

956 F.3d 71
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee
v.
Ralph NOLAN, Defendant-Appellant.

16-3423-pr(L)
|
August Term 2019
|
18-1113-pr(CON)
|
Argued: November 4, 2019
|
Decided: April 15, 2020

Synopsis

Background: Defendant moved to **vacate**, set aside, or correct his sentence after he was convicted of conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, and brandishing firearm during and in relation to attempted robbery. The United States District Court for the Southern District of New York, [George B. Daniels, J.](#), [2018 WL 1166726](#), denied defendant's motion. Defendant appealed.

Holdings: The Court of Appeals, [Jed S. Rakoff](#), of the United States District Court for the Southern District of New York, sitting by designation, held that:

[1] trial counsel's strategy of abandoning defendant's pretrial motion to exclude eyewitness testimony of four victims in favor of trying to impeach such testimony at trial was professionally unreasonable;

[2] counsel failed to render reasonable professional assistance by neglecting to call or even consult expert to testify about unreliability of eyewitness identifications in ways that was not readily apparent to lay jury;

[3] defendant was prejudiced by counsel's deficient performance;

[4] jury instructions were not sufficient to cure eyewitness identifications that were unreliable in ways that were not readily apparent to lay jury;

[5] defense counsel's failure to seek limiting instruction for

photograph of defendant posing with what appeared to be handgun, but which actually was BB gun, constituted ineffective assistance of counsel;

[6] defense counsel's handling of gun photograph, both in not seeking to exclude it and in not seeking limiting instruction to accompany its admission, was sufficiently prejudicial to defendant that there was reasonable probability that result of trial would have been different had photo not been admitted; and

[7] ineffectiveness of counsel claim properly was before [Court of Appeals](#).

Reversed and **remanded**.

West Headnotes (14)

[1] [Criminal Law](#) [Review De Novo](#)

De novo review applies to the denial of ineffective assistance claims on a motion to **vacate**, set aside, or correct a sentence. [U.S. Const. Amend. 6](#); [28 U.S.C.A. §§ 2253, 2255\(d\)](#).

[2] [Criminal Law](#) [Deficient representation and prejudice in general](#)

To succeed on an ineffective assistance claim, a defendant must demonstrate, first, that in light of all the circumstances, the acts or omissions of trial counsel were outside the wide range of professionally competent assistance, and, second, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. [U.S. Const. Amend. 6](#).

[3] **Criminal Law** — Identification

Trial counsel's strategy of abandoning defendant's pretrial motion to exclude eyewitness testimony of four victims in favor of trying to impeach such testimony at trial on charges of conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, and brandishing firearm during and in relation to attempted robbery was professionally unreasonable, as required for relief on ineffective assistance of counsel claim, since ability of witnesses to accurately process what they observed was impaired through perpetrators' wearing disguise, presence of weapon, stress of situation, cross-racial nature of crime, passage of time between observation and identification, and witnesses' exposure to defendant through multiple identification procedures. *U.S. Const. Amend. 6*; 18 U.S.C.A. §§ 924(c)(1)(A)(ii), 1951.

1 Cases that cite this headnote

[4] **Criminal Law** — Experts; opinion testimony

Counsel failed to render reasonable professional assistance in defendant's prosecution on charges of conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, and brandishing firearm during and in relation to attempted robbery by neglecting to call or even consult expert to testify about unreliability of eyewitness identifications in ways that was not readily apparent to lay jury, such as that persons of given race or color were not nearly as good at perceiving and remembering fine facial features of someone of different race or color as they were at perceiving such features of someone of their own race or color. *U.S. Const. Amend. 6*; 18 U.S.C.A. §§ 924(c)(1)(A)(ii), 1951.

1 Cases that cite this headnote

[5] **Criminal Law** — Presentation of witnesses

Strickland ordinarily does not require defense

counsel to call any particular witness. *U.S. Const. Amend. 6*.

[6] **Criminal Law** — Identification
Criminal Law — Experts; opinion testimony

Defendant was prejudiced by counsel neglecting to call or even consult expert to testify about unreliability of eyewitness identifications in ways that were not readily apparent to lay jury, and abandoning defendant's pretrial motion to exclude eyewitness testimony of four victims in favor of trying to impeach such testimony at trial, as required for ineffective assistance of counsel, in prosecution for conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, and brandishing firearm; without identifications, probative value of government's remaining evidence against defendant would have been limited at best, and therefore reasonable jury likely would have rendered acquittal, assuming that judge would have let case go to jury. *U.S. Const. Amend. 6*; 18 U.S.C.A. §§ 924(c)(1)(A)(ii), 1951.

[7] **Conspiracy** — Larceny, embezzlement, burglary, and robbery; stolen property
Robbery — Attempts
Weapons — Use or Possession in Commission of Crime

Evidence that defendant knew co-conspirator, that he, without knowledge that police considered co-conspirator a suspect, told police that co-conspirator had set him up, connection between victims being tied up with cable wire and his work as cable installer, his admission to being known as "White Boy" in area populated by people of color and one perpetrator being white, and victims' identifying defendant from his photograph on social media through co-witness interaction, did not establish guilt by any standard, let alone beyond reasonable doubt, in trial on charges of conspiracy to commit Hobbs Act robbery, attempted Hobbs Act

robbery, and brandishing firearm during and in relation to attempted robbery. 18 U.S.C.A. §§ 924(c)(1)(A)(ii), 1951.

U.S.C.A. §§ 924(c)(1)(A)(ii), 1951.

[8] **Criminal Law** → Identification

Jury instructions were not sufficient to cure eyewitness identifications that were unreliable, and therefore there was reasonable probability that result of proceeding on charges of conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, and brandishing firearm during and in relation to attempted robbery would have been different had defense counsel effectively contested eyewitness identification testimony; many factors were counterintuitive and, therefore, not coterminous with common sense, such as likely impact on perception of extreme stress and weapon focus, and detective's identification practices that were highly suggestive. U.S. Const. Amend. 6; 18 U.S.C.A. §§ 924(c)(1)(A)(ii), 1951.

1 Cases that cite this headnote

[9] **Criminal Law** → Limiting and curative instructions

Defense counsel's failure to seek limiting instruction for photograph of defendant posing with what appeared to be handgun, but which actually was BB gun, constituted ineffective assistance of counsel, in defendant's prosecution on charges of conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, and brandishing firearm during and in relation to attempted robbery; photo was highly prejudicial but weak in probative value, government's motion in limine for court to admit photo should have put defense counsel on notice that government planned to focus on photo at trial, and government did highlight photo in its summation, arguing to jury that photo provided evidence of defendant's access to firearms and knowledge of them. U.S. Const. Amend. 6; 18

[10] **Criminal Law** → Strategy and tactics in general

On an ineffective assistance of counsel claim, a court must begin with a presumption that, under the circumstances, the challenged action might be considered sound trial strategy. U.S. Const. Amend. 6.

[11] **Criminal Law** → Identification
Criminal Law → Limiting and curative instructions

Defense counsel's handling of photograph of defendant posing with what appeared to be handgun, but which actually was BB gun, both in not seeking to exclude it and in not seeking limiting instruction to accompany its admission, was sufficiently prejudicial to defendant that there was reasonable probability that result of trial on charges of conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, and brandishing firearm during and in relation to attempted robbery would have been different had photo not been admitted, as required for ineffective assistance of counsel claim; although photo was of much less significance to government's case than eyewitness identifications, it nonetheless likely served to elicit emotional reaction among jurors in light of fact that defendant was being tried on charge of armed robbery. U.S. Const. Amend. 6; 18 U.S.C.A. §§ 924(c)(1)(A)(ii), 1951.

[12] **Criminal Law** → Preparation for trial

Counsel's inadequate investigation of circumstances of photograph of defendant posing with what appeared to be handgun, as

well as defendant's claim that gun in photo was BB gun, had limited prejudicial effect at defendant's trial on charges of conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, and brandishing firearm during and in relation to attempted robbery, for purpose of ineffective assistance of counsel claim, since government in its summation told jury that weapon was BB gun. [U.S. Const. Amend. 6](#); [18 U.S.C.A. §§ 924\(c\)\(1\)\(A\)\(ii\)](#), 1951.

1 Cases that cite this headnote

[13] [Criminal Law](#) → Preferability of raising effectiveness issue on post-conviction motion

In most cases a motion to [vacate](#), set aside, or correct a sentence is preferable to direct appeal for deciding claims of ineffective assistance. [U.S. Const. Amend. 6](#); [28 U.S.C.A. § 2255](#).

[14] [Criminal Law](#) → Successive appeals or other proceedings
[Criminal Law](#) → Effective assistance

Ineffectiveness of counsel claim properly was before Court of Appeals for resolution on appeal from denial of motion to [vacate](#), set aside, or correct his sentence, since defendant obtained order from Court consolidating his direct appeal and denial of his motion. [U.S. Const. Amend. 6](#); [18 U.S.C.A. §§ 924\(c\)\(1\)\(A\)\(ii\)](#), 1951; [28 U.S.C.A. § 2255](#).

*74 Appeal from the United States District Court for the Southern District of New York (Daniels, J.)

Attorneys and Law Firms

APPEARING FOR APPELLANT: [Susan J. Walsh](#) ([Yannick Allan Grant](#), on the brief), [Vladeck](#), [Raskin](#) &

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APPEARING FOR APPELLEE: [Richard Cooper](#), Assistant United States Attorney (Karl Metzner, Assistant United States Attorney, on the brief), for [Geoffrey S. Berman](#), United States Attorney for the Southern District of New York, New York, NY
Before: [Sack](#) and [Hall](#), Circuit Judges, and [Rakoff](#), District Judge.

Opinion

RAKOFF, District Judge:

*75 Eyewitness identification testimony is notoriously prone to error. As the Supreme Court recognized over a half-century ago, “[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.” [United States v. Wade](#), 388 U.S. 218, 228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); see also [Simmons v. United States](#), 390 U.S. 377, 383-84, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); [Manson v. Brathwaite](#), 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). The results can be devastating. For example, as Appellant here points out, according to the Innocence Project, eyewitness misidentification was present in an astonishing 71 percent of the cases in which subsequent DNA testing established the factual innocence of wrongfully convicted defendants. See Innocence Project, [Eyewitness Identification Reform](#), [www.innocenceproject.org/eyewitness-identification-reform](#) (Last Visited Mar. 16, 2020).

In the instant case, even though many of the typical causes of mistaken eyewitness identifications were apparent, defendant's trial counsel did almost nothing to challenge the introduction of such identifications or combat these problems. We conclude that given the obvious materiality of the eyewitness testimony in the case at bar, this failure amounted to ineffective assistance of counsel, requiring [reversal](#) of the district court's judgment, [vacatur](#) of Nolan's conviction, and [remand](#) to the district court for further proceedings consistent with this opinion.

In brief summary, on April 10, 2015, a jury sitting in the Southern District of New York, relying almost entirely on eyewitness identifications, convicted Defendant-Appellant [Ralph Nolan](#) of conspiracy to commit Hobbs Act robbery in violation of [18 U.S.C. § 1951](#) (Count One), attempted Hobbs Act robbery in violation of [18 U.S.C. § 1951](#) (Count Two), and

brandishing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count Three). Specifically, Nolan was found to have joined in an armed robbery of an apartment occupied by a family, some of whose members had been dealing drugs. Four of the five adults present in the apartment at the time of the robbery—all testifying at Nolan’s trial pursuant to grants of immunity—identified Nolan as one of the robbers. On September 28, 2016, the district judge sentenced Nolan to 120 months’ imprisonment followed by three years of supervised release. Nolan is currently serving his sentence.

All four identifications bore significant indicia of unreliability. The robbers were partially disguised. They carried guns, on which the eyes of the victims were likely focused. Initially, the victims were unable to give investigators a detailed description of the robbers beyond noting that they were light-skinned or Hispanic. The four victims did not identify Nolan (who is white) as one of the intruders until they saw his photo in a photo array presented to them more than a month after the crime. Even then, at least one of the victims did not firmly identify Nolan until law enforcement allowed that victim to view photos of Nolan on Facebook. That victim discussed with two other victims her identification of Nolan and showed the other two victims his Facebook photo before these victims were asked to identify Nolan from a photo array.

Nolan’s defense counsel nonetheless did virtually nothing to contest the admissibility of these identifications. In particular, defense counsel abandoned a pre-trial motion to preclude the eyewitness identifications for reasons that counsel has failed to explain. And both then and after the testimony had been introduced at trial, defense counsel failed to call or even consult an expert witness who could have informed the judge and jury about the multiple, well-established ways in which these identifications were unreliable.

[1]Arguing that his lawyers’ errors prejudiced the outcome of his trial, Nolan petitioned the district court under 28 U.S.C. § 2255 for a writ of habeas corpus on the ground of ineffective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). On February 20, 2018, the district court (Daniels, J.) denied the petition without a hearing. No. 14-cr-555 (GBD), 2018 WL 1166726 at *1 (S.D.N.Y. Feb. 20, 2018). Nolan appeals from this denial.² We have jurisdiction under 28 U.S.C. §§ 2253 and 2255(d), and we review Nolan’s ineffective assistance claims *de novo*. *Pham v. United States*, 317 F.3d 178, 182 (2d Cir. 2003). For the following reasons, we **reverse** the district court

and **vacate** Nolan’s conviction.

Background

By finding Nolan guilty, Nolan’s jury effectively found that on December 16, 2013, Nolan and an accomplice committed an armed home invasion of an apartment in the Bronx, known by the robbers to be home to a family, some of whose members had been dealing drugs, from whom the robbers were seeking to steal marijuana and other valuables. (Evidence at trial also established the involvement of a third co-conspirator, Shaun Odiot, who had canvassed the apartment earlier that day but did not enter it during the robbery.) According to trial testimony, upon entering the apartment, Nolan and the other robber threatened the victims in the apartment with guns and demanded marijuana and money. In the course of the robbery, Nolan is alleged to have pistol-whipped one victim, leaving her unconscious. He also purportedly ripped cable wires out of the wall and used them to bind the hands of the victims. According to the victims’ testimony, Nolan stole a small amount of marijuana as well as some electronic devices from the apartment.

There were five adult victims in the apartment at the time of the robbery: Lorraine Scroggins, the primary resident; Desiree Scroggins, Lorraine’s daughter; Christopher Martinez, Desiree’s boyfriend; Sandra Martinez, Christopher’s mother; and Deyanira Beriguete, a home health aide who took care of Lorraine, who is quadriplegic. Christopher’s and Desiree’s infant daughter was also in the apartment during the robbery.

In the immediate aftermath of the crime, several of the victims indicated that the robbers may have been Hispanic, and none identified Nolan (who is white and who was previously known to two of the victims) as one of the culprits.³ Law enforcement initially showed Desiree, Lorraine, and Christopher photo arrays that did not include Nolan’s picture, and all three of these victims said that they did not recognize anyone in the photos as one of the robbers.

Law enforcement did not add Nolan’s picture to the photo array until several weeks later. Specifically, after the NYPD detective investigating the robbery began to suspect that Odiot was the third co-conspirator, the detective “searched [Odiot’s] address for anybody that had been arrested using that address in the past,” Det. E. Deloren, trial tr. at 449, and created a new photo array

including people who turned up in that search and who matched the general description of the other robber. This new photo array included a picture of Nolan.

The detective first showed this new photo array to Desiree. She testified that she identified Nolan from his photo as one of the robbers but was at first only about 75% sure in her identification. The detective then went into another room and showed the photos to Lorraine, who identified Nolan as the robber. At that point, Desiree entered the room where Lorraine was. Lorraine, referring to Nolan's photo, asked Desiree, "that's him, right?" L. Scroggins, trial tr. at 152. Desiree and Lorraine, in the detective's presence, then looked at photos of Nolan on his Facebook page.⁴ And after viewing Nolan's Facebook photos, Desiree testified, she became certain of her identification.

On the same day, according to Desiree's testimony, she discussed her identification of Nolan with Sandra and Christopher Martinez, to whom law enforcement had not yet showed a photo array that included Nolan's picture. She also showed them Nolan's Facebook photos.

The following day, NYPD showed a "six-pack" photo array containing Nolan's photograph to Sandra, who identified Nolan and testified that she was "pretty confident" in her identification. S. Martinez, trial tr. at 626. Sandra also testified that, at that point, she recognized Nolan as the person she knew of as "White Boy" from her old neighborhood. About two weeks later, law enforcement showed the photo array to Christopher, who also identified Nolan as one of the robbers and stated that he recognized him as "White Boy." Christopher testified that he was confident in his identification. He also testified that his mother, Sandra, had shown him a picture of Nolan before law enforcement showed him the photo array.⁵

***78** The Government heavily relied in its summation on the victims' identifications of Nolan, arguing to the jury that:

There's absolutely no dispute in this trial that this heinous crime happened. ... The only issue that's really in dispute is whether Ralph Nolan was one of the robbers, and not one, not two, not three, but four of the victims took that witness stand and told you he was. Back closer to the robbery, when they talked to the police, they looked at

his picture and said that's the guy who robbed us, and right here in this courtroom you saw them, one after the other, they took the witness stand, they looked around the courtroom, and they said he did it, he did it.

Trial tr. at 765.

The evidence against Nolan beyond these eyewitness identifications was limited. But among such evidence, the Government introduced a photo from Nolan's Facebook page of him holding what appears to be a black handgun, but which the jury was told was in fact a BB gun. The Government also discussed this photo in its summation, arguing that it evidenced "the defendant's ... access to firearms and knowledge of them." Trial tr. at 840.

Defense counsel argued a theory of mistaken identity at trial. But as relevant to this appeal, defense counsel made little effort to exclude the evidence discussed here. Counsel initially made a pre-trial motion to preclude in-court identification testimony by Lorraine and Desiree Scroggins and Christopher and Sandra Martinez. But when instructed by the trial court that, were it to preclude the identifications, it would also preclude any questioning about the identification techniques used by law enforcement, such as permitting the victims to view Facebook photos of Nolan, defense counsel withdrew the motion in favor of allowing "it ... all [to] come in." Trial tr. at 50. Defense counsel then attempted to impeach the credibility of the identifications on cross-examination⁶ and argued on summation that the identifications were not reliable.

Defense counsel also did not seek to exclude the Facebook BB gun photo, nor did counsel object to its introduction at trial. Before trial, the Government moved in limine to permit introduction of the photo as direct evidence of the crime, or alternatively as evidence under [Fed. R. Evid. 404\(b\)](#) of the defendant's knowledge of and access to firearms. The Government also moved in limine to introduce a small portion of the video recording of Nolan's ***79** post-arrest interview with law enforcement in which Nolan made the incriminating statement that he knew suspected co-conspirator Odio. In response, defense counsel, rather than seeking to exclude the photo of Nolan holding a gun, moved under [Fed. R. Evid. 106](#), the so-called "rule of completeness," to introduce the entire post-arrest video, including portions where Nolan denied involvement in the charged crime. Significantly, another portion of the video included an exchange in

which law enforcement showed Nolan the BB gun photo and discussed it with him. Ruling on these motions, the district court essentially gave both sides what they sought, admitting the entire post-arrest video under [Rule 106](#) and also admitting the BB gun photo, reasoning that introducing the segments of the post-arrest video where Nolan and the law enforcement officer discuss the BB gun photo would “minimize[] any potential prejudice” from showing the jury the photo itself. Tr. of April 1, 2015 hearing, at 9.

Discussion

The Eyewitness Identifications

[2]To succeed on an ineffective assistance claim, a defendant must demonstrate, first, that “in light of all the circumstances,” the acts or omissions of trial counsel “were outside the wide range of professionally competent assistance,” and, second, that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” [Strickland](#), 466 U.S. at 690, 694, 104 S.Ct. 2052. This test presents a high bar for a defendant, as [Strickland](#) instructs courts to apply a “presumption of effective performance.” [Greiner v. Wells](#), 417 F.3d 305, 326 (2d Cir. 2005). “The standard of [Strickland](#) ‘is rigorous, and the great majority of habeas petitions that allege constitutionally ineffective counsel founder on [it].’ ” [Bell v. Miller](#), 500 F.3d 149, 155 (2d Cir. 2007) (alteration in original) (quoting [Lindstadt v. Keane](#), 239 F.3d 191, 199 (2d Cir. 2001)).

The first ground on which Nolan challenges his trial counsel’s effectiveness is that counsel failed to adequately challenge the eyewitness identifications that formed the core of the Government’s case. Specifically, Nolan argues that he received ineffective assistance because his lawyers (1) failed to pursue a pre-trial motion to preclude the in-court identification testimony by the four victims, and (2) failed to hire an expert on eyewitness testimony or seek to introduce expert testimony about the unreliability of eyewitness identifications in the circumstances presented by this case. Despite the very high bar for an ineffective assistance claim, we agree with both arguments.

[3]As to the first argument, trial counsel’s strategy of

abandoning defendant’s pretrial motion to exclude the eyewitness testimony of the four victims in favor of trying to impeach such testimony at trial was professionally unreasonable, thereby satisfying [Strickland](#)’s first prong. Indeed, it was contrary to the protections that the Supreme Court has erected to deal with the widely recognized problems with eyewitness testimony. Following the Court’s decision in [United States v. Wade](#), 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), which held that the Sixth Amendment guarantees a defendant the right to have counsel present during a post-indictment “lineup” identification procedure, *id.* at 228-39, 87 S.Ct. 1926, a series of subsequent cases recognized that due process requires trial courts to scrutinize whether the pretrial identification procedures employed in a particular case were “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *80 [Simmons](#), 390 U.S. 377, 384, 88 S.Ct. 967 (1968); see also [Stovall v. Denno](#), 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), overruled on other grounds by [Griffith v. Kentucky](#), 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).

A growing body of scientific research, moreover, has clarified and expanded what factors a court should examine in determining whether to exclude eyewitness identification testimony. As this Court has observed, this “literature indicates that certain circumstances surrounding a crime — including the perpetrator’s wearing a disguise, the presence of a weapon, the stress of the situation, the cross-racial nature of the crime, the passage of time between observation and identification, and the witness’s exposure to [the] defendant through multiple identification procedures — may impair the ability of a witness ... to accurately process what she observed.” [Young v. Conway](#), 698 F.3d 69, 78-79 (2d Cir. 2012); see generally National Research Council, [Identifying the Culprit: Assessing Eyewitness Identification](#) (2014) (hereinafter “[Identifying the Culprit](#)”).⁷

All of the impairing factors referred to in [Young](#) were present here. The perpetrators were wearing disguises that partially obscured their facial features; one robber was wearing a “half ski mask” and the other was wearing a “skully.” They were armed, thus suggesting the widely-recognized phenomenon known as “weapon focus,” by which the presence of a weapon at the crime scene tends to draw the eyewitnesses’ attention, distracting them from the face of the perpetrator. See [Identifying the Culprit](#) at 93-94; [State v. Henderson](#), 208 N.J. 208, 27 A.3d 872, 904-05 (2011). The aggressive behavior of the robbers toward their victims plainly placed the latter under stress, and, as the Supreme Court

of New Jersey pointed out in revising its eyewitness procedures, research has shown that “an eyewitness under high stress is less likely to make a reliable identification of the perpetrator.” *Id.* at 904; see also, e.g., [State v. Lawson](#), 352 Or. 724, 291 P.3d 673, 744 (2012); Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int’l J. L. & Psychiatry 265 (2004).

Also, while the victims were black (the Scrogginses) and Hispanic (the Martinezes), the individual identified as a robber (Nolan) was white. It is well established that eyewitnesses are materially less accurate when identifying individuals of a different race, see [Lawson](#), 291 P.3d at 688; [Henderson](#), 27 A.3d at 907 (citing academic sources), or a different ethnicity, see Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. Applied Soc. Psychol. 972 (1988); *Identifying the Culprit* at 96. But cf. [Henderson](#), 27 A.3d at 917 (distinguishing what it called “the dearth of social scientific research in the field of cross-ethnic bias from the convincing social science data demonstrating the potential unreliability of cross-racial identifications.” (internal quotation marks omitted)). Further still, many weeks elapsed between the time of the robbery and the time the victims were shown the photo array containing Nolan’s photo, and it is also well established that eyewitness identifications are materially less accurate if made more than a short time after the crime. [Lawson](#), 291 P.3d at 688; see also, e.g., Kenneth A. Deffenbacher et al., *Forgetting *81 the Once-Seen Face: Estimating the Strength of an Eyewitness’s Memory Representation*, 14 J. Experimental Psychol.: Applied 139 (2008).

Finally, and perhaps most egregiously, the police employed highly irregular procedures in pursuing the witnesses’ identification of Nolan, potentially biasing the victims’ identifications by, for example, allowing them to talk among themselves about Nolan’s identification and allowing them to view his photos on Facebook. Studies have demonstrated that the memories of eyewitnesses are extremely susceptible to contamination by external information, a common source of which is “cowitness interaction.” See [Lawson](#), 291 P.3d at 710 (citing Elin M. Skagerberg, *Co-Witness Feedback in Line-Ups*, 21 Applied Cognitive Psychol. 489 (2007)).

“Even the best criminal defense attorneys would not defend a particular client in the same way.” [Strickland](#), 466 U.S. at 689, 104 S.Ct. 2052. But in light of the foregoing characteristics of the witnesses’ identification testimony here, we conclude that an effective defense counsel would have vigorously contested the admissibility

of the testimony.

Here, however, defense counsel, after initially bringing such a motion, abandoned it on the theory that the defense would be better off impeaching the eyewitnesses at trial. We do not understand how he could have reached that conclusion. If defense counsel had succeeded in the exclusion motion, it would appear that the case would have been effectively over in light of the Government’s heavy reliance on the eyewitness identifications. And even if defense counsel had lost the motion, they would have educated the judge as to the frailty of the identifications and would, of course, still have been free to fully impeach the eyewitnesses at trial. Even making “every effort ... to eliminate the distorting effects of hindsight,” [Bell](#), 500 F.3d at 156 (quoting [Strickland](#), 466 U.S. at 689, 104 S.Ct. 2052), we conclude that this strategy fell outside “the wide range of reasonable professional assistance.” [Strickland](#), 466 U.S. at 689, 104 S.Ct. 2052.

[4]Counsel also failed to render reasonable professional assistance by neglecting to call or even consult an expert to testify about the unreliability of the eyewitness identifications under the egregious circumstances presented in this case.⁸ This Court came to a similar conclusion in a comparable case. In [Bell](#), the eyewitness was the victim of an attack, and endured significant blood loss and a lengthy period of sedation before identifying his assailant. See generally 500 F.3d 149. Although the victim’s identification was virtually the only evidence against defendant Bell at his trial, Bell’s counsel did not consult an expert who could have opined on whether the victim’s identification was reliable despite the medical trauma he had experienced. *Id.* at 155-56. This Court held that counsel’s performance was ineffective, as an expert could have explained that the eyewitness’s identification was highly unreliable for reasons “beyond the ken of the typical juror.” *Id.* at 156 (quoting [People v. Taylor](#), 75 N.Y.2d 277, 552 N.Y.S.2d 883, 552 N.E.2d 131, 135 (1990)).

Here, similarly, the eyewitness testimony was sufficiently unreliable in ways not readily apparent to a lay jury. For example, as noted above, persons of a given race or color are not nearly as good at perceiving and remembering the fine facial features of someone of a different race or *82 color as they are at perceiving such features of someone of their own race or color. But it appears to us unlikely that this is common knowledge among typical jurors. Moreover, if defense counsel had consulted an expert on eyewitness identifications, in light of the state of the relevant science referred to above, they would surely have become more aware of the factors causing the eyewitness

identifications here to be problematic, and would not have so readily abandoned their exclusion motion. Indeed, the expert might well have provided an affidavit greatly strengthening that motion.

[5]To be sure, [Strickland](#) ordinarily does not require defense counsel to call any particular witness. See [United States v. Best](#), 219 F.3d 192, 201 (2d Cir. 2000) (“[W]e [do not] see anything unreasonable in counsel’s decision not to call the potential witnesses.”). But under the unusual circumstances presented here, as in [Bell](#), counsel could not render effective assistance without input from an expert. Counsel therefore had a duty at least to consult an expert and consider whether to call her to the stand.

[6] [7]As to [Strickland](#)’s second prong, we find it abundantly clear that counsel’s actions so prejudiced the outcome of the trial that we must grant Nolan’s ineffective assistance claim. See 466 U.S. at 694, 104 S.Ct. 2052. Without the identifications, the probative value of the Government’s remaining evidence against Nolan would have been limited at best.⁹ Therefore, had defense counsel successfully excluded the eyewitness identifications and Government nonetheless proceeded with the prosecution, a reasonable jury would likely have rendered an acquittal, assuming that the judge would have even let the case go to the jury.

[8]The only possible argument that Nolan might not have been prejudiced by the performance of defense counsel — and the argument that persuaded the district court — that we can conjure is that the jury instructions told the jury all they needed to know about eyewitness identifications. Among other factors, the district court instructed the jury to “ask whether the witness was able to observe and had an adequate opportunity to observe the person who committed the crimes charged[,] ... whether the witness is positive in the identification, ... whether the witness gave a description of the person who committed the crime, and ... [whether] the identification was made under circumstances that may have influenced the witness.” [2018 WL 1166726](#) at *5. But this was not sufficient to cure the aforementioned problems with the identifications that would not have been apparent to a lay jury. As this Court has noted, “[m]any of these factors are counterintuitive and, therefore, not coterminous with ‘common sense.’ ” [Young](#), 698 F.3d at 79. A lay juror would not know, for example, about the likely impact on perception of extreme stress and weapon focus, nor would the juror necessarily understand that the detective’s identification practices were highly suggestive. Accordingly, we find more than “a reasonable probability that ... the result of the proceeding would have been

different” had defense counsel effectively *83 contested the eyewitness identification testimony. 466 U.S. at 694, 104 S.Ct. 2052.

The Facebook “Gun” Photo

[9]Although the foregoing is sufficient to warrant **reversal**, there is still another, independent ground for such relief. Nolan argues that the performance of defense counsel at trial also failed to pass constitutional muster because counsel made no effort to preclude the Government from introducing a highly prejudicial Facebook photo of Nolan posing with what appears to be a handgun, but which was actually a BB gun.¹⁰

[10]We agree. Although [Strickland](#) instructs courts to begin with a “presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy,’ ” 466 U.S. at 689, 104 S.Ct. 2052 (quoting [Michel v. Louisiana](#), 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)), we again see no strategic rationale for defense counsel’s failure to move to exclude the photo. To be clear, we do not fault defense counsel for seeking to admit the favorable portions of the post-arrest video, and had the district court already ruled that the Facebook BB gun photo was admissible, then it would seem to have become a reasonable fallback strategy for defense counsel to move to admit the entire video under [Rule 106](#). But as in the analysis above, we fail to understand why defense counsel did not first seek to exclude the gun photo.

Indeed, the district court may well have granted the motion. The photo is not direct evidence of the charged crime, inasmuch as the photo does nothing to place Nolan at the time and place of the robbery. And the Government’s proffered rationale — that the photo is supposedly probative of Nolan’s access to, knowledge of, and comfort with firearms — is weak on its face (especially in light of the fact that it is a BB gun) and must be weighed against the obvious prejudice to the defendant that would result from showing the jury a photo of a defendant charged with armed robbery posing with a gun of any kind. See [Fed. R. Evid. 403](#). In contrast to the district court, then, we see no valid ground for defense counsel not to have at least attempted to have the court exclude the photo. See [2018 WL 1166726](#) at *13.

We think defense counsel’s failure to seek a limiting instruction for the photo also constituted ineffective assistance of counsel. We are mindful that in some cases,

effective counsel might elect not to seek a limiting instruction for fear that “the instruction may call the jury’s attention to the harmful evidence.” [PRL USA Holdings, Inc. v. U.S. Polo Ass’n, Inc.](#), 520 F.3d 109, 117 (2d Cir. 2008). But such reasoning does not apply here. As noted above, the Government moved in limine for the court to admit the photo. This should have put defense counsel on notice that the Government planned to focus on this evidence *84 at trial. And indeed, the Government did highlight the photo in its summation, arguing to the jury that the photo provided evidence of the defendant’s “access to firearms and knowledge of them.” Trial tr. at 840. This portion of the summation in effect implied that the jury could consider the photo as evidence of Nolan’s propensity to commit gun crimes. Given all of this, counsel’s decision never to seek a limiting instruction for the photo fell below the level of reasonable professional effectiveness required by [Strickland](#).

[11] [12] We also find that defense counsel’s handling of the photo, both in not seeking to exclude it and in not seeking a limiting instruction to accompany its admission, was sufficiently prejudicial to Nolan that “there is a reasonable probability that ... the result of the proceeding would have been different” had the photo not been admitted. [Strickland](#), 466 U.S. at 694, 104 S.Ct. 2052. Concededly, the photo was of much less significance to the Government’s case than the eyewitness identifications. But it nonetheless likely served to elicit an emotional reaction among the jurors in light of the fact that the defendant was being tried on a charge of armed robbery.

Deciding Ineffectiveness of Counsel

[13] [14] We are mindful, of course, of the Supreme Court’s instruction, to which this Court often refers, that “in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance.” [Massaro v. United States](#), 538 U.S. 500, 504, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003). As noted in footnote 2, above, though, the defendant made a § 2255 motion in the district court, which the court denied. And on May 4, 2018, the defendant obtained an order from this Court consolidating his direct and § 2255 appeals. The § 2255 ineffectiveness of counsel claim is thus properly before us for resolution.

Conclusion

For the foregoing reasons, we hold that Ralph Nolan did not receive the effective assistance of counsel guaranteed by the Sixth Amendment. We **reverse** the district court’s denial of Nolan’s § 2255 motion, **vacate** his conviction on all three counts, and **remand** the case to the district court for further proceedings consistent with this opinion.

All Citations

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Footnotes

- 1 Judge Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.
- 2 Additionally, on direct appeal, Nolan challenges some of the district court’s evidentiary rulings, and he also challenges his conviction on Count Three on the ground that attempted Hobbs Act robbery is not a “crime of violence” under the definition in 18 U.S.C. § 924(c)(3)(A). See [United States v. Davis](#), — U.S. —, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019). Prior to oral argument, this Court consolidated Nolan’s direct appeal with his § 2255 petition. Because we grant Nolan’s ineffective assistance claims and **vacate** his conviction on all three counts, we need not and do not consider his alternative grounds for relief. Instead, we **remand** the matter so that, if the Government chooses to retry Nolan, the district court can consider these alternative grounds with the benefit of additional briefing on recent developments in the case law interpreting § 924(c).
- 3 After the robbery, the NYPD initially circulated an “information needed” poster identifying the robbers as two Hispanic males. At trial, however, Sandra testified that one of the robbers was white. Desiree testified that she had told law enforcement shortly after the robbery that the perpetrators were two Hispanic men, but that one had light skin.
- 4 Lorraine and Desiree were able to locate Nolan’s Facebook page, according to Lorraine’s testimony, because the detective had told her Nolan’s name. There is inconsistent testimony about the detective’s exact role in the Facebook search, but at the very least he was aware of what was happening and did not immediately stop it, and he may have initiated and/or encouraged Desiree and Lorraine to look at Nolan’s photos on Facebook.

- 5 Deyanira Beriguete, Lorraine’s home health aide, and the only one of the five victims not granted immunity for her testimony, was also shown the photo array but did not make an identification. When asked at trial whether she would be able to recognize either of the two individuals who committed the robbery, she replied, “I don’t know.” D. Beriguete, trial tr. at 193.
- 6 For example, counsel cross-examined Desiree about her initial statement to the police that the robbers were Hispanic, her statement that she was only 75% sure of her identification of Nolan based on the photo array, and the fact that she and her mother looked at Facebook photos of Nolan. Counsel cross-examined Christopher about his initial identification of the robbers as Hispanic and the fact that he did not recognize “White Boy” at the time of the robbery. Counsel also cross-examined Lorraine about looking at Nolan’s Facebook photos. And finally, counsel cross-examined Sandra about the identification of both robbers as Hispanic, the fact that she and Christopher did not recognize “White Boy” during the crime, and the fact that she viewed and discussed Nolan’s Facebook photos with Desiree and Christopher before identifying Nolan from a photo array. The defense also called to the stand Lorraine’s son, Robert, who was in the room with her and the detective when she made her photo array identification of Nolan. The defense apparently expected him to testify that Lorraine was uncertain in her identification until she viewed the Facebook photos, but he did not actually say this.
- 7 Such research has already led the Supreme Courts of two states to substantially change their approach to evaluating eyewitness identifications. [State v. Henderson](#), 208 N.J. 208, 27 A.3d 872 (2011) (replacing the existing test for admissibility of eyewitness identifications with one that incorporates the findings of scientific research on eyewitness reliability); [State v. Lawson](#), 352 Or. 724, 291 P.3d 673 (2012) (same).
- 8 In support of Nolan’s § 2255 petition to the court below, one of Nolan’s trial counsel wrote a letter to the trial court, conceding that he had rendered ineffective assistance on this ground. [United States v. Nolan](#), No. 14-cr-555 (GBD), Dkt. 115, Ex. 1 (Oct. 9, 2015).
- 9 In addition to the prejudicial Facebook photo discussed below, the Government introduced evidence that Nolan knew co-conspirator Odiot, that Nolan — without knowledge that the police considered Odiot a suspect — told the police that Odiot had set him up, and that Nolan admitted to being known as “White Boy.” The Government also drew a connection between the fact that the victims had been tied up with cable wire and the fact that Nolan worked as a cable installer. None of this comes close to establishing guilt by any standard, let alone beyond a reasonable doubt.
- 10 Nolan also argues that counsel was ineffective for failing to move to exclude two other pieces of “bad act” evidence: first, a reference he made in his post-arrest interview to a juvenile conviction, which he went on to explain was the result of a fistfight among teenagers, and second, a fleeting reference to a prior arrest of Nolan in the testimony of the NYPD detective who conducted the photo array sessions. While we are troubled by the admission of the prior conviction without a limiting instruction, see [United States v. McCallum](#), 584 F.3d 471, 478 (2d Cir. 2009), we find it unlikely that this evidence was so prejudicial in the eyes of the jury that counsel’s decision not to move to preclude it constituted ineffective assistance. In any event, we need not address the question in detail since we grant Nolan’s claim as to the Facebook BB gun photo. We also need not reach Nolan’s third independent ground for his ineffective assistance claim — his counsel’s failure to introduce purported alibi testimony from the defendant’s father.
- 11 Nolan also argues that counsel erred by inadequately investigating the circumstances of the photo, as well as Nolan’s claim that the gun in the photo was a BB gun. But since the Government in its summation told the jury that the weapon was a BB gun, any such error had limited prejudicial effect.