

1 Court for the Eastern District of New York, Allyne R. Ross,
2 Judge, denying Petitioner-appellant Derrick Bell's
3 application for a writ of habeas corpus pursuant to 28
4 U.S.C. § 2254. For the following reasons, we reverse the
5 decision of the District Court and remand for the entry of
6 judgment conditionally granting the writ and ordering
7 Derrick Bell's release unless the State provides him a new
8 trial within 60 days.

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1 DENNIS JACOBS, Chief Judge:

2 Petitioner-appellant Derrick Bell, who was convicted of
3 robbery and assault in New York State Supreme Court, Kings
4 County, is seeking a writ of habeas corpus on the ground
5 that his lawyer was constitutionally deficient for having
6 failed to consult a medical expert regarding the reliability
7 of the complaining witness's identification--the only
8 evidence tying Bell to the crime. The witness was shot in
9 the thigh, lost half his blood, was heavily medicated,
10 lapsed into a coma for eleven days, and identified Bell by
11 name after recovering consciousness--notwithstanding that at
12 the scene of the attack he had described his attacker
13 generically, as though the attacker was unknown to him. The
14 District Court denied the petition on the ground that the
15 state court's rejection of Bell's claims was not based on an
16 unreasonable application of federal law, see 28 U.S.C. §
17 2254(d). We reverse.

18 **BACKGROUND**

19 Brentonol Moriah was held up at gunpoint as he was
20 walking in Brooklyn at 2:30 a.m. on July 16, 1996. His
21 assailant, armed with a full-length shotgun, demanded money.

1 Soon after Moriah surrendered the contents of his pockets,
2 headlights flashed from a nearby intersection and the
3 assailant fired into Moriah's thigh and fled, weapon in
4 hand.

5 When the police came to the scene, Moriah was lying on
6 the street, having lost copious amounts of blood. Moriah
7 told the officers that someone tried to rob him and then
8 shot him in the thigh. A police officer testified that
9 Moriah described the perpetrator (in Moriah's words) as "a
10 male black, wearing a lemon-colored shirt." Moriah said
11 nothing to the officers that would evince any familiarity
12 with the shooter; accordingly, the police reports from the
13 crime scene list the perpetrator's identity as "unknown" and
14 "unidentified."

15 For the following eleven days, Moriah was hospitalized
16 in a heavily sedated state, comatose if not actually in a
17 coma. When he regained consciousness on July 28, 1996,
18 Moriah told the detective that his assailant was one Derrick
19 Bell, who had been his neighbor in a rooming house.

20 Bell was arrested on August 14, 1996, and charged with
21 first-degree assault, second-degree assault, fourth-degree

1 grand larceny, and two counts of first-degree robbery. Bell
2 had no prior criminal record.

3 On August 19, 1996, Moriah again named Bell in
4 videotaped grand jury testimony given from his hospital bed.
5 Moriah stated that he continued to take painkillers every
6 four hours and to suffer from memory lapses and dizziness.

7

8 **A. Bell's State Trial**

9 At Bell's trial, Moriah was the only prosecution
10 witness who identified Bell as the assailant. Moriah
11 testified on direct that he and Bell shared a bathroom and
12 kitchen at a rooming house for more than a year, that they
13 spoke occasionally and never argued or fought, and that on
14 the night of the crime he stood face-to-face with Bell for
15 five minutes. On cross, Moriah admitted that he first named
16 Bell eleven days after the crime took place; and that he did
17 not recall speaking with police officers on the night of the
18 crime. Bell's counsel asked Moriah no questions about the
19 medications he was administered while in the hospital
20 (including at the time he first identified Bell as his
21 assailant), nor did he ask about Moriah's memory loss,

1 which, according to Moriah's grand jury testimony, persisted
2 for at least a month after the crime.

3 Dr. Robert Brewer, the emergency room surgeon who
4 treated Moriah on the night of the crime, testified for the
5 prosecution that Moriah lost 50 percent of his blood as a
6 result of the shooting. On cross-examination, Bell's trial
7 counsel inquired about the effect of that blood loss on
8 Moriah's consciousness when he arrived at the hospital.
9 Counsel did not ask about the impact of blood loss on
10 memory, nor did he ask about the medications that were given
11 to Moriah at the hospital.

12 The prosecution called four other witnesses.
13 The policeman who had interviewed Moriah at the crime scene
14 testified as to Moriah's description of his assailant: "a
15 male black wearing a lemon-colored shirt." The detective
16 assigned to the case testified that Moriah first identified
17 Bell as the perpetrator eleven days after the crime took
18 place, and that he was unable to interview Moriah before
19 then because Moriah had been unconscious. Martin Payne, who
20 lived near the crime scene, testified that on the night of
21 the crime, he heard a person scream "no" several times,

1 followed by a gunshot; however, Payne did not see the
2 shooting. Richard Edmonds, the landlord of the rooming
3 house where Moriah and Bell once lived, testified about his
4 tumultuous landlord-tenant relationship with Bell.

5 Bell testified that he left work around midnight to
6 join friends, and they all played cards until five o'clock
7 the following morning. Bell's three alibi witnesses
8 confirmed that they played cards with Bell on the night in
9 question.

10 The jury convicted Bell of first-degree robbery and
11 second-degree assault. The trial court sentenced Bell to
12 concurrent sentences of 12½-to-25 years on the robbery count
13 and seven years on the assault count, the maximum term for
14 both crimes.

15 16 **B. State Appeal**

17 Bell filed a timely notice of appeal in New York State
18 Supreme Court. His direct appeal asserted various claims of
19 ineffective assistance of trial counsel but did not
20 challenge counsel's failure to consult a medical expert.
21 The Second Department affirmed, People v. Bell, 298 A.D.2d

1 398 (2d Dep't 2002), and the New York Court of Appeals
2 denied leave to appeal. People v. Bell, 99 N.Y.2d 555
3 (2002).

4 On February 13, 2004, Bell filed a motion to vacate his
5 conviction pursuant to N.Y. Crim. Proc. Law § 440.10.

6 There, for the first time, Bell argued that his trial
7 counsel was ineffective for having failed to consult a
8 medical expert regarding the effects of trauma, blood loss
9 and painkillers on Moriah's memory.¹ In support of his §
10 440 motion, Bell submitted the affidavit of Dr. Elkhonon
11 Goldberg, a neuropsychologist affiliated with New York
12 University and Columbia University, who reviewed the police
13 reports from the case, Moriah's grand jury and trial
14 testimony, and the trial testimony and affidavit of Dr.
15 Brewer. Dr. Goldberg opined that: "Mr. Moriah's testimony
16 contains unequivocal evidence that he suffered from
17 retrograde amnesia for the events predating the loss of

1 ¹ Other grounds for asserting ineffective assistance
2 were presented in Bell's § 440 motion and in the habeas
3 petition, but those grounds are not before us here, as the
4 Certificate of Appealability is limited to the medical
5 expert issue. For the sake of simplicity, we refer to this
6 sole remaining claim as Bell's "ineffective assistance
7 claim."

1 consciousness"; the retrograde amnesia was exacerbated by
2 such anxiolytic and amnestic medications as Dr. Brewer
3 attested were likely administered to Moriah in the emergency
4 room;² false memories can be persistent and dominant,
5 overriding true memories; and Moriah's was unlikely to have
6 regained full consciousness when he first named Bell.
7 Accordingly, Dr. Goldberg concluded that Moriah's
8 identification of Bell was unreliable.

9 On October 4, 2004, the state court denied Bell's § 440
10 motion without a hearing. It applied N.Y. Crim. Proc. Law
11 § 440.10(2)(c) to Bell's ineffective assistance claim,
12 citing as unjustifiable Bell's failure to raise the issue on
13 direct appeal.³ The court added: "But if the merits were
14 reached, the result would be the same." The state court

1 ² Mr. Moriah's medical records were marked as exhibits,
2 but the District Attorney's Office has been unable to
3 retrieve them. It is unclear whether Bell could have
4 obtained them by other means or whether he will be able to
5 do so now.

6 ³ § 440.10(2)(c) mandates denial of a motion to vacate
7 where, though "sufficient facts appear on the record of the
8 proceedings underlying the judgment to have permitted, upon
9 appeal from such judgment, adequate review of the ground or
10 issue raised upon the motion, no such appellate review or
11 determination occurred owing to the defendant's . . .
12 unjustifiable failure to raise such ground or issue upon an
13 appeal actually perfected by him."

1 observed that Dr. Goldberg's affidavit was "fraught with
2 hedge words," and questioned whether, at the time of Bell's
3 trial in 1997, Goldberg's expert testimony regarding a
4 "single witness identification issue" would have been
5 admissible in a New York State court.

6 7 **C. Federal Habeas Proceedings**

8 Bell filed his federal habeas petition in the Eastern
9 District of New York on February 5, 2005. On August 12,
10 2005, the District Court issued an opinion denying the
11 petition and declining to issue a Certificate of
12 Appealability. The District Court concluded that Bell's
13 ineffective assistance claim was not procedurally barred
14 because N.Y. Crim. Proc. Law § 440.10(2)(c) is not an
15 "adequate" state ground because New York courts do not apply
16 that rule regularly to ineffective assistance claims, as
17 such claims often depend on extrinsic evidence and therefore
18 must be brought through collateral attack. Bell v. Miller,
19 No. 05-cv-0663, 2005 WL 1962413, at *5 (E.D.N.Y. Aug. 12,

1 2005). This ruling is unchallenged on appeal.⁴ The
2 District Court also concluded that because the state court
3 decision "provided a full analysis" of Bell's ineffective
4 assistance claim, it constituted an "adjudication on the
5 merits," triggering the more deferential standard of review
6 required by the Antiterrorism and Effective Death Penalty
7 Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1). Id. at *6.
8 This ruling is challenged, and decided below.

9 As to the merits, the District Court found that Bell
10 did not show that the failure of trial counsel to consult a
11 medical expert fell below prevailing professional norms in
12 1997 when Bell was tried. Id. at *7. The District Court
13 distinguished the cases Bell relied on as applying only to
14 expert medical testimony in child sexual abuse cases. Id.
15 at *8. The District Court also found that Bell failed to
16 show prejudice, characterizing Dr. Goldberg's conclusions as

1 ⁴ The State does not contest this aspect of the
2 District Court's opinion on appeal, and so we decline to
3 address it. See Jimenez v. Walker, 458 F.3d 130, 141 n.8
4 (2d Cir. 2006) ("Because the existence of an adequate and
5 independent procedural bar is not jurisdictional in the
6 habeas context, a federal court is not required to raise it
7 sua sponte; rather, it is a defense that the State is
8 obligated to raise and preserve if it is not to lose the
9 right to assert the defense thereafter." (internal citation
10 omitted)).

1 attenuated and speculative. Id.

2 On June 12, 2006, this Court issued a Certificate of
3 Appealability on the sole question of whether trial
4 counsel's failure to consult a medical expert constituted
5 ineffective assistance of counsel.

7 **DISCUSSION**

8 We review de novo the District Court's denial of Bell's
9 petition for habeas corpus. Thibodeau v. Portuondo, 486
10 F.3d 61, 64 (2d Cir. 2007).

12 **I. AEDPA Deference**

13 Under AEDPA, if a habeas petitioner's claim "was
14 adjudicated on the merits in State court proceedings," a
15 federal court can grant habeas only if the state court's
16 decision was "contrary to, or involved an unreasonable
17 application of, clearly established Federal law, as
18 determined by the Supreme Court of the United States," or
19 "was based on an unreasonable determination of the facts in
20 light of the evidence presented." 28 U.S.C. § 2254(d).

21 An "adjudication on the merits" is one that "(1)

1 disposes of the claim on the merits, and (2) reduces its
2 disposition to judgment.” Sellan v. Kuhlman, 261 F.3d 303,
3 312 (2d Cir. 2001) (emphasis added and internal quotation
4 marks omitted). The state court’s ruling on Bell’s § 440
5 motion discussed the merits and was reduced to a judgment;
6 but the wording of the opinion reflects that the disposition
7 was not premised on the court’s view of the merits. The
8 discussion of the merits was preceded by a contrary-to-fact
9 construction: “if the merits were reached, the result would
10 be the same.” And a contrary-to-fact construction is not
11 the same as an alternative holding. See Zarvela v. Artuz,
12 364 F.3d 415, 417 (2d Cir. 2004) (concluding that state
13 court had reviewed the claim on the merits where it found
14 “petitioner’s claim to be unpreserved, and, in any event,
15 without merit,” constituted an adjudication on the merits)
16 (emphasis added). We decline to read a contingent
17 observation as an “adjudication on the merits.”
18 Accordingly, we review Bell’s claim de novo.

20 **II. Merits**

21 A criminal defendant asserting that counsel is

1 constitutionally deficient must show that the lawyer's
2 performance "fell below an objective standard of
3 reasonableness" and that "there is a reasonable probability
4 that, but for counsel's unprofessional errors, the result of
5 the proceeding would have been different." Strickland v.
6 Washington, 466 U.S. 668, 688, 694 (1984). The standard of
7 Strickland "is rigorous, and the great majority of habeas
8 petitions that allege constitutionally ineffective counsel
9 founder on [it]." Lindstadt v. Keane, 239 F.3d 191, 199 (2d
10 Cir. 2001).

11 Bell's claim threads this needle. The only evidence
12 connecting Bell to the crime was Moriah's testimony. Three
13 friends testified that Bell was elsewhere playing cards.
14 Given the trauma Moriah endured and the medical treatments
15 he received, Moriah's memory was highly vulnerable to attack
16 by scientific evidence. Minutes after an encounter in which
17 he stood face-to-face with the assailant for five minutes,
18 Moriah told police officers that his assailant was a "male
19 black wearing a lemon-colored shirt," a description that
20 implicitly but undeniably indicates that the assailant was a
21 stranger: one does not fall back on general features (a

1 "male black") or the color of a shirt ("lemon" yellow) to
2 express the identity of a person known by name or
3 affiliation. By the time Moriah identified Bell as the
4 assailant, Moriah had (in sequence) lost nearly half his
5 blood, undergone surgery, would (in usual course) have been
6 given anxiolytic and amnestic pharmaceuticals, entered a
7 sedated, coma-like state, remained semi-conscious (at best)
8 for eleven days, and awakened with cognitive abilities that
9 were in doubt. On August 19, 1996, over a month after the
10 initial trauma, Moriah reported that he continued to take
11 painkillers and suffer memory loss and dizziness. And he
12 had forgotten altogether the conversation at the crime scene
13 in which he described his assailant but did not name him.

14 Taking the Strickland requirements in reverse order,
15 there is a "reasonable probability" that had trial counsel
16 consulted with a medical expert, "the result of the
17 proceeding would have been different." Strickland, 466 U.S.
18 at 694. The prosecution's case against Bell was thin--there
19 was no eyewitness other than Moriah; no witness or other
20 evidence (forensic or otherwise) linked Bell to the crime.
21 See Strickland, 466 U.S. at 696 ("a verdict . . . only

1 weakly supported by the record is more likely to have been
2 affected by errors than one with overwhelming record
3 support"). Impeaching Moriah's memory was therefore all in
4 all for the defense. Armed with the insight and advice of a
5 medical expert, a lawyer could have vastly increased the
6 opportunity to cast doubt on this critical evidence.

7 It is likely that the state trial court would have
8 permitted a medical expert to testify as to the effects of
9 trauma, blood loss, and anxiolytic and amnestic medications
10 on the human brain, as those topics are well "beyond the ken
11 of the typical juror." People v. Taylor, 75 N.Y.2d 277, 288
12 (1990) (internal citation omitted); see, e.g., People v.
13 Cronin, 60 N.Y.2d 430, 433-34 (1983) (reversing trial
14 court's preclusion of expert testimony on the impact of
15 alcohol, marijuana and Valium on defendant's ability to act
16 purposefully); People v. Real, 137 A.D.2d 416, 416 (1st
17 Dep't 1988) ("Since the key issue for the jury's
18 determination was whether defendant could have formed the
19 required intent for the charged crimes, the court erred in
20 precluding defendant from calling an expert to testify as to
21 the effect of 'angel dust' intoxication on his ability to

1 form such intent."). The State cites cases to show that
2 expert testimony on the reliability of eyewitnesses was
3 inadmissible in New York. See, e.g., People v. Lee, 96
4 N.Y.2d 157 (2001). But those cases exclude expert testimony
5 from social scientists on the fallibility of eyewitness
6 identifications in general.

7 True, counsel cross-examined Moriah and Dr. Brewer in
8 an effort to cast doubt on Moriah's identification. But
9 counsel's failure even to investigate the scientific
10 implications of Moriah's trauma, blood loss and sedation
11 handicapped his cross-examination of those key prosecution
12 witnesses. See Eze v. Senkowski, 321 F.3d 110, 129 (2d Cir.
13 2003) (explaining that by not investigating the scientific
14 accuracy of prosecution witness's conclusions, counsel
15 "missed out on the chance to impeach him on contrary medical
16 literature"). Thus counsel failed to ask Dr. Brewer how
17 Moriah's blood loss--estimated to be 50 percent--might have
18 altered Moriah's memory of the crime, including the
19 potential for retrograde amnesia. And counsel failed to
20 ascertain from Dr. Brewer what drugs he administered to
21 Moriah, let alone how those medications might have impacted

1 Moriah's memory. Likewise, counsel failed to elicit any
2 testimony from Moriah about those medications, even though
3 Moriah had testified to the grand jury (on videotape) that,
4 over a month after the crime, he continued to take
5 painkillers and suffer memory lapses and dizziness.

6 As to the first requirement under Strickland, we must
7 make "every effort . . . to eliminate the distorting effects
8 of hindsight," and "indulge a strong presumption that
9 counsel's conduct falls within the wide range of reasonable
10 professional assistance; that is, the defendant must
11 overcome the presumption that, under the circumstances, the
12 challenged action might be considered sound trial strategy."
13 Strickland, 466 U.S. at 689 (internal quotation marks
14 omitted). Even affording this deference, we conclude that
15 counsel's performance was deficient.

16 Counsel's performance cannot fairly be attributed to a
17 "strategic decision" arrived at by "diligent counsel . . .
18 draw[ing] a line [based on] good reason to think further
19 investigation would be a waste." Rompilla v. Beard, 545
20 U.S. 374, 383 (2005). Bell's lawyer failed even to consider
21 consulting a medical expert regarding the reliability of

1 Moriah's memory. Cf. Wiggins v. Smith, 539 U.S. 510, 525-
2 529 (limiting scope of investigation into potential
3 mitigation was not entitled to deference because it was made
4 at an unreasonable stage, rendering an informed decision
5 impossible); Williams v. Taylor, 529 U.S. 362, 390 (2000)
6 (failing to uncover and present extensive mitigating
7 evidence could not be justified on decision to focus on
8 other defense because that decision was made prematurely,
9 without the benefit of a thorough investigation).

10 Moreover, the record reveals no "tactical justification
11 for the course" trial counsel chose. United States v.
12 Luciano, 158 F.3d 655, 660 (2d Cir. 1998) (per curiam). The
13 defense proceeded along two strategic lines: impeaching
14 Moriah and establishing an alibi. The first of these would
15 have been promoted, without any appreciable downside, by
16 expert medical testimony on the impact that blood loss and
17 painkillers had on Moriah's memory. See, e.g., Pavel v.
18 Hollins, 261 F.3d 210, 219 (2d Cir. 2001) (finding
19 ineffectiveness for failure to call witness whose testimony
20 could have bolstered defense theory).

21 Our disposition of this appeal does not announce a per

1 se rule requiring a defense counsel to consult with a
2 medical expert in order to cast doubt on a key prosecution
3 witness. But where the only evidence identifying a criminal
4 defendant as the perpetrator is the testimony of a single
5 witness, and where the memory of that witness is obviously
6 impacted by medical trauma and prolonged impairment of
7 consciousness, and where the all-important identification is
8 unaccountably altered after the administration of medical
9 drugs, the failure of defense counsel to consider consulting
10 an expert to ascertain the possible effects of trauma and
11 pharmaceuticals on the memory of the witness is
12 constitutionally ineffective.

13
14 **CONCLUSION**

15 For the foregoing reasons, we reverse the decision of
16 the district court and remand for the entry of judgment
17 conditionally granting the writ and ordering Derrick Bell's
18 release unless the State provides him a new trial within 60
19 days. The mandate will issue forthwith.