ORIGINAL

No. 19-8430

In the Supreme Court of the United States

VALERY LATOUCHE- PETITIONER

vs.

MICHAEL CAPRA - RESPONDENT

PETITION FOR WRIT OF CERTIORARI FROM

QUESTION(S) PRESENTED

WHETHER THE TRIAL COURTS INVOCATION OF STATUE 440.10(3)(C) DENIED PETITIONER HIS INTEREST, DUE PROCESS RIGHTS, AND EQUAL PROTECTION OF THE LAW.

WHETHER THE TRIAL COURT IMPROVIDENTLY EXERCISE ITS DISCRETION WHEN IT CAME TO HOLDING A HEARING AND DETERMINING THE 440.10 MOTION ON THE SUBMITTED PAPERS.

LIST OF PARTIES

Petitioner Valery LaTouche , is an inmate incarcerated at Sing Sing Correctional Facility, 354 Hunter St., Ossining, New York 10562

Respondent, the People of the State of New York, is represented by District Attorney of Rockland County, at 1 South Main Street, Suite 500, New City, New York 10956

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

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below

OPINIONS BELOW

For cases from state courts:

The opinion of the highest state court to review the merits appears at appendix-D- to the petition and is unpublished.

JURISDICTION

For cases from state courts:

The date on which the highest state court decided my case was July 8, 2019.

A timely petition for rehearing was thereafter denied on the following date December 12th, 2019

The jurisdiction of this court is invoked under **28 U.S.C. § 1257(a)**

CONSTITUITONAL AND STATUTORY PROVISION INVOLVED

FEDERAL STATUES

Fifth Amendment rights, which make it, clear that; no person "shall be compelled in criminal case to be a witness against himself

The Sixth Amendment guarantees every criminal defendant the right to effective assistance of counsel.

The Sixth Amendment to the United States Constitution provides, in relevant part: "in all criminal prosecutions, the accused shall enjoy the right to be confronted by the witnesses against him."

Fourteenth Amendment of the United States Constitutions protects against deprivation of life, liberty or property without due process of law.

STATE STATUTES

Article I, Section 6, of the New York Constitution

C.P.L. 440.10 (1)(h)

C.P.L. 440.10(3)(c)

C.P.L 440.10(a) (c).

STATEMENT OF THE CASE

440.10 provide for the vacating of a judgment of conviction which was obtained in violation of an accused constitutional right, an actual innocence claim is cognizable under C.P.L. 440.10(1)(h). At any time subsequent to entry of a judgment may, upon motion of a defendant vacate said judgment was obtained of a right of the defendant under the New York and United State Constitutions, C.P.L. 440.10 (1)(h). A freestanding claim of actual innocence, asserted by defendant who has been convicted upon a jury verdict is cognizable in New York, and such a defendant, who establishes his or her actual innocence by clear and convincing evidence is entitled to relief under C.P.L. 440.10 (1)(h). See, People v Maxwell, 152 A.D.3d 622, People v Hamilton, 115 A.D.3d 12.

Actual innocence "means factual innocence not mere legal insufficiency of evidence of guilt, and must be base upon reliable evidence which was not presented at the trial" People v Hamilton, supra,. Evidence of actual innocence need not be new, any reliable evidence of innocence can be considered. The actual innocence test sweeps away many of the procedural obstacles to post-judgment relief. A claim of actual innocence may be asserted either as a gateway to review of another claim, which is otherwise procedurally barred or as a freestanding claim justifying relief in and of itself (House v Bell, 547 U.S. 518, 126 S.Ct 2064 2d Cir). If the actual innocence claim "was previously determined on the merits upon appeal from the judgment," or there was sufficient facts on the records to raise the issue on the appeal but no review occurred because of defendants unjustifiable failure to perfect or raise the issue on appeal. The Court will not entertain the motion. 440.10(a) (c). A defendant will therefore have to go beyond the trial records to raise an actual innocence claim.

Petitioner filed a 440.10 motion raising ineffective assistance of counsel and actual innocence. The motion was supported with documents that were not part of the trial records. The first document was psychologist report detailing petitioner's low I.Q., emotional disturbance and cognitive abilities. The report was completed by a certified school psychologist, Mr. Paul R. Plotnick, who was employed by Ramapo School District. The second document was a police report detailing potential witness who would have provided exculpatory testimony The Court was supplied with reports and article on false confession and the need of an expert. The information was applied to the facts and circumstances of my case to demonstrate the involuntariness and invalidity of the confession. The reports and article are introduce for purpose of advocating the ineffective assistance of counsel and actual innocence and the involuntariness of the confession and intended to provide the court with unbiased professional research and opinion on the subject of false confession and police techniques.

On petitioner received the respondent opposition the respondents did not accepted the 440.10 motion as an actual innocence motion. The respondents did not contest or dispute the claim of actual innocence and miscarriage of justice. The respondent went on to opposes the motion as a standard 440.10 motions and dispute the ineffective assistance of counsel claim. Specifically the respondent dispute the claim arguing the involuntariness of petitioner's statement and low intellectual disability

On March 5th 2019, Judge Kevin F. Russo, J.C.C. denied the motion on the grounds; the defendant now moves to vacate the judgment of the trial court claiming that his trial counsel was ineffective in failing to submit certain documents during the suppression hearing, to wit, documents allegedly demonstrating a finding of borderline mental retardation. **C.P.L. 440.10(3)(c)** provides that "**the Court may deny a motion to vacate a judgment when; upon a**

previous motion made pursuant to this section, the defendant was in position adequately to raise the ground or issue underlying the present motion but did not do so." In this ca se, the defendant has made two prior motions but had inexplicably failed to raise this issue. Therefore, the court denies the motion without reaching the merits of the defendant's contention. On Aril 17, 2019, a motion to re-argue the 440.10 (1)(h) motion that was denied by Judge Kevin Russo on March 5th, 2019 on the ground that Judge Kevin Russo's decision and order improperly denied Mr. LaTouche's 440.10 motion in which ineffective assistance of counsel and actual innocence was raised. The motion was denied on June 28, 2019 on the grounds that; **the defendant has annexed an "affidavit of service" attesting to the filing of the instant motion.** The affidavit does not indicate that the motion was served upon the people. Leave for application to appeal to the Appellate division, Second Department was denied on July 8, 2019.

In the instant case the lower court incorrectly applied the procedural bar to petitioner's 440.10 motion. First, the Court of Appeals has advised that ineffective assistance of counsel is generally not demonstrable on the main record. See, People v Brown, 45 N.Y.2d 852 ( ). The Court has stated that "in the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottom on an evidentiary exploration by a collateral or post-conviction proceeding brought under C.P.L 440.10. Second, C.P.L. 440.10 (3) (c) is not adequate firmly established and regularly followed by New York state in question in the specific circumstances presented. The Second Department in Hamiliton has made it clear that claim of actual innocence is not subjected to mandatory procedural bar. Finally, It is arguable that Mr. Petitioner substantially complied with C.P.L. 440.10 (3)(c), particularly given "the

realities" of his pro se status and that the judge reviewing the 440.10 motion was not the trial judge and was therefore less familiar with the records.

ARGUMENTS

POINT ONE

THE TRIAL COURT IMPROVIDENTLY EXERCISE ITS DISCRETION WHEN IT CAME TO HOLDING A HEARING AND DETERMINING THE 440.10 MOTION ON THE SUBMITTED PAPERS.

C.P.L. 440.10(1)(h) allows a defendant to move to vacate where the judgment was obtained in violation of a defendant's state or federal constitutional right. Subdivision (1)(h) imposes no time litigation in bring the motion and is applicable to judgments obtained both through guilty pleas and upon verdict in a trial. This provision is the basis for the commonplace claim that the conviction was obtained due to ineffective assistance of counsel in violation of the federal and state constitution. C.P.L. 440.10 does not limit a defendant to one motion. Although the subdivision presents instances in which the court must deny the motion, a failure to present a claim on a prior 440 motions is not one of them. Under the plain language of N.Y. C.P.L. 440.30, there are only four permissible grounds on which the court may deny a N.Y. C.P.L. 440.10 motion without first conducting a hearing (a) when there is no legal basis for the motion; (b) when the papers do not contains sworn allegations tending to substantiate all the essential facts' (c) when an essential allegation is conclusively refuted by unquestionable documentary proof; or (d) when an essential allegation is contradicted by court a record or made solely by the defendant.

Mr. LaTouche met this burden of establishing a legal basis for his claim when he offered psychologist report by certified school psychologist Paul Plotnick of Ramapo School District, article and reports on false confessions. The information was applied to the facts and circumstances of the Mr. LaTouche's case to demonstrate the involuntariness and illegality of the

confession. The report and article were introduced for the purpose of illustrating the ineffective assistance of counsel, actual innocence and the involuntariness of the confession. The report and articles were intended to provide the court with unbiased professional research and opinion on the subject of false confession and police techniques. This is the kind of "exculpatory scientific evidence" that was not presented at trial and which amounts to "some new reliable evidence", when taken together with all available evidence is compelling. The psychologist report detailing Mr. LaTouche's low I.Q., emotional and cognitive disabilities and the articles and reports on false confessions and the need for an expert witness are new information not presented to the jury that dramatically undermines the central evidence linking Mr. LaTouche to the crime of which he was convicted.

In sum and substance Mr. LaTouche's has shown that he has intellectual deficits and personal traits that rendered him vulnerable to giving a false confession and that confession are frequently entered by person with mental retardation in police interrogation without full understanding of their rights, also under the circumstances of the interrogation he was incapable of making a "knowing and intelligent" waiver of his constitutional and Miranda rights, and that there is a lack of waiver and the confession was secured by police method that violated his right under the Fifth and Fourteenth Amendment to the constitution of the United States. Further more, the police report detailing the substance of an interview police conducted with two witnesses are credible eyewitness accounts that was not presented at trial and is compelling in the sense that it offers several novel factual matters that were not presented to the jury, at the very lest the police report reveal the existence of eyewitnesses to the attempted robbery and murder of the cab driver and their testimony contradicted the prosecution theory and cast doubts on the testimony and investigation of the detectives, who accounts of the crime focused on three

perpetrators. Had these evidence been presented to the jury it would provide a new theory for a jury to consider and the jury could have properly entertain the doubts about the presence of Mr. LaTouche at the scene of, and his participation with the murder. The new evidence undercut reliability of proof of guilt, even if it did not affirmatively prove innocence and the new evidences amounts to clear and convincing evidence sufficient to reject the trial court previous finding concerning the waiver of the Miranda right and voluntariness of the confession and also the guilty verdict of the jury.

C.P.L. 440.30 (4)(a) does not require a movant to establish that he or she wou ld ultimately prevail on the merits of the motion in order to be entitled to a hearing (see, People v Huges, 181 Ad.2d 912, 913 (2nd Dept 1992) ["That the defendant's chances of ultimate success in meeting his burden of proof with respect to issues raised in his motion (see C.P.L. 440.30(6) may be slight, even remote, does not, by itself, furnish a basis to deny the motion without a hearing"]). Rather, the appropriate threshold question for the court is whether the movant alleged any ground constituting a legal basis for the motion. C.P.L. 440.30 (5), provides that the court "must conduct a hearing and make findings of fact" on the post judgment motion. C.P.L. 440.30 (5), clearly contemplates that defendants who make the required prima facie showing have the right to present that evidence at an evidentiary hearing. It was correctly noted by the Appellate Division dissent, "if the defendant produces post-conviction evidence favorable to him or her, C.P.L. 440.30(5) requires the court to 'conduct a hearing and make findings of fact essential to the determination [of the motion]" (109 Ad.3d at 408-409).

In sum, because defendant's motion alleged that he had favorable evidence that could entitle him to the relief sought, and the motion had none of the deficiencies set forth in C.P.L.

440.30 (4)(a)(b), (c) or (d), the court did not have discretion to decide the motion without conducting a hearing, and such hearing was required pursuant to C.P.L. 440.30(5).

POINT TWO

THE TRIAL COURTS INVOCATION OF STATUE 440.10(3)(C) DENIED PETITIONER HIS INTEREST, DUE PROCESS RIGHTS, AND EQUAL PROTECTION OF THE LAW.

The mechanism to challenge a constitutional violation was ineffective and inadequate. Although 440.10 provides grounds for which a court may vacate a judgment of conviction after the such judgment has been entered, however the statute also provides that court may deny a 440.10 motion when previous motion made pursuant to this section, the 'defendant' was in a position adequately to raise the ground or issue underlying the present motion but did not so. The Second Department, was the first Appellate Division to recognized that C.P.L. 440.10(1)(h) authorized an actual innocence claim. The Court expounded the rationale for an actual innocence claim under 440.10 (1)(h) as rooted in constitutional due rights and freedom from cruel and unusual punishments. The second Department concluded that incarcerating a guiltless person contravenes both the New York Constitution's Due Process Clause and its provision prohibiting cruel and unusual punishment. Therefore, "a freestanding claim of actual innocence may be addressed pursuant to C.P.L. 440.10(1)(h), which provides for vacating a judgment which was obtained in violation of accused' constitutional rights. People v Hamilton, 115 A.D.3d 12 (2014), recognize that a claim of actual innocence does not rely solely on post conviction new evidence, but rather emphasizes constitutional safeguards that ensure that defendants have an opportunity to prove actual innocence in the face of a wrongful conviction.

The state and federal constitutions guarantees that the states should not deprived any person as his or her liberty without due process of law. As a general rule, due process of law stands for

protection against the arbitrary exercise of the power of government and assures adherence to the fundamental principle of justice and fair play by subjecting a judgment to reversal upon review where trial safeguard have been violated. Additionally, the due process clause requires that action by a state through any of its agencies must be consistent with the fundamentals of liberty and justice.

Petitioner case is grounded in the right of due process of law, the bedrock of our constitutional order, and through the documents submitted herein, it is established that trial counsel and trial judge's conduct were in total disregarded of our fundamental of liberty and justice, denying the defendant any possibility to receive his due process right. Given the petitioner's detailed allegation, the record, and the motion papers presented herein, which articulately and persuasively present a viable claim that he had been denied the effective assistance of trial counsel. Generally, due process requires that a state affords person some kind of hearing prior to depriving them a liberty or property interest. Here as to the liberty interest affected, Mr. LaTouche identifies an interest in overturning his conviction pursuant to 440.10(1)(h).

The trial courts and appellate state courts actions have a prejudice and discriminatory effect, which made it difficult for petitioner to present the constitutional violations. Considering the realities of petitioner pro se status he has been discriminated against. The 440.10(3)(c) statue was applied discriminately towards petitioner whereas 440.10(3)(c) is discretionary and precludes piece meals litigation and is target towards pro se prisoners without funds or legal assistance to present their claim. Clearly, petitioner was not treated equitably with individual in the same circumstances.

WHEREFORE, Mr. LaTouche, case's squarely under N.Y.C.P.L. 440.30(5), under which the court must conduct an evidentiary hearing to determine facts essential to the motion. Thus, it was an error of law for trial court to procedurally bar Mr. LaTouche's motion to vacate and for the Second Department to affirm the denial.

REASONS FOR GRANTING THE WRIT

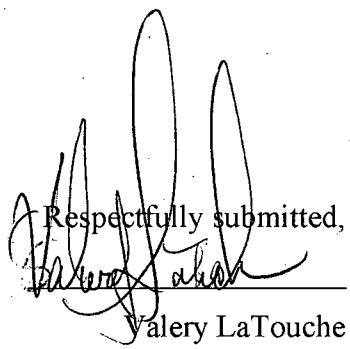
The issues presented are matters of first impression, the invocation of C.P.L. 440.10(3)(c) denies a prose defendant of his compelling interest to overturn conviction pursuant to constitutional violation and there are no statute, rules, law or regulation prohibiting court's discretions from undermining due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

January 5, 2020



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