

UNITED STATES SUPREME COURT

No.

JOSE RODRIGUEZ,
PETITIONER

V.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT

CRIMINAL APPEALS FROM THE SUPREME JUDICIAL COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two United States Supreme Court decisions have held the question that requires consideration for recusal of former prosecutor/appellate judge by the courts are, whether considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable. Was it error for the state appellate courts to disregard the rulings and hold that the Petitioner did not present sufficient working connection during prosecution and resentencing?

COURT JURISDICTION:

The statutory provision for this court is 28 U.S.C. 1257. The Massachusetts Appeals Court reviewed and affirmed sentences, criminal convictions on November 16, 2017 Commonwealth v. Rodriguez, 92 Mass.App.Ct. 1115 (2017). Petitioner filed further appellate review to the state's highest court the Supreme Judicial Court of all issues and was denied on February 6, 2018. Petitioner has 90 days to file certiorari to this Court.

STATEMENT OF THE CASE:

The Petitioner was arrested when he was 16 years old for assault and battery with a dangerous weapon and rape of a 21 year old female college student on September 27, 1976. Identification of the Petitioner was one of the main issues of contention in both trials and appeals herein after the victim is named "student". The Brookline police arrested petitioner at his school on September 28, 1976. The Petitioner was bound over to adult court system on November 19, 1976. The Petitioner was convicted of Assault and battery with a dangerous weapon and rape on July of 1977. Judge Irwin sentenced the Petitioner to day to life as a sexually dangerous person on October 21, 1977. The Petitioner appealed the SDP findings and sentence Commonwealth v. Rodriguez, 376 Mass. 632 (1978) but was affirmed upon the court mistakenly two dismissed juvenile cases as guilty delinquent findings. The Petitioner also appealed convictions, overturned by Massachusetts Appeals Court 383 NE2d 852 (1978) and Supreme Judicial Court 378 Mass. 296 (1979). The Petitioner was retried on December of 1987 with prosecutor Hanlon and trial counsel Carhart before judge McHugh. Prosecutor Hanlon, in 1976 was an assistant district attorney in Norfolk county. Prosecutor Hanlon was at the time of retrial an assistant attorney general and was appointed a special prosecutor for retrial, resentencing and part of the appeal. Prosecutor Hanlon continued to work out of the criminal division of the attorney general office along with assistant attorney general Susan Beck.

At the resentencing prosecutor Hanlon knew that both juvenile cases were dismissed on February 24, 1977, before the original sentencing, but said nothing to the Petitioner or judge. As a result the resentencing attorney Sheketoff was misinformed as well as the petitioner and judge. On April 28 1988 the judge resented the Petitioner using the dismissed juvenile case and original illegal life sentence to enhance the Petitioner sentence to 15 years to life for the rape and 8 to 10 years concurrent for the ABDW. The Petitioner was not aware of dismissed juvenile cases until 2014, and filed for resentencing on November of 2014. The Petitioner filed a sentence appeal to the Appellate Division of the Superior Court with prosecutor Hanlon filing misrepresentations of Petitioner's criminal record, denied on January 11, 1990. The Petitioner filed a pro se motion for trial and resentencing on May 15, 1990, submitting numerous claims of ineffective assistance of counsels against Carhart and Sheketoff and prosecutorial misconduct against Prosecutor Hanlon. Petitioner filed amended memorandum in July of 1993 and supplemental memorandum by appellate attorney O'Niell on August 1996. First motion for new trial with attorney O'Niell was denied on September 1997. The Motion judge refused to allow the Petitioner to argue any sentencing or resentencing issues and attorney O'Niell did not pursue any sentencing issues. Direct appeal and first motion for new trial was denied Commonwealth v. Rodriguez, 50 Mass.App.Ct. 405 (2000) judge Beck was on the panel and wrote the opinion. Judge Beck was an assistant attorney general in 1987-88 in

criminal division with assistant attorney general Hanlon where they both prosecuted the Petitioner's criminal case. Further Appellate Review by attorney O'Neill to the Supreme Judicial Court was denied and rescript issued on January of 2001. The Petitioner filed a motion to revise and revoke sentences (sentence appeal to the superior court) on February 2001 and denied on October 2001. Petitioner saw that attorney O'Neill was ineffective for abandoning all of the pro se appellate issues and other issues in the Application for Further Appellate Review. As a result the Petitioner filed a pro se motion for late filing of Further Appellate Review to the Supreme Judicial Court, was granted and Petitioner filed a pro se Application for Further Appellate Review on June of 2002 and denied on July, 2002.

In 2001 the Petitioner discovered that Judge Beck was an assistant attorney general as shown above. The appellate attorney O'Neill had failed to discover the conflict of interest and thus timely file a motion to recuse. The Petitioner filed a pro se motion for extra-ordinary relief to the Supreme Judicial Court single justice (G.L. c. 211 section 3). The Single justice denied the motion with the Petitioner's request for another appeal because of the conflict of interest with judge Beck. The Petitioner filed a habeas corpus in the United States District Court for Massachusetts on January 31, 2003, with all exhausted claims in a timely fashion (the Further Appellate Review filed pro se). The District Court dismissed

the habeas petition as time barred beyond the 1 year statute of limitations. The Appeals Court did not take into consideration the pro se Application for Further Appellate Review filed in 2002. In April of 2003 the petitioner filed a certificate of appealability to the First Circuit. Sue Sponte the court determined that the issue for appeal was whether the motion for extra-ordinary relief (c. 211, section 3) saved the Petitioner's habeas corpus from being time barred.

The First Circuit affirmed dismissal holding the conflict with Judge Beck was irrelevant because under state law the other 2 judges ruled to deny relief along with Judge Beck Rodriguez, v Spencer, 412 F.3d 29 (1st Cir. 2005) and as a result the motion was not properly filed. Certiorari was filed Rodriguez v. Spencer, 564 U.S. 1142 (2006) and denied by this Court. Petitioner discovered in 2014 that on February 24, 1977 two juvenile cases were dismissed in West Roxbury District Court. These two juvenile cases were used to enhance Petitioner's original sentences and resentencing. On March 4, 2016 judge Connors denied the second motion for new trial and resentencing that was filed on November of 2014. Petitioner's motion for reconsideration showed that the motion judge failed to rule on the newly discovered evidence. The prosecutor made no arguments against the dismissed juvenile cases in the superior court. Timely notices of appeal were filed to the Massachusetts Appeals Court March 25, 2016 and April 21, 2016 for reconsideration motion. This second motion for new trial and resentencing contained prosecutorial misconduct, ineffective assistance

of trial counsel; ineffective assistance of counsel at re-sentencing; ineffective assistance of appellate counsel and newly discovered evidence; Due Process violation at sentencing and resentencing; original appeals and resentencing appeals.

The appeal was docketed in the Massachusetts Appeals Court 2016 and before briefs were prepared and filed, Williams v. Pennsylvania, 136 S.Ct. 1899 (2016), now this Court held that an appellate judge must recuse himself when "there is an unconstitutional potential for bias" exists. Petitioner filed a full appeal of the issues filed in the lower court and also included Williams, "structural error" issues. The Massachusetts Appeals Court reached the merits of the Petitioner's Williams, structural error arguments. Reaching the merits removes any bar to federal court review, regarding the conflict of interest issues with judge Beck. On November 16, 2017 all appellate issues were denied by the Massachusetts Appeals Court. The Petitioner appealed all appellate issues to the next and highest state court, the Supreme Judicial Court and the Supreme Judicial Court denied the Application for Further Appellate Review on February 6, 2018.

I. PETITIONER IS ENTITLED TO A DIRECT APPEAL ANEW THE STATE COURTS FAILED TO USE THE CORRECT TEST REGARDING RECUSAL OF APPELLATE JUDGE. CERTIORARI SHOULD BE GRANTED.

The Massachusetts Appeals Court reached the merits of Petitioner's claims regarding the conflicts of interest with judge Beck in the 3 judge panel that affirmed convictions on direct appeal Commonwealth v. Rodriguez, 92 MassApp.Ct. 1115 (2017):

"d. Appellate judge's conflict of interest. Finally,

we address the defendant's argument that he is entitled to a new trial on the ground that the Appeals Court judge who authored the decision affirming his convictions and the denial of his prior motion for a new trial had a supposed conflict of interest because she worked in the Attorney General's office at the time of his underlying trial, and his case was prosecuted by a special assistant district attorney who was also working at the Attorney General's office. The Defendant has not shown that the Appeals Court judge had 'significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case.' Williams v. Pennsylvania, 136 S. Ct. 1899, 1905 (2016).'" Ibid.

Once "the last state court to be presented with a federal claim reaches the merits, then it removes any bar to federal-court review that might otherwise have been available."

Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991); Victor v. Nebraska, 511 U.S. 1 (1994). Williams, supra has overruled the Massachusetts state law that the 2 to nothing made judge Beck "irrelevant"; and as the First Circuit put forth as state law Rodríguez v. Spencer, supra at 37. Another aspect of an error by the Massachusetts Appeals Court decision is the court's conclusion that the Petitioner is seeking a new trial as a result of the conflict with judge Beck, see above quote. This is completely inaccurate, the Petitioner sought and is seeking an appeal anew. That of course is the remedy. The Petitioner would be content with that appeal here in this Court.

The Massachusetts Appeals Court used an incorrect test (shown above), regarding Williams, supra and Rippo v. Baker, 137 S. Ct. 905, 907 (2017) "The Nevada Supreme Court did not ask the question our precedents require: whether; considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable. (The Court asks ... whether there

is an unconstitutional potential for bias ...))" Ibid.

The prosecutor Hanlon is obsessed with convicting the the Petitioner at all cost, by any means necessary. She was the prosecutor in the first trial as Assistant District Attorney for Norfolk county 1977. As Assistant Attorney General in the second trial in 1987 she was appointed special prosecutor

working out of the state Attorney General's office with Assistant Attorney General Beck. The fact that both worked together to prosecute Petitioner in the second trial was never contested in the state courts or federal courts. The main finding was that the conflict of interest with judge Beck was "irrelevant" in a 3 judge panel, Rodriguez v. Spencer, supra at 37. Now years later the Mass. Appeals Court holds that the Petitioner has not shown a significant personal involvement by AAG Beck during prosecution, supra Commonwealth v. Rodriguez, supra writ page 6.

The Petitioner has shown that both worked together in the same office that prosecuted the Petitioner at the time Petitioner was being prosecuted and convicted in 1987. And later that same AAG Beck was an Appeals Court judge that authored the opinion that affirmed the convictions. Petitioner had numerous claims of prosecutorial misconduct against Hanlon in what's called a "Moffett brief" Commonwealth v. Moffett, 383 Mass.

201 (1981), which allows Petitioner to file a pro se brief along with the attorney's main brief. The risk of bias was too high to be constitutionally tolerable Williams, supra and Rippo, supra. As Williams, pointed out many duties are carried out by prosecutors such as preparing documents and other duties behind

the scenes. Also ineffective assistance of counsel (appellate) should have filed a motion to recuse but failed to do so partly because of her conflicts of interests. The Petitioner fully addressed appellate counsel's ineffectiveness on the record in the state courts.

The Court should address this important issue because the state Massachusetts has a great many former prosecutors/assistant attorney generals in their judicial branch of government. The Petitioner had to file a motion to recuse four Mass. Appeals Court justices: former AAG Hanlon; former trial counsel/ADA; DA Carhart; and Assistant Attorney General William Meade (AAG in the 1990's), these three had direct involvement against the Petitioner. The motion to recuse was allowed November 2017 by the Mass. Appeals Court. From the time of Governor William Weld in the 1990's the Massachusetts Governor to date with Charlie Baker continue this practice of appointing as many prosecutors/assistant attorney generals to the courts.

Other Circumstance Supporting Certiorari.

Petitioner has shown a risk of bias above. But as the Williams, and Rippo, held that "all the circumstances alleged" can support a finding of a "risk of bias () too high to be constitutionally tolerable" Rippo, supra at 907. Other circumstances supporting relief for Petitioner is that there was a complete breakdown in the judicial process. That complete breakdown was first noticed when all of the trial evidence was lost prior to retrial. Prosecutorial misconduct and ineffective trial counsel Carhart aggravated that loss Rodriguez, 50

Mass. App. Ct. 405. Prosecutorial misconduct and ineffective assistance of resentencing counsel; failure to investigate court file for dismissed juvenile cases Rompilla v. Beard, 545 U.S. 374 (2005). Petitioner filed a 42 U.S.C. section 1983 lawsuit in the district federal court against trial counsel Carhart; Prosecutor Hanlon; court officer Craig and court stenographer Criss alleging a conspiracy to convict the Petitioner and a cover conspiracy. Petitioner received a default judgment against court officer Craig. But was dismissed entirely based on Heck v. Humphrey, 512 U.S. 477 (1994). It took 8 years to assemble the trial transcripts, and some were "lost" before appeal. Ineffective appellate counsel O'Neill; conflict of interest with Petitioner, Carhart and O'Neill's "Boss" attorney Prince who represented Carhart in Petitioner's lawsuit (as long as conviction and sentence stand no lawsuit maybe brought Heck supra). Appellate counsel O'Neill failed to investigate resentencing issues; court file for juvenile cases that were dismissed failed to file a motion to recuse judge Beck; abandoned all prose issues and other issues at the Supreme Judicial Court.

Decades of fraud and lies by the Prosecution and attorneys about 2 dismissed cases that was used to enhance Petitioner's sentence in the 1970's and resentencing in 1988 to a life sentence. The Petitioner finally figured out the fraud and lies in 2014 and filed 2 certified docket entries showing dismissal of the juvenile cases on February 24, 1977. Petitioner sought resentencing through the appropriate post conviction motions and Appeals because false and misleading information denies Due

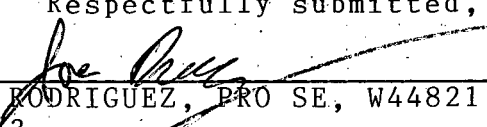
Process and Petitioner must be resentenced Townsend v. Burke, 334 U.S. 736, 740-1 (1948); United States v. Tucker, 404 U.S. 443, 447 (1972); Roberts v. United States, 445 U.S. 552, 556 (1980) and Johnson v. United States, 544 U.S. 295, 303 (2005). The Mass. Appeals Court did not acknowledge these cases Rodriguez, supra at 92 Mass.App.Ct. 1115 or the Supreme Judicial Court. The Petitioner can fully brief these and other issues in this Court as direct appeal.

CONCLUSION

Grant Certiorari to the Petitioner:

1. For this Court to review as full direct appeal of all issues presented in direct appeal and this collateral appeal
2. For remand to the state for direct appeal anew and collateral appeal issues.

Respectfully submitted,


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Date: April 26, 2018

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