SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 51

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DOMINIQUE STRAUSS-KAHN,

Defendant.

RECOMMENDATION FOR DISMISSAL

Indictment No. 02526/2011

SUMMARY

The People of the State of New York move to dismiss the above-captioned indictment, which charges the defendant with sexually assaulting the complainant at a hotel in midtown Manhattan on May 14, 2011. The crimes charged in the indictment require the People to prove beyond a reasonable doubt that the defendant engaged in a sexual act with the complainant using forcible compulsion and without her consent. After an extensive investigation, it is clear that proof of two critical elements – force and lack of consent – would rest solely on the testimony of the complaining witness at trial. The physical, scientific, and other evidence establishes that the defendant engaged in a hurried sexual encounter with the complainant, but it does not independently establish her claim of a forcible, nonconsensual encounter. Aside from the complainant and the defendant, there are no other eyewitnesses to the incident. Undeniably, then, for a trial jury to find the defendant guilty, it must be persuaded beyond a reasonable doubt that the complainant is credible. Indeed, the case rises and falls on her testimony.

At the time of the indictment, all available evidence satisfied us that the complainant was reliable. But evidence gathered in our post-indictment investigation severely undermined her reliability as a witness in this case. That an individual has lied in the past or committed criminal acts does not necessarily render them unbelievable to us as prosecutors, or keep us from putting them on the witness stand at trial. But the nature and number of the complainant's falsehoods leave us unable to credit her version of events beyond a reasonable doubt, whatever the truth may be about the encounter between the complainant and the defendant. If we do not believe her beyond a reasonable doubt, we cannot ask a jury to do so.[1]

We have summarized below the circumstances that have led us to this conclusion. This is not a case where undue scrutiny or a heightened standard is being imposed on a complainant. Instead, we are confronted with a situation in which it has become increasingly clear that the complainant's credibility cannot withstand the most basic evaluation. In short, the complainant has provided shifting and inconsistent versions of the events surrounding the alleged assault, and as a result, we cannot be sufficiently certain of what actually happened on May 14, 2011, or what account of these events the complainant would give at trial. In virtually every substantive interview with prosecutors, despite entreaties to simply be truthful, she has not been truthful, on matters great and small, many pertaining to her background and some relating to the circumstances of the incident itself. Over the course of two interviews, for example, the complainant gave a vivid, highly-detailed, and convincing account of having been raped in her native country, which she now admits is entirely false. She also gave prosecutors and the grand jury accounts of her actions immediately after the encounter with the defendant that she now admits are false. This longstanding pattern of untruthfulness predates the complainant's contact with this Office. Our investigation revealed that the complainant has made numerous prior false statements, including

[1] This motion explains the basis for our request that the indictment returned by the grand jury be dismissed. It does not purport to make factual findings. Rather, we simply no longer have confidence beyond a reasonable doubt that the defendant is guilty.

ones contained in government filings, some of which were made under oath or penalty of perjury. All of these falsehoods would, of course, need to be disclosed to a jury at trial, and their cumulative effect would be devastating.

Finally, we have conducted a thorough investigation in an effort to uncover any evidence that might speak to the nature of the sexual encounter between the complainant and the defendant. All of the evidence that might be relevant to the contested issues of force and lack of consent is simply inconclusive.

We do not make this recommendation lightly. Our grave concerns about the complainant's reliability make it impossible to resolve the question of what exactly happened in the defendant's hotel suite on May 14, 2011, and therefore preclude further prosecution of this case. Accordingly, we respectfully recommend that the indictment be dismissed.

PROSECUTION STANDARDS

Along with the substantial power conferred upon prosecutors come unique responsibilities. Rather than serving only as a zealous advocate on behalf of a client, prosecutors have a broader set of obligations to the community, the victim, and the defendant:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.[2]

New York's rules of professional conduct, which parallel the ethics rules in virtually all jurisdictions, and the American Bar Association's Criminal Justice Standards both rest on the same belief that the prosecutor's duty is to seek justice, not simply to win cases.[3]

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[2] *Berger v. United States*, 295 U.S. 78, 88 (1935).

[3] *See* New York Rules of Prof'l Conduct R. 3.8 cmt. 1, 6B (2011); ABA Standards for Criminal Justice: Prosecution Function 3-1.2(b), (c).

Prosecutors also must abide by unique rules that reflect our special role in the legal system. Most significantly, prosecutors must satisfy an exacting standard for conviction: proof of guilt beyond a reasonable doubt. This requirement is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent [person] than to let a guilty [person] go free."[4]

That standard of proof guides the decisions of prosecutors who must decide whether to proceed with a case, not just the jurors who must decide whether to convict. At the beginning of a case, prosecutors are frequently called upon to make charging decisions before all the relevant facts are capable of being known, or all investigative steps required for trial are complete. Under New York's legal ethics rules, charges may be brought against a defendant if they are supported by probable cause.[5] But for generations, before determining whether a case should proceed to trial, felony prosecutors in New York County have insisted that they be personally convinced beyond a reasonable doubt of the defendant's guilt, and believe themselves able to prove that guilt to a jury. The standards governing the conduct of federal prosecutors, as well as the American Bar Association's criminal justice standards, likewise recognize the need for prosecutors to act as a gatekeeper by making an independent assessment of the evidence before proceeding to trial.[6]

These core principles, by which this Office operates, are therefore clear. If, after a careful assessment of the facts, the prosecutor is not convinced that a defendant is guilty beyond a reasonable doubt, he or she must decline to proceed. While an abiding concern for victims of crime is an essential attribute for every prosecutor working in this Office, that concern cannot eclipse our obligation to act only on the evidence and the facts, mindful of the high burden of proof in a criminal prosecution.

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[4] *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

[5] New York Rules of Prof'l Conduct R. 3.8(a) (2011); Model Rules of Prof'l Conduct R. 3.8(a) (2010).

[6] *See* U.S. Dep't of Justice, United States Attorneys' Manual § 9-27.220 (1997); ABA Standards for Criminal Justice: Prosecution Function 3-3.9(b)(i).

PROCEDURAL BACKGROUND

The defendant was taken into custody on May 14, 2011, and on the following day, was identified in a line-up by the complainant and arrested by the New York City Police Department ("NYPD"). The People filed a felony complaint on May 15, 2011, charging the defendant with the same crimes for which he was later indicted, which are specified below. On May 16, 2011, the defendant was arraigned in Criminal Court and despite a request for bail, was remanded on the People's motion. Pursuant to CPL §180.80, the People were required within 144 hours to present evidence to a grand jury and obtain an indictment in order to avoid the defendant's release from custody. Based on the evidence available at that time, the People determined that the case should be presented to a grand jury. The presentation occurred on May 18, 2011; the defendant chose not to testify in the grand jury proceeding. The grand jury indicted on the same day.

The indictment (number 02526/2011) charged the defendant, Dominique Strauss-Kahn, with two counts of Criminal Sexual Act in the First Degree, in violation of Penal Law §130.50(1); one count of Attempted Rape in the First Degree, in violation of Penal Law §§110/130.35(1); one count of Sexual Abuse in the First Degree, in violation of Penal Law §130.65(1); one count of Unlawful Imprisonment in the Second Degree, in violation of Penal Law §135.05; one count of Forcible Touching, in violation of Penal Law §130.52; and one count of Sexual Abuse in the Third Degree, in violation of Penal Law §130.55.

On May 19, 2011, the defendant made a second bail application, and bail was set in the amount of $1 million in cash plus a $5 million bond. The conditions of bail included the surrender of the defendant's passport, his home confinement in New York County, and electronic monitoring at his expense. He was arraigned on the indictment on June 6, 2011, entered a plea of not guilty, and counsel filed and served a written discovery demand. The case was adjourned until July 18, 2011.

On June 30, 2011, in a letter to defense counsel, the People disclosed exculpatory information regarding the complainant pursuant to the People's obligations under CPL §240.20, Rule 3.8 of the New York Rules of Professional Conduct, and *Brady v. Maryland*, 373 U.S. 83 (1963) and its doctrinal progeny. The case was advanced to July 1, 2011, for the purpose of a renewed bail application, at which point this Court released the defendant on his own recognizance, at the defendant's request and with the People's consent, on the condition that the People retain possession of the defendant's passport and travel documents. On July 7, 2011, the case was administratively adjourned on the consent of both parties from July 18, 2011 to August 1, 2011, for the purpose of continued investigation by both sides. On July 26, 2011, the case was again adjourned to August 23, 2011.

HISTORY OF THE INVESTIGATION

A. Initial Investigation and Indictment

On May 14, 2011, the complainant, a housekeeper at the Sofitel Hotel on West 44th Street in Manhattan, reported to hotel security, and later to the NYPD, that she had been sexually assaulted by the defendant in his hotel suite. She first reported this incident to her immediate supervisor shortly after her interaction with the defendant, whose suite (Suite 2806) she had been assigned to clean. That supervisor summoned a more senior supervisor, to whom the complainant repeated her claim. The second supervisor notified hotel security and management personnel, who in turn notified the NYPD. NYPD uniformed police officers and detectives interviewed the complainant and had her transported to a local hospital for a medical examination later that afternoon.

In substance, the complainant reported to NYPD detectives, and later to prosecutors, that shortly after she entered the defendant's suite to perform her housekeeping duties, he emerged naked from the suite's bedroom, approached her, and grabbed her breasts without her consent. According to the complainant, the defendant closed the door to the suite, forced her into the bedroom, pushed her onto the bed, and attempted to forcibly insert his penis into her mouth, which caused his

penis to make contact with her closed lips. The complainant stated that the defendant then physically forced her further into the suite's interior by pushing her down a narrow hallway. According to her, he pulled up her uniform dress, partially pulled down her stockings, reached under her panties, and grabbed the outside of her vaginal area forcefully. Finally, the complainant reported that the defendant physically forced her to her knees, forcibly inserted his penis into her mouth, held her head, and ejaculated. This sexual act, the complainant stated, occurred at the end of the suite's interior hallway, in close proximity to the suite's full bathroom. According to the complainant, she instantly spat the defendant's semen onto the suite's interior hallway carpet, and continued to do so as she promptly fled from the suite.

The NYPD ascertained that the defendant was scheduled to depart on an Air France flight at John F. Kennedy Airport that was headed for Europe. He was asked to disembark from that flight at approximately 4:45 p.m. by detectives assigned to the Port Authority Police Department, and was eventually taken into custody.

On the date of the incident, and for several days afterward, the complainant was interviewed by detectives assigned to the NYPD's Manhattan Special Victims Squad and by other experienced investigators and prosecutors, including members of the Office's Sex Crimes Unit. As in all cases where a witness' testimony is essential to prove the crime, the prosecutors who interviewed the complainant explained to her that her past and present circumstances would be thoroughly examined. The complainant expressed her willingness to cooperate with prosecutors and to be truthful. In the course of these initial interviews with prosecutors and police, which probed the details of the incident as well as the complainant's background and history, the complainant appeared truthful. Her account of the incident was plausible, and as she repeated it on different dates to Special Victims detectives and prosecutors, it was materially consistent.

Investigation between the time of the incident and May 18 revealed no red flags in the complainant's background. She had a work history at the Sofitel Hotel of more than three years, her employee file contained no incident reports or disciplinary history, and her supervisors indicated that she was a model employee. She had no criminal history and had been granted asylum by the United States Immigration Court. Although she noted that she had originally entered the United States using a visa and papers that had been issued to a different person, she readily admitted this fact. Finally, available evidence indicated that the complainant had no foreknowledge of the defendant's stay at the hotel that might have enabled her to orchestrate an encounter between them, and that she entered the defendant's suite believing it to be empty.

Other evidence was consistent with a non-consensual sexual encounter between the defendant and the complainant. As described above, the complainant made a prompt outcry to two supervisors,[7] both of whom were interviewed by a prosecutor within the first 48 hours of the investigation, and who reported that she appeared upset. A preliminary result from DNA testing conducted by the Office of Chief Medical Examiner ("OCME") established that several stains located on the upper portion of the complainant's hotel uniform dress contained semen that yielded the defendant's DNA. Although this preliminary forensic finding did not resolve whether the encounter between the defendant and the complainant was forcible, it established that the defendant had engaged in a sexual act with the complainant. Early investigation also indicated that the encounter between the complainant and the defendant was brief, suggesting that the sexual act was not likely a product of a consensual encounter.

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[7] Evidence that a sexual assault victim promptly complained about an incident may be admitted to corroborate that a sexual assault occurred, *see People v. McDaniel*, 81 N.Y.2d 10, 16 (1993), although it cannot independently establish the elements of the crime.

Pre-indictment investigation indicated that the defendant had left the hotel in a hurried manner,[8] but it was not known at that time where the defendant went immediately after his departure from the hotel.[9] What was known, however, was that later in the afternoon of May 14, 2011, the defendant had boarded an Air France flight at John F. Kennedy Airport destined for Europe, and that he was a French citizen. Prior to the defendant's arraignment, it was also ascertained that as a French national, he would not be subject to extradition for purposes of a criminal prosecution in the United States.

Based on multiple interviews with the complainant and an assessment of all of the evidence available at the time, the NYPD detectives and prosecutors who spoke with the complainant during this initial phase of the investigation each arrived independently at the same conclusion. Each found the complainant to be credible and believed that criminal charges were warranted. Accordingly, the case was presented to a grand jury and the defendant was indicted.

B. Subsequent Investigation

From the date of the indictment until the present, the District Attorney's Office continued to conduct a comprehensive and wide-ranging investigation into the defendant, the complainant, and the facts of this case. That investigation has included the results of physical examinations of the complainant and the defendant, and scientific testing of forensic evidence obtained from both of them and their clothing. Police officers, detectives, civilian witnesses, medical personnel, forensic scientists, and medical experts were interviewed. Documents, records, and other evidence have been gathered and analyzed, including records of electronic communication carriers, financial records, business records, medical records, video surveillance recordings from inside the Sofitel

[8] Investigators and prosecutors interviewed the hotel employees who assisted the defendant in the lobby when he checked out at approximately 12:28 p.m., and also interviewed the hotel front office manager.

[9] Not until the June 6, 2011 arraignment did the defense reveal that the defendant's precise location in the time period between his departure from the hotel and arrival at John F. Kennedy Airport was a Manhattan restaurant located at Sixth Avenue between 51st and 52nd Streets.

Hotel and other locations, police department records, and records of other law enforcement and governmental agencies.

Because credible testimony from the complainant was necessary to establish the crimes charged, prosecutors and investigators interviewed the complainant repeatedly regarding her personal history, current circumstances, and the details of the incident itself. During interviews conducted from May 14, 2011 to June 7, 2011, the complainant provided prosecutors and investigators with detailed information about the incident, her personal history, and her current circumstances. On June 7, 2011, the complainant's attorney alerted prosecutors that the complainant had not been truthful in recounting her personal history, including her account of an alleged prior rape. In further interviews conducted on June 8, June 9, and, June 28, 2011,[10] the complainant herself admitted that she had been untruthful with prosecutors about aspects of her personal history and current circumstances.

In the June 28 interview, in the presence of her lawyer, three prosecutors, and an investigator, the complainant also admitted not just that she had been untruthful with prosecutors about her activities in the immediate aftermath of the charged incident, but also that she had lied in the grand jury on this important point. In a letter dated June 30, 2011, the Office disclosed complainant's false statements and other potentially exculpatory information to the Court and defense counsel.

From July 1, 2011 to the present, the Office continued its investigation of the case, including interviewing further civilian witnesses, scientists, and medical experts; seeking and reviewing additional records; examining additional forensic results provided by OCME; and evaluating additional information provided by the complainant's lawyer and defense counsel. Prosecutors also met with the com-

[10] On June 9, 2011, the complainant's attorney called prosecutors and halted an interview with his client. From that point until June 28, 2011, the Office negotiated with the complainant's attorney to resume the interview, without success. On June 28, 19 days after the interview had been stopped, the complainant returned to resume the interview.

plainant one additional time, on July 27, 2011, at which time the complainant again significantly altered her account of what had occurred in the time immediately after her encounter with the defendant.

REASONS FOR RECOMMENDATION OF DISMISSAL

The prosecution has the burden at trial to prove the guilt of an accused beyond a reasonable doubt. For a host of reasons, including those set forth below, the complainant's untruthfulness makes it impossible to credit her. Because we cannot credit the complainant's testimony beyond a reasonable doubt, we cannot ask a jury to do so. The remaining evidence is insufficient to satisfy the elements of the charged crimes. We are therefore required, as both a legal and ethical matter, to move for dismissal of the indictment.

I. The Complainant's Testimony at Trial Cannot Be Relied Upon to Establish Proof Beyond A Reasonable Doubt

In the course of numerous interviews, the complainant has given irreconcilable accounts of what happened immediately after her encounter with the defendant, leaving us unable to ascertain what actually occurred or to count on truthful testimony from the complainant in this regard. She has also made numerous false statements, both to prosecutors and in the past. Some of these statements were made under oath or penalty of perjury; some constituted fraudulent acts.

A. The Continued Conflicting Accounts from the Complainant Regarding the Charged Incident

Version One. From the date of the incident until June 28, 2011, the complainant repeatedly stated to prosecutors that after the sexual encounter with the defendant, she immediately fled the defendant's suite and went to the far end of the 28th floor hallway. The complainant further stated that after spitting on the carpet in the 28th floor hallway, she remained there, fearful, until she unexpectedly encountered her supervisor. At that point, the two of them entered Suite 2806. There, she began to tell her supervisor what had happened between her and the defendant, and repeated her account after a

second supervisor joined them. When asked by prosecutors why she had remained in the 28th floor hallway rather than fleeing to the protection of an empty room on that floor and telephoning her supervisors or security, she stated that all of the other rooms on the floor had "do not disturb" signs on them and were thus unavailable to her.

Version Two. In an interview conducted on June 28, 2011, in the presence of her lawyer, the complainant provided a materially different account of her actions immediately following the incident in the defendant's suite. At the outset of this interview, she admitted for the first time that she had been untruthful about this key point with prosecutors and had lied about it in her testimony before the grand jury. The complainant gave a new version of these events, stating that after leaving the defendant's room, she had gone directly into another room (2820) to finish cleaning it. She gave specific details, saying that she had vacuumed the floor and cleaned the mirrors and other furniture in that room. She further stated that after completing her tasks in Room 2820, she had returned to the defendant's suite and began to clean it as well. She reported that when she subsequently went to a linen closet in the 28th floor hallway to retrieve supplies, she encountered her supervisor, and the two of them went back into Suite 2806 together. Rather than immediately telling her supervisor about the encounter with the defendant, the complainant asked the supervisor a hypothetical question about whether guests were allowed to force themselves on staff members, and reported the incident with the defendant only when her supervisor pressed her. Given the significance of this new account – which was at odds with her sworn testimony in the grand jury – prosecutors questioned her about it extensively during the course of the June 28 interview.

Because the complainant now reported that she had entered Room 2820, the Office obtained the electronic swipe records for that room. Those records, which were also provided to complainant's counsel by someone outside of this Office, established that the complainant entered Room 2820 at 12:26 p.m., and also entered defendant's suite during the same minute (also 12:26

p.m.). The exceedingly short window of time that the complainant spent in Room 2820 belied her statement that she had completed several cleaning tasks in that room before returning to the defendant's suite.

Version Three. In a subsequent interview conducted on July 27, 2011, the complainant again changed her account of her actions immediately after the encounter with the defendant. On that date, she said that she had cleaned Room 2820 earlier in the morning of May 14. Immediately after the incident, she stated, she left Suite 2806 and ran around the corner, as she had originally reported, not right into Room 2820. After seeing the defendant leave in the elevator, she entered Room 2820 only momentarily to retrieve cleaning supplies. As to the statements that the complainant had made on June 28, she denied making them, and asserted that they must have been mistranslated by the interpreter or misunderstood by prosecutors.[11] But that claim is not believable in light of the extensive follow-up questioning about these events, as well as the complainant's insistence on June 28 that the account she gave on that day was truthful. Critically, her willingness to deny having made those statements to the very same prosecutors who had heard her make them on June 28 calls her credibility into question at the most fundamental level.[12]

Under any view of the available evidence, the People remain unable to elicit a consistent narrative from the complainant regarding her actions surrounding the charged incident – issues that would be central at trial. Not only does this impair her reliability as a witness, but these varying accounts also make it difficult to ascertain what actually occurred in the critical time frame between 12:06 and 12:26,

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[11] The complainant demonstrated her ability to speak and understand English over the course of numerous interviews with investigators and prosecutors. Indeed, at times, she corrected the interpreter's translation of her remarks. Notably, she did not do so during the extended questioning on this topic in the June 28 interview.

[12] There is at least a question whether the complainant ran out of the suite immediately, if at all, after the defendant ejaculated. The report completed by the certified Sexual Assault Forensic Examiner ("SAFE") who examined the complainant at the hospital on the date of the injury describes the complainant's account of the defendant's ejaculation, and then states, "Pt. reports he got dressed + left the room, and that he said nothing to her during the incident." This report certainly suggests that the defendant left first, although the SAFE examiner concedes the possibility that the report might conflate different portions of the complainant's narrative in the same sentence.

and we have no confidence that the complainant would tell the truth on this issue if she were called as a witness at trial.[13]

B. The Complainant's Persistent Pattern of False Statements, Including False Accounts of a Prior Rape

1. False Account of a Rape

In response to questioning by prosecutors on May 16, 2011, the complainant volunteered that she had previously been gang raped by soldiers who had invaded her home in Guinea. In an interview held on May 30, 2011, she offered precise and powerful details about the number and nature of her attackers and the presence of her 2-year-old daughter at the assault scene, who, she said, was pulled from her arms and thrown to the ground. During both interviews, she identified certain visible scars on her person, which she claimed were sustained during the attack. On both occasions, the complainant recounted the rape with great emotion and conviction: she cried, spoke hesitatingly, and appeared understandably distraught, and during the first interview, even laid her head face down on her arms on a table in front of her.

In subsequent interviews conducted on June 8, 2011, and June 9, 2011, the complainant admitted to prosecutors that she had entirely fabricated this attack. When asked to explain why, she initially stated that she had lied about the gang rape because she had included it in her application for asylum, and she was afraid to vary from her application statement; she also stated that at the time she told prosecutors this account, she was not under oath. When confronted with the fact that her written asylum application statement made no mention of the gang rape, she stated that she had fabricated the gang rape, as well as other details of her life in Guinea, in collaboration with an unnamed male with whom she consulted as she was preparing to seek asylum. She told prosecutors this man had given her a cas-

[13] *See* New York Rules of Prof'l Conduct R. 3.3(a)(3) ("[a] lawyer shall not knowingly . . . offer or use evidence that the lawyer knows to be false," and "[a] lawyer may refuse to offer evidence . . . that the lawyer reasonably believes is false"); *id.* R. 3.3 cmt. 6A (prosecutors have additional duty "to correct any false evidence that the government has already offered," and prosecutor should inform the tribunal when she comes to know that a prosecution witness has testified falsely); *id.* cmt. 9.

sette tape that included an account of a fictional rape, which she had memorized. Ultimately, she told prosecutors she decided not to reference the rape in her written application.[14]

It is clear that, in a case where a complainant is accusing a defendant of a sexual assault, the fact that she has given a prior false account of a different sexual assault is highly relevant. That it was told to prosecutors as an intentional falsehood, and done in a completely persuasive manner – identical to the manner in which she recounted the encounter with the defendant – is also highly significant. But most significant is her ability to recount that fiction as fact with complete conviction.

Prosecutors often argue to a jury that a witness' demeanor is a key factor in assessing credibility, and a judge gives jurors the same instruction as a matter of law. In this case, proof of the elements of forcible compulsion and lack of consent rest on a sole witness, the complainant. That she has previously persuaded seasoned prosecutors and investigators that she was the victim of another serious and violent – but false – sexual assault, with the same demeanor that she would likely exhibit at trial, is fatal. Knowing that her compelling manner cannot serve as a reliable measure of truthfulness, coupled with the number of falsehoods uncovered in our interviews with her, compel our conclusion that we are no longer convinced of the defendant's guilt beyond a reasonable doubt, and cannot ask a jury to convict based on the complainant's testimony.[15]

2. False Statements Under Oath

Equally significant, the complainant has admitted to making false statements under oath, in testimony before the grand jury that voted the present indictment, and also in statements filed under

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[14] In her interviews of June 9 and June 28, the complainant stated that she had indeed been raped in the past in her native country, but in a completely different incident than the one that she had described in her earlier interviews. Our interviews of the complainant yielded no independent means of investigating or verifying this incident.

[15] On occasion, the complainant's untruths were accompanied by dramatic displays of emotion. In the course of one interview, the prosecutor asked the complainant about a particular personal circumstance, and she calmly responded in the negative to the inquiry. In an interview two days later, she was asked a more specific question about the same subject. In response, she dropped to the floor, and physically rolled around while weeping; once composed, she said that she did not know the answer to the prosecutor's question. In yet a later interview, the prosecutor revisited the issue. This time, the complainant responded affirmatively, in a matter-of-fact manner, to the question.

penalty of perjury with the federal government. In a case like this one, where the complainant's testimony is crucial to proving the charged crimes beyond a reasonable doubt, the fact that she has testified falsely before a grand jury about the charged incident and filed false documents under penalty of perjury is highly damaging.

3. Additional Falsehoods

In addition to the complainant's false account of a rape and false statements made under oath or penalty of perjury, she has been untruthful to law enforcement about so many other things that we simply can no longer credit her. For example, she executed repeated certifications that she now admits were fraudulent to re-establish her eligibility for the low-income housing where she resided, in which she intentionally omitted the income she made from the Sofitel. The complainant also displayed a repeated lack of candor about a wide range of additional topics concerning her history, background, present circumstances, and personal relationships.

Further, in response to routine questions from prosecutors regarding her sources of income, the complainant failed to disclose a stream of cash deposits – totaling nearly $60,000 – that were made into her checking account by other individuals in four different states. When asked about these transactions, she stated that she had allowed her fiancé in Arizona[16] to use her checking account in order to make cash deposits for what, according to her, she believed to be a clothing and accessory business. At times, she said, he had asked her to withdraw cash that he had deposited and give the money to a business partner of his who was located in New York City. She claimed not to know how much money had gone through her account in this fashion. Although she denied profiting from any of these banking transactions, portions of each deposit frequently remained in her account.

[16] The complainant's fiancé has been convicted in Arizona of conspiracy to possess marijuana for sale, after delivering some $36,500 to undercover police officers for purchase of a large amount of marijuana. The complainant stated that she had no information about whether any funds deposited in her account were the proceeds of drug trafficking.

Additionally, as early as May 16, 2011, the complainant was asked about potential financial motivations, given that she had retained a civil attorney. She unequivocally professed to have no interest in obtaining money as a result of her involvement in the case. She maintained this position during other pre- and post-indictment interviews, emotionally claiming on one occasion that no one could "buy" her. But very close in time to these statements, the complainant had a recorded conversation with her incarcerated fiancé, in which the potential for financial recovery in relation to the May 14, 2011 incident was mentioned.[17] Although there is nothing wrong with seeking recovery from a defendant in a civil suit, the complainant's disavowal of any financial interest is relevant to her credibility.

In sum, the complainant has been persistently, and at times inexplicably, untruthful in describing matters of both great and small significance. In our repeated interviews with her, the complete truth about the charged incident and her background has, for that reason, remained elusive.

II. The Physical and Other Evidence Does Not Establish Forcible Compulsion or Lack of Consent

The physical, medical, and other evidence available in this case is of limited value to the key contested issues of forcible compulsion and lack of consent. It conclusively establishes that the defendant engaged in a sexual encounter with the complainant on May 14, 2011. It does not, however, prove or corroborate that their encounter was forcible or non-consensual, and fails to corroborate certain aspects of the complainant's account of the charged incident.

A. The Crime Scene Evidence

Based on the complainant's initial account of the charged incident, two locations of the Sofitel Hotel were identified and processed by the NYPD's Crime Scene Unit: Suite 2806, where the incident

[17] This call was translated and certified as true and accurate by two Fulani-English translators. While differing in their precise word-for-word transcriptions of the call, both translations are materially similar in their discussion of making money with the assistance of a civil lawyer. On August 8, 2011, the complainant filed a civil suit against the defendant, seeking unspecified monetary damages.

occurred, and the area at the end of the 28th floor hallway that the complainant had identified in her early accounts as the location to which she fled immediately after the incident.[18] The Crime Scene Unit identified five distinct areas in Suite 2806's interior hallway that potentially contained biological fluids such as semen or saliva.[19] The next day, Crime Scene Unit detectives removed the carpet from the suite's interior hallway, as well as the wallpaper from the suite's hallway wall, and delivered this evidence to OCME's Forensic Biology Department. Preliminary tests conducted by OCME identified five areas of the carpet that contained biological fluid. One of these stains, which was located approximately six to eight feet from where the complainant said the sexual encounter occurred, tested positive for the presence of semen and amylase and contained a mixture of the defendant's and the complainant's DNA. None of the other stains from the carpet or the single stain on the wallpaper contained either the complainant's or the defendant's DNA.[20]

On May 14, 2011, the complainant's hotel uniform, consisting of a dress and an apron, was recovered from her by responding police officers and forwarded to OCME's Forensic Biology Laboratory. Three stains on the upper portion of the uniform dress were identified as containing semen; two of the three contained amylase consistent with semen, saliva, or vaginal fluid. A single DNA profile matching the defendant's was obtained from these three stains. Additional swabs taken from the complainant's body as part of the forensic sexual assault examination failed to identify semen or amylase and therefore yielded no DNA results. Similarly, scrapings from underneath her fingernails also yielded no results.

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[18] Because the complainant did not reveal that she had entered Room 2820 until June 28, 2011, that room was not processed by crime scene detectives.

[19] The processing detective took swabs of each area for further examination at OCME's Forensic Biology Laboratory. Those swabs were negative for the presence of semen and amylase, an enzyme found in semen, saliva, and in other bodily fluids, including vaginal fluid.

[20] Three of the other stains on the carpet contained the semen and DNA of three different unknown males, and one other stain contained amylase and a mixture of DNA from three additional unknown individuals. The stain on the wallpaper contained the semen and DNA of a fourth unknown male. As there is no evidence that any other person was present during the charged incident, the circumstances under which the unidentified DNA was deposited are unrelated to the incident under investigation.

Fingernail scrapings from the defendant's left hand contained his own DNA profile; scrapings from his right hand yielded no results. A penile swab taken from the defendant tested positive for semen and contained the defendant's DNA profile, as did a stain on the boxer shorts that were recovered from him shortly after his arrest. Two small blood stains on the defendant's boxer shorts contained the defendant's DNA, as did a single small spot of human blood found on the suite's top bed sheet. These stains appeared to be unrelated to the incident under investigation, since at the time of his arrest, the defendant was suffering from a skin condition that caused the skin on his hands to bleed. The condition and bleeding were clearly observable to arresting detectives and are depicted in photographs taken of the defendant's hands at the time of his arrest. At no time did the complainant state that she was bleeding during the incident, or that either of the two sustained any type of injury that might have bled; nor was any blood found on the complainant's clothing or body.

At the time of the incident, the complainant was wearing two pairs of panty hose (a pair that was darker in shade and a pair that was lighter in shade).[21] Underneath both pairs she wore a pair of panties. On May 14, 2011, police recovered these items of clothing from the complainant after she had been escorted to the hospital, and forwarded them to OCME for testing. The defendant's DNA, in the form of epithelial cells, was found on both the interior and exterior waistband of both pairs of hose, as well as on the waistband of the panties. The defendant's DNA, also from epithelial cells, was also found on the exterior crotch of the lighter colored pair of hose but was not found on the interior or exterior crotch of the darker colored hose or of the panties. Because an individual can touch fabric and not necessarily deposit his DNA on it, these findings suggest that the defendant touched the complainant's undergarments, but they do not controvert or confirm the complainant's account that the defendant placed his hand inside her underwear and groped her genital area directly.

[21] When submitted to OCME, the lighter pair of hose was inside the darker pair.

On May 16, 2011, the Crime Scene Unit returned to the hotel suite and, among other things, swabbed the sink in the suite's small half-bathroom and collected some used tissues from the full bathroom. The complainant had stated that after the incident and while she was in the suite on May 14, 2011 with her supervisor, she had spit into the sink in the small half-bathroom. The two sink swabs, along with the tissues, were forwarded to OCME, and all tested negative for semen and positive for amylase. OCME could not extract sufficient material from the sink swabs to develop a DNA profile.

B. The Medical and Hospital Evidence

1. Physical Examination

On the date of the incident, the complainant was examined by a registered nurse who is an experienced and certified SAFE examiner at St. Luke's Roosevelt Hospital. During her initial examination, the examiner noted no visible injuries to the complainant and documented that she had no trauma to her body or oral cavity. The only physical finding that the examiner noted was "redness," which was observed during the gynecological examination. The examiner could not say to a reasonable degree of medical certainty that this "redness" was a direct result of the incident, nor that it was even an injury or a bruise. The examiner stated that this finding could be attributed to the incident described by the complainant, but could also be attributed to a host of other causes.

In the post-indictment period, we retained and consulted with a second, highly-experienced physician who is an expert in the field of sexual assault forensic examinations. This expert inspected complainant's medical records from May 14, 2011, and concurred with the SAFE examiner's conclusion that the observed red coloration was a very non-specific finding that could be attributed to a host of causes other than trauma, including any type of friction, irritation, or inflammation to the area. This expert further opined that although it was possible for the redness to have been caused by the defendant's grabbing the complainant in the manner that she had described, it was not likely caused by such an act.

2. Shoulder Injury

While at the hospital, the complainant initially reported pain in her left shoulder, which she rated as 5 on a scale of 10 to the triage nurse. As documented in her medical chart, the pain clearly alleviated as the hours passed in the emergency room. The emergency medical physician's examination of the complainant revealed no joint tenderness, and no X-rays were ordered. The complainant was determined to have suffered a muscle strain and contusion, although no bruising or swelling to her shoulder was observed. She did not receive any pain medication in the hospital, nor was she given a prescription for any such medication.

In multiple interviews in the days following the incident, the complainant was asked whether she had suffered any injury as a result of the incident, and consistently responded that her shoulder had been sore on the day of the incident but was much better by the next day. During these early interviews, the complainant displayed no apparent distress and made no verbal complaints of pain or discomfort, including when making vigorous physical movements in the presence of prosecutors and investigators. In light of these repeated statements regarding her lack of physical injury, as well as the medical assessment, no charges involving the proof of physical injury were alleged in the criminal complaint or submitted to the grand jury.[22]

On June 13, 2011, the complainant's attorney notified prosecutors that the complainant was experiencing substantial pain in her shoulder that required immediate medical treatment and rendered her unavailable for interviews. On June 22, 2011, her orthopedic surgeon, with the benefit of an MRI, diagnosed the complainant with a "SLAP type 2 tear" of the left shoulder accompanied by bursitis and tendinosis, but was unable to determine the date of the injury's onset, or its origin. After reporting additional symptoms, including numbness and tingling in her fingers, the complainant saw a second phy-

[22] Under New York law, physical injury requires proof of "impairment of physical condition or substantial pain." Penal Law §10.00(9).

sician for an evaluation of her cervical spine. To our knowledge, this physician has not made a diagnosis.

Through her attorney, the complainant has now asserted to prosecutors that she sustained the SLAP type 2 tear injury as a result of the encounter with defendant. To date, she has not provided prosecutors with a waiver to allow them to obtain her medical records prior to the date of the incident, in order to ascertain whether she had any pre-existing shoulder injury. More importantly, the Office retained a prominent expert orthopedic surgeon to examine all of the records of the shoulder injury. This expert has concluded that, to a reasonable degree of medical certainty, the injury, if it was an injury at all,[23] was likely caused by "repeated overhead use of the upper extremity in an abducted and externally rotated position," such as an athlete might experience in overhead throwing. The expert further opined that, to a reasonable degree of medical certainty, for the tear on complainant's MRI to have been caused by a single traumatic episode, such as the one she described, it would have had to have been accompanied by "a significant amount of pain, not only for the first twelve hours but also for at least the first few days." Moreover, the expert "would not expect the pain . . . to completely subside in the first forty-eight hours only to redevelop approximately twenty-eight days later."

In light of several factors relating to this claim of physical injury, most notably the expert's conclusions, the shoulder injury does not support the claim of sexual assault charged in the indictment.[24]

3. Defects in the Panty Hose

As indicated above, at the time of the incident the complainant was wearing two pairs of panty hose. It was noted at the time of their recovery, and later at OCME, that the lighter colored pair of

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[23] Although he could not give a definitive opinion, the expert noted that the MRI finding may be within the range of normal. In the expert's view, "[his] experience as well as the experience of others indicates that MRI reports provided by radiologists tend to overdiagnose SLAP tears. It is quite possible that the finding noted on MRI could be considered a normal variant since posterior SLAP tears of this type are known to be present in the absence of associated pathology-i.e. a normal variant."

[24] In an interview conducted on July 27, 2011, the complainant claimed for the first time that as a result of the defendant's having grabbed her vaginal area, she had suffered pain while urinating in the first few days after the incident. The medical records do not reflect any complaint of this sort, nor did the complainant report it to prosecutors at any time prior to July 27, contrary to what she now claims.

hose had defects in them. One of these defects measures approximately three inches in length and is located in the crotch, immediately adjacent to the central seam in the garment. The other, located in an area corresponding to the upper thigh or hip, is approximately one and a half inches in size.

When the panty hose were initially recovered, the complainant readily conceded to the SAFE examiner, and later to police and prosecutors, that she did not know if the defects had occurred as a result of the defendant's conduct or whether they were unrelated to the incident. Common experience indicates that nylon panty hose can experience defects for a variety of reasons, including normal wear and tear. For these reasons, we would be unable to argue to a jury that the defects observed in the complainant's panty hose corroborate the claim of a forced sexual encounter.

C. Timeline of the Alleged Attack and the Defendant's Actions in the Immediate Aftermath

The relatively brief nature of the encounter between the defendant and the complainant initially suggested that the sexual act was not likely consensual. Specifically, key card records from the hotel indicated that the complainant first entered Suite 2806 at 12:06 p.m., and telephone records later showed that the defendant had placed a call to his daughter at 12:13 p.m.[25] Accordingly, it appeared that whatever had occurred between the complainant and the defendant was over in approximately seven to nine minutes. But in light of the complainant's failure to offer an accurate and consistent narrative of the immediate aftermath of the encounter, it is impossible to determine the length of the encounter itself. That the defendant placed a brief phone call at 12:13 p.m. is not dispositive of when the encounter took place, how long it lasted, or where the complainant was from 12:06 to 12:26. Any infe-

[25] On the day of the incident, there was a possible discrepancy of approximately two minutes between the time indicated on the record of electronic key card entries in the hotel system and the actual time, in that the recorded times could be two minutes earlier than the actual time. Although we have been informed that the call detail times in the cellular records are synchronized to actual time, because of the hotel discrepancy, the exact passage of time cannot be determined with certainty.

rences that could conceivably be drawn from the timeline of the encounter are necessarily weakened by the inability to solidify the timeline itself.

D. Prompt Outcry Evidence

The prompt outcry witnesses have been interviewed repeatedly and appeared reliable. Both witnesses indicated that the complainant appeared upset when telling them about her encounter with the defendant. But in light of our inability, detailed above, to credit the complainant, along with her ability to muster emotion for effect, the strength and effect of the available prompt outcry evidence is greatly diminished. It is also notable that the complainant's current version of her prompt outcry to her first supervisor is inconsistent with certain aspects of that supervisor's account.

E. Other Allegations of Sexual Misconduct By the Defendant

During the pendency of the case, evidence came to the Office's attention concerning an alleged sexual assault committed by the defendant on another woman in France, [redacted]. After the filing of the indictment, [redacted] reported publicly that during an interview in France in 2003, the defendant had attempted to rape her inside an empty apartment.[26] It appears unlikely, however, that prosecutors would be permitted to introduce in their case-in-chief any testimony by [redacted] regarding this alleged attack.[27]

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[26] Claire Chartier & Delphine Saubaber, *Pourquoi je porte plainte contre DSK*, L'Express, July 4, 2011, available at http://www.lexpress.fr/actualite/societe/justice/tristane-banon-pourquoi-je-porte-plainte-contre-dsk_1009151.html (last accessed August 19, 2011).

[27] *See People v. Molineux*, 168 N.Y. 264 (1901) (explaining the limitation on admissibility of evidence that defendant has committed an uncharged crime); *People v. Vargas*, 8 N.Y.2d 856, 858 (1996) (rejecting admission of evidence of prior sexual misconduct where it was relevant only to lend credibility to the complainant). Under the facts of this case, this same analysis would apply if other credible witnesses of past encounters similar to [redacted] were to surface.

CONCLUSION

For the foregoing reasons, the People respectfully recommend that Indictment No. 02526/2011 be dismissed. No previous application for this relief has been made to any judge or court.

Dated: New York, New York
August 22, 2011

Respectfully submitted,

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APPROVED:

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