COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2015-P-0689

Commonwealth

v.

James Adams

On Appeal from a Judgment
of the Middlesex Superior Court

BRIEF FOR
DEFENDANT-APPELLANT JAMES ADAMS

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November 2018 (Replacement Brief)

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Defendant-Appellant James Adams was charged with nine counts of forcible rape of a child arising out of an encounter with one alleged victim. Three counts alleged he was a principal for three different acts (oral rape, vaginal rape, and anal rape). The other six counts alleged he was a joint venturer to two codefendants' oral rape, vaginal rape, and anal rape.

At trial, Adams was acquitted on five counts: the three counts in which he was charged as a principal and the two joint-venture counts involving his codefendants' alleged oral rapes. The jury failed to return a verdict on the other four charges. Adams was later retried and convicted on those four counts.

This appeal raises two separate but related double-jeopardy issues based on the jury's acquittals at Adams's first trial:

1. The Double Jeopardy Clause prohibits a second trial on a crime where an essential element of the crime was decided in a defendant's favor at the first trial. Here, the record from Adams's first trial shows that the jury concluded that Adams was not a joint venturer. Accordingly, did the Double Jeopardy Clause prohibit Adams from facing a second trial on the remaining joint-venture charges?

2. The Double Jeopardy Clause also prohibits the relitigation at a second trial of facts determined

in a defendant's favor at a first trial. Here, the jury at Adams's first trial concluded that Adams did not personally commit rape. Accordingly, was the erroneous admission at Adams's second trial of DNA and testimonial evidence suggesting otherwise, along with the Commonwealth's use of that evidence, harmless beyond a reasonable doubt?

Statement of the Case

I. Prior Proceedings

In October 2011, a Middlesex County grand jury returned ten indictments of Defendant-Appellant James Adams, charging him with nine counts of forcible rape of a child, *see* G.L. c. 265, § 22A, and one count of contributing to the delinquency of a minor, *see* G.L. c. 119, § 63 (R.A. 6, 13-33).[1] All ten charges involved the same complainant, "Ann,"[2] who was 14 years old at the time of the encounter at issue.

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[1] In this brief, Adams refers to the materials in the record as follows:

- "Add. [page]" = the Addendum to this brief;
- "R.A. [page]" = Adams's Record Appendix;
- "Tr. A[volume]/[page]" = the nine-volume trial transcript from Adams's first trial (August 6, 2013 to August 16, 2013);
- "Tr. B[volume]/[page]" = the nine-volume trial transcript from Adams's second trial (October 14, 2014 to October 24, 2014.
- "Tr. [date]/[page]" = transcripts from other proceedings.

[2] "Ann" is a pseudonym. *See* G.L. c. 265, § 24C.

The nine rape counts can be divided into three groups of three: Adams was charged as a principal in three counts alleging forcible oral, vaginal, and anal rape with his own penis (Counts 2, 6, and 8; R.A. 16, 24, 28); he was charged as a joint venturer in three counts alleging forcible oral, vaginal, and anal rape with codefendant Calvin Spencer's penis (Count 3, 5, and 9; R.A. 18, 22, 30); and he was charged as a joint venturer in three counts alleging forcible oral, vaginal, and anal rape with codefendant Joseph Brown's penis (Counts 1, 4, and 7; R.A. 13, 20, 26).

When a nine-day trial ended in August 2013 (Hamlin, J., presiding), Adams was convicted of just one charge: contributing to the delinquency of a minor (Count 10) (R.A. 8, 44). He was acquitted of five charges -- all three rape counts in which he was charged as a principal (Counts 2, 6, and 8), and the two rape counts where he was charged as a joint venturer to Spencer's and Brown's alleged oral rapes (Counts 5 and 7) (R.A. 8, 34, 36, 38, 40, 42). The jury failed to reach a verdict on the other four rape counts, resulting in a mistrial on those four counts (Counts 1, 3, 4, and 9) (Tr. A9/17).

Adams was retried on the four hung counts in October 2014. Before the second trial, Adams moved to "exclude any and all evidence regarding allegations contained in" the counts on which Adams was acquitted

at the first trial (R.A. 46-48). After repeated, extensive argument on the issue (Tr. Oct-2-2014/21-24; Tr. Oct-7-2014/3-9, 13, 15-16; Tr. Oct-8-2014/3-12; Tr. B2/125-39), the trial judge denied Adams's motion (Tr. B3/4-5, R.A. 46).

The evidence at the second trial was similar to the evidence at the first trial, except that -- notwithstanding Adams's acquittals as a principal at the first trial -- the Commonwealth introduced substantially more DNA evidence suggesting that Adams had sex with Ann. In addition, despite Adams's acquittals as a principal at the first trial, the Commonwealth continued to argue that Adams had personally raped Ann. This time, at the conclusion of another nine-day trial (Hamlin, J., again presiding), Adams was convicted on the four counts charging him as a joint venturer to Spencer's and Brown's alleged vaginal and anal rapes of Ann (Counts 1, 3, 4, and 9) (R.A. 9, 54, 56, 58, 60).

The trial judge sentenced Adams to concurrent state-prison terms of eight to twelve years on the two rape convictions involving Brown (Counts 1 and 4), followed by concurrent probationary terms of five years on the two rape convictions involving Spencer (Counts 3 and 9) (R.A. 9-10). Adams was also given a one-year house-of-correction sentence on the conviction for contributing to the delinquency of a

minor (Count 10), to be served concurrently with Adams's state-prison sentences (R.A. 10). Adams filed a timely notice of appeal on November 25, 2014 (R.A. 10, 62).

II. Statement of Facts

The evidence at Adams's two trials was similar. Eight of the nine witnesses at the first trial were among the ten witnesses at the second trial.[3] To present the facts comprehensively (but with relative simplicity), following is a single narrative (usually with citations to both trials) that also notes the most significant differences between the two trials.

A. The encounter involving Ann

In April 2011, 14-year-old Ann was living at McLean Hospital in Belmont and attending school on the McLean grounds (Tr. A3/59; Tr. B3/37-40). On April 5, 2011, Ann had a "pass" to go to Boston for a Portuguese lesson (Tr. A3/63-64; Tr. B3/44). That afternoon, Ann traveled by bus and subway to a coffee shop near Boston University, arriving at approximately 5:30 or 6:00 p.m., after the scheduled meeting time (Tr. A3/65-67; Tr. B3/45-46). Presuming that her

[3] The only different witnesses at the second trial were Ann's father (her mother testified instead at the first trial), and a police detective whose testimony was less than four transcript pages.

instructor had come and gone, Ann took the subway back toward downtown Boston (Tr. A3/67-68; Tr. B3/46-49).

Ann went to South Station, hoping to find drugs (she had been given money by a friend who hoped Ann could get marijuana and cocaine for the friend) (Tr. A3/60-61, 68-69; Tr. B3/41, 49). Finding no success, Ann took the subway to Harvard Square to find drugs (Tr. A3/69; Tr. B3/50). Ann proceeded to "the pit" in Harvard Square, arriving shortly before 8:00 p.m. (Tr. A3/70; Tr. B3/51-53).

After smoking cigarettes in "the pit," Ann was approached by four men of African-American or Latino descent (Tr. A3/71-72; Tr. B3/54-55). Three were in their early-to-mid 20s and one was older (Tr. A3/87, A4/18; Tr. B3/55). The older man (later identified as Armando Hernandez) was of average height; of the younger men, one was a little shorter (later identified as Calvin Spencer [Tr. B5/42]), one was taller (later identified as Joseph Brown [Tr. B5/42]), and one was of about average height and had a white Blackberry (later identified as Adams [Tr. A4/103-05; Tr. B5/42, 87, 111]) (Tr. A3/87; Tr. B3/55-56).

The men talked to Ann, with Brown talking to her the most (Tr. A3/72; Tr. B3/56-57). Ann told them she was a 19-year-old college student (Tr. A3/72; Tr. B3/57-58). Ann thought they might have access to drugs (Tr. A3/73; Tr. B3/58). After the group saw a

police officer "kind of harassing" some people, one man suggested that they should leave (Tr. A3/73; Tr. B3/60). The men walked toward Harvard Yard and Ann followed (Tr. A3/74; Tr. B3/63), "hoping that they were maybe taking [her] to a stash" (Tr. B3/63).

The men then got onto an MBTA bus and Ann continued to follow them (Tr. A3/75; Tr. B3/64). After the group reached the back of the bus, one man (Ann did not know which one [Tr. A4/21, Tr. B3/68]) pulled out liquor and passed it around (Tr. A3/76-77; Tr. B3/67-68). Ann "chugged" a bottle of brandy, drinking most of the bottle (Tr. A3/77; Tr. B3/68-69). Hernandez then took out a prescription bottle and took a Percocet pill from it (Tr. A3/83; Tr. B3/74). As Hernandez testified, he also gave one (second trial) or more (first trial) Percocet pills to Spencer (Tr. A4/101; Tr. B5/88). Shortly afterward, Hernandez got off the bus (Tr. A3/86; Tr. B3/75). The three younger men and Ann soon got off the bus as well (Tr. A3/84; Tr. B3/75).[4] Ann estimated that they were on the bus for less than 10 minutes (Tr. B3/73).

By this time, Ann was feeling "[k]ind of light headed" or "dizzy and disorganized," but "thinking clearly" (Tr. A3/86; Tr. B3/76). After Spencer said

[4] While Ann testified that Hernandez got off the bus before the others, Hernandez testified that he actually rode the bus farther (Tr. A4/101; Tr. B5/90).

he would buy some liquor (Tr. A3/87; Tr. B3/77), Brown and Adams crossed the street and Ann followed (Tr. A3/89; Tr. B3/79). The trio arrived at 929 Massachusetts Avenue in Cambridge, a tall apartment building with businesses on the lower floors (Tr. A3/89; Tr. B3/80, B5/28). Ann believed the doors were locked because the group did not go inside until someone exited the building (Tr. A3/90-91; Tr. B3/82). After one man grabbed the door and went inside, Ann did too (Tr. A3/91; Tr. B3/82). Inside the foyer, one man (Ann did not say which one) rolled a marijuana cigarette (Tr. A3/93; Tr. B3/84). Meanwhile, Ann called McLean and said she was running later than expected (Tr. A3/92; Tr. B3/84). Ann and the men then went farther into the building and she followed them to the elevator; Spencer may have returned by this time (Tr. A3/95; Tr. B3/85-86).

The group took the elevator up; when the men got off the elevator, Ann followed (Tr. A3/96; Tr. B3/88). The group arrived into a small series of hallways (Tr. A3/97-98; Tr. B3/91). They took turns using a bathroom and then sat down on the floor in the hallway; by this time, all three men were there (Tr. A3/100; Tr. B3/91).

One man (Ann did not remember which one) gave Ann a pill and said "Here, have a Perc," which Ann understood to mean Percocet (Tr. A3/100; Tr. B3/92).

Ann swallowed the pill (Tr. A3/191; B3/92). Ann described herself as feeling "light headed and dizzy," "more pronounced than earlier" on the bus (Tr. A3/103), or very sedated with her thinking "a little slow" (Tr. B3/95-96). One man (Ann did not say which one) then took out marijuana and they all smoked it (Tr. A3/103-04; Tr. B3/96). Ann "took maybe 10 or 11 hits" (Tr. A3/104), "a fairly large amount" (Tr. B3/97); she felt "very unaware of everything" (Tr. A3/104), or was "very, very high from it" (Tr. B3/97). Ann stated that she "didn't really comprehend time" and "couldn't think really" (Tr. A3/104); she was "just gone" and "very, very stupefied" (Tr. B3/97).

After the group passed around cigarettes, Ann started to "kind of slouch down the wall" (Tr. A3/105; Tr. B3/99). The man next to her then asked if she had ever been with a black man (Tr. A3/105; Tr. B3/100-01).[5] Ann replied "no" and then blacked out (Tr. A3/105-06; Tr. B3/100). Someone touched her right leg and she felt in danger (Tr. A3/105; Tr. B3/101).

Ann testified that for the next half hour, she "couldn't really move much, couldn't really talk at all, wasn't thinking, wasn't feeling" (Tr. B3/102).

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[5] At the first trial, Ann was not asked to identify who asked her that question. At the second trial, Ann said that she did not know who it was, except that it was not the shorter man -- *i.e.*, Spencer (Tr. B3/101).

The next thing she remembered was that she had a bra on, but was otherwise undressed (Tr. A3/106; Tr. B3/102, 113). Ann felt like she "was asleep and [she] woke up and [she] fell asleep and [she] woke -- it felt kind of like that" (Tr. B3/103).

While Ann did not remember the exact sequence of events, she testified that someone began having sex with her (Tr. A3/107; Tr. B3/103-04). She was switching between her back and her stomach, but could not move herself; someone was moving her (Tr. A3/108; Tr. B3/104-05). Ann testified that "it started off one at a time, and then there were two at a time. It was never vaginally and anally at the same time. It was like constantly oral and then switched off between anal and vaginal" (Tr. A3/108-09; Tr. B3/106). The men "switched" at least five or six times (Tr. B3/109), but there were never more than two men having sex with her at once (Tr. A4/35-36; Tr. B4/88). Ann stated there had been at least two penises in her mouth; she could distinguish them because one was hairy and one was more shaven or smooth (Tr. A3/109; Tr. B3/109, B4/6-7). At some point, Ann heard one man say something like "she might be dead or what if she's dead or, dude, I think she's dead or something" (Tr. A3/108; Tr. B3/107).

Ann testified that, to the best of her memory, condoms were not used because she could feel when the

men ejaculated (Tr. A3/108-09; Tr. B4/7, 90). At the first trial, Ann testified there were at least two ejaculations in her mouth and at least two in her vagina (Tr. A3/108); at the second trial, Ann said there were three ejaculations in her mouth and at least one more in her vagina (Tr. B4/7, 90).

While this was going on, "there was a lighter that flicked" (Tr. B3/110). According to Ann, "[i]t was very close," within three feet, and Ann was convinced she would be burned (Tr. A3/107; Tr. B3/111). Ann could not tell if the person with the lighter had been smoking (Tr. B4/11, 92).

At the first trial, Ann made clear she did not know which men had sex with her (Tr. A4/36, 38), that it could have been the same two men through the entire encounter (Tr. A4/54), and that she could not say with certainty that Adams was one of them (Tr. A4/47).

After the encounter ended, Ann was lifted and helped to dress, but her clothes were all backward, inside-out, or both (Tr. A3/111; Tr. B4/12). Ann checked her phone and it was between 8:30 and 8:50 p.m. (Tr. A3/110; Tr. B4/13). She was helped to the elevator and went downstairs; there were at least two men with her, but Ann did not remember if there was a third (Tr. A3/112; Tr. B4/13).

After Ann got outside, only one man remained, and he walked her toward Central Square (Tr. A3/112; Tr.

B4/14). At the first trial, Ann testified that she could not remember which man it was (Tr. A3/113), but at the second trial Ann stated that it was the man with the white Blackberry (Adams) (Tr. B4/14). Ann testified that the man asked about her plans for the next day (Tr. B4/14-15). Ann told the man she had classes, and that they would be over by 3:15 (Tr. A3/113; Tr. B4/15). At the man's request, Ann gave him her phone number and he then sent Ann a text message to confirm it was the right number (Tr. A3/113; Tr. B4/15). According to Ann, the man then told her "it would be better next time if you weren't so drunk" (Tr. A3/113) or "next time it will be funner because you won't be as drunk" (Tr. B4/15). After they parted, Ann went to the Central Square subway station and took the subway to Harvard Square (Tr. A3/114-15; Tr. B4/15-17). Inside the Harvard Square subway station, Ann sat down and passed out or fell asleep (Tr. A3/115; Tr. B4/18). She slept on and off for about a half hour (Tr. A3/116; Tr. B4/19).

When she woke up, Ann texted her friend Emma (Tr. A3/122; Tr. B4/19-20), who was the Commonwealth's first-complaint witness (Tr. A6/37-41; Tr. B4/110-19). The text-message conversation between Ann and Emma was admitted as an exhibit at both trials (with slight, but immaterial differences) (Tr. A6/37-41; Tr. B4/114), and Emma read their exchange to the jury (Tr.

A6/39; Tr. B4/116-17). In a series of messages, Ann told Emma that someone had "Tony"-ied" her[6]:

> I was hanging in Harvard Square. I was going to ask some of the pit people where I could get some dru[g]s. There was a group of black guys. I went with them on the bus to a building with a lot of rented-out stories. On the bus, I downed at least 2/5 of brandy. We got to the building and went in. We go to the 3rd floor (pretty much break in) and all pee. I get a Percocet, smoke some trees, smoke a cigarette with them. Next thing I know, they're (3 of them) are fucking me including ass-fucking. I leave on a bus and get picked up at Harvard. Now, apparently they have to talk with me. Fuck.

(Tr. A6/39; Tr. B4/116-17). After Emma asked whether the men had sex with Ann, Ann responded, "Yep. All 3 entrances" (Tr. A6/39; Tr. B4/117).

Ann also called McLean and asked to be picked up in Harvard Square (Tr. A3/116, 122; Tr. B4/22-23). After returning to McLean, Ann went to the emergency room later that night (Tr. A3/125; Tr. B4/26).

At the hospital, Ann was examined by a pediatric emergency doctor (Tr. A3/125-26, A5/10-13; Tr. B4/26, B7/65). The doctor noted there was bruising on Ann's right labia, a tear of her hymen on both sides, bruising on her labia minora, and bruising to multiple areas on Ann's cervix (Tr. A5/20-21; Tr. B7/75-76).

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[6] Emma explained that "Tony"-ied referred to an incident she (Emma) had experienced a year earlier where two people fed her drugs and raped her (Tr. A6/38; Tr. B4/112).

Ann felt pain in her back because of a rug burn she sustained during the encounter and both her body and head ached (Tr. A3/124; Tr. B4/27). She felt pain in her rectum, and her vagina was slightly irritated and very uncomfortable (Tr. A3/124; Tr. B4/27-28).

At trial, the doctor explained that in cases of suspected sexual assault, besides treating the patient, emergency physicians also collect evidence using a kit (Tr. A5/7-9; Tr. B7/63-64). Ann's clothes were all collected and placed into separate envelopes, except that her bra and tank top were improperly packaged together (Tr. A5/31-32; Tr. B7/67-69). The doctor took swabbings of Ann's mouth, genitalia, and anal area (Tr. A5/27-28; Tr. B7/78).

Next, the doctor explained that alcohol and narcotics like Percocet have a synergistic effect and are more potent together than they would be if taken individually (Tr. A5/41-42; Tr. B7/83). While everyone metabolizes substances differently, someone who combines alcohol with Percocet would generally experience sleepiness, confusion, and a lack of coordination (Tr. A5/42; Tr. B7/83).

Finally, the doctor described the refractory period -- the time after ejaculation when a man cannot ejaculate again (Tr. A5/36; Tr. B7/85). The refractory period for men varies widely and can vary from minutes to hours, but the doctor estimated that

10 minutes is roughly correct for a short refractory period (Tr. A5/37-38; Tr. B7/85).

B. The Cambridge Police investigation

Approximately 10 days later, Ann and her father went to the Cambridge Police Station (Tr. A2/32; Tr. B4/20, B5/7). Cambridge Police Detective Joseph Murphy administered several photo arrays to Ann (Tr. A3/32-33; Tr. B4/29, B5/8-10). During the first four sets of photos, Ann had little response, but during the fifth array, Ann became animated and said "I think that is a yes" for one photo; the photo depicted Adams (Tr. A2/37-38, 41-42; Tr. B5/10-11).

At the second trial (but not at the first), Ann testified that she gave her cell phone to the police because at approximately 3:15 p.m. the day after the encounter, someone had called her from an unknown number (Tr. B4/29). Likewise, at the second trial (but not at the first), Detective Murphy testified that a subpoena revealed the 3:15 call came from a phone number then registered to Adams (Tr. B5/14).

Ann also gave the police the "Charlie tickets" she had purchased to ride the subway (Tr. A2/47; Tr. B4/30, B5/17). Using the tickets, the police obtained surveillance footage of Ann entering South Station at 6:48 p.m. and Central Square at 8:56 p.m. (Tr. A2/47-48, 97-98; Tr. B5/18-20). Ann also led the police to

929 Massachusetts Avenue in Cambridge (Tr. A2/64-65, 67-74, A3/126; Tr. B4/31, B5/28-35).

The police obtained video footage from a surveillance camera in the lobby of 929 Massachusetts Avenue, which depicted four people getting into the elevator at approximately 7:45 p.m. on April 5, 2011 (Tr. A2/80-84, 90, Tr. B5/38). The footage also depicted Brown coming out of an elevator at approximately 8:45 p.m., with Adams, Spencer, and Ann coming out of a second elevator shortly afterward (Tr. A2/91-93; Tr. B5/38-41).

Crime scene personnel later returned to the hallway at 929 Massachusetts Avenue (Tr. A2/93-95, A4/61-62; Tr. B5/43). They brought with them an alternative light source to help look for bodily fluids that would not be visible to the naked eye (Tr. A2/94-95, A4/59-63; Tr. B5/42). It revealed the hallway had many stains on the ground, walls, and doors (Tr. A2/95-96, A4/63-64; Tr. B5/43; B5/100-01). Crime scene personnel took several cuttings from the carpet and collected samples from some of the stains on the wall (Tr. A4/64-65; B5/101).

C. Adams's statement to the police

In August 2011, Detective Murphy and another detective interviewed Adams. The detectives told Adams they were investigating an April 2011 sexual

assault and showed Adams a photo of Ann from the subway station (Tr. A2/110-11; Tr. B5/48). Adams nodded and said "Yup. We didn't force her to have sex, because if she's saying that, we didn't force her to have sex" (Tr. A2/111; Tr. B5/48). He repeated this over and over (Tr. A2/111; Tr. B5/48).

When the detectives asked Adams what happened that day, Adams told them he was hanging out in "the pit" with Spencer and Brown, who Adams called "his dudes" (Tr. A2/112; Tr. B5/49-50). According to Detective Murphy, Adams stated that "one of his dudes hipped her onto him" and asked her if she wanted to hang out with them and "chill" (Tr. A2/113; Tr. B5/51). They got onto the bus together, and one person with them, Armando Hernandez, had Percocet pills and gave one out (Tr. A3/113; Tr. B5/52).[7]

They got off the bus and proceeded to 929 Massachusetts Avenue and "piggybacked" their way into the lobby (Tr. A2/114; Tr. B5/52-53). They went upstairs and drank and smoked marijuana (Tr. A2/114; Tr. B5/53).[8] Ann also took a Percocet (Tr. A2/114; Tr.

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[7] At the first trial, Detective Murphy testified only that Adams said Hernandez was with the group on the bus, but he made no mention of Adams saying that Hernandez had distributed Percocet.

[8] At the second trial (but not at the first) Detective Murphy stated that Adams admitted rolling the marijuana (Tr. B5/53). Notably, he did not record

B5/53). At one point, Brown kissed Ann (Tr. A2/115; Tr. B5/54). According to Detective Murphy, Adams stated that he took out three condoms, giving one to Brown, one to Spencer, and keeping one for himself (Tr. A2/117; Tr. B5/54). Detective Murphy testified that Adams stated they all put their condoms on, after which Brown "started fingering" Ann and then began to have sex with her (Tr. A2/116; TR. B5/54). First, Ann was on her back and then Brown flipped her over and entered her from behind (Tr. A2/116; Tr. B5/54). Spencer then put his penis in Ann's mouth while Brown was having sex with Ann from behind (Tr. A2/116; Tr. B5/54). Adams stated that Brown had sex with Ann for 10 to 15 minutes and then Spencer did likewise (Tr. A2/116-17; Tr. B5/55).

Adams admitted that he was present, but denied having sex with Ann (Tr. A2/116; Tr. B5/55). Ann was acting weird and Adams did not find her attractive: she was sickly, very pale, and out of it; Adams also said she had cuts on her arms and that he had watched a video of Ann cutting her arm (Tr. A2/117-18, A3/6-7; Tr. B5/57).[9] Instead, according to Detective Murphy,

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that new "fact" anywhere in the seven pages of notes he took during the interview (Tr. B5/ 74).

[9] The "cutting" issue was disputed at both trials. At the first trial, Ann admitted that she had cut herself in the "months prior" to April 2011 (Tr. A3/128). At the second trial, Ann admitted that she

Adams stated he masturbated while Spencer and Brown were having sex with Ann (Tr. A2/116; Tr. B5/56). At the first trial, Detective Murphy testified that Adams said he ejaculated, but was not sure where and that he had taken the condom off (Tr. A2/116-17); at the second trial, Detective Murphy testified that Adams said he ejaculated into the condom and disposed of it somewhere (Tr. B5/57).

Adams stated that the encounter ended with Spencer saying he "couldn't get a nut off" and Ann complaining about being under Spencer for a period of time (Tr. A2/118; Tr. B5/58). Adams said that while Brown was having sex with Ann, he (Adams) took an iPod and a set of headphones from Ann's backpack and sold them in Boston the next day (Tr. A2/116; Tr. B5/59). Finally, at the second trial (but not at the first) Detective Murphy testified that Adams said he got Ann's phone number from her and tried calling her the next day (Tr. B5/59-60, 62).

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had cut herself previously and acknowledged that she had scars on her arms, but stated that none were from cutting (Tr. B4/38, 42, 44). At the first trial, Ann admitted that she had a scar on her right arm on April 5, 2011, but denied that she had a video of the scar on her iPod (Tr. A4/48). In contrast, at the second trial Ann admitted that there was a video on her iPod where she stuck safety pins around a scar (Tr. B4/51), and also acknowledged that on April 5, 2011 she still had the scar depicted in the video (Tr. B4/73).

D. The DNA evidence

Kelley King, a forensic scientist in the State Police Crime Lab, processed the samples from the hospital evidence collection kit. After extracting the vaginal swab for sperm cells and getting a positive result (Tr. A5/89; Tr. B6/14), King prepared the vaginal swabs for DNA testing and sent them to the DNA unit (Tr. A5/90; Tr. B6/17).

King also processed Ann's clothing. King detected a stain on the inside of Ann's bra; it tested negative for seminal fluid enzyme but positive for amylase (Tr. A5/93-94; Tr. B6/27).[10] Accordingly, King prepared a sample for DNA testing (Tr. A5/94-95; Tr. B6/27). King also located a stain on the inside of Ann's tank top, which tested positive for seminal fluid enzyme and amylase (Tr. A5/95-97; Tr. B6/23-24).[11] After extracting sperm cells from the stain in the tank top, King prepared a sample for DNA testing

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[10] Amylase is a component of saliva also found in feces, urine, and breast milk (Tr. A5/90; Tr. B6/14).

[11] The bra and tank top were improperly packaged together (Tr. A5/117; Tr. B6/25, 43). King testified that it was possible that the stains in the tank top and bra could be the result of transfer between them, but opined that it was unlikely because the tank-top stain contained sperm cells and the bra stain did not (Tr. A5/118; Tr. B6/27-28). The Commonwealth's DNA analyst testified that a transfer was not possible because the bra sample yielded a major male profile, while the tank top yielded a major female profile (Tr. A6/7; Tr. B5/18-19).

and sent it to the DNA unit (Tr. A5/97-98; Tr. B6/24).[12] At the time of Adams's first trial, samples from three sources had been sent for DNA testing: (1) the vaginal swabs; (2) the inside of Ann's bra; and (3) the inside of Ann's tank top (Tr. A5/131-32).

During DNA testing, the vaginal swab was divided into sperm and non-sperm fractions. The non-sperm fraction yielded a single-source profile matching Ann (Tr. A5/134, Tr. B7/7). The sperm fraction was a mixture with the major profile matching Calvin Spencer; the probability of a random person matching the major profile was 1 in 319.5 trillion of the Caucasian population, 1 in 298.3 trillion of the African-American population, 1 in 521.9 trillion of the Hispanic population, and 1 in 5.206 quadrillion of the Asian population (Tr. A5/135, Tr. B7/8-9). Ann was a potential contributor to the sperm fraction and Adams and Brown were both excluded as potential contributors (Tr. A5/134-35; Tr. B7/10).

The sample from Ann's bra (which had no sperm cells) was a mixture of at least three individuals, with the major profile matching Adams; the probability of a random person matching the major profile was 1 in

[12] King testified that she also received samples from 929 Massachusetts Avenue but did not process them because the other samples she received would be more probative (Tr. A5/101; Tr. B5/33-34).

116.4 billion of the Caucasian population, 1 in 2.467 billion of the African-American population, 1 in 157.9 billion of the Hispanic population, and 1 in 642.3 billion of the Asian population (Tr. A5/138; Tr. B7/16-17). Spencer and Ann were potential contributors to the mixture and Brown was excluded (Tr. A5/141; Tr. B7/16).

The sample from the tank top was divided into sperm and non-sperm fractions (Tr. A5/143). The sperm fraction was a single-source profile matching Spencer with the same probabilities as the sperm fraction from the vaginal swab (Tr. A5/143; Tr. B7/10). The non-sperm fraction was a mixture of at least three people, with Ann matching the major profile (Tr. A5/143; Tr. B7/13). Spencer and Adams were potential contributors and Brown was excluded (Tr. A5/143; Tr. B7/13).

In sum, the DNA evidence at the first trial suggested that Adams was a likely contributor to a sperm-free sample on Ann's bra, but was excluded as a potential contributor to both the vaginal swabbing and the sperm fraction on Ann's tank top.

Perhaps not surprisingly, after the five acquittals and four hung counts at Adams's first trial, the Commonwealth conducted substantially more DNA testing before Adams's second trial. For example, at the time of the first trial, King had examined Ann's skirt, but declined to send a sample from either

the skirt or from Ann's underwear for DNA testing (Tr. A5/84, 99). But at Adams's second trial, King testified that she had identified several yellow crusty stains on Ann's skirt, which tested positive for seminal fluid enzyme (Tr. B6/19). After identifying sperm cells in two of the stains, King prepared a sample of sperm cells from the skirt for DNA testing and sent it to the DNA unit (Tr. B6/21). In addition, unlike at Adams's first trial, King testified that she located stains on the interior front panel, interior crotch, and interior rear panel of Ann's underwear, all of which tested positive for seminal fluid enzyme (Tr. B6/29-30). She prepared samples from the two interior panel stains for DNA testing and sent them to the DNA unit (Tr. B6/32). In all, by the time of Adams's second trial, King had now sent samples from six sources for DNA testing: the samples from the three sources tested prior to Adams's first trial -- (1) the vaginal swabs; (2) the inside of Ann's bra; and (3) the inside of Ann's tank top -- and samples from three additional sources: (4) the interior front panel of Ann's underwear; (5) Ann's skirt; and (6) the interior rear panel of Ann's underwear (Tr. B6/32, B7/4). In addition, whereas at Adams's first trial the DNA unit had employed only STR

analysis, for Adams's second trial, the DNA unit also conducted YSTR analysis on some samples (Tr. B7/22).[13]

The sample from the interior front panel of Ann's underwear was divided into sperm and non-sperm fractions. The sperm fraction was a mixture, with the major profile matching Spencer, and there being insufficient information for comparison on other contributors (Tr. B7/24). On the non-sperm fraction, the major profile matched Ann and under STR analysis, there was insufficient information for comparison on other contributors. But YSTR analysis revealed a mixture of at least three men, and neither Spencer nor Adams could be excluded as potential contributors (Brown could be excluded) (Tr. B7/24-26). Notably, however, the resulting profile that precluded exclusion of Spencer and Adams could be expected 5,062 times in a database of 5,426 African-American men, 2,200 times in a database of 3,344 Asian men, 5,475 times in a database of 6,209 Caucasian men, and 2,427 times in a database of 2,858 Hispanic men (Tr. B7/28).

The sample from the skirt was also divided into sperm and non-sperm fractions. The sperm fraction was a single-source male profile matching Spencer (Tr.

[13] As the Commonwealth's DNA analyst explained, YSTR analysis is DNA analysis specific to the Y chromosome present in a sample and therefore is used when more information is sought about the male contribution to a sample (Tr. B6/65-66, B7/22).

B7/29). Like the front-panel underwear sample, the major profile of the non-sperm fraction on the skirt sample matched Ann and under STR analysis, there was insufficient information for comparison on other contributors (Tr. B7/29). Again, YSTR analysis revealed a mixture of at least three men, and that neither Spencer nor Adams could be excluded as potential contributors (Tr. B7/29-30). This time, the resulting profile that precluded exclusion of Spencer and Adams could be expected 4,516 times in a database of 5,426 African-American men, 2,037 times in a database of 3,344 Asian men, 4,643 times in a database of 6,209 Caucasian men, and 2,152 times in a database of 2,858 Hispanic men (Tr. B7/28).

Finally, the sample from the interior rear panel of Ann's underwear was divided into sperm and non-sperm fractions. The sperm fraction was a mixture of at least two individuals; the major profile matched Spencer, and Adams was included as a potential contributor to the minor profile (with Brown excluded) (Tr. B7/34-35). Under STR testing, a random person would not be expected to be a contributor to the minor profile more than 1 in 431 times in the African-American population, 1 in 19,928 times in the Asian population, 1 in 2,215 times in the Caucasian population, and 1 in 2,007 times in the Hispanic population (Tr. B7/37). Under YSTR testing, the

resulting profile that precluded exclusion of Adams could be expected 4,747 times in a database of 5,426 African-American men, 2,822 times in a database of 3,344 Asian men, 5,186 times in a database of 6,209 Caucasian men, and 2,471 times in a database of 2,858 Hispanic men (Tr. B7/37). On the non-sperm fraction from the rear panel of Ann's underwear, again the major profile matched Ann and under STR analysis, there was insufficient information for comparison on other contributors (Tr. B7/30). YSTR analysis again revealed a mixture of at least three men, but this time suggested there was a major profile matching Adams that would be expected in 1 in 1,961 African-Americans, 1 in 1,255 Asians, 1 in 2,242 Caucasians, and 1 in 1,171 Hispanics (Tr. B7/31).

As the Commonwealth's DNA analyst testified, Adams could not be excluded from any item tested except the vaginal swab (Tr. B7/38), with the number of items tested having doubled since the first trial. And unlike at Adams's first trial, the DNA evidence also included Adams as a potential contributor to the sperm fraction of a stain in Ann's underwear.

Argument

I. The Prohibition Against Double Jeopardy Barred Adams's Second Trial Following the Acquittals Returned at Adams's First Trial.

A. Adams's second trial and resulting convictions violated his right to be free from double jeopardy.

The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." While the Massachusetts Declaration of Rights does not include a double jeopardy clause, the Commonwealth's "statutory and common law have long embraced the same principles and protections." *Kimbroughtillery v. Commonwealth*, 471 Mass. 507, 510 (2015).

The Double Jeopardy Clause provides several constitutional protections, one of which is a bar to prosecution for the same offense following acquittal. *E.g.*, *Yeager v. United States*, 557 U.S. 110, 118-19 (2009). That protection exists in two forms. First, an acquittal bars reprosecution on the actual charge of acquittal. *Id.*; *see Bravo-Fernandez v. United States*, 137 S. Ct. 352, 357-58 (2016) (characterizing this form of protection as "claim preclusion"). Second, and more germane here, an acquittal also prohibits the prosecution from "relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial," thereby barring subsequent prosecution

on charges that can be treated as the "same offence" under the Double Jeopardy Clause. *Yeager*, 557 U.S. at 119; *see Bravo-Fernandez*, 137 S. Ct. at 358 (characterizing this form of protection as "issue preclusion"). Hence, where "one of the issues necessarily decided at [a] first trial is an essential element of the alleged crime in [a] second trial," the Double Jeopardy Clause bars the second trial. *Commonwealth v. Ferreira*, 90 Mass. App. Ct. 491, 498 (2016) (quoting *Commonwealth v. Benson*, 389 Mass. 473, 478 (1983)).

The classic illustration of this latter form of protection is the Supreme Court's decision in *Ashe v. Swenson*, 397 U.S. 436 (1970). *Ashe* involved a robbery of six poker players. After Ashe was charged and acquitted of robbing one of the players, the prosecution tried Ashe for robbery of another player -- this time using "substantially stronger" testimony from "witnesses [who] were for the most part the same" -- and Ashe was convicted. *Ashe*, 397 U.S. at 439-40. The Supreme Could held that the second prosecution violated the Double Jeopardy Clause: "Because the only contested issue at the first trial was whether Ashe was one of the robbers, we held that the jury's verdict of acquittal collaterally estopped the [prosecution] from trying him for robbing a different player during the same criminal episode."

Yeager, 557 U.S. at 119 (citing *Ashe*, 397 U.S. at 446).

In assessing what issues a jury "necessarily decided" with an acquittal, a reviewing court must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter." *Bravo-Fernandez*, 137 S. Ct. at 359 (quoting *Ashe*, 397 U.S. at 444). The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Bravo-Fernandez*, 137 S. Ct. at 359 (quoting *Ashe*, 397 U.S. at 444). In doing so, the emphasis should be on "realism and rationality" rather than "hypertechnical[ity]." *Ashe*, 397 U.S. at 444. The burden is on the defendant "to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided by a prior jury's verdict of acquittal." *Bravo-Fernandez*, 137 S. Ct. at 359 (quotation marks omitted).

Crucially, where as here, a jury fails to return a verdict on some counts, the hung counts are not a "relevant part of the record of the prior proceeding" and must be ignored:

> Because a jury speaks only through its verdict, its failure to reach a verdict cannot -- by negative implication -- yield a piece of information that helps put together the trial puzzle. A mistried count is therefore nothing like the other forms of record material that

> *Ashe* suggested should be part of the preclusion inquiry.

Yeager, 557 U.S. at 121. In other words, the hung counts at Adams's first trial are a "nonevent" and have "no place in the issue-preclusion analysis." *Id.* at 120, 122. Here, as described below, the jury at Adams's first trial necessarily decided that Adams was not a joint venturer. Hence, Adams's reprosecution on the four joint-venture counts violated Adams's right to be free from double jeopardy.

As noted, Adams was charged as a joint venturer to six counts of forcible rape of a child -- three relating to Calvin Spencer and three relating to Joseph Brown. Consequently, at the conclusion of Adams's first trial, the trial judge began her jury charge on the substantive offenses with a lengthy and thorough joint-venture instruction (Tr. A7/70-72).

The judge then instructed the jury on the three necessary elements to prove forcible rape of a child: (1) sexual intercourse with the victim, (2) "that the sexual intercourse was accomplished by compelling [Ann] to submit by force and against her will or by compelling her to submit by threat of bodily injury," and (3) "that [Ann] was a child under 16 years of age at the time of the alleged offense" (Tr. A7/75).

The judge also instructed the jury on the lesser included offense of statutory rape under G.L. c. 265,

§ 23 (Tr. A7/79); *see Commonwealth v. Thayer*, 35 Mass. App. Ct. 599, 602 n.7 (1993) (recognizing statutory rape under G.L. c. 265, § 23 is a lesser included offense of forcible rape of a child under G.L. c. 265, § 22A). As the trial judge instructed the jury, a conviction for statutory rape also requires proof of three elements: (1) sexual intercourse, (2) "that [Ann] was a child under 16 years of age at the time of the alleged offense," and (3) "that the sexual intercourse was unlawful," which the trial judge defined as "intercourse outside of the marital relationship" (Tr. A7/79-80). As is obvious, the difference between forcible rape of a child under G.L. c. 265, § 22A and statutory rape under G.L. c. 265, § 23 is that "nonconsent and force or threats of bodily injury are essential elements of forcible rape but not statutory rape." *Thayer*, 35 Mass. App. Ct. at 602 n.7.

The jury at Adams's first trial acquitted Adams of the two counts where he was charged as a joint venturer in Spencer's and Brown's alleged oral rapes of Ann. Importantly, the jury's acquittals encompassed not only the forcible-rape charges alleged in the indictment, but also the lesser included offense of statutory rape on those counts (Tr. A7/79) (jury instructions); (R.A. 34, 38, 42) (verdict slips). Accordingly, for the jury to have acquitted

Adams on those two charges, it had to have determined either that (a) one of the three elements of statutory rape had not been satisfied, or (b) Adams was not a joint venturer.

Viewed from a "practical frame," *Bravo-Fernandez*, 137 S. Ct. at 359, there was no dispute whether Spencer and Brown had committed statutory rape; the only contested element was whether Adams was a joint venturer to Spencer's and Brown's acts. To begin, two of the three elements of statutory rape -- Ann's age and the "unlawful" nature of any potential intercourse between Spencer or Brown and Ann -- were beyond dispute. Next, three facts demonstrate that it had to have been Spencer and Brown who engaged in oral intercourse with Ann: (1) it was undisputed that there were three people present with Ann (Spencer, Brown, and Adams); (2) Ann testified that she was raped orally by two people: "while someone was putting their penis in my mouth, I know that one of them was hairy and one of them was smooth" (Tr. A3/109); and (3) the jury acquitted Adams of oral rape as a principal, leaving only Spencer and Brown. Moreover, Adams confirmed this in his own statement, as Detective Murphy testified:

> And [Adams] goes ["]then my dudes were having sex with her, first face -- her face up, back on the floor, flip her around, do her doggy style.["]

> ["]Then one guy pulled her head towards his penis, and then [they][14] were both doing her and one from the front and the mouth, one from the back.["]
>
> ["]And then they were flipping.["]
>
> ["]And then my dude Vocals, he was -- he was on that for like 10, 15 minutes, and then -- and then Mr. Spencer had her, and he had a couple different ways, flipping her back and forth.["]

(Tr. A7/116). The upshot is, as the Commonwealth acknowledged in its closing, Adams did not contest whether Spencer and Brown had engaged in intercourse with Ann: "The defendant himself spoke with the Police and corroborated that Calvin Spencer and Joseph Brown had sex with her. . . . What the defendant is contesting here is that it was forcible, that he shared their intent, and that he committed any of those acts himself" (Tr. 7A/34). Rather, as the Commonwealth recognized, Adams contested only whether he was a joint venturer -- i.e., whether "he shared their intent" (Tr. A7/34).[15]

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[14] The transcript reflects that Detective Murphy stated "we" rather than "they" here, but it is apparent from the record that this is a stenographic error. Adams consistently denied any sexual contact with Ann, and even the Commonwealth never suggested that he admitted that "we" "were both doing her."

[15] To be sure, during his closing, defense counsel halfheartedly suggested that Adams "cannot have aided and abetted a crime that there's no evidence was ever committed. And there's no evidence before you that Joseph Brown had anal, oral, or vaginal sex with [Ann]" (Tr. 7A/30). But the gist of counsel's overall

In sum, by acquitting Adams of being a joint venturer to Spencer's and Brown's oral rapes of Ann, the jury had to have determined that Adams was not a joint venturer to any rape of Ann. Accordingly, the Double Jeopardy Clause prohibited the Commonwealth from retrying Adams on the four rape counts alleging that he was a joint venturer to Spencer's and Brown's vaginal and anal rapes of Ann

The Commonwealth is likely to have two responses. First, the Commonwealth may argue that the jury could have acquitted on the joint-venture oral-rape counts by determining that Ann had not been orally raped at all. Such a fanciful argument conflicts with the trial evidence and fails to apply the requisite inquiry with the "realism and rationality" that the Supreme Court has commanded. *Ashe*, 397 U.S. at 444. As described above, both Ann's testimony and Adams's

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argument was that Adams merely stood by while Spencer and Brown had sex with Ann: "If I'm standing in front of you saying that one of the reasons I don't want you to convict Mr. Adams is because while his friends were having sex with her, even though they thought she was 19 and it was consensual, [Adams] was busy stealing her iPod. That is certainly not a position that any defense lawyer wants to be put into, but that's not what he's charged with" (Tr. 7A/22-23, 28). In addition, as noted, regardless of what counsel argued, the undisputed evidence was that two of the three men had sex with Ann and the jury's verdicts indicate that was Adams not one of them, meaning that the two culprits had to have been Spencer and Brown.

own statement demonstrate that Ann was orally raped by two men, and that the two men were Spencer and Brown. Any suggestion that the jury could have acquitted Adams because it concluded Ann had not been orally raped at all simply does not view "all the circumstances of the proceedings" "in a practical frame." *Bravo-Fernandez*, 137 S. Ct. at 359 (quoting *Ashe*, 397 U.S. at 444).

Second, the Commonwealth may suggest that if Adams's argument is correct -- i.e., the jury found that Adams was not a joint venturer -- then the jury should have also acquitted him on the other joint-venture rape charges. Such an argument is foreclosed by *Yeager*, which held that hung counts are a "nonevent" and have "no place in the issue-preclusion analysis." *Yeager*, 557 U.S. at 120, 122. Indeed, the lower court in *Yeager* had permitted a second trial by embracing precisely such an argument, and the Supreme Court roundly rejected it. *Id.* at 120.

In sum, the jury's acquittals at Adams's first trial indicate that it necessarily decided that Adams was not part of a joint venture to any rape committed by either Spencer or Brown. As a result, the Double Jeopardy Clause prohibited his second trial on the joint-venture vaginal-rape and anal-rape charges.

B. The Court should not decline to review Adams's double-jeopardy claim.

Before Adams's second trial, defense counsel moved to "exclude any and all evidence regarding allegations contained in" the counts on which Adams was acquitted at the first trial (R.A. 46-48). Regrettably, however, defense counsel failed to take the additional step of moving to dismiss the counts on which the jury had hung at the first trial. In *Commonwealth v. Spear*, 43 Mass. App. Ct. 583, 586-89 (1997), this Court held that appellate review of a double-jeopardy claim is unavailable unless a defendant files a motion to dismiss prior to a second trial. Here, Adams submits that his double-jeopardy claim should be reviewed for three separate and independently sufficient reasons.

First, Adams respectfully submits that *Spear* was wrongly decided and should be overruled.[16] The Court's

[16] In his initial brief to this Court, Adams mistakenly suggested that "this Court is obligated" to follow its prior decision in *Spear*. In fact, the Court has the authority to overrule its own decisions. *See, e.g.*, *Commonwealth v. Corcoran*, 69 Mass. App. Ct. 123, 1267-27 (2007) ("We conclude that [a prior Appeals Court decision] requires correction . . . . Thus to the extent that [the prior decision] has come to stand for [a particular proposition], that decision is overruled."); *Commonwealth v. Jones*, 59 Mass. App. Ct. 157, 163 (2003) ("To the extent [a prior Appeals Court's decision] requires a different result, it is overruled."); *Carmel Credit Union v. Bondeson*, 55 Mass. App. Ct. 557, 561 (2002) ("To the extent that the opinion in [a prior Appeals Court case] can be read to require [a contrary holding] we overrule

decision in *Spear* was purportedly based on G.L. c. 277, § 47A and Mass. R. Crim. P. 13, which govern pretrial motions in criminal cases. Neither provision supports the weight *Spear* placed on them. By its terms, G.L. c. 277, § 47A applies only to "defense[s] or objection[s] based upon defects in the institution of the prosecution or in the complaint or indictment"; Adams's double-jeopardy claim has nothing to do with "defects in the institution of the prosecution or in the complaint or indictment." Next, while the text of Rule 13(c) arguably applies (and even if G.L. c. 277, § 47A applied),[17] nothing in either provision suggests that failing to file a pretrial motion renders a claim entirely unreviewable.

To the contrary, as the Supreme Judicial Court ("SJC") has long made clear, "[a]ll claims, waived or not, must be considered. The difference lies in the standard of review that we apply when we consider the merits of an unpreserved claim." *Commonwealth v.*

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it."); *Commonwealth v. Montalvo*, 50 Mass. App. Ct. 85, 89 (2000) ("To the extent that [a prior Appeals Court decision] suggests the contrary [conclusion], we overrule it.").

[17] Rule 13(c)(1) provides that "All defenses available to a defendant by plea, other than not guilty, shall only be raised by a motion to dismiss or by a motion to grant appropriate relief," and Rule 13(c)(2) provides that "A defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion."

Randolph, 438 Mass. 290, 293-94 (2002). Relief is always warranted where an error creates a substantial risk of a miscarriage of justice. *Id.* at 294. As the SJC put it, the substantial-risk standard is a "default standard of review" that applies "[i]n all cases where a defendant fails to preserve his claim for review." *Id.*

Given the SJC's clarity in *Randolph*, it is not surprising that since *Spear* (and contrary to this Court's holding in that case), the SJC has reviewed for a substantial risk of a miscarriage of justice other claims not raised in a pretrial motion -- including claims expressly governed by G.L. c. 277, § 47A -- rather than (as in *Spear*) declining to review them entirely. *E.g.*, *Commonwealth v. St. Louis*, 473 Mass. 350, 355 (2015) (reviewing facial void-for-vagueness challenge under substantial-risk standard despite lack of pretrial motion to dismiss); *Commonwealth v. Fernandes*, 430 Mass. 517, 521 n.13 (1999) (reviewing challenge to sufficiency of indictment under substantial-risk standard despite requirement that such challenges be raised prior to trial); *cf. Commonwealth v. Holley*, 476 Mass. 114, 119-20 (2016) ("By waiting until after his conviction, however, the defendant has waived his right to object under Massachusetts law to defects in the underlying grand jury proceeding.... Thus the defendant must show

that the grand jury irregularity caused a substantial likelihood of a miscarriage of justice in the trial jury's verdict.").

Even more telling, the SJC has reviewed double-jeopardy claims even where (like Adams) a defendant failed to move to dismiss and then (unlike Adams) later pleaded guilty. *Commonwealth v. Negron*, 462 Mass. 102, 103-09 (2012); *cf. Commonwealth v. Dykens*, 473 Mass. 635, 638-40 (2016). In *Negron*, the SJC explicitly declined the Commonwealth's invitation to "follow the lead of the Appeals Court, which has held that, where a defendant does not challenge as duplicative the charges in a pretrial motion to dismiss and pleads guilty voluntarily and intelligently to the allegedly duplicative charges, the defendant's guilty plea forecloses any double jeopardy claim." *Negron*, 462 Mass. at 105-06. As the SJC noted in *Negron*, "a guilty plea will not preclude a court from hearing a constitutional claim that the State should not have tried the defendant at all" because "a defendant's claim of double jeopardy goes to the very power of the State to bring the defendant into court." *Id.* at 104 (quoting *Commonwealth v. Clark*, 379 Mass. 623, 625-26 (1980)) (brackets and quotation marks omitted). That principle applies equally -- if not more powerfully -- to a defendant

like Adams who was convicted at trial rather than pleaded guilty.[18]

Alternatively, even if *Spear* remains good law, given that the trial judge denied the actual motion that defense counsel filed, the trial judge would have also denied a motion to dismiss raising the issue that Adams is now pressing on appeal. After all, Adams's actual motion raised a substantially similar issue; it also relied on Adams's acquittals on the joint-venture counts at his first trial; and it cited some of the same caselaw Adams does now. The judge's denial demonstrates that she would have also denied a motion to dismiss if Adams had filed one. In other words, given the circumstances, a motion to dismiss would have been futile. *Cf. Commonwealth v. Vasquez*, 456 Mass. 350, 356-59 (2010) (treating issue as preserved where raising it would have been futile). As a result, the Court should review Adams's double-jeopardy claim as if it had been raised.

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[18] *Spear* also suggested that its holding was "in accord with the treatment of the issue in other jurisdictions," including "[n]umerous [f]ederal appellate decisions." *Spear*, 43 Mass. App. Ct. at 587-88. Regardless of whether that was true when *Spear* was decided, it is not true now: The federal courts of appeal uniformly review unpreserved double-jeopardy claims for "plain error" rather than (as in *Spear*) refusing to review them entirely. *See United States v. Robertson*, 606 F.3d 943, 950 n.3 (8th Cir. 2010) (collecting cases).

Finally, the Court should also review the merits of Adams's double-jeopardy claim because trial counsel's failure to move to dismiss was constitutionally ineffective. To prove ineffectiveness, a defendant must demonstrate both that counsel's performance was deficient and resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974). Defense counsel's performance is constitutionally deficient when it falls below "an objective standard of reasonableness." *Strickland*, 466 U.S. at 688; *Saferian*, 366 Mass. at 96 (describing the standard as "behavior falling measurably below that which might be expected from an ordinary fallible lawyer"). To prove prejudice, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Saferian*, 366 Mass. at 96 (describing the standard as "depriv[ing] the defendant of an otherwise available, substantial ground of defense"); *see also Commonwealth v. Millien*, 474 Mass. 417, 432 (2016) (clarifying prejudice standard under *Saferian*).

Here, both requirements are easily satisfied. Defense counsel's failure to seek dismissal is

baffling given the result of the first trial. In addition, there could have been no conceivable strategic reason to forgo seeking dismissal given that a successful motion would have barred Adams's second trial and denial of the motion would merely have left Adams in the same position. Put another way, defense counsel inexplicably declined an opportunity to hit a home run without even risking an out. Defense counsel's failure to seek dismissal prior to Adams's second trial was "objectively unreasonable" and represents "behavior falling measurably below that which might be expected from an ordinary fallible lawyer." In addition, for the reasons described above, had counsel sought dismissal, the motion would have been meritorious; hence, not seeking dismissal deprived Adams of "an otherwise available, substantial ground of defense."

* * *

For any or all of these reasons, the Court should review the merits of Adams's double-jeopardy claim and conclude that because the jury at Adams's first trial decided that Adams was not a joint venturer, the Double Jeopardy Clause barred his second trial.

II. Adams's Rape Convictions Should be Reversed Because at Adams's Second Trial, the Commonwealth Introduced and Made Extensive Use of Evidence Suggesting that Adams Had Personally Raped Ann Despite Adams's Acquittal as a Principal at the First Trial.

Under the Double Jeopardy Clause, an acquittal prohibits the prosecution from "relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager*, 557 U.S. at 119. This doctrine has two potential effects. First, as with Adams's first claim, "it may bar totally a subsequent prosecution if one of the issues necessarily decided at the first trial is an essential element of the alleged crime in the second trial." *Ferreira*, 90 Mass. App. Ct. at 498 (quoting *Benson*, 389 Mass. at 478). In addition, even where a second trial is permitted, "the doctrine may bar the introduction of certain facts determined in the defendant's favor at the first trial." *Id.* Here, as described below, by acquitting Adams of all three rape counts on which he was charged as a principal, the jury at Adams's first trial necessarily decided that Adams did not penetrate Ann's vagina, anus, or mouth with his penis. Accordingly, even assuming Adams's second trial was not barred entirely, evidence that Adams himself raped Ann should have been excluded.

The jury at Adams's first trial acquitted Adams of all three counts in which he was charged as a

principal -- or as the trial judge put it when instructing the jury, "personally committing the rape" (Tr. A7/72). Importantly, as noted, the jury's acquittals encompassed not only the forcible-rape charges alleged in the indictments, but also the lesser included offense of statutory rape on those counts (Tr. A7/79) (jury instructions); (R.A. 36, 40) (verdict slips). Again, two of the three elements of statutory rape -- Ann's age and the "unlawful" nature of any potential intercourse between Adams and Ann -- were uncontested. Here, by acquitting Adams of all three rape counts on which he was charged as a principal, the jury necessarily had to have determined that he did not penetrate Ann's vagina, anus, or mouth with his penis. Indeed, that was the linchpin of Adams's defense at the first trial and the highlight of defense counsel's closing argument:

> [W]hen I addressed you a week ago, I told you that the Commonwealth would not provide any direct evidence that James Adams ever had any manner of sex with [Ann].
>
> Nobody in the last week stood in that chair and said I saw James Adams on top of [Ann], I saw James Adams having sex with [Ann].
>
> [Ann], when she took that seat never once pointed to James Adams and said, yes, I remember him, yes, he was on top of me that night, yes, he was having sex with me that night.
>
> Christy Lemire, Kelly King, the two DNA evidences -- two DNA witnesses that the

> Commonwealth put on, not one of them said I received swabs or I took samples or cuttings, we tested them, and not one of them had said that there was spermal DNA from James Adams inside [Ann], on [Ann], or anywhere near [Ann].
>
> * * *
>
> Finally, regarding James Adams having vaginal, oral, and anal sex with [Ann], as I went over exhaustively, and I'm not going to take more time on this, there's no evidence that that happened, no testimonial evidence, no forensic evidence, no evidence from [Ann].
>
> That never happened.

(Tr. 7A/14-15, 31).

Prior to Adams's second trial, Adams moved to exclude evidence suggesting he had personally had sex with Ann (R.A. 46-48), which the Commonwealth opposed (R.A. 49-53); Adams's motion was denied after extensive argument (Tr. Oct-2-2014/21-24; Tr. Oct-7-2014/3-9, 13, 15-16; Tr. Oct-8-2014/3-12; Tr. B2/125-39, B3/4-5; R.A. 46). Because the issue is preserved, *see Commonwealth v. Grady*, 474 Mass. 715, 719 (2016), Adams's rape convictions must be reversed unless the Commonwealth proves that the erroneous admission of this evidence was harmless beyond a reasonable doubt. *Commonwealth v. Royce*, 20 Mass. App. Ct. 221, 228 (1985) (reviewing this type of error for harmlessness beyond a reasonable doubt). Under this standard, reversal is required if there is even "a reasonable possibility that the evidence complained of might have

contributed to the conviction." *Commonwealth v. Pimentel*, 76 Mass. App. Ct. 236, 238 (2010) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)). In making this assessment, the Court must "examine a number of factors, including the importance of the evidence in the prosecution's case, the frequency of reference to the evidence, whether it was cumulative of other evidence, and whether the other evidence against the defendant was overwhelming," as well as "the relationship between the evidence and the premise of the defense." *Pimentel*, 76 Mass. App. Ct. at 238 (quoting *Commonwealth v. Rosario*, 430 Mass. 505, 511 (1999) and *Commonwealth v. Mahdi*, 388 Mass. 679, 696-97 (1983)). Above all, the Court must consider whether, "on the totality of the record before [it], weighing the properly and improperly admitted evidence together, [the Court is] satisfied beyond a reasonable doubt that the tainted evidence did not have an effect on the jury and did not contribute to the jury's verdicts." *Commonwealth v. Tyree*, 455 Mass. 676, 701-02 (2010). Here, the Commonwealth cannot satisfy this heavy burden.

As described above, at Adams's second trial the Commonwealth introduced powerfully inculpatory DNA evidence suggesting that Adams had sex with Ann, despite his acquittals on those allegations at his first trial. While at Adams's first trial, he was

excluded from the two sperm-fraction DNA samples, at Adams's second trial the Commonwealth was permitted to introduce evidence suggesting that Adams was a potential source of sperm inside Ann's underwear, as well as a potential source of DNA in stains on Ann's skirt. In addition, despite Adams's acquittal of oral rape as a principal, Ann was permitted to testify during the second trial that "at least" two (and perhaps three) penises were put into her mouth (Tr. B3/109), that "at least one was hairier and at least one was a lot more shaven" (Tr. B3/109)(emphasis added), that "at least two" of the men had raped her (Tr. B4/5), and that there were "at least two men that forced their penises into [her] mouth" (Tr. B4/6) (emphasis added).

If all this were not enough, throughout her closing, the prosecutor repeatedly invited the jury to conclude that Adams had personally raped Ann. The prosecutor extended her invitation in three ways. First, she repeatedly told the jury that at least two of Spencer, Brown, and Adams had raped Ann, when the jury was not permitted to conclude that Adams himself had raped her:

- "[T]here were at least two different men raping, at least two different types of penises" (Tr. B8/23) (emphasis added).

- "[A]t least two of them took turns forcing their penises into her vagina, her mouth, and flipping her over and over again" (Tr. B8/31) (emphasis added).

- "[Ann] told you there were at least two types of penises, at least two of them penetrated her at the same time" (Tr. B8/31) (emphasis added).

Second, the prosecutor repeatedly told the jury that Adams had at least assisted Spencer and Brown, thereby suggesting that perhaps he had done even more:

- "[W]hat the evidence does show is that at the least, [Adams] participated, that he aided, he assisted his friends" (Tr. B8/20) (emphasis added).

- "It's enough to find that [Adams] was at least present and ready and willing to assist his friends as they committed these rapes, at least" (Tr. B8/24) (emphasis added).

- "According to [Adams's] own statement, again at the least, he helped make this happen, and he obviously wanted it to happen and keep happening" (Tr. B8/26) (emphasis added).

- "[A]t the very least, this defendant acted together with his friends before and during these rapes to make them happen" (Tr. B8/35) (emphasis added).

Finally, the prosecutor's argument was sometimes even more direct:

- "[Adams] was the minor profile in the sperm fraction of her underwear, and he was the major profile in the non-sperm fraction" (Tr. B8/32).

- "And then think about the DNA. Think about what [the DNA witnesses] told you. Are their findings consistent with someone who had just sat there nearby and masturbated?" (Tr. B8/28).

- "Again, his saliva was in her underwear. . . . Did he use saliva as lubrication?" (Tr. B8/33) (emphasis added).

- "This defendant James Adams's DNA profile could be included in some way in every piece of clothing that [Ann] was wearing during and after the rapes, every piece of evidence except for the vaginal swabs. . .. And would we expect to find him in those swabs? We know he was wearing a condom" (Tr. B8/33) (emphasis added).

The prosecutor's suggestions that Adams may have used saliva as lubrication and that his use of a condom would explain the lack of his DNA on the vaginal swabs cannot be interpreted in any way other than an argument that Adams personally had sex with Ann -- an issue that the jury at Adams's first trial resolved in Adams's favor. The Commonwealth's introduction and use of that evidence should have been prohibited.

As demonstrated by the jury's verdicts at Adams's first trial, the evidence was not overwhelming -- far from it. While there were several small differences between the two trials, the most substantial change in the evidence was the Commonwealth's new DNA evidence: Adams was linked by DNA to twice as many samples in the second trial as in the first, and the second trial (unlike the first) included the powerfully inculpatory

evidence that Adams's DNA was found in the sperm fraction of a sample taken from Ann's underwear. The Commonwealth used that evidence (along with Ann's testimony suggesting that "at least" two men had raped her) to suggest to the jury that Adams had personally raped Ann. Accordingly, the erroneous admission and use of that evidence cannot be deemed harmless beyond a reasonable doubt. Reversal is required.

Conclusion

For the reasons described above, the Court should reverse Adams's rape convictions on Counts 1, 3, 4, and 9, and remand the case to the Superior Court with an order to enter judgments of acquittal in Adams's favor on those counts. Alternatively, the Court should vacate Adams's rape convictions on Counts 1, 3, 4, and 9 and remand the case to the Superior Court for a new trial.

Respectfully submitted,

JAMES ADAMS,

By his attorney,

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Statutory Addendum

G.L. c. 265, § 22A. Rape of child; punishment

Whoever has sexual intercourse or unnatural sexual intercourse with a child under 16, and compels such child to submit by force and against his will or compels such child to submit by threat of bodily injury, shall be punished by imprisonment in the state prison for life or for any term of years. A prosecution commenced under this section shall neither be continued without a finding nor placed on file.

G.L. c. 265, § 23. Rape and abuse of child

Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under 16 years of age, shall be punished by imprisonment in the state prison for life or for any term of years or, except as otherwise provided, for any term in a jail or house of correction. A prosecution commenced under this section shall neither be continued without a finding nor placed on file.

Rule 16(k) Certification

I certify this brief complies with the rules of court that pertain to filing briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

Scott Katz (BBO # 655681)

Certificate of Service

I certify that a true copy of the above document will be served on Assistant District Attorney Robert J. Bender, counsel for the Commonwealth, via electronic service on eFileMA.

Scott Katz (BBO # 655681)