No. 10-854

IN THE
Supreme Court of the United States

RICHARD ROSARIO

Petitioner,

v.

PATRICK GRIFFIN, SUPERINTENDENT, SOUTHPORT CORRECTIONAL FACILITY, AND ANDREW M. CUOMO, ATTORNEY GENERAL OF NEW YORK

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF LEGAL INVESTIGATORS AND NATIONAL DEFENDER INVESTIGATOR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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January 28, 2011

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The National Association of Legal Investigators, Inc. ("NALI"), established in 1967, is a nationwide organization of investigative professionals who are actively engaged in criminal defense and plaintiff personal injury investigations. Members of NALI, both in-house investigators and licensed private investigators, assist attorneys in developing testimonial, documentary, forensic, and physical evidence. NALI investigators are united by a commons goal: to enhance and elevate the profession by establishing a forum and platform from which to provide professional development and continuing education to legal investigators. The association's Certified Legal Investigator® designation is recognized throughout the country as one of the most respected professional credentials available to the legal investigator.

The National Defender Investigator Association ("NDIA") is an international association of investigators and other professionals who are engaged in criminal defense work on behalf of indigent defendants. NDIA members assist public defenders and court-appointed counsel in conducting factual investigations and provide continuing

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Counsel of record for all parties received timely notice and have consented to the filing of this brief in letters on file with the Clerk's office.

education to criminal defense personnel throughout the United States and its territories.

Amici believe that their extensive experience with pre-trial factual investigations in criminal defense matters will enable them to contribute substantially to this Court's evaluation of Rosario's petition for *certiorari*. Rosario's petition asks this Court to grant *certiorari* to overturn a Second Circuit decision that denied Rosario's claim that he was entitled to habeas relief because Rosario's lawyers failed to conduct an adequate pre-trial investigation into his alibi. *Amici* will explain that investigations are fundamentally important to the legal process and that the prevailing norms for investigations require interviewing all alibi witnesses. The Second Circuit's decision to deny habeas relief in a case where most alibi witnesses were not interviewed sets up a legal framework under which courts can apply the New York ineffectiveness standard without also applying the standard from *Strickland v. Washington*, 466 U.S. 668, 688 (1984), creating a risk of many future decisions that contravene *Strickland* and permit convictions to stand despite inadequate pre-trial investigations. It also creates a split with the Sixth Circuit's decision in *Bigelow v. Haviland*, 576 F.3d 284 (6th Cir. 2009).

For these reasons, *amici* urge this Court to grant *certiorari* and make clear that habeas relief is warranted when a court applies the New York effectiveness standard without also applying *Strickland*.

ARGUMENT

I. An Adequate Pretrial Investigation Is The Key To The Effective Representation Of Criminal Defendants.

As Rosario convincingly argues in his Petition, New York's "meaningful representation" standard permits a finding of effectiveness in a significant number of cases in which the counsel's performance otherwise would be found constitutionally inadequate under *Strickland*. Pet. at 20-38. In this case, the Second Circuit denied habeas relief where a New York court applied only the state ineffective-of-assistance standard even though under that standard, counsel may avoid a finding of ineffective assistance despite having conducted an objectively incompetent pretrial investigation that is below clear professional standards and that deprived the accused of important potentially exonerating evidence. Because *amici* know first-hand that most criminal cases are won or lost on the basis of *facts* rather than counsel's courtroom skills, *amici* urge this Court to review this case and reject the notion that criminal defense counsel can provide effective assistance through strong courtroom performance in the absence of an adequate pre-trial investigation.

A. Factual Investigation Is The Most Critical Stage Of A Lawyer's Preparation.

This Court has previously explained that, in our adversary system, "[T]he need to develop all relevant facts ... is both fundamental and comprehensive," and that "[T]he ends of criminal justice would be defeated if judgments were to be founded on a *partial*

or speculative presentation of the facts." *United States v. Nixon*, 418 U.S. 683, 709 (1974) (emphasis added); *Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988).

Because of the centrality of facts, pretrial investigation "is, perhaps, the most critical stage of a lawyer's preparation." *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984) (reversing denial of habeas relief based on inadequate pretrial investigation). In conducting a thorough pre-trial investigation, trial counsel or an investigator may uncover potential alibi witnesses, alternate suspects, or police misconduct. Counsel also may uncover documentary or scientific evidence that will support a defendant's alibi, such as surveillance camera footage, bus tickets or train tickets purchased by the accused at the time of the crime, restaurant or store receipts, or phone call records. Because of the importance of pre-trial investigation, a 2002 report concluded that a public defender "cannot put up a fair defense" to a district attorney's charges without adequate investigative resources. Mary Sue Barkus & Paul Marcus, *The Right To Counsel In Criminal Cases, A National Crisis*, 57 Hastings L.J. 1031, 1099 (2006). As one trial manual designed to educate lawyers explains:

> most cases turn primarily on the presentation of evidence rather than legal argument. The *facts* are counsel's most important asset not only in litigating the case at trial but also in every other function counsel performs: urging the prosecutor to drop or reduce charges, negotiating a plea bargain with the prosecutor, urging a favorable

> sentencing recommendation on a probation officer or judge. . . . Although there are additional instruments for fact-gathering, such as discovery ... and motion practice, ... they are far less reliable and comprehensive than the time-honored practice of hitting the streets and looking for witnesses.

1 Randy Hertz *et al.*, *Trial Manual for Defense Attorneys in Juvenile Court* § 8.01 (1991).

In setting forth their professional standards, attorneys' organizations have recognized the importance of a thorough factual investigation. For instance, Standard 4-4.1 of the American Bar Association states that defense counsel has a duty to investigate and "should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." ABA Standards for Criminal Justice: Prosecution Function and Defense Function Standard 4-4.1 (3d ed. 1993); *see also id.* comment ("Failure to make adequate pretrial investigation and preparation may also be grounds for finding ineffective assistance of counsel."). Likewise, performance guidelines authored by the National Legal Aid & Defender Association state that, "Counsel has a duty to conduct an independent investigation .... as promptly as possible." National Legal Aid & Defender Ass'n, *Performance Guidelines For Criminal Defense Representation*, Guideline 4.1 (1995).

B. No Pretrial Investigation Is Adequate Without Interviewing All Potential Witnesses.

Locating, interviewing, and taking the statements of all potential witnesses, especially alibi witnesses, is a fundamental and necessary component of any adequate criminal investigation. Brandon A. Perron, *Uncovering Reasonable Doubt: The Component Method* 7-3 (1998). Under the prevailing professional norms for criminal defense, such investigative work should begin as soon as counsel is retained. F. Lee Bailey & Henry B. Rothblatt, *Investigation And Preparation Of Criminal Cases* § 1:10 (2d ed. 1985).

In a standard pre-trial investigation, counsel or the investigator identifies all potential witnesses by interviewing the accused and reviewing the police file. Perron at 7-3. The highest priority witnesses are those identified by the accused as his or her alibi witnesses, even if counsel is skeptical of the alibi, because every client "is entitled at the very least, to the small comfort of knowing his own lawyer does not disbelieve him without a fair inquiry." Bailey & Rothblatt §§ 1:12, 7:9. If there are disinterested alibi witnesses "who can place the accused somewhere else" at the time of the crime, such witnesses are interviewed first and asked to produce any records that can support their testimony. *Id.* § 7:9. Locating and interviewing all potential alibi witnesses is important because the strength of an alibi defense depends on the detailed recollection of witnesses of what they and the defendant were doing at the precise time that the crime took place. *Trial Manual* § 8.03.

While alibi witnesses should be counsel's top priority, the prevailing professional standards call for a prompt identification and interviewing of *all potential witnesses* because counsel "can never be sure what facts will turn up or what leads may develop." Bailey & Rothblatt § 6:3. As the Eighth Circuit has recognized, "Counsel has a duty . . . to investigate *all witnesses* who allegedly possessed knowledge concerning [the defendant's] guilt or innocence." *Hendersen v. Sargent*, 926 F.2d 706, 711-12 (8th Cir. 1991) (affirming the grant of post-conviction relief based on ineffective assistance of counsel) (emphasis added; alternations in original; internal quotation marks omitted); *see* Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, The Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 Fordham Urb. L.J. 1097, 1109-10 (2004).

Only by interviewing all potential witnesses can a defense counsel assess the strengths and weaknesses of each potential witness and make an informed strategic decision about "which witnesses will withstand cross-examination and which are likely to impress the jury." Bailey & Rothblatt § 11:9. By identifying and interviewing all potential witnesses, counsel also avoids placing an undue reliance on the testimony of a single witness at trial, who may be impeached by the prosecution. *Id.* § 6:5. Rather, each witness's statement is viewed "as a lead to be substantiated by additional evidence." *Id.* The leads provided by a witness may include not only other witnesses but also documentary evidence, such as a date book, movie ticket, or e-mail, that corroborate

the witness's recollection and the alibi. Perron at 7-7, 7-6.

Witnesses should be interviewed in person, rather than over the telephone. When counsel or an investigator interviews a witness in person, he or she can observe the witness's appearance, manner of speaking, and body language. As a result, counsel or the investigator can make a much better assessment of whether a particular witness is credible and should be called to testify at trial. Kathleen Cunningham, *Body Language and Indicators of Deception*, 35 Legal Investigator 4 (2010); Bailey & Rothblatt § 3:1.

Interviewing all potential witnesses is particularly important when the prosecution's case rests entirely on eye-witness testimony, which several studies have demonstrated is notoriously unreliable. For instance, one study of exonerations in the United States from 1989 through 2003 reported that 219 out of 340 wrongful convictions, or nearly 65%, were based on eye-witness misidentification. Samuel R. Gross *et al.*, *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 542-47 (2005). Another study of exonerations based on post-conviction DNA testing reported an even higher rate: "The overwhelming number of convictions of the innocent involved eyewitness identification – 158 of 200 cases (79%)." *See* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 78 (2008). To effectively rebut erroneous eyewitness testimony, counsel often needs to present several defense witnesses.

II. The Pre-Trial Investigation Conducted By Rosario's Counsel Was Objectively Unreasonable Under The Prevailing Professional Standards.

The limited pretrial investigation conducted by Rosario's counsel fell far below the prevailing professional standards for a criminal defense investigation. Rosario was arrested solely on the basis of two stranger eyewitness identifications from "mug books," which are, as noted above, notoriously unreliable evidence. Pet. App. 102a. After his arrest Rosario consistently maintained to the police, his lawyers, and the defense investigator assigned to his case that he was in Florida on the day of the New York murder, and he provided the police, his lawyers, and the defense investigator with the names of thirteen people who could place him in Florida during the month of June. Despite having an extensive list of potential alibi witnesses, Rosario's lawyers contacted only a few of them and spoke to them only over the phone despite acknowledging that in this case it was "critical" for an investigator to be able to meet the witnesses "in person and have a face-to-face conversation." *Id.* at 26a.

Besides failing to contact all the known alibi witnesses whom Rosario had identified, Rosario's trial counsel failed to investigate whether other potential alibi witnesses existed. One of the additional alibi witnesses identified by Rosario, Fernando Torres, testified at the post-conviction hearing that he and Rosario went shopping for car parts on the day of the murder and that, shortly thereafter, he invited Rosario to visit a church. Hence, a thorough investigation would have included

interviewing people at the car shop and at the church who might have remembered seeing Rosario, thus collaborating his alibi.

Rosario's lawyers also utterly neglected to collect any documentary evidence of Rosario's presence in Florida in June of 1996. During the evidentiary hearing on Rosario's ineffectiveness of counsel claim, Rosario's first lawyer admitted that she failed to request Western Union records of wire transfers that Rosario said were sent to him in Florida from his ex-fianceé in New York. These records were subsequently destroyed and thus were unavailable for trial. Rosario's lawyers also made no effort whatsoever to collect other documentary evidence of Rosario's presence in Florida in June 1996, such as phone records, store receipts, banking records, or security camera footage from Florida gasoline stations or stores. The failure of Rosario's lawyers to conduct an adequate investigation cannot be explained by a lack of funds. They were awarded fees from the court to conduct an investigation. Pet. at 8.

Because the investigation was inadequate, Rosario's second lawyer was forced to rely on two of Rosario's close friends – John Torres and Jenine Seda – to establish Rosario's abili. This lawyer later explained that he relied on these witnesses, not because they were the best witnesses, but because "they were the only two" available. Pet. App. at 5a. Had Rosario's alibi defense been properly investigated, at least *nine* alibi witnesses, several of whom were not friendly with Rosario, could have been presented at trial. *See* Pet. App. 22a (Straub, J.,

dissenting). Each of these witnesses had the potential to corroborate Rosario's alibi and contribute additional facts about Rosario's stay in Florida.

Based on *amici*'s extensive experience with defense investigations, it is *amici*'s opinion that Rosario's lawyers' failure to adequately investigate Rosario's alibi was indeed a "colossal failure" that "plainly falls below acceptable profession standards," Pet. App. 22a (Straub, J., dissenting), and that there is a "reasonable probability" sufficient to "undermine confidence" in Rosario's conviction that but for Rosario's counsels' failure to investigate his alibi defense, Rosario would not have been convicted. *Strickland*, 466 U.S. at 694.

III. The Second Circuit's Decision Creates An Important Recurring Issue and Conflicts With Decisions Of Other Circuits.

Neither the Second Circuit nor any other court disagreed that there is a "reasonable probability" the result would have been different with an effective investigation. The Second Circuit found no habeas relief to be warranted, because: (1) the New York standard was consistent with *Strickland*, and (2) under a deferential review, the New York court properly applied *Strickland*. But there was no way for the district court or Second Circuit to conclude that the New York court correctly applied *Strickland* since the New York court did not apply *Strickland* at all. Certainly, the federal courts could not find correct application of *Strickland* on the basis of *deference* to a decision that the New York court never made.

The New York court never asked *Strickland's* key question: whether there is a "probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 703 (quotation marks omitted). Instead, as part of a totality-of-the-circumstances inquiry, the court applied the standard for newly discovered evidence and asked whether Rosario would have been entitled to a new trial if he had argued for one on the basis of discovery of these witnesses. Pet. at 14; Pet. App. 227a. In *Strickland* itself, this Court recognized that this is a different question than the constitutional ineffectiveness inquiry. *Strickland*, 466 U.S. at 694. Yet the state court used it as a basis to deny post-conviction relief. And the Second Circuit held that the district court properly deferred to that decision as if the state court had been applying *Strickland*. *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) (setting forth separate inquiries on habeas after federal court has concluded that the state court is applying the correct governing rule).

After the Second Circuit's decision, state courts will be able to continue to apply the New York standard alone and federal courts will defer to their decisions on habeas review as if they had applied *Strickland*. Such deference will lead to frequent unconstitutional results, because, as the Second Circuit acknowledged, there is a significant chance that New York courts will interpret the New York effectiveness standard to require less than *Strickland*.

The Second Circuit's decision will not only lead to continuing decisions inconsistent with *Strickland* but will also lead to results, like the one here, that conflict with rulings of this Court requiring adequate defense investigations and with results in similar habeas cases in other circuits. This Court has consistently reversed denials of post-conviction relief where defense counsel failed to conduct an adequate factual investigation thereby prejudicing the accused. For instance, in *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), this Court reversed denial of habeas relief, finding that counsels' decision not to expand their investigation of defendant's life history beyond the presentence investigation report and department of social services records fell short of prevailing professional standards. Most recently, in *Sears v. Upton*, 130 S. Ct. 3259, 3264 (2010), this Court vacated the denial of post-conviction relief where the trial counsel conducted only a "cursory" investigation into mitigation evidence – "limited to one day or less, talking to witnesses selected by the [accused]'s mother." *See also Porter v. McCollum*, 130 S. Ct. 447, 453 (2009) (reversing denial of habeas relief where defense counsel "did not even take the first step of interviewing witnesses or requesting records").

Further, while the Second Circuit upheld a denial of habeas relief here despite counsel's failure to interview at least nine alibi witnesses, other circuits have made plain that failure to interview potential alibi witnesses constitutes ineffective assistance. Pet. App. 4a, 22a. For instance, in *Bigelow v. Haviland*, 576 F.3d 284 (6th Cir. 2009), the defendant, Michael

Bigelow, consistently maintained, like Rosario here, that he was in another city 150 miles away on the day of the crime. Like here, the prosecution's case against Bigelow rested solely on the eyewitness testimony. Even though Bigelow identified several alibi witnesses, his lawyer called only one of them at trial, and the alibi defense failed. State courts denied Bigelow's ineffective assistance of counsel claim, but the Sixth Circuit held habeas relief was warranted. The Sixth Circuit ruled that state courts unreasonably applied *Strickland* because Bigelow's counsel's failure to take "minimal additional investigative steps" – such as interviewing at least three additional alibi witnesses – fell below the prevailing professional standards and prejudiced Bigelow: "In a case in which everything turned on the alibi defense – and in which the prosecution's ability to place Bigelow at the scene of the crime rested entirely on conflicting eyewitness testimony – [Bigelow's counsel] had ample reasons to do more than he did with the one alibi witness that his client found. ... [I]t is difficult to see how [counsel] could have failed to realize that without seeking information that could either corroborate the alibi or contextualize it for the jury, he was seriously compromise[ing] [his] opportunity to present an alibi defense." 576 F.3d at 289 (internal citations omitted; first three brackets in original). The Sixth Circuit also reached a similar result in *Blackburn v. Foltz*, 828 F.2d 1177, 1183 (6th Cir. 1987), holding that counsel's failure "to investigate a known and potentially important alibi witness" constituted ineffective assistance of counsel.

Other circuits have reached similar results. *See, e.g.*, *Grooms v. Solem*, 923 F.2d 88, 90 (8th Cir. 1991) ("Once a defendant identifies potential alibi witnesses, it is unreasonable not to make some effort to contact them to ascertain whether their testimony would aid in the defense."); *Bryant v. Scott*, 28 F.3d 1411, 1418 (5th Cir. 1994) (holding that counsel's "complete failure to investigate alibi witnesses fell below the standard of a reasonably competent attorney practicing under prevailing professional norms").

The repeated holdings by courts that failure to conduct a reasonable factual investigation constitutes ineffective assistance is evident from a California study of 121 cases in which counsel's performance was found to be ineffective. Forty-four percent involved counsel's failure to investigate. California Comm'n On The Fair Administration Of Justice, *Report And Recommendations On Funding Of Defense Services In California*, at 4 (Apr. 14, 2008). But the Second Circuit's decision here will continue to permit cases like this one, in which the convictions of defendants will be upheld despite failures by their counsel to conduct remotely adequate investigations. As the state court did in this case, courts will balance deficiencies in the investigation against counsel's overall performance. But for the reasons *amici* have explained, an adequate pretrial investigation is even more important than "the forensic skill exhibited in the courtroom" because it "may disclose evidence of which even the defendant is unaware and may suggest issues and tactics at trial which would

otherwise not emerge." *Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970) (reversing denial of post-conviction relief). By permitting state courts to find counsel's performance effective when an investigation is fundamentally deficient in a manner that has a reasonable probability of affecting the outcome, the Second Circuit's decision creates an important and recurring issue.

CONCLUSION

For the reasons set forth above, *amici* urge this Court to grant Rosario's petition for a writ of *certiorari*.

Respectfully submitted,

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