Docket No. ____

IN THE SUPREME COURT OF THE UNITED STATES

ADRIAN PARBHUDIAL,

Petitioner,

– against –

JAMIE LaMANNA, Superintendent, Green Haven Correctional Facility,

Respondent.

PETITION FOR WRIT OF CERTIORARI

On Certiorari to the United States Court of Appeals
For the Second Circuit

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STATEMENT OF QUESTIONS PRESENTED

1. Was it an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984) and its progeny for the state courts, and the habeas courts below, to treat an attorney's decision to call or not call witnesses as a *per se* strategic decision even where, as here, the witnesses in question were the only ones who could have proven his innocence and trial counsel admitted that the uncalled witness's testimony would have been helpful to the defense?

2. In a case where the petitioner was accused of shooting at police officers who broke into his family's home late at night and had an extremely strong defense of mistake, did he receive ineffective assistance of counsel where his attorney committed a cascade of errors that effectively deprived him of that defense, including failure to secure the availability of critical witnesses, failure to call those witnesses, and failure to object to prejudicial rulings, and did the state courts unreasonably apply Strickland, supra, in holding otherwise?

PARTIES TO THE PROCEEDING

The parties to the proceeding are petitioner Adrian Parbudhial and respondent Jamie LaManna, Superintendent of Green Haven Correctional Facility.

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2020 WL 4284178 (N.D.N.Y. Jul. 27, 2020)

The decision of the Court of Appeals declined to grant a certificate of appealability from an order of the United States District Court for the Northern District of New York (Hon. James K. Singleton, J.), entered July 27, 2020, denying petitioner Adrian Parbhudial's petition for habeas relief pursuant to 28 U.S.C. §2254..

In the underlying state court proceedings, petitioner Parbhudial was convicted of attempted aggravated murder, reckless endangerment in the first degree, criminal possession of a weapon in the third degree, hindering prosecution in the first degree, perjury in the third degree, and making an apparently sworn false written statement in the second degree, and sentenced to a determinate prison term of 40 years. The state court decision on his direct appeal may be found at People v. Parbhudial, 135 A.D.3d 978 (N.Y. App. Div. 2016), lv. denied, 27 N.Y.3d 967 (2016). The state court decisions on Parbhudial's post-conviction motion are unreported.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) in that this is a petition for *certiorari* from a final judgment of the United States Court of Appeals for the Second Circuit in a habeas corpus case. The instant petition is timely because the Second Circuit's decision denying a certificate of appealability was issued on November 24, 2020, less than 150 days prior to the filing of this Petition. There have been no orders extending the time to petition for *certiorari* in the instant matter except to the extent that the time to petition for *certiorari* has been extended generally by this Court's COVID-19 guidance..

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. Const. Amend. 6

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF FACTS

One of the most terrifying and dangerous things that can happen to a person is to have armed strangers burst into his family's home late at night. Where the armed strangers are in fact police officers, the terror and danger become even greater. The resident's natural response is to defend his home, and in a chaotic situation where he is forced to make split-second decisions, he will often be unaware that the people invading his home are the police. This can lead, not only to possible injury or death, but to the lodging of unjust criminal charges that make no allowances for the chaos and confusion of the moment.

The nation recently became keenly aware, through the tragic death of Breonna Taylor, of how sudden police entry to a private home can go wrong. Taylor, an emergency room technician, was in her boyfriend Kenneth Walker's apartment in Louisville, Kentucky, when police officers burst in with a battering ram. Walker, thinking that the apartment was being invaded, shot at the officers who returned fire; Taylor was hit by six bullets during the crossfire and was killed. In the wake of the shootout, Walker – like Parbhudial – was charged with attempted murder, with the police officers claiming that they announced themselves and knocked on the door before breaking in.

In Walker's case, cooler heads fortunately prevailed and the charges were dropped. No doubt the Louisville prosecutors recognized that ordinary citizens in their homes are entitled to the same consideration when making split-second decisions as the police themselves are given, and that in the confusion of a late-night raid, shouts

of "police" might not be heard or immediately processed. But in petitioner Parbhudial's case, the outcome was far more tragic. Even though no more than a few seconds elapsed between the time Parbhudial's home was raided and the time he ran downstairs to face the invaders with a shotgun, and even though no police officers were injured, he was charged, convicted, and sentenced to *40 years to life in prison*, meaning that he must serve four full decades before being eligible for release. Moreover, the story of how Parbhudial's life was taken away is a tragedy of errors in itself, committed by his counsel, and it is one that this Court has the power to correct.

A. Proceedings in State Court.

1. Charges, Trial and Direct Appeal.

In the early hours of February 20, 2010, other members of petitioner's family shot and killed Ganesh Ramgoolam after an escalating series of incidents - a homicide in which petitioner is *not* alleged to have been involved. Less than 48 hours later, on the evening of February 21, 2010, a SWAT-type Strategic Operations Squad ("SOS") team of Schenectady police officers, dressed in balaclavas (face masks leaving only the eyes exposed) and dark clothing and carrying rifles, descended on 935 Maple Avenue to execute a search warrant. The Parbhudial family was on edge at this time, anticipating a revenge attack by the Ramgoolam family. It was in this environment that the SOS team burst through the front door with a ram and entered the house.

At the time of the raid, Adrian Parbhudial was in his bedroom on the second floor of 935 Maple Avenue. He heard a loud bag, screaming and what sounded like shattering glass. He grabbed a .12 gauge shotgun, loaded it with number 8 birdshot

- hardly the choice of ammunition for someone who might believe he is confronting police officers - and ran downstairs. At the stairwell behind the door to the first-floor living area, he noticed people dressed in black approximately ten feet away from him and fired the shotgun at them. Unbeknownst to him, the people at whom he fired were not members of the Ramgoolam family but Detective Jeremy Pace and Officer Thomas Kelly. Fortunately, neither Officer Pace nor Officer Kelly was injured.

After realizing that he had shot at police officers, petitioner surrendered and was apprehended peacefully.

By indictment dated May 3, 2010 ("the First Indictment"), petitioner was charged with attempted murder in the first degree, reckless endangerment in the first degree, criminal possession of a weapon in the third degree, hindering prosecution in the third degree, perjury in the third degree, and making an apparently false written statement in the second degree. The charges of hindering prosecution, perjury, and making a false statement related to a statement he made in which he allegedly disclaimed any knowledge of the Ramgoolam murder.

Subsequently, by separate indictment dated June 25, 2010 ("the Second Indictment"), petitioner was charged with attempted aggravated murder, attempted aggravated assault on a police officer, attempted assault in the first degree, and criminal possession of a weapon in the third degree. On July 1, 2010, at arraignment on the Second Indictment, the People orally moved to consolidate the two indictments, which was granted without objection from the defense.

At trial on the consolidated indictments, the People made use of the perjury,

false statement and hindering prosecution charges of the First Indictment to elicit extensive evidence concerning the Ramgoolam murder, on the basis that they would have to prove the existence of the murder as an element of the hindering charge. This resulted in seven whole days of trial being devoted to the Ramgoolam killing, in which Adrian Parbhudial was concededly not involved, before any evidence was taken concerning the events surrounding the February 21, 2010 raid. Indeed, 34 of the 48 witnesses who testified at trial gave testimony that related to the Ramgoolam murder, not to any event in which petitioner was involved.

The facts surrounding the February 21 raid were, and are, largely undisputed. Petitioner acknowledged throughout the trial that he shot Detective Pace and Officer Kelly. His defense was that he did not know that they were police officers but instead mistakenly believed that he was defending himself and his family against members of the Ramgoolam family out for revenge. In support of this defense, he elicited evidence that the raid was a fast-moving, noisy, chaotic event that lasted mere seconds and in which he could not make out any alleged shouts of "police" or ascertain who had actually broken into the house.

Nevertheless, the jury convicted petitioner of attempted aggravated murder, reckless endangerment in the first degree, criminal possession of a weapon in the third degree, hindering prosecution in the first degree, perjury in the third degree, and making an apparently sworn false written statement in the second degree. He was subsequently given the maximum sentence of 40 years to life on the attempted murder count, together with concurrent sentences on the other counts of conviction.

Petitioner's conviction and sentence were affirmed by the New York State Appellate Division, Third Department on January 7, 2016, see People v. Parbhudial, 135 A.D.3d 978 (3d Dept. 2016), and leave to appeal was denied by the New York Court of Appeals on March 31, 2016, see People v. Parbhudial, 27 N.Y.3d 967 (2016).

2. Post-Conviction Motion Practice.

On April 18, 2017, petitioner moved to vacate his conviction pursuant to Section 440.10 of the New York Criminal Procedure Law, on the basis of *inter alia* ineffective assistance of counsel. Petitioner proffered affidavits from Angelene Parbhudial, Vishan Parbhudial, and Richard Baliraj, who were all in 935 Maple at the time of the raid and who attested inter alia that the commotion was so great that they could not tell whether the people invading the house were police officers. In addition, petitioner presented the affidavit of his wife Nikita Parbhudial, who was present on the second floor of 935 Maple at the time of the raid and who attested to both the commotion of the raid and the way in which petitioner and Baliraj reacted. Unlike the other three witnesses, Nikita was not charged with any crime, but was never called to the stand by trial attorney Roy Nestler to support petitioner's defense. Petitioner argued that Mr. Nestler was ineffective for not calling these witnesses.

Petitioner also made several other claims of ineffective assistance including, as relevant to this petition, (i) failing to adjourn the trial so that Angelene Parbhudial, Vishan Parbhudial and Richard Baliraj (who at the time were facing criminal charges in connection with the Ramgoolam homicide) could be tried first and testify for hte defense; (ii) failing to object to joinder of the two indictments, resulting in the People

being able to devote the majority of petitioner"s trial to the Ramgoolam murder in which he admittedly took no part; (iii) failing to object to testimony and summation argument regarding petitioner's silence when the police questioned his mother in his presence; (iv) failing to object to extensive testimony that had no purpose other than to elicit sympathy for Ganesh Ramgoolam; (v) failing to follow up on testimony that one of the SWAT officers themselves was confused by the fast-moving situation and didn't even realize he had been shot; and (vi) failing to object to propensity arguments and speculation in the prosecutor's summation.

The state trial court ordered an evidentiary hearing at which attorney Nestler as well as Nikita Parbhudial (under her new married name of Nikita Koylas), Angelene Parbhudial, Vishan Parbhudial and Richard Baliraj testified.

Nikita testified that on the evening of the SWAT raid that resulted in petitioner Parbhudial's arrest, she returned to 935 Maple Avenue from her cousin's house at 13 Eagle. (H.61).[1] After arriving at 935 Maple and getting some food, she went to the room she shared with petitioner on the second floor, and saw defendant in the second-floor living room playing video games. (H.62). Petitioner went in and out of their shared room during this period. (H.63). Nikita then heard a loud bang and heard "screaming as if somebody was dying." (H.63-64).

At that point, she, petitioner, and Richard Baliraj met in the second-floor

[1] Citations to "H." refer to the transcript of the evidentiary hearing. This transcript, and any other parts of the record the Court may require, will be provided upon request.

kitchen (which was between the shared bedroom and the living room) and tried to figure out what was going on. (H.64). Baliraj said "I think the people might be coming in." (H.64). He said nothing more about who "the people" were. (H.65). Nikita did not hear the word "police," and "there was still a lot of screaming and stuff, so [she] didn't really know what was going on." (H.65). Petitioner "took his gun and told [Ms. Koylas] to lock the door behind him." (H.65). Nikita heard gunshots but did not see them or know where they came from. (H.65). Only later, when "everything quieted down and then someone was calling up in like an authoritative voice," did she look out the window and learn that the people who had come into the house were police officers. (H.65-66).

Angelene Parbhudial testified that, the day after Ramgoolam was shot, "family members came in front of [her] house and told us we were all going to be in body bags." (H.110, 150-51). She told petitioner about this incident later that day. (H.111). The following day - Sunday, February 21, 2010 - she was present on the first floor of 935 Maple when she heard a big bang from the front door and then heard "get the fuck on the ground" and "drop the baby, drop the baby." (H.113). She heard the SWAT team say that they were police only after they had come all the way from the front door to the back room where she was hiding in a closet with her baby. (H.114, 158, 159-60, 163-65). She heard another loud bang with all the commotion in the apartment but did not know where it was coming from. (H.114-15, 159). This was all consistent with her statement against the police in which she likewise stated that she was terrified because she didn't know it was the police at first, that she heard "police" after she

grabbed her baby and went into her sister's closet, and that there had been people with guns in front of her house the previous night. (H.158, 162-63).

Angelene further stated that when petitioner went to trial, she was still facing charges, and her attorney told her that it was a "conflict of interest" to testify for defendant and "it would look bad for [her] because [she] was going to trial next." (H.116). This was not contradicted by Attorney Nestler, who stated that he was sure he did speak to the witnesses' attorneys and that he did not recall whether or not the conversation involved whether the witnesses would testify. (H.15-16).

Vishan Parbhudial testified that, after the Ramgoolam shooting, he was at Moyston Street until late Saturday. (H.181). The following evening at about 7 p.m., he was downstairs when he heard a big bang at the front door, followed by a lot of people saying "everybody get the F down, everybody get your hands in the air." (H.181-82). It was "chaotic" and everyone was screaming so he "didn't know if it was [Ramgoolam's] family or what was going on." (H.183). He never heard them announce they were police. (H.183). He learned that the SWAT officers were police officers only when they got close to him and he could see "police" on the back of their vests. (H.183). From the flash bang when the door burst open to the second bang of the gunshot took only a couple of seconds. (H.183).

This account is consistent with his contemporaneous statement to the police in which he likewise stated that he did not know the SWAT team members were police until they came near the kitchen. (Defendant's Hearing Exhibit 2 at 1).

Vishan also testified that he discussed testifying at petitioner's trial with his attorney and that he was advised not to do that because it would be a conflict of interest. (H.184). Again, Nestler's testimony was that he would have spoken to the witness' counsel. (H.15-16).

Richard Baliraj testified that he went to Moyston Srreet after the Ganesh Ramgoolam shooting and stayed there for about a day, then returning to 935 Maple. (H.215). While he was still at Moyston, he learned from Angelene Parbhudial that the Ramgoolam family had come to the house and made threats. (H.216).

On the night of the SWAT raid, Baliraj was in his second-floor bedroom at the front of the house. (H.216-17, 255, 270). As he was getting ready to eat, he heard a loud bang, got up, looked out the window, and saw seven or more guys outside with a white van, wearing dark clothing and carrying weapons. (H.217, 270). He believed these men to be part of the Ramgoolam family so he ran out of his rom, got a weapon, banged on petitioner's door and said that there were guys with guns outside. (H.217-18, 270-71). He went upstairs to the attic and saw petitioner again only after the police took everyone out of the house. (H.218, 270, 272). He did not hear shots being fired. (H.272). While in the attic, and not before, he saw a marked cruiser and realized that the people outside were police officers, and he did as they instructed. (H.220-21, 223, 253-54, 271).

With the exception of him being on Moyston Street rather than Queens on the day after the Ramgoolam shooting, which was admittedly a lie (H.215), there is nothing in Baliraj's testimony inconsistent with his statement to the police (Defendant's

Hearing Exhibit 5A) and, as discussed above, his account of warning petitioner in the police statement because he was never asked (H.262-63), but was also not denied - was corroborated by Nikita (H.64-65).

Baliraj mentioned to his attorney that he was available to testify for petitioner if necessary, and the attorney recommended that he not say anything and stay quiet. (H.222). Baliraj was still facing charges at this time. (H.221).

Notably, Nestler - who testified fully and candidly at the hearing - admitted that the great majority of errors alleged in the motion were not strategic decisions, and in fact, admitted that calling Nikita in particular would have *furthered* his trial strategy. It is undisputed that Nikita did speak to Mr. Nestler (H.17, 36-37, 66) and told him what she had seen that night (H.37-38, 66). Although Nestler initially stated that his reason for not calling Nikita was "trial strategy" (H.18), he then said that the trial strategy was "to distance myself from [the Ramgoolam] murder" (H.18), which obviously did not provide any reason to exclude Nikita because she was never charged with any offense relating to that murder (H.40, 60-61). Moreover, on cross-examination, when asked if he recalled why he did not call Nikita as a witness, Nestler answered "no." (H.37).

And on redirect, not only did Nestler acknowledge that there was no need to distance Ms. Koylas from "the murder aspect of [the trial]" (H.41), but he agreed that the central issue at trial was whether defendant knew or should have known that the SWAT team members were police officers (H.41) and that "another part" of his strategy was that "[defendant] did not know police officers were coming into this house" (H.52).

He agreed with the hearing court's question as to whether his strategy included "attack[ing] the People's argument that [defendant] knew or should have known." (H.52). And, when shown Nikita's statement, testified as follows:

> Q. Okay. And are you aware that – well, I would like you to take a look at the statement that has been - that is in evidence as Defendant's Exhibit 4. And I would like you to take a look at the bottom of that, of page 1 going into the top of page 2.
>
> A. (Witness complying) Yes, sir.
>
> Q. Do you believe a witness who gave that account of the accident would have been useful to Adrian Parbhudial at trial?
>
> *A. Yes.*

(H.44) (emphasis added).

On other matters, Nestler acknowledged that he did not know of pertinent New York State case law under which petitioner could have sought to have Angelene, Vishan and Baliraj tried first (H.45-46), and that there would have been no downside to making a motion to change the order of trials (H.20). He also had no recollection of why he did or did not make specific objections and/or pursue lines of questioning (H.25-26).

After the hearing, petitioner's motion was transferred to another judge for decision. On August 6, 2018, that judge issued a decision denying the motion. As to the ground of ineffective assistance based on defendant's failure to call Nikita, the motion court stated as follows:

> Nikita couldn't testify to being in a position where she would have made similar observations as the defendant

> because she was on the second floor and the defendant went down to the first floor. She couldn't testify as to where the defendant was when the police entered, where the defendant went afterwards, what he saw, or what he heard. Since Nikita was not in the same area of the house as the defendant, her testimony would not have been helpful to the jury. While it is true that at the hearing Mr. Nestler testified that Nikita's testimony might have been useful, his opinion is not controlling… After reviewing Nikita's hearing. testimony, it is clear to the court that trial counsel's decision not to call her was a reasonable strategy due to the potential negative impact her testimony could have had on the defense.

(8/6/18 Decision at 3-4). Notably, the motion court did not specify what "negative impact" Nikita might have had, nor did it point to anything in her testimony that might conceivably have damaged the defense.

The court additionally found that the failure to request that Angelene, Vishan and Richard be tried first was not ineffective because their Fifth Amendment rights would have continued through appeal, notwithstanding that none of these witnesses ever appealed their convictions. (Id. at 4). The court stated further that any failure to call them was justified due to Nestler's strategy of distancing petitioner from those in his family who had been charged with taking part in the Ramgoolam shooting. (Id. at 5). As to "the rest of defendant's ineffective assistance claims," the court stated that defendant had "fail[ed] to demonstrate that even if trial counsel had taken the actions identified by the defendant that any of them would have been successful" and "there is no reason to believe that the objections cited by the defendant would have been sustained by the court or that cross examination would have elicited the answers that the defendant suggests." (Id. at 4-5).

Petitioner timely sought leave to appeal to the Appellate Division, Third Department, which was denied by order dated October 18, 2018.

B. Proceedings in Federal Court.

On January 2, 2019, petitioner filed a Section 2254 habeas petition in the United States District Court for the Northern District of New York, which reiterated the ineffective assistance claim raised in his CPL § 440.10 motion.[2] Respondent, represented by the New York State Attorney General's office, opposed the motion, and petitioner replied.

By order entered July 27, 2020, the district court (Hon. James K. Singleton, J.) denied the petition. (App. 2-16).[3] Notably, the district court opined that the decision to call or not to call certain witnesses was *categorically* excluded from ineffective assistance of counsel, stating that "the decision of which witnesses, if any, to call at

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[2] Respondent raised an issue as to the timeliness of the petition; however, this was not the ground of decision in either the district court or the circuit court. To the extent that any timeliness issue may exist, petitioner submits (i) that he is entitled to equitable tolling by reason of prior counsel incorrectly informing him as to the number of days chargeable to the AEDPA statute of limitations that had elapsed as of the time leave to appeal his CPL § 440;l0 motion was denied, see Baldayaque v. United States, 338 F.3d 145 (2d Cir. 2003) (granting equitable tolling where habeas petitioner was misinformed by prior counsel), and/or discrepancies in the dates of certain state court filings, see Diaz v. Kelly, 515 F.3d 149 (2d Cir. 2008); and (ii) that the witnesses who testified at the hearing, particularly but not exclusively Nikita Koylas nee Parbhudial, provided clear and convincing proof of his actual innocence thus obviating the statute of limitations, see McQuiggin v. Perkins, 569 U.S. 383 (2013). In any event, petitioner submits that the issue of whether the petition was timely and/or the tolling, if any, to which he is entitled, should be determined in the first instance by the circuit court and/or district court on remand.

[3] Citations to "App." refer to the appendix to this Petition.

trial is the type of sound trial strategy that *cannot* be the basis for an ineffective assistance of counsel claim." (App. 12) (emphasis added). Alternatively, the court found that the failure to call these witnesses did not prejudice petitioner because they did not see him "at the exact time the shooting happened." (Id.) The court further opined that, although Nikita's testimony "might have been marginally helpful" to Parbhudial, she "contradicted" his statement on whether they were together when the police entered and thus "left open the possibility that Parbhudial was not on the second floor as he claimed but rather was the person officers testified they saw on the third floor attic, watching them as they prepared to enter." (Id. at 13). But as will be discussed below, it was undisputed through the testimony of the *prosecution's* trial witnesses - including multiple police officers who recognized Baliraj as the same person they saw looking out the attic window - that the person on the third floor was not petitioner but Baliraj.

The district court further stated that Nestler was not ineffective in failing to adjourn petitioner's trial until after the trials of Angelene, Vishan and Baliraj because "trial counsel articulated a rational tactical decision for avoiding testimony from family members who had bene implicated in the Ramgoolam murder" and because they would have retained their Fifth Amendment rights pending appeal (id. at 14), again ignoring the fact that they pled guilty and did not appeal. Finally, the district court found that there was no basis to believe that objections to joinder, evidentiary matters, or jury instructions, if made by Nestler, would have succeeded. (Id. at 14-15). The court thus denied habeas relief. (Id. at 15).

Petitioner timely sought a Certificate of Appealability ("COA") from the Second Circuit Court of Appeals. By order dated November 24, 2020, the Second Circuit denied the COA, stating that "Appellant has not made a substantial showing of the denial of a constitutional right." (App. 1).

REASONS FOR GRANTING THE WRIT

This petition comes before this Court from the Second Circuit's denial of a COA. It thus bears emphasis that "[t]he COA inquiry... is not coextensive with a merits analysis," and "the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of [her] constitutional claims." Buck v. Davis, 137 S. Ct. 759, 773 (2017). A COA must issue pursuant to 28 U.S.C. § 2253(c) where the petitioner makes "a substantial showing of the denial of a constitutional right," which exists where "reasonable jurists could debate whether the petition should have been resolved in a different manner or the issues presented [are] adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

The COA standard has been described as "modest," Randolph v. Kemna, 276 F.3d 401, 403 n.1 (8th Cir. 2002), and "lenient," Hayward v. Marshall, 603 F.3d 546, 553 (9th Cir. 2010). A legal issue need not be clear-cut or obvious to "deserve encouragement to proceed further," and "[a] substantial showing does not compel a petitioner to demonstrate that he would prevail on the merits." Lucidore v. New York State Div. of Parole, 209 F.3d 107, 112 (2d Cir. 2000). Instead, the standard is designed to weed out "frivolous issues" while "at the same time affording habeas

petitioners an opportunity to persuade [this Court] through full briefing and argument of the potential merit of issues that may appear, at first glance, to lack merit." Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000).

Accordingly, "a court should not decline the application for a [certificate of appealability] merely because it believes the applicant will not demonstrate an entitlement to relief." Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003). All that petitioner must show is that, under the governing law, more than one result could plausibly be reached, and indeed, "[a]ny doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination." Fuller v. Johnson, 114 F.3d 491, 495 (5th Cir. 1997).

The circuit court failed to give Parbhudial the benefit of this doubt. Petitioner's COA application arose from an underlying clam of ineffective assistance of counsel, which is judged according to the familiar standard of Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland and its progeny, a defendant who claims that he was denied the effective assistance of counsel must meet a two-prong test: he must show both that his attorney fell below accepted professional standards and that he was prejudiced by his counsel's lapse. See id.

The first prong of the Strickland standard measures counsel's performance against professional norms existing at the time of the representation. See id. at 688-89. Although counsel's performance is viewed deferentially, see id., at 689-90, this deference does not extend to errors of omission for which counsel cannot provide any reasonable strategic or tactical justification. See, e.g., Libberton v. Ryan, 583 F.3d

1147, 1169 (9th Cir. 2009) (finding that failure to pursue mitigating evidence could not be justified by any valid strategy). Indeed, counsel "should not be allowed automatically to defend his omission simply by raising the shield of 'trial strategy and tactics.'" Sullivan v. Fairman, 819 F.2d 1382 (7th Cir.1987); see also Campbell v. Reardon, 780 F.3d 752, 764 (7th Cir. 2015) (decision made after insufficient investigation or consideration is not the product of reasonable strategy) (collecting cases).

In order to demonstrate prejudice under the Strickland standard, the defendant must show a reasonable probability that his counsel's errors affected the outcome of the trial. See Strickland, 466 U.S. at 686. In Kyles v. Whitley, 514 U.S. 419, 434 (1995), this Court explained that the "reasonable probability" standard is met when the errors of trial counsel "undermine confidence in the outcome of the trial." In addition, the Kyles Court further stated that the reasonable probability standard does not require demonstration by a preponderance of the evidence that counsel's error "would have resulted ultimately in the defendant's acquittal" and that "[a] defendant need not demonstrate that after discounting the [errors of counsel], there would not have been enough left to convict." Id. at 434-35. Indeed, reasonable probability has been described as a "fairly low threshold," Riggs v. Fairman, 399 F.3d 1179, 1183 (9th Cir. 2005), which "may be less than fifty percent," Ouber v. Guarino, 293 F.3d 19, 26 (1st Cir. 2002), and is indeed satisfied whenever the chances of a different outcome are "better than negligible," United States ex. rel. Hampton v. Leibach, 347 F.3d 219, 246 (7th Cir. 2003).

This was a closely contested case in which, while the historical facts were not in dispute, petitioner's knowledge and perspective very much were. He plausibly claimed that he did not know that the people invading his family's home were police officers, and as discussed at the beginning of this Petition, the remarkably similar raid on Breonna Taylor's apartment shows how easily such mistakes can happen. This was a case that could easily have resulted in acquittal – in fact, that would justly have resulted in acquittal – had evidence of the perspective from the second floor been presented, had the proper instructions been provided to the jury, and had the prosecutor not been permitted to spend a week trying the Ramgoolam murder case before petitioner's name was ever mentioned. But attorney Nestler, for no good reason, did not present this evidence and did not make the appropriate objections. Indeed, by his own admission, even he was unable to articulate strategic justification for the great majority of his opinions. It was thus clear that Nestler was ineffective, that his ineffectiveness prejudiced petitioner, that the state courts unreasonably applied Strickland and its progeny in holding otherwise, and that, at minimum, petitioner's habeas claim was sufficiently debatable among jurists of reason that a COA should have issued.

I. It Is Unreasonable to Treat a Decision Not to Call Critical Witnesses as a Per Se Strategic Judgment, Especially Where Trial Counsel Admits That The Uncalled Witness Would Have Been Helpful To The Defense.

First, it was error – and indeed, an unreasonable application of Strickland and its progeny – to treat an attorney's decision not to call a witness as "the type of sound trial strategy that *cannot* be the basis for an ineffective assistance of counsel claim."

(App. 12) (emphasis added). Neither Strickland nor any other decision of this Court has ever categorically excluded a particular class of decisions by trial counsel from forming the basis of an ineffective assistance claim. While, to be sure, Strickland mandates that an attorney's strategic decisions be analyzed with deference, and while the standard of review in the Section 2254 context is "doubly deferential," Knowles v. Mirzayance, 556 U.S. 111, 123 (2009), this Court has never held that any particular type of decision is *per se* strategic, such that it "cannot" form the basis of an ineffective assistance claim no matter how unreasonable. To the contrary, Strickland and its progeny mandate that all acts and omissions by counsel be judged through the same lens, and that the failure to call a witness, if shown to be unreasonable and prejudicial, can constitute ineffective assistance no less than any other failure.

For instance, in Williams v. Taylor, 529 U.S. 362, 373 (2000), this Court considered an ineffective assistance claim based on, *inter alia*, "failure to contact a potentially persuasive character witness" who could have testified on the defendant's behalf. Reversing the Fourth Circuit, this Court held that Strickland was clearly established law for AEDPA purposes and that, under Strickland, counsel's failure to present evidence that could have mitigated guilt, including the character witness, was unreasonable and prejudicial. See id. at 394-97. Likewise, in Harris v. Reed, 489 U.S. 255 (1989), this Court reinstated an ineffective assistance claim that hinged on failure to call alibi witnesses, and while this Court's decision hinged on waiver, it could easily have upheld the dismissal of the claim on alternative grounds if it believed that an attorney's failure to call a witness was a *per se* matter of strategy.

Other habeas courts have likewise held, in cases governed by the AEDPA, that an unreasonable failure to call a witness can constitute ineffective assistance, and indeed, have granted habeas relief on such grounds. See, e.g., Lindstadt v. Keane, 239 F.3d 191, 204-05 (2d Cir. 2001); Schulz v. Marshall, 528 F. Supp. 2d 77, 101 (E.D.N.Y. 2007), aff'd, 345 Fed. Appx. 627 (2d Cir. 2009); see also Mosley v., Atchison, 689 F.3d 838 (7th Cir. 2012); Blackburn v. Foltz, 828 F.2d 1177, 1183 (6th Cir. 1987); Towns v. Smith, 395 F.3d 251, 258-61 (6th Cir. 2005). Indeed, at least one circuit court has held that "an attorney's failure to present available exculpatory evidence is *ordinarily* deficient unless some cogent tactical or other consideration justified it." Pavel v. Hollins, 261 F.3d 210, 220 (2d Cir. 2001) (emphasis added). Thus, both the precedent of this Court and federal AEDPA jurisprudence in general run directly contrary to the district court's conclusion that the failure to call a witness "cannot" possibly be ineffective assistance.

And that is all the more true where, as here, (i) at least one uncalled witness, namely Nikita, was absolutely critical, and (ii) the attorney *admitted* that the testimony of the witness in question would have been helpful to his client. As discussed in the Statement of Facts, it is undisputed that the key issue at trial was whether petitioner Adrian Parbhudial knew, or should have known, that the people entering his house were police. There was considerable evidence from which a jury might infer that he *did not* know and could not reasonably have known, including (a) the fact that Ganesh Ramgoolam's family had a feud with defendant's family and was likely to seek revenge for Ramgoolam's death; and (b) the fact the raid happened

suddenly and with no warning; (c) that he used birdshot, which, to say the least, would not be the weapon of choice in a deliberate assault against a SWAT team; and (d) that, by the admission of the SWAT officers, the entire sequence of events from breaching the door to the gunshot took only 5 to 10 seconds (Tr. 1576, 1612-13). The People attempted to prove that petitioner knew or should have known who the SWAT team was by offering the testimony of the officers themselves and people outside the house who heard shouts of "police," *but the People did not call any witnesses who were inside the house, much less the second floor where defendant was*.

Nikita - who was on the second floor with petitioner when the SWAT team breached the door, and who was in the same room with defendant and Mr. Baliraj immediately afterward - could have provided the missing perspective from the second floor, and could have shown the jury that the only sounds audible from petitioner's vantage point were a loud bang followed by incoherent screaming. Given that Nikita never heard the word "police" and did not know that the SWAT team members were police officers until after she looked out the window, a jury could well find that defendant Parbhudial also had no reason to know who the SWAT officers truly were. This is especially true given that Nikita also testified to Baliraj saying that he thought "the people" were coming into the house - a description more likely to connote the Ramgoolam family than police officers. In other words, Nikita was the witness who could have proved petitioner's innocence.

The state courts' and district court's quibbles with Nikita's testimony are not even remotely to the contrary. The ground cited by the New York State motion court

– that petitioner was no longer on the second floor when he actually fired the shots - is immaterial for at least two reasons. First, petitioner unquestionably was on the second floor when the SWAT team breached the door, when he met with Baliraj and Ms. Koylas in the second-floor kitchen, and when Baliraj told him that "the people" had entered the house. And second, the stairs down which petitioner ran after this discussion are stairs in which "you have to turn" (H.83) and in which there are "two turns, you walk down and you turn and then you walk out" (H.84) - i.e., down halfway to a landing, turn 180 degrees, and then down the rest of the way to the door. Only for the last fraction of a second would petitioner have been in a position where the sounds from downstairs were not muffled by a wall. And it is also undisputed that petitioner fired the shots through a closed, albeit unlatched, door, meaning (a) that he could not see the officers, and (b) the door, too, was muffling sound. In a split-second situation like the SWAT raid in this case, there is no basis to infer that petitioner could have heard and processed the word "police" during the last quarter-second or half-second of his run down the stairwell.

Notably, Nikita was considerably closer to defendant Parbhudial's vantage point than the witnesses the People called at trial to support their argument that he did know or should have known that he was dealing with police officers. Each of those witnesses was either outside the house or was one of the police officers themselves. If their testimony was probative of petitioner's guilt, then Nikita's testimony, from a vantage point closer to his, would certainly be probative of his innocence.

The ground cited by the district court – that because of a minor discrepancy

between Nikita's and petitioner's statements concerning exactly where on the second floor he was at a particular time, a jury might have inferred that he was not on the second floor at all but was instead the person watching the police from the third floor – has even less merit. The People's own trial witnesses made clear that the person in the attic was Richard Baliraj. Officer Sean Clifford testified that he recognized the person in the attic as the same person he had originally seen looking out the window, and that this person was Richard Baliraj. (Tr.1245-46). The gun in the attic, near where Baliraj had been, was a hunting rifle with a scope, not the shotgun that defendant used. (Tr. 1267). Indeed, at the time Officer Clifford saw Baliraj in the attic window, defendant was already under arrest and being brought out of the house. (Tr. 1246). Officers Eric Gandrow (Tr. 1425-27), Robert Dashnow (Tr. 1505) and Thomas Kelly (Tr. 1614-15) further testified that the person in the attic window was not the defendant and was instead Baliraj. There is absolutely nothing about Nikita's testimony that could lead to another conclusion, and therefore, the district court's conclusion that she might have harmed petitioner's defense if called to the stand was nothing short of fanciful.[4]

Thus, Nikita's testimony would have been nothing but helpful to the defense – it could not possibly have caused harm. Nor, contrary to the conclusions of the state courts and the district court, would it have been only "marginally" helpful. Instead,

[4] Moreover, when given the opportunity to cross-examine Nikita at the hearing, the People did not impeach her account of the night's events in any meaningful respect, and in fact, devoted most of their cross-examination to the Ramgoolam murder, in which neither she nor petitioner were alleged to have been involved.

Nikita's testimony could have shown, from the perspective of the floor where petitioner was located when the raid began, that he did not know and could not reasonably have known that the people breaking into the family home were police officers As discussed above, we now know from the Breonna Taylor incident exactly how easy it is to make that mistake, and Nikita could have proven beyond doubt that petitioner's actions that night *were* a mistake, not some kind of insane kamikaze assault on a SWAT team with Number 8 birdshot.

And as the final coup de grace, attorney Nestler effectively *admitted* that he should have called Nikita. As discussed above, Nestler initially stated in conclusory terms that his reason for not calling Nikita was "trial strategy" (H.18), but then admitted that the only strategic justification he could articulate – disassociating petitioner from the Ramgoolam murder (H.18) – didn't even apply to Nikita because she was never charged in that murder or accused of participating in it (H.40, 60-61). On cross-examination, when asked if he recalled why he didn't call Nikita as a witness, he said "no." (H.37). And then, on redirect, he admitted that the testimony Nikita would have given at trial, as reflected in her statement to the police, *would have helped* his trial strategy by showing that petitioner could not have known that the people breaking in downstairs were policemen. (H.41, 44, 52).

Thus, the bottom line in this case is that not only was Nikita a critical – possibly *the* critical – witness for the defense, but Nestler admitted that there was no genuine strategic reason not to call her and that she would instead have been helpful to his strategy. Under these circumstances, it is not only erroneous but unreasonable to hold

that failing to call Nikita was a *per se* strategic decision that categorically cannot constitute ineffective assistance of counsel. This Court should grant certiorari to review this aspect of the decisions below and to make clear that (i) there are no acts or omissions by counsel that are categorically excluded from forming the basis of an ineffective assistance claim; and (ii) the failure to call a critical defense witness whose testimony would be highly probative of innocence without significant risk rises to the level of constitutionally ineffective assistance of counsel.

II. It Is Unreasonable to Find Effective Assistance Where an Attorney Commits Multiple Errors That Sacrifice His Client's Only Defense.

Petitioner submits that, for the reasons set forth in ground I above, Nestler's failure to call Nikita as a witness for the defense is, by itself, enough to constitute ineffective assistance. But as discussed in the Statement of Facts, Nestler committed many more omissions, all of which impacted petitioner's only defense. The sum total of these errors effectively sacrificed petitioner's claim – his *meritorious* claim – that when he ran downstairs and fired his shotgun, he didn't know that he was confronting police officers rather than home invaders. The state courts' rejection of the *totality* of petitioner's ineffective assistance claim was clearly an unreasonable application of Strickland and its progeny.

First, Nestler failed to bring to the trial court's attention that Richard Baliraj and Angelene and Vishan Parbhudial had critical exculpatory testimony to give but could not give it because the charges against them were still pending. Had he done so, there is plainly a reasonable probability, under governing New York authority, that he

would have succeeded in deferring petitioner's trial until after these three witnesses were tried and became free to testify on his behalf.

In People v. Kelly, 38 N.Y.2d 633, 636 (1976), the New York Court of Appeals stated that, in determining the order of trials, "priority should be given, among others, to cases where there is a critical issue involving guilt or innocence, or the possible loss of witnesses to the prosecution or the defense" (emphasis added). Subsequently, in People v. Garnes, 134 Misc. 2d 39 (Sup. Ct., Queens Co. 1986), the court found that Kelly requires co-defendants to be tried first if they would then be able to provide exculpatory testimony to the moving defendant.

In Garnes, two defendants - Kenneth Garnes and Kwame Brew-Adams - were charged with drug possession and possession of drug paraphernalia. Garnes sought a severance, and sought an order directing that Brew-Adams be tried first, so that Brew-Adams would be available as a witness at his trial. See Garnes, 134 Misc. 2d at 40. The court framed the issue as follows:

> In this case we are presented with the problem of the defendant, Garnes, calling his codefendant, Brew-Adams, as a witness in his behalf. Garnes contends that if this is done at a joint trial, Brew-Adams will claim his 5th Amendment rights. He contends such a result will not only prejudice his case in the minds of the jurors, but it will also preclude the introduction into the trial of highly favorable exculpatory evidence which should be before the trier of the facts.

Id. at 41-42. This is, of course, exactly the same issue that was presented in the instant case - only the names are changed.

The Garnes court resolved this issue by directing a severance and ordering that

Brew-Adams' trial take place first. As to the latter question, the court stated:

> Since a severance of the trials of the defendants is being granted pursuant to this order, were the Garnes's case tried first, the very purpose of the severance would be defeated since the possibility that the defendant Brew-Adams would assert his 5th Amendment privilege were he called to testify would continue to exist. *In such an event, the very purpose of the severance granted by this motion would be frustrated. However, if the defendant Brew- Adams's case were tried first, he would then be in a position to testify at the trial of the codefendant, Garnes, without jeopardizing his position as regards his trial.*

Id. at 43 (emphasis added).

Courts in other States, as well as Federal jurisdictions, have reached similar conclusions, holding that a defendant's Sixth Amendment right to present the testimony of a severed co-defendant should weigh heavily in determining the order of trials. See, e.g., United States v. DiBernardo, 880 F.2d 1216, 1229 (11th Cir. 1989); DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962); State v. Walland, 555 So. 2d 478 (La. App. 1989); State v. Scovil, 387 A.2d 413 (N.J. Super. 1978).

Here, both the affidavits and the hearing testimony of Angelene Parbhudial, Vishan Parbhudial, and Richard Baliraj all attest that they had exculpatory testimony to give concerning petitioner Adrian Parbhudial but, because charges relating to the Ramgoolam homicide were pending against them and Adrian was scheduled to be tried first, they would be forced to take the Fifth Amendment if called as witnesses at defendant's trial. Had Nestler made the trial court aware of this and cited Kelly, Garnes and the other above-cited authorities, there is plainly a reasonable probability that he would have succeeded in changing the order of trials so that these witnesses' exculpatory testimony could be presented to the jury.

Nor does the state motion court's observation that the Fifth Amendment right continues through appeal - which is the only ground cited by that court for rejecting this claim of ineffective assistance - to the contrary, because it is undisputed that none of the three witnesses ever took an appeal.

Notably, at the hearing, Nestler acknowledged that he did not know of the Kelly and Garnes cases or their holdings (H.45-46), and that there would have been no downside to making a motion to change the order of trials (H.20). Where, as here, an attorney's failure to make an application to the court is based on ignorance or oversight the law rather than trial strategy, it constitutes ineffective assistance. See Eze v. Senkowski, 321 F.3d 110, 112-13 (2d Cir. 2003).

Second, it was ineffective for Nestler not to object to the consolidation of the First and Second Indictments. As discussed above, the First Indictment contained counts relating to alleged obstruction of the Ganesh Ramgoolam murder investigation while the counts of the Second Indictment related only to the shooting of the two police officers. The consolidation of the two indictments permitted the People to prove up the Ramgoolam murder as an element of the obstruction-related charges, thus leading to day upon day of prejudicial testimony concerning the murder and the crimes of petitioner's family members before a single witness testified concerning the raid and the petitioner's discharge of a shotgun.

Had Nestler recognized the importance of the obstruction-related charges and objected to the consolidation of the two indictments, then the People would not have been able to prove up the existence of the Ramgoolam murder as an element of the

charges in the Second Indictment. Instead, at a trial of the Second Indictment alone, the evidence relating to the murder and underlying feud, as well as evidence concerning possession and use of weapons by other members of defendant's family, would have been admissible only under what the New York courts refer to as a Molineux theory (roughly equivalent to Fed. R. Evid. 404(b)). Any such evidence would have been subject to a limiting instruction and would also have been drastically limited in volume under state law to prevent a "deluge" of evidence on uncharged acts, see People v. Barnes, 117 A.D.3d 1203, 1208 (3d Dept. 2014). Moreover, in all likelihood, crime scene photos of Ramgoolam's body – which were admitted to prove that the underlying homicide was not self-defense, and which were highly inflammatory and prejudicial – would not have come in at all. The result would have been a much more focused trial with a much lesser volume of evidence concerning other people's uncharged acts which could be and was used to paint defendant as guilty by association.

Petitioner acknowledges that, on direct appeal, the Appellate Division found no error in refusing to sever the two indictments *after* they were consolidated. But this is all the more reason why Nestler should never have permitted them to be consolidated in the first place. Once the two indictments were consolidated, severance could only be granted in the narrow circumstances set forth in NY CPL § 200.20(3) – which include, inter alia, a requirement that the offenses to be severed be "the same or similar in law" - but consolidation in the first place is always discretionary and a court need not grant it even if the two indictments are joinable, see NY CPL §

200.20(4)-(5). Given that the trial judge expressed concern at various points about trying the Ramgoolam murder case as part of the case against petitioner, there is certainly – contrary to the motion court's opinion – a reasonable probability that it would have denied the People's motion to consolidate had Nestler pointed out that consolidation would result in exactly that. And since, at the hearing, Nestler stated that he could not recall whether he considered objecting to such joinder (H.20) and hence did not articulate any strategic reason for failing to do so, the only possible conclusion is that he was ineffective.

Third, counsel failed to object to testimony (Tr. 380-91, 415-22) and summation argument (Tr. 2436-37) regarding defendant's silence when the police questioned his mother in his presence. It is well settled in New York that law enforcement questioning is plainly not a situation in which defendant would naturally be expected to speak, and therefore, his silence could not be held against him and an objection would have been sustained. See People v. De George, 73 N.Y.2d 614, 618-19 (1989); People v. Sprague, 267 A.D.2d 875, 879-80 (3d Dept. 1999). Just as plainly, this testimony and argument prejudiced petitioner by permitting the jury to impute damaging admissions by petitioner's mother to petitioner himself. And, since Nestler acknowledged at the hearing that he had no recollection of why he did or did not make specific objections and/or pursue lines of questioning (H.25-26), there is, again, no strategic justification for his failure to make these objections.

Fourth, counsel failed to object to the extensive testimony of witness Pariag concerning Ganesh Ramgoolam's family background, personality and character, which

had no purpose other than to inflame the jury's sympathy for someone defendant was not even accused of helping to kill. This was the type of testimony that the trial court precluded when the People tried to elicit it as to other witnesses (Tr. 1599) and hence, there is a reasonable likelihood that the court would have sustained an objection to Mr. Pariag's testimony had one been made. And again, Nestler did not recall why he failed to make objections (H.25-26), meaning that the record contains no strategic justification for failing to object.

Fifth, Nestler failed to follow up after the SWAT officer testified that he initially did not even know he was shot (Tr. 1576, 1612-13) to secure an admission (which could be stressed on summation) that, in split-second situations, even trained officers can make mistakes about what is going on. Such an admission - which, contrary to the motion court's opinion, the officer would have to have made in light of his acknowledgment that it took him a few seconds to realize that he had been shot - would have been of obvious value to defendant, who was faced with a split-second situation, did not have the training police officers do, and unlike the officers, did not have an opportunity to prepare in advance. Again, at the hearing, Nestler was unable to recall a strategic justification for not following particular lines of questioning (H.25-26).

Sixth, Nestler failed to object to prejudicial summation arguments. To begin with, the prosecutor argued both propensity and guilt by association, contending that petitioner and his family were "becoming increasingly violent" during the lead-up to the raid. (Tr. 2357). This improperly conveyed to the jury that petitioner had a propensity to commit violence and that he was part of a violent family, both of which

could not help but color the jury's view of whether he had knowingly fired a shotgun at police officers. Indeed, the prosecutor returned to the "violent family" theme throughout later points in his summation, all without an objection from Nestler.

Counsel also failed to object when the prosecutor argued that petitioner might have seen a SWAT team raid a neighboring house a year earlier and thus knew what SWAT officers looked like (Tr. 2433-34) which went beyond the bounds of fair comment given that there was no evidence that petitioner was in a position to see that other raid or even that he was home at the time. Again, at the hearing, Nestler did not recall any reason for not objecting to these prejudicial arguments which went far beyond the bounds of fair comment. (H.25-26).

Seventh and finally, if (as the state courts determined) Richard Baliraj, Angelene Parbhudial, and/or Vishan Parbhudial were available to be called as witnesses at trial, it was ineffective assistance not to call them, because, like Nikita, they too could have corroborated that the sound "police" could not be discerned from either the first or second floor, that the Ramgoolam family had threatened violence over the weekend, and that Baliraj had warned defendant that people with guns were coming in.

The hearing testimony of these three witnesses, as described above in the Statement of Facts, establishes three things. First, Angelene Parbhudial's testimony shows that petitioner was aware, prior to the SWAT raid, that the Ramgoolams had made threats of violence against the Parbhudial family, which would heighten his apprehension that they rather than the police were the ones breaking into the house.

Second, Richard Baliraj's testimony corroborates the testimony of Nikita that defendant was warned that "people" – not police – were breaking into the house. Third, the testimony of all three witnesses shows that on both the first *and* second floors, the events were so chaotic, and took place at such a split-second level, that it was reasonable for people in the house not to discern that the SWAT officers were in fact policemen. If the confusion was too great even on the first floor to immediately discern who had entered the house, it was certainly too great on the second floor where petitioner was.

All these things, of course, would have compellingly refuted what was already a far from ironclad case against petitioner. Thus, for the reasons set forth above with respect to Nikita's testimony, the testimony of these three witnesses would likewise result in reasonable probability of a more favorable outcome, and as with Nikita, these witnesses were key to that part of Nestler's strategy that hinged on showing that petitioner did not know and should not have known that the SWAT officers were police. And of course, with the first seven days of trial already having been taken up by graphic proof of the Ramgoolam murder, any consideration of "distancing" petitioner from that murder was already a dead letter despite the fact that he was concededly not involved, and the fact that Angelene, Vishan and Baliraj faced charges relating to that murder was not a reasonable basis for failing to call them and elicit their favorable and compelling testimony,

In sum, this series of omissions, especially when combined with Nestler's failure to call Nikita to the stand,, was highly prejudicial and not justified by any reasonable

strategic consideration. The evidence in this case was far from overwhelming, and had Nikita been called, and had the other errors and omissions not been made, there is plainly a reasonable – that is, "better than negligible," see Hampton, supra – chance that petitioner Parbhudial's trial would have resulted in a more favorable outcome. Indeed, there is a reasonable likelihood that petitioner was convicted of, and is now spending 40 years in prison for, a "crime" that was in fact nothing more than an honest mistake in defending his home and family. Even under a "doubly deferential" standard – indeed, even if there were such a thing as *triple* deference – it is unreasonable to find that these errors amounted to anything other than prejudicial error under Strickland and its progeny. This Court should therefore find that the issues in this case warrant review and remand.

CONCLUSION

WHEREFORE, in light of the foregoing, this Court should grant certiorari on all issues raised in this Petition and, upon review, should vacate the judgment against petitioner and grant such other and further relief as may be appropriate.

Dated: New York, NY
April 19, 2021

Respectfully Submitted,
EDELSTEIN & GROSSMAN
Attorney for Petitioner

By: JONATHAN I. EDELSTEIN

ORDER OF THE SECOND CIRCUIT COURT OF APPEALS DATED NOV. 24, 2020 [1]

N.D.N.Y.
19-cv-5
Singleton, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of November, two thousand twenty.

Present:

Guido Calabresi,
Robert A. Katzmann,
Richard J. Sullivan,
Circuit Judges.

Adrian Parbhudial,

Petitioner-Appellant,

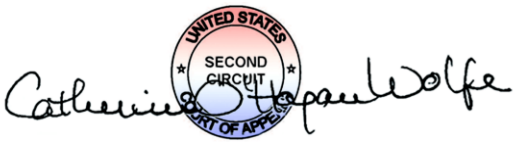
v. 20-2741

Jamie LaManna, Superintendent, Green Haven Correctional Facility,

Respondent-Appellee.

Appellant moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



DECISION OF THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF N.Y. ENTERED JUL. 27, 2020 [2-16]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

ADRIAN PARBHUDIAL,

Petitioner,

vs.

JAMIE LAMANNA, Superintendent, Green Haven Correctional Facility,

Respondent.

No. 9:19-cv-00005-JKS

MEMORANDUM DECISION

Adrian Parbhudial, a New York state prisoner represented by counsel, filed a Petition for a Writ of Habeas Corpus with this Court pursuant to 28 U.S.C. § 2254. Parbhudial is in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS") and incarcerated at Green Haven Correctional Facility. Respondent has answered the Petition, and Parbhudial has replied.

I. BACKGROUND/PRIOR PROCEEDINGS

In May 2010, Parbhudial was charged with attempted murder in the first degree, first-degree reckless endangerment, third-degree criminal possession of a weapon, first-degree hindering prosecution, third-degree perjury, and second-degree making an apparently sworn false statement. The charges stemmed from an incident where police executed a no-knock search warrant at Parbhudial's home in search of evidence of the Parbhudial family's involvement in the murder of Ganesh Ramgoolam, which had occurred outside the Parbudial residence on February 20, 2010. After officers used a battering ram to gain entrance to the residence, Parbhudial fired a round of birdshot from his shotgun at the officers, who were

wearing bullet-proof vests. After the shooting, the officers detained Parbhudial and brought him to the Schenectady Police Department for questioning. Following a gun residue test, Parbhudial acknowledged that he was the shooter, but claimed that he believed the officers to be intruders. Parbhudial was also questioned about the Ramgoolam shooting.

A supplemental indictment in June 2010 charged Parbhudial with attempted aggravated murder, attempted aggravated assault upon a police officer, first-degree attempted assault, and third-degree criminal possession of a weapon. The People moved to consolidate the two indictments, and Parbhudial consented to the consolidation and joined in the motion for joinder of charges pursuant to New York Criminal Procedure Law ("CPL") § 200.20(4).[1]

Roughly seven months after the charges were consolidated, and less than one week prior to the start of trial, Parbhudial made an oral application to sever the charges of hindering prosecution, perjury, and making an apparently sworn false statement from the rest of the charges. County court denied the motion, stating that the "cases were inextricably linked."

Following a three-week trial at which Parbhudial's defense was that he believed, at the time he shot the entering police, that he was protecting his family from vengeful members of the Ramgoolam family, the jury found Parbhudial guilty of attempted aggravated murder, third-degree criminal possession of a weapon, first-degree reckless endangerment, first-degree hindering prosecution, third-degree perjury, and second-degree making an apparently sworn

[1] That provision provides that the court may consolidate multiple indictments and treat them as a single indictment for trial purposes if they are joinable under CPL § 200.20(2)(b), which mandates that offenses are properly joined "when evidence of a crime charged in one indictment is material and admissible as evidence of a crime charged in a second."

false written statement. The trial court subsequently sentenced him to an aggregated term of forty years to life imprisonment.

Through counsel, Parbhudial appealed his conviction, arguing that: 1) the county court erred in denying his severance motion; 2) his convictions were not based on legally sufficient evidence; 3) his convictions were against the weight of the evidence; and 4) his sentence is harsh and excessive. The Appellate Division of the New York Supreme Court unanimously affirmed his conviction in a reasoned opinion issued on January 7, 2016. *People v. Parbhudial*, 22 N.Y.S.3d 648, 652 (N.Y. App. Div. 2016). Parbhudial sought leave to appeal in the New York Court of Appeals, which was summarily denied on March 31, 2016. *People v. Parbhudial*, 56 N.E.3d 908, 908 (N.Y. 2016).

Again proceeding through counsel, Parbhudial moved pursuant to CPL § 440.10 to vacate the judgment of conviction, arguing that newly-discovered evidence, consisting of affidavits from witnesses Angelene Parbhudial (Parbhudial's sister), Vishan Parbhudial (his brother), and Richard Baliraj (his sister's fiancé), supported his actual innocence. Parbhudial further averred that his trial counsel was ineffective for failing to: 1) seek adjournments until after the People had the opportunity to prosecute Angelene Parbhudial, Vishan Parbhudial, and Richard Baliraj for the Ramgoolam shooting so that Parbhudial could call them to testify at trial; 2) object to the court's instruction on the justification defense; 3) object to the joinder of charges; and 4) object to the prosecutor's opening statement, summation, and improper witness examinations. The county court held an evidentiary hearing at which his trial attorney, his brother, his sister, his sister's fiancé, and his ex-wife Nikita Parbhudial testified.

At the evidentiary hearing, Parbhudial's family members testified as to the events related to the execution of the search warrant. Parbhudial's brother, sister, and sister's fiancé testified that they had been charged with crimes related to the Ramgoolan shooting at the time of Parbhudial's trial, but they did not enter their guilty pleas to second-degree gang assault until after that trial ended.

Trial counsel testified that he did not consider moving to have Parbhudial's case tried after the trial of those family members and was not aware of any provision of the CPL that would have allowed such motion. He further testified that he decided not to call Parbhudial's family members at trial because he wanted to distance Parbhudial as much as possible from his family who had been implicated in the murder, and he did not want to call as witnesses those individuals that had been charged with the murder. Trial counsel testified that he did not recall why he made, or did not make, certain objections at trial and did not recall why he did not pursue certain lines of questioning.

At the conclusion of the hearing and in consideration of post-hearing memoranda of law by the parties, the county court denied the motion in its entirety. Parbhudial filed a counseled petition for leave to appeal to the Appellate Division, asking that court to review all claims unsuccessfully raised in the county court. The Appellate Division denied leave without comment on October 18, 2018.

Parbhudial then filed the instant counseled Petition for a Writ of Habeas Corpus to this Court on January 2, 2019. Docket No. 1 ("Petition"); *see* 28 U.S.C. § 2244(d)(1)(A). Briefing is now complete, and the Petition is before the undersigned judge for adjudication.

II. GROUNDS RAISED

In his counseled Petition before this Court, Parbhudial raises the ineffective assistance of trial counsel claims that he unsuccessfully raised to the state courts in his motion to vacate the judgment pursuant to CPL § 440.10. Namely, Parbhudial argues that counsel was ineffective for failing to: 1) call his ex-wife, Nikita Parbhudial, and mother, Omawattie Parbhudial, to testify at trial; 2) seek adjournment of his trial until his family members had been prosecuted and were able to testify at trial; 3) object to the jury instructions on justification; 4) object to the joinder of charges; and 5) object to the prosecutor's opening and closing statements and improper examination.

III. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), this Court cannot grant relief unless the decision of the state court was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). A state-court decision is contrary to federal law if the state court applies a rule that contradicts controlling Supreme Court authority or "if the state court confronts a set of facts that are materially indistinguishable from a decision" of the Supreme Court, but nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 406 (2000). The term unreasonable is a common term in the legal world. The Supreme Court has cautioned, however, that the range of reasonable judgments may depend in part on the nature of the relevant rule argued to be clearly established federal law. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) ("[E]valuating

whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.").

To the extent that the Petition raises issues of the proper application of state law, they are beyond the purview of this Court in a federal habeas proceeding. *See Swarthout v. Cooke*, 131 S. Ct. 859, 863 (2011) (per curiam) (holding that it is of no federal concern whether state law was correctly applied). It is a fundamental precept of dual federalism that the states possess primary authority for defining and enforcing the criminal law. *See, e.g.*, *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (a federal habeas court cannot reexamine a state court's interpretation and application of state law); *Walton v. Arizona*, 497 U.S. 639, 653 (1990) (presuming that the state court knew and correctly applied state law), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002).

In applying these standards on habeas review, this Court reviews the "last reasoned decision" by the state court. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991); *Jones v. Stinson*, 229 F.3d 112, 118 (2d Cir. 2000). Where there is no reasoned decision of the state court addressing the ground or grounds raised on the merits and no independent state grounds exist for not addressing those grounds, this Court must decide the issues de novo on the record before it. *See Dolphy v. Mantello*, 552 F.3d 236, 239-40 (2d Cir. 2009) (citing *Spears v. Greiner*, 459 F.3d 200, 203 (2d Cir. 2006)); *cf. Wiggins v. Smith*, 539 U.S. 510, 530-31 (2003) (applying a de novo standard to a federal claim not reached by the state court). In so doing, the Court presumes that the state court decided the claim on the merits and the decision rested on federal grounds. *See Coleman v. Thompson*, 501 U.S. 722, 740 (1991); *Harris v. Reed*, 489 U.S. 255, 263 (1989); *see*

also Jimenez v. Walker, 458 F.3d 130, 140 (2d Cir. 2006) (explaining the *Harris-Coleman* interplay); *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804, 810-11 (2d Cir. 2000) (same). This Court gives the presumed decision of the state court the same AEDPA deference that it would give a reasoned decision of the state court. *Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011) (rejecting the argument that a summary disposition was not entitled to § 2254(d) deference); *Jimenez*, 458 F.3d at 145-46. Under the AEDPA, the state court's findings of fact are presumed to be correct unless the petitioner rebuts this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

IV. DISCUSSION

A. *Timeliness*

Respondent urges the Court to dismiss Parbhudial's Petition as untimely.

The AEDPA provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Here, the New York Court of Appeals denied Parbhudial's application for leave to appeal his conviction on March 31, 2016. His conviction became final 90 days later, on June 29, 2016, the conclusion of the period during which Parbhudial could have sought certiorari review in the United States Supreme Court. *See Williams v. Artuz*, 237 F.3d 147, 150-51 (2d Cir. 2001). It appears that he filed his CPL § 440.10 motion to vacate on April 20, 2017, after 294 days had lapsed on the one-year limitations period. The limitations period was tolled from April 20, 2017, until October 18, 2018, when the Appellate Division denied his application for leave to appeal. 28 U.S.C. § 2244(d)(1)(D)(2). Parbhudial therefore had 71 days to file his petition. The counseled Petition was filed on January 2, 2019, 76 days later. Respondent thus urges the Court to dismiss the Petition as untimely.

In response, Parbudial contends that equitable tolling should apply to render his Petition timely. Parbhudial stresses that his Petition was filed only 5 days late. Parbhudial also argues that he has been pursuing his rights diligently and that any delay is modest and attributable to difficulties and delays in retaining new counsel and in receiving notification of his denied CPL § 440.10 motion from former counsel, whose letter also incorrectly noted the date that a federal habeas petition would be due.

Here, however, this case may be more easily resolved on the merits, and thus the Court declines to decide the case on procedural grounds. *See Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (stating that bypassing procedural questions to reach the merits of a habeas petition is justified "if the [underlying issues] are easily resolvable against the habeas petitioner, whereas the procedural bar issue involved complicated issues of state law"); *Boddie v. New York State Div. of Parole*, 288 F. Supp. 2d 431, 439 (S.D.N.Y. 2003) ("[P]otentially complex and difficult

issues about the various obstacles to reaching the merits [of a habeas petition] should not be allowed to obscure the fact that the underlying claims are totally without merit.") (quotation omitted). Accordingly, the Court will address the merits of Parbhudial's claims, as discussed below.

B. *Merits*

Parbhudial's Petition alleges that trial counsel rendered ineffective assistance in a variety of ways. To demonstrate ineffective assistance of counsel under *Strickland v. Washington*, a defendant must show both that his counsel's performance was deficient and that the deficient performance prejudiced his defense. 466 U.S. 668, 687 (1984). A deficient performance is one in which "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* The Supreme Court has explained that, if there is a reasonable probability that the outcome might have been different as a result of a legal error, the defendant has established prejudice and is entitled to relief. *Lafler v. Cooper*, 132 S. Ct. 1376, 1385-86 (2012); *Glover v. United States*, 531 U.S. 198, 203-04 (2001); *Williams*, 529 U.S. at 393-95. Thus, Parbhudial must show that his counsel's representation was not within the range of competence demanded of attorneys in criminal cases, and that there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. *See Hill v. Lockhart*, 474 U.S. 52, 57 (1985). An ineffective assistance of counsel claim should be denied if the petitioner fails to make a sufficient showing under either of the *Strickland* prongs. *See Strickland*, 466 U.S. at 697 (courts may consider either prong of the test first and need not address both prongs if the defendant fails on one).

New York's test for ineffective assistance of counsel under the state constitution differs slightly from the federal *Strickland* standard. "The first prong of the New York test is the same as the federal test; a defendant must show that his attorney's performance fell below an objective standard of reasonableness." *Rosario v. Ercole*, 601 F.3d 118, 123 (2d Cir. 2010) (citing *People v. Turner*, 840 N.E.2d 123 (N.Y. 2005)). The difference is in the second prong. Under the New York test, the court need not find that counsel's inadequate efforts resulted in a reasonable probability that, but for counsel's error, the outcome would have been different. "Instead, the 'question is whether the attorney's conduct constituted egregious and prejudicial error such that the defendant did not receive a fair trial.'" *Id.* at 123 (quoting *People v. Benevento*, 697 N.E.2d 584, 588 (N.Y. 1998)). "Thus, under New York law the focus of the inquiry is ultimately whether the error affected the 'fairness of the process as a whole.'" *Id*. (quoting *Benevento*, 697 N.E.2d at 588). "The efficacy of the attorney's efforts is assessed by looking at the totality of the circumstances and the law at the time of the case and asking whether there was 'meaningful representation.'" *Id.* (quoting *People v. Baldi*, 429 N.E.2d 400, 405 (N.Y. 1981)).

The New York Court of Appeals views the New York constitutional standard as being somewhat more favorable to defendants than the federal *Strickland* standard. *Turner*, 840 N.E.2d at 126. "To meet the New York standard, a defendant need not demonstrate that the outcome of the case would have been different but for counsel's errors; a defendant need only demonstrate that he was deprived of a fair trial overall." *Rosario*, 601 F.3d at 124 (citing *People v. Caban*, 833 N.E.2d 213, 222 (N.Y. 2005)). The Second Circuit has recognized that the New York "meaningful representation" standard is not contrary to the federal *Strickland* standard. *Id.* at 124, 126. The Second Circuit has likewise instructed that federal courts should, like the New

York courts, view the New York standard as being more favorable or generous to defendants than the federal standard. *Id*. at 125.

Parbhudial's ineffective assistance claims must fail, however, even under the more favorable New York standard. With respect to his claim that counsel was ineffective for failing to call Nikita and Omawattie Parbhudial to testify, the decision of which witnesses, if any, to call at trial is the type of sound trial strategy that cannot be the basis for an ineffective assistance of counsel claim. *See Untied States v. Smith*, 198 F.3d 377, 386 (2d Cir. 1999) ("The decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial."); *United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir. 1997) (defense counsel's decision whether "to call specific witnesses—even ones that might offer exculpatory evidence—is ordinarily not viewed as a lapse in professional representation").

Parbhudial counters that counsel's failure to call Parbhudial's ex-wife and mother at trial cannot be deemed a strategic decision because they were not implicated in the Ramgoolam murder. However, he fails to show that he was prejudiced by the omission, or that a different result would have been achieved had they been called, because neither witness testified that they saw Parbhudial at the exact time the shooting happened. Notably, the record shows that post-conviction counsel abandoned the claim as to Parbhudial's mother, and thus that claim is not properly before the Court.[2]

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[2] The record indicates that, during the evidentiary hearing on Parbhudial's § 440.10 motion, post-conviction counsel explicitly withdrew the testimony of Parbhudial's mother from the hearing transcript and stated that they were no longer presenting that claim. *See* Docket No. 6-1 at 392-393 ("We will continue to go forward on the other grounds of that claim including the failure to call Nikita Parbhudial, as well as other grounds set forth in that motion, but we will not

Moreover, there were problems with the ex-wife's potential testimony. She stated by affidavit that she was with Parbhudial watching TV in his second-floor bedroom when she heard a loud bang and lot of screaming, which made it difficult to hear what anyone was saying, and she did not hear the word "police." Parbhudial stated, "I think it might be the people breaking in," before taking his shotgun and telling her to lock the door behind him. The ex-wife stated that, while she heard it, she "didn't see the gunshot go off." Docket No. 6-1 at 137. Although Parbhudial did not testify himself at trial, his version of events that corroborated with the ex-wife's affidavit was introduced at trial through statements he had given to law enforcement after his arrest as well as his videotaped interview that was played for the jury. While it might have been marginally helpful to Parbhudial if the ex-wife's statement was heard, ultimately, it is not reasonably likely that the jury would have credited Parbhudial's version of events in light of it.

In any event, at the evidentiary hearing, the ex-wife testified that she was watching TV alone in the second-floor bedroom when she heard the bang that she would later find out was the police entering the Parbhudial residence. She testified that Baliraj was the one that stated that "people might be coming in" and that then "Adrian came and took his gun and told me to lock the door behind him." Docket No. 6-1 at 355. While she had at some point seen Parbhudial playing video games in the second floor living room, she was not with him when the police entered. Her testimony at the §440 hearing thus contradicted Parbhudial's statement on that point and left open the possibility that Parbhudial was not on the second floor as he claimed but rather was the person officers testified they saw on the third floor attic, watching them as they prepared to enter. Because the ex-wife's testimony could actually have been quite damaging to

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be pressing that claim based on Omawattie Parbhudial.").

Parbhudial's defense, Parbhudial fails to show that he was prejudiced by the omission of her testimony and thus fails to demonstrate that the state courts' rejection of his claim was anything but reasonable.

Nor can he show that counsel was ineffective for failing to request a continuance until after Parbhudial's family members were prosecuted and available to testify at trial. Importantly, trial counsel articulated a rational tactical decision for avoiding testimony from family members who had been implicated in the Ramgoolam murder. Moreover, as the county court recognized, even if Parbhudial's trial had taken place after the family members had pled guilty, those members would still have been able to invoke their Fifth Amendment rights against self-incrimination during the pendency of any appeal. *See People v. Cantave*, 993 N.E.2d 1257, 1260 (N.Y. 2013). The state courts' rejection of this claim was thus both reasonable and fully supported by the record.

The county court also reasonably rejected Parbhudial's claim that trial counsel was ineffective for failing to object to the trial court's omission of a justification charge. As the county court explained:

> Since there was no reasonable view of the evidence that the officers were burglarizing [Parbhudial's[home or that they were trying to kill [Parbhudial] or members of his family, the trial court was correct in not reading the justification charge for counts 1 and 3 of the indictment. Therefore, [Parbhudial] wasn't entitled to a justification charge with regard to counts 1 and 3, and defense counsel was not ineffective for failing to object to the trial court's failure.

As to Parbhudial's claim that counsel was ineffective for failing to object to the joinder of the indictments, he fails to show that such objection would have been successful. As the Appellate Division explained in rejecting on direct appeal Parbhudial's contention that the claims were erroneously enjoined:

> Proof of the Ramgoolam murder by [Parbhudial's] family members was a necessary element of the hindering prosecution in the first degree charge, as well as the alleged perjury and sworn false statement charges. [Parbhudial's] knowledge of such crime and its connection to individuals living in his home were also relevant to and admissible in the People's case on the attempted aggravated murder charge to prove intent, motive and the lack of mistake; in fact, the central defense was that defendant did not know it was police entering his house and he mistakenly shot them believing they were intruders. Under the circumstances, the offenses were properly joined under CPL 200.20(2)(b) and, accordingly, County Court did not err in denying severance.

Parbhudial, 22 N.Y.S.3d at 651 (citations omitted).

Finally, Parbhudial fails to show that counsel was ineffective for failing to object to the prosecutor's opening and closing statements and certain lines of questioning. An independent review of the record supports the county court's conclusion that "there is no reason to believe that the objections cited by [Parbhudial] would have been sustained by the court or that cross examination would have elicited the answers that [Parbhudial] suggests." In sum, for the foregoing reasons, Parbhudial is not entitled to relief on any argument advanced in support of his ineffective assistance claim.

V. CONCLUSION

Parbhudial is not entitled to relief on any ground raised in his Petition.

IT IS THEREFORE ORDERED THAT the Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus is **DENIED**.

IT IS FURTHER ORDERED THAT the Court declines to issue a Certificate of Appealability. 28 U.S.C. § 2253(c); *Banks v. Dretke*, 540 U.S. 668, 705 (2004) ("To obtain a certificate of appealability, a prisoner must 'demonstrat[e] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" (quoting *Miller-El*,

537 U.S. at 327)). Any further request for a Certificate of Appealability must be addressed to the Court of Appeals. *See* FED. R. APP. P. 22(b); 2D CIR. R. 22.1.

The Clerk of the Court is to enter judgment accordingly.

Dated: July 27, 2020.

/s/ James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
Senior United States District Judge