No. 20-5425

IN THE

SUPREME COURT OF THE UNITED STATES

RASHEEN GAMBLE — PETITIONER
(Your Name)

vs.

DARCEL D. CLARK — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

STATE OF NEW YORK COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

RASHEEN GAMBLE
(Your Name)

ELMIRA CORRECTIONAL FACILITY - BOX 500
(Address)

ELMIRA, NEW YORK - 14902
(City, State, Zip Code)

607-734-3901
(Phone Number)

QUESTION(S) PRESENTED

I.

WAS DEFENSE COUNSEL INEFFECTIVE FOR CONSENTING TO THE PROSECUTOR'S EXTREMELY UNTIMELY REQUEST FOR A DNA SAMPLE--A MOVE THAT THE APPELLATE DIVISION DETERMINE DIDN'T GREATLY PREJUDICE ME, EVEN UNDER FEDERAL STANDARDS. STRICKLAND V. WASHINGTON, 466 U.S. 668,694. U.S. CONST. AMENDS. VI. XIV.

II.

UNDER FEDERAL STANDARDS, DID TRIAL COURT VIOLATE MY DUE PROCESS RIGHT TO CONFRONTATION BY PRECLUDING DEFENSE COUNSEL FROM CROSS-EXAMINING A KEY WITNESS ABOUT A PRIOR ARREST. CONTRARY TO THE APPELLATE DIVISION FINDINGS. DELAWARE V. VAN ARSDALL, 475 U.S. 673, 678-679. U.S. CONST. AMENDS. VI. XIV.

III.

DID THE CUMULATIVE EFFECT OF THE PROSECUTOR'S REMARKS, THAT THE APPELLATE DIVISION DEEMED HARMLESS, DEPRIVE ME OF MY DUE PROCESS RIGHT TO A FAIR TRIAL, UNDER FEDERAL STANDARDS. U.S. CONST., AMEND. XIV.

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
1. Alaska v. Davis, 415 U.S. 308, 94 S. Ct. 1105[1974].	p.20, p.22
2. California v. Schmerber, 384 U.S. 757, 86 S. Ct. 1826[1966]	p.13
3. Dechristoforo v. Donnelly, 416 U.S. 637, 94 S. Ct. 1868[1974]	p.26
4. U.S. v. Mesareosh, 352 U.S. 1, 77 S. Ct. 1[1956]	p.23
5. Wainwright v. Darden, 477 U.S. 168, 106 S. Ct. 2464[1986]	p.26
6. Washington v. Strickland, 466 U.S. 668, 104 S. Ct. 2052[1984]	p.14
7. Beasley v. U.S., 102 F. 3d 1440, [8th Cir. 1996]	p.16
8. Boucher v. Friedman, 568 F. 3d 1119, [9th Cir. 2009]	p.13
9. Director v. Andrews, 2017WL6065748, T DC-Lid U.S. District Court E.D. Texas	p.22
10. Dunbar v. State, 2020WL2060275, [Court of Appeals of Arizona, Div 2] . .	p.20
11. Schuab v. U.S., 886 F. 2d 509[1989]	p.19
12. A.B.E. A., Matters of, 56 N.Y. 2d at 296, 452 N.Y.S. 2d 6[1982]	p.14
13. Ashwal v. People, 39 N.Y. 2d at 111[1986] . . .	p.26
14. Calabria v. People, 94 N.Y. 2d 519, 727 N.E. 2d 1245[2000]	p.24
15. Carbrano v. People, 301 N.Y. 39, 92 N.E. 2d 871[1950]	p.24
16. Crimmins v. People, 36 N.Y. 2d 230[1975] . . .	p.25, p.29
17. Fomby v. People, 103 A.D. 3d 28, 956 N.Y.S. 2d 683[2012]	p.13
18. Yazum v. People, 13 N.Y. 2d 302, 196 N.E. 2d 263[1963]	p.16

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

19. Brightley v. People, 56 A.D. 3d 314, 867 N.Y.S. 2d 90(1st Dept. 2008) . . p.19

20. Flores v. People, 153 A.D. 3d 182, 62 N.Y.S. 3d 68(2nd Dept. 2017) p.25

21. James v. People, 147 A.D. 3d 1211, 48 N.Y.S. 3d 524(3rd Dept. 2017) p.16

22. Loftin v. People, 71 A.D. 3d 1576, 896 N.Y.S. 2d 789(4th Dept. 2010) p.22

23. Moco v. People, 176 A.D. 3d 644, 111 N.Y.S. 3d 586(1st Dept. 2019) p.22, p.23

24. Redd v. People, 141 A.D. 3d 546, 35 N.Y.S. 3d 402(2nd Dept. 2016) p.26

25. Robert T., Matters of, 220 A.D. 2d 434, 631 N.Y.S. 2d 915(2nd Dept. 1995) p.20

26. Rutledge v. People, 179 A.D. 2d 404, 578 N.Y.S.2d 162(1st Dept. 1992) . . . p.26

27. Shaun C., Matters of, 169 A.D. 2d 406, 563 N.Y.S. 2d 822(1st. Dept. 1991) p.23

28. Smith v. People, 143 A.D. 3d 31, 37 N.Y.S. 3d 4(1st Dept. 2016) p.18

29. Smith v. People, 288 A.D. 2d 496, 733 N.Y.S. 2d 237(2nd Dept. 2001) p.26

30. Smith v. People, 95 A.D. 3d 21, 940 N.Y.S. 3d 373(4th Dept. 2012) p.13

31. Wearen v. People, 98 A.D. 3d 535, 949 N.Y.S. 2d 170(2nd Dept. 2012) p.16

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

32. Cherry v. People, 34 Misc. 3d 1235(a)
950 N.Y.S. 2d 610[Sup.Ct.Kings County] p.17

STATUTES AND RULES

1. Crim. P.L. §30.30 [Mckinney] p.17, p.19

2. Crim. P.L. §110.120.05(2) [Mckinney] p.11, p.12

3. Crim. P.L. §125.25(1) [Mckinney] p.11

4. Crim. P.L. §240.40(1)(2)(B)(V) [Mckinney] . . . p.4, p.13, p.17

OTHER

1. E.g., Grisdale, Kelly S. Et. Al., "Successful Nuclear DNA Profiling Rootless Hair Shaft's: A Novel Approach", int. j. legal med.[2018] 132.107 . . . . . p.15

2. NYC Office Chief Medical Examiner,Forensic Biology Evidence & Case Managment Manual, at 10.13, 11.13, 12.13, 13.13[Effective 9/23/19] p.15

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 16

CONCLUSION 31

INDEX TO APPENDICES

APPENDIX A - Decision & Order of The State of New York Court of Appeals(Feinman j.) affirming order of The Appellate Division, First Department, entered January 28, 2020.

APPENDIX B - Decision & Order of The Appellate Division, First Department affirming a judgment of The Supreme Court, Bronx County, rendered on November 13, 2013.

APPENDIX C - Excerpts of Trial Transcripts

APPENDIX D - Court Appearances - (2011 - 2012)

APPENDIX E - Motions/Brief filed - (2009 - 2017)

APPENDIX F - Police Reports, Lab Reports, Jury Note, Sentence & Commitment Form

IN THE

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 _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[✓] For cases from **state courts:**

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

[✓] reported at People v. Gamble, 35 N.Y. 3d 970 [2020]; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Appellate Division - 1st Department court appears at Appendix B to the petition and is

[✓] reported at People v. Gamble, 179 A.D. 3d 580 [2020]; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[✓] For cases from **state courts**:

The date on which the highest state court decided my case was April 21, 2020. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, AM. VI p.13, p.15, p.20, p.23

2. United States Constitution, AM. XIV p.13, p.15, p.20, p.23, p.24, p.26

STATEMENT OF THE CASE

Police officers arrived to building 280-300 on east 161st. street immediately following a shooting incident within the building that occurred on february 8, 2009 at approximately 3:20 a.m., resulting in the victim(Brian McCray) dieing from his injuries & another victim* (Luis Lôpez) was shot, he was taken to the hospital & later released soon after with minor injuries that healed in a week following the this incident,(see: C-41, C-42). One of the officers who first arrived at the scene(P.O. Boone) interviewed the only eyewitness(Luvenia Staples) about the incident. In that interview ms.staples told officer boone, she don't know who the shooter was.*

At approximately 12:10 p.m., detective o'brien arrived on the scene & was informed by other detectives to check out the trash compactor room because a maintenance worker directed them to go in it. There, he discovered a black bag with two shotguns* & a bag containing various clothing with blood on it.* After these items were examined, photographed

---

*At trial, mr.lopez stated he could not recognize who the shooter was when he went to the front of his apartment door & looked through the peephole,(see: C-42). At that moment, all he saw was a black man with a hood up over his head when the shots were fired in the apt. door's keyhole,(see: C-43).

*At approximately 4:15 a.m., within a half hour after the interview she had with P.O. Boone, ms.staples had another interview with a nighwatch detective(MIcheal Cullen). In that interview, she maintained her initial statement she told p.o. boone, that the shooter had on a mask because it happened so fast & the guy didn't say anything,(see: F-1). Then throughout the course of the investigation leading up to her testimony at trial, she gave three more additional statements that were inconclusive with her initial statement,(see: C-51 - C-54, F-2). Including her stating at trial that when she gave another statement at the police precinct to the case detective, she didn't even know why she mentioned my name,(see: C-49).

*On february 9, 2009, criminalist amy dorsey received the two firearms & four shotshells recovered from the crime scene & after conducting a fingerprint analysis on both the firearms & the shotshells, no fingerprints

(continued . . .)

STATEMENT OF THE CASE

vouched & packaged, it was rushed to the office of chief medical examiner(hereinafter o.c.m.e.) with a request for analysis on all items.* Detective o'brien was then directed to go upstairs to the 5th flr. of the building & retrieve a few buccal swabs from the blood dots that were discovered by law enforcement. He recovered a total of three buccal swabs, one near apartment 5f & the other two near the compactor room.

Later that day, after standing downstairs for approximately 14 hrs. after the shooting incident, ms.staples received a call from detective Mullarkey(case detective) asking her to come to the precinct. When she got there, both detective mullarkey & detective smith took her in a interview room & she told them she could not make no identification of the shooter, detective mullarkey then "banged on the table" & accused her of "lying" about not knowing who the shooter was,(see: C-55, C-57). That's when she said, "yeah I know" & she "gave the name"(see: C-58). Detective mullarkey then left the room to go retrieve a DMV photo of myself(printed 2002) & she identified me.

---

were found on the operable firearm(the mossberg) or any of the shot shells,(see: C-66, C-67). On the inoperable firearm(the ithaca) two fingerprints were recovered on the stock of the gun. Those prints were sent to detective arthur connolly for comparison/identification purposes & to determine if the prints had any value or not,(see: C-65).

*Judge Clancy allowed over defense counsel objection, a non-license detective(arthur connolly) to testify about the comparison he made with the digital print he recived from amy dorsey & compared it to a ten print card of my own hand,(see: C-69, C-70, C-71).

*At approximately 5:15 a.m., detective Paul Brown arrived on the scene & did a dusting for possible latent fingerprints at the scene; the interior & exterior of the staircase(c stairwell) door; the interior

(continued . . .)

STATEMENT OF THE CASE

At approximately 8:15 p.m., detective streicher under court orders, arrived at apartment 5f to execute a search after he conferred with detective mullarkey & he requested that detective streicher pick-up any DNA.* Detective streicher then began taking photographs & he sketched the apartment. All the pictures he took of the area containing alleged blood dots or splatter[the dining room rug, the bedroom closet door & the bedroom wall] he swabbed them & he also for serological purposes, took a hair brush & a hair pick from my bedroom* (see: C-68).

---

portion of the security door inside the security booth area. There were no latent prints recovered from the scene,(see: C-39,C-40).

*Criminalist Amy Dorsey's testing she performed on the operable gun was subject to re-examination by criminalist manishi agarwal on july 25, 2012. This was due to a corrective action that was taken out on her in one of her cases, involving her missing a print that was considered to have value, leading all her work to be re-exam,(see: C-63). Ms.Agarwal stated upon re-examing the gun she encountered rust. Even though she was still able to see dorsey's initials on the gun & concurred with her findings,(see: C-62). The rust itself made it impossible to retrieve any fingerprints or observe any,(see: C-64).

*On september 19, 2013, prior to trial, there was a discussion in court about the evidence that was destroyed in a storage facility(erie basin) that it was held in due to the flooding caused by hurricane sandy in october 2012. The evidence that was destroyed includes: all the swabs taken by the crime scene detectives at the scene & all three swabs criminalist amy dorsey took at the crime lab when she was examing the shotgun everything that was vouchered & all the items recovered from my bedroom. The property that wasn't affected was the 23 shell casing, the morgue bullets, one of the two shotguns(the ithaca) & the DNA swabs that were obtained from me on july 17, 2012. Trial counsel ms.tobia position on this issue was because the evidence was destroyed, in particular, the swab that was taken from the pump action area of the alleged murder weapon, there's no way now she can challenge independently that DNA finding, especially given the time that she was appointed to me as counsel,(see: C-1 - C-8).

STATEMENT OF THE CASE

On april 6, 2009, Patrick L. Bruno Esq., was assigned to this case as 18b counsel. On july 27, 2009, mr.bruno filed an omnibus motion. On august 18, 2009, Joshua Gradinger, the assistant district attorney(hereinafter prosecution) at the time representing the people received a copy of Mr.bruno's motion. Prosecution didn't respond to the motion until 7 months later on march 2, 2010.* On may 10, 2010, honorable judge raymond l. bruce, decided & order that all three request by counsel be granted but denied the request for any release of the grand jury minutes, deeming the evidence before the grand jury was sufficient.

On january 31, 2012, mr.bruno announced he was ready for trial, the people wasn't & judge margaret l. clancy ordered an adjournment. On june 8, 2012, the people in a discovery motion moved pursuant to c.p.l. §240.40(2)(B)(V), for the court to mandate that I provide a saliva sample, attached to the motion was the DNA profile that was developed on april 9, 2009, as a unidentified male donor A, waiting for comparisons upon submission of an oral swab from the suspect,[Rasheen Gamble](sse: E-18 - E-21). On june 18, 2012, judge clancy ordered that I produce a saliva sample; that it is necessary pursuant to c.p.l. §240.40(2)(B)(V) for me to submit one,(see: E-22).

On july 12, 2012, through his partner, Anthony Ventura Esg., waived my appearance to show up in court & consented to the people's motion to

---

*Mr.Bruno made no demands for any written reports or documents concerning any forensic testing, pursuant to c.p.l. §240.90, nor any DNA profiles pursuant to c.p.l. §240.40(1). This omnibus motion was the only motion mr.bruno filed in the 3 1/2 years he represented me.

compel. On july 12 2012, it was discovered by the court's that I refused the oral swabbing because I didn't have any knowledge of the order & I wanted to speak to mr.bruno,(see D-6). At the next court appearance on july 17, 2012, mr.bruno told me that the DNA swabbing will be done in the holding cell I was in. Mr. Adam Oustatcher, the prosecutor who began taken over the case on behalf of the people, had a detective in place. Mr.bruno stated judge clancy ordered it & that if I still refused, I would be subject to a force order,(see: D-9). He then went before the court & stated I was ready to fully cooperate with being swabbed by the detective, leading me now to submit a saliva sample,(see: D-10).

On september 18, 2012, the results to the DNA buccal swab[FB12-00984] & the DNA profile male A donor[FB09-00827],* that was created came back a positive match. At that moment, I was seeking for new counsel because I felt he wasn't fighting for my rights. Judge clancy stated that mr.bruno is one of the finest most experienced attorney's in the bronx & that attorney's like him be on trial, so if she was to appoint me a new lawyer, they're not going to be ready in january when she's looking to take this case to trial. Also since he's been on the case for 3 years, it's in my best interest to stay with him, she's not prepared to give me a new attorney,(see: D-13).

On october 24, 2012, at a unassigned court appearance, judge clancy

---

*Criminalist IV Christopher Kamnik stated at trial that he received 3 sample swabs that contained skin cells from criminalist amy dorsey who located those sample swabs on the grip of the operable gun, indicating who was handling the gun,(see: C-60) & a non-stain area on the pump of the gun, with a request for analysis,(see: C-60) but it was never done, he stated he don't even know who those skin cells belong to,(see: C-61).

stated she wanted to resolve this issue concerning me wanting another lawyer now. Mr.bruno acknowledged that he had "admittedly been very busy with other homicides" & "that he would withdraw from the case & asked the judge to assign another counsel. Judge clancy stated she's going to grant my request for new counsel & informed mr.bruno to make a copy of his file, he stated he would,* (see: D-17).

On november 14, 2012, maria tobia esq. appeared in court as newly appointed counsel. It was sometime in september of 2013, ms.tobia received pieces of the discovery including all the vouchers before trial initially started & she went to mr.oustatcher office to examine the ballistic evidence that was available, specifically all the vouchered evidence including the clothing, that's when she was told for the first time that the property was unavailable.*

Trial

On september 19, 2013, defense counsel went before the jury in her opening statements to explain to them, although this shooting was horrifying & incredibly sad . . . "don't take those emotions & leave your brain at home". . . "you will see how ms.staples behaves in the video surveillance, how she doesn't go over to mr.mccray & see how he's doing after the shooter leaves". . ."you will hear about the prior

---

*Mr.bruno never turned over his complete file to ms.tobia. This led to her mentioning this at the start of trial stating, she reached out to mr.bruno four times trying to get a response to better prepare her for trial, but he never responded back, (see: C-9).

*On october 9, 2013, during the charge conference at trial, the people stated that ms.tobia never filed any request to preserve evidence or made a demand for discovery to make it available to her for inspection as soon as she got the case, despite her saying she did, "it just never happen", (see: C-13).

statements that she made & you will hear everything about what she did afterwards". . . "don't give her a pass."(see: C-14).

On october 3, 2013, during the cross-examination of prosecution single witness ms.staples, defense counsel after further research, sought to ask ms.staples if she had assaulted & robbed someone stating, that the case was dismissed but it wasn't dismissed on the merits because 30.30 is not a dismissal on the merits,(see: C-10). Proseecution opposed any questioning regarding the 2012 crime. According to prosecution, the A.D.A. who handled ms.staples case, "the case was ultimately not prosecuted because the complainant in the case kept switching his story between ms.staples telling someone to hit a kid & ms.staples being an eyewitness to the crime,(see: C-10) Based off of defense counsel information of this arrest, trial court prohibited any inquiry,(see: C-11).

On october 9, 2013, prosecution rendered his summation & during his closing arguments he discussed the phone call made to my mother & asked the jurors to consider what "the defendant would have said to his mother if he really didn't do this shooting,"knowing what he knew at that time" Defense counsel objected stating that there was no evidence of what I "knew at that time"(see: C-22). The court sustained the objection and the prosecutor continued, "what would an innocent man say to his mother? I submit to you, the first thing an innocent man would say to his mother is, I didn't do it". Again defense counsel objected & the court sustained the objection that there was "no evidence in the case".

Then prosecution proceeded immediately to comment on my failure to call 911 after the shooting:

> MR.OUSTATCHER: This is the defense attorney, page 472. She's questioning Detective Smith:

STATEMENT OF THE CASE

> "QUESTION: Now, Detective, you yourself today, before you testified, you listened to a 911 call, right?"
>
> "ANSWER: Yes."
>
> * * *
>
> "QUESTION: One of the callers was in fact a male caller, correct?"
>
> ["ANSWER":] There was an interview done by a detective that says he spoke to a gentleman, it appears his name is Juan Amante? He says he called."
>
> . . . The calls I heard, the calls I heard today were three females."
>
> MR.OUSTATCHER: Okay. The only male caller was amante. There was no male caller named Rasheen Gamble. <u>If the reason the defendant was bleeding, had some innocent explanation, if he was a victim, you would expect a reasonable person, an innocent person, to call 911?</u> (emphasis added).

At this point, the court sustained defense counsel objection & struck the argument,(see: C-23, C-24). The court reiterated her ruling during a sidebar that followed:

> . . . . It is fair for you to argue that there's not an innocent explanation of him, of his flight, and that's consciousness of guilt, I have no problem with that. But there's no factual basis in the evidence. You're going to argue from his point, I assume, that he was bleeding, but all of this other argument about calling 911, it's either not connected up for me right now or I don't see where it is in the record to make the argument,(see: C-25).

Prosecution then made several remarks to the effect that there was "no innocent explanation" for blood droplets near my apartment, "no innocent explanation" for blood on the same shotgun used to shoot

at Mr.lopez's door.(see: C-26) "no innocent explanation" for my DNA on a shotgun,(see: C-27) "no explanation of how genetic material got on [the two shotguns]",(see: C-28), & "no innocent explanation" for blood in the fifth-floor hallway,(see: C-29).

Prosecution then argued:

> . . . And as much discussion as you heard this morning about what could have been done and what should have been done, there's one thing you didn't hear and I talked about it a lot. What you did [not] hear this morning and that's because it does not exist, was a reasonable innocent explanation for how all this evidence came to be. How does the defenant's blood get on the mossberg? How did the defendant's blood get on the ithaca [sic]? Why is defendant's blood in that stairwell? why is the defendant's blood all over the fifth floor hallway? Why did the defendant flee? If the defendant is not guilty of these crimes, within all this information before you, you expect to see some innocent explanation evidence of how it all got there"
>
> MS. TOBIA: Objection.
>
> THE COURT: Sustained.
>
> The burden remians at all times on the people. No obligation at all on the defense to provide any explanation for any -
>
> MS. TOBIA: Judge, I'll need to make an application at the end.
>
> THE COURT: Go ahead.
>
> MR. OUSTATCHER: You're going to draw conclusions when you get back there and start talking, you're going to find as you deliberate on this case that there is no reasonable and logical and innocent explanation.
>
> MS. TOBIA: Objection. Move to strike.
>
> THE COURT: Overruled.

STATEMENT OF THE CASE

Make the argument from your evidence,
(see: C-29, C-30)(emphasis added).

At the end of the people's summation, defense counsel moved for a mistrial, citing prosecution's burden-shifting statements,(see: C-31). Prosecution countered that it was permissible to say that "looking at the evidence in total there simply is no innocent explanation",(see: C-32). The court reserved her devision.

The following day, defense counsel renewed her mistrial request & alternatively, requested a curative instruction that the defense had no obligation to explain anything, including why his blood was on the shotgun,(see: C-34). Prosecution again argued that he was only asking the jury to analyze "the totality of the information before them,(see: C-35).

In response, the court told prosecution some of his remarks had been phrased "that way" but that these comments were "juxtaposed" within a few sentences of you saying, you now, there's one thing you didn't hear, including this morning . . [W]hen it comes to the defendant's right to testify, the burden on the people, that's sacrosanct and you have to stay well clear of that",(see: C-35). The court denied the mistrial motion,(see: C-37).

During this colloquy, the court also indicated that, on reconsideration, she was reversing her prior ruling "concerning what the defendant did or did not say to his mother or the absence of a 911 call",(see: C-37, C-38). The defense objected to the court's change of position in favor of the prosecution,(see: C-37).

Based on the new ruling, the court then instructed the jurors the

STATEMENT OF THE CASE

following:

> One quick thing before I move to my instructions on the law:
>
> During ADA Oustatcher's summation, when he spoke to you concerning what the defendant did or did not say to his mother, that is absence of a 911 call. I sustained objections to certain arguments that he was making. After further review, I'm reversing that ruling and, for the record, those are to arguments made as to page 1019, line 16.* And those arguments will remain in the record and you may give consideration to those arguments, as well as any arguments that were made by either counsel that were not sustained in your deliberations.

On october 10, 2013, I was convicted by a jury trial for murder in the second degree(penal law §125.25[1]) & attempted assault in the second degree(penal law §110-120.05[2]) in the supreme court of the state of new york, bronx county[clancy j.] & was sentenced to an indeterminate term of imprisonment of 25 years to life for murder in the second degree with another indeterminate term of imprisonment of one & one third to four years of incarceration for attempt assault in the second degree, running both charges consecutive,(see:F-19).

On april 24, 2014, the supreme court of the state of new york, appellate division - first department, granted me leave to appeal on the original record. On January 28, 2020, the appellate division affirmed the conviction of murder in the second degree(penal law §125.25[1]) &

---

*This line of the transcript states: "What would an innocent man say to his mother? I submit to you, the first thing an innocent man would say to his mother, I didn't do it."

attempted assault in the second degree(penal law §110-120.05[2]) with an opinion. The appellate division also denied the request for the direct appeal on calendar for oral argument of january 7, 2020 to be taken off the court's calendar & admission to file a pro-se reply brief, people v. gamble, 179 a.d. 3d 580[2020] & leave to the state of new york court of appeals was denied on april 27, 2020,[feinman j.], people v. gamble, 35 n.y. 3d 970[2020].

REASONS FOR GRANTING THE PETITION

I.

DEFENSE COUNSEL WAS INEFFECTIVE FOR CONSENTING TO THE PEOPLE UNTIMELY REQUEST FOR A DNA SAMPLE -- A MOVE THAT GREATLT PREJUDICE ME. U.S. AMENDS VI, XIV.

I want to first bring to this court's attention that under both state & Federal courts have stated that a buccal swabbing inside of the mouth for saliva directly implicates a defendants fourth amendment right, (see: People v. Smith, 95 A.D. 3d 21[4th Dept.][2012]; People v. Fomby, 103 A.D. 3d 28[2012]; Schmerber v. California, 384 U.S. 757[1966]; Friedman v. Boucher, 568 F. 3d 1119[9th][2009]). On february 9, 2009, amongst the evidence that was collected in this case, pursuant to a search warrant issued by the local magistrate(fabrizio j.) to my apartment, for serological purposes, the N.Y.P.D. collected my hairbrush & hairpick, (see:C-67). On june 8, 2012, the people seeked an order to permit the taking of a DNA saliva sample pursuant to c.p.l.§240.40(1) for comparison purposes to the evidence collected.

The people did not serve & file there motion however, until 3 1/2 years from the day I was arraigned on april 30, 2009. Yet, in absence of any good basis shown for their delay in filing the motion, trial court (clancy j.) granted the people's motion,(see: E-22) in violation of c.p.l.§240.40[2][B][V] statue. To make matters worse, when the people seeked to obtained this saliva sample, the motion itself, never mentioned the necessity for obtaining a saliva sample considering they was in possession of my DNA collected from my apartment. It did not even set forth sufficient grounds to obtain an oral swab, despite there knowledge that they were in possession of my DNA and four other "considered blood samples collected from my apartment, for example, an affidavit; from an analyst

from the O.C.M.E. explaining the complications they're having with the evidence collected and another sample from the defendant would be necessary.

The people simply chose not to have the DNA samples tested, and decided to wait 3 1/2 years to seek another sample, this time through an unnecessary intrusion into my body. This alone was a violation to my fourth& fifth amendment right, even if the motion had been timely served & filed. Trial court erred by not considering any other avenue to further this,(see: Matters of A.B.E. A, 56 N.Y. 2d at 296[1982] [stating- before a court may compel a defendant to supply corporeal evidence, it must consider the unavailability of a less intrusive means of obtaining it in determining whether the order is appropriate]).

This is why I call on this court for further review because contrary to the appellate division decision, that under federal standards following strickland v. washington, 466 u.s. 668, 694[1984] where the court stated that the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case", "but that counsel's error undermined the confidence in the outcome of trial." Defense counsel (Patrick Bruno) consent to the people's motion to compel a DNA sample was objectively unreasonable & prejudice the defense, also the defense of my second lawyer because by the time she was assigned to the case, all of the physical evidence, untested evidence(including the skin cell samples that were found on the alleged murder weapon) was gone. Super storm sandy hit the storage facility the evidence was held in; the delay in discovery in this case crushed the defense. Further, the key issue in this single-

witness identification case for the jury determination was the identity of the shooter, with this information admitted, the people enjoyed the luxury of using it all throughout trial to establish that fact. The people would've been without this information if defense counsel had protest to the order for it, leaving the people no choice but to rely on the forensic evidence collected from my apartment.

However, the problem with conducting an analysis to the hairbrush or hairpick is that if the hair from either which grooming item didn't have hair that included skin cells from the root it would be hard to analyze, (see: E.g., Grisdale, kelly S. Et al., "successful nuclear DNA profiling of rootless hair shafts: A novel approach", int. j. legal med[2018] 132.107-[stating - The problems of doing DNA test on hair if the samples do not include skin cells from the root]). The current O.C.M.E. protocols say that hair is generally not tested but that occasionally there is a request to use pulled hair as an exemplar. Pulled hair & public hair is done in a controlled way to make sure there is a root(follicle) to permit testing, (see: NYC office chief medical examiner forensic biology evidence case managment manual, at 10.13, 11.13, 12.13, 13.13[effective 9/23/19).* So it would've been impossible for the people to conduct an analysis to the hairbrush & hairpick. The other four blood samples that was collected from my apartment, it must be noted that no DNA analysis was done to determine if those samples were consisted of blood. Based off the 2009 DNA lab report. It was documented that one of the samples was obtained from mold off a closet door,(see: F-9). So there's no guarantee that these "blood samples" were blood at all & without an analysis done to these

*https://www1.nyc.gov/site/ocme/services/technical-manuals page

samples it was improper for the people to draw the conclusion that they were blood & make further assumptions that any of the other evidence collected could've been utilized,(see: E-27).

The value of the people's DNA evidence was undermined absent this DNA order. The remainder of the people's case absent this information, consisted of testimony from a undermined witness due to the inconsistencies in her statements concerning the description of the shooter beginning with her initial statement,(see: F-1); the misconduct of the N.Y.P.D. during the identification procedure they conducted with her; and her reliability based her character, which should've fell under scrutiny because of a prior arrest for assault & robbery, all questioning her reliability. Then to the people's circumstantial evidence, a fingerprint, that the appellate division stated was found closely near the scene connecting me to the crime,(see: B-2). This is without contention because the mere confirm DNA match of a fingerprint in close temporal proximity to the commission of the crime does not, according to state & federal courts, establish any identity of the perpetrator,(see: People v. James, 147 a.d. 3d 1211[3rd Dept.][2017]; also see: U.S. v. Beasley, 102 F. 3d 1440 [8th Cir.][1996]). The evidence of flight was also of limited probative force due to the information that was admitted involving me being in a musical band,(see: C-12: also see: §19:185. specific jury instructions. flight from scene, handling a criminal case in new york, ch.19., IV. Jury Instructions & Deliberations; also see: People v. Yazum, 13 n.y. 2d 302 [1963]).

The appellate division went completely "bonkers" when they opinionated on this issue. The second department ruled in **wearen** that since a DNA

sample was already collected previously, that was linked to a burglary on july 7, 2006, for which he was charged and convicted for; they granted wearen's c.p.l.§30.30 motion & dismissed the indictment because the people couldn't establish why they needed a confirmatory DNA sample when they had knowledge as of january 2007 that a DNA match was made with the crime scene DNA sample & a DNA profile of wearen already.

The same issue arose in **cherry**, where he actually opposed the people's motion to compel the DNA sample pursuant to c.p.l.§240.40(1) on the grounds that it was untimely. The court denied the people motion stating, that cherry asserted that the people offered no good cause for filing & serving the motion until 9 months after his arraignment. Cherry also asserted that within the discovery by stipulation paperwork submitted by the people's at the time of his arrest, he consented to a DNA buccal swab & concluded that a swab was taken. Cherry then asserted that the people are simply not chosing to have his DNA they already obtained tested & now was seeking a duplicative intrusion in his body; That the people have not set forth sufficient grounds to allow such an oral swab to take place; that a taking of a oral swab would violate his fourth & fifth amendment right among his federal & state constitutional right, even if the motion had been timely served, 34 misc. 3d 1235(a).

This is coupled with the lack of assistance counsel demonstrated since being assigned to this case, because he never did any discovery in this case. Defense Counsel forewent conducting any investigations or inspections to any of the evidence, even after trial court made the efforts to get him the discovery from the people at a march 28, 2011 court appearance,

(see: D-1) he still didn't review any of it. If he did, he would've realized, not only a search & seizure was conducted to my apartment but there were "blood" samples collected that was ruled out, my DNA. Knowing this information at the very least, would've prompt him to oppose the people's request seekin for more DNA 3 1/2 years after they're seizure in my apartment.

Ironically, without doing any discovery or conducting any interviews with any witnesses nor as the people stated at trial, "the defense never made any request to preserve evidence",(see:C-13) he announced he was ready for trial on january 31, 2012,(see: D-4). His reasons for not effectively representing me was that he was busy with other homicide case,(see: D-18). This was blatant neglect at it's highest capacity, especially when during the pre-trial proceedings, concerns of a DNA request/order arise. That's critical within the meaning of the law. Defense Counsel effective assistance was a no show,(see: People v. Smith, 143 A.D. 3d 31[1st Dept.][2016]).

II.

TRIAL COURT VIOLATED MY DUE PROCESS RIGHT TO CONFRONT THE SOLE WITNESS MS.STAPLES CONCERNING A PRIOR ARREST. U.S. CONST. AMENDS. VI.,XIV.

I would just like to make it clear to this court that the reason trial court denied counsel from questioning ms.staples about the assault/robbery charge was not because of the record the people made on this issue, it was because of the record defense counsel made. The appellate division decided the information that defense counsel discovered

through a google search on these charges, that were dropped appearently on 30.30 speed trial grounds was "speculative"(see: B-3). But this considered "speculative" information did not provide any basis for the appellate division to dismiss this claim in it's entirety because a mere discrepancy or lack of information in whether the dismissal of the charges was on 30.30 grounds was irrelevant considering the record that the people made, which confirmed that the charges were in fact dropped. There was not an acquittal or a conviction nor was there a plea bargain taken by ms.staples, making it then impossible to make an inquiry. The dismissal was in part due to the victim failing to come forward with a straight story. He kept "flip-flopping" his story around on whether ms.staples was an eyewitness to the crime or she was the assailant, (see: C-10).

The very court that refused to entertain this claim stated in **brightley**, "the fact that mr.brightley's prior florida arrest charges were dismissed due to the failure of the victim to come forward doesn't preclude inquiry into the matter, since the dismissal was not on the merits",[emphasis added](see: People v. Brightley, 56 A.D. 3d 314[2008][1st Dept.]). Further, both state & federal courts stated the mere fact that the ultimate disposition of prior charges wasn't explained to trial court, was not a sufficient enough reason to deny defense counsel from cross-examining a witness on prior charges, because those charges resulted in a termination. Regardless if the termination was unexplained or not, the disposition did not result in an acquittal,(see: U.S. v. Schuab, 886 F.2d 509[1989][stating- where the D.A. found out about the prior arrests & was permitted to question the witness about them,

even though the people didn't get the ultimate disposition]; also see: Matter of Robert T., 220 A.D. 2d 434[1995][2nd Dept.][stating - The district attorney ultimately terminated the prior charge for unspecified reasons, such a termination does not constitute an acquittal or a dismissal on the merits, which would bar cross-examination of the underlying acts]).

This is why I'm seeking further review from this court on this issue because under federal law, though lower level trial court retains complete discretion over whether a party could cross-examine the opposing party on issue like this, a trial court's discretion however, should be narrowly construed when a defendant's fundamental rights is at issue & the confrontation right is perhaps as fundamental as any other, (see: Davis v. Alaska, 415 U.S. 308, 316[1974]). Under the federal constitution, a defendant has a due process right to present a defense, including a right to effective the cross-examination of the witness at trial,(see: State v. Dunbar, 2020WL2060275[court of appeals of arizona, div. 2]; const. amends. vi. xiv.) that any restrictions on the right to cross-examine a key prosecution witness can deprive me of an important means of combating inculpatory testimony or at least demonstrating the existence of a reasonable doubt as to guilt.

Whether this line of questioning had any material relevance in this case is an understatement because ms.staples testimony was not collateral to the people's evidence in part, it was crucial in determining the identity of the shooter. It was her reliability that kept this case from proceeding to trial as a circumstantial case,(see: C-33). Ms.Staples undoubtedly was the glue to the people's case. The glue that

was the primary point in defense counsel's theory in her misidentification defense when she took aim at convincing the jury from the beginning of trial, "not to give her a pass". . . ."to evaluate her testimony," (see: C-18).

The reason why was for three factors: (1) due to the inconsistencies in all her statements after her initial statement stating, "I don't know who the shooter was because he had on a mask & it happen so fast, (see: F-1). (2) The misconduct at the hands of the N.Y.P.D., in the way they handled ms.staples when they re-interviewed her after I was labeled a suspect then turned perpetrator,(see: C-55). (3) Her character, which was hanging in the balance when defense counsel highlighted the fact that ms.staples was a long-standing member of the community who cater party for kids . . . . she's a president of the tenant board that discussed issues dealing with drugs & violence,(see: C-19) but knowing there's more to the story she asked the jury in her opening statements "to pay close attention to her actions in the video, she don't flinch, cover her ears, she don't check on the victim nothing . . .",(see: C-17).

The people in retrospect even threw ms.staples "under the bus" following counsel's analogy stating, ms.staples was downstairs in the security booth prior to the shooting because the victim wanted to apologize for the incident that happen to her son when he was jumped resulting in a group of guys cutting up his coat in the lobby on the shift that he was working on. This, prompting a fiery ms.staples to come downstairs & ask why nobody didn't call her to tell her what happen to her son,(see: C-15, C-44 - C-48). Another unfavorable inference that aimed directly at her credibility.

REASONS FOR GRANTING THE PETITION

If defense counsel was granted permission to engage into this line of questioning concerning ms.staples prior arrest, it very well may have tipped the balance in her credibility & the people's case. Especially when her involvement in this case was similar to her prior arrest, where there was discrepancy whether she was an eyewitness or not,(see: People v. Loftin, 71 A.D. 3d 1576[4th Dept.][2010]). Although I can't speculate whether the jury, the sole judge of the credibility of ms.staples would have accepted this line of questioning had counsel been permitted to present it, the jurors were entitled to have the benefit of defense counsel theory before them so that they could make an informed judgment as to the weight to place on her testimony, "the glue" to the people's case,(see: Davis v. Alaska, 415 U.S. 308[1974]; also see: Andrews v. Director, 2017WL6065748, T DC-1-LID U.S. District Court E.D. Texas, Texarkana Division).

Counsel had the necessary good faith basis to ask about the prior arrest; there was no danger that such cross-examination would go to anything other than her credibility. The appellate division erred tremendously in their ruling on this claim & in essence of the fact, I believe they were a bit contradictive on this claim. It was a few short months prior to their ruling in this case, that on october 31, 2019, they denied defendant **moco** relief on the same issue when he challenged that the people were in error for cross-examing him on his two prior arrest where it was not ascertained whether the charges had been dismissed on the merits, but nevertheless it was harmless; that any prejudice was minimized by the court's statement to the jury that the charges were

dismissed & that the proof of the defendant's guilt was overwhelming, (see: People v. Moco, 176 A.D. 3d 644[1st Dept.][2019]). The people's cross-examination of **moco** prior acts was considered harmless, without a complete disposition of those acts.

The same similar issue happen with defendant **shaun c.**, where the lack of proof concerning the witness Richard Brown's prior acts wasn't even an issue in the case nor was it the reason why trial court precluded defense counsel from inquirying into brown's prior acts, it was because of the lack of relevancy to the issue at trial. This was a factor that the 1stdepartment reversed & remanded the case on stating, as it pertained to brown's prior acts, "as the trier of the fact, the court could not close it's mind to relevant evidence even before that evidence was heard",(see: Matter of Shaun V., 169 A.D. 2d 406[1st Dept.] [1991]). Concluding , although defense counsel lacked sufficient evidence of brown's prior bad acts, the 1st. dept. decided to reverse & remand the case because those acts were relevant to the issue at hand, even in the face of the evidence collected in that case. The way the 1st department ruled in my case on this issue was obscured.

In view of the fundamental nature of my rights guaranteed under federal statues, amends vi. xiv., due process right to confront, I ask this court for help to further review this issue following Mesareosh v. U.S. 352 U.S. 1[1956] stating, "truthfulness of testimony . . . the dignity of the united states government will not permit the conviction of any person on tainted testimony".

REASONS FOR GRANTING THE PETITION

III.
THE CUMULATIVE EFFECT OF THE PROSECUTOR COMMENTS DEPRIVED ME OF A FAIR TRIAL. U.S. CONST. AMEND.XIV.

The appellate panel erred when they ruled that the curative instruction was sufficient to prevent any prejudice from the comments the prosecutor made on the lack an "innocent explanation" for the evidence which was a burden shift. But more importantly, when trial court considered the prosecutor's further argument harmless concerning my failure to make a 911 call at the time of the incident, that in turn was granted permission for the jury to consider for deliberation,(see: B-2).

In addressing the first portion of the panel's decision, it must be noted, as this court is fully aware of, a court's curative instruction to a jury to disregard matters improperly brought to their attention cannot always assure elimination of the harm already occasioned because of the prosecutors persistent disregard to the trial court's ruling,(see: People v. Calabria, 94 N.Y. 2d 519[2000][stating - The court's prompt curative instruction did not eliminate the prejudicial effect of any misconduct where the prosecutor persistently disregarded the trial court's ruling]; also see: People v. Carborano, 301 N.Y. 39[1950]).

That's what happen here, prosecution consistent reference to there being no innocent explanation for the DNA evidence discovered away from the crime scene,(see: C-26, C-27, C-29). Despite trial court's sustaining of defense counsel objections to this argument, prosection continued to rally on that there was no reasonable, logical & innocent explanation to the DNA evidence collected,(see: C-30). This ultimately shifted the burden of proof on the defense. There's no way the jury adhered the court's instruction to these comments because they gave it considerable weight

during they're deliberations when they asked to re-hear the DNA evidence about the DNA samples , that was swabbed/obtained inside the building, (see: F-18).

The second challenged portion of the people's summation, the 1st department knew these comments concerning my failure to make a 911 call at the time of the incident was not harmless & incorrectly applied the harmless error analysis to this portion of prosecution's comments because when errors like this arise, regardless of the considered "circumstances" in a case, the court of appeals explained in **flores** that "if in any instance, an appellate court concludes that there has been such error of a trial court, such misconduct of a prosecutor . . . or such other wrong as to have operated to deny any individual defendant his fundamental right to a fair trial, the reviewing court must reverse the conviction & grant a new trial, quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction", 153 A.D. 3d 182[2017] quoted from People v. Crimmins, 36 N.Y. 2d 250, 238[1975].

Under no circumstances was the prosecutor allowed to call upon the jury to draw conclusions which were not fairly inferable from the evidence. For the people to ask the jurors to speculate, "what I did or would have said to my mother if I really didnt do this shooting, knowing what I knew at that time . . . . the first thing an innocent man would say to his mother is, I didnt do it" was error,(see: C-22). There was no evidence showing what I knew at the time of the call. Further, it was unacceptable for trial court to specifically instruct the jury, after sustaining defense counsel objection to these comments, to consider such arguments,(see: C-38). Because at this point, trial court has now given

standing to these comments as legitimate argument. What's hard to understand is that the very court this case was first appealed to & the court of appeals,has condemned actions of such committed by trial court over the years because it "greatly enhances the possibility of prejudice to the defendant",(see: People v. Rutledge, 179 A.D. 2d 404, 405[1st Dept.][1992]; also see: People v. Ashwal, 39 N.Y. 3d at 111[1976]).

So at this point I am seeking for help from this court; that the cumulative effect of prosecutor's comments ultimately robbed me of my due process right to a fair trial. U.S. Const., Amend XIV.; also see: Darden v. Wainwright, 477 U.S. 168[1986]. Following Donnelly v. Dechristoforo, the relevant question here was whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of my due process right, 416 u.s. 637; it was. The prosecutor's arguments from the beginning of trial during his opening statements, making insinuations that I made an attempt to manipulate the judicial system by "successfully avoiding being held responsible for the violence I inflicted",(see: C-16). Comments that there was no evidence whatsoever of me making any attempt to do so let alone, it was an improper slur on my character. Then when he began implicating other specific rights such as my right to remain silent, 513 F. Supp. at 958; also see: People v. Smith, 288 A.D. 2d 496[2nd Dept.][2001], making arguments not fairly inferable from the evidence,(see: C-24) burden-shifting,(see: C-29, C-30) improperly vouched for his witness(ms.staples) credibility stating, "Ms.Staples is a truth teller". . . ."it's not just that she was truthful, she was accurate",(see: C-20, C-21; also see: People v. Redd, 141 A.D. 3d 546[2nd Dept.][2016]). Then trial court allowing the misstated 911 comments to be considered for the jury,(see: C-38).

REASONS FOR GRANTING THE PETITION

The flagrant & pervasive pattern of comments from the people & the actions of trial court deprived me of a fair trial. Following **crimmins**, my right to a fair trial is self-standing & that the proof of guilt however overwhelming, if this court presumes it to be, can never be permitted to negate this right, 36 N.Y. 2d 230,238.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kirsten Gould

Date: 7/15/19