19-6955

ORIGINAL

No._____

IN THE SUPREME COURT OF THE UNITED STATES

****

Shondell Paul,

PETITIONER

VS.

New York,

RESPONDENT

****

ON PETITION FOR A WRIT OF CERTIORARI TO
THE NEW YORK APPELLATE DIVISION, FOURTH
JUDICIAL DEPARTMENT

****

PETITION FOR WRIT OF CERTIORARI

****

Shondell Paul
Great Meadow C.F.
Box 51
Comstock, New York 12821

RECEIVED
DEC 12 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

Does the Fourteenth Amendment place an obligation on the New York Court of Appeals to address a federal constitutional question when its prior precedent bind its lower courts but conflicts with clearly established federal constitutional law?

Can a state court use a remedial direct appeal, ordered to cure appellate counsel's ineffectiveness, as a vehicle to substantively change state law without violating the spirit of the Sixth Amendment's Counsel Clause, the Fourteenth Amendment's Due Process Clause, and Strickland v. Washington's directive?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

RELATED CASES

. People v. Paul, 298 A.D.2d 849, 854(4th dept.2002)
. People v. Paul, 99 N.Y.2d 562(2002)
. People v. Paul, CPL § 440.20 Motion Decision/Order (2/7/02)
. People v. Paul, 78 A.D.3d 1635(4th Dept.2010)
. People v. Paul, 16 N.Y.3d 834(2011)
. People v. Paul, CPL § 440.10 Motion Decision/Order (1/26/11)
. People v. Paul, App. Div. Lea. App. (4th Dept. 7/6/11)
. Paul v. Lavalley, No.12-cv-254, U.S. District Court for the Northern District of New York. Judgment entered August 15, 2013.
. Paul v. Lavalley, No.13-3476, U.S. Court of Appeals for the Second Circuit. Judgment entered December 4, 2013.
. Paul v. Lavalley, No.13-10655, U.S. Supreme Court. Judgment entered October 6, 2014.
. People v. Paul, 104 A.D.3d 1217(4th Dept. 2013)
. People v. Paul, 22 N.Y.3d 1043(2013)
. People v. Paul, 148 A.D.3d 1723(4th Dept. 2017)
. People v. Paul, 171 A.D.3d 1467(4th Dept. 2019)
. People v. Paul, 33 N.Y.3d 1107(2019)

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Cases

Statutes and Constitutional Rules

IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner, Shondell Paul, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is reported at 171 A.D.3d 1467(4th Dept. 2019).

The order of the Chief Judge of the New York Court of Appeals appears at Appendix B to the petition and is reported at 33 N.Y.3d 1107(2019).

JURISDICTION

The date on which the highest state court denied entry to further appeal was July 31, 2019. A copy of that decision appears at Appendix B.

A timely application for rehearing was thereafter denied on the following date: September 25, 2019, and a copy of the order denying rehearing appears at Appendix C.

Paul invokes the jurisdiction of this court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case.

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

U.S. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

28 U.S.C. § 1257(a)

(a) Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

During the jury selection in this case, the court held sidebar voir dire with every single prospective juror interviewed. Afterwards, the prospective jurors were seated in the jury box for open court voir dire. The subject of the sidebar voir dire concerned potential biases and the ability of the prospective juror to remain impartial.

At the outset of the proceeding, the attorneys for Paul and the co-defendant waived their respective client's right to be present for, and to participate in these sidebars. These waivers also took place at sidebar outside of Paul's presence, and Paul was never made aware of such waivers. Nor was Paul made aware of the fact that he had a right to be present for these voir dire sidebars.

During the initial appeal taken after Paul was convicted, assigned appellate counsel omitted this issue of error and Paul's conviction was affirmed (See, People v. Paul, 298 A.D.2d 849,854[4th Dept. 2002]; Appendix D). An associate judge of the New York Court of Appeals denied Paul leave to further appeal (See, People v. Paul, 99 N.Y.2d 562[2002]; Appendix E).

After numerous unsuccessful state and federal collateral proceedings, including a petition for certiorari to this court pertaining to Paul's habeas petition, Paul moved the Appellate Division, Fourth Department for grant of a writ of error coram nobis, claiming ineffective assistance of appellate counsel. The motion was granted and remedial appeal was ordered (See, People v. Paul, 148 A.D.3d 1723[4th Dept. 2017]; Appendix F).

On remedial appeal, and because of the clear and unambiguous statements made by this court and the Second Circuit Court of Appeals, Paul pressed claims that his right to be present at the proceedings in question was constitutionally based so that the waiver issued by counsel outside of Paul's presence without consent would be invalid. These federal constitutional claims were prominently pressed in points one and two of Paul's main appellate brief, as well as in point two of his reply brief.

Despite this fact, relying on binding New York Court of Appeals precedent that such rights are not constitutionally based, the appellate court validated the attorney waiver, based on presumptions from a silent record, and affirmed the conviction. In reaching its conclusion, the court departed from well settled principles of state law for the first time in order to find the waiver valid.

Paul then sought leave to appeal to the New York Court of Appeals, asking that court to finally address the constitutional implications its decision in People v. Antommarchi, 80 N.Y.2d 247(1992) presents. Paul also asked that the court address the conflict its prior holdings have with precedent from this court and the Second Circuit Court of Appeals concerning the constitutionality of the right to be present for voir dire. Paul argued that it was now necessary for that court to finally address the long put off question and settle the conflict because the validity of the waiver in this case turned on the constitutional question. Leave to appeal, as well as the request for rehearing, was denied.

Paul timely petitions this court for redress, asking that it settle the conflict.

REASONS FOR GRANTING PETITION

NEW YORK'S HIGH COURT HAS REFUSED TO ADDRESS THE FEDERAL CONSTITUTIONAL QUESTION THE RIGHT TO PRESENCE AT VOIR DIRE PRESENTS.

This court has longed recognized the settled principle that every criminal defendant has a fundamental constitutional right to be personally present at all critical stages of his or her trial (See, Rushen v. Spain, 464 U.S. 114,117 [1983]), and that voir dire is such a critical stage of a trial during which a defendant has a constitutional right to be present (See, Gomez v. United States, 490 U.S. 858,873[1989]).

Several state high courts have come to the same conclusion (See, State v. Carver, 94 Idaho 677,679-680[1972]; Bunch v. State, 281 Md. 680,686-687[Maryland 1978]; People v. Bean, 137 Ill.2d 65,79-80[Illinois 1990]; In re Cardinal, 162 Vt. 418,419-420[Vermont 1994]; Chase v. State, 699 So.2d 521,534[Mississippi 1997]; State v. Muse, 967 S.W.2d 764,766[Tennessee 1998]; Muhammad v. State, 782 So.2d 343,351[Florida 2001]; State v. Broaden, 780 So.2d 349, 360[Louisiana 2001]; State v. Padilla, 132 N.M. 247,252[New Mexico 2002]; Lockett v. State, 53 P.3d 418,422-423[Oklahoma 2002];State v. Bird, 308 Mont. 75,79-80[Montana 2002]; State v. W.A., 184 N.J. 45,53[New Jersey 2005]; State v. Irby, 170 Wash.2d 874,883-884[Washington 2011]; Com. V. Hunsberger, 619 Pa. 53, 62[Pennsylvania 2012]; Hager v. U.S., 79 A.3d 296,301[Washington D.C. 2013]; People v. Wall, 3 Cal. 5th 1048,1059[California 2017]; Truss v. Com., 560 S.W.3d 865,869-870[Kentucky 2018]).

New York, however, has reached a contrary conclusion, finding that voir dire is not a core proceeding critical to the outcome of criminal proceedings, which would be protected by the federal constitution, but is merely an ancillary proceeding that "may" be material for purposes of the "statutory" right to presence (See, People v. Sprowal, 84 N.Y.2d 113,117[1994].

Because the rule announced by the New York Court of Appeals in People v. Antommarchi, 80 N.Y.2d 247(1992) purportedly conferred a right to New York defendants that was greater than that which federal law "appeared" to confer, that court has continuously refused to address the constitutional question Antommarchi's core holding presents, except when considering retroactivity (See, Sprowal, Supra; People v. Favor, 82 N.Y.2d 254,262(1993); People v. Mitchell, 80 N.Y.2d 519,526-527(1992). Indeed, that court has expressly stated that the right to be present at voir dire is conferred solely by statute (Sprowal, at 117).

These statements are clearly wrong, as they are in contravention with this court's unambiguous pronouncement that voir dire is a critical (i.e. core) stage of trial that a criminal defendant has a constitutional right to be personally present for (See, Gomez, Supra; Accord Kentucky v. Stincer, 482 U.S. 730,745[1987].

The core right identified in Antommarchi is that a defendant has a right to be personally present for any voir dire conducted at the bench that delves into a prospective juror's potential bias or impartial views. Several courts, both federal and state, find this core right to be constitutionally protected (See, Cohen v. Senkowski, 290 F.3d 489-490[2nd Cir. 2002]; United States v. Thomas, 724 F.3d 632, 642[5th Cir. 2013]; United States v. Sherwood, 98 F.3d 402,407[9th Cir. 1996]; People v. Bean, 137 Ill.2d 65,78-81[1990]; Williams v. State, 292 Md. 201,211-212[1981]; State v. Payne, 328 N.C. 377[1991]; State v. Bird, 308 Mont. 75,79-80[2002][collecting cases]).

Undoubtedly, New York provided the most favorable rule with Antommarchi. But by keeping the core of that holding in the realm of statutory rights, New York has been able to apply a less stringent rule on the issue of waiver (See, People v. Vargas, 88 N.Y.2d 363[1996]), although acknowledging the Antommarchi right as one personal to the defendant so that any waiver must reflect a knowing, voluntary, and intelligent choice made by the defendant.

The issue in this case is the validity of the waiver proffered. And because the waiver herein in no way reflects a knowing, voluntary, and intelligent choice made by Paul, but rather clearly reflects the attorney's choice to waive the right without the slightest hint of any consultation with Paul, New York was asked to squarely address the constitutional question the Antommarchi holding presents.

Paul argued that adjudication of the constitutional claim became necessary because when the lower court validated this waiver New York no longer offered a greater protection of the right than the federal constitution does with respect to waiver, as courts who find the right constitutionally protected apply Johnson v.Zerbst, 304 U.S. 458(1938) for its waiver analysis (See, e.q., Campbell v. Wood, 18 F.3d 662,672[9th Cir. 1994]; Cross v. U.S., 325 F.2d 629,632[D.C. Cir. 1963][cited approvingly] in Taylor v. Illinois, 484 U.S. 400,418,fn.24[1988]; State v.Muse, 967 S.W.2d 764,767-768[[Tenn. 1998]; State v. Bird, 308 Mont. 75,82[2002]; and State v. Padilla, 132 N.M. 247,254[2002]).

Although the constitutional claim was pressed in the appellate court, that court was bound by the Court of Appeals' prior holdings and ruled accordingly. It therefore fell to New York's high court to finally address the issue and resolve the conflict its holdings have with federal law. Chief Judge Difiore denied entry, and therefore refused to allow Paul to resolve his constitutional claim in at least one state court.

Since state courts are the principle forum for asserting constitutional challenges to state convictions, (See, Harrington v. Richter, 562 U.S. 86,103[2011]), at least one meaningful state court merits adjudication of a federal constitutional claim is required. The Chief Judge's refusal to do so is tantamount to the denial of the right to appeal, and renders the appellate process fundamentally unfair by denying due process.

A CHANGE IN APPLICABLE STATE LAW RENDERED ON THE VERY REMEDIAL APPEAL ORDERED TO CURE PRIOR COUNSEL'S INEFFECTIVENESS VIOLATES THE SPIRIT OF STRICKLAND'S OUTCOME-DETERMINATIVE PREJUDICE TEST AND RENDERS THE APPELLATE PROCESS FUNDAMENTALLY UNFAIR.

When dealing with statutory, as opposed to constitutional rights, the New York Court of Appeals announced a flexibility principle with respect to acceptable forms of waivers from defendants and their attorneys (See, People v. Vargas, 88 N.Y.2d 363,375-376[1996]). However, that court clearly put the defendant's Antommarchi rights into the rubric of rights that are personal to the defendant when it stated that any waiver must reflect a knowing, voluntary, and intelligent decision (Id.).

Thus, the Court of Appeals validated Antommarchi waivers that were made through counsel, but did so specifically because the attorney waivers were effectuated in open court in the presence of the defendant (See, People v. Keen, 94 N.Y.2d 533,538[2000]; People v. Velasquez, 1 N.Y.3d 44,50[2003]).

This was the extent to which New York sanctioned attorney made Antommarchi waivers when Paul's direct appeal was initiated in 2002. During that initial appeal, assigned counsel omitted a clear Antommarchi violation where the attorney waiver, made in secrecy at the bench despite an empty courtroom, and later put on record at a sidebar where Paul was again not present, did not comport with the requirements of a knowing, voluntary, and intelligent personal waiver.

In 2014, the Court of Appeals decided the case of People v. Flinn, 22 N.Y.3d 599(2014), in where it validated an explicit attorney made Antommarchi waiver made on record, at sidebar, but outside of the defendant's presence. The attorney in that case, however, represented to the court that he had explained to his client the substance of the Antommarchi right, and that his client had expressed a desire to waive the right.

The court, under those circumstances, departed with the need for the attorney made waiver to be effectuated in the defendant's presence because it felt a lawyer could be trusted to explain rights to his or her client and report to the court the results of that discussion (See, Flinn, Supra, at 602). This was a fact specific holding that decided the case before the court. More importantly, counsel's representations reflected record-based compliance with the personal right waiver requirements.

In its entirety, the waiver colloquy in the present case reads as follows:

> (Whereupon, the following on the record discussion took place at the bench, outside the hearing of the prospective jurors.)
>
> The Court: The record will reflect that Mr. Lenkiewicz and Mr. Johnson have indicated they would wish to waive their clients' presence at the bench.
>
> Mr. Lenkiewicz: that's correct, your Honor
>
> The Court: Correct?
>
> Mr. Johnson: That's correct.
>
> The Court: Okay, all right. Come on up.
>
> (Whereupon, the court clerk approached the bench.)

Nowhere in this sidebar exchange is there an attorney representation that Paul consented to waive his presence at the bench for individual voir dire. Nor is there a reflection of any sort of compliance with the personal waiver requirements mandated by People v. Vargas, Supra. In fact, the only thing that is reflected in this record is the attorney's independent decision to waive Paul's presence at the bench.

Nevertheless, the appellate court validated the waiver, stating that a lawyer could waive the Antommarchi right (People v. Paul, 171 A.D.3d 1467[4th Dept. 2019]). This ruling changed the law in New York concerning Antommarchi waivers in two significant ways: 1) It departed from Vargas' rule that such waivers be knowing, voluntary, and intelligent, i.e., be made by the defendant with knowledge of the right; and 2) It abandoned the well settled principle of law that it is impermissible to presume waiver from a silent record, but that the record must show that an accused intelligently and understandingly abandoned a known right (See, People v. Harris, 61 N.Y.2d 9,17[1983][citing Carnley v. Cochran, 369 U.S. 506,516[1962]), which was adopted by the appellate division with respect to the "statutory" Antommarchi right (See, People v. Lucious, 269 A.D.2d 766,767[4th Dept. 2000]["...a waiver by a defendant will not be inferred from a silent record]).

In cases that do not involve the possibility that a court would err in a defendant's favor, this court has made it clear that it is Strickland's outcome-determinative prejudice test that controls the federal ineffective inquiry (See, Williams v. Taylor, 529 U.S. 362,397[2000]). The very spirit of this outcome-determinative test dictates that the effective counsel protection requires a defendant to receive whatever outcome she would have received had counsel rendered effective assistance (See, Young v. Dretke, 356 F.3d 616,629-630[5th Cir. 2004][cited with approval in Shaw v. Wilson, 721 F.3d 908,919[7th Cir. 2013]).

Therefore, to use Paul's remedial appeal to effectively change settled principles of law violates the spirit of Strickland because it renders the right to effective counsel and due process hollow shells and no one respects the bark of a dog known to have no teeth.

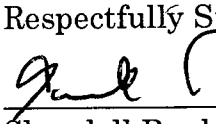
CONCLUSION

For the above stated reasons, the court should grant certiorari on these questions, especially in this case, where it appears that a grant of certiorari represents the only chance Paul will ever have to get his federal constitutional questions answered. Paul has had a federal court sit in habeas review once already. And although the issues Paul presents here could not have been brought before that habeas court, any new habeas petition would be Paul's second. There is no savings clause for § 2254 petitions, and Paul cannot meet the rigors of § 2244(b)(2).

So it would seem that appellate counsel's ineffectiveness continues to haunt Paul by ultimately being the reason why he cannot have his federal constitutional claims adjudicated by a federal court should this court deny review. In the least, then, this court should remand the case to the New York Court of Appeals with instructions to review these constitutional claims and resolve the conflict its holdings have with this court's decisions.

Dated: November 25, 2019

Respectfully Submitted,



Shondell Paul # 01B1181
Great Meadow CF, Box 51
Comstock, New York 12821

Appendix A