No. [redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

In Re ROBERT RODRIGUEZ,

Petitioner.

ON PETITION FOR WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF HABEAS CORPUS

ROBERT RODRIGUEZ, *Pro Se*
#83-B-2844
Box 338
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FEB 24

QUESTION PRESENTED FOR REVIEW

1. WHETHER THIS COURT SHOULD GRANT HABEAS CORPUS REVIEW SINCE THE SECOND CIRCUIT COURT OF APPEALS AND DISTRICT COURT *FAILED* TO ADDRESS PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO MENTAL ILLNESS CLAIM PURSUANT TO THE PREJUDICE PRONG OF *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984), OF WHICH WAS AUTHORIZED FOR REVIEW BY THE SECOND CIRCUIT IN *RODRIGUEZ V. MITCHELL*, 252 F.3D 191 (2D CIR.2001), OR TRANSFER TO THE DISTRICT COURT FOR ADJUDICATION PURSUANT TO 28 U.S.C. §2241, SINCE THE DENIAL OF REVIEW CONCERNING THE CLAIM IS A VIOLATION OF THE SUSPENSION CLAUSE OF THE U.S. CONSTITUTION.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner respectfully prays that a writ of habeas corpus or transfer to the district court issue.

OPINIONS BELOW

The Court of Appeals opinion dated November 3, 2003, denying as "successive" Petitioner's habeas corpus petition is not reported, but can be found at Petitioner's Appendix A1. The district court opinion dated August 25, 2003, denying as "successive" Petitioner's habeas corpus petition is not reported, but can be found at Petitioner's Appendix A2.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1651(a), which provides that the Supreme Court may issue all writs necessary or appropriate in aid of their respective jurisdictions.

The judgment of the Court of Appeals for the Second Circuit was entered on November 3, 2003. This petition is timely filed pursuant to Supreme Court Rule 13(1) because it is filed within ninety days of the date of entry.

STATEMENT PURSUANT TO RULE 20

Petitioner respectfully prays for a Writ of Habeas Corpus to review the judgment of the Court of Appeals for the Second Circuit, entered on November 3, 2003, denying as "successive" Petitioner's request to file a habeas corpus petition, of which was initially dismissed by the district court on August 25, 2003, and transferred to the Second Circuit Court of Appeals. These Courts previously *failed to address* Petitioner's ineffective assistance of trial counsel due to mental illness pursuant to the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), of which was authorized by the Second Circuit. *See Rodriguez v. Mitchell*, 252 F.3d 191. When they failed to do so Petitioner refiled the habeas of which is the matter challenged at hand. So while Petitioner did raise the claim it has *not been addressed* in the lower federal courts.

STATEMENT OF THE CASE

Petitioner seeks review of the judgment of a United States Court of Appeals decision. The basis for federal jurisdiction in the court of first instance was 28 U.S.C. §2244(b). This court's power to grant the writ derives from 28 U.S.C. §1651(a); §2241; and §2254(a).

The Trial

In 1983 Petitioner, along with his codefendants Kareem Abdul Latif f/k/a George Suarez, and Milton Cotto, Jr., were convicted of murder in the second degree and attempted robbery. The conviction arose from the attempted robbery and shooting deaths of Milton Scher and Rose DeGennaro by codefendant Latif in the presence of Petitioner,

Cotto and Michael Dones.[1] At Petitioner's trial the people introduced into evidence Petitioner's admissions to law enforcement agents.[2] Sandra Nieves testified to certain alleged admissions made to her by Latif and Petitioner. Nieves was not cross-examined by trial counsel Lawrence J.D. Mort, nor did Petitioner testify at his trial. Petitioner's defense was one of mere presence without participation nor prior knowledge of Latif's homicidal intent. And that his post-polygraph statements were coerced by law enforcement agents by getting Petitioner to admit prior knowledge. The jury convicted Petitioner and his codefendants of the charges noted *supra*.[3]

The Direct Appeal[4]

Appellate counsel David Epstein filed a ten point brief on April 1989. Petitioner's *pro se* supplemental brief of which contained eleven points was filed by the Appellate Division on May 15, 1991. By order dated September 23, 1991, the Appellate Division affirmed Petitioner's conviction. *People v. Rodriguez*, 176 AD2d 299. Petitioner sought leave to appeal to the New York State Court of Appeals but was denied. *People v. Rodriguez*, 79 NY2d 863. As well as his reconsideration motion, *People v. Rodriguez*, 79 NY2d 1053.

The First Habeas Attacking the Conviction

On January 3, 1994, Petitioner, *pro se*, filed a habeas corpus petition before the federal district court arguing the eleven points raised in his *pro se* supplemental brief. It was docketed *Rodriguez v. Mitchell*, #94-CV-127. After the respondents filed an

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[1] Dones was never apprehended.
[2] The initial statements while placing Petitioner at the scene, denied any prior knowledge or participation in the crimes. The post-polygraph statements to Kings County District Attorney Polygraph Examiner Joseph Ponzi and assistant district attorney acknowledge prior knowledge but *no* participation.
[3] For a full recitation of the facts at the state hearing/trial see App. C3-16.
[4] For a full recitation of Petitioner's pre-appeal history, As well as the claims raised on appeal see App. C17-22

opposition and Petitioner a traverse Judge Weinstein assigned counsel. On February 8, 1995, habeas counsel filed a six point memorandum of law. Judge Weinstein on February 28, 1995 ordered an evidentiary hearing on the claims concerning the involuntariness of Petitioner's admissions and ineffective assistance of trial counsel. During the hearing Petitioner testified to the circumstances of his admissions and trial counsels ineptness. The Court ordered the respondents to depose and then produce trial counsel at the hearing. None of those two options occurred and the Court denied the habeas petition on April 17, 1995. On April 18, 1995, habeas counsel sought reconsideration in light of trial counsel's faxed letter to the court. Since in the letter he made reference to a citation that turned out to be pertaining to him. It delineated a history of mental illness on his behalf. Pet. App.xx). Said motion was denied but the Court granted a certificate of probable cause on all claims. On February 23, 1996, the Second Circuit affirmed on all grounds except the ineffective assistance of trial counsel due to mental illness. It held said claim was unexhausted and should be exhausted in state court. *Rodriguez v. Mitchell*, #95-2310. Petitioner sough rehearing with suggestion for rehearing *en banc* of which was denied on April 18, 1996, as well as a writ of certiorari that was denied on October 7, 1996. *Rodriguez v. Mitchell*, 519 U.S. 888.[5]

The Second §440 Motion

On May 12, 1997, Petitioner filed before the New York State Supreme Court County of Kings a motion to vacate the judgment of conviction pursuant to C.P.L. §440.10. The grounds argued were: (1) denial of counsel at initial stages of prosecution;

[5] On April 16, 1996, Petitioner filed a Rule 60(b) motion before the district court. Petitioner argued that trial counsel perpetrated a fraud on the district court and Petitioner by claiming to be an attorney in Ohio when he was not. Thus, this may have caused him not to appear before the district court for the hearing.

(2) lower court failed to *sua sponte* order a competency hearing of Petitioner; (3) ineffective assistance of counsel due to mental illness *per se* and under *Strickland v. Washington*, 466 U.S. 668; and (4) *Brady* violations. The respondents argued claims one, two and three should of been raised on direct appeal. And that Petitioner's ineffective assistance of counsel and *Brady* claims were without merit. In response Petitioner noted that he tried to expand the appellate record during the appeal process to include the transcripts pertaining to the right to counsel and incompetency claims. But was denied by the Court so Petitioner could not argue the claim on appeal. As to the ineffective counsel claim, Petitioner noted the records concerning that were discovered during the 1995 habeas corpus proceedings, so it couldn't be raised in the 1991 appeal. And as to the merits of the ineffective counsel/*Brady* claims Petitioner noted the *de hors* records to substantiate his claims. By order dated November 25, 1997, the state court held, *inter alia*, that the ineffective counsel claim could not be raised on direct appeal; that Petitioner was not denied ineffective assistance *per se*; that Petitioner did not substantiate his claim since he did not show at the time of the 1983 trial counsel was mentally ill and the trial record showed that counsel was "lucid" and "coherent" and as such Petitioner was not prejudiced (App. I1-3). Petitioner sought leave to appeal but was denied by the appellate division.[6]

Petitioner's First Authorization Motion[7]

On January 19, 1999, Petitioner, *pro se*, filed before the Second Circuit Court of Appeals a motion for authorization to pursue: (1) all four claims raised in his §440.10

The court denied the motion on the law of the case doctrine and the Second Circuit on June 4, 1997, affirmed. *Rodriguez v. Mitchell*, #96-2534. See App. C25-26.

[6] For a full recitation of this motion and Petitioner's coram nobis filed before state court, see App C26-31.

[7] Prior to this Petitioner filed a second Rule 60(b) motion before the district court. See App C32-33.

motion; and (2) the claims raised in his *coram nobis* motion. The respondents on February 17, 1999, filed an opposition arguing Petitioner's ineffective counsel due to mental illness was already addressed by the federal court and The *Brady* claim concerning Sandra Nieves polygraph report having been found to be fraudulent should not be addressed. By order dated February 25, 1999, summarily denied the motion, but stayed the decision, and assigned counsel to argue the retroactivity of §2244(B) to Petitioner's claims. On June 30, 1999, counsel filed a brief arguing the ineffectiveness of trial counsel due to mental illness under *Strickland v. Washington*, 466 U.S. 668 (1984). And the *Brady* claims concerning Nieves polygraph report and Nancy Santiago's statement concerning her account of what Michael Dones told her. The respondents countered by their brief dated September 1999, arguing Petitioners claims as meritless and should not be granted permission to proceed before the district court. Counsel filed a reply brief rectifying the misstatements and arguments of the respondents. By order dated June 6, 2001, the Second Circuit Court of Appeals held the *Brady* claims were an abuse of the writ, but the ineffective assistance of counsel claim not successive. Since the claim was previously raised in the prior habeas petition but held unexhausted by the Second Circuit. *See Rodriguez v. Mitchell*, 252 F.3d 191.

The Recommenced Habeas Petition

On June 12, 2001, Petitioner, *pro se*, filed the habeas petition before the district court on the ineffective assistance of trial counsel due to mental illness (see App G1-15). It was docketed *Rodriguez v. Mitchell*, 01-CV-4222 (JBW). By order dated June 15, 2001, the court assigned counsel. By order dated June 28, 2001, the Court closed docket #01-CV-4222 and reopened docket #94-CV127. On July 31, 2001, a conference was held

wherein the Court directed counsel to amend the habeas petition. Petitioner wrote to counsel and informed him to amend the petition with the right to counsel and *coram nobis* claims. Counsel refused to do such and Petitioner requested reassignment of counsel. On October 31, 2001, a conference was held wherein the Court refused to reassign counsel and requested counsel to file the amended habeas petition.[8] Thereafter, the respondents in their opposition dated April 19, 2002, opposed Petitioner's habeas as time barred and that the IAC claim was not an unreasonable application of *Strickland* (see App G16-28). Habeas counsel filed a reply dated May 16, 2002 arguing the time bar was inapplicable and if so it was equitably tolled. And Petitioner was denied the effective assistance of counsel due to mental illness *per se* (see App G29-36). Petitioner filed a request dated May 28, 2002 for reassignment of counsel and a reply memorandum of law arguing, *inter alia*, his petition was not time-barred and his ineffective assistance of counsel claims under the *per se* and prejudice prongs of *Strickland v. Washington*, 466 U.S. 668 (1984) (see App G37-56). On June 10, 2002, a conference was held wherein Judge Weinstein noted the complexity of the habeas petition and preferred counsel to represent the habeas petition. He ruled that the habeas petition was not time-barred and that in light of *Bell v. Cone*, 122 S.Ct. 1843 (2002), Petitioner's IAC *per se* argument was denied. He refused to reassign counsel, but relieved counsel and then recused himself. Since he believed he could not address the habeas without the assistance of counsel. Petitioner wrote a letter dated June 11, 2002, to Chief Judge Edward R. Korman explaining what happened and that he have Judge Weinstein reassigned to Petitioner's habeas petition (see App D9-11). By letter dated June 18, 2002, Chief Judge Korman notified Petitioner that he could not get involved in Petitioner's case because the case was

[8] He filed it and it was docketed #01-CV-7743.

not assigned to him. He stated he would send my letter to Judge Weinstein to consider (see App D12).[9] By order dated June 21, 2002, the case with Chief Judge Korman's approval was reassigned to him (see App D13).[10] By orders dated October 29 & 30, 2002, Judge Korman denied Petitioner's amendment motion and habeas petition (see App F62-69, F70-1). The amendment motion was denied because: (a) the habeas petition was time-barred, and (b) the claims were time-barred because they did not relate back.

Petitioner filed a timely notice of appeal and Certificate of Appealability (hereinafter "COA") motion before the district court (see App F12-19). Petitioner sought a COA on the following grounds:

POINT I

WHETHER THE COURT'S ADJUDICATION OF THIS MATTER DEPRIVED IT OF JURISDICTION, SINCE IT FAILED TO ADDRESS PETITIONER'S RECUSAL MOTION REQUESTING IT TO REASSIGN JUDGE WEINSTEIN; AND WHETHER JUDGE WEINSTEIN'S *SUA SPONTE* RECUSAL WAS UNWARRANTED IN LIGHT OF *LITEKY V. U.S.*, 510 U.S. 540 (1994).

POINT II

WHETHER CHIEF JUDGE KORMAN'S DENIAL OF PETITIONER'S HABEAS AND AMENDMENT MOTION WAS INCOMPLETE IN LIGHT OF *RUDENKO V. COSTELLO*, 286 F.3D 51 (2D CIR.2002), AND *CATALAN V. UNITED STATES*, 284 F.3D 420 (2D CIR.2002) WHERE: (A) IT DID NOT CITE ON WHAT SPECIFIC GROUNDS THE HABEAS WAS TIME-BARRED; (B) IT'S DECISION CONCERNING THE MERITS OF THE *PER SE*

[9] Yet by that time in a published opinion dated June 14, 2002, Judge Weinstein had reiterated his position stated from the bench. *See Rodriguez v. Mitchell*, 208 F.Supp.2d 381.

[10] By motion dated June 27, 2002, Petitioner moved for assignment of counsel, and filed a supplemental reply memorandum of law to the respondents opposition (App G57-62). By order dated July 12, 2002, Judge Korman denied without prejudice said motion. On July 2, 2002, Petitioner filed a motion to amend the habeas with the right to counsel claim. On August 19, 2002, Petitioner filed a motion for Judge Korman to recuse himself and reassign the case to Judge Weinstein. On October 16, Petitioner filed another motion to amend the habeas with the right to counsel claim and *coram nobis* claims. He never addressed the recusal motion.

E.D.N.Y./BKNY
03-cv-3770
Korman, C.J.

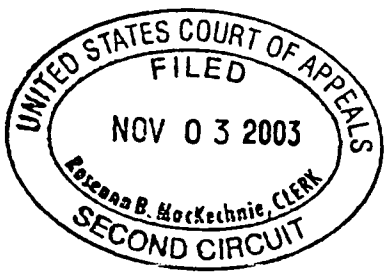
MANDATE

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 3rd day of November two thousand and three,

Present:

Hon. Joseph M. McLaughlin,
Hon. Robert A. Katzmann,
Circuit Judges,
Hon. Shira A. Scheindlin,*
District Judge.



Robert Rodriguez,
Petitioner,

v.

03-3606

Eliot L. Spitzer,
Respondent.

Petitioner, *pro se*, moves for an order authorizing the United States District Court for the Eastern District of New York to consider a successive 28 U.S.C. § 2254 petition. This is a successive petition because both the district court and this Court have previously adjudicated Rodriguez's § 2254 petition, challenging the same conviction, on the merits. Upon due consideration, it is ORDERED that the motion is DENIED, as it does not satisfy the criteria set forth in 28 U.S.C. § 2244(b). *See* 28 U.S.C. § 2244(b).

A TRUE COPY
ROSEANN B. MacKECHNIE, CLERK
Joseph M. Rodriguez

NOV 3

FOR THE COURT:
Roseann B. MacKechnie, Clerk

BY: Lucille Carr

*The Honorable Shira A. Scheindlin, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A1

ISSUED AS MANDATE: DEC 1 2003