No. 21-5925

IN THE

SUPREME COURT OF THE UNITED STATES

DENWORTH DAVIDSON, PETITIONER

vs.

THOMAS R. GRIFFIN, SUPERINTENDENT, RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DENWORTH DAVIDSON
DIN# 08-A-0241

Green Haven Correctional Facility

PO Box 4000

Stormville, New York 12582

(845) 221-2711

QUESTION(S) PRESENTED

1. Whether, as a threshold matter, Petitioner has shown that his federal constitutional right to a fair trial and due process was violated by the prosecutor's misconduct at trial and thus a certificate of appealability should have been issued.

2. Whether Petitioner has met a threshold showing that he was denied his sixth amendment right to the effective assistance of counsel and thus a certificate of appealability should have issued.

3. Whether Petitioner has shown both cause for the procedural default that the state court found and actual prejudice for the constitutional violation.

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

NONE

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Denworth Davidson, an inmate currently incarcerated at Green Haven Correctional Facility in Stormville, New York, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit denying him a Certificate of Appealability for his habeas petition.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____ ;
or, [ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____ ;
or, [ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____ ;
or, [ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.
The opinion of the _____ court appears at Appendix_____ to the petition and is

[ ] reported at _____ ;
or, [ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 1, 2021.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix .

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on _____ (date) in Application No. A .

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____ . A copy of that decision appears at Appendix _____ .

[ ] A timely petition for rehearing was thereafter denied on the following date: _____ , and a copy of the order denying rehearing appears at Appendix _____ .

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on_____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253(c) provides:

> (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 arises out of process issued by a State court; or
>
> * * *
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Introduction

Under New York Queens County indictment 161/05, petitioner was charged with murder in the first degree and lesser charges, arising from the shooting of Bruce Levy during the robbery of his commercial dry cleaners. After five days of deliberations, petitioner's first trial ended in a hung jury.

At his second trial, petitioner took the stand on his own behalf, as he had at the first trial. He told the jury that he had not taken part of the robbery, although he had known about it from his friends Mo Findlay and Jerome Fletcher, and that he had not made a statement to the police admitting to the offense. To undermine petitioner's testimony, during cross-examination, the prosecutor suggested that petitioner had a propensity for committing robberies and using guns; violated statutory requirements and court rulings when impeaching with prior bad acts; commented on petitioner's silence after he invoked his right to counsel; and made sure the jury knew that she disbelieved him. The prosecutor's impermissible tactics continued during summation where he became an unsworn witness against petitioner, labeled defense counsel as racist, and improperly commented on the petitioner's invocation of his right to counsel. The jury convicted petitioner of first-degree murder and lesser counts, and the court sentenced him to life without the possibility of parole.

Petitioner appealed as a poor person to the Appellate Division: Second Department of the New York Supreme Court. On November 16, 2016, petitioner's conviction was affirmed, and on July 10, 2017, leave to appeal to the New York Court of Appeals was denied. Petitioner then filed a petition for a writ of habeas corpus that was denied by the District Court for the Eastern District of New York on December 7, 2020. The Court of Appeals for the Second Circuit denied a certificate of appealability on June 1, 2021.

***

On October 7, 2004, Bruce Levy was shoot and killed during the robbery outside of his dry-cleaning establishment. Petitioner and Jerome Fletcher were indicted for first-degree murder and lesser offenses; their trials were severed. At petitioner's trial, Davia Gabriel, who was Fletcher's girlfriend, testified that Fletcher brought up robbing the cleaners where she worked. She told him that the employees got paid in cash every Thursday between 11 a.m. and noon. Fletcher said that he was going to come the next payday, which was when the robbery occurred. Gabriel did not know petitioner.

Stacey Whittaker, another of Fletcher's girlfriends, owned the car that was seen leaving the robbery. Fletcher had borrowed her car on October 7th. Later, a female friend of Fletcher's and then Fletcher gave her a total of $8000 in different denominations and asked for new bills; she exchanged them at the bank where she worked. Whittaker did not know petitioner.

There were two eyewitnesses to the robbery who testified at trial. Said Meftah, a passerby, gave a description of the shooter at trial but made no identification. Omar Valerio, who worked at the drycleaners, identified petitioner as the shooter for the first time 2½ years after the robbery; that identification occurred in the courtroom at petitioner's first trial.

Detective Gus Papadopoulos arrested Fletcher in Florida and while interrogating him, listened in on a conversation between Fletcher and someone who said that he should be called "Shatta" now, meaning a Jamaican hitman. The detective identified the voice as petitioner's. After arresting petitioner, Detective Robert Mattera interrogated him and testified that he made a written confession and then, prior to any videotaped statement, had requested counsel. The prosecutor also introduced numerous telephone records into evidence between Fletcher, Whittaker, Findley and petitioner.

Petitioner took the stand and testified that he had known about the robbery, as Fletcher and Findlay had discussed it within earshot. He denied confessing to the robbery and said that he had signed only what he believed was a witness statement that the detective had written out.

During her cross-examination of petitioner, the prosecutor was permitted to ask him – solely as it went to his credibility – whether he had previously been convicted of attempted second-degree robbery, without reference to the

underlying facts. Nonetheless, after confirming that appellant thought he could get a program if he went on the videotape, the prosecutor asked:

Q. You are not new to the criminal justice system, are you? Are you?
A. No.
Q. You have been around the block, right?

After counsel objected and the court said "rephrase," the prosecutor asked:

Q. You have been convicted of a felony robbery case before this case, correct?
A. Yes.
Q. And yet you sit here and you tell us that you were of the belief that the D.A. would give you a program for murder, correct?
A. Yes.
Q. Just so we're clear (491-492).

The prosecutor then asked appellant about his weed business1 and knowledge of weapons, segueing back to his prior robbery conviction:

Now back in October and November of 2004, you were a drug dealer, correct?
A. Yes.
Q. And you were working the corner, out on Flatlands and what is it 79th or Flatlands and 78th?
A. Yeah.
Q. Which one?
A. 79th.
Q. And you were dealing weed, right?
A. Yeah, I'm selling weed.
Q. And you are buying in bulk, right?
A. Yeah.
Q. And you were packaging it up?
A. Yeah.

---

1 During direct examination, appellant stated that he making money in October 2004 by selling marijuana. He sold on his block, usually between 9 a.m. and 11 p.m., when his mother was not home (470).

Q. And you spend your days basically from morning until night selling that weed?
A. Selling weed, yes.
Q. You got customers?
A. Yes.
Q. And you are not going to sell them garbage or else they're not coming back?
A. Correct.
Q. So you are not selling dirt week? There is hydro, it's hydro?
A. Yes.
Q. There is purple haze, right?
A. Yes.
Q. There's purple haze out there and in order to keep a good relationship with your customers, right, you can't be selling the low end, you got to be selling something decent?
A. Yeah.
Q. Now you sell your stuff you run out and keep a stash, right? You do keep a stash?
A. Yes.
Q. What is a stash?
A. A stash is someplace you keep your weed.
Q. Right and it's got some value to it, doesn't it?
A. Yes.
Q. Drug dealer, drug dealing on the street of Brooklyn, this is a dangerous business, isn't it?
A. Yes, selling weed.
Q. Absolutely.
Now, why don't you tell us the difference between a revolver and a semi- automatic weapon? Why don't you tell us?
A. I don't know.
Q. You don't know. You're out in Brooklyn, day and night, selling your drugs in this dangerous business, and you have no idea – do you have any knowledge about guns?
A. No, I don't. I sell weed.
Q. You just sell weed; you don't have anything to protect your produce?
A. Yeah, I have it hidden.
Q. And so you don't know about guns from your drug dealing but you also have a felony robbery conviction, correct? Correct?
A. Correct.
Q. And you don't know about guns from that either, do you?

A. No.
Q. Right (491-494).

32. After asking about appellant's relationship with Mo and Jay2 and overhearing the discussion of the robbery (494-498), the prosecutor asked:

Q. And so, you must have known a little bit about both of those guys, right?

A. Yeah.

Q. And you knew of course that Mo never had any kind of felony let alone a robbery in his past?

[DEFENSE COUNSEL]: Objection.

A. I don't know nothing.

THE COURT: Overruled.

A. I don't know, no.

Q. You didn't know that?

A. No.

[DEFENSE COUNSEL]: Objection.

Q. You never discussed that with him?

A. No.

THE COURT: Overruled (498).

After some additional questions about appellant not discussing Mo's criminal history with him (498-499), the prosecutor then turned to Jay:

Q. Did you also know that Jay had also never, never been convicted of any kind of robbery; did you know that?

[DEFENSE COUNSEL]: Objection.

A. No, I didn't know that.

---

2 When appellant testified that Mo had introduced him to Jay, the prosecutor commented, "Everything is, it's all connected to Mo" (495). Later, asked if he spent time with Jay, appellant answered, "Yeah, Mo would bring him by" and the prosecutor responded, "Mo, Mo, Mo" (498).

THE COURT: What is your objection other than you are objecting. What is it based upon?

[DEFENSE COUNSEL]: Right now form.

THE COURT: Overruled.

Q. Did you know?

A. No.

Q. Well, when you over hear them talking as you say in your backyard about your plans. Did it ever dawn on you to say, hey, I am just out here dealing weed, I don't have much going on, I am the guy with experience, why don't you count me in? Did it ever dawn on you to say that?

A. No (499-500).

The prosecutor then elicited that, around the time of the offense, Jay called appellant's home, but for Mo, not appellant. He had never called Jay but knew his number (500-502).

34. The prosecutor then moved on to appellant's girlfriend, eliciting that he had a girlfriend, Annie, who, prior to his arrest, had lived for about a year with him, his mother and his brother (504). She then asked:

Q. And you were in your 20s at the time, right?3
A. Yes.
Q. And your girlfriend, you were close with her? You were intimate with her, correct?
A. Yeah, that's my girl, yes.
Q. Isn't it fair to say she was 14 years old?
[Defense Counsel]: Objection.
Q. 14?

3 Twenty-four at the time of trial, appellant had just turned 21 at time of offense.

After a side-bar was held at counsel's request, the court asked for an answer to the question:

A. No, I know didn't know her exact age.
Q. You did not know her exact age?
A. No.
Q. 14 sound about right to you?
A. No.
Q. Did you have an opportunity to see the visitor log put in by Mr. Romps as you sat here during your trial? Did you have an opportunity to take a look at that and look at her date of birth?
A. No, I didn't really look at it.
Q. So you have no idea how old Annie [] was?
[Defense Counsel]: Objection.
The Court: Overruled.
A. No.
Q. Why don't you take a look at it sometime (505-506).

The prosecutor also questioned appellant about the precinct statement. She asked whether a detective would put in an intentional murder case that there had been a struggle and the gun went off, which made it sound like an accident. When counsel's objection was sustained, the prosecutor asked, was that "the detective's spin on things." Counsel's objection was overruled, and appellant replied that he did not know. The prosecutor repeated, "You don't know." She then asked if the part of the statement about turning around and not knowing if Levy was hit, which also made it sound like an accident, was something the detective put in to "jam" appellant up. Appellant said that he did not know (517-518).

The prosecutor also asked, "You told us that the first time that you had heard Miranda was when the tape began to roll and the D.A. is sitting there and the D.A. gives you the Miranda warning, right?"

A. Yeah.
Q. Now you are familiar with Miranda warnings, aren't you?
A. Yeah, but I was --.
Q. In fact, you have a prior case, a felony robbery case. You knew very well about Miranda; is that fair to say?
A. Yeah, but it was the first time it was given to me.
Q. Yes or no.
A. Yeah (525).

Finally, the prosecutor asked appellant why, when the prosecutor showed up, he did not say "hey, hey Mr. D.A., those bad policemen, they had me sign something, I didn't say any of this. You don't say that, do you?" Appellant said he did not get a chance to say anything. The prosecutor repeated, "You didn't say it, did you?," and appellant said no. Referring to the videotape that been shown, the prosecutor inquired:

> Q. So he says to you what happened, what happened a couple of beats and then you say I just couldn't do it, I couldn't tell the D.A. something I didn't do?
>
> Isn't it a fact that the District Attorney is sitting in the room? Did the District Attorney become a ghost and evaporate from the room.

Counsel's objection to a compound question was overruled, as the court found that the prosecutor was "just setting the scene." The prosecutor asked if the District Attorney was "still sitting right there, correct" when he told Mattera that

he could not say it, and appellant said correct. The prosecutor asked if the District Attorney had asked what he meant by that, and appellant said "no" (527-528).

In his summation, defense counsel pointed out that the only evidence against appellant was Valerio's identification and the precinct statement, and he argued as to why neither was reliable.

Addressing counsel's questions regarding the suggestiveness of Valerio's in-court identification. She claimed that counsel's questions "went something like this:"

> I am a white man. I am the defense attorney. I am a white man. Would you agree with that, yes. And my client over here, he's a black man. He is a black man? Yes. And isn't it fair to say you are just coming in here and picking him out because he's a black man?
>
> Now come on, ladies and gentlemen. Look at the facts of this particular case and look at who it is that he was asking the question of. Omar Valerio did not step off of a plane from Kansas. Omar Valerio lives in Brooklyn in a diverse community . . . You know, to infuse this into this case doesn't belong. Such a racially charged idea is kind of outrageous. Does anyone think that's why Omar Valerio picked out the defendant? That's obscene and you should completely disregard that kind of notation (589).

She continued with that theme later, accusing counsel of more "stereotyping" when he allegedly claimed that all Caribbean accents sound alike (594-595).

Moreover, in reviewing the identification, the prosecutor claimed that Meftah and Valerio gave full descriptions to the police "very early on in the case shortly after the shooting." Providing the jury with the details of the description, she continued with how closely appellant matched them, characterizing it as "dead on" (584-585, 589-590). There was no evidence in support of her claim, as she had not asked either of them if they had provided a description to the police or what it was. The only evidence regarding a description of the shooter given prior to trial was that he had braids.

As to appellant's alleged statement, the prosecutor argued that Detective Mattera could not have composed it because he knew facts that were not in the statement – for example, Mattera would have put in Gabriel's and Whittaker's names. Similarly she claimed, Mattera would not have put in excess details like the glovebox or the rear view mirror, assuring the jury that "[T]his is nothing that a Detective would put in a statement. It serves no purpose" (594-598).

As to the parts of the statement which minimized guilt, the prosecutor informed the jury that:

> Defense counsel of course, a detective is going to put – of course a detective is going to put in these things that try to minimize the defendant's conduct. Are you kidding? I suggest to you it's ridiculous. That doesn't make sense.
>
> One of the charges and the Judge is going to instruct you on the law is Murder in the First degree. It is a charge that involves intent.

> A homicide detective is not going to undermine his case and make this sound like an accident. Who does it benefit to do that?
>
> Do you know who it benefits? This defendant and you can rest assured those were his words trying to make himself look less guilty. Twice in here there are references to oh, I turned around and I fired the gun. I didn't even know if I hit anyone. Oh yeah, right.
>
> A Detective trying to make out a Murder One case, that's what he is going to put in here? That's ridiculous. That's just absurd, and then at the end, there's an apology, I am sorry. Right? The Detective wants to get sympathy for the defendant? How about the defendant wants to get sympathy for himself (598-599).

The prosecutor also commented on appellant's conduct after invoking his right to counsel. She argued that appellant did not tell the assistant that he had not made the statement, commenting:

> Well, did the District Attorney evaporate? The District Attorney is still in the room, right? And then what happened? I suggest to you that's ridiculous. If it went as the defendant said, the District Attorney is sitting right here. The District Attorney is not a ghost. He is sitting right there. The District Attorney would have heard that if that's what happened but that is not what happened . . . (617-618).

The prosecutor also remarked on appellant's drug business and his lack of knowledge about guns:

> You know he's got his corner. He is dealing with drugs. He is protecting his product, stash. Dangerous business. Tells us the difference between a revolver, semi-automatic. Oh, I don't know anything about guns. I am not really asking you about caliber, I am

> asking you the difference between guns. Oh, I don't know anything about guns. Really, really? And you've been convicted of a felony, robbery. You know nothing about guns? Both of those things, drug dealer, felony robbery case, you don't know the difference between two basic types of guns? No, no (614).

The court charged the jury as follows on appellant's prior conviction and bad acts:

> A jury has the right to consider the prior conviction and prior bad acts of any witness in determining the weight and value they will attach to any witness's testimony. This testimony as to prior bad acts and to prior convictions is admissible solely upon the question of what credence and value you will give to the testimony of a witness.
>
> In other words, in light of his prior convictions or bad acts, what weight and what value will you attach to the testimony of this witness. Jurors I emphasize this evidence is admitted solely on the question of the credibility of such witness.
>
> You have the right and it is your duty to scrutinize very carefully testimony coming from such a source and to determine in the light of all the facts and circumstances in the case whether the witness testified truthfully during the trial (665-666).

As to the precinct statement, the court charged the jury, *inter alia*, that, in order to use the statement as evidence in the case:

> You must first be convinced that the statement attributed to the defendant was, in fact, made or adopted by him. In determining whether the defendant made or adopted the statement, you may apply the tests of believability and accuracy that we have already discussed.

The court continued that, even if the jury found that appellant made the statement, they could not consider it as evidence unless the People have proven

beyond a reasonable doubt that the defendant made the statement voluntarily (658-659).

On appeal to the New York Supreme Court, Appellate Division: Second Department, petitioner argued that he was deprived of his federal constitutional right to due process and a fair trial by the prosecutor's misconduct during cross-examination and summation and by the court's erroneous and incomplete charge. Petitioner also argued that he was deprived of his federal constitutional right to the effective assistance of counsel by counsel's failure to object to the prosecutorial misconduct and to ensure the fairness and completeness of the court's charge.

The Appellate Division held that

> The defendant correctly contends that the People failed to provide adequate notice to him of their intention to impeach his credibility based on a prior uncharged bad act, and that the Supreme Court erred in overruling his objection and allowing cross-examination about the prior bad act (*see People v. Slide*, 76 AD3d 1106, 118 [2010]; *People v. Montoya*, 63 AD3d 961, 963 [2009]). Nevertheless, under the circumstances of his case, the error did not deprive the defendant of his right to a fair trial.
>
> The defendant's challenge to the jury charge was unpreserved for appellate review and, in any event, without merit. His challenge to the prosecutor's conduct is unpreserved for appellate review and, in an event, the challenged conduct did not deprive the defendant of a fair trial.

The court also held that petitioner's remaining contentions were without merit. *People v. Davidson*, 144 A.D.3d 938 (2nd Dept. 2017). Petitioner's application to appeal to the New York State Court of Appeals was denied on July 10, 2017.

On October 4, 2018, appellant filed a petitioner for a writ of habeas corpus in the district court, raising federal constitutional claims and arguing that the state court's resolution of those claims was contrary to and an unreasonable application of clearly established Supreme Court precedence.

In an order entered December 7, 2020, the Honorable William F. Kuntz, III, denied the petition and a certificate of appealability. The court held that, except for the single instance regarding the prior bad act, the prosecutorial misconduct issue was procedurally barred; that appellant did not establish cause and prejudice; and that counsel was not ineffective for failing to object to the misconduct or ensure the propriety of the court's charge.

The Second Circuit denied petitioner's motion for a certificate of appealability on June 1, 2021.

REASONS FOR GRANTING THE PETITION

Petitioner has made threshold showing that his federal constitutional right to a fair trial and due process was violated by the prosecutor's misconduct at trial and thus a certificate of appealability should have issued.

Habeas relief is required when prosecutorial misconduct so infects the jury with unfairness as to make the resulting conviction a denial of due process. *Parker v. Matthews*, 567 U.S. 37, 45 (2012); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). In this case where petitioner took the stand and refuted the state's case, it was critical for the jury to be able to fairly assess his credibility. The prosecutor's misconduct made that impossible.

During her cross-examination of petitioner, the prosecutor characterized him as the one with the experience in committing robberies, a clear and improper propensity argument that was made in violation of the court's pre-trial ruling. The prosecutor also ensured that the jury knew that neither Fletcher nor Findlay had a prior criminal record. The prosecutor also specifically, and again in violation of the court's ruling, linked appellant's prior robbery conviction to the use of guns. Not only was the prosecutor's questions regarding the difference between semi-automatic and automatic weapons irrelevant, but they served only to imply that appellant was familiar with guns, and violence. The prosecutor also quizzed appellant at length regarding his marijuana business – questioning him on irrelevant issues regarding his selling location, buying in bulk, packaging,

hours spent selling, customers, types of marijuana available and sold, stashes, dangerousness, and protection. Such extensive questioning served only to improperly raise the inference of criminal propensity. In summation, the prosecutor again made sure that the jury correlated appellant's "drug" business and prior robbery with his knowledge of guns.

Despite petitioner's invocation of his right to counsel at the start of the videotaped session, the prosecutor asked him several times if he had told the assistant district attorney who was present that the detectives had coerced him into signing the document that they had written. She also asked appellant if the assistant district attorney had asked him any questions and assured the jury in summation that, if appellant had said that he had not made the statement, the prosecutor would have followed up. Yet, as appellant's "indelible" right to counsel had attached, all questioning had to cease.

The prosecutor also, in violation of her statutory obligation to request a pre-trial ruling, the prosecutor questioned appellant about his "intimate relationship" with his "14-year-old girlfriend" prior to the offense when he was "in his 20's" (he was just 21 when arrested in the case). She excused her misconduct on the specious ground that she had not actually mentioned the crime of statutory rape.

Finally, throughout her cross-examination of appellant, the prosecutor made sure that the jury was aware of her disbelief in his answers. She did so through her comments and asides, and her sarcastic and argumentative tone.

In summation, the prosecutor also attacked defense counsel, and her comments that he had "infuse[d]" race into the case, that a "such a racially charged idea is kind of outrageous ... and obscene ..." and that "interjecting racism into the case was despicable tactic," were highly improper. While counsel's cross-examination of Valerio regarding his in-court identification of petitioner, who was black, sitting at the defense table with a white attorney may had been inartfully expressed, those are, as the courts have recognized, inherently suggestive. At the same time as she impermissibly undermined counsel's attack in the identification testimony, the prosecutor tried to bolster it. She contended that Valerio and Meftah had given descriptions to the police very early on and the details matched petitioner. In fact, the only evidence was their description of the shooter at trial, and the only pre-trial description of the shooter that was before the jury was that the shooter had braids.

Finally, in addressing petitioner's testimony that the detective had written the statement he signed, the prosecutor argued that, because petitioner was charged with murder, the detective would not have suggested that the shooting was accidental. Yet not only would a detective be aware that no intent is

necessary to be convicted of felony-murder, but also there is no indication that this was a first-degree murder case prior to the prosecutor's entry into the case. Moreover, as this Court has recognized, it is a well-established interrogation technique to minimize the conduct or intent in order to further the interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 455 (1966).

For these reasons, petitioner has made a substantial showing of the denial of a constitutional right and a certificate of appealability should have been issued. 28 U.S.C. §2253(c); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Petitioner has also met a threshold showing that he was denied his sixth amendment right to the effective assistance of counsel and thus a certificate of appealability should have issued.

To establish that an ineffective assistance of counsel, petitioner must show that counsel's performance fell below "an objective standard of reasonableness" and demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland v. Washington*, 466 U.S. 668 (1984). Here, that standard was met when counsel failed to properly object to when the prosecutor misused both her cross-examination of appellant and her summation counsel largely remained silent. Counsel

- did not object when the prosecutor raised a propensity argument, linking the charged robbery to appellant's prior robbery conviction by questioning him as to why he would not have joined in the plan to rob the

dry cleaners since he was the one with experience while Fletcher and Findlay had never been convicted of robbery;

- did not object when the prosecutor questioned appellant about his familiarity with guns, even though that was not an issue at trial;
- did not object when the prosecutor, both during cross-examination and in summation, questioned how appellant could not be familiar with guns given his prior robbery conviction (even though the prosecutor was precluded from eliciting any underlying facts of the prior conviction and counsel should have been aware that a simulated gun had been involved in the prior case);
- did not object when the prosecutor examined appellant at length about his marijuana business and linked the use of guns to that business without any factual basis; and,
- did not object to the prosecutor's comments during cross-examination, designed to convey to the jury her disbelief in appellant's answers.

In addition to portraying appellant as having a propensity for gunpoint robberies and not being worthy of belief, the prosecutor also impermissibly attacked his testimony that the detectives had written the precinct statement and coerced him into signing it. Again, counsel

- did not object when the prosecutor assured the jury that, if appellant had answered a detective's question by saying he had not committed the offense, the prosecutor would have followed up (even though appellant had invoked his right to counsel) and that did not happen; and
- did not object when the prosecutor assured the jury that no homicide detective would put in a statement that the shooting had been an accident, even though there was no evidentiary basis for her claim, it was actually a well-established interrogation technique, and appellant was initially charged with felony-murder not requiring any homicidal intent.

Second, even though appellant's credibility and the invalidity of the precinct statement was critical to the defense case, counsel

- did not object when the court charged the jury that they had to "carefully very scrutinize" appellant's testimony;
- did not object to the court's failure to charge the jury that the prior conviction was not evidence of appellant's guilt in the case or appellant's disposition to commit crimes; and,
- did not request a charge that, before considering the precinct statement, the jury had to find "beyond a reasonable doubt" that appellant had made or adopted it.

As a result of these failures, counsel's representation fell below an objective standard of reasonableness.

The district court found, in part, that counsel's performance was not objectively unreasonable as petitioner did not show that the charge as given was incorrect under state law, as he cited no case law. However, in arguing that the correct jury instructions included language that prior convictions are not evidence of guilt or propensity and that the state had to prove beyond a reasonable doubt that that petitioner made the statement attributed to him, petitioner cited the New York Criminal Jury Instructions. Petitioner would argue that pattern jury instructions are a proper measurement of the reasonableness of counsel's performance. *Cf. Padilla v. Kentucky*, 559 U.S. 356, 367 (2010)(in assessing the objective standard of reasonableness, court may look at prevailing professional norms as set forth in bar association standards).

The district court found that, as to the prosecutorial misconduct, prejudice had not been shown under the second prong of Strickland, given the strength of

the evidence against petitioner. Yet, the evidence the court cited – statement, identification and phone records, was not overwhelming and there was a "reasonable probability" that a fair assessment of petitioner's testimony may have resulted in a different outcome. Moreover, the court failed to recognize the impact that the prosecutor's misconduct in claiming that petitioner was familiar with guns impacted on the jury's determination as to whether petitioner was guilty of first-degree murder requiring an intent to kill or second-degree felony-murder, requiring only an intent to commit a robbery.

Petitioner has also shown cause for the procedural default that the state court found and actual prejudice for the constitutional violation. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

For the same reasons that petitioner made a showing that his sixth amendment right to the effective assistance of counsel was violated, he has established the requisite "cause." *Murray v. Carrier*, 477 U.S. 478, 488-489 (1986). Also contend that when prejudice prong of met, then so has the prejudice Such a procedural default would bar habeas review unless, as here, the appellant can demonstrate cause for the default and actual prejudice for the constitutional violation. Whether "cause" for a default has been established is "a question of federal law" for the federal court. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Moreover, as the prejudice prong of Strickland has been shown, so has the actual prejudice requirement.

CONCLUSION

The petition for a writ of certiorari should be granted. Petitioner respectfully requests that this Court grant certiorari and summarily reverse the decision below and remand with directions to issue a COA or set the case for briefing and argument to settle these important questions.

Respectfully submitted,

Date: August 27, 2021