No. 005105

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JUL 10 2000
CLERK

In Re Dennis Vilella - PETITIONER

VS.

John P. Keane, Superintendent - RESPONDENT
Sing Sing Correctional Facility

ON A PETITION FOR AN EXTRAORDINARY WRIT TO THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR AN EXTRAORDINARY WRIT

Dennis Vilella 87-A-9590
Sing Sing Correctional Facility
354 Hunter Street
Ossining, New York 10562

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QUESTION(S) PRESENTED

1. Does the competency standard for waiving counsel apply when petitioner's waiver has been influenced by a disbarred attorney with the trial court's knowledge?

2. Is due process of law denied when the trial court fails to give a ruling removing disbarred attorney who is influencing petitioner's decision to waive counsel and proceed **pro se**?

3. Considering new evidence and according to the trial record was the guilty verdict against the weight of the evidence and did a miscarriage of justice occur?

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STATEMENT OF THE CASE

After a three day trial fully demonstrating the perils of self-representation, defendant was convicted on July 29, 1987 of the crimes of attempted murder in the second degree and assault in the first degree upon the sole testimony of the alleged victim, one Theresa Nappi, with whom petitioner had ended an extra-marital affair years prior to the alleged incident. The prosecution proposed the theory that petitioner attempted to murder Ms. Nappi because of a dispute over child support payments.

Based on the contradictory and unsupported testimony of this sole witness; petitioner's inability to effectively represent himself at trial (petitioner proceeded **pro se** despite not making a knowing and intelligent waiver); the trial court's misconduct in allowing petitioner to proceed **pro se**; and the efforts of an overzealous prosecutor, petitioner was convicted of the above mentioned charges.

Maintaining his innocence throughout, and to this day, petitioner was sentenced on October 9, 1987 to concurrent terms of imprisonment of 8 1/3 to 25 years (attempted murder) and 5 to 15 years (assault). Petitioner has now served over 12 years for a crime which he did not commit. This fact is supported by the lack of credible evidence, and the alleged victim herself, who provided the trial court with a written statement and asked for the petitioner's release from prison.

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Petitioner's conviction would not have been effectuated had petitioner been represented by a trained advocate instead of **pro se**, and had the trial court rightfully and wisely ruled against self-representation based on the information before the court.

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REASONS FOR GRANTING THE PETITION

This case is one which displays the great perils of self-representation and gives life to the proverb that, "[o]ne who is his own lawyer has a fool for a client." However, in the American adversarial system of justice, there are three sides of the coin - the defense, the prosecution and the court. The common goal of these is to seek justice, with the latter balancing justice on the narrow edge of the coin, protecting the rights of the individual against the awesome power and resources of the government. The role of the court becomes all the more significant when the awesome power of the government is waged against a **pro se** defendant. As stated by former Chief Justice Burger in Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975):

> "[It is not] accurate to suggest, ...that the quality of [**pro se** defendant's] representation at trial is a matter with which only the accused is legitimately concerned. Although we have adopted an adversary system of criminal justice, the prosecution is more than an ordinary litigant, and the trial judge is not simply an automaton who insures that technical rules are adhered to. Both are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial. That goal is ill-served, and the integrity of public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel...."

The duty of the trial court is to prevent injustice and protect the individual. The prosecutor also holds this responsibility to "seek justice, not merely to convict."[1]

1. Standard 3-1.2 - The Function of the Prosecutor - American Bar Association Standards Relating to the Administration of Criminal Justice (3d ed. 1992)

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This is a case in which the petitioner's hired attorney was disbarred prior to trial; the petitioner believed and was assured by said disbarred attorney that his representation could legally continue; this attorney had previously filed successful legal documents and motions, releasing petitioner from county jail; the level of trust in this attorney by petitioner was very high; the attorney continued to advise petitioner during trial (preparing motions, preparing the cross examination of witnesses and writing the opening and closing arguments); the trial judge was aware of this disbarred attorney's presence and the record supports that this disbarred attorney influenced petitioner throughout the trial (disbarred attorney addressed the court and defendant stated in court that he wished to consult with the disbarred attorney). While petitioner is aware that he does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure (see, McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 [1984]), that does not change the trial court's duty to uphold justice. The trial court had enough reason to doubt that petitioner's waiver was knowing and voluntary. Petitioner's decision to waive counsel was essentially coerced by disbarred attorney acting with both implicit and explicit approval of the trial court. As a result, the decision to waive counsel was not knowing, intelligent, nor voluntary, and violated due process.

Petitioner's proceeding **pro se** with his eyes closed was ill-advised. Petitioner did not know what a character witness

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was, arousing comment from the court about petitioner's ineptitude, yet the court moved the proceedings along despite this knowledge (see Appendix C). Petitioner could not effectively cross examine witnesses, question his supporting witnesses, nor expose the gaping contradictions evident from the record. Equally detrimental was petitioner's inability to allow trial court to charge a lesser included offense, although this was suggested by the trial court (indicating the trial court's view of the questionable testimony of the complainant and the evidence presented). The court's subsequent confusion in regard to the charge, exacerbated by the prosecution's questioning of this confusion, left petitioner with severely diminished faith in the proceedings (see Appendix D). Throughout it was clear that while petitioner may have been sufficiently prepared by the disbarred attorney for a trial in an ideal world -- petitioner was not prepared for the intricacies of a trial against an able, resourceful and experienced adversary. An otherwise straightforward defense, which if carried out effectively would have refuted the only witness' testimony and therefore would have acquitted petitioner, became assured destruction in the courtroom and resulted in a punishment far more severe than those of cases similar to petitioner's.[2] An innocent man was wrongly convicted because the court failed by allowing petitioner to represent himself

2. No hearing was conducted concerning the presentence report prior to sentencing denying pro se petitioner the opportunity to read said report and/or challenge its contents as part of his preparation for sentencing. Petitioner received the maximum sentence.

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despite evidence that petitioner was in no position to make a knowing and intelligent waiver.

Concerning petitioner's ill-fated, unknowing and unintelligent decision to proceed **pro se**, it is understood that there is more to being a lawyer than being with his client when he is in court. There is legal research; there is investigation for factual information; there is an investigation in order to gain better insight into the individuals involved; and there must be developed between lawyer and client a sense of confidence so that each may speak freely and honestly to each other. Petitioner had developed a relationship of trust with his attorney but this attorney was disbarred prior to trial. Under the false pretense (as advised by the disbarred attorney) that said attorney would be bound by contract to represent the petitioner at trial, and further that being appointed a new attorney at the time of trial would be detrimental because of the fact that the appointed attorney would not have the benefit of knowledge of the case, petitioner proceeded at trial **pro se** believing the advice and guidance that would be provided by the disbarred attorney would be sufficient for adequate self-representation. Petitioner trusted this attorney completely. However, petitioner was mislead, affecting his competence to waive his right to counsel. Petitioner's waiver was not made in a knowing and intelligent manner and as a result his proceeding with trial **pro se** was so apt to result in injustice as to be fundamentally unfair. Uveges v. Pennsylvania, 335 U.S. 437, 441, 69 S. Ct. 184, 93 L. Ed. 127

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(1948). Furthermore, petitioner was left vulnerable by the court which was aware of the disbarred attorney's influence, yet failed to give a stern, unequivocal ruling forbidding the disbarred attorney's involvement (see Appendix E). This said attorney was later convicted of filing legal motions without a license (see Appendix F). The court's statement that the petitioner represents himself at his own peril does not dissolve the court's responsibility.

Also, while the record has often mentioned that the petitioner holds a college degree from St. John's University, that does not render him less susceptible to coercion, and the Court has clearly stated that education does not render a layman an attorney:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law... He lacks both the skill and knowledge adequate to prepare his defense, even though he have a perfect one... [T]he failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment." Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

The prosecution's observation that petitioner had conducted his defense with reasonable competence and in an orderly manner goes against the record. In a trial based solely on the complainant's testimony and assertions (a fact conceded by the court and prosecution), petitioner's inability to show the lack of corroboration in complainant's story and other indicia of a fabricated case (which in perfect hindsight is clearly evident) display petitioner's ineffectiveness. By being permitted by the court to proceed **pro se** at trial without a knowing and

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intelligent waiver, a substantial and injurious effect worked to petitioner's actual disadvantage, infecting the entire trial with error of constitutional dimensions. U.S. v. Frady, 456 U.S. 152, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982).

This injustice involves a sequence of events which proceeds through an inept **pro se** litigant; a complainant who was confused and repeatedly contradicted herself at trial; who visited petitioner in prison and who has written letters supporting petitioner's release (see Appendices G and H); who received a sum of $30,000 from the Crime Victim's Board based on fraudulent information provided by the prosecution (see Appendix I); a lead police detective who failed to conduct a thorough investigaton that would have provided exculpatory evidence; a trial judge who failed in his duty and responsibility to protect the **pro se** litigant against the powerful State; and an overzealous trial prosecutor who permitted perjurious testimony to be introduced at trial. For example, this included the misrepresentation of skull fractures when hospital reports stated that x-rays and a CAT scan indicated none existed (see Appendices J and K). This prosecutorial misconduct must not be overlooked; not only because it was inflicted upon an innocent man, but also because it goes against the search for truth and justice. As stated in Mooney v. Holohan, 294 U.S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791 (1935):

> "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the

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> presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

Any one of these elements of this travesty would warrant the Court's review. The fact that so many elements infected this case implore the Court to review this matter in the interest of justice. Had petitioner the benefit of trained trial counsel this case could not have been proven beyond a reasonable doubt, a principle which plays a vital role in the American scheme of criminal procedure. Even the forensics department failed to find <u>any</u> evidence that this alleged attack occurred where complainant claims it occurred or with the instrument claimed to have been used, nor were complainant's depiction of the events supported by any other evidence. As the record shows, complainant's entire testimony was contradictory and contained many indications of confusion and even fabrication. Something happened here. Petitioner does not deny that. However, whatever happened did not occur in the manner represented by the complainant, nor was petitioner involved in any crime. A careful and thorough review of the case will reveal that. The conviction was against the weight of the evidence. In light of the new evidence obtained after trial (see Appendix L: John Nappi affidavit and Appendices G and H: Theresa Nappi letters) which was presented to the lower courts, petitioner's guilt is even further from conceded or plain. There is a colorable showing of factual interest. Clearly, in this case, had the trial court correctly ruled regarding waiver, and had the new

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evidence been available at trial, the trier of facts would have entertained a reasonable doubt of petitioner's guilt. Proof beyond a reasonable doubt is a prime instrument for reducing the risk of convictions resting on factual error, which is evident here. The standard provides concrete substance for the presumption of innocence--that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of American criminal law. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

As if this case was not already infected enough as a result of ineffective self-representation due to judicial misconduct, and as a result of the State's misconduct, it also displays the perils of being associated with members of the Bar who have brought shame to the legal institution. Justice has never been achieved in this case. It is rife with inconsistencies, gaping holes and difficult questions that all lead to the conclusion that there has been a grave miscarriage of justice. Petitioner's trial attorney was disbarred. Petitioner's appellate counsel was disbarred (see Appendix M). Even the trial prosecutor resigned amid scandal that could have lead to disbarment. These individuals are entrusted with seeking justice yet they failed to uphold the standards of their profession. If professional codes could not be honored with integrity, how could they then seek justice for petitioner?

Additionally, petitioner was not even afforded the constitutional right to appeal his conviction. In a case such as petitioner's this only compounds the miscarriage of justice.

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A direct appeal was perfected by an attorney who had been relieved by petitioner[3]; and said attorney knew he had been relieved (see Appendices N, O & P which clearly show the appellate brief was unauthorized). Petitioner believed he had retained new counsel in M. Ozer, Esq. and his assistant, P. Labriola. Several checks were written and cashed, and P. Labriola even visited petitioner at Elmira Correctional Facility. How these licensed representatives of the American legal system failed to inform the court of the situation was beyond petitioner's understanding until petitioner learned that P. Labriola had forged M. Ozer's name to cash the checks and also learned that the matter concerning his appeal was not being attended to. Petitioner was not informed that the appeal had been submitted and only learned this after the fact. Issues crucial to petitioner's appeal were not raised because petitioner had no involvement in his defense on appeal.

Petitioner then retained P. Grishman, Esq. who filed a motion with the Appellate Division, Second Department, informing the court of the travesty which had occurred and requesting a stay on all appellate proceedings. This motion also raised the very disturbing particulars of the relieved appellate counsel's ineffectiveness (see Appendix P).

3. Petitioner had notified appellate counsel that petitioner was relieving him. Presuming said appellate counsel to be professional enough to inform the court and presuming newly retained counsel, Martin Ozer (see check dated prior to submission of appellate brief by previously relieved appellate counsel and affidavit of P. Labriola, Martin Ozer's assistant - Appendices N & O) would do the same, petitioner trusted these representatives of the legal system. Also, the District Attorney did not reject the appellate brief despite knowledge that appellate counsel who submitted the brief had been relieved.

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Petitioner continually contends that this unauthorized appellate brief is a nullity. There is more than sufficient evidence (the "paper trail" is conclusive) to show the brief was not authorized by petitioner. How the lower courts have ignored petitioner's constitutional rights is a question now presented to this Court.

Furthermore, the relieved appellate attorney was facing charges before the same District Attorney's office which prosecuted petitioner (again, see Appendix M). Although there was a clear conflict of interest and petitioner had unequivocally relieved appellate counsel prior to the brief being submitted (attempts by petitioner to obtain an affidavit from relieved attorney Rivers were fruitless. Rivers was attempting to evade the authorities - he certainly wanted to evade petitioner as well; another client he had betrayed and swindled), the petitioner was abandoned by the court once again. Throughout, petitioner was left alone against the awesome power of the District Attorney's office. At every step, it is evident that the District Attorney's office abused its power to insure petitioner would be imprisoned, and remain imprisoned. Petitioner was denied due process and denied his liberty because he was left unprotected by the courts. This is an opportunity for this great Court to remedy this travesty of justice and reinstill confidence in the American public about the state of this country's system of justice.

The petitioner maintains his innocence to this day. This is not a case of self-representation in which the weight of

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the evidence supports a finding of guilt beyond a reasonable doubt. In re Winship, supra. Certainly this defendant is not suggesting a review of every case of self-representation. However, there exist cases, such as this one, that warrant review and warrant the Court revisiting the matter of self-representation set forth in Faretta v. California, supra, and Godinez v. Moran, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993) in light of the facts of this case and in the interest of justice.

As has been the history of this great Court, writs have been accepted for review when they involve issues of importance to the public and when the scales of justice have been capsized in favor of the awesome power of the government. Writs have also been accepted when petitioner can show he is innocent and that there was a constitutional error at trial which caused the conviction. In short, there was a fundamental miscarriage of justice. Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986).

Looking at each element of this case separately, everything that could go wrong, went wrong. And taken as a whole, the facts do not support a finding of guilt, nor can they ever amount to justice. What they do support is that petitioner was denied due process and wrongly convicted against the weight of the evidence. Petitioner is a victim of a fundamental miscarriage of justice. Petitioner's journey through the levels of the American legal system is tantamount to persecution. No citizen should be subjected to such treatment. The manifest injustice

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perpetrated against petitioner must not be permitted to continue.

Finally, this petition for an extraordinary writ is made on the grounds that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court (Rule 20).

The writ will be in aid of the Court's appellate jurisdiction. Petitioner, a **pro se** petitioner, incarcerated for nearly the past 13 years in a New York State prison, is a citizen of the United States and the State of New York. Petitioner's claims entail a controversy between himself and a party represented by the State of New York and involves violations of the petitioner's constitutional rights. Here, the trial court violated petitioner's constitutional rights which are secured by the sixth and fourteenth amendments to the constitution and acted in excess of its judicial authority. Therefore, in this case the United States Supreme Court has appellate jurisdiction and this petition is submitted in aid of the Court's appellate jurisdiction.

This case involves exceptional circumstances which warrant the exercise of the Court's discretionary powers. In this regard petitioner offers the particulars already detailed in this petition and further offers the standard set forth in Murray v. Carrier, supra, which properly strikes the balance between the societal interests and the individual interest in justice

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when the claimed injustice is that constitutional error has resulted in the conviction of one who is actually innocent. Petitioner, in this petition, has shown that in light of new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt.

Furthermore, petitioner applies Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995) which requires petitioner asserting actual innocence to support his allegations of constitutional error with new reliable evidence that was not presented at trial. Petitioner has fulfilled this requirement.

Also, petitioner applies the miscarriage of justice standard set forth in McCleskey v. Zant, 499 U.S. 467, 494 (1991) which requires a showing of both constitutional error and innocence. Once again, petitioner has fulfilled this requirement.

Petitioner's innocence, as supported by the evidence detailed in the petition, is an exceptional circumstance in itself warranting the exercise of the Court's discretionary powers.

To show that adequate relief cannot be obtained in any other form or from any other court, petitioner refers to exhibit B, the U.S. District Court's decision and opinion which details every avenue and remedy that has been exhausted by petitioner. Petitioner also refers to exhibit A, the mandate of the U.S. Court of Appeals denying the petitioner's application for an order to consider a successive 28 U.S.C. § 2255 motion. The denial of authorization by a court of appeals to file a second or successive petition for writ of habeas corpus may not be

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reviewed on certiorari. 28 U.S.C. § 2244 (b)(3)(E). Therefore, petitioner's only avenue is to seek relief via a petition for an extraordinary writ.

WHEREFORE, in the interest of justice, petitioner seeks immediate release from the custody of respondent so that he may return to his family and community and begin his life anew as a law-abiding, productive citizen. Petitioner has no intention of pursuing any kind of litigation against any of the parties mentioned in this petition.

Petitioner further seeks to have all his records sealed so as to protect himself from any litigation on the part of George Sassower; such need evidenced by the order of Chief Judge Oakes of the U.S. Court of Appeals for the Second Circuit (see Appendix Q). Petitioner has disassociated himself completely from George Sassower and never wants to have dealings with him again.

Petitioner prays that this relief be granted, along with any other and further relief as this Court may deem just and proper.

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MANDATE

93-cv-4587
Wexler, J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
MAR 14 2000
Roseann B. MacKechnie, CLERK
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 14th day of March two thousand,

Present:

Hon. Richard J. Cardamone,
Hon. José A. Cabranes,
Circuit Judges.
Hon. David Trager,
District Judge.

Dennis Vilella

Petitioner,

v.

John P. Keane,

Respondent.

00-3506

Petitioner has filed, *pro se,* an application for an order authorizing the district court to consider a successive 28 U.S.C. § 2255 motion. Upon due consideration, it is ORDERED that the application be denied.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: Lucille Carr

MAR 14 2000
Date:

USCA Order:

A TRUE COPY
ROSEANN B. MACKECHNIE, CLERK

By _____ Deputy Clerk

ISSUED AS MANDATE:
March 15, 2000

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DENNIS VILELLA,

Petitioner,

-against-

JOHN P. KEANE, WARDEN OF SING SING CORRECTIONAL FACILITY,

Respondent.
----------X

MEMORANDUM AND ORDER
CV 93-4587

(Wexler, J.)

APPEARANCES:

DENNIS VILELLA
Petitioner Pro Se
#87-A-9590
Sing Sing Correctional Facility
354 Hunter Street
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DENIS DILLON, NASSAU COUNTY DISTRICT ATTORNEY
BY: DOUGLAS NOLL, ASSISTANT DISTRICT ATTORNEY
Attorney for Respondent
262 Old Country Road
Mineola, New York 11501

WEXLER, District Judge

Pro se petitioner Dennis Vilella brings the above-captioned petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent opposes the petition. For the reasons below, the petition is denied.

I. BACKGROUND

At approximately midnight of July 26, 1986, Theresa Nappi ("Nappi") was discovered in a bloody, semi-conscious state in a vacant parking lot in Glen Cove, New York. Nappi, the victim of a vicious attack, had multiple head wounds and had lost

approximately 40% of her blood.

Several days later, petitioner was arrested by Detective John Richards ("Richards") of the Nassau County Police Department in connection with the attack on Nappi. Richards headed an investigation leading to petitioner's arrest and then testified before the grand jury, which eventually indicted petitioner for attempted murder in the second degree and assault in the first degree.

Petitioner retained George Sassower, Esq. ("Sassower") as his trial attorney, but approximately five months before trial Sassower was disbarred. See In re Sassower, 512 N.Y.S.2d 203 (2d Dep't), appeal dismissed, 518 N.Y.S.2d 964 (N.Y. 1987). Petitioner then chose to represent himself at trial.

On July 29, 1987, following a three-day trial, petitioner was convicted of attempted murder in the second degree and assault in the first degree. On October 9, 1987, petitioner was sentenced to concurrent terms of imprisonment, the greater of which was eight and one-third to twenty-five years. At sentencing, petitioner was represented by attorney Robert Rivers, Esq. ("Rivers").

Rivers filed a notice of appeal on petitioner's behalf to the Appellate Division, Second Department, submitted a brief, and then argued the appeal on December 22, 1988. On the appeal, Rivers contended that petitioner's waiver of trial counsel was not knowing and intelligent, that petitioner was denied due process by being permitted to proceed without counsel, and that

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the verdict was against the weight of the evidence.

Prior to a decision on the appeal, but after oral argument, Sassower (who was still disbarred) filed an application with the Appellate Division, returnable January 20, 1989, to vacate or stay all appellate proceedings on the ground that petitioner had allegedly discharged Rivers as counsel before Rivers had filed the appellate brief. Peter Grisham, Esq. ("Grisham") filed a cross-motion on petitioner's behalf seeking similar relief. By order dated February 7, 1989, the Appellate Division dismissed Sassower's application on the ground that Sassower lacked standing and denied Grisham's cross-motion.

Subsequently, the Appellate Division unanimously affirmed the conviction. See New York v. Vilella, 538 N.Y.S.2d 66 (2d Dep't 1989). The New York Court of Appeals denied leave to appeal. See New York v. Vilella, 543 N.Y.S.2d 413 (N.Y. 1989).

Petitioner made two motions pursuant to New York Criminal Procedure Law § 440.10 challenging his conviction. In the first § 440.10 motion, petitioner raised the following grounds: (1) ineffective assistance of appellate counsel; (2) improper trial role of disbarred attorney Sassower; and (3) "newly discovered evidence." The newly discovered evidence was presented in an affidavit dated September 6, 1989 from John Maloney a/k/a John Nappi ("Maloney"), Nappi's former husband, in which Maloney states that he accompanied Nappi to Manhattan on the evening of the attack, at a time when Nappi

testified she met petitioner in Glendale, Queens (the "Maloney affidavit"). The motion was denied in a decision and order dated December 29, 1989. By an order dated June 12, 1990, the Appellate Division denied leave to appeal.

In the second § 440.10 motion, petitioner raised several grounds: (1) the prosecutor and Richards lied to the grand jury; (2) deception by the trial judge; (3) the prosecution failed to disclose Brady material; and (4) "newly discovered evidence" demonstrating that Nappi lied in her testimony at trial. The newly discovered evidence consisted of the Maloney affidavit and a two-page notarized letter dated May 6, 1991, purportedly written by Nappi and addressed to the trial judge (the "Nappi letter"). The Nappi letter states that Nappi no longer has any recollection of the events of the evening of July 26, 1986, and requests that petitioner be released if there is not sufficient evidence of his guilt independent of any statements previously made by her. The motion was denied in a decision and order dated October 29, 1991. By an order dated January 7, 1992, the Appellate Division denied leave to appeal; and, in an order dated February 4, 1992, the Court of Appeals denied leave to appeal.

Thereafter, petitioner filed a petition for a writ of habeas corpus in this Court challenging his conviction (the "first petition"). In the first petition, petitioner asserted denial of his federal constitutional rights based on the following grounds: (1) prosecutorial misconduct based on "newly

discovered evidence" (i.e., the Maloney affidavit and Nappi letter) demonstrating that the prosecution withheld exculpatory evidence from the grand jury; (2) the trial judge deceived petitioner by not giving him an opportunity to put forth evidence of prosecutorial misconduct; (3) Richards committed perjury in the grand jury and the prosecution failed to interview certain potential witnesses; and (4) ineffective assistance of both trial and appellate counsel. By Memorandum and Order dated February 8, 1993, this Court dismissed the first petition because it contained unexhausted claims. This Court found that claims (1) and (4) had not been exhausted and suggested that petitioner raise the unexhausted claims in the state court in a third § 440.10 motion. As to the first claim, this Court determined that, although petitioner presented his "newly discovered evidence" to the state courts in his prior § 440.10 motions, he never before alleged that the prosecutor "knew that the complaining witness had given the detectives in charge of the investigation conflicting statements." As to the fourth claim, this Court determined that petitioner presented several "ineffective assistance of counsel" claims in the state courts, but never before alleged that he was unconstitutionally denied the services of attorney Sassower, who was disbarred before petitioner's trial began.

Petitioner subsequently filed a third § 440.10 motion in County Court, Nassau County, alleging (1) "newly discovered evidence" (i.e., the Nappi letter) demonstrating that the

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prosecutor knowingly withheld certain exculpatory evidence, in particular, that Nappi had given Richards conflicting statements; (2) that the conviction was procured by duress, misrepresentation or fraud perpetrated by the prosecutor; and (3) that the conviction was obtained in violation of petitioner's federal and state constitutional rights. That motion was denied by order dated June 3, 1993. In its decision, the court concluded that "[e]ach and every assertion raised by [petitioner] in the motion now before the [c]ourt has been previously considered in depth and denied or the assertions have previously been deemed meritless." Thereafter, by order dated August 27, 1993, the Appellate Division denied petitioner leave to appeal.

Petitioner then filed the present habeas corpus petition (the "second petition"), asserting denial of his federal constitutional rights based on the following four grounds: (1) the trial judge deceived petitioner by not giving him an opportunity to bring forth evidence of prosecutorial misconduct during trial; (2) prosecutorial misconduct in that the prosecutor withheld exculpatory evidence from the grand jury as demonstrated by the Maloney affidavit and Nappi letter; (3) denial of a right to appeal due to representation by attorney Rivers, whom petitioner claims to have discharged; and (4) prosecutorial misconduct on the basis that the prosecutor failed to inform the grand jury and trial jury that the District Attorney's Office was instrumental in securing a $30,000 "award" for Nappi, the victim and sole complaining witness.

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III. CONCLUSION

For the reasons above, the petition is denied. The Clerk of the Court is directed to close the file in this matter.

SO ORDERED.

LEONARD D. WEXLER
UNITED STATES DISTRICT JUDGE

Dated: Hauppauge, New York
May 31, 1996