

No. 20-5973

IN THE  
SUPREME COURT OF THE UNITED STATES

**EFRAIN SANTOS** — PETITIONER  
(Your Name)

vs.

**STEWART ECKERT** — RESPONDENT

FILED  
SEP 16 2020

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

**EFRAIN SANTOS**

(Your Name)

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(City, State, Zip Code)

**NONE**

(Phone Number)

**QUESTION(S) PRESENTED**

1. Whether the U.S. Court of Appeals for the Second Circuit erred in refusing to grant petitioner a COA to appeal from a judgment of the District Court denying Federal Habeas relief?
2. Whether a Fourteenth Amend. due process claim of prosecutorial-misconduct can be predicated on a prosecutor's prejudicial use of a jigsaw puzzle (depicting a gun) to explain the "reasonable doubt" standard (in a case involving a shooting) notwithstanding the lack of Supreme Court precedent condemning the act?
3. Whether a Sixth Amend. claim of Ineffective Assistance of trial counsel can be predicated upon an attorney's failure to object (on basis of state law grounds) to prosecutorial misconduct in a state court proceeding, although the instances of prosecutorial conduct itself, are insufficient to establish a due process violation under the Federal Constitution?

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**LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

**RELATED CASES**

None.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

**OPINIONS BELOW**

The opinion of the United States Court of Appeals appears at the Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at the Appendix B to the petition and is reported at: Santos v. Eckert, 2019 WL 6895249.

**JURISDICTION**

The date on which the United States District Court denied Federal Habeas relief was December 18, 2019.

A timely petition for a Certificate of Appealability was filed in the United States Court of Appeals for the Second Circuit and was denied on June 5, 2020.

The jurisdiction of this court is invoked under 28 U.S.C §1254(1).

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

U.S. Const. Amend VI.

"In all criminal prosecutions, the accused shall enjoy the right

Petitioner appealed his conviction through counsel, who in relevant part argued that petitioner was denied due process (fair trial) as a result of prosecutorial misconduct and relatedly argued that his trial counsel was ineffective in failing to object to the conduct. From the onset of opening statements, the prosecutor had pursued a horror theme, using inflammatory remarks, appealing to the sympathy of the jury at length about the imagined horror that the victims' mother went through watching her two sons get gunned down and by repeated quotes attributed to George Washington and leading sheep to slaughter [T2 @ 240 - 41, 246, 247, 252]. The prosecutor likewise denigrated the defense, by continually referring to defense counsels arguments as "ridiculous," "not true" and that it was based on a "big conspiracy theory" [T2 @ 380, 383, 384, 397 - 98, 401]. Then, used a jigsaw puzzle analogy depicting a gun to explain the burden of proof [T2 @ 407] and voiced for credibility of a "key witness" (the codefendant who took a plea deal in exchange for his testimony) [T2 @ 181, 397 - 98], although his trial testimony was inconsistent with what he previously told police [T2 @ 204, 212 - 15, 230]. The state appeals court held that the issue of prosecutorial misconduct was not preserved for appeal based on failure of trial counsel to object at trial and declined to exercise its review power (People v. Santos, 151 AD3d 1620, 1621 - 22 [4 Dept. 2017]). Further appeal to the NYS Court of Appeals was summarily denied (People v. Santos, 29 NY3d 1133 [2017]).

The petitioner timely filed a pro se petition for a Writ of Habeas Corpus in the U.S. District Court, Northern District of New York.

✓ The District Court denied the petition, in short on grounds that:  
(i) petitioner's due process claim of prosecutorial misconduct was procedurally defaulted in state court, yet, failed to address the petitioner's advanced issues of cause, but (ii) addressed each of the instances of prosecutorial remarks (seperately), finding them to be either fair response to defense counsel's comments or to be insufficient to establish Federal due process violations; (iii) that because petitioner failed to establish that the prosecutor had committed misconduct the related ineffective assistance claims also must fail (exhibit B).

The petitioner then timely moved for a COA in the Court of Appeals, which summarily denied the application (exhibit A).

#### **REASONS FOR GRANTING WRIT OF CERTIORARI**

First, this petition presents the opportunity for this court to resolve recurring issue(s) of due process implicated by prosecutors using jigsaw puzzle analogies (that often depict an inflammatory - illustration) to explain the standard of reasonable doubt in a way that clearly diminishes the burden of proof.

Second, the petition provides an important constitutional question in conflict of whether a Sixth Amend. claim of ineffective assistance can be predicated on an attorney's failure to raise state law issue in a state court proceeding under Strickland.

I. THE COURT OF APPEALS FOR THE SECOND CIRCUIT ERRED IN DENYING PETITIONER'S APPLICATION FOR A COA, BECAUSE THE PETITIONER MADE THE "SUBSTANTIAL SHOWING" OF THE CONSTITUTIONAL VIOLATIONS OF HIS RIGHTS DURING STATE CRIMINAL TRIAL PROCEEDS.

In the context of a Certificate of Appealability, where applicants must make a substantial showing of the denial of a constitutional right (§2253[c][2]), this court has long cautioned that a threshold inquiry is not co-extensive with the merits analysis and does not require the showing that the appeal would succeed. Instead, the only question is whether the applicant can show that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further. Buck v. Davis, 137 S.ct 759, 773 - 74 [2017](quoting Miller -El v. Cockrell, 537 U.S. 322, 336 - 37 [2003]).

Here, petitioner advanced two constitutional claims that involved specific instances of prosecutorial misconduct and related issues of counsel's failure to object to those instances of misconduct at trial. Resolution of the claims by the district court, however are debateable by jurists of reason and further deserved encouragement to proceed, which demonstrated entitlement to a COA.

A. The Prosecution's Use of Jigsaw Puzzle Analogy During The Trial To Explain the Burden Of Proof Involved Issues of Due Process.

It is undisputed here that the prosecutor made several comments and

remarks that have been found to be improper by both state / federal court precedents, which included inter alia, comments appealing to the sympathy of the jury:

"begging and pleading for her...sons's lives as she watched the defendant lead her sons like sheep to the slaughter."

(in reference to testimony by the mother of the victims); and by

denigrating the defense by refering to it as being "ridiculous" or based on "conspiracy theories" and by vouching for credibility of the codefendant that testified for the prosecutor, suggesting that he had nothing to gain by his testimony...

Amid the improper comments, the prosecutor also used a metaphor to explain the burden of proof, which involved a jigsaw puzzle that depicted a gun and quantified the standard of "reasonable doubt" in the following manner:

"That's the picture of a puzzle (indicating). Are there pieces missing? Yes. Are there some unanswered questions? Yes. Can you still conclude beyond a reasonable doubt that is a picture of a gun (indicating)? Yes. Absolutely. Now, if you walk right up to it, okay, if you were to walk right up to the picture and just look at this one little missing piece right here (indicating), as the defense is asking you to do, this one thing here is missing. If you only look at that, you can't conclude what the picture is, but if you take a minute, take a breath and step back and look at the whole picture, then you conclude beyond a reasonable doubt what it is." [T2 @ 407].

This had created the distinct impression that the reasonable doubt standard may be met by fewer pieces of evidence and invited the

jury to guess and jump at conclusions. Moreover, a real prospect of prejudice was elevated by the fact that the puzzle depicted a gun as opposed to some other picture, because the jury was readily able to connect the puzzle to this case, which involved a shooting and then conclude that a lesser burden of proof would suffice. Noteably this was not an easy case for the jury. It deliberated for approx. two days. The subject matter of the case was sensitive, given that a man lost his life and that his brother was also wounded by a gun. It was therefore a cummulative effect of improper and prejudicial - remarks along with the metaphor, which created the real possibility of the jury not convicting the petitioner based on evidence, but as a result of misleading information, improper comment and sympathy.

Other courts that have ruled on the issue of prosecutor's using jig saw puzzles to illustrate the reasonable doubt standard do readily agree that it constitutes misconduct, but are split on whether it can infect trial with such unfairness as to constitute the denial of due process. Compare:

U.S. v. Bradley, 917 F.3d 493, 508 [6 cir. 2019] (found to be improper, but not flagarant misconduct requiring reversal); U.S. v. Pungitore, 910 F.2d 1084, 1128 [3 cir. 1990] (found use of puzzle improperly suggested quantative measure of reasonable doubt, but to be fair reply to defense counsel's opening statement(s) and did not prejudice defense); People v. Katzenburger, 178 Cal. App. 4th 1260, 1264 - 68 [2009] (found use of puzzle improper, but that defense was not prejudiced, following curative instructions); and the People v. Wilds, 141 AD2d 395, 398 [1 Dept. 1988] (Found use of puzzle to be

prejudicial, reversed the conviction and ordered a new trial).

The foregoing cases demonstrate that debatable issue exists as to whether metaphors by prosecutors using jigsaw puzzles to illustrate the standard of reasonable doubt violate Federal due process. Few courts have addressed this issue, but it remains an open question within the Second Circuit and therefore deserved encouragement to proceed further. Namely, for clear analysis under the substantial prejudice standard set by this court in Darden v. Wainright, 477 U.S. 168, 181 [1986].

B. The Lower Court's Conclusion that A Sixth Amendment Claim Of Ineffective Assistance Can Not Be Predicated On An Attorney's Failure To Object On The Basis of State Law Grounds To The - Prosecutor's Misconduct, Because That Misconduct Had Not Been Sufficient To Establish A Due Process Violation Under Federal Constitution Was Unreasonable And has been resolved Differently By Other Jurists Of Reason.

Even assuming that the instances of prosecutorial misconduct had been insufficient itself, to establish a "due process" violation under federal constitution, it was unreasonable to conclude per se, that a related Sixth Amend. claim of ineffective assistance, must likewise fail, based on counsel's failure to object to that misconduct on the basis of state law (regarding prosecutorial - misconduct).

A Sixth amendment claim of ineffective assistance of counsel can be predicated on the attorney's failure to raise state law issues in state court proceedings. See generally McNary v. Lempke, 708

F.3d 905, 920, citing Estelle v. McGuire, 502 U.S. 62, 67-68). It did not require the District Court to resolve question(s) of state law as it erroneously suggested.

Under the test standards of Strickland v. Washington, 466 U.S. 668 [1984], this petitioner was required to demonstrate the reasonable probability that he would have obtained relief, if his counsel had objected to the instances of prosecutorial misconduct at trial. The issues of N.Y. State Law on the claimed instances of prosecutorial misconduct underlied the Strickland analysis. That is because, the District Court had been required to assess counsel's performance - against the back drop of the applicable state law. See Jones v. Zatecky, 917 F.3d 578, 583 [7 cir. 2019].

Here, the prosecutor's conduct was plainly improper. Beyond the obviously improper use of the jigsaw puzzle (depicting a gun), the prosecutor repeatedly made comments / remarks that were known to be prejudicial, inflammatory or denigrating to the defense such as the quotes attributed to George Washington and of leading sheep to the slaughter, and consistently referring to defense counsel's argument as "ridiculous," "not true," and being based on "a big conspiracy theory." Significantly, the state appellate court (Fourth Dept.), where the petitioner took direct appeal has consistently overturned convictions and ordered a new trial, were as here, the cumulative effect of similar comments and misconduct was found to be improper under state law. i.e.: People v. Jones, 134 AD2d 1588, 1589; People v. Porter, 136 AD3d 1344, 1346; People v. Griffin, 125 AD3d

Amend. rights to counsel (under Federal Constitution) based on the failure of counsel to object to the issues of prosecutorial - misconduct (based on state law grounds) was never decided on the merits in either state court or the Federal District Court, which denied the claim on a basis that was contrary to precedent set by this court's Strickland jurisprudence, as unreasonably applied and deserved encouragement to proceed further.

#### CONCLUSION

Based upon the foregoing facts, circumstances and applicable case authority, the petition for a Writ of Certiorari should be granted to this pro se petitioner (Efrain Santos).

RESPECTFULLY SUBMITTED,

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EFRAIN SANTOS, Pro Se  
(Petitioner)

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Dated: September 2, 2020.