Docket No.

IN THE
SUPREME COURT OF THE UNITED STATES

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Blair Garner,

Petitioner,

-against-

William Lee, as Superintendent of
Greenhaven Correctional Facility,

Respondent.

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On Petition for Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The prejudice component of *Strickland v. Washington*, 466 U.S. 668 (1984), presents a mixed question of law and fact. *Id.* at 698. When a district court decides that question upon independently finding facts after holding an evidentiary hearing, does the clear error or the de novo standard apply on review of its decision? The Second Circuit held that the de novo standard applies without regard to whether answering the mixed question entails primarily legal or factual work – splitting with the First and Third Circuits and departing from the general rule for mixed questions announced in *U.S. Bank N.A. v. Village at Lakeridge, LLC*, 583 U.S. ——, ——, 138 S.Ct. 960, 967, 200 L.Ed.2d 218 (2018).

2. Where the appellant's brief did not challenge a factual finding ancillary to a *Strickland* prejudice determination which it challenged in other respects, did the court of appeals abuse its discretion in reviewing the factual finding *sua sponte*, without notice to the parties or according them an opportunity to present a position?

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Rules

OPINIONS BELOW

Garner v. Lee, 908 F.3d 845 (2d. Cir. 2018)

Garner v. Lee, 2016 WL 7223335 (E.D.N.Y.),
vacated and remanded, 908 F.3d 845 (2d Cir. 2018)

People v. Blair Garner, (Suffolk County Court, N.Y., Oct. 4, 2010)
(denying motion to vacate conviction; not reported)

STATEMENT OF JURISDICTIONAL BASIS

The judgment of the Court of Appeals was entered on November 15, 2018. Petitioner ("Garner") timely petitioned for rehearing on November 28, 2018; an order denying rehearing was entered on December 14, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE 52(a)(6)

> Setting Aside the Findings. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

STATEMENT OF THE CASE

Petitioner Blair Garner seeks a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its decision and judgment, entered on the appeal of respondent Lee, vacating the district court's grant of his habeas petition under 28 U.S.C. § 2254. *Garner v. Lee*, 908 F.3d 845 (2d. Cir. 2018); Appendix A, A1-20.

Statement of Facts

Garner is in custody pursuant to a New York State conviction for attempted murder and associated crimes, arising out of a shooting in 2002. On collateral attack in the New York courts, and in his subsequent federal habeas petition, Garner asserted that his trial counsel had been prejudicially ineffective in multiple respects. After holding an evidentiary hearing and making factual findings, the district court found that Garner had satisfied both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984) on

one ground.

The ground on which the district court granted the writ

The district court granted the writ on the ground that Garner's trial counsel had failed to develop evidence and make arguments which would have established two things to the jury: first, that the shooting occurred no earlier than 10:31 p.m. and no later than 10:41 p.m.; second, that during that entire ten-minute period, Garner was continuously on the phone, making calls, as reflected in the usage records for a cell phone that, at trial, both the prosecution and Garner maintained he was using that night.

Accordingly, if Garner had shot the victim, it could only have been while making a stream of phone calls. Not only would that have been implausible, but it would have directly contradicted the victim's account of the shooting. *Garner v. Lee*, 2016 WL 7223335 at *13-14 (E.D.N.Y. 2016); Appendix B, A29-30. The victim testified that Garner had been with him for over twenty minutes, without being on the phone, before Garner slipped behind and shot him as they walked on a residential street to consummate a narcotics purchase. Tr. 486-487, 499-504.[1]

The district court found that Garner's trial counsel thus unreasonably failed to "affirmatively establish[ ], at a minimum, reasonable doubt as to Petitioner's commission of the crime" (A29-30); if counsel had presented the evidence and made the arguments, "there [was] a reasonable probability that the outcome of the trial would

[1] The trial transcript ("Tr. ") is included within Docket Entry # 12, *Garner v. Lee,* 2:11-CV-00007(PKC)(E.D.N.Y.)

have been different." A30-31.

The trial evidence

The sole witness who testified to the shooting was the victim (Karl Keith). He alone identified Garner as the shooter. No forensic evidence linked Garner to the crime, and there was no confession or admission.

The victim's cousin (Jesse Merkelson) testified too. He was a college drug dealer who provided the buy money for the intended purchase and was ultimately to receive most of the drugs. Tr. 348-349. Accompanied by a friend who had driven him from Pennsylvania, the cousin joined the victim in New York and all three proceeded to a parking lot on Long Island where the victim met with Garner. Tr. 365, 369. That was followed by a second meeting in another parking lot, where the victim met with a man who the cousin assumed, but could not say, was Garner, driving a car which the cousin could not say was the car that he had seen Garner in earlier. The victim then rode off, driven by that man. Tr. 366-367, 386. 388. The cousin remained behind at, as he understood it, Garner's insistence.

The victim testified that he and Garner kept in touch by cell phone before and between the two meetings. It was Garner who met with him at the second meeting, but driving a different car. Tr. 475-477, 479, 483-484. From there, Garner took him to purchase the drugs, insisting that the cousin remain behind.

After a drive of approximately twenty minutes, Garner parked on the street. Garner had not been on his cell phone all that time. Before they got out, Garner

instructed the victim to put the buy money in the glove compartment for safekeeping, until the victim tested the drugs and found them to be genuine, using a kit his cousin had given him. Tr. 481-482, 486-489. The victim complied and, with the money in the glove compartment, the two got out and started walking, ostensibly toward the seller's house. Then, Garner slipped behind the victim and shot him in the back of the head. Tr. 498-502. He lost consciousness briefly, then heard Garner calling him by his nickname. He played dead and did not answer, lest Garner finish him off. Tr. 505-508.

One of the first police officers to arrive at the scene (Gover) testified that the victim, though gravely wounded, was alert and gave him a coherent account. That account was largely, but not entirely, consistent with the victim's later trial testimony. He told the officer that Garner shot him. He described Garner in detail, and Garner's place of employment. He told of the planned narcotics transaction and of the buy money in the glove compartment, but entirely omitted to mention his cousin or the cousin's involvement. Tr. 309-312, 327.

As the victim waited for an ambulance, his cell phone lit up with a call; the display showed it was from Garner's cell phone. Tr. 316, 512. The victim told the officer that the man who had just shot him (in the back of the head, and left him for dead) was calling him. He told the officer *not* to answer. Tr. 512. The officer answered anyway and asked the caller where he was. The caller said "on the parkway", and hung up. Tr. 316-317, 331.

Garner testified in his own defense. He had given the victim the phone number

of a narcotics connection some days before the shooting, but had not been involved in arranging the transaction after that. Tr. 786-787. The evening before, the victim came to Garner and borrowed some money, saying there might be a transaction over the weekend. The day of the shooting, the victim called Garner and told him he wanted to speak with him, evidently in person. Tr. 788, 790. Garner met with the victim just once, not twice, in a parking lot; the victim was accompanied by his cousin and someone else. It was the victim who asked Garner to hold the buy money for safekeeping until he tested the drugs, not Garner who insisted on that. Garner would remain behind and, if the drugs tested genuine, the victim would call him to bring the money. Besides putting money in Garner's glove compartment, the victim also gave Garner $900, mainly to repay money he owed him. Tr. 793. The victim then rode off with his cousin and the cousin's friend, leaving Garner behind.

Garner denied driving the victim to the shooting or shooting him. Tr. 797-798. By then, Garner was already home, waiting to for the victim to call and tell him to bring the money. Tr. 791-795. When the victim did not call, Garner tried calling him from his cell phone, several times. Eventually an unknown male voice answered – evidently the police officer. Tr. 794-796.

Late the next day, detectives arrested Garner at his job at a car dealership and seized his car, a blue Altima. $6,300 was subsequently recovered from its glove compartment. Tr. 572-57. Garner testified he had driven the Altima the night before and had left the money where the victim had put it, expecting to bring it to the victim.

Tr. 797, 830. The victim, however, testified that he had left the money not in the blue Altima -- the first of two cars Garner had driven -- but in the second, which was red. Tr. 479, 484, 554, 572, 791.

Both cousin and victim asserted there was originally more money than was found in the Altima (even adjusting for the $900 Garner said he was given). The cousin and victim could not, however, agree whether $1,700 of the money had been a loan from cousin to victim to pay for some of the drugs, to be repaid by the victim from the proceeds of reselling them, or a commission from cousin to victim for arranging the purchase. Tr. 394, 468.

The prosecution effectively destroyed Garner's alibi by cross-examining him with the carrier's usage records for his cell phone. The records showed two calls that night from Garner's cell phone to his home land line, at 10:28 p.m. and 10:31 p.m.; both calls were made well after Garner claimed to have arrived home. Garner acknowledged making the two calls. That disproved his alibi. It would be implausible for him to call home, from home, twice. Garner could not have been home when he said he was. Tr. 817-821; A6, A23.

Further, Garner had told the officer who answered his call to the victim's cell phone that he was on the parkway. Tr. 317, 331. He made that call even later, shortly before 11:00 p.m. (Tr. 328), undeniably after the shooting. If Garner then gave his true whereabouts to a stranger answering the phone of a man who was criminally enmeshed with him, whether in a drug deal, or as the victim of an attempted/ murder robbery, or

both, then Garner was not home at that time. *Garner v. Lee*, *supra*, 908 F.3d at 848; A1.

The factual finding ancillary to finding prejudice –
that the earliest time for the shooting was 10:31 p.m.

It was essential to the district court's finding of prejudice that Garner's counsel had failed to show the jury that the shooting "could not have occurred any earlier than 10:31 p.m." (the "ancillary factual finding"). A33 fn.27. That was because it was not until 10:28 p.m. that Garner's stream of calls began (and got into full swing at 10:31 p.m.) If the shooting had occurred earlier, say at 10:26 p.m., it would have been at a point when the cell phone records did not reflect that Garner was, or just had been, on the phone. That would have been consistent with the victim's testimony, and have presented no implausibility.

The shooting was reported in two 911 calls. Both were made by nearby residents who said they heard the shot, came out of their houses and then came upon the bleeding victim. At the evidentiary hearing, Garner introduced recordings of both calls via a tape cassette which had originated with the prosecution and been given to Garner's trial counsel. It was from those calls that the district court concluded that Garner's trial counsel could have established a shooting time between 10:31 p.m. and 10:41 p.m.

Only the first of the two 911 calls had been introduced at Garner's trial and played for the jury. That was by the prosecution, also from a tape cassette containing both calls. Tr. 739-741, 759-760. Garner argued that his trial counsel had been ineffective in not introducing and playing the second call too, for it was the second call

that cemented a shooting time of no earlier than 10:31 p.m.

The two 911 calls were made minutes apart. Both were made outdoors, from near the victim, evidently from cell phones. The first caller was highly agitated. He said he had "just" come out of his house, after hearing a loud noise. He said he was afraid of getting shot himself. He was not asked and did not say how much time had passed since the shot. That he feared the shooter might still be nearby, and fire again, suggests that it was not much time at all.

The district court determined that the first call was made at approximately (and no earlier than) 10:41 p.m. It did so by relating the contents and timing of statements within the call to the time of the police notification. Trial testimony showed the notification was at 10:44 p.m. A33 fn. 27. 10:41 p.m. also matched the time noted for the call on the prosecution-produced tape cassette introduced at the evidentiary hearing. In summation, the prosecutor had told the jury that the first call was made at approximately 10:40 p.m. Tr. 883, 886.

The same tape cassette noted a 10:46 p.m. time for the second call. At oral argument following the evidentiary hearing, however, Lee's counsel told the district court that the second call was made at about 10:44 p.m.[2]

One minute and forty-five seconds into the second call, the caller was asked how much time had passed since the shot. She answered about five or ten minutes. The district court "credit[ed] that estimation." A33 fn.27. If the call was made at 10:46 p.m.,

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[2] *Garner v. Lee,* 2:11-CV-00007(PKC) (E.D.N.Y.), Docket Entry # 40, p. 41.

then the estimation was given at 10:47 p.m. or 10:48 p.m., and ten minutes before that would be 10:37 p.m. or 10:38 p.m. If the call was made at 10:44 p.m., then the estimation was given at 10:45 p.m. or 10:46 p.m., and ten minutes before that would be 10:35 p.m. or 10:36 p.m. The estimation could, thus, support a finding that 10:35 p.m. was the earliest time for the shooting. The district court, however, made a more conservative ancillary factual finding: that the shooting "could not have occurred any earlier than 10:31 p.m." A33. fn.27.[3]

The state court's rejection of Garner's collateral attack without reaching prejudice or the time of the shooting; the district court's basis for de novo review

Garner's state court collateral attack had presented the same ineffectiveness claim, based on the two 911 calls and the cell phone records. The state court rejected it without holding an evidentiary hearing, without reaching the issue of prejudice or finding a time for the crime, and without listening to the 911 calls. It determined that Garner's trial counsel's conduct in relation to the cell phone records – including failing to obtain them prior to trial as Garner averred he requested – was objectively reasonable. A41-42. The state court thus avoided reaching prejudice or considering factual issues ancillary to prejudice.

The district court found that the state court had thereby applied *Strickland* and its progeny unreasonably. A26-27. It was thus free to decide objective unreasonableness de novo, and prejudice too, since the state court had not reached that issue at all. The

[3] The amount of time that elapsed from the making of the second call to the giving of the estimation was not noted by the district court. A33 fn. 27.

record upon which the district court thereupon granted the writ included both the state court record and the habeas record (including the evidentiary hearing).

Lee appeals the grant of the writ; his brief challenges prejudice, but not the ancillary factual finding of the earliest time for the shooting; Garner's opposition brief does not defend that finding against an unmade challenge; the parties do not include the underlying 911 call recordings in the record on appeal.

On appeal, respondent Lee filed a brief which argued that Garner's claim was procedurally defaulted, that the state court had applied *Strickland* and its progeny reasonably, that the district court misapplied the applicable legal standard and/ or applied an incorrect and less stringent standard in concluding otherwise, and that the district court had erred in holding an evidentiary hearing and, on the merits de novo, in finding ineffectiveness and prejudice. A44-88.[4]

Despite challenging prejudice in broad strokes, Lee's brief did not challenge the 911 call-based ancillary factual finding that the shooting could not have occurred before 10:31 p.m. *Id.* At oral argument, Lee's counsel explicitly disavowed any such challenge. A133-135. He stated "[b]ased on the state court record that exists, I cannot challenge that." 134.[5]

Elsewhere in his argument, Lee's counsel as much as tacitly conceded prejudice.

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[4] Lee's brief on appeal below appears as Appendix E, A44-88. Lee did not submit a reply brief.

[5] Time-stamped excerpts from the oral argument appear as Appendix G, A132-135. The recording of the argument is available for download at http:/ / www.ca2.uscourts.gov/ decisions/ isysquery/ 672a7ded-7e9d-44ef-8e1a-424df2c7 9c67/ 741-750/ list/

He suggested that, at a retrial, the prosecution might not maintain that Garner possessed and used his cell phone at the scene of the crime. A132. That would represent a complete about-face from the prosecution's alibi-destroying position at the original trial, but would neutralize the exculpatory force of the ancillary factual finding and the cell phone records. If someone else had been using the phone somewhere else, it would not be implausible, or contradict the victim's testimony, for Garner to be shooting the victim at that time.

Lee's counsel thus recognized that a jury – a new one or the original one – if effectively presented with the contents of the cell phone records, and both 911 calls, and the ancillary factual finding that flowed from them – might well acquit, or have acquitted, so long as it believed – as the prosecutor told the original jury – that it was Garner who had been using the phone.

Not having challenged the ancillary factual finding, Lee did not include the underlying 911 call recordings in the record on appeal. Neither did Garner. His brief in opposition set forth the ancillary factual finding and its basis, but did not defend the finding against an unmade challenge.[6]

The 911 call recordings were nevertheless available to the Second Circuit if it wanted them. They were contained in an exhibit introduced at the evidentiary hearing. That exhibit had not been filed with the district court clerk, but, under Second Circuit Local Rule 11.2, Garner's counsel was required to, and did, maintain custody of it, to be

[6] Garner's brief below appears as Appendix F, A89-131.

available to the Second Circuit upon request.

On de novo review, the Second Circuit rejects the district court's prejudice determination through rejecting the ancillary factual finding, without having consulted the underlying 911 call recordings, without notifying the parties that the finding, though unchallenged, would be reviewed, and without according the parties an opportunity to present a position on it.

In deciding the appeal, the Second Circuit either rejected or did not reach most of Lee's arguments. It found no procedural default, and no error in conducting the evidentiary hearing. A8-10; *Garner v. Lee*, *supra*, 908 F.3d at 859-860. It did not reach objective unreasonableness, nor whether the district court had correctly found that the state court applied *Strickland* and its progeny unreasonably. It assumed, *arguendo*, that the district court had been correct on those questions. It disposed of Garner's claim on the prejudice prong of *Strickland* alone. A10; *Garner v. Lee*, *supra*, 908 F.3d at 860-861.

The Second Circuit reviewed the district court's finding of prejudice de novo. It held that *Rompilla v. Beard*, 545 U.S. 374, 390 (2005), authorized de novo review where the district court itself had determined prejudice de novo. A10; *Garner v. Lee*, *supra*, 908 F.3d at 861. It also reviewed the ancillary factual finding, even in the absence of any challenge to it. Without listening to the 911 call recordings, it rejected that finding not as clearly erroneous or implausible, but as being supported by evidence insufficiently conclusive to establish prejudice. A16-17; 908 F.3d at 869-871.

The court's opinion issued more than ten months after oral argument. At no point had the court notified the parties that it would be reviewing the unchallenged ancillary factual finding, nor accord the parties an opportunity to address that finding

in a supplemental submission.

The opinion remarked upon the absence of the 911 calls from the appellate record, but not upon the absence of any challenge to the ancillary factual finding from Lee's brief. It did, however, observe that Lee "inexplicably" had "seemed to concede" the ancillary factual finding at oral argument. A20 fn.24; 908 F.3d at 870 fn. 24. It considered, however, that the "seem[ing]" concession "cannot be taken at face value" – Lee must have meant to say only that a challenge based exclusively upon the trial record would fail, that is, a challenge based exclusively upon the first 911 call, which was part of the trial record, but not upon the second call 911 call, which was not. *Id.*[7]

The opinion did not explain why Lee might have addressed the inefficacy of a challenge based exclusively on the first call, when the ancillary factual finding clearly rested on the second call too. In any event, Lee cannot reasonably have thought that a challenge would fail if he limited it to asserting that the evidentiary support that the first call alone provided for the finding was insufficient, but might somehow succeed if he expanded it to assert that the aggregate support provided by the first and second calls together was insufficient too. The second call did not detract from the ancillary factual finding at all; it strengthened it. It was the second call that contained the estimation of the shooting time which the district court cited and relied upon. The Second Circuit elsewhere observed that the finding "hinged" on the second call alone. A16; 908 F.3d at 870.

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[7] Lee's oral argument in this regard appears at A133-135.

The Second Circuit accepted 10:41 p.m. as the latest time for the shooting but determined that the second call, standing alone, did not "conclusively" establish that 10:31 p.m. was the earliest time. Although the district court had "credit[ed]" (A33 fn.27) the caller's estimation of the shooting time (after listening to the recording of the caller giving it), the Second Circuit discredited that estimation as "off-the-cuff" without having heard it: the caller could have been off, and the shooting could have been earlier. A16; 908 F.3d at 870. Thus, the Second Circuit concluded that, in light of the strength of the trial evidence, that there was no substantial likelihood that Garner's counsel could have created reasonable doubt using that call. A17; 908 F.3d at 870-871.

The first 911 call did not enter the Second Circuit's calculus. The court did not consider that it might be improbable that both of two people who heard a shot, then separately went to investigate, and separately called 911 upon seeing a man both reported was alive but bleeding profusely, would, independently of one another, each have waited or taken as much as ten or more minutes to make their urgent calls. Nor did it consider that the first caller's agitation and fear of getting shot himself, upon just coming outside, could indicate that so little time had passed that the shooter might still be nearby and fire again.

At trial, neither the prosecutor nor Garner's counsel, in summation or otherwise, had accorded any significance whatsoever to how much time may have elapsed between the shooting and the first 911 call. The jury was given no reason to consider whether the shooting occurred ten or fewer minutes before the call, that is, within the

ten-minute period from 10:31 p.m. until 10:41 p.m., when Garner was continuously on the phone. To the contrary, both trial counsel told the jury that the shooting occurred *outside* that period. Each argued for a different time outside, the prosecutor for 10:25 p.m. or earlier, Tr. 874, and Garner's counsel for "roughly" 10:52 p.m. Tr. 845.[8]

Moreover, the jury was not made aware that Garner was continuously on the phone during the ten-minute period. Neither counsel told that to the jury, and the jury never saw the only evidence that showed it – the contents of Garner's cell phone records. Those records were in evidence, but they were never read or published to the jury. Though the prosecutor invited the jury to look at them, Tr. 845, it never did.[9]

In discounting the first 911 call as evidence that the shooting occurred within the preceding ten minutes, the Second Circuit considered that the jury had listened to it yet convicted after hearing the prosecutor say in summation that the first call was made at 10:40 p.m and that the shooting had occurred at 10:25 p.m., fifteen minutes earlier. From that, it inferred that the jury must have determined that fifteen minutes had elapsed from the shooting to the first 911 call, and rejected the first 911 call as

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[8] 10:52 p.m. was manifestly impossible. That was *after* the first 911 call. It was the time the police officer testified, repeatedly, that he arrived to find the bleeding victim sprawled in the street. Tr. 302, 304, 325, 328, 332.

[9] For an exhibit to be sent into the jury room and be available to review during deliberations required a note from the foreperson. Tr. 931, 934. There were three notes, but none requested the cell phone records. Tr. 936-37, 940, 944. All that the jury learned of their contents came from Garner's testimony on cross-examination, acknowledging the subset of the calls which the prosecutor chose to ask him about – at 10:06 p.m.,10:28 p.m., 10:31 p.m., 10:45 p.m., and 10:54 p.m. Tr. 819– 821. Those calls did not establish continuous use during the ten-minutes from 10:31 p.m. to 10:41 p.m.

evidencing that less time had elapsed. A20 fn.25; 908 F.3d at 871 fn.25.

Even if, *arguendo*, that were a fair inference, the Second Circuit did not consider that jury might have arrived at a lapsed time of fewer than ten minutes if it had also been given the second 911 call, with its estimation, and considered that in addition to the contents of the first 911 call.

The district court did "not find that the prosecution's case was so overwhelming as to negate the reasonable probability that Petitioner could have been acquitted" if Garner's counsel had effectively presented both 911 calls, the ancillary factual finding, and the arguments that flowed from them and the cell phone records. A33 fn.26. The Second Circuit disagreed. Its de novo review "weigh[ed]" several factors against what it considered to be the second 911 call's otherwise unsupported, and inconclusive, evidence for the ancillary factual finding. A17; 908 F.3d at 870-871.

One factor did not involve the trial evidence at all. It was the perceived failure of Garner's collateral attack to come up with a new or revised alibi any better than his original one. How that might bear upon prejudice at his original trial, as opposed to his prospects of success at a retrial, the opinion did not explain. A17; 908 F.3d at 871.

The other factors related to the trial evidence: the victim had, from that night onwards, repeatedly and consistently accused Garner of shooting him, with no demonstrable motive to falsify. A17; 908 F.3d at 870. But there were countervailing factors to enter the weighing too. The opinion did not remark that it might be considered illogical, in the extreme, for someone to shoot a man in the back of the head,

and leave him for dead in a residential street, but then to call his cell phone, for no discernible purpose, but at considerable risk: the police might have arrived and note the call as a contemporaneous link between caller and victim. Nor did the opinion remark that it might be seen as suspect, and telling, that the victim asked the officer not to answer.

The opinion also considered that the cousin agreed with the victim that some money was missing from the amount recovered, and that Garner had a motive to rob the victim. A17; 908 F.3d at 870-871. But it did not consider that the continued presence of the money in the glove compartment could evince intent not to steal it but to deliver it to the victim (the detective who found it was surprised it was still in the glove compartment after so much time had elapsed. Tr. 640). Nor did the court consider that it was questionable whether any money was missing at all. The two drug dealers on whose testimony that depended could not even agree whether the cousin had outright given the victim part of the money or fronted it to the victim to buy drugs.

Having thus reviewed prejudice de novo, and having found that it had not been established, the Second Circuit vacated the grant of the writ and remanded for the district court to consider those of Garner's remaining claims that it had not yet reached. A17; 908 F.3d at 871. As of the date of this petition, the district court has not yet ruled on those claims.

REASONS FOR ALLOWING THE WRIT

First Question Presented for Review

The Second Circuit read *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) as authority for de novo appellate review of prejudice de novo whenever a district court had itself determined prejudice de novo. A10; 908 F.3d at 861. In thus applying the de novo standard irrespective of whether the district court had, in deciding prejudice, engaged primarily in legal or in factual work, the Second Circuit misread *Rompilla*, split with the First and Third Circuits, and departed from the rule announced in *U.S. Bank N.A. v. Village at Lakeridge, LLC*, 583 U.S. ——, ——, 138 S.Ct. 960, 967, 200 L.Ed.2d 218 (2018).

The prejudice component of *Strickland* – like the performance component – is a mixed question of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). For a mixed question, "the standard of review [ ] all depends—on whether answering it entails primarily legal or factual work." *U.S. Bank N.A.*, *supra,* 583 U.S. at ——, 138 S.Ct. at 967, 200 L.Ed.2d at ——. Where mixed questions "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard * * * *— appellate courts should typically review a decision *de novo*." *Id.* But where

> mixed questions immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address what we have [ ] called "multifarious, fleeting, special, narrow facts that utterly resist generalization" [,] *Pierce v. Underwood,* 487 U.S. 552, 561–562, (1988) (internal quotation marks omitted) [ ] appellate courts should usually review a decision with deference.

Id.

Resolving such issues typically does

> not much clarify legal principles or provide guidance to other courts resolving other disputes. And that means the issue is not of the kind that appellate courts should take over.[footnote omitted]

Id. at 968.

The prejudice issue here was case-specific and factual, as *Strickland* prejudice issues typically are. Because it turned upon independent fact-finding, the rule of *U.S. Bank N.A.*, *supra,* would call for deferential rather than de novo review.

In other habeas contexts, district court rulings made on factual findings entered after holding an evidentiary hearing may not be set aside on factual rather than legal grounds unless the findings are clearly erroneous. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (factual finding establishing cause for procedural default); *Wade v. Mayo,* 334 U.S. 672, 683–684 (1948) (due process violation finding, predicated on a factual finding that petitioner's youth and inexperience rendered him incapable of defending himself against criminal charges pro se); *See Knowles v. Mirzayance*, 556 U.S. 111, 126 (2009).

To survive clear error review, findings need merely be plausible, even if alternative findings are more plausible, and "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson v. Bessemer City*, 470 U. S. 564, 574 (1985); *Cooper v. Harris,* __ U.S. ___, 137 S.Ct. 1455, 1465, 1468 (2017); Fed. R. Civ. P. 52(a)(6).

The Second Circuit did not review the ancillary factual finding here for clear

error. It did not state that it was clearly erroneous, nor implausible. It could not credibly have done so without first having consulted the 911 call recordings upon it was based. Instead, it reviewed the ancillary finding as part and parcel of its overall prejudice review – de novo. Whereas the district court had credited the second 911 caller's estimation of how much time had passed since the shooting, the Second Circuit discredited it. It disagreed that the shooting time was established sufficiently conclusively to support prejudice. A16; 908 F.3d at 870.

Rompilla, *supra*, did not authorize that. There, unlike here, the district court had not held an evidentiary hearing or engaged in independent fact-finding; it was the state court that had done so. After determining that the state court had applied *Strickland* unreasonably, the district court ruled on the performance prong of *Strickland* de novo, but did so on the state court record alone, without engaging in new or independent fact-finding. *Rompilla v. Horn*, 355 F.3d 233, 238 (3rd Cir. 2004), *rev'd*, 545 U.S. 374 (2005).

When the Third Circuit reversed, it explained that its review was de novo ("plenary") "[b]ecause the district court did not conduct an evidentiary hearing". *Rompilla v. Horn*, *supra*, 355 F.3d at 239. This Court in turn reviewed the Third Circuit de novo, agreed with the district court, and reversed again.

The critical distinction between *Rompilla* and this case is that here the district court held an evidentiary hearing and engaged in fact-finding independent of the state court record. In *Rompilla*, the facts had all been found by the state court, before the district court ever got the case and, moreover, were entitled, under 28 U.S.C. §

2254(e)(1), to an (unrebutted) presumption of correctness. *Strickland*, *supra*, 466 U.S. at 698; *see Rompilla v. Horn*, *supra*, 355 F.3d at 240. Answering the mixed questions of law and fact there was legal work – applying law to established facts – not factual work. Appellate courts are better suited to such work than trial courts, and when district courts do such work, appellate courts review it de novo. *See U.S. Bank N.A.*, *supra.* *Rompilla* is entirely consistent with *U.S. Bank N.A.*, *supra,* as well as *Amadeo v. Zant* and *Wade v. Mayo*, *supra.*

Here, the determination of prejudice turned on the factual component of the district court's work, not its legal component. The differing answers given by the district court and the Second Circuit to the prejudice question here reflected disagreement on what facts were established by evidence at the evidentiary hearing, not on how law applied to facts. Under the rule of *U.S. Bank N.A.*, *supra,* the Second Circuit should have reviewed for clear error.

The Second Circuit erred in relying on *Rompilla*, *supra.* That decision provides no authority whatsoever for de novo review of a district court's answer to a prejudice mixed question where it was arrived at through and dependent upon independent fact-finding after an evidentiary hearing.

In decisions rendered prior to *U.S. Bank N.A.*, *supra,* the First Circuit reviewed *Strickland* mixed question determinations under either the clear error or the de novo standard "'depend[ing] ... on the extent to which a particular question is fact-dominated or law-dominated.' *Pike* [*v. Guarino*], 492 F.3d [61,] 68 [1st Cir. 2007]". *Dugas v. Coplan*,

506 F.3d 1, 8 (1st Cir. 2007)(reviewing for clear error a "fact-dominated" prejudice determination made after an evidentiary hearing). The First Circuit thus anticipated the rule of *U.S. Bank N.A.*, *supra.*

The Third Circuit, in a decision antedating *U.S. Bank N.A.*, *supra*, distinguished an "independent judgment" standard from the de novo and clear error standards. *United States v. Washington*, 869 F.3d 193, 204 (3rd Cir. 2017):

> On appeal of the District Court's decision, we exercise plenary review over the legal components of ineffectiveness, assess any underlying findings of fact for clear error, and "exercise independent judgment on whether those facts, as found by the District Court, show that counsel rendered ineffective assistance." [citation omitted]

It is unclear whether in practice the "independent judgment" standard devolves into first determining whether a mixed question is fact-dominated or law-dominated and then, consistently with *U.S. Bank N.A.*, *supra,* reviewing it under either the clear error or the de novo standard.

Formerly, and before *U.S. Bank N.A.*, *supra* was decided, the Second Circuit reviewed *Strickland* mixed questions consistently with that decision. *Cornell v. Kirkpatrick*, 665 F.3d 369, 380 (2nd Cir. 2011); *Davis v. Greiner*, 428 F.3d 81, 91 (2nd Cir. 2005). The opinion below, however, did not mention *Cornell* or *Davis*, *supra*, nor its departure from them or from the general rule for mixed questions that had since been announced in *U.S. Bank N.A.*, *supra,* nor its split with the First and Third Circuits.

Other circuits, in decisions antedating *U.S. Bank N.A.*, *supra,* have, in addressing *Strickland* mixed questions, invoked the de novo standard as being applicable to mixed

questions generally, reserving clear error review to only the facts themselves. *E.g.*, *Winston v. Pearson*, 683 F.3d 489, 503-506 (4th Cir. 2012); *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004); *Mosley v. Butler*, 762 F.3d 579, 587-588 (7th Cir. 2014); *Garmon v. Lockhart*, 938 F.2d 120, 121-122 (8th Cir. 1991); *Littlejohn v. Royal*, 875 F.3d 548, 558 (10th Cir. 2017)[10]; *Chandler v. U.S.*, 218 F.3d 1305, 1312 (2000)(en banc), 1327 (concurring opinion) ;*Wright v. Hopper*, 169 F.3d 695, 701 (11th Cir. 1999).

This Court should, accordingly, allow the writ on the first question presented, to correct the Second Circuit's erroneous reading of *Rompilla*, *supra*, to resolve the circuit split, and to clarify that the rule of *U.S. Bank N.A.*, *supra,* for mixed questions generally applies to *Strickland* mixed questions in particular.

Second Question Presented for Review

In *Day v. McDonough,* 547 U.S. 198 (2006), this Court held that the timeliness of a habeas petition may be reviewed sua sponte where, due to an inadvertent time miscalculation, no statute of limitations defense had been interposed. This Court observed, further, that "[o]f course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions. [citation omitted]." *Id.,* 547 U.S. at 210.

Subsequently, in *Wood v. Milyard*, 566 U.S. 463 (2012), this Court held that where a failure to assert a statute of limitations defense resulted not from inadvertence but a

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[10] While stating that *Strickland* mixed questions were reviewed de novo, *Littlejohn* also stated that some mixed questions involving "primarily a factual inquiry" are reviewed for clear error. 875 F.3d at 558 fn.3.

knowing and intelligent decision – a waiver – a court of appeals abuses its discretion if it reviews the petition's timeliness sua sponte. It was of no moment that the parties had been accorded notice and an opportunity to brief the issue.

Here, the facts establish waiver. Lee knew of the ancillary factual finding and, as reflected both in his brief and oral argument, made a knowing decision not to challenge it on appeal. *Wood v. Milyard*, *supra*, 566 U.S. at 474; *United States v. Olano,* 507 U.S. 725, 733(1993); *See Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163, 167 (1934)(claim of error not pressed on appeal "must be treated as abandoned").

The present context differs some from that in *Wood, supra.* The unchallenged ancillary factual finding, unlike a waived statute of limitations defense, continued within the case, as an underpinning of the prejudice determination the appellant was challenging in other respects. Whether or not that may warrant relaxing the rule that waiver per se bars sua sponte review, simple fairness and the adversarial process required notice to the parties and according them an opportunity to present a position once the court itself had placed the finding in issue.

A reasonable observer might conclude that the Second Circuit, in failing to consult the available 911 call recordings, deliberately closed its eyes to their tenor and full content, and, further, preferred that the appeal be decided upon a factual challenge of its own that no party had made, no party had briefed, and no party had completed the record for.

This Court should, accordingly, allow the writ on the second question presented,

to clarify that *Day* and *Milyard* extend beyond unasserted untimeliness defenses to waived factual challenges, and, in doing so, to preserve the appearance of justice.

CONCLUSION

For all the foregoing reasons, this Court should grant the petition and issue a writ of certiorari to the United States Court of Appeals for the Second Circuit on both questions presented for review.

Dated: New York, New York
March 5, 2019

Respectfully submitted,

/ S/

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908 F.3d 845
United States Court of Appeals, Second Circuit.

Blair GARNER, Petitioner–Appellee,
v.
William LEE, as Superintendent of Greenhaven Correctional Facility, Respondent–Appellant.
No. 17-78-pr
|
August Term 2017

|
Argued: January 3, 2018
|
Decided: November 15, 2018

Synopsis
Background: After prisoner's convictions for attempted murder, assault, and robbery were affirmed on appeal, 27 A.D.3d 764, he petitioned for writ of habeas corpus. The United States District Court for the Eastern District of New York, Chen, J., 2016 WL 7223335, granted petition. Superintendent of prison appealed.

Holdings: The Court of Appeals, Debra Ann Livingston, Circuit Judge, held that:

prisoner's ineffective assistance claim was not procedurally defaulted, but

defense counsel's failure to obtain prisoner's phone records before trial did not prejudice him.

Vacated and remanded.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

*848 Appeals from the judgment of the United States District Court for the Eastern District of New York (Chen, J.)

Attorneys and Law Firms

For Petitioner-Appellee: Norman Trabulus, Law Office of Norman Trabulus, New York, New York

For Respondent-Appellant: Michael J. Miller, pro bono publico, for Timothy D. Sini, District Attorney of Suffolk County, Riverhead, New York
Before: Raggi, Livingston, and Lohier, Circuit Judges.

Opinion

Debra Ann Livingston, Circuit Judge:

One night in April 2002, Karl Keith ("Keith"), a 20-year-old student at Westchester Community College who lived with his parents, and Jesse Merkelson ("Merkelson"), his cousin and a 23-year-old college student at Carnegie Mellon University, met in a parking lot with Petitioner-Appellee Blair Garner ("Garner") for the purpose of purchasing ecstasy and cocaine. Within a few hours, Keith had been robbed of thousands of dollars, shot in the head, and left to die in a pool of his own blood in the middle of an unlit, deserted street in North Amityville, New York. Keith thought that he would bleed to death but, remarkably, he survived. Thinking that he was going to die, he told the first responding police officer what he could: namely, he had been shot by Garner, a supposed friend whose wedding he had attended. In a stroke of luck, while the police officer was trying to learn as much as he could about Garner, Garner called Keith and told the police officer (who answered Keith's phone) that he was "on the parkway[,]" Trial Tr. 317, 331, a damning contemporaneous statement that obliterated Garner's alibi (both at trial and still today) that he was at home at the time of the shooting.

At Garner's workplace the next day, a supervising police officer clandestinely observed him on the phone "speaking in urgent tones" and "pleading to the party on the other end." *Id.* at 655. Garner's behavior suggested to the supervising officer that Garner "was about to leave [the] building" and that he was "about to leave the Long Island area." *Id.* Three police officers promptly arrested Garner, recovering (1) thousands of dollars of cash from his car that Garner does not dispute had been placed there temporarily by Keith not long before he was shot, and (2) a portfolio full of collection notices for unpaid bills.

*849 At trial, Keith's account of the night in question was substantially corroborated by the physical evidence and by the testimony of many other witnesses—including Merkelson, who had been with Keith for many of the key events, and several police officers. In contrast, Garner took the stand in his own defense, claiming incredibly, and without corroboration, to have been home during the relevant period.

Unsurprisingly, given the prosecution's strong evidence, the

jury found Garner guilty of all five counts, including attempted murder, assault, and robbery, after deliberating for only two or three hours. The trial court imposed the maximum sentence and twice described the evidence of Garner's guilt as "overwhelming." Nov. 21, 2002 Sentencing Tr. at 18; Oct. 12, 2006 Resentencing Tr. at 18. Garner variously filed a direct appeal, petition for a writ of error *coram nobis*, and collateral attack in state court. All failed. In Garner's state collateral attack, he alleged that his trial counsel—who, like Keith, attended Garner's wedding and who had also represented him successfully during a 1997 double murder trial—was constitutionally ineffective. This claim was denied without a hearing. Garner next filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. The district court (Chen, *J.*) granted Garner's petition, determining that trial counsel's conduct with respect to certain phone records—including counsel's failure to obtain the records before trial and to object to their admission at trial—constituted prejudicially deficient performance.

We vacate the district court's judgment and remand for further proceedings consistent with this opinion. To establish an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the likelihood of a different result in the absence of the alleged deficiencies in representation "must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011); *see also Strickland*, 466 U.S. at 693, 104 S.Ct. 2052 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding."). Having carefully reviewed the state court and district court proceedings, we conclude that, given the strong evidence of Garner's guilt, he has not shown that his defense was constitutionally prejudiced by trial counsel's conduct even assuming, *arguendo*, that it was deficient. The district court accordingly erred in granting Garner's petition.

BACKGROUND

I. Factual Background[1]

Garner's jury trial commenced on October 18, 2002. He stood trial for five counts: (1) attempted murder in the second degree (Count One); (2) assault in the first degree (Count Two); (3) robbery in the first degree (Count Three); (4) criminal use of a firearm in the first degree (Count Four); and (5) criminal possession of a weapon in the second degree (Count Five).

A. The Prosecution's Case

During the prosecution's case in chief, Keith testified that he met Garner through a mutual friend, Michael Waring ("Waring"), Keith's former high school classmate, who worked at the Hempstead car dealership where Garner also worked at the time. As of April 13, 2002, the day of the crime, Keith had known Garner, who he sometimes called "Blizzie" or "Bliz," for about a year and a half. Before the crime, Keith thought that he knew Garner well, *850 having been in contact with him on essentially a daily basis, attended Garner's wedding, and helped Garner paint his fence.

During April 2002, Keith asked Garner if he could help Keith obtain 2,000 pills of ecstasy for his cousin, Merkelson, and two ounces of cocaine for himself. Neither Keith nor Merkelson had ever participated in a large drug purchase of this sort before, nor had either ever been convicted of a crime. But Keith and his cousin had a plan to sell these drugs for a profit. After some back and forth, it was agreed that Merkelson would pay $8,000 for the ecstasy and also front $1,700 to his cousin for the cocaine, with Keith, whose life was "hectic" during this period, Trial Tr. 466, promising to pay back the $1,700 once Keith had sold the cocaine at Carnegie Mellon, Merkelson's school. Garner agreed to arrange for the purchase. As of the day before the crime, Keith's understanding was that he and Merkelson were supposed to go with Garner to buy the drugs, but Keith had no idea where or from whom.

On April 13, 2002, the day of the crime, Garner told Keith that he was coming straight from work and asked Keith if he had the money; Keith replied in the affirmative. Keith testified that the money he brought with him to purchase the drugs was divided into thousand-dollar segments, with each thousand dollar segment separately rubber-banded, the $1,700 for the cocaine separately rubber-banded, and a few rubber bands around the whole $9,700. This testimony was corroborated by Merkelson, who testified at trial that he counted the bills in preparation for the purchase, "rubber-band[ed] it up, and then ... double-check[ed] ... to make sure that all the bunches were correct." *Id.* at 351.

Appendix A

Merkelson used beige, red, and blue rubber bands.

Garner instructed Keith that he should meet him at a McDonald's parking lot in Long Island. Keith estimated that he and Merkelson met Garner there at around 9:15 p.m.[2] Garner was driving a blue-green car. Initially, Keith alone entered Garner's car and spoke to Garner. Then, Merkelson, who had never met Garner, came over and was introduced. Merkelson testified at trial that Garner "appeared somewhat older than us, than like me and my cousin, and that kind of gave me a little bit of a start. ... because what was this older guy doing hanging out with my cousin?" *Id.* at 363. Garner, who was wearing glasses, "seemed very cold and he didn't ... talk much at all." *Id.* Garner had told Keith as Merkelson approached that it would be better if just Keith (and not Merkelson) was present when they went to buy the drugs. Garner said that he had to go home and change out of his business suit, and directed Keith to meet at a second parking lot, near a Home Depot on Long Island. When advised of the change in plans, Merkelson told Keith that he "didn't think [the change] was such a good idea." *Id.* at 481. Keith reassured Merkelson that he had known Garner "for a long time," and that he "d[id]n't think [Garner would] do anything." *Id.*

Keith and Merkelson proceeded to the second parking lot near the Home Depot. Keith had the money that Merkelson had provided. They arrived before Garner. Keith, who testified that he often spoke to Garner using the walkie-talkie function on his Nextel phone, spoke to him repeatedly that evening while waiting in the parking lot. Instead of driving to where Keith was parked, however, Garner called Keith and told him to find Garner's car near the Home Depot entrance. Keith left his cousin *851 behind and found Garner, who was now driving a dark red car (a different car than the car that Garner was driving in the first parking lot near the McDonald's).[3] For his part, Merkelson did not see or converse with Garner in the second parking lot, but he testified that Keith was in "pretty much constant contact" with Garner through the walkie-talkie function on Keith's Nextel phone, and there was "no question in [Merkelson's] mind" that Keith would be meeting Garner in the second parking lot. *Id.* at 398. At the conclusion of these walkie-talkie exchanges, Keith left to join Garner, and Merkelson observed Keith get into a car with a solo driver and depart.

Keith testified that he entered the passenger side of Garner's car at about 10:00 p.m. and that Garner then drove to North Amityville. During the drive, Keith could not recall Garner making or receiving any phone calls. Keith testified that he was nervous because he had never before carried so much money or been involved in a large drug buy. But Garner reassured him, telling Keith that he knew the sellers "pretty well" and, regardless, that Garner "would protect" him because he knew him better than the sellers. *Id.* at 488. While on the road, Keith remembered discussing a third party that Keith had met through Garner; Garner told Keith that he had asked this third party "to kill a kid for money." *Id.* at 487. Keith observed that there were no people on the street and no cars passing.

They arrived at the North Amityville destination about 20 minutes later. Keith had never been to this location before. Upon arrival, Garner told Keith to put the money in the glove box. Keith complied, putting all $9,700 in the otherwise empty glove box. Keith understood that they were supposed to go to an unspecified house and, if the drugs were satisfactory, then retrieve the money from the parked car's glove box.

Keith and Garner exited the car; Garner walked toward and slightly past the back of the car along the driver's side, and Keith walked—parallel to Garner but along the passenger side—also toward and slightly past the back of the car. Garner was in Keith's peripheral vision. They were not speaking to each other. As Keith took a step closer to Garner as he passed the car's rear, Garner momentarily "dropped out of [Keith's] sight" which "was weird because he was supposed to be leading the way." *Id.* at 502. Keith paused, sensing that Garner had dropped a step or two behind him. Suddenly, Keith was shot behind his right ear by the center of his neck. During this entire period before the crime, Keith neither saw nor heard anyone besides Garner in his vicinity. The prosecution estimated that the shooting occurred at or before 10:25 p.m.

Keith later woke up on the ground, not knowing how long he had been unconscious. When he came to, Keith realized that he had been shot and "couldn't move at all." *Id.* at 506. Lying on the ground, Keith heard Garner call in a loud whisper "Yo, Dread, Yo, Dread"—"Dread" being Garner's nickname for Keith. *Id.* at 508. Garner was not asking if Keith was okay or if he needed help. Keith played dead; he closed his eyes, held his breath, did not move at all, and prayed. He played dead because he "thought [Garner] would come back and finish [him] off if [Garner] knew [he] was alive." *Id.* It worked; Garner left.

Keith recalled that "[n]othing right away" happened after Garner left. *Id.* Though he tried, he could not move his arms, so he was unable to call 911. Keith's *852 cell phone rang

multiple times but, again, he was unable to move his arms to grab his phone, much less answer any of the calls.[4] Keith later heard people talking about calling 911 and he asked them to "[g]et an ambulance." *Id.* at 509.

Two different individuals later placed two separate 911 calls, with the earlier of the two calls (played for the jury) occurring at approximately 10:40 p.m. Officer Brian Gover ("Officer Gover"), with the Suffolk County Police Department, received a call at about 10:44 p.m. to respond to the scene. He testified that he arrived around 10:52 p.m. Officer Gover explained that the street where Keith was shot was a fenced, densely-wooded area, with "all sorts of thickets and sticks and branches as well as bushes," *id.* at 321, located in a "fairly quiet residential community" in North Amityville, *id.* at 301. The officer testified that the specific area where Keith was shot is "completely dark," there is "no direct lighting." *Id.* at 320. When he arrived, Officer Gover saw Keith lying in the roadway about five feet from the curb. There were a small number of civilians in the general area but not directly near Keith's body.

Officer Gover explained that he wanted to assess Keith's level of consciousness, so he asked Keith basic questions such as his name and date of birth, which Keith answered without any difficulty. Officer Gover described Keith as "very somber" and "a little nervous"; he noted that Keith's voice "quivered a little." *Id.* at 308. Keith asked several times "if he was gonna make it" and "if somebody could notify his parents." *Id.* Officer Gover noted that he memorialized Keith's comments because, based on his experience, "the amount of blood loss, and the fact that the victim could not move his body in any way, from listening to his voice, just his whole demeanor, I was very worried, I really thought he was gonna die on me." *Id.* at 313.

Keith testified that he "immediately" told the police "[e]verything [he] could," *id.* at 509, because he "thought [he] was gonna die. [He] wanted to make sure that the person who shot [him] got caught[,]" *id.* at 511. Officer Gover testified that Keith did not hesitate in any way when describing what had happened, and that he was "very alert, very attentive," *id.* at 326, and "very coherent," *id*. at 327. Among other things, Keith told Officer Gover: that he met Garner through his friend, Waring, about two years ago; that Keith had come to North Amityville with Garner who was "gonna hook him up with someone to buy drugs," *id.* at 311; that he had just been shot by Garner, who had the nickname "Blizzie"; that Keith had left the money for the deal in the glove box of the car Garner was driving, at Garner's instruction; that Garner was over six feet tall and weighed roughly 210 to 220 pounds; that he had several tattoos including a flower on his neck, his name on his arm, his wife's name on his calf, and a heart on his wrist; and that he then worked at a Five Towns car dealership.

According to both Keith and Officer Gover, Keith's cell phone rang about this time. Officer Gover estimated that Keith's cell phone went off between five and 10 minutes after Officer Gover's 10:52 p.m. arrival. Officer Gover grabbed Keith's ringing phone and showed Keith the caller ID display, which indicated that "Blizzie" was calling. Keith confirmed that Blizzie, his nickname for Garner, was "the person that just shot me." *Id.* at 512. Officer Gover answered the phone, but did not *853 identify himself as a police officer. Officer Gover asked who the caller was, but Garner did not identify himself. When he asked where the caller was, however, Garner responded "I'm on the parkway" and then hung up.[5] *Id.* at 317, 331. Officer Gover then told a police dispatcher to alert officers within the county and in adjacent counties that Garner, an attempted murder suspect, was on the parkway in a red car.

Detective Patrick Walsh ("Detective Walsh"), the lead detective investigating Keith's shooting, arrived at the scene at about 11:09 p.m., after an ambulance had arrived. He accompanied Keith during the drive to the hospital. Keith testified that he relayed the same information to Detective Walsh that he had communicated to Officer Gover, and Detective Walsh corroborated that Keith told him that Garner had committed the shooting. Detective Walsh testified that Keith "was extremely pale, but he was conscious and alert." *Id.* at 541. He was also forthcoming. Keith told him, among other information: his name; that Garner shot him for drug money; that he had known Garner for almost two years; that Garner lived in south Freeport; and that Garner had driven him to the site of the shooting in Garner's car. Keith arrived and was treated at Brunswick Hospital before being airlifted and treated at Stony Brook University Hospital ("Stony Brook"), where he was put into a coma to stop bleeding and swelling in his brain.[6]

Detective Walsh and his partner, Detective Faughnan, obtained a photograph, phone number, and home address for Garner. By around 1:40 a.m., they had arrived at Garner's home, where they observed a red car in the driveway. For safety reasons, the detectives did not approach Garner's home that night. Instead, leaving officers behind to keep an eye on the situation, Detectives Walsh and Faughnan met with their supervisor, Detective-Sergeant Kenneth Williams ("Detective-Sergeant Williams"), early on the morning of April 14 to strategize Garner's arrest. They eventually

converged on the Five Towns car dealership where Garner worked.

Detective-Sergeant Williams went alone into the dealership. He recognized Garner, who was talking on a desk telephone. Rather than introduce himself, Detective-Sergeant Williams instead "moved as close as [he] could to [Garner], appearing to be a customer just car shopping, and got close enough to hear what he was saying." *Id.* at 654. Detective-Sergeant Williams testified that Garner "was speaking in urgent tones" and "seemed to be pleading to the party on the other end." *Id.* at 655. Detective-Sergeant Williams added that Garner's statements during that call, "along with his demeanor," made it "apparent" to Detective-Sergeant Williams that Garner "was about to leave [the] building" and "was about to leave the Long Island area" as well. *Id.* Detective-Sergeant Williams *854 rushed back outside to gather Detectives Walsh and Faughnan and told them that they "had to get back inside and arrest [Garner] as soon as possible. ... [Garner's] getting out of here." *Id.*

At approximately 4:40 p.m. (between 18 and 19 hours after Keith's shooting), Detective Walsh, Detective Faughnan, and Detective-Sergeant Williams entered the Five Towns car dealership and arrested Garner. Detective Walsh affirmed that Garner "never expressed any interest in why he was being arrested" and "never asked ... who he was accused of shooting." *Id.* at 638. During a pat down as Garner was being placed in the back seat of a police car, a key for the car that Garner drove to work that day—a blue-green car with a dealer license plate—was recovered from his person. The car was seized as evidence and impounded.

After executing a search warrant on Garner's blue-green car, Detectives Walsh and Faughnan recovered from the glove box (and photographed) a large sum of money wrapped in red, blue, and beige rubber bands: $6,300.[7] Detective Walsh admitted that he "didn't expect to find any money wrapped in rubber bands in the glove box of that blue [car]," and that so finding was "a bonus." *Id.* at 640. Additionally, at the time of his arrest, Garner had $1,140 in cash not wrapped in rubber bands on his person, which was invoiced as evidence at the precinct. The police officers deemed these funds to be "proceeds from the robbery." *Id.* at 704. When Garner was arrested, the detectives further found a black leather folding portfolio with a zipper around it—and a strap, similar to a handbag—on Garner's person. The portfolio contained personal papers, revealing, as Detective Faughnan testified, "[a] lot of creditors looking for monies" or "[c]ollection type notices." *Id.* at 705.

While at the precinct, Garner called his wife and, 15 minutes later, received a call from an attorney who had represented him successfully in the past and would represent Garner at trial. At the precinct, Detective Walsh asked basic pedigree questions, and observed that Garner wore eyeglasses and had several tattoos, which corroborated Keith's description.

B. The Defense Case

The defense case at trial consisted solely of Garner's testimony. Garner concurred in much of the prosecution's case, admitting that he met Keith through Waring, a mutual friend, that they hung out together, and that Keith had attended his wedding. He agreed that in April 2002, Keith asked him if he could help Keith find some ecstasy, cocaine, and "maybe" some marijuana. *Id.* at 786. But Garner contended that he gave Keith the number of someone who could help "and that was it." *Id.* at 787.

As to the drug dealer's identity, the entirety of Garner's testimony on direct examination was the following:

> Well, it's a guy that comes to the dealership on weekends, and when we get paid of course he knows we have money. He sells CDs, tapes and whatever. Red. I approached him about it and he told me he knew somebody. He gave me a number, a Nextel number, and I told him I'd pass it along.

Id. Garner added on cross-examination that "Red" was "a jack of all trades," *855 *id.* at 807, and also sold belts and "things like that," *id.* at 805. Garner did not know of any other names "Red" used and could not remember if "Red" ever gave him a business card. Garner had never set up a drug deal with Red before and did not have his phone number.

Garner agreed with the Government that on April 13, 2002, the day of the shooting, at around 9 p.m., he met Keith at a McDonald's parking lot in Long Island. Garner was driving a blue car, the same car that was later photographed and searched by the police. Garner knew where to meet Keith because of their walkie-talkie communications and he confirmed that he possessed his cell phone the whole evening and had not given it to anyone else to use.

Garner claimed that Keith asked Garner if he would accompany Keith to the drug buy, which was to take place "somewhere around Freeport." Trial Tr. 793. Garner was equivocal, whereupon Keith proposed that Keith and his cousin Merkelson would meet the drug dealer, test the drugs, and that "[i]f everything's fine, then I want to call you and you bring the money and we'll do everything then." *Id.* Garner agreed. Keith put the money for the drugs in Garner's glove box. Included in the stack of money in the glove box, Garner claimed, was about $900 that Keith had given him to pay off about $800 that Keith owed Garner.[8]

Garner estimated that he was in the McDonald's parking lot for only 10 or 15 minutes, and then went directly home, where he parked his car on the street, with the untouched money remaining in the glove box overnight. He estimated that the drive home took about 15 minutes, and he was home by 9:45 or 10 p.m. Garner was adamant that he did not leave his house after 9:45 p.m. that night. His wife and kids were not home (they were at a child's birthday party), so Garner merely waited for them, changed clothes and relaxed "probably playing video games or watching TV or whatever ...." *Id.* at 794. Then, at about 10:30 or 10:45 p.m., Garner's wife came home, and he played and talked with her and the kids.[9] Garner told his wife that he might go out to see Keith, but he was "not sure" if he would and said "let me check." *Id.*

On cross-examination, the prosecution introduced—after Garner's counsel reviewed them and raised no objection—Garner's cell phone records for the night of the shooting. They showed that Garner made no phone calls between 10:06 and 10:28 p.m., but suddenly made a flurry of phone calls starting at 10:28 p.m. The records also showed that two of Garner's phone calls that evening—at 10:28 p.m. and 10:31 p.m., respectively—were to his own home. Both before and after seeing the phone records, Garner separately testified on direct, cross, and redirect examination that he came home between 9:45 and 10 p.m. and never left his house.

Garner claimed that after his wife came home, Garner called Keith using the walkie-talkie function on his phone but got no response. He later tried again. A voice that Garner did not recognize answered the phone, and so his understanding was that "it wasn't [Keith] answering." *Id.* at 795. The voice said "Who's this?" *Id.* Garner responded "Who's this?" *Id.* Garner testified that he "didn't say anything else," and, after that conversation, he "d[id]n't try to call back." *Id.* Garner testified that *856 he never met Keith in a second parking lot, never drove to North Amityville, and did not shoot Keith.

The next day, Garner drove the blue car to work. He left the money as it was, "locked in the glove box." *Id.* at 797. He was arrested later that day at work. Garner acknowledged that he had a Toyota Camry key on his person when he was arrested, that his wife had a burgundy Toyota Camry, and that he had "access to many cars at [the] dealership," Trial Tr. 826. On cross-examination, Garner was shown a "final notice[ ]" for a credit card bill for $4,114.97, dated just seven days prior to the robbery, with Garner's name on it. *Id.* at 827–28. Garner said that it was for jewelry he had purchased in 2001.

Garner also admitted on cross-examination that he was convicted of (1) a felony in 1997, and (2) criminal impersonation in 1995 for lying to the police when he pretended to be his cousin, Shawn Garner. On redirect, Garner disclosed that the felony conviction was for possessing a blackjack, "a piece of leather, wrapped leather, about six inches long with a strap." *Id.* at 830.

C. Verdict and Sentencing

On October 24, 2002, after deliberating for about two or three hours, the jury returned a verdict of guilty on all five counts. The state court judge who presided over Garner's trial thereafter sentenced him to the statutory maximum of 25 years' imprisonment, followed by five years of post-release supervision. In imposing the maximum sentence, the state court remarked:

The testimony at your trial was overwhelming. You shot Mr. Keith with the intent to kill him and you were motivated by greed; namely, a sum of money less than $10,000.

Incredibly, you were on parole at the time of this shooting.

....

Your crimes here were deliberate, planned and callous. The maximum sentence is the only appropriate sentence.

Nov. 21, 2002 Sentencing Tr. at 18.[10]

II. Cost-Trial Proceedings

A. State Court Direct Appeal and Petition for a Writ of Error *Coram Nobis*

On August 26, 2005, Garner—represented by new appellate counsel, the Legal Aid Society—appealed his conviction to the Appellate Division, Second Department. Garner mounted five arguments in his briefing, including a challenge to the sufficiency of the evidence, but did not raise the issue of whether his trial counsel was ineffective. The Appellate Division, Second Department unanimously affirmed Garner's conviction. *See* People v. Garner, 27 A.D.3d 764, 815 N.Y.S.2d 614 (2d Dep't 2006). On July 7, 2006, the New York Court of Appeals denied Garner's application for leave to appeal. *See* People v. Garner, 7 N.Y.3d 789, 821 N.Y.S.2d 819, 854 N.E.2d 1283 (2006).

Garner then petitioned the Appellate Division, Second Department for a writ of error *coram nobis*, claiming that he was denied the effective assistance of *appellate* (but not trial) counsel. *See* People v. Garner, 70 A.D.3d 854, 892 N.Y.S.2d 908 (2d Dep't 2010). On February 9, 2010, the Appellate Division, Second Department denied Garner's petition, determining that he failed to establish ineffective assistance of appellate counsel. *See id.*

*857 B. State Court Collateral Attack

On April 21, 2010, Garner—represented again by new appellate counsel, who remains his current counsel—moved to vacate his conviction under New York Criminal Procedure Law § 440.10(1)(h) (the "440.10 motion").[11] In his 440.10 motion, Garner contended that he was denied the right to meaningful representation by trial counsel and to effective assistance of trial counsel under both the New York State Constitution and the Sixth Amendment to the United States Constitution.

Garner offered seven independent reasons for why trial counsel's performance was constitutionally ineffective: (1) trial counsel conceded improperly in his jury addresses that Keith did not believe that he was lying; (2) trial counsel unreasonably abandoned a hearsay objection; (3) trial counsel failed to make or renew a motion to inspect and dismiss the indictment, which relied impermissibly on hearsay statements; (4) trial counsel made a prejudicial factual misstatement during his opening statement; (5) trial counsel failed to impeach two prosecution witnesses with prior inconsistent statements; (6) trial counsel failed to object to certain testimony concerning Keith's gunshot wound; and (7) trial counsel failed to obtain Garner's cell phone records before trial, did not object to the records' admission at trial, and also failed to use the records affirmatively to support Garner's case.

On October 4, 2010, the County Court of the State of New York for the County of Suffolk (Efman, *J.*) (the "County Court") denied Garner's 440.10 motion without a hearing. Citing to New York Criminal Procedure Law § 440.10(2)(c) and *People v. Cooks*, 67 N.Y.2d 100, 500 N.Y.S.2d 503, 491 N.E.2d 676 (1986), the County Court began by noting that a 440.10 motion cannot be used to "collaterally challenge an issue which could have been addressed on direct appeal" and that Garner's ineffective of counsel arguments were, "for the most part, issues that could be resolved by examining the record and, therefore, should have been determined on direct appeal."[12] App. 261-62. Regardless, the County Court proceeded to analyze each of Garner's claims on the merits and concluded that "a review of the record shows that defendant received effective representation" and "objectively meaningful representation" under both federal and state law. *Id.*; *id.* at 267. As a result, the County Court did not assess whether Garner's trial counsel's alleged errors were in fact prejudicial. Two-and-a-half months

later, on December 23, *858 2010, the Appellate Division, Second Department denied Garner's application for leave to appeal the County Court's denial of Garner's 440.10 motion.

C. Federal Habeas Petition

On January 3, 2011, Garner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York (Feuerstein, *J.*) under 28 U.S.C. § 2254, (1) raising, as in his 440.10 motion, the same seven independent reasons for why trial counsel's performance was constitutionally ineffective, and (2) alleging that his constitutional due process and fair trial rights were violated when the trial court denied his mid-trial mistrial motion following the trial court's colloquy with certain jurors about their potential exposure to an article in *Newsday* discussing the trial.[13]

Over two years after Garner's petition was filed, on April 25, 2013, the case was transferred to a different district court judge (Chen, *J.*) (the "district court"). The district court held an evidentiary hearing on Garner's petition on February 24, 2016, and also heard oral argument on December 7, 2015 and February 24, 2016. On December 13, 2016, the district court determined that Garner's petition was not procedurally barred and granted Garner's petition on the merits. *See* Garner v. Lee, No. 2:11-cv-00007 (PKC), 2016 WL 7223335 (E.D.N.Y. Dec. 13, 2016).

The district court did not examine Garner's due process and fair trial argument nor address six of his seven bases for supposed ineffective assistance of counsel. Instead, the district court concluded that trial counsel's conduct with respect to the phone records constituted prejudicially deficient performance and granted the habeas petition on this sole ground. In particular, the district court concluded that phone records introduced by the prosecution during Garner's cross examination, which showed calls from his cell phone to his house at 10:28 p.m. and 10:31 p.m.—when he testified that he was home—were "devastating." Garner, 2016 WL 7223335, at *8. The district court insisted that the County Court had unreasonably applied Strickland in determining that Garner's attorney was not constitutionally deficient for failing to obtain and review the phone records in advance of trial. Id. The district court then applied the Strickland standard *de novo* and concluded that Garner had sufficiently demonstrated both constitutionally deficient performance and prejudice. Id. at *9–14.

Respondent-Appellant William Lee ("Lee") appealed, filed a motion to stay the judgment, and the Suffolk County District Attorney's Office announced its intention to retry Garner if Lee's appeal was unsuccessful. The district court granted the motion to stay. Garner moved for bail pending appeal and, on April 18, 2017, a three-judge panel of this Court denied Garner's motion.

STANDARD OF REVIEW

"We review [a] district court's grant of a petition for habeas corpus *de novo*, and its underlying findings of fact for clear error." Waiters v. Lee, 857 F.3d 466, 477 (2d Cir. 2017).

*859 DISCUSSION

I. Lee's Procedural Claims

A. Procedural Default

Lee first contends that the district court erred in deciding that Garner did not procedurally default the claim on which the court granted relief. We disagree. "[A] federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule."

Davila v. Davis, —— U.S. ——, 137 S.Ct. 2058, 2064, 198 L.Ed.2d 603 (2017). But, for this procedural default rule to apply, the state court must have "*clearly and expressly state[d]* that its judgment rest[ed] on a state procedural bar."*Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 118 (2d Cir. 2015) (emphasis added) (quoting *Messiah v. Duncan*, 435 F.3d 186, 195 (2d Cir. 2006)). In other words, "it must be 'clear from the face of the opinion' that the state court's decision rest[ed] on a state procedural bar." *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 722, 735, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)).

While a state court may rest its judgment on a state procedural bar if it rejects the merits of a federal claim *only in the alternative*, *see Glenn v. Bartlett*, 98 F.3d 721, 724 (2d Cir. 1996), the Supreme Court has admonished that, when in doubt, courts should presume that the state court adjudicated the claim on the merits, *see Richter*, 562 U.S. at 99, 131 S.Ct. 770 (citing *Harris v. Reed*, 489 U.S. 255, 265, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)); *see also Galarza v. Keane*, 252 F.3d 630, 637 (2d Cir. 2001) (Sotomayor, *J.*) (noting that a state court's reliance on a state procedural bar must be "unambiguous"). When, as here, there is "ambiguity" in a state court opinion that "prevent[s] us from definitively concluding that" the state court relied on a state procedural bar—such as when the "opinion states that a group of contentions is either without merit 'or' procedurally barred"—we will presume that the state court resolved the decision on the merits and that we are not precluded from reviewing the claim's merits. *Messiah*, 435 F.3d at 196 (quoting *Miranda v. Bennett*, 322 F.3d 171, 178 (2d Cir. 2003)).

Such ambiguity is present here. First, the County Court noted that Garner's arguments were, "*for the most part*, issues that could be resolved by examining the record and, therefore, should have been determined on direct appeal," App. 261 (emphasis added); it never specified, however, *which* of Garner's seven arguments it deemed unpreserved for collateral review. The County Court then ambiguously noted that Garner could not use a 440.10 motion to "collaterally challenge *an issue* which could have been addressed on direct appeal," *id.* at 262 (emphasis added), without noting to *which issue* it was referring. After devoting all of two cryptic sentences to the procedural default issue, the County Court spent over 25 paragraphs—spanning five full single-spaced pages—scrutinizing Garner's claims on the merits. Then, at the very end of its opinion, the County Court wrote that it "[a]ccordingly[ ] ... finds that defendant was provided with objectively meaningful representation[,]" *id.* at 267, and offered nothing to suggest that its merits finding was merely an alternative holding.

Given all this, we conclude that there is sufficient ambiguity about whether the County Court's judgment was premised solely on a state procedural bar so as to foreclose Lee's argument. Because we apply a presumption against finding a state procedural bar in cases of doubt, *see, e.g.*, *Richter*, 562 U.S. at 99, 131 S.Ct. 770; *Messiah*, 435 F.3d at 196; *Galarza*, 252 F.3d at 637, we agree with the district *860 court that Garner's claim is not procedurally defaulted.

B. Evidentiary Hearing

Lee next submits that the district court ran afoul of the Supreme Court's decision in *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), by holding an evidentiary hearing and considering evidence outside the state court record in determining whether to grant Garner's petition. We disagree.

28 U.S.C. § 2254 allows a court to entertain a habeas petition "only on the ground that [an individual] is in custody in violation of the Constitution or laws or treaties of the United States."28 U.S.C. § 2254(a). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") amended this statute and added a further requirement. Under AEDPA, when a state court has "adjudicated" a petitioner's habeas claim on the merits, a district court may grant relief only if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *id.* § 2254(d)(1), or if the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2). In *Pinholster*, the Supreme Court explained that "evidence introduced in federal court has no bearing on § 2254(d)(1)

review," and that a federal habeas court, in conducting § 2254(d)(1) review, cannot consider evidence outside the state court record. *Pinholster*, 563 U.S. at 185, 131 S.Ct. 1388; *see also id.* at 182–83, 131 S.Ct. 1388 ("Our cases emphasize that review under § 2254(d)(1) focuses on what a state court knew and did. ... It would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court."). Crucially, however, in addition to satisfying § 2254(d), a habeas petitioner must *also* demonstrate "by a preponderance of the evidence that his constitutional rights have been violated," *Cardoza v. Rock*, 731 F.3d 169, 178 (2d Cir. 2013) (quotation omitted)—a legal analysis that the district court conducts *de novo*, *see Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007); *see also Porter v. McCollum*, 558 U.S. 30, 39, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (per curiam). *Pinholster* does not bar a federal habeas court from holding an evidentiary hearing and considering evidence beyond the state court record when it engages in this non-§ 2254(d), *de novo* review. *See, e.g.*, *Stechauner v. Smith*, 852 F.3d 708, 722 (7th Cir. 2017); *Madison v. Comm'r, Alabama Dep't of Corr.*, 761 F.3d 1240, 1249 & n.9, 1249–50 (11th Cir. 2014); *Sanchez v. Roden*, 753 F.3d 279, 307 (1st Cir. 2014).

Here, the district court made abundantly clear that it was limiting its § 2254(d)(1) review to the state court record—and that it would not consider any evidence adduced from its evidentiary hearing in its § 2254(d)(1) analysis. It considered evidence introduced for the first time in federal court only during its non-§ 2254(d)(1), *de novo* review of Garner's claim. The question of whether the district court made a *substantive* error in its § 2254(d)(1) or non-§ 2254(d)(1) *de novo* analysis is a separate matter that we discuss below. As a pure matter of *procedure*, however, the district court did not run afoul of *Pinholster* by holding an evidentiary hearing and considering evidence outside the state court record for purposes of its non-§ 2254(d)(1), *de novo* review.

II. Ineffective Assistance of Counsel

We now turn to the merits of Garner's petition. In *Strickland*, the Supreme Court promulgated a two-prong *861 test to evaluate ineffective assistance of counsel claims: "a defendant must demonstrate both 'that counsel's performance was deficient' and 'that the deficient performance prejudiced the defense.' " *Waiters*, 857 F.3d at 477 (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). The *Strickland* Court also declared, however, that "there is no reason for a court ... to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant ...." *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052. As the Supreme Court admonished, "[t]he object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*; *accord Mitchell v. Scully*, 746 F.2d 951, 954 (2d Cir. 1984) (Friendly, *J.*).

Because the evidence of Garner's guilt presented at trial was truly overwhelming, this is a case in which it is far easier to dispose of an ineffectiveness claim on the second *Strickland* prong alone. We will therefore assume *arguendo* that the district court correctly concluded that the County Court unreasonably applied *Strickland*, and also assume *arguendo*—again, without deciding—that there was no strategic rationale for Garner's trial counsel's conduct with respect to Garner's phone records.[14] Because the County Court did not reach the prejudice issue, we examine *de novo* whether Garner's defense was constitutionally prejudiced by trial counsel's conduct. *See Rompilla v. Beard*, 545 U.S. 374, 390, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). For the reasons set forth below, we conclude that the district court erred in determining that Garner satisfied *Strickland*'s prejudice prong, and we therefore vacate the district court's grant of habeas relief.

A. The *Strickland* Prejudice Prong

To establish *Strickland* prejudice, Garner must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result *862 of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. That is, Garner must show that he was "deprive[d] ... of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. 2052; *see also* *Richter*, 562 U.S. at 111, 131 S.Ct. 770 ("*Strickland* asks whether it is 'reasonably likely' the result would have been different." (quoting *Strickland*, 466 U.S. at 696, 104 S.Ct. 2052)).[15] "[T]he question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is *possible* a reasonable doubt might have been established if counsel acted differently"; instead, "[t]he likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 111–12, 131 S.Ct. 770 (emphasis added); *see also* *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." (internal citation omitted)).

The prejudice analysis should also "be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.' " *Hill v. Lockhart*, 474 U.S. 52, 60, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052). The prejudice inquiry is therefore ineluctably tied to the strength of the prosecution's evidence. "[A] verdict or conclusion with ample record support is less likely to have been affected by the errors of counsel than 'a verdict or conclusion only weakly supported by the record.' " *Waiters*, 857 F.3d at 480 (quoting *Strickland*, 466 U.S. at 696, 104 S.Ct. 2052). As a result, "[e]ven serious errors by counsel do not warrant granting habeas relief where the conviction is supported by overwhelming evidence of guilt." *Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir. 2001).

B. Juror Statements

Before applying the *Strickland* standard to the facts of Garner's case, we note that to the extent the district court relied on a juror's post-trial statements to evaluate *Strickland* prejudice, *see, e.g.*, *Garner*, 2016 WL 7223335, at *11 ("[T]he devastating impact of the prosecution's use of the cellphone records to cross-examined [*sic*] Petitioner is borne out by ... one juror's statements to the media and a private investigator after the trial ...."), the district court committed error. As the Supreme Court explained in *Strickland*, "evidence about the actual process of decision ... should not be considered in the prejudice determination," because the proper focus of the inquiry is the reliability of the result, from an objective viewpoint, and not the "unusual propensities" of particular judges or jurors. *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052; *accord* *Hill*, 474 U.S. at 60, 106 S.Ct. 366; *see also* *Miller v. Angliker*, 848 F.2d 1312, 1323 (2d Cir. 1988) (describing, as "clear directions," the Supreme Court's instructions in *Hill* and *Strickland* that courts must evaluate prejudice claims from the perspective of an objective factfinder); *cf.* *Peterson v. Douma*, 751 F.3d 524, 532 (7th Cir. 2014) ("[T]he *Strickland* prejudice inquiry is an objective one and cannot rest solely on the trial judge's say-so." (citation and internal quotation marks omitted)); *Saranchak v. Beard*, 616 F.3d 292, 309 (3d Cir. 2010) *863 (explaining that it was error for a court to "consider[ ] the effect the new evidence would have had on th[e] particular judge ... rather than considering, more abstractly, the effect the same evidence would have had on an unspecified, objective factfinder, as required by *Strickland*"). We need not dwell here on the many reasons why *Strickland*'s prejudice inquiry does not and should not turn on the selective, unsworn, after-the-fact comments of trial jurors.[16] We simply reaffirm that, given "the clear directions in *Hill* and *Strickland*[,] ... the likely outcome of a trial should be assessed objectively, without regard for the idiosyncrasies of the particular decisionmaker." *Miller*, 848 F.2d at 1323 (internal quotation marks omitted) (quoting *Hill*, 474 U.S. at 60–61, 106 S.Ct. 366).

C. Application of the *Strickland* Prejudice Prong

1. De Novo *Review*

After reviewing the record *de novo*, we see no reason to disagree with the state trial court's

assessment that the evidence against Garner was "overwhelming," Nov. 21, 2002 Sentencing Tr. at 18; Oct. 12, 2006 Resentencing Tr. at 18. Keith's eyewitness account of the night in question was first given at the scene of the crime to Officer Gover. At that time, Keith fully expected to die from the gunshot wounds he had sustained. Officer Gover established that Keith's trial testimony was wholly consistent with that first account in all its key features: (1) that Garner had shot him; (2) that Keith had come to North Amityville with Garner to buy drugs; (3) that he met Garner through a third individual named Waring about two years ago; (4) that Garner lived in south Freeport, sold cars at a Five Towns dealership, was approximately six feet three inches tall and 210 to 220 pounds, was wearing dark clothing, and had a series of tattoos on his hand, neck, and leg, which Keith described in detail; (5) that, as to the shooting, Keith "had stepped out of the passenger side, the front seat of the passenger side of the vehicle, and walked approximately ten to fifteen feet from that door[,]" when he "heard a loud sound, felt a pain in the back of his neck and head area, and then he hit the floor, and he said he realized he had been shot[,]" *id.* at 312; and (6) that, after Officer Gover had been at the scene for some time, Keith's phone rang and Officer Gover picked up, having an incriminating conversation with Garner. On cross-examination, Officer Gover was adamant that Keith was "very alert, very attentive," *id.* at 326, and "very coherent," *id.* at 327.[17]

*864 Keith's account was substantially corroborated by the testimony of several other witnesses—including Merkelson, Detective Walsh, and Detective Faughnan—and critical physical evidence. Merkelson corroborated Keith's testimony: (1) that Garner never revealed the identity or address of the supposed "drug seller" in North Amityville; (2) that Merkelson distinctively rubber-banded the drug money using beige, red, and blue rubber bands; (3) that Merkelson gave Keith $9,700 of rubber-banded money; (4) that Garner was wearing eyeglasses the night in question; (5) that the original plan was for Merkelson, Garner, and Keith to all go together to buy drugs but Garner unexpectedly changed the plan the night in question; and (6) that Garner told Keith to meet him at a second parking lot.

Moreover, as to the second parking lot, Merkelson's testimony was completely consistent with Keith's testimony but wholly at odds with Garner's account. While candidly admitting that he did not see Garner in the second parking lot, but only a solo driver in the car in which Keith rode away, Merkelson testified that the unmistakable plan was that Keith and Garner would buy the drugs together and then they would return to the parking lot. Merkelson was "definite[ ]" that Keith rode away with Garner, Trial Tr. at 369, because even though Merkelson did not converse with Garner in the second lot, "it was clear ... that [Keith] was going with [Garner][,]" *id.* at 397; "there was never any discussion" that Keith would buy the drugs with someone besides Garner, *id.* at 398; he did not "see any other way to interpret" the events in question, *id.* at 397; and Keith and Garner had been in "pretty much constant contact" with the Nextel's walkie-talkie function before Garner arrived at the second parking lot, *id.* at 398. There was thus "no question in [Merkelson's] mind" that Garner was supposed to and did accompany Keith to the ill-fated drug buy, *id.* at 398.

Detectives Walsh and Detective Faughnan provided still further corroboration of Keith's version of the events. At the precinct, Detective Walsh asked Garner basic pedigree questions, and observed that Garner wore eyeglasses and had several tattoos, which corroborated Keith's description. And after executing a search warrant on Garner's blue-green car, Detectives Walsh and Faughnan recovered from the glove box (and photographed) a large sum of money wrapped in red, blue, and beige rubber bands. Furthermore, when Garner was arrested, the detectives recovered on his person additional physical evidence probative of a motive for robbery: a black leather folding portfolio replete with personal papers revealing, as Detective Faughnan testified, "[a] lot of creditors looking for monies" or "[c]ollection type notices." *Id.* at 705.

In stark contrast to the prosecution's case-in-chief, Garner presented a thin and wholly uncorroborated narrative during his defense case, which was riddled with damaging holes. Garner denied that he ever met Keith in a second parking lot, drove to North Amityville, or shot Keith. Garner instead testified, repeatedly and under oath: (1) that Keith gave him the money for the drug deal to hold, awaiting Keith's call; (2) that he was home by 9:45 or 10 p.m.; and (3) that he did not leave his house once he got home.

At the habeas hearing before the district court, Garner's trial counsel, *who spoke with him the day* *865 *after the crime*, testified that: (1) Garner's trial testimony "was in material aspects the same as the information [Garner] had given [him]," App. 134; (2) at trial, he "heard nothing [from Garner] that was materially different from what [Garner] had told [him]," *id.* at 135; (3) Garner's trial testimony "was in conformity with [their] prior discussions," *id.* at 137; and (4) he and Garner "had a very good relationship" and "spoke about the facts," *id.* at 165.

Garner bears the burden of showing prejudice, *Waiters*, 857 F.3d at 479, and so it is noteworthy that he has to this day never identified a single witness who can corroborate any aspect of his tale. Nor has he proved able to identify anything approximating a plausible motive for why Keith would falsely and steadfastly maintain that Garner shot him, nor why Merkelson would assist in propagating this narrative, if untrue.[18] *See* Br. for Pet'r-Appellee at 39 ("It remains an unsolved mystery why Keith would falsely accuse Garner."). On this front, at the habeas hearing before the district court, Garner's trial counsel testified that he and Garner "had a very good relationship[,]" they "spoke about the facts" and about "what [they] felt would be the best defense." App. 165. "And based on everything else that was there," Garner's trial counsel revealingly conceded, they jointly determined that claiming that Keith had experienced a vision that Garner had shot him "would be a better defense rather than arguing that somebody that attended your wedding that was a friend of yours would have a motive to all of a sudden lie and so forth." *Id.* at 166.

In sum, Garner's conviction was "supported by overwhelming evidence of guilt." *Lindstadt*, 239 F.3d at 204. Garner therefore bears a heavy burden, to say the least, in demonstrating that his attorney's allegedly "serious errors" at trial merit the grant of habeas relief. *See id.* As explained below, Garner has failed to carry this burden.

2. The Phone Records

The district court concluded that had Garner's trial counsel obtained Garner's phone records before trial, there is a reasonable probability that the outcome of Garner's trial would have been different. The district court determined that Garner's counsel could have used the phone records for two different purposes. First, Garner's counsel could have used the phone records *defensively* by reviewing those records with Garner before trial. The district court insisted that doing so might have led Garner to change his testimony on the stand, or not to testify at all. Second, the district court concluded, Garner's counsel could have used the phone records *offensively*. Specifically, the district court insisted, Garner's counsel could have: (1) argued to the jury that, based on the 911 calls that took place after Keith was shot, the shooting occurred not on or before *866 10:25 p.m., as the prosecution contended, but rather between 10:31 p.m. and 10:41 p.m.; then (2) pointed out to the jury that, according to the phone records, Garner was on his phone continuously between 10:31 p.m. to 10:41 p.m.; and thus, finally, (3) argued to the jury that it is highly unlikely that Garner "was shooting Keith while simultaneously making a phone call, or in the midst of making a series of phone calls." *Garner*, 2016 WL 7223335, at *13. We do not believe, however, that it is "substantial[ly]" likely that Garner's trial would have resulted in a different verdict even if Garner's counsel had reviewed the records with his client before trial and used them in the manner that the district court described. *See Richter*, 562 U.S. at 112, 131 S.Ct. 770.

a. Defensive Use of the Phone Records

With regards to the possible "defensive" use of the phone records, the district court posited that had Garner's counsel reviewed the phone records with Garner before trial, one of two possibilities was likely. One possibility is that Garner might have "remember[ed] more precisely his whereabouts at different times that night and where he might have been" at 10:28 p.m. and 10:31 p.m., and thus would have presented a revised narrative on the stand to avoid incorrectly stating that he was home at the time. *Garner*, 2016 WL 7223335, at *12 n. 25. The other possibility, the district court insisted, is that Garner might not have testified at all, "leaving the jury to decide the case based almost exclusively on Keith's and Merkelson's testimony." *Id.* at *12. Neither possibility, we conclude, would have produced a substantial likelihood of a different

verdict.

First, if upon review of the records, Garner did not take the stand, there is no reasonable likelihood that he would not have been convicted given the strength of the prosecution evidence detailed earlier in this opinion. *See* *Richter*, 562 U.S. at 111, 131 S.Ct. 770.

Second, *even if* Garner had decided to take the stand after reviewing the phone records, it is far from clear that Garner would have revised his testimony. To be sure, seven-and-a-half years after trial, Garner insisted in a 2010 affidavit that

> [i]f [he] had reviewed the phone records before testifying, it would have come back to [him] that when [he] came home and found [his] wife and children still out [he] went out again, called home at 10:28 and 10:31 p.m., tried to call Mr. Keith later, and then came home and tried to call Mr. Keith again.

Affirmation in Answer, *Garner v. Lee*, No. 2:11-cv-00007-PKC (E.D.N.Y. Mar. 10, 2011), ECF No. 9-2 at 38 ("2010 Affidavit"). But Garner uniformly and persistently testified on direct, cross, and redirect examination at trial, under oath and *both before and after seeing the phone records*, that he came home between 9:45 p.m. and 10 p.m. the night of the shooting and never left his house thereafter. Garner's trial counsel further testified at the habeas proceeding that Garner's trial testimony "was in material aspects the same as the information [Garner] had given [him]," App. at 134, and that Garner's trial testimony "was in conformity with [their] prior discussions," App. at 137. Furthermore, Garner was arrested the day after the events in question and Garner's trial counsel was in communication with him within hours of the arrest.[19] In other words, Garner's testimony at trial *was his story from the beginning, and in the immediate aftermath of the events.* Given *867 that "[s]olemn declarations in open court carry a strong presumption of verity," and that "[t]he subsequent presentation of conclusory allegations unsupported by specifics is" often "subject to summary dismissal," *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977), we are far from convinced that, *even if* Garner had reviewed the phone records before trial and decided to testify regardless, his testimony would have changed.

But even assuming *arguendo* that, after reviewing the phone records, Garner would have taken the stand and revised his narrative in accordance with his 2010 Affidavit,[20] even his *updated* narrative is irreconcilable with the trial evidence for (at least) three reasons. First, Garner's revised narrative remains impeached by Officer Gover's testimony at trial. According to Garner's 2010 Affidavit, Garner arrived home after meeting with Keith, noticed that his wife and kids were out, left his house, called home at 10:28 and 10:31 p.m., called Keith from outside his home, "and then came home and tried to call ... Keith again." 2010 Affidavit at 38. Garner also made clear during trial that it was during his final call to Keith that evening that an unknown individual (*i.e.*, Officer Gover) answered the phone. *See* Trial Tr. 795 (noting that after speaking with Officer Gover, Garner hung up and "d[id]n't try to call back"). Thus, according to Garner's revised narrative, he was *at home* when he placed this final call to Keith the night of the shooting. That claim, however, remains contradicted by Officer Gover's sworn testimony on both direct and cross-examination that when he answered Garner's call to Keith at the crime scene and spoke to Garner, Garner told Officer Gover that he was "*on the parkway*." Trial Tr. 317 (emphasis added), 331 (emphasis added). This testimony was strongly corroborated by Officer Gover's ensuing action: he testified that he then told a police dispatcher to alert officers within the county and in adjacent counties that Garner, an attempted murder suspect, was *on the parkway*. Detective Faughnan independently corroborated that Officer Gover put out such a notification. Garner has yet to provide any sort of explanation—either in his 2010 Affidavit or at his habeas evidentiary hearing—for the glaring contradiction between his insistence that he made his final call to Keith from his home, and Officer Gover's sworn trial testimony, corroborated by his own dispatch, that Garner said during this call that he was on the parkway.

Second, nothing in Garner's revised narrative accounts for a crippling discrepancy between (1) Garner's insistence that he merely served as a custodian for the drug deal funds—and guarded the funds for "safekeeping" while Keith tested the drugs,

2010 Affidavit at 26—and (2) the fact that when Garner was arrested, the police recovered only $7,440 of the $9,700 drug money. Merkelson repeatedly testified that he gave Keith $9,700 of rubber-banded money. He testified that he "vividly" remembered rubber-banding the funds. *Id.* at 357. Keith put the money in Garner's car's glove box and echoed Merkelson's testimony about the amounts, confirming that there was $8,000 for ecstasy for Merkelson, and $1,700 for cocaine for himself. When asked about this amount on cross-examination, Keith stressed that there was no uncertainty about the $9,700 figure. In fact, Keith testified that if he was told that only $6,300 was in the glove box (as opposed *868 to $9,700), that "would make [him] think that somebody removed some of the money." *Id.* at 525. Yet, when Garner was arrested 18 to 19 hours after Keith's shooting, only $6,300 of rubber-banded funds were recovered from the glove box with an additional $1,140 found on his person.

Garner could not—and still cannot—account for the missing $2,260. He claimed at trial, without any record support and in opposition to Keith's and Merkelson's testimony, that included in the stack of money was about $900 that Keith had given Garner to pay off an $800 debt. Garner has not "updated" this figure in his 2010 Affidavit. Yet even crediting Garner's unsupported assertion that $800 or $900 of the $9,700 was for him to keep, he *still* cannot explain the remaining missing $1,360 or $1,460. Thus, to subscribe to Garner's revised narrative, jurors would have had to believe that Garner's sole task was to guard the funds for safekeeping even though he cannot explain—even 16 years later—how within roughly 20 hours of receiving the funds, between $1,360 and $2,260 went missing. The prosecution seized on this unexplained discrepancy, making the missing funds the very first argument of its summation:

> [W]hy is it $1,140 in this hand and $6,300 in this hand? Why doesn't that add up to what the evidence shows was ninety-seven hundred dollars that was brought to North Amityville that night? Because I submit to you, ladies and gentlemen, that within the eighteen hours before this defendant was arrested he started spending this money.

Id. at 871–72.[21] Simply put, Garner's revised narrative cannot surmount his acute problem with the physical evidence: the funds do not add up.

Finally, nothing in Garner's revised narrative provides any additional information about the supposed alternative perpetrator: the mysterious and elusive "Red," about whom the prosecution hammered Garner during cross-examination and in summation. Among other trial testimony, Garner admitted that he knew of no other names that "Red" used, had never set up a drug deal with Red before, and did not have his phone number stored. On cross-examination, Garner agreed with the prosecution's summary of his testimony: he "put Dread in touch with Red," it was "Dread meet Red to make a drug deal." *Id.* at 807. Unsurprisingly, the prosecution devoted considerable portions of its summation to attacking Garner's testimony about "Red":

> [I]f you were charged with attempted murder in the second degree and arrested within eighteen hours of the incident, just eighteen hours later, ... wouldn't you [ ] make it your business to know who Red was? Wouldn't you try to find that business card that had his name on it, and telephone number, to find out who this Red was who supposedly did this killing or attempted killing? Wouldn't you try to find that out?
>
> I submit to you, ladies and gentlemen, that didn't happen because Red doesn't exist. There is no Red, ladies and gentlemen.

Id. at 872–73. Even though Garner claimed that "Red" came to the car dealership on weekends, he has never—including at trial in 2002, in his 2010 Affidavit, or at the 2016 habeas hearing before the district *869 court where he declined to testify—put forward a single witness (such as a co-worker) to testify that "Red" even exists.

In sum, Garner's revised narrative presents no likelihood, much less a substantial one, of a different result. Indeed, we cannot even say with confidence what Garner might have testified to, if he had taken the stand to present this story. *Cf., e.g.*, *Hemstreet v. Greiner*, 491 F.3d 84, 91 (2d Cir. 2007) ("Since [the potentially exculpatory witness] offered different

versions of the salient events at different times, no one ... can say with any confidence what her testimony would have been [had she testified].”). Garner’s revised narrative is sufficiently full of holes that, as the district court concluded, if Garner had reviewed his cell phone records before trial, “it is more likely that [Garner] would not have pursued an alibi defense and would not have testified.” *Garner*, 2016 WL 7223335, at *12. Given Keith’s and Merkelson’s testimony, the district court also concluded that, “[w]ere this the only likely scenario,” there would not be a “reasonable probability that the outcome of the trial would have been different.” *Id.* (internal quotation marks omitted). We agree. We therefore next turn to the district court’s insistence that Garner’s counsel could have also used the phone records *affirmatively* to create reasonable doubt about Garner’s guilt.

b. Affirmative Use of the Phone Records

The prosecution’s theory at trial was that Garner drove Keith to North Amityville between 10:00 p.m. and 10:25 p.m., shot Keith at approximately 10:25 p.m., and then made a flurry of phone calls starting at 10:28 p.m. And, as noted above, Garner’s phone records indeed establish that his phone was in use continuously between 10:28 p.m. and 10:41 p.m. The prosecution also played a 911 call for the jury that the prosecution claimed took place at “approximately 10:40 p.m.” Trial Tr. 883; *see also id.* at 886 (referencing “[t]he good Samaritan on the street who called 911 at 10:40”). The prosecution thus told the jury that Garner’s phone records corroborated its proposed time frame, and expressly urged the jury to “[t]ake [the phone] records” into the jury room and examine them for themselves. *Id.* at 875.

The district court concluded that, had Garner’s trial counsel obtained Garner’s phone records before trial, he could have argued to the jury that Keith was shot not at 10:25 p.m., as the prosecution insisted, but rather “between 10:31 p.m. and 10:41 p.m.,” a period during which Garner’s phone was in use. *Garner*, 2016 WL 7223335, at *13. Specifically, the district court insisted that Garner’s counsel could have made the following argument to the jury: (1) *two* 911 calls were made following Keith’s shooting, with one having occurred before the other; (2) the first 911 call, which the prosecution played for the jury, occurred at approximately 10:41 p.m.;[22] (3) the second 911 call—which the prosecution did *not* play for the jury—must have therefore occurred no earlier than approximately 10:41 p.m.; (4) on the second 911 recording, the caller insisted that the shooting had occurred “five to ten” minutes prior to the call; thus, (5) given that the second 911 call occurred no earlier than approximately 10:41 p.m., even if the shooting had happened a full ten minutes prior, “the shooting could not have occurred *870 any earlier than 10:31 p.m.,” when Garner was apparently on the phone. *Garner*, 2016 WL 7223325 at *13 n. 27. The district court thus concluded that, by obtaining Garner’s phone records in advance and making such an argument, Garner’s counsel could have created reasonable doubt of Garner’s guilt.

We are not persuaded. First, the district court’s argument hinges not on the phone records *per se*, but rather on the content of the second 911 call, which the prosecution did not play for the jury.[23] The prosecution did not dispute at trial that Garner’s phone records established that Garner was on the phone constantly between 10:28 p.m. and 10:41 p.m. Nor is this surprising, given that the timing of these calls was potentially helpful to Garner *only if* the crime took place within that period and not at about 10:25 p.m., as the prosecution asserted. The district court concluded, in granting habeas relief, that the second 911 call undercut the prosecution’s theory that the shooting occurred at approximately 10:25 p.m. *See, e.g.*, *Garner*, 2016 WL 7223335, at *13 n.30 (“It is clear from the record that Petitioner’s counsel never analyzed the 911 calls to determine the likely time frame for the shooting.”). But we perceive no substantial probability that the result here would have been different, even assuming that Garner’s counsel had used the second 911 call just as the district court contends it should have been employed.

Simply put, and contrary to Garner’s contention on appeal, the second 911 call certainly does *not* conclusively “establish[ ] that the shooting occurred between 10:31 p.m. and 10:41 p.m.,” Br. for Pet’r-Appellee at 9, rather than 10:25 p.m., as the prosecution contended.[24] Garner’s argument hinges entirely on the 911 caller’s off-the-cuff estimate that the shooting occurred about “five to ten” minutes prior to her call, which the district court itself

estimated as occurring at "approximate[ly]" 10:41 p.m. *Garner*, 2016 WL 7223325 at *13 n. 27. Even a skilled trial attorney would have had difficulty using these rough approximations of time to create a reasonable doubt in the mind of a juror, especially because the argument collapses completely if the approximations are off by as little as a few minutes. Against the evidence of the second 911 call, we must weigh the fact that, among other things: (1) Keith stated repeatedly—both to the officers at the scene shortly after the shooting and under oath at trial—that Garner shot him; (2) Merkelson corroborated Keith's testimony that the plan was for Garner to meet Keith in the second parking lot and drive him to North Amityville; (3) Garner was found the day after the shooting with Merkelson's distinctively wrapped drug money bundle in his possession, and with more than $2,200 missing from that bundle; (4) Garner had a clear motive to rob Keith that evening, and *871 Keith lacked any sort of apparent motive to accuse Garner falsely of shooting him; and (5) Garner, to this day, has yet to provide any sort of concrete and convincing evidence of an alibi outside of a single conclusory sentence in his 2010 Affidavit. Accordingly, given the overwhelming evidence of Garner's guilt, and the fact that he bears the prejudice burden, we do not believe that "[t]he likelihood ... [is] substantial, [rather than] just conceivable," that the second 911 call, even if used affirmatively by Garner's counsel, would have created reasonable doubt about Garner's guilt in the mind of the jury. *See* *Richter*, 562 U.S. at 111–12, 131 S.Ct. 770 (emphasis added).[25]

* * *

To reiterate, to establish prejudice Garner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The likelihood of a different result must be "substantial." *Richter*, 562 U.S. at 112, 131 S.Ct. 770. Fatal to Garner's claim, there is simply no basis here for concluding that he has established anything close to a *substantial likelihood* of a different result, even if his attorney had obtained the phone records in question prior to trial. The district court erred in concluding otherwise.

With respect to Garner's (1) six other grounds for relief based on trial counsel's alleged ineffective assistance, and (2) due process and fair trial argument, we do not address them here because the district court did not consider them below. *Cf.* *DiSimone v. Phillips*, 461 F.3d 181, 198 (2d Cir. 2006) (remanding habeas case for consideration of a question that had "not to date been the focus of attention in the courts that ... reviewed [the petitioner's] case"). We therefore remand so that the district court may consider the remaining aspects of Garner's claims in the first instance, consistent with the analysis herein.

CONCLUSION

For the foregoing reasons, we VACATE the district court's grant of Garner's petition for a writ of habeas corpus and REMAND the case for further proceedings consistent with this opinion.

All Citations

908 F.3d 845

Footnotes

1 The factual background presented here is derived principally from the trial transcript and otherwise reflects information in the state court and district court records.

2 Keith and Merkelson were driven to the parking lot by Ryan Palmera, a friend of Merkelson's.

3 Over the course of their acquaintanceship, Keith had observed Garner drive many different dealership cars, often switching their license plates as he shifted from one to another.

4 Merkelson testified that he called Keith that evening when Keith failed to return to the second parking lot as promised. He received no answer and learned only the next day from another family member that Keith had been shot.

5 Garner does not dispute that he was the person who called, but testified at trial and maintains to this day that he was at home when he made this call.

6 Keith did not recall much from his first three or four days in the hospital, noting that he would "wake up for a minute or so ... and then basically go back to sleep." Trial Tr. at 516. He did remember making another statement, on April 19, 2002, to Detective Walsh, who was accompanied by his partner, Detective James Faughnan ("Detective Faughnan"). Detectives Walsh and Faughnan confirmed at trial that they interviewed Keith on April 19 and that he was "coherent," answered questions, and spoke "clearly" at that time. *Id.* at 585. Keith remained at Stony Brook until May, after which he spent time in a rehabilitation facility before commencing intensive outpatient therapy after discharge. He testified at trial about six months after he was shot.

7 At trial, Merkelson repeatedly identified various photographs of the rubber-banded money, pointing out that there were thousand-dollar batches wrapped with red, blue, and beige rubber bands. He confirmed that "[t]hese are the same rubber bands that I had tied around this money seven months ago. I remember it very vividly." *Id.* at 357. He further noted that "the particular way that I bundled it I think is pretty unique and pretty easily identifiable." *Id.*

8 Garner had earlier testified that the day before the drug deal, he loaned Keith "a couple [of] dollars for the weekend," Trial Tr. 787, but he did not discuss the transaction at any length.

9 Neither Garner's wife nor his children testified at trial.

10 For reasons not pertinent here, Garner was resentenced on October 12, 2006, again to the maximum sentence.

11 New York Criminal Procedure Law § 440.10(1)(h) provides that
[a]t 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 ... [t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States ....

12 New York Criminal Procedure Law § 440.10(2)(c) stipulates that
the court must deny a motion to vacate a judgment when ... [a]lthough sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, [on direct review], adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him ....
In *Cooks*, the New York Court of Appeals explained that the purpose of this provision "is to prevent [N.Y. Crim. Proc. Law §] 440.10 from being employed as a substitute for direct appeal when defendant was in a position to raise an issue on appeal or could readily have raised it on appeal but failed to do so." *Cooks*, 67 N.Y.2d at 103, 500 N.Y.S.2d 503, 491 N.E.2d 676 (internal citations omitted).

13 Garner's second argument—about the *Newsday* article—had been presented on direct appeal to, and unanimously rejected by, the Appellate Division, Second Department. The mid-trial *Newsday* article mentioned that, five years before Garner's in-progress Suffolk County trial (for Keith's shooting), a Nassau County jury acquitted Garner of two separate murders. The article compared the prior murders and Keith's attempted murder, noting that each victim was shot in the head, the same defense attorney represented Garner in all of the proceedings, and the shootings all arose out of drug debts or robberies.

14 Mindful that on remand the district court might again apply AEDPA to address Garner's remaining *Strickland* claims, we do note that the district court erred in relying on language from one of our AEDPA precedents—*Monroe v. Kuhlman*, 433 F.3d 236, 246 (2d Cir. 2006)—in articulating the standard for AEDPA review. Quoting *Monroe*, the district court wrote that although "[s]ome increment of incorrectness beyond error is required [to satisfy AEDPA] ... *the increment need not be great*; otherwise habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." *Garner*, 2016 WL 7223335, at *7 (emphasis in original) (quoting *Monroe*, 433 F.3d at 246). We do not believe, however, that this standard (which we will call the "some increment of incorrectness" standard, and which originated in *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000)), survived the Supreme Court's decision in *Richter,* 562 U.S. at 102, 131 S.Ct. 770. *Richter* imposes a more deferential AEDPA standard of review, requiring courts to assess whether the state court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103, 131 S.Ct. 770. Although we have cited the "some increment of incorrectness" standard in several cases since *Francis S.*, *see, e.g.*, *Jones v. West*, 555 F.3d 90, 96 (2d Cir. 2009); *Hemstreet v. Greiner*, 491 F.3d 84, 89 (2d Cir. 2007); *Gersten v. Senkowski*, 426 F.3d 588, 607 (2d Cir. 2005), our more recent AEDPA decisions have instead (correctly) cited *Richter*'s more deferential "no reasonable jurist" standard, without mentioning *Francis S.* and its progeny, *see, e.g.*, *Washington v. Griffin*, 876 F.3d 395, 403 (2d Cir. 2017); *Carmichael v. Chappius*, 848 F.3d 536, 544 (2d Cir. 2017); *Fuentes v. T. Griffin*, 829 F.3d 233, 245 (2d Cir. 2016); *Rivas v. Fischer*, 780 F.3d 529, 546 (2d Cir. 2015).

15 The Supreme Court has noted that "the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.' " *Richter*, 562 U.S. at 112, 131 S.Ct. 770 (quoting *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052).

16 Full explication of this topic is unnecessary because, among other reasons, the rationale for discouraging post-verdict contact with jurors has been recited in the case law on many occasions. *See, e.g.*, *Pena-Rodriguez v. Colorado*, —— U.S. ——, 137 S.Ct. 855, 869, 197 L.Ed.2d 107 (2017) (stressing the importance of limiting counsel's post-trial contact with jurors "to provide jurors some protection when they return to their daily affairs after the verdict has been entered"); *id.* at 865 (emphasizing that restrictions on post-verdict scrutiny of jurors have "substantial merit" because they "give[ ] stability and finality to verdicts" and "promote[ ] full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict"); *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989) ("[P]ost-verdict inquiries may lead to evil consequences: subjecting juries to harassment, inhibiting juryroom deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts.").

17 Detective Walsh, who the trial court found "to be a credible and straightforward witness," *id.* at 269, similarly testified that Keith was forthcoming and told him in the ambulance, among other information: his name; that Garner shot him for drug money; that he had known Garner for almost two years; that Garner lived in south Freeport; and that Garner had driven him to the site of the shooting in Garner's car. Detective Walsh said that at no time did he have "any hesitation" about arresting Garner in connection with Keith's shooting. *Id.* at 550.

18 At oral argument before the district court on February 24, 2016, Garner's current counsel struggled with this problem, urging, for instance, that Keith was obviously capable of deception because, after being shot, he pretended to be dead when the shooter re-approached him:

> Now I know, Your Honor, I think we all wonder in such a case why somebody would make something up. We know that ... Mr. Keith was capable of making things up even when he first told the cop, the officer, Officer Gover that it was [Garner] who did it, because we know it a couple of ways. One, he said he had been playing dead so he's conscious enough to—thinking enough to pretend to be dead. ... So Keith was certainly capable of fabricating and capable of concealing at that point in time. Why would he do it, Judge, I can only speculate.

App. 206.

19 Garner had a preexisting relationship with his counsel, who had previously represented him successfully at a 1997 double murder trial.

20 We will also assume, *arguendo*, that nothing in this hypothetical review of the phone records before trial would have led Garner to give false testimony, because "[w]hatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*." *Nix v. Whiteside*, 475 U.S. 157, 173, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).

21 Dealt this difficult hand, Garner's counsel tried his best (1) to get Keith to depart from the $9,700 figure during cross-examination (he failed); and, alternatively, (2) to downplay its significance by conceding that while the "exact amount" of the funds was "questionable," ultimately "[w]hether it's ninety-seven, ninety-six, ninety-eight hundred, *doesn't matter .... it's not so much the dollar amount*." Trial Tr. 289–90 (emphasis added).

22 The district court insisted that "[a]lthough the exact times of the 911 calls are not in the record," it could discern the "approximate" time of the first 911 call based on the evidence submitted at trial. *Garner*, 2016 WL 7223325 at *13 n. 27. Given that the prosecution itself argued to the jury that the first 911 call occurred at "approximately" 10:40 p.m., Trial Tr. 883, we do not believe that the district court's factual finding is clearly erroneous. *See Waiters*, 857 F.3d at 477.

23 To be clear, neither party placed either records of the 911 calls or transcripts of their contents into the record on appeal. We therefore assume, *arguendo*, that the district court opinion accurately reflects the contents of the second 911 recording.

24 Inexplicably, Lee seemed to concede at oral argument before our Court that the 911 evidence establishes that the shooting occurred between 10:31 p.m. and 10:41 p.m. But counsel's statement to this effect cannot be taken at face value. Lee also insisted—confusingly—that he was basing his assessment solely on the evidence presented at trial, even though the second 911 call—which the district court found critical for establishing the relevant time frame—was never played for the jury. Lee also erroneously stated that "the prosecution argued that the shooting occurred sometime after ... 10:28" p.m., Oral Arg. at 50:47–57, even though the prosecution actually argued to the jury that the shooting occurred no later than 10:25 p.m., *see* Trial Tr. 874, 876. Suffice it to say that we have found the record to be a surer guide to the trial evidence than these representations at oral argument.

25 Before both the state court and the district court, Garner argued that his trial counsel could have also used the *first* 911 call to establish that the shooting occurred sometime between 10:31 p.m. and 10:41 p.m. Although a transcript of this call—which the prosecution told the jury took place at 10:40 p.m.—is not in the record, Garner insists that the individual on this call informed the 911 dispatcher that he had "just walked out" after hearing a loud noise, implying that the shooting could not have occurred more than a couple of minutes prior to the call. Affirmation in Answer, *Garner v. Lee*, No. 2:11-cv-00007-PKC (E.D.N.Y. Mar. 10, 2011), ECF No. 10-2 at 38. But even assuming *arguendo* that Garner has accurately characterized the contents of this call, we do not believe that such an offhanded remark by a 911 caller (*i.e.*, "just walked out") is sufficient to outweigh the overwhelming evidence of Garner's guilt. That is especially so given that *the prosecution played this 911 call for the jury*, *told the jury that the call occurred at 10:40 p.m.*, and nonetheless still maintained to the jury (ostensibly successfully) that Garner shot Keith at approximately 10:25 p.m. *See also* App. at 227 ("[The first 911 caller] doesn't say this immediately happened before me. ... He doesn't say for how long or from where he comes upon the body [and] he calls the police.").

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Appendix A

2016 WL 7223335
Only the Westlaw citation is currently available.
United States District Court, E.D. New York.

Blair GARNER, Petitioner,
v.
Wililam LEE, Superintendent of Greenhaven Correctional Facility, Respondent.
2:11-CV-00007 (PKC)

|
Signed 12/13/2016

Attorneys and Law Firms

Norman Trabulus, Law Office of Norman Trabulus, New York, NY, for Petitioner.

Michael J. Miller, Riverhead, NY, for Respondent.

MEMORANDUM & ORDER

PAMELA K. CHEN, United States District Judge:

*1 Petitioner Blair Garner ("Petitioner" or "Garner") petitions this Court for a writ of *habeas corpus* pursuant to 28 U.S.C § 2254, challenging his conviction, following a jury trial in Supreme Court, Suffolk County, of murder in the second degree, assault in the first degree, robbery in the first degree, criminal use of a firearm in the first degree, and criminal possession of a weapon in the second degree, all arising out of a non-fatal shooting on April 13, 2002. In his petition, Garner contends, *inter alia*, that he was denied effective assistance of counsel based on his trial counsel's failure to obtain Garner's cellphone records, which detail calls made to and from that cellphone on the night of the shooting.[1] (Dkt. 1.) For the reasons set forth below, the petition is GRANTED.

BACKGROUND

I. TRIAL EVIDENCE AND PROCEEDINGS

The evidence presented at trial, which commenced on October 17, 2002, established that on April 13, 2002, Petitioner shot Karl Keith ("Keith") from behind, as Keith was about to engage in a drug transaction. (*See* State Court Trial Transcript ("Tr.") at 1, 501-03.) Following a jury trial before Suffolk County Court Judge Martin J. Kerins, a jury found Petitioner guilty of attempted murder in the second degree (Count One), assault in the first degree (Count Two), robbery in the first degree (Count Three), criminal use of a firearm (Count Four), and criminal possession of a weapon in the second degree (Count Five). (Tr. at 945-46.) At a resentencing, Judge Kerins sentenced Petitioner to concurrent terms of imprisonment totaling 25 years, to be followed by a period of post-release supervision of five years. (Resentencing Transcript at 18-20.)[2] Keith and Petitioner provided the key trial testimony, which the Court summarizes in turn.

A. Karl Keith's Testimony

At the time of trial, Keith had known Petitioner for approximately a year-and-a-half. (Tr. at 464.) On April 11, 2002, two days before the shooting, Keith had contacted Petitioner about purchasing 2,000 pills of ecstasy and two ounces of cocaine for Keith's second cousin, Jesse Merkelson. (Tr. at 469.) Keith was also interested in purchasing cocaine to sell himself. (*See* Tr. at 467.) The proposed drug transaction was to cost $9,700. (Tr. at 470.)

On the evening of April 13, 2002, Keith, Merkelson, Merkelson's friend Ryan Palmera, and Petitioner met at a McDonald's in Roosevelt, New York.[3] (Tr. at 477-78.) Upon arriving, Petitioner pulled his car into the parking spot next to Keith's car. (Tr. at 478.) Keith got out of his car and got into Petitioner's car. (Tr. at 479.) As Merkelson began to approach Petitioner's car, Petitioner told Keith that "it would be a better idea" if Keith and Petitioner went alone—without Merkelson—for the drug transaction. (*Id.*) Petitioner then told Keith that he wanted to return home to change out of his business suit and put on different clothes, so he asked Keith to meet him at a Home Depot in Freeport, New York. (*Id.*) Keith, Merkelson, and Ryan subsequently drove to meet Petitioner at the Home Depot, while Petitioner went home to

Appendix B

change. (Tr. at 483.)

*2 Upon arriving at the Home Depot, Keith walked over to Petitioner's car and got into the front passenger seat. (Tr. at 484-85.) Together, the two left the parking lot and drove to North Amityville, where Keith was supposed to test the ecstasy. (Tr. at 484-85, 488.) During the approximately 20-minute drive, Keith neither saw nor heard Petitioner speak on the phone. (Tr. at 486.) He also never heard Petitioner's phone ring. (*Id.*) After arriving at the drug transaction location in North Amityville, Keith put the cash for the transaction in the glove compartment of Petitioner's car. (Tr. at 489.)

Keith and Petitioner exited the car and began walking toward the rear of it. (Tr. at 501.) At that point, Keith lost sight of Petitioner. (*Id.*) After a slight hesitation, Keith turned around and was suddenly shot in the back of his right ear. (Tr. at 502.) Keith then heard Petitioner whisper "Yo, Dread, Yo." (Tr. at 508.) Afraid of getting shot again, Keith closed his eyes and acted as if he was dead. (*Id.*) Sometime later, a police officer arrived at the scene and asked Keith to describe what happened. (Tr. at 509-10.) At that moment, Keith noticed his cellphone ringing with the name "Blizzie," a nickname for Petitioner, displayed on the Caller ID. (Tr. at 512-13.) When the officer showed the phone to Keith, Keith said: "Don't answer it. That's the person that just shot me." (Tr. at 512.)[4]

B. Petitioner's Testimony on Direct Examination

Petitioner's affirmative case consisted solely of his own testimony, which differed greatly from Keith's testimony with respect to the events that occurred on the night of the shooting.

Petitioner testified that at the McDonald's, Keith left the cash for the transaction in Petitioner's glove compartment and told Petitioner that he (Keith) was going with Merkelson—not Petitioner—to meet the drug supplier in Freeport. (Tr. at 793.) Keith then said that he would call Petitioner later that night for the cash if everything checked out. (*Id.*) Petitioner explained that he went home, and Keith and Merkelson went to the site of the drug transaction without him. (Tr. at 793-94.) Although no one was home when he initially arrived, Garner's wife and children eventually came home, and he spent time with them while he waited. (Tr. at 794-95.)[5] Later that night, after not hearing from Keith, Garner used the radio and alerts features of his phone to try to contact him. (Tr. at 795.)[6] Keith did not respond. (*Id.*) The next day, while at work, Petitioner was arrested. (Tr. at 798.)[7]

C. Cross-Examination of Petitioner

The prosecution's cross-examination of Petitioner serves as the basis for most of Petitioner's *habeas* petition. Certain pre-trial proceedings are relevant to Petitioner's arguments regarding that cross-examination.

1. Pre-Trial Proceedings

After jury selection, Petitioner's trial counsel raised an issue with the Court regarding the prosecution's apparent intent to introduce Petitioner's Nextel cellphone records. (Tr. at 233.) As Petitioner's counsel explained:

*3 Your Honor ... I received the *Rosario*[8] material after the jury was selected yesterday. And in reviewing those materials I had noticed that there are no Nextel records that I would be entitled to prior to opening.

If you take a look at the witness list that the People intend to call, there's a witness, Nextel custodian of records. My understanding is that individual would be used to lay foundation to introduce telephone records for calls that were made through a cellular phone where there was conversations and phone calls made between my client and either a detective or Karl Keith in this case during 10:40 through 11 o'clock the evening that he was shot.

Clearly, under the *Rosario* rules, I am entitled to that. I've asked [the prosecutor] this morning for that. She indicated to me she does not have them, even though they were subpoenaed.

I will not open without reviewing those records. In the first sense, I'm entitled to it. And should the People not call that witness, I certainly have standing to have those records before I open.

(Tr. at 233-234 (emphasis added).)

Appendix B

In response, the prosecution informed the court that they had not yet received the cellphone records, but in any event, had "no objection" to "not putting those records into evidence." (Tr. at 237.)[9] After the prosecution made this representation, Petitioner's counsel dropped the issue and did not persist in his request to obtain the cellphone records, notwithstanding his contention that he was entitled to the records even if the prosecution was not going to admit them. The Court did not rule on trial counsel's objection presumably because it appeared that Petitioner's counsel had withdrawn it.

2. Impeachment of Petitioner with the Cellphone Records

The prosecution's cross-examination of Petitioner focused on his alibi claim, namely, that he was at home at the time Keith was shot. Despite defense counsel's earlier request for Petitioner's cellphone records and the prosecution's representation that they did not have them, the State moved to admit Petitioner's cellphone records on cross-examination. (Tr. at 817-20.) Petitioner's counsel requested to see the records briefly, stating that he did not "believe [he would] have any objection" to their admission. (Tr. at 818.) Though not having seen them up until that point, after a short review, he indicated that he had no objections. (Tr. at 819.)

*4 The prosecution questioned Petitioner about various entries in his cellphone records. Most devastating were the entries that showed calls from Petitioner's cellphone to his home on April 12, 2002 at 10:20 p.m. and 10:28 p.m.—right about the time when Petitioner testified that he was at home. (Tr. at 819-21.)

The prosecution capitalized on this evidence in its summation:

10:06 was the last call recorded on the defendant's Nextel. 10:28 was the next call. Isn't that interesting? And where does he call at 10:28? His home. His home. After he told you that he was certain he got home between 9:45 and ten o'clock and never left again.

Well, who is he calling? Is he calling himself? Did he take out his Nextel and call himself? Well, perhaps he picked up the phone next to the bed, the phone he told you that his wife picked up when they were called by the police, and maybe he called himself....

Does that make sense? Ask yourselves. Does that make sense? Does that ring true? Does any of that make sense?

(Tr. at 874-75.)

II. SUBSEQUENT PROCEDURAL HISTORY

A. Post-Trial Investigation

After the trial, Newsday published an article featuring post-trial statements of jurors from Petitioner's trial. (Dkt. 10-2 at ECF 76-77.) The article specifically discussed the jurors' reaction to the prosecution's use of Petitioner's cellphone records to undermine his claimed alibi. (*Id.* at ECF 77.) One juror stated that "[t]he time difference was the deciding factor for" him and that Petitioner's testimony, which was contradicted by the cellphone records, "hurt him big." (*Id.*)

The same juror further elaborated on his decision to find Petitioner guilty in a later interview with a private investigator, which was submitted below as part of Petitioner's Section 440 proceeding:

[Juror]: ... I remember the guy was guilty as sin.

[Investigator]: And why do you say that?

[Juror]: Well, if it wasn't enough that the guy was—the kid he shot was pointing a finger at him. He was—the story that he was telling when he took the stand. *He basically got caught in a lie. He was saying, yeah, I was calling myself from home. You know, that's the time I said, you know, why are you calling your house if you're there?*

* * * *

[Investigator]: Okay. Was there anything else that stood out

or was that the deciding factor[?]

[Juror]: The fact that the kid was pointing a finger at him, and the fact that he was caught lying to me was what decided it for me.

(*Id.* at ECF 72.)

B. Direct Appeal

Petitioner, represented by counsel,[10] appealed his conviction to the Appellate Division, Second Department ("Appellate Division") on the following five grounds: (1) Petitioner's guilt was not proven beyond a reasonable doubt and the verdict was against the weight of the evidence at trial; (2) the Court erred in holding that Petitioner was not entitled to a *Wade* hearing[11]; (3) Petitioner was denied a fair trial based on the cumulative effect of the prosecutor's improper remarks, which "denigrated the defendant and [his] case" and "unduly inflamed" the jury's emotions; (4) Petitioner's sentence was unduly harsh and excessive; and (5) the Court erred in failing to grant a motion for mistrial upon discovering that two jurors may have viewed a newspaper article about the trial and about Petitioner's prior acquittal from two prior murder charges. (Dkt. 5-2 at ECF 3.)

*5 The Appellate Division affirmed Petitioner's conviction, holding that: (1) Petitioner's challenge to the legal sufficiency of the evidence was unpreserved for appellate review, but that the trial evidence construed in the light most favorable to the prosecution was still legally sufficient to establish Petitioner's guilt beyond a reasonable doubt and that the verdict was not against the weight of the evidence; (2) the Court did not err in denying Petitioner's request for a *Wade* hearing, given the sufficiency of the record at the *Rodriguez* hearing[12]; (3) Petitioner's contention that the prosecutor's remarks were improper was also unpreserved for appellate review, but the challenged remarks were either fair comment on the evidence, permissive rhetorical comment, or responsive to defense counsel's summation; (4) Petitioner's sentence was not excessive; and (5) Petitioner's contention regarding jury impartiality was without merit. *People v. Garner*, 27 A.D.3d 764 (N.Y. App. Div. 2006). On July 7, 2006, the New York Court of Appeals denied Petitioner's application for leave to appeal. *People v. Garner*, 854 N.E.2d 1283 (N.Y. 2006)

Petitioner then petitioned the Appellate Division for a writ of error *coram nobis*, alleging ineffective assistance of appellate counsel.[13] On February 9, 2010, the Appellate Division found that Petitioner had failed to establish that he was denied effective assistance of appellate counsel and denied Petitioner's application for leave to appeal. *People v. Garner*, 70 A.D.3d 854 (N.Y. App. Div. 2010).

C. State Collateral Attacks

Petitioner then filed his Section 440 Motion, alleging ineffective assistance of his trial counsel on eight separate grounds: (1) counsel conceded in opening and summation that the victim, who was the prosecution's key witness, was not lying—despite Garner's conflicting testimony—and instead pursued a theory that the witness was delusional; (2) counsel abandoned a hearsay objection to a police officer's restatement of the victim's statements; (3) counsel failed to make or renew a motion to dismiss the indictment after learning that the victim had not testified before the grand jury; (4) counsel misspoke during his opening, thereby conceding a disputed factual matter; (5) counsel failed to impeach the victim and a corroborating witness with prior inconsistent statements; (6) counsel failed to object to unqualified expert testimony regarding the gunshot and, further, failed to use that testimony to the defense's advantage; (7) counsel failed to obtain Garner's cellphone records in order to prepare for trial and refresh Garner's recollection before testifying; and (8) counsel failed to use Garner's cellphone records to defense's advantage by cross-referencing those records with 911 calls and establishing that Garner was continuously using his cellphone throughout the only period of time during which Keith could have been shot.

On October 4, 2010, the County Court of the State of New York for the County of Suffolk ("County Court") denied Petitioner's motion without a hearing. The County Court found that Petitioner's ineffective assistance of counsel claims were, "for the most part, issues that could have been resolved by examining the record and, therefore, should have been determined on direct appeal." (Dkt. 7-3 ("440 Opinion") at ECF 3.) The County Court also denied each of Petitioner's claims on the merits and asserted that trial counsel's actions and decisions were reasonable at trial. (440 Opinion at ECF 3-8.)

D. *Habeas* Petition

*6 On January 3, 2011, Petitioner submitted the instant Petition for a Writ of *Habeas* Corpus pursuant to 28 U.S.C.

§ 2254. (Dkt. 1.) The parties agree that the petition is timely. (Dkt. 5 at ECF 5.)

The Court held an evidentiary hearing on the petition on February 24, 2016, at which Petitioner's trial counsel testified. The Court also heard oral argument from Petitioner's and Respondent's counsel on December 7, 2015 and February 24, 2016.

DISCUSSION

I. PROCEDURAL DEFAULT

Under 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a petitioner must comply with certain procedural requirements when filing an application for a federal writ of *habeas corpus.* A federal court generally is precluded from reviewing a *habeas* claim if the State court's prior denial of that claim rests on adequate and independent State law grounds. *Lee v. Kemna*, 534 U.S. 362, 375 (2002). A petitioner's failure to comply with a State procedural rule qualifies as such an adequate and independent state ground, provided that (i) the State court actually "relied on the procedural bar as an independent basis for its disposition of the case," *Harris v. Reed*, 489 U.S. 255, 261 (1989) (internal citation and quotation marks omitted), and (ii) the State procedural rule is "firmly established and regularly followed." *See Cotto v. Herbert*, 331 F.3d 217, 239-40 (2d Cir. 2003). In determining whether to deny a *habeas* claim on that basis, however, federal courts "apply a presumption against finding a state procedural bar and 'ask not what we think the state court actually might have intended but whether the state court plainly stated its intention.' " *Galarza v. Keane*, 252 F.3d 630, 637 (2d Cir. 2001) (quoting *Jones v. Stinson*, 229 F.3d 112, 118 (2d Cir. 2000)).

Here, Respondent contends that the County Court's reference to CPL § 440.10(2)(c)—which provides, in relevant part, that a State court must deny a Section 440 Motion when the defendant fails to raise an issue on direct appeal—demonstrates that the County Court's rejection of Petitioner's ineffective assistance claim rested on adequate and independent State grounds. (Dkt. 8 at ECF 23-24.) The Court disagrees for the sole reason that the County Court did not expressly rule that the entirety of Petitioner's ineffective assistance claim could have been raised on direct appeal. Rather, the County Court stated that Petitioner's "arguments concerning ineffective assistance of counsel are, *for the most part*, issues that could be resolved by examining the record and, therefore should have been determined on direct appeal[.]" (440 Opinion at ECF 3-4 (emphasis added).) It is therefore impossible to determine whether the County Court "clearly and expressly" rested the entirety of its decision regarding Petitioner's ineffective assistance claim on adequate and independent State grounds or which of Petitioner's ineffective assistance arguments the County Court rejected on procedural grounds. Accordingly, the Court declines to find that Petitioner's ineffective assistance claim is procedurally barred for purposes of federal *habeas* review.[14]

II. MERITS OF PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

*7 Having determined that Petitioner's *habeas* petition is not procedurally barred, the Court turns to the merits of his ineffective assistance of counsel claim.

A. AEDPA Legal Standard

A State prisoner seeking *habeas* relief under Section 2254 must show that he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Section 2254(d) sets forth the standard of review that applies when a *habeas* claim has been adjudicated on the merits by the State court:[15]

An application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Basing his claim on Section 2254(d)(1), Petitioner argues that the County Court's rejection of his ineffective assistance claim was an unreasonable application of clearly established federal law. (Dkt. 11 at ECF 39.) In deciding this issue, the Court "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Even if the Court finds that "the state court's adjudication of the claim was unreasonable under § 2254(d)[,] ... the court may ... [only] grant *habeas* relief ... if the petitioner has shown a violation of federal law under § 2254(a)," *i.e.*, that he "is in custody in violation of the Constitution or laws or treaties of the United States." *Lopez v. Miller*, 906 F. Supp. 2d 42, 50 (E.D.N.Y. 2012); 28 U.S.C. § 2254(a). In making this determination, the Court may consider evidence beyond the State court record including, but not limited to, information obtained at an evidentiary hearing. *Lopez*, 906 F. Supp. 2d at 55-56. Accordingly, to succeed on his ineffective assistance claim, Petitioner must establish that: (1) the County Court's rejection of his ineffective assistance claim was unreasonable under 28 U.S.C. § 2254(d); and (2) his constitutional rights were violated under 28 U.S.C. § 2254(a). The Court finds that Petitioner has established both.

B. Section 2254(d)(1): Unreasonable Application of Law

A State court decision is an "unreasonable application" of clearly established federal law if "the [S]tate court identifies the correct governing legal principle from [Supreme Court] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 407 (2000); *see also Gersten v. Senkowski*, 426 F.3d 588, 606 (2d Cir. 2005). "[A]n unreasonable application of federal law[, however,] is different from an incorrect application of federal law." *Williams*, 529 U.S. at 410. Section 2254 thus embodies a "difficult to meet ... and highly deferential standard ... which demands that state-court decisions be given the benefit of the doubt." *Cullen*, 563 U.S. at 181 (internal citations and quotations omitted). "Some increment of incorrectness beyond error is required," but the Second Circuit has cautioned "*that the increment need not be great*; otherwise habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." *Monroe v. Kuhlman*, 433 F.3d 236, 246 (2d Cir. 2006) (emphasis added) (internal quotation marks and citations omitted).

*8 The Supreme Court's *Strickland* standard, which governs ineffective assistance claims, is well-established. To prevail on such a claim, a petitioner must demonstrate that (i) his counsel's performance "fell below an objective standard of reasonableness" and (ii) there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Notably, the Supreme Court also observed in *Strickland* that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691; *see also Gersten*, 426 F.3d at 607 ("[C]ounsel has a duty to make reasonable investigations, and a decision not to investigate will be reasonable only to the extent that reasonable professional judgments support the limitations on investigation." (internal quotation marks and citation omitted)).

The Court finds the County Court's decision regarding trial counsel's handling of the cellphone records issue to be an unreasonable application of *Strickland* and its progeny. In rejecting Petitioner's argument that his attorney was ineffective because he failed to obtain the cellphone records before trial, the County Court concluded that this decision was a "reasonable and potentially effective trial strategy," explaining "that, if defendant had reviewed the records ahead of time, this would have been disclosed upon cross-examination," and thus by not getting the records before trial, Petitioner's trial counsel "avoid[ed] any inference that his client's testimony was tailored to conform with information contained within the phone records." (440 Opinion at ECF 8.) This *post hoc* rationalization is so speculative and confounding, not to mention unconvincing, that it rises to the level of being an unreasonable application of *Strickland*. Even though a jury could have drawn a negative inference about Petitioner's credibility based on his having reviewed the cellphone records before testifying—which is far from certain—no reasonable attorney would have concluded that this inference would be more, or even as, damaging to Petitioner's credibility, *as well as* his entire defense, than him being completely blind-sided by the prosecution's use of the cellphone records on cross-examination to thoroughly impeach him and decimate his alibi claim. Moreover, to the extent that avoiding a negative inference regarding Petitioner's credibility was sound trial strategy, the County Court's rationalization does nothing to justify trial counsel's failure to obtain the records and review them *himself*, without showing them to Petitioner, so that counsel could decide critical trial strategy issues, such as what defense to employ (*e.g.*, whether to argue alibi), whether Petitioner should testify, how to prepare Petitioner to testify (*e.g.*, how the cellphone records could be used against him on cross-examination), and, as discussed below, whether the cellphone records might have actually aided Petitioner's defense. Nor does the County Court's rationalization justify

trial counsel's failure to take more time to review the cellphone records after the prosecution revealed prior to trial that they were aware of the records and mid-trial that they possessed and intended to use them on Petitioner's cross-examination. Even a cursory review of the records would have revealed the devastating impact they would have on Petitioner's credibility and alibi defense, which, in turn, should have prompted defense counsel to renew his pre-trial objection to their admission based on the prosecution's failure to turn them over during discovery.

For this reason, and those further explained below, the Court finds that trial counsel's actions "fell below an objective standard of reasonableness" and that the County Court's contrary finding is an unreasonable application of the *Strickland* standard.[16] *See* *Gersten*, 426 F.3d at 611 (finding counsel's failure to challenge credibility of prosecution witness to "not be based on a sound trial strategy" and therefore "it was an unreasonable application of *Strickland* for the County Court to hold otherwise").[17]

C. Section 2254(a): Constitutional Violation

*9 Having determined that the County Court unreasonably applied the *Strickland* ineffective assistance standard, the Court must next decide whether Petitioner is "in custody in violation of the Constitution." 28 U.S.C. § 2254(a). In deciding this issue, the Court considers evidence beyond the State court record, including information learned at the February 9, 2016 evidentiary hearing. *Lopez*, 2012 WL 6027751, at *1. Here, the Court must decide the same issue presented to the County Court: whether Garner was denied effective assistance of trial counsel. Thus, the Court addresses *Strickland*'s two prongs: (1) performance and (2) prejudice.

1. Performance

On the first prong, "the [ ] inquiry must be whether counsel's assistance was reasonable considering all circumstances." *Strickland*, 466 U.S. at 694. In assessing performance, a court must apply a "heavy measure of deference to counsel's judgments." *Rompilla v. Beard*, 545 U.S. 374, 408 (2005) (internal quotation marks and citation omitted). The Court must not look only to the evidence before counsel but also consider "whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2007); *Rivas v. Fischer*, 780 F.3d 529, 547 (2d Cir. 2015). Thus, the Court's evaluation of this duty does not hinge on whether defense counsel should have presented certain evidence; rather, the inquiry hinges on whether the investigation itself was reasonable. *Wiggins*, 539 U.S. at 523; *Rivas*, 780 F.3d at 547. Failing to investigate certain leads can qualify as constitutionally deficient. *See, e.g.*, *Espinal v. Bennett*, 588 F. Supp. 2d 388, 399 (E.D.N.Y. 2008), *aff'd,* 342 Fed.Appx. 711, 712 (2d Cir. 2009) (holding that counsel's failure to investigate a redacted police report that could have corroborated petitioner's alibi qualified as constitutionally deficient); *Schulz v. Marshall*, 528 F.Supp.2d 77, 96 (E.D.N.Y. 2007), *aff'd,* 345 Fed.Appx. 627, 627 (2d Cir. 2009) (holding that counsel's failure to call and interview a potential alibi witness qualifies as constitutionally deficient).

Here, trial counsel's performance fell below an objective standard of reasonableness. In reaching this conclusion, the Court finds *United States v. Velazquez* to be instructive. In *Velazquez*, a jury convicted the defendant of five crimes related to his participation in a conspiracy to rob drug traffickers and business owners. *United States v. Velazquez*, 11-CR-639, 2016 WL 3561704, at *1 (E.D.N.Y. June 24, 2016). After his conviction, the defendant moved for a new trial pursuant to Federal Rule of Criminal Procedure 33 arguing, among other things, that his trial counsel was ineffective. *Id.* at *1. The Court granted the defendant's motion, concluding that defense counsel's errors satisfied both *Strickland* prongs. In particular, the Court found it inexcusable that defense counsel failed to obtain and introduce the defendant's cellphone records, and rejected counsel's explanation that he did not do so because "such records would be useless given that the records would not confirm that it was the defendant (as opposed to someone else) using the telephone at any particular time." *Id.* at *2. The Court explained that there was "no downside to obtaining and reviewing the records" and that "[e]ven though telephone records do not establish on their face who was using the phone at a given time, the records can often be used ... to strongly support the conclusion that it was the defendant ... who was using the telephone at the relevant times." *Id.* The Court also found that defense counsel erred by failing to show his client certain Department of Motor Vehicle records prior to their introduction, where it was "clear that, if the defendant had been shown [the records] prior to trial and had time to discuss it with his attorney, counsel would have been able to obtain [ ] evidence that would have definitely undermined the government's theory." *Id.* at *2-3.[18]

*10 The reasoning in *Velazquez* is persuasive here. Trial counsel's failure to obtain Petitioner's cellphone records before trial was inexcusable and devastating to Petitioner's

Appendix B

defense. Not only did it lead to Petitioner's impeachment on cross-examination by documents he had not previously seen, but it also prevented trial counsel from devising a reasonable trial strategy and pursuing other leads, such as identifying the people whom Petitioner had spoken to on the phone during critical times on the night of the shooting. Indeed, Petitioner's counsel acknowledged as much during the February 24 evidentiary hearing:

Q: And for what reason would you want to know in advance [what cellphone records the State has]?

A: To review, see what phone calls were being made, see who the individual called, see if there's any calls to the complaining witness in this case or the victim or his friends. *It would be foolish not to.*

(Dkt. 29 at 21:22-22:2 (emphasis added).)[19]

The Court cannot envision any reason for Petitioner's counsel not to have obtained the cellphone records prior to trial, or to request a recess when it became clear that the prosecution was going to have the records admitted and use them to cross-examine Petitioner. At the February 24 hearing, trial counsel suggested reasons why he did not obtain the Nextel records, including his belief that Petitioner primarily used "prepaid" and "burn[er]" cellphones, for which there would be no call activity records, that he believed Petitioner primarily used his Nextel cellphone for point-to-point communication, similar to a walkie-talkie, which would also not be reflected in call activity records, and that Petitioner did not advise or lead his attorney to believe that there would be anything useful to his case from any of Petitioner's cellphones. (Dkt. 29 at ECF 16, 19.)[20] However, any confusion surrounding Petitioner's cellphones or counsel's assumptions about Petitioner's cellphone usage did not absolve the attorney of his duty to conduct a reasonable investigation to identify all evidence that might have helped or hurt Petitioner's case, especially when counsel clearly knew, or had reason to believe, that Petitioner had used his Nextel cellphone the night of shooting. (Tr. at 512-13 (shortly after the shooting, victim received a call from Petitioner, which appeared on the Caller ID as Petitioner's nickname).) Similarly, even if Petitioner did not ask his attorney to obtain the cellphone records,[21] it was the attorney's responsibility to determine their relevance, if any, regardless of the client's failure to recognize it. Here, the potential relevance of the cellphone records was obvious: Petitioner was pursuing an alibi defense and thus his whereabouts and activity at and around the time of the shooting—which could be demonstrated, in part, through Petitioner's cellphone calls—was of critical significance. Yet, despite initially seeming to understand the need to obtain the cellphone records, Petitioner's counsel seemingly delegated the responsibility for getting them to Petitioner's mother and ultimately did not wait to receive them before proceeding to trial.[22]

*11 Furthermore, even if trial counsel's failure to obtain the cellphone records prior to trial was excusable, no reasonable attorney would have proceeded with trial after it became obvious that those records—which trial counsel himself had not seen—could be used against his client during cross-examination. Despite objecting at the pre-trial conference to the prosecution's introduction of the records—which the prosecution claimed not to have at that time—trial counsel dropped his objection when the prosecution agreed not to use them in its case in chief.[23] But, when the prosecution suddenly sought to spring the records on the defense in the middle of trial and only after Petitioner's direct testimony, his attorney failed to renew his objection to their admission, despite having previously objected to their admission precisely because they had not been provided to the defense. To make matters worse, trial counsel only briefly reviewed the cellphone records—if at all—before consenting to their admission and use during Petitioner's cross-examination. Trial counsel's mistakes led to the impeachment of his client and the destruction of Petitioner's entire alibi defense. Furthermore, by not objecting to the admission of the cellphone records, Petitioner's counsel likely precluded the possibility of obtaining post-trial relief on that issue. *See* *People v. Oliphant*, 986 N.Y.S.2d 600, 601 (N.Y. App. Div. 2014) (finding that "defendant's argument that the court erred in admitting a recording of two 911 emergency telephone calls placed by the complainant regarding the subject incident [was] unpreserved for appellate review, as the defendant failed to object to the admission of the recording at trial").

Thus, trial counsel's failure to obtain Petitioner's cellphone records and also his failure to object to their surprise admission mid-trial constituted deficient performance.

2. Prejudice

With respect to the second prong, Petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

Appendix B

been different." *Strickland*, 466 U.S. at 694. "[T]he question to be asked in assessing the prejudice from counsel's errors ... is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Id.* at 695. "Indeed, the defendant must show more than that the unprofessional performance merely had some conceivable effect." *Henry v. Poole*, 409 F.3d 48, 63 (2d Cir. 2005) (internal citation and quotation marks omitted). But, "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, *even if the errors of counsel cannot be shown by a preponderance* of the evidence to have determined the outcome." *Id.* at 64 (quoting *Strickland*, 466 U.S. at 694) (emphasis in original). This inquiry requires an evaluation of trial counsel's failure within the context of the State's case and the evidence supporting Petitioner's conviction. *See Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir. 2001). "The Supreme Court has made clear that 'a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.' " *Schulz v. Marshall*, 528 F. Supp. 2d 77, 100 (E.D.N.Y. 2007) (quoting *Strickland*, 466 U.S. at 696).

Applying the standard here, the Court "cannot conclude that there is no reasonable probability" that the failure to obtain Petitioner's cellphone records "affected the outcome of [Petitioner's] trial." *Henry*, 409 F.3d at 66. As trial counsel himself acknowledged, it is conceivable that he would have pursued a different strategy had he reviewed the records:

The Court: Had you had the phone records that you now see before the trial started, would that have changed your strategy?

[Trial Counsel]: It may have.

The Court: In what way?

[Trial Counsel]: Well, I think in speaking with Blair and redefining where he may have been, and based on our conversations as to other witnesses that may be able to testify, for example, that Blair was home or was not home....

The Court: Or who he was talking to on the phone?

[Trial Counsel]: Correct, and times.

(Dkt. 29 at 46:9-20.) Trial counsel also conceded that a review of the cellphone records might have led him to not call Petitioner to the stand. (*Id.* at 47:1-4.)

Indeed, the devastating impact of the prosecution's use of the cellphone records to cross-examined Petitioner is borne out by the one juror's statements to the media and a private investigator after the trial: "[Petitioner] was guilty as sin" because he "basically got caught in a lie" when "[h]e was saying, yeah, I was calling myself from home. You know that's the time I said, you know why are you calling your house if you're there [*i.e.*, at your house]? .... [T]he fact that he was caught lying to me was what decided it for me." (Dkt. 10-2 at ECF 72, 77.) Thus, the prosecution's introduction and use of Petitioner's cellphone records had an undeniable impact on the verdict.

*12 Had Petitioner's counsel obtained and reviewed the records before trial, it is likely he would have made different strategic decisions—as he acknowledged at the February 24 hearing—that would have avoided or mitigated the potentially negative impact of the records, such as not asserting an alibi defense and not having Petitioner testify.[24] Even if Petitioner had still chosen to testify, he and his attorney would have had the benefit of the cellphone records to prepare him to testify and to anticipate questions about the calls to his home around the time of the murder.[25] Such changes in strategy clearly could have affected the outcome of Petitioner's trial, especially given that the State's case came down to a credibility contest between Petitioner and Keith. There was no forensic evidence or an eyewitness identification establishing that Petitioner was the shooter.[26] As the one juror confirmed, it was Petitioner's impeachment coupled with Keith's testimony that led to Petitioner's conviction. Thus, had Petitioner not been impeached, the jury could have credited his testimony over Keith's, and acquitted him.

However, given the difficulty of reconciling Petitioner's alibi defense and testimony with the cellphone records, it is more likely that Petitioner would not have pursued an alibi defense and would not have testified, leaving the jury to decide the case based almost exclusively on Keith's and Merkelson's testimony. Were this the only likely scenario, the Court would not find a "reasonable probability" that the outcome of the trial would have been different.

*13 But, as shown in the instant *habeas* petition and at the February 24 hearing, Petitioner's counsel could have used the cellphone records at trial to affirmatively establish, at a

Appendix B

minimum, reasonable doubt as to Petitioner's commission of the crime. Specifically, he could have argued that based on the 911 calls to the police on April 13, 2002, the shooting occurred between 10:31 p.m. and 10:41 p.m.,[27] and that, given this time frame, the cellphone records create reasonable doubt as to whether Petitioner was even with Keith when he was shot—as Keith claimed and Petitioner denied. Petitioner's cellphone records establish that Petitioner was on the phone *continuously* between 10:28 p.m. and 10:41 p.m., *i.e.*, the entire ten-minute window during which Keith was shot. As set forth in Petitioner's Reply Brief (Dkt. 11 at ECF 26), Petitioner's cellphone records show that Petitioner made the following calls the night of April 12, 2002:[28]

Time of Call	Duration of Call (minutes:seconds)
10:28 p.m.[29]	2:04
10:31 p.m.	1:00
10:32 p.m.	2:15
10:35 p.m.	4:38
10:40 p.m.	1:06

This evidence would have been critical to Petitioner's defense because (1) a jury certainly would have reason to doubt that Petitioner was shooting Keith while simultaneously making a phone call, or in the midst of making a series of phone calls, and (2) these records contradict Keith's testimony that Petitioner did not make any calls during their 20-minute ride to the drug location or thereafter, which would undercut both Keith's credibility and his account of the shooting.[30]

*14 Considering the totality of these facts, the Court finds that there is a reasonable probability that the outcome of the trial would have been different had Petitioner's counsel obtained and reviewed the cellphone records before trial, conducted investigation based on these records, and formulated a trial strategy that both took into account and affirmatively used the records in Petitioner's defense. Accordingly, the Court finds that Petitioner's Sixth Amendment right to the effective assistance of counsel at trial was violated.

CONCLUSION

Appendix B

For the reasons set forth above, the Court concludes that the State court's decision to deny Petitioner's ineffective assistance claim under *Strickland* "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Moreover, the Court finds that Petitioner has shown that his counsel's performance fell "outside the wide range of professionally competent assistance" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 690.

Accordingly, Petitioner's *habeas* petition is GRANTED. Respondent is ordered to release Petitioner from custody within forty-five (45) days of this Order unless the State declares its intention, before those forty-five (45) days expire, to retry Petitioner on the charges against him. Should Respondent choose to appeal this decision, it shall advise the Court whether it is seeking to stay this decision pending appeal.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 7223335

Footnotes

1 In addition to his ineffective assistance claim, Petitioner also asserts that he was denied a fair trial when the trial court refused to grant a motion for mistrial upon discovering two jurors' potential exposure to a relevant newspaper article. However, as discussed below, because the Court grants the petition on the grounds of ineffective assistance of counsel, it need not address the other bases for the petition.

2 The reason for Petitioner's resentencing is not relevant to the instant *habeas* petition.

3 Roosevelt is a village in the town of Hempstead on Long Island, New York. *See* Roosevelt Union Free School District, http://rooseveltufsd.org/Page/165 (last viewed on 12/08/16).

4 The officer who arrived on the scene, Officer Brian Gover, corroborated this testimony. (Tr. at 316.)

5 Neither Petitioner's wife nor his children testified at trial.

6 These features permit an individual to send an alarm to another individual without speaking on the phone. (Tr. at 795.)

Appendix B

7 In addition to Keith, the State also presented testimony from Merkelson, four detectives, two Suffolk County Police Department ("SCPD") officers, and one 911 operator, all of whom, except Merkelson, testified as to the timeline of events after the shooting. The jury also heard from the surgeon who operated on Keith's gunshot wound, a forensic scientist from SCPD's firearms unit, and a physician's assistant, who was also Keith's father.

8 In *People v. Rosario*, the New York Court of Appeals held "that a right sense of justice entitles the defense to examine a witness' prior statement, whether or not it varies from his testimony on the stand." 173 N.E.2d 881, 883 (N.Y. 1961).

9 As further explained below, Petitioner submitted an affidavit in support his State court motion pursuant to New York Criminal Procedure Law § 440.10 ("Section 440 Motion"), attesting to the fact that prior to trial, he had asked his attorney to obtain his cellphone records for April 12, 2002. (Dkt. 9-2 at ECF 36.) Petitioner's counsel, however, did not request nor subpoena the phone records from the phone company. (*Id.*) Rather, according to Petitioner, his counsel requested that Petitioner ask his mother for the records because she was the account holder at the time. (*Id.*) Petitioner's mother requested the records, but they did not arrive until after the trial. (*Id.*)

10 Petitioner was represented on his direct appeal by a different attorney than both his trial counsel and current counsel.

11 A court may conduct an evidentiary hearing pursuant to *United States v. Wade*, 388 U.S. 218 (1967) to determine the admissibility of a pre-trial identification. *See United States v. Chandler*, 164 F. Supp. 3d 368, 382 (E.D.N.Y. 2016).

12 "In New York, a *Rodriguez* hearing is held in lieu of a *Wade* hearing when the prosecution alleges that, by virtue of a prior relationship between a witness and the defendant, the witness is 'impervious to police suggestion,' and her identification is therefore untainted by an otherwise suggestive pretrial identification procedure." *Stallings v. Woods*, 04-CV-4714, 2006 WL 842380, at *16 n.17 (E.D.N.Y. Mar. 27, 2006) (quoting *People v. Rodriguez*, 593 N.E.2d 268 (N.Y. 1992)).

13 The precise grounds for Petitioner's *coram nobis* petition are not in the record before this Court.

14 *See, e.g.*, *U.S. ex rel. Bell v. Pierson*, 267 F.3d 544, 556 (7th Cir. 2001) (finding claim not procedurally defaulted where lower court expressly referenced procedural bar, but did not discuss how bar applied to the facts and also denied *habeas* relief on the merits); *Devison v. Cunningham*, 09-CIV-1031, 2010 WL 5060789, at *22 (S.D.N.Y. Oct. 15, 2010) (State court decision did not clearly and expressly rely on procedural bar where court merely "adopt[ed]" Respondent's argument), *report and recommendation adopted,* 09-CIV-1031, 2010 WL 5060728 (S.D.N.Y. Dec. 8, 2010); *Alexander v. Connell*, 05-CIV-9020, 2010 WL 2165273, at *9-10 (S.D.N.Y. Apr. 9, 2010) (finding no express reliance where decision stated that petition was either subject to dismissal because it was previously raised or rejected or because it could have been raised on direct appeal), *report and recommendation adopted,* 05-CIV-9020, 2010 WL 2165272 (S.D.N.Y. May 28, 2010); *Santorelli v. Cowhey*, 124 F. Supp. 2d 853, 856 (S.D.N.Y. 2000) (State court did not clearly and expressly rely on procedural bar where it was "at best, ambiguous as to whether it determined that Petitioner's federal constitutional claims ... had been dismissed because they were unpreserved as a matter of state law or because they lacked merit), *aff'd,* 4 Fed.Appx. 78 (2d Cir. 2001).

15 The parties agree that the State court adjudicated Petitioner's ineffective assistance of counsel claim on the merits. (*See* 440 Opinion at ECF 4-9; Dkt. 8 at ECF 12 ("The state courts ... have decided the federal issues on the merits ... and the deferential standard of review applies.").)

16 The County Court did not analyze the second prong of *Strickland*—whether trial counsel's failure to obtain Petitioner's cellphone records was prejudicial.

17 The State court also noted that "Defendant [Garner] concedes that counsel did in fact attempt to obtain the records prior to trial and that the obligation to do so rested with [D]efendant." (440 Opinion at ECF 8.) First, the Court agrees with Petitioner that it is unclear how the State court reached this conclusion. Second, even if this concession was true, it does not excuse Petitioner's trial counsel's failure to obtain the records or later object to their introduction.

18 The Court identified a third error—defense counsel's entering into a stipulation that was damaging to defendant—which, when combined with the previously discussed errors, "in the aggregate," satisfied the first prong of *Strickland*. *Id.*

19 Though he did not have a clear memory of the events relating to Petitioner's case, trial counsel appeared to the Court to be candid and forthcoming during his testimony at the hearing, and the Court credits his testimony.

Appendix B

20 Petitioner's counsel did acknowledge that he did not have a "clear recollection either way [as to] whether or not [Petitioner] asked [him] to get [Petitioner's] cell phone records." (Dkt. 29 at ECF 18.)

21 At the hearing, Petitioner's counsel denied Petitioner's assertion that he had asked his attorney to obtain the cellphone records. (Dkt. 29 at 16:6-12.)

22 In conflict with her son's testimony, Petitioner's mother testified that *Petitioner* asked her to obtain his cellphone records—not Petitioner's trial counsel. (Dkt. 29 at ECF 7.) In any event, it is clear that, prior to trial, Petitioner's counsel was well aware of the existence and potential significance of the cellphone records.

23 To the extent trial counsel implicitly consented to the prosecution's use of the cellphone records for cross-examination purposes, without ever having seen them, this was clearly ineffective as well.

24 This is not to say that Petitioner necessarily could have avoided testifying, even if he knew about the cellphone records before trial, given that some of the evidence required explanation that only Petitioner could give, *e.g.*, the presence of Keith's money in the glove compartment of Petitioner's car. In addition, even if Petitioner chose not to testify, his post-arrest claim to the police about being at home at the time of the shooting—which was arguably contradicted by the cellphone records—might have been introduced by the prosecution as a false exculpatory statement. *United States v. Taylor*, 767 F. Supp. 2d 428, 434 (S.D.N.Y. 2010) ("[F]alse exculpatory statements are admissible as circumstantial evidence of a consciousness of guilt in this Circuit."). Petitioner therefore might still have chosen to testify in order to explain how his alibi claim was not contradicted by the cellphone records. In any event, in making these and other consequential decisions regarding his defense, Petitioner should have had the benefit of this extremely relevant information, of which his counsel was fully aware before trial.

25 While a defendant does not have a "right" to falsely tailor his testimony to other evidence in the case, it is entirely proper for an attorney to rely on other evidence in preparing his client to testify, whether to jog the client's memory or verify its accuracy, especially with respect to the specific timing of events. Here, given the inexact time frames involved, it is conceivable that the cellphone records might have prompted Petitioner to remember more precisely his whereabouts at different times that night and where he might have been when he called his home. In any event, the fundamental point is that a defense attorney has a duty to obtain all evidence relevant to his client's case so as to be able to adequately and appropriately prepare his client's defense.

26 Keith, of course, testified that he was shot from behind while walking a few feet in front of Petitioner, who was the only other person present at the time. Though there was other evidence pointing to Petitioner's guilt, as discussed *supra* in footnote 24, the Court does not find that the prosecution's case was so overwhelming as to negate the reasonable probability that Petitioner could have been acquitted if his attorney had obtained the cellphone records before the trial and investigated and prepared Petitioner's defense using that information. *See Salcedo v. Artuz*, 107 F. Supp. 2d 405, 418 (S.D.N.Y. 2000) ("Given the overwhelming evidence of petitioner's guilt, he has failed to [demonstrate prejudice].").

27 Although the exact times of the 911 calls are not in the record, the Court credits Petitioner's argument that approximate times can be discerned based on the submitted evidence. In particular, a minute-and-a-half into the first 911 call, the operator told the caller that police were already on the way. Since Officer Gover received notification to respond to the shooting at 10:44 p.m., the call could not have occurred prior to 10:41 p.m. On the second 911 call, the caller indicated that the shooting happened five to ten minutes prior to her call. Crediting that estimation, and assuming the call occurred ten minutes before, then the shooting could not have occurred any earlier than 10:31 p.m.

28 Notably, Respondent does not dispute that these cellphone records are Petitioner's. Indeed, at trial, the prosecution, after impeaching Petitioner with the records, argued in closing both that the cellphone was Petitioner's and that he was the person using the cellphone that night, at least at the time the calls to his home were made.

29 Two of these calls, the one at 10:28 p.m. and 10:31 p.m., were to Petitioner's home (Dkt. 11 at 22), which would tend to undermine his claim of having gone home and remained there after meeting Keith and Merkelson at the McDonald's. However, as previously discussed, had Petitioner's counsel obtained the cellphone records in advance of trial, he could have used them to determine more precisely Petitioner's whereabouts at different points in time on the night of the shooting. Furthermore, even if these records might have undercut Petitioner's credibility and any claim about him being at home at the time of shooting, the records would have directly raised significant doubt about whether Petitioner shot Keith, which was the ultimate issue the jury had to decide.

Appendix B

30 It is clear from the record that Petitioner's counsel never analyzed the 911 calls to determine the likely time frame for the shooting. In fact, in his closing, notwithstanding the evidence that Gover was notified of the 911 at 10:44 p.m., counsel mistakenly referred to the shooting taking place around 10:52 p.m. Given defense counsel's failure to identify the time frame for the shooting, it is unclear that even if he had timely obtained or received the cellphone records, he would have appreciated their significance. What is clear, however, is that after receiving them mid-trial, he did not.

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Appendix B

At the County Court of the State of New York for the County of Suffolk, at the Courthouse thereof located at 210 Center Drive, Riverhead, New York on the 4th of October, 2010.

PRESENT:

HONORABLE MARTIN I. EFMAN
Acting County Court Judge

ORDER

Case No. 01049-2002

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

BLAIR GARNER,

Defendant.

----------X

HON. THOMAS J. SPOTA
District Attorney, Suffolk County
By: Michael J. Miller, Esq.
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By Notice of Motion, Affidavit of defendant, Affirmation of defense counsel, Reply and Memoranda of Law, defendant moves pursuant to CPL §440.10 to vacate his judgment of conviction, alleging ineffective assistance of counsel. By Affirmation in Opposition and Memorandum of Law, the People are opposed.

After careful consideration of the submissions by the parties and review of the Court file, the Court determines that the motion must be denied without a hearing for the reasons set forth below.

Findings of Fact

The charges in this indictment relate to events occurring on the evening of April 13, 2002 in Amityville, Suffolk County, New York. During the course of a drug transaction involving the victim Karl Keith, his cousin Jesse Merkelson and defendant Blair Garner, Keith was shot in the head. Keith survived the attack and subsequently told police that defendant, with whom he was previously acquainted, had arranged the drug deal and then shot him.

Defendant Blair Garner was charged under Indictment No. 01049-2002 with Attempted Murder in the Second Degree [PL §110.00 and 125.25(1)](Count One); Assault in the First Degree

[PL §120.10(1)](Count Two); Robbery in the First Degree [PL §160.15(1)](Count Three); Criminal Use of a Firearm in the First Degree [PL §265.09(1)] (Count Four); and Criminal Possession of a Weapon in the Second Degree [PL §265.03](Count Five). Following trial by jury, defendant was found guilty as charged to all five counts of the indictment.

On November 21, 2002, defendant was sentenced to serve four concurrent terms of twenty-five years imprisonment on Counts One through Four and a concurrent fifteen year term on Count Five, all to be followed by concurrent five year terms of post-release supervision.

Defendant appealed his judgment of conviction, People v. Garner, 27 A.D.3d 764 (2nd Dept. 2006), lv. to appeal denied 7 N.Y.3d 789 (2006). The Appellate Division determined that the trial evidence herein "was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, upon the exercise of our factual review power, we are satisfied that the verdict of guilt was not against the weight of the evidence (citations omitted)," Id. The Appellate decision addressed specific arguments raised by defendant and went on to note that any additional arguments "are without merit," Id.

Pursuant to CPL §440.20, defendant filed a *pro se* motion challenging his adjudication as a second violent felony offender. The Court granted relief to the extent that defendant was returned to the Court for resentencing as a second felony offender, People v. Garner, (Suffolk County Court, 12/7/05, Hon. Robert W. Doyle, Case No. 01049-2002). On October 12, 2006, defendant was resentenced to the same terms of imprisonment and post-release supervision. Defendant subsequently appealed on the ground that this sentence was excessive. By Decision and Order of April 22, 2008, the Appellate Division affirmed, People v. Garner, 50 A.D.2d 1057 (2nd Dept. 2008), lv. to appeal denied 10 N.Y.3d 934 (2008).

A *pro se* application to vacate the judgment of conviction on the ground of ineffective assistance of Appellate counsel was denied by the Court, People v. Garner, 70 A.D.3d 854 (2nd Dept. 2010), lv. to appeal denied, ___ N.Y.3d ___ (July 7, 2010).

Defendant now argues that trial counsel erred by: (1) presenting unreasonable and prejudicial arguments before the trial jury; (2) failing to object to admission of certain evidence; and (3) failing to pursue certain trial strategies. The People are opposed. They argue that there is no merit to defendant's claims and submit that the issue of ineffective assistance of counsel is a record based claim which should have been raised in the direct appeal. They also argue that counsel was indeed effective and characterize defendant's motion as an attempt to present an alternative theory from that presented at trial.

Conclusions of Law

Defendant's arguments concerning ineffective assistance of counsel are, for the most part, issues that could be resolved by examining the record and, therefore, should have been determined on direct appeal, Criminal Procedure Law § 440.10(2)©. Defendant cannot now use a CPL §440.10

motion to collaterally challenge an issue which could have been addressed on direct appeal, People v. Cooks, 67 N.Y.2d 100 (1986). In any event, a review of the record shows that defendant received effective representation.

The New York standard for the effective assistance of counsel is whether defendant was afforded "meaningful representation", which requires examining the representation in light of the law and the facts of the case, viewed in their totality at the time of trial, People v. Baldi, 54 N.Y.2d 137 (1981). Under the federal standard, there is a two-prong test for ineffective assistance, Strickland v. Washington, 466 U.S. 668 (1984). Defendant must first demonstrate "that counsel's representation fell below an objective standard of reasonableness" and, secondly, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different," Strickland at 688.

The burden falls upon defendant to establish that he was denied meaningful representation and to "overcome the strong presumption" that he was represented competently, People v. Myers, 220 A.D.2d 461 (2nd Dept. 1995), lv. to appeal denied 87 N.Y.2d 905; People v. Cuesta, 177 A.D.2d 639 (2nd Dept. 1991), lv. to appeal denied 79 N.Y.2d 919 (1992). Counsel is "strongly presumed" to have exercised reasonable judgment in all significant decisions, Strickland at 690.

The Court determines that defendant has failed to meet his burden. The trial record establishes that defense counsel engaged in motion practice, obtained discovery materials from the District Attorney's Office, made pre-trial applications on defendant's behalf , cross-examined the People's witnesses, objected to certain items of evidence, presented evidence on behalf of the defendant at trial and made cogent arguments to the jury. As such, absent a demonstration that defense counsel's trial strategy unduly prejudiced defendant, this Court is satisfied that defendant was adequately represented by counsel under both the State and Federal Constitutions.

Defendant's argument that counsel's conduct fell below an objective standard of reasonableness is based upon eight separate claims which, considered both individually and collectively, fail to establish ineffective assistance. Each of these claims is addressed below.

Defense Trial Strategy

The first allegation by defendant is that defense counsel erred in the manner that he framed his argument to the jury. In support, he cites counsel's opening statement and closing argument.

The victim Karl Keith testified that, after he was shot, he saw the defendant standing over him and heard the defendant calling out his name. Defense counsel argued that the seriously injured victim believed something that was not true due to his head wound. Defendant now argues that this was an implausible defense unsupported by evidence, such as medical records or expert testimony. Instead, defendant suggests that counsel should have argued that Keith was lying. The People respond that defense counsel conceded an issue that could not be conclusively refuted, i.e. Keith's identification of defendant as the person who shot him. The People further argue that a defense that

the victim was mistaken was a more reasonable tactic then attacking a sympathetic victim who had survived a gunshot wound to the head.

In analyzing whether a defendant has been accorded meaningful representation, the Court of Appeals has emphasized the difference between ineffective representation and losing trial tactics. Counsel's performance will not be considered ineffective, even if unsuccessful, as long as it reflects an objectively reasonable and legitimate trial strategy under the circumstances and evidence presented, People v. Berroa, 99 N.Y.2d 134 (2002); People v. Henry, 95 N.Y.2d 563 (2000), subsequent appeal aff'd 281 A.D.2d 490 (2nd Dept. 2001), cert. denied 547 U.S. 1040 (2006). "Hindsight does not elevate counsel's unsuccessful trial strategies to ineffective assistance of counsel (citations omitted)", People v. Monroe, 52 A.D.3d 623 (2nd Dept. 2008).

In this case, discrediting the only witness who identified defendant as the shooter was a consistent and plausible strategy. Counsel did this by suggesting that the evidence offered by the victim was not an actual recollection of events but, rather, the result of severe head trauma combined with a false belief that defendant had committed the act. This defense focused directly on defendant's innocence and his denial of any involvement in the shooting. If the jury accepted this theory of mistaken identity, there was a possibility of acquittal. As argued by the People, there was a tactical reason not to characterize a sympathetic victim as a liar.

The Court determines that counsel employed a reasonable strategy that constituted objectively meaningful representation. Defendant's motion on this ground is denied.

Opening Statement - Home Depot Issue

Defendant alleges that, by conceding a factual issue in his opening statement, defense counsel undermined defendant's credibility at trial. He argues that, prior to trial, counsel was aware that defendant's testimony at trial would differ from testimony presented by Keith and Merkelson. Specifically, counsel represented that defendant did not meet with the two men in a Home Depot parking lot some time prior to the shooting, which occurred at a second location. Defendant posits that defense counsel's reference to the Home Depot meeting in his opening statement subliminally inferred to the jury that counsel could only have known about the Home Depot meeting from conversations with defendant. Although the People concede that there was a mistaken reference to a Home Depot meeting, they respond that it did not alter the message to the jury that defendant did not go there.

The Constitution "guarantees the accused a fair trial, not necessarily a perfect one" and not every error or mistake made by counsel will constitute ineffective assistance, People v Benevento, 91 NY2d 708 (1998), on remand 253 A.D.2d 642 (1st Dept. 1998); People v. Flores, 84 N.Y.2d 184 (1994) . Where "trial counsel's actions resulted from error rather than strategy, trial counsel's performance must still be accorded a certain degree of deference, as the Sixth Amendment does not guarantee error-free, perfect representation," Harris v Hollins, 1997WL 633440 at *6 (S.D.N.Y. 9/14/1997).

Although both sides concede that counsel mistakenly referred to a Home Depot meeting in his opening, it cannot be said that this error is elevated to the level where a single lapse can constitute ineffectiveness of counsel. *See* People v. Borrell, 12 N.Y.3d 365 (2009), post-conviction proceeding at 73 A.D.3d 1197 (2nd Dept. 2010); People v. Turner, 5 NY3d 476 (2005). The mistaken remark does not "undercut the conclusion that defendant . . . received meaningful representation", Benevento at 714. Regardless of the remark by counsel, the consistent defense throughout the trial was that defendant was not present when the crime occurred. The claimed prejudice that the jury could possibly surmise the source of counsel's knowledge and negatively attribute it to defendant is highly speculative and the motion on this ground is denied.

Objection to "Excited Utterance" Statement

Defendant argues that counsel erred by abandoning a meritorious objection to a statement that the Court ruled qualified as an excited utterance hearsay exception. At issue is Keith's statement to police, while lying wounded in the street, identifying defendant as the assailant. Defendant now argues that this evidence did not qualify as a hearsay objection, that it constituted improper bolstering and that there was no strategic reason for counsel not to object. The People respond that the Trial Court's grant of a continuing objection to defense counsel negated any necessity for further objection.

An objection that is clearly made and overruled serves as a continuing objection and renders it unnecessary to challenge other improper evidence of the same sort adduced from that witness, Kulak v. Nationwide, 40 N.Y.2d 140 (1976). In this case, the parties concede that defense counsel objected to admission of the statement. "Although objection was not made to every question during this line of testimony the objections ' were sufficient to cover the whole of the material accepted as evidence' (citation omitted)", Id. At 145. The record before the Court does not support defendant's claim that there was "abandonment" of the continuing objection. For these reasons, defendant's motion to dismiss on this basis is denied.

Motion for Reinspection of Grand Jury Minutes

By Order of June 4, 2002, the Court determined the evidence presented to the Grand Jury to be legally sufficient to sustain the indictment. Defendant argues that counsel erred by failing to move for reinspection after learning that hearsay evidence from the victim was presented to the Grand Jury. The People did not respond to this portion of the motion.

Defendant's motion on this ground is denied. There is no statutory authority for reinspection. A motion to reinspect would have violated the doctrine of the law of the case by reviewing a matter which already had been the subject of the June 4, 2002 determination by the Court, People v. Guin, 243 A.D.2d 649 (2nd Dept. 1997), lv. to appeal denied 91 N.Y.2d 834 (1997). The suggested motion to reinspect would not have been based upon any evidence unknown to the reviewing Court at the time of its original Order. Since the defendant has not made a showing of extraordinary circumstances and the record otherwise fails to support such a finding, a motion to reinspect was

unwarranted and the Court finds that counsel acted competently.

Impeachment of Karl Keith

Defendant argues that counsel failed to impeach the victim through use of prior inconsistent statements. Defendant relies upon Keith's April 15, 2002 sworn statement to police. He argues that this statement contradicts the victim's testimony concerning various events related to the shooting. Although defendant's Affidavit concedes that defense counsel did in fact refer to the April 15, 2002 statement at trial, ineffective representation is claimed on the basis that counsel did not press the issue and "just dropped it" (Defendant's Affidavit, Page 10, ¶26). The People counter that, at trial, Keith testified that he had no memory of events occurring during his first few days in the hospital and that he had no memory of making a statement to police at that time. They conclude that impeachment would not have been an effective tactic due to Keith's memory loss.

"It is well established that a witness' prior inconsistent statement may be used to impeach his trial testimony," People v. Bornholdt, 33 N.Y.2d 75 (1973), cert. denied 416 U.S. 905 (1974). However, "[w]here it appears that the witness has no independent recollection of either the memorandum or the facts which it recites, and his memory is not refreshed thereby, the writing may not be used as a basis for testimony" (citations omitted), Brown v. Western Union Tel. Co., 26 A.D.2d 316 (4th Dept. 1966).

Keith testified at trial that he had no recollection of making the April 15, 2002 statement. If Keith could not recall the statement to police and, therefore, was incapable of denying or explaining it, the foundation could not be laid to introduce it into evidence. *See* Prince-Richardson on Evidence §6-411(b)[2008 ed.]. In any event, defendant's moving papers concede that defense counsel did in fact refer to this prior statement at trial. Counsel's actions in this regard were competent and defendant's motion on this ground is denied.

Impeachment of Jesse Merkelson

Defendant argues that counsel failed to impeach Jesse Merkelson through use of a prior sworn statement to police. He argues that Merkelson's testimony at trial concerning arrangements for the drug purchase differed from the earlier account provided to police. The People argue that Merkelson's testimony was not at odds with the defense.

The evidence at trial was that Merkelson was not present at the scene of the shooting. Defense counsel chose not to question him on the collateral issue of events occurring prior to that time. Such a strategy avoided "burying good arguments . . . in a verbal mound made up of strong and weak contentions", Young v. McGinnis, 411 F.Supp2d 278 (E.D.N.Y. 2006) citing Jones v. Barnes, 463 U.S. 745 (1983), aff'd 310 Fed.Appx. 12 (2nd Cir. 2009). The Court finds that counsel properly exercised his professional judgment. There is no evidence that counsel's legitimate strategy on this point prejudiced defendant.

Evidence of Stippling

Defendant argues that counsel failed to object to evidence of gunshot stippling. At trial, testimony was given by Robert Keith, a physician's assistant and father of the victim, Karl Keith. He testified that, during the course of a hospital visit with his son, he observed gunshot stippling on the back of the neck. Defendant argues that evidence of stippling near the gunshot wound improperly bolstered the victim's testimony that he was shot from behind at close range. The People respond that evidence of stippling is irrelevant.

The defense at trial was simply that defendant did not commit these crimes. Factual evidence of the location of the gunshot wound and the distance from which the gun was fired were collateral issues. Defendant's arguments on this point, suggesting that the entry wound was actually on the side of the victim's face or that Robert Keith was not truthful in testifying that he observed stippling, are highly speculative, irrelevant and unsupported by credible evidence or affidavit. Defendant's motion on this ground is denied.

Evidence of Cellular Phone Records

There are extensive arguments by defendant concerning evidence of his cellular phone records. Defendant testified at trial that he was home at the time of the shooting. On cross-examination of defendant, the People introduced these records and subsequently argued to the jury that the records established that his cell phone was used to call home at that time.

Defendant argues that counsel erred by failing to obtain defendant's phone records prior to trial and by consenting to admission of said records at trial. Defendant further argues that, after the records were admitted into evidence at trial, counsel failed to utilize them effectively on defendant's behalf. He also argues that, if counsel had reviewed them with defendant prior to trial, defendant would not have been impeached on cross-examination. In response, the People cite a specific portion of the transcript to argue that defendant testified at trial that he guessed about the times of the phone calls. They further argue that defense counsel, in his closing argument, relied upon these same records to show that defendant was not the assailant.

The Court finds that counsel cannot be considered ineffective for his trial strategy relating to the phone records. Defendant concedes that counsel did in fact attempt to obtain the records prior to trial and that the obligation to do so rested with defendant. Defendant, after consultation with counsel, testified from memory about the events of April 13, 2002. There is a reasonable possibility that, if defendant had reviewed the records ahead of time, this would have been disclosed upon cross-examination. Such evidence would have greatly undermined defendant's testimony on the main issue of the case. In addition, counsel argued to the jury that the records bolstered defendant's time line and description of events ["And I tell you, if it wasn't for the fact that she introduced these records, we certainly would have introduced these records on redirect . . ." (T.-867)]. Under these circumstances, the Court finds that, by avoiding any inference that his client's testimony was tailored to conform with information contained within the phone records and by using the records to support

defendant's testimony regarding his location at the time of the shooting, counsel employed a reasonable and potentially effective trial strategy.

Accordingly, the Court finds that defendant was provided with objectively meaningful representation. The motion is denied without the need for a hearing, CPL §§ 440.30(1); 440.30(4)(a)and (d).

The foregoing constitutes the Decision and Order of the Court.

ENTER:

ACTING J.C.C.
HON. MARTIN I. EFMAN

Dated: **OCTOBER 4 , 2010**

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of December, two thousand and eighteen,

Before: Reena Raggi,
Debra Ann Livingston,
Raymond J. Lohier, Jr.

Circuit Judges.

Blair Garner,

Petitioner - Appellee,

v.

William Lee, as Superintendent of Greenhaven Correctional Facility,

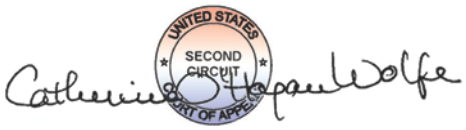
Respondent - Appellant.

ORDER
Docket No. 17-78

Appellee Blair Garner having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



Appendix D

17-78

To Be Argued By:
Michael J. Miller

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BLAIR GARNER,
Petitioner-Appellee

- v -

WILLIAM LEE, Superintendent
Green Haven Correctional Facility,
Respondent - Appellant.

On Appeal From The United States District Court For The Eastern District Of New York

BRIEF FOR
RESPONDENT-APPELLANT

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Appendix E

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

JURISDICTIONAL STATEMENT

This is an appeal of a final judgment of the United States District Court for the Eastern District of New York (Chen, J.). The Memorandum and Order (A 268)[1] and Judgment (A 295) of the District Court granted Garner's petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, based on its determination that Garner had been denied the effective assistance of trial counsel.

The State (Respondent-Appellant) filed a notice of appeal dated January 9, 2017. The District Court's jurisdiction was pursuant to 28 U.S.C. §§ 1331, 2254; this Court's appellate jurisdiction is according to 28 U.S.C. §§ 1291, 2253.

[1] Parenthetic numbers preceded by an 'A' refer to the pages of the Appellant's Appendix.

ISSUES PRESENTED

1. An issue is procedurally defaulted and is not reviewable in a petition for a writ of habeas corpus if it was rejected in the state courts on an adequate and independent state rule of procedure. Here, the County Court declined to review Garner's ineffective assistance of counsel claim because it was "mostly" record based and should have been raised on appeal. The County Court, however, also cited to state decisional authority that clearly stated the procedural rule. In these circumstances, the District Court erred by rejecting the procedural default.
2. United States Supreme Court decisional authority requires a "doubly deferential" standard of review when a habeas corpus court considers a claim of ineffective assistance of counsel under 28 U.S.C. § 2254 (d)(1). That standards requires that "unreasonableness" under *Strickland* not be equated with an "unreasonable application" under § 2254 (d)(1). Here, the District Court erroneously combined the standards.
3. The objectively unreasonable standard established by the Supreme Court in *Williams v Taylor* was altered in *Harrington v Richter*, at least as it applies to claims of ineffective assistance of counsel. Here the District Court used the wrong standard to determine if the state court decision was objectively unreasonable.

4. In *Cullen v Pinholster*, the Supreme Court held that a determination under § 2254 (d)(1) had to be made on the record that was before the state court. The District Court, relying on other District Court authority, evaded the holding in *Pinholster* by claiming its review was pursuant to the 28 U.S.C. § 2254 (a), a section of 2254 that establishes the jurisdiction of the court but not the standard of review. The District Court erred by applying this erroneous standard and by not reviewing the state court decision solely with reference to Supreme Court decisional authority.

5. The District Court erred when it determined that trial counsel was ineffective.

STATEMENT OF THE CASE

Garner was charged in Indictment 1049-02 with attempted second-degree murder (NY PL §110 and 125.25[1]), first-degree assault (NY PL§120.10[1]), first-degree robbery (NY PL §160.15[1]), first-degree criminal use of a firearm (NY PL §265.09[1]), and second-degree criminal possession of a weapon (NY PL §265.03).

A. Pre-trial hearings

Pre-trial hearings were held to determine whether the People could introduce evidence of prior crimes during their direct case (T. 2-15);[2] this motion was denied (*id.*).[3] Next, the People requested permission to cross-examine Garner – if he chose to testify – about his prior convictions.[4] The trial court ruled that the People could question Garner about both the facts underlying a misdemeanor conviction and the fact of the misdemeanor conviction, but could only ask if Garner had been previously convicted of any felony (T. 14).

Next, through discovery material, defense counsel learned that the victim was shown a single-photo of Garner and identified Garner as the person who shot him (T. 234-59). A hearing was held to determine whether a statutory notice requirement (NY CPL §710.30) was implicated based on the circumstances and

[2] Parenthetic numbers preceded by "T" refer to the pages of the trial transcript (Docket # 12).
[3] *People v. Molineux*, 168 N.Y. 264 (1901).
[4] *People v. Sandoval*, 34 N.Y.2d 371 (1974).

facts of the single-photo identification. After hearing testimony, the trial court ruled that this was a confirmatory identification and no statutory notice was required (T. 269-70).[5]

B. The trial

1. The People's Case

The victim, Karl Keith, was 20 years old, lived at home with his parents, and attended Westchester Community College (T. 463). Mr. Keith had a friend from high school, Michael Waring, who had worked at a car dealership with Garner (T. 464-65). Mr. Waring introduced Mr. Keith to Garner and, as of April 13, 2002, Mr. Keith knew Garner for about one and one-half years (T. 464-65). Mr. Keith knew Garner as Blair, Blizzie or Bliz, and he thought that he knew Garner pretty well (T. 465). Mr. Keith had attended Garner's wedding and helped Garner paint his fence (T. 465). He also regularly spoke with Garner on the telephone (T. 467).

Mr. Keith also had a close relationship with his cousin, Jesse Merkelson (T. 342, 467). Jesse was 23 years old and a college student at Carnegie Mellon University in Pittsburgh (T. 342). Jesse was supporting himself at school by both working and selling marijuana (T. 348). He had saved about $8,000 to $10,000, and he wanted to use the money to buy Ecstasy (T. 343, 348-49). Jesse had talked

[5] *People v. Rodriguez*, 79 N.Y.2d 445 (1992).

with Karl about his plan and Karl sought someone to supply the drugs (T. 342, 467-70). According to Karl, Jesse had $8,000 for Ecstasy and would loan him $1,700. He would buy cocaine, and when he sold the cocaine, he would pay back his cousin (T. 468). Karl said he acted as a go-between for Jesse and Garner; Garner ultimately agreed to get them two thousand Ecstasy pills and two ounces of cocaine (T. 469-70). The price for the Ecstasy was $4.00 per pill; Jesse thought that was a good price, and believed he would be able to sell the pills and make a profit (T. 346, 348-49).

The total cost of the deal, therefore, was $9,700 (T. 470). On April 12, 2002, Karl Keith went to the car dealership where Garner worked (T. 470). As they talked, Garner was switching a dealer license plate from one car to another (T. 471). Mr. Keith knew that Garner often drove different cars (T. 472). In any event, Mr. Keith went to see Garner because he wanted Garner to loan him (or front him) the cocaine so that he could then sell it and pay Garner from the proceeds of the sale (T. 472-73). Garner would not "front" him the cocaine because he needed the money (T. 472-73).

To effectuate the plan Jesse bought a kit to test the pills to insure that they were Ecstasy (T. 346-47). He also bundled his money in stacks of one thousand dollars. Each stack was rubber-banded together with all the separate stacks then rubber-banded together (T. 351). Finally Jesse, who did not drive, had a friend

(Ryan) drive him to New York on April 13, 2002 (T. 359, 370). They met Karl at Karl's friend's house in Brooklyn and then Ryan drove them to a McDonald's parking lot in Roosevelt to meet Garner (T. 360-62, 475-77).

Garner arrived at the McDonald's after them (T. 478). When he arrived Karl got in Garner's car to talk with him (T. 362, 478). At this time Garner was wearing a business suit and he was driving a blue-green Nissan Altima (T. 479). Garner, who was briefly introduced to Jesse, told Karl to drive with his cousin to the parking lot of a Home Depot in Freeport (T. 363, 479). Garner said that he wanted to go home and change his clothes and that he would then meet Karl and Jesse at the Home Depot (T. 479). Garner also said that, contrary to the original plan, only Karl could go with him to get the drugs (T. 366-67, 479). Jesse did not like the change in plans, but he agreed to it because Karl assured him that he knew Garner (T. 366-67, 481). During this time Jesse also split his money into two piles: $8,000 to buy Ecstasy and $1,700 for Karl. He kept $300 (T. 367, 477).

Ryan then drove Jesse and Karl to the Home Depot in Freeport (T. 367-68, 481). While they waited for Garner to arrive, Jesse showed Karl how to use the test kit, which consisted of a plate, a folding knife and a bottle of chemicals (T. 370, 482). Karl also put the two bundles of money in his pocket (T. 482). Karl called Garner once while they waited, and Garner said he was on his way to meet them (T. 483). Garner soon arrived, but now he was driving a red car (T. 369, 483-84).

Karl got into Garner's car and they drove off together; there was no one else in the car (T. 369-70, 483-84).

Garner and Karl Keith drove about twenty minutes to North Amityville and went to a place unknown to Mr. Keith (T. 486-87). They eventually stopped and were supposed to go to a house to test the drugs (T. 488). Karl Keith was nervous but Garner assured him both that he knew the people they were going to see and that he had Karl's back because he knew him better (T. 488). When they stopped, Garner told Karl to put the money in the glove box. Garner explained that they would test the drugs, and if everything was in order, they would come back for the money (T. 489). Karl put $9,700 in the glove box and then got out of the car (T. 489, 499). Mr. Keith was nervous and alert; there were no other cars in the area and there were no people in the street (T. 490, 498).

Mr. Keith and Garner were on opposite sides of the car, but they both walked towards the rear of the car (T. 499). They walked into the street and Mr. Keith got slightly ahead of Garner (T. 501). He hesitated and started to turn because Garner was supposed to be leading them (T. 501-02). As he turned he was shot behind his right ear towards the center of his neck (T. 501-02). Mr. Keith collapsed without breaking his fall (T. 502, 505). He woke up on the ground and rolled over and heard Garner call to him (T. 505-07, 508). He played dead because he believed Garner would kill him if he knew he was alive (T. 508). Eventually the

police and an ambulance arrived (T. 509). None of his personal property – his gold chain, cell phone, gold bracelet, or wallet – was missing (T. 485, 507).

When the police arrived they found Mr. Keith conscious and lying in a large pool of blood (T. 307-08). The first officer at the scene – Police Officer Gover – thought that Mr. Keith was going to die so he obtained as much information as possible (T. 313). Thus, Officer Gover learned that Mr. Keith's friend, Blair, who was also called Blizzie or Bliz, had shot Mr. Keith (T. 309, 509-11). Mr. Keith explained that he was there to buy drugs and that he had $9,7000 with him and that the money was bundled up in rubber-bands (T. 311, 509-11). Mr. Keith did not know Garner's last name. Nevertheless, he gave the police Garner's description, the general area where he lived, and that he worked at Five Town Toyota (T. 309-11, 509-12). Mr. Keith also gave a detailed description of Garner's tattoos (T. 310).

On the ground around Mr. Keith, the police found a folding knife, a plate, a bottle with some chemical in it, and his cell phone (T. 315). Mr. Keith's cell phone rang several times while he was lying on the ground, but he could not move to answer it (T. 512). Indeed, his cousin Jesse had called him several times when he did not return to the Home Depot parking lot (T. 373-74). While the police were attending to Mr. Keith, the cell phone rang again and the caller ID indicated that

Blizzie was calling (T. 315-16). Mr. Keith said that the call was from the person who shot him (T. 316, 512).

Mr. Keith was brought to the hospital (T. 513-14). The bullet had passed from behind his right ear and exited his left cheek (T. 514-15, 752). Stippling by the wound entrance indicated that Mr. Keith was shot from close range (T. 334, 777-78). The second cervical vertebrate was fractured and there was shockwave concussions to the spinal cord (T. 514-15, 753). There were facial fractures, hearing loss, and a brain hemorrhage (T. 753-55). Mr. Keith had to relearn how to walk, feed himself and bathe (T. 517). His body was numb, he could not discern temperature and, even at the trial, he could not turn his head to the right (T. 516-18).

Based on the information from Mr. Keith and the phone number for Blizzie stored in Mr. Keith's cell phone, the police learned that Blizzie was Blair Garner (T. 475, 545). With the name and telephone number the police learned petitioner's address (T. 545, 688-89). They got a picture of Garner from the Freeport Police Department and then staked-out Garner's home (T. 544-45, 690-92). At Garner's house they saw a red Toyota (T. 545, 691). The police spoke with Garner on the telephone during the early morning of April 14, 2002, but they discontinued their surveillance (T. 547-49, 692-94). Later that day (April 14th) they arrested Garner at work. The police first went to Five Towns Toyota where they learned that

Garner had changed jobs and now worked at Five Towns Nissan. The dealerships were close to each other and the police went to the Nissan dealership to arrest Garner (T. 551-54, 653-56, 697-98).

When he was arrested Garner had $1,140 with him (T. 582, 704). An additional $6,300 was recovered from the glove box of the blue-green Nissan Altima that Garner drove (T. 382, 707). This money was in rubber-bands (T. 574). Garner also had a key to a 1997 red Toyota Camry (T. 704). Finally, Garner's tattoos matched the description given by Mr. Keith (T. 310, 510, 568, 701-03).

2. Garner's Case

Garner testified that he sold cars at Five Towns Nissan and, because of his work, he often drove different cars (T. 784-85). He had worked with Mike Waring at a car dealership and had met Karl Keith through Mike (T. 785-86). He knew Mr. Keith as Dread and Dread had asked for his help in obtaining Ecstasy and cocaine (T. 786). Garner spoke with a person known as "Red" who sold CDs and tapes from his car, and then gave Dread a telephone number that he got from Red (T. 787).

Garner saw Dread on April 12th but not with regard to any drug deal; rather, he loaned Dread some money (T. 878-88). The next day Garner worked and Dread called him there (T. 490). He agreed to meet Dread at a McDonald's after work (T. 790-91). When they met, Dread asked Garner to go with him to meet the drug

dealer (T. 791). Garner said he would consider helping but had to go home first to change his clothes (T. 792). It was then decided that he would hold Dread's money and Dread and Jesse would check everything out and, if the drugs were good, they would call Garner and he would deliver the money (T. 793). The money was put in the glove box of his car (T. 793). He never heard from Dread and he called him once to check on him (T. 794-95). He never went to the second parking lot, never drove Karl Keith to Amityville, and never shot Mr. Keith (T. 797-98).

C. State post-conviction proceedings

1. Post-conviction proceedings that are not the basis of the current litigation.

Garner appealed his judgment of conviction to the Appellate Division, Second Judicial Department. The Appellate Division affirmed the judgment of conviction, and Garner was denied leave to appeal to the Court of Appeals.[6] The current proceeding is not based on Garner's direct appeal.

While the direct appeal was pending Garner, *pro se*, moved to vacate his sentence.[7] The People agreed that there was an error in the sentence, the motion was granted, and Garner was resentenced. Garner appealed from his resentencing and claimed that the new sentence was harsh and excessive. The resentencing was

[6] *People v Garner*, 27 AD3d 764 (2d Dept), *lv to app den* 7 NY3d 789 (2006).
[7] NY CPL §440.20.

affirmed by the Appellate Division and leave to appeal to the Court of Appeals was denied.[8] The current proceeding is not based on the sentencing appeal.

Next, Garner petitioned the Appellate Division for a writ of error coram nobis, which is the legal mechanism used in New York to raise a claim that appellate counsel was ineffective.[9] The Appellate Division denied relief, and leave to appeal to the Court of Appeals was denied.[10] The current proceeding is not based on the coram nobis petition.

2. Garner's motion to vacate his judgment of conviction, which is the basis of the current litigation.

During April 2010, Garner moved to vacate his judgment of conviction.[11] In that motion, he presented eight (8) arguments to support his conclusion that his defense attorney was ineffective. The 7th and 8th allegations of error were that defense counsel failed to obtain his phone records for trial preparation and failed to exploit those records to narrow the time frame for the crime and show that the victim's testimony about the events was flawed. The People responded that the ineffective assistance of counsel claim as it was framed by Garner should have been raised on appeal and was, in any event, without merit.

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[8] *People v Garner*, 50 AD3d 1057 (2d Dept), *lv to app den* 10 NY3d 934 (2008).
[9] *People v Bachert*, 69 NY2d 595 (1987).
[10] *People v Garner*, 70 AD3d 854 (2d Dept), *lv to app den* 15 NY3d 773 (2010).
[11] NY CPL §440.10; see Docket # 5-10 (containing CPL §440.10 motion).

On October 4, 2010, the County Court denied Garner's motion (A 260-67). The court held that the ineffective assistance of counsel claim should have been raised on direct appeal (A 261-62). The court, however, reviewed the issue "in any event" and found that Garner received the effective assistance of counsel (A 262, 266-67). As regards the cell phone records, the court found that defense counsel had attempted to obtain the records through efforts by Garner (A 266-67); that Garner testified about the events without reviewing the trial records so as to not undermine his credibility (*id.*); and that defense counsel argued that the cell phone records aided his client's case (*id.*). The court found that defense counsel employed a potentially effective trial strategy with regards to the cell phone records and that Garner was adequately represented under both the State and Federal Constitutions (A 262, 267). Garner was denied leave to appeal to the Appellate Division in an unreported decision dated December 23, 2010.[12]

D. Garner's petition for a writ of habeas corpus

Garner petitioned the United State District Court for a writ of habeas corpus (A 7-43). He essentially repeated the claims he had made in his motion to vacate his judgment of conviction. He again alleged that trial counsel mishandled the cell phone information/evidence. In response to the petition, the State argued that the ineffective assistance of counsel claim was procedurally defaulted because the

[12] See, Docket entry #7, Exhibit #9.

State court had declined to reach the issue based on an adequate independent state rule of procedure (A 44-49). Additionally, even if the issue were properly before the federal court, Garner could not overcome the clearly defined standard applicable to federal collateral review of ineffective assistance of counsel claims. Finally, the record established that trial counsel was effective (A 44-49, 50-76).

In response to the initial written submission, the District Court decided to hold a hearing about defense counsel's effectiveness.[13] The State opposed the hearing, which Garner supported.[14] The District Court concluded that the hearing was permitted based on the analysis found in *Lopez v Miller*.[15] On February 9, 2016, defense counsel testified about his representation of Garner (A 77-143).

On December 13, 2016, the District Court published a Memorandum and Order (A 268). The Court reviewed the history of the case and then held that the ineffective assistance claim was not procedurally defaulted (A 278-79). Next, the Court decided that it could use the federal hearing testimony to determine if counsel was ineffective only after it first decided that the State court decision was an unreasonable application of clearly established federal law (A 280-81). The District Court then concluded that under 28 U.S.C. § 2254 (d)(i) the State court decision that trial counsel was effective was an unreasonable application of federal

[13] See, Docket entry 12-7-15 following entry 16.
[14] See, Docket #s 24, 25.
[15] *Lopez v. Miller*, 906 F. Supp. 2d 42 (E.D.N.Y. 2012).

law (A 281-83). Finally, the District Court then decided that, according to 28 U.S.C. § 2254 (a), trial counsel was ineffective and that Garner was prejudiced (A 284-94). The State appeals from this decision.

SUMMARY OF ARGUMENT

The District Court's decision should be reversed. The District Court erred when it determined that this issue was not procedurally defaulted. The District Court also erred when it combined the review required under *Strickland* with the standards established by 28 U.S.C. § 2254 (d).[16] The District Court did not give the State court decision the deference it deserves according to controlling Supreme Court precedent. Furthermore, the objectively unreasonable standard articulated in this Court is inconsistent with controlling Supreme Court authority. Next, the District Court erred when it held a hearing regarding the ineffective assistance of counsel issue according to 28 U.S.C. § 2254 (a). Finally, the District Court was wrong; trial counsel provided effective assistance.

[16] *Strickland v. Washington*, 466 U.S. 668 (1984).

ARGUMENT

THE DECISION AND JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED BECAUSE GARNER DID NOT ESTABLISH THAT THE STATE COURT'S DECISION WAS AN UNREASONABLE APPLICATION OF CLEARLY-ESTABLISHED FEDERAL LAW.

1. Underlying principles of review.

This Court's review off a District court decision on a state prisoner's petition for a writ of habeas corpus involves two standards. First, this Court reviews a District Court habeas corpus decision *de novo*.[17] Second, the state court rulings that underlie the habeas petition are entitled to deferential review if those rulings were made on the merits.[18]

According to the provisions of 28 U.S.C. § 2254 (d), an application for a writ of habeas corpus by a prisoner in state custody "shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings …" unless either the state court decision was contrary to or an unreasonable application of clearly-established federal law as determined by the Supreme Court, or was based on an unreasonable determination of the facts based on the evidence presented in the state court proceedings. Clearly-established law refers to "the

[17] *Cook v. N.Y. State Div. of Parole*, 321 F.3d 274, 277 (2d Cir. 2003).
[18] 28 U.S.C. § 2254 (d); *Jenkins v. Artuz*, 294 F.3d 284, 291 (2d Cir. 2002) (and cases cited therein).

holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision."[19]

In *Williams v. Taylor*, the Supreme Court wrote that a state court decision is "contrary to" clearly-established federal law, "if the state court arrives at a conclusion opposite that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts."[20] Likewise, a state court decision is an "unreasonable application" of clearly-established federal law if the state court "identifies the correct governing legal principle from [the Supreme Court's] decisions, but unreasonably applies that principle to the facts of [a] prisoner's case."[21]

Furthermore, a federal court must use a deferential standard of review when engaged in the collateral habeas corpus analysis of the relevant state court decision. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly-established federal law erroneously or incorrectly."[22]

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[19] *Green v. Travis*, 414 F.3d 288, 296 (2d Cir. 2005) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).
[20] *Williams*, 529 U.S. at 413.
[21] *Id.*
[22] *Gilchrist v. O'Keefe*, 260 F.3d 87, 93 (2d Cir. 2001).

2. The District Court erred when it held that the ineffective assistance of counsel claim was not procedurally defaulted.

In order to reach the ineffective assistance of counsel issue, the District Court held that it was not procedurally defaulted (A 278-79). The People had argued that the decision on the motion to vacate the judgment of conviction was decided on an adequate and independent state procedural rule. Specifically, we argued that the issue could not be addressed in Garner's motion to vacate his judgment of conviction because it should have been raised on appeal (A 72-73). We maintained that the State court accepted this argument and, therefore, collateral federal review was barred (*id.*). The District Court rejected this argument because the County Court wrote that "arguments concerning ineffective assistance of counsel are, for the most part, issues that could be resolved by examining the record and, therefore, should have been determined on direct appeal [.]" (A 261). The District Court erred, however, because it did not consider the County Court's entire statement on this question.

A State court judgment will not be reviewed via a writ of habeas corpus when "it rests on a state law ground that is independent of the federal question and adequate to support the judgment."[23] A State court decision rejecting a claim on a state procedural rule is a procedural default that "constitutes an independent and

[23] *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) *holding modified by Martinez v. Ryan*, 566 U.S. 1 (2012).

adequate state ground that bars federal consideration of the substantive claim on habeas corpus"[24] Whenever a state court holding contains a plain statement that the claim is procedurally barred, it is not reviewable by this Court, even if the State court also rejected the claim on the merits in the alternative.[25] Likewise, when a State court "says that a claim 'is not preserved for appellate review' and then ruled 'in any event' on the merits, such a claim is not preserved."[26] But when a State court "uses language such as 'the defendant's remaining contentions are either unpreserved for appellate review or without merit.' The validity of the claim is preserved and is subject to federal review."[27] To overcome a procedural bar, petitioner must "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice" (citation omitted).[28] A petitioner who fails to set forth facts to support his claims cannot demonstrate actual prejudice and, accordingly, is not entitled to review on these claims.

After first noting that the People maintained that the ineffective assistance of counsel claim was record based and should have been raised on direct appeal, the County Court wrote:

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[24] *Gonzalez v. Sullivan*, 934 F.2d 419, 421 (2d Cir. 1991).
[25] See *Harris v. Reed*, 489 U.S. 255, 264 n. 10 (1989).
[26] *Glenn v. Bartlett*, 98 F.3d 721, 724–25 (2d Cir. 1996).
[27] *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804, 810 (2d Cir. 2000).
[28] *Coleman*, 501 U.S. at 731.

> Defendant's arguments concerning ineffective assistance of counsel are, for the most part, issues that could be resolved by examining the record and, therefore, should have been determined on direct appeal. Criminal Procedure Law §440.10 (2)(c). Defendant cannot now use a CPL §440.10 motion to collaterally challenge an issue which could have been addressed on direct appeal. *People v. Cooks*, 67 N.Y.2d 100 (1986). In any event, a review of the record shows that defendant received effective representation.
>
> (A 260-61).

The entire passage counters the District Court's balkanized citation to the State court decision. By citing *Cooks*, the County Court indicated that the issue was precluded from its review by NY CPL §440.10 (2)(c).[29] After citing to *Cooks*, the County Court went on to say that "in any event" the claim was without merit. By predicating its review of the substance of the claim by this disclaimer, the County Court signaled that it was reviewing the claim even though it should have been raised on appeal. The District Court ignored the substance of the entire passage by the County Court, picked only the language that supported its conclusion, and expanded the scope of federal review allowed under 28 U.S.C. § 2254. This was error.

3. The District Court applied the wrong standard of review.

The District Court correctly identified the unreasonable application clause of 28 U.S.C. § 2254 (d)(1) as the controlling federal authority with relation to

[29] *People v. Cooks*, 67 N.Y.2d 100, 103–04 (1986) (the purpose of CPL §440.10 (2)(c) is to prevent CPL §440.10 from being employed as a substitute for direct appeal).

Garner's ineffective assistance of counsel claim (A 280-83). The Court continued that an unreasonable application of federal law is different from an incorrect application, but that the increment of incorrectness beyond error need not be great. The Court cited *Cullen v. Pinholster* and *Monroe v. Kuhlman* for its legal authority for these prepositions (A 281).[30] The District Court continued and excoriated the reasoning in the County Court's ineffectiveness decision (A 282-85). The District Court concluded that trial counsel's representation fell below an objective standard of reasonableness and that the County Court's contrary determination was, therefore, an unreasonable application of the *Strickland* standard (*id.*). This determination is wrong for at least two reasons. The District Court combined the reasonableness standard under *Strickland* with unreasonableness review under 28 U.S.C. § 2254 (d)(1); the standards and analysis are different and distinct. And, the degree of error – as defined by the United States Supreme Court – is greater than some small increment beyond error.

First, the District Court combined the *Strickland* analysis with the analysis under 28 U.S.C. § 2254 (d)(1). The District Court concluded that because trial counsel's actions were not objectively reasonable, the County Court's contrary finding is an unreasonable application of the *Strickland* standard (A 282-83). This

[30] *Cullen v. Pinholster*, 563 U.S. 170 (2011); *Monroe v. Kuhlman*, 433 F.3d 236 (2d Cir. 2006).

analysis is wrong because it failed to apply the doubly differential standard of review mandated by the Supreme Court in *Harrington v Richter*.[31]

In *Harrington*, the issue was whether the lower federal courts had used the proper standard to review a claim that counsel in a state criminal proceeding was ineffective according to the standard set down in *Strickland*.[32] The Supreme Court wrote that on 28 U.S.C. § 2254 review, the question was not whether trial counsel's performance fell below the *Strickland* standard because habeas corpus review would then be the same as direct review.[33] Rather, in order to access a claim of ineffective assistance of counsel through the prism of habeas corpus review the correct question to ask is "whether it is possible fair-minded jurists could disagree that those arguments or theories (that might support the state court decision) are inconsistent with the holdings in a prior decision of this Court."[34] This is not, therefore, a test of the District Court's confidence in the result it would reach under *de novo* review.[35] "It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable."[36]

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[31] *Harrington v. Richter*, 562 U.S. 86, 1102 (2011) (treating 2254 (d) question as a test of its confidence in result of *Strickland* analysis is incorrect).
[32] *Id.* at 101.
[33] *Id.*
[34] *Id.* at 102.
[35] *Id.* As we discuss later, the District Court manipulated the plain language of 28 U.S.C. § 2254 in order to engage in prohibited *de novo* review.
[36] *Id.*

Here, the District Court showed its disdain for the County Court's decision when it deconstructed it. That the District Court disagreed with the County Court's analysis is, after *Harrington*, irrelevant. Its disagreement with the County Court and its subsequent *de novo* review of the assistance provided by defense counsel is not the equivalent of determining if any fair-minded jurist would disagree with the District Court's "analysis.[37] The District Court never engaged in this analysis. The District Court thought that the County Court's reasoning – that defense counsel did not want to have Garner conform his testimony to the cell phone records – was unreasonable under *Strickland* (A 282). Because the District Court "had little doubt that … [the] *Strickland* claim had merit, the [District Court] concluded the state court must have been unreasonable in rejecting it. This analysis overlooks arguments that would otherwise justify the state court result …"[38] Thus, even at a rudimentary level, the District Court did not engage in the appropriate analysis.

Second, even if we assume that the District Court did not combine the applicable standards of review, it still did not follow Supreme Court precedent. There is no doubt that review of habeas corpus petitions made by state prisoners is

[37] *Premo v. Moore*, 562 U.S. 115, 123 (2011) ("The question is, is there any reasonable argument that counsel satisfied *Strickland's* deferential standard.").
[38] *Harrington*, 562 U.S. at 102.

based upon the Supreme Court's decisions.[39] The lower federal courts cannot apply a rule or standard on habeas corpus review that is contrary to Supreme Court decisional authority.[40]

In *Williams v. Taylor*, the Supreme Court decided that when a federal court makes the unreasonable application inquiry of 28 U.S.C. § 2254 (d)(1), the court should ask itself "whether the state court's application of clearly-established federal law was objectively unreasonable."[41] The Court continued and wrote that an "all reasonable jurists" standard would not be acceptable because it was subjective.[42] And that unreasonableness itself was difficult to define.[43] Nevertheless, the Court approved that standard because it was familiar to jurists and because, for the issue before it, it was sufficient to point out that an unreasonable application of federal law is different from an erroneous application of federal law.[44]

In *Harrington*, however, the Supreme Court iterated that reasonable professional competence under *Strickland* was not the equivalent of the reasonable application of federal law under 28 U.S.C. § 2254 (d).[45] And, under §2254 (d)(1),

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[39] See, 28 U.S.C. § 2254 (d)(1);
[40] See, *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009); *Renico v Lett*, 559 U.S. 766, 778-79 (2010) (state court bound by Supreme Court precedent but not rules created by circuit courts).
[41] *Williams*, 529 U.S. at 409.
[42] *Id.* at 410.
[43] *Id.*
[44] *Id.*
[45] *Harrington*, 562 U.S. at 101.

an unreasonable application is different than an incorrect application of federal law.[46] For §2254 (d)(1) purposes, unreasonable application has been interpreted by this Court to mean an objectively unreasonable interpretation of the facts in light of the controlling federal authority.[47] Objectively, in this context, presumably means "expressing or dealing with facts or conclusions as perceived without distraction by personal follies, prejudices, or interpretations."[48] The state court decision must reflect some increment of incorrectness beyond mere error so that "it may be said to be unreasonable."[49] This Court iterated that the increment of incorrectness beyond error does not need to be great, "otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence."[50] This formulation of the test to be applied under §2254 (d)(1) is that the federal court must determine that the state court erred plus a little more; something to cross the line from error to obvious error. After *Harrington*, this test is not sufficiently deferential to state court decision.

Rather than using the one-toe-over-the line approach that separates error from objectively unreasonable error, the Supreme Court starts at the other end of the analytical spectrum. 28 U.S.C. § 2254 (a) "stops short of imposing a complete

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[46] *Williams*, 529 U.S. at 410.
[47] *Lynn v. Bliden*, 443 F.3d 238, 246 (2d Cir. 2006), *as amended* (May 19, 2006).
[48] Merriam.webster.com; definition (3) (a) of objective law.
[49] *Lainfiesta v. Artuz*, 253 F.3d 151, 155 (2d Cir. 2001).
[50] *Id.*; *Rosario v. Ercole*, 601 F.3d 118, 137 (2d Cir. 2010).

ban on federal court re-litigation of claims already rejected in state proceedings."[51] Under this iteration of the test, unreasonableness application falls further along the analytical path to res judicata than clear error.[52] Under the *Harrington* standard deference must be given to state court decisions unless, "… the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement."[53]

Post-*Harrington*, the analysis is not if there is an error slightly beyond a reasonable mistake; rather, it is that a state court decision will not be disturbed unless it approaches an extreme malfunction on the state criminal justice system.[54] Because this standard approaches res judicata, state decisions should, we suggest, rarely be vacated. In any event, an unreasonable application means something closer to a state court decision that suggests judicial incompetence rather than a decision that a federal judge finds disagreeable.

The District Court in the decision here combined the *Strickland* analysis into the 2254 (d) analysis and then applied the wrong definition of objectively unreasonable. The result of these two errors is that the District Court decision is wrong. Under the correct deferential standard, Garner has not shown that the state

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[51] *Harrington*, 562 U.S. at 102.
[52] *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (clear error fails to give proper deference to state courts).
[53] *Harrington*, 562 U.S. at 103.
[54] *Id.* at 102; *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013).

court decision is an objectively unreasonable application of *Strickland.* Put in other terms, a fair-minded jurist could find that the state court's after-the-fact review was correct, or at least not unwarranted. The District, moreover, made additional analytical errors. A habeas corpus hearing in the District Court is prohibited under the facts and circumstances of this case.

4. Neither *Lopez v Miller* nor 28 U.S.C. § 2254 (a) alter the proper procedure, which the District Court did not follow.

The District Court wanted to hold a hearing on this petition despite the holding of the United States Supreme Court in *Cullen v. Pinholster.*[55] In *Pinholster* the District Court held a hearing on the claim of ineffective assistance of counsel. The Circuit Court then confirmed that it was appropriate to hold the hearing and that evidence from that hearing could be used to consider whether the California Supreme Court's decision was contrary to or an unreasonable application of *Strickland.*[56] The Supreme Court disagreed with the Ninth Circuit and held that review under 28 U.S.C. § 2254(d) is limited to the record that was before the state court that adjudicated the claim on the merits.[57] The Supreme Court then analyzed *Pinholster's* claim of ineffective assistance under 28 U.S.C. § 2254(d) without reference to the federal hearing.[58]

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[55] *Cullen*, 563 U.S. 170; Docket entry 2-2-16 following entry #16.
[56] *Id.* at 180.
[57] *Id.* at 181.
[58] *Id.* at 187–94.

To avoid the holding of *Pinholster*, the District Court relied on *Lopez v. Miller*, another District Court holding that is, of course, not controlling Supreme Court authority that is binding under 28 U.S.C. § 2254.[59] In any event, the District Court in this case and the District Court in *Lopez v. Miller* both said that they were not holding a hearing to decide the 2254 (d)(1) issue; instead they proclaimed that once having decided that the state court decision was unreasonable under 28 U.S.C. § 2254 (d)(1) they then had the authority and obligation to independently decide if the Constitution was violated under §2254 (a). Thus, the hearing was necessary to fulfill this obligation (A 280-81). This reasoning is wrong.

There is no Supreme Court case that analyzes an ineffective assistance of counsel claim based on 28 U.S.C. § 2254 (a). With no Supreme Court precedent establishing §2254 (a) as the authority for a decision on ineffective assistance of counsel, the claim cannot be granted on that basis.[60] Instead, the Supreme Court has consistently referred to §2254 (a) as establishing the prerequisites for federal review and the jurisdiction of the federal courts. Thus, in order to obtain federal review the habeas applicant must be in custody[61] in violation of the Constitutional

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[59] *Lopez*, 906 F. Supp. 2d 42. The *Lopez* analysis is not universally accepted in the District Courts. See, *Santos v. Artus*, No. 08 CIV. 5087 PAE FM, 2013 WL 1981574, at *22 (S.D.N.Y. May 14, 2013), *report and recommendation adopted,* No. 08 CIV. 5087 PAE FM, 2013 WL 2458464 (S.D.N.Y. June 3, 2013).

[60] *Knowles*, 556 U.S. at 122–23.

[61] *Garlotte v. Fordice*, 515 U.S. 39, 40 (1995); *Lehman v. Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502, 507–08 (1982).

laws or treaties of the United States.[62] Simply put, 28 U.S.C. § 2254 (a) establishes the jurisdiction of federal courts to review habeas corpus claims, but it does not establish the standards for the review of those claims.[63] The Supreme Court has analyzed §2254 (a) with relation to the federal courts' jurisdiction to review applications for habeas review. It has not used §2254 (a) to provide the analysis for a claim for which it has jurisdiction. There is no Supreme Court authority for the *Lopez* Court or the District Court in this case to alter the scope of review applicable to state law claims.

Furthermore, the Supreme Court has only referred to 28 U.S.C. § 2254 (d) when it has considered whether counsel's representation fell below *Strickland's* standards. In *Harrington v. Richter*, the Supreme Court began its analysis by reiterating that the statutory authority for habeas corpus relief is found in §2254 (d).[64] Similarly, in *Cullen v. Pinholster*, the Court noted that the petitioner had to carry his burden of proof under §2254 (d)(1) in order to obtain federal relief.[65] In *Premo v. Moore*, the Court reviewed a claim of ineffective assistance of counsel

[62] *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (2254(a)) prohibits review for violation of state law); *Reed v. Farley*, 512 U.S. 339 (1994) (whether Interstate Agreement on Detainers is a federal law subject to habeas corpus review).
[63] *Withrow v. Williams*, 507 U.S. 680, 686 (1993); *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993); *Maleng v. Cook*, 490 U.S. 488, 490 (1989).
[64] *Harrington*, 562 U.S. at 97–98.
[65] *Cullen*, 563 U.S. at 181.

according to §2254 (d).[66] And, in *Knowles v. Mirzayance*,[67] the Court found the state court decision on counsel's performance was not unreasonable under §2254 (d)(1). These cases illustrate that petitions for habeas corpus relief are decided under 28 U.S.C. § 2254 (d).[68]

The District Court's decision and the decision in *Lopez v. Miller*, are additionally untenable because they increase a petitioner's burden under 28 U.S.C. § 2254. When properly construed, a petitioner prevails under §2254 when s/he establishes that the state court's application of *Strickland* was unreasonable. Under the District Court's version, the petitioner must then additionally prove that federal relief is warranted. This is a requirement never instituted by the Supreme Court. Under this novel requirement, petitioner must establish that the state court's analysis of his ineffective assistance claim was an unwarranted application of *Strickland* that was objectively unreasonable and the District Court makes an additional finding of ineffectiveness. Under this system a petitioner could prevail under §2254 (d)(1) and still theoretically have his petition denied.

5. The State court decision that Garner received the effective assistance of counsel is correct.

The District Court held that defense counsel provided ineffective assistance of counsel. The Court wrote that counsel's performance was deficient because

[66] *Premo*, 562 U.S. at 120–21.
[67] *Knowles*, 556 U.S. at 114.
[68] See, *Williams*, 529 U.S. 362.

there was no downside in obtaining the records. At the federal hearing counsel – 13 years after the trial – allowed that obtaining the phone records might have been helpful. The Court found that his assumptions about his client's use of the cell phone did not absolve him of his duty to obtain those records (A 284). Furthermore, counsel failed to object to admission into evidence of the phone records and did not adequately review the records once they were made available to him (A 285-87). The District Court then held that Garner was prejudiced because effective counsel would have made different strategic decisions (A 288-94). The District Court's *post hoc* speculation is not reasonable under *Strickland.*

The Sixth Amendment and, therefore, federal habeas corpus review is not implicated if defense counsel's conduct did not affect the perceived reliability of the trial; counsel's actions are reviewed not for the sake of criticizing counsel but to assess whether the trial was fair.[69] This assessment is based on the facts and circumstances as they existed at the time of trial.[70] "Limitations of time and money, however, may face early strategic choices, often only based solely on conversations with the defendant and a review of the prosecutor's evidence."[71] Furthermore, "it is difficult to establish ineffective assistance when counsel's

[69] *Lockhart v. Fretwell*, 506 U.S. 364, 368–69 (1993).
[70] *Strickland*, 466 U.S. at 690.
[71] *Id.* at 681; *Harrington*, 562 U.S. at 107.

overall performance indicates active and capable advocacy."[72] Additionally, a lawyer's inability to remember his reasons for the decisions made at the time of the trial neither establishes ineffectiveness nor overcomes the presumption of constitutionally effective counsel.[73]

Here, viewing counsel's performance based on the information available to him at that time, counsel's performance was not deficient. Analysis starts with the presumption that trial counsel was familiar with the facts and circumstances of the case.[74] He knew that the victim was Garner's friend who would identify Garner (A 133). He also knew that the People were trying to get Garner's cell phone records (A 137). If the prosecutor had those records they could establish both Garner's location and who he called. In other words, defense counsel established on the eve of trial that the People did not have the records and, if they got them during trial, they would be hard pressed to do a timely forensic evaluation.

Harrington v. Richter is instructive on this point. In *Harrington* defense counsel did not have certain blood evidence tested. Counsel was not remiss in forgoing the testing both because the result of the testing could have been harmful to the defense and because by drawing attention the blood evidence would have caused the prosecutor to conduct its own testing and focus on the blood evidence

[72] *Harrington*, 562 U.S. at 111.
[73] *Greiner v. Wells*, 417 F.3d 305, 526 (2d Cir. 2005).
[74] Beyond the presumption that counsel acted appropriately, his testimony at the habeas corpus hearing confirmed this (A 131-37). Although the hearing should not have been held, counsel's testimony does not establish his ineffectiveness.

which may have further incriminated his client.[75] Although defense counsel had no ready answer when the blood evidence was introduced, the prosecution "itself did not expect to make that presentation and had made no preparations for doing so on the eve of trial. For this reason alone, it is at least debatable whether counsel's error was so fundamental as to call the fairness of the trial into doubt."[76] Here, as in *Harrington*, defense counsel's best hope was that the prosecution would not have the records in time for trial. And, as in *Harrington*, because the cell phone records were not highlighted, the prosecution did not receive them in time to do a forensic evaluation.

Although the District Court believed that the cell phone records should have been used to tighten up the time here and establish an alibi defense, those records do no such thing. The first question to ask here is if Garner were home at the time of the crime (or soon thereafter) as he testified, then his family could have been called as witnesses. They were not, and no one has ever questioned that decision. In other words, based on the attorney-client communications, defense counsel decided not to call Garner's family as trial witnesses (assuming they were willing to testify – if not that raises other concerns), and when pressed used the cell phone

[75] *Harrington*, 562 U.S. at 108–10.
[76] *Id.* at 110.

records in an attempt to buttress the defense.[77] If the People had obtained the records earlier, they too would have tightened-up the time line and may have also forensically proved Garner – or at least Garner's cell phone – was in Suffolk rather than Nassau County. Obtaining the evidence early may or may not have helped his case, but it would have given the prosecution more time to use the same evidence to improve their case.[78]

Also, the District Court did not understand state procedure. If defense counsel subpoenaed the records, the material had to be returned to the court, and, unless there was an inept prosecutor, the evidence would have been known to the prosecution.[79] Defense counsel, within the limits of the available resources, was allowed to have Garner obtain the records. This procedure would also prevent the prosecutor from knowing their content. The District Court also suggests that defense counsel should have objected to admitting the records into evidence. There was no basis for an objection.

Based on the facts known to defense counsel at that time, his representation was not deficient. Even if defense counsel should have done more with or about the cell phone records, Garner was not prejudiced. At best he would have refined his time line, which he testified was only a guess (T. 820). The District Court

[77] In the federal hearing, defense counsel recalled that Garner's trial testimony pretty-much matched the information he had been told in their conversations (A 88-92).
[78] *Harrington*, 562 U.S. at 94–96.
[79] NYC PL §§610.10, 610.20, 610.30; subpoenas are returned to court.

wrote that a close analysis of the call records showed that Garner had a limited amount of time to commit this crime (A 292-93). But the records do not establish that he could not have committed this crime. The records do not establish an alibi or demonstrate that Garner could not have committed the crime. With time to examine the records, the prosecution may have been able to place defendant at or near the crime scene. And, although the District Court suggests that Garner could have refined his testimony about his location (whether or not he was home) defense counsel maintained the story Garner told at trial was consistent with what he learned from Garner during their meetings. Based on the facts and circumstances of this case, defense counsel's representation was not deficient, nor did it prejudice the result of the trial.

Finally, although the District Court should not have held a hearing regarding this petition, the testimony at that hearing establishes that trial counsel was not ineffective. Garner's mother testified that she obtained her phone records at her son's request (A 127). She could not remember when she got the records (it may have been during trial), and she could not recall where her son was when she sent the records to him (maybe in prison upstate) (A 128-29). Her testimony does not support the conclusion that she was asked to obtain the records before trial.

That Mrs. Garner did not seek her own records before trial is not inconsistent with defense counsel's testimony. Defense counsel testified that

although Garner had a Nextel and burner phone, he was unaware of Mrs. Garner's phone (A 136). If Garner had told him about the phone, he would have obtained the records and used them (A 144, 174). But, we maintain, there was no request to obtain the phone records because defense counsel was not aware of this phone. Furthermore, defense counsel remarked several times that he could not recall what occurred thirteen years before his testimony in federal court (A 136, 146), but there may have been some discussion that Garner's wife had the cell phone in question (A 156). If defense counsel was not told about this cell phone, he may have, at the time of trial, questioned in his own mind whether his client had told him everything and then proceeded in light of all the information he had at that time. The federal hearing does not, therefore, support the District Court's conclusions.

CONCLUSION

The State maintains that trial counsel was not ineffective. Indeed, he did the best he could with the facts as he knew them. The County Court likewise was correct when it determined that defense counsel did not err in having Garner conform his testimony to the records when those records became available at trial. The District Court erred when it combined the *Strickland* and §2254 analysis and applied the wrong standard to assess whether defense counsel's advocacy was unreasonable. That assessment, moreover, is based on a standard that is incompatible with Supreme Court decisional authority. These errors were compounded when the District Court held a hearing in contravention of controlling Supreme Court authority and then used that information to determine that defense counsel was ineffective under the *Strickland* standard. Reasonable jurists could disagree with the District Court's decision, and – in fact – they have. There was not, therefore, an extreme malfunction in the state system that activates habeas corpus review.[80]

[80] *Harrington*, 562 U.S. at 102.

CONCLUSION

THE DECISION OF THE DISTRICT COURT SHOULD BE REVERSED.

DATED: May 12, 2017
Riverhead, New York

Respectfully submitted,

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17-78-pr

To be argued by Norman Trabulus

United States Court of Appeals for the Second Circuit

BLAIR GARNER,

Petitioner-Appellee,

-against-

WILLIAM LEE, as Superintendent of Green Haven Correctional Facility,

Respondent-Appellant.

On Appeal from the United States District Court
for the Eastern District of New York

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Appendix F

TABLE OF CONTENTS

Page

Page

Table of Authorities

Page

Cases

Page

Statutes

PRELIMINARY STATEMENT

Appellee Blair Garner ("Garner"), who remains in state custody serving a twenty-five year prison sentence, respectfully submits this brief in opposition to the brief of appellant William Lee ("Lee"). Lee, the superintendent of Garner's correctional facility, has appealed Judge Chen's grant of Garner's habeas petition.[1] This brief refers to Lee as "the prosecution" and to his brief as the "prosecution brief."

STATEMENT OF THE CASE

Introduction

On the night of April 13, 2002, Karl Keith ("Keith) was shot as he was, by his own admission, about to engage in a narcotics purchase. At Garner's trial, he testified that Garner had driven him to the scene and that, as they walked to where a third party was supposed to sell him the drugs, Garner slipped behind and shot him. No evidence besides Keith's word supported that. No forensic evidence linked Garner to the shooting, and he gave no inculpatory admission.

Garner testified. He acknowledged helping arrange the narcotics purchase

[1] After filing his habeas petition, Garner was transferred from Greenhaven Correctional Facility to Eastern New York Correctional Facility. Lee was transferred too, becoming superintendent of the latter facility, after being superintendent of the former. Lee thus continues to have custody of Garner.

for Keith, but denied driving him to it, or shooting him, or being present when he was shot. He said that he met him that evening and received the buy money for safekeeping, following which Keith and his cousin Merkelson drove off to meet the seller and test the drugs; he "guess[ed]" or "figur[ed]" that he arrived home by 9:45 or 10:00 p.m., and waited to bring them the money. Tr. 792-793, 814-815.

The prosecutor cross-examined Garner with his cellphone records. They reflected two calls from Garner's cellphone to his home at 10:28 p.m. and 10:31 p.m. A301. That was well after Garner said he arrived home, and after when the prosecutor said Keith had been shot. The prosecutor argued that Garner would not have called home unless he was still out, that he was out then and when Keith had been shot, and that he had testified to a false alibi, evidencing consciousness of guilt. A273-274. At least some jurors were swayed by that. A274-275.

The critical cell phone record and 911 call evidence; Judge Chen's findings

In his habeas petition, Garner claimed that his trial counsel, Mr. Lemke, had been prejudicially ineffective in respect of the cellphone record evidence and 911 call evidence. Judge Chen agreed. In a Memorandum and Order, A268-294, she found that Mr. Lemke's actions and omissions, in both preparation for and conduct of the trial, had been deficient in multiple respects.

Judge Chen found, among other things, that Mr. Lemke's failure to obtain

the cellphone records before Garner took the stand, and his consequent failure to review them before Garner testified, had been ineffective. Had he done so, Garner might not have testified at all, or, with a refreshed recollection, his testimony might not have been inconsistent with the cell phone records. Mr. Lemke's failure to obtain the records left him ignorant of facts necessary to prepare, strategize, and advise Garner effectively. A284-291.

Notwithstanding that he was presenting an alibi defense, Mr. Lemke also never analyzed the 911 call evidence to ascertain the time Keith was shot. That continued even after he received the cellphone records in midtrial. If he had known the time of the crime, he could then have examined the cellphone records to see what they reflected Garner was doing at that time. A293 fn.30.

That was both ineffective and prejudicial. The 911 call evidence established that the shooting occurred significantly later than the prosecution contended, within a ten-minute window from 10:31 p.m. to 10:41 p.m. (A292 fn. 27). The cellphone records showed that during that entire ten-minute period Garner had been on the phone continuously, making calls. A292-293.

Keith had testified that he had been with Garner for a continuous period of over twenty minutes immediately preceding the shooting. He asserted that during that entire time Garner had not used his phone, nor had it rung. Tr. 486-487.

If Mr. Lemke had argued the cellphone record and 911 call evidence the case would not have turned on alibi. That evidence contradicted Keith's account, impeached his credibility, and made it highly implausible for Garner to have shot him, in the midst of a phone call or making a series of calls. A293.

Accordingly, Judge Chen concluded that Suffolk County Court, in rejecting Garner's ineffectiveness claim predicated upon Mr. Lemke's failure to do that, had unreasonably applied *Strickland v. Washington,* 466 U.S. 668 (1984) and its progeny. A280-283. On the merits, she concluded that Garner had been prejudiced: if Mr. Lemke had effectively analyzed the 911 call and cellphone record evidence and argued it to the jury, there was a substantial probability that the verdict would have been different. *Id.*

The prosecution does not challenge the factual underpinnings of her conclusions. It does not dispute that Garner had been in possession of his cellphone at all relevant times – the central premise of his cross- examination. It does not dispute that the 911 call evidence establishes that the shooting occurred between 10:31 p.m. and 10:41 p.m. It does not dispute that the cell phone records reflect that Garner was continuously on the phone during that entire time, contradicting Keith's testimony. It just pays those facts scant attention.

Instead, the prosecution argues (1) that Garner's claim is procedurally

defaulted, (2) that it cannot survive the "doubly deferential" standard applicable to ineffectiveness claims under 28 U.S.C. § 2254(d)(1), (3) that Judge Chen supposedly applied an erroneously less stringent standard in sustaining it, (4) that Judge Chen erred in holding an evidentiary hearing on the merits, and, (5) that Judge Chen erred in finding, on the merits, that Mr. Lemke had been ineffective. Each of those contentions will be shown to be mistaken.

The limited cell phone record content actually given to the jury; the two differing time frames – both incorrect – that defense and prosecution counsel respectively gave the jury for the crime

The trial record reflects that Garner's jury never actually saw the cell phone records. Mr. Lemke did not ask the jury to review them, they were not published to the jury, nor were they were requested by, or provided to, the jury during its deliberations. The only things the jury learned of their contents came from Garner's answers to questions the prosecutor asked him on cross-examination.

Those questions obscured that Garner had been on the phone continuously during the10:31 p.m. to 10:41 p.m. time frame. After questioning Garner about his call to home at10:31 p.m., the prosecutor asked him about a 10:45 p.m. call. She referred to that call as "the next entry," misleadingly suggesting that there had been no calls in between. Tr. 820. In fact, there had been three intervening calls. Together with the 10:31 p.m. call, they occupied virtually the entire time period

from 10:31 to 10:41 p.m. A292-293; A301. Even if the jury had understood that was the correct time frame for the shooting, it would still have lacked the information that showed that Garner had been on the phone continuously during that time.

Moreover, to ascertain the correct time frame for the shooting, it was necessary first to do as Judge Chen did – to measure the elapsed times from the beginning of the first 911 call to statements by the caller saying how soon before he had heard the loud noise of the shooting, and to statements by the 911 operator that a police notification had gone out, which police testimony established happened at approximately10:44 p.m. Tr. 302, 333-334.

Doing all that yielded a 10:41 p.m. time for the first 911 call.[2] From what the 911 callers said, Judge Chen concluded the shooting occurred no earlier than ten minutes before – at 10:31 p.m. or after. A292 fn 27.

The jury heard portions of the 911 call tape cassette played just once, during the trial. Tr. 760. The cassette was not in the jury room during deliberations, nor was any portion of it ever replayed. The jury it was in no position from a single hearing to figure out the correct time frame of the shooting.

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[2] Indeed, People's Exhibit 49 – the prosecution-generated tape cassette containing the 911 calls – bears a notation "10:41". The physical cassette was, however, never published to the jury, nor was the notation read to it. Tr. 760.

If Mr. Lemke had determined that time frame himself, and argued it to the jury, and explained how it was arrived at from the recordings, the jury could, if it wished to, have verified that by having the cassette replayed and timing it.

Mr. Lemke instead argued an impossibly late time for the shooting – "roughly 10:52 p.m." Tr. 845. That was impossible because it was when officer Gover testified he arrived at the scene and found Keith already shot, having been notified eight minutes earlier to respond to the shooting scene. Tr. 302, 304. Notably, Mr. Lemke himself repeatedly elicited from Officer Gover that he had arrived at the scene at 10:52 p.m., including that Gover had confirmed that time afterwards, by listening to the 911 tapes. Tr. 325, 328, 332.

The prosecutor argued that the shooting occurred between 10:00 p.m. and 10:25 p.m. Tr. 874. She did not cite any evidence specifically supporting that time frame, and there was none – Keith was general about the time, emphasizing he did not check it that night and was approximating in his testimony. Tr. 485-87.

Garner's cellphone records reflected no usage between a 10:06 p.m. call and a 10:28 p.m. call. The prosecutor's 10:00 p.m. to 10:25 p.m. range roughly corresponded to that, and was apparently chosen as being the only twenty-plus minute period that fell between 10:00 p.m. and 11:00 p.m. and for which the cellphone records would not contradict Keith's testimony (Tr. 486-487) that

Garner had not used his phone for the twenty-plus minutes preceding the shooting.

Garner's cell phone had both a telephone function and a walkie-talkie function. Tr. 476, 512 (Keith), 788 (Garner). The cell phone records reflected only calls made or received through the cellphone function, not calls through the walkie-talkie function. Tr. 686 (Detective Faughnan). Accordingly, if there had been walkie-talkie calls during the prosecutor's time frame for the shooting, they would not appear in the cellphone records. Fortunately, it was the telephone function that Garner used during the actual time frame of shooting, and the calls appeared there.

SUMMARY OF ARGUMENT

I. Garner's claim is not procedurally defaulted. It was, under New York law, a "mixed claim" of ineffectiveness, comprising both allegations based on the record and allegations founded outside the record. New York permits all the allegations within such a mixed claim – record-based and not – to be reviewed upon a collateral attack, and that is what Suffolk County Court did here. That court did not state that it was relying on a procedural bar to deny the claim.

II. Judge Chen correctly applied the "doubly deferential" standard in determining whether Suffolk County Court had unreasonably applied *Strickland* and its progeny. *Strickland* required Suffolk County Court to consider the

reasonableness of trial counsel's successive decisions to limit his investigation by (a) neither obtaining the cellphone records before trial, (b) not analyzing those records once he was given them midtrial, and, in a case where the defense was alibi, (c) not analyzing the 911 call evidence to ascertain the time of the shooting. Suffolk County Court did not, however, consider the reasonableness of any of those decisions. Nor did it consider the reasonableness of Mr. Lemke's consequent conduct: (a) presenting an alibi defense which, both as testified to by Garner, and as reformulated by Mr. Lemke in closing argument, was demonstrably untrue, and (b) not arguing, from the 911 call evidence of the time of the crime, and the cellphone record evidence, that Garner was continuously on the phone, contradicting Keith's account of the shooting and rendering it implausible that Garner shot him. Judge Chen correctly determined that Suffolk County Court unreasonably applied *Strickland* and its progeny in rejecting Garner's claim that his trial counsel had been ineffective.

III. Judge Chen, after correctly making the foregoing determination, based upon the state court record alone, correctly held an evidentiary hearing to assist her in determining the merits de novo. The prosecution has not even alleged how that hearing supposedly prejudiced it. It cannot in any event complain that it was thus afforded a second opportunity to sustain Suffolk County Court's denial of

Garner's claim, on the merits, after losing on the unreasonable application issue.

IV. Judge Chen correctly determined, on the merits, that Mr. Lemke's conduct had been objectively unreasonable. If he had presented and argued the cellphone record evidence and, from the 911 call evidence, the correct time of the shooting, there was a reasonable probability that the verdict would have been different. Thus, Mr. Lemke's ineffectiveness had been prejudicial under *Strickland*, *supra*. For the reasons Judge Chen gave, and other reasons too, the evidence had not been so overwhelming as to negate prejudice.

STANDARD OF REVIEW

This Court reviews a district court's grant of a petition for habeas corpus de novo, and its underlying findings of fact for clear error. *Waiters v. Lee*, 857 F.3d 466, 477 (2d Cir. 2017); *Ramchair v. Conway*, 601 F.3d 66, 72 (2d Cir. 2010).

POINT I

THE PROSECUTION BRIEF ERRS IN ASSERTING THAT GARNER'S CLAIM IS PROCEDURALLY DEFAULTED.

Garner's ineffectiveness claim was first raised on a (post-appeal) motion to vacate his conviction pursuant to New York CPL § 440.10. Suffolk County Court denied the motion, and Garner was denied leave to appeal that denial. Garner timely filed the present habeas petition. The petition advanced the same

allegations of ineffectiveness that had appeared in his motion to vacate. Only the allegations involving or related to the cellphone records are presented on this appeal. A23-24; A276-277 (Memorandum and Order).

In denying the motion to vacate, Suffolk County Court observed that its ineffectiveness issues were "for the most part" record-based and "should" have been determined on direct appeal:

> Defendant's arguments concerning ineffective assistance of counsel are, for the most part, issues that could be resolved by examining the record and, therefore, should have been determined on direct appeal, Criminal Procedure Law § 440.10(2)(c). Defendant cannot now use a CPL §440.10 motion to collaterally challenge an issue which could have been addressed on direct appeal, *People v. Cooks*, 67 N.Y.2d 100 (1986). In any event, a review of the record shows that defendant received effective representation.

A261-262.

At no point, however, did Suffolk County Court specify which issues could, and which could not, have been resolved by examining the record. Nor did it state that it was relying on any resulting procedural bar to deny the motion. Following the passage quoted above, it proceeded immediately to discuss and deny the motion on the merits.

The prosecution nevertheless has argued that Garner's habeas claim is procedurally defaulted because some of its issues were record-based. Judge Chen

disagreed:

> the County Court did not expressly rule that the entirety of Petitioner's ineffective assistance claim could have been raised on direct appeal. * * * * It is therefore impossible to determine whether the County Court "clearly and expressly" rested the entirety of its decision regarding Petitioner's ineffective assistance claim on adequate and independent State grounds or which of Petitioner's ineffective assistance arguments the County Court rejected on procedural grounds.

A278-279.

Garner presented a "mixed claim" of ineffectiveness, comprising both record-based and non-record-based issues. New York permits *all* issues comprised within a mixed ineffectiveness claim – both record-based and not – to be raised and reviewed upon a motion to vacate. *Pierotti v. Walsh*, 834 F.3d 171, 178 (2d Cir. 2016):

> "[S]uch a mixed claim, presented in a [Section] 440.10 motion, is not procedurally barred, and the [Section] 440.10 proceeding is the appropriate forum for reviewing the claim of ineffectiveness *in its entirety"*[emphasis added].

Pierotti, *supra*, 834 F.3d at 178, *quoting People v. Maxwell*, 89 A.D.3d 1108, 933 N.Y.S.2d 386, 388 (2d Dep't 2011). The rule reflects that New York courts

> "'do not view each alleged mistake or shortcoming of [defendant's] trial attorney as a separate "ground or issue raised upon the motion.'" (CPL 440.10[2][b]). Rather, the defendant's claim of ineffective assistance of counsel constitutes a single ground or issue upon which relief is requested."

Maxwell, *supra*, 89 A.D.3d at 1109, 933 N.Y.S.2d at 387.

The prosecution brief (p.22) nevertheless mistakenly argues that Suffolk County Court's citation of *People v. Cooks,* 67 N.Y.2d 100 (1986) should be read to indicate that it had really meant to say that Garner's ineffectiveness claim was procedurally barred. Aside from the fact that is not what Suffolk County Court actually said, *Cooks* did not involve a mixed claim. *Cooks* involved a guilty plea, and the defendant there conceded that his claim was entirely record-based and could be determined solely from the plea transcript. As such, the claim was procedurally barred.

Notably, in denying Garner's claim on the merits, Suffolk County Court considered matters outside the record. For example, it asserted that Garner's counsel attempted to obtain his cell phone records prior to trial – something not found in either the trial record or in the motion record. A266. And it also stated that Garner had consulted with his counsel before testifying. That appears only in the motion record. A266.

Procedural default requires that (1) a state court have actually relied upon a state procedural rule as a basis to deny a claim and (b) that the rule be firmly established and regularly followed. *Cotto v. Herbert*, 331 F.3d 217, 239-40 (2d Cir. 2003). Suffolk County Court's decision may be fairly read to state that some

of Garner's issues would have been procedurally barred if they had been raised in isolation, but not to state more than that. It cannot be read to state that such issues were barred when comprised within a mixed claim, or that the court was relying upon such a bar to deny the claim.

Further, if its decision had asserted such reliance, there would still be no procedural default here. That it because the decision would have been relying upon a rule that was not "firmly established." *Cotto*, *supra*. To the contrary, the rule would have been a departure from New York's firmly established and regularly followed rule that mixed claims of ineffectiveness may be reviewed in their entirety on a collateral motion to vacate. *Pierotti*, *supra*; *Maxwell*, *supra.*

POINT II

JUDGE CHEN APPLIED THE CORRECT AEDPA LEGAL STANDARD, AND APPLIED IT CORRECTLY.

The prosecution brief (pp. 22-28) mistakenly argues that Judge Chen, in analyzing the reasonableness of Suffolk County Court's application of the first prong of the *Strickland*, erroneously conflated the "unreasonable application" standard of 28 U.S.C. § 2254(d)(1) with *Strickland*'s "objective unreasonableness" standard and, thus, failed to apply the correct "doubly deferential" standard.

Judge Chen properly determined prejudice de novo.

The prosecution brief makes no comparable contention concerning Judge Chen's analysis of the second, prejudice, prong of *Strickland*. Suffolk County Court had never reached or passed upon the prejudice prong. A283 fn. 16. There was, accordingly, no state court adjudication of the prejudice issue for Judge Chen to defer to. 28 U.S.C. § 2254(d)(1) therefore did not apply, and she properly determined that issue de novo. *Brumfield v. Cain,*__ U.S. ___, 135 S.Ct. 2269, 2282-2283 (2015)*; Rompilla v. Beard*, 545 U.S. 374, 390 (2005)(citing *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

Judge Chen applied the correct standard in determining that Suffolk County Court had unreasonably applied *Strickland* and its progeny in concluding that Mr. Lemke had been effective.

It is plain from the Memorandum and Order that Judge Chen well understood the "doubly deferential" standard. The Memorandum and Order cites *Cullen v. Pinholster*, 563 U.S. 170 (2011), which specifically references that standard, 563 U.S. at 190, and which also cites *Harrington v. Richter,* 562 U.S. 86 (2011), the decision which the prosecution brief mistakenly asserts that Judge Chen disregarded. The Memorandum and Order quotes *Pinholster* to the effect that § 2254(d)(1) embodies a difficult-to-meet and highly deferential standard, one which gives state court decisions the benefit of the doubt (A281) – these are things

that *Richter* stands for too.

Further, the Memorandum and Order acknowledges that whether Suffolk County Court applied *Strickland* and its progeny unreasonably was an issue distinct from the objective reasonableness of Mr. Lemke's conduct, and that, in a given case, those two issues might resolve differently. A281.

Notably, the prosecution brief does not cogently defend the analysis given by Suffolk County Court to deny Garner's claim as constituting a reasonable application of *Strickland* and its progeny. Instead, it takes issue with the authorities that Judge Chen cited in determining that it was unreasonable.

Thus, the prosecution brief (p.26) criticizes the Memorandum and Order's citation of *Williams v. Taylor,* 529 U.S. 362 (2000) – as if that seminal Supreme Court decision had been overruled or discredited. The Supreme Court, however, has continued to cite and rely upon *Williams*, including in opinions issued after *Richter*, *supra*, the opinion which the prosecution brief erroneously asserts is inconsistent with it. *E.g., Hinton v. Alabama*, ___ U.S. ___, 134 S.Ct. 1081, 1089 (2014)[3]; *Lafler v. Cooper*, 565 U.S. 156, 173 (2012).

The prosecution brief (pp. 24-27) takes the Memorandum and Order to task

[3] *Hinton* also cited *Richter*, *supra,* without noting any inconsistency between *Williams'* and *Richter's* formulation of the standard. *Hinton,* 134 S.Ct. at 1088.

for not citing or quoting from *Richter, supra*. From that, it incorrectly concludes that Judge Chen applied a standard inconsistent with *Richter*.

In *Richter,* the state court had rejected the petitioner's ineffectiveness claim on the merits, but without providing an explanation. *Richter's* particular formulation of the 2254(d) standard – requiring a habeas court to assess the reasonableness of all arguments or theories that *could* have supported the denial, 562 U.S. at 102 – is tailored to apply to such unexplained denials. *Pinholster*, *supra*, 563 U.S. at 187-188; *accord*, *Lynch v. Dolce*, 789 F.3d 303, 311 (2d Cir. 2015). Since Suffolk County Court had explained its denial, there was no occasion for Judge Chen to cite or quote *Richter's* formulation. There was, rather, occasion to scrutinize the explanation, which is what Judge Chen did.

Judge Chen correctly determined that Suffolk County Court's application of *Strickland* and its progeny to Garner's claim was unreasonable.

Judge Chen summarized Garner's ineffectiveness claim in respect of the cellphone records as follows:

> ([1]) counsel failed to obtain Gamer's cellphone records in order to prepare for trial and refresh Garner's recollection before testifying;
>
> and
>
> ([2]) counsel failed to use Garner's cellphone records to defense's advantage by cross-referencing those records with 911 calls and

> establishing that Garner was continuously using his cellphone throughout the only period of time during which Keith could have been shot.

A277.

That claim was founded in lack of investigation and preparation. Applying *Strickland* to such a claim necessarily entails considering the reasonableness of the choices that led counsel to forego a particular investigation. *Hinton v. Alabama*, 134 S.Ct. 1081, 1088 (2014):

> Under *Strickland,* "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S., at 690–691, 104 S.Ct. 2052.

Hinton, *supra,* ___ U.S. at ___, 134 S.Ct. at 1088. A281-282.

Critical among Mr. Lemke's choices were his decisions (1) not to obtain the cellphone records in advance of trial and (2) not to analyze 911 call evidence as to the time of the shooting (despite presenting an alibi defense), and (3) not to ascertain from the cellphone records, once they were provided to him, what Garner had been doing at the time of the shooting. Though not having obtained the cellphone records in the first instance may have contributed to Mr. Lemke's failure

to utilize them affirmatively even after receiving them midtrial, it was the latter failure which ultimately resulted in prejudice. A292-293.[4]

Suffolk County Court did not even truly apply *Strickland,* in that it failed to consider the reasonableness of Mr. Lemke's decisions not to obtain the cellphone records himself before trial, not to analyze them once he was given them midtrial, not to ascertain the time of the crime from the 911 evidence (despite presenting an alibi defense), and instead to present an alibi defense that was patently false.

In rejecting Garner's claim, Suffolk County Court failed to inquire as to the reasonableness of Mr. Lemke's various choices not to investigate or prepare. Thus, though it cited *Strickland*, it did not truly apply it. *See Lafler v. Cooper*, 566 U.S. 156, 173 (2012)(state court does not apply *Strickland* when it fails to make the inquiry *Strickland* calls for but instead makes a different inquiry).

Suffolk County Court did not inquire at all concerning the reasonableness of Mr. Lemke's decision not to obtain the cellphone records in advance of trial. Instead, it inquired into the reasonableness of a different decision that Mr. Lemke

[4] Judge Chen wrote: "Given defense counsel's failure to identify the time frame for the shooting, it is unclear that even if he had timely obtained or received the cellphone records, he would have appreciated their significance. What is clear, however, is that after receiving them mid-trial, he did not." A293 fn. 30.

supposedly had made – not to show the records to Mr. Garner before he testified.

Mr. Lemke had made no such decision. If he had not wanted Garner to see the records before testifying, he would not have told Garner to get them through his mother, for that would have resulted in Garner seeing them (if they arrived in time.) It was uncontroverted in the state court record that, upon refusing to obtain the records himself, Mr. Lemke told Garner to have his mother obtain them (the phone account was in her name). She ordered them, but they only arrived after the trial. Document 9-2 at p. 36, 11-Cv-7 (E.D.N.Y.) (Garner affidavit on motion to vacate); see A25-26 (petition).

More importantly, even if Mr. Lemke had made that decision, that would not have made it reasonable for him to decide not to obtain the records for his own use. A282-283. In derogation of *Strickland*, Suffolk County Court never even considered the reasonableness of that decision, which Mr. Lemke did make.

Instead, Suffolk County Court mistakenly wrote that "[d]efendant concedes that counsel did in fact attempt to obtain the records prior to trial and that the obligation to do so rested with defendant." A266.

That is not supported in the state court record and is simply incorrect. Garner had argued in his motion to vacate that the obligation to obtain his

cellphone records rested with Mr. Lemke, who, unlike Garner or his mother, had subpoena power. There is nothing in the state court record suggesting that Mr. Lemke tried to obtain the records himself. Judge Chen was, accordingly, unable to find support for Suffolk County Court's assertions that Garner had supposedly conceded that it was his responsibility to obtain the records or that Mr. Lemke had attempted to obtain them himself. A282 fn. 13 ("the Court agrees with Petitioner that it is unclear how the State court reached this conclusion.") The prosecution brief has not taken issue with that, nor asserted that Suffolk County Court was correct in attributing such concessions to Garner.

Garner's motion to vacate argued the ineffectiveness of Mr. Lemke's failure to make affirmative use of the cell phone records in the same detail as he later presented it in his habeas petition. The motion papers included the records, and analyzed them, in conjunction with the 911 calls, to demonstrate both that the shooting necessarily occurred within the same ten-minute time frame that Judge Chen later found, and that Garner was on the phone throughout that time. It maintained that Mr. Lemke should have argued that to the jury and that, as Judge Chen later found, that it was reasonably probable that a different verdict would have resulted.

Suffolk County Court nowhere referenced any of that in denying Garner's

claim. It did not question that the shooting occurred within that time frame, or that the cell phone records reflected continuous use of the phone at that time. It did not point to any downside to making such an argument at all. It did not consider that Mr. Lemke, though he had proffered an alibi defense, was seemingly oblivious to critical favorable evidence that established the time of the shooting and what Garner was doing at that time. For Suffolk County Court not to consider that, or the reasonableness of Mr. Lemke's choices that led to it, was an unreasonable application of Strickland. *Gersten v. Senkowski*, 426 F.3d 588, 611 (2d Cir. 2005)("The County Court's holding ... not supported by any analysis or argument to justify a conclusion that counsel's decision to settle on a defense without having conducted an adequate pretrial investigation of possible alternative strategies and defenses was objectively reasonable, was an unreasonable application of *Strickland.*")

The state court record reflected that Mr. Lemke had been aware before trial that the cell phone records might contain important information bearing on Garner's activities the night of the shooting. Accordingly, when the prosecution initially indicated it would be introducing Garner's cell phone records, Mr. Lemke told the trial judge he would not proceed with an opening statement without having seen the cell phone records first. Tr. 233-234. But when the prosecutor

responded that she did not have them yet and would forego introducing them rather than delay the trial, Mr. Lemke was satisfied. Tr. 237. A272. He apparently conceived only that the records might hurt, not help, the defense, and that his duty to investigate correspondingly extended only to anticipating their possible use by the prosecution, but not to seeking to develop anything favorable from them. In not analyzing the reasonableness of Mr. Lemke's decision to exclude the cellphone records from his investigation, Suffolk County Court evinced that it too shared that unreasonable view, unreasonably.

By that decision, Mr. Lemke disabled himself from refuting Keith's account of the shooting and from demonstrating – with objective and unimpeachable evidence – the implausibility of Garner shooting him. Lacking that, he weakly argued that Keith was not lying but, having just suffered a serious head injury, saw a "vision" implicating Garner, believed it to be real, and had been testifying to it at trial. Tr. 845-846.

Ignorant of the true favorable significance of the cell phone records, Mr. Lemke put on a brave face in his closing. He tried to make the best of the damage the prosecution had done to Garner's alibi by telling the jury that he would have introduced the cellphone records himself if the prosecution had not done so. Tr. 867.

Appendix F

Mr. Lemke thus tried to extricate the defense from the consequences of his prior choices that doomed it. Suffolk County Court determined that was effective. A266 (citing Tr. 867). That determination, however, was contrary to *Strickland*. *Gersten*, *supra*, 426 F.3d at 610 ("Defense counsel 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.")

Suffolk County Court even misapprehended what Mr. Lemke had actually argued. It wrote that he told the jury that the cell phone records "bolstered defendant's time line and description of events." A266. That was incorrect.

What Mr. Lemke actually told the jury was that Garner's time line and description of events had been *wrong*. He acknowledged that Garner had not arrived home by 10:00 p.m., contrary to his testimony, but was still out at 10:31 p.m., as the phone records reflected. At that time, Mr. Lemke said, Garner was calling his wife, saying he would be home soon. Further, he must have arrived home soon after, Tr. 867, and, Mr. Lemke argued, made it home before the shooting – which Mr. Lemke placed at "roughly 10:52 p.m." Tr. 845.

The jury did not need to analyze the 911 calls to know that was impossibly late. 10:52 p.m. was when Officer Gover arrived to find Keith bleeding in the street, after having being notified some eight minutes earlier to respond to the

Appendix F

shooting. Tr. 302. 304. Mr. Lemke had himself elicited that from Gover multiple times. Tr. 325, 328, 332. And Gover had testified he had listened to the 911 tapes to make sure that was true. *Id.*

Mr. Lemke thus tried to patch up Garner's discredited alibi by pushing back the time of his arrival home while also pushing back the time of the shooting to later still – to a point of manifest impossibility. Mr. Lemke's revised alibi defense was no better than Garner's original discredited version. Yet he had the unutilized evidence in front of him, with which he could have rendered Garner's alibi mistake inconsequential, by showing the correct time frame and that Garner was constantly on the phone during all of it. Not doing that is what Suffolk County Court found to be effective.

It was unreasonable for Suffolk County Court to determine under *Strickland* that failing to argue the favorable cellphone record and 911 call evidence, and instead presenting a patently false revised alibi defense, had been effective.

Failing to present exculpatory evidence is not a reasonable trial strategy. *Gersten*, *supra*, 426 F.3d at 611. No fairminded jurist could agree that a choice to instead advance a false alibi constituted sound trial strategy, or that the decisions not to investigate or prepare, which had resulted in that choice, were reasonable. *Rivas v. Fischer*, 780 F.3d 529, 549-550 (2d Cir. 2015):

> He relied on an alibi defense when, in fact, Rivas did not have an alibi for the precise time that the prosecution claimed Rivas had murdered Hill. In effect, [counsel's] alibi defense amounted to no defense at all. No "fairminded jurist[ ]," [*Richter*], 562 U.S. at 101, could agree that this decision constituted "sound trial strategy," *Strickland,* 466 U.S. at 689 (internal quotation marks omitted). Accordingly, the state court's conclusion to the contrary was objectively unreasonable. *See Wiggins,* 539 U.S. at 521, 123 S.Ct. 2527.

Rivas, *supra*, 780 F.3d at 549-550 (2d Cir. 2015).

Arguing a false alibi to a jury is, further, per se ineffective. *Henry v. Poole,* 409 F.3d 48, 65, 71 (2d Cir. 2005) ("We conclude as well that the [ ] decision that Henry had not made a sufficient showing of prejudice resulting from counsel's presentation of the false alibi defense constituted an objectively unreasonable application of *Strickland* [ ] * * * * * [and] does not reasonably apply *Strickland* because it does not appear to consider the false alibi defense's likely effect on the jury.")

POINT III

IT WAS NOT ERROR TO CONDUCT AN EVIDENTIARY HEARING.

Under *Pinholster, supra,* 563 U.S. at 180, a habeas court may consider only the state court record determining whether the state court's ruling constituted an unreasonable application of Supreme Court holdings. That is what Judge Chen did. She relied on only the state court record to support her finding of an

unreasonable application of *Strickland* and its progeny. A281-283. The prosecution brief has not contended otherwise.

The prosecution brief mistakenly contends, however, that Judge Chen erred in conducting an evidentiary hearing, even though she considered it only in adjudicating Garner's claim de novo, A284-293, after determining that Suffolk County Court had unreasonably applied *Strickland*. A281-283. It also complains of the temporal irrelevancy that the hearing was conducted before the unreasonable application determination issued. It does not, however, indicate how it was supposedly prejudiced.

The prosecution brief does not suggest what remedy should follow. One might have expected it to argue that any de novo adjudication of Garner's claim had to be on the state court record alone. The prosecution brief does not, however, ask for that to be done, not even in the alternative.

The prosecution brief takes an erroneously constricted view of the procedural options available to a federal habeas court upon determining that a state court unreasonably applied Supreme Court precedent to deny a petitioner's claim. Consistently with *Pinholster, supra,* a habeas court may then conduct an evidentiary hearing to assist it. *Mosley v. Atchison*, 689 F.3d 838 (7th Cir. 2012).

It is the prosecution that stands to benefit from such an evidentiary hearing,

Appendix F

by receiving a second opportunity within the habeas proceeding to establish that the denial should be sustained. The prosecution brief (p. 32) recognizes that, in observing that "[u]nder this system a petitioner could prevail under § 2254(d)(1) and still theoretically have his petition denied." There is no anomaly in that. A state court may have unreasonably applied Supreme Court precedent to deny a claim that, nonetheless, should ultimately fail on the merits. *Mosley*, *supra*, 689 F.3d at 841-842.

The prosecution should not be heard to complain that Judge Chen gave it a second opportunity. That opportunity did not fail because the prosecution was given it, but because, on the merits, Mr. Lemke had been prejudicially ineffective.

POINT IV

JUDGE CHEN CORRECTLY GRANTED THE PETITION UPON FINDING PREJUDICIAL INEFFECTIVENESS.

Judge Chen's de novo analysis of the merits subsumed her earlier analysis in determining that Suffolk County Court had unreasonably applied *Strickland* and its progeny. Point II *supra* discusses that, and its arguments are not repeated.

It was objectively unreasonable for Mr. Lemke not to obtain the cellphone records in advance of trial; the burden on resources would have been de minimis, and there was no downside to doing so.

Mr. Lemke testified at the evidentiary hearing that it would have been

foolish not to know in advance what the cell phone records contained; he believed, however, that due to the type of phone he believed Garner had, no records would be available. A286.

Mr. Lemke could not clearly recall whether Garner asked him to obtain those records. A287 fn. 20. If he had, that would have strongly suggested such records were available. And even if Garner had not, with Garner pursuing an alibi defense, the records' potential relevance was obvious, and it was Mr. Lemke's duty to try to ascertain their availability himself and, if they were available, to obtain them. A287.[5]

Any mistaken belief that the records were unavailable could have been easily corrected through an inquiry or subpoena to the carrier. It could not excuse Mr. Lemke's failure to obtain them. *See Hinton*, *supra*, 134 S.Ct. at 1088-1089 (mistaken belief as to limit on available funds for expert no excuse); *Williams, supra*, 529 U.S. at 395 (mistaken belief records not available no excuse).

Judge Chen found no conceivable reason *not* to obtain the records – no

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[5] Judge Chen believed that Garner had stated in his motion to vacate that Mr. Lemke himself had asked Garner's mother to obtain the records. A287 fn 22. Garner's affidavit on that motion had, however, stated that it was he, Garner, who had asked his mother to obtain the records, after Mr. Lemke told him to, upon refusing to do so himself. Document 9-2 at p. 36 (¶ 40), 11-Cv-7 (E.D.N.Y.) That was consistent with the mother's testimony at the evidentiary hearing (at which Garner did not testify).

downside to doing so (nor to seeking a recess to review them, as Mr. Lemke did not, when it became clear the prosecution was seeking to admit them.) A285-286. *See Harris v. Artuz*, 288 F.Supp. 2d 247, 259-260 (E.D.N.Y.) 2003, *aff'd*, 100 Fed.Appx 56 (2d Cir. 2004)("no tactical justification for counsel's omission can be conceived').

The prosecution brief (p. 36) nevertheless mistakenly contends that it was reasonable for Mr. Lemke not to subpoena the records and to instead have Garner try to obtain them himself through his mother. It cites the "limits of the available resources," notwithstanding that defendants in New York criminal proceedings are not required to tender a fee or expenses upon serving a subpoena and many carriers accept service by fax or mail.

The prosecution brief argues that the prosecutor would have been able to examine the records if they had been obtained by subpoena. It has the incredible temerity to assert – against the backdrop of events as they actually unfolded – that having Garner obtain the records through his mother "would also *prevent* the prosecutor from knowing their content." Prosecution brief (p.36) (emphasis added). It was, however, Mr. Lemke and Mr. Garner who did not know their content at trial, not the prosecutor.

The prosecution brief (p.36 fn 77) acknowledges that Garner's pretrial

discussions with Mr. Lemke pretty much matched his testimony. In other words, Garner had told Mr. Lemke he had not shot Keith.[6] Yet, citing *Richter*, *supra*, it argues that Mr. Lemke's "best hope" was that the prosecution would not have Garner's records in time for trial – as if, without seeing them, it was reasonable for Mr. Lemke to presume they could only hurt, not help.

Gersten, *supra,* demonstrates the fallacy of such a "best hope" argument. There, defense counsel pinned his hopes on the victim not either not showing up to testify at trial or breaking down on the stand and saying nothing against his client. *Gersten, supra*,426 F.3d at 602, 605. Defense counsel therefore failed to consult an expert and had no expert to call when the victim testified, even though an expert could have discredited both her testimony and that of the experts whom the prosecution had called to bolster her credibility.

Richter was decided on 2254(d)(1) grounds, not on the merits. It sustained as a reasonable application of *Strickland* a state court determination that trial counsel had not been ineffective for failing to allocate limited resources to hiring a blood expert. Up until the trial, it had not even appeared that the prosecution would introduce blood evidence. *Richter*, 562 U.S. at 94. Moreover, there was a

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[6] The prosecution brief, p. 36 fn. 77, incorrectly cites to A88-92 for this. The correct citation is A134 (lines 8-10) and A135 (lines 6-9).

risk that opening up blood evidence issues could result in something unfavorable.

Here, in contrast, the defense was alibi, and it had been apparent to Mr. Lemke that it would be "foolish" not to consult the record of Garner's cellphone calls in advance, if available. The resources expended in doing so would have been de minimis and not comparable to the cost of retaining a blood expert. And whether the cellphone records were favorable or unfavorable, it was reasonable to anticipate that the prosecution would subpoena them if available – its costs would have been de minimis too. The prosecution would then have had them available to cross-examine Garner in his anticipated alibi testimony, as in fact it did.

The prosecution brief's other ineffectiveness arguments are unavailing.

The prosecution brief (p.35) questions why members of Garner's family were not called as alibi witnesses. It insinuates that may reflect that Garner was lying. No family member could, however, possibly have supported his alibi without contradicting his testimony. He testified that his wife and children were out at a birthday party when he came home and that he had to wait for them. Tr. 794. How could they then say when he arrived home, whenever that was?

The prosecution brief (p,38) asserts in respect of Mr. Lemke's pre-trial conversations with Garner that "there may have been some discussion that Mr. Garner's wife had the cell phone in question (A156)." The implication is that Mr.

Lemke may have been led to believe the critical phone usage could have been by Garner's wife, not Garner, rendering the cell phone records irrelevant.

The correct citation is A158, not A156. There, Mr. Lemke testified at the evidentiary hearing that "I'm not too sure if part of our conversation was his wife was alone at the time, may have had the phone, she was at a birthday party." Mr. Lemke may not, when testifying at the hearing, have remembered the specifics of what Garner had told him many years before. He did, however, remember that it was in material respects the same as his trial testimony. A134 (lines 8-10) and A135 (lines 6-9). That testimony was that the wife was at a birthday party, and that he, Garner, had the phone. Mr. Lemke had no reason at the time to question the importance of the cell phone records. As he testified, it would have been foolish not to look at them in advance.

The prosecution brief makes no attempt to justify, and could not have justified, Mr. Lemke's failure to analyze and affirmatively use the cellphone records once he had them.

The prosecution brief asserts that the cell phone records do not establish an alibi. True. They do just as well, perhaps better. They objectively show that what Garner was doing at the time of the crime was entirely inconsistent with Keith's account of the shooting and that it was implausible for him to shoot Keith while doing it.

Appendix F

The prosecution brief offers no excuse at all for Mr. Lemke's failure to utilize the cell phone records affirmatively once he had them, and to instead persist with a retreaded and still manifestly false alibi defense that depended on an impossibly late time for the crime. That is what ultimately prejudiced Garner. A292-293.

Even if, *arguendo*, it had been reasonable for Mr. Lemke not to obtain or analyze the records before, it would not matter. Not analyzing and using them, with the 911 calls, when both were at hand, was ineffective, objectively unreasonable, and prejudicial.

Judge Chen correctly found prejudice.

It remains an unsolved mystery why Keith would falsely accuse Garner. That, however, does not diminish the force of the evidence from the cell phone records and 911 calls.

The prosecution brief (p.9) points out that Keith first accused Garner on the night of the shooting, at the scene, to police officer Gover. Keith at the time was "very coherent." Tr. 327 (Gover).

Notably, at trial, Keith claimed that he had, after being shot, already deliberately fabricated, even before speaking with Gover.

Keith testified that Garner supposedly returned before Gover arrived. Keith

said he then pretended to be dead so that Garner would not shoot him again and kill him. Tr. 508. If something like that was true – even if it was not Garner there – it was a quick-witted fabrication. If not, Keith's testimony that it happened was a fabrication.

Keith demonstrably concealed in giving his account to Gover. Though lying in growing pool of his own blood, he was able to give Gover a detailed account of the shooting and of the preceding arrangements for a drug transaction. In doing so, he described the money that, at trial, he testified Merkelson had given him to pay for the drugs. In speaking with Gover, however, he did not say that Merkelson had given it to him, nor mention Merkelson at all – even though Merkelson was waiting for him as they spoke. Tr. 311-312 (Gover). (In contrast, Keith did not hesitate to ask Gover that his parents be notified. Tr. 308. (Gover)). Keith was thinking ahead, to protect Merkelson, a campus drug dealer who had been the instigator of the aborted drug transaction. To that end, Keith concealed Merkelson's involvement from the police.

As Gover and Keith were speaking, Keith's cell phone lit up with a call displaying from "Blizzie" – Garner. Keith told Gover it was the shooter calling and that Gover should *not* pick up and answer, for that very reason. Tr. 512 (Keith). Why would a "very coherent" man who had just provided a detailed and

Appendix F

accurate physical description of Garner, to facilitate his apprehension, not want a policeman to speak with him so soon after the shooting? For fear that Garner might then and there establish an alibi to the police, while things were still fresh and, perhaps, while others were still with him? (Garner testified he was alone from the time that Merkelson and Keith drove off to do the deal, until he arrived home, and after; Keith, however, would not then have known that Garner had remained alone after they parted.)

Why, for that matter, might someone who had just shot a man and left him for dead in a residential street call his phone number twenty-odd minutes later, when the police might well answer the phone? Garner, however, had testified he had been waiting to hear from Keith to bring him the buy money. Consistently with that, he had reason to call Keith to find out what was going on.

That was not the only time that Keith's phone rang after he was shot. The first of the two 911 callers, the one whose call came in at 10:41 p.m., who lived right near the shooting, Tr. 687, and who reported he had just come out of his house after hearing a loud noise, said that Keith's cell phone kept on ringing. A253. Keith too testified that his cell phone rang, multiple times, including before Gover arrived, but that he was unable to reach it and answer it. Tr. 512, 520.

Someone was calling Keith repeatedly, as early as the first, 10:41 p.m., 911

Appendix F

call. That someone was not Garner – the phone records show that he had been on the phone with others, up to and extending into 10:41 p.m. A301.

Keith and Merkelson testified that Merkelson stayed behind and that Garner and Keith went off to make the drug purchase. Garner, however, testified that it was he who stayed behind, and would later bring the buy money to the scene, while Keith and Merkelson drove off. Tr. 792-793.

Keith testified he had not made any phone calls immediately preceding the shooting. Tr. 487. Yet his phone started getting calls right after. The caller apparently had just learned that something had gone wrong. Who might have seen or heard the shooting and known Keith's number to call him? Likely Merkelson, if he had accompanied Keith to the buy. Afraid to approach lest he be shot too, he would have called to ascertain his condition.

These are additional reasons, besides those given by Judge Chen, that the prosecution's case was not "so overwhelming as to negate the reasonable probability that [Garner] could have been acquitted if his attorney had obtained the cellphone records before the trial and investigated and prepared [Garner's] defense using that information." A291 fn 26.

Appendix F

CONCLUSION

For all the foregoing reasons, this Court should affirm in all respects.

Dated: August 8, 2017
New York, New York

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Dated: New York, New York
August 8, 2017

/S/
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Appendix F

22:00

So, those records show a lot of things. What it doesn't show is who had the phone, where they were when they had the phone, and it does not actually establish an alibi because we don't know who had the phone.

It would have possibly done him great harm if we had time to take all those records, and go through it, and see if we could obtain any of his cell site information. Obviously 16 years after the event we don't think that that would happen at all. Although of course now Mr. Lemke has testified, and at this point he has – There is no attorney client privilege left. And in the future if this were retried I don't think our position would be if that cell phone was necesarily at the scene since we already – we now know for the first time after this hearing that he had at least three cell phones, maybe more.

In fact, Mr. Lemke said he had burner phones presumably because he was a drug dealer. So, everybody is fixated on these records, but it really would not have helped him. He presented a cogent argument that his client was home. Those records don't dispute it. They don't say where the phone was. So –

23:10

48:38

trial level, the prior conferences they had, and was of course partially based upon his assessment of what that judge was going to do at that point.

So, it's very difficult to say that he could've simply gotten more time to then subpoena the records. He may have been looking at a situation where he knew he was going to trial that day and was trying to make the best of it as was he could. That's the first point. Second point is the question came up of what would've happened with those records if the defendant had not testified. And there was an answer oh it would be put in to evidence.

I don't know that that's correct in any shape or form. We used them to cross examine the defendant. Whether or not they were independently going into evidence – they would have to be, even if they were certified in some way to get around the, the fact that they were correct –

49:30

Judge Lohier: Your adversary says that you don't challenge the, as I understand it, the facts of the cell phone records. Is that correct? That is, the timing.

Judge Raggi: That the fact that the time –

Mr. Miller: What, what I know –

Judge Raggi: I actually, the fact that the 9-1-1 evidence establishes that the shooting occurred between 10:31 and 10:41.

Mr. Miller: I was trying to adhere as close as I could to the state court trial record without guessing or –

Judge Lohier: Your adversary says that you don't challenge that fact.

Mr. Miller: I don't challenge it, because there was nothing in the state court record to challenge it. In any event –

Judge Raggi: I don't know what that means. Does that mean that therefore you don't accept Judge Chen's characterization of the murders having happened between 10:31 and 10:41 or that you do challenge that? I mean, you can challenge it on various grounds; I'm just trying to understand what.

50:29 Mr. Miller: Based on the state court record that exists, I cannot challenge that.

50:28 Judge Raggi: So, you accept it?

Mr. Miller: Based upon the state court record at the trial level, yes. But the point of the matter –

50:37 Judge Raggi: You think the state court trial record supports that conclusion?

Mr. Miller: I think it supports that conclusion to the extent those were the arguments that were made essentially in summation. The prosecutor argued that the shooting occurred sometime after, actually after 10:28 because there was a block of 20 minutes where no calls were made on that phone, which coincided with the testimony of the victim that while they drove there were no phone calls. It takes about 20 minutes to get to the location. So, it would have to have been sometimes after 10:28 p.m.

51:09

Defense counsel argued well defendant last call home was at 10:31 and if he, he tried to move the time back a little further to 10:50, but the fact of the matter is the argument was essentially after that he was home. So, they both used those records, but it was inconclusive about precisely what they show. The point I was trying to make was if the defendant did not testify, those records