No. 24-_____

IN THE

Supreme Court of the United States

JORGE ESPINOSA

Petitioner,

V.

STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

James A. Feldman
3750 Oliver St. NW
Washington, DC 20015
Wexfeld2@gmail.com

William Kastin
Counsel of Record
Patricia Pazner
Sam Feldman
APPELLATE ADVOCATES
111 John Street, 9th Floor
New York, NY 10038
(212) 693-0085, ext. 273
SFeldman@appad.org

Counsel for Petitioner

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QUESTION PRESENTED

Whether all ineffective assistance of counsel claims are assessed under the *Strickland* error-and-prejudice rule, or whether such claims based on a single error by counsel require an additional more demanding showing that the error involved an issue that was "clear-cut and dispositive."

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jorge Espinosa respectfully petitions for a writ of certiorari to review the judgment of the New York Court of Appeals in this case.

OPINIONS BELOW

The opinion of the New York Court of Appeals (App., infra, 1a-22a) is reported at 40 N.Y.3d 1065. The opinion of the New York Supreme Court, Appellate Division, Second Department (App., infra, 23a-24a) is reported at 170 N.Y.S.3d 487.

JURISDICTION

The judgment of the New York Court of Appeals was entered on November 21, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

INTRODUCTION

Under Strickland v. Washington, 466 U.S. 668, 687 (1984), a defendant alleging ineffective assistance of counsel must show that counsel's performance was deficient and that "the deficient performance prejudiced the defense." New York, however, has erected a special rule, and additional barrier, that applies to claims based on a single error by counsel. New York rejects ineffective-assistance claims in such cases, even if, under Strickland, "the identified acts or omissions were outside the wide range of professionally competent assistance" expected of counsel, id. at 690, and prejudiced the defense. Instead of applying the usual Strickland standard in single-error cases, New York courts require an additional showing that the error involved a legal issue that was "clear-cut and dispositive." App., infra, 2a. That single-error rule is inconsistent with this Court's rulings in Strickland and its progeny.

The New York "single-error" rule determined the outcome in this case. At petitioner's jury trial for burglary and related offenses, DNA evidence was the only evidence linking petitioner to the crime. Both the prosecutor and defense counsel emphasized the importance of that evidence, and its validity was the only real issue before the jury. Yet the witness who introduced the DNA evidence had not himself analyzed the DNA samples, but had merely read the reports prepared by others and repeated their conclusions to the jury. Defense counsel did not make the obvious Confrontation Clause objection to that testimony.

The New York Court of Appeals held that petitioner had received effective assistance of counsel only by applying its single-error, "clear-cut and dispositive" standard. This Court should grant review to resolve the important question whether there is a special rule requiring a "clear-cut and dispositive" issue in single-error cases, or whether, regardless of the number of errors, counsel's performance should be measured against its deviation from an objective standard of reasonableness and whether it prejudiced the defendant, as Strickland requires.

STATEMENT OF THE CASE

1. In 2013, two men burglarized an apartment in Queens, New York. One of them, Antonio Rivera, was immediately apprehended in possession of the proceeds of the burglary, while the other fled wearing a ski mask. There were no fingerprints or surveillance videos, and no one identified petitioner as the man in the mask who fled. There was no description beyond the statement of one of the apartment's occupants, a woman less than 5 feet 5 inches tall, that the fleeing robber was taller than her and "[s]ort of heavy-set," and she had a "gut feeling" that he was "Hispanic." C.A. App. A240. A DNA sample taken from a screwdriver found outside the apartment, which police believed was used to break in, revealed a mixture of DNA from at least two contributors.

2. The DNA sample from the screwdriver was tested by an analyst at the New York City Office of the Chief Medical Examiner (OCME) named Ashley Rhodes, who derived a DNA profile for one of the contributors, "Male

Donor A." C.A. App. A208-09, A344-45. Rhodes compared this DNA profile to a DNA profile that other OCME analysts had derived in 2007 from a court-ordered buccal swab of petitioner in an unrelated case and concluded that the two profiles matched. C.A. App. A344, A423. Rhodes wrote in her report that the profile of Male Donor A would be expected to be found in approximately 1 in greater than 6.8 trillion people. C.A. App. A423. No additional DNA sample was taken from petitioner for this case. C.A. App. A16-17.

3. Petitioner was arrested and charged with burglary and related offenses. Both sides at the 2016 trial recognized that the DNA evidence was critical. The prosecutor claimed in his opening statement that petitioner "got away" on the day of the burglary, but "he could not, he did not run away from his DNA." C.A. App. A21. The prosecutor told the jury that petitioner left behind a screwdriver with his DNA on it, which was "so important" because it was "the burglar's tool," "the actual item used to pry open that balcony door." C.A. App. A22-23.

Rhodes, the "reporting analyst" who had tested the screwdriver, had left OCME for another job and did not testify at trial. Instead, the prosecution introduced the reports she wrote through a different OCME employee, Daniel Ferrara. C.A. App. A208-09. Ferrara was Rhodes's supervisor and a "technical reviewer" for the DNA testing on the screwdriver sample. He testified that his opinion testimony was his own and "not based on anyone else's opinions or conclusions" and that the DNA profile was "based upon [his] own individual

work." C.A. App. A209-10. However, on cross-examination Ferrara admitted that he was "not the person who did the testing," that "this processing was actually done by several people," that "[he] personally did not do any of the testing in this case," that he "read the reports prepared by other people," and that "[u]ltimately Ashley Rhodes wrote the report and made her conclusions." C.A. App. A223-24. He claimed no involvement at all with the 2007 buccal swab of petitioner. Instead, he based his testimony on his review of the case file. Id. Ferrara repeated Rhodes's conclusions and told the jury that Male Donor A matched the DNA profile of petitioner based on his 2007 buccal swab and that there was a 1 in 6.8 trillion chance that this profile would appear in a randomly selected person. C.A. App. A213-14, 223, 423.

Defense counsel expressly affirmed that he had no objection to the admission of both items of DNA evidence. C.A. App. A208, A217, A219. But like the prosecutor, he too realized that the DNA evidence—what he called "the elephant in the room"—was decisive. C.A. App. A271. He argued that "[t]he prosecutor wants you to conclude it was [petitioner] based on his DNA evidence," which he admitted "[s]ounds very compelling." C.A. App. A28. He continued, "Let's just talk about this screwdriver and this DNA. Let's talk about it, because that's all he's got. That is all the government has." C.A. App. A30. He argued that the DNA evidence was "incomplete" and "insufficient." C.A. App. A271. He tried to argue that the prosecution "didn't even call the person who did the DNA testing," but the court sustained the prosecutor's

objection to that statement. C.A. App. A271. He concluded that petitioner "has been accused of a crime he didn't commit based solely on his DNA being found on a tool which is outside of the home that was burglarized. And nothing more." C.A. App. A33.

4. The jury convicted petitioner of second-degree burglary, possession of burglar's tools, and fourth-degree criminal mischief. He was sentenced to an aggregate prison term of 15 years followed by a five-year term of post-release supervision.

5. New York's Appellate Division, Second Department, affirmed the judgment and rejected petitioner's Confrontation Clause claim. App., infra, 23a-24a. The court held that the claim was unpreserved. The court also held that Ferrara's evidence was properly admitted because Ferrara "performed a technical review of the analyst's report, independently reviewed the analyst's data interpretation, and reached an independent conclusion." App., infra, 24a (quoting People v. Frederick, 128 N.Y.S.3d 864 (N.Y. App. Div. 2020)). New counsel on appeal had also argued that petitioner's trial counsel had rendered ineffective assistance, because he had failed to object to the critical DNA evidence. The Appellate Division rejected that argument without discussion. App., infra, 24a.

The sole issue before the New York Court of Appeals was whether defense counsel was ineffective. A divided court affirmed petitioner's conviction in a memorandum opinion. The court held that counsel was not

ineffective even assuming the Confrontation Clause objection would have been meritorious, because "the alleged omission does not 'involve an issue that [was] so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it'" and petitioner had not "demonstrated that the alleged error was not a matter of legitimate trial strategy." App., infra, 2a (quoting and citing People v. Rodriguez, 101 N.E.3d 977, 1068 (N.Y. 2018)).

Judge Rivera dissented. In her view, "defense counsel should have objected based on the law established at the time of trial that the prosecution could not present DNA evidence through the testimony of a criminalist like Ferrara who was not involved in any stage of the DNA analysis and merely served as a conduit for the work of others." App., infra, 5a. The dissent argued that "[t]he law on an omitted claim need not be 'definitively settled' at the time of trial and the claim need not be 'a clear winner' before its omission can qualify as ineffective assistance." App., infra, 8a (quoting People v. Turner, 840 N.E.2d 123, 127 (N.Y. 2005)).

The dissent explained that counsel had ample basis to object at the time of trial. It cited Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009), and Bullcoming v. New Mexico, 564 U.S. 647, 651 (2011), both decided years before the 2016 trial: "Counsel should have been aware of this binding Supreme Court precedent that the Sixth Amendment guarantees defendants the right to be confronted by the individuals who performed the analysis and rendered conclusions, not a 'surrogate' like Ferrara, who merely relays the

analyses and conclusions of others." App., infra, 12a (quoting Bullcoming, 564 U.S. at 652). Even if this Court's cases "had not provided a clear basis for a Confrontation Clause challenge," the dissent noted precedents from the Appellate Division, Second Department, "the intermediate appellate court to which defendant here would appeal," holding "that the defendant's 'rights under the Confrontation Clause of the Sixth Amendment were violated when the [trial court] admitted a nontestifying DNA analyst's report linking the defendant to DNA evidence recovered at the crime scene.'" App., infra, 15a (quoting People v. Cartagena, 7 N.Y.S.3d 150, 151–52 (N.Y. App. Div. 2015)). Furthermore, petitioner's trial began "after full briefing and oral arguments," though before the decision was issued, in a New York Court of Appeals case applying the Confrontation Clause to DNA evidence admitted through an analyst who was not involved in the testing. App., infra, 15a (citing People v. John, 52 N.E.3d 1114, 1118 (N.Y. 2016)).

Finally, the dissent disputed that any "reasonable trial strategy" could account for defense counsel's failure to object to admission of "the only direct link connecting defendant to the crime," particularly when "counsel based their arguments to the jury for discounting the DNA evidence on the very same grounds they could have raised to the judge for excluding that evidence." App., infra, 19a. The dissent concluded that "defense counsel could have and should have avoided creating this post-admission uphill battle by objecting to prevent

its admission on confrontation grounds in the first instance, based on existing Supreme Court and state decisional law." App., infra, 19a.

REASONS FOR GRANTING THE PETITION

New York's courts evaluate most claims that an attorney's performance violated the constitutional right to effective assistance of counsel under the standards articulated in this Court's decisions in the Strickland line of cases. But they have developed a novel additional test based on the number of errors that counsel committed. For single-error claims, after applying the usual Strickland standard, they require an additional heightened showing that the error involved an issue that was "clear-cut and dispositive." They have continued to apply that more demanding rule in a series of cases, despite its variance from this Court's decisions. This Court should grant review to restore uniformity to the law and reaffirm the Strickland rule as the governing standard for ineffective assistance of counsel claims, regardless of the number of errors that counsel is alleged to have committed.

I. The Ruling Below Conflicts With This Court's Sixth Amendment Jurisprudence.

This Court has developed a familiar test for ineffective assistance of counsel claims requiring deficient performance by counsel that prejudices the defendant. New York, however, has imposed an additional requirement for claims regarding a single error by counsel: such claims are permitted only if

the error involves an issue that is "clear-cut and dispositive." That additional requirement is unsupported by and inconsistent with this Court's cases. The New York Court of Appeals has applied it in a long line of cases and is unlikely to reconsider it. Even judges of the United States Court of Appeals for the Second Circuit have commented on the divergence from this Court's standards, but they have no authority to alter New York law.

1. Under this Court's well-established test, a defendant seeking relief for ineffective assistance of counsel must satisfy a two-part test. "First, the defendant must show that counsel's performance was deficient," which is to say, "that counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 687-88 (1984). The defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id. at 690. "Second, the defendant must show that the deficient performance prejudiced the defense," which is to say, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 687, 694.

In a companion case decided together with Strickland, the Supreme Court held that "the type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to counsel's performance as a

whole—specific errors and omissions may be the focus of a claim of ineffective assistance as well." United States v. Cronic, 466 U.S. 648, 657 n.20 (1984). The Court reaffirmed two years later that "the right to effective assistance of counsel, . . . as this Court has indicated, may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." Murray v. Carrier, 477 U.S. 478, 496 (1986). These cases, while clearly recognizing that a single error may amount to ineffective assistance of counsel, applied no special standard or rule to single-error cases. Instead, they affirmed that the general two-part Strickland test applied equally to such cases.

2. The New York Court of Appeals initially followed those teachings. In early cases, it made the unremarkable observation, similar to (and sometimes quoting) this Court's decision in Carrier, that ineffectiveness can consist of a single damaging error. See People v. Caban, 833 N.E.2d 213, 220 (N.Y. 2005); People v. Hobot, 646 N.E.2d 1102, 1103 (N.Y. 1995); People v. Flores, 639 N.E.2d 19, 21 (N.Y. 1994). Accordingly, the court did not initially restrict single-error claims to only those involving clear-cut legal issues. For example, the court held an attorney ineffective for failing to raise a statute of limitations defense, even though "there existed some New York lower court decisions that might have been cited by the People in opposing" the defense and the law may not have been "definitively settled" at the time of trial. People v. Turner, 840 N.E.2d 123, 127 (N.Y. 2005). The court explained: "A reasonable defense

lawyer at the time of defendant's trial might have doubted that the statute of limitations argument was a clear winner—but no reasonable defense lawyer could have found it so weak as to be not worth raising." Id. at 128. The opinion in Turner noted in passing that neither of two prior cases it had decided "involved the failure to raise a defense as clear-cut and completely dispositive as a statute of limitations." Id. at 126 (emphasis added).

Over the following decade, however, the Court of Appeals transformed this "clear-cut and completely dispositive" remark into a freestanding rule governing single-error cases. This process began in People v. Brunner, where the court held that counsel was not ineffective for failing to move for dismissal under a speedy trial statute: "although defendant's arguments concerning the timeliness of the prosecution are substantial, there is nothing clear cut about his . . . claim" because "its success would have depended on the resolution of several novel issues" and "the applicability of various exclusions is debatable." 947 N.E.2d 139, 140 (N.Y. 2011) (emphasis added). The Court therefore appeared to hold that the "claim"—not the attorney error—must be "clear cut" before counsel's single error could be said to have deprived the client of effective assistance of counsel. See also People v. Keating, 967 N.E.2d 1159, 1160 (N.Y. 2012) (noting that cases finding ineffective assistance based on a single error "have involved issues that are 'clear-cut' and 'dispositive'").

By People v. McGee, 986 N.E.2d 907 (N.Y. 2013), the "clear-cut and dispositive" standard had become a new, additional requirement applicable

only in single-error cases. McGee held that, for "a failure to make a significant argument" to amount to ineffective assistance of counsel, "the omission must typically involve an issue that is so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it, and it must be evident that the decision to forgo the contention could not have been grounded in a legitimate trial strategy." Id. at 909. McGee rejected an ineffectiveness claim based on counsel's failure to raise sufficiency arguments that, the Court held, were "not fairly characterized as clear-cut and dispositive in defendant's favor." Id.

Since McGee, the Court of Appeals has regularly applied the "clear-cut and dispositive" standard to deny "single-error" ineffective assistance of counsel claims, sometimes even while assuming, as it did in this case, that counsel had erred. See People v. Saenger, 211 N.E.3d 686, 692 (N.Y. 2023) (applying "clear-cut and dispositive" standard to reject ineffective assistance claim because "there was no clear appellate authority adopting the statutory interpretation . . . that defendant now urges is correct"); People v. Keschner, 37 N.E.3d 690, 702 (N.Y. 2015) ("express[ing] no opinion as to whether" trial court committed reversible error, "a close question," but concluding counsel was not ineffective for failing to object because "[t]he issue is not clear-cut"); People v. Santiago, 9 N.E.3d 870, 877 (N.Y. 2014) (without deciding underlying issue, holding that "the objection . . . that defendant now raises is not so 'clear-cut' or 'dispositive' an argument that its omission amounted to ineffective assistance of counsel"); People v. Thompson, 997 N.E.2d 1232, 1234–35 (N.Y.

2013) (holding counsel not ineffective because, although "whether the court committed reversible error [in denying for-cause challenge] is debatable" and "defense counsel's decision not to use a peremptory challenge [that would have preserved the error] . . . was questionable," "[t]he issue of the for-cause challenge was not, in the words of Turner, 'clear-cut and completely dispositive'").[1] The Court of Appeals views the issue as settled and sometimes disposes of single-error ineffectiveness cases by quoting the rule in a brief memorandum opinion, as it did in this case. See People v. Jennings, 177 N.E.3d 213 (N.Y. 2021); People v. Rodriguez, 101 N.E.3d 977 (N.Y. 2018).

3. New York's single-error rule imposes the additional "clear-cut and dispositive" requirement on top of the standards developed in Strickland and its sequels. That conflicts with this Court's cases, which apply a single standard to counsel's performance regardless of the number of errors involved.

a. When this Court addressed an ineffective-assistance claim based on a single error by counsel, it noted that the case "call[ed] for a straightforward application of our ineffective-assistance-of-counsel precedents, beginning with Strickland," and did not impose any additional hurdle based on whether the

[1] In other cases, the Court of Appeals quoted a version of the "clear-cut and dispositive" standard but went on to hold that counsel was not ineffective because the underlying argument counsel failed to raise would have been meritless. See People v. Flowers, 68 N.E.3d 1228, 1231, 1233 (N.Y. 2016) (quoting single-error rule but denying ineffective-assistance claim based on conclusion that the underlying claim "fails on its merit"); People v. Howard, 4 N.E.3d 320, 327 (N.Y. 2013) (similar). Although the Court applied the incorrect standard in these cases, its conclusion would have been the same under the correct standard.

legal issue was "clear-cut" or "dispositive." Hinton v. Alabama, 571 U.S. 263, 272 (2014). The Court held that the defense attorney in that capital case had rendered ineffective assistance because he (along with the trial judge) mistakenly believed that he could not obtain more than $1,000 to cover expert witness fees, when in fact state law had recently been amended to remove that cap. Id. at 266–68. Whether or not this legal issue could be characterized as "clear-cut"—a question this Court never addressed—it was not "dispositive," as required under the New York rule: had counsel obtained more funding, he could have hired a better expert who could have been more persuasive at trial, id. at 270, but this would merely have aided the defense case rather than necessarily resulting in an acquittal on some or all of the charges. Hinton thus illustrates the divergence between the New York single-error rule and the rule this Court has long employed.

b. The New York rule disfavoring single-error claims by imposing an additional "clear-cut and dispositive" standard for single-error claims stems from the New York principle that an ineffective-assistance claim "is ordinarily assessed on the basis of the representation as a whole." People v. Blake, 21 N.E.3d 214, 216 (N.Y. 2014); see also People v. Harris, 43 N.E.3d 750, 754–55 (N.Y. 2015) (recognizing single-error claims as a "rare" exception to "the sort of pervasive representational failure ordinarily necessary to support an ineffective assistance claim"). This principle flies in the face of this Court's holding that "the type of breakdown in the adversarial process that implicates

the Sixth Amendment is not limited to counsel's performance as a whole—specific errors and omissions may be the focus of a claim of ineffective assistance as well." Cronic, 466 U.S. at 657 n.20 (emphasis added); see also United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006) ("[I]f and when counsel's ineffectiveness 'pervades' a trial, it does so (to the extent we can detect it) through identifiable mistakes."). Rather than focus on specific errors and omissions, New York holds that "[t]he constitutional guarantee of effective assistance of counsel is met where a defendant was afforded 'meaningful representation' based on 'the evidence, the law, and the circumstances of the particular case, viewed in totality." People v. Maffei, 150 N.E.3d 1169, 1173 (N.Y. 2020) (brackets omitted) (quoting People v. Benevento, 697 N.E.2d 584, 587 (N.Y. 1998)).

Numerous judges of the Second Circuit have expressed concern that "the [New York] state [ineffective assistance] standard could be misapplied to diminish the prejudicial effect of a single error." Rosario v. Ercole, 617 F.3d 683, 684 (2d Cir. 2010) (Wesley, J., concurring in denial of rehearing en banc); see also id. at 687 (Jacobs, J., dissenting from denial of rehearing en banc) ("It is this shift—from the specific mistake to the broader performance—that concerns me and should concern the entire Court."); Rosario v. Ercole, 601 F.3d 118, 138 (2d Cir. 2010) (Straub, J., dissenting in part) (finding New York court's analysis "entirely at odds with Strickland," as defense counsel should "be found ineffective under the Sixth Amendment if deficient in a material way,

albeit only for a moment and not deliberately, and that deficiency prejudiced the defendant."); Henry v. Poole, 409 F.3d 48, 70–71 (2d Cir. 2005). Despite the Second Circuit's doubts about the New York ineffective-assistance framework, it is powerless to directly review New York's interpretation of federal law; only this Court can do so.

4. The New York Court of Appeals is committed to its single-error rule, has applied it in numerous cases, and is unlikely to reconsider it without this Court's intervention. Indeed, the rule is sufficiently well-established in New York that the Court of Appeals applies it in simple memorandum opinions without further discussion, even years after this Court's 2014 decision in Hinton demonstrated that no special rule applies to single-error claims. Federal appellate judges have expressed concern about New York's reluctance to recognize single-error claims but are powerless to correct New York's interpretation of the Sixth Amendment. Further review is warranted to consider whether the standard governing ineffective assistance claims should vary with the number of errors made by counsel under New York's rule, or rather whether the Strickland deficiency-and-prejudice standard developed by this Court should govern all ineffective assistance claims.

II. New York's Single-Error Rule Hollows Out the Right to the Effective Assistance of Counsel.

"The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment," and this Court has long "recognized that 'the right to counsel is the right to the effective assistance of counsel.'"

Strickland, 466 U.S. at 685–86 (quoting McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970)). New York's single-error rule weakens the adversarial system essential to a fair trial by holding that a defendant has been effectively represented so long as counsel has raised claims and objections that are "clear-cut and dispositive." That standard is inconsistent with what is expected of counsel throughout our adversary system, and the Court should grant review to examine this constrained view of defense counsel's role.

1. One of defense counsel's "primary duties," particularly at a criminal trial, is "to ensure that constitutional and other legal rights of their clients are protected." ABA Standards for Criminal Justice, Defense Function 4–1.2(b), (f) (4th ed. 2017); see Powell v. Alabama, 287 U.S. 45, 68–69 (1932). This duty includes raising sound claims or objections in accordance with the defense strategy, which in turn requires ascertaining which arguments are legally viable. In doing so, counsel is not restricted to well-established rules, but should also consider statutory and constitutional text, persuasive precedent, arguments by analogy, and open legal questions. While a lawyer is not required to raise frivolous or baseless claims, the New York single-error rule goes too far in the opposite direction, defining effective representation to mean raising only those claims based on fully settled "clear-cut" law.

2. The New York Court of Appeals' application of its single-error rule demonstrates just how little legal help a defendant may expect from counsel. Last year, for example, the Court of Appeals addressed an ineffective

assistance of counsel claim predicated on counsel's failure to move for dismissal of a felony charge based on a statutory construction argument that had not been definitively adopted or rejected. People v. Saenger, 211 N.E.3d 686, 691–92 (N.Y. 2023). The Court of Appeals acknowledged that, "[a]t the time of defendant's trial . . . , two Appellate Division decisions had identified the issue but did not conclusively resolve it," as it was unpreserved in one case and undisputed based on the prosecution's concession in the other. Id. at 692 (citing People v. Kelly, 913 N.Y.S.2d 846, 847 (N.Y. App. Div. 2010), and People v. Taylor, 36 N.Y.S.3d 651, 652 (N.Y. App. Div. 2016)). Another decision issued after the defendant's trial explicitly endorsed the statutory construction argument, id. (citing People v. Barrett, 137 N.Y.S.3d 230, 232–33 (N.Y. App. Div. 2020)), suggesting that if counsel had preserved the issue, the defendant too could have prevailed on appeal. Nevertheless, because the prosecution had "offered a plausible alternative interpretation" of the statute and "there was no clear appellate authority" on the issue at the time of trial, the Court rejected the ineffectiveness claim "[b]ecause the issue was not 'so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it.'" Id. (quoting People v. Flowers, 46 N.Y.S.3d 497, 501 (N.Y. 2016)).

Saenger illustrates the danger of New York's single-error rule. Defense counsel failed to raise a claim that any reasonably competent attorney would have raised, and that is at the core of criminal liability in our system: that the charged statute, correctly read, did not apply to the defendant's conduct and

the felony charge should therefore be dismissed. The statutory text, the appellate decisions, and the prosecution's concession on the issue in a prior case should have alerted counsel to the existence of a compelling issue of law. Under these circumstances, raising the issue was part of counsel's "overarching duty to advocate the defendant's cause." See Strickland, 466 U.S. at 688. Under the New York single-error rule, however, none of these considerations were relevant: because "there was no clear appellate authority adopting the statutory interpretation," Saenger, 211 N.E.3d at 692, failing to argue that interpretation could not constitute ineffective assistance. The single-error rule thereby restricts the advocacy required of counsel to only those legal questions that have already received definitive answers. Attorneys who raise only "clear-cut" issues fail in their duty to be "zealous advocates for their clients." ABA Standards for Criminal Justice, Defense Function 4–1.2(b) (4th ed. 2017).

3. The effects of this single-error rule are far-reaching because cases presenting significant but unresolved legal issues are not unusual. Indeed, courts sometimes explicitly recognize that a legal question is unsettled, either because it has not yet been squarely presented to an appellate court or because appellate courts have split on the issue.

This Court's splintered decision in Williams v. Illinois, 567 U.S. 50 (2012), provides one such example of a clear signal that an issue is unresolved. That case presented the question of whether certain DNA evidence introduced

against the defendant through an expert who did not conduct the testing was testimonial under the Confrontation Clause. The Court's failure to produce a majority opinion demonstrated that, as a matter of federal law, questions about the testimonial nature of DNA evidence were unresolved. See United States v. James, 712 F.3d 79, 95–96 (2d Cir. 2013) ("No single rationale disposing of the Williams case enjoys the support of a majority of the Justices . . . It is therefore for our purposes confined to the particular set of facts presented in that case."). Any competent defense attorney presented with a similar case, in which the prosecution offered vital DNA evidence through a surrogate witness, therefore had a basis to object after Williams, at least until local appellate courts had definitively resolved the questions Williams left open.

Under New York's single-error rule, however, it was precisely during this period—after Williams, but before any definitive resolution of the Confrontation Clause issue in the New York courts or this Court—that no ineffective assistance of counsel claim could possibly accrue regarding a failure to object to DNA evidence presented through a surrogate witness. Because the law in this interval was not clear-cut, New York's interpretation of the Sixth Amendment did not entitle defendants to any advocacy by counsel on this topic, even if—as in this case—a failure to raise the Confrontation Clause challenge fell "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690.

III. The Issue is Squarely Presented

This case comes to the Court on direct review of an appeal of petitioner's conviction, in which the New York single-error rule was dispositive. Respondent itself realized the importance of the "clear-cut and dispositive" standard. In its brief to the New York Court of Appeals, it quoted that standard 14 times, and the "clear-cut" part of it an additional 9 times. Had the Court of Appeals applied the Strickland standard instead of its single-error rule, it could not have rejected petitioner's claim.

1. Under this Court's cases, counsel's failure to object to the DNA evidence on Confrontation Clause grounds at trial was "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. It was critical to petitioner's defense, and the objection should have been obvious to professionally competent counsel. Under Strickland, petitioner would have been entitled to relief.

a. The identification of petitioner by means of the DNA evidence was the only contested factual issue at trial. The prosecutor himself characterized the DNA evidence as "so important." C.A. App. A22. Defense counsel agreed that it was "the elephant in the room" and that the prosecutor had "nothing more" than the DNA evidence to support his argument for conviction. C.A. App. A33, A271. Indeed, although defense counsel did not object to the introduction of the DNA evidence, he devoted much of his effort in cross-examination and argument to attacking its validity and probative value.

Neither respondent nor any court below has disputed that, without the DNA identification evidence that might have been eliminated by a successful objection, the case against petitioner would have been dismissed.

At the time of petitioner's trial in February and March 2016, the objection to the DNA evidence would have been obvious to professionally competent counsel. In a line of cases that began 12 years earlier with Crawford v. Washington, 541 U.S. 36 (2004), this Court had held that when scientific evidence is "testimonial"—i.e., "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," id. at 52—"it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." Bullcoming v. New Mexico, 564 U.S. 647, 657 (2011). In both Bullcoming and Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), the Court had applied that principle to scientific forensic evidence. In Melendez-Diaz, the Court explained that even statements deriving from "neutral scientific testing" must be subject to confrontation, as scientific testing and analysis still relies on the subjective judgment of individuals to be probed on cross-examination. 557 U.S. at 318–20. The Court noted the same is "true of many of the other types of forensic evidence commonly used in criminal prosecutions." Id. at 320. That should have been sufficient to alert counsel to the objection.

The DNA evidence in this case was "testimonial," and therefore inadmissible under Crawford, Bullcoming, and Melendez-Diaz. Both DNA reports were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Crawford, 541 U.S. at 51–52, and their "primary purpose" was to "establish or prove past events potentially relevant to later criminal prosecution," Davis v. Washington, 547 U.S. 813, 822 (2006). Indeed, both reports were prepared to assist in the prosecution of specific individuals: the 2007 DNA profile was derived in order to prosecute petitioner, while the OCME documents relating to the 2013 screwdriver swab list the apprehended burglar, Antonio Rivera, as the suspect. C.A. App. xx (A344, A359-60). At the time of trial, the local intermediate appellate court had already held that DNA reports were testimonial and that the Confrontation Clause barred their admission in the absence of the authoring DNA analyst. See People v. Cartagena, 7 N.Y.S.3d 150, 151–52 (N.Y. App. Div. 2015); People v. Gonzalez, 991 N.Y.S.2d 340, 341 (N.Y. App. Div. 2014). To the extent that there was any doubt about the reports' testimonial status, however, the law supporting exclusion of the evidence at the time of trial was strong enough—and the stakes high enough in this case—that professionally competent counsel should have objected to its admission. The sole evidence arguably linking petitioner to the offense was the DNA evidence, and counsel failed to pursue its exclusion.

b. Respondent has argued that People v. Brown, 918 N.E.2d 927 (N.Y. 2009), and Williams v. Illinois, 567 U.S. 50 (2012), suggested that the Confrontation Clause objection in this case would have been unsuccessful. Brown held that a DNA report "was not 'testimonial' . . . because it consisted of merely machine-generated graphs, charts and numerical data," without any "subjective analysis." 918 N.E.2d at 931. This conclusion did not survive this Court's 2011 opinion in Bullcoming, five years before petitioner's trial, which rejected the New Mexico Supreme Court's similar holding that the Confrontation Clause did not require the testimony of an analyst who "'simply transcribed the result generated by the gas chromatograph machine,' presenting no interpretation and exercising no independent judgment." 564 U.S. at 659 (quoting State v. Bullcoming, 147 N.M. 487, 494 (2010)) (brackets omitted). Accordingly, Brown would not have helped respondent defeat a Confrontation Clause objection.

There was no opinion for the Court in Williams, which resulted in a four-Justice plurality, a four-Justice dissent, and two concurring opinions. As was widely noted before the time of petitioners' trial, the splintered opinions produced "no new rule of law." Jenkins v. United States, 75 A.3d 174, 176 (D.C. 2013).[2] See App., infra, 13a-15a (Rivera, J., dissenting). And even under the

[2] See People v. M.F., 25 N.Y.S.3d 816, 817–18 (N.Y. Sup. Ct., Bronx Co. Jan. 20, 2016) ; State v. Stanfield, 347 P.3d 175, 184 (Idaho 2015); State v. Griep, 863 N.W.2d 567, 581 & n.18 (Wis. 2015); State v. Michaels, 95 A.3d 648, 665–67 (N.J. 2014); State v. Maxwell, 9 N.E.3d 930, 950 (Ohio 2014); State v.

Williams plurality's "targeted individual" test, 567 U.S. at 82–84, which a majority of the Court rejected, see id. at 114–15 (Thomas, J., concurring in the judgment); id. at 135–36 (Kagan, J., dissenting), at least some of the DNA evidence was testimonial: the DNA profile of petitioner was developed from his court-ordered buccal swab for the sole purpose of prosecuting him, and the DNA profile from the screwdriver was developed to prosecute Rivera for the charged burglary. Respondent's novel arguments below that petitioner's DNA profile was not testimonial in this case because it was derived for the prosecution of petitioner in a different case, and the screwdriver DNA profile was not testimonial here because it was derived for the prosecution of a different person in this case, could have been presented to the trial court in response to an objection, but not with any controlling authority. If anything, then, Williams would have suggested to professionally competent counsel that a Confrontation Clause objection stood at least a good prospect of success.[3]

c. Indeed, respondent's argument illustrates the decisive difference that the "clear-cut and dispositive" standard made in this case. Under Strickland, although counsel is not constitutionally ineffective simply for failing to raise a claim on which he had "nothing to lose," Knowles v. Mirzayance, 556 U.S. 111,

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Dotson, 450 S.W.3d 1 (Tenn. 2014); United States v. Duron-Caldera, 737 F.3d 988, 994–95 (5th Cir. 2013); James, 712 F.3d at 95–96.

[3] Currently pending before this Court is Smith v. Arizona, No. 22-899 (argued Jan. 10, 2024), which presents the question whether the Confrontation Clause permits the prosecution to introduce the testimony of a "substitute expert conveying the testimonial statements of a nontestifying forensic expert."

122 (2009), counsel must provide "professionally competent assistance." Strickland, 466 U.S. at 690. A defendant is therefore entitled to representation that is not limited to arguments or objections that are "clear-cut and dispositive." Crawford, Melendez-Diaz, and Bullcoming establish that the Confrontation Clause objection in this case would have had a good prospect of success. Nothing in state law or the fractured decision in Williams suggested otherwise. If successful, the objection could have eliminated the DNA identification of petitioner—without which petitioner could not have been convicted. Counsel providing reasonably competent professional assistance would have made the objection. Had it applied Strickland rather than its "clear-cut and dispositive" standard, the New York Court of Appeals would have accepted petitioner's claim of ineffective assistance.

2. The Court of Appeals also held that petitioner had not "demonstrated that the alleged error was not a matter of legitimate trial strategy." App., infra, 2a. That holding, however, followed from the Court's single-error rule and could not have been reached absent that rule.

a. In a series of cases, the New York Court of Appeals has held that in a single-error case, "'the omission must typically involve an issue that is so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it, and it must be evident that the decision to forgo the contention could not have been grounded in a legitimate trial strategy.'" People v. Keschner, 37 N.E.3d 690, 701 (N.Y. 2015) (emphasis added) (quoting McGee, 986 N.E.2d at

909); see also Flowers, 68 N.E.3d at 1231. This language differs from the familiar Strickland standard, which requires that a defendant "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). This case illustrates the inordinate difficulty of satisfying the "evident" and "could not have been strategic" standard that the New York Court of Appeals applies in single-error cases.

b. In this case, no professionally competent counsel would have made a strategic choice to forgo the Confrontation Clause objections that could, if successful, have eliminated the prosecution's case. To be sure, counsel did attack the DNA evidence before the jury. But he had already "allowed the prosecution to put the most compelling evidence of [petitioner's] guilt before the jury." App., infra, 19a (Rivera, J., dissenting). Indeed, once the DNA evidence was admitted, including testimony that there was a 1 in 6.8 trillion chance the DNA profile from the screwdriver swab would appear in a randomly selected person, petitioner's conviction was a near-certainty. No reasonable attorney in counsel's position would prefer to attack such damaging evidence rather than exclude it, especially when significant precedents from this Court provided strong support for exclusion.

Respondent speculated below that petitioner's counsel might have been concerned that, had the court granted the objection and excluded Ferrara's testimony and the DNA exhibits, it might have also granted the prosecution a

continuance. If granted a continuance, respondent might have been able to find witnesses who would have been competent to testify regarding both the DNA profile derived from the 2007 buccal swab of petitioner and the DNA profile derived from the 2013 swab of the screwdriver; both would have been necessary since it was the tie between the two samples that identified petitioner. Finally, if it had obtained the continuance and found the witnesses, respondent might have been able to arrange for them to appear at trial, to the supposed detriment of petitioner's case. Resp. C.A. Br. 46-48.

Aside from its wholly conjectural nature, respondent's argument assumes that there were no mistakes, irregularities, or hidden uncertainties involved in the generation of either DNA profile, and that nothing would come to light on cross-examination to call the DNA evidence into question. If courts could conclusively presume that scientific evidence is reliable, there would indeed be no need for cross-examination of forensic witnesses. But the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Crawford, 541 U.S. at 61. It is counsel's job to perform that testing on behalf of the client. Even if counsel's objection had not won an immediate dismissal of all charges, the court was willing to grant a sufficient continuance, and the prosecution found and called additional witnesses, petitioner's counsel would have been presented with an opportunity to question petitioner's actual accusers and explore potential flaws in the generation of the

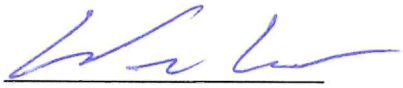
DNA profiles. A decision to forego this opportunity in favor of allowing the damaging DNA evidence to be admitted through a surrogate witness could not be considered sound trial strategy.

3. The New York Court of Appeals rejected petitioner's claim only because it applied its "clear-cut and dispositive" standard instead of this Court's teachings in Strickland and subsequent cases. Further review is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



James A. Feldman
3750 Oliver St. NW
Washington, DC 20015
Wexfeld2@gmail.com

William Kastin*
Patricia Pazner
Sam Feldman
APPELLATE ADVOCATES
111 John Street, 9th Floor
New York, New York 10038
(212) 693-0085, ext. 273
SFeldman@appad.org

Counsel for Petitioner

*Counsel of Record

February 16, 2024

APPENDIX A

State of New York Court of Appeals

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports

No. 76
The People &c.,
Respondent,
v.
Jorge Espinosa,
Appellant.

Samuel Feldman, for appellant.
Amanda Iannuzzi, for respondent.
The Legal Aid Society, amicus curiae.

MEMORANDUM:

The order of the Appellate Division should be affirmed.

Defendant asserts that trial counsel rendered ineffective assistance by failing to argue that the admission into evidence of DNA reports through the testimony of an analyst who did not perform, witness or supervise the testing, or independently analyze the raw data, violated his constitutional right to confrontation. This argument is without merit. "Even assuming that counsel failed to assert a meritorious Confrontation Clause challenge, the alleged omission does not 'involve an issue that [was] so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it'" (*People v Rodriguez*, 31 NY3d 1067, 1068 [2018], quoting *People v McGee*, 20 NY3d 513, 518 [2013]). Nor, on this record, has defendant demonstrated that the alleged error was not a matter of legitimate trial strategy (*see id.*).

RIVERA, J. (dissenting):

In 2016, defendant Jorge Espinosa was convicted of second-degree burglary and several misdemeanors based on allegations that he forcibly entered a New York City

apartment with a co-defendant who stole money from a wallet. At trial, the prosecution admitted two reports containing DNA analyses through a criminalist who testified, based on his review of the file prepared by another criminalist, that defendant's DNA matched DNA on a screwdriver recovered from the scene of the break-in. This evidence was therefore admitted through a surrogate witness in violation of the Confrontation Clause (*Bullcoming v New Mexico*, 564 US 647 [2011]; *Crawford v Washington*, 541 US 36 [2004]). The question on this appeal is whether defense counsel was ineffective for failing to raise a Confrontation Clause objection to this evidence's admission. At the time of defendant's trial, the law was sufficiently settled to support such an objection. Indeed, counsel recognized that the basis for the testifying criminalist's conclusions was vulnerable to attack, as he asked the jury to reject those conclusions on the ground that the criminalist did not conduct the DNA testing. Given that the prosecution's entire case rested upon this DNA evidence, counsel's failure to challenge this evidence on Confrontation Clause grounds cannot be explained as a reasonable strategy. Therefore, I would reverse and order a new trial.

I.

Defendant was prosecuted on charges arising from a New York City apartment break-in. One resident saw a man going through his wallet before running towards the back of the apartment. Another resident entered the home and bumped into a man wearing a ski mask—who she had "a gut feeling" was Latino—run out of the building and down the street. She then noticed another man jump off the upstairs balcony; this other man was

arrested that night and eventually pleaded guilty to second-degree burglary. Defendant was arrested months after the crime when the City's Office of Chief Medical Examiner (OCME) notified investigators that his DNA matched a DNA profile developed from a screwdriver recovered from an outdoor patio located underneath the balcony from which the other man had jumped. Neither resident knew defendant or ever identified him as having been at the scene of the burglary. Thus, the entire case against defendant depended on this DNA evidence.

The prosecution presented testimony from an OCME criminalist, Daniel Ferrara, and, through him, admitted two DNA reports. The first report was based on the swab from the screwdriver and listed defendant under "SUSPECT(S)." The other report was based on a DNA buccal swab sample the police obtained from defendant in an unrelated 2006 case and stated that "[t]he DNA alleles from the suspect, Jorge Espinosa, are the same as those of the DNA donor identified in" that previous case. Ferrara did not participate in any of the DNA testing in the instant case. Instead, as he explained during direct examination, a former OCME employee named Ashley Rhodes was "the reporting analyst" who performed the testing and interpretive analysis, rendered the conclusions, and wrote the report. By the time of trial, Rhodes no longer worked for OCME, so Ferrara reviewed the file and Rhodes's conclusions.

Ferrara testified that he had been Rhodes's supervisor and the "technical reviewer" in this case, meaning that he "[went] through all the results, look[ed] at the testing and ma[de] sure it [wa]s scientifically sound and based on policies and procedures." Although he had supervised "thousands" of DNA analyses before, he did not testify that he

supervised Rhodes' analysis here. Rather, Ferrara acknowledged that his "opinion conclusion" was "based on [his] own review of the business record"—i.e., Rhodes's report. Neither Ferrara's name nor his initials were in the portion of the report covering the electrophoresis stage of the analysis.[1]

Rhodes' analysis concluded that the screwdriver contained a mixture of DNA which, when compared against DNA collected during the earlier, unrelated case, revealed a match with defendant's DNA. The prosecution did not present any testimony regarding who collected and analyzed the DNA in the prior case, and Ferrara did not testify that he was in any way connected to it. Ferrara's name did not appear in the 2007 report, which placed defendant's name in a field labeled "Suspect."

Defense counsel failed to object to the DNA reports' admission and Ferrara's testimony but did cross-examine Ferrara about his lack of involvement in the testing and analysis of the DNA. Ferrara acknowledged that he was "not the person who did the testing" and "personally did not do any of the testing in this case" but that he instead had "read the reports prepared by other people." Ferrara testified that "Ashley Rhodes wrote

[1] Ferrara's name appears four times in the DNA report, related to reviews conducted on two dates—July 14, 2014, and August 1, 2014—where his name is in a box labeled, "Report Tech1 Reviewed By Daniel Ferrara." The initials "DAF" appear throughout the report for the 2006 case, but there is no evidence in the record confirming that those were Ferrara's initials.

the report and made her conclusions. [He] technically reviewed those conclusions and that is how the report came to be."

During his summation, defense counsel argued to the jury that the DNA evidence was "incomplete" and "insufficient" because the prosecution failed to call the person who conducted the DNA testing and instead "called the supervisor who submitted the report" whose conclusions therefore should not be credited. For their part, the prosecutor relied heavily on the DNA evidence, arguing: "He chose to use a screwdriver. How do we know he used it? Well, his DNA is all over that screwdriver." The prosecutor also repeated a theme first raised during opening statements, exhorting that defendant "can't run away from his own DNA."

The jury convicted defendant on all counts and the court sentenced him to an aggregate of 15 years incarceration, followed by five years of post-release supervision.

The Appellate Division affirmed the judgment of conviction (207 AD3d 655, 656 [2022]). The Court concluded that Ferrara's testimony did not violate defendant's right of confrontation and therefore defendant was not deprived of his right to the effective assistance of counsel when his attorney failed to object to the testimony on Confrontation Clause grounds (*id.*). A Judge of this Court granted defendant leave to appeal (39 NY3d 962). We should reverse because defense counsel should have objected based on the law established at the time of trial that the prosecution could not present DNA evidence through the testimony of a criminalist like Ferrara who was not involved in any stage of the DNA analysis and merely served as a conduit for the work of others.

II.

A.

Under the Sixth Amendment to the Federal Constitution, defense counsel is ineffective when their performance falls below "an objective standard of reasonableness" and prejudices the defendant (*Strickland v Washington*, 466 US 668, 688 [1984]). Under Article I, Section 6 of the New York Constitution, a defendant is denied effective counsel when the circumstances, "viewed in totality," show that the attorney did not provide "meaningful representation" (*People v Benevento*, 91 NY2d 708, 712 [1998]), a standard that the Court has characterized as "somewhat more favorable to defendants" and which, like the federal standard, requires an initial showing of objective unreasonableness (*People v Turner*, 5 NY3d 479, 480 [2005]). Thus, conduct found deficient under the federal standard also constitutes ineffectiveness under our State standard (*see People v Wragg*, 26 NY3d 403, 412 [2015] [rejecting defendant's state-based ineffective assistance claim "(s)ince 'our state standard . . . offers greater protection than the federal test' "], quoting *People v Caban*, 5 NY3d 143, 156 [2005]).

An attorney who performs in an objectively reasonable fashion is one who "take[s] the time to review and prepare both the law and the facts relevant to the defense" (*People v Droz*, 39 NY2d 457, 462 [1976]). On the other hand, counsel performs deficiently where, due to an unreasonable mistake of law or failure to perform research, counsel overlooks a viable claim and no plausible strategy explains the apparent oversight (*see Hinton v Alabama*, 571 US 263, 274 [2014] ["An attorney's ignorance of a point of law that is

fundamental to (their) case combined with (their) failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*"]).

To establish prejudice under the federal standard, the defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Strickland*, 466 US at 693-694). "[A] defendant need not establish that the attorney's deficient performance more likely than not altered the outcome" (*Nix v Whiteside*, 475 US 157, 175 [1986]), only a reasonable probability of an impact on the verdict "sufficient to undermine confidence in the outcome" (*Strickland*, 466 US at 693-694). By contrast, the state standard "does not require the defendant to fully satisfy the prejudice test of *Strickland*" even though the Court "continue[s] to regard a defendant's showing of prejudice as a significant but not indispensable element in assessing meaningful representation" (*Caban*, 5 NY3d at 155-156 [internal quotation marks omitted]). "Our focus is on the fairness of the proceedings as a whole" (*People v Stultz*, 2 NY3d 277, 282 [2004]).

Under both standards, a single error may qualify as ineffective assistance (*see Murray v Carrier*, 477 US 478, 496 [1986] [observing that the right to effective assistance "may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial"]; *People v Hobot*, 84 NY2d 1021, 1022 [1995] ["Where a single, substantial error by counsel so seriously compromises a defendant's right to a fair trial, it will qualify as ineffective representation"]; *see also Turner*, 5 NY3d at 480, citing *Caban*, 5 NY3d at 152; *Murray*, 477 US at 496). Where a defendant complains that counsel failed to raise a claim, the claim must typically involve "an issue that is so clear-cut

and dispositive that no reasonable defense counsel would have failed to assert it, and it must be evident that the decision to forgo the contention could not have been grounded in a legitimate trial strategy" (*People v McGee*, 20 NY3d 513, 518 [2013]; *see e.g. Turner*, 5 NY3d at 481 [holding that an attorney who objected to submission of a lesser-included count, but failed to raise a "clear-cut and completely dispositive" statute of limitations defense to that same count was ineffective]). A "[d]efendant bears the burden of establishing [their] claim that counsel's performance is constitutionally deficient by demonstrating the absence of strategic or other legitimate explanations for counsel's alleged failures" (*People v Sposito*, 30 NY3d 1110, 1111 [2018] [cleaned up]), and "counsel's performance is objectively evaluated to determine whether it was consistent with strategic decisions of a reasonably competent attorney" (*People v Mendoza*, 33 NY3d 414, 418 [2019]). Overall, ineffectiveness must be assessed "as of the time of representation" (*People v Carncross*, 14 NY3d 319, 331 [2010]).

The law on an omitted claim need not be "definitively settled" at the time of trial and the claim need not be "a clear winner" before its omission can qualify as ineffective assistance (*Turner*, 5 NY3d at 483). Recently, we held that, in such single-error cases, there must be some "clear appellate authority" supporting the omitted claim (*People v Saenger*, 39 NY3d 433, 442 [2023]). Counsel is not constitutionally ineffective simply for failing to raise a claim having had "nothing to lose" (*Knowles v Mirzayance*, 556 US 111, 122 [2009]), but is ineffective in foregoing a claim supported by clear appellate authority when "no reasonable defense lawyer could have found it so weak as to be not worth raising" (*Turner*, 5 NY3d at 483).

B.

In addition to decisional law and state professional rules, the United States Supreme Court and this Court look to professional norms in assessing defense counsel's effectiveness (*see Strickland*, 466 US at 688; *Hurrell-Harring v State of NY*, 15 NY3d 8, 18 [2010]). "[P]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . [because] these standards may be valuable measures of the prevailing professional norms of effective representation" (*Padilla v Kentucky*, 559 US 356, 366 [2010] [internal citations omitted]; *e.g. People v Clark*, 28 NY3d 556, 563 [2016] [looking to ABA Standards to determine whether counsel was ineffective for declining to pursue a justification defense at the defendant's insistence]; *see also People v Arjune*, 30 NY3d 347, 367-368 [2017] [Rivera, J., dissenting] [professional norms relevant in determining whether counsel was ineffective for, after filing a notice of appeal, failing to either perfect the appeal advise the defendant of how to do so, resulting in the appeal's dismissal]).

III.

Defendant argues, as he did before the Appellate Division, that the DNA reports are testimonial, and that defense counsel was ineffective for failing to object to the DNA

evidence on the ground that Ferrara served as a surrogate witness for its admission in violation of defendant's right of confrontation. Defendant is correct on all points.

A.

The Confrontation Clause of the Sixth Amendment guarantees criminal defendants the right to be "confronted with the witnesses against [them]" (US Const, Amend VI), and "[t]his bedrock procedural guarantee applies to both federal and state prosecutions" (*Crawford*, 541 US at 42, citing *Pointer v Texas*, 380 US 400, 406 [1965]). As the Supreme Court has noted, "[t]he right to confront one's accusers is a concept that dates back to Roman times" (*id.*). The *Crawford* Court observed that the Confrontation Clause "applies to 'witnesses' against the accused," meaning "those who bear testimony . . . for the purpose of establishing or proving some fact" (*id.* at 51 [internal citation and quotation marks omitted]). Out-of-court testimonial statements are admissible under the Confrontation Clause only when the declarant is "unavailable to testify, and the defendant [had] had a prior opportunity for cross-examination" (*id.* at 54). The Supreme Court has included within the "core class of testimonial statements . . . pretrial statements that the declarant would reasonably expect to be used prosecutorially, extrajudicial statements . . . contained in formalized testimonial materials . . . [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" (*id.* at 51-52).

In 2009, in *Melendez-Diaz* the Supreme Court concluded that formal forensic reports—such as the narcotics report at issue there—are testimonial for purposes of the Confrontation Clause (557 US at 310, quoting *Crawford*, 541 US at 51). A forensic report

is "incontrovertibly a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact' " (*id.*, quoting *Crawford*, 541 US at 51). In other words, the report at issue in that case was "the precise testimony" that the witness "would be expected to provide if called at trial" (*id.*). Critically, the Court rejected the claim that the Confrontation Clause applies only to statements that "directly accuse [defendants] of wrongdoing[,]" noting that such view "finds no support in the Sixth Amendment or in [its] case law" and, indeed, "would be contrary to longstanding case law" (*id.* at 313-315, citing *Kirby v United States*, 174 US 47, 53-55 [1899]). As the Court explained, there is no "category of witnesses, helpful to the prosecution, but somehow immune from confrontation" (*id.*). "To the extent the analysts were witnesses"— because their statements were testimonial—"they certainly provided testimony against [the defendant], proving one fact necessary for his conviction—that the substance he possessed was cocaine" (*id.* at 313 [emphasis in original]).

In 2011, the Supreme Court reaffirmed *Melendez-Diaz* in *Bullcoming* and further held that, under the Confrontation Clause, "a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification" was inadmissible "surrogate testimony" that deprived the accused of the "right to be confronted by the analyst who made the certification" (564 US at 652). Moreover, the Court concluded, "the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination"

(*id.* at 662). Thus, at the time of defendant's 2016 trial, the DNA evidence proffered by the prosecution fell squarely within the Supreme Court's description of testimonial evidence subject to confrontation and the evidence offered through Ferrara—who did not prepare the file, "perform or observe the test[,]" or conduct an independent analysis of the DNA samples—was "surrogate testimony of [an] order [that] does not meet the constitutional requirement" (*id.* at 652).

The prosecution argues that our decision in *People v Brown* (13 NY3d 332 [2009]) was controlling at the time of defendant's trial and made clear that the Confrontation Clause did not apply to reports compiled before a defendant became a suspect. Here, the prosecution continues, the DNA match was based on a DNA profile developed in an unrelated matter years before defendant was a suspect in the underlying burglary and, therefore, under *Brown*, Ferrara's testimony satisfied the Confrontation Clause. This argument fails. First, the defendant's status as a non-suspect in *Brown* was not the primary focus of *Brown's* holding (*see* 13 NY3d at 340). Rather, the *Brown* Court concluded that the DNA report there "was not testimonial because it consisted of machine-generated graphs, charts and numerical data" that did not reflect the analyst's conclusions or interpretations (*id.* [internal quotation marks omitted]). In any event, the Supreme Court decided *Bullcoming* two years after *Brown* and nearly five years before defendant's trial. Counsel should have been aware of this binding Supreme Court precedent that the Sixth Amendment guarantees defendants the right to be confronted by the individuals who performed the analysis and rendered conclusions, not a "surrogate" like Ferrara, who merely relays the analyses and conclusions of others (*Bullcoming*, 564 US at 652).

The prosecution's reliance on *Williams v Illinois* (567 US 50 [2012]) is similarly unpersuasive. *Williams* involved a forensic expert who testified that a DNA profile generated by an outside laboratory based on evidence collected as part of a rape kit matched the defendant's DNA profile that was already in the government's possession as part of an earlier, unrelated case (*see id.* at 56). A plurality of the Court concluded that "[o]ut-of-court statements that are related by [a testifying] expert solely for the purpose of explaining the assumptions on which [the expert's] opinion rests" are not subject to confrontation, in relevant part, because they are "not prepared for the primary purpose of accusing a targeted individual" (*id.* at 58, 84).[2] Justice Thomas concurred only in the judgment, agreeing that the Confrontation Clause did not cover the underlying DNA profile, but on the basis—which no other Justice endorsed—that the profile was "not a statement by a witness within the meaning of the Confrontation Clause" because it lacked "the solemnity of an affidavit or deposition" (*id.* at 111 [Thomas, J., concurring] [internal quotation marks and alteration omitted]).

[2] The plurality alternatively concluded that the outside laboratory's profile was not offered for its truth and therefore was not testimonial (*Williams*, 567 US at 57-58). Five justices squarely rejected this view (*see id.* at 105-110 [Thomas, J. concurring], 125-130 [Kagan, J., dissenting]), and this Court had previously rejected the same several years prior to defendant's trial (*see People v Goldstein*, 6 NY3d 119, 128 [2005] [holding that statements from third parties familiar with the defendant made to an expert psychiatrist were offered for their truth because one could "not see how the jury could use the statements of the interviewees to evaluate (the psychiatrist's) opinion without accepting as a premise either that the statements were true or that they were false"]; *see also id.* ["The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful"]).

Justice Thomas squarely rejected the plurality's targeted-individual test (*see id.* at 114 ["There is no textual justification . . . for limiting the confrontation right to statements made after the accused's identity became known"]). So too did Justice Kagan who, joined by three other Justices, dissented, but agreed with Justice Thomas that none of the Court's prior cases had held that a testimonial statement "must be meant to accuse a previously identified individual" and that the plurality's targeted-individual test "derives neither from the text nor from the history of the Confrontation Clause" (*id.* at 135 [Kagan, J., dissenting]). Thus, before defendant's 2016 trial, a majority of the Justices specifically rejected the targeted-individual test the prosecution argues controlled at the time.

Indeed, at the time of trial, several federal and state courts had concluded that *Williams* did not establish any controlling rule (*see United States v James*, 712 F3d 79, 95-96 [2d Cir 2013] [concluding that, as "five Justices disagreed with" the *Williams* plurality's "narrowed definition of testimonial" "and it would appear to conflict directly with *Melendez-Diaz*," *Williams* did not "yield a single, useful holding"]; *United States v Duron-Caldera*, 737 F3d 988, 994-995 [5th Cir 2013] [declining to adopt targeted-individual test and noting the *Williams* plurality is not "controlling"]; *Jenkins v United States*, 75 A3d 174, 176 [DC 2013] [noting that *Williams* yielded "no new rule of law"]; *State v Stanfield*, 158 Idaho 327, 366, 347 P3d 175, 185 [2015] ["Because no position received support from a majority of the justices, *Williams* does not provide us a governing legal principle"]; *State v Maxwell*, 139 Ohio St 3d 12, 24, 9 NE3d 930, 950 [2014] [noting "five justices in *Williams* rejected the plurality's narrowed definition of the primary-purpose test (the targeted-individual test)," and rejecting use of that "narrowed

definition"]). Thus, at the time of defendant's trial, the "clear appellate authority" established in *Melendez-Diaz* and *Bullcoming* controlled and supported a Confrontation Clause objection (*Saenger*, 39 NY3d at 442).

Even assuming the Supreme Court had not provided a clear basis for a Confrontation Clause challenge to the admission of the reports and Ferrara's testimony, there was "clear appellate authority" from our state courts supporting one (*id.*). Counsel could have relied on *People v Cartagena* where, post-*Brown* (13 NY3d 332), the Appellate Division, Second Department—the intermediate appellate court to which defendant here would appeal—held that the defendant's "rights under the Confrontation Clause of the Sixth Amendment were violated when the Supreme Court admitted a nontestifying DNA analyst's report linking the defendant to DNA evidence recovered at the crime scene" (126 AD3d 913 [2d Dept 2015]); *see also People v Gonzalez*, 120 AD3d 832 [2d Dept 2014] [same, but conceded by the prosecution]).

In addition, defendant's trial began after full briefing and oral arguments in *People v John* (27 NY3d 294 [2016]) and, although we did not decide *John* until after defendant's conviction, defense counsel had a continuing obligation throughout his representation to "take[ ] the time to review and prepare both the law and the facts relevant to the defense" (*Droz*, 39 NY2d at 462), and "stay abreast of changes and developments in the law" (National Legal Aid and Defender Association, Performance Guidelines for Criminal Defense Representation § 1.2 [2006]). This continuing obligation also included "a duty to be well-informed regarding the legal options and developments that can affect a client's interests during a criminal representation" and "a duty to continually evaluate the impact

that each decision or action may have at later stages, including . . . post-conviction review" (ABA Standards for Criminal Justice, Defense Function 4-1.3 [e], [f] [4th ed 2017]).

Defense counsel's failure to object could not have been part of a "legitimate trial strategy" (*McGee*, 20 NY3d at 518). Ferrara admitted on direct and cross examination that he was not involved at all in the DNA testing that produced the two reports admitted at trial, nor did he independently analyze any of their raw data. True, defense counsel drew on these acknowledgments in an attempt to persuade the jury to reject the evidence but, by then, the damage had been done; the reports were admitted into evidence and the jury had heard Ferrara's testimony. In a case that turned on the DNA evidence, defense counsel inexplicably failed to take the singular preventive step available to him—object to the admission of this powerful DNA evidence on confrontation grounds—despite the "clear appellate authority" supporting it (*Saenger*, 39 NY3d at 442). Under these circumstances, defendant was deprived of effective assistance of counsel.

B.

The majority erroneously concludes that our decision in *People v Rodriguez* (31 NY3d 1067 [2018]) controls this case and compels the conclusion that defense counsel here was not ineffective (majority mem at 2). That conclusion is mistaken. First, we issued that one-paragraph memorandum more than two years after defendant's trial and thus it could not have dissuaded counsel from raising a Confrontation Clause objection to the DNA evidence—the only question relevant to deciding whether counsel was ineffective.

Second, *Rodriguez* is distinguishable in meaningful ways. There, the Appellate Division concluded that the defendant's Confrontation Clause claim was unpreserved and

declined to review it under that Court's interest of justice jurisdiction (*People v Rodriguez*, 153 AD3d 235, 238 [1st Dept 2017]). The majority nonetheless, in pure dicta, addressed the merits and concluded that the prosecution's failure to call the criminalists who generated two DNA profiles on which the testifying criminalist relied to determine that the defendant's DNA was present on a pair of wire cutters used to commit the underlying burglary did not violate the Confrontation Clause (*id.* at 247). The Court explained that, in response to the prosecutor's pretrial motion for a ruling on the introduction of DNA testing, the defense counsel "argued against the introduction of reports of conclusions reached by nontestifying examiners, and urged that the admissible evidence from OCME's files should be limited to the pages of documents reflecting raw data that had been personally reviewed and initialed by" the proffered criminalist witness (*id.* at 239). The majority further explained that the testifying criminalist "performed an independent review of the raw data generated by the testing analysts," distinguishing her testimony from what this Court found insufficient in *John* (*id.* at 245-246, citing 27 NY3d at 312-313). According to the Court, the criminalist's conclusions were instead "based upon her own 'separate, independent and unbiased analysis of the raw data,' [ ]as reflected in the OCME laboratory report bearing her name as analyst as well as in her own testimony at trial" (*id.* at 246, quoting *John*, 27 NY3d at 311). In addition, as defendant here points out, the defense counsel in *Rodriguez* subpoenaed the raw data and employed their own forensic DNA expert to review it (*see* brief for respondent [*People v Rodriguez*, 31 NY3d at 1067] at 3, 8).

The Appellate Division's description of defense counsel's actions in *Rodriguez* thus shed light on our summary decision there and confirm that we did not, as the majority

suggests, foreclose an ineffectiveness claim based on pre-*John* conduct. Our holding in *Rodriguez* that the record failed to establish counsel's ineffectiveness was based on the assumption "that counsel failed to assert a meritorious Confrontation Clause challenge" (31 NY3d at 1068). From that premise, we then concluded that "the alleged omission d[id] not 'involve an issue that [was] so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it,' " (*Rodriguez*, 31 NY3d at 1068, quoting *McGee*, 20 NY3d at 518). As our memorandum decision and the record of that criminalist's testimony suggest, the defendant's allegations of a meritorious confrontation claim may have been exaggerated—based on the law at the time—and not clear-cut grounds for a defense objection (*see id.*; *Rodriguez*, 153 AD3d at 239-247).[3] As we further noted, on that record, defendant also failed to demonstrate " 'that the decision to forgo the contention could not have been grounded in a legitimate trial strategy' " (*Rodriguez*, 31 NY3d at 1068, quoting *McGee*, 20 NY3d at 518). Notably, the defendant in *Rodriguez* did not advance an ineffective assistance of counsel claim at the Appellate Division, and made that claim for the first time on appeal to our Court (*compare Rodriguez*, 153 AD3d at 235, *with id.*, 31 NY3d at 1067).

Defendant here presents a different case. Based on the record and the law at the time of defendant's trial, the Confrontation Clause violation is plain, whereas in *Rodriguez* we merely assumed arguendo that the defendant had a meritorious confrontation challenge

[3] In fact, the Appellate Division majority, after deeming the Confrontation Clause claim unpreserved, held that any such claim would have been futile anyway had defense counsel properly raised it (*see Rodriguez*, 153 AD3d at 238).

before concluding that defense counsel there was not ineffective for failing to raise it (31 NY3d at 1068). Defense counsel here did not object to the DNA evidence based on Ferrara's lack of involvement in the testing of the DNA evidence that was the core of the prosecution's case. In contrast, defense counsel in *Rodriguez* vigorously objected to the proffered evidence on what were essentially Confrontation Clause grounds (*see Rodriguez*, 153 AD3d at 239). Indeed, defense counsel there did not merely object, but also sought and eventually was granted access to the raw data to conduct independent DNA testing, the results of which may have informed counsel's decisions regarding the DNA evidence in that case.[4] In contrast, here, defense counsel's actions belie any reasonable trial strategy for failing to object to admission of the DNA evidence even though counsel based their arguments to the jury for discounting the DNA evidence on the very same grounds they could have raised to the judge for excluding that evidence (*see McGee*, 20 NY3d at 518).

IV.

The DNA evidence was the only direct link connecting defendant to the crime. Defense counsel understood as much and argued to the jury that this evidence should not be credited, in part, because it was presented by someone who did not conduct the tests. However, defense counsel could have and should have avoided creating this post-admission uphill battle by objecting to prevent its admission on confrontation grounds in the first instance, based on existing Supreme Court and state decisional law. This single failure had an outsized impact on the verdict because it allowed the prosecution to put the

[4] Indeed, Rodriguez's trial attorney "did not present any evidence at trial" (*Rodriguez*, 153 AD3d at 252 [Acosta, P.J., dissenting]).

most compelling evidence of defendant's guilt before the jury. Therefore, this error deprived defendant of effective assistance and, accordingly, requires reversal and a new trial.

I dissent.

Order affirmed, in a memorandum. Chief Judge Wilson and Judges Garcia, Singas, Cannataro, Troutman and Halligan concur. Judge Rivera dissents in an opinion.

Decided November 21, 2023

APPENDIX B

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D69512
T/htr

_____AD3d_____ Argued - May 9, 2022

HECTOR D. LASALLE, P.J.
FRANCESCA E. CONNOLLY
LARA J. GENOVESI
WILLIAM G. FORD, JJ.

2016-03674 DECISION & ORDER

The People, etc., respondent,
v Jorge Espinosa, appellant.

(Ind. No. 2367/14)

Patricia Pazner, New York, NY (Meredith S. Holt and Samuel Barr of counsel), for appellant.

Melinda Katz, District Attorney, Kew Gardens, NY (Johnnette Traill, William H. Branigan, and Benjamin N. Costanza of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Robert A. Schwartz, J.), rendered March 17, 2016, convicting him of burglary in the second degree, possession of burglar's tools, and criminal mischief in the fourth degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Contrary to the defendant's contention, although the complainants were unable to positively identify him, the circumstantial evidence, including the DNA evidence linking the defendant to the crime, established a prima facie case as to identity (*see People v Drummond*, 143 AD3d 836; *People v Moss*, 138 AD3d 761). Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15[5]; *People v Danielson*, 9 NY3d 342), we nevertheless accord great deference to the factfinder's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the

evidence (*see People v Romero*, 7 NY3d 633).

Contrary to the defendant's contention, the Supreme Court's *Sandoval* ruling (*People v Sandoval*, 34 NY2d 371) was a provident exercise of discretion, as it constituted an appropriate compromise which properly balanced the probative value of the proffered evidence against any potential prejudice to the defendant (*see People v Smith*, 18 NY3d 588, 593-594; *People v Hayes*, 97 NY2d 203, 207-208).

The defendant's contention that certain DNA evidence should have been precluded based on an alleged violation of Executive Law § 995-c is unpreserved for appellate review, since defense counsel did not object to the admission of the DNA evidence on this basis (*see* CPL 470.05[2]). In any event, the defendant's contention is without merit (*see People v Weathers*, 201 AD3d 959, 960). "'[V]iolation of a statute does not, without more, justify suppressing the evidence' when the violation does not implicate a constitutionally protected right" (*id.*, quoting *People v Greene*, 9 NY3d 277, 280; *see Matter of Quadon H.*, 55 AD3d 834, 835).

Similarly, the defendant's contention that his Sixth Amendment right to confrontation was violated because DNA test results admitted into evidence contained testing performed by an analyst who did not testify at trial is unpreserved for appellate review (*see* CPL 470.05[2]). In any event, the defendant's contention is without merit (*see People v John*, 27 NY3d 294; *People v Frederick*, 186 AD3d 1398; *People v Aponte*, 149 AD3d 1096; *People v Pitre*, 108 AD3d 643). "The testifying criminalist performed a technical review of the analyst's report, independently reviewed the analyst's data interpretation, and reached an independent conclusion, and thus, was not merely 'functioning as a conduit for the conclusions of others'" (*People v Frederick*, 186 AD3d at 1399, quoting *People v John*, 27 NY3d at 315).

Contrary to the defendant's contention, he was not deprived of the effective assistance of counsel (*see Strickland v Washington*, 466 US 668; *People v Benevento*, 91 NY2d 708).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80).

LASALLE, P.J., CONNOLLY, GENOVESI and FORD, JJ., concur.

ENTER:

Maria T. Fasulo

Maria T. Fasulo
Clerk of the Court