No. 19-8607

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DERRICK THOMPSON 10A2753-PETITIONER

PATRICK GRIFFIN, SUPERINTENDENT, OF
SULLIVAN CORRECTIONAL FACILITY-RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO

SECOND CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Derrick Thompson

Eastern Correctional Facility

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QUESTIONS PRESENTED

1. Does the Confrontation Clause permit the prosecution to introduce testimonial identification statements of a non-testifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements?

2. Whether petitioner's right to a fair trial denied to him by the prosecution's flagrantly irrelevant and inflammatory summation to the jury, when the misconduct was (i) repeated and persistent, (ii) intentional, (iii) unremedied by a curative instruction from the court, even though counsel made no objection, (iv) unprovoked by defense counsel?

3. Whether petitioner was deprived the effective assistance of counsel guaranteed by the Constitutional, when counsel sat idly and let the prosecution/court violate petitioner's Constitutional right to a fair?

4. Did Appellate counsel deprive petitioner meaningful representation when, she omitted in her Appeal Brief that, petitioner's Constitutional Statutory right to a Speedy trial had been violated?

5. Did Appellate counsel deprive petitioner meaningful representation when, she omitted trial counsel's ineffectiveness of failure to protect the right of petitioner, through the court allowing surrogate testimony to the prosecutions DNA identification evidence, of reports and conclusion of a non- testifying analyst work?

6. Did Appellate counsel's representation fell below an objective standard of reasonableness when, she omitted in her appeal brief, trial counsel's failure to object to the prosecutions improper inflammatory remarks during summation?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASE

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TABLE OF AUTHORITIES CITED

CASES **NUMBER PAGES**

STATUTES AND RULES

OTHER

IN

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts:**

The opinion of the United States court of appeals appears at **Appendix A** to the petition and is

is unpublished.

The opinion of the United States district court appears at **Appendix B** to the petition and is

reported at 2019 WL1368995 (2019)

For cases from **state courts:**

The opinion of the highest state court to review the merits appears at **Appendix C** to the petition and is

reported at 20 NY.3d 989 (2012)

The opinion of the Appellate court appears at **Appendix D** to the petition and is

reported at 99 Ad.3d 819 (2012)

JURISDICTION

For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was October 23, 2019.

A timely petition for rehearing was denied by the United States Court of Appeals on December 27, 2019, and a copy of the order denying rehearing appears at Appendix-A

An extension of time to file the petition for a writ of certiorari was granted to and including May 25, 2020 on March 6, 2020 in Application No. 19A987.

The jurisdiction of this court is invoked under 28 U.S.C. §1254(a).

For cases from **state courts;**

The date on which the highest state court decided my case was December 13, 2012 A copy of that decision appears at Appendix C.

No timely petition for rehearing was filed.

An extension of time to file the petition for writ of certiorari was granted to and including May 25, 2020 on March 6, 2020 in Application No. 19-A-987.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the constitution provides in relevant part: An accused defendant shall enjoy the right to due process

The Sixth Amendment of the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

The Sixth Amendment of the United States provides that: "In criminal prosecutions the

The Fifth Amendment of the constitution protects illegal privileges against self-right to assistance of counsel is guaranteed." incrimination and against real dangers, not remote and speculates possibilities.

The Fourth Amendment of the constitution protects against Illegal Search and Seizure(s).

CPL 240.90 (1)

CPL 30.30

CPL 30.30(4) (g) ii

CPL 470.05 [2]

CPL 440.10

STATEMENT OF THE CASE

The Crime and Evidence at trial

On April 7, 2006, on petitioner's day off from work, petitioner was asked by a friend (Antre Scott) to help him move, petitioner agreed and got into a car driven by Antre Scott and taken to a house that Scott went into leaving petitioner in the car, telling him he'll be right back. While petitioner was in the car, Scott called petitioner on his cell phone and told him to come in the house he went into, he needed his help. The petitioner did as requested and upon entering the house did not see Scott and yelled out-where you at. Scott yelled back and told petitioner to come up stairs, as petitioner went up stairs, Scott open a room door and handed petitioner a bag, as petitioner reached for the bag, petitioner scratched his arm on something on the doorframe. Petitioner proceeded down the stairs, went to the car, and put the bag inside, petitioner went back into the house and as he proceeded to go up the stairs, Scott was coming down and told petitioner to bring the bike that was in the hall.

Months later, on October 18, 2006, Petitioner was brought in for questioning as to how his DNA blood was found in a home that was burglarized. Petitioner told the detective, he knew nothing about any burglary, and he did recall a day when he helped his friend Antre Scott move on his day off from work. The Detective said he would inform the ADA investigating the case what petitioner told him. The detective returned and told petitioner, "that ADA Lipkansky said 'she don't believe you, that's your M.O., and to charge you.'" Petitioner was arrested and charged with the offense of Burglary in the Third Degree Penal Law § 140.20, a Class D Felony. Petitioner was arraigned and bail was set at $25.000, petitioner was remanded into custody. Petitioner appeared before a Grand Jury *February 13, 2007* (upon request). It was alleged petitioner had been indicted, (to date, said indictment is in dispute-the Bill is not signed by any

foreperson, and the prosecution has not produce a (True Bill)). *March 1, 2007* the prosecution filed Readiness for trial. Petitioner was arraigned on the alleged indictment *March 8, 2007* on a greater charge of Burglary in then Second Degree *Penal Law 140.25(2)* and Grand larceny in the Third Degree *Penal law 155.35.* Nine months later after the prosecution filed readiness *March 1, 2007, November 19,* 2007, the prosecution filed an "untimely" discovery motion pursuant to *CPL 240.40* seeking a DNA Buccal Swab from petitioner. Petitioner refused as a right i.e., (all motion for discovery are to be file within 45 days of an accused arraignment, absent good cause for any delay) See *CPL* 240.90 *(1).* The prosecution lost that right, the Court (*P. Griffin*) disregarded Statute *240.90* and granted the prosecution motion to take petitioner's DNA as they saw fit! Petitioner recognizing the prosecutions filing of readiness was an allusion, filed a motion arguing his Speedy trial rights had been violated pursuant *to Statute 30.30.* The Court (*P. Griffin*) denied the motion without any hearing (See *Court file*). *June 5, 2008*, petitioner was abducted and taken to a location whereupon, he was savagely beaten and stomped out and his DNA retrieved by a bloody swab stick stuck in his mouth by an Emergency Service Unit Team, all in violation of petitioner's Constitutional right, i.e. his Fourth Amendment right against Illegal Search and Seizure-his Fifth Amendment right against Self Incrimination. The DNA blood that was obtained from the swab was used as the prosecution identification evidence at trial. The principle DNA evidence savagely obtained by a violation of petitioner's Constitutional right(s) was proffered by the State into evidence by the testimony of a surrogate witness, Dr. Noelle Umback (hereafter as Umback) of the Office of Chief Medical Examiner (hereafter as OCME) who "parroted" hearsay testimony of a non-testifying analyst work products that was not made available for cross-examination by the defense at not time, during trial or before, thus depriving petitioner Due Process of the Law.

In sum, at the close of the evidence, the prosecutor's case for conviction was depended, in overwhelming measure, upon the jury's acceptance of the hearsay identification testimony of the surrogate witness Umback. With this uncertainty, the summations to the jury took on particular importance.

A. The identification testimony

The identification of petitioner by surrogate witness Umback of the (*OCME*) was crucial to the prosecution's case. Petitioner describes here how Umback was permitted by the Court to testify on the States Direct case about her identification of petitioner at trial, whereas this Court has deemed impermissible.

B. Umback's identification of petitioner

Umback works for the New York City Department of Forensic i.e. (*OCME*); she is a Criminalist Level Four. In addition, the prosecution retained her, and her current assignment included "comparing" DNA samples for analysis (*Trial Page 359*). Umback acknowledged that the *OCME* received evidence collected from the crime scene from BODE TECHNOLOGY, and the evidence was labeled DNA blood swab taken from third floor interior door. *(Trial Page 368)*

Through Umback's testimony on People Direct, Umback continuously "aligned" her self as "we" instead of stating what she did, and constantly informed the court that she "compared" all information she testified to." (*Trial pages 359-375*).

On (*Trial pages 372-373*) Umback informed the court and the jury, the *OCME* received two sticks in a box with the voucher number *P-240533*, and "initialed and dated by the analyst that worked on the actual sample in the lab" (an analyst that was not made available for cross-examination by the defense at no time during trial or before). In view of these circumstances the

gratuitously unfair right of petitioner being deprived his Constitutional right to confront his accuser'(s) that identified petitioner are particularly significant.

C. The summation and conviction

Seemingly recognizing that a summation confined to marshalling the evidence and considering the inferences to be drawn from it, ADA Buchter (who took over the case after ADA Lipkansky recused her self to become a witness against petitioner), devoted the bulk of her closing argument to matters wholly of petitioner's guilt or innocence to distract the jurors from the proper performance of their task and to impel them to return a verdict based upon passion. If ever a prosecutorial summation may so, overstep the bounds of legitimate argument as to deprive a defendant of a fair trial, ADA Buchter's summation here did so.

Within less than 15 summation transcript pages, the prosecutor focused the juror's attention upon petitioner's not wanting to give his DNA, and put her own opinion as to petitioner's guilt in issue, explaining to the jury that petitioner didn't want us to have his DNA.

Summation
ADA Buchter

"Just to be sure, a mistake wasn't made and you heard that this defendant didn't want to give his DNA. Do you think that's the way an innocent person would behave? (*Trial pages 408 lines 4-7)*...

"I submit to you isn't it reasonable that a person who is innocent of a crime that they had been accused of would say please, take my DNA, I want to clear my name? (*Trial pages 408 lines 12-17)*...

"Is this consistent with someone who is innocent or someone who is guilty of a burglary and ... knows that his DNA from his mouth is gonna match that blood at the crime scene? Someone who knows he's guilty of a burglary and that's why he doesn't want to give his DNA because he knew he was guilty. It's the fact that he did not want to give his DNA because he knew he was guilty." *(Trial page 408 lines 24-25, 409 lines 1-5).*

Another theme repeatedly voiced was, ADA Buchter's "vouching" for her witness Umback's credibility, on evidence of a towel and bag (not in possession of the prosecution).

ADA Buchter:

"Look at the statistics that Noelle Umback gave you. ... It doesn't get more certain than that does it? "(*Trial page 409 lines 16-25).*

"You heard Phultmati told you there was a towel gone from her room. Where do you think that went? "He used it to stop the bleeding"... "You heard that a bag was missing from the storage room. Where do you think that went? Use your common sense. "He used the bag to put all his loot." (*Trial page 411 lines 9-15*).

Said comment(s) by the prosecutor sought to infect the jurors with her own animosity. The prosecutor's comments shifted the burden of proof to the defendant; this error was not harmless. Beyond any doubt, these numerous other flagrantly and inflammatory remarks by the prosecution were the product not of mischance but of calculation, were unprovoked by any conduct of petitioner's counsel, and were permitted by the court to proceed unrestrained, while defense counsel made no objection.

Following summations, the jury brought in a verdict of guilty on all counts, and petitioner was sentence to a prison term of 20 years to life for the burglary offense and 2 to 4 years to run concurrent on the grand larceny offense as a persistent violent felony offender.

On appeal, the Appellate Division: Second department Affirmed petitioner's conviction *(People v. Thompson 99 AD.3d 819 (2012).* The court ruled: Petitioner's Sixth Amendment right to confront witnesses is unpreserved for appellate review, and in any event, without merit. The appellate court also ruled that petitioner's summation argument as unpreserved for appellate review, although the defendant correctly contends these comments might have contributed to the defendant's conviction. The Appellate Court recognizing "although the defendant correctly contends that some of the prosecutor's comments impermissibly shifted the burden of proof to the defendant," denied Petitioner a new trial, contrary to, and unreasonable application to clearly

established Federal Law under the command of Due Process of the Fourteenth Amendment to the United States Constitution.

REASON FOR GRANTING THE WRIT

SUMMARY OF THE ARGUMENT

Petitioner's conviction and sentence must be set aside for several reasons.

I. Petitioner was deprived Due Process of the Law in the States Direct case by the court allowing the prosecution's to present admissions of DNA identification evidence through the testimony of a surrogate witness Supervisor Dr. Noelle Umback of the (*OCME*). Several considerations compel the exclusion of such evidence without regard to the reliability of the identification. First, the reliability of evidence of identification by a surrogate witness is almost uncertain; moreover, the reliability of such evidence is inherently not susceptible to verification. Second, a rule of automatic exclusion will deter improper identification procedures. Third, such a rule will free the courts from elusive inquires into the reliability of surrogate identifications. Together, these benefits outweigh the minimal interference with the law resulting occasional exclusion of surrogate identification evidence that is, in fact, of probative value, notwithstanding uncertainty and the circumstances in which it was elicited. However, even measured under a totality-of the circumstances standard, the identification evidence at petitioner's trial should have been excluded, based on petitioner being deprived a Constitutional right to confront his accuser(s).

II. As both Federal and State Courts has often recognized, prosecutorial misconduct before or during trial may involve such a probability of prejudice to a defendant as to constitute a denial of due process. Here, however narrow the scope of review, the prosecution willfully inflammatory summation deprived petitioner of a fair trial.

III. The right to effective assistance of counsel is guaranteed by both the Federal and State

Constitution. It is elementary that the right to effective representation includes the right to Assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense, and to investigate to see if matters for the defense can be developed. Effective assistance of counsel is also viewed in process as a whole. Here upon review, this court can determine that in this case, less than meaningful representation has not been had in the states case against petitioner.

ARGUMENT

I

THE TRAIL COURT'S FAILURE TO EXCLUDE HEARSAY TESTIMONY IDENTIFICATION OF A SURROGATE WITNESS DEPRIVED PETITIONER DUE PROCESS OF THE LAW

In this instant case, the trial Court violated petitioner's Sixth Amendment Constitutional right to confront witnesses that bore testimony against him. The Court allowed into evidence, admission of DNA test results and comparison through the testimony of retained surrogate witness Supervisor Umback from the *OCME* who had no personal involvement with either the testing supervising, or who had not even observed any part of the testing procedure *Crawford v. Washington, 541 US 36; Melendez-Diaz v. Massachusetts, 557 US 305; Davis v. Washington,547 US 813; People v. Goldstein, 6 NY.2d 119; People v. John, 27 NY.3d 294 (2016); People v. Austin, 30 NY.3d 98 (2017); People v. Tsintzelis, 2020 WL1355707, __ NE.3d __ 2020; People v. Oliver, 92 Ad.3d 900; Bullcoming v. New Mexico, 560 US 64)*, thereby depriving petitioner due process (USCA Const. Amend. 14, 5).

The prosecutions desire to discover test results and record information from the *OCME* was for purpose of proving some fact, and fact in question was precise testimony that analysts, would be expected to provide if called at trial, and equally important, the analyst reports and

conclusions where made in aid of a police investigation therefore, ranks as "testimonial" within the meaning of confrontation clause, (forensic reports available for uses at trial are "testimonial statements," and certifying analyst is a witness for purpose of the Sixth Amendment.)

The DNA profile in this case was evidence used as substantive evidence to prove petitioner's guilt, as it directly linked petitioner to the DNA blood on the door frame of the third floor interior door. Therefore, "[a]s a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness *(Bullcoming, 546 US at 657)* Statements that are considered testimonial include "affidavits ... similar pretrial statements that declarants would reasonably expect to be used prosecutorally ... [and] would lead an objective witness reasonably to believe that the statement would be available for use at later trial" *(Crawford, supra, 541 US at 51-52).* [Internal quotation marks and citations omitted]). Forensic evidence reports admitted into evidence for proving the truth of the matter asserted are not exempt from Confrontation Clause under *Crawford* and its progeny.

As noted in *Bullcoming v. New Mexico, 564 US at 662* the court states: "More fundamentally, as this court stressed in *Crawford*, [t]he text of the Sixth Amendment does not suggest any open-ended exceptions from Confrontation requirement to be developed by the courts." *(541 US. at 54, 124 S.Ct. 1354,* nor is it "the rule of courts to extrapolate from the words of the [Confrontation Clause] to the values behind it, and then to enforce it guarantees only to the extant they serve (in Court's views) those underlying values." *Giles v. California, 554 US 35 (2008) (plurality).* Accordingly, the clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial Statements provide a fair enough opportunity for cross-examination *(564 US at 662).*

As both State and Federal Courts recognized, DNA evidence is susceptible to flaws and errors, and Confrontation is necessary to unearth and guard against those flaws *(Melendez-Diaz v. Massachusetts, 557 US 305).* Supreme Court precedent requires Confrontation of the testing analyst, *Pointer v. Texas, 380 US 400; Melendez-Diaz v. Massachusetts, 577 US 305; Crawford v. Washington, 547 US 813; United States v. James, 712 F3d 79; People v. Goldstein; 6 NY.3d; Ohio v. Roberts, 448 US 56).* Business records exception cannot be used to circumvent Confrontation Clause requirements *(Michigan v. Bryant, 562 US 344; People v. Guidice, 83 NY.2d 630; People v. Washington, 86 NY.2d 189).*

Petitioner understands the matter before this court is to unearth if any of petitioner's fundamental constitutional rights have been violated during his trial pursuant a differently set of materially indisquishable facts of petitioner's confrontation argument. *(William v. Taylor, 529 US 362, at 413.* That said, petitioner draws the court's attention to **APPENDIX-E** the trial record, *(pages 359,367-368, 372, 373, 374, 375),* showing the Court that Umbacks testimony consisted of hearsay and parroting testimony (compare) *(John, 27 NY3d 294; Austin, 30 NY.3d 98* and People *v. Tsintzelis, 2020 WL: 1355707 ___NE.3d____ 2020)* of comparing reports and conclusions of an analyst work products that was not made available for cross-examination by the defense at no time, during trial or before. See The People on Cross - Direct - Umback, *Trial Page 359 (Lines 21-23*).

> Q. And Doctor Umback, does your current assignment include comparing DNA samples for analysis?
>
> A. Yes it does

Trial page 367 (lines 23-25)

> Q. Doctor Umback, I will draw your attention first to the case that we have just been discussing BTB06030255, the file for which you have in front of you (continued on page 368)...

Trial Page 368 (lines 1-4)

what was the evidence that yielded that DNA profile?

A. This evidence was a swab taken from the scene, it was labeled DNA Blood swab taken from the "third floor interior door." ...

Lines (7-10)

Q. Isn't it a fact that when you received that information form bode initially, the only information you were aware of was that this was a male profile?

A. Correct.

APPENDIX-E page 368 (lines 1-4) as the court can see, Umback acknowledges that the *OCME* received evidence collected from the crime scene, therefore, it can not be disputed that the *OCME* receiving said DNA evidence, would reasonably believe that the results from the *OCME* would be available for use at trial later *(Crawford, supra 541 US at 51-52).*

Lines (11-16)

Q. Did you then compare the profile developed from the sample vouched under M as in Mary 810771 assigned lab number BTB06030225 which you just told us was the swab taken from the scene to a profile developed from a known specimen number 9934423 from a data bank?

A. Yes "we" did.

Here as the court can see, Umback stating, "yes we did," consists of aligning her self with a non-testifying witnesses that was not made available for cross-examination. (No Objection from trial counsel).

Trial Page 372 (lines 16-25)

Q. I will ask you, Doctor Umback, do you see a lab number on that item?

A. Yes, I do.

Q. What is that lab number?

A. It's FB08-S-0529

Q. Is that the lab number that you just told us was assigned to the case involving the swabs that you were submitted to the *OCME* for analysis?

A. Yes, it is.

Q. And does that box other then having your lab (continued page 373)...

Trial Page 373 (lines 1-6)

number, does that box have any markings on it indicating that it was received by the *OCME?*

A. Yes, there's an evidence unit number, which is EU-08-M-6850. The voucher number is written on it is, P-240533, and also initialed and dated by the analyst that worked on the actual sample in the lab.

With the above shown, petitioner states, the Court (B. Kron,) hearing Umback state "the box was initiated and dated by the analyst that worked on the actual sample in the lab," Recognizing Umback was not that analyst who's name was on the box. The court had the "green light" to stop Umback's testimony as it consisted of hearsay testimony. (See, generally *United States v. Farnkoff, 535 F.2d 661, 668 (1st Cir. 1976)* Umback in her own statement, brought to the courts attention she was not the analyst that worked on the actual sample in the lab. Equally important as well, defense counsel turned a "blind eye" to the very fact that his client was being deprived a Constitutional right to confront that actual analyst whose initials was on that box. (But made no objection).

Trial Page 374 (lines 2-24)

Q. And now you indicated the Chief of Medical Examiner and not bode Technology solely handled that file?

A. Correct.

Q. Now Doctor Umback, did you further compare the two profiles that you have just discussed the profile from the scene of the crime which was under voucher M-81-0771 and lab specimen number 9934423 assigned to Derrick Thompson,

those two profiles that we've just discussed, did you further compare those two profiles developed from the known specimen swab which you just testified about and the swab contained within the box you were holding which was voucher number P-240533 that assigned FB-08-S-0528?

A. Yes, all three of those were compared two each other.

Q. How did you compare these profiles?

A. You can take DNA profiles and line them up since were looking at the same locations every time and see what the results are at each of those locations.

Q. And what was the result of your comparison?

A. That all three of those profiles are the same.

Q. And is that within a reasonable degree (continued of page 375)....

Trial Page 375 (lines 2-11):

A. Yes.

Q. And again just to say, all three profiles are the same. We're talking about the profiles from the known sample you had belonging to Derrick Thompson and the profile from the swab taken from the mouth of Derrick Thompson, correct?

A. Yes.

Q. And the three of these all were the same profile?

A. Yes, they were.

With all the record information shown herein, it is very clear that the people's witness Umback, testimony consisted of nothing but hearsay comparisons. Here the Constitutional rules that guarantee petitioner a fair trial of confronting any analyst that handled any part of the DNA test was not had-and few such rules are more important than the one that guarantees petitioner the right to confront the witnesses against him, and because that Fundamental right was violated in this case, this court can determine that contrary to the lower Appellate Court's decision *(People v. Thompson 99 AD.3d 819 (2012)* rendering petitioner's Confrontation issue

unpreserved, and in any event without merit, resulted in a decision that is contrary to, and involves and unreasonable application of clearly established [F]ederal law, as determined by the United States Supreme Court. Understanding this, this court can determine that the Court of Appeals decision denying petitioners his C.O.A Leave Application is not only contrary to controlling law, which differs from the United States Supreme Court on a set of materially indistinguishable facts *(Williams, supra).* Here, the lower State Court(s) indeed identifie[d] the correct governing legal principle from the [The United States Supreme Court's] precedents of Confrontation, but unreasonably applie[d] that principle to the facts of petitioner's case *Id at 413, 120 S.Ct. 1495,* not even in the interest of Justice. The only difference in this case, counsel failed to preserved the record for later appellate review, even so, the law is the law, and petitioner's Fourteenth Amendment right to due process was not had according to this courts precedent regarding confrontational issues.

Petitioner states in a different context "MODE" has been broken whereas petitioner's trial was irreparably tainted *(*See for example *People v. Patterson, 39 NY.2d 288 (1976) at 295-96)*; **(OPINION OF THE COURT (JASON, J)** "A Defendant in a criminal case cannot waive, or even consent to, error that would affect the organization of the court or the mode of proceedings proscribed by law". *(Cancemi v. People, 18 NY 128, 138; People ex rel. Battisa v. Christian, 249 NY 314, 319)* ... "The Court: "As we view it today, the purpose of this narrow, historical exception is to ensure that criminal trials are conducted in accordance with mode of procedure Mandated by Constitution and Statute". (Here, that is petitioner's Constitutional Sixth Amendment right to confront his accusers). The court went on to state: ... "Where the procedure adopted by the court below is at basic variance with the mandate of law, 'the entire trial is irreparably tainted'. As we stated 50 years ago, 'prosecutions **must** be conducted in substance

and without essential change as the Constitution commands.' " Noted, although *Patterson* is a case of a different matter, the issue there is, (mode) of proceedings has been broken as in this case for review, petitioner was denied a Constitutional right that all the lower courts had opportunity to correct and in making their determinations, their decision falls within the means of an unreasonable application of clearly established federal law, and as such cannot be brushed aside as merely harmless error beyond a reasonable doubt *(Crimmins, 36 NY.2d at 237)* thus rendering petitioner's trial irreparably tainted, i.e. petitioner's being denied the constitutional right to confront his accuser'[s]. The trial record as shown herein shows this court clearly Umback had no actual involvement with those DNA tests, reports, and conclusions of the non-testifying witness that was not made available for the defense to cross-examine at no time. Here the Constitutional rules that guarantee petitioner a fair trial was not had and because that right was violated in this case, the judgment should have been reversed in the interest of justice and a new trial ordered, because indeed, an injustice has been had.

In conclusion, petitioner has shown the court that he has been deprived a fundamentally fair trial in respects to the Sixth Amendment Confrontation Clause. The Sixth Amendment contemplates two classes of witnesses, those against a defendant, and those in favor of, and here, the prosecution was required to produce former, *USCA Const. Amend. 6; Fed Evid. Rule, 803*

ARGUMENT

II

THE PROSECUTOR'S SUMMATION WAS SO SATURATED BY INFLAMMATORY ARGUMENT THAT PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

During trial, the prosecutions inflammatory remarks during summation deprived petitioner his Fourteenth Amendment Constitutional right of a fair trial, when the prosecutor; (**a**)

Expressed her opinion as to the guilt of petitioner; (**b**) Vouched for her witnesses credibility; (**c**) Presented evidence not in possession of the prosecution; (**d**) became an unsworn witness.

These cumulative errors recognized by "all Courts" both State and Federal had an obvious tendency to make petitioner's trial unfair and cannot be dismissed as merely technical mistakes. For example, Trial pages *408-409* shows this court prosecutor Buchter expressing her opinion as to petitioner's guilt; Vouching for her witnesses' credibility; Presenting evidence of a towel and bag not in possession of the prosecution. (See **APPENDIX-F**)

Summation ADA Buchter Trial
Pages 408-409

408 lines 4-7	Just to be sure a mistake wasn't made and you heard that this defendant didn't want to give us his DNA. Do you think that's the way an innocent person would behave? ...
408 lines 12-17	I submit to you isn't it reasonable that a person who is innocent of crime that they had been accused of would say please, take my DNA, I want to clear my name? ...
408 lines 24-25	Is this consistent with someone who is innocent or someone who is guilty of a burglary and ...
Continued 409 lines 1-5	knows that his DNA from his month is gonna match that blood at the crime scene? Someone who knows he's guilty of a burglary and that's why he doesn't want to give his DNA because he knew he was guilty.

As noted in ABA Standards for Criminal Justice, (3-5.8(b) "It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or guilt of the defendant. Petitioner states, said comment(s) prejudiced the jury, and are recognized as fowl blows See *Berger v. U.S. 295 U.S. 78 (at 88)* ("But, while he may strike hard blows, he is not at liberty to strike foul ones. 'It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every

legitimate means to bring a just one' "); See also *U.S. v. Young, 470 U.S. 1* ("[i]t is unprofessional conduct for the prosecutor to express his or her personal beliefs or opinions as to the truth or falsity of any testimony or evidence or guilt of the defendant"). Here, petitioner was deprived his Constitutional right of a fair trial *USCA Const. Amend 14; NY Const. Art. 1, § 6.* The prosecuting attorney's argument was undignified and intemperate, containing improper insinuations and ascertains calculated to mislead the jury *(Berger, supra at 83).* In a better context, in *State v. Gutierrez, 2007-NMSC-033, 142 N.M. 1, 162 P.3d 156 (207),* the Court took note of the prosecutor's remark concerning a defendant's refusal to submit to a polygraph test is an impermissible comment on the defendant's exercise of his right to remain silent. Those very same principles apply here. In *Griffin v. California, 380 US 609, 85 S.Ct. 1229, 14 L.Ed.2d 106,* the Supreme Court held: "that allowing a prosecutor to comment on the defendant's failure to testify violated the Fifth Amendment privilege against Self Incrimination." *Griffin at 614* **(OPINION OF THE COURT: JUSTICE DOUGLAS)** "What the jury may infer, given no help from the court, is one thing: What it may infer when the court solemnizes the silence of accused into evidence against him is quite another." Petitioner state, said comment(s) by prosecutor expressing her opinions as to the guilt of petitioner for not wanting to give his DNA, carries with it the imprimatur of the Government, and may induce the jury to trust the Governments judgment rather than its own view of the evidence *(Berger v. United States 295 US at 88-89).* Said comment(s) were designed to suggest, if petitioner was innocent and had nothing to hide, he would have given his DNA. Because he has not done so, he is guilty. Petitioner states and this is factual, such suggestion / comment(s), has a potential for prejudice, when made by the prosecution, thus depriving petitioner a Constitutional right of a fair trial.

ADA Buchter's inflammatory remarks continued by vouching for her witnesses Umback and Phulmati's credibility. See for example Trial Pages 409 and 411: **APPENDIX-F**.

Buchter 409 lines 16-25 Look at the Statistics that Noelle Umback gave you. She told us in her scientific opinion, the source of that blood was this defendant and she gave us some statistics to back it up. She told us the population of this earth is about 6 billion people. Chances of this earth is about 6 billion people. Chances of this DNA profile being seen is once in a trillion, okay. She told you that we would need 150 planet earths each with six billion people on it for us to ever see this defendant's DNA profile again. It doesn't get more certain then that does it? ...

Here, there can be no doubt; prejudice ensued by said comment.

411 lines 9-15 You heard Phulmati told you there was a towel gone from her room. Where do you think that went? Use your common sense. He used it to stop the bleeding.

You heard that a bag was missing from the storage room. Where do you think that went? Use your common sense. He used the bag to put all his loot in.

The prosecutor's inflammatory remarks constitute vouching, and the Second Circuit has repeatedly warned prosecutors not to vouch for their witnesses' truthfulness, see, e.g., *U.S v. Bivona, 487 F.2d 443, 444-47 (2d Cir. 1973); U.S. v. Drummond, 481 F.2d 62, 63-64 (2d Cir. 1979); U.S. v. White, 486 F.2d 204 (2d Cir. 1973),* the prosecutor also became an unsworn witness, when the prosecutor stated: "petitioner used the towel to stop the bleeding, and used the bag to put his loot in" just because her witness Phulmati said those items were missing (not there use), and yet, there are no such items in evidence, see **APPENDIX-G** (evidence collected at crime scene). The prosecutor's parting shot was uncalled for and was made to prejudice the jury against petitioner. As noted in *United States v. Lamerson, 457 F.2d 371, 372 (5th Cir. 1972 (per curiam); McMillian v. United States, 363 F.2d 165, 169 (5th Cir 1966)* "Personal expressions of opinion are especially improper if phrased to leave the impression that the prosecutor's opinion

is based on matters in the investigative file and not in the trial evidence." See *People v. Ashwal, 39 NY.2d 105, 347 NE.2d 564 (1976)* (It is fundamental that the jury must decide the issues on the evidence, and therefore fundamental that counsel, in summing up, must stay within "the four corners of the evidence" (*Williams v. Brooklyn, El R.R. Co., 126 NY 96, 102 (at 103)* and avoid irrelevant comments which have no bearing on any legitimate issue in the case *(People v. Carborano, 301 NY 39, 42; People v. Tassiello, 300 NY 425)* Thus the District Attorney may not refer to matters not in evidence *(People v. Fielding, 158 NY 542; People v. Esposito, 244 NY 370;* or call upon the jury to draw conclusions which are not in evidence *(People v. Creasy, 236 NY 205; People v. Jenman, 296 NY 269; People v. Griffin, 29 NY.2d 91).* Above all, he should not seek to lead the jury away from the issues by drawing irrelevant and inflammatory conclusions which have a decided tendency to prejudice the jury against the defendant *(Berger v. United States, 295 US 78).* As shown herein, it cannot be disputed petitioner suffered actual injury because of the prosecutions improper departures during summation, and thus, prejudice occurred. The Prosecutor's un-wanting remarks was not provoked by any remarks made by defense counsel Martin, as the record shows, Martin sat idly quiet, thus ignoring the Constitutional right of his client being deprived a fair trial by the un-wanting remarks made by the prosecution, without any objection(s). The prosecutor's remarks were improper, constituting "Constitutional error (contrary to the Lower State Courts determinations, denying petitioner any relief argued below). Said Constitutional error resulted in a decision that was contrary to, and involves an unreasonable application of, clearly established [F]ederal and (State) Law, as determined by the Supreme Court of the United States. The remarks described shown herein are so prejudicial that they rendered petitioner's trial a Constitutional violation of a Fundamental right to a fair trial. The record also shows that the trial Court made no effort to cure any of the

effects of the improper remarks. *Cf. People v. Thompson, 99 Ad.3d 819 (2012); see U.S. v. Frankoff, 535 F.2d 661, 668 (1st Cir. 1979).* The Second Circuit in fact through numerous threats to reverse convictions for prosecutorial misconduct reversed a criminal conviction because of an improper summation, absent substantial prejudice See *U.S. Drummond, 481 F.2d 62 (2d Cir. 1979); Harris v. U.S., 402 F.2d 656, 659 (D.C.Cir.1968).* As noted in *U.S. Young 470 U.S. 1 105 S.Ct. 1038 84 L.Ed.2d 1 (1985)* (Opinion) "We emphasize that the trial judge has the responsibility to maintain decorum in keeping with the nature of the proceeding; "the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." *Querica v. United States, 289 U.S. 466, 469, 53 S.Ct. 698, 77 L.Ed 1321 (1993).* "The judge "must meet situations as they arise and [be able] to cope with ... the contingences inherent in the adversary process." *Geders v. United States 425 U.S., at 86, 96 S.Ct. at 1334.* Of course, "hard blows" cannot be avoided in criminal trials; both the prosecutor and defense counsel must be kept within appropriate bounds. See *Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975).*

In this case at bar, the inflammatory remarks made by the prosecution diverted the juries attention from the crimes charged for which petitioner was being tried, and from the fundamental principles by which a jury must discharge its duty See *United States ex rel Hayes v. Mckendrick, 481 F.2d 152, 157 (2d Cir. 1973)* (noting defendant's right to be tried on evidence in case and not "extraneous issues"); *United States v. Lewis, 447 F.2d 134 (1971) (same).* Petitioner states, and recognizes while each instance of prosecutorial misconduct, standing alone, might not justify reversal, however, the effect of all of them herein requires it based on the substantial prejudice they carried in petitioner's trial.*(United States v. Young, 470 U.S. 1, 11-12, 105 S.Ct. 1038, supra.* Contrary to the Lower State Court's decision *(People v. Thompson, 99 AD.3d 819, 951*

NYS.2d 754, 2012 NY Slip Op. 06828) as rendering petitioner's summation claims as "unpreserved for appellate review (*CPL 470.05[2*]), and in any event the error was harmless, as the evidence of defendant's guilt was overwhelming and there was no reasonable possibility that the comments might have contributed to the defendant's conviction. Petitioner disagrees and (respectfully states: a court cannot read the mind of jurors). Petitioner further draws this courts attention to a statement made by the Court of Appeals; See for example (*People v. Slover, 232 NY 264, 133 N.E.633, 634 (1921)*): "even in cases of clearest of guilt it is the duty of the district attorney to refrain from over zealous advocacy." The three-factor test in determining the existence of the "substantial prejudice" herein, goes to; (**a**) the severity of the misconduct; (**b**) the measures adopted to cure the misconduct; and (**c**) the certainty of conviction absent the improper statements," and as shown herein, the prosecuting attorney's misconduct was pronounced and persistent with a probable cumulative effect upon the jury *Berger v. U.S, 295 U.S. 78, 89 (1935),* and as such Petitioner was deprived a Fundamental Constitutional right of Due Process of a fair trial and seeks any relief as this Court deem appropriate.

ARGUMENT

III

PETITIONER WAS DEPRIVED HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO MEANINGFUL REPRESENTATION DURING TRIAL

The standard of reviewing the effective assistance of trial counsel Joshua D. Martin's (hereafter as Martin) representation falling below an objective standard of reasonableness under prevailing norms *(Strickland v. Washington, at 668, 104 S.Ct. 2052),* is founded upon the (trial record) contrary to the Appellate Court's determination, that petitioner's ineffective assistance of counsel claims are a mixed claim of matters appearing on and off the record, *(People v.*

Thompson, 99 AD3d 819 (2012) (at 820 [4], and advised petitioner to file a *§ 440.10* Motion. For the record, Petitioner filed said *440.10* motion, and the court (B. Kron. J) Denied motion *(See Court File).*

Having understood the above, petitioner draws the courts attention to the trial record which clearly shows Martin incorrectly informing the court that he could not oppose the prosecution's discovery motion seeking petitioner's DNA, Martin:

"When I met Mr. Thompson, Mr. Siff had represented him and I believe an Order was presented to Judge Griffin with respect to the DNA request for swabbing by the People, I reviewed the Paperwork and told Judge Griffin, I told my client as well I couldn't in good faith "oppose the motion because like your Honor stated, there is case law that supports the taking of the swab so therefore, I did not oppose the motion." See **APPENDIX-H** *Page 20 (lines 23-25) and Pages 21 (lines 1-6).*

Petitioner states, contrary to Martins assessment of the facts that, "he could not oppose the prosecutions motion." According to *Statutory Law (240.9(1))* Martin had every legal right to oppose the people's motion, it was "untimely" filed ("All motions for discovery are to be filed within 45 days of an accused defendant's arraignment, absent good cause for any delay"). See e.g. *People v Addison, 51 Misc.3d 498 (2016)* (the court denied as "untimely" the People's motion for an order authorizing the taking of saliva from defendant Muhammad Addison ("Defendant") because the people never proffered any good cause for 340 days delay"). Martin's statement "he reviewed the paperwork after receiving it from Mr. Siff, and could not oppose the motion," runs afoul of *Statute 240.90 (1).* Here it is safe to say, Martin was not armed with the facts of statutory law whereas to give petitioner the meaningful representation that the Constitution guarantees an accused defendant, *(USCA Const. Amend. 6),* and prejudice ensued.

Petitioner states, Martin could not have reviewed the paper work Mr. Siff gave him prior to being assigned to represent him. If he had, Martin, would have discovered that, the people never justified any reasoning of why they filed their motion *November 19, 2007* seeking

petitioner's DNA 8 months after his arraignment *March 8, 2007*, and 8 months after filing ready for trial *March 1, 2007* whereas to meet the exceptional circumstance rule in *Statute 30.30 (4) (g) ii* which is required in order for a court to grant such motion. The prosecution lost that right to obtain petitioner's DNA (*Addison, supra*), and Martin was in "great position" to argue such, based on the court *(P.Griffin's)* error of granting the people's untimely motion without cause. Martins failure to oppose the people's motion caused prejudice, in that, petitioner's Fourth Amendment right to protection from unreasonable Search and Seizures was violated through the Courts (*P. Griffin*) error of granting the people's "untimely" motion, (**APPENDIX-I**) which resulted in petitioner being abducted, savagely beaten and his DNA retrieved by a bloody swab stick stuck in his mouth on *June 5, 2008*, and the DNA blood swab retrieved was thereafter used as the prosecutions evidence at trial, all through violation(s) of petitioner's Constitutional rights, which Martin failed to protect. See *(Powell v. Alabama, 287 US 45, 68-69, 53 S.Ct. 55, 77 L.Ed 158 (1932)* ("[The defendant] requires the guiding hand of counsel at every step in the proceedings against him," (even in a scene of preserving the record for later appellate review). In this case, Martin made no objections to protect a Fundamental right of his client being deprived the right of Due Process when the court erroneously granted the prosecutions untimely discovery motion thus, failing to preserve the record for appellate review *(CPL 470.05 [2];* see also *Fed. Rule Crim. Proc. 52[b],* thereby depriving petitioner the meaningful representation that the Constitution affords an accused *(USCA. Const. Amend.6).* Had Martin investigated, Martin would have discovered the prosecution lost that legal right to obtain his clients DNA, and would have been in great position to oppose the prosecutions untimely motion, specifically in the aspect that (it violated petitioner's Fourth Amendment Constitutional rights against Illegal Search and Seizure), and the results of the court granting the prosecutions untimely motion would have

resulted different. See generally *Strickland, supra 466 US 669 at 2056, also* (compare) *Addison, supra.* Most importantly, Martin would have discovered that, indeed his clients right to a Speedy trial had been violated, and therefore, could have reargued petitioner's pro se speedy trial motion, denied by the court (*P. Griffin*) (see *Court file*). Martin's less than meaningful representation caused injury to petitioner's defense. .

B. Martins Failure to Object to the Court Allowing the Prosecutions To Present DNA Identification Evidence through a Surrogate Witness Deprived Petitioner Meaningful Representation.

Martins misrepresentation continued, which is further supported by the trial record and by the Appellate Courts very own decision as to rendering petitioner's Sixth Amendment Constitutional right to confront his accuser's as unpreserved for appellate review, and in any event, without merit, (a confusing decision, and in another aspect, petitioner finds, contrary to, and involves an unreasonable application of clearly established Federal and State Law) argued in Ground One herein. However so, petitioner will stay on the ineffective assistance Claim, and draws the courts attention to the appellate courts determination as to rendering petitioner's Confrontation argument as unpreserved for appellate review *(See People v. Thompson 99 AD.3d 819 (2012)*. The Appellate courts decision clearly shows this court one thing, i.e. Martins failure to object to petitioner being denied a fundamental constitutional right to confront his accuser's during trial or before, Martin failed to preserved the record for appellate review pursuant to *Statute 470.05 [2]; See also, Fed. Rule Crm. Proc. 52(b)* thereby depriving petitioner the equal opportunity to raise his claims of being deprived a constitutional right to confront his accuser's on appeal. Petitioner learning the value of *Statute 470.05(2), i.e.* (to preserve an argument for appellate review, counsel "must" object to the impropriety, stating all bases for the objection on the record" *(Powell v. Alabama, supra, 287 US 45, 68-69, 53 S.Ct 55, 77 L.Ed. 158 (1932)*:

("Effective" trial counsel preserves claims to be considered on appeal"), in this way the issue is preserved for appellate review, (Martin did not), thereby depriving petitioner meaningful representation. (*USCA Const. Amend. 6).*

As the main record shows, *Pages 359, 367-68, 372, 373, 374* and *375* **APPENDIX-E**, the court (B. Kron, J) allowed the people to introduce into evidence, *Exhibit[s] 21, 22, 23, 24 DNA* identification reports through a Surrogate retained Supervisor Dr. Umback of the *OCME* who parroted all information *(Compare) (John, 27 NY.3d 294; see also Austin 30 NY.3d 98); Tsintzelis, 2020 WL1355707, ___ NE.3d ___ 2020; Crawford v .Washington 541 US. 36; Bullcoming v. New Mexico, 566 US. 647; Melendez-Diaz v. Massachusetts, supra)* of a non-testifying analyst work products that was not made available to be cross-examined by the defense at no time during trial or before, a Constitutional Statutory violation of the Confrontation Clause. Instead of Martin objecting to the court's error, Martin sat "idly" and ignored that right of his client (petitioner) being deprived a constitutional right to confront his accuser'[s] without objection. Here it cannot be disputed that Martins representation fell below an objectionable standard of reasonableness *(466 US at 68, S.Ct. 2052),* truly an objection was in order. Noted, The Court of Appeals has held: "when an attorney's failure to object is the basis for a claim of ineffective assistance of counsel, that claim, by its very nature will ordinarily be made for the first time on appeal *(See People v. Clarke, 66 AD.3d 694 (2nd Dept 2009); People v. Turner, 10 AD.3d 458 (2nd Dept 2004)*), petitioner raised said claim in his pro se supplemental brief (See *Court file).*

As the main record further shows Pages *366, 367-371, 373* and 375, **APPENDIX-J** the Court (*B. Kron, J*) gave Martin equal opportunities to object to the people's introduction of *DNA* identification reports introduced through the surrogate witness Umback marked as Exhibits *21,*

22, 23, 24, Martin did not object and such representation cannot be considered as trial strategy. Petitioner's case involves DNA evidence, relied upon by the people to introduce at trial for proving petitioner's guilt. Test results, statements, reports, and conclusions were made by the *OCME* in aid of an police investigation that would reasonably expect the information to be used prosecutorally... and would lead and objective analyst to believe their reports – conclusions would be available for use at later trial (See *Melendez-Diaz v. Massachusetts, supra at 311, 129 S.Ct. at 2533*); *Bullcoming v. New Mexico, supra at 664, 131 S.Ct. 2717*, and therefore petitioner had a fundamental right to confront anyone involved. Martin was supposed to protect that right *Powell v. Alabama, supra 287 US 45, 53 S.Ct. 55, 77 L.Ed 158 (1932).*

C. Martins Failure to Object to the Prosecutor's Uninvited Inflammatory remarks during Summation, thus failing to preserve the Record Deprived Petitioner Meaningful Representation at Trial

As the trial record shows *(Pages 408-409 and 411* **APPENDIX-F**) Martin failed to object to the Prosecutors unwanted, uninvited egregiously improper inflammatory remarks during Summation *(U.S. v. Young 470 US 1, 105 S.Ct. 1038)*, deprived petitioner meaningful representation. **APPENDIX-F** shows-the prosecutor (**a**) Expressing her opinion as to petitioner's guilt; (**b**) Vouching for the credibility of her witnesses Dr. Umback and Phulmati); and (**c**) Presented evidence of a towel & bag not in possession of the prosecution shown in (**APPENDIX-G**); (**d**) became an unsworn witness, while Martin stood mute, ignoring the misconduct of the prosecutor remarks violating petitioner's Constitutional right to a fair trial. These cumulative errors recognized by "all" court's convey the impressions that petitioner was guilty of the charges against him, and should have been objected to by Martin, Martins failure to do so, cannot be explained as merely tactical *(Baldi, 54 NY.2d 137(at 146).*

According to the law, several State Courts have recognized, hence "defense counsel's failure to object to ... [a] prosecutor's egregiously departures during summation ... deprive[s] [a] defendant of the right to effective assistance of counsel" *(People v.Fisher, 18 NY.3d 964, 967 [2012]; People v. Baldi, 54 NY.2d 137, 146-147 [1981].* That said, a court cannot dispute from this (trial record information), Martins representation fell below an objective standard of reasonableness under prevailing norms *(Id, 466 US at 668; 104 S.Ct. 2052)* there was nothing strategic regarding Martins failure to object. *See generally 6 Carmody-Wait, New York Practice, § 40, P. 602 cases cited.* Equally important ("Such interruptions should have been dealt with by the Court as in the cases of other improper trial tactics having a tendency to thwart the proper administration of justice"). Quoting *People v. Marcelin 23 Ad.2 368;* see also *ABA Standard for Criminal Justice 3-5.8(b)* recognizing that "(i)t is the responsibility of the (trial) court to ensure that final argument to the jury is kept within proper, accepted bounds" see also *U.S. v. Farnkoff supra 535 F.2d at n. 17; Harris v. U.S., 402 F.2d 656, 659 (D.C.Cir. 1968) 668; U.S. v. Benter, 457 F.2d 1174 (at 1178) (1972)* "the court made no effort to cure the effects of the improper remarks." Contrary to the Appellate Division Second Department decision in *People v. Thompson, 99 AD.3d 819 (2012)* erroneously stating petitioner's claims of ineffective assistance of counsel on Direct Appeal, are "Mixed Claims" and cannot be considered without reviewing the hold record. Petitioner states, the ineffective assistance of counsel claims argued by petitioner in his Supplemental Brief, are matters viewable from the record as shown herein.

With all the above shown, petitioner states, a review of the record, this court can determine that petitioner was denied his Fourteenth Amendment Constitutional right of a fair trial by the prosecutors inflammatory remarks not objected to, nor cured by the Court (B, Kron).

ARGUMENT

IV

PETITIONER WAS DENIED HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO MEANINGFUL REPRESENTATION ON DIRECT APPEAL

In this argument, the undisputed dilatoriness of Appellate counsel Kendra Hutchinson's (hereafter as) Hutchinson representation falling below an objective standard of reasonableness under prevailing norms *(Strickland v. Washington, 466 US at 668, S.Ct. 2052)* are founded upon Hutchinson's failure to raise trial record information of trial counsel's Martins ineffectiveness. And most importantly, a response letter of Hutchinson telling petitioner "incorrect" reasoning'(s) why she "felt" the right to omit that petitioner's Constitutional right(s) to a Speedy Trial *CPL 30.30)* had not been violated on Direct Appeal., as well as other meritorious issues omitted by Hutchinson (See **APPENDIX-K**) e.g.

A. Hutchinson Failure of Omitting Petitioner's Sixth Amendment Constitutional Right to a Speedy Trial Violated on Direct Appeal. Deprived Petitioner Meaningful Representation.

In the states case against petitioner, the people filed readiness for trial *March 1, 2007* before petitioner's arraignment on the indictment *March 8, 2007*, and thereafter, *November 19, 2007* (8 months later); the prosecution filed an "untimely" discovery motion pursuant to *Statute 240.40* seeking a buccal swabbing from petitioner, incorrectly granted by the court (P. Griffin). (See **APPENDIX-I**) Petitioner having been informed by Hutchinson that she was assigned to perfect his Direct Appeal, requested that Hutchinson raise in her brief, that the prosecution motion filing readiness for trial *March 1, 2007* was an illusion because they sought *DNA* from petitioner 8 months after that, thereby showing non-readiness. Hutchinson wrote petitioner back and stated; "We cannot argue that their statement of readiness was illusory because they did not seek your DNA until a number of months after your arrest." (See **APPENDIX-K** *Pages 5* and *6*

of *16*). According to the Court of Appeals, ("A statement of readiness at the time when the people are not actually ready is illusory and insufficient to stop the running of the Speedy trial clock.") *People v. Cole, 73 NY.2d 957, 538 NE.2d 336;* see also *People v. Kendzia, 64 NY.2d 331, 453 NE.2d 548* ("People must file readiness at the time they are actually ready.") Petitioner states, Hutchinson's assessment was incorrect, here the prosecutions want of petitioners *DNA* clearly shows a court, that the prosecution had not done all that was required of them to bring petitioner's case to a point where it may be tried (compare) *People v Mckeena, 76 NY.2d 59, 64-65, and n., 556 NYS.2d 514, 555 NE.2d 911.* Equally important, the Law is clear that "all motions for discovery are to be filed within 45 days of arraignment, absent good cause for any delay." quoting *Statute 240.90 (1).*

APPENDIX-K, Further shows this court, Hutchinson's misinterpretation of the law and facts of petitioner's case when petitioner asked Hutchinson to raise in her brief, the Court (*P. Griffin*) improperly granted the prosecutions untimely motion to take petitioner's DNA by any means necessary (**APPENDIX-I**). Hutchinson responded: "Unfortunately, the U.S. Supreme Court has specifically held that compelling (forcing) a defendant to provide physical evidence does not violate his Fifth Amendment privilege against Self Incrimination." Petitioner states, in some cases this may be true, However so, in the states case against petitioner, the prosecution "lost" that right when they never showed any good cause for their delay in seeking petitioner's *DNA* swab *November 19, 2007*, 8 months after his arraignment *March 8, 2007*, therefore the *DNA* evidence obtained was insufficient to be used against petitioner.. As stated above, *Statute 240.90 (1)* clearly states, "All motions for discovery are to be filed within 45 days of arraignment, absent any good cause for any delay," therefore, in order for the Court (*P. Griffin*) to have granted the prosecutions untimely motion (**APPENDIX-I**), the prosecution would have

had to state their cause for their delay whereas to meet the exceptional circumstance rule in *Statute 30.30 (4) (g) ii,* (compare) *People v. Addison, 51 Misc.3d 498 (2016)* (The Court: "People's untimely motion for Order authorizing taking of Saliva sample from defendant, thereby implicating his Fourth Amendment right to protection from unreasonable Search and Seizures, could not be granted under Statute requiring discovery within 45 days after arraignment or any time before trial so long as good cause was shown.") Having understood that, Petitioner believes, it is safe to say that, Hutchinson's failure to unearth, that, the Court (*P. Griffin*) improperly granted the prosecutions motion ignoring *Statute 240.90(1)* (a *Statutory* right of petitioners), and more importantly *Statute 30.30 (4) (g) ii* (based on the prosecution never showing the Court any reasoning why they filed their discovery motion untimely). Clearly, this Court can conclude, Hutchinson's assessment of the facts, where off base, and therefore, her representation was less than meaningful (*USCA Const. Amend. 6).*

APPENDIX-K Also shows this Court, Hutchinson misadvising petitioner in regards to his Speedy trial issue; when Hutchinson told petitioner: "there is simply not enough time to charge against the people to argue that your speedy trial rights were violated." As shown above-the prosecutor stopped the speedy trial clock *November 19, 2007* of a desire to obtain *DNA* evidence she was not entitled to 8 months after filing readiness *March 1, 2007* (see **APPENDIX-L**) (this is clear), therefore, the filing of readiness and later ask for petitioner's *DNA* through a Statutory violation of petitioner's Constitutional right of due process i.e. *(Statute 240.90 (1)),* (because we now know *Statute 240.90 (1)* prohibited the prosecution from obtaining petitioner's DNA swab), accordingly that time from *March 1, 2007* to *November 19, 2007* should be charged to the people, otherwise *Statute 30.30* would be meaningless in a court. In one breath, the prosecutions said they were ready for trial, and in another breath said, hold on

Judge, I forgot to get a *DNA* sample from the defendant for confirmatory analyses. Such actions on the prosecution shows non-readiness compare (*Mckeena, supra).* The people's want of petitioner's *DNA* shows they had not done all that was required of them to bring petitioner's case to the point where it may be tried, said statement of readiness filed at time when the people are not actual ready is illusory and insufficient to stop the running of the speedy trial clock *Cole, supra;* ("People must file readiness at the time they are actually ready*") kendzia, supra* therefore, petitioner's fundamental right to a speedy trial was violated, contrary to Hutchinson's incorrect assessment. Hutchinson acknowledging petitioner's concerns written to her did no investigation, not even as to call trial counsel Martin to see his view(s) on matter(s). And as this Courts long since held: "Part of an attorney's representation includes meaningful investigations to see if matters can be developed for the defense" *(Strickland v. Washington, 466 US 668, 690-691, 104 S.Ct. 2052, 80 L.Ed.2d 674; People v. Droz, 39 NY.2d; People v. Bennet, 29 NY.2d 466; Cole v. Peyton, 389 F.2d 224, 226.* Had Hutchinson investigated, she would have discovered that petitioner's fundamental right to a speedy trial had been violated pursuant to *Statute 30.30* and been in a better position to raise the significant and obvious issue in her brief, *Mayo v. Henderson, 13 F.3d 528 (2d. Cir 1994)* and the results of petitioner's appeal may have resulted differently generally (*Strickland v. Washington, 466 US at 66, 692-94; Lynch v. Dolce, 789 F.3d 303, 311 (2d Cir. 2015))*; see also *People v. D'Alessandro, 2010 NY Slip. Op.75591 [U]* the Court found that, the speedy trial issue was clearly meritorious and determined that "Because it is "clear-cut" that defendant would have prevailed on the speedy trial issue had appellate counsel raised it, he is entitled to a writ of error coram nobis".

B. Hutchinson's Failure of Omitting Martin's Failure to Oppose the Prosecutions Untimely Discovery Motion Seeking Petitioner's DNA Deprived Petitioner Meaningful Representation on Direct Appeal

The trial record (**APPENDIX-H** *Pages 20-21)* reviewed by Hutchinson showed Hutchinson as well as this Court, Martins representation falling below means of meaningful representation when Martin "out right incorrectly" told the Court (B Kron, J.): "he saw no reason to oppose the prosecutions motion for petitioner's DNA, after reviewing the paperwork prior counsel Mr. Siff gave him". Hutchinson seeing said statement, clearly had the green light to raise Martins incorrect statement of facts pertaining to him not being able to oppose the prosecutions motion in her brief, it was untimely filed pursuant to *CPL 240.90* (1) which goes hand in glove with *CPL 30.30 (4)(g) ii (i.e.,* (Compare) *People v. Clarke, 28 NY.3d 48 [2016]* "People did not exercise due diligence in obtaining defendant's DNA exemplar in order to conduct comparative testing with DNA obtained by office of Chief Medical Examiner for gun". *People v. Rahim, 91 Ad.3d 970 (2012) (same); People v. Wearen, 98 Ad.3d 535 (2012) (same)* "No explanation for the people's failure to seek confirmatory DNA sample in the 19 months following notifications of DNA test results for blood recovered from crime scene". (Compare) also *Addison, supra.*

As shown herein, contrary to Martin's statement he could not oppose the people's motion for DNA, said statement runs afoul of the *Statute 240.90 (1)* and *30.30 (4)(g) ii.* Facts Hutchinson should have been aware of, in this way; she could have raised Martins ineffectiveness based on his incorrect statement alone. As this Court held in *Powell v. Alabama, supra, 287 US 45 68-69 S.Ct. 55, L.Ed 158* (1932 "[The defendant] requires the guiding hand of counsel at every step in the proceedings against him without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocent". Hutchinson's reasoning for not raising Martins ineffectiveness on Appeal, is based on Hutchinson her self not

knowing the prosecutions motion seeking petitioner's *DNA* violated *statute 240.90 (1)*, and this is confirmed by Hutchinson's very own words in *Pages 5-6 of 16* ***APPENDIX-K***, e.g. Hutchinson stated: "Nor can we argue that the force order was improperly granted ... unfortunately, you could not convince a court that you had the constitutional right to refuse to provide a buccal swab." Petitioner poses a question to the court, (why not?) The Statute *240.90(1)* and *30.30 (4)(g) ii* are clear, the prosecution never showed any reasoning why they waited 8 months to obtain petitioner's *DNA*, after his arraignment, and in doing so, lost that right.

C. Hutchinson's Failure of Omitting Trial Counsel Martins Ineffectiveness of Failing to Object to the Court Allowing Surrogate Testimony on DNA Evidence In Her Appeal Brief Deprived Petitioner Meaningful Representation

As the trial record shows **APPENDIX-E**, the Court (B. Kron, J) allowed the prosecution to present into evidence, *DNA* identification information *Exhibits 21, 22, 23, 24* through the testimony of a surrogate witness Dr. Umback of the *OCME* and Martin made no objection of the court depriving petitioner that fundamental right to Confront his accuser(s) *(USCA Const. Amend. 6). (Crawford v. Washington 541 US 36; Bullcoming v. New Mexico, 564 US at 664, 131 S.Ct 2717; Melendez-Diaz v. Massachusetts, 577 at 311, 129 S.Ct at 2532; People v. John, 27 Ny.3d 295 52 NE.3d 1114; People v. Austin, 30 NY.3d 98 NE.3d 542; Tsintzeils, 2020 WL1355707 2020.*

Petitioner states, Hutchinson's review of the trial record, specifically *Pages 359-373* "clearly" showed Hutchinson that, Martin ignored that right of his client being deprived the constitutional right to confront his accusers when the court (*B. Kron*) allowed this constitutional error to occur in his court by allowing the surrogate witness Dr. Umback to testify to the prosecutions *DNA* identification evidence, and Martin did nothing. As the record shows, Dr.

Umback admittedly stated, "The box received by the *OCME* had a voucher number written on it, and also initialed and dated by the analyst that worked on the actual sample in the lab." See **APPENDIX-E** *(Page-373)*. Here, without any thought, the Court had a duty to stop the surrogate witness testimony, Umback's name was not the analyst name on the box-therefore her testimony constituted hearsay of a non-testifying analysts work products that was not made available to be cross-examined by the defense thereby depriving petitioner a Constitutional right of Due Process. Hutchinson reading the record and this court as well, can concluded that Martin failed to protect that Constitutional right of his client being deprived that very right to confront his accuser(s). *USCA Const. Amend. 6.* A question is posed as to why Hutchinson did not raise Martins ineffectiveness in her brief? There was no strategic sound reason why Martin sat idly quiet without any meaningful objection.

D. Hutchinson's Failure of Omitting Martins Ineffectiveness When Martin Failed to object to the Inflammatory Remarks made by the Prosecution during Summation, in her Appeal Brief Deprived Petitioner of Meaningful Representation

The trial record further shows this court, Martin sitting idly quiet while the prosecutor disrupted the atmosphere of the court by using inflammatory remarks to prejudice the jury by way of (**a**) Expressing her opinion as to petitioner's guilt; (**b**) Vouching for her witness(es) Dr. Umback and Phulmati credibility; (**c**) Presented evidence of a towel and bag not in possession of the people and (**d**) Became an unsworn witness, see *Pages 408-409 and 411*. **APPENDIX-F**

Petitioner states, Hutchinson's review of the record "clearly" had to recognize Martin did nothing to protect that right of his client being deprived due process of a fair trial through the unwanting-uninvoked inflammatory remarks made by the prosecution *(Powell, supra)*. This Court's review of the summation record as a whole should clearly come to the conclusion that petitioner was deprived a Fundamentally fair trial through the improper comments made by the

prosecutor as well as less than meaningful representation of Martins failure to object to those improper comments, and more importantly, pose a question as to why the Court (B. Kron) allowed such misconduct in his court room? In *Querica v. United States, 289 US 466, 469, 53 S.Ct. 698, 77 L.Ed 1321 (1933)* the court states: "The judge must meet situations as they arise and [be able] to cope with ... the contingencies inherent in the adversary process." *Geders v. United States, 425 US 80, 86, 96 SCt. 1330, 47 L.Ed.2d 592 (1976)* "of course "hard blows" can not be avoided in criminal trials; both the prosecutor and defense counsel must be kept within appropriate bounds *Herring v. New York, 422 US 853, 862, 95 SCt. 2550, 2555, 45 L.Ed.2d 593 (1975).* More importantly, Hutchinson had to know her summation argument raised in her brief was not preserved by Martin's failure to object [CPL 470.05 [2]), but raised the issue any way, why? That said, petitioner poses another question as to why Hutchinson omitted Martins failure to object to the improper remarks? The Court of Appeals has long since said in *People v. Baldi, 54 NY.2d 137, 146-147 (1981)* hence "defense counsel's failure to object too ... [a] prosecutor's egregiously improper comments during summation ... deprive[s] [a] defendant of the right to effective assistance of counsel." ... counsel's failure to object cannot be explained as merely tactical; see also *People v. Satterfield, 66 NY.2d 796, 799-800 (1985); People v. Rivera, 71 NY.2d 705, 708 (1988).* Duly noted, a review of the prosecutor's summation, Hutchinson should have recognized that the record shows the inflammatory remarks <u>were not invited</u> by any comments made by Martin, and as such, Martin was required to interrupt the summation for purpose of objecting to the improper remarks See *(6 Carmody Wait New York Practice, 40 P.602).* Petitioner states, the prosecutor's remarks were improper, that taken in the context of the entire trial, resulted in substantial prejudice; *United States v. Young, 470 US 1, 11-12, 105 S.Ct 1038, 1044-45, 84 L.Ed2d 1 (1985))* see also *Berger v. United States, 295 US 78, 55 SCt. 629*

(1935), and Hutchinson's failure to raise Martins failure to preserve the record for Appellate review, deprived petitioner less than meaningful representation on Direct Appeal.

As the law would have it, the right of an indigent criminal defendant to services of counsel on appeal is established by a long line of decisions of the Supreme Court and the New York State Court of Appeals. Those decisions make clear that the assistance given must be that of an advocate rather than as *amicus curiae (Ellis v. United States, 356 US 674; People v. Emmett, 25 NY.2d 354,* that right "means more than just having a person with a law degree nominally" representing defendant *(People v. Bennett, 29 NY2d 462, 466)* that it requires the effective assistance of "Single-Minded" counsel *(People v. Emmett, supra, P.356)* in the "research of the law, and marshalling of argument on [defendant's] behalf" *(Douglas v. Califorina, 372 US 353, 358;* See, also *People v. Marcerola, 47 NY.2d 257; People v. Droz, 39 NY.2d 457, 462)*, so that defendant is provided the "full consideration and resolution of the matter" of "an active advocate in behalf of his client" *(Anders v. California, 386 US 738, 743-744).* The objective of State and Federal decisions has been to assure that an indigent criminal appellant receives substantially the same assistance of counsel as one who can afford to retain an Attorney of his choice *(Douglas v. California, 372 US 353; Nickols v. Gagnon, 454 F.2d 467).*

CONCLUSION

Petitioner state, with all the herein facts shown to this Court, only one conclusion should be rendered to the effect of petitioner being deprived a Fundamental right of Due Process throughout the states case against him. Evidence was illegally taken from petitioner, through several violations of petitioner's Constitutional rights as shown herein. Petitioner's rights were not protected by any counsel of record in any aspect of the law. The petition for a writ of

certiorari should be granted, because as shown herein, a Fundamental injustice has been manifested.

Respectfully submitted,

DERRICK THOMPSON 10A2753

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