

THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2018
No. 17-9500

REGINALD SWINTON, Petitioner,

v.

STEVEN RACETTE, SUPERINTENDENT,
GREAT MEADOWS C.F., Respondent

To: THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE,
OF THE UNITED STATES SUPREME COURT, AND PRESIDING JUSTICE
FOR THE UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

Pursuant to Rule 44 of the United States Supreme Court Rules, Petitioner respectfully request he be reheard from the October 1, 2018, Order of this Court, denying issuance of a writ of Certiorari from the United States Court of Appeals for the Second Circuit's denial of a Certificate of Appealability under appeal number 17-2127, of April 12, 2018, regarding denial of habeas corpus relief under 12-Civ-9051, and 15-Civ-2812 (VSB), (FM). The grounds stated herein are confined to intervening circumstances of substantial and controlling effect or substantial grounds available to Petitioner but not previously presented.

Petitioner certifies that this petition is presented in good faith and not for delay and is restricted to the grounds specified in paragraph 2 of Rule 44 of the United States Supreme Court Rules. Petitioner, therefore, ask this Court to suspend the Order denying the writ of Certiorari pending the filing of this rehearing petition, and for any other and further relief deemed by the Justice to be just and fair.

ISSUES PRESENTED

Whether jurists of reason could debate Petitioner's showing by clear and convincing evidence that he is confined due to the denial of Due Process of Law rights by the Federal and State courts' unreasonable determination of fact, in light of the evidence presented, is not fundamentally prejudiced by the state court's arbitrary evidentiary rulings, and instruction that appeared not to be in the range of the state's statutory and common-law rule exception, which relieved the state of its In re Winship burden, and prejudicially denied other constitutional

protections, is wrong, as would support issuance of a Certificate of Appealability, and; the reviewing habeas court's unreasonable assessment being a per se., abuse of discretion in failing to set aside the First Habeas Court's Judgment as void due to fundamental due process of law, procedural violations and other habeas errors, is wrong, within the meaning of the Rule 60-b(4) provision, as would support issuance of a Certificate of Appealability.

DISCUSSION

Petitioner is innocent and not guilty of the charges lodged against him by the State, and is currently being held "in custody in violation of the Constitution or laws or treaties of the United States". 28 U.S.C., §§ 2241(c)(3); 2254(a); see, Hicks v. Oklahoma, 447 U.S. 343, 346 (1980), (petitioner "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the [fact-finder] in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.")

In unconstitutionally depriving Petitioner of his liberty, the State employed an unreasonable determination of facts, "in light of the evidence presented", in its commingled impeachment/other crime evidence rulings, and instruction, disregarding substantial material evidence and procedural due process of law rights along the way. 28 U.S.C., § 2254[d][2]; Wilson v. Corcoran, 562 U.S. 1, 5-6 (2010); Taylor v. Maddox, 366 F.3d 992, 1008 (9th Cir., 2004).

During the start of trial the state acknowledged it lacked sufficient evidence establishing Petitioner's identity as the perpetrator of the third offense. Tr. 357, 618-619. Nonetheless, the state sought to do so based on a claim of the third victim's out of court "observation of the defendant either at the time or place of the commission of the offense or upon some other occasions relevant to the case." N.Y.C.P.L., § 710.30(1)(b). As such, the state requested and was admitted by the Court to link Petitioner to the third offense by showing alleged similarities in the assailant's modus operandi in the first and second offense, with that of the third. This ruling, which the Court would later instruct the jury on, was based on the Court's adoption of the common-law rule exception in the case of People v. Beam, [57 N.Y.2d 241 (1982)]. Petitioner objected to the ruling and instruction for several reasons. Tr. 290-367.

The Court's adjudication to reach this determination, however, is fundamentally unfair and unreliable. The victim of the third offense never made no such out of court identification of Petitioner consistent with the statutory provision enumerated in 710.30(1)(b). Such a claim appears to have been misleading, legal fiction tacitly promoted by the state through its issuance of the Voluntary Disclosure Form, (VDF), and in ignoring

Petitioner's discovery request thereon. See, VDF, p.5. Moreover, in relying on this statutory procedure to make their case on the third offense, the state failed to comply with the statute's due process procedural obligation in providing Petitioner with notice of its intended use of such identification evidence within 15 days after the arraignment. N.Y.C.P.L., § 710.30(2). Indeed, the state never made, or even attempted to make a showing of good cause for such later disclosure of such evidence, until after the start of trial. id. Nor, in either instance, did the Court make an inquiry or require the state to do so.

To be sure, the state was likely aware, or certainly should have been aware of the existence of this intended evidentiary use of the third offense prior to the drafting of the accusatory instrument, and certainly over a year before the start of the trial. Yet, nowhere in the felony complaint, indictment, VDF, or responsive pleadings to Petitioner's discovery requests, does the state notify, or attempt to notify Petitioner of the intended use of such allegedly, out of court, identification evidence regarding the third offense.

Further, the Court's application of this common-law, rule exception, is objectively unreasonable in light of the evidence presented. The exception carved out by Beam addresses the use of extrinsic, uncharged other crime evidence not, as in Petitioner's case, intrinsic, charged offenses in the indictment the accused is presently being tried on. E.g., Beam, 57 N.Y.2d at 250; see, People v. Molineux, 168 N.Y. 264 (1901); compare, id. with, N.Y.C.P.L., 200.20(2)(b) and, N.Y.C.P.L., § 200.20(2)(c) and, Tr. 285.

Here, the fact-finding of similarities between these offenses relied upon by the Court to support its ruling and instruction on the use of such identification evidence appears arbitrary. The purported similarities between the offenses are generic and, unfortunately, a usual, and all too common occurrence in such offenses in a city the size and diversity of New York. Such generality of factual occurrences as these are not unique or distinctive, so as to reasonably point to one, and only one individual, at the exclusion of another, or others, beyond a reasonable doubt.

Indeed, in Petitioner's case, there is material, testimonial evidence by the state's own complaining witnesses, detailing marked distinction between one offense from the other. Each victim describes their assailant's voice differently from the other victim. Statements and actions made and not made, are markedly different. In fact, according to the detectives who investigated the third offense, and the complaining victim, either someone, other than the Petitioner did the crime, or no crime was committed. (It should be noted that Franklin Darwin, a level three, registered sex-offender, was initially arrested for the offenses, being picked up in the neighborhood where the third offense is said to have occurred.) The Court's evidentiary ruling and instruction, in this respect, is not harmless error. See,

Brecht v. Abrahamson, 507 U.S. 619, 637, 638, n9 (1993).

Thus, for the Court to have arrived at its conclusion, in light of the evidence presented, was to unreasonably ignore such equal, and stronger, countervailing material facts otherwise. This arbitrary introduction by the Court, in admitting and charging the jury thereon, merely exacerbated further the unconstitutionality of an already wrongful conviction, by inviting the jury to disregard the deficiencies in the state's proof as it relates to the third offense. In this posture, and in light of the state's unexplained negligence in failing to provide Petitioner timely notice as to its intended use of such out of court, identification evidence to link Petitioner to the third offense, the Court was statutorily required to preclude the state's use of such identification, and should not have instructed the jury it could convict thereon. N.Y.C.P.L., § 710.30(3).

This, the Court failed to reasonably do. As a consequence, the ruling and instruction becomes the basis upon which the jury is authorized to render a verdict of guilt on an offense in the indictment, upon which the state did not have to prove an essential element beyond a reasonable doubt. See, e.g., Fiore v. White, 531 U.S. 225, 228-229 (2001)*

So, too, the State's unreasonable adjudication of the impeachment issue. See, N.Y.C.P.L., § 240.43; People v. Sandoval, 34 N.Y.2d 371 (1974).

Here, because there existed in the record a presumption of reasonable doubt as to Petitioner's guilt on charges in the indictment, and Petitioner had previously tendered a good-faith proffer of likely material testimonial evidence supporting his innocence of the state's charges, he should have been afforded a fair and meaningful opportunity to be heard by the jury in his defense. This, however, the State did not reasonably afford him the right to, in its arbitrary and ill-balanced assessment of his criminal history, and failure to adhere to statutory, mandated procedures.

Because neither the state or the court made a timely reasonable determination as to the admissibility, or notice to Petitioner of all specific prior, unharged, vicious or immoral conduct intended to be offered at trial if Petitioner took the witness stand, until well after, and into the actual commencement of the jury selection process, Petitioner, as a result, is left unaware, with no reasonable opportunity to prepare an informed defense whether or not to testify. The state merely requesting, in response to Petitioner's timely pretrial pleadings, a deferral of the issue until the case goes before a trial court is not a

*This is not to say that evidence presented and relied upon by the state regarding the first and second offense in the indictment is, in any ways, immune from constitutional challenges as to their sufficiency or lawfulness.

reasonable showing of good cause for the denial of this due process right of Petitioner's. The Court should have but failed to make inquiry or impose reasonable sanctions on the state for its negligent compliance with this procedural mandate.

The unreasonable delay by the state, and admissibility ruling by the court, is particularly unfortunate and fundamentally prejudiced Petitioner's fair trial efforts to meaningfully be heard. Both the Court and the state were present when Petitioner had informed prospective jurors that he intended to testify in his defense, well before the Court had rendered its impeachment ruling at the behest of the state. Compare, Tr. 183-185 with, Tr. 339-340.

The court's determination as to the relevancy of Petitioner's uncharged conduct was objectively unreasonable. The court disregards the fact that these past acts are well over thirty years old and that, in one instance, was for a misdemeanor for which Petitioner served less than a year jail time. In two of these instances relied on there is no mention or evidence of a sexual assault being alleged. It is in light of these facts that the virtual, unlimited scope, length and depth of impeachment questioning allowed the state by the court, regarding Petitioner's alleged, past misconduct and the sentences received for each if he should take the witness stand in his defense, was prejudice that far outweighed such interrogation's probative value regarding Petitioner's veracity and credibility.

The very tenor of such impeachment evidence on cross-examination would amount to no more than an unfair exhibition before the jury of Petitioner's guilt of the instant offenses because he has a past propensity for committing the types of crimes he is currently being tried for. Such unfair inquiry would have the unsavory effect of likely misleading the trier of fact's attention away from the truth of Petitioner's testimony of innocence, while concealing the evident deficiencies in the state's proof in the process.

The fact that the court rejected, out of hand, a reasonable and balanced compromise advanced by Petitioner is unfair and arbitrary. See, People v. Coe, 95 A.D.2d 685,686(1st Dept. 1983). (That the court later offered a slightly modified impeachment ruling was no balanced or fair compromise as it merely shifted the propensity argument to another area of cross-examination.)

Here, both the court and the state likely knew that the jury was anticipating hearing Petitioner's testimony and that his failure to do so, without an explanation, would likely result in adverse penal consequences to the defense. In such light, the Court's impeachment adjudication appears not to have been meant to be fair and balanced consistent with due process; and certainly was not harmless. In neither the first and third offense was the evidence of Petitioner's guilt found to be

overwhelming. See, Brecht v. Abrahamsom, supra.

Nor would this Court's holdings in Luce v. United States, [469 U.S. 38 (1984)], necessarily have applied in light of the facts presented. Petitioner wanted to testify and had material, testimonial evidence available and known to him supporting his innocence that he wished to impart with the jury. In this respects, Petitioner previously prepared a severance motion wherein he submitted a proffer of what his testimony would be. The fact that he would inform a prospective jury of his intent to testify should have reasonably informed the court of the non-speculative nature of Petitioner's intended testimony. Had there been a doubt as to this proffer, or Petitioner's declaration to this prospective jury, the court could have questioned Petitioner outside the presence of the jury, in order to assure itself as to the good-faith intention of Petitioner, and the materiality of his proffered trial testimony.

Thus, unlike the situation in Luce, Petitioner made a stated commitment to testify before a jury, as well as made a good-faith proffer of what his testimony would detail prior to the court's impeachment ruling. It is in light of the evidence presented, however, and the clear intent of the court's ruling that Petitioner realized the likelihood that, if he did testify, the proffer made might be used to incriminate him, which dissuaded him from taking the witness stand in his defense. See, New Jersey v. Portush, 440 U.S. 450 (1979); cf., Luce, supra.

These constitutionally arbitrary, judicial rulings extended to, and was systematic in, skewing the factual determination of several other fundamental, federal rights guaranteed the Petitioner.

The court's other crime evidence ruling biased its factual adjudication of Petitioner's pro se., Speedy Trial claims as to who was actually to blame for the delay of trial. U.S. Const., Amend's VI; XIV; N.Y.C.P.L., §§ 30.20; 30.30(1)(a); Barker v. Wingo, 407 U.S. 514 (1972); Klopfer v. North Carolina, 386 U.S. 213, 222-224 (1967); People v. Staley, 41 N.Y.2d 789 (1977). Although Petitioner satisfied his burden, and the state did not, in demonstrating that the state's actions or inactions, whether deliberate or negligent, were responsible for the Speedy Trial delays in this case, the court still found Petitioner responsible. See, N.Y.C.P.L., § 210.20(1)(g); 210.45; State Court's Spedy Trial Determination (February 21, 2007). However, in fact, because the state was unable to lawfully proceed to a trial, let alone a Speedy Trial, on all of the charges in the indictment during these periods, until admitted by the court an out-come, determinative, other crime evidence ruling during the trial, all prior includable periods of delays attributed to Petitioner now would be, in the aggregate, fairly and reasonably attributed to the state for Speedy Trial purposes. See, Vermont v. Brillon, 556 U.S. 81, 92-93 (2009); People v. Sibblies, 22 N.Y.3d 1174, 1181 (2014); People v. England, 84 N.Y.2d 1, 4 (1994); People v. O'Shaughnessy, 124 Misc.2d 1031, 1033 (Sup.Ct.,

W.Chst Co., 1984; People v. Blue, 114 Misc.2d 383 (Sup.Ct. Kings Co., 1982). Yet, due to the state's timing in seeking admission of this out-come, determinative motion needed in order to proceed to a trial on all of the charges in the indictment, coming as it did during the trial, Petitioner is now statutorily precluded and prejudiced from establishing his challenge anew to the state's evident Speedy Trial violations. See, C.P.L., § 210.20(2); People v. Lawrence, 64 N.Y.2d 200 (1984); but, see, Betterman v. Montana, 136 S.Ct. 1609, 1612 (2016); Smith v. Hooey, 393 U.S. 374 (1969).

The ruling also, in light of the evidence presented, prejudiced Petitioner's due process right to an objectively reasonable jury charge determination regarding the state's constitutional obligations on the indicted charges submitted. U.S. Const., Amend. XIV; see, Jones v. United States, 527 U.S. 373, 391 (1999); Estelle v. McGuire, 502 U.S. 62, 68, 72 (1991), (quoting, Cupp v. Naughton, 414 U.S. 141, 147 (1973)). In instructing the trier of fact that it, in effect, must convict on the third offense based on acceptance of an impermissible Beam exception ruling, the court took a presumption meant to be permissible, and made it mandatory; one in which the court's one time, limiting instruction thereon likely was dismissed by the jury as nonsensical or ineffective. See, Tr., 749; Francis v. Franklin, 471 U.S. 307, 314, 316, 324 (1985). To be sure, because identification of the assailant is a necessary element needed to be proven by the state beyond a reasonable doubt, the Beam instruction as given unreasonably reallocated or reduced that portion of the state's necessary burden to prove in achieving its conviction of the third offense in the indictment. In re Winship, 397 U.S. 358, 364 (1970); see, Jackson v. Virginia, 443 U.S. 307 (1979); id., supra, 332, n5; Ponnapula v. Spitzer, 257 F.3d 172, 182-183 (2d Cir., 2002); People v. Jenkins, 68 N.Y.2d 896, 898 (1986).

The court's factual adjudication regarding the admissibility of impeachment issues also prejudiced several fundamental, constitutional protections afforded Petitioner. U.S. Const., Amend's V; VI; XIV.

The ruling, in unfairly dissuading Petitioner from testifying, resulted in impermissibly penalizing him for thereafter exercising his post-Miranda right to silence. See, Doyle v. Ohio, 426 U.S. 610, 619 (1976). The ruling further infringed upon Petitioner's presumption of innocence before a verdict was rendered by the jury. See, Herrera v. Collins, 506 U.S. 390, 398 (1993). Indeed, as the only material evidence he had to combat the state's claims of guilt, the court's decision unconstitutionally interfered with Petitioner's right to the effective assistance of trial counsel's guiding hand in the timing of a critical element of the defense's presentation of Petitioner's innocence. See, Strickland v. Washington, 466 U.S.

668, 692 (1984); Gerder v. United States, 425 U.S. 80, 88-89 (1976); Brooks v. Tennessee, 406 U.S. 602, 613 (1972), (quoting, Powell v. Alabama, 289 U.S. 48, 69 (1932)).

These rulings resulted in an adjudication at sentencing that was cruel and unusually, disproportionate punishment, which itself, was unreasonably determined in light of the evidence presented. U.S. Const., Amend's VIII; XIV; see, Solem v. Helms, 463 U.S. 277, 290 (1983).

Here, the court's recidivist adjudication and sentencing of 150 years to life is an objectively unreasonable finding of facts. Although the court statutorily adjudicated Petitioner a persistent, violent felony offender, (PVFO), Petitioner is sentenced to a term of imprisonment as a persistent felony offender, (PFO), without adherence to the applicable, procedural and penal restrictions governing. See, Sen.Tr., pp. 18-19, (5/24/07); Roballo v. Smith, 63 N.Y.2d 485 (1984); compare, N.Y.P.L., §§ 70.00(3)(a)(i) and, 70.10(1)(a)(2) with, §§§§ 70.00(2)(b); 70.02(1)(a) and, 70.04(1)(b); 70.08(1), (3)(a)(i). The arbitrary adjudication of Petitioner as a PFO would effectively preclude him from a statutorily mandated reduction of his sentence. See, N.Y.P.L., § 70.30(1)(e)(vi).

In this respect, Petitioner's pro-se., efforts in seeking to controvert the use of an prior violent felony sentence, from serving as the predicate for enhanced punishment, is dismissed out of hand by the court without further inquiry. See, Sen.Tr., pp 9-11, (5/10/07); Sen.Tr., 2-3, (5/24/07); N.Y.C.P.L., §§ 400.15; 400.16; Point Two Discussion, infra; see, generally, Lackwanna Cty. D.A. v. Coss, 532 U.S. 394, 403-405 (2001).

Moreover, the consecutive terms of imprisonment imposed for each offense is an arbitrary finding of the facts presented. See, N.Y.P.L., § 70.25(2); People v. Laureano, 87 N.Y.2d 640, 643 (1996).

The convictions were secured under a cumulative evidentiary showing of guilt by the state. As such, the actus rea that served as an essential element of one offense, (i.e., physical injury; forcible compulsion), are material elements existing in and is similar to each offense Petitioner is convicted of. These are elements material to the facts, used and and relied upon by the state, as established through the trial and sentencing records, with no difference in intent as presented by the state, charged by the court, and accepted by the jury. See, N.Y.P.L., §§§§§ 10.00(a); 130.00(8)(a), (b); 130.35(1); 130.50(1); 140.30(2); People v. Alford, 14 N.Y.3d 846 (2010); People v. Rossas, 8 N.Y.3d 493 (2007); cf., People v. Salcedo, 92 N.Y.2d 1019, 1021-1022 (1998).

As such the sentences imposed are the result of, and based on an unreasonable determination of fact, that are not "within the range prescribed by State law"; nor consistent with relevant federal laws. See, Solem v. Helms, supra; White v. Keane, 969 F.2d 1381, 1383 (2d Cir., 1992).

Counsel's effective assistance on appeal was compromised, in many respects, due to the resulting interference left in the wake of the state's unreasonable, trial determination of facts, creating prejudicial, procedural constraints and limitations in the record on appeal to what would have been a reasonable and accurate appellate review and determination of the claims presented. Nonetheless, and in light of the evidence presented, appellate counsel unreasonably failed to present several significant and obviously stronger, constitutional claims for review that were material, and relevant to those issues he did raise. Instead, counsel directed Petitioner to do so.

Petitioner sought relief through error coram nobis, specifically on the issues surrounding the need for settlement of a material and disputed fact in the record, pivotal to a fair and accurate Speedy Trial determination; trial counsel's failure in reasonably pursuing the pro se, Speedy Trial motion, and in the filing of a severance motion; and, the trial counsel's and the court's constitutional errors during Petitioner's sentencing phase on the instant indictment. In these respects, appellate counsel was wrong for merely telling Petitioner to just write and explain to the appellate court the factual discrepancies in the disputed record, and his belief that trial counsel's performance was not ineffective.

For one, and from appellate counsel's position at the appellate level, he had to be aware, or should have been aware that, without a modicum of evidence based on a settlement of the disputed record for appellate review, Petitioner's explanation of a discrepancy of fact would not be presumed correct. See, N.Y.C.P.L., § 460.70[1]; 22 N.Y.C.R.R., §§ 600.5[a][e]; 600.10[b][1][v]; Benn v. Stinson, 917 F.Supp.202 (S.D.N.Y.,1992). This fact becomes significant when one realizes that it was appellate counsel who informed Petitioner that the state was likely accountable for 154 days of Speedy Trial delay. As such, a correction of the record wherein 42 additional days are likely available but in dispute as to who is actually to blame for the delay would be decisive towards dismissal of the indictment for Speedy Trial violations, or remand for an evidentiary hearing thereon. N.Y.C.P.L., §§ 30.30(1)(a);(4)(b); 210.20(1)(g); see, People v. Blue, 114 Misc.2d 383 (Sup.Ct., Kings Co., 1982)

So, too, the likelihood of trial counsel's failure in pursuing the pro se Speedy Trial motion; and failure to move for a Severance of the charges in the indictment. See, e.g., People v. Kirk, 290 A.D.2d 805 (3rd Dept., 2002); People v. Sanford, 148 A.D.2d 999 (4th Dept., 1989). Again, from counsel's position at the appellate level, the prejudiced inured by Petitioner due to trial counsel's incompetence in these matters, should have been significant and obvious to appellate counsel particularly, in light of the evidence presented, and the unconstitutional means by which the state secured the conviction under review. This claim equally applies to trial counsel's failure to participate beyond his mere presence at the recidivist, sentencing

proceeding, and trial counsel's and the court's abuse of discretion at Sentencing regarding Petitioner's timely and formal request to be heard on the re-assignment of trial counsel. C.P.L., §§§ 330.30; 380.50(1); 400.15(8); see, Gonzalez v. United States, 722 F.3d 118, 135-137 (2d Cir., 2013); Fredrick v. Warden, Lewisburg Corr.Fac., 308 F.3d 192, 196-197 (2d Cir., 2002); United States v. John Doe#1, 272 F.3d 116 (2d Cir., 2001).

Here, under the totality of circumstances, appellate counsel's performance in failing to brief the aforementioned pro se issues in conjunction with, and relevant to, those he did raise, "fell below a objective standard of reasonableness", which prejudiced Petitioner's due process right to a reliable and fundamentally fair, and likely different, outcome in the appellate proceeding, with confidence. Strickland v. Washington, 466 U.S. 668 (1984). It is in such light that Petitioner contends he was denied the effective assistance of counsel on his first tier appeal as of right. See, e.g., Lynch v. Dolce, 798 F.3d 303 (2d Cir., 2015); People v. Turner, 5 N.Y.3d 476, 484 (2005); People v. Casiano, 67 N.Y.2d 906, 907 (1986), ("neither a review of the record by the Appellate Division nor a pro se brief can substitute for the single-minded advocacy of appellate counsel.")

In sum, because the state courts' decision on these federal claims is based on an unreasonable determination of fact in light of the evidence presented, it is likely the resulting state application of constitutional law on the merits, will be contrary to and, or an unreasonable determination of clearly established federal law as determined by the United States Supreme Court. 28 U.S.C., § 2254(d)(2). It would, therefore, not be appropriate to afford a presumption of correctness, or deference to the unreasonable adjudication of the state's factual findings, based on the clear and convincing evidence diligently sought to be presented and be heard on by Petitioner, in light of the evidence in the record. The habeas and state courts were wrong in doing so, and in denying the Federal claims. An evidentiary hearing should have been held to reasonably resolve the Constitutional issues. 28 U.S.C., 2254(e)(1)(2).

It is in light of the liberty and public interest, that Petitioner respectfully submits this petition for a rehearing on the substantial Constitutional grounds available but not previously presented the state's systemic, plethora of procedural due process violations, being indicative of "extreme malfunctions in the state's criminal justice system", worthy of this Court's intervention and relief. Jackson v. Virginia, 443 U.S. 307, 332, n5 (1979).

2. DISCUSSION

The reviewing, habeas court committed a per se abuse of discretion, in its failure to void the First Habeas Court's Judgment, based on a "no merit" assessment of the pro se, Rule 60-b(4) claim. The reviewing habeas court arrived at this conclusion through an erroneous view in the application of the

law, and a clearly erroneous view of the facts, in light of the evidence presented. Moreover, the Second Circuit, Court of Appeals, was wrong in denying the Certificate of Appealability prayed for, upon a claim of no substantial constitutional issues being shown. It is for these, and the following reasons, petitioner respectfully ask this Court to be heard for issuance of a writ of certiorari to review and determine the Constitutional question being presented herein.

The integrity of the First Habeas Court's, (the rendering court), procedures by which it issued a 1978 judgment denying issuance of a requested writ of habeas corpus, on a claim of an involuntary plea of guilty being taken from Petitioner by the State, is called into question and should be made void. Federal Rules of Civil Procedures for the United States District Courts, 28 U.S.C., Rule 60-b(4); Gonzalez v. Crosby, 545 U.S. 524 (2005).

The rendering court did not afford Petitioner any service of process of habeas documents and pleadings exchanged between it and the State, nor performed other applicable habeas statutory rules and procedures as mandated under Federal law to be timely carried out and disclosed to Petitioner to ensure due process of law, fundamental fairness in the fact-finding process, particularly of documents of an untrue, unsubstantiated, and highly prejudicial nature, apparently provided by the State and relied upon by the rendering court in arriving at its judgment. See, Swinton v. Fogg, No. 77-CV-2532, (VLB).

A judgment is deemed void within the meaning of Rule 60-b(4) when the rendering court is found powerless to have entered a judgment, or its exercise of jurisdiction is "egregious", representing a "clear usurpation of power", lacking even an arguable ground for jurisdiction. In otherwords, the rendering court lacks either subject-matter or personal jurisdiction over the parties; acted in a manner inconsistent with, or contravening constitutional due process; or acted beyond the power granted to it under the law. United Student Aid Funds, Inc. v. Espinoza, 559 U.S. 260, 271 (2010); Oldfield v. Bahia, 558 F.3d 1210, 1215, n13 (11th Cir., 2009); Kasner v. Lothian, 532 F.3d 876, 886 (D.C. Cir., 2008).

The basis of the reviewing, habeas court's denial is predicated on two erroneous fronts. The first is a view that the petition presents impermissible, substantive claims. The second being that the claim raised by Petitioner has "no merit". Swinton v. Racette, (Walter Fogg), No. 15-Civil-2812, (VSB), (September 19, 2016). Such assessments and views held by the reviewing court are wrong on either front.

In viewing the Rule 60 claim as nothing more than Petitioner's "disagreement with the [rendering court's] decision or logic", the reviewing court concluded such "does not render the judgment void". Id. This finding, however, is contingent on a clearly erroneous assessment of facts in light of the evidence presented.

In the rendering court's Memorandum/Order of January 5, 1978, the habeas court references purported testimony of the victims, said to have been testified to at the State's Wade hearing, wherein Petitioner is claimed to have told two, of the five victims of the alleged sexual assaults, that his name is "Reggie", and he is a "photographer", in one incident and, just "Reggie", in the other, before the assault or attempted assault. Mem., pp 8, 9. However, the alleged assertions, as the rendering court is led to believe and rely on, is not true, not supported and not lawful.

Although the rendering court refers to a Wade hearing as the purported source for these accusations, the habeas court does not cite to, or actually quote to, or attach copies of any specific page from the proceeding, from which one can view or verify the authenticity of the alleged statements. Such a pretrial proceeding was not raised by the appellate counsel or the State on Petitioner's direct appeal to the First Department, and Court of Appeals. Nor did Petitioner present such an issue in his application before the federal court for a writ of habeas corpus in 1977.

As such, this information is highly suspect. Petitioner does not recall such testimony and details being made by the victims of these alleged offenses at a Wade, or any other judicial proceeding relative to this case. Nor are such accusations cited to, reported or memorialized by the Department of Probation that prepared the investigation report; or any judicial officer thereafter, who later, either sentenced petitioner in 1986, or held a collateral, adjudication proceeding regarding Petitioner's status on parole in 2005. Each would have had access to this 1975, pretrial hearing, plea, plea withdrawal hearing, and sentencing records surrounding the 1975 guilty plea, and would have likely availed themselves of such damning accusations in support of their judicial determinations. Indeed, the state court judge that took the plea of guilty and sentenced petitioner did not refer to or quote such testimony to buttress further support for his judgment. That is because, simply put, such testimony as the rendering court was erroneously led to believe, did not happen.

In truth, the unsubstantiated and untrue document as reported to and relied on by the rendering court, appears to be the product of some misguided person's intentions in the District Attorney's Office, lacking confidence in the certainty of the guilty plea's voluntariness withstanding an unbiased, constitutional scrutiny by a Federal, habeas court.

However, even assuming in arguendo, such allegations were made at a Wade hearing, Petitioner is nonetheless lawfully entitled to be served process of such documentary evidence, as well as other relevant and mandated habeas pleadings for fair and timely notification of its use in the habeas proceedings, with meaningful opportunity being afforded Petitioner to be heard in

defense thereon. This, the rendering court failed to do consistent with the mandates of habeas, due process of law. U.S. Const., Amend's V; XIV; United Student Aid Funds, Inc. v. Espinoza, supra, 559 U.S. at 271; see, Walker v. Johnston, 312 U.S. 275 (1942); Mansberry v. Lee, 311 U.S. 32 (1940).

From the filing of the application for a writ of habeas corpus in 1977, until the rendering court's judgment denying the writ on January 5, 1978, Petitioner is not served with any other documents or pleadings relative to the habeas proceedings. Petitioner is never served with an actual copy of the rendering court's Order for the State to Show Cause why the writ should not issue. Nor is Petitioner afforded service of process of the State's Reply/Answer to this Order, if any. He is certainly not served a copy of the unsubstantiated document(s) given by the State to the rendering court. Federal Rules of Civil Procedures, ("FRCP"), 28 U.S.C., Rule 5; Rules Governing Section 2254 Cases, ("2254 Rule"), 28 U.S.C., Rule 12, (1976 Amendment); see, "R" Best Produce, Inc v. DiSapio, 540 F.3d 115, 126 (2d Cir., 2008).

It is due to the rendering court's egregious failure to have had Petitioner lawfully served with these mandated documents "in the course of the [habeas] proceedings", that resulted in the rendering court's lack jurisdiction over the parties. Johnson v. Zerbst, 304 U.S. 458, 468 (1938), (quoting, Franks v. Magnum, 237 U.S. 309, 327 (1915); Oldfield v. Bahia, supra, 558 F.3d. at 1215, n13; United States ex rel. Schwartzkopf v. Uhl, 137 F.2d 898, 900 (2d.Cir., 1943).

These fundamental errors of the rendering court led to constitutional infirmities resulting in a "violation of due process that deprive[d]. . . [Petitioner] of notice or the opportunity to be heard." United Student Aid Funds, 559 U.S. at p. 271. Here, Petitioner had a protected interest that the rendering court, in passing judgment denying the writ, would not do so inconsistent with, or controvening the Fifth and Fourteenth Amendments of the United States Constitution. However, in not affording any notice, or meaningful opportunity for petitioner to be heard in defense of the State's allegations, Petitioner is prejudicially prevented from any awareness or ability to repond and defend in challenge to the untrue, and misleading unsubstantiated State document, which apparently biased the rendering court to an unreasonable determination of the habeas petition. See, Matthews v. Eldridge, 424 U.S. 319 (1975); Uhl, supra.

Indeed, if this document was meant to be the State's ex parte submission, it was not proper, nor likely made under oath. See, 28 U.S.C., §§ 2243; 2244; 2254 Rule, 7(a)(e); Rule 11 (1976 Amendment); FRCP, Rule 52; Walker v. Johnston, supra, 312 U.S. at p. 287; Williams v. Schriro, 423 F.Supp.2d 994, 1003 (D.Ariz., 2006). Moreover, had this been the rendering court's intention to expand the record, based on this unsubstantiated, State submission, fundamental fairness would reasonably dictate Petitioner being given timely notice and meaningful opportunity to be heard. Petitioner, having been given such due process rights,

likely would have resulted in the rendering court conducting a hearing to determine the validity and veracity of the matter; or have granted the writ due to State malfeasance. Yet, with no notice or opportunity given petitioner, the rendering court was unfairly bound to presume the truth of the State's unsubstantiated document. 2254 Rules, Rule 5(b), (e); Rule 7(e). This unreasonable nullification of the Due Process Clause was an unreasonable usurpation of the power given the rendering court in making a judgment to deny an uninformed, not heard from petitioner, of his liberty. See, Nelson v. Colorado, 137 S.Ct. 1249, 1255 (2017); United Student Fund, Inc., supra, 559 U.S. at 270, 272. Such acts, or failures to act within the mandated procedures by the rendering court, resulted in a judgment issued beyond the powers granted it under the law. U.S. Const., Amend's V; XIV; 28 U.S.C., §§ 2242; 2248; 2254 Rules, Rules 4; 5; 7; 8; Harris v. Nelson, 394 U.S. 286, 293, n3, 299, 300 (1969); Walker v. Johnston, supra, 312 U.S. at 284, 286, 287.

Secondly, the underlying basis for opposition to the reviewing court's finding of a substantive claim being the basis of this petition is because the conclusion is arrived at through a clearly erroneous assessment of Federal law.

Petitioner did not intend, nor did he present in the Rule 60 motion, the 2007, recidivist, sentencing issue, the predicate of which being based on the contention that the 1975, plea of guilty taken by the court is involuntary due to the denial of the right to retain counsel of choice. Moreover, in any event, this 1975 sentence has not "expired" and Petitioner is actually still "in custody" based on the judgment. 28 U.S.C., §§ 2241(c)(3); 2254(a); Garlotte v. Fordice, 515 U.S. 39, 41, 46-48 (1995); Peyton v. Rowe, 391 U.S. 54, 67 (1968). In the footnoted #2 entry of the Rule 60-b memorandum of law, Petitioner merely sought to inform the reviewing court assigned to the existence of this current, habeas pleading that may have relevancy, and visa versa. Here, the reviewing court is wrong to conclude that the 1975, plea conviction has "expired" and Petitioner is no longer "in custody", or that he was attempting to mount an attack on the 1975 conviction by way of a Rule 60-b motion, through a 2007, Sentencing issue. See, Gittens v. United States, 311 F.3d 529, 532 (2d Cir., 2002); Rodriguez v. Mitchell, 252 F.3d 191, 198 (2d. Cir., 2001).

The discrepancy surrounding the reviewing court's erroneous, substantive claim assessment appears to be a confusion due to federal pleadings filed at the time by Petitioner, prior to the submission of the Rule 60-b motion, and the reviewing court's assignment thereon. The matters, however, were subsequently resolved.

However, because this Rule 60-b(4) "case present[s] a substantial constitutional question, then an independently substantial statutory issue may come along for the ride." Ramunno v. United States, 264 F.3d 723, 725 (7th Cir., 2007), (citing with approval, Slack v. McDaniels, 529 U.S. 473 (2000)).

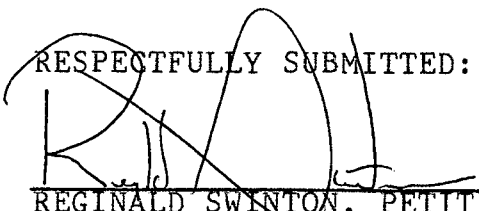
It is for these reasons that the writ was meant to protect in order to ensure fair play and justice in the habeas process. habeas jurisprudence requires strict compliance with its statutes, rules and decisional law that governs this "Grant Writ". Omni Capitol Investments v. Rudoff Wolff and Co., Ltd., 484 U.S. 97, 104 (1987). Yet, in the instant case, from precluding Petitioner the process of service to be a party to the habeas suit, to the State submission of pleadings and unsubstantiated and prejudicial documents submitted only to the First Habeas Court, and the rendering court accepting it, only to be erroneously presumed to be true, while at the same time prohibiting petitioner notice or opportunity to be heard thereon by "traverse and petition [being] treated" as one, culminated in an abdication by the rendering court's right to deny Petitioner of his liberty under Federal law. This is the reason the judgment of the First Habeas Court is rendered void. See, United Student Aid Funds, Inc., supra; Walker v. Johnston, supra; Price v. Johnston, 334 U.S. 266, 292 (1948); United States ex rel. Catalano v. Shaughnessy, 197 F.2d 65 (2d Cir., 1962); Turner v. Pleasant, 663 F.3d 770, 777 (5th Cir., 2011); Kasner v. Lothian, supra, 532 F.3d at 886.

These are the facts and matters the reviewing courts have erroneously ignored, did not reasonably consider, nor specifically addressed in arriving at a finding of "no merit", and "no substantial constitutional question being presented", in failing to void the First Habeas Court's 1978 Judgment. The determination of which, is a per se, abuse of discretion. Browder v. Dir., Dept. of Corr's of Illinois, 434 U.S. 257, 263 (1978); Central Vermont Public Serv. Corp. v. Herbert, 341 F.3d 186, 189, 190 (2d. Cir., 2003).

For the reasons set forth above, Petitioner, Reginald Swinton, request that the Court set aside the Order of denial and hear the petition for issuance of a writ of certiorari from the United States Court of Appeals, for the Second Circuit, and for any other and further relief deemed by this Court to be just and fair.

Dated: December 9th., 2018
Cayuga County, New York.

RESPECTFULLY SUBMITTED:


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