No.: 19-6110

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

REPLY TO OPPOSITION

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REPLY

As a preliminary matter, I here reassert and affirm the issues I raised in my original Application for Certiorari. However, I would like to take this opportunity to Reply to the new issues brought up by the State in Point 1 of their Opposition.

A. The refusal to deliver an intra-racial identification charge is of Constitutional dimension, and there is sufficient studies to support its inclusion as part of a comprehensive identification charge that should be submitted to a jury upon the defendant's request

In their Opposition, the State claims that because whether and how to deliver cross-racial identification charges has been confined to state jurisprudence (Opposition, at 32), the failure of the trial court to give the intra-racial charge is not of constitutional dimensions (Opposition at 31). They also imply that because the efficacy of an "intra-racial" charge lacks any of the foundational studies that support the giving of a cross-racial identification charge, there is no support in the scientific community for such a charge (Opposition, at page 32). However, they are mistaken on both points.

Addressing the latter issue first, there are significant studies which support the given of an intra-racial charge, many of which are summarized in State v. Henderson, 208 N.J. 208, 27 A3d 872, 886 (2011) (see e.g. 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). Moreover, studies have shown that cross-racial identifications are much less likely to be accurate than same race identifications (Rahaim & Brodsky, Empirical Evidence versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy, 7 Law and Psych. Rev. 1, 2 [1982]).

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, and/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 these principles (Commonwealth v. Gomes, id. at 900). Amongst which is the reliability of intra-racial identification. A crucial factor is this case (also see Young v. State, 374 P.3d 395, 417-425, 427 [Alaska 2016]). So, the State's claim of a lack of studies on this issue is belied by well-established case law.

As for whether or not the failure to give an intra-racial identification charge is of constitutional dimensions, it would certainly seem so. Jury instructions are used not only as a defense, but also as a way of putting the State's case to its proper test. Therefore, to insure that a defendant has a fair trial, particularly in a circumstantial case, a jury instruction expressing the most recent research into eyewitness identification, whether it be same race, or cross cultural, will do nothing but aid the jury in deciding the case in a neutral light. These instructions will act as a lamp to guide the jury's fee in journeying through the testimony in search of a legal verdict. Even the State agreed with this proposition when in their Appellate Brief submitted in State Court they commented 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)

To now disagree with their prior statement is contrary to their role as an officer of the Court, particularly when one considers the following recap of the facts.

On August 7, 2014, Pedro Dejesus, while knocking on the door to his brother's house next door to the fatal incident, saw an unfamiliar Hispanic heavy-set man trying to climb over the fence before letting go of it and falling down. He also saw a different Hispanic man appear from the yard of the house with a gun in his hand. When the unknown man reached the area where the heavy-set man laid, he witnessed the unknown man aim the gun at the man on the ground without shooting and said in Spanish, "I told you I was going to kill you," before the other Hispanic male 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, Ms. Christina Acosta testified that she too saw a 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; also see T.T. 598). She too picked out Michael Soto (T.T. 702-704). What makes this identification so compelling is the fact that that although both Ms. Acosta and the Mr. Dejesus went to police headquarters in a separate cars, *and* were interviewed in a separate rooms (T.711-712), they both picked out the same person. Michael Soto as the shooter she saw in the backyard (T.T. 702-704). Even when Acosta and Dejesus had a chance to identify the petitioner 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).

Even Natalie Perez, who actually saw the shooter running from the scene, and knew the Petitioner, said that the person she saw running was not this Petitioner.

One last thing to consider. While it is true that detective Malec, who is Caucasian, testified that the witnesses picked out Michael Soto because Michael Soto "looked similar to the defendant" (T.T. 599), a review of the Petitioner's picture and the pictures of Michael Soto does not support this assumption. The defendant has an oblong, horse shaped head with distinctly European features, while Michael Soto has a bulbous, round head with distinctly Mexican features. Detective Malec's testimony proves coincides with what the research indicates, and that is that cross-racial identifications are 1.56 times more likely to be incorrect than same race identifications (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, [2001][summarizing results of three decades of studies demonstrating effect of own-race bias in eyewitness identifications], while persons of the same race are 2.2 times more likely to accurately identity a person of their own race than a person of another race (id. at 15-16)(2001).

Because this case is the perfect platform to harmonize this growing field, while at the same time define the full scope of a defendant's constitutional right to present a defense, this Court should grant the writ.

B. In order to unify the realities of intra-racial identification, with a defendant's constitutional right to present a defense, the intra-racial charge outlined in State v. Henderson, 208 N.J. 208, 27 A3d 872, 886 (2011), should be uniformly adopted for all courts under this Court's jurisdiction

In their Opposition, the state asserts that if an intra-racial charge was to find its footing in due process, what kind of charge would be meaningful for a deliberating jury (Opposition, at page 33).

This question has already been answered. The comprehensive charge that was adopted in State v. Henderson, 208 N.J. 208, 27 A3d 872, 886 (2011).

CONCLUSION

Based on the law and facts articulated above, and the original arguments advanced in the original application for Certiorari, this Court should grant certiorari, assigned competent counsel, and allow these arguments to be advanced to a full panel of this Court.

Dated: January 30, 2020

Respectfully submitted,

Abimael Ayala Gonzalez