ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

E'MARIO ALLEN,

21-6506 DOCKET NO: _____

Petitioner,

v

DALE A. ARTUS,

Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

E'MARIO ALLEN
Attica Correctional Facility
P.O.Box 149
Attica, New York 14011

QUESTIONS PRESENTED:

Whether the Habeas Court proceeding and asjudication of the claim regarding a Batson issue did not result in a decision that was contrary to, or involved an unreasonable application of misapplied facts in the state court, as clearly established Federal Laws, as determine by the Supreme Court of the United States, or was based on an unreasonable determination of the facts in light of the evidence presented in the Federal Habeas Court proceeding, thus the District Court abuse of discretion on its part when it denied Petitioner Batson claim that was clearly demonstrated in the state court proceeding?

Whether Respondent to the Federal Habeas Court mischaracterzies Allen's positions in state court, and misrepresents the factual record with the most salient facts regarding a Batson violation, thus failed to properly engage in demonstrating the Supreme Court requirements regarding a Batson claim to the Federal Habeas Court in its Answer and Memorandum?

TABLE OF CONTENTS: PAGE

INDEX TO APPENDIX:

TABLE OF AUTHORITIES CITED:

CASES:

CASES CONTINUE:

STATE CASES:

OTHER AUTHORITY:

IN THE SUPREME COURT OF THE UNITED STATES

E'MARIO C. ALLEN,

Petitioner,

v

DALE A. ARTUS,

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

DOCKET NO:_____

E'Mario C. Allen, respectfully Petition for a Writ of Certiorari to review the judgment entered by the United States Supreme Court, Second Circuit, Court of Appeals of the District Court of Western New York.

OPINIONS BELOW:

The opinion of the United States Supreme Court, for the Second Circuit, Court of Appeals, ____ F.3d ____, 2nd Cir. Crt. (2021), and the opinion of the Western District Court of New York, Buffalo Division, _____ F.Supp.3d _____, (WDNY 2020) is therefore, reported.

JURISDICTION:

The United States Court of Appeals for the Second Circuit affirmed Petitioner's Federal 28 USC 2254 Habeas Corpus on July 14, 2021, mandate entered on July 14, 2021, and the Western District Court for New York State, Buffalo Division denied Petitioner

Federal Habeas Corpus Petitioner under 28 USC 2254 for relief on November 18, 2020 in its (40) page written denial; (see Appendix A & B)[Both Federal Habeas Corpus Decision & Order].

CONSTITUTIONAL PROVISIONS INVOLVED:

The Sixth Amendment of the United States Constitution and Equal Protection Clause of the United States Constitution offers every citizen the guarantee. And it should not be violated by the 'discriminatory use of peremptory' challenge pursuant to the Fourteenth Amendment of the United States Constitution, and the same goes for the Sixth Amendment right to a fair trial pursuant to Batson[In all criminal prosecutions the accused shall enjoy the right to a speddy and fair trial, and public trial, by an impartial jury of his/her peers of the United States, and the district where (in) the crime was committed, and the Fourteenth Amendment intert (wined) with the Fifth Amendment of the United States Constitution provides, in relevant part, "...nor shall any State deprive any person of...life,...liberty,...property without affording him due process of law".

STATEMENT OF CASE:

This case presents the novel questions of constitution (ality) regarding Equal Protection under the law requires a criminal trial free of racial discrimination in the jury selection process to ensure a criminal defendant of his Sixth Amendment right to a fair trial for people of color and of his peers. And even under the Equal Protection Clause, even one single ground/instances of race

discrimination against a 'prospective' juror is 'impermissible' violating the Sixth and Foureenth Amendment of the United States Constitution. Because the Equal Protection Clause of the United States Constitution forbids the States to strike 'black' venire (men) on the assumption that they will be [bias] in a particular case simply because the 'defendant' is "black".

Under the United States Supreme Court ruling in Batson, a state prosecutor cannot be bias during jury selection and rebut a 'black' juror on a claim of discrimination by stating merely that he challenged jurors of the defendant's race assumption of his intuitive judgment, that they would be partial to the 'black' defendant because of their same race of "black". [A] criminal defendant under the Supreme Court requirements in Batson can show purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's excercise of peremptory challenges at defendant's criminal trial, as herein.

Here, in Allen's case during his criminal trial, the one racially discriminatory peremptory strike of proepective juror was one too many for juror Leonard Lannie, a (23) year old African-American prospective juror. Lannie was a college student, worked at a local grocery store, and lived with his parents. Thus was a peer of Defendant's and fits the Batson requirements for a Equal Protection Clause violation.

Under Batson, Mr. Allen does not have to show a persistent pattern or demonstrate a history of racially discrimina (tory) strikes by the prosecutor during voir doir to present a

viable claim of race discrimination pursuant to the Baston require (ments) set forth by this Court in Baston v Kentucky, 476 US 79 (1986); and Snyder v Louisiana, 552 US 472, 483-84 ( ), and this Court's most recent ruling in Flowers v Mississippi, ____ US ____, (2019)[2019 WL 1112674](2019)[see U.S.Const.Amend. VI & XIV]. The State Court of Appeals failed to engage with the most salient facts demonstrating the State prosecutor's intent to discriminate against Allen when the State prosecutor unconstitution (al) used [a] peremptory challenge in order to discriminate against Allen, and removed a black African-American juror that was entitled to serve on the jury , named Leonard Lannie, thus deprived petitioner of a fair trial and due procss of law under the Equal protection Clause of the United States Constitution. And Allen's case does fits the requirements of Batson/Flowers ruled by this Court, and are well-settled standards set forth by this Court sitting as the highest court of the United States. The removal of Lannie was only a pretextual strike made by the State prosecutor, and are recorded in the record[see T.T. p.p. 125-163(where the juror provides factual proof that he does not know Officer Exum, and he is a friend of his sister)]. The State Court finding was an unreasonable application of the facts in state court, and contrary to the United States Supreme Court ruling in Batson/Flowers, and warrants review by this Court on Certiorari; (see APP. p.p. 1-5), and the same goes for the denial by the Western District Court, and Court of Appeals for the Second Circuit; (see APP p.p. 9-50).

TRIAL:

Petitioner was charged by indictment of the Erie County Grand Jury for the crimes of Attempted Murder in the First Degree, Assault in the First Degree, Attempted Assault in the First Degree, and with co-defendant's Dwayne Gordon, and Cordero JOnes-Hocks, with two counts of Robbery in the First Degree involving the same victim. Charged in indictment 02505-2011. The judgment was entered in Erie County Supreme Court, Hon. Penny Wofgang, sentence on August 28, 2012 to a term of (40) years in prison with no post-release supervision.

After a jury trial Petitioner was convicted on July 24, 2012, of one count of Assault in the First Degree, and one count of Attempted Assault in the First Degree, and (2) counts of Robbery in the First Degree. And the jury was not able to reach a verdict of the count one of the indictment, Attempted Murder in the Second Degree. That count was dismissed upon counsel's motion to the Supreme Court before sentencing; (see CPL 290.10). The prosecutor did appeal that order of dismissal by the trial court to the Fourth Judicial Department, but later withdrew its Notice of Appeal to challenge that decision by Supreme Court.

FACTS:

Aaron Green celebrated his birthday in the early morning hours of November 12, 2011 by attending a bar in the City of Buffalo, New York, named Buffalo Live. The victim knew Petitioner

since childhood. Around 3:00 am the bar closed and Green and three other friends headed to another bar called Pandora's Box on Fillmore Avenue in the City of Buffalo, New York. Green was shot after leaving the bar, and gave material testimony that he did not witness who shot him on Victoria Avenue as he walked to the bar; (see T.T. p.p. 352-358). At that point after Green was not able to witness defendant as the shooter, the prosecutor wanted to treat Green as an 'hostile' witness. The Court adjourned the matter for the day in order to have Green consult with counsel.

During the next trial day, Green testified that Petitioner, who was also being detained in the Erie County Holding Center, came up to him in the jail law library and expressed to him not to attend court any further; (see T.T. p.p. 363), and the victim testifed that he was afraid to testify and be considered a 'snitch'; (see T.T. p.p. 262-63).

The testimony of Green to the jury was that he had brought about $600.00 dollars with him on the night of his birthday, and that he had spent about $300.00 dollars by the time he left Buffalo Live, and after seeing Petitioner at the first bar and offering him a drink, but Petitioner denied. He left with friends heading to another bar, named Pandora's Bar; (see T.T. p.p. 3680369). While exiting the vehicle on Victoria Avenue to go to the next bar, Green saw Petitioner approaching him with a gun in his hand. Than Petitioner fired the gun at Green shooting him, and Green hit the ground, and noticed that someone other than Petitioner was going in his pockets, and Petitioner was wearing a red hoodie; (see T.T. p.p. 369-371).

Green allegedly espressed to Petitioner while being shot on the ground "you got the money and you shot me twice", and what's the problem, just leave me alone, while the victim alleged (ly) remembered one of the defendant's telling Petitioner that he should kill Green because he knew Petitioner's name; (see T.T. p.p. 372-374).

THE BASTON ISSUE IN STATE COURT:

During jury selection the state prosecutor exercised a peremptory challenge on prospective juror Leonard Lannie. Defense counsel raised a proper Baston challenge. The prosecutor gave his reasons for the challenge, and defense counsel argued that the challenge was grounded on pretextual grounds during the Third step of the Baston arguments; (see T.T. p.p. 189-195), and the Supreme Court of Erie County denied the Baston challenge; (see APP. p.p. 72).

The prosecutor gave his reasons for removing Lannie with the peremptory challenge was that he was too young to serve on the jury for this type of criminal case and he lacked experience and that he knew the prosecutor witness Darren Exum, a police officer in this case; (see T.T. p.p. 189-191). At step three defense counsel clearly demonstrated the pretextual nature of the prosecutor' choice for not allowing Lannie to serve of a black defendant trial, since they both were black young men and african-american. Because the prosecutor had prior did the same discriminatory conduct with another potential black juror, that counsel allowed and pass on without any Batson challenge: (see T.T. p.p. 192-93). The Court in

third step determination never addressed that claim, named Maurice Samuel, 46 year old african-american, peremptory challenge used by state prosecutor; (see T.T. 65-67); Derek-Brim, 20 years old african-american, peremptory challenge used by prosecutor; (see T.T. p.p. 68-70. The Supreme Court during its determination in the third step when denying Petitioner's Batson claim never ruled on the merits of the abovementioned peremptory challenges used by prosecutor to strike 'black' potential jurors.

The Supreme Court did not make any valid reasons in her denial on the record that was contrary to the Batson/ Flowers, standards set forth by the United States Supreme Court regarding grounds of 'pretextual' methods employed by the state prosecutor for removal of african-american jurors Lannie, Samuel, and Brim, was a valid Batson challenge made by counsel, and should of been determined by the Court in its ruling regarding the third step of Batson .The court violated the requirements in Batson when it ruled only that Lannie should be dismissed based on the grounds that he knew Police Officer Darren Exum. When the record proves that Lannie did not know Officer Lannie, but his sister was the person that was friends with Officer Exum.

There was also another situation where a white-american juror named Schiferle also indicted that she knew a police witness, only in passing, and not personally; (see T.T. p.p. 109-110). Both siuations was the same, as the record demonstrates. When Schiferle provided fact that she knew Officer Lopez, was the same that Lannie sister knew Officer Exum, and not Lannie, himself, was the same

type of situation under Batson, and for Allen to be entitled to a Baston claim under Flowers, supra. The juror could be from a different race, as Schiferle was. With the abovementioned said regarding the removal of Lannie, and not Schiferle are grounds for a Baston, challenge of a pretextual ground here in this record, and should of warranted the relief sought under Batson in the State court. Lannie unequivocally provided fact that he can be fair and impartial when serving on the jury, even if Lannie sister knew Office Exum; (T.T. p.p. 194), and does provides fact that the state prosecutor reasons for using a peremptory challenge against Lannie was nothing other than pretextual, and the same goes for the other two balck jurors named, Brim and Samuel.

The State court ruling should of never survived the third step of the Batson inquiry, and the same goes for the state prosecutor choices for that removal, was bias and discrimination on the basis. Lannie's youth should of not had any role in the prosecution's oral arguments, because he was a peer of Petitioner' within the requirements to serve, and showed no grounds of biasness to serve on the jury. All his answers was 'unequivocally' to the state prosecutor's question on this record, factually and legally sound. **[Refer to Appendix D trial transcripts record and ruling]**

THE STATE COURT DECISION'S:

On direct appeal to the Fourth Judicial Department, Appellate Court, Petitioner argued, inter alia, that the State Court decision was grounded upon the grounds that Petitioner was

denied Equal protection of the Law under the United States Consti (tution) and New York State Constitution when the trial court improperly allowed the prosecution to use a preemptory challenge to remove a prospective juror without giving a non-pretextual race-neutral reason; (see U.S.Const. Amend. VI & XIV). The Fourth Judicial Department rejected Petitioner argument in "That the court properly denied defendant's Batson challenge to the prosecutor' peremptory strike of an African-American proepective juror. The prosecutor explained that he exercised that strike based upon, inter alia, the prospective juror's acquaintance with a prosecution' witness, and the court properly accepted that explanation as race-neutral and nonpretextual; see People v Grant, 291 AD2d 912, 912, lv. denied 98 NY2d 675). The Appellate court in its decision and order never ruled regarding the United States Supreme Court ruling, and made a decision that are contrary to Batson/Flowers; see Peopel v Allen, 122 AD3d 1423, 4th Dept. (2014).

Permission to appeal to the Court of Appeals was seeked by appellate counsel. Petitioner argued his same Batson challenege to the Court of Appeals in his application pursuant to CPL 460.20[1], and that claim was rejected by Court of Appeals Judge Eugene F. Pigott, Jr. Petitioner did seek for reconsidera (tion) regarding his Baston claim to the same judge, and the argument for reconsideration was denied by Judge Eugene F Pigott, Jr.; (see 25 NY3d 987, (2015), rearguement denied 25 NY3d 1197, (2015). Petitioner argued to the New York State Court of Appeals that he was denied his right to Equal Protection of the law under the United States Constitution and New York State

Constituion when the Court allowed the prosecution to exercise a preemptory challenge against a prospective juror without giving a non-pretextual race-neutral reason. The Petitioner argued the standards and ruling of this Court's decision in Batson v Kentucky, 476 US 79, 89 (1986), and the standards set forth by New York State Court of Appeals in its grounded precedent cases in People v Scott, 70 NY2d 420 (1987)[Where the Court ruled that the minority of the prospective jurors removed by the prosecution were disposed to the prosecutor, and in People v Hecker, 15 NY3d 625, 649-650 (2010[Where the Court ruled that the lower court failed to prpperly decide the defense Batson objection], as herein, thus the Court of Appeals mischaracterizes Allen's positions and misrepresents the factual record with the most salient facts, thus properly did not engage in ruling within the Batson/Flowers ruling of the United States Supreme Court.

Accordingly, the State Court decision did not result in a decision clearly established Federal law, as determined by the Supreme Court of the United States, and or was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding, and the adjudication are contrary to Batson/Snyder, and warrants review on appeal by this Court, wholly.

NOTE: The state court should of determine that the trial court ruling was an abuse of discretion when the trial court over looked the totality of the record when it denied Allen's Batson claim during its ruling in the third step, and reversed the judgment of conviction.

THE BATSON ISSUE IN FEDERAL COURT[HABEAS CORPUS]:

[P]etitioner argued in his Federal Habeas Corpus proceeding that he was denied his Equal Protection Clause in violation of the Fourteenth Amendment of the United States Constitu (tion) that are intertwined with the Sixth Amendment right that guarantees all criminal defendant's a right to a fair trial, without a bias jury.

Petitioner's claims was grounded on the record that was perfected in the State lower court pursuant to Batson, and the objections made by his counsel under the New York State Objection Rule, and there was appellate court review owing to Petitioner regarding his Batson claim. He argued the constitutional issue regarding Batson to the Court of Appeals, and was able to meet the federal exhaustation requirements for Federal Habeas review under Batson v Kentucky, 476 US 79 (1986)[see U.S.Const.Amend. XIV].

His counsel made a valid challenge to the State lower court regarding that juror Leonard Lannie was removed by the State prosecutor upon grounds of racial discrimination, and the record did demonstrate such biasness for discrimination under Batson. Mr. Allen also argued that Lannie removal due to his sister knowing a prosecutor witness, not him, named Police Officer Exum. Lannie provided fact that he can still be fair and impartial when determining the facts of this case. The state prosecutor still invoked his right to a peremptory for the removal of Lannie. The peremptory challenge was granted by the state court over counsel's Baston objection.

There was another situation in relation to a white juror named Schiferle who was chosen to serve on the jury. Mrs. Schiferle also knew a Police Officer named Officer Dawn Lopez, and she was also a prosecutor witness, and law enforcement. Here, in that same situation upon counsel's objection regarding that Mrs. Schiferle be removed because she knew a prosecutor witness was denied by the state court; (see T.T. p.p. 195).

There was other black potential jurors that was removed in violation of equal protection clause, that was not mentioned during the state court ruling in the third step of the court's Batson ruling, but was devoided in the record by the State court biasness against Allen.

Mr. Allen argued all the abovementioned to the Federal Habeas Court, because it was preserved pursuant to the exhaustation requirements for 28 USC 2254 relief, and should of been considered by the District Court in Petitioner favor that a Batson violation had occurred during his criminal trial. The Petitioner relied on this Court grounded precedent ruling in Batson; quoting Snyder v Louisiana, 552 US 472, 478 (2008) all was rejected by the District Court on a mistake of facts and law, thus contrary to the cited ruling in Batson/Snyder standards for a viable Batson claim, was met by Petitioner's brief filed to the District Court for the relief sought. Petitioner proved that discriminatory played a major role in his criminal trial, and that both his Fourteenth and Sixth Amendment to the United States Constitution was violated by this prejudicial conduct of both the state prosecutor and the State lower court, acting as a unit for discrimination against a black defendant.

RESPONENT'S BRIEF:

The Respondent in its brief to the District Court mischaracterizes Petitioner's positions regarding the misconduct that occurred with Lannie, Schiferle, and other potential black jurors, and misrepresents the factual record in state court that was made regarding the Batson objection and grounds that were relevant and material in his favor, with the most salient facts cited and quoted for the relief sought. The Respondent failed to engage in demonstrating the relevance of Lannie, Schiferle, and the two other black male potential jurors were all within the requirements of the Supreme Court Batson ruling for racial discrimin (ation), and warranted the District Court to conduct an evidentiary hearing on the substantive merits.

The Respondent short 2½ page Batson argument should of failed in the District Court. First, because Lannie should of not been removed pursuant to the Batson/Snyder standards set forth by the Supreme court, this Court. Second, the trial court was bias and acting on behalf of the State, when he allowed Schiferle to serve on the trial, but would not allow Lannie to serve on the trial for the same grounds. Because both potential jurors knew of a police officer that was testifing on behalf of the state prosecutor. The abovementioned was clearly revealed and demonstrated to the District Court and the Court of Appeals for the Second Circuit for review in granting Petitioner the relief sought pursuant to Batson, but denied on a mistake of facts and law recorded, thus contrary to the grounded precedent ruling in Batson/Snyder, as fully argued below in depth.

The Respondent in its brief misapplied the Batson requirements to Petitioner's case, and failed to make the correct mention and citations to the record and necessary ruling in Snyder/Batson, and by-passed critical steps when arguing a Batson claim. The District Court should of denied the Respondent's short brief arguments, because they were indeed contrary to those in Batson/Snyder, as argued more fully, below.

The Respondent concedes in its brief that Police Officer Exum was friends with Lannie sister, and not him in it's brief, and the claim that Lannie could not handle a case of this 'magnitude' should of been rejected by the State Court, and the District Court, wholly, considering that Mrs. Schiferle was willing and able to serve on the jury, against the defense 'objection'. Mrs. Schiferle knowing Police Officer Dawn Lopez was the same issue with this alleged claim that Lannie knew Officer Exum, was bogus on its face grounded on a claim of racial discrimination by the state prosecutor. This Court must hold the State accountable for this type of discrimination just to obtain its criminal convic (tion), thus violated Petitioner's Equal Protection Clause protected by the Fourteenth Amendment of the United States Constitution. The prosecutor using this same type of rational to excuse black potential jurors, must be cited with racial discrimination within the Batson standards set forth by this Court in 1986, and in Flowers in 2019, are well-settled Supreme Court standards. Petitioner should be entitled to the same relief as Batson/Flowers.

GROUNDS FOR GRANTING THE WRIT OF CERTIORARI:

Introduction:

[A] criminal defendant raising Baston challenge are allowed to present a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race, where...statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case, and evidence of a prosecutor' disparate questioning and investigation of black prospective jurors' in the case, side by side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case, [a] prosecutor's misrepresentations of the record when defending the strikes during the Batson hearing, [a] hearing court must fully determine the relevant history of the State's peremptory strikes in past cases, and other relevant and material circumstances that bear upon the issue of race discrimination[see U.S.Const.Amend. XIV].

[C]omparing prospective jurors who was struck and not struck can be an important step in determining whether a Batson violation occurred, as the comparison can suggest that the prosecutor' proffered explanations for striking black prospective jurors were a pretext for discrimination[see U.S.Const.Amend. VI & XIV], must be protected by all Courts of the United States to ensure that a person of color Civil Rights are being protected; see Pierson v Ray, 386 US 547 (1967)[see Civil Rights Act Bill of 1964].

The State In its Federal filing mischaracterizes Allen's positions and misrepresents the factual record and requirements for a Batson claim and misapplied the facts and law in this matter:

Under the United States Supreme Court case Batson v Kentucky, 476 US 79, 89 (1986), and this Court's most recent ruling in Flowers v Mississippi, 139 S.Ct. 2228 (2019) pursuant to Batson standards once a prima facia case of discrimination has been shown by a criminal defendant, the State must provide race-neutral reasons for its peremptory strikes. The trial judge than must determine whether the prosecutor's stated reasons were actual reasons or instead were a 'pretext' for discrimination. This Court in Batson rejected the State's four arguments. First, the Batson court rejected the idea that a defendant must demonstrate a history of racially discriminatory strikes in order to make out a claim of race discrimination. Second, the Baston court rejected the argument that a prosecutor could strike a black juror on an assumption or belief that the black juror would favor a black defendant. Third, the Batson court rejected the argument that race based peremptories should be permissible because black, white, Asian, and Hispanic defendants and jurors were all 'equally' subject to race-based discrimination, and lastly, the Batson court rejected the State's argument that race-based peremptories are permissible because both the prosecution and defense could employ them in any individual case and in essence balance things out; (id. at 2237-2242).

Here in this case, the State and the State court when ruling on the merits of Petitioner's Baston claim during the third step both did not compare prospective white juror Schiferle who was not struck for knowing Police Officer Lopez; (see T.T. p.p. 109-110), but than struck potential prospective juror Leonard Lannie for knowing Police Officer Exum, and in fact it was his sister that was friends with Officer Exum, and not the african-american juror L. Lannie. The abovementioned was an important step in determining whether there was a Batson violation committed by the State prosecutor. The state prosecutor never even argued the abovementioned fact during the third step, nor in any of the briefs submitted to the State Appellate Court, and Court of Appeals; see Snyder v Louisiana, 552 US 472, 483-84.

In this case a black juror was struck named Leonard Lannie, the State says in part, because he was (23) years old, a student at Medaille College, and worked as a grocery store clerk. That he allegedly knew Officer Darren Exum, one of the State' witnesses, but was a friend of Lannie sister, and not a friend of Lannie; (see T.T. p.p. 162). The State was also concern that Lannie lacked the necessary life experience to 'handle a case of this magnitude'; (see T.T. p.p. 189-191), and that he might have issues with Officer Exum that he neglected to mention, and the State prosecutor used one of his peremptory strikes to remove Lannie.

But there was white potential juror Schiferle who also gave factual proof that she knew Police Officer Lopez in pass (ing): (see T.T. p.p. 109-110). Here these two potential jurors was

NOTE: Refer to Appendix D for trial transcripts noted record for Batson issue review.

based upon the same facts, because they both allegedly knew people from law enforcement, but one was white[Schiferle], and another was black[Lannie], but instead the prosecutor did not use one of his peremptory strikes for this white juror Schiferle, and she was able to serve on the jury. There was no difference factually and legally regarding the jurors. Does give cause that the State peremptory strike for the removal of Lannie was grounded upon the facts of race-discrimination as ruled in Batson/Flowers, and should of been ruled on by the State court in its determination during the third step of the Batson ruling, and was devoided of the record; (see T.T. p.p. 181-196).

There were other black potential jurors that the state prosecutor used illegal peremptory strikes against that was based upon the same grounds of race-discrimination: (1) Maurice Samuel; (see T.T. p.p. 65-66); (2) Derek Brim; (see T.T. p.p. 68-70[20 years old])[Maurice Samuel 46 years old]). The State Court rejected the defense objection under Batson, and granted the prosecutor's race-neutral explanation, and found that Lannie knowing Officer Exum pre-se, "is a legitimate race-neutral basis for a peremptory challenge"; (see T.T. p.p. 195). But in the state court's ruling it never determine the merits of the other grounds listed abovementioned regarding Schiferele being white and knowing Officer Lopez, and using two peremptory challenges to prevent two other black jurors from serving on the jury, named Maurice Samuel, 46 years old and Derek Brim, 20 years old. The State Court devoided the record in its ruling pursuant to Batson. Had the State Court

NOTE: All the mentioned trial transcripts are annexed in Appendix D for this Court's sufficient review regarding a Batson violation.

followed the mandated requirements set forth by this Court in its precendent grounded ruling in Batson/Snyder; (id. at 483-84), it would of granted the defense Baston hearing challenge, and denied the state-prosecutor race-neutral explanation as ruled by the Court of Appeals of New York State in its ruling in People v Hecker, 15 NY3d 625, 652 (2010)[Where the New York State Court of Appeals ruled that a defendant is entitled to a Batson violation if there is a persistent pattern by the state prosecutor of apparent race-discrimination with his peremptory strikes to get rid of potential black jurors], and this was the case as demonstrated abovementioned, herein; see Flowers v Mississippi, 139 S.Ct 2228 (2019)[id. at 2244]; quoting Snyder v Louisiana, 552 US 472, 483-84. [refer to Court of Appeals ruling in Hecker, supra.]

It was the state trial judge duties to enforce the Batson requirements in Allen's trial; (see id. at 97, 99 n. 22). Because the judges in the United States operate at the front lines of American justice. In criminal trials, discrimination has no place, the trial judges possess the primary responsibility to enfore Batson standards in every trial, and here the trial judge dropped the ball, and rolled Petitioner under the yellow school bus. This State judge failed Allen's Sixth Amendment right to a fair and not bias trial when it violated his Equal Protection Clause in order to prevent racial discrimination from seeping into the jury selection process. [see Civil Rights Act of 1964]

As this Court ruled in its precedent Batson case, and later reiterated in Flowers[same], supra., once a prima facie case

[o]f [racial] discrimination has been established, the prosecutor must provide race-neutral reasons for the strikes. The trial court must consider the prosecution's race-neutral explanations in light of all the other relevant facts and circumstances, and this was not done by the State judge in his duties in order to protect Allen's Batson rights that was established by this Court in 1986, and the same in Flowers in 2019, are well-settled ruling and laws, rendering that the State court decision are contrary to clearly established Supreme Court laws and ruling, and warrants this Court to grant this instant motion for Certiorari.

The trial court did not rule accordance to the arguments set forth on the record, because defense counsel did demonstrate the pretextual nature of the prosecutor's reasons, and the prosecutor himself was aware of the same situation with juror Schiferle when both attorneys allowed her to sit and serve on the jury after she conceded that she knew Police Officer Lopez, and the prosecutor was being bias and vindictiveness in his peremptory strike against Lannie, after both attorneys allowed Schiferle to serve. Here, Lannie did provide unequivocal reasons why he can serve and be fair and impartial in this matter. And Lannie explained to the record factual that he knew of Officer Exum from his sister, same as Juror Schiferle that knew of Officer Lopez; (see T.T. p.p. 109-110). Here, the state judge did not properly credit [Leonard Lannie] credibility, and defendant did prove that the prosecutor's demeanor was discriminatory intent; see Synder, 552 US at 477. This here was the duty of the State trial judge. **[see APP. p.p. 56-72]**

THE DISTRICT COURT/COURT OF APEALS BOTH FAILED TO ENGAGE WITH THE RECORD BASED FACTS AND ALL THE RELEVANT MATERIAL SALIENT FACTS IN THE STATE COURT RECORD, TOTALITY THAT WOULD OF DETERMINE THAT THERE WAS THE PROSECUTOR INTENT TO DISCRIMINATE AGAINST PETITIONER IN VIOLATION OF BATSON STANDARDS:

Here, Federal Court of Appeals for the Second Circuit and District Court decision was contrary to the record grounded facts, and the Supreme Court ruling in this Court. The State in denying Petitioner's Batson claim violated its own standards in People v Hecker, 15 NY3d 625 (2010). The Federal Courts should of made the correct choice with the record in surrendering its final decision pursuant to Batson. Because the ulimate inquiry is whether the State of New York was "motivated in substantial part by discrim (inatory) intent", as explained abovementioned; see Foster, 578 US _____, 136 S.Ct. 1737; Snyder, 552 US 472; Miller-El, II, 545 US 231; and Batson, 476 US 79, 89 (1986)[internal quotation marks omitted][see Appendix A & B].

The review by the District Court was an abuse of discretion on its part, and should of not been upheld by the Court of Appeals for the Second Circuit. Because the Federal courts reviewed the same set of facts in order to make a valid determina (tion) that the State Court decision was grounded of a misapplied application of the facts and laws ruled in its decision. Since this Court's decision was based on the record and whether the State court's ruling was evaluated on credibility of the state record and relevant facts made in the record in the lower court; see Batson, 476 US at 98 n.21, and whether the appellate court ruling was "highly deferential"; Snyder, 552 US at 479. Whether the intent for discrimination was in the record for review by the

Appellate Court, and argued to the Court of Appeals in counsel's leave to appeal, because there was a question of law that ought to be reviewed by the Court of Appeals regarding Petitioner's Batson claim; (see Appendix A 27-31). Here, the District Court and or Court Appeals should of determined from the salient facts and totality of the record during the voir doir hearing regarding black potential jurors that there was an issue of 'discriminatory intent' by the State prosecutor that discriminated against black potential jurors in this matter, as demonstrated abovementioned; Because the lower court's ruling under Batson were clearly wrong, improper, and erroneous; (id. at 477, 128 S.Ct. 1203).

Accordingly, the ruling made by the District Court on the record grounded salient facts that went over-looked by the State court are not in accordance to the grounded principles set forth in Batson/Snyder, thus violates Petitioner's equal protection clause of the United States Constitution, and warrants further review on appeal by this Court in granting this Writ of Certiorari. [see U.S.Const.Amend. XIV]

Lastly, the Constitution forbids striking even a single prospective juror for discriminatory reasons; see Foster, 578 US ____, 136 S.Ct. at 1747. The question for this Court on appeal is whether the District Court abuse of discretion on its part in concluding that the State was not 'motivated in substantial part by discriminatory intent' when exercising peremptory strikes at Allen's trial; (id. at 136 S.Ct. at 1754[internal quotation marks omitted]; see also Snyder, 552 US at 1203. And this Court owe

no deference to the New York State Court, as distinct from deference to the New York State trial court. This matter should be remanded back to the Western District Court of New York, and to be determine by this Court on th merits on this Writ of Certiorari.

This Court must determine the merits of allowing Schiferle to serve on the jury as an white juror, and not allowing Lannie to serve as a black juror, and if the prosecutor violated Baston when he used a peremptory challenge strike for Lannie who knew of Officer Exum from his sister, and not any peremptory stike for Schiferle who also knew of a Police Officer Lopez was qualified to serve on the jury, as Lannie was not under the same set of facts and circumstances. And whether the prosecutor's peremptory strikes for two other african-american jurors named Maurice Samuel and Derek Brim was struck for discriminatory intent by the state prosecutor, thus violated Petitioner's Civil Right Act Bill of 1964; Pierson v Ray, 386 US 547 (1967), while allowing Schiferle and other white jurors to serve on Allen's jury, and he was convict (ed). This Court must address each claim on Certiorari appeal. This Court must review the entire voir doir record in order to determine the merits with the abovementioned whether a Batson violation was committed by the state prosecutor, and the Petitioner says "Yes" to that question of fact and law that ought to be reviewed by this Court. In order to review a question of law this Court must review a pure question of fact, cited, herein.**[see Appendix D Batson Hear.]**

Racial discrimination in the administration of justice is intoler (able):

Racial discrimination in the administartion of justice

"strikes at the core concerns of the Fourteenth Amendment and at the fundamental valuse of our society and our legal system"; see Rose v Mitchell, 443 US 545, 564 (1979). Becuase "the power of the State weighs most heavily upon the individual" in criminal cases; see McLaughlin v Flordia, 379 US 184, 193 (1964); "[d] (iscrimination) on the basis of race, odious in all respects, is especially pernicious" in that context; see Rose, 443 US at 555; see also Pena-Rodriguez v Colorado, 137 S.Ct. 855, 868 (2017)[quoting this language from Rose]; Buck v Davis, 137 S.Ct. 759, 778 (2017)[same].

Therefore, in criminal cases courts "must be especially senestive to the policies of the Equal Protection Clause"; McLaughlin 379 US at 192. This is nowhere more true than in jury trial selections. The jury's indispensable role as 'a criminal defendant fundamental ' 'protection of life and liberty against race or color prejudice'; Pena-Rodriguz, 137 S.Ct. at 868(quoting McClesky v Kemp, 481 US 279, 310 (1987)[quoting in turn, Strauder v West Virigina, 100 US 303, 309 (1879), means that racial discrimination in jury selection threatens the gravest of harms to criminal defen (dants).

In a case such as Allen's, the involved prespective jurors, too, stand to be harm and suffered by racial discrimination. For that reason, prohibitions against it were 'designed to serve multiple ends' only one of which was to protect individual defen (dants) from discrimination in the jury selection process; see Powers v Ohio, 499 US 400, 406 (1991)[internal citations omitted].

Here, the very mere fact that african-american pot (ential) jurors [members of a particular race] are singled out and expressly denied...all right to participate in the administra (tion) of jutice of law, as jurors and peers, because of their color, though they are a citizen, and may be in other respects fully qualified to serve, is practically a brand upon them, affixed by the law, as assertion of their inferiority...Strauder, 100 US at 308.

There was the harm in this case facing Mr. Allen regarding race-discrimination in his criminal trial set forth by the state prosecutor, and it was [conduct] that was aided and abetted by the State process and judge affecting the composition of the jury, and his right to a fair trial within the Sixth Amendment context of the United States Constitution. This does extends beyond inflicted on the defendant and the excluded juror to touch the entire community; see Batson, 476 US at 87. Such discrimination in a existing case "destroys the apperance of justice and thereby casts doubt on the integrity of the judicial process, as a whole; Rose, 443 US at 556; Buck, 137 S.Ct. at 778[Such discrimination injures not just the defendant but the law as an institution...the interest of the community at large, and... the democratic ideal reflected in the process of our courts; quoting Rose, supra.

The abovementioned misconduct and fraud, in turns, undermines "public confidence" in the criminal justice system and fosters community suspicion that a verdict may not have been

given in accordance with the law by persons who are fair and impartial, and that a criminal defendant was convicted by a bias jury; see Powers, 499 US at 413. Simply put, active discrimination by a state prosecutor, "during jury selection" invites cynicism respecting the jury's neutrality and its obligation to adhere to the law and it "cannot be tolerated", (id. at 412.). Here, the State Court trial judge where the record was made failed to diligently review all the relevant and material evidence that a peremptory strike was racially discriminatory against for (3) potential black jurors in this case named, Leonard Lannie, 23 years old, Maurice Samuel, 46 years old, and Derek Brim, 20 years old.

This Court ruled in Strauder, more than a century ago[100 hundred years], that a State denies an African-American defendant equal protection of the laws under the Fourteenth Amend (ment) of the United States Constitution, when it puts a black person on trial before a jury that is all white, and which of members of his race have been purposefully exculded, as herein. Batson, ruled by this Court in 1986, held that a potential juror may not be excluded from jury service through a peremptory challenge based on racial animosity or steretypes and more than he may be excluded from the venire for such reasons; Batson, 476 US at 88. The proof provides in this case that the state prosecutor was omitting black potential jurors that would create a potential biasness in his mind based on the assumption that a black juror "will be bias in a particular case simply because Allen was black" (id. at 97).

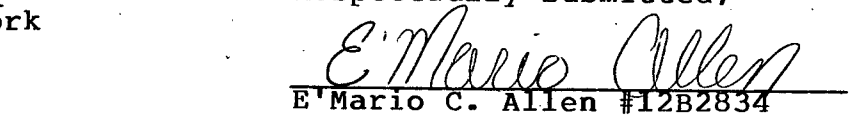
NOTE: This Court ruled in Pierson that when a Court violates a defendant right that he are entitled to does violates his Civil Rights Act Bill of 1964.

CONCLUSION

For the foregoing reasons, Petitioner Allen prays for an order that this Court grant Certiorari, and allow him to file new briefs in this matter to reserve the decision of the District Court of the Western District, and or the Court of Appeals for the Second Circuit, and remand this matter back to the District Court to conduct an evidentiary hearing on his Batson claim under 28 USC 2254, because there is a constitutional issue that ought to be reviewed by this Court on Certiorari.

DATED: November 1st, 2021
Attica, New York

Respectfully submitted,



E'Mario C. Allen #12B2834
Attica Correctional Facility
P.O.Box 149
Attica, New York 14011

xc: Scott Harris, Clerk
United States Supreme Court

John J. Flynn, Esq.
Erie County District Attorney

File/Allen

Petitioner guilty on Counts II-V. The court granted a mistrial as to Count I, and later dismissed that count of the Indictment.

On August 28, 2012, the trial court sentenced Petitioner, as noted earlier, on Counts 2-5 of the Indictment, to determinate prison for terms of 25 years, 15 years, 25 years and 25 years, respectively, with the three 25-year sentences to run concurrently to each other but consecutively to the 15-year sentence, for a total sentence of 40 years.

Petitioner appealed his convictions, asserting the following grounds: 1) the conviction for Attempted Assault in the First Degree was against the weight of the evidence; 2) the trial court erroneously denied the motion for a mistrial based on admission of the taped statement of Petitioner's questioning "which featured the officer's badgering of [Petitioner] and ridiculing his silence," and trial counsel was ineffective for failing to raise the interrogating detective's "bullying manner of interrogation and the comments of the detective [about Petitioner's] silence"; 3) Petitioner was denied equal protection under the constitutions of the United States and the State of New York when the court allowed the prosecutor to use a peremptory challenged to remove a prospective juror without giving a non-pretextual race-neutral reason; 4) the court erred in finding that a jailhouse informant was not an agent of the prosecution; 5) the court failed to properly instruct the jury concerning the verdict sheet; 6) the court failed to rule on all parts of Petitioner's motion to dismiss the indictment; and 7) the sentences should be concurrent and are harsh and excessive.

On November 21, 2014, the Fourth Department unanimously denied Petitioner's appeal and affirmed his convictions and sentence.

On December 17, 2014, Petitioner sought leave to appeal from the New York Court of Appeals primarily on two issues: 1) the Fourth Department erred in denying the equal protection/*Batson* challenge; and 2) trial counsel was ineffective in making his *Batson* challenge,

because he "failed to note that a similarly situated white juror [(Carol Schiferle ("Schiferle"))] who knew a police witness was allowed on the jury by the prosecutor." The second of these arguments was not raised by Petitioner before the Appellate Division. In addition to those arguments, Petitioner included a blanket statement asking the Court of Appeals to a review every other issue in his brief to the Fourth Department.[22]

On April 7, 2015, the Court of Appeals denied leave to appeal.

Petitioner moved for reconsideration, but on July 14, 2015, the Court of Appeals denied the application for reconsideration.

On July 22, 2016, Petitioner filed a motion for writ of error coram nobis with the Fourth Department, alleging ineffective assistance of appellate counsel. In particular, Petitioner argued that his appellate attorney had failed to raise issues of ineffective assistance by trial counsel, even though Petitioner had asked him to do so. In the coram nobis motion, Petitioner alleged that trial counsel had provided ineffective assistance in the following ways: 1) with respect to the charge of Attempted Assault in the First Degree, he never discussed with Petitioner "the possibility of requesting a charge down to the lesser included offense of Attempted Assault in the Third Degree"; 2) he erred, during the prosecution's examination of Green, by asking the trial court to declare Green a hostile witness and appoint him counsel, and by failing to object to aspects of Green's testimony.

[22] *See, Jordan v. Lefevre*, 206 F.3d 196, 198 (2d Cir. 2000) ("In this case, Jordan forcefully argued his *Batson* claim in the first three paragraphs of his application for leave, but made no reference to his other claims. In the fourth paragraph of his counsel's letter to the New York Court of Appeals he asked that he be given permission to appeal "[f]or all of these reasons and the reasons set forth in his Appellate Division briefs." Arguing a single claim at length and making only passing reference to possible other claims to be found in the attached briefs does not fairly apprise the state court of those remaining claims.").

30

On September 30, 2016, the Fourth Department denied the motion for writ of error coram nobis.

On November 10, 2016, Petitioner sought leave to appeal to the Court of Appeals. However, on January 23, 2017, the Court of Appeals denied that application.

On January 31, 2017, Petitioner filed the subject habeas petition, proceeding *pro se*. As indicated above, the Petition purports to set forth three separate grounds for relief: 1) "the trial court erroneously denied the defense's *Batson* objection"; 2) "denial of effective assistance of counsel"; and 3) "the trial court violated Petitioner's right to due process and to remain silent." With regard to Claim 1, Petitioner alleges that the trial court erred in denying his *Batson* challenge where the Prosecutor used a peremptory challenge to excuse an African-American juror, while leaving two other jurors (Wutz and Schiferle) who were similarly situated except that they were white. With regard to Claim 2, Petitioner alleges that his trial defense attorney was ineffective in the following respects: At the *Huntley* hearing he "failed to raise the bullying manner of interrogation and comments by detective Cedric Holloway; he failed to ask for a jury charge on the voluntariness of Petitioner's statement to police; he failed, when making his *Batson* challenge, to argue that Petitioner was being treating differently than a similarly-situated white juror; he erred in requesting that prosecution witness Aaron Green be declared a hostile witness, "which led the prosecution to elicit inadmissible and highly prejudicial testimony"; and he "never discussed with Petitioner the possibility of requesting a charge down to the lesser included offense of Attempted Assault in the Third Degree given the weak and insubstantial evidence on Count Three of [the Indictment charging] Attempted Assault in the First Degree." As for Claim 3, Petitioner alleges that the trial court erred, since

> [t]he tape of the statement by Petitioner taken by Detective Holloway was admitted into evidence at trial [and] was played in its entirety at trial over defense counsel's objection in an unredacted state[ment]. The Prosecution placed a portion of the

> taped statement to the jury during summation despite the detectives ridiculing and mocking of Petitioner's silence to cajole Petitioner to break that silence and answer his questions and shifting the burden to Petitioner to explain himself.

Petition, ECF No. 1 at p. 21.

On June 16, 2017, Respondent filed an Answer and Memorandum of Law. (ECF Nos. 5, 6). Respondent contends that the Petition is untimely; that the trial court did not err in denying the *Batson* challenge since the Prosecutor provided two "permissible, race-neutral reasons for his peremptory challenge of an African-American juror, and Petitioner failed to establish that the explanation was a pretext for discrimination"; that the alleged instances of ineffective assistance of counsel are unexhausted except for one – counsel's failure to challenge the voluntariness of Petitioner's statement – and as to that claim counsel was not ineffective; and the trial court's admission of the audiotape of Petitioner's interrogation, in which a detective made "comments critical of Petitioner's silence," did not violate Petitioner's right to remain silent, since Petitioner waived his *Miranda* rights and agreed to speak with police, since the admission of the tape was not fundamentally unfair, and since the trial court gave "a limiting instruction to curtail any possible prejudice."

On July 17, 2017, Petitioner field a Traverse/Reply. (ECF No. 8) in which he asserts that Respondent's arguments are "baseless." In particular, Petitioner contends that Respondent's argument that the Petition is untimely is incorrect, based on the timing of Petitioner's request for reconsideration that he filed with the New York Court of Appeals.

The Court has considered the parties' submissions and the entire record. Pursuant to Rule 8 of Rules Governing Habeas Corpus cases under Section 2254 in the United States District Courts and upon review of the answer, transcript and record, the Court determines that

22

an evidentiary hearing is not required. After considering the parties' submissions and the entire record, the petition is denied for the reasons set forth below.

DISCUSSION

Petitioner's *Pro Se* Status

Since Petitioner is proceeding *pro se*, the Court has construed his submissions liberally, "to raise the strongest arguments that they suggest." *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994).

Section 2254 Principles

Petitioner brings this habeas corpus petition pursuant to 28 U.S.C. § 2254, and the general legal principles applicable to such a claim are well settled.

> As amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and interpreted by the Supreme Court, 28 U.S.C. § 2254—the statutory provision authorizing federal courts to provide habeas corpus relief to prisoners in state custody—is "part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 787, 178 L.Ed.2d 624 (2011). A number of requirements and doctrines . . . ensure the centrality of the state courts in this arena. First, the exhaustion requirement ensures that state prisoners present their constitutional claims to the state courts in the first instance. *See id.* (citing 28 U.S.C. § 2254(b)). Should the state court reject a federal claim on procedural grounds, the procedural default doctrine bars further federal review of the claim, subject to certain well-established exceptions. *See generally Wainwright v. Sykes*, 433 U.S. 72, 82–84, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). If the state court denies a federal claim on the merits, then the provisions of § 2254(d) come into play and prohibit federal habeas relief unless the state court's decision was either: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court." 28 U.S.C. § 2254(d)(1)-(2). Finally, when conducting its review under § 2254(d), the federal court is generally confined to the record before the state court that adjudicated the claim. *See Cullen v. Pinholster*, —— U.S. ——, 131 S.Ct. 1388, 1398–99, 179 L.Ed.2d 557 (2011).

2

Jackson v. Conway, 763 F.3d 115, 132 (2d Cir. 2014). As just mentioned, regarding claims that were decided on the merits by state courts,

> a federal court may grant habeas corpus relief to a state prisoner on a claim that was adjudicated on the merits in state court only if it concludes that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2).
>
> A state court decision is contrary to clearly established Federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to the Supreme Court's result.
>
> A state court decision involves an unreasonable application of clearly established Federal law when the state court correctly identifies the governing legal principle but unreasonably applies it to the facts of the particular case. To meet that standard, the state court's decision must be so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. It is well established in this circuit that the objectively unreasonable standard of § 2254(d)(1) means that a petitioner must identify some increment of incorrectness beyond error in order to obtain habeas relief.

Santana v. Capra, No. 15-CV-1818 (JGK), 2018 WL 369773, at *7–8 (S.D.N.Y. Jan. 11, 2018) (Koeltl, J.) (citations and internal quotation marks omitted).

The Timeliness of the Petition

Respondent contends that the Petition is untimely, and the legal principles generally applicable to this issue are well settled:

> Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), habeas petitions must be filed within one year of the date on which the petitioner's state judgment became final. 28 U.S.C. § 2244(d)(1). A judgment becomes final "after the denial of certiorari [by the U.S. Supreme Court] or the expiration of time for seeking certiorari." *Williams v. Artuz*, 237 F.3d 147, 151 (2d Cir. 2001).

14

> Consequently, state judgments are deemed final if no petition for a writ of certiorari has been filed with the Supreme Court within 90 days. *See Ross v. Artuz*, 150 F.3d 97, 98 (2d Cir. 1998); Sup. Ct. R. 13.
>
> The filing of certain state court collateral attacks on a judgment, including New York *coram nobis* petitions, tolls AEDPA's one-year statute of limitations. 28 U.S.C. § 2244(d)(2); *see Smith v. McGinnis*, 208 F.3d 13, 15–16 (2d Cir. 2000). "[P]roper calculation of § 2244(d)(2)'s tolling provision excludes time during which properly filed state relief applications are pending but does not reset the date from which the one-year statute of limitations begins to run." *Smith*, 208 F.3d at 16 (emphases added). In "rare and exceptional" circumstances, AEDPA's one-year statute of limitations can be equitably tolled to permit the filing of an otherwise time-barred petition. *Id.* at 17 (citation omitted). Courts must decide whether equitable tolling is applicable on a "case-by-case basis," while still being "governed by rules and precedents" and "draw[ing] upon decisions made in other similar cases for guidance." *Holland v. Florida*, 560 U.S. 631, 649–50, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010) (citations omitted). To invoke the doctrine of equitable tolling, a petitioner bears the burden of establishing two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005).

Davis v. Lempke, 767 F. App'x 151, 152–53 (2d Cir. 2019).

Here, as discussed earlier, with regard to Petitioner's direct appeal, the New York Court of Appeals denied his application for leave to appeal on April 7, 2015, and then denied his motion for reconsideration on July 14, 2015. In arguing that the Petition is untimely, Respondent does not mention the request for reconsideration. Rather, Respondent states: "In petitioner's case, leave to appeal was denied on April 27, 2015, meaning that the conviction became final on July 26, 2015 (90 days later)."[23] (Respondent inaccurately uses the date of April 27, 2015, when the actual date of the initial denial by the Court of Appeals was April 7, 2015). Consequently, a preliminary issue is what effect, if any, did Petitioner's request for reconsideration have on the date that his conviction became "final" for purposes of 28 U.S.C. § 2244(d)(1)(A)?

[23] ECF No. 6 at p. 8.

As this Court has previously held, the conviction becomes final ninety days after the Court of Appeals denies a motion for reconsideration. *Brockway v. Burge*, 710 F. Supp. 2d 314, 321–22 (W.D.N.Y. 2010) ("As respondent points out, the Appellate Division affirmed the judgment of conviction on November 13, 1998, and the New York Court of Appeals denied Brockway's application for reconsideration on June 22, 1999. Petitioner's conviction became "final" ninety (90) days later, on September 20, 1999, the date on which his time to seek a writ of certiorari from the United States Supreme Court expired."); *see also, Hizbullahankhamon v. Walker*, 255 F.3d 65, 68 (2d Cir. 2001) ("On direct appeal, the Appellate Division, First Department, unanimously affirmed the conviction, *People v. Johnson*, 181 A.D.2d 509, 580 N.Y.S.2d 357 (1st Dep't 1992). The Court of Appeals denied petitioner's application for leave to appeal, *People v. Johnson*, 80 N.Y.2d 833, 587 N.Y.S.2d 917, 600 N.E.2d 644 (1992), *and, on December 10, 1992, denied his application for reconsideration*, *People v. Johnson*, 81 N.Y.2d 763, 594 N.Y.S.2d 725, 610 N.E.2d 398 (1992). Petitioner's conviction thus became final on March 10, 1993, the date on which the time to petition for certiorari to the Supreme Court of the United States expired. *See Ross v. Artuz*, 150 F.3d 97, 98 (2d Cir.1998).") (emphasis added).

Consequently, Petitioner's conviction became "final" on October 12, 2015, which was ninety days after the Court of Appeals denied his application for reconsideration. Petitioner then had one year in which to file an application under 28 U.S.C. § 2254.

The 1-year clock then ran for more than nine months, from October 13, 2015, until July 22, 2016, when Petitioner filed his motion for writ of error coram nobis, at which point the clock was tolled pursuant to § 2244(d)(2). The clock remained tolled until January 23, 2017, when the New York Court of Appeals denied Petitioner's request for leave to appeal the Fourth Department's denial of his coram nobis application. At that time, Petitioner still had more than two months remaining on his 1-year clock. On January 31, 2017, eight days after the Court of

26

Appeals denied his application for leave to appeal, Petitioner filed this action. Accordingly, the action is timely as it was filed within one year after Petitioner's conviction became final.

Respondent disagrees and contends that the clock was tolled only until September 30, 2016, when the Appellate Division denied the motion for writ of error coram nobis. On that point, Respondent asserts that, "[t]he limitation period was not tolled . . . during the interval between the denial of the motion and the denial of petitioner's application [to the Court of Appeals] for leave to appeal. *Hizbullahankhamon v Walker*, 255 F3d 65, 71-72(2nd Cir 2001), cert 536 US 925." However, Respondent's reliance on *Hizbullahankhamon* is misplaced, since at the time that decision was issued, a defendant had no right under New York law to apply to the Court of Appeals for leave to appeal from a denial of a coram nobis motion. *Id.*, 255 F.3d at 69-72. New York State law was subsequently amended, and now defendants are permitted to seek such relief from the Court of Appeals.[24] Consequently, Petitioner's coram nobis motion remained pending, within the meaning of § 2244(d)(2), until January 23, 2017.

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[24] *See, McPherson v. Greiner*, No. 02 CIV.2726 DLC AJP, 2003 WL 22405449, at *12 (S.D.N.Y. Oct. 22, 2003) ("In 2002, the New York Criminal Procedure Law was amended to allow permissive appeals to the New York Court of Appeals from the denial of coram nobis petitions. C.P.L. § 450.90(1)."); *see also, Witherspoon v. New York*, No. 11-CV-5815 DLI, 2015 WL 5676020, at *2 (E.D.N.Y. Sept. 24, 2015) ("In *Hizbullahankhamon v. Walker*, the Second Circuit held that "the one-year limitations period was not tolled during the intervals between [the coram nobis] denials [by the Appellate Division] and the dates on which the Court of Appeals dismissed Petitioner's applications for leave to appeal these denials" because New York law did not authorize appeals from coram nobis denials. 255 F.3d 65, 70–71 (2d Cir.2001). However, in 2002, New York law changed to allow the Court of Appeals to consider requests for leave to appeal coram nobis denials. N .Y. C.P.L. § 450.90(1); *see also People v. Stultz*, 2 N.Y.3d 277, 281, 778 N.Y.S.2d 431, 810 N.E.2d 883 (2004) (recognizing that New York State law "authoriz[es] appeals (by permission) to this Court from appellate orders granting or denying coram nobis relief based on claims of ineffective assistance or wrongful deprivation."). Subsequently, the Second Circuit held that "a § 440.10 motion is 'pending' for purposes of AEDPA at least from the time it is filed through the time in which the Petitioner could file an application for a certificate for leave to appeal the Appellate Division's denial of the motion." *Saunders v. Senkowski*, 587 F.3d 543, 548 (2d Cir.2009). Although the Second Circuit has yet to address whether the limitation period is tolled during the 30–day period in which the denial of a coram nobis petition is appealable, the reasoning of Saunders suggests that AEDPA's one-year limitation period is tolled during this period."); *Mohsin v. Ebert*, 626 F. Supp. 2d 280, 294 (E.D.N.Y. 2009) ("Mohsin filed his Coram Nobis Motion on September 1, 2004, tolling the statute of limitations 321 days after his conviction became final. The court denied the Coram Nobis Motion on March 21, 2005. Under earlier case law, that event would have ended the tolling period for purposes of the one-year statute of limitations, on the ground that the denial of such a motion is not appealable. See, e.g., *Hizbullahankhamon v. Walker*, 255 F.3d 65, 70–71 (2d Cir.2001) (citing cases). However, a change in New York law permitted Mohsin to seek leave to appeal the denial of his Coram Nobis Motion. *See* N.Y.Crim. Pro. Law 450.90(1) (2002). As a result, the denial of the Coram Nobis Motion became final

For these reasons, Petitioner's contention that the petition is untimely lacks merit. The Court finds, instead, that the petition was timely filed.

Unexhausted and Procedurally Defaulted Claims

Respondent next contends that all but one of the instances of alleged ineffective assistance of trial counsel, set forth Petitioner's "Ground Two," are unexhausted and procedurally defaulted since Petitioner failed to raise them in his direct appeal. The applicable legal principles are clear:

> If anything is settled in habeas corpus jurisprudence, it is that a federal court may not grant the habeas petition of a state prisoner "unless it appears that the applicant has exhausted the remedies available in the courts of the State; or that there is either an absence of available State corrective process; or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. § 2254(b)(1). To satisfy § 2254's exhaustion requirement, a petitioner must present the substance of "the same federal constitutional claim[s] that he now urges upon the federal courts," *Turner v. Artuz*, 262 F.3d 118, 123-24 (2d Cir.2001), "to the highest court in the pertinent state," *Pesina v. Johnson*, 913 F.2d 53, 54 (2d Cir.1990).
>
> When a claim has never been presented to a state court, a federal court may theoretically find that there is an "absence of available State corrective process" under § 2254(b)(1)(B)(i) if it is clear that the unexhausted claim is procedurally barred by state law and, as such, its presentation in the state forum would be futile. In such a case the habeas court theoretically has the power to deem the claim exhausted. *Reyes v. Keane*, 118 F.3d 136, 139 (2d Cir.1997). This apparent salve, however, proves to be cold comfort to most petitioners because it has been held that when "the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred," federal habeas courts also must deem the claims procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).
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> ***
>
> Dismissal for a procedural default is regarded as a disposition of the habeas claim on the merits. . . . For a procedurally defaulted claim to escape this fate, the petitioner must show cause for the default and prejudice, or demonstrate that

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no earlier than August 8, 2005, when the Court of Appeals denied Mohsin leave to appeal.").

28

> failure to consider the claim will result in a miscarriage of justice (*i.e.*, the petitioner is actually innocent). *Coleman*, 501 U.S. at 748-50, 111 S.Ct. 2546 (1991).

Aparicio v. Artuz, 269 F.3d 78, 89–90 (2d Cir. 2001).

Here, in "Ground Two," as mentioned earlier Petitioner alleges that his trial defense attorney was ineffective in the following five instances: 1) At the *Huntley* hearing he "failed to raise the bullying manner of interrogation and comments by detective Cedric Holloway; 2) he failed to ask for a jury charge on the voluntariness of Petitioner's statement to police; 3) he failed, when making his *Batson* challenge, to argue that Petitioner was being treating differently than a white juror, Carol Schiferle, who also knew a police witness; 4) he erred in requesting that prosecution witness Aaron Green be declared a hostile witness, "which led the prosecution to elicit inadmissible and highly prejudicial testimony"; and 5) he "never discussed with Petitioner the possibility of requesting a charge down to the lesser included offense of Attempted Assault in the Third Degree given the weak and insubstantial evidence on Count Three of [the Indictment charging] Attempted Assault in the First Degree."

Respondent contends that only the first of these, number 1) above, was properly exhausted, while the remaining four are unexhausted and procedurally defaulted. The Court agrees.

Number 1) was exhausted because Petitioner raised it both in his direct appeal brief to the Appellate Division, and in his application for leave to appeal to the Court of Appeals. On the other hand, number 2) was *not* exhausted, since it was never raised in the state courts.

Number 3) was raised in the state courts, but only in Petitioner's application for leave to appeal to the Court of Appeals, following the denial of his appeal by the Appellate Division. Petitioner did not raise that claim before the Appellate Division. Consequently, the claim is unexhausted, since "raising a federal claim for the first time in an application for discretionary

review to a state's highest court is insufficient for exhaustion purposes." *St. Helen v. Senkowski*, 374 F.3d 181, 183 (2d Cir. 2004); *see also, Clark v. Dolce*, No. 9:11-CV-00893-JKS, 2014 WL 2573119, at *4 (N.D.N.Y. June 9, 2014) ("Clark's challenge to the imposition of consecutive sentences is also unexhausted. He raised this claim for the first time in his application for leave to appeal to the Court of Appeals. Because he raised this claim only in a discretionary leave application, it is unexhausted.") (citing *St. Helen v. Senkowski*).

Numbers 4) and 5) were raised in the state courts, but only indirectly, in the coram nobis application. That is, in the coram nobis motion, Petitioner alleged that *appellate* counsel had been ineffective for failing to raise the instances of alleged ineffectiveness by trial counsel described in numbers 4) and 5).

Courts in this circuit routinely hold that raising an ineffective-assistance-of-appellate-counsel claim in a coram nobis motion does not exhaust the underlying claims that appellant counsel failed to raise. *See, e.g., Roberts v. Lamanna*, No. 19 CV 880 (AMD)(LB), 2020 WL 5633871, at *6 (E.D.N.Y. Aug. 31, 2020) (""[C]ourts in this circuit have consistently recognized[ ] an ineffective assistance claim is an insufficient vehicle for exhausting the underlying allegations when those allegations are asserted for the first time as separate claims on habeas." *Hall v. Phillips*, No. 04 CV 1514 (NGG)(VVP), 2007 WL 2156656, at *5 (E.D.N.Y. July 25, 2007) (citing cases)."), report and recommendation adopted, No. 19CV00880AMDLB, 2020 WL 5633078 (E.D.N.Y. Sept. 21, 2020); *see also, Cobb v. Unger*, No. 09-CV-0491MAT, 2013 WL 821179, at *3 (W.D.N.Y. Mar. 5, 2013) ("Under New York law, a writ of error coram nobis is available "only to vacate an order determining an appeal on the ground that the defendant was deprived of the effective assistance of appellate counsel," and other constitutional errors may only be advanced in coram nobis applications to the extent that they are "predicates for the claim of ineffectiveness, on the theory that effective counsel would have appealed on those grounds."

Turner v. Artuz, 262 F.3d 118, 123 (2d Cir.2001) (internal quotation marks omitted). *In other words, no claim besides ineffective assistance of appellate counsel can be exhausted through an application for a writ of error coram nobis.* Thus, Petitioner has exhausted his ineffective assistance of appellate counsel claim by virtue of his coram nobis application, the denial of which he appealed to the state's highest court. See 28 U.S.C. § 2254(b). *However, none of the underlying claims in the habeas petition were exhausted by this procedure, and thus they remain unexhausted for purposes of federal habeas review.*") (emphasis added).

However, in *Aparicio v. Artuz*, cited earlier, the Second Circuit ruled that a habeas petitioner had exhausted a claim for ineffective assistance of trial counsel that was asserted in a coram nobis petition, along with a claim for ineffective assistance of appellate counsel, stating:

> Petitioner did raise, in his coram nobis petition to the Appellate Division, the ineffectiveness of his trial counsel for failing to request an eyewitness identification instruction. See supra, at 86 & n. 1. However, the Appellate Division did not explicitly address this claim, writing only, "appellant has failed to establish that he was denied effective assistance of appellate counsel." *Aparicio*, 696 N.Y.S.2d at 697. Although the trial counsel claim was not explicitly addressed, it was, as a technical matter, adjudicated; the Appellate Division denied Aparicio's coram nobis application. *Id.* Thus, this claim is exhausted. *Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971).

Id., 269 F.3d at 92. The foregoing quote suggests that, unlike in the instant case, the petitioner in *Aparicio* raised the alleged ineffectiveness of trial counsel as a stand-alone claim in his coram nobis motion, in addition to the alleged ineffectiveness of appellate counsel, rather than merely identifying it as a claim that appellate counsel should have raised. The Circuit Court went on to find, though, that the ineffective-assistance-of-trial-counsel claim was nevertheless procedurally barred, reasoning that the Appellate Division necessarily had to have denied the claim on state procedural grounds, insofar as the defendant had no excuse for failing to raise it in his direct appeal. *Id.*, 269 F.3d at 93 ("The Appellate Division's conclusion on coram nobis that Aparicio

was not denied effective assistance of appellate counsel disposed of Aparicio's only proffered cause for the failure to raise the trial counsel claim on direct appeal. The Appellate Division's decision concerning Aparicio's trial counsel claim thus had to rest on a state procedural bar; under New York law, the decision could not possibly rest on any other ground.").

Subsequently, some district courts have interpreted *Aparicio* to find that "underlying" ineffective-assistance-of-trial-counsel claims in coram nobis motions are exhausted but nevertheless procedurally barred. *See, e.g., Davis v. Greene*, No. 04 CIV. 6132 (SAS), 2008 WL 216912, at *8-9 (S.D.N.Y. Jan. 22, 2008) ("In *Aparicio v. Artuz*, the Second Circuit held that an ineffective assistance of trial counsel claim, raised before a state court as an underlying issue in a coram nobis motion arguing ineffective assistance of appellate counsel, was actually exhausted. . . . The reasoning in *Aparicio* applies to the five of Davis' trial counsel claims that rest on facts within the trial record . . . [and those claims] are therefore exhausted by Davis' coram nobis motion. . . . [However, a]s in *Aparicio*, no good reason exists here [for the defendant's failure to raise the underlying issue on direct appeal]; in fact, once the Appellate Division denied the ineffective assistance of counsel claims neither it nor any other court could hear the trial counsel claims under section 440.10, because there was no justification for Davis' failure to raise those claims on direct appeal. Because the claims have been defaulted under a state procedural rule, federal habeas review is precluded[.]"); *see also, Cumberland v. Graham*, No. 08 CIV. 04389 LAP DF, 2014 WL 2465122, at *32 (S.D.N.Y. May 23, 2014) ("Although it is not entirely clear whether the trial-counsel claim in *Aparicio* had actually been raised on coram nobis as an independent claim (as opposed to as a predicate for a claim challenging the effectiveness of appellate counsel), most courts have read *Aparicio* to apply to underlying claims raised on coram nobis either directly or indirectly. Ultimately, though, it does not matter whether this court finds that Petitioner's ineffective-assistance-of-trial-counsel claim is exhausted, under

32

Aparicio, or unexhausted but "deemed" exhausted, as set out above, as, in either event, the claim would be procedurally barred from review by this Court.") (citation omitted).

Based on the foregoing discussion, the Court here finds that numbers 4) and 5) are unexhausted, but that even if they were exhausted, they are nevertheless procedurally barred. Similarly, the Court finds that numbers 2) and 3) are procedurally barred, in addition to being unexhausted, since Petitioner failed to raise them in his direct appeal and presumably would not be able to raise them now in a separate collateral attack in New York state court. *See, Aparicio v. Artuz*, 269 F.3d at 91 ("New York does not otherwise permit collateral attacks on a conviction when the defendant unjustifiably failed to raise the issue on direct appeal. N.Y.Crim. Proc. Law § 440.10(2)(c)."). This is particularly true, with regard to numbers 4) and 5), where, as here, the state courts have already denied Petitioner's claim for ineffective assistance of appellate counsel. *See, Aparicio v. Artuz*, 269 F.3d at 91 ("The nagging question here is whether Petitioner's failure to assert ineffective assistance of trial counsel . . . might be forgiven under § 440.10 because of the ineffective assistance of Petitioner's appellate counsel. Given the Appellate Division's determination in the coram nobis proceeding that Petitioner "failed to establish that he was denied effective assistance of appellate counsel," *People v. Aparicio*, 696 N.Y.S.2d at 697, we are persuaded that it is most unlikely that another state court would suddenly find the performance of Petitioner's appellate counsel to be so ineffective as to justify Petitioner's failure to include this ineffective assistance of trial counsel claim in his direct appeal. Thus, any state court to which Petitioner might now present this claim would almost certainly find it procedurally barred.").

The Court having found that points 2), 3), 4) and 5) of Petitioner's ineffective-assistance claim are unexhausted and procedurally defaulted, those claims must be denied unless Petitioner can demonstrate either cause and prejudice or actual innocence: "That procedural

3

default can only be cured by a showing of cause for the default plus prejudice, or a showing of actual innocence." *Aparicio v. Artuz*, 269 F.3d at 91 (citation omitted); *see also, St. Helen v. Senkowski*, 374 F.3d at 184 ("In the case of procedural default (including where an unexhausted claim no longer can proceed in state court), we may reach the merits of the claim "only if the defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent." *Bousley v. United States*, 523 U.S. 614, 622, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (internal quotation marks and citations omitted).").

Petitioner, though, has not attempted to demonstrate cause, prejudice or actual innocence. Instead, the Petition incorrectly maintains that Petitioner exhausted all of his claims. Similarly, Petitioner's Traverse brief asserts that he exhausted all of his claims via his direct appeal and his coram nobis motion. Petitioner has not offered any alternative argument (regarding cause and prejudice or actual innocence) in the event that the Court were to disagree with his exhaustion argument, which it does.

To the extent that Petitioner's *pro se* submissions can be liberally construed to suggest that his failure to exhaust was caused by the ineffectiveness of his appellate counsel, to establish cause he would need to show that his appellate attorney's performance amounted to ineffective assistance of counsel in violation of the Sixth Amendment. *See, Aparicio v. Artuz*, 269 F.3d 78, 91 (2d Cir. 2001) ("A defense counsel's ineffectiveness in failing to properly preserve a claim for review in state court can suffice to establish cause for a procedural default only when the counsel's ineptitude rises to the level of a violation of a defendant's Sixth Amendment right to counsel."). The applicable legal principles are clear:

> With respect to claims of ineffective assistance of appellate counsel, the Supreme Court has also held, as relevant here, that "appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal."

> *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (describing *Barnes*, 463 U.S. 745, 103 S.Ct. 3308); *see also Lynch v. Dolce*, 789 F.3d 303, 319 (2d Cir.2015).

Chrysler v. Guiney, 806 F.3d 104, 118 (2d Cir. 2015). "Counsel's failure to raise a claim on appeal constitutes "constitutionally inadequate performance" where "counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Morales v. United States*, 651 F. App'x 1, 5 (2d Cir. 2016) (quoting *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir.1994), also *citing Jackson v. Leonardo*, 162 F.3d 81, 85 (2d Cir.1998)).

Here, though, none of the points raised by Petitioner involve "significant and obvious issues" that were "clearly and significantly" stronger than the issues raised by appellate counsel. Consequently, Petitioner cannot demonstrate cause, and the Court therefore need not consider prejudice, though the Court does not believe that he can demonstrate that element either. Moreover, even liberally construing Petitioner's *pro se* submissions, they do not make any gateway showing of actual innocence. See, *Hyman v. Brown*, 927 F.3d 639, 656–58 (2d Cir. 2019) (discussing the standards applicable to actual innocence claims). Consequently, the procedurally defaulted claims are denied.

To reiterate, with regard to Petitioner's "Ground Two," alleging five separate incidents of alleged ineffective assistance of counsel, the Court finds that only number 1) alleging that trial counsel was ineffective at the *Huntley* hearing, for "fail[ing] to raise the bullying manner of interrogation and comments by detective Cedric Holloway," is exhausted. The remaining instances are denied on the merits as procedurally defaulted. The Court will now proceed to consider Petitioner's remaining claims on the merits.

The *Batson* Challenge

3

As discussed further below, the Petition asserts that "the trial court erroneously denied the defense's *Batson* objection" by failing to make the necessary findings at the third step of the *Batson* analysis. As mentioned, the *Batson* issue arose after the prosecutor used a peremptory challenge to excuse Lannie, an African-American. In response to the *Batson* challenge, the prosecutor indicated that he challenged Lannie for two reasons: First, because of Lannie's age and possible immaturity, inasmuch as he was age 23 year-old college student who lived with his parents and had a part-time job; and, second, because Lannie knew prosecution witness Exum, who was a friend of Lannie's sister.

In front of the trial court, Petitioner alleged that the prosecutor's reasons were pretextual, since Lannie had not indicated any hostility toward Exum, and since Lannie was close in age to a white juror, Wutz. The prosecutor pointed out, though, that Wutz was two years older than Lannie and, unlike Lannie, was employed full time and lived independently of her parents. Additionally, Wutz did not know any witnesses in the case. The prosecutor also noted that he had challenged white prospective jurors similar in age to Lannie.

In the instant action, Petitioner also argues that Lannie was similarly situated to white juror Carol Schiferle, who was age 42 and employed full time, and who "knew in passing" prosecution witness, Dawn Lopez. Schiferle, when asked to explain how she knew Lopez, indicated that she was aware of Lopez through friends of hers who were police officers, adding, "I know one of the officers, Dawn Lopez, not really personally. . . . I don't really – I'm not friends with her. I would say I just know her in passing." Transcript at p. 110. The Court observes again, though, that the argument concerning Schiferle was never made to the trial court or, for that matter, to the Appellate Division. Rather, as explained earlier, in the state courts, the argument concerning Schiferle was only raised in Petitioner's request for leave to appeal the denial of his direct appeal, in the context of a claim for ineffective assistance of trial counsel.

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court, "[i]n recognition of the danger of race-based jury selection in a particular trial,"

> mandated a three-step burden-shifting framework for determining whether the prosecution exercised its peremptory challenges on the basis of race. Under this framework, a defendant must first establish a prima facie case of racial bias. *Id.* at 96–97, 106 S.Ct. 1712. If he or she succeeds in doing so, the prosecution must then offer a race-neutral explanation for its challenge to the jurors in question. *Id.* at 97, 106 S.Ct. 1712; *see also Purkett v. Elem*, 514 U.S. 765, 767–68, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). Even if the reasons the prosecution provides are neither "persuasive, [n]or even plausible," as long as those reasons are facially valid, the burden will then switch to the defendant to prove that the reasons the prosecution gave are a pretext for purposeful discrimination. *Id.* at 767–68, 115 S.Ct. 1769. At that point, the determination "largely will turn on [the court's] evaluation of credibility," *Batson*, 476 U.S. at 98 n. 21, 106 S.Ct. 1712, and, therefore, "the best evidence often will be the demeanor of the attorney who exercises the challenge," *Hernandez v. New York*, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

Majid v. Portuondo, 428 F.3d 112, 126 (2d Cir. 2005).

Here, Petitioner argues that "[t]he trial court fell short of adjudicating Petitioner's *Batson* claim on the merits by accepting at face value [the] prosecutor's facially neutral explanation for [the] strike, without a finding of credibility," citing *Dolphy v. Mantello*, 552 F.3d 236 (2d Cir. 2009).[25] This Court considers carefully the merit of Petitioner's argument, given the relatively terse explanation provided by the trial court for denying the *Batson* objection. However, while the trial court's explanation could have been more comprehensive, the Court disagrees with Petitioner and finds that the trial court indicated that it found the prosecutor's explanation credible and not a pretext for discrimination, thereby satisfying the requirements of *Dolphy v. Mantello*.

In this regard, the legal principle referenced by Petitioner was set forth by the Second Circuit as follows:

[25] Traverse, ECF No. 8 at pp. 6-7.

> "[T]he third step of the *Batson* inquiry requires a trial judge to make an ultimate determination on the issue of discriminatory intent based on all the facts and circumstances." *Jordan v. Lefevre*, 206 F.3d 196, 200 (2d Cir.2000) (internal quotation and citation omitted).
>
> Trial courts applying the third *Batson* prong need not recite a particular formula of words, or mantra. *Galarza v. Keane*, 252 F.3d 630, 640 n. 10 (2d Cir.2001). An "unambiguous rejection of a *Batson* challenge will demonstrate with sufficient clarity that a trial court deems the movant to have failed to carry his burden to show that the prosecutor's proffered race-neutral explanation is pretextual." *Messiah v. Duncan*, 435 F.3d 186, 198 (2d Cir.2006). However, we have repeatedly said that a trial court must somehow "make clear whether [it] credits the non-moving party's race-neutral explanation for striking the relevant panelist." *Messiah*, 435 F.3d at 198; *see Galarza*, 252 F.3d at 636 ("We have repeatedly emphasized that a trial court may not deny a *Batson* motion without determining whether it credits the race-neutral explanations for the challenged peremptory strikes."); *Jordan*, 206 F.3d at 200 ("Jordan now declares that the district court's conclusory statement that the prosecutor's explanations were race neutral did not satisfy Batson 's third step. We agree."); *Barnes v. Anderson*, 202 F.3d 150, 156 (2d Cir.1999) (holding that "denial of a *Batson* motion without explicit adjudication of the credibility of the non-movant's race-neutral explanations for challenged strikes" constitutes error).

Dolphy v. Mantello, 552 F.3d at 239.

Here, as discussed earlier, after hearing argument back and forth between the attorneys on the *Batson* challenge, the trial court stated:

> I do have to find that, based on the District Attorney's explanations, that there are many race-neutral explanations for the challenge, and particularly knowing a witness per se pretty much would explain, no matter what the race of the prospective juror. In most cases, I'm sure you would agree, Mr. Terranova, that that is a reason, as in the Stuart Easter example, so the *Batson* challenge is denied.

(Transcript at p. 195). In this regard, the trial court indicated not only that the prosecutor had offered a race neutral reason for the challenge to Lannie, but that "based on the District Attorney's explanations," the reason was not a pretext for discrimination. Indeed, the trial court indicated that "knowing a witness" was not only a legitimate race-neutral reason for excusing

Lannie, but that the prosecutor had, for the same reason, also dismissed white prospective jurors in the case, such as the prospective juror who knew prosecution witness Officer Stuart Easter.[26] Consequently, the Court finds that the trial court made the necessary finding at step three of the *Batson* inquiry, as required by *Dolphy v. Mantello*, and that Petitioner's argument to the contrary therefore lacks merit. *See, e.g., Bowman v. Lee*, No. 10-CV-0951 ERK, 2015 WL 1514378, at *11 (E.D.N.Y. Apr. 3, 2015) ("Although the trial judge did not expressly credit the prosecutor's explanation for striking Ms. Thomas in particular, courts need not engage in "a talismanic recitation of specific words in order to satisfy *Batson*." *Messiah*, 435 F.3d at 198. In addition to the trial judge's clear statement finding a lack of subterfuge generally, the judge's explanation that the prosecutor had a right to be concerned about Ms. Thomas's potential empathy for the defendant implicitly credits the prosecutor's good faith in explaining his race-neutral reasoning. The prosecutor's good faith is further bolstered by his decision to strike Mr. Derek, a prospective juror who had participated in multiple volunteer projects involving prison inmates."), *aff'd*, 641 F. App'x 51 (2d Cir. 2016).

Ineffective Assistance of Counsel

The Petition alleges that trial counsel was ineffective during the *Huntley* hearing when he "failed to raise the bullying manner of interrogation and comments by detective Cedric Holloway." Although Petitioner does not flesh out this argument, he apparently maintains that if his attorney had "raised the bullying manner of interrogation and comments" about Petitioner's silence by Holloway, the trial court would have found that his statements were involuntarily made and

[26] The fact that potential white juror Schiferle also indicated that she knew a police witness, though only "in passing" and "not really personally," Transcript at pp. 109-110, seems of no consequence to the Court, since that point was never raised to the trial judge. In any event, the Court does not agree with Petitioner that Lannie and Schiferle were similarly situated, except for their races, in terms of the circumstances under which they "knew" the police witnesses. Lannie indicated that he knew Officer Exum, while Schiferle essentially indicated that she "knew of" Officer Lopez.

suppressed them. Respondent counters that Petitioner cannot make the showing required to establish ineffective assistance, stating:

> Petitioner cannot make that showing here. He said very little in his statement to the police, and the little that he did say was an outright denial. In light of the fact that petitioner's "will was not overborne," his statement was voluntary. *Mickey v Ayers*, 606 F3d 1223, 1234 (9th Cir 2010) (O'Scannlain, J.), cert denied 565 US 952. Counsel provided excellent representation throughout the proceedings; he lodged proper objections, cross-examined the People's witnesses, made a motion for a trial order of dismissal, and successfully moved to dismiss the top count of the indictment. Counsel cannot be held ineffective for failing to make an argument that was doomed to fail.

ECF No. 6 at pp. 13-14.

The familiar test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), for evaluating an ineffective assistance of counsel claim has two prongs. The first requires showing that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688, 694. "Constitutionally effective counsel embraces a 'wide range of professionally competent assistance,' and 'counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Greiner v. Wells*, 417 F.3d 305, 319 (2d Cir. 2005) (quoting *Strickland*, 466 U.S. at 690). Fulfilling the second prong of an ineffective assistance claim requires a showing of prejudice which translates to "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "The habeas petitioner bears the burden of establishing both deficient performance and prejudice." *Greiner*, 417 F.3d at 319 (citing *United States v. Birkin*, 366 F.3d 95, 100 (2d Cir. 2004)).

A defense attorney cannot be deemed ineffective for failing to pursue an unmeritorious defense or application. *See, United States v. Kirsh*, 54 F.3d 1062, 1071 (2d

Cir. 1995) ("[T]he failure to make a meritless argument does not rise to the level of ineffective assistance, *see United States v. Javino*, 960 F.2d 1137, 1145 (2d Cir.), cert. denied, 506 U.S. 979, 113 S.Ct. 477, 121 L.Ed.2d 383 (1992), and "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Strickland v. Washington*, 466 U.S. at 690, 104 S.Ct. at 2066; *United States v. Eisen*, 974 F.2d 246, 265 (2d Cir.1992), cert. denied, 507 U.S. 998, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993); *United States v. Aguirre*, 912 F.2d 555, 560 (2d Cir.1990).").

Preliminarily, the Court observes that in his pretrial omnibus motion defense counsel moved to suppress Petitioner's statements as having been "involuntarily made." The trial court granted a *Huntley* hearing and, in connection with that hearing, received in evidence a CD recording of Petitioner's thirteen-minute interview, as well as testimony from Joy Jermain ("Jermain"), a detective who, along with Holloway, interviewed Petitioner after Petitioner waived his *Miranda* rights and agreed to speak to the detectives. The primary strategy of Petitioner's attorney, at the *Huntley* hearing, was to establish that Petitioner's statement was involuntarily made since Petitioner had been intoxicated at the time he was administered his *Miranda* warnings. The trial court denied Petitioner's motion, finding in pertinent part that Petitioner "was not impaired by alcohol at the time he was made aware of his *Miranda* rights, and that he voluntarily and knowingly waived the *Miranda* warnings."

Against this backdrop, Petitioner now maintains that counsel was ineffective because he failed to also argue that Holloway acted in a bullying manner and made statements that were improper insofar as they were designed to goad Petitioner into admitting his involvement in the crimes. Petitioner, though, offers no legal citation or

analysis indicating that such an argument would have been successful. Nor does the Court believe that it would have been successful. In that regard, Petitioner has not argued or shown, nor does the record indicate, that the totality of the circumstances surrounding the interview rendered Petitioner's post-*Miranda* statements involuntary, or that Holloway's conduct was so fundamentally unfair that it denied Petitioner due process or raised the danger that it would induce a false confession. *See, People v. Green*, 73 A.D.3d 805, 805, 900 N.Y.S.2d 397, 398 (2d Dept. 2010) ("Contrary to the defendant's contention, based on the totality of the circumstances (*see People v. Anderson*, 42 N.Y.2d 35, 35–39, 396 N.Y.S.2d 625, 364 N.E.2d 1318), including the duration and conditions of his detention, the conduct and demeanor of the police toward him, and his age, physical state, and mental state (*see People v. Martin*, 68 A.D.3d 1015, 890 N.Y.S.2d 646; *People v. Pegues*, 59 A.D.3d 570, 571–572, 873 N.Y.S.2d 160; *People v. Petronio*, 34 A.D.3d 602, 604, 825 N.Y.S.2d 99), the defendant's post-*Miranda* (*see Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694) statements were voluntarily given. Moreover, the deception employed here by law enforcement officers was neither "so fundamentally unfair as to deny due process," nor did it raise the danger that it would induce a false confession. (*People v. Tarsia*, 50 N.Y.2d 1, 11, 427 N.Y.S.2d 944, 405 N.E.2d 188; *see People v. Sanabria*, 52 A.D.3d 743, 745, 861 N.Y.S.2d 359; *People v. Ingram*, 208 A.D.2d 561, 616 N.Y.S.2d 780; *People v. James*, 146 A.D.2d 712, 536 N.Y.S.2d 858)."); *see also, People v. Niemann*, 21 Misc. 3d 136(A), 873 N.Y.S.2d 514 (App. Term 2008) ("[E]ven if the Troopers informed defendant that his companion was subject to arrest, in part to induce him to admit his alcohol consumption and his involvement in the accident, the strategy was not "so fundamentally unfair as to deny due process or likely to induce

42

a false confession" (*People v. Velez*, 211 A.D.2d 524 [1995]; see also *People v. Cannady*, 243 A.D.2d 642 [1997]).").

Nor has Petitioner claimed that he suffered any particular prejudice as a result of his attorney's failure to advance this argument at the *Huntley* hearing. As Respondent points out, although Petitioner waived his *Miranda* rights and agreed to speak with the detectives, "[h]e said very little in his statement to the police, and the little that he did say was an outright denial." Petitioner's Traverse fails to counter this argument. At most, the Traverse baldly asserts that trial counsel committed a number of errors (referring to the five instances of alleged ineffectiveness of trial counsel described in the Petition, four of which the Court has already denied as procedurally barred), the cumulative effect of which "compromised" his right to effective assistance of counsel.[27] Petitioner is correct that under the *Strickland* test, "[i]n assessing prejudice, we consider the cumulative effect of the errors committed by counsel." *Gross v. Graham*, 802 F. App'x 16, 18 (2d Cir. 2020). However, for the reasons already discussed, Petitioner has not shown that trial counsel committed any errors of constitutional significance, and therefore he cannot demonstrate that the cumulative effect of his attorney's errors resulted in prejudice.

In sum, the Court finds that Petitioner has not made the necessary showing under either prong of the *Strickland* test, and his claim that trial counsel was ineffective is therefore denied as lacking merit.

Denial of Right to Remain Silent

Petitioner further contends that the trial court violated his right to remain silent, by admitting the tape recording of the thirteen-minute interrogation into evidence. Petitioner

[27] ECF No. 8 at p.

4

maintains that the jury should not have been permitted to hear Detective Holloway's questions, since his "ridiculing and mocking of Petitioner's silence to cajole Petitioner to break that silence and answer his questions [shifted] the burden to Petitioner to explain himself."[28] Liberally construing Petitioner's submissions to raise the strongest arguments that they suggest, the Court understands Petitioner to be raising a due process claim under *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976), in which

> the Supreme Court held that "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id.* at 619, 96 S.Ct. 2240. The Court reasoned that "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *See id.* at 618, 96 S.Ct. 2240.

Grigg v. Phillips, 401 F. App'x 590, 591 (2d Cir. 2010). Here, while Petitioner did not testify and was not impeached with his silence, he nevertheless maintains that the playing of the recorded interview, in which he remained silent after making his initial statement, despite Holloway's efforts to get him to explain himself, had the effect of penalizing him for remaining silent.

The Court disagrees, since Petitioner did not in fact exercise his right to remain silent, but rather, he chose to make a post-*Miranda* statement, and then never reasserted his right to remain silent. In *U.S. v. Pitre*, 960 F.2d 1112 (2d Cir. 1992), the Second Circuit held:

> Otero argues that Agent McDonnell's testimony regarding the post-arrest interview and the government's remarks in rebuttal pertaining to this testimony were improper because his conduct in declining to respond to Agent McDonnell's question, regarding who gave him the bag, was an exercise of his fifth amendment right to remain silent. We find Otero's claim to be without merit.

[28] Petition, ECF No. 1 at p. 21.

14

> It is undisputed that Otero was read his *Miranda* rights. *See Doyle v. Ohio*, 426 U.S. 610, 618, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976) (footnote omitted) ("[W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."). Herein, despite the *Miranda* warnings, Otero made statements to Agent McDonnell during the post-arrest interview, thus, waiving his right to remain silent under *Miranda*. *See Moran v. Burbine*, 475 U.S. 412, 420–23, 106 S.Ct. 1135, 1140, 1141–42, 89 L.Ed.2d 410 (1986). Therefore, unless Otero resurrected and asserted his right to remain silent, the government was entitled to introduce this evidence at trial and comment on it during summation. Persuaded by the view of the First Circuit in *United States v. Goldman,* 563 F.2d 501, 502–04 (1st Cir.1977), *cert. denied*, 434 U.S. 1067, 98 S.Ct. 1245, 55 L.Ed.2d 768 (1978), we believe that Otero waived his right to remain silent and did not thereafter assert this right. In *Goldman*, the defendant, upon being arrested and read his *Miranda* rights, was given a standard waiver of rights form. The defendant signed this form and answered questions asked of him by the investigating agent. However, the defendant "either refused to respond or did not respond" to two of the agent's questions. During trial, the government introduced testimony concerning the defendant's conduct with regard to the two questions and commented upon it in summation. Following his conviction, the defendant appealed, claiming the testimony concerning the two questions asked by the agent and the government's remarks relating to the questions violated his right to remain silent. In analyzing his claim, the First Circuit found no indication in the record that the defendant wished to assert his right to remain silent, and the court commented that, based on the record, it appeared the defendant wished to give an exculpatory story. Stating that the defendant's decision not to answer a question "was simply a strategic choice, perhaps based on a fear that any answer might weaken [his] story," and that "the failure to answer was not a reassertion of rights," *id.* at 504 n. 5, the First Circuit rejected the defendant's claim. Likewise, herein, since Otero clearly waived his right to remain silent and there is no indication in the record that he resurrected and asserted this right, we find his claim to be without merit.

960 F.2d at 1125–26; *see also, Nowicki v. Cunningham*, No. 09 CIV. 8476 KMK GAY, 2011 WL 12522139, at *5 (S.D.N.Y. Mar. 30, 2011) ("*Doyle* does not protect a defendant's post-*Miranda* waiver silence. Therefore, the threshold question in any *Doyle* claim is whether the petitioner waived and subsequently failed to reassert their right to remain silent. In two of the challenged

colloquies, the prosecutor questioned the detectives about interviews with Nowicki that occurred after he had waived his *Miranda* rights. Since petitioner waived and never reasserted his *Miranda* rights, the prosecution did not contravene *Doyle* by inquiring into Nowicki's failure to offer exculpatory statements during his interviews with the detectives.") (citations omitted); *Hogan v. Ercole*, No. 05-CV-5860 RRM, 2011 WL 3882822, at *10 (E.D.N.Y. Sept. 2, 2011) ("The use of a defendant's post-arrest silence may violate due process and the privilege against self-incrimination. *Brecht v. Abrahamson*, 507 U.S. 619, 629–30, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *Doyle v. Ohio*, 426 U.S. 610, 617–18, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *Grigg v. Phillips*, 401 F. App'x 590, 593 (2d Cir.2010). However, once an arrestee waives his right to remain silent, the government is entitled to introduce evidence at trial of the arrestee's silence in response to questions, and the government may comment on that silence during summation, as long as the arrestee did not resurrect and assert his right to remain silent. *See United States v. Pitre*, 960 F.2d 1112, 1125 (2d Cir.1992) ("[U]nless [petitioner] resurrected and asserted his right to remain silent, the government was entitled to introduce this evidence at trial and comment on it during summation."). At trial, Detective Severin testified that that petitioner was silent when asked why he had not turned himself in to the Albany police and when asked why he told his family that he was going to Virginia and went to Tennessee instead. However, prior to trial, the court determined that petitioner was properly read his *Miranda* rights by the Nassau County Police Department and that he waived his right to remain silent, thus finding admissible his post-arrest statements to Detective Severin. As such, that defendant declined to answer some questions is not constitutionally protected.") (citations to trial record omitted).

Even assuming *arguendo* that a *Doyle* violation occurred here, which the Court does not find, it would be harmless in light of the relevant factors:

16

> The Supreme Court has addressed directly the proper standard of review in determining whether the occurrence of a *Doyle* error during a state court trial constitutes harmless error. In *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), the Court adopted a harmless error standard for violations of this type drawn from the Court's decision in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), asking "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710 (quoting *Kotteakos,* 328 U.S. at 776, 66 S.Ct. 1239). Assessing harmless error outside the context of *Doyle* violations, we have identified four factors as particularly relevant to the analysis: "(1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted testimony; and (4) whether such evidence was cumulative of other properly admitted evidence." *Zappulla v. New York*, 391 F.3d 462, 468 (2d Cir.2004). Of the four factors, "[t]he strength of the prosecution's case is probably the single most critical factor." *United States v. Reifler*, 446 F.3d 65, 87 (2d Cir.2006) (alteration in original) (quoting *Latine v. Mann*, 25 F.3d 1162, 1167–68 (2d Cir.1994)).

Grigg v. Phillips, 401 F. App'x 590, 593 (2d Cir. 2010) (footnote omitted).

Considering the foregoing factors, any error here would be harmless. In that regard, the Court particularly notes that the evidence against Petitioner as to the crimes for which he was convicted was strong, if not overwhelming, and that the prosecutor did not emphasize Petitioner's silence during the interview or attempt to use it as evidence of his guilt. Rather, as already discussed, in response to defense counsel's closing argument that the interview had been "illegal," the prosecutor disputed that characterization and argued that the recording of the interview was important not because of Petitioner's silence, but because Petitioner's statement (that he had been sleeping immediately prior to his arrest), made after waiving his *Miranda* rights, was inconsistent with the rest of the evidence.

For these reasons Petitioner's claim that he was denied due process, when his right to remain silent was violated, lacks merit and is denied.

CONCLUSION

The application under 28 U.S.C. § 2254 is denied. The Clerk of the Court is directed to close this case. Pursuant to 28 U.S.C. § 2253, the Court declines to issue a certificate of appealability, since Petitioner has not made a substantial showing of the denial of a constitutional right. The Court hereby certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Order would not be taken in good faith and leave to appeal to the Court of Appeals as a poor person is denied. *Coppedge v. United States*, 369 U.S. 438 (1962). Further requests to proceed on appeal *in forma pauperis* should be directed on motion to the United States Court of Appeals for the Second Circuit in accordance with Rule 24 of the Federal Rules of Appellate Procedure.

So Ordered.

Dated: Rochester, New York
November 18, 2020

ENTER:

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge

48

APPENDIX D

the way this crime was investigated?

PROSPECTIVE JUROR 1: I think I may question that, yes.

MR. FEROLETO: Okay. So even based on your prior experiences, you may not be able to -- you may be heading into this --

PROSPECTIVE JUROR 1: I may not be able to separate personal experience, yes.

MR. FEROLETO: You think you would be able to separate it?

PROSPECTIVE JUROR 1: I think I can't.

MR. FEROLETO: You can't. Well, thank you. I appreciate that.

Mr. Samuel, I have a couple questions for you. You said you work at Baker Victory?

PROSPECTIVE JUROR 2: Baker Victory Services. I work in their school with youth, from eighth-graders to twelfth-graders.

MR. FEROLETO: Okay. And do you -- I mean, are these like -- what kind of work do you do with them?

PROSPECTIVE JUROR 2: Some counseling stuff. These are young men and young women with behavioral issues, and they're a regular high school and perform, so when they become academic and things like that,

attendance, that kind of stuff, fighting, gangs, all that kind of stuff.

MR. FEROLETO: I take it you work with students who probably are facing criminal charges?

PROSPECTIVE JUROR 2: Some are on probation. Some have been violated and sent to prison. Some death. So very rough --

MR. FEROLETO: In your role, you're helping those kids try and stay on track, as far as going to school and what they're going to be doing in the future?

PROSPECTIVE JUROR 2: Absolutely, right.

MR. FEROLETO: You mentioned also you have a relative who was accused of arson, who I think you said is on parole?

PROSPECTIVE JUROR 2: He is on parole.

MR. FEROLETO: Okay. He's on parole?

PROSPECTIVE JUROR 2: Yes.

MR. FEROLETO: He's from Buffalo?

PROSPECTIVE JUROR 2: He is from Buffalo.

MR. FEROLETO: Did that occur here in Erie County?

PROSPECTIVE JUROR 2: It did.

MR. FEROLETO: All right. So he would have been prosecuted by someone from the Erie County

District Attorney's office.

PROSPECTIVE JUROR 2: Yes.

MR. FEROLETO: Do you have any feelings one way or the other about how he was treated with respect to that case and that investigation?

PROSPECTIVE JUROR 2: No. Because, actually, I don't know. I mean, even today he'll talk about how it didn't occur and how he was set up, and I -- I don't know. I don't -- I don't feel -- I don't know.

MR. FEROLETO: So if you're selected as a juror, you're gonna say --

PROSPECTIVE JUROR 2: Well, I think with his case, part -- you know, because he has some addiction issues, you know, and -- you know, no telling. So I don't know.

MR. FEROLETO: Okay. So if you're selected as a juror in this case, are you going to say to me, well, my cousin, he should have never been prosecuted, you know, ten years ago. I don't know, you know, what the District Attorney's office is doing in this case. I don't trust what's going on here?

PROSPECTIVE JUROR 2: No, I wouldn't.

MR. FEROLETO: You would be able to separate those situations?

PROSPECTIVE JUROR 2: Absolutely.

MR. FEROLETO: Okay. Thank you. Derek, I just have a couple questions -- oh, I'm sorry, wait. One more thing from Mr. Samuel.

PROSPECTIVE JUROR 2: Okay.

MR. FEROLETO: Kara, do you work at Victory?

PROSPECTIVE JUROR 9: I work at Father Baker Manor. It's a nursing home in Orchard Park.

MR. FEROLETO: So it's a different situation?

PROSPECTIVE JUROR 9: Oh, very different.

MR. FEROLETO: Mr. Brim, you say you're an intern at GM?

PROSPECTIVE JUROR 3: Yes.

MR. FEROLETO: Do you know anyone here in the jury? I just know there was someone here who said they worked at Ford.

PROSPECTIVE JUROR 3: Yeah, I don't know anyone.

MR. FEROLETO: So you've never seen Mr. McDonald before?

PROSPECTIVE JUROR 3: No.

MR. FEROLETO: What year are you in in college?

PROSPECTIVE JUROR 3: Junior.

MR. FEROLETO: Okay. So you got one more year?

PROSPECTIVE JUROR 3: Um-hum.

MR. FEROLETO: Now, with -- you know, with engineering, I take it probably in your internship, it's important that things be very precise and kind of line up exactly to make sure that the different equipment you're working on runs properly and works properly?

PROSPECTIVE JUROR 3: True.

MR. FEROLETO: You know, in this case you're gonna hear from ten or eleven witnesses that may have seen events from different perspectives, so not everything might line up exactly perfectly. But there may be a reason for that. If someone says, well, you know, a car was gray or a car was black, is that something where you feel like, well, maybe they saw it in a different light or there's some kind of inconsistency be the kind of precision you're looking for in your everyday life?

PROSPECTIVE JUROR 3: Two people can see it from a different perspective, especially if it's at night or so, so it could be two different perspectives. But, you know, they might be from a similar point of view.

MR. FEROLETO: Okay. So you -- if there's minor inconsistencies between witnesses, you wouldn't

automatically reject what people have to say?

PROSPECTIVE JUROR 3: No.

MR. FEROLETO: Okay. Thank you. Ms. Reed, I know you said you're -- I'm sorry, I think an instructional designer?

PROSPECTIVE JUROR 4: That's right.

MR. FEROLETO: Okay. Could you just explain to me what that is?

PROSPECTIVE JUROR 4: Sure. I design online courses for a community college, train faculty.

MR. FEROLETO: So working at N Triple C?

PROSPECTIVE JUROR 4: Yes.

MR. FEROLETO: So you work with the faculty to help them design their courses?

PROSPECTIVE JUROR 4: That's right.

MR. FEROLETO: That's all I have for you. Thank you.

I know, Mr. McGuire, you said your mom was the victim of a stalking case?

PROSPECTIVE JUROR 5: Yes.

MR. FEROLETO: I'm sorry to hear that. How long ago was that?

PROSPECTIVE JUROR 5: Maybe three, four years ago.

MR. FEROLETO: All right. Did that happen

rendering a verdict in this case. And I could be a fair and impartial juror in this case.

THE COURT: Who do you work for?

PROSPECTIVE JUROR 2: I work at Elderwood and Maplewood.

THE COURT: Thank you.

PROSPECTIVE JUROR 2: Thank you.

PROSPECTIVE JUROR 3: I'm forty-two years old. I was born in Williamsville, New York. I went to Williamsville South and have a bachelor's of communication. I live in Kenmore currently. I am a computer programmer.

THE COURT: Who do you work for?

PROSPECTIVE JUROR 3: Micros Systems. I live with one other adult and she's a Buffalo school teacher. I've never served on a grand or trial jury before. I know one of the officers, Dawn Lopez, not really personally. I've never been -- I have several friends and people that I know who work in law enforcement. I've never been accused of a crime or anyone I know been accused of a crime. I've never been a victim of a crime, but I have friends who have been victims of crimes. My religious or personal philosophy wouldn't prevent me from rendering a verdict. And I would be a fair and impartial juror.

THE COURT: Now how do you know Officer Lopez?

PROSPECTIVE JUROR 3: Just from other officers that I know, other friends of mine.

THE COURT: Is this socially, in other words? Is that what you mean or --

PROSPECTIVE JUROR 3: Yeah, not work related. I don't really -- I'm not friends with her. I would just say I know her in passing.

THE COURT: So would there be any problem, if she was to be a witness in this case, for you to judge her credibility the same as you would any other witness? Would you be able to do that?

PROSPECTIVE JUROR 3: Yes.

THE COURT: Okay.

PROSPECTIVE JUROR 4: Hi. My name is Patricia Logan. I'm fifty-nine years old. I was born in Alabama. And I went to ECC. I have an associate degree in nursing, RN. I live in Erie County. I have two kids, one twenty-one, one forty-three. I did serve on a trial jury and that was around about 1990.

THE COURT: What type of case was it? Criminal or civil?

PROSPECTIVE JUROR 4: It was criminal, and we did reach a verdict at that time. I do not know anyone

was -- of course you know that crime was solved and the individual responsible was convicted and that sort of thing?

PROSPECTIVE JUROR 3: Right.

MR. TERRANOVA: This is a shooting case also.

PROSPECTIVE JUROR 3: Right.

MR. TERRANOVA: Or the allegations are that my client shot somebody. Based on what happened to your friend, and I know she's had a very long and painful recovery, does that -- is this the kind of case that is going to give you any pause about and affect your objectivity in this case?

PROSPECTIVE JUROR 3: No. Again, everything surrounding everything with her was basically based on her -- just her recovery and getting better and just being there as her friend.

MR. TERRANOVA: Okay. Thank you. Could you hand that to Ms. Paycheck, please?

Ms. Paycheck, generally in the back of every juror's mind is this thought: If that guy over there is so innocent, why doesn't he testify on his own behalf?

PROSPECTIVE JUROR 4: Okay.

MR. TERRANOVA: Do you suppose that might be on your mind if he doesn't testify?

PROSPECTIVE JUROR 4: No.

MR. TERRANOVA: Okay. Why not?

PROSPECTIVE JUROR 4: Because --

MR. TERRANOVA: Is there some legal rule you know about?

PROSPECTIVE JUROR 4: No. 'Cause it's his choice.

MR. TERRANOVA: Okay. Well, you know that -- you've heard Justice Wolfgang say that the standard of proof is proof beyond a reasonable doubt and the burden of proof never shifts from the prosecutor to the defense. So we all share the Constitutional right that we can't be compelled to testify at all. The defense cannot be compelled to provide proof of innocence. It's always the Government or the prosecutor that has to show -- having brought the charges against my client, it's their burden of proof beyond a reasonable doubt to try to convict him of those allegations, okay? The defendant is under no obligation to present any proof or testify in his own behalf. And that isn't a new liberal invention, as the Republicans would lead you to believe, but what it is is a right that we've enjoyed since this country was founded. Okay?

Now, I say all that because my client may testify in this case. And if he does, how will you

approach his testimony, as opposed to everyone else's?

PROSPECTIVE JUROR 4: The same.

MR. TERRANOVA: Meaning?

PROSPECTIVE JUROR 4: Everybody is -- I would treat his the same as I would treat a police officer or the guy who's giving the forensics or the guy who is -- any witness that was going on the stand.

MR. TERRANOVA: Okay. Could you pass that to Ms. Mika, please?

Ms. Mika, what if you hear an instruction from the Court about what we call interested witnesses, meaning, that if a witness has an interest in the outcome of the case, that you can take that into account? And certainly you'll be told in that same legal instruction that the defendant is an interested witness because he has an interest in the outcome of the case. He could be convicted of a very serious crime. And he testifies. How do you approach that?

PROSPECTIVE JUROR 2: I would, you know, take it into consideration, what is being said, and I'd weigh it equally, you know, depending on --

MR. TERRANOVA: Okay. Could you pass that forward to Ms. Zawadzki, please?

Ms. Zawadzki, what if my client doesn't testify?

PROSPECTIVE JUROR 9: I wouldn't feel -- have any other feelings against it or for it.

MR. TERRANOVA: Okay. No curiosity in the back of your mind that you would have to stomp on --

PROSPECTIVE JUROR 9: No.

MR. TERRANOVA: -- to say, well, no, we're not allowed to consider that?

PROSPECTIVE JUROR 9: Well, if he doesn't testify, it's just like nothing really -- you know what I mean? Like, he doesn't want to incriminate himself and he also doesn't want to, like, show that he is innocent.

MR. TERRANOVA: Well, he may have a good reason to not testify, right?

PROSPECTIVE JUROR 9: Right, correct.

MR. TERRANOVA: But that's his own --

PROSPECTIVE JUROR 9: That's his own right.

MR. TERRANOVA: -- his own feeling and you can't hold that against him, right?

PROSPECTIVE JUROR 9: Correct.

MR. TERRANOVA: Can you pass that down, please, to Mr. Brostko?

What do you say about that, Mr. Brostko? Is that something that -- what are your feelings on whether the defendant testifies or not?

PROSPECTIVE JUROR 14: Well, you know, I understand the process of the Court, the purpose of the Court, the purpose of yourself and the prosecution and, you know, your job is to, you know, prove his innocence. And my opinion, if he's not gonna testify, it's a direction from yourself. And as far as the way I look at it is, you know, you're gonna do whatever it takes to try to win essentially, quote unquote, you know, so if he's not gonna testify, he's not gonna testify. But --

MR. TERRANOVA: Strictly speaking -- and I know I'm interrupting you here. Strictly speaking, my job is to make sure that if my client is convicted, it's on proof beyond a reasonable doubt, which means that I will be very carefully attempting to show you that there is reasonable doubt in this case, okay? And so that's basically my job. And it's not a game, it's serious business. So it's not like -- it's not like playing chess. Because this is live theater. I don't know what these witnesses are going to say. I have an idea of what some of them are going to say. But there's this perception among jurors that we all know what's going to happen in this courtroom and it's just a matter of doing it. But if my client testifies, are you going to view him as a witness that should be paid

close attention to?

PROSPECTIVE JUROR 14: I would view him the same way I would view some of the other witnesses, absolutely. I mean, our job as the jury is to collect the facts, you know, consider them, whether it be your client or a police officer or a doctor, whatever the case may be. It really makes no difference to me whether he testifies or not. The same way if maybe there are other police officers involved that I don't know about that obviously will not testify, or people on the list that may not end up testifying. That makes no difference to me. Whoever gets in that chair, I'm going to listen to what they say and make my decision based on the results the way it's presented from you and the prosecution.

MR. TERRANOVA: Okay. Couldn't have said it better myself. Anybody here disagree with what Mr. Brostko just said? Anybody here? Okay. That will do it. Thank you very much.

THE COURT: Are there any challenges for cause outside the presence of the jury to put on the record?

MR. TERRANOVA: I have a challenge for cause.

THE COURT: You do?

MR. TERRANOVA: But I see no reason to do it

outside the presence of the jury.

THE COURT: Well, it's up to you.

MR. TERRANOVA: Can we just approach?

THE COURT: No, you can't.

MR. TERRANOVA: Okay. I think Number Eight, Mr. Kus, should be challenged for cause.

MR. FELICETTA: Concur, Your Honor.

THE COURT: The challenge is granted. You're going to be excused, sir.

PROSPECTIVE JUROR 8: Awesome.

MR. TERRANOVA: The record will reflect that he's smiling.

(Prospective juror excused.)

THE COURT: All right. The other challenges will be in writing.

(Peremptory challenges were made in writing.)

MR. TERRANOVA: Could we approach, Your Honor?

THE COURT: Is it about the jury selection?

MR. TERRANOVA: Yes.

THE COURT: Could you just approach the clerk? The clerk knows, not me.

MR. TERRANOVA: Well, it's not that -- that's not the question. It's a legal issue.

THE COURT: All right. Then we're going to

take a brief recess. We're going to ask you to please go out in the hall for a brief recess and we're going to discuss an issue on the record that we don't want you to hear about. So we'll call you back shortly. And please do not talk about the case during the brief recess.

(Prospective jurors left the courtroom.)

THE COURT: Mr. Terranova, yes.

MR. TERRANOVA: Your Honor, I believe that at this point -- and it's not apparent to the Court because you don't know this yet.

THE COURT: Yes.

MR. TERRANOVA: But I think there's a Batson issue here. The prosecutors have just exercised a peremptory challenge in this round which we have not yet exercised a challenge on, to Juror Number Ten, Mr. Lannie. Mr. Lannie is an African-American. He's twenty-three years old. He attends Medaille College. He'll be a senior there. He also works at Tops. His father is a drug counselor and his mother is a teacher's aide. He did indicate that there is a police officer that will be testifying here, Officer Exum, who is not his friend. He's aware of him. He recognizes the name because he's a friend of his sister's.

The reason I'm mentioning this is because, as

I said, Leonard Lannie is an African-American. The District Attorney challenged two African-Americans previously. Maurice Samuel, who at the time was Juror Number Two in the first round, and the gentleman who sat next to him, Juror Number Three, Derek Brim, B-R-I-M. And I believe at this point that, of every available African-American that could be challenged -- there were a number of African-Americans who were seated but, for whatever reason, were not subject to challenge because they took themselves out. And I would ask that the District Attorney place on the record at this point as to -- the other two individuals are gone, Mr. Maurice Samuel and Derek Brim, and I can see reasons why the defense would have kept those individuals. But now, as to Mr. Lannie, I'm stating for the record that the defense would accept him as a witness. He is African-American. And I'd ask that the District Attorney be questioned as to why they exercised a peremptory against Mr. Lannie, Juror Number Ten.

Step 1

MR. FELICETTA: Your Honor, the People's reasons for excusing -- or exercising a peremptory challenge on Mr. Lannie, Prospective Juror Number Ten, are as follows: Mr. Lannie is twenty-three years old, and Mr. Feroleto and I have discussed, both in the last

Step 2

panel and in this, a real concern about having anyone who is as young as Mr. Lannie on the jury, particularly because the charges are so serious in this case, being an A-II felony. So in that regard, because these are serious charges, because of the fact that this is a very violent shooting in the middle of the street, we are concerned about having people who perhaps don't have much life experience on the jury. So as a result of that, we have been exercising peremptories consistently throughout on any of the jurors who we believe are too young. Mr. Brim yesterday was -- or this morning, was twenty years old. Ms. Moore, a white female, was twenty years old. We exercised a challenge on her for the exact same reasons. And now Mr. Lannie.

There is one exception to that, and that is Mr. McGuire, who is twenty-two, a year younger than Mr. Lannie, who we did not exercise a challenge on, but the defense did. But our feeling was that Mr. Lannie was more mature and exercised a great deal of maturity, despite his age -- I'm sorry, McGuire. Mr. McGuire was very mature. He had already received his college degree, a Bachelor of Arts in criminal justice. He was working full time. And based upon his responses to individual questioning, we were satisfied that, despite his age, he had enough life experiences that he would

be able to handle a case of this magnitude.

With respect to Mr. Lannie, he did not demonstrate the same thing to me with the individual questions I asked, nor with the general questions from the questionnaire. He is still currently a college student. He's a part-time employee at a grocery store, lives with his parents. And our -- I'll be honest with the Court. My biggest concern with him, with Mr. Lannie, is that he knows Darren Exum, who is a key witness in this trial. Officer Exum is incredibly important to the prosecution case and we -- we intend to have him on the witness stand to demonstrate that this defendant was at the crime scene or coming from the crime scene, and he's the only witness who can do that at the position where the defendant was stopped in the vehicle. And when I inquired of him whether he knew Officer Exum or whether that might be an issue for him, I wasn't satisfied that his answers were credible. It just seemed incredible to me that he has no feelings whatsoever about Officer Exum one way or the other. And given the fact that he's a key witness, for all of those reasons, we exercised a peremptory challenge.

MR. TERRANOVA: Two factors I'd like to point out, Your Honor. First of all, I think that's a straw dog with regard to Officer Exum. Mr. Lannie answered

the questions about his familiarity with Mr. Exum in all the detail that was requested from him. In other words, would you -- the question was asked of him by the prosecutors, would you credit his testimony over others? Would you -- how well do you know him? And he indicated that, look, he's a friend of my sister's and that's how I know him. I can be fair and objective. And, no, I'm not going to favor or disfavor him. As a matter of fact, if the District Attorney is really worried about how Mr. Lannie is going to approach the testimony of Officer Exum -- if anything, it should be the defense that's worried about that, but we're not because how does it hurt the prosecution if Mr. Lannie, the prospective juror, credits everything that Officer Exum says? So I find that hard to believe.

Secondly, the prosecution did not exercise a peremptory against a young woman by the name of Kara Wutz, who's two years older than Mr. Lannie. She said she was twenty-five years old. She doesn't have the educational level that Mr. Lannie does. She went to high school and graduated from high school and she works as a certified nursing assistant, lives with two roommates, and she knew people in law enforcement and that her sister was assaulted at some point and she works at a skilled nursing facility. So the standards

that the prosecutors apparently are holding up to the Court as being consistent in their jury selection is refuted by Kara Wutz. So that I think that -- and again, I am not -- I'm not imputing to the prosecution any racist tendencies or anything like that. I'm saying to the Court that there is a pattern that's been established here. For example, I think that the two -- the two jurors that were dismissed, Derek Brim, he was twenty years old, but Maurice Samuel, who was black, was forty-six years old and worked at Baker Victory as a counselor. So that the only things that all these three individuals share is that they were African-American. And again, I'm not imputing racism to the prosecution. But by the same token, their justification in the pattern of their peremptory challenges just isn't borne out by the evidence here.

MR. FELICETTA: Your Honor, in response, with regard to counsel's response to my race-neutral reasons that they are pretextual, I want to respond by saying the following: First, that with respect to Kara Wutz, who was twenty-five, because of her occupation, being a certified nursing aide, working in a hospital-type setting and living on her own independently, outside the home of her parents, we were satisfied both by the fact that she was older and her life experiences, that

she does not fit into the same category that I put the challenged juror, Mr. Lannie or Mr. Brim.

Secondly, with respect to the relationship with Darren Exum, I just simply don't know what it is. I don't know if it's positive or if it's negative. It's most likely positive. Usually it is. He didn't indicate it was negative. But he wouldn't say one way or the other, and that was the concern. And that's the exact same reason we used on Prospective Juror Lisa Macaluso. She knows not just cops, she knows a witness. She knows Stu Easter. And we exercised a challenge on her. With respect to this defendant, he doesn't just know cops, he knows a witness, a specific witness in this case. That's the reason we're challenging him.

And finally, Your Honor, with respect to Mr. Samuel, I recognize he's a forty-six-year-old black man. We challenged him for wholly different reasons. Had nothing to do with his age. Had everything to do with the answers to the questions he gave. And I know there was no Batson challenge at that time by Mr. Terranova, but to then suggest, somehow piggyback to say that because we challenged Mr. Samuel, that it means we're exercising non-race-neutral purposes here, Your Honor, I just want to respond and say that's not