19-6110

No.:_____

ORIGINAL

In The

SUPREME COURT OF THE UNITED STATES

Abimael Ayala-Gonzalez,
Petitioner - Pro Se

v.

The People of the State of New York
Respondent

On Petition for a Writ of Certiorari To
New York State Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Abimael Ayala-Gonzalez - DIN: 16B2592
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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1

During voir dire, my trial counsel repeatedly referred to me as a drug dealer, supplanting the prosecution with a motive that would never have survived New York's prior bad acts and uncharged crimes protocols. My trial counsel failed to object when a non-testifying ballistics examiner's findings were improperly used to connect me to the weapon used in the offense. On dozens of occasions, my trial counsel allowed the prosecution to spoon-feed the jury theories under the guise of "evidence". Also, at sentencing, my trial counsel placed me at the scene of the homicide as one of three men who came to assassinate Mr. Mateo, the decedent in this case. Although presented with the two part performance prejudice standard under Strickland v. Washington, 466 U.S. 668 (1984), the Appellate Division, Fourth Department completely ignored its constitutional duty to resolve my federal claim of ineffective assistance of counsel, and instead, used New York's meaningful representation standard, which omits Strickland's Prejudice prong, and severely alters Strickland's performance prong beyond recognition.

Q1a. Does a state appellate court have a duty to resolve a federal claim of ineffective assistance of counsel claim under the Federal performance/prejudice test?

Q1B. Is New York State's meaningful representation standard equivalent to Strickland's performance/prejudice standard? If not, is New York's meaningful representation standard sufficient in and of itself to resolve a defendant's 6th Amendment claim of ineffective assistance of counsel.

QUESTION 2

All of the main witnesses to see the shooter were Hispanic. None of them picked me out as the shooter, but instead, consistently picked out Mr. Michael Soto, the drug dealer who lived next door to the victim. To overcome this key flaw in their case, during the district attorney's summation, the prosecutor used an "all Hispanics look alike" strategy to explain away why the people picked Mr. Michael Soto instead of me. To combat this prejudicial claim, my trial counsel requested that the jury be charged with an intra-racial identification charge, explaining the reliability of intra-racial identification. Despite the years of expert findings and case law supporting the charge, the trial court denied the charge, and the Appellate Division upheld the denial.

Q2a. Did the denial of the charge deprive me of the right to present an adequate defense?

Q2b. Is there a need to have an intra-racial charge in cases such as this?

Q2c. Is it time that this Court update its holdings in Neil v. Biggers, 409 U.S. 188 (1972), Manson v. Brathwaite, 432 U.S. 98 (1977) and Perry v. New Hampshire, 565 U.S. 228 (2012) to reflect the over thirty years of scientific studies affecting the reliability of eyewitness identification?

QUESTION 3

The prosecutor withheld key Brady material for months before being forced to hand it over to the defense. The prosecutor frequently circumvented the rules of evidence and skirted the county court's pre-trial rulings in a desperate attempt to divert the jury's attention away from the witnesses' identifications that pointed to Michael Soto, the drug dealer next door. During summation, the prosecutor contorted the evidence, pointing to the racist implications of one of its detectives that all Hispanics look alike to explain away why so many witnesses identified Michael Soto instead of this writer, and constantly disparaged the performance of trial counsel.

Q3a. In this purely circumstantial case, did the prosecutor's misconduct satisfy the three part test for misconduct outlined in numerous precedent set by this Court, and did the Appellate Division, Fourth Department violate the Supremacy Clause when it failed to properly utilize the evaluation criteria that would have resulted in the granting of my appellate counsel's application for reversal?

Q3b. What was the appropriate sanction for the prosecutor's numerous blatant and purposeful Brady violations which occurred in this case?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows

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TABLE OF AUTHORITIES

Federal Cases

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below

OPINIONS BELOW

The opinion of the highest State Court to review the merits appears at Appendix B, and is

[X] reported at People v. Ayala-Gonzalez, 33 NY3d 945 (2019)

The opinion of the Appellate Division, Fourth Department appears at Appendix C to the petition and is

[X] reported at People v. Ayala-Gonzalez, 167 A.D.3d 1536 (4th Dept. 2018)

The Opinion of the Erie County Court of New York, granting, in part, the requested sanctions for the prosecutor's deliberate *Brady* violations appears at Appendix N to the petition and is

[X] is unpublished

JURISDICTION

[X] The date on which the highest state court deciding my case was 03/25/19. A copy of that decision appears at Appendix B. This Court gave me until August 22, 2019 to file this application (see Appendix A). After I submitted my application, it was returned to me and I was ordered to re-file this application (after corrections) within 60 days of the date of the letter of correction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 6th Amendment of the United State Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of counsel for his defence
(United States Constitution, 6th Amendment)

The 6th Amendment of the United State Constitution provides in relevant part:

The accused shall enjoy the right to be confronted with the witnesses against him . . .
(United States Constitution, 6th Amendment)

The 14th Amendment of the United States Constitution provides in relevant part:

No state shall ... deprive any person of life, liberty or property, without due process of law (see United States Constitution, 14th Amendment, Section 1).

The Supremacy Clause of Article VI of the United States Constitution provides in relevant part:

The Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the Supreme Law of the Land; and the Judges of every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding (see United States Constitution, Article 6, Clause 2).

Article 1 § 6 of the New York State Constitution provides in relevant part:

In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . .; nor shall he be compelled in any criminal case to be a witness against

STATEMENT OF THE CASE

I. Pre-trial and Trial Proceedings

A. The shooting of Mr. Manual Mateo; Pedro DeJesus and Christiana Acosta's identification of Michael Soto as the shooter; and the Prosecutor's intentional withholding of this information from the defense

On August 7, 2014, Pedro DeJesus and his former girlfriend, Christina Acosta, were knocking on the door of his brother's house at 351 Herkimer when he heard gunshots. They sounded like they were coming from his brother's backyard. Worried, DeJesus ran towards the fenced-in right side of the house where he could see his brother's backyard. At first he saw nothing. He just heard children screaming. Then, he saw an unfamiliar Hispanic heavy-set man trying to climb over the fence before letting go of it and falling down. He then saw another Hispanic man appear from the yard of the house to the right. This man had a gun in his hand. When he reached the area where the heavy-set man lay, he aimed the gun at him without shooting and said in Spanish, "I told you I was going to kill you," before running towards Delavan (T.T. 692-695)[1].

Worried about the events he had just witnessed, DeJesus called 911, while at the same time banging on the door of his brother's house. When his brother came out, they both went towards the back of the house to the fence, which, with the help of neighbors, they proceeded to tear down. Once the gate was opened DeJesus saw the victim, but he did not recognize him (T.T. 696-697, 700).

Mr. DeJesus's Girlfriend, Ms. Christina Acosta testified that when she went to pick up her children at DeJesus's brother's house at 351 Herkimer Street in the afternoon of August 7th, gunshots rang out as she was walking up to the porch. She banged on the door to be let inside; She saw an Hispanic man run out of the side of DeJesus's brother's yard. He had a black gun in his right hand and was running to Delevan Street (T.T. 732-737).

[1] Citations to "T.T. ___" reference the indicated pages from the trial transcript

That same day, DeJesus and Acosta went to police headquarters in separate cars, and were subsequently interviewed in separate rooms (T.711-712). At around 4:30 p.m., DeJesus gave a sworn statement. When shown a photo array, Mr. DeJesus identified Michael Soto as the shooter he saw in the backyard (T.T. 702-704), and as the person whom he saw fleeing from the scene (T.T. 598).

Ms. Acosta also gave a sworn statement, and like Mr. DeJesus, when showed numerous photos, she too picked out Michael Soto as the man that she saw run from the back of the house. It must be stressed that both Ms. Acosta and Mr. DeJesus were separated while they were being transported downtown, while they were in their respective interview rooms, and while they were being shown the photo arrays, and still picked out the same person from the thousands of photographs they were shown. Mr. Michael Soto.

In Ms. Acosta's sworn statement identifying Mr. Soto, she noted that he "looks like him but the hair is different". She also selected another Hispanic male, Mr. Colon, stating, "he had the same hairstyle as the shooter and had similar features to the shooter." Several months later, these same witnesses were shown pictures of me (T.T. 568-570; T.T. 744; T.T. 810). Mr. DeJesus and Ms. Acosta both confirmed that I bore any resemblance to the suspect they saw on the day of the shooting (T.T. 744).

But for some strange reason, this, and other exculpatory information, was not made available to the defense until the start of trial (see Appendices J, K, L, M and N) when an investigatory package was inadvertently given to the defense (see Appendix J). This package contained numerous statements and photographic arrays revealing that there were numerous exculpatory identifications and statements made that, by law, should have been shown to the grand jury in order for them to fulfill their gate keeping function, and to the defense, so that we could file the proper motions, and conduct the appropriate investigation. To escape the obvious prejudicial nature of this inadvertent disclosure, the prosecutor, claiming that these documents were not Brady[2], or otherwise exculpatory, began an elaborate verbal dance to obscure the significance of the documents (see Appendixes J and M). But the exculpatory significance of

[2] Brady v. Maryland, 373 U.S. 83 (1963)

these documents could not be escaped. Several witnesses positively identified the drug dealer next door, Mr. Michael Soto, as the shooter (see Appendix J, K, M). More importantly, these documents showed that none of the witnesses identified me as the shooter, even though they were shown several photographs of me.

To address these blatant Brady violations, there were two court proceedings (see Appendix J and M), a motion submitted by trial counsel (see e.g. Appendix K), and a response by the district attorney (see Appendix L). So extensive were these proceedings that it delayed trial for nearly seven months. Thereafter, in an oral order issued on December 3, 2015, the county court held that its review of the material provided in fact contained materials that were favorable to the defense, and that these materials should have been recognized by the prosecution as Brady material and provided to the defense (Appendix N, pages 4-6). For this willful and deliberate withholding of exculpatory information, trial counsel asked that the indictment be dismissed. But the county court only ordered the district attorney not to enter those documents into evidence, nor to ask the witnesses to make in court identifications (see Appendix N, pages 4-6).

B. Defense counsel, without my consent, informs the Jury that I was involved with interstate drug dealing, opens the door for prejudicial comments to be made by the investigative detective, and fails to adequately protect the record for appellate review

During voir dire, my trial counsel -- without prompting -- informed the prospective jurors, "Mr. Mateo [the decedent] is involved in drugs. I'll tell everyone from the jump, the defendant is, too. The – Mr. Ayala-Gonzalez, this whole case, there's gong to be drugs everywhere." (T.T. 358).

A short time later, defense counsel admitted to all of the elements of a federal drug trafficking offense when she stated "I'm telling you right now, you're going to hear more talk about it, Mr. Ayala-Gonzalez comes back and forth from Ohio to pick up cocaine from the owner of Pandora's and takes it back to Ohio and sells it" (T.T. 392). It must be noted that this

information was never supplied at trial by the prosecution, either through *Molineux*[3], *Sandoval*[4], or other direct evidence. During summation, defense counsel again targeted my alleged drug dealing by stating, "We told you he's a drug dealer. He comes here to and from Ohio to deal drugs .... He's a drug dealer" (T.T. 939-940).[5]

Defense counsel also failed to ensure that the prosecution was unable to allow unsworn expert testimony to be introduced during trial on a crucial topic: the murder weapon. During the direct examination of Erica Coombs, the prosecution asked the witness if any other individuals created an "opinion" relative to the ballistics report in this case (T.T. 859). The witness replied "[a]nd Bert Pandolfino, the other firearms examiner, he also came up with the same opinion, that it was fired from that pistol" (id.). The prosecution put forth no testimony that Pandolfino was unavailable to testify. Defense counsel failed to object.

Moreover, in summation alone, there at least twenty instances where the prosecutor misstated the evidence, bolstered her witnesses' respective testimonies, overstated the probative value of the DNA evidence, or postured unsupported theories as proven evidence (see T.T. 959, 960, 962, 964, 965, 966, 966, 968, 970-971, 975-976-977, 980, 981-982, 984-987). Each of these occurred without objection from defense counsel (also see Appendix D, pages 52-58). But that's not all.

C. Defense counsel's requests for a mistrial, and the trial court's failure to give the requested intra-racial instruction to the Jury to cure the taint of Detective Malec's implied statement that all Hispanics look alike

Aside from the individuals who already knew your petitioner, several other individuals described the individuals they saw present near the home on Herkimer the day the decedent was shot. Each witness gave completely different descriptions of the individuals they saw. But all of the individuals had one key feature in common: when they were shown pictures of me they never

[3] See People v. Molineux, 168 NY 264 (1901)
[4] See People v. Sandoval, 34 NY2d 371 (1974)
[5] Unfortunately, the prosecutor used this her advantage in summation to push the theory; that this was a drug-deal gone wrong that resulted in a shooting and that Mr. Ayala-Gonzalez shot the decedent over a batch of bad drugs, a theory, again, that was never proven at trial (T.T. at 985).

identified me as the person who they saw fleeing from the scene, even though they had several opportunities to do so (T.T. 408, 474, 726-728, 801). This is particularly noteworthy because Ms. Perez, who knew me from prior encounters, and knew my body type, my hairstyle, my complexion, my mannerisms, and my speech (T.T. 511), was absolutely clear that the person that she saw running after hearing gunshots was definitively not me (see T.T. 552).

However, in an effort to overcome this blow to their purely circumstantial case, on re-cross examination the prosecutor asked Detective Malec why the witnesses selected the drug dealer next door from a photo array, and not me. He remarked, because "he looked similar to the defendant" (T.T. 599). Defense counsel, immediately insisted on a mistrial[6], and stated that a curative instruction would be disastrous because . . .

> . . . it's going to draw attention back to it. We don't want a curative instruction, we want a mistrial, and we think that the damage that was done by that, he's now planted the seed in the jury, instead of them saying to themselves, you know what? They probably picked out Michael Soto because he lives up the street and he might be involved in all of this and this investigation's horrible. Now, they're – they've got the subconscious seed planted that, you know what? Michael Soto probably looks just like him and that's why they picked him out. So, we are moving for a mistrial. (T.T. 607-608).

The mistrial was denied. This was significant because during her summation the prosecutor attempted to persuade the jury that they picked out the drug dealer next-door because Mr. Soto and I allegedly look alike. A blatant "all Puerto Ricans look alike" summation. Defense counsel again moved for a mistrial, and alternatively asked for a specific charge on intra-racial identification based on the fact that:

> These witnesses had ample opportunity to see the defendant, alone with other people, and they continuously picked out other people, and that it's not happening because they are being stereotypical in following horrible stereotypes where all Puerto Ricans look alike. This is a case where they should have been able to pick out the person who was standing right in front of them on several

[6] It must be noted that it was defense counsel who opened this door when he asked Detective Malec why so many witnesses picked Michael Soto as the shooter, to which he responded, "***they*** look alike", an obvious reference to both this writer and Mr. Soto being Hispanic.

> occasions, and they were of the same race. And I think that this charge kind of tells the jury that if they're of the same race, then you know, sometimes that helps them identify somebody. I think it is applicable here, because they are all of the same race.
> (T.T. 996-997).

The court summarily denied the request of defense counsel.[7]

D. In front of the jury, the Prosecutor mischaracterizes the identification evidence, accuses defense counsel of failing to produce witnesses, bolsters the credibility of her witnesses, constantly ridicules defense counsel, and becomes an unsworn witness

Throughout the trial the prosecutor made the inference that the witnesses would have been able to identify me had they only been able to see the back of my head. She asked a detective "Did any of the Face book photos that you obtained . . . show the back of the defendant's head?" (T.T. 576). She asked a witness who identified the drug dealer next door, "none of them show the back of someone's head, do they?" (T.T. 744).

In summation, she suggested that the only reason witnesses could not identify me was because "their only view was from behind," a statement that contravened the testimony of the myriad of witnesses who were able to see both the face and back of the fleeing suspect (T.T. 964). Most damaging of all, she suggested that a witness who observed the fleeing suspect only identified someone else in party photo because he looked similar to me, even though a side-by-side comparison of the two suggested otherwise (T.T. 964).

The prosecutor suggested Ms. Perez only identified Mr. Soto as the shooter because she was in shock, and thus, that negatively affected her ability to make a positive identification of this writer; or that, maybe she was not able to identify Mr. Ayala-Gonzalez because she just missed him (see T.T. 975-977). However, Ms. Perez never stated that she was in shock, nor was there any expert testimony about how the alleged "shock" could affect her ability to identify the suspect.

[7] When defense counsel sought to set aside the verdict for the court's failure to grant his request, the court denied his motion (see T.T.8/17/16 at 4-5).

During summation, capitalizing on trial counsel's ill-advised maneuver to caste me as a major drug dealer, the prosecutor implied that I was dealing drugs (T.T. 967, 984). She also stated that none of my family members testified because they were covering up for me (T.T. 968, 985). She stated that witnesses who identified the drug dealer next door did not make real identifications (T.T. 982). She stated that "six different people saw [me] running with a gun in [my] hand immediately after the shooting" (T.T. 961). She stated that "most of those folks on Herkimer said they saw the defendant running away from them" (T.T. 964).

But none of these inferences were supported by the record. These were, in fact, complete misstatements of the eyewitness's testimonies that detracted the jury's attention away from the fact that several of these witnesses had identified Michael Soto as the shooter.

One of the lowest points of the prosecutor's summation was when she went to great lengths to characterize defense counsel as deceptive and manipulative:

> And while we're talking about the photographs and Pedro DeJesus, Recall what Mr. LoTempio did with those photographs while Mr. Dejesus was on the stand. When he showed them People's 66, which is the photograph that Mr. Vellon had circled three people on, he told them that another witness had said that the guy in the red sweatshirt was his brother, O'Brien. Did you think that we and you weren't paying attention? Did he think that we and you were not going to correct that? He wanted you to think that the person Pedro DeJesus had circled was Felix Omar Vellon's brother, which you know is not the case. *That wasn't a mistake, it was an attempt to further their unsupported claim that Mr. Vellon's brother had something to do with this*, that maybe he was the shooter. Recall also that after that exchange with Pedro DeJesus, he didn't put the pictures up on the monitor, as he certainly would have if he had some aha moment, took them, and put them back on the table
> (T.T. 965)(emphasis added).

Next, the prosecutor told the jury:

> Now, you folks have seen a little bit of everything in this case. You might be tempted to just go back there and throw up your

> hands and say, this must be reasonable doubt. They'd probably love if you did that.
> (T.T. 966).

But her misconduct was not just during cross examination, or summation. In her opening statements, she commended the police for their thorough investigation (T.T. 386). She attempted to bolster the testimony of witnesses at the scene by asking if the photographs they were shown showed the back of the suspect's head, seemingly implying that they would not have identified someone else had the picture showed the backs of the individuals' heads (T.T. 408, 576, 744). She asked witnesses about their previous statements without any proper foundation, including whether or not they were being truthful, and at one point reading a witness's testimony into evidence over the objection of defense counsel (T.T. 419-420, 817).

In an effort to shore up an otherwise fragile case, the prosecutor cross-referenced other identification testimony by asking questions of witnesses and how police officers conducted their investigation (T.T. 525). She elicited testimony that suggested that there were some witnesses who were reluctant to testify or speak with police (T.T. 559-560). She tried to buoy the testimony of the officers by intimating that they were busy with other cases at the time of this investigation (T.T. 578). Even though identification was a hotly contested issue at trial, the prosecution moved photo arrays into evidence over the objection of defense counsel (T.T. 703), and in contravention to the trial court's December 03, 2015 order absolutely forbidding such introduction (see Appendix N, pages 5-6). She bolstered the testimony of the ballistics witness by asking her about the findings of other expert witnesses who did not testify at trial in an attempt to forensically connect me to the gun (T.T. 859), when in fact, the DNA evidence excluded me.

The bolstering hit its high point in summation when she insinuated that it was my fault for making witnesses "with all their baggage" testify at trial (T.T. 968). She emphasized that it was not easy for the witnesses to talk to police (T.T. 968). She paid particular attention to bolstering the testimony of one witness, Juan Davila, one of two witnesses who identified me in court and stated that Mr. Davila saw me one hour prior to the shooting. Mr. Davila's credibility was already suspect given that he had been convicted of at least thirteen crimes and was a convicted sex offender because of his role in assisting his friend rape a minor and preventing the

minor from receiving aid (T.T. 442-447). During summation, the prosecutor took it upon herself to urge the jury to find Davila credible:

> Why should you credit his testimony? How do you know that he was not making things up or embellishing? First of all, he has no motive to do so. He was the boyfriend of the defendant's cousin for seven years, and there's been no evidence in this trial that Juan Davila had or has any animosity towards this defendant, and certainly not that he wants to curry any favor with us. He didn't want to have to testify for us. He had to be ordered to come back here from Tennessee and be present for this trial (T.T. 970).

This bolstering was apparently not enough for the prosecutor, who had to take another bite at the apple:

> But when you examine his testimony, you will see that despite that record, he is a credible witness. I had to go back, slow things down, simplify them for him to understand. It wasn't an act, that's who he is (T.T. 970-971).

The prosecutor bypassed the trial court's pre-trial Brady ruling by improperly bootstrapping identification testimony through other witnesses, and suggesting to the jury that the drug dealer next door was identified only because he looked similar to me:

> Ask yourselves, as counsel said in his opening, if the defendant sticks out like a sore thumb in these pictures. They said he's the one giving the finger. Well, there's a couple people giving the finger. Does he stick out like a sore thumb? Look at the person that Pedro DeJesus circled on September 17th, the man in the red sweatshirt. Compare him to the defendant, who's standing next to him in that picture. You assess the similarities for yourselves (T.T. 964-965).

The prosecutor also criticized defense counsel for the way he conducted direct examination and surreptitiously brought up the fact that he had failed to "further their unsupported claim" that another individual shot the decedent (T.T. 965). On two other occasions, the prosecutor implied that certain other witnesses were not called by defense counsel because they were either protecting me or they had nothing valuable to say (see T.T. 968, 985-986). Although trial counsel failed to properly object to these issues, when he did, the trial court gave no curative instructions to the jury, save for one after summation that essentially stated that defense counsel, contrary to the assertions of the prosecution, did not lie to the jury in his summation (T.T. 998).

E. Jury deliberations and the verdict

The jury sent out four notes. The first sought the pictures from the birthday party, including the invitation and the photo arrays which were entered into evidence, but which, according to the trial court's Brady sanctions, were supposed to be omitted from consideration from trial. The second was the testimony of Christina Acosta and Pedro DeJesus relative to the testimony of the appearance of the man that they saw. And the third was to hear the testimonies of Juan Davila, Nathalie Perez, and to see the photos of the house, as well as the police statement/report of Juan Davila (see Appendix H)[8]. After reviewing this testimony, the Jury found me guilty of both counts.

F. Defense counsel's CPL § 330.30 Motion

On 06/09/16, trial counsel submitted a CPL § 330.30 motion, arguing that the court erred when it failed to give the requested intra-racial identification charge. That the prosecutor committed gross misconduct. And the evidence was against the weight of the evidence (see Appendix P). The prosecutor submitted a Response, opposing the granting of the motion (see Appendix Q). On 08/17/16, the county court denied the application (see Appendix R, pages 3 - 5).

G. The unauthorized sentencing statement of defense counsel that I was one of three people sent to kill the decedent

During sentencing, I chose not to speak. I couldn't. Right there before me my trial counsel stated that I was at the scene, one of three sent to do harm to the decedent (Appendix R, pages 7 - 9).

[8] Each of these requests seem to center on the issue of identification

H. My Direct Appeal and Leave Application to the Court of Appeals

On or about 04/25/18, my appellate counsel filed his brief with the Appellate Division, Fourth Department, raising 5 grounds for relief. Those being:

> Point 1: The Verdicts Were Against The Weight Of The Evidence And Were Based On Legally Insufficient Evidence Where Witnesses Closest To The Event Stated That Mr. Ayala-Gonzalez Was Not The Shooter, No Witnesses Identified Him As The Shooter, DNA Results Excluded Him From The Profile Obtained From A Gun, And No Witnesses Identified The Gun Introduced At Trial.
>
> Point 2: Prosecutorial Misconduct Permeated The Trial And Resulted In Palpable Prejudice To Mr. Ayala-Gonzalez Where Defense Counsel Was Portrayed As A Trickster, The Trial Court's *Brady* Ruling Was Bypassed Through Admitting Photo Arrays, The Burden Of Proof Was Shifted Toward The Defense, The Prosecutor Contorted The Evidence In Summation, And The Prosecution Bolstered Her Witnesses.
>
> Point 3: Mr. Ayala-Gonzalez Was Denied Effective Assistance Of Counsel Where His Own Attorneys Repeatedly Referred To Him As An Interstate Drug Dealer, Failed To Object to Shoehorned Expert Testimony, And Failed To Object To Dozens Of Instances Of Prosecutorial Misconduct.
>
> Point 4: The Trial Court Erred In Denying Defense Counsel's Request For A Racial Identification Charge In A Circumstantial Case Where Identity Was Crucial And There Were Multiple Identifications Of Individuals Who Were Not Mr. Ayala-Gonzalez.
>
> Point 5: The Criminal Possession Of A Weapon Sentence Was Unduly Harsh And Excessive ...

On 08/10/18, the district attorney submitted their opposition, opposing each of my appellate counsel's arguments. It is interesting to note that in responding to my appellate counsel's arguments concerning the trial court's failure to give the intra-racial identification charge, the district attorney agreed with the logic of defense counsel's request, commenting that:

> [I]f identifications are qualifiable because people of one race may tend to lack the power to differentiate among people of a different race, ***then identifications of people of one's own race should enjoy a presumption of greater reliability*** -- and [a defendant would be entitled to a judicial instruction to that effect] . . . in other words . . . [a] jury should have been told in some form that

> the witnesses' identifications of Soto and non-identifications of [the defendant] serve greater confidence because identification are more significant and yield fewer false hits where the eyewitness is of the same race as the suspect.

(Appendix E, pages 57-58)(inner quotation marks, and citations, omitted)

The district attorney then went on to admit that trial counsel's request did "seem to harmonize logically with the current rule and reasoning" relative to the need for instructions in same-race eyewitness identification cases (Appendix E, page 58), but stated that trial counsel was simply asking too much (Appendix E, page 58), and therefore the county court was right to deny the request.

On 12/21/18, the Appellate Division, Fourth Department, denied my appeal, holding, amongst other things that: (a) I received meaningful representation at trial, (b) the trial court did not commit error in refusing to provide an intra-racial identification charge, and (c) my appellate attorney's prosecutorial misconduct claim did not warrant reversal or modification of my conviction (Appendix C). In issuing its order, the Appellate Division failed to even address my appellate attorney's federal claim that I received the ineffective assistance of counsel, and instead, rested their entire resolution of my federal claim on the state's meaningful representation standard, which omits the prejudice analysis, and significantly weakens the performance prong of Strickland with a totality consideration that often excuses deficient conduct in contradiction to Strickland's performance evaluation requirements.

II. Reasons Why This Court Should Grant Certiorari

This case represents the perfect platform for this Court to inquire into 3 areas of criminal law that are ripe for discussion by this Court, and will no doubt benefit courts across the country in resolving similar claim.

First, nearly every single prosecution witness who viewed the suspect in broad daylight consistently identified another individual by the name of Michael Soto as the suspect (see State's

Confidential Appendix[9] at 30, 40-41, 48, 57, 65, 70-74; also see T.T. 573, 574, 703, 706,740, 801). All of the witnesses were Hispanic. Because this was purely a circumstantial evidence case, with two eyewitness to the aftermath of the crime identifying another Hispanic by the name of Michael Soto as the shooter, this case presents the perfect opportunity for this court to update is decisions in Neil v. Biggers, 409 U.S. 188 (1972), Manson v. Brathwaite, 432 U.S. 98 (1977) and Perry v. New Hampshire, 565 U.S. 228 (2012) to the conclusion reached by many of this Court's subordinate jurisdictions that instructions on this phenomenal (i.e. intra-racial identification, amongst other things) is consistent with a defendant's right to due process, right to present a defense, and his right to a fair trial.

Second, the facts discussed above present a perfect opportunity for this Court to re-examine the cumulative effects of prosecutorial misconduct, as well as provide for the appropriate sanctions when, as here, the prosecutor purposely withheld the fact that there were identifications of another suspect (see Appendices J, K, L and M and N), none of the DNA at the scene was tested to see if they matched any of the other suspects named by the eyewitnesses, the DNA did not match my DNA, and the state acted with willful disregard to years of this Court's rulings on the appropriate behavior which should be exhibited by a prosecutor (see Appendix D, pages 27 - 52).

And third, my defense counsel constantly referred to me as an interstate drug dealer, failed to object to shoehorned expert testimony and to dozens of instances of prosecutorial misconduct. He also failed to introduce expert testimony summarize the over thirty years of empirical data which shows that studies have shown that subjects were 2.2 times more likely to accurately identity a person of their own race than a person of another race[10]. A needed pre-requisite to his request for an intra-racial charge. Yet, when presented with these clearly unprofessional omissions and actions, the State court found that under New York's constitutional standard of meaningful representation -- which does not assess prejudice (*Strickland*'s first

[9] A confidential appendix was submitted to the Appellate Division. I was never given that appendix. I ask that the district attorney be ordered to provide that Confidential Appendix for use by this Court during its consideration of whether or not to grant certiorari.

[10] see Christian A. Meisner & John C. Bringham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: a MetaAnalytic Review*, 7 Psycol., Pub. Pol'y & L. 2 at 15-16 (2001) (summarizing results of three decades of studies demonstrating effect of own-race bias in eyewitness identifications).

prong), and which excuses counsel's mistakes as long as he makes an opening, cross examines witnesses, makes a closing and files motions -- my trial counsel provided meaningful representation (see Appendix C). Noticeably absent from the decision was any discussion of the Strickland standard. Based on these facts, this case presents the perfect platform to finally resolve if New York State's meaningful representation standard is an effective substitute for the Strickland standard, and whether or not a State court's failure to consider Strickland's two-prong test independently of the respective States' constitutional standard violates the Supremacy Clause.

1. There is a nationwide need for this Court to harmonize the over thirty years of empirical data showing the many variations that affect eyewitness identification with its earlier decisions in Neil v. Biggers, 409 U.S. 188 (1972), Manson v. Brathwaite, 432 U.S. 98 (1977) and Perry v. New Hampshire, 565 U.S. 228 (2012)

In Neil v. Biggers, 409 U.S. 188 (1972), this Court listed five factors for consideration when evaluating the accuracy of eyewitness testimony concerning the identity of a suspect. Those being the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation (id. at 199-200). Then in Manson v. Brathwaite, 432 U.S. 98 (1977), while emphasizing the reliability is the linchpin in determining the admissibility of identification testimony (Manson, 432 U.S. at 114), this Court held that a reviewing court should apply the five Biggers factors, viewed in the light of the totality of the circumstances (id. at 119, 116).

For most of the intervening time, state courts across the county have followed the reliability test announced in Biggers, refined in Manson, and without alteration, applied by this Court most recently in Perry v. New Hampshire, 565 U.S. 228 (2012). It should be noted, however, that in Perry, this Court's latest foray into this subject, the American Psychological Association ("APA"), with both parties consent, submitted an amicus brief urging the Supreme Court to revisit Manson and correct the assumption made in that case because:

> [M]ost of [the Biggers] factors are indeed relevant to probable accuracy -- with the notable exception of witness certainty. But

> given the notable exception, and given the plethora of other accuracy-related factors that researchers have identified since Biggers and Manson, APA urges the Court, in an a appropriate case, to revisit the Manson framework so as to bring it in line with current scientific knowledge
>
> (See Perry, citing APA Brief at 13 n. 8)(citations omitted)

As Justice Sotomeyer stated in her dissent, jurors routinely overestimate the accuracy of eyewitness identifications (Perry, 565 U.S. at 263-64) (Sotomeyer, J. Dissenting)

The year before Perry, however, the New Jersey Supreme Court, in State v. Henderson, 208 N.J. 208, 27 A3d 872, 886 (2011), attempted to revise the concepts raised in Biggers and Manson. After oral argument in 2009, the court "appointed a Special Master to evaluate scientific and other evidence about eyewitness identifications. [He] provided testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies" (Henderson, 27 AD3d at 877). The court adopted much of the extensive and "very fine report" (id.). And what that expert found must be included in a decision by this Court.

For instance, the Henderson Special Master found that during the 1970s, when this Court decided Manson, researchers conducted some experiments on the malleability of human memory. But that decade produced only four published articles in psychology literature containing the words "eyewitness" and "identity" in their abstracts. By contrast, the Special Master in Henderson estimated that more than two-thousand studies related to eyewitness identification have been published in the past thirty years (Henderson, 27 A3d at 892), and thereafter developed a comprehensive framework for both judges and jury's to deal with evaluating eyewitness identifications.

The Henderson Court's framework for addressing identification evidence recognized a far more comprehensive list of suggestiveness and reliability factors than available to this Court in it Biggers and Manson decisions. Based on the research, these factors fell into one of two categories, system variables and estimator variables. System variables are facts which the State controls. While estimator variables are facts beyond the control of the criminal justice system,

and are related to the incident, the witness, or the perpetrator (id. at 904), they include, amongst other things:

- The level of stress the eyewitness was under at the time of the events (Henderson at 904)
- The amount of time the eyewitness observed the event (Henderson at 905)
- Whether the identification is cross racial, as that is generally more difficult (Henderson at 907).
- The speed with which the witness makes an identification (Henderson at 909-10)

Here, on August 7, 2014, Pedro DeJesus actually saw an unknown Hispanic man aim the gun at Mr. Mateo while he was laying on the ground and heard him shooting in Spanish, "I told you I was going to kill you," before the shooter ran towards Delavan (T.T. 692-695). Later that day he would identify Michael Soto as the shooter (T.T. 702-704), and as the person whom he saw fleeing from the scene (T.T. 598).

Mr. DeJesus's Girlfriend was also present, and she had seen the same man running towards Delavan avenue with a black gun in his right hand (T.T. 732-737; also see T.T. 598). She too picked out Michael Soto (T.T. 702-704). More importantly, when Acosta and Dejesus had a chance to identify me as the shooter from a series of photographs shown to them months later, they never picked me out as the shooter (T.T. 568-570; also see T.T. 744, 810).

Based on the scientific studies listed in Henderson, this would have been the perfect case to apply the studies which showed that subjects were 2.2 times more likely to accurately identity a person of their own race than a person of another race (see Christian A. Meisner & John C. Bringham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: a MetaAnalytic Review*, 7 Psycol., Pub. Pol'y & L. 2 at 15-16 [2001]) (summarizing results of three decades of studies demonstrating effect of own-race bias in eyewitness identifications). As such, this case presents significant facts warranting this Court's intervention to update Biggers, Manson and Perry to include the most recent expert findings regarding eyewitness identification.

2. There is a need for this Court to harmonize the confusion amongst the lower courts as to whether or not there is a constitutional right to present a defense that includes instructions based on Eyewitness Estimator Criteria articulated in Henderson

Jury surveys and mock jury studies disclose that jurors all over the country do not intuitively understand the science of memory, and unless informed on the subject, are inclined to accept the eyewitness's level of "certainty" (see State v. Guilbert, 306 Conn, 218, 49 A3d 705, 720-21[2012][stating there is "near perfect scientific consensus" that "eyewitness identification are potentially unreliable in a variety of ways unknown to the average jury"]). To battle this deficiency in knowledge, the Court in Henderson asked New Jersey's Criminal Practice and Model Criminal Jury Charges Committees to draft proposed revisions to the current charge on eyewitness identification that reflect all of the system and estimator variables for which there was scientific support generally accepted by experts (id. at 925-26). The underlying rationale was that with enhanced jury instructions, there will be less need for expert testimony because jury instructions would be focused and concise, authoritative in that the jury heard them from the trial judge, not a witness called by one side, they avoid possible confusion to jurors created by dueling experts, and they eliminate the risk of an expert invading the jury's role of opinion on an eyewitness' credibility (id. at 925).

Other State Courts have recommended the same. For instance, The Supreme Court of Hawaii also considered Henderson (State v. Cabagbag, 277 P.3d 1027, 1037 [Haw. 2012]). The court held it cannot be assumed that juries will necessarily know how to assess the trustworthiness of eyewitness identification evidence, therefore, when eyewitness identification is central to the case, circuit courts must give a specific jury instruction upon the request of the defendant to focus the jury's attention on the trustworthiness of the identification (id. at 1038).

The Supreme Judicial Court of Massachusetts established its own study group in eyewitness evidence (see Commonwealth v. Gomes, 470 Mass. 352, 22 NE3d 897, 900 n. 3 [2015]). Their report often quoted from, or overlapped with the Henderson findings (see Commonwealth v. Gomes, at 911-16). The report convinced the court that some scientific

principles are so generally accepted that it is appropriate in the future to instruct juries on these issues in order to help jurors apply those principles (Commonwealth v. Gomes, id. at 900).

In Young v. State, 374 P.3d 395, 417-25 (Alaska 2016), the Alaska Supreme Court, while conducting its own review of the research, borrowed much from Henderson, supra, on its way toward requiring a procedure for trial courts that closely follows the framework set out by the Supreme Court of New Jersey in Henderson (Young v. State, 374 P.3d at 427). The court also asked the state's jury instruction committee to draft a model instruction consistent with the research (id. at 428). Moreover, given that the district attorney conceded that:

> . . . ***identifications of people of one's own race should enjoy a presumption of greater reliability*** -- and [a defendant would be entitled to a judicial instruction to that effect] . . . in other words . . . [a] jury should have been told in some form that the witnesses' identifications of Soto and non-identifications of [the defendant] serve greater confidence because identification are more significant and yield fewer false hits where the eyewitness is of the same race as the suspect.
>
> (Appendix E, pages 57-58)(inner quotation marks, and citations, omitted)

This case presents the perfect platform upon which this Court's previous decisions in Biggers and Manson could be harmonized with the over thirty years of empirical studies informing the estimator and system biases findings missing from this Court's earlier rulings, while at the same time defining the defendant's constitutional right to present a defense in the context of jury instructions which will help the jury put identification evidence, particularly same race identification evidence, in its proper perspective.

3. There is a need to clarify whether State courts' resolutions of federal claims of ineffective assistance under their respective state constitutions supersedes and/or supplants Strickland's evaluation tools, and/or whether a State Courts' failure to apply Strickland's performance/prejudice test violate the Supremacy Clause

Defense counsel constantly referred to me as an interstate drug dealer, failed to object to shoehorned expert testimony and failed to object to dozens of instances of prosecutorial misconduct. He also failed to introduce expert testimony summarize the over thirty years of empirical data which shows that Studies have shown that subjects were 2.2 times more likely to

accurately identity a person of their own race than a person of another race (see Christian A. Meisner & John C. Bringham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: a MetaAnalytic Review*, 7 Psycol., Pub. Pol'y & L. 2 at 15-16 [2001][summarizing results of three decades of studies demonstrating effect of own-race bias in eyewitness identifications]), but then asked the trial court for an intra-racial charge.

When presented with these clearly unprofessional actions and omissions, the State court, utilizing New York's Constitutional Standard for evaluating claims of ineffective assistance of counsel, found that my trial counsel provided meaningful representation (see Appendix C). Noticeably absent from the decision was any discussion of the Strickland standard.

Based on these facts, this case presents the perfect opportunity for this Court to (a) instruct its lower courts that notwithstanding their respective state constitutions' criteria for evaluating ineffective assistance of counsel claims, they must also resolve a federal claims of ineffective of counsel based on the federal standard outlined in Strickland v. Washington, supra, and (b) settle whether New York's meaningful representation standard, as it now exists, is adequate to resolve federal constitutional claims that counsel was ineffective.

A. New York's meaningful representation standard, when used to evaluate a 6th Amendment claim of ineffective assistance of trial counsel, violates the Supremacy Clause

The Supremacy Clause (U.S. Constitution,. Article 6, Cl.2) does not allow states to deny remedies for federal rights (Harper v. Virginia Department of Taxation, 509 U.S. 86, 100 [1993][11]). While state law may provide relief beyond the demands of federal due process, under no circumstances may it confine petitioners to a lesser remedy (id. at 102) (internal citations omitted). Therefore, when this Court applies a rule of federal constitutional law, that rule is the controlling interpretation of the federal constitutional claim and the States must apply its principles in all cases which seek resolution of the federal constitutional claim when raised by the

[11] While Harper v. Virginia Department of Taxation, 509 U.S. 86, 100 (1993) deals with retroactivity, this Court's rationale, that state court's must apply its ruling to all cases before it, is the controlling principle here.

defendant. This rule ensures that states do not selectively apply rules in an effort to circumvent the constitutional application of this Court's rules.

In Strickland v. Washington, 466 U.S. 668 (1984), this Court issued a two part test for evaluating 6th Amendment claims of ineffective assistance of counsel. The now well entrenched performance/prejudice test. However, when resolving claims of ineffective assistance of counsel, New York Courts routinely apply its meaningful representation standard (see e.g. People v. Baldi, 54 N.Y.2d 137, 146 [1981]; also see People v. Benevento, 91 N.Y.2d 708 [1998]), instead of the Strickland test. This is concerning because New York's evaluation criteria for claims of ineffective assistance of counsel not only does not have a prejudice component (see Rosario v. Ercole, 601 F.3d 118, at 123-23 [2nd Cir. 2010]; also see e.g. People v. Honghirun, 29 N.Y.3d 284 [2017][noting that New York's standard does not require a showing of prejudice]), but it unreasonably alters this Court's performance prong. And this may indeed be its biggest flaw.

Why? This Court has repeatedly stated that while it may generally be appropriate to assess counsel's overall performance throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance, but reminded the lower courts that counsel's performance may still be constitutionally deficient "irrespective of trial performance" (see Kimmelman v. Morrison, 477 U.S. 365, 385-86 [1986]) (internal quotation marks omitted). But New York courts constantly do the opposite. They routinely aggregate counsel's performance and rewards an attorney with the label of meaningful representation, as long as he makes an opening statement, cross examines witnesses, makes a trial order of dismissal, and delivers a summation.

Even if defense counsel had performed superbly throughout the bulk of the proceedings, under the Federal standard he would still be found ineffective under the sixth amendment if deficient in a material way, albeit only for a moment and not deliberately (see e.g. Henry v. Poole, 409 F.3d 48, 72 [2nd Cir. 2005][reliance on counsel's competency in all other respects fails to apply the Strickland standard]).

Here, my trial counsel told the jury that I was a drug dealer (which he never had authorization to do). He told the sentencing court that I was present at the scene of the crime, and actually aided the persons who did the shooting (see Appendix R). He failed to make numerous objections to the prosecutor's summation, and committed a host of other failures (see Appendix D, pages 52-58). Under the Federal standard, he would have been found ineffective. But instead of using the Federal standard, the State found that he performed meaningfully (see Appendix C) because of his other professional conduct in order to lift counsel's otherwise inadequate performance back into the realm of professional acceptability. Under these circumstances, the meaningful representation standard is in sharp contrast with this Court's holdings that no such aggregation can dismiss the taint of improper conduct (see Kimmelman v. Morrison, 477 U.S. at 385-386]).

Thus, under this construct, New York's meaningful representation standard is inconsistent with Strickland's two-prong test, and therefore, must be declared inadequate to resolve a 6th Amendment claim of ineffective assistance of counsel.

B. Lower courts need to be instructed to resolve 6th Amendment claims separately from the state constitutional standards for evaluating claims of ineffective assistance of counsel

The Supremacy Clause makes the decisions of this Court interpreting the United States Constitution the "Supreme Law of the Land." (U.S. Const. Article 6, cl.2; also see Griffith v. Kentucky, 479 U.S. 314 [1987][12]). Therefore, every state trial, appellate and court of last resort must apply the evaluation tools of this court in the manner specifically spelled out by this court.

Here, there is no dispute that under Strickland, which the state court avoided, trial counsel's deficient performance would have resulted in the reversal of my conviction (see Appendix D, pages 52-58). Because my federal claim of ineffective assistance of counsel showed promise, the failure of the State court to use the evaluation tools outlined in Strickland calls on this court to instruct all lower courts that in the future, if a defendant raises a federal

[12] Although this case dealt with retroactivity, the underlying premise, the superiority of this Court's decision over all subordinate courts, provides ample persuasive language to be utilized for an argument urging this Court to instruct lower court's to adjudicate federal claims of ineffective assistance of counsel under Strickland's two prong test

claim under the State and Federal constitutions, as was done here (see Appendix D, pages 52 - 58), then it is the State Court's duty to resolve both claims separately.

4. Because this was purely a circumstantial case, and the record shows gross examples of prosecutorial misconduct and ineffective assistance of counsel which were both enhanced by the trial court's failure to provide me with intra-racial instruction, this case represents the perfect vehicle to expand on this Court's cumulative prejudicial affect jurisdiction

As stated in the statement of this case, nearly every single prosecution witness who viewed the suspect in broad daylight consistently identified Michaels Soto as the shooter (see State's Confidential Appendix[13] at 30, 40-41, 48, 57, 65, 70-74; also see T.T. 573, 574, 703, 706,740, 801). All of the actors were Hispanic. When defense counsel asked for a specific instruction on intra-racial instruction, the trial court refused to give it, and the Appellate Division, Fourth Department, sanctioned this denial (see Appendix C).

This was a case where there were multiple investigatory leads that the police knew about, failed to investigate and the prosecutor seemingly swept under the rug. This was a case that is rampant with exculpatory material and evidence that was only turned over after the people inadvertently gave it to the defense (see Appendixes J, K, L and M). This was a case where the prosecutor portrayed defense counsel as a trickster, bypassed the trial court's Brady ruling, and constantly shifted the burden of proof during summation, all the while bolstering the credibility of her own witnesses, and contorting the evidence in summation (see Appendix D, pages 27 - 52).

This is a case where a defense counsel constantly referred to me as an interstate drug dealer, failed to object to shoehorned expert testimony and failed to object to dozens of instances of prosecutorial misconduct (Appendix D, pages 52-58). He also failed to introduce expert testimony summarizing the over thirty years of empirical data which shows that subjects were 2.2

[13] The State court has a confidential appendix which was used on appeal, and I ask that this Court order the district attorney to provide it with this appendix for this Court's *in camera* inspection prior to this Court's resolution of my application for certiorari.

times more likely to accurately identity a person of their own race than a person of another race[14] A needed pre-requisite to his request for an intra-racial charge.

The cumulative effects of these separate errors operated together to deprive me of my due process right to a fair trial, and presents this Court with the perfect opportunity to expand on its current cumulative prejudice jurisprudence (see e.g. Chambers v. Mississippi, 410 U.S. 284 [1973]; also see Taylor v. Kentucky, 436 U.S. 478 [1978]).

CONCLUSION

Based on the law and facts articulated above, I am requesting that this Court issue an order granting certiorari on any and all questions and arguments raised above, assigning me counsel to perfect this matter, and for any other and further relief as to this Court may deem just and proper.

Date: September 26, 2019

Respectfully submitted,

Abimael Ayala Lopez

Abimael Ayala-Gonzalez

[14] see Christian A. Meisner & John C. Bringham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: a MetaAnalytic Review*, 7 Psycol., Pub. Pol'y & L. 2 at 15-16 (2001) (summarizing results of three decades of studies demonstrating effect of own-race bias in eyewitness identifications)