

Rule 13(5) Application for an Extension of Time to File a Writ of Certiorari

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| A | 03/25/19 | 01 | New York State Court of Appeals Order Denying Leave to Appeal |
| B | 12/21/18 | 02 | The date that the Appellate Division, Fourth Department issued its decision stating that although the evidence was entirely circumstantial, the evidence was sufficient to support my conviction, and that the Erie County Supreme Court did not err in denying my trial counsel's request for a racial identification charge (see Exhibit <u>B</u>). |
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Rule 13(5) Application for an Extension of Time
to File a Writ of Certiorari

Exhibit A

WESTLAW

People v. Ayala-Gonzalez

Court of Appeals of New York. March 25, 2019 Slip Copy 33 N.Y.3d 945 2019 WL 1575003 (Table) (Approx. 1 page)

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33 N.Y.3d 945

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE
PUBLICATION IN THE NEW YORK REPORTS.

(The decision of the Court of Appeals of New York is referenced in the New York Supplement
and North Eastern Reporter as a decision without published opinion.)

Court of Appeals of New York.

PEOPLE

v.

AYALA-GONZALEZ (Abimael)

3/25/2019

4th Dept: 12/21/2018 (Erie)

Opinion

Stein, J.

*1 Applications in Criminal Cases for Leave to Appeal Denied

All Citations

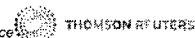
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**Rule 13(5) Application for an
Extension of Time to File a Writ of
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Exhibit B

WESTLAW

People v. Ayala-Gonzalez

Supreme Court, Appellate Division, Fourth Department, New York. December 21, 2018 167 A.D.3d 1536 90 N.Y.S.3d 778 2018 N.Y. Slip Op. 08817 (Approx. 4 pages)

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167 A.D.3d 1536

Supreme Court, Appellate Division, Fourth Department, New York.

The PEOPLE of the State of New York, Respondent,

v.

Abimael AYALA-GONZALEZ, Also Known as Javi, Also Known as Rabito,
Also Known as Mijo, Defendant-Appellant.

1261

KA 16-01597

Entered: December 21, 2018

Synopsis

Background: Defendant was convicted, after a jury trial in the Supreme Court, Erie County, Christopher J. Burns, J., of second-degree murder and second-degree criminal possession of a weapon. He appealed.






Holding: The Supreme Court, Appellate Division, held that evidence was sufficient to support conviction.

Affirmed.

Trial or Guilt Phase Motion or Objection Appellate Review

West Headnotes (2)

Change View

- 1 **Homicide**  Eyewitness identification
Homicide  Miscellaneous particular circumstances
 Evidence was sufficient to support conviction for second-degree murder and second-degree criminal possession of a weapon, despite any lack of direct evidence that defendant fired the shot that killed the victim; witnesses testified that defendant was observed arguing with the victim about poor quality drugs earlier on day of the shooting and that, later in the day, gunshots were heard and a man with a blond ponytail, i.e., a distinguishing feature of defendant's appearance, was observed running with a gun in his hands, and other witnesses testified that, around the same time, defendant ran to a yellow pickup truck with a gun in his hand. N.Y. Penal Law §§ 125.25(1), 265.03(3).
- 2 **Criminal Law**  Construction in favor of government, state, or prosecution
Criminal Law  Inferences or hypotheses from evidence
Criminal Law  Circumstantial evidence
 Even in circumstantial evidence cases, standard for appellate review of legal sufficiency issues is whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the factfinder on basis of the evidence at trial, viewed in the light most favorable to the People.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered August 17, 2016. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

Attorneys and Law Firms

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN A. KULESUS OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ.

****779 MEMORANDUM AND ORDER**

***1536** It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

1 2 Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03[3]), arising from the fatal shooting of the victim outside a residence on Herkimer Street in Buffalo. Defendant contends that the conviction is not supported by legally sufficient evidence primarily because there is no direct evidence that he fired the shot that killed the victim. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People" (**1537 People v. Pichardo*, 34 A.D.3d 1223, 1224, 825 N.Y.S.2d 603 [4th Dept. 2006], *lv denied* 8 N.Y.3d 926, 834 N.Y.S.2d 516, 866 N.E.2d 462 [2007] [internal quotation marks omitted]; see generally *People v. Bleakley*, 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672 [1987]). Here, prosecution witnesses testified that defendant was observed arguing with the victim about poor quality drugs earlier on the day of the shooting and that, later in the day, gunshots were heard and a man with a blond ponytail, i.e., a distinguishing feature of defendant's appearance, was observed with a gun in his hands running toward West Delavan Avenue, near Herkimer Street. Prosecution witnesses also testified that, around the same time, defendant ran to a yellow pickup truck on West Delavan Avenue with a gun in his hand. We therefore conclude that there is ample evidence in the record from which the jury could have reasonably concluded that defendant possessed a weapon and fired the shot that killed the victim. Additionally, upon viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v. Danielson*, 9 N.Y.3d 342, 349, 849 N.Y.S.2d 480, 880 N.E.2d 1 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (see generally *Bleakley*, 69 N.Y.2d at 495, 515 N.Y.S.2d 761, 508 N.E.2d 672).

Contrary to defendant's further contention, Supreme Court did not err in denying defense counsel's request for a racial identification charge (cf. *People v. Boone*, 30 N.Y.3d 521, 526, 69 N.Y.S.3d 215, 91 N.E.3d 1194 [2017]). Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (see generally *People v. Baldi*, 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 429 N.E.2d 400 [1981]). We further conclude that the sentence is not unduly harsh or severe. Finally, we have reviewed defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

All Citations

167 A.D.3d 1536, 90 N.Y.S.3d 778, 2018 N.Y. Slip Op. 08817

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**Rule 13(5) Application for an
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Certiorari**

Exhibit C

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January 7, 2019

Honorable Janet M. DiFiore
Chief Judge. Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207-1095

Attn: Hon. John P. Asiello
Chief Clerk and Legal Counsel to the Court

RE: *People v Abimael Ayala-Gonzalez*, 2018 NY Slip Op 08817, 2018 WL 6714332
Appellate Division Docket No. 16-01597 (4th Dept)
Erie County Indictment No. 2014-1459
Application for Leave to Appeal

Dear Chief Judge DiFiore,

Pursuant to Section 460.20 of the Criminal Procedure Law and Section 500.20 of the Rules of Practice of this Court, the above-named defendant-appellant hereby applies for a certificate granting leave to appeal to the Court of Appeals from an Order of the Appellate Division, Fourth Department dated December 21, 2018. No previous application has been made to a justice of the Appellate Division regarding the instant matter. There are no co-defendants in this matter. A telephone conference to further argue the merits of this application is not requested.

While this Court has considered whether a cross-racial identification charge must be given upon request, it has yet to determine if the opposite is true: must the same charge be given upon request of defense counsel in cases involving same-race identifications? Based on the scientific studies relied upon by the Court in *Boone*, intra-racial identifications are much more accurate than cross-racial ones.

Appellant also requests this Court to grant leave to appeal based on every issue raised in his brief filed with the Appellate Division (*see Morgan v Bennett*, 204 F3d 360, 369-371 [2d Cir 2000]; *Galdamez v Keane*, 394 F3d 68, 74-78 [2d Cir. 2005]).

In this case, myriad witnesses failed to identify Mr. Ayala-Gonzalez as the individual fleeing from the scene of the shooting. In fact, several of them identified individuals other than Appellant as the person who fled the scene. Both the witnesses and Mr. Ayala-Gonzalez are Hispanic.

Aside from individuals who already knew Mr. Gonzalez, no other witnesses were able to identify Mr. Ayala-Gonzalez from repeated photos arrays or at trial. In fact, the girlfriend of the decedent affirmatively stated that Mr. Ayala-Gonzalez was not the individual she saw running out of the yard following the shooting.

Defense counsel requested a cross-racial identification charge during the charging conference (tr at 995). He stressed the importance of the charge because the same-race witnesses should have been able to make a more accurate identification. Their failure to do so indicated that the perpetrator was not actually Mr. Ayala-Gonzalez (tr at 996-997). The trial court denied the request.

Following a jury trial, Mr. Ayala-Gonzalez was convicted of murder in the second degree and criminal possession of a weapon in the second degree (PL §§ 125.25[1], 265.03[3]).

The fact that same-race identifications are more reliable and accurate than cross-racial identifications is supported by ample scientific studies (*see e.g.*, Bryan Scott Ryan, Note, *Alleviating Own-Race Bias in Cross-Racial Identifications*, 8 Wash U Jur Rev 115, 128 [2015]; National Research Council, *Identifying the Culprit, Assessing Eyewitness Identification* 96 [2014]; Wu et al., *Through the Eyes of the Own-Race Bias: Eye Tracking and Pupillometry During Face Recognition*, 7 Soc. Neuroscience 202 [2012]; Saul M. Kassin et al., *On the “General Acceptance” of Eyewitness Testimony Research, A New Survey of the Experts*, 56 Am. Psychologist 405, 410 [2001]; Christian Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psychol. Pub. Pol’y & L 3, 17 [2001]).

Case law in federal and other states prior to *Boone* indicates the same (*see Arizona v Youngblood*, 488 US 51, 72, n 8 [1988] [noting that “Cross-racial identifications are much less likely to be accurate than same race identifications”]; *Young v Conway*, 698 F3d 69, 81 [2d Cir 2012], *reh denied* 715 F3d 79 [2013], *cert denied sub nom* 134

Sup Ct 20 [2013]; *State v Lawson*, 291 P3d 673, 688 [Oregon Sup Ct 2012]; *State v Henderson*, 27 AD3d 872, 911-912 [NJ Sup Ct 2011]).

Jurors might not understand the complexities at play when race is an issue in identifications. This applies equally to same-race and cross-race identifications. Both must be considered in the jurors' decisionmaking calculus. Without any charge on the matter, it is unlikely that the jury will consider something so important.

Appellant is not suggesting that this Court create a new charge. Rather, he is suggesting that the existing charge must also be read upon request of defense counsel where same-race identifications are an issue at trial. The CJI itself also alludes to same-race identifications when comparing the strength of same-race identifications against cross-race identifications (*see* CJI2d[NY] Final Instructions ["You may consider whether there is a difference in race between the defendant and the witness who identified the defendant, and if so, whether that difference affected the accuracy of the witness's identification. Ordinary human experience indicates that *some people have greater difficulty in accurately identifying members of a difference than they do in identifying members of their own race.*"]).

From an Equal Protection standpoint, all similarly situated people — in this case, defendants — must be treated the same. Any ruling which distinguishes or favors people based on race violates the Equal Protection clause. Without clarification from this Court in the instant matter, *Boone* seemingly confers separate treatment of defendants in each case based on their race. If cross-racial identifications are required in one defendant's case based on race, they must be given in other cases of same-race identifications upon defense counsel's request. Otherwise, courts would allow disparate treatment of defendants based on race (*see* US Const amend XIV; NY Const art 1, § 11).

Aside from the denial of the requested charge, Mr. Ayala-Gonzalez experienced prejudice from multiple angles at trial. Prosecutorial misconduct permeated the trial. The prosecutor was permitted to refer to defense counsel's arguments as "rank speculation"; repeatedly bolster her witnesses; shift the burden of proof; and denigrate defense counsel. These prejudices should have minimally yielded a new trial for Appellant. They also warrant review by this Court.

A copy of each brief filed with the Appellate Division and the Order of the Appellate Division are enclosed. Furthermore, excerpts from the trial transcript relating to the requested charge are enclosed (pages 995-997). Proof of service upon the People is also enclosed.

Sincerely yours,



Erin A. Kulesus
Staff Attorney
Appeals and Post-Conviction Unit

CC: John J. Flynn
Erie County District Attorney
ATTN: Donna A. Milling, Esq.
Chief, Appeals Bureau

Abimael Ayala-Gonzalez

Encl.

COLLOQUY

1 be deleted from the charge. And Mr. LoTempio, you have an
2 application.

3 MR. LOTEMPPIO: I do, Judge. I noticed that
4 numerous times in the charge that the word perpetrator is
5 being used. I'd ask that that all be substituted to
6 person.

7 THE COURT: I think that we've agreed on that.

8 MS. GABLE: Yes.

9 MR. LOTEMPPIO: Okay. And then in my copy that I
10 downloaded last night from the CJI website, there's a
11 paragraph that reads: You may consider whether there is a
12 difference in race between the defendant and the witness
13 who have identified the person; and if so, whether the
14 difference affected the accuracy of the witness's
15 identification. Ordinary human experience indicates that
16 some people have a greater difficulty in accurately
17 identifying members of a different race than they do in
18 identifying members of their own race.

19 With respect to this issue, you may consider the
20 nature and extent of the witness's contacts with members of
21 the defendant's race, and whether such contacts, or lack
22 thereof, affected the accuracy of the witness's
23 identification.

24 You may also consider the various factors I
25 have detailed which relate to the circumstances

COLLOQUY

1 surrounding the identification. That part probably
2 should be cut but -- and you may consider whether there is
3 other evidence which supports the accuracy of the
4 identification.

5 Judge, we have here a case where everybody in
6 the case is of Hispanic descent. And I think if you read
7 the footnote on this, which is five, People versus Juertes,
8 which is a Hispanic case, this is in there because there is
9 psychological research and other research done that people
10 of the same race are more apt to be able to focus on things
11 like facial features, nose, cheekbones, hair, body size, as
12 opposed to people of differing races who tend to bulk
13 people together, or follow stereotypes in identifying
14 people.

15 In this case, we are arguing that these
16 witnesses had ample opportunity to see the defendant, along
17 with other people, and they continuously picked out other
18 people, and that it's not happening because they are being
19 stereotypical in following horrible stereotypes where all
20 Puerto Ricans look alike.

21 This is a case where they should have been able
22 to pick out the person who was standing right in front of
23 them on several occasions, and they were of the same race.
24 And I think that this charge kind of tells the jury that
25 if they're of the same race, then, you know, sometimes that

COLLOQUY

1 helps them identify somebody. I think it is applicable
2 here, because they are all of the same race.

3 MS. GABLE: Your Honor, I don't think that it
4 is applicable in this case. I think that the other
5 factors in the Witness Plus charge go to the ability for
6 certain witnesses to observe a person, but I don't think
7 that in this case, the studies and the so-called
8 eyewitness ID experts, what they often opine is that
9 people of different races can have problems with cross
10 racial issues, but I think that the race issue isn't even
11 an issue here. And I think that what this portion of the
12 charge typically talks to is cross racial identifications.
13 I think any issues of whether they should have been able
14 to identify him, I think the other portions of the charge
15 address that, as far as distance and lighting, and those
16 sorts of things, so --

17 THE COURT: I agree with the prosecution on this
18 issue. You have your exception.

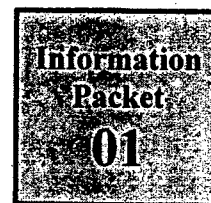
19 With regard to the mistrial, I'm going to deny
20 the motion for mistrial. If -- if both sides want, I
21 would instruct the jury that there's no evidence that
22 either side has made any attempt to mischaracterize the
23 evidence or mislead the jury. They're simply arguing in
24 support of their cases.

25 MR. LOTEMPPIO: I'd ask for the curative

CLINTON

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CORRECTIONAL FACILITY



Overview of Clinton Main's Law Library Services

The following information is provided to help you optimize the services offered by Clinton's Law Library.

Law Library Hours:

Clinton's Law Library is open from Monday through Friday, 8:30 a.m. – 11:00 a.m. (AM Mod); 11:30 a.m – 12:45 p.m. (Workers Only); 1:00 p.m. - 3:30 p.m. (PM Mod); and 6:00 p.m. – 9:00 p.m. (EVE Mod). It's also open on Saturday mornings (AM Mod) from 8:45 a.m. to 11:00 a.m. **PLEASE NOTE:** On the third Wednesday of each month the facility is on a modified schedule. On those days, the Law Library is only open for AM and EVE sessions.

Monthly Callouts:

Clinton's Law Library utilizes a Monthly Call-Out system. The form can be obtained from the block or from the Law Library. You can only put down for those mods when **YOU DON'T HAVE A PROGRAM**. You may put down for 2-3 sessions per week, but law library access may be restricted based on space availability and your previous attendance during the month. This allows everyone equal access to the Law Library when there are more requests for a particular day and time than there are spots available.

If you are unemployed or idle, do not put in an evening call-out. Call-out requests are processed 5-7 days in advance. To allow time for you to be placed on the callout, please submit your form at least seven days before the date(s) you are requesting.

Photo Copies:

There are three ways you can obtain copies. The first and indeed quickest way is to purchase **COPY TICKETS** from the commissary. They are listed under Special Purchase Tickets, code # 5028, on your commissary sheet. They cost .50 cents for five (5) copies. So, if you want to purchase 50 copies, you have to mark down 10 units (10 x .50 cents) on your commissary sheet. Then, all you have to do is present the copy ticket to the Law Library officer when you need copies.

The second method is to submit a **DISBURSEMENT FORM**. However, because the disbursement form has to be cleared by the business office (which is closed during the evening), it may take up to 5 days before you can receive your copies. Under this method, you have to identify the copies you want on a preprinted form, submit the form and the disbursement to the Law Library Officer, and when your disbursement is cleared, the copies will be made and either sent to you, or kept in the law library until the next time you attend the law library.

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If you have a court imposed deadline (i.e. an order signed by the court saying that you have to send a particular application, Reply or other submission to the Court by a particular date), you may obtain deadline access. If the deadline date is 30 days or less from the date of the application, you can attend the law library during your non-program hours, Monday through Friday. Also, instead of attending the law library every day during this period, you can request particular days during the week (i.e., instead of Monday through Friday, you can select Monday, Wednesday and Friday). Deadline access is only available once you are within thirty days of your Court imposed deadline.

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Clinton's Law Library also has various forms and information packets designed to assist you to:

- Utilize the full potential of the programs on the Law Library's research/database system (e.g. "Inmate Legal Resources", "Law Library Resources", "New York Law Journal" [and index], "WestlawNext Guide", "WestlawNext Correctional")
- Obtain documents for use in post conviction proceedings.
- Effectively navigate CPL 440.10, CPL 440.20, Coram Nobis, Habeas Corpus and Other Proceedings

Consult The Information Packet And Forms' Table Of Contents Posted At The Main Counter For A Complete List Of Available Forms And Information Packets