No. _____

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

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court set forth a two-part test for demonstrating ineffective assistance of counsel under the Sixth Amendment. First, a prisoner must demonstrate that his "counsel's performance was deficient." Second, the prisoner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." By contrast, New York's state constitutional standard for ineffective assistance of counsel is limited to a single inquiry: whether "the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation." *People v. Baldi*, 429 N.E.2d 400, 405 (N.Y. 1981). This state standard "allows the gravity of individual errors to be discounted indulgently by a broader view of counsel's overall performance." App., *infra*, 244a (Jacobs, C.J., dissenting to denial of rehearing en banc). In evaluating petitioner's federal constitutional claim of ineffective assistance of counsel, the state court applied the New York state constitutional standard instead of *Strickland*, and denied habeas relief.

The question presented is:

Whether application of New York's state constitutional "meaningful representation" standard to evaluate Sixth Amendment claims of ineffective assistance of counsel results in decisions that are contrary to, or involve an unreasonable application of, clearly established federal law.

PARTIES TO THE PROCEEDING

Petitioner is Richard Rosario.

Respondents are Superintendant Patrick Griffin, Southport Correctional Facility, and New York Attorney General Andrew Cuomo.

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PETITION FOR A WRIT OF CERTIORARI

Richard Rosario respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-58a) is reported at 601 F.3d 118. The opinion of the district court (App., *infra*, 60a-98a) is reported at 582 F. Supp. 2d 541. The report and recommendation of the magistrate judge (App., *infra*, 99a-204a) is reported at 582 F. Supp. 2d 541.

The order of the court of appeals denying the petition for rehearing and rehearing en banc (App., *infra*, 237a-249a) is unreported but is available at 2010 U.S. App. LEXIS 16675.

JURISDICTION

The Second Circuit issued its opinion on April 12, 2010. App., *infra*, 1a-58a. On August 10, 2010, the Second Circuit denied the petition for rehearing and rehearing en banc. App., *infra*, 237a-249a. On October 22, 2010, Justice Ginsburg granted an extension of time within which to file a petition for a writ of certiorari to and including December 8, 2010, and, on November 29, 2010, Justice Ginsburg granted a further extension to and including December 29, 2010.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in an appendix to the petition. App., *infra*, 250a-253a.

STATEMENT

Petitioner Richard Rosario was denied habeas relief by a sharply divided Second Circuit—first, a two-to-one decision by the panel and then, in four separate opinions, a six-to-four denial of rehearing en banc. While acknowledging a violation of Rosario's Sixth Amendment right to effective assistance of counsel, the court of appeals denied habeas relief because it deferred to the state court's denial of Rosario's claim. The court of appeals so held, even though the state court applied only New York's state constitutional "meaningful representation" standard to Rosario's federal claim, instead of the two-part standard of *Strickland v. Washington*, 466 U.S. 668 (1984). As the dissenting opinions below correctly determined, application of that state law standard can result—as it did here—in decisions that are contrary to, or an unreasonable application of, federal law.

Under this Court's clearly established federal law, the Sixth Amendment right to effective assistance of counsel is violated if there is a reasonable probability that, but for counsel's error, the outcome at trial would have been different. *Id.* at 668. The New York Court of Appeals, however, has rejected

Strickland in favor of New York's own standard. That state constitutional standard examines only whether a defendant received meaningful representation—a standard that "allows the gravity of individual errors to be discounted indulgently by a broader view of counsel's overall performance." App., *infra*, 244a (Jacobs, C.J., dissenting to denial of rehearing en banc). Although New York's standard differs from *Strickland* in that outcome-determinative errors by counsel may not constitute ineffective assistance of counsel, the Second Circuit repeatedly has sanctioned application of that state standard to federal claims raised by New York state prisoners.

Application of New York's standard to habeas petitioners' federal ineffective assistance of counsel claims has made a difference in this and other cases. Indeed, this is not even a close case. All five of the federal judges who examined Rosario's claim under *Strickland*—the magistrate judge, the district court judge, and all three members of the Second Circuit panel—concluded that Rosario had been deprived of his Sixth Amendment right to effective assistance of counsel. The only basis for denying federal habeas relief was deference to the state court's adjudication of the Sixth Amendment claim. But the state court never applied *Strickland*. Instead, in denying relief, the state court explained that Rosario's counsel's error was a mere "misunderstanding or mistake" that "was not deliberate" and the error did "not alter the fact that both attorneys represented defendant skillfully, and with integrity and in accordance with the

standards of 'meaningful representation' defined by [New York] appellate courts." App., *infra*, 226a. Thus, the state court considered the ultimate effect of counsel's mistake on the trial outcome to be "relevant, but not dispositive" to the state constitutional inquiry. App., *infra*, 223a (quoting *People v. Benevento*, 697 N.E.2d 584, 588 (N.Y. 1998)).

This important and recurring issue will not be resolved absent this Court's review. The Second Circuit repeatedly has refused to hold that New York's state standard is contrary to *Strickland*, and it denied en banc review here. As the dissent from the denial of rehearing en banc observed, the conflict between the state and federal standards "likely will give rise to more cases that will bedevil the district courts, which are left to sort out case-by-case a problem that is systemic." App., *infra*, 242a. This Court should intervene now and prevent that result. Indeed, given that the Second Circuit is an outlier among the courts of appeals in deferring to a state ineffectiveness standard so contrary to *Strickland*, summary reversal may be warranted. Alternatively, the case should be set for full briefing and argument.

A. Constitutional And Statutory Framework

1. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. That act imposed new restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners. As amended by AEDPA, Section 2254(d)(1) of Title 28 of the United

States Code provides that a writ of habeas corpus for a state prisoner shall not issue unless the state court adjudication "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).

In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court explained that Section 2254(d)(1) "defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court." *Id.* at 404. First, a state court decision applying federal law is "contrary to [the Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Court's] cases," or, when confronting "facts that are materially indistinguishable from a decision of this Court * * * arrives at a result different from [the Court's] precedent." *Id.* at 405-406. Second, "[a] state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case" constitutes an unreasonable application of clearly established federal law. *Id.* at 407-408.

2. The Sixth Amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." This Court has recognized that "the right to counsel is the right to effective assistance of counsel." *Strickland*, 466 U.S. at 685. In *Strickland*, the Court

held that a defendant's claim of ineffective assistance of counsel has two parts: "First, the defendant must show that counsel's performance was deficient. * * * Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. The latter prejudice component requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694.

3. Article I, Section Six of the New York Constitution provides in relevant part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel * * *." N.Y. Const., art. 1, § 6. The New York Court of Appeals has construed this provision to require "effective" aid. *People v. Benevento*, 697 N.E.2d 584, 586 (N.Y. 1998).

Under the state constitution, whether a defendant received effective assistance is measured by New York's meaningful representation standard. Rather than separately examine whether counsel's performance was deficient and resulted in prejudice, the meaningful representation standard involves a single inquiry: whether "the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation." *People v. Baldi*, 429 N.E.2d 400, 405 (N.Y. 1981). This analysis is less focused on prejudice and is "ultimately concerned with the fairness of the process as a whole rather than its particular impact

on the outcome of the case." *Benevento*, 697 N.E.2d at 588.

B. State Court Proceedings

1. On June 19, 1996, George Collazo was shot and killed in the Bronx, New York, while walking with a friend. The shooting occurred in daytime, minutes after the victim had an argument with two men he passed on the street. Two weeks after the shooting, Rosario was arrested for the murder, based solely on two stranger eyewitness identifications from "mug books." App., *infra*, 102a. A third eyewitness had observed the confrontation between Collazo and the two unknown men, but that witness did not identify Rosario at trial as a participant in the crime. App., *infra*, 103a. No other evidence linked Rosario to the crime or the victim.

Rosario had been in Florida the entire month of June 1996. When Rosario learned that police in New York were looking for him, he left Florida on June 30, 1996 and returned to New York. Rosario arrived in New York on July 1, 1996 and voluntarily contacted the police that day. C.A. App. A-788. Rosario denied any involvement in the shooting. He provided the police with a detailed alibi statement naming 13 individuals who could confirm that he had spent the entire previous month in Florida. App., *infra*, 3a. He also provided several addresses and phone numbers. Neither the detectives who took Rosario's statement nor the prosecutors who handled the case ever sought

to confirm the alibi information provided by Rosario upon his arrest.

2. Joyce Hartsfield was appointed to represent Rosario. Hartsfield filed an application in the trial court for fees to send a defense investigator to Florida to investigate the 13 alibi witnesses whom Rosario had identified to the police. C.A. App. A-1042-1045, A-1398, A-1865-1866. The trial court granted the application for fees in March 1997. C.A. App. A-1891-1892. Although Hartsfield remained Rosario's counsel for nearly a year after the fee application had been granted, she never instructed a defense investigator to travel to Florida to interview Rosario's alibi witnesses. C.A. App. A-1047-1048, A-1050, A-1399-1400.

In February 1998, Hartsfield was replaced by Steven Kaiser as Rosario's appointed defense counsel. C.A. App. A-1935. Kaiser mistakenly believed that the trial court had *denied* the application for investigatory fees, when in fact the court had *granted* the application. C.A. App. A-1127-1128, A-1200. Moreover, Kaiser failed to make his own request for such fees, and he failed to conduct an investigation in Florida of Rosario's alibi witnesses. C.A. App. A-1136.

At trial, the prosecution called three eyewitnesses to testify. Two of the witnesses identified Rosario as the shooter; the third eyewitness did not identify Rosario as the shooter despite prompting from the prosecutor. The defense presented two alibi witnesses who testified that Rosario was in Florida at the time

of the murder: John Torres, Rosario's close friend, and Jenine Seda, John Torres's fiancée. Each testified that in June 1996 Rosario stayed at their apartment in Deltona, Florida until the birth of their first child on June 20, 1996. Both testified that they knew that Rosario was in Florida on the day of the murder (on June 19, 1996) because they specifically recalled seeing Rosario on the day before the birth of their son. C.A. App. A-741-742. The prosecution challenged the credibility of Torres's and Seda's testimony due to their close relationship with Rosario. C.A. App. A-929.

Rosario also took the stand in his own defense. He testified that he was in Florida at the time of the murder. He also said that he had lived with Shannon Beane in Florida from February through April 1996. The prosecution impeached this latter statement with Rosario's Florida arrest record, which demonstrated that he had been arrested in March 1996 and imprisoned in Florida until April 1996.

Rosario was convicted of second degree murder and was sentenced to the maximum sentence of 25 years to life. The Appellate Division of the Supreme Court of New York affirmed the judgment, and the New York Court of Appeals denied review. *People v. Rosario*, 733 N.Y.S.2d 405 (N.Y. App. Div. 2001), appeal denied, 97 N.Y.2d 760 (2002) (table review).

3. Following his direct appeal, Rosario filed a motion to vacate the judgment of conviction, pursuant to Section 440.10 of the New York Criminal Procedure

Law. Rosario asserted ineffective assistance of counsel under the federal and state constitutions.

a. The state trial court conducted an evidentiary hearing into Rosario's claim of ineffective assistance of counsel. Rosario proffered seven alibi witnesses, not including the two who had testified at the trial. All of these witnesses had been identified by Rosario in his post-arrest statement or in interviews with his defense counsel and defense investigator. They corroborated the statements of Rosario and his trial alibi witnesses that he was in Florida throughout June 1996, including on the date of the murder. Their testimony would have provided corroboration, additional context, and credibility to the trial testimony that Rosario was in Florida at the time of the murder.

Two of these additional witnesses, Chenoa Ruiz and Fernando Torres, specifically recalled seeing Rosario in Florida on June 19, 1996, (the day of the murder) and would have been more persuasive than the trial alibi witnesses because they were not Rosario's friends. C.A. App. A-1495, A-1501, A-1519; C.A. App. A-1302, A-1308-1310. Ruiz was a neighbor of John Torres and Jenine Seda. Ruiz recalled in particular seeing Rosario in Florida on June 19, 1996, because, while Ruiz was accompanying Seda to the doctor on the day before Seda would give birth, Torres "wasn't involved like he should have been because he was hanging out with" Rosario. C.A. App. A-1495.

The second additional witness, Fernando Torres, visited his son's and Seda's apartment almost every day in June 1996, and recalled that Rosario was living there. C.A. App. A-1302. On the day of the murder (June 19), Fernando specifically recalled going with his son and Rosario to purchase car parts because his son's car had broken down. C.A. App. A-1308-1310. Fernando Torres also saw Rosario on the morning of June 20, when he went to his son's apartment. He learned then from Rosario that his son and Seda were at the hospital and that Seda was giving birth to his grandson. C.A. App. A-1303-1305. Fernando Torres again saw Rosario on June 21, when he met his grandson for the first time at his son's apartment. C.A. App. A-1305-1306.

A third witness and a fourth witness, Michael Serrano and Ricardo Ruiz, further corroborated that Rosario was in Florida around the time of the murder. Serrano, a corrections officer, testified that he saw Rosario frequently in June 1996. C.A. App. A-1708, A-1712. Serrano recalled seeing Rosario among the small group that celebrated with John Torres when he returned from the hospital on June 20. C.A. App. A-1714. Like Ruiz and Fernando Torres, and unlike the two alibi witnesses from the trial, Serrano did not consider himself to be particularly close to Rosario. C.A. App. A-1716.

The fourth additional witness, Ricardo Ruiz, who was Chenoa Ruiz's brother, saw Rosario "[a]ll the time" at Torres's and Seda's apartment during June 1996, both before and after their baby was born. C.A. App. A-1455.

A fifth witness and a sixth witness could have testified about a specific incident that occurred in Florida around the time of the Bronx murder. Denise Hernandez, who dated Rosario throughout June 1996, and her friend, Lysette Rivera, frequently saw Rosario in Florida throughout June 1996. Hernandez specifically recalled an argument with Rosario in mid-June after he borrowed her car without her permission. C.A. App. A-1620-1621. Hernandez was upset because a present for her sister's birthday, which was on June 26, had been in the car. C.A. App. A-1621.

Rivera also recalled this incident, which she believed occurred between five and seven days before Hernandez's sister's birthday on June 26. C.A. App. A-1662-1665. To the extent Hernandez's testimony would have been subject to impeachment due to Hernandez's close relationship with Rosario, Rivera's testimony would have corroborated the testimony.

Finally, a seventh witness, Minerva Godoy, testified that Rosario left New York for Florida in May 1996. She testified that she did not see him again until he returned to New York on July 1, 1996. C.A. App. A-1559-1560, A-1565. Godoy explained that she was in regular contact with Rosario while he was in Florida during this time, that she called him at a Florida telephone number, and that she wired money to Florida for him via Western Union. C.A. App. A-1562-1564. In particular, Godoy recalled that Rosario called her from Florida the day after Seda gave birth and said that he was going to see the baby. C.A. App. A-1564.

Rosario's counsel also testified at the post-conviction hearing.

Hartsfield testified that she believed it was "critical" to speak with Rosario's alibi witnesses in person. C.A. App. A-1042-1043. She further conceded that she did not remember that the trial court had approved her investigator fee request or why she had never conducted an investigation of Rosario's Florida alibi witnesses. C.A. App. A-1047-1048. Moreover, Hartsfield acknowledged that the failure to investigate Rosario's alibi witnesses in Florida was not a strategic decision. C.A. App. A-1072.

Trial counsel Kaiser testified that he believed that Hartsfield's request for investigative fees had been denied by the court. C.A. App. A-1127-1128, A-1200. But he never tried to confirm his understanding with the court, renew the application, or pursue a Florida investigation himself. C.A. App. A-1127-1128, A-1136, A-1200. Kaiser testified that he would have "loved" additional alibi witnesses. C.A. App. A-1183-1184, A-1192-1193, A-1963-1966.

b. The state court denied Rosario's motion to vacate the judgment. App., *infra*, 207a-230a.

The state court noted that both the federal and state constitutions guarantee the right to effective assistance of counsel. The court explained, however, that New York courts had "expressly rejected" the *Strickland* standard in favor of New York's meaningful representation requirement. App., *infra*, 222a n*.

The state court noted that the New York meaningful representation analysis "is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case." App., *infra*, 222a. As a result, even if a "defendant would have been acquitted * * * but for counsel's errors," that fact is only "'relevant, but not dispositive'" under the New York constitution. App., *infra*, 223a (quoting *Benevento*, 697 N.E.2d at 588).

Applying the New York standard, the court concluded that both counsel "represented [Rosario] in a thoroughly professional, competent, and dedicated fashion." App., *infra*, 224a. While the court acknowledged that Rosario's counsel had failed to use court-ordered funds to conduct an alibi investigation in Florida due to a "misunderstanding or mistake," that failure "was not deliberate" and did "not alter the fact that both attorneys represented Rosario skillfully, and with integrity and in accordance with the standards of 'meaningful representation' defined by [New York's] appellate courts." App., *infra*, 226a.

As evidence that Rosario received a fair process, the state court also invoked the standard for a claim of newly discovered evidence and concluded that the discovery of Rosario's additional alibi witnesses did not entitle him to relief. The court reasoned that such witnesses would not have been sufficient to satisfy the standard for "a motion for new trial based on a claim of newly discovered evidence." App., *infra*, 227a. The state court explained that this evidence would have been "cumulative to evidence presented

at the trial" and should have been discoverable "with due diligence." App., *infra*, 227a.

4. The Appellate Division denied leave to appeal. App., *infra*, 232a-233a.

C. Proceedings Below

Rosario filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York.

1. The district court denied habeas relief. Both the magistrate and district court judges concluded that Rosario received ineffective assistance of counsel under the Sixth Amendment. But both also concluded that Rosario could not meet 28 U.S.C. § 2254(d)(1)'s requirements for habeas relief. App., *infra*, 61a, 75a, 137a-138a.

2. A divided court of appeals affirmed. The panel majority acknowledged that "some of [its] colleagues have cautioned that there may be applications of the New York standard that could be in tension with the prejudice standard in *Strickland*." App., *infra*, 12a. And the court recognized that the New York standard "creates a danger that some courts might misunderstand the New York standard and look past a prejudicial error as long as counsel conducted himself in a way that bespoke of general competency throughout the trial." App., *infra*, 15a.

Nevertheless, the court of appeals reaffirmed its prior holding that New York's meaningful representation standard is not contrary to *Strickland* under

Section 2254(d)(1). App., *infra*, 15a. The court thus explained that Rosario's only avenue for relief was through Section 2254(d)(1)'s unreasonable application criterion. App., *infra*, 16a. While the court of appeals "conclude[d] both prongs of *Strickland* ha[d] been met," App., *infra*, 17a, the panel majority nevertheless concluded that Rosario was not entitled to habeas relief because the state court's application of *Strickland* was not unreasonable.

Judge Straub dissented in relevant part, noting that the case "present[ed] an extraordinarily troubling set of circumstances." App., *infra*, 21a. The dissent explained that Rosario's "defense attorneys * * * failed to investigate his alibi defense adequately and did not contact many of the[] potential witnesses." App., *infra*, 22a. Judge Straub observed that the result of this "colossal failure" was the presentation of "a relatively weak alibi defense, consisting of only two alibi witnesses who were subject to impeachment as interested witnesses because they were close friends with Rosario." App., *infra*, 22a.

As Judge Straub explained, "additional witnesses could have made all the difference in the world." App., *infra*, 37a. Chenoa Ruiz "would have testified that she saw Rosario both the night prior to the murder, when she took Seda to the hospital, and twice throughout the day of the murder, both before and after Seda's doctor's appointment." *Ibid*. Fernando Torres "would have placed Rosario in Florida on three consecutive days beginning with the day of the murder and would have corroborated [his son's]

testimony that Rosario was with him looking for car parts on the nineteenth." App., *infra*, 37a-38a. And the other alibi witnesses would have provided further context "by testifying that they saw Rosario in their Florida community throughout June of 1996." App., *infra*, 37a.

Judge Straub noted that "the state court's use of the 'meaningful representation' standard led it to focus on certain factors that have little bearing on a proper *Strickland* analysis." App., *infra*, 43a. Judge Straub explained that the state court "relied heavily" on its finding that Rosario's trial counsel "'represented [him] in a thoroughly professional, competent, and dedicated fashion.'" App., *infra*, 43a (quoting state court decision). The dissent noted that the state court's analysis was "entirely at odds with *Strickland*" because it is "axiomatic that, even if defense counsel had performed superbly throughout the bulk of the proceedings, they would still be * * * found deficient in a material way." App., *infra*, 44a. And, to the extent that state constitutional standard can be, and was, applied in a manner less favorable than *Strickland*, that would constitute an error "clearly * * * 'contrary to' *Strickland*." App., *infra*, 47a.

Judge Straub noted, however, that he did not need to confront whether application of the state constitutional standard resulted in a decision contrary to clearly established federal law because, at a minimum, it was an unreasonable application of *Strickland*. The dissent explained that it was "clear from the record that the state court not only unreasonably

focused on counsel's overall performance and minimized their mistakes, but also unreasonably discounted the alibi evidence adduced at the post-conviction hearing and thus undervalued its prejudicial effect." App., *infra*, 48a. Indeed, Judge Straub noted that the state court ruling appeared influenced by the irrelevant fact that Rosario might not satisfy a new trial standard based on "newly discovered evidence" and that it was "unclear when, if ever, the court returned to the ineffective assistance of counsel analysis." App., *infra*, 46a-47a.

3. The Second Circuit denied rehearing en banc in a six-to-four vote.

In a five-judge concurrence, Judge Wesley, who authored the panel opinion, disagreed that the New York constitutional standard was contrary to *Strickland*.

Judge Katzmann, in his separate concurrence, noted that the New York standard "could leave room for New York courts to find a lawyer effective by focusing on the 'fairness of the process as a whole'" rather than *Strickland's* prejudice requirement, but that such a result did not occur in this case. App., *infra*, 241a (quoting *Benevento*, 697 N.E.2d at 588).

Four judges dissented from the denial of rehearing en banc.[1] Chief Judge Jacobs's opinion on behalf of the four dissenters explained that New York's meaningful representation standard is "contrary to the standard set forth in *Strickland*." App., *infra*, 242a. The Chief Judge explained that the "New York test averages out the lawyer's performance while *Strickland* focuses on any serious error and its consequences." App., *infra*, 244a. This dissent noted that, as a result of the state constitutional standard, "the gravity of individual mistakes may be submerged in an overall assessment of effectiveness, in a way that violates the federal Constitution." App., *infra*, 247a.

In addition to joining the Chief Judge's dissent, Judge Pooler filed a separate dissent. She emphasized that the "state standard can act to deny relief despite an egregious error from counsel so long as counsel provides an overall meaningful representation"—a result "contrary to *Strickland.*" App., *infra*, 248a.

While sharply divided as to the outcome of this case, the full court of appeals agreed in one respect: "that New York state courts would be wise to engage in separate assessments of counsel's performance under both the federal and state standards." App.,

[1] In addition to the four judges dissenting from the denial of rehearing, Senior Judge Straub also "endorsed the views expressed" in Chief Judge Jacobs's dissenting opinion. App., *infra*, 242a n.1.

infra, 240a (Wesley, J., concurring). "Such an exercise would ensure that the prejudicial effect of each error is evaluated with regard to outcome * * *." App., *infra*, 240a; *see also* App., *infra*, 241a (Katzmann, J., concurring); App., *infra*, 247a (Jacobs, C.J., dissenting); App., *infra*, 248a-249a (Pooler, J., dissenting).

REASONS FOR GRANTING THE PETITION

REVIEW IS NECESSARY BECAUSE NEW YORK'S "MEANINGFUL REPRESENTATION" STANDARD RESULTS IN DECISIONS THAT ARE CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, *STRICKLAND V. WASHINGTON*

This Court should grant review of the Second Circuit's blanket rule that application of New York's state constitutional meaningful representation standard to Sixth Amendment claims of ineffective assistance does not result in a ruling contrary to clearly established federal law. Under the state constitutional standard, New York courts are not guided by whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Rather, as the Second Circuit explained, under the state standard, a defendant must "demonstrate that he was deprived of a fair trial overall." App., *infra*, 11a. That result squarely conflicts with *Williams v. Taylor*, 539 U.S. 362 (2000), where this Court held that it would be contrary to clearly established federal law for a state court to compel a prisoner to prove

more than *Strickland* requires. It also conflicts with the decisions of other courts of appeals, which have not hesitated to grant habeas relief when a state court, to a habeas petitioner's detriment, has substituted its own standard for *Strickland*. Here, application of New York's different state standard resulted in a decision that was contrary to, and an unreasonable application of, *Strickland*. As Chief Judge Jacobs explained in his dissent, absent review, "this defect will likely give rise to more cases that will bedevil the district courts, which are left to sort out case-by-case a problem that is systemic." App., *infra*, 242a.

A. The Ruling Below Conflicts With The Habeas Decisions Of This Court And Other Courts Of Appeals

Review by this Court is warranted because application of the New York state constitutional standard to federal ineffective assistance of counsel claims results in decisions that are "contrary to" or an "unreasonable application of" clearly established federal law. 28 U.S.C. § 2254(d)(1).

1. Contrary to clearly established federal law

a. In this case, the Second Circuit once again reaffirmed its previous holding that application of New York's state constitutional standard to federal ineffective assistance of counsel claims is not contrary to *Strickland*. But, as the dissenting judges explain, New York's state constitutional standard sharply departs from *Strickland*. Thus, in a class of cases,

including this one, that different state standard results in rulings that are contrary to *Strickland*.

Indeed, the panel majority and the opinions concurring in the denial of rehearing en banc all acknowledge, as they must, that "New York's test for ineffective assistance of counsel differs from the federal *Strickland* standard." App., *infra*, 10a, 238a (Wesley, J., concurring); *see also* App., *infra*, 241a (Katzmann, J., concurring). For example, rather than examine whether "the identified *acts* or *omissions* were outside the wide range of professionally competent assistance," *Strickland*, 466 U.S. at 690 (emphasis added), the state court focused on the fact that the error was a "misunderstanding or mistake" and was "not deliberate." App., *infra*, 226a. And contrary to this Court's requirements, that state standard does not examine whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Instead, New York's standard asks "whether the error affected the fairness of the process as a whole." App., *infra*, 222a (citing *People v. Benevento*, 697 N.E.2d 584, 588 (N.Y. 1998)).

Application of this state law standard to federal constitutional claims can and does result in decisions that cannot be reconciled with *Strickland.* As the panel majority recognized, the state law standard "creates a danger that some courts might misunderstand the New York standard and look past a prejudicial error as long as counsel conducted himself in a way that bespoke of general competency throughout

the trial." App., *infra*, 15a. Similarly, Judge Wesley, while concurring in denial of en banc review, acknowledged that the state constitutional standard can "be misapplied to diminish prejudicial effect of a single error." App., *infra*, 238a. And Judge Katzmann likewise recognized that the state constitutional standard "could leave room for New York courts to find a lawyer effective by focusing on the 'fairness of the process as a whole,' rather than on whether 'there is a reasonable probability that . . . the result of the proceeding would have been different' absent defense counsel's mistakes." App., *infra*, 241a (citations omitted) (ellipses in original).

In short, as the four judges dissenting from the denial of rehearing en banc explain, the state constitutional standard "allows the gravity of individual errors to be discounted indulgently by a broader view of counsel's overall performance." App., *infra*, 244a. Whereas *Strickland* "focuses on any serious error and its consequences," the New York standard "averages out the lawyer's performance." App., *infra*, 244a.

And the Second Circuit is not misreading the New York state constitutional standard. As the New York Court of Appeals has explained, the state law standard is more "concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case." *Benevento*, 697 N.E.2d at 588. Indeed, the New York Court of Appeals has "rejected ineffective assistance claims despite significant mistakes by defense counsel," because that court concluded that the counsel's "overall performance

[was] adequate." *People v. Turner*, 840 N.E.2d 123, 126 (N.Y. 2005). To the extent the New York Court of Appeals has held that a single error can amount to the absence of meaningful representation, it requires that error to be "clear-cut and completely dispositive." *Ibid.* But *Strickland* does not require such absolute proof: a habeas petitioner must demonstrate only that, but for counsel's errors, there is a "reasonable probability" that the outcome would have been different.

Here, the state court ignored *Strickland*'s prejudice standard, and instead expounded that under the state standard, "whether defendant would have been acquitted of the charge but for counsel's errors is 'relevant, but not dispositive'" to an ineffective assistance of counsel claim. App., *infra*, 223a.

b. The Second Circuit's blanket holding that the New York standard is not contrary to *Strickland*—even though the state standard can require more than *Strickland*—cannot be reconciled with the decisions of this Court and other courts of appeals.

In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court held that a state court decision is contrary to clearly established federal law "if the state court applies a rule that contradicts the governing law set forth in [the Court's] cases." *Id.* at 405. Thus, the Court held that the Virginia Supreme Court's injection of a "fundamental fairness" requirement into federal ineffective assistance of counsel claims was contrary to *Strickland*. *Id.* at 393. This was so

because the state court denied the prisoner's Sixth Amendment claim even when he could "show that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceeding." *Id.* at 393. Indeed, like the state court ruling in this case, the Virginia Supreme Court's decision "turned on its erroneous view that a 'mere' difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel." *Id.* at 397.

The Second Circuit's decision also conflicts with the rulings of other courts of appeals. The Seventh Circuit has held that a state court decision is contrary to clearly established federal law if it imposes a requirement on a habeas petitioner that is inconsistent with *Strickland*. *Goodman v. Bertrand*, 467 F.3d 1022, 1026 (7th Cir. 2006). Thus, the Seventh Circuit held that the Wisconsin court's requirement that a habeas petitioner prove that the proceeding was "fundamentally unfair" altered *Strickland*'s prejudice requirement in a manner that was "'contrary to' clearly established federal law." *Id.* at 1028 (citation omitted).

The Tenth Circuit reached a similar conclusion. There, the state court held that a "'mere showing that a conviction would have been different but for counsel's errors [did] not suffice to sustain a Sixth Amendment claim,' without an additional inquiry into the fairness of the proceeding." *Spears v. Mullin*, 343 F.3d 1215, 1248 (10th Cir. 2003) (citation omitted), cert. denied, 541 U.S. 909 (2004). The Tenth Circuit explained that application of that "more onerous

standard was contrary to" *Strickland*. *Ibid.*; *see also Cargle v. Mullin*, 317 F.3d 1196, 1203-05 (10th Cir. 2003) (because Oklahoma's ineffective assistance of counsel test requires habeas petitioners to "establish not only a meritorious omitted issue but also an improper motive or cause behind counsel's omission of the issue," state court rulings based on that standard are not entitled to deference).

And the Fifth Circuit similarly has explained that "to the extent that the state habeas court's 'decision turned on its erroneous view that a "mere" difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel,' the court's analysis was 'contrary to' *Strickland*." *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004) (quoting *Williams*, 529 U.S. at 397).

Indeed, the overwhelming precedent of other courts of appeals holds that a state ineffective assistance of counsel standard is contrary to clearly established federal law when it is applied in a manner that compels a state prisoner to prove more than a "reasonable probability" that the outcome at trial would have been different. *Saranchak v. Beard*, 616 F.3d 292 (3d Cir. 2010) (Pennsylvania Supreme Court "subjective review" prejudice requirement contrary to *Strickland*'s objective standard); *Hummel v. Rosemeyer*, 564 F.3d 290, 305 (3d Cir.), cert. denied, 130 S. Ct. 784 (2009); *Young v. Sirmons*, 486 F.3d 655, 680 (10th Cir. 2007) (Oklahoma Court of Criminal Appeals' requirement that a habeas petitioner show prejudice by "'clear and convincing evidence'" contrary to

Strickland), cert. denied, 552 U.S. 1203 (2008); *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1243 (9th Cir.) (Oregon court's "more probable than not" prejudice requirement contrary to *Strickland*), cert. denied, 546 U.S. 944 (2005); *Magana v. Hofbauer*, 263 F.3d 542 (6th Cir. 2001) (Michigan Court of Appeals' standard requiring habeas petitioner to demonstrate "an absolute certainty that the outcome of the proceedings would be different" contrary to *Strickland*); *Rose v. Lee*, 252 F.3d 676, 689 (4th Cir.) (North Carolina court "applied the wrong burden of proof with respect to the prejudice prong" when it required the defendant to prove the result of the proceeding would be different " 'by the preponderance of the evidence' "), cert. denied, 534 U.S. 941 (2001).

To be sure, there can be instances where a state standard is phrased differently from *Strickland*, yet it is not contrary to clearly established federal law. In such cases, however, other courts of appeals have held that the state law standard must be "the 'functional equivalent of *Strickland*.' " *Castillo v. Matesanz*, 348 F.3d 1, 12 (1st Cir. 2003) (quoting *Ouber v. Guarino*, 293 F.3d 19, 31 (1st Cir. 2002)), cert. denied, 543 U.S. 822 (2004). For example, the First Circuit has explained that the Massachusetts and *Strickland* standards differ only in a "minor variation in phraseology." *Id*. at 14. But, unlike the New York standard applied in this case, that state law standard is only linguistically different from *Strickland*. It did not conflate the performance and prejudice requirements of *Strickland*, so that an

outcome determinative error by counsel is overlooked due to counsel's otherwise positive performance. By endorsing a state law standard that allows outcome-determinative errors to be overlooked, the Second Circuit is so out of step with the precedent of this Court and other courts of appeals that summary reversal may be warranted.

c. The state court's departure from *Strickland* made the difference in this case.

Had the proper standard been applied, Rosario unquestionably would have been entitled to relief under *Strickland*. That is established by the opinions below. Every federal judge who has reviewed the record in this case has found a federal constitutional violation. The magistrate judge, the district court judge, and all three judges on the Second Circuit panel agreed that Rosario received constitutionally deficient representation under *Strickland* and would be entitled to relief under de novo review. App., *infra*, 137a, 61a, 17a, 21a-23a. It was only because the decisions below deferred to the state court ruling under 28 U.S.C. § 2254(d)(1) that habeas relief was denied. But that deference was unwarranted. The state court *never* applied *Strickland* (or any standard sharing *Strickland*'s reasoning). Instead, the state court applied a state law standard that the state court understood as having "expressly rejected" this Court's approach. App., *infra*, 222a n*.

Nor does the fact that the New York Court of Appeals believes that, in some circumstances, the

New York standard may be more favorable to defendants than *Strickland* excuse the outcome in this case. App., *infra*, 11a; *see also Turner*, 840 N.E.2d at 125-126 (noting that the "meaningful representation" standard may be "somewhat more favorable to defendants"). While the New York standard might be more protective for defendants as applied in *some* other cases, the state court's application of its own state law standard *here* led to a result that fell well below (and thus was contrary to) what *Strickland* requires. Rather than examine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different," the state court noted that Rosario's counsel "represented defendant in a thoroughly professional, competent, and dedicated fashion" and that their error was only a "misunderstanding or mistake" rather than "deliberate." App., *infra*, 226a.

Indeed, to the extent the state court examined what effect Rosario's counsel's error had on the outcome at all, it erroneously did so through the prism of the state law standard for a new trial based on newly discovered evidence. App., *infra*, 227a. But this Court in *Strickland* rejected that very approach. *Strickland*, 466 U.S. at 694 (rejecting as "not quite appropriate" a standard that "comports with the widely used standard for assessing motions for new trial based on newly discovered evidence"). Nevertheless, the state court appeared to explain that Rosario would not be entitled to relief under that new trial standard because the alibi evidence was "cumulative"

to the evidence presented at trial and the "existence" of his alibi witnesses "was known to the defendant" before the trial began. App., *infra*, 227a-228a. That misses the point: it was Rosario's counsel's failure to investigate the abundance of known alibi witnesses that was at issue. And the state court excused any harm it did find based on its belief that Rosario's counsel otherwise performed in a professional manner. App., *infra*, 229a.

In any event, the missing alibi evidence was anything but "cumulative." As the panel dissent explained, "additional witnesses could have made all the difference in the world." App., *infra*, 37a. As discussed below (*see* pp. 33-35, *infra*), the additional witnesses would have corroborated Rosario's alibi, provided a fuller picture of his presence in Florida throughout June 1996, shown additional details at and around the time of the murder, and been less vulnerable to impeachment than the two friends who testified at Rosario's trial. Moreover, in order to convict Rosario, rather than "disbelieving two alibi witnesses who were good friends with Rosario and Rosario himself, the jury would have had to discredit at least seven additional witnesses, who would have corroborated Rosario's alibi, provided further context to his defense and testified to additional facts that had not been elicited at trial." App., *infra*, 31a-32a (Straub, J., dissenting in part and concurring in part).

Because the state court applied a state law standard incompatible with and more stringent than *Strickland*, the state court ruling is contrary to the "governing law" of this Court. *Williams*, 529 U.S. at 405. Application of that standard led to the denial of Rosario's Sixth Amendment claim. Review and reversal by this Court is warranted.

2. Unreasonable application of clearly established federal law

Even if New York's one-part meaningful representation standard were not "contrary to" *Strickland*'s two-part test, this Court's review is nevertheless necessary because the different state constitutional standard results in decisions that are "an unreasonable application of" clearly established federal law. 28 U.S.C. § 2254(d)(1).

As this Court has explained, a state court decision amounts to an unreasonable application of *Strickland* when it applies the "governing legal rule" in an unreasonable manner to a particular habeas petitioner's case. *Williams*, 529 U.S. at 407-408. "In order for a federal court to find a state court's application of [the Court's] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). That standard is met here. And, if the Second Circuit's decision is not reversed, such unreasonable applications of this Court's law to federal ineffectiveness claims by New York state prisoners will no doubt recur.

Because the state court applied the New York standard to Rosario's Sixth Amendment claim, the state court examined only whether Rosario received "meaningful representation." App, *infra*, 222a. It did not separately examine Rosario's counsel's performance and resulting prejudice. App., *infra*, 222a-223a. To salvage the state court's analysis, the Second Circuit panel majority "translated" the state court ruling into *Strickland* terminology. *Id.* at 19a. But that artificial dissection of the state court ruling overlooked the fact that the state court, in applying its own test, focused on "certain factors that have no bearing" on *Strickland*. App., *infra*, 43a (Straub, J., dissenting in part and concurring in part). And those factors infected the state court's entire analysis. App., *infra*, 246a (Jacobs, C.J., dissenting to denial of rehearing en banc) ("a finding on a mixed question of law and fact (such as prejudice) is suspect (at least) if it is guided by a defective understanding of the law").

First, the panel majority read the state court ruling as having somehow implicitly addressed *Strickland*'s performance prong. The panel majority asserted that the state court found no deficiency in Rosario's counsel's performance, and the panel concluded that that finding was not an unreasonable application of *Strickland*. The Second Circuit explained that the state court found that Rosario's counsel acted in a professional manner and that the failure to investigate further alibi witnesses did "'not alter this finding.'" App., *infra*, 18a (quoting state court). But a single error by counsel can amount to

deficient performance under *Strickland*. As the panel dissent concluded, Rosario's "counsel essentially turned a blind eye to the existence of substantial potentially exculpatory evidence of which it was aware and, moreover, did so not on the basis of any reasonable professional judgment, but rather as a result of pure inadvertence." App., *infra*, 48a-49a (internal quotation marks and citation omitted). Indeed, counsel conceded there was no legal strategy to forgoing a more thorough alibi investigation. And this Court has long recognized that a failure to investigate available exculpatory evidence and to make an informed judgment about whether to use it at trial is rarely, if ever, excusable. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). In that regard, the state court's conclusion was an unreasonable application of *Strickland*'s performance prong.

Second, as to *Strickland*'s prejudice prong, the panel majority cobbled together the conclusion that the state court implicitly found no prejudice, pointing to the state court's conclusion that Rosario's counsel put on the best witnesses and the alibi evidence was largely cumulative. App., *infra*, 19a-20a. But it was objectively unreasonable for the state court to deem the alibi evidence cumulative. After all, the state court's reasoning was based at least in part on its importation of a state law standard for a "motion for new trial based on a claim of newly discovered evidence," where relief will not be granted if the evidence is "cumulative to evidence presented at trial." App., *infra*, 227a.

Indeed, the state court compared the two trial witnesses with the seven post-conviction witnesses, concluding that the latter were "not as persuasive" as the two who testified at trial. App., *infra*, 230a. But the state court never considered the effect that the additional witness testimony would have had in confirming and supporting the testimony of the two trial witnesses or the mutually reinforcing nature of the additional alibi testimony. *See Williams*, 529 U.S. at 397-398 (holding that the state court's "prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available * * * evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding"). As the panel dissent explained:

> All of the other witnesses * * * would have * * * testif[ied] that they saw Rosario in their Florida community throughout June of 1996. They would have provided specific facts regarding where he lived and what he was doing at the time. Several witnesses could have corroborated each other's testimony that Rosario was in Florida on the exact day of the murder and in the immediately surrounding days.

App., *infra*, 37a. As this Court has explained, "testimony of more disinterested witnesses" is not cumulative of a defendant's own self-serving testimony because it "would quite naturally be given much greater weight by the jury." *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986).

And such evidence would have been particularly important given the relative weakness of the prosecution's case. The prosecution based its entire case on the testimony of two stranger eyewitnesses. No other evidence linked petitioner to the crime. *United States v. Wade*, 388 U.S. 218, 235 (1967) (noting that eyewitness accounts of strangers can be "'proverbially untrustworthy'" (citation omitted)); *Manson v. Brathwaite*, 432 U.S. 98, 112 (1977) ("The witness' recollection of the stranger can be distorted easily by the circumstances or by later actions of the police.").

This missing alibi evidence would have provided "indisputably critical data points in establishing that Rosario was in Florida, and not over 1000 miles away in New York, when the victim was murdered." App., *infra,* 38a (Straub, J., dissenting in part and concurring in part). In short, the state court "unreasonably discounted" the additional evidence that was critical to the defense that Rosario's counsel failed to investigate adequately. *Porter v. McCollum*, 130 S. Ct. 447, 454 (2009) (per curiam).

B. Continued Application Of New York's "Meaningful Representation" Standard Will Prejudice Habeas Petitioners And Burden Federal Courts

1. Absent this Court's review, New York courts will continue to apply the different state constitutional standard to federal ineffective assistance of counsel claims. Because the Second Circuit has categorically held that New York's "meaningful representation"

standard is not contrary to *Strickland*, federal courts will struggle to fit those state court rulings into Section 2254(d)(1)'s unreasonable application analysis.

This concern is not inchoate. Each year, the New York courts apply the State's "meaningful representation" standard to numerous cases where state prisoners claim ineffective assistance of counsel. Many of these cases subsequently will be filed under Section 2254 as federal habeas cases. Thus, as Chief Judge Jacobs observed in his dissent from the denial of rehearing en banc, "this defect likely will give rise to more cases that will bedevil the district courts, which are left to sort out case-by-case a problem that is systemic." App., *infra*, 242a.

Indeed, in a tacit acknowledgment that the state law standard is contrary to *Strickland* and will continue to impose a significant burden on the federal judiciary, every active judge on the Second Circuit recommended, in response to Rosario's petition for rehearing en banc, that New York state courts apply both the federal and state standards to "ensure that the prejudicial effect of each error is evaluated with regard to outcome." App., *infra*, 240a (Wesley, J., concurring); *see also* App., *infra*, 241a (Katzmann, J., concurring); App., *infra*, 247a (Jacobs, C.J., dissenting); App., *infra*, 248a-249a (Pooler, J., dissenting). This directive from the Second Circuit to New York state courts reveals that the active judges on the Second Circuit have no confidence that New York courts are actually applying the malleable New York

standard in a manner consistent with *Strickland*. If the meaningful representation standard were in fact always at least as protective as *Strickland*, this recommendation would have been unnecessary. In any event, *Strickland* is not simply a recommendation to be followed only as state courts see fit. The New York courts' failure to apply it in this case and many others makes this Court's review imperative.

2. Moreover, it now should be plain that the recurring issue raised by this petition will not be resolved absent this Court's review.

While the Second Circuit long has struggled to reconcile New York's meaningful representation standard with *Strickland*, it has done so without success. A decade ago, the court of appeals first concluded that application of the state constitutional standard to Sixth Amendment ineffective assistance of counsel claims was not contrary to *Strickland*. *Lindstadt v. Keane*, 239 F.3d 191, 198 (2d Cir. 2001); *Loliscio v. Goord*, 263 F.3d 178, 193 (2d Cir. 2001). Subsequent decisions have held that the Second Circuit is "bound to follow" that precedent. *Eze v. Senkowski*, 321 F.3d 110, 124 (2d Cir. 2003).

Although some members of the Second Circuit have expressed the view that the New York state standard and *Strickland* might conflict, the Second Circuit has not taken the issue en banc. For example, in *Henry v. Poole*, 409 F.3d 48 (2d Cir. 2005), cert. denied, 547 U.S. 1040 (2006), the Second Circuit

paused on, but did not address, "whether the New York standard is not contrary to *Strickland*." *Id.* at 70. And, in a separate opinion in *Poole*, Judge Sack concluded that, "assuming that the Supreme Court does not give us guidance in the interim, we might be well advised to consider the appeal for en banc review as a means to reconsider the issue." *Id.* at 72-73 (Sack, J., concurring). The denial of rehearing en banc in this case makes clear, however, that a majority of the full court of appeals has declined to heed that advice and that this Court's guidance is now needed.

3. Finally, this case presents an ideal vehicle to address the question presented. As shown above, application of the New York standard was outcome-determinative in this case. Every federal judge who has examined Rosario's Sixth Amendment ineffective assistance of counsel claim—the magistrate judge, the district court judge, and all three judges on the Second Circuit panel—has concluded that Rosario received constitutionally deficient assistance of counsel and was prejudiced as a result of counsel's error. App., *infra*, 137a, 61a, 17a, 21a-23a.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted. The Court may wish to consider summarily reversing the judgment of

the court of appeals; in the alternative, the Court should set the case for briefing and oral argument.

Respectfully submitted,

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DECEMBER 29, 2010

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2009

(Argued: November 19, 2009 Decided: April 12, 2010)

Docket No. 08-5521-pr

RICHARD ROSARIO,

Petitioner-Appellant,

– v. –

SUPT. ROBERT ERCOLE, GREEN HAVEN CORRECTIONAL FACILITY, ATTORNEY GENERAL ELIOT SPITZER,

Respondents-Appellees.

Before:

CABRANES, STRAUB, WESLEY, *Circuit Judges*.

Richard Rosario appeals from a judgment of the United States District Court for the Southern District of New York (Castel, *J*.), entered on October 23, 2008, denying his petition for a writ of habeas corpus. We hold that the state court's review of Rosario's ineffective assistance of counsel claims was neither contrary to, nor an unreasonable application of, *Strickland v. Washington*, 466 U.S. 668 (1984).

Affirmed. Judge Straub concurs in part and dissents in part in a separate opinion.

JODI K. MILLER, Morrison & Foerster, LLP, New York, N.Y. (Carl H. Loewenson, Morrison & Foerster, LLP, New York, NY, and Jin Hee Lee, NAACP Defense and Education Fund, Inc., *on the brief), for Petitioner-Appellant*.

JOSEPH N. FERDENZI, Assistant District Attorney, Bronx, N.Y. (Christopher J. Blira-Koessler, Assistant District Attorney, Bronx, NY, for Robert T. Johnson, District Attorney, Bronx County), *for Respondents-Appellees*.

WESLEY, *Circuit Judge*:

This case requires us to examine New York law and analyze one sentence in a New York Court of Appeals opinion that has troubled our circuit since its publication.

Background

On June 19, 1996, George Collazo was shot and killed in the Bronx while walking with his friend Michael Sanchez. The daytime shooting followed an argument sparked by Collazo's racial epithet to two men as he and Sanchez passed them. Sanchez later identified appellant Richard Rosario as Collazo's assailant. Robert Davis, a porter working at a nearby building, witnessed the murder and also identified

Rosario as the shooter. A third eyewitness was also present, but did not identify Rosario as a participant in the crime.

Rosario was arrested for the murder on July 1, 1996, after he voluntarily returned to New York from Florida. From the time of his arrest, Rosario claimed he was in Florida when Collazo was shot. Rosario provided the police with a statement, maintained his innocence, and listed the names of thirteen people who could corroborate his alibi.

Before Rosario's trial began, he was assigned Joyce Hartsfield as counsel. Hartsfield brought an application before the court requesting funds for a private investigator to travel to Florida and interview the potential alibi witnesses. The court granted the application. Hartsfield was eventually replaced as counsel by Steven Kaiser in February of 1998. Kaiser had a mistaken belief that the application for investigation fees had been denied. Kaiser did not make a request for fees; no investigation of alibi witnesses was done in Florida.

During the trial, the prosecution called Sanchez and Porter, who identified Rosario as the shooter, and the third eyewitness, who failed to identify Rosario. The defense presented two alibi witnesses – John Torres, a friend of Rosario, and Jenine Seda, John Torres' fiancée. Both testified that Rosario was living with them in Florida when the murder occurred. They remembered the date because their first child was born on June 20th, a day after the murder.

Rosario took the stand in his own defense and testified that he was in Florida through June 30, 1996. Rosario stated he lived with a woman named Shannon Beane from February through April of 1996. The prosecution rebutted this assertion with Rosario's Florida arrest record, which indicated that he was arrested in March of 1996 and imprisoned until April of that year. The jury convicted Rosario of second degree murder, and the court sentenced him to 25 years to life.

After Rosario's unsuccessful direct appeal of his conviction, *see People v. Rosario,* 733 N.Y.S.2d 405 (1st Dep't 2001), *leave denied* 97 N.Y.2d 760 (2002), he filed a motion to vacate his conviction under Section 440.10(1)[1] of the New York Criminal Procedure Law on the grounds that he was deprived effective assistance of counsel at trial. The Bronx County Supreme Court held a hearing, at which Rosario's attorneys (Hartsfield and Kaiser), the private investigator, and seven alibi witnesses testified. Hartsfield testified that she did not pursue documentary records to support Rosario's alibi defense, including records from Western Union that were subsequently destroyed and a police field report detailing Rosario's

[1] The relevant part of the New York statute governing a motion to vacate a judgment reads: "At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that: . . . (h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States." N.Y. Crim. Proc. Law § 440.10(1).

stop by Florida police on May 30, 1996. She also testified that, though she retained a private investigator and received funding from the court to send the investigator to Florida to investigate the alibi witnesses, she did not instruct the private investigator to do so. She conceded there was no strategic reason behind that choice.

Kaiser, for his part, stated that he did not know where he got the misimpression that the court had denied investigatory funds. He testified that he did attempt to locate or contact alibi witnesses in Florida, working from New York alone. When asked if the two alibi witnesses he called were the best witnesses, he replied "they were the only two," and he would have preferred to call additional alibi witnesses.

Jesse Franklin, the private investigator, testified that she had a meeting with Rosario where he provided her with a list of names for alibi witnesses. She attempted to reach all the people on the list via telephone, though it was difficult to do so because many of them had moved. Franklin raised these difficulties with Hartsfield, who instructed her to draft an affidavit detailing her difficulties for an application to the court for additional investigatory funds to send Franklin to Florida. She believed traveling to Florida was necessary to investigate properly Rosario's alibi. She never heard from Hartsfield again about the application and assumed that it had been denied. Despite not traveling to Florida, Franklin did manage to contact two of the witnesses on the list, Fernando and Robert Torres, both of

whom told Franklin that they had seen Rosario in Florida in late June of 1996. Franklin did not contact those men again. However, Franklin did later contact the two witnesses who were actually called at trial, Jenine Seda and John Torres, and was told by John Torres that he could provide the names of other alibi witnesses. Franklin tried unsuccessfully to telephone other witnesses that Rosario had named.

At the end of the hearing, the state court concluded that Hartsfield and Kaiser had provided Rosario with "meaningful representation" under New York law. The court detailed the testimony of each witness, and concluded that the two witnesses presented at trial were the "most credible among the possible alibi witnesses." *Rosario v. Ercole,* 582 F. Supp. 2d 541, 550 (S.D.N.Y. 2008). The court also determined that the testimony of several of the proffered alibi witnesses could have undermined Rosario's alibi defense in the eyes of the jury.

The state court noted that Rosario's right to effective assistance of counsel was guaranteed by both the federal and state constitutions. The court contrasted the federal standard set forth in *Strickland* with the New York standard employed under the state constitution. After a lengthy analysis under the New York constitutional standard, the court concluded that Rosario had received "meaningful representation" as required by New York's constitution. The court also concluded that the government's case was "strong"; that the prospective alibi witnesses "were, for the most part, questionable and certainly

not as persuasive as the two witnesses who did testify"; and that the verdict was "unimpeached, and 'amply supported by the evidence.'"[2]

Rosario filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York (Castel, *J.*). *Rosario v. Ercole,* 582 F. Supp. 2d 541 (S.D.N.Y. 2008). The district court requested a report and recommendation from a magistrate judge (Pitman, *M.J.*). *Id.* at 545. The magistrate judge and the district court concluded that counsels' performance was in fact deficient under *Strickland. Id.* at 551. However, both determined that the state court's decision to deny Rosario's motion to vacate was not an unreasonable application of, nor contrary to, clearly established federal law. *Id.* at 552-53. This appeal followed.

Discussion

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may only grant a writ of habeas corpus for a claim that has been adjudicated on the merits by a state court if the adjudication of the claim:

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[2] Upon appeal, the New York Appellate Division, First Department, did not address the ineffective assistance claim. *People v. Rosario,* 733 N.Y.S.2d 405 (1st Dep't 2001). The New York Court of Appeals denied leave to appeal. *People v. Rosario,* 97 N.Y.2d 760, 760 (2002) (Ciparick, *J.*).

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Rosario argues that the state court decision denying his claim for ineffective assistance of counsel was both an unreasonable application of, and contrary to, the clearly established federal standard under the first subsection of § 2254(d). Because the state court adjudicated the merits of his claim, Rosario must prove that the state court either identified the federal standard for ineffective assistance but applied that standard in an objectively unreasonably way, or that the state applied a rule that contradicts the federal standard. *Lockyer v. Andrade,* 538 U.S. 63, 73, 75-76 (2003); *Williams v. Taylor,* 529 U.S. 362, 387-89 (2000). We review the district court's denial of the writ *de novo. Jones v. West,* 555 F.3d 90, 95 (2d Cir. 2009).

Rosario argues that the state court ran afoul of federal law when it concluded that he had received effective representation. In Rosario's view, counsels' failure to investigate Rosario's alibi witnesses and documentary evidence was a violation of his

constitutional right to the effective assistance of counsel, and any conclusion otherwise misapprehends clearly established law.

In *Williams v. Taylor,* the Supreme Court determined that *Strickland v. Washington,* the seminal case defining the contours of the right to effective assistance of counsel, qualified as "clearly established law" for purposes of AEDPA. 529 U.S. at 390-91. The *Strickland* test for ineffective assistance has two necessary components: the defendant must establish both that his attorney was ineffective and that the attorney's errors resulted in prejudice to the defendant. *Id.*; *see also Strickland v. Washington,* 466 U.S. 668, 687 (1984). Counsel is ineffective when her efforts fall "'below an objective standard of reasonableness.'" *Williams,* 529 U.S. at 390-91 (quoting *Strickland,* 466 U.S. at 688). A defendant satisfies the prejudice prong by proving that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* at 391 (quoting *Strickland,* 466 U.S. at 694).

When a federal court reviews a state court decision under § 2254, "[t]he question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Knowles v. Mirzayance,* ___ U.S. ___, 129 S. Ct. 1411, 1420 (2009)

(internal quotation marks omitted). The *Strickland* standard itself is a "general standard," meaning its application to a specific case requires "a substantial element of judgment" on the part of the state court. *Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004); *accord Knowles,* 129 S.Ct. at 1420. Thus, state courts are granted "even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles,* 129 S.Ct. at 1420. In order to prevail, a petitioner must overcome that substantial deference and establish that the state court's decision on ineffective assistance was contrary to, or an unreasonable application of, *Strickland.*

To be "contrary to" clearly established law, a state court must reach a conclusion of law antithetical to a conclusion of law by the Supreme Court, or decide a case differently than the Supreme Court has when the two cases have "materially indistinguishable facts." *Williams,* 529 U.S. at 412-13. The state court examined Rosario's claims under New York's constitutional standard for ineffective assistance. New York's constitution, like the U.S. Constitution, affords its citizens with the right to competent representation by an attorney. *See* U.S. Const. amend. VI; N.Y. Const. art. I, § 6; *see also People v. Baldi,* 54 N.Y.2d 137, 146 (1981). However, as noted by the state court, New York's test for ineffective assistance of counsel under the state constitution differs from the federal *Strickland* standard. The first prong of the New York test is the same as the federal test; a defendant must show that his attorney's performance fell below an objective

standard of reasonableness. *People v. Turner*, 5 N.Y.3d 476, 480 (2005). The difference arises in the second prong of the *Strickland* test. *Id.* In New York, courts need not find that counsel's inadequate efforts resulted in a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Instead, the "question is whether the attorney's conduct constituted egregious and prejudicial error such that defendant did not receive a fair trial." *People v. Benevento,* 91 N.Y.2d 708, 713 (1998) (internal quotation marks omitted). Thus, under New York law the focus of the inquiry is ultimately whether the error affected the "fairness of the process as a whole." *Id.* at 714. The efficacy of the attorney's efforts is assessed by looking at the totality of the circumstances and the law at the time of the case and asking whether there was "meaningful representation." *Baldi,* 54 N.Y.2d at 147.

The New York Court of Appeals clearly views the New York constitutional standard as more generous toward defendants than *Strickland. Turner,* 5 N.Y.3d at 480 ("Our ineffective assistance cases have departed from the second ('but for') prong of *Strickland,* adopting a rule somewhat more favorable to defendants." (citing cases)). To meet the New York standard, a defendant need not demonstrate that the outcome of the case would have been different but for counsel's errors; a defendant need only demonstrate that he was deprived of a fair trial overall. *People v. Caban,* 5 N.Y.3d 143, 155-56 (2005). A single error by otherwise competent counsel may meet this standard if

that error compromised the integrity of the trial as a whole. *Turner*, 5 N.Y.3d at 480.

For our part, we have recognized that the New York "meaningful representation" standard is not contrary to the *Strickland* standard. *Eze v. Senkowski*, 321 F.3d 110, 123-24 (2d Cir. 2003); *Lindstadt v. Keane,* 239 F.3d 191, 198 (2d Cir. 2001). However, some of our colleagues have cautioned that there may be applications of the New York standard that could be in tension with the prejudice standard in *Strickland. Henry v. Poole,* 409 F.3d 48, 70-71 (2d Cir. 2005). The primary source of this consternation is a sentence from a New York Court of Appeals decision, *Benevento,* which notes that "whether defendant would have been acquitted of the charges but for counsel's errors is relevant, but not dispositive under the State constitutional guarantee of effective assistance of counsel." 91 N.Y.2d at 714. Of course, under *Strickland,* if a defendant would have been acquitted but for counsel's errors, that fact is both relevant and dispositive because it creates more than a reasonable probability of a different outcome and thus soundly passes the prejudice prong of the test. *See Strickland,* 466 U.S. at 694.

The problem is that focusing solely on this sentence leads one to ignore the context in which it was written. *Benevento* recognized that, like *Strickland,* "a claim of ineffective assistance of counsel will be sustained only when it is shown that counsel partook 'an inexplicably prejudicial course.'" *Benevento,* 91 N.Y.2d at 713 (quoting *People v. Zaborski,* 59 N.Y.2d

863, 865 (1983)). However, the New York Court of Appeals carefully noted that, prior to *Strickland,* New York had "developed a somewhat different test for ineffective assistance of counsel under article I, § 6 of the New York Constitution from that employed by the Supreme Court in applying the Sixth Amendment." *Id.* (quoting *People v. Claudio,* 83 N.Y.2d 76, 79 (1993)). *Benevento* explained that in New York "'prejudice' is examined more generally in the context of whether defendant received meaningful representation." *Id.* Because the concept of prejudice in New York's ineffective assistance of counsel jurisprudence focuses on the quality of representation provided and not simply the "but for" causation chain, New York has "refused to apply the harmless error doctrine in cases involving substantiated claims of ineffective assistance." *Id.* at 714 (citing cases). In New York, even in the *absence* of a showing that but for counsel's errors the outcome would be different, a defendant may still have an ineffective assistance claim under New York's constitution. Even if the errors are harmless in the sense that the outcome would remain the same, a defendant may still meet the New York prejudice standard by demonstrating that the proceedings were fundamentally unfair. *See People v. Stultz,* 2 N.Y.3d 277, 283-84 (2004). This is not a novel view – New York state courts have repeatedly asserted that the New York standard is, in practice and in intent, more generous to defendants than the federal standard. *See, e.g., People v. Ozuna,* 7 N.Y.3d 913, 915 (2006); *Turner*, 5 N.Y.3d at 480 (collecting

cases). Federal courts faced with the New York standard should view it as such.

The concern this Court expressed in dicta in *Henry v. Poole* about the New York state standard was misplaced. The *Henry* panel wrote, "we find it difficult to view so much of the New York rule as holds that '*whether defendant would have been acquitted of the charges but for counsel's errors is . . . not dispositive,'* as not 'contrary to' the prejudice standard established by *Strickland.*" 409 F.3d at 71 (internal citation omitted). However, it is hard to envision a scenario where an error that meets the prejudice prong of *Strickland* would not also affect the fundamental fairness of the proceeding. The very opinion from which the troublesome phrase was drawn – *Benevento* – affirmatively stated that even a "harmless error" could undermine the fairness of the process in such a way that violates the state's constitutional guarantee of effective assistance. *See Benevento,* 91 N.Y.2d at 714. What case, then, could present the converse, an error so egregious that it most likely influenced the outcome of the trial, but did not cripple the fundamental fairness of the proceedings? We can think of none. Fundamental fairness analysis by its nature must always encompass prejudice.

The New York standard is not without its problems. In defining prejudice to include "the context of whether defendant received meaningful representation," *Benevento,* 91 N.Y.2d at 713, New York has, to some degree, combined the two prongs of *Strickland.*

Prejudice to the defendant, meaning a reasonable possibility of a different outcome, is but one factor of determining if the defendant had meaningful representation. New York courts look at the effect of the attorney's shortcomings as part of the equation in deciding if the defendant received the benefit of competent counsel. This approach, and the language of *Benevento,* creates a danger that some courts might misunderstand the New York standard and look past a prejudicial error as long as counsel conducted himself in a way that bespoke of general competency throughout the trial. That would produce an absurd result inconsistent with New York constitutional jurisprudence and the mandates of *Strickland.* Properly applied, however, this standard is not contrary to *Strickland* and, in the case before us, the court properly applied the standard.

The trial court's decision[3] addressing the ineffective assistance of counsel claim did recite the troublesome phrase from *Benevento,* and added a footnote that read: "The federal standard for allegations of ineffective assistance of counsel, which was set forth in *Strickland v. Washington,* requires a showing that the attorney's performance was deficient and that, but for the attorneys['] errors, the result of the proceeding would have been different, was expressly

[3] Because the state court appeals did not address the ineffective assistance of counsel claim, we look to the trial court's analysis of the issue. *See Ylst v. Nunnemaker,* 501 U.S. 797, 803 (1991).

rejected in this case." (internal quotation marks and citation omitted). Rosario argues that this alone is enough to establish his claim under Federal law. But as noted above, New York's rejection of *Strickland* was in the context of recognizing a state constitutional right that is more protective of a defendant's right to an effective attorney, and not because *Strickland* is too generous.

As the *Henry* panel recognized, this Court has repeatedly held that application of the New York state standard is not contrary to *Strickland. See, e.g., Eze,* 321 F.3d at 123-24. And, as the *Henry* panel also recognized, "in the absence of a contrary decision by this Court en banc, or an intervening Supreme Court decision, we are bound to follow the precedents . . . that the N.Y. Court of Appeals standard is not 'contrary to' *Strickland.*" *Henry,* 409 F.3d at 70. We emphasize again that the New York state standard for ineffective assistance of counsel is not contrary to *Strickland.*

The only avenue of reprieve available to Rosario then is to establish that the state court unreasonably applied *Strickland.* A state court "unreasonably applies" clearly established law when it identifies the correct legal principle from Supreme Court jurisprudence, but unreasonably applies the principle to the case before it. *Williams,* 529 U.S. at 412-13.

In order to prevail, Rosario must first satisfy the prongs of *Strickland* on *de novo* review of the merits. *See Henry,* 409 F.3d at 67. The magistrate judge and

the district court concluded that Rosario had done so. We see no need to quibble with those conclusions because, like the magistrate judge and the district court judge, we agree that the New York court's application of *Strickland* – albeit in the terms of New York cases – was not an unreasonable application of the federal standard.

For us to find that the state court unreasonably applied *Strickland,* we must uncover an "increment of incorrectness beyond error." *Francis S. v. Stone,* 221 F.3d 100, 111 (2d Cir. 2000). The increment need not be great, but simply disagreeing with the outcome is insufficient. *Id.*; *see also Williams,* 529 U.S. at 410. This is so even if, as here, we conclude both prongs of *Strickland* have been met. "[A] state prisoner seeking a federal writ of habeas corpus on the ground that he was denied effective assistance of counsel must show more than simply that he meets the *Strickland* standard. . . . [T]he state court's decision rejecting his claim is to be reviewed under a more deferential standard than simply whether that decision was correct." *Henry,* 409 F.3d at 67.

As noted above, the state court conducted an extensive hearing in response to Rosario's motion to vacate his conviction under New York Criminal Procedure Law § 440.10 due to ineffective assistance of counsel. The hearing lasted over a month. After the hearing, Justice Davidowitz issued a lengthy decision, reviewing the evidence presented and detailing his conclusions on Rosario's claims. While we may disagree with Justice Davidowitz's findings (and

indeed our dissenting colleague does), we cannot say that he unreasonably applied federal law.

As the district court stated: "[t]hough not delivered in *Strickland* terminology, the state court opinion ruled that 1.) Rosario was effectively represented in his alibi defense, and 2.) that his representation did not undermine confidence in the jury's verdict." *Rosario,* 582 F. Supp. 2d at 553. Examining both the efforts of counsel and the alibi witnesses presented, Justice Davidowitz concluded: "By *any standard*, Ms. Hartsfield and Mr. Kaiser represented defendant in a thoroughly professional, competent, and dedicated fashion and not in accord with the issues of ineffectiveness. . . . [T]he errors or omissions suggested by the defendant do not alter this finding or rise to that level." (emphasis added). Justice Davidowitz noted that "an investigation was conducted . . . and, most importantly, a credible alibi defense was presented to the jury." He found that the two witnesses presented at trial were Rosario's best alibi witnesses. Justice Davidowitz labeled Kaiser's decision not to present the police reports detailing Collazo's fight a "perfectly reasonable and appropriate" strategy. To put it in terms of *Strickland,* Justice Davidowitz did not find that the performance of counsel was objectively unreasonable.

Justice Davidowitz then examined in great detail the testimony of the alibi witnesses presented at the hearing. The court noted that the two alibi witnesses that were presented at trial "had the best reason for remembering why defendant was present in Florida

on June 19[,] 1996 – the birth of their son – an event that was more relevant for them than the events relied upon by the other witnesses." He expressed skepticism as to the probative value of the witnesses presented at the hearing, calling the evidence "in some cases questionable and in others [raising] issues which could have created questions for a deliberating jury. For example, two of the witnesses – Lisette Rivero[ ] and Denise Hernandez – could not say where the defendant was on June 19 and 20." The judge "studied closely" the alibi witnesses presented at the hearing, and concluded they were "for the most part, questionable and certainly not as persuasive as the two witnesses who did testify, and were rejected by the jury" and the testimony they would have provided was "largely" cumulative. In spite of the failure to call the alibi witnesses, Justice Davidowitz determined "this jury verdict was *unimpeached* and amply supported by the evidence." (internal quotation marks omitted and emphasis added). Translated into the language of *Strickland,* Justice Davidowitz concluded that there was not a reasonable probability that the outcome of the trial would be different but for counsel's errors.

Justice Davidowitz conducted a thorough hearing, assessing the credibility of the potential witnesses first-hand. He concluded that the two witnesses called at trial were the best witnesses to represent Rosario's alibi defense, and that the other witnesses were "questionable and certainly not as persuasive as the two witnesses who did testify, and were rejected

by the jury." He considered the prejudicial effect of the errors, and concluded that the outcome of the trial would not have been different but for those errors – the guilty verdict, in his words, remained "unimpeached." He adhered to the New York state standard and found counsel to have been effective. Whether our own cold reading of the record would lead us to this conclusion is of no moment; we must presume the state court's findings of fact are correct and can only be rebutted by clear and convincing evidence otherwise. *Lynn v. Bliden,* 443 F.3d 238, 246 (2d Cir. 2006) (citing 28 U.S.C. § 2254(e)).

Justice Davidowitz's analysis need not employ the language of a federal court's *de novo* review in order to pass AEDPA muster. *See Coleman v. Thompson,* 501 U.S. 722, 739 (1991). While he did not explicitly review the evidence under the *Strickland* standard, the import was the same. Conflating the two prongs of *Strickland* does not violate AEDPA – different is not *per se* unreasonable. Here, Justice Davidowitz did not find that counsel's performance was objectively unreasonable, nor did he find that the fundamental fairness of the trial was harmed by counsel's errors. On this record, we cannot say that the state court unreasonably applied the tenets of *Strickland.* Therefore, consistent with the standards of AEDPA, we agree with the district court that the writ must be denied.

We have reviewed Rosario's additional arguments and find them to be without merit.

Conclusion

The district court's judgment of October 23, 2008, denying the petition for the writ of habeas corpus is hereby AFFIRMED.

STRAUB, *Circuit Judge*, dissenting in part, concurring in part:

The principal issue in this appeal is whether the state court ruling on Rosario's motion to vacate his conviction pursuant to New York Criminal Procedure Law § 440.10 was objectively unreasonable in holding that Rosario received effective assistance of counsel in accordance with the Sixth Amendment of the United States Constitution under *Strickland v. Washington,* 466 U.S. 668 (1984). As I believe it was, I must respectfully dissent. Rosario raises two additional claims on appeal. Because I would conditionally grant Rosario's petition on the basis of ineffective assistance of counsel, I believe it unnecessary to reach his claim under *Batson v. Kentucky,* 476 U.S. 79 (1986). I concur only in the majority's rejection of Rosario's actual innocence claim.

This appeal presents an extraordinarily troubling set of circumstances. During the pendency of his prosecution, Rosario consistently maintained, both to the police and to his criminal defense attorneys, that he was in Florida on the day of the Bronx murder and on multiple occasions provided a list of up to thirteen alibi witnesses to corroborate this claim. Rosario's

defense attorneys nevertheless failed to investigate his alibi defense adequately and did not contact many of these potential witnesses. They offer no strategic reason for not doing so and, indeed, concede that such an investigation was essential to Rosario's defense. Their explanation for this failure is that they mistakenly believed that the state trial court had denied Rosario's application for fees to cover the investigatory expenses, when in fact the court had clearly granted the application. Such conduct plainly falls below acceptable professional standards, satisfying *Strickland*'s performance prong. *Strickland,* 466 U.S. at 687.

As a result of this colossal failure, Rosario's trial counsel presented a relatively weak alibi defense, consisting of only two alibi witnesses who were subject to impeachment as interested witnesses because they were close friends with Rosario. It is now clear that had Rosario's defense attorneys followed through in investigating his alibi defense, they would have had the opportunity to call *at least seven additional* alibi witnesses at trial. These witnesses would have provided corroboration and supplied distinct facts relating to Rosario's presence in Florida on and around the day of the murder, adding further context and credibility to his alibi defense; moreover, a number of these additional witnesses would not have been as vulnerable to impeachment as interested witnesses as were the two trial witnesses because they are not as close with Rosario. Moreover, the prejudice in this case is worsened because the only evidence of

Rosario's guilt was the testimony of two stranger eyewitnesses. There is no question, in my opinion, that had the additional alibi witnesses who were presented in connection with Rosario's post-conviction motion testified at trial, there is a reasonable probability that the jury's verdict would have been different, satisfying the prejudice prong of the *Strickland* analysis. *Id.*

While the majority appears to agree with this much of the analysis, our opinions diverge where I further conclude that the state court's holding to the contrary was not merely error, but an unreasonable application of *Strickland.* I come to this conclusion, as I must, because there exists too much alibi evidence that was not presented to the jury, and too little evidence of guilt, to now have *any* confidence in the jury's verdict. In sum, I would conditionally grant the petition because it was objectively unreasonable both to sanction counsel's failure to investigate Rosario's alibi defense as reasonable and to find no reasonable probability that the verdict would have been different if the jury had heard the significant alibi evidence that Rosario's defense attorneys neither uncovered nor presented.

I. Ineffective Assistance of Counsel

The majority does not dispute that Rosario received constitutionally ineffective assistance of counsel under *Strickland*, but views the state court's decision to the contrary as within the bounds of

permissible error. Engaging in the *Strickland* analysis is helpful to underscore why I must disagree with the majority's conclusion that the state court did not unreasonably apply the precedent.

Under *Strickland*, to establish ineffective assistance of counsel, Rosario "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." *Carrion v. Smith*, 549 F.3d 583, 588 (2d Cir. 2008) (internal quotation marks omitted). "To satisfy the first prong – the performance prong – the record must demonstrate that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Wilson v. Mazzuca*, 570 F.3d 490, 502 (2d Cir 2009) (quoting *Strickland*, 466 U.S. at 687). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," *Strickland*, 466 U.S. at 690, and even "strategic choices made after less than complete investigation do not amount to ineffective assistance – so long as the known facts made it reasonable to believe that further investigation was unnecessary," *Henry v. Poole*, 409 F.3d 48, 63 (2d Cir. 2005) (citing *Strickland*, 466 U.S. at 690-91), *cert. denied,* 547 U.S. 1040 (2006). By contrast, "omissions [that] cannot be explained convincingly as resulting from a sound trial strategy, but instead arose from oversight, carelessness, ineptitude, or laziness," may

fall below the constitutional minimum standard of effectiveness. *Wilson*, 570 F.3d at 502 (alteration in original) (quoting *Eze v. Senkowski*, 321 F.3d 110, 112 (2d Cir. 2003)). To satisfy the second prong – the prejudice prong – "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

A. Performance Prong

Defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland,* 466 U.S. at 690). Rosario's pre-trial and trial counsel did neither. From his arrest to the present, Rosario has consistently maintained that he was in Florida on the day of the murder. At every juncture of this case, he has disclosed the substance of his alibi defense and the names of the individuals who could corroborate it, including in his post-arrest statement on the day he voluntarily surrendered to the police and to both of his defense counsel thereafter. Nevertheless, his attorneys abdicated their duty to investigate a majority of these individuals because of their mistaken belief that the state trial court had denied the application for fees to cover the expenses of such an investigation. This clearly satisfies the deficient representation prong of *Strickland.*

To be more specific, the record is undisputed that Rosario's first counsel, Joyce Hartsfield, retained investigator Jessie Franklin, and, after Franklin's unsuccessful attempt to contact several potential alibi witnesses by telephone, concluded that an on-the-ground investigation in Florida was necessary. Accordingly, Hartsfield applied to the trial court for fees to cover the cost of sending Franklin to Florida. The court ultimately granted the application, but Hartsfield failed to disclose this fact to Franklin. Franklin assumed the court had denied the application because Hartsfield never informed her otherwise and never ordered her to conduct the investigation. Steven Kaiser, Rosario's second counsel, similarly labored under the erroneous impression that the court had denied the application and neglected to make any further inquiry into the matter. Whatever their reasons for harboring this mistaken belief, an on-the-ground investigation in Florida was never conducted. The direct and proximate result of this mistake was that Rosario's defense team never contacted most of Rosario's alibi witnesses.

To be clear, neither Hartsfield nor Kaiser claim that the failure to conduct this investigation was strategic; they admit it was a mistake. Hartsfield testified that in this case it was "critical" for the investigator to be able to meet the witnesses "in person and have a face-to-face conversation," and that had Hartsfield realized that the application for fees had been granted she would have asked Franklin to go to Florida. Hartsfield unequivocally confirmed that

her failure to interview additional witnesses was not strategic. Kaiser likewise testified that he relied upon the erroneous belief that the fee motion had been denied in limiting his investigation of Rosario's alibi to evidence that could be gathered from New York, and repeatedly testified to the effect that he would have "loved to" call additional alibi witnesses if only they had been available to him.

Under these circumstances, there is simply no question that this mistake on the part of Rosario's defense attorneys – and their resulting failure to investigate Rosario's alibi properly – was constitutionally deficient under the Sixth Amendment. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 396 (2000) (concluding that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on the defendant's voluntary confessions because counsel had not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background"); *Pavel v. Hollins,* 261 F.3d 210, 220 (2d Cir. 2001) (noting that "an attorney's failure to present available exculpatory evidence is ordinarily deficient, unless some cogent tactical or other consideration justified it"); *Maddox v. Lord*, 818 F.2d 1058, 1061-62 (2d Cir. 1987) (concluding that counsel would be constitutionally deficient if he "was aware of – but failed" for non-strategic reasons "to interview – a potential witness . . . who was prepared to testify . . . that he had diagnosed [petitioner] as being extremely emotionally disturbed prior to, and during, the

commission of the crime"); *Garcia v. Portuondo,* 459 F. Supp. 2d 267, 287-88 (S.D.N.Y. 2006) ("[T]here is no reasonable trial strategy that would have excluded at least conducting interviews of the alibi witnesses to determine whether they could provide exculpatory evidence.").[4]

B. Prejudice Prong

I also conclude that Rosario has satisfied the prejudice prong of *Strickland.* Because of defense counsel's failure to properly investigate Rosario's alibi defense, the only two alibi witnesses presented at trial were John Torres and Jenine Seda, who both

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[4] Kaiser's deficiency extended beyond his failure to investigate. In his limited investigation, Kaiser was able to contact a few individuals in Florida beyond the two witnesses he actually presented at trial. Specifically, he spoke with Fernando Torres – who, it will be seen, could have been an important witness – perhaps Fernando's wife Margarita, and others whose names Kaiser could not recall. Kasier would have liked to call some of these witnesses; the limited recollection of the conversations he had, however, was that those he spoke with could not afford to come to New York and may have been reluctant to testify at least in part for financial reasons. Kaiser was unaware of a New York state statute providing reimbursement of certain expenses of out-of-state witnesses and, in any event, operating under the belief that the state court had denied the motion for fees to send Franklin to Florida, assumed that the court would have likewise declined to reimburse the witnesses any expenses. Thus, Kaiser's decision not to pursue additional witnesses was also based on an erroneous belief rather than on any "plausible strategic calculus or an adequate pretrial investigation" of the facts and law. *Pavel,* 261 F.3d at 222.

testified that Rosario stayed with them in Deltona, Florida from approximately the end of April or beginning of May until about June 20, 1996. Specifically, they testified that Rosario was in Florida on June 19, 1996, the day of the murder, and that they remembered this because it was the day before the birth of their son. John[5] further explained that on June 19, his car broke down and he spent the day with Rosario looking for car parts before they returned to his apartment together. Seda also testified that Rosario was at her apartment to see the baby on June 21, 1996, when she returned from the hospital. Rosario took the stand on his own behalf and testified that he was in Florida on the day of the murder and was staying with John and Seda for most of June 1996.

The prosecution successfully discredited the alibi defense presented at trial by convincing the jury that John, Seda and Rosario were lying. The first words from the prosecution during its summation were: "You [the jury] have to determine which witnesses were credible, which witnesses were believable, which witnesses had an interest in the outcome of this case." The prosecution went on to argue, Rosario's "saying he was in Florida. Look at the testimony to determine, can you rely on it? Is it believable? Is it credible?" Discrediting Seda and John, the prosecution argued:

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[5] Because a number of relevant witnesses share the surnames "Torres" and "Ruiz," I shall refer to those individuals by their first names.

> First the two witnesses we heard. Jenine Seda and John Torres, the defendant's friends. I would suggest to you, ladies and gentlemen, that those witnesses are interested witnesses, interested because they have an interest in the outcome of the case. They don't want to see their friend go to jail. They don't want to see their friend in trouble.

With respect to Rosario's testimony, the prosecution noted at the outset that "the Judge will instruct you he is an interested witness." The prosecution also emphasized that Rosario lied about staying with a woman in Florida during March and April of 1996 named Shannon Beane, whom he claimed to have been with every day, when in fact he had been incarcerated between March 13 and April 12. The prosecution argued:

> Ladies and gentlemen, he took the stand. He put his hand on the Bible. He swore to tell the truth, and he told you I was with Shannon [B]ean[e]. I was with her daily, every day, and we know, ladies and gentlemen, from Captain Bolton that's not true.
>
> Ladies and gentlemen, I would suggest to you he doesn't want you to know the truth about June 19th because to know the truth is to know that he was on White Plains Road, to know that he was on Turnbull Avenue, and to know that he was pumping a bullet [into] the head of George Collazo, and ending his life.

> Ask yourself to what extent he would go to preventing you from knowing the truth. If he didn't want you to know where he was in March and April of 1996, a time period which is insignificant since it has nothing to do with the commission of this crime, what would he do for the time period that really matters?
>
> * * *
>
> . . . . Ladies and gentlemen, use your common sense. Keep in mind that [Rosario] has an interest in this case.

The prosecution thus presented the jury with a choice: it could choose to believe two, disinterested eyewitnesses, or it could believe Rosario and his two good friends. It was a credibility battle. It is not shocking, therefore, that the prosecution secured a conviction. I conclude, however, that if the jury had been presented with the additional alibi evidence unearthed only by Rosario's post-conviction team, there is a reasonable probability that the outcome at trial would have been different.

Rather than the slim alibi defense actually presented at trial, the jury would have been presented with a much stronger and more credible account of Rosario's presence in Florida on the day of the murder and in the immediately surrounding period. Instead of disbelieving two alibi witnesses who were good friends with Rosario and Rosario himself, the jury would have had to discredit at least seven additional witnesses, who would have corroborated

Rosario's alibi, provided further context to his defense and testified to additional facts that had not been elicited at trial. Moreover, many of the additional witnesses are less interested in the outcome of the trial than were the trial witnesses and thus would have been less vulnerable to impeachment as interested witnesses.

The following alibi evidence was presented in connection with Rosario's post-conviction motion. First, Chenoa Ruiz, neighbor of John and Seda and wife of John's brother Robert Torres, testified that she saw Rosario about five times a week when he was living with John and Seda in June 1996, but that he moved out of their house and in with a friend named Ray who lived nearby when the baby was born. Chenoa testified that on the night of June 18, 1996 (the night prior to the murder), John, Seda, Robert and Rosario were at her and Robert's apartment when Seda began to have contractions. Chenoa and another woman took Seda to the hospital without John, who chose instead to remain with Robert and Rosario. Seda was not kept in the hospital that night, but was told to return the next day for a scheduled appointment. The next morning (June 19, the day of the murder), Chenoa saw Rosario when she arrived at John and Seda's apartment to take Seda to the doctor and saw him again when she and Seda returned home several hours later. Chenoa testified that she remembers this day in particular because she was annoyed that John was "hanging out" with Rosario instead of tending to his pregnant girlfriend. Chenoa

would have provided less interested testimony than John and Seda because she did not consider Rosario a friend.

Second, Fernando Torres, John's father, testified that Rosario lived with John and Seda around the time that his grandson was born on June 20, 1996. Fernando testified that he was with Rosario in Florida on June 19, 1996, the day of the murder, because John's car broke down and Fernando accompanied John and Rosario to purchase car parts. Fernando also saw Rosario in Florida the following morning: early on June 20, Fernando went to his son's house and learned from Rosario that John and Seda were at the hospital. Finally, Rosario was again present at John and Seda's apartment when Fernando met his grandson for the first time on June 21, the day Seda returned from the hospital. Fernando invited Rosario to church that day. In addition to providing additional facts not supplied by either John or Seda, a jury may have found Fernando more credible because he was not a friend of Rosario and thus undoubtedly a less interested witness. Additionally, Fernando is a generation older than Rosario, John and Seda, who were all in their twenties, which may have further bolstered his credibility over the trial witnesses. *See, e.g., United States v. Liporace,* 133 F.3d 541, 545 (7th Cir. 1998) (approving instruction to jury that it may consider a witness's age in assessing that witness's credibility); *cf. Washington v. Schriver,* 255 F.3d 45,

59-60 & n.10 (2d Cir. 2001) (implicitly approving same).[6]

A third witness – Michael Serrano, a corrections officer – testified that in June of 1996, he saw Rosario two or three times a week in the apartment complex where John, Seda, Robert and Chenoa lived, including in the days prior to the birth of John and Seda's child. Though he did not know Rosario's whereabouts on the day of the murder, Serrano testified that on the night that the baby was born (i.e., the day after the murder), Serrano and several other people, including Rosario, held an impromptu celebration in the parking lot of the apartment complex to congratulate John when he came home from the hospital.[7] As with Ruiz, Serrano did not consider himself to be good friends with Rosario.

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[6] Margarita Torres, Fernando's wife and John's mother, filed an affidavit in connection with the post-conviction hearing stating that she saw Rosario in Florida on June 19, 1996, the day of the murder, and again when Seda came home from the hospital with her grandson. Along with Fernando, Margarita invited Rosario to church that day. Though she did not testify at the post-conviction hearing, she indicated that she would be "more than willing" to testify on Rosario's behalf. As with Fernando, had Margarita testified, a jury may have viewed her testimony as more credible than either John's or Seda's because she was not a friend of Rosario and is a generation older than they.

[7] According to Serrano, John alone came home briefly to get a change of clothes before returning to the hospital that night. Accordingly, his testimony does not contradict Fernando's account that Seda and the baby remained in the hospital until the following day.

Fourth, Denise Hernandez, Rosario's ex-girlfriend, testified that she saw Rosario in Florida around the time of the murder because they were dating throughout June 1996, and recalled in particular a big argument at some point in the middle to end of that month. Hernandez explained that one day, she and her friend were at her friend's house getting ready to go out to a movie when Rosario took her car, without her permission, on a "joyride." Hernandez was particularly upset because this incident occurred a few days before her sister's birthday, which is on June 26, and her sister's birthday present was in the car. As a result of this and other issues in their relationship, Hernandez broke up with Rosario at some point between her sister's birthday and when Rosario returned to New York. It is true that Hernandez has maintained a close relationship with Rosario, even visiting him in prison on several occasions, and thus the prosecution presumably would have attacked her as an interested witness. Nevertheless, her testimony would have provided additional and distinct facts relating to Rosario's whereabouts around the date of the murder and would have provided further context to his alibi defense.

Furthermore, a fifth witness, Hernandez's friend Lyssette Rivera, testified that she was present when Rosario took Hernandez's car on the joyride and recalled the ensuing argument between Hernandez and Rosario and its proximity to Hernandez's sister's birthday (recalling that the argument occurred between five days and a week prior to the sister's

birthday). Thus, to the extent that Hernandez would have been subject to impeachment in light of her relationship with Rosario, defense counsel could have corroborated her testimony with that of Rivera, who – though she also had communicated with Rosario since his incarceration – did not have as close a relationship with him.

Sixth, Ricardo Ruiz, the brother of Chenoa, testified that he saw Rosario at John and Seda's apartment during the month of June 1996 "[a]ll the time," including before and after their baby was born. In particular, he testified that Rosario was in Florida "[a]t the time that [Seda] gave birth to [the baby]." He also testified that after Rosario moved out of John and Seda's apartment, Rosario moved in with a friend named Ray, who lived across the street from John and Seda.

The seventh witness – Minerva Godoy, Rosario's ex-fiancee – testified that Rosario left New York for Florida in May 1996, to relocate and find a job, and she did not see him again until the morning of July 1, 1996, when he claims to have returned to New York. Godoy testified that she was in regular contact with Rosario while he was in Florida, calling him at Fernando's Florida telephone number and once wiring him money in Florida via Western Union. In particular, she testified that Rosario called her from Florida

the day after Seda gave birth and told her that he was going to go see the baby.[8]

Because the prosecution's case hinged so much on discrediting Rosario's alibi defense, these additional witnesses could have made all the difference in the world. Godoy could have provided the necessary context by testifying about Rosario's departure from New York to Florida in May 1996, essentially serving as the first chapter of his alibi defense, and then about their meeting on July 1, 1996, providing the final chapter immediately prior to his surrender to the police. All of the other witnesses discussed above would have filled in the middle by testifying that they saw Rosario in their Florida community throughout June of 1996. They would have provided specific facts regarding where he lived and what he was doing at that time. Several witnesses could have corroborated each other's testimony that Rosario was in Florida on the exact day of the murder and in the immediately surrounding days. Chenoa would have testified that she saw Rosario both the night prior to the murder, when she took Seda to the hospital, and twice throughout the day of the murder, both before and after Seda's doctor's appointment. John's father Fernando would have placed Rosario in Florida on three consecutive days beginning with the day of the

[8] Another potential alibi witness – Jeremy David Guzman – filed a written statement in connection with the post-conviction hearing stating that he had spent "hours" with Rosario in Florida on June 19, 1996.

murder and would have corroborated John's testimony that Rosario was with him looking for car parts on the nineteenth. From Chenoa and Fernando alone, the jury would have been provided additional concrete facts that Rosario was in Florida the night prior to, at various points the day of, and the morning following the murder – indisputably critical data points in establishing that Rosario was in Florida, and not over 1000 miles away in New York, when the victim was murdered.

Additionally, Serrano would have testified that he was with Rosario in the parking lot of John and Seda's apartment complex on the night after the murder; Hernandez and Rivera would have provided consistent testimony about the fight between Hernandez and Rosario around the date of the murder; and Ricardo could have further corroborated Rosario's general presence in Florida throughout June.

This additional evidence that the jury never heard would have provided the necessary context and corroboration for Rosario's alibi defense. Moreover, as discussed, many of these witnesses were not vulnerable to impeachment as interested witnesses because they were not close friends with Rosario.[9]

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[9] Nor would have impeachment for criminal history been an issue. Notably, Ricardo was the only witness at Rosario's post-conviction hearing with any criminal record, consisting solely of misdemeanor convictions.

I conclude that this evidence, taken together, clearly establishes a reasonable probability that the outcome of the trial would have been different had defense counsel investigated and presented this additional alibi evidence, satisfying *Strickland's* prejudice prong. "Overall," as Rosario argues, "if presented with the additional evidence at trial, a jury must disregard nine witnesses, as opposed to two, as mistaken or lying about seeing Rosario in Florida on and about June 19, 1996, before convicting him of the Bronx murder." Brief for Rosario at 34. *See Stewart v. Wolfenbarger,* 468 F.3d 338, 359 (6th Cir. 2006) (finding prejudice when defense counsel failed to call two additional alibi witnesses to corroborate the one alibi witness called at trial who was impeached because of his close association with the defendant); *Washington v. Smith,* 219 F.3d 620, 634 (7th Cir. 2000) (finding prejudice when defense counsel failed to call three additional alibi witnesses to corroborate the one alibi witness at trial who had knowledge of the defendant's whereabouts during the robbery, particularly when none of the additional witnesses, unlike the trial witness, had a criminal record); *Montgomery v. Petersen,* 846 F.2d 407, 415 (7th Cir. 1988) (finding prejudice in failure to call additional, disinterested alibi witness, noting that "the jury might well have viewed the otherwise impeachable testimony of the twelve witnesses who were presented at the . . . trial in a different light had the jury also heard the testimony of this disinterested witness").

Further highlighting the prejudicial effect of defense counsel's error in this case is the paucity of the prosecution's case, which consisted of only two stranger eyewitnesses. We have consistently acknowledged that this sort of evidence is "proverbially untrustworthy." *Kampshoff v. Smith,* 698 F.2d 581, 585 (2d Cir. 1983); *see also Gersten v. Senkowski,* 426 F.3d 588, 613 (2d Cir. 2005) (characterizing direct evidence consisting only of eyewitness testimony as "underwhelming"), *cert. denied sub nom., Artus v. Gersten,* 547 U.S. 1191 (2006); *Lyons v. Johnson,* 99 F.3d 499, 504 (2d Cir. 1996) ("[T]his court has noted on more than one occasion that eyewitness testimony is often highly inaccurate."). Indeed, each year thousands of defendants in the United States are convicted for crimes that they did not commit, and many experts estimate that eyewitness error plays a role in half or more of all wrongful felony convictions. Richard A. Wise, Clifford S. Fishman & Martin A. Safer, *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case,* 42 CONN. L. REV. 435, 440 & n.12 (2009) (citing study showing that eyewitness error accounts for nearly sixty percent of all wrongful convictions).

In this case, there are reasons to be concerned with the two eyewitnesses' accounts: the porter, Robert Davis, saw the shooter at a distance of more than two car lengths for only a few seconds, and although Michael Sanchez testified that he got a good

look at the shooter, it was only for a short moment under very stressful conditions.[10] This is of course not to say there was insufficient evidence to convict Rosario. But *Strickland* makes clear that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." 466 U.S. at 696. Such is the case here. *See Lindstadt v. Keane,* 239 F.3d 191, 204-05 (2d Cir. 2001) (finding prejudice and reversing denial of writ of habeas corpus where trial counsel failed to investigate evidence that could have corroborated the petitioner's alibi claims, and where the prosecution's case rested on only two eyewitnesses and limited corroborating evidence); *see also Espinal v. Bennett,* 588 F. Supp. 2d 388, 402, 407-08 (E.D.N.Y. 2008) (granting habeas relief when defense counsel failed to investigate a statement provided by a potential alibi witness who might have corroborated the petitioner's own testimony regarding his whereabouts on the day of the murder in a prosecution consisting primarily of two eyewitnesses, one of whose credibility was impeached), *aff'd,* 342 F. App'x. 711 (2d Cir. Aug.18, 2009) (unpublished disposition).

[10] A third eyewitness, Jose Diaz, believed that he might be able to identify the shooter, but failed to identify Rosario in court.

II. Habeas Corpus Standards

The majority essentially concedes a *Strickland* violation and that Rosario would be entitled to relief if this case arose on direct review but denies the writ out of deference to the state court. Pursuant to 28 U.S.C. § 2254, a federal court may not grant a writ of habeas corpus to a state prisoner "with respect to any claim that was adjudicated on the merits" by the state court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Under this principle of deference, habeas relief may not be granted merely upon a "conclusion that counsel's performance was constitutionally inadequate." *Carrion v. Smith*, 549 F.3d 583, 591 n.4 (2d Cir. 2008). Rather, "petitioner must identify some increment of incorrectness beyond error in order to obtain habeas relief." *Jones v. West,* 555 F.3d 90, 96 (2d Cir. 2009) (quoting *Sorto v. Herbert,* 497 F.3d 163, 169 (2d Cir. 2007)). Moreover, as the majority notes, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles v. Mirzayance,* 556 U.S. ___, 129 S. Ct. 1411, 1420 (2009). Nevertheless, "the increment of incorrectness beyond error need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." *Georgison v. Donelli,* 588 F.3d 145, 154 (2d Cir. 2009) (internal brackets omitted)

(quoting *Hoi Man Yung v. Walker,* 468 F.3d 169, 176 (2d Cir. 2006)).

A close review of the state court's decision makes it entirely clear, however, that – even affording the state court its due deference – its decision rejecting Rosario's claim was an unreasonable application of *Strickland* and should not stand.

At the outset, I note that the state court's use of the "meaningful representation" standard led it to focus on certain factors that have little bearing on a proper *Strickland* analysis. And it appears to have done so at the expense of determining whether the undisputed mistakes made by Rosario's defense counsel fell below objectively reasonable standards and, moreover, whether they caused him prejudice, as required under *Strickland.* Indeed, the state court relied heavily upon its finding that Rosario's pre-trial and trial attorneys "represented [him] in a thoroughly professional, competent, and dedicated fashion." It emphasized that "[b]oth attorneys filed all appropriate motions; within the scope of the information that was then available to them, an investigation was conducted; witnesses were examined and cross-examined adeptly, professionally and with clarity; Mr. Kasier's opening and closing statements were concise and to the point; and, most importantly, a credible alibi defense was presented to the jury." The state court went on to emphasize that counsel's mistake as to the denial of the application for investigative fees "was not deliberate" and "does not alter the fact that both attorneys represented defendant

skillfully, and with integrity and in accordance with the standards of 'meaningful representation' defined by [the New York state] appellate courts." It wrote:

> Defendant has tried to second-guess his trial counsel at almost every level of their representation. He has questioned the depth of their investigation, the scope and focus of cross-examination and argued that his alibi defense could have been better if they had only followed through on [the state trial court's fee] order. His criticisms ignore the fact that Ms. Hartsfield and Mr. Kaiser ably, and professionally represented him at every stage of the case with integrity and in ways that were consistent with the standards of 'meaningful representation' described above.
>
> . . . And Mr. Kaiser at trial was prepared, skillful, purposeful, thoughtful and creative.

This type of analysis is entirely at odds with *Strickland* and is not dispositive of whether Rosario's defense counsel were ineffective under the Sixth Amendment. It is axiomatic that, even if defense counsel had performed superbly throughout the bulk of the proceedings, they would still be found ineffective under the Sixth Amendment if deficient in a material way, albeit only for a moment and not deliberately, and that deficiency prejudiced the defendant. *See, e.g., Henry v. Poole*, 409 F.3d 48, 72 (2d Cir. 2005) ("[R]eliance on counsel's competency in all other respects, . . . fail[s] to apply the *Strickland* standard at all." (internal citation and quotation marks omitted)), *cert. denied,* 547 U.S. 1040 (2006); *cf. Kimmelman v.*

Morrison, 477 U.S. 365, 386 (1986) (noting that while "[i]t will generally be appropriate . . . to assess counsel's overall performance throughout the case in order to determine whether the identified acts or omissions overcome the presumption that a counsel rendered reasonable professional assistance," a "failure to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," may be constitutionally deficient irrespective of trial performance (internal quotation marks omitted)).

It is far from clear whether the state court realized this basic principle. In fact, the state court noted in a footnote that New York case law, in particular *People v. Benevento,* 91 N.Y.2d 708 (1998), "expressly rejected" *Strickland*'s requirement "that, but for the attorneys['] errors, the result of the proceeding would have been different." This footnote, viewed in context with the entirety of the court's decision, begs the question whether the state court understood that New York state's "ineffective assistance cases have departed from the second ('but for') prong of *Strickland,*" only to "adopt[ ] a rule somewhat more *favorable* to defendants." *People v. Turner,* 5 N.Y.3d 476, 480 (2005) (emphasis added) (citing *People v. Caban,* 5 N.Y.3d 143, 155-56 (2005); *People v. Stultz,* 2 N.Y.3d 277, 284 (2004); *Benevento,* 91 N.Y.2d at 713-14). That is, it is unclear whether the state court appreciated that even if prejudice in the *Strickland* sense is not shown, a defense attorney can be found ineffective under the New York State Constitution if his

performance was so below par that he did not provide "meaningful representation" to his client. *See Caban,* 5 N.Y.3d at 156 ("[U]nder our State Constitution, even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still warrant reversal whenever a defendant is deprived of a fair trial. . . . [O]ur state standard thus offers greater protection than the federal test. . . .").

On a different note, at one point in the decision the state court sharply detoured into an analysis regarding newly discovered evidence. It wrote:

> In order to prevail on a motion for a new trial based on a claim of newly discovered evidence, a defendant must establish by a preponderance of the evidence that evidence has been discovered since the trial which could not, with due diligence, have been produced at trial, and which is of such a character that, had it been presented at trial, there is a probability that the verdict would have been more favorable for him. . . .
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> * * *
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> . . . the existence of these witnesses was not new evidence discovered since the trial. They were known to defendant, who immediately gave their names to the police after his arrest, to his attorneys at their first and subsequent meetings, and to Jesse Franklin. Efforts were made to speak and interview them and the substance of their testimony was known to the parties before the trial began.

It is unclear when, if ever, the court returned to the ineffective assistance of counsel analysis, and, more importantly, to what extent this detour infected that analysis. If this newly discovered evidence analysis did in fact bleed over to the ineffective assistance of counsel analysis, the harmful effect is patent, considering the obvious tension between a newly discovered evidence claim and an ineffectiveness claim based on an attorney's failure to investigate an alibi that was disclosed to him by his client prior to trial.

It is true that a New York state court's application of the meaningful representation standard does not necessarily result in error affording a petitioner habeas relief because the standard, properly construed, is more favorable to defendants. *See Henry v. Poole,* 409 F.3d at 68-71. It is also true that we do not grant habeas relief when a state court is merely inartful or unclear in its reasoning. But, in this case, it is entirely unclear to what extent the state court abandoned the *Strickland* analysis for a rule less favorable to defendants. Such an error would clearly be "contrary to" *Strickland.* 28 U.S.C. § 2254(d)(1).

The majority aptly pinpoints the "danger" of New York's "meaningful representation" standard: though generally more protective of defendants' rights than *Strickland,* it risks leading a court that "misunderstand[s] the New York standard" to "look past a prejudicial error as long as counsel conducted himself in a way that bespoke of general competency throughout the trial." *Ante at* 18-19. The state court's opinion provides strong indications that this is

precisely what happened here. Yet the majority fails to address the very real likelihood that the state court fell victim to the danger it identified, merely concluding that, in general, when properly applied, the New York standard is not contrary to *Strickland. Id. at* 19.

Nevertheless, I "need not make a determination under the 'contrary to' clause, for [I] conclude that the . . . Court's rejection of [Rosario's] ineffective-assistance-of-counsel claim was at least an objectively unreasonable application of *Strickland*." *Henry,* 409 F.3d at 71. It is clear from the record that the state court not only unreasonably focused on counsel's overall performance and minimized their mistakes, but also unreasonably discounted the alibi evidence adduced at the post-conviction hearing and thus undervalued its prejudicial effect.

In terms of *Strickland's* performance prong, the state court recognized that counsel's failure to complete their investigation was neither strategic nor the result of any sound trial strategy, but rather a "mistake." The state court – as well as the majority – appears to excuse this mistake because it was "not deliberate," counsel's performance was otherwise "skillful[ ]," and counsel conducted some investigation leading to the presentation of a putatively "credible" alibi defense. But none of this excuses the fact that counsel essentially turned a blind eye to the existence of substantial potentially exculpatory evidence of which it was aware and, moreover, did so not on the basis of any "reasonable professional judgment," *Strickland,* 466 U.S. at 690, but rather as a result of

pure inadvertence. Such conduct clearly falls below the threshold of minimal competence and, to the extent the state court found otherwise, I conclude that was an unreasonable application of *Strickland*.

With respect to prejudice, in relevant part, the state court reasoned:

> [A]n alibi defense *was* presented through the two witnesses who had the best reason for remembering why defendant was present in Florida on June 19 [,] 1996 – the birth of their son – an event that was more relevant for them than the events relied upon by the other witnesses. . . . Moreover, the alibi evidence offered by defendant at the hearing was in some cases questionable and in others raised issues which could have created questions for a deliberating jury. For example, two of the witnesses – Lisette Rivero [sic], and Denise Hernandez – could not say where defendant was on June 19 and 20. And Fernando Torres, when questioned about the purchase of auto parts years later, changed the date to three or four days *before* his grandson was born. . . .
>
> . . . It may not be cumulative to evidence presented at the trial – which largely was the case herein – and it must not be merely impeaching evidence. . . .
>
> For instance, Chenoa Ruiz recalled defendant's presence in the Torres' apartment on June 18 and 19, the two days prior to the birth of their child. And, Fernando Torres

> testified that he was with defendant and his son the day before his daughter-in-law gave birth. That testimony was cumulative to his son John's trial testimony.
>
> * * *
>
> An investigator was not sent to Florida to interview witnesses. Nevertheless, the fact remains that the People's case was strong, which was acknowledged by the Appellate Division when it affirmed the conviction herein. The prospective witnesses now before the court, studied closely, were, for the most part, questionable and certainly not as persuasive as the two witnesses who did testify, and were rejected by the jury.

First, the state court's finding that "a credible alibi defense was presented to the jury" is hardly relevant to whether there is a reasonable probability of a different result had defense counsel presented a substantially more credible alibi defense. Second, the state court's recognition that "an alibi defense *was* presented through the two witnesses who had the best reason for remembering why defendant was present in Florida on June 19, 1996 – the birth of their son – an event that was more relevant for them than the events relied upon by the other witnesses" also misses the point. It overlooks the fact that John and Seda were subject to impeachment as interested witnesses, and at least seven additional witnesses were available, a number of whom were less interested in the outcome of the trial, to corroborate their testimony, as well as add additional facts.

Third, although the court did find that "the alibi evidence offered by defendant at the hearing was in some cases questionable and in others raised issues which could have created questions for a deliberating jury," it provided just three examples from a voluminous record in support of this finding, none of which bear scrutiny. It noted that "two of the witnesses – Lisette Rivero [sic], and Denise Hernandez – could not say where defendant was on June 19 and 20." But, as discussed, these witnesses testified to additional, non-cumulative facts that placed Rosario in Florida around the day of the murder. *See ante at* 46-48. The relevancy of this evidence is indisputable. The court also noted that "Fernando Torres, when questioned about the purchase of auto parts years later, changed the date to three or four days *before* his grandson was born." This is simply not supported by the record. In fact, when asked whether he told Rosario's post-conviction counsel that he went looking for car parts with his son and Rosario three or four days before his grandson was born, Fernando responded, "No, I don't recall that at all," and maintained that the excursion occurred on June 19.

Fourth, the state court found that the additional alibi witnesses were "largely . . . cumulative." To the extent that the additional alibi evidence corroborated John's and Seda's testimony, it is only reasonable to conclude that this militates in favor of a showing of prejudice. Again, John's and Seda's credibility was attacked by the prosecution. Corroboration was thus desperately needed. *See, e.g., Washington v. Smith,*

219 F.3d 620, 634 (7th Cir. 2000) ("Evidence is cumulative when it 'supports a fact established by existing evidence,' Black's Law Dictionary 577 (7th ed. 1999), but Washington's whereabouts on the day of the robbery was far from established – it was *the* issue in the case. The fact that Pickens had already testified to facts consistent with Washington's alibi did not render additional testimony cumulative.").

Finally, the state court characterized the People's case as "strong." But, the fact remains that it was based solely on the eyewitness accounts of two strangers – the type of evidence that this Court has repeatedly characterized as weak.

At bottom, the problem with the state court's decision is its application of the reasonable probability standard. Contrary to the state court's apparent belief, this standard does not require that the reviewing court be convinced of Rosario's alibi defense. "[T]he reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *Wilson v. Mazzuca,* 570 F.3d 490, 507 (2d Cir. 2009) (quoting *United States v. Dominguez Benitez,* 542 U.S. 74, 83 n.9 (2004) (citing *Kyles v. Whitley,* 514 U.S. 419, 434 (1995))). "A reviewing court looks instead to whether the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding." *Id.* (internal quotation marks omitted) (quoting *Dominguez Benitez,* 542 U.S. at 83 (quoting *Strickland,* 466 U.S. at 694)); *see*

also Porter v. McCollum, 558 U.S. ___, 130 S. Ct. 447, 455-56 (2009) (per curiam) ("We do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" (alteration in original) (quoting *Strickland,* 466 U.S. at 693-94)).

Under the present circumstances, it is unreasonable to conclude that the probability of a different result is not sufficiently likely so as to undermine the confidence in the verdict. Defense counsel failed to investigate Rosario's alibi defense and, as a result, did not call at least seven additional alibi witnesses. Instead, they proceeded with only two witnesses, both of whom were impeached as interested. In a credibility battle, such as this case, there is, to some extent, power in numbers – that is, if presented with the additional evidence at trial, the jury would have had to disregard a total of at least nine defense witnesses claiming to have seen Rosario in Florida on and around the day of the murder, as opposed to just two interested witnesses. As discussed, the additional alibi witnesses would have provided further context to and corroboration of Rosario's alibi defense, would have testified to non-cumulative facts, and a number of them would have been less subject to impeachment than John and Seda.

The prosecution's principal argument is that the additional alibi witnesses are not as reliable or credible as John and Seda. It emphasizes that Fernando,

Chenoa, Rivera and Godoy provided less detailed accounts of their recollection during interviews prior to the 440.10 hearing than they did on the stand during the actual hearing. We have noted, however, that such "silence is so ambiguous that it is of little probative force." *Victory v. Bombard,* 570 F.2d 66, 70 (2d Cir. 1978) (quoting *United States v. Hale,* 422 U.S. 171, 176 (1975)). The prosecution also emphasizes that Chenoa did not recollect certain facts, such as when Rosario traveled back and forth between Florida and New York during his previous trips and the precise date he left Florida at the end of June 1996. The fact that witnesses do not remember all relevant details is hardly surprising and certainly not dispositive as to whether they are reliable witnesses to the ultimate fact at issue, such as Rosario's whereabouts on or about June 19, 1996 – particularly where, as here, there is a significant independent event to anchor memories surrounding the relevant date. The prosecution also argues that any harm created by defense counsel's failure to call additional alibi witnesses is overwhelmed by the harm that Rosario caused himself by what it characterizes as lying on the stand when he did not disclose that he was incarcerated for part of March and April of 1996. This argument seems to cut the other way, however. That is, to the extent that the jury believed that Rosario was being deliberately deceptive, additional alibi witnesses were all the more necessary.

At bottom, the prosecution's brief takes each witness's testimony in isolation, picks it apart, and

makes an assessment as to whether there is a reasonable probability that the inclusion of that particular witness's testimony would have affected the outcome of the trial. We cannot engage in such a piecemeal analysis. Rather, we must analyze the cumulative effect of counsel's failure to call any of the additional alibi witnesses. *See Lindstadt v. Keane,* 239 F.3d 191, 199 (2d Cir. 2001) *("Strickland* directs us to look at the 'totality of the evidence before the judge or jury'. . . . We therefore consider these errors in the aggregate." (quoting *Strickland,* 466 U.S. at 695-96)). This principle, which the majority's analysis seems to overlook, is essential to the proper application of *Strickland,* as we were yet again reminded by the Supreme Court in *Porter v. McCollum,* 558 U.S. ___, 130 S. Ct. 447, 453-54 (2009) (per curiam).

I find defense counsel's performance and the resulting prejudice in this case very troubling. "[T]here is nothing as dangerous as a poorly investigated alibi. An attorney who is not thoroughly prepared does a disservice to his client and runs the risk of having his client convicted even where the prosecution's case is weak. A poorly prepared alibi is worse than no alibi at all." 2 G. Schultz, Proving Criminal Defenses ¶ 6.08 (1991), *quoted in Henry v. Poole,* 409 F.3d 48, 65 (2d Cir. 2005), *cert. denied,* 547 U.S. 1040 (2006); *cf. United States v. Parness,* 503 F.2d 430, 438 (2d Cir. 1974) ("It is axiomatic that exculpatory statements, when shown to be false, are circumstantial evidence of guilty consciousness and have independent probative force."), *cert. denied,* 419 U.S. 1105 (1975).

Defense counsel put forth a half-baked alibi defense, leaving substantial additional alibi evidence unexplored, and Rosario is paying the price. For all the foregoing reasons, I would grant the writ of habeas corpus on a conditional basis, providing the State with sufficient opportunity to commence a new prosecution against Rosario prior to his ordered release. Accordingly, I respectfully dissent.

I note that I agree with the majority's implied denial of habeas relief on the basis of Rosario's actual innocence claim. While I conclude it is unreasonable to hold that defense counsel performed adequately and that there is no reasonable probability that the verdict would have been different had the additional alibi witnesses testified at trial, I do not think that Rosario has surmounted the extraordinary hurdle required to succeed on an actual innocence claim, assuming such a claim exists under federal law. Finally, I would not so quickly dismiss Rosario's claim of racial discrimination in the prosecutor's use of peremptory challenges; however, I need not reach the merits of this claim, because I would grant a conditional writ of habeas corpus based upon Rosario's receipt of ineffective assistance of counsel, which would warrant a new trial or his release from custody – the same or greater relief that would be provided by a successful *Batson* challenge.

MANDATE

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 Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of April, two thousand and ten.

PRESENT: JOSÉ A. CABRANES,
CHESTER J. STRAUB,
RICHARD C. WESLEY,
Circuit Judges.

RICHARD ROSARIO,

Petitioner-Appellant,

v.

SUPT. ROBERT ERCOLE, GREEN HAVEN CORRECTIONAL FACILITY, ATTORNEY GENERAL ELIOT SPITZER,

Respondent-Appellees.

JUDGMENT
Docket No. 08-5521-pr

(Filed Apr. 12, 2010)

The appeal in the above-captioned case from the United States District Court for the Southern District of New York was argued on the District Court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the District Court is AFFIRMED in accordance with the opinion of this Court.

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk

[SEAL]

/s/ Catherine O'Hagan Wolf

Joy Fallek, Administrative Attorney

A True Copy

Catherine O'Hagan Wolf Clerk

United States Court of Appeals Second Circuit

[SEAL]

/s/ Catherine O'Hagan Wolf

MANDATE ISSUED ON 09/01/2010

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 Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 15th day of April, two thousand nine,

Present:

Hon. Ralph K. Winter,
Hon. José A. Cabranes,
Hon. Sonia Sotomayor,
Circuit Judges.

Richard Rosario,
Petitioner-Appellant,

v.

Supt. Robert Ercole, Green Haven Correctional Facility, *et al*.,
Respondents-Appellees.

08-5521-pr
(Filed Apr. 15, 2009)

Appellant, through counsel, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is GRANTED. The Clerk's Office shall issue a scheduling order.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
By: /s/ Franklin Perez

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- x

RICHARD ROSARIO, 05 Civ. 8072 (PKC)

Petitioner, MEMORANDUM AND ORDER

-against-

SUPERINTENDANT ROBERT ERCOLE,

Respondent.

---------- x

P. KEVIN CASTEL, District Judge:

Following a jury trial in the New York Supreme Court, Bronx County, petitioner Richard Rosario was convicted of one count of murder in the second degree under New York Penal Law Section 125.25. The trial court sentenced Rosario to a term of imprisonment of 25 years to life, pursuant to which he currently is incarcerated. He directly appealed his judgment and conviction to the New York Supreme Court Appellate Division, First Department, *People v. Rosario,* 288 A.D.2d 142 (1st Dep't 2001), and on March 26, 2002, was denied leave to review by the New York Court of Appeals. *People v. Rosario,* 97 N.Y.2d 760 (2002) (table). On September 16, 2005, Rosario filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The habeas petition asserts four grounds for relief. First, he asserts that he was denied the effective assistance of counsel pursuant to *Strickland v. Washington,* 466 U.S. 668 (1984). Second, he asserts that the trial court incorrectly ruled that he failed to establish a *prima facie* case of discrimination pursuant to *Batson v. Kentucky,* 476 U.S. 79 (1986). Third, he asserts that the trial court deprived him of a due process right to a fair trial by improperly admitting extrinsic evidence of prior incarceration. Fourth, he asserts that he is actually innocent of the crime for which he was convicted.

I referred the petition to Magistrate Judge Henry B. Pitman on December 29, 2005. In a thorough, 107-page Report and Recommendation (the "R & R") dated December 28, 2007, Magistrate Judge Pitman recommended that Rosario's petition be conditionally granted as to his *Batson* claim and denied in all other respects. Both the petitioner and respondent have filed objections to the R & R.

I have reviewed the R & R *de novo.* R. 72(b), Fed. R. Civ. P.; 28 U.S.C. § 636(b)(1). For the reasons explained below, I modify the R & R to the extent that it conditionally recommends granting the petitioner's *Batson* claim. I adopt the R & R in all other respects. The petition is denied.

Background

On June 19, 1996, George Collazo was fatally shot in the head on Turnbull Avenue in Bronx County,

New York. (Trial Tr. at 19.) At least three eyewitnesses observed the incident, (Trial Tr. at 54-56, 133-66, 286-94.) though only two of them testified that Rosario was the shooter. One witness, Michael Sanchez, was a friend of the victim and present with him at the time of the shooting. (Trial Tr. at 137-65, 286-94.) He testified that an argument arose between Rosario and the victim after the victim uttered a racial epithet, and stated that he had a clear and unobstructed view of Rosario's face during the verbal quarrel. (Trial Tr. at 139-50.) According to Sanchez, Rosario approached from behind shortly thereafter, and shot the victim with a revolver. (Trial Tr. at 152-55.) Three weeks after the shooting, a police lineup was organized, and Sanchez identified Rosario as the shooter. (Trial Tr. at 164-65.) At trial Sanchez again identified Rosario as the shooter, and stated that he had no doubt, either at the lineup or at trial, that his identification of Rosario was correct. (Trial Tr. at 165.) A second witness, Richard Davis, identified Rosario as the shooter after reviewing photographs provided by police; he testified at trial that he had an unobstructed view of the shooting. (Trial Tr. at 53-66.) A third witness, Jose Diaz, testified that he heard the fatal shot and stated that he might be able to recognize the persons involved in the dispute preceding the shooting, but he did not identify Rosario in the courtroom. (Trial Tr. at 292-96.)

Two alibi witnesses – Jenine Seda and John Torres – testified at trial that Rosario was with them in Florida on the day of the shooting. (Trial Tr. at

305-09.) Seda testified that she specifically recalled Rosario's presence in her home, because the date of the shooting was one day before she gave birth to a son, and she further testified that Rosario was present in her home when she returned from the hospital. (Trial Tr. at 328, 334-35.) John Torres, Rosario's friend and the father of Seda's baby, testified at trial that on the day of the shooting, Rosario had spent the day with him purchasing auto parts for a broken-down car. (Trial Tr. at 347.) Rosario also offered the testimony of a New York terminal manager for Greyhound Busline, who authenticated and explained a "readout of a transaction" dated June 30, 1996, indicating that Rosario had purchased bus tickets from Orlando, Florida to New York City. (Trial Tr. at 366-69.) The terminal manager also testified that passengers generally are not required to submit identification when they pay and board, and are not required to use the ticket on its date of purchase. (Trial Tr. at 371-72.)

Rosario testified in his own defense, and asserted that he was present in Florida from late May through June 30, 1996, during which he hoped to find work and ultimately relocate. (Trial Tr. 399-400.) Rosario further testified that his New York fiancée Minerva Godoy wired money to him in Florida via Western Union at least three times, and that the transfers were addressed to John Torres because Rosario himself lacked valid, government-issued identification. (Trial Tr. at 422-24.) He stated that he resided with John Torres and Jenine Seda until after the

birth of their child on June 20, 1996 (Trial Tr. at 409-10); that he and John Torres spent a day looking for auto parts together, even though he could not recall the precise date (Trial Tr. at 419.); and that he returned to New York from Florida on June 30, 1996, upon hearing from his sister that detectives wished to speak to him in connection with the Collazo shooting. (Trial Tr. at 388-89.)

In rebuttal, the prosecution offered the testimony of Captain Bruce Bolton, records custodian of the Department of Corrections in Volusia County, Florida. Bolton testified that the Department's records showed that Rosario was in Department custody from March 13, 1996, through April 12, 1996. (Trial Tr. at 451.) Prior to this testimony, Rosario's counsel objected that the rebuttal evidence would be unduly prejudicial, and that Rosario was never directly questioned about his incarceration, such that Bolton's testimony constituted extrinsic evidence on a collateral matter. (Trial Tr. a[t] 435-38.) The objection was overruled. (Trial Tr. at 438-39.)

The jury found Rosario guilty of murder in the second degree. (Trial Tr. at 595-98.)

Standard of Review

Under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 100 Stat. 1218 ("AEDPA"), federal courts must accord deference to the state court's determination of a habeas petitioner's claims.

A federal court should not grant habeas relief to a person in custody pursuant to a state court judgment unless the state proceedings "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). "[T]he meaning of the phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor,* 529 U.S. 362, 412 (2000).

I. Pursuant to the Standard of Review Set Forth by AEDPA, the R & R is Adopted, and Petitioner's Ineffective Assistance Claim is Dismissed

In support of his claim that he received ineffective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution, Rosario argues that his trial counsel failed to undertake a sufficient investigation of his alibi defense, and neglected to seek out relevant and readily available witnesses and documentary evidence that established his presence in Florida on the date of Collazo's shooting. He contends that counsel's actions were based in error and neglect, rather than conscious strategic decisions.

Rosario's ineffective assistance claim is directed toward two of the four attorneys who represented him between his arrest and jury trial. Joyce Hartsfield

represented Rosario from mid-July 1996 through mid-February 1998. (Hearing Tr. at 13-14, 117.) Steven J. Kaiser then represented Rosario through the conclusion of trial. (Hearing Tr. at 117.) The R & R recommended that I dismiss Rosario's ineffective assistance claim based on the standard of review set forth in Section 2254(d)(1). For the reasons explained below, I adopt the R & R's recommendation.

A. At Rosario's Post-Conviction 440.10 Hearing, Several Alibi Witnesses Testified that He was Present in Florida During June 1996

The R & R thoroughly and carefully sets forth the events and testimony relevant to the ineffective assistance claim. I briefly recount them here.

Following Rosario's unsuccessful direct appeal of his judgment and conviction, he filed a motion to vacate his judgment of conviction pursuant to Section 440.10 of the New York Criminal Procedure Law, arguing that he had been denied effective assistance of counsel in regard to his alibi defense. An evidentiary hearing was conducted before the Honorable Edward M. Davidowitz, Justice of the Supreme Court, Bronx County. In total, the 440.10 hearing included testimony from ten witnesses, including seven alibi witnesses, attorneys Kaiser and Hartsfield, and the private investigator that Hartsfield retained. Rosario was represented by counsel and presented his ineffective assistance case at length. (Miller Dec. Ex. 61.)

The R & R concluded that Rosario exhausted his ineffective assistance claim in state court (R & R at 23-24), a conclusion that I adopt.

At the section 440.10 hearing, Hartsfield testified that she sought no documentary records to support Rosario's alibi defense, including, among other things, money transfer records from Western Union that subsequently were destroyed pursuant to Western Union's routine expunging of business records. (Hearing Tr. at 28, 32; Miller Ex. 53.) Hartsfield did, however, retain an investigator named Jessie Franklin, for the purpose of locating and interviewing prospective alibi witnesses. (Hearing Tr. at 42-43.) Franklin spoke to Fernando Torres (father of trial alibi witness John Torres) and Robert Torres (John's brother). (Activity Log of Jessie Franklin, attached at Miller Dec. Ex. 17.) On April 16, 1997, Hartsfield successfully applied to the court for funds to further investigate the alibi defense, (Miller Dec. Ex. 29) and yet for reasons that are not entirely clear, pursued no subsequent investigation. She implied that logistical concerns and unawareness of funding availability both may have influenced her actions. (Hearing Tr. at 50.) Hartsfield stated that there was no conscious strategic decision not to press forward with investigating Rosario's alibi defense:

> Q. Miss Hartsfield, while you were representing Mr. Rosario, did you make a conscious strategic decision not to contact any particular witness?
>
> A. No.

> Q. And while you were representing Mr. Rosario, did you make a conscious strategic decision not to pursue any particular evidentiary leads?
>
> A. No.

(Hearing Tr. at 73.) In objecting to the R & R, the respondent also notes the following testimony from Hartsfield:

> Q. And you didn't have a strategic reason not to send [Jessie Franklin] during that year [to Florida], did you?
>
> A. Not that I can recall, no, no.

(Hearing Tr. at 52.) Hartsfield did, however, testify that a successful alibi defense relied on witness credibility, and that a non-credible witness could jeopardize the defense. (Hearing Tr. at 95.) When asked whether John Torres and Jenine Seda were the best possible witnesses to provide alibi testimony, Hartsfield stated that she was "not in a position to make that evaluation." (Hearing Tr. at 95.)

Hartsfield's successor, Kaiser, stated via affirmation that Hartsfield indicated to him that the court had not authorized funds for a Florida investigation, (Miller Dec. Ex. 50)[1] but then submitted a second affirmation retracting his assertion that Hartsfield told him about a lack of funds, noting that

[1] Hartsfield stated via affidavit that she did not recall making this representation to Kaiser. (Miller Dec. Ex. 51.)

his "recollection is presently unclear" about the source of his misimpression concerning the availability of investigation funds. (Miller Dec. Ex. 52.) He affirmed that he nevertheless attempted to locate and contact alibi witnesses in Florida. (Miller Dec. Ex. 52.) As to the decision not to present additional alibi witnesses, he testified at the 440.10 hearing that he was under an impression that John Torres's parents, Fernando and Margarita, seemed unwilling to travel to New York on grounds of expense, and generally seemed reluctant to serve as witnesses. (Hearing Tr. at 192-95.) He further testified that additional witnesses merely may have duplicated the testimony of John Torres and Jenine Seda in a less-cooperative manner. (Hearing Tr. at 196, 276-78.) He stated that John Torres and Jenine Seda seemed like the best possible witnesses because they could establish the date of Rosario's presence, and had no prior convictions that would leave them vulnerable to impeachment. (Hearing Tr. at 196, 221, 225.) He noted at trial that they "weren't impeached in any way as being bad characters." (Hearing Tr. at 196.) He did, however, state that he would have preferred to call additional alibi witnesses, including those who did not live with Rosario. (Hearing Tr. at 196-98.) Kaiser testified at the hearing that he was under the impression that funds for an investigation had been denied, so he made no effort to pursue one. (Hearing Tr. at 128-29, 133, 210-11.)

Jessie Franklin, the investigator that Hartsfield retained to pursue Rosario's alibi defense, also

testified at the hearing. Her notes reflected that she held an hour-long meeting with Rosario, who provided contact information for John Torres, Robert Torres, Chenoa Ruiz, Ricardo Ruiz, Nerida Colon and Denise Hernandez. (Miller Dec. Ex. 19.) She stated that prior to drafting an affidavit supporting a grant of additional investigation funds, she had contacted only two potential witnesses, Fernando and Robert Torres. (Hearing Tr. at 384-85, 403-04.) Both men indicated to her that they saw Rosario in Florida in late June 1996. (Hearing Tr. 391-92, 437-38; Notes of Jessie Franklin, attached at Miller Dec. Ex. 21.) Franklin did not subsequently contact Fernando or Robert Torres, and assumed that the request for investigation funds had been denied in light of lack of communication from Hartsfield. (Hearing Tr. at 403, 407.) She later resumed the investigation, contacted Jenine Seda and John Torres, and was told by John Torres that he could provide names of other alibi witnesses. (Hearing Tr. at 411-14.) Franklin attempted to contact others named by Rosario, but was unsuccessful. (Hearing Tr. at 415-17.) She testified that Kaiser never contacted her as to the investigation. (Hearing Tr. at 421-22.)

Several alibi witnesses provided testimony stating that Rosario was present in Florida in or around late June 1996. Fernando Torres testified that on the day of Collazo's murder, he accompanied Rosario and John Torres on trips to buy auto parts, and that he did not know until several years after the fact the crime for which Rosario was convicted

occurred on June 19, 2006 [sic]. (Hearing Tr. at 318-19, 364, 371-72, 374-75.) He then submitted a post-hearing statement stating that he saw Rosario in John Torres's apartment on June 19. (Miller Dec. Ex. 56.) Chenoa Ruiz, a next-door neighbor to John Torres and Jenine Seda, testified that she observed Rosario on both June 18 and June 19, and recalled frequently feeling irritated with Rosario because he so often was "hanging out" with John Torres, who she believed should have been tending to Seda's pregnancy. (Hearing Tr. 497, 503, 527.) Rosario also was memorable to her, she added, because he often kept her boyfriend out late at night, which caused her problems. (Hearing Tr. at 527.) She stated that she specifically observed Rosario at the home of John Torres and Jenine Seda on June 19, when she picked up Seda for a doctor's appointment. (Hearing Tr. at 548, 550.) She stated that she was not contacted by any attorney for Rosario until after his conviction, and that she would have been willing to testify at his trial. (Hearing Tr. at 509-10.) Michael Serrano testified that he recalled Rosario being present when John Torres returned from the hospital after Seda gave birth on June 20 – one day after Collazo's shooting. (Hearing Tr. 719-20.) Various other witnesses testified that they observed Rosario in Florida in June 1996, and the R & R summarizes their testimony in detail. (R & R at 33-36, summarizing testimony of Ricardo Ruiz Minerva Godoy, Denise Hernandez and Lisette Rivera.)

B. Following the 440.10 Hearing, Rosario's Motion for Relief Based on Ineffective Assistance was Denied in the New York Supreme Court, Bronx County

Justice Davidowitz issued a 22-page opinion denying post-conviction relief. (Miller Dec. Ex. 62.) He summarized the testimony provided by witnesses at the 440.10 hearing. (Miller Dec. Ex. 62 at 7-15.) Justice Davidowitz ruled that Rosario received effective representation pursuant to the constitutions of the United States and the State of New York, and evaluated effectiveness pursuant to New York's "meaningful representation" standard set forth in *People v. Benevento,* 91 N.Y.2d 708 (1998), and *People v. Baldi,* 54 N.Y.2d 137 (1981). His opinion noted that it was "relevant, but not dispositive" whether, but-for counsel's errors, Rosario would have been acquitted. (Miller Dec. Ex. 62 at 15.) The opinion noted that "meaningful representation" is assessed in a broad context and considers the attorney's performance during the entire course of representation. (Miller Dec. Ex. 62 at 16-17.) Justice Davidowitz held that any error concerning the availability of investigation funds was due to "a misunderstanding or a mistake" and was not deliberate, (Miller Dec. Ex. 62 at 18) and also emphasized that two alibi witnesses testified at Rosario's criminal trial. (Miller Dec. Ex. 62 at 18-19.) He considered John Torres and Jenine Seda the most credible among the possible alibi witnesses, and concluded that the other prospective witnesses, "studied closely, were, for the most part, questionable and certainly not as persuasive as the two witnesses

who did testify, and were rejected by the jury." (Miller Dec. Ex. 62 at 21-22.) On September 8, 2005, the Appellate Division denied leave to appeal Justice Davidowitz's decision. (Miller Dec. Ex. 63.)

C. AEDPA's Deferential Standard of Review Requires Dismissal of Rosario's Ineffective Assistance Claim

An ineffective assistance claim is determined under the well-known criteria of *Strickland v. Washington,* 466 U.S. 668 (1984). *Strickland* established a two-prong analysis for considering such a claim. The first considers whether counsel's performance was objectively unreasonable. Any errors by counsel must be "so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Second, the petitioner must establish prejudice, as *Strickland* requires "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Both error and prejudice must be established. *Id.*

"The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison,* 477 U.S. 365, 374 (1986). Scrutiny of counsel's performance "must be highly deferential" and avoid hindsight. *Strickland,* 566 U.S. at 689. The petitioner bears the

burden of proof to establish a constitutional violation in a habeas corpus proceeding. *Zappulla v. New York,* 391 F.3d 462, 489 n.19 (2d Cir. 2004).

"An ineffective assistance claim asserted in a habeas petition is analyzed under the 'unreasonable application' clause of AEDPA because it is 'past question that the rule set forth in *Strickland* qualifies as clearly established Federal law, as determined by the Supreme Court of the United States . . . '" *Lynn v. Bliden,* 443 F.3d 238, 247 (2d Cir. 2006) (quoting *Williams,* 529 U.S. at 391, *cert. denied,* 127 S.Ct. 1383 (2007)). The petitioner must do more than "convince a federal habeas court that, in its independent judgment, the state court applied *Strickland* incorrectly. Rather, he must show that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Cox v. Donnelly,* 387 F.3d 193, 197 (2d Cir. 2004) (alteration in original) (quoting *Bell v. Cone,* 535 U.S. 685, 698-99 (2002)). "Unreasonableness is determined by an objective standard," *Gersten v. Senkowski,* 426 F.3d 588, 607 (2d Cir. 2005), *cert. denied,* 547 U.S. 1191 (2006), and therefore "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Gilchrist v. O'Keefe,* 260 F.3d 87, 93 (2d Cir. 2001) (quoting *Williams,* 529 U.S. at 411). The state court's application of federal law must reflect "'[s]ome increment of incorrectness beyond error,'" *Gersten,* 426 F.3d at 607 (alteration in original)

(quoting *Henry v. Poole,* 409 F.3d 48, 68 (2d Cir. 2005)), although the increment "need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." *Yung v. Walker,* 341 F.3d 104, 110 (2d Cir. 2003) (quoting *Francis S. v. Stone,* 221 F.3d 100, 111 (2d Cir. 2000)).

In a careful and detailed analysis, the R & R independently concluded that both prongs of the *Strickland* test had been violated, (R & R at 42-56) before recommending dismissal of petitioner's ineffectiveness claim pursuant to AEDPA and the law of the Second Circuit. (R & R at 56-64.) I adopt Magistrate Judge Pittman's recommendation that AEDPA requires dismissal of petitioner's *Strickland* claim.

As Rosario points out, the law of the State of New York does not analyze ineffectiveness claims pursuant to the *Strickland* framework. Instead, New York law looks to whether a defendant received "meaningful representation" during the process as a whole. *Benevento,* 91 N.Y.2d at 713-14. As noted by the R & R, Justice Davidowitz evaluated counsel's performance pursuant to "a number of issues routinely considered by New York courts in analyzing whether or not counsels' errors amounted to ineffective assistance, such as did counsel perform competently in other respects and were counsels' errors so seriously prejudicial as to compromise a defendant's right to a fair trial." (R & R at 57 (collecting cases).) The R & R summarized Justice Davidowitz's conclusions, noting that Rosario's counsel filed all appropriate motions,

competently examined witnesses and presented competent opening and closing statements, and offered a credible alibi defense. (R & R at 57.) The R & R also noted Justice Davidowitz's conclusion that the alibi witnesses not called at Rosario's criminal trial were less persuasive than John Torres and Jenine Seda. (R & R at 57-58.)

First, I address whether the state court decision was "contrary to" *Strickland.* A state court decision is "contrary to" federal law if it is "diametrically different" from, "opposite in character or nature" to, or "mutually opposed to" relevant Supreme Court precedent. *Williams,* 529 U.S. at 405. The Second Circuit has held that New York's standard of "meaningful representation" is not "contrary to" *Strickland's* interpretation of the Sixth Amendment. *See, e.g., Eze v. Senkowski,* 321 F.3d 110, 123-24 (2d Cir. 2003); *Lindstadt v. Keane,* 239 F.3d 191, 198 (2d Cir. 2001). As noted, the Second Circuit also has indicated that a habeas petition raising *Strickland* is subject to "unreasonable application" analysis, and not the "contrary to" criteria set forth in AEDPA. *Lynn,* 443 F.3d at 247.

The R & R notes language from *Henry,* which appeared to question whether New York's approach to ineffectiveness necessarily satisfies *Strickland's* prejudice prong. A relevant portion of *Henry* observes:

> [I]n light of the *Strickland* principle that an ineffective assistance claim is established if

> the court concludes that there is a reasonable probability that but for counsel's professional deficient performance the outcome of the proceeding would have been different, we find it difficult to view so much of the New York rule as holds that "*whether defendant would have been acquitted of the charges but for counsel's errors is . . . not dispositive,*" as not "contrary to" the prejudice standard established by *Strickland*.

Henry, 409 F.3d at 71 (emphasis and ellipses in original; citations omitted). *Henry* also noted that the New York standard considers the fairness of the process as a whole, while *Strickland's* prejudice prong focuses on whether attorney insufficient performance was outcome-determinative. *Id.* at 69. Rosario contends that this potential divergence between the Sixth Amendment of the U.S. Constitution and New York's ineffective assistance standard resulted in a decision contrary to *Strickland,* pursuant to 28 U.S.C. § 2254(d)(1).

While *Henry* may or may not portend an eventual differentiation between *Strickland* and New York's ineffectiveness standard, the R & R correctly noted that both *Henry,* 409 F.3d at 70, and *Eze,* 321 F.3d at 123-24, held that in absence of a contradictory holding by either the Supreme Court of the United States or the Second Circuit sitting *en banc,* the courts of this Circuit remain bound by the holding of *Lindstadt*, which concluded that the New York standard does not run afoul of *Strickland. See* 239 F.3d at 198. Justice Davidowitz also held that the jury's guilty

verdict was supported by the trial record, a consideration consistent with *Strickland's* prejudice prong. *Strickland,* 466 U.S. at 696. Thus, as the R & R properly observed, the state court believed that the prosecution's case was sufficiently strong that the trial outcome would have been the same, even if additional alibi evidence had been offered. (R & R at 62.)

Second, I conclude that the state court decision was not an "unreasonable application" of *Strickland.* Under the "unreasonable application" prong of Section 2254(d)(1), a federal court may grant relief when a state court "'correctly identifies the governing legal principle from [Supreme Court] decisions but unreasonably applies it to the facts of a particular case.'" *Harris v. Kuhlmann,* 346 F.3d 330, 344 (2d Cir. 2003) (quoting *Bell v. Cone,* 535 U.S. 685, 694 (2002)). Though the terminology employed by the state court varies from *Strickland,*[2] I cannot conclude that it amounted to an unreasonable application of federal law. 28 U.S.C. § 2254(d)(1). Justice Davidowitz concluded that the performance of Rosario's counsel was

[2] For example, as Rosario points out in his objections to the R & R, the state court's opinion noted the diligence and integrity of counsel in matters of representation unrelated to the alibi defense. (Petitioner's Objections to the R & R at 13-14.) While such considerations would not arise under a *Strickland* analysis, their presence in the state court opinion does not, in itself, render the state court's analysis unreasonable under 2254(d)(1). To conclude otherwise would be a failure to apply *Eze,* 321 F.3d at 123-24, and *Lindstadt,* 239 F.3d at 198.

not objectively unreasonable, and that the reliability of the trial's outcome of the jury trial was not jeopardized by the performance of his legal counsel. He noted that "most importantly, a credible alibi defense was presented to the jury." (Miller Dec. 62 at 17.) He concluded that John Torres and Chenoa Ruiz were strong alibi witnesses because their memory of the defendant's presence in Florida was related to the birth date of their son. (Miller Dec. Ex. 62 at 18-19.) He also noted inconsistencies presented in the testimony of Fernando Torres. (Miller Dec. Ex. 62 at 19.) Though not delivered in *Strickland* terminology, the state court opinion ruled that 1.) Rosario was effectively represented in his alibi defense, and 2.) that his representation did not undermine confidence in the jury's verdict.

A cold reading of the testimony at the 440.10 hearing does not point to only one clear conclusion concerning the possible impact of calling Chenoa Ruiz and Fernando Torres at trial. Yet the record does not support the conclusion that the state court's fact-finding was objectively unreasonable. A state court's findings of fact are presumed to be correct, and can be rebutted only by clear and convincing evidence produced by the petitioner. *Lynn,* 443 F.3d at 246-47. A district court is not free to engage in *de novo* review of state-court fact-finding. *Price v. Vincent,* 538 U.S. 634, 638-39 (2003).

Justice Davidowitz considered testimony from ten witnesses, recorded in more than 750 pages of hearing transcripts. (Miller Dec. Ex. 61.) His opinion

included firsthand observations as to witness credibility and the comparative persuasiveness of the various witnesses presented, and, while not employing the terminology commonly used in a *Strickland* analysis, nevertheless found that 1.) counsel's handling of the alibi defense was not ineffective, and 2.) counsel's performance did not undermine the reliability of the trial's outcome. In light of Justice Davidowitz's opinion and the record before me, I cannot hold that this conclusion was an unreasonable application of *Strickland.*

I therefore adopt the R & R's recommendation that Rosario's ineffective assistance claim be dismissed.[3]

II. The R & R is Modified as to Petitioner's *Batson* Claim, Which is Dismissed

Jury selection in Rosario's trial occurred in three rounds. It is undisputed that, before the second round

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[3] The R & R evaluated whether Rosario's representation satisfied both *Strickland* prongs. (R & R at 42-56.) It concluded that it did not. However, as the R & R correctly recognized, a petitioner "must do more than show that he would have satisfied *Strickland's* test if his claim were analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." *Bell,* 535 U.S. at 698-99. Rather, in order to grant habeas relief, *Strickland* must be applied objectively unreasonable manner. *Id.* The state court's ruling was not objectively unreasonable, and survives scrutiny under AEDPA.

concluded, the prosecutor exercised six peremptory strikes, and that all six were exercised against African-American members of the jury pool. Petitioner then raised an objection pursuant to *Batson v. Kentucky,* 476 U.S. 79 (1986), and the following exchange occurred:

> MR. KAISER: Judge, most respectfully, and I hate to do it, but it's reached the point now where I notice a pattern of challenges that are consistent only by one factor and that's the race of the person that's being challenged, all of whom are black. Every single one of them.
>
> Now, granted this is the Bronx and there's a lot of black jurors and there's a couple or few that she didn't take off, but the ones that she did take off without exception are Afro Americans.
>
> THE COURT: Let's see if there is a pattern.
>
> (Whereupon, there is a brief pause in the proceedings.)
>
> THE COURT: I do not see a prima facie case of exercised peremptory challenges by race. The People have exercised six peremptories of Afro Americans and there were four that were not challenged by her, three of whom are jurors, one of them whom you challenged. I deny your challenge.

(Miller Dec. Ex. 65 at 161-62.) The court then corrected itself and stated that five African-American veniremembers went unchallenged by the prosecutor,

not four. (Miller Dec. Ex. 65 at 163.) Jury selection resumed. The prosecution exercised five additional peremptory strikes, including one of an alternate juror. (Miller Dec. Ex. 65 at 164, Ex. 66 at 85-88.) Petitioner raised no additional *Batson* objection, and the race of the five additional challenged veniremembers is not reflected in the record.

In his direct appeal to the Appellate Division, First Department, Rosario asserted that because the prosecution exercised all of its first six peremptory strikes against African-American veniremembers, he established a *prima facie* case of discrimination under *Batson,* and that the prosecution should have then been compelled to set forth race-neutral explanations for its challenges. The Appellate Division rejected the argument. *People v. Rosario,* 288 A.D.2d at 143. I adopt the Magistrate Judge's conclusion that the petitioner exhausted his *Batson* claim in state court.

To guard against the discriminatory exercise of peremptory strikes in violation of the Equal Protection Clause of the Fourteenth Amendment, *Batson* and its progeny set forth a three-step framework for evaluating such a claim. First, the party challenging the strikes must establish a prima facie case that its adversary's challenges are race-based. *Batson,* 476 U.S. at 96-97. Once a prima facie case is made, the party exercising the strikes must provide a race-neutral explanation for its peremptory challenges. *Id.* at 97-98. The court must then determine whether the challenging party has established that the challenges were race-based. *Id.* at 96, 98.

The threshold for establishing a prima facie case merely requires "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California,* 545 U.S. 162, 170 (2005). A trial court weighing the existence of a prima facie case looks to all relevant circumstances, including numerical patterns and the questions and answers offered during the voir dire. *Batson,* 476 U.S. at 96-97. A *Batson* challenge brought via habeas petition must defeat the "presumption of correctness" afforded to the trial court's first-hand observation of the events in voir dire. *Galarza v. Keane,* 252 F.3d 630, 635 (2d Cir. 2001). "[I]t is one thing to conclude that a pattern of strikes is *prima facie* evidence of discrimination; it is a very different thing to hold that the contrary conclusion would be an unreasonable application of *Batson*." *Sorto v. Herbert,* 497 F.3d 163, 174 (2d Cir. 2007). Because the habeas petitioner bears the burden of demonstrating a violation of constitutional rights, if a deficiency in the record makes it impossible to ascertain the existence of discriminatory conduct, the petitioner's claims must be rejected. *Id.* at 172-73. The Second Circuit also has observed that while the burden of showing a prima facie case is not onerous, it safeguards "the traditional confidentiality of a lawyer's reason for peremptory strikes unless good reason is adduced to invade it. . . ." *Id.* at 170 (citing *Miller-El v. Dretke,* 545 U.S. 231 (2005)).

The R & R concluded that the state trial court unreasonably applied federal law in ruling that

Rosario failed to establish a prima facie case under *Batson* and recommended that the habeas petition be conditionally granted as to its *Batson* claim. (R & R at 69-82.) It reasoned that "[t]he prosecutor's disproportionate strikes of black jurors, despite the fact that not all blacks were stricken from the jury, was sufficient to raise an inference of discrimination and, therefore, sufficient to establish a *prima facie* case under *Batson*." (R & R at 82.) In reaching this conclusion, the R & R relied on *United States v. Alvarado,* 923 F.2d 253 (2d Cir. 1991), and emphasized that at the time Rosario raised his *Batson* objection, six of six peremptories were brought against African-American veniremembers. (R & R at 74-78.)

The Second Circuit often has noted the perils of using a snapshot in time amid an incomplete voir dire when reviewing a *Batson* objection raised in a habeas petition. To ascertain the existence of a prima facie case, "[t]he discharge of this burden may entail a review of prosecutorial strikes over the span of the selection process." *Sorto,* 497 F.3d at 170. This is because, in part, "[t]he need to examine statistical disparities may commend a wait-and-see approach," and because "an early *Batson* challenge limits the state court's ability to properly assess a prima facie case." *Id.*

In *Overton v. Newton,* 295 F.3d 270, 279 (2d Cir. 2002), a *Batson* objection arose partway through voir dire. At the time of the objection, the prosecutor had exercised seven peremptory strikes against African-American veniremembers, whereas three African

Americans had been seated as jurors and one African-American veniremember had been struck for cause. *Id.* The state trial court ruled that the petitioner failed to establish a prima facie case. *Id.* The Second Circuit held that because the statistics-based *Batson* objection arose partway through jury selection, it was not unreasonable for the trial court to deny the motion. *Id. Overton* explained the complications of granting habeas relief pursuant to a statistics-based *Batson* objection arising before jury selection completes:

> [T]he trial judge never confronted, and the trial record does not reveal, what the statistics would have shown at the conclusion of jury selection. If those statistics sufficiently established the inference that challenges were based on race, the court could then have implemented the *Batson* process to ensure that impermissible challenges would not be allowed. If, on the other hand, the statistics at the conclusion failed to support a sufficient inference, there would be no need to engage in the process. We cannot say, on this record, that the trial judge's refusal to implement *Batson's* process for testing each questioned challenge midway in the process was an unreasonable application of the *Batson* requirements.

Id. at 279-80. *Overton* noted that this caution is particularly warranted when reviewing a state court's *Batson* determinations pursuant to a habeas petition. *Id.* at 280 n.12. In *Williams v. Burge,* 2005 WL

2429445, at *4-6 (S.D.N.Y. Oct. 3, 2005), *aff'd,* 257 Fed. Appx. 337 (2d Cir. 2007) (table), this Court applied *Overton* and held that it was not objectively unreasonable for a state trial court to find no *prima facie* case when a *Batson* objection arose partway through jury selection. Similarly, in *Sorto,* the Second Circuit held that a state court acted reasonably when it denied as premature a *Batson* challenge "after only three peremptory strikes." 497 F.3d at 171.

Subsequent to the R & R in this case, the Second Circuit again affirmed dismissal of a habeas petition raising a statistics-based *Batson* objection prior to the conclusion of jury selection:

> [H]ere, petitioner's *Batson* challenge was denied as premature, she failed to renew the motion, and the status of jury selection at the time of the challenge did not insure that the statistics would establish a *prima facie* case irrespective of what happened during the jury selection process thereafter.

Brown v. Alexander, ___ F.3d ___, 2008 WL 4287864, at *7 (2d Cir. Sept. 22, 2008). In *Brown,* the defendant's trial counsel argued partway through jury selection that the prosecutor exercised its peremptory strikes in a discriminatory fashion when seven of eight peremptory strikes were used against African-American veniremembers. *Id.* at *2, *2 n.2. The trial court denied the *Batson* challenge, which was never renewed by trial counsel. *Id.* at **2-3. The Second Circuit held that the trial court's ruling was not unreasonable. *Id.* at **7-8. In so holding, *Brown*

underscored the holdings of *Overton* and *Sorto,* and further illuminated the perils posed to a habeas court reviewing a *Batson* challenge "lodged relatively early in the jury selection process." *Id.* at *6. Of course, because *Brown* post-dates the R & R, it was issued without the benefit of *Brown's* holding and analysis, which makes clear that in many situations, a trial court's "'wait-and-see' approach" is not an unreasonable application of *Batson.*

As in *Overton, Sorto* and *Brown,* the record of jury selection here precludes me from holding that the trial court's ruling was unreasonable. In this instance, the reliance on *United States v. Alvarado,* 923 F.2d 253 (2d Cir. 1991), is misplaced. *Alvarado,* which was reviewed under a direct appeal, holds that a defendant successfully establishes a prima facie case under *Batson* when there is significant statistical disparity between the prosecution's challenge rate against minorities and the overall minority composition of the venire. *Id.* at 255. As pointed out by the respondent in his objections to the R & R, *Alvarado's* statistical analysis accounted for minority venirepersons who went unchallenged by the prosecutor, and looked to the overall rate of minority-directed challenges in light of those who were unchallenged. In its statistical analysis, *Alvarado* noted that "the prosecution challenge rate against minorities was 50 percent (three of six) in the selection of the jury of 12,

and 57 percent (four of seven) in the selection of the jury of 12 plus alternates." *Id.* at 255.[4]

It is true that at the time petitioner raised his *Batson* objection, six of six peremptory strikes had been exercised against African-American veniremembers, while five other African Americans from the pool were unchallenged by the prosecution. (Miller Dec. Ex. 65 at 161-63.) Thus, under *Alvarado,* the relevant focus is that six of 11 – or slightly less than 55 percent – African-American veniremembers were challenged, not that 100 percent of peremptory challenges were brought against African-American veniremembers. The transcript of jury selection indicates that at the time of the *Batson* objection, there were 11 African-American veniremembers in a pool of 21 potential jurors, excluding those potential jurors removed on consent. (Miller Dec. Ex. 65 at, 88, 90-92, 94, 100-02, 156-63.) Thus, it appears from the transcript that at the time of the *Batson* objection,

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[4] *Alvarado's* statistical breakdown is brief and somewhat cryptic, so it is worthwhile to point out the statistical analysis of its predecessor opinion, *U.S. v. Alvarado,* 891 F.2d 439, 444 (2d Cir. 1989), *vacated on other grounds,* 497 U.S. 543 (1990) (per curiam). *Alvarado I* explicitly rejected the argument that the relevant strike rate looks to the percentage of peremptories directed at minorities (in that case, four minority-striking peremptories out of six peremptories used) as opposed to considering challenges in light of those waived (in that case, four minorities peremptorily struck out of seven minorities in the jury pool). *Id.* The statistical approach of *Alvarado I* was employed by its successor upon remand, without reference to the rejected approach. 923 F.2d at 255.

African Americans were 52 percent of the jury pool, and challenged at a rate of 55 percent. As the respondent argues, this challenge rate is not a significant variant from the overall percentage of African-American veniremembers, and is insufficient to establish a prima facie case under *Batson. See generally Harrison v. Ricks,* 326 F. Supp. 2d 372, 378-79 (E.D.N.Y. 2004), *aff'd* 150 Fed. Appx. 95 (2d Cir. 2005) (table); *Barbara v. Goord,* 98 Civ. 4569, 2001 WL 1776159, at *3 n.2 (Dec. 27, 2001) (Raggi, J.) (pursuant to *Alvarado,* "a prosecutor's percentage of minority challenges should be calculated by considering waived as well as exercised challenges."); *but see Truesdale v. Sabourin,* 427 F. Supp. 2d 451, 461 (S.D.N.Y. 2006) (emphasizing that 100 percent of peremptory challenges were exercised against minority veniremembers).

I also note that in *Alvarado,* the Second Circuit heard a direct appeal from a federal criminal case, and was not considering a habeas petition pursuant to Section 2254. 923 F.2d at 254. The deference required under AEDPA is not equivalent to the scrutiny of an appellate court exercising direct review. *See, e.g., Overton,* 295 F.3d at 280 n.12 ("Our ruling in this case is governed by the deferential standard prescribed by AEDPA for *habeas* review by a federal court of a state court determination. We, therefore, do not address the question that would arise if this were a direct appeal from a federal criminal trial on the same facts and make no suggestion as to how such a case should be decided."); *see also Galarza,* 252 F.3d

at 635 ("[W]hen reviewing a *Batson* challenge in the context of a habeas petition, a trial court's conclusion that a peremptory challenge was not exercised in a discriminatory manner is entitled to a presumption of correctness. . . .").

I conclude that the trial court was not unreasonable in ruling that petitioner failed to establish a prima facie case showing discriminatory exercise of peremptory strikes, and that the petition's claim for relief on *Batson* grounds is denied. The R & R is modified accordingly.

III. The R & R Correctly Concluded that Rosario's Constitutional Rights Were Not Violated by the Testimony of the Prosecution's Rebuttal Witness

Rosario contends that he was denied his Fourteenth Amendment right to due process because the trial court allowed, over counsel's objection, the testimony of the prosecution's rebuttal witness, Captain Bruce Bolton, the records custodian of the Department of Corrections in Volusia County, Florida. (Petition, Ground Three.) Bolton testified that Rosario was in Department custody from March 13, 1996, through April 12, 1996. (Trial Tr. at 451.)

First, I adopt the R & R's conclusion that Rosario exhausted this claim in the state courts. Consistent with *Davis v. Strack,* 270 F.3d 111, 122 (2d Cir. 2001), Rosario alerted the Appellate Division of his contention that he was denied due process

under the Fourteenth Amendment, and incorporated that contention in his submission to the New York Court of Appeals. (Appellate Division Brief at I, attached at Blira-Koessler Aff. Ex. 1; R & R at 86-89.) The Appellate Division ruled on the merits of this claim. *People v. Rosario,* 288 A.D.2d at 142-43. The respondent's contention that this claim is unexhausted lacks merit.

Second, I adopt the R & R's conclusion that Bolton's testimony did not violate the Fourteenth Amendment. As noted by the R & R, evidentiary rulings, even erroneous ones, rarely rise to the level of a constitutional violation. *See, e.g., Estelle v. McGuire,* 502 U.S. 62, 67-70 (1991). Habeas relief can be granted only if improperly admitted evidence is so unfair that it violates fundamental concepts of justice. *See, e.g., Dowling v. United States,* 493 U.S. 342, 352 (1990). The erroneous evidence must have provided the basis for conviction, or else the evidence must be so integral that without it, reasonable doubt would have existed. *Dunnigan v. Keane,* 137 F.3d 117, 125 (2d Cir. 1998).

Rosario's testimony opened the door for impeachment evidence concerning his whereabouts during March and April, 1996. He testified that he was in Florida until mid-April because he was "having a good time" and "enjoying being out there." (Trial Tr. at 384.) He stated that during this time, he "was staying in a girl's house I met over there," and resided with her from February through mid-April 1996. (Trial Tr. at 382, 394-95.) Bolton's testimony was introduced for the purpose of impeaching Rosario's

factual statements. As noted in the R & R, when a defendant provides testimony as to a specific fact, the prosecutor may offer impeachment testimony showing that the defendant's testimony was untruthful. *United States v. Beno,* 324 F.2d 582, 588 (2d Cir. 1963), *cert. denied,* 379 U.S. 880 (1964). Even if the issue is a collateral one, a witness is not permitted to benefit from "a gratuitously offered statement." *Id.*

Rosario also contends that the rebuttal evidence prompted the jury to conclude that he had a propensity toward criminal conduct, and that the resulting prejudice violated his due process rights. The trial judge, however, issued a limiting instruction directed toward Bolton's testimony:

> The defendant's incarceration in Florida is not evidence of the defendant's guilt in this case nor evidence that the defendant is the person who was disposed to commit crimes. You should consider such testimony only in determining the credibility of witnesses who have appeared before you. You should not consider his testimony for any other purpose.

(Trial Tr. at 565.) Jurors are presumed to follow instructions, *Zafiro v. United States,* 506 U.S. 534, 540 (1993), including limiting instructions. *United States v. Stewart,* 433 F.3d 273, 307 (2d Cir. 2006). The risk of prejudice is most likely to outweigh the power of a limiting instruction in instances when impeachment testimony includes a crime similar to the one for which the defendant is on trial. *See, e.g., United States v. Puco,* 453 F.2d 539, 542 (2d Cir.

1971). However, in this instance, the trial judge did not specify the crime for which Rosario was incarcerated, and it is unlikely that a juror would infer from the brief period of imprisonment that Rosario had been convicted of murder or a similarly serious offense.

I adopt Magistrate Judge Pitman's recommendation that Rosario's due process claim should be denied.

IV. The R & R Correctly Concluded that Rosario's Actual Innocence Claim Should Be Dismissed

Rosario asserts that his habeas petition should be granted on grounds of actual innocence. (Petition, Ground Two.) He contends that relief on grounds of actual innocence is appropriate because nine witnesses have provided exculpatory testimony placing him in Florida at or around the date of Collazo's murder, and because he was convicted on the basis of eyewitness testimony. (*Id.*)

Actual innocence may excuse a procedural default, and may arguably provide a basis not to apply the statute of limitations imposed by AEDPA. *Doe v. Meneffee,* 391 F.3d 147, 161 (2d Cir. 2004); *Whitley v. Senkowski,* 317 F.3d 223, 225-26 (2d Cir. 2003). Neither the Supreme Court nor the Second Circuit has recognized a freestanding claim of actual innocence as a basis for habeas relief. *See Herrera v. Collins,* 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have

never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."); *United States v. Quinones,* 313 F.3d 49, 67 (2d Cir. 2002) (citing *Herrera* and noting that actual innocence has not been held to provide an independent basis for habeas relief). Nevertheless, for the purpose of this petition, I will generously assume that such a basis for relief exists.

As the R & R notes, a successful claim for actual innocence requires the petitioner to come forth with new and reliable evidence making it more likely than not that no reasonable juror presented with that evidence would have convicted the petitioner. *Schlup v. Delo,* 513 U.S. 298, 327 (1995). A reviewing court must evaluate the actual innocence claim in light of the entire record, including evidence that may have been inadmissible. *Id.* at 162; *Doe,* 391 F.3d at 161.

In concluding that the actual innocence assertion should be rejected, the R & R noted that, even if additional alibi testimony had been admitted, Rosario's acknowledgement that he often traveled between New York and Florida might prompt a reasonable juror to conclude that Rosario was present in New York in mid-June. (R & R at 103.) It noted that the prosecution's two eyewitnesses expressed great confidence that Rosario was the shooter, and that their testimony was unimpeached at trial. (R & R at 103.) The alibi witnesses all risked impeachment on grounds that they were friends of Rosario, the R & R noted. (R & R at 103.) I cannot conclude that no

reasonable juror would have been persuaded by the prosecution's case, *see Bousley v. United States,* 523 U.S. 614, 623 (1998), in what would have been, at heart, a credibility contest.

In addition, as the R & R notes, an actual innocence claim considers "whether the new evidence on which the actual innocence claim is based is reliable." *Doe,* 391 F.3d at 165. The R & R notes that, for example, witnesses at the 440.10 hearing had contradictory recollections as to Jenine Seda's whereabouts on June 19, 1996. Such contradictions would lead to further questions about the reliability of the memories of the alibi witnesses and their placement of Rosario at a certain time and place. Given the passage of time, witness memories inevitably fade. Perhaps a jury would fully credit Rosario's alibi witnesses, or perhaps they would not. In either event, the alibi testimony is not so ironclad in its reliability that it satisfies the criteria for actual innocence.

I adopt in full Magistrate Judge Pitman's recommendation that the actual innocence claim be dismissed.

Conclusion

The R & R is modified to the extent that it recommends granting the petitioner relief on his *Batson* claim. It is adopted in all other respects. The petition is dismissed.

Petitioner has not made a substantial showing of the denial of a constitutional right, and, accordingly, a certificate of appealability will not issue. 28 U.S.C. § 2253.

SO ORDERED.

/s/ P. Kevin Castel
P. Kevin Castel
United States District Judge

Dated: New York, New York
October 22, 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

RICHARD ROSARIO,

Petitioner,

-against-

ROBERT ERCOLE, Superintendant,

Respondent.

----------X

05 **CIVIL** 8072 (PKC)

JUDGMENT

(Filed Oct. 23, 2008)

Whereas on December 28, 2007, the Honorable Henry B. Pitman, United States Magistrate Judge, having issued a report and recommendation ("report") recommending that the petition be conditionally granted as to the Batson claim and denied in all other respects, and the matter having come before the Honorable P. Kevin Castel, United States District Judge, and the Court, thereafter, on October 22, 2008, having rendered its Memorandum and Order modifying the report to the extent that it conditionally recommends granting the petitioner's Batson claim, adopting the report in all other respects, and denying the petition, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Order dated October 22, 2008, the report is modified to the extent that it conditionally recommends granting the petitioner's Batson claim; the report is adopted in all other respects; and the

petition is dismissed; the Court finds that because petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue.

DATED: New York, New York
October 23, 2008

J. MICHAEL McMAHON
Clerk of Court

BY: /s/ [Illegible]
Deputy Clerk.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARDS ROSARIO, Petitioner,	:	05 Civ. 8072 (PKC) (HBP)
-against-	:	REPORT AND RECOMMENDATION
ROBERT ERCOLE, Superintendent of Green Haven Correctional Facility Respondent.	:	

PITMAN, United States Magistrate Judge:

TO THE HONORABLE P. KEVIN CASTEL, United States District Judge,

I. Introduction

Petitioner Richard Rosario seeks, by his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, an Order vacating a judgment of conviction entered on November 23, 1998 after a jury trial in the Supreme Court of the State of New York, Bronx County (Fisch, J.), for one count of murder in the second degree in violation of New York Penal Law Section 125.25. By that judgment, petitioner was sentenced to an indeterminate term of imprisonment of twenty-five years to life and is currently incarcerated pursuant to the judgment.

Petitioner asserts four claims in his petition: (1) that petitioner was denied his Sixth Amendment right to the effective assistance of counsel, (2) that the Trial Court erred when it failed to find that petitioner had made out a *prima facie* case of discrimination under *Batson v. Kentucky,* 476 U.S. 79 (1986), (3) that the Trial Court deprived petitioner of his due process right to a fair trial by erroneously admitting extrinsic evidence of petitioner's prior incarceration, and (4) that petitioner is actually innocent of the crime for which he has been convicted. (Memorandum of Law in Support of Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus ("Pet. Mem.") at 2-3).

For the reasons set forth below, I respectfully recommend that the petition be conditionally granted with respect to petitioner's *Batson* claim and denied in all other respects.

II. Background

A. Facts Leading to Petitioner's Conviction

1. The Prosecution's Case

Early in the afternoon on June 19, 1996 petitioner shot George Collazo in the head on Turnbull Avenue in Bronx County, New York, fatally injuring him (Trial Tr.[1] at 19). There were at least three eyewitnesses to the incident: Michael Sanchez, Collazo's friend; Robert Davis, a porter who was working in the

[1] "Trial Tr." refers to the transcript of petitioner's trial.

vicinity of the shooting when it occurred; and Jose Diaz, a food vendor who was also working in the vicinity of the shooting that day (Trial Tr. at 54-56, 133-67, 286-94).

Sanchez testified at trial that he and Collazo were walking on White Plains Road when they passed two males, one of whom Sanchez described at trial as a tall, thin Hispanic male with a fade haircut and a moustache; Sanchez described the other male as black (Trial Tr. at 139-47). Sanchez testified that after he and Collazo passed the two men, Collazo stated "why do these niggers always have to front" (Trial Tr. at 141). An argument ensued between Collazo and the Hispanic male, during which Sanchez stood approximately two feet from the Hispanic male and had an unobstructed view of the Hispanic male's face (Trial Tr. at 145, 149-50). After about a minute of arguing, Collazo and Sanchez walked away, continuing down White Plains Road and then turning on to Turnbull Avenue (Trial Tr. at 150, 190).

According to Sanchez, while he and Collazo were walking on Turnbull Avenue, the Hispanic male, with whom Collazo had just argued, approached them from behind and said something to get their attention (Tr[i]al Tr. at 153). When Sanchez turned around, the male was pointing a chrome revolver at Collazo; he then fired a single shot that hit Collazo in the head and ran away (Trial Tr. at 152-55). Sanchez ran after the shooter for a short distance, but then returned to the scene and yelled to nearby workers to call the police (Trial Tr. at 156). Sanchez testified that he had

no doubt that petitioner was the shooter both when he identified petitioner in a lineup almost three weeks after the shooting and when he identified petitioner at trial (Trial Tr. at 165).

On the day of the murder, Robert Davis, a porter, was working on Turnbull Avenue when he heard someone say, "You won't do this anymore" (Trial Tr. at 53-56). Davis then saw three men walking towards him when one shot another in the head and ran (Trial Tr. at 56-57). Davis testified that he was able to see the faces of the three men, none of whom he had ever seen before and who were approximately two car lengths away from him at the time. Although it had started to drizzle, Davis had an unobstructed view of the incident (Trial Tr. at 58).

Davis reviewed "mug books" at the police precinct on the day of the shooting, but could not then identify the shooter (Trial Tr. at 80). Later that day detectives went to Davis' place of work with additional photographs. Davis believes he looked at 50 to 75 more photos before he identified petitioner's (Trial Tr. at 86). Davis testified that the officers and detectives who presented the photographs to him did not tell him that he had to select a photograph, and the photograph he selected was not marked (Trial Tr. at 85-86). Davis also testified that after he selected petitioner's photograph, he never saw the photo again (Trial Tr. at 88). Davis testified that when he recognized petitioner in a lineup on July 9 and in court, he had no doubt that petitioner was the shooter (Trial Tr. at 66).

Jose Diaz, a food vendor operating a hot dog truck on the day of the shooting, witnessed the argument between Collazo and the other two males, which he believed lasted about ten minutes; Diaz witnessed the argument from approximately twenty-eight feet away (Trial Tr. at 292-93). Diaz testified that after the argument, the males walked in separate directions, but one of the males with dark skin ran down the street. Diaz did not see the shooting, but heard the shot (Trial Tr. at 295). Diaz testified that he might be able to recognize the men he saw arguing that day, but did not identify petitioner in the courtroom (Trial Tr. at 295).

Detective Martinez of the 43rd precinct testified that he interviewed both Sanchez and Davis the day of the shooting, and that while the men were in the precinct they were separated from each other so that they could not discuss the incident (Trial Tr. at 116). Detective Martinez also testified that when Diaz and Sanchez viewed a lineup on July 9 that included the petitioner, they were not permitted to speak to each other and were kept in separate rooms before viewing the lineup (Trial Tr. at 110).

2. Petitioner's Defense

Petitioner presented an alibi defense. Specifically, petitioner contended that on the day of the shooting he was in Deltona, Florida, where he had been residing since approximately May 26, 1996, and that he did not leave Florida until June 29 after he heard

from his family in New York that the police were looking for him.

Petitioner presented two alibi witnesses at trial, Jenine Seda and John Torres, who traveled from Florida to testify that petitioner was living with them, and that they both saw him on the day of the murder, June 19.

Seda testified that she had known petitioner since December of 1995, and that petitioner was staying at her house in Deltona from approximately the end of April or beginning of May, 1996 until about June 30 (Trial Tr. at 307-08, 323). Seda testified that while petitioner was living with her and her boyfriend, John Torres, petitioner and John[2], who were good friends, spent most of their time together because neither of them were working (Trial Tr. at 311). Seda testified that she knew petitioner was at her house on June 19 (Trial Tr. at 312), and that she remembers that day because it was the day before her son was born (Trial Tr. at 335). Seda also stated that she was admitted to the hospital at about 5:00 a.m. on June 20 and that petitioner was at her home when she returned from the hospital on June 21 (Trial Tr. at 328). Seda testified that while traveling from Florida to New York for the trial, she and John Torres did not discuss either their memories regarding June

[2] Because this report and recommendation repeatedly refers to witnesses with the same surname, I refer to individuals with non-unique surnames by their first name.

19 or the fact that they were testifying (Trial Tr. at 324-25).

John Torres testified that petitioner was living with him from about April until June 19, 1996, when petitioner went to live with John's brother, Robert Torres, to make room for John and Seda's new baby (Trial Tr. at 344, 360-61). John testified that on June 19 his car broke down and he spent the day with petitioner looking for car parts before returning to John's home (Trial Tr. at 347). John had no receipts or other documents to corroborate that his car had broken down or that parts were purchased that day (Trial Tr. at 349). John testified further that Seda was working on June 19. John also stated that in June, 1996 he was working at a toll plaza five days a week (Trial Tr. at 349). John testified that while he and Seda were traveling to New York for the trial they discussed the fact that they would be testifying and what might happen (Trial Tr. at 351).

Petitioner also offered the testimony of the New York terminal manager for Greyhound Busline and introduced as evidence a "readout of a transaction" for the sale of a bus ticket. The "readout" indicated that Richard Rosario had purchased tickets to travel from Orlando, Florida to New York on June 30, 1996 (Trial Tr. at 366-69). The manager testified that while the "readout" gives the name of the passenger, date of purchase, and destinations, Greyhound does not routinely require a passenger to submit identification upon paying or boarding (Trial Tr. at 371-72).

Petitioner testified in his own defense regarding three different time periods when he was in Deltona, Florida. The first was a two-week visit in late December, 1995 until early January of 1996, during which he met John Torres and Jenine Seda (Trial Tr. at 377-80). The second was a visit from February through mid-April, 1996 (Trial Tr. at 386-87). The third was from late May, 1996 until June 30, 1996. During the second and third trips, petitioner had hoped to find work, re-locate to Florida, and have his fiancé, Minerva Godoy, and their children join him in Florida (Trial Tr. 399-400). Petitioner stated that both he and his friend John Torres were not working in June 1996 and that during his trip in May and June, Ms. Godoy wired money to him via Western Union on at least three occasions (Trial Tr. 422-24). Because petitioner did not have a valid, government-issued identification that was required to receive a money wire transfer, Ms. Godoy transmitted the money to John to give to petitioner (Trial Tr. at 423). Petitioner testified that he lived at John and Seda's home from the end of May until after the baby was born on June 20, when he left to stay with his friend Ray so that John and Jenine could have more privacy and space (Trial Tr. at 409-10). Petitioner recalled that he was with John Torres when John's car broke down and they went looking for parts; however, petitioner could not recall whether this occurred on June 19 or a different day before the baby was born (Trial Tr. at 419). On June 30, petitioner left Florida and returned to New York after his sister told him that detectives were looking

for him in connection with a murder (Trial Tr. at 388-89).

During Cross-examination, the prosecutor questioned petitioner about his February to April, 1996 visit to Florida. Petitioner testified that he stayed at the home of a friend, Shannon Beane, until he left for New York on April 13 (Trial Tr. at 394-95).

3. The Prosecution's Rebuttal Case

The prosecution presented as a rebuttal witness Captain Bruce Bolton of Volusia County, Florida, Department of Correction [sic]. Captain Bolton testified that he was the records custodian of the Volusia County Department of Corrections in Daytona, Florida and that the Department's records showed that petitioner was in custody in Volusia County from March 13, 1996 until April 12, 1996.

Before Captain Bolton testified, petitioner's attorney, Steven Kaiser, objected to the rebuttal evidence on the grounds that: (1) petitioner was never directly questioned about whether he was incarcerated during the period of time at issue and given the opportunity to address the issue before the improper introduction of extrinsic evidence on a collateral matter and (2) the introduction of this "bad act" evidence would result in unjust prejudice against petitioner and that petitioner had never been given the opportunity of seeking a

Sandoval[3] hearing outside the presence of the jury concerning this period of incarceration (Trial Tr. at 435-37). The Court allowed the testimony, accepting the prosecution's argument that the captain's testimony was part of disproving petitioner's alibi defense that he was living with the other witnesses in Florida (Trial Tr. at 439).

4. Summations

Defense counsel's summation focused on inconsistencies between the descriptions of the shooter that the eyewitnesses gave to detectives and in court, such as differences regarding the shooter's approximate height, facial characteristics, and clothing. Defense counsel also stressed the unreliability of eyewitness identifications (Trial Tr. at 488-503). Counsel pointed out that if petitioner's alibi witnesses, John and Seda, were conspiring to give false testimony on petitioner's behalf, then their testimonies would be more, not less, consistent with each other (Trial Tr. at 474). Defense counsel suggested to the jury that petitioner was not dishonest when he testified that he stayed with a friend during a time period that included his four weeks in the county jail, as it is consistent for a person to say they live in one place even if they are temporarily incarcerated elsewhere during that time (Trial Tr. at 485).

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[3] *People v. Sandoval,* 34 N.Y.2d 371, 357 N.Y.S.2d 849, 314 N.E.2d 413 (1974).

During its summation, the prosecution focused on the credibility of the eyewitnesses, Sanchez and Davis, while minimizing the inconsistencies in the descriptions they gave to detectives after the shooting (Trial Tr. at 520-21). With regard to petitioner's witnesses, the prosecutor explained to the jury "that the little things about the testimony [are] what you have to look at to determine if you can rely on the witnesses" (Trial Tr. at 528-29). The prosecution then suggested that Jenine Seda and John Torres "are interested witnesses, interested because they have an interest in the outcome of the case. They don't want to see their friend go to jail" (Trial Tr. at 529). Because John and Seda were inconsistent on "little things," such as whether John was working on and around June 19, 1996, the prosecution suggested that John and Seda were unreliable witnesses (Trial Tr. at 530). The prosecution argued that John and Seda's inconsistent testimony about whether they discussed the trial while traveling to New York also demonstrated their unreliability (Trial Tr. at 532). The prosecution pointed out that John and Seda both testified inaccurately that defendant lived with them from early April through June (Trial Tr. at 531). Moreover, the prosecution noted that the Greyhound ticket evidence offered by the defense does not really establish anything since Greyhound does not check the identification of its passengers (Trial Tr. at 533).

With respect to petitioner's testimony that he lived with Shannon Bean while he was actually incarcerated, the prosecution suggested that petitioner's

responses were untruthful because he did not want the jury to know that he was in jail. According to the prosecution, this showed that petitioner was willing to lie on the stand and mislead the jury (Trial Tr. at 536).

5. Jury Instructions

The Trial Judge informed the jury that an interested witness is one who, "by reason of relationship [or] friendship" with either a party or a witness, might give biased testimony in favor of that person and that an interested witness' testimony may be accepted despite, or rejected in light of, that witness' interest in the outcome of the case (Trial Tr. at 558-559).

The Trial Judge also gave a limiting instruction regarding the evidence concerning petitioner's incarceration in Florida in March and April of 1996. The judge told the jury that the evidence of the incarceration could not be considered as evidence of petitioner's propensity to commit crimes. He did, however, advise the jury that it could be considered "in determining the credibility of witnesses who have appeared before you" (Trial Tr. at 565).

B. Procedural History

1. Petitioner's Direct Appeal

Petitioner appealed his conviction to the Appellate Division of the New York State Supreme Court,

First Department, arguing: (1) the prosecutor's introduction of extrinsic evidence that petitioner was incarcerated during a period that ended over two months before the June 19 shooting deprived petitioner of his Fourteenth Amendment Due Process right to a fair trial (Brief for Defendant-Appellant ("App. Div. Br.") at 32-46, annexed as Exhibit 1 to Affidavit in Opposition to Habeas Corpus Petition ("Resp. Op.") (Docket Item 12)); (2) the prosecutor's use of all six peremptory challenges to strike prospective African-American jurors established a *prima facie* case of discrimination under *Batson,* requiring the prosecution to offer race-neutral reasons for its challenges (App. Div. Br. at 46-53); and (3) the cumulative impact of the prosecutor's improper tactics misled and unfairly influenced the jury in violation of petitioner's Fourteenth Amendment Due Process right to a fair trial (App. Div. Br. at 53-63).

The Appellate Division unanimously affirmed petitioner's conviction on November 27, 2001. The Appellate Division held that (1) the Trial Court properly exercised its discretion in allowing the prosecution to introduce rebuttal evidence that petitioner was incarcerated, as it tended to disprove his alibi, was not collateral because petitioner made his multiple trips to Florida "integral parts of his alibi defense," and had minimal prejudicial effect particularly in light of the Trial Court's limiting instruction; (2) petitioner had failed to establish a *prima facie* case of racial discrimination by the prosecutor's use of peremptory challenges because the mere number

of the prosecution's peremptory challenges against African-American prospective jurors did not establish a *prima facie* case, and petitioner failed to show disparate treatment or other relevant circumstances raising an inference of discriminatory purpose; and (3) petitioner's challenges to the prosecutor's questioning of witnesses and comments in summation were not preserved, and, in any event, did not present a basis for reversal. *People v. Rosario,* 288 A.D.2d 142, 142-143, 733 N.Y.S.2d 405, 406-407 (1st Dep't 2001).

The New York State Court of Appeals denied petitioner's leave to appeal on March 26, 2002. *People v. Rosario,* 97 N.Y.2d 760, 769 N.E.2d 367, 742 N.Y.S.2d 621 (2002).

2. Petitioner's Motion to Vacate

On June 11, 2003, petitioner filed a motion pursuant to New York Criminal Procedure Law Section 440.10 to vacate the judgment of conviction, arguing that he had been denied effective assistance of counsel. The Honorable Edward M. Davidowitz, Justice of New York State Supreme Court, Bronx County held an evidentiary hearing at which petitioner presented seven of his purported alibi witnesses, two of his defense attorneys (Joyce Hartsfield and Steven J. Kaiser) and Hartsfield's investigator on the case, Jessie Franklin. In a twenty-two page opinion, Justice Davidowitz denied relief, finding that both Hartsfield and Kaiser provided petitioner with "meaningful representation" (Decision and Order of the

Honorable Edward M. Davidowitz, Justice of the Supreme Court, dated April 4, 2005 ("440 Order"), annexed as Exhibit 17 to Resp. Op., at 18).

The Appellate Division denied leave to appeal Justice Davidowitz's decision on September 8, 2005 (Certificate Denying Leave, annexed as Exhibit 19 to Resp. Op.).

Petitioner filed his petition for a writ of habeas corpus on September 16, 2005.

C. The Current Petition

As noted above, petitioner asserts four claims: (1) that petitioner was denied his Sixth Amendment right to effective assistance of counsel based on his attorneys' failure to adequately investigate and to present additional witnesses and documentary evidence in support of his alibi defense; (2) that the Trial Court erred when it refused to find a *prima facie* case of discrimination under *Batson v. Kentucky, supra,* 476 U.S. 79 and when it refused to require the prosecution to give race-neutral grounds for using all of its peremptory challenges to strike African-American prospective jurors; (3) that the Trial Court deprived petitioner of his Due Process right to a fair trial by erroneously admitting extrinsic evidence that petitioner had been in jail three months before the murder; and (4) that petitioner is actually innocent of the crime of which he was convicted (Pet. Mem. at 2-3).

III. Analysis

A. Standard of Review

Where the state court has decided a habeas petitioner's claims on the merits, a habeas petitioner must meet a stringent standard before a federal court can issue the writ. Specifically, 28 U.S.C. § 2254(d), modified by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides that in such a situation, habeas relief may be granted only when the Trial Court's decision

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Supreme Court has explained the alternative standards contained in the former paragraph as follows:

> First, we have explained that a decision by a state court is "contrary to" our clearly established law if it "applies a rule that contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Williams v. Taylor,* 529 U.S. 362, 405-406,

> 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). See also *Early v. Packer,* 537 U.S. 3, 7-8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (*per curiam*). . . .
>
> Second, [petitioner] can satisfy § 2254(d) if he can demonstrate that the [State] Court's decision involved an "unreasonable application" of clearly established law. As we have explained:
>
> > "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [a Supreme Court case] incorrectly. See *Bell v. Cone,* 535 U.S. 685, 698-699, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Williams, supra,* at 411, 120 S.Ct. 1495. Rather, it is the habeas applicant's burden to show that the state court applied [that case] to the facts of his case in an objectively unreasonable manner."
>
> *Woodford v. Visciotti,* 537 U.S. 19, 24-25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (*per curiam*).

Price v. Vincent, 538 U.S. 634, 640-41 (2003); *accord Brown v. Payton,* 544 U.S. 133, 139-40 (2005); *see also Lockyer v. Andrade,* 538 U.S. 63, 70-72 (2003); *Hawkins v. Costello,* 460 F.3d 238, 242-43 (2d Cir. 2006); *Brown v. Artuz,* 283 F.3d 492, 500-01 (2d Cir. 2002).

In addition to the definition of "unreasonable application" set forth above, a state court may unreasonably apply Supreme Court precedent "if the state court unreasonably extends a legal rule established by the Supreme Court or if it unreasonably fails to extend a legal rule to a context in which the rule reasonably should apply." *Serrano v. Fischer,* 412 F.3d 292, 296-97 (2d Cir. 2005), *cert. denied,* 546 U.S. 1182 (2006).

"Unreasonableness is determined by an 'objective' standard." *Gersten v. Senkowski,* 426 F.3d 588, 607 (2d Cir. 2005), *cert. denied,* 126 S.Ct. 2882 (2006), *quoting Williams v. Taylor,* 529 U.S. 362, 409 (2000). In order for a state court's application of Supreme Court precedent to be unreasonable, "[s]ome increment of incorrectness beyond error" is required. *Henry v. Poole,* 409 F.3d 48, 68 (2d Cir. 2005), *cert. denied,* 547 U.S. 1040 (2006) (internal quotation marks omitted); *accord Brown v. Artuz, supra,* 283 F.3d at 500-01; *Aparicio v. Artuz, supra,* 269 F.3d at 94. However, "the increment need not be great; otherwise, habeas relief would be limited to state court decisions 'so far off the mark as to suggest judicial incompetence.'" *Francis S. v. Stone,* 221 F.3d 100, 111 (2d Cir. 2000), *quoting Matteo v. Superintendent, SCI Albion,* 171 F.3d 877, 889 (3rd Cir. 1999) (*en banc*); *accord Gersten v. Senkowski, supra,* 426 F.3d at 607.

The nature of the rule in issue also impacts the assessment of the reasonableness of the state court's action.

> [W]hile very specific rules may not permit much leeway in their interpretation, the same is not true of more general rules, the meaning of which "must emerge in application over the course of time." [*Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004)]. "The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Id.*

Serrano v. Fischer, supra, 412 F.3d at 297; *see also Hawkins v. Costello, supra,* 460 F.3d at 243.

Both the "contrary to" and "unreasonable application" clauses "restrict[ ] the source of clearly established law to [the Supreme] Court's jurisprudence." *Williams v. Taylor, supra,* 529 U.S. at 412. "That federal law, as defined by the Supreme Court, may either be a generalized standard enunciated in the [Supreme] Court's case law or a bright-line rule designed to effectuate such a standard in a particular context." *Kennaugh v. Miller,* 289 F.3d 36, 42 (2d Cir. 2002). "A petitioner can not win habeas relief solely by demonstrating that the state court unreasonably applied Second Circuit precedent." *Yung v. Walker,* 341 F.3d 104, 110 (2d Cir. 2003); *accord DelValle v. Armstrong,* 306 F.3d 1197, 1200 (2d Cir. 2002).

In order to be entitled to the deferential standard of review under subsection 2254(d), the state courts must have resolved the petitioner's claims "on the merits." *Cotto v. Herbert,* 331 F.3d 217, 230 (2d Cir. 1993); *see e.g. Ryan v. Miller,* 303 F.3d 231, 245 (2d Cir. 2001) ("[I]n order for this deferential standard of

§ 2254 to apply, we must first determine that the state court considered [petitioner's claim] on its merits"); *Sellan v. Kuhlman,* 261 F.3d 303, 309-10 (2d Cir. 2001).

For habeas purposes, a state court is deemed to have reached the merits of a federal claim when the state court's decision "fairly appear[s] to rest primarily on federal law or to be interwoven with federal law," unless there is a "clear and express statement of reliance on a state procedural bar." *Jimenez v. Walker,* 458 F.3d 130, 145 (2d Cir. 2006); *see Coleman v. Thompson, supra,* 501 U.S. 722, 739-40 (1991). Habeas courts in this circuit examine "the face of the state-court opinion, . . . whether the state court was aware of a procedural bar, and . . . the practice of state courts in similar circumstances" to determine whether a state court decision falls into one of the above classifications. *Jimenez v. Walker, supra,* 458 F.3d at 145 n.16.

I shall address the nature of the state court's disposition of each of petitioner's claims in connection with my discussion of each of the claims.

B. Petitioner's Claims

1. Ineffective Assistance of Counsel

Petitioner claims that he did not receive effective assistance of counsel based on counsel's failure to investigate petitioner's alibi defense adequately and to produce additional witnesses and documentary

evidence that would have supported petitioner's alibi (Pet. Mem. at 18).

Petitioner was represented by at least four defense attorneys after his arrest. The representation provided by petitioner's first two attorneys, one of whom represented petitioner at arraignment, the other at petitioner's lineup, is not at issue. Petitioner's third attorney, Joyce Hartsfield, represented petitioner from about mid-July, 1996 until mid-February of 1998 (Hrg. Tr.[4] at 14). Steven J. Kaiser represented petitioner after Hartsfield and through his trial (Hrg. Tr. at 117). Petitioner claims that Hartsfield and Kaiser's representation was ineffective.

Petitioner asserts that he had always maintained that he was in Florida on the date of the murder. Immediately after turning himself in, petitioner wrote a statement for the police describing various events in Florida, providing the names of at least eleven potential alibi witnesses and identifying potential documentary evidence that he believed would establish his presence in Florida at the time of the murder (Pet. Mem. at 18; Petitioner's Post-Arrest Statement ("Post-Arrest Stmnt."), annexed as Exhibit 10 to the Declaration of Jodi K. Miller ("Miller Decl.")). In his statement, petitioner claimed that he went to Florida on a Greyhound bus around the end

[4] "Hrg. Tr." refers to the transcript of the hearing held in connection with petitioner's 440.10 motion.

of May and did not leave Florida until June 29, 1996. Petitioner claimed that several individuals in Florida could attest to his presence there, including John Torres' mother, Margarita Torres, and his father, Fernando Torres, as well as John Torres, Jenine Seda, Robert Torres, David Guzman, Nereida Colon, "Ray MH," "Mike," "Gordo," and "Hector."[5] Petitioner had addresses for most of these individuals but not telephone numbers. Petitioner also reported in his post-arrest statement that during June, he and Gordo went to a bail bondsman to bail out their friend Michael. Petitioner also noted in his post-arrest statement that he had been incarcerated during a previous trip to Florida, but that he had been released from jail on April 12, 1996 (Post-Arrest Stmnt.).

While Hartsfield was representing petitioner, she moved for funds to investigate petitioner's alibi defense in Florida, and the Trial Court granted that motion during a hearing in the presence of Hartsfield and petitioner (Calendar Call Transcript, dated March 19, 1997, annexed as Exhibit 29 to Miller Decl.). Nevertheless, for unknown reasons, many of those alibi witnesses were never contacted by detectives, prosecutors, investigators, or petitioner's attorneys until petitioner's appellate counsel found them in Florida after petitioner was convicted of Collazo's murder.

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[5] The record does not reveal the full names of "Ray MH," "Mike," "Gordo," or "Hector."

a. Petitioner's 440 Hearing

Because petitioner's claim of ineffective assistance raised factual issues that were outside the record of his trial, he properly asserted and exhausted the claim by way of a motion to vacate pursuant to New York Criminal Procedure Law Section 440.10. *Arce v. Smith,* 889 F.2d 1271, 1272 (2d Cir. 1989) (ineffective assistance claim normally raised by collateral proceeding since its resolution "often requires evidence not contained in the record"); *Washington v. Greiger,* 00 Civ. 2383 (RWS), 2001 WL 214236 at *3 (S.D.N.Y. Mar. 1, 2001) (same); *Otero v. Stinson,* 51 F. Supp.2d 415, 418-419 (S.D.N.Y. 1999) (same); *Garcia v. Scully,* 907 F. Supp. 700, 706 (S.D.N.Y. 1995) (same); *People v. Brown,* 45 N.Y.2d 852, 382 N.E.2d 1149, 410 N.Y.S.2d 287 (1978). Pursuant to petitioner's motion, the Trial Court conducted an evidentiary hearing at which evidence was offered establishing the following facts.

Hartsfield testified that she made no efforts to obtain any documentary evidence in support of petitioner's alibi (Hrg. Tr. at 32). Though Hartsfield was aware that petitioner claimed he bailed a friend out of jail in Florida in June of 1996, she did not make any efforts to contact the bail bondsman identified by petitioner (Hrg. Tr. at 27-28). Hartsfield also admitted that although petitioner had told her that his fiancé had wired money to him in Florida in June of 1996, Hartsfield did not contact Western Union to

obtain records of those transactions (Hrg. Tr. at 28).[6] Petitioner also told Hartsfield that his fiancé had called petitioner in Florida at a public pay phone, yet Hartsfield made no effort to obtain toll records of those calls (Hrg. Tr. at 30). Petitioner's counsel questioned Hartsfield about a police "field contact report" that noted that petitioner had been stopped by the police in Deltona, Florida on May 30, 1996, but Hartsfield could not recall whether petitioner had told her about that event (Hrg. Tr. at 30-31).

Petitioner had told Hartsfield that he knew several people who could corroborate that he was in Florida on the day of the murder (Hrg. Tr. at 14). In response to this information, Hartsfield hired an investigator, Jessie Franklin, to assist her in finding and interviewing petitioner's potential alibi witnesses (Hrg. Tr. at 43). Hartsfield and Franklin initially decided that they would focus their investigation on the couple with whom petitioner had lived during June, 1996, John Torres and Jenine Seda, because it appeared they were in the best position to confirm petitioner's presence in Florida on the day of the murder, June 19 (Hrg. Tr. at 88). Hartsfield did not know whether other witnesses could also provide an

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[6] Petitioner's post-conviction counsel attempted to obtain these records from Western Union in June, 2004, but Western Union responded that it only maintained these records for 60 months, i.e. until June, 2001 (June 17, 2004 letter from Stacy C. Anderson of Western Union to Morrison & Foerster, LLP in response to subpoena, annexed as Exhibit 53 to Miller Decl.).

alibi for June 19 (Hrg. Tr. at 107). On October 25, 1996, Franklin spoke by telephone with John Torres's father, Fernando Torres, and his brother, Robert Torres, but was unable to locate John Torres at that time (Jessie Franklin Activity Log, annexed as Exhibit 17 to Miller Decl.).

On October 29, 1996, after Franklin was unsuccessful in her attempts to contact John Torres, Jenine Seda, and several other potential witnesses, Hartsfield filed an omnibus motion on behalf of petitioner requesting, *inter alia,* court authorization to send an investigator to Florida to find credible alibi witnesses (Hrg. Tr. at 43). The motion was accompanied by an affidavit signed by Franklin, stating that she had only been able to speak with two potential alibi witnesses, that her attempts to contact other witnesses who had moved or who did not have access to a telephone had been unsuccessful, and that she needed to travel to Florida to conduct an effective investigation concerning petitioner's defense (Affidavit of Jessie Franklin, sworn to Oct. 29, 1996 ("Franklin Af.") attached to Notice of Omnibus Motion, annexed as Exhibit 25 to Miller Decl.). During a hearing on March 19, 1997, the Honorable Joseph Fisch, Justice of New York State Supreme Court, Bronx County, granted Hartsfield's request to send Franklin to Florida (Hrg. Tr. at 48). Hartsfield, however, did not recall whether the request had been granted until she reviewed the transcript of the March 19, 1997 proceeding in preparation for the 440.10 hearing (Hrg. Tr. at 50).

On September 22, 1997, several months after Justice Fisch granted Hartsfield's request to send an investigator to Florida, Franklin finally located and interviewed John Torres and Jenine Seda in Pennsylvania, where the two were then residing (Hrg. Tr. at 91).

Hartsfield never sent Franklin to Florida and was unable to explain why, although she believed there could have been logistical reasons (Hrg. Tr. at 50). Hartsfield also testified that if she had realized the motion had been granted, then she would have sent Franklin to Florida, suggesting that she had been unaware of the outcome of her omnibus motion in 1997 (Hrg. Tr. at 51). She testified that she did not make a conscious strategic decision to limit potential alibi witnesses to Jenine Seda and John Torres (Hrg. Tr. at 73). Rather, Hartsfield acknowledged the success of an alibi defense turned on the credibility of the witnesses and that an incredible alibi witness could jeopardize the defense (Hrg. Tr. at 95).

Kaiser represented petitioner from February 18, 1998 through pre-trial hearings and his trial (Hrg. Tr. at 117). Immediately before petitioner's 440.10 hearing, Kaiser submitted an affirmation, in which he stated that when he took petitioner's defense, Hartsfield had told him that the Court "had specifically denied her request to send the assigned investigator to Florida to follow-up on initial alibi evidence already adduced" (Affirmation of Steven Kaiser, dated Dec. 31, 2003, annexed as Exhibit 50 to Miller Decl. ("Dec. 31, 2003 Kaiser Affirm.")). Hartsfield's [sic]

then submitted an affirmation, stating that after she reviewed the transcript of the March 19, 1997 hearing before Justice Fisch, she recalled that the justice had granted expenses for a Florida investigation; she did not recall telling Kaiser that the judge had denied the expenses (Affirmation of Joyce Hartsfield, dated Jan. 29, 2004, annexed as Exhibit 51 to Miller Decl.). On February 7, 2004 Kaiser submitted another affirmation, stating that on January 30, 2004 he received and read Hartsfield's affirmation and the minutes of the March 19, 1997 hearing before Justice Fisch, and Kaiser retracted his prior statement that Hartsfield had told him her request to send an investigator to Florida had been denied (Affirmation of Steven Kaiser, dated Feb. 7, 2004, annexed as Exhibit 52 to Miller Decl. ("Feb. 7, 2004 Kaiser Affirm.")). Kaiser asserted in this second affirmation that he did the best he could under the mistaken belief that the request for investigative expenses had been denied, that he used mail and telephone to try to establish contact with witnesses in Florida, and that he made arrangements for the known alibi witnesses to be able to travel to New York to testify (Feb. 7, 2004 Kaiser Affirm.).

Kaiser testified that he is not certain who he spoke with in Florida other than John Torres and Jenine Seda, but he believed he spoke to John's father, Fernando Torres, his wife, Margarita Torres, and "contemporaries of Torres and Seda" (Hrg. Tr. at 124-25). These individuals told Kaiser that they could not afford to travel to New York. Kaiser suspected

that lack of finances was being used as an excuse by people "not as eager to help Mr. Rosario when [Kaiser] was dealing with them as they might have been when Mr. Barry, the investigator for Legal Aid Society was with them in their home . . . not necessarily because they weren't going to be truthful. But just that they weren't that thrilled about the prospect of having to leave whatever they were doing and come up and it was more than just the money" (Hrg. Tr. at 194-95). Because Kaiser believed the court had denied funding to send an investigator to Florida, he testified that he also believed funding for witnesses to travel to New York would likewise be denied. Kaiser did not, therefore, request such funds or advise any potential witnesses that such costs could be reimbursed (Hrg. Tr. at 128).

Kaiser testified that while preparing petitioner's trial, he (Kaiser) believed John Torres and Jenine Seda were the best witnesses because they could establish the date of petitioner's presence in Florida by virtue of their son's birth on June 20 and because they had no prior convictions that the prosecution might use to impeach them (Hrg. Tr. at 196, 221, 225). Kaiser believed that other potential witnesses with whom he spoke would have only provided similar testimony and were not as cooperative (Hrg. Tr. at 195). Kaiser also admitted, however, that he would have preferred to have had more alibi witnesses, especially ones who did not live with petitioner (Hrg. Tr. at 196-99).

Jessie Franklin testified that she was hired by Hartsfield to investigate petitioner's alibi defense. According to Franklin's notes, she met with petitioner on September 23, 1996 at Rikers Island, and petitioner gave Franklin addresses for John Torres, Robert Torres and his wife Chenoa, Ricardo Ruiz, and Nerida Colon. He also gave Franklin a telephone number where he believed another potential witness, Denise Hernandez, could be reached (Jessie Franklin's notes, dated Sept. 23, 1996, annexed as Exhibit 19 to Miller Decl.).

Franklin also testified that prior to drafting an affidavit in support of the motion for funding to investigate in Florida, she was only able to reach two of petitioner's potential alibi witnesses, Fernando and Robert Torres, with whom she spoke for a total of approximately one hour (Hrg. Tr. at 384-85, 403-04). Franklin's notes indicate that on October 25, 1996, Fernando told her that "in the latter part of June" he, his son John and petitioner had looked for car parts and that petitioner had contributed thirty dollars toward the purchase of the parts because he had been using the car and was going to New York (Hrg. Tr. at 391-92, 438). Franklin testified that, according to her notes, Fernando did not specifically tell her that he saw petitioner on June 19, and she had not asked Fernando about his arrest history as she normally would have if a potential witness were cooperative (Hrg. Tr. at 437-38). Franklin's October 25 notes also indicate that Robert Torres had reported to her that petitioner left John's home after the baby was born on

June 20 and then stayed with David Guzman (Jessie Franklin's notes, dated Oct. 25, 1996, annexed as Exhibit 21 to Miller Decl.). Franklin did not contact Fernando or Robert again and assumed the request for funding for her to investigate in Florida had been denied because she never heard otherwise from Hartsfield (Hrg. Tr. at 404, 407).

Franklin re-opened her investigation into petitioner's case in September, 1997 and interviewed Jenine Seda and John Torres (Hrg. Tr. at 411). John Torres informed Franklin that he could provide a list of names of other alibi witnesses in Florida (Hrg. Tr. at 413). Franklin also attempted at that time to contact a number of other individuals named by petitioner, but was unsuccessful (Hrg. Tr. at 416-17). When Franklin spoke with Seda and John Torres, she did not make any determinations as to whether they would be the best witnesses for petitioner. Rather, John and Seda were the ones Franklin could contact at that time, and Franklin still considered it necessary to investigate petitioner's alibi further (Hrg. Tr. at 418-20, 433). After Kaiser took petitioner's case, Kaiser never contacted Franklin to discuss witnesses or to follow up on what she learned in her investigation (Hrg. Tr. at 422).

Fernando Torres testified he remembered spending June 19 with petitioner and his son, John Torres, after John's car broke down and the three of them looked for car parts. Fernando did not know until several years later that the crime for which petitioner was arrested had occurred on June 19 (Hrg. Tr. at

318, 364, 372, 374).[7] Fernando's written statement, which was also submitted as evidence in support of the motion to vacate, asserts that he knew petitioner was in Florida on June 19 because he saw petitioner in John's apartment; the statement does not mention that Fernando spent time that day with petitioner looking for car parts (Statement of Fernando Torres, signed Nov. 9, 2002, annexed as Exhibit 56 to Miller Decl.). Fernando could not recall being contacted by a lawyer or an investigator regarding petitioner until 2004, although he testified that Jessie Franklin's name sounded familiar to him (Hrg. Tr. at 329, 332-33). Fernando testified that petitioner's sisters had to pay for John and Seda to travel to New York to testify, and that the sisters had told him petitioner's attorney suggested John's testimony would be sufficient (Hrg. Tr. at 332-33). Fernando testified that he would have come to New York to testify at petitioner's trial if he had been asked to and been provided with money to cover travel expenses (Hrg. Tr. at 333-34).

Ricardo Ruiz testified that he saw petitioner about five times a week during the month of June, 1996, and that he saw petitioner several days after John Torres' baby was born (Hrg. Tr. at 463, 488).

[7] During Fernando's cross-examination at the 440 hearing, respondent's counsel reported that Fernando had informed petitioner's counsel, Jodi Miller, that he, petitioner and John looked for car parts three or four days before John's baby was born. Petitioner's counsel agreed to submit a stipulation regarding this, but no such stipulation has been included in petitioner's habeas submissions (Hrg. Tr. at 344).

Ricardo could not recall whether or not he saw petitioner on June 19 (Hrg. Tr. at 476), but he believed petitioner had been in Florida since the winter of 1995-96 except for a brief period after his release from jail in April (Hrg. Tr. at 479).

Chenoa Ruiz lived next door to John Torres and Jenine Seda while petitioner was staying with them in June, 1996 (Hrg. Tr. at 497). Chenoa testified that she did not like petitioner because John was "hanging out" with petitioner instead of properly attending to Seda during her pregnancy (Hrg. Tr. at 503). Chenoa testified that on the night of June 18, 1996, when she took Seda to the hospital, she saw petitioner with John and some of their friends at John and Seda's home (Hrg. Tr. at 500, 547). Chenoa also testified that she saw petitioner at John and Seda's home on June 19, both at about 11:30 a.m. when she picked up Seda for a doctor's appointment, and again several hours later when she brought Seda back (Hrg. Tr. at 548, 550). Petitioner's presence at John and Seda's home on these days stuck in Chenoa's mind because, in her words, petitioner was like a "spotlight" and caused problems for her and Seda by staying out late with their boyfriends (Hrg. Tr. at 527). Chenoa could not recall whether petitioner went to New York after he got out of jail in April, 1996. Chenoa also did not know when petitioner left Florida after Seda gave birth (Hrg. Tr. at 530-31). Chenoa testified that petitioner's appellate counsel was the first person to contact her about petitioner's case (Hrg. Tr. at 509),

and that she would have testified at petitioner's trial had she been asked to (Hrg. Tr. at 510).

Minerva Godoy is the mother of petitioner's children and was his fiancé at the time of his arrest (Hrg. Tr. at 566). Godoy testified that petitioner left New York in May, 1996 intending to relocate in Florida (Hrg. Tr. at 568). Godoy sent money to petitioner using Western Union in June 1996, but that money had to be sent to John Torres because petitioner did not have proper identification to receive a money transfer (Hrg. Tr. at 570-72). Godoy testified that she informed petitioner's "female attorney" of the money transfer and that she telephoned petitioner in Florida on multiple occasions in June, 1996 (Hrg. Tr. at 580). Godoy recalled that petitioner called her the day after John and Seda's baby was born and told her that he was going to see their baby (Hrg. Tr. at 618).

Denise Hernandez testified that she and petitioner dated in Florida from about February, 1996 until some time in June of 1996, and that during that time she saw petitioner approximately four times per week (Hrg. Tr. at 627-28). Hernandez could not attest to petitioner's whereabouts on June 19, 1996 or the days immediately before or after that day. All Hernandez could recall was that she and petitioner had an argument in Florida in mid to late June because petitioner had taken her car without permission (Hrg. Tr. at 628). Hernandez believed the argument occurred close to the day of the shooting because her sister's birthday present was in the car when

petitioner took it, and her sister's birthday is June 26 (Hrg. Tr. at 629). Hernandez testified that she broke up with petitioner, in Florida, about two weeks before he left for New York (Hrg. Tr. at 629).

Lisette Rivera is a friend of Denise Hernandez who testified that she was present when petitioner took Hernandez's car in approximately June, 1996 (Hrg. Tr. at 672). Rivera believed the incident occurred about five days before Hernandez's sister's birthday; however, she also testified that she believed the sister's birthday was in mid-June rather than late June (Hrg. Tr. at 673). Before Rivera learned the date of the shooting for which petitioner was convicted, she submitted an affidavit that she saw petitioner regularly in Florida between June and November of 1996 (Hrg. Tr. at 698).

Both Hernandez and Rivera admitted that they had been in touch with petitioner since his conviction and had written and visited with him at least twice (Hrg. Tr. at 633, 677).

Michael Serrano testified that he was a good friend of John Torres' brother, Robert, and knew petitioner while he was staying with John Torres in June, 1996 (Hrg. Tr. at 718). Though Serrano could not recall the date that Jenine and John's baby was born, he remembered that he was with petitioner, Robert Torres and Ricardo Ruiz outside Jenine and John's home when John returned from the hospital on the day of the child's birth (Hrg. Tr. at 719, 732). Serrano testified he was never contacted by anyone

regarding petitioner's case until an investigator reached him in 2002. Serrano also stated that he would have testified at petitioner's trial had he been asked (Hrg. Tr. at 722-24).

After hearing all the foregoing testimony and considering additional written submissions, Justice Davidowitz denied petitioner's motion to vacate, holding that Hartsfield and Kaiser provided petitioner with "meaningful representation" as required by *People v. Benevento,* 91 N.Y.2d 708, 697 N.E.2d 584, 674 N.Y.S.2d 629 (1998). This standard for ineffectiveness is "ultimately concerned with the fairness of the process as a whole . . . " (440 Order at 15, 22). Justice Davidowitz found that although both Hartsfield and Kaiser were mistaken regarding whether Justice Fisch had granted funding to investigate in Florida, that mistake "was not deliberate" and "does not alter the fact that both attorneys represented defendant skillfully, and with integrity . . . " (440 Order at 18). Justice Davidowitz concluded that Kaiser presented a credible alibi defense to the jury and a number of the witnesses who testified at the post-conviction hearing would not have strengthened the alibi defense (440 Order at 17-19). Justice Davidowitz also held that trial counsel's performance should not upset the jury's verdict, as the verdict was "amply supported by the evidence" (440 Order at 19-22).

In addition, Justice Davidowitz found that the testimony of the alibi witnesses petitioner presented at his hearing was not "newly discovered evidence"

because: (1) petitioner knew who the witnesses were and gave their names to police at the time of his arrest; (2) the substance of the alibi witness' testimony was known before trial and (3) counsel had made efforts to speak to the witnesses prior to petitioner's trial. Moreover, Justice Davidowitz found that the testimony of these witnesses would have been merely cumulative of the testimony of the alibi witnesses presented at petitioner's trial (440 Order at 19-20).

Justive [sic] Davidowitz's decision constitutes a ruling on the merits of petitioner's ineffective assistance claim and is, therefore, entitled to the AEDPA's deferential standard or [sic] review. "An 'adjudication on the merits' is one that '(1) disposes of the claim on the merits, and (2) reduces its disposition to judgment.'" *Bell v. Miller,* 500 F.3d 149, 155 (2d Cir. 2007), *quoting Sellan v. Kuhlman,* 261 F.3d 303, 312 (2d Cir. 2001). Justice Davidowitz expressly found that petitioner had received "meaningful representation" (440 Order at 18). The use of this language, along with the absence of any suggestion in Justice Davidowitz's decision of a procedural basis for the ruling, constitutes an adjudication of the merits of petitioner's federal ineffective assistance claim, sufficient to entitle Justice Davidowitz's decision to the AEDPA'a [sic] deferential standard of review. *Gersten v. Senkowski,* 426 F.3d 588, 698, 606 (2d Cir. 2005); *Eze v. Senkowski,* 321 F.3d 110, 123-24 (2d Cir. 2003); *Loliscio v. Goord,* 263 F.3d 178, 193 (2d Cir. 2001);

Acensio [sic] *v. McKinney,* 05-CV-1026 (NGG), 2007 WL 2116253 at *14 & n.19 (E.D.N.Y. July 20, 2007).[8]

b. Failure to Investigate and Present Additional Alibi Evidence as Ineffective Assistance of Counsel

In order to prevail on a claim of ineffective assistance of trial counsel, the petitioner here must show that the State Supreme Court unreasonably applied the now familiar two-part test set forth in *Strickland v. Washington,* 466 U.S. 668, 686-87 (1984):

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
>
> . . . .

[8] As discussed in *Henry v. Poole,* 408 F.3d 48, 68-72 (2d Cir. 2005) and in *Acensio* [sic] *v. McKinney, supra,* 2007 WL 2116353 at *14, the Court of Appeals for the Second Circuit has expressed some doubt as to whether a finding of "meaningful representation" will always constitue [sic] a finding that federal Sixth Amendment standards have been met. However, it appears to be the law in this Circuit that a state court's finding of "meaningful representation," where the state court was aware of a defendant's federal claim and the federal standard, constitutes an adjudication on the merits of a Sixth Amendment ineffective assistance claim. *See Eze v. Senkowski, supra,* 321 F.3d at 121-22.

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Accord Lynn v. Bliden, 443 F.3d 238, 247 (2d Cir. 2006), *cert. denied,* 127 S.Ct. 1383 (2007); *Davis v. Greiner,* 428 F.3d 81, 87 (2d Cir. 2005); *Greiner v. Wells,* 417 F.3d 305, 319 (2d Cir. 2005), *cert. denied,* 126 S.Ct. 1363 (2006); *Aeid v. Bennett,* 296 F.3d 58, 62-63 (2d Cir. 2002); *Hernandez v. United States,* 202 F.3d 486, 488 (2d Cir. 2000); *Guerrero v. United States,* 186 F.3d 275, 281-82 (2d Cir. 1999); *McKee v. United States,* 167 F.3d 103, 106-07 (2d Cir. 1999); *Jackson v. Leonardo,* 162 F.3d 81, 85 (2d Cir. 1998).

In determining whether counsel's performance was objectively deficient, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional

assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland v. Washington, supra*, 466 U.S. at 689 (internal quotation marks omitted).

The second prong of the test – actual prejudice – requires the petitioner to show that, but for trial counsel's errors, there is a "reasonable probability" that the result of the trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington, supra*, 466 U.S. at 694. Because the test is conjunctive, a habeas petitioner's failure to satisfy either prong requires that the challenge to the conviction be rejected. *Strickland v. Washington, supra*, 466 U.S. at 697.

Petitioner claims that but for his trial counsel's failure to adequately investigate and present his alibi defense there is a reasonable probability that the jury would not have found him guilty of Collazo's murder and that Justice Davidowitz's decision denying petitioner's ineffective assistance of counsel claims was both contrary to, and an unreasonable application of, clearly established federal law. I agree with petitioner that under the *Strickland* two-part test, petitioner's counsel performed below constitutionally reasonable standards, and counsel's deficient performance caused petitioner to suffer prejudice at his trial. However, applying AEDPA's "objective" standard articulated by the Supreme Court in *Williams v. Taylor, supra,* 529 U.S. at 412, I find that the State

Court's decision denying petitioner's motion to vacate was neither an unreasonable application of, nor contrary to, clearly established federal law. Thus petitioner's claim for habeas corpus relief based on ineffective assistance of trial counsel should be denied because it fails to reach the threshold for relief required by the AEDPA.

c. The Strickland Standard and the Merits of Petitioner's Claim

i. Deficient Performance

Defense counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington, supra,* 466 U.S. at 690-91. Counsel's duty to investigate "includes the obligation to investigate all witnesses who may have information concerning [the defendant's] guilt or innocence." *Towns v. Smith,* 395 F.3d 251, 258 (6th Cir. 2005).

After successfully contacting only Robert and Fernando Torres, Hartsfield believed that it was necessary to send an investigator to Florida in order to prepare petitioner's alibi defense adequately. Hartsfield drafted Franklin's affidavit in which Franklin described her difficulties contacting witnesses who had moved or who did not have telephones. Hartsfield also recalled that it was important for Franklin to go to Florida to have "face-to-face conversation[s]" with Robert and Fernando Torres, to obtain additional leads for witnesses, and to establish

petitioner's exact movements (Hrg. Tr. at 44-45). Yet, the only explanation Hartsfield could offer for not sending Franklin to Florida was that funding would have been difficult to arrange (Hrg. Tr. at 50-52). Even though Franklin eventually located two key alibi witnesses, John Torres and Jenine Seda, Hartsfield admitted that she made no conscious strategic choice to limit the alibi witnesses to John and Seda (Hrg. Tr. at 73). Hartsfield had also been informed, either through her investigator or petitioner's post-arrest statement, of several possible items of documentary evidence that tended to support petitioner's alibi, yet she made no efforts to obtain any of them (Hrg. Tr. at 32).

Kaiser's performance was also lackluster. Kaiser never contacted Franklin to discuss her investigation (Hrg. Tr. at 422). Kaiser never reviewed the record to determine if Hartsfield's motion for funding to send an investigator to Florida had been granted. Kaiser never conducted an investigation in Florida due to his mistaken belief that Hartsfield's motion for funding had been denied. Rather, Kaiser worked "as best he could" from New York to secure petitioner's witnesses (Dec. 31, 2003 Kaiser Affirm.).

A failure to investigate that is a result of inattention rather than strategic judgment is unreasonable conduct for defense counsel. *Wiggins v. Smith,* 539 U.S. 510, 526 (2003). "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."

Strickland v. Washington, supra, 466 U.S. at 690-91. At the time Justice Fisch granted Hartsfield's requests for funds for a Florida investigation, Franklin had the full names of at least eleven potential alibi witnesses that petitioner believed would still be [sic] Deltona, Florida. Franklin had acquired addresses for at least five of these individuals, whom she had been unable to reach by telephone. These include Chenoa Ruiz, Ricardo Ruiz, Nerida Colon, John Torres and Jenine Seda (Post-Arrest Stmnt.; Jessie Franklin's notes, dated Sept. 23, 1996, annexed as Exhibit 19 to Miller Decl.). Within three days of his arrival in Florida, the investigator working for petitioner's post-conviction counsel was able to locate and interview several of the named but uncalled alibi witnesses whom trial counsel never interviewed, namely Chenoa Ruiz, Margarita Torres and Jeremy David Guzman (Affidavit of Joseph Barry, sworn to June 4, 2003, annexed to motion for an order pursuant to N.Y. Crim. Proc. L. § 440.10 vacating judgment, annexed as Exhibit 5 to Resp. Op.). The investigator also interviewed Fernando Torres, with whom Franklin, and possibly Kaiser, had only spoken by telephone. Thus, it appears that if Kaiser or Hartsfield had initiated an investigation in Florida, they would have been able to meet Fernando in person, as well as locate and interview Chenoa Ruiz, both of whom testified at petitioner's 440 hearing that they saw petitioner in Florida on June 19 and would have testified at petitioner's trial.

In this case, counsels' failure to locate and interview the potential witnesses whom petitioner had identified concerning a viable defense cannot be deemed strategic; it was only by contacting the witnesses that counsel could determine whether they could help petitioner's case or lead counsel to additional defense witnesses or evidence. *See Garcia v. Portuondo,* 459 F. Supp.2d 267, 287-89 (S.D.N.Y. 2006). Thus, Hartsfield and Kaiser's failure to conduct an investigation that would have uncovered additional alibi witnesses, including Chenoa Ruiz, and/or other evidence, of whose existence counsel had already been informed, was constitutionally deficient performance.

Assuming Kaiser knew before petitioner's trial that Fernando Torres could have provided useful testimony regarding petitioner's alibi[9], Kaiser's decision not to pursue Fernando as a witness appears to have been based on a mistaken belief that he could not obtain funds for his travel expenses, and the decision was flawed because it was not based on "a plausible strategic calculus or an adequate pre-trial investigation." *Pavel v. Hollins,* 261 F.3d 210, 221-22 (2d Cir. 2001); *see also Tosh v. Lockhart,* 879 F.2d 412, 414 (8th Cir. 1989) (counsel's performance was deficient for failing to procure witness testimony that counsel knew was relevant). Insofar as Kaiser

[9] As noted at page 28 [*supra*, at 125a], above, Kaiser was not sure whether he had spoken to Fernando Torres prior to petitioner's trial (Hrg. Tr. at 124).

believed that Fernando did not want to testify for reasons of expense and inconvenience, it was still unreasonable for Kaiser to forgo Fernando's testimony. *See Washington v. Smith,* 219 F.3d 620, 630 (7th Cir. 2000) (". . . placing witness convenience above the vital interests of [a] client does not make [a defense attorney's] decision reasonable – or even really strategic.") Even if Kaiser had been reasonable in his mistaken belief that Justice Fisch had not approved funding for investigative expenses for a Florida investigation, that did not excuse Kaiser from requesting assistance under a statute that permitted the Trial Court to order reimbursement of a defendant's indigent witness' reasonable travel expenses. *See* McKinney's CPL § 610.50(2). Kaiser's failure to take advantage of available procedural mechanisms to help secure the production of key witnesses was performance falling below a reasonable professional standard. *See Batten v. Griener,* 97 Civ. 2378, 2003 WL 22284187 at *9 (E.D.N.Y. 2003). Kaiser's failure to procure witnesses, which was based on Kaiser's failure to review the record and accurately learn the outcome of the motion for investigative fees, cannot be considered reasonable or strategic. Hence, his failure to arrange Fernando's presence at trial was constitutionally deficient. *See Noble v. Kelly,* 89 F. Supp.2d 443, 463 (S.D.N.Y. 2000).

Respondent suggests that since Fernando's testimony "mimicked" his son's trial testimony, defense counsel might have purposely decided not to use it because it was " 'unnecessarily cumulative' " (Resp.

Op. at 8 *quoting United States v. Luciano,* 158 F.3d 655, 660 (2d Cir. 1998)). Hartsfield's testimony at the 440 hearing does not indicate she decided to forgo any alibi witness testimony as cumulative; to the contrary, she believed additional witnesses could have helped depending on how those individuals would present at trial (Hrg. Tr. at 95). While Kaiser testified that Fernando Torres did not have new information to add to petitioner's other alibi witnesses, Kaiser also admitted that he was not sure he ever spoke with Fernando. Kaiser had no notes documenting any conversations with Fernando, and Fernando did not recall ever speaking with Kaiser (Hrg. Tr. at 193, 353-54). Kaiser also testified that he did not ask additional potential witnesses to testify because they had told him that traveling to New York would have been a hardship for them, and Kaiser believed that they would not be reimbursed for traveling expenses (Hrg. Tr. at 225). Therefore I cannot find that defense counsel concluded that Fernando's testimony would have been unnecessary and cumulative, or that counsel made any strategic choices regarding Fernando's testimony.

For the reasons stated above, I find that Hartsfield's and Kaiser's performances were objectively deficient for failing to adequately investigate petitioner's alibi and present additional witnesses at his trial.

ii. Prejudice

As to the prejudice prong of *Strickland,* I conclude that there was a reasonable probability that Fernando and Chenoa's testimony would have affected the outcome of petitioner's trial

To show prejudice as a result of his counsel's failure to call additional alibi witnesses, petitioner must show that the uncalled witness would have provided relevant, non-cumulative testimony. *United States v. Luciano, supra,* 158 F.3d at 660-67. Only two of the seven witnesses presented at the 440 hearing, Fernando Torres and Chenoa Ruiz, actually testified to seeing petitioner in Florida on June 19.

At petitioner's 440 hearing, Fernando testified consistently with John Torres that he spent part of June 19 with petitioner searching for car parts, and Chenoa testified that she saw petitioner twice on June 19 at the home of John Torres and Jenine Seda. Respondents argue that the testimony of Fernando and Chenoa was cumulative to John Torres and Jenine Seda's testimony, and therefore, petitioner's counsel cannot be found ineffective for failing to present Fernando and Chenoa at trial (Resp. Op. at 8, 9-10).

A habeas petitioner cannot satisfy the prejudice prong of *Strickland* by showing that defense counsel failed to present exculpatory witnesses that would have been merely corroborative of or cumulative to those who testified at trial. *See United States v. Luciano, supra,* 158 F.3d at 660-67. Even though

Fernando's testimony about June 19 was repetitive of his son's, cumulative or repetitive evidence will carry some weight "in a situation where inconsistent testimony and credibility are at issue." *United States v. Puco,* 338 F. Supp. 1252, 1254 (1972). Fernando's testimony was significant and non-cumulative because it would not have been as susceptible to impeachment as his son's testimony. The prosecutor argued in summation that both John Torres and Jenine Seda were "interested witnesses" who did not want to see *their* friend go to jail (Trial Tr. at 529). The Trial Judge instructed the jury that it could consider a friend of a defendant to be an interested witness whose testimony is biased (Trial Tr. at 558). Fernando, on the other hand, did not have a similar personal relationship with petitioner and could not have been impeached on that ground. When the jury is faced with a pure credibility determination, disinterested witnesses can impact the determination and should not be considered cumulative. *See Montgomery v. Petersen,* 846 F.2d 407, 413 (7th Cir. 1988) (additional alibi witness would not have been cumulative despite testimony by several other witnesses, where the additional witness did not suffer from the same credibility problems as the others); *Bohan v. Kuhlman,* 234 F. Supp.2d 231, 251 (S.D.N.Y. 2002) (trial court erred in excluding testimony of alibi witness who, if credited by the jury, would have "bolstered the testimony of [petitioner's] other alibi witnesses."); *see also Bigelow v. Williams,* 367 F.3d 562, 575 (6th Cir. 2004) (disinterested witnesses' testimony would not have been cumulative);

Washington v. Smith, 219 F.3d 620, 634 (7th Cir. 2000) (rejecting state appellate court's conclusion that uncalled alibi witnesses' testimony would have been repetitive and thus cumulative; petitioner's whereabouts at the time of the crime was not an established fact, and the witnesses would have added credibility to petitioner's alibi defense.)[10]

Respondent also claims that Fernando's testimony is not credible because he may have been "honestly mistaken" about seeing petitioner on June 19 (Resp. Op. at 7). Respondent points out that Franklin's notes of her conversation with Fernando state that Fernando was with petitioner looking for car parts in "latter June," rather than stating that Fernando reported doing so specifically on June 19 (Resp. Op. at 7). However, respondent offers no evidence that when Franklin spoke to Fernando in October, 1996, Franklin had asked Fernando specifically about June 19, or that Franklin had told Fernando that June 19 was the date of the crime for which petitioner was arrested. Moreover, respondent's argument is applicable to any uncalled witness, and, if accepted, all claims of

[10] Respondent argues that, despite the prosecution's position at trial, Jenine Seda was not an interested witness and that petitioner's counsel did, therefore, offer disinterested alibi witness testimony at trial (Resp. Op. at 18-20). At petitioner's trial, the prosecution's summation clearly accused Seda, with whom petitioner had lived, of being interested and potentially biased towards petitioner (Trial Tr. at 529). Given the prosecution's argument at trial, respondent's claimed recent epiphany is impossible to credit.

ineffective assistance could never be predicated on counsel's failure to call a witness.

Respondent also argues that Fernando's 2004 hearing testimony was unreliable because he failed to remember other details, such as his conversations with Kaiser and Franklin, what day of the week Seda was admitted to the hospital to give birth, when John and Seda moved to Pennsylvania, when petitioner traveled to and from Florida, and when petitioner was incarcerated in Florida (Resp. Op. at 7-9). Respondent's argument is unavailing. Fernando's inability to recall those other details does not necessarily mean Fernando's memory is flawed regarding June 19, 1996, the day before his first grandson was born. Moreover, since Fernando was not a close friend of petitioner, he would have no reason to remember when petitioner traveled or was incarcerated. Fernando's inability to remember these details does not excuse Kaiser's failure to communicate more fully with Fernando and to produce him as a witness at petitioner's trial.

Respondent argues that Chenoa Ruiz's testimony was also completely cumulative because her testimony would have placed petitioner at the same exact location during the same time periods as John Torres and Jenine Seda (Resp. Op. at 9-10). Chenoa testified, however, that she was not friends with petitioner; to the contrary, Chenoa testified that she did not like petitioner because she believed his presence was making things more difficult for Seda during her pregnancy (Hrg. Tr. at 500-03). Thus, like Fernando

Torres, Chenoa could not have been impeached on the ground of bias, and her testimony would not have been cumulative to that of John Torres and Jenine Seda.

Respondent also makes several unpersuasive attempts to discredit Chenoa.

Respondent first argues that Chenoa was not credible because although she recalled seeing petitioner on June 19, she could not remember when petitioner traveled back and forth between Florida and New York during his previous Florida trip, and she did not know exactly when petitioner left Florida in the end of June, 1996 (Resp. Op. at 10-12). Chenoa testified that she specifically recalled seeing petitioner at Seda's apartment on June 19 because she took Seda to the doctor that day and Seda's baby was born the following day (Hrg. Tr. at 548, 550). In addition, Chenoa testified that she had heard only a few weeks after June 19 that petitioner was arrested for a crime that occurred that day (Hrg. Tr. at 506-07). Hence, Chenoa's precise memory of seeing petitioner on June 19 is explainable because there were other significant events connected with that day and the following day. There were no other similar landmark events in Chenoa's life to mark the other dates about which she was asked. Thus I do not agree with respondent that Chenoa's 440 testimony was unreliable because she could not recall petitioner's whereabouts on dates other than June 19.

I also disagree with Respondent that the fact that petitioner sent a single letter to Chenoa during the eight years in which he was incarcerated shows that Chenoa was biased. Chenoa testified that when petitioner was in Florida, he became friendly with her infant children and their father, that petitioner wrote mainly to inquire about the children, and that petitioner's letter did not mention his case (Hrg. Tr. at 524). In addition, there is no evidence of any friendly relationship between petitioner and Chenoa prior to petitioner's trial. Respondent's allegation regarding petitioner's letter to Chenoa is not sufficient to conclude that petitioner ever had, let alone maintained, a close relationship with Chenoa.

Respondent also contends that Chenoa is unreliable because she had previously prepared a written statement that lacked some of the details she provided in her testimony, and merely stated that she knew petitioner was in Florida on June 19 because she saw him that day (Resp. Op. at 10). The omission of details from Chenoa's written statement does not call her reliability into question. There is no indication that anyone requested that Chenoa write a detailed statement that included everything she could remember about petitioner on June 19. Thus, there is no basis to conclude that, because she submitted a sparse written statement, Chenoa either lied or reconstructed details upon testifying at petitioner's 440 hearing. *See Victory v. Bombard,* 570 F.2d 66, 70 (2d Cir. 1978) (statements witness made to a detective were not prior inconsistent statements merely

because they omitted details disclosed by that witness' testimony).

No physical evidence was presented at petitioner's trial connecting petitioner to Collazo's murder; the prosecution relied solely on the eyewitness identifications of two individuals, Sanchez and Davis, neither of whom had ever met petitioner. Sanchez testified that he only saw petitioner for a minute, and Davis, who was about fifteen feet away from the shooting, appears to have witnessed the relevant events for only several seconds (Trial Tr. at 150, 53-58). A third eyewitness, Jose Diaz, believed he would be able to recognize the perpetrator yet did not identify petitioner in court (Trial Tr. at 295-96).

Eyewitness evidence, uncorroborated by physical evidence, is not overwhelming evidence. *Griffin v. Warden, Maryland Correctional Adjustment Center,* 970 F.2d 1355, 1359 (4th Cir. 1992) ("[e]yewitness identification evidence, uncorroborated by a fingerprint, gun, confession, or coconspirator testimony, is a thin thread to shackle a man for forty years."). Eyewitness identification by a stranger is even more susceptible to error than identification by someone who is otherwise familiar with an alleged perpetrator. *See Kampshoff v. Smith,* 698 F.2d 581, 585 (2d Cir. 1983) ("The identification of strangers is proverbially untrustworthy" *quoting* Felix Frankfurter, *The Case of Sacco & Vanzetti* 30 (1927).).

The addition of Fernando Torres and Chenoa Ruiz would have presented the jury with a total of

four alibi witnesses to contradict the prosecution's two eyewitnesses, and Fernando and Chenoa were substantially disinterested in the outcome of the trial.[11] "In a case involving identification and identification alone, it is not easy to imagine a defense lawyer who would pass on the chance to bolster the defense with [additional alibi witnesses] – particularly since eyewitness evidence is 'precisely the sort of evidence that an alibi defense refutes best.'" *See Bigelow v. Williams, supra,* 367 F.3d at 576 *quoting Griffin v. Warden, Maryland Correctional Adjustment Center, supra,* 970 F.2d at 1359.

In light of the thin evidence presented by the prosecution at petitioner's trial, the additional alibi

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[11] None of the other five witnesses at petitioner's hearing, or items of documentary evidence presented and described, establish petitioner's presence in Florida on the day of the shooting. The failure to offer this evidence could not, therefore, have prejudiced petitioner. *United States v. Luciano, supra,* 158 F.3d at 660-67 (to show prejudice from the failure of counsel to call witnesses, petitioner must show that the uncalled witnesses would have provided relevant testimony); *Buitrago v. Scully,* 705 F.Supp. 952, 954 (S.D.N.Y. 1989) (counsel not ineffective for failing to present alibi witness where petitioner fails to show witness knew where petitioner was at the time of the crime); *United States v. Puco,* 338 F. Supp. 1252, 1254 (D.C.N.Y. 1972) (witness' testimony that he was with the defendant during the afternoon the day of the crime is not relevant alibi evidence when the crime occurred in the evening). Since the failure to call these witnesses and offer this evidence could not have prejudiced petitioner, there is no need to address whether counsel's failure to offer this evidence constituted deficient performance. *Strickland v. Washington, supra*, 466 U.S. at 697.

testimony from Fernando and Chenoa presented at petitioner's post-conviction hearing was sufficient to "undermine confidence in the outcome" of petitioner's trial. *Strickland, supra,* 466 U.S. at 694. Thus I find that petitioner has satisfied both prongs of *Strickland.* Nevertheless, I cannot conclude that the state court's holding to the contrary was an unreasonable application of, or contrary to, Supreme Court precedent.

d. Application of the AEDPA Standard to Petitioner's Claim

As discussed above, Justice Davidowitz rejected petitioner's ineffective assistance of counsel claim, applying New York State's "meaningful representation" standard as articulated by the New York Court of Appeals in *People v. Benevento, supra,* 91 N.Y.2d 708, 697 N.E.2d 584, 674 N.Y.S.2d 629. This standard for analyzing claims of ineffective assistance of counsel "is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case." *People v. Benevento, supra,* 91 N.Y.2d at 714, 697 N.E.2d at 588, 674 N.Y.S.2d at 633. Petitioner argues that Justice Davidowitz's application of the "meaningful representation" standard was both contrary to, and an unreasonable application of *Strickland* (Pet. Reply at 16).

In his 440 Decision and Order, Justice Davidowitz looked at a number of issues routinely considered by New York courts in analyzing whether

or not counsels' errors amounted to ineffective assistance, such as did counsel perform competently in other respects and were counsels' errors so seriously prejudicial as to compromise a defendant's right to a fair trial (440 Order at 16-17, *citing People v. Flores,* 84 N.Y.2d 184, 639 N.E.2d 19, 615 N.Y.S.2d 662 (1994), *People v. Aiden,* 45 N.Y.2d 394, 380 N.E.2d 272, 408 N.Y.S.2d 444 (1978), and *People v. Adams,* 12 A.D.3d 523, 783 N.Y.S.2d 867 (2d Dep't 2004)). Justice Davidowitz concluded that both attorneys filed all appropriate motions, conducted an investigation that was "within the scope of information" available to them, competently examined witnesses and made competent opening and closing statements, and, "most importantly, a credible alibi defense was presented to the jury" (440 Order at 17). Without specifically addressing the testimony of Fernando Torres and Chenoa Ruiz, Justice Davidowitz then concluded that the witnesses presented at the hearing were "questionable" and "not as persuasive as [John Torres and Jenine Seda] who . . . were rejected by the jury" (440 Order at 21-22). Thus, Justice Davidowitz found that the outcome of petitioner's trial was "unimpeached and 'amply supported by the evidence'" (440 Order at 22, *quoting People v. Jackson,* 74 A.D.2d 585, 424 N.Y.S.2d 484 (2d Dep't 1980), *aff'd,* 52 N.Y.2d 1027, 420 N.E.2d 97, 438 N.Y.S.2d 299 (1981)). Petitioner argues that Justice Davidowitz's "meaningful representation" analysis was contrary to *Strickland* (Pet. Mem. at 39).

The Second Circuit has repeatedly held that New York's "meaningful representation" standard for analyzing habeas claims of ineffective assistance of counsel, as articulated in *People v. Benevento, supra,* 91 N.Y.2d at 714, 697 N.E.2d at 588, 674 N.Y.S.2d at 633, is not contrary to *Strickland. See Eze v. Senkowski,* 321 F.3d 110, 122-23 (2d Cir. 2003); *Lindstandt v. Keane, supra,* 239 F.3d at 198. Nevertheless, petitioner argues that the Second Circuit's more recent opinion in *Henry v. Poole, supra,* 409 F.3d 48, "suggested that New York's 'flexible' focus on the overall fairness of the petitioner's trial might dilute *Strickland*'s prejudice standard by requiring something more than a reasonable probability of a different outcome" (Pet. Mem. at 39, *quoting Henry v. Poole, supra,* 409 F.3d at 70-71). Specifically, the Court noted in *Henry* that

> in light of the *Strickland* principle that an ineffective assistance claim is established if the court concludes that there is a reasonable probability that but for counsel's professionally deficient performance the outcome of the proceeding would have been different, we find it difficult to view so much of the New York rule as holds that "*whether defendant would have been acquitted of the charges but for counsel's errors is . . . not dispositive,*" *Benevento,* 91 N.Y.2d at 714, . . . as not "contrary to" the prejudice standard established by *Strickland.*

Henry v. Poole, supra, 409 F.3d at 71 (emphasis in original). Several District Court decisions within the

Circuit have confirmed that *Henry* does question the continuing vitality of the Second Circuit prior decisions that found New York's "meaningful representation" is not contrary to *Strickland. Acencio v. McKinney,* 05-CV-1026 (NGG), 2007 WL 2116253 at *14 n.20[,] (E.D.N.Y. July 20, 2007); *Remy v. Graham,* 06 CV 3637 (JG), 2007 WL 496442 at *5 (E.D.N.Y. Feb. 12, 2007); *Baskerville v. Dennison,* 04 Civ. 10261 (PKC), 2005 WL 3535067 at *6 (S.D.N.Y. Dec. 27, 2005). Nevertheless, the panels in both *Henry, supra,* 409 F.3d at 70, and *Eze v. Senkowski,* 321 F.3d 110, 124 (2d Cir. 2003), expressly noted that, in the absence of an intervening Supreme Court or *en banc* Circuit decision, they were "bound" by the Circuit's precedents holding that New York's "meaningful representation" standard was not contrary to *Strickland.* Given that the Second Circuit has expressly found itself bound by these precedents, it would be clearly improper for me to conclude that I had greater discretion than the Court with the authority to set the law for the Circuit. Accordingly, I am bound by precedent to conclude that the "meaningful representation" standard is not contrary to Strickland. Nevertheless, I will consider petitioner's arguments that Justice Davidowitz's analysis of petitioner's ineffective assistance of counsel claim was contrary to *Strickland,* as doing so would not affect the outcome of this case.

Petitioner argues that Justice Davidowitz's analysis was contrary to *Strickland* because his opinion emphasized that Hartsfield and Kaiser's

misunderstandings regarding the granting of expenses to investigate were unintentional errors. Petitioner contends this "honest heart" standard imposes a heavier burden on petitioner than *Strickland's* "reasonable professional" standard because it requires petitioner to demonstrate that trial counsel had an improper motive for his or her objectively deficient performance (Pet. Mem. at 39-40), *citing Cargle v. Mullin,* 317 F.3d 1196, 1204-05 (10th Cir. 2003). I disagree with petitioner that Justice Davidowitz's opinion petitioner placed such a burden on petitioner. Unlike the petitioner in *Cargle,* petitioner here was not required to establish why his counsel failed to find and present additional witnesses or evidence at his trial. *Cargle v. Mullin, supra,* 317 F.3d at 1205. Justice Davidowitz's opinion does not suggest that petitioner was required to show anything more than what *Strickland* requires: that his counsel were deficient and that because of such deficiency the outcome of his trial might have been different. Justice Davidowitz's opinion discussed the positive aspects of counsels' performance and counsels' "integrity" to support his conclusion that petitioner received a fair trial; he did not deny petitioner's motion for failing to establish that Kaiser and Hartsfield had improper motives. Hence, Justice Davidowitz's emphasis on counsel's lack of bad intentions was not contrary to, nor was it an unreasonable application of, the *Strickland* standard.

Petitioner also argues that Justice Davidowitz's opinion was contrary to *Strickland* because it relied

on a formulation of prejudice that precludes relief where the verdict was "amply supported by the evidence" (440 Order at 22, *quoting People v. Jackson, supra,* 74 A.D.2d at 587, 424 N.Y.S.2d at 485), and that such a standard is diametrically different from *Strickland's* requirement that a petitioner show only a reasonable probability of acquittal had counsel performed adequately (Pet. Mem. at 40). When referring to *People v. Jackson, supra,* 74 A.D.2d at 587, 424 N.Y.S.2d at 485, Justice Davidowitz was not saying petitioner's motion should be denied simply because there was ample evidence in support of petitioner's guilt. Rather, he was merely taking into consideration the strength of respondent's case in reaching his conclusion. Consideration of the strength of the prosecution's case is completely appropriate under *Strickland v. Washington, supra*, 466 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."); *Baskerville v. Dennison, supra,* 2005 WL 3535067 at *10 ("In assessing the question of prejudice, the Court must take into account the totality of the evidence before the trial court."). It was not contrary to or an unreasonable application of *Strickland* for the state court to find the prosecution's case was sufficiently strong that a jury verdict would have been the same if petitioner had presented additional alibi witnesses.

Petitioner also contends that Justice Davidowitz unreasonably applied *Strickland* by focusing on counsels' competent performance in other areas while

assessing whether counsel was ineffective for failing to adequately investigate the alibi defense (Pet. Mem. at 42). Petitioner argues that the Court in *Henry v. Poole, supra,* 409 F.3d at 72, "noted that when the New York Court of Appeals emphasized 'counsel's competency in all other respects' in determining 'meaningful representation,' it was failing to apply the *Strickland* standard "'at all'" (Pet. Mem. at 39, *citing Henry v. Poole,* 409 F.3d at 72). However, the *Henry* court did not fault the New York Court of Appeals for *emphasizing* counsel's competency; the Court faulted it for "it's [sic] *reliance*" on counsel's competent performance in ways that were not the subject of the ineffectiveness claims. *Henry v. Poole, supra,* 409 F.3d at 72 (emphasis added). I disagree with petitioner's contention that Justice Davidowitz found that "counsel's competency in some areas of their legal representation [can] compensate for significant deficiencies in other areas" (Pet. Reply at 17). Rather, Justice Davidowitz looked at counsel's performance as a whole, including the alibi evidence that was presented at trial, to reach his conclusion that petitioner failed to demonstrate that further investigation in Florida could have resulted in a different jury verdict. In *Strickland* terms, Justice Davidowitz held that petitioner failed to show he was prejudiced by counsels' deficiencies – a conclusion which, if reasonable, is sufficient by itself to deny habeas relief. *Strickland v. Washington, supra*, 466 U.S. at 697 ("[A] court need not determine whether counsel's performance was deficient . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of

sufficient prejudice . . . that course should be followed."). Although I would reach a different result if the matter were before me for *de novo* review, the evidence is not so one-sided that Justice Davidowitz's conclusion can be characterized as unreasonable. Hence I do not find that the state court's consideration of the totality of counsel's performance to have been contrary to or an unreasonable application of *Strickland.*

e. Summary

Accordingly, despite the merits of petitioner's ineffective assistance of counsel claim, I conclude that the state court's rejection of petitioner's claim is erroneous but not "unreasonable" or "contrary to" the United States Supreme Court's precedent in *Strickland.* Thus, in light of the deference owed to the state's decision under AEDPA, petitioner's claim for relief based on the ineffective assistance of counsel should be denied.

2. Petitioner's Batson Claim

Petitioner next claims that the prosecutor's use of her first six peremptory challenges to strike African-American jurors established a *prima facie* case of racial discrimination, and that the Trial Court erred by failing to require the prosecutor to provide race-neutral explanations for her choices as required by *Batson v. Kentucky,* 476 U.S. 79 (1986). Petitioner further argues that the Appellate Division's rejection

of his *Batson* challenge was an unreasonable application of the Supreme Court's precedent.

a. Jury Selection and State Court Proceedings

The twelve jurors and three alternate jurors who heard the case against petitioner were selected through three rounds of *voir dire.* Because New York classifies murder as a Class A felony, both the prosecution and defense had twenty peremptory challenges, exclusive of challenges to potential alternate jurors. N.Y. Crim. Proc. L. § 270.25(a). It appears from the record that the jury was selected using the "jury box" system, commonly used in criminal trials in New York. Under this system, groups of prospective jurors, randomly selected from the venire, are called to the jury box and questioned. Counsel then exercise challenges for cause. After "for cause" challenges are resolved, counsel exercise their peremptory challenges. The process is repeated until a jury is empaneled. *See generally Sorto v. Herbert,* 497 F.3d 163, 166 (2d Cir. 2007) (describing "jury box" selection system).

During the first round of jury selection in petitioner's case, sixteen venire persons were called to the jury box. Two were removed on consent (Jury Tr.[12] I at 88). After an unsuccessful challenge to one

[12] "Jury Tr." refers to the transcript of jury selection proceedings in petitioner's case.

prospective juror for cause (Jury Tr. I at 90-92), the prosecution exercised four peremptory challenges, including a challenge to the prospective juror who was unsuccessfully challenged for cause (Jury Tr. I at 91). The defense exercised two peremptory challenges (Jury Tr. I at 92-93), and the remaining eight individuals were sworn in as jurors (Jury Tr. I at 94).

In the second round of jury selection, seventeen individuals were called to the jury box (Jury Tr. I at 100-02). After four of these individuals were excused on consent (Jury Tr. I at 156-60), Justice Fisch asked counsel if they had any peremptory challenges as to the first four prospective jurors remaining in the second round (Jury Tr. I at 160). The prosecution challenged one of those four, and then the defense challenged two of them (Jury Tr. I at 161). Justice Fisch then invited counsel to exercise their peremptory challenges with regards to the next three jurors (Jury Tr. at 161). The prosecution challenged one of those three individuals (Jury Tr. I at 161).

At that point, the following colloquy occurred:

> [Defense Counsel:] Judge, most respectfully, and I hate to do it, but it's reached the point now where I notice a pattern of challenges that are consistent only by one factor and that's the race of the person that's being challenged, all of whom are black. Every single one of them.

Now, granted this is the Bronx and there's a lot of black jurors and there's a couple or a few that she didn't take off, but the ones that she did take off without exception are Afr[ican]-Americans.

THE COURT: Let['s] see if there is a pattern.

(Whereupon, there is a brief pause in the proceedings.)

THE COURT: I do not see a prima faci[e] case of exercised peremptory challenges by race. The People have exercised six peremptories of Afr[ican-] Americans and there were four that were not challenged by her, three of whom are jurors, one of them whom you challenged. I deny your challenge.

[Defense Counsel:] All right.

* * *

THE COURT: As a matter of fact, I should say that five [African-Americans] were not challenged. Six were challenged, five were not.

[Defense Counsel:] Yeah, but I don't think – it's not necessarily who['s] not challenged. I think it is who is challenged.

THE COURT: All right, that's my ruling. I do not see a prima faci[e] case.

(Jury Tr. I at 161-63).

Defense counsel never raised any additional arguments concerning the prosecution's use of its peremptory challenges. The prosecution subsequently exercised four more peremptory challenges in the remainder of the second round and during the third round of jury selection (Jury Tr. I at 168, Jury Tr. II at 84-87). The record does not reflect the race of any of the subsequently challenged venire persons or the final racial make-up of the jury.

Petitioner argued on direct appeal that the prosecution's use of its first six peremptory challenges exclusively against African-Americans established a *prima facie* case of discrimination under *Batson,* and that the prosecution should have been required to provide race-neutral reasons for its challenges (App. Div. Br. at 46-49). The Appellate Division rejected petitioner's arguments, stating:

> Defendant failed to make a prima facie showing of racial discrimination by the prosecution in the exercise of its peremptory challenges, particularly in light of the racial makeup of the panel of prospective jurors

> (*see, People v Ware,* 245 AD2d 85, *lv denied* 91 NY2d 978). The mere number of peremptory challenges exercised by the prosecution against African-Americans did not establish a prima facie case and defendant failed to show disparate treatment of similarly situated panelists or other relevant circumstances to raise an inference of a discriminatory purpose (*see, People v Jenkins,* 84 NY2d 1001; *People v Bolling,* 79 NY2d 317).

People v. Rosario, supra, 288 A.D.2d at 143, 733 N.Y.S.2d at 406-07.

The Appellate Division's decision clearly constitutes a decision on the merits of petitioner's *Batson.* It addresses the substance of the claim and does not remotely suggest any procedural deficiency. Accordingly, the Appellate Division's decision is entitled to the deferential standard of review set forth in the AEDPA, and relief can be granted only if the Appellate Division's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254; *Sorto v. Herbert, supra,* 497 F.3d at 169.

b. Analysis

In *Batson v. Kentucky, supra,* 476 U.S. at 79, the Supreme Court held that a prosecutor may not use peremptory challenges to discriminate against potential jurors along racial lines. "[T]he Equal Protection Clause forbids the prosecutor to challenge potential

jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky, supra,* 476 U.S. at 89.

The *Batson* Court formulated a three-part test "for assessing a prima facie case under the Equal Protection Clause."

> The *Batson* Court . . . establish[ed] a three-step burden-shifting framework for the evidentiary inquiry into whether a peremptory challenge is race-based, [476 U.S.] at 96-98, 106 S.Ct. 1712: First, the moving party – i.e., the party challenging the other party's attempted peremptory strike – must make a prima facie case that the nonmoving party's peremptory is based on race. *Batson,* 476 U.S. at 96-97, 106 S.Ct. 1712; *Hernandez v. New York,* 500 U.S. 352, 358, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). Second, the nonmoving party must assert a race-neutral reason for the peremptory challenge. *Batson,* 476 U.S. at 97-98, 106 S.Ct. 1712; *Hernandez,* 500 U.S. at 358-59, 111 S.Ct. 1859. The nonmoving party's burden at step two is very low. Under *Purkett v. Elem,* 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam), although a race-neutral reason must be given, it need not be persuasive or even plausible. *Id.* at 768, 115 S.Ct. 1769. Finally, the court must determine whether the moving party carried the burden of showing by a preponderance of the evidence that

> the peremptory challenge at issue was based on race. *Batson,* 476 U.S. at 96, 98, 106 S.Ct. 1712; *Hernandez,* 500 U.S. at 359, 111 S.Ct. 1859.

McKinney v. Artuz, 326 F.2d 87, 97[-]98 (2d Cir. 2003) (footnote omitted); *accord Sorto v. Herbert, supra,* 497 F.3d at 169-70; *Frazier v. New York,* 187 F. Supp.2d 102, 114 (S.D.N.Y. 2002), *aff'd mem.,* 156 Fed. Appx. 423 (2d Cir. 2005).

"To establish a *prima facie* case, 'a defendant must show facts and circumstances that raise an inference that the prosecutor used the peremptory challenge to exclude potential jurors from the petit jury on account of their race.'" *Sorto v. Herbert, supra,* 497 F.3d at 170, *quoting Overton v. Newton,* 295 F.3d 270, 276 (2d Cir. 2002). The burden of making a *prima facie* showing under a *Batson* challenge is not onerous and is analogous to the burden borne by the plaintiff in a Title VII case to make out a *prima facie* case under the *McDonnell Douglas* test. *See Truesdale v. Sabourin,* 427 F. Supp.2d 451, 458-59 (S.D.N.Y. 2006); *see also Williams v. Bruge* [sic]*, supra,* 2005 WL 2429445 at *5 ("[A] prima facie case under *Batson* demands only a 'minimal burden' from the claimant."). The party asserting the challenge need not show that it is more likely true than not that discriminatory animus underlies the adversary's conduct; all that need be shown to establish a *prima facie* case is "evidence sufficient to permit the trial judge to draw an inference that discrimination has

occurred." *Johnson v. California,* 545 U.S. 162, 170 (2005).

There is no formula for determining what showing is sufficient to establish a *prima facie* case of discriminatory use of peremptory challenges. *Tankleff v. Senkowski,* 135 F.3d 235, 249 (2d Cir. 1998). Rather,

> [i]n deciding whether the defendant has made the requisite [*prima facie*] showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against all black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative.

Batson v. Kentucky, supra, 476 U.S. at 96-97; *accord Overton v. Newton, supra,* 295 F.3d at 277-78; *see Isaac v. Greiner,* 01 Civ. 2178 (PKC), 2005 WL 1713036 at *5 (S.D.N.Y. July 19, 2005).

"[T]he threshold decision concerning the existence of a *prima facie* case of discriminatory use of peremptory challenges involves both issues of fact and an issue of law." *United States v. Alvarado,* 891 F.2d 439, 443 (2d Cir. 1989), *vacated on other grounds,* 497 U.S. 110 (1990). Where the state courts have issued a decision on the merits concerning the existence of a *prima facie* case, that decision is

entitled to the deferential standard of review set forth in the AEDPA. *Overton v. Newton, supra,* 295 F.3d at 277. Thus, a prisoner challenging the trial court's resolution of a *Batson* challenge through a habeas corpus petition has to overcome a "presumption of correctness":

> We review a district court's ruling on a petition for a writ of habeas corpus *de novo. See English v. Artuz,* 164 F.3d 105, 108 (2d Cir. 1998). Because a trial court's determination of whether a juror was struck for a discriminatory reason turns largely on the judge's observations of the attorneys and prospective jurors and an evaluation of their credibility, "a reviewing court ordinarily should give those findings great deference." *Hernandez v. New York,* 500 U.S. 352, 364, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). More particularly, when reviewing a *Batson* challenge in the context of a habeas petition, a trial court's conclusion that a peremptory challenge was not exercised in a discriminatory manner is entitled to a presumption of correctness, except, *inter alia,* to the extent that the trial court did not resolve the factual issues involved in the challenge or if the finding is not fairly supported by the record. *See* 28 U.S.C. §§ 2254(d)(1) (presumption of correctness not applicable if "the merits of the factual dispute were not resolved in the State court hearing") and (d)(8) (1994) (presumption of correctness not applicable if state court's "factual determination is not fairly supported by the record"); *see also Purkett v. Elem,* 514

> U.S. 765, 769, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) ("[T]he factual findings of state courts are presumed to be correct, and may be set aside, absent procedural error, only if they are not fairly supported by the record.") (internal quotation marks omitted); *Washington v. Schriver,* 240 F.3d 101, 110 (2d Cir. 2001) (stating that the factual findings of state trial and appellate courts are entitled to a presumption of correctness absent special circumstances, including a determination that the factual finding is not fairly supported by the record).

Galarza v. Keane, supra, 252 F.3d at 635 (footnote omitted). The burden is on petitioner to rebut the trial court's presumption of correctness by clear and convincing evidence. *Williams v. Burge,* 04 Civ. 2590 (PKC), 2005 WL 2429445 at *3 (S.D.N.Y. Oct. 3, 2005), *quoting Parsad v. Greiner,* 337 F.3d 175, 181 (2d Cir. 2003). Hence, "[a] federal court reviewing a state court determination that no *prima facie* [case] existed must accord substantial deference to that determination." *Williams v. Burge, supra,* 2005 WL 2429445 at *3.

In light of the deferential standard of review afforded to state court decisions in the context of a habeas corpus petition, the Court of Appeals seems to have suggested that a finding on a direct appeal in a federal criminal case that a particular set of facts supports a *Batson prima facie* case does not necessarily imply that a state court's decision reaching the opposite result on the same facts is contrary to or

constitutes an unreasonable application of federal law. *Sorto v. Herbert, supra,* 497 F.3d at 172; *Overton v. Newton, supra*, 295 F.3d at 280 n.12.

Finally, since the petitioner in a habeas proceeding bears the burden of demonstrating a violation of his constitutional rights, deficiencies in the record that make it impossible to determine whether the evidence supports an inference of discrimination require that the claim be rejected. *Sorto v. Herbert, supra,* 497 F.3d at 172-73.

Petitioner contends that he made out a *prima facie* case under *Batson* because the prosecution's use of peremptory challenges against African-Americans was grossly disproportionate to the percentage of African-Americans who made up the pool of prospective jurors after challenges for cause and after jurors had been excused on consent. Specifically, at the time the *Batson* challenge was made, a total of 33 prospective jurors had been called to be questioned; a total of six had been excused on consent; and the Trial Court had invited counsel to exercise peremptory challenges against a total of 21 prospective jurors.[13] The prosecution made peremptory challenges directed at six

[13] In the first round, the Trial Court invited counsel to exercise their peremptory challenges against all 14 prospective jurors who remained after two were excused on consent. In the second round, the Trial Court subdivided the prospective jurors into a group of four and then a group of three. Petitioner made his *Batson* challenge after peremptories directed at the group of three were made. See pages 64-65 [*supra*, at 159a-161a], above.

African-Americans; the Trial Court noted that there were five African-Americans who the prosecution did not challenge. Thus, of the 21 prospective jurors against whom the prosecution could have made peremptory challenges, 11, or 52%, were African-Americans, yet 100% of the prosecution's peremptory challenges were directed at African-Americans.

Analogous facts were presented in *United States v. Alvarado,* 923 F.2d 253 (2d Cir. 1991) in which the prosecution exercised its peremptory challenges against two African-American prospective jurors, two white prospective jurors and one Hipanic [sic] prospective juror. The prosecution waived its sixth peremptory challenge. In addition, the prosecution used the one peremptory challenge it had for alternate jurors to strike an African American. *United States v. Alvarado, supra,* 923 F.2d at 255.

After assuming that minorities represented 29% of the pool of prospective jurors, the Court of Appeals found that the pattern of peremptory challenges "strongly support[ed] a *prima facie* case under *Batson*:"

> Here, the prosecution's challenge rate against minorities was 50 percent (three of six) in the selection of the jury of 12, and 57 percent (four of seven) in the selection of the jury of 12 plus alternates. Whether this rate creates a statistical disparity would require knowing the minority percentage of the venire; for example, if the minority percentage of the venire was 50, it could be expected that a

prosecutor, acting without discriminatory intent, would use 50 percent of his challenges against minorities. Only a rate of minority challenges significantly higher than the minority percentage of the venire would support a statistical inference of discrimination. We are not informed of the minority percentage of the venire in this case, but we may accept as a surrogate for that figure the minority percentage of the population of the Eastern District, from which the venire was drawn. That percentage is 29. *See Alvarado I,* 891 F.2d at 444 & n.5.

We think a challenge rate nearly twice the likely minority percentage of the venire strongly supports a *prima facie* case under *Batson.* The Government opposes this conclusion, pointing to the prosecution's waiver of a challenge in the fifth round, when minority veniremen were in the jury box, subject to peremptory challenge. Though failure to exercise an available challenge against minority veniremen has been mentioned in the decisions of some courts finding no prima facie case of discrimination, *see United States v. Moore,* 895 F.2d 484, 486 n. 5 (8th Cir. 1990); *United States v. Grandison,* 885 F.2d 143, 148 (4th Cir. 1989)*, cert. denied,* 495 U.S. 934, 110 S.Ct. 2178, 109 L.Ed.2d 507 (1990), the fifth round waiver here does not defeat a *prima facie* case. The discrimination condemned by *Batson* need not be as extensive as numerically possible. A prosecutor may not avoid the *Batson* obligation to provide race-neutral explanations for what

> appears to be a statistically significant pattern of racial peremptory challenges simply by forgoing the opportunity to use all of his challenges against minorities.

923 F.2d at 256. *See also Overton v. Newton, supra,* 295 F.3d at 278 ("[W]e have no doubt that statistics, alone and without more, can, in appropriate circumstances, be sufficient to establish the requisite *prima facie* showing under *Batson*.").

Similarly, in *Truesdale v. Sabourin,* 427 F.Supp.2d 451 (S.D.N.Y. 2006), 19 individuals made up the panel of prospective jurors, 14 of whom were African-Americans. As of the time the *Batson* challenge was made, the prosecution had exercised eight peremptory challenges, all of which were directed at African-Americans. The Trial Court concluded that these statistics were insufficient to establish a *prima facie* case under *Batson*[,] 427 F. Supp.2d at 454-55, and the Appellate Division affirmed the Trial Court's conclusion on direct appeal.

The prisoner then filed a petition for a writ of habeas corpus in this Court. After noting that the burden at the initial step of *Batson* is not a significant one, the Honorable Denise L. Cote, United States District Judge, concluded that petitioner had made a *prima facie* case of a *Batson* violation.

> When a defendant relies on statistical arguments to establish a *prima facie* case of discriminatory jury selection, "a rate of minority challenges significantly higher than

> the minority percentage of the venire would support a statistical inference of discrimination." *Alvarado,* 923 F.2d at 255. At the time the *Batson* challenge was made in this case, the rate of challenges against black members of the venire was 100% (8/8), and the percentage of blacks in the venire was 74% (14/19). Black prospective jurors were thus struck at a rate 36% higher than would be expected if peremptory challenges were exercised randomly across the venire. To be sure, this disparity is far below the greater than 100% difference relied upon by the Second Circuit in *Alvarado, id*. at 256, but that case did not purport to, and should not be read to, establish a minimum threshold for *prima facie* claims of discrimination. Were it otherwise, no inference of discrimination would be possible where members of the targeted group compose more than 50% of the venire.

427 F. Supp.2d at 461.

In this case, as in both *Alvarado* and *Truesdale*, the prosecution used 100% of the peremptory challenges actually exercised up to the time of the *Batson* challenge to strike only African-American prospective jurors despite the fact that African-American prospective jurors made up a significantly smaller percentage of the pool of prospective jurors. Here, that percentage was 52% (11 out of 21). *Alvarado* teaches that this disparity is sufficient to trigger the prosecution's obligation to proffer racially neutral reasons for its challenges.

In support of his position, respondent cites to a number of facts and cases; none of his arguments are convincing.

Like the Trial Court, respondent cites the fact that a number of African-Americans were not challenged (Resp. Op. at 47-48). *Alvarado,* however, expressly rejected this argument:

> The discrimination condemned by *Batson* need not be as extensive as numerically possible. A prosecutor may not avoid the *Batson* obligation to provide race-neutral explanations for what appears to be a statistically significant pattern of racial peremptory challenges simply by foregoing the opportunity to use all of his challenges against minorities.

United States v. Alvarado, supra, 923 F.2d at 256. Moreover, this argument misses the point of *Batson*. *Batson* was intended, among other things, to prohibit the use of a race as a factor in jury selection, regardless of whether a minority is entirely excluded from the jury or the number of minority jury members is merely limited. *See Walker v. Girdich,* 410 F.3d 120, 123 (2d Cir. 2005) ("[U]nder *Batson* and its progeny, striking even a single juror for a discriminatory purpose is unconstitutional."); *accord Green v. Travis,* 414 F.3d 288, 297 (2d Cir. 2005); *United States v. Vasquez-Lopez,* 22 F.3d 900, 902 (9th Cir. 1994) (stating that "[t]o establish a *prima facie* case, [the defendant] did not need to show that the prosecution had engaged in a pattern of discriminatory strikes against more than one prospective juror. We have

held that the Constitution forbids striking even a single prospective juror for a discriminatory purpose."); *Jones v. Ryan,* 987 F.2d 960, 972 (3d Cir. 1993) (noting that the striking of even a single juror based on race violates the Constitution); *Reyes v. Greiner,* 340 F. Supp.2d 245, 266 (E.D.N.Y. 2004) ("[I]t is settled law that a *Batson* violation occurs where the prosecution or the defendant has been found to have struck a single juror on the basis of race, even where the prosecution or the defendant waived peremptory challenges, leaving other persons of that race on the jury." (citations omitted)).

Next, respondent argues that the result in this case should be governed by the decisions in *Overton v. Newton, supra,* 295 F.3d 270 and *Williams v. Burge, supra,* 2005 WL 2429445 (Resp. Op. at 45-48). Although these cases have some similarity to this case, I conclude that they are both distinguishable and not controlling.

In *Overton* the Second Circuit rejected a claim by a habeas petitioner that a state trial judge had incorrectly concluded there was no *prima facie* case under *Batson*. The petitioner in *Overton* made his *Batson* challenge after two rounds of jury selection and after the prosecution had exercised peremptory challenges against seven of the eleven African-Americans potential jurors and three against non-African-Americans. 295 F.3d at 273-74. The *Batson* challenge was not renewed at the conclusion of jury selection, and the record did not reveal what the actual composition of the jury was. *Overton v. Newton, supra,* 295 F.3d at

279. The Court of Appeals found that the record before it did not establish an unreasonably erroneous decision by the Trial Court, stating:

> Here, the prosecutor used four peremptory challenges in the first round of jury selection and struck two of five African-American potential jurors from the venire. Three African-American jurors were seated. In the second round, there were six African-American potential jurors in the box; one was struck for cause and the other five were excluded as a result of peremptory strikes by the prosecutor. At this point, before jury selection was completed and before the above facts were even fully established on the record, petitioner made his *Batson* challenge. It was at this stage that the trial court denied it; we cannot say that, in doing this, it unreasonably applied the *Batson* principle.

295 F.3d at 279.

In *Williams,* during the first round of jury selection, the prosecutor had used his first five peremptory challenges against African-American potential jurors when the defendant made a *Batson* motion. The trial judge found that the motion was premature at that point, stating:

> I quite frankly feel that a prima facie case has not been made out. . . . Not at this point. [Five strikes is] not enough, in my judgment, to require the People to present me with non-contextural [*sic*]. It may be when we concluded the selection process for the first

> 17 that I will revisit the issue, but right now, no.

2005 WL 2429445 at *1. The first round of jury selection then continued, and the prosecutor exercised three additional peremptory challenges, all of which were directed at non-African-American potential jurors. *Williams v. Burge, supra,* 2005 WL 2429445 at *2.

Your Honor concluded that the Trial Judge's determination that no *prima facie Batson* claim had been established was not an unreasonable application of federal law. *Williams v. Burge, supra,* 2005 WL 2429445 at *6-7. Although your Honor expressed skepticism concerning whether denial of a *Batson* claim prior to the conclusion of jury selection could ever constitute an unreasonable application of federal law, this does not appear to have been the basis for the decision. *Williams v. Burge, supra,* 2005 WL 2429445 at *6. Rather your Honor distinguished Williams's claim from *Green v. Travis, supra,* 414 F.3d 288 and from *Batson* itself on the ground that not all of the peremptory claims exercised by the prosecution were directed at minorities and the challenges were not used to eliminate an entire minority from the jury. *Williams v. Burge, supra,* 2005 WL 2429445 at *6.

I conclude that both *Overton* and *Williams* are distinguishable because in neither case did the prosecution direct its peremptory challenges solely at African-Americans, as the prosecutor did in this case.

Moreover, nothing in *Overton* suggests that the Court of Appeals intended to overrule *Alvarado,* which unequivocally held that a disproportionate use of peremptory challenges against a minority can satisfy the requirement of a *prima facie* case under *Batson.* Although I appreciate that the Court of Appeals has repeatedly noted that *Batson* claims raised in habeas petitions are entitled to more lenient review than similar claims raised on direct appeals from federal convictions, the rate of challenge here – 100% of the challenges exercised against a minority group that made up only 52% of the panel – was sufficiently disparate to at least require the prosecution to proffer a racially neutral reason for its challenges.

Finally, respondent also offers hypothetical racially-neutral reasons for the prosecution's peremptory challenges (Resp. Op. at 52-53). Such after-the-fact suggestions are insufficient to remedy a *Batson* violation. "A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El v. Dretke,* 545 U.S. 231, 252 (2005); *accord Rogers v. Artuz,* 00 Civ. 2718 (JBW), 03 Misc. 0066 (JBW), 2007 WL 2815692 at *6 (E.D.N.Y. Sep. 24, 2007).

The prosecutor's disproportionate strikes of black jurors, despite the fact that not all blacks were stricken from the jury, was sufficient to raise an inference of discrimination and, therefore, sufficient

to establish a *prima facie* case under *Batson*. Thus, the Trial Court erred in not requiring the prosecutor to offer race-neutral reasons for her peremptory challenges and the appellate divisions' finding otherwise was an unreasonable application of clearly established federal law.

c. Relief

There are three options available to a court in fashioning a remedy for a petitioner's successful habeas claim based on a state court's *Batson* rulings.

> When a state court fails to fulfill its duties under *Batson,* a federal court sitting in habeas review has three options in its selection of a remedy. The federal court may "(1) hold a reconstruction hearing and take evidence regarding the circumstances surrounding the prosecutor's use of the peremptory challenges . . . ; (2) return the case to the state trial court on a conditional writ of habeas corpus so that the state court could conduct the inquiry on its own; or (3) order a new trial." *Harris,* 346 F.3d at 347 (citation omitted). There are some limits, however, to the district court's discretion to choose among these remedial options. Most importantly, the Second Circuit has cautioned that "if appropriate findings may be conveniently made" at a reconstruction hearing, "this should be done." *Id.* at 348 (citation omitted). Thus, a district court has the discretion to

> order a new trial "only where it is demonstrably true that the passage of time has impaired the trial court's ability to make a reasoned determination of the prosecutor's state of mind when the jury was selected." *Id.* (citation omitted).

Truesdale v. Sabourin, supra, 427 F. Supp.2d at 462, *see also Tankleff v. Senkowski,* 3 F. Supp.2d 278, 280 (E.D.N.Y. 1998).

Despite the fact that approximately nine years have passed since petitioner's trial, respondent reports that the prosecution is still capable of presenting its reasons for its peremptory challenges at a reconstruction hearing (Resp. Op. at 56-57).

Accordingly, I respectfully recommend that the writ be granted on the basis of petitioner's *Batson* claim unless, within ninety (90) days of the final resolution of this matter, the New York courts conduct a reconstruction hearing concerning the prosecution's non-discriminatory reasons for the exercise of its peremptory challenges.

3. Prosecutor's Introduction of Extrinsic Evidence that Petitioner Was Incarcerated

Petitioner next claims that his Due Process rights were violated by the prosecution's introduction of extrinsic evidence that petitioner was incarcerated in Florida for a period of time several months before the day of the crime charged (Pet.

Mem. at 49). Petitioner argues that not only was the introduction of this evidence in violation of New York state's evidentiary rules, but resulted in a "highly prejudicial inference of criminal propensity" that denied petitioner the right to a fair trial (Pet. Mem. at 49).

a. The Trial Testimony

Petitioner testified on his direct examination that he first met alibi witness John Torres during a two-week visit to Florida in December, 1995 (Trial Tr. at 379-80). Petitioner returned to Florida in January or February of 1996 in the hopes of getting a job with John's father (Trial Tr. at 381). Although, petitioner was unable to obtain work with John's father, he stayed in Florida at the house of a female friend until mid-April (Trial Tr. at 382-84). When asked why he stayed in Florida until April when he had no job, petitioner responded that "honestly I was enjoying being out there. . . . I was having a good time out there" (Trial Tr. at 384). Petitioner further testified that he left Florida in April because he missed his children in New York (Trial Tr. at 384).

On cross-examination, petitioner testified more specifically regarding his living situation during his trip to Florida from February to April. Petitioner stated that every day, throughout that entire trip, he stayed with his friend, Shannon Beane, until he left for New York in mid-April (Trial Tr. 394-98).

Over defense counsel's objection, the prosecution presented as a rebuttal witness Captain Bruce Bolton of the Volusia County Department of Correction, who testified that petitioner was housed at the Volusia County Department of Corrections from March 13, 1996 until April 12, 1996 (Trial Tr. at 439). The Trial Judge also allowed the introduction of petitioner's Florida arraignment photograph (Trial Tr. 452-54). No evidence was presented regarding the reason for petitioner's incarceration, or the disposition of the Florida case (Pet. Mem. at 50). In addition the jury was not advised that petitioner disclosed the fact of his incarceration in Florida in his written, post-arrest statement (Post-Arrest Stmnt.).

During its summation, the prosecution argued that petitioner should not be believed because he had lied to the jury about his incarceration in Florida, and was, therefore, willing to lie to the jury about his alibi for the day of the murder (Trial Tr. at 535-38). The Trial Judge subsequently instructed the jury that Captain Bolton's testimony was not offered to show guilt or that petitioner has a predisposition to commit crimes, but should be used "only in determining the credibility of witnesses who have appeared before you" (Trial Tr. at 565).

b. Exhaustion

On his direct appeal, petitioner, citing the Fourteenth Amendment of the United States Constitution, argued that his due process right to a fair trial was

violated by the introduction of Captain Bolton's testimony.

The Appellate Division denied this claim on the merits, stating:

> The trial court properly exercised its discretion in permitting the People to introduce rebuttal evidence since it tended to disprove defendant's alibi (*see*, *People v Harrington,* 262 AD2d 220, lv denied 94 NY2d 823; *see also, People v. Marsh,* 264 AD2d 647, lv denied 94 NY2d 825). While the rebuttal evidence concerned defendant's whereabouts several months prior to the crime, it was not collateral because defendant had made his various travels to Florida over an extended period of time integral parts of his alibi defense. Furthermore, the prejudicial effect of revealing to the jury that defendant had served 30 days in jail for an unspecified offense was minimal, particularly in light of the court's limiting instructions, and was outweighed by the probative value of the rebuttal evidence. In any event, were we to find any error, we would find it harmless in light of the overwhelming evidence of defendant's guilt.

People v. Rosario, supra, 288 A.D.2d at 142-43, 733 N.Y.S.2d 405 at 406.

Respondent first argues that petitioner did not properly present his federal claim to the State appellate courts, and, thus, the claim is procedurally barred from habeas review (Resp. Op. at 58).

Respondent contends that even though petitioner's brief to the Appellate Division cited to the Fourteenth Amendment of the United States Constitution and claimed that petitioner was denied a fair trial, petitioner failed to explain how the evidence violated his federal Due Process rights (Resp. Op. at 60). Respondent argues that under Second Circuit precedent, petitioner failed to put the state court on the required notice of his federal claim because to do so he "must demonstrate '(a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation'" (Resp. Op. at 59 *quoting Daye v. Attorney General of State of New York,* 696 F.2d 186, 194 (2d Cir. 1982)).

Unlike petitioner here, the petitioner in *Daye* did not, in his briefs to the state courts, cite the provision of the United States Constitution on which he relied. *Daye v. Attorney Gen. of the State of New York, supra,* 696 F.2d at 192. Thus, the issue in *Daye* was how the exhaustion requirement could be met in the absence of an express reference in state court to a provision in the federal constitution. In fact, the Second Circuit expressly stated that "[o]bviously if the petitioner has cited the state courts to the specific provision of the Constitution relied on in his habeas petition, he will have fairly presented his legal basis to the state

court." *Daye v. Attorney Gen. of the State of New York, supra,* 696 F.2d at 192. In a more recent opinion, also cited by respondent, the Second Circuit held that a mere reference to a provision of the United States constitution in a point heading of a brief sufficiently asserts a federal claim even where the petitioner's argument only refers to state law. *Davis v. Strack,* 270 F.3d 111, 122 (2d Cir. 2001). Petitioner's brief to the Appellate Division contains the exact same text that the Second Court found sufficient in *Davis,* namely, that the evidence of petitioner's incarceration in Florida "DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL. U.S. CONST., AMEND. XIV" (App. Div. Br. at i). *See Davis v. Strack,* 270 F.3d at 122.

Respondent also argues that petitioner failed to exhaust his federal claim in state court because his letter to the New York State Court of Appeals did not identify any federal, constitutional claims (Resp. Op. at 61). This argument is equally without merit. Petitioner's letter to Chief Judge Kaye uses language substantially identical to that of the petitioner in *Davis,* and requested that the Court of Appeals "consider and review all issues outlined in defendant-appellant's brief" (Jan. 2, 2002 Letter to Chief Judge Kaye, annexed as Ex. 3 to Resp. Op.). *See also Davis v. Strack, supra,* 270 F.3d at 122. "[S]uch a request is 'sufficiently specific' to present any federal constitutional claim set forth in the Appellate Division brief to the state Court of Appeals, regardless of whether the defendant reiterates the claim in any subsequent

letter to the court." *Davis v. Strack, supra,* 270 F.3d at 122, *citing Morgan v. Bennett,* 204 F.3d 360, 369-72 (2d Cir. 2000). Since petitioner's letter to Judge Kaye used the same language approved by the Second Circuit in *Daye,* petitioner fairly presented his constitutional claim to the Court of Appeals, and he may assert his claim in this court.

Finally, the Appellate Division's opinion clearly disposed of petitioner's evidentiary claim on the merits. The Appellate Division's judgment discussed the substance of the claim and did not assert any procedural issues. Accordingly, the Appellate Division's judgment is entitled to AEDPA's deferential standard of review, and petitioner cannot obtain habeas relief on this issue unless that decision was either contrary to, or involved an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1).

c. Analysis

Generally, erroneous evidentiary rulings do not rise to the level of a constitutional violation – the essential predicate for habeas relief. *Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991); *Sims v. Stinson* 101 F. Supp.2d 187, 194 (S.D.N.Y. 2000); *Colon v. Johnson,* 19 F. Supp.2d 112, 118 (S.D.N.Y. 1998); *Roberts v. Scully,* 875 F. Supp. 182, 189 (S.D.N.Y.), *aff'd,* 71 F.3d 406 (2d Cir. 1995); *Alvarez v. Scully,* 833 F. Supp. 1000, 1005 (S.D.N.Y. 1993). A habeas court will review a trial court's admission of evidence

"[o]nly where evidence 'is so extremely unfair that its admission violates fundamental concepts of justice.'" *Marsh v. Ricks,* 02 Civ. 3449 (NRB), 2003 WL 145564, *3 (S.D.N.Y. Jan. 17, 2003) *quoting Dowling v. United States,* 493 U.S. 342, 352 (1990). The erroneous admission of evidence will rise to the level of constitutional error only where the petitioner can show that it deprived him of a fundamentally fair trial, and in this way, of due process of law. *See Taylor v. Curry,* 708 F.2d 886, 891 (1983); *Alvarez v. Scully, supra,* 833 F. Supp. at 1005-06. To amount to a denial of due process, the evidence in question must have been "'sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it.'" *Dunnigan v. Keane,* 137 F.3d 117, 125 (2d Cir. 1998), *quoting Johnson v. Ross,* 955 F.2d 178, 181 (2d Cir. 1992); *Collins v. Scully,* 755 F.2d 16, 18-19 (2d Cir. 1985); *see also Mitchell v. Herbert,* 97 Civ. 5128 (DC), 1998 WL 186766 at *5 (S.D.N.Y. April 20, 1998). Even if such constitutional error is established, habeas relief is warranted only where the petitioner demonstrates that the error had a " 'substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson,* 507 U.S. 619, 637-38 (1993), *quoting Kotteakos v. United States,* 328 U.S. 750, 776 (1946).

Counsel who seeks to challenge the credibility of a witness' testimony on a collateral matter generally may not introduce extrinsic evidence, such as calling a subsequent witness, to contradict answers given by the witness whose credibility is under attack. *See* 4

Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 607.06[3][a] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2007). Petitioner argues that the Trial Court erred by allowing the rebuttal testimony of Captain Bolton because his testimony "was collateral and used only to challenge Petitioner's credibility" (Pet. Mem. at 53). However, it is not necessarily erroneous to permit a witness to testify for the purpose of impeaching another witness' testimony; "[t]he determinative question in deciding whether extrinsic evidence contradicting a witness' testimony is admissible is not whether the contradicting extrinsic evidence is material, but rather whether the assertions that the impeaching party seeks to contradict are themselves material or collateral." *Rosario v. Kuhlman,* 839 F.2d 918, 925-26 (2d Cir. 1988); *see also People v. Schwartzman,* 24 N.Y.2d 241, 245, 299 N.Y.S.2d 817, 821, 247 N.E.2d 642, 644 (1969) ("[W]hen a witness testifies concerning a fact material to the case, he may be contradicted either by cross-examination or by introduction of other evidence."). Facts that are relevant to a case for reasons other than mere credibility are material and not collateral. *Rosario v. Kuhlman, supra,* 839 F.2d at 926.

Petitioner testified on his direct examination that he made three separate trips to Florida in an attempt to make a life for himself there (Trial Tr. at 380-83). It was during these visits to Florida that petitioner came to know his alibi witnesses, John Torres and Jenine Seda. During his second visit, from February

to mid-April of 1996, petitioner testified that he stayed at a friend's house near the home of John Torres and Jenine Seda, both of whom he saw frequently during that time (Trial Tr. at 383). Petitioner's presence in John and Seda's neighborhood and his frequent association with them for the entirety of his second trip to Florida would tend to show that John and Seda were more capable then they might otherwise be of vouching for Petitioner's whereabouts during his third trip in June. Thus, petitioner made his second sojourn in Florida a relevant material piece of his alibi defense. Moreover, when the prosecution cross-examined petitioner about the specifics of where he stayed in Florida from March to April, defense counsel made no objections to the relevancy of those questions. Since petitioner's whereabouts from March through April of 1996 were material and relevant to his alibi defense, the Trial Court did not err by permitting the introduction of extrinsic evidence to contradict petitioner's testimony on that matter.

Not only was it permissible to introduce extrinsic evidence impeaching petitioner's testimony about his living arrangements because it was relevant testimony, but the evidence was also admissible because petitioner had opened the door for its introduction. Petitioner testified on direct examination that he "stayed [at Ms. Beane's house] until April," and the reason why he remained in Florida until the middle of April, even though he had not found employment, was because he was "having a good time" (Trial Tr. at

384). "[W]here a defendant, in his direct testimony, falsely states a specific fact, the prosecution will not be prevented from proving, either through cross-examination or by calling its own witnesses, that he lied as to the fact." *United States v. Beno,* 324 F.2d 582, 588 (2d Cir. 1963) *citing Walder v. United States,* 347 U.S. 62, 74 (1954); *accord United States. v. Benedetto,* 571 F.2d 1246, 1250 (2d Cir. 1978). This is so regardless of whether the issue is collateral, as "a defendant should not be allowed to profit by a gratuitously offered misstatement." *United States v. Beno, supra,* 324 F.2d at 588. Because petitioner testified falsely on his direct examination about where and why he stayed in Florida during his second trip, it was not improper for the Trial Judge to permit the prosecution to offer Captain Bolton's testimony regarding petitioner's incarceration.[14]

Petitioner also argues that there was no need for the prosecution's rebuttal evidence because Rosario was not dishonest in his testimony – "no one could have reasonable [sic] expected petitioner to testify

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[14] Petitioner cites *People v. Goggins,* 64 A.D.2d 717, 717-18, 407 N.Y.S.2d 531, 532 (2d Dep't 1978), for the proposition that that a prosecution's introduction of extrinsic evidence of a collateral issue to attack a defendant's credibility deprives the defendant of a fair trial (Pet. Mem. at 52). That case, however, involved extrinsic evidence that challenged testimony the defendant gave only on cross-examination. *People v. Goggins, supra,* 64 A.D.2d at 717, 407 N.Y.S.2d at 531. The case at bar is distinguishable in that petitioner testified falsely during both his direct and his cross-examinations.

that he 'stayed' in a county jail when asked where he lived during his second trip to Florida. It is entirely consistent to 'live' in a residence while being 'held' in a correctional facility" (Pet. Mem. at 54). Even if I were to accept this logic, the argument still overlooks the nature of petitioner's testimony during his cross-examination:

Q: How long did you stay with Miss Beane?

A: I stayed at her house until I came back to New York City.

Q: And you were in her house for the entire time?

A: Yes.

Q: And that was from March or February?

A: From February.

Q: Until March?

A: It's passed March.

Q: Into April in fact, isn't that correct?

A: Yes.

Q: And during that time from February when you arrived there until you left for New York in April, you are telling this jury you were living with Miss Beane?

A: I was staying with her. That's correct.

Q: And you would stay there on a daily basis, correct?

A: Yes.

* * *

Q: You weren't staying with Johnny Torres in April?

A: No, I was not. I was staying with Shannon. I came back on the 15th. I got here a Monday [*sic*]. No, I got here on Sunday. It was the 14th. I started working on the Monday. That's how come I remember that date.

Q: But, for the first two weeks in April –

A: Yes

Q: When you were –

A: No. I was staying with Shannon and, yes, I did see Johnny.

Q: So, Mr. Rosario, for those first two weeks of April that you were in Florida –

A: [Y]eah.

Q: – you were with Shannon and not with Johnny Torres, is that correct?

A: No, I wasn't, but I did see Johnny in Florida.

Q: In March of 1996, you were in Florida, correct?

A: Yes.

Q: And again, you were with Shannon and Not Johnny Torres?

A: Correct

(Trial Tr. 394-98). Petitioner did not just testify that he "stayed" and "lived" with Ms. Beane while he was incarcerated. Petitioner agreed that from February until he left Florida in mid-April, he was "in [Ms. Beane's] house for the entire time," and that he would "stay [at Ms. Beane's house] on a daily basis" (Trial Tr. at 394-397). I cannot agree that petitioner's testimony regarding his whereabouts from March until mid-April of 1996 was truthful or even substantially truthful; the simple truth is that even though petitioner stayed with Ms. Beane during his second trip to Florida, the last month of that trip was spent not at her home, but in a correctional facility. Thus, petitioner's testimony during cross, coupled with his misleading testimony on direct (discussed on page 83, above) gave cause for the prosecution's rebuttal evidence.

Petitioner also asserts that the rebuttal evidence rendered his trial unfair and violated his Due Process rights because as a result of that evidence "the jury inevitably perceived him as a bad person with the propensity to commit crimes, such as the murder at issue" (Pet. Mem. at 53). To protect petitioner from such an adverse inference, the Trial Judge issued a limiting instruction to the jurors that they were not to consider evidence of Rosario's incarceration as evidence of a propensity to commit crimes (Trial Tr. at

565). Jurors are presumed to abide by a trial judge's instructions to limit consideration of evidence. *Zafiro v. United States,* 506 U.S. 534, 540-41 (1993) ("[J]uries are presumed to follow their instructions" *quoting Richardson v. Marsh,* 481 U.S. 200, 211 (1987)); *accord United States v. Stewart,* 433 F.3d 273, 307 (2d Cir. 2006) (noting it is a "well-settled proposition" that jurors are presumed to follow limiting instructions). Petitioner argues that a limiting instruction such as this, "does little – if anything – to mitigate the severe and wholly unnecessary prejudice that subsequently infected the trial" (Pet. Mem. at 54). As petitioner points out, in some situations a limiting instruction to a jury is unlikely to prevent the average juror from inferring that a prior conviction shows a defendant has the propensity to commit the crime with which he is charged (Pet. Mem. at 54 *citing United States v. Puco,* 453 F.2d 539, 542 (2d Cir. 1971)). Such an inference, despite a limiting instruction, is likely to arise where the government seeks to impeach a criminal defendant with evidence of a conviction for a crime similar to the crime with which he or she is currently being tried. *See United States v. Puco, supra,* 453 F.2d at 542; *United States v. Ortiz,* 553 F.2d 782, 784 (2d Cir. 1977). The prejudicial effect of evidence of prior crimes is also more likely to substantially outweigh its probative value when the prior crime "negates credibility only slightly." *United States v. Puco, supra,* 453 F.2d at 542 *quoting United States v. Palumbo,* 401 F.2d 270, 273 (2d Cir. 1968); *see also Simmons v. Ross,* 965 F. Supp. 473, 480 (S.D.N.Y. 1997).

Evidence of petitioner's Florida incarceration at his murder trial does not, however, rise to the level of being substantially prejudicial under either theory. A month-long incarceration, regardless of what a juror may infer regarding its cause, is unlikely to be perceived by a juror as suggesting that a defendant committed murder, attempted murder or another similar violent offense. Evidence of petitioner's incarceration was also probative of petitioner's credibility, since it served to impeach his testimony that he was living with a friend during the time he was in jail. Thus, the prosecution's rebuttal evidence did not result in unfair prejudice that substantially outweighed the evidence's probative value, and it did not render petitioner's trial fundamentally unfair in violation of his Due Process rights.

Lastly, it is of no moment that the jury was not informed that petitioner had initially told the police about his incarceration in Florida. The fact that petitioner reported his incarceration to the police is irrelevant to whether petitioner mislead the jury at trial. Petitioner fails to explain how informing the jury of this information could have rehabilitated him.

For all the foregoing reasons, I conclude that the Appellate Division's decision that the Trial Judge properly acted within his discretion when he allowed the prosecution's rebuttal evidence was not contrary to, or an unreasonable application of, clearly established federal law. Thus, this claim should be denied.

4. Actual Innocence Claim

Finally petitioner claims that his habeas petition should be granted because he is actually innocent of the murder for which he was convicted. This claim is denied on the merits.

The doctrine of actual innocence in habeas claims developed to prevent a "miscarriage of justice" where procedural rules might otherwise prevent a federal court from considering a claim by a petitioner who is factually innocent of the crime for which he or she was convicted. *Schlup v. Delo,* 513 U.S. 298 (1995), *citing Murray v. Carrier,* 477 U.S. 478, 495 (1986); *Kuhlmann v. Wilson,* 477 U.S. 436 (1986); *Smith v. Murray,* 477 U.S. 527 (1986). The doctrine mitigates the harshness of procedural requirements intended to protect the interests of finality and comity that are threatened by successive or untimely federal review of state convictions. *Doe v. Menefee,* 391 F.3d 147, 160 (2d Cir. 2004).

Petitioner's claim of actual innocence was not raised in state court and is asserted for the first time in his habeas petition. However any procedural default that might otherwise exist would not bar a meritorious claim of actual innocence.[15] *Doe v.*

[15] This is true even after the passage of AEDPA, which codifies aspects of the actual innocence doctrine in provisions not relevant to this case. *See Doe v. Menefee, supra,* 391 F.3d at 161 *citing* 28 U.S.C. §§ 2244(b); 2254(e)(2).

Menefee, supra, 391 F.3d at 161, *citing Schlup v. Delo, supra,* 513 U.S. at 315-17.

To prevail on a claim of actual innocence, a petitioner must present new reliable evidence in light of which it is more likely than not that no reasonable juror would have convicted petitioner. *Schlup v. Delo, supra,* 513 U.S. at 327; *accord Murden v. Artuz,* 497 F.3d 178, 194 (2d Cir. 2007). *See also House v. Bell, supra,* 126 S.Ct. at 2078 (upholding the *Schlup* standard to defaulted habeas claims despite the passage of AEDPA-). To meet the *Schlup* standard, a petitioner must "support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Schlup v. Delo, supra,* 513 U.S. at 324; *accord Guity v. Ercole,* 07 Civ. 728 (RPP), 2007 WL 3284694 at *8 (S.D.N.Y. Nov. 6, 2007). Thus, a reviewing court that determines new evidence is reliable must analyze the claim of innocence in light of the entire record, including evidence that may have been inadmissible at trial. *Doe v. Menefee, supra,* 391 F.3d at 162. After, making its own credibility assessments, if the court then concludes it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt, the actual innocence standard is satisfied and the court may review the constitutional challenge. *Doe v. Menefee, supra,* 391 F.3d at 163; *accord Sacco v. Greene,* 04 Civ. 2391 (CLB), 2007 WL 432966 at *7 (S.D.N.Y. Jan. 30, 2007).

In support of petitioner's actual innocence claim, petitioner cites the total of nine witnesses (Jenine Seda, John Torres, and the seven witnesses presented at his post-conviction hearing) who testified regarding petitioner's presence in Florida on or around the date of the murder. Petitioner also relies on the documentary evidence that petitioner was stopped by police in Florida on May 30 and traveled by bus from Florida to New York on June 30 (Pet. Mem. at 57). Petitioner argues that in light of the totality of the evidence, no reasonable juror would find that petitioner returned to New York from Florida after May 30, failed to contact his fiancée, Minerva Godoy and their children, engaged in a random argument with the victim after which he shot the victim in the head, and traveled back to Florida only to return days later and turn himself in to the police. In addition, in order to find petitioner guilty, a juror would have to find that John Torres, Jenine Seda, Fernando Torres and Chenoa Ruiz all lied under oath when testifying that they each saw petitioner in Florida on June 19 (Pet. Mem. at 57-58).

As I stated in my analysis of petitioner's ineffective assistance of counsel claim, the totality of evidence presented at petitioner's trial and post-conviction hearing raised a reasonable probability that the jury could have found petitioner not guilty of murder had Fernando and Chenoa testified. However, in assessing all of the evidence presented at petitioner's trial and post-conviction hearing, I cannot conclude petitioner's evidence satisfies the substantially higher standard

necessary to sustain a claim of actual innocence. *Murden v. Artuz, supra,* 497 F.3d at 194 (Actual innocence "requires a stronger showing than the showing of prejudice necessary to prevail on an ineffective assistance claim." (internal quotation marks omitted)). Petitioner's evidence does not show that it is more likely than not that no reasonable juror could have found petitioner guilty for the June 19 murder.

First, in light of the evidence, it would not be unreasonable for a juror to find that petitioner was in fact in Florida in June of 1996, then returned to New York in the middle of the month, only to flee after the commission of Collazo's murder. Petitioner freely admitted that he traveled back and forth to Florida on a number of occasions with only brief stays in New York between those trips (Trial Tr. at 377-80, 386-87, 399). It is likewise not implausible that petitioner would immediately flee New York after committing a murder and later turn himself in to the police, who were already looking for him, in the hope of prevailing on an alibi defense. At trial the prosecution's eyewitnesses, Sanchez and Davis, testified that they were very confident when recognizing petitioner as the shooter (Trial Tr. at 165, 66), and their testimony has not been impeached. John Torres, Jenine Seda and Chenoa Ruiz were all part of a group of friends to which petitioner belonged, and Fernando Torres is the father of two of those friends. Thus these alibi witnesses were all still subject to impeachment based on their relationship to petitioner. In light of all the

evidence[,] I cannot conclude that no reasonable juror would credit the prosecution's witnesses over the greater number of defense witnesses. *See* 1 Hon. Leonard B. Sand, John S. Siffert, Walter P. Loughlin & Steven A. Reiss*, Modern Federal Jury Instructions* Inst. 4-3 (2005) (A jury is free to credit the side offering a smaller number of witnesses.).

Furthermore, in making an actual innocence determination the habeas court must determine "whether the new evidence on which the actual innocence claim is based is reliable." *Doe v. Menefee, supra,* 391 F.3d at 165. Chenoa's testimony at petitioner's 440 hearing appears to conflict with John Torres' testimony at petitioner's trial. Chenoa testified that she recalled seeing petitioner and John at Seda's house on June 19 because she had taken Seda to a doctor's appointment at approximately 11:30 a.m. and did not return until later in the afternoon (Hrg. Tr. at 548, 550). John testified that Seda worked on June 19 (Trial Tr. at 349). In addition, while the prosecution's witnesses testified to events that occurred over two years prior, petitioner's post-conviction hearing witnesses testified to events that occurred about six years prior. Even where petitioner's witnesses may have absolutely no intention of misleading the court, six-year old memories are inherently not as reliable as two and a half-year old ones.

Thus, petitioner has failed to establish that "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him," and his claim of actual innocence should be denied.

See Bousley v. United States, 523 U.S. 614, 623 (1998).

IV. Conclusion

Accordingly, for all the foregoing reasons, I respectfully recommend that petitioner's petition for a writ of habeas corpus be granted with respect to his claim that the prosecutor's use of peremptory challenges established a *prima facie* case of racial discrimination unless within ninety (90) days of the final resolution of this proceeding, the New York State courts conduct a reconstruction hearing and conclude that race did not play a role in the prosecution's exercise of its peremptory challenges. I recommend that the habeas petition be denied with respect to petitioner's claims that (1) he received ineffective assistance of counsel, (2) the Trial Court erred in allowing the prosecutor to introduce extrinsic evidence of his Florida incarceration, and (3) the evidence demonstrates he is actually innocent of the crime.

Since petitioner has made a substantial showing of the denial of a constitutional right with respect to his claim of ineffective-assistance, I also recommend that a certificate of appealability be issued for that claim but that no certificate of appealability be issued for his evidentiary and actual innocence claims. 28 U.S.C. § 2253. To warrant the issuance of a certificate of appealability, "petitioner must show that reasonable jurists could debate whether . . . the petition

should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Middleton v. Attorneys Gen.,* 396 F.3d 207, 209 (2d Cir. 2005) (*per curiam*) (internal quotation marks omitted); *see also Love v. McCray,* 413 F.3d 192, 195 (2d Cir. 2005) (*per curiam*). For the reasons set forth above, I conclude that there could be a difference of opinion among reasonable jurists that petitioner's federal rights were violated with respect to his ineffective-assistance claim, but not with respect to his evidentiary or actual innocence claims.

V. Objections

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from the date of this Report and Recommendation to file written objections. *See also* Fed.R.Civ.P. 6(a) and 6(e). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable P. Kevin Castel, United States District Judge, 500 Pearl Street, Room 2260, New York, New York 10007, and to the chambers of the undersigned, 500 Pearl Street, Room 750, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Castel. FAILURE TO OBJECT WITHIN TEN (10) DAYS ***WILL*** RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. *Thomas v. Arn,* 474 U.S. 140

(1985); *IUE AFL-CIO Pension Fund v. Herrmann,* 9 F.3d 1049, 1054 (2d Cir. 1993); *Frank v. Johnson,* 968 F.2d 298, 300 (2d Cir. 1992); *Wesolek v. Canadair Ltd.,* 838 F.2d 55, 57-59 (2d Cir. 1988); *McCarthy v. Manson,* 714 F.2d 234, 237-38 (2d Cir. 1983).

Dated: New York, New York
December 28, 2007

Respectfully submitted,

/s/ Henry Pitman
HENRY PITMAN
United States Magistrate Judge

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APPENDIX E

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

BEFORE: Hon. DAVID FRIEDMAN
Justice of the Appellate Division

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The People of the State of New York,	M-1966 Ind. No. 5142/96
– against –	CERTIFICATE DENYING LEAVE
Richard Rosario,	
Defendant.	

----------X

(Entered Sept. 8, 2005)

I, DAVID FRIEDMAN, a Justice of the Appellate Division, First Judicial Department, do hereby certify that, upon application timely made by the above-named defendant for a certificate pursuant to Criminal Procedure Law, section 460.15, and upon the record and proceedings herein, there is no question of law or fact presented which ought to be reviewed by the Appellate Division, First Judicial Department, and permission to appeal from the order of the Supreme Court, Bronx County, entered on or about April 4, 2005, is hereby denied. To the extent that defendant seeks poor person relief and assignment of counsel, that motion is hereby denied as academic.

Dated: New York, New York
September 1, 2005

/s/ David Friedman
DAVID FRIEDMAN
Justice of the Appellate Division

APPENDIX F

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX:

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THE PEOPLE OF THE STATE OF NEW YORK	DECISION AND ORDER
– AGAINST –	INDICTMENT NO. 5142/96
Richard Rosario	
DEFENDANT	

----------X

DAVIDOWITZ, J.:

Defendant was convicted after trial on November 23, 1998 of murder in the second degree. He alleges that both pre-trial, and trial counsel rendered ineffective assistance to him for the following reasons, and moves for an order setting aside the verdict pursuant to CPL 440.10(1): they did not seek out, interview and call additional witnesses who could have testified that he was in Florida before, at the time of the crime and for a period after the crime was committed; they failed to send an investigator to Florida to investigate his alibi defense although the court approved travel expenses for this purpose; his trial counsel did not investigate, and pursue at trial evidence this suggested that another person had a motive to harm the deceased; and the witnesses who could support his alibi constituted newly discovered evidence; and he is innocent of the charges.

The Homicide and the Proceedings Before Trial

George Callazo was murdered on June 19, 1996. Two eye-witnesses – Robert Davis and Michael Sanchez – were interviewed at the scene and later at the 43rd precinct. Each selected defendant's photo from a book of photos and identified him in a line-up on July 9, 1996 as the shooter.

Defendant was notified that the police were looking for him. He left Florida on June 30, 1996 and arrived in New York on July 1, when he was arrested. He told the police that he was in Florida on June 19, 1996 and for several months before that date. He denied his involvement in the homicide, and provided the names of thirteen potential alibi witnesses, their Florida addresses and, in some cases, their telephone numbers.

Joyce Hartsfield, Esq. was appointed, pursuant to Article 18b of the County Law, to represent defendant on July 10, 1996. He was arraigned on the indictment on August 13 and Ms. Hartsfield filed an omibus [sic] motion on October 30. She also requested a court order for an investigator to travel to Florida to investigate defendant's alibi defense and, in support of this request, submitted an affidavit of Jesse Franklin, a private investigator. Ms. Franklin stated that she was unable at long distance to complete an effective investigation and, therefore, it was critical that she travel to Florida to interview witnesses. The court's written decision on the omnibus motion on November

25 did not address this request and a Florida investigation was not conducted.

Steven Kaiser, Esq. replaced Hartsfield as defendant's counsel on February 18, 1998. He did not retain an investigator to go to Florida. The trial began on November 10, 1998.

The Trial

Ten witnesses testified for the People: four police officers, a medical examiner, three eye-witnesses – Robert Davis, Michael Sanchez and Jose Diaz – and a rebuttal witness – Captain Bruce Bolton, of the Valise County, Florida Department of Corrections.

Mr. Davis, a porter in a building near the crime scene, testified that he was sweeping near the rear of the building when he heard angry words: "you won't do this no more." He turned and saw three men, one of whom took a gun from his jacket pocket, held it four to five inches from Mr. Callazo's head, shot him and ran. Mr. Davis was standing approximately two car lengths from the shooting. He described the shooter as a light-skinned Hispanic man, between six foot and six foot one inches tall, skinny with short curly hair, a mustache, and side burns and wearing a short sleeved striped shirt. He identified defendant as the shooter in a line-up.

Mr. Sanchez was a friend of the deceased and was with him at the time of the shooting. As he and Mr. Callazo were walking on White Plains Road, they

were approached from the opposite direction by two men, a black and an Hispanic. For a few minutes, angry words were exchanged after which Sanchez and Callazo walked away. Moments later the Hispanic man approached from behind, held a chrome revolver in his hand and, standing two inches from Mr. Callazo, shot him in the head. The shooter ran toward White Plains Road. Mr. Sanchez described him as a tall skinny Hispanic with a mustache and goatee and a striped shirt. He too identified defendant in a line-up as the shooter.

Jose Diaz was part owner of a hot dog truck parked on White Plains Road. He heard four men arguing for almost ten minutes. They were approximately twenty-eight feet away from him. After the argument he heard one shot but did not see the shooting. Mr. Diaz said that he might be able to recognize the shooter but that he was not completely sure. He did not identify defendant.

Detective Gary Whitaker interviewed Mr. Sanchez and Mr. Davis at the 43rd precinct. According to his report, based on the interview with Mr. Sanchez, the gun was a black revolver and a description of the shooter did not include facial hair.

Captain Bruce Bolton, the custodian of records for the county Jail in Daytona, Florida testified that defendant was incarcerated in the Vales County jail from March 13, 1996 to April 12, 1996. This testimony was offered to rebut defendant's account that

he was living with a woman named Shannon Bean from February to April, 1996.

The defense called two alibi witnesses – Janine Seda and John Torres – and Detective Richard Martinez, who had testified on the People's direct case. Defendant testified on his own behalf.

Ms. Seda, John Torres' girlfriend, testified that she met defendant through Mr. Torres in late December 1995. Defendant stayed at their apartment from the end of April, or beginning of May 1996 until June 20 1996, when she was admitted to the hospital to give birth to her first child. She returned home on June 21 and saw defendant at her home after that date when he came to see the baby. She learned of defendant's arrest in September or October 1996. An attorney called her in October 1997, while she was staying in Pennsylvania and asked her if she would testify for defendant. She agreed when she was told that the crime date was June 19, 1996 because she knew that on that date defendant was in her home.

John Torres met Defendant in December 1995 through his brother Robert. Defendant lived with John and Jenine from the end of May until June 19, 1996 when he moved next door to Robert's house. On June 19 he and defendant spent most of the day looking for car parts for John's car. He saw defendant through the end of June when defendant left for New York.

In July or August he received a telephone call from defendant's family telling him that defendant had been arrested for murder.

Defendant testified that he stayed with Jenine and John for about one month prior to the birth of their son on June 20, 1996. On June 19 he spent the day looking for parts for John's car. He learned from his sister that the police wanted to question him about a murder. He took a bus to New York on June 30, 1996 and called the police when he arrived on July 1. Defendant said he would surrender the next day. The police arrested him at his mother's house on July 1.

Detective Richard Martinez testified that he interviewed both Mr. Sanchez and Mr. Davis at the precinct and prepared a police report (DD-5) of the interview. Sanchez described the shooter as an Hispanic, with olive skin tone and about six feet tall. Martinez did not ask Sanchez if the shooter had facial hair and there was nothing in the report that indicated that the shooter had facial hair.

Defendant was convicted of murder in the second degree (P.L. §125.25[1]) on November 23, 1998. He was sentenced on December 17, 1998 to a term of twenty-five years to life. The conviction was affirmed by the Appellate Division (288 AD 2d 1423) and leave to appeal was denied by the Court of Appeals (97 N.Y. 2d 760).

The Motion

Defendant moved to vacate his conviction, pursuant to CPL §440.10, on the grounds that he received ineffective assistance of counsel. He alleged that: his

attorneys did not investigate or obtain additional alibi witnesses from Florida; these witnesses constituted newly discovered evidence that he was in Florida on the date of the crime; Mr. Kaiser should have investigated a report that someone had once threatened the deceased and cross-examined witnesses on this issue at trial; and he is actually innocent of this crime. The People replied that defendant was provided with meaningful representation; that the statements of additional alibi witnesses do not qualify as newly discovered evidence; and that the trial evidence of guilt was very strong.

Affirmations were also submitted by defendant's attorneys. Mr. Kaiser stated that Joyce Hartsfield told him "that the court had specifically denied her request to send an investigator to Florida". Accordingly, he "worked as best he could by telephone and mail, to secure people who could testify to defendant's presence in Florida at the time of the homicide." Ms. Hartsfield stated that she did not recall telling Mr. Kaiser that the travel request had been denied, or why the investigator did not travel to Florida before she was relieved.

The court obtained minutes of calendar calls. Justice Joseph Fisch, during the proceedings on March 19, 1997, granted Ms. Hartsfield's application to send an investigator to Florida. Mr. Kaiser then submitted another affirmation which stated that, after reading the transcript of March 19, and Ms. Hartsfield's affirmation of January 29 2004, his recollection was unclear as to the source of his belief that the court

denied Ms. Hartsfield's request. Nevertheless, he did operate on that belief, particularly since no investigator had gone to Florida. A hearing on these issues was ordered on February 19, 2004.

The Hearing

The hearing began on August 3, 2004 and ended on September 30, 2004. Defendant called seven witnesses – Fernando Torres, Ricardo Ruiz, Minerva Godoy, Chenoa Ruiz, Denise Hernandez, Lisette Rivero, and Michael Serrano – who testified about his whereabouts in Florida in general in the Spring, and June, 1996, the attorneys who represented him before and during the trial – Joyce Hartsfield and Steven Kaiser – and the investigator who was retained by Ms. Hartsfield to work on the case – Jessie Franklin. The relevant elements and portions of their testimony are summarized below.

Fernando Torres is the father and father-in-law of the alibi witnesses who testified for defendant at his trial – John and Jenine Torres. He saw defendant in Deltona, Florida outside defendant's apartment on June 20, 1996, when his grandchild was born, and on June 19 when he, defendant and his son went to an auto discount store to purchase parts for his son's car, which was disabled, and on June 21 at his son's house. He did not see defendant again after June 21.

Mr. Torres learned that defendant had been arrested for a murder in the beginning of July 1996, and that the murder occurred on June 19, 1996,

several years later when his family and their friends discussed it in his presence. He agreed on cross-examination that he told one of defendant's attorney's on April 15, 2004 that the incident involving the disabled car occurred three or four days before his grandchild was born on June 20. He did not remember talking to Mr. Kaiser about the case. A trip to New York to testify for defendant would have constituted a financial hardship. His son and daughter-in-law were living in Florida when they came to New York to testify, not in Pennsylvania, where they moved in 1997.

Ricardo Ruiz was a friend of defendant, his girlfriend and the Torres'. He spent at least five days a week with them in a parking lot near their home. Defendant slept at John Torres' house since he had no other place to stay. He did not remember the events of June 19, and 21 and was unclear about June 20. But he recalled that defendant left Florida about one month after John Torres' baby was born and that he saw him in Deltona before and the day after the baby was born. The date of the baby's birth – June 20 – was provided to him recently. He was not certain how long before June 20 that he saw defendant.

Chenoa Ruiz was married to Robert Torres and lived at 111 Carribean Street in Deltona in 1996, next door to John and Jenine Torres. She saw defendant on June 18 with John Torres when she took Jenine to a doctor's office for an appointment, on June 19 at the apartment complex and again on June 21 on the street. Jenine was angry with defendant and did not

want him to come to the hospital after the baby was born.

Ms. Ruiz first learned about defendant's arrest in the middle of July for a murder that occurred on June 19. She remembered the events of June 19 because John and Jenine's baby was born the next day. She did not speak to anyone about this information and no one contacted her, except for an investigator three or four years later. However, a written statement, which she prepared on November 10, 2002, only reported that she saw defendant on June 19; it did not refer to her visit to the hospital on June 18, the doctor on June 19 or the birth of the Torres' baby on June 20.

Ms. Ruiz agreed to take a polygraph examination; however, an investigator's report stated that she was ill and refused, which, she testified, was not true. She remembered the defendant as he was "a spotlight" and she saw him frequently, although she was unaware that defendant traveled between Florida and New York between February and the end of June, 1996. He spent a lot of time outside of the Torres' residence. Defendant returned to New York sometime between June 20 and the beginning of July 1996.

Minerva Godoy worked for Blue Cross, and Blue Shield, lived in Queens and was the mother of two of defendant's children. The defendant left for Florida in May 1996 to get a job and they did not live together from that time on. Defendant called her the day after John Torres' child was born and said that he was

going to visit them. She spoke to a woman investigator five or six times and told her about this conversation. However, Jesse Franklin's notes of her interview with Ms. Godoy on October 23, 1996 reported only that Ms. Godoy spoke to defendant on the telephone; there was no reference to John Torres' baby or any precise dates.

She saw defendant on July 1, the day he was arrested, at her house. She did not know where he was on June 19. She helped support defendant when he lived in New York and in Florida.

Denise Hernandez testified that she lived in Deltona in 1996. She met defendant in February 1996, and dated him through June 1996, and, during that period, saw him from four to seven times each week.

Sometime in June 1996 she and defendant had a bitter argument when defendant took her car for a joy ride. She recalls that the fight occurred in June because her sister's birthday was on June 26 and she had a gift in the car for her. Therefore, the argument must have occurred several days before then.

She last saw defendant in Florida when they broke up two weeks or so after the fight. But, that at least occurred after her sister's birthday. She did not remember exactly how long before June 26 that she had the fight with defendant. She testified that it might have occurred several weeks to a few days before that date. However, an affidavit prepared by an investigator reported that the fight occurred several days before the birthday.

She first learned about defendant's arrest in 1998, but did not learn the date right away; she learned from his attorneys that the homicide occurred on June 19. She continued to write, speak to and visit defendant in prison after his arrest.

Lisette Rivero met defendant in February 1996 and saw him three to four times a week. She remembered the argument between defendant and Denise Hernandez about the use of her car. She believed that it occurred about five days to one week before the birthday of Denise's sister, which occurred towards the middle or end of June. She remembered that the argument occurred in June 1996 but was uncertain about the date. Since then she visited defendant in prison twice, wrote to him and spoke to him on the telephone.

She first learned that defendant had been arrested in 1998 or 1999 from Denise Hernandez. Her recollection about the fight may have been refreshed by Denise and her belief that it occurred in June came "from people directing her to that month." She was interviewed by an investigator in 2002 and she did not mention the date of the argument in an affidavit which she prepared at the request of defendant's sister. In fact, she did not know where defendant was on June 19 – either in Florida or New York – and did not learn that the homicide occurred on June 19 until sometime in 2004.

Michael Serrano is a correction officer who lived in Deltona. He worked for a locksmith in June 1996

and remembers that defendant was present and congratulated John Torres when he returned from the hospital after his son was born. But, he did not remember the date when this happened and did not remember seeing defendant in Deltona the day before the baby was born.

He was interviewed by an investigator in 2002. He told him that he saw defendant the night the baby was born but he did not remember whether he saw him the night before and he was unclear about when he saw defendant again – perhaps the following day.

Jesse Franklin, a private investigator for more than twenty-eight years, was retained by Joyce Hartsfield to work on the case. Many of the prosecution's alibi witnesses were difficult to locate; some had moved, the telephone numbers of others were disconnected. But, she did interview Fernando and Robert Torres, Minerva Godoy, and John and Jenine Torres on the telephone. She tried to telephone John Torres, and Lizette Rivero and could not reach them; she did not have telephone numbers for Chenoa Ruiz and David Guzman. Therefore, Ms. Hartsfield asked her to draft an affidavit in support of an application for expenses to go to Florida to interview witnesses whose names she got from defendant. Ms. Hartsfield never told her that the application was granted by Judge Fisch; she assumed, therefore, that it had been denied. In fact, she learned for the first time that Judge Fisch granted the application from defendant's current attorneys shortly before the hearing.

Ms. Franklin, in any event, interviewed John Torres, Jenine Seda, defendant's sister, Maria Maldonado and Fernando Torres, who remembered that defendant purchased parts for his son's car "in the latter part of June"; there was no reference to June 19 or 20.

Joyce Hartsfield began her representation of defendant by interviewing him in July 1996. He provided her with the names of people who could testify that he was in Florida on July 19. She believed that she spoke to one of the alibi witnesses but could not remember his name.

Ms. Hartsfield did not remember that Judge Fisch had authorized a trip by an investigator to Florida and, had she known about that, she would have asked the investigator to go there. And, she did not remember telling Ms. Franklin that her application was denied. Nor did she remember if she told Mr. Kaiser that the application had been rejected. But she was certain that she would not have said that to them; there was no reason or logic for her to say that the motion had been denied when it had been granted – perhaps there was a misunderstanding on financial issues. In any event, they concentrated on John and Jenine Torres, who could account for defendant's presence in Florida on the date of the homicide. She and Ms. Franklin focused on the Torres' because the birth of their child on June 20 provided a special reason for remembering defendant's whereabouts. In any event, Ms. Franklin was not satisfied with the investigation as she was unable to contact the

prospective alibi witnesses. But not all of them remembered his whereabouts on June 19.

Steven Kaiser replaced Ms. Hartsfield on February 18, 1998. He met defendant for the first time on March 5, 1998. Defendant said that he was with John Torres in Florida on the date of the crime, and named thirteen possible alibi witnesses. Kaiser spoke to Fernando Torres and perhaps to his wife Margarita, their son, John Torres, and Jenine Seda.

Mr. Kaiser tried to locate other witnesses by telephone and mail but was unsuccessful. He did the best he could in the belief that the court denied Ms. Hartsfield's application for an investigator to go to Florida; Kaiser would have liked to call Fernando and Margarita Torres to testify, since they were a generation older than their twenty year old son John, and Jenine Seda. However, he thought that they were reluctant to testify and could not afford the trip to New York. He spoke also to other potential witnesses but could not remember which ones. Some of them could not afford to come to New York. And, it was his impression that some – including Fernando and Margarita Torres – were reluctant to help defendant by testifying for him. In any event he believed that Judge Fisch had denied Ms. Hartsfield's application for investigative expenses.

Mr. Kaiser did contact the Greyhound Bus Company and obtained documentary evidence to show that defendant traveled from Florida to New York on June 30, 1996.

Mr. Kaiser had in his file several police reports. Names of the interviewees were redacted. They recorded an incident when George Collazo allegedly slapped a woman, who then filed a harassment charge against him. According to the reports, threats were also made against Mr. Collazo. Mr. Kaiser, nevertheless, decided not to explore this incident, and therefore, did not ask the court for unredacted copies of the reports or address it on cross-examination. He decided to focus on the alibi defense, and this incident and the police investigation of it did not, in his judgment, "enhance" its credibility.

The Law

The right to the effective assistance of counsel is guaranteed by both the Federal and State constitutions (US Const, 6th Amend.; NY Const, Art I, §6). Under the State constitution, effective assistance is determined generally in the context of whether defendant received "meaningful representation" (*People v. Benevento*, 91 NY 2d 708, 713; *People v. Baldi*, 54 NY 137). The claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case (*People v. Benevento*, *supra* at 714)*. Thus,

* The federal standard for allegations of ineffective assistance of counsel, which was set forth in *Strickland v. Washington*, 466 US 668, requires a showing that the attorney's "performance was deficient" and that, but for the attorneys errors, the result of the proceeding would have been different, was expressly rejected in this case.

whether defendant would have been acquitted of the charge but for counsel's errors is "relevant, but not dispositive" (*People v. Benevento*, *supra at* 714).

Meaningful representation does not mean perfect representation (*People v. Ford*, 86 NY 2d 397, 404) or representation that is errorless (*People v. Aiken*, 45 NY 2d 394, 398). It means, basically, that a defendant received a fair trial "as a whole" rather than fixing on a "particular impact on the outcome of the case" (*People v. Benevento*, *supra* at 714).

Defendants must, in other words, demonstrate that they were deprived of a fair trial by less than meaningful representation; a simple disagreement long after trial with strategies employed by attorneys, or their tactics, or judgements, or the scope and thrust of cross-examination is just not enough (*People v. Flores*, 84 N.Y. 2d 184). In that respect, "courts should not confuse true ineffectiveness with losing trial tactics or unsuccessful attempts to advance the best possible defense." The issue is, were the trial strategies employed by attorneys reasonable, even though they were unsuccessful (*People v. Henry*, 95 NY 2d 563). An unexplained error or blunder by an attorney does not amount to ineffective assistance unless "that error was so serious that defendant did not receive a fair trial" (*People v. Flores*, *supra*; *People v. Jackson*, 52 NY 2d 1027; *People v. Bridgefourth*, 13 AD 3d 1165, 1167). Moreover, when applying these standards, an attorney's efforts should not be second-guessed "with the clarity of hindsight" to determine how the defense might have been more effective

(*People v. Jackson*, 52 NY 2d 1027). In that respect there is a "strong presumption that a defense counsel rendered effective assistance" (*People v. Wong*, 11 AD 3d 484).

Some of the issues explored by the courts when determining whether meaningful representation standards were met include, for example: did the attorney present a credible defense; were witnesses effectively examined and cross-examined; were all appropriate and relevant motions perfected; were opening and closing statements organized and presented properly; and were objections appropriate (*People v. Miller*, 226 AD 2d 833 app den 88 NY 2d 939). Other issues are: did an attorney's errors "seriously compromise a defendant's right to a fair trial" (*People v. Jones*, 30 AD 2d 1035; *People v. Adams*, 12 AD 3d 523); were these errors "sufficiently egregious and prejudicial" (*People v Flores*, *supra*); and was the representation "so inadequate and ineffective as to deprive defendant of a fair trial" (*People v. Aiden*, 45 NY 2d 394).

By any standard, Ms. Hartsfield and Mr. Kaiser represented defendant in a thoroughly professional, competent, and dedicated fashion and not in accord with the issues of ineffectiveness set forth above; the errors or omissions suggested by defendant do not alter this finding or rise to that level. For example, defendant argues that Mr. Kaiser should have investigated the information provided in police reports about a dispute between a woman and the deceased which, allegedly, resulted in threats against the deceased by unknown persons, and then addressed

this issue at trial. Mr. Kaiser explained at the hearing that he felt that cross-examination on this incident would have diluted, and weakened the alibi defense and, therefore, elected not to pursue it. Defendant's complaint really is addressed to Mr. Kaiser's tactics and strategy, which the courts have regularly held are not appropriate subjects of a CPL §440.40 motion (*People v. Henry*, *supra*; *People v. Jackson*, *supra*), and were perfectly reasonable and appropriate.

Both attorneys filed all appropriate motions; within the scope of the information that was then available to them, an investigation was conducted; witnesses were examined and cross-examined adeptly, professionally and with clarity; Mr. Kaiser's opening and closing statements were concise and to the point; and, most importantly, a credible alibi defense was presented to the jury (*People v. Barber*, 13 AD 3d 848; *People v. Damphier*, 13 AD 3d 663; *People v. Sullivan*, 12 AD 3d 1046).

It is true that Judge Fisch granted defendant's application for funds to send an investigator to Florida and nothing was done. It is equally true that Ms. Hartsfield and Mr. Kaiser believed that this application had been denied; an impression that all parties held at the outset of these proceedings. But, the reality is that Ms. Hartsfield would not tell Mr. Kaiser that the motion was denied when it had been granted. As she said during the hearing: " . . . I would never say that they denied it because there's no reason to say he denied it . . . but I don't know why

I would say it was denied when it had been granted . . . " And, at page 57: I have no idea why I would say it was denied unless at the point in time that Fisch had made his ruling, that I misunderstood him. But I would not say to her [Jessie Franklin], if I understood him to grant it, "oh, it was denied." That part just does not make sense, that it was denied. If it was granted, it seems to me that it was just an issue of money for traveling. I can't honestly put that piece together, your Honor."

The best and most reasonable explanation, then, is that there was a misunderstanding or mistake which persisted throughout the case and which the parties simply cannot explain. But it was not deliberate. And that does not alter the fact that both attorneys represented defendant skillfully, and with integrity and in accordance with the standards of "meaningful representation" defined by our appellate courts.

In any event, an alibi defense *was* presented through the two witnesses who had the best reason for remembering why defendant was present in Florida on June 19 1996 – the birth of their son – an event that was more relevant for them than the events relied upon by the other witnesses (*People v. Fax*, 232 AD 2d 734 app den 89 NY 2d 9425). Moreover, the alibi evidence offered by defendant at the hearing was in some cases questionable and in others raised issues which could have created questions for a

deliberating jury. For example, two of the witnesses – Lisette Rivero, and Denise Hernandez – could not say where defendant was on June 19 and 20. And Fernando Torres, when questioned about the purchase of auto parts years later, changed the date to three or four days *before* his grandson was born (*People v. Benjamin*, 151 AD 2d 685).

In order to prevail on a motion for a new trial based on a claim of newly discovered evidence, a defendant must establish by a preponderance of the evidence that evidence has been discovered since the trial which could not, with due diligence, have been produced at trial, and which is of such a character that, had it been presented at trial, there is a probability that the verdict would have been more favorable for him (CPL §§440.10[1][g], 440.20[6]). That evidence must be material evidence. It may not be cumulative to evidence presented at the trial – which largely was the case herein – and it must not be merely impeaching evidence (*People v. Salemi*, 309 NY 208 *cert den* 348 US 845).*

Nevertheless, the existence of these witnesses was not new evidence discovered since the trial. They were known to defendant, who immediately gave

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* For instance, Chenoa Ruiz recalled defendant's presence in the Torres' apartment on June 18 and 19, the two days prior to the birth of their child. And, Fernando Torres testified that he was with defendant and his son the day before his daughter-in-law gave birth. That testimony was cumulative to his son John's trial testimony.

their names to the police after his arrest, to his attorneys at their first and subsequent meetings, and to Jesse Franklin. Efforts were made to speak, and interview them and the substance of their testimony was known to the parties before the trial began.

A number of cases where alibi witnesses were not called, or did not appear, and yet courts found that attorneys provided meaningful representation, bear important, instructive parallels to this proceeding. For instance, a defense attorney in *People v. Henry*, *supra*, called an alibi witness who could not "account for defendant's whereabouts on the night of the crime"; although the People "discredited the alibi testimony," the court said, the attorney in every other respect provided meaningful representation "[C]ounsel's failed attempt to establish an alibi was at most an unsuccessful tactic that cannot be characterized as ineffective assistance." The defendant in *People v. Gaito*, 98 AD 2d 909 argued that he was "ineffectively represented" because his attorney did not call "two witnesses who would have provided additional testimony" that another person, not defendant, was in a police car when witnesses made an identification. That testimony, the court said, was cumulative to other "substantial" evidence which was rejected by the jury. A flight attendant in *People v. Stewart*, 248 AD 2d 414 app den 92 NY 2d 861 was too ill and unwilling to testify. But his testimony was "weak, at best" and four other alibi witnesses did testify. Defense counsel's failure to call three witnesses did not constitute ineffective assistance of counsel in

People v. Warney, 299 AD 2d 956 lv den 99 NY 2d 633 even though the attorney failed "to learn of the existence" of one of them; "viewed in totality" defendant received assistance of counsel in *People v. Park*, 229 AD 2d 598 app den 86 NY 2d 739 since the witnesses could not say "with certainty that they were with the defendant on the day the crime for which he was convicted was committed." An attorney's failure to discover evidence of defendant's specific whereabouts on "the day of the crime" did not deprive him of effective assistance of counsel in *People v. Miller*, 226 AD 2d 833 app den 88 NY 2d 939, since the case, "viewed in totality," disclosed that he received meaningful representation. And, defendant was not denied effective assistance of counsel in *People v. Adams*, 148 AD 2d 964 app den 74 NY 2d 660 because a witness did not testify; the attorney called, left messages, wrote, visited her apartment and hired an investigator (See also *People v. Hamilton*, 272 AD 2d 553 lv den 95 NY 2d 935).

Defendant has tried to second-guess his trial counsel at almost every level of their representation. He has questioned the depth of their investigation, the scope and focus of cross-examination and argued that his alibi defense could have been better if they had only followed through on Judge Fisch's order. His criticisms ignore the fact that Ms. Hartsfield and Mr. Kaiser ably, and professionally represented him at every stage of the case with integrity and in ways that were consistent with the standards of "meaningful representation" described above.

An investigator was not sent to Florida to interview witnesses. Nevertheless, the fact remains that the People's case was strong, which was acknowledged by the Appellate Division when it affirmed the conviction herein. The prospective witnesses now before the court, studied closely, were, for the most part, questionable and certainly not as persuasive as the two witnesses who did testify, and were rejected by the jury. And Mr. Kaiser at trial was prepared, skillful, purposeful, thoughtful and creative.

The Second Department in *People v. Jackson*, 74 AD 2d 585 aff'd 52 NY 2d 1027, in rejecting a defendant's challenge to the ineffectiveness of his trial counsel said: "We are not persuaded that trial counsel's performance here should undo a jury verdict which was amply supported by the evidence." I, too, believe that this jury verdict was unimpeached, and "amply supported by the evidence." Defendant's attorneys provided him with meaningful representation and his motion is, therefore, denied.

DATED: April 4, 2005
The Bronx, New York

/s/ Edward M. Davidowitz
Edward M. Davidowitz
Justice of the Supreme Court

TO: HON. Robert T. Johnson
District Attorney, Bronx County
BY: Chris Blira-Koessler, Esq.
Daniel McCarthy, Esq.

Carl H. Loewenson, Jr., Esq.
Kerry Elgarten, Esq.
ATTORNEYS FOR DEFENDANT

APPENDIX G

State of New York
Court of Appeals

BEFORE: HON.
CARMEN BEAUCHAMP CIPARICK,
Associate Judge

THE PEOPLE OF THE STATE
OF NEW YORK,
Respondent,
– against –
RICHARD ROSARIO,
Appellant.

CERTIFICATE DENYING LEAVE

I, CARMEN BEAUCHAMP CIPARICK, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission is hereby denied.

* ***Description of Order*:** Order of the Appellate Division, First Judicial Department, entered November 27, 2001, affirming a judgment of the Supreme Court, Bronx County, rendered December 17, 1998.

Dated: March 26, 2002
at New York, New York

/s/ Carmen Beauchamp Ciparick
Associate Judge

APPENDIX H

REMITTITUR

(Filed Dec. 5, 2001)

Andrias, J.P., Wallach, Lerner, Rubin, Buckley, JJ.

5380 The People of the State of New York,

Respondent,

– against –

Richard Rosario,

Defendant-Appellant.

John M. Moreira

[5142/96]

Kerry Elgarten

Judgment, Supreme Court, Bronx County (Joseph Fisch, J.), rendered December 17, 1998, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The trial court properly exercised its discretion in permitting the People to introduce rebuttal evidence since it tended to disprove defendant's alibi (*see*, *People v Harrington*, 262 AD2d 220, *lv denied* 94 NY2d 823; *see also*, *People v Marsh*, 264 AD2d 647, *lv denied* 94 NY2d 825). While the rebuttal evidence concerned defendant's whereabouts several months prior to the crime, it was not collateral because defendant had made his various travels to Florida over an extended period of time integral parts of his alibi defense. Furthermore, the prejudicial effect of revealing to the jury that defendant had served 30

days in jail for an unspecified offense was minimal, particularly in light of the court's limiting instructions, and was outweighed by the probative value of the rebuttal evidence. In any event, were we to find any error, we would find it harmless in light of the overwhelming evidence of defendant's guilt.

Defendant failed to make a prima facie showing of racial discrimination by the prosecution in the exercise of its peremptory challenges, particularly in light of the racial makeup of the panel of prospective jurors (*see*, *People v Ware*, 245 AD2d 85, *lv denied* 91 NY2d 978). The mere number of peremptory challenges exercised by the prosecution against African-Americans did not establish a prima facie case and defendant failed to show disparate treatment of similarly situated panelists or other relevant circumstances to raise an inference of a discriminatory purpose (*see*, *People v Jenkins*, 84 NY2d 1001; *People v Bolling*, 79 NY2d 317).

Defendant's challenges to the prosecutor's questioning of witnesses and comments in summation are unpreserved and we decline to review them in the interest of justice. Were we to review these claims, we would find no basis for reversal (*see, People v Overlee*, 236 AD2d 133, *lv denied* 91 NY2d 976; *People v D'Alessandro*, 184 AD2d 114, 118-119, *lv denied* 81 NY2d 884).

THIS CONSTITUTES THE DECISION
AND ORDER OF THE SUPREME COURT,
APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 27, 2001

/s/ Catherine O'Hagan Wolfe
CLERK

APPENDIX I

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 Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of August, two thousand ten.

– X

RICHARD ROSARIO,

Petitioner-Appellant,

– v. –

SUPT. ROBERT ERCOLE, Green Haven Correctional Facility, ATTORNEY GENERAL ELLIOT SPITZER, — 08-5521-pr

Respondents-Appellees.

– X

ORDER

Following disposition of this appeal on April 12, 2010, petitioner-appellant Richard Rosario filed a petition for rehearing and rehearing *in banc*. Upon consideration by the panel that decided the appeal, the petition for rehearing is **DENIED**. An active judge requested a poll on whether to rehear the case *in banc*. A poll having been conducted and there being no majority favoring *in banc* review, rehearing *in banc* is hereby **DENIED**.

Judge Wesley concurs in an opinion joined by Judges Cabranes, Raggi, Hall, and Livingston; Judge Katzmann concurs in a separate opinion; Chief Judge Jacobs dissents in an opinion joined by Judges Pooler, Lynch, and Chin; and Judge Pooler dissents in a separate opinion.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

RICHARD C. WESLEY, Circuit Judge, with whom Judge JOSÉ A. CABRANES, Judge REENA RAGGI, Judge PETER W. HALL, and Judge DEBRA ANN LIVINGSTON join, concurring in the denial of rehearing *en banc*.

We stand by the panel's decision in this case and support the Court's decision not to rehear this case *en banc*.

As the lead dissent from the denial of rehearing *en banc* concedes, the New York state standard is more protective of defendants than the federal standard. The New York Court of Appeals has expressed this sentiment in decision after decision. *See*, *e.g.*, *People v. Ozuna*, 7 N.Y.3d 913, 915 (2006); *People v. Turner*, 5 N.Y.3d 476, 480 (2005) (collecting cases). Yet because the state standard could be misapplied to diminish the prejudicial effect of a single error, members of this Court wish to encroach on the province of the state to demand that it reframe its standard for identifying ineffective assistance of counsel to mimic

the less protective federal model. I believe such a drastic measure is unnecessary as a matter of law and unwarranted as a matter of comity. As the court's opinion in this case holds, an attorney error that prejudiced a defendant under the federal standard would necessarily affect the fairness of the process as a whole under the state standard. Thus, to the extent that any state court failed to afford relief for prejudicial error, that oversight would be contrary to both the federal and state standard, and could be dealt with on case by case review.

Certainly the failure that the dissent fears did not occur in this case. As detailed in the court's opinion, in his assessment of the alibi witnesses at the hearing pursuant to New York Criminal Procedure Law 440.10(1), Justice Davidowitz looked specifically at the possible prejudicial effects of the very error at issue here. He did not minimize the mistake, but instead concluded that the omission of the additional alibi witnesses could not support an inference that, but for that omission, the outcome would have been different. The dissent focuses on but one passage from the state court opinion, arguing that Justice Davidowitz "shifted the focus" away from the error to the performance of counsel overall. The dissent fails to recount the full extent of the state court inquiry. As stated in the court's opinion:

> The [state] court noted that the two alibi witnesses that were presented at trial "had the best reason for remembering why defendant was present in Florida on June 19[,]

> 1996 – the birth of their son – an event that was more relevant for them than the events relied upon by the other witnesses." He expressed skepticism as to the probative value of the witnesses presented at the hearing, calling the evidence "in some cases questionable and in others [raising] issues which could have created questions for a deliberating jury. For example, two of the witnesses – Lisette Rivero[ ] and Denise Hernandez – could not say where the defendant was on June 19 and 20." The judge "studied closely" the alibi witnesses presented at the hearing, and concluded they were "for the most part, questionable and certainly not as persuasive as the two witnesses who did testify, and were rejected by the jury" and the testimony they would have provided was "largely" cumulative. In spite of the failure to call the alibi witnesses, Justice Davidowitz determined "this jury verdict was *unimpeached* and amply supported by the evidence." (internal quotation marks omitted and emphasis added).

Rosario v. Ercole, 601 F.3d 118, 127 (2d Cir. 2010).

That said, I agree with the dissent that New York state courts would be wise to engage in separate assessments of counsel's performance under both the federal and the state standards. *See*, *e.g.*, *People v. McNeill*, 899 N.Y.S.2d 840, 841 (1st Dep't 2010). Such an exercise would ensure that the prejudicial effect of each error is evaluated with regard to outcome, and would guarantee that defendants get the quality of

overall representation guaranteed under New York state law. This vigilance will also alleviate the risk that the federal courts will force state courts to abandon New York's generous standard for one akin to the more restrictive federal model.

KATZMANN, *Circuit Judge*, concurring in the denial of rehearing *in banc*.

The dissenters have identified possible challenges posed by New York's constitutional standard for ineffective assistance of counsel claims. As they note, the New York standard could leave room for New York courts to find a lawyer effective by focusing on the "fairness of the process as a whole," *People v. Benevento*, 91 N.Y.2d 708, 714 (1998), rather than on whether "there is a reasonable probability that . . . the result of the proceeding would have been different" absent defense counsel's mistakes, *Strickland v. Washington*, 466 U.S. 668, 694 (1984). *See Henry v. Poole*, 409 F.3d 48, 70-72 (2d Cir. 2005) ("paus[ing] to question whether the New York standard is not contrary to *Strickland*").

As both Chief Judge Jacobs' dissent and Judge Wesley's concurrence observe, however, such difficulties can be avoided by separate consideration of counsel's performance under the federal standard when a federal challenge is presented in the New York courts. For the reasons set forth in the panel's decision, *see Rosario v. Ercole*, 601 F.3d 118, 127 (2d Cir. 2010), I am satisfied that the trial court here

engaged in such an inquiry, albeit "not delivered in *Strickland* terminology," *id.* (quoting *Rosario v. Ercole*, 582 F. Supp. 2d 541, 553 (S.D.N.Y. 2008)). Accordingly, this case does not require us to review New York's standard. Thus, I concur in the decision of the Court to deny rehearing *in banc*.

DENNIS JACOBS, *Chief Judge*, joined by ROSEMARY S. POOLER, GERARD E. LYNCH, and DENNY CHIN, *Circuit Judges*, dissenting from the denial of rehearing *in banc*.

I agree with the panel majority that the New York standard for ineffective assistance of counsel is more lenient to defendants generally, lacking as it does a "but for" prejudice requirement. *See People v. Turner*, 5 N.Y.3d 476, 480 (2005). But it is nevertheless contrary to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). I respectfully dissent from the order denying *in banc* review because this defect likely will give rise to more cases that will bedevil the district courts, which are left to sort out case-by-case a problem that is systemic.[1]

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[1] Senior Circuit Judge Chester J. Straub, the author of the panel's minority opinion concurring in part and dissenting in part, was not authorized to participate in the *in banc* poll, but has endorsed the views expressed in this opinion.

I

Under federal law, a lawyer is ineffective when conduct that falls "below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, creates "a reasonable probability that . . . the result of the proceeding would have been different," *id.* at 694. "[U]nder New York law the focus of the inquiry is ultimately whether the error affected the 'fairness of the process as a whole.'" *Rosario v. Ercole*, 601 F.3d 118, 124 (2d Cir. 2010) (quoting *People v. Benevento*, 91 N.Y.2d 708, 714 (1998)). The test articulated by the New York Court of Appeals thus allows a lawyer whose overall performance is adequate to be deemed constitutionally effective notwithstanding an isolated lapse that calls the result into question – the very scenario that triggers relief under *Strickland*. The New York standard is fairly unambiguous:

> Two of our decisions have rejected ineffective assistance claims despite *significant mistakes* by defense counsel (*People v. Hobot*, 84 N.Y.2d 1021 (1995); *People v. Flores*, 84 N.Y.2d 184 (1994)). Those cases hold, and we reaffirm today, that such errors as overlooking a useful piece of evidence (*Hobot*), or failing to take maximum advantage of a *Rosario* violation (*Flores*), do not in themselves render counsel constitutionally ineffective where his or her *overall performance is adequate*. But neither *Hobot* nor *Flores* involved the failure to raise a defense as *clear-cut and completely dispositive* as a statute of limitations. Such a failure, in the absence of a reasonable

> explanation for it, is hard to reconcile with a defendant's constitutional right to the effective assistance of counsel.

Turner, 5 N.Y.3d at 480-81 (emphases added). Thus the New York test averages out the lawyer's performance while *Strickland* focuses on any serious error and its consequences.

In the passage quoted above, the *Turner* court relies on *Flores*. That is dubious precedent. In *Flores*, a case involving a single serious error, the New York Court of Appeals relied on the "totality of representation" to decide that defense counsel's waiver of a *Rosario* claim did not constitute ineffectiveness. *People v. Flores*, 84 N.Y.2d 184, 187 (1994). Years later, this Court granted habeas relief, finding "at least a reasonable probability . . . that had that *Rosario* claim been pressed, Flores would have been granted a new trial by the trial court or on appeal." *Flores v. Demskie*, 215 F.3d 293, 305 (2d Cir. 2000).

Because the New York standard allows the gravity of individual errors to be discounted indulgently by a broader view of counsel's overall performance, it is contrary to *Strickland*.

II

The present case illustrates the constitutional defect in the New York standard. Rosario's pre-trial and trial counsel admitted an uncommonly bad mistake in believing that the state court had denied an application for funds to send an investigator to find

and interview about a dozen alibi witnesses who would swear that the defendant was in Florida when the charged crime was committed in New York. This failure was not a misfire of strategy or tactics; it was conceded error. In denying Rosario's collateral challenge, the Supreme Court of the State of New York acknowledged as much, but then shifted the focus:

> The best and most reasonable explanation, then, is that there was a misunderstanding or mistake which persisted through the case and which the parties simply cannot explain. But it was not deliberate. And that does not alter the fact that both attorneys represented defendant skillfully, and with integrity and in accordance with the standards of "meaningful representation" defined by our appellate courts.

It is this shift – from the specific mistake to the broader performance – that concerns me and should concern the entire Court.

III

I recognize that some colleagues may not consider this case an ideal vehicle for deciding the issue, in view of the state court's alternative ruling that "an alibi defense *was* presented through the two witnesses who had the best reason for remembering why" Rosario was elsewhere when the crime was committed, and that the prospective additional alibi witnesses "were, for the most part, questionable and

certainly not as persuasive as the two witnesses who did testify."

The panel majority seizes on this alternative ground to assert that the state court "considered the prejudicial effect of the errors, and concluded that the outcome of the trial would not have been different but for those errors." *Rosario*, 601 F.3d at 128.

The state court's findings of fact may bear on whether the state court unreasonably applied the correct federal standard, but they do not obviate the need to start with the correct standard; a finding on a mixed question of law and fact (such as prejudice) is suspect (at least) if it is guided by a defective understanding of the law. Moreover, although the state court conducted a hearing that included testimony from seven prospective alibi witnesses, I am unimpressed by the finding that they were "for the most part, questionable," and that the two who testified at trial were the best of the lot. First, if a witness is without flaw, I tend to suspect perjury; second, corroboration matters. As the panel dissent forcefully explains, Rosario was seriously prejudiced by the absence of more alibi witnesses. *Rosario*, 601 F.3d at 131-37, 140-42 (Straub, *J.*, dissenting).

IV

The full Court took an *in banc* poll in this case and decided not to revisit the panel's ruling. But this should not be construed as an imprimatur.[2]

I acknowledge that in most instances the state standard is more solicitous of the Sixth Amendment right to counsel than ours, and I respect the measures taken by the New York courts to administer cases in a way that seeks to accommodate a federal standard that is not congruent. That said, members of this Court entertain serious disquiet that in the courts of New York the gravity of individual mistakes may be submerged in an overall assessment of effectiveness, in a way that violates the federal Constitution.

Unneeded conflict can be avoided by separate consideration of counsel's performance under the *Strickland* standard in the New York courts when a federal challenge is presented. No doubt, there are other ways to the same end. But without some further vigilance in the state courts, the issue will be

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[2] At different times, this Court has been of different minds on the question. Some opinions have said (albeit in dicta or in following binding precedent) that the New York test is not contrary to *Strickland*. *See Eze v. Senkowski*, 321 F.3d 110, 124 (2d Cir. 2003); *Loliscio v. Goord*, 263 F.3d 178, 192-93 (2d Cir. 2001); *Lindstadt v. Keane*, 239 F.3d 191, 198 (2d Cir. 2001). A later panel voiced doubt. *See Henry v. Poole*, 409 F.3d 48, 70-71 (2d Cir. 2005) (pausing "to question whether the New York standard is not contrary to *Strickland*," but granting habeas relief on the unreasonable application ground).

presented to us one day in a case in which fact-findings do not blur focus on the constitutional question, and an *in banc* panel of this Court may be convened to deal with it.

POOLER, *J.*, dissenting in the denial of rehearing *en banc*:

I fully join Chief Judge Jacobs' dissent from the denial of rehearing *en banc*. I write separately only to further highlight the injustice this court's denial permits. It is probably correct that *generally* the New York state ineffective assistance standard is more lenient towards defendants than the federal standard. Rosario, however, I am sure would disagree. The state standard can act to deny relief despite an egregious error from counsel so long as counsel provides an overall meaningful representation. This is contrary to *Strickland*. *See Strickland v. Washington*, 466 U.S. 668 (1984). Far from being a theoretical problem as the concurrence suggests, this seems to be exactly what happened in Rosario's case. All three members of the *Rosario* panel agreed that defense counsels' performance was probably ineffective under *Strickland* even though it was not ineffective under the state standard. *Rosario v. Ercole*, 601 F.3d 118, 126 (2d Cir. 2010); *id.* at 129 (Straub, *J.*, dissenting).

At least we all can agree that the New York state courts would be wise to evaluate counsels' performances separately under the federal and the state standards. Doing so will likely prevent future defendants

from being penalized by a lacuna in a state standard that we have upheld because it supposedly works to their benefit.

APPENDIX J

United States Code, Title 28

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

> **(A)** the applicant has exhausted the remedies available in the courts of the State; or
>
> **(B)(i)** there is an absence of available State corrective process; or
>
> **(ii)** circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance

upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the

existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.