UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 08-5521-pr

Caption [use short title]
Rosario v. Ercole

Motion for: Leave to File Brief as Amici Curiae in Support of Petitioner

Set forth below precise, complete statement of relief sought:

Leave to file an amicus brief in support of petition for rehearing en banc.

MOVING PARTY: NACDL, NYSACDL
☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Robert Ercole et al

MOVING ATTORNEY: Brian D. Ginsberg

OPPOSING ATTORNEY: Christopher J. Blira-Koessler

[name of attorney, with firm, address, phone number and e-mail]

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Court-Judge/Agency appealed from: U.S. District Court, Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney: Brian D. Ginsberg **Date:** 5/3/10

Has service been effected? ☑ Yes ☐ No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED.**

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

Form T-1080

08-5521-pr

In the United States Court of Appeals
For the Second Circuit

Richard Rosario,

Petitioner-Appellant,

v.

Superintendent Robert Ercole, Green Haven Correctional Facility,
Attorney General Eliot Spitzer,

Respondents-Appellees.

On Petition for Rehearing *En Banc*

Motion of National Association of Criminal Defense Lawyers and New York State Association of Criminal Defense Lawyers For Leave to File Brief as *Amici Curiae* In Support of Petitioner

---

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Corporate Disclosure Statement

National Association of Criminal Defense Lawyers ("NACDL") has no parent corporation. No publicly held corporation owns 10 percent or more of NACDL's stock.

New York State Association of Criminal Defense Lawyers ("NYSACDL") in an affiliate of NACDL. No publicly held corporation owns 10 percent or more of NYSACDL's stock.

Pursuant to Federal Rule of Appellate Procedure 29(b), the National Association of Criminal Defense Lawyers ("NACDL") and New York State Association of Criminal Defense Lawyers ("NYSACDL") respectfully request leave to file the accompanying Brief as *Amici Curiae* in Support of the Petition for Rehearing *En Banc* filed by Petitioner-Appellant Richard Rosario.

This appeal addresses the manner in which New York state courts adjudicate ineffective-assistance-of-counsel claims raised by indigent defendants. As leading organizations of criminal defense lawyers, including criminal defense lawyers in New York state, NACDL and NYSACDL are uniquely positioned to address the adjudication of Sixth Amendment ineffectiveness claims and the implications of the panel's decision on the representation of indigent criminal defendants.

Petitioner-Appellant consents to the filing of this brief. Respondents-Appellees do not.

Interest Of The Proposed *Amici Curiae*

Founded in 1958, **NACDL** is a nonprofit, professional bar association that represents the nation's criminal defense attorneys. NACDL has over 11,000 members and over 40,000 affiliate members and is the preeminent organization advancing the institutional mission of the nation's criminal defense bar to ensure the proper and fair administration of justice, including due process for all persons

accused of crime. NACDL members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

NACDL frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeals, and the highest courts of numerous states. NACDL also commits significant institutional resources to ensuring that indigent accused persons have access to meaningful and effective representation and maintains a full-time Indigent Defense Counsel whose sole responsibility is to support indigent defense reform efforts throughout the country.

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 and was founded in 1986 to promote study and research in the field of criminal defense law and related disciplines. NYSACDL also appears as *amicus curiae* in cases of significant public interest or of professional concern to the criminal defense bar. NYSACDL has long advocated for systematic reform of the indigent defense system.

Both NACDL and NYSACDL regularly file amicus briefs before this Court. *See, e.g., United States v. Treacy*, No. 09-3939-cr (2d Cir.) (amicus brief filed on February 4, 2010); *Portalatin v. Graham*, 07-1599-pr, ___ F.3d ___, 2010 WL 1223194 (2d Cir. Mar. 31, 2010); *United States v. Polouizzi*, No. 08-1830-cr, 564 F.3d 142 (2d Cir. 2009). NACDL and NYSACDL have also appeared as *amici*

curiae in the class action litigation challenging the constitutional sufficiency of New York's system for providing representation to indigent criminal defendants. *Hurrell-Harring v. State of New York*, No. 8866-07 (N.Y. Sup. Ct.).

Argument

Under Federal Rule of Appellate Procedure 29, NACDL and NYSACDL respectfully request that the Court grant them leave to file the accompanying *amici curiae* brief in support of Petition for Rehearing *En Banc*. Courts may permit *amicus* briefs in support of a petition for rehearing *en banc*. *See* 1998 Advisory Committee's Notes on Fed. R. App. P. 29(e), 28 U.S.C. App., p. 563 (noting that "an *amicus* may be permitted to file in support of a party's petition for rehearing").

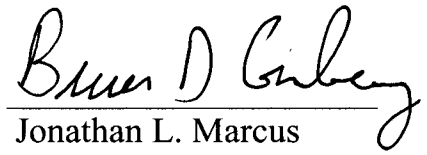
This Court has previously granted leave to organizations of criminal defense attorneys to file an *amicus* brief in support of a petition for rehearing *en banc*. *See, e.g., United States v. Cutler*, No. 05-2516 (2d Cir. 2008) (permitting New York Council of Criminal Defense Lawyers to file as *amicus curiae* in support of petitioners). As leading organizations of criminal defense lawyers, including criminal defense lawyers in New York state, NACDL and NYSACDL are uniquely positioned to address the issues presented by this case, including the adequacy of representation provided by counsel at criminal trials. *Amici*'s ability to articulate the views of criminal defense attorneys throughout the state of New York and nationwide, and their vast experience representing indigent criminal defendants in

criminal trials, make them uniquely suited to supply context and perspective that the parties cannot.

Conclusion

For the preceding reasons, the Court should grant the motion for leave to file the attached proposed amicus brief.

Respectfully submitted,



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May 3, 2010

Anti-Virus Certification

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Certificate of Service

I certify that on May 3, 2010, I caused to be served true and correct copies of the Motion of *Amici Curiae* National Association of Criminal Defense Lawyers and New York State Association of Criminal Defense Lawyers for Leave to File an *Amicus* Brief in Support of Petitioner by first-class mail, postage prepaid, upon the following:

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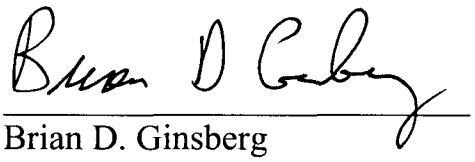

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In the United States Court of Appeals
For the Second Circuit

Richard Rosario,

Petitioner-Appellant,

v.

Superintendent Robert Ercole, Green Haven Correctional Facility,
Attorney General Eliot Spitzer,

Respondents-Appellees.

On Petition for Rehearing *En Banc*

Brief for National Association of Criminal Defense Lawyers and New York State Association of Criminal Defense Lawyers in Support of Petitioner-Appellant

---

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Statement of Interest

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 rehearing *en banc* filed by Petitioner Richard Rosario. *En banc* review is necessary to ensure that the Second Circuit enforces the Sixth Amendment's guarantee of effective assistance of counsel and provides needed guidance to New York state courts, which apply a standard that is contrary to federal law.[1]

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] Pursuant to Local Rule 29.1, neither party's counsel authored this brief in whole or in part. No party or person other than amici curiae, their members, or their counsel, contributed money intended to fund preparation or submission of this brief.

Although Petitioner consents to the filing of this brief, Respondents do not. *Amici* have moved for leave to file this brief pursuant to Federal Rule of Appellate Procedure 29(b).

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 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. The application of a standard that does not protect Sixth Amendment rights is especially troublesome in New York, which often fails to provide adequate counsel to indigent criminal defendants.

Summary of Argument

Rehearing *en banc* is necessary for the Second Circuit to ensure that New York state courts do not continue to adjudicate ineffective-assistance-of-counsel claims in a manner that is "contrary to" the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Unlike the *Strickland* standard, the state courts' approach regularly denies defendants relief — even when there is a reasonable probability that counsel's deficient performance affected the result at trial — so long as counsel's overall representation was "meaningful."

Here trial counsel committed a "colossal failure," Slip. Op. at 27 (Straub, J., dissenting), to adequately investigate and identify seven witnesses who would have

supported Mr. Rosario's alibi defense. As a result, the State — which presented a thin case that depended entirely on unreliable eyewitness identifications from two strangers — discredited Mr. Rosario's defense on the ground that the two alibi witnesses who testified were biased. On collateral review, the state court nevertheless upheld Mr. Rosario's conviction, noting that New York courts have "expressly rejected" the federal *Strickland* standard and dismissing trial counsel's prejudicial error because counsel represented Mr. Rosario "in accordance with the standards of 'meaningful representation' defined by our appellate courts." *People v. Rosario*, No. 5142/96, slip. op. at 15 n.*, 18 (N.Y. Sup. Ct. April 4, 2005) ("State Op.").

Multiple judges of this Court have recognized the problems with the New York standard. The panel majority in this case acknowledged that the state standard "creates a danger that some courts might . . . look past a prejudicial error as long as counsel conducted himself in a way that bespoke of general competency throughout the trial." Slip. Op. at 18. Although prior Second Circuit panels have held that the New York state standard is not "contrary to" federal law, other panels have openly questioned these decisions — only to acknowledge that they bind future panels "in the absence of a contrary decision by this Court en banc, or an intervening Supreme Court decision." *Henry v. Poole*, 409 F.3d 48, 70 (2d Cir. 2005). Another circuit judge has observed that this Court "might be well advised

to consider the appeal for *en banc* review as a means to reconsider the issue." *Id.* at 73 (Sack, J., concurring).

En banc review is essential to correct the New York standard and protect the right to adequate representation at criminal trials. Here, the state court's failure to apply *Strickland* creates the risk that Mr. Rosario will spend the rest of his life in prison as a result of his counsel's deficient performance. More generally, application of the correct constitutional standard is especially important in New York, which systematically fails to appoint adequate counsel to criminal defendants.

Argument

Rehearing is necessary because the New York state courts' application of the Sixth Amendment is "contrary to" *Strickland*. 28 U.S.C. § 2254(d)(1). In *Strickland*, the Supreme Court held that a criminal defendant establishes ineffectiveness when he demonstrates a "reasonable probability" that, but for counsel's unprofessional errors, the outcome of the proceeding in question would have been different. 466 U.S. at 687. No more is required.

In New York state court, however, counsel is effective as long as he provides "meaningful representation." *People v. Benevento*, 91 N.Y.2d 708, 710 (1998). *Strickland* notwithstanding, in New York "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." *Id.* at 714 (emphasis added).

It is unclear why this Court has deferred under AEDPA to a state standard that "expressly reject[s]" *Strickland*. State Ct. Slip. Op. at 15 n.*. While acknowledging that the New York test "is not without its problems" and "creates a danger that some courts might misunderstand the [test] and look past a prejudicial error," Slip. Op. at 18, the panel majority emphasized that *the New York courts* view their standard as "more generous" than *Strickland*, *id.* at 13. But the New York courts' perception of their own standard does not control on questions of federal law, especially when the New York standard, in application, risks overlooking the prejudice caused by counsel's errors. The Supreme Court has refused to defer under AEDPA to state courts that "require a separate inquiry into fundamental fairness even when [the defendant] is able to show that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceeding." *Williams v. Taylor*, 529 U.S. 362, 393 (2000). Other circuit courts have also recognized that state standards like New York's are "contrary to" *Strickland*.[2]

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[2] *See, e.g.*, *Goodman v. Bertrand*, 467 F.3d 1022, 1028 (7th Cir. 2006) (state requirement that defendant prove that counsel's error rendered his trial "fundamentally unfair" is "contrary to" *Strickland* (quotations omitted)); *Spears v.* (continued...)

In nonetheless concluding that the New York rule protects defendants at least as much as *Strickland*, the panel here and prior panels have overlooked several cases that epitomize the flaws in New York's approach.

Flores. In *People v. Flores*, after the jury returned a guilty verdict, but before sentencing, counsel discovered that the prosecution had not disclosed all of the required witness statements before trial. 84 N.Y.2d 184 (1994). Counsel "waived [an objection to] a violation of this disclosure requirement that would have entitled the [defendant] to a new trial." *Flores v. Demskie*, 215 F.3d 293, 295 (2d Cir. 2000). And counsel did so not for any strategic reason, but instead because he was "unfamiliar with the well-established New York state rule that a prosecutor's failure to deliver a prior statement of a witness to be called at trial constitutes *per se* error requiring a new trial." *Id.* at 305.

Although counsel's error cost the defendant a new trial, New York's highest court held that the defendant received the effective assistance of counsel because counsel had provided "meaningful representation." In the state court's view,

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Mullin, 343 F.3d 1215, 1248 (10th Cir. 2003) (state court's rule — that "[a] mere showing that a conviction would have been different but for counsel's error would not suffice to sustain a Sixth Amendment claim, without an additional inquiry into the fairness of the proceeding" — was "contrary to" *Strickland* (quotations omitted)); *cf. State v. Sardinia*, 713 P.2d 122, 126-27 (Wash. Ct. App. 1986) (holding, pre-AEDPA, that *Strickland* "is more protective of [a defendant's] rights" than state standard requiring "effective representation and a fair and impartial trial").

counsel did many other things adequately and demonstrated a "single-minded devotion to his client's best interest and representation." 84 N.Y.2d at 189.

Henry. The same misguided focus on counsel's overall performance plagued the state court's decision in *People v. Henry*, 95 N.Y.2d 563 (2000). There, counsel asserted an alibi defense but put forth "an alibi for the wrong date" and then, compounding his error, "adhered to the alibi defense and urged the jury to accept it throughout the trial — long after it must have been clear to the jury beyond peradventure that [the alibi witness] provided Henry with an alibi only for the *night after* the night of the crime." *Henry*, 409 F.3d at 64 (emphasis added). Despite this critical error, New York's highest court held that the defendant received "meaningful representation," because counsel "competently represented defendant's interests at other stages of the proceedings" and was "competen[t] in all other respects." 95 N.Y.2d at 566.

As this case illustrates, the problem persists even though this Court in both *Flores* and *Henry* ultimately applied *Strickland* and granted habeas relief. Here, the New York state courts again applied the wrong standard, upholding Mr. Rosario's conviction despite defense counsel's "colossal failure" to adequately investigate Mr. Rosario's alibi defense. Slip. Op. at 27 (Straub, J., dissenting). At trial, the prosecutor convinced the jury that Mr. Rosario's two alibi witnesses were biased. Had defense counsel known that funds were available to send a private

investigator to Florida, Mr. Rosario could have presented "at least seven additional witnesses" — with no apparent bias — "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." *Id.* at 39.

Notwithstanding this crucial error, the state court concluded that counsel provided "meaningful representation" because he did many other things well at trial. The state court's analysis confirms that it diverged significantly from *Strickland*:

- The state court focused on other factors such as whether counsel's "opening and closing statements were concise and to the point" and whether examinations were conducted "professionally and with clarity." State Op. at 17.
- As to counsel's mistaken belief that funds for investigation were not available — "a misunderstanding or mistake which persisted throughout the case" — the state court focused on whether attorneys represented Mr. Rosario "with integrity and in accordance with the standards of 'meaningful representation' defined by our appellate courts." *Id.* at 18.
- The state court focused not on whether there was a reasonable probability that the outcome would have been different, but instead on whether there was sufficient evidence to support the jury's verdict. *Id.* at 22 (noting that the jury's verdict was "amply supported by the evidence").

Lest there be any doubt that the wrong standard was applied, the state court noted that the New York courts have "expressly rejected" the federal *Strickland* standard. *Id.* at 15 n.*.

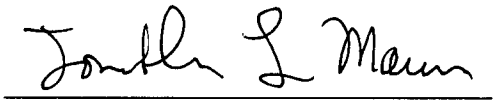
The New York courts' failure to apply *Strickland* is especially troubling given the findings of recent studies that "the indigent defense system in New York State is both severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of the United States and the Constitution." 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). Public defenders handle up to "1,000 cases a year" and indigent defendants often meet their counsel for the first time in court. The Spangenberg Group, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense* 44–46, 67 (2006).

The risk that indigent defendants will pay a significant price for these structural and systemic deficiencies and spend decades in prison as a result of counsel's errors will continue unless and until this Court requires the state courts to properly apply the Sixth Amendment's requirements. Indeed, in response to a lawsuit challenging the constitutional sufficiency of New York's indigent defense system in five counties, the State asserted that the appellate process — including federal habeas review — provides "[a]dequate remedies . . . to litigate plaintiffs' claims of ineffective assistance of counsel." Br. of New York at 1, 11–12, *Hurrell-*

Harring v. State of New York, No. 8866-07 (N.Y. Sup. Ct. April 4, 2008). That cannot be the case if this Court continues to defer to the wrong standard.

Conclusion

For the reasons stated above, the Court should rehear this case *en banc*.



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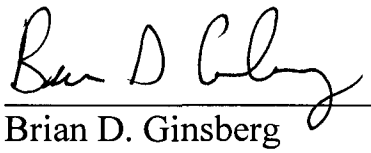
May 3, 2010

Certificate of Compliance

I certify, pursuant to Federal Rules of Appellate Procedure 32(a)(7)(A) and 35(b)(2) that the foregoing Brief does not exceed 15 pages, excluding the parts of the Brief exempted under Federal Rule of Appellate Procedure 32. In accordance with Federal Rule of Appellate Procedure 32(a)(5)-(6), this Brief has been prepared in 14-point Times New Roman font.



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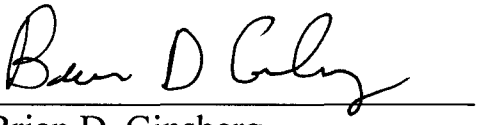

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