UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ROY USHER, :

Petitioner, :

-against- :

ROBERT ERCOLE, Superintendent, :
Green Haven Correctional Facility,
:

Respondent.
:

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PETITION FOR A WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

To the Honorable Judge of the United States District Court for the Eastern District of New York:

PROCEDURAL HISTORY

1. Petitioner was convicted in the Supreme Court of the State of New York, Kings County.

2. The date of the judgment of conviction is December 20, 2001.

3. Petitioner was sentenced to a determinate prison term of 25 years.

4. Petitioner is currently confined at Green Haven Correctional Facility, P.O. Box 4000, Stormville, New York 12582-0100. Petitioner's inmate number is 02-A-0210.

5. Petitioner was charged with course of sexual conduct against a child in the second and third degrees [N.Y. Pen. Law

§§ 130.75(a), 130.80(a)] and endangering the welfare of a child [N.Y. Pen. Law § 260.10(1)]. He was convicted of course of sexual conduct against a child in the first degree and, on December 4, 1998, he was sentenced to a determinate prison term of 25 years (Demarest, J., at trial and sentencing).

6. Petitioner pleaded not guilty to the offenses charged and a trial on the issue of guilt or innocence was held before a jury.

7. Petitioner did not testify on his own behalf.

8. The facts of petitioner's appeal from the original judgment are as follows:

(a) Petitioner appealed his conviction to the Appellate Division of the Supreme Court of the State of New York, Second Department arguing that he was deprived of his Sixth Amendment right to the effective assistance of counsel.

(b) The Appellate Division affirmed petitioner's conviction.

(c) The date of the Appellate Division's decision was December 8, 2003. See People v. Usher, 2 A.D.2d 545, 767 N.Y.S.2d 877 (2003). The decision is attached in Exhibit B, Decision and Order (Exhibit E).

(d) Petitioner sought leave to appeal to the Court of Appeals on that issue. On February 25, 2004, Judge Albert M. Rosenblatt of the Court of Appeals denied leave. See People v. Usher, 1 N.Y.2d 635, 777 N.Y.S.2d 33 (2004). Copies of the leave

application and response, and of the certificate denying leave, are attached as Exhibit F.

(e) Petitioner also filed a motion, pursuant to N.Y. Crim. Proc. Law § 440.10, to vacate his conviction, also on grounds of ineffective assistance of counsel. That motion, the State's response, and petitioner's reply, are attached as Exhibits B, C and D.

(f) The state trial court dismissed the motion in an unpublished Decision and Order dated July 21, 2005, and filed on August 10, 2005. That decision is attached as Exhibit A.

(g) Petitioner sought leave to appeal the denial of his motion to vacate on September 9, 2005. The motion for leave to appeal, and the State's response, are attached as Exhibit G.

(h) The Appellate Division, Second Department, denied petitioner's motion for leave to appeal the trial court's dismissal of his motion to vacate the conviction on March 9, 2006. A copy of that decision is attached as Exhibit H.

9. Aside from the direct appeal from the judgment of conviction and sentence, petitioner has not filed any actions with respect to that judgment in any state court.

STATEMENT OF FACTS

Introduction

The indictment accused appellant of engaging in a course of sexual conduct against four-year-old Fatima between July 25 and November 17, 2000. At trial, Fatima testified on direct examination about acts of abuse, but did not indicate that appellant's conduct exceeded three months in duration, as required by the statute. Appellant's 18-b attorney, Michael Harrison, cured this defect by introducing evidence, and opening the door to testimony, proving that the sexual conduct started on July 25, 2000, the missing fact proving abuse over a three-month period.

Prior to trial, the court ruled that it would allow very limited "outcry" evidence from Fatima's mother, an acknowledged drug addict. However, during the cross-examination of the prosecution's first witness, Fatima's godmother and legal custodian, defense counsel elicited testimony about the outcry. Because defense counsel opened the door, the prosecutor was permitted to elicit the details of the outcry, including the specific allegations of abuse, in direct contravention of the court's pre-trial ruling. Fatima's mother never testified at trial.

Defense counsel also introduced the entire record from Fatima's medical examination in January 2001, which included five

pages of interview notes that recounted, in detail, her allegations about the nature and frequency of the abuse.

The prosecution called the doctor who examined Fatima to demonstrate that she had been sexually abused. Defense counsel never consulted an expert witness and, on cross-examination, failed ask about published scientific studies that contradicted key aspects of the doctor's conclusions, or otherwise effectively challenged the doctor's dubious conclusions that the medical examination revealed signs of sexual abuse.

Appellant was convicted of Course of Sexual Conduct Against a Child in the First Degree and sentenced to 25 years' imprisonment.

The Indictment

The first count of the indictment charged appellant with Course of Sexual Conduct Against a Child in the First Degree, N.Y. Pen. Law § 130.75(1)(a), committed as follows:

> [O]n or about and between July 25, 2000 and November 17, 2000 in the County of Kings[,] *a period of time not less than three months in duration*, the defendant did engage in two or more acts of sexual conduct including at least one act of sexual intercourse, deviate sexual intercourse or aggravated sexual conduct, namely: defendant's penis to complain-ant's vagina and the defendant's penis to complainant's mouth [with] Fatima a child less than eleven years old (emphasis added).

Appellant was also charged with Course of Sexual Conduct Against a Child in the Second Degree, N.Y. Pen. Law § 130.80(1)(a), and Endangering the Welfare of a Child, N.Y. Pen. Law § 260.10(1).

Pre-Trial Proceedings

The "Prompt Outcry" Ruling

The prosecutor moved in limine to allow testimony from Fatima 's mother, Lugenia Reed, about a "prompt outcry" that her daughter allegedly made on November 17, 2000. According to the proffer, Fatima spent the weekend with her godmother, Marilyn Laguerre, the director of the school that Fatima attended. When Fatima returned home, she became "very emotional" and started "crying." When her mother asked what was wrong, she stated that appellant "touched me" and pointed "to her vagina." Her mother became very angry and threatened appellant, who denied "doing anything." Lugenia asked her daughter to repeat these statements in appellant's presence; Fatima again said that appellant had "touched me in my vagina" (P.40-41, P.69-70).[1]

Defense counsel objected only that the proposed testimony was "prejudicial and not relevant" (P.71).

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1 Numbers in parentheses preceded by "P." refer to the transcript of the pre-trial proceedings, dated November 16, 19-20, 2001; those preceded by "T." refer to the transcript of the trial proceedings, dated November 20-21, 27-29, 2001; and those preceded by "S." refer to the transcript of the sentencing proceeding, dated December 20, 2001.

The Court ruled:

> I would permit the words of the child limited to *the four or five or six words* . . . the child said. With respect to the second confrontation with the defendant, I believe that this is within the parameters of an appropriate outcry. . . . but again it's not to be repeated in terms of *details* . . . *with respect to both instances of what the child said*. The jury will be instructed that this is hearsay. It's being offered for the fact that the statements were made, but not for the truth of the statements (P.71-72) (emphasis added).

The Trial

The People's Case

Marilyn Laguerre's Observations

Fatima 's godmother, MARILYN LAGUERRE, was the director of the Duff[ield] Adult Fair Child Center, a pre-school for children when Fatima was three and a half years old. Fatima's birthday is July 25, 1996. Laguerre knew Fatima's family -- her mother, Lugenia Reed; appellant Roy Usher, who was Reed's live-in boyfriend; and Fatima's younger brother, Malik . Laguerre often visited the apartment where the Reed family lived in Brooklyn (T.432-36).

Reed usually brought her daughter to school. Various people picked her up from school, including her mother, her uncle and aunt, and appellant. Fatima always appeared to be happy when people other than appellant arrived at the preschool. However, with appellant Fatima would sometimes "withdraw behind a

teacher," or ask in "an angry way" for her mother. She "did not want to go" home with him (T.436-38).

Laguerre testified that on November 17, 2000, Laguerre drove Fatima home from her great- grandmother's house in East New York, where Fatima had been staying. When they arrived home, Fatima jumped "from the back seat of [the] car and wedg[ed] herself between the steering wheel" and Laguerre. She was adamant "about not wanting to go upstairs." She started crying, "I don't want to go. I want to stay with you." After "act[ing] out in the street," Fatima eventually went inside the apartment with her mother (T.440-42).

Later that evening, Laguerre saw Fatima at the Children Advocacy Center, which houses Safe Horizons, a child welfare agency for sexually abused children. When Laguerre started to describe a telephone call that she had received, which had prompted her to go the Center, the court instructed her not to tell the jury about the contents of that conversation. Instead, Laguerre stated only that the call was from Fatima's mother and that it concerned appellant. Laguerre also spoke to a detective at the Center (T.442-44).

Laguerre obtained legal custody of Fatima in December 2000 (T.434). Since then, Fatima has suffered from continuous nightmares and has been afraid to go to bed; she "cries" and "screams" before going to sleep, she "hates going to sleep." Fatima also believes that "monsters [are] coming out of the

toilet" (T.446-47). In January 2001, Fatima started attending weekly counseling (T.450).

Defense Counsel's Introduction of Fatima's Entire Medical Record, Including Her Detailed Allegations of Sexual Abuse

On direct examination of Laguerre, the prosecutor elicited that, in December 2000, a doctor recommended that Fatima be examined by Dr. Flora Ramirez. The prosecutor established that Fatima met with Dr. Ramirez in January 2001, but did not ask any questions about the details of that examination (T.445-46).

On cross-examination, defense counsel asked Laguerre about Fatima's medical history, as recorded by Dr. Ramirez during her January 4, 2001, medical examination. Laguerre was present during the examination and, along with Fatima's mother, provided the doctor with Fatima's background and medical history (T.452-53). They told Dr. Ramirez that she had no previous injuries, nor any history of vaginal infection, but that, at age three, she had experienced vaginal discharge and itching (T.456-57).

Defense counsel then asked whether Fatima had any history of vaginal trauma (T.457). After the prosecutor objected on unspecified grounds, defense counsel moved into evidence the entire medical record of Dr. Ramirez's examination, which included a checklist of Fatima's past medical history; an evaluation of Fatima's developmental abilities; the details of the physical examination of Fatima's vaginal and rectal areas; and Dr. Ramirez's five-page interview with Fatima about the

sexual abuse allegations. Noting that the parties were "aware that this is a complete record," the court received the exhibit into evidence (T.458-59; Defense Exh. A).[2]

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2 A certified copy of the medical record is located in the Supreme Court file (see People's Response to Defense Omnibus Motion, Attachment #2). A portion Dr. Ramirez's five-page interview with Fatima is reproduced here:

> This 4 5/12 yr old girl was referred. . . for sexual abuse evaluation. . . . Fatima [was] interviewed alone . . . When shown a picture of a female pre-schooler (see illustration), she identified all her body parts, called her genitalia "cooty," anus "butt." She said she lives in a 3 bedroom apartment with her mom, her baby brother, her aunt Jackie & her newborn baby. She said she sleeps in her own room . . . When asked who was Roy, she whispered "my daddy." When asked to tell me about him, (cont.)
>
> she said "Daddy put her finger (showing her index finger) inside my "cooty." How many times? She said 5 times showing 5 fingers. When asked if she remembered the first time he did, she said he did it "when I came back from my grandma's house." What were you doing at Grandma's house? She said she stayed with her grandma when her mother went to the hospital to have her baby. When did you return home? She said "after my birthday" (her birthday was on July 25). What else did Roy do? Looking at the illustration, she pointed to the anal area & said "Roy also put his finger [in]side my butt," five times (again showing 5 fingers). Did Roy say anything to you? She said "not to tell my mom." But added, "I told her anyway. I also told my aunt, and my grandmother." Then suddenly perching herself in the chair [in which] she was seated, she said "Roy told me to put grease on him and I did not do it." I repeated[,] Roy told you to put grease . . . and asked where? She whispered "on his penis." I asked "you saw his penis?" She said "yes." Then I asked[,] what happened next? She said "he put grease on himself." Then what happened next? "He put his penis in my cooty." "He burnt me." Did you get a cut? "No." Did you bleed? "No." When asked who was home with her when Roy did that she said "my little brother, he was a baby then." "Where was your mom? She said "she was out shopping." . . . I asked "how many times did Roy put his penis in your cooty? She said "many times, twelve times (bringing up ten fingers, then two). "Every[time] mom was out shopping." When did you tell your mom, the first time he did it or the

After introducing the medical records, defense counsel asked whether Laguerre told the doctor that Fatima had no history of either "vaginal trauma" or "vaginal bleeding" (T.459-60). Laguerre stated that she "gave some of the information in relationship to whatever I was able to answer . . . Most of it had to come from her mom because her mom had the history" (T.462) and that she had not provided the doctor with either of these responses (T.459, T.462).

Defense counsel then asked whether, during the medical examination, Fatima had said that appellant had "burned" her. Laguerre responded that she remembered Fatima saying that "it burned" (T.467). Using the medical records that defense counsel put into evidence, the prosecutor on re-direct examination provided the context for this response:

> Q: [Defense Counsel] spoke to you about January 4th at Dr. Ramirez's office, and he asked you if Fatima said he burned her. . . . Was this the conversation and the context that had took place: ["]Roy told me to put grease and I asked where. She whispered, on his penis. I asked if she saw his penis. She said, yes. I asked what happened next. She said he put grease on himself. Then what happened next? He put his penis in my cootie. He burnt me. ["] Was that the full context that was said?
>
> A: That's what I was trying to say, yes.
>
> Q: It wasn't that he burned her with a flame . . . or fire, or anything like that?

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last time? She answered "the last time" . . . Did you tell me everything[?] She said "no" "later."

A: No

Q: It was the sensation she was feeling?

A: Yes.

Defense Counsel: Objection, state of mind.

Court: Overruled. I just note that the district attorney has read from the medical records that are now in evidence, and the jury will have the opportunity to examine them themselves (T.475-77).

Opening the Door to the Details of Fatima's Alleged Outcry

Defense counsel asked Laguerre when she "first" learned that Fatima had alleged that she was engaged in "sexual relations" with appellant. Laguerre stated that Fatima first mentioned appellant's conduct during a telephone conversation on November 17, 2000 (T.469-70). In response to defense counsel's questions, Laguerre also stated that she spoke to both Fatima and her mother, Lugenia Reed, during this phone call (T.471).[3]

On re-direct examination, the prosecutor asked additional questions about the November 17th phone conversation:

Q: You said you received a call from Fatima . . . on [November] Seventeenth. What exactly did Fatima tell you?

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3 Laguerre also indicated that Fatima's cousin, Kenneth Washington, was present in the Reed home during the phone call (T.470). Laguerre did not know whether Washington -- who was approximately 30 to 35 years old -- lived with the Reed family on November 17th (T.455,472). Washington and Reed would sometimes bring Fatima home from school together (T.469). Fatima "like[d]" her cousin and was always "happy" to see him (T.478).

Defense Counsel: Objection.

Court: Overruled.

Laguerre: She told me that she had told her mommy that Roy had touched her on her cooty and that Roy had put his – she calls it his peanuts on her, in her cooty and in her butt . . . and in her mouth.

Q: [D]o you know when she says cooty what body part?

A: Cooty she's talking about her pubic area and her vagina.

Q: Did Fatima ever tell you about a game that her and the defendant would play called mommy and daddy?

* * *

A: She said that [appellant] would give her a mommy daddy kiss which means he would tongue kiss her.

* * *

Q: You said that Roy put his peanuts in her cooty . . . what does she refer to as peanuts?

A: When she says peanuts, she means the whole male sexual organs. The penis and the testicles.

* * *

Q: [W]hen Fatima and the defendant would play . . . mommy and daddy, would they do anything else besides kissing, that you know of, during this game?

A: Yeah, she said that . . . he would put his penis in her and would take vaseline – she didn't call it vaseline, she said grease (T.473-76).

Outside the presence of the jury, the court, on its own initiative, stated that it had expected this "outcry" testimony to come from Fatima's mother, as discussed before trial, rather than from Laguerre.[4] The court indicated that it would tell the jury "that the testimony was hearsay and was admitted for the sole purpose of indicating that the statements were made and not for the truth of the statements." Both parties agreed (T.513-14).

The court instructed the jury:

> [Y]ou [heard] testimony through the witness Marilyn Laguerre regarding a telephone conversation that she had with the child Fatima . Now that testimony was hearsay. That is the statements of Fatima , through Miss Laguerre, is what is called hearsay. I permitted that testimony to be elicited only for the purpose of establishing, if you accept such testimony, that such statements were true. Excuse me. I retract that. That such statements were made but not for the truth of the statement. In other words, you may not consider the statements that were testified to by Miss Laguerre as true. You may consider them only in light of the testimony that the statements were made (T.517-18).

4 After eliciting this outcry testimony, the prosecutor decided not call Fatima's mother to testify at trial.

Fatima 's Testimony

Five-year-old FATIMA testified under oath[5] that she lived with her "godma," Marilyn Laguerre. When she was four years old, she lived with her mother, uncle, younger brother, and appellant. At that time, she attend the Duffield School (T.521-22, 526-27).

Fatima was scared when appellant would pick her up from school because she thought he was "going to touch" her when they got home (T.528). When asked where appellant would touch her, Fatima stated her "vagina" -- which she used to call her "cooty" -- pointing to her vaginal area (T.529-30). When the prosecutor asked if appellant touched her "a lot," Fatima said "yes" (T.537).

According to Fatima, appellant would take off her clothes when no one else was home and touch the inside of her "cooty" with his "peanuts" (T.528-29). It "hurt." The prosecutor asked Fatima to identify where on her body "peanuts" is found. She pointed to her vaginal area and stated that only "boys" have "peanuts" (T.529-30). Appellant also touched the inside of her "butt" and "vagina" with his hands (T.531-32). Appellant would ask Fatima to put "gel"-- the "stuff you use with your hair" -- on his "peanuts" (T.532-33). Appellant also kissed Fatima on her mouth with his tongue (T.534). Appellant told Fatima that "he

5 The court concluded, after a swearability hearing, that Fatima was capable of testifying under oath (T.512-13).

would kill" her if she "told her mommy" (T.531).

The prosecutor asked Fatima about three events: (1) At the Halloween party at school, she wore a "Power Puff" girl costume. Appellant picked her up from school "just before" the party, took her home, and touched her "vagina" with his "peanuts." He did the same thing after the Halloween party (T.535-37); (2) On another date, which was not specified, appellant and Fatima were on an elevator; he made Fatima put his "peanuts in [her] mouth" (T.533-34) (3) On the day that Fatima told her mother and godmother that appellant had been
touching her, she met with two policemen. Since then, she had not seen appellant (T.538).

The prosecutor asked if Fatima "remember[ed her] birthday party when [she] turned four." She said "no." The prosecutor asked no further questions about Fatima's birthday party, nor any questions about allegations of sexual conduct around that time (T.527).

Although the prosecutor had not established the beginning date of the alleged abuse or, therefore, that it had exceeded three months in duration, on cross-examination defense counsel asked Fatima when appellant "first touch[ed]" her. In response, Fatima stated that it happened "last week" (T.542). Counsel also asked whether appellant "broke the elevator by putting his penis in your mouth?"; Fatima answered "yes" and that it had happened "last week" (T.540). When the court asked whether Fatima knew

"what a week is," she responded "no"(T.548).

Defense counsel also asked Fatima whether appellant had touched her "a year ago," to which Fatima said "yes." The cross-examination continued:

> Q: You remember the day he touched you a year ago?
>
> A: Yes.
>
> Q: What was the date?
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> * * *
>
> Court: Now, we're talking about a year ago, right? . . . Do you understand the question you're being asked. Mr. Harrison asked how long ago it was that [appellant] started touching you and I think you said a year. Is that right?
>
> A: Yes.
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> Court: Now he wants to know do you know what [the] date is. You said your birthday.
>
> A: Yes.
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> * * *
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> Court: What is your birth date?
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> A: July 25.
>
> Court: Right. That's a date. Were you able to say the first time when he touched you by a date like that?
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> A: Yes (T.543-45).

In response to defense counsel's questions, Fatima also testified that appellant did not use "oil" when he put his "finger" in her "butt" and that appellant put his penis in her vagina "all

the way." Fatima demonstrated this latter point by making a hand and arm gesture (T.547-48).

The Testimony of the Examining Doctor

DR. FLORA RAMIREZ, a pediatric specialist with extensive training and background relating to the sexual abuse of children, examined Fatima at the Lafayette Child Health Clinic on January 4, 2001. The examination consisted of an interview, the purpose of which was to "determine her developmental abilities;" review of her medical history; and a physical examination. Fatima appeared to be in good general health, "very typical for a four-year-old" (T. 617-19).

The examination of Fatima's genital region demonstrated that her hymenal opening was "ten millimeters in diameter," whereas a normal four-year-old would have an opening of no more than five millimeters. In addition, the hymen appeared to be irregular. There was a notch in the bottom half of the hymen (T. 621), which is the "most common finding" indicative of "suspected child abuse" (T. 630), although Dr. Ramirez could not determine whether the notch was due to trauma or a birth abnormality (T. 622, 630). The tissue surrounding the hymenal opening was thinner than normal for a four-year-old. The "posterior vaginal column" also appeared to be "thickening inside" and the "fossa navicular" was "ill defined and flattened." Additionally, the "posterior fourchet" felt as if

it had "thinned out" (T. 622-23).[6]

Based on the interview and physical examination of Fatima, both of which were used for the diagnosis, Dr. Ramirez concluded to a "reasonable degree of medical certainty" that she had been sexually abused (T. 624). The injuries could have been caused by "penetration over time with a penis" or "rubbing with a finger," although digital penetration alone would not normally produce them (T. 624-25). The injuries had been sustained by "chronic" and "repeated" penetration "over time," rather than by a single incident. Some of the injuries, especially the notch in the hymen, could have caused "severe bleeding" (T. 625, 628-29). The state of healing of the injuries indicated that they had been sustained at least six weeks prior to the examination (T. 626-27).

Due to the direction and depth of Fatima's injuries, Dr. Ramirez claimed "to a reasonable degree of medical certainty" that the injuries were not "self-inflicted." The injuries would not be visible to anyone who did not perform a gynecological exam. "From the outside the child would appear to be normal" (T. 631-33).

Defense counsel, who did not call, had presumably had not engaged the services of,[7] an expert witness, cross-examined Dr.

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6 Using a diagram, Dr. Ramirez identified the area between the vagina and the anus as the "posterior fourchet," and the area between the posterior fourchet and the hymen as the "fossa navicular" (Exhibit B at 611-615).

7 Although defense counsel was assigned to represent Mr. Usher under Article 18-b, the Supreme Court file does not disclose that he requested assignment of an expert witness.

Ramirez without asking whether her medical conclusion that Fatima had been sexually abused was supported by scientific literature or studies or whether the physical indicators of sexual abuse on which she relied were accepted in the scientific community as being indicative of sexual abuse. Instead, he asked hypothetical questions about a theoretical four-year-old child.

First, defense counsel asked about the injuries that would be expected by the penetration of an adult penis into a child's vagina. The doctor responded that a "great amount of force" or the "first forcible entry" would cause a laceration in the hymen that could cause "bleeding" (T. 633-34). This type of penetration, with an erect penis without lubrication, would cause "a tremendous laceration" and "pain" (T.639).

Defense counsel also asked whether, hypothetically, these types of injuries could result if a person took a "washcloth, wrap[ped] it around her hand . . . and jam[med] it up a child's vaginal area [] very hard or viciously" (T. 640). Dr. Ramirez stated that it was possible, especially if the washcloth was "not soapy" or "lubricated" (T. 643-44).

Defense counsel also asked, hypothetically, what kind of injuries would result if an adult "took" his "finger" and "jammed it into the vaginal area . . . all the way up." Dr. Ramirez responded that it would depend on the timing of the medical examination; there could be no damage if the exam took place six weeks after the event, but an examination within two weeks might

demonstrate "some impact on the hymen," such as "a scratch" or "bleeding" or irritation in the area (T. 634-38).

Defense counsel also asked about Fatima's medical history. She had no sexually transmitted diseases and had been previously treated by another doctor for a urinary tract infection. She also had a prior history of a vaginal itch, which could have been caused by the detergent used to wash her underwear or the soap in a bubble bath. These agents could also cause a rash (T. 644-47, 649).

On re-direct examination, Dr. Ramirez indicated that Fatima's injuries were consistent with penetration by a lubricated penis over an extended period of time. In addition, only "the bottom half" of Fatima's vagina was injured, which was inconsistent with defense counsel's washcloth hypothetical (T. 642-43). Fatima's vaginal itch, when she was three years old, was not "indicative of sexual abuse" (T. 649).

Defense Case

The defense did not put on a case (T.653).

Defense Summation

According to defense counsel, the "key issue" was the "truthfulness" of Fatima, who had been "trained to tell a story" (T.668). Although he could not "prove" that Fatima was lying (T.668), defense counsel argued that she had used language such as "vagina" and "he put it all the way in" that sounded like "adult description[s]" (T.669-71). Fatima's testimony that she had been abused "last week" in the elevator -- a physical impossibility --

and that "fellatio" (a word Fatima did not use) and appellant's "magic penis" had stopped the "elevator from running" was further evidence that she was either "using her imagination" or "taught to parrot" (T.672-73, T.676).

Defense counsel focused on the extent of Fatima's injuries in an attempt to show that the sexual abuse did not occur. He argued that Dr. Ramirez did not testify that Fatima had any anal injuries, to which the court sustained the prosecutor's objection that defense counsel "could have asked" about those injuries (T.673). As a "lay person speaking," he argued that Fatima should have sustained greater injuries than reflected in the medical records if appellant had put his "finger" in her "butt" without "oil" and penetrated her vagina with his penis. This conduct, counsel asserted, would have "caused a terrible, terrible amount of damage" and "ripped the child to pieces." Fatima's vaginal itch, which counsel claimed resulted in "vicious scrubbing," was the likely source of her injuries (T.677-78). The court sustained the prosecutor's objection when he suggested that Fatima's itching had produced a rash that her mother had not treated and was "eating away at the flesh" (T.674).

Defense counsel also focused his argument on Fatima's mother, stating that, after learning of the abuse, she waited six weeks to bring her daughter to a doctor (T. 668-69), and that she was "a

drug addict."[8] In response to the prosecutor's objection, the court reminded the jury that it could consider only the evidence that was admitted, not representations about evidence that was never introduced (T.678-79).

Defense counsel concluded by stating that he wanted to leave the jury "with this thought. In the early 1600's" in "Salem, Massachusetts, we had" a "series of witch trials." The court cut him off, stating that the Salem witch trials were not "relevant" (T.680).

Prosecution Summation

The prosecutor argued that the jury should concern itself only with the evidence presented, including witness testimony and Fatima's medical records that "you are allowed to read" (T.680-81). Citing Marilyn Laguerre's testimony, the prosecutor noted that Fatima was afraid to leave school with appellant because he would touch her "in her cooty," a term that Fatima used when describing the abuse during the November 17th phone conversation. This proved that Fatima had not been coached to use the adult term "vagina" (T.682-83).

As to the medical evidence, the prosecutor recounted Dr. Ramirez's testimony about the specific injuries to Fatima's vaginal area, in particular that the "flattening of the posterior fourchet,

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8 Although both parties had asked during jury selection about how prospective jurors would react to learning that Fatima's mother was a drug addict (P.128, P.138), neither side introduced any evidence at trial about her drug habit.

worn out hymen, the vaginal opening ten millimeters wide, twice the size of a normal four year old" were consistent with "chronic, repeated" damage to the child's vagina (T.692). The state of healing of Fatima's injuries, the prosecutor stated, was consistent with the period of alleged abuse (T.688). The prosecutor then implored the jury to "ask to see Defense Exhibit [A], medical records of Fatima. You can read them. You'll see that it is consistent. Repeated, chronic sexual abuse of this child" (T.693).

In response to the defense arguments, the prosecutor stated that Lugenia Reed's drug habit was irrelevant and that, contrary to defense counsel's assertion, Fatima did see a doctor shortly after the abuse ended. It was that doctor who referred her to Dr. Ramirez, a specialist in child abuse cases, for a full examination (T.687, T.694).

The prosecutor also argued that Fatima was credible in describing the details of appellant's conduct against her, even though she had mistakenly stated that the last incident of abuse had occurred a week before trial. Dr. Lewittes explained why Fatima would misstate that she had been abused "a week ago." In addition, Fatima indicated that she did not know what a "week" meant (T.689-91).

Jury Deliberations, Verdict and Sentence

The jury asked to see Fatima's medical records, which were provided (T.728). Appellant was convicted of the top count in the indictment, Course of Sexual Conduct Against a Child in the First

Degree (T.748), and sentenced to 25 years' imprisonment (S.12).

The Direct Appeal

Mr. Usher claimed on appeal that defense counsel's many on-the-record errors, including his apparent failure to consult an expert witness, constituted ineffective assistance of counsel. Mr. Usher claimed that even though the case turned on whether Fatima was telling the truth, defense counsel bolstered her credibility by introducing and opening the door to highly damaging and otherwise inadmissible evidence that she had reported her allegations, in detail and months before trial, to both Dr. Ramirez and Marilyn Laguerre. Counsel compounded these errors by failing to engage in minimally competent tactics to undermine Dr. Ramirez's medical conclusions and by curing a defect in the prosecutor's case by eliciting that appellant's conduct exceeded three months in duration, a statutory element of the crime. Nor did counsel present the testimony of an expert witness. Mr. Usher claimed that these deficiencies were so severe that they compromised appellant's constitutional right to effective assistance of counsel (Exhibit B, Brief for Defendant-Appellant at 29-46 (Exhibit D)).

On December 8, 2003, the Appellate Division affirmed Mr. Usher's conviction, holding that "[a] review of the totality of circumstances of this case shows that the defendant was provided with meaningful representation," and so he was not deprived of his constitutional right to the effective assistance of counsel (Exhibit E). Leave to appeal to the Court of Appeals was denied on

February 25, 2004 (Rosenblatt, J.) (Exhibit F).

The Post-Conviction Motion to Vacate

Trial Counsel Did Not Consult an Expert Witness

On May 12, 2005, Michael C. Harrison, petitioner's trial attorney, informed appellate counsel that although his trial files from the case had been misplaced or destroyed, he recalled Mr. Usher's case and acknowledged that he did not consult a medical expert with respect either to Dr. Ramirez's testimony or to any other aspect of the case (Exhibit B, Affirmation of Appellate counsel, ¶ 17).

Affidavit of Mark L. Taff, M.D.

Dr. Mark Taff, retained by Appellate Advocates to consult on Mr. Usher's behalf with respect to his post-conviction motion to vacate the verdict, was a forensic pathologist with extensive experience in the medical examination of fatalities and of live patients/victims (Exhibit B, Taff Affidavit, ¶ 1(Exhibit A)). Upon reviewing the Dr. Ramirez's trial testimony and the medical records of her examination of complainant Fatima , Dr. Taff concluded that Dr. Ramirez's examination and conclusions were lacking in several areas.

First, because Dr. Ramirez took no photographs of her examination, did not use a colposcope when she made the measurements on which she relied, and did not describe how those measurements were taken, the measurements themselves cannot be verified as accurate (Exhibit B, Taff Affidavit, ¶ 3).

Second, because Dr. Ramirez interviewed Fatima before conducting the physical examination, the results, which tend to involve subjective determinations, likely were colored by Fatima's allegations that she had, in fact, been sexually abused (Exhibit B, Taff Affidavit, ¶ 5).

As for Dr. Ramirez's findings, Dr. Taff disagrees that the diameter of Fatima's hymenal opening (10 millimeters) was evidence of sexual abuse. According to Dr. Taff, the size of the hymenal opening is not, consistent with the scientific literature, evidence of sexual abuse (Exhibit B, Taff Affidavit, ¶ 6). And even if it were, the size is inconclusive in this case since Fatima was big for her age and would be expected to have a larger opening than other children her age (Exhibit B, Taff Affidavit, ¶ 7).

Dr. Ramirez's suggestion that a "notch" at the 5 o'clock position on Fatima's hymen could have been caused by sexual abuse was not convincing. As Dr. Ramirez acknowledged, such a notch can be caused by an abnormality other than trauma. Besides, even if trauma were the cause, the fact that Dr. Ramirez's examination took place six weeks after the last alleged contact by Mr. Usher means that the trauma would already have been fully healed. Therefore, it would have been impossible to tell whether the trauma had occurred during the time of the alleged abuse by Mr. Usher or at some time previous to that.

Dr. Taff found Dr. Ramirez's conclusion that the state of Fatima's posterior forchette and fossa navicular indicated sexual

abuse was not supported by the evidence. In particular, Dr. Taff took issue with the lack of measurement or precise description of the "thinning" and "flattening" that Dr. Ramirez claimed to have observed (Exhibit B, Taff Affidavit, ¶ 9).

As for defense counsel's performance, Dr. Taff noted a number of missed opportunities for cross examination, such as inquiring about Dr. Ramirez's methods of measurement, her interview-first examination procedure, and her assumption that Fatima should have had the same size hymenal opening as the average four-year-old. Dr. Taff also noted that counsel failed to inquire concerning Dr. Ramirez's notations inconsistent with abuse, including her finding that the hymen was "annular" and therefore of normal shape, and her "hedge" that her findings "can be" evidence of sexual abuse (Exhibit B, Taff Affidavit, ¶¶ 5-11).

GROUNDS OF UNCONSTITUIONALITY
OF PETITIONER'S CONVICTION AND SENTENCE

I. PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

In this case, where the sole issue was whether Fatima was telling the truth, defense counsel bolstered her credibility by introducing and opening the door to highly damaging and otherwise inadmissible evidence that she had reported her allegations, in detail and months before trial, to both Dr. Ramirez and Marilyn Laguerre. Counsel also failed to consult an expert or engage in even minimally competent efforts to undermine Dr. Ramirez's dubious

medical conclusions, and cured a major defect in the prosecutor's case -- namely, that appellant's conduct exceeded three months in duration, a statutory element of the crime. These deficiencies were so severe that they compromised appellant's constitutional right to effective assistance of counsel. Accordingly, appellant's conviction should be reversed and a new trial ordered. U.S. Const., Amends. VI, XIV; N.Y. Const., Art. I, §6.

The right to effective assistance of counsel is guaranteed by both the state and federal constitutions. In the leading New York case, People v. Baldi, 54 N.Y. 2d 137, 146-47, 444 N.Y.S.2d 893 (1981), the Court of Appeals, emphasizing that "true ineffectiveness" should not be confused with "mere losing tactics" and that there is no inflexible standard applicable to all cases, described the state of the law this way: "so long as the evidence, the law, and the circumstances of the particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met." The standard of "meaningful representation" focuses on "the fairness of the process as a whole rather than [any] particular impact on the outcome of the case." People v. Benevento, 91 N.Y.2d 708, 714, 674 N.Y.S.2d 629 (1998). Under the federal constitution, a defendant claiming ineffective assistance of counsel must show that his attorney rendered less than "reasonably effective assistance" and that there is a reasonable probability that, but for counsel's unprofessional

errors, the "result in the proceeding would have been different." Strickland v. Washington, 466 U.S. 668 (1984).

According to these standards, appellant was deprived of his right to effective assistance of counsel under both the state and federal constitutions.

A. Because of Defense Counsel, the Jury Learned that Fatima Had Told Her Doctor and Godmother About the Sexual Abuse Months Before Trial

Inexplicably, defense counsel introduced the complete record of Dr. Ramirez's interview with Fatima, which recounted, in detail, her allegations of sexual abuse. He compounded this error by opening the door to testimony about Fatima's outcry to her godmother, which also included the explicit details of appellant's alleged conduct. This evidence, which was otherwise inadmissible, reinforced every important aspect of Fatima's testimony and let the jury know that she told a consistent story of abuse over time. Given the importance of Fatima's credibility in this case, these errors, alone and in conjunction with the other deficiencies in defense counsel's performance, see post, constituted ineffective assistance of counsel.

Although an attorney is not ineffective merely for undertaking "a misguided though reasonably plausible strategy decision," ineffective assistance of counsel will be established if he or she pursues "an inexplicably prejudicial course." People v. Zaborski, 59 N.Y.2d 863, 864-65, 452 N.Y.S.2d 763 (1983). Errors that contribute to such a finding include defense counsel introducing,

without justification, highly damaging evidence against his client. See Id. This is true whether the evidence is otherwise admissible, see id. (defense counsel ineffective, in part, for repeatedly eliciting damaging evidence from prosecution's witnesses); People v. Lee, 129 A.D.2d 587, 588, 514 N.Y.S.2d 84 (2d Dept. 1987) (same), or inadmissible. See, e.g., People v. Bennett, 29 N.Y.2d 462, 466, 329 N.Y.S.2d 801 (1971) (counsel ineffective, in part, because of "blanket offer" to put in defendant's entire hospital records, including inadmissible portions); People v. Dove, 287 A.D.2d 806, 807, 731 N.Y.S.2d 769 (3d Dept. 2001) (counsel ineffective for eliciting damaging uncharged crimes evidence that had been excluded at Ventimiglia hearing); People v. Ofunniyin, 114 A.D.2d 1045, 1046, 495 N.Y.S.2d 485 (2d Dept. 1985) (counsel ineffective, in part, for eliciting defendant's prior record that had been excluded at Sandoval hearing).

Here, during the testimony of the prosecution's first witness, Marilyn Laguerre, defense counsel introduced five pages of interview notes from Dr. Ramirez's January 4, 2001, medical examination. Fatima's statements contained in these highly damaging notes reinforced every important aspect of her trial testimony, including that the abuse started after her birthday on July 25, 2000; that appellant had penetrated her with his penis and fingers; that he had used a lubricant gel; that she used the term "cooty" to refer to her genitalia; and that she had disclosed the abuse to her mother and other family members. Indeed, Fatima told her doctor

more details about the abuse than she told the jury, including the number of times that each act took place and that she had not revealed "everything," suggesting that there were other forms of abuse that she did not want to discuss. All together, these notes -- which the jury reviewed during deliberations at the prosecutor's urging -- substantially bolstered the case against appellant by demonstrating that Fatima's allegations remained specific, detailed and consistent over time.

Defense counsel's conduct was all the more egregious because the interview notes were not otherwise admissible. See, e.g., People v. Thomas, 288 A.D.2d 405, 406, 733 N.Y.S.2d 231 (2d Dept. 2001) (answers by child complainant to nurse concerning "the details of the rape" should not have admitted under the business records exception to the hearsay rule, albeit harmless); People v. Singleton, 163 A.D.2d 498, 499, 558 N.Y.S.2d 174 (2d Dept. 1990) (description in medical records of events leading up to rape held inadmissible, albeit harmless); People v. Jackson, 124 A.D.2d 975, 976, 509 N.Y.S.2d 230 (4th Dept. 1986) (in sodomy and rape case, history portion of medical records that included detailed report of the incident, and identified perpetrator, was inadmissible; conviction reversed). As a result, absent defense counsel's decision to introduce the notes, the jury would never have learned of them.[9]

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9 Even assuming, for argument's sake, that some minimal portion of the interview notes was relevant to diagnosis and

Nor was there any reasonable justification for defense counsel's conduct. Indeed, defense counsel appeared to have no strategy whatsoever. After introducing Fatima's entire medical record, he asked no questions about it. Instead, counsel simply asked whether Laguerre recalled saying that Fatima had no history of vaginal trauma or bleeding, questions that he could have asked without introducing the records into evidence. To the extent it was necessary, defense counsel could have refreshed Laguerre's recollection with the medical records without putting them into evidence. Defense counsel did not even use the interview notes to question Dr. Ramirez about his examination of Fatima, nor make any reference to the notes in summation.

The absence of any justification is further illuminated by defense counsel's inquiry, during the cross-examination of Laguerre, about whether appellant had "burned" Fatima (T.467), a question that was meant to suggest that Fatima had fabricated a story about other forms of physical abuse. This attempt to mislead the jury quickly backfired when the prosecutor was permitted to quote from the section of the interview notes that proved that Fatima had experienced a burning sensation caused by the sexual

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treatment, Fatima's statements during the interview with Dr. Ramirez about the details of the alleged abuse -- including the repetitive and chronic nature of the conduct, the suggestion that other types of abuse occurred, and appellant's identity as the perpetrator -- would never have been admitted under this exception to the hearsay rule. See Williams v. Alexander, 309 N.Y. 283, 288, 129 N.E.2d 417 (1955); Jackson, 509 N.Y.S.2d 232.

abuse, and not that appellant had burned her in any other way, for example, with a cigarette or flame. Either defense counsel failed to familiarize himself with the medical records before introducing them, or he thought he could grossly distort them and get away with it, neither of which constitutes a reasonable explanation for his prejudicial course of action.

Defense counsel continued on this erroneous course by eliciting testimony about Fatima's prompt outcry to Laguerre, which opened the door to all of the details of the November 17th phone conversation. As with the medical records, defense counsel's error permitted the jury to learn that, almost a year before trial, Fatima had made specific allegations against appellant, including that he had put his "peanuts" in her "cooty" and mouth and that he had made her play a game called "mommy and daddy" that involved open-mouth kissing. As the prosecutor argued in summation, this testimony proved that Fatima used the term "cooty" when she first disclosed the abuse, thus undermining defense counsel's assertion that Fatima had been coached to use the adult term "vagina." In addition, by eliciting this testimony from Laguerre, a former director of a day care center and Fatima's legal guardian, defense counsel obviated the need for the prosecutor to call Fatima's mother, an impeachable witness who was an acknowledged drug addict and who had lost custody of her child.

Moreover, Laguerre's testimony far exceeded the scope of the "prompt outcry" exception to the hearsay rule. Under this rule, a

prior statement from a sexual abuse victim is permissible to demonstrate "only the fact of a complaint," and not the details of the assault, when the victim makes a prompt outcry at "the first suitable opportunity." People v. McDaniel, 81 N.Y.2d 10, 17, 595 N.Y.S.2d 364 (1993). Testimony concerning the details of the sexual incident "goes beyond the limited purpose of the exception, which is simply to show that a complaint was made." People v. Rice, 75 N.Y.2d 929, 932, 555 N.Y.S.2d 677 (1990). Even testimony that a victim claimed to know her attacker goes too far. People v. Tiexeira, 189 A.D.2d 838, 592 N.Y.S.2d 757 (2d Dept. 1993). The court clearly recognized, when it ruled that the prosecutor would be permitted to elicit only the "five or six words" of Fatima's complaint (P.71-72), that to go further would violate the rule against bolstering, see McDaniel, 595 N.Y.S.2d 368.

Thus, even assuming, for argument's sake, that Fatima's report was sufficiently prompt, but for defense counsel's incompetence, Laguerre would not have been permitted to testify about all of the details of the alleged abuse. In addition, having opened the door to the outcry evidence, defense counsel made only an initial, general objection that was insufficient to preserve the issue for review and then remained silent as detail upon detail of Fatima's alleged abuse was recounted. This lapse was inexcusable. See People v. Cortez, 296 A.D.2d 465, 466, 745 N.Y.S.2d 467 (2d Dept. 2002) (counsel ineffective, in part, for soliciting inadmissible testimony on cross-examination and then failing to object when

further testimony about the issue was admitted on redirect examination).[10]

Nor was there any legitimate reason to ask Laguerre to describe when she "first" learned of the sexual abuse, the question that elicited her testimony about the November 17th phone conversation (T.469-70). Defense counsel was on notice from the pre-trial proceedings that Fatima had informed her mother of the abuse on November 17th after driving home with Laguerre. The date that Laguerre had learned about of the abuse was simply irrelevant and such a question only invited damaging hearsay. Indeed, prior to this question, Laguerre had limited her direct testimony to her observations, including that Fatima appeared to be afraid of appellant and that she continued to suffer from nightmares, and not about any direct knowledge of the alleged abuse. When she started to testify on direct examination about the substance of the November 17th phone conversation, the court stopped her. Instead of taking advantage this favorable ruling, defense counsel converted it into a liability by opening the door to testimony that bolstered Fatima's credibility, conduct that in other cases has been found to

10 The court's limiting instruction regarding the November 17th phone did not alleviate the prejudicial impact of defense counsel's error. The instruction itself was confusing, as the court first indicated that the phone conversation could be considered for its truth, then corrected itself by saying that it could be considered only for the fact that it was made. Moreover, no reasonable juror could have ignored the graphic details of the phone call, despite the cursory instruction, which did not explain the difference between a statement offered for its truth and a statement offered for the fact that it was made.

be ineffective. See Dove, 731 N.Y.S.2d 769; Ofunniyin, 495 N.Y.S.2d 485.

In sum, defense counsel's decision to put into evidence Dr. Ramirez's interview notes and to elicit testimony from Laguerre about the November 17th phone call significantly enhanced the prosecution's case. This evidence reinforced every important aspect of Fatima's trial testimony and allowed the jury to hear the specific allegations of the abuse, not once as the prosecution had planned, but three times through the testimony of a credible adult witness, Fatima, and in writing. In fact, this evidence provided more details about the abuse than the prosecution introduced at trial. In addition, it proved that the details of Fatima's allegations remained consistent over time -- first on November 17, 2000, then on January 4, 2001, and finally at trial. And, as the prosecutor argued in summation, it undercut defense counsel's suggestion that Fatima had been coached to use the word "vagina" and the insinuation that appellant had tried to burn her with a cigarette or flame.

Under these circumstances, where, as defense counsel noted, the "key issue" was Fatima's credibility (T.668), these errors are much more than a "disagreement" in trial "strategies [and] tactics." People v. Flores, 84 N.Y.2d 184, 187 (1994). Rather, they constitute the type of inexcusable and prejudicial course of conduct that demonstrates ineffective assistance of counsel. See Zaborski, 465 N.Y.S.2d 927; Bennett, 329 N.Y.S.2d 801; Dove, 731

N.Y.S.2d 769; Lee, 541 N.Y.S.2d 84; Ofunniyin, 495 N.Y.S.2d 485.

B. Counsel Failed to Take Basic Steps to Undermine the Medical Evidence of Abuse

Five-year-old Fatima 's credibility depended largely on Dr. Ramirez's medical conclusion that she had been sexually abused. Yet, during cross-examination, defense counsel did not ask about published studies that would have contradicted key portions of the doctor's findings, nor ask any questions about the scientific basis for her medical conclusions. Indeed, defense counsel did not even consult with a medical expert in preparation for trial. These failures alone establish that Mr. Usher did not receive the effective assistance of counsel at his trial.

The People's expert witness testified that the 10 millimeter diameter of complainant Fatima 's hymenal opening, a "notch" on her hymen at the 5 o'clock position, a "thinning" of her posterior forchette and a "flattening" of her fossa navicular, all constituted physical evidence of sexual abuse. Defense counsel did not engage the services of an expert witness to challenge these findings and failed to cross-examine the People's expert witness concerning the reliability and accuracy of her measurements or whether her findings were consistent with principles accepted in the scientific community. Counsel's failure to engage an expert witness therefore deprived Mr. Usher of the effective assistance of counsel. U.S. Const., Amends. VI, XIV; N.Y. Const., Art. I, § 6. Strickland v. Washington, 466 U.S. 668 (1981).

It is firmly established that the constitutional right to counsel includes the right to effective assistance of counsel. Strickland, 466 U.S. at 684, 687; People v. Baldi, 54 N.Y.2d 137, 140, 444 N.Y.S.2d 893 (1981). Effective assistance requires that the attorney provide "meaningful representation" in view of the evidence, the law, and the circumstances of the case, Baldi, 444 N.Y.S.2d 893 (state standard), or that the attorney provide "reasonably competent" representation that does not fall below an "objective standard of reasonableness." Strickland, 466 U.S. at 687-88 (federal standard).

Strategy decisions made by defense counsel, such as what defense to pursue and what evidence to present, are "reasonable" such that counsel's representation is meaningful only to the extent that such decisions are based on counsel's reasonable and diligent investigation of the facts and applicable law. Wiggins v. Smith, 539 U.S. 510 (2003); Lindstadt v. Keane,239 F.3d 191 (2d Cir. 2001); People v. Droz, 39 N.Y.2d 457, 384 N.Y.S.2d 404 (1976); People v. Hobot, 200 A.D.2d 586, 595, 606 N.Y.S.2d 277 (2d Dept. 1994). In a case involving expert testimony concerning physical evidence of sexual abuse introduced by the People, counsel is obligated to consult his own expert, familiarize himself with the studies on which the People's expert relies, and to conduct any further relevant research. See Lindstadt 239 F.3d at 202; Pavel v. Hollins, 261 F.3d 210, 223-25 (2d Cir. 2001). Indeed, counsel is obligated to "attack vigorously the reliability of any physical

evidence of sexual contact between the defendant and the complainant." People v. Eze, 321 F.3d 110, 112 (2d Cir. 2003).

In this case, counsel admittedly did not consult an expert and any reasonable reading of the cross-examination of Dr. Ramirez reveals that counsel could not have familiarized himself with the studies on which she relied. Indeed, he never asked a single question about the scientific basis of her testimony. Nor did he question that the injuries Dr. Ramirez testified about were actually injuries as opposed to mere abnormalities or variants of normal.

The questions counsel did ask were, at best, ineffectual. He started by asking open ended questions about the effects of penetration by an adult penis or finger, which amounted to additional testimony against his client. The only "attack" counsel mounted was to ask a hypothetical question that, because it was unrelated to the facts of the case, had no bearing on the reliability of Dr. Ramirez's testimony: Counsel asked whether Fatima's injuries could have been caused by penetration by an adult finger wrapped in a washcloth. There being no testimony that Fatima was ever subjected to any such treatment, that inquiry was largely irrelevant. Only through sheer speculation could the jury have concluded that it was more likely that Fatima had been inadvertently injured bathing rather than because of sexual abuse.

The only arguably useful cross-examination defense counsel conducted was to elicit that Fatima had a history of vaginal

itching. However, without further inquiry on cross-examination, and in the absence of any affirmative evidence concerning Fatima's response to the itching or of any treatment for it, the jury would, again, have had to engage in sheer speculation to conclude that the itching provoked a physical response that might have led to the injuries on which Dr. Ramirez based her sexual abuse finding.

By failing to consult an expert, defense counsel neglected to educate himself concerning the validity of Dr. Ramirez's claims and the existence of scientific studies containing findings inconsistent with her conclusions. See Lindstadt, 238 F.3d at 201-202. Had counsel consulted an expert, he would have been advised of such cross-examination possibilities as, (1) inquiring as to how Dr. Ramirez made her measurements and why she didn't use colposcope as is standard practice, (2) challenging the validity of the results of the physical examination, which could have been influenced by the disclosure of the abuse allegations in the interview Dr. Ramirez conducted in advance, (3) challenging the scientific validity of finding abuse based on diameter of the hymenal opening, a conclusion not supported in the scientific literature, (4) inquiring as to how Dr. Ramirez arrived at the conclusion that there was "thinning" of the posterior forchette and "flattening" of the fossa navicular, why no measurements supporting those conclusions were made, and whether those conclusions were supported in the scientific literature, (5) conducting a more informed inquiry concerning the possibility that Fatima's

"injuries" had been self-inflicted, and (6) challenging Dr. Ramirez's hedge in the medical records that her observations "can be" due to the abuse Fatima alleged, and inquiring about the hymen's annular, or normal, shape (see Exhibit B, Taff Affidavit (Exhibit A)).

More importantly, perhaps, Had defense counsel consulted an expert, he could have presented affirmative evidence contradicting Dr. Ramirez's conclusions. First, Dr. Taff states that the diameter of the hymenal opening is simply not recognized in the scientific literature as being evidence of sexual abuse. That opinion not only directly contradicts Dr. Ramirez's contrary conclusion, it calls into question her expertise overall.

Second, Dr. Taff called into question whether the "notch" on Fatima's hymen had any probative value whatever. Since six weeks had passed and any trauma would have been fully healed, it would be impossible to distinguish an injury caused by the abuse from one that predated it. Therefore, even if the notch was indicative of trauma, it was not evidence of trauma during the time alleged. Third, Dr. Taff stated that Dr. Ramirez's descriptions of the state of Fatima's posterior forchette and fossa navicular were too vague and undocumented to be relied upon as evidence of sexual abuse.

These observations mirror those made by experts consulted after-the-fact in two recent cases finding ineffective assistance of counsel for failure to conduct a medical expert in a sex abuse case. In Gersten v. Senkowski, 299 F. Supp. 2d 84, 103-04

(E.D.N.Y. 2004), the district court granted a writ of habeas corpus on grounds of ineffective assistance of counsel where petitioner presented the affidavit of an expert witness who disputed much of what the People's expert had relied upon at trial in finding physical evidence of sexual abuse. Petitioner's expert stated (1) that "neo-vascularization of the posterior forchette" was no longer considered evidence of sexual abuse because it could result from factors other than sexual abuse, (2) that a torn or stretched hymen was not evidence of sexual abuse in an adolescent because such conditions were commonly found in post-pubescent adolescents who had not been abused, and (3) that a "notch" on the hymen does not indicate trauma from penetration. Petitioner's expert also stated that none of the prosecution expert's findings were supported in the scientific community. Id. The district court found that because petitioner's expert had been unable to conclude that the prosecution's physical evidence supported a finding of sexual abuse, that defense counsel's failure to present an expert "fell below the objective standard of reasonableness required by Strickland. Id. At 104. The court continued as follows:

> Had trial counsel consulted with and called an expert witness . . . he would have been able to present an additional defense—that no penetrating sexual activity had ever occurred. . . . When backed with the strength of expert medical testimony, this defense is considerably more compelling than a simple denial of sexual abuse. Not only would it have rebutted the testimony of the People's medical expert, but it would have cast considerable doubt on all of the

> [complainant's] testimony. The failure of the trial court to consider the importance of this omitted expert testimony in denying petitioner's motion to vacate the judgment of conviction is an unreasonable application of the Strickland standard. Id. (Emphasis supplied).

Similarly, in Miller v. Senkowski, 268 F. Supp. 2d 296, 311 (E.D.N.Y. 2003), the district court found that defense counsel's failure to call an expert witness to rebut the prosecution witness's conclusion that perceived damage to the hymen was evidence of sexual abuse, or at least to confer with an expert in preparation for cross-examination "'contributed significantly to his ineffectiveness.'" Id. At 312 (quoting Lindstadt, 239 at 202).

Mr. Usher's case, like these, boiled down to a question of the complainant's credibility.

> When a case hinges all-but-entirely on whom to believe, an expert's interpretation of relevant physical evidence (or the lack of it) is the sort of "neutral, disinterested" testimony that may well tip the scales and sway the fact-finder. Because of the importance of physical evidence in "credibility contest" sex abuse cases, in such cases physical evidence should be a focal point of defense counsel's pre-trial investigation and analysis of the matter. And because of the "vagaries of abuse indicia," such pre-trial investigation and analysis will generally require some consultation with an expert. Pavel, 261 F.3d at 224 (emphasis supplied; internal citations omitted).

Trial counsel's failure to consult an expert and educate himself concerning the prosecution's medical testimony cannot be justified on strategic grounds. Without access to the necessary

scientific basis for conducting a cross-examination, trial counsel was in no position to conduct it effectively. Instead, he posed absurd hypothetical scenarios that had no basis in fact, such as the suggestion that Fatima's injuries had been caused by someone forcing a washcloth "viciously" into her vagina (T.640), and his assertion in summation, based on his admitted "lay person's" opinion, that her injuries should have been more severe than indicated in the medical records (T.677). Perhaps most outrageous was defense counsel's closing argument that Fatima's injuries could have been sustained by a rash that was "eating away at" her "flesh" (T.674), a grotesque suggestion that was flatly contradicted by Dr. Ramirez's expert testimony.

In sum, given the highly specialized and complicated nature of the scientific evidence at issue, and its importance in this case, defense counsel's acts and omissions constitute an "amazing dereliction" of professional duty. Lindstadt v. Keane, 239 F.3d at 201-02; see also Eze v. Senkowski, 321 F.3d at 128-29; see also Pavel v. Hollis, 261 F.3d at 224.

C. Counsel Cured a Critical Deficiency in the Prosecution's Case

The prosecutor failed to establish that appellant's conduct exceeded three months in duration, a statutory element of the only two counts in the indictment submitted to the jury. Yet, defense counsel failed to take advantage of this omission and, even more egregiously, introduced evidence that cured this defect. This

conduct was ineffective.

The prosecution was required to prove, as charged in the indictment, that appellant's conduct against Fatima started on or about July 25 and continued until November 17, 2000, to demonstrate that it "exceeded three months in duration," a required element of the charged crimes. N.Y. Pen. Law §§ 130.75(1)(a) & 130.80(1)(a). Failure to establish this element is a deficiency in proof severe enough to require reversal of a conviction and dismissal. See People v. Juara, 279 A.D.2d 479, 480, 719 N.Y.S.2d 102 (2d Dept. 2001).

Nevertheless, the prosecution failed to meet this burden during the direct examination of its witnesses. Marilyn Laguerre testified that Fatima's birthday was July 25th, but did not provide any evidence that the abuse started on or near this date. Nor did Fatima fill in this gap in the evidence. Instead, in response to the prosecutor's question, she explicitly stated that she did not remember what happened on her birthday on July 25, 2000 (T.527). The only dates she did recall -- that the abuse took place on and after Halloween and continued until November 17, 2000 -- covered a period of less than a month, which was insufficient to meet the statutory elements of the charged crimes. See id.

Defense counsel did not make use of this glaring deficiency in the prosecution's proof, either by waiting to the end of the prosecution's case to seek a trial order of dismissal on this ground, or by waiting until the close of evidence and then arguing

to the jury that the evidence failed to establish beyond a reasonable doubt that appellant's conduct exceeded three months in duration. Instead, counsel cured this defect by introducing into evidence Dr. Ramirez's interview notes, which included Fatima's statement that the abuse started after her birthday. Defense counsel also pressed Fatima to testify that the abuse had started about "a year" before trial (T.542), which provided her with an opportunity to testify -- in response to the court's clarifying question that misstated the record -- that it began on July 25, 2000.

This conduct was inexcusable. The indictment and the pre-trial proceedings put defense counsel on specific notice that the prosecution was required to prove that appellant's conduct started on or about July 25, 2000. Had counsel performed according to minimum professional standards, he could have exploited the deficiency in the prosecution's case to obtain an acquittal on the top two counts in the indictment. Instead of this favorable outcome, he ensured that the prosecution satisfied its burden of proof. This is the type of single, critical mistake by an attorney that, by itself, constitutes ineffective assistance of counsel. See People v. Hobot, 84 N.Y.2d 1021, 1022 (1995).

* * *

The cumulative effect of defense counsel's errors was to substantially enhance the strength of the prosecution's case. Absent these errors, the only direct evidence of the crime would

have been the trial testimony of Fatima , a five-year-old child who did not comprehend concepts of time, such as a week, and admitted to forgetting key events, such as her fourth birthday. Defense counsel's cross-examination of the psychologist, Dr. Lewittes, did nothing to help appellant and, instead, elicited damaging testimony that young children have difficulty memorizing or repeating things (which undermined the defense theory that Fatima had been coached) and that children Fatima's age are easily confused by lawyers asking them questions (which provided the prosecution with an opportunity to explain away Fatima's memory lapses). Although Marilyn Laguerre stated that Fatima was afraid of appellant and suffered from nightmares and other anxieties, none of her direct testimony implicated appellant in sexual abuse. Had defense counsel adequately prepared for trial -- by consulting an expert, educating himself, and effectively cross-examining Dr. Ramirez -- the medical evidence would have been inconclusive, given the contradictory state of medical science about the indicators of sexual abuse. And, as noted, absent defense counsel's conduct, there was no evidence to prove that the alleged conduct exceeded three months in duration.

In sum, the cumulative effect of defense counsel's errors was so severe that they deprived appellant of meaningful representation under the state constitution. See Baldi, 444 N.Y.S.2d 893. And because there was a reasonable probability that, but for these errors (in particular, the error that proved that appellant's

conduct exceeded three months in duration), the result at trial would have been different, appellant was also deprived of his right to effective assistance of counsel under the federal constitution. See Strickland v. Washington, 466 U.S. at 687-96.

II. PETITIONER'S ENTITLEMENT TO A WRIT OF HABEAS CORPUS

This Court has the power to issue a writ of habeas corpus on Mr. Usher's Sixth Amendment claims because the Appellate Division's decision affirming his conviction, and its subsequent decision affirming the dismissal of his post-conviction motion to vacate the conviction, were decisions involving an "unreasonable application" of "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); Williams v. New York, 529 U.S. 362, 412-13 (2000); see Cotto v. Herbert, 331 F.3d 217 (2d Cir. 2003).

The state courts ruled that Mr. Usher was not deprived of his Sixth Amendment right to the effective assistance of counsel on precisely the same three claims he raises in this petition (Exhibit J). The conclusion reached in those decisions, that counsel's introduction of damaging, inadmissible, hearsay allegations of sexual abuse, his elicitation of an element of the crime the people had failed to prove, and his failure to consult an expert to contest the State's expert medical testimony, were not merely incorrect; they were so egregiously erroneous as to constitute an unreasonable application of the Sixth Amendment principles that

have been clearly established by the United States Supreme Court. See Williams, 529 U.S. at 411-13; 28 U.S.C. § 2254(d)(1).

Moreover, the petition presents no procedural obstacles to issuance of the writ. Mr. Usher has plainly exhausted his state remedies. As was noted above, he specifically argued before both the trial court and the Appellate Division that his Sixth Amendment rights to the effective assistance of counsel were violated in the very same three ways that are alleged in this petition. Mr. Usher also specifically raised that issue in his application for leave to appeal from the Appellate Division's affirmance of his conviction to the Court of Appeals, and in his application for leave to appeal from the trial court's dismissal of his motion to vacate the conviction,[11] which were both denied (Exhibits F, G).

It is also clear that Mr. Usher did not waive his right to habeas corpus review by failing to comply with any state procedural rule. Mr. Usher specifically presented the same arguments raised in his petition through each level of State court review. The Appellate Division relied on no procedural ground in affirming his conviction and denying leave to appeal from the denial of his motion to vacate his conviction (Exhibits E, H). See Jenkins v. Artuz, 294 F.3d 284, 291 (2d Cir. 2002); Jones v. Vacco, 126 F.3d 408, 415 (2d Cir. 1997). Accordingly this court may, and should,

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11 In New York, a defendant may not seek leave to appeal the Appellate Division's decision to deny leave to appeal from a trial court's denial of a motion to vacate the conviction. See e.g., Loren v. Marry, 83 N.Y.2d 824, 612 N.Y.S.2d 103 (1994).

grant Mr. Usher's petition for a writ of habeas corpus.

RELIEF REQUESTED

For the reasons set forth above, this Court should grant Mr. Usher's petition and order respondent to release him unless, within a reasonable period of time, he is afforded a new trial.

REQUIRED INFORMATION

Petitioner was represented by the following attorneys:

(a) at pretrial hearings, trial, and sentence, by Micheal C. Harrison, 476 Broadway, 23F, New York, New York, 10013, (212) 406-5282.

(b) on appeal, by Lynn W. L. Fahey, Attorney-in-Charge, Appellate Advocates, and Tigran Eldred and Paul Skip Laisure, Appellate Counsel, 2 Rector Street, 10th Floor, New York, New York 10006.

Petitioner was sentenced under one count of an indictment. He was not sentenced on more than one indictment in the same court at the same time.

Petitioner does not have any future state sentence to serve after he completes the sentence imposed by the judgment under attack.

WHEREFORE, Petitioner prays that this Court:

(1) Issue a writ of habeas corpus;

(2) Order respondent to discharge petitioner unless, within a reasonable time, petitioner is afforded a new trial and,

(3) Grant petitioner such other and further relief as may be just and proper.

Respectfully submitted,

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Attorney for Petitioner

_____
By: PAUL SKIP LAISURE (PL 5560)
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March 13, 2006