No. 19-6613

IN THE
SUPREME COURT OF THE UNITED STATES

JAIME RODRIGUEZ AND STEVEN CAMACHO,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

On Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the mandate rule bars consideration and adjudication of newly raised claims, under a Sixth Amendment ineffective assistance of counsel claim, that are based upon underlying factual predicates that were never raised by counsel nor considered by the appellate court? Can the mandate rule bar consideration and readjudication of a previously raised claim, under a Sixth Amendment ineffective assistance of counsel claim, when the appellate court's prior decision was based upon reliance on false positions and deliberate misrepresentations of the record which counsel failed to expose?

2. Whether counsel provided ineffective assistance in, inter alia, failing to object to, or expose in counsels' own closing arguments, any aspect of the government's egregiously improper closing arguments, such as the prosecutors': consistent and repeated misstatements of the record to fashion arguments calling defense witnesses liars; repeated arguments that the Defendants put their witnesses to lie; misrepresentations of counsels' arguments to fashion rebuttals based on those misrepresentations; vouching with arguments the prosecutors knew to be factually untrue; denigration of the defense arguments as a fraud; unresponsive

"guilty by association" rebuttal argument; becoming an unsworn witness in providing virtual testimony in a rebuttal unresponsive to counsels' arguments; misstatements of the law in stating that an acquittal rested on the jury finding that the government witnesses lied and made everything up; and vouching with the government's integrity in stating that to disbelieve the government witnesses required that the jury believe there was "some grand conspiracy by the government" to tell the witnesses what to say and that such a finding would be "just ridiculous"?

3. Whether counsel provided ineffective assistance and caused overwhelming prejudice to petitioners, in proffering to the jury in opening statements what two alibi witnesses would prove despite never having even spoken to one of those witnesses until the day of his testimony and then inexplicably failing to call the other? Was there overwhelming prejudice when the testifying alibi witness could not provide the testimony promised to the jury and provided hearsay testimony that was contradicted by record evidence and which was the basis of the government's arguments (by way of misrepresentations of the witness's testimony) calling that witness a liar and stating that petitioners put him to lie?

CONSTITUTIONAL PROVISIONS RELEVANT TO THIS PETITION

United States Constitution, Amendment V ("due process" clause)

> No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor be deprived of life, liberty or property, without due process of law

United States Constitution, Amendment VI ("assistance of counsel" clause)

> In all criminal prosecutions, the accused shall enjoy the right. . . to have the assistance of counsel for his defense

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1254 to review the Summary Order, dated April 19, 2019, and subsequent Order denying rehearing and rehearing en banc, dated July 9, 2019, of the United States Court of Appeals for the Second Circuit. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. The United States District Court had jurisdiction in the first instance under 28 U.S.C. §§ 2255 and 1331, and original jurisdiction under 18 U.S.C. § 3231.

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The Summary Order of the United States Court of Appeals for the Second Circuit, dated April 19, 2019, affirming the December 14, 2017 order of the District Court is reproduced herein as Appendix A1. The related Summary Order, dated June 12, 2006 is reproduced as Appendix A6. The Order denying Petitioners' petition for panel rehearing or rehearing en-banc, dated July 9, 2019, is reproduced as Appendix A13. The District Court's Memorandum and Opinion on Petitions for Habeas Corpus, dated December 14, 2017, is reproduced as Appendix A14.

For ease of review of this Petition, Petitioners' Joint/Consolidated Appellate Brief, Reply, and Petition for Rehearing and Rehearing En Banc are reproduced as Appendix A68, A165, and A179, respectively. Petitioners' Joint Memorandum of Law and Argument in support of their 28 U.S.C. § 2255 petitions is reproduced as Appendix A195.

PRELIMINARY STATEMENT

Petitioners Jaime Rodriguez ("Rodriguez") and Steven Camacho ("Camacho") (collectively, "Petitioners"), joined in this Petition for a Writ of Certiorari, humbly request this Court to apply less

stringent standards to the arguments of law and interpret them to contain and imply the strongest arguments possible. Haines v. Kerner, 404 U.S. 519 (1972). Petitioners, proceeding pro-se, are not attorneys and have enlisted the aid of others in preparing this submission.

INTRODUCTION

This petition arises from the denial of Petitioners' consolidated 28 U.S.C. § 2255 petitions, and subsequent denial of their consolidated appeal and Petition for Rehearing and Rehearing En Banc. Petitioners claim that their trial and appellate counsel failed to provide effective assistance as guaranteed by the Sixth Amendment of the United States Constitution, resulting in their convictions and affirmance on direct appeal for crimes they did not commit. This is a case wrought with prosecutorial abuses where Petitioners were falsely charged with crimes based solely on cooperating witnesses without any government investigation. Indeed, half of Petitioners' initial charges were proven absolutely false and the sole surviving victim of the remaining charges, whom the government never bothered to interview, exonerated petitioners and identified the true perpetrators. One of those perpetrators even offered to provide exculpatory testimony, but was unable for lack of protection from state prosecution by way of his testimony. Only by way of prosecutorial

misconduct and counsels' failure to provide effective assistance were Petitioners convicted and those convictions kept in place, and this Court should grant review to remedy this fundamental miscarriage of justice.

This case presents a qunitessential example of the lower court's seemingly deliberate failure to apply its own jurisprudence and that of this Court. First, by misapplying the mandate rule the lower court has denied Petitioners of their right to have their newly raised issues heard and ruled upon. Petitioners have simply been denied their day in court. For example, under an ineffective assistance of counsel ("IAC") claim, a claim of over twenty new instances of improper closing argument statements have been raised, all based on factual record proof and backed by long established jurisprudence condemning and reversing for such conduct, yet not one has been reviewed nor considered by the appellate court by way of misapplication of the mandate rule. In effect, the appellate court is condoning the very actions and errors that this Court and numerous lower courts, including its own court, has already condemned. Petitioners are being denied review of blatantly obvious and reversible issues simply by virtue of their counsels' failure to object to and/or expose the misconduct at trial and again on direct appeal in failing to raise the claims there -- the very gravamen of an IAC claim.

The mandate rule was also used to bar review of some previously raised and ruled upon claims, even though the facts and events underlying Petitioners' claims were never previously raised nor considered (the basis of the IAC claim) and would have had a direct impact on, and altered, the prior appellate decision. In fact, Petitioners have presented irrefutable proof that the government's positions, arguments and factual record assertions, which were the very basis of the prior decisions, were false. Made into a simple hypothetical: How can the mandate rule bar review of a previous decision that was based on the belief of the government's position that it was a cold, dark night when Petitioners can show that counsel failed to present available irrefutable evidence that it was, in fact, a hot, sunny day? That is an illogical and unjust application of the mandate rule and it is submitted that the rule cannot, and should not, be used to bar review of such claims.

As such, it is necessary for this Court to review and consider the application of the mandate rule to claims in a habeas context such as Petitioners', to set the standards of its application and to avoid this injustice from occurring here and in future cases.

Second, this case presents a quintessential example of a pattern of prosecutorial misconduct throughout the proceedings

coupled with counsels' ineffective assistance, most glaringly during closing arguments and on direct appeal. There was a plethora of improper and overwhelmingly prejudicial government closing argument statements that counsel failed to object to and correct, or to challenge and expose in counsels' own closing arguments. Likewise, there were many deliberate misrepresentations and false positions made by the government on appeal that counsel failed to expose and challenge, along with a failure to raise clearly reversible issues. Many have individually been the subject of reversals in other cases and in conjunction overwhelmingly warrant reversal in this case. This Court should grant review of such claims on their merits.

Finally, this case presents a pure example of ineffective assistance causing overwhelming prejudice based on an attorney's failure to perform the most basic investigation in presenting an alibi defense. Counsel promised to the jury to present two alibi witnesses and proffered what their testimony would be despite never having spoken to one witness and then failing to call the other. The presented witness, which the record shows only spoke to counsel on the day of his testimony, could not provide the proffered testimony (i.e., personal knowledge) and provided hearsay testimony that was in conflict with parole and court record evidence which was the basis of the government's claim to the jury (by way of misstating his testimony) that he was a liar

and that Petitioners put him to lie. This was no fair trial and not one of these facts, nor the effects on the trial, have been considered by the lower court.

This was a weak case that rested solely on witness credibility, i.e., whether the jury believed the government's two conflicting witnesses or Petitioners' two alibi witnesses and exonerating victim witness who identified the true perpetrators. Indeed, the verdict rested on the jury's acceptance of the testimony of two violent criminals testifying for leniency and whose testimony clashed with glaring inconsistencies that the government had to explain away (improperly so with a factually false argument). As such, because most of the claims have a direct bearing on the jury's credibility determinations, justice and fundamental fairness compels that this Court should grant full and fair review of Petitioners' claims.

STATEMENT OF FACTS RELEVANT TO THIS PETITION

In May of 1994, the government unsealed its indictment in the matter of United States v. Padilla, et. al., 94 Cr. 313 (CSH), a 72 Count RICO indictment which charged 17 defendants with various crimes including 14 murders, kidnappings, extortion, and drug and gun crimes. This case was referred to as the "C&C" case after the names of the alleged ringleaders, George Calderon and Angel

Padilla, aka "Cuson". C&C was a violent organization primarily involved in the extortion of drug dealers, charging "rent" for providing them with protection and the right to operate at given locations.

Petitioners were indicted in this matter with charges accusing them of involvement in two separate shooting incidents: the September 14, 1991 conspiracy to murder and attempted murder of several unidentified men; and the January 2, 1993 conspiracy to murder Hector Ocasio ("Ocasio"), aka "Neno", the murders of Ocasio and Gilberto Garcia, aka "Tablon", and the attempted murder of Luis Garcia ("Garcia"). Prior to trial, the government dismissed the charges relating to the September 14, 1991 shooting due to Rodriguez' airtight alibi of being hospitalized, with a full leg cast after having undergone knee surgery, from September 8 through the 16th of 1991. In addition, testimony at trial from cooperating witness James Albizu ("Albizu"), aka "Pito", who was cooperating with authorities since 1993 and admitted to involvement in the September 14, 1991 shooting, also cleared Petitioners of any involvement in the shooting.[1] Petitioners had been falsely accused of, and charged with, this crime.[2]

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[1] This exculpatory Brady information from Albizu was withheld from the defense and only surfaced at trial through Albizu's testimony.

[2] Another defendant in the case, Edwin Gonzales, aka "Flaco", aka

A. Angel Padilla's Trial

Petitioners were severed from the main defendants in this case of which only Angel Padilla ("Padilla"), aka "Cuson", and Ivan Rodriguez proceeded to trial in the spring of 1995. Padilla was convicted of numerous crimes including charges related to the January 2, 1993 shooting, to which the government posited that he had those men killed by ordering the murder of Ocasio from prison through visits from C&C member Rafael Torres, aka "Ski".

B. Petitioners' Trial

1. The Government's Case

In June 1996, Petitioners proceeded to trial solely on the charges relating to the January 2, 1993 shooting. The government presented no physical evidence linking Petitioners to the charged crimes, yet presented a plethora of background drug and gun evidence from Petitioners' prior drug trial at United States v. Camacho, S2 94 Cr. 549 (JFK), that was seized 1½ years prior to the charged crimes. This background evidence was introduced through three days of testimony from a cooperating witness, Jose

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"Peachy", was also falsely accused and charged with a double kidnapping and a double murder. He was incarcerated at the time the crimes occurred.

Crespo ("Crespo"), and the police detective that arrested him, taking up a third of the government's case in chief.

The only evidence linking Petitioners to the charged crimes came solely through the testimony of cooperating witness Albizu and immunized witness Douglas Welch ("Welch"). They both testified that Trumont Williams ("Williams"), aka "Tree", and Camacho were the shooters, while Rodriguez remained in the getaway vehicle with Welch, and Albizu remained somewhere around the corner. Virtually all of their remaining testimony clashed, most glaring being Welch's story of a carjacking committed by Albizu, Williams and Gregory Cherry ("Cherry") aka "Ninja", aka "G", just prior to the shooting, which Albizu denied, and of Welch's inclusion of Cherry as present on the night of the shooting, of whom Albizu stated was not there.

Albizu, a core C&C member, testified that he orchestrated the murders because Hector Ocasio, the new C&C leader put in place by Padilla while Padilla was in prison, was shorting his weekly pay to his new crew. Albizu felt Padilla should have placed him or one of the original C&C members in charge, and recruited former core C&C members Williams and Cherry to help murder Ocasio and take over C&C. Williams and Cherry had their own motives to murder Ocasio as he had stopped paying them, had them shot at upon his orders, had a murder contract out for them, and even stated to Albizu that if he

saw Williams or Cherry, he would shoot them himself. Albizu also recruited Joseph Pillot, aka "Joey", another former core C&C member, who agreed to take control of the extortion collections once Ocasio was gone. As for Petitioners, non-C&C members, Albizu testified that they were former drug dealers who in late 1992 were doing bad financially and offered to participate in the murder plot to be placed on the C&C payroll. Albizu stated that an initial attempt to murder Ocasio was called off because Cherry failed to appear, but that Cherry was not present on the day of the murders, nor was there a carjacking on that day. Albizu testified that Petitioners were only paid for two or three weeks after the murders in amounts of $1000.00 and less. Albizu admitted to involvement in at least seven murders, kidnappings, tortures, rape and a host of other crimes.

Douglas Welch testified that he was an "OJ" driver (a cab driver) who first met Williams as a customer. Williams then later called Welch simply to borrow money, and then a week or so after first meeting him Williams called Welch to hold his Tec-9 firearm, which Welch took and sold. Then on January 2, 1993, Williams called Welch to retrieve the firearm (that he no longer had) and used him as a getaway driver for the shooting. Welch testified that Cherry was present that night and that he witnessed a carjacking committed by Albizu, Williams and Cherry prior to the shooting. Welch admitted to selling the Tec-9 firearm Williams gave him to hold; to

being present for the carjacking; seeing Cherry shoot out of the window of the carjacked vehicle; and to participating in the murders as a getaway driver. He testified that Camacho returned to his vehicle as a means to leave the area but Williams did not. He testified that Cherry was dropped off just prior to the shooting but repappeared right after the shooting at another location with the carjacked vehicle and with Williams there. Welch testified that he never met Albizu, Cherry, Camacho and Rodriguez until the day of the shooting and never saw them again after that night.[3] By Court order, because Welch was only immunized for crimes relating to the January 2, 1993 shooting, defense counsel were barred from questioning Welch regarding his long and violent criminal history, including his years of dealing crack, cocaine and heroin, his numerous armed robberies of drug dealers, and his shooting at people both before and after the January 2, 1993 shooting.

Ballistics evidence, as testified to by the government's ballistics expert, established that at least 15 shots were fired from two guns. Gilberto Garcia was shot twice and Luis Garcia once with the same gun, and Hector Ocasio was shot 4 times with another gun.

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[3] It was only during Welch's testimony at trial, through cross-examination, that the prosecutors first learned of Cherry's presence and involvement on the night of the murders. Welch was first questioned by prosecutors about Cherry on the evening of June 18, 1996, after the end of his direct testimony. (see, Tr. 1359).

2. The Defense Case

a. Exonerating Victim/Witness Luis Garcia

Luis Garcia, the surviving victim of the January 2, 1993 shooting, testified that he had never seen and did not know Camacho or Rodriguez, and instead identified Williams and Cherry as the shooters. Garcia knew Cherry personally and knew who Williams was from seeing him in the street, and identified them both by photo, height, weight and build. He testified that Williams shot him and Cherry shot the other two men. Questioned in detail he testified that after Williams shot him he fell to the ground and Williams stepped over him with his foot at Garcia's side and that Williams continued shooting at someone else while Garcia felt the shell casings falling behind his neck. He testified that he saw Cherry from 8 to 10 feet away, but didn't see him shoot anyone or see him with a gun. He saw Cherry running around the corner after one of the other victims and then heard shots, and admitted that as he saw that happen he believed it was Cherry who was shooting. He stated that when he was shot he heard someone say "Why the fuck did you shoot Luis?" and told this to the detectives who interviewed him at the hospital. Soon after his release from the hospital he saw Cherry in the street who then approached him and told him "Listen, that wasn't meant for you." Garcia testified that when he was

interviewed by detectives at the hospital and then later at his home, he told them that he didn't see the shooters although he did see them and knew who they were. He stated that at the time he believed the shooters were still out on the street and he feared for his safety. Garcia testified that, in the 3½ years since the shooting, no one from the U.S. Attorney's Office or any federal agency had ever interviewed him to ask him who shot him.

b. Alibi Witness Nancy Melendez ("Melendez")

Nancy Melendez, Rodriguez' former girlfriend and the mother of his son, testified that Rodriguez was with her throughout the day of January 2, 1993, only going out briefly to buy some take out food. At the time she was a stay at home mother of two children (Rodriguez' son was not born until March of 1994), one of which had special needs requiring her to stay home with him. She stated Rodriguez was not with her on New Years eve and came home late evening on January 1, 1993. January 1 is her birthday and she was angry at Rodriguez for not spending New Years and her birthday with her, and it took Rodriguez a while to make it up to her. She testified that her romantic relationship with Rodriguez began in November of 1991 and that she had been separated from him since June 5, 1993, when she moved away to Pennsylvania, and that she had seen Rodriguez about six times since then as she brings his son to New York to see him approximately twice a year. Melendez also

testified that Camacho began living with her beginning around October of 1992. She testified that he left to Florida in the week between Christmas and New Years and returned around January 5, 1993, and that Camacho had told her that he wanted to spend some time with his mother and left with his mother to Florida. She stated that Camacho went to Florida again sometime in the spring of 1993 by bus.

c. Alibi Witness Venero Jimenez ("Jimenez")

Venero Jimenez testified that he met Camacho in the week after Christmas of 1992 when he accompanied Camacho's mother, Luisa Figueroa, on a trip from Florida to New York to pick up Camacho and her granddaughter. At the time he and his family lived in Orlando, Florida, across from Camacho's mother and she did not know the way to New York by car so he accompanied her, taking turns driving with the trip taking approximately 19 hours straight through. They stayed in New York for about four hours to shower and eat and returned to Orlando with Camacho and Figueroa's granddaughter, arriving before New years of 1993. He stated that (at the time of his testimony in 1996) he had made the same trip about once every six months for the past seven years to see children he has in New York. Jimenez did not know when Camacho left Florida but testified that he was told by Camacho's mother, because he asked her, that he left about three weeks later. He stated that he saw Camacho about

ten times while he was there. He stated that Camacho was always at home and he would just see him and did not know what Camacho was doing inside the house or what he did for New Years. He learned that Camacho left Florida because he wanted to get his wife and daughter and have a life there, and recalls seeing Camacho again in Florida another time.

3. The Government's Rebuttal

a. The New York City Detectives

New York City Detectives Robert Addolorato and Ricardo Burnham, whom had interviewed Luis Garcia on separate occasions, both testified that when they interviewed Garcia after the shooting, he told them he did not see the shooters. Both detectives testified that they did not believe Garcia, with Detective Addolorato stating that Garcia wasn't forthcoming, and Detective Burnham stating that he believed Garcia should have known who shot him. Addolorato acknowledged that Garcia told him he heard someone say "why the fuck did you shoot Luis?" and thus adduced that one of the shooters knew Garcia by name. Burnham stated that Garcia was concerned for his safety. Burnham also revealed that the first time he was asked by the prosecutors about his interview with Garcia back in the spring of 1993 was the day before his testimony (on June 19, 1996, during the middle of trial).

b. Parole Officer Carol Skinner

New York State Parole Officer Carol Skinner testified that she was Camacho's parole officer during the time in question. She stated that Camacho had a parole meeting with her before Christmas of 1992 and again on January 6, 1993, and that he had a court hearing in New York on January 7, 1993. She did not know where Camacho was on January 2, 1993. She stated that Camacho would need permission to leave New York State and that he did not have that permission. She revealed that Camacho had requested to have his parole transferred to Florida State beginning in August of 1992 and he also made at least four requests that fall for permission to visit his family in Florida, but every request was denied. Skinner was shown Camacho's Florida State photo identification which was obtained on July 7, 1993, during the time between meetings she had with Camacho, and she stated that he did not have permission to be in Florida at that time.

4. The Government's Summations

In summation, as an explanation for the glaring discrepancies between its witnesses the government argued that Welch's testimony of events was more accurate and he remembered more than Albizu because the events were exciting for Welch but routine for Albizu

who had an extensive violent criminal history. The government argued that all of its witnesses had to tell the truth or they would suffer the consequences outlined in their cooperation deals, and argued that an acquittal rested on the jury's belief that the witnesses lied and made everything up and that to do so required a belief of "some grand conspiracy by the government" to tell them what to say. In response to the defense's highlight of the government's lack of investigation and failure to even attempt to interview the victim, Luis Garcia, the government provided an explanation as to why the New York City detectives did not return to interview Garcia.

To discredit Garcia, the government argued that he was mistaken and claimed that he told the jury himself why he believes Cherry was a shooter rather than Camacho, because Cherry approached him after he came out of the hospital and told him he was not an intended target. The government also ridiculed Garcia's testimony of his belief of which shooter shot which victim as "flatly contradicted" by ballistics evidence.

To discredit the alibi witnesses the government argued that they were liars and fabricated their alibis, and repeatedly argued that Petitioners put them to lie. The government highlighted Melendez' assertion that she was unaware of Rodriguez' involvement with drugs or guns and claimed she was lying because she had met

Petitioners and background witness Jose Crespo that summer and that there was considerable background evidence through Crespo and Albizu that Rodriguez was involved with both during his relationship with Melendez. It further claimed that her alibi was fabricated based on her late meeting with defense counsel in December of 1995 to offer her alibi, arguing that she would have stepped up sooner if true and rhetorically asking "are there no phones in Pennsylvania?" The government argued that "her testimony didn't even come close to the truth" and that the timing of her discussion with counsel had "everything to do with [her] veracity."

To discredit Venero Jimenez, the government argued that his alibi testimony was false because he "distinctly recall[ed]" Camacho being in Florida for three weeks when parole and court records place him in New York within that time frame. It repeated that Jimenez was a witness "who took an oath" and told the jury that Camacho was in Florida for about three weeks into January of 1993, while quoting from the record a response to a specific question that assumes Jimenez affirmatively stated that as fact.

Petitioners were then convicted.

Subsequently, Gregory Cherry met with defense counsel and offered to provide exculpatory testimony if provided immunity. Counsel sought to compel "use" immunity for his testimony only, yet

the government refused with the false position that Cherry could be prosecuted for prior inconsistent statements if he testified, and thus would not provide immunity for such offense. In an affirmation submitted years later, the prosecutor admitted that there was a disadvantage to learning what Cherry had to say.

REASONS FOR GRANTING THE WRIT

1. The Court Should Set The Standards of Application of The Mandate Rule in a Habeas Context

A. The Mandate Rule Should Not Be Used to Bar Review of Newly Raised Claims, Under an IAC Claim, That Are Based Upon Underlying Factual Predicates That Were Never Raised By Counsel Nor Considered by The Appellate Court; and

B. The Mandate Rule Should Not Be Used To Bar Review of a Previously Raised and Disposed of Claim, Under an IAC Claim, When The Appellate Court's Prior Decision Was Based Upon Reliance on False Positions and Deliberate Misrepresentations of The Record Which Counsel Failed to Expose

The lower court (the Second Circuit) has already held that the mandate rule cannot bar review of a habeas claim that is based upon newly raised underlying factual predicates. It is simply not applying its own holding to Petitioners' case. While holding that the mandate rule bars relitigation of issues that were "expressly decided by the appellate court . . . [and] issues impliedly resolved by the appellate court's mandate," Yick Man Mui v. United States, 614 F.3d 50, 53 (2d Cir. 2010), it expressly held that the rule only "bars the raising in a habeas proceeding of a claim **when**

the events underlying the claim were the same as those underlying a claim raised and decided on the merits on direct appeal." Id., at 56 (emphasis added). Indeed, the court recognized that "pretrial investigation, trial preparation, . . . opening or closing arguments, presentation of evidence or omission of evidence, objections to prosecution evidence or lack thereof, . . . and the arguments made on appeal are among the multitude of events that may give rise to ineffective assistance claims." Id.

As clearly outlined in Petitioners' appellate brief and Reply, most, if not all, of the claims raised therein were not expressly or impliedly rejected by the prior appellate court ruling because the underlying factual predicates of the claims were never raised nor considered by that court. The mandate rule was misapplied simply because the titles of those claims were similar to ones previously considered. In addition, on other claims that were previously decided on the merits, an IAC claim cannot be barred review under the mandate rule when the claim is based upon different factual predicates that were not raised nor considered and which would have had a direct impact on, or altered, that prior decision.

For example, the panel applied the mandate rule to summarily bar Petitioners' claims in regard to counsels' failure to object and challenge the government's repeated, improper and abusive closing arguments (Appendix A[illegible], Part B, page 3). By citing to and quoting from the prior appellate order that it would not "disturb the convictions on account of improper closing

arguments," the panel applied the mandate rule by finding that the court "previously considered and rejected these claims" and thus "any additional improprieties in summation not explicitly discussed in our ruling on direct appeal were impliedly rejected by our previous order." Id. But a review of the prior order reveals that the quote from the prior order was made pursuant to a merits based review of only the few weak and/or improperly argued instances of improper closing arguments raised by counsel (see, United States v. Rodriguez, 187 F. App'x 30 (2006); attached as Appendix A6). Not one of Petitioners' newly raised and different factual instances of blatantly improper closing arguments, numbering more than twenty and most not contested by the government on the appeal, was raised by counsel nor considered by the court, expressly or impliedly, on the prior appeal. In fact, the prior appellate decision faulted counsels' failure in presenting the issues that were raised, see Id. ("Defendants have not attempted to show that any misrepsentations in recounting [a witness's] testimony was deliberate, as is required to show prosecutorial impropriety"; "defendants cite not even a single case anywhere in their four page argument on this point to establish that the prosecution's remarks were improper"; "even if the government's alleged comment (to which defendants provide no citation) . . . was improper, [it did not] show the 'flagrant abuse' necessary to secure reversal where, as here, the defendants did not object to the prosecutor's summation at trial"), and now

Petitioners are being barred from raising and exposing those very failures and omissions, and the effects on the trial and on the decision -- an anomalous and unjust result by way of misapplication of the mandate rule.

Likewise in barring Petitioners' claim regarding the government's improper denial of use immunity for potential exculpatory witness Gregory Cherry (Appendix A1, page 4-5). While this issue was reviewed and rejected on the prior appeal, Petitioners' claim here is of counsels' failure to expose the fact that the government's position and arguments justifying its refusal to provide use immunity, which were the very basis of the court's decision in rejecting the claim, were false (see, Petitioners' Appellate Brief ("Br."), at 75-80; attached as Append A150-55). The prior appellate panel, which included this Court's own Honorable Justice Sotomayor (then appellate court judge), was manipulated into ruling in the government's favor by way of false positions, misrepresentations and false citations of the record. One would expect for any court to take issue with such a claim, especially when one of the judges on the new panel (the Honorable John Walker) was one of the manipulated judges on the prior panel. To apply the mandate rule to bar consideration of this claim, which clearly impacts the prior decision, is an inappropriate and unjust application of the rule. This is not the intent of the mandate rule as promulgated by the courts.[4]

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[4] This is not the only instance. Petitioners have raised several

Indeed, in similar situations the Seventh Circuit has used its inherent authority to revisit prior decisions and correct any errors based upon reliance on mistaken or omitted facts, see, United States v. Noble, 299 F.3d 907, 910 (7th Cir. 2002) (court acknowledged and fixed error in earlier appeal); Bebout v. Norfolk & W. Ry. Co., 47 F.3d 876, 879 (7th Cir. 1995) (reversing a decision on subsequent appeal because court's prior decision was based on mistaken facts). The administration of justice compels that such result should have occurred in this case.

This Court should thus set the standards of application of the mandate rule in a habeas context to provide guidance and clarification to avoid the unjust application of the rule, and rule on the merits of Petitioners' claims or remand the case back to the lower court with direction to apply its own standards and rule on the merits of each of Petitioners' claims.[5]

2. The Court Should Consider Whether, Under an IAC Claim, a Counsel's Failure to Object to, Contest, or Correct Any Aspect of the Government's Egregiously Improper Closing Arguments is Objectively Unreasonable Warranting Habeas Relief

Failure to review this claim results in a de facto condoning of actions and errors that this Court, the Second Circuit, and every other court has already condemned. Such action

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other instances of the prior panel's decision having been based upon reliance on false positions and misstatements (as established by clear record proof) made by the government on appeal, to include factual errors made by the prior panel (see, Br. at 80-86; Append A155-61). None have been examined or considered due to misapplication of the mandate rule.

5 It is submitted that the lower court's refusal to review

erodes the public trust in our judicial system when a petition is denied review of such blatantly obvious issues by way of clearly inapplicable standards. This is the ideal case as an example of egregiously improper closing arguments that denied Petitioners a fair trial, a Fifth Amendment violation, coupled with the defense attorneys' failure to provide effective assistance, a Sixth Amendment violation, which this Court should review. Indeed, this Court is not bound by the conclusions of lower courts and has the duty to make its own independent examination of the record and to decide for itself facts or constructions upon which constitutional issues rest. Napue v. Illinois, 360 U.S. 264, 271, 3 L.Ed.2d 1217, 79 S.Ct. 1173 (1959).

This Court has long held that prosecutors must "refrain from improper methods calculated to produce a wrongful conviction." Berger v. United States, 295 U.S. 78, 88, 79 L.Ed. 1314, 55 S.Ct. 629 (1935). This Court made clear that a prosecutor should "prosecute with earnestness and vigor," but, "while he may strike hard blows, he is not at liberty to strike foul ones." Ibid.

Touching just on the improper summation issue, this Court,

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glaringly obvious misconduct issues by way of an inapplicable standard produces the appearance of impropriety to any observer. In light of the extent of the misconduct on this case; a Bar Association and two Office of Professional Responsibility investigations that required AUSA resignations to end said investigations; the long, personal relationship of one of the resigning AUSAs with court officials and personnel; the AUSA's outburst to the appellate panel that Petitioners filed to the Bar;

and every other court, has long held it improper for the government to misstate or misrepresent the record or refer to facts not in evidence, and reversed for such conduct. See, e.g., Berger, supra (reversed for, inter alia, misstatement of facts and "improper insinuations and assertions calculated to mislead the jury"); United States v. Forloma, 94 F.3d 91, 93 (2d Cir. 1996) (misstatements deprived the defendant of a fair trial; vacated and remanded for new trial); United States v. Watson, 171 F.3d 695, 700 (D.C. Cir. 1999) (reversed for misstatement of defense witness testimony); United States v. Francis, 170 F.3d 546 (6th Cir. 1999) (same); United States v. Dispoz-o-Plastics, 172 F.3d 275 (3rd Cir. 1999) (same); Shurn v. Delo, 177 F.3d 662 (8th Cir. 1999) (same); United States v. Sanchez, 176 F.3d 1214 (9th Cir. 1999) (same); United States v. Tocco, 135 F.3d 116, 130 (2d Cir. 1998) (counsel "are generally entitled to wide latitude during closing arguments, so long as they do not misstate the evidence"); United States v. Richter, 826 F.2d 206, 209 (2d Cir. 1987) (observing prosecutor's duty to "not deliberately misstate the evidence" in summation).

Petitioners here claim, as unquestionably proven by the record, that every argument put forth by the government to call the defense witnesses liars and the exonerating victim wrong was based

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and the Southern District of New York U.S. Attorney's Office's documented history of approaching judges in chambers off the record to change opinions that indicate misconduct, any reasonable person would conclude that the outright and unjust denial of review stems from a behind the scenes cover-up of misconduct. This is especially true when the errors in denying review were made clear in a Petition for Rehearing and Rehearing En Banc (attached as Appendix A179). Cases like this are what bring the administration

on consistent and repeated deliberate misstatements and misrepresentations of the record testimony and evidence (see, Br. at 27-38; Append A102-113). The government went as far as to repeatedly (five times!!) argue that Petitioners suborned their witnesses' alleged perjury (Id.). The record also establishes that some of the government's rebuttal arguments were non-responsive to counsels' arguments and based upon misrepresentations of counsels' arguments (Id. at 46, 47-48; A121-123).

As examples, the government argued that the exonerating victim/witness was wrong in identifying Cherry (aka "Ninja") rather than Camacho as the second shooter by misstating that the victim "told you himself why he believes it is Ninja," because Ninja approached him after he came out of the hospital and told him "that wasn't meant for you." The record shows that the victim stated no such thing and actually stated the opposite to that line of questioning (see Br. 36; Append A111).[6] The government also manipulatively claimed that the victim's testimony was "flatly contradicted" by ballistics evidence and mocked that testimony, when the record shows that his detailed testimony of events actually matched the ballistics evidence (see Id. 36-37; A111-112).

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of justice into disrepute. The appearance of justice must be preserved and thus review on the merits is necessary to preserve the fairness, integrity, and public reputation of the judicial proceedings.

[6] The government continued with this misstatement to the appellate court on the prior appeal ("Garcia testified that he was sure

With alibi witness Nancy Melendez, the government argued that she was a liar and knew about guns and drugs during her relationship with Petitioner Rodriguez because "she met [background witness] Joey Crespo that summer" (in summation) and because there was "plenty of evidence through Jose Crespo and Pito that [Rodriguez] was a drug dealer" (in rebuttal), yet the record evidence shows that she testified she never met Jose Crespo and he and all of the background drug evidence he was arrested with were seized, and the drug dealing stopped, months before her relationship with Rodriguez began (see Id. at 33-36; A108-111). The government's argument that her alibi was fabricated as evidenced by her late alibi discussions with counsel in December of 1995 was also a misleading misrepresentation when the government's own cross-examination revealed that Melendez was in contact with counsel since 1994 (when this case began) (Id. at 32-33; A107-108).

With alibi witness Venero Jimenez, the government argued that he was a liar based on the claim that he "distinctly recall[ed]" Petitioner Camacho being in Florida for about three weeks and then again stated that he was a witness "who took an oath and who told you that Steven Camacho was in Florida about 3 weeks into January of 1993," yet the record shows that he had no personal

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Cherry had shot him because of a conversation he had with Cherry three days after he was released from the hospital.") with false citations of the record (see Br. 82-83; Appendix A157-158).

knowledge and testified in direct and cross-examination that he was only told (hearsay) that Camacho was in Florida for about that period of time (see Id. 31-32; A106). After counsel attempted to clarify that Jimenez only repeated hearsay, the government further misled the jury in response by misstating "[b]ut that's not what Mr. Jimenez said." Id.

Courts have also held it improper for the government to vouch for its witnesses, misstate the law, and use its integrity. See, e.g., Floyd v. Meachum, 907 F.2d 347, 354 (2d Cir. 1990) (reversed because prosecutor's "implied voucher" for witness's credibility "invited the jury to view its verdict as a vindication of the prosecutor's integrity rather than as an assessment of guilt or innocence based upon the evidence presented at trial."); see also, United States v. Tomblin, 46 F.3d 1369, 1390 (5th Cir. 1995) (holding it improper to argue that jury had to disregard prosecution witness testimony to believe defense testimony and that doing so would require jury to believe government conspired to craft its case, because "the jury could reasonably infer that it must 'abandon confidence in the integrity of the government' before it could acquit" and the argument can bolster its witnesses "by stamping them with the integrity of the sovereign."); United States v. Venable, 269 F.3d 1086 (D.C. Cir. 2001) (holding it improper to suggest that in order to find defendant not guilty, the jury would

have to disbelieve the testimony of all government witnesses); United States v. Richter, 826 F.2d 206 (2d Cir. 1987) ("Prosecutors have been admonished time and again to avoid statements to the effect that, if the defendant is innocent, the government agents must be lying.").

As Petitioners here claim, the record unquestionably shows that the government twice argued that an acquittal rested on the requirement that the jury believe that its witnesses lied and made everything up, and then argued that to disbelieve its witnesses the jury "ha[d] to believe that there's some grand conspiracy by the government" to tell them what to say, and then stated that such a finding would be "just ridiculous." (see, Br. 38-41; Append A113-116).

In vouching for its witnesses the government also made arguments it knew to be factually untrue, see, United States v. Valentine, 820 F.2d 565 (2d Cir. 1987) (reversal for prosecutorial misconduct where prosecutor's argument was refuted by unoffered evidence in the government's files); see also, United States v. Udechukwu, 11 F.3d 1101 (1st Cir. 1993) (same). For example, in explaining away the glaring discrepancies between its witnesses, the government vouched for one witness's testimony as more accurate and remembering more based on his lack of criminal history as compared to the other witness, while fully aware of that witness's unrevealed and extensive violent criminal history which included

numerous armed robberies of drug dealers and shooting at people both before and after the shootings in question (See Br. 44-46; Append A119-121). The claim that its witnesses had to tell the truth or suffer the consequences of their deals was also factually false when the government was fully aware of the irrefutable proof that Jose Crespo, its only witness whom had already received his deal and a sentence of time served prior to testifying here, had committed perjury and breaches of his second cooperation agreement which the government did not reveal to his sentencing judge yet falsely told this jury that it did so (see Id. at 42-44, also 68-75; Appendix A117-119, A143-150).

The government also denigrated the defense arguments as a fraud, see, United States v. Bagaric, 706 F.2d 42, 61 (2d Cir. 1983) (improper for prosecution to describe the defense as a "sham" or as an insult to the jury's intelligence) and even argued guilt by association and became an unsworn witness by providing virtual testimony in rebuttals unresponsive to counsels' arguments (see Br. at 42-46, 47-50; Append A117-125). Not one of these and other claims now raised by Petitioners has ever been reviewed, considered or resolved by the appellate court.

In light of the above and the fact that this case rested solely on the credibility determination of the government's two primary witnesses versus the alibi witnesses and exonerating

victim, it is necessary to consider whether counsel provided ineffective assistance in failing to contest and correct any of the government's vouching, false arguments, misstatements and misrepresentations of the record that were the basis of the government's support of its witnesses and its attack on the defense case and defense witnesses. Not one objection was made and thus not one curative instruction was given. Counsel had the ability to easily and unquestionably prove the falsity of the government's record claims, arguments and positions (by objection or in defense summations), yet left each and every one unchallenged and accepted by the jury. Indeed, the Sixth Circuit has found that a counsel's failure to object to any aspect of the government's egregiously improper closing arguments was objectively unreasonable warranting habeas relief. Hodge v. Hurley, 426 F.3d 368 (6th Cir. 2005). Had counsel at least provided an adequate closing argument exposing and countering the above, it would have changed the result of the trial. This was no fair trial and the outright barring of the review and consideration of these (and many other raised) claims that are based on clear factual record proof and jurisprudence from every court produces a result wherein this Court will be condoning the very actions and errors that have already been condemned. Failure to review would only serve to bring the administration of justice into disrepute. Review on the merits is necessary to preserve the fairness, integrity and public reputation of the judicical proceedings.

3. The Court Should Consider Whether it is Ineffective Assistance for a Counsel to Present an Alibi Defense Without Thorough Investigation, and Proffering to the Jury in Opening Statements What Two Alibi Witnesses Would Prove Despite Never Having Spoken to One and then Inexplicably Failing to Call the Other, and Where the Presented Witness Could Not Provide the Promised Testimony and Was the Basis of the Government's Repeated Arguments that Petitioners Put their Witnesses to Lie

This is another glaring issue that presents the ideal example of ineffective assistance in presenting an alibi defense, of which Petitioners have been denied proper review. As correctly held by the Second Circuit's very own Honorable Gearld E. Lynch (then District Court Judge):

> Thorough investigation of the facts, including interviewing any potential witnesses, is a basic requirement of competent attorney performance, and putting a witness on the stand without adequate preparation would fall below a minimum standard of professional practice. . . . [N]o lawyer could make a "strategic" decision not to interview witnesses thoroughly, because such preparation is necessary in order to know whether the testimony they provide would help or hinder his client's case, and thus is prerequisite to making any strategic decisions at all.

Newton v. Coombe, No. 95 CIV 9437 (GEL), 2001 U.S. Dist. LEXIS 9739, 2001 WL 799846, at *5 (S.D.N.Y. July 13, 2001).

As clearly pointed out on appeal, the record reveals that counsel did not investigate the alibi defense and at opening statements proffered to the jury what an alibi witness, Benero Hernandez, would say despite never having spoken to this witness at that time, and did not speak to him until the very day of his testimony (see, Br. 63-68; Append A138-143) Counsel did not even give his correct name which was actually Venero Jimenez (Id.). This is a pure example of ineffective assistance and only the resulting prejudice must be examined. Strickland v. Washington, 466 U.S. 668, 687 (1984).

In this case, prejudice was suffered when this witness could not testify to what counsel proffered to the jury (i.e., provide personal knowledge of when Petitioner Camacho left Florida) and only provided hearsay that was in conflict with the dates of a parole meeting and a court appearance in New York. Besides failing to interview the alibi witness, had counsel investigated his proposed alibi and simply questioned his own client in regard to his almost weekly parole meetings in New York, this error at opening and conflict during trial would not have occurred. This prejudice must be viewed in light of the fact that it was the basis of the government's false summation arguments calling this witness a liar by misstating his testimony and then repeatedly arguing that Petitioners put him to lie. More prejudice was suffered when counsel apologized to the jury for

his mistake in opening and asking that it not hold it against Camacho, of which the government pounced on in rebuttal by arguing to the jury that it not "let him get away with that" and again blatantly misstating Jimenez's testimony in response to counsel's accurate argument that Jimenez only repeated hearsay, and twice more argued that Petitioners put their witnesses to lie (see, Br. 31-32, 63-66; A106-107, A138-141). The prejudicial effects of these points, which stemmed from counsel's errors, were not considered by the District Court nor the appellate court, nor were any challenged as untrue by the government.

Moreover, the question of whether it was Ineffective Assistance for counsel to fail to call the second alibi witness, after promising to present this witness to the jury in opening statements (see Br. 63-68; Append A138-143), has not been resolved by the district court nor by the appellate court. The First Circuit has found this to be ineffective assistance and considered the prejudicial effect on a case, see, Ouber v. Guarino, 293 F.3d 19, 35-36 (1st Cir. 2002) (ineffective assistance because counsel failed to present promised testimony). This is especially necessary in this case in light of the fact that the government called the defense witnesses liars (by misstating the record), repeatedly argued that Petitioners put them to lie, and denigrated the defense as a fraudulent con. What effect did it have on the jury when the alibi witness already promised to them

was inexplicably never presented?

CONCLUSION

It is clear that prosecutorial misconduct so infected the proceedings rendering the trial fundamentally unfair in violation of Petitioners' Fifth Amendment Due Process rights, and Petitioners did not receive effective assistance as guaranteed by the Sixth Amendment. It is equally clear that Petitioners were not afforded fair review of their claims on appeal. Petitioners beg this Court to correct this injustice and grant a writ of certiorari with full review of Petitioners' habeas claims; or remand with direction for the Second Circuit to review each of Petitioners' claims on its merits; and for any and other relief this Court deems just and proper.

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Respectfully submitted,

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