

No. 19-6063

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM ALEXANDER,

Petitioner,

v.

NEW YORK,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

ERIC GONZALEZ
District Attorney
Kings County

LEONARD JOBLOVE*
JEAN M. JOYCE
Assistant District Attorneys

Kings County District Attorney's Office
350 Jay Street
Brooklyn, New York 11201-2908
jobloveL@brooklynDA.org
(718) 250-2511

*Counsel of Record for the Respondent

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QUESTION PRESENTED

Whether William Alexander's petition for certiorari should be denied because:

- (1) the decision of the New York State intermediate appellate court in this case does not present an important, unsettled question of federal law, does not conflict with any decision of this Court, and is correct under well-established principles of law;
- (2) even if the evidentiary ruling at issue was erroneous, the error was not of constitutional magnitude and was, in any event, harmless beyond a reasonable doubt; and
- (3) under these circumstances, summary reversal, which Alexander urges, is unwarranted.

PARTIES TO THE PROCEEDING

The petitioner in this Court is William Alexander, who was convicted after trial in a New York state court of robbery and criminal possession of a weapon. The respondent is the State of New York, which is represented in this case by Eric Gonzalez, the District Attorney of Kings County, New York.

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RESPONDENT'S BRIEF IN OPPOSITION

The State of New York requests that this Court deny William Alexander's petition for a writ of certiorari, in which he seeks review of an order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, that affirmed Alexander's judgment of conviction for robbery and criminal possession of a weapon.

OPINION BELOW

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, is reported at 170 A.D.3d 738, 93 N.Y.S.3d 608 (App. Div. 2019). That opinion is reproduced in the appendix to the petition for certiorari.

JURISDICTIONAL STATEMENT

The order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, was entered on March 6, 2019. The order of a judge of the New York Court of Appeals, denying Alexander permission to appeal to that court, was entered on June 27, 2019. The petition for certiorari was timely filed in this Court on September 23, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . .

United States Constitution, Fourteenth Amendment:

No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASEThe Trial

The petitioner, William Alexander ("defendant"), was tried before a jury in the New York Supreme Court, Kings County, for the gunpoint robbery, in broad daylight, of the complainant. The trial evidence included the identifications of defendant as the assailant, minutes after the crime, by the complainant and a Good-Samaritan eyewitness. The eyewitness, accompanied by the complainant, followed defendant by car as he fled the scene on a bicycle, and the eyewitness reported defendant's location to the police on a recorded 911 call.

The evidence showed that on December 29, 2012, at approximately 1:55 p.m., a black man in a bright yellow "hoodie" and a blue vest, riding a small bicycle, approached the complainant, who was walking home on Atlantic Avenue, in Brooklyn (31-33, 38-42, 50-53).¹ The man, whom the complainant identified in court as defendant, said "give me money, give me the money," pulled out a gun, and pointed it at the complainant (32-34, 36-37, 40-41). The complainant opened her purse and gave defendant

¹ Numbers in parentheses followed by the letter "a" refer to pages of the appendix filed in this Court. Unprefixed numbers in parentheses refer to pages of the trial transcript, which was part of the record on appeal.

her money -- a \$20 bill and two \$10 bills. Defendant grabbed at the complainant's purse, but she held onto it (34-35).

Meanwhile, the eyewitness was driving his minivan down Atlantic Avenue, when he saw a man -- defendant -- shoving something into a woman's chest; the woman looked terrified (50, 57, 60, 66-67). The eyewitness stopped his car and defendant let the complainant go, jumped on his bicycle, and pedaled away (50-52, 58-60).

The eyewitness offered to help the complainant, who got into the eyewitness's car. They circled the block and began following defendant from about a block away, and the eyewitness called 911 (35-36, 43-44, 53-55, 61; People's Exhibit 1 [recording of 911 call]). The eyewitness told the 911 operator that a black man on a bicycle wearing a yellow hoodie and a blue vest had robbed a woman at gunpoint (54, 65; People's Exhibit 1).² The eyewitness told the 911 operator where defendant was going, block by block (54-55, 62-63, 65; People's Exhibit 1).

At some point, defendant veered off (54, 63-64). The eyewitness spotted a police car, so he drove up and told the officers

² In the petition for certiorari, counsel asserts that, at trial, both the complainant and the eyewitness described the robber as "appearing to be a teenager" (Petition at 4), but that assertion is incorrect. In fact, neither witness gave that description. The complainant estimated the age of the robber to be "[a]lmost 30, 20 something" (41); and the eyewitness answered "Yes" when asked if, in his 911 call, he described the robber as being "in his 20s" (65).

what was happening (54, 63-64). The eyewitness kept driving around and spotted defendant again, but could not follow him without going against traffic (54, 64-66).

At 2:02 p.m., Police Officer Remel Thomas received a radio call describing a gunpoint robbery by a black man, on a bicycle, wearing a yellow hoodie, a blue vest, and blue jeans (73, 103). One minute later, Officer Thomas saw a man on a bicycle, who matched that description, ride right past him (73-74, 103). The man, who made eye contact with Officer Thomas, was wearing a yellow hoodie, a blue vest, and blue jeans (73-74). Officer Thomas turned on his turret lights and pursued the man, "never los[ing] sight of him" (73-74).

The man, whom the officer identified in court as defendant, jumped off his bicycle and threw a gun to the ground (74-76, 104). Officer Thomas's partner, Police Officer Lisette Jordan, drew her weapon, and defendant put his hands up (70, 75, 78-79, 104). Officer Thomas handcuffed and searched defendant and recovered on his person one \$20 bill and two \$10 bills (79, 84-85 [12a-13a], 104; People's Exhibit 3 [photocopy of U.S. currency]). A loaded handgun was recovered from the sidewalk, approximately four feet away from

defendant (86, 101, 105 [17a]; People's Exhibit 4 [gun]).³

Meanwhile, the 911 operator called the eyewitness back and said that the police were looking for him (65-66). Officers in a patrol car directed the eyewitness to go to a specified location (54, 66). Upon arriving there, the complainant immediately identified defendant as the person who had robbed her (36-37).

Subsequently, Officers Thomas and Jordan brought defendant to the police precinct, and Officer Jordan, as the arresting officer, completed the arrest report and the complaint report (86-87, 105). An arrest photograph was taken of defendant at the precinct on the same day, but, in the photograph, defendant was wearing different clothing than he had been wearing at the time of his arrest (105-06 [17a-18a], 115 [24a]).

The People declined to call Officer Jordan to testify at trial, largely because she had an open criminal case in another county in which she was charged with misdemeanor assault (92-93, 111, 144-45 [48a-49a]). Defense counsel initially stated that the

³ A witness who was a DNA expert analyzed DNA that was recovered from a swab taken from the trigger or trigger guard of the gun. The witness determined that the swab presented a DNA mixture to which three or more individuals had contributed, and concluded that it was 367 times more likely that the DNA mixture obtained from that swab was from three unknown, unrelated contributors than from defendant and two unknown, unrelated contributors (190-94). The witness explained, however, that, for a number of reasons, a person could have touched the gun but not left enough DNA to be detected (223-28).

defense intended to call Officer Jordan as a witness "so that we can put the mugshot photo into evidence" (137-38 [41a-42a]), noting that Officer Jordan "was the one who had custody of the defendant" (138-39 [42a-43a]). Defense counsel subsequently interviewed Officer Jordan and declined to call her as a witness (96-97, 133 [37a], 149-52 [53a-56a], 172 [62a]). But defense counsel requested a missing witness instruction regarding the People's failure to call Officer Jordan, and the court granted that request and gave such an instruction to the jury (152 [56a], 173 [63a], 254-58, 320-21).

Defendant's Attempts to Admit the Arrest Photograph into Evidence

During cross-examination of the eyewitness, defense counsel showed him defendant's arrest photograph (which had been marked as Defendant's Exhibit A for identification) (67). The eyewitness testified that he recognized the person in the photograph as the suspect, noting: "[B]ut that is not the clothes he was wearing. Absolutely not the clothes he was wearing, unless he changed somehow. He had a yellow. It is a big difference from yellow to that color. It was yellow, and a blue vest actually" (67).

The court asked the eyewitness whether he had identified defendant based upon what the police had told him, and the eyewitness replied unequivocally that he identified defendant because the

eyewitness had recognized him (68). The eyewitness testified that defendant had been wearing a yellow hooded sweatshirt and a blue sleeveless vest, that he had been riding a small bicycle, and that, as the eyewitness was driving around, he had not seen anyone else matching defendant's description (67-69).

Defense counsel also showed Officer Thomas the arrest photograph, which, Officer Thomas testified, was taken at the precinct on the day of defendant's arrest (105-06 [17a-18a], 115 [24a]). Officer Thomas testified that he recognized the person in the photograph to be defendant, but stated that defendant was "wearing different clothes" and "was wearing multiple clothes that he could have exchanged" (105-06 [17a-18a]).

Defendant's Argument and the Court's Ruling

Defense counsel asked to move the photograph into evidence, arguing that it could establish mistaken identification, in that the clothing defendant was wearing in the photograph differed from what the actual perpetrator was wearing at the time of the robbery (108 [20a]). The trial court noted that "three separate witnesses all indicated at the scene of the arrest the clothing he [defendant] had worn, and two of them looked at this [photograph] and said that's him, but his clothing has been changed" (113 [22a]). The court stated that if defendant proffered "some kind of sponsoring testimony that this was the clothing that he was wearing and they

arrested the wrong guy," the court would admit the photograph into evidence (108-09 [20a-21a], 113 [22a]). The court later observed that admitting the photograph would allow the prosecution, on rebuttal, to elicit testimony regarding the clothing worn by "every person that was arrested in that precinct" (138 [42a]).

Before the defense case, defendant once again sought to admit the arrest photograph into evidence (168-72 [58a-62a]). The trial court stated that the defense had failed to lay a proper foundation for the photograph's admission and that the photograph was irrelevant, because, "without knowing the time" when the photograph had been taken, the defense argument regarding the clothes that defendant was wearing in the photograph would "cause[] the jury to speculate" (167-68 [57a-58a], 171-72 [61a-62a]). The court stated that the defense could still "try to find some way to put that photograph into evidence" with a proper foundation (172 [62a]).

The Defense Summation

On summation, defense counsel discussed, at length, the testimony of Officer Thomas and of the eyewitness that the clothing that defendant was wearing in his arrest photograph was significantly different from the clothing that the complainant and the eyewitness said the robber wore (264-65, 270-74). Defense counsel noted that while the clothing worn by the robber "is supposed to be a blue ski vest, a hoodie, yellow, bright yellow hoodie,"

"[w]e know that when Mr. Alexander [defendant] was photographed at the precinct shortly after his arrest, that was not the color of the clothing that he was wearing" (265); and counsel further noted that the eyewitness stated in his 911 call that the man whom he was chasing wore a yellow hoodie, but "that testimony does not match up with what we know about how Mr. Alexander appeared in his arrest photo at the precinct" (269-71).

Relying in large part on that disparity between the description of the robber's clothing given by the witnesses and the clothing that defendant was wearing in his arrest photograph, counsel argued to the jury that defendant had been misidentified as the robber.

The Verdict and the Sentence

On December 3, 2014, defendant was convicted of Robbery in the First Degree (N.Y. Penal Law § 160.15[4]) and Criminal Possession of a Weapon in the Second Degree (N.Y. Penal Law § 265.03[3]). On December 23, 2014, defendant was sentenced, as a second violent felony offender, to concurrent prison terms of twenty-five years on the robbery count and fifteen years on the weapon possession count, plus five years of post-release supervision on each count.

The Appeal

Defendant appealed from his judgment of conviction to an intermediate appellate court, the Supreme Court of the State of New

York, Appellate Division, Second Judicial Department. On that appeal, defendant claimed, in relevant part, that the trial court's decision not to admit the arrest photograph into evidence deprived him of his right to present a defense under the Sixth and Fourteenth Amendments of the United States Constitution, and that the alleged error was not harmless beyond a reasonable doubt.

On March 6, 2019, the Appellate Division affirmed defendant's judgment of conviction (1a-2a). People v. Alexander, 170 A.D.3d 738, 93 N.Y.S.3d 608 (App. Div. 2019). The Appellate Division concluded that the trial court providently exercised its discretion in excluding the photograph from evidence, because defendant failed to lay a sufficient foundation for its admission. The Appellate Division further held that, in any event, even if erroneous, the failure to admit the photograph was harmless, because the proof of defendant's guilt was overwhelming and there was no significant probability that, had the photograph been admitted, the jury would have acquitted defendant (1a). 170 A.D.3d at 739, 93 N.Y.S.3d at 609.

In an order dated June 27, 2019, a judge of the New York Court of Appeals denied defendant's application for permission to appeal to that court from the order affirming the judgment of conviction (71a). People v. Alexander, 33 N.Y.3d 1066, 105 N.Y.S.3d 1 (2019).

REASONS WHY THE PETITION SHOULD BE DENIED

In his petition for certiorari, defendant challenges the trial court's evidentiary ruling that he failed to lay a proper foundation to admit his arrest photograph into evidence, and claims that this ruling deprived him of his constitutional right to present a defense. Defendant contends that his case is "ideal for summary treatment" (Petition at 2). But summary reversal is unwarranted, because defendant's claim of a constitutional violation is meritless.

Defendant's petition for certiorari should be denied for three reasons. First, defendant has not identified any issue of national importance presented by the holding of the Appellate Division in this case, and instead he apparently seeks only summary review. Second, the evidentiary ruling at issue complied with the requirements of the Constitution. Third, in any event, any error was harmless beyond a reasonable doubt.

I. This Case Presents No Issue of National Importance and No Other Compelling Reason that Would Warrant Granting the Petition for Certiorari.

Defendant's petition for certiorari should be denied. His petition does not present an "important" federal question decided by the Appellate Division in a way that conflicts with a decision of this Court, of any federal court of appeals, or of any state court of last resort. See Sup. Ct. R. 10(b), (c).

Defendant seeks summary reversal (see Petition at 2, 9, 12), but summary reversal is not warranted here. The Appellate Division's decision in this case was correct, and thus it does not present a clear constitutional error that could justify summary reversal. Cf. Sexton v. Beaudreaux, 138 S. Ct. 2555, 2560 (2018) (per curiam) (granting summary reversal where lower court's opinion "was not just wrong," but also "committed fundamental errors that this Court has repeatedly admonished courts to avoid"); Sears v. Upton, 561 U.S. 945, 946 (2010) (per curiam) (granting summary reversal where "it is plain from the face of the state court's opinion" that state court failed to apply correct constitutional standard established by this Court); Michigan v. Fisher, 558 U.S. 45, 51-52 (2009) (Stevens, J., dissenting) ("it is hard to see how this Court is justified in micromanaging the day-to-day business of state tribunals making fact-intensive decisions").

II. The Exclusion of Defendant's Arrest Photograph Pursuant to State Evidentiary Principles Was Constitutional.

Defendant's petition for certiorari should be denied because New York's rule authorizing a court to exclude relevant evidence at trial if its probative value is outweighed by certain other considerations -- as that rule was applied in this case -- is a reasonable restriction on the right to present relevant evidence. The trial court properly applied that evidentiary rule in declining to admit defendant's arrest photograph into evidence. Moreover, even if the evidentiary ruling was erroneous, that ruling did not violate defendant's constitutional right to present a defense.

A criminal defendant's right to present a complete defense at trial is a fundamental element of due process arising from both the Sixth and Fourteenth Amendments of the United States Constitution. See U.S. Const. amends. VI, XIV; Chambers v. Mississippi, 410 U.S. 284, 294-95, 302 (1973). The right to present evidence, however, is subject to reasonable restrictions, which may constitutionally authorize the exclusion of evidence "under standard rules of evidence." Taylor v. Illinois, 484 U.S. 400, 410 (1988). States have considerable latitude under the Constitution to establish rules that exclude evidence from criminal trials. See Holmes v. South Carolina, 547 U.S. 319, 324 (2006). Those rules do not curtail an accused's right to present

a defense, as long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." Rock v. Arkansas, 483 U.S. 44, 56 (1987); see also Michigan v. Lucas, 500 U.S. 145, 149 (1991); Chambers, 410 U.S. at 295. This Court has been "traditional[ly] reluctan[t] to impose constitutional restraints on ordinary evidentiary rulings by state trial courts." Crane v. Kentucky, 476 U.S. 683, 689 (1986).

In New York, a trial court has the discretion to exclude evidence, even if that evidence may be minimally relevant, "if its probative value is outweighed by the danger that its admission would prolong the trial to an unreasonable extent without any corresponding advantage; or would confuse the main issue and mislead the jury; or unfairly surprise a party; or create substantial danger of undue prejudice to one of the parties." People v. Davis, 43 N.Y.2d 17, 27, 400 N.Y.S.2d 735, 740 (1977) (quotation marks and citations omitted). That evidentiary rule is neither arbitrary nor disproportionate to the purpose it is designed to serve. Indeed, that rule is substantially similar to Rule 403 of the Federal Rules of Evidence, which is entitled, "Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons," and which states:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the

issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Fed. R. Evid. 403.

The evidentiary ruling at issue in this case did not violate any constitutional principle and does not requires this Court's attention. The trial court applied "standard rules of evidence" concerning admissibility (see Taylor, 484 U.S. at 410) when it weighed the limited probative value of the arrest photograph against the adverse risks that would arise from its presentation to the jury. See Holmes, 547 U.S. at 326 ("well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury" [citing, inter alia, Fed. R. Evid. 403]).

Three factors support the propriety of the trial court's ruling to exclude the arrest photograph. First, the trial court apparently, and reasonably, concluded that, in the absence of a proper foundation regarding the time of the taking of the arrest photograph and the circumstances of defendant's custody until that time, admitting the photograph would have left the jury to speculate as to how much time passed from when defendant was arrested until the photograph was taken and what opportunities defendant might have had during that time to exchange his clothes

with another person who was in custody at the precinct (167-68 [57a-58a], 171-72 [61a-62a]). Officer Thomas testified that the arrest photograph of defendant was taken at the precinct on the day of his arrest (105-06 [17a-18a], 115 [24a]) -- and that the arrest occurred shortly after 2:00 p.m. (72, 103) -- but he did not testify that he was present when the photograph was taken, or that he knew at what time it was taken, or that he knew what opportunities defendant might have had to exchange his clothes with someone else before the photograph was taken.

Second, the trial court noted that admitting the arrest photograph would have risked unnecessarily prolonging the trial, by opening the door for the prosecution, on rebuttal, "to bring in testimony as to every person that was arrested in that precinct" and "the clothing that that person had," thus potentially creating "a trial within a trial" (138 [42a]).

Third, the testimony of Officer Thomas showed that the arresting officer -- Officer Jordan -- had taken the photographs of the bicycle and the gun that were recovered, and had made the photocopy of the currency that was recovered (77 [9a], 79-83, 87 [15a]), and that she had completed the police reports (105 [17a]). Thus, there was reason to believe that Officer Jordan could provide additional information regarding the circumstances surrounding the taking of the arrest photograph. Defense counsel initially stated

that the defense intended to call Officer Jordan as a witness, in order to seek to put the arrest photograph into evidence (133-39 [37a-43a]), and defense counsel subsequently interviewed Officer Jordan. But, despite the court's invitation to defense counsel that "[y]ou can certainly again try to find some way to put that photograph into evidence . . . if you have a proper foundation" (172 [62a]), counsel ultimately decided not to call Officer Jordan to testify. Instead, defense counsel requested (and the court gave the jury) a missing witness instruction regarding the prosecution's failure to call that officer (172-73 [62a-63a]); and, in summation, counsel took the prosecution to task for not calling Officer Jordan as a witness, arguing that Officer Jordan "had eyes on him [defendant] the whole time" he was in police custody and that she therefore was "the person who could best address the issue of the arrest photo" (272-74).

Defendant contends that the arrest photograph "contradicts all eyewitness testimony" (Petition at i) and that it "irrefutably show[s] that [defendant] was not, on the day in question, the man wearing the bright yellow hoodie and blue vest" (id. at 5). Those contentions are patently meritless. There is no contradiction between, on the one hand, the testimony that showed that defendant was wearing a yellow hoodie and a blue vest at the time of the robbery and at the time of the arrest; and, on the other hand, the

arrest photograph, which showed that defendant was wearing different clothing at whatever later time that photograph was taken, by which time he could have changed his outerwear.

Similarly, defendant asserts that "the robber was never out of sight long enough to have performed a miraculous wardrobe change" (id. at 11). But, in the absence of any evidence regarding the time when the photograph was taken and the circumstances of defendant's custody until that time, that assertion is utterly unsupported by the record and rests on speculation.

Contrary to defendant's suggestion (see Petition at 7 n.3), it is irrelevant to the propriety of the evidentiary ruling at issue that Officer Jordan stated that she would have invoked her Fifth Amendment privilege if called to testify in this case. Officer Jordan made that statement, after the defense had rested, during an inquiry by the court to determine whether she had been available to testify and whether the defense request for a missing witness instruction therefore should be granted (241-42 [69a-70a]). The court ultimately granted the defense request and gave a missing witness instruction, and thus the court apparently found that Officer Jordan was available to testify and that she would have invoked the privilege only with respect to her own pending case. Moreover, before the defense case, when defense counsel stated that the defense would not call Officer Jordan as a witness

in an attempt to lay a foundation for introducing the arrest photograph, counsel never cited, as a reason for not calling the officer, that her anticipated invocation of the privilege would render her testimony unavailable (see 167-72 [57a-62a]); and, later, in support of the defense request for a missing witness instruction and on summation, counsel instead argued the opposite position -- namely, that the officer's testimony was available.

Consequently, it was entirely reasonable for the trial court to rule that, in order to introduce the photograph, the defense needed to lay a foundation by showing the time when the photograph was taken and the circumstances of defendant's custody until that time, so that the jury could intelligently weigh the plausibility of the proffered defense theory -- which was that the clothing that defendant was wearing in the photograph was the same clothing in which he had been arrested, and that the complainant, the eyewitness, and Officer Thomas were all "misremembering" what defendant was wearing at the time of his arrest (142-43 [46a-47a]) -- against the plausibility of the explanation that defendant had exchanged his outerwear with someone else at the precinct by the time the photograph was taken.

In any event, the trial court's evidentiary ruling did not violate defendant's constitutional right to present a defense. This Court has held that exclusions of evidence were unconstitutional

when they "significantly undermined fundamental elements of the defendant's defense." United States v. Scheffer, 523 U.S. 303, 315 (1998). In this case, the ruling at issue did not have that effect, because defense counsel elicited testimony that allowed counsel to make essentially the same argument to the jury that counsel could have made if the photograph itself had been admitted.

In the presence of the jury, two witnesses -- the eyewitness and Officer Thomas -- were shown the arrest photograph and testified unequivocally that the clothing that defendant was wearing in the photograph was different from the clothing that he had been wearing at the time of the crime and the arrest. Upon viewing the photograph, the eyewitness testified that the clothes that defendant was wearing in the photograph were "[a]bsolutely not" the clothes he had been wearing earlier, and that there was "a big difference" between the yellow clothing that he had been wearing earlier and the color of the clothes shown in the photograph (67). When defense counsel showed the photograph to Officer Thomas, he testified, three times, that defendant was wearing different clothes (105-06 [17a-18a]).

During her summation, defense counsel capitalized on this testimony. Defense counsel reminded the jury that Officer Thomas had been shown the photograph during cross-examination, and counsel noted that while the clothing worn by the robber "is

supposed to be a blue ski vest, a hoodie, yellow, bright yellow hoodie," "[w]e know that when Mr. Alexander [defendant] was photographed at the precinct shortly after his arrest, that was not the color of the clothing that he was wearing" (265). Defense counsel similarly mentioned that the eyewitness had also been shown the photograph during cross-examination. Counsel noted that the eyewitness stated in his 911 call that the man whom he was chasing wore a yellow hoodie, but counsel, quoting the eyewitness's testimony, emphasized, four times, that there was a "big difference" between the yellow hoodie that the eyewitness described in his 911 call and the color of the clothing that defendant was wearing in the photograph (270-72). Defense counsel maintained that the police had simply stopped the wrong man riding a bicycle in the vicinity of the crime -- defendant -- and that the complainant misidentified defendant as her assailant (271).

Thus, the argument that counsel sought to advance by introducing the arrest photograph -- namely, the argument that the difference between the description of the robber's clothing given by the witnesses and the clothing that defendant was wearing in his arrest photograph supported the theory that defendant had been misidentified as the robber -- was put before the jury. Therefore, the court's ruling excluding the photograph did not "significantly undermine[] fundamental elements of the defendant's defense" and

did not violate his constitutional right to present a defense.

See Scheffer, 523 U.S. at 315.

Moreover, contrary to defendant's contention (Petition at 8, 10-12), there was no "disparate treatment" of the parties with respect to the introduction of photographs. The photograph of the bicycle was admitted into evidence because Officer Thomas testified that the photograph accurately depicted what defendant's bicycle looked like on the day of his arrest (76-78 [8a-10a]), and the photocopy of the currency was similarly admitted because Officer Thomas testified that the photocopy accurately depicted the money that he recovered from defendant (83-85 [11a-13a]). But, by contrast, Officer Thomas did not testify that he ever saw defendant in the clothes depicted in the arrest photograph, or that he knew at what time the photograph was taken, or that he knew what opportunities defendant might have had to exchange his clothes with someone else before the photograph was taken. Thus, the arrest photograph was excluded because the necessary foundation was lacking, not because of any alleged disparate treatment.

III. Any Constitutional Error in the Evidentiary Ruling Was Harmless.

The petition for certiorari should be denied for the additional reason that, even if the evidentiary ruling at issue

were held to be unconstitutional, any such constitutional error would be harmless, in light of the strength of the prosecution's case and the minimal impact of the ruling at issue on defendant's ability to present his defense.

The evidence of defendant's guilt was overwhelming. Defendant was apprehended and identified just eight minutes after the commission of the gunpoint robbery of the complainant during daylight hours. Both the complainant and an eyewitness promptly identified defendant, and both witnesses recognized the yellow hooded sweatshirt and the blue vest that the robber had been wearing. Defendant threw a gun to the ground when he was confronted by the police. In addition, the police recovered from defendant one \$20 bill and two \$10 bills, which matched the number of bills and the denominations of the bills taken from the complainant.

Furthermore, during the trial, defense counsel was able to show the arrest photograph to two witnesses -- the eyewitness and Officer Thomas -- and to elicit from both of those witnesses unequivocal testimony that the clothing that defendant was wearing in the photograph was different from the clothing that he had been wearing at the time of the arrest. Relying on that testimony, counsel argued at length on summation that the difference between the description of the robber's clothing given by the witnesses

and the clothing that defendant was wearing in his arrest photograph supported the theory that defendant had been misidentified as the robber. In light of that testimony regarding the clothing that defendant was wearing in his arrest photograph, and in light of defense counsel's reliance on that testimony in summation, the exclusion of the photograph itself had little or no effect on the argument that counsel was able to make to the jury, because the photograph would have been largely cumulative of the testimony that the clothing defendant was wearing in the photograph was different from the clothing he was wearing at the time of his arrest.

Under these circumstances, there is no reasonable possibility that the introduction of the arrest photograph would have changed the verdict. Consequently, any constitutional error in the exclusion of that photograph was harmless beyond a reasonable doubt. See Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (harmless-error analysis applies to exclusion of evidence in violation of Confrontation Clause); Chapman v. California, 386 U.S. 18, 24 (1967) (for federal constitutional error to be held harmless, it must be harmless beyond a reasonable doubt).

* * *

Accordingly, in the absence of any basis to conclude that the evidentiary ruling at issue violated the Constitution, let alone

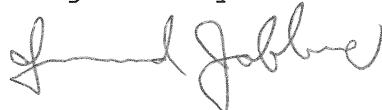
that it would require reversal of defendant's conviction, this case does not warrant review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD
BE DENIED.

Respectfully submitted,

ERIC GONZALEZ
District Attorney
Kings County



LEONARD JOBLOVE*
JEAN M. JOYCE
Assistant District Attorneys

Kings County District Attorney's Office
350 Jay Street
Brooklyn, New York 11201-2908
jobloveL@brooklynDA.org
(718) 250-2511

*Counsel of Record for the Respondent

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