QUESTIONS PRESENTED

1. Was There Insufficient Evidence to Support the Jury's Verdict?

2. Did the Lower Court Err by Failing to Hold an Inquiry, as Required by New York CPL § 60.20(2), Prior to Accepting the Unsworn Testimony of a Three-Year-Old Witness?

3. Did the Lower Court Impose an Excessively Harsh Sentence?

STATEMENT OF FACTS

I. Background and Incident

During May of 2020, Kenneth Reed ("Reed") was living with his then girlfriend Ashlee Manell ("Manell"), her daughter and son from a prior relationship, Brinleigh Manell ("Brinleigh") and Blake Manell ("Blake"), as well as Reed's son from a prior relationship – Axel Reed ("Axel") (R: 661–63).

At that time, Brinleigh was two years old, Blake was four years old, and Axel was five years old. *Id*. The five of them lived in a two-story house in Washington County, New York. *Id*. The house had one bedroom downstairs and two bedrooms upstairs. *Id.* at 666. The two upstairs bedrooms were "right across from each other." *Id.* During that time period, Reed, Axel, and Manell slept together in one bed within one of the upstairs bedrooms, while in the adjacent upstairs bedroom Blake slept in a toddler's bed and Brinleigh slept in a crib. *Id.* at 667.

On May 29, 2020, Manell brought Brinleigh and Blake to her cousin Lisa Mannell's house for babysitting. *Id.* at 716. Later that day, Manell picked the two children up and brought them back home, and eventually put Blake and Brinleigh to bed herself. *Id.* at 718. At that point, Manell went into the other bedroom and texted Reed, who was downstairs, to "initiat[e] having sex." *Id.* at 722. Following

this unprotected sexual intercourse, whereby Reed ejaculated inside of Manell, Manell went directly to sleep and Reed went back downstairs. *Id.* Shortly thereafter, Reed brought his son Axel up to their bedroom, where the two of them then fell asleep as well. *Id.*

Sometime later that evening and into the early morning hours of May 30, 2020, Manell heard a "whining cry" coming from Brinleigh and went into the second bedroom where she observed Reed next to Brinleigh's crib. *Id.* at 725. Manell then removed Brinleigh from her crib and ultimately brought her to a bathroom and observed blood near the edge of Brinleigh's diaper. *Id.* at 729. While Brinleigh did not indicate that she was in any pain at that point in time, Manell phoned an on-call nurse and ultimately decided to bring Brinleigh to the emergency room. *Id.* at 731, 733, 735.

II. Immediate Investigation

On that same date, Manell received a phone call from Lieutenant Gregory Danio ("Lt. Danio") from the Washington County Sheriff's Office. *Id.* at 742. Lt. Danio had first been notified of the matter from a child protective services ("CPS") worker. *Id.* at 486. Shortly after this notification, Lt. Danio retrieved a "SANE" kit containing evidence related to Brinleigh's visit to the hospital, as well as evidence bags containing Brinleigh's pajamas and pull up diaper that she had

been wearing when brought there. *Id.* at 505. Back at the police station, Lt. Danio then took a "deposition" of Manell while Brinleigh and Blake remained present in the same room. *Id.* at 512. Lt. Danio then designated Reed as a "suspect" and continued with his investigation. *Id.* at 492. A day later, on May 31, 2020, Lt. Danio went to Reed's residence. *Id.* While speaking briefly on Reed's front porch, Lt. Danio noted that Reed "went from polite, agitated, to almost upset, crying." *Id.* at 497.

A few days later, on June 3, 2020, Manell also brought Brinleigh to the CARE Center located in Glens Falls, which Lt. Danio facilitated and was also present at. *Id.* at 519; 744. Members from the local district attorney's office and a CPS worker were also present. *Id.* at 520. Shy Watters, an employee with CPS, questioned Brinleigh by herself, while Lt. Danio and the others remained in another room, observing the interview by video camera. *Id.* at 521. The interview itself was not recorded. *Id.* at 522. While he met with Manell approximately five times throughout the investigation, the June 3, 2020 CARE Center meeting was the *only time* Lt. Danio had met with Brinleigh. *Id.* at 531–32. Manell and Brinleigh ultimately met with the district attorney's office "a lot of times" since the night the incident had taken place. *Id.* at 744.

On August 6, 2021, Lt. Danio obtained DNA from Reed, which was then

sent to a lab for testing. *Id.* at 498. On September 1, 2020, an arrest warrant was issued for Reed, who was apprehended shortly thereafter. *Id.* at 501, 536.

III. Trial

Trial commenced on May 3, 2021. As part of their direct case, the People called law enforcement, medical experts, and civilian witnesses. As a part of their own case, the defense called Reed as well as other witnesses.

A. *Voir Dire and Opening Statements*

During voir dire, the Court made clear that everyone would be required to wear a mask throughout trial except the testifying witnesses. *Id.* at 5; 23. The Court also informed the parties that the jurors would be "surrounding" the parties at trial. *Id.* at 6; 440.

In their opening statement, the People stated that on May 29, 2020, Manell put her daughter Brinleigh to bed at around 7:00 p.m. *Id.* at 357. At that time, Manell did not observe Brinleigh to have any tears, blood, or signs of discomfort. *Id.* According to the People, at around 4:00 a.m. on May 30, 2020, Manell woke up to Brinleigh crying, and upon walking into Brinleigh's bedroom, observed Reed standing next to her crib. *Id.* at 358. Manell walked into the bedroom and asked Brinleigh if her arm was stuck or if she was attempting to take her "sleeper" off, which her daughter had done in the past. *Id.* Manell then brought Brinleigh to

the bathroom and observed blood "in the pullup" and eventually put a new one on her. *Id.* at 359. Shortly thereafter, Manell elected to take Brinleigh to a nearby hospital where she was observed by Doctor Brian Nelson and eventually by Sexual Assault Nurse Examiners ("SANE"). Brinleigh was then observed to have a "centimeter tear" on her posterior fourchette. *Id.* During this initial observation, DNA swabs were also taken from various areas of Brinleigh's body as well as from her pull-up. *Id.* at 361. The People added that "[u]nfortunately, there was not enough DNA present on the swab for comparison, on the vulva swab, the vaginal swab, and the crotch cutting of the diaper non-sperm fraction. But there was enough on the perianal swab and the sperm fraction swab from the crotch cutting of two-year-old Brinleigh Manell's pull-up." *Id.* at 363 (adding that the DNA tested was "a match for the Defendant").

Lastly, the People included that a few days after the incident, Brinleigh was seen again by a medical professional who "for the first time noted an abrasion to her hymen." *Id.* Based on the evidence, the People stated that "somewhere" during night of May 29, 2020, Reed had sexual intercourse with Brinleigh, and also inserted his fingers into her vagina, thereby causing injury. *Id.*

The defense opened by alluding to "poor police investigation, sloppy work done by a Sexual Assault Nurse Examiner and misleading DNA analysis, not to

mention the countless times this suggestible child had been questioned about what happened, none of which was ever recorded." *Id.* at 364. Defense counsel continued that everything had been "normal" between Reed, Manell, and the children prior to this incident, and that "there was nothing unusual" about Reed helping the child at her crib given the fact that Brinleigh "often undressed herself when she got hot at night." *Id.* at 365. The defense then pointed to a rushed conclusion at the hospital as well as the police's failure to retrieve and test Brinleigh's *original* pull-up that she had been wearing when the incident had allegedly occurred. *Id.* at 366.

B. ***Expert and Medical Witnesses***

The People's first witness was Doctor Brian Nelson ("Dr. Nelson"), who testified that on May 30, 2020, he observed two-year-old Brinleigh. *Id.* at 370–71. Brinleigh was not crying nor was she in any acute distress when he met with her. *Id.* at 387. Brinleigh, despite being "very interactive" with Dr. Nelson, "wouldn't really respond or give [him] any sort of information as to what happened." *Id.* at 371. Dr. Nelson observed Brinleigh to have a "cut, or a laceration" – one centimeter in length – on the bottom of her vagina, part of which extended "into the vaginal canal." *Id.* at 372–73; 392. Brinleigh did not have any bruising at that time (*id.*), nor was there any active bleeding during his observation. *Id.* at 391.

Dr. Nelson, who was "taught to have a high index of suspicion for any sort of injury," then alerted the on-call Sexual Assault Nurse Examiner. *Id.* at 373. Dr. Nelson did this despite the fact that Manell stated to Dr. Nelson that she did not believe that this was the result of a sexual assault. *Id.* at 388. Dr. Nelson also stated that he was familiar with straddle injuries, which is an injury to the area between the legs, but that he did not believe Brinleigh's injury was a straddle. *Id.* at 374. Dr. Nelson also stated that he did not "think" Brinleigh's injury could have been caused by Brinleigh herself due to the amount of force necessary to cause it. *Id.*

Lori Carte ("Carte"), a SANE nurse, testified that a SANE kit is a box that contains 15 envelopes, each of which contains a swab delegated for a specific area of one's body, but that using all 15 may not be necessary depending on the circumstances of the victim's injuries. *Id.* at 401–02. On May 30, 2020, Carte observed Brinleigh after "there was concern" of an assault. *Id.* at 403.

When Carte arrived, Brinleigh was "cheerful," happy, and calm." *Id.* at 404–05; 431. Carte then began to converse with Brinleigh, *asking her open-ended questions, to which Brinleigh did not provide any response*. *Id.* at 405. Carte then proceeded to ask Brinleigh leading questions, despite the fact that she would not "typically" do so and despite knowing that this technique may persuade a child to

provide certain answers. *Id.* at 432. Specifically, Carte asked Brinleigh if Reed ever "place[d] his hands" on her during playtime. *Id.* at 433. *Prior to this question, Brinleigh had not made any mention of Reed putting his hands on her*. *Id.* In response to this questioning, Brinleigh eventually stated to Carte that "Ken *touched* my pee pee, and it hurt." *Id.* at 405 (emphasis supplied). Brinleigh did not state where or when this took place, and did not provide any more details other than the above-referenced statement. *Id.* at 434.

Only after this statement did Carte then elect to examine Brinleigh (*id.* at 433–34), at which time she observed the same tear that Dr. Nelson had seen. Carte also observed some bruising on Brinleigh's knees and shins. *Id.* at 406. As it pertained to Brinleigh's genital area, Carte took the following DNA swabs: 1) labia majora, also known as the outer fatty lips or vulva swab, 2) inner labia minora, also known as the inner lips or vaginal swab, and 3) the perianal area, also known as the opening of the anus. *Id.* at 409–12. Carte also collected Brinleigh's diaper and her one-piece pajama sleeper and placed them into separate bags. *Id.* at 419; 452. The diaper collected was not the original one Brinleigh had been wearing during the night of the incident, but rather the one that Manell changed her into prior to bringing her to the hospital. *Id.* at 518.

Carte also informed the jury that Brinleigh used the term "pee-pee" for

female genitalia. *Id.* at 421. When asked specifically what her word for male genitalia is, Brinleigh also stated "my brother, pee pee." *Id.* Carte acknowledged that in cases where straddle injury is present, it can also be consistent for sexual assault injury. *Id.* at 443. Carte did not use a flouresecent light to look for semen on Brinleigh because she did not feel as if Brinleigh would tolerate that. *Id.* at 456.

Nadia Giumarra ("Giumarra"), a nurse at Glens Falls Hospital, saw Brinleigh on June 3, 2020. *Id.* at 470. Giumarra observed an abrasian to Brinleigh's hymen, which, she testified, possibly occurred after May 30, 2020 or which could have been missed during the May 30 examination. *Id.* at 471–72. Giumarra did not take pictures of this injury, and confirmed that this injury had not been included on notes from the May 30 examination. *Id.* at 473, 479. Giumarra also confirmed that a straddle injury can cause hymen abrasians, can cause tearing and bleeding to genital area, and that bruising from an injury such as straddle can take a period of time to develop. *Id.* at 480–81.

Stacy Rack ("Rack"), a serologist and DNA analyst with the state police testified that she became involved in Brinleigh's case and was primarily responsible for testing and examining the SANE kit evidence as well as Brinleigh's diaper. *Id.* at 550. Rack acknowledged that she had been previously

disciplined by her agency after they confirmed that she had cheated on an outside vendor training program and then lied when originally investigated and confronted. *Id.* at 546–49. Rack also noted that the evidence bag she received had "red and clear tape," which is "indicative of being additionally sealed in the evidence section. Or, that tape was put on in the evidence section of our lab." *Id.* at 553. Rack agreed that this "additional piece" of tape would be there due to "some type of tear or hole in the bag." *Id.* at 581. Rack noted that a chain of custody for this evidence would usually be included, but in this case, it was not. *Id.* at 563.

Regarding the SANE kit evidence, Rack examined the vulva swab, the vaginal swab, and the perianal swab taken from Brinleigh. *Id.* at 555. Rack then tested for "spermatozoa," more commonly known as sperm. In order to do so, she had to separate DNA cells into a portion that would potentially contain male sperm versus a portion that would only contain female cells and male non-sperm cells. *Id.* at 556. *Concerning the vulva, vaginal, and perianal swabs, Rack did not identify any sperm to be present*. *Id.* at 585.

Rack did not do any testing with regard to Brinleigh's pajama set. *Id.* at 564. With regard to the diaper swabs, Rack stated that she observed the presence of *two* sperm heads. *Id.* at 557; 568. Rack also swabbed the inside crotch area of

the diaper as well as two cuttings from the top layer. *Id.* at 567; 583. Rack "believe[d]" the side of the diaper was positive for blood, and she also preserved the lining of the diaper for DNA analysis. *Id.* Lastly, Rack used a "prime scope," which is a tool that illuminates biological fluids – including semen – on different surfaces. *Id.* at 569. Rack reported that she used the tool on the areas of the diaper which she swabbed and that *nothing had illuminated* when doing so. *Id. Rack did not test for seminal fluid*. *Id.*

Amanda Pease ("Pease"), who works with the Forensic Investigation Center, testified that she became involved in this matter as a DNA analyst and conducted testing as it pertained to DNA samples taken from Brinleigh and Reed. *Id.* at 603; 608. Pease testified that male DNA had been found on the vulva swabs, vaginal swabs, and on the crotch of the pull-up, non-sperm fractions, yet those samples were not suitable for comparison. *Id.* at 609; 611. Pease conceded that despite advancements in technology to amplify very small samples of DNA otherwise not suitable for comparison, the amounts here were still insufficient to perform such a technique. *Id.* at 627.

Pease did testify that the perianal swabs and the swab of the crotch of the pull-up had male sperm suitable for comparison. *Id.* at 610. Pease conducted this analysis and concluded that "Reed and his biological paternal relatives can be

included as possible contributors of DNA to these profiles. The probability of selecting a male with a haplotype profile developed [from these areas] is one in 24,639." *Id.* at 614. Pease conceded that "also as possible contributors would be an unknown number of unknown male donors." *Id.* at 624. Pease further testified that transfer DNA is a mechanism whereby DNA may be deposited onto a surface and then transferred from that surface to another area by a second individual, as opposed to the primary individual who had first left the DNA. *Id.* at 629–30.

C. *Law Enforcement*

Lieutenant Gregory Danio from the Washington County Sheriff's Office testfied that on May 30, 2020 he was notified of a "child abuse case" from an on-call Child Protective Services worker. Id. at 485–86. On that date, Lt. Danio also picked up the SANE kit which contained evidence related to Brinleigh's hospital visit, including DNA swabs taken from her and from her diaper. *Id.* Sometime later, Lt. Danio sent these materials to a lab for testing. *Id.*

On May 30, 2020, Lt. Danio also took a "deposition" from Manell while her two children – Brinleigh and Blake – remained present in the interview room. *Id.* at 509–10; 512. Following this interview, Lt. Danio deemed Reed to be a suspect and continued his investigation. *Id.* at 491–92. The following day, on May 31, 2020, Lt. Danio briefly interviewed Reed at his residence. *Id.*

On June 3, 2020, Brinleigh was brought to a child "CARE" center where Lt. Danio and others arranged for her to be interviewed. *Id.* at 519–21. Shy Watters, a social and clinical worker, interviewed Brinleigh in a room while Lt. Danio and two prosecutors observed *via* video camera – albeit, the interview was not recorded. *Id.* As such, during Lt. Danio's trial testimony, defense counsel attempted to ask him about the form of questioning Brinleigh faced, particularly whether or not the questions were leading in nature. *Id.* at 524–525. After first sustaining an objection, the court allowed defense counsel to ask Lt. Danio about interviewing techniques in general, in which he agreed that leading questions were inappropriate for children because children are "impressionable." *Id.* at 529–30. When asked more specifically about whether or not Brinleigh was interviewed with leading questions, Lt. Danio, reading from his notes related to the interview, replied that he did not "personally remember any leading questions being asked. But that is not a true transcript of what transpired." *Id.* at 530. Defense counsel then sought clarification of this response, but the Court denied further inquiry. *Id.*

Other than the June 3, 2020 interview observation, Lt. Danio never met with Brinleigh, though he did meet with Manell over five times. *Id.* at 531–32. Later in the summer, on August 6, 2020, Lt. Danio collected a DNA sample from Reed which was also sent to a lab for testing and comparison. *Id.* at 499–500.

Sometime thereafter, Lt. Danio spoke with a prosecutor and eventually applied for an arrest warrant once he and the prosecutor "discussed the findings of the lab results." *Id.* at 537. Lt. Danio also testified that he became aware that there had been a change in the victim's story between the initial incident date and the time he arrested Reed. *Id.* at 540.

Jackie Szova ("Szova"), a social services worker, testified that she and Lt. Danio spoke with Manell on May 30, 2020, and that she also accompanied Lt. Danio to speak with Reed the following day. *Id.* at 592–94.

D. *Civilian Witnesses*

Lisa Manell ("Lisa"), Ashlee Manell's relative, testified that on May 29, 2020, she babysat Brinleigh and Blake at her house. *Id.* at 636.

Brinleigh Manell – two years old during the incident and three years old during the trial – testified without taking an oath *and* without first being questioned directly by the lower court. *Id.* at 647. Brinleigh initially testified that she "liked" Reed and then twice stated that she did not recall anything that happened with him. *Id.* at 647–48. Brinleigh was then asked if she went to the doctor the last time that she had seen Reed, to which she nodded her head yes. *Id.* When asked what happened, Brinleigh then stated that Reed "hurted" her, but that she did not know where he had hurt her. *Id.* at 648–49. The People asked

Brinleigh again if she recalled where he had hurt her, to which Brinleigh again replied: "I don't know." *Id.* at 649. Brinleigh then testified that she has a "pee pee" but that she *never* hurt it. *Id.* at 651. On cross-examination, Brinleigh stated that she did not know when her birthday was. *Id.* at 652.

Ashlee Manell testified that during May of 2020 she was living in a house with Reed, Reed's son Axel (five-years-old), Blake (three-years-old), and Brinleigh (two-years-old). *Id.* at 662–63. The home had three bedrooms, with two of those being upstairs. *Id.* at 666. The upstairs bedrooms were "right across from each other" (*id.*), and Manell, Reed, and Axel slept in one of the upstairs bedrooms while Brinleigh and Blake slept in the adjacent one. *Id.* at 667. Manell testified that Brinleigh would take off her pajamas at night sometimes, but could not remember if she also removed her diaper. *Id.* at 670. Brinleigh would also cry at night on ocassion, and either Manell or Reed would go into her room to get her. *Id.* at 671.

On May 29, 2020, Manell picked up Brinleigh and Blake from Lisa's house and brought them home. *Id.* at 674. That evening, Brinleigh took a bath with Axel and Blake, which lasted for about thirty minutes. *Id.* at 675; 720. Following the bath, Manell put Brinleigh in a pull-up diaper and then into her pajamas. *Id.* Manell then put Blake and Brinleigh to bed, and left the door open as usual so that

she could hear them. *Id.* at 676–677; 721. Manell and Reed then had unprotected sex, and Reed ejaculated inside of Manell. *Id.* at 677. Manell fell right asleep and Reed went downstairs. *Id.* at 678.

Manell next recalled waking up to Brinleigh crying. *Id.* Manell then walked into Brinleigh's bedroom and observed Reed, fully clothed, who told Manell that he was putting Brinleigh's arm back into her pajamas. *Id.* at 678; 725. Reed did not appear nervous at this time. *Id.* at 735. Manell proceeded to bring Brinleigh to the bathroom and observed blood on her pull-up which she let Reed know about, to which Reed responded: "What ... could it be from a UTI." *Id.* at 678. Manell testified that Brinleigh "could have done it," and that it continued to hurt Brinleigh as she urinated. *Id.* at 679. Manell threw the diaper that Brinleigh had been wearing during the incident into the garbage and put a fresh diaper on her. *Id.* at 680.

Manell then elected to bring Brinleigh to the hospital. *Id.* at 683. Prior to leaving, Reed put Brinleigh in a car seat while Manell gathered some items from the house. *Id.* at 738–39. During this time, Brinleigh was not acting weird around Reed. *Id.* Once at the hospital, one of the doctors had asked Brinleigh if she knew what happened, to which Brinleigh responded, "I don't know." *Id.* at 685. Upon leaving the hospital, Manell went back to the house to grab whatever items she

could, and then eventually spoke with law enforcement. *Id.* at 686. After this conversation Manell knew with "one hundred percent certainty" what had happened to Brinleigh. *Id.* at 687.

On the ride out to the hospital, Brinleigh stated to Manell that, "Ken was going to kick my ass." *Id.* at 683. Sometime thereafter, Manell texted Reed about this, to which Reed responded: "Oh, that's sweet. I love her. She smiles and laughs with me and says shit like that." *Id.* at 691. Manell testified that, outside of this occasion, Brinleigh had also said something similar to her previously. *Id.*

Manell "[d]efinitely" did not suspect Reed of abusing children prior to this incident, and he was not acting in an unusual manner at all leading up to the incident. *Id.* at 713–14. Prior to May 30, 2020, Manell had been texting with another individual and expressed concern about her two kids touching each other's private parts. *Id.* Manell had even personally observed Blake and Brinleigh "exploring with each other" in their private parts. *Id.* at 751. Manell also expressed concern previously about Brinleigh coming home from her father's house with a bad diaper rash. *Id.* at 716.

E. *Defense Case*

Once the People rested their direct case, the defense called Kenneth Reed. Reed confirmed that on the evening of May 29, 2020, Manell initiated unprotected

sex with him after she had put Brinleigh and Blake to bed. *Id.* at 772–73. Reed testified that from his own bedroom he was able to see Blake's bed in the other room, which in turn was right next to Brinleigh's crib. *Id.* at 775.

In the early morning hours of May 30, 2020, Reed heard Brinleigh "fussing" in her crib and then observed her to be "half in and half out of her onesie, which was normal." *Id.* at 775. Manell entered the room about three-to-five seconds after Reed did. *Id.* at 776. Shortly thereafter, Manell took Brinleigh downstairs and eventually notified Reed that she had observed blood on her. *Id.* at 777–78. Reed helped Manell get Brinleigh ready for the hospital. *Id.* Reed brought Brinleigh out to the car and Brinleigh told Reed she loved him. *Id.* at 779.

On the evening of May 30, 2020, Reed, who had been out for most of the day, recognized that the childrens' toothbrushes were missing from the bathroom, which made Reed feel "terrible." *Id.* at 783. On May 31, 2020, Lt. Danio and a social worker visited Reed. *Id.* A few days after that, Manell messaged Reed for the first time and relayed to him the allegations. *Id.* at 786. Reed concluded his direct examination by testifying that he never touched Brinleigh's vagina and "would never hurt that little girl. I loved her absolutely." *Id.* On cross-examination, Reed stated that it was not out of the ordinary for Brinleigh to say that people were going to "kick her ass," and that on prior occasion she had said, "Lisa

is going to kick my ass, she said that daddy slapped my mouth, she said mommy kicked my butt and she had said that I kicked her ass." *Id.* at 792.

The defense also called Allison Reed, Kenneth's ex-wife and Axel's mother. On May 30, 2020, Reed dropped Axel off to Allison, and, according to her, Reed seemed "happy." *Id.* at 802. The defense also called Shy Watters, the social worker with the CARE Center. On June 18, 2020, Watters received a referral regarding the incident with Brinleigh. *Id.* at 808.

The defense next called Tristan Wristen ("Wristen"), an independent nurse examiner who at the time of the trial had been working primarily in New Jersey. *Id.* at 812. Wristen specialized in forensic nursing with a particular focus on sexual assault cases, and was licensed through the Board of New Jersey as a forensic nurse certified in sexual assaults. *Id.* at 814.

Wristen reviewed the case file as it related to Brinleigh and the associated medical records, and observed one of the photographs which depicted the one centimeter laceration to her vaginal area. *Id.* at 821. Wristen deemed the laceration to be "pretty significant" given its size and location, and concluded that "it would have been likely to cause a decent amount of bleeding" had the tear been recent. *Id.* at 825. However, in comparing the photographs of Brinleigh's diaper, and in it the relatively minor amount of blood, Wristen believed that the injury was not as

recent but rather could have happened hours prior to when diaper was observed to have blood on it. *Id.* at 826. Observing the laceration type and locaton itself, Wristen concluded that these were not consistent with penetration. *Id.* at 833. Rather, based on the location of the laceration and the redness surrounding the area, as well as the abrasion, Wristen concluded that Brinleigh's injuries were consistent with that of a straddle injury as opposed to a sexual assault penetration. *Id.* at 833; 835.

Lastly, the defense called Allison Eastman ("Eastman"), a self-employed Forensic DNA consultant. Eastman discussed the differences between "autosomal" DNA testing and Y-STR DNA testing. *Id.* at 870. Primarily, Eastman confirmed that with Y-STR DNA testing, an identification of an individual is impossible because all males within a lineage – father, son, grandfather, and so on – will have the same Y chromosome. *Id.* Furthermore, there could be other individuals in the world population that share the same Y-STR profile outside of that particular paternal family lineage, and hence other possible contributors can not be eliminated when conducting DNA analysis through Y-STR. *Id.* at 871. Eastman also reviewed the DNA report which was generated by the People's experts, and confirmed that "in this case, there's the possibility of 1 in 24,639 individuals having that same profile [as Reed]. So, the match significance is certainly less than

if it was autosomal." *Id.* at 873. Eastman concluded this point by stating that a match through Y-STR is "not an identification, because ... all of the paternal relatives are going to have the same profile. And an unknown number of individuals in the world or whatever population you are talking about may also have the same DNA profile." *Id.* at 874.

Eastman would also typically expect to see transfer DNA between individuals residing in the same home due to laundering clothes together, hugging, and sleeping together. *Id.* at 875. Eastman further testified that the "sperm fraction" from the pull-up swab contained "twice as much female DNA ... as there was male DNA." *Id.* at 877. Eastman included that even the male DNA found within the sperm fraction "could have been just male DNA from non-sperm cells that was carried down into that fractions." *Id.* Eastman further noted that humans shed 300,000 to 400,000 cells a day, but that *only seven* body cells were found in the sperm-fraction extract. *Id.* at 878. Eastman concluded that this incredibly low number of cells would indicate that the DNA likely was deposited on that surface due to a secondary transfer. *Id.* Eastman also reiterated that seminal fluid was not tested for within the two sperm heads identified, and that the florescent light did not reveal any seminal fluid either. *Id.* at 880. Eastman also stated that the average human adult male has 200 to 300 million sperm cells per ejaculation. *Id.* at 881.

IV. Motion to Dismiss

Following the close of the defense's case, counsel renewed her motion to dismiss previously made at the close of the People's case. *Id.* at 895. Prior to then ruling, the Court first noted that it *did not* reserve it's decision "nonchalantly." *Id.* at 900. The Court continued:

> I gave this a lot of thought over a lot of time. I think at the end of the day I'm going to deny the motion. I think viewing the proof in the light most favorable to the People, particularly as to Count 1, *however meager*, I think the proof satisfied the prima facie case.

Id. (emphasis supplied).

V. Summations and Charges

On summation, defense counsel argued that the evidence established that Reed stood falsely accused of sexually assaulting Brinleigh primarily due to sloppy police work and a misleading DNA analysis. *Id.* at 904. Defense counsel also pointed out that Manell had testified to observing Blake and Brinleigh exploring each other's private parts. *Id.* at 906.

Turning to the night of the incident, defense counsel reminded the jury that Reed woke up to Brinleigh "whining," and that he was fully dressed and calm when Manell walked into the adjacent bedroom only seconds later. *Id.* at 908. Counsel reminded the jury that Brinleigh would sometimes undress herself at

night. *Id.* Upon bringing Brinleigh downstairs, Manell used the toilet *for the first time* since her and Reed had unprotected sex whereby Reed ejaculated inside of her. *Id.* Directly after this, Brinleigh proceeded to use the same toilet. *Id.*

Defense counsel next looked at the investigation, and pointed out that Brinleigh's very first response at the hospital when asked what had happened to her was, "I don't know." *Id.* at 912. Moreover, Manell initially stated that Brinleigh had not been sexually abused. *Id.* Lt. Danio did not collect any bedding, did not collect any articles of clothing or sheets from Reed, *did not collect the original diaper Brinleigh had been wearing during the incident*, and did not collect any finger scrapings from Reed despite interviewing him within twelve hours of the incident. *Id.* at 917. Counsel also harped on the text messages in which Reed and Manell specifically discussed certain prior issues with Brinleigh's genital area, and specifically that such issues came about after she spent time with her father. *Id.* at 911. Defense counsel then spent time reviewing the DNA, reiterating to the jury that an identification could not be made through Y-STR analysis, and that many more sperm cells would have been found on Brinleigh had Reed ejaculated onto her. *Id.* at 918–22.

Defense counsel concluded by urging the jury to consider the many unknowns in this case and the many alternatives as to how this injury to Brinleigh

could have come about other than Reed – a successful businessman who had just had sex with his adult girlfriend – assaulting Brinleigh while the rest of the family slept in the same and adjacent bedrooms. *Id.* at 924.

The People argued that this case required to jury to "think about the possibility of a 34-year-old man inserting his penis inside of a 2-year-old" and to "think about a 34-year-old man inserting his fingers inside of a 2-year-old." *Id.* at 925–26. The People focused on Brinleigh's lack of pain, discomfort, or injury during May 29, 2020.

Concerning the night of the incident, the People brought up Reed's trial testimony in which he stated that Manell was in Brinleigh's bedroom only seconds after he entered, and compared it to the fact that "the Defendant, while this case was pending ... never said it to CPS" during his initial interview, nor did he state it to Lt. Danio during the investigation. *Id.* at 926; 929. Turning to the fresh diaper that was put on Brinleigh, the People inferred that the only way Reed's semen could have ended up on it was by his "ejaculate" seeping out of Brinleigh during the ride to the hospital. *Id.* at 930. And as to the DNA, primarily addressing the defense's contention that only two sperm heads were found, the People urged that this was a "lie" – to this statement, the Court sustained an objection. *Id.* at 934–44.

The People concluded by urging the jury to use the "inferences" touched on – namely that semen "seep[ed]" out of Brinleigh – to find that Reed had inserted his penis into Brinleigh. *Id.* at 939. The People also pointed to Brinleigh's injury, "which we all know is there," to urge the jury to find that Reed had put his finger into Brinleigh's vagina. *Id.* at 940. The People stated that it is not individuals in a "windowless van" who sexually abused minors, but rather it is "the people who have the trust of the child, the trust of the child's family, they are the ones that do these things." *Id.* at 947.

Following summations, the court instructed the jury as to the charges. Count One (Predatory Sexual Assault Against a Child) required the jury to find that Reed engaged in sexual intercourse with Brinleigh. Count Two (Aggravated Sexual Abuse in the Second Degree) required the jury to find Reed inserted his finger into Brinleigh's vagina. Count Three (Sexual Abuse in the First Degree) required the jury to find that Reed touched Brinleigh's vagina. Finally, Count Four (Endangering the Welfare of a Child) required the jury to find that Reed knowingly acted in a manner likely to be injurious to the physical, mental, or moral welfare of Brinleigh.

Lastly, the court read to the jury two special instructions as it related to this case. *First*, the court instructed the jury that Reed may not be convicted of an

offense solely upon the unsworn testimony but rather, in order to convict, the jury must find that Brinleigh's testimony was *truthful and accurate and that it was supported by other evidence* which tends to establish that the offense was committed. *Second*, and only as to Count One, the court instructed the jury that Reed's guilt may be proven by circumstantial evidence if such evidence gives rise to an inference of guilt beyond a reasonable doubt.

VI. Verdict and Sentence

On May 11, 2021, the jury reached a verdict. As to count one, Reed was found not guilty. As to counts two, three, and four, Reed was found guilty. *Id.* at 999–1000.

On June 10, 2021, Reed appeared for sentencing once a pre-sentence report had been circulated. Both the People and the defense also submitted sentencing memorandums. *Id.* at 1006. A victim impact statement was then read by Ashlee Manell. *Id.* at 1006–1007. The court confirmed that: count two carried a determinate sentence within the range of three-and-a-half to fifteen years, with five to fifteen years of post-release supervision, count three carried a determinate sentence within the range of two to seven years, with three to ten years of post-release supervision, and count four carried up to one year of incarceration. *Id.* at 1008.

The People then argued that Reed "tore the genitals" of Brinleigh. *Id.* The prosecutor also stated that "we all heard" Brinleigh at trial "testifying as to how the Defendant 'hurted her.'" *Id.* at 1009. The People asked for the maximum incarceration and maximum post-release supervision as to each count. *Id.* at 1011–1012.

The defense pointed to its sentencing memorandum, which included character letters, and emphasized that the defendant's only prior history was a reckless driving charge. *Id.* at 1013. Defense counsel also highlighted that Reed was a business owner and a father to his son, Axel. *Id.* Reed then made a statement in which he discussed his relationship with his son and the love he has for him. *Id.* at 1015–1016.

In its determination the court first stated that it had to "disregard" the character letters attached to Reed's brief, and that it likewise "can't consider a statement that is based on he would never do such a thing when he's been convicted." *Id.* at 1014–1015.

The court then stated that it was "amazed" that Reed made a statement "that it's all about you and your son, that you are a better person than everyone else." *Id.* at 1017. After a brief review of the evidence, the court then added: "And you believe I should be sympathetic to you and let you stay home so you can see your

son. I find that somewhat amazing that you accept no responsibility." *Id.* at 1018. The court sentenced Reed to the maximum incarceration as to counts two, three, and four (fifteen years, seven years, and one year, respectively), and the maximum post-release supervision for counts two and three (fifteen years and ten years, respectively). *Id.* at 1018. The Court ruled that the sentences would run concurrent.

ARGUMENT

I. There was Insufficient Evidence to Support the Jury's Verdict

There can be no question that the evidence offered at trial did not support Reed's conviction with respect to Aggravated Sexual Abuse in the Second Degree, Sex Abuse in the First Degree, and Endangering the Welfare of a Child. Instead, the evidence provided through Manell, Reed, Brinleigh, and the medical experts clearly outweighs the strongest evidence offered by the People through inconclusive DNA and Brinleigh's unrecorded and unreliable statement allegedly made in response to a leading question following the incident.

A. *Legal Standard*

Where a defendant argues that his conviction was contrary to the weight of the evidence at trial, an appellate court is obligated to perform a two-step analysis. This approach, articulated by the Court of Appeals, requires courts to first look at whether "based on all the credible evidence, a different finding would not have been unreasonable." *People v. Bleakley*, 69 N.Y.2d 490, 495 (1987). If a different conclusion by the fact-finder would have been reasonable, the reviewing court then "must weigh the probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony." *Id.* (internal quotations and citations omitted). If the appellate court concludes from

this analysis that the fact-finder has "failed to give the evidence the weight it should be accorded, then the appellate court may set aside a verdict." *Id.*

B. ***Analysis***

At the outset, it is imperative to recall that the jury acquitted Reed as to Count One, effectively discrediting the People's claim that Reed had inserted his penis into Brinleigh and ejaculated on or inside of her. Within this lens, therefore, the crucial inquiry becomes whether or not sufficient evidence existed to prove that Reed inserted his fingers into Brinleigh or touched Brinleigh's genitals.

i. *Pertinent Civilian Witnesses*

In this light and as set forth above, the analysis must first focus on the civilian witness testimony. Of course, Manell herself was unable to testify to anything remotely related to Reed touching Brinleigh near her genitals, as she merely observed, upon walking into Brinleigh's room, Reed standing fully clothed next to her crib. Manell also testified that Brinleigh had been fully clothed in her pajamas, at least up to her arm area (R: 678). Importantly, Manell also stated at the emergency room that she had no reason to believe that Brinleigh had been abused. *Id.* at 713–14. Notably, Manell also testified that prior to the incident, she had to reprimand both Brinleigh and Blake when she observed them to be "exploring" with each other's private parts. *Id.* at 751. On the other hand, Reed

testified that he had heard a whining noise coming from Brinleigh's room, and walked in to assist her with her arm only seconds before Manell appeared in the bedroom as well.

ii. *Brinleigh's Testimony*

Hence, the crucial testimony – and the only potential countervailing evidence from a civilian witness standpoint – is from Brinleigh herself. We respectfully submit that Brinleigh's entire testimony be regarded with skepticism.[1] To be sure, Brinleigh, two-years-old at the time of the incident and three-years-old during the trial, testified as an unsworn witness, with her testimony itself encompassing a total of six pages of trial transcript. When initially asked about Reed, Brinleigh agreed that she "liked" him. *Id.* at 648. The following exchange then took place:

> Q: And what happened with Ken?
> A: *I don't know*.
> Q: You don't know, you don't know what happened with Ken?
> A: *Yeah*.
>
> ***
>
> Q: All right. Did you have to go to the doctor last time you saw him?

[1] Brinleigh's unsworn testimony was received by the lower court despite the court's failure to conduct *any form* of voir dire or pre-testimony questioning, as *mandated* by CPL § 60.20. Nor did Brinleigh's testimony contain any indication that she, as a three-year-old, possessed sufficient intelligence and capacity to testify, also required by statute. This reversible error is discussed in Part II, *infra*.

A: (Nodding yes).
Q: All right, what happened?
A: *He* hurted me.

***

Q: How did he hurt you? Or where did he hurt you[?]
A: Yup.
Q: Where?
A: *I don't know*.

***

Q: Do you remember where you got hurt?
A: (Nodding yes).
Q: Where did you get hurt?
A: *I don't know*.

Id. at 648–49 (emphasis supplied). Following this exchange, the People then again lead Brinleigh, asking her if she could identify her private parts, in which she indicated that she has a "pee pee." *Id.* at 650. Asked by the People if she ever hurt her "pee pee," Brinleigh indicated that *she had not*. *Id.* at 651.

As observed, until asked through leading questions, Brinleigh stated numerous times that she did not know what happened with Reed. At best, Brinleigh then stated that "*he*" hurt her, without ever identifying Reed nor providing any other testimony to connect Reed's actions with the reasoning behind her visit to the doctor. Moreover, Brinleigh was then unable to answer *where or how* Reed hurt her, and when asked specifically if she ever hurt her "pee pee," she shook her head that she had not.

While the defense conceded at trial that Brinleigh did in fact sustain some

form of injury, it was also brought out that Brinleigh had been around many other individuals – adults and children, both male and female – in the hours leading up to the discovery of her injury. It is undeniable that *nothing* in Brinleigh's testimony indicated that *Reed* had injured her or touched her vagina.

iii. *DNA and Medical Witness Testimony*

Pursuant to CPL § 60.20(3), Brinleigh's unsworn testimony must be accompanied by corroborating evidence in order for Reed's convictions to stand. Yet, the only potentially corroborating evidence that came even remotely close to support that Reed inserted his finger into Brinleigh and touched Brinleigh's vagina was from the DNA evidence.

The testimony and reports stemming from the DNA analysis, however, revealed that the People's strongest evidence was in fact relatively weak, flawed, and insufficient. To review, investigators took three swabs from Brinleigh's genital areas, none of which were taken from the "*inside* vaginal vault" due to her age. *Id.* at 413 (emphasis supplied). With regard to those three swabs, investigators did not identify *any* sperm cells to be present on Brinleigh. *Id.* at 585. Swabs were also taken from the diaper Manell put on Brinleigh prior to bringing her to the hospital, a different diaper than the one she had been wearing during the alleged assault. The diaper itself had first arrived at the lab in an

evidence bag with "red tape," which indicated that there had been "some type of tear or hole in the bag." *Id.* at 581. With regard to the diaper swabs, a total of two sperm heads were identified and tested against Reed's DNA, resulting in a "1 in 24,639" chance that "Reed and his biological paternal relatives" could be included as possible contributors. *Id.* at 557; 568; 614. Yet, it was also confirmed that, due to "Y-STR" testing, "also as possible contributors would be an *unknown number of unknown male donors*." *Id.* at 624 (emphasis supplied).

Given the above background, the only plausible connection between Reed's DNA and Brinleigh was found on the diaper that had been placed on her before traveling to the hospital. Significantly, prior to placing the diaper on Brinleigh, Manell took Brinleigh from her crib and went to the bathroom with her, where Manell then proceeded to use the toilet for the *very first time* following unprotected sexual intercourse with Reed earlier that evening, at which time Reed ejaculated inside of her.[2] Brinleigh then proceeded to use the *same* toilet, followed directly by Manell placing Brinleigh into the diaper which was later cut and tested. However, and most importantly, despite the People's theory that Reed's DNA then "seeped" out of Brinleigh's vagina and onto her diaper during

[2] Indeed, following the earlier intercourse, Manell did not use the toilet nor even wash her hands or body, instead falling asleep immediately thereafter (R: 678).

the car ride to the hospital, the jury flatly rejected this theory by acquitting Reed of Count One concerning sexual intercourse. *Id.* at 939. Given the acquittal, therefore, it is impossible to square away the argument that Reed's DNA had been found on Brinleigh's diaper due to sexual intercourse – rather, the *only* remaining possibility would be through transfer DNA. *Id.* at 875. Also notable is the fact that this specific DNA sample contained "twice as much female DNA ... as there was male DNA," further supporting that the DNA had in fact been transferred from Manell as opposed to from Reed himself. *Id.* at 877.

In turn, as it relates to the DNA analysis and medical "experts," the evidence is insufficient to support the claim that Reed had inserted his finger into Brinleigh's vagina (Count Two) or that he had even "touched" Brinleigh's vagina (Count Three). To reiterate, there were no swabs taken from the "inside" of Brinleigh's vagina, and the *only swab* from her body containing the trace of male DNA alluded to above was from the "perianal area," which is in fact located at the opening of the anus. *Id.* at 409–12; 610. The other two swabs from Brinleigh's genital areas – drawn from the inner and outer lips of the *vaginal area – did not reveal any* male DNA connected to Reed or his biological paternal relatives.

Accordingly, Brinleigh's unsworn testimony, that Reed "hurted her," was not sufficiently corroborated by DNA evidence. Rather, at most, the DNA

analysis revealed the presence of a male strain of DNA located on Brinleigh's new diaper and near her anus area, both of which, given the issues surrounding transfer DNA and Y-STR identification, do not support that Reed hurt Brinleigh nor that he inserted his finger into her.

Beyond the insufficient DNA, the *only other* evidence offered to corroborate Brinleigh's untrustworthy testimony is an equally unreliable statement allegedly made by her hours after the incident. Upon being brought to the hospital, Brinleigh was first observed by Doctor Nelson, at which time she was "very interactive," yet did not respond nor give him "any sort of information as to what happened" regarding the injury. *Id.* at 371. Sometime thereafter, Brinleigh was observed by Lori Carte, who asked Brinleigh open ended questions, to which Brinleigh did not provide *any* response. *Id.* at 405. At that point, Carte began asking *leading questions*, and asked Brinleigh if Reed ever placed his hands on her – prior to this question, Brinleigh *never mentioned* that Reed had done so. *Id.* at 433. Eventually, in response, Brinleigh allegedly stated that Reed "touched my pee pee, and it hurt." *Id.* at 405.[3] Brinleigh was unable to provide any other details outside of this lone statement. *Id.* at 433–34. It is respectfully submitted,

[3] Later in her testimony, despite any claim that she needed to do so, Carte was handed her report from Brinleigh's evaluation to refresh her recollection, in which she wrote that Brinleigh stated: "She said he put his finger in my pee pee, and it hurt" (R: 420).

therefore, that Brinleigh's response to Carte's leading questions – then introduced at trial as an unrecorded hearsay statement through an improper refresh – be viewed with skepticism, as young children are highly impressionable when faced with such methods. *Id.* at 432; 529; 646; *see also People v. Mudd*, 184 A.D.2d 388 (1st Dept 1992).

Yet, on the other hand, Brinleigh's impermissible trial testimony on its own supports, *at most*, that Reed had "hurted her," which in turn falls well short of testifying that he inserted his fingers into her or even touched her vagina, as required by Counts Two and Three. Rather than providing sufficient evidence, Brinleigh actually went on to state, twice, that she "did not know" where Reed hurt her, and further stated that she never hurt her "pee pee" (R: 648–51). Significantly, in addressing a weight of the evidence argument, "regardless of objections or exceptions," an "intermediate court is not precluded from taking into consideration the circumstance that illegal evidence was taken." *People v. Kelly*, 12 N.Y.2d 248, 250 (1963). Hence, pertaining to a weight of the evidence argument, this court is not precluded from considering the fact that, in addition to being completely unreliable, the People's crucial, damaging evidence by way of Brinleigh's testimony was also impermissibly admitted to begin with and should not even have been considered by the jury. *See also People v. Graham*, 20 A.D.2d

949 (3d Dept. 1964) ("[I]llegal evidence introduced upon the trial gave rise to substantial prejudice.... The absence of objection or exception does not vitiate our right, nor relieve us of what we conceive to be our clear duty to reverse for injustice so manifest and so substantial").

Assuming arguendo that Brinleigh's testimony was permissible, it did not, at all, provide sufficient evidence pertaining to counts two, three, or four. And, because the corroborating evidence put forth by the People was "not overwhelming," Reeds convictions must be reversed. *People v. Maldanado*, 199 A.D.2d 563, 564 (2d Dept. 1993) (reasoning further that "[i]t is well established that a person cannot be convicted of a crime solely on the testimony of an unsworn witness"); *see also People v. Rabens*, 275 A.D. 717 (2d Dept. 1949) ("The testimony of the complaining witness, a seven-year-old child, was not under oath and was not sufficiently supported by other evidence"); *cf. People v. Lowe*, 289 A.D.2d 705, 707 (3d Dept. 2001) ("abundance of evidence tending to connect defendant to the crime"); *People v. Groff*, 71 N.Y.2d 101, 108 (1987) (holding that corroborating evidence must "sufficiently harmonize" with the child's unsworn testimony – "the law requires that before unsworn statements can support a conviction they must be corroborated to *elevate their trustworthiness* to the level associated with sworn testimony") (emphasis supplied).

II. The Trial Court Erred by Failing to Hold an Inquiry, as Required by New York CPL § 60.20(2), Prior to Accepting the Unsworn Testimony of a Three-Year-Old Witness

At the critical juncture of the trial – Brinleigh Manell's testimony – the lower court committed reversible error by allowing three-year-old Brinleigh to testify without first conducting an inquiry to determine if she possessed "sufficient intelligence and capacity," as required by New York Criminal Procedure Law § 60.20(2).[4]

A. *Legal Standard*

Pursuant to CPL § 60.20(2),

> [a] witness less than nine years old may not testify under oath unless the court is satisfied that ... she understands the nature of an oath. If ... a witness is deemed to be ineligible to testify under oath, the witness may nevertheless be permitted to give unsworn evidence *if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof*. A witness understands the nature of an oath if he or she appreciates the difference between truth and falsehood, the necessity for telling the truth, and the fact that a witness who testifies falsely may be punished.

CPL § 60.20(2) (emphasis supplied).

Hence, as it relates to witnesses below the age of nine, trial judges are

[4] This issue, though not preserved on the record, is within this Court's discretion to reach and reverse Reed's convictions on in the interests of justice. *See* CPL § 470.15(6)(a).

required to first hold an inquiry in order to determine if that witness will be permitted to provide sworn testimony, permitted to provide unsworn testimony, or not be permitted to provide any testimony. Accordingly, CPL § 60.20(2) creates a "rebuttable presumption" that individuals below the age of nine are incompetent to testify, and may only provide sworn or unsworn testimony if deemed to satisfy the standards laid out by the statute.[5] *People v. Nissof*, 36 N.Y.2d 560, 565 (1975).

Commonly, this inquiry is held at a pretrial hearing or in a voir dire format outside the jury's presence, where the trial judge, and sometimes the attorneys, question a prospective witness. If satisfied that the witness, despite her age, understands and appreciates the nature of an oath, the court will then allow that witness to give *sworn* testimony. Even where the potential witness does not display a satisfactory understanding of an oath, the trial court may nonetheless still accept *unsworn* testimony from that witness *only if* it is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception of such evidence. This latter determination is made by the lower court based directly off the initial voir dire questions and answers concerning the witness's appreciation of

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[5] If permitted to provide unsworn testimony, the court must then instruct the jury as to "corroboration of unsworn witnesses." *See* CPL § 60.20(3). Indeed, the lower court here did in fact read this jury instruction, which in and of itself highlights that "[a] witness may be unsworn and give evidence *only for a reason* specified in CPL § 60.20(1) *and* (2), *and when that is permitted*, this charge should be given. *See* N.Y. Crim. Jury Instr. 2d Corroboration of Unsworn Witness, fn.1.

an oath, the witness's understanding of telling the truth versus telling a lie, and the consequences of thereof.

i. *Mandatory Inquiry*

As such, when the circumstances prescribed by CPL § 60.20(2) arise, some form of inquiry *must* be conducted outside of the jury's presence *prior* to the satisfaction of the court and reception of testimony from a witness under the age of nine.

In summarizing *People v. Klein*, 266 NY 188 (1935), the seminal Court of Appeals case on the topic, *People v. Zigles*, 119 Misc.2d 417 (Suffolk Co. Crim Ct. 1983), lays out the requirement neatly:

> Case Law provides ample explanation as to the *necessity of the voir dire* of such witnesses to demonstrate the requisite capacity and intelligence to justify the reception *of even unsworn testimony*; *This Court finds no authority, either in statute or case law, to disregard the voir dire examination requirement of an infant witness or to treat such testimony, when the requirement is overlooked, as unsworn testimony*.... [T]he Court of Appeals [has] held the *testimony of infant witnesses to be improperly received where said infants were not duly qualified by the trial court by proper preliminary examination*, to determine competency, before being sworn.

Id. at 421 (emphasis supplied); *see also People v. Scott*, 86 N.Y.2d 864, 865 (1995) ("The trial court did not abuse its discretion in permitting the four-year-old

victim to give unsworn testimony *after having conducted an inquiry outside the presence of the jury* and determining that the child understood the difference between a truth and a lie and was competent to testify") (emphasis supplied); *People v. Rivers*, 149 A.D.2d 544, 545 (1989) (prior to testimony, "the child was questioned by the court to determine her competence to testify *in accordance with* CPL § 60.20") (emphasis supplied); *Nisoff*, *supra*, at 566–67 (1975) (trial judge "followed the *strictures* of CPL § 60.20(2)" before receiving testimony) (emphasis supplied); *People v. Oyola*, 6 N.Y.2d 259, 263 (1959) ("presumption *must be* overcome by proper preliminary examination") (emphasis supplied); *People v. Paul*, 28 A.D.3d 833 (2d Dept. 2008) (unsworn testimony permitted where, "*after an inquiry*," lower court deemed underage witness to possess sufficient intelligence and capacity) (emphasis supplied); *People v. Richard*, 33 Misc.3d 855, 859 (Crim. Ct. Kings Co. 2011) ("There is no dispute that CPL Sec. 60.20(2) *imposes a duty* upon the Court to determine whether or not a witness is competent to testify") (emphasis supplied); *People v. Peppard*, 27 A.D.3d 1143 (4th Dept. 2006) ("voir dire was *not mandatory*" where victim above the age of nine); (emphasis supplied); *People v. Zeitz*, 148 A.D.3d 1636 (4th Dept. 2017) (same); *People v. Miller*, 295 A.D.2d 746 (3d Dept. 2002) ("County Court's determination to permit the victim's unsworn testimony, *made after extensive questioning of the*

victim outside the presence of the jury, is fully supported by the record") (emphasis supplied); *People v. Lowe*, 289 A.D.2d 705, 706–07 (3d Dept. 2001) (lower court allowed unsworn testimony after "detailed findings" were made following an "extensive voir dire of the victim" where "the People and defense counsel [also had] an opportunity to question her"); *People v. Snyder*, 289 A.D.2d 695, 696 (3d Dept. 2001) ("record reflect[ed] that the court *extensively questioned* the child victim and that she demonstrated an ability to discern the truth from a lie, thereby satisfying the court" that she possessed sufficient intelligence or capacity) (emphasis supplied).

ii. *Satisfaction of Standard*

It is not enough that the court merely conduct an inquiry, rather, the court must also determine that the standards prescribed by CPL § 60.20 were satisfied prior to allowing sworn or unsworn testimony – in the event they are not, the court must deny the witness's proposed testimony altogether.

> It is clear that, in the course of the pre-oath examination, the *court failed to elicit any evidence* that this child witness understood the consequences of giving false testimony under oath. There is no demonstration that the witness knew that perjury could result in criminal sanctions, or believed that there was a special moral duty to tell the truth while under oath. In short, there is no demonstration in this record that the *key witness* for the prosecution understood the nature of an oath.

People v. Ranum, 122 A.D.2d 959, 960 (2d Dept 1986) (emphasis supplied); *see also Nisoff*, *supra*, at 566–67 ("voir dire ... demonstrated that [witness] *undoubtedly possessed* the *requisite capacity and intelligence* to justify the reception of her unsworn testimony") (emphasis supplied); *People v. Bush*, 184 A.D.3d 1003, 1007 (3d Dept. 2020) ("The court's *extensive questioning* of the victim and the responses thereto demonstrate that the victim knew the difference between telling the truth and a lie, understood the significance of an oath to tell the truth and appreciated the consequences if he lied under oath") (emphasis supplied); *People v. Reyes*, 143 A.D.3d (1st Dept. 2016) ("child's responses ... at a hearing established that she sufficiently understood the difference between truth and falsity, the significance of a promise to tell the truth, and the wrongfulness and consequences of lying"); *People v. McGrady*, 45 A.D.3d 1395 (4th Dept. 2007) (lower court properly refused to allow five-year-old sister to testify "where there were ambiguities in witness's statements concerning her understanding of the difference between the truth and a lie"); *People v. Davis*, 304 A.D.2d 421 (1st Dept. 2003) (only unsworn testimony permitted where, "*although* [witness] knew the difference between the truth and a lie, the child lacked an understanding of the nature and consequences of an oath") (emphasis supplied); *People v. Johnson*, 292

A.D.2d 284 (1st Dept. 2002) (witness "demonstrated sufficient intelligence and capacity" – the witness "understood that it was wrong to lie, stated that he would not lie to help his mother and understood that he would be punished if he did lie"); *People v. Paramore*, 288 A.D2d 53, 54 (1st Dept. 2001) ("voir dire established that [witness] knew the difference between the truth and a lie and expected divine punishment if she lied"); *Snyder*, *supra*, at 696 (decision to allow unsworn testimony upheld where witness, who was "extensively questioned ... demonstrated an ability to discern the truth from a lie"); *Rivers*, *supra*, at 545 (appellate court "satisfied from ... review of the voir dire ... that the child ... demonstrated a degree of intelligence, comprehension, memory, logic and appropriateness sufficient to satisfy the statutory requirements"); *People v. Shepard*, 259 A.D.2d 775, 777 (3d Dept. 1999) ("responses given ... adequately demonstrated the victim's qualification to give sworn testimony at trial").

Beyond extensive questioning, courts have also given particular emphasis on how a child answers when faced specifically with leading questions – which are generally accepted to be persuasive and impressionable on a child witness. *See* 5/6/21 TR 646 ("[R]emember it's a child. You know, so you don't lead too much, try and not do that too much. Just take into consideration the age ..."); *Maldonado*, *supra*, at 563 (2d Dept. 1993) ("*although* [witness] *could differentiate*

between the truth and a lie we are not satisfied that *her perfunctory, one- word, or nonverbal responses* to the mostly leading questions demonstrate that she understood that there is a special moral duty to tell the truth while under oath") (emphasis supplied); *People v. Mudd*, 184 A.D.2d 388 (1st Dept 1992) (lower court erred "in permitting complaining witness to give sworn testimony concerning alleged sodomy where, prior to swearing witness, court asked only leading questions which elicited merely perfunctory answers").

B. *Analysis*

i. *Mandatory Inquiry*

It is undeniable that the lower court failed to follow the strictures set forth in CPL § 60.20 when faced with Brinleigh's proposed testimony. As a three-year-old witness, Brinleigh fell squarely within the protections and safeguards afforded to Reed by the statute, and thus it was "mandatory" for the court to first hold an inquiry outside of the jury's purview prior to receiving her testimony. *See Peppard*, *supra*, at 1143.

In *People v. Rose*, 223 A.D.2d 607, 608 (2d Dept. 1996), the appellate court reversed a defendant's convictions where the trial court allowed a five-year-old witness to give testimony without first holding an inquiry. *Despite the fact that*

the error was not preserved for appeal,[6] the appellate court nonetheless reached it "in the interests of justice" and concluded that,

> it is well established that [underaged] witnesses ... are presumptively incompetent to testify in criminal cases and the *presumption may only be rebutted by a proper preliminary examination of the witness*. *It was error* for the trial court in this case to permit the *unsworn* testimony of the five-year-old complainant *without first conducting a preliminary examination* to determine whether she understood the nature of an oath and could, therefore, offer sworn testimony or whether she possessed sufficient intelligence and capacity to justify the reception of unsworn testimony.

Id. (internal citations and quotations omitted) (emphasis supplied); *see also People v. Cortez*, 140 Misc.2d 267, 271–72 (Crim. Ct. Queens Co. 1988) (lower court noting that the government "appear[ed] to concede the *need to adhere* to CPL § 60.20," and concluding that an inquiry could be conducted in a variety of ways, "whether it be in an empty courtroom or an in-camera proceeding") (emphasis supplied); *Zigles, supra*, at 420 ("This Court finds no authority, either in statute or case law, to disregard the voir dire examination requirement of an infant witness .... [T]he testimony of infant witnesses [is] improperly received where said infants were not duly qualified by the trial court by proper preliminary examination, to determine competency, before being sworn").

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[6] *See* discussion *infra*.

Just like in *Rose, Cortez, Zigles,* and the string of cases cited above, it is undisputable that CPL § 60.20 imposes a "duty upon the court" to conduct a preliminary examination of a prospective underage witness, and in this regard, the lower court undeniably failed to do so when it did not hold a sufficiency hearing prior to receiving Brinleigh's testimony. *See Richard*, *supra*, at 859.

Therefore, on these grounds alone, reversal of Reed's convictions is warranted. Brinleigh, the "prosecution's key witness," was not subject to any competency hearing, yet went onto testify that Reed "hurted" her. *See Ranum*, *supra*, at 960. Not only did the jury hear such testimony, but the People made sure to pinpoint and highlight it during summation: "I didn't know what to expect when she came in here, but she did give you that, *he hurted me*" (R: 935) (emphasis supplied); *see also id.* at 1009 ("we all heard" Brinleigh at trial "testifying as to how the Defendant hurted her").

And, perhaps most crucially, the jury undisputably gave weight and consideration to this evidence, specifically sending out a note in which they requested a read back of Brinleigh's testimony. *Id.* at 988; *see also People v. Tavarez*, 155 A.D.3d 783 (2d Dept. 2017) ("jurors' note suggests [impermissible evidence] may have contributed to their verdict of guilt ...").

ii. *Satisfaction of Standard*

Even assuming, *arguendo*,[7] that this Court were to review Brinleigh's trial testimony itself[8] to determine if she possessed sufficient intelligence and capacity to testify, the result remains the same as the record is entirely void of any evidence as towards her awareness of the "difference between truth and falsehood, as well as his duty to tell the former." *Nissof*, at 566; *see also People v. Childress*, 2009 WL 4894362, at *3 (Crim Ct. Kings Co. 2009) ("1) does the child know the difference between a lie and a truth; 2) does the child know the meaning of an oath; 3) does the child understand what can happen if he or she tells a lie; 4) does the child have the ability to recall and relate prior events").

The seminal Court of Appeals case, *People v. Nissof*, is demonstrative. In *Nissof*, the People sought to introduce testimony from a ten-year-old victim and an eight-year-old victim.[9] In its analysis, the Court of Appeals first found that the lower court "followed the strictures of CPL § 60.20(2)" by questioning the witness

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[7] As supported by the long line of precedent cited, this brief maintains that reversal is automatically warranted due to the lower court's failure to hold a pre-testimony hearing.

[8] As outlined, when a CPL § 60.20 scenario arises, an appellate court will review the competency hearing record to determine if the witness did in fact meet its requirements. *See Nissof* at 642. As we are left without any hearing transcript to review, only a review of Brinleigh's trial testimony is possible.

[9] In 1975, the year in which *Nissof* was decided, CPL § 60.20(2) required that inquiries be made of any prospective witness under the age of 12.

prior to testimony, and concluded that the decision to allow testimony was ultimately "supported by the preliminary examination" of the witnesses. *Id.* at 642. Concerning the ten-year-old witness, the appellate court approved the admission of her sworn testimony as "perfectly proper":

> Under questioning ... [the witness] answered that an oath meant 'To swear to tell the truth....' [The witness] was a fifth grade student with a scholastic average of 87%, [she] was able to articulate the difference between right and wrong, [she] was aware of the fact that telling a lie was wrong and that lying was a sin for which she would be punished by both God and her parents.

Id. at 563. Concerning the eight-year-old witness, the appellate court approved the admission of her unsworn testimony because "the voir dire of this witness demonstrated that she *undoubtedly possessed* the requisite capacity and intelligence to justify" its reception. (emphasis supplied). The voir dire for this witness revealed that she,

> was a second grade student with good grades .... However, *although she was able to recite an acceptable definition of the word 'oath,'* it became apparent that [she] did not fully understand its complete meaning and nature. Further questioning ... revealed that *she was able* to differentiate between right and wrong, that she was well acquainted with her classroom activities and that *she knew* lying was a sin for which she would be punished ....

Id. (emphasis supplied).

People v. Cordero, 257 A.D.2d 372, 374 (1st Dept. 1999) is also illustrious. *Cordero* concerned a seven-year-old witness who was permitted to provide unsworn testimony. Upon review, the appellate court examined the preliminary inquiry and found that the lower court questioned the prospective witness *extensively*, asking him his date of birth, to identify the room he was in, who the trial justice was and his role – all of which the witness was able to answer accurately and truthfully. *Id.* The lower court continued, asking the witness:

> why he was in court, and complainant responded 'to talk about something.' When the court asked '[w]hat is important when you talk to me about those things?' complainant responded 'To tell the truth.' The court then instructed him to tell a lie, and complainant responded 'Like if I said your coat is green and it is not.' Then, pointing to a court officer, the court asked whether it was the truth or a lie that the man was an 'astronaut,' and the complainant responded 'a lie.' The court asked whether he was 'sure,' explaining that although the man definitely didn't look like an astronaut, 'sometimes it is tricky about truth and lies ... sometimes you don't know, right?' The complainant responded affirmatively.

Id. The lower court *continued even further*:

> COURT: What happens if ... somebody asked you a question, right, like I did about the [astronaut], and you don't know the answer, what do you have to do?
> WITNESS: I don't know, say the truth.
> COURT: You have to tell me that you don't know. Can you do that?

WITNESS: Um-hum.
COURT: Are you sure? What happens if you tell a lie?
WITNESS: Then that means that you lie ...
COURT: What happens? What is going to happen if you tell something that is not true?
WITNESS: I don't know.
COURT: Is it a good thing to tell a lie or a good thing to tell the truth?
WITNESS: It is a good thing to tell the truth.

Id. at 375. Based on this extensive record, the appellate court upheld the lower court's decision to allow testimony:

> [T]he complainant possessed sufficient intelligence and capacity to be sworn as a witness. He demonstrated his familiarity with his own personal circumstances and the purpose of his visit to the courtroom. Further, he expressed a keen understanding of the distinction between telling the truth and lying, and that telling the truth was a 'good thing.' Indeed, complainant's statement that it was 'important' to tell the truth when he was 'talking' in court reflected an appreciation and recognition of the moral obligation to testify truthfully.

Id. (internal citations omitted);

By way of comparison, the record created through Brinleigh's testimony fails to even scratch the surface as to her sufficient intelligence and capacity. Brinleigh's testimony, which spanned a total of six pages of trial transcript, contained zero questions regarding a truth versus a lie, the importance of telling the truth or the consequences of telling a lie (R: 647–53). Nor, at any point, was

Brinleigh asked to provide an example of a truth or a lie. *Id.*; *see also Ranum*, *supra*, at 961 ("the only relevant questions to the infant complainant as to the 'truth' were leading questions responded to by perfunctory answers, or by paraphrasing the court's own words.... [T]he court failed to elicit any evidence that this child witness understood the consequences of giving false testimony under oath."); *cf. People v. Snyder*, 289 A.D.2d 695, 696 (3d Dept. 2001) (unsworn testimony permissible where witness questioned "extensively" and "demonstrated an ability to discern the truth from a lie").

Rather, the People first asked Brinleigh basic family background questions to which she nodded her head yes, until prompted by the court to provide a verbal response (R: 648). From there, Brinleigh responded "I don't know" when asked *twice* about "what happened with Ken." *Id.* Directly on the heels of those questions, the People began to lead Brinleigh, asking her if she had to go to a doctor the last time she saw Reed, to which she nodded her head. *Id.* Brinleigh was then asked what had happened, and only then did she provide the People with the damaging, material response that would later be harped on: "He hurted me." *Id.* Yet, upon inquiring further, Brinleigh stated two consecutive times that she did not know where he hurt her:

Q: How did he hurt you? Or where did he hurt you,

Brinleigh? Can you tell me?
A: Yup.
Q: Where?
A: *I don't know*.

***

Q: Where did you get hurt?
A: *I don't know.*

Id. at 649 (emphasis supplied). Upon the People's failure to elicit their desired response, they then fed Brinleigh a series of leading questions about body parts, with Brinleigh eventually stating that she had a "pee pee." *Id.* at 650. The following exchange then took place:

Q: You have a pee pee, okay. Do you ever hurt your pee pee?
A: (*Shaking head no*).

Id. at 651 (emphasis supplied).

Hence, *in the face of this final leading question*, which concerned the People's main theory that Reed had injured Brinleigh's vagina, Brinleigh denied that she had ever been hurt there. At best, by shaking her head as opposed to giving any verbal response, Brinleigh was unable to give a proper response to show any semblance of having sufficient intelligence and capacity to testify. *See Childress, supra*, at *9 (amongst other related reasons, witness who "repeatedly" needed "to be reminded to give verbal answers" was deemed unaware of the difference between the truth and a lie). Nonetheless, by this point, the People

were able to solicit the key statement from Brinleigh that Reed had "hurted her," an admission that it went on emphasize during summation, and testimony which the jury specifically asked for during deliberations. *See Tavarez, supra*.

On cross-examination, defense counsel at least attempted to create a record to find out whether or not Brinleigh could testify truthfully by first asking a basic factual question, which Brinleigh failed as well:

> Question: When is your birthday?
> Answer: I don't know.

R: 652; *see also Mudd, supra,* at 389 ("Prior to receiving complainant's testimony, the court conducted a voir dire. At the outset, certain simple questions – such as the *child's birthday*, where she lived, whether she played marbles – *elicited no response*") (emphasis supplied).

Therefore, taking Brinleigh's "inconsistent if not confusing testimony together with [her] lack of maturity and demeanor" it is clear that she did not "clearly demonstrat[e] that [she was] aware of the difference between truth and falsehood ...." *See Childress*, *supra*, at *5; *see also McGrady*, *supra*, at 1395 (testimony from five-year-old properly precluded "where there were ambiguities in witness's statements concerning her understanding of the difference between the truth and a lie"). As observed in the line of cases from *Nissof* to *Cordero*, at the

very least, courts look to see if the witness knows the difference between a truth and a lie *even where* only unsworn testimony is being allowed in. In *Nissof*, even an underaged witness who could define the word "oath" was nevertheless deemed ineligible to provide sworn testimony, evincing the rigid application of CPL § 60.20 in general.

Ultimately, by not conducting a competency hearing, as mandated by CPL § 60.20, the lower court committed reversible error in allowing the jury to "rely on [the] unsworn testimony" of Brinleigh, give weight to such evidence while deliberating, and eventually find Reed guilty (R: 988; 1011). Due to this blatant and material error, Reed's convictions must be overturned.

C. *Pursuant to CPL § 470.15(6)(a), the Court Should Exercise Its Discretion and Reach the Issue of Brinleigh's Unsworn Testimony in the Interests of Justice*

i. *Legal Standard*

Pursuant to CPL § 470.15, an appellate court may consider and determine *any* question of law or issue of fact involving error or defect in the criminal court proceedings *which may have adversely affected* the appellant. Specifically, where a potential error made by the lower court has not been preserved, the appellate court is nonetheless authorized to reach the issue and maintains the sole power to review a defendant's contention as a matter of discretion in the interest of justice.

See CPL § 470.15(6)(a) ("The kinds of determinations of *reversal or modification* deemed to be made as a matter of discretion in the interest of justice include, but are not limited to ... an error or defect occurring at a trial resulting in a judgment, which error or defect was not duly protested at trial ... so as to present a question of law, *deprived the defendant of a fair trial*") (emphasis supplied).

There are a number of scenarios whereby an appellate court will decide to reach an issue in the interests of justice. Reviewing courts tend to reach these matters where the case itself "turn[s] on the issue" that was not preserved. *People v. Mosley*, 296 A.D.2d 595 (3d Dept. 2002) (improper bolstering testimony, "in a case that clearly turned on the issue that was bolstered ... cannot be disregarded as harmless error ..."). Further, reviewing courts have historically exercised their discretion and have reached unpreserved matters in the interests of justice where the evidence against a defendant, outside of the error, is otherwise "far from overwhelming." *People v. Faison*, 126 A.D.2d 739, 740 (2d Dept. 1987). Finally, in determining whether or not to exercise their discretion, courts will evaluate whether there was "legally sufficient evidence *wholly apart* from" the otherwise impermissible evidence which is now subject to an appellate attack despite being unpreserved. *People v. MacKay*, 98 A.D.2d 732 (2d Dept. 1983). If such legally sufficient evidence is not "wholly apart" from the evidence in question, courts are

more inclined to review the error in the interests of justice. *Id.*

People v. Ranum , 122 A.D.2d 959 (2d Dept. 1986) is demonstrative. *Ranum* concerned an 11-year-old witness who had claimed to be sexually abused by a defendant and was permitted to provide sworn testimony at trial. Defense counsel did not object to the witness being permitted to testify. *Id.* at 960–61. Yet, "in light of the weakness of the prosecution's case," the appellate court found review of the CPL § 60.20 issue to be "warranted in the interest of justice," and then went on to analyze the record:

> With regard to the swearing of the complaining witness, *whose testimony was crucial* to the defendant's conviction, the court never mentioned the word 'oath' and did not define the meaning of the word 'oath.' Indeed, having asked a number of appropriate background questions, the only relevant questions to the infant complainant as to the 'truth' were leading questions responded to by perfunctory answers, or by paraphrasing the court's own words.

Id. (emphasis supplied). The court went on to conclude that "the voir dire conducted by the [lower] court in this case failed to demonstrate" that the witness – whose testimony "*was crucial to the defendant's conviction*[,] understood, or had any conception of, the obligations of an oath." *Id.* at 961 (further noting that it "is clear that, in the course of the pre-oath examination, *the court failed to elicit any evidence that this child witness understood the consequences of giving false*

testimony under oath. There is no demonstration that the witness knew that perjury could result in criminal sanctions, or believed that there was a special moral duty to tell the truth while under oath. In short, there is no demonstration in this record that the *key witness* for the prosecution understood the nature of an oath.") (emphasis supplied); *see also People v. Danza*, 127 A.D.2d 781 (2d. Dept 1987) (in the interests of justice, reviewed court's decision to allow sworn testimony, despite defense counsels failure to object); *People v. Bitting*, 224 A.D.2d 1012 (4th dept 1996) (same).

Faison, *supra*, concerned a robbery in which the identification of the defendant, who presented an alibi defense, was the crucial issue to be decided at trial. The lower court, without any objection, allowed a police officer to testify that the complainant identified the defendant to him as her robber – this testimony was presented on the heels of the complaining witness herself also testifying and identifying the defendant. *Id.* at 739. The appellate court overturned the defendant's conviction based on the police officer's testimony, reasoning that the issue of improper bolstering was "appropriate" for exercising discretion in the interests of justice because the issue itself went to the heart of the matter – an identification case where the evidence was otherwise "far from overwhelming." *Id.*

Lastly, this error could also be accurately classified as a "mode of proceedings error," which do not typically "require preservation in as much" as an unpreserved substantive error of law in order to warrant review in the interests of justice. *See People v. Garrow*, 126 A.D.3d 1362, 1363 (4th Dept. 2015) (lower court committed reversible error by violating the "core requirements of CPL § 310.30 in failing to advise counsel on the record of the contents of a substantive jury note"). The seminal case dealing with a mode of proceedings error is *People v. Walston*, 23 N.Y.3d 986 (2014), which summarized neatly:

> In such cases, although there has been a deviation from procedure, preservation is required where it is evident from the record that the trial court fulfilled its core responsibilities. *When a court fails to fulfill those responsibilities*, however, a mode of proceedings error occurs and departures ... *are not subject to preservation rules.*

Id. at 989 (emphasis supplied).

ii. *Analysis*

The issues discussed at length *supra* – whether or not the lower court erred by receiving Brinleigh's unsworn testimony without first conducting a CPL § 60.20 inquiry – warrants not only a review in the interests of justice, but, as outlined, a reversal as well.

Undoubtedly, the instant matter centered upon Reed's alleged sexual assault

of Brinleigh. Whether or not Reed had in fact forcibly touched and injured Brinleigh, therefore, became *the only crucial issue* for the jury to determine in order to find him guilty. As such, "in a case that clearly turned on the issue" that was improperly testified to due to the failure to adhere to CPL § 60.20, this scenario – the admissibility of Brinleigh's testimony, especially in the face of otherwise underwhelming evidence[10] – is precisely the same as those matters where courts have elected to overturn a conviction on an unpreserved issue reached in the interests of justice. *Mosley*, *supra*, at 595.

In sum, there is "no demonstration in this record that the *key witness* for the prosecution" possessed sufficient intelligence and capacity to testify, and at the very least, the CPL § 60.20 error outlined above warrants review in the interests of justice. *Ranum*, *supra*, at 960. As evidenced by the jury's note and other facets of trial, Reed's convictions are not based on legally sufficient evidence "wholly apart" (*MacKay*, *supra*, at 732) from Brinleigh's impermissible testimony. Rather, Brinleigh's confusing yet inflammatory testimony was directly tied to the other "corroborating" evidence put forth by the People, then further *intertwined* by the

[10] As the lower court acknowledged in ruling on defense counsel's mid-trial motion to dismiss, it did not reserve its decision "nonchalantly" (R: 900). Rather, the lower court "gave this a lot of thought over a lot of time. I think at the end of the day I'm going to deny the motion. I think viewing the proof in the light most favorable to the People, particularly as to Count 1, *however meager*, I think the proof satisfied the prima facie case." *Id.* (emphasis supplied); *see also* discussion *supra*, Part I.

prosecutor on summation:

> Now, Brinleigh's testimony. She's three years old. I didn't know what to expect when she came in here, but she did give you that, he hurted me. But I want to remind you of something. This evidence, that he put his finger in my pee pee, it hurt, that comes in for the truth of what's being said.... Brinleigh's statement to RN Carte comes in for that fact.

R: 935; *see also Tavarez*, *supra*, at 786 (issue not preserved for appeal warranted appellate review, and conviction ultimately reversed, given that "defendant's guilt was far from overwhelming, and the jurors' note suggests that [impermissible testimony] may have contributed to the verdict of guilt").

Finally, the lower court's error here, grounded squarely within the criminal procedural law, is much more akin to a mode of procedures error – which does not "require preservation in as much" as a substantive error of law. *Garrow*, *supra*, at 1363; *People v. Walston*, 23 N.Y.3d 986 (2014) ("a mode of proceedings error ... [is] not subject to preservation rules"). Hence, as the lower "court fail[ed] to fulfill those responsibilities" required by statute, preservation of the record, let alone the interests of justice, is not even required for appellate review.

III. The Lower Court's Sentence was Unduly Harsh or Severe

In the event that this Court does not reverse Reed's convictions due to the issues outlined above, the instant matter warrants modification of the maximum

sentences handed down by the lower court.

A. *Legal Standard*

While set to run concurrently, we respectfully submit that the lower court imposed an unduly harsh and severe sentence when it handed down the maximum term of incarceration and post-release supervision with respect to each count. CPL § 470.15(2)(c) states that, "upon a determination that a sentence imposed [is] unduly harsh or severe, the court may modify the judgment by reversing it with respect to the sentence ...." CPL § 470.15(3) states that a reversal or a modification of a sentence "must be based upon a determination made: (a) upon the law; (b) upon the facts; or (c) as a matter of discretion in the interest of justice ...." *See generally People v. Daly*, 20 A.D.3d 542 (2d Dept. 2005) (even where a sentence imposed was legally proper, the Appellate Court retains the discretion to modify the sentence); *see also People v. Delgado*, 80 N.Y.2d 780, 783 (1992) (Appellate Division may exercise power to reverse or modify a sentence if the "interests of justice warrants, *without deference* to the sentencing court") (emphasis supplied); *People v. Potskowski*, 298 N.Y. 299 (1948) (appellate division has jurisdiction to extend mercy to a defendant by a reduction of sentence).

While a sentencing court is generally allocated wide latitude to dispense

proportionate and fair punishment, a court's discretion in sentencing is not without limits and "any failure of the sentencing court to exercise the full scope of discretion or to *take into consideration all relevant factors* can be remedied by the exercise of *unfettered discretion*" by an appellate court. *People v. Felix*, 87 A.D.2d 529 (1st Dept. 1982) (emphasis supplied). "In fashioning an appropriate sentence, the lower court is *required* to weigh and consider societal protection, rehabilitation and deterrence, as well as the circumstances that gave rise to the conviction." *People v. Lanfair*, 18 A.D.3d 1032 (3d Dept. 2005) (emphasis supplied). Courts are also instructed to consider the defendant's criminal history, if any, particularly as it relates to committing violent acts. *See generally People v. Green*, 179 A.D.3d 1516 (4th Dept. 2020).

B. ***Analysis***

In the instant matter, the lower court did not correctly exercise the entire scope of its discretion when it failed to consider all relevant factors pertaining to Reed – including, but not limited to, the disparity between Reed's plea offers and his eventual sentence, Reed's lack of criminal history or acts of violence, and Reed's successful business and general good reputation within the community.

First, at sentencing, the People informed the court that during pre-trial negotiations Reed was offered a deal "somewhere in the middle" of the three to

fifteen year sentence he was facing on a top count conviction (R: 1010). The People then explicitly asked the Court to "disregard all of those offers," and proceeded to ask for the maximum allowable prison sentence. *Id.* Remarkably, in the same breath, the People claimed that they were "not asking for a quote/unquote jury tax .... That is not what that is." *Id.* Despite the People's efforts to characterize it as otherwise, in reality, they requested – and Reed was eventually given – the maximum penalty for exercising his constitutional rights, as evinced by the plea offers made to him (which were approximately six years less than what was handed down). *Cf. People v. Morton*, 288 A.D.2d 557, 559 (3d Dept. 2001) (defendant, offered a two to four year sentence during plea negotiations but sentenced to 12-1/2 to 25 years, was afforded a modification by appellate court – "the considerable disparity between the sentence offered prior to trial and that ultimately imposed after trial strikes us as too extreme a penalty for defendant's exercise of his constitutional right to a jury trial); *People v. Fowler*, 192 A.D.2d 462, 463 (1st Dept. 1993) (sentence of 25 years to life was excessive where plea offer of 8 1/3 to 25 years was made pretrial "[g]iven the significant disparity").

Second, Reed is an individual with absolutely no record of violence, and his only criminal history relates to a reckless driving conviction from years prior to the instant matter. This is a far cry from the many cases where appellate courts

have agreed to uphold maximum or near-maximum sentences for individuals with lengthy criminal histories, which justifiably support recidivism concerns. *See People v. Milan*, 189 A.D.2d 627 (1st Dept. 1993) (defendant's sentence reduced due to minor criminal history which indicated that he was not career criminal and that instant matter was isolated incident); *People v. Mami*, 128 A.D.2d 389 (1st Dept. 1987) (sentence of eight and one third to twenty-five years for defendant, who pled guilty to manslaughter in the first degree, was excessive and had to be reduced in the interests of justice; defendant was 45 years old when he committed the crime, and crime appeared to be isolated incident of criminal activity on defendant's part); *cf. People v. Joseph PP.*, 153 A.D.3d 970 (3d Dept. 2017) (sentence for second violent felony offender was not harsh and excessive in light of defendant's recurring violations of conditions of probation over the span of many years and his repeated commission of violent burglaries while on probation); *People v. Monroe*, 134 A.D.3d 1138 (3d Dept. 2015) (sentence reduction not warranted for defendant, convicted of child sexual abuse, where defendant had lengthy history of sexual incidents involving young children); *People v. Hadfield*, 119 A.D.3d 1224, 1228 (3d Dept. 2014) ("given defendant's extensive criminal history, we find no ... abuse of discretion supporting a reduction of the sentence in the interest of justice); *People v. Hilton*, 25 A.D.3d 505, 506 (1st Dept. 2006)

(sentence of "extended incarceration" upheld "in view of defendant's very lengthy and serious criminal record – which ... is replete with violent acts against women ..."); *People v. Archer*, 232 A.D.2d 820 (3d Dept. 1996) (sentence imposed on sexual abuse convictions was not harsh or excessive given defendant's previous conviction of sex-related crime involving same victim and predatory nature of crimes that carried high risk of recidivism).

Third, from the record, the lower court appeared to give zero weight nor consideration to the fact that Reed had been gainfully employed and had owned a business for over a decade (R: 1013–1014). Indeed, many of Reed's customers wrote character letters on his behalf, and it was made clear that Reed was going to lose his business with any prolonged period of incarceration. *Id.* Yet, in its reasoning, the court made zero reference to Reed's employment when handing down the final sentence. *Id.* at 1017–1018; *cf. People v. Ortiz*, 180 A.D.2d 429 (1st Dept. 1992) (consecutive terms of imprisonment of five years to life was not unduly harsh or severe in case in which defendant had no prior criminal record, but also had no history of work); *People v. Prentice*, 91 A.D.2d 1202 (4th Dept. 1983) (in view of defendant's history and work record, and the fact that he had almost always been gainfully employed, sentence reduction was warranted and reflected sufficient punishment despite conviction for negligent homicide).

Finally, the sentencing court appeared to ignore Reed's good reputation in the community in general as well as his unwavering commitment to his son. At sentencing, the defense relied primarily on its previously filed memorandum, which included as exhibits a number of character letters from Reed's family, friends, and customers (R: 1014). While some of those letters included *portions* discussing beliefs about Reed's potential innocence, the trial judge appeared to focus exclusively on these comments, and decided to "disregard" the letters. *Id.* Instead, the judge thought that "each and every one says he would never do such a thing. I can't consider that." *Id.* In response, defense counsel highlighted that,

> also contained in those letters are mitigating circumstances such as their prior relationship with him and the character that he had in the community. So, if the Court had to disregard those statements, I understand that. But I would ask that the Court at least consider the remaining portion of –

Id. at 1015. At that point, the trial judge cut off defense counsel, stating, "I can't consider a statement that is based on he would never do such a thing when he's been convicted. I just can't. So move on." *Id.*

As demonstrated with court's own words, the trial judge refused to give consideration to the letters, in which contained Reed's character and good reputation within the community as well as a host of other positive attributes. *Cf.*

Hilton, supra, at 506 ("As reflected in the sentencing minutes, the court *carefully considered* the pre-sentence memorandum and statements on the record in defendant's behalf ...."") (emphasis supplied); *People v. Richard*, 65 A.D.2d 595 (2d Dept. 1987) (sentence imposed on defendant convicted of rape, "who had no previous involvement with the law and enjoyed good reputation in his community, who had always provided adequately for his wife and two children ... and who patently was not habitual criminal with antisocial orientation, would be modified as a matter of discretion in interest of justice" – court further reasoned that in "reviewing the propriety of a given sentence it is incumbent upon the court to consider not only the nature of the crimes involved, but also the personal background and character of the particular defendant"); *People v. Rodriguez*, 136 A.D.2d 509 (1st Dept. 1988) (sentence of 6 to 18 years imprisonment was excessive, and reduced to 4 to 12 years, for first-degree manslaughter where defendant was almost 40 years old, and had no prior arrest record, where defendant had been steadily employed for many years, where defendant regularly met his support obligation to his former wife and children).

A reduction of the Reed's sentence is warranted due to the lower court's failure to take into consideration all of the factors prescribed by statute and case law. To the extent such factors were considered, a reduction of Reed's mandatory

sentence is nevertheless warranted in the interests of justice.

CONCLUSION

For the foregoing reasons, defendant-appellant Kenneth Reed's conviction should be vacated.

Dated: February 24, 2022
New York, NY

Respectfully Submitted,

_____

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APPELLATE DIVISION - THIRD DEPARTMENT
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Respectfully Submitted,

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