Petition for Writ of Certiorari

Anderson, Trevor v. Lynn Lilley

Appendix

Appendix A

130 A.D.3d 1055
Supreme Court, Appellate Division, Second Department, New York.

The PEOPLE, etc., respondent,
v.
Trevor ANDERSON, appellant.

July 29, 2015.

Synopsis

Background: Defendant was convicted in the Supreme Court, Kings County, McKay, J., of attempted murder in the second degree and criminal possession of a weapon in the second degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:
identification evidence was legally sufficient to find that defendant shot victim;
error resulting from trial court's determination, after a *Sandoval* hearing, that the People could inquire about the defendant's prior conduct of possessing guns was harmless; and
fact that count charging criminal possession of a weapon was only submitted as alternative to attempted murder charge did not require trial court to reject guilty verdict on the weapons charge when jury convicted defendant of both charges.

Affirmed.

Attorneys and Law Firms

****104** Lynn W.L. Fahey, New York, N.Y. (Kathleen Whooley of counsel), for appellant.

Kenneth P. Thompson, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Solomon Neubort, and Gabrielle Lang of counsel), for respondent.

WILLIAM F. MASTRO, J.P., PETER B. SKELOS, THOMAS A. DICKERSON, and HECTOR D. LaSALLE, JJ.

Opinion

***1055** Appeal by the defendant from a judgment of the Supreme Court, Kings County (McKay, J.), rendered January 3, 2012, convicting him of attempted murder in the second degree and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

***1056** ORDERED that the judgment is affirmed.

On March 24, 2010, at approximately 1:10 a.m., Diana Perez's boyfriend, Erick Brown–Gordon, was crossing the street in front of his house when the defendant, Perez's ex-boyfriend, walked up to him and, after a short verbal exchange, took out a .45 caliber automatic revolver and shot him twice in the abdomen. As Brown–Gordon turned around and attempted to flee, the defendant shot him two more times, this time in the back. Brown–Gordon collapsed, face down, on the ground in front of his nearby home. Brown–Gordon's father, who had observed the shooting from inside his house, ran out and asked his son who had shot him. Brown–Gordon answered "Trevor," the defendant. Brown–Gordon identified the defendant from a lineup and identified him in court as the individual who had shot him.

Contrary to the defendant's contention, viewing the evidence in the light most favorable to the prosecution (*see People v. Contes*, 60 N.Y.2d 620, 621, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that the identification evidence was legally sufficient. Moreover, upon the exercise of our factual review power (*see* CPL 470.15[5]), we are satisfied that the jury's finding that the

defendant was the shooter was not against the weight of the evidence (*see* **105 *People v. Romero*, 7 N.Y.3d 633, 644–645, 826 N.Y.S.2d 163, 859 N.E.2d 902). Neither Perez's level of intoxication nor the inconsistencies between Brown–Gordon's prior statements to the police and before the grand jury, on the one hand, and his trial testimony, on the other, were so significant as to render their testimony incredible or unreliable (*see People v. Almonte*, 23 A.D.3d 392, 393, 806 N.Y.S.2d 95; *People v. Lambert*, 272 A.D.2d 413, 414, 709 N.Y.S.2d 189).

We agree with the defendant that the Supreme Court improvidently exercised its discretion in determining, after a *Sandoval* hearing (*see People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849, 314 N.E.2d 413), that the People could inquire about the defendant's prior conduct of possessing guns. Whereas "[c]ommission of perjury or other crimes or acts of individual dishonesty, or untrustworthiness ... will usually have a very material relevance, whenever committed" (*id.* at 377, 357 N.Y.S.2d 849, 314 N.E.2d 413), the fact that the defendant had possessed guns on a prior occasion had little bearing on his credibility (*cf. People v. Grant*, 7 N.Y.3d 421, 425, 823 N.Y.S.2d 757, 857 N.E.2d 52). However, the error was harmless (*see People v. Crimmins*, 36 N.Y.2d 230, 367 N.Y.S.2d 213, 326 N.E.2d 787). Moreover, under the circumstances of this case, this error did not deprive the defendant of a fair trial.

The defendant's contention that the prosecutor's improper remarks during summation deprived him of a fair trial is unpreserved for appellate review (*see* CPL 470.05[2]). In any *1057 event, the challenged remarks did not deprive the defendant of a fair trial (*see People v. McMillan*, 130 A.D.3d 651, 12 N.Y.S.3d 301 [2d Dept.2015]; *People v. Almonte*, 23 A.D.3d 392, 806 N.Y.S.2d 95).

Also unpreserved for appellate review is the defendant's contention that the Supreme Court should have rejected the verdict on the weapons possession count, because it was submitted for consideration only in the alternative. In any event, there is no merit to this argument because, while the court was permitted to remedy the jury's lapse by simply refusing to accept the verdict on the alternative concurrent count (*see People v. McDowell*, 216 A.D.2d 419, 421, 628 N.Y.S.2d 336), it was not required to do so.

The sentence imposed was not excessive (*see People v. Suitte*, 90 A.D.2d 80, 83, 455 N.Y.S.2d 675).

All Citations

130 A.D.3d 1055, 15 N.Y.S.3d 103, 2015 N.Y. Slip Op. 06355

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Appendix B

29 N.Y.3d 69
Court of Appeals of New York.

The PEOPLE of the State of New York, Respondent,
v.
Trevor ANDERSON, Appellant.

April 4, 2017.

Synopsis

Background: Defendant was convicted in the Supreme Court, Kings County, Joseph K. McKay, J., of second-degree attempted murder and second-degree criminal possession of a weapon. He appealed. The Supreme Court, Appellate Division, 130 A.D.3d 1055, 15 N.Y.S.3d 103, affirmed. Defendant appealed.

Holdings: The Court of Appeals, Abdus–Salaam, J., held that:
slides from computerized presentation were properly used in summation, and
defense counsel was not ineffective for failing to object to prosecution's use of slides from computerized presentation during summation.

Affirmed.

Rivera, J., filed dissenting opinion in which Fahey, J., concurred.

Attorneys and Law Firms

***257 Lynn W.L. Fahey, Appellate Advocates, New York City (A. Alexander Donn of counsel), for appellant.

Eric Gonzalez, Acting District Attorney, Brooklyn (Terrence F. Heller and Leonard Joblove of counsel), for respondent.

OPINION OF THE COURT

ABDUS–SALAAM, J.

**640 *71 Defendant Trevor Anderson was convicted, upon a jury verdict, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and criminal possession of a weapon in the second degree (Penal Law § 265.03[1][b]). Defendant argues that he was deprived of a fair trial by the prosecutor's use of PowerPoint slides during summation, and that defense counsel was ineffective for failing to object to the use of the slides. Defense counsel, who objected to one of the PowerPoint slides, was not ineffective for failing to challenge the others, as the vast majority were not objectionable.

I.

According to the People's proof at trial, on March 14, 2010, on a Brooklyn street, defendant approached Erick Brown–Gordon, who was dating defendant's ex-girlfriend Diana Perez, and shot him twice in the abdomen. When Brown–Gordon turned around and tried to flee, defendant shot him twice more, in the back. Defense counsel argued at trial that Perez and **641 ***258 Brown–Gordon were not credible witnesses and had falsely identified defendant.

The Appellate Division rejected defendant's challenges to his conviction and affirmed the judgment (*72 130 A.D.3d 1055, 15 N.Y.S.3d 103 [2d Dept. 2015]). A Judge of this Court granted defendant leave to appeal (26 N.Y.3d 1142, 32 N.Y.S.3d 56, 51 N.E.3d 567 [2016]). We now affirm.

II.

In *People v. Ashwal*, 39 N.Y.2d 105, 383 N.Y.S.2d 204, 347 N.E.2d 564 (1976), this Court explained that it is "fundamental" that counsel must stay within "the four corners of the evidence" during summation and that the prosecutor "may not refer to matters not in evidence or call upon the jury to draw conclusions which are not fairly inferable from the evidence" (*id.* at 109, 383 N.Y.S.2d 204, 347 N.E.2d 564 [citations omitted]; *see also* CJI2d [N.Y.] Pre–Summation Instructions ["(s)ummations provide each lawyer an opportunity to review the evidence and submit for (the jury's) consideration the facts, inferences, and conclusions that they contend may properly be drawn from the evidence"]). The PowerPoint slides used by the People in this case were consistent with these principles. As we observed in *People v. Santiago*, 22 N.Y.3d 740, 751, 986 N.Y.S.2d 375, 9 N.E.3d 870 (2014), PowerPoint "slides depicting an already admitted photograph, with captions accurately tracking prior ... testimony, might reasonably be regarded as relevant and fair ... commentary on the ... evidence, and not simply an appeal to the jury's emotions."

At bottom, a visual demonstration during summation is evaluated in the same manner as an oral statement. If an attorney can point to an exhibit in the courtroom and verbally make an argument, that exhibit and argument may also be displayed to the jury, so long as there is a clear delineation between argument and evidence, either on the face of the visual demonstration, in counsel's argument, or in the court's admonitions. We reject defendant's position that trial exhibits in a PowerPoint presentation may only be displayed to the jury in unaltered, pristine form, and that any written comment or argument superimposed on the slides is improper. Rather, PowerPoint slides may properly be used in summation where, as here, the added captions or markings are consistent with the trial evidence and the fair inferences to be drawn from that evidence. When the superimposed text is clearly not part of the trial exhibits, and thus could not confuse the jury about what is an exhibit and what is argument or commentary, the added text is not objectionable. The slides, in contrast to the exhibits, are not evidence. The court properly instructed the jury that what the lawyers say during summations is not evidence, and that in finding the facts, the jury must consider only the evidence. *73 In this case, as was appropriate, the jury was told that the physical exhibits admitted into evidence would be made available to them, while the slides were not supplied to the jury during deliberations.

Given the parameters of the permissible use of PowerPoint slides in summation, counsel was not ineffective for failing to object. For example, some of the slides were pictures of exhibits with captions or numbers inserted to highlight the relevant portion of those exhibits. Two slides showed a portion of the victim's medical records which included a diagram depicting the location of four wounds. One slide showed the enlarged diagram, with superimposed text reading "Two Gun Shot Wounds to front" and "Two Gun Shot Wounds to back." That text accurately **642 ***259 reflected the information in the exhibit. Another slide showed the same diagram, with numerals on each of the respective markings representing the four wounds. Defendant asserts that the People improperly altered the medical records to reflect their theory that the victim was shot four times, where the records purportedly show that he was shot twice. However, the medical records are not clear as to whether Brown–Gordon was shot twice and sustained four wounds (i.e., one entrance and one exit wound per shot), or was shot three or four times. The text inserted by the People referred to wounds, not shots, and the prosecutor argued, consistent with Brown–Gordon's testimony, that he had been shot four times. These slides, and the oral argument by the prosecutor, were fair comment on the evidence and the reasonable inferences to be drawn from that evidence.

Defendant also argues that his counsel was ineffective for failing to object to slides that showed photographs, received into evidence, of the street on which the shooting had occurred. On two of those slides, the prosecutor had superimposed yellow circles around street lamps which witnesses had testified had sufficiently illuminated the street so that they were able to see defendant. On another slide, there was a superimposed circle around the location where a testifying police officer said he had found three shell casings. These added markings did not misrepresent the evidence. [1]

*74 Additionally, we reject defendant's argument that defense counsel was ineffective for failing to object to the prosecutor's use of a slide that showed defendant's arrest photograph, which had been received in evidence, surrounded by a superimposed circle, with boxes containing text summarizing the People's theory of the case.[2] Defendant argues that this slide improperly altered the trial evidence and that the text boxes surrounded defendant's face as if he were a target. In our view, the added text accurately tracked the witnesses' testimony and the fair inferences to be drawn from the evidence, and the placement of the text boxes around defendant's face was "not simply an appeal to the jury's emotions" (*Santiago*, 22 N.Y.3d at 751, 986 N.Y.S.2d 375, 9 N.E.3d 870).

Nonetheless, even accepting defendant's position that this slide was objectionable, the display of this slide alone did not deprive defendant of a fair trial. Instead, as in *Santiago*, "the objection to the PowerPoint presentation that defendant now raises is not so 'clear-cut' or 'dispositive' an argument that its omission amounted to ineffective assistance of counsel" (22 N.Y.3d at 751, 986 N.Y.S.2d 375, 9 N.E.3d 870).

Finally, to the extent that the court made a *Sandoval* ruling, defendant's claim that the ruling was in error is unpreserved (*see People v. Hawkins*, 11 N.Y.3d 484, 494, 872 N.Y.S.2d 395, 900 N.E.2d 946 [2008]).

***260 **643 Accordingly, the order of the Appellate Division should be affirmed.

RIVERA, J. (dissenting).

The prosecutor's use of digitally edited reproductions of exhibits to convey inferences and misinformation, as well as to project defendant's image as the "face of death," exceeded the bounds of proper summation. A prosecutor may not use altered copies of exhibits to suggest that the evidence unequivocally establishes disputed facts or to distract the jury by playing to emotion. That, however, is what happened here.

The PowerPoint presentation employed by the prosecutor during summation included a modified version of defendant's arrest photograph, with the picture of his head at the center of *75 a symbolic target. This target was surrounded by eight boxes containing both facts of the case and the prosecutor's inferences and mischaracterizations of the evidence, all pointing directly at defendant's face. The reimagining of defendant's likeness—through a powerful visual medium—distracted the jury from the unaltered trial evidence and the relevant facts, and was accompanied by the prosecutor's verbal statements that appealed to passion, not reason.

The error was compounded by the prosecutor's showcase of edited medical exhibits in two additional slides. The slides of the victim's hospital records contained superimposed words and numbers which, in the context of the presentation, misled the jury as to what the actual exhibits showed in order to suggest that certain disputed facts were conclusively established at trial, and to thereby bolster witness testimony. These alterations were the equivalent of using unadmitted evidence.

The strategic use of technology to display visual images enhanced the prejudicial impact of the edited reproductions of these exhibits, and when combined with defense counsel's failure to object to the offensive PowerPoint slides, denied defendant a fair trial. Even in the face of earnest efforts to make the distinction between admitted evidence and argument clear, overlaying evidence with embedded inferences presents issues that cannot be overcome through jury instruction. I would reverse and remit for a new trial.

I.

During summation, the prosecutor may marshal the evidence so as to persuade the jury of defendant's guilt beyond a reasonable doubt, based on the People's view of the facts (CJI2d[NY] Pre–Summation Instructions; 6 Am. Jur. Trials 873; CPL 260.30[9]). The prosecutor may

"comment upon every pertinent matter of fact bearing upon the questions the jury have to decide.... And although counsel is to be afforded the widest latitude by way of comment, denunciation or appeal in advocating [counsel's cause,] summation is not an unbridled debate in which the restraints imposed at trial are cast aside so that counsel may employ all the rhetorical devices at [counsel's] command. There are certain well-defined limits" (*People v. Ashwal,* 39 N.Y.2d 105, 109, 383 N.Y.S.2d 204, 347 N.E.2d 564 [1976] [internal quotation marks and citations omitted]).

*76 It is a fundamental tenet of our legal system that the People's "interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done" and thus while the prosecutor in summation "may strike hard blows, [the prosecutor] is not at liberty to strike foul ones" (*Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 [1935]; *People v. Jones,* 44 N.Y.2d 76, 80, 404 N.Y.S.2d 85, 375 N.E.2d 41 [1978]).

***261 **644 The cardinal rule is that a summation, whether by the People or the defense, "must stay within the four corners of the evidence and avoid irrelevant comments which have no bearing on any legitimate issue in the case" (*Ashwal,* 39 N.Y.2d at 109, 383 N.Y.S.2d 204, 347 N.E.2d 564 [internal quotation marks and citation omitted]). In adherence to this rule, the prosecutor cannot misstate the evidence, or advance misleading representations to encourage inferences of guilt based on facts not in evidence (*People v. Wragg,* 26 N.Y.3d 403, 411–412, 23 N.Y.S.3d 600, 44 N.E.3d 898 [2015]). "Above all [the prosecutor] should not seek to lead the jury away from the issues by drawing irrelevant and inflammatory conclusions which have a decided tendency to prejudice the jury against the defendant" (*Ashwal,* 39 N.Y.2d at 110, 383 N.Y.S.2d 204, 347 N.E.2d 564).

These proscriptions apply to the prosecutor's use of the original physical exhibit or a technologically-generated reproduction in summation. I do not accept the majority's rule that "a visual demonstration during summation is evaluated in the same manner as an oral statement" (majority op. at 72, 52 N.Y.S.3d at 258, 74 N.E.3d at 641). Such an approach ignores the impact of visual aids on the viewer and assumes that the medium and manner by which ideas are communicated has no independent effect on the way those ideas are deconstructed and understood. It also ignores the enhanced effect of combining imagery with oral commentary.

II.

Every person who relies on visual aids to communicate a message is likely cognizant of what the science bears out: the medium of delivery has the potential to powerfully influence the way the message is heard and retained (*see* Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy,* 19 S. Cal. Interdisc. L.J. 237, 293 [2010]). Research shows that pictures are typically remembered better than words (*see* Mary Susan Weldon & Henry L. Roediger, III, *Altering Retrieval Demands Reverses the Picture Superiority Effect,* 15 Memory & Cognition 269, 269 [1987]). Indeed,

*77 "[w]ith visual information, people believe what they see and will not step back and critically examine the conclusions they reach, unless they are explicitly motivated to do so. Thus, the alacrity by which we process and make decisions based on visual information conflicts with a bedrock principle of our legal system—that reasoned deliberation is necessary for a fair justice system" (Jewel, *supra,* at 293).

This can make the use of images at trial particularly problematic when combined with language, as "annotating images with text ... exacerbates the interpretive distortion of images" (Elizabeth G. Porter, *Taking Images Seriously,* 114 Colum. L. Rev. 1687, 1755 [2014]). Particularly troubling in the legal context are recent studies showing "that photos that relate to, but do not provide any evidence for, a claim ... can nudge people towards believing that the related claims are true, whether they are true or not" (Eryn Newman & Neal Feigenson, *The Truthiness of Visual Evidence,* 25 The Jury Expert 1, 1 [Nov. 2013]; *see also* Eryn Newman et al., *Nonprobative Photographs [or Words] Inflate Truthiness,* 19 Psychonomic Bulletin & R. 969, 973 [2012] [studies have suggested that "the mere presence of nonprobative information such as photos might rapidly inflate the perceived truth of many types of true and false claims" and that this **645 ***262 effect can last for up to two days]). [1] Furthermore, "images are much more immediately and tightly linked with emotion than is text," so "while images offer a wealth of creative

and effective communication tools for lawyers, the very elements that make them persuasive pose dangers to the integrity of the decisionmaking process" (Porter, *supra,* at 1755–1756).[2]

I have previously addressed how visual imagery can be particularly impactful in summation,

> "when 'any argument that drones on for 5 or 10 minutes on any one point, regardless of how effective its content is, will lose the jury' (Thomas A. Mauet, Trial Techniques 394 [8th ed. 2010]). Visual ***78** aids are a welcome relief since '[b]y the end of the trial, jurors are looking for new and fresh ways of receiving evidence and arguments' (*id.*). The use of technology at the end of closing argument may be particularly powerful. As one commentator has noted, '[t]he right to the final word has a psychological impact that makes it a forensic prize' (Siegel, N.Y. Prac. § 397 at 692 [5th ed. 2011])." (*People v. Santiago,* 22 N.Y.3d 740, 754, 986 N.Y.S.2d 375, 9 N.E.3d 870 [2014, Rivera, J., dissenting].)

The last side to comment and deploy a visual presentation of its view of the case therefore gains an edge in persuading the jury as it commences deliberations. In the end, if visual tools did not enhance the rhetorical impact of the spoken word or persuade the viewer of the logic of an advocate's reasoning, the prosecutor would not take the time to mark up photos of exhibits, embed those photos with text and images suggesting defendant's guilt, and present those images in a PowerPoint slide show, as was done here.

Given the potential that crafted visual demonstrations have to influence the viewer differently and more memorably than the listener of words spoken without visual accompaniment, in order to "stay within the four corners of the evidence," a prosecutor may display an image of an altered exhibit if the edited version is intended to assist the jury with its fact-finding function, as opposed to drawing the jury's attention away from the relevant issues through prejudicial rhetoric; expresses information that places the exhibit's relevance in context, such as how the exhibit relates to the question of defendant's guilt; accurately and precisely reflects the admitted testimony and documentary evidence, as in the case of superimposed text of a direct quote; or draws attention to some relevant aspect of the exhibit with, for example, arrows, circles, or underlines. Such overlays do no more than represent and organize the evidence clearly and in a manner that the prosecutor believes will ultimately persuade the jury to convict.

By contrast, the prosecutor may not seek to influence the jury's deliberative process by taking an exhibit, copying or enlarging it, and then superimposing on the image inferences to be drawn from the evidence about defendant's guilt. An image of an exhibit embedded with an inference enhances the risk that jurors will ****646** *****263** treat the inference as an undisputed fact, especially where the image is presented alongside reproductions ***79** of other exhibits that contain superimposed testimony. In that way, the altered image elevates argument into fact. Allowing such images also increases the risk that unreasonable inferences will be adopted by the jury. Similarly, the prejudicial impact of inferences that appeal to emotion rather than fact is amplified when combined with a visual image. While a phrase mentioned once in passing may not leave an indelible mark or be sufficiently egregious on its own to sway the jury, the odds that an inflammatory remark will be noted, remembered, and revisited during the deliberative process increase when that remark is presented visually on an edited exhibit (Miriam Z. Mintzer & Joan Gay Snodgrass, *The Picture Superiority Effect: Support for the Distinctiveness Model,* 112 Am. J. Psychol. 113, 113 [1999] [explaining that pictures are easier to remember than roughly equivalent denotational words]).

The majority's assertion that a jury knows the added text is not part of either the trial exhibits or evidence is unresponsive to the issues presented on this appeal (majority op. at 72, 52 N.Y.S.3d at 258, 74 N.E.3d at 641). We are not asked to assume that a juror could not make this distinction, but rather to consider the prejudice associated with overcoming the visual cues. Moreover, it is no answer to state that the jury only has access to the original exhibits and not the prosecutor's summation materials when the prosecutor has the last word and defense counsel cannot respond to the inferences in the exhibit (*compare* Siegel, *supra* § 397 ["Plaintiffs are comforted throughout their summations by the knowledge that the defendant will not get another chance to address this jury"]). Of course, there is no assurance jurors will confirm their impression of the facts by referring back to the exhibits.

Rather than rely on the judge's instructions to "cure" the effect of any possible confluence of inference and fact, or to dispel confusion after the jury has been exposed to the edited exhibit image, it is simply easier—and fairer—to maintain the separation between exhibits and the prosecutor's inferences. As Justice Thurgood Marshall noted, "it is quite unrealistic to

believe that instructions to disregard evidence that a jury might treat in a manner highly prejudicial to a defendant will often be followed" (*Chaffin v. Stynchcombe,* 412 U.S. 17, 41, 93 S.Ct. 1977, 36 L.Ed.2d 714 [1973, Marshall, J., dissenting]). Judge Learned Hand similarly expressed that under some circumstances a limiting instruction may be "[a] recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else [sic]" (***80** *Nash v. United States,* 54 F.2d 1006, 1007 [2d Cir. 1932]). As such, it is preferable to avoid the problem before it is necessary to cure it. This way the jury will not confuse fact with the prosecutor's inference or suggestion.

III.

Defendant's arrest photo, taken 10 days after the incident, was admitted into evidence despite no apparent relevance to the issues. The victim identified defendant, whom he had met on multiple occasions, as the assailant three separate times during the trial. During the testimony of a subsequent witness, the People offered the photo into evidence as representative of defendant's appearance on the day of the lineup—a matter not in dispute. After defense counsel objected on relevance grounds the judge admitted the photo, stating "if that's the only problem or objection, I will receive it, and the jury will find it helpful, or perhaps not."

While "[a]n arrest photograph may be admitted into evidence in order to establish ****647** *****264** that a defendant's appearance was different at the time of the commission of the crime than at trial" (*People v. Ahmr,* 22 A.D.3d 593, 594, 804 N.Y.S.2d 331 [2d Dept.2005]), to show defendant's appearance on the date of the crime (*People v. Santana,* 162 A.D.2d 191, 192, 556 N.Y.S.2d 316 [1st Dept.1990]); or for other identification issues (*see People v. Richards,* 220 A.D.2d 268, 269, 632 N.Y.S.2d 540 [1st Dept. 1995]), when "the complainant and the arresting officer had no trouble identifying defendant in court, there [i]s no legitimate need for the prosecutor to offer into evidence defendant's arrest photographs" (*People v. Black,* 117 A.D.2d 512, 513, 497 N.Y.S.2d 929 [1st Dept.1986]; *see also State v. Lazo,* 209 N.J. 9, 19, 34 A.3d 1233, 1239 [2012] ["(I)f identification is an issue and the State's use of a mug shot is reasonably related to that issue, an arrest photo may be admitted only if it is presented in as neutral a form as possible" (internal quotation marks omitted)]). While the prejudice to the defense from the admission of an arrest photo is most often related to its implication that the defendant has a criminal record (*see e.g. United States v. Harrington,* 490 F.2d 487, 490 [2d Cir.1973]), there is an additional source of potential prejudice, as when the photo is unrelated to identification testimony and serves only to show defendant in a negative light (*see* Paul Lashmar, *How to Humiliate and Shame: A Reporter's Guide to the Power of the Mugshot,* 24 Soc. Semiotics 56, 56–87 [2014] [examining the history and cultural significance of mug shots]).

In defendant's case, the prosecutor relied on the exhibit twice in summation and not to argue a disputed question of identification, ***81** but for impassioned rhetorical emphasis. An unedited slide of the exhibit opened the prosecution's PowerPoint presentation, over which the prosecutor remarked, "[t]hat's the face of the man that [the victim] told you he saw right before the defendant shot him." The prosecutor ended his summation with a highly edited version of the exhibit, one that placed defendant's head in what appears to be a target. The composition of the arrest photo, overlaid with an orange circle and text boxes with arrows pointing at defendant's face, containing snippets of testimony and the prosecutor's inferences, is clearly designed to manipulate the jury's reasoned deliberation by appealing to their emotions and prejudices.

This imagery is reminiscent of cases in which edited arrest photos were found to be improper summation material because of superimposed descriptive labels and inferences which appealed to passion. *In re McKague*, 182 Wash.App. 1008, 2014 WL 2963441 (2014) involved a prosecutor's slide which featured the defendant in the center of a circle with the word "GUILTY" overlaid over his face. Text surrounded the circle, with each phrase pointing towards the defendant. The phrases included text that summarized the trial testimony such as "intended to commit theft," "During the taking-the defendant resorted to force," "took can of oysters," etc. (*id.* [emphasis omitted]). The court found that the "slide was a calculated device employed by the prosecutor to manipulate the jury's reasoned deliberation and impair its fact finding function. It substantially undermined [the defendant's] right to a fair trial" (*id.*). Similarly, the court sitting en banc in *In re Glasmann*, 175 Wash.2d 696, 701–702, 286 P.3d 673, 676 (2012) ordered a new trial because the prosecutor committed pronounced and persistent misconduct when he overlaid the phrase "guilty" across defendant's arrest photo on three separate occasions, as well as phrases like "do you believe him?" and "why should you believe anything he says about the assault?" (emphasis omitted; *see also* *****265** ****648** *State v.*

Walker, 182 Wash.2d 463, 341 P.3d 976 [2015]). In *State v. Walter*, 479 S.W.3d 118, 127 (Mo.2016), the en banc court found overlaying the word "guilty" over defendant's booking photo amounted to prejudicial error requiring a new trial (emphasis omitted; *see also Watters v. State*, 129 Nev. ——, 313 P.3d 243 [2013] [booking photo overlaid with the word "guilty" used during a PowerPoint in People's opening statement so prejudicial as to require a new trial (emphasis omitted)]).

The circle around defendant's head, surrounded by numerous text-filled boxes with arrows pointing towards him, with ***82** one text box asserting that defendant "[l]ay in wait for [the victim] with .45 cal handgun," is equivalent to defendant's image superimposed with the word "guilty" over it. Just as in *In re Glasmann*, this imagery, along with a statement not in evidence that implies defendant's actions were predatory, manifests an appeal to the passions and prejudice of the jury (175 Wash.2d at 711, 286 P.3d at 681). The slide is a clear visual communication to the jury that the defendant is a frightening man whom the State has dedicated significant resources to target.

The edited exhibit does not even comply with the majority's rule because the slide is not merely a display of a verbal argument or the equivalent to pointing at something. The prosecutor could not physically draw a circle with arrows pointing at defendant and, significantly, could not simultaneously have asserted all the statements contained in the text boxes. That imagery is only possible through the editing of the exhibit. Moreover, contrary to the majority's claims, the text in the final slide does not "accurately track [ ] the witnesses' testimony and the fair inferences to be drawn from the evidence" (majority op. at 74, 52 N.Y.S.3d at 259, 74 N.E.3d at 642). The notion that defendant "[l]ay in wait for" the victim outside is belied by the trial testimony that he told his ex-girlfriend that he was on his way into the building. When she tried to dissuade him, he told her if she did not come out he would go in. Similarly, there was no testimony at trial to suggest that the victim was shot with an "illegal" handgun as the gun was never recovered. Other text boxes present disputed claims as facts, such as the number of shots and the distance between the shooter and the victim. The text boxes blended the facts, inferences, and speculation and did not present a "clear delineation between argument and evidence" (*id.* at 72, 52 N.Y.S.3d at 258, 74 N.E.3d at 641). Nor does this final slide avoid "an appeal to the jury's emotions" (*id.* at 74, 52 N.Y.S.3d at 259, 74 N.E.3d at 642). The intent of the edited exhibit was laid bare when, during the display of the slide, the prosecutor dramatically declared that defendant's image: "was the face of death on March 14, 2010." [3]

In addition, the prosecutor's use of slides depicting edited images of the victim's hospital records was improper because the slides were misleading. The added text and numbers appeared to scientifically confirm the victim was shot four times, twice in the front and then twice in the back, when the hospital ***83** records did not establish the number and order of shots. This is a further example of why an inference—here that the victim was shot four times, twice in the back—can be confused as an undisputed fact and should not be superimposed on a reproduction of an exhibit.

These slides were additionally prejudicial to defendant because medical documents, like the hospital records here, have ****649 ***266** an air of objectivity that can carry significant weight with the jury (*see Vella v. Commissioner of Social Sec.*, 394 Fed.Appx. 755, 757 [2d Cir.2010] [medical records considered "objective evidence"]). The prosecutor used the slides to convey that the victim was shot four times, and stated that the exhibits were physical evidence corroborating the victim's testimony to that effect. Thus, the exhibit was used as objective evidence to bolster the victim's testimony and undermine the defense's argument that the victim was not telling the truth.

IV.

The prosecutor exceeded the scope of proper summation by including in his PowerPoint presentation edited slides featuring defendant's arrest photo and hospital records that misrepresented the evidence, misled the jury, and appealed to emotion. Defense counsel should have objected during summation (*People v. Wright*, 25 N.Y.3d 769, 780, 16 N.Y.S.3d 485, 37 N.E.3d 1127 [2015]). His failure to do so deprived defendant of meaningful representation, and left defendant vulnerable to the force of these slides on the jury's deliberations. There was no strategic reason for counsel's silence (*id.*), as he was aware before summations that the PowerPoint presentation would be—as counsel described it—"a force to be reckoned with." Given the impact of summation, counsel's failure to object constituted ineffective assistance of counsel (*id.*; *People v. Fisher*, 18 N.Y.3d 964, 967, 944 N.Y.S.2d 453, 967 N.E.2d 676 [2012]). For the reasons I have discussed, the display of these slides, and defense counsel's failure to

object, denied defendant a fair trial and was highly prejudicial (*People v. Baldi,* 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 429 N.E.2d 400 [1981]; *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 [1984]).

I dissent.

Chief Judge DiFIORE and Judges STEIN, GARCIA and WILSON concur; Judge RIVERA dissents in an opinion in which Judge FAHEY concurs.

Order affirmed.

All Citations

29 N.Y.3d 69, 74 N.E.3d 639, 52 N.Y.S.3d 256, 2017 N.Y. Slip Op. 02589

Footnotes

1 The slides that did not display the exhibits but summarized the evidence at trial were not objectionable, as they did not "call upon the jury to draw conclusions which are not fairly inferable from the evidence" (*Ashwal,* 39 N.Y.2d at 110, 383 N.Y.S.2d 204, 347 N.E.2d 564).

2 The text in the boxes stated "3/14/10—Armed himself with a loaded and operable illegal .45 cal handgun"; "Made a series of calls to Diana immediately before shooting"; "Lay in wait for Erick Brown–Gordon with .45 cal handgun"; "Fired .45 handgun twice from less than 8 feet away as Erick faced him"; "Fired .45 handgun twice more as Erick ran from deft"; "His bullets hit Erick twice in front and twice in back"; "Defendant grabbed Diana and fled scene"; and "3/24/10—Erick identified deft as shooter in line-up."

1 For a summary of much of this research and the case law, *see* Matthew S. Robertson, Note, *Guilty As Photoshopped: An Examination of Recent Case Law and Scholarship Regarding the Use of Non–Probative Images in the Courtroom,* 55 Washburn L.J. 731, 732 (2016).

2 "Visual presentations may send subconscious messages to jurors, creating a significant risk that jurors reach verdicts based on emotionalism and leaps in logic rather than on the facts in evidence" (Janet L. Hoffman, *Visual Advocacy: The Effective Use of Demonstrative Evidence at Trial,* 30 Litig. J. 9 [2011]).

3 Defense counsel's objection to this statement was overruled.

End of Document

Appendix C

453 F.Supp.3d 574
United States District Court, E.D. New York.

Trevor ANDERSON, Petitioner,

v.

William LEE, Respondent.

19-cv-4488 (BMC)
|
Signed 04/07/2020

Synopsis

Background: Following affirmance on direct appeal of the petitioner's state court convictions for attempted second-degree murder and second-degree criminal weapon possession and his 20-year prison sentence, 29 N.Y.3d 69, 74 N.E.3d 639, 52 N.Y.S.3d 256, he filed petition for federal habeas relief.

Holdings: The District Court, Brian M. Cogan, J., held that:
determination by New York Court of Appeals, that slides from computerized presentation were properly used in prosecutor's closing argument, was not contrary to clearly established federal law, and thus, federal habeas relief was not warranted on that basis;
claim that sentence was based on improper factual findings was procedurally barred on habeas review; and
ineffective assistance claim was not procedurally barred on habeas review.

So ordered.
Post-Conviction Review

Attorneys and Law Firms

*576 Trevor Anderson, Napanoch, NY, pro se.

Kings County District Attorneys Office, New York State Attorney Generals Office, Terrence F. Heller, Office of the District Attorney, Kings County, Brooklyn, NY, for Respondent.

MEMORANDUM DECISION AND ORDER

COGAN, District Judge.

*577 Petitioner seeks habeas corpus relief under 28 U.S.C. § 2254 from his conviction for attempted second-degree murder (N.Y. Penal L. § 125.25(2)) and second-degree criminal weapon possession (N.Y. Penal L. § 265.03(3)). Petitioner was convicted after a second trial, the first having ended with a hung jury. He was sentenced to twenty years' custody. The facts will be stated below as necessary to address each of his points of error, but to summarize, petitioner fired multiple shots at close range into one Erick Brown-Gordon, who was dating petitioner's former girlfriend, Diana Perez.

Petitioner raises three points of error in his petition: (1) prosecutorial misconduct by use of an argumentative PowerPoint presentation during closing argument; (2) imposition of an unconstitutional sentence; and (3) ineffective assistance of trial counsel on numerous grounds. Petitioner's first point of error does not meet the standard for habeas corpus relief, and his second is procedurally barred.

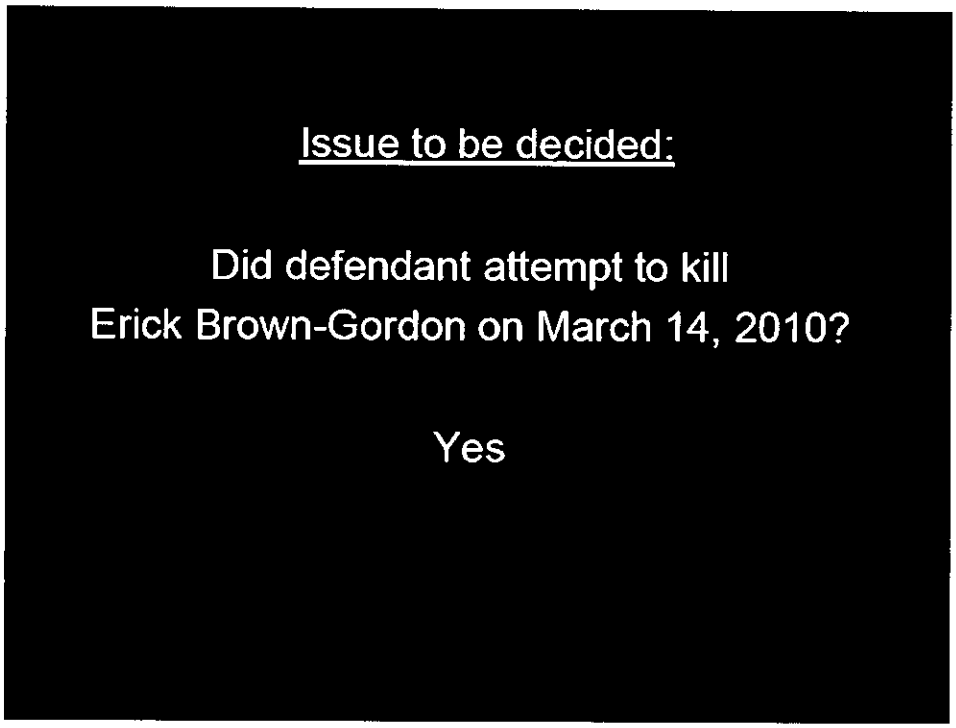
However, the state court exorbitantly applied a state procedural bar as to petitioner's ineffective assistance of counsel claim. In addition, it did not alternatively review the entirety of that claim on the merits. Because respondent has not had the opportunity to brief the claim under the *de novo* review standard that applies, I will schedule additional briefing limited to the ineffective assistance claim under that standard.

I. The PowerPoint Presentation

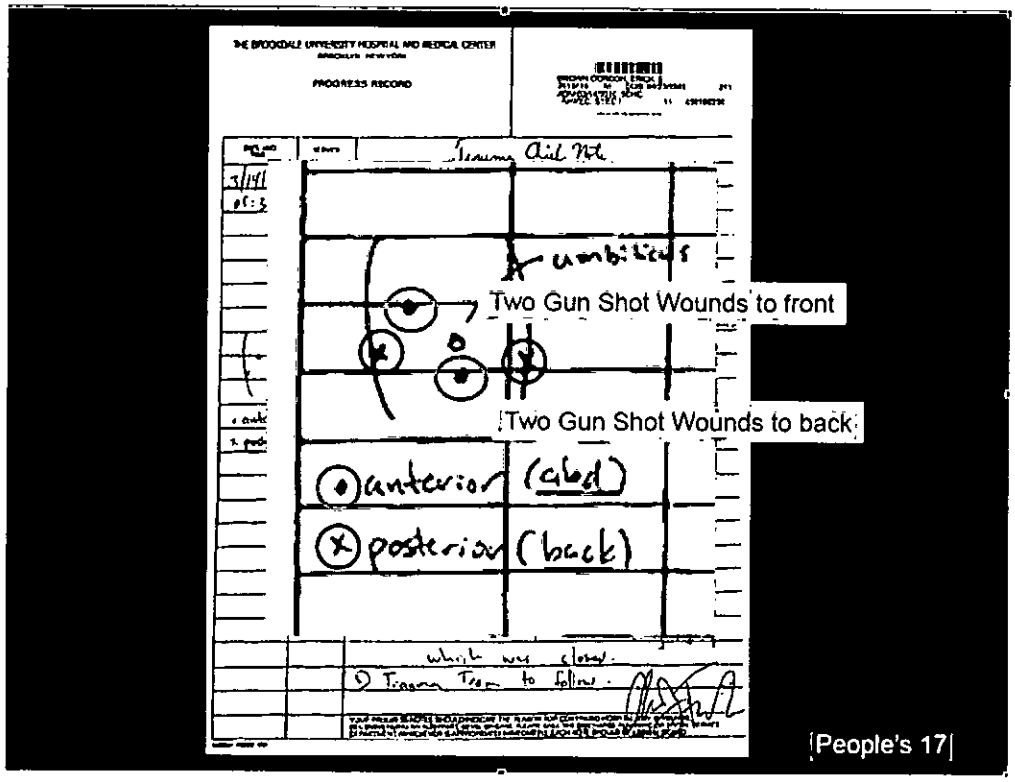
A. Background

The prosecutor accompanied his closing argument with a 77-slide PowerPoint presentation. Most of the slides consisted of talking points to focus the jury on the particular point that the prosecutor was making, e.g., the third slide was:

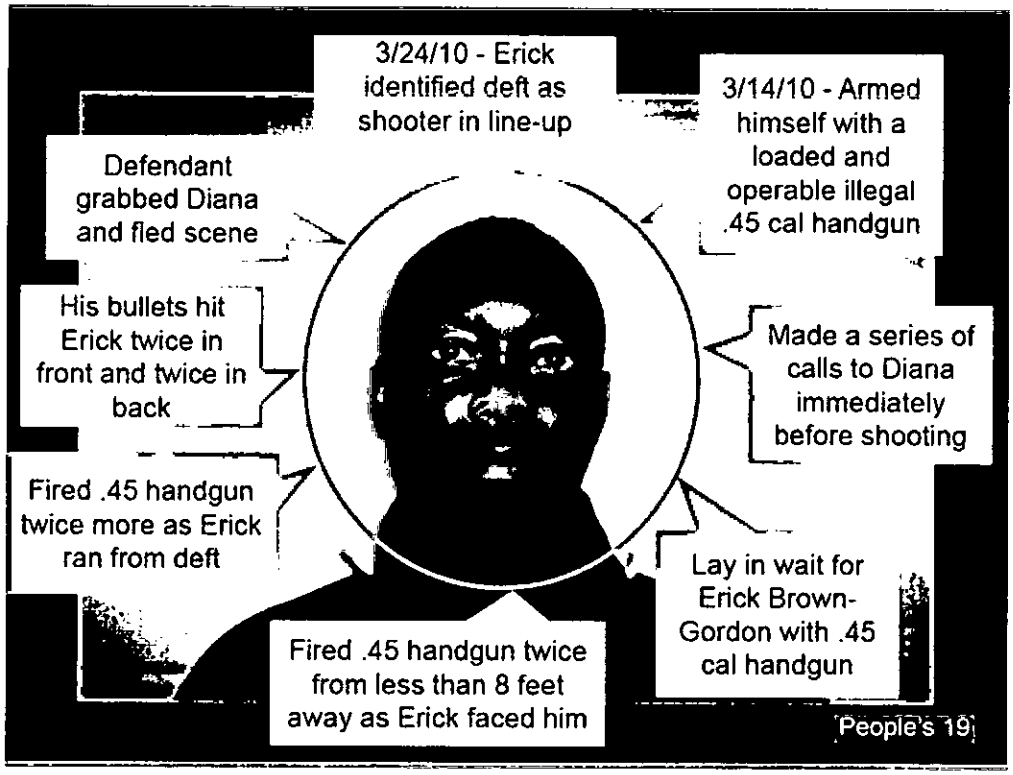
*578



Other slides consisted of exhibits that had been admitted at trial, with superimposed commentary that tracked the closing argument. For example, when the prosecutor referred in his closing to the fact that the victim had been shot multiple times, he showed a slide that depicted a diagram of the victim (received in evidence), on which the superimposed phrases "Two Gun Shot Wounds to front" and "Two Gun Shot Wounds to back" appeared, with green circles drawn around the diagram's front gunshot wounds and red circles around the back gunshot wounds:



Perhaps the most heavily attacked slide on direct appeal was one that showed a photograph of defendant (received in evidence), *579 with superimposed references to other evidence in the case:



Because petitioner's trial counsel had not objected to the PowerPoint, petitioner contended on appeal that his counsel was ineffective for failing to object. In granting leave to appeal, the New York Court of Appeals effectively mooted the ineffective assistance issue by addressing whether the PowerPoint presentation compromised petitioner's right to a fair trial. It held that the PowerPoint presentation was proper, and therefore trial counsel was objectively reasonable in not objecting to it. The Court laid down this basic rule regarding the use of PowerPoint slides during closing:

> [A] visual demonstration during summation is evaluated in the same manner as an oral statement. ... PowerPoint slides may properly be used in summation where, as here, the added captions or markings are consistent with the trial evidence and the fair inferences to be drawn from that evidence. When the superimposed text is clearly not part of the trial exhibits, and thus could not confuse the jury about what is an exhibit and what is argument or commentary, the added text is not objectionable. The slides, in contrast to the exhibits, are not evidence. The court properly instructed the jury that what the lawyers say during summations is not evidence, and that in finding the facts, the jury must consider only the evidence. In this case, as was appropriate, the jury was told that the physical exhibits admitted into evidence would be made available to them, while the slides were not supplied to the jury during deliberations.

People v. Anderson, 29 N.Y.3d 69, 72-73, 52 N.Y.S.3d 256, 257-58, 74 N.E.3d 639 (2017). Commenting specifically on the photograph of petitioner with superimposed evidentiary references, the Court held that: "In our view, the added text accurately tracked the witnesses' testimony and the fair inferences to be drawn from the evidence, and the placement of the text boxes around defendant's face was not simply an appeal to the jury's emotions." ***580** Id. at 74, 52 N.Y.S.3d at 259, 74 N.E.3d 639 (internal quotations and citation omitted).

B. Analysis

Because the New York Court of Appeals decided this issue on the merits, my review attracts the provisions of the Antiterrorism and Effective Penalty Act of 1996, 28 U.S.C. § 2254 ("AEDPA"). AEDPA permits reversal only if a state court's legal conclusion is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ...." 28 U.S.C. § 2254(d)(1). The decision of a state court is "contrary" to clearly established federal law within the meaning of § 2254(d)(1) if it is "diametrically different" from, "opposite in character or nature," or "mutually opposed" to the relevant Supreme Court precedent. Williams v. Taylor, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court decision involves "an unreasonable application" of clearly established federal law if the state court applies federal law to the facts of the case "in an objectively unreasonable manner." Brown v. Payton, 544 U.S. 133, 141, 125 S.Ct. 1432, 161 L.Ed.2d 334 (2005).

The Supreme Court has made clear that the AEDPA standard of review is extremely narrow, and is intended only as "a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal ...." Ryan v. Gonzales, 568 U.S. 57, 75, 133 S.Ct. 696, 184 L.Ed.2d 528 (2013) (internal quotation marks and citation omitted). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 88, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004)). The Supreme Court has repeatedly admonished Circuit Courts for not affording sufficient deference to state court determinations of constitutional issues. See, e.g., White v. Wheeler, 577 U.S. 73, 136 S. Ct. 456, 460, 193 L.Ed.2d 384 (2015) ("This Court, time and again, has instructed that AEDPA, by setting forth necessary predicates before state-court judgments may be set aside, 'erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.' " (quoting Burt v. Titlow, 571 U.S. 12, 19, 134 S.Ct. 10, 187 L.Ed.2d 348 (2013))).

There is of course no Supreme Court precedent referencing the due process limitations of a PowerPoint presentation. We are therefore relegated to the Supreme Court precedent, perhaps most prominently Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), dealing with the due process limitations of closing argument in general. The Supreme Court has recognized that "because the Darden standard is a very general one, leaving courts 'more leeway in reaching outcomes in case-by-case determinations,' " habeas corpus review is particularly circumscribed. Parker v. Matthews, 567 U.S. 37, 48, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012) (quoting Yarborough, 541 U.S. at 664, 124 S.Ct. 2140). The cases hold that even when a closing argument contains "undoubtedly" improper statements, it "is not enough that the prosecutors' remarks were undesirable or even universally condemned." Darden, 477 U.S. at 181, 106 S.Ct. 2464 (quoting Darden v. Wainwright, 699 F.2d 1031, 1036 (11th Cir. 1983)). Rather, "[t]he relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Id. (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)).

*581 Applying these authorities to petitioner's claim here, it is plain that the New York Court of Appeals' decision is not contrary to or an unreasonable application of any Supreme Court decision. Indeed, the starting point of the Supreme Court cases is the assumption that some of the prosecutor's comments during closing were excessive, and even then, only in a narrow group of cases will a court properly find a due process violation. Here, in contrast, there was nothing improper about the New York Court of Appeals' conclusion that since the PowerPoint presentation was based on the evidence or inferences that a jury could reasonably draw from the evidence, the prosecutor had not engaged in any misconduct at all. Its holding does not even approach any decision of the Supreme Court, and therefore petitioner's point of error is rejected.

II. Sentencing Error

On direct appeal and in a post-judgment motion pursuant to N.Y. C.P.L. § 440.20, petitioner challenged his sentence on two different grounds. On direct appeal, he argued that his sentence was harsh and excessive. This is an appeal to the Appellate Division's discretion and since petitioner was sentenced within the statutory range for his crimes, it is not cognizable on federal habeas corpus grounds. See White v. Keane, 969 F.2d 1381, 1383 (2d Cir. 1992). In any event, it does not appear that petitioner seeks to reassert this argument in his habeas corpus petition.

He is reasserting the argument he made pursuant to C.P.L. § 440.20, which is similar to one of his arguments advanced in connection with his claim of ineffective assistance of trial counsel as described above. That is, he contends that he was sentenced under improper facts because the sentencing court thought he had shot Brown-Gordon four times when in fact he had only shot Brown-Gordon two or three. In addition, he contends that the trial court improperly found that the shooting was out of jealousy when there was no evidence to support that.

The § 440.20 court dismembered his argument. First, the court held that the claim was procedurally barred because petitioner failed to raise it on direct appeal. Petitioner contended that since his sentencing challenge in the § 440.20 proceeding was on a different theory than the "harsh and excessive" argument, he had the right to raise it by way of a collateral attack. As the § 440.20 court held, that is wrong; both theories concerning the sentence were available on the face of the record and had to be raised on direct appeal. See C.P.L. § 440.10(2)(c).

Second, the § 440.20 court held alternatively that petitioner had his facts wrong. First, the § 440.20 court had not made a finding as to how many times petitioner had shot Brown-Gordon; it had raised the question and decided that since there were multiple shots in any event, it didn't matter:

> [T]here is no indication whatsoever in the sentencing transcript that the Court made any determination as to the number of times that complainant had been shot. To the contrary, the Court clearly recognized that the testimony gave rise to the possibility that he had been shot somewhere between two and four times, notwithstanding his [Brown-Gordon's] testimony that he had been shot four times.

As to the "jealousy" point, the § 440.20 court ruled that "there was absolutely no indication" that the Court had considered "jealousy" in determining the sentence. [1]

*582 The § 440.20 court was right that the claim was procedurally barred because it should have been raised on direct appeal. There is neither cause nor prejudice as petitioner never raised, let alone exhausted, a claim of ineffective assistance of appellate counsel for having failed to raise it on appeal, and twenty years – less than the 25-year maximum that could have been imposed – does not constitute a miscarriage of justice for a cold-blooded shooting.

III. Ineffective assistance of trial counsel

A. Background

In a motion under N.Y. C.P.L. § 440.10, petitioner alleged a plethora of errors allegedly committed by his trial counsel. Some of his claims asserted on-the-record errors which had not been raised on direct appeal or as to which the Appellate Division or Court of Appeals had rejected the underlying claim on the merits, and two alleged acts or omissions of ineffective assistance that occurred off-the-record. Separating and understanding each claim is difficult because some are expressed in a convoluted manner, others are barely developed, and some overlap with others.

Liberally reading his petition, the ineffective assistance claims that petitioner has carried over from his § 440 motion to this habeas corpus proceeding are the following alleged failures by counsel. Those in italics are the ones that the § 440 court rejected on the merits, holding that the remainder were or could have been raised on direct appeal and were therefore procedurally barred:

1. Failure to seek dismissal of the indictment on the ground of improper evidence submitted to the grand jury, consisting of Diana Perez's testimony that she had observed petitioner with guns prior to the shooting (petitioner referred to this as "prosecutorial misconduct");

2. Failure to seek suppression of evidence or dismissal of the indictment on the ground that there was no probable cause to arrest petitioner;

3. Lack of objection to a Sandoval ruling;

4. Failure to seek suppression of a witness's identification of petitioner on the ground that the police used a mugshot of petitioner from an earlier "illegal arrest."

5. *Failure to interview the prosecution's witnesses prior to trial (referred to by petitioner as a "failure to investigate").*

6. Lack of objection to the PowerPoint presentation;

7. Failure to object to the exorbitant use of a pen register warrant, and to suppress evidence obtained through the pen register, because police used it to obtain location information on petitioner as well as telephone number information;

8. Failure to highlight numerous witness inconsistencies at trial; and

9. *Failure to hire a medical expert to show that petitioner shot Brown-Gordon only twice instead of four times, as the prosecutor argued during closing.*

B. "Mixed" ineffective assistance claims under New York law

A federal court should not address the merits of a petitioner's habeas claim if a state court has rejected the claim on "a state law ground that is independent of the federal question and adequate to support the judgment." *583 Lee v. Kemna, 534 U.S. 362, 375, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002) (quoting Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)) (emphasis omitted). When a state court rejects a petitioner's claim because he failed to comply with a state procedural rule, the procedural bar may constitute an adequate and independent ground for the state court's decision. See, e.g.,

Coleman, 501 U.S. at 729-30, 111 S.Ct. 2546; Murden v. Artuz, 497 F.3d 178, 193 (2d Cir. 2007). State procedural grounds are only adequate to support the judgment and foreclose federal review if they are "firmly established and regularly followed" in the state. Murden, 497 F.3d at 193 (quoting Monroe v. Kuhlman, 433 F.3d 236, 241 (2d Cir. 2006)).

It is well-established that failure to comply with the requirements of C.P.L. § 440.10 can constitute an adequate and independent state law ground precluding federal habeas review. See, e.g., Finley v. Graham, No. 12-cv-9055, 2016 WL 47333, at *9-11 (S.D.N.Y. Jan. 4, 2016) (collecting cases). However, "[w]here the ineffective assistance of counsel claim is not record-based, federal habeas courts have held that the rule of C.P.L § 440.10(2)(c) is not adequate" to bar habeas review. Byron v. Ercole, No. 07-cv-4671, 2008 WL 2795898, at *13 (E.D.N.Y. July 18, 2008) (citation and internal quotation marks omitted); see also Morency v. Annucci, No. 14-cv-672, 2017 WL 4417718, at *9 (E.D.N.Y. March 20, 2017), report and recommendation adopted by, 2017 WL 4417647 (E.D.N.Y. Sep. 30, 2017).

In this case, in holding that all but the medical expert and failure to interview points were procedurally barred because petitioner could have raised them on direct appeal, the § 440 court relied upon N.Y. C.P.L. § 440.10(2)(c). The statute provides that

> the court must deny a motion to vacate a judgment when ... [a]lthough sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him ....

The purpose of this provision is to prohibit criminal defendants from resuscitating claims that could have been raised on direct appeal but were not. See People v. Cooks, 67 N.Y.2d 100, 500 N.Y.S.2d 503, 491 N.E.2d 676 (1986).

However, the New York courts have recognized that in some cases where a defendant's ineffective assistance of trial counsel claim includes both on-the-record and off-the-record arguments, a § 440 motion is the only place that such a claim – referred to as a "mixed claim" – can be raised. Thus, in People v. Maxwell, 89 A.D.3d 1108, 1109, 933 N.Y.S.2d 386, 388 (2nd Dep't 2011), the Appellate Division stated:

> [S]ince some of the defendant's allegations of ineffectiveness involve matters appearing on the record, while others involve matters that are outside the record, the defendant has presented a "mixed claim[ ]" of ineffective assistance. In order to properly review a defendant's claim of ineffective assistance, a court must consider all of his or her allegations – as well as the evidence, the law, and the circumstances of the case – "in totality". Thus, where, as here, a defendant presents a mixed claim of ineffective assistance that depends, in part, upon matters that do not appear on the record, it cannot be said that "sufficient facts appear on the record with respect to the ground or issue ***584** raised upon the motion to permit adequate review thereof upon such an appeal" (CPL 440.10 [2] [b]). Therefore, such a mixed claim, presented in a CPL 440.10 motion, is not procedurally barred, and the CPL 440.10 proceeding is the appropriate forum for reviewing the claim of ineffectiveness in its entirety.

(citations omitted).

In opposing petitioner's § 440 motion, the District Attorney urged the § 440 court to hold that the on-the-record arguments of petitioner's ineffective assistance of trial counsel claim were procedurally barred as most were not raised on direct appeal, ignoring the New York authorities concerning mixed claims. [2]

In People v. Taylor, 156 A.D.3d 86, 64 N.Y.S.3d 714 (3d Dep't 2017), the defendant moved to vacate his conviction on the ground that he was denied effective assistance of counsel. His motion alleged four errors by his trial counsel as the basis for his overall ineffective assistance claim, namely, that his counsel failed to: (1) impeach the prosecution's key witness with a prior inconsistent statement; (2) request that a certain lesser included offense be submitted to the jury; (3) object to the Court's

erroneous charge; and (4) sufficiently articulate and support a request for an instruction on the defense of justification. Id. at 89, 64 N.Y.S.3d at 715.

The Appellate Division found that trial counsel's first and second alleged failures did not involve matters adequately reflected in the record and thus were not procedurally barred. Specifically, as to the failure to impeach point, defendant's argument was "dependent upon [a] statement[ ] to the police that [was] outside the record." Id. at 90, 64 N.Y.S.3d at 716. Similarly, as to the failure to request a lesser included offense charge, the Appellate Division held that "while it is apparent from the face of the record that counsel did not request submission of the [lesser included offense charge], it is axiomatic that the decision ... is often based on strategic considerations", which were also not discernable from the face of the record. Id. (internal quotation marks omitted).

Even though the third and fourth alleged failures were on-the-record, the Taylor court, relying on Maxwell, proceeded to combine the defendant's record-based allegations of ineffectiveness with his non-record-based allegations in the context of the § 440.10 motion, thereby permitting review of his "unified" claim of ineffective assistance in its entirety. Id. at 91-93, 64 N.Y.S.3d at 716-718. Upon conducting this review, the court found that – even though counsel's errors, individually, may not have necessarily rose to the level of ineffective assistance – the "cumulative effect" of defense counsel's record- and non-record-based failures deprived the defendant of meaningful representation and ordered a new trial. Id. at 95-97, 64 N.Y.S.3d at 719-21.

The weight of state case law suggest that New York courts regularly apply the firmly established concept of an "unified" ineffective assistance of counsel claim espoused by Maxwell and Taylor when a "mixed" claim is raised and permit the claim to be brought in collateral proceedings. See, e.g., People v. Wilson, 162 A.D.3d 1591, 78 N.Y.S.3d 819 (4th Dep't 2018); ***585** People v. Kerley, 161 A.D.3d 1458, 77 N.Y.S.3d 748 (3rd Dep't 2018); People v. Barbuto, 126 A.D.3d 1501, 6 N.Y.S.3d 369, 373 (4th Dep't 2015); People v. Stokes, 126 A.D.3d 1018, 3 N.Y.S.3d 618, 619 (2nd Dep't 2015); People v. Freeman, 93 A.D.3d 805, 940 N.Y.S.2d 314 (2nd Dep't 2012).

C. Exorbitant application of a state procedural bar

In Pierotti v. Walsh, 834 F.3d 171, 178-79 (2d Cir. 2016), the Second Circuit recognized Maxwell as the dominant view under New York law when a "mixed" ineffective assistance claim is raised. It declined to recognize the procedural bar invoked by the state courts in that case because, "where 'a defendant presents a mixed claim of ineffective assistance ...[,] such a mixed claim, presented in a 440.10 motion, is not procedurally barred, and the 440.10 proceeding is the appropriate forum for reviewing the ineffectiveness in its entirety." Id. at 178 (quoting Maxwell, 933 N.Y.S.2d at 388). Specifically, the Circuit noted that "the weight of state case law suggest[s] that New York Courts do not ordinarily apply [Section] 440.10(2)(c) to bar claims of ineffective assistance based on out-of-court" facts. Id.

The Pierotti Court held that the petitioner had presented a "mixed claim" because the claim depended on some facts appearing on the trial record, but also turned on facts appearing outside the record. It therefore concluded that the state court's reliance on a procedural bar represented an "exorbitant application" of the state rule and that § 440.10(2)(c) was "inadequate" to foreclose review of the petitioner's ineffective assistance of counsel claim. Id. at 180.

The same result is required here. Despite recognizing that petitioner was raising a "mixed" ineffective assistance of counsel claim, the § 440 court proceeded to bifurcate the alleged failures of petitioner's trial counsel. It purported to do this under the authority of People v. Lebron, 128 A.D.3d 851, 852, 9 N.Y.S.3d 128, 129 (2nd Dep't 2015), applying the language in that case holding that allegations of ineffective assistance based on matters outside the record need only be considered if "that fact [i.e., the off-the-record component], in and of itself, was material, and if established, would entitle him to relief." In other words, Lebron seems to require grounds outside the record which by themselves suffice to meet the standard for ineffective assistance of counsel before the court may consider arguments that were or could have been raised on direct appeal.

Applying this principle, the § 440 court found that two off-the-record alleged deficiencies of trial counsel lacked merit, while concluding that the majority of trial counsel's alleged failures were procedurally barred, as they were adequately reflected on-

the-record and thus should have been raised on direct appeal. In other words, it did not treat petitioner's ineffective assistance claim as a single, unified claim.

There is an inconsistency between Lebron, on the one hand, and the Maxwell and Taylor line of cases. The Maxwell and Taylor line of cases establish the necessity of considering the "totality of the circumstances" in determining ineffective assistance of trial counsel claims. Lebron, in contrast, seems to require grounds outside the record which by themselves suffice to meet the standard for ineffective assistance of trial counsel before the court may consider arguments that were or could have been raised on direct appeal. But if that is a prerequisite, then why would a defendant ever need to invoke Maxwell's "mixed claim" framework? He could prevail without regard to his on-the-record arguments if his off-the-record arguments were themselves sufficient to warrant relief. It follows that Lebron, as applied by ***586** the § 440 court here, contradicts the Maxwell and Taylor line of cases.

Having reviewed the case law in New York and the Court of Appeals' interpretation of it in Pierotti, I am compelled to conclude that Lebron is an outlier. As the Second Circuit noted in Pierotti, 834 F.3d at 178, Maxwell is "New York law" in this context. Thus, the § 440 court's application of Lebron, an opinion that is irreconcilable with the "mixed claim" framework of Maxwell and goes against the weight of its progeny, constitutes an "exorbitant application" of a state rule. In other words, the holding in Lebron is not firmly established and regularly followed in New York.

Consequently, petitioner's unified ineffective assistance of counsel claim is not procedurally barred, and I will therefore need to review his claim on its merits. See Murden, 497 F.3d at 196. The remaining question is what standard of review should apply to that analysis. Is it the deferential review standard from AEDPA discussed in Point I above, or should I undertake the review *de novo*?

Had the § 440 court found the entirety of petitioner's claim of ineffective assistance without merit as an alternative to its invocation of a partial procedural bar, this alternative holding would be entitled to deferential review on the merits. See Zarvela v. Artuz, 364 F.3d 415, 417 (2d Cir. 2004). But as explained above, the § 440 court announced no such alternative holding as to petitioner's unified ineffective assistance claim. It excluded arguments that could have been raised on the record as forfeited and considered on the merits only the two arguments that it found off the record. As a result, I am required to consider the unified ineffective assistance claim *de novo*. See Acevedo v. Capra, No. 13-cv-5579, 2014 WL 1236763, at *17 (E.D.N.Y. March 25, 2014) ("The proper standard of review is *de novo*, because petitioner has done all that state law allows him to do to exhaust his ineffective assistance claim, and yet no state court has considered that claim in its totality. There is thus no state court decision to which AEDPA deference can be afforded.").

There is one further caveat to my conclusion. The § 440 court properly recognized that since the Court of Appeals had expressly held that counsel was objectively reasonable in not objecting to the PowerPoint, then petitioner's argument to the contrary could not be raised in his § 440 motion. In other words, the § 440 court was not free to reject the Court of Appeals' express determination of objective reasonableness as to the PowerPoint argument. See People v. Turner, 5 N.Y.3d 476, 482, 806 N.Y.S.2d 154, 840 N.E.2d 123 (2005); see also Jiannaras v. Alfant, 124 A.D.3d 582, 586, 1 N.Y.S.3d 332, 335 (2nd Dep't 2015) ("[T]his Court is a court of precedent and is bound to follow the Court of Appeals."). If the Court of Appeals expressly holds that an alleged act or omission was objectively reasonable, that act or omission cannot be part of the "unified claim" of ineffective assistance raised in a § 440 proceeding. Indeed, whether an act or omission is found objectively reasonable on direct appeal or on a § 440 motion doesn't matter – once the act or omission is so characterized, it is no longer part of the unified ineffective assistance claim.

This follows from the principle behind Maxwell and its progeny. Those cases seek to address the concern that an act or omission by trial counsel, even if objectively unreasonable, may cause insufficient prejudice, or may be considered "harmless," so that, standing alone, the error does not satisfy the prejudice prong of Strickland. But trial prejudice, like evidence at trial itself, is both qualitative and quantitative. One error or omission may not cause sufficient prejudice but two or more may.

***587** That is not the case with Strickland's first prong of objective reasonableness. Although objective reasonableness must be considered in the context of the entire trial, see Purdy v. United States, 208 F.3d 41, 44 (2d Cir. 2000) (citing Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)), unrelated acts or omissions that are each found to be

objectively reasonable cannot contribute to an ineffective assistance claim because such a claim requires an overall finding of objective unreasonableness. Unlike prejudice, there is no "cumulative" aspect to evaluating whether a particular decision by trial counsel was objectively reasonable.

The District Attorney responds that pursuant to C.P.L. § 440.10(2)(c), the procedural bar should apply not only to ineffective assistance arguments that were actually raised on direct appeal and rejected on objective reasonableness grounds, but also to ineffective assistance arguments that could have been raised on direct appeal and were not. That approach, however, would lead us right back to a violation of the holding in Maxwell and its progeny.

In contrast, there is no compromise of the purpose behind C.P.L. § 440.10(2)(c) by reading it in conjunction with Maxwell. Appellate counsel on direct appeal is still incentivized to raise any argument of ineffective assistance that appellate counsel decides can be determined on the record. If the appellate courts reject it based on a finding that counsel's conduct was objectively reasonable, that logically should be the same result that would have obtained had the argument been raised in a § 440 motion. And if the appellate courts reject it on the ground that any prejudice was insufficient, then it may be re-presented to a § 440 court as part of a unified claim of ineffective assistance if there are also off-the-record arguments.

CONCLUSION

The claims in the petition arising from the PowerPoint presentation and the sentencing error are denied. Because the District Attorney has not had the opportunity to brief the entirety of the claim of ineffective assistance of counsel (excluding the PowerPoint claim) on a *de novo* basis before me, he is granted 20 days to do so. Petitioner may have 20 days thereafter to reply. Decision on the ineffective assistance of counsel claim is deferred pending receipt of this additional briefing.

SO ORDERED.

All Citations

453 F.Supp.3d 574

Footnotes

1 In any event, the motive of jealousy was an almost unavoidable conclusion. The only thing that petitioner and Brown-Gordon had in common was their respective prior and current relationships with Diana Perez.

2 In fact, as I have seen in other cases, the Kings County District Attorney's office did not acknowledge the "mixed claim" standard at all before the § 440 court and argued the case as if it did not exist. It is unclear to me why the District Attorney is repeatedly taking positions on New York law that are contrary to direct Second Department authority. In this habeas corpus proceeding, the District Attorney has acknowledged the Maxwell line of cases.

End of Document

Appendix D

2020 WL 5043906
Only the Westlaw citation is currently available.
United States District Court, E.D. New York.

Trevor ANDERSON, Petitioner,

v.

William LEE, Superintendent of Eastern New York Correctional Facility, Respondent.

19-cv-4488 (BMC)

Signed 08/26/2020

Attorneys and Law Firms

Trevor Anderson, Napanoch, NY, pro se.

Terrence F. Heller, Office of the District Attorney, Brooklyn, NY, Kings County District Attorneys Office, New York State Attorney Generals Office, for Respondent.

MEMORANDUM DECISION AND ORDER

COGAN, District Judge.

*1 In a decision and order dated April 6, 2020, familiarity with which is assumed, I denied two of the three claims in petitioner's request for habeas corpus relief under 28 U.S.C. § 2254(d). [1] However, I deferred ruling on petitioner's third claim – a multi-prong attack on the effectiveness of his trial counsel. The basis for deferring ruling on this third claim was my conclusion that the state courts had exorbitantly applied a procedural bar to block consideration of the merits of most of that claim, and that I therefore had to consider the claim *de novo*. Because the parties had not addressed that claim under a *de novo* standard of review, I requested, and have received from both sides, additional briefing of the claim under that standard.

The test for ineffective assistance of trial counsel claims is too well-established to require much discussion. Briefly, to prove ineffective assistance of counsel, petitioner must meet the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). The first prong requires him to show that counsel's performance fell below "an objective standard of reasonableness" under "prevailing professional norms." Id. at 688. I must apply a "strong presumption of competence" and "affirmatively entertain the range of possible reasons [petitioner's] counsel may have had for proceeding as they did." Cullen v. Pinholster, 563 U.S. 170, 196 (2011) (citation and internal quotation marks omitted). The second prong requires petitioner to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 669. "The likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 112 (2011).

None of the acts or omissions that petitioner contends deprived him of effective assistance of counsel entitle him to relief. He merely second guesses his trial counsel's strategy calls or the jury's determination. His arguments are disposed of as follows.

I. Failing to call a medical expert

Most vehemently stressed by petitioner is his claim that his counsel was constitutionally ineffective for failing to hire a medical expert to show that petitioner shot the victim, Erick Brown-Gordon, only two times, not four times. [2] Petitioner contends that if a medical expert would have opined that petitioner shot Brown-Gordon only twice, then the jury would have been unable to find that petitioner intended to kill Brown-Gordon, or, alternatively, the evidence would have raised a reasonable doubt as

to whether someone else had shot Brown-Gordon. The § 440 court rejected this argument on the merits for numerous reasons, and I think there are even more.[3]

*2 First, as to petitioner's intent at the time of the shooting, it is entirely speculative to assume the jury would have found that two shots versus four shots made the difference as to whether petitioner intended to kill Brown-Gordon, especially since in either scenario, at least one shot hit Brown-Gordon when his back was turned, and under no scenario did Brown-Gordon attack petitioner. I highly doubt that the decision of a reasonable jury that petitioner intended to kill Brown-Gordon would hinge on whether he shot him twice two, three, or four times. Shooting someone twice from six feet away with a .45 caliber firearm is more than sufficient to demonstrate intent to kill; indeed, shooting someone once is sufficient. See, e.g., People v. Cabassa, 79 N.Y.2d 722, 728, 586 N.Y.S.2d 234, 236 (1992); People v. Galarza, 127 A.D.3d 407, 408, 4 N.Y.S.3d 500 (1st Dept't 2015); People v. Blue, 55 A.D.3d 391, 865 N.Y.S.2d 97 (1st Dep't 2008). The evidence was overwhelming that regardless of how many shots hit Brown-Gordon, the gun was fired towards the victim at least three times (the police found three or four shell casings), which is plenty of indicia of intent.

As to identification, I do not see how the number of bullet wounds would bear one way or the other on petitioner's identity. In any event, there was extensive evidence that petitioner was the shooter. Petitioner makes much of the fact that no witness testified to seeing the gun in his hand at the time the shots rang out. But the lack of direct evidence on seeing the shots is insignificant in light of the abundance of circumstantial evidence showing that petitioner was the shooter.

Specifically, the woman in the middle of the triangle, petitioner's former girlfriend Diana Perez, testified that after she confronted petitioner in the street with Brown-Gordon and after they started walking away him (Perez in front and Brown-Gordon in back), she heard about six or seven shots ring out, and Brown-Gordon fell. After she heard the shots, she began running away. She further testified that petitioner then caught up with her and forced her into a livery cab which took her home, getting in with her and, at one point, gesturing to his right side which made her think he might shoot her. She also testified that when she exited the car, petitioner told her "don't tell anyone." In addition, three witnesses testified that petitioner was the only person on the street at the time of the shooting besides Brown-Gordon. Before he passed out, Brown-Gordon identified petitioner to his father, William Gordon ("William") as the shooter. And cell phone records showed several calls between petitioner and Perez up to one minute before the shooting.

Brown-Gordon also testified that defendant had approached him, they exchanged words, and from a distance of six to seven feet away, he saw petitioner move his arm, and then gunshots rang out. Brown-Gordon further testified that when he turned to flee, he was hit by another bullet in the back, and that when William ran out to the street to aid him, he told his father it was petitioner who shot him. There was thus abundant evidence by which the jury could find that petitioner was the shooter, even in the absence of a witness observing a gun in petitioner's hand.

Secondly, it seems clear that both of petitioner's prior counsel did in fact consult with a medical expert but determined not to use him. Petitioner had two trials, the first of which ended in a hung jury.[4] In each trial, he was represented by an attorney, albeit a different attorney, from the Legal Aid Society. As shown below, the colloquy at petitioner's sentencing after the second trial, when the issue of the number of shots came up, compels the conclusion that petitioner's first legal aid lawyer had indeed consulted a medical expert on this issue and that the second lawyer had further consultations with that same expert.

*3 In contending at sentencing that the record showed less than four bullet wounds to the victim, and that the prosecutor had committed misconduct by alleging four bullet wounds to the victim in his closing argument, defense counsel stated, "I did send the medical records, with the corresponding testimony of the complaining witness in this case, to a doctor who has been used over the years by the Legal Aid Society." He further disclosed that this was the same medical expert with which his colleague from the first trial had consulted. Counsel argued that his discussions with the medical expert led him to believe that petitioner had shot Brown-Gordon less than four times, and that the evidence of how many times was inconsistent. Although the sentencing court (by the same judge who had presided over the second trial) did not make a definitive finding, the court was clear that whether it was two, three or four shots was immaterial: "I would say it is more likely that were at least three,

and one of them is probably from the back. And I really didn't intend to ... insert myself, beyond raising an issue that I thought could answered by counsel on either side." [5]

We do not know exactly what the medical expert opined to petitioner's first and second trial counsel, although it seems likely he was prepared to state his opinion that as to the number of shots, it may have been some number less than four and perhaps as few as two. But in any event, it is clear that separate counsel at both trials made the same determination not to call the expert. Putting aside the inference that the medical expert was not called because he might have actually hurt petitioner's case, the decision not to call him was a strategic determination that counsel was entitled to make. See generally United States v. Smith, 198 F.3d 377, 386 (2d Cir. 1999).

Petitioner's trial counsel had a Hobson's choice – both the identification defense and the lack of intent defense were weak. Yet he could not choose both, for it would not have been a credible argument to the jury to assert that "someone else shot Brown-Gordon but if you find that my client did it, then you should also find that he didn't intend to kill him." Counsel's choice to go with the identification defense by attempting to discredit the witnesses against petitioner was not constitutionally defective. See generally Daly v. Lee, No. 11-cv-3030, 2014 WL 1349076, a *17 (E.D.N.Y. April 4, 2014) ("The decision to choose one consistent defense is the kind of strategic decision entrusted to counsel.").

In sum, whether I provide AEDPA deference to the § 440 court's rejection of this argument, or whether, for reasons stated in my prior decision, I review it *de novo* as part of the entirety of petitioner's ineffective assistance of trial counsel claim, petitioner has demonstrated neither that counsel was objectively unreasonable in determining not to call the medical expert nor that he was prejudiced by that decision.

II. Prior Bad Act Evidence

Before the grand jury, the prosecutor called Perez who testified, among other things, that she had seen petitioner with handguns on an occasion prior to the night Brown-Gordon was shot. In a pretrial hearing, the prosecutor sought a ruling under People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901), contending that Perez's statement was not being offered to show propensity, but that petitioner's familiarity with handguns supported the prosecutor's theory that petitioner intended to kill Brown-Gordon. The hearing court held (ironically) that in light of the fact that multiple shots were fired, "intent is not an issue," and therefore denied the prosecutor's application.

*4 Seizing on this ruling, petitioner contends that it was improper for the prosecutor to have presented that evidence to the grand jury and that his counsel was ineffective for not seeking to dismiss the indictment on that ground once the hearing court precluded Perez's testimony. This argument fails for at least two reasons.

First, there is no rule under New York law that decisions made by the prosecutor regarding what evidence to place before a grand jury must precisely parallel the trial court's subsequent discretionary evidentiary rulings before or at trial, and that if they don't, the indictment is subject to dismissal. Although, unlike in federal practice, the rules of evidence generally apply to New York grand jury proceedings, see N.Y. C.P.L. § 190.30(1), only if the prosecutor offers plainly inadmissible evidence, knowingly perjured testimony, or otherwise acts in bad faith before the grand jury, is the indictment vulnerable. See Bernard v. United States, 25 F.3d 98, 102 (2d Cir. 1994) (citing Colon v. City of New York, 60 N.Y.2d 78, 468 N.Y.S.2d 453 (1983)).

That is a particularly material point in this case because petitioner got a very generous exercise of discretion when the hearing judge denied the prosecutor's motion to allow Perez's prior bad act evidence (i.e., the possession of guns on one occasion) at his second trial. In fact, the prosecutor in petitioner's first case had obtained the opposite ruling, and Perez was permitted to repeat the testimony she had given before the grand jury that she had observed petitioner with two guns on an occasion prior to the Brown-Gordon shooting.

Moreover, the ruling allowing the evidence in the first trial was in accord with all of the recent Appellate Division cases that have decided this precise issue. In People v. Nunes, 168 A.D.3d 1187, 90 N.Y.S.3d 694 (3rd Dep't 2019), for example, the defendant was convicted of murder, attempted robbery, and criminal possession of a weapon. The trial court admitted testimony

from the defendant's girlfriend that on a prior occasion, she had observed the defendant with a handgun. The Appellate Division upheld the conviction, holding that:

> The evidence regarding defendant's prior possession of a handgun was inextricably interwoven with the charged crimes and tended to show that defendant had access to the weapon that was used in the shooting, and we discern no error in Supreme Court's conclusion that its probative value outweighed any prejudicial effect.

Id. at 1192, 90 N.Y.S.3d at 700-01.

Similarly, in People v. Humphrey, 109 A.D.3d 1173, 971 N.Y.S.2d 631 (4th Dep't 2013), the defendant was convicted of manslaughter and assault. During trial, the trial court admitted photographs of the defendant holding a rifle on a prior occasion. The Appellate Division rejected the argument that this was error, holding that the photographs were "not evidence of an uncharged crime absent further proof that his possession of that item was illegal. Mere speculation that a jury may discern something sinister about a defendant's behavior does not render such behavior an uncharged crime." Id. at 1174, 971 N.Y.S.2d at 633 (*colatus*).

In short, petitioner cannot bootstrap a generous trial court discretionary ruling into a claim that his indictment was unlawful. The prosecutor's offer of this evidence to the grand jury was clearly in good faith, with a reasonable expectation that the evidence would be admissible at trial. [6] His counsel was thus not ineffective for failing to raise an issue that would have been resolved against him.

***5** The second reason why petitioner's argument fails is that even when a prosecutor offers improper evidence or acts in bad faith with regard to putting evidence before the grand jury, the indictment usually will not be deemed infirm under New York law. The submission of some inadmissible or improper evidence during the course of a grand jury proceeding is fatal only when the remaining legal evidence is insufficient to sustain the indictment. People v. Pelchat, 62 N.Y.2d 97, 105, 476 N.Y.S.2d 79, 83 (1984); People v. Chiarenza, 185 A.D.2d 679, 587 N.Y.S.2d 888 (4th Dep't 1992).

Even excluding Perez's testimony about the prior handgun possession, there was still plenty of evidence demonstrating a *prima facie* case that petitioner committed the crime. Brown-Gordon and Perez both testified that petitioner was the shooter. Specifically, Brown-Gordon testified that, after passing petitioner in front of his house and turning back to exchange words with him, he saw petitioner with both hands in his pocket. His next recollection was hearing gun fire and getting shot multiple times. Wounded but still conscious, Brown-Gordon testified that he then observed petitioner "run up the block and turn the corner[.]" A week later, he picked petitioner out of a lineup at the local precinct.

Brown-Gordon's testimony was largely corroborated by Perez. She testified that petitioner was her ex-boyfriend and that she had called petitioner because she had just been in an argument with Brown-Gordon. She told the grand jury that after Brown-Gordon and she stepped out of the former's house, she saw petitioner begin to cross the street and walk towards them. At this point, she turned away and heard multiple gunshots. After she had turned the corner, petitioner caught up with her and shoved her into a cab. In the cab, petitioner warned Perez not to say anything. Petitioner repeats his argument that neither Brown-Gordon nor Perez actually saw him holding the handgun, but as shown above, that conclusion is inescapable based on the inferences that could be drawn from their testimony. Gilding a lily that is already in full bloom does not invalidate an indictment. See Hernandez v. Kuhlmann, 14 F. App'x 90, 92 (2d Cir. 2001).

Because a motion by counsel to dismiss the indictment based on the prior gun episode would certainly have failed, petitioner's trial counsel was not objectively unreasonable in determining not to file a futile motion. For the same reason, petitioner was not prejudiced by the absence of a motion to dismiss.

III. Pretrial Hearing/Reopening Errors

Prior to petitioner's trial, his counsel moved to suppress evidence that Perez picked petitioner out of photo array and that Brown-Gordon picked him out of a photo array and lineup. The hearing court denied petitioner's motion, finding that the identification evidence met constitutional standards.

It is not entirely clear as to the errors and omissions petitioner contends his trial counsel made with respect to the pretrial hearings. I see three possibilities, none of which have any merit.

First, petitioner may be arguing that there was insufficient probable cause to arrest and prosecute him, and that his attorney erred in not seeking to dismiss the indictment on that basis. There was certainly probable cause to arrest him based on Perez and Brown-Gordon's identification of him and statements to the police, to which a police officer with firsthand knowledge testified at the suppression hearing. And having reviewed the grand jury testimony, there was even more probable cause to prosecute him. If this is petitioner's argument, it is not clear what he thinks his counsel could or should have done.

*6 More likely, petitioner is reprising his argument that since Perez, Brown-Gordon, and William testified at trial that they did not see a gun in petitioner's hand or a muzzle flash, their identifications of him as the shooter were inadmissible and resulted in an illegal arrest, and that his attorney unreasonably failed to seek to reopen the suppression hearing when they so testified at trial. As illustrated above, petitioner has simply ignored the extensive circumstantial evidence pointing to him as the shooter and enabling the jury to reach that conclusion.

The final argument petitioner advances is that the photo array identifications by Perez and Brown-Gordon, and probably his arrest and prosecution, should have been suppressed because his photo in the array was "illegally obtained" from a prior, unrelated arrest, the records of which had been sealed under N.Y. C.P.L. § 160.50, and that his counsel was ineffective for not seeking that relief. This argument fails because (1) there is nothing in the record to suggest that the earlier photograph was, in fact, the one that had been sealed; (2) there is nothing in the record to suggest that petitioner told his trial counsel that his photograph was from the prior arrest; and (3) the New York Court of Appeals has held that suppression is not an available remedy for a violation of C.P.L. § 160.50. See People v. Patterson, 78 N.Y.2d 711, 579 N.Y.S.2d 617 (1991).

In sum, if petitioner is contending that his counsel should have either challenged his arrest or prosecution, or the witnesses's identification of him because of their testimony during trial, there was nothing objectively unreasonable in not making motions that were virtually certain to lose. For the same reason, petitioner was not prejudiced by his counsel's decision not to make such a motion.

IV. Failing to object to alleged Sandoval ruling

Before petitioner's second trial, the prosecutor obtained a ruling pursuant to People v. Sandoval, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974), that if petitioner chose to testify, he could be questioned about whether he had been in possession of guns on a prior occasion, as Perez had described in her grand jury testimony. [7] As discussed above, petitioner's trial counsel had obtained a pretrial ruling successfully blocking the prosecutor from questioning Perez at the second trial on that incident, but the trial court held that the grand jury testimony could form a good faith basis for questioning petitioner on the incident if he testified.

The Appellate Division found that, although the trial court's ruling was incorrect, the error was harmless and did not deprive petitioner of a fair trial. People v. Anderson, 130 A.D.3d 1055, 1056, 15 N.Y.S.3d 103, 105 (2nd Dep't 2015). The New York Court of Appeals held, in contrast, that the error was unpreserved because petitioner had failed to object to the Sandoval ruling. People v. Anderson, 29 N.Y.3d 69, 74, 52 N.Y.S.3d 256, 259 (2017). Petitioner argued in his § 440 motion, and argues here, that his counsel was ineffective for failing to preserve the error.

I reject petitioner's claim that counsel was ineffective for failing to preserve the purported error for a number of reasons. First, I am not at all convinced that the Appellate Division correctly ruled that the trial court's Sandoval ruling was error. If petitioner took the stand in a case where his intent or lack of intent to kill was an issue, his prior experience with handguns seems fair game to me for the same reasons that I think Perez should have been permitted to testify to the prior incident. See Nunes, 168 A.D.3d 1187, 90 N.Y.S.3d 694; Humphrey, 109 A.D.3d 1173, 971 N.Y.S.2d 63. Nor do I think it would be unduly prejudicial

to cross-examine petitioner on that incident, since the mere possession of the guns on one occasion, without more, is not the same as evidence that he committed a crime. See id. at 1174, 971 N.Y.S.2d at 633.

*7 But even if the failure to preserve was error, the Appellate Division's alternative ruling – that the error was harmless and did not deprive petitioner of a fair trial – is at least roughly coextensive with Strickland's prejudice prong. See Alleyne v. Racette, No. 15-cv-1915, 2020 WL 2797521, at *14 (E.D.N.Y. May 28, 2020); Guerrero v. United States, No. 15-cv-7282, 07-cr-248, 2017 WL 1435743, at *8 (S.D.N.Y. April 20, 2017); Barry v. United States, No. 14-cv-5898, 2015 WL 3795866, at *2 (E.D.N.Y. June 17, 2015) ("the Second Circuit's findings of overwhelming evidence and harmless error necessarily dispose of the applicable Strickland prejudice inquiry."). Whether I apply Strickland *de novo* as to counsel's failure to preserve without regard to the Appellate Division's decision, or whether I review the Appellate Division's harmless error determination under either Chapman v. California, 386 U.S. 18 (1967), or Brecht v. Abrahamson, 507 U.S. 619, 637 (1993), the result comes out the same – as shown below, petitioner had far bigger problems if he chose to take the stand than being asked a couple of questions about whether on one occasion in the past he had possession of handguns. [8]

The record gives no indication of what testimony petitioner would have given had he testified except, as his attorney speculated to the Court of Appeals, maybe he would have testified that, "It was an accident, I just wanted to scare him" or that the shooting was in self-defense. But petitioner had already testified to the grand jury that he was home when the shooting occurred, so testimony about his lack of intent to kill Brown-Gordon when he shot him would have made things worse. His grand jury testimony and the overwhelming evidence against him made it entirely implausible for him to take the stand, and petitioner suffered no prejudice.

V. Failure to interview witnesses

In his § 440.10 proceeding, petitioner argued that if his trial counsel had interviewed Perez, Brown-Gordon, and William (who testified to Brown-Gordon's excited utterance that petitioner shot him), these witnesses would have contradicted the statements and identifications that they gave to the police. The § 440 court rejected this argument on the merits, holding that petitioner failed to produce any evidence suggesting that the witnesses would have recanted or contradicted themselves.

I would go further. It is clear from the record that petitioner's counsel had more than one investigator assigned to his case. There is no evidence why petitioner thinks counsel or one of counsel's investigators did not try to interview these three witnesses. Frankly, since none of these witnesses had an obligation to talk to petitioner's team at all, and all three had already given statements indicating that petitioner had shot Brown-Gordon, I see no reason why any of them would have talked to a member of petitioner's legal team. Whether I provide AEDPA deference to the § 440 court's holding on the merits, or whether, for reasons stated in my prior decision, I review it *de novo* as part of the entirety of petitioner's ineffective assistance of counsel claim, it is wholly without merit.

VI. Failure to seek suppression of cell-site information

*8 Petitioner contends that his counsel was ineffective for not seeking suppression of cell-site information used at trial to tie him to the location of the crime. He contends that although a judge had issued a "trap and trace" warrant that led to his cell phone number, the police had no authority to use a cell site simulator to obtain his location.

Petitioner is wrong. I have reviewed the Order authorizing the search and it expressly includes the right to obtain cell site location information. The Order was supported by an affidavit showing more than sufficient probable cause for its issuance. There is no action petitioner's counsel could have taken to challenge this evidence.

VII. Failure to highlight inconsistencies in testimony

Finally, petitioner contends that his counsel failed to effectively cross-examine William and Brown-Gordon at trial by showing inconsistencies between their testimony in the first trial and the second trial. [9]

There are few areas in which defense counsel's discretion is broader under Strickland than in determining which questions to ask and which to omit in cross-examination. As the Second Circuit has noted, " 'whether to engage in cross-examination, and if so to what extent and in what manner, are ... strategic in nature' and generally will not support an ineffective assistance claim." Dunham v. Travis, 313 F.3d 724, 732 (2d Cir. 2002) (quoting United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987)). See generally Cruz v. Griffin, No. 16-cv-8998, 2019 WL 6220806 (S.D.N.Y. Oct. 24, 2019) ("Petitioner cannot prevail on a claim of ineffective assistance merely because he believes that his counsel's strategy was inadequate or because the cross-examinations were arguably ineffective.") (*colatus*); Fabian v. United States, No. 04-cv-1896, 2007 WL 2480164, at *9 (E.D.N.Y. Aug. 28, 2007) ("Ineffective assistance of counsel claims based on inadequate cross-examination are strongly disfavored."). Courts within the Second Circuit afford "significant deference ... [to] a trial counsel's decision how to conduct cross examination," and "refus[e] to use perfect hindsight to criticize unsuccessful trial strategies." Eze v. Senkowski, 321 F.3d 110, 132 (2d Cir. 2003). Strickland's presumption of correctness "operates with particular force when the conduct at issue relates to counsel's conduct of cross-examination." Love v. McCray, 165 F. App'x 48, 49 (2d Cir. 2006). This is because trial counsel is not only required to consider materials available through pre-trial discovery, but to make rapid decisions based on the evidence that emerges during direct examination, and then to prioritize which points are worth raising and which are not.

Each of petitioner's claimed missed opportunities are merely attempts to second guess his counsel. Some have no basis in the record at all. A few of them are set forth here by way of example:

- William testified at the first trial that he didn't see what clothing the shooter was wearing, but at the second trial he testified that the shooter was wearing a hoodie.

There was no inconsistency. [10] William was not asked at the first trial whether he observed what petitioner was wearing.

*9 • William's testimony at the second trial that the shooter wore a hoodie is inconsistent with what William told police.

For this assertion, petitioner relies on an uniform complaint prepared by the police and a DD-5 interview report. The complaint form states "OUTERWEAR – UNK", but, contrary to petitioner's assertion, does not describe the source of its information. The DD-5 was apparently prepared after a fleeting interview with William who was on his way to the hospital immediately following the shooting. The DD-5 states that William "did not see the [shooter's] face" (as William testified at trial) and that William "could not describe [the shooter's] clothing," after which William "then stated to the undersigned that he needed to go to the hospital to be with his son and would make himself available to answer any more questions at a later date."

These reports are statements of the officer purporting to relay what William had said, not statements of William himself, and thus could not have been used to impeach William. At most, defense counsel had a good faith basis for asking, "didn't you tell the police that you could not describe the shooter's clothing?" Perhaps William would have answered, "I don't remember;" perhaps he would have said, "yes, but I was on my way to the hospital and couldn't stop to talk to the officer;" or perhaps he would have said "no." Whichever answer he would have given does not allow the conclusion that petitioner was sufficiently prejudiced by the omission of the question that he was denied effective assistance. This was a trivial opportunity that does not come close to changing the outcome of the case in light of two witnesses testifying that petitioner was the shooter, the victim's excited utterance to his father that petitioner shot him, and corroborating phone records.

- Brown-Gordon testified at the first trial that he had attended Transit Tech High School and did not graduate from it, but in the second trial, around seven months later, he testified that he had completed high school and some college.

It is true that Brown-Gordon testified at the second trial that he "last completed high school and some college." But petitioner's contention – that his counsel was constitutionally deficient for failing to address this apparent inconsistent – fails for many reasons. First, there is no evidence before me that, by the second trial, the victim had not completed his GED or had never taken any college level courses. Petitioner simply speculates that Brown-Gordon chose not to further his education in the months between trials. Second, assuming the victim embellished his educational background at the second trial, I cannot fault petitioner's trial counsel for choosing to forego challenging such an immaterial and collateral issue in the heat of a contentious attempted murder trial: just as petitioner is unsure of Brown-Gordon's educational achievements, his attorney could not have known at that precise moment whether the victim pursued his high school diploma through alternative means during those seven months between the two trials. It would have been a cardinal sin on cross-examination to ask a question to which one did not know the answer. [11]

*10 Third, counsel's credibility (and thus petitioner's defense) would have likely been undermined if counsel chose to quibble with the victim on such a collateral issue, especially since the trial court most likely would not have permitted petitioner to introduce extrinsic evidence concerning this purely collateral matter. See People v. Duncan, 46 N.Y.2d 74, 412 N.Y.S.2d 833 (1978); People v. Metellus, 54 A.D.3d 601, 602, 864 N.Y.S.2d 408, 409 (1st Dep't 2008) (trial court properly exercised its discretion in denying the defendant's request to introduce extrinsic evidence of an allegedly prior inconsistent statement since the subject matter of the alleged inconsistency had little or no probative value with regard to any issue other than general credibility).

Putting aside these three issues, the burden is on petitioner to show prejudice – that this "missed" opportunity would have made a difference. See Harrington, 562 U.S. at 104. But as noted above, the evidence against petitioner was overwhelming, consisting of multiple witnesses and the victim's declaration to his father, mere seconds after the shooting, that petitioner was his assailant. Therefore, counsel's strategic decision not to challenge the victim on such a trivial issue could not have prejudiced petitioner. See Sowell v. Anderson, 663 F.3d 783, 800-01 (6th Cir. 2011) (stating the petitioner had not been prejudiced in a capital murder trial by trial counsel's alleged ineffective assistance in not cross-examining witness to shooting since even if counsel would have highlighted these inconsistences, they concerned somewhat collateral matters).

The remaining cross-examination omissions that petitioner alleges are either similarly without basis in the record or not nearly weighty enough to have deprived petitioner of effective assistance of counsel. [12] The fact is that his trial counsel not only engaged in cross, but re-cross examination, and in doing so, she did impeach William with several inconsistencies from prior proceedings. At the second trial, for example, petitioner's trial counsel, Ms. Leisenring, pointed out the following material inconsistences: (1) at the first trial, the victim testified that his shooter was around "15 feet" away, but later testified at the second trial that he "never" said that; and (2) at the second trial, the victim testified that the shooter said, "Yo ... [I'm] Trevor," even though he testified at the grand jury that "all [the shooter] said to me was 'yo' ".

Petitioner's hindsight does not equate with constitutionally ineffective counsel. [13]

CONCLUSION

*11 The petition is denied and the case is dismissed. The Clerk is directed to enter judgment against petitioner. A certificate of appealability shall not issue as the petition raises no substantial constitutional issue. See 28 U.S.C. § 2253(c). Further, the Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore *forma pauperis* status is denied for the purposes of any appeal. See Coppedge v. United States, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

All Citations

Slip Copy, 2020 WL 5043906

Footnotes

1 Anderson v. Lee, —— F. Supp. 3d ——, 2020 WL 1682605 (E.D.N.Y. April 7, 2020).

2 Brown-Gordon had four bullet wounds, but the record was not entirely clear as to whether two of them were exit wounds. For reasons described below, it is clear that petitioner fired at least three shots.

3 I already addressed this two shots v. four shots theory in my prior decision, albeit in a different context. Petitioner alleged a sentencing error because, petitioner claimed, the sentencing court had assumed four shots, not two shots, and therefore given him a more severe sentence. Applying the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 *et seq.*, standard of review, I rejected this claim because the reviewing court found that the sentencing court had made no such assumption. My prior holding, however, is not controlling as to petitioner's ineffective assistance of counsel claim, as it now appears in a different context under a different standard of review.

4 The record indicates that the first jury hung 11-1 in favor of conviction with one juror refusing to deliberate.

5 Respondent also contends that petitioner failed to submit a medical expert affidavit in his post-judgment proceedings to support his theory. That is true, but I am not giving that much weight, as obtaining a medical expert in the context of § 440 proceeding would have been difficult if not impossible. More probative to me is the fact that petitioner could have had access to both his attorneys' files before he filed his post-judgment proceedings but made no reference to his attorneys' consultations with the medical expert.

6 In fact, the only reason this question was asked of Perez was because a member of the grand jury posed the question.

7 I reject respondent's argument that the trial court made no ruling on this issue. It reserved ruling on the Sandoval issue about whether petitioner's disciplinary history as a former Georgia police officer could be used to impeach petitioner, but it clearly ruled that if petitioner testified, he could be questioned about the gun possession incident that Perez had described.

8 I also reject respondent's argument that because petitioner did not testify, his ineffective assistance claim alleging his attorney's failure to object to the Sandoval ruling is not cognizable on federal habeas corpus review. The cases hold that petitioner's failure to testify precludes a challenge to the Sandoval ruling itself on due process grounds, see, e.g., Melendez v. LaValley, 942 F. Supp. 2d 419, 424 (S.D.N.Y. 2013), but it does not preclude a petitioner from arguing that his attorney was ineffective under the Sixth Amendment for failing to object to the Sandoval ruling. Nevertheless, petitioner's failure to testify makes it very hard for him to show prejudice from his counsel's failure to object absent a convincing § 440 affidavit as to what he would have testified, which is lacking here. See generally, Duren v. Lamanna, 18-cv-7218, 2020 WL 509179, at *22 (E.D.N.Y. Jan. 30, 2020) ("Petitioner did not testify, so any potential for prejudice is merely speculative and cannot be examined here.").

9 Petitioner submitted excerpts of the first trial to the § 440.10 court to show these inconsistences, and my conclusions above are based on those excerpts as compared to the transcript of the second trial.

10 In contending otherwise, petitioner cites only to Erick's grand jury testimony, not to any testimony given by William in the first trial. In any event, I have reviewed the excerpts of William's first trial testimony that petitioner submitted.

11 See Irving Younger, The Irving Younger Collection: Wisdom & Wit from the Master of Trial Advocacy (2010).

12 Petitioner contends that another "critical inconsistency" counsel failed to highlight was that William purportedly brought blankets out to cover his son from the rain while they waited for the arrival of emergency personnel. This statement is contained in the DD-5 referenced earlier. He claims this prior statement would have shown that it rained the night of the shooting, thereby serving as circumstantial evidence that the witnesses's ability to perceive was impacted. Petitioner is mistaken. At the second trial, his counsel did in fact cross-examine William on this point, and William answered that "it was drizzling" – refuting his son's testimony that it wasn't raining. In light of William's testimony, there was no reason to introduce any weather reports.

13 Petitioner calls his trial counsel ineffective for having characterized William's testimony as "credible" during summation. This was a strategic decision by his counsel to shift blame to another unknown suspect. William contradicted his son and Perez on many important issues (i.e., weather conditions, description of events leading up to the shooting, and Perez's behavior after the shooting). Since Brown-Gordon and Perez had positively identified petitioner as the shooter, William's testimony that there was no confrontation or conversation among the three before hearing gunfire undermined the prosecution's theory that the pair had ample opportunity to observe Brown-Gordon's shooter. As trial counsel vehemently argued, "[William's] perspective flies straight in the face of both Diana Perez and Erick Brown." In light of the overwhelming evidence pointing towards petitioner (and his decision to testify before the grand jury), a case of mistaken identity was a reasonable, if not the only, available defense.

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Appendix E

2021 WL 1084714
Only the Westlaw citation is currently available.
United States Court of Appeals, Second Circuit.

Trevor ANDERSON, Petitioner-Appellant,

v.

William LEE, Respondent-Appellee.

20-3175

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February 18, 2021

Attorneys and Law Firms

Trevor Anderson, Napanoch, NY, Pro Se.

Solomon Neubort, Esq., Kings County District Attorney's Office, Brooklyn, NY, for Respondent-Appellee.

Present: Debra Ann Livingston, Chief Judge, Denny Chin, Joseph F. Bianco, Circuit Judges.

Opinion

*1 Appellant, pro se, moves for a certificate of appealability and in forma pauperis status. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

All Citations

Not Reported in Fed. Rptr., 2021 WL 1084714

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of April, two thousand twenty-one.

Trevor Anderson,

Petitioner - Appellant,

v.

William Lee,

Respondent - Appellee.

ORDER

Docket No: 20-3175

Appellant, Trevor Anderson, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request as a motion for reconsideration, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the motion and petition are denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk