No. 03-8158

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
NOV 25 2003
OFFICE OF THE CLERK

In re **LENARD BERRIAN** - **PETITIONER**

Vs.

GEORGE DUNCAN - **RESPONDENT(S)**

ON PETITION FOR EXTRAORDINARY WRIT/HABEAS CORPUS TO
THE UNITED STATE COURT OF APPEALS; SECOND CIRCUIT
(Name of Court that last ruled on merit of your cases)

PETITION FOR EXTRAORDINARY WRIT/HABEAS CORPUS

LENARD BERRIAN - 97-A-5940
(Your Name)

GREAT MEADOW CORRECTIONAL FACILITY
(Address)

P.O. BOX 51, COMSTOCK, NEW YORK 12821
(City, State, Zip Code)

RECEIVED
DEC 30 2003
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION(S) PRESENTED

1) Did district Judge issue decision without having jurisdiction of habeas corpus proceeding when no application for informa pauperis was determined.

2) Did district Judge act in violation of Article III of the U.S. Constitutional, where publically denouncing legislatures enactment of sentencing guidelines, being admonished for acting in such excessiveness of jurisdiction, and Judge presently declining to serve on bench for such limitation of discretion enacted by legislature.

3) Did district Judge constructively deny petitioner his constitutional right to federal habeas relief when rendering decision on the merit, but not having the pertinent State Court record to assess according to submitted claims, erroneously citing "none of claims are supported by case law citation", when submission papers show case law.

4) Did district Judge act arbitrarily towards petitioner when all mail sent from chambers addressed to petitioner was left unsealed, and received in such manner.

5) Does New York State's confirmed crises of Indigent Counsel Plan causing systemic deprivations to thousands of defendants, entitle petitioner to review of allegations made to State Court on such crisis as effecting him.

6) Was petitioner deprived his right to testify before a grand jury in violation of the Fourteenth Amendment, where the State acted arbitrarily to it's enactment of procedures to be followed as mandated.

7) Did appellate counsel cause petitioner constructive denial of representation in violation of **Evitt v. Lucey** (assist in preparing/submitting brief /playing role of active advocate) As counsel caused usurpation of issues when constructing and submitting brief based solely on prosecutor misconduct, but left out of brief preserved mistrial request of Misstatement of

Evidence attested in Summation, and leaving out of brief preserved Trial Order Dismissal request.

8) Does federal suit pursuant to 42 U.S.C. 1983, 1985, 1986, for public defender conspiracy with the State exist where conviction obtain by the State is in effect pursuant to **Heck v. Humphrey**, as left unanswered, pursuant to **Tower v. Glover**.

Statement Of The Case

1) After I Was arrested and charged with Criminal Sale of Controlled Substance in the Third Degree, I requested to the assigned 18-B attorney that I be produce to the Grand Jury so that I could tell my side to the circumstances surrounding the arrest:
   (a) That it wasn't me whom sold the officer two (2) bags of Crack,
   (b) That the police knew I was a drug user from prior arrest and charged me with the crime of sale because I wouldn't tell them who and where the guy was that actually sold the drugs to the officer,
   (C) That I didn't match the description to arrest, and I hav prior drug abuse history with the crack pipe as evidence,
   (d) That the pre-recorded buy money found on my person is the result of change from purchase of drugs from another person, possibles the actual seller during a police Buy & Bust operation.

2) The assigned counsel never informed the court or prosecutor of my request to be present and give testimony at the grand ju However, I sent my own pro-se motion to dismiss an indictm pursuant 190.50. When I went to court I complained to the judge in open court about counsel not having me produce to the grand jury. Counsel then asked to be relieved and the judge appointed me a new lawyer, and that I wouldn't be arraigned on the indictment that day. When the new couns came, he made motion to dismiss the indictment pursuan

→

C.P.L 190.50 on the basis that I should appear before a grand jury to give testimony on my behalf. The motion was then denied on basis that first counsel never sewed notice.

3) While being indicted and awaiting a date for probable cause hearing and trial, I went to court for five (5) to six (6) months and no counsel was available for me. When I fina did see counsel, I was rushed through a 15 minute probable cause hearing where elements constituting the crime charged was entered in on Defense Cross-Examination, and no confro tation was performed on warrantless exigency circumstances substantiating the arrest. The suppression hearing was den

4) The next day at trial, testimony given by arresting officer c to information received for arrest was different from the infor mation given just yesterday for arrest at the hearing as th held. Trial Order Dismissal was moved for and denied, although no corroboration as required pursuant warrantless arrest existed. Motions for mistrial was called on three (3) occassions on basis of prosecutor commenting on my right to stand trial, Vouching for police witnesses, and misstatement of evidence in summation, all (3) motions were denied. Ref errence to the third person envolved in the transaction surr- ounding the Crime for which I was tried was acknowledged for the first time (in trial) by the prosecution. The judge limited cross-examination on the third participant envolved. The trial lasted 3 days consisting of 168 pages of opening-verdict.

5) Legal Aid Society was assigned to me for the submission of an appeal. While appeal was pending and briefs had not been yet submitted, I submitted a pro-se motion C.P.L 440 (Motion to Vacate) to the trial Court based on grounds of ineffective assistance of trial Counsel to have the prosecution prove their burden of probable cause at the hearing, as violating my right to confrotation when evidence existed to refute the vague descript as given to arrest, and no evidence existed for prosecution's theory of exigency circumstances justifying arrest, Therefore the arrest was violative of the Fourth Amendment. I sent motion by Certified mail to the Court and District Attorney, I sent copy by regular mail to appointed appellate Counsel for looking over.

A Couple of months had passed, and I inquired to the Court of status of motion. The Court Clerk (trial), had informed me tha no motion had been received by the Court, District Attorney never responded to motion, and appellate Counsel made no mention of the merits of motion even though I inquired three(3) times.

I wrote to app. Counsel, and appellate Clerk seeking if I may Consolidate my motion that the trial Court say they never receive even after sending it by Certified mail, with my Direct Appeal. Th Appellate Clerk said that without a disposition that nothing could be consolidated, therefore the Court is without jurisdiction and refererd matter to appellate Counsel. Counsel responded to me that until disposition was entered on the 440 motion nothing could be done, and that they would try to contact judge of whe I first notified them of, who had the 440 motion when it was first acknowledged by judge's clerk. Discrepencies existed

due to fact of court clerk saying no 440 motion had been submitted, and fact of me receiving notice from judge clerk that when a decision is rendered, I'll be notified. I then filed another identical 440 Motion in the same court, and two weeks later I received disposition on the motion from judge whom I was initially informed would be deciding motion saying "The Motio is denied for the same reasons as decided six months ago . . . tha the claims raised in motion needed to be pursued on Direct Appea that's pending.".

6) I was informed by app. counsel that an Oral Argument was schedu on the then submitted Appellate Briefs. I was not satified with the brief submitted because:

(a) Counsel did not want to raise the grand jury issue of me being arbitrarily deprived. Counsel suggested I seek permission from cou to file Pro-se brief which I did, and was denied.

(b) Counsel did not consult with me on any issues to be raised, didn't get in contact with the trial counsel as suggested I do by trial lawyer.

(c) Sent me a draft copy of brief and said to contact within three (3) days or the brief will be submitted, where the third day was a legal holiday (Presidents Day).* (due dilligence yeild Brief already file

(d) Did not raise issue of me writing explaining I didn't see my counsel during pre-trial stage.

(e) Suggesting in Appellate Brief that the "Mapp Decision is not con tested on this appeal.", Although counsel knew of the 440 motion I was trying to bring to appellate court's attention.

→

7) I requested to counsel that at Oral Argument to seek motion to hold appeal in abeyance so that the 440 motion issues could be consolidated as a disposition had been entered by the judge whom counsel informed me they were trying to contact about such 440 Motion. I explained and sent a copy of the disposition saying the issues had to be pursued on direct-appeal. Counsel responded that "because you did the motion pro-se, check on the status of motion yourself ... the appellate division is not the proper forum to raise such issue." The appeal was affirmed and permission to the highest state court was denied, as well as reconsideration. Counsel raised on appellate brief sole issue of prosecutor misconduct.

8) I submitted a state collateral petition - Error Coram Nobis based on:

(a) Failure to be able to testify at grand jury - ineffective counsel.

(b) Failure to have adequate representation as a conflict of intrest existed where counsel had to attend other clients.

(c) Failure of counsel to have prosecution prove their burden, attaching the 440 motion as denied on right to confrotation at fact-finding.

(d) Constructive denial of appellate counsel because counsel just submitted brief without me having any say so or corroberation on issues to be raised.

(e) Appellate counsel falsely representing and leading me to believe that they were acting on behalf of trying to find out the status of pro-se 440 submissions.

(f) That app. counsel gave me false information when said appellate court is not the proper forum to bring issues, where the judge in trial court said appellate division is proper forum,

therefore precluding my right to have issues of fact reviewed. The decision to the Error Coram Nobis petition was summarily denied by the Appellate Division First Department.

9) I submitted federal Habeas Corpus Petition raising the claims as raised in the state courts. I cited Claim of Miscarrage of Justic Fundamental Right to fair Trial, gave reference to the record whe my rights were violated, and cited claims on ineffective assistanc of appellate counsel at least warranting a hearing. District Judge John S. Martin was assigned my petition, and issued order "petition should not be summarily dismissed", Ordered State Attorney General and New York County District Attorney to Answer Petition, and that I could Reply thereto. After the State submi ted Answer, I made and submitted "Traverse-Memorandum of law with Exhibits. The district judge issued decision on the merits and dismissed petition although the decision does not reflect any facts as brought forth pertaining to the substantial claims as raise in the petition and Traverse. Nor does the decision reflect any analysis as to whether the State Courts decision was "contrary to, or involved an unreasonable determination of facts," according to facts a petitioned in state court.

10) Certificate of Appealability with supporting Affidavit, Memora dum of law, Exhibits and poor person status was submitted to the Second Circuit Court of Appeals. The Moving papers mainly alleged district judge John S. Martin constructively denied me My right to federal habeas review when rendering his decision on the merits, but not addressing substantial Claims. →

That district judge committed impropriety when all of mail sent from Chambers were received at correctional facility open and unsealed. The original unsealed date stamped envelopes were marked as Exhibits and annexed to COA papers, with copies being served on Respondent. The COA application and poor person request was summarily denied.

11) I sought Rehearing of COA based on fact that district judge lacked jurisdiction of the petition because there were no informa pauperis determination made as required. It was also cited that Judge Martin is in violation of Article III of the United States Constitution as he continuously critizes Congress for the enactment of law limiting district judges' discretion with sentencing Guidelines. That the court had already admonished judge for such "conduct affecting the judicial reputation." At present the COA Rehearing is still pending.

*(COA Denied 10-31-03 Rehearing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

Lenard Berrian,

Petitioner,

-v.-

02 Civ. 1833 (JSM)

OPINION & ORDER

George Duncan,

Respondent.

----------X

JOHN S. MARTIN, Jr., District Judge:

Lenard Berrian, who was convicted in the New York State Supreme Court, New York County, on charges of Criminal Sale of a Controlled Substance in the Third Degree, brings this action pursuant to 28 U.S.C. § 2254, seeking to vacate his conviction.

In addition to contesting Petitioner's claims on the merits, the State argues that the Court should not consider certain of Petitioner's claims because he failed to exhaust his state remedies. However, 28 U.S.C. § 2254(b)(2) gives the Court the discretion to deny unexhausted claims on the merits. Given the fact that, as demonstrated below, these claims are totally lacking in merit, the Court will exercise its discretion and decide the claims on the merits.

Before turning to Petitioner's specific claims, it must be noted that Congress has limited the jurisdiction of the federal courts to provide relief under 22 U.S.C. § 2254.

(d) An application for a writ of habeas corpus on behalf

D-7

> of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

See generally Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000).

None of the claims asserted by Petitioner meet this standard. While Petitioner lumps several claims in a single sentence and none of the claims are supported by case citation, it appears that his principal claim is that his trial counsel was ineffective. He claims that because his counsel had many other clients, counsel did not devote adequate time to his case and failed to represent him effectively.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at

2068.

The Supreme Court decision in Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2639 (1986), establishes that the failure to raise a viable issue does not necessarily mean that counsel's representation was constitutionally deficient. Mere error in judgment by an attorney, even if professionally unreasonable, does not warrant setting aside the verdict of a criminal proceeding if the error does not undermine "'confidence in the outcome.'" See Martin v. Garvin, No. 92 Civ. 3970, 1993 WL 138813, at *2 (S.D.N.Y. Apr. 23, 1993)(quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). The soundness of this proposition is reflected in the reasoning promulgated by the Ninth Circuit that "[t]he Constitution does not guarantee representation that is infallible." See Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978).

Petitioner claims that his counsel was ineffective in failing to preserve his right to appear before the grand jury. However, given the nature of the People's proof--testimony of an undercover officer who purchased crack from Petitioner and of another officer who arrested Petitioner and found the buy money in his possession--no competent criminal lawyer would allow his client to appear before the grand jury. The decision of defense counsel that Petitioner should not testify in the grand jury and that the substance of his defense not be placed before the grand

jury was well within the range of tactical strategy that is left to the professional judgment of defense counsel, and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065.

To the extent that Petitioner's argument is that the denial of his right to appear before the grand jury alone deprived him of due process, that claim does not present an issue of constitutional dimension, but is merely an issue of state law. The defendant in a federal criminal proceeding has no right to appear before a grand jury and the Constitution does not require it. If the state chooses to provide such a right, the failure to do so in an individual case does not violate any provision of the United States Constitution.

As the Supreme Court said in Estelle v. McGuire:

> We have stated many times that "federal habeas corpus relief does not lie for errors of state law." Lewis v. Jeffers, 497 U.S. 764, 780, 110 S. Ct. 3092, 3102, 111 L. Ed. 2d 606 (1990); see also Pulley v. Harris, 465 U.S. 37, 41, 104 S. Ct. 871, 874-75, 79 L. Ed. 2d 29 (1984). Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2241; Rose v. Hodges, 423 U.S. 19, 21, 96 S. Ct. 175, 177, 46 L. Ed.2d 162 (1975) (per curiam).

502 U.S. 62, 67-68, 112 S. Ct. 475, 480 (1991).

Petitioner's claim that his counsel did not adequately represent him at the pre-trial hearing fails because there is no basis to conclude that counsel's performance was deficient or the deficient performance prejudiced the defense. See Strickland v. Washington, supra.

Petitioner's attack on his appellate counsel is similarly without merit, as it fails to satisfy either prong of the Strickland test. In Jones v. Barnes, 463 U.S. 745, 752-53, 103 S. Ct. 3308, 3313 (1983), the Supreme Court rejected the argument that appellate counsel had an obligation to raise every non-frivolous ground for reversal, stating:

> There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts--often to as little as 15 minutes-- and when page limits on briefs are widely imposed. See, e.g., Fed.Rules App.Proc. 28(g); McKinney's 1982 New York Rules of Court §§ 670.17(g)(2), 670.22. Even in a court that imposes no time or page limits, however, the new *per se* rule laid down by the Court of Appeals is contrary to all experience and logic. A brief that raises every colorable issue runs the risk of burying good arguments--those that, in the words of the great advocate John W. Davis, "go for the jugular," Davis, The Argument of an Appeal, 26 A.B.A.J. 895, 897 (1940)--in a verbal mound made up of strong and weak contentions. See generally, e.g., Godbold, Twenty Pages and Twenty Minutes--Effective Advocacy on Appeal, 30 SW.L.J. 801 (1976).
>
> Here, appellate counsel's choice of issues to raise on

appeal was well within the range of tactical strategy that is left to the professional judgment of defense counsel, and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. The fact that Petitioner, a person with no legal training, may have considered other issues as meritorious, does not indicate that appellate counsel's professional judgment was not appropriate.

Petitioner also challenges the seizure of the buy money at the time of his arrest and the testimony of the arresting officer that she observed him swallowing plastic bags. However, in Stone v. Powell, 428 U.S. 465, 482, 96 S. Ct. 3037, 3046 (1976), the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." See also Capellan v. Riley, 975 F.2d 67, 70-72 (2d Cir. 1992).

Petitioner's final claim is that inappropriate conduct by the prosecutor denied him due process. While the trial court found some of the prosecutor's conduct to be improper,

it denied Petitioner's motions for a mistrial. Petitioner cannot sustain his burden to show that the decision to deny a mistrial "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In order to warrant federal habeas relief, the conduct of a prosecutor must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2472 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 945 S. Ct. 1868 (1974)). Here, there was nothing in the prosecutor's conduct that so unfairly prejudiced the Defendant as to constitute a denial of due process.

For the foregoing reasons, the petition for relief pursuant to 28 U.S.C. § 2254 is denied and the action is dismissed. In addition, pursuant to 28 U.S.C. § 1915(a), the Court certifies that an appeal from this case may not be taken *in forma pauperis;* such an appeal would be frivolous and cannot be taken in good faith. See Coppedge v. United States, 369 U.S. 438, 444-45, 82 S. Ct. 917, 920-921 (1962). The Court determines that the petition presents no question of substance for appellate review, and that Petitioner has failed to make a "substantial showing of the denial of a

constitutional right." 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b). Accordingly, a certificate of appealability will not issue.

SO ORDERED.

Dated: New York, New York
January 13, 2003

JOHN S. MARTIN, JR.
U.S.D.J.

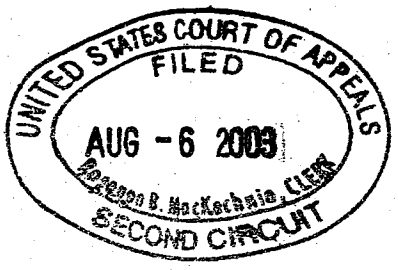
S.D.N.Y.
02-cv-1833
Martin, J.

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, at Foley Square, in the City of New York, on the 6th day of August two thousand and three,

Present:

Hon. Guido Calabresi,
Hon. Sonia Sotomayor,
*Circuit Judges.**



Lenard Berrian,

Petitioner-Appellant,

v.

03-2077

George Duncan,

Respondent-Appellee.

Appellant, *pro se*, moves for a certificate of appealability and *in forma pauperis* status. Upon due consideration, it is ORDERED that the motions are DENIED and the appeal is dismissed because appellant has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253 (c)(2).

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: Lucille Carr

* The Honorable Richard C. Wesley, of the United States Court of Appeals for the Second Circuit, has recused himself. Accordingly, the matter is decided by the remaining panel members. *See* 2D CIR. R. 0.14(b).

SAOAT

AUG 06 2003

E-1