

Court of Appeals
of the
State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

— against —

HARVEY WEINSTEIN,

Defendant-Appellant.

**BRIEF OF *AMICI CURIAE* ORGANIZATIONS AND OTHERS
ADVOCATING FOR SEXUAL ASSAULT VICTIMS SUPPORTING
RESPONDENT**

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CORPORATE DISCLOSURE STATEMENT

Sanctuary for Families Inc., Women's Equal Justice, Crime Victims Treatment Center, Equality Now, Inc., Esperanza United, Heruniversity Inc., Joyful Heart Foundation, Legal Momentum, National Alliance to End Sexual Violence, National Center on Violence Against Women in the Black Community (Ujima Inc.), National Network to End Domestic Violence, National Women's Law Center, New York City Alliance Against Sexual Assault, New York City Anti-Violence Project, New York State Coalition Against Domestic Violence, New York State Coalition Against Sexual Assault, Rape, Abuse, & Incest National Network, Safe Horizon, Violence Intervention Program, and Womankind are not-for-profit entities that are not publicly traded and in which no publicly traded company has an ownership interest. These entities do not have any corporate parents, subsidiaries, or affiliates.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici are non-profit organizations and others with extensive experience advocating for victims of sexual violence and informing international human rights guidelines on addressing rape as a grave human rights violation. Based on first-hand experience assisting tens of thousands of victims, amici have gained valuable insight into the dynamics between sexual abusers and victims, the offending patterns of sexual abusers, and the importance of considering evidence of other bad acts when evaluating the facts in sexual assault cases. A list of amici appears in the first Appendix to this brief.

New York courts' practice of admitting other bad acts evidence under this Court's *Molineux* decision to prove intent is well-settled and, in amici's experience, is particularly appropriate in sexual assault cases. Amici believe that in such cases other bad acts evidence can also be properly admitted to prove absence of consent. Amici offer their experience-based perspective to assist this Court in evaluating Defendant-Appellant Harvey Weinstein's challenge to his conviction based on the trial court's *Molineux* ruling.

QUESTION PRESENTED

Did the trial court properly admit *Molineux* evidence of Weinstein’s other sexual assaults?

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Long ago, *People v. Molineux* established that—as an exception to the general rule against admitting evidence of a defendant’s other bad acts—such evidence may be admitted to prove the crime charged when the evidence is relevant to some material fact in the case, other than the defendant’s propensity to commit the crime charged. *People v. Molineux*, 168 N.Y. 264 (1901). This Court has affirmed the admission of similar prior or subsequent bad acts in many cases. *See, e.g., People v. Ingram*, 71 N.Y.2d 474, 480-81 (1988); *People v. Calvano*, 30 N.Y.2d 199, 206 (1972). The *Molineux* holding is well-settled, and it is re-stated in subpart (1) of the Guide to New York Evidence, Rule 4.28 (“Evidence of Crimes and Wrongs (*Molineux*)”).

Evidence of other bad acts can be particularly probative in sexual assault cases. Unlike many other physical crimes, rape and other forms of sexual assault require proof of both intent and non-consent. Because these crimes are often perpetrated behind closed doors, they typically involve one person’s account against another’s, requiring jurors to make important credibility determinations. Based on amici’s extensive experience assisting tens of thousands of sexual assault

victims, as well as based on research and academic literature, sexual assault cases (particularly assaults committed by an acquaintance of the victim) may contain seemingly “counterintuitive” features that could lead jurors to conclude mistakenly that the victim consented to the conduct or that the defendant lacked the requisite intent. In such cases, admission of evidence of the defendant's sexual assaults involving other victims can provide important context and enable jurors to better understand evidence that might otherwise appear confusing.¹

The Appellate Division correctly concluded that the trial court acted properly in carefully considering the People’s *Molineux* application and Weinstein’s opposition, and in articulating its reasoning why the proffered evidence was probative of Weinstein’s intent and knowledge that complainants did not consent to his advances, and that the high probative value of the evidence outweighed its prejudicial effect. *See People v. Weinstein*, 207 A.D.3d 33, 67-68 (1st Dept. 2022). This Court should affirm that the *Molineux* evidence was

¹ The trial court acted properly in admitting evidence of Weinstein’s other assaults against one of the complaining witnesses specified in the indictment (“complainant”), Jessica Mann, “for the non-propensity purpose of establishing the defendant’s intent to use forcible compulsion and the complainant’s lack of consent.” *People v. Weinstein*, Sup. Ct., N.Y. County, Burke, J., Decision & Order at 5 (Dec. 16, 2019). New York courts have admitted such evidence in other sexual assault cases. *See, e.g., People v. George*, 197 A.D.2d 588, 589 (2d Dept. 1993); *People v. Johnson*, 37 A.D.2d 218, 221 (3d Dept. 1971). This brief will focus primarily on the trial court’s admission of evidence of Weinstein’s sexual assaults against women other than the complainants.

properly admitted to prove Weinstein's intent. It should also make clear that the evidence of Weinstein's assaults of other women was properly admitted to help prove that the complainants did not consent to his conduct.

ARGUMENT

Amici have extensive experience assisting and advocating for victims of sexual violence in New York and at the national and international levels. This work has provided amici with valuable insights into the dynamics between sexual abusers and victims, the offending patterns of sexual abusers, the psychology of victim behavior, and societal attitudes towards women alleging sexual assault. Amici's experience-based perspective highlights the importance of relevant evidence of other bad acts when evaluating the complex—and often facially ambiguous—evidence relating to events that often take place behind closed doors in sexual assault cases.

Amici's first-hand experience working with sexual assault victims, as well as research concerning sexual violence, behavioral patterns of sex offenders, and victim behavior, support the admission of *Molineux* evidence—including evidence of assaults against women other than the complainants—in this case and in many other rape and sexual assault cases.

I. *Molineux* Evidence is Particularly Important in Sexual Assault Cases.

A. *Molineux* Evidence is Highly Probative in Light of the Exceptional Circumstances Often Present in Sexual Assault Cases.

In *Molineux*, this Court explained that uncharged crimes may be relevant to show the intent, motive, knowledge, common scheme or plan, or identity of the defendant. *Molineux*, 168 N.Y. at 293. This list of purposes for admitting evidence of other bad acts is “merely illustrative and not exhaustive” of the possible range of relevancy. *People v. Rojas*, 97 N.Y.2d 32, 37 (2001); *People v. Jackson*, 39 N.Y.2d 64, 68 (1976). This Court has recognized numerous additional purposes for which *Molineux* evidence may be properly admitted, such as to provide the jury with “necessary background information on the nature of [a] relationship” (*People v. Dorm*, 12 N.Y.3d 16, 19 (2009)); to “fill in gaps in ‘interwoven events’ ... [to] help the jury understand the case in context” (*People v. Resek*, 3 N.Y.3d 385, 389 (2004)); and to “sort out ambiguous but material facts” (*id.* at 390).

As this Court has explained, *Molineux* evidence can help jurors understand situations that may appear ambiguous and provide valuable context for the events at issue. *Id.* As one scholar has explained, in sexual assault cases jurors are “faced with the dilemma of determining the relative responsibility and veracity of the [complainant] and the defendant,” but because “the facts of the case would rarely make such judgments obvious, jurors must draw inferential conclusions about

personal characteristics, events, and intentions.”² *Molineux* evidence can thus be essential to shed light on material facts in sexual assault trials.

In amici’s experience, confirmed by scholarly research, sexual assault has at least five features that make context key to evaluation of the conduct.

First, unlike many other crimes of a physical nature, such as murder or other forms of assault, consent is key to whether the conduct at issue is legal or illegal. The physical act of sex may or may not be a crime, depending on whether all participants consent. The *Molineux* Court recognized that there are some “cases in which the intent may be inferred from the nature of the act,” but in cases where criminality is ambiguous, evidence of other bad acts may help resolve whether the conduct is criminal. *Molineux*, 168 N.Y. at 297. Sexual assault cases often involve evidence that the defendant inaccurately attempts to paint as indicating a consensual encounter but that is, in reality, consistent with the offender’s commission of sexual assault.

Second, sexual assault is often perpetrated in private settings with no other witnesses, resulting in a trial that pits the complainant’s version of events against the defendant’s and requires the jury to make important credibility determinations.

² See Patricia L. Fanflik, *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?*, National District Attorneys Association at 19–20 (2007) (citing Olsen-Fulero & Fulero, *Commonsense rape judgments: An empathy-complexity theory of rape juror story making*, Psychology, Public Policy, and Law at 402 (1997)).

See, e.g., United States v. Enjady, 134 F.3d 1427, 1431 (10th Cir. 1998) (“Unlike other crimes, the defendant may raise consent as a defense—as he did here—reducing the trial to a ‘swearing match’ and diffusing the impact of even DNA evidence.”). In fact, in sexual assault cases, the accused often admits to the act of intercourse, so physical evidence that the act occurred does not resolve innocence or guilt. Physical evidence that could support the complainant’s account, such as bruising, may be lacking or inconclusive.³ A multi-site study of sexual violence case attrition in the United States found that prosecutors reported making charging decisions in anticipation of how they believed a jury would respond to the evidence in a case, and that cases with no third-party witness to the assault, where the victim alleged sexual assault and the defendant claimed that the victim consented, were often not taken to trial.⁴

Third, sexual assaults in non-stranger contexts (*e.g.*, “acquaintance rapes”) often involve complicated relationships and unequal power dynamics. For instance, perpetrators of sexual violence within relationships—through a

³ David. P. Bryden & Roger C. Park, “*Other Crimes*” *Evidence in Sex Offense Cases*, 78 Minn. L. Rev. 529, 578 (1994) (explaining that juries need additional evidence in consent defense rape trials to reach an informed decision, and that physical evidence is often lacking or inconclusive in such cases).

⁴ Melissa S. Morabito, Linda M. Williams & April Pattavina, *Decision Making in Sexual Assault Cases: Replication Research on Sexual Violence Case Attrition in the U.S.*, National Criminal Justice Reference Center Reference Service No. 252689, at 81-87, 107 (2019).

phenomenon known as “trauma-bonding” or “trauma-coerced attachment”—often engage in manipulative behaviors, combining physical or sexual violence with displays of affection and attachment, which can confuse observers and factfinders.⁵ And some victims of acquaintance rape—as a means of coping with the traumatic event—do not immediately “acknowledge the assault as ‘rape’ and therefore do not report the crime to the police,” although the assault legally qualifies as rape.⁶ Research shows that many rape victims who do not initially acknowledge they were assaulted may maintain a relationship with and even continue to have sex with the offender, which “may lead to future victimization.”⁷ Perpetrators in such dynamics often use their knowledge of the particular vulnerabilities of their victims as a method of control and continued offending.⁸ Serial offenders may select their

⁵ See Kendra Doychak & Chitra Raghavan, “No voice or vote:” *trauma-coerced attachment in victims of sex trafficking*, *Journal of Human Trafficking*, at 2-3 (Oct. 2018) (explaining that trauma-coerced attachments involve the use of control tactics, exploitation of power imbalances, and intermittent delivery of reward and punishment by the abuser, and that women in such relationships “often behave in ways that are puzzling to the outsider”).

⁶ See Fanflik, *supra* note 2, at 12; see also Lana Stermac, Peter M. Sheridan, Alison Davidson & Sheila Dunn, *Sexual Assault of Adult Males*, 11(1) *Journal of Interpersonal Violence* 52, 54 (Mar. 1996) (stating that male sexual assault victims “nearly uniformly used repression, denial, and minimizing of trauma as psychological defenses”).

⁷ See Fanflik, *supra* note 2 at 12-13.

⁸ Jenny E. Mitchell & Chitra Raghavan, *The Impact of Coercive Control on Use of Specific Sexual Coercion Tactics*, 27(2) *Violence Against Women* 187, 187-88 (2021) (explaining that a defining feature of coercive control in abusive attachments is that the intimate partner uses knowledge of the victim’s particular vulnerabilities to control her).

victims and deliberately carry out their offenses under circumstances that make the elements of the crime, including the offender’s intent and the victim’s lack of consent, difficult to evaluate.

Fourth, victims of sexual assault may engage in seemingly “counterintuitive” behaviors—such as not fighting off their attacker, engaging in self-blame, not immediately reporting the assault, or continuing a relationship with (and even having consensual sex with) the offender following the assault—that do not make sense to most individuals.⁹ However, victims who have suffered the psychological trauma of sexual assault, and in some cases an abusive pattern from an intimate partner, may have varying psychological responses that manifest in a range of behavioral patterns or coping strategies.¹⁰ Research suggests that different psychological responses and external factors can combine to produce a variety of trauma responses, behaviors, or coping strategies in sexual assault victims.¹¹ For example, victims of sexual assault commonly experience “tonic immobility” during their assault—a neurobiological response to an extreme threat

⁹ See Fanflik, *supra* note 2 at 8-9, 13-14 (discussing that victim behavior may not conform to “normal” societal expectations).

¹⁰ *Id.* at 5, 14.

¹¹ See *id.* at 5; see also Jen Percy, *What People Misunderstand About Rape*, New York Times Magazine, Aug. 22, 2023, available at <https://www.nytimes.com/2023/08/22/magazine/immobility-rape-trauma-freeze.html> [last accessed Aug. 29, 2023].

resulting in involuntary, temporary motor inhibition, which has been described as a “catatonic-like state with muscle hyper- or hypo-tonicity, tremor, lack of vocalization, analgesia and relative unresponsiveness to external stimuli,” and is colloquially described as “freezing” or “shutting down.”¹²

In short, not all reactions will comport with what would “normally” be expected, and jurors could mistakenly interpret conduct that does not comport with the “normal” understanding to indicate consent to the assault.¹³ Indeed, as there is nothing normal about being sexually victimized, there cannot be a “normal” reaction to such a traumatic event, and victims “are caught between societal expectations [of how they should react] and personal feelings in an attempt to cope with the experience.”¹⁴ As researchers have noted, “victim reactions are often

¹² Anna Möller, Hans Peter Söndergaard & Lotti Helström, *Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression*, 96(8) Acta Obstetrica et Gynecologica Scandinavica, 932, 932-933 (2017); Jen Percy, *What People Misunderstand About Rape*, New York Times Magazine, Aug. 22, 2023, available at <https://www.nytimes.com/2023/08/22/magazine/immobility-rape-trauma-freeze.html> [last accessed Aug. 29, 2023].

¹³ See Fanflik, *supra* note 2 at 3-5, 8-11, 15, 21 (explaining that the reactions of sexual assault victims may vary, and though a victim’s reaction may appear “counterintuitive” to the average person (e.g., not fighting back during a rape, continuing to date an abuser, or not reporting until months later), the reaction is based on the victim’s individual characteristics, experiences, conceptualizations of the assault, coping strategies, and external factors).

¹⁴ See *id.* at 9.

scrutinized because of the variability in behaviors . . . leading some observers to question the credibility of the victim.”¹⁵

Fifth, pervasive myths can cause jurors to regard victims alleging sexual assault with some degree of skepticism,¹⁶ and *Molineux* evidence can counter such perceptions by placing events into appropriate context. Unfounded attitudes include, for instance, prejudices that blame the victim or excuse the offender, or notions that sexual assault should look a certain way (such as involving two strangers or a certain level of force). Research shows that when a sexual assault does not meet the stereotypical scenario involving a stranger, a sudden violent attack at night involving a weapon, and penile/vaginal penetration, the assault is often regarded with more skepticism.¹⁷ Other studies have shown that, particularly in acquaintance rape situations, such prejudices and unsupported beliefs affect jurors’ evaluation of evidence.¹⁸

In light of the distinctive features of sexual assault crimes, it is imperative that courts allow introduction of evidence that will provide jurors with the full context of the conduct. Such evidence is admissible *not* to show propensity, but to

¹⁵ *See id.* at 14.

¹⁶ *Id.* at 18.

¹⁷ *Id.* at 20.

¹⁸ Bryden, *supra* note 3, at 578 (explaining that research shows that jurors have a tendency to blame the victim in acquaintance rape cases).

shed light on the offender's intent and whether the victim consented to the conduct. As discussed below, *Molineux* evidence can be crucial to enabling jurors to better understand evidence they may otherwise mistakenly interpret to indicate that the defendant lacked the requisite intent or the victim consented to the sexual conduct at issue.

B. Evidence of the Defendant's Sexual Assaults of Other Victims Can Shed Important Light on Conduct in Sexual Assault Cases.

Evidence of the defendant's other bad acts, including with other victims, can be critical to jurors' understanding of the conduct of both the offender and the victim in sexual assault cases.

1. Evidence of Other Bad Acts Can Reveal a Defendant's Intent.

Under well-settled New York law, *Molineux* evidence is admissible to show a defendant's intent to commit sexual assault. *Molineux*, 168 N.Y. at 297-300.

This Court has made clear that *Molineux* evidence is admissible to show intent where intent is at issue or cannot necessarily be inferred from the act itself. *See Ingram*, 71 N.Y.2d at 479. As explained by the *Molineux* Court, proof of intent in such cases "is often unattainable except by evidence of successive repetitions of the act." *Molineux*, 168 N.Y. at 298. The rationale for admitting such evidence is the "law of probabilities": "[T]he more often the act constituting the crime has been done, the less the likelihood that it could have been done innocently, as if by chance." *Ingram*, 71 N.Y.2d at 479 (citing 2 Wigmore,

Evidence §§ 302, 312 (Chadbourn rev. 1979)). The repetition of an act “reduces the probability of innocence.” *Id.* at 480 (citing 2 Wigmore, Evidence § 321, at 285). Other courts have articulated similar rationales for admitting other bad acts evidence. *See, e.g., United States v. Cavallaro*, 553 F.2d 300, 305 (2d Cir. 1977).

In *People v. Denson*, this Court upheld the admission of evidence of the defendant’s past sexual assault of a child to help prove in the underlying case that the defendant intended to kidnap another child, where the defendant exhibited much of the same behavior in both cases. Intent was not evident from the defendant’s act. The Court held that the trial court had properly concluded that, considering the similarity of the victims and “certain distinctive patterns of behavior employed by the defendant” against both victims, “the defendant’s fixation with the first victim is proof of his intent with regard to the second.” *People v. Denson*, 26 N.Y.3d 179, 188 (2015) (internal marks omitted).

The use of *Molineux* evidence to clarify intent is especially important in sexual assault cases, particularly in non-stranger contexts—the experience of many of the clients amici assist. As discussed in Section I.A, many sex offenders engage in manipulative behaviors that can create confusion in the minds of jurors as to whether the defendant had the requisite intent to rape. For instance, perpetrators of sexual violence who establish trauma-coerced attachments often combine physical and sexual violence with displays of affection, which can raise doubts for jurors

attempting to determine after the fact whether the defendant had the requisite criminal intent.¹⁹

If other bad acts evidence demonstrates that the defendant has manipulated other victims and forced sex on them in similar circumstances, jurors are in a position to view the defendant's claim of innocent intent with appropriate skepticism.

2. Evidence of Other Bad Acts Can Provide Context for Jurors Assessing Whether Sexual Conduct Was Consensual.

In sexual assault cases where the People must prove non-consent or where the defendant advances a consent defense, *Molineux* evidence should be admissible to help prove non-consent.²⁰

As noted above, the list of purposes the *Molineux* Court provided for admitting evidence of other bad acts is “merely illustrative and not exhaustive.” *See, e.g., Rojas*, 97 N.Y.2d at 37. Such evidence is admissible for additional reasons where the evidence “is relevant to some material fact in the case.” *See*

¹⁹ *See Doychak, supra* note 5, at 2-3.

²⁰ Under New York law, non-consent is an element of rape and all other sexual offenses. *See, e.g.,* New York Penal Code § 130.05(1) (Sex offenses; lack of consent) (“Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without consent of the victim.”). Subpart (2) of the Guide to New York Evidence, Rule 4.28, which is derived from this Court's decisions, provides that evidence of a defendant's commission of other bad acts may be used to rebut a defense raised by the defendant when those acts “are relevant and probative to disprove the defense.”

People v. Cass, 18 N.Y.3d 553, 560 (2012). *Molineux* evidence is particularly relevant to the material fact of non-consent in sexual assault cases.

As discussed in Section I.A, sexual assault cases often involve evidence that can falsely be painted as indicating consent. Compounding these challenges, the victim's credibility on the issue of consent is crucial, but sexual assault victims face special—and unwarranted—challenges to their credibility. Particularly where the complainant knows the perpetrator, evidence that the perpetrator engaged in similar assaults of other victims under similar circumstances can provide context for other evidence that jurors might otherwise mistakenly interpret as indicating that the complainant consented to the assault. *See Resek*, 3 N.Y.3d at 389-390.

For instance, some victims of acquaintance rape may be in denial or seek to minimize what happened to them as a psychological means of coping with the trauma of the assault, and therefore may not report the crime to the police. These victims may initially use more benign labels, such as “miscommunication,” to describe the experience of what really was a nonconsensual sexual assault.

Researchers found that a large percentage of such “unacknowledged” sexual assault victims were acquainted with, and continued to have other sexual contact with, the offender.²¹ When, or if, a victim later reports the assault, the victim's

²¹ Fanflik, *supra* note 2, at 12-13 (describing studies involving “acknowledged” and “unacknowledged” victims whose experiences met the legal definition of rape).

earlier reaction and behavior may lead some observers to question the victim's credibility.

Additionally, some sexual assault victims engage in some of the other seemingly "counterintuitive" behaviors described above; jurors could later mistakenly interpret such conduct as indicative of consent to the assault.

Particularly with acquaintance rape, demonstrating an offender's conduct across multiple victims can have a "synergistic effect" and can help the People rebut the offender's claim that the victim in the case at hand consented to the assault.²² For instance, a defendant accused of raping a woman on a date may attempt to create a reasonable doubt by pointing to inconsistencies in her story, the absence of bruises, or conduct on her part that could (incorrectly) be interpreted to suggest consent or a motive to fabricate.²³ If other women accuse the defendant of raping them in similar settings, the defendant may be able to raise doubts about each of their individual accounts, but jurors hearing multiple accusations would have deeper context regarding whether the conduct at issue was in fact consensual.²⁴

²² Bryden, *supra* note 3, at 577 (explaining that evidence of the defendant's sexual assaults against other victims is "extraordinarily credible" evidence that can have a "synergistic effect" in acquaintance rape cases).

²³ *Id.*

²⁴ *Id.*; see Jennifer Gentile Long et al., *Seeking Justice Through Sexual Violence Prosecutions*, in *Sexual Assault Kits and Reforming the Response to Rape*, at 190-191 (Rachel E. Lovell & Jennifer Langhinrichsen-Rohling eds., 2023) (noting that defendants in sexual assault cases commonly assert that the victim consented to

Scholars have noted that some offenders *design* their sex offenses to be hard to prove, including by arranging scenarios intended to make it appear that the victim consented to the offender's conduct. For instance, some offenders deliberately target and subdue especially vulnerable victims that they believe they can assault with impunity.²⁵ Qualitative data have revealed that "a common pattern of sexual assault involve[s] the exploitation of vulnerable individuals."²⁶ One study found that as a first step in the victimization process, "predators connect with potential targets to assess the opportunity for exploitation. As part of this initial selection, predators often recruit their victims deliberately based on a particular set of assets or attributes that they observe and find alluring . . . where the possibility of exerting influence to manipulate individuals' choices and behaviors exists."²⁷ In some cases, offenders may carefully craft relationships with

sexual activity, and explaining that evidence of the defendant's other bad acts can help counter such an assertion).

²⁵ Long, *supra* note 24, at 190.

²⁶ See Stermac, *supra* note 6, at 57 (reporting a high percentage of male sexual assault victims experiencing economic and social instability—such as being indigent, unemployed, physically disabled, and/or cognitively impaired—which may reflect the exploitation of vulnerable individuals who have a decreased capacity to prevent their victimization).

²⁷ Jacquelyn F. Duron, Laura Johnson, Gretchen L. Hoge & Judy L. Postmus, *Observing Coercive Control Beyond Intimate Partner Violence: Examining the Perceptions of Professionals About Common Tactics Used in Victimization*, 11(2) *Psychology of Violence* 144 148-150 (2021) (describing that victims were exploited because of risk factors, including lack of supportive systems and limited options or resources).

victims by cultivating allegiance through psychological coercion and gaining the victim's trust, including by fulfilling victim needs such as friendship, housing, or career advancement.²⁸ The evidence of what transpired before, during, and after assaults can confuse jurors as they try after the fact to interpret whether the victim consented to the assault.

Molineux evidence can provide the jury with important insight into the offender's methods, strategies, and tactics of victim selection, perpetration, and concealment. A Michigan case illustrates this point. In *People v. Oliphant*, the defendant was convicted of forcible rape after convincing the complainant (a stranger) to get in his car, driving her (willingly) to various bars and other locations, and ultimately driving her to an unfamiliar part of the city, where he threatened her with a non-visible gun and knife and forced her to engage in various sexual acts. *People v. Oliphant*, 399 Mich. 472, 480-82, 250 N.W.2d 443, 445-46 (1976), *habeas denied Oliphant v. Koehler*, 594 F.2d 547, 550 (6th Cir. 1979). At trial, the defendant claimed that the complainant had consented, and the record included many facts that a jury could mistakenly interpret as indicating consent: the complainant willingly entered the defendant's car and accompanied him to a number of locations, they talked for a while, and the defendant—after driving the complainant to an unfamiliar area—made her sit next to him “so they would look

²⁸ *Id.* at 148.

like boyfriend and girlfriend.” *Id.* at 480. Additionally, the complainant was not beaten, her clothes were not torn, and the defendant did not display a weapon. After the rape, the defendant allowed the complainant to replace her clothing, drove her back to her dormitory, and instructed her to note his license plate number; her knowledge of the plate number later suggested to others that she previously knew the defendant and perhaps had consensual sex with him before subsequently regretting the sex. Moreover, the defendant himself visited the police station to report that after having consensual sex, the complainant became upset, and he was apprehensive as to what she would do. *Id.* at 480-82.

The Michigan Supreme Court concluded that the trial court had properly admitted evidence showing that the defendant had raped three other witnesses under very similar circumstances. The court explained that the other bad acts evidence was properly admitted to show a common scheme or plan of raping victims in a manner and under circumstances that were crafted to give the appearance of consent should the victims report the rape; thus, the evidence was important proof of non-consent. *Id.* at 482-94. The court further noted that the “dearth of evidence on consent, aside from the contradictory testimony of complainant and defendant, [made] evidence as to the circumstances of the incident particularly important.” *Id.* at 495.

Courts in other jurisdictions have similarly upheld admission of defendants' similar sexual assaults to prove the complainants' lack of consent. In *State v. Hill*, the Arizona Supreme Court held that evidence of the defendant's other sexual assaults was properly admitted to prove the complainant's non-consent; such evidence was especially vital because the defendant could point to seeming indicators of consent, such as his falling asleep in her bed after the rape instead of fleeing. *State v. Hill*, 104 Ariz. 238, 239, 450 P.2d 696, 697 (1969).

In *Williams v. State*, the Florida Supreme Court held that though consent is unique to the individual, evidence of the defendant's sexual assaults of other women was properly admitted to rebut a consent defense because of the similarity of those assaults to the charged crime; the other evidence showed a common scheme or plan to "seek out and isolate victims not likely to complain or to complain unsuccessfully because of the circumstances surrounding the assaults and the victims['] involvement with drugs." *Williams v. State*, 621 So. 2d 413, 416-17 (Fla. 1993). In *State v. Esposito*, the Supreme Court of Connecticut similarly noted, "[E]vidence of a common plan or scheme to engage in compelled sexual intercourse would tend to negate a defense of consent." *State v. Esposito*, 192 Conn. 166, 172-173, 471 A.2d 949, 953 (1984). In holding that the trial court had properly admitted evidence of the defendant's sexual assault of a different victim, the court noted similarities between the sexual assaults and remarked that the

circumstances under which the defendant assaulted the victims would “make it easier for the defendant to claim later that there had been consent.” *Id.* at 174.

Supreme courts of several other states have likewise ruled that evidence of prior assaults of other victims was properly admitted to help prove the complainants’ lack of consent. *See, e.g., State v. Morrison*, 310 N.W.2d 135, 137 (Minn. 1981) (evidence of defendant’s sexual assaults of other victims was properly admitted because it was relevant to the issue of consent; in both offenses, “defendant, figuring he could explain it away later, forced women he knew to have vaginal sexual intercourse with him.”); *State v. Willis*, 370 N.W.2d 193, 198 (S.D. 1985) (“Evidence reflecting these common features to plan or scheme to engage in compelled sexual intercourse negates [a] defense of consent.”); *State v. Nelson-Waggoner*, 6 P.3d 1120, 1127 (Utah 2000) (evidence of defendant’s other sexual assaults was properly admitted because it was probative on the issue of consent); *Hunt v. State*, 233 Ga. 329, 331, 211 S.E.2d 288, 290 (1974) (evidence of defendant’s other sexual assault, that had numerous similarities to the assault with which he was charged, was properly admitted to “show the intent, motive, plan, scheme, and bent of mind of the appellant, and was relevant on the issue of whether or not the prosecutrix consented to the sexual acts.”).

Amici themselves have worked with clients who reported similar types of experiences. For example, one amicus worked with a victim who was sexually

assaulted in the offender's apartment. After raping and strangling her nearly to unconsciousness, the offender insisted the victim lie in bed and "cuddle" with him. One month later, the offender raped and strangled another woman and insisted afterwards that she lie in bed and "cuddle" him. In isolation, either victim's truthful testimony that she "cuddled" the defendant after the rape might confuse jurors about the nature of the relationship between the offender and the victim and obscure the non-consensual nature of the intercourse. Admission of the offender's other sexual assault, however, could provide important context for the evidence of cuddling that jurors might otherwise interpret as indicative of consent to the intercourse.

Evidence of strategies the offender has used in other sexual assaults is clearly relevant to the issue of non-consent and is important to help jurors contextualize events and the behaviors of the parties. This Court should hold here that *Molineux* evidence may properly be admitted to help establish a sexual assault victim's lack of consent.

II. The Trial Court Did Not Abuse Its Discretion in Admitting Evidence of Weinstein's Similar Bad Acts as Evidence of Both His Intent and the Complainants' Non-Consent.

The trial court did not abuse its discretion in admitting evidence of Weinstein's sexual assaults involving other victims to prove his criminal intent in this case or to prove the complainants' non-consent. *Weinstein*, Sup. Ct., N.Y.

County, Burke, J., Decision & Order at 5, 8 (Dec. 16, 2019); *see also People v. Morris*, 21 N.Y.3d 588, 597 (2013) (trial court’s decision to admit *Molineux* evidence may not be disturbed unless it constitutes an abuse of discretion as a matter of law). The trial court provided ample justification for admitting this evidence:

[Weinstein’s] intent to forcibly compel the two complainants in the indictment to engage in sexual acts with him is directly at issue in this case, particularly where, as here, [Weinstein] has made public and extra-judicial statements where he admits that he had sex with the complainants, but that every act was consensual and that the complainants are not credible. The uncharged acts . . . rebut[] the defendant’s claim of consent and demonstrate[] the defendant’s intent to commit these crimes.

Weinstein, Sup. Ct., N.Y. County, Decision & Order at 8.

While the Appellate Division’s affirmance on this issue refers primarily to the issue of intent, the need to prove the complainants’ lack of consent likewise provided an appropriate ground for admitting the evidence of other assaults.

A. The Trial Court Properly Admitted Evidence of Weinstein’s Other Sexual Assaults to Prove His Intent.

Intent is a well-established exception to the general rule that other bad acts evidence should be excluded. Here, as the trial court recognized, jurors could mistakenly interpret the circumstances of Weinstein’s sexual assaults of complainants to be ambiguous as to his intent because this case involved the kinds of conduct and behavioral patterns described in Section I.

The charged crimes occurred within the context of ongoing relationships between Weinstein and the complainants. During the charged incidents, Weinstein did not use extreme levels of physical violence, but rather used a combination of physical force, manipulation, intimidation, and coercion. Moreover, one of the complainants formed a romantic relationship with Weinstein after he sexually assaulted her (but prior to the charged assault). Under these circumstances, Weinstein's intent may not have been evident from the charged conduct, and evidence of his sexual assaults of other victims was important to illuminate his intent. This evidence helped the People demonstrate that Weinstein intended to engage in intercourse with the complainants regardless of whether they consented.

The trial court's admission of *Molineux* evidence to shed light on Weinstein's intent with respect to the charged crimes was plainly not an abuse of discretion. As the Appellate Division observed,

[W]ithout [the *Molineux* evidence], the jury could have easily believed that the incidents happened exactly the way [the complainants] described them, but still concluded that [Weinstein] reasonably believed that they consented because of the way that, before and after the charged incidents, they had befriended him, flattered him, accepted his assistance, and engaged in other sexual acts with him that were consensual.

Weinstein, 207 A.D.3d at 65.

Weinstein's other sexual assaults increased the likelihood that he understood the complainants' words and acts at the time of the assaults to be expressions of non-consent, since he had encountered similar expressions by other women who

had not consented to his sexual advances. Evidence of Weinstein’s practice of baiting women with opportunities for career advancement, then imposing sex upon them without regard to whether they consented, was highly relevant to understanding his intent in committing the charged crimes.

B. The Trial Court Properly Admitted Evidence of Weinstein’s Other Sexual Assaults to Help Establish the Complainants’ Non-Consent.

Evidence of Weinstein’s other sexual assaults was also properly admitted to show that the complainants in this case did not consent to the charged assaults. Weinstein asked the jury to interpret certain evidence as indicative of consent. In particular, at times, the complainants—who were trying to advance their careers in the entertainment industry—went to Weinstein’s hotel room alone, did not report his assaults immediately, stayed in touch with Weinstein afterwards, and accepted career help from him. *See id.* at 41.

That same evidence takes on a different cast when one considers that other women—aspiring actresses—recounted being sexually assaulted by Weinstein under similar circumstances: Weinstein expressed interest in helping them with their careers and found ways to meet them alone. *See id.* at 42–50 (describing testimony of Miriam Haley, Jessica Mann, Annabella Sciorra, Lauren Young, Dawn Dunning, and Tarale Wulff). For most of the victims, Weinstein used his larger size and physical weight to move or restrain them during the assaults (*see id.*

at 43, 45–49 (describing testimony of Haley, Mann, Sciorra, Young, and Wulff)), and many recounted that he forced oral sex upon them. *See id.* at 43, 45–47 (describing testimony of Haley, Mann, and Sciorra). The victims refrained from reporting the assaults because they were intimidated by Weinstein’s power and influence in the entertainment industry, and some stayed in touch with Weinstein and accepted career help from him after being assaulted. *See id.* at 43–44, 46–50 (describing testimony of Haley, Mann, Dunning, and Wulff). When viewed together, the evidence that jurors might mistakenly interpret as signs of consent begins to look more like indicators that Weinstein lured vulnerable victims into meeting with him alone and that the complainants felt unable to separate from him after the sexual assaults. The evidence of other assaults tends to show that Weinstein repeatedly engaged in a practice of baiting budding professionals in the entertainment industry with career assistance and then forcing sexual acts upon them without regard for whether they consented.

With this important context, the jurors were better able to understand and assess the evidence when deliberating about whether the complainants had consented. The trial court did not abuse its discretion by admitting the *Molineux* evidence based on its relevance to the complainants’ non-consent, as well as to Weinstein’s intent.

C. The Trial Court Properly Balanced the Probative Value of the *Molineux* Evidence Against Any Prejudicial Effect, Leaving No Basis for a Due Process Challenge.

For the many reasons discussed above, evidence of Weinstein's sexual assaults of other victims was highly probative on material issues. Of course, trial courts must balance the high probative value of such evidence against the prejudicial effect of admitting it. *See People v. Alvino*, 71 N.Y.2d 233, 242 (1987).

Here, the trial court appropriately considered the prejudicial effect of the *Molineux* evidence and balanced it against its high probative value. As the Appellate Division recognized, the trial court exercised sound discretion when it: i) carefully considered the People's *Molineux* submission and Weinstein's opposition, ii) articulated its reasoning why the proffered evidence was probative of Weinstein's intent and the complainants' lack of consent, iii) limited the number of *Molineux* witnesses, and iv) issued thorough limiting instructions to the jury both at the time *Molineux* testimony was heard and in the final jury charge. *See Weinstein*, 207 A.D.3d at 68. These steps were more than adequate to support a conclusion that the trial court engaged in appropriate balancing and exercised provident discretion in admitting the evidence.

Moreover, the trial outcome shows that Weinstein was not unduly prejudiced. Despite hearing *Molineux* evidence, jurors did not rush to judgment

but carefully deliberated on the evidence they had heard, acquitting on some counts, convicting on some counts, and deadlocking on others.

Weinstein nevertheless argues that the trial court's *Molineux* ruling violated his constitutional right to a fair trial. *See* Appellant's Brief, at 24, 41. In light of the trial court's careful limitations on the jury's use of the *Molineux* evidence and its proper balancing of probative value and potential prejudice, there is no basis for this claim.

Federal courts' rejection of due process challenges to the application of Federal Rule of Evidence ("F.R.E.") 413 shows why Weinstein's due process argument lacks merit. Under F.R.E. 413, where a defendant is accused of sexual assault, federal courts may admit evidence that the defendant committed another sexual assault for any matter to which such evidence is relevant, including propensity. In assessing due process challenges to this rule, federal courts of appeals have repeatedly held that the rule does not violate federal due process because admission of evidence of other assaults is subject to the court's balancing of its probative value against any prejudicial effect. *See United States v. Schaffer*, 851 F.3d 166, 177-81, 184 (2d Cir. 2017) (collecting cases); *United States v. Mound*, 149 F.3d 799, 800-01 (8th Cir. 1998); *Enjady*, 134 F.3d at 1433; *Allison v. Superintendent Waymart SCI*, 703 Fed. Appx. 91, 97-98 (3d Cir. 2017); *see*

generally 1 George E. Dix et al., McCormick on Evidence § 190.10 (Mosteller 8th ed. 2020 & Supp. 2022).

Similarly, New York courts have held that admitting other bad acts evidence does not deprive a defendant of his constitutional right to a fair trial where the trial court took steps to minimize prejudice and exercised appropriate discretion in weighing probative value against potential prejudice. *See, e.g., Morris*, 21 N.Y.3d at 594 (evidence of defendant’s uncharged crime that was admitted as background to explain police aggressiveness was subject to proper balancing and accompanied by jury instructions, and thus did not deprive defendant of fair trial); *People v. Sudler* 116 A.D.2d 605, 606 (1986) (involving issuance of bad checks).

Because the trial court took steps to reduce prejudice to Weinstein and properly balanced the significant probative value of evidence of Weinstein’s other sexual assaults against any prejudicial effect, his due process rights were not violated.

CONCLUSION

Admission of *Molineux* evidence in many sexual assault cases is entirely proper and may be crucial due to the distinctive circumstances of such crimes. Here, the trial court did not abuse its discretion by admitting *Molineux* evidence to illuminate both Weinstein’s intent and the complainants’ lack of consent.

Dated: New York, New York
October 13, 2023

COVINGTON & BURLING LLP

By: 
Nancy Kestenbaum

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE (22 NYCRR § 500.13(C))

I, Nancy Kestenbaum, hereby certify that that the foregoing amicus brief was prepared on a word-processing system. A proportionally spaced typeface compliant with the requirements of 22 NYCRR § 500.13(c) was used, as follows:

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Dated: New York, New York
October 13, 2023

COVINGTON & BURLING LLP

By: 
Nancy Kestenbaum

Counsel for Amici Curiae

APPENDIX - LIST OF AMICI

Sanctuary for Families Inc.

Women's Equal Justice

Mary Haviland, Esq.

Crime Victims Treatment Center

Equality Now, Inc.

Esperanza United

Heruniversity Inc.

Joyful Heart Foundation

Legal Momentum

National Alliance to End Sexual Violence

National Center on Violence Against Women in the Black Community (Ujima Inc.)

National Network to End Domestic Violence

National Women's Law Center

New York City Alliance Against Sexual Assault

New York City Anti-Violence Project

New York State Coalition Against Domestic Violence

New York State Coalition Against Sexual Assault

Rape, Abuse, & Incest National Network

Safe Horizon

Violence Intervention Program

Womankind

APPENDIX PURSUANT TO 22 NYCRR 500.1(H)

Tab 1: Anna Möller, Hans Peter Söndergaard & Lotti Helström, *Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression*, 96(8) Acta Obstetricia et Gynecologica Scandinavica 932 (2017).

Tab 2: David. P. Bryden & Roger C. Park, “*Other Crimes*” *Evidence in Sex Offense Cases*, 78 Minn. L. Rev. 529 (1994).

Tab 3: Jacquelynn F. Duron, Laura Johnson, Gretchen L. Hoge & Judy L. Postmus, *Observing Coercive Control Beyond Intimate Partner Violence: Examining the Perceptions of Professionals About Common Tactics Used in Victimization*, 11(2) Psychology of Violence 144 (2021).

Tab 4: Jennifer Gentile Long et al., *Seeking Justice Through Sexual Violence Prosecutions*, in *Sexual Assault Kits and Reforming the Response to Rape*, (Rachel E. Lovell & Jennifer Langhinrichsen-Rohling eds., 2023).

Tab 5: Jenny E. Mitchell & Chitra Raghavan, *The Impact of Coercive Control on Use of Specific Sexual Coercion Tactics*, 27(2) Violence Against Women 187 (2021).

Tab 6: Kendra Doychak & Chitra Raghavan, “*No voice or vote:*” *trauma-coerced attachment in victims of sex trafficking*, Journal of Human Trafficking (Oct. 2018).

Tab 7: Lana Stermac, Peter M. Sheridan, Alison Davidson & Sheila Dunn, *Sexual Assault of Adult Males*, 11(1) Journal of Interpersonal Violence 52 (Mar. 1996).

Tab 8: Melissa S. Morabito, Linda M. Williams & April Pattavina, *Decision Making in Sexual Assault Cases: Replication Research on Sexual Violence Case Attrition in the U.S.*, National Criminal Justice Reference Center Reference Service No. 252689 (2019).

Tab 9: Patricia L. Fanflik, *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?*, National District Attorneys Association (2007).

Tab 10: Jen Percy, *What People Misunderstand About Rape*, New York Times Magazine, Aug. 22, 2023, available at <https://www.nytimes.com/2023/08/22/magazine/immobility-rape-trauma-freeze.html> [last accessed Aug. 29, 2023].