State of New York
Court of Appeals

OPINION

No. 63
The People &c.,
Respondent,
v.
Tyrone Wortham,
Appellant.

Angie Louie, for appellant
David M. Cohn, for respondent.

FAHEY, J.:

On this appeal, we are first asked to determine whether a police officer's question to defendant regarding where he lived falls within the "pedigree exception" to the *Miranda* requirement. We conclude that it does. We nevertheless reverse and remit because no *Frye* hearing was held (*see Frye v United States*, 293 F 1013 [DC Cir 1923]) on the admissibility of statistical evidence generated by the forensic statistical tool (FST)

developed by the New York City Office of Chief Medical Examiner (OCME), where it is alleged that defendant was a contributor to a multiple-source DNA profile.

I.

In May 2011, police officers executed a search warrant at an apartment in Brooklyn. When the officers entered the apartment, defendant and his two young children were inside. Pursuant to police department policy, defendant was handcuffed. While still inside the apartment, a detective asked defendant his name, date of birth, address, height, and weight. Defendant stated that his children's mother let him stay at the apartment, motioning toward a bed in the living room. No *Miranda* warnings were given to defendant before those questions were asked. The detective asked defendant for his pedigree information before any contraband was found in the apartment. After defendant's departure from the apartment, the officers recovered weapons, drugs, and drug paraphernalia from a back bedroom. Defendant and a codefendant were jointly indicted and tried on several counts related to the possession of the firearms and controlled substances.

The admissibility of defendant's statement that he lived at the apartment was the subject of a pretrial suppression hearing. During that hearing, the detective who asked defendant for his "pedigree" information testified that it was the policy of the New York City Police Department to handcuff all adults found inside a location where a search warrant was to be executed, pat them down for weapons, ask them certain questions for identification purposes, and then transport them from the search warrant location to the precinct or central booking. The questions typically included the person's name, date of birth, address, height, and weight. The detective testified that all adults found inside a

searched location were asked those pedigree questions, regardless of whether contraband was ultimately found during the search, and the information was entered into the online booking system. If the individual was later arrested, the police would have pedigree information for the person under arrest. If that person was not later arrested, the information would still be entered into the online booking system in order to document that the individual had been in police custody at one point. The detective further testified that he followed this procedure with defendant. After the hearing, the suppression court ruled that defendant's statement that he lived in the apartment was admissible because it fell within the scope of the pedigree exception to the *Miranda* requirement.

Before trial, defendant moved to preclude expert testimony regarding the probability that he was a contributor to a multiple-source DNA sample, a statistic derived from the use of the FST, or, in the alternative, for a *Frye* hearing. The court denied defendant's motion without a *Frye* hearing. Defendant also moved for a severance on the eve of trial, which motion was denied. After a jury trial, defendant was convicted on all counts.

The Appellate Division affirmed the judgment (160 AD3d 431 [1st Dept 2018]). The Court concluded that the pedigree exception to *Miranda* applied and that the trial court properly denied defendant's motion to suppress his statement (*see id.* at 431). The Appellate Division further concluded that defendant's severance motion and his motion for a *Frye* hearing were properly denied (*see id.* at 432).

A Judge of this Court granted defendant leave to appeal (34 NY3d 940 [2019]). We now reverse.

II.

We first address defendant's contention that his suppression motion should have been granted because the pedigree exception to *Miranda* did not apply.

A.

Miranda warnings (*see Miranda v Arizona*, 384 US 436 [1966]) are required before a person in custody is subjected to interrogation by the police (*see Rhode Island v Innis*, 446 US 291, 297-302 [1980]; *People v Paulman*, 5 NY3d 122, 129 [2005]).[1] " 'The term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response' " (*Paulman*, 5 NY3d at 129, quoting *People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007 [1985]; *see Innis*, 446 US at 300-302).

Pedigree questions, also sometimes referred to as "booking questions," typically ask a suspect for identifying information such as name, date of birth, and address. These questions constitute custodial interrogation when they are posed to a suspect in custody (*see People v Rodney*, 85 NY2d 289, 292 [1995], citing *Pennsylvania v Muniz*, 496 US 582, 601-602 [1990] [plurality opinion]). Nevertheless, we have recognized an exception to *Miranda* for pedigree questions (*see Rodney*, 85 NY2d at 292; *People v Rodriquez*, 39 NY2d 976, 978 [1976]; *People v Rivera*, 26 NY2d 304, 309 [1970]). We explored the genesis and scope of the pedigree exception in *Rodney*. "The exception derives from the essential purpose of *Miranda*—to protect defendants from self-incrimination in response

[1] The People do not dispute that defendant was in police custody at the time he was questioned.

to questions posed as part of the investigation of a crime, as distinguished from noninvestigative inquiries" (*Rodney*, 85 NY2d at 292). Pedigree questions are an exception to *Miranda*—that is, a defendant's response to such questions is "not suppressible even when obtained in violation of *Miranda*"—when the questions are " 'reasonably related to the police's administrative concerns' " (*id.* at 292-293, quoting *Muniz*, 496 US at 601-602).

As a threshold matter, pedigree questions must be reasonably related to the police's administrative concerns for the pedigree exception to *Miranda* to apply (*see id.*). The exception may not apply in certain situations, however, even if the question is reasonably related to police administrative concerns. As we stated in *Rodney*, "the mere claim by the People that an admission was made in response to a question posed solely as an administrative concern does not automatically qualify that admission for the pedigree exception to *Miranda* or exempt the People from the necessity of supplying a CPL 710.30 notice" (*id.* at 293).

Our decision in *Rodney* has engendered some confusion regarding when the pedigree exception will apply. In that decision, the Court stated that the pedigree exception would not apply "if the questions, though facially appropriate, are likely to elicit incriminating admissions because of the circumstances of the particular case," or, stated another way, if the question is "reasonably likely to elicit an incriminating response from [the] defendant" (*id.* at 293-294). We also stated in *Rodney*, however, that the pedigree exception applied in that case because the question was "not a disguised attempt at investigatory interrogation" (*id.* at 294). *Rodney* requires clarification.

We agree with the Second Circuit's view that "[w]hether the information gathered turns out to be incriminating in some respect does not, by itself, alter the general rule that pedigree questioning" does not require *Miranda* warnings (*Rosa v McCray*, 396 F3d 210, 221 [2d Cir 2005], *cert denied* 546 US 889 [2005]). If the biographical questions are reasonably related to police administrative concerns, and thereby meet the threshold requirement for the pedigree exception to apply, the fact that the response given by the defendant may ultimately turn out to be incriminating at trial does not alter the analysis. To the extent that *Rodney* suggested otherwise when it stated that questions "reasonably likely to elicit an incriminating response" would not qualify for the pedigree exception (*see id.* at 294), we now clarify that simply because a pedigree question elicits an incriminating response does not preclude the application of the pedigree exception to *Miranda*.

We further conclude that the subjective intent of the officer may be relevant but is not dispositive. In other contexts, we have "acknowledge[d] the difficulty, if not futility, of basing the constitutional validity of searches or seizures on judicial determinations of the subjective motivation of police officers" (*People v Garvin*, 30 NY3d 174, 186 [2017] [internal quotation marks omitted]). The suppression court may consider the subjective intent of the officer in assessing whether the pedigree exception applies, but the inquiry itself must be objective (*see United States v Doe*, 878 F2d 1546, 1551 [1st Cir 1989] ["The question is an objective one; the officer's *actual* belief or intent is relevant, but it is not conclusive"]).

The primary purpose of *Miranda* is "to protect defendants from self-incrimination in response to questions posed as part of the investigation of a crime" (*Rodney*, 85 NY2d

at 292). The police are "entitled to make a reasonable inquiry as to the identity of the person they have taken into custody" (*Rivera*, 26 NY2d at 309; *see Rodney*, 85 NY2d at 292 [distinguishing "noninvestigative inquiries"]). As a result, when a defendant challenges the application of the pedigree exception, the proper inquiry for the suppression court is whether the police used pedigree questions as a guise for improperly conducting an investigative inquiry without first providing *Miranda* warnings.

We hold that the pedigree exception will not apply even if the pedigree question is reasonably related to police administrative concerns where, under the circumstances of the case, a reasonable person would conclude based on an objective analysis that the pedigree question was a "disguised attempt at investigatory interrogation" (*Rodney*, 85 NY2d at 294). Confining the scope of the pedigree exception to police inquiries that are "directed solely to administrative concerns" (*id.* at 293), but precluding application of the pedigree exception where an objective analysis demonstrates that the police are using the cover of pedigree questions to improperly conduct an investigative inquiry without *Miranda* warnings, is consistent with both our decision in *Rodney* and the policies underlying the *Miranda* rule.

B.

Applying those principles to the case before us, we conclude that the pedigree exception applied and that defendant's suppression motion was properly denied. The detective's testimony during the suppression hearing established the administrative purpose for seeking pedigree information from any adults found at a location where a

search warrant is to be executed: the police must know whom they have in custody (*see Rivera*, 26 NY2d at 309). The People thereby established the threshold basis for the pedigree exception to apply, i.e., the questions were reasonably related to the police's administrative concerns (*see Rodney*, 85 NY2d at 292).

We further agree with the People that the pedigree questions were not a disguised attempt at investigatory interrogation (*see id.* at 294). Notably, the police asked defendant his name, date of birth, and where he lived immediately after their entry to the apartment, before the apartment had been searched and before any contraband had been found. The detective further testified that it is standard practice for *all* adults found at a location where a search warrant is executed to be handcuffed and asked these pedigree questions, regardless of whether contraband is found during the search. That defendant's response ultimately turned out to be incriminating does not alter the conclusion that, at the time it was asked, the question was not a disguised attempt at investigatory interrogation by the police (*see id.*).

We have previously observed that "[a]sking a suspect for his name and address is neither intended nor likely to elicit information of a criminal nature" (*Rivera*, 26 NY2d at 309). Although there may be some circumstances where asking a suspect for core identifying information such as name, date of birth, and address will not qualify for the pedigree exception to *Miranda*, those circumstances will be rare. Here, the question posed to defendant regarding where he lived was reasonably related to the police's administrative concerns, and, under the circumstances, was not a disguised attempt at investigatory interrogation (*see Rodney*, 85 NY2d at 292-294). The pedigree exception to *Miranda*

applied, and no *Miranda* warnings were required before police asked defendant for this information. Defendant's suppression motion was properly denied.

III.

We nevertheless hold that reversal is warranted because the court abused its discretion when it denied defendant's motion for a *Frye* hearing with respect to the admissibility of evidence derived from the FST on a multiple-source DNA sample.

People v Williams (35 NY3d 24 [2020]) and its companion case, *People v Foster-Bey* (35 NY3d 959 [2020]), control here and require reversal.[2] There, we held under nearly identical circumstances that the trial courts had abused their discretion as a matter of law in admitting the results of DNA analysis conducted using the FST without first holding a *Frye* hearing (*see Williams*, 35 NY3d at 30; *Foster-Bey*, 35 NY3d at 961). We upheld the defendants' convictions on those appeals only because we concluded that the error was harmless (*see Williams*, 35 NY3d at 42-43; *Foster-Bey*, 35 NY3d at 961).

Williams contains our reasoning on the *Frye* issue with respect to the FST. In *Williams*, no *Frye* hearing had yet been held on the FST at the time of the underlying motion practice (*see Williams*, 35 NY3d at 35). In support of his motion, the defendant in *Williams* argued that the FST was a proprietary program developed and used only by OCME and had not been subjected to independent outside validation (*see id.* at 33). The People opposed the motion primarily by arguing that the FST was based on generally accepted mathematical formulas and had been approved by the DNA Subcommittee of the

[2] *Williams* and *Foster-Bey* were not yet decided when the trial court declined defendant's request for a *Frye* hearing.

New York State Commission on Forensic Science (*see id.* at 34-35).

We agreed with defendant that the trial court was required to hold a *Frye* hearing. We observed that the "FST is a proprietary program exclusively developed and controlled by OCME," and that the approval of the DNA Subcommittee was "no substitute for the scrutiny of the relevant scientific community" (*id.* at 41). The Court concluded that the defendant's papers had "adequately showed that OCME's secretive approach to the FST was inconsistent with quality assurance standards within the relevant scientific community" (*id*. at 41). In addition, we stated that the FST "should be supported by those with no professional interest in its acceptance" (*id*. at 42).

Williams and *Foster-Bey* are controlling here, and the People's attempt to distinguish this case is unavailing. Although low copy number (LCN) DNA evidence was at issue in those cases, we held, independently, that a *Frye* hearing was required with respect to *both* LCN DNA evidence and statistical DNA evidence derived from the FST (*see id.* at 38-42). The People's contention that the defendant's motion papers in *Williams* were more robust than defendant's motion papers here is without merit (*see id.* at 41-42).

Unlike *Williams* and *Foster-Bey*, the error here was not harmless. The statistical DNA evidence derived from use of the FST was the strongest evidence tying defendant to the contraband found in the apartment. The People's remaining evidence consisted of proof that defendant either lived at or was frequently present at the apartment itself and did not link him directly to the contraband. Moreover, the People emphasized the DNA evidence as proof of defendant's possession of the contraband. The evidence of defendant's guilt was not overwhelming without the DNA evidence, and there was a

significant probability that the admission of that evidence contributed to the verdict (*cf. id.* at 42-43).

Inasmuch as Supreme Court abused its discretion in failing to hold a *Frye* hearing, we remit to that court for a *Frye* hearing. If the court determines, after a *Frye* hearing, that the DNA evidence derived from the use of the FST is not admissible, defendant is entitled to a new trial. If the court determines after a *Frye* hearing that the evidence is admissible, defendant may challenge that determination on direct appeal.

We respectfully disagree with our dissenting colleague that this remedy is inappropriate or unconstitutional. As Judge Wilson concedes, we have employed a similar remedy on prior occasions (*see e.g. People v Bilal*, 27 NY3d 961, 961-962 [2016]; *People v Clermont*, 22 NY3d 931, 932-934 [2013]; *People v Hightower*, 85 NY2d 988, 990 [1995]; *People v Williamson*, 79 NY2d 799, 801 [1991]; *People v Millan*, 69 NY2d 514, 521-522 [1987]; *People v Coleman*, 56 NY2d 669, 671 [1982]).[3]

[3] Cases cited by our dissenting colleague where the People failed to establish the proper foundation for the admission of evidence during trial are distinguishable. "The *Frye* inquiry is separate and distinct from the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case" (*People v Brooks*, 31 NY3d 939, 941 [2018] [internal quotation marks omitted]). The People's failure to establish, during trial, the foundation for the admission of evidence is not subject to a pretrial judicial determination. If the People fail to establish the proper foundation for the admission of evidence during trial, the remedy must be a new trial at which the People may, if they so choose, attempt to establish the proper foundation. *People v Freeland* (68 NY2d 699 [1986]) falls into this category, as do many of the other New York state cases and cases from other jurisdictions cited by Judge Wilson.

By contrast, here, the error was the denial of defendant's request to hold a pretrial *Frye* hearing on the admissibility of the statistical DNA evidence derived from the use of the FST. At that pretrial hearing, it will be the People's burden to demonstrate the general acceptance of the FST by the relevant scientific community (*see Williams*, 35

This Court and the intermediate appellate courts are authorized to "take or direct such corrective action as is necessary and appropriate both to rectify any injustice to the appellant . . . and to protect the rights of the respondent" (CPL 470.20; *see* CPL 470.40 [1]). Consistent with that directive, we have ordered different corrective actions, including a conditional remand for a hearing by the trial court, based on the legal error at issue and the circumstances presented in each case (*see People v Carmona*, 37 NY3d 1016, 1017-1018 [2021]; *People Edwards*, 95 NY2d 486, 496 [2000]; *People v Serrano*, 93 NY2d 73, 78-79 [1999]).[4] Here, the error was the trial court's failure to exercise its gatekeeping role under *Frye* to determine the admissibility of the evidence generated by the FST. We do not yet know whether the DNA evidence was improperly admitted at trial because a *Frye* hearing was not held. The appropriate remedy in this case is a remittal to the trial court for a *Frye* determination. In the absence of that threshold determination, appellate review of the admissibility of the evidence and, concomitantly, whether the evidence was improperly admitted during trial, cannot be performed.

We agree with the Appellate Division that the trial court did not abuse its discretion in denying defendant's motion for a severance.

Accordingly, the order of the Appellate Division should be reversed and the case remitted to Supreme Court for further proceedings in accordance with this opinion.

NY3d at 40). The motion court will apply the same standard to evaluate that issue upon remittal as it would have applied had a pretrial *Frye* hearing previously been held.

[4] Courts in other jurisdictions have also recognized that the remedy ordered must be tailored to the circumstances presented in each particular case (*see e.g. United States v Bacon*, 979 F3d 766, 769-770 [9th Cir 2020]).

RIVERA, J. (dissenting in part):

I agree with the majority that the detective's question to defendant asking where he lived constituted an interrogation without *Miranda* warnings (*see Miranda v Arizona*, 384 US 436 [1966]). Statements obtained from individuals in custody before

informing them of their constitutional rights to remain silent and to have an attorney appointed if they cannot afford counsel cannot be used by the prosecution and are thus subject to suppression (*see id.* at 447). However, the majority is incorrect that the question falls within a "routine booking question exception" to *Miranda* as recognized by a plurality of the United States Supreme Court in *Pennsylvania v Muniz* (496 US 582, 601-602 [1990]) and acknowledged, under existing state precedent, by this Court in *People v Rodney* (85 NY2d 289, 293 [1995]). That exception is limited to questions that are intended solely for administrative purposes and not reasonably likely to elicit an incriminating statement under the circumstances of the case.

Here, during the execution of a warrant authorizing a search of an apartment for guns and drugs, a dozen officers forced the front door open and found defendant and his two children inside. Any person found in the apartment—whether the owner or someone with dominion and control over the area where the contraband was found—would be subject to prosecution for illegal possession (*see* Penal Law § 10.08 [8]; *People v Manini*, 79 NY2d 561, 573 [1992]). Nevertheless, upon entry to the apartment, one of the officers immediately handcuffed defendant and asked a series of questions, including where defendant lived. If the officer had asked defendant, "Do you live in this apartment where we are looking for drugs and guns?" the question undoubtedly would violate *Miranda*, rendering any response subject to suppression and inadmissible. The question actually put to defendant is the functional equivalent and demanded the same self-incriminating answer.

It was error not to suppress the statement, which allowed the prosecutor to argue at defendant's trial that the statement further established defendant's unlawful possession.

Under the facts of this case, the error was not harmless, as the statement was directly contradictory to defendant's claim that the contraband was not his and that he had no control over the room where it was found. The majority misinterprets *Rodney* as applied here and adopts a rule focused on the police officer's malintent, rather than on the likelihood that the question would elicit an incriminating answer. I dissent from this rewriting of *Rodney* and, based on the rule as announced in that case, I would reverse the conviction and order a new trial (*see People v Thomas*, 22 NY3d 629 [2014]).[1]

In *Rhode Island v Innis*, the United States Supreme Court concluded that *Miranda* warnings were required in advance of the use of "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" (446 US 291, 301 [1980]). The Court further clarified that such questioning "focuses primarily upon the perceptions of the *suspect*, rather than the intent of the police" (*id.* [emphasis added]). However, the officer's knowledge is not irrelevant and may be an additional factor in determining whether the police violated an individual's rights (*see id.* at 302 n 8). In *Muniz*, a plurality of the Court explained that *Innis* leads to the inexorable conclusion that custodial interrogation includes words or actions that the officer "knows or reasonably should know

[1] I agree, for the reasons discussed by the majority, that the lower court abused its discretion as a matter of law in denying defendant's request for a *Frye* hearing (*see* majority op at 9, citing *People v Williams*, 35 NY3d 24 [2020]). However, because that is not the sole error in this appeal, I have no occasion to opine on the proper remedy, as I conclude defendant is entitled to reversal and a new trial based on the suppression error. Nor is it necessary that I address the merits of defendant's severance claim, as this challenge is rendered academic by the fact that defendant cannot be retried with the original codefendant.

are likely to have the force of a question on the accused and therefore be reasonably likely to elicit an incriminating response" (496 US at 601 [internal quotation marks, citation, and alteration omitted]). The plurality determined that "routine booking questions"—questions seeking biographical information, including a suspect's name and address—asked while detaining a suspect are custodial interrogation because, as explained in *Innis*, interrogation is assessed from the suspect's perspective (446 US at 301). Nevertheless, the plurality concluded that, because the state court had determined that questions posed to Muniz "were requested for record-keeping purposes only, and therefore the questions appear[ed] reasonably related to the police's administrative concerns" (*id.* at 601-602 [internal quotation marks and citation omitted]), the questions fell within the routine booking exception.

In *Rodney*, this Court considered whether the People were required to give notice pursuant to CPL 710.30 of their intent to admit the defendant's statements in response to police questioning during booking (*see* 85 NY2d at 291).[2] In analyzing the specific question and circumstances of that case, the Court reaffirmed its prior recognition of an exception to the requirements of *Miranda* for "routine booking questions" and further noted that the United States Supreme Court and the federal circuits have limited the

[2] In *Rodney*, the Court noted that "the purpose of CPL 710.30 is to inform a defendant that the People intend to offer evidence of a statement to a public officer at trial so that a timely motion to suppress the evidence may be made," including on the ground that the statement was "obtained in violation of defendant's constitutional rights" (85 NY2d at 291-292). Thus, the Court's analysis in *Rodney* focused on defendant's "assertion that the questions posed during the booking process violated his constitutional right against self-incrimination and that he was therefore entitled to pretrial notice so that he could seek suppression" (*id.* at 292).

exception to questions "reasonably related to the police's administrative concerns" (*id.* at 292, citing *Muniz*, 496 US at 601-602, *United States v McLaughlin*, 777 F2d 388, 391-392 [8th Cir 1985], and *United States v Sims*, 719 F2d 375, 378 [11th Cir 1983]). The Court acknowledged that "[t]he exception derives from the essential purpose of *Miranda*—to protect defendants from self-incrimination in response to questions posed as part of the investigation of a crime, as distinguished from noninvestigative inquiries" (*id.* at 289 [citations omitted]). Thus, where routine booking questions serve only their intended administrative purpose, "defendant lacks a constitutional basis upon which to challenge the voluntariness of [their] statement" (*id.* at 293). Accordingly, "[s]tatements made in response to questions which are not directed solely to administrative concerns are subject to the requirements of CPL 710.30" (*id.*). "Similarly, the People may not rely on the pedigree exception if the questions, though facially appropriate, are likely to elicit incriminating admissions because of the circumstances of the particular case" (*id.*).

The majority does not merely "clarify" *Rodney* (majority op at 6). Instead, the majority reinterprets *Rodney* and limits that holding to situations where "the police are using the cover of pedigree questions to improperly conduct an investigative inquiry without *Miranda* warnings" (*id.* at 7). This reinterpretation departs from the explicit language of *Rodney*, which is concerned with questions likely to *elicit* incriminating responses—that is, questions that are, irrespective of the intention of the questioner, likely to provoke an incriminatory answer. The majority jettisons this language from *Rodney* and confines that case's holding only to those questions that are "disguised attempt[s] at investigatory interrogation" (majority op at 8, quoting *Rodney*, 85 NY2d at 294). In other

words, the majority improperly rewrites *Rodney* to focus only on incriminating answers affirmatively *solicited* by the authorities.

The majority's rule ignores the boundaries of the pedigree exception as expressly articulated in *Rodney*. But we are not free to avoid our precedent simply because the current majority disagrees with the rule as previously articulated (*see People v Bing*, 76 NY2d 331, 338 [1990] ["The doctrine (of stare decisis) . . . rests upon the principle that a court is an institution, not merely a collection of individuals, and that governing rules of law do not change merely because the personnel of the court change"]; *Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1 [2016] ["(I)n the rarest of cases, we may overrule a prior decision if an extraordinary combination of factors undermines the reasoning and practical viability of our prior decision"]; *People v Taylor*, 9 NY3d 129, 149 [2007] ["It is well settled that '(s)tare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process'"], quoting *Payne v Tennessee*, 501 US 808, 827 [1991]). Neither party has argued that the *Rodney* rule is unworkable or confusing. Indeed, *Rodney* did not hold that the police cannot ask these questions. If law enforcement wishes to use incriminating statements obtained from a person in custody, they merely need to spend a few seconds providing *Miranda* warnings. This straightforward procedure avoids litigation over whether a question—which the majority and the federal courts all acknowledge is interrogation in the first instance—falls within the booking questions exception.

The two-part rule announced in *Rodney* is clear: first, the booking question must be intended for administrative purposes only; second, when considered in context, the question cannot be likely to elicit an incriminating statement. Critical to defendant's challenge in this case, the Court in *Rodney* explained that "the mere claim by the People that an admission was made in response to a question posed solely as an administrative concern does not automatically qualify that admission for the pedigree exception to *Miranda*" (*id.*). The applicability of the exception must be assessed based on the question and the circumstances of the case.

Here, the interrogating detective made perfectly clear that his question was *not* "directed solely to administrative concerns" (*id.*). When asked how the police use pedigree information, he explained that "[i]t's used to put into the On-Line Booking System, you know, their names, dates of birth, where they live, *for prosecution*" (emphasis added). The majority nonetheless asserts, contrary to the detective's explanation, that his "testimony during the suppression hearing established the administrative purpose for seeking pedigree information" (majority op at 7).[3] But as the detective's testimony establishes, the question

[3] The detective's suppression hearing testimony reveals that his question, far from being directed "solely" to administrative concerns, was indeed designed to obtain information "for prosecution." The detective's trial testimony was even more specific. When asked, "What is the reason for taking somebody's pedigree?", the detective's first response was, "It's what we use to enter into the online booking system *to draw up formal charges and for prosecution*" (emphasis added). When asked to explain what "the online booking system" is, he continued, "It's the NYPD computer database that we use to enter their names, their addresses, their date of births *so the prosecution has the chance to prosecute*" (emphasis added). That is a far cry from "questions to secure the biographical data necessary to complete booking or pretrial services" (*Muniz*, 496 US at 601 [internal quotation marks and citation omitted]). While the majority purports to "[c]onfin[e] the scope of the pedigree exception to police inquiries that are 'directed *solely* to administrative

here cannot fall within the exception, even as redefined by the majority, because the officer admitted that the question was also intended for prosecutorial purposes.

Even assuming, for the sake of argument, that the question was intended for administrative purposes, the circumstances in which defendant was asked where he lived still constituted interrogation that is not exempt from *Miranda*. The question was not asked during booking but rather as part of what the detective, an investigator in the narcotics division, described as a policy of "cuff and toss," where, "during the execution of the search warrant," police "cuff[] people inside the location and toss[] them" into the "P van," that is, a vehicle that "transports prisoners to and from the location and/or the precinct to Central Booking."[4] At the suppression hearing, the interrogating detective testified that he had participated in thousands of narcotics-related arrests and hundreds of search warrant executions throughout his career. He therefore undoubtedly knew the purpose of the search warrant—i.e., to seize evidence of contraband relevant to the narcotics division, pursuant to a search warrant authorized after a judicial determination of probable cause—and, we must assume, understood the elements of the crime of unlawful possession, including on a theory of constructive possession. Moreover, after the police forcibly entered the

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concerns'" (majority op at 7, citing *Rodney*, 85 NY2d at 293 [emphasis added]), its conclusion here that the detective's question was purely administrative in nature is irreconcilable with his unambiguous admissions in the record that, when he asked the question, the detective had full knowledge that the statement might well be used to prosecute defendant.

[4] Defendant does not challenge the lawfulness of this policy apart from the admissibility of the statement regarding his living arrangements.

apartment, they encountered defendant, who was dressed only in athletic shorts and was the only adult supervising two young children. The detective's extensive background in executing narcotics-related search warrants coupled with defendant's seeming familiarity with the apartment are precisely the kind of circumstances "likely to elicit incriminating admissions" (*Rodney*, 85 NY2d at 293).[5] That is, asking a defendant, who appeared to be at least somewhat at home in the target apartment, "Where do you live?" is, under the circumstances, functionally equivalent to asking him, "Do you live in this apartment where we are looking for drugs and weapons?" Both are likely to elicit responses that would provide evidence in a prosecution for illegal possession. Accordingly, the prosecution could not rely on defendant's response, and it should have been suppressed.

[5] Indeed, the detective must have been aware of the particularly high likelihood of eliciting an incriminating admission because, as the prosecutor informed the suppression court at a sidebar conference, the detective had previously executed a search warrant at the apartment and was therefore familiar with the premises.

WILSON, J. (dissenting):

I agree with the majority that "the court abused its discretion when it denied defendant's motion for a *Frye* hearing with respect to the admissibility of statistical DNA evidence derived from FST" (majority op at 9). I further agree that, "[u]nlike *Williams* and

Foster-Bey, the error here was not harmless" (*id*. at 10). What do those two holdings, taken together, mean? They mean that Tyrone Wortham was convicted based on material evidence as to which the People failed to demonstrate admissibility. The inexorable conclusion is that there is, at present, no basis to sustain his conviction or subject him to the consequences of it. (Although Mr. Wortham was sentenced to 9 years of incarceration, so much time has elapsed between his conviction and this appeal that he has served his term of imprisonment and is now on post-release supervision.)

I concur in Judge Rivera's dissent but write separately because, for reasons completely unrelated to Judge Rivera's dissent, I disagree with the majority's remedy. The majority remits this case to the trial court to hold a *Frye* hearing and says that Mr. Wortham is entitled to a new trial only if, at the forthcoming *Frye* hearing, the trial court determines that the DNA evidence linking him to the pistol is inadmissible. Mr. Wortham is not entitled to having his conviction vacated today, the majority writes, because "[w]e do not yet know whether the DNA evidence was improperly admitted at trial because a *Frye* hearing was not held" (*id*. at 12). This is my point exactly. We know the evidence was improperly admitted, because no proper foundation for it was established. We do not know whether the People will be able to establish, *post hoc*, a justification for its admission. Under the majority's holding, Mr. Wortham remains convicted of a crime as to which we "do not know" whether there was a valid basis for conviction; when a conviction was obtained based on material evidence lacking a basis for admission at the time of trial, the remedy is not to continue to enforce the erroneously obtained conviction while giving the People a freestanding chance to demonstrate admissibility. The conviction should be

vacated, after which the People should be free to retry Mr. Wortham and, during the course of that new prosecution, attempt to demonstrate the admissibility of the DNA evidence in a *Frye* hearing should they choose to do so. We have no basis on which to enforce—even for a minute—Mr. Wortham's improperly obtained conviction pending the scheduling of a *Frye* hearing.

Put simply, because Mr. Wortham was convicted based on evidence admitted in error, what legal basis do we have to continue to enforce that conviction? It is true that this court has, without analysis or explanation, occasionally engaged in that practice previously,[1] but that does not render it constitutional.

I

Our system of criminal law rests on two foundational principles. First, that "there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law" (*Estelle v Williams*, 425 US 501, 503 [1976] [quoting *Coffin v United States*, 156 US 432, 453 (1895)]). Second, the People bear the burden of proving a defendant's guilt beyond a reasonable doubt, and "courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt" (*id*.).

[1] *See People v Bilal*, 27 NY3d 961, 962 (2016); *People v Clermont*, 22 NY3d 931, 934 (2013).

During any criminal trial, the People try to prove a defendant's guilt by offering incriminating evidence. That evidence comes in many forms—physical evidence, forensic evidence, testimonial evidence—but all evidence that is admitted at trial must meet certain criteria established by the rules of evidence. Those rules governing admissibility are our way of trying to make sure that all the evidence that a jury sees is reliable enough to be a basis for its verdict.

The rules of evidence are complicated, and the fast-paced nature of criminal trials demands that judges make many decisions very quickly. Mistakes are made. (If trial courts never made mistakes, we appellate judges would be out of business.) Sometimes the mistake is harmless. When a reviewing court determines that certain trial evidence was erroneously admitted, but concludes that, based on all of the other evidence offered during the trial, the "defendant's guilt is overwhelming and that there is no significant probability that the jury would have acquitted defendant had it not been for these errors" (*People v Williams*, 35 NY3d 24, 42-43 [2020]), the error does not require reversal of the conviction. But in other cases, such as this one, the mistake is not harmless. In those cases, the reviewing court finds there is "a significant probability" that the erroneously admitted evidence "contributed to the verdict" (majority op at 10-11 [citing *Williams*, 35 NY3d at 42-43]). I agree with the majority's conclusion that the erroneously admitted DNA evidence "was the strongest evidence tying defendant to the contraband found in the apartment" (*id.* at 10).

How then, after finding that erroneously admitted evidence contributed to Mr. Wortham's conviction, can the majority say that the existing conviction remains valid? There is no legal or constitutional basis for such a holding. With the foundational evidence knocked out from under it, Mr. Wortham's conviction falls and we return to square one: the People have not discharged their burden to prove Mr. Wortham's guilt beyond a reasonable doubt with admissible evidence, and Mr. Wortham is entitled anew to the presumption of innocence.

II

It is wholly within our power to vacate Mr. Wortham's conviction; we have granted that remedy many times before. For example, in *People v Johnson*, we reversed the defendant's conviction of rape, sodomy, and endangering the welfare of a child because the trial court erroneously admitted the victim's Grand Jury testimony without first holding a pretrial *Sirois* hearing (93 NY2d 254 [1999]). We held:

> "Here, it cannot be said that the evidence before the trial court so overwhelmingly established witness-tampering as to satisfy the clear and convincing standard and render a *Sirois* hearing superfluous. There was evidence of the victim's refusal to testify at trial, and evidence of the defendant's misconduct in attempting to silence her. On this record, however, defendant should have been afforded an opportunity to test the causal link between those two elements, as he requested, at a separate hearing. . . . At a *Sirois* hearing, defendant would have had an opportunity to challenge the People's evidence by raising questions as to defendant's role in securing the victim's unavailability at trial. The People contend that a hearing was unnecessary because the record as it stands establishes that defendant was responsible for procuring the victim's

> silence. . . . On these facts, we agree with the Appellate Division that the constitutionally guaranteed truth-testing devices of confrontation and cross-examination should not have been cast aside and the Grand Jury testimony admitted without a hearing or waiver by defendant"

(*id*. at 258-259). Accordingly, we affirmed the Appellate Division order "revers[ing] defendant's conviction" (*id*. at 257-258). We did not remit for a freestanding *Sirois* hearing while leaving the conviction undisturbed.

Similarly, in *People v Freeland*, we reversed a defendant's conviction of driving while intoxicated because the trial court admitted breathalyzer logs for which no proper foundation had been laid (68 NY2d 699, 701 [1986]). We held that "it was error to admit the [breathalyzer] test results and a new trial is required" (*id*.).

In each of these cases, we[2] reversed the challenged convictions because they were based on evidence that had been admitted at trial without a proper foundation having first

[2] Supreme Court and the Appellate Division also routinely grant this remedy (*see, e.g., People v Vanhoesen*, 31 AD3d 805, 808 [3d Dept 2006] ["Reversal is also required because the detective introduced hearsay testimony when he testified as to the drug-related meanings of terms and actions. . . . More information was required to establish a basis for the detective's specialized knowledge regarding how most drug transactions occur . . . . (N)o foundation for this testimony was introduced" (citations omitted)]; *People v Singer*, 236 NYS2d 1012, 1014 [NY Co Ct 1962] ["The qualifications of the police officer, Detective Dihrberg, who performed the blood alcohol test, are questionable, to say the least. . . . (N)o proper foundation was laid for either the results of the test or for the expression of the witness' opinion as to blood alcohol content. . . . (T)he erroneous admission of the blood test result require(s) that defendant be afforded a new trial"]; *People v Davidson*, 5 Misc 2d 699, 702-703 [NY Co Ct 1956] ["It may be that the use of the 'Drunkometer' will become so widespread that practical knowledge of its operation will become the portion of every person, but until it can be said that legally the accuracy and reliability of this device has become established and recognized, a reasonable and proper foundation for the use of its proof must be furnished. . . . Since the finding of guilty was predicated upon all of the evidence received at the trial of this action it cannot be said that

been laid. We did not merely remit for hearings that could potentially cure the error by establishing *post hoc* that the evidence was in fact admissible.

Here, vacating Mr. Wortham's conviction is the proper remedy. Moreover, the People have waived any argument to the contrary. Before the Appellate Division, Mr. Wortham requested that his conviction be vacated. The People did not, in the Appellate Division, dispute the proposition that if the trial court erred by refusing to hold a *Frye* hearing, reversal was required, nor did they make any mention of remittal until oral argument before our Court. Their argument is unpreserved.

III

By declining to vacate Mr. Wortham's conviction, we part ways with many of our sister state courts and a majority of federal circuit courts.[3]

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the receipt of the improper evidence did not affect the outcome. The judgment of conviction is reversed, the fine remitted, and a new trial ordered"]).

[3] *See, e.g., United States v Kaplan*, 490 F3d 110, 114 (2d Cir 2007) ("For the reasons set forth below, we agree that Kaplan's conviction on Counts One through Five must be vacated because the district court erred in admitting, without adequate foundation, lay opinion testimony regarding Kaplan's knowledge of the fraud and testimony regarding others' knowledge of the fraud, and that at least the first of these errors was not harmless"); *United States v Pelullo*, 964 F2d 193, 221-222 (3d Cir 1992) ("The district court erred in admitting numerous documents as well as the summaries prepared by Agent Wolverton. The documents were hearsay and the Government did not comply with the foundation requirements of Rule 803(6), the business records exception. . . . We conclude that these errors were not harmless and therefore we must reverse the convictions on all counts except count 54"); *United States v Garcia*, 752 F3d 382, 391-392 (4th Cir 2014) ("Despite the district court's careful attention to Agent Dayton's credentials as a decoding expert, however, we hold that the agent's testimony was fraught with error . . . [including] her

The Supreme Courts of California, Delaware, and New Mexico have reversed defendants' convictions for driving under the influence of alcohol when the trial courts admitted evidence relating to a novel field sobriety test, called the horizontal gaze nystagmus ("HGN") test, without first holding a *Frye* hearing (or its local equivalent). The Supreme Court of California affirmed the reversal of the defendant's conviction because the trial court erroneously declined to hold a *Kelly* hearing on whether HGN was generally accepted within the relevant scientific community (*People v Leahy*, 8 Cal 4th 587, 592 [1994]). Although the court found that a limited remand for a *Kelly* hearing was the

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failure to state on the record an adequate foundation for very many of her specific interpretations. . . . [W]e are constrained to hold that these flaws deprived Garcia of a fair trial, i.e., that the missteps were not harmless, and thus require vacatur of Garcia's convictions"); *United States v Baker*, 538 F3d 324, 332, 334 (5th Cir 2008) ("In light of the record as a whole, we conclude that the district court erred by admitting Exhibit 8 over Baker's objection that no foundation or predicate was offered. . . . For the foregoing reasons, we REVERSE Baker's conviction"); *United States v Freeman*, 730 F3d 590, 597, 600 (6th Cir 2013) ("Agent Lucas failed to explain the basis of his interpretations—what experience he had that the jurors themselves did not have—and therefore failed to lay a foundation under Rule 701. . . . Because it does not appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained, we vacate the conviction" [alteration, internal quotation marks, and citation omitted]); *United States v Le*, 272 F3d 530, 531 (8th Cir 2001) (per curiam) ("We need only consider one aspect of defendants' appeal in order to reverse each of their convictions and remand for further proceedings. Each defendant claims his conviction should be reversed, because the district court improperly admitted a drug laboratory report, absent the proper foundation. Their argument is well taken"); *United States v Mouzin*, 785 F2d 682, 693 (9th Cir 1986) ("In reviewing the government's foundation for the admission of this evidence under Federal Rule of Evidence 801(d)(2)(E), we cannot but note the similarities between the foundational deficiencies for the ledger and for the computer printout. . . . [W]e find the improper admission of the ledger and printout to be prejudicial error. . . . Accordingly, we reverse the defendant's convictions on these two counts based on the improper admission of the ledger and computer printout" [citations omitted]).

appropriate remedy, it nevertheless affirmed the judgment reversing the defendant's conviction:

> "We accept, however, the People's suggestion that an entire retrial of the case may be unnecessary. Instead, we will direct the Court of Appeal to reverse defendant's conviction and remand the case to the trial court for a *Kelly* hearing in accordance with our opinion. If, at the conclusion of the hearing, the trial court concludes there is sufficient basis to admit the HGN testimony previously presented, the court should reinstate the judgment without reintroducing such testimony. If the trial court determines the HGN evidence is inadmissible under *Kelly*, the court should order a new trial if the People so elect. If the judgment of conviction is reinstated, or a new trial ordered, appellate review will be available to the respective parties regarding the trial court's ruling, limited to any new issues not resolved in this opinion"

(*id*. at 610). Although the California Supreme Court remitted for a *Kelly* hearing, it did so *after* affirming the intermediate court's reversal of the defendant's conviction, which the intermediate court did without qualification. Thus, the difference between the remedy in *Leahy* and the remedy in this case is that the defendant was not subject to an improperly obtained conviction pending the ordered *Kelly*/*Frye* hearing.

The Supreme Court of Delaware also reversed a defendant's conviction, holding that the trial court "prejudicially erred by considering the HGN test without sufficient scientific medical expert foundation," and "[b]ecause the error was not harmless, . . . reverse[d] the appellant's conviction . . . and remand[ed] the case for a new trial" (*Zimmerman v State*, 693 A2d 311, 313, 317 [Del 1997]). The Supreme Court of Mexico likewise held that because "the HGN testimony should not have been admitted at trial

because it lacked the necessary *Alberico–Daubert* foundation," the defendant was "entitled to a new trial" (*State v Torres*, 1999-NMSC-010, ¶¶ 54-55, 127 NM 20, 36-37).

The Supreme Court of Nebraska reversed a defendant's conviction for driving under the influence of alcohol because it was based on evidence from another field test, an Intoxilyzer breath test, for which no proper foundation had been laid (*State v Baue*, 258 Neb 968, 975 [2000]). In that case, "[t]estimony adduced by the State established that when operating properly, the testing device generates both a digital readout and a printed test record card reflecting the alcohol content of the breath sample" (*id*. at 974). But when the officer administered the test on the defendant, "he obtained a digital readout . . . but no printout on the test record card" (*id*.). The Supreme Court of Nebraska held that "[b]ecause the State did not prove that the testing device was working properly at the time the . . . result was obtained, foundation for the result was not established, and the trial court erred in receiving the result in evidence over [the defendant's] objection" (*id*. at 974-975). The court held that this issue was "dispositive of the appeal" and that it was "required to reverse [the defendant's] conviction and remand the cause for a new trial" (*id*. at 977).

The Supreme Court of Utah reversed a defendant's conviction of forcible abuse, rape, forcible sodomy, and incest because "the trial judge erred in admitting certain testimony by expert witnesses called on behalf of the prosecution" (*State v Rimmasch*, 775 P2d 388, 389 [Utah 1989], sup by rule on other grounds in *State v Maestas*, 2012 UT 46, ¶ 121 n 137, 299 P3d 892, 930). The Supreme Court of Utah found that

> "Throughout the testimony of these key experts, which consumed almost two-thirds of the trial, little foundation was offered or demanded by the court as to the scientific basis for the profile of the typical sexually abused child, the ability of the profile to sort the abused from the nonabused with any degree of accuracy, or the ability of the experts to judge whether the daughter was telling the truth during the interviews"

(*id*. at 395). Because no "adequate foundation was laid for a determination that the evidence was reliable," and because "the improperly admitted testimony had a substantial impact on the verdict," the court held that the defendant's "conviction must be reversed and the matter remanded for retrial" (*id*. at 404, 408). Similarly, the Supreme Court of Oregon reversed a defendant's conviction of sexual abuse and attempted sodomy (*State v Henley*, 363 Or 284, 310 [2018]). In that case, "the trial court permitted a forensic interviewer to testify about defendant's behavior that may have constituted 'grooming' of the victim for sexual abuse if defendant had the requisite intent, without the state first establishing that the testimony about grooming was scientifically valid and reliable" (*id*. at 286). For that reason, the court found that it "must reverse defendant's conviction and remand the case to the trial court for further proceedings" (*id*. at 310).

Finally, earlier this year, the Supreme Judicial Court of Massachusetts reversed a defendant's conviction of armed assault with intent to murder and related charges (*Commonwealth v Davis*, 487 Mass 448, 450 [2021]). In that case, the defendant was on probation on a federal drug charge and wearing a GPS ankle monitor, which placed him in the vicinity of a shooting that took place when an unidentified man fired multiple shots through the window of a moving sedan (*id*. at 499). The Supreme Judicial Court of

Massachusetts held that the trial judge "abused his discretion in admitting the speed evidence, where the [GPS ankle monitor's] ability to measure speed had never been formally tested" and "[b]ecause this error was prejudicial," it "reverse[d] the defendant's convictions" (*id*. at 450).

IV

Any argument that remittal is the proper remedy because our Court has not yet determined whether the admission of the DNA evidence was erroneous is meritless. Such an argument looks at the issue from the wrong vantage point. The error warranting vacating Mr. Wortham's conviction occurred the moment the DNA evidence was admitted without foundation into his trial. Whether a proper foundation *could* have been laid for that evidence is another matter entirely, one that is subsequent to the fatal error here.

For virtually all evidence erroneously admitted for lack of foundation, whether testimonial, forensic or documentary, it is always theoretically possible that a better foundation could be laid if the People are given a second chance. That second chance does not come by sustaining the conviction pending a freestanding showing by the People that they have better foundational evidence than what they presented at trial; it comes by vacating the conviction and allowing the People to retry the defendant, at which time they may present their better foundational evidence (*see People v Price*, 29 NY3d 472, 480 [2017] ["(A)dmission of the photograph here lacked a proper foundation and, as such, constituted error as a matter of law. Furthermore, on the facts of this case, we cannot

conclude that the error was harmless. Accordingly, the order of the Appellate Division should be reversed and a new trial ordered" (citations omitted)]; *People v Quevas*, 81 NY2d 41, 42, 45-46 [1993] ["The sole issue on this appeal is whether the prosecutor laid a proper foundation for the introduction of identification testimony through a police officer. . . . The proper foundation was not laid . . . . Accordingly, the order of the Appellate Division should be reversed and a new trial ordered"]; *People v Ely*, 68 NY2d 520, 527 [1986] ["Because the foundation for the tapes was not sufficiently established, there must be a reversal and a new trial"]; *People v Kennedy*, 68 NY2d 569, 571 [1986] ["This appeal presents a novel application of the business records exception to the hearsay rule (CPLR 4518): two miniature pocket diaries, identified by the People's retained expert as the master records of a loanshark kept in the regular course of his business, were received in evidence in a prosecution against defendant to establish that he was the loanshark's silent partner. We agree with the Appellate Division that a sufficient foundation for those records was not established, and there must be a new trial"]). There is no reason that expert testimony as to which the People have failed to demonstrate the foundation necessary for admissibility should be treated any differently than any other form of evidence.

There is also no meaningful legal distinction between a lack of foundation demonstrated pretrial and a lack of foundation demonstrated during trial (majority op at 11-12 n 3). Why would a constitutional deprivation warranting a new trial occur when material foundationless evidence is erroneously admitted during trial but not when it is erroneously deemed admissible pretrial?

Setting aside constitutional arguments, the Criminal Procedure Law (CPL) also cuts against the meaningfulness of such a distinction. CPL 710.70(3) provides that a pretrial motion to suppress is the "exclusive method of challenging the admissibility of evidence upon the grounds specified in section 710.20"; CPL 710.20 does not include *Frye* or lack of foundation for testimony of any kind (including expert testimony), but rather concerns evidence that might be excludable because of police taint (*e.g.*, unlawful search and seizure, unlawful wiretapping, coerced confessions). The necessary conclusion is that all other types of foundational objections may be made either by a pretrial motion *in limine* or during trial. Thus, the CPL contemplates that an objection to a lack of general scientific acceptance could be made before or during trial. The majority's distinction, albeit *dicta*, means that if a defendant's meritorious challenge to a lack of foundation is raised pretrial, the People will get a freestanding do-over to establish foundation, whereas if the meritorious challenge is made during trial, the People will have to retry the entire case. Fundamentally, the majority's distinction is incompatible with the presumption of innocence and the People's burden to prove guilt beyond a reasonable doubt because it maintains a criminal conviction where an appellate court has determined the People, at trial, failed to prove the foundation necessary to admit evidence material to the defendant's conviction. Whether the error occurred pre-trial or mid-trial is of no constitutional moment.

As shown by our decisions, and the decisions of our sister state courts and federal circuit courts, vacating Mr. Wortham's conviction is the proper remedy, and it should be

an uncontroversial one. The trial court's error in admitting the DNA evidence without a *Frye* hearing deprived Mr. Wortham of his right to a fair trial (NY const art I, § 2; US Const, 6th, 14th Amends). In the face of that error, there is no lawful basis to maintain his conviction—even in some interim period pending a *Frye* hearing. Having determined that material incriminating evidence was improperly admitted at trial, the failure to vacate his conviction immediately is, quite simply, unconstitutional.

Order reversed and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein. Opinion Judge Fahey. Chief Judge DiFiore and Judges Garcia, Singas and Cannataro concur. Judge Rivera dissents in part in an opinion, in which Judge Wilson concurs in a separate dissenting opinion.

Decided November 23, 2021