No. _____

In the Supreme Court of the United States

WILLIAM ALEXANDER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

Alan S. Axelrod
Counsel of Record
Will A. Page*
LEGAL AID SOCIETY
CRIMINAL APPEALS BUREAU
199 Water Street, 5th Floor
New York, New York 10038

* *Admitted in N.Y. and the Second Circuit*

Counsel for Petitioner

QUESTION PRESENTED

Whether *Chambers v. Mississippi*, 410 U.S. 284 (1973), and its progeny require the admission of reliable photographic evidence of what an accused was wearing on the day in question, particularly where the defense to the charges is one of misidentification, where no forensic evidence ties the accused to the crime, and where the excluded photographic evidence contradicts all eyewitness testimony.

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PETITION FOR A WRIT OF CERTIORARI

William Alexander respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division, Second Department.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department appears at Appendix A and is reported at *People v. Alexander*, 93 N.Y.S.3d 608 (N.Y. App. Div. 2d Dep't 2019). The oral rulings of the Supreme Court of the State of New York, County of Brooklyn, denying admission of Mr. Alexander's arrest photograph were made *in limine* and appear at Appendix B.

JURISDICTION

The Second Department entered its opinion on March 6, 2019. The New York Court of Appeals denied permission to appeal in an order dated June 27, 2019, which appears at Appendix C and is reported at 33 N.Y.3d 1066 (2019). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions from the Sixth and Fourteenth Amendments are reproduced at Appendix E.

INTRODUCTION

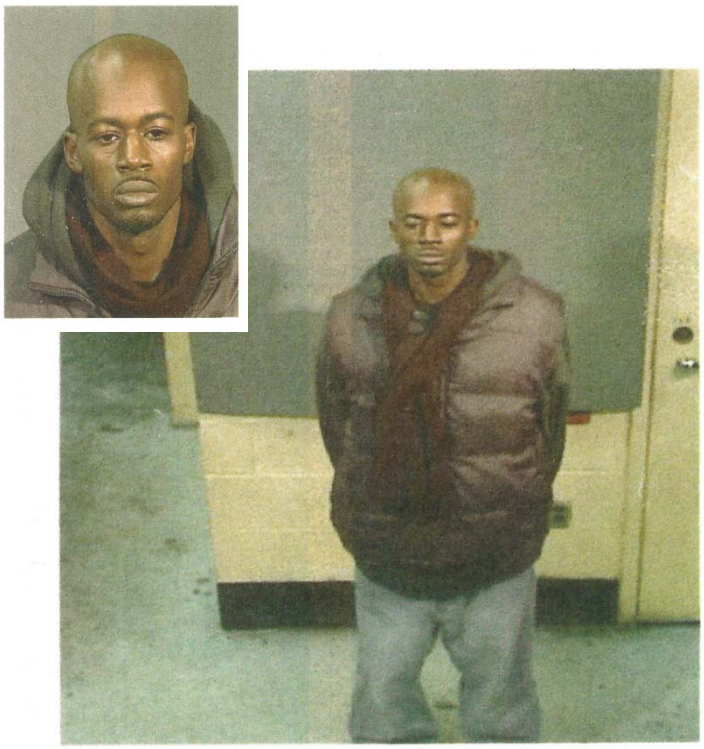
This case presents a critical opportunity for the Court to reaffirm longstanding principles of criminal constitutional law through the simple application of *Chambers v. Mississippi*, 410 U.S. 284 (1973), and its progeny to an erroneous, severely detrimental, and one-sided exclusion of defense evidence—petitioner's mugshot. This case is unencumbered by extraneous considerations, namely AEDPA deference, making it ideal for summary treatment.

At trial, petitioner repeatedly sought to introduce his mugshot in support of his misidentification defense. The importance of the photo was simple: How could petitioner, as alleged, be the perpetrator of a robbery committed by a man wearing a distinctively bright outfit when his clothing was so drab? The robber was chased from the scene, arrested in flight, and photographed that day—and no forensic evidence tied petitioner to the crime. Thus, petitioner's mugshot cast grave doubts on the witnesses' identifications.

Despite urging that *Chambers* required the admission of the photo, the trial court ruled it was a) irrelevant, b) unreliable, and c) lacking foundation. In contrast, the court allowed the prosecution to introduce every photograph proffered. The court explained that "no . . . United States Supreme Court . . . law [] says that the fundamental rulings of evidence are to be twisted into an unrecognizable shape, to allow a defendant to present a defense." (60a-61a.) This Court should summarily reverse, given the trial court's erroneous understanding of the law and unjustifiable disparate treatment of petitioner.

STATEMENT OF THE CASE

1. In December 2012, on a Brooklyn street in the early afternoon, a man wearing a bright yellow hoodie with a blue vest committed an armed robbery. After a short chase, with the complainant and an eyewitness pursuing the suspect, officers recognized and arrested a man based on that same brightly colored outfit. That man—the armed robber—was taken to the station and photographed. Apparently, so was Mr. Alexander, who is pictured, in custody, below. (*See* Mugshot, App'x D.)



Petitioner's arrest photograph, above, shows what *he* was wearing that day—drab maroon colors that

could not be mistaken for the universally accepted description of the robber's yellow and blue outfit. Nevertheless, the prosecution claimed that Mr. Alexander was the man that committed the armed robbery.

2. At trial, the complainant and an eyewitness described the individual wearing the bright yellow hoodie with a blue vest who committed the armed robbery, as having the hood pulled over his head and appearing to be a teenager. They detailed how, after witnessing the robbery, the eyewitness immediately helped the complainant into his car and the two chased after the robber, who was fleeing on a bike. The eyewitness also described calling the police and relaying the description of the robber—and his bright yellow hoodie and blue vest—to the 911 operator while the two were chasing after the man on the bike.

The jury learned that New York City Police Officers Thomas and Jordan, after receiving information from the 911 call, subsequently saw a black man wearing a yellow hoodie with a blue vest ride by on a bicycle. Recognizing his brightly colored outfit, they pursued, caught, and arrested him. When the eyewitness and complainant arrived on the scene shortly thereafter, they saw a black man in a yellow hoodie and blue vest being arrested.

3. Notably, Officer Jordan testified at the Grand Jury, just as she had reported in the arrest paperwork, that she had recovered a gun from the scene of the arrest. (*See* 40a.) Indeed, she told the officer conducting the forensics investigation that she had "recovered the gun on the sidewalk[.]" But, when that officer sought a DNA sample for elimination purposes, she refused to provide one. (34a-35a.)

Her refusal was troubling enough. But then, under oath at the pre-trial hearings, she changed her story and testified that it was actually Officer Thomas who recovered the gun after they pursued the perpetrator wearing the yellow hoodie and a blue vest. (*See* 5a.)[1] Despite being the officer who took the photographs of the bike, of the recovered money, and of Mr. Alexander, Officer Jordan never testified at trial.[2]

4. Maintaining his innocence, petitioner attempted to introduce his arrest photograph, taken by Officer Jordan, to irrefutably show that he was not, on the day in question, the man wearing the bright yellow hoodie and blue vest. Indeed, Mr. Alexander was 39 years old, not 19, and his maroon and gray outfit resembled the robber's in style only.

The trial judge, however, repeatedly excluded the mugshot, giving ever shifting reasons for why it could not be admitted.

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[1] Thomas repeated the new story at trial, testifying he used gloves to retrieve the weapon, placed it in a paper bag, and turned it over to Jordan once it was deemed safe. (14a-15a.)

[2] Although defense counsel agreed that there would be "no questioning regarding any pending cases" involving Officer Jordan, specifically her domestic violence charges, (37a; *see also* 50a), Jordan indicated that if she had been called as a witness she would have asserted her Fifth Amendment rights. Understandably, she was likely concerned about a) the conflict between her statements made at the Grand Jury versus during the pretrial hearings and b) her refusal to provide a DNA sample in relation to the gun "recovered" at the scene. Indeed, at trial, everyone recognized the issue: "when [Jordan] testified under oath at [the] hearing [she] admitted that her testimony in the grand jury was *incorrect*[.]" (40a-41a (emphasis added).)

For example, the judge claimed the photo was unreliable and irrelevant, because it conflicted with the description of the perpetrator. (20a-21a.) The judge suggested Mr. Alexander could forgo his right against self-incrimination, take the stand, and "testify as to how he looked and if these were his clothes," perhaps rendering the photo relevant and reliable. (22a.) Otherwise, the judge asserted the defense could not "get[] past the[] evidentiary issues" surrounding the photo, because there was no proof that Mr. Alexander had not changed his clothes. (42a-46a.)

But nothing other than rampant speculation was presented to render the photo, taken by the police, unreliable. The fact that it conflicted with the witnesses' testimony actually made it all the more relevant and critical to Mr. Alexander's misidentification defense.

Then, after the defense pushed again to introduce the photograph and argued that denying Mr. Alexander the opportunity to put this critical piece of identification related evidence before the jury violated his constitutional rights to present a defense, citing to *Chambers v. Mississippi*, 410 U.S. 284 (1973), the prosecution and the court shifted rationales. This time, the prosecution asserted there was a lack of an evidentiary foundation for the arrest photo—because the officer who took the photograph, Officer Jordan, had not testified. (57a-62a.) Of course, when Jordan was later questioned with respect to a missing witness charge, she indicated that she would have asserted her Fifth Amendment rights in a blanket fashion to avoid testifying. (69a-70a.)

Moreover, and contrary to the lack of foundation contention, Officer Jordan's partner, Officer Thomas,

was able to confirm at trial that whomever they transported from the scene of the arrest to the precinct (whether it was the robber or Mr. Alexander) did not receive any visitors prior to being photographed.

Thus, either the photo depicted the robber, but cast grave doubts on the witnesses' veracity given the difference in his clothing, or it depicted Mr. Alexander who was, in fact, not the robber—just another man in a hoodie pulled out of lock-up and charged with the armed robbery. Or, as the defense repeatedly tried to assert, this was a case of misidentification.

Even without the photographer herself (Officer Jordan),[3] Officer Thomas's testimony should have been sufficient to authenticate this photograph, which the prosecution conceded depicted Mr. Alexander. Indeed, the prosecution had no problem admitting, over defense objection, Officer Jordan's photographs of a) the bicycle that the robber was riding and b) the money recovered from the actual robber. (8a-10a; 11a-13a.)

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[3] When the defense sought a missing witness charge, after being denied the ability to question Jordan as a hostile witness, (55a-56a), the court questioned her directly. The judge asked, "If you were called to the stand on this case, would you have asserted your Fifth Amendment privileges [to] not testify?" (69a.) Jordan indicated that, "Yes," she "would have." (*Id.*)

The defense then tried to examine her about her actions as "the arresting officer in the case" to establish the extent of her adversity, but the court cut-off any questioning. (70a.) The defense could not clarify whether her Fifth Amendment refusal related to "her open case" or to "the arrest of Mr. Alexander," because the court allowed no further questions. (*Id.*)

Apparently, whenever the prosecution sought to admit photos through Officer Thomas—the only police witness made available—the evidentiary foundation was unquestioned. But when Mr. Alexander tried to admit a reliable and contemporaneous depiction of what he was wearing on the day of the robbery, the court would not budge. Most relevantly, the trial court stated that it knew of "no . . . United States Supreme Court . . . law that says that the fundamental rulings of evidence are to be twisted into an unrecognizable shape, to allow a defendant to present a defense. All defenses that are presented must comply with the rules of evidence." (60a-61a.)

With the photo excluded, petitioner was convicted and sentenced to 25 years of imprisonment.

5. On direct appeal, the Appellate Division, Second Department, of the Supreme Court of New York determined that there was no foundation for the admission of the photograph and, in any event, the failure to admit it was harmless. (App'x A.)

The Appellate Division did not engage with the constitutional issues presented, nor did it mention that the only other piece of physical evidence recovered—the gun—had never been handled by Mr. Alexander. The prosecution's own DNA expert had concluded it was over 350 times more likely that three random people had handled the gun than petitioner.

Thus, the allegedly overwhelming evidence of guilt in this case was apparently the eyewitnesses' and testifying officer's testimony that Mr. Alexander was the man in the yellow hoodie, even if that is not what was depicted in the photo.

New York's highest court, the Court of Appeals, denied leave to appeal on June 27, 2019. (App'x C.)

REASONS FOR GRANTING THE PETITION

Mr. Alexander is serving 25 years for an armed robbery committed by a man wearing a yellow hoodie and a blue vest. Since *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Crane v. Kentucky*, 476 U.S. 683 (1986), the rules have been clear: "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense,'" *Crane*, 476 U.S. at 690, and where those "constitutional rights directly affecting the ascertainment of guilt are implicated," evidentiary rules "may not be applied mechanistically to defeat the ends of justice," *Chambers*, 410 U.S. at 302. Nevertheless, time and time again this Court has had to remind the States of the vitality of these important protections against "arbitrary" rules. *See Holmes v. South Carolina*, 547 U.S. 319, 325-26 (2006) (considering the examples from *Washington v. Texas*, *Chambers*, *Crane*, and *Rock v. Arkansas* in reversing another arbitrary application of a State rule of evidence). Because this case is just another example in a long line of such deprivations, error correction via summary reversal is appropriate. *See, e.g.*, *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (per curiam) (where the "explanation the Massachusetts court offered for upholding [a] law [prohibiting stun guns] contradict[ed] this Court's [recent] precedent," certiorari granted, state judgment vacated, and the case remanded).

Despite this Court's strenuous warning against the danger of excluding defense evidence after "evaluating the strength of only [the prosecution's] evidence," *Holmes*, 547 U.S. at 331, the trial court in this case committed exactly the same error. When the trial judge concluded that the conflict between the witnesses' description of the perpetrator and the photo of Mr. Alexander rendered the photographic evidence unreliable or irrelevant, the court committed the same single-sided error in logic as in *Holmes*. "The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Holmes*, 547 U.S. at 331.

Moreover, there is a fundamental inequity in allowing the prosecution to present photographs taken by an officer who does not testify, only to bar the admission of similar photographs when introduced by the defense. Two adages intersect in this case: "what is good for the goose is good for the gander" and "a picture is worth a thousand words." The prosecution benefitted from the photos in this case, while Mr. Alexander was denied the same opportunity. Perhaps this stark—and unjustifiable—disparate treatment explains why defense counsel repeatedly raised the issue, arguing again and again with the trial judge that this photograph had to be admitted in order to preserve petitioner's constitutional right to present a defense. Indeed, the exclusion of such evidence in similar circumstances is so contrary to this Court's established precedent as to warrant habeas relief. *See, e.g.*, *Kubsch v. Neal*, 838 F.3d 845, 858 (7th Cir. 2016) (en banc) (discussing the well-established "lessons

from the *Chambers* line of cases" with respect to the erroneous exclusion of exculpatory videotaped interviews of two witnesses); *see also Scrimo v. Lee*, No. 17-3434, --- F.3d ----, 2019 WL 3924811, at *14 (2d Cir. Aug. 20, 2019) (habeas granted after *Chambers* violation, unaddressed by Second Department, deprived accused of chance to introduce reasonable doubt).

The jury never had a chance to see the photo for themselves. The issue of how Mr. Alexander could be the perpetrator—when the robber was never out of sight long enough to have performed a miraculous wardrobe change—was never fully presented to the jury because they could not compare the contemporaneous photograph to the witnesses' descriptions for themselves. Although they heard that a photo existed that showed him in "different clothes," they could not weigh the witnesses' credibility against photographic proof of what Mr. Alexander was actually wearing. They could not decide whether the wrong black man in a hoodie had been pulled out of lock-up or off the street and charged with someone else's offenses.

Summary reversal is appropriate here for many of the reasons recognized by the circuit in *Kubsch*. First, this case, like the *Chambers* line of cases, deals with the exclusion of evidence directly relevant to the asserted defense—misidentification. Second, the evidence was essential: it was photographic evidence of what Mr. Alexander was wearing at the time of his arrest, which directly contradicted the witnesses' description of the perpetrator. Third, the photograph was reliable, as it was police-generated. And, in contrast to *Holmes*, the collateral evidence (the forensic evidence) did not match petitioner.

His DNA was not found on the handgun recovered at the scene; instead, it was at least 350 times more likely that the DNA "mixture" that was recovered did not include any genetic material from Mr. Alexander.

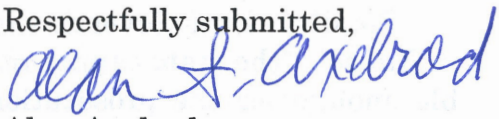
Finally, as the Seventh Circuit eloquently stated in *Kubsch*, "the state cannot regard evidence as reliable enough for the prosecution, but not for the defense." *Kubsch*, 838 F.3d at 858. The "lack of parity," *id.*, was on full display in this case, where the prosecution was allowed to admit photographs taken by the non-testifying officer but the defense was not. If the photographic evidence in this case was reliable enough for the prosecution, then it should have been reliable enough for Mr. Alexander to present his complete misidentification defense. Instead, "the jury never [saw] a critical additional piece of evidence, which, if credited, would have permitted them to find that the police had the wrong man." *Id.* at 850; *see also Scrimo*, 2019 WL 3924811, at *14 ("wrongfully excluded testimony would have introduced reasonable doubt where none otherwise existed").

Recognizing that the trial court's exclusion of Mr. Alexander's arrest photo runs afoul of *Chambers* and its progeny, including *Holmes*, this Court should grant the petition to correct an error of constitutional dimension, vacating petitioner's conviction, and remanding the case for further proceedings.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,



Alan Axelrod
Counsel of Record
Will A. Page
LEGAL AID SOCIETY
CRIMINAL APPEALS BUREAU
199 Water St. 5th Floor
New York, NY 10038
(212) 577-3470
AAxelrod@legal-aid.org

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