00-6528

No. 2000-

Supreme Court, U.S.
FILED
SEP 29 2000
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

ORIGINAL

"In re DOMINIC M. FRANZA"

PETITION FOR A WRIT OF HABEAS CORPUS
FOR REVIEW OF THE DECISION OF THE
NEW YORK SUPREME COURT

DOMINIC M. FRANZA, PRO-SE
92A3659
CLINTON CORR. FACILITY ANNEX
P.O. BOX 2002
DANNEMORA, N.Y 12929

9

QUESTIONS PRESENTED

Did the State obtain Franza's conviction in violation of his Federal Constitutional Rights under the 14th Amendment by the knowing use of false evidence and testimony. Giglio v. U.S., 405 U.S. 150, 152 (1972); Miller v. Pate, 386 U.S. 1, 2-7 (1967); Napue v. Illinois, 360 U.S. 264, 269-270 (1959).

Did the trial Court's denial of post conviction collateral relief deny Franza of his Liberty Interest in violation of his Federal Constitutional rights under the 14th Amendment.

Should a defendant make an error in pleadings may a conviction still stand that is proven to be fraudulent.

LIST OF PARTIES

The petitioner is Dominic M. Franza, 92A3659, a prisoner at Clinton Corr. Facility Annex located at P.O. Box 2002, Dannemora, N.Y. 12929.

The respondent is Daniel A. Senkowski, the Superintendent of Clinton Correctional Facility Annex.

Respondent's Attorney is Eliot Spitzer, the Attorney General of the State of New York, Department of Law, The Capitol, Albany, N.Y. 12224-0341.

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Petitioner Dominic M. Franza prays the judgment of the New York Trial Court's denial of post conviction relief be reviewed and a writ of habeas corpus issue releasing petitioner from unlawful custody or an immediate hearing as petitioner is innocent and the conviction a miscarriage of justice. As adequate relief cannot be obtained in any other form or from any other Court.

OPINION BELOW

The opinion of the Trial Court is not published; a copy is attached as Appendix "A" 1-4

JURISDICTION

The decision of the Trial Court was issued on December 19, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §2241 (a); 28 U.S.C. §2254 (a); Rule 20 (4) of the Supreme Court of the United States; Felker v. Turpin, 518 U.S. 651, 657-658 (1996).

STATEMENT OF REASONS PURSUANT 28 U.S.C. §2242

Application was made to the Court of Appeals, Second Circuit for permission to file a second or successive habeas corpus petition. The application was denied. See App. "A" 72.

STATEMENT OF THE CASE

Dominic M. Franza was convicted and is presently incarcerated for conduct - purportedly sending a man to shoot his Mother-in-law Mrs. Josephine Mendez and wife Mrs. Myra Franza. As well, having another man prepare and mail a pipe bomb to Puerto Rico in an attempt to seriously injure Mrs. Josephine Mendez's Mother Rosa Matos, Mrs. Myra Franza's Grandmother. After going through the Discovery materials while incarcerated Franza discovered the testimonies and evidence were fraudulent, thereby violating Franza's Constitutional rights, which this Court held in Miller v. Pate, 386 U.S. 1, is unlawful. After reviewing the Discovery materials Franza filed a post Conviction motion seeking collateral relief pursuant to New York Criminal Procedure law 440.10(1)(b,c,h) from his unlawful incarceration (App. "B" 1-145)[1].

The Trial Court denied Franza's collateral challenge on the merits, finding the charges unsubstantiated (App. "A" 1-4)[2].

1- Other claims were made. Such are not subject of this Writ.
2- The Trial Court claimed sufficient facts appeared in the record, but went on to reach the merits.

Franza sought leave to appeal from the denial of the post conviction motion and was granted permission. Said appeal was consolidated with Franza's direct appeal from conviction (App. "A" 5). On direct appeal Franza claimed the Trial Court's denial of the post conviction motion was violative of due process of law and equal protection of the law (App. "C" 1-66). On May 13, 1997, the Appellate Division: First Department denied Franza's appeal on the merits. As well, denying Franza's motion to file the post conviction motion exhibits, People v. Franza, 239 A.D.2d 201 (1st Dept. 1997)(App. "A"6). Franza sought leave to appeal to the Court of Appeals on the same grounds (App. "D" 1-46). On August 25, 1997, the Court of Appeals denied Franza's leave application (App. "A" 7). Cited as, People v. Franza, 90 N.Y.2d 904 (1997).

On July 31, 1998, Franza filed a petition for a writ of habeas corpus, 98 Civ. 5484 (App. "E" 2-74) and a memorandum of law in support (App. "F" 1-95) in the Southern District of New York supported with documentary evidence as reflected. Franza raised the same grounds raised in the State Courts, the Trial Court's denial of the post conviction motion constituting a violation of due process and equal protection of the law.

On November 17, 1998, Franza filed another memorandum of law in further support of the habeas corpus petition raising a Miller v. Pate, 386 U.S. 1, 207 argument (App. "G").

The State on December 16, 1998, filed their answer (App. "H" 1-17) and memorandum of law (App. "I" 1-31). Within the answer the State admitted the evidence used in the post conviction motion was discovery material from their office (App. "H" 8, ¶16).

In response Franza filed a traverse (App. "J" 1-12) and a memorandum of law in support raising once again a Miller v. Pate, 386 U.S. 1, 2-7 argument (App. "K" 1-20).

In opposition to Franza's motion for discovery the State blatantly admitted Franza used the discovery materials as exhibits repeatedly in the State Courts and the habeas corpus petition filed (App. "L" 1-5, ¶5).

On June 7, 1999, United States Magistrate Judge Andrew J. Peck filed his report and recommendation (App. "A" 8-66). Magistrate Peck did not reach the merits of the petition as to the denial of the post conviction motion. Holding,. the Trial Court's denial of the post conviction motion is not cognizable for Federal habeas review (App. "A" 53-56)[3].

On June 21, 1999, Franza filed his objections to Magistrate Peck's report and recommendation. Franza argued the Miller v. Pate issue was not addressed on the merits (App. "N" 1-21).

3- Magistrate Peck made comment on other aspects (App. "M" 56-65).

On June 30, 1999, the District Court issued an order denying Franza's habeas corpus petition for the reasons set forth in Magistrate Peck's report and recommendation (App. "A" 67-69). The Clerk of the Court entered the Judgment on June 30, 1999 (App. "A" 70).

On July 30, 1999, Franza filed an application for a Certificate of Appealability (App. "O" 1-14) memorandum of law in support (App. "P" 1-10) and a reply (App. "Q" 1-5 with the Second Circuit. On July 25, 2000, the Second Circuit denied the Certificate of Appealability (App. "A" 71).

As a result of the District Court denying Franza's habeas corpus petition for the reasons set forth in Magistrate Peck's report and recommendation in that the denial of the post conviction motion not being cognizable for Federal review, thereby not reaching the merits. Franza on August 31, 1999, filed an application with the Second Circuit seeking permission to file a second or successive habeas corpus petition (App. "R" 1-29). Franza claimed the following:

> Petitioner's conviction and incarceration constituted a Miscarriage of Justice, Manifest injustice and cruel and unusual punishment as petitioner is actually innocent as the prosecutors knowingly and intentionally used false evidence and false testimonies before the Grand Jury, Pretrial and Trial to gain a conviction in violation of the 8th and 14th Const. Amendments, Miller v. Pate, 386 U.S. 1, 7 (1967); Napue v. Illinois, 360 U.S. 264, 269-270 (1959); Triesman v. U.S., 124 U.S. 361, 379 (2nd Cir. 1997).

> The above warrants that permission to file a second or subsequent habeas corpus petition be granted, as petitioner has made a colorable showing of actual innocence, resulting in a Miscarriage of Justice and unjust incarceration. Calderon v. Thompson, No. 97-215, 118 S.Ct. 1487, 1502-1504 (1998); Schlup v. Delo, 513 U.S. 298, 314-329 (1995); Herrera v. Collins, 505 U.S. 390, 404 (1993); Sawyer v. Whitley, 505 U.S. 333, 339 (1992); Coleman v. Thompson, 501 U.S. 722, 750 (1991); McClesky v. Zant, 499 U.S. 467, 493-495 (1991); Murray v. Carrier, 477 U.S. 478, 495-496 (1986); Kuhlman v. Wilson, 477 U.S. 436, 454 (1986); Triesman v. U.S., 124 F.3d 361, 377-380 (2nd Cir. 1997).

On September 30, 1999, the Second Circuit denied the application (App. "A" 72).

Franza now petition's this Court under Felker v. Turpin, 518 U.S. 651 (1996). That the consideration of the merits of the Constitutional claim are not procedurally barred as Franza is actually innocent and his conviction and incarceration resulting in a miscarriage of justice. Schlup v. Delo, 513 U.S. 298, 326-327 (1995). That exceptional circumstances warrant this Court's discretionary powers, as adequate relief cannot be obtained in any other form or from any other Court. This petition is filed within 1 year of denial.

TRIAL

July 17th, 1990, incident

The shooting of Mrs. Josephine Mendez and Mrs. Myra Franza occurred on July 17, 1990, at 485 West 187st, Apt 1D, at around 7:00 P.M. (App. "S" 222-223, 313)[4].

4- Complete set of trial transcripts provided pages 1-2001.