COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against- No. 76

JORGE ESPINOSA,

Appellant.

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20 Eagle Street
Albany, New York
October 17, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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CHIEF JUDGE WILSON: Last matter on today's calendar is number 75, People v. Jorge Espinosa.

MR. FELDMAN: Good afternoon. May it please the court. Sam Feldman for Appellant Jorge Espinosa. I'd like to reserve three minutes for rebuttal.

CHIEF JUDGE WILSON: Yes.

MR. FELDMAN: Thank you, Your Honor.

This is a DNA case in which the prosecution introduced the crucial DNA evidence through the wrong witness.

JUDGE GARCIA: Counsel, is this the - - - is this the elusive cold hit case that we've never decided?

MR. FELDMAN: I would say it's not, for a couple of reasons. First of all, there were, of course, two different DNA profiles at issue in this case. One was a - - - a post-arrest buccal swab, you know, that was taken pursuant to a court order for Mr. Espinosa - - -

JUDGE GARCIA: And a CODIS hit?

MR. FELDMAN: Sorry?

JUDGE GARCIA: And a CODIS hit?

MR. FELDMAN: Yes.

JUDGE GARCIA: A cold hit? Did both go in at trial?

MR. FELDMAN: The CODIS hit didn't. It was the - - - the two that went in at trial were the profile from the

buccal swab and then the profile from the crime scene evidence, which did have an identified suspect, you know, listed in the OCME case file. It just - - -

JUDGE CANNATARO: Just to be clear, the buccal swab was from a prior arrest and prosecution, right?

MR. FELDMAN: That's right. Of the same - - - of the same person.

JUDGE CANNATARO: So how is this not the cold case that Judge Garcia is looking for?

MR. FELDMAN: Well, it's a a fair question. I think the sort of classic cold hit scenario is one where, you know, evidence is fed into - - -

JUDGE GARCIA: It is in Austin, right? Austin was a confirmatory - - - they put in a confirmatory swab, right?

MR. FELDMAN: I believe the only difference between this case and Austin is that the buccal swab was taken pursuant to a court order for a different case rather than the same case. But it was the same defendant.

CHIEF JUDGE WILSON: So can I ask you what concerns me I guess, most about this case, which is it comes on an ineffective assistance claim only; is that right?

MR. FELDMAN: Yes, that's right.

CHIEF JUDGE WILSON: And so we have a brief SSM

decision, People v. Rodriguez, that says, "Even assuming that counsel failed to assert a meritorious confrontation clause challenge, the alleged omission does not involve an issue that was so clear cut and dispositive that no reasonable defense counsel would have failed to - - - to assert it".

The only difference that I can really see between the two is the timing of when the trials took place. And unless I'm missing something, you'd have to show that something became clear by the March 2014 trial here - - - I'm sorry, March 26 trial here, that was not clear in the March 24 trial in Rodriguez.

MR. FELDMAN: Well, I think there's two important differences that go to the factual context, as well as the differences in the legal context. Those two differences in the factual context are, first of all, the lawyers - - - and much of this is in the First Department decision in Rodriguez. Counsel in Rodriguez did object to the DNA evidence at trial. Did object and - - - and made sort of, if not the perfect objection, at least an objection to much of the DNA evidence. Objected to, and I'm quoting from the First Department, introduction of reports of conclusions reached by nontestifying examiners and urged that the admissible evidence from OCME's file should be limited to the pages of documents reflecting raw data that had been

personally reviewed and initialed by the analyst, in that case - - -

JUDGE CANNATARO: Are you reading from the Appellate Division decision there?

MR. FELDMAN: Yes. The First Department. So in other words, counsel - - -

CHIEF JUDGE WILSON: The First - - - the First Department, I think considered that claim on the merits, even though it deemed it unpreserved, I think. And the only thing that came to us was the ineffective assistance claim.

MR. FELDMAN: Exactly. I - - - my - - - my point in quoting that language is just that where counsel here failed entirely to object to the crucial DNA evidence, counsel in Rodriguez sort of did a lot more towards making that objection. But the second difference that I think is important not to overlook, is that in Rodriguez, and again, this is drawing on the First Department decision, it's actually very difficult to figure out if that even was the right witness. Because that witness' initials were - - - were sort of all over the DNA, the OCME case file there. So even assuming there was an error, it was - - - it was sort of a close call. It was a difficult thing to figure out that there even was an error. And it's less counsel's fault for not noticing a confrontation clause problem

there.

JUDGE GARCIA: Why isn't that analogous to - - - is this a cold hit or not? I mean, we don't know if this is the cold hit case we've been waiting for, and we've never decided that issue.

MR. FELDMAN: Well, I think that the real question is from the perspective of defense counsel at trial, you know, in March 2016, was there - - - was there a reason to object to it? Was there - - -

JUDGE GARCIA: Is it dispositive?

MR. FELDMAN: Is it - - -

JUDGE GARCIA: Isn't that the test? That it would have to be dispositive? Right? It's a winner.

MR. FELDMAN: I would say - - -

JUDGE GARCIA: It would qualify as a winner.

MR. FELDMAN: - - - it was clear cut that counsel should have objected. What would have happened had counsel objected?

JUDGE GARCIA: That's not the standard, right? Isn't the standard that the issue is so dispositive, right? So clear cut and dispositive. And how can we say that's a clear cut issue where we've never had this fact scenario before?

MR. FELDMAN: I would say - - - so again, had counsel made that objection, this was in the middle of

trial. Now, the prosecution could have sought an adjournment to produce a different witness, and perhaps the court would have granted that adjournment. And perhaps - - -

JUDGE GARCIA: My point is we've never decided this scenario before.

MR. FELDMAN: No. That - - - that's true.

JUDGE GARCIA: So how could we say it's so clear cut and dispositive? We have to decide it.

MR. FELDMAN: Well, we don't just have to look to decisions from this court. I mean, I think had counsel made an objection here, as counsel was doing, and other defense counsel was doing in many other cases at the time, to the evidence.

CHIEF JUDGE WILSON: What other courts would you suggest we look at?

MR. FELDMAN: Melendez-Diaz and Bullcoming are the most important cases.

CHIEF JUDGE WILSON: Those are - - - and those cases were around before Rodriguez. So that can't get us there.

MR. FELDMAN: That's true. The - - - so then to get to the third difference between this case and Rodriguez, which is about the legal context, it - - - it's not just about timing of 2014 versus 2016. In 2014, in the

First Department, every First Department case pointed in one way, pointed against an objection. And the First Department had sort of squarely on point cases saying there's no confrontation clause problem here.

But in 2016, in the Second Department, there was multiple Second Department cases pointing towards an objection and finding confrontation clause error. In fact, in one case that had already been decided by the Second Department, the prosecution conceded that there was a confrontation clause error.

So it - - - it's both timing and a difference in departments.

JUDGE CANNATARO: Assuming - - - you know, assuming you don't think that the decision in John, or that you think the decision in John categorically answers this question, you have to at least acknowledge that pre-John, there - - - there was some question on that, right? Because it's hard to understand why the case would be in this court if there wasn't a question.

MR. FELDMAN: There - - - there may have been some question. And again, there was a sort of a departmental split because the First Department had been deciding cases one way, the Second Department had started deciding them a different way. This case was in the Second Department. But I think this case resembles a lot what

this court wrote in 2005, in People v. Turner, in holding counsel ineffective for not raising an objection. This court wrote, "It is true that there existed some New York lower court decisions that might have been cited by the People in opposing", the objection there. "Perhaps the law on this point was not definitively settled", at the time of trial. But this court went on to say, "There were strong indications that the defense had the better of the argument. A reasonable defense lawyer at the time of defendant's trial might have doubted that the statute of limitations argument", which is what it was there, "was a clear winner, but no reasonable defense lawyer could have found it so weak as to not be worth raising". And I think that's this case.

JUDGE CANNATARO: So let's get into that, though, for a second, because I'm having trouble understanding how post-John, assuming, you know, you have the - - - the benefit of the clairvoyance that John is going a certain way, how this - - - this particular motion would have been such a slam dunk winner as to create a Turner error.

MR. FELDMAN: Well, again, I think Turner doesn't require a slam dunk winner. But I - - - I - - -

JUDGE CANNATARO: It has to - - - well, I mean, we've heard the standard from Judge Garcia a couple of times now. It has to be so - - - you know, of such a huge

nature - - - excuse me - - -

JUDGE GARCIA: Clear cut and dispositive.

JUDGE CANNATARO: Clear cut and dispositive. Thank you.

CHIEF JUDGE WILSON: Well, clear cut and dispositive that no counsel would - - - no reasonable counsel would fail to raise it.

MR. FELDMAN: Exactly, Your Honor, yes. But I think - - -

CHIEF JUDGE WILSON: That's the distinction you're making. It's not that it has to be a winner. It has to be a good enough argument that if you were a competent lawyer, you would - - - you would make the argument.

MR. FELDMAN: Yes.

JUDGE CANNATARO: And do you have that post-John?

MR. FELDMAN: Post-John?

JUDGE CANNATARO: Because it's not a cold hit case. And - - - and that's really the - - - that's where everything seems to go off the rails.

MR. FELDMAN: So if we look at the law pre-John decision, there was no - - - no New York case, at least there was no case from this court or the Second Department and certainly no Supreme Court case holding that cold hits are not testimonial. In other words, that a DNA profile

can be testimonial if it's from a profile generated post-accusation, but not if it's pre-accusation.

JUDGE CANNATARO: And there's no case holding that they are.

MR. FELDMAN: Well, I guess, there's - - - there's no reason looking at the Supreme Court cases and looking again at the cases this court had decided - - -

JUDGE GARCIA: I think in Williams, I mean, it's hard to take any lesson from Williams, right?

MR. FELDMAN: Well, there were a couple of things that - - - that got - - - a couple of sort of propositions that got a majority in Williams. There was certainly a majority for rejecting Justice Thomas' approach, for example. Eight - - - Eight justices rejected - - -

CHIEF JUDGE WILSON: Carry on.

MR. FELDMAN: - - - but there were also five justices rejecting the - - - the sort of, quote-unquote, pluralities targeted individual rule. Both Justice Thomas in his concurrence and the dissent spent some time explaining why that rule was completely inconsistent with Melendez-Diaz and Bullcoming, as well as with the common law and - - - and other precedents.

JUDGE CANNATARO: And here we have no targeted individual.

MR. FELDMAN: Right. So in other words, under -

- - under Williams, I think it's clear that you don't need to have a targeted individual because five justices had - - - had signed on to that proposition. Even though there may not have been much else in Williams that produced that kind of agreement.

The other factor, I think, to consider when evaluating counsel's performance here is that there was no reason not to make this objection, which - - - for which counsel could have cited Supreme Court precedent and local precedent. It didn't conflict with any defense counsel was raising. There was no - - -

JUDGE GARCIA: And I think that goes to your earlier statement, so weak as to not be worth raising, goes to that part of the test, which is okay, if it's so dispositive. I think you can still look at, well, was there a strategic reason not to raise it, right? But you still have to get by the first part. So I think, you know, it's not, so weak as to not be worth raising, isn't the standard. That's I think, more on the standard towards, okay, do we need a 440 for this or is it, you know - - - right?

MR. FELDMAN: I mean, I - - - I agree that it's also important to show that it was clear cut that - - - that counsel sort of objected. I think on this record, it - - - it was, first of all, clear cut, you know, assuming

the confrontation clause applied to DNA evidence, which there were cases saying that it did. And assuming that this witness wasn't the right witness, which he clearly wasn't, I think that made it clear cut and on this record, dispositive of the prosecution's case.

Again, this was solely a DNA case. There was no other evidence of identity. And again, I would - - - I would primarily point this court to the language in Turner, which I think is uncannily similar to the situation presented here.

MS. IANNUZZI: Good afternoon. Your honors, ADA Amanda Iannuzzi, on behalf of the respondent, Queens County District Attorney Melinda Katz. May it please the court.

The question here is one of ineffective assistance of counsel, and the analysis here focuses on the state of the law that existed at the time of the representation.

JUDGE RIVERA: Isn't this Rodriguez?

MS. IANNUZZI: It is, Your Honor.

While my - - - you know, counsel references the difference in the underlying facts to a certain extent, it is obviously different from the facts here. But the ultimate fact that binds the two cases is that in either case, there was no specific confrontation clause objection to the admission of those reports. And the issue that was

presented to this court in both cases is exactly the same. It's a claim of single error - - -

JUDGE RIVERA: But he's argued that it wasn't that obvious that the confrontation clause - - - that there was really a confrontation clause objection available to counsel.

MS. IANNUZZI: In? I'm sorry.

JUDGE RIVERA: In Rodriguez.

MS. IANNUZZI: Well, in Rodriguez the - - - it's true that the counsel - - - the attorney in that case had made some objection and there was also - - - I believe it was a motion from the People discussing redactions of the document - - - but he never actually raised a confrontation clause objection, specifically whether or not that report was testimonial. And that is the same as the case here.

Whether or not this report, the - - - the two reports that were made - - -

JUDGE RIVERA: Because I thought he was arguing there were reasons that are factually distinguishable between Rodriguez and here for why the counsel - - - excuse me, would not have done that.

MS. IANNUZZI: Well, this court's decision didn't focus on what the attorney in that case did or ultimately focus on what he didn't do, which was raise the objection. The decision of this court wasn't based on, well, the

attorney in that case did a little bit more and kind of, sort of, raised an objection. He failed to raise the objection. The analysis of this court was, this was not a clear cut and dispositive issue at that time, and therefore, counsel was not ineffective even if he had a meritorious argument. And that's the same analysis that this court should take here in this case.

JUDGE RIVERA: Yeah. On the one paragraph, ma'am. Let me - - - let me ask you this. What about his point regarding the state of the law and the Second Department?

MS. IANNUZZI: Well, there were decisions, as counsel referenced, of the state of the law that some cases had ruled for and some cases had ruled against. I know the People - - - we did cite to some of those in our brief. Ultimately, counsel had a few cases to look at that were the most senior binding precedent. It was this court's decision in Brown, and it was the series of federal cases from the United States Supreme Court. Melendez-Diaz, Bullcoming, and ultimately, the fractured decision of Williams. Williams, of course, being the only case from the Supreme Court to specifically deal with the DNA issue.

Counsel justifiably could look at this court's decision in Brown, which admitted the DNA evidence with no confrontation violation. And look at the analysis in

Williams, where four plus one says it comes in on two different analysis, the more narrow primary purpose test and then also Justice Thomas' formalized sworn document rationale, and say, well, in each of those two analyses, my reports here would come in. So it would be completely reasonable for counsel on the facts of this case, a cold hit case, to look at these cases and say, I don't believe I have a viable objection.

CHIEF JUDGE WILSON: John had also been briefed and argued by the time the trial and the underlying case occurred, right? It hadn't been decided.

MS. IANNUZZI: Correct.

CHIEF JUDGE WILSON: So that might have been a reason that things were different from the time of Rodriguez. No?

MS. IANNUZZI: I don't believe so, Your Honor. And - - - and the reason for that is, as it was referenced earlier, it's that the Sixth Amendment doesn't require clairvoyancy. So - - - so counsel might have been aware of the briefing, might have been aware of the oral arguments, but the oral arguments are not necessarily indicative of how the court ultimately may rule. And certainly now, with the benefit of hindsight, of knowing how this court ruled in John, knowing the intricacies of the court's decision, the emphasis on electrophoresis and raw data, that is

something that even at that time, counsel - - - it would not be reasonable for counsel to say - - - to at least to say, oh, you know, attorney should have known that in a couple of weeks we're going to emphasize the - - - the importance of the electrophoresis stage.

JUDGE CANNATARO: What about the trend in the other courts? You know, what's going on in the Second Department and the Supreme Court decision in Williams? Is that a legitimate area of inquiry in determining whether or not there is a Turner error taking place?

MS. IANNUZZI: Well, I would say Turner - - - Turner is a - - - is a very distinguishable case because that was a black letter law issue. There was law that, although it was from, I think, like a hundred years prior, it was still nevertheless in existence and on point at the time of the representation there. So the fact that things are changing and decisions were in the works and there's fractured opinions, I think is very relevant to the analysis of what is going on at the time of the representation here.

JUDGE CANNATARO: So would you say that should have motivated defense counsel to make the objection more?

MS. IANNUZZI: If - - - I think if there were a different set of facts here, then potentially the answer to that question would be different, that counsel should have

raised the objection. But as was referenced earlier, this was a cold hit case. It was a DNA report that was generated before the defendant here - - -

JUDGE RIVERA: But what about his argument that five Justices in Williams rejected? What would be the foundation for such an argument?

MS. IANNUZZI: Well, I think that all - - - the fact that all nine justices of the Supreme Court couldn't agree on an analysis, for or against admission of the document, certainly underscores that this was not a clear cut...

JUDGE RIVERA: Well, yeah, they couldn't- - - I get your point about that. But what about the argument that there are five justices who are rejecting the foundation of the argument on the cold hits?

MS. IANNUZZI: I think then that the plurality of the - - - that decision, I think, becomes very relevant when you then consider that in connection with this court's decision in Brown. There was - - -

JUDGE GARCIA: But isn't that what you said before, it's the plurality that in that situation plus Thomas? Thomas being the swing vote, kind of like the circuit is doing in Garlick, right? In a different context. But you have the four judge plurality on that issue, plus you have no ribbons and stamps under Thomas, so

you get five votes.

MS. IANNUZZI: Correct. And could counsel have raised the argument, they're relying on this fractured decision? Yes, he could have. But I think that the facts of this case, the decisions that existed at that time, and then the possible strategy of counsel knowing that if I raise the objection, I ultimately win the objection. That then opens the door for the prosecutor to call in whichever witnesses they need to get the document into evidence, to avoid the confrontation clause, and then overwhelm the jury with evidence on the validity of those test results. And by doing that, counsel, in this case, when you examine the strategy he did take, he would have lose an avenue of attack, which was what he was trying to do. It was a two-pronged attack on the evidence. It was - - -

JUDGE RIVERA: So - - - so you mean when there's an obvious - - - I mean, when it's obvious. Where even you would agree it's obvious, counsel should have the strategy not - - - not to raise the objection, because the ADA might actually be able to address the deficiency?

MS. IANNUZZI: Well, I think that the strategy here in this case, it was important. It was certainly a factor. But ultimately, I think that based on the fact of - - - the - - - the facts of this case and the law that existed at that time, the counsel was reason - - - it was

completely reasonable for him to ultimately conclude that he did not have a viable objection.

JUDGE CANNATARO: So counsel here chose a different tact, as you say, and it was a powerful one, right? It was bad collection of evidence. It - - - the evidence was moved and no one told the officer who was collecting it. You know, he - - - he took a gambit on that. And I understand your argument to be that, you know, that's why he chose not to raise the confrontation argument.

My question - - - my response to that is, why not do both? I mean, you could certainly argue this in the alternative. So - - - so why not do it?

MS. IANNUZZI: Well, I think that's - - - I think what Your Honor is getting to is essentially looking at it now with the benefit of hindsight.

JUDGE CANNATARO: Is that it?

MS. IANNUZZI: I - - - I think it's a sense of essentially Monday morning quarterbacking, for lack of a better term, to say, well, counsel could have just done this and he would have been fine either way. I think - - -

JUDGE CANNATARO: So it was a legitimate strategic decision on his part to just say, you know what, I'm not going to bother with this motion that I don't think I'm going to win. I'll focus instead on the - - - this

other aspect.

MS. IANNUZZI: I do believe it was a legitimate decision of him based on the law that existed at that time.

JUDGE GARCIA: Can we get to that point - -

JUDGE RIVERA: That's a little bit different because he - - - he's basically making all of the arguments to the jury that he would have made to the judge.

MS. IANNUZZI: Well, an attorney may not necessarily have an argument that - - - against an admissibility of a certain piece of evidence. But - - -

JUDGE RIVERA: But in going to Judge Cannataro's point, why not do both? I mean, you've already - - - it's obvious the lawyer had thought this through, right? And thought about what are the problems with - - - with this particular testimony that I want to attack, right?

MS. IANNUZZI: Well, I think to go back to my - - - my earlier point, he certainly could have. He could have made an argument against ineffectiveness or - - - I'm sorry, an argument for admissibility and then later on argued the weight of the evidence, the strength of that evidence, could argue that the People didn't bring in the right witness. Ultimately here, is do we have to, essentially, look at the entire performance of this attorney and throw it into the garbage because he didn't do that single act?

JUDGE HALLIGAN: But you're - - - sorry. Go ahead.

MS. IANNUZZI: Oh, just to - - - just to finish that thought. It was just basically to say, you know, ultimately here, we do not have to completely throw all of his effective representation, which is undeniable on the face of the record, into the garbage can, because he didn't do the single act, because the issue at that time was not clear cut and dispositive.

JUDGE HALLIGAN: Would your answer to Judge Cannataro's question be the same if this arose after John was decided?

MS. IANNUZZI: No, I don't believe so. And that's because that this is a cold hit case, which, as Your Honors had mentioned when my opponent was arguing, is still a question that is left unanswered even after John. So while John might have stirred the pot a little bit more, it certainly would not and - - - and does not appear to answer this question of a cold hit case, which is the facts of this particular case.

JUDGE HALLIGAN: So - - - so your view is that it has to be clear cut that the objection would prevail in order to require that it be put on the table?

MS. IANNUZZI: I think, Your Honor, just kind of reformulating the standard, which is, is it a clear cut and

dispositive issue? So I think either - - - either way you say that statement, it is the same thing. It - - - it - - -

JUDGE HALLIGAN: I guess, what I'm getting at is, is it your view that you can never have an ineffective assistance claim on anything that is, in any respect, an open question that hasn't been squarely decided?

MS. IANNUZZI: Well, I think with respect to this case, it certainly was an open question and not clearly decided at that time.

JUDGE CANNATARO: Would a - - - would a different articulation be that you can't have an ineffective assistance claim on a single error issue where it's not clear cut and dispositive?

MS. IANNUZZI: I think that's - - - I think that is the better way to formulate a standard if we were to create one with this case. Because ultimately, this is a claim of single error, ineffective assistance. The failure to do the single act of failing to raise the confrontation clause objection.

CHIEF JUDGE WILSON: And you think that's true even after John? Even today, if defense counsel failed to make a confrontation clause argument in a cold hit case, you would say that's not ineffective?

MS. IANNUZZI: I would. If there are no further

questions, the People will rest on our brief.

CHIEF JUDGE WILSON: Thank you.

MR. FELDMAN: I'd like to, with the court's permission, push back on the idea that this was a classic cold hit case. But if possible, before that, I'd just like to continue the conversation that was just being had. Well, actually, no, sorry. I'll do that first. So a classic cold hit case is one where the DNA profile is produced with no suspect in mind. That isn't this case. Both of these DNA profiles were produced with suspects in mind. And one case, it was Mr. Espinosa himself.

Now, counsel could have refrained from making an objection. Or had he made an objection, the prosecution could have argued that that DNA profile of Mr. Espinosa was produced for a different accusation, not this one. And therefore, it was testimonial as to that case, but not this case. But as far as I know, had the trial court accepted that argument, it would have been the first court in the United States perhaps to accept that argument.

JUDGE CANNATARO: Can you just explain - - - explain that in a little more detail for me? Are you saying that Mr. Espinosa was a known suspect because he had been charged in a prior crime? Because my understanding was, other than the fact that there was some visual identification by one of the residents of the apartment,

nobody had any idea who had committed the break in.

MS. IANNUZZI: That's right. So what happened was, in an earlier case, Mr. Espinosa was arrested in 2006. There was a court order to take his DNA. A police officer took it. It was sent to the OCME lab. They produced this DNA profile for the purpose of prosecuting him in that case. And then, you know, a decade or so later, it was used in the trial of this case. But it was produced for the purpose of prosecuting Mr. Espinosa, for it - - - for a crime.

JUDGE CANNATARO: For a prior crime?

MR. FELDMAN: For a prior crime. But if you look at the definition of what's testimonial in all of the Supreme Court's cases where it's addressed this, all the majority opinions, it's always about the circumstances of the statement's production. It's never about the circumstances of the statement's use. The Supreme Court always says, you know, and they've offered a few different definitions in Crawford and Davis and other cases, of what's testimonial. But it's always - - -

JUDGE CANNATARO: Well, it's - - - I'll grant to you that that's a very legitimate question, right? You know, maybe it's not what you would call classically testimonial here, but the - - - his DNA profile could very well have been testimonial in the prior prosecution. But

that's a lot to go into on an ineffective assistance case. I mean, wouldn't the better thing to do from a judicial economy perspective to be, wait for that case to come here, present it fully on its merits?

MR. FELDMAN: Right. I think that's a reason to - - - to reject the prosecution's sort of counterargument that would have been made to the objection had it been made in this case. In other words, to put that more simply, the objection would be straightforward. The objection is this was testimonial; it was produced for the purpose of prosecution. The argument against that objection would be, I think, strange and - - - and trying to produce a new rule that has - - - never been endorsed by any court, as far as I know. Certainly hadn't been at the time of trial in this case. So in other words, the novel rule that - - - that, you know, shouldn't really be considered in this case is the one that the prosecution is advocating, which is that a statement loses its testimonial character when it's used at a subsequent trial of the same defendant.

I'm happy to answer other questions on that. But I did want to other - - - just make one other quick note about, you know, what constitutes ineffective assistance of counsel, how clear cut does it have to be. I think the touchstone of this court's jurisprudence on ineffective assistance of counsel has always been meaningful

representation. And so the question is, you know, what counts as meaningful representation within the context of whatever case is on the table?

And when the case is entirely about DNA evidence, the only evidence of identity is this DNA testing. That's what the trial is going to be about. If there's an objection that could keep out that DNA evidence, doesn't meaningful representation mean an attorney who has - - - is familiar enough with the basic law that they know to make that objection? I think that's really the touchstone here. It's, of course, going to be different in different cases. It's going to depend on how - - - you know, how clear it is that this is the wrong witness. It's going to depend on the centrality of the DNA evidence. But meaningful representation in this case, at this time, necessarily meant making this objection.

CHIEF JUDGE WILSON: Thank you.

MR. FELDMAN: Thank you.

(Court is adjourned)

C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of New York State v. Jorge Espinosa, No. 76 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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