No. _____

IN THE
Supreme Court of the United States

JOSE MEJIA,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari
to the New York Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

On October 25, 2021, N.Y. Crim. Proc. § 440.10(2)(b) and (c) were amended to remove the procedural bar precluding a defendant from raising a collateral claim based on the ineffective assistance of counsel if he did not raise it on his direct appeal, to echo the federal policy set forth in *Massaro v. United* States, 538 U.S. 500, 504 (2003), and that existing in a majority of other states. *See* N.Y. A.B. 2653, Comm. Report (Jan. 21, 2021). As New York law already favored raising "mixed claims" of ineffective assistance on collateral review, the Legislature reasoned that applying the prior procedural bar created a risk that defendants would be forced to raise the issue in an inappropriate forum when the trial record was incomplete or inadequate to argue the claim. *Id.*

Both houses of the state Legislature unanimously passed the amendment, which went into effect immediately upon enactment. However, New York courts declined to apply the amendment retroactively. Thus, defendants who recognized that: (1) their ineffective assistance of counsel claims necessitated an expansion of the trial record to fully articulate the claim, and (2) the futility of raising such claims on direct appeal, only to be told that the appropriate mechanism for such review was through N.Y. Crim. Proc. § 440.10, are now in legal limbo with no due process.

This case presents a critical question for criminal appellate practice in New York: Does the failure to apply the amendment retroactively deprive a defendant of his fundamental rights under the Sixth and Fourteenth amendments where he claims he was denied effective assistance of counsel?

PARTIES TO THE PROCEEDING

Petitioner Jose Mejia, was defendant-appellant before the New York Court of Appeals.

The Respondent is the State of New York, who was appellant before New York Court of Appeals.

Luis Hernandez is a co-defendant on the original indictment. Mr. Hernandez pleaded guilty prior to the original trial and was not involved in either Mr. Mejia's direct appeals on his trials, or any of the proceedings related to the instant appeal of Erie County Supreme Court's summary denial of his motion for post-conviction relief pursuant to N.Y. Crim. Proc. § 440.10.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the Supreme Court of Erie County, the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, and the New York Court of Appeals:

The People of the State of New York v. Mejia, No. 01534-2006 (N.Y. Sup. Ct., Erie County, Jul. 19, 2007).

The People of the State of New York v. Mejia, KA 07-01558, No. 754 (N.Y. App. Div., 4th Dep't., Jul. 2, 2009).

The People of the State of New York v. Mejia (N.Y. Ct. App., Nov. 23, 2009).

The People of the State of New York v. Mejia, No. 01534-2006 (N.Y. Co. Sup. Ct., Erie County, Mar. 19, 2012)

The People of the State of New York v. Mejia, KA 12-00793, No. 231 (N.Y. App. Div., 4th Dep't., Mar. 20, 2015)

The People of the State of New York v. Mejia (N.Y. Ct. App., Dec. 2, 2015)

Mejia v. New York, No. 15-8830 (578 U.S. 1026, Jun. 6, 2016)

Mejia v. New York, 2021 WL 409861 (W.D.N.Y., Feb. 5, 2021)[1]

The People of the State of New York v. Mejia, No. 01534-2006 (N.Y. Sup. Ct., Erie County, Oct. 11, 2018)

The People of the State of New York v. Mejia, KA 18-02204 (N.Y. App. Div., 4th Dep't., Jan. 22, 2019)

The People of the State of New York v. Mejia, KA 18-02204, No. 787 (N.Y. App. Div., 4th Dep't., Oct. 1, 2021)

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[1] Petition for *habeas corpus* denied on grounds not related to Mr. Mejia's claim of ineffective assistance of trial counsel which petitioner acknowledged was unexhausted, and which he subsequently withdrew. *See* App. 30a, n 9.

The People of the State of New York v. Mejia, KA 18-02204, Motion No. 0787 / 21 (N.Y. App. Div., 4th Dep't., Jan. 28, 2022)

The People of the State of New York v. Mejia (N.Y. Ct., App., Feb. 17, 2022)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

On October 25, 2021, New York State codified the right for a defendant to pursue collateral review of a criminal conviction on grounds of ineffective assistance of counsel, regardless of whether he pursued the issue on a direct appeal, lifting a prior procedural bar on such claims. The statutory amendment was made in accordance with the holding in *Massaro v. United States*, 538 U.S. 500, 504 (2003), which lifted a similar procedural bar to raising these claims in federal habeas proceedings.

On October 1, 2021, the New York Supreme Court, Appellate Division, Fourth Department affirmed a lower court decision applying the pre-existing procedural bar to Mr. Mejia's post-conviction motion seeking vacatur based on, among other things, the ineffective assistance of counsel.

The Appellate Division subsequently declined to hear reargument on the appeal, and the New York State Court of Appeals declined to further review the case. These decisions amount to a refusal to retroactively apply a legislative amendment that was intended to restore a defendant's fundamental due process right to counsel, under the Fourteenth and Sixth Amendments, respectively.

OPINION AND ORDER BELOW

The Order of the New York Court of Appeals is unreported. It is reproduced at App. 1a. The order of the New York Supreme Court, Appellate Division, Fourth Judicial Department denying petitioner's motion for reargument is reported at 158 N.Y.S.3d 717 (N.Y. App. Div. 4th Dep't 2022). It is reported at App. 2a. The opinion

of the New York Supreme Court, Appellate Division, Fourth Judicial Department is reported at 152 N.Y.S.3d 368 (N.Y. App. Div. 4th Dep't 2021). It is reproduced at App. 3a. The order of the New York Supreme Court, Appellate Division, Fourth Judicial Department granting leave to appeal in connection with defendant's claim of ineffective assistance of counsel is unreported. It is reproduced at App. 5a. The Erie County Supreme Court's Memorandum and Order summarily denying petitioner relief is unpublished but is reproduced at App. 6-a.

JURISDICTION

The Order of the New York Court of Appeals was entered on February 17, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution reads:

> In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution reads:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

> without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Other involved statute – N.Y. Crim. Proc. § 440.10 is reproduced in a Statutory Addendum at App. 39a.

STATEMENT OF THE CASE

I. Following an unsuccessful direct appeal, petitioner filed a motion pursuant to N.Y. Crim. Proc. § 440.10, seeking collateral review of his claim of ineffective assistance of counsel.

Police handcuffed a flip-flop clad Mr. Mejia, then 20 years old, in front of his mother, at her house. They took him in for questioning about a homicide they were investigating and obtained a statement from him. According to a police detective, he noticed a pair of sneakers in her foyer and asked for them so that Mr. Mejia could wear them at headquarters. The detective claimed that he later realized the Air Jordan sneakers were connected to the case — specifically, that they purportedly belonged to the decedent in the homicide they were investigating.

In August, 2006, Mr. Mejia and his co-defendant were indicted on multiple counts including murder, robbery and weapons charges. The co-defendant pleaded guilty and testified against Mr. Mejia at a trial in April, 2007. A jury convicted Mr. Mejia of murder in the first degree, robbery in the first degree, criminal possession of a weapon in the second degree and criminal possession of stolen property (the sneakers) in the fifth degree. Mr. Mejia was sentenced on July 19, 2007 to a controlling sentence on the top count of murder in the first degree of life imprisonment without parole.

Mr. Mejia appealed his conviction, and on July 2, 2009, his conviction was reversed due to the police improprieties in obtaining the statement, and the matter was remitted for a new trial. *People v. Mejia*, 882 N.Y.S.2d 621 (N.Y. App. Div. 4th Dep't 2009). In that same appeal, the New York Supreme Court, Appellate Division, affirmed the lower court's ruling denying suppression of the sneakers. *Id.*

At the second trial, in October 2011, the co-defendant refused to testify, but respondent was able to introduce his testimony from the first trial against Mr. Mejia. The primary piece of evidence was the sneakers that respondent claimed belonged to the decedent. Mr. Mejia's defense at trial was that the popular and common sneakers were his own, and *not* the decedent's.

DNA analysis performed on the sneakers revealed that: (1) there was no evidence of the decedent's DNA on the sneakers and (2) that Mr. Mejia could not be excluded as a contributor to the DNA discovered on the sneakers (that he ultimately wore to the police station). But defense counsel failed to highlight the highly exculpatory forensic evidence at trial, either by way of cross-examination of the prosecution witnesses, or by offering a forensic witness to testify for the defense, and did not provide the jury with any explanation as to why the absence of the decedent's DNA on the sneakers was significant.

Another change at the second trial was respondent's decision not to call the ballistics expert who testified at Mr. Mejia's first trial. At the first trial, that witness failed to conclusively establish that the weapon introduced at trial was the murder weapon. Notably, the co-defendant's self-serving testimony conflicted with other

testimony suggesting that it was the co-defendant who was the primary actor in the events leading to decedent's death. Yet, defense counsel did not call the ballistics expert for the defense, or otherwise challenge the prosecution's case as to the purported murder weapon, which was recovered from an area separate from the crime scene, but connected to the co-defendant.

The jury acquitted Mr. Mejia of murder in the first degree, but found him guilty of two counts of murder in the second degree (intentional and felony murder), robbery in the first degree, criminal possession of a weapon in the second degree, and criminal possession of stolen property in the fifth degree. Mr. Mejia was sentenced on those convictions on March 19, 2012, and filed a timely notice of appeal.

In or about 2014, Mr. Mejia perfected his direct appeal arguing, among other things, that it was reversible error to admit the co-defendant's prior testimony, but his conviction was affirmed. *People v. Mejia*, 6 N.Y.S.3d 813 (N.Y. App. Div. 4th Dep't 2015). Mr. Mejia did not raise a claim of ineffective assistance on the direct appeal.

Mr. Mejia's subsequent petitions for writs of certiorari and habeas corpus were denied on June 6, 2016 and February 5, 2021, respectively. *Mejia v. New York.*, 578 U.S. 1026 (2016); *Mejia v. New York*, 2021 WL 409861 (W.D.N.Y., Feb. 5, 2021).

On or about August 9, 2017, Mr. Mejia filed a *pro se* motion pursuant to N.Y. Crim. Proc. § 440.10 in Erie County Supreme Court seeking to vacate his judgment of conviction, raising several grounds, as permitted by that statute. The Supreme Court denied the motion in its entirety, without a hearing. Mr. Mejia's subsequent motion to the Supreme Court, Appellate Division, Fourth Department seeking

permission to appeal that summary denial was granted, but only as to Mr. Mejia's claim of ineffective assistance of trial counsel. App. 5a.

II. Mr. Mejia's claim of ineffective assistance of counsel was a "mixed claim" requiring an expansion of the trial record to fully articulate his claim such that his post-conviction motion was the appropriate mechanism to raise that claim.

New York has long held that mixed claims of ineffective assistance of counsel involving matters outside of the record should be raised by way of a motion pursuant to N.Y. Crim. Proc. § 440.10. *See People v. Love,* 443 N.E.2d 486, 487 (N.Y. 1982). Mr. Mejia's claim is such a mixed claim. And, as this Court held in *Massaro*, it is of no moment that the record bears *some* indication of the claim. 538 U.S. 500, 504-504 (2003). This makes sense given the federal and state standards in establishing ineffective assistance claims, which require at a minimum that counsel's strategy was not legitimate, and that the defendant suffered prejudice due to counsel's ineffectiveness. *Strickland v. Washington*, 466 U.S. 668 (1984)*; People v. Baldi*, 429 N.E.2d 400 (N.Y. 1981).

Although it is evident from this record what defense counsel did not do, there is no explanation for trial counsel's omissions with respect to the forensic and ballistics evidence. Nor can it be said definitively that counsel's omissions were not part of a legitimate strategy. There is nothing in this record elucidating counsel's otherwise inexplicable inactions. Given the totality review in New York state, on this record alone, an appellate court cannot make a definitive ruling on an ineffectiveness claim.

In his moving papers, Mr. Mejia asserted new counsel had approximately two weeks to prepare for the second trial.[2] Thus, critical to the review of Mr. Mejia's claim is what steps new counsel took to prepare for a homicide trial with the limited preparation time, including whether he reviewed the testimony and evidence from the first multi-day trial.[3] Notwithstanding some indicia of counsel's deficiencies on the record, given New York's totality review of ineffective assistance of counsel claims, there were significant additional facts needed to substantiate Mr. Mejia's claim that would have precluded a finding on the direct appeal. *See People v. Brown*, 382 N.E.2d 1149, 1149 (N.Y. 1978) ("Consequently, in the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceedings brought under CPL 440.10").

III. The Appellate Division unanimously affirms Supreme Court's Decision and the Court of Appeals denies leave to appeal.

On his limited permissive appeal to the Appellate Division, Fourth Judicial Department, Mr. Mejia argued that the Supreme Court's summary denial of his claim was improper, and that he had either set forth sufficient facts in his moving papers militating a summary grant of his application, or in the alternative, a hearing to further develop the record. Respondent contended that the lower court properly

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[2] A review of the court file indicates that Mr. Mejia had successive counsel following the remittal to Supreme Court, and that trial counsel was assigned on September 30, 2011, with the jury trial commencing on October 13, 2011.

[3] Trial commenced with jury selection on April 9, 2007. Proof began on April 10, 2007, and the jury rendered its verdict on April 17, 2007.

applied the procedural bar to Mr. Mejia's claim, and that in any event, the claim was without merit.

The Appellate Division affirmed the Supreme Court, concluding that it properly determined that Mr. Mejia could have raised his claim on the direct appeal, and that the procedural bar was appropriately applied. App. 3a. The Appellate Division did not, however, comment on whether Mr. Mejia's claim could be *decided* based on what appeared on the record, thus leaving open the question of whether Mr. Mejia's claim was, in fact, a mixed claim, to be pursued on collateral review, and not a direct appeal. Nor did it discuss or assess the merits of Mr. Mejia's claim. *Id.*

By letter application dated October 28, 2021, Mr. Mejia sought leave to appeal to the New York State Court of Appeals, contending that if claims of ineffective assistance of counsel are often indeterminable based on the trial record alone, a defendant should not be precluded from raising those claims by way of a post-conviction motion if he fails to raise the unwinnable argument on his direct appeal. Respondent reiterated its contentions on appeal.

Shortly thereafter, appellate counsel learned that only a few days earlier, on October 25, 2021, New York State Governor Kathy Hochul enacted New York Assembly Bill Number A2653, to be effective immediately. N.Y. A.B. 2653 (NS) (2021). That act codified the holding in *Massaro*, removing the previous bar as to post-conviction claims for ineffective assistance of counsel claims that was relied on by Erie Supreme Court in denying Mr. Mejia's motion. Appellate counsel immediately filed a motion for reargument, contending that the Court's October 1,

2021 decision was based on outdated standards that were now specifically repudiated by the legislature, and requested that the Court of Appeals reserve decision on Mr. Mejia's application for leave to appeal pending the resolution of the motion. That motion was denied. App. 2a.

Thereafter, on February 1, 2022, Mr. Mejia supplemented his original letter application requesting that the Court of Appeals grant permission to appeal for the reasons set forth in the original application, or alternatively, find that the amendments to N.Y. Crim. Proc. § 440.10(2)(b) and (c) be applied retroactively. Respondent objected, citing to the state's general presumption of nonretroactivity, absent specific language directing retroactivity.

The Court of Appeals thereafter denied Mr. Mejia permission to appeal. App. 1a.

REASONS FOR GRANTING THE PETITION

In *Massaro v United States*, this Court recognized the untenable position of defendants forced to raise a claim on a direct appeal, that by its very nature generally cannot be determined on a trial record alone. 538 U.S. 500, 504 (2003). At issue in *Massaro* was whether a petitioner seeking a writ of habeas corpus was foreclosed from raising a claim of ineffective assistance of counsel on his petition for the writ, if he failed to raise it on his direct appeal. In lifting that procedural bar, this Court found that requiring a defendant to raise an ineffective assistance of counsel claim on a direct appeal did not promote the procedural default rule's objectives of conserving judicial resources and respecting the law's important interest in the

finality of judgments. *Id.* This was because in general, the appellate court was not the forum best suited to assess those facts, even where the record contained some indication of the claim.

It is clear that New York intended to remove the same obstacle for defendants in this state and align itself with the minimal rights accorded in *Massaro*. And, Mr. Mejia, contends, it is also clear that New York intended for this correction to apply retroactively, particularly where off-record support would further develop matters not readily apparent on the record, such as counsel's strategy, for a proper review on the merits. The failure of the courts to apply this legislation retroactively is a matter that cuts to the core of substantive due process.

I. The legislative intent of the statutory amendment establishes an exception to the presumption against retroactivity.

As evidenced by the New York State Assembly committee report in support of the new legislation, New York wished to rectify the existing bar for the same reasons given in *Massaro*. N.Y. A.B. 2653, Comm. Report (Jan. 21, 2021). The reporting committee pointed out that the "underlying purpose" of the procedural bar was to prevent defendants from using the post-conviction motions as a substitute to direct appeals, and that procedural bars exist to promote judicial economy and finality. But, the committee concluded that this particular procedural bar did not promote these objectives, and instead created a "risk that defendants will feel compelled to raise the issue for the first time in a forum not best suited to assess those facts," *Id.*, (citing *Massaro* at 504). That in turn would result in a situation where the participants in the direct appeal "must proceed on a trial record that is not developed precisely for

the purpose of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." *Id.* The committee thus determined, "The Supreme Court's reasons for exempting ineffective assistance claims from its equivalent procedural bar are equally applicable in New York's statutory scheme." *Id.*

Given that the amendment went into effect immediately, and the readily discernible intent of the legislation, it is clear that the state Legislature "expressed a sufficiently clear intent to the apply the amendment retroactively," despite not including explicit language as to that intent. *Regina Metro. Co., LLC,* 154 N.E.3d 972, 992 (N.Y. 2020); *see also, Matter of Duell v. Condon*, 647 N.E.2d 96 (N.Y. 1995) (legislative intent of retroactivity of Real Property Law amendment evident from the legislative history); *cf. People v. Duggins*, 140 N.Y.S.3d 317, 321 (N.Y. App. Div. 3d Dep't 2021) (declining to make retroactive an amendment to the Criminal Procedure Law allowing defendants to challenge denials of "speedy trial" motions despite pleading guilty, where among other things, the amendment's effective date was set in the future from enactment date, and that effective date was further delayed).

Indeed, without explicit language in a statutory amendment to confer retroactivity, there is a general presumption against retroactivity. *See generally, Regina Metro,* 154 N.E. 3d 972. But that is not the end of the analysis. There is no requirement that particular words are used, since the legislative intent can sometimes be discerned from the nature of the legislation or the legislative history. *Regina Metro* at 978, 992 (citing *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998) (citing *Altman v. 285 W. Fourth* LLC, 99 N.E.3d 858 (N.Y. 2018)); *see also Matter of M.B.*,

846 N.E.2d 794, 801 (N.Y. 2006) (when statute is part of a broader legislative scheme, its language is construed "in context and in a manner that harmonizes the related provisions and renders them compatible") (quoting *Matter of Tall Trees Constr. Corp. v. Zoning Bd. Of Appeals of Town of Huntington*, 761 N.E.2d 565 (N.Y. 2001)).

Here, both the legislative intent and nature of the legislation are one and the same — to modify the pre-existing inefficient procedural structure, and remove the barrier for defendants seeking to file ineffective assistance of counsel claims. The legislation was passed unanimously by both houses N.Y. A.B. 2653 (NS) (2021)(Bill Tracking). And the statute went into effect immediately. There is no stronger indicia of the legislative intent than for the procedural barrier to be removed immediately, and retroactively.[4]

And federal jurisprudence seemingly recognizes an exception to the general presumption of nonretroactivity when a "new" rule merely applies a settled rule. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1555 (2021) (holding that new rules of criminal procedure cannot be applied retroactively in federal collateral review proceedings, contrasting the question with when "settled rules" are applied). Here, the amendment to N.Y. Crim. Proc. § 440.10(2)(b) and (c) removes a recognized impediment for defendants to pursue Sixth Amendment claims in the state courts. Indeed, the right to the effective assistance of counsel implicates the fundamental fairness and

[4] Petitioner contends that the amendment meets the first requirement of the state analysis that the legislation has retroactive effect, and that analysis is not at issue here. *See Regina Metro* at 988.

accuracy of the criminal trial proceedings, and is a long-settled right. *Gideon v Wainright*, 372 U.S. 335 (1963); *Garza v. Idaho*, 139 S. Ct. 738 (2019).

II. The decision below is wrong.

Notwithstanding the amendments to N.Y. Crim. Proc. § 440.10(2)(b) and (c), the Appellate Division's decision is not only wrong, it sends the wrong message to defendants and appellate counsel alike. Although it did not address the merits of Mr. Mejia's claim, in affirming the Supreme Court's decision, its affirmance suggests that Mr. Mejia's claim is solely a direct appeal claim, when in fact it *is* a mixed claim. Tellingly, the Appellate Division declined to address the merits, the likelihood of success of the claim on a direct appeal, or Mr. Mejia's specific assertion in his moving papers that his claim was a mixed claim. *See Brown*, 382 N.E.2d 1149 (N.Y. 1978)*; accord People v. Henderson*, 64 N.E.3d 284, 285-286 (N.Y. 2016).

When Mr. Mejia's direct appeal was perfected in 2014, the Fourth Department (in accordance with state law) was regularly rejecting claims of ineffective assistance of counsel where they concerned matters not before the court on direct appeal. *See People v. Conway,* 988 N.Y.S.2d 337, 338-339 (N.Y. App. Div. 4th Dep't 2014); *People v. West*, 988 N.Y.S.2d 792, 794 (N.Y. App. Div. 4th Dep't 2014); *People v. Williams,* 988 N.Y.S.2d 771, 773 (N.Y. App. Div. 4th Dep't 2014). If Mr. Mejia had raised the issue on his direct appeal, where he would have to establish an absence of a legitimate strategy to prevail (*see Strickland*, 466 U.S. 668*; Baldi*, 429 N.E.2d 400), it is more likely than not that the Appellate Division would have found that the claim was not supported by the direct record, and required the development of additional facts.

This is the precise problem the amendment is designed to correct:

> Prohibiting a defendant from collaterally raising an ineffective assistance claim that potentially falls within the *narrow class* directly appealable ineffectiveness claims imposes unnecessary burdens on defendants and the on the judicial system. Importantly, it is often difficult for a defendant to predict whether a given court will categorize his or her ineffectiveness claim as cognizable on direct appeal. N.Y. A.B. 2653, Comm. Report (Jan. 21, 2021).

Notably, the Supreme Court, Appellate Division, Third Department followed *Massaro*, even prior to the amendment, for the same reasons. *See People v. Taylor*, 64 N.Y.S.3d 714 (N.Y. App. Div. 3d Dep't 2017); *People v. Maxwell,* 933 N.Y.S.2d 1108 (N.Y. App. Div. 3d Dep't 2011).

This is not a situation where Mr. Mejia sought to file a N.Y. Crim. Proc. § 440.10 motion "as a substitute for a direct appeal." *People v. Cooks,* 491 N.E.2d 676, 678 (N.Y. 1986). This case is precisely the scenario the Legislature sought to prevent. In recognizing that more was needed than what was evident on the record to substantiate his ineffective assistance claim, Mr. Mejia pursued the only appropriate avenue available for him to raise it. That he waited to filed the 440 motion shows only that he first waited the outcome of his direct appeal on which, he would not have succeeded on the ineffective claim, but had other meritorious issues to raise, and the potential for success. Such a strategy is often employed on post-conviction matters, to avoid the unnecessary filing of motions where the ultimate end-relief (reversal of his conviction) might be achieved on direct appeal.

III. The question presented is recurring and exceptionally important, as this case shows.

Appellants should not be precluded from seeking post-conviction relief for failing to raise claims of ineffective assistance of counsel that cannot be decided on direct appeal for lack of a full record.

Giving retroactive effect to this amendment only returns to defendants what was rightfully theirs — the right to seek post-conviction relief on ineffective assistance claims. As recognized by the Legislature, and as evident by the number of state and federal decisions (pre-dating *Massaro*) any contrary holding punishes defendants for not pursuing unwinnable claims is against public policy, and deprives them of their due process rights:

> Following the lead of the federal system and the majority of other states, this measure would . . . remove the existing bars to collateral review where the claim is the ineffective assistance of counsel. In so doing, it would encourage these claims to be brought in the preferable forum in the first instance, would help to eliminate the potential injustices to defendants . . . , and would help to prevent unnecessary, or unduly delayed, appeals in these cases. N.Y. A.B. 2653, Comm. Report (Jan. 21, 2021)

IV. This case is an excellent vehicle.

This case is an excellent vehicle for resolving the question presented. If the Appellate Division, Fourth Department had followed *Massaro*, or its sister appellate court, in the first instance, it would have furthered the public policy goals of allowing defendants to seek collateral review of ineffective assistance claims. Instead, the Supreme Court foreclosed the only appropriate avenue available to Mr. Mejia,

depriving him of his due process right to seek relief for a violation of his Sixth Amendment right to counsel.

While the Legislature was a little "late to the game," it was not without trying. As the legislative history establishes, the bill was initially proposed in the Assembly as early as 2005 (*Massaro* was decided in 2003) (N.Y. A.B. 2653 (NS) (2021) (Bill Tracking). That Mr. Mejia's appeal coincided with the ultimate successful passage and enactment of the bill is almost fortuitous, as it brought this very important question of the law's retroactivity to the forefront, to be decided sooner rather than later.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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