No. 10-854

IN THE

Supreme Court of the United States

RICHARD ROSARIO,
Petitioner,
v.

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

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

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amici curiae National Association of Criminal Defense Lawyers ("NACDL") and New York State Association of Criminal Defense Lawyers ("NYSACDL") respectfully submit this brief in support of the petition for a writ of certiorari filed by Richard Rosario.[1] This Court's review is necessary to ensure uniform nationwide enforcement of the Sixth Amendment's guarantee of effective assistance of counsel and to provide needed guidance to New York state courts, which apply a standard that is contrary to federal law.

NACDL is a nonprofit, professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. NACDL has over 11,000 members and over 40,000 affiliate members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

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[1] Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amici curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Rule 37.2, counsel of record for all parties received timely notice of *amici*'s intention to file this brief.

NYSACDL is a not-for-profit corporation with a subscribed membership of more than 800 attorneys, including private practitioners, public defenders, and law professors. It is a recognized State Affiliate of NACDL.

Both NACDL and NYSACDL regularly participate as *amici* in state and federal appeals, and in matters before this Court, and both are acutely aware of the need for adequate representation of criminal defendants at trial. *Amici* are concerned that as a result of the panel's decision, New York state courts will continue applying the wrong standard in evaluating ineffective-assistance claims. Under that standard, defendants are unable to obtain relief from convictions tainted by ineffective assistance of counsel as defined by this Court. The application of a standard that fails to protect Sixth Amendment rights is especially troublesome in New York, where structural deficiencies in the indigent defense system often result in defendants' receiving inadequate representation.

INTRODUCTION

Under this Court's decision in *Strickland v. Washington*, 466 U.S. 668, 694 (1984), an attorney fails to provide the effective assistance of counsel guaranteed by the Sixth Amendment if there is a reasonable probability that, but for his errors, the defendant would have been acquitted.

New York state courts do not apply this test in deciding claims of ineffective assistance of counsel. Instead, they apply a "meaningful representation" test, under which counsel is effective so long as his

errors do not make the trial as a whole "fundamentally unfair." Pet. App. 13a (panel opinion below) (citing *People v. Stultz*, 810 N.E.2d 883, 886–87 (N.Y. 2004)).

The "meaningful representation" test obviously diverges from *Strickland* as a linguistic matter. But, more importantly, it diverges from *Strickland* as a practical matter, too. First, unlike *Strickland*, the "meaningful representation" test "averages out" a lawyer's performance. Pet. App. 244a (Jacobs, C.J., dissenting from denial of rehearing en banc). If counsel makes an outcome-determinative error in one aspect of his representation, he nevertheless will be deemed effective if he otherwise performs error-free. Second, unlike *Strickland*, the "meaningful representation" test holds ineffectiveness claims alleging a single error to a higher standard than ineffectiveness claims alleging multiple errors. These features of the "meaningful representation" test make clear that when a New York state court adjudicates an ineffectiveness claim under that test, it does not apply *Strickland* at all, but instead applies a more exacting standard.

The panel majority recognized the wide gulf between the two standards.[2] It nonetheless refused

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[2] "The difference [between the two standards] arises in the second prong of the *Strickland* test." Pet. App. 11a. "[U]nder New York law the focus of the inquiry is ultimately whether the error affected the fairness of the process as a whole." *Id.* (internal quotation marks omitted). New York courts assess "[t]he efficacy of the attorney's efforts . . . by looking at the totality of the circumstances and the law at the time of the case (continued…)

to hold that New York's "meaningful representation" test is "contrary to" *Strickland* within the meaning of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1). Pet. App. 11a–16a. As a result, New York federal courts must accord deference to the New York state courts' "meaningful representation" analysis, and defendants asserting ineffectiveness claims never receive a plenary evaluation under *Strickland*.

This Court should grant the petition for certiorari and reverse the decision below for three reasons. First, the panel's decision conflicts with decisions from this Court and other courts of appeals. This Court and the Seventh and Tenth Circuits have squarely held that a state court acts "contrary to" *Strickland* when—as the New York court did here—it requires a defendant to prove that counsel's errors made his trial fundamentally unfair in order to establish a Sixth Amendment violation.

Second, because the Second Circuit has steadfastly refused to rule that the "meaningful representation" test is "contrary to" *Strickland*, granting certiorari and reversing the decision below is the only way to ensure that New York defendants have their ineffectiveness claims decided, in the first instance, by a *Strickland* analysis.

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and asking whether there was meaningful representation." *Id.* (internal quotation marks omitted). Unlike in *Strickland*, "the concept of prejudice in New York's ineffective assistance of counsel jurisprudence focuses on the quality of the representation provided and not simply the 'but for' causation chain." Pet. App. 13a.

And third, because the problem of ineffective assistance of counsel is acute in New York, it is especially important that New York defendants have their ineffectiveness claims evaluated in the first instance according to the correct constitutional standard. Structural deficiencies in New York's indigent criminal defense system all but guarantee that the State's indigent and most vulnerable defendants will receive an unacceptably low quality of legal representation. When such inadequate assistance may have contributed to a conviction, a defendant in New York should have no less of an opportunity to obtain collateral relief than defendants in other states.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With Decisions From This Court And Other Circuits Holding That A State Court Acts "Contrary To" *Strickland* By Refusing To Find Counsel Ineffective Unless His Errors Made The Trial "Fundamentally Unfair."

As the panel majority below acknowledged, the New York state court that decided Rosario's habeas claim applied a test—the "meaningful representation" test—under which the question "whether defendant would have been acquitted of the charges but for counsel's errors" is "not dispositive" of a Sixth Amendment violation. Pet. App. 14a (quoting *Henry v. Poole*, 409 F.3d 48, 71 (2d Cir. 2005)). Rather, the defendant would have to prove "that the proceeding was fundamentally unfair." Pet. App. 13a (citing *Stultz*, 810 N.E.2d at 886–87).

The panel majority nonetheless held that the state court's ruling denying Rosario's ineffectiveness claim was not "contrary to" *Strickland*, accorded it AEDPA deference, and upheld it.

That decision conflicts squarely with this Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000). In *Williams*, a Virginia court rejected an ineffectiveness claim on the ground that the defendant had not demonstrated that "the result of the proceeding was fundamentally unfair or unreliable." *Id.* at 394. This Court held that the Virginia court's ruling was "contrary to" *Strickland*. It explained that "[a] state-court decision will certainly be 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." *Id.* at 405. The Virginia court, by holding that "a 'mere' difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel," *id.* at 397, had contradicted federal law. Therefore, the Court held, the state court ruling did not merit AEDPA deference; the federal courts must review it *de novo*. *Id.* at 405–06.

The Seventh Circuit reached the same result in *Goodman v. Bertrand*, 467 F.3d 1022, 1028 (7th Cir. 2006), holding that a state court acted "contrary to" *Strickland* by requiring the defendant "to show that his . . . trial was 'fundamentally unfair' or 'unreliable'"—above and beyond proving *Strickland* prejudice—in order to demonstrate that counsel was constitutionally ineffective. Likewise, in *Spears v. Mullin*, 343 F.3d 1215, 1248 (10th Cir. 2003), the Tenth Circuit held that a state court acted "contrary to" *Strickland* by determining that "[a] mere showing

that a conviction would have been different but for counsel's errors would not suffice to sustain a Sixth Amendment claim" and requiring defendant to prove additionally that his trial was "[un]fair[]."

This Court in *Williams*, the Seventh Circuit in *Goodman*, and the Tenth Circuit in *Spears* got it exactly right: Requiring a defendant to prove that counsel's errors rendered his trial "fundamentally unfair"—as the New York state courts do—is completely inconsistent with, and more exacting than, *Strickland*. By deferring to a standard that requires a defendant to demonstrate that counsel's overall performance deprived him of a fair trial, Pet. App. 11a, the decision below squarely conflicts with these decisions, and this Court should grant certiorari to resolve the conflict.[3]

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[3] In concluding that the New York standard is not contrary to *Strickland*, the panel majority emphasized that *the New York courts* view their standard as "more generous" than *Strickland*. Pet. App. 13a. But the New York courts' perception of their own standard does not control on questions of federal law, especially when, in practice, that standard permits courts to overlook the prejudice caused by counsel's error. *See infra* Part II. While the panel majority acknowledged that the New York test indeed "creates [this] danger," it contended that such danger is the product of a "misunderstand[ing]" of the test. Pet. App. 15a. Given the panel majority's recognition that, under the New York test, "[p]rejudice to the defendant, meaning a reasonable possibility of a different outcome, is but one factor of determining if the defendant had meaningful representation," *id*., it should have acknowledged that the danger is inherent in the standard.

II. New York's "Meaningful Representation" Standard Subverts *Strickland*.

The very nature of the New York "meaningful representation" test is contrary to the *Strickland* standard, as New York state court decisions applying this standard, including the decision in Rosario's case, demonstrate. These decisions highlight two prime aspects of this conflict.

Averaging-Out. As Chief Judge Jacobs observed in his dissent from denial of rehearing en banc, "the New York test averages out the lawyer's performance while *Strickland* focuses on any serious error and its consequences." Pet. App. 244a. This is not simply a theoretical concern; New York courts confronted with potentially prejudicial counsel errors regularly find that counsel provided "meaningful representation" so long as he performed adequately in enough other areas. Indeed, they routinely deny ineffectiveness claims without so much as *discussing* the claimed error.

The Appellate Division's decision in *People v. Ott*, 815 N.Y.S.2d 864 (N.Y. App. Div. 4th Dep't 2006), is illustrative. The defendant claimed that his trial counsel was ineffective for, *inter alia*, failing to object to the prosecutor's leading questions put to key witnesses and expose the fact that various prosecution witnesses had been drinking heavily and were intoxicated during the time period relevant to their testimony. *See* Brief for Respondent at *9–10, *People v. Ott* (Apr. 3, 2006), 2006 WL 4690901. Knowing how the "meaningful representation" test diverges from *Strickland*, the District Attorney asserted in response that "[t]he most important

factor to note regarding the defendant's representation" is *not* that the claimed errors had no effect on the trial. *See id.* at *9. Rather, it was "that counsel, through her vigorous advancement of the defense case, convinced the jury to acquit the defendant of the two highest counts of the indictment, dramatically reducing the defendant's sentencing exposure. In light of *this* fact, defendant's various claims concerning counsel's effectiveness are inconsequential." *Id.* (emphasis added).

The Appellate Division agreed. Applying the "meaningful representation" test, it affirmed the conviction without even *mentioning* what the specific claimed errors were, let alone why they were not prejudicial:

> We reject the contention of defendant that he was denied effective assistance of counsel. Defense counsel made appropriate pretrial motions, adequately cross-examined the prosecution witnesses, and gave effective opening and closing statements, and defendant was acquitted of the two most serious crimes charged in the indictment. The record *thus establishes* that defendant received *meaningful representation.*

Ott, 815 N.Y.S.2d at 865 (emphases added). *Accord People v. Race*, 910 N.Y.S.2d 271, 275–76 (N.Y. App. Div. 3d Dep't 2010) (holding that counsel provided "meaningful representation" because he "made appropriate motions and clear opening and closing statements, effectively cross-examined witnesses, made appropriate objections and successfully moved

to have certain charges of the indictments dismissed"); *People v. Hall*, 892 N.Y.S.2d 457, 458 (N.Y. App. Div. 2d Dep't 2009) (holding that counsel provided "meaningful representation" because he "successfully obtained acquittals on the two higher counts" of the indictment).

This very case illustrates how New York courts applying the "meaningful representation" test "average out" counsel's performance and in so doing systematically overlook glaring prejudicial errors. The state court here did just that in denying Rosario's ineffective assistance claim, averaging out counsel's devastating failure to fully investigate his strong alibi defense by crediting all of the *other* tasks counsel did well.

Rosario argued that his public defenders were ineffective because they failed to send an investigator to Florida to interview potential alibi witnesses, even though a court had granted a motion for funds to use for precisely that purpose. *See* Pet. App. 212a–14a. One of Rosario's pre-trial lawyers made and won that motion, but she never conducted the investigation, and his trial counsel was under the misimpression that the court had denied the motion. *See* Pet. App. 213a–14a.

Rosario's counsel thereby eviscerated his alibi defense. Had his lawyers acted properly and sent the investigator to Florida, they would have discovered multiple individuals with no close connection to Rosario who would have corroborated Rosario's presence in Florida at the time of the crimes charged. Critically, those witnesses would

have been much less vulnerable to impeachment for bias than the two alibi witnesses who did testify. *See* Pet. App. 214a–19a. This error was all the more devastating because the prosecution's case hinged entirely on stranger eyewitness testimony, *see* Pet. App. 2a–4a (panel opinion below), which, as this Court has observed, can be "proverbially untrustworthy," *United States v. Wade*, 388 U.S. 218, 228 (1967).

The New York state court acknowledged counsel's error. Nevertheless, the court held that, because Rosario's lawyers performed so many other tasks adequately, the error did not render them ineffective. Specifically, the court explained that the error "d[id] 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." Pet. App. 226a. Namely, "[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; [and] opening and closing statements were concise and to the point . . . ." Pet. App. 225a.

The state court's focus on counsel's overall performance came at the expense of a proper evaluation of the impact of counsel's error on the

jury's evaluation of the prosecution's case.[4] This substantial deviation from *Strickland* makes it more difficult for defendants in many cases, including this one, to obtain relief. As such, the "meaningful representation" standard is contrary to *Strickland* and should be rejected by this Court.

Treating Single Errors Differently. *Strickland* commands that the same prejudice test be used to evaluate any alleged error or constellation of errors. Under the "meaningful representation" test, by contrast, ineffectiveness claims alleging single errors must clear a higher bar: "For a single error to constitute ineffective assistance of counsel, the failing would have to be clear-cut and completely dispositive, and not one based on a complex analysis." *People v. Calderon*, 884 N.Y.S.2d 29, 33 (N.Y. App. Div. 1st Dep't 2009) (internal citation omitted); *see also* Pet. App. 11a–12a (panel opinion below) (stating that "a single error by otherwise competent counsel may meet [New York's 'meaningful representation'] standard if that error compromised the integrity of the trial as a whole").

Given these fundamental differences in approach that will make it more difficult for defendants in New York, such as Rosario, who have been prejudiced by a single error to obtain relief from their convictions, the "meaningful representation" test

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[4] To the extent the state court even considered the effect of the error on the jury's verdict, it applied the wrong standard. *See* Pet. App. 230a (noting that the verdict was "amply supported by the evidence").

simply does not square with *Strickland*. Therefore, when a federal habeas court reviews a *Strickland* claim rejected under the "meaningful representation" test, that court becomes the *first* court—not the last—to undertake a proper *Strickland* analysis. Accordingly, contrary to the Second Circuit's decision here, that analysis should be conducted *de novo*, as this Court directed in *Williams*. *See* 529 U.S. at 406.

Although the Second Circuit has acknowledged "problems" with New York's standard, it has refused to rectify them. That court has on multiple occasions recognized that New York's "meaningful representation" test diverges from *Strickland*. *See, e.g.*, Pet. App. 17a (panel decision below) (concluding that Rosario's ineffectiveness claim, rejected under "meaningful representation" test, would have been granted under *Strickland*); *Wilson v. Mazzuca*, 570 F.3d 490, 507 (2d Cir. 2009) (same); *Gersten v. Senkowski*, 426 F.3d 588, 613–14 (2d Cir. 2005) (same); *Henry*, 409 F.3d at 67 (same). The Second Circuit is thus aware that a defendant's entire journey through the New York state courts will end without any tribunal giving his ineffectiveness claim a plenary *Strickland* analysis, and that in some cases this means that a defendant who would have obtained habeas relief had the New York courts applied *Strickland* will be denied relief under the "meaningful representation" standard.

Yet, the panel below—like its predecessors—held that the "meaningful representation" standard is not "contrary to" *Strickland*. Accordingly, New York defendants' ineffectiveness claims will *never* receive plenary review under the more protective *Strickland*

standard at any stage—unless and until this Court intervenes.[5]

III. Structural Deficiencies In New York's Indigent Defense System Make It Especially Important That New York Defendants' Ineffectiveness Claims Are Evaluated Under *Strickland*.

Problems posed by incompetent, underperforming court-appointed lawyers are particularly acute in New York. Structural deficiencies in the State's indigent defense system all but guarantee that the quality of representation provided to many indigent defendants will not improve meaningfully in the near future. Given the severity of the underlying crisis, indigent defendants who have been convicted in New

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[5] A habeas court may review a "meaningful representation" decision *de novo* if it finds, on the particular facts of that case, that the state court "unreasonably applied" *Strickland*. 28 U.S.C. § 2254(d)(1). But that is not an adequate safety valve, for at least two reasons. First, as the panel and district court opinions in this case demonstrate, the Second Circuit and its district courts do not always make this determination. Second, as this Court has explained, because the underlying problem is systemic (the use of a flawed standard), the solution must likewise be systemic (*de novo* review of all applications of that standard). *See Williams*, 529 U.S. at 405–06 (mandating *de novo* review of all decisions reached using "rule that contradicts the governing law set forth in [the Court's] cases"). Indeed, it is unclear how a federal court should determine whether a New York state court has "unreasonably applied" *Strickland* when that state court, with the Second Circuit's approval, has not applied *Strickland* at all.

York's criminal courts have a compelling interest in ensuring that their Sixth Amendment rights are adjudicated under *Strickland*, the correct federal law standard.

"New York's indigent defense system is in a serious state of crisis and suffers from an acute and chronic lack of funding." The Spangenberg Group, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services* 155 (2006) [hereinafter "*TSG Report*"]. It "is a haphazard, patchwork composite of multiple plans that provides inequitable services across the state to persons who are unable to afford counsel," *id.*, and is "structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of the United States . . . ," William E. Hellerstein, *Final Report to the Chief Judge of the State of New York, Commission on the Future of Indigent Legal Services* 3 (2006) (internal citation omitted). Most court-appointed attorneys lack the resources for support staff, cannot afford to conduct appropriate investigations, and do not have access to expert services. *TSG Report* 49–50, 72–77. Moreover, there are no state-wide rules for managing caseloads, and some public defenders handle up to 1,000 cases a year. *Id.* at 44–46; *see also Report of the Indigent Defense Organization Oversight Committee to the Appellate Division First Department for Fiscal Years 2008–09*, at 2 ("[F]ully 100% of the trial staff [at New York County Defender Services] was assigned an excessive number of new cases."). These lawyers are subject to few mandatory

standards, little supervision, and inadequate training. *TSG Report* at 51–53.

Accordingly, client contact is often severely limited, hindering counsel's ability to prepare for cases. For defendants facing serious charges, institutional providers of indigent defense services frequently use a "horizontal" form of representation, where multiple attorneys handle one case at different stages of the proceeding, as opposed to "vertical" representation, where one attorney handles a case from start to finish. *Id.* at 47–49. Although horizontal representation helps indigent defense attorneys manage their extraordinarily high case loads, it confuses clients and limits attorney-client communication, increasing the likelihood that defendants will receive inadequate representation. *Id.* at 48.

Rosario's experience with court-appointed counsel exemplifies the inadequacies of New York's indigent defense system. Rosario had "at least four" court-appointed attorneys between his arrest and conviction. Pet. App. 119a (district court decision below). His third court-appointed attorney, Joyce Hartsfield, requested a court order for an investigator to travel to Florida so that she could investigate Rosario's extensive alibi defense. Pet. App. 120a. As noted previously, the court granted the request, but the investigation was never conducted. *Id.* After approximately a year and a half, Steven Kaiser replaced Hartsfield as Rosario's fourth defense attorney. Pet. App. 119a. Kaiser—who mistakenly believed that Hartsfield's request was denied—never retained an investigator, and the

case went to trial without a thorough investigation of witnesses who could testify in support of Rosario's alibi. Pet. App. 124a–25a. The clear communication breakdown during the counsel switch resulted in a "colossal failure" to investigate a strong alibi defense (Pet. App. 22a (Straub, J., dissenting from panel opinion)), *see supra* Part II, and is indicative of the recurring problems that result from a system that promotes efficiency and cost-cutting over effective representation.

Defense counsel's failure to provide adequate representation to indigent defendants is so pervasive that New York's Court of Appeals recently allowed a lawsuit challenging the constitutional sufficiency of the State's indigent defense system to proceed. *See Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010). Recent efforts have been made to reform the system, *see, e.g.*, John Fulmer, *State of New York's Indigent Legal Services Office Christened*, Daily Record (Rochester, N.Y.) (June 28, 2010), but the fact remains that many individuals are potential victims of the State's inability to provide adequate legal representation to indigent defendants. Indeed, approximately 2.7 million New Yorkers live below the poverty line.[6] This Court—and only this Court—can ensure that indigent defendants in New York are able to obtain appropriate relief when their court-

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[6] *See Poverty: 2008 and 2009*, U.S. Census Bureau 5 (Sept. 2010), *available at* http://www.census.gov/prod/2010pubs/acsbr09-1.pdf.

appointed attorneys' inadequate legal assistance contributes to their conviction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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