No. 19-6063

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

REPLY TO STATE'S BRIEF IN OPPOSITION

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Respondent's Position That The Prosecution's One-Sided Theory Justified Excluding Presentation Of Petitioner's Equally, If Not More, Plausible Theory Of Misidentification Via His Arrest Photo, Underscores That Mr. Alexander's Constitutional Right To Present A Complete Defense Was Violated.

As respondent's opposition makes clear, the critical facts are not in dispute.[1] What is disturbing is how respondent addresses the fact that Mr. Alexander's clothes in his arrest photo (Pet. at 3; 72a), did not match those of the robbery suspect.

Rather than acknowledging that this major discrepancy was indeed relevant, probative, and highly exculpatory, respondent clings to the speculation used by the trial court as an excuse to deny the introduction of the photo in the first place. Respondent posits that the police-generated photograph could never be admitted because there is no sensible way to

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[1] The robbery suspect wearing the bright yellow hoodie and blue vest was chased from the scene, (Opp. at 3-4); eventually spotted and pursued by NYPD Officer Thomas who "never los[t] sight of him," (*id.* at 5); until he was captured, arrested, and processed at the station, (*id.* at 5-6); and his photograph was taken "the same day," (*id.* at 6). Petitioner apologizes for transforming a "twenty-something" suspect into a teenager. (*See* Opp. at 4 n.2; *see also* Trial Tr. 65 ("Black man in his 20s").) The fact remains that Mr. Alexander's age was significantly higher—he was a 39-year-old man at the time of his arrest. (72a.)

prove or disprove whether Mr. Alexander changed his clothes in lock-up (Opp. at 16-17, 20), ignoring the other obvious exculpatory theory that Mr. Alexander, as so often occurs for black men, was misidentified.[2]

Indeed, the Appellate Division's decision, on review in this petition, found no analogue to support the proposition that mugshots become unreliable when they do not match the prosecution's theory of the case. (*See* 1a.) Instead, the decision cited *People v. Price*, 29 N.Y.3d 472 (2017), a case where the prosecution was not allowed to present a photo found on the internet as a photo of the accused, due to the lack of foundation connecting the individual depicted to the defendant. *Id.* at 478-49. It should be self-evident, however, that a police-generated mugshot, provided through discovery, is of a substantially higher quality and far more reliable than something downloaded off the internet. *Cf. id.* at 476 ("testimony establishing a chain of custody may suffice to demonstrate authenticity in other circumstances"); *People v. Slavin*, 1 N.Y.3d 392, 403

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[2] Aside from common sense—which should tell us that lock-up is not a free-for-all where arrestees can exchange clothes with whomever they wish—there are a multitude of sources that explain the process by which arrestees are processed and photographed. *See, e.g.*, *Bell v. Poole*, No. 00 Civ. 5214 (ARR), n.1 (E.D.N.Y. Apr. 10, 2003) ("the mugshot pedigree form . . . contains color versions of both photographs taken at Central Booking"); *Dey v. Scully*, 952 F. Supp. 957, 965-66 (E.D.N.Y. 1997) ("arrestees [are] not allowed to receive visitors who might bring a change of clothing into the holding cells. . . . Moreover, throughout [] initial processing, [] arrestees [are] under constant observation by police officers[.]")

None of these sources suggest Mr. Alexander would have been free to don a new outfit while under constant surveillance.

(2004) ("arrest photographs" are "necessary for the administrative purpose of identifying those in the custody of the police."). This is particularly true, given that there was no disagreement that the arrest photo was of Mr. Alexander. (*See* Opp. at 6, 8.)

Thus, respondent hopes to obscure the absurdity of excluding the mugshot by justifying why the other police-generated photos *were* admissible. (Opp. at 23.) Yet, the trial court's handling of those photos only proves petitioner's point—that the photo was admissible, and any questions about it should have gone to its weight. Indeed, the only discernable reason for why the court denied the mugshot's admission was that the court had already credited the prosecution's theory of the case. (20a-21a.)

For starters, the court's treatment of the photograph of the money shows that foundation principles were understood and properly applied—when it came to evidence offered by the prosecution. Officer Thomas explained he had recovered the same amount of currency, as that pictured in the photo, from the individual arrested for the robbery. (11a, 13a.) But he did not know the specifics of the actual bills recovered, *i.e.*, their serial numbers, or what happened to them after he gave them to Officer Jordan. (12a.) Nevertheless, the court admitted the photo and said that his lack of knowledge went to the weight of the evidence rather than its admissibility. (13a.)

In contrast, the photo of the bicycle presents the more typical situation. Officer Thomas had seen the bike—and he agreed with how it was depicted in the photo. (9a-10a.) Therefore, even though the actual

photograph was taken by Officer Jordan, the photo was admitted. (*Id.*)

The only difference between the mugshot and the photo of the bicycle was Officer Thomas's statement that the clothing was different. (*See* 17a-20a; Opp. at 8.) Yet, that disagreement—particularly given Thomas's confirmation that the photo depicted Mr. Alexander (17a-18a)—should have gone to weight rather than admissibility, just like the photo of the money. But the trial court did not provide the defense with the same treatment that it provided the prosecution. When the court excluded the photo on Thomas's say-so alone, it improperly based its decision on "the strength of only one party's evidence[.]" *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006).

Given the dearth of credible reasons for excluding the mugshot, respondent also hopes to use defense counsel's argument on summation as a substitute for Mr. Alexander's right to present a defense through evidence. Respondent thus asserts that the jury understood the issues despite never seeing the photograph because defense counsel argued that when Mr. Alexander was "photographed at the precinct" the brightly colored outfit "was not the color of the clothing that he was wearing." (Opp. at 10.) But, as the jury was properly instructed, summations are not evidence. *See also Darden v. Wainwright*, 477 U.S. 168, 183 (1986) ("arguments [are] not evidence").

The jury needed to see that Mr. Alexander was wearing street clothes with a hood and a vest. And, they needed to see the stark difference in the colors,

to see and hear about the actual maroon and gray outfit that Mr. Alexander was wearing. Otherwise, the jury could never understand why this photo was critical to Mr. Alexander's defense when all the jury heard was that he was wearing "different clothes" in his arrest photo. (*See* Opp. at 7, 8.)[3]

For all they knew, he might have been wearing a jail jumpsuit in the photograph, since the defense could not show them the actual outfit and colors that were depicted. And, in response, the prosecution would have been able to offer evidence to explain the stark difference between his outfit and the outfit described by the witnesses.

That is why the prosecution fought so hard to exclude this evidence at trial. It was afraid of this powerful, exculpatory evidence and concerned that there was no credible way to prove the far-fetched theory that Mr. Alexander had somehow found extra clothes and changed into them while in lock-up. But that is exactly why *Chambers* and *Holmes* say this type of evidence should not be excluded on the basis of technical evidentiary rules. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Holmes*, 547 U.S. at 324-27.

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[3] Moreover, the defense would have been able to cross-examine each witness, and impeach their credibility, regarding the inexplicable difference between the outfits. Indeed, the defense might have been able to question the admissibility of the prior identifications, given that the eyewitness and the complainant both noted that they had recognized the man being arrested based on his clothing. (Trial Tr. 37 ("I recognize[d] him by . . . the yellow jacket"); 55 ("I recognized him, the same clothes").)

Since the defense's argument was that the wrong person was charged with these crimes—and that the unique clothing of the perpetrator did not match Mr. Alexander's—this compelling misidentification evidence should have been admitted and examined for the benefit of the jury, as constitutionally required. That remains true even if the arresting officer, who processed the paperwork, is not readily available either due to her "open criminal case," (Opp. at 6), or due to her credibility problems. (*See* Pet. at 4 (discussing Officer Jordan's failure to provide an exclusionary DNA sample), 5 n.2 (discussing Jordan's false grand jury testimony, left unaddressed by respondent's opposition).) Given the defendant's constitutional right to present a defense, any questions about what transpired between arrest and photographing were for the jury to explore through weighing the evidence, not speculation.

In sum, petitioner agrees with respondent on the standard for summary reversal: "situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). All three conditions are present. As demonstrated by the petition and this reply, any contention that there was no constitutional error in this case does not fit the uncontested facts.[4]

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[4] To the extent there are any questions requiring full-briefing, plenary review remains an option. *See Schweiker*, 450 U.S. at 791. It remains petitioner's position, however, that the exclusion of this photograph in a misidentification case is beyond clear error—and the harm is palpable.

"[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'" *Arizona v. Youngblood*, 488 U.S. 51, 72 (1988) (Blackmun, J., dissenting). Without the photograph, Mr. Alexander had little chance to counter that powerful, though demonstrably mistaken, evidence.

CONCLUSION

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

Respectfully submitted,

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