

Supreme Court of the State of New York
Bronx County: PART 15

The People of the State of New York,

— against —

John A. Smith,
Defendant-Petitioner.

Ind. No. 9999-2021

Affirmation in Support of
Motion to Vacate the
Judgment of Conviction

JANE BOOKS, ESQ., an attorney duly admitted to practice law in the State of New York, affirms under penalty of perjury that:

1. I am the attorney of record for John A. Smith. I am familiar with the facts of this case and make this affirmation in support of Mr. Smith’s motion herein [Order of Assignment, attached as Exhibit 1, A. at 1].¹

2. On December 15, 2022, Mr. Smith was convicted, after a jury trial, of one count of murder in the second degree in violation of Penal Law § 125.25 (1). Mr. Smith was sentenced to 25 years to life imprisonment [Sentence and Commitment Order, attached as Exhibit 2, A. at 2]. Mr. Smith has not perfected his direct appeal. Mr. Smith is currently incarcerated pursuant to this judgment.

3. I make this affirmation in support of Mr. Smith’s motion to vacate the judgment of conviction, pursuant to CPL 440.10 (1) (h), on the ground that he was denied the right to the effective assistance of counsel (*see* US Const, Amends VI, XIV;

¹ Citations beginning with “A.” refer to pages of the appendix provided in connection with this motion; those preceded by “H.” refer to minutes of the pretrial hearing on May 16-17, 2022; those preceded by “Tr.” refer to minutes of the trial from November 7-10, 2022; and those preceded by “S.” refer to minutes of the sentencing on December 15, 2023.

NY Const, art I, § 6; *Strickland v Washington*, 466 US 668 [1984]; *People v Baldi*, 54 NY2d 137 [1981]; *see also People v Benevento*, 91 NY2d 708 [1998]).

4. Defense counsel was ineffective for failing to investigate an exculpatory witness and marshal and present this favorable evidence in Mr. Smith's defense; failing to object to and request remedies for the prosecutor's false and highly misleading characterization of the DNA evidence during closing arguments; and failing to request a jury charge on cross-racial identification (*see People v Oliveras*, 21 NY3d 339, 341 [2013] [rejecting prosecution's argument that defendant received adequate assistance where "trial counsel failed to conduct an appropriate investigation of records critical to the defense"]; *People v Wright*, 25 NY3d 769, 771 [2015] [holding defense counsel was ineffective for continuously failing to object as prosecutor misrepresented DNA evidence to the jury]; *People v Camacho*, 178 AD3d 515, 516 [1st Dept 2019] [holding defense counsel was ineffective for failing to request charge that supported defense theory]).

5. The following exhibits are annexed hereto and made a part of the Motion to Vacate the Judgment of Conviction:

- Exhibit 1 is a copy of the Order of Assignment;
- Exhibit 2 is a copy of the Sentence and Commitment Order;
- Exhibit 3 is a copy of the transcript of the 911 call;
- Exhibit 4 is a copy of the police report DD5-3;
- Exhibit 5 is a copy of the police report DD5-4;
- Exhibit 6 is a copy of the police report DD5-18;
- Exhibit 7 is a copy of the Crime Scene Unit Report;
- Exhibit 8 is a copy of DD5-21;
- Exhibit 9 is a copy of the arrest report;
- Exhibit 10 is a copy of the lineup documents;

- Exhibit 11 is a copy of the felony complaint;
- Exhibit 12 is a copy of the Grand Jury Indictment;
- Exhibit 13 is a copy of the Decision on Suppression Motion;
- Exhibit 14 is a copy of the OCME Report;
- Exhibit 15 is a copy of the Affidavit of Christina Smith; and
- Exhibit 16 is a copy of the Affirmation of Gerry Prior, Esq.

6. Unless otherwise specified, all statements of fact in this affirmation are made upon information and belief, based on a review of the record on appeal, including the trial exhibits; the court file; documents received from and communications with trial defense counsel Gerry Prior; communications with Mr. Smith's family members; and communications with Mr. Smith.

7. Mr. Smith reserves the right to supplement this motion upon the discovery of additional evidence that supports his legal claims.

FACTUAL AND PROCEDURAL BACKGROUND

8. Mr. Smith's conviction rests on the testimony of a single eyewitness, who made a cross-racial identification of him as the perpetrator, and on a statistical analysis of a complicated low-level DNA mixture from the trigger of the gun.

9. Here, defense counsel failed to advocate for Mr. Smith in significant ways and deprived Mr. Smith of meaningful representation and the effective assistance of counsel. First, defense counsel failed to investigate and present the testimony of an exculpatory witness, whose statement to police that she did not recognize Mr. Smith as a "regular" in her bodega next door to the bar completely undermined the eyewitness's identification of Mr. Smith. Second, defense counsel failed to object to the prosecutor's misleading characterization of the DNA evidence

in summation, in which the prosecutor incorrectly stated that the likelihood ratio “corroborated that Mr. Smith shot the gun” and proved that “his DNA is all over that gun” [Tr. at 712] and failed to request a mistrial to protect Mr. Smith’s rights. And finally, defense counsel failed to request a jury charge on cross-racial identification.

A. The Crime and Investigation

10. On June 18, 2021, at 1:22 a.m., Jose Garcia was fatally shot in front of Casa Juancho, a bar on the corner of 138th Street and Willis Avenue in the Bronx [Tr. at 125-26]. Police responded, and an ambulance took Mr. Garcia to a hospital where he was pronounced dead [Tr. at 127]. An autopsy revealed that Mr. Garcia suffered two gunshot wounds to his chest [Tr. at 423-24].

11. Valentina Jimenez, who had been standing in front of the bar talking to some friends, called 911 within moments of the shooting. She was screaming and crying as she told the dispatcher that she saw a Black man, who was about 5'9" tall and stocky and wearing a grey hoodie and jeans, pull out a pistol and shoot a man as he was leaving Casa Juancho. She yelled, “He’s running around the corner!” [Transcript of 911 Call, attached as Exhibit 3, A. at 3].

12. In the early morning hours, Detective Andrew Johnson arrived at the scene and interviewed Ms. Jimenez. Ms. Jimenez reported that she was hanging out with friends outside of the bar, which was “packed,” when she saw a man leave the bar and walk about 20 feet to the corner where he stood near the fire hydrant while staring at the entrance to the bar. She said that about a minute later, he pulled out

a gun and shot twice at a man who was leaving the bar, and then ran north on Willis Avenue towards 139th Street [DD5-3, attached as Exhibit 4, A. at 4].

13. Ms. Jimenez claimed she recognized the shooter as someone she had seen coming in and out of the bodega next door to the bar. She explained that she went to that same bodega every morning to buy coffee. She believed he was “homeless” and often stayed in Willis Park near 141st Street [DD5-3, attached as Exhibit 4, A. at 4].

14. After interviewing Ms. Jimenez, at about 3:12 a.m., Det. Johnson and his partner headed to Willis Park. They found Mr. Smith sleeping on a park bench. He was wearing a faded navy-blue hoodie and jeans. The detectives asked Mr. Smith if he would accompany them to the 40th Precinct as part of a shooting investigation. Mr. Smith complied [DD5-4, attached as Exhibit 5, A. at 5].

15. During these early hours of the morning, police officers continued to canvas the neighborhood [Tr. at 165]. At about 3:45 a.m., NYPD Officer Luis Sanchez interviewed Carla Williams, the owner of the bodega right next door to Casa Juancho on 138th Street, who was standing outside in a crowd of people [DD5-18, attached as Exhibit 6, A. at 6].

16. Ms. Williams did not witness the shooting. Ms. Williams said that she worked in the bodega every morning at the cash register and would likely recognize most “regulars.” She confirmed that Ms. Jimenez frequented her shop and bought coffee almost every morning [DD5-18, attached as Exhibit 6, A. at 6].

17. An NYPD Crime Scene Unit detective discovered a pistol that had been discarded into a trashcan between 139th and 140th Streets on Willis Avenue [Tr. at 196]. Subsequent ballistics testing concluded that the pistol contained one live round which matched the bullet that was removed from Mr. Garcia's right lung during the autopsy [Crime Scene Unit Report, attached as Exhibit 7, A. at 8; Tr. at 214].

18. At approximately 4:15 a.m., Mr. Smith was placed into a lineup at the precinct with five other Black men between the heights of 5'7" to 6'0" tall [DD5-21, attached as Exhibit 8, A. at 17]. Mr. Smith was 5'7" tall and weighed approximately 180 pounds [Arrest Report, attached as Exhibit 9, A. at 18]. Ms. Jimenez selected Mr. Smith as the shooter and said she was "absolutely positive" about her identification [Lineup Identification Documents, attached as Exhibit 10, A. at 22].

19. Following the lineup identification, Mr. Smith was arrested and taken into custody, and a felony complaint was drafted and executed on June 18, 2021 [Felony Complaint, attached as Exhibit 11, A. at 24]. Mr. Gerry Prior was assigned as Mr. Smith's counsel and represented him from his arraignment through the sentencing proceeding.

20. The next day, on June 19, 2021, around 10:00 a.m., Det. Johnson went to Ms. Williams' home and asked her to view six photographs of Black men and to let him know whether she had seen any of these men in her bodega [DD5-18, A. at 7]. Ms. Williams told the officer that she did not recognize any of the men in the photographs and did not believe that any of the men were regular customers in her

bodega. Mr. Smith's photograph was included in the photographs shown to Ms. Williams [DD5-18, A. at 7].

21. On June 22, 2021, the grand jury indicted Mr. Smith on one count of murder in the second degree [Grand Jury Indictment, attached as Exhibit 12, A. at 25].

B. The Suppression Hearing

22. A *Wade-Huntley* hearing was held on May 16 and 17, 2022, before Justice George Cutler [H. at 1-2, 67-68]. The sole witness at the proceeding was Det. Johnson, who testified about the lineup identification procedure he conducted with Ms. Jimenez.

23. After his testimony, both sides made arguments to the Court related to the identification procedure. Defense counsel argued that Mr. Smith's skin tone was lighter than the skin tones of the fillers in the lineup [H. at 99-100]. In response, the prosecution argued that the lineup was not unnecessarily suggestive and that the "incandescent lighting" could "account for some of the differences in complexion" [H. at 102].

24. The Court rejected Mr. Smith's suppression motion [H. at 103-04] and issued a written decision [Decision on Suppression Motion, May 23, 2022, attached as Exhibit 13, A. at 27].

C. The Trial and Sentencing

25. Mr. Smith was tried by a jury before Justice Frank Anderson on November 7-10, 2022. At the trial, the prosecution called the eyewitness Ms. Jimenez,

an employee of the Office of the Chief Medical Examiner, and several law enforcement witnesses, including Det. Johnson, the Crime Scene Unit detective, and a ballistics expert. The prosecution also introduced various photographs and other physical evidence from the crime scene and autopsy.

26. Valentina Jimenez, a white Hispanic woman [DD5-3, A. at 4], was the prosecution's only eyewitness, and she testified about what she saw from the time the shooter exited the bar and waited by the fire hydrant to the moment that she witnessed the shooting. Ms. Jimenez said that she had gone to the bar that evening at about 10:30 p.m. with a group of friends [Tr. at 17]. She testified that she had drunk two beers from about 11:00 p.m. to 12:30 a.m., and that she had forgotten to eat dinner that evening [Tr. at 19-22]. She said that she did not feel tipsy or drunk, just "relaxed" [Tr. at 22].

27. At around 1:20 a.m., while talking to her friends outside of the bar, Ms. Jimenez said she noticed a man "aggressively push through the door of the bar" to get outside [Tr. at 28]. She testified that his behavior made her feel nervous and she kept an eye on him [Tr. at 29]. She claimed the man was wearing a "bluish-grey hoodie and jeans" and was a Black man between 5'7"-5'8" tall with a "medium build" [Tr. at 43].

28. On cross-examination, when Mr. Prior asked Ms. Jimenez why she had described the shooter differently to police—saying that he was 5'9" tall, stocky, and wearing a grey hoodie and jeans—Ms. Jimenez testified that she "just knew" that the man was bigger than her—a 5'3" tall, 120-pound woman—so she did the best she

could to describe him at the time [Tr. at 72]. She further testified that once she had taken time to reflect on the incident, she realized that the shooter was not as large as she had first described him. She explained that she was “very nervous” when the man first appeared and was “terrified” at the time of the shooting [Tr. at 73].

29. Ms. Jimenez said that a couple of minutes after the shooter walked over to the fire hydrant, she saw him pull his hand out of his hoodie pocket and point a pistol at a man who was leaving the bar [Tr. at 33]. She heard a shot and immediately ran towards the closed bodega next door, crouched down in front of it, and put her arms over her head [Tr. at 33-34]. She said that when she looked up again, about 10 seconds later, she saw the shooter running around the corner heading north on Willis Avenue [Tr. at 34-35]. Ms. Jimenez said that there was plenty of light coming from the bar, and she had no problem seeing the face of the shooter [Tr. at 44].

30. Ms. Jimenez testified that after the shooter ran off, she realized that she recognized him as a man she often saw in the mornings when she would buy her coffee at the bodega right next to the bar [Tr. at 44-45]. She said she saw him at least three times per week hanging out in front of and inside the bodega, that he often smelled like alcohol, and that she was “pretty sure” she had seen him sleeping in Willis Park a couple of times when she went jogging there [Tr. at 45]. Ms. Jimenez identified Mr. Smith in the courtroom as the shooter [Tr. at 45].

31. Josephine James, a senior interpreting analyst with the Office of the Chief Medical Examiner, testified that the swab from the trigger of the pistol contained a complicated low-level mixture of at least three contributors [Tr. at 331].

She explained that she had to resort to using probabilistic genotyping to produce a likelihood ratio, which compares the likelihood of two different scenarios causing the mixture of DNA that was detected on the sample [Tr. at 342].

32. Ms. James concluded that “the mixture found on the trigger is approximately 5,090 times more probable if the sample originated from John Smith and two unknown, unrelated individuals than if it had originated from three unknown, unrelated individuals” [Tr. at 358; OCME Report, attached as Exhibit 14, A. at 33].

33. The Court held a charge conference prior to closing arguments. Defense counsel did not request that the Court instruct the jury on the issue of cross-racial identification [Tr. at 602-05].

34. Defense counsel presented no evidence. On summation, he argued that while Ms. Jimenez was “obviously a nice young woman” [Tr. at 614], her eyewitness identification was not reliable because she only had a short period of time to view the shooter, the lighting was not ideal, and she was frightened during the entire event [Tr. at 614-18].

35. During the prosecution’s summation, the prosecutor first argued that Ms. Jimenez was a reliable eyewitness, who recognized Mr. Smith as someone she had seen often in the neighborhood, and who had plenty of time to observe him in “good lighting” prior to the shooting [Tr. at 649].

36. Additionally, the prosecutor made false and misleading statements to the jury about the DNA evidence. Despite the fact that a likelihood ratio can only

compare whether a DNA mixture would be more likely in one of two different scenarios, the prosecutor falsely argued that Mr. Smith's DNA was actually found on the gun [Tr. at 712].

37. Specifically, the prosecutor first claimed that the 5,090 likelihood ratio "corroborated that Mr. Smith shot the gun" [Tr. at 712]. Then, the prosecutor said that the jury could "rely on the science" and that "the science tells us that his DNA is all over that gun" [Tr. at 712]. Defense counsel failed to object to the prosecutor's false and misleading statements regarding the DNA evidence and failed to request any remedies.

38. On November 10, 2022, the jury found Mr. Smith guilty of murder in the second degree. On December 15, 2022, Mr. Smith was sentenced to 25 years to life imprisonment [S. at 11; Sentence and Commitment Order, A. at 2].

D. The Instant Motion

39. Mr. Smith respectfully requests this Court vacate the judgment of conviction, pursuant to CPL 440.10 (1) (h), on the ground that he was denied his right to the effective assistance of counsel. Mr. Smith's defense counsel was ineffective under both the federal and state constitutions (*see* US Const Amends VI, XIV; NY Const, art. I, § 6; *Strickland*, 466 US at 687; *Baldi*, 54 NY2d at 146; *Benevento*, 91 NY2d at 713-14).

40. On February 15, 2023, Christina Smith, Mr. Smith's mother, executed an affidavit stating that she had spoken to trial counsel Mr. Prior on one occasion during trial, immediately after Mr. Prior had given her a copy of the police reports

[Affidavit of Christina Smith, attached as Exhibit 15, A. at 56-57]. After reading the contents of DD5-18 in which Ms. Williams, the bodega owner, stated she did not recognize the photograph of Mr. Smith and did not believe that he was a regular in her store, Ms. Smith asked defense counsel to interview the bodega owner [A. at 57].

41. Ms. Smith believed that the bodega owner's prior statement was strong evidence that Ms. Jimenez had mistakenly identified her son as the shooter. Ms. Smith said that Mr. Prior told her that he would "look into it" [A. at 57]. During the trial, Ms. Smith sent Mr. Prior two follow-up emails and "begged him to speak with the bodega owner," but she did not receive any responses [A. at 57].

42. On March 6, 2023, Mr. Prior signed an affirmation related to his representation of Mr. Smith during the proceedings [Affirmation of Gerry Prior, Esq., attached as Exhibit 16, A. at 58-59].

43. In the affirmation, Mr. Prior confirmed that he did not investigate Ms. Williams, the owner of the bodega located next door to Casa Juancho [A. at 58]. He stated that he did not believe that speaking with a bodega owner about whether Mr. Smith appeared to be a regular in her store would be a "good use" of his time as he prepared for trial [A. at 58]. He believed that this type of testimony from someone who had not witnessed the shooting would be "distracting to the jury," and he felt that it made more sense to put his efforts into cross-examining the eyewitness on the adverse viewing conditions at the time of the shooting [A. at 58-59].

44. In addition, Mr. Prior stated that he did not object to the prosecutor's testimony about the DNA evidence during summations because "objections are

distracting” and “upset the jury” and because he was unaware that the prosecutor’s testimony that the likelihood ratio “corroborated that Mr. Smith shot the gun” and proved that “his DNA is all over that gun” [Tr. at 712] was misleading [Affirmation of Gerry Prior, Esq., A. at 59].

45. Finally, Mr. Prior explained that he did not request a cross-racial identification charge because “Bronx juries are very diverse and understand cross-racial IDs,” and he did not think it was necessary [A. at 59].

46. Defense counsel’s failures to investigate a witness with potentially exculpatory information, to object to the prosecution’s false and misleading characterization of the DNA evidence during closing statements, and to request a jury charge on cross-racial identification deprived Mr. Smith of the effective assistance of counsel. Mr. Smith’s Motion to Vacate the Judgment of Conviction should be granted (*see* CPL 440.10 [1] [h]). In the alternative, a hearing should be ordered to resolve any disputed issues of fact (*see* CPL 440.30 [5]).

Dated: March 13, 2023
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