DOCKET NO.# 03-7741

IN THE SUPREME COURT

OF THE UNITED STATES

Supreme Court, U.S.
FILED
NOV 26 2003
OFFICE OF THE CLERK

ORIGINAL

*In re* HARRY AYRHART,

PETITIONER,

-VS-

ANTHONY ZON, Superintendent
of Wende Correctional Facility,

RESPONDENT(S).

ON PETITION FOR WRIT OF HABEAS CORPUS
TO THE NEW YORK COURT OF APPEALS

# PETITION FOR WRIT OF HABEAS CORPUS
**U.S. SUP. CT. RULE 20.1, 2 & 4(a)**
**(28 U.S.C.A. §§ 2241 & 2254(a)**

HARRY AYRHART, c/o 87-C-0559
WENDE CORRECTIONAL FACILITY
3622 WENDE ROAD
ALDEN, NEW YORK 14004

## QUESTIONS PRESENTED

1. Whether the Petitioner is being deprived of his Federal Constitutional Right to have his Federal Claims adjudicated on the merits, in a Federal Forum, pursuant to the provisions of Article 1 § 9 of the Suspension Clause where, the District Court held; the issues raised were not properly preserved for Appellate review, after the State Court ruled on the merits of the Federal Claims ?

2. Whether the Petitioner was deprived of effective assistance of appellate counsel, under the Sixth & Fourteenth Amendments of the Federal Constitution, where counsel failed to raise or argue: **a)** the conviction is based upon the knowing use of false testimony from Darren Ayrhart and Theodore Rhim and cumulative effect of the numerous BRADY Violations and; **b)** the State's entire line of proof is not admissible as Declarations Against Penal Interests ??

3. Whether the Petitioner was deprived of his Sixth & Fourteenth Amendment Rights under Due Process & A Fair Trial, where the jury verdict is not support by evidence of guilty "beyond a reasonable doubt" and, the jury verdict is "against the weight of evidence" ??

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## LIST OF PARTIES

The parties in this action are; 1) the Respondent Anthony Zon Superintendent of Wende Correctional Facility who has custody of the Petitioner and 2) the Attorney General of the State of New York is Eliott Spitzer, New York State Department of Law, State Capitol Albany, New York 12224-0341.

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## STATEMENT OF THE CASE

According to the State's case, the victim, Randy Neal's body was discovered by his mother in the bedroom of his home on the morning of June 2, 1986.

The medical examiner determined that, he died sometime between the evening of June 1 st and the early morning hours of June 2, 1986, from a number of cuts and a single wound to the throat.

Shortly thereafter, the Petitioner and his entire family were questioned, including Darren Ayrhart and his girlfriend Julie Helsdon, and a search conducted of the Ayrhart residence. Everyone questioned told Police and the Investigators that, they knew nothing about the victim's death, and there was no evidence collected from the Ayrhart home.

In August 1986, the Petitioner and his brother Darren Ayrhart entered into a package deal plea agreement with the State trial prosecutor, requiring the Petitioner to plea to misdemeanor possession of stolen property, and Darren to felony intimidation of a witness, the victim Randy Neal. In September 1986, both were sentenced to the promised one (1) year in the County Jail.

Approximately two (2) weeks later, Darren, based upon a promise through his attorney, approached the prosecutor and the Sheriff's Department, now claiming the Petitioner admitted to him and his girlfriend that he killed the victim and where he disposed of the weapon.

As a result of Darren's story, the Police conducted a second search of the Ayrhart home in late September 1986, and removed a bent knife blade from the basement which, Darren but, not Julie directed them to.

Following Darren's statement to the prosecution and Police, he was released from the County Jail in exchange for his grand jury testimony.

On October 3, 1986, the Petitioner was indicted for murder 2°; burglary 1°; and criminal solicitation 4°, and was arraigned on the indictment shortly thereafter and counsel was assigned.

Even though the State prosecutor knew neither Darren or the witness/victim, Randy Neal were in jail together, or with the Petitioner at the same time, he used the hearsay testimony of Theodore Rhim who claimed the Petitioner solicited him, in April 1986, in the County Jail, to intimidate Randy Neal. Surprisingly, Rhim also testified that, Darren tried to physically attack the witness/victim through the jail bar the next day.

The Petitioner was tried in June and July 1986, and after a ten (10) day trial the jury returned a verdict of guilty on all counts.

Another witness, Paula Livingston was questioned a second time, and also now claimed she heard the Petitioner make several comments that someone should kill the victim. Although the witness did not testify before the grand jury, the prosecutor based his entire line of hearsay testimony on Darren's prior threst to kill the witness/victim, Randy Neal.

According to the facts presented to the jury during trial, Darren allegedly threaten to kill the witness/victim at his home in March 1986.

Petitioner's brother Darren falsely testified that, Petitioner was released from jail, supposedly in April 1986, and spoke with another person about doing bodily harm to, or killing Randy Neal. Trial counsel objected and moved for a mistrial based upon the knowing use of perjured testimony and prosecutorial misconduct, on the know fact that, the Petitioner was actually released from jail in May 1986, at which time Darren was not even present, and the alleged conversation could not possibly have happened.

Due to the fact that, the prosecution withheld the records to disprove Darren's claim, the trial court denied the motion. It was also revealed during trial that, Darren was released from jail in exchange for his testimony which, the prosecution failed to disclose to the defense.

Furthermore, there was also testimony presented that the witness/victim, Randy Neal was released from jail after his March 1986 burglary arrest in exchange for his cooperation against the Petitioner, and Darren allegedly threatened to kill him at his home, in front of his father.

The prosecution also went so far as to attempt to connect the Petitioner to the crime or the scene, by calling a witness, Paul Rutherford and asking him whether he was with the Petitioner during the time frame the medical examiner said the victim died anticipating the witness' Fifth Amendment assertion in front of the jury.

The prosecution apparently created his inference of guilt in an attempt to corroborate the sharp inconsistencies between the story Darren gave, and the later story given by his girlfriend Julie Helsdon.

At the close of the prosecution's case, the defense called the Petitioner's mother June, his brother David and David's wife Wendy, who refuted the State's witnesses testimony and several aspects of the case.

Trial counsel also moved for a trial order of dismissal arguing that, the circumstantial evidence presented was not a sufficient basis to sustain a conviction, which, was denied by the trial court. The case was submitted to the jury on July 9, 1987, and they returned with a verdict of guilty on all counts after asking to have Darren and Julie's testimony read back.

Trial counsel also moved to set aside the verdict based on Paul Rutherford's Fifth Amendment assertion in front of the jury which, was also denied, and on the same day the Petitioner was sentenced to 25 years to life (murder); 12½ to 25 years (burglary); and 1 year (criminal solicitation) to be served concurrently.

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ANDATE

Arcara, J.
Buffalo

# UNITED STATES COURT OF APPEAL

FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 30th day of June one thousand nine hundred and ninety-seven,

UNITED STATES COURT OF APPEALS
FILED
JUN 30 1997
GEORGE LANGE III, CLERK
SECOND CIRCUIT

Harry Ayrhart,

Petitioner-Appellant,

v.

Walter R. Kelly,

Respondent.

97-3551

FILED
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U.S. DISTRICT COURT
W.D.N.Y.-BUFFALO

A motion having been made herein by petitioner pro se for an order authorizing consideration of a successive 28 U.S.C. § 2254 petition, upon consideration thereof, it is ordered that said motion be and it hereby is denied. Petitioner has not shown that the successive petition's new claims involve either a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or that the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and that the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A) and (B)(i)-(ii).

Ralph K. Winter

Joseph M. McLaughlin (concurs)

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Circuit Judges

RKW JMW JMcL

*Judge Walker is a member of the panel considering this application. He is unavailable and, it is therefore decided by two judges pursuant to Local Rule § 0.14

USCA Order

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GEORGE LANGE III, CLERK

ISSUE AS MANDATE: JUL 1 199