No. 21-5729

IN THE

SUPREME COURT OF THE UNITED STATES

FRANK R. STEVENSON, PRO SE,

PETITIONER,

ORIGINAL

VS.

THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO

SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION: SECOND DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the New York Court of Appeals precedential case, on confrontation violation claims, is contrary to clearly established federal law, as established by this Court, rendering, as it follows, the New York Supreme Court, Appellate Division: Second Department's determination, in denying Petitioner's application for a writ of error coram nobis, that he was not deprived of his right to confrontation, as guaranteed under the Confrontation Clause, provided by the Sixth Amendment of the United States Constitution, contrary to clearly established federal law, as established by this Court, and or unreasonable in light of the facts presented. And;

Whether the New York Court of Appeals precedential case, on ineffective assistance of appellate counsel claims, is contrary to clearly established federal law, as established by this Court, for not adopting a "comparison" element when such claims are under review, rendering, as it follows, the New York Supreme Court, Appellate Division: Second Department's determination, in denying Petitioner's application for a writ of error coram nobis, that he was not deprived of his right to the effective assistance of appellate counsel, as guaranteed under the Sixth Amendment of the United States Constitution, contrary to clearly established federal law, as established by this Court, and or unreasonable in light of the facts presented.

LIST OF ALL PARTIES

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

RELATED CASES

People v. Stevenson, Supreme Court of the State of New York, Appellate Division: Second Department. Judgment entered on June 17, 2015, denying direct appeal, published and reported at 129 A.D.3d 998, 11 N.Y.S.3d 646 (2 Dept. 2015). Leave denied by New York Court of Appeals, judgment entered on December 28, 2015, published and reported at 26 N.Y.3d 1092, 23 N.Y.S.3d 649, 44 N.E.3d 947 (N.Y. 2015).

People v. Stevenson, Supreme Court, Kings County, Part 18. Judgment entered on April 17, 2017, unpublished, denying Motion to Vacate Judgment: CPL §440.10. Leave denied by Appellate Division: Second Department, unpublished, on August 9, 2017.

People v. Stevenson, Supreme Court, Kings County, Part 18. Judgment entered on January 8, 2019, unpublished, denying second Motion to Vacate Judgment: CPL §440.10. Leave denied by Appellate Division: Second Department, unpublished, on April 9, 2019.

People v. Stevenson, Appellate Division: Second Department. Judgment entered on February 17, 2021, denying application for a writ of error coram nobis, published and reported at 191 A.D.3d 905, 138 N.Y.S.3d 395 (2 Dept. 2021). Leave denied by New York Court of Appeals. Judgment entered on May 16, 2021, published and reported at 37 N.Y.3d 960, 147 N.Y.S.3d 539, 170 N.E.3d 413 (N.Y. 2021).

Stevenson v. Capra, United States District Courts: Eastern District of New York. Judgment entered on August 16, 2021, at this instance unpublished, Docket number 17-CV-5251 (MKB) (LB), denying habeas corpus and granting Certificate of Appealability on August 23, 2021. Appeal to United States Court of Appeals: Second Circuit currently pending.

People v. Stevenson, Appellate Division: Second Department. Second application for a writ of error coram nobis filed on June 16, 2021 currently pending judgment.

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The judgment and order of the Supreme Court of the State of New York, Appellate Division: Second Department (Appendix [hereinafter appx.] A), denying the Petitioner's writ of error coram nobis, was published and reported at 191 A.D.3d 905, 138 N.Y.S.3d 395. The order of the New York State Court of Appeals (Appx. B), denying his application for Criminal Leave to Appeal the Appellate Division's denial of that said writ of error coram nobis was published and reported at 37 N.Y.3d 960, 2021 WL 2425919.

JURISDICTION

The judgment and order of the Appellate Division was entered on February 17, 2021. The order denying Leave by the New York State Court of Appeals was entered on May 16, 2021. In accordance to an Order issued by this Court on March 19, 2019 (ORDER LIST: 589 U.S.), extending all petitions for a writ of certiorari deadlines "to 150 days from the date of the lower court judgment, order denying discretionary review," as here in Petitioner's case, Petitioner timely filed this petition for a writ of certiorari on September 10, 2021. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment of the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him. ..and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE: TRIAL

In the course of prosecuting and convicting the Petitioner of Rape in the First Degree (PL §130.35[3]), two counts of Sexual Abuse in the First Degree (PL §130.65[3]) and two counts of Endangering the Welfare of a Child (PL §260.10[1]), on the second day of trial, May 6, 2013, the Prosecutor, A.D.A. Erskine, announced, outside the presence of the jury, that "the medical expert [she] was going to call (nurse Rose Mary Daniele [see Appx. E: Voddi 246, and Appx. D: Medical Report]), who actually examined the child, her mother broke -- her 87-year-old mother broke her hip on Friday so she is not available, she is monitoring her 87 year-old mother's progress in the hospital." (Appx. F: Tr. 193). Defense counselor, inexplicably failed to object, or, at minimum, request an adjournment so that he may investigate the validity of what the Prosecutor alleged. Continuing, the Prosecutor stated further, that she has "found a Dr. Madhu Voddi, she will be coming in her stead," [sic] ibid. Still counsel failed to launch one single objection, this time on the grounds that for Dr. Voddi to come "in [nurse Daniele's] stead," implicates a substitution that would violate the Petitioner-Defendant's right to confrontation, guaranteed under the Sixth Amendment of the U.S. Constitution.

Later that afternoon, Dr. Voddi was sworn in (Appx. E: Voddi 239) and excepted as a medical expert in pediatrics and child abuse medicine, including sexual abuse (Appx. E: Voddi 243), again, without a single objection from defense counsel. It was during the of this substitute medical expert, Dr. Voddi's, surrogate

testimony that the medical report (Appx. D: Medical Report [People Ex. 11]) of the medical examination performed on the complainant, both by nurse Daniele, was admitted before the jury (Appx. E: Voddi 245), again, without a single objection from defense counsel on grounds of such an admission, under those circumstances, being a blatant violation of the Petitioner's right to confrontation.

Although the medical report revealed no physical findings, and was a normal exam, documented in that report, nurse Daniele stated that "[a] normal exam does not preclude sexual abuse," concluding that her "diagnosis is Child Sexual Abuse." (Appx. D: Medical Report).

And although Dr. Voddi conceded, on cross, to "relying upon the medical report that was placed in evidence to give [her] the information that [she was] using to answer the questions put to [her]" (Appx. E: Voddi 253), and although she admitted that she "did not examine [the] child[-complainant]" (Appx. E: Voddi 245-46, 253), in an apparent attempt to explain her colleague, nurse Daniele's, diagnosis, she went outside of what was clearly not documented in that said medical report and stated, by another concession, that "in spite of the fact that there wasn't one single indication of abnormality to [the compainant's] genitalia, the fact that she made a complaint was sufficient alone for a finding of or a diagnosis of child sexual abuse." (Appx. E: Voddi 256, and see also Voddi 263-64). Infact, Dr. Voddi testified to what steps nurse Daniele had taken in performing the exam on the complainant (Appx. E: Voddi 247-48, 263-64, 266); steps clearly

not documented in the medical report.

And lastly, although Dr. Voddi reluctantly admitted, after a ten minute fiasco before the jury, that, in "putting the history aside," which is -in medical terms- "what it is the patient says [to the examining physician]" (Appx. E: Voddi 266), there was not "anything in the physical exam that corroborates what's alleged in the history" (Appx. E: Voddi 269), when questioned by the trial Judge, Hon. Harrington, during the ten-minute fiasco, due to her reluctance to give a direct answer to the, somewhat, exact question presented to her by defense counsel on re-cross, Dr. Voddi repeatedly stated that "the physical exam of [the child complainant] substantiate[d]" and "corroborated her complainant of sex abuse." (Appx. E: Voddi 266-69).

STATEMENT OF THE CASE: DIRECT APPEAL

Represented by court appointed appellate counsel, M(r)s. Jenin Younes, Esq. of Appellate Advocates, on Petitioner's Direct Appeal to the Appellate Division: Second Department, Docket number 13-06438, M(r)s. Younes elected to raise issues that were clearly and significantly weaker (Appx. G: App. Br.), while omitting the clearly significant issues of Petitioner having been deprived of his right to confrontation, the right to the effective assistance of trial counsel, for his inexplicable failure to defend this particular right to confrontation Petitioner was guaranteed to enjoy, all under the Sixth Amendment of the U.S. Constitution. See also, Appx. C: Coram Nobis at III.

REASONS FOR GRANTING THE PETITION

POINT I- Being that the precedent setforth by the New York State Court of Appeals is contrary to clearly established federal law as as established by the Supreme Court of the United States, the New York Supreme Court, Appellate Division: Second Department's determination, that the Petitioner was not deprived of his right to confrontation, as guaranteed under the Confrontation Clause, provided by the Sixth Amendment of the United States Constitution, was not only contrary to clearly established federal law as established by the Supreme Court of the United States, but was also unreasonable in light of the facts presented.

In 2016, erroneously adopting a the holding of a fragmented Supreme Court Case, Williams v. Illinois, 567 U.S. 50, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012), the New York State Court of Appeals setforth precedent for all its State Courts' to follow when they are reviewing confrontation violation claims in People v. John, 27 N.Y.3d 294, 33 N.Y.S.3d 88, 52 N.E.3d 1114 (N.Y. 2016), holding "[G]iven the primary purpose of a medical examiner in conducting autopsies, such related reports-'a contemporaneous, objective account of observable facts that do not link the commission of the crime to a particular person'-are not testimonial." It follows that, being that a New York Court of Appeals' decision is binding on all courts in New York (People v. Sierra, 85 A.D.2d 546, 445 N.Y.S.2d 2 [1st Dept. 1981]), in reviewing, then ultimately denying, Petitioner's confrontation claims, the Second Department followed the New York Court of Appeals erroneous holding in John.

Recently, in Garlick v. Lee, 1 F.4th 122 (2d Cir. 2021), in affirming the United States District Court: Southern District of New York's granting of the defendant-Garlick-petition for habeas relief (Garlick v. Lee, 464 F.Supp.3d 611 [S.D.N.Y. 2020]), the Second Circuit admonished not only the New York Supreme Court: First Department's determination in denying Garlick's direct appeal (People v. Garlick, 144 A.D.3d 605, 42 N.Y.S.3d 28 [1st Dept. 2016]) finding its "adjudication [to be] an incorrect application of clearly established Supreme Court precedent" Garlick, 1 F.4th, at 133-34, and that it "also unreasonably applied clearly established law," id., at 135, but it also admonished the New York Court of Appeals precedential case, John, that the First Department followed, finding John to also be a "contradict[ion to] clearly established Supreme Court precedent," id., at 136, setforth by this Court in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) and Bullcoming v. New Mexico, 564 U.S. 647, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011). The Second Circuit found it to be error for the New York Court of Appeals, in John, to adopt a "'fragmented [Supreme] Court['s]'" holding. Garlick, 1 F.4th., at 133 (quoting Marks v. United States, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)).

Clearly there is a conflict between New York courts, the United States Court of Appeals: Second Circuit, and the United States Supreme Court that "call[s] for an exercise of this Court's supervisory power," respectfully. RULE 10.

POINT II- Being that the precedent setforth by the New York State Court of Appeals is contrary to clearly established federal law, as established by the Supreme Court of the United States, as it follows, the New York Supreme Court, Appellate Division: Second Department's determination, that the Petitioner was not deprived of his right to the effective assistance of appellate counsel, as guaranteed under the Sixth Amendment of the United States Constitution, was not only contrary to clearly established federal law, as established by the Supreme Court of the United States, but was also unreasonable in light of the facts presented.

In 2017 this Court reinstated a standard of analysis it already established for courts reviewing ineffective assistance of appellate counsel claims, holding; "[d]eclining to raise a claim on appeal...is not defecient performance unless that claim was plainly stronger than those actually presented to the appellate court." Davila v. Davis, --U.S.--, 137 S.Ct. 2058, 2067, 198 L.Ed. 2d 603 (2017) (citing Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000)). Clearly, this Court setforth a "comparison" standard of analysis to be applied when a reviewing court is presented with ineffective assistance of appellate counsel claims. Therefore, a reviewing court is to "compare" both the omitted claims with those appellate counsel elected to raise.

Six years prior to Robbins, in 1994, the United States Court of Appeals: Second Circuit had already established this "comparison" standard of analysis to be applied by its District Courts when

reviewing ineffective assistance of appellate counsel claims, holding that a "petitioner may establish constitutionally inadequate performance if he shows that [appellate] counsel omitted significant obvious issues that were clearly and significantly weaker." Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994).

To this date the New York State Court of Appeals has never adopted any "comparison" standard. In fact, in 2004, the New York Court of Appeals only, somewhat, adopted this Court's standard it setforth in Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 756 (2000), where it held that the standards to be applied by a court reviewing ineffective assistance of appellate counsel are the ones it setforth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) holding in People v. Stultz, 2 N.Y.3d 277, 284, 778 N.Y.S.2d 431, 436, 810 N.E.2d 883, 888 (N.Y. 2004) that New York State courts "should apply the Baldi (People v. Baldi, 54 N.Y.2d 137, 444 N.Y.S.2d 893, 429 N.E.2d 400 [N.Y. 1981]) standard in connection with claims of ineffective assistance of appellate counsel." To not adopt a "comparison" standard and establish for all State courts to apply it when reviwing such claims is contrary to clearly established federal law, as established by this Court and it follows that, therefore, the Second Department's determination, in denying Petitioner's ineffective assistance of appellate counsel claims was also contrary to clearly established federal law, as established by this Court.

Apparently, here is another conflict between New York State Courts, the United States Court of Appeals: Second Circuit, and the United States Supreme Court that "call[s] for an exercise of this Court's supervisory power," respectfully. **RULE 10.**

* * * * *

Quite simply put: Certainly, Petitioner right to confrontation was violated and certainly, "surrogate testimony of the kind [Dr. Voddi] was equipped to give could not convey what [nurse Daniele] knew or observed about the events [her medical report] concerned, i.e., the particular test and testing process [she] employed. Nor could such surrogate testimony expose any lapses or lies on [nurse Daniele's] part...[Indeed, w]ith [nurse Daniele] on the stand, [Petitioner's] counsel could have asked questions designed to reveal whether incompetence, evasiveness, or dishonesty accounted for" her questionable diagnosis of child sexual abuse, **Bullcoming**, 564 U.S., at 661-62, which in turn calls into question trial counsel's failure to defend Petitioner confrontation rights, as argued in the coram nobis independently. Had counsel revealed such incompetence, evasiveness, etc., the prosecution would not have been allowed "to dress up the weak and inconclusive physical evidence[, and the lack thereof,] in the trappings of [Dr. Voddi's] expertise." **Lindstadt v. Keane**, 239 F.3d 191, 205 (2d Cir. 2001). And, surely appellate counsel had more to gain than lose by raising Petitioner's confrontation and ineffective trial counsel claims, especially being that she raised two ineffective trial counsel claims. Surely, these much stronger and more meritorious claims would have advanced her

claims raised on direct appeal, increasing her chances of obtaining a reversal of Petitioner's conviction and a new trial ordered. As it demonstrates, appellate counsel's performance was deficient for omitting "claim[s that] was plainly stronger than those presented to the appellate court." **Davila**, 137 S.Ct., at 2067 (quoting **Robbins**, 528 U.S., at 288). Compare Appx. C: Coram Nobis and Appx. G: Appellate Brief; Direct Appeal. Upon this Court's granting of Petitioner's petition for a writ of certiorari, which Petitioner humbly prays, a full, highly meritorious argument supporting all claims will be further elaborated, respectfully.

CONCLUSION

The petition for a writ of certiorari should be **GRANTED.**

Respectfully submitted,

Frank R. Stevenson
(DIN# 13-A-2625), Pro Se,
Petitioner

Date: September 10, 2021