No. 19-6110

IN THE
Supreme Court of the United States

ABIMAEL AYALA-GONZALEZ,
Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

OTHER AUTHORITIES

STATUTES

STATEMENT OF THE CASE

Petitioner was charged with murder in the second degree (N.Y. Penal Law § 125.25[1]) and criminal possession of a weapon in the second degree (N.Y. Penal Law § 265.03[3]) for shooting and killing Manuel Mateo. Petitioner was tried by a jury and found guilty as charged, whereupon the trial court sentenced him to concurrent terms of fifteen years to life in prison for the murder and fifteen years in prison for weapon possession. Additionally, he was ordered to serve five years of post-release supervision.

Petitioner appealed the judgment of conviction to the Appellate Division of the New York Supreme Court, Fourth Department. On December 21, 2018, that court unanimously affirmed the judgment, holding 1) there was "ample evidence" to justify the verdict; 2) the verdict accorded with the weight of the evidence; 3) the trial court rightly denied defense counsel's request for a racial identification charge; 4) defendant received the effective assistance of counsel; and 5) the sentence was not excessive. *People v. Ayala-Gonzalez*, 167 A.D.3d 1536 (4th Dept. 2018).

The New York Court of Appeals denied without comment leave to appeal the Appellate Division's decision. *People v. Ayala-Gonzalez*, 33 N.Y.3d 945 (2019); *People v. Mijo*, 33 N.Y.3d 951 (2019); *People v. Javi*, 33 N.Y.3d 949 (2019); *People v. Rabito*, 33 N.Y.3d 953 (2019).

FACTS

During the afternoon of August 7, 2014, twenty-two-year-old Jennifer Moreno was attending a family gathering at her mother's house at 371 Herkimer Street in Buffalo. At about 3:15 p.m., while outside of the house, Moreno heard gunshots – possibly three. She saw a man with "a blond ponytail" holding a small black gun and running away toward West Delavan and Niagara Streets. Moreno gave the police a sworn statement on September 24, 2014 but, when shown pictures, was unable to pick anybody out (T 401-405, 407-409, 411; numerals in parentheses after "T" refer to pages of the trial transcript).

On cross-examination, Moreno testified that the gunshots came from 347 Herkimer Street, several houses down from her mother's place. Bryan Santiago, with whom she had been living, accompanied her when she traveled to the police station. Among those attending the gathering the afternoon of the shooting, only she and Santiago had not been drinking. Initially, Moreno testified that after the police had responded, she did not talk about the incident with anyone who had attended the gathering, but simply resumed her normal activities. She later testified that she and Bryan had spoken together of having seen a gun in the running man's hand (T 411-419).

People's witness Juan Davila, forty-six, knew petitioner; petitioner and Davila's girlfriend of seven years, Lucille Gonzalez, were cousins (T 426-427).

In August 2014, Davila was living with Lucille Gonzalez and her father, Felipe Gonzalez, at 347 Herkimer Street. Petitioner – Abi, to Davila – occasionally stayed at the house during that time but lived in Ohio. He had a little "gold ponytail"; the rest of his hair was black. Davila and the Gonzalezes were living in the rear apartment, which could only be

entered from the back of the building. The backyard was fenced in (T 426-431, 450).

Davila was sitting outside in front of his apartment in the late morning or early afternoon of August 7, 2014 when a green van pulled up. The occupants, a male and female, were unknown to him. Petitioner walked up to the van and argued with the male in Spanish, which Davila could understand. They were arguing about drugs; defendant said the drug was no good. Before driving off, the male in the van said that he would be back, and petitioner replied that he would wait for him. Petitioner went to the backyard (T 433-435).

As Davila was about to enter the apartment, he saw petitioner standing on the back porch. Petitioner told him that he was waiting for his friend. Davila went inside; Lucille and her father were there. About an hour later, Davila heard what sounded like firecrackers, and they all ran outside. Davila rushed next door to the yard at 351 Herkimer. The male who had been in the green van was lying on the ground, apparently injured. Davila went to the corner of West Delavan and Herkimer Streets looking for petitioner, but he was nowhere to be seen. He would not see petitioner again until trial (T 437-440).

On September 10, 2014, Davila went with the police to their headquarters and gave a sworn statement. In 2015, sometime after testifying before an Erie County Grand Jury about these events, he went to Tennessee. There he was arrested for and pleaded guilty to failing to register as a sex offender. This was not his second brush with the law; his long train of convictions included petit larceny, misdemeanor assault, loitering for drugs and prostitution activity, disorderly conduct, harassment, reckless endangerment, criminal mischief, misdemeanor drug possession, criminal trespass, criminal sale of marijuana, identity theft, statutory rape, and twice failing to register as a sex offender (T 441-442, 446).

Davila received no assistance from the Erie County District Attorney's Office regarding his Tennessee charges and, in fact, was subpoenaed to testify about the present matter. He did receive an unsupervised probationary sentence in Tennessee that was conditioned on his coming to Buffalo to testify when and if prosecutors here asked him to do so. When he did come to Buffalo, the district attorney's office covered hotel and food costs and provided transportation for a doctor's appointment. Davila knew petitioner and petitioner's family and had preferred not to testify in this case, but he was compelled by subpoena to do so (T 446-449).

On cross-examination, Davila testified that he did not know anyone named Michael Soto. When questioned further about his conviction for statutory rape, he admitted to having thrown the male who was accompanying the female victim from a bridge (T 450-453).

A month had passed between the shooting and when Davila spoke with police. Defense counsel challenged him for not mentioning in his statement to police that he had seen a green van and heard an argument about drugs. Repeatedly, when shown his statement on the stand, Davila indicated that he could not read it without his glasses (T 455, 457-460).

The prosecution's next witness, Buffalo Police Detective Sergeant Harvey Frankel of the crime scene unit, arrived at the already-secured crime scene on August 7, 2014 at approximately 4:40 p.m. He conferred with Detective Sergeant Carl Lundin and Detective Joy Jermain of the homicide squad, who pointed out evidence they wanted collected (T 467-470).

The body of Manuel Mateo lay near a stockade fence on the driveway running between 347 and 351 Herkimer Street. A board of wood similar to the wood on the stockade fence was between his legs. A flip phone was found a few feet away. Mateo had some three

hundred seventy dollars in cash, a phone, a wallet with a Puerto Rico driver's license, and a bag containing heroin on his person. A bullet hole was in his back. Several .380 caliber cartridge cases and cigarette butts were found nearby and submitted to the laboratory for analysis (T 471-479, 482-485, 503).

Frankel attended Mateo's autopsy at the Erie County Medical Examiner's Office and collected a sample of his blood. The sample and a bullet that Dr. Yarid removed from Mateo's right chest area were submitted to the laboratory for future analysis (T 486-488).

Frankel testified on cross-examination that whoever loaded the semi-automatic weapon used in the shooting had to have touched all of the bullets' shell casings, all of which the police collected that day. Shell casings are not tested for fingerprints, however, which Frankel said "do not survive the firing process." DNA also does not survive the firing process, according to Frankel. DNA can be taken from the grip, trigger, and barrel of a gun – or from the top of a chain link fence. No one requested that samples be taken from the top of the fence, or from a chair or bench beside the fence, for fingerprint or DNA testing. No pictures were taken of the backyard of 347 Herkimer Street, and no evidence was collected there (T 492-499, 502).

Twenty-year-old Nathalie Perez, a high school graduate and fragrance vendor at Macy's, grew up in the New York City area and was living there at the time of trial. Manuel Mateo was Perez's Godmother's boyfriend (T 506-507).

In August 2014, she and Mateo drove up to the Buffalo area in Mateo's green minivan. She was Mateo's driver; he did not know how to drive. He had asked her to go to Niagara Falls with him and mentioned visiting old friends. They were not in any sort of

romantic or sexual relationship; Mateo was paying her to drive him there. Perez knew Mateo to be involved with selling drugs but did not know whether this trip was for that purpose (T 507-508).

They arrived in Buffalo at nighttime on Tuesday, August 5, 2014. They went to a bar, which was closed, where they met someone named Miguelle and his wife (T 508-510).

That first night in Buffalo, Perez stayed in a hotel. On Wednesday, she and Mateo went to some stores and returned to the same bar that night. The bar was closed, but Miguelle and his wife, and a friend of Miguelle's named Javi, whom she did not know, were there. Javi was "sort of skinny" and had "about three, four inches of blond hair in the back." Perez learned that Javi also went by the name Rabito (T 508-512).

Perez spent about two hours in the bar that night. She and Mateo socialized with Javi and Mateo, and the two men exchanged phone numbers. Perez, Mateo, Javi, and another individual left the bar together. After dropping off the unknown individual, they dropped Javi off at his Herkimer Street house at about 2:00 a.m. and returned to the house in which Mateo's friend was letting them sleep (T 512-514).

On Thursday morning, August 7, 2014, Perez and Mateo "woke up to phone calls." Mateo was rushing Perez out of the house. She and Mateo went to Herkimer Street, arriving there about 8:00 or 9:00 a.m., and parked in front of the "second house next to the red building." Mateo got out to speak to Javi, though Perez could not hear the conversation. Mateo and Perez left, had a meal, and returned to the same house sometime in the afternoon. Mateo made a phone call and then entered through the fence gate of the house by the red building; Perez remained in the van, which was parked in front of the fence (T 515-518).

Two or three minutes later, Perez heard four or five gunshots. She saw someone run through the fence gate Mateo had entered earlier – someone average or short in stature, stocky, and with something on his head – but did not get a good look at him. Realizing what was happening, Perez drove off and ended up at the house where they had been staying. She called her sister crying and seeking advice, and Miguelle, who tried to calm her. She returned to the same bar after speaking with Miguelle and cried while relating the story to him and his wife. Perez returned to New York City alone (T 515-524).

Upon her return, Perez talked to her sister about the traumatic events. Her sister became angry, called Buffalo police, and made her speak to them, which she did over the phone on August 8, 2014. Her account to the police included the names Javi or Javier (T 525).

Perez gave Buffalo police detectives a sworn statement when they visited her in New York on August 12, 2014. Despite showing her "a bunch of pictures of people," she did not recognize anyone. She returned to Buffalo to testify before a grand jury concerning this case. As to her grand jury and trial testimony, the district attorney's office paid for her flights, her hotel stays, and her food. She did not want to come to Buffalo; she was subpoenaed to come, and a detective interrupted her workday at Macy's – the day she was promoted – by telling her they would get a warrant if she refused to comply. Reluctantly, she testified in the trial (T 525-527).

On cross-examination, Perez testified that she and Mateo shared a hotel room with two beds when they drove up to Buffalo together. She said that was the first time he had her drive him someplace for money. She claimed to have told police that Mateo was her Godmother's boyfriend, but this fact was missing from her statement. Besides Herkimer, Perez

could not remember the name of any of the streets they traveled in Buffalo (T 531-533, 541-543).

Perez was questioned about the other person in the car besides Mateo and Javi the night she gave Javi a ride home to Herkimer Street. She could not recall his name but described him as stocky and wearing baggy clothes. The police did not show her pictures from inside the bar to identify him (T 542-544).

The morning after her first night in Buffalo, Javi and Mateo had a discussion on Herkimer Street near the van. In her statement, she had said noon. Javi was on the phone and seemed a little aggravated, but Perez did not recall he and Mateo arguing (T 545-549).

Perez testified that in the shooting's immediate aftermath, she saw two individuals: One was running up the driveway toward her with an object in his hand; another was in the background. She was without her glasses and could not see the person in the background clearly. The person running up the driveway was stocky and, to her mind, definitely not Javi. She never identified the person in the background as Javi. When she drove off, a black car behind her drove off also. A yellow truck yielded to Perez as she approached it. When Perez returned to the bar, Miguelle did not say that they should call the police; rather, he told her the police would eventually contact her and to cooperate with them without anxiety. He gave her money to return to New York City (T 550-554).

Homicide Detective Scott Malec responded to 351 Herkimer Street on August 7, 2014 and attempted with fellow detectives to get people from 347 Herkimer Street to come out and talk. The detectives failed that day. In Malec's experience, this failure was unsurprising; garnering witness cooperation in homicide investigations is often difficult. Malec persisted,

however, and, eventually, Juan Davila and his girlfriend spoke with him (T 557-560).

Malec met with Christina Acosta at headquarters. Acosta gave a statement and a description of the suspect. Her description was entered in a computer, which in turn yielded web images – mug shots – that she was asked to view. She indicated someone to Malec, and he developed a photo array based on that image. That array was not shown to Acosta, however, but to her boyfriend, Pedro DeJesus, by Captain Gramaglia. Meanwhile, Acosta continued to view web images. She indicated a different person as well, which Malec noted. There were three pages in which she made some indication of a person to Malec. She viewed over two hundred fifty pages in all; none included pictures of petitioner (T 560-564).

Petitioner's picture was not in the photo array that Malec gave to Captain Gramaglia to show to DeJesus. A photograph of a person named Michael Soto was, however. While Acosta and DeJesus were being spoken to separately by different detectives on August 7, 2014, Malec lacked any suspects' names (T 564-565).

A fellow detective's phone interview of Nathalie Perez on August 8th yielded a name: "Javi," which detectives thought could be for Javier, or possibly Xavier, with an "X". Detectives Jermain and Malec flew to New York City on August 12th to interview Perez. They took a statement from her and showed her several mug shots of Hispanic males named Javier or Xavier, but she did not pick anyone out. Petitioner's photograph was not among those mug shots (T 565-567).

During her interview, Perez told detectives that the bar she had visited during her time in Buffalo was Pandora's. She also provided a name, Miguelle Diaz-Rios, a person they then wished to interview. The detectives returned to Buffalo the same day. The next day,

August 13th, they met with Diaz-Rios at Pandora's. He spoke little English, so the detectives brought in Kenneth Ayana, a Buffalo police officer fluent in Spanish. Diaz-Rios showed the detectives photographs on a Facebook page, which they printed out and used in the investigation. One of the photographs, a birthday advertisement, pictured petitioner with the words "Rabito De Oro birthday bash" (T 567-570).

Malec returned for a second interview of Diaz-Rios on August 28th, this time accompanied by Detective John Garcia, who was also fluent in Spanish. This interview led the detectives to investigate a different name: "Abi." This name was linked with a victim of a home invasion listed as Abimael Ayala in the crime report for that incident (T 570-571).

The investigation continued into September. On September 10th, Malec, Facebook photographs in hand, took a statement from Juan Davila. He also interviewed Davila's girlfriend, whom he learned was petitioner's cousin, but she grew uncooperative toward the investigation (T 571-572).

Also on September 10th, Christina Acosta was shown some of the newer, Facebook photographs. She did not recognize anyone in them (T 573-574).

Pedro DeJesus was shown the Facebook photographs on September 17th. He picked out someone other than petitioner. Notably, none of the Facebook photographs obtained in the investigation showed the back of petitioner's head (T 574).

The detectives followed up on information regarding the yellow truck that Perez claimed had yielded to her as she was driving away from the scene. In September, their search led to a home on Lilac Street in South Buffalo and two brothers: Felix O'Brien Vellon and Felix Omar Vellon. Each gave a statement separately from the other (T 575-576).

A smart phone and a flip phone were recovered near the victim's body. Phone records were acquired for the victim's phone and petitioner's phone. Records for petitioner's phone led detectives to a person named Roberto Mitchell, whom they interviewed around September 23rd. Other information led them to possible witnesses Bryan Santiago and Jennifer Moreno, who both gave statements (T 575-577).

Malec and Detective John Garcia went to Ohio in February and March 2015. In late March or early April 2015, petitioner agreed to come back to Buffalo with Malec (T 578-579).

On cross-examination, Malec testified that of the hundreds, possibly some two or three thousand, images shown to Christina Acosta, she picked out two people, Orlando Colon and Michael Soto. These two individuals "had similar features to the shooter." Soto lives at 353 Herkimer Street (T 582-584).

Malec acknowledged that Pedro DeJesus had picked Soto out of a photo array as resembling the suspect. To Malec, it appeared from text messages that Mateo had been a drug dealer and that this case had involved heroin (T 586-587).

The investigation revealed that petitioner was living in Buffalo at the time of the crime. However, he was from someplace else originally and left Buffalo after the crime (T 596).

On redirect examination, Malec testified that despite Christina Acosta and Pedro DeJesus's selection of Michael Soto from photographs shown to them, neither was sure of their selection. Probed by defense counsel about DeJesus and Acosta both picking Soto out despite being kept in different rooms without an opportunity to communicate with each other, Malec indicated that they selected Soto for his similar appearance to the shooter (T 581-584, 597-599).

Thirty-two-year-old Felix Omar Vellon testified for the prosecution that he did not know anyone by the names Abimael Ayala-Gonzalez, Abi, or Rabito, or anyone named Miguelle Diaz-Rios. He did, however, know petitioner exclusively as Mijo, one of the individuals he recognized from a photograph – People's Exhibit 66. He identified petitioner during trial as the person he knew as Mijo and recalled that, back in August 2014, petitioner was skinny and had a yellow ponytail. (T 612-617, 628).

Petitioner was at Vellon's South Buffalo house at around 4:00 a.m. on August 7, 2014. Vellon was drinking in celebration of his birthday, and petitioner left by taxicab after about an hour's visit. Later, Vellon, using his father's cell phone, called petitioner to see if he had made it home alright (T 618-620).

Later that morning, petitioner called Vellon on his father's cell phone and Vellon called him back. They arranged to get money and go drinking. Using his father's yellow Ford pick-up truck, Vellon picked petitioner up somewhere on the west side, and they rode out to West Delavan Street so petitioner could get money and celebrate with Vellon. Vellon parked the truck in a certain block on West Delavan Street facing Grant Street and waited inside for around thirty minutes. He turned the truck around so that it was facing Niagara Street in order to pick petitioner up. A motorcycle passed by just before petitioner came running up to the truck (T 620-627).

Petitioner opened the door to get inside. He had a gun in his hand, which Vellon questioned him about. He replied that it was better not to ask (T 627-628). Petitioner directed Vellon to drop him off at 14th and Connecticut Streets. Vellon reached a stop sign on West Delavan Street when a green minivan almost struck his truck as it rapidly passed by.

After dropping petitioner off, Vellon went home and then rode his motorcycle to Niagara Falls and stayed by the water park, something he commonly did (T 628-630, 639-641).

Vellon did not call the police that day about what he had witnessed; he felt he lacked knowledge about the matter, testifying, "I don't know anything" (T 631).

The police found Vellon's father in September of 2014 while looking for the truck. Vellon's mother and father took him to police headquarters on September 20, 2014. Vellon's brother also attended the meeting and was interviewed separately. The police read Vellon his rights and a recorded interview followed. He also provided police a sworn written statement (T 632-633).

Vellon told the police everything he knew when he spoke with them. He would later find out that someone he did not know, and had nothing to do with, had been killed on Herkimer Street on August 7th. He testified that he was in no way involved in that person's death (T 633-635).

On cross-examination, Vellon testified that he has been living in the Buffalo area since the age of nineteen. He originally lived on York Street on the west side, not far from Herkimer Street (T 635-636).

When shown pictures by the police, Vellon circled petitioner; his brother; a short, stocky person possibly named Pavo, or Pablo; and another individual. The police did not inquire of Vellon further about who the latter two individuals might be. Vellon knew that petitioner did not live in Buffalo "regularly" (T 641-643, 645). Police did not request or in any way try to obtain a DNA sample from Vellon during their meeting. They did not ask him what his cell phone number was or try to find out if he owned a flip phone, nor did they have

him view photo arrays or mug shots (T 644-646).

Vellon, whose birthday was August 4th, admitted to drinking throughout the week of the incident, which was in keeping with a Puerto Rican tradition of celebrating one's birthday for the whole week. Petitioner also drank, and was drunk, the entire week, claimed Vellon. Vellon testified that he and petitioner had been drinking at the former's house on August 7th sometime between 4:00 and 5:00 a.m., after which petitioner had left in a taxicab. Petitioner called him later, and Vellon picked him up on Carolina Street (T 646-650).

In September, Vellon told police that he had not heard gunshots, just a motorcycle pass by. The police records reflect that Vellon had used the pronoun "they" in explaining who was taking too long as he was ready to pull away in his truck; Vellon testified that he had said, or meant to say, "he" to police, not "they," and that his mistake was due to his imperfect English. He does not know what became of the gun that he saw in petitioner's hand when petitioner entered the truck. He testified that when he had stopped to allow the green van to pass by, he saw that its driver was a woman (T 646-654).

On redirect examination, Vellon was shown a portion of his statement – not the part where he described the moments before pulling away in the truck – where he had referred to the person who had called his father's phone, petitioner, variably as "he" and "they." This oddity renders the earlier example of Vellon's pronoun switch adequately explained by his self-described deficient English (T 655-656).

Vellon also testified on redirect examination that the only phone he used was his father's phone; he had no phone of his own and did not carry a flip phone. He did not lose his father's phone, the phone he carried around with him, on August 7th. Neither the person he

identified as Pavo or Pablo, nor the person he marked as "Number 4" on People's Exhibit 66, got into his truck with a gun on August 7th (T 656-657).

Next, the prosecution called sixty-year-old Deborah Brooks to the stand. Her extensive criminal history dates back to 1976 and consists of some twenty-five convictions, including disorderly conduct, attempted petit larceny, attempted possession of stolen property, attempted third-degree assault, attempted reckless endangerment, reckless driving, petit larceny, obstructing governmental administration, and criminal possession of a controlled substance. Many of her crimes were driven by drug addiction. She also has felony convictions for grand larceny and possession of forged instruments. Brooks was using crack cocaine and heroin in August 2014 (T 660-664).

On August 7, 2014, around 3:00 p.m., Brooks was on West Delavan Street near Herkimer Street to buy crack cocaine. She was with her significant other in her parked car, a gray Chevy Aveo, facing Grant Street. She was not using drugs while she was sitting in the car and does not recall having used any drugs earlier that day. She did not end up buying drugs that day; the seller never came (T 664-666).

Brooks had pulled up behind a yellow truck, which had a "Splash" sign on the back left side. At some point the driver of the truck performed a U-turn, stopped, waited a moment, and slowly backed the truck up to the corner. Brooks heard gunshots; the truck began moving slowly. A male came running from Herkimer Street with a black handgun in his right hand and appeared to be motioning with his hands to the driver of the truck to stop. The armed man, who had long hair below his ears and was wearing a white T-shirt and black shorts, hurriedly entered the truck (T 666-671).

Brooks did not see where the truck drove off to. She heard the sound of sirens as she proceeded in her car toward Grant Street. Three children, ten or eleven years old, rode by on bikes, looking "all over." A woman was standing in the middle of the street waving police on (T 671-672).

The next day, Brooks called the police to say that she had information about these events. Some time passed without a return call, so Brooks called again and eventually met with them in June 2015. She gave a sworn statement at police headquarters on June 12, 2015. At that time, she had no pending charges against her and was not seeking anything in return for her information (T 672-673).

On cross-examination, Brooks testified that during the approximately ten minutes that she was waiting in her car behind the yellow truck on August 7, 2014, she did not see or hear any motorcycles pass by. The police did not show Brooks photographs of anyone when they met to discuss the information she had. About a month after the incident, she saw the same yellow truck on Pennsylvania Avenue (T 675, 677, 679-680).

Thirty-two-year-old David Diesenbruch, who works in construction, was on probation during the trial and testified for the prosecution with his attorney present. Diesenbruch pleaded guilty on October 6, 2015 to attempted criminal possession of a weapon in the second degree regarding the discovery of two illegal guns on his property. He was sentenced on January 11, 2016 to weekends in jail and five years of probation. He received no benefit from the district attorney's office for his testimony in this case; the charge and plea predated his involvement in the current matter. He was, however, given a letter from the district attorney's office advising him that he could not legally be prosecuted again for

possession of the gun (T 683-685).

The prosecution first reached out to Diesenbruch in April 2016 regarding a gun found on his property – in his backyard – on July 2, 2015. Diesenbruch's DNA was found on the gun. He had obtained the gun some time after August 7, 2014 from a friend named Mohammed, a relative of his brother-in-law, while at 62 Hawley Street, a construction site on the city's west side. The defense did not cross-examine Diesenbruch (T 685-688).

Pedro DeJesus, a thirty-three-year-old bartender living in Buffalo, was convicted in July 2011 of misdemeanor criminal possession of a controlled substance – crack cocaine. In June 2003, he pleaded guilty in federal court to conspiracy to distribute cocaine and served three years in a federal prison (T 689-690).

Back on August 7, 2014, DeJesus's brother, Omar, was living at 351 Herkimer Street with his significant other and three children, ages five, seven, and two. DeJesus and his former girlfriend, Christina Acosta, were at that residence at around 3:15 or 3:20 p.m. on August 7, 2014 to pick up two of Acosta's children, a nine and seven year old (T 689-692).

DeJesus was knocking on the door of his brother's house when he heard gunshots, which sounded like they were coming from his brother's backyard. DeJesus ran toward the fenced right side of the house where he could see into the backyard. At first he saw nothing when he looked up the driveway by the fence; he just heard the children screaming. Then, he saw an unfamiliar heavy-set man trying to climb over the fence before letting go of it and falling down. Another man appeared from the yard of the house to the right. He had a gun in his hand. When he reached the area where the heavy-set man was lying, he aimed the gun at him without shooting and said in Spanish, "I told you I was going to kill you," before running

toward Delavan (T 692-695).

The man with the gun was light skinned, five feet six or five feet seven inches tall, thin, and wearing a hat over short hair. Worried about the events he had just witnessed, DeJesus called 911. As these events unfolded, Acosta was on the porch. DeJesus banged on the door of his brother's house, and he came out from the back of the house to the fence, which, with the help of neighbors, he proceeded to tear down. Once the gate was opened, DeJesus saw the victim but did not recognize him (T 696-697, 700).

That same day, DeJesus and Acosta went to police headquarters, and, at around 4:30 p.m., he gave a sworn statement. The police showed him a photo array. Of the person in the number 2 position, he said, "It looks a little like him, but I'm not sure." He testified that he does not know anyone named Michael Soto (T 702-704).

DeJesus returned to the Homicide Office sometime around September 17, 2014. He was shown three photographs then. He did not circle anyone in the photograph received as People's Exhibit 71. In the photograph received as People's Exhibit 72, he circled a person in red with a Bulls hat and indicated that he had done the shooting on Herkimer Street. He circled the same person in People's Exhibit 73. During trial, DeJesus designated by his initials a person wearing purple in People's Exhibits 72 and 73, who had looked familiar to him from somewhere else (T 710).

On cross-examination, DeJesus testified that police took him from the scene to police headquarters in an unmarked car. Acosta was taken in a separate car. DeJesus was neither questioned nor shown photographs during this ride (T 711-712).

DeJesus did not pay attention to the people who lived at 353 Herkimer Street.

He could not say whether drugs or guns were leaving or entering that house (T 712-713).

It was between two and three o'clock in the afternoon when DeJesus went to his brother's house on August 7, 2014. The children were in the backyard playing when the shooting happened and would have witnessed whatever occurred there. DeJesus was paying no particular attention to anything happening on Delavan Street and, consequently, never saw a yellow truck or a green van pull up. DeJesus merely heard the gunshots; he could not say who had fired the gun. Though he saw one person leave by the driveway, he cannot say whether anyone else might have left that backyard by another way – by climbing over a fence, for example. DeJesus did not focus on the person he did see, or watch where he went; he was too concerned for his children. He remained on the porch but looked up the driveway by leaning over the railing (T 715-719).

When shown the photo array at police headquarters later that day, DeJesus understood the seriousness of the events and the importance of any indications of possible culprits he might make. Nevertheless, he circled an individual the same size as he but who was only in his mid twenties – several years younger than he. Meanwhile, Acosta was in a different room – also viewing photographs, as DeJesus would learn afterward – and had no interaction with DeJesus before his selection of someone in the photo array. The two would discover afterward that they had each picked out a photograph (T 721-723).

A week or so later, the police showed DeJesus pictures of what appeared to be a celebration. He circled in one of those pictures the person he believed had come down the driveway during the events of August 7, 2014. The person he circled was wearing a red Michael Jordan sweatshirt in the picture. Despite not wanting to implicate the wrong person

for the shooting, he testified of the person he circled, "Yes, I guess, that looks like [the person coming down the driveway]." DeJesus had, however, written on People's Exhibit 70 of the person he circled, "I recognize him from the shooting on Herkimer, he did it" (T 724-728).

DeJesus stated on redirect examination that it was his concern about picking out the wrong person that made him hedge his selection of number two in the photo array by saying that it looked a little like the person he saw on August 7, 2014. People's Exhibit 66 includes this notation by another witness concerning the person in the red sweatshirt: "seen before, can't remember names." A notation by an individual shown in a Yankees hat reads, "O'Brien, my brother" (T 724-730).

Twenty-nine-year-old Christina Acosta, a teacher assistant of seven years, has two children, ages ten and eight. Her boyfriend in August 2014 was Pedro DeJesus. She and DeJesus 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; Pedro went to the other side of the porch. She saw a man run out of the side of DeJesus's brother's yard, but only the back of him. He was of medium height, had a blond mullet, which she also described as "a chunk piece of hair on the bottom," and was wearing a black shirt with "jean shorts or jean pants." He had a black gun in his right hand and was running to Delavan Street (T 732-737).

When DeJesus's brother opened the gate, Acosta could see the victim lying on the ground. She did not know who he was (T 737).

Acosta spoke with police at police headquarters that afternoon, as did DeJesus, but the two were taken separately. She gave a sworn statement and was asked to view

photographs and see if she recognized anyone. She indicated her recognition of two individuals among the photographs shown to her. Asked if she recognized anyone from the photo array, she responded with a "maybe," noting that the person on page 84 looked like the person with the gun but had different hair, and that although the person on pages 218 and 219 had similar features, she was unsure (T 737-743).

She returned to police headquarters about a month later, on September 10, 2014. She was shown different photographs but could not pick anybody out (T 743-744).

Acosta acknowledged on cross-examination that she viewed a lot of photographs during her meeting with the police – possibly over two thousand. She described the man with the gun as being about twenty-five years old and, in People's Exhibit 61, selected a person named Michael Soto, who appeared to her of similar age. Acosta did not know the name of the person she selected, however (T 752-753, 755).

Later, the police had her view more photographs, including People's Exhibit 75. She did not see the man with the gun among the people displayed in that exhibit (T 753-754).

The People's next witness, Mohammed Shafie, was granted immunity before testifying before the jury. A twenty-eight-year-old used car salesman with a 2014 conviction for possessing a small amount of marijuana, Shafie admitted to at one time illegally possessing a handgun – a Hi-Point .380 semi-automatic pistol. He gave the weapon, which a now-deceased person named Jo-Jo had given him, to David, whose last name he does not know, sometime after August 7, 2014. David's sister is married to Shafie's cousin (T 758-765).

Nicole Yarid, Associate Chief Medical Examiner for Erie County, has performed approximately eight hundred autopsies in her career. She performed the autopsy of Manuel

Mateo on August 8, 2014. Mateo was five feet seven and one half inches tall and weighed one hundred eighty-six pounds. He was wearing a red short-sleeved shirt with a collar and khaki shorts. He had a wallet, some money, and a little plastic bag with "some sort of gray-white stuff in it." He had multiple abrasions or scrapes on his left inner upper arm and on his forearm, around both knees, and on his right inner thigh (T 769-776).

Mateo had a gunshot entrance wound on the left side of his back. There was no exit wound; the bullet was still inside his body. Yarid did not observe any fouling or stippling, which meant either that the gun had been fired from more than a couple of feet away from Mateo or that something, such as heavy clothing or a wall or window, had blocked the soot or smoke. No stippling or soot was seen on Mateo's shirt (T 777-779).

The gunshot had injured Mateo's heart, liver, left lung, and one of his ribs. He had "quite a bit of blood in his chest cavity": one liter in the space around the left lung; two hundred milliliters in the right chest cavity; and three hundred milliliters in the pericardial sac. He had a small amount of blood, fifty milliliters, in his abdominal cavity. Such an injury is generally fatal (T 779-781).

Yarid recovered a bullet from Mateo's body and gave it to the police. The bullet was not tampered with between its recovery and delivery to the police, and it never left the custody of the Medical Examiner's Office in that period. In fact, Detective Sergeant Frankel was there to take custody of the bullet upon its recovery from Mateo's body (T 781-782).

Toxicology testing yielded no findings of drugs or alcohol in Mateo's system. Yarid opined, based on her autopsy and the results of the toxicology testing, that Mateo had died from a gunshot chest wound. She could say nothing of the events or circumstances surrounding

the shooting (T 783-788).

Bryan Santiago, twenty-four, came up to the Buffalo area from Puerto Rico in 2009. His lone criminal conviction came in 2011, felony possession of a narcotic drug with intent to sell (T 793-795).

On August 7, 2014, Santiago was at his mother-in-law's house on Herkimer Street with his family. Neither he nor his significant other, Jennifer Moreno, were drinking alcoholic beverages that afternoon. He heard multiple shots at about 3:20 p.m. and caught a fleeting glimpse of the back of a man in black clothing running on Herkimer Street toward West Delavan, and from there toward Niagara Street. The man had "a little ponytail" and was carrying a chrome-colored handgun. Santiago went to the victim, whom he had never seen before (T 795-798, 802).

Santiago and Moreno went to Buffalo Police Headquarters on September 24, 2014 and were interviewed in separate rooms. He gave a sworn statement and was shown pictures, People's Exhibit 77, but did not recognize anyone in them (T 799-802).

The defense elicited on cross-examination that Santiago had described the gun to police as a big gun without using the word handgun. He had, however, indicated that it was in the man's right hand. He had not noticed a yellow pickup truck or a green van on the day in question (T 806, 811, 814).

Thirty-one-year-old Roberto Mitchell, who has convictions for driving with a suspended license, disorderly conduct, and felony sale of a controlled substance, knew petitioner by the names Rabito De Oro, Mijo, and Millones. He knew petitioner back in August 2014, when petitioner had a gold ponytail, and saw him at Pandora's Bar a couple of times (T

820-824)

Petitioner came to Mitchell's home in the early morning of August 7, 2014. They had a couple of drinks. Later that day, while Mitchell was home at 22 Esperar Street, petitioner phoned him requesting a ride, but he declined. Petitioner hung up the phone, which marked the end of their contact (T 824-826).

At the request of police, Mitchell accompanied them to headquarters on September 23, 2014. They had him view pictures. He recognized Millones, O'Brien, and Miguelle in one of them – People's Exhibit 78. Millones was wearing "the black with the red Jordan on it" (T 827-829).

On cross-examination, Mitchell indicated that the men depicted in People's Exhibit 78 would occasionally all hang out together at Pandora's Bar. He gave some information to police about certain people in the picture on September 23, 2014. Although the police did not follow up with him to try to learn names or addresses for certain of these people, Mitchell provided this information to them (T 831-835).

Petitioner had left Mitchell's house the morning of August 7, 2014 by taxicab. Mitchell did not know where petitioner went from there. When petitioner called Mitchell on the phone later that day, he was talking fast. According to Mitchell's statement to police, when he had declined to give petitioner a ride because he had to look after his son, petitioner told him to bring his son with him. Mitchell testified, contra his statement, that he never told police that petitioner had told him to bring his son (T 835-840).

Firearms examiner Jennifer Coombs testified that the forensic laboratory received People's Exhibit 79, a Hi-Point .380 semi-automatic pistol, which was test fired by another

firearms examiner, Cody McKellar. The first of three test fires involved a cartridge that had been submitted to the laboratory with the pistol; the second two cartridges used were from the laboratory's ammunition supply (T 841, 848-849).

Coombs analyzed People's Exhibit 45, the bullet recovered from Mateo's body. There was rifling on that bullet – nine land groove impressions with a left twist, meaning there were nine grooves cut into the barrel to create the nine groove impressions and the nine land impressions, and the direction of twist in the barrel was to the left. Coombs determined that the bullet was in a class of ammunition that includes "380 auto." People's Exhibit 45 and the bullet generated by the test fire share the same rifling characteristics commonly found in Hi-Point pistols. Coombs also examined People's Exhibits 40, 41, 42, and 43, which she determined to be .380 caliber cartridge cases, and which shared class characteristics: parallel breechface marks; hemispherical firing pin impressions with circular marks within them; and extractor marks in the three o'clock position, and no distinct ejector marks. She concluded that People's Exhibit 42 had been fired from the Hi-Point pistol that was submitted to the laboratory as evidence in this case, and produced a report to this effect on April 14, 2016, which, upon review by the supervisor of the laboratory's firearms section, Bert Pandolfino, was transmitted to the Erie County District Attorney's Office (T 850-858).

Coombs acknowledged on cross-examination that she did not know where the gun had been between August 7, 2014 and July 8, 2015, when the Lancaster Police Department submitted it to the laboratory. She could not say whether the magazine that was in the gun was the original equipment, or that whoever loaded the gun on or about August 7, 2014 had touched the magazine. The firing of four shots from that weapon would not typically cause the

handle, the trigger, or the magazine to get hot, though the cartridge that falls to the ground after a shot is fired may be warm to the touch. Coombs was not aware of any requests for DNA analysis of the gun or any of its equipment, but, as a firearms examiner, is not involved with such requests (T 861-867).

Forensic biologist Jodi Luedemann testified that many variables affect whether and how much DNA gets transferred to an object via touch, including one's tendency or lack thereof to shed DNA, or skin cells, and how oily one's skin is. Simply point, one may touch an object without leaving DNA on it. DNA deposited on an item can be removed, such as by bleach or another cleaning agent. An object such as a pen that passes through many hands may lose some of its handlers' DNA along the way through transference; a handler may, simply by touching the object, collect some or all of the DNA of a previous handler. Frequently, laboratory personnel will encounter a mixture of DNA on an object – DNA from multiple people. As time passes and more people handle an object, the DNA of a more distant handler may become harder, or even impossible, to find (T 868, 872-875).

Luedemann swabbed the handgun recovered in this case, People's Exhibit 79, on July 15, 2015, before it was test fired. There was no magazine with the gun when she swabbed it. Magazines are not typically swabbed at the laboratory; historically, swabbing them has yielded poor results. Cartridges are also generally not swabbed due to their small size and the damaging effect of heat on any DNA that might have been left on them (T 878-884).

A genetic profile was obtained from the swabbing of the handgun that consisted of a mixture of DNA from four people, at least one of whom was a male. The major DNA profile was of a male individual and matched the DNA profile from a cup abandoned by David

Diesenbruch. Then, Luedemann compared a known buccal sample from defendant with the mixture of genetic material obtained from the gun. Defendant was excluded as a contributor to that material (T 884-886).

Luedemann also analyzed cigarette butts retrieved in this case and obtained genetic profiles from them. There were mixtures on two of the butts and single profiles on the other two. One of the single profiles belonged to an unknown female. Petitioner meanwhile, was excluded from all of the cigarette butts. Mateo was also excluded as a contributor to the genetic material on all of the cigarette butts based on his known sample. He was the source of the genetic material obtained from the piece of fence submitted to the laboratory (T 886-888).

On cross-examination, Luedemann testified that the piece of fence tested negative for blood, meaning that the DNA Mateo had left on it might have been from skin cells or sweat, or both. She could not say whether petitioner had or had not touched the gun (T 888-889, 900).

POINT ONE

PETITIONER'S CHALLENGE OF THE TRIAL COURT'S REFUSAL TO DELIVER AN *INTRA*-RACIAL IDENTIFICATION CHARGE TO THE JURY IS NOT OF FEDERAL CONSTITUTIONAL DIMENSION. THE ABSENCE OF THAT CHARGE DID NOT DEPRIVE PETITIONER OF A FAIR TRIAL.

Petitioner is Hispanic. The People's main witnesses, those present during the shooting, were also Hispanic. When these witnesses were shown photographs of potential suspects, they did not select petitioner but indicated that another man, Michael Soto, resembled the man they saw that day.

Without more, this fact would naturally raise concerns of a wrongful conviction. Petitioner maintains that the threat of such injustice compelled the trial court to charge the jury that it may ascribe special importance to the fact that members of his own race selected a different individual as the possible shooter. As will be seen, providing such a charge was not only needless but would have raised the specter of serious unintended consequences. The proof before the jury was much stronger than petitioner imagines, however, making the present debate largely academic.

The centerpiece of petitioner's challenge below of the sufficiency of the evidence was that the People's witnesses could not identify the man with the gun who had run up the driveway from 347 Herkimer Street. Two of those witnesses, Pedro DeJesus and Christina Acosta, selected a person named Michael Soto from, respectively, a photo array and a large compilation of photographs. On top of this, petitioner contends that the witnesses' descriptions of the people they saw immediately after the sound of gunfire conflicted with one another. Add

to this petitioner's exclusion as a source of genetic material collected from the gun, as well as from cigarettes collected from the scene, and what remained, according to him, was a case that was starved for evidence – terminally circumstantial – and which failed to justify the verdict.

This case was, as the prosecutor rightly observed in summation, "a building process" (T 979). When that process was completed, the proof of petitioner's guilt was compelling. Of course, the People's witnesses could not have been expected to identify petitioner from photographs, much less confidently so, when mostly they had gotten only a fleeting or poor look at him or seen him only from behind – or, in Perez and DeJesus's case, had likely not actually seen him at all, but Davila (T 403-404, 515-524, 437-440, 550-554, 732-737). But the witnesses' descriptions of the shooter accorded well with descriptions of petitioner by those acquainted with him: Moreno mentioned the ponytail; Perez, that he was sort of skinny with three or four inches of blond hair in the back; DeJesus, that he was thin, light skinned, and of medium height – five six or five seven; Roberto Mitchell, that he had a gold ponytail; Vellon, that he was skinny with a yellow ponytail; Davila, that he had a gold ponytail; Acosta, that he was of medium height and had a blond mullet, or "a chunk piece of hair on the bottom." None of the photographs from which selections were made showed the distinctive feature by which the person with the gun was most consistently described; none of them showed anyone from behind (T 403, 428, 508-512, 574, 628-630, 696, 732-737, 820-824).

As to the claimed identifications of Soto, there were no actual – certainly no confident – identifications but only tentative or qualified selections (T 581-584, 597-599). Petitioner suggests Soto should have been the target of the police investigation, but recall that Acosta also selected Orlando Colon from among the photographs. The witnesses were, in their

own words, simply pointing out individuals whose features resembled who they had seen that day – again, mostly from behind, or only momentarily. Their supposed identifications of Soto were mostly qualified suggestions.

The evidence of petitioner's guilt is spread widely throughout the testimony of the People's many witnesses and is merely summarized here. The phone records, People's Exhibits 47 and 48, established the phone contact between Mateo and petitioner, who had exchanged numbers the night before Mateo's killing; Vellon testified to having driven petitioner to a location near the scene of the killing on August 7th and that, some thirty minutes later, petitioner entered the yellow truck with gun in hand, refusing Vellon an explanation for the gun (T 627). The truck they were riding in, Vellon's father's yellow Ford, became an important piece of proof: Perez testified that as she was driving away from the scene after the gunshots, it yielded to her as she approached it (T 550-554). This explains why Perez had not seen petitioner running up the driveway, but probably Davila; petitioner had already raced to and entered the yellow Ford, which Vellon was trying to navigate away from the scene as Perez was hurrying herself away (T 628-629, 654). Nor should it be overlooked that in August 2014, petitioner had occasionally been staying at 347 Herkimer, the residence of Lucille Gonzalez and Felipe Gonzalez, his cousin and uncle, and Davila (T 426-427). Neither Lucille nor Felipe Gonzalez cooperated with police during their investigation of the shooting (T 557-560, 571-572).

Davila's testimony had petitioner at the scene, standing on the back porch waiting for his friend, just moments before the shooting (T 437-440). His testimony made no mention of anyone else inside the house but Lucille, Felipe Gonzalez and himself. Not only that, he positively testified that before he went inside, nobody was in the backyard besides petitioner

(T 436-437). Deborah Brooks corroborated testimony placing petitioner at the scene, particularly Vellon's, in her account of seeing a yellow truck begin moving after gunshots sounded and an armed man motioning toward it and hurriedly entering it (T 666-671). DeJesus had seen the man with the gun run up to the victim, aim the gun at him, utter in Spanish, "I told you I was going to kill you," and run toward Delavan Street (T 692-695).

Finally, Davila testified that earlier the day of the shooting, he saw the green van pull up near 347 Herkimer Street and petitioner walk up to the van. Petitioner was arguing, in Spanish, with one or both of the van's occupants about drugs. Before driving off, the male in the van said that he would return; petitioner said that he would wait for him. Petitioner went to the backyard, where Davila would see him, alone, moments before the crime (T 433-435).

There was more evidence than this, and this Court is encouraged to revisit the facts rehearsed above in order to gain a fuller picture of the proof, and of the People's painstaking "building process" that resulted in the jury's verdict. This was a circumstantial case, but the many elements of the witnesses' testimony combined to make it a strong one – much stronger than it might at first have appeared.

Proof aside, petitioner's challenge of the refusal to deliver an *intra*-racial identification charge is not of federal constitutional dimension. While this Court "has recognized the inherently suspect qualities of eyewitness identification evidence" (*Watkins v. Sowders*, 449 U.S. 341, 350 [1981]), and – in a footnote to a dissenting opinion by Justice Blackmun – acknowledged certain studies' finding that cross-racial identifications "are much less likely to be accurate than same race identifications" (*Arizona v. Youngblood*, 488 U.S. 51

[1988], Fn. 8, citing Rahaim & Brodsky, Empirical Evidence versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy, 7 Law and Psych. Rev. 1, 2 [1982]), whether and how to deliver cross-racial identification charges has been confined to state jurisprudence. The New York State Court of Appeals has recently held that when in criminal cases identification is an issue, and the identifying witness and defendant appear to be of different races, "upon request, a party is entitled to a charge on cross-racial identification." *People v Boone*, 30 N.Y.3d 521, 526 (2017). Significantly, undergirding the court's holding was a variety of published studies showing that the challenges of identification across races were not only real and demonstrable, but also unappreciated by many, even a majority, of jurors surveyed. *Boone*, 30 N.Y.3d at 529. The difficulty unique to cross-racial identifications has achieved in New York criminal courts the status of a judicially-noticed fact that demands, where relevant, the giving of a jury charge upon a party's request as a matter of due process.

In contrast, an *intra*-racial identification charge, one which would have invited jurors to attach special import to the qualified selection of Michael Soto by the People's main witnesses, lacks any of the foundation of studies and careful consideration that led the *Boone* court to its conclusion on cross-racial identification charges. While it is logical to draw from these same studies that, generally, more confidence can be had in an intra-racial than a cross-racial identification, this greater confidence should be viewed not as infusing the identification with some special value, but as preserving the mean. That is, in a factual vacuum all witness identifications enjoy an equal footing. Only when certain facts are marshaled – the lighting was poor, the glimpse was fleeting, the witness was without her glasses – does this equality begin to erode. Likewise, if the studies are right, this equality erodes, in some degree, when

the identification is across races.

But what kind of *intra*-racial identification charge would be meaningful for a deliberating jury? To advise a jury that an intra-racial identification generally deserves greater confidence than a cross-racial identification is merely to tell it that the intra-racial variety, whatever its problems, lacks the unique type of problem associated with identifications across races. Such a charge would constitute a truistic addition to a cross-racial identification instruction, a different but extraneous way of telling the jury that it must identify some other fact or facts besides race to treat this identification differently from all the others existing in an informational vacuum.

Yet, if such a charge were to find its footing in due process, it would have to be crafted extremely carefully to prevent the benefitted party from netting a windfall – or, put in terms that would not induce, even subtly, the jury to abandon fastidious and objective scrutiny of the identification in terms of traditional and commonsense considerations like distance, time, lighting, attention level, et cetera.

But what if a prosecutor were to seek an instruction as to the identifications of his Hispanic witnesses of a Hispanic defendant? Should the People be denied the benefit of a judicially-noticed fact that the intra-racial nature of their witnesses' identifications of the defendant makes them more trustworthy than if they had been cross-racial in nature?

Finally, it bears noting that the claimed identifications of Soto were more qualified selections than true identifications. The witnesses expressed uncertainty when pointing out Soto, indicating that he resembled the man they saw. And this raises another question: Would tentative selections of a defendant by prosecution witnesses effectively be

bolstered by the giving of an intra-racial identification charge? Invariably, those criminal defendants tentatively identified would claim so.

For the reasons stated above, the refusal to give an intra-racial identification charge does not implicate federal due process considerations. If anything, mandating provision of such a charge would invariably create problems affecting due process and the fairness of trials – for both parties.

POINT TWO

TRIAL COUNSEL'S REPRESENTATION WAS EFFECTIVE UNDER THIS COURT'S STANDARD ANNUNCIATED IN *STRICKLAND V. WASHINGTON*. NEW YORK STATE'S "MEANINGFUL REPRESENTATION" STANDARD COMPORTS WITH THIS COURT'S STANDARD.

Petitioner asserts that trial counsel provided ineffective representation by informing jurors during voir dire, his opening and closing statements that he was involved in drug dealing; failing to oppose the prosecutor's introduction of "unsworn expert testimony" during trial; and failing to object – or object properly – to improper summation remarks and other alleged missteps by the prosecutor during the trial. Contra petitioner, trial counsel's advocacy satisfied the state and federal standards of effective representation.

Among his most serious criticisms of trial counsel was the repeated references to his involvement in drug dealing (T 358, 392, 939-940). As to these references, petitioner cannot, on this record, overcome the presumption that they were part of a sound trial strategy. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Indeed they were: It is commonly known that drug dealers risk violent death at the hands of trade competitors or dissatisfied buyers. Presenting defendant as a dealer effectively assigned him to a particularly endangered class of people, a fact which harmonized with trial counsel's portrayal of him as having fled in fear or confusion from where the actual shooter had struck (T 940). Trial counsel appears to have considered this strategy necessary to counteract the testimony of Felix Vellon, which placed defendant at the scene and depicted him as having hurried back to Vellon's vehicle, gun in hand, just after the shooting (T 620-630).

Another supposed failure of trial counsel lay in a failure to object to Erica Coombs' testimony that laboratory supervisor Bert Pandolfini had agreed with her findings concerning the murder weapon (T 859). This failure to object was inconsequential: Coombs had just testified that the report of her findings had to be reviewed by a qualified analyst – Pandolfini, in this instance – before it could be sent out. The report was sent out; the prosecutor had it and was questioning Coombs about it on direct examination. By simple deduction, Pandolfini must have reviewed the report and agreed with its findings. The jury needed no help recognizing the fact. There was nothing to object to.

Petitioner cites the absence of objections to the prosecutor's summation remarks he deems improper. In fact, the prosecutor's summation constituted fair commentary on the proof elicited during trial. Petitioner suffered no prejudice from trial counsel's silence during that stage. *See Strickland*, 466 U.S. at 669.

Meanwhile, trial counsel vigorously pursued a strategy of undermining confidence in the police investigation and the handling of leads. This strategy was coherent and likely the most powerful available, if ultimately unsuccessful, because of the photographic selections of Michael Soto by two of the People's witnesses. Trial counsel's strategic choices resulted from professional judgment and must be given deference. *Id.* at 681.

Petitioner also claims that New York State's standard of review for claimed ineffective assistance of counsel cases, whether the representation was "meaningful" when viewing the case in totality, violates this Court's *Strickland* standard. *People v. Baldi*, 54 N.Y.2d 137, 147 (1981). Besides the New York standard's absence of a prejudice prong, his main criticism of it seems to involve its supposed tendency of overlooking serious but isolated

failings by trial counsel in favor of an overly-broad outlook on his or her representation.

Given that trial counsel's representation satisfied the *Strickland* standard, this claim need not be resolved here. All the same, New York's standard, while different from the federal standard, is more favorable to criminal defendants: In New York, "even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still warrant reversal whenever a defendant is deprived of a fair trial." *People v. Honghirun*, 29 N.Y.3d 284, 289 (2017), quoting *People v. Caban*, 5 N.Y.3d 143, 155-156 (2005). Under both the federal and state standard, a criminal defendant must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Honghirun*, 29 N.Y.3d at 289, quoting *Strickland*, 466 U.S. at 668. In fairly recent years, New York's standard has approximated the federal standard further – particularly *Strickland's* prejudice prong. In *People v. Turner* (5 N.Y.3d 476, 481 [2005]), the Court of Appeals held that despite an otherwise sound performance, trial counsel will be deemed ineffective for neglecting to advance a "clear-cut and completely dispositive" claim.

In this case, trial counsel met both the state and federal standard for effective representation. His representation met an objective standard of reasonableness and resulted in no prejudice to petitioner. Additionally, those two standards are much closer than petitioner contends, with New York's offering an even more favorable review for criminal defendants than what *Strickland* establishes.

POINT THREE

THE TRIAL COURT CORRECTLY ADDRESSED A *BRADY* VIOLATION BY THE PROSECUTION, ENSURING THE ABSENCE OF PREJUDICE TO PETITIONER.

Petitioner claims that the prosecution not only committed a *Brady* violation but also circumvented the trial court's ruling, irretrievably prejudicing the defense. However, the trial court correctly addressed the prosecution's lapse and ensured in its remedial ruling that any potential prejudice to petitioner was eliminated.

On the day jury selection was to begin, the defense voiced concerns over certain information they discovered when the prosecution provided discoverable material. The information related to identification procedures of which the defense had not, as they should have, been fully apprised. The details would not all be provided until after the trial was adjourned. The materials contained information favorable to the defense and which should have been recognized as *Brady* material – namely, police-arranged photographic identifications by certain witnesses of people other than petitioner.

After extensive discussion about the nature of the withheld material (Petitioner's Appendix, Exhibit J), the trial court fashioned a remedy. Noting first that "much of the potential prejudice to [petitioner] has been cured by the adjournment of the trial and the release of the materials," it then concerned itself with "ensur[ing] [petitioner's] constitutional right to a fair trial" (Petitioner's Appendix, Exhibit N). The principal relief consisted in the trial court's preclusion of the prosecution from asking the relevant witnesses, if called, to make an in-court identification on its direct case (Petitioner's Appendix, Exhibit N).

Contra petitioner, at no time during the course of the trial did the prosecution circumvent or violate the trial court's *Brady* violation remedy. The prosecution was not prohibited from using or referring to the photographs, but only from eliciting in-court identifications of petitioner from the subject witnesses of the *Brady* violation. The prosecution suffered the penalty for its oversight, but the trial was adjourned so that the defense could be made aware of all the materials in question. The possibility of prejudice was eliminated by the trial court's correct handling of the matter.

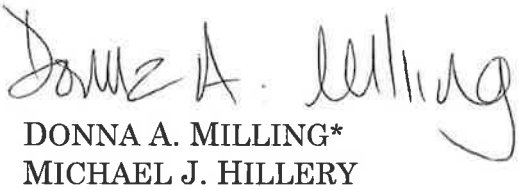
CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED IN EVERY RESPECT.

Dated: Buffalo, New York
January 16, 2020

Respectfully submitted,

JOHN J. FLYNN
Erie County District Attorney



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