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 the State of New York,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

After the prosecution called two eyewitnesses who identified petitioner as the shooter, petitioner's attorney called two alibi witnesses and petitioner to testify that he was in Florida at the time of the murder, which occurred on June 19, 1996. Petitioner testified, in pertinent part, that he was staying with friends in Florida at the time of the crime. He also testified that from February, 1996, until April 13, 1996, he was living in Florida at the home of a female friend. The prosecutor rebutted this testimony by calling a representative of the Volusia County, Florida, Department of Corrections to testify that petitioner was, in fact, incarcerated during part of the period he testified that he was living with his female friend.

1. Under these circumstances, was the state court's decision denying petitioner's post-trial motion to vacate the judgment based on ineffective assistance of counsel contrary to, or an unreasonable application of, clearly established federal law as determined by this Court, where two of the "new" alibi witnesses who testified at petitioner's post-trial hearing would only have offered, at best, cumulative testimony in support of the alibi, the remaining "new" witnesses would have offered no support for the alibi whatsoever, and the record reveals that petitioner's attorneys spoke to the uncalled witnesses and made a strategic determination to not call them at trial?

2. Is New York state's standard for ineffective assistance of counsel contrary to the federal standard, either on its own or as applied by the state court in this case, where (a) the New York state standard provides more protection than the federal standard by requiring

state courts to scrutinize not only whether, but for one or more claimed errors committed by counsel, the judgement would have been different, but also whether counsel's performance, considered in its totality, demonstrates that counsel provided his or her client with "meaningful representation," and (b) the state court measured counsel's performance under the federal standard, found no prejudice, and then additionally scrutinized counsel's performance under the higher state standard and found that counsel provided "meaningful representation"?

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STATEMENT OF THE FACTS

At midday on June 19, 1996, petitioner shot and killed George Collazo. Two eyewitnesses – Michael Sanchez and Robert Davis – testified that petitioner was the shooter. Davis, a porter cleaning the sidewalk outside of a building near the crime scene, saw petitioner's face from a distance of two car lengths. Sanchez, who was standing next to the victim, saw petitioner walking towards him and pass him from five feet away. He then observed petitioner turn and argue with Collazo. Afterwards, he saw petitioner point a revolver at Collazo's head and shoot. The next day, Davis identified a photograph of the shooter from several mugbooks. Petitioner was arrested on July 1, 1996. Both Davis and Sanchez picked petitioner out of a lineup on July 9, 1996.

At trial, Davis and Sanchez identified petitioner as the shooter.

Petitioner presented an alibi defense. His attorney presented the testimony of two alibi witnesses – John Torres and Jenine Seda – who testified that petitioner was living with them in Deltona, Florida at the time of the homicide. They testified that their son was born on June 20, 1996, one day after the murder.

Petitioner also testified in support of his alibi. He stated that he often traveled between New York and Florida, and that it would take only one day to travel from New York to Florida by bus. Petitioner asserted that he traveled to Deltona, Florida in December 1995 to find a job. It was during this trip that he met John and Jenine. Petitioner testified that he could not find employment,

and that he returned to New York City in January 1996. Again unable to procure a job, petitioner asserted that he returned to Florida in February, 1996. He testified that from February, 1996, until April 13, 1996, he was living at the home of a woman named Shannon Beane. Petitioner stated that he returned to New York City on April 14, 1996, but again left for Florida in May, 1996 and stayed with John and Jenine until June 20 or 21, 1996. Petitioner testified that he returned to New York City on June 30, 1996 when he discovered that the police were looking for him.

To refute petitioner's testimony that he was living at Beane's house from February to April 13, 1996, the prosecution presented rebuttal evidence from Captain Bruce Bolton, the records custodian for the Volusia County Department of Corrections in Florida. He testified that on March 13, 1996, petitioner was arrested by the Volusia County Sheriffs Department and brought to the Volusia County Branch Jail in Daytona, Florida. Petitioner was released from custody on April 12, 1996. Upon his arrest, petitioner gave his address as 2071 Walton Avenue, Bronx, New York.

Petitioner was convicted, following a jury trial, of Murder in the Second Degree, and was sentenced to an indeterminate term of from twenty-five years to life imprisonment.

On direct appeal in state court, petitioner claimed, in pertinent part, that the state trial court improperly admitted the aforementioned rebuttal evidence. The Supreme Court of the State of New York, Appellate Division, First Department, rejected this claim, and

unanimously affirmed petitioner's conviction. In doing so, the Appellate Division noted that the rebuttal evidence was not collateral because petitioner's travels between New York and Florida were an important part of his alibi defense. *People v. Rosario*, 288 A.D.2d 142 (1st Dept. 2001), *leave denied* 97 N.Y.2d 760 (2002).

Almost five years after the murder trial, in papers dated June 11, 2003, petitioner sought to vacate his conviction based on ineffective assistance of counsel and newly discovered evidence. Petitioner presented affidavits from witnesses who stated that he was in Florida at the time of the murder. Petitioner presented the testimony of seven alleged alibi witnesses: Fernando Torres (father of trial witness John Torres), Chenoa Ruiz, Ricardo Ruiz, Michael Serrano, Minerva Godoy (mother of petitioner's children), Denise Hernandez, and Lyssette Rivera. Two additional individuals, Margarita Torres and Jeremy David Guzman, submitted affidavits but did not testify. Petitioner also presented the testimony of his two former attorneys, Joyce Hartsfield and Steven Kaiser, as well as Jessie Franklin, an investigator hired by Ms. Hartsfield. Petitioner claimed that his attorneys were ineffective for failing to send Ms. Frankin to Florida in furtherance of the investigation, despite the fact that the state court granted them funding to do so, and for failing to call the additional alibi witnesses at trial.

The state court (Edward Davidowitz, J.) held a hearing that lasted over a month. At the hearing, only Fernando and Chenoa placed petitioner in Florida on the day of the homicide. Their testimony was very similar to that of the trial witnesses, except Chenoa testified that on June 19, 1996, at about 11:00 to 11:30 a.m., she brought

Jenine to a doctor's appointment. By contrast, John Torres testified at trial that Jenine was at work that day. Also, Ms. Ruiz did not have knowledge of facts deemed "integral" to petitioner's alibi defense by the state appellate court, such as petitioner's travels back and forth between New York and Florida between February 1996 and the end of June 1996.

Fernando testified that he did not recall if a lawyer ever contacted him about petitioner's case. Steven Kaiser confirmed that he did, in fact, speak with Fernando. Nor did Fernando recall whether Jessie Franklin, petitioner's investigator, ever contacted him about the case, "but for some reason the name" sounded familiar to him. The name was familiar because Ms. Franklin had contacted Fernando and took notes of her interview with him. Ms. Franklin confirmed that the notes of her interview with Fernando from October 25, 1996 did not mention "that Fernando told [her] anything about defendant's whereabouts on June 19, 1996" or June 20, 1996, the birth of John Torres' son, or Jenine's trip to the hospital on June 20, 1996. She also confirmed that the only reference in Fernando's statement to a time frame were the words "latter June" (meaning "latter part of June"), and that these words referred to a point in time when Fernando and John went looking for car parts. And while Fernando mentioned running into petitioner on June 20, 1996 outside of John and Jenine's apartment complex, Ms. Franklin's notes contained no indication that Fernando mentioned this to her either. She testified that the notes of her interview with Fernando indicated the "substance of everything that was said to her."

The testimony of defendant's attorneys and Ms. Franklin established that they spoke to many, if not all, of the witnesses that testified at the trial and post-trial hearing. Ms. Franklin testified that according to her notes she spoke with Fernando and Robert Torres by telephone on October 25, 1996, and Minerva Godoy on October 29, 1996. She also testified that according to her notes, she interviewed defendant's sister and his mother on September 15, 1997, Jenine Seda on September 22, 1997, and John Torres on September 23, November 5, and November 18, 1996. Ms. Hartsfield further testified that not all of the alleged alibi witnesses named by petitioner could "remember [petitioner's] whereabouts on the date in question."

Mr. Kaiser testified that he spoke with Fernando and Margarita, that their testimony was cumulative to the testimony of John and Jenine, and that "if it were the explosive alibi testimony that somehow was different from what [he] already had available, [he] would have made every effort that [he] could to get them up here, whether they wanted to come or not." Fernando confirmed that petitioner's sisters called him and stated that "the public defend[er] suggested that" his son John's testimony was enough and that they did not need him to testify. Mr. Kaiser also testified that Fernando and Margarita seemed somewhat "reluctant to appear and get involved in the case," and that they were "using money as an excuse" to avoid testifying.

Mr. Kaiser further testified that he also spoke with other witnesses whom he described as "young people that are contemporaries" of John Torres and Jenine Seda. While he did not recall the names of these additional

witnesses, all the people who testified at the hearing, with the exception of Fernando and Margarita, were "contemporaries" of John, Jenine and petitioner.[11] Mr. Kaiser testified that the alleged witnesses he "spoke to that said that they couldn't afford to come up, I got . . . more than a little bit of an impression that maybe . . . maybe they were using that as an excuse. That they were not as eager to help Richard when I was dealing with them as they might have been when Mr. Barry,[22] the investigator for [the] Legal Aid Society [who] was with them in their home" and 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. That was the impression that I had."

Mr. Kaiser confirmed that petitioner's false testimony concerning his whereabouts in March and April of 1996 was "really devastating" to the defense, and "disruptive of [petitioner's] alibi" defense.

After the hearing, the state court denied petitioner's motion. In a 23 page opinion, the state court found that "[b] y any standard" (Appendix, p. 224a), petitioner received the effective assistance of counsel. The court ruled that the alibi witnesses who testified at petitioner's trial were

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1. Jenine Seda was 21 years old at the time of trial, and John Torres was 23, as was petitioner. At the time of the hearing, which was held about six years after the trial, Fernando Torres was 62, Ricardo Ruiz was 34, Chenoa Ruiz was 30, Minerva Godoy was 32, Denise Hernandez was 28, Lyssette Rivera was 28, and Michael Serrano was 31.

2. Barry was the investigator for the Legal Aid Society who interviewed witnesses in conjunction with the post-trial motion to vacate the judgment. He did not testify at the hearing.

the ones 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" (Appendix, p. 226a). Regarding the state court's grant of funding for a Florida trip, the state court held that the failure to send Ms. Franklin to Florida did not change the fact that petitioner received effective representation (Appendix, p. 226a). The court held that petitioner's "new" alibi witnesses were "in some cases questionable and in others raised issues which could have created questions for a deliberating jury" (Appendix, pp. 226a-227a). The court further found that "[e]fforts were made to speak, and interview [the witnesses] and the substance of their testimony was known to the parties before the trial began" (Appendix, p. 228a). At the close of its opinion, the state court expressly found that the State's evidence was "strong," that the "new" alibi witnesses were "not as persuasive as the two witnesses who did testify," and that the "jury verdict was unimpeached, and 'amply supported by the evidence'" (Appendix, p. 230a).

Petitioner filed his petition for a writ of habeas corpus on September 16, 2005. In a Report and Recommendation dated December 28, 2007, the Honorable Henry Pitman recommended that the District Court reject petitioner's ineffective assistance of counsel claim. Judge Pitman concluded that, even though defense counsels' performance was "objectively deficient" because they failed to "adequately investigate" and "present additional witnesses" at trial, "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" (Appendix, pp. 143a, 159a).

In a Memorandum and Order dated October 22, 2008, the Honorable P. Kevin Castel adopted Judge Pitman's recommendation that the ineffective assistance claim be rejected and denied the habeas petition (Appendix, p. 80a).

The United States Court of Appeals for the Second Circuit affirmed the lower court's decision denying the writ. In doing so, the Court explained why the New York state standard for ineffective assistance of counsel was not contrary to the federal standard, noting that "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" (Appendix, 13a [emphasis in original]). Moreover, as did Judge Pitman and Judge Castel, the Second Circuit held that the state court decision was not contrary to, or an unreasonable application of, clearly established federal law as determined by this Court (Appendix, pp. 15a, 20a). The Court of Appeals also denied petitioner's application for en banc rehearing (Appendix, p. 237a).

REASONS FOR DENYING THE PETITION

The petitioner believes certiorari is warranted because the New York standard on ineffective assistance of counsel allegedly "conflates[s] the performance and prejudice requirements of *Strickland* so that an outcome determinative error by counsel is overlooked due to counsel's otherwise positive performance." (Petition, pp. 27-28). This argument, however, misdescribes the New York standard, and its fallacy is illustrated by the ruling of Justice Davidowitz in this case. In addition, the defining characteristics of New York's "meaningful representation" standard, virtually unique among those of the fifty states, makes the question presented by petitioner relevant almost exclusively in New York, with extremely limited nationwide application.

Under the New York standard, even if there is no outcome determinative error, a defendant may still prevail on an ineffective assistance of counsel claim if the state court determines that defense counsel's overall performance resulted in a fundamentally unfair proceeding. *See People v. Stultz*, 2 N.Y.3d 277, 283-84 (2004). In other words, as petitioner admits, the New York standard is generally understood to be more favorable to criminal defendants than the *Strickland* standard. Therefore, in this case, after concluding that the failure to call the additional alibi witnesses would not have altered the outcome of the trial, thereby satisfying *Strickland*'s second (prejudice) prong, the state court was still required to assess counsel's overall performance in order to determine whether the fairness of the proceedings had been compromised in violation of New York law.

What petitioner has done in his brief to this Court is distort Justice Davidowitz's ruling. He portrays it as a ruling that held that, despite a prejudicial error that might have altered the outcome of the trial, defense counsel otherwise performed in such a competent manner that the state court was free to disregard an error that would otherwise establish ineffectiveness under *Strickland*. But, as Judge Wesley noted, Justice Davidowitz did no such thing. Instead, "Justice Davidowitz looked specifically at the possible prejudicial effects of the very error at issue here," and concluded there was no prejudice (Appendix, p. 239a).

Hence, petitioner is actually asking this Court to grant certiorari in order to review a decision that does not even present the theoretical possibility posited by petitioner, namely, that a New York court might conceivably *misapply* its standard in a way that would conflict with *Strickland* (Petition, p. 29: as petitioner puts it, "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." [emphasis in original]). Nevertheless, petitioner, relying on the dissent from the denial of rehearing en banc, predicts dire consequences for defendants who will have their ineffective assistance of counsel claims assessed under the New York standard (Petition, p. 4). But, the dissent on which petitioner so heavily relies also wrote:

> 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).

(Appendix, p. 242a). Therefore, as Judge Wesley aptly observed, "to the extent that any [New York] 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." (Appendix, p. 239a). *Flores v. Demskie*, 215 F.3d 293 (2d Cir. 2000), for example, illustrates the validity of that observation.

One of petitioner's *amici* cites several cases in an attempt to demonstrate that New York's ineffective assistance of counsel standard imposes an additional, unconstitutional burden on defendants, necessitating that they prove more than what *Strickland* requires before they can obtain redress: *Williams v. Taylor*, 529 U.S. 362, 397 (2000), *Goodman v. Bertrand*, 467 F.3d 1022, 1028 (7th Cir. 2006), and *Spears v. Mullin*, 343 F.3d 1215, 1248 (10th Cir. 2003) (Brief for National Association of Criminal Defense Attorneys, pp. 6-7). But this analysis is misguided because these cases involve standards that are the opposite of New York's. In each of these cases, the state court applied a more onerous standard in assessing the ineffectiveness claim, necessitating that the petitioners prove more than what *Strickland* requires. By contrast, in New York, even if there is *no* prejudicial error, an attorney may still be found ineffective because prejudice is a "relevant, but not dispositive" element of New York's broader, "meaningful representation" standard. *See People v. Benevento*, 91 N.Y.2d 708, 714 (1998). In other words, as the Second Circuit put it: "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" (Appendix, p. 13a [emphasis in original]). This observation is borne out by New York state decisions. *See*, *e.g.*, *People v. Ozuna*, 7 N.Y.3d 913, 915 (2006) (motion court's decision that defendant did not meet prejudice prong of *Strickland* test was an insufficient basis to deny his ineffective assistance of counsel claim); *cf. People v. Hilliard*, 73 N.Y.2d 584, 587 (1989) (where defendant was denied ability to consult counsel for 30 days following arraignment, "the reviewing court must reverse the conviction and grant a new trial, without evaluating whether the error[] contributed to the defendant's conviction").

In an effort to bootstrap his petition for certiorari, petitioner asserts that all five of the federal judges below (the Magistrate, the District Court, and the Second Circuit panel) "concluded that Rosario had been deprived of his Sixth Amendment right to effective assistance of counsel" (Petition, p. 3). This, however, is incorrect. Only two – the Magistrate and the dissenting member of the Second Circuit panel – reached this conclusion. Although the District Court adopted the Report and Recommendation "in all . . . . respects" other than the jury selection claim (Appendix, p. 61a), this appears to refer to the Magistrate's recommendation that the ineffective assistance claim be dismissed, not that petitioner had satisfied both prongs of *Strickland*. Indeed, the District Court never specifically expressed agreement with the Magistrate's conclusion that petitioner had met the prejudice prong under *Strickland*. Nor did the Second Circuit majority reach this conclusion (Appendix, p. 17a: "While we *may* disagree with Judge Davidowitz's findings . . ." [emphasis added]; p. 20a: Judge Davidowitz "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.").

In its decision denying habeas relief, the Second Circuit stated:

> 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, 173 L.Ed.2d 251 (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, 124 S.Ct. 2140, 158 L.Ed.2d 938 (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*.

(Appendix, pp. 9a-10a).

This is a correct statement of the law. *See Premo v. Moore*, – U.S.– , 131 S.Ct. 733 (decided Jan. 19, 2011), and *Harrington v. Richter*, – U.S.– , 131 S.Ct. 770 (decided Jan. 19, 2011). Given this unquestionably correct application of federal law by the Second Circuit, this Court's recent and comprehensive discussion of this issue in *Harrington* and *Premo*, and the uniqueness of the issue to New York, this Court should decline to grant certiorari.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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