People v McKay
2010 NY Slip Op 31154(U)
January 27, 2010
Sup Ct, Kings County
Docket Number: 10728/2006
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 18
--X
THE PEOPLE OF THE STATE OF NEW YORK,

Decision and Order
Ind. # 10728/2006
Date: February 1, 2010

-against-

PAUL MCKAY,
Defendant.
--X

Debra Silber, J:

Upon the following papers (numbered 1 to 2) read on this motion for an order seeking to vacate judgment; Notice of Motion and supporting papers 1; Affidavit in Opposition and Memorandum of Law 2. For the reasons herein, the application is denied.

By motion dated October 21, 2009, defendant, pursuant to CPL § 440.10, seeks an order vacating the Judgment imposed upon him on February 26 , 2009 (Silber, J.) on the grounds of ineffective assistance of counsel. The People oppose the application.

Defendant Paul McKay stands convicted, after trial, of two counts of Criminal Possession of a Controlled Substance in the Third Degree [PL § 220.16[12] and other lesser charges. The defendant was sentenced on February 26, 2009.

By motion dated October 21, 2009, defendant has moved to vacate his judgment of conviction pursuant to CPL 440.10, claiming that his trial counsel was ineffective, and that he was deprived of his right to confront witnesses against him at trial, and deprived of his right to due process, because of a stipulation entered into by the People and defendant's counsel with regard to lab reports of two NYPD chemists.

It is noted that defendant has filed a timely Notice of Appeal to the Appellate Division, which is currently pending before the Appellate Division, Second Department. CPL §

440.10(2)(b) requires that the court "must deny a motion to vacate a judgment" when "the judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal."

When an appeal is pending on issues of law, in order for a defendant to overcome the presumption of regularity which is conferred upon a judgment of conviction and bring a 440.10 motion, he must demonstrate that he seeks to establish facts which are beyond the record, which, if proven, would entitle him to vacatur of the judgment of conviction entered against him. *People v Perez*, 198 AD2d 540,541 [3rd Dept 1993]; *People v Williams*, 237 AD2d 644 [3rd Dept 1997]; *People v Smith*, 227 AD2d 655 [3rd Dept], *lv denied*, 88 NY2d 994 [1996]. Defendant has made no such claims.

As defendant's claims that, because of the stipulation, he was deprived of the right to confrontation and of his right to effective assistance of counsel, are the sole grounds raised in support of the instant application, the Court must examine the significance of the factual allegations underpinning them to his defense, and whether either issue is "dehors" the record of the trial. Having reached the substance of defendant's argument, the Court denies defendant's motion because none of his claims concern matters outside the record of the trial. Defendant's motion is thus procedurally barred from review pursuant to CPL 440.10. Sufficient facts appear on the record with respect to the stipulation concerning the chemists. See, *People v Smith*, 36 AD3d 633, 634 [2nd Dept 2007]. *People v Nunez*, 264 AD2d 487 [2nd Dept 1999].

Defendant claims he was denied his right to confrontation. However, defendant waived this claim since the stipulation concerning the lab tests of the drugs was agreed upon in open

Court, in defendant's presence and read to the jury. *People v Cotto*, 300 AD2d 191 [1st Dept 2002]. *People v Sterling*, 221 AD2d 235, 236 [1st Dept 1995]. *People v McCaskell*, 217 AD2d 527, 528-529 [1st Dept 1995]. In *McCaskell*, a claim that alleged that a similar stipulation resulted in defendant's unknowing, involuntary, unintelligent right of confrontation was rejected as "utterly unreasonable." Moreover, because laboratory reports are business records, in the absence of the stipulation, the People could have called either of the chemists to testify, or any knowledgeable supervisor in the NYPD laboratory. *People v Brown*, 2009 NY LEXIS 4047 (November 19, 2009); *Crawford v Washington*, 541 US 36, 68 [2004].

The Court is cognizant of the recent decision concerning lab reports rendered by the US Supreme Court, *Melendez-Diaz v Massachusetts*, 129 S.Ct. 2527 [2009]. In *Melendez-Diaz*, the Court struck down a Massachusetts law which permitted the admission into evidence of chemist affidavits to prove elements of the charged crimes without testimony from the chemists. This is a completely different circumstance than the facts in the instant case. Under the law struck down in *Melendez-Diaz*, the prosecutor was not required to call witnesses who would be subject to cross-examination regarding the laboratory findings, nor to obtain a stipulation with defendant as to what the substance of those witnesses' testimony would be if they were to testify. By contrast, in the instant case, defendant voluntarily stipulated to the findings of the laboratory report.

Defendant has also moved, pursuant to CPL 440.10 (1) (h), to vacate the instant judgment of conviction, alleging ineffective assistance of counsel. Specifically, in his supporting affirmation and Memorandum of Law, defendant asserts that trial counsel was ineffective on the sole and exclusive ground that he stipulated to the testimony of NYPD chemists Norma Hamilton and Renu Thompson, instead of insisting that the District Attorney call them as witnesses.

Defendant maintains that if the chemists had been called to testify, somehow cross-examination would have inured to his benefit.

The evidence, the law and the circumstances of this case, viewed in their totality reveal that the defendant's attorney provided meaningful representation. *People v McKinney*, 302 AD2d 993, 995, [4th Dept] *reargument denied* 306 AD2d 960, *lv denied* 100 NY2d 584 [2003]; *People v Thompson*, 27 AD3d 888, 890 [3rd Dept], *lv denied* 6 NY3d 853 [2006]. In sum, trial counsel made appropriate pretrial motions, more than adequately cross-examined the prosecution witnesses, and gave effective opening and closing statements. The record thus establishes that defendant received meaningful representation. *People v Ott*, 30 AD3d 1081[4th Dept 2006].

In any event, analysis begins with the well entrenched principle that our State's standard for effective assistance of counsel has long been whether the defendant was afforded meaningful representation. In applying this standard, the Court of Appeals has emphasized the difference between ineffective representation and losing trial tactics. Indeed, counsel's performance will not be considered ineffective, even if unsuccessful, as long as it reflects an objectively reasonable and legitimate trial strategy under the circumstances and evidence presented. *People v Berroa*, 99 NY2d 134, 138, [2002]; *People v Henry*, 95 NY2d 563, 565 [2000], *habeas corpus granted* 409 F.3d 48 [2nd Cir], *cert denied* 547 US 1040 [2006].

Further, in applying this standard, counsel's efforts should not be second-guessed with the clarity of hindsight to determine how the defense might have been more effective. The Constitution guarantees the accused a fair trial, not necessarily a perfect one. That a defendant was convicted may have little to do with counsel's performance, and courts are properly skeptical when disappointed prisoners bring their former lawyers up on charges of incompetent representation. *People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Butler*, 273 AD2d 613,

615-616 [3rd Dept], *lv denied* 95 NY2d 933 [2000].

Thus, where, as here, the evidence, the law and the circumstances of the particular case, viewed together and as of the time of representation, reveal that meaningful representation was provided, defendant's constitutional right to the effective assistance of counsel has been satisfied. *People v Satterfield*, 66 NY2d 796, 798-799 [1985]; *People v Benevento*, 91 NY2d at 712. In this regard, the Court of Appeals has clarified meaningful representation to include a prejudice component which focuses on the fairness of the process as a whole, rather than any particular impact on the outcome of the case. *People v Henry*, 95 NY2d at 566; *People v Ozuna*, 7 NY3d 913, 915 [2006]; *People v Schulz*, 4 NY3d 521, 530 [2005]. To sustain a claim of ineffective assistance of counsel, New York courts examine the trial as a whole to determine whether defendant was afforded meaningful representation. *People v Georgiou*, 38 AD3d 155 [2nd Dept 2007]. In New York, a defendant's demonstration of prejudice is a significant but not indispensable element in assessing meaningful representation.

Most importantly, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland v Washington*, 466 US 668, 686 [1984]; *People v Schulz*, 4 NY3d at 531.

Application of the foregoing well-established principles to the case at bar leads to the conclusion that the defendant's ineffective assistance of counsel claim is wholly unsupportable. Specifically, the record conclusively demonstrates that defense counsel made appropriate pretrial motions in an effort to suppress evidence against the defendant; delivered clear and cogent opening and closing statements; conducted meaningful cross-examination of the People's witnesses; lodged objections consistent with the defense theory; highlighted inconsistencies in

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the witnesses' testimony and urged leniency during sentencing. *People v Mondelus*, 233 AD2d 408, 408-409 [2nd Dept] *lv denied* 89 N.Y.2d 987 [1997].

Defense Counsel's decision to stipulate to the admission of the chemists' testimony without requiring their appearance in court, was reasonable in the absence of any evidence to controvert their lab reports, which concluded that the substances were cocaine. In addition, defense counsel's decision to enter into the stipulation was a valid and reasonable trial strategy. The defendant's defense was based upon mistaken identity, that the drugs weren't defendant's, and this sort of stipulation was completely consistent with such defense. In light of the defense's theory of misidentification, the stipulation was a tactical choice that does not give rise to a claim of ineffective assistance. See, *People v Young*, 35 AD3d 958, 961 [3rd Dept 2006]; *People v Alexander*, 255 AD2d 708, 709 [3rd Dept 1998]; *People v Rodriguez*, 186 AD2d 838, 839 [3rd Dept 1992].

Taken as a whole, the defendant was provided with meaningful representation. *Id.* at 409; *People v Boyce*, 2 AD3d 984, 986 [3rd Dept], *lv denied* 2 NY3d 796 [2004]; *People v Charles*, 309 AD2d 873 [2nd Dept], *lv denied* 1 NY3d 625 [2004]; *People v Johnson*, 303 AD2d 830, 834-835 [3rd Dept], *lvs denied* 99 N.Y.2d 655 [2003]; 100 N.Y.2d 583 [2003]; *People v Duke*, 292 AD2d 463, 464 [2nd Dept 2002]; People v Franklin, 288 AD2d 751 [3rd Dept], *lv denied* 97 NY2d 728 [2002]; *People v Walker*, 259 AD2d 1026, 1027 [4th Dept], *lv denied* 93 NY2d 1029 [1999], *habeas corpus denied* 262 FS2d 25 [WDNY 2003]. A review of the record reflects a performance commensurate with that of a competent attorney who conducted the defense in accordance with a reasoned trial strategy. *People v Butler*, 273 AD2d at 615-616; *see also People v Morehouse*, 5 AD3d 925, 927-928 [3rd Dept], *lv denied* 3 NY3d 644 [2004]; *People v Tomasello*, 189 AD2d 903, 904 [2nd Dept 1993].

The law is well established that the defendant bears the high burden of demonstrating that he was deprived of a fair trial as the result of counsel's performance and simple disagreement with strategies and trial tactics will not suffice. *People v Schreter*, 252 AD2d 563 [2nd Dept], *lv denied* 92 N.Y.2d 951 [1998], *habeas corpus denied* 225 FS2d 249 [EDNY 2002]; *see also People v Hobot*, 84 NY2d 1021, 1022 [1995], *habeas corpus denied* 1998 U.S. Dist. LEXIS 14631, 1998 WL 642705 [EDNY]; *People v Balbuena*, 264 AD2d 424 [1st Dept 1999].

In this case, it is unquestionable, as the trial record plainly reveals, that defendant has not overcome the strong presumption that trial counsel rendered effective assistance. S*ee People v Fernandez*, 7 AD3d 730, 731 [2nd Dept], *lv denied* 3 NY3d 658 [2004], *error coram nobis denied* 19 AD3d 614, *lv denied* 5 NY3d 828 [2005]; *People v Bell*, 298 AD2d 398 [2nd Dept], *lv denied* 99 N.Y.2d 555 [2002], *habeas corpus denied* 2005 WL 1962413 [EDNY]; *People v Birch*, 284 AD2d 405 [2nd Dept], *lv denied* 96 NY2d 916 [2001].

Specifically, defendant has not shown that his counsel's acts and omissions were inconsistent with a competent legal strategy or seriously compromised his right to a fair trial and, most importantly, affected the result. *People v Parker*, 305 AD2d 858, 859 [3rd Dept], *lv denied* 2 NY3d 804 [2004]; *People v Harris*, 304 AD2d 355 [1st Dept], *lv denied* 100 NY2d 582 [2003]. Furthermore, a defendant is not entitled to error-free representation , and here defendant failed to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged failures. *People v Jackson*, 4 AD3d 848, 849 [4th Dept], *lv denied* 2 NY3d 801 [2004]; *People v Grey*, 34 AD3d 832, 833 [2nd Dept 2006]; *People v Williams*, 24 AD3d 575, 576 [2nd Dept], *lv denied* 6 NY3d 782 [2006]; *People v Nixon*, 21 AD3d 1123, 1123-1124 [2nd Dept 2005]; *People v Louissant*, 8 AD3d 407 [2nd Dept], *lv denied* 3 NY3d 677 [2004].

In this regard, defendant's attack on counsel's decision not to require the chemists to be

called as witnesses is, at most, a disagreement over trial strategy that does not demonstrate ineffectiveness, as there was a real risk that these witnesses would have furnished testimony damaging to the defendant's position. *People v Brooks*, 283 AD2d 367, 368 [1st Dept], *lv denied* 96 NY2d 916[2001]; *People v Thomas*, 244 AD2d 271 [1st Dept], *lv denied* 91 NY2d 898 [1998]; *People v Hernandez*, 295 AD2d 989 [4th Dept], *lv denied* 98 NY2d 711 [2002], *error coram nobis denied* 303 AD2d 1059, *lv denied* 100 NY2d 562 [2003]. For example, they might have testified that the packaging was unusual, or they may have had information about the packaging that would have been incriminating. Perhaps live testimony would have highlighted the weight of the drugs, which was not desired by counsel.

Viewed objectively, the record demonstrates a legitimate and strategic reason for not requiring the chemists to testify at trial. *People v Peters*, 28 AD3d 686, 687 [2nd Dept], *lv denied* 7 NY3d 793 [2006]; *People v Llanos*, 13 AD3d 76, 77 [1st Dept], *lv denied* 4 NY3d 833 [2005]; *People v Botting*, 8 AD3d 1064, 1066 [4th Dept], *lv denied* 3 NY3d 671 [2004]. Thus, the defendant failed to demonstrate that he was deprived of meaningful representation. *People v Peters*, 28 AD3d at 687.

In any case, the defendant's disagreement with the strategies and tactics employed by his defense counsel does not amount to a deprivation of effective assistance of counsel. *People v Morrison*, 288 AD2d 494 [2nd Dept], *lv denied* 97 N.Y.2d 758 [2002], *error coram nobis denied* 300 AD2d 323; *People v Benn*, 68 NY2d 941, 942 [1986]; *People v Love*, 307 AD2d at 532; *People v Koufomichalis*, 2 AD3d 987, 989 [3rd Dept], *lv denied* 2 NY3d 742 [2004]; *People v Philbert*, 267 AD2d 607, 608 [3rd Dept], *lv denied* 94 NY2d 905 [2000].

Ineffective assistance of counsel may not be premised upon an unsuccessful trial strategy by defense counsel. *People v Brown*, 286 AD2d 687 [2nd Dept], *lv denied* 97 NY2d 702 [2002];

People v Taylor, 1 NY3d 174, 177 [2003], *habeas corpus denied* 2005 US Dist. LEXIS 40676, 2006 WL 416372 [SDNY]; *People v Colvin*, 37 AD3d 856, 858 [3rd Dept 2007] ; *People v Jenkins*, 300 AD2d 751, 753 [3rd Dept], *lv denied* 99 NY2d 615 [2003]; *People v Washington*, 184 AD2d 451, 452 [1st Dept], *lv denied* 80 N.Y.2d 911 [1992], *habeas corpus denied* 1997 US Dist. LEXIS 4587, 1997 WL 178616 [SDNY]; *People v Thomas*, 33 AD3d 1053, 1055 [3rd Dept 2006]; *People v Walker*, 2 AD3d 656, 656-657 [2nd Dept], *lv denied* 1 NY3d 602 [2004], *habeas corpus denied* 2006 US Dist. LEXIS 563, 2006 WL 47410 [EDNY]; *People v Sowizdral*, 275 AD2d 473, 476 [3rd Dept], *lv denied* 95 NY2d 969 [2000].

In determining whether a defendant has been afforded meaningful representation, courts should not confuse true ineffectiveness with losing trial tactics or unsuccessful attempts to advance the best possible defense. *People v Rose*, 307 AD2d 270, 271 [2nd Dept 2003]; *People v Plaisted*, 2 AD3d 906, 909 [3rd Dept], *lv denied* 2 NY3d 744 [2004]; *People v Standard*, 273 AD2d 870 [4th Dept], *lv denied* 95 NY2d 908 [2000]; *People v Smith*, 230 AD2d 925 [2nd Dept], *lv denied* 89 NY2d 930 [1996], *habeas corpus denied* 1999 U.S. Dist. LEXIS 16567, 1999 WL 1007348 [EDNY]). Here, defense counsel pursued a coherent trial strategy, made appropriate motions and objections and otherwise provided defendant with meaningful representation. *People v Plummer*, 24 AD3d 1027, 1028 [3rd Dept], *lv denied* 6 NY3d 837 [2006]; *People v Madison*, 31 AD3d 974, 975 [3rd Dept], *lv denied* 7 NY3d 868; [2006] *People v Sieber*, 26 AD3d 535, 536 [3rd Dept], *lv denied* 6 NY3d 853 [2006]; *People v Deshields*, 24 AD3d 1112 [3rd Dept], *lv denied* 6 NY3d 811 [2006].

The Court is unconvinced by defendant's contention that he received the ineffective assistance of counsel. The Court also views counsel's performance as objectively reasonable and legitimate, and defendant's current arguments as simply second-guessing the defense strategy.

People v Wallis, 24 AD3d 1029, 1033, [3rd Dept], *lv denied* 6 NY3d 854 [2006].

As the Court of Appeals stated in *People v Baldi* (54 NY2d 137 [1981]), "[i]t is always easy with the advantage of hindsight to point out where trial counsel went awry in strategy" See also, *People v Benevento*, 91 NY2d at 712. However, a difference of opinion with respect to strategies or trial tactics, particularly with the benefit of hindsight, is not sufficient to demonstrate ineffectiveness of counsel. *People v Philbert*, 267 AD2d at 608. As long as a defendant was afforded meaningful representation, the courts may not, aided by the wisdom of hindsight, second-guess matters of the defense counsel's trial strategy. *People v Finley*, 27 AD3d 763 [2nd Dept], *lv denied* 7 NY3d 788 [2006].

It is not for this Court to second-guess whether the course chosen by defendant's counsel was the best trial strategy, or even a good one, since the defendant was unquestionably afforded meaningful representation. *People v Satterfield*, 66 NY2d at 799-800; *People v Pierce*, 303 AD2d 966, 966-967 [4th Dept], *lv denied* 100 N.Y.2d 565 [2003]; *People v Williams*, 273 AD2d 824, 825 [4th Dept], *lv denied* 95 NY2d 893 [2000], *habeas corpus denied* 435 FS2d 99 [WDNY 2006]). Significantly, defense counsel had a discernible strategy. *People v Barnes*, 305 AD2d 1095 [4th Dept], *lv denied* 100 NY2d 592 [2000]; *People v Lawton*, 134 AD2d 454, 455 [2nd Dept], *lv denied* 71 NY2d 1029 [1988]. Where, as here, a defense attorney presents a well-grounded but ultimately unsuccessful defense, such attorney will not later be held to have provided ineffective assistance. *People v Rodabaugh*, 26 AD3d 598, 600 [3rd Dept 2006]; *People v Tomasky*, 36 AD3d 1025, 1027[3rd Dept 2007]. In this regard, "hindsight does not elevate counsel's unsuccessful trial strategies into ineffective assistance of counsel. *People v Gillespie*, 36 AD3d 626, 627 [2nd Dept 2007].

To prevail on a claim of ineffective assistance of counsel a defendant must demonstrate

the absence of strategic or other legitimate explanations for counsel's failure to pursue colorable claims. *People v Garcia*, 75 NY2d 973, 974 [1990]; *People v Benevento*, 91 NY2d at 712; *People v Johnson*, 37 AD3d 363, 363 [1st Dept 2007];*People v Eagleton*, 161 AD2d 482 [1st Dept], *lv denied* 76 NY2d 855 [1990]; *People v Philbert*, 267 AD2d at 608. Defendant, however, has simply failed to do so; and thus it will be presumed that counsel acted in a competent manner and exercised professional judgment. *People v Taylor*, 1 NY3d at 177-178; *People v Hightower*, 35 AD3d 884 [2nd Dept 2006].

Nor has defendant demonstrated that but for counsel's purported errors, the verdict would have been different. *People v Styles*, 156 AD2d 223, 225 [1st Dept], *lvs denied* 75 NY2d 872 [1990], 76 NY2d 743 [1990]; *habeas corpus denied* 1995 U.S. Dist. LEXIS 7428, 1995 WL 326445 [SDNY], *affd* 101 F.3d 684 [2nd Cir], *cert denied* 519 US 936 [1996]; *People v Harris*, 304 AD2d at 356; *People v Diaz*, 157 AD2d 569 [1st Dept], *lv denied* 76 NY2d 733 [1990]. In fact, even if the Court were to find that trial counsel's failure to insist upon the calling of the chemists was neglectful rather than strategic, the Court would still find that defendant received meaningful representation. *People v Brown*, 306 AD2d 12, 13 [1st Dept], *lv denied* 100 NY2d 592 [2003], *habeas corpus denied* 2005 U.S. Dist. LEXIS 15026, 2005 WL 1773683 [SDNY], *affd* 451 F.3d 54 [2nd Cir 2006], as there is no proof that defendant suffered actual prejudice as a result of the claimed deficiencies, which is a necessary prerequisite to a finding of ineffective assistance of counsel. *People v Frascatore*, 200 AD2d 860, 861 [3rd Dept 1994]; *People v Miller*, 254 AD2d 627, 628 [3rd Dept 1998]. Trial counsel's failure to insist upon the calling of the chemists did not affect either the fairness or the outcome of the trial. *People v Barnes*, 29 AD3d 390, 391 [1st Dept], *lv denied* 7 NY3d 785 [2006].

Consequently, considering counsel's conduct of the defense as a whole, defendant was not

denied meaningful representation. *People v Parker*, 305 AD2d at 859; and, defendant did not meet his well-settled, high burden of demonstrating that he was deprived of a fair trial by less than meaningful representation. *People v Coleman*, 305 AD2d 1031, 1032 [4th Dept], *lv denied* 100 NY2d 579 [2003].

The relevant and dispositive issue is the quality of trial counsel's representation of the defendant at trial. This Court's review of the pretrial suppression hearing decision, and the decision on the motion to reargue the decision, plus the trial record, reveals that trial counsel demonstrated a more than reasonable understanding of the principles of criminal law and procedure and was familiar with the facts and the law bearing on the defendant's case. *People v Schlageter*, 238 AD2d 891, 892 [4th Dept 1997]). In this regard, the trial record reflects that counsel made appropriate motions and objections, effectively cross-examined witnesses, presented sound opening and closing statements and otherwise pursued a cogent defense. *People v Valderama*, 25 AD3d 819, 821 [3rd Dept], *lv denied* 6 NY3d 854 [2006]; *People v Gillespie*, 36 AD3d at 627; *People v Lackey*, 36 AD3d 953, 956 [3rd Dept 2007]; *People v Lozada*, 35 AD3d 969, 970 [3rd Dept 2006]; *People v Weaver*, 34 AD3d 1047, 1050 [3rd Dept 2006]; *People v Madison*, 31 AD3d at 975.

Having concluded that there was no violation of the defendant's right to effective assistance of counsel under our State Constitution, the Court next examines whether the defendant received effective assistance of counsel under the Federal Constitution - even though the New York State Court of Appeals has held that our State standard offers greater protection to defendants than the federal test. *People v Caban*, 5 NY3d 143, 156 [2005]; *People v Ozuna*, 7 NY3d at 915, quoting *People v Turner*, 5 NY3d 476, 480 [2005]; *People v Casiano*, 184 AD2d 206 [1st Dept], *lv denied* 80 NY2d 927 [1992]; *People v Parker*, 220 AD2d 815, 816 [3rd Dept],

lv denied 87 NY2d 1023 [1996].

In *Strickland v Washington* (466 US 668 [1984], *rehearing denied* 467 US 1267), the Supreme Court established a two-pronged test for determining whether a defendant's Sixth Amendment right to the effective assistance of counsel has been violated. In order to prove such a violation, a convicted defendant must show both that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that the deficient performance prejudiced the defense so seriously as to deprive the defendant of a fair trial, a trial whose result is reliable. *Henry v Poole*, 409 F3d at 62-63. Prejudice, which forms the second half of an ineffective assistance claim is found to exist when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Greiner v Wells*, 417 F3d 305, 319 [2nd Cir], *cert denied* 546 US 1184 [2006]. Further, it is the defendant who bears the burden of establishing both deficient performance and prejudice. *Id.*

The defendant herein cannot satisfy the first prong of the Strickland performance test. In assessing performance, the federal courts apply a heavy measure of deference to counsel's judgments. Federal courts will not normally fault counsel for foregoing a potentially fruitful course of conduct if that choice also entails a significantly potential downside. Thus, a lawyer's decision not to pursue a defense does not constitute deficient performance if, as is typically the case, the lawyer has a reasonable justification for the decision and, most significantly, strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Greiner v Wells*, 417 F3d at 319. Even strategic choices made after less than complete investigation do not amount to ineffective assistance, so long as the known facts made it reasonable to believe that further investigation was unnecessary. *Henry v Poole*, 409 F3d at 63.

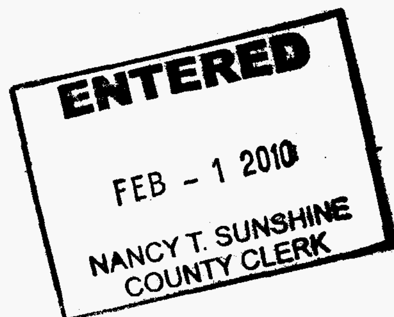
In *Villoch v Brooks* (FS2d , 2006 U.S. Dist. LEXIS 73153, 2006 WL 2715180 [EDPa 2006]), the federal magistrate issued a report and recommendation, subsequently approved and adopted by the district court, denying habeas relief to a state court prisoner who had argued that he was deprived of ineffective assistance of counsel because trial counsel had failed to call and interview a witness in support of an alibi defense. The magistrate held that in order to establish ineffective assistance of counsel for failure to call a witness, defendant must establish that, among other things, the absence of the testimony prejudiced the defendant so as to deny him a fair trial.

After reviewing the trial record in conjunction with the applicable *Strickland* standard, the Court must conclude that there is surely no reasonable probability, no probability sufficient to undermine confidence in the outcome, that, but for trial counsel's failure to insist upon the calling of the chemists to testify, the result of the proceeding would have been different.

In the end, a review of the trial record reveals that trial counsel provided defendant with meaningful representation. *People v Baptiste*, 306 AD2d at 569. While it must be noted that there are countless ways to provide effective assistance in any given case, in the case at bar the defendant did in fact receive very effective assistance of counsel.

Accordingly, defendant's motion is denied.

This opinion shall constitute the Decision and Order of the Court.



ENTER:

Hon. Debra Silber, A.J.S.C.

Dated: January 27, 2010

Hon. Debra Silber
Justice Supreme Court