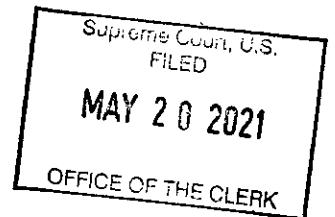


20-8227

No.

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



TREVOR ANDERSON,

Petitioner,

v.

LYNN LILLEY, SUPERINTENDENT¹,
EASTERN CORRECTIONAL FACILITY,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

TREVOR ANDERSON
PETITIONER *PRO-SE*
EASTERN NY CORRECTIONAL FACILITY
P.O. BOX 338
NAPANOCH, NEW YORK 12458
(845)-647-7400

¹ The original caption read "William Lee, respondent," however, William Lee has since retired and Lynn J. Lilley has taken his place as superintendent of Eastern NY Correctional Facility

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OFFICE OF THE CLERK.
SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. Can a prosecutor's display of a visual presentation during summation activate implicit biases, and if so, does the activation of those biases deprive a criminal defendant of a fair trial?
2. Does this Court need a more specific standard of review for claims of prosecutorial misconduct involving visual presentations?
3. Did the Court of Appeals Second Circuit correctly decide to not to issue petitioner a COA?
4. Did the District Court properly deny petitioner's request for an evidentiary hearing.

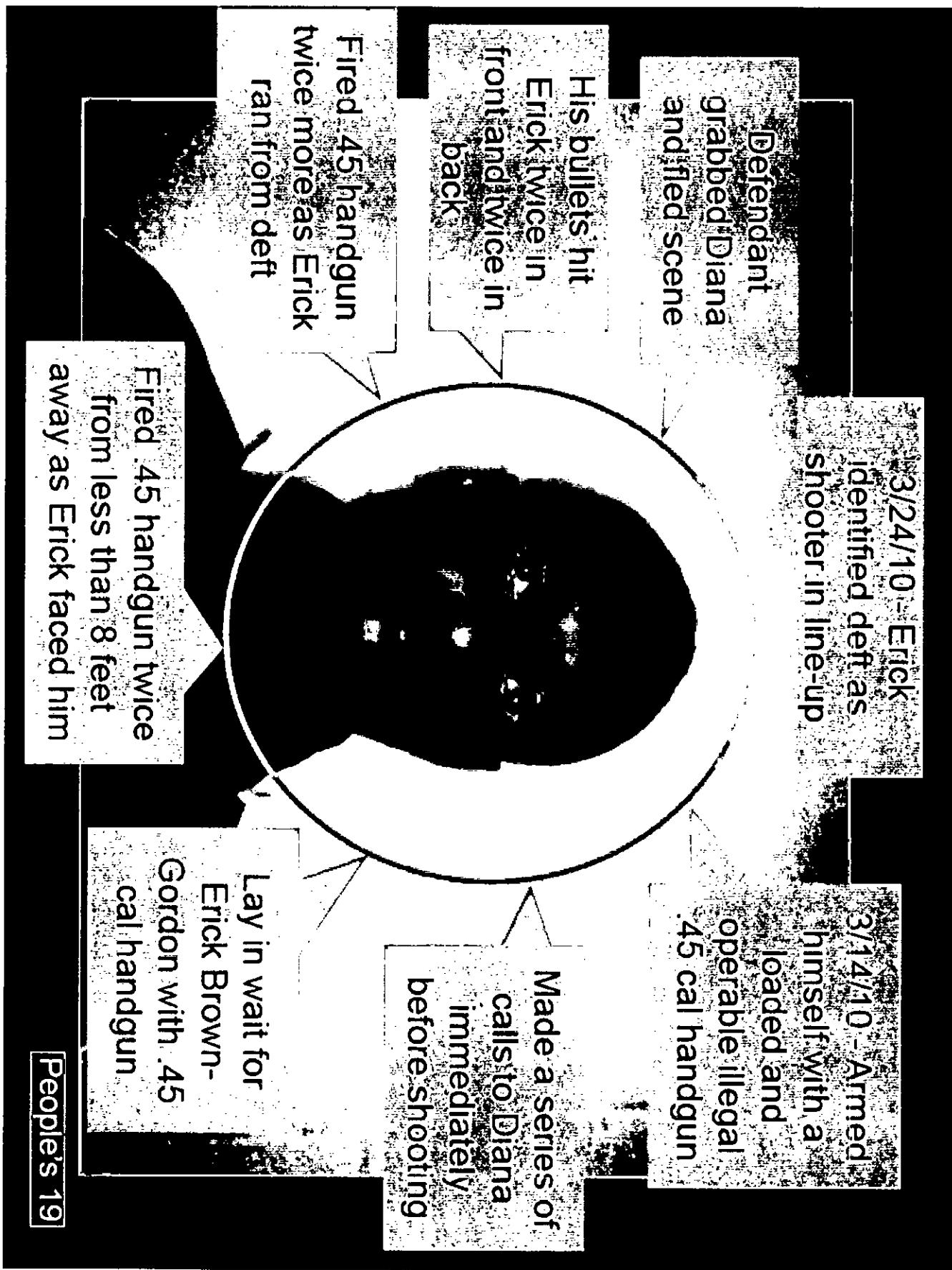


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IN THE SUPREME COURT OF THE
UNITED STATES PETITION FOR A
WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The order of the New York State Supreme Court of Appellate Division Second Department appears at Appendix A to the petition, and is available at People v. Anderson, 130 AD 3d 1055, 15 NYS 3d 103 (2nd Dept. 2015)

There are two opinions written in the New York State Court of Appeals and are reported at People v. Anderson, 29 NY 3d 69, (NY 2017). The opinions appear at Appendix B to this petition.

The order of the New York State Court of Appeals denying a timely filed petition for re-argument appears at Appendix C to this petition.

The decision and orders of the United States District Court Eastern of New York, Judge Brian M. Cogan, denying and dismissing the petition are available at Anderson v. Lee, 453 F. Supp 3d 574; and 2020 WL 5043906. A copy of the decisions and orders appear at Appendix D of this petition.

The decision of the United States Court of Appeals Second Circuit denying the issuance of COA, and a re-hearing en banc appears at Appendix E of this petition.

JURISDICTION

On July 29, 2015, the New York State Supreme Court Appellate Division order affirming petitioner's conviction. On April 4, 2017, the New York State Court of Appeals affirmed the order of the Appellate Division affirming petitioner's conviction. On April 4, 2020, and August 6, 2020, the United States District Court Eastern District of New York denied and dismissed Mr. Anderson's petition for Habeas Corpus. On February 22, 2021, the United States Court of Appeals 2nd Circuit denied Anderson's application for a certificate of appealability.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) because the State of New York denied petitioner rights, and privileges guaranteed to him by the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States of America.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In its pertinent part, the Fifth Amendment, states:

No person shall be held to...nor be deprived of life liberty or property, without due process of law...

In its pertinent part, the Sixth Amendment, states:

In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; to have compulsory proceed for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In its pertinent part, the Fourteenth Amendment, states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizen of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within is jurisdiction the equal protection of the laws.

In its pertinent part, 28 U.S.C. § 1254(1) states

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

In its pertinent part, 28 U.S.C. § 2253 (2) states:

- (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from...
 - (A) the final order in a habeas corpus proceeding in which the detention complained of arise out of process issued by a State court
 - (2) A certificate of appealability may issue under paragraph (1) if the applicant has made a substantial showing of the denial of a constitutional right.

In its pertinent part, 28 U.S.C. § 2254 (a) states

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or Laws or treaties of the United States.

STATEMENT OF THE CASE

Introduction

In today's world, detecting attempts to activate implicit racial biases and prejudices in the courtroom is becoming more and more difficult.² These types of biases have evolved from the explicit expressions of racism to more subtle and very abstract forms. These implicit biases can be triggered through language. This case presents a unique look at how visual presentations combined with oral arguments can operate to deprive a criminal defendant of a fair trial.

During the last moments of his closing argument, Trevor Anderson's trial attorney sided with the prosecutor telling the jury that a critical prosecution witness—a man with previous convictions for evidence tampering—was an example of a credible. Mr. Anderson's trial lawyer essentially conceded the case as this witness supported the sole eyewitness account.

As surprising as it sounds, Anderson's trial counsel's improper concession that a critical, yet seriously flawed, prosecution witness should be believed is not the only troubling issue with petitioner Anderson's representation at trial. Issues from the failure to adequately investigate to failing to subject the prosecution's case to any meaningful adversarial testing are all present here.

Yet, what makes this case extraordinary are the combination of uncorrected errors by defense counsel and the unchecked insidious misconduct by the trial prosecutor. In this case, and many others like it, the trial prosecutor strategically

² Praatika Prasad, "Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response" 86 Fordham Law Review 3091

employed a wide range of tactics designed to evade recognition of his improper arguments during his summation.

One of the ways the prosecutor accomplished his goal of obtaining a conviction was by using a highly prejudicial visual presentation in his closing argument. He employed a power-point presentation to display altered evidence, spread misinformation, and activate unconscious implicit biases and prejudices that research shows we all have.

The current standard of review for the type of misconduct claimed here does not account for the science related to the persuasiveness of visual presentations and the ability for such presentations to activate implicit or racial biases. Once these biases are activated, research shows people stop making decisions base on reasoned deliberation. Petitioner's trial counsel offered few objections.

Using visual presentations in this manner effectively created an atmosphere where the trial prosecutor's unchallenged words became truth, and his comments, which were displayed on a large screen in a darkened courtroom, became evidence. The intended effect of all these tactics was to evoke emotional reactions to the deliberative process. As a result, the uncheck use of an improper visual presentation compromised Mr. Anderson's chances of having a fair trial.

The Crime

On March 14, 2010, police officers responded to a complaint of a male shot. 911 callers did not provide a description of the shooter. Upon arrival, officers found victim, Erick Brown-Gordon, lying in the middle of the street with what appeared to

be two gunshots to his back. Mr. Gordon was alert, conscious, but in pain. Police records and testimony of a responding officer indicate he did not provide any description of his assailant.³

Emergency medical personnel took Mr. Brown-Gordon to the hospital where he was admitted with the chief complaint of gunshot wounds to the back. Mr. Brown-Gordon's father, William Gordon, who initially could not provide any perpetrator description accompanied detectives to the precinct. At the precinct, Mr. Gordon informed detectives that prior to leaving the crime scene; his son informed him that "Trevor shot him."

Detectives also interviewed the victim's girlfriend Diana Perez. A detective noted that Ms. Perez was intoxicated at the time. During the interview Ms. Perez initially indicated petitioner had a gun and was at the scene of the shooting. However, when asked the color of the gun, she changed her story and told police she did not see petitioner with a gun, and did not see the shooting. At the hospital, Mr. Brown-Gordon selected petitioner from a photo array and selected petitioner from a line up following petitioner's apprehension.

The Trial Court Proceedings

In March of 2011 Mr. Anderson went on trial for shooting Erick Brown-Gordon on a darkened street on the rainy night of March 14, 2010. Evidence used to identify Mr. Anderson as the shooter was circumstantial. It consisted of testimony from Mr. Brown-Gordon's, which highlighted his belief that Mr. Anderson shot him

³ Citations to the transcript of the trial transcript are designated as R__. Citations to other supporting documents in the appendix are designated A__.

4 times. Neither Mr. Brown-Gordon nor any other witness testified to seeing Mr. Anderson with a gun that night.

Only one civilian witness—Erick Brown-Gordon—testified that petitioner was his attacker. Mr. Brown-Gordon claimed petitioner Anderson was his attacker, even though he did not observe petitioner with a gun. Much of his testimony implies that petitioner Anderson was his assailant, and it was circumstantial in nature.

Other evidence included testimony of civilian and police, phone records, which did not include location information but listed call detail information, three shell casings, and hospital records. Most of the evidence presented was circumstantial in nature because it required drawing an inference to establish a fact. Defense counsel did not offer on any witnesses and encouraged petitioner not to testify.

Both sides presented closing arguments; however, the trial court directed the prosecutor to cease using his PowerPoint presentation midway through his summation. After approximately 8 days of deliberations, the March 2011 trial ended with a jury deadlocked on all charges.⁴ During deliberations the jury indicated their discussions were intense. Eventually, the jury indicated that they were hopelessly deadlocked. The court declared a mistrial.

A second trial commenced in November of 2011. Jury selection began with both sides asking prospective jurors whether consistency is important to credibility determinations and the jurors replied in the affirmative. In addition, at least two

⁴ R. 2-8, April 6, 2011 Proceedings Deadlocked Jury Mistrial

jurors, who were selected to serve on petitioner's trial, made statements indicating that they would want to hear the petitioner's side of the story.

At trial the people presented testimony from civilian witnesses including the complainant, an EMT, and at least two police witnesses. Most civilian witnesses gave testimony that either contradicted physical evidence, was false, and inconsistent with previous testimony or statements provided earlier in the case. Defense counsels failed to highlight these critical points at trial.

The people's presentation of evidence ended. Petitioner's trial counsels failed to put on any evidence of their own. Defense counsel gave a summation, which at times expressed his personal opinion about evidence, vouched for one of the people's witnesses as credible, and attacked the credibility of Diana Perez. The prosecution's summation was quite different.

The court provided pre-summation instructions, which included an instruction that lawyers will "not be explaining the law."⁵ The people delivered a summation using a PowerPoint presentation which brought together all of the prosecutor's earlier mindset priming tactics with his frequent, unchecked misstatement, misrepresentation and oversimplified representations of facts.⁶

The prosecutor's argument appealed to jurors' emotions by using known biblical representations to imply petitioner's consciousness of guilt. Not content with emotional appeals, the prosecutor offered his personal opinion that the

⁵ R at 433

⁶ For more on mindset priming See, Barbara O'Brien, "It's Not Just What You Think, But Also How You Think About It: The Effect of Situationally Primed Mindsets on Legal Judgments and Decision Making," 92 Marquette Law Review 149, 151,152

motivation for the shooting was jealousy. This jealousy theme was unsupported by any observation or claim by any witness, yet the prosecutor expressed his belief the case is about petitioner's jealousy of Eric Brown-Gordon.

He also displayed petitioner's altered arrest photograph as the face of death in a manner that resembled a target or bull's-eye. This display of petitioner's photograph is particularly disturbing because the prosecutor placed the photo in the background with word boxes in the shape of arrows pointing to petitioner's face, which is outlined in a circle.

Even more problematic was the prosecutor's unchecked extensive discussion and onscreen display of the law and legal principles to the jury despite the jury being told lawyers will not be explaining the law. The prosecutor ended his summation telling the jury that they, "know in [their] heart of hearts" that there is not reasonable doubt of petitioner is guilt.⁷

The judge instructed the jury on legal principles related to the case, but did not clarify the instruction given about lawyers not discussing the law. This conduct blurred the lines separating the prosecutor and the court. The jury, now left with a basis to give more weight to the prosecutor's discussion of the law, was primed to return a guilty verdict.

Petitioner's counsel said nothing about the errors, and he failed to request any further curative instruction to the prosecutor's visual display of incomplete sets of legal principles. The jury ultimately returned a guilty verdict after approximately two days of deliberation.

⁷ R. at 502

Habeas Decision

The district court denied the petition without the benefit of an evidentiary hearing. Judge Brian M. Cogan of the Eastern District dismissed petitioner's claims of prosecutorial misconduct and ineffective assistance of counsel as without merit for several reasons. Much of the district court's reasoning rested in improper premises or inaccurate representations of evidence.

For example, the district court's determination rested on the inaccurate fact that two witnesses, Diana Perez testified that petitioner was the shooter. This is wrong. Several parts of the record reflect Diana Perez did not identify any person as a shooter, and did not see the shooting or petitioner with a gun. This is significant because this particular piece of fact finding forms the basis of the district court's belief that the verdict is supported by overwhelming "circumstantial evidence."⁸

In addition, the district court downplayed the fact that heavy rains may have diminished Mr. Brown-Gordon's ability to perceive the event. The court also downplayed the importance of the victim's false testimony inflating his education accomplishments saying even if the prosecution's main witness embellished his educational background that fact was a collateral issue.⁹

In the end, the district court found every way possible to give petitioner's counsel the benefit of the doubt. He denied and dismissed the petition saying the claims presented by petitioner are meritless and reviewed petitioner's due process claims under a general standard using *Darden v Wainwright*, 477 U.S. 168.

⁸ *Anderson v. Lee*, 2020 WL 5043906 at page 2, 6

⁹ *Id.* at page 9.

SUMMARY OF THE ARGUMENT

The case presented in this petition is not uncommon. Claims of prosecutorial misconduct coupled with claims of ineffective assistance of counsel commonly make their way through all levels of the appellate process. However, this is an extraordinary case. It is a case where this court has the opportunity to address a growing yet overlooked problem occurring in courts around this country. This case is about the activation implicit biases using a series of subtle visual and verbal cues.

In this particular case, the trial prosecutor designed an improper visual presentation to evoke racial biases, stoke fears, and misstate evidence to the fact-finders during summation. The issues presented here focus on the subtle but very influential ways prosecutors activate racial, religious, and emotional biases using language and visual cues. A weak response by the system deprived petitioner of a fair trial.

One particularly offensive aspect of the prosecutor's closing argument involved the display of petitioner's altered arrest photograph with the prosecutor's comments superimposed over the face of the picture. The central issue with the display of petitioner's arrest photograph is that its display served no legitimate purpose. Its display was to evoke latent racial biases among the decision makers.¹⁰

The picture was simply there to send the jury a message that the petitioner, a black man, looks guilty, and therefore, he is guilty. There simply is no other way to explain the prosecutor's display of picture because identification was not an issue,

¹⁰ Research shows everyone harbors some unconscious stereotypes about race. See Chris Cialeo, Note, [In] equality Under the Law: Remedyng Unequal Anti discrimination Ethics Rule for Federal Prosecutors, 28 GEO J. Legal Ethics 435, 437 (2015).

and the prosecutor did not comment on the petitioner's appearance as it related to any other evidence. This petition asks this court to address four major issues in this case.

First, petitioner argues that evaluating visual presentations in the same manner as an oral argument does not take into consideration that improperly used visual presentations can trigger latent biases, implicit biases, and other unconscious prejudices.¹¹ Other segments of our criminal justice system recognize the potential for these types of biases to affect the way people make decisions.¹²

In fact, in 2016, the United States Department of Justice announced its new department wide implicit bias training for its personnel.¹³ Recently, the Chief Judge of New York State Court of Appeals commented on the issue of racial and implicit biases saying, "we have a solemn obligation to identify and eliminate racial bias from our courts and from the justice system wherever it may exist."¹⁴

Second, petitioner argues that guidelines related to claims of prosecutorial misconduct need updating to take into account the potential for technology to compromise a person's right to a fair trial. Currently, courts around the country are using outdated guidelines to evaluate Due Process claims involving prosecutorial misconduct and the improper use of visual presentations during summation.

¹¹ Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C.L. REV. 945, 946, 949 (2006)

¹² See Teneille Brown & Emily Murphy, "Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant's Past Mental States," 62 Stan. L Rev. 1119, 1201-02 (2010).

¹³ News release, "Department of Justice announces new department-wide implicit bias training for personnel," June 27, 2016.

¹⁴ Message from Chief Judge Janet DiFiore October 19, 2020; 2020 WL 7686601 (N.Y.St.Bar.Assn.Comm. Prof.Eth.)

To date, there is no meaningful guidance from statutes or case law to address these types of unconscious biases that are activated by improper argument designed to evoke emotional responses. Such conduct infringes on a criminal defendant's due process right to a fair trial by diminishing the likelihood of having a fair and impartial jury determine guilt or innocence.

There must be a different set of guidelines that consider the high potential for a visual presentation to affect a person's ability to accurately recall, remember, and perceive an event or evidence. In addition, the law has not caught up with the constantly evolving ways that people convey messages to others that provoke unconscious prejudices and render emotional based decisions.¹⁵

Third, petitioner argues that lower courts need a narrow definition of what constitutes a substantial showing of the denial of a Constitutional Right. What constitutes a substantial showing is being diluted by lower courts. In this case, petitioner showed that issues presented are debatable by jurist of reason.

In fact, at least two judges in the NY State Court of Appeals felt the trial prosecutor committed reversible error using an improper power-point presentation during summation. In addition, the Second Circuit failed to specify what standard it used to deny the issuance of a COA.

Finally, petitioner argues that lower courts are routinely failing to consider claims of ineffective assistance of counsel in conjunction with other errors occurring at trial. In this case, the district court failed to analyze how the combination of the

¹⁵ See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59UCLA L REV 1124 (2012) (describing ways implicit bias impacts perceptions of criminal defendants).

claimed trial errors may have influenced the outcome of the trial. This failure deprived petitioner of due process rights to a fair review of his habeas petition.

Here is a clear example. The lower courts failed to determine the combined effect petitioner's counsels failing to impeach key witnesses with prior inconsistent statements and how the failure of petitioner's counsel to go over his testimony likely influenced his decision not to testify. Additionally, the district court's use of defective reasoning to resolve factual disputes without the benefit of an evidentiary hearing was error.

ARGUMENT

POINT I

THE PROSECUTOR'S IMPROPER USE OF A VISUAL PRESENTATION DURING SUMMATION CONTAINED LANGUAGE AND ARGUMENTS WITH THE POTENTIAL TO ACTIVATE LATENT, COGNITIVE, RACIAL, AND IMPLICIT BIASES DEPRIVED PETITIONER OF A FAIR TRIAL

A. A Prosecutor's Visual Presentations and Improper Argument During Summations Can Activate Biases.

The Sixth and Fourteenth Amendments to the United States Constitution provide, among other things, that a criminal defendant has due process right to a fair trial. The rights guaranteed by those amendments to the Constitution encompass the right to a fair and impartial jury. The goal is a trial that is fundamentally fair—meaning a trial where the integrity of the fact finding process is untainted by prejudicial conduct by any party.

That goal is challenged when a prosecutor engages in conduct that is designed to misstate, misrepresent, and alter evidence. It is threatened when that same prosecutor engages in conduct that targets a juror's ability to accurately recall evidence and make decisions based on emotion rather than reasoned deliberation. The challenge to the goal dramatically increases when the prosecutor injects into his argument subtle cues to activate implicit biases.

The goal is defeated when a criminal defendant's attorneys fail to object to prosecutorial misconduct occurring throughout the trial, and especially when the trial court—whose role is to protect the rights of a criminal defendant, fails to cure

the improper conduct. The stated goals for a criminal defendant's constitutional rights to a fair trial were effectively defeated up until this point.

The problem in this case is that the prosecutor's improper use of a PowerPoint presentation denied the petitioner his constitutional right to a fair trial. Specifically, the PowerPoint presentations have the unique ability to alter the memories,¹⁶ and cause decision making based on emotion rather than deliberation when improperly used.¹⁷ It is an error to allow any conduct that targeted to affect a juror's deliberative process.

During the closing argument, the prosecutor utilized a computer-edited slides of exhibits entered into evidence to express his personal belief of what they contained, or to display misinformation to jurors. Petitioner's defense counsel failed to adequately address the issues that were to arise by the prosecutor's improper use of a power point presentation. One part of the presentation was very problematic.

The prosecutor also displayed an altered version petitioner's arrest photo. This photograph was admitted over defense counsel objection on relevancy grounds. The prosecutor displayed the picture on a 70 inch screen in a darkened courtroom. This picture was not relevant to any issue raised at trial, and indeed, the prosecutor did not link it to any issue related to any witness description of the shooter. The purpose of displaying this picture was much more sinister.

¹⁶ Rebecca Tushnet, "Worth a Thousand Words: The Images of Copyright," 125 Harv. L Rev. 683, 690 (2012)

¹⁷ See Lucille A. Jewel, Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy, 19 S. Cal Interdisc. LJ. 237, 239 (2010)

The picture tells its own story. It is a story whose context is already shaped by public opinion, and given context by the prosecutor's frequent misstatements of fact and improper jealousy theory. It says that the person staring at the jurors is a criminal. The menacing look of a black man on the petitioner's face helps to inform any negative emotions or stereotypes a person may feel when seeing it.¹⁸ The prosecutor meant for this picture to stare at jurors.

Equally important is what the picture doesn't say. It doesn't tell jurors about the 26 hours petitioner spent in the precinct holding cells prior to taking the photo. It doesn't say that petitioner did not get much sleep during that time, and it doesn't tell the story about petitioner being taken to the hospital for chest pains prior to being questioned for hours about the shooting. It doesn't tell the people about the level of stress involved in the entire process.

At one point in his closing argument, the prosecutor referred to this photo as the "Face of Death."¹⁹ He displayed it with his personal opinion of what the evidence proved superimposed onto the picture. He also did the same thing with medical exhibits displaying them with comments or symbols superimposed directly onto the digital copy of the documents.

Using altered images in this way enhanced the likelihood that latent biases are activated. This causes substantial prejudice to a person's Constitutional rights to a fair trial. Without any guidance from the court the error will cause a criminal

¹⁸ See Courtney M. Bonam et al., *Polluting Black Space* 9, 19 (June 30, 2013)

¹⁹ R. at 501

defendant to lose his constitutional right to a fair trial by unbiased fair and impartial jurors.

Scientific research has shown altered or “doctored” images can sway public opinion.²⁰ Just as it is true that doctored images can sway public opinion, the same is true for the courtroom. Just the same, subtle reference to race or certain behaviors can appeal to implicit biases and emotions creating the potential for prejudice.

Take, for example, the slides displaying comments such as “the wicked flee when no one pursues but the righteous stand steadfast as a lion,”(fn 492) images of hospital records, and argument misstating the meaning of the displayed documents. The problem with this conduct as it occurred at petitioner’s trial is that it affects the jury’s ability to accurately recall evidence.²¹ It also triggers emotional responses.

While it may seem trivial at first glance, the words spoken and the display of altered images by the trial prosecutor are a serious problem. For example, when the prosecutor said to the jury, “the wicked flee when no one pursues but the righteous stand steadfast as a lion,” he did was implying that the petitioner had a guilty conscience and sought to flee.

Following that comment, the prosecutor stated, “Speculation is the enemy of truth. There is no evidence of where the defendant was except he wasn’t at his

²⁰ This is according to Ken Light of the University of California, Berkley.

²¹ Dario L. M. Sacchi, Franca Agnoli and Elizabeth F. Loftus, “Changing History: Doctored Photographs Affect Memory for Past Public Events,” Applied Cognitive Psychology Vol. 21 pages 1005-1022 (2007).

house the two times the detectives went there.”²² This statement sent jurors the message that they could take evidence of flight as a presumption of guilt.

This particular saying is rooted in the bible—Proverbs 28:1.²³ However, when viewed in context of the prosecutor’s summation, the prosecutor was in effect commenting on the petitioner’s failure to explain why he was not located at his other apartment when police sought to question him. It was a clear improper appeal to religious beliefs and a direct assault on petitioner’s failure to testify.²⁴ It shifted a burden of proof to petitioner.

This type of argument has for a long time been rejected by the U.S. Supreme Court for years as unduly prejudicial (See generally, Alberty v. U.S., 162 U.S. 499). It is a blatant attack on the petitioner’s failure to take the stand in his own defense. In addition, this type of argument is designed to not just appeal to juror’s emotions, but make them vote in favor of the prosecution’s case. This Court has never evaluated a case where there are so many subtle attempts to activate implicit biases at once.

Even more harmful than this statement was the fact that the prosecutor made it while also discussing the applicable law. Yet still, the trial court allowed the comments to pass without proper curative instruction. To make matters worse defense counsel failed to object to key errors with the PowerPoint presentation,

²² Summation at 493-494

²³ Compare, e.g. *The Bible*; Proverbs 22: 3 “A wise man sees trouble and flees.”

²⁴ See David L. Paavola, “I Know Exactly What You Mean: Recognizing The Danger of Coded Appeals to Religious Prejudice In Capital Cases,” 60 S.C.L Rev. 693, 648, 653-658 (2011)

This is error is enhanced when jurors are primed to perceive, remember, and behave towards evidence in a certain way.²⁴ It is enhanced when improper images are accompanied by equally improper oral arguments and comments from a prosecutor. This is error compounded when there is no or little limiting instruction on the error, which in effect lends legitimacy to the prosecutor's improper comments.

The trial court told the jury lawyers from won't be discussing the law, but the trial prosecutor discussed and projected on screen the law extensively throughout his summation. There was overruled objection by defense counsel to the prosecutor's oral description and visual display of legal definitions during his summation. In the end, the jury is left without a basis to reject the prosecutor's legal arguments because according to the judge's instruction he was able to discuss them just as the court would.

The effect on the deliberative process is what makes the improper use of PowerPoint presentations during summation an issue that denies a criminal defendant his Constitutional rights to a fair trial. Petitioner Anderson complained that the prosecutor improperly altered several images of trial evidence to include comments that do not accurately describe or interpret the evidence the image represents.

The prosecutor orally argued that petitioner shot the complainant four times. He simultaneously displayed a slide containing a digital copy of a medical record

²⁴ See Peter Gollwitzer et al., "Deliberative and Implemental Mind-Sets: Cognitive Tuning Toward Congruous Thoughts and Information," 59 J. Personality & Soc. Psychol. 1119, 1120, 1122 (1990)

with the numbers 1-4 superimposed onto the exhibit. However, the argument was misleading as it conflicted with the unaltered version of the same medical record displayed and is at odds with testimony of other witnesses.

His version of the medical records and what they proved gave the appearance that the displayed document conclusively states that the complainant was struck by four separate gunshots.²⁵ Additionally, the prosecutor displayed the medical records in a manner that portrayed him as a medical expert. The prosecutor's argument is misleading for a few reasons.

First, the people's ballistic expert testified that it takes one pull of the trigger to discharge a round from a semi-automatic firearm, which will in turn eject one shell casing. Since three shell casings were located at the scene, the evidence proved that only three shots were fired. If only three shots were fired the complainant could not have been struck by more shots. The direction of the shots now becomes important.

Second, a medical document admitted into evidence contained a statement, by the complainant, stated that he hear three shots. Third, other prosecution witnesses, a police officer, testified that the complainant was shot twice, and an emergency medical technician also testified that the complainant was shot twice and that the bullets entered his back and exited his abdomen, therefore leaving four gunshot wounds.

²⁵ The document was displayed with the focus zoomed in on the area where a doctor sketched a drawing of the area where the gunshot wounds were located.

Finally, the same document displayed by the prosecutor in its unaltered states, that the complainant suffered four “penetrating” wounds.²⁶ In light of the evidence the prosecutor’s argument relative to the complainant’s injuries and the display of evidence altered to mislead the jury from its true contents deprived petitioner of a fair trial. As a result of defense counsel’s failure to object and the lack of any sufficient instructions from the court, the error is compounded.

B. Courts Have So Far Not Considered The Science Behind Visual Presentations

The error to allow the prosecutor’s misstatement of evidence and the display of altered exhibits deprived me of a fair trial. Pictures have an effect on memory that words do not and having the last word is advantageous to the prosecution. Without any meaningful way to respond, petitioner is left without a way to rectify the errors committed.

Dissenting Judges from the New York State Court of Appeals noted this saying, “the use of visual imagery can be particularly impactful in summation, because ‘jurors are looking for new and fresh ways of receiving evidence and arguments’ and ‘the right to the final word has a psychological impact that makes it a forensic prize.’” Having the last word makes all the difference in the way jurors perceive the prosecutor in this case.

Also noted by the Judges is the fact that images have the potential to influence the way messages are heard and remembered, and that research shows that pictures are typically remembered better than words. Improper comments and

²⁶ The term penetrating wounds used in the medical context means a break in the skin and not simply an entry or exit wound. See *ATTORNEY’S ILLUSTRATED MEDICAL DICTIONARY* at W4, W5 [1997]

the display of improperly misrepresented evidence that have the tendency to alter a juror's memory of the actual facts deprive criminal defendants of a fair trial. *See Berger v. United States, 295 US 78, 88 (1935)*

The dissenting NY Court of Appeals Judges observed the prosecutor's contention that petitioner "lay in wait" belies the record, and that the slides were a clear visual communication that petitioner's actions were predatory, which had no other legitimate purpose but to appeal to passions of the jury. *See People v. Anderson, 29 NY 3d 69, 83 (NY 2017)*. Again we have an argument designed to activate implicit racial biases.²⁷

The highest courts in the states of California, Hawaii, Illinois, Nevada, New Jersey, New York, Washington and the Federal Court of Appeals from the District of Columbia do not apply the same standard of review to this same issue. Many of those courts have different sets of standards depending on what is said, but they all seem to overlook the science behind the display of some types of pictures.

As a result, reviewing courts are overlooking the critical fact that images and comments displayed in a PowerPoint presentation have the ability to disrupt a person's ability to accurately recall trial evidence. This is a serious problem that is likely to affect the outcome of a trial (*See e.g. Blumenthal v. U.S., 332 US 539, 559 (1947)*). To date, state courts, federal district, and circuit courts have not dealt sufficiently with the idea that visual displays can have a powerful effect on deliberation.

²⁷ Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L.L. REV. 413, 432, 437 (2006)

In the end, new technology delivers visual images in ways that are more persuasive than ever before. Today, we are living in a world where companies like Cambridge Analytica used date from social media accounts to target “persuadable” voters with images and claims designed to trigger an emotional response in favor of the candidate who hired that company. This phenomenon cannot be overlooked. In fact it must be addressed.

Much of the information used to target these voters was altered or misleading. PowerPoint presentations used improperly in the courtroom can have the same effect, and effectively take the decision making power from the jury and place it in the hands of the prosecution. This in way resembles a fair trial. Without the PowerPoint presentation in petitioner Anderson’s first trial, a jury was deadlocked on all charges.

Would the jury have reached the same verdict if the PowerPoint presentation presented in a fair manner. Would the jury still have voted to convict if petitioner’s defense counsel did not vouch for the prosecutions case. Based on the fact that a jury deadlocked at the first trial, the most reasonable answer to those questions is no.

Substantial prejudice to this issue arises from the fact that petitioner could not answer the prosecutor’s misinformation without the aid of competent counsel or a rebuttal to the summation. Unlike the defendant in *Darden v Wainwright*, 477 U.S. 168, petitioner did not get a chance to have any strong curative instruction

after the fact, and he did not get a chance to rebut any of the prosecutor's misstatements and misrepresentations (*id* at 182).

POINT II

PETITIONER ANDERSON DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE CONSTITUTION BECAUSE COUNSEL FAILED TO ADEQUATELY INVESTIGATE, DISCOURAGED PETITIONER FROM TAKING THE STAND AND FAILED TO ADEQUATELY ENGAGE IN MEANINGFUL ADVERSARIAL TESTING OF THE PEOPLE'S CASE

The facts and circumstances of this case are similar to those found in *Harris v. Artuz*, 288 F. Supp. 2d 247 [E.D.N.Y. 2003], *Affirmed by Harris v. Artuz*, 100 Fed. Appx. 56. The district court claimed to review petitioner's ineffective assistance of counsel [IAC] claim *de novo*, and the court's primary reason affording a *de novo* review of petitioner's ineffective assistance of counsel claim was the state court's erroneous application of a procedural bar.

However, the district courts factual determinations are contrary to established fact, or they are the result of inferences based upon other inferences. Therefore, this Court should review the district court's fact findings for clear error, reverse the order dismissing the petition, and provide instructions for the district court to grant the petitioner or hold an evidentiary hearing (*See generally Carrion v Smith*, 549 F. 3d 583, 588 [2nd Cir 2008]).

The state court's fact finding process was inadequate because it did not hold an evidentiary hearing to resolve factual disputes and adequately develop the record. Even though the district court claimed to provide a *de novo* review, that

court made every effort to excuse counsel's failure to reasonably investigate, effectively cross-examine witnesses, and failure to litigate 4th Amendment claims. All lower courts involved in this case made no attempt to protect petitioner's Constitutional rights to effective representation and a fair trial.

Petitioner's defense counsel failed to subject the people's case to any meaningful adversarial testing, and petitioner presented enough evidence to prove this claim or at least warrant hearing counsel's off record reasons for not performing adequately. As a result of the state court's failure, many of petitioner's claims were underdeveloped.

Despite knowing fact finding procedure was inadequate, the district court reviewed the merits of the IAC claim while, at times, relying on the state court's representation of facts, without the benefit of a hearing. This was error. In order to provide petitioner Anderson fair review of his claims, the district Court should have held an evidentiary hearing to determine what, if any, were the causes of defense counsels failure. Moreover, several unresolved factual disputes in this case required the district court to hold a hearing before issuing a decision.

A defendant seeking a hearing on an ineffective assistance of counsel claim "need only establish that he has a 'plausible' claim of ineffective assistance of counsel, not that he will necessarily succeed on the claim... if material facts are in dispute..." (See Punlisi v. United States 586 F.3d 209, 2013 (2d Cir. 2009). In this case, petitioner presented clear and credible evidence that his defense counsel,

among other things, failed to consult with a medical expert prior to trial, and that counsel improperly encroached on petitioner's right to testify in his own defense.

In reviewing the merits of Petitioner Anderson's claims, the district court applied the Strickland standard to facts that were often misstated or misapprehended by the court. In addition, the court drew inferences against already established fact and at times drew inferences from other inferences. Moreover, the court either changed the context of some statements made at trial, or misquoted some of the trial record and based his decision on a particular claim on those misquotes.

For example, the district court quotes defense counsel's statement about his investigation into the medical records saying, "I did send the medical records, with the corresponding testimony of the complaining witness in this case, to a doctor who has been used over the years by the Legal Aid Society." (See Decision and order at 5). The problem is the exact quote says the following:

"And over the break I did send the medical records, with the corresponding testimony of the complaining witness in this case, to a doctor who has been used over the years by the Legal Aid Society," and "I believe that further review by further experts will, and maybe even a pathologist, I did not interview a pathologist..." (See sentencing tr. at 7-9).

The district court's reasoning on this point is flawed because it overlooks the fact that counsel could not have sent the complainant's trial testimony to a medical expert before the complainant actually testified. This sort of reasoning is indicative of so many problems with the district court's review of issues presented in this case.

In addition to the changing counsel's words, the court failed to obtain counsel's side of the story.

The issues of how many shots were fired and from which direction made a difference in this case. Petitioner Anderson offered the following facts to explain that it makes it impossible for him to be the shooter:

- 1) A call from "defendant's" phone to Diana Perez's phone connected at 0109 am;
- (2) The call lasted into the 0110 am;
- (3) The shooting occurred at 0110 am;
- (4) The complainant stated he stood in front of the defendant for the first two shots without seeing a gun or "anything"; and most significantly,
- (5) No witness testifies to seeing defendant on the phone before or during the shooting, although Diana Perez's phone records indicate that defendant was on the phone at the same time of the shooting.

In light of these circumstances, counsel had everything to gain by demonstrating that defendant was on the phone during the shooting. Certainly such an argument would have definitely aided a misidentification defense. The Second Circuit Court of Appeals in Garner v. Lee, (908 F. 3d 845, 871 2nd Cir 2018) considered phone records a useful source to confirm the absence or existence of other facts relevant to a shooting incident.

Unlike the instant case, phone records for the defendant in *Garner* did not necessary conflict with other witness testimony as it does in this case. Considering all facts regarding the shooting combined with the fact that Mr. Anderson was on the phone at the time of the shooting should lead a reasonable person to believe that Mr. Anderson was not the shooter. Additionally, proof of guilt in the *Garner* case was considered overwhelming by the court.

The district court noted that proof in this case was circumstantial yet did not comment on the absence of a circumstantial evidence charge. That is the type of oversight that petitioner Anderson believes this court can correct. The fact that a different standard of review applies to circumstantial evidence cases means that if given a circumstantial evidence charge the outcome may have been different. The Erroneous fact finding by the district court does not stop here.

The district court's claim that petitioner failed to provide the contents of his testimony is untrue. Affidavits submitted with the *CPL 440.10* motion in state court and a motion for an evidentiary hearing in district court clearly indicate petitioner's intent to testify and specify most of the contents of petitioner's testimony. .

The district court's contention that the Order authorizing the use of "cell site location information" was proper seems to imply that police were authorized to use a cell site simulator. If this is the case, the district court either failed to understand that a cell site simulator is not the same as cell site location information from a phone company, or the district court failed to apply the appropriate law to the case.

In any event, the NY law regarding pen register/trap and trace orders do not authorize the search of a private home or determine a suspect's location without a search warrant (See Generally, *People v. Gordon*, 58 Misc. 3d 544, 546 [Kings County. Sup. Ct. 2017]). Additionally, the district Court's own opinion states that historical cell site data was authorized by the trap and trace order.²⁸ This is

²⁸ See Susan Freiwald et al., "The Carpenter Chronicle: A Near-Perfect Surveillance," 132 Harvard Law Rev. 205, 229 2018.

different from real time cell site monitoring which requires more. (See *United States v. Lambis*, 197 F. Supp. 3d 606, 609 [SDNY 2016])

The district court implies that William Gordon did not provide information to police is contradicted by the record and exhibits submitted by petitioner. Specifically, the complaint report submitted by petitioner listed William Gordon as a “reporter” or the source of information. In addition to that document is William Gordon’s first trial testimony that police, “already had me on the side interrogating me, asking me what happened and everything,” and his second trial testimony saying he told police right away that it was “Trevor.”

The problem here is police records do not indicate that anyone told them “Trevor” had committed the shooting. Contrary to the district court’s determination, these are inconsistencies that are relevant to the jury’s credibility assessment of a witness who has a history of evidence tampering and motive to fabricate his story. According to the trial prosecutor, “Mr. Pate [counsel] has a book of things that all these witnesses said before.”

Accordingly, defense counsel should have taken steps to place the document that directly contradict this witness’s testimony before the jury. This issue dovetails into the claim that defense counsel improperly conceded William Gordon was a credible witness. Viewed in context of the failure to use prior inconsistent statements to impeach William Gordon, counsel had no legitimate basis to argue that he was an example of a credible witness (See U.S. v. Rosemond, 958 F. 3d 111)

The district court's determination that trial counsel was not ineffective for failing to highlight the fact that the complainant could not "complete high school and some college" in the few months between petitioner's trials is clearly the result of the district court drawing conclusions based upon impermissible inferences from established fact (See decision and order at 19). This is not simply a collateral matter. It goes directly to the complainant's credibility.

For example, the district court reasoned that there is no evidence that the complainant had not completed his GED or never taken any college level courses. To that point he is correct. However, the complainant never said, and petitioner never argued the complainant did not complete his GED. The complainant said he "completed" High School and Some College. It is important to understand the word choice here.

Common knowledge and experience tells us that you cannot complete High School under the circumstances outlined in the petition. The district court should have held hearing to get counsels side because he did not state there was a highly unusual circumstance for the failure to subject the people's case to meaningful adversarial testing.

In determining that a trial court ruling prevented petitioner from testifying, New York State's intermediate appellate court agreed that a trial court's improper but incorrectly deemed that error was harmless. That court applied an incorrect standard of review to petitioner's claim citing *People v. Crimmins*, 36 NY 2d 230 (NY 1975) stating that "under the circumstances" of petitioner's case, this error did

not deprive the petitioner of a fair trial. New York States highest court failed to correct the error.

Claims of improper harmless error applications by courts are reviewed under the standard, set forth by this Court, in *Chapman v. California*, 386 US 18, *Bretch v. Abrahamson*, 507 US 619. This Court's decision in Chapman held that constitutional errors committed at a criminal defendant's trial cannot be reversed unless they affect the substantial rights of the parties involved. (See Chapman at 22). The court recognized the need for a standard of review for claims of harmless error and developed a test to determine whether an error committed at trial was harmless beyond a reasonable doubt.

In petitioner's case, the New York State Court of appeals failed to apply the appropriate standard of review to petitioner's claim that he was deprived of a fair trial because of an improper ruling allowing the prosecutor to ask certain improper questions should he take the stand. Specifically, the prosecutor was allowed to ask petitioner about his alleged possession of guns in his home at some date prior to the shooting he is convicted of committing. This constituted error.

On appeal, petitioner argued this ruling prevented him from testifying. Allowing the prosecutor to ask irrelevant questions was extremely prejudicial because there was no proof that petitioner possessed any firearms at his house on some prior date. The prosecutor's simple reference to the gun possession would have given him the opportunity to argue to the jury that petitioner had the means to commit the shooting at issue in this case.

The appellate court agreed that the court's ruling was error, but that error was harmless. That court's decision did not state whether the error was harmless because there was overwhelming evidence of petitioner's guilt. New York's highest court failed to review this claim stating that it was unpreserved for appellate review.

Given the fact that petitioner could not refute such accusations, which are based upon speculation, and assumption, the error was prejudicial. Additionally, the ruling deprived petitioner of a fair trial because it infringed on his constitutional right to testify in his own defense. *See generally Ferguson v. State of Ga.*, 365 US 570 (1961) In light of the fact that during jury selection at least two sworn jurors indicated that they would wonder what the petitioner has to say, this error was extremely prejudicial.

CONCLUSION

Applying a general standard of review to claims of summation misconduct without first determining whether the combination of certain arguments, comments, and images potentially had a significant impact a person's ability to proper perceive and remember evidence presented at trial fails to protect the all important rights to a fair trial as it is now common knowledge that false information, "fake news," and other types of misinformation can be overly persuasive.

In this case, the improper use of a PowerPoint presentation during summation, misrepresentation of evidence by the trial prosecutor, and the failure of

defense counsel to object to the prosecutor's improper conduct and the trial court's failure to provide adequate curative instruction served to deprive petitioner Anderson of his Constitutional rights to a fair trial.

Dated: May 17, 2021
Napanoch, New York

Respectfully Submitted,



Trevor Anderson
Petitioner *pro-se*

3/24/10 - Erick
identified deft as
shooter in line-up

Defendant
grabbed Diana
and fled scene

3/14/10 - Armed
himself with a
loaded and
operable illegal
.45 cal handgun

His bullets hit
Erick twice in
front and twice in
back

Fired .45 handgun
twice more as Erick
ran from deft

Fired .45 handgun twice
from less than 8 feet
away as Erick faced him

Lay in wait for
Erick Brown-
Gordon with .45
cal handgun

People's 19