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

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents ignore the sharp division in the Second Circuit in denying the petition for rehearing en banc in this case. Only a bare majority of the active court of appeals judges voted to deny rehearing en banc, and even those judges expressed little confidence that the New York state constitutional standard is being applied consistently with *Strickland v. Washington*, 466 U.S. 668 (1984). Instead, these judges took the extraordinary step of advising New York state courts to apply both the federal and state constitutional standards in order to avoid issuing decisions that are contrary to *Strickland*.

Because the Second Circuit consistently has refused to revisit its prior precedent addressing this issue, only this Court can determine whether New York's meaningful representation standard—which the state court in this case described as having "rejected" *Strickland*—is contrary to clearly established federal law. As the Second Circuit judges who dissented from the denial of rehearing en banc explained, this issue, if left unresolved, will continue to bedevil the federal courts that seek to reconcile these two contradictory standards.

This is an ideal vehicle to resolve the question presented. The application of the state law standard instead of federal law made a difference—and all five federal judges to have considered the issue accepted that *Strickland* had been violated. Notwithstanding respondents' attempt to distort the record below, that

conclusion is amply supported by the facts. Rosario's trial counsel failed to thoroughly investigate his alibi defense. This was not a strategic decision; it was instead based on the inexplicably mistaken belief that the trial court denied funds for such an investigation. *Seven* additional alibi witnesses would have testified that Rosario was over a thousand miles away at the time of the offense. This would have made a difference in any case, but particularly so here, where no forensic evidence linked Rosario to the crime and the prosecution was based solely on two eyewitness accounts of strangers—evidence consistently proven to be unreliable.

The fact that New York is an outlier in failing to follow *Strickland* (Opp. 9) is not a reason for this Court to deny review—New York state prisoners are no less deserving of federal constitutional protection. The Court should summarily reverse the judgment below or, in the alternative, grant plenary review.

A. New York's Meaningful Representation Standard Is Contrary To, Or At A Minimum Results In Decisions That Are An Unreasonable Application Of, *Strickland v. Washington*

1. Respondents incorrectly state that New York's meaningful representation standard is consistent with *Strickland*. As Chief Judge Jacobs explained in his four-judge dissent from the Second Circuit's 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. Under the New York standard, "the gravity of individual mistakes may be submerged in an overall assessment of effectiveness, in a way that violates the federal Constitution." Pet. App. 247a. Indeed, the New York Court of Appeals expressly has held that the state standard is more "concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case." *People v. Benevento*, 697 N.E.2d 584, 588 (N.Y. 1998). Thus, under the New York standard, it is only "relevant, but not dispositive" that a defendant like Rosario would have been acquitted but for counsel's errors. *Ibid.*

Far from endorsing New York's meaningful representation standard, even the divided Second Circuit majority recognized that it creates "a danger that some courts might misunderstand * * * and look past a prejudicial error as long as counsel conducted himself in a way that bespoke of general competency throughout the trial." Pet. App. 15a. Thus, in voting to deny Rosario's petition for rehearing en banc, Judge Wesley "agree[d] 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." Pet. App. 240a.

Review is thus warranted here because the New York standard is patently incompatible with *Strickland*.

2. Contrary to respondents' suggestion (Opp. 9-10), the state court never applied *Strickland*. And this is not a case where the state court was unaware of—or merely silent as to—the standard it applied. *Harrington v. Richter*, ___ U.S. ___, 131 S. Ct. 770, 784 (2011) ("[A] state court need not cite or even be aware of [this Court's] cases under § 2254(d)."). Rather, the state court in this case *acknowledged* the *Strickland* standard's existence, but explicitly declined to apply it because it had been "expressly rejected" by the New York Court of Appeals. Pet. App. 222a n*.

Thus, it is respondents who "distort" the state court ruling by claiming, without citation, that *Strickland* was applied. Opp. 10. Rather than identify *where* in the text of the state court opinion *Strickland* was applied, respondents instead point to Judge Wesley's Second Circuit concurring opinion which asserts—but also does not indicate where—the state court examined prejudice under *Strickland*. *Ibid.* (citing Pet. App. 239a).

That bald assertion is contradicted by the state court ruling itself. Indeed, far from applying anything compatible with *Strickland*'s prejudice prong, the state court applied the requirements "to prevail on a motion for a new trial based on a claim of newly discovered evidence" and determined Rosario was not entitled to relief. Pet. App. 227a. But this Court rejected that standard as "not quite appropriate" for the ineffective-assistance-of-counsel

analysis. *Strickland*, 466 U.S. at 694 ("Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims."). The application of a standard expressly rejected by *Strickland* cannot be an application of—and must be "contrary to"—"clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

3. Respondents do not confront the precedent in this Court and other courts of appeals holding that a state standard providing less protection than *Strickland* is contrary to clearly established federal law. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362 (2000) (holding that it would be contrary to clearly established federal law for a state court to compel a prisoner to prove more than *Strickland* requires); *Goodman v. Bertrand*, 467 F.3d 1022 (7th Cir. 2006); *Spears v. Mullin*, 343 F.3d 1215 (10th Cir. 2003).

Instead, respondents assert that the New York standard is distinguishable from the "more onerous" state law standards applied in those cases because the New York standard is "generally understood to be more favorable to criminal defendants." Opp. 9, 11. Respondents, however, have identified no case where relief was granted under the New York standard, but

would have been denied under *Strickland*.[1] Even if respondents could point to such a case, the question presented would not be any less worthy of this Court's review. The question is not whether New York can have a state constitutional standard that is, in some circumstances, more protective of some defendants' rights. Rather, it is whether New York can have a Sixth Amendment ineffective assistance of counsel standard that, at the same time, is *less* protective for a different category of defendants. As the petition explains, this Court and other federal courts have repeatedly rejected such less protective standards. In particular, state law standards—like the meaningful representation standard—that rely on "fairness" rather than adverse outcomes are consistently held to be "contrary to" clearly established federal law. Pet. 25-27.

4. Respondents cite *Premo v. Moore*, ___ U.S. ___, 131 S. Ct. 733 (2011), and *Harrington v. Richter*, ___ U.S. ___, 131 S. Ct. 770 (2011), as a basis for denial of review. Opp. 13-14. But those decisions addressed whether a determination is an "unreasonable application" of clearly established federal law and, thus, are entirely inapposite to whether the

[1] Respondents cite *People v. Ozuna*, 7 N.Y.3d 913 (2006), and *People v. Hilliard*, 73 N.Y.2d 584, 586 (1989), as instances where the New York standard might have made a difference. Opp. 12. But the *Ozuna* court rejected the ineffective assistance of counsel claim and thus did not establish that the New York standard is more protective. And *Hilliard* discussed neither *Strickland* nor the meaningful representation standard.

New York standard is "contrary to" the federal standard for ineffective assistance of counsel.

In any event, neither *Premo* nor *Harrington* support denying review of Rosario's additional claim that the state court decision was an unreasonable application of clearly established federal law. By no means was it "arguable that a reasonable attorney could decide to forgo" a Florida investigation of Rosario's alibi. *Harrington*, 131 S. Ct. at 788. Although trial counsel Hartsfield believed it "critical" to speak with the alibi witnesses in person and Kaiser would have "loved" additional witnesses, neither conducted a Florida investigation. C.A. App. A-1042-1043, A-1183-1184, A-1192-1193, A-1963-1966. Their failure resulted solely from their *mistaken* belief that the trial court had denied funds for such an investigation. C.A. App. A-1127-1128, A-1200. While "[c]ounsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies," *id.* at 789, counsel could not reasonably formulate a strategy based on an inexplicable mistake.

Counsel's unjustified failure to conduct a Florida investigation and present disinterested alibi witnesses created not just a "conceivable" likelihood of a different result, but in fact a "substantial" likelihood. *Id*. at 792. As explained in the petition (Pet. 31-35), the additional testimony 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." Pet. App. 38a (Straub, J., dissenting in part and concurring in part).

B. This Is An Ideal Vehicle To Address This Important Issue

There is no merit to respondents' claim that this case does not present a suitable vehicle to resolve the question presented. The issues in this case are recurring and affect a category of defendants in one of the most populous States.

1. As Chief Judge Jacobs explained in his dissent to the denial of rehearing en banc, absent this Court's review, the continued application of the New York standard to Sixth Amendment claims "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." Pet. App. 244a.

Respondents suggest that this is not a problem, and that district courts can sort out any conflicts between New York's standard and *Strickland* on a case-by-case basis. In support, they cite *Flores v. Demskie*, 215 F.3d 293 (2d Cir.), cert. denied, 531 U.S. 1029 (2000), as an example where the federal courts got it right. But *Flores* underscores the persistent gap between the New York and federal standards, and the need for this Court's review. In *Flores*, the Second Circuit granted habeas relief, rejecting the New York court's holding that, because the counsel committed a single, egregious error, counsel's "totality of representation" was adequate. *Id.* at 297, 305.

Nevertheless, the New York Court of Appeals has continued to apply—indeed reaffirmed—its own holding in *Flores* that individual errors do not "themselves render counsel constitutionally ineffective where his or her overall performance is adequate." *People v. Turner*, 840 N.E.2d 123, 126 (N.Y. 2005).

2. Contrary to respondents' suggestion, this Court should not deny review simply because the constitutionality of the meaningful representation standard is "virtually unique" to New York. Opp. 9. New York accounts for almost all of the Second Circuit's population, and the State has jurisdiction over more people than either the First or Tenth Circuits. And, as amicus National Association of Criminal Defense Lawyers explains, the structural deficiencies in New York's indigent defense systems make it virtually certain that the deficient representation that Rosario received is common, not an outlier. NACDL Br. 15-18. Thus, absent this Court's review, an entire category of New York defendants will be deprived of the constitutional protections of the Sixth Amendment, except through the deferential lens of federal habeas, due solely to the random coincidence of geography.

Nor are the issues in this case too New York-centric to warrant full briefing and argument. As the petition demonstrates, this is not a close case. And because the Second Circuit effectively stands alone among the courts of appeals in condoning the use of a state standard that is contrary to and less protective than *Strickland*, summary reversal would be appropriate.

C. If The State Court Had Applied *Strickland*, Rosario Would Have Been Granted Relief

The state court's failure to apply *Strickland* made a difference in this case—just as it will continue to make a difference in other cases if this Court denies review. There is little doubt that had the state court applied *Strickland*, it would have granted relief. Contrary to respondents' contention, all three members of the Second Circuit panel, the district court judge, and the magistrate judge accepted that Rosario suffered a *Strickland* violation. Pet. App. 17a. Indeed, as Judge Pooler's dissent from the denial of rehearing en banc explained: "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." Pet. App. 248a.

Yet respondents take great pains to muddy the record by suggesting that trial counsel made a conscious choice to forgo a Florida alibi investigation. Opp. 5-7. That bald assertion is not only implausible, but easily belied by the record. Pet. App. 26a-27a (Straub, J., dissenting in part and concurring in part). Trial counsel, Hartsfield, requested court approval to send her investigator to Florida for the sole purpose of finding all available alibi witnesses. C.A. App. A-1032-1034, A-1874. She had no strategic reason for not pursuing this investigation. C.A. App. A-1046-1050. In support of Hartsfield's request, her investigator affirmed by affidavit that she was "unable at a long distance to render an effective

investigation on this very serious case" due to her inability to contact numerous alibi witnesses. C.A. App. A-1876. Kaiser, who represented Rosario at trial, believed "alibi witnesses in Florida who were only unearthed because of on-the-ground legwork by the appellate counsel's investigator * * * would have strengthened" Rosario's alibi defense and "may have caused a very different result in the outcome." C.A. App. A-1965, A-1183-1184; *see also* C.A. App. A-1192-1193. Indeed, even the state court recognized that neither Hartsfield nor Kaiser ever explained or justified their failure to conduct a Florida investigation. Pet. App. 225a-226a.

Nor does the record support respondents' contention that Rosario's trial counsel and investigator "spoke to many, if not all, of the witnesses" presented by post-conviction counsel. Opp. 5. Of the seven witnesses who testified at the state post-conviction evidentiary hearing, only two—Minerva Godoy and Fernando Torres—were contacted by Rosario's defense team before trial. C.A. App. A-1568-1580, A-1323-1324, A-1187-1188. None of the five other post-conviction alibi witnesses was investigated by Rosario's trial defense team, let alone asked to testify at trial. C.A. App. A-1463 (R. Ruiz), A-1500-1502 (C. Ruiz), A-1623-1624 (Hernandez), A-1666-1668 (Rivera), A-1716-1718 (Serrano). Moreover, any speculative concerns that potential witnesses may have had about the cost of testifying at trial, Opp. 5-6, would have been obviated by New York's statutory provisions authorizing payment of witnesses' expenses—

provisions of which Kaiser had no knowledge, C.A. App. A-1127-1130, A-1184-1187.

Respondents' discussion of Rosario's impeached testimony, which involved an irrelevant, prior arrest and detention in Florida, C.A. App. A-791-793, merely highlights the prejudice that resulted from his counsel's error. As the panel dissent noted, the jury was faced with a "credibility battle" between the prosecution's two eyewitnesses and the defense's two alibi witnesses along with Rosario himself. Pet. App. 31a (Straub, J., dissenting in part and concurring in part). Had the jury heard the seven post-conviction witnesses—especially Chenoa Ruiz and Fernando Torres, disinterested witnesses who saw Rosario in Florida on the day of the Bronx murder, C.A. App. A-1302, A-1308-1310, A-1495, A-1501, A-1519—there is little reason to doubt that those additional witnesses "could have made all the difference in the world." Pet. App. 37a (Straub, J., dissenting in part and concurring in part). Instead, the only alibi evidence at trial came from the testimony of Rosario, whom the prosecutor claimed was lying about his brief incarceration in Florida, C.A. App. A-935-937, and the testimony of John Torres and Jenine Seda, whom the prosecutor argued were lying for their friend, C.A. App. A-929.

The prejudice to Rosario was compounded by what the panel dissent called the "paucity of the prosecution's case, which consisted of only two stranger eyewitnesses"—evidence known to be "proverbially untrustworthy." Pet. App. 40a (Straub, J., dissenting

in part and concurring in part) (citation omitted). Indeed, as amici the Innocence Project and the National Association of Legal Investigators and National Defender Investigator Association explain, eyewitness identifications are inherently unreliable, and a conviction based solely on such evidence is particularly suspect. Innocence Project Br. 7-21; Nat'l Ass'n of Legal Investigators and Nat'l Defender Investigator Ass'n Br. 8.

CONCLUSION

For the reasons set forth above and in the petition, the petition should be granted and the judgment summarily reversed. In the alternative, the case should be set for briefing and argument.

Respectfully submitted,

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