To be argued by:
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(15 minutes requested)

NEW YORK SUPREME COURT
APPELLATE DIVISION—FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

FABIAN COKE,

Defendant-Appellant.

Appellate Case Nos. 2018-2162, 2023-04374

BRIEF FOR DEFENDANT-APPELLANT

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Indictment No. 70/15 (Bronx County)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, - against - FABIAN COKE, Defendant-Appellant.	Appellate Case Nos. 2018-2162, 2023-04374 Indictment No. 70/15 (Bronx County)

22 NYCRR § 1250.11(d)(1) STATEMENT

1. This is a consolidated appeal from (a) a judgment of Supreme Court, Bronx County, convicting Fabian Coke, after a jury verdict, of murder in the second degree, in violation of Penal Law § 125.25(1), and criminal possession of a weapon in the second degree, in violation of Penal Law § 265.03(1)(b), and sentencing him to 25 years to life in prison, and (b) a decision and order denying Mr. Coke's motion to vacate the judgment of conviction under CPL § 440.10.

2. The Court imposed an indeterminate sentence of 25 years to life in prison on the murder count and a determine sentence of 15 years in prison, with five years of post-release supervision, on the weapon count, with the prison terms running concurrently.

3. No application for a stay of execution of judgment pending determination of the appeal has been made.

4. There is no outstanding order issued pursuant to CPL § 460.50.

5. There were two codefendants in the trial court. Codefendant Brendrick Brown was acquitted on all counts. Codefendant Devon Jenkins, who was tried during the same proceedings but before a separate jury, was found guilty of murder in the second degree and criminal possession of a weapon in the second degree. This Court affirmed his conviction on direct appeal. *See People v. Jenkins*, 198 A.D.3d 488 (1st Dep't 2021).

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PRELIMINARY STATEMENT

This is a consolidated appeal from a judgment of conviction rendered on September 6, 2017, by Supreme Court, Bronx County, and the same court's decision and order on October 14, 2022, denying Fabian Coke's motion to vacate the judgment of conviction under CPL § 440.10.

A jury convicted Coke of one count of murder in the second degree, PL § 125.25(1), and one count of criminal possession of a weapon in the second degree, PL § 265.03(1)(b). He was sentenced to 25 years to life in prison on the murder count and 15 years in prison, with five years of post-release supervision, on the weapon count, with the terms running concurrently.

Justice Robert A. Neary presided at trial and sentencing. Timely notice of appeal was filed.

On August 18, 2021, Coke filed a CPL § 440.10 motion to vacate his conviction. Justice Margaret L. Clancy denied the motion on October 14, 2022.

On August 17, 2023, a Justice of this Court (Webber, J.) granted Coke leave to appeal the denial of the CPL § 440.10 motion and consolidated the 440 appeal with Coke's direct appeal. A notice of appeal from the denial of the CPL § 440.10 motion was timely filed on August 22, 2023.

Coke is serving his sentence in the custody of the Department of Corrections and Community Supervision. No stay of execution has been sought.

QUESTIONS PRESENTED

1. Was the evidence legally insufficient to prove Fabian Coke guilty of murder where, at most, it showed that he was with his two codefendants *98 minutes before the shooting* and that a few of his skin cells were part of a three-person DNA mixture on the murder weapon—cells that could have been left at any time, including by secondary transference?

The trial court denied Coke's motion for a trial order of dismissal, which preserved Coke's insufficiency claim.

2. Should the verdict be overturned because it is against the weight of the evidence?

This claim need not be preserved.

3. Did Coke's trial lawyer deprive him of the effective assistance of counsel by (a) failing to move to exclude DNA testimony of a type that another court had previously ruled inadmissible because it was based on a method that lacked general acceptance, (b) failing to educate the jury about the unreliability of that method, and (c) failing to object to the prosecutor's misrepresentations about the DNA and other evidence in summation?

Most of Coke's ineffectiveness claim was raised in a CPL § 440.10 motion, which was denied by the trial court; that part of the ineffectiveness claim that

concerns counsel's summation is based upon the trial record and may be raised for the first time on direct appeal without any further preservation.

4. Should the conviction be reversed under *People v. Powell*, 165 A.D.3d 842 (2d Dep't 2018), because the prosecutor misleadingly claimed in summation that Coke's DNA categorically "[wa]s on" the gun, when the prosecution's DNA witness had testified this was only a *probability*?

Trial counsel did not object to this remark by the prosecutor, but this Court should nevertheless vacate the conviction on this ground in the interest of justice, as the Appellate Division did in *Powell*.

5. At the very least, where the Court of Appeals recently held that trial courts must hold a *Frye* hearing on the admissibility of the type of DNA evidence that caused Coke's conviction, should this matter be remitted for such a hearing?

Trial counsel did not request a *Frye* hearing, but this Court should remit this case for such a hearing in the interest of justice.

INTRODUCTION

In 2014, Dune Jacobs was shot dead in the Bronx. The evidence used to convict Appellant Fabian Coke of acting in concert with others to kill Jacobs was legally insufficient, as trial counsel argued, and the verdict was against the weight of the evidence.

No evidence established that Coke had any connection to Jacobs or intent to kill her. At most, the evidence showed that Coke was with his codefendants 98 minutes before the killing, at a store; no evidence showed he was with them when the shooting happened. Even if it is assumed—despite the absence of any such evidence—that Coke was in the car when someone got out and shot Jacobs, there is no evidence that he was that shooter or that he aided and abetted the shooter.

While the prosecution alleged that a few cells containing Coke's DNA were mixed with cells from other donors on the apparent murder weapon, there was no evidence of how these few cells got there, or when. Indeed, the prosecution's expert testified that the cells could have gotten there at any time, including through secondary transference.

That Coke is serving a 25-years-to-life sentence on this evidence is deeply disturbing. The conviction should be reversed for legal insufficiency or on weight-of-the-evidence review.

In the alternative, the Court should order a new trial because Coke's counsel was ineffective, principally for repeatedly failing to challenge the prejudicial DNA testimony, but for additional reasons as well. DNA evidence may give the prosecution's case a false "aura of invincibility." *People v. Wright*, 25 N.Y.3d 769, 783 (2015) (internal quotation marks omitted). Indeed, the jury convicted Appellant Coke but acquitted his codefendant Brendrick Brown, against whom no DNA evidence was admitted. (Codefendant Devon Jenkins was tried before a separate jury.)

Coke's lawyer should have known it was crucial to keep out or undermine the DNA evidence, which he knew had been generated by the controversial Forensic Statistical Tool, or "FST." But counsel—as he has admitted—failed to conduct an adequate pretrial investigation into this technology. As a result, the prejudicial, yet highly challengeable, evidence came in essentially unrebutted. Unaware that a New York court had previously excluded FST evidence because scientists do not generally accept it as reliable, counsel neither moved to exclude the testimony nor educated the jury—through cross-examination or his own expert—about the ample evidence of the FST's unreliability. Then, in summation, he accepted the unchallenged FST testimony and compounded the prejudice by failing to object when the prosecutor inaccurately and misleadingly claimed that the DNA evidence was absolute proof that Coke's DNA was on the gun.

Counsel's errors left the inherently prejudicial DNA evidence in this very weak case largely unchallenged. This combination of negligent conduct and the prejudice it caused deprived Coke of a fair trial and led directly to his conviction, violating his right to the effective assistance of counsel under the State and Federal Constitutions. Thus, even if the Court does not dismiss the indictment, it should grant Coke a new trial.

STATEMENT OF FACTS

A. The shooting and initial police investigation

Shortly before 1:00 a.m. on December 2, 2014, NYPD Sgt. Thomas Casey and his driver were in an unmarked car in the Bronx when they heard gunshots. T.76-79.[1] After turning westbound onto East 213th Street toward the shots, Sgt. Casey observed a white Nissan at the intersection of Carlisle Place and 213th. T.78-80, 82. When the Nissan headed southbound on Carlisle, the officers followed it. T.80. The Nissan drove slowly, taking several turns, then proceeded eastbound on 213th Street and sped up to 70-80 miles per hour. T.81-83. When the Nissan turned left onto Givan Avenue, the officers briefly lost sight of it, but then found it abandoned at the intersection of Givan and Gunther Avenues. T.83-86.

[1] Citations prefixed "T." are to the trial transcript, which has been filed with the Court in accordance with 22 NYCRR § 600.11. Other transcripts are provided in the accompanying appendix, citations to which are prefixed "A."

Officers responding to 213th and Carlisle found an unresponsive woman, Dune Jacobs, bleeding on the sidewalk on the south side of 213th Street. T.34-36, 86, 115-16, 399-401. Jacobs was soon after pronounced dead. T.37.

Sgt. Casey retraced the car-chase route for detectives. T.87. At 213th Street and Paulding Avenue, crime-scene detectives found a handgun near the curb. T.164-72. Other detectives matched fingerprints found inside the Nissan to Devon Jenkins and Brendrick Brown. T.201-02, 365-66.

Jenkins was arrested and made a videotaped statement that later was introduced against him at his trial. *See* T.306-29; People's Exhibits 95, 96. This statement largely exculpated Coke: while Jenkins put Coke in the car, Jenkins claimed that Brown, not Coke, got out of the car and apparently committed the shooting. *See* Exhibit 96, "VTS_01_1.VOB" at 3:25, 5:25; "VTS_01_2.VOB," at 10:05. Jenkins did not say that Coke did or said anything to indicate that Coke knew Brown would commit a shooting.

B. The first indictment against Coke is dismissed based on insufficient evidence, but Coke is reindicted after the prosecution obtains DNA evidence of a type that had previously been held inadmissible in court.

In December 2014, a grand jury indicted Jenkins, Brown, and Coke on one count of intentional murder in the second degree and related charges, all on an acting-in-concert theory. *See* A.1. Because "the only evidence presented which actually connected [Coke] to the commission of the crime was the hearsay

statement of" Jenkins putting Coke in the car, the court dismissed all counts against Coke. A.3.

After the court granted the prosecution leave to re-present the charges, Coke's lawyer objected that the evidence would continue to be insufficient: although new evidence allegedly showed Coke's DNA on the recovered firearm, such "circumstantial evidence does not support a murder count," A.6; *see also* A.13-14, and Coke's "[m]ere presence" at the scene would be insufficient to prove "acting in concert for a murder," A.18. Nevertheless, Coke was indicted again, on the same counts, under the same indictment number.

As discussed in more detail below, the DNA results, generated by the New York City Office of the Chief Medical Examiner ("OCME"), failed to definitively prove that Coke's DNA matched the DNA on the gun. Rather, the OCME used its Forensic Statistical Tool, or "FST," to conclude that Coke's DNA *probably* was part of a mixture of multiple persons' DNA on the gun. The FST is a computer program that determines the statistical likelihood that a suspect's DNA is part of a mixture. *See People v. Collins*, 49 Misc. 3d 595, 613-15 (Sup. Ct. Kings Cty. 2015). Two years before Coke's trial, the Honorable Mark Dwyer had held in *Collins*, after a lengthy *Frye* hearing at which numerous experts testified to their doubts about the FST's accuracy and reliability, that FST evidence was inadmissible in court because it was not "generally accepted in the relevant

scientific community." *Id.* at 597 (citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)). After Coke's trial, the Court of Appeals endorsed Justice Dwyer's reasoning in *People v. Williams*, 35 N.Y.3d 24 (2020). *See* Point II.A.3, *infra*.

Although *Collins* provided a comprehensive roadmap for challenging the admissibility of the FST evidence against Coke, defense counsel never moved to exclude the evidence or sought a *Frye* hearing. Counsel later admitted that he was unaware of the *Collins* decision before and during Coke's trial. *See* p. 25, *infra*.

C. The trial

Coke, Brown, and Jenkins were tried at a single trial in July and August 2017. As noted above, Jenkins was tried before one jury, which heard his statements, while Coke and Brown were tried before another, which did not hear Jenkins's statements. Neither jury heard any evidence about any motive for the shooting or any link between shooting victim Jacobs and the defendants.

1. Police witnesses

Sgt. Casey testified to the details discussed above about driving toward the gunshots, chasing the white Nissan, and finding it abandoned. T.78-86. He testified that he removed two cell phones from the Nissan. T.92, 99, 433-35. Inexplicably, police never analyzed the contents of these phones. T.388.

A crime-scene detective testified that she discovered, on the car-chase route, a Glock handgun. T.91, 164-72; A.21. She recovered three spent shell casings at

the southwest corner of 213th and Carlisle, while Jacobs's bloody clothes, bullet fragments, and bullet damage to cars parked down the street were all found west of the casings, indicating that the shooter had fired westward from the southwest corner of 213th and Carlisle. T.139-42, 146-48, 151-55; A.23; People's Exhibits 25-38. An OCME doctor testified that Jacobs was killed by a "[g]unshot wound of the head," T.472, but that it was "almost impossible" to tell where the gun was in "relationship to where [Jacobs was] standing," T.470.

A firearms analyst testified that the recovered shell casings were fired from the recovered Glock. T.420. Bullet fragments recovered from the street and from Jacobs's autopsy were fired from *a* Glock, though the detective couldn't say which Glock. T.415, 420-21.

Other detectives testified that fingerprints from the "interior" of the abandoned Nissan's "driver's door" matched Jenkins, T.365-66; fingerprints from the "exterior side of the front passenger door" and "rear passenger door interior" matched Brown, T.366-67; and a fingerprint from one of the cellphones found in the car matched a person named Arvey Valderrama, T.364-65. The jury heard no evidence about who Valderrama was. T.577.

There was no evidence that Coke's fingerprints were found anywhere.

Detectives testified that they recovered in or near the Nissan a do-rag, T.186; various beverage bottles, T.161, 184-85; DNA swabs, T.199; hair and fiber

samples, T.206-07; a baseball cap, a glove, two black t-shirts, a black knit hat, multiple compact discs, a cigarette box, and multiple gift cards, T.207-08, 224.

There was no evidence connecting any of the above items to Coke.

The lead detective testified that, after Coke's arrest, he collected a soda bottle from which Coke had been drinking to have it tested for DNA. T.383. He said that detectives recovered store receipts from the Nissan and then obtained various surveillance videos, listed below, from the stores. T.380-81.

2. Video evidence is alleged to show Coke with his codefendants 98 minutes before the shooting, but no evidence establishes his whereabouts after that.

The prosecution introduced discs containing surveillance videos showing the intersection of 213th Street and Carlisle Place. T.100-01, 662; *see* People's Exhibits 9, 100, at A.25. The videos show a white sedan turning right onto southbound Carlisle at approximately 12:45 a.m. and immediately stopping, at which point only a small portion of the car's rear driver side is visible. *See* People's Exhibit 9, "47 10951 1.avi." Seconds later, a pedestrian walks westward down 213th Street, crosses Carlisle in the crosswalk, just behind the white sedan, then walks out of the frame. *Id.*, "47 10951 1.avi" and "47 10951 3.avi." About 22 seconds after the pedestrian crosses the street, the white car drives off, as another car drives westward down 213th and turns onto Carlisle. *Id.*, "47 10951 2.avi." Sgt.

Casey testified that the second car in the video was his car following the white Nissan after he heard gunshots. T.103-05.[2]

The videos do not show anyone getting out of the Nissan or committing the shooting, but a visible shadow strongly suggests that only one person exited the car. At approximately "12:50:42," in the bottom right corner of video "47 10951 2.avi" from People's Exhibit 9, there is a moving shadow that is consistent with a single person exiting the car. Eight seconds later, at "12:50:50," the same video shows a single shadow that is consistent with the person re-entering the car a few seconds before it drives away.

Additional surveillance videos, obtained based upon the receipts recovered from the Nissan, were introduced as part of People's Exhibit 100, *see* A.25, and included the following:

- Videos from Burger King on November 30, 2014, showing a man in the white Nissan, apparently alone. T.439-41. While all three defendants are Black, this man appears not to be.
- A video from Target on December 1, 2014, at 1:03 p.m., showing a Black male, who the prosecution would argue was Jenkins. T.444.
- Videos from Popeyes on December 1, 2014, at 1:37 p.m., showing the same man from Target, a woman with a stroller, and two other men. T.441-42. The prosecution would argue that these were "other individuals" than Coke and Brown. T.577; *see also* T.517-18.

[2] It was stipulated that the time stamps on these videos were "five minutes fast and that a.m. and p.m. are reversed." T.101. Although the date on the videos appears as "12-01-2014," the day before the shooting, Sgt. Casey testified that the video depicted the events of December 2.

- Videos from Wet Liquor & Wine, on December 1, 2014, starting at 9:13 p.m., showing two Black men making purchases. T.445.

- Videos from a Sunoco gas station, on December 1, 2014, starting at 11:04 p.m., showing the same two men from the liquor store, one of them making a purchase while the other talks to a third Black male. T.447-48. At 11:07 p.m., shortly after the three men leave the Sunoco store, a white sedan drives away from the gas station.[3]

The prosecutor argued in summation that Coke was the person in the liquor-store and Sunoco videos wearing a black sweatshirt with white writing, T.519, 580; Jenkins was the person in both videos wearing gray pants, T.519, 580; and Brown was the third person in the Sunoco video, dressed in all black. T.578-80. Coke's attorney argued that it was not clear beyond a reasonable doubt that Coke was in the videos. T.563.

Assuming the white car that left the Sunoco at 11:07 p.m. was the same white Nissan at 213th and Carlisle at 12:45 a.m., when the shooting occurred, the Brown/Coke jury heard no evidence about where this car was in the intervening hour and 38 minutes. Nor was any evidence introduced that Coke was in the car after the Sunoco video or at the time of the shooting.

[3] It was stipulated that the time stamp on the Sunoco videos is one hour and two minutes fast. T.447. Exhibit 100 also contained a Home Depot receipt dated November 30, 2014, at 5:01 p.m. The prosecutor was unable to play the Home Depot surveillance video at trial, T.444, 451, 453, 499, and the jury never asked to view it.

3. An OCME criminalist testifies, essentially unrebutted, that DNA found on the recovered firearm likely is Coke's.

Kendra Hardy, an OCME criminalist, testified about DNA evidence. T.236-38. Hardy explained that a person's DNA profile is represented with numerals: "at fifteen out of the sixteen areas of DNA that we look at, there will either be one number or two numbers"—"[o]ne number if you inherit ... the same number from both of your parents" and "[t]wo numbers if your parents each give you a different number." T.251. Thus, if there are more than two numerals at a given area of DNA, "that indicates that there is more than one individual contributing" to the sample. T.251. The numeral a person inherits from each parent at a given location is called an "allele." T.282.

Hardy testified that the OCME received swabs from the recovered gun, and only the textured area of the gun slide had sufficient DNA for testing. T.250-51, 266. (A detective had testified that the "slide" is a piece on top of the weapon that the user must pull back and release before firing. T.408.)

Hardy testified that the gun-slide swab contained a mixture of DNA from "three individuals." T.262; *see* T.251. She testified that, sometimes, contributors to a mixture leave different quantities of DNA, allowing analysts to determine the profiles of each contributor. Here that was not possible. T.252. But the OCME *could* compare the DNA in the mixture to any submitted individual DNA profiles. T.252. The OCME then received from the NYPD "a bottle submitted for Fabian

Coke" and "a cigarette butt submitted for Devon Jenkins." T.253. Notably, there was no evidence that the OCME compared Brown's DNA to the mixture.

Hardy testified that "the donor to [the] cigarette butt" was "excluded as a contributor" to the mixture on the gun. T.254. As for "the donor to the bottle," Hardy concluded that he "*cannot be excluded as a contributor* to the DNA" mixture. T.261 (emphasis added).

However, Hardy then went further, testifying that it was "approximately one hundred sixty-two billion times more probable that [the DNA mixture] originated from the donor to the bottle submitted for Fabian Coke and two unknown individuals versus three unknown individuals"—and that this was "very strong support" for the bottle donor's DNA being on the gun. T.262-63. On direct examination, Hardy gave no explanation of how she arrived at this statistic.

On cross-examination, Hardy agreed she was "unable to state with scientific certainty that the person from the bottle is included in the mixture"; she could give only a statistical likelihood. T.284. She explained that her testimony about this "likelihood ratio" was based on the OCME's "forensic statistical tool," which uses an "algorithm" to generate a statistic based on how often the alleles seen in the mixture appear in the population for particular racial groups. T.284-86. This was Hardy's *only* testimony about the FST or explanation about how it worked. Coke's attorney did not question Hardy about any of the numerous doubts about the FST's

reliability that were thoroughly detailed in Justice Dwyer's *Collins* decision, which are discussed in Point II.A.3, below.

Regarding Hardy's testimony that the DNA mixture on the gun was from three contributors, counsel never pressed her to adequately explain the basis for this conclusion. This is important because, according to an expert later retained by Coke's post-conviction counsel, there was a "substantial likelihood" that the mixture in this case was from *four* people, not three, and as discussed *infra* at p. 25, *the FST could not at the time of Coke's trial be used to analyze mixtures from more than three contributors*. Moreover, multiple experts, including a former OCME training director, had testified before Justice Dwyer in *Collins* that OCME analysts likely underestimated the number of contributors to mixtures.

Hardy's explanation on direct examination for why she believed the mixture was from three people was that, "at some locations there are up to five" alleles, so "if two people are contributing[] the maximum amount of two numbers per person," there would still be "a number a left over," indicating a third DNA contributor. T.262. However, based on Hardy's testimony that a person can have either one or two alleles at each location, the presence of five alleles could mean there were four or five DNA contributors. *See* p. 25, *infra*. But Hardy did not explain why she concluded there were only three contributors.

On cross-examination, counsel did not elicit any of the powerful evidence about the likelihood that the mixture was from more than three people or about the significance of such a likelihood. While he asked Hardy whether the mixture "[c]ould ... be from four people" rather than three, Hardy merely said it was "possible" but then reiterated that she had "reported [it] to be a three person mixture." T.283. When counsel asked whether she could "rule out" a "four person mixture," Hardy did not answer but simply insisted, "It was my conclusion and interpretation that it was a three person mixture," while emphasizing that this was endorsed "through a technical review of another qualified individual." T.283-84. Counsel did not object to this last remark although it was hearsay. Hardy still did not explain *why* she had reached this conclusion, and counsel demanded no explanation. Counsel also did not question Hardy, or otherwise elicit evidence, about why it would be significant if the mixture was from more than three people.

On cross-examination, Hardy agreed there is a phenomenon called "secondary transference." T.275. She agreed it was possible that, through such transference, a person's DNA could end up on a gun even if he never touched it. T.289. For example, if a person "le[ft] their DNA on ... a bag" after they "held it tight," then "handed [the bag] to somebody," and then that second person "touch[ed] this area of the gun," the second person "could possibly leave [on the gun] some skin cells"—and thus DNA—belonging to the first person. T.289.

Hardy testified that the DNA mixture on the gun consisted of five to seven skin cells total. T.273. She could not tell which of these cells came from which contributor. T.274. She agreed "there is no way to tell *when* these five or six skin cells were deposited or left" on the gun, and no way to tell if the different contributors' cells were left "at the same time." T.286 (emphasis added).

Hardy testified that when the OCME received the bottle purportedly used by Fabian Coke, the bottom was cut off, without explanation. T.277-80. The OCME received only this "pseudo-exemplar[]," T.282; it never received an oral swab, or a "known sample," from Coke, which would have "ma[d]e sure" that the DNA profile compared to the gun mixture was Coke's, T.281.

4. In summation, the prosecutor inaccurately claims that Mr. Coke's DNA was *proven* to be on the gun and argues, with no evidentiary support, that two people exited the Nissan when the shooting occurred.

After the prosecution rested, the court deferred motions for trial orders of dismissal until after summations. T.479, 593, 595.

In summation, Coke's lawyer argued that the jury didn't know "who did the shooting" or "who had a gun," and it had "no proof that Fabian Coke was in that car at th[e] time when this homicidal act took place." T.552-53. He emphasized that the evidence was, at best, circumstantial. T.551-52.

Regarding the DNA, counsel contended that it was "not accurate" when the prosecutor had claimed in her opening statement that "Coke had his DNA on the

gun"; rather, OCME analyst Hardy had testified that she could give only a "[p]robability" that "five or six skin cells' worth" of Coke's DNA was on the gun. T.571-72. Hardy was "not saying that person is part of the mixture"; she was "[v]ery clear" that "she can't say that" for certain. T.571.

Counsel noted that Hardy's statistical testimony was based on a "computer algorithm program," with "a whole mathematical formula," T.572, but he made no argument that the FST evidence was unreliable or invalid. To the contrary, he accepted Hardy's testimony that the FST evidence was "very strong support" that Coke's DNA was on the gun and that the DNA mixture was from "three persons" and not four. T.571.

Counsel argued that, even if Coke's DNA *was* on the gun, it was "[e]ntirely possible" it had gotten there by being "transferred from someone else," T.568—for example, that Coke left his DNA on the handle of a liquor-store bag, that his DNA was transferred to the hand of one of his codefendants when the codefendant grabbed the bag, and that when the codefendant then handled the gun, Coke's DNA was transferred to the gun, *see* T.566-68.

The prosecutor admitted this was "a circumstantial case" with no evidence of motive. T.589-90. She acknowledged that "almost two hours" passed between the white car leaving the Sunoco and the shooting. T.580-81. But she contended that, when the shooting occurred, Jenkins was driving the Nissan, since his

fingerprints were on the driver's door; Brown was "in the back seat," since his palm print was there; and Coke was in the front seat. T.588; *see* T.581-82. She did not explain why Brown, whose fingerprints were also found in the front seat, could not have been seated in front, or what basis, besides her assumption of Coke's guilt, supported her assertion that Coke, whose prints were found nowhere, was in the car.

Further arguing Coke's guilt without supportive evidence, the prosecutor argued that "the *people* on the passenger side of that vehicle got out of that car and shot and killed Dune Jacobs," T.582 (emphasis added), and "both Mr. Brown and Mr. Coke got out of the car," T.583. Although there was no evidence that multiple people got out of the car—indeed, the shadow in the surveillance video suggested that only *one* person exited—counsel did not object to these remarks. He objected only one transcript page later, but was overruled, when the prosecutor argued, with no support, that the autopsy proved that Jacobs "was turning her head while the bullet struck her" and that this somehow proved that two people were involved in the shooting. T.584. The prosecutor claimed this was because the shooter must have been "back off to [Jacobs's] right," but then, confusingly, she contended "the shooter would be standing to [Jacobs's] left." T.584-85. It is unclear what she was trying to argue; what *is* clear is that none of this evidence showed that two people exited the car.

In a similar vein, the prosecutor implied, falsely, that a 911 caller whose car was hit by a stray bullet had seen multiple people exit the Nissan. According to the prosecutor, the caller told the operator, "I don't think they were shooting at me. *They*." T.589 (emphasis added). This was inaccurate and misleading. On the 911 recording that was played during trial, T.115-16, the caller reported that he was in a car at the intersection of 213th Street and Holland Avenue—a block west of the corner where Jacobs was shot—and that "*someone* just shot at [his] car" (emphasis added). People's Exhibit 10, at A.25, at 0:03. Asked, "Do you know who shot your car?", the caller responded, "No no no no," id. at 0:23, and later, "No. *I don't think that it was, it was me.* I don't even think," *id.* at 1:56 (emphasis added). Still later, when *the operator* asked if "*they* were shooting at you," the caller responded, "They shot out the whole fucking window." *Id.* at 2:06, 2:53 (emphasis added). In short, it was clear the caller never saw any perpetrator, single or multiple. He said "they" only in response to the operator's use of that word, which itself was a colloquialism that did not on its face indicate more than one person. However, defense counsel did not object to the prosecutor's inaccurate and misleading characterization. Unfortunately, the jury never requested the 911 call and therefore likely accepted the prosecutor's misrepresentation.

Turning to the DNA evidence, the prosecutor argued that "[s]cience in very many ways is more reliable than people," and that "[w]e have science here"—

namely, the evidence that "Fabian Coke's DNA *is on the s[l]ide of the gun*." T.588-89 (emphasis added). This, too, was a misrepresentation. OCME analyst Hardy had testified only about the *probability* that Coke's DNA was on the gun, explicitly denying she could say so with certainty. *See* p. 16, *supra*. Defense counsel did not object to this inaccuracy.

The prosecutor did not address the defense arguments that Coke's DNA could have gotten on the gun through secondary transference even if he never touched the gun, or that Coke could have touched the gun at a time and place having nothing to do with the shooting.

5. Motion for trial order of dismissal

Moving for a trial order of dismissal, Coke's attorney argued that, in this case alleging intentional murder on an acting-in-concert theory, "There is absolutely no evidence that Mr. Coke had any intent." T.596. He further argued that the evidence was entirely "circumstantial" and legally insufficient because it "d[id]n't support only one inference[,] that being guilt," but rather supported "multiple inferences" consistent with innocence. T.596. He otherwise "rest[ed] on the record," which included the summation arguments he had just made. *Id.*

6. Jury deliberations and verdicts

Jenkins's jury found him guilty of second-degree murder and second-degree criminal possession of a weapon. T.653-55.

The afternoon after summations, the Brown/Coke jury asked for the "[c]hart and evidence for DNA for weapon possession," "[v]ideos of vehicle at the intersection," all evidence of DNA and fingerprints "found in and out of the vehicles [sic]," "[l]ocation of where weapon was found," and the "complete testimony" of OCME criminologist Hardy. T.658.

The next afternoon, the jury acquitted Brown on all counts and found Coke guilty of second-degree murder and second-degree criminal possession of a weapon. T.680-82. The court sentenced Coke to 25 years to life in prison. He is currently imprisoned at Auburn Correctional Facility.

D. Mr. Coke's CPL § 440.10 motion alleging ineffective assistance of counsel

In August 2021, Coke, represented by new counsel, challenged his conviction under CPL § 440.10(1)(h), alleging that trial counsel was ineffective.[4] In affirmations supporting the motion, post-conviction counsel attested that she spoke with Coke's trial attorney in 2019 and 2021. A.34 ¶¶ 11-12. Trial counsel told her "he did not hire or consult with a DNA expert" but, "shortly before the beginning of trial," he had "consulted with an attorney in Legal Aid's DNA Unit, to help prepare his cross-examination of Kendra Hardy, the OCME criminalist." *Id.* While post-conviction counsel discovered that this Legal Aid attorney had been

[4] The motion also raised a *Brady* claim, but that claim was dropped. A.37, 167.

involved in the *Collins* case, *see* A.173, trial counsel stated that "he was unaware, at the time of Mr. Coke's trial, that FST had previously been challenged successfully on *Frye* grounds" in *Collins*, A.34 ¶12.

Also accompanying the 440 motion was an affidavit from Professor Keith Inman, who has several decades' experience conducting DNA analysis in police departments and teaching and writing on that topic. A.42-47 ¶¶ 1-10. Professor Inman opined, *inter alia*, that the FST "was not generally accepted in the scientific community" when Coke was tried. A.51 ¶ 18.

Regarding the DNA mixture on the gun slide, Professor Inman opined, contrary to Hardy, that "a substantial likelihood exists that the evidence profile contains four, rather than three, contributors," and he cited research showing that four-person mixtures are frequently "erroneously inferred to be three-person mixtures." A.53 ¶ 23; *see also* A.52-53 ¶ 22.

Importantly, Professor Inman noted that the FST was validated for "two- or three-person mixtures" only. A.53 ¶ 24 (internal quotation marks omitted). Indeed, it was still the case in 2019, after Coke's trial, that "the FST[] [wa]s not able to assess probabilities in a four person mixture." *People v. Thompson*, 65 Misc. 3d 1206(A), at *9 (Sup. Ct. N.Y. Cty. 2019).

Coke argued that counsel was ineffective for failing to consult with a DNA expert such as Inman before trial or to conduct the basic investigation necessary to

learn about the *Collins* decision, issued "two years before Mr. Coke's trial." A.84. These failures had, in turn, caused counsel's failures to (1) move to preclude the FST evidence under *Frye*, A.84-87, and (2) adequately attack Hardy's FST testimony by educating the jury—either on cross-examination or by calling a defense expert—about the "substantial likelihood" that the DNA mixture on the gun was from four contributors rather than three, which would have rendered the FST evidence invalid, or about the extensive expert opinions outlined in *Collins* doubting the FST's reliability, A.87-90.

The court (Clancy, J.) ordered a hearing, but then Coke's trial lawyer passed away, and the parties agreed that the court would "consider [trial counsel's] hearsay statements about this case, without the need for a hearing, through [post-conviction] counsel's affirmation in support of the motion." A.167.

By order of October 13, 2022, the court denied the motion. A.169-78. The court's reasoning is addressed in Point II, below.

This Court (Webber, J.) granted leave to appeal on August 17, 2023, and the appeal of the denial of Coke's 440 motion was consolidated with his direct appeal. A.180.

ARGUMENT

POINT I

Where no evidence proved that Mr. Coke intended for Dune Jacobs to be shot, the conviction was based upon legally insufficient evidence, or alternatively the verdict was against the weight of the evidence, and the indictment should be dismissed.

Viewing the evidence in the light most favorable to the prosecution, it did not establish beyond a reasonable doubt that Coke was guilty of murder as either a principal or an accomplice. Indeed, the evidence did not even establish that Coke was present when the shooting occurred. At most, it proved his presence with Jenkins and Brown at the Sunoco station *one hour and thirty-eight minutes* before the shooting. This did not prove Coke was still with them, or anyone, in the car when the shooting occurred.

Even if one speculates that he was present, there was no evidence that he committed the shooting as a principal or intentionally aided it as an accomplice. The video and firearm evidence indicated only one person exited the car and shot Jacobs, but there was no proof that Coke was that person. Even assuming a few of Coke's skin cells were on the murder weapon (evidence whose reliability we challenge in Point II, below), that would not prove that Coke fired it. The prosecution's expert testified that DNA from at least three individuals was on the gun, and it would be pure speculation to conclude that Coke was the one who used it to shoot Jacobs. Indeed, the expert conceded that Coke could have touched the

gun some other time or that his DNA could have gotten there through secondary transference without him *ever* touching it.

As for accomplice liability, there was no evidence from which to infer that Coke intended to aid or abet the shooting. He had no motive: there was no evidence that he had any previous connection to Jacobs, let alone desired or planned her death. The traces of his DNA allegedly on the gun permit no inference that he gave the gun to the shooter at all, let alone that he did so intending it be used in a homicide. Guilt in this case depends upon multiple would-be inferences that are, in fact, rank speculation.

Because the circumstantial evidence in this case did not exclude the reasonable possibility that Coke is innocent, his conviction rests on legally insufficient evidence and must be reversed.

In the alternative, the verdict was against the weight of the evidence. The jury likely convicted despite the extraordinarily weak evidence because the DNA testimony, despite being equivocal, imbued the prosecution's case with "an aura of invincibility." *Wright*, 25 N.Y.3d at 783 (internal quotation marks omitted). On top of that, the prosecutor in summation overstated the significance of the DNA evidence and repeatedly argued, without any evidentiary basis, that both Brown and Coke exited the car. The prosecutor's false argument appears to be what caused the jury to convict.

A. Coke's insufficiency argument is preserved.

To preserve a challenge to the sufficiency of the evidence, the accused must move for a trial order of dismissal, making an argument that is "specifically directed at the error being urged" on appeal. *People v. Hawkins*, 11 N.Y.3d 484, 492 (2008) (internal quotation marks omitted). A "general motion to dismiss" is inadequate. *People v. Gray*, 86 N.Y.2d 10, 20 (1995).

Here, counsel timely moved for a trial order of dismissal after the prosecution's case. T.594-95. He argued that the evidence was insufficient because there was "absolutely no evidence that Mr. Coke had any intent," as required to find him guilty of the charged crimes. T.596. He further argued that the evidence was entirely "circumstantial" and was legally insufficient because it supported "multiple inferences" consistent with Coke's innocence. T.596. These are the same arguments Coke raises now.

Moreover, counsel's repeated arguments *before* trial about the insufficiency of the evidence also preserved the present claim. *See* p. 9, *supra*; *People v. Finch*, 23 NY.3d 408, 413-14 (2014) (pretrial motion to dismiss based on legal insufficiency preserved appellate insufficiency claim, since prosecution had chance to cure deficiencies in the evidence).

Coke's arguments about the insufficiency of the evidence also were made clear by counsel's summation, which, at the court's request, he gave before moving

for dismissal. In it, he argued, as Coke argues now, that there was no proof that Coke was in the car when the homicide happened or that he intended Jacobs's death, and that the alleged presence of Coke's DNA on the gun didn't prove his guilt. *See* pp. 19-20, *supra*.

In sum, both the prosecution and the court were fully alerted to the nature of the defense's insufficiency claim, and thus the claim is preserved. Should the Court disagree, it should reach the insufficiency issue in the interest of justice. Such a technical deficiency should not cause a conviction based on such patently insufficient evidence to stand.

B. The evidence did not prove beyond a reasonable doubt that Coke was in the car or that he intended for Jacobs to be shot.

1. Law governing insufficiency claims and accessorial liability

"[A] verdict is legally sufficient when, viewing the facts in a light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt." *People v. Bailey*, 13 N.Y. 3d 67, 70 (2009) (quoting *People v. Danielson*, 9 N.Y 3d 342, 349 (2007)); *see also Jackson v. Virginia*, 443 U.S. 307, 316 (1979) (same under the U.S. Constitution, Fourteenth Amendment).

In prosecutions alleging accessorial liability, the prosecution must prove that the defendant, "acting with the mental culpability required for the commission" of

the crime, "intentionally aid[ed]" the principal in the criminal conduct. *People v. Grohoske*, 148 A.D.3d 97, 105 (1st Dep't 2017) (quoting PL § 20.00); *see also People v. Bello*, 92 N.Y.2d 523, 526 (1998) (defendant must have exhibited "calculated or direct behavior that purposefully affected or furthered" the crime). Where the crime is intentional murder, as here, "the evidence must establish adequate proof of such a design by each person charged, and 'must be shown to exclude other fair inferences.'" *People v. McLean*, 107 A.D.2d 167, 169 (1st Dep't 1985) (quoting *People v. Monaco*, 14 N.Y.2d 43, 45 (1964)), *aff'd*, 65 N.Y.2d 758 (1985).

Liability cannot be established by evidence that the defendant merely was "presen[t] near the scene of the crime," *McLean*, 107 A.D.2d at 167 (1st Dep't); or fled from the crime scene, *People v. Bruno*, 144 A.D.3d 413, 413 (1st Dep't 2016); or provided the murder weapon to another person, *People v. Nelson*, 178 A.D.3d 1395, 1396 (4th Dep't 2019).

Where a case consists entirely of circumstantial evidence, the reviewing court "must decide whether a jury could rationally have excluded innocent explanations of the evidence." *People v. Reed*, 22 N.Y.3d 530, 535 (2014); *see id.* at 534 (jury may convict only if it "exclude[s] to a moral certainty every other reasonable hypothesis" (quoting *People v. Marin*, 65 N.Y.2d 741, 742 (1985))). "Close judicial scrutiny of verdicts based on circumstantial evidence is required to

ensure that the trier of fact has not relied upon 'equivocal evidence to draw unwarranted inferences or to make unsupported assumptions.'" *People v. Hoc*, 146 A.D.2d 545 (1st Dep't 1989) (quoting *People v. Way*, 59 N.Y.2d 361, 365 (1983)).

2. The evidence was insufficient to prove that Coke was present for the shooting, committed it, intended it, or aided or abetted it.

Viewed most favorably to the prosecution, the circumstantial evidence did not support, beyond a reasonable doubt, any of the inferences that would be necessary to convict Fabian Coke, as either principal or accessory. The only evidence involving Coke was (a) surveillance videos supposedly showing him at a liquor store with Jenkins 3 ½ hours before the shooting, and then at a Sunoco station with Jenkins and Brown 98 minutes before the shooting; (b) the presence in the Nissan, after the shooting, of purchases resembling those Coke supposedly made in the liquor store; and (c) the alleged presence of a few of Coke's skin cells on the apparent murder weapon. Such evidence was far too equivocal to prove that Coke even was present when the shooting occurred; that, if he was present, he committed the shooting; or, whether he was present or not, that he intended Jacobs be shot or aided or abetted the shooting.

First, there was no proof that Coke was present. Starting with the store surveillance videos, even assuming they showed Coke, this alone did not support the inference that he was still in the car 98 minutes later, when Jacobs was shot. Other evidence showed that numerous other people were in and out of the car, or

present with Jenkins, during the 35-plus hours encompassed by the surveillance videos; in the prosecution's own view of the case, the presence of such individuals at one moment didn't mean they were present at another.

Coke's purchases allegedly being in the car established only that he or someone else left them there, not that he was there when the shooting happened. There are many reasons why a person would leave liquor-store purchases with acquaintances. Arvey Valderrama's *cellphone* was left in the car after the shooting, but the prosecution didn't contend this proved *his* guilt, even though this fact was far more incriminating, since the most likely explanation for abandoning such a personal item was panicked flight. The inference to be drawn against Valderrama was stronger than the one against Coke, yet the prosecution accused only Coke.

The alleged presence of Coke's DNA on the gun also falls far short of proving, beyond a reasonable doubt, that he was present for the shooting. The prosecution's expert agreed that the DNA alleged to be Coke's came from just a few skin cells, that the DNA of at least two other people also was on the gun, and that Coke's cells could have gotten there through secondary transference, which would mean he never touched the gun. The analyst also agreed that, however Coke's DNA supposedly got there, there was "*no way to tell when" it got there*. T.286 (emphasis added). So even if Coke did touch the gun at some point, that

didn't prove beyond a reasonable doubt that he was present when the gun was used to shoot Jacobs.

Even if Coke was present, there was no proof that he committed the shooting. Assuming, *arguendo*, that Coke was in the car when the shooting occurred, there was no evidence that he did anything more than sit there while one of the car's other occupants got out and shot Jacobs. The crime-scene surveillance video shows the shadow of a single person alighting from and returning to the car, and all the recovered shells matched one gun, indicating a single shooter. There was simply no proof that Coke, as opposed to one of the other two allegedly in the car—especially Brown, whose fingerprints were found on both the front and rear passenger doors—was this shooter.

Even if traces of Coke's DNA were on the gun, that did not prove beyond a reasonable doubt that he ever touched the gun, as noted above, let alone that he was the one who used it to shoot Jacobs. Such proof is particularly lacking considering that the DNA of two other people also was found on the gun, and Brown never was excluded as one of these people.

Whether Coke was present or not, there was no proof that he intentionally aided or abetted the shooting. There was no evidence that Coke was involved in planning the crime, and no evidence of motive—indeed, no evidence of any connection at all between him and Jacobs. That a trace amount of his DNA was

allegedly on the gun does not prove that he intended it be used to shoot Jacobs, because that evidence didn't establish that he ever touched the gun or, if he did touch it, when or why he did so. There is simply no evidence that Coke even knew Jacobs would be shot, let alone intended it or helped it happen, whether he was present for the shooting or not.

People v. Nelson speaks powerfully to the insufficient evidence of intent. In *Nelson*, the Appellate Division reversed a gang assault conviction where the defendant supplied the knife his codefendant used to stab the victim. *See* 178 A.D.3d at 1395-96. Even though the defendant participated in the attack by kicking the victim, the evidence was insufficient to prove that, by giving the knife to the codefendant *before* they encountered the victim, he "shared the codefendant's intent to cause serious physical injury," which was an element of the crime. *Id.* at 1396. Here, the evidence is even weaker than in *Nelson*. There is zero direct evidence that Coke handed the gun to the shooter, let alone that he did so intending that the gun be used to shoot Jacobs (or anyone).

Numerous other decisions by this State's appellate courts make clear that even direct evidence of a defendant's presence at the crime scene, without evidence of intent, is insufficient to prove liability for a homicide. *See, e.g.*, *People v. Cummings*, 131 A.D.2d 865, 867 (2d Dep't 1987) (evidence "established nothing more than that the defendant was [one of four] passenger[s] in the vehicle"

from which shots were fired); *People v. Jones*, 89 A.D.2d 876, 877-78 (2d Dep't 1982) (evidence "established nothing more than that appellant was a passenger in an automobile from which [a purse thief] alighted" and "into which [the thief] returned a short time later"); *Bruno*, 144 A.D.3d at 413 (that "defendant accompanied the codefendant to an apartment where drugs were sold, and fled with him after the codefendant shot the victim in the head," did not prove "defendant shared the codefendant's intent to cause the victim's death"); *McLean*, 107 A.D.2d at 170 (defendant "anticipated violence," "was with the actual gunman before the shooting, accompanied him to the place of the shooting, and then fled with him," but no proof of his intent (discussing *People v. Ligouri*, 284 N.Y. 309 (1940))); *People v. Burke*, 126 A.D.2d 938, 938-39 (4th Dep't 1987) (insufficient proof of intent where defendant "admitted being present in the car outside the residence while it was burglarized").

Finally, assuming *arguendo* that Coke was in the Nissan when the driver left the scene, this would not be probative of Coke's alleged guilt. "[F]light" is "equivocal circumstantial evidence" and cannot, without more, support a murder conviction. *McLean*, 107 A.D.2d at 169-170. Moreover, if Coke was present, he was a mere passenger, and his intent could not, without more, be inferred from the driver's actions.

This is a classic case where conviction is impermissible because the circumstantial evidence did not "exclude to a moral certainty every other reasonable hypothesis." *Reed*, 22 N.Y.3d at 534 (internal quotation marks omitted). The inference that Coke was in the car 98 minutes after the Sunoco video is neither weaker nor stronger than the inference that he was elsewhere. If he was in the car, no evidence was sufficient to exclude the inference that he did nothing while someone else shot Jacobs. As for his DNA on the gun, it could have been transferred there by Brown, Jenkins, or Valderrama after Coke shook hands with them earlier. Or he could have given them the gun earlier, not knowing what they wanted it for. Or he could have briefly handled it when someone else showed it to him. Ultimately, whether he was present or not, and whether he touched the gun or not, there was simply no evidence that excluded the hypothesis that the shooting happened without Coke intending it or intentionally helping it happen.

While this Court affirmed Jenkins's conviction, *see People v. Jenkins*, 198 A.D.3d 488 (1st Dep't 2021), that decision has no precedential value here because the evidence against Jenkins was different and stronger. Unlike Coke, Jenkins admitted being in the Nissan and at the crime scene, *Jenkins* Resp. Br. 6, 21; lied to police about his activities that night, indicating consciousness of guilt, *id.* at 13-14; and falsely told police that he sped away upon unexpectedly hearing gunshots, when the video showed he drove away slowly, suggesting he had foreknowledge

that the shots would occur, *id.* at 12-13, 20. None of this evidence against *Jenkins* proved that *Coke* was in the car or intended that the shooting occur.[5]

Since the weapon charge also was premised on Coke acting in concert to use the gun unlawfully against another, *see* A.2, of which there was no evidence, that count of conviction must be reversed and dismissed as well.

C. Should this Court deem the evidence against Coke legally sufficient, it should find the verdict against the weight of the evidence.

"Even if all the elements and necessary findings are supported by some credible evidence," this Court "may set aside the verdict" if "it appears that the trier of fact has failed to give the evidence the weight it should be accorded." *People v. Bleakley*, 69 N.Y.2d 490, 495 (1987); *see Danielson*, 9 N.Y.3d at 349 ("a legally sufficient verdict can be against the weight of the evidence."). Sitting as a "thirteenth juror," *Danielson*, 9 N.Y.3d at 348, the Court must first determine "whether an acquittal would not have been unreasonable"; if this threshold is met, the Court must "review any rational inferences" from the evidence, "evaluate the strength of such conclusions," and "then decide[] whether the jury was justified in finding the defendant guilty," *People v. Kancharla*, 23 N.Y.3d 294, 303 (2014).

[5] Both Jenkins and Respondent erroneously stated that Coke shot Jacobs, contrary to Jenkins's statements that only *Brown* exited the car. *See* Jenkins Br. 2, 3, 5, 16, 22-24, 30; Resp. Br. 12-13, 20. The prosecutor later corrected his misstatement, writing that he "erroneously had identified Coke, instead of Brown, as the shooter in [his] brief." Letter from T. Charles Won to Susanna M. Rojas, Sept. 8, 2021, A.D. No. 2018-2779.

Concerned about "wrongful convictions and the prevalence with which they have been discovered," courts have called weight-of-the-evidence review an "an important judicial bulwark against an improper criminal conviction." *People v. Delamota*, 18 N.Y.3d 107, 116 (2012); *accord People v. Russell*, 99 A.D.3d 211, 215 (1st Dep't 2012).

This Court also has the power to reverse and dismiss in the interest of justice. *See* CPL § 470.15(3)(c); *People v. Kidd*, 76 A.D.2d 665, 668 (1st Dep't 1980) (reversing robbery conviction where Court "c[ould]not say the verdict [wa]s against the weight of the evidence in the accepted legal sense," but was "left with a very disturbing feeling that guilt ha[d] not been satisfactorily established").

The insufficiency analysis above clearly shows that an acquittal would not have been unreasonable here. It is likely that the jury nevertheless convicted, however, because it was unduly influenced by the DNA evidence and unfairly prejudiced by the prosecutor's misstatements about this, and other, evidence. The Court of Appeals has recognized that "jurors may overvalue" DNA evidence, because when it "is introduced against an accused at trial, the prosecutor's case can take on an aura of invincibility," even "in the absence of any additional accompanying direct evidence." *Wright*, 25 N.Y.3d at 783-84 (internal quotation marks omitted). The prosecution's reliance on FST evidence, in particular, creates a strong risk of "juror confusion regarding the limited probative value of" such

statistical evidence—that is, jurors are likely to take such evidence as *absolute proof*, rather than a likelihood, that the defendant's DNA was present. *People v. Powell*, 165 A.D.3d 843-44 (2d Dep't 2018) (quoting *Wright*, 25 N.Y.3d at 782).

That appears to be what happened here. The jury heard virtually the same evidence against Coke and Brown except no DNA evidence was offered against Brown; clearly, the DNA testimony caused the jury to convict Coke. Reinforcing this conclusion is that, during deliberations, the jury requested all the DNA evidence, including the "complete testimony" of OCME analyst Hardy. *See* p. 24, *supra*. Although this equivocal evidence should not have led to Coke's conviction, because there were numerous ways Coke's DNA could innocently have gotten on the gun, the jury likely gave it too much weight, owing to DNA's "mystical aura of definitiveness." *Wright*, 25 N.Y.3d at 783 (internal quotation marks omitted).

Such influence was compounded by the prosecutor's inaccurate remark that "science" proved that "Fabian Coke's DNA *is on* the s[l]ide of the gun." T.588-89 (emphasis added). The OCME analyst explicitly agreed she was "unable to state [this] with scientific certainty" but rather could give only a statistical likelihood. T.284. As discussed in Points II.A.2 and II.B.3, below, the Second Department vacated a conviction based on almost identical summation remarks in *People v. Powell*, recognizing that such prosecutorial "overstatement and misrepresentation" of statistical DNA testimony causes substantial prejudice. 165 A.D.3d at 843.

The prosecutor also improperly influenced to jury to convict by inaccurately arguing that the evidence showed multiple perpetrators exiting the Nissan, which would have made it more likely that, if Coke was in the car, he got out and participated in the shooting. There was no factual basis for this argument by the prosecutor, as discussed on pages 21-22, *supra*.

POINT II

Counsel was ineffective for unreasonably failing to conduct the investigation that would have shown the DNA evidence to be unreliable, to seek to exclude that evidence under *Frye*, to educate the jury about the evidence's unreliability through cross-examination or by calling a defense expert, and to object to the prosecutor's misstatements of the evidence in summation.

Any lawyer trying this murder case would have recognized before trial that the evidence against Coke was extremely weak but the FST testimony nevertheless posed a significant risk of unduly influencing a jury to convict. Defense counsel had every reason to try to keep out—or at least seek to undermine—the FST evidence. Yet he unreasonably failed to do so at several junctures, thus prejudicing Coke and depriving him of a fair trial. Further contributing to counsel's ineffectiveness were his failures to object to the prosecutor's summation remarks overstating the significance of the DNA evidence and claiming, without support, that two people exited the Nissan to commit the shooting.

A. Legal principles

1. The right to the effective assistance of counsel under state and federal law

"The right to effective assistance of counsel is guaranteed by the Federal and State Constitutions." *People v. Rivera*, 71 N.Y.2d 705, 708 (1988) (citing U.S. Const., amends. VI, XIV; N.Y. Const., art. I, § 6); *see Strickland v. Washington*, 466 U.S. 668, 669 (1984); *People v. Caban*, 5 N.Y.3d 143, 155-56 (2005).

A federal ineffectiveness claim requires two showings. First, the accused must establish that counsel's performance "fell below an objective standard of reasonableness ... under prevailing professional norms." *People v. Clark*, 28 N.Y.3d 556, 563 (2016) (quoting *Strickland*, 466 U.S. at 688). "[O]missions that cannot be explained convincingly as resulting from a sound trial strategy" satisfy the first *Strickland* prong. *United States v. Melhuish*, 6 F.4th 380, 393 (2d Cir. 2021) (quoting *Wilson v. Mazzuca*, 570 F.3d 490, 502 (2d Cir. 2009)).

Second, the accused must show prejudice—that is, a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. This standard "'does not require certainty that the result would have been different.'" *Melhuish*, 6 F.4th at 393 (quoting *DeLuca v. Lord*, 77 F.3d 578, 590 (2d Cir. 1996)). Rather, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome," *Gersten v. Senkowski*, 426 F.3d 588, 611 (2d Cir. 2005) (quoting *Strickland*, 466

U.S. at 694), or a probability that "at least one juror[]" would have taken a different view of the case, *Cone v. Bell*, 556 U.S. 449, 452 (2009) (applying the "reasonable probability" standard in the *Brady* context).

The New York ineffectiveness standard "is more protective than the federal standard." *People v. Debellis*, 40 N.Y.3d 431, 436 (2023). Under New York law, the court must determine whether counsel provided "meaningful representation," *id.* (quoting *People v. Benevento*, 91 N.Y.2d 708, 712 (1998)); thus, "even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still warrant reversal whenever a defendant is deprived of a fair trial," *id.* (quoting *Caban*, 5 N.Y.3d at 156). To meet this standard, the defendant must show "the absence of strategic or other legitimate explanations for counsel's failure[s]." *Rivera*, 71 N.Y.2d at 709. Counsel's "effective performance on ancillary" issues will not excuse his "ineffective performance on a core issue at trial." *Debellis*, 40 N.Y.3d at 439.

"A single error can constitute ineffective assistance" when "'sufficiently egregious and prejudicial.'" *People v. Maffei*, 35 N.Y.3d 264, 269 (2020) (quoting *Caban*, 5 N.Y.3d at 152). But even where a single error does not rise to this level, "the cumulative effect of [defense] counsel's actions" can. *Wright*, 25 N.Y.3d at 779 (quoting *People v. Oathout*, 21 N.Y.3d 127, 132 (2013)).

2. Counsel provides deficient representation by failing to adequately investigate matters of law and fact, to make colorable applications to preclude prejudicial evidence, and to object to improper summation remarks.

"[C]ounsel has a duty to make reasonable investigations," *Hinton v. Alabama*, 571 U.S. 263, 274 (2014), "both factual and legal, to determine if matters of defense can be developed," *People v. Oliveras*, 21 N.Y.3d 339, 346 (2013) (quoting *People v. Bennett*, 29 N.Y.2d 462, 466 (1972); citing *Strickland*, 466 U.S. at 690-91). "[S]trategic choices made after less than complete investigation" are reasonable only "to the extent that reasonable professional judgments support the limitations on investigation." *Hinton*, 571 U.S. at 274.

Defense lawyers are frequently found ineffective "for failing to consult an expert," or at least to investigate the scientific literature, when they are "not sufficiently 'versed in a technical subject matter ... to conduct effective cross-examination.'" *Pavel v. Hollins*, 261 F.3d 210, 224 (2d Cir. 2001) (quoting *Knott v. Mabry*, 671 F.2d 1208, 1212-13 (8th Cir. 1982)). Indeed, this Court has ordered a hearing on a 440 claim alleging, like Coke, that counsel unreasonably failed to hire a DNA expert, with whose guidance "he could have more effectively cross-examined the People's DNA expert." *People v. Mercado*, 147 A.D.3d 613, 616 (1st Dep't 2017).

Similarly, where a prosecution expert cited several scientific studies when testifying that sexual abuse had occurred, the Second Circuit found counsel

ineffective for "fail[ing] to consult an expert" or to "conduct any relevant research," which would have revealed *other* studies, undermining the expert's conclusions, that counsel could have used on cross-examination. *Lindstadt v. Keane*, 239 F.3d 191, 201-02 (2d Cir. 2001); *see also, e.g.*, *Eze v. Senkowski*, 321 F.3d 110, 127 (2d Cir. 2003) (ordering hearing where counsel "failed to enlighten the jury about the extent to which the medical community had called into question the method used by" the prosecution's sexual-abuse expert); *People v. Caldavado*, 26 N.Y.3d 1034, 1035-36 (2015) (ordering hearing where counsel failed "to pursue certain lines of defense on cross-examination" of prosecution's experts, or through testimony of defense expert, in shaken baby syndrome case); *United States v. Nolan*, 956 F.3d 71, 81 (2d Cir. 2020) (counsel ineffective for "neglecting to call or even consult an expert to testify about the unreliability of the eyewitness identifications").

Counsel also is ineffective for omitting "colorable" arguments for excluding prejudicial evidence when such omission "was not the result of a reasoned, professional judgment ... about the [arguments'] viability." *People v. Gil*, 285 A.D.2d 7, 12-13 (1st Dep't 2001) (internal quotation marks omitted) (citing *Rivera*, 71 N.Y.2d at 709). Even on an "unexpanded record" on direct appeal, this Court has found a lack of such reasoned judgment where counsel chose "not to contest the admissibility of critical evidence against his client" despite having "everything

to gain and nothing to lose" by making the argument. *People v. Kindell*, 135 A.D.3d 423, 424-25 (1st Dep't 2016) (quoting *People v. Sinatra*, 89 A.D.2d 913, 915 (2d Dep't 1982)); *accord Gil*, 285 A.D.2d at 13.

Indeed, counsel has been held ineffective for failing to challenge statistical DNA testimony almost identical to the FST evidence at issue here. In *People v. Wilson*, a rape victim identified her attacker, and the prosecution expert testified to a high statistical probability, as determined by the "TrueAllele" software, that DNA on the perpetrator's recovered gloves was the defendant's. 164 A.D.3d 1012, 1016-18 (3d Dep't 2018). The court found counsel ineffective for not making a *Frye* challenge, since no court had yet decided whether TrueAllele evidence was admissible, and thus the court could "not find that it would have been futile for defense counsel to have requested a *Frye* hearing." *Id.* at 120.

Also instructive is *State v. Kenneth II*, 190 A.D.3d 33 (3d Dep't 2020), in which counsel was ineffective for not challenging, under *Frye*, a mental-health diagnosis that qualified his client as a "dangerous sex offender." Although, at the time of trial, the Court of Appeals had deemed such diagnosis "viable," it still "c[ould]not be said" that a *Frye* motion "would have had little or no chance of success," because the Court of Appeals decision had been over dissent, and a later Court of Appeals decision acknowledged the diagnosis was "controversial." *Id.* at 47. Moreover, "scientific articles reveal[ed] that," before trial, "at least some part

of the scientific community questioned the reliability of the subject diagnoses." *Id.* All these documented doubts "clearly set the stage for respondents to challenge the viability of [the diagnosis] via *Frye*," even though the Court of Appeals had upheld its viability. *Id.*

Finally, counsel is ineffective for failing to object to summation "statements that misrepresent evidence central to the determination of guilt," including remarks overstating "the strength of the DNA evidence." *Wright*, 25 N.Y.3d at 780, 783; *see also Aparicio v. Artuz*, 269 F.3d 78, 91 (2d Cir. 2001). In *People v. Powell*, the Appellate Division held counsel ineffective for not objecting to the prosecutor's "overstatement and misrepresentation" of statistical DNA testimony exactly like the testimony here. 165 A.D.3d at 843. The prosecution expert testified that it was "1.11 billion times more probable" than not that the defendant's DNA was in the mixture on a gun, but the prosecutor argued, categorically, that "defendant's DNA *was on* the safety of that gun" and "the science finds him guilty." *Id.* (emphasis added). These remarks were so improper and prejudicial that, despite the lack of objection, the court further held, in the interest of justice, that the remarks deprived the defendant of a fair trial and warranted reversal. *Id.* at 844.[6]

[6] The *Powell* court distinguished *People v. Ramsaran*, 29 N.Y.3d 1070 (2017), in which the Court of Appeals had held that counsel's failure to object to less categorical remarks about statistical DNA evidence did not amount to ineffectiveness. *See Powell*, 165 A.D.3d at 844; *People v. Ramsaran*, 141 A.D.3d 865, 871 (3d Dep't 2016) (summarizing the remarks).

3. Justice Dwyer's 2015 *Collins* decision—later cited favorably by the Court of Appeals—holding that DNA evidence generated by the OCME's Forensic Statistical Tool does not satisfy *Frye* provided Coke's attorney a strong basis for moving to exclude the FST evidence.

As discussed above, two years before Coke's trial, a leading trial judge and expert in this field held that FST evidence was not admissible because it did not meet *Frye*'s requirement of being "generally accepted in the relevant scientific community." *Collins*, 49 Misc. 3d at 597. The author of *Collins* was Justice Mark Dwyer, a member of the American Bar Association's "Task Force on DNA Evidence" and former co-chair of the New York State Justice Task Force, which was created "to address wrongful convictions in our state and make recommendations for changes to the criminal justice system to safeguard against such convictions." *People v. Boone*, 30 N.Y.3d 521, 534 & n.4 (2017).[7]

In *Collins*, after a lengthy *Frye* hearing, Justice Dwyer detailed several eminently qualified experts' doubts about the reliability of FST evidence. He found that the FST software was created, used, and validated exclusively by the OCME and never vetted by "independent experts," making it "a 'black box'" and thus impossible to be "generally accepted." *Collins*, 49 Misc. 3d at 615, 620.

[7] *See* Press Release, N.Y. Unified Court System, "Hon. Deborah A. Kaplan Named NYS Justice Task Force Co-Chair," Jan. 13, 2021, https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR21_02.pdf; *ABA Standards for Criminal Justice, DNA Evidence* (3d Ed.), 2007, at vii, *available at* https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/dna_evidence.pdf.

The OCME's own former Director of Training, Dr. Eli Shapiro, testified at the *Frye* hearing that OCME analysts likely tended to "underestimate the number of contributors to a mixture," and he "contested other aspects of the FST programming" as well. *Id.* at 608, 616-17.

Dr. Noah Rosenberg, "a population geneticist and statistician" at Stanford, disputed the OCME's method of having analysts "simply make an estimate of the number of contributors to a mixture," because such estimates cannot be definitive, and "a mistaken estimate comes with serious consequences," such as "false positives," *id.* at 617, 620—or, as in Coke's case, the improper reliance on FST analysis at all, since FST cannot be used on four-person mixtures, *see Thompson*, 65 Misc. 3d at *9.

Dr. Ranajit Chakraborty, of the University of North Texas, was a member of the New York State committee that approved the OCME's use of the FST but testified that he "ha[d] since changed his mind" based on several doubts about the software's reliability. *Collins*, 49 Misc. 3d at 609.

Several experts testified that the FST relied on flawed studies and unfounded assumptions about "drop-in" and "drop-out" rates, a key component of the FST's calculation of probabilities, or "likelihood ratios," such as the one OCME analyst Hardy testified about in Coke's case. *Id.* at 600 & n.4, 606-07, 614-15.

Multiple experts testified that the OCME's internal validation studies to check for "false positives" were flawed. *Id.* at 619.

Justice Dwyer also explained in *Collins* why previous trial-court decisions admitting FST evidence were incorrect: they had, *inter alia*, improperly disregarded the "black box" nature of the FST and "deprecated the 'counting' of scientists' 'votes'" approach that *Frye* requires when determining whether a scientific method is "generally accepted." *Id.* at 627-28.

In 2020, the Court of Appeals in *Williams* endorsed Justice Dwyer's analysis. The *Williams* trial court had "simply decline[d] to follow *Collins*" and, denying a *Frye* hearing, sided instead with the decisions admitting FST evidence. *Williams*, 35 N.Y.3d at 36 (internal quotation marks omitted). The Court of Appeals held that this was an abuse of discretion. *Id.* at 30. The Court echoed Justice Dwyer's criticism "that FST is a proprietary program exclusively developed and controlled by OCME"; this "'black box' nature of th[e] program" was "an invitation to bias" and "inconsistent with quality assurance standards within the relevant scientific community." *Id.* at 41. In other words, the FST could not be "generally accepted" as long as it was a "black box."

Moreover, the Court cited evidence—which Justice Dwyer also had considered—that "the accuracy calculations of th[e] program may be flawed." *Id.*; *see id.* at 36 (same evidence was before Justice Dwyer).

Finally, the Court echoed Justice Dwyer's analysis that the trial-court decisions admitting FST testimony "did not adequately account for either the proprietary nature of the FST or the relatively narrow subsection of the relevant scientific community able to examine and endorse that tool." *Id.* at 42.[8]

B. Counsel unreasonably failed to perform the investigation that should have led him to challenge the admissibility of the FST evidence under *Frye*, to conduct an effective cross-examination of the prosecution's DNA expert or call his own expert, and to object to the prosecutor's misrepresentations in summation.

1. Counsel unreasonably failed to challenge the FST evidence under *Frye*.

Counsel had everything to gain and nothing to lose by moving to exclude the prejudicial FST evidence under *Frye*, but he unreasonably failed to conduct the investigation that would have revealed strong grounds for a *Frye* motion—particularly, research revealing the *Collins* decision. Counsel admitted he was unaware of *Collins*. Omitting such a *Frye* motion was not a considered decision based upon the alternatives, but rather one unreasonably made in ignorance of the options available to him.

[8] It appears that, since *Williams*, only one New York court has opined on the admissibility of FST evidence, finding it admissible, *see People v. Burrus*, 81 Misc. 3d 550 (Sup. Ct. Kings Cty. 2023), while a New Jersey appellate court has ruled it *in*admissible under *Frye*, *see New Jersey v. Rochat*, 470 N.J. Super. 392, 434-42 (App. Div.), *cert. denied*, 252 N.J. 79 (2022). *Burrus* does not meaningfully address the Court's concern in *Williams* that the FST's "'black box' nature" prevents the "objective, unbiased review" that "*Frye* demands." *Williams*, 35 N.Y.3d at 41-42. This single decision that contradicts *Williams*, *Collins*, and *Rochat* does not mean that Coke had "no chance" of excluding the evidence in 2017 or would have no chance today.

The 440 court erred in concluding—contrary to the principles of *Kenneth II* and the other decisions discussed at pp. 45-46, *supra*—that a *Frye* motion had "no chance of success" simply because *Collins* was then the only decision excluding FST evidence. A.176. Justice Dwyer's comprehensive opinion—based on the testimony of numerous experts at a thorough hearing and endorsed by the Court of Appeals in *Williams*—established that such a motion was not only viable but meritorious. The *Collins* decision "clearly set the stage for [counsel] to challenge the viability of [the evidence] via *Frye*"; therefore, "it cannot be said that [a *Frye* motion] would have had little or no chance of success," and counsel was deficient for not bringing the motion. *Kenneth II*, 190 A.D.3d at 47. There was no strategic reason for foregoing such a motion. The 440 court's decision is wrong.

2. Counsel unreasonably failed to challenge the prosecution's DNA expert through cross-examination or by calling a defense expert.

Having neglected to move to exclude the FST testimony, counsel unreasonably failed to educate the jury about the many reasons, given by numerous experts, to doubt the FST's reliability.

First, counsel inexcusably neglected to elicit, through cross-examination of OCME analyst Hardy or through a defense expert, that the FST evidence was likely invalid. This was because the FST software could not be used on four-person DNA mixtures; it was substantially likely, as Professor Inman has attested, that the mixture on the gun was from at least four people; and the OCME's own former

training director believed OCME analysts, like Hardy, routinely underestimated the number of contributors to mixtures. Instead, the jury heard only Hardy's weak agreement that a four-person mixture was "possible," followed by her unrebutted insistence that it *was* a three-person mixture, which she improperly bolstered with the hearsay—not objected to—that "another qualified individual" agreed with her. T.283-84. Counsel then *accepted* in summation that the DNA was a "mixture of three persons." T.571. And the jury never even learned *why* it would matter if the mixture was from four persons rather than three.

The 440 court incorrectly held that counsel's cross-examination about the number of contributors was adequate, writing only that "counsel cross-examined the OCME Criminalist about her conclusion that the DNA mixture found on the gun was a three-person mixture." A.177. But merely questioning Hardy "about" the number of contributors was insufficient. The court never addressed counsel's failure to elicit that the mixture *likely* contained four contributors' DNA and that, under such circumstances, the FST program could not be used at all.

Second, counsel unreasonably failed to elicit the many doubts about the FST's reliability detailed in *Collins*, including those of the former OCME training director and one of the scientists who initially approved the FST's use. Instead, counsel damagingly conceded that the FST evidence was "very strong support" for Coke's DNA being on the gun. T.571. These failures were just as inexcusable and

prejudicial as counsels' omissions in *Lindstadt*, *Eze*, *Caldavado*, and *Nolan*, where new trials or hearings were ordered. *See* pp. 44-45, *supra*.

The 440 court simply did not address these grave failures by counsel. Contending that counsel "did, in fact, cross-examine the People's expert witness on the issues now raised by defendant," the court wrote that "[t]rial counsel's failure to challenge FST as not generally accepted in the scientific community has already been addressed in this decision." A.177. However, the issue of general acceptance went only to the pretrial legal question of whether the FST evidence should have been excluded; the court never addressed counsel's failure to elicit testimony *before the jury* about numerous experts' doubts about the FST.

Counsel's post-conviction statements prove that these omissions resulted not from any informed strategy, but rather from his unreasonable failure to adequately consult with a DNA expert or conduct his own investigation. The 440 court wrote that counsel "was prepared to cross-examine the People's expert" because he had consulted with "one of the lead attorneys in the *Collins* case," which "beg[ged] the question as to how [counsel] could not have known about" *Collins*. A.173, 178. But counsel's failure to rely on *Collins* to make a *Frye* motion or to cross-examine Hardy at trial, when that decision provided such a clear roadmap for challenging the FST's reliability, makes no sense if he knew about *Collins*. Evidently, counsel's conversation with the Legal Aid lawyer "shortly before the beginning of

trial," A.34 ¶ 12, was so perfunctory that the relevant information was not conveyed. An investigation that fails to reveal the key, obvious information that counsel should have learned about is not an adequate investigation.

Alternatively, if, as the 440 court implied, counsel's post-conviction statements were inaccurate, and he *did* know about *Collins* but simply failed to make use of it, then he was still ineffective, because there was no conceivable strategic explanation for failing to use *Collins*, in the ways discussed above, to challenge the most damaging evidence introduced against Coke.

3. Counsel unreasonably failed to object to the prosecutor's multiple inaccurate and misleading summation arguments.

In addition to reviewing the above errors, which were raised in Coke's 440 motion, this Court should consider on direct appeal counsel's unreasonable failures to object to the prosecutor's multiple prejudicial misstatements of the evidence in summation, which are referenced in Point I.C, above.

First, the prosecutor argued that "we know" Coke was involved in the crime because his "DNA *is on the s[l]ide of the gun*," and "[s]cience is ... more reliable than people." *See* pp. 22-23, *supra*. Just as in *Powell*, this absolute statement that the accused's DNA was on the gun "overstate[d] and misrepresent[ed]" the evidence. 165 A.D.3d at 843. In each case, the prosecution expert testified only to a *probability*, albeit a high one, that the DNA was present. Just as in *Powell*, this remark alone—and counsel's failure to object to it—deprived Coke of a fair trial

due to "the powerful influence of DNA evidence on juries" and "the opportunity for juror confusion" caused by the prosecutor's "misrepresent[ation]." *Id.* at 844.

Second, counsel failed to object when the prosecutor repeatedly claimed, inaccurately, that the evidence proved that both Brown and Coke got out of the car when the shooting occurred. These arguments were highly misleading: the prosecutor misquoted the 911 caller, who was clear that he never saw any shooter or shooters, and her argument that the autopsy somehow proved that two people exited the car was baseless. *See* pp. 21-22, *supra*.[9]

Although counsel is deceased and cannot be asked why he didn't object to these remarks, there could be no legitimate strategic grounds for failing to object to such damaging, but clearly inaccurate and misleading, arguments. *See, e.g.*, *Wright*, 25 N.Y.3d at 783 ("[d]efense counsel could not have reasonably chosen a strategy of allowing the prosecution to misrepresent the strength of the DNA evidence"); *People v. Fisher*, 18 N.Y.3d 964, 967 (2012) ("no strategic basis for counsel's failure to object to ... highly prejudicial" remarks "attenuated from the evidence").

[9] Counsel's failure to object was all the more unreasonable because the prosecutor had, earlier the same day during her summation before Jenkins's jury, foreshadowed that she would make this unsupported argument before the Coke/Brown jury. She had claimed that Jenkins told police, "they get out of the car," T.516, when in fact Jenkins had said only that *Brown* got out, *see* T.318. Jenkins's lawyer, unlike Coke's, had corrected the prosecutor's misstatement, saying "it's not 'They,' it's he." T.516.

C. Trial counsel's errors, considered cumulatively, allowed prejudicial evidence and argument to go unchallenged in this very weak case and thus deprived Mr. Coke of meaningful representation under state law and prejudiced him under *Strickland*.

It is reasonably probable that the court would have granted Coke's motion to exclude the FST evidence had counsel made such a challenge. There was ample basis to agree with Justice Dwyer's comprehensive, compelling analysis in *Collins*—just as the Court of Appeals later did in *Williams*—rather than the previous decisions admitting FST evidence, whose errors *Collins* detailed. Had that happened, the jury would have heard only that Coke "could not be excluded" from the DNA mixture on the gun, making the DNA at best a neutral piece of evidence, instead of hearing that his DNA likely was on the gun. The impact obviously would have been much different. Coke likely would have been acquitted just like Brown.

Even if the *Frye* motion had been denied, however, it is still reasonably probable that Coke would have been acquitted had counsel used the ample material available to him to undermine Hardy's FST testimony through cross-examination or by calling his own expert. The jury would have learned that the mixture *likely* was from *four* people, not three, and that the FST evidence was therefore likely invalid. The jury would have heard the extensive expert criticisms of the FST, including by the OCME's former training director and one of the scientists who had approved the FST before changing his mind based on doubts about its

reliability. And the jury would at least have heard a correction to the prosecutor's misleading remark that "science" proved that Coke's DNA "[wa]s on" the gun, as well as her unsupported claims that two people exited the Nissan.

Certainly, under New York's more protective standard, in which prejudice is not dispositive, Coke did not receive meaningful representation where his lawyer omitted a colorable *Frye* motion to exclude the FST testimony; mounted *no* challenge to that damaging testimony at trial; and sat silently while the prosecutor falsely inflated the significance of that testimony, while also misrepresenting other testimony. Considered cumulatively, as they must be, counsel's errors deprived Coke of a fair trial. He is entitled to a new trial.

D. In the alternative, the Court should order a new trial based on the prosecutor's summation misconduct.

If this Court does not order a new trial based on counsel's ineffectiveness, it should do so in the interest of justice based on the prosecutor's false argument that "science" proved Coke's DNA "[wa]s on the s[l]ide of the gun"—just as the court did based on the same misconduct in *Powell*, *see* p. 47, *supra*—as well as her other improper summation remarks, discussed above.

E. At the very least, in the interest of justice, the Court should remit this matter for a *Frye* hearing because of the substantial likelihood that Mr. Coke was convicted based on an unreliable scientific theory.

Under *Williams*, the trial court should have held a *Frye* hearing on the admissibility of the FST testimony. *See Williams*, 35 N.Y.3d at 41; *People v.*

Wortham, 37 N.Y.3d 407, 419 (2021). The 440 court noted that Coke would have been entitled to relief had his trial lawyer sought the hearing, and it anticipated that "the Appellate Division may be receptive to [Coke's] argument in the exercise of its interest of justice jurisdiction." A.176. This Court should take up that invitation. At the very least, the controversial evidence upon which this troubling conviction stands should be subjected to the scrutiny that *Williams* requires, including an inquiry into the black-box nature of the FST and the substantial likelihood that the FST should not have been used at all because the mixture was from four people.

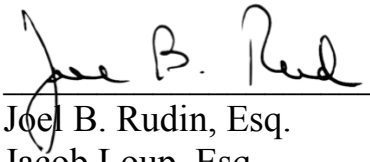
CONCLUSION

The evidence in this case failed to prove that Fabian Coke was present for the shooting, committed it, intended it, or aided or abetted it. No man should be condemned to spend decades—maybe his whole life—in prison where the evidence leaves open such a strong possibility of innocence. This Court should reverse the judgment and dismiss the indictment.

In the alternative, Coke is constitutionally entitled to a new trial with counsel who effectively challenges the problematic FST evidence and objects to prosecutorial misconduct, which very likely led to Coke's conviction despite the exceptionally weak evidence of guilt.

Dated: February 23, 2024
New York, New York

Respectfully submitted,



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ADDENDA

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, - against - FABIAN COKE, Defendant-Appellant.	Appellate Case Nos. 2018-2162, 2023-04374 Indictment No. 70/15 (Bronx County)

CPLR § 5531 STATEMENT

6. The Index Number in the trial court was Bronx County Indictment No. 70/15.

7. The full names of the original parties are set forth above. There have been no changes.

8. The action was commenced in Supreme Court, Bronx County.

9. The action was commenced on January 23, 2015, by the filing of an indictment of a Bronx County Grand Jury.

10. This is a consolidated appeal from (a) a judgment of Supreme Court, Bronx County, convicting Fabian Coke, after a jury verdict, of murder in the second degree, in violation of Penal Law § 125.25(1), and criminal possession of a weapon in the second degree, in violation of Penal Law § 265.03(1)(b), and sentencing him to 25 years to life in prison, and (b) a decision and order denying Mr. Coke's motion to vacate the judgment of conviction under CPL § 440.10.

11. This appeal is from (a) a judgment of conviction entered on September 6, 2017, by Supreme Court, Bronx County (Neary, J.), and (b) a decision and order entered on October 14, 2022, by the same court (Clancy, J.).

12. This appeal is being perfected on the appendix method.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, - against - FABIAN COKE, Defendant-Appellant.	Appellate Case Nos. 2018-2162, 2023-04374 Indictment No. 70/15 (Bronx County)

PRINTING SPECIFICATIONS STATEMENT
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The foregoing brief was prepared on a computer, using Microsoft Word. According to that software, the brief contains 13,982 words, counting headings and footnotes, but not counting the cover, table of contents, table of authorities, caption, signature block, or this certification. The brief uses double-spaced, 14-point Times New Roman font, except that quotations of more than two lines are indented and single-spaced, headings are single-spaced, and footnotes are single-spaced and use 12-point Times New Roman font.