No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

MAURICE COTTON — PETITIONER
(Your Name)

VS.

HAROLD GRAHAM — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☐ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

_____

_____

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☒ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____

_____, or

☐ a copy of the order of appointment is appended.

M. Cotton

(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Maurice Cotton, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ 0	$ 0	$ 0	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child Support	$ 0	$ 0	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0	$ 0	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0	$ 0	$ 0
Other (specify): _____	$ 0	$ 0	$ 0	$ 0
Total monthly income:	$ 0	$ 0	$ 0	$ 0

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
0	0	0	$ 0
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
0	0	0	$ 0
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
0	$ 0	$ 0
	$	$
	$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value 0

☐ Other real estate
Value 0

☐ Motor Vehicle #1
Year, make & model 0
Value

☐ Motor Vehicle #2
Year, make & model 0
Value

☐ Other assets
Description 0
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
0	$ 0	$ 0
	$	$
	$	$

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
0	0	0

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☑ Yes ☐ No Is property insurance included? ☑ Yes ☐ No	$ 0	$ 0
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ 0	$ 0
Clothing	$ 0	$ 0
Laundry and dry-cleaning	$ 0	$ 0
Medical and dental expenses	$ 0	$ 0

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$ 0
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ 0
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$ 0
Life	$ 0	$ 0
Health	$ 0	$ 0
Motor Vehicle	$ 0	$ 0
Other: _____	$ 0	$ 0
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ 0	$ 0
Installment payments		
Motor Vehicle	$ 0	$ 0
Credit card(s)	$ 0	$ 0
Department store(s)	$ 0	$ 0
Other: _____	$ 0	$ 0
Alimony, maintenance, and support paid to others	$ 0	$ 0
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ 0
Other (specify): _____	$ 0	$ 0
Total monthly expenses:	$ 0	$ 0

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I have been incarcerated for several years.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: October, 2021

M. Cotton

(Signature)

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

MAURICE COTTON — PETITIONER
(Your Name)

vs.

HAROLD GRAHAM — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Maurice Cotton, Pro Se
(Your Name)

Elmira Correctional Facility, 1879 Davis Street
(Address)

Elmira, New York 14901
(City, State, Zip Code)

607-734-3901
(Phone Number)

QUESTION PRESENTED

Whether the lower court erred in finding Petitioner failed to make a substantial showing of a denial of a constitutional right, when Statute 28 U.S.C.A. §2253 is without an examination of the trial record or an evidentiary hearing?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

PETITION FOR A WRIT OF CERTIORARI

Maurice Cotton, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit denying petitioner, or indigent appellant, leave to appeal in forma pauperis and certificate of appealability on an appeal from a state criminal conviction and the rehearing on opinion of the assistant clerk of Court to double file Writ of Certiorari in this case.

OPINION BELOW

The opinion of the court of appeals denying a certificate of appealability is attached. Appendix (hereinafter App.) A. The opinion of the court of appeals denying motions for rehearing/reconsideration en banc, to vacate panel judgment and the recall of mandate is attached. App. B. The opinion and order of the district court denying a certificate of appealability is attached. App. C. The opinion and order of the district court denying the writ of habeas corpus is attached. App. D. The motion for rehearing on the opinion of the supplanted assistant clerk of Court to double file Writ of Certiorari is attached. App. F.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 2021. App. A. Timely petitions for rehearing/reconsider en banc, to

vacate judgment and to recall mandate were denied on August 23, 2021. App. B. A timely Writ of Certiorari was filed on October 29, 2021. App. F. This Court's jurisdiction rests on 28 U.S.C.A. §1254.

STATUTE INVOLVED

Pertinent provisions of United States Code Annotated Section 2253 are set forth at **Appendix E** to this petition.

STATEMENT

This case involves the denial of habeas corpus despite the lack of an evidentiary hearing or an examination of trial record before making a judgment that petitioner failed to make a substantial showing of a denial of a constitutional right. Nonetheless, the Second Circuit denied the certificate of appealability and motions to recall mandate, vacate judgment and rehearing/reconsideration en banc, holding that petition failed to make a showing of a denial of a constitutional right without an examination of the trial record or an evidentiary hearing. In other words, the district court must decide an exaggerated case not the case before it.

The Second Circuit's ruling puts a law governing making a substantial showing of a denial of a constitutional right into complete chaos. Only a short time ago, the Second, Eighth, Ninth

and Tenth Circuits, reaffirming prior decisions, upheld that an evidentiary hearing and trial records are required, in making a showing or a failure to make such a showing of a denial of a constitutional right.

This conflict among the courts means that, until this Court resolves the issue, courts reviewing a substantial showing of a denial of constitutional right cannot be certain what criteria to apply in deciding whether to certify a failure to provide effective assistance based on not making a routine motion for a trial order of dismissal or a failure to interview alibi witnesses. Under the Second Circuit's normal practice, certification for a showing of a denial of a constitutional right, must go through an evidentiary hearing or an examination of trial record.

It is critically important for courts and litigants to know whether the Second Circuit's decision is right or wrong. Among the most important benefits of an evidentiary hearing or an examination of trial record are finality and certainty. The confusion created by the Second Circuit regarding a key element of the substantial showing ec tion means that parties will have neither. Instead, the certain c nclusion of a substantial showing of a denial of a constitutional right, as in this case, will be more litigation. If the Second Circuit is wrong but its ruling remains unreviewed, the decision will unjustifiably deter parties from a substantial showing and force them unnecessarily to

litigate these cases. If the Second Circuit is right and its approach ultimately prevails nationwide, parties that make a substantial showing in reliance on the decisions of other courts eventually will see a bar to a certificate of appealability. This Court should grant review to clarify the standard for a substantial showing and an evidentiary hearing or an examination of trial record, and prevent the enormous waste of both judicial and private resources that is the real-world result of these conflicting rulings.

1. Background. This lawsuit arose out of the states criminal trial conviction based on ineffective assistance of counsel in violation of the Sixth Amendment. Petitioner had alibi witnesses that he was no where near the crime at the time of crime nor had anything to do with the crime. **Pro Se Supp. Appendix**, 80-90. Petitioner's trial counsel neither interviewed nor presented the alibi witnesses or expert witness for trial. Also, the trial counsel forgot to make a routine motion for trial order of dismissal. **Reply to Response to Petitioner's Amended Objections to Report and Recommendation**, p.2.

Petitioner was provided with ineffective assistance, when a counsel fails to make a motion for a trial order of dismissal, because forgetting to preserve an insufficiency of evidence issue by not making the motion is an error so serious it causes a trial to be unfair, and shows that the counsel was not functioning as a counsel guaranteed by the Constitution and the error made the

trial result unreliable. See, Jelinek v. Costello, 247 F. Supp. 2d 212, 271 (E.D.N.Y. 2003); Nickels v. Conway, 2013 WL 4403822, at 6.

In Jelinek, the counsel did not make any requests for trial dismissal. Id., at 253. The Sixth Amendment right to effective assistance of counsel can be violated, if there is a failure to raise an obvious claim such as trial order of dismissal. Id., at 268, citing, LanFranco v. Murray, 313 F. 3d 112, 118 (2d Cir. 2002). "[T]he court may ... upon motion of an indictment because the trial evidence is not legally sufficient to establish'" an offense.Id., at 270. "Legally sufficient" describes a quantum rather then a quality of evidence. Id. Failure to move for an order ... is ineffective assistance of counsel. Id., at 271. In Nickels, the trial counsel did not make a trial order of dismissal to preserve the legal insufficiency of evidence issue. Id., at 5. The failure to preserve the issue by not making a motion for the trial order of dismissal is ineffective assistance. Id., at 6.

Here, as in Jalinek and Nickels, I was provided with ineffective assistance of counsel. The trial counsel did not effectuate the trial order of dismissal. **Trial Transcript** (T.T.). The error was presented to the lower courts. Cf., District Court's **Decision and Order.** The motion for trial order of dismissal is necessary to preserve a legal insufficiency of evidence issue, which is a routinely obvious claim that court can

dismiss any count of an indictment upon a motion. A quantum of evidence means an amount of evidence, which was lacking to establish the elements for legal sufficiency of an attempt murder charge. The nature and extent of that case are well documented. Two trials were held and a CPL 440.10 Motion was filed. The lower courts found the trial counsel's mistake in forgetting to preserve the insufficiency of evidence issue and interview alibi witnesses were strategic. **Appendix D.** Ineffective assistance overcomes a procedural default. See, Harris v. Reed, 489 U.S. 255, 262 (1989). But, in Petitioner's case counsel's not making the routine motion or providing ineffective assistance is used as a procedural default of insufficiency of evidence issue because I am denied the benefits of Harris, Jelinek and Nickels's rules of law. See, People v. Cotton, 120 A.D. 3d 1564.

2. District Court Proceeding. Respondent did not provide the trial record to district court. **Reply to Return**, p. 3. So, the district court did not provide either an evidentiary hearing or an examination of trial record regarding ineffective assistance or alibi witnesses' testimonies before the lower courts found Petitioner failed to make a substantial showing of a denial of a constitutional right. The distrcit court denied the writ of hebeas corpue. **Appendix D.** An appeal was timely filed and a certificate of appealability was filed. The certificate of appealability was denied. **Appendix C.**

3. Court of Appeals Proceeding. A notice of Appeal was

filed. A motion for certificate of appealability was filed. App. A. It was denied for a failure to show a denial of a constitutional right. App. A. Motions and petitions to recall mandate, vacate judgment and for rehearing/reconsideration en banc were filed. App. F, Exhibits B - post 36, C, D. The motions and petitions were denied. App. B. The court of appeals concluded that a failure to make a substantial showing of a constitutional right can be found without an examination of a trial record or an evidentiary hearing. App. A.

REASONS FOR GRANTING THE PETITION

Because Statute 28 U.S.C.A. §2253 permits courts to independently conduct an evidentiary hearing or examine trial record before determining a failure to make a substantial showing of a denial of a constitutional right, the court of appeals below incorrectly applied §2253.

There is a clear conflict among the courts of appeals regarding the question presented. That conflict is markedly illuminated by the contrast among the Second, Eighth, Ninth and Tenth Circuits' decisions in Taylor, Nave, Jones and Cook, infra and the decision below. All cases invoke a certificate of appealability's substantial showing of a denial of a constitutional right. The Circuits conclude that without an evidentiary hearing or independent examination of trial record the certificate of appealability's substantial showing of a denial of a constitutional right cannot be considered, while the Ninth Circuit upheld a certificate based on a legal standard that required a consideration of the evidentiary hearing or trial record. This completely different treatment of similarly-situated litigants creates an intolerable conflict and severe unfairness, that this Court should resolve.

A. The Second Circuit's Ruling Conflicts With The Decisions Of Every Other Court Of Appeals That Has Addressed The Issue.

The Second Circuit previously explicitly rejected the Second Circuit's present approach, observing that to decide the certificate of appealability an evidentiary hearing must be conducted. See, Taylor v. U.S., 822 F. 3d 84, 94 (2d Cir. 2016). Other courts of appeals agree with the Second Circuit's previous approach. See, Jones v. Wood, 114 F. 3d 1002, 1008 (9th Cir. 1997); Nave v. Delo, 62 F. 3d 1024, 1033 (8th Cir. 1995)(The court of appeals rejects the defendant's claim to remand because an evidentiary hearing was conducted in the district court and one is necessary, pursuant to the Supreme Court.); U.S. v. Cook, 166 F. 3d 1222 (10th Cir. 1999)(The district court examined the trial record and appellant failed to make a substantial showing of a denial of a constitutional right based on the trial record.).

First, in Taylor, the defendant moved the court to construed his appeal from the district court's conviction for drugs as a motion to recall the mandate, to vacate the original judgment and reenter judgment. Id., at 87. The defendant offered unsupported allegations. Id., at 94. Defendant has not had the opportunity to prove his allegations. Id., at 95. The case is remanded for an evidentiary hearing on the unsupported allegations, which means

an evidentiary hearing is essential for "a substantial showing of a denial of constitutional right." Id., 94.

Finally, in Jones, the counsel failed to investigate another suspect prior to trial and to investigate the physical evidence. Supra, at 1007. The defendant filed two motions requesting discovery of his counsel's records and expansion of the record asking that the FBI conduct tests on the physical evidence that his lawyer did not perform. Id., at 1007. The motions were denied by the magistrate judge without an independent review of the record. Id. The district court is required to make an independent review of the record, or otherwise grant an evidentiary hearing and make its own findings on the merits. Id., at 1008. The record before the magistrate judge did not include the state court trial transcript. Id. There is no evidence that the magistrate judge examined the transcript. Id. It is of no consequence that defendant did not provide the transcript. The actual trial evidence is not analyzed, so because there were no evidentiary hearing or independently review of the state court record, the writ is remanded. Id.

Here, as in Taylor and Jones, the Court should grant my writ to vacate the district court and court of appeal's judgment and reenter judgment remanding the writ for an evidentiary hearing or the examination of trial record. I was not provided an evidentiary hearing nor an independent review of trial transcript nor pro bono counsel to substantiate my allegations. I cannot

substantiate my allegations without an evidentiary hearing or trial record because I am incarcerated. The lower courts hold I failed to make a substantial showing of the denial of a constitutional right to criminal trial counsel for a certificate of appealability without an evidentiary hearing or trial record or pro bono counsel. **Panale Court's Decision and Order.** Although there is no issue with my acting with diligence, I am unable to substantiate my allegations with proof because I am without an evidentiary hearing or trial record and pro bono counsel.

B. The Second Circuit Erred, When It Did Not Examine All The Evidence.

In applying Strickland, a court is required to evaluate the strength of all the evidence, which includes the evidence favorable to the petitioner, in order to make a fair determination. Skakel v. Commission of Correction, 320 Conn. 1, 26 (2018), citing, Williams v. Taylor, 592 U.S. 362, 397-98 (2000).

In Skakel, the petitioner raised an alibi defense. Id., at 12. The counsel called petitioner's relatives as alibi witnesses, but committed a very serious error by foregoing an investigation into what one potential witness might say. Id., at 23. The petitioner is prejudiced by a counsel's failure to present a witness that would corroborate an alibi defense. Id., at 41. Although prosecution's evidence was sufficient to convict, it was not strong enough to find that the alibi testimony would not have mattered. Id. "The question is ... whether in [alibi testimony] absence he received a fair trial." Id., at 139, n. 27, citing, Avery v. Prelesnik, 548 F. 3d 434, 439 (6th Cir. 2008).

Here, unlike in Skakel, I did not receive a fair evidentiary hearing, trial record examination nor determination, because the alibi witnesses's testimonies are not considered. I notified the counsel of the alibi witnesses. T.T. The alibi witnesses are neither interviewed nor presented. T.T. One alibi witness is

independent and corroborates the alibi defense. T.T. The district court did not examine all the defense evidence that included the alibi witnesses' testimonies and affidavits. **Appendix D**, p. 4-5. The district court did not apply the Strickland's standard in violation of this Court, in omitting a defense evidence examination. The district court only determined the respondent's evidence or perspective of case. **Appendix D**, p. 4-5. It was also required to examine defense alibi evidence. Because it did not examine my alibi witnesses, like they did not exist, the case should be remanded, in order to be determined fairly.

C. The Second Circuit's Decision Distorts Statute 28 U.S.C.A. §2253.

It comes as no surprise that the Second Circuit's analysis of the merits is insupportable, given the inconsistency of the holding below with the uniform decisions of the other courts of appeals. It required a court to ignore important and relevant information that sits squarely in front of it, when deciding whether to issue a certificate of appealability. This peculiar approach is flatly inconsistent with the language, history, and purpose of statute.

1. The court of appeals's holdings finds no support in the language of the statute, which nowhere suggests that the existence of an evidentiary hearing or trial record must be ignored, or the district court judge must apply the certificate of appealability's criteria to hypothetical litigation that assuredly will never occur. Contrarily, §2253 makes sure that the certification inquiry must be directed to the actual state of the proceeding.

§2253 (c) (2) provides that: A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right. I was never given a fair showing because of the lack of examination of trial record or conduct of evidentiary hearing concerning the failure to interview alibi witnesses and make a routine motion

for trial order of dismissal.

2. Also, the Second Circuit's holding cannot be squared with the more general principles used to apply the Statute. "A certificate of appealability may issue, when I have made a substantial showing of the denial of a constitution right."

3. If the certification inquiry may take evidentiary hearings or trial records into account, certification and forma pauperis in this case assuredly was proper. The counsel forgot to make a routine motion for trial order of dismissal and interview alibi witnesses. The court of appeals did not suggest otherwise. Instead, the Second Circuit expressly indicated that it applies §2253, without taking into account the trial record or an evidentiary hearing. **Appendix C.**

The court of appeals finding that "the requirements of §2253 were not met" turned entirely on its conclusion that litigation of the case was fairly conducted. But, there is no examination of the trial record nor an evidentiary hearing.

By the same token, the Second Circuit's insistence on applying all of the §2253 factors, without taking into account the trial record or an evidentiary hearing equally infected its conclusion that the trial counsel forgot to make a routine motion for trial order of dismissal and failed to interview alibi witnesses. Indeed, courts have stood by applying trial records and evidentiary hearing as set forth above in the Second, Eighth, Ninth and Tenth Circuits. In these circumstances, the recent

decision below should not stand.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

Maurice Cotton, 08B0465
Pro Se
Elmira Correction Facility
1879 Davis Street
Elmira, New York 14901

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

MAURICE COTTON,

Petitioner

v.

HAROLD GRAHAM, Superintendent

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

APPENDIX

Maurice Cotton, Pro Se
Elmira Correctional Facility
1879 Davis Street
Elmira, New York 14901

TABLE OF CONTENTS

APPENDIX A

MANDATE

W.D.N.Y.
17-cv-650
Vilardo, J.
Scott, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of May, two thousand twenty-one.

Present:

Dennis Jacobs,
Reena Raggi,
Susan L. Carney,
Circuit Judges.

Maurice Cotton,

Petitioner-Appellant,

v.

20-4172

Superintendent Harold Graham,

Respondent-Appellee.

Appellant, pro se, moves for leave to proceed in forma pauperis and a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

Catherine O'Hagan Wolfe

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

Catherine O'Hagan Wolfe

MANDATE ISSUED ON 06/23/2021

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of August, two thousand twenty-one.

Before: Dennis Jacobs,
Reena Raggi,
Susan L. Carney,
Circuit Judges.

Maurice Cotton,

Petitioner - Appellant,

v.

Superintendent Harold Graham,

Respondent - Appellee.

ORDER

Docket No. 20-4172

Appellant, pro se, moves for a recall of the mandate and to vacate the Court's decision dated May 13, 2021.

IT IS HEREBY ORDERED that the motion is DENIED.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX D

APPENDIX C

MIME-Version:1.0
From:webmaster@nywd.uscourts.gov
To:Courtmail@nywd.uscourts.gov
Bcc:
--Case Participants: David Anthony Heraty (david.heraty@erie.gov, elaine.williams@erie.gov, kristy.dulak@erie.gov, michael.hillery@erie.gov), Hon. Hugh B. Scott (matthew_meyers@nywd.uscourts.gov), Hon. Lawrence J. Vilardo (vilardo@nywd.uscourts.gov)
--Non Case Participants:
--No Notice Sent:

Message-Id:<4707368@nywd.uscourts.gov>
Subject:Activity in Case 1:17-cv-00650-LJV-HBS Cotton v. Graham Text Order
Content-Type: text/html

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. DISTRICT COURT

U.S. District Court, Western District of New York

Notice of Electronic Filing

The following transaction was entered on 1/4/2021 at 12:50 PM EST and filed on 1/4/2021
Case Name: Cotton v. Graham
Case Number: 1:17-cv-00650-LJV-HBS
Filer:
WARNING: CASE CLOSED on 11/24/2020
Document Number: 26(No document attached)

Docket Text:
TEXT ORDER: The petitioner has requested a certificate of appealability. Docket Item [25]. The Court has reviewed that request and the decision dismissing the petition. Because the issues raised here are not the type of issues that a court could resolve in a different manner, and because these issues are not debatable among jurists of reason, the Court finds that the petitioner has failed to make a substantial showing of the denial of a constitutional right. The petitioner's request for a certificate of appealability under 28 U.S.C. § 2253 and Fed. R. App. P. 22(b) therefore is denied. SO ORDERED. Signed by Hon. Lawrence J. Vilardo on 1/4/2021. (MLA) (Chambers has mailed a copy of the decision to the pro se petitioner)

1:17-cv-00650-LJV-HBS Notice has been electronically mailed to:

David Anthony Heraty david.heraty@erie.gov, elaine.williams@erie.gov, kristy.dulak@erie.gov, michael.hillery@erie.gov

1:17-cv-00650-LJV-HBS Notice has been delivered by other means to:

APPENDIX D

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MAURICE COTTON,

Petitioner,

v.

17-CV-650-LJV-HBS
DECISION & ORDER

HAROLD GRAHAM, Superintendent
Green Haven Correctional Facility,

Respondent.

On June 22, 2016, the *pro se* petitioner, Maurice Cotton, submitted a petition for a writ of habeas corpus under 28 U.S.C. § 2254, alleging (1) that his counsel was ineffective in failing to raise an alibi defense and call alibi witnesses, as well as in failing to elicit testimony from a ballistics-trajectory expert, and (2) in light of his counsel's failure to elicit the expert testimony, that his conviction is not supported by sufficient evidence. Docket Item 1.

After the case was transferred to this Court from the United States District Court for the Northern District of New York, *see* Docket Item 3, the respondent, Harold Graham, filed a response, Docket Items 8, 9. On March 29, 2018, Cotton replied. Docket Item 10.

On October 17, 2019, the case was referred to United States Magistrate Judge Hugh B. Scott for all proceedings under 28 U.S.C. §§ 636(b)(1)(A) and (B). Docket Item 13. On February 21, 2020, Judge Scott issued a Report and Recommendation ("R&R"), finding that the petition should be dismissed because Cotton did not exhaust

his claims and, in the alternative, because Cotton's counsel was not ineffective. Docket Item 14.

On March 9, 2020, Cotton objected to the R&R. Docket Item 15. On March 16, 2020, Cotton moved to amend his objection, Docket Item 17, and this Court granted that motion, Docket Item 18. Cotton objects to the R&R on the grounds that (1) he raised the conduct of trial counsel on appeal and therefore exhausted his ineffective-assistance-of-counsel claims, and (2) his trial counsel was, in fact, ineffective in failing to present an alibi defense and a ballistics-trajectory expert. Docket Item 17. On April 13, 2020, Graham responded to the amended objection, Docket Item 19, and on April 27, 2020, Cotton replied, Docket Item 20.

A district court may accept, reject, or modify the findings or recommendations of a magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). The court must review *de novo* those portions of a magistrate judge's recommendation to which a party objects. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

This Court has carefully and thoroughly reviewed the R&R; the record in this case; the objection, response, and reply; and the materials submitted to Judge Scott. Based on that *de novo* review, the Court accepts Judge Scott's recommendation in part and denies Cotton's habeas corpus petition.[1]

[1] The Court assumes the reader's familiarity with the facts alleged in the petition, *see* Docket Item 1, and Judge Scott's analysis in the R&R, *see* Docket Item 14.

DISCUSSION

I. EXHAUSTION

A. INSUFFICIENT-EVIDENCE CLAIM

A state prisoner generally may obtain federal habeas relief only after exhausting his claims in state court. 28 U.S.C. § 2254(b)(1), (c); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Ordinarily, if "one or more of [a petitioner's] claims has not been fully exhausted, . . . the district court must either" (a) dismiss the petition entirely and "send [the petitioner] back to state court," or (b) "afford [the petitioner] the opportunity to abandon his unexhausted claims and proceed only with his exhausted claims." *Zarvela v. Artuz*, 254 F.3d 374, 378 (2d Cir. 2001), as amended (June 26, 2001), as amended (Aug. 17, 2001) (citing *Rose v. Lundy*, 455 U.S. 509, 519-20 (1982)).

When a federal habeas petition includes a claim that is procedurally barred—that is, "an unexhausted claim, for which no further state review (direct or collateral) is available"—as well as other claims, dismissal of the entire petition is not warranted. *Bacchi v. Senkowski*, 884 F. Supp. 724, 731 (E.D.N.Y. 1995) (citing *Harris v. Reed*, 489 U.S. 255, 263 n.9) (1989)); *see also Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991). In that case, a federal court is precluded from reviewing only those claims about which a state court "'clearly and expressly' states that its judgment rests on a state procedural bar," *Harris*, 489 U.S. at 263, and for which a petitioner has not demonstrated "cause for the default and prejudice resulting therefrom," *Gonzalez v. Sullivan*, 934 F.2d 419, 421 (1991).

A petitioner can show cause for the default by demonstrating that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule, . . . the factual or legal basis for a claim was not reasonably available to counsel, or . . . 'some interference by officials[]' made compliance impracticable." *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (internal citations omitted). Ineffective assistance of counsel also may be adequate cause for a procedural default. *Id.* at 489.

Here, the New York State Supreme Court, Appellate Division, Fourth Department, "clearly and expressly," *see Harris*, 489 U.S. at 263, found that Cotton failed to preserve his insufficient-evidence claim for appellate review. *People v. Cotton*, 120 A.D.3d 1564, 1565, 993 N.Y.S.2d 225, 227 (4th Dep't 2014) ("In his pro se supplemental brief, defendant contends that the evidence is legally insufficient to support the conviction. Defendant failed to renew his motion for a trial order of dismissal after presenting evidence, and thus failed to preserve his sufficiency challenge for our review.").

Cotton has not demonstrated cause or prejudice that would excuse his default. Indeed, Cotton does not point to anything specific that would constitute cause or prejudice. *See Murray*, 477 U.S. at 488-89. This Court therefore agrees with Judge Scott that Cotton's insufficient-evidence claim is procedurally barred. *See Bacchi*, 884 F. Supp. at 731. And even if it were not—even if ineffective assistance of counsel might excuse the procedural bar—this Court would agree with the Fourth Department that "the evidence in the light most favorable to the People . . . is legally sufficient to support the conviction of the crimes charged." *Cotton*, 120 A.D.3d at 1565, 993 N.Y.S.2d at 226.

As Graham observes, the victim was Cotton's great uncle, who "knew [Cotton] . . . well, saw him in broad daylight at close range, and identified him as the shooter in the immediate aftermath of the shooting" and again at trial. Docket Item 9 at 5-6, 9; *see also* Docket Item 8 at Ex. A (Trial Tr., May 4, 2010, at 196-98, 235, 273-74, 276-78). That alone was sufficient to support the conviction.

B. INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIMS

In order to exhaust a claim, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845. One can exhaust claims either through direct appeal or a collateral proceeding, *see, e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475 (1973), but a petitioner has exhausted state court remedies only for those claims that have been "fairly presented" to the state courts, *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Smith v. Duncan*, 411 F.3d 340, 349 (2d Cir. 2005).

A petitioner "fairly present[s]" a claim to state courts by "inform[ing] the state courts of both the factual and legal premises of the claim he asserts in federal court." *Daye v. Attorney General of the State of New York*, 696 F.2d 186, 191 (2d Cir. 1982) (citing *Picard*, 404 U.S. at 276-77). The petitioner must have "set forth in state court all of the essential factual allegations in his federal petition," and "must have placed before the state court essentially the same legal doctrine he asserts in his federal petition." *Id.* at 191-92.

A petitioner need not cite "book and verse on the federal constitution," *Picard*, 404 U.S. at 278, so long as the state court was "alerted to the constitutional nature of [the petitioner's] claim," *Daye*, 696 F.2d at 192. This requirement is satisfied when the

"legal basis of the [state court] claim . . . was the 'substantial equivalent' of that of the habeas claim," or if the petitioner "relie[d] on federal constitutional precedents" or "claimed the deprivation of a particular right specifically protected by the Constitution." *Id.* at 192-93. And a *pro se* supplemental brief, "when properly submitted to the state court, puts that court on notice of the constitutional claims addressed in that brief." *Reid v. Senkowski*, 961 F.2d 374, 376 (2d Cir. 1992) (citing *Abdurrahman v. Henderson*, 8897 F.2d 71, 73 (2d Cir. 1990)).

Although Judge Scott found that Cotton had not exhausted his ineffective-assistance-of-counsel claims, this Court respectfully disagrees with that conclusion. Cotton's supplemental brief submitted *pro se* to the Fourth Department argued that Cotton's counsel on retrial was ineffective in failing to raise an alibi defense, call alibi witnesses, and present a ballistics-trajectory expert. Docket Item 1-2 at 29-30. The Fourth Department unanimously rejected Cotton's ineffective-assistance-of-counsel claims because Cotton "failed to 'demonstrate the absence of strategic or other legitimate explanations' for counsel's allegedly deficient conduct.'" *Cotton*, 120 A.D.3d at 1566, 993 N.Y.S.2d at 227. And the New York Court of Appeals denied Cotton's request for leave to appeal. *People v. Cotton*, 56 N.E.3d 905, 27 N.Y.3d 963 (2016). Therefore, Cotton exhausted those claims. But that is of no moment because, for the reasons that follow, Cotton's claims are not viable.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

To be entitled to relief based on the ineffective assistance of counsel, a petitioner must "(1) demonstrate that his counsel's performance 'fell below an objective standard of reasonableness' in light of 'prevailing professional norms'; and (2) 'affirmatively prove

prejudice' arising from counsel's allegedly deficient representation." *United States v. Cohen,* 427 F.3d 164, 167 (2d Cir. 2005) (citations omitted) (quoting *Strickland v. Washington,* 466 U.S. 668, 688 (1984)). Under the first prong, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Under the second prong, the petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. If counsel's conduct was not deficient, the court need not reach the issue of prejudice. *Id.* at 697.

Strickland is deferential to a lawyer's trial strategy; likewise, under section 2254(d)(1), federal courts are deferential to state courts' application of *Strickland*.[2] The question for this Court therefore is "not whether the state court was incorrect or erroneous in rejecting [the petitioner's] ineffective assistance of counsel claim, but whether it was 'objectively unreasonable' in doing so." *Sellan v. Kuhlman*, 261 F3d 303, 315 (2d Cir. 2001). So long as "'fair[-]minded jurists could disagree' on the correctness of the state court's decision," this Court must deny the habeas petition. *See Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

---

[2] The standard of section 2254(d) is a steep barrier to relief—a federal court "shall not" grant a state prisoner's writ of habeas corpus petition for claims adjudicated on the merits in state court "unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

A. ALIBI DEFENSE AND WITNESSES

A lawyer's decision not to pursue a particular defense or call a particular witness to testify "is typically a question of trial strategy that reviewing courts are ill-suited to second-guess." *Greiner v. Wells*, 417 F.3d 305, 319, 323 (2d Cir. 2007) (quoting *United States v. Luciano*, 158 F.3d 655, 660 (2d Cir. 1998) (per curiam)). Thus, "a lawyer's decision not to pursue a defense does not constitute deficient performance if, as is typically the case, the lawyer has a reasonable justification for the decision." *Id.* at 319 (citing *DeLuca v. Lord*, 77 F.3d 578, 588 n.3 (2d Cir. 1996)). And a lawyer's decision "whether to call specific witnesses—even ones that might offer exculpatory evidence—is ordinarily not viewed as a lapse in professional representation." *United States v. Best*, 219 F.3d 192, 201 (2d Cir.2000) (quoting *United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir.1997)). Ultimately, a lawyer's choice to forgo a defense or witness that "entails a 'significant potential downside,'" *Wells*, 417 F.3d at 319 (quoting *Sacco v. Cooksey*, 214 F.3d 270, 275 (2d Cir. 2000)), such as "expos[ing] a defendant to [a prosecutorial] attack[,] is surely a tactical decision that cannot be second-guessed," *see Best*, 219 F.3d at 202.

Cotton argues that his retrial counsel was ineffective when he did not raise an alibi defense or call alibi witnesses. Docket Item 17 at 3-4. He specifically contends that his alibi defense was "completely exonerating" and therefore "statistically unlikely" to have led to "self-incrimination and opening the door in cross[] examination." *Id.* at 4.

Cotton's retrial counsel, however, indeed had specific and strategic reasons for not presenting the alibi defense or witnesses. As Judge Scott correctly observed, Cotton's retrial counsel "heard [Cotton's] Grand Jury testimony," in which he could not

"name one of the alibi witnesses for the Grand Jury[,] . . . and made the strategic calculation of [forgoing] the alibi defense rather than exposing [Cotton] to cross-examination." Docket Item 14 at 12. Especially because Cotton had been convicted once before using the alibi defense, retrial counsel "provided effective assistance in choosing to forgo an alibi defense and instead to focus the defense on the issue of identification." *See Pina v. Maloney*, 565 F.3d 48, 55 (1st Cir. 2009). The Fourth Department was not objectively unreasonable in concluding that Cotton "failed to 'demonstrate the absence of strategic or other legitimate explanations'" for that decision. *See Cotton*, 120 A.D.3d at 1566, 993 N.Y.S.2d at 227. On the contrary, this Court agrees with that conclusion.

B. EXPERT TESTIMONY

Cotton also contends that counsel was ineffective when he failed to call a ballistics-trajectory expert as a witness, arguing that a ballistics expert would have disproved the victim's claim that the shooter was "standing on the driver's door-running board, with a gun on the roof[ ] of a car." Docket Item 1-1 at 2.

"In some instances, the failure to call an expert witness may satisfy the two-pronged ineffective assistance of counsel standard." *Massaro v. United States*, 2004 WL 2251679, at *4 (S.D.N.Y. Oct.5, 2004) (quoting *United States v. Aliotta*, 1998 WL 43015, at *3 (S.D.N.Y. Feb.3, 1998)). But when "an expert would only marginally assist the jury in its role as fact finder, an attorney's decision not to call an expert is more likely to fall within the bounds of reasonable performance and less likely to prejudice the defendant." *Id.*

Counsel pursued the possibility of a ballistics expert here, but he was unable to find one who would testify favorably. *See* Docket Item 1-3 at 64-66 (letter from John R. Nuchereno, Esq., to Maurice Cotton, dated April 22, 2010). He explained to Cotton, in great detail, why that was so. *Id.* Specifically, attorney Nuchereno told Cotton that because the bullet had hit the victim's bone and fragmented, no expert could "offer an opinion within a reasonable degree of professional certainty" that the bullet was shot in a way that was inconsistent with the victim's account. *Id.* at 65-66. That effort by counsel to find an expert, and his painstakingly careful explanation of why he was unsuccessful, belies any claim of ineffectiveness.

In light of what counsel learned from the "[b]allistics individuals" with whom he spoke, *id.* at 65, there was a strategic reason not to pursue the possibility of a ballistics expert any further. And even if retrial counsel had been able to find an expert who would have testified the way Cotton wanted, there is no indication that such testimony would have done more than "marginally assist the jury," *see Massaro*, 2004 WL 2251679, at *4, especially because counsel raised the argument that Cotton wanted him to raise and challenged the discrepancy between the victim's account and the trajectory of the bullet during cross-examination and his summation, Docket Item 8 at Ex. A (Trial Tr., May 4, 2010, at 223, 235, 408). Again, the Fourth Department was not unreasonable in rejecting Cotton's claim; in fact, again, this Court agrees with the Fourth Department's assessment that Cotton has not "demonstrate[d] the absence of strategic or other legitimate explanations" for the decision of his attorney to forgo a ballistics-trajectory expert. *Cotton*, 120 A.D.3d at 1566, 993 N.Y.S.2d at 227.

CONCLUSION

This Court therefore accepts in part Judge Scott's recommendation in the R&R. For the reasons stated above and in the R&R, Cotton's petition, Docket Item 1, is DENIED, and the Clerk of the Court shall close the file.

SO ORDERED.

Dated: November 23, 2020
Buffalo, New York

LAWRENCE J. VILARDO
UNITED STATES DISTRICT JUDGE

APPENDIX E

28 U.S.C.A. § 2253

§ 2253. Appeal

Currentness

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

APPENDIX F

CERTIFICATE OF COMPLIANCE

No.

MAURICE COTTON,

Petitioner

v.

HAROLD GRAHAM, Superintendent

Respondent

As required be Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 2,878 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 29 day of October, 2021.

No.

SUUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

Maurice cotton,

Petitioner,

v.

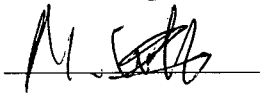
HAROLD GRAHAM, SUPERINTENDENT,

Respondent.

DELATRATION OF SERVICE

I, Maurice Cotton, the petitioner herein, declare under penalty of perjury, pursuant 28 U.S.C §1756, that on the 3 day of December, 2021, I served one copy of the Petition for a Writ of Certiorari, Appendix, Motion for Leave to Proceed in Formal Pauperis, and Declaration in Support of a Motion for Leave to Proceed in Forma Pauperis on David A. Heraty, Asst. Dist. Atty., the respondent herein, by mailing the same to counsel of record for said respondent located at Appeals Bureau, 25 Delaware Avenue, Buffalo, New York, 14202 by placing a copy in a separate envelope, with postage prepaid, and depositing in the U.S. Mail at Elmira Correctional Facility, 1879 Davis Street, Elmira, New York 14901 on the 3 day of December, 2021.

All parties have been served.



Maurice Cotton

Executed this 3 day of December, 2021