the victim's potential to misperceive situations: her memory loss, her two previous allegations of forced intercourse and associated trauma symptoms (including violent flashbacks), and her history of psychotic episodes (including visual and auditory hallucinations). Considered in tandem, these documents constituted powerful impeachment materials in and of themselves, which were more than enough to alert defense counsel that the victim's difficulties with accurately

perceiving reality could be a productive line of inquiry on cross examination. Not that defense counsel needed prompting – counsel requested the victim's medical history in pretrial discovery and thoroughly cross-examined her at trial regarding how her mental illness might have affected her ability to accurately perceive or remember what happened with McCray in the abandoned house. The assertion that McCray was prevented from mounting a defense based on the victim's "pathological failures to appreciate reality," *id.* at 8, is clearly contradicted by the record.

Second, the dissent makes much of a note in the victim's Patient Care Activity Report stating that she confabulated stories about hospital staff. "Confabulate," in both its dictionary definition and as a technical or psychological term, means "[t]o fill in gaps in one's memory with fabrications that one believes to be facts." *Confabulate*, The American Heritage Dictionary of the English Language (5th ed. 2011); *see also* The American Psychiatric Association, The Diagnostic and Statistical Manual of Mental Disorders 157 (4th ed. 1994) ("DSM-IV") (stating that confabulation is "often evidenced by the recitation of

imaginary events to fill gaps in memory").[2] Clearly, the note indicates that the victim may be an unreliable witness. But so do the documents that were disclosed to McCray, which indicate that the victim had trouble with memory loss and with misperceiving and misremembering events. It was therefore not unreasonable for the New York Court of Appeals to determine that the note in the Activity Report was cumulative of the other impeachment materials that were provided to McCray prior to trial.

Third, the dissent says that two assessments indicating that the victim "cannot remember good experiences if she has bad experiences with someone" were material and should have been disclosed. Dissent at 9. The dissent spins a theory that McCray and the victim shared a good experience – namely, consensual sex in an abandoned building – followed by a bad experience pertaining to a post-coital struggle over money. But nothing in the documents cited by the dissent suggests that the victim was prone to forget good experiences within minutes of experiencing them, as would have had to be the case here, where the victim, sobbing and covered in blood, immediately ran to a payphone to call 911 and

[2] We have recognized the DSM-IV, which was the edition of the DSM in effect at the time this note was written, as "an objective authority on the subject of mental disorders." *Fuentes*, 829 F.3d at 249.

report having been raped by McCray. Moreover, those same documents clearly state that when the victim does choose to remember something, her memory is excellent. It is dubious that these ambiguous documents would have been especially helpful to McCray, and it was not unreasonable for the New York Court of Appeals to find that they were cumulative of other evidence that demonstrated the victim's faulty memory and potential unreliability as a witness.

Finally, the dissent notes that the undisclosed records show that the victim accused her father of attempting to rape her by pinning her against a wall and that a mental health professional, without explanation, later deemed that allegation to be unfounded. According to the dissent, this prior allegation could have "damn[ed]" the case against McCray. *Id.* at 11. But the dissent fails to fully or accurately describe either the records at issue or the victim's allegation against McCray. The records state that the victim had alleged that her father tried to rape her by pinning her up against the wall in a sexual position and that she could not recall how she got away. The victim's allegation against McCray, however, was much more detailed and differed in significant respects from the allegations made against her father. The victim testified that once she and McCray were in the abandoned house, McCray backed her up against a wall, forced his tongue down

her throat, and began grinding against her. She told him to stop and tried to push him away, but he continued, commanding, "You are going to give it to me or I'm going to take it." *McCray I*, 958 N.Y.S.2d at 515. The victim testified that she punched McCray in the face, near his jaw or chin; that McCray hit her in the face several times and choked her from behind; that she then bit McCray's forearm while he was choking her, all while begging for her life and trying to make noise to draw attention, until she finally gave up and fell to her hands and knees; and that McCray then raped her on the floor of the abandoned house. When it was over and the victim got up to leave, McCray told her, "Don't go out there looking like that." *Id.* at 516. She wiped the tears and blood from her face and then went out the same way they had entered, only to immediately call the police from a payphone and report that she had been raped. The similarities between the two stories are at most superficial and trivial. While the dissent insists that the evidence suggesting that the victim may have misinterpreted her father shoving her as an attempted rape would be "dynamite" to the jury, Dissent at 13, we are not persuaded that there is a "reasonable probability" that the result of the trial

would have been different had the evidence been disclosed to McCray. *Kyles*, 514 U.S. at 434.[3]

In sum, the dissent is incorrect to say that the withheld documents would have corroborated the weaker aspects of McCray's defense in ways the disclosed documents did not. Dissent at 15. McCray was given a wealth of information in pretrial disclosures; the victim testified about her various mental health issues in open court; and the victim was cross-examined vigorously on her mental illness, her erratic behavior, and – by extension – her reliability. The jury nonetheless credited her testimony and convicted McCray. Based on the entire record, we cannot say that no fair-minded jurists would agree with the New York Court of Appeals that McCray received a fair trial. We therefore deny McCray's petition insofar as it seeks relief based on *Brady*.

B. McCray's Confrontation Clause Claim

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with

[3] The dissent notes that the withheld documents show that the victim experiences flashbacks to being sexually abused. Dissent at 11. While that is true, notes regarding the victim's flashbacks to her prior sexual abuse were also included in the disclosed documents. Thus, any discussion of the victim's flashbacks in the undisclosed documents is duplicative or cumulative of what was disclosed.

the witnesses against him." U.S. Const. amend. VI. Supreme Court caselaw clearly establishes that the Confrontation Clause entitles a criminal defendant to "a meaningful opportunity to cross-examine witnesses against him." *Alvarez v. Ercole*, 763 F.3d 223, 229–30 (2d Cir. 2014); *see also Davis v. Alaska*, 415 U.S. 308, 315 (1974). McCray argues that he was deprived of such an opportunity because the sample of the victim's mental health records provided to him was insufficient. The New York Court of Appeals rejected this argument as a matter of law, concluding that the Confrontation Clause does not extend to pretrial discovery and instead analyzing McCray's claims only in connection with *Brady* and its progeny. *See McCray II*, 23 N.Y.3d at 198.

The view that the opportunity to cross-examine witnesses is meaningful only when the defendant is given adequate pretrial discovery was advanced in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), by Justice Blackmun in his concurrence, *see id.* at 61–66 (Blackmun, J., concurring), and by Justices Brennan and Marshall in their dissent, *see id.* at 66–72 (Brennan, J., dissenting). This, however, was not the view of the plurality, which made clear that the right to confrontation is only "a *trial* right" that "does not include the power to require the pretrial disclosure of

any and all information that might be useful in contradicting unfavorable testimony." *Id.* at 52–53 (plurality opinion).

Other than in *Ritchie*, the Supreme Court has not directly addressed how, if at all, the Confrontation Clause affects pretrial discovery. To the extent that any guidance may be gleaned from other Supreme Court cases, that guidance is consistent with the *Ritchie* plurality's characterization of a defendant's right to confrontation as a trial right only. *See Barber v. Page*, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right."); *California v. Green*, 399 U.S. 149, 157 (1970); *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). Thus, we find no basis to conclude that the New York Court of Appeals's decision concerning McCray's confrontation rights was "contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

IV. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

DENNIS JACOBS, Circuit Judge, dissenting:

I respectfully dissent.

In a word-against-word rape case, the State turned over to the defense documents reflecting a variety of mental disorders of the complainant that rendered her vulnerable; but the State did not turn over documents reflecting her distortions of memory and reality, and an earlier report of rape. The withheld documents put the case in a wholly different light, raise powerful doubts about what happened, and would have opened the only promising avenues for investigation and trial strategy.

I acknowledge the high hurdle that a federal court must surmount to grant a writ of habeas corpus in a state case: it must be that the state court's decision was "objectively unreasonable," Fuentes v. Griffin, 829 F.3d 233, 245 (2d Cir. 2016) (quoting Yarborough v. Alvarado, 541 U.S. 652, 665 (2004)), that is, "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," Harrington v. Richter, 562 U.S. 86, 103 (2011). The standard is not often met; but the miscarriage here is arresting and unprecedented. It is not easily thinkable.

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The facts may be put in skeletal fashion. Terence Sandy McCray and the complainant ended a social evening in 2009 by going to an abandoned house. She says that she was "follow[ing] him" around the premises when McCray pinned her to a wall and raped her. State Ct. R. at 380:7-8, No. 9:15-cv-1129 (N.D.N.Y. Apr. 21, 2016), ECF No. 35-1. He says that they were seeking a private place for sex, and that after consensual sex, she demanded payment, grabbed his pants and fished for cash; and that after a tussle ensued, he fled.

As everyone agrees, the case turns on the credibility of McCray and the complainant. McCray was convicted by a jury in Albany County Court, and sentenced to 22 years in prison—where he has now been for about 13 years. (McCray spurned a plea agreement that would have subjected him to a misdemeanor conviction and time served—which says something about the prosecution's view of its case.) The conviction withstood state appeals by closely divided panels: 3-2 in the Appellate Division, 4-3 in the Court of Appeals.

I would hold that the disposition of the Court of Appeals (after almost all of the exculpatory documents were known to the judges) was "objectively unreasonable." Fuentes, 829 F.3d at 245 (quoting Alvarado, 541 U.S. at 665). I will adduce particulars, but in sum, the Constitutional deprivation under Brady

v. Maryland, 373 U.S. 83 (1963) was absolute—that is, none of the many exculpatory documents were turned over. It was incontestable error to tolerate that denial of the due process right to a fair trial.

The majority deems it "critical to McCray's case" that Brady is a "general rule" that entails "judgment" in deciding what "specific materials" must be turned over, and therefore may not be a viable ground for seeking relief under the habeas standard. Maj. Op. at 12-13. That principle would foreclose habeas relief even when—as here—the Brady violation is complete, flagrant, and consequential, which cannot be the law.

I

As permitted in New York, the culling of the complainant's (huge) medical file was done by the trial judge; that procedure for the disclosure of confidential documents is sanctioned by both the New York Court of Appeals, see People v. Gissendanner, 48 N.Y.2d 543, 551 (1979); see also People v. Contreras, 12 N.Y.3d 268, 272 (2009), and the United States Supreme Court, see Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987).

The trial judge turned over to the defense (and prosecution) 28 pages out of over 5000 and placed the rest under seal, where they remain, inaccessible to both the defense and the prosecution. Scrutiny in the state appellate courts, in the district court, and in my chambers identified 45 additional pages that should have been produced. But the seal order has disabled McCray's counsel from specifying the use and impact of the withheld documents, or how they might have affected trial strategy. Unless lawyers can see what has been withheld, they are shadow-boxing.

Six appellate judges (albeit out-voted) would grant a new trial. That includes me.

The New York Court of Appeals (the "Court") wrote off the withheld documents as "cumulative or of little if any relevance to the case." People v. McCray, 23 N.Y.3d 193, 199 (2014) ("Ct. App. Op."). Both grounds are manifestly wrong. The 28 pages that were disclosed demonstrate no more than that the complainant was vulnerable, which was a great boon to the prosecution. But the defense was left with the insupportable argument that people with mental illness cannot be relied on to tell the truth, or might misperceive a consensual encounter as rape. As the Court itself recounted, the 28 pages that were produced showed:

> that the complainant had very significant mental health problems. Her diagnoses, as summarized in her own testimony, included "Bipolar, Tourettes, post-traumatic stress disorder, epilepsy." It was also brought out that she suffered from attention deficit disorder and hypersexuality; that she had reported that she "visualized" or "sense[d] the presence of" dead people; that she had cut her flesh with sharp objects; that her bipolar disorder caused her "on occasion" to be "explosive and angry" and to "physically strike out at people"; that at the time of the incident she was taking medications, was receiving treatment from a mental health facility, and was also seeing a counselor weekly or biweekly; that she failed "once in a while" to take her medications, and that on the night of the alleged rape she could not remember whether she had taken them that day; that, after the alleged rape and before the trial, she had been hospitalized for an overdose of drugs; and that that was not her first suicide attempt, though she said it was her first "serious" one.

Id. at 197–98 (alteration in original).

The complainant's vulnerability, as detailed in the documents known to the jury, was the mainspring of the prosecution's case, as pressed in summation: "something wasn't right about [the complainant]," possibly because of "her mental health conditions." State Ct. R. at 778:12–14, No. 9:15-cv-1129 (N.D.N.Y. Apr. 21, 2016), ECF No. 35-5 ("Prosecutor's Summation"). The prosecutor imputed to McCray the assumption that he could rape her with impunity: "[n]obody's going to believe [the complainant]" because "[s]he's crazy." Id. at 790:22–25. And vulnerability was the prosecution's explanation for why the rape took place in the context of a willing sexual encounter:

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> I submit to you the plan was not to rape her. The plan was to take advantage of her because he knew he could. And what happened was what he didn't predict or plan, that she said no. She said no. Because she agreed and participated in sexual activity with him before in April and even earlier that night at his friend's house, he figured he was a shoe-in. He had it in the bag. He was going to take her to an abandoned building where he knew it would be private.

Id. at 780:10–19.

The complete defense to all this would have been evidence that the complainant had a distorted memory or a fragile sense of reality. But the disclosed evidence did nothing to support such an argument. There is nothing about Tourette Syndrome, bipolar disorder, PTSD, epilepsy, or attention deficit disorder that renders the complainant an unreliable witness. And hypersexuality (to the extent it is anybody's business) simply reinforces the prosecution's argument that she was vulnerable.

Brady requires the disclosure of evidence that takes on force from "cumulative effect." Kyles v. Whitley, 514 U.S. 419, 440 (1995). Yet the Court considered it sufficient if McCray had documents containing "examples" of the mental health issues that appeared in the withheld documents, and good enough if the withheld documents "were no clearer or more dramatic than the ones the defense already had." Ct. App. Op., 23 N.Y.3d at 199. As example, the Court

picked the single disclosed document that involves misperception: the complainant saw or sensed the presence of the dead. The Court deemed this sufficiently representative of her "hallucinations or distorted perceptions." Id. But there are no zombies in this case.

II

The complainant's withheld medical history reflects memory distortion, misperception, and fabrication that undermine credibility generally and fatally. Since, as Judge Rivera observed in her potent dissent in the New York Court of Appeals (on behalf of three judges), "[c]ases are made or unmade by specifics, not generalities," Ct. App. Op., 23 N.Y.3d at 206 (Rivera, J., dissenting), I will focus on the impact of particular documents that bear upon those features of McCray's testimony that were most in need of corroboration.

In this opinion, withheld documents are cited in italics to avoid repeating endlessly the description, "another record withheld from the defense."

The Court held that the two accounts of what happened at the crucial moment set up a binary choice: either the sex was consensual or it was rape—and it therefore could not be attributed to "a failure of recollection or a misunderstanding." Ct. App. Op., 23 N.Y.3d at 199. But if the defense had in

hand the evidence it was entitled to have, it could have mounted a defense that reconciled the opposite accounts on the basis that both witnesses were telling the truth: one of them with pathological failures to appreciate reality.

As to the alleged rape itself, the withheld documents specifically adduce symptoms that bear directly on the complainant's ability to recall and relate the disputed events. The complainant "has pretty significant short term memory loss." *Oct. 2006 Progress Note*. At times, she has felt "out of control" and afterward "has had no recollection of the events" that took place during the episode. People v. McCray, 958 N.Y.S.2d 511, 524 (3d Dep't 2013) (McCarthy, J., dissenting). She has "confabulat[ed] stories about [hospital] staff." *Nov. 2006 Patient Care Activity Rep.* The "major feature" of confabulation has been described in scientific literature as "an inaccurate and sometimes bizarre narrative account of a present or past event," sometimes characterized as "'honest lying,' in the sense that patients believe what they are saying even though it is demonstrably false." Daniel L. Schacter, Jerome Kagan, & Michelle D. Leichtman, True and False Memories in Children and Adults: A Cognitive Neuroscience Perspective, 1 PSYCH. PUB. POL'Y & L. 411, 415–16 (1995). (The

ordinary definition of "confabulation" is set out in the margin.[1]) The complainant also "has a very poor perception of reality" and distorts her interpersonal relationships. *July 2006 Discharge Summ*.

One such distortion of reality has direct bearing on the case. Withheld psychiatric assessments, dated about one year apart, reveal that the complainant has a selective memory. It is not the kind of selective memory that is fairly universal; the complainant "cannot remember good experiences if she has bad experiences with someone." *Sept. 2007 & Aug. 2008 Assessments*. Consider: McCray testified that he and the complainant shared a good experience (consensual sex) followed by a bad one (a struggle over money). The evidence of the complainant's pathology would have thus corroborated McCray's account.

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[1] To "confabulate" means "to fill in gaps in memory by fabrication," Confabulate, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/confabulate (last visited December 14, 2021), or "by a falsification that one believes to be true," Confabulate, Dictionary.com, https://www.dictionary.com/browse/confabulate?s=t (last visited December 14, 2021); see Confabulate, Oxford Dictionary, https://premium.oxforddictionaries.com/us/definition/american_english/confabulate (last visited December 14, 2021) (defining "confabulate" as "[f]abricate imaginary experiences as compensation for loss of memory"); see Francis P. Kuplicki, Fifth, Sixth, and Fourteenth Amendments: A Constitutional Paradigm for Determining the Admissibility of Hypnotically Refreshed Testimony, 78 J. OF CRIM. L. & CRIMINOLOGY 853, 856 (1988) (defining "confabulate" as "[to] fill gaps in [one's] memory with plausible, but not necessarily accurate, data").

Justice McCarthy made the same observation in his dissent in the Appellate Division: "This . . . record could be especially important, considering defendant's testimony that they had consensual sex and struggled afterward when the victim attempted to take his money." McCray, 958 N.Y.S.2d at 525 (McCarthy, J., dissenting).

Judge Rivera's dissent in the Court of Appeals cites this same memory defect as illustrative of how the documents that were disclosed "did not reveal the full range of medical and behavioral issues that implicate the complainant's credibility." Ct. App. Op., 23 N.Y.3d at 208 (Rivera, J., dissenting).

The jury heard from the prosecutor that McCray's account of consensual sex required "believ[ing] him over everything else," Prosecutor's Summation at 783:12–15; but the jury never learned of the psychiatric evidence corroborating McCray's version of events. And there was no "everything else." The physical evidence, as the majority notes, "was consistent with both stories." Maj. Op. at 3.

Testimony about the aftermath was also conflicting. McCray testified that the complainant demanded money after sex, grabbed his pants when he refused, and rifled the pockets for his wallet. She denied this behavior. The withheld documents reflect, however, that "[s]he has developed strategies to get what she

wants from people," including by acting impulsively in ways that endanger herself and others, such as by "grabbing the steering wheel when [her] mom is driving . . . ." *July 2008 Clinical Diagnostic Formulation*.

The prosecutor told the jury that someone so disturbed could not also be "manipulative and clear-headed and crafty . . . ." Prosecutor's Summation at 787:8–9. But the withheld documents demonstrate that at the same time the complainant is having delusions she could have a clear enough head to grab what she wanted. This, too, would have corroborated McCray's testimony and subverted the prosecution's theory.

It is damning in a rape case if the defense can show that the complainant had previously made false rape allegations. The withheld documents reveal that, as early as 2004, the complainant reported that her father tried to rape her by pinning her against a wall. That is of course what she claims McCray did when he raped her. Relatedly, the withheld documents show that the complainant experienced flashbacks to being sexually abused. In particular, the withheld documents reflect that she has flashbacks to her father's alleged sexual abuse, and that role playing with her boyfriend would trigger flashbacks.

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The Court recognized that the complainant's accusation against her father "provides the strongest basis for [McCray's] argument on appeal," Ct. App. Op., 23 N.Y.3d at 200, but dismissed it for two reasons. First, the Court considered it was "quite different" from the accusation against McCray. Id. But the defense (if armed with the withheld documents) could easily have depicted the allegations as quite similar: she was in the willing presence of an older man, who suddenly pins her to a wall for rape. Second, the Court dismissed the 2004 accusation against her father as too "far removed in time" to be probative of her 2009 accusation against McCray. Id. This was likewise unreasonable. The accusation against her father would have been recent enough for the State to criminally prosecute him;[2] surely it was recent enough to be relevant to McCray's prosecution.

[2] Depending on the severity of the crime, New York's statute of limitations for sexual assault ranges from five to twenty years, N.Y. Crim. Proc. Law § 30.10(2)(a-1)–(a-2), 3(e) (McKinney 2019); for rape in the first degree and some other sexual offenses, there is no limitation period, § 30.10(2)(a), and for some sexual offenses committed against children, the limitation period does "not begin to run until the child has reached the age of twenty-three or the offense is reported to a law enforcement agency . . . whichever occurs earlier," § 30.10(f). The complainant would have been about 14 years old when she reported that her father tried to rape her, and she had not yet reached the age of 23 at the time of McCray's trial.

A social worker referred to the allegation that the father attempted rape as "unfounded," *Undated Psych. Assessment*, and the complainant's mother doubted it.[3] But neither was in a position to know; and, much more important, McCray's account would have been strengthened whether her father attacked her, or whether she imagined the attack. If it happened, it would be powerful on cross-examination; if it didn't, it would be dynamite.

"Prior false rape complaints may be admissible when they suggest a pattern casting substantial doubt on the validity of the charges made by the victim or indicate a significant probative relation to such charges." People v. Blackman, 935 N.Y.S.2d 181, 188 (3d Dep't 2011) (quotation marks and citation omitted). Obviously, if the complainant's allegation of rape against her father were false or delusory, the defense would have had no trouble connecting the episode to her encounter with McCray. But defense counsel, having never (even now) seen the documents, had no opportunity to make an offer of proof. In any event, as the Court recognized, even "[i]nadmissible evidence can be material under Brady if it will be useful to the defense, perhaps as a lead to admissible evidence or a 'tool in disciplining witnesses during cross-examination.'" Ct.

[3] Some mentions of the allegation, and the mother's denial, are either highlighted or crossed out.

App. Op., 23 N.Y.3d at 199-200 (quoting United States v. Gil, 297 F.3d 93, 104 (2d Cir. 2002)).

The allegation against the complainant's father, whether it was true or not, would have been critical to the defense because it would have explained how the complainant might *truthfully* testify to a rape that *did not happen*—as she would if she had a flashback to her father's sexual abuse during a consensual encounter with McCray, just as (according to another withheld document) flashbacks were triggered by consensual sex with her boyfriend. Moreover, given her documented history of confabulation and significant memory distortion, defense counsel would have been able to explain that her memory gaps from the night in question were filled by details from her father's sexual abuse; or, alternatively, that she compensated for short-term memory distortion by confabulating details quite apart from her history with her father.

The prosecutor told the jury that the complainant's testimony could not possibly have been "fantasy." Prosecutor's Summation at 778:1. The Court adopted this false assumption, reasoning that the complainant "certainly did not fantasize or misremember that she and defendant had a violent encounter: they both had the wounds to prove it. And their descriptions of that encounter are so

starkly different that if one version is not a lie, the other must be." Ct. App. Op. at 199. But McCray testified to a violent tussle over money; so wounds do not discredit his account. Much more important: the Court failed to recognize—and the jury never learned—that the complainant's version of events may have resulted from a pathological misperception of the truth, rather than a lie.

At the risk of being obvious, the withheld documents would have corroborated the weaker specifics of McCray's testimony: the complainant's sudden turning on a person with whom she was in a sexual encounter, her perception of consensual sex as rape, her impulsive grab to get the cash from his pants. The withheld documents would have allowed jurors to reconcile the conflicting accounts, treating his as true and hers as sincerely held delusion.

III

"The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434 (1995). Taken together, the

withheld documents subvert the reliability of the complainant's testimony and would have turbocharged her cross-examination. As Judge Lynch has explained:

> It is the role of the jury, fairly appraised of the facts then known, to weigh the strengths and weaknesses of the evidence before them, bearing in mind the inherent limitations on the victim's ability to observe, remember, and report what he saw. . . . The justice of relying on the jury's conclusion, however, depends critically on the assumption that the jury knew all of the relevant facts . . . .

Poventud v. City of New York, 750 F.3d 121, 140 (2d Cir. 2014) (in banc) (Lynch, J., concurring).

IV

One apparent cause of the Court's error was a failure to consider the withheld documents in the way practicing lawyers would: as springboards for investigation, as a mine for cross-examination, and as tools for shaping trial strategy. In short, the Court failed to recognize the dynamic force of disclosure in the hands of a lawyer.

Defense counsel armed with the withheld documents would not have been limited to waving the pieces of paper in front of the jury. The power of such documents is multiplied by their potential to corroborate, to direct investigation, and to develop the defense theory of the case. It is not for the State (whether

prosecutor or judge) to pick which of these documents that bear on the sole issue at trial would enable defense counsel to defend the client. If three documents out of 5000 contain similar information, defense counsel might seek to admit all three, or select the most salient one—or present none of them to the jury and instead mine them for investigative leads. Brady material thus includes evidence that supports a viable defense strategy. "The records that indicate an inability to remember and potential history of fabrication would have been critical to the defendant's preparation and cross-examination of the complainant." Ct. App. Op., 23 N.Y.3d at 209 (Rivera, J., dissenting).

Accordingly, in Fuentes v. Griffin, 829 F.3d 233 (2d Cir. 2016)—another word-against-word rape case—we granted the writ, ruling that the New York Court of Appeals' application of Brady "was objectively unreasonable" because it failed "to make a reasonable assessment of the benefits to the defense of exploring [the complainant's] mental state as revealed in the [withheld psychiatric document]." Id. at 250. In that case, the complainant alleged that Fuentes raped her on the roof of her apartment building. Id. at 237. It was undisputed that some sexual encounter occurred on the roof; so, as here, "the issue for trial was whether the sex was consensual." Id. Thus, as here, the

complainant's (credible) testimony was essential to the prosecution's case. Id. at 250–51.

The (single) suppressed document in Fuentes revealed that the complainant had been depressed and suicidal for two years before the alleged rape; and that she had a disorder that causes "feelings of inadequacy," "excessive anger," and "chronic mood symptoms [that] may contribute to interpersonal problems or be associated with distorted self-perception." Id. at 249 (quotations omitted). Because the trial testimony "presented two diametrically opposing versions of what happened," the key issue was the complainant's "motivation for accusing Fuentes of engaging in conduct to which she had not consented; and the [withheld document] was pertinent to the issue of her motivation because it identified a relevant mood disorder." Id. at 252. The Court's decision was objectively unreasonable both because "the jury could well have given greater credence to Fuentes's version of the events" if it had known the complainant's psychiatric history, and because disclosure would have enabled defense counsel "to develop this line of defense further." Id.

Similarly, the non-disclosure here prevented counsel from developing an effective line of defense. The central issue with the complainant's credibility was

her delusion and distorted perception. But the majority opinion conflates impairment of memory with delusion: the difference is between forgetting something and remembering something that did not happen.

The withheld documents would fuel a powerful defense theory of the case, as well as an impeachment strategy, neither of which could be viable based on the disclosed documents alone. When the State "has a witness's psychiatric records that are favorable to the accused because they provide material for impeachment, those records fall within Brady principles, and that the Supreme Court has so recognized." Id. at 247. The majority opinion considers arguments made in this dissent, and engages with them, but that exercise underscores that McCray's own lawyers cannot advance arguments based on the undisclosed documents because they still have not seem them.

The district court observed that the approximately 5000 pages of records contain just a single mention of confabulation. The district court considered that that was not much; but it is a great gift in a case that is all about credibility; and a competent lawyer would conclude from the single notation that investigation would be promising. Armed with the knowledge that the complainant had previously confabulated stories, defense counsel could have sought elaboration

from the note's author and others who treated her or knew her. Without timely pre-trial access to the withheld documents, McCray's counsel was prevented from doing the job. Judge Rivera amplified this point in a compelling passage:

> [I]n response to the prosecution's strategy of characterizing the defendant as a manipulative, older man seeking to take advantage of a younger woman who acted in a sexually provocative manner, and who he could see suffered from some type of mental impairment, the defendant had to persuade the jury that the complainant's mental health conditions would have led her to fabricate a story of a rape, or to cause her to believe and recount for the jury an incorrect version of the sexual encounter with the defendant. In that sense, the more the defendant sought to establish the general severity of the complainant's mental health conditions, the more the jury could find persuasive the People's version. Thus, in order for the defendant to present the complainant's mental health condition objectively from the defense point of view—that she is too mentally ill to recall that she consented, or that she made up the whole story because of her illness—disclosure of records about her ability to recall events accurately and her capacity to fabricate events was crucial.

Ct. App. Op., 23 N.Y.3d at 211 (Rivera, J., dissenting).

V

It was the trial court that reviewed the complainant's medical file and made the initial error of nondisclosure. The Court of Appeals unreasonably reviewed the trial court's violation as a matter of discretion. See Ct. App. Op., 12 N.E.3d at 1081 ("In sum, the issue here is whether the trial court abused its

discretion in finding defendant's interest in obtaining the records to be outweighed by the complainant's interest in confidentiality . . . ."). Federal law affords no "discretion" to withhold evidence that is constitutionally required to be produced. The question is one of due process. See Brady, 373 U.S. at 87. And there is no allowable discretion to deprive a criminal defendant of his right to due process.

VI

The State now doggedly defends a conviction that it obtained thanks to a violation of due process. True, the initial mistake here was made by the trial judge. With 5000 pages of a medical file, the process of review somehow broke down. The critical documents were withheld from the prosecution as well as the defense. But after the trial, the successive state courts and the district court—and now my chambers—found documents that "put the whole case in . . . a different light" and "undermine confidence in the verdict." Banks v. Dretke, 540 U.S. 668, 698 (2004) (quoting Kyles, 514 U.S. at 435). A prosecutor who knowingly did what the trial judge did would be a menace. But good faith is irrelevant under Brady, 373 U.S. at 87, and functionally, there is no difference between an error by

the trial judge and a dirty deed by a prosecutor: the State has deprived the defendant of a fair trial. To McCray, in jail for 22 years, it is all one.

It is emphatically the role of the prosecutor to correct a radical deficiency in a prosecution even after the exhaustion of appeals. The prosecution's interest "is not that it shall win a case, but that justice shall be done." Turner v. United States, 137 S. Ct. 1885, 1893 (2017) (quoting Kyles, 514 U.S. at 439).

In Warney v. Monroe County, 587 F.3d 113 (2d Cir. 2009), an assistant district attorney ("ADA") took the initiative post-trial to obtain DNA results that cleared the defendant, and later was sued by the defendant for failing to disclose the results to defendant's counsel for three months, id. at 118–20. We held that the ADA was immune from suit because correcting a bad conviction is integral to a prosecutor's role as an advocate. Id. at 122–24. We reasoned: "[t]he DNA testing obviously would have bearing on the advocacy work of deciding whether to oppose Warney's [post-trial] initiatives" because "[a] prosecutor has an affirmative obligation, before filing an opposition, to ensure that the petition should in fact be opposed." Id. at 124.

On this present appeal, the majority has rigorously applied principles of finality and deference. But those principles and constraints in no way bind a

prosecutor. A prosecutor who continues to enjoy a misbegotten victory is as much a menace as one who contrives it. Here, the Attorney General knows from successive appellate opinions that McCray, who is still in prison, was wholly denied the right to defend himself. Yet the Attorney General labors hard to maintain the advantage. The result here is that a person is more than halfway through a 22-year prison sentence, without a trial that anyone can now deem fair, and he is still without the opportunity to see the documents that could have acquitted him. I don't know what happened in that abandoned house; but it is clear what is happening here. This is a sinister abuse. The last-ditch defense of such a conviction by the Attorney General is disreputable. Were I a lawyer for the State, I would not have been able to sign the brief it filed on this appeal.

App. 48

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 17, 2013 103682

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
v MEMORANDUM AND ORDER
TERENCE McCRAY,
Appellant.

Calendar Date: October 18, 2012

Before: Mercure, J.P., Spain, Stein, McCarthy and Garry, JJ.

Paul J. Connolly, Delmar, for appellant, and appellant pro se.

P. David Soares, District Attorney, Albany (Steven M. Sharp of counsel), for respondent.

Spain, J.

Appeal from a judgment of the County Court of Albany County (Breslin, J.), rendered September 1, 2010, upon a verdict convicting defendant of the crime of rape in the first degree.

This case, which began with a consensual relationship and ended in defendant's indictment on a single count of rape in the first degree (see Penal Law § 130.35 [1]), presents a classic he-said she-said credibility determination. After a jury trial, defendant was convicted and sentenced as a second felony offender to a prison term of 22 years and five years of postrelease supervision. Defendant appeals and we now affirm.

We turn first to defendant's argument that the verdict was

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against the weight of the credible evidence, necessitating a full review of the testimony adduced at trial. Many details are undisputed. Defendant, then 40 years old, first met the victim – an 18-year-old woman with an extensive history of psychiatric problems – at a bus stop in the City of Albany in April 2009. They talked extensively about various topics, including sex, while walking together until they eventually visited a recreational vehicle that belonged to a friend of defendant. The victim testified that, while inside the vehicle, defendant gave the victim a back massage, but nothing else happened of an intimate nature. Defendant's version of these events differed only in that he testified that, following the massage, the victim engaged in oral sex with him. Upon parting that night, the victim gave defendant her telephone number and they spoke on the telephone a few times in the weeks ahead. On May 26, 2009, defendant called the victim and invited her out for the evening. The victim's mother drove her to defendant's residence, where the victim met members of defendant's family, and she then dropped the pair off on Lark Street. They walked around for a while and stopped at the home of defendant's friend, Marvin Calhoun, where they visited with Calhoun and his family. The victim admits that she exchanged sexual innuendos with defendant during this visit. After a few hours, the couple left, ending up at the apartment of another one of defendant's friends, Kevin Johnson, where they engaged in consensual kissing and fondling.

It is at this point that the testimony of defendant and the victim sharply diverges. The victim testified that after about 15 minutes, defendant wanted to have intercourse but she refused, telling him it was too soon in their relationship. When defendant continued to insist, she became angry with him and left the apartment. Defendant caught up with her on a street outside the apartment and apologized to her. She stated that they continued to argue while they walked, but that she tired of walking so they sat down. The victim stated that, while seated, they witnessed police officers draw their weapons on a young female with a baseball bat. She explained that this incident made both her and defendant laugh, and she no longer felt angry with him.

Defendant testified that the victim had unsuccessfully asked Calhoun if they could use a bedroom to have sex while visiting Calhoun's family and, once at Johnson's apartment, she initiated sex and it was he who refused to have intercourse there because he thought it was not appropriate to have sex on the couch with his friend in the next room. He testified that they left the apartment together in search of another place to have sex, and that the victim was willing even to have sex outside in the bushes. Defendant further stated that the victim was not angry with him when they left Johnson's apartment and that they never witnessed the police encounter with the female with the baseball bat.

By both accounts, the couple eventually ended up at an abandoned house located at 595 Clinton Avenue in Albany, where the victim followed defendant through the backyard into the house. At this point, the accounts of the victim and defendant again diverge. The victim testified that defendant backed her up against a wall and started to forcibly kiss and grind against her. She testified that she pushed him away and told him to stop, but that he continued, telling her, "You are going to give it to me or I'm going to take it." The victim stated that they struggled; she punched defendant in the face, near his jaw or chin, and defendant hit her in the face several times and choked her. While he was choking her from behind, the victim testified, she was able to bite his forearm. After an extended struggle, during which the victim tried to make noise to draw attention and begged for her life, she gave up and submitted to sexual intercourse with defendant. The victim stated that, when it was over, defendant did not prevent her from leaving, but told her, "Don't go out there looking like that." The victim stated that she wiped the tears and blood off of her face onto her shirt, then went out the same way they had entered. She further testified that she got caught on a fence while trying to leave, and ripped her shirt. She came upon a pay telephone and called 911. Police officers arrived and she was brought to the hospital for examination. The victim's torn shirt and photographs of her bruised face were admitted in evidence at trial.

By contrast, defendant testified that the couple had consensual intercourse once inside the abandoned building. He

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explained that after they were through and he asked the victim if she wanted to go home, she suddenly demanded money from him and, when he refused, grabbed his pants and began to leave. Defendant stated that he then tackled the victim to prevent her from leaving and her face struck the floor as they fell. They then struggled as he attempted to pry his money – which the victim had by then extracted from the pocket of his pants – from her hand and, during the struggle, she bit his arm. According to defendant, he eventually managed to squeeze the victim's hand open and retrieve his cash, at which point the victim got up and left the building.

Defendant then went to the home of his friend, James Close, where, according to Close, he pounded on the door, yelling for admittance. Close testified that defendant looked like he was being chased by someone and implied that he wanted to come inside because there was a female outside who was exposing herself to defendant. Defendant testified that he went to Close's house because he wanted to tell him about his encounter with the victim but, suddenly realizing that the abandoned house he had been trespassing in might belong to Close, changed his mind and left. He explained that he might have referred to the victim as "the girl [who] lifted her shirt up on Central Avenue that time" because he had told Close about his first meeting with the victim and that she had exposed herself on the street that night to some passers-by.

Based on this evidence, it would not have been unreasonable for the jury to believe defendant's testimony that the sexual encounter was consensual.[1] Thus, to determine if the verdict was

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[1] A defendant is guilty of the crime of rape in the first degree "when he or she engages in sexual intercourse with another person: [b]y forcible compulsion" (Penal Law § 130.35 [1]). As no dispute exists that defendant and the victim engaged in sexual intercourse, the issue here devolves to whether such intercourse was consensual or by forcible compulsion, which may be by "use of physical force" or "a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person" (Penal Law § 130.00 [8]).

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against the weight of the evidence, we "'must, like the trier of fact below, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony'" (People v Terry, 85 AD3d 1485, 1486 [2011], lv denied 17 NY3d 862 [2011], quoting People v Romero, 7 NY3d 633, 643 [2006]), while giving due deference to the credibility determinations of the jury (see People v Wright, 81 AD3d 1161, 1163 [2011], lv denied 17 NY3d 803 [2011]). Defendant, both in counsel's brief and in his pro se submission, relies on inconsistencies in the victim's testimony, her mental health history and his interpretation of the physical evidence and testimony adduced at trial to argue that the verdict is against the weight of the credible evidence. Examining all his arguments and the proof adduced at trial, we find no legal basis for substituting a different conclusion from that reached by the jury.

Defendant focuses on the fact that a hospital record states that the victim reported to medical personnel that the attack lasted three minutes, while she testified that they struggled for 30 to 45 minutes. A review of that record, however, suggests that the time reported may refer to the duration of the rape, as opposed to the entire struggle. Further, defendant emphasizes the fact that, according to a hospital record, the victim first reported that there was some consensual kissing at the abandoned house, but thereafter testified that the kissing was also against her will. We do not find this inconsistency to be evidence that the victim's testimony is fundamentally unreliable; she was cross-examined on this at trial, thus putting the credibility determination squarely in front of the jury. Faced with inconsistencies, "the jury 'was entitled to credit some of her testimony while discounting other aspects'" (People v Hoppe, 96 AD3d 1157, 1159 [2012], lv denied 19 NY3d 1026 [2012], quoting People v Kuykendall, 43 AD3d 493, 495 [2007], lv denied 9 NY3d 1007 [2007]; see People v Alteri, 49 AD3d 918, 920 [2008]). Likewise, defendant's assertion on appeal – that the victim's testimony that they witnessed police officers draw their weapons on a female carrying a baseball bat was incredible – is a decision appropriately left to the trier of fact.

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Defendant also argues that the victim's credibility is undermined by her mental illnesses. Evidence was presented at trial that established that the victim had a long history of mental illness; she had been diagnosed with epilepsy, posttraumatic stress disorder, Tourette's disorder and bipolar disorder and, as a result of these conditions, she had been hospitalized more than 10 times in her 18 years. It is well settled that an individual suffering from mental illness may be competent to provide evidentiary testimony at trial (see People v Gelikkaya, 84 NY2d 456, 460 [1994]; People v Rensing, 14 NY2d 210, 213-214 [1964]). No proof was presented that the victim was unable to appreciate the nature of her oath (see People v Gelikkaya, 84 NY2d at 460), and the jury was aware of the victim's diagnoses and was free to determine that she was, nevertheless, more credible than defendant (see People v Plaisted, 2 AD3d 906, 909 [2003], lv denied 2 NY3d 744 [2004]).

Nor do we find that the victim's testimony was necessarily contradicted by the physical evidence. The victim's injuries, which consisted of a bruise on her face, a cut inside her cheek and a scratch near her lip, coupled with the teeth marks on defendant's forearm, were not so insubstantial as to render the victim's description of the struggle implausible. The victim's testimony was not incredible as a matter of law; rather, the conflicting testimony "presented 'a classic credibility issue' for the jury to resolve" (People v Mitchell, 57 AD3d 1308, 1309 [2008], quoting People v Allen, 13 AD3d 892, 894 [2004], lv denied 4 NY3d 883 [2005]; see People v Blackman, 90 AD3d 1304, 1308 [2011], lv denied 19 NY3d 971 [2012]).[2]

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[2] In his pro se brief, defendant also challenges the legal sufficiency of the evidence. Although this argument was not preserved by his general motions to dismiss for failure to present a prima facie case (see People v Terry, 85 AD3d at 1486), we "'necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' for which there is no preservation requirement" (People v Newkirk, 75 AD3d 853, 855 [2010], lv denied 16 NY3d 834 [2011], quoting People v Caston, 60 AD3d 1147, 1148-1149 [2009]).

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We turn next to defendant's contention that County Court erred in refusing to turn over all of the victim's mental health records. In general, mental health records are confidential and will not be discoverable where sought as "a fishing expedition searching for some means of attacking the victim's credibility" (People v Brown, 24 AD3d 884, 887 [2005], lv denied 6 NY3d 832 [2006]; see People v Gissendanner, 48 NY2d 543, 550 [1979]; People v Bush, 14 AD3d 804, 805 [2005], lv denied 4 NY3d 852 [2005]). Access will be provided, however, where a defendant can demonstrate a good faith basis for believing that the records contain "data relevant and material to the determination of guilt or innocence[,]" a decision which will rest "largely on the exercise of a sound discretion by the trial court" (People v Gissendanner, 48 NY2d at 548; see People v Plaza, 60 AD3d 1153, 1154-1155 [2009], lv denied 12 NY3d 919 [2009]). Here, defendant requested all of the victim's mental health records, based on the disclosure by the People that the victim has a history of mental illness, had been the victim of sexual abuse on at least three prior occasions and had attempted suicide in the months leading up to the trial.

Under these circumstances, County Court appropriately conducted an in camera review of the victim's records and partially granted defendant's request by turning over those records that the court found were pertinent to the case. In this manner, the court properly balanced defendant's 6th Amendment right to cross-examine an adverse witness and his right to any exculpatory evidence against the countervailing public interest in keeping certain matters confidential (see People v Gissendanner, 48 NY2d at 549-551; People v Boyea, 222 AD2d 937, 938-939 [1995], lv denied 88 NY2d 934 [1996]; see also People v Fuentes, 12 NY3d 259, 263-265 [2009]). We have reviewed the victim's voluminous mental health records and conclude that the court provided an appropriate sample of documents that covers all of the victim's relevant and material mental health issues.

The dissent, in performing its review of the victim's mental health records, has unearthed some documents that were not disclosed to defendant and are relevant to the victim's competence to testify, in particular, references to short-term memory loss, such as her inability to recall events after she has

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had a temper tantrum, and a suggestion that she forgets good experiences with a person if they are succeeded by a negative experience. We find, however, that it was not an abuse of discretion for County Court to fail to disclose these documents. Indeed, given the limited impact these additional relevant records have when compared to the amount of material that was disclosed to the defense regarding the victim's hallucinations, various diagnosed conditions, medications, preoccupation with sex, poor judgment, dangerous behaviors, self-abuse, violent outbursts, etc., we cannot find that County Court so failed in its diligent efforts to cull through thousands of pages of mental health records to balance the victim's rights against defendant's rights such as would constitute an abuse of discretion.[3]

Other documents that the dissent asserts should have been disclosed were redundant in light of those records that were disclosed. For example, additional documents relating to the victim's poor perception and insight were properly withheld because the sample documents disclosed contain multiple references to her poor impulse control and lack of judgment, especially in sexual interactions and Internet exchanges. Likewise, the victim's experiences with seizures and flashbacks were disclosed in documents turned over to the defense. An incident where the victim was found wandering on a highway and not able to remember how she got there was also noted in one of the documents that was disclosed.

Additionally, it was not necessary for County Court to disclose those few references in the victim's mental health records that suggest that she may have falsely accused her father of sexually abusing her when she was 13. Assuming that the records contain enough information to suggest a false

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[3] The vast majority of the documents disclosed were dated, revealing a picture of the victim's mental health between the ages of 13 and 18. One of the documents disclosed contains an assessment of the victim taken on the day of the rape.

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allegation,[4] this evidence would not be admissible under New York's Rape Shield Law because it is far too different and attenuated from the circumstances of the present allegation of rape to "'suggest a pattern casting substantial doubt on the validity of the charges made by the victim' or 'indicate a significant probative relation to such charges'" (People v Blackman, 90 AD3d at 1310 [citations omitted]; see People v Mann, 41 AD3d 977, 978-979 n [2007], lv denied 9 NY3d 924 [2007]). We detect no pattern of behavior by comparing this remote, alleged false claim of sexual abuse by the victim against her alcoholic, physically abusive father, with her assertion that she was date-raped by defendant (see People v Mandel, 48 NY2d 952, 953 [1979] [prior false allegations of rape inadmissible where "no showing was made that the particulars of the complaints, the circumstances or manner of the alleged assaults or the currency of the complaints were such as to suggest a pattern casting substantial doubt on the validity of the charges made by the victim in this instance"], appeal dismissed and cert denied 446 US 949 [1980]; People v McKnight, 55 AD3d 1315, 1316 [2008] [insufficient proof that alleged prior false accusations of sexual abuse were "suggestive of a pattern that casts doubt on the validity of, or bore a significant probative relation to, the instant charges" (internal quotation marks and citations omitted)], lv denied 11 NY3d 927 [2009]; compare People v Hunter,

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[4] The victim's mental health records reveal a very troubled relationship with her father, who physically abused her during a limited amount of time during the victim's lifetime – approximately six months when the victim was 13 – when he resided with the family. The full extent of details of the abuse alleged by the victim are that he "tried to rape her," describing that he "pinned her up against the wall in a sexual position and she can not recall how she got away." Her mental health records do not contain any other details from the victim pertaining to sexual abuse or that she ever recanted her statements. The only suggestions that the allegation was false come from a mental health worker at a local childcare institution that was treating the victim when she was 13 who noted, without elaboration, that the allegation was "unfounded" and the mother's reported opinion that the father never sexually abused the victim.

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11 NY3d 1, 6 [2008] [noting the similarities between recent, allegedly false accusations and those alleged against the defendant]). When determining whether a trial court abused its discretion, we must necessarily consider whether or not the document, if turned over, could have had any impact on the trial. Here, there can be no abuse of discretion as the information contained in the documents would not have been admissible, and we cannot envision how such information might have led to other material and admissible evidence.

Defendant also argues that County Court committed reversible error by precluding him from examining the victim about her hypersexuality. When defense counsel asked the victim on cross-examination if, at some point in time, she had been diagnosed as hypersexual, the court sustained the People's objection as to form and directed counsel to rephrase the question. Counsel was unable to do so in a way to avoid objection and moved on. "Evidence of a victim's sexual conduct shall not be admissible in a prosecution for [a sex] offense" unless it meets one of the enumerated statutory exceptions (CPL 60.42). Here, the victim's mental health records indicate that she exhibits hypersexual behavior in that she is inappropriately focused on sex in conversation with others, and that such behavior is a symptom of her bipolar disorder. Defendant did not introduce medical evidence or expert testimony to establish that hypersexuality is a mental illness that would impact the victim's credibility or control her behavior; indeed, all references to the victim's "hypersexuality" in her medical history are to her wholly voluntary inappropriate, promiscuous behavior – conduct intentionally designed to shock and draw attention – which is precisely the kind of evidence the Rape Shield Law prohibits (see CPL 60.42; People v Simonetta, 94 AD3d 1242, 1246 [2012], lv denied 19 NY3d 1029 [2012]). Under these circumstances, we discern no abuse of discretion in the court's limitation on the scope of cross-examination of the victim (see People v Halter, 19 NY3d 1046, 1049 [2012]; People v Simonetta, 94 AD3d at 1246; People v Scott, 67 AD3d 1052, 1054 [2009], affd 16 NY3d 589 [2011]; People v Passenger, 175 AD2d 944, 946 [1991]).

In any event, defendant was permitted to introduce evidence of the victim's hypersexuality on the record through the

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testimony of the victim's mother, defendant and Calhoun.[5] Accordingly, the jury had this information when assessing the evidence against defendant. We also hold that County Court's refusal to permit defendant to cross-examine the victim's mother regarding various events at which the victim exhibited undisciplined behavior, while permitting questions regarding the victim hearing voices, wandering around outside in her pajamas, sensing dead people and visualizing her deceased grandfather, demonstrated a sound exercise of discretion in controlling the scope of cross-examination (see People v Carter, 50 AD3d 1318, 1321 [2008], lv denied 10 NY3d 957 [2008]).

We turn next to defendant's claim that he was deprived of the effective assistance of counsel and, in doing so, address several substantive arguments that defendant asserts on appeal that were not preserved by an appropriate objection at trial. To establish this claim, defendant must show that counsel failed to provide meaningful representation and that there is an "'absence of strategic or other legitimate explanations' for counsel's allegedly deficient conduct" (People v Caban, 5 NY3d 143, 152 [2005], quoting People v Rivera, 71 NY2d 705, 709 [1988]).

Defendant asserts that counsel should have objected to the introduction of testimony from police officers that the victim reported being sexually assaulted on the basis that these hearsay statements improperly bolstered the victim's testimony (see People v Buie, 86 NY2d 501, 510-511 [1995]; People v Caba, 66 AD3d 1121, 1123 [2009]). Significantly, defendant does not directly dispute that the admitted statements fall within the prompt outcry exception to the hearsay rule (see People v Rosario, 17 NY3d 501, 511 [2011]; People v Perkins, 27 AD3d 890, 892-893 [2006], lvs denied 6 NY3d 897, 7 NY3d 761 [2006]) but, instead, argues the prejudicial impact of this evidence in light of the number of prompt outcry statements admitted and County Court's failure to provide a limiting instruction as to its

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[5] Calhoun was even permitted to provide a layperson's definition, explaining that hypersexual means "she[is] very hot in the pants."

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relevance. Inasmuch as the outcry testimony was accurately limited to the fact that a complaint was made and the court gave an appropriate prompt outcry instruction in its charge to the jury (see CJI2d[NY] Prompt Outcry; People v Bernardez, 85 AD3d 936, 938 [2011], lv denied 17 NY3d 857 [2011]), we discern no significant error in counsel's decision not to object to this testimony or ask for a limiting instruction.

Likewise, defense counsel did not err in failing to object to the introduction of evidence of the victim's statements to medical personnel. These statements squarely fall within the medical records exception to the hearsay rule because they were germane to diagnosis and treatment (see People v Wright, 81 AD3d 1161, 1164 [2011], lv denied 17 NY3d 803 [2011]; People v Thomas, 282 AD2d 827, 828 [2001], lv denied 96 NY2d 925 [2001]; see also CPLR 4518; CPL 60.10). Accordingly, the testimony and records pertaining to the victim's emergency room visit on the night of the rape were properly admitted (see People v Ortega, 15 NY3d 610, 617 [2010]; People v Wright, 81 AD3d at 1164).

We also discern no error in defense counsel's failure to object to the introduction of evidence of defendant's criminal history inasmuch as a Sandoval hearing was held prior to trial where County Court precluded inquiry into 22 of the 27 prior offenses proffered by the People. Additionally, the People did not exceed the scope of the court's limited Sandoval ruling during defendant's cross-examination, and the court informed the jury that it could only consider the crimes with regard to his credibility (see People v Nash, 87 AD3d 757, 759 [2011], lv denied 17 NY3d 954 [2011]). Likewise, although defense counsel did not object to the People's use of defendant's statement for the first time during his cross-examination, such objection would have been fruitless as the statement was admissible to impeach him (see People v Martin, 8 AD3d 883, 886 [2004], lv denied 3 NY3d 677 [2004]).

Defendant makes numerous other, specific objections to defense counsel's choices in representing him. We have considered them carefully and find each to be the product of a legitimate trial strategy, or to concern matters outside the record, and, therefore, are more properly reviewed on a motion

pursuant to CPL article 440 (see People v McCray, 96 AD3d 1160, 1161 [2012], lv denied 19 NY3d 1104 [2012]). Counsel zealously advocated for defendant, made appropriate pretrial motions, pursued a reasonable defense theory, thoroughly cross-examined witnesses and made appropriate evidentiary objections; thus, viewing the record as a whole, defendant received meaningful representation (see People v Benevento, 91 NY2d 708, 712 [1998]; People v Evans, 81 AD3d 1040, 1041 [2011], lv denied 16 NY3d 894 [2011]).

Many of defendant's remaining contentions on appeal do not warrant extended discussion. His claim that bail was improperly denied is moot in light of his conviction and subsequent incarceration (see Matter of Varela v Stein, 37 AD3d 1001, 1001 [2007]). His contentions that County Court improperly denied his second request for new counsel, and that deficiencies existed in the grand jury proceedings, the felony complaint, the indictment and the presentence report lack a factual basis in the record. Defendant's allegations of prosecutorial misconduct do not demonstrate a "'flagrant and pervasive pattern' of misconduct" warranting reversal (People v Hunt, 39 AD3d 961, 964 [2007], lv denied 9 NY3d 845 [2007], quoting People v McCombs, 18 AD3d 888, 890 [2005]).

Finally, we turn to defendant's request that we modify his sentence on the basis that it is unduly harsh and excessive. Given the violent nature of this crime against a particularly vulnerable victim, defendant's extensive criminal history – including three prior felonies and a prior sexual offense – and the fact that defendant's own conduct prevented any argument for leniency to be made as he refused to permit counsel to speak on his behalf at sentencing or to address County Court himself, we cannot find "an abuse of discretion or extraordinary circumstances warranting reduction" (People v Walker, 266 AD2d 727, 728 [1999], lv denied 96 NY2d 909 [2001]; see People v Jones, 39 NY2d 694, 697 [1976]). Nor are we persuaded that the disparity between the ultimate sentence imposed and a very favorable plea offered prior to trial necessitates the conclusion that defendant was penalized for exercising his right to a trial where, as here, the attractive plea offer is easily justified by the fact that the People's proof largely rested on the

credibility of the victim, who was a troubled, emotional young woman (see People v Blond, 96 AD3d 1149, 1153-1154 [2012], lv denied 19 NY3d 1101 [2012]; People v Maldonado, 205 AD2d 933, 933 [2011], lvs denied 84 NY2d 906, 908 [1994]; compare People v Williams, 40 AD3d 1364, 1367 [2007], lv denied 9 NY3d 927 [2007]).

We have considered defendant's remaining contentions and find them to be without merit.

Stein and Garry, JJ., concur.

McCarthy, J. (dissenting).

Defendant is entitled to a reversal of his judgment of conviction because his 6th Amendment rights to confront and cross-examine adverse witnesses were violated by County Court's failure to turn over to defendant certain critical mental health records pertaining to the victim. Defendant was entitled to the undisclosed records pursuant to controlling Court of Appeals precedent. The undisclosed records all raise issues that would affect the victim's credibility or her ability to recall events, and some of the undisclosed records would be extremely damaging to the People's case. We, therefore, respectfully dissent.

County Court followed the proper procedure by conducting an in camera review of the victim's mental health records to balance defendant's 6th Amendment rights to confront and cross-examine adverse witnesses with the public interest in keeping certain matters confidential (see People v Gissendanner, 48 NY2d 543, 549-551 [1979]; People v Boyea, 222 AD2d 937, 938-939 [1995], lv denied 88 NY2d 934 [1996]). Confidential records should only be turned over to the defense if they contain information that is "relevant and material to the determination of guilt or innocence" (People v Gissendanner, 48 NY2d at 548), such as "evidence that the victim has a history of hallucinations, sexual fantasies or false reports of sexual attacks" (People v Fish, 235 AD2d 578, 580 [1997], lv denied 89 NY2d 1092 [1997]; see People v Brown, 24 AD3d 884, 887 [2005], lv denied 6 NY3d 832 [2006]).

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As the majority notes, the 28 pages of mental health records provided to the defense by County Court – out of the thousands of pages reviewed in camera – contain statements about the victim's history of psychiatric hospitalizations, hallucinations and preoccupation with talking about sex. Contrary to the majority's conclusion, however, these 28 pages do not "cover all of the victim's relevant and material mental health issues." We acknowledge that some of the undisclosed records would have been, in some respects, redundant, as they include, among other things, some of the same material as the records that were provided.[1] But, contrary to the majority's assertion, criminal defendants are entitled to more than just a "sample" of documents addressing a key witness's mental health problems that could affect his or her testimony. In a case such as this, which the majority correctly characterizes as presenting "a classic he-said she-said credibility determination," defendant must be allowed to consider and explore all legitimate avenues of information relevant to his defense and to the victim's testimony and potential cross-examination. The question here is not whether County Court should have permitted the defense to enter certain documents into evidence or ask the victim about certain topics at trial (compare People v Mandel, 48 NY2d 952, 953-954 [1979], appeal dismissed and cert denied 446 US 949 [1980]), but whether the court should have provided defendant certain records that would have allowed the defense to investigate information contained therein to determine if admissible evidence could be gathered or proper questions could be formulated. More records should have been provided to defendant, addressing all of the

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[1] County Court provided records noting that the victim experienced visual and auditory hallucinations at different times between 2003 and 2007. Other records indicated earlier hallucinations, gave more details on some of the more recent ones and noted that the victim denied that what she sensed was a hallucination. Although those records probably should have been turned over as well, we will not go so far as to say that it was an abuse of discretion for the court to have limited the number of documents it provided that contain similar information. On remittal, however, we would provide those documents to defendant as well.

victim's relevant mental health issues, so that defense counsel could fully investigate, prepare and advocate for defendant.[2]

Certain records that were not provided to defendant relate to the victim's ability to recall events. "Where a primary prosecution witness is shown to suffer from a psychiatric condition, the defense is entitled to show that the witness's capacity to perceive and recall events was impaired by that condition" (People v Baranek, 287 AD2d 74, 78 [2001] [citations omitted]; see People v Rensing, 14 NY2d 210, 213-214 [1964]). While some disclosed records mentioned that the victim suffered from epilepsy or grand mal seizures in the past, those records did not associate her seizure activity with possible memory loss as the undisclosed records did. A July 2006 record[3] discussed her history of seizures, which condition was treated successfully with medication, but raised a question of possible seizure activity due to episodes where she ended up in places and could not remember going there, such as walking along a busy highway. An August 2006 record also referred to times when the victim wound up on a highway and spent the night in a shelter but could not remember how she got there. Similarly, a June 2006 record noted "recent dissociative[4] episodes [without] visible seizure activity" for which the author sought a neurological consultation. An October 2006 record noted "significant short

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[2] Some of the records that were disclosed did not contain the name of the author, the source of information, the date they were created or where the original record was located. Such information should have been provided, if available (and it generally was), so that defense counsel could place the information in context. For example, hallucinations in 2003 may not be as relevant or important as hallucinations that occurred closer in time to the incident.

[3] None of the records referred to in this dissent by a specific month and year were disclosed to defendant; all of them should have been.

[4] This term refers to a detachment from one's surroundings, consciousness, memory or identity.

term memory loss." According to a May 2007 record, the victim talked about times when she was out of control and related how it was sometimes scary to learn afterward what she had done or said because, at times, she has had no recollection of the events. A progress note from June 2008 includes information given by the victim's mother that the victim acted strangely, related a feeling of bugs crawling on her face and said that she had taken morphine. An August 2008 psychiatric assessment found that the victim's memory is selective, namely that she admits not being able to remember good experiences with a person if she had bad experiences with that person. This last record could be especially important, considering defendant's testimony that they had consensual sex and struggled afterward when the victim attempted to take his money. Defense counsel could have explored whether the victim was unable to remember any good experiences with defendant due to this subsequent bad experience of the struggle over money, making defendant's testimony more plausible (see People v Hunter, 11 NY3d 1, 6-7 [2008]). All of these records raise questions as to the victim's ability to accurately recall the details of the alleged rape, making the records relevant and material to the determination of defendant's guilt or innocence (see People v Baranek, 287 AD2d at 79). These records were not merely redundant, because the records provided by County Court did not address these topics. Thus, defendant was entitled to all of these undisclosed records.

Records also mention that the victim has suffered flashbacks from previous sexual abuse. This was noted in July 2006. While the majority correctly notes that a disclosed record from June 2006 mentions that the victim reported flashbacks, it is unclear if that record is relating the flashbacks to prior sexual abuse or physical abuse. Disclosure of additional records could have helped to clarify that ambiguity. A March 2008 record mentioned that the victim was "experiencing increased flashbacks of prior abuse." Another record from that same month discussed the flashbacks and noted that they were triggered by, among other things, role playing in consensual sex with her boyfriend. This is another topic that defense counsel could have investigated in preparing for trial.

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Additionally, a July 2006 record included the summary that the victim had "a very poor perception of reality with distortions in her interpersonal relationships." That record also noted the victim's wishful thinking regarding relationships with males that she had just met, that she offered sexual favors to make friends, and that she became extremely upset when these relationships did not last. Similarly, a January 2008 record noted that the victim was adamant that she had a realistic plan for her new boyfriend – whom she met online but had never met in person, was more than 10 years older than her and lived out of state – to move to New York within a month and live with her. The therapist who wrote the note found that the victim was fixated on this fantasy, which the victim considered her reality, of a relationship with this man she recently met online. A June 2008 record indicated that the victim was invested in the fantasy of an ideal relationship. Proof of these fantasies and misconceptions of her relationships with males was also relevant and material to the defense.

Also relevant were records of prior allegations of sexual abuse that were possibly false. Evidence of a prior rape complaint is admissible if there is sufficient proof that the complaint was false, and it suggests "a pattern casting substantial doubt on the validity of the charges made by the victim" or "indicate[s] a significant probative relation to such charges" (People v Mandel, 48 NY2d at 953; see People v Blackman, 90 AD3d 1304, 1310 [2011], lv denied 19 NY3d 971 [2012]; People v Pereau, 45 AD3d 978, 980 [2007], lv denied 9 NY3d 1037 [2008]). In footnote 4 of its opinion, the majority mentions one October 2006 undisclosed mental health record containing information about a possible false allegation of sexual abuse, but dismisses the victim's allegations that her father "tried to rape her" and "pinned her up against the wall in a sexual position" by saying that "[t]he only suggestions that the allegation was false" came from a mental health worker who listed the allegation as "unfounded" and the victim's mother's "opinion that the father never sexually abused the victim." Although the mental health records do not contain more details of the alleged attack, the records do not indicate that the mother's statements are mere "opinion"; one states that the mother "did continue to deny that [the victim's] father ever sexually abused her." This supports

disclosure to defendant so he could investigate the details of the purportedly false allegations prior to trial. Considering that the mother lived with both her husband – who is the victim's father and the alleged perpetrator – and the victim, the mother's statement that the abuse did not happen was an outright denial by a fact witness rather than a mere "opinion." When a female claims that a male "tried to rape her," the alleged conduct is inherently sexual in nature. Either the victim's mother and a mental health worker concluded that the victim fabricated the allegations or they blindly ignored clear allegations of sexual abuse. The physical abuse by the father was apparently reported to authorities and resulted in an indicated report of abuse; the records do not clearly state whether the alleged attempted rape was similarly reported or investigated. The record mentioned by the majority states on its face that the victim's sex abuse allegations against her father were "unfounded," but it is unclear whether this term was used in its legal sense, as in the context of child abuse allegations (see Social Services Law § 422 [5]; 18 NYCRR 433.2 [1]).

The majority states repeatedly that this evidence would not be admissible, but that is not the standard. Regardless of admissibility at trial, pursuant to controlling Court of Appeals case law, defendant was entitled to records that are relevant to a potentially false allegation of sexual abuse so that he could have investigated that claim prior to trial, consistent with his 6th Amendment right to cross-examine his accuser. Defendant was not even aware that this report existed, but he could have tried to establish the falsity of this prior claim if the record were disclosed, and he would only be permitted to discuss it in front of the jury if he "established a good faith 'basis for the allegation that the prior complaint was false'" (People v Bridgeland, 19 AD3d 1122, 1123 [2005], quoting People v Gozdalski, 239 AD2d 896, 897 [1997], lv denied 90 NY2d 858 [1997]). The first mention of alleged sexual abuse of the victim by her father appears in a July 2004 record, after she revealed details of an attempted rape by him. Throughout numerous intake reports and mental health histories taken during the ensuing years, answers to a question about past physical and sexual abuse include statements about physical abuse by the father and sexual

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abuse by others,[5] but they do not mention sexual abuse by the father. Other records mention possible sexual abuse in the home, without explanation.

The majority refers to the lack of proof that the victim ever recanted these allegations. Two years after this undisclosed 2006 report, the victim continued to insist that her father sexually abused her. A March 2008 record discussed the victim's regressive behavior as related to her "recent disclosures" of sexual abuse by her father.[6] That same record noted that the victim's mother "was able to be more genuine and spoke openly about past traumas that [the victim] experienced," but – despite the victim's insistence and lack of recantation – the note also stated that the mother continued to deny that the victim was ever sexually abused by her father. The mother had been separated from the father since 2004 and the record discloses that she harbored ill feelings towards him, making it unlikely that the mother was denying the abuse out of loyalty to him. A July 2008 record also notes that the victim has alluded to past sexual abuse that was not substantiated by the mother.

These records alone may have provided defendant with a good faith basis that the victim's prior rape allegation against her father was false. Even if they were not sufficient to prove falsity by themselves, defense counsel could have used these records as the basis for an investigation and a subpoena of child protective services records regarding unfounded reports (see generally Social Services Law § 422 [4] [A] [e]). Although there are differences between a complaint of attempted rape of a young teen by her father and a complaint by an older teen of date rape, the circumstances of the prior allegation here suggest a pattern,

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[5] The answers were also inconsistent regarding her prior sexual abuse history that apparently is not contested, sometimes mentioning an incident when she was seven years old, sometimes mentioning an incident when she was 12, and sometimes including both incidents.

[6] This record does not refer to the 2004 or 2006 records of the victim's prior disclosure.

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casting doubt on the validity of the charge at issue at defendant's trial (see People v Bridgeland, 19 AD3d at 1123-1124; compare People v Hunter, 11 NY3d at 7), and "indicate a significant probative relation to such charge[]" (People v Mandel, 48 NY2d at 953). While the majority finds the rape by defendant as too unlike the alleged attempted rape by the victim's father, at the very least defendant had a right to be advised of the prior allegation and provided an opportunity to address the similarity or presence of a pattern. When considered in conjunction with the many undisclosed records regarding the victim's impaired memory, hallucinations, ability to recall events, sexual fantasies and flashbacks, the failure to disclose these records was error. The undisclosed records all raise issues that would affect the victim's credibility or ability to recall events, and the allegations of prior sexual assault – if proven to be false – would be extremely damaging to the People's case.[7] Regardless of their admissibility at trial, defendant was entitled to be aware of and afforded the opportunity to investigate these matters prior to trial.[8] By not disclosing these records, County Court deprived defendant of the ability to fully prepare his defense, in violation of his 6th Amendment rights to confront and cross-examine the key adverse witness. He is, therefore, entitled to a new trial.

Mercure, J.P., concurs.

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[7] Prior to trial, the People offered defendant a plea to a misdemeanor and time served, presumably based on the People's recognition of the serious problems with the victim's credibility.

[8] Compared to the 28 pages that County Court provided to the defense, there are an additional 34 pages that, pursuant to prevailing case law, should also have been provided. By our calculations, this means that when preparing his defense prior to trial, defendant had less than 50% of the documents to which he was entitled.

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ORDERED that the judgment is affirmed.

ENTER:

Robert D. Mayberger
Clerk of the Court

New York
Official Reports

23 N.Y.3d 193, 12 N.E.3d 1079, 989
N.Y.S.2d 649, 2014 N.Y. Slip Op. 02970

**1 The People of the State
of New York, Respondent
v
Terence McCray, Appellant.

Court of Appeals of New York
40
Argued February 13, 2014

Decided May 1, 2014

CITE TITLE AS: People v McCray

SUMMARY

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of that Court, entered January 17, 2013. The Appellate Division affirmed a judgment of the Albany County Court (Thomas A. Breslin, J.), which had convicted defendant, upon a jury verdict, of rape in the first degree.

People v McCray, 102 AD3d 1000, affirmed.

HEADNOTE

Crimes
Disclosure
Mental Health Records of Complainant in Rape Prosecution —Materiality

In a rape prosecution in which complainant testified that defendant beat and raped her and defendant testified that consensual sex was followed by a struggle, the trial court, in response to defendant's request for disclosure of complainant's mental health records, did not abuse its discretion in deciding, after in camera review, to disclose 28 pages of the thousands of documents submitted by the People. A defendant is entitled to the disclosure of material evidence favorable to his or her case. Where a defendant has made a specific request for evidence, materiality is based on whether there is a reasonable possibility that the verdict would have been different if the evidence had been disclosed. The disclosed records showed that the complainant had significant mental health problems, including multiple disorders, that she visualized dead people, was occasionally explosive and sometimes failed to take her medication. While the undisclosed documents contained other examples of possible distorted perceptions, they were no clearer or more dramatic than the ones disclosed and the trial court could reasonably conclude that they would add little force to the credibility attacks. Moreover, it would be difficult for a juror to attribute the undisclosed references of complainant's tendency to misremember or misunderstand events to this rape claim, which was made immediately after the encounter. Most of the undisclosed evidence of prior sexual abuse complaints were not complaints that anyone violently forced sex on her and nothing suggested that they were untrue. The details of her sexual experiences were no more than marginally relevant given that the jury knew of complainant's hypersexuality and that evidence would likely be excluded under CPL 60.42. Finally, an undisclosed report made by the complainant during treatment that her father had sexually assaulted her, which was deemed "unfounded," was quite different from the accusation made against defendant five years later immediately after the event.

RESEARCH REFERENCES

Am Jur 2d, Depositions and Discovery §§ 290–292; Am Jur 2d, Rape §§ 64, 65.

*194 Carmody-Wait 2d, Discovery §§ 187:84–187:90; Carmody-Wait 2d, Particular Types of Evidence §§ 194:37–194:41.

LaFave, et al., Criminal Procedure (3d ed) §§ 20.3, 20.4.

McKinney's, CPL 60.42.

NY Jur 2d, Criminal Law: Procedure §§ 1670, 1692, 1696, 2046; NY Jur 2d, Criminal Law: Substantive Principles and Offenses §§ 723, 726, 728, 729.

ANNOTATION REFERENCE

See ALR Index under Discovery; Medical Records; Rape; Rape Shield Statute.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: rape /s prosecut! & mental /2 health /2 record & material

POINTS OF COUNSEL

Paul J. Connolly, Delmar, for appellant.
I. County Court violated appellant's right to confront and cross-examine witnesses and otherwise to prepare his defense by failing to disclose all of complainant's mental health records that were potentially relevant to her credibility or to her account of the alleged crime, or which could have led to discovery of potentially admissible evidence or aided in cross-examining prosecution witnesses. (*Crane v Kentucky*, 476 US 683; *California v Trombetta*, 467 US 479; *Olden v Kentucky*, 488 US 227; *Delaware v Van Arsdall*, 475 US 673; *Davis v Alaska*, 415 US 308; *Douglas v Alabama*, 380 US 415; *Brady v Maryland*, 373 US 83; *Strickler v Greene*, 527 US 263; *United States v Gil*, 297 F3d 93; *Johnson v Folino*, 705 F3d 117.) II. County Court erred in not reviewing the records of complainant's fall 2009 hospitalization and in not disclosing to appellant such of those records as could potentially aid the defense. (*People v Bailey*, 58 NY2d 272; *People v Jackson*, 291 AD2d 930, 98 NY2d 677; *People v Gissendanner*, 48 NY2d 543; *People v Yavru-Sakuk*, 4 NY3d 814.) III. Defense counsel's failure to object to the multiple out-of-court statements of complainant claiming to have been raped or sexually assaulted, recounted by the police and in medical and paramedical records, and his failure to request limiting instructions as to the statements to the police, rendered him ineffective under the State and Federal Constitutions. (*People v Rice*, 75 NY2d 929; *People v Seit*, 86 NY2d 92; *People v O'Sullivan*, 104 NY 481; ***195** *People v Deitsch*, 237 NY 300; *People v Rosario*, 17 NY3d 501; *People v McDaniel*, 81 NY2d 10; *People v Shepherd*, 83 AD3d 1298; *People v Felix*, 32 AD3d 1177, 7 NY3d 925; *People v Fabian*, 213 AD2d 298, 85 NY2d 972; *People v Santos*, 243 AD2d 276.) IV. County Court committed reversible error by precluding appellant from examining complainant about a diagnosis that she was hypersexual. (*Crane v Kentucky*, 476 US 683; *California v Trombetta*, 467 US 479; *Davis v Alaska*, 415 US 308; *Douglas v Alabama*, 380 US 415; *People v Baranek*, 287 AD2d 74; *People v Douglas*, 29 AD3d 47, 6 NY3d 847; *People v Rivera*, 138 AD2d 169; *People v Crimmins*, 36 NY2d 230.) V. County Court committed reversible error in sustaining prosecution objections to multiple defense questions of complainant and complainant's mother, which were designed to elicit testimony as to complainant's erratic and unstable behavior, and thus to aid the jury in assessing her credibility. (*People v Klem*, 80 AD3d 777; *People v Baranek*, 287 AD2d 74; *People v Dudley*, 167 AD2d 317; *People v Phipps*, 220 AD2d 238; *People v Tucker*, 171 Misc 2d 1; *People v Cesar G.*, 154 Misc 2d 17; *People v Rensing*, 14 NY2d 210; *People v Manzanillo*, 145 Misc 2d 504; *People v Plaisted*, 2 AD3d 906, 2 NY3d 744; *People v Carter*, 50 AD3d 1318.)
P. David Soares, District Attorney, Albany (*Steven M. Sharp* of counsel), for respondent.
I. County Court's in camera review appropriately balanced defendant's due process rights and the victim's privacy rights and represented a sound exercise of discretion. (*Brady v Maryland*, 373 US 83; *People v Bryce*, 88 NY2d 124; *Giglio v United States*, 405 US 150; *People v Fuentes*, 12 NY3d 259; *People v Vilardi*, 76 NY2d 67; *People v Gissendanner*, 48 NY2d 543; *People v Tissois*, 72 NY2d 75; *People v De Jesus*, 69 NY2d 855; *Pennsylvania v Ritchie*, 480 US 39; *Jaffee v Redmond*, 518 US 1.) II. Defendant was responsible for obtaining the victim's medical records relative to her hospitalization in the fall of 2009, not the court or the People. (*People v Chatman*, 186 AD2d 1004; *People v Kelly*, 62 NY2d 516; *People v Hayes*, 17 NY3d 46; *People v Reedy*, 70 NY2d 826; *People v Sealey*, 239 AD2d 864; *People v Darling*, 276 AD2d 922.) III. Defendant received effective assistance of counsel. (*People v Benevento*, 91 NY2d 708; *People v Felder*, 47 NY2d 287; *People v Claudio*, 83 NY2d 76; *People v Hobot*, 84 NY2d 1021; *People v Baldi*, 54 NY2d 137; *People v Henry*, 95 NY2d 563; *People v Flores*, 84 NY2d 184; *People v Aiken*, 45 NY2d 394; *People v Rivera*, 71 NY2d 705; *People v Angelakos*, 70 NY2d 670.) IV. County Court did not preclude defendant from questioning witnesses about the victim's purported hypersexuality. (***196** *People v Williams*, 81 NY2d 303; *People v Corby*, 6 NY3d 231; *People v Scott*, 16 NY3d 589; *People v Halter*, 19 NY3d 1046.) V. County Court properly sustained objections to questioning the victim's mother about incidents that were only relevant to the victim's credibility. (*People v Pavao*, 59 NY2d 282; *People v Duffy*, 36 NY2d 258; *People v Klem*, 80 AD3d 777.) VI. Defendant's claims in his pro se supplemental brief are without merit.

OPINION OF THE COURT

Smith, J.

Defendant, prosecuted for rape, sought disclosure of the complainant's mental ****2** health records. The trial court reviewed the records in camera and disclosed only a few of them. We hold that the court did not abuse its discretion.

I

Defendant, 40 years old, and the complainant, 18, met for the first time in April 2009. They had several telephone conversations after their first meeting, and agreed to go on a date on May 26, 2009.

Both of them testified to what happened that evening, and their accounts, up until the final, critical events, match in many respects. They visited a friend of defendant at his home, tried unsuccessfully to go to a bar (which excluded the complainant because of her age) and then went to the home of another of defendant's friends, who left them to themselves. While there, they kissed, and touched each other intimately, but did not have intercourse. Defendant then led the complainant to an abandoned house.

Some time later, the complainant called 911 from a pay phone near the house, weeping and struggling to speak. She said that defendant had beaten her, made her beg for her life, and raped her. A police officer who approached her while she was on the phone saw blood on her clothes and her face. Photographs and hospital records show that she had abrasions and bruises on her left arm and left cheek, and lacerations to the inside of her mouth. Defendant, meanwhile, had gone to the home of a friend near the abandoned house, and (according to the friend's testimony) banged on the door and asked to be let in because a woman was "exposing herself and . . . chasing him." Defendant had a bite mark on his forearm.

The key issue at trial, of course, was what happened in the abandoned house. The complainant testified that defendant ***197** pinned her against a wall, forced his tongue into her mouth, rubbed against her and demanded sex. She refused and a struggle followed, in which each hit the other in the face, defendant choked the complainant and the complainant bit him. Eventually, the complainant said, she "gave in" and "let him have it because he said if I did, I could live." They had intercourse, and she left the house.

Defendant testified that the couple engaged in foreplay and consensual sex. Afterwards, the complainant said "I want some money" or "I want to be compensated." This led to a loud exchange of epithets, after which, defendant said, the complainant "grabbed my pants and . . . started heading out the door with them." Defendant tackled her, and her face hit the floor. He then sat on her back, tried to retrieve his pants from underneath her, and noticed that she had removed some of his money and had it in her hand. As he tried to wrench it away, she bit him. Eventually, he retrieved his pants and his money, and the complainant got up and walked out.

The outcome of the case obviously depended on which witness the jury believed. Seeking information that would undermine the complainant's credibility, defendant asked before trial that the People be directed to obtain her mental health records and turn them over to the ****3** defense. The court directed instead that the records be submitted to it in camera. From the thousands of documents submitted, the court selected 28 pages for disclosure, and withheld the rest.

The records that were disclosed showed, and the jury was informed at trial, that the complainant had very significant mental health problems. Her diagnoses, as summarized in her own testimony, included "Bipolar, Tourettes, post-traumatic stress disorder, epilepsy." It was also brought out that she suffered from attention deficit disorder and hypersexuality; that she had reported that she "visualized" or "sense[d] the presence of" dead people; that she had cut her flesh with sharp objects; that her bipolar disorder caused her "on occasion" to be "explosive and angry" and to "physically strike out at people"; that at the time of the incident she was taking medications, was receiving treatment from a mental health facility, and was also seeing a counselor weekly or biweekly; that she failed "once in a while" to take her medications, and that on the night of the alleged rape she could not remember whether she had taken them that day; that, after the alleged rape and before the trial, she had been hospitalized for an overdose of drugs; and that ***198** that was not her first suicide attempt, though she said it was her first "serious" one.

Defendant was convicted of rape. The Appellate Division affirmed, holding among other things, after examining the undisclosed documents, that the trial court did not err in withholding them (*People v McCray*, 102 AD3d 1000 [3d Dept 2013]). Two Justices dissented, concluding that the undisclosed records "raise issues that would affect the victim's credibility or her ability to recall events" and that some of them "would be extremely damaging to the People's case" (*id.* at 1011). A Justice of the Appellate Division granted leave to appeal, and we now affirm.

II

While defendant presents the issue as one of interference with his rights of confrontation and cross-examination, we view this as essentially a *Brady* case (*Brady v Maryland*, 373 US 83 [1963]; *see Pennsylvania v Ritchie*, 480 US 39, 56 [1987] [evaluating under *Brady* the question of whether confidential

investigative files concerning child abuse must be disclosed to a criminal defendant]). Under *Brady*, a defendant is entitled to the disclosure of evidence favorable to his case "where the evidence is material" (373 US at 87). In New York, the test of materiality where, as here, the defendant has made a specific request for the evidence in question is whether there is a "reasonable possibility" that the verdict would have been different if the evidence had been disclosed (*People v Vilardi*, 76 NY2d 67, 77 [1990]).

This case differs from the typical *Brady* case in that it involves confidential mental health records, and the decision to deny disclosure was made not by a prosecutor, but by a judge after an in camera review of the records sought. In such a case, the trial court has a measure of discretion in deciding whether records otherwise entitled to confidentiality should be ****4** disclosed (*see People v Gissendanner*, 48 NY2d 543, 548 [1979]).

In sum, the issue here is whether the trial court abused its discretion in finding defendant's interest in obtaining the records to be outweighed by the complainant's interest in confidentiality; and defendant's interest could be outweighed only if there was no reasonable possibility that the withheld materials would lead to his acquittal. Having examined those materials, we conclude that the court did not abuse its discretion.

As to most of the documents in question, we have no hesitation in agreeing with the courts below that they are either ***199** cumulative or of little if any relevance to the case. The jury knew that the complainant had "visualized" her deceased grandfather and had said that she "could sense the presence of dead people." The undisclosed records contain other examples of what could be called hallucinations or distorted perceptions, but the other examples were no clearer or more dramatic than the ones the defense already had; the trial court could reasonably conclude they would add little force to defendant's attacks on the complainant's credibility.

There are also many references in the undisclosed documents to the complainant's tendency to misremember or misunderstand events. It is hard to imagine, however, a juror who could attribute the complainant's testimony here —a claim of rape, made immediately after what defendant testified was consensual sex followed by a dispute over payment—to a failure of recollection or a misunderstanding, however susceptible to those failings the complainant may have been. She certainly did not fantasize or misremember that she and defendant had a violent encounter: they both had the wounds to prove it. And their descriptions of that encounter are so starkly different that if one version is not a lie, the other must be. With one possible exception, which we discuss below, there is nothing in the undisclosed records suggesting that the complainant had a tendency to make accusations she knew to be false.

The undisclosed records do show that the complainant had made several previous complaints of sexual abuse. But—again with one exception—these were not complaints that anyone had used violence to force sex on her. And—subject to the same exception—nothing in the records suggests that the complaints were untrue. Certain of them may show that, before the complainant reached the age of consent, a number of boys or men took advantage of the hypersexuality that, as the jury knew, was among her mental problems. We agree with the Appellate Division majority that this is exactly what the diagnosis of hypersexuality would lead one to expect, and that the details of the complainant's sexual experiences were of no more than marginal relevance to this case.

We also agree with the Appellate Division majority that, in all likelihood, proof of these details was prohibited by the Rape Shield Law (CPL 60.42), which bars, subject to certain exceptions, "[e]vidence of a victim's sexual conduct" in sex offense cases. We recognize that this likelihood is not necessarily conclusive on the *Brady* issue. Inadmissible evidence can be ***200** material under *Brady* if it will be useful to the defense, perhaps as a lead to admissible ****5** evidence or a "tool in disciplining witnesses during cross-examination" (*United States v Gil*, 297 F3d 93, 104 [2d Cir 2002]). And even the question of admissibility cannot be decided definitively, because defendant has not seen the documents and has had no chance to make an offer of proof that might bring the evidence within an exception to the Rape Shield Law (*see* CPL 60.42 [5] [permitting the trial court to admit evidence that otherwise would be excluded, if it determines after an offer of proof that the evidence is "relevant and admissible in the interests of justice"]). But any evaluation of materiality under *Brady* involves a prediction about the impact of undisclosed material on a trial, and here the existence of a statute that would likely keep out of evidence not only the records themselves but the facts underlying them supports the view of the courts below that their impact, if any, would be slight.

The exception we have mentioned provides the strongest basis for defendant's argument on appeal. Records from 2004,

when the complainant was 13, say that she reported having been sexually assaulted by her father. She claimed that he pinned her against a wall and tried to rape her, but she escaped. The records show that her father had in fact been physically abusive, but they also show that the complainant's mother did not believe the charge of sexual assault was true. One record refers to the allegation as "unfounded," without further explanation. These documents give us some pause (*cf. People v Hunter*, 11 NY3d 1 [2008] [finding a *Brady* violation, under a "reasonably probable" materiality standard, where a prosecutor failed to disclose the complainant's report that another man had committed a similar rape]).

But the complainant's 2004 accusation of her father was far removed in time and quite different from the accusation she made in 2009 against defendant. It was an accusation of abuse by a family member, made not in a 911 call immediately after the event, but in the course of treatment by mental health professionals. And even if the accusation was not true, nothing in the records indicates that the complainant fabricated it, rather than misinterpreted or imagined something her father had done. It is, as we have said, almost impossible that a jury could think the complainant's accusation in this case to be an honest but mistaken one, as the accusation against her father may have been.

We therefore hold that the trial court could reasonably think ***201** there was no more than a remote possibility that disclosure of the records it withheld would lead to defendant's acquittal. The court was within its discretion in finding the records' relevance to be outweighed by the complainant's legitimate interest in confidentiality.

Defendant's remaining arguments lack merit.

Accordingly, the order of the Appellate Division should be affirmed.

Rivera, J. (dissenting). Pretrial disclosure to the defendant of favorable and material evidence is constitutionally required to ensure the defendant's rights of due process and to a fundamentally fair trial (*Brady v Maryland*, 373 US 83, 87 [1963]; US Const, 14th Amend, § 1). Disclosure of ****6** exculpatory and impeachment evidence is essential to establishing a defense, and furthers the goals of seeking the truth through the trial process (*see generally Giglio v United States*, 405 US 150 [1972]). Despite the importance of disclosure to the defendant and the proper functioning of our criminal justice system, the majority concludes that denial of vast amounts of revealing medical documents was proper in this case. I disagree.

Here, credibility issues were central to the case, and there was evidence supporting the defendant's version of events, thus requiring the jury to decide between divergent stories. There is a "reasonable possibility" that failure to disclose documents from the complainant's mental health medical records, which reveal her history of memory loss, potential fabrications, substance abuse, distortions in her view of interpersonal relationships, and information suggesting unsubstantiated claims of prior rape and sexual abuse, contributed to the verdict (*see People v Vilardi*, 76 NY2d 67, 77 [1990]). Therefore, the trial court abused its discretion in denying disclosure.

In addition, to the extent the majority suggests that the defendant's challenge to the medical records in this case is limited to a *Brady* violation, I disagree with this narrow interpretation of the defendant's constitutional rights. Denial of documents that would have assisted the defense in preparing for cross-examination of the complainant, including questioning for impeachment purposes, implicates the defendant's confrontation rights.

I.

Our Federal and State Constitutions guarantee every defendant a fair trial (US Const 5th Amend; NY Const, art I, § 6). Essential to this guarantee, which is grounded in the Due Process ***202** Clause, is the defendant's right to disclosure of evidence "favorable to the accused and material to guilt or punishment" (*Pennsylvania v Ritchie*, 480 US 39, 57 [1987], citing *United States v Agurs*, 427 US 97 [1976]; *Brady*, 373 US at 87). As the majority concedes, evidence confidential in nature is subject to disclosure when the state's interest in maintaining confidentiality is outweighed by a defendant's constitutional rights of access to materially favorable evidence (majority op at 198, citing *People v Gissendanner*, 48 NY2d 543, 548 [1979]). Whether and to what extent confidential information should be disclosed is within the trial court's purview, subject to the proper exercise of its discretionary power (*Gissendanner*, 48 NY2d at 548). Disclosure is required, and the court affords access, "to otherwise confidential data relevant and material to the determination of guilt or innocence, as, for example, . . . when it involves other information which, if known to the trier of fact, could very well affect the outcome of the trial" (*id.*).

In order to determine whether the denial of the documents to the defendant constituted a violation of his constitutional rights under *Brady*, we must decide whether there is a "reasonable possibility that the failure to disclose [the medical reports] contributed to the verdict" (*Vilardi*, 76 NY2d at 77 [internal quotation marks omitted]). In *Vilardi*, we adopted the "reasonable possibility" test recognizing that it was the proper measure of "materiality" (*id*.). Clearly, the test is meant to ensure defendants' access to material available in accordance with *Brady* and our state constitutional guarantees, and sets a high bar against nondisclosure. As we stated, the "reasonable possibility" standard is "essentially a reformulation of the 'seldom if ever excusable' rule" (*id*.; *see Agurs*, 427 US at 106 ["When the prosecutor receives a specific and relevant (discovery) request, the failure to make any response is seldom, if ever, excusable"]).

II.

No less essential to the defense than the due process rights to disclosure of favorable and material evidence is the defendant's right to confrontation of adverse witnesses, embodied in both our Federal and State Constitutions (US Const 6th, 14th Amends; NY Const, art I, § 6). The majority avoids consideration of the defendant's confrontation rights, instead choosing to analyze the defendant's challenges under *Brady* (majority op at 198). I agree that the defendant's appellate claims are properly the subject of *Brady* analysis, but they also implicate the defendant's confrontation rights.

***203** The defendant argues that he was entitled to access the complainant's mental health records because they were necessary for him to effectively cross-examine the complainant, especially with respect to her reliability, or would have led to discovery of this type of evidence. He contends that the failure to disclose these documents violated his constitutional rights to confront and cross-examine witnesses. His arguments present a viable confrontation rights claim.

Denial of documents that provide the defense with material to prepare for cross-examination and impeachment of the complainant in this case of alleged rape goes to the very core of the right to confront adverse witnesses. Without access to documents concerning reliability of the witness, the defendant cannot properly develop and pursue questioning favorable to the defense or address facts and related issues important to the truth finding process. I would ground this right in our New York State Constitution. We have previously recognized that the protections under our constitution extend beyond those found in our federal counterpart, which sets the floor, but not the ceiling, for the rights of an individual (*People v LaValle*, 3 NY3d 88, 129 [2004]; *accord Sharrock v Dell Buick-Cadillac*, 45 NY2d 152, 159 [1978]).

While our constitutional language mirrors that of the Federal Constitution (*compare* US Const 6th Amend ["(t)he accused shall enjoy the right . . . to be confronted with the witnesses against him"] *with* NY Const, art I, § 6 ["the party accused shall be allowed to . . . be confronted with the witnesses against him or her"]), federal consideration of this issue is ****7** uncompelling. In *Pennsylvania v Ritchie*, the plurality rejected a Confrontation Clause challenge to the denial of documents, limiting the application of the Confrontation Clause to a defendant's opportunity to cross-examine:

> "the Confrontation Clause was not violated by the withholding of the [confidential] file; it only would have been impermissible for the judge to have prevented Ritchie's lawyer from cross-examining the [complainant]. Because defense counsel was able to cross-examine all of the trial witnesses fully, we find that the Pennsylvania Supreme Court erred in holding that the failure to disclose the [confidential] file violated the Confrontation Clause" (480 US at 54).

***204** Many states have found the plurality's reasoning unpersuasive, including Pennsylvania, the state whose law was at issue in *Ritchie* (*see Commonwealth v Lloyd*, 523 Pa 427, 432, 567 A2d 1357, 1359 [1989] [defendant's state confrontation clause rights violated where he was denied access to the contents of the complainant's psychiatric records]; *accord Jones v State*, 297 Md 7, 464 A2d 977 [1983] [defendant entitled by common law to inspect grand jury minutes for cross-examination purposes]; *Commonwealth v Stockhammer*, 409 Mass 867, 570 NE2d 992 [1991] [under state confrontation clause defendant can inspect complainant's rape victim counseling records, without in camera inspection, for evidence of prejudice or motive to fabricate by the complainant]; *but see State v Donnelly*, 244 Mont 371, 798 P2d 89 [1990], *revd on other grounds State v Imlay*, 249 Mont 82, 813 P2d 979 [1991] [Montana constitution does not afford greater protection than the Federal Constitution]). Similarly, at least one federal circuit has rejected the narrow confrontation clause analysis in *Ritchie* (*see Wallace v Price*, 2002 WL 31180963, *22, 2002 US Dist LEXIS 19973, *72 [WD Pa, Oct. 1, 2002, civil action No. 99-231], *report and recommendation adopted* 265 F Supp 2d 545 [WD Pa 2003], *affd* 243 Fed Appx 710 [3d Cir 2007]

["plurality's reasoning did not garner a majority of the court" and is therefore not binding]).

In light of the broader guarantees provided under our State Constitution, and because of the important role of cross-examination to ensuring both the rights of the defendant and the truth seeking functions of our criminal justice system, I would reject the narrow interpretation of the *Ritchie* plurality (*see Ritchie*, 480 US at 66 [Brennan, J., dissenting] ["(the plurality's) interpretation ignores the fact that the right of cross-examination also may be significantly infringed by events occurring outside the trial itself, such as the wholesale denial of access to material that would serve as the basis for a significant line of inquiry at trial"]). As we have stated:

> "[I]n determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this court is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States" (*People v Barber*, 289 NY 378, 384 [1943]).

There is no need to address the boundaries of the defendant's confrontation claim ****8** in this case, because, as discussed herein, ***205** there is a reasonable possibility that disclosure of the documents would have resulted in a different outcome at trial (*Vilardi*, 76 NY2d at 77). Claims based on the defendant's confrontation rights may require application of a lower threshold to establish violation of those rights, but certainly are not subject to greater scrutiny. Therefore, whether analyzed as a violation of the defendant's confrontation rights, or rights protected under *Brady*, I would find the trial court's denial of the documents constituted an abuse of discretion.

III.

The trial court and the Appellate Division rejected an absolute prohibition on disclosure, and instead concluded that the defendant was entitled to certain of the complainant's medical records. At the Appellate Division, the majority and dissenting Justices agreed that the state's interest in maintaining the confidentiality of complainant's medical records must cede to the defendant's constitutional rights, and that the defendant was entitled to review at least some of the medical documents (*People v McCray*, 102 AD3d 1000, 1005 [3d Dept 2013]; *see also id.* at 1010-1011 [McCarthy, J., dissenting]). Thus, this case does not involve the propriety of an absolute prohibition on confidential information, but rather the extent of disclosure required to protect defendant's rights while recognizing the state's interest in confidentiality.

As an initial matter, the Appellate Division erred in allowing "an appropriate sample" of the complainant's medical documents to substitute for a fuller disclosure (*McCray*, 102 AD3d at 1005). A sample means an example of something else: "a representative part or single item from a larger whole or group" (Merriam Webster's Collegiate Dictionary 1034 [10th ed 1996]). A sample document, by its nature, shares only general attributes, and not specific peculiarities, with other documents from the "larger whole or group." A single document that discusses a medical condition is thus a "sample" of other documents discussing the same condition.

Here the majority does not specifically reject the Appellate Division's reference to this improper standard, but concludes that many of the undisclosed documents are "cumulative" and therefore not subject to disclosure (*see* majority op at 198-199). However, the undisclosed documents are not merely "cumulative" in a legal sense. Cumulative evidence is "[a]dditional evidence that supports a fact established by existing evidence" ***206** (Black's Law Dictionary 636 [9th ed 2009]). It can be excluded by New York courts when "its admission would prolong the trial to an unreasonable extent without any corresponding advantage"; that is, when it will prove a fact that other evidence has already proven (*People v Davis*, 43 NY2d 17, 27 [1977]; *see also People v Petty*, 7 NY3d 277, 286 [2006]; *People v Corby*, 6 NY3d 231, 235-236 [2005]). Sample documents prove only the general principle that they embody. Assuming that other documents in the "larger whole or group" prove specific facts, those documents are not "cumulative" of the ****9** sample document (*cf. People v Russell*, 79 NY2d 1024, 1026 [1992] [four noneyewitness photo identifications not cumulative of eyewitness identifications]; *People v Linton*, 166 AD2d 670, 671 [2d Dept 1990] [the testimony of different social workers was not cumulative when "(e)ach social worker had a different relationship and experience with the victim"]). Cases are made or unmade by specifics, not generalities. Therefore, sample documents that share only general characteristics with a corpus of documents cannot displace the evidentiary value of documents that uniquely prove specific facts.

The risk attendant on selecting a "sample" from the universe of confidential records is that the undisclosed document may contain information about alternative diagnoses or treatment protocols even if the substantive content is representative of

other documents containing the same underlying information but with different conclusions. Another risk is that the sample may lack a fuller and more nuanced description of the same information contained in the disclosed sample.

Review of the complainant's disclosed and undisclosed documents illustrates the point. The majority of the documents disclosed to the defendant appear to consist of short, "progress notes" or intake forms, generated by a therapist or other health care practitioner, and do not reflect a full analysis of the complainant's condition. Some contain phrases which suggest significant problems, such as a history of auditory and visual hallucinations, poor impulse control and questionable judgment, but do not adequately reveal the root causes or their impact over time on the complainant. What are missing from the sample, and contained in the undisclosed documents, are narratives based on discussions and professional analysis of the complainant that provide a fuller picture of the complainant's mental health history and conditions and how they may affect her veracity as well as her ability to comprehend and accept ***207** reality. For example, one undisclosed report revealed the complainant has a very poor perception of reality, and noted the complainant's distortions of her interpersonal relationships, leading the health care practitioner to write that the complainant suffers from wishful thinking about relationships with males with whom she is recently acquainted. Similarly, another undisclosed document revealed complainant reported dissociative episodes. The "sample" of disclosed documents did not provide this type of information about the complainant.

Applying the correct standard, the documents could properly be excluded only if there is no reasonable possibility that they contain information that if disclosed would have resulted in a different outcome at trial (majority op at 200-201). I disagree that we can conclude on this record that there is no reasonable possibility that the undisclosed records would have affected the outcome of this case, that is to say that there is no "substantial basis for claiming materiality" (*see Agurs*, 427 US at 106).

Like the majority, I begin my analysis with a review of the information contained in the disclosed documents and compare it to the information in the undisclosed medical records. ****10** The complainant's written medical history is extensive and spans years of treatment, primarily describing her mental health services and diagnoses, and includes references to incidents that occurred when the complainant was seven years old.

The trial court disclosed a mere 28 pages, which, with few exceptions, can best be described as brief if not cursory updates of the complainant's condition based on interviews and reviews by a series of health care practitioners, created from different sources, and includes records from episodic hospitalizations and long-term counseling. The majority of these disclosed documents make shorthand references to several of the complainant's mental health and behavioral issues.

The documents state that the complainant is diagnosed as bipolar, and suffered from Tourette's syndrome, post-traumatic stress disorder, attention deficit disorder and epilepsy. They further state that for years she was on several medications, and at times she failed to take her medications as prescribed, including close to the time when she met the defendant. There are documents indicating that she had been hospitalized due to her mental health conditions and suicidal ideation. The documents contain additional references that she suffered from auditory and visual hallucinations; was once found along a local highway ***208** and could not articulate how she got there; she sensed and spoke to dead people; and she had been experiencing "psychotic symptoms."[*]

The disclosed documents present information about what must be recognized as severe mental health issues and reveal a history of physical and sexual abuse. While the documents disclosed information about the complainant's mental health useful to the defendant, they did not reveal the full range of medical and behavioral issues that implicate the complainant's credibility.

For example, a review of the undisclosed medical records reveals a document that indicates the complainant suffers from memory loss, has difficulty accurately recalling events, has a distorted view of interpersonal relationships and admits to lying. The same undisclosed document also reveals complainant's memory can be selective; she forgets good experiences with people if there are subsequent bad experiences.

Other documents state that complainant's mental health condition will deteriorate as she grows older. I, therefore, disagree with the majority's conclusion that most of the undisclosed documents are merely more of the same, that they

lack information distinct from that contained in the disclosed documents, and that the information, if known to the jury, would not **11 have a "reasonable possibility" of resulting in acquittal.

The majority states that medical records referencing the complainant's history of deliberate untruthfulness, as well as her inability to recall events, would have made no difference to the jury because the complainant's failure to recollect or her likelihood to misunderstand events could not have affected her ability to recall the alleged rape, and that the other evidence and the defendant's own testimony supported the complainant's claims that they had a "violent encounter" (majority op at 199). According to the majority, the jury was left to decide who was lying and nothing in the undisclosed documents, with one exception, suggests that she makes false accusations. Yet, the undisclosed medical records contain several references to the complainant's inability to correctly recall events. While disclosed documents and the complainant's own testimony reveal her *209 history of seizures, several undisclosed documents associate her seizure activity with an inability to recollect what had happened to her. Additionally, one undisclosed document discusses the complainant's desire to obtain her mother's trust, implying complainant was not forthcoming with her mother and may have a need to lie so as to avoid disappointing her mother. Another indicates complainant fantasizes about her interpersonal relationships and has a poor perception of reality. The records that indicate an inability to remember and potential history of fabrication would have been critical to the defendant's preparation and cross-examination of the complainant.

It certainly was reasonably possible for the jury to conclude, based on the complainant's prior history of distorted reality, that while she could accurately remember everything leading up to the moment of having sex with the defendant, she fabricated events surrounding the sex act. Indeed, we have long recognized that juries are tasked with making decisions about the credibility or incredibility of testimony, and may accept or discount testimony based on difficult credibility determinations (*see generally People v Sage*, 23 NY3d 16 [2014] [jury is left free to accept or reject testimony]).

The records of possible fabrication of sexual assault and attempted rape by her father and the other undisclosed records could have provided a basis to show falsity of the allegations, or a pattern of false complaints that may very well have been admissible (*see People v Mandel*, 48 NY2d 952, 953 [1979]). Certainly, the records were not inadmissible as a matter of law (*see People v Hunter*, 11 NY3d 1, 6 [2008]), and were within the court's discretion as to whether to admit in the interests of justice (*see* CPL 60.42 [5]). Regardless of the admissibility of these documents, the defendant had a right to review them and determine whether the allegations were unsubstantiated, and showed conduct sufficiently similar to the complainant's alleged claims about the defendant such that defendant could argue they constituted the type of "pattern of false complaints" that would be admissible at trial. Moreover, the documents that were disclosed may have misled the defendant as to the complainant's history of sexual abuse because they referred to physical and not sexual abuse by the father and brother. **12

The majority concludes that the allegations of attempted rape by the father may not be sufficiently similar to the facts in this alleged "date rape" case, or occurred too distant in time, to support its admission. In fact, undisclosed records indicate thealleged *210 attempted rape by complainant's father is similar to the allegations made here against defendant in that complainant claims she was forced up against a wall by her father, a much older man, but could not recall how she got away. Here, complainant testified similarly that defendant was "backing [her] up against a wall" and she aggressively tried to fight his advances.

Moreover, the mental health records contain references to the mother's denial of the attempted rape, and thus place its truth in question. Therefore, the defendant should have had the opportunity to review the records and determine whether there was a basis to seek its admission at trial, to show a pattern of false claims of rape.

The records relating to flashbacks from previous alleged sexual abuse also should have been made available to the defendant because they would have allowed the defendant to determine whether complainant's capacity and motive in this case were affected by a prior experience. Therefore, I cannot conclude, as does the majority, that "the trial court could reasonably think there was no more than a [mere] remote possibility that disclosure of the records . . . would lead to defendant's acquittal" (majority op at 200-201).

IV.

The case as presented to the jury depended on whether the complainant and the defendant engaged in *consensual* sex. Mental health records indicating that complainant has

a history of lying or that her memory was unclear go to the truthfulness of her statements that she was raped by defendant. Far from a "hope that the unearthing of some unspecified information would enable him to impeach the witness" (*Gissendanner*, 48 NY2d at 549, citing *People v Norman*, 76 Misc 2d 644 [Sup Ct, NY County 1973]), this information went to whether there could be a basis to disbelieve the complainant's version.

Moreover, the prosecutor argued that defendant knew the complainant had mental health problems simply by observing and speaking with her and that he sought to manipulate her based on what he perceived was her vulnerability due to her mental condition. As the record establishes, the prosecutor argued that the complainant's mental health condition was obvious to the defendant and the jury, and that the defendant took advantage of the complainant. Defense counsel sought to persuade the jury that as a result of the complainant's various ***211** mental health issues, she was either unable to remember that the sex was consensual or was lying about the rape. However, in response to the prosecution's strategy of characterizing the defendant as a ****13** manipulative, older man seeking to take advantage of a younger woman who acted in a sexually provocative manner, and who he could see suffered from some type of mental impairment, the defendant had to persuade the jury that the complainant's mental health conditions would have led her to fabricate a story of a rape, or to cause her to believe and recount for the jury an incorrect version of the sexual encounter with the defendant. In that sense, the more the defendant sought to establish the general severity of the complainant's mental health conditions, the more the jury could find persuasive the People's version. Thus, in order for the defendant to present the complainant's mental health condition objectively from the defense point of view—that she is too mentally ill to recall that she consented, or that she made up the whole story because of her illness—disclosure of records about her ability to recall events accurately and her capacity to fabricate events was crucial.

V.

Medical records describing the complainant's short term memory loss, selective memory, tendency to fabricate, poor perception and unrealistic assessments of intimate relationships, flashbacks of alleged sexual abuse, and possible false allegations of rape went directly to the reliability of the complainant, and would have allowed the defense to fully cross-examine her. The information contained in these documents does not merely give occasion for "some pause" (*see* majority op at 200), but rather establishes that there is a "reasonable possibility" that this information if disclosed would have affected the outcome.

The record reveals that the evidence was such that, as the Appellate Division concluded, "it would not have been unreasonable for the jury to believe defendant's testimony that the sexual encounter was consensual" (*McCray*, 102 AD3d at 1003 [footnote omitted]). The denial of additional medical records providing evidence that could serve as a basis for the jury to disbelieve the complainant's version was, therefore, an abuse of discretion.

I dissent.

***212** Judges Graffeo, Read and Abdus-Salaam concur with Judge Smith; Judge Rivera dissents and votes to reverse in an opinion in which Chief Judge Lippman and Judge Pigott concur.

Order affirmed.

FOOTNOTES

Footnotes

* In addition to these documents, shortly before trial the defendant learned through a *Brady* disclosure that the complainant had started to abuse drugs and alcohol heavily after the alleged incident and was hospitalized for a suicide attempt.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

TERENCE SANDY MCCRAY,

Petitioner,

vs.

MICHAEL CAPRA, Superintendent, Sing Sing Correctional Facility,

Respondent.

No. 9:15-cv-01129-JKS

AMENDED MEMORANDUM DECISION

Terrence Sandy McCray, a New York state prisoner proceeding *pro se*, filed a Petition for a Writ of Habeas Corpus with this Court pursuant to 28 U.S.C. § 2254. McCray is in the custody of the New York State Department of Corrections and Community Supervision and incarcerated at Sing Sing Correctional Facility. Respondent has answered the Petition, and McCray has replied.

I. BACKGROUND/PRIOR PROCEEDINGS

On June 3, 2009, McCray was charged with rape in the first degree in an indictment alleging that he had engaged in sexual intercourse with a woman by forcible compulsion. On direct appeal of his conviction, the Appellate Division of the New York Supreme Court recounted the following facts underlying the charges against McCray and the evidence presented at trial:

> Many details are undisputed. [McCray], then 40 years old, first met the victim—an 18–year–old woman with an extensive history of psychiatric problems—at a bus stop in the City of Albany in April 2009. They talked extensively about various topics, including sex, while walking together until they eventually visited a recreational vehicle that belonged to a friend of [McCray]. The victim testified that, while inside the vehicle, [McCray] gave the victim a back massage, but nothing else happened of an intimate nature. [McCray's] version of these events differed only in that he testified that,

following the massage, the victim engaged in oral sex with him. Upon parting that night, the victim gave [McCray] her telephone number and they spoke on the telephone a few times in the weeks ahead. On May 26, 2009, [McCray] called the victim and invited her out for the evening. The victim's mother drove her to [McCray's] residence, where the victim met members of [McCray's] family, and she then dropped the pair off on Lark Street. They walked around for a while and stopped at the home of [McCray's] friend, Marvin Calhoun, where they visited with Calhoun and his family. The victim admits that she exchanged sexual innuendos with [McCray] during this visit. After a few hours, the couple left, ending up at the apartment of another one of [McCray's] friends, Kevin Johnson, where they engaged in consensual kissing and fondling.

It is at this point that the testimony of [McCray] and the victim sharply diverges. The victim testified that after about 15 minutes, [McCray] wanted to have intercourse but she refused, telling him it was too soon in their relationship. When [McCray] continued to insist, she became angry with him and left the apartment. [McCray] caught up with her on a street outside the apartment and apologized to her. She stated that they continued to argue while they walked, but that she tired of walking so they sat down. The victim stated that, while seated, they witnessed police officers draw their weapons on a young female with a baseball bat. She explained that this incident made both her and [McCray] laugh, and she no longer felt angry with him.

[McCray] testified that the victim had unsuccessfully asked Calhoun if they could use a bedroom to have sex while visiting Calhoun's family and, once at Johnson's apartment, she initiated sex and it was he who refused to have intercourse there because he thought it was not appropriate to have sex on the couch with his friend in the next room. He testified that they left the apartment together in search of another place to have sex, and that the victim was willing even to have sex outside in the bushes. [McCray] further stated that the victim was not angry with him when they left Johnson's apartment and that they never witnessed the police encounter with the female with the baseball bat.

By both accounts, the couple eventually ended up at an abandoned house located at 595 Clinton Avenue in Albany, where the victim followed [McCray] through the backyard into the house. At this point, the accounts of the victim and [McCray] again diverge. The victim testified that [McCray] backed her up against a wall and started to forcibly kiss and grind against her. She testified that she pushed him away and told him to stop, but that he continued, telling her, "You are going to give it to me or I'm going to take it." The victim stated that they struggled; she punched [McCray] in the face, near his jaw or chin, and [McCray] hit her in the face several times and choked her. While he was choking her from behind, the victim testified, she was able to bite his forearm. After an extended struggle, during which the victim tried to make noise to draw attention and begged for her life, she gave up and submitted to sexual intercourse with [McCray]. The victim stated that, when it was over, [McCray] did not prevent her from leaving, but told her, "Don't go out there looking like that." The victim stated that she wiped the tears and blood off of her face onto her shirt, then went out the same way they had entered. She further testified that she got caught on a fence while trying to leave, and ripped her shirt. She came upon a pay telephone and called 911. Police officers arrived and she was

> brought to the hospital for examination. The victim's torn shirt and photographs of her bruised face were admitted in evidence at trial.
>
> By contrast, [McCray] testified that the couple had consensual intercourse once inside the abandoned building. He explained that after they were through and he asked the victim if she wanted to go home, she suddenly demanded money from him and, when he refused, grabbed his pants and began to leave. [McCray] stated that he then tackled the victim to prevent her from leaving and her face struck the floor as they fell. They then struggled as he attempted to pry his money—which the victim had by then extracted from the pocket of his pants—from her hand and, during the struggle, she bit his arm. According to [McCray], he eventually managed to squeeze the victim's hand open and retrieve his cash, at which point the victim got up and left the building.
>
> [McCray] then went to the home of his friend, James Close, where, according to Close, he pounded on the door, yelling for admittance. Close testified that [McCray] looked like he was being chased by someone and implied that he wanted to come inside because there was a female outside who was exposing herself to [McCray]. [McCray] testified that he went to Close's house because he wanted to tell him about his encounter with the victim but, suddenly realizing that the abandoned house he had been trespassing in might belong to Close, changed his mind and left. He explained that he might have referred to the victim as "the girl [who] lifted her shirt up on Central Avenue that time" because he had told Close about his first meeting with the victim and that she had exposed herself on the street that night to some passers-by.

People v. McCray, 958 N.Y.S.2d 511, 514-16 (N.Y. App. Div. 2013).

McCray filed a pre-trial discovery demand seeking medical, psychiatric, and related medical records of each prosecution witness on the ground that such information could bear on testimonial capacity, memory, or credibility. At a court appearance on August 27, 2009, the prosecutor appeared before the court and indicated that she had disclosed to the defense information related to the victim's mental health history. The prosecutor further stated that there were three prior incidents in which the victim had alleged sexual assault; she had reported only one of those to the police. Defense counsel asked the trial court to require the People to disclose all of the victim's mental health records. The trial court ordered the People to obtain the records and to submit the records to the court for *in camera* review.

On November 4, 2009, the court informed the parties that it had reviewed the psychiatric records and would disclose to the defense those records that would relate to fabricating or misperceiving events or that showed delusional behavior on the part of the victim. On December 17, 2009, the court released to the defense 28 pages from the over 5000 pages submitted for *in camera* review.

At the conclusion of trial, the jury convicted McCray of first-degree rape as charged. The court subsequently sentenced him as a second felony offender to a determinate imprisonment term of 22 years, to be followed by 5 years of post-release supervision.

Through counsel, McCray appealed his conviction. The Appellate Division affirmed the judgment against McCray in a reasoned, published opinion issued on January 17, 2013. *McCray*, 958 N.Y.S.3d at 528. Two justices dissented, stating their belief upon review of the undisclosed medical records that, "[b]y not disclosing [the complainant's medical] records, County Court deprived [McCray] of the ability to fully prepare his defense, in violation of his 6th Amendment rights to confront and cross-examine the key adverse witness." *Id.* at 527 (McCarthy, J., dissenting). McCray was granted leave to appeal to the New York Court of Appeals and was represented by counsel. On May 1, 2014, the Court of Appeals affirmed the order of the Appellate Division in an opinion indicating that it had performed its own review of the undisclosed records. *People v. McCray*, 12 N.E.3d 1079, 1083 (N.Y. 2014). Three judges dissented on the ground that the trial court abused its discretion by "[t]he denial of additional medical records providing evidence that could serve as a basis for the jury to disbelieve the complainant's version." *Id*. (Rivera, J., dissenting). McCray moved for re-argument in the

Court of Appeals, which was denied without comment on September 18, 2014. *People v. McCray*, 18 N.E.3d 749, 749 (N.Y. 2014).

McCray then timely filed a *pro se* Petition for a Writ of Habeas Corpus to this Court on September 15, 2015. *See* 28 U.S.C. § 2244(d)(1)(A). On August 31, 2017, this Court issued an initial memorandum decision denying the majority of McCray's claims. Docket No. 46; *McCray v. Capra*, No. 9:15-cv-01129, 2017 WL 3836054 (N.D.N.Y. Aug. 31, 2017). The Court concluded, however, that McCray had raised a serious claim for relief with respect to his contention that the trial court erroneously and prejudicially failed to disclose portions of the victim's mental health records that bore on her credibility (Ground 4 and Arguments 6, 6a, and 7 in Attachment(1)). Docket No. 46 at 33; *McCray*, 2017 WL 3836054, at *16. The Court determined that further briefing on that issue was necessary for a just determination and that the interests of justice required the appointment of counsel for McCray solely with respect to submitting additional briefing on that issue. Docket No. 46 at 34; *McCray*, 2017 WL 3836054, at *16. The Court therefore appointed counsel for McCray and ordered additional briefing from the parties. Docket No. 46 at 34; Docket No. 47; *McCray*, 2017 WL 3836054, at *16. The additional briefing is now complete, and the remaining claim is ripe for adjudication.

II. GROUNDS RAISED

In his *pro se* Petition before this Court, McCray raised a number of claims previously considered and rejected by this Court (Claims 1-3 and 5-9). Claim 4 has now been fully briefed and is ready for consideration.

III. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), this Court cannot grant relief unless the decision of the state court was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). A state-court decision is contrary to federal law if the state court applies a rule that contradicts controlling Supreme Court authority or "if the state court confronts a set of facts that are materially indistinguishable from a decision" of the Supreme Court, but nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 406 (2000).

To the extent that the Petition raises issues of the proper application of state law, they are beyond the purview of this Court in a federal habeas proceeding. *See Swarthout v. Cooke*, 131 S. Ct. 859, 863 (2011) (per curiam) (holding that it is of no federal concern whether state law was correctly applied). It is a fundamental precept of dual federalism that the states possess primary authority for defining and enforcing the criminal law. *See, e.g.*, *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (a federal habeas court cannot reexamine a state court's interpretation and application of state law); *Walton v. Arizona*, 497 U.S. 639, 653 (1990) (presuming that the state court knew and correctly applied state law), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002).

In applying these standards on habeas review, this Court reviews the "last reasoned decision" by the state court. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991); *Jones v. Stinson*, 229 F.3d 112, 118 (2d Cir. 2000). Where there is no reasoned decision of the state court

addressing the ground or grounds raised on the merits and no independent state grounds exist for not addressing those grounds, this Court must decide the issues de novo on the record before it. *See Dolphy v. Mantello*, 552 F.3d 236, 239-40 (2d Cir. 2009) (citing *Spears v. Greiner*, 459 F.3d 200, 203 (2d Cir. 2006)); *cf. Wiggins v. Smith*, 539 U.S. 510, 530-31 (2003) (applying a de novo standard to a federal claim not reached by the state court). In so doing, the Court presumes that the state court decided the claim on the merits and the decision rested on federal grounds. *See Coleman v. Thompson*, 501 U.S. 722, 740 (1991); *Harris v. Reed*, 489 U.S. 255, 263 (1989); *see also Jimenez v. Walker*, 458 F.3d 130, 140 (2d Cir. 2006) (explaining the *Harris-Coleman* interplay); *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804, 810-11 (2d Cir. 2000) (same). This Court gives the presumed decision of the state court the same AEDPA deference that it would give a reasoned decision of the state court. *Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011) (rejecting the argument that a summary disposition was not entitled to § 2254(d) deference); *Jimenez*, 458 F.3d at 145-46. Under the AEDPA, the state court's findings of fact are presumed to be correct unless the petitioner rebuts this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

IV. DISCUSSION

A. Grounds 1-3, 5-9

This Court issued an initial memorandum opinion denying these claims; nothing has altered the Court's conclusion that these claims are meritless, and they therefore remain denied for the reasons expressed in that memorandum opinion and order dated August 31, 2017. Docket No. 46; *McCray*, 2017 WL 3836054, at * 4-16. That opinion is incorporated by reference herein as if fully set out.

B. Ground 4 *(Non-disclosure of Victim's Mental Health Records)*

In this remaining claim, McCray argues that his conviction was unlawfully obtained by the failure of the prosecution and trial court to disclose the entirety of the victim's mental health records. *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny require the prosecution to disclose material[1] information that is "favorable to the accused, either because it is exculpatory, or because it is impeaching." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (applying *Brady* principles on direct review of a defendant's conviction for sexual assaults against his minor daughter). "To establish a *Brady* violation, a petitioner must show that (1) the undisclosed evidence was favorable to him; (2) the evidence was in the state's possession and was suppressed, even if inadvertently; and (3) the defendant was prejudiced as a result of the failure to disclose." *Mack v. Conway*, 476 F. App'x 873, 876 (2d Cir. 2012) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Under these principles, a *Brady* violation occurs only where there is a "reasonable probability" that a different verdict would have resulted from disclosure of the information that the defendant claims was suppressed. *Strickler*, 527 U.S. at 281. That is, "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines

[1] As the Second Circuit has explained, the *Brady* Court appeared to use "'material' in its evidentiary sense, *i.e.*, evidence that has some probative tendency to preclude a finding of guilt or lessen punishment." *United States v. Coppa*, 267 F.3d 132, 141 (2d Cir. 2001). As discussed below, the Supreme Court has subsequently disavowed such contention and made clear that evidence is material in the *Brady* context only if "its suppression undermines confidence in the outcome of the trial." *United States v. Bagley*, 473 U.S. 667, 678 (1985); *Ritchie*, 480 U.S. at 57 (1987) (using the *Bagley* standard of materiality to define the scope of a *Brady* disclosure obligation). Moreover, the Supreme Court has explicitly stated that the *Brady* requirement, as enunciated in *Bagley*, "requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678. Notably, the Supreme Court has recently suggested that, in considering materiality under *Brady*, courts should consider whether the undisclosed evidence would lead to a different result, including a hung jury. *See Turner v. United States*, 137 S. Ct. 1885, 1898 (J. Kagan, dissenting (stating that all members of the Court, including the majority and the dissent, "agree on the legal standard by which to assess the materiality of undisclosed evidence for purposes of applying the constitutional rule: Courts are to ask whether there is a "reasonable probability" that disclosure of the evidence would have led to a different outcome—*i.e.*, an acquittal or hung jury rather than a conviction").

As discussed above, after the prosecution informed the defense that the victim had been diagnosed with mental health issues, the defense filed a pre-trial discovery demand seeking medical, psychiatric, and related records of the victim and asked the trial court to require the People to disclose all of her mental health records. The trial court ordered the People to obtain the mental health records and submit them to the court for *in camera* review.[2] Docket No. 35-1 (SEALED) at 213. At a subsequent hearing held on November 4, 2009, the court indicated that it had reviewed the documents and "indicated anything that would relate to her fabricating, misperceiving, delusional, anything in that regard [the court] would turn over." Docket No. 35-1 (SEALED) at 215. The court further stated, "beyond that I was not aware of any authority to just

[2] The record before this Court indicates that the records the court reviewed *in camera*, with the exception of those ultimately disclosed to the defense, were lost or destroyed prior to the state court appeal. Docket No. 35-1 (SEALED) at 27 n.2. Appellate counsel moved for the record to be re-created, and the county court re-subpoenaed the providers and collected the mental health records. *Id.* Two providers were not able to be located or subpoenaed. *Id.* With the exception of those records, the parties believed that the records submitted to the Appellate Division and the Court of Appeals on direct appeal included all documents the county court reviewed prior to trial. *Id.*

turn over psychiatric records with regard to mood disorder, other things and I invite you to refer me to any cases that would show a contrary result." *Id.* at 15-16.[3] On December 17, 2009, the court submitted to defense counsel "copies of medical records . . . that are pertinent to this case." Docket No. 35-1 (SEALED) at 192. The disclosure totaled 28 pages of medical records[4] from the thousands of pages submitted for review. Docket No. 35 (SEALED) at 431-50; Docket 35-1 (SEALED) at 1-8.

The record does not indicate that any expert witness for either party testified as to the complainant's mental health history or regarding the possible significance of her diagnoses or the medications she took on her memory or possible reasons why her testimony might be suspect.[5]

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[3] Although not part of the trial transcript, correspondence between the parties and the court, which is part of the record before this Court, indicates that, at a subsequent hearing on or about November 13, 2009, the court indicated that it would "turn over all of the subpoenaed records to [defense counsel] for [his] examination and consultation with one or more experts, if deemed necessary." Docket No. 35-1 (SEALED) at 188. The People "strongly oppose[d] the release of any mental health or medical records of the victim in this case unless they indicate[d] the victim has a propensity to hallucinate and/or fabricate events." *Id.* at 190. As aforementioned, the record indicates that the court released only a portion of the subpoenaed medical records. *Id.* at 192. The record does not reflect that McCray followed up on the issue of counsel reviewing the medical records with one or more expert mental health professionals, nor does it include any further proceedings in which McCray modified his demand for all records or sought to specify areas of concern. If defense counsel consulted with a mental health expert, there is no record evidence. Generally, where an attorney consults with an expert but does not plan to call the expert as a witness, there is no requirement that the consultation be disclosed.

[4] The Appellate Division dissenters noted that, of the 28 pages of records disclosed, some are undated and the source or author unidentified. *McCray*, 958 N.Y.S.2d at 524 n.2 (McCarthy, J., dissenting). It does not appear that defense counsel complained to County Court about this or sought further information.

[5] In his counseled post-trial motion to vacate the judgment alleging ineffective assistance of trial counsel, McCray alleged that the prosecution presented the testimony of Janice Ceccucci, an expert witness, who testified, "in sum and substance, to [the complainant's] credibility gaps. Upon information and belief, Ms. Ceccucci was allowed to ruminate on [the

On direct appeal, the New York Appellate Division issued a divided opinion concluding that, after review of the records, "the court provided an appropriate sample of documents that covers all of the victim's relevant and material mental health issues." *McCray*, 958 N.Y.S.2d at 518. As the majority opinion noted, "[t]he dissent, in performing its review of the victim's mental health records, . . . unearthed some documents that were not disclosed to [McCray] and are relevant to the victim's competence to testify, in particular, references to short-term memory loss, such as her inability to recall events after she has had a temper tantrum, and a suggestion that she forgets good experiences with a person if they are succeeded by a negative experience." *Id.* at 518. The majority concluded that the documents identified in the dissent would have had "limited impact . . . when compared to the amount of material that was disclosed," *id.* at 519, were "redundant in light of those records that were disclosed," *id.*, and contained evidence that would have been inadmissible, *id.* at 520.

The last reasoned decision in this case was by the New York Court of Appeals. *McCray*, 12 N.E.3d at 1079. It is this decision which we may review. *Ylst*, 501 U.S. at 804. As we have seen, this Court may only provide McCray relief if that court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

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complainant's] condition, at various times bolstering her testimony and explaining away its deficiencies." Docket No. 35-3 (SEALED) at 21. The record reflects, however, that Ms. Ceccucci, a nurse with forensic training who was tasked with interviewing and examining rape victims, did not testify as to the complainant's mental health history but instead was offered to "explain why a sexual assault victim may not have vaginal or other internal injuries." Docket No. 35-5 (SEALED) at 312. When Ceccucci testified that she did not perform the sexual assault exam on the complainant and had "never even looked at th[e] victim," defense counsel objected, and the court did not allow the proffered testimony. *Id.* at 312-13. The doctor who administered the sexual assault exam did, however, testify and address the significance of the absence of vaginal or internal injuries. Consequently, no expert testified regarding the possible impact the complainant's mental health history might have had on her credibility.

Supreme Court of the United States, or was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The Court of Appeals' decision was not contrary to established Federal law. The Court of Appeals correctly identified applicable law as centered in *Brady* [6]and its progeny. *See McCray*, 12 N.E.3d at 1081-82. The Court of Appeals did not confront a set of facts that were materially indistinguishable from a decision of the Supreme Court but nevertheless arrived at a different result. There is no decision of the Supreme Court that has facts that are materially indistinguishable from this case. The closest case on the facts is *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).[7]

The question before this Court, therefore, is whether the New York Court of Appeals' ultimate determination in this case—that the medical records which were not disclosed were not material under *Brady* and thus their non-disclosure was not prejudicial—constituted an

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[6] As aforementioned, the leading case is *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (establishing that a defendant is entitled to discover information under the control of the prosecution that is favorable to his defense either to help avoid conviction or, if convicted, lead to a favorable sentence). The prosecution must consider a case prospectively and assure that favorable evidence that might in retrospect be material to an unfavorable result is disclosed. *See Coppa*, 267 F.3d at 143.

[7] In *Ritchie*, the Court considered and rejected the Supreme Court of Pennsylvania's decision that, in a case like this, a defendant was entitled to have his attorney review all of a complaining witness's confidential records, with an advocate's eye, to see if there might be information relevant to exculpation or the impeachment of adverse witnesses. 480 U.S. at 51-56. The *Ritchie* court held that the defendant was entitled to have the trial court review the records *in camera* to determine whether relevant information was available, but was not entitled to conduct a fishing expedition through the complaining witness' records himself. *Id.* at 57-58. County court followed this procedure. No Supreme Court decision reaches the next step and determines whether, after an *in camera* review, the trial court committed federal error in limiting the information disclosed. On this point, we must look to more general discussions in Supreme Court opinions addressing unrelated facts. Of course, the more general the rules we are applying, the more leeway the state court has in reaching a "reasonable" application. *Renico v. Lett*, 559 U.S. 766, 776 (2010).

unreasonable application of Supreme Court principles or relied upon an unreasonable determination of the facts.[8] While the members of the Court of Appeals discussed how individual documents might have affected McCray's jury, it is clear that the court understood that the entire record must be considered, and the judges discussed the totality of the record among themselves and viewed individual documents in context. In considering the reasonableness of the state court's conclusion, this Court has, like the Appellate Division and the Court of Appeals, conducted an independent *in camera* review of the undisclosed records to assess their value, particularly as they might lend support to the impeachment of the complaining witness.[9]

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[8] *Brady* contains its own prejudicial error determination. *Mack v. Conway*, 476 F. App'x 873, 876 (2d Cir. 2012) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)) ("To establish a *Brady* violation, a petitioner must show that (1) the undisclosed evidence was favorable to him; (2) the evidence was in the state's possession and was suppressed, even if inadvertently; and (3) the defendant was prejudiced as a result of the failure to disclose."). Under these principles, a *Brady* violation occurs only where there is a "reasonable probability" that a different verdict would have resulted from disclosure of the information that the defendant claims was suppressed. *Strickler*, 527 U.S. at 281. That is, "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678.

The materiality question is a mixed question of fact and law. *See, e.g.*, *United States v. Payne*, 63 F.3d 1200, 1209 (2d Cir. 1995) (quoting *United States v. Rivalta*, 925 F.2d 596, 598 (2d Cir.1991)). The Court must predict what impact the information contained in the records not disclosed would have on a hypothetical jury as a basis for estimating how the information would have impacted McCray's jury and then exercise legal judgment and determine how that impact would have affected the outcome, if at all. *See, e.g.*, *Fuentes v. Griffin*, 829 F.3d 233, 249-52 (2d Cir. 2016).

[9] This Court has paid particular attention to items that were identified by the reviewing courts, particularly the dissents, which were not provided to McCray but which individual judges believed should have been disclosed. Also, this Court has found one document not mentioned by either appellate court but that it considers important and which is discussed hereafter.

Before addressing that issue, it is necessary to address some preliminary questions. First, as we have seen, this Court may not review pure questions of state law. The dissent identified two areas in which New York state law might differ from Federal law in being more protective of McCray's rights. Federal law provides the minimum protections to which McCray is entitled, but New York law, and particularly New York constitutional law, may provide greater protection.[10] The two areas identified by the dissenters are, first, whether the Confrontation Clause adds additional protection to the defendant's rights under *Brady*. The Court of Appeals rejected this contention and limited its analysis to *Brady*.[11]

The second issue on which the dissenters argued that New York state law was more favorable to defendants concerned the standard for determining when information was "material" under *Brady*. In federal court, materiality is determined under *Giglio v. United States*, 405 U.S. 150, 154 (1972), and requires disclosure of information that is favorable to the accused on the issues of conviction or sentence and might as a reasonable probability undermine confidence in the result. The dissenters point out that New York has rejected the "reasonably probable" statement of the rule in *Giglio* and adopted a "reasonably possible" statement. *See People v. Vilardi*, 555 N.E.2d 915, 920 (N.Y. 1990). The majority agreed with the dissenters on this point.

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[10] State courts must give criminal defendants at least the protection afforded by the United States Constitution, but may allow under their own state Constitutions greater protection. *McGrath v. Toys "R" Us, Inc.*, 356 F.3d 246, 250 (2d Cir. 2004) ("State courts are not bound to interpret state laws in accordance with federal interpretations of analogous federal statutes . . . .").

[11] In *Ritchie*, the Court, over dissent by two justices and a concurring justice, held that, in cases like this, the Confrontation Clause does not adds additional protections to pre-trial discovery. 480 U.S. at 54. The *McCray* dissenters noted that many state courts have rejected this limitation and followed the *Ritchie* dissenters under their respective state constitutions. *McCray*, 12 N.E.2d at 1085 (Rivera, J., dissenting). They wished to reach this result under the New York constitution. *Id.*

After careful consideration of these two issues, I am not convinced that federal law and New York law, as envisioned by the dissenters, should make a difference in this case.[12] It is impossible to quantify the distinction between a reasonable probability and a reasonable possibility.[13]

The county court indicated which possible records it considered "material" and provided to defense counsel those which it concluded met its test. The Appellate Division and the Court of Appeals each reviewed all of the medical records and respectively addressed additional items

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[12] In theory, confidential mental health records may appear analytically different from other evidence which is under Government control and subject to *Brady* disclosure requirements because neither the prosecutor nor law enforcement generally have control over or access to such records. If *Brady* did not apply to confidential records, then the Confrontation Clause might offer access to a defendant where his attorney proceeded directly to subpoening a non-law enforcement government custodian.

The Court of Appeals, however, held that *Brady* does apply. *McCray*, at 1081. This complies with current federal law. *See Fuentes*, 829 F.3d at 247 (2d Cir. 2016) (holding that any confidential information that might lead the defendant to discover material impeaching evidence would be covered by *Brady*). Thus, it is difficult to see how a consideration of the Confrontation Clause could have given McCray anything that *Brady* would not. As Justice Blackmun concluded in concurring in *Ritchie* to make a five justice majority, the *Brady* duty of disclosure recognized in *Ritchie* is ongoing and therefore particularly relevant to potential matters of impeachment which might not be shown to be material until late in the trial after prosecution witnesses had testified. *Ritchie*, 480 U.S. at 65-66 (J. Blackmun, concurring). Justice Blackmun therefore concluded that the *Ritchie* procedure of an *in camera* review by the trial court would uncover anything governed by the Confrontation Clause. *Id.*

[13] There is no way to prove that any undisclosed evidence, if disclosed, would have affected the outcome (this is a conditional contra factual question). We are not permitted to empanel a number of mock juries and test them. What is required is for each judge or justice to consider the entire record, both the evidence actually considered by the jury and the evidence that might have been considered if *Brady* was fully satisfied, and then, on the basis of all of the judge's knowledge, both academic and experiential, each judge should make a judgment as to whether his or her confidence in the outcome is undermined. The only relevant difference is that, in the state Court of Appeals, each judge considers the matter individually and exercises independent judgment and, in the U.S. District Court, the judge must determine whether, on the record, a "reasonable" judge could have reached the state court result.

that each court found arguably favorable to the accused and relevant, but about which the majority and the dissent ultimately disagreed regarding materiality.

For purposes of determining whether the New York Court of Appeals properly applied *Brady* to the complaining witness's medical records, all of the records will be divided into four categories: 1) those documents disclosed to the defense; 2) those documents amplifying the complaining witness's past memory problems that were not disclosed; 3) information regarding a claim the complaining witness made when she was 13 years old that her father had sexually molested her; and 4) a nurse's note not mentioned by any state judge indicating that the complaining witness had "confabulated" stories about staff.

CATEGORY ONE

The Court of Appeals addressed foundationally all of the mental health information about the complaining witness that was known to defense counsel and the jury:

> The records that were disclosed showed, and the jury was informed at trial, that the complainant had very significant mental health problems. Her diagnoses, as summarized in her own testimony, included "Bipolar, Tourettes, post-traumatic stress disorder, epilepsy." It was also brought out that she suffered from attention deficit disorder and hyper sexuality; that she had reported that she "visualized" or 'sense[d] the presence of" dead people; that she had cut her flesh with sharp objects; that her bipolar disorder caused her "on occasion" to be "explosive and angry" and to "physically strike out at people"; that at the time of the incident she was taking medications, was receiving treatment from a mental health facility, and was also seeing a counselor weekly or biweekly; that she failed "once in a while" to take her medications, and that on the night of the alleged rape she could not remember whether she had taken them that day; that, after the alleged rape and before the trial, she had been hospitalized for an overdose of drugs; and that that was not her first suicide attempt, though she said it was her first "serious" one.

McCray, 12 N.E.3d at 1080-81.

CATEGORY TWO

The Court of Appeals explained its reasons for concluding that the Category 2 information was not material as follows:

> It is hard to imagine . . . a juror who could attribute the complainant's testimony here—a claim of rape, made immediately after what [McCray] testified was consensual sex followed by a dispute over payment—to a failure of recollection or a misunderstanding, however susceptible to those failings the complainant may have been. She certainly did not fantasize or misremember that she and [McCray] had a violent encounter: they both had the wounds to prove it. And their descriptions of that encounter are so starkly different that if one version is not a lie, the other must be. With one possible exception, which we discuss below, there is nothing in the undisclosed records suggesting that the complainant had a tendency to make accusations she knew to be false.

Id.

CATEGORY THREE

Category 3 refers to a discussion in the complaining witness' mental health records about a disclosure made by the complaining witness to a health professional when she was 13 of an alleged incident of sexual abuse by her father. The record indicates that the complainant's mother denied that such abuse had occurred and the treating professionals discounted it.[14] Under New York law, a pattern of false accusations of sexual assault by a complaining witness may be admissible in evidence. *See People v. Gifford*, 720 N.Y.S.2d 876, 877 (N.Y. App. Div. 2001) (under New York law, a defendant seeking to cross-examine a victim about an alleged unrelated false accusation against another person is required to demonstrate "both that the accusation was 'indeed false' and that the accusation was 'such as to suggest a pattern casting substantial doubt on the validity of the charges made by the victim in this instance'" (citations omitted)). Defense

[14] It should be noted that, at about the same time, claims of physical abuse were investigated and apparently confirmed.

counsel did know that the complaining witness had alleged in the past, apparently to treating health workers, three past cases of sexual assault, none of which is discussed further in the record. *See McCray*, 12 N.E.3d at 1081-83. With the exception of her claim against her father, which her mother and her counselors discounted, nothing in the records suggests that the complaints were untrue. The Court of Appeals considered the complaining witness's statements regarding sexual abuse by her father the strongest basis for defendant's argument on appeal. *Id.* The court noted that the record reflected that the allegation was unfounded without further explanation. *Id.*

The court concluded that the complaining witness's sexual experiences other than with her father were the kind of thing the defense and the jury would infer from the knowledge that she was hypersexual, and therefore were of only marginal relevance to the case. *Id.* The Court considered the claim against her father the most troubling but ultimately considered it not material, reasoning that it occurred in 2004 and was quite different from her claim against McCray:

> It is an accusation of abuse by a family member, made not in a 911 call immediately after the event, but in the course of treatment by mental health professionals. And even if the accusation was not true, nothing in the records indicates that the complainant fabricated it, rather than misinterpreted or imagined something her father had done. It is, as we have said, almost impossible that a jury could think the complainant's accusation in this case to be an honest but mistaken one, as the accusation against her father may have been.

Id. at 1083.

CATEGORY FOUR

Category 4 contains an undisclosed November 20, 2006, Patient Care Activity Report with a handwritten notation indicating that the complainant "confabulat[ed] stories about staff."

Confabulate has been defined as "fill[ing] in gaps in the memory with detailed accounts of fictitious events believed true by the narrator." WEBSTER'S NEW WORLD DICTIONARY 291 (3d ed. 1984). Other definitions offered in the literature are similar:

> the fabrication of experiences or situations, often recounted in a detailed and plausible way to fill in and cover up gaps in the memory. The phenomenon occurs principally as a defense mechanism and is most commonly seen in alcoholics, especially those who have Korsakoff's psychosis, and persons with head injuries or lead poisoning. Also called fabrication.

MOSBY'S MEDICAL, NURSING, AND ALLIED HEALTH DICTIONARY 292 (Walter D. Glanze et al. eds., 3d ed. 1990). Another secondary source defines confabulation as "[t]he filling of memory gaps with detailed stories of imaginary experiences; may result from organic disorders that affect intellectual functioning." ATTORNEY'S ILLUSTRATED MEDICAL DICTIONARY (Ida G. Dox et al. eds., 1997). The medical dictionaries and the Diagnostic and Statistical Manual of Mental Disorders[15] thus indicate that confabulation refers to a type of false memory or fabrication made without the conscious intention to deceive.[16]

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[15] *American Psychiatric Association*, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) (the "DSM-V"). The Second Circuit has recognized the DSM as "an objective authority on the subject of mental disorders." *Fuentes*, 829 F.3d at 249 (quoting *Fuller v. J.P. Morgan Chase & Co.*, 423 F.3d 104, 107 (2d Cir. 2005)).

[16] Many of the definitions treat "confabulation" and "fabrication" as synonymous. *See* Susan M. Chlebowski, M.D., et al., *Confabulation: A Bridge Between Neurology and Psychiatry?*, PSYCHIATRIC TIMES (May 27, 2009), http://www.psychiatrictimes.com/cognitive-disorders/confabulation-bridge-between-neurology-and-psychiatry (explaining that "confabulation has been variously described as a falsification of memory in association with an organically derived amnesia, an extreme form of lying or deception, and 'honest lying'" (footnotes omitted)). Fabricate is defined as "1. to make build, construct, etc., esp. by assembling parts; manufacture; 2. to make up (a story, reason, lie, etc.); invent." WEBSTER'S NEW WORLD DICTIONARY 484 (3d ed. 1984). Where confronted with a question about a matter, a person questioned, even if not suffering from a major mental illness, may fill gaps in the memory with imagined facts. Dr. Elizabeth Loftus discusses "Maleability of Memory:"

> When we try to remember something that happened to us, these sorts of

The Court of Appeals' opinion makes no mention of this document, and it is not clear whether any of the state court judges came across it in their review of the undisclosed documents. Notably, the word appears in what seems to be a short nursing note rather than in a detailed report following a psychological evaluation, and thus it is not entirely clear whether the author was using "confabulation" as a term of art as it is defined above. Nor is it clear what the writer was describing by the reference to "stories about staff."[17] It is possible that the New York judges simply overlooked this item, which would be understandable in reviewing thousands of nurse's notes. More likely, the judges, both those in the majority and those in the dissent, considered it unimportant. Confabulation is most often associated with people suffering from Korsakoff's syndrome, which is not among the diagnoses given to the complaining witness. More important, confabulated statements are generally not consciously false. In this case, the majority's reason for finding no error in failing to disclose other documents relating to memory problems would apply. The complaining witness made a prompt outcry, a centuries' old mark of

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> "constructive" errors are common. We can usually recall a few facts that probably happened. We make inferences. From these probable inferences, we are lead to other "false facts" that might—or might not—have been true. . . . This process of using inferences and probable facts to fill in the gaps in our memories has been called "refabrication," and it probably occurs in nearly all of our everyday perceptions. We supply these bits and pieces, largely unconsciously, to round out fairly incomplete knowledge.

ELIZABETH LOFTUS, MEMORY: SUPRISING NEW INSIGHTS INTO HOW WE REMEMBER AND WHY WE FORGET 40 (1980). Dr. Loftus's discussion shows the relation between "confabulation" and "fabrication," whether by the mentally ill or ordinary folks in constructing "facts" to fill in gaps in memory. A fabrication, while a construction, in context is not necessarily a conscious deception.

[17] Importantly, the note does not indicate that the complainant confabulated stories accusing staff of sexual assault. If that were the case, the document would surely qualify as material information under *Brady*.

credibility, and the discrepancies between the two descriptions of their interaction were impossible to dismiss as an innocent misrecollection. One of them had to be lying.

Importantly, this Court does not view each non-disclosed document in isolation; rather, it must assess the materiality of the withheld documents and the possibility that their disclosure would have affected the verdict in this case "in light of the totality of the circumstances." *Bagley*, 473 U.S. at 683. Thus, in determining the materiality of the suppressed evidence, the Court must consider the cumulative effect of all non-disclosed evidence rather than consider each item of evidence individually. *Kyles*, 514 U.S. at 440-41. It was not unreasonable for the Court of Appeal to conclude that the disclosed records provided an "appropriate sample" and sufficient information for the defense to narrow the request to specific areas of concern or consult with a mental health expert regarding the possible significance on her memory of her diagnoses or the medications she took or possible reasons why her testimony might be suspect.[18] *Compare Fuentes*, 289 F.3d at 253 (disclosure of complainant's psychiatric record would have provided defense counsel the only means to seek an expert opinion with regard to the record's indication of other significant mental health symptoms).

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[18] Notably, the record indicates that, after trial, McCray filed a counseled motion to set aside the verdict pursuant to New York Criminal Procedure Law ("CPL") § 330.30(1) in which he alleged that trial counsel was ineffective for failing to investigate false allegations of sexual assault made by the complaining witness. Docket No. 35-1 (SEALED) at 14. In his *pro se* Petition, McCray likewise alleged in relevant part that counsel was ineffective for failing to investigate the facts of the case. But as this Court noted in rejecting McCray's ineffective assistance claim in the initial memorandum decision, McCray made only vague and conclusory allegations in support of his claim, which were insufficient to warrant granting habeas relief, and did not specifically allege that counsel was deficient with respect to his handling of the request for the complainant's medical records. Docket No. 46 at 24-25; *McCray*, 2017 WL 3836054, at *12.

It is likewise worth noting that there existed a single notation of confabulation in records totaling over 5500 pages and spanning over 5 years of treatment. It is certainly true, as Judge McCarthy recognized in his dissenting opinion in the Appellate Division, that "[t]he question here is not whether County Court should have permitted the defense to enter certain documents into evidence or ask the victim about certain topics at trial, but whether the court should have provided [McCray] certain records that would have allowed the defense to investigate information contained therein to determine if admissible evidence could be gathered or proper questions could be formulated." *McCray*, 958 N.Y.S. 2d at 524 (McCarthy, J., dissenting); *cf. Fuentes*, 829 F.3d at 249-50 (noting that "timely disclosure of [psychiatric record] would have provided defense counsel with an opportunity to seek an expert opinion with regard to the [record's] indication of other significant symptoms, in order to establish reasonable doubt in the minds of the jurors because of [the complainant's] pre-disposition toward emotional instability and retaliation"). But again, the record does not disclose what, if any, investigation the defense undertook regarding the impact her disclosed diagnoses had on her behavior. The Court of Appeals could well reasonably conclude that further information would not have triggered an investigation that the information supplied did not trigger. *Cf. Fuentes*, 829 F.3d at 258 (Wesley, C.J., dissenting) (citing *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (per curiam) (reversing Ninth Circuit's grant of habeas relief on *Brady* claim "based on mere speculation" that suppressed polygraph results "might have led respondent's counsel to conduct additional discovery that might have led to some additional evidence that could have been utilized")).

As the majority in the Appellate Division recognized, the universe of undisclosed documents additionally contain "references to short-term memory loss, such as her inability to

recall events after she has had a temper tantrum, and a suggestion that she forgets good experiences with a person if they are succeeded by a negative experience," *McCray*, 958 N.Y.S.2d at 518, which were not presented to the jury.[19] McCray could argue that the document indicating that the complainant had confabulated stories about staff, when viewed in conjunction with those other undisclosed documents that bear on her capacity to testify as required by *Kyles*, 541 U.S. at 440-41, might show a pattern. But, this Court must remain mindful of its obligations under AEDPA deferential review. *See Richter*, 562 U.S. at 102 (criticizing the Ninth Circuit for "treat[ing] the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review" and reiterating "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable").

This case differs from those in which circuit courts determined that a witness's withheld mental health records and evaluations were deemed sufficiently material to warrant habeas relief. In those cases, the defense was unaware of the witness's mental health issues or the withheld documents revealed information previously unknown or not otherwise discoverable upon further investigation. *See Fuentes*, 829 F.3d at 252 ("In sum, the suppressed psychiatric record provided the only evidence with which the defense could have impeached G.C. as to her mental state and explained why she might have fabricated a claim of rape."); *Browning*, 717 F.3d at 1106, 1108 (holding that evidence of the prosecution's "indispensible" witness's mental health diagnosis, which the trial court withheld in its entirety after conducting an *in camera* review, was material because the reports indicated that the witness had a tendency to "blur reality and fantasy and

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[19] Notably, an incident where the complainant was found wandering on a highway and not able to remember how she got there was mentioned in one of the documents that were disclosed. Docket No. 35 (SEALED) at 431 (SR 429).

project blame onto others"); *Gonzalez v. Wong*, 667 F.3d 965, 982-84 (9th Cir. 2011) (holding witness's psychiatric reports, unearthed after trial, to be material where they implicated his "competency to perceive accurately and testify truthfully"); *Wilson v. Beard*, 589 F.3d 651, 665-66 (3d Cir. 2009); *Bailey v. Rae*, 339 F.3d 1107, 1116 (9th Cir. 2003) (therapy reports on a developmentally disabled victim's ability to understand consent produced after trial provided "[u]nique and relevant evidence" that could not "be characterized as cumulative"). Here, the 28 pages from the complaining witness's mental health records put McCray on notice of her diagnoses and significant insight into how those diagnoses affected her past behavior. Despite this knowledge, it is not clear that defense counsel consulted a mental health expert, or if counsel consulted an expert, what resulted from that consultation. Accordingly, it cannot be said that the Court of Appeals' determination that the withheld documents were not material was unreasonable or contrary to *Brady* or its progeny.

C. Docket 67 (Petitioner's *Pro Se* Supplemental Filing)

At Docket No. 67, counsel for McCray filed on his behalf a letter that the Court construes as a motion to submit a late-filed reply brief in support of the Petition for a Writ of Habeas Corpus. In this submission, McCray avers for the first time that the trial prosecutor in his case urged his mother to encourage McCray to plea guilty to a misdemeanor offense prior to trial and indicated that the State would be willing to remove the sex offender registration requirement should McCray enter a guilty plea. Docket No. 67 at 5-6.

The Court declines to consider the submission at Docket No. 67. The record reflects that counsel for McCray filed a reply memorandum on McCray's behalf on April 20, 2018. McCray filed his own *pro se* submission on April 27, 2018. McCray's submission is both untimely and

outside the scope of permissible briefing. Moreover, the proposed reply raises a new claim not argued in the Petition and apparently not raised before the state courts. The Court will not consider such claim because a traverse or reply is not the proper pleading in which to raise additional grounds for habeas relief, particularly one that has not been fully exhausted. *Parker v. Smith*, 858 F. Supp. 2d 229, 233 (N.D.N.Y. 2012). The motion at Docket No. 67 must therefore be denied.

V. CONCLUSION

The Court of Appeals stressed that the complaining witness's prompt outcry, which resulted in the police taking her statement within hours of the event, coupled with McCray's testimony that the two fought but over the complainant's demand for money not the sexual activity, created a dispute that could not have been the product of mistake or faulty memory. Nothing in the medical records concealed was exculpatory. The complaining witness was under the care of mental health professionals at the time of the incident. Her statements at the hospital about the incident were disclosed to McCray and used at his trial to cross examine her. *See McCray*, 958 N.Y.S.2d at 517-18. McCray's *Brady* claim rests entirely on the contention that additional information from her mental health records would have helped with his attempts to impeach her, either by suggesting additional questions he might have asked her or appropriate areas for investigation. Yet McCray's testimony is that she consented to sex but wished financial compensation. Nothing in her records discloses that she ever engaged in prostitution. She testified that she did not reject McCray, which is also indicated by her admitted actions. She further testified that she declined intercourse at that moment because "it was too soon in

their relationship." *McCray*, 958 N.Y.S.2d at 515-16. Her history is consistent with her desires to have a boyfriend and a lasting relationship.

In determining whether the absence of additional information from the complaining witness's mental health records in this case would have led reasonable judges to lack confidence in the result, we must recognize that, regarding the central issue, the complaining witness and McCray told such specific stories that one of them must have been lying and McCray was seriously impeached. The trial transcript indicates that the trial court allowed the prosecution to impeach McCray's credibility with a number of convictions relating to crimes of dishonesty, but kept out a number of crimes of borderline admissibility. *See* Docket No. 35-5 (SEALED) at 22-26.

The positions of the dissenters in the Appellate Division and in the Court of Appeals were not "unreasonable;" a change of one vote in McCray's favor in either court would have given him a victory. But the reasonableness of the dissenters is not the issue. Having carefully reviewed the record it is clear that the Court of Appeals did not act unreasonably in finding that McCray had not shown that he was denied "material" information relevant to the complaining witness's credibility. This Court cannot say that no reasonable judge would have reached the conclusion that the Court of Appeals reached in this case.

IT IS THEREFORE ORDERED THAT the Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus is **DENIED**.

IT IS FURTHER ORDERED THAT the motion at Docket No. 67 is **DENIED**.

IT IS FURTHER ORDERED THAT the Court grants a Certificate of Appealability solely with respect to McCray's claim that the non-disclosure of the complainant's medical

records violated *Brady* (Ground 4). 28 U.S.C. § 2253(c); *Banks v. Dretke*, 540 U.S. 668, 705 (2004) ("To obtain a certificate of appealability, a prisoner must 'demonstrat[e] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" (quoting *Miller-El*, 537 U.S. at 327)). Any further request to expand the Certificate of Appealability must be addressed to the Court of Appeals. *See* FED. R. APP. P. 22(b); 2D CIR. R. 22.1.

IT IS FURTHER ORDERED THAT the appointment of counsel shall continue for purposes of any appeal. If counsel wishes to decline the appointment on appeal, he should file a withdrawal request with the Court. Otherwise, counsel should confer with McCray for the purposes of filing an appeal.

The Clerk of Court is to enter judgment accordingly.

Dated: July 24, 2018.

/s/ James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
Senior United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of September, two thousand twenty-two.

Terence Sandy McCray,

Petitioner - Appellant,

v.

Michael Capra, Superintendent, Sing Sing Correctional Facility,

Respondent - Appellee.

ORDER

Docket No: 18-2336

Appellant, Terence Sandy McCray, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk