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 Memorandum of Law

INTRODUCTION

In a case built on only the cross-racial eyewitness testimony of one woman and a low-level likelihood ratio connected to a complicated DNA mixture on the trigger of the gun, defense counsel failed to investigate a favorable police report that could have led to exculpatory information from an unbiased witness, failed in every way to advocate for Mr. Smith during the prosecution's summation as the prosecutor made wildly inaccurate statements about the DNA evidence, and failed to request a jury charge to explain that some people have more difficulty accurately identifying members of a different race than of their own race.

Ms. Jimenez, the sole eyewitness, was at a bar drinking with friends when she witnessed the gunman exit the bar and then execute a man by shooting him twice. As a white Hispanic woman, her observations of a Black man, during a short and extremely stressful event where she was likely focused on the shooter's weapon rather than on his face, contain indicia of multiple negative viewing factors that significantly increased the risk of a mistaken identification.

Defense counsel's errors, both individually and cumulatively, were objectively unreasonable and cannot be justified as legitimate strategic or tactical decisions. Moreover, there is a reasonable probability that if defense counsel had not made such mistakes, the outcome of the proceeding would have been different.

ARGUMENT

John Smith Was Deprived of Effective and Meaningful Representation Where Defense Counsel Failed to Investigate an Exculpatory Police Report that Undermined the Eyewitness Identification, Failed to Object to or Request Remedies for Prosecutorial Misconduct During Closing Arguments Where the Prosecutor Grossly Misrepresented the DNA Evidence at Trial, and Failed to Request a Charge on Cross-Racial Identification.

Mr. Smith was denied effective and meaningful representation, and his conviction should be vacated, pursuant to CPL 440.10 (1) (h) (*see* US Const Amends VI, XIV; NY Const art I, § 6; *Strickland v Washington*, 466 US 668, 686 [1984]; *People v Benevento*, 91 NY2d 708, 712-13 [1998]; *People v Baldi*, 54 NY2d 137, 147 [1981]).

Both the United States and New York Constitutions guarantee every criminal defendant the right to the effective assistance of counsel (*see Strickland*, 466 US at 686; *Baldi*, 54 NY2d at 146). Under the federal standard, Mr. Smith is entitled to the reversal of his conviction if he can establish that defense counsel's performance fell below an "objective standard of reasonableness" and that it prejudiced his case at trial so as to "undermine confidence in the outcome," meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Strickland*, 466 US at 688, 694).

New York law requires courts to assess whether counsel's performance "viewed in totality" amounts to "meaningful representation" (*People v Turner*, 5 NY3d 476, 480 [2005], quoting *Baldi*, 54 NY2d at 147; *see Benevento*, 91 NY2d at 712). This inquiry "focuses on the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*People v Caban*, 5 NY3d 143, 156 [2005] [internal quotation marks and citations omitted]).

However, it is constitutionally irrelevant whether counsel may have performed competently during other stages of the proceeding. The *Strickland* inquiry focuses on whether the "identified acts or omissions" constitute deficient performance and were prejudicial (*Kimmelman v Morrison*, 477 US 365, 386 [1986] [finding that conduct beyond the "identified acts or omissions" is only relevant where it sheds light on whether the errors were reasonable]; *see also People v Jones*, 167 AD3d 443, 443 [1st Dept 2018] ["Under both the state and federal standards, a single, prejudicial error may constitute ineffective assistance, regardless of whether counsel's overall performance 'bespoke of general competency.'"], quoting *Rosario v Ercole*, 601 F3d 118, 124-126 [2d Cir 2010], *cert denied* 563 US 1016 [2011]). Thus, even "[a] substantial, single 'blunder' could, of course, qualify" as sufficiently prejudicial (*People v Flores*, 84 NY2d 184, 188 [1994]).[1]

---

[1] "New York state courts would be wise to engage in separate assessments of counsel's performance under both the federal and the state standards [to] ensure that the prejudicial effect of each error is evaluated with regard to outcome" (*Rosario v Ercole*, 617 F3d 683, 685 [2d Cir 2010, Wesley, J.,concurring]).

Moreover, "where counsel's errors individually may not constitute ineffective assistance, the cumulative effect…can deprive defendant of meaningful representation" (*People v Wright*, 25 NY3d 769, 779 [2015] [internal quotation marks, brackets, and citations omitted]; *see People v Oathout*, 21 NY3d 127, 132 [2013]).

The severity of defense counsel's failures at Mr. Smith's trial completely undermined confidence in the verdict (*see Strickland*, 466 US at 688). These errors, both individually and cumulatively, caused Mr. Smith identifiable prejudice and deprived him of effective and meaningful representation.

A. Defense counsel was ineffective for failing to investigate the police report supporting the defense theory that Mr. Smith was mistakenly identified.

The defense theory was always that Ms. Jimenez, the only eyewitness and the key evidence connecting Mr. Smith to the shooting, had mistakenly identified Mr. Smith as the shooter. Ms. Jimenez testified that she recognized the shooter as a man she frequently saw in the mornings inside the bodega next door to Casa Juancho [Tr. at 44-45]. Yet the jury never learned that Carla Williams, the owner and morning cashier of the bodega, not only confirmed that Ms. Jimenez frequented her store in the mornings, but she also established that Mr. Smith *did not* [DD5-18, A. at 6-7]. Ms. Williams looked at a photograph of Mr. Smith provided to her by a police officer and said that she did not recognize Mr. Smith as a "regular customer" in her store [A. at 7].

Though the DD5 provided to the defense documented Ms. Williams' revelatory statement, defense counsel inexcusably failed to make any efforts to investigate this crucial witness, despite the pleas of Mr. Smith's mother [DD5-18, A. at 6-7; Affidavit

of Christina Smith, A. at 56-57 ("begg[ing]" Mr. Prior "to speak with the bodega owner" during the course of the trial)]. As the Court of Appeals has explained, the "defendant's right to representation does entitle him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed" (*People v Oliveras*, 21 NY3d 339, 346 [2013], quoting *People v Bennett*, 29 NY2d 462, 466 [1972]). To be certain, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" (*Strickland*, 466 US at 690, 691). But decisions cannot be strategic, and thereby insulated from challenge, if they are made after an unjustifiable failure to investigate (*see id.* at 691). "It simply cannot be said that a total failure to investigate the facts of a case, or review pertinent records, constitutes a trial strategy resulting in meaningful representation. There is simply no legitimate explanation for this purported strategy" (*Oliveras*, 21 NY3d at 348).

Underscoring this principle, New York courts have frequently found ineffectiveness due to failure to investigate potentially helpful witnesses (*see People v Droz*, 39 NY2d 457, 462 [1976] [reversing conviction due to ineffectiveness where counsel made no meaningful attempts, beyond mailing two letters, to contact potentially helpful witnesses]; *see also People v Jenkins*, 68 NY2d 896, 898 [1986] [finding defendant was deprived of meaningful representation where counsel failed to make use of helpful police reports without tactical reason]; *People v Davis*, 193 AD3d 967, 970-71 [2d Dept 2021] [vacating the judgment and remitting for a new trial where counsel's failure to contact and interview potential witnesses could not be

characterized as a legitimate strategic decision]; *People v Green*, 37 AD3d 615, 615 [2d Dept 2007] [affirming grant of 440 motion in murder case where "trial counsel, without a reasonable strategic reason, failed to interview or even contact potential witnesses known to counsel prior to trial, including an eyewitness to the crime, who could have offered exculpatory testimony"]).

Here, Mr. Prior had in his possession the DD5 that documented that Ms. Williams, the owner and morning cashier of the bodega next to the bar, did *not* recognize Mr. Smith as a regular customer in her store—an account completely undermining Ms. Jimenez's cross-racial identification of Mr. Smith where Ms. Jimenez was certain that the shooter was a "regular" at the bodega [DD5-18, A. at 6-7]. Under these circumstances, Mr. Prior's failure to "pursue the minimal investigation required under the circumstances" was objectively unreasonable and cannot be justified as a legitimate strategic or tactical decision (*Oliveras*, 21 NY3d at 348). "[C]ounsel may not fail to conduct an investigation and then rely on the resulting ignorance to excuse his failure to explore a strategy that would likely have yielded exculpatory evidence" (*Gersten v Senkowski*, 426 F3d 588, 610 [2d Cir 2005]).

Indeed, Mr. Prior, in his affirmation, provided no strategic or legitimate reason for his failure to investigate this favorable information. Mr. Prior stated that, even though his client's mother had requested it, he did not investigate Ms. Williams because he believed that her testimony would be "distracting to the jury" [Affirmation of Prior, A. at 58]. Incredibly, Mr. Prior conceded that he believed that investigating a potentially favorable witness was not a "good use" of his time while he prepared for

trial [A. at 58]. Moreover, Mr. Prior explained that he wanted to concentrate his efforts on cross-examining the eyewitness about the adverse viewing conditions at the time of the shooting [A. at 58-59]. Defense counsel could not simply forego the pursuit of exculpatory evidence on the assumption that the information that may arise from the investigation might distract the jury or that he could give the jury a good "gut feeling" regarding the inaccuracy of the identification through his cross-examination of Ms. Jimenez (*see Oliveras*, 21 NY3d at 345, 348).

Defense counsel's inexplicable failure unquestionably deprived Mr. Smith of the right to a fair trial, and his conviction must be reversed due to ineffective assistance of counsel.

B. Defense counsel was ineffective for failing to object to or request remedies for prosecutorial misconduct during the prosecutor's summation where the prosecutor grossly misrepresented the DNA evidence produced at trial.

The prosecutor's summation contained highly prejudicial, improper statements that misled the jury about the DNA evidence presented at trial. In making this erroneous argument, the prosecutor abdicated his responsibility as a representative "of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all" (*Berger v United States*, 295 US 78, 85 [1935]). In making arguments to the jury, "the prosecutor may strike hard blows, [but] is not at liberty to strike foul ones" (*id.* at 88). A prosecutor "should not seek to lead the jury away from the issues by drawing irrelevant and inflammatory conclusions which have a decided tendency to prejudice the jury against the defendant" (*People v Ashwal*, 39 NY2d 105, 109 [1976]). During the prosecutor's

closing argument, defense counsel never objected to the prosecutor's misleading characterization of the DNA evidence and failed to request any remedy, including a mistrial [Tr. at 712].

In this case, the swab of the trigger of the gun connected to the shooting was subjected to DNA testing. However, because the swab contained a complicated low-level mixture of at least three contributors [Tr. at 331], the analyst used a technique called "probabilistic genotyping" to produce a likelihood ratio, which compares the likelihood of two different scenarios causing the mixture of DNA [Tr. at 342]. Thus, the analyst could only conclude 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]. In other words, this low-level likelihood ratio was not "a statement that the defendant's profile is part of the DNA mixture present on evidence," but rather "a standard statistical calculation" saying "that given the composition of the mixture it is more likely than not that the defendant is a contributor to the DNA mixture" (*People v Williams*, 35 NY3d 24, 48 [2020] [addendum]). Given this, the prosecutor's egregiously misleading statements to the jury on summation that the likelihood ratio "corroborated that Mr. Smith shot the gun," that the jury could "rely on the science," and that "the science tells us that his DNA is all over that gun" misrepresented the strength of the DNA evidence and violated Mr. Smith's rights to a fair trial [Tr. at 712]. Yet defense counsel did nothing to protect them.

"While the prosecutor [is] entitled to fair comment on the DNA evidence available in [a] case, [the prosecutor is] not entitled to present the results in a manner that [is] contrary to the evidence and the science" (*Wright*, 25 NY3d at 782). In *Wright*, the Court of Appeals held that defense counsel was ineffective for "fail[ing] to object, time and again, when the prosecutor repeatedly misrepresented to the jury critical DNA evidence as proof of defendant's guilt, in contradiction of the People's expert testimony" (*id.* at 771; *see People v Powell*, 165 AD3d 842, 843 [2d Dept 2018] [holding that the prosecutor's proclamations that the defendant's DNA was on the weapon and that the "science finds him guilty" misrepresented the analyst's testimony and deprived the defendant of a fair trial]; *cf. People v Ramsaran*, 29 NY3d 1070, 1071 [2017] [holding that defense counsel was not ineffective where he failed to object to the prosecutor's statement that the victim's DNA was "on" defendant's shirt with a 1.661 quadrillion likelihood ratio]).

People v Powell (165 AD3d at 843) is directly on point. Mr. Powell was accused of a shooting murder, and the prosecution presented DNA evidence that relied on likelihood ratio statistics that the DNA mixture taken from the safety of the gun was approximately 1.11 billion times more probable if the sample originated from the defendant, the witness's girlfriend, and one unknown, unrelated person than if it originated from the witness's girlfriend and two unknown, unrelated persons and that it was approximately 616 million times more probable if the sample originated from the defendant and two unknown, unrelated persons than if it originated from three unknown, unrelated persons (*see id.* at 842-43). During summation, the

prosecutor claimed that the "defendant's DNA was on the safety of that gun," that the "DNA has spoken," and that "science finds him guilty" (*id.* at 843). Although the DNA evidence in *Powell* strongly suggested that the defendant's DNA was on the gun—exponentially more so than in this case—the Appellate Division held that the prosecutor's comments were "an overstatement and misrepresentation of the statistical comparison testified to by the People's expert who performed the DNA analysis of the swab" and that defense counsel was ineffective for failing to object to the "improper comments" (*id.*).

Effective assistance "cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation" (*Baldi*, 54 NY2d at 146). Under the circumstances of Mr. Smith's trial, Mr. Prior's failure to object to the prosecutor's misstatements and ask for a mistrial due to the prosecutorial misconduct in summation was ineffective and requires reversal (*Droz*, 39 NY2d at 463 [finding counsel ineffective for, *inter alia*, dismissing the option of requesting a mistrial]).

Moreover, Mr. Prior's lack of advocacy at summation was objectively unreasonable and cannot be justified as a legitimate strategic or tactical decision (*see People v Fisher*, 18 NY3d 964, 967 [2012] [finding ineffective assistance of counsel in the absence of a "strategic basis" for failing to make proper objections]). Here, Mr. Prior acknowledged that he did not understand the science and was unaware that the prosecutor's statement 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 Prior, A. at 59]. Furthermore, he stated that he did not want to object

during summation because it would be "distracting" and "upset the jury" [Affirmation of Prior, A. at 59]. Where Mr. Prior has failed to provide a strategic or legitimate explanation for his failure to object and request a mistrial during summation, Mr. Smith was deprived of the effective assistance of counsel, and his conviction must be reversed (*see Fisher*, 18 NY3d at 967).

C. Defense counsel was ineffective for failing to request an instruction on cross-racial identification.

"Social scientists have found that the likelihood of misidentification is higher when an identification is cross-racial" (*People v Boone*, 30 NY3d 521, 528 [2017]; *see also Young v Conway*, 698 F3d 69, 78-79 [2d Cir. 2012] [noting that an "extensive body of scientific literature" indicates that "certain circumstances surrounding a crime—including the perpetrator's wearing a disguise, the presence of a weapon, the stress of the situation, the cross-racial nature of the [identification], the passage of time between observation and identification, and the witness's exposure to defendant through multiple identification procedures—may impair the ability of a witness…to accurately process what she observed"]). Consistent with this scientific understanding, the CJI was amended in 2011 to include an instruction on cross-racial identification (*see Boone*, 30 NY3d at 534-35; CJI2d[NY] Identification – One Witness). As the First Department has emphasized, such an instruction is "essential to a reliable determination of guilt or innocence" (*People v Crovador*, 15 AD3d 610, 611 [1st Dept 2018]).

Mr. Smith was entitled to a charge on cross-racial identification where the identification was at issue and where the defendant and the witness appeared to be

of different races (*see Boone*, 30 NY3d at 528). Here, there is no question that Ms. Jimenez made a cross-racial identification: Ms. Jimenez is a white Hispanic woman, and Mr. Smith is a Black man [DD5-3, A. at 4; Arrest Report, A. at 18]. However, despite the increased likelihood that the identification was erroneous, defense counsel did not ask the trial court to provide any kind of instruction on cross-racial identifications [Tr. at 602-05; Affirmation of Prior, A. at 59].

Here, where the case hinged on Ms. Jimenez's identification, defense counsel's failure to ensure that the jury received an instruction on this critical subject was completely unreasonable, especially given the "significant disparity between what the psychological research shows and what uninstructed jurors believe" (*Boone*, 30 NY3d at 529). Yet Mr. Prior provided no reasonable or strategic reason for this failure, and in fact, conceded that he simply did not believe that it was necessary because "Bronx juries understand cross-racial IDs" [Affirmation of Prior, A. at 59].

Defense counsel's nonstrategic failure to request a cross-racial identification charge, in addition to his other errors, deprived Mr. Smith of effective and meaningful representation (*see People v Camacho*, 178 AD3d 515, 516 [1st Dept 2019] [finding counsel ineffective for failing to request jury charge that supported defense theory]; *People v Jones*, 167 AD3d 443, 444 [1st Dept 2018] [finding counsel ineffective where "defense counsel's failure to seek [the jury] charge was not strategic"]; *People v Douglas*, 160 AD3d 436, 436 [1st Dept 2018] [holding that "counsel's admittedly nonstrategic failure to request the instruction constituted ineffective assistance" of counsel]; *see also Henry v Scully*, 78 F3d 51, 53 [2d Cir 1996] [finding counsel's failure

to request a missing witness charge regarding a confidential informant who did not testify at trial, along with counsel's other errors, constituted ineffective assistance of counsel]; *People v Donovan*, 184 AD2d 654, 655-56 [2d Dept 1992] [finding counsel's failure to request "that the court charge the jury that the People's failure to call either of the officers involved permitted an inference that their testimony would have corroborated the testimony of the defense witnesses" was evidence of ineffectiveness]).

D. Had defense counsel investigated the police report containing exculpatory information that wholly undermined the eyewitness's familiarity with Mr. Smith, objected to and requested a mistrial for prosecutorial misconduct during the prosecution's summation for misrepresenting the DNA evidence, and/or requested a charge on cross-racial identification, there is a reasonable probability that the outcome of the proceeding would have been different.

There is, at a minimum, "a reasonable probability that…the result of the proceeding would have been different" (*Strickland*, 466 US at 688, 694) if Mr. Prior had properly investigated Mr. Smith's case and advocated for him during the charge conference and the prosecutor's summation. Mr. Prior's errors both individually and cumulatively deprived Mr. Smith of effective and meaningful representation.

The prosecution's evidence against Mr. Smith was weak. It consisted only of the cross-racial eyewitness identification made by a "terrified" woman hanging out with friends at the scene of the shooting [Tr. at 28, 73] and a low-level likelihood ratio connected to the DNA evidence [Tr. at 358].

The Court of Appeals has recognized time and again that cross-racial identification can exacerbate the potential for misidentifications in cases turning on

eyewitness identifications by strangers (*see People v Santiago*, 17 NY3d 661, 672 [2011] [expert identification testimony admissible when the case turns on the accuracy of eyewitness identification and the remainder of the evidence does not sufficiently corroborate the identification; *People v Abney*, 13 NY3d 251, 268 [2009] [same]). In *Boone* (30 NY3d at 528), the Court of Appeals highlighted the "prevalence of eyewitness misidentifications in wrongful convictions and the danger they pose to the truth-seeking function and integrity of our justice system," especially in cases with a single cross-racial eyewitness identification.[2]

Here, Ms. Jimenez's identification of Mr. Smith was riddled with negative viewing factors that can increase the risk of error in identification, including that this was a cross-racial identification where the amount of time that she could view the shooter's face was fleeting, and that she was impaired by a high level of stress and was almost certainly focused on the shooter's weapon, rather than on his face (*see Santiago*, 17 NY3d at 672).

In a case where the only evidence against Mr. Smith was a cross-racial identification by a woman who testified inconsistently with her initial description of the shooter and a low-level likelihood ratio connected to a complicated DNA mixture on the trigger of the gun, each individual "blunder" made by defense counsel qualified as "sufficiently prejudicial" to constitute ineffective assistance (*Flores*, 84 NY2d at

---

[2] Cross-racial identifications are notoriously unreliable, playing a role "in 42 percent of the cases in which an erroneous eyewitness identification was made" (Nat'l Research Council, Identifying the Culprit: Assessing Eyewitness Identification [2014], at 96).

188; *see Kimmelman*, 477 US at 386 [holding counsel's assistance was constitutionally deficient where counsel's trial performance, which was "creditable enough," could not explain his singular failure to conduct pre-trial discovery]).

Furthermore, counsel's errors, singularly and cumulatively, constituted ineffective assistance, "regardless of whether counsel's overall performance 'bespoke of general competency'" (*Jones*, 167 AD3d at 443, quoting *Rosario*, 601 F3d at 124-126). Thus, this Court should vacate Mr. Smith's conviction where he was deprived of effective and meaningful representation (*see* US Const, Amends VI, XIV; NY Const. art I, § 6; *Strickland*, 466 US at 687; *Benevento*, 91 NY2d at 713).

CONCLUSION

For the reasons set forth above and in the affirmation in support of Mr. Smith's motion to vacate the judgment of conviction, this Court should vacate Mr. Smith's conviction where he was denied the effective assistance of counsel (CPL 440.10 [1] [h]). Alternatively, this Court should hold an evidentiary hearing to resolve any factual dispute necessary to the determination of the motion (*see* CPL 440.30 [5]).

Respectfully Submitted,

JANE BOOKS, ESQ.
55 Morris Ave., Ste. 6B
Bronx, NY 10451
718-123-1234
janebooks@defense.com