DOCKET NO. _____

In The
Supreme Court of the United States

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MICHAEL S. GIBSON,

Petitioner,

v.

EARL BELL,
Superintendent, Clinton Correctional Facility,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. A writ of certiorari is requested to review the Summary Order of the Second Circuit Court of Appeals affirming the decision of the United States District Court for the Eastern District of New York to deny Michael S. Gibson's *pro se* petition for a writ of habeas corpus.

PARTIES TO THE PROCEEDING

The parties to the proceeding are those named in the caption. The Petitioner is Michael S. Gibson. The Respondent is Earl Bell, Superintendent of the Clinton Correctional Facility.

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SUPREME COURT
OF THE UNITED STATES

MICHAEL S. GIBSON,

Petitioner,

- against -

EARL BELL, Superintendent, Clinton Correctional Facility,

Respondent.

The Petitioner Michael S. Gibson respectfully prays that a Writ of Certiorari issue to review the Summary Order of the United States Court of Appeals for the Second Circuit dated November 7, 2023, affirming the decision of Judge Gary R. Brown of the United States District Court for the Eastern District of New York, dated July 13, 2021 [A7][1], to deny his *pro se* petition for a writ of habeas corpus made pursuant to 28 U.S.C.§2254.

CITATION TO THE OPINION BELOW

The Order of the Second Circuit Court of Appeals is unpublished Summary Order 21-1892 (2d Cir. November 7, 2023), but appears in the Appendix annexed hereto [A1-A6].

STATEMENT OF JURISDICTION

The Summary Order of the United States Court of Appeals for the Second Circuit was entered in this case on November 7, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1] Numbers preceded by the letter "A" refer to the pages of Petitioner's Appendix.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in the issue raised herein include, *inter alia*, the right to due process of law. U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

I. THE INDICTMENT

By Nassau County Indictment Number 85N/2012, Michael Gibson was charged in the Supreme Court of the State of New York, Nassau County with one count of Murder in the Second Degree [N.Y. P.L. §125.25(1)], and two counts of Criminal Possession of a Weapon in the Second Degree [N.Y. P.L. §265.03(1)(b), and (3)].

II. REQUESTS FOR A *FRYE* HEARING

By written pre-trial motion dated February 5, 2013, defendant's first trial counsel asked the New York State Supreme Court, Nassau County to hold a hearing pursuant to Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) to determine the admissibility of evidence related to low copy number ("LCN") DNA analysis, a type of DNA analysis used when a very low quantity of DNA is present in a sample. In support of that motion, counsel cited the fact that Frye hearings were being conducted by at least two other New York trial courts regarding this type of DNA testing. Defense Motion dated February 5, 2013 at ¶¶6-10.

The People opposed the motion, arguing that LCN DNA testing was not based on new or novel techniques, and was generally accepted as reliable in the scientific community. People's Opp. dated February 13, 2013 at ¶¶7-15.

By written decision dated May 14, 2013, Nassau County Supreme Court Judge William J. Donnino denied the defense request for a Frye hearing, finding that (1) other New York courts had

already held LCN DNA evidence to be admissible in criminal cases; and (2) the mere fact that other defendants in other cases have made a showing that LCN DNA testing lacks general acceptance, without any explanation of what that showing was, is no substitute for a showing in this particular case since other courts have found that Frye hearings on this issue were unnecessary. Donnino Decision dated April 1, 2013 at pp. 2-3.

More than two years later, by motion dated April 24, 2015, Mr. Gibson's new defense counsel filed a second motion to preclude the LCN DNA evidence and for a Frye hearing before the trial court (Hon. Jerald S. Carter) stating that after his predecessor's Frye motion had been denied by Judge Donnino, a New York City judge had ruled that LCN DNA analysis results were unreliable and included the transcript of the proceeding during which that ruling had been made.[2] Defense Motion dated April 24, 2015 at ¶¶6-10. Counsel further argued that a Frye hearing was necessary because "LCN DNA typing, including the OCME's [New York's City's Office of Chief Medical Examiner] LCN DNA methodology, has yet to meet the Frye standard of general acceptance within the relevant scientific community... LCN testing methods have been, and continue to be, the subject of vigorous debate and disagreement within the forensic DNA scientific community, precisely because of the potential for unreliable, unreproducible and skewed results." Id. at ¶9. In so arguing, counsel cited scholarly articles which have called into serious question the reliability the methodology of LCN DNA analysis.

Just before *voir dire* commenced, the People announced on the record that they would provide a written response to counsel's second Frye motion, but noted that Judge Donnino had

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[2] The 2014 case cited by defense counsel was People v. Andrew Peaks and Jaquan Collins, Kings County Indictment Numbers 7689-10, 8077-10. Defense Motion dated April 24, 2015 at ¶¶13.

properly denied the first motion and that the only change since then was the single trial court decision cited by defense counsel (T.27-28)[3]. There is no further reference to the second Frye motion in the trial transcripts, and no decision regarding the motion appears in the trial court file.

III. THE TRIAL

Following a trial before a jury in May and June of 2015 before Hon. Jerald S. Carter, Mr. Gibson was convicted of all three charges. As a result, on September 8, 2015, he was sentenced to an indeterminate term of imprisonment of twenty-five years to life on the Murder in the Second Degree charge, and definite terms of fifteen years on each of the two Criminal Possession of a Weapon charges, to be followed by five years of post-release supervision. The court further ordered the sentences to run concurrently.

IV. THE STATE COURT POST-TRIAL PROCEEDINGS

Mr. Gibson appealed his conviction to the Appellate Division, Second Department, presenting six issues for review: (1) whether the evidence was legally and/or factually sufficient to find that he intended to kill Joseph Bolling; (2) whether he received ineffective assistance of trial counsel due to counsel's (a) failure to request a lesser included offense; (b) concession that the shooter intended to kill Joseph Bolling; and (c) failure to object on confrontation clause grounds to the DNA 'technical reviewer' testifying rather than the analyst who actually performed the tests; (3) whether he was denied his right to confront the DNA analyst who performed the LCN DNA test; (4) whether he was denied his right to present a defense when the trial court prevented counsel from questioning the police detective about his investigation into others who may have had motive to kill Joseph Bolling; (5) whether he was denied his right to a Frye hearing to contest the general acceptance and overall

[3] Numbers in parentheses preceded by the letter "T" refer to the pages of the trial transcript.

reliability of LCN DNA testing.

In a decision dated July 5, 2018, the Appellate Division affirmed Mr. Gibson's conviction holding that: (1) the evidence was sufficient to prove guilt beyond a reasonable doubt; (2) the request for a Frye hearing was properly denied; (3) the claims that he was denied the right to confront the analyst who performed the DNA testing and denied the right to present a defense were unpreserved and without merit; and (4) the claim of ineffective assistance of counsel would better be raised in a C.P.L. §440.10 motion. People v. Gibson, 163 A.D.3d 586 (2d Dept. 2018).

Petitioner filed an application with the New York State Court of Appeals requesting leave to appeal which was denied by order dated October 11, 2018. People v. Gibson, 32 N.Y.3d 1064 (2018).

By *pro se* motion dated December 18, 2018, Mr. Gibson requested vacatur of his conviction pursuant to C.P.L. §440.10(1)(h) based on the claim of ineffective assistance of counsel. On May 14, 2019, the Supreme Court, Nassau County denied the motion in its entirety on the ground that his claims were procedurally barred and were matters of record that had previously been raised on direct appeal. Petitioner sought leave to appeal the denial of his C.P.L. §440.10 motion, but on August 19, 2019, the Second Department denied that request.

V. THE 28 U.S.C. §2254 HABEAS CORPUS PETITION

By *pro se* petition made pursuant to 28 U.S.C. §2254, filed in the United States District Court for the Eastern District of New York on June 8, 2020, Mr. Gibson requested a writ of habeas corpus arguing that: (1) the evidence presented at trial was insufficient to prove his guilt of all charges beyond a reasonable doubt; (2) the trial court erred in failing to provide the jury with an instruction for manslaughter; (3) he was denied his constitutional right to confront the analyst who performed

the LCN DNA testing; (4) he was denied his constitutional right to present a defense when the trial court limited the scope of cross-examination of a police witness; (5) he was denied his right to a Frye hearing to determine the reliability of the LCN DNA testing; (6) the court erred in denying his request for a post-conviction evidentiary hearing; and (7) he was denied his right to the effective assistance of trial counsel.

By decision and order filed on July 13, 2021 [A7], United States District Court Judge Gary R. Brown denied Mr. Gibson's habeas petition holding, *inter alia*, that "none of the grounds support habeas relief." First, the court held that some of Mr. Gibson's claims are rooted in State law rights that are not cognizable in a habeas petition and/or were denied based upon an independent and adequate State law ground, including claims regarding the trial court's jury instructions, failure to charge a lesser included offense, and evidentiary rulings. Second, the court held that, to the extent that factually-based claims were fully considered by the State courts, such determinations must be given deference by the district court on habeas review under the AEDPA. Third, the court found that the trial court had not erred in his determinations concerning the admissibility of the DNA evidence given that the DNA evidence merely confirmed the direct and circumstantial evidence of record including surveillance video footage of the incident and eyewitness identification testimony from Mr. Gibson's girlfriend who drove the vehicle as they left the area where the shooting had taken place and identified him as the person in the video who got out of the car, and a participant in the fight who identified Mr. Gibson as the shooter. Fourth, the district court held that Mr. Gibson's challenge to the sufficiency of the evidence fails to meet the "doubly deferential" standard applied to the determinations of juries and State courts. And, finally, the court held that the "claim of ineffective assistance of counsel does not warrant relief." Habeas Decision dated July 13, 2021 [A7-A12].

On July 29, 2021, Mr. Gibson filed a timely Notice of Appeal.

VI. THE APPEAL OF THE DENIAL OF THE 28 U.S.C. §2254 HABEAS CORPUS PETITION TO THE SECOND CIRCUIT COURT OF APPEALS

On September 8, 2021, Mr. Gibson filed a *pro se* motion for a certificate of appealability requesting review of all of the issues he had raised in his habeas corpus petition. That motion was granted by order of the Second Circuit dated January 19, 2022, limited to just one issue: "whether the state trial court's evidentiary ruling admitting DNA testing testimony without conducting a *Frye* hearing presents a constitutional due process claim because the admitted evidence was crucial to the trial's outcome." The Court further ordered that Mr. Gibson be assigned counsel for the appeal.

By decision dated November 7, 2023, the Second Circuit affirmed the district court's decision to deny Mr. Gibson's *pro se* habeas petition holding that the Court cannot say that the admission of the LCN DNA evidence in the absence of a Frye hearing "was a mistake of constitutional magnitude 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair[-]minded disagreement'." Habeas Decision dated July 13, 2021 at p.6 (2023) *citing* Harrington v. Richter, 562 U.S. 86, 103 (2011) [A6].

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. A WRIT OF CERTIORARI IS REQUESTED TO DETERMINE WHETHER THE SECOND CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE DISTRICT COURT TO DENY HIS *PRO SE* PETITION FOR A WRIT OF HABEAS CORPUS

The issue presented to this Court – whether the Second Circuit erred in affirming the district court's decision to deny his *pro se* petition for a writ of habeas corpus, holding that the trial court did not err in admitting LCN DNA testing results at trial without first holding a Frye hearing – is of national significance because the Second Circuit's Summary Order stands in direct conflict with this Court's decision in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) and violated Mr. Gibson's constitutional right to due process. U.S. Const. Amend. XIV.

In his *pro se* 28 U.S.C. §2254 habeas petition, Michael Gibson argued, *inter alia*, that the trial court violated his right to a Frye hearing where a determination could be made as to whether LCN DNA analysis has been generally accepted within the scientific community as a reliable forensic tool for identification purposes before such evidence was admitted at his trial. A review of this record reveals that under any standard of review: (1) the district court's finding that there was "no error regarding the determinations concerning the admissibility of the DNA evidence given that the DNA evidence merely confirmed the direct and circumstantial evidence of record" was clearly wrong; and (2) the erroneous admission of the LCN DNA testimony at Mr. Gibson's trial resulted in the violation of his constitutional right to due process given that the DNA evidence in this single-eyewitness case was crucial to the outcome of the trial. Specifically, the Second Circuit's decision violates this Court's mandate in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Id. at 589.

As a result, Mr. Gibson's conviction, which was based in large part on the People's unreliable LCN DNA evidence, must be vacated.

A. *The Procedural Background*

1. The Pre-Trial Requests for a Frye Hearing

By motion dated February 5, 2013, defendant's first trial counsel asked the State court to hold a hearing pursuant to Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) to determine the reliability and admissibility of LCN DNA testing results, a form of DNA analysis used when very low quantities of DNA is present in a sample. In support of that motion, counsel cited the fact that Frye hearings were being conducted by at least two other trial courts in New York. Defense Motion dated February 5, 2013 at p. 5 ¶¶6-10.

The People opposed the motion, arguing that LCN DNA analysis was not based on new or novel techniques, and was generally accepted as reliable in the scientific community. People's Opposition dated February 13, 2013 at ¶¶7-15.

By written decision dated May 14, 2013, Judge Donnino denied the defense request for a Frye hearing based on his findings that: (1) other New York courts had already held LCN DNA testing results to be admissible in criminal trials; and (2) the mere fact that other defendants in other cases have made a showing that LCN DNA testing lacks general acceptance, without any explanation of what that showing was, is not a substitute for a showing in this case since other courts had also found Frye hearings on this issue were unnecessary. Decision dated April 1, 2013 at pp. 2-3.

More than two years later, by motion dated April 24, 2015, Mr. Gibson's second defense counsel asked the trial court to preclude the LCN DNA testing results or, in the alternative, for a Frye hearing, arguing that after his predecessor counsel's Frye motion had been denied by Judge Donnino,

a judge in New York City had ruled that LCN DNA testing was unreliable. He included the transcript of the proceeding during which that ruling had been made. Defense Motion dated April 24, 2015 at ¶¶6-10. Counsel further argued that a Frye hearing was necessary because "LCN DNA typing, including the OCME's [New York City's Office of the Chief Medical Examiner] LCN DNA methodology, has yet to meet the Frye standard of general acceptance within the relevant scientific community... LCN testing methods have been, and continue to be, the subject of vigorous debate and disagreement within the forensic DNA scientific community, precisely because of the potential for unreliable, unreproducible and skewed." Id. at ¶9. In support, counsel cited scholarly articles which have called into serious question the LCN DNA analysis methodology.

Just before *voir dire* commenced, the People stated that they would provide a written response to counsel's second motion, but noted that Judge Donnino had properly denied the first motion and that the only change since then was a single trial court decision cited by defense counsel (T.27-28). There is no further reference to this second Frye motion in the trial transcripts, and no decision or order regarding that motion is included in the record or court file.

2. The Trial Testimony Regarding the LCN DNA Analysis

The examinations of the two witnesses regarding the LCN DNA analysis performed in this case droned on for more than two hundred pages of the trial transcript (T.1063-1284). The lay jurors, presumably not experts in the complicated and controversial science of DNA testing, were forced to listen as the attorneys for both sides interrogated these analysts, picking apart the science behind the procedures and the techniques used in analyzing this minuscule amount of genetic material. There was a prosecutor who was attempting to convince everyone in the courtroom that LCN DNA analysis is reliable, and a defense attorney trying his best to convince them that it is not. In the end, it all must

have sounded like mumbo jumbo to the lay jurors.

The witnesses at trial testified that, in response to information received from the Crime Stoppers Call Center which allows individuals to anonymously report criminal activity, police searched sewers and discovered a black and silver semiautomatic handgun and a magazine containing bullets (Andoos: T.509, 512-13; Koffsky: T.563-65; Cefalu: T.570-72; Tobias: T.612). Swabs were taken from those items and analyzed at the Nassau County Medical Examiner's Office (Espana: T.1063, 1077-78, 1083-85). The analyst who testified at trial explained that, when a sample is tested, one-third of the swab used to collect the genetic material is placed in a tube, then the DNA is extracted. After the extraction is performed, only a liquid, called an extract, remains in the tube. In this case, after the extraction was performed, it was determined that the Nassau County laboratory would be unable to perform DNA typing because the amount of DNA present on the items was too small. (Espana: T.1070-85, 1088-91, 1104, 1125-27)

The swabs and liquid extract were then turned over for LCN DNA analysis to New York City's OCME, which, at the time, was the only laboratory performing LCN DNA testing (Espana: T.1091; Smith: T.1150-53, 1156-57, 1281; Londono: T.1352).

After confirming that the negative control sample did not contain DNA, OCME combined the extracts that had been produced by the Nassau County laboratory with the extracts it had created. They also combined the extracts for the magazines and cartridges into one sample for testing in order to "maximize the potential of recovering DNA." Next, OCME quantified the samples to determine the amount of DNA they contained and then "amplified [the sample], using the PCR-based process." During the amplification process, the LCN DNA was "run" for "three extra cycles." After amplification, electrophoresis, the process by which DNA is separated into strands which have been

treated with fluorescent dye, took place. A graph was then generated that identified portions of the DNA strands. Software was then used to identify which alleles are present and the results are reviewed by an analyst. (Smith: T.1164-65, 1177-82; 1222-23; 1232).

When the results of the LCN DNA analysis were reviewed, OCME determined that the samples contained a mixture of DNA from at least three contributors. It was explained to the jury that when a mixture of more than one person's DNA is found in a sample, the higher concentration of the DNA is determined to have been contributed by the "major contributor" and the lower concentration is from the "minor contributor[s]." Using those findings, OCME determined the profile of the major contributor. (Smith: T.1190-91, 1198; Espana: T.1068-69, 1122)

After he was apprehended, a DNA sample was taken from Mr. Gibson and sent to the OCME for processing and a DNA profile was developed (Fleming: T.1055-59; Smith: T.1166-68, 1179, 1196). When OCME compared Mr. Gibson's DNA profile with the results of the analysis of the DNA obtained from the firearm, cartridges, and magazine, it was determined that he was not the major contributor for the DNA mixture from the samples they had created, but could not be ruled out as a minor contributor (Smith: T.1185, 1195-97, 1251). Because there was a "positive association" between Mr. Gibson and the DNA mixture, OCME performed a statistical analysis to determine the likelihood that his DNA was contained in the mixture and it was determined that it was "approximately four hundred two times more probable that the sample originated from Michael Gibson and two unknown unrelated persons, than that it originated from three unknown unrelated persons" (Smith: T.1197-98). On cross-examination, it was revealed that although OCME had considered the possibility that one of the unknown DNA donors could have been one of Mr. Gibson's relatives, they did not obtain DNA samples for testing from any of his siblings (Smith: T.1255).

3. The State Court Direct Appeal

On direct appeal, Mr. Gibson argued, *inter alia*, that the lower court erred by not holding a Frye hearing to determine whether LCN DNA has achieved general acceptance in the relevant scientific community. The Appellate Division affirmed the conviction and held that the lower court's denial of defendant's Frye motion, finding that a hearing was not necessary given the acceptance of LCN DNA testing by other New York State courts, was not error. People v. Gibson, 163 A.D.3d at 587.

4. The 28 U.S.C. §2254 Habeas Corpus Petition

By *pro se* petition filed in the United States District Court for the Eastern District of New York on June 8, 2020, Mr. Gibson requested a writ of habeas corpus arguing, *inter alia*, that he was erroneously "denied his right to a Frye hearing to determine whether low copy DNA has been generally accepted within the scientific community as a reliable forensic tool for identification purposes." *Pro Se* §2254 Petition at p. 20.

By decision and order filed on July 13, 2021, Judge Brown denied Mr. Gibson's habeas petition holding, *inter alia*, that "none of the grounds support habeas relief." Although the district court did not specifically address Mr. Gibson's claim regarding the trial court's refusal to hold a Frye hearing, he did hold that

> The Court finds no error regarding the determinations concerning the admissibility of the DNA evidence, given that the DNA evidence merely confirmed the direct and circumstantial evidence of record, including video footage of the murder and eyewitness identification testimony (i) from Petitioner's girlfriend who drove his vehicle as they fled the scene and identified him as the person in the video who got out of the car and (ii) from a participant in the fist fight who identified Petitioner as the shooter.

Habeas Decision dated July 13, 2021 at p. 5 [A11].

B. *The State Court Erred in Denying the Defense Requests for a Frye Hearing*

The first prong of this analysis must be a determination as to whether the State trial court erred in denying Mr. Gibson's requests to hold a Frye hearing to determine whether LCN DNA analysis has been generally accepted within the scientific community as a reliable forensic tool for identification purposes. A review of this record clearly reveals that a Frye hearing should have been held before the testing results were admitted at trial and the failure to do so resulted in the denial of Mr. Gibson's constitutional right to due process.

1. The Evolution of the Test for the Admission of Novel Scientific Evidence in the Federal Courts

The question of when and whether novel scientific evidence should be admitted as evidence at trial was first addressed in 1923 in Frye v. United States, 293 F. 1013 wherein the D.C. Circuit held that an expert opinion based on a scientific technique is admissible only where the technique is generally accepted as reliable in the relevant scientific community. In both State and Federal courts, the hearing at which such a determination would be made came to be known as a "Frye hearing."

In the Federal courts, Frye was superceded by Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. at 588, wherein this Court mandated that the Frye test of general acceptance in the scientific community was being replaced by Rule 702 of the Federal Rules of Evidence which states that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed.R.Evid. 702.

Rule 702 assigns to trial courts "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand" because, "[w]hile the proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the admissibility requirements of Rule 702 are satisfied," the district court is the ultimate "gatekeeper" for the admission of all evidence. United States v. Williams, 506 F.3d 151, 162 (2d Cir. 2007); Fed.R.Evid. 104(a); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. at 597; United States v. Cruz, 363 F.3d 187, 192 (2d Cir. 2004).

As guidance to district courts as to how to make a determination regarding the admission of novel scientific evidence at trial, the Second Circuit has explained that, in assessing the reliability of a piece of evidence, "the district court should consider the indicia of reliability identified in Rule 702, namely, (1) that the testimony is grounded on sufficient facts or data; (2) that the testimony is the product of reliable principles and methods; and (3) that the witness has applied the principles and methods reliably to the facts of the case (internal quotation marks omitted)." Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 265 (2d Cir. 2002). However, these criteria are not exhaustive. See Wills v. Amerada Hess Corp., 379 F.3d 32, 48 (2d Cir. 2004). This Court in Daubert also enumerated a list of additional factors bearing on the reliability of this type of scientific evidence that trial courts may also consider including: (1) whether a scientific theory or technique has been or can be tested; (2) whether the scientific theory or technique has been subjected to peer review and publication; (3) the scientific technique's known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and (4) whether a particular scientific technique or theory has gained general acceptance in the relevant scientific community. Daubert v.

Merrell Dow Pharmaceuticals, Inc., 509 U.S. at 593-94. Those factors were never assessed here because no inquiry regarding this LCN DNA evidence was ever conducted.

2. The Frye Standard Remains the Test for Admissibility of Novel Scientific Evidence in New York State Courts

Although it is no longer used in Federal courts after Daubert, the test for the admissibility of novel scientific evidence in New York State courts remains the Frye test. The New York State Court of Appeals has articulated the rule for the admission of such evidence as follows: "... expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field." People v. Wesley, 83 N.Y.2d 417, 422 (1994) *quoting* Frye v. United States, 293 F. at 1014 (The NYS Court of Appeals acknowledged that, although the Daubert test is now used by the Federal courts, New York continues to use the Frye test for determining the admissibility of novel scientific evidence). The NYS Court of Appeals has further explained that: "The process is meant to assess whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally (internal quotation marks omitted)." People v. Brooks, 31 N.Y.3d 939, 941 (2018).

As guidance to state trial courts, the NYS Court of Appeals has explained that, in order to admit novel scientific evidence, the party proffering the evidence, in this case the Nassau County District Attorney, must establish a consensus of reliability within the scientific community:

> Although unanimity is not required, the proponent [of the disputed evidence] must show consensus in the scientific community as to [the methodology's] reliability. That consensus has been described as a surrogate for determining the reliability of a purported scientific methodology. A showing that an expert's opinion has 'some support' is not sufficient to establish general acceptance in the relevant scientific community (internal citations and quotation marks omitted).

People v. Williams, 35 N.Y.3d 24, 37 (2020). That did not happen in the case at bar.

3. The State Court's Decision to Deny the Defense Requests for a Frye Hearing Regarding LCN DNA Analysis Was Erroneous and an Abuse of Discretion

Under both the State (Frye) and Federal (Daubert, Rule 702) tests governing the admission of novel scientific evidence, it is clear that the State court's decision to deny the defense request to conduct a hearing to assess the admissibility of LCN DNA testing results was wrong and an abuse of discretion for several reasons. First, the decision was erroeous because, contrary to Judge Donnino's claim that a hearing was not warranted because "the defendant's allegations have failed to create an issue of fact as to whether LCN DNA testing is genuinely novel and generally accepted as reliable in the relevant scientific community" [Donnino Decision dated May 14, 2013 at p. 4], defense counsel did just that. In the first motion requesting a Frye hearing, Mr. Gibson's counsel raised questions regarding the general acceptance of LCN DNA testing and noted that Frye hearings were being conducted by at least two other New York courts, thus demonstrating a lack of general acceptance in the community. Defense Motion dated February 5, 2013 at ¶¶6-10. And, in the second motion submitted as trial began, counsel cited and provided the transcript from another New York case in which the trial court had precluded evidence of LCN DNA testing conducted by OCME. He also cited several scholarly articles on the subject of LCN DNA testing, including one co-authored by Dr. Bruce Budowle, the executive director of applied genetics at the University of North Texas Health Science Center ("UNTHSC"), who the NYS Court of Appeals called "the father of American DNA analysis." People v. Williams, 35 N.Y.3d at 33. In that article, appropriately titled "Low Copy Number Typing Has Yet to Achieve 'General Acceptance,'" Dr. Budowle

> ... noted that a "[c]laim[] ha[d] been made recently" in *People v Megnath* (27 Misc3d 405 [Sup Ct, Queens County 2010]) "that LCN

> typing is generally accepted as being reliable." Dr. Budowle and his coauthors, however, believed that conclusion "difficult to substantiate... because of the inherent lack of reproducibility of the current LCN method(s)." The conclusion to that article explained that Dr. Budowle and his coauthors would not endorse OCME's "flawed" LCN testing practices, which the writers believed to be "inconsistently applied [to overstate] the weight of the evidence." The title the authors chose for that article distilled those points and neatly summarized defendant's case with respect to the LCN question.

People v. Williams, 35 N.Y.3d at 33. This acknowledgment by the NYS Court of Appeals that "the father of American DNA analysis" would not endorse OCME's "flawed" LCN DNA testing practices is nothing less than astonishing. And, what is more astonishing is that the trial court in this case ignored that finding and admitted the LCN DNA testing results at Mr. Gibson's trial without first conducting a Frye hearing to make his own determination regarding the reliability and acceptance in the scientific community of this clearly controversial novel scientific evidence that was a major focal point of the People's case. This is a catastrophic error that should not have been ignored by the State appellate and Federal habeas courts.

Second, even if it were true that defense counsel had failed to provide the necessary support for the argument to preclude the LCN DNA testing results from trial (which Mr. Gibson does not concede), this would not be an adequate reason to deny the request for a Frye hearing because this Court has made it clear that it is "...the proponent of expert testimony [who] has the burden of establishing by a preponderance of the evidence that the admissibility requirements of Rule 702 are satisfied." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. at 593, n.10. And, the NYS Court of Appeals in People v. Williams, 35 N.Y.3d at 37 also made it clear that under the Frye standard, "...the proponent [of the disputed evidence] must show consensus in the scientific community as to [the methodology's] reliability." Thus, as the proponent of the evidence of the LCN DNA testing

results, it was the District Attorney who had the burden of establishing the general acceptance by the relevant scientific community of this LCN DNA analysis and Mr. Gibson was entitled to have the trial court hold the People to that burden. Any perceived inadequacies in the defense's request should not have been the basis for the denial of a Frye hearing where the People did not (because they could not) establish by a preponderance of the evidence in their motion the reliability of the LCN DNA testing.

Third, in assessing whether a scientific test has gained general acceptance, the NYS Court of Appeals has provided guidance to its trial courts, explaining that a trial court should consider expert testimony [People v. Wesley, 83 N.Y.2d at 424-26]; texts and scholarly articles [People v. Middleton, 54 N.Y.2d 42, 49 (1981)]; and judicial precedents. Id.; People v. Wesley, 83 N.Y.2d at 437 (Kaye, CJ., concurring). The trial court here chose to use only one of these tools – prior judicial precedents. However, as the NYS Court of Appeals has also recognized, it is for scientists, not judges, to decide whether a scientific test produces reliable results. Id. at 422-23. Judicial notice of a couple of other court decisions on the general acceptance of a controversial novel scientific process cannot relieve a judge of his duty to ensure that only scientific evidence that has been generally accepted as reliable by the scientific community – not just a couple of judges – will be presented to a jury. However, that is precisely what happened here. Rather than taking the time to make an informed decision himself regarding the reliability of the proposed evidence, the trial court simply relied on decisions made by other judges who presumably are not scientists themselves. Donnino Decision dated May 14, 2013 at p. 4. In doing so, the court embraced the errors in the decisions of those other courts. And then, when a new attorney made a second motion to preclude the evidence and for a Frye hearing, a motion which included a plethora of new evidence demonstrating that LCN DNA testing had recently been deemed unreliable by experts in the field and thus could not be deemed "generally accepted," the

motion was simply ignored by the court.

Specifically, in denying the request for a Frye hearing, the State court relied on trial court decisions in People v. Garcia, 39 Misc.3d at 482 (Supr. Ct., Bx. Co. 2013), a case in which no Frye hearing was held, and People v. Megnath, 27 Misc.3d 405, 411 (Sup Ct, Queens Cty. 2010), a case in which a lengthy Frye hearing was held after which the judge admitted the LCN DNA testing analysis results. Decisions by other trial courts, including Megnath and Garcia, should have been the starting point for the trial court's exploration as to whether LCN DNA testing is generally accepted as reliable, not the totality of the basis of the court's determination. As then-Chief Judge Judith Kaye observed in her concurring opinion in People v. Wesley, 83 N.Y.2d at 439, the absence of other court opinions finding that a new scientific test is not reliable does not demonstrate general acceptance or judicial endorsement, but rather may simply represent the "prematurity of admitting" such evidence, reflecting that "[i]nsufficient time had passed for competing viewpoints to emerge." Thus, when a court relies on materials that are not in the trial record before it, such as judicial opinions authored by other judges, without himself conducting an investigation, he must take special care to assure that the question of general acceptance in the scientific community was thoroughly litigated in those cases so that reliance on them does not become automatic. That is so because to rely automatically on the opinions of other judges will result in the dilution of the standard set in Frye (and Daubert and Rule 702) and leaves criminal defendants vulnerable to being convicted based on unreliable evidence that is not generally accepted by experts in the scientific community.

The damage that can be done by relying blindly on prior judicial precedents is clearly demonstrated in the case at bar when it is recognized that People v. Megnath, the case heavily relied on by the State court in denying Mr. Gibson's request for a Frye hearing, has come under intense

scrutiny by the NYS Court of Appeals. In its 2020 decision in People v. Williams, 35 N.Y.3d at 38, the Court of Appeals held that the trial court had abused its discretion as a matter of law in permitting the admission of evidence of LCN DNA testing results without first holding a Frye hearing because the decision to deny the hearing was based on Megnath. In doing so, the Court explained that, although the Megnath court had taken the time to hold a Frye hearing after which it had ruled that LCN DNA testing performed by the NYC OCME, was "generally accepted as reliable in the forensic scientific community" [People v. Megnath, 27 Misc.3d at 411], that conclusion was now suspect given that it "was based on the court's review of what was OCME's own, internal support for its process as well as upon evidence reflecting that such methodology had 'been used worldwide for over 10 years and [was] currently used in many other countries.'" People v. Williams, 35 N.Y.3d at 38. The Court further criticized the Megnath trial court, finding that it "... did not adequately assess whether OCME's LCN testing was generally accepted within the relevant scientific community." Id. at 39. The Court added that, the fact that one or more courts, relying on flawed analyses, have deemed a scientific principle reliable, is not a substitute for proof that it had been generally accepted in the scientific community:

> The repetition of a single, questionable judicial determination does not strengthen or add validity to such ruling, and it defies logic that an error, because it is oft-repeated, somehow is made right... Scientific community approval, not judicial fiat, is the litmus test for the admission of expert evidence generated from a scientific principle or procedure, and it is not to be assumed that one hearing is automatically "enough" to hurdle a *Frye* inquiry in a different matter.

Id. at 38-39.

Also recognized by the Williams Court was the inherent unreliability of this type of DNA testing: "...the fact remains that there was 'marked conflict' with respect to the reliability of LCN

DNA within the relevant scientific community at the time the LCN issue was litigated in this case." Id. at 39. Importantly, that decision was also made around the same time that the issue was litigated in Mr. Gibson's case. The Frye hearing request was made in Williams in or about March 2014[4] and the second motion in this case was made in April 2015. And, as further evidence of the unreliability of this LCN DNA testing analysis, in 2022 the NYS Court of Appeals again held that:

> FST is a low copy number (LCN) DNA method that was developed by the New York City Office of Chief Medical Examiner (OCME). LCN DNA analysis was developed as a means of obtaining DNA profiles from even smaller amounts of DNA by increasing the PCR amplification cycles to essentially make more copies of the DNA segments to allow for analysis. As the Electronic Frontier Foundation explains in its amicus brief, OCME has since discontinued using FST after independent source code audits uncovered serious errors in the software's calculation of likelihood ratios (internal citations and quotation marks omitted).

People v. Easley, 38 N.Y.3d 1010, 1018 n.2 (2022).

Thus, given its inherent unreliability and the judges and scientists that have so held, it is clear that the State court erred in failing to recognize that a Frye hearing was necessary to determine the reliability of the LCN DNA testing results before this evidence was admitted at Mr. Gibson's trial.

C. *The Trial Court's Denial of the Defense Requests for a Frye Hearing Was an Unreasonable Application of Clearly Established Federal Law as Determined by the United States Supreme Court*

Once it has been established that there was an error committed by the State court(s), the next step is to determine whether it involved an unreasonable application of clearly established Federal law which is established with proof that "... the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in

[4] The NYS Court of Appeals does not make it clear when Williams requested a Frye hearing. However, the Court noted that the order denying the application was rendered March 5, 2014.

existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. at 103. Mr. Gibson has clearly met that burden.

In its Summary Order affirming the district court's denial of Mr. Gibson's §2254 habeas petition, the Second Circuit erroneously held that "there is no clearly established constitutional requirement that a hearing be held before expert testimony is admitted. There is no Supreme Court caselaw on point for the state court to have acted contrary to, nor any case with materially indistinguishable facts." Habeas Decision dated July 13, 2021 at p.4 [A10]. The Second Circuit is wrong. In support of his Federal law claim, Mr. Gibson relied on Daubert v. Merrell Dow Pharmaceuticals, a decision of this Court that has been cited thousands of times and can absolutely be labeled "clearly established federal law as defined by the United States Supreme Court."

While it is, of course, true that the Daubert Court explained that the Frye test of general acceptance in the scientific community was no longer the standard to be used, that ruling did not eliminate the duty of trial courts to make informed assessments and hold hearings before admitting novel scientific evidence to ensure both its relevance and reliability. Rather, in so holding, the Court explained that although the Frye standard was being replaced with Rule 702 of the Federal Rules of Evidence, the Court was absolutely not doing away with the trial courts' duty to assess novel scientific evidence before admitting it. It did not create a free-for-all scenario where prosecutors could present any scientific evidence without oversight. In fact, in recognizing Frye's replacement with Rule702, the Court made a point of noting that it was doing just the opposite, stating that just because

> ... the Frye test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge

> disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. at 589. Thus, whether the review is called the Frye test or the Daubert test (or simply review under Rule 702), as the gatekeeper of the evidence trial courts still have the critically essential duty to review novel scientific evidence before admitting it to determine both its relevance and reliability.

In affirming the district court's denial of Mr. Gibson's §2254 habeas petition, the Second Circuit even went so far as to claim that "Even assuming *arguendo* that it was an error of New York evidentiary law to deny counsels' requests for a Frye hearing... we cannot conclude that the New York state courts acted outside the limits of objective reasonableness in upholding Gibson's conviction." Habeas Decision dated July 13, 2021 at p.5 [A5]. The Court based that determination on the fact that it had "previously upheld federal district court determinations to admit LCN DNA evidence (albeit after a hearing pursuant to Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993))." Habeas Decision dated July 13, 2021 at p.5 [A5]. The Second Circuit is wrong. Had the trial court taken the time to hold a hearing or, at a minimum, to himself assess conduct a review and make a determination as to the reliability of the proffered evidence, he would have come to the same conclusion that other New York courts have come to which is that this scientific evidence is not sufficiently reliable, nor is it accepted in the scientific community. Instead, the trial court denied the pre-trial motion requesting a review of the evidence relying on erroneous trial court decisions made in other cases

As described *supra*, in Mr. Gibson's second motion, drafted more than two years after the first and never decided by the court, Mr. Gibson's attorney provided an update for the court on the

monumental developments in the law regarding LCN DNA testing result evidence and asked the court to preclude the evidence or to conduct a Frye hearing. In doing so, counsel explained that after Mr. Gibson's first Frye motion was denied without a hearing by Judge Donnino, a New York City judge held a Frye hearing after which he ruled that LCN DNA testing was unreliable and precluded evidence of the results. Defense Motion dated April 24, 2015 at ¶¶6-10. In support of his argument, counsel cited several scholarly articles which called into serious question the LCN DNA testing methodology. And, as was revealed in Mr. Gibson's state court appeal, serious issues regarding the integrity of the OCME lab where the LCN DNA testing had been conducted had come to light after Mr. Gibson's first motion was denied that should have prompted the state court to, at a minimum, hold a hearing before making a determination regarding the admissibility of the testing results:

> The LCN DNA statistical program was created in April 2013, by Dr. Theresa Cargene, an employee of the NYC OCME. Dr. Cargene was subsequently fired due to "many problems in the lab" (Smith: 1235-36); among those problems was Dr. Cargene's willingness to change DNA results that she disagreed with (Smith: 1255-56).
>
> Smith was the "technical supervisor" of the analyst who actually performed LCN DNA tests. However, Smith neither replicated the test results (due to the small amount of DNA being used up during the initial testing process) and was not present to observe the analyst conducting the tests (Smith: 1153). Samantha Orren performed the initial DNA analysis of the evidence (T.1157-58). Smith merely "reviewed" her test results (T.1153).
>
> Two "technical reviews" were conducted. The first was by Ms. Smith; and the second by Dr. Cargene (Smith: 1269-70): "The technical review is me basically checking to make sure all the data in the file is represented in the report. So, I did the first review. And the second review was done by Dr. Cargene. *Id.*"

However, inexplicably this was ignored by the trial court which was error and a clear abuse of his

discretion as he had a duty to act as the gatekeeper of the evidence. Instead, knowing that the methodology with which the LCN DNA results had been procured had been called into serious doubt by scientific experts in the field (and trial courts who took the time to review them), the trial court allowed this unreliable evidence to be presented to the jury.

This is all especially troubling given that after Mr. Gibson's trial, the NYS Court of Appeals, in People v. Williams, 35 N.Y.3d 24, ruled that it was error to admit LCN DNA evidence without first holding a Frye hearing because, as discussed *supra*, "the father of American DNA analysis" refused to endorse OCME's "flawed" LCN DNA testing practices. Id. at 33. And, while it is true that the Williams decision came after Mr. Gibson's conviction, we know that the People and trial court were aware of this development because defense counsel had brought it to their attention. Specifically, they knew that other courts had called into serious question the LCN DNA testing process and were conducting Frye hearings before admitting it and they knew that because, in addition to legal authority, along with his motion counsel included scholarly articles, authored by prominent experts in the field, which outlined the concerns being expressed by the scientific community:

> LCN DNA typing, including the OCME's LCN DNA methodology, has yet to meet the Frye standard of general acceptance within the relevant scientific community. As one text put it, "it is fair to say that LCN typing is the subject of great dispute among some of the leading lights of the forensic community." FAIGMAN; DAVID, JEREMY BLUMENTHAL, EDWARD CHENG, JENNIFER MNOOKIN, ET. AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY (Thomson 2011-2012). See also Jason Gilder, Roger Koppl, Irving, Kornfield, et. al., "Comments on the Review of Low Copy Number Testing," Lrit'l J. Legal Medicine, June 2008, ("Given the acknowledged lack of consensus in interpretation (among other concerns)... it is unlikely that LCN tests based on STR loci will be embraced by crime

> laboratories in the U.S. or that such results would be deemed admissible if they were challenged"); Natasha Gilbelt, "Science in Court: DNA's Identity Crisis," Nature, Vol. 464, p.347-348 (2010) (discussing the "highly charged debate in the scientific and law enforcement communities about low-copy number analysis"). LCN testing methods have been, and continue to be, the subject of vigorous debate and disagreement within the forensic DNA scientific community, precisely because of the potential for unreliable, unreproducible and skewed results.

Defense Motion dated April 24, 2015 at ¶9. Given that this information was before the trial court, it is extremely troubling that the District Attorney, whose duty it is to seek justice, not just convictions, argued then and has continued to argue in the post-conviction State and Federal proceedings that there was no error in admitting this flawed, unreliable testimony.

Thus, it cannot be said, as the Second Circuit claims, that Mr. Gibson "has fallen short of showing that the evidence here would not have been admitted after a hearing..." Habeas Decision dated July 13, 2021 at p.5 [A5]. The failure of the State court to do its due diligence to hold a hearing or, at a minimum to thoroughly screen the scientific evidence to ensure that it "is not only relevant, but reliable" [Id.] in accordance with the standard set by this Court in Daubert prior to admitting it at trial is precisely why Mr. Gibson's conviction cannot stand.

D. *The Trial Court's Denial of the Defense Request for a Frye Hearing Resulted in the Denial of Constitutional Due Process Because the LCN DNA Evidence Was Crucial to the Trial's Outcome*

Once it is determined that a Frye hearing should have been held to determine the admissibility of the LCN DNA testing results before they were admitted by the People at Mr. Gibson's trial, and that the failure to do so was an unreasonable application of clearly established Federal law, the next step is a determination as to weather the admission of this unreliable scientific evidence resulted in the denial of constitutional due process because it was crucial to the trial's outcome. According to

the Second Circuit, this prong cannot be met because "the LCN DNA evidence ... merely corroborated other, more powerful evidence against Gibson." Habeas Decision dated July 13, 2021 at p.5 [A5]. The Second Circuit is wrong.

In accordance with this Court's decisions, evidentiary rulings made by State trial courts, even if erroneous under State law, do not present constitutional issues cognizable on Federal habeas review unless the challenged ruling affects the fundamental fairness of the proceedings. Crane v. Kentucky, 476 U.S. 683, 689 (1986) (Noting this Court's "traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts"); DiGuglielmo v. Smith, 366 F.3d 130, 137 (2d Cir. 2004) (*per curiam*) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). And, that threshold of fundamental unfairness is met where: "[T]he erroneously admitted evidence, viewed objectively in light of the entire record before the jury, was sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it. In short it must have been crucial, critical, [and] highly significant." Collins v. Scully, 755 F.2d 16, 19 (2d Cir. 1985). Here, the test for prejudice and unfairness can easily be met as it is clear that the erroneously admitted LCN DNA evidence was so "crucial, critical, [and] highly significant" that it "removed a reasonable doubt that would have existed on the record without it." Id.

In opposition to Mr. Gibson's §2254 habeas petition, the Government argued that he cannot establish the requisite prejudice for the trial court's evidentiary error in refusing to hold a Frye hearing and admitting the LCN DNA testing results because the evidence of his guilt was overwhelming:

> .... any error in admitting the DNA evidence could not have prejudiced defendant because the evidence of his guilt was overwhelming. The murder was recorded on video. Defendant's girlfriend, who drove his

> vehicle as they fled the scene, identified defendant as the person in the video who got out of the car, ran down the street, and shot Bolling. A participant in the fist fight outside the strip club recognized defendant and identified him as the shooter. The DNA evidence merely confirmed the People's ample direct and circumstantial evidence that defendant shot Bolling before discarding the handgun and magazine in the sewers of Uniondale before he fled the State. Further, the DNA evidence did not prove that defendant was the only person who could have contributed the DNA on the murder weapon. It simply showed that it was 402 times more likely that defendant and two others contributed to the mixture than that three unknown people did (internal citations omitted).

People's Opposition to Habeas Petition at p. 23. And, in denying Mr. Gibson's petition, the district court simply repeated the People's argument, holding that there was:

> no error regarding the determinations concerning the admissibility of the DNA evidence, given that the DNA evidence merely confirmed the direct and circumstantial evidence of record, including video footage of the murder and eyewitness identification testimony (i) from Petitioner's girlfriend who drove his vehicle as they fled the scene and identified him as the person in the video who got out of the car and (ii) from a participant in the fist fight who identified Petitioner as the shooter.

Habeas Decision dated July 13, 2021 at p. 5 [A11]. Both the People and the district court are wrong. A review of the trial record reveals that the evidence of Mr. Gibson's guilt was not overwhelming and that the DNA evidence was not simply confirmatory of the People's direct and circumstantial evidence. Rather, the LCN DNA testing results were a critically important piece of the People's case at trial, and one which tipped the case in the prosecution's favor.

As both the People and the district court noted, the People's case was based on (1) the incredible trial testimony of immunized cooperating witness Diana Parson, one of Mr. Gibson's girlfriends who was in the car with him on the night of the incident; (2) the incredible trial testimony of cooperating witness Priestly Green, an admitted career criminal who, despite his protestations that

he did not receive a benefit for his cooperation in this case, was clearly rewarded for it with a greatly reduced sentence in an unrelated criminal matter; (3) video surveillance of the incident that showed a man in a white shirt shoot Joseph Bolling in front of a strip club during a fight (Mr. Gibson could not be identified from that video); and (4) the highly questionable LCN DNA testing results at issue here. None of this evidence taken either individually or together amounts to what the People claim to be "overwhelming" evidence of Mr. Gibson's guilt. Therefore, it cannot be said that the State court's error in denying the requests for a Frye hearing to determine the admissibility of the testimony regarding the results of the LCN DNA testing, evidence which proved to be crucial to the trial's outcome, was harmless.

1. The Testimony of Diana Parson

Right out of the gate, the testimony of one of the People's star witnesses, Diana Parson, must be examined with great suspicion and scrutiny as she was gifted the ultimate reward for her cooperation – immunity in the grand jury and transactional immunity for her trial testimony (Parson: T.852-53, 880, 913). And, not only was she handsomely rewarded, she also proved herself to be a liar, a fact which the prosecutor was forced to admit during summation. Although he tried to spin it to convince the jurors that Parson was lying to protect Mr. Gibson when she was, according to him, "less than truthful" in her testimony, in the end he was left asking the jury to convict Mr. Gibson of murder based on the testimony of an obvious liar:

> How do you know with respect to her testimony that you can consider what she said? You can consider what she said with respect to the defendant being on the block that night, having something in his pocket; about the fact that she observed him as a person on the video that gets out of the car, runs up the block and runs back? Consider what she's telling you.

> Mr. LoPiccolo [Defense counsel] is troubled by the fact that she doesn't seem to be being one hundred percent honest. That she is holding back.
>
> There is a phrase that we like to use with a witness, or somebody who says they saw something: They deny what they can't admit, and they admit what they can't deny. I submit to you that is exactly what's going on with Ms. Parson. She is being less than truthful with you about what she said the defendant did that night, about what she said she knew the defendant was doing that night.
>
> But ask yourselves, is she being less than truthful because she is a woman scorned, because she's trying to hurt him? Or is she being less than truthful because she's only admitting what she has to, and is trying to help him?
>
> I submit to you that she is trying to help him.

(T.1480-81). Much like one of his star witnesses, the prosecutor was left "Admit[ting] what they can't deny." And that admission was that Parson, one of the People's star witnesses, was a liar. Her motivation for lying under oath on the witness stand is irrelevant. All that is relevant is that Parson is a liar whose obvious goal was to help herself and, as a result, her testimony cannot be relied upon.

Parson testified that she had been dating Mr. Gibson for a couple of months to a year before the shooting (she could not recall how long) (Parson: T.855, 900). She claimed that on the night of the incident, Mr. Gibson picked her up at her house in a burgundy Toyota Camry[5] and drove them to his friend's house. After hanging out there for about four hours drinking alcohol and smoking marijuana, the group decided to go to Seduccions, a strip club. Mr. Gibson drove the two of them to the club and parked around the corner. (Parson: 857-60, 882, 885-86).

According to Parson, about twenty minutes later, they were still sitting in the car – not

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[5] The burgundy Camry was registered to Geraldine Caldwell, the mother of Shaina Brown, another one of Mr. Gibson's girlfriends (Caldwell: T.1002-05).

smoking or drinking (although she told detectives that they smoked marijuana while sitting in the vehicle)[6] – when they saw a fight break out near the club (Parson: T.859-61, 880-88). Mr. Gibson then got out of the car and went toward the altercation. As he exited the vehicle, Parson claimed to have seen a black, shiny object tucked in his waistband. She could not say for certain what it was, but noted that it was the first time she had seen it that night (Parson: T.861-63, 889-91). When Mr. Gibson got out, Parson also exited the car and took over in the driver's seat (Parson: T.860-61, 868). She claimed that immediately after Mr. Gibson went up the block toward Seduccions, she "heard a lot of commotion" and "a gun noise," a sound she recognized from television. (Parson: T.861, 868-69, 892).

Parson testified that when Mr. Gibson returned to the car, she immediately drove off without him telling her to do so. She did not observe any injuries or blood on his hands or body. (Parson: T.862, 870, 892-94) She then drove them to a gas station and after they got gas, they made another stop where Mr. Gibson got out of the car for about five minutes. Parson remained in the car and did not see what he was doing. (Parson: T.862-65, 871, 895). On cross-examination, Parson acknowledged that she may have been mistaken (or perhaps lying) and that they may have made the stop before getting gas (Parson: T.895-96).

Another lie was revealed with regard to where Parson went after the gas station and stop. Initially, she testified that after the gas station and the stop she went home and did not go anywhere else with Mr. Gibson that night. However, on cross-examination, when confronted with her grand

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[6] On cross-examination it was revealed that Parson had lied either during her trial testimony or during her interview with police because she told detectives that she and Mr. Gibson were smoking marijuana while sitting in the car near Seduccions, and then testified at trial that they were not (Parson: T.888).

jury testimony and prior statements to police during which she told a different story, she was forced to admit that she had not gone home, but had actually returned with Mr. Gibson to the friend's house where they had been before going to Seduccions. (Parson: T.866, 896-901)

In addition to the myriad of lies she told, it is also critically important to note that Parson's tale was not provided to the police voluntarily. She did not stick around that night to tell the police what she had seen or heard and made no effort to contact authorities in the days that followed. Parson did not give the police her story to police until September 21, 2011 when she was pulled out of a car and interrogated. And, although she claims that she did not recall being threatened with arrest to convince her to reveal her story, the truth is that she testified in the grand jury and at trial with immunity (Parson: T.907-12). Thus, to call the evidence in this case overwhelming based on the unreliable testimony of a woman who only gave her story when promised immunity and who the People admitted had perjured herself under oath, is ridiculous.

2. The Testimony of Priestly Green

Priestly Green, a convicted criminal who admitted on the stand that he is "prone to violence," was the People's other star witness and was just as incredible as Parson. Green testified that on the night of the incident, he parked his motorcycle in front of Seduccions. He explained that he was there that night to collect money from the strip club's dancers who paid him for protection, transportation and connections he made for them. (Green: T.929, 943-47, 963, 968, 985)

According to Green, after he arrived, he stayed outside the club speaking with several very intoxicated friends, including Joseph Bolling who he knew had previously been arrested for murder. A short time later, a fight broke out. Although he did not know what the altercation was about, Green got involved by striking participants in the face and head with his motorcycle helmet. He was also

heard yelling, "Get my gun." (Green: T.929-31, 934-35, 946, 985; Londono: T.1384)

According to Green, during the fight he saw Mr. Gibson approach the scene holding a chrome handgun. He then claimed to have seen Mr. Gibson "look at the gun. He moved about five more steps, ran about five more steps, approximately ten yards, and raised the gun and fired one shot" at Bolling. After the shot, everyone scattered but Green followed the shooter in an effort to get a license plate so that he could "take matters into [his] own hands." During his pursuit of the shooter, he saw a burgundy car drive away. (Green: T.935-41, 957, 984-85)

Green admitted that even though Bolling was his friend, he did nothing to ensure that the person who shot him was brought to justice. He left the scene before the police arrived because he knew that he was wanted by law enforcement for an unrelated incident, and did not bother to call in a tip (anonymous or otherwise) after he left the scene. It was not until he was arrested in October 2011 on an assault charge related to an April 2011 bar fight during which he stabbed someone in the stomach and hit him in the eye with a broken bottle, that he suddenly felt the urge to help the police make their case against Mr. Gibson. (Green: T.941, 959, 967, 973-74, 984-85; Londono: T.1379-80). But, before he was willing to help the police and avenge his friend's death, he first asked for a deal on all of his open cases in exchange for his information (Green: T.973). Although at Mr. Gibson's trial he claimed that he had not received any benefit for his cooperation because he did not receive the minimum sentence on his assault case, that claim is blatantly false. The truth is that he received a tremendous benefit in the form of an aggregate nine-year sentence (when the minimum was seven years) for the assault charges stemming from the vicious bar fight when he faced twenty-five years (Green: T.970). And, in addition to that greatly reduced sentence, Green reluctantly admitted that, in order to secure his testimony, the District Attorney also promised to submit a favorable letter to

the Parole Board on his behalf when the time comes and to relocate him after he served his sentence (Green: T.968-71, 998). Thus, it is hard to believe a man who claims to have received no benefit for his testimony when he, in fact, was handsomely rewarded with a greatly reduced sentence, favorable Parole letter, and relocation. Under any definition of the word, those would qualify as benefits for cooperation.

Green also testified about his very lengthy criminal history which includes multiple convictions for violent felonies in addition to the vicious assault in 2012 described *supra* for which he was incarcerated when he testified in this case. He further admitted that he had violated his post-release supervision on multiple occasions in 2010 and 2013m and had committed numerous other crimes for which he was never prosecuted. (Green: T.959-67)

Once again, to call evidence in this case overwhelming based on the testimony of a man with an extensive, violent criminal history, who only gave his story to police when given tremendous benefits, is far-fetched.

3. The Video Surveillance Footage

The next piece of evidence upon which the People and the district court heavily relied was video surveillance footage. The video showed that an individual in a white shirt exited the driver's side of a car, turned the corner to where the fight took place, and appeared to pull at something in his hand. Seconds later, another individual fell to the ground and the man in the white-shirt ran back down the street and got into the passenger side of a car and the car drove off. Parson, the People's fully immunized cooperating witness who they described as being "less than truthful" in her trial testimony [T.1480-81], identified that car as the one Mr. Gibson had driven to the club, and identified him as the person who got out of the car. (Parson: T.867-70)

However, it is important to remember that James Quinn, a doorman at Seduccions on the night of the fight, testified that the strip club brought in a "rough crowd." He also testified that there were a number of individuals wearing white shirts at Seduccions that night who had been denied entry because they refused to be searched for weapons so they were hanging out outside of the club. Finally, he testified that, at some point, that group walked to the corner and a fight broke out. (Quinn: T.803-13; Green: T.930).

In addition, there was testimony that after the incident, the police received a Crime Stoppers tip identifying a man named Kevin Powell as the person who shot Bolling (Londono: T.1364-65).

4. The Importance Placed by the People on the LCN DNA Testimony

In making a determination as to whether to vacate a conviction based on a trial court's evidentiary decision, the degree of importance given to a piece of evidence should weigh heavily in the decision-making process. Here, the importance given by the People to the LCN DNA testing results surely weighs in favor of vacatur. One only needs to look at the prosecutor's summation to see just how important the People believed this DNA evidence to be. During his summation, the prosecutor stated, in no uncertain terms, that it was the DNA that proved Mr. Gibson's guilt: "... in this case, there was one weapon; there were two cartridges. One was never fired, and was found. The other one was. That one is a match to the gun with his DNA on it. Why does it matter? Because it shows you he's guilty." (T.1491). That last sentence, "Because it shows you he's guilty," is precisely why this conviction cannot stand. How can a conviction based on LCN DNA testing results stand when the reliability of that evidence is called into such serious question? The short answer must be that it cannot.

II. CONCLUSION

Despite the Second Circuit's claim that there was overwhelming evidence of Mr. Gibson's guilt without consideration of the LCN DNA testing results which the Court labels "confirmatory," that is simply not true. When one examines the remainder of the People's evidence without reference to the LCN DNA evidence, all that is left is the grossly incredible testimony of two cooperating witnesses who were rewarded with amazing benefits for their cooperation, one of which the People admitted had repeatedly lied under oath at Mr. Gibson's trial, and a video from which Mr. Gibson cannot actually be identified.

Moreover, even if the LCN DNA evidence could be described as confirmatory, that confirmation was all the jury needed to convict. The importance of DNA testimony to jurors cannot be underestimated. It is crucial evidence for a conviction in today's trials. In fact, the massive importance assigned by jurors to DNA evidence was acknowledged by the NYS Court of Appeals in People v. Wright, 25 N.Y.3d 769, 783-84 (2015), wherein the Court took note of several scholarly articles and studies which outlined the great importance to juries of DNA evidence and its "increasingly important role in conclusively connecting individuals to crimes:"

> Indeed, the potential danger posed to defendants when DNA evidence is presented as dispositive of guilt is by now obvious. As this Court previously recognized, "forensic DNA testing has become an accurate and reliable means of analyzing physical evidence collected at crime scenes and has played an increasingly important role in conclusively connecting individuals to crimes" *(People v Pitts*, 4 NY3d 303, 309 [2005]). Courts and commentators have remarked on the unique status of DNA evidence within the criminal justice system and in the minds of jurors. "Modern DNA testing can provide powerful new evidence unlike anything known before" (*District Attorney's Office for Third Judicial Dist. v Osborne*, 557 US 52, 62 [2009]). The persuasiveness of DNA evidence is so great that as one commentator noted, "[w]hen DNA evidence is introduced against an

> accused at trial, the prosecutor's case can take on an aura of invincibility" (Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence By Prosecutors: Ethical and Evidentiary Issues*, 76 Fordham L Rev 1453, 1469 [2007]). Similarly, in a three-case study, the researchers noted that "a mystical aura of definitiveness often surrounds the value of DNA evidence to exonerate the innocent and convict the guilty" (Joel D. Lieberman et al., *Gold Versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence?*, 14 Psychol Pub Pol'y & L 27, 27 [2008]). Furthermore, this same aura "that surrounds DNA profiling has led it to become 'perhaps the most powerful and, thus the most troubling forensic technology to ever be used in a court of law'"(*id.* at 33 [citation omitted]). The studies suggested that "[g]iven the strength of DNA evidence in the face of strong cross-examination (and in the absence of any additional accompanying direct evidence), it appears that jurors may overvalue this high quality, but not flawless, evidence" (*id.* at 57). The researchers concluded that "[t]he strong and largely invariant impact of DNA evidence across experimental conditions suggests that this type of scientific evidence may be so persuasive that its mere introduction in a criminal case is sufficient to seriously impede defense challenges" (*id.* at 58).

These critically important concerns expressed by the NYS Court of Appeals in Wright were clearly implicated in the case at bar wherein the trial court handed the jurors the DNA evidence upon which they would rely to convict without first ensuring that it was gathered and analyzed using scientific techniques that have "gained general acceptance" in the scientific community [People v. Wesley, 83 N.Y.2d at 422 *citing* Frye v. United States, 293 F. at 1014] and that was all they needed to convict Mr. Gibson.

Thus, since it can easily be said that, given the tenuous nature of the People's other evidence without consideration of the LCN DNA testing results, the DNA evidence at issue here "remove[d] a reasonable doubt that would have existed on the record without it," then it must be deemed to have been "crucial, critical, [and] highly significant" to the outcome of this case. Collins v. Scully, 755 F.2d

at 19. And, if the evidence at issue was "crucial, critical, [and] highly significant" to the outcome of this trial, then its erroneous admission resulted in the violation of Mr. Gibson's right to due process requiring vacatur of his conviction.

As a result of this blatant constitutional error, a writ of habeas corpus should have been issued by the district court and certiorari is now requested to review the denial of Mr. Gibson's meritorious petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254.

CONCLUSION

For the reasons set forth above, we respectfully request that a petition for a Writ of Certiorari be granted.

Dated: January 21, 2024

Respectfully Submitted,

JILLIAN S. HARRINGTON, ESQ.
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P.O. Box 6006
Monroe Twp., NJ 08831
(718) 490-3235

PETITIONER'S APPENDIX

21-1892
Gibson v. Bell

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

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 7th day of November, two thousand twenty-three.

Present:

DEBRA ANN LIVINGSTON,
Chief Judge,
AMALYA L. KEARSE,
SUSAN L. CARNEY
Circuit Judges

MICHAEL S. GIBSON,

Petitioner-Appellant,

v. 21-1892

EARL BELL, Superintendent, Clinton Correctional Facility

Respondent-Appellee.

For Petitioner-Appellant: JILLIAN S. HARRINGTON, Law Office of Jillian S. Harrington, Monroe Township, New Jersey.

For Respondent-Appellee: MONICA M. C. LEITER, Assistant District Attorneys, *of Counsel* (Tammy J. Smiley, Daniel Bresnahan, Cristin N. Connell, *on the brief), on behalf of* Anne T. Donnelly, District Attorney, Nassau County, Mineola, New York.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Brown, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Petitioner-Appellant Michael Gibson appeals from a judgment dated July 13, 2021, by the United States District Court for the Eastern District of New York (Brown, *J.*), denying Gibson's petition for a writ of habeas corpus under 28 U.S.C. § 2254. Gibson was convicted of second-degree murder and two counts of criminal possession of a weapon following a jury trial in New York State Supreme Court, Nassau County, and was sentenced to an indeterminate term of twenty-five years to life imprisonment on the murder charge and a definite term of fifteen years imprisonment on each of the weapons charges, to be followed by five years of post-release supervision.

Twice before trial, defense counsel unsuccessfully sought a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), to determine the reliability and general acceptance of low copy number ("LCN") DNA testing before expert testimony of such testing was admitted. Gibson raised the denial of such a hearing, among other claims, on direct appeal to the Appellate Division, Second Department, which rejected the challenge and unanimously upheld his conviction. *See People v. Gibson*, 80 N.Y.S. 3d 392, 394 (N.Y. App. Div. 2018). The New York Court of Appeals, where he also pressed the claim, denied leave to appeal. *People v. Gibson*, 32 N.Y.3d 1064, 1064 (2018). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

* * *

We certified a single issue for appeal: "whether the state trial court's evidentiary ruling admitting DNA testing testimony without conducting a *Frye* hearing presents a constitutional due process claim because the admitted evidence was crucial to the trial's outcome." We will assume *arguendo* that it was an error of state law for the trial court to decline a *Frye* hearing in the circumstances of this case. However, this alone is insufficient for habeas relief because, as the Supreme Court has repeatedly stated, "'[F]ederal habeas corpus relief does not lie for errors of state law.'" *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). In addition, our review of a state court's denial of relief on the merits of a constitutional claim is statutorily limited.[1] *Scrimo v. Lee*, 935 F.3d 103, 111 (2d Cir. 2019). As relevant here, a federal court may grant habeas relief only if "the [state court] adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[2] 28 U.S.C. § 2254(d).

"A state court's decision is contrary to clearly established federal law when it 'applies a rule that contradicts the governing law set forth in Supreme Court caselaw or . . . confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent.'" *McCray v. Capra*, 45 F.4th 634, 640 (2d Cir. 2022) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)) (alteration marks omitted). The right to a fundamentally fair trial has been clearly established. *See, e.g.*, *Chambers v.*

[1] Nassau County argues that Gibson's due process claim is procedurally barred because he failed to exhaust any constitutional challenge to the state trial court's determination not to hold a *Frye* hearing. Given our determination that Gibson's claim is without merit in any event, we need not address this argument. 28 U.S.C. § 2254(b)(2).

[2] "[C]learly established Federal law, as determined by the Supreme Court of the United States" means "the holdings, as opposed to the dicta" of the Supreme Court, and only of that court. *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Lopez v. Smith*, 574 U.S. 1, 2 (2014) (per curiam).

Mississippi, 410 U.S. 284, 302 (1973). But there is no clearly established constitutional requirement that a hearing be held before expert testimony is admitted. There is no Supreme Court caselaw on point for the state court to have acted contrary to, nor any case with materially indistinguishable facts.

As to the unreasonable application of clearly established federal law, a petitioner demonstrates entitlement to habeas relief by "'show[ing] that the state court's ruling on the [constitutional] claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair[-] minded disagreement.'" *Carmichael v. Chappius*, 848 F.3d 536, 544 (2d Cir. 2017) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). The determination of what constitutes a reasonable application will depend on "the level of specificity of the relevant precedent's holding." *Id.* (citation omitted). "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). Because there are few rules more general than the requirement that a trial be fundamentally fair pursuant to the "general 'fairness' mandate of the due process clause," courts have considerable leeway in making case-by-case determinations in this context. *See Herring v. Meachum*, 11 F.3d 374, 378 (2d Cir. 1993) (noting that a habeas petitioner bears "an onerous burden" in challenging a state conviction under this general mandate).

We have said that "[t]he inquiry . . . into possible state evidentiary law errors at the trial level assists us in ascertaining whether the appellate division acted within the limits of what is objectively reasonable." *Hawkins v. Costello*, 460 F.3d 238, 244 (2d Cir. 2006) (internal quotation marks and alteration marks omitted) (quoting *Jones v. Stinson*, 229 F.3d 112, 120 (2d Cir. 2000)). In evaluating whether the trial court's possible error "was 'so pervasive as to have denied the

defendant a fundamentally fair trial,'" we consider whether "'the erroneously admitted evidence, viewed objectively in light of the entire record before the jury, was sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it.'" *Smith v. Greiner*, 117 F. App'x 779, 781 (2d Cir. 2004) (summary order) (quoting *Collins v. Scully*, 755 F.2d 16, 18, 19 (2d Cir. 1985)); *see also Collins*, 755 F.2d at 19 (noting that, to violate due process, erroneously admitted evidence "must have been crucial, critical, highly significant" (internal quotation marks omitted)).

Even assuming *arguendo* that it was an error of New York evidentiary law to deny counsels' requests for a *Frye* hearing, however, we cannot conclude that the New York state courts acted outside the limits of objective reasonableness in upholding Gibson's conviction. Indeed, we have previously upheld federal district court determinations to admit LCN DNA evidence (albeit after a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)). *See United States v. Morgan*, 675 F. App'x 53, 55–56 (2d Cir. 2017) (summary order); *United States v. Wilbern*, No. 203494-cr, 2022 WL 10225144, at *2 (2d Cir. Oct. 18, 2022) (summary order). And Gibson has fallen short of showing that the evidence here would not have been admitted after a hearing, much less that as a result of the state court's failure to afford him a *Frye* hearing, he was denied a fundamentally fair trial.

Here, viewing the record as a whole, the LCN DNA evidence was not crucial to the outcome of Gibson's trial, but merely corroborated other, more powerful evidence against Gibson. This evidence included eyewitness testimony, video footage, corroborating cell site location evidence, recovery of the murder weapon at a location that Gibson had visited shortly after the shooting, Gibson's flight out of state, and his false statements upon apprehension. In addition, the LCN DNA expert was subject to effective cross-examination about the reliability of the LCN DNA

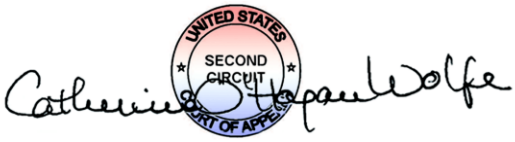
process. *See Olin Corp. v. Certain Underwriters at Lloyd's London*, 468 F.3d 120, 134 (2d Cir. 2006) (discussing cross-examination as one of the ways to challenge "weak expert testimony, rather than complete exclusion"); *see also United States v. Ware*, 69 F.4th 830, 848 (11th Cir. 2023) ("[T]he proper cure for sufficiently reliable but allegedly 'shaky' scientific evidence is not exclusion, but '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'") (quoting *Daubert*, 509 U.S. at 596)).

In sum, we cannot conclude that upholding Gibson's conviction, despite the admission of the LCN DNA evidence in the absence of a *Frye* hearing, was a mistake of constitutional magnitude "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair[-]minded disagreement." *Richter*, 562 U.S. at 103. In such circumstances, Gibson is not entitled to habeas relief.

* * *

We have considered Gibson's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
MICHAEL S. GIBSON,

Petitioner,

-against-

EARL BELL, SUPERINTENDENT CLINTON CORRECTIONAL FACILITY,

Respondent.
----------X

MEMORANDUM AND ORDER
20-CV-2584 (GRB)

GARY R. BROWN, United States District Judge:

Petitioner Michael S. Gibson ("Petitioner"), proceeding *pro se*, petitions this Court for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging his conviction entered on September 8, 2015 in the Supreme Court of the State of New York, County of Nassau (the "trial court"). Following a jury trial, Petitioner was convicted of one count of murder in the second degree and two counts of criminal possession of a weapon in the second degree. On this petition, Petitioner raises several claims:

- Insufficiency of the evidence
- Failure to provide the jury with a charge for manslaughter
- Denial of the right to confront the analyst who performed the low copy DNA testing
- Denial of the right to present a defense when the trial court limited the scope of cross-examination of a police witness
- Denial of the right to a *Frye* hearing to determine the reliability of the low copy DNA testing
- Denial of a post-conviction evidentiary hearing, and
- Ineffective assistance of counsel, largely predicated on the other grounds cited, and for the additional grounds of failure to pursue a misidentification defense; failure to pursue a

no-intent defense and conceding the shooting was intentional; and failure to preserve his confrontation claim.

Docket Entry ("DE") 1. Because each of these claims is procedurally barred and/or substantively without merit, and because none represent a procedure or decision that was contrary to, or an unreasonable application of, clearly established federal law, the petition for a writ of habeas corpus is denied.

I. BACKGROUND

A review of the petition, filings by the Petitioner and the Respondent and the state court record reveals that the Petitioner was convicted by a jury after trial, during which trial the prosecution introduced evidence including eyewitness testimony, crime scene surveillance video footage, DNA profile evidence, DNA expert testimony, and evidence of cell site information of Petitioner's girlfriend (the driver of the getaway car). DE 1, 6, 7, 9.

Petitioner was sentenced to a term of (i) twenty-five years to life imprisonment for the second-degree murder conviction and (ii) fifteen years' imprisonment followed by five years of post-release supervision for each of the weapon possession convictions. DE 7-61. The sentences were ordered to run concurrently. *Id*.

Petitioner pursued an appeal in the state court system. In a decision and order dated July 5, 2018, the New York Supreme Court, Appellate Division, Second Department (the "Second Department") affirmed Petitioner's judgment of conviction. *People v. Gibson*, 80 N.Y.S.3d 392, 392-95 (2d Dep't 2018), *leave to appeal denied*, 32 N.Y.3d 1064 (2018). The court denied his claims based upon the sufficiency of the evidence and found that Petitioner's request for a *Frye* hearing was properly denied. *Id.* In addition, the Second Department found that Petitioner's claims that he was denied the right to confront the analyst who performed the DNA testing and denied the right to present a defense were unpreserved, and in any event, were without merit. *Id.*

Finally, the court found that the claim of ineffective assistance of counsel was mixed because it was based, in part, on matter outside the record that should have properly been raised in a New York Criminal Procedure Law Section ("C.P.L.") 440.10 motion. *Id.* The court determined that it was not evident from the matter appearing on the record that Petitioner was deprived of effective assistance of counsel. *Id.* Petitioner filed an application with the New York State Court of Appeals for leave to appeal the Second Department's decision, but on October 11, 2018, the Court denied Petitioner's application for further review. *People v. Gibson*, 32 N.Y.3d 1064 (2018).

Thereafter, on December 18, 2018, Petitioner, proceeding *pro se*, moved to vacate the judgment of conviction pursuant to C.P.L. § 440.10(1)(h) based on claims of ineffective assistance of counsel for trial counsel's failure to request a charge for manslaughter and failure to object to the DNA testimony on confrontation clause grounds. DE 7-63. On May 14, 2019, the Supreme Court, Nassau County denied the motion in its entirety on the ground that his claims were procedurally barred and were matters of record that were previously raised on direct appeal. DE 7-66. The court noted that Petitioner had not submitted any sworn factual allegations of any matters outside the record that substantiated or tended to substantiate his claims. *Id.* In addition, the court ruled that counsel had provided meaningful representation. *Id.* Petitioner sought leave to appeal the denial of his C.P.L. § 440.10 motion, but on August 19, 2019, the Second Department denied his application. DE 7-48.

II. Standard of Review

This petition is reviewed under the well-established standard of review of habeas corpus petitions, including the authority of this Court to review such matters, the application of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the exhaustion doctrine, the

independent and adequate procedural bar, the cause and prejudice exception, AEDPA deference, the evaluation of claims of ineffective assistance of counsel and Brady violations, and the liberal construction afforded to filings by *pro se* petitioners, as more fully discussed in *Licausi v. Griffin*, 460 F. Supp. 3d 242, 255–60 (E.D.N.Y. 2020), *appeal dismissed*, No. 20-1920, 2020 WL 7488607 (2d Cir. Nov. 17, 2020). The discussion of these principles set forth in *Licausi* is incorporated herein by reference.

III. DISCUSSION

As noted, Petitioner seeks habeas relief on the following grounds: insufficiency of the evidence, failure to provide the jury with a manslaughter charge, denial of the right to confront the analyst who performed the low copy number DNA testing, denial of the right to present a defense when the trial court limited the scope of cross-examination of a police witness, denial of the right to a *Frye* hearing, denial of a post-conviction evidentiary hearing, and ineffective assistance of counsel, largely predicated on the other grounds cited, and for the additional grounds of failure to pursue a misidentification defense; failure to pursue a no-intent defense and conceding the shooting was intentional; and failure to preserve his confrontation claim.

Even affording the petition the solicitous treatment accorded to *pro se* pleadings, none of the grounds support habeas relief. Some are rooted in state law rights that are simply not cognizable on a habeas petition and/or were denied based upon an independent and adequate state law ground, including claims regarding jury instruction issues,[1] failure to charge a lesser

[1] *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973) (jury instruction argument in habeas petitions generally rooted in state law). Here, the complained of error – the failure to provide a lesser-included offense charge for first-degree manslaughter was a legitimate trial strategy because it would have been inconsistent with and would have contradicted Petitioner's misidentification defense. *See People v. Olsen,* 148 A.D.3d 829, 830 (2d Dep't 2017) (legitimate trial strategy to pursue an all or nothing strategy seeking acquittal on a murder charge rather than a conviction on a manslaughter charge); *see also People v. Diaz*, 149 A.D.3d 974, 974-75 (2d Dep't 2017) (decision not to seek a lesser-included offense charge "reflected a legitimate trial strategy because it would have undermined misidentification defense at trial"); *see also Cruz v. Colvin*, No. 17-CV-3757 (JFB), 2019 WL 3817136, at *15

included offense,[2] and evidentiary rulings.[3] To the extent that factually-based claims were fully considered by the state court, *People v. Gibson*, 80 N.Y.S.3d at 392-95, such determinations must be given deference by this Court under the AEDPA. The Court finds no error regarding the determinations concerning the admissibility of the DNA evidence, given that the DNA evidence merely confirmed the direct and circumstantial evidence of record, including video footage of the murder and eyewitness identification testimony (i) from Petitioner's girlfriend who drove his vehicle as they fled the scene and identified him as the person in the video who got out of the car and (ii) from a participant in the fist fight who identified Petitioner as the shooter. Furthermore, Petitioner cannot proceed on claims that were not fully exhausted and hence subject to the procedural bar, as Petitioner has failed to demonstrate (1) "cause for the default and actual prejudice as a result of the alleged violation of federal law" or (2) "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Petitioner's challenge to the sufficiency of the evidence fails to meet the "doubly deferential" standard applied to the determinations of the jury and the state courts.[4] Finally,

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(E.D.N.Y. Aug. 14, 2019) (holding that "Counsel's decision not to pursue an affirmative defense that would have contradicted his theory of the case, which was a mistaken identity theory, is a sound trial strategy").

[2] In *Jones v. Hoffman*, 86 F.3d 46, 48 (2d Cir.1996) the Circuit held that because a decision on whether due process requires the inclusion of lesser-included offenses in non-capital cases would require the announcement of a new constitutional rule, consideration of that issue under federal *habeas* review was precluded by *Teague v. Lane*, 489 U.S. 288, 316 (1989).

[3] "Under Supreme Court jurisprudence, a state court's evidentiary rulings, even if erroneous under state law, do not present constitutional issues cognizable under federal habeas review." *McKinnon v. Superintendent, Great Meadow Corr. Facility*, 422 F. App'x 69, 72-73 (2d Cir. 2011) (citing *Hawkins v. Costello*, 460 F.3d 238, 244 (2d Cir.2006)); *see also Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Such claims do not constitute constitutional magnitude unless the evidentiary error was "so pervasive as to have denied [defendant] a fundamentally fair trial." *Collins v. Scully*, 755 F.2d 16, 18 (2d Cir. 1985).

[4] "When a federal habeas petition challenges the sufficiency of the evidence to support a state-court conviction, AEDPA establishes a standard that is 'twice-deferential.' A state court directly reviewing a jury verdict of guilty must, consistent with United States Supreme Court precedent, view the evidence in the light most favorable to the

based on these considerations, Petitioner's claim of ineffective assistance of counsel does not warrant relief.[5]

Thus, the petition is denied in its entirety.

IV. CONCLUSION

Because the Court has considered all of Petitioner's arguments and found them meritless, the petition is denied. A certificate of appealability shall not issue because Petitioner has not made a substantial showing that he was denied any constitutional rights. *See* 28 U.S.C. § 2253(c)(2). The Court certifies that any appeal of this Memorandum and Order as to those issues would not be taken in good faith, and thus *in forma pauperis* status is denied for the purposes of any appeal on those grounds. *Coppedge v. United States*, 369 U.S. 438, 444–45 (1962).

The Clerk of the Court is respectfully directed to mail a copy of this Memorandum and Order to Petitioner and to close the case.

SO ORDERED.

Dated: July 13, 2021
Central Islip, New York

/s/Gary R. Brown
HON. GARY R. BROWN
UNITED STATES DISTRICT JUDGE

prosecution and must not uphold a challenge to the sufficiency of the evidence if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. And the federal court in a habeas proceeding may not ... overturn the state-court decision rejecting a sufficiency challenge ... unless the decision was objectively unreasonable. In sum, *Jackson* [*v. Virginia*, 443 U.S. 890 (1979)] leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that jurors draw reasonable inferences from basic facts to ultimate facts, and on habeas review, a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court." *Santone v. Fischer*, 689 F.3d 138, 148 (2d Cir. 2012) (alterations omitted).

[5] "Representation is constitutionally ineffective only if it 'so undermined the proper functioning of the adversarial process' that the defendant was denied a fair trial." *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (citation omitted).