

COUNTY COURT OF THE STATE OF NEW YORK:
COUNTY OF SUFFOLK

-----X

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

Indictment No. 1701-14

-against-

JOHN M. BITTROLFF,

Defendant-Movant.

-----X

MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO VACATE
CONVICTIONS PURSUANT TO CPL§ 440.10

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PRELIMINARY STATEMENT

Due to discovery by Cybergentics of a male profile found on Colleen's vaginal swab, stretch pants and male dungarees found at her crime scene, as well as the discovery of two additional male profiles found on items at her crime scene, all of which were previously determined to be inconclusive by the Suffolk County Crime Laboratory, Mr. Bittrolff moves, pursuant to CPL §440.10 (1)(g-1) for an order vacating the judgment of conviction entered against him on the ground that there exists a reasonable probability that the verdict would have been more favorable to him if this information was known to the jury. Mr. Bittrolff further moves pursuant to CPL § 440.30 for an order of this Court requiring the People to conduct a search of these newly discovered profiles in CODIS and any local DNA database, to order the mitochondrial DNA testing of the hairs found on the bodies of Colleen and Rita and to compare all DNA profiles to the profile of Rex Heuermann. In the alternative, he seeks an evidentiary hearing on this motion.

STATEMENT OF RELEVANT FACTS

Background

In 2017 John Bittrolff was convicted of killing two women – Rita Tangredi and Colleen McNamee. Both women were sex workers in Suffolk County at the times of their deaths. Rita's body was found in a wooded area on November 2, 1993, she had been strangled and bludgeoned to death. Colleen's body was also found in a wooded area in January 1994 and, like Rita, had been bludgeoned and strangled to death. The discovery of their bodies led to hundreds of tips regarding possible suspects. These tips revealed the unsavory characters who both women associated with – pimps, Pagan gang members, corrupt police officers and abusive ex-partners to name a few. Despite the many tips, no arrest was made until 2014 when DNA found on both women was found to partially match John Bittrolff's brother. This partial match led investigators to John Bittrolff. It

was later determined that John's DNA matched some samples taken from the women's bodies. He was arrested and ultimately convicted in their murders.

Yet, the only physical evidence that connected Mr. Bittrolff to these women was his DNA being found on the vaginal and anal swabs of Rita Tangredi, the anal swab of Colleen McNamee and a partial identification of his DNA in the fingernail scrapings of Rita's left hand only. Although both crime scenes showed that the women suffered violent deaths, no other physical evidence showed that Mr. Bittrolff was present at the crime scenes. Mr. Bittrolff's fingerprints were not found on or near the women and no other trace evidence was found on the women or at the crime scenes that belonged to Mr. Bittrolff. While the People stated that the presence of Mr. Bittrolff's DNA in the fingernail scrapings of Ms. Tangredi's left hand showed that a violent struggle took place, the People's witness at trial testified that he did not see any blood or skin in those fingernail scrapings, which undermined the People's theory of a physical fight between John and Rita. Additionally, no eyewitnesses claimed to see Mr. Bittrolff with either woman before their deaths and none of the hundreds of tips mentioned him as a possible suspect.

More importantly, unknown male DNA was found on Colleen's body and on items found at her crime scene. However, the Suffolk County Crime Laboratory deemed this unknown male DNA as inconclusive, meaning it could not retrieve a profile and could not compare it to any known suspects. *See* Affirm. of L. Marcoccia, Ex. B. This inconclusive DNA was found on Colleen's vaginal swab, stretch pants and the male dungarees found at her crime scene. *Id.* The male dungarees with the name Michael M. in the waistband were found near Colleen's body and had semen and Colleen's blood on them. *Id.* at Ex. C-D. At one point in into Michael Murphy was prematurely destroyed by the Suffolk County Police Department. Also questioned during the investigation were the Murphy brothers, who included James, Michael and William. *See* Affirm. of L. Marcoccia, at Exhibit N. James Murphy worked at the Tender Trap the money." The investigation file

where Colleen was a topless dancer. He believed that Tony the Wig or John Miller murdered Colleen. *Id.*

Although the jury ultimately found Mr. Bittrolff guilty for the women's deaths, it was not an easy or quick verdict. The jury deliberated for seven days and returned to the courtroom on three occasions to announce that they were deadlocked. While it is unknown what caused the deadlock, a logical assumption is that while the evidence may have proved that sexual intercourse occurred, it did not prove murder.

The Murder of Sandra Costilla

On November 20, 1993, shortly after the discovery of Rita Tangredi, the body of Sandra Costilla was found in a wooded area in North Sea. Sandra Costilla, who was also a sex worker, had been strangled and beaten. The District Attorney's office claimed that John Bittrolff was a suspect in Sandra Costilla's death due to similarities in the way that the bodies of Rita, Colleen and Sandra were found. Specifically, all three women were found with their legs spread apart, hands over their head, with one shoe missing. Colleen and Sandra were found with their shirts above their heads. Assistant District Attorney referred to the way the bodies were displayed as the killer's signature and calling card. *See Affirm. of L. Marcoccia, Ex. I.*

Although the District Attorney's office believed that Mr. Bittrolff was responsible for Sandra's death, they never charged him with her murder. In June 2024, Rex Heuermann was charged with Sandra's death after being identified through hairs found on her body. *See Affirm. of L. Marcoccia, Ex. J.* He was also charged with the murder of six other sex workers.

Cybergenetics Analysis

The Suffolk County Crime Laboratory analyzed the DNA evidence collected from Rita and Colleen using a threshold-based method, involving human interpretation, known as Combined Probability Inclusion ("CPI.") CPI is an old method of DNA analysis that most crime laboratories have stopped using due to its limitations. Specifically, many studies have found that the CPI

methodology discards a large portion of the DNA data present in a sample and by doing so, ignores DNA data that is required to accurately include or exclude a suspect. Laboratories that use the CPI method struggle to produce a match statistic if a sample contains small amounts of DNA and/or DNA mixtures.

Mr. Bittrolff's appellate counsel sought the services of Cybergenetics, an independent lab who own TrueAllele software, a probabilistic genotyping software. TrueAllele uses all quantitative DNA data when examining a sample, resulting in a more accurate result. TrueAllele is able to obtain DNA information on one-tenth the amount of DNA that CPI would need and is further able to separate genotypes in mixture data and calculate a match statistic. *See* Affirm. of L. Marcoccia, at Ex. K (Suffolk County's Validation Study of TrueAllele.) In fact, the Suffolk County District Attorney's office has used TrueAllele to re-analyze data on 28 criminal cases. *See* Affirm. of L. Marcoccia, at ¶ 43.

On or about August 29, 2024, Cybergenetics received the raw data for certain pieces of evidence found in Rita and Colleen's cases. Specifically, Cybergenetics was asked to review the samples that were deemed inconclusive by the Suffolk County Crime Laboratory.

On December 29, 2024, Cybergenetics issued its report. *See* Affirm. of L. Marcoccia, Ex. M. For inconclusive samples – the sperm fraction of the vaginal swab of Colleen, the sperm and non-sperm fraction of the DNA found on the stretch pants, and the sperm and non-sperm fraction of the DNA found on the dungarees-Cybergenetics was able to obtain three unknown male profiles that are capable of being compared with known male profiles and are CODIS eligible. *Id.* at 4-9. Cybergenetics further confirmed that Mr. Bittrolff is excluded from the male DNA found on the vaginal swab and stretch pants but also found that he was excluded from the male DNA found on the dungarees, an exclusion not previously reported. *Id.* at 5.

The most powerful finding by TrueAllele is that there is an unknown male whose DNA is found in sperm component of Colleen's vaginal swab, the sperm and non-sperm component of

Colleen's stretch pants and the sperm and non-sperm component of the male dungarees found at the crime scene. *Id.* at 2-5. He is the only male to be found on all items of evidence. *Id.* at 5. Based upon this finding, this unknown male not only had sexual intercourse with Colleen but was also present at the crime scene.

As a result of this new forensic information, Mr. Bittrolff moves to have his convictions vacated.

ARGUMENT

POINT I

THERE EXISTS A REASONABLE PROBABILITY THAT HAD THE JURY BEEN INFORMED OF THE FINDINGS BY CYBERGENETICS -THAT THE SAME UNKNOWN MALE IS FOUND ON COLLEEN AND ON ITEMS FOUND AT HER CRIME SCENE – MR. BITTROLFF WOULD HAVE BEEN ACQUITTED

“The persuasiveness of DNA is so great that as one commentator noted, ‘when DNA evidence is introduced against an accused at trial, the prosecutor’s case can take on an aura of invincibility.’ *People v. Wright*, 25 N.Y.3d 769, 783(2015)(internal citation omitted).

Given the power of DNA evidence, Criminal Procedure Law Section 440.10 provides that:

At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that: . .

(g-1) Forensic DNA testing of evidence performed since the entry of a judgment, (1) in the case of a defendant convicted after a guilty plea, the court has determined that the defendant has demonstrated a substantial probability that the defendant was actually innocent of the offense of which he or she was convicted, or (2) *in the case of a defendant convicted after a trial, the court has determined that there exists a reasonable probability that the verdict would have been more favorable to the defendant.* NY CPL § 440.10(1)(g-1)(emphasis added).

While a defendant who has conducted post-conviction DNA testing under this subsection “needs to show more than a mere possibility that the verdict would have been more favorable to him, he does not have to establish a virtual certainty that there would have been no conviction without the

DNA evidence.” *People v. Robinson*, 214 A.D.3d 904, 906 (2d Dept. 2023); *see also People v. Hicks*, 114 A.D.3d 599, 601 (1st Dept. 2014).

Here, the defense’s theory at trial was that while Mr. Bittrolff may have had sexual intercourse with Rita and Colleen, who were both sex workers at the time, he did not murder them. The physical evidence admitted at trial supported this theory since Mr. Bittrolff’s genetic material only existed in places consistent with sexual intercourse. Yet the People were able to undermine this theory by relying on the fact that Mr. Bittrolff was the only individual whose DNA appeared on both women– a coincidence they suggested that was too great to assume it occurred by sexual intercourse alone despite the lack of physical evidence placing Mr. Bittrolff at the crime scenes. Relying solely on this coincidence, the People minimized the unknown male DNA found on Colleen’s body, and at her crime scene, by assuming it ended up there as a result of her occupation and relied on the crime laboratory’s inconclusive results to downplay its significant.

Now, with the analysis done by Cybergenetics, the other male DNA cannot be overlooked, particularly the genetic material left behind from unknown male A- the DNA thread that ties it all together. *See* Affirm. of L. Marcoccia, at Ex. M. As set forth in the report, DNA from unknown male A is found in sperm component of Colleen’s vaginal swab, the sperm and non-sperm component of Colleen’s stretch pants and the sperm and non-sperm component of the male dungarees found at the crime scene. *Id.* at p. 2 (A)(3),(B)(3);p.3 (C)(2)(i),(D)(3); p. 4(E)(2);p. 5 (IV)(DNA Match Tables). This new evidence is highly significant because it not only shows that unknown male A had sexual intercourse with Colleen but that he was also present where her body was discovered since his sperm was found on her stretch pants, which were found hanging on a bush, and on the male dungarees, which also had Colleen’s blood on them, and were found a short distance from her body. *See People v. Hicks*, 114 A.D.3d at 601 (finding that new DNA evidence was “material and exculpatory because it supports identifying someone other than the defendant as the attacker;”) *see also* Affirm. of L. Marcoccia, at Ex. D. Again, unknown

male A is the only man to appear on one of the women's bodies and on items of evidence found at the crime scene. *See* Affirm. of L. Marcoccia, Ex M at p. 5.

In addition to the unknown male A being present on all samples at Colleen's crime scene, and the discovery of two additional male profiles (unknown males B and C), Cybergeneitics was able to provide yet another exclusionary result for John Bittrolff. *See* Affirm. of L. Marcoccia at Ex. M., p. 5. Specifically, TrueAllele excluded Mr. Bittrolff from the sperm and non-sperm portions of the DNA samples taken from the dungarees. *Id.* This exclusion was not reported by the Suffolk County Crime Laboratory and not presented at Mr. Bittrolff's trial. Mr. Bittrolff was previously excluded as the contributor to the male DNA found on Colleen's vaginal swab and stretch pants.

While the Cybergeneitics report does not contain new evidence regarding Rita, the physical evidence collected at Rita's crime scene was more limited than that of Colleen's crime scene. In fact, several pieces of evidence found at her crime scene were not swabbed for DNA, including a pair of jeans, two beer containers and a shoe. *See* Affirm. of L. Marcoccia, at Ex. G, p. 117-119. However, since the People alleged that one person killed both women, exculpatory DNA evidence for one victim is exculpatory evidence for both victims.

If this DNA evidence had been presented at trial, it is not unreasonable to conclude that the jury may have acquitted Mr. Bittrolff, especially since they came back dead locked on three occasions even without this powerful DNA evidence. *See Robinson*, 214 A.D.3d at 906 (holding that there existed a reasonable probability that the verdict would have been different if the DNA evidence had been presented at trial especially since two *Allen* charges were required by the jury rendered a verdict).

This DNA evidence, coupled with the indictment of Rex Heuermann for the death of Sandra Costilla, a murder that the District Attorney always claimed to be connected to Rita and Colleen, raises too much doubt as to Mr. Bittrolff's guilt to allow his convictions to stand. Justice requires that this court vacate Mr. Bittrolff's convictions.

POINT II

PURSUANT TO CPL SECTION 440.30 THE HAIRS FOUND AT THE CRIME SCENES OF RITA AND COLLEEN MUST BE SENT FOR MITOCHONDRIAL DNA TESTING AND THE NEW DNA PROFILES OBTAINED BY CYBERGENETICS BE SEARCHED IN CODIS AND IN ALL LOCAL DNA DATABASES AND COMPARED AGAINST THE DNA PROFILE OF REX HEUERMANN

- A. A CODIS and Local Database Search Must Be Conducted For The DNA Profiles Reported by Cybergenetics

CPL Section 440.30(2)(c) provides:

(c) In response to a motion under this paragraph, upon notice to the parties and to the entity required to perform the search the court may order an entity that has access to the combined DNA index system (“CODIS”) or its successor system to compare a DNA profile obtained from probative biological material gathered in connection with the investigation or prosecution of the defendant against DNA databanks by keyboard searches, or a similar method that does not involve uploading, upon a court's determination that (1) such profile complies with federal bureau of investigation or state requirements, whichever are applicable and as such requirements are applied to law enforcement agencies seeking such a comparison, and that the data meet state DNA index system and/or national DNA index system criteria as such criteria are applied to law enforcement agencies seeking such a comparison and (2) if such comparison had been conducted, and if the results had been admitted in the trial resulting in the judgment, a reasonable probability exists that the verdict would have been more favorable to the defendant, . . .

As detailed in Cybergenetics’ report, three additional male profiles were deduced from the evidence collected at Colleen’s crime scene, specifically, Colleen’s vaginal swab, stretch pants and male dungarees. *See* Affirm. of L. Marcoccia, Ex. M at p. 3-5; 6-7. The Suffolk County Crime Laboratory was previously unable to retrieve profiles from these samples. As provided in the Cybergenetics’ report, all these profiles are CODIS eligible, meaning that they meet the requirements to be run through the DNA index system.

There is no doubt that if there is a CODIS or local database hit on any of the newly discovered profiles, and had that information been made available at trial, there exists a reasonable probability that the verdict would have been more favorable to Mr. Bittrolff. Logic dictates that had the jury been made aware of the identity of a man, who was not John Bittrolff, but who left

his sperm on both Colleen and items discovered at the crime scene, they would have likely acquitted Mr. Bittrolff.

Thus, this Court should order that these profiles be searched in CODIS and any local DNA database. The Court should further order that the profiles obtained by Cybergeneics be compared to Rex Heuermann.

B. Due to the Indictment of Rex Heuermann in the Killing of Sandra Costilla, The Court Should Order that Mitochondrial DNA Testing Be Conducted On The Hairs Found At the Crime Scenes of Rita and Colleen

It was long held belief that John Bittrolff was responsible for the death of Sandra Costilla. Identical to Rita and Colleen's crime scenes, Ms. Costilla was found lying on her back, with her legs spread apart and arms over head. Like Colleen, her shirt was pulled over her head. She was also missing one shoe and wood chips were recovered on her body.

Because of the similarities in the crime scenes, the District Attorney's office believed that one person killed all three women. *See* Affirm. of L. Marcoccia, Ex. I, at p. 38 (prosecutor referring to the manner of Rita and Colleen's death and how they were displayed as the killer's "calling card" and "signature."). The People, on several occasions, told the press that Mr. Bittrolff was a suspect in the murder of Sandra Costilla. *See* Rashed Mian, Manorville Man Arrested for 90s Murder Suspected in 3rd Cold Case, July 22, 2014; *see* Andrew Smith, John Bittrolff Arraigned on Charges of Killing Two Women Twenty Years Ago, July 31, 2014.¹ However, no physical evidence connected him to her crime scene, and he was never charged with her murder.

On June 6, 2024, Rex Heuermann, not John Bittrolff, was indicted for the murder of Sandra Costilla. Mr. Heuermann was also charged with the killings of six other women who, like Colleen

¹ <https://www.longislandpress.com/2014/07/22/manorville-man-arrested-for-90s-murders-suspected-in-3rd-cold-case/>
<https://www.newsday.com/long-island/suffolk/john-bittrolff-pleads-not-guilty-to-two-90s-slayings-ordered-held-with-bail-a26292>

and Rita, were known sex workers. Rex Heuermann was identified as a suspect in the murder Sandra Costilla through mitochondrial DNA testing of hairs found on her body. *See* Affirm. of L. Marcoccia, Ex. J, at p. 15. He was also identified as the suspect in the murders of Maureen Brainard Barnes, Megan Waterman, Amber Costello, Jessica Taylor and Valerie Mack through mitochondrial DNA hair analysis.

The People's witness, Thomas Zaveski, a scientist from the Suffolk County Crime Laboratory, testified hairs were found on both Colleen and Rita's body but they were not sent for Mitochondrial DNA testing. Affirm. of L. Marcoccia at Exhibits E, F, at p. 52-56 (Forensic scientist Clyde Wells testifying that questioned hairs were suitable for mitochondrial DNA testing but that was not performed.) The decision not to test the hairs was made by the District Attorney's office. *Id.* at 16.

Pursuant to CPL Section 440.30, the court should order that the hairs found on the bodies of Colleen and Rita be sent for mitochondrial DNA testing. *See* CPL § 440.30(1-a)(a)(1)(stating that shall grant motion for DNA testing if there exists a reasonable probability that verdict would have been more favorable to defendant if results admitted at trial). If the hairs had been sent for mitochondrial DNA testing and the identity of another male, not John Bittrolff, had been established, there is a reasonable probability that the jury would have acquitted Mr. Bittrolff. Again, this is a sound conclusion since the jury was deadlocked even without the identification of another suspect.

Based upon this, Mr. Bittrolff requests that this Court order that the hairs found on the bodies of Colleen and Rita be sent for mitochondrial DNA testing.

CONCLUSION

Based upon the foregoing, Mr. Bittrolff respectfully requests that his convictions be vacated, and that this Court order that the People compare the new profiles in CODIS, any local DNA database and against Rex Heuerman's DNA and conduct mitochondrial DNA testing. In the alternative, this court should hold an evidentiary hearing on the merits of this claim.

Dated: Riverhead, New York
January 23, 2025

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