

96CV04665-EHN-MJ

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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ANTONIO RODRIGUEZ,

96 CV 4665

Petitioner,

MEMORANDUM  
AND  
ORDER

- against -

DANIEL SENKOWSKI, Superintendent,  
Clinton Correctional Facility,

Respondent.

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ANTONIO RODRIGUEZ  
P.O. Box 2001  
Clinton Correctional Facility  
Dannemora, New York 12929  
Petitioner pro se

RICHARD A. BROWN  
DISTRICT ATTORNEY, QUEENS COUNTY  
(John M. Castellano, Robin A. Forshaw, Linda  
Cantoni, of counsel)  
125-01 Queens Boulevard  
Kew Gardens, New York 11415  
for Respondent

NICKERSON, District Judge:

Petitioner Antonio Rodriguez brought this proceeding under 28 U.S.C. § 2254 for a writ of habeas corpus.

In June 1991, petitioner was charged in Queens County, with Two Counts of Murder, One Count of Attempted Murder, One Count of Assault, One Count of Criminal Use of a Firearm, and One Count of Reckless

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Endangerment. The jury found him guilty of Second Degree Murder and First Degree Assault. He was sentenced on August 24, 1993, to two concurrent prison terms of twenty-five years to life and seven and a half to fifteen years.

On appeal he argued that he was deprived of due process because the trial court did not redact from his videotaped statement in evidence references to his just having been released from prison when the fatal shooting occurred. He also urged that his sentence was excessive.

The Appellate Division affirmed stating that, contrary to petitioner's contention, it was not error for the trial court to decline to redact the statement to delete three references to his having been previously incarcerated. The court held that the references were inextricably woven into petitioner's description of the events and were necessary to complete the narrative of his version of the incident. The court also found the sentence not excessive.

People v. Rodriguez, 221 A.D.2d 381, 633 N.Y.S.2d 506 (2d Dep't 1995). The New York Court of Appeals denied leave to appeal. People v. Rodriguez, 88 N.Y.2d 884, 645 N.Y.S.2d 458 (1996).

The evidence showed that on June 22, 1991, petitioner had an altercation with a group of men and

was beaten. He left and about forty-five minutes later returned to the scene with a gun and shot one of the men, Cassius Zarzuela, to death. He also shot another of the men, Julio Ortiz, in the neck.

The references in petitioner's statement to his having just been released from prison were not the subject of specific questioning by the police on that subject. They were volunteered by petitioner as a part of his explanation of what happened before the shooting. He claimed that the men with whom he had the altercation had earlier robbed him of \$180. In response to the question of how he knew he had precisely that amount, he explained that his father had given him the money because he "had just finished doing eight months" and had only been "out on the street eight days." Petitioner's statement also related that after the group beat him, he met his friend "Black" who gave petitioner "something to defend myself with." The prosecutor asked him where "Black" lived, and petitioner responded that he did not know, because "I have eight months I've been in."

It is a fair reading that the statement's three references were made by petitioner to bolster his credibility as to the alleged robbery of the \$180 and as to where he got the gun. The jury could assess

these statements to determine whether petitioner's statement to the police was true.

In any event it seems unlikely that the references were so prejudicial as to deny petitioner due process. The statement also included petitioner's words "I have no record here in this country." At most the jury could have concluded from the statement that petitioner had been guilty of some relatively minor crime carrying a sentence of eight months rather than some serious crimes such as those with which he was charged.

The evidence against petitioner was very strong. He admitted he returned to the scene with a gun and fired it. Two witnesses testified that petitioner came back with a gun about forty-five minutes after the initial argument and without provocation shot Zarzuela point blank in the chin and turned one hundred and eighty degrees and shot Ortiz in the neck. Ortiz recalled that petitioner held the gun in his right hand straight out from his shoulder.

Even if the admission of the unredacted statement was error the prejudicial effect was greatly outweighed by the evidence of guilt.

In addition, this court must consider whether a decision to grant habeas corpus in this case would be announcing a "new rule" as described in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989). Teague held

that, with two exceptions, a lower federal court may not grant habeas corpus to a state prisoner based on a "new rule" announced or applied after the conviction has become final. Stringer v. Black, 503 U.S. 222, 227, 112 S. Ct. 1130, 1135 (1992). A case "announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Caspari v. Bohlen, 510 U.S. 383, 390, 114 S. Ct. 948, 953 (1994). Whether the result is so "dictated" depends on whether under existing precedent "the unlawfulness of [the] conviction was apparent to all reasonable jurists." Lambrix v. Singletary, 520 U.S. 518, \_\_\_\_\_, 117 S. Ct. 1517, 1525, 137 L. Ed. 2d 771, 787 (1997). The "precedent" must be that laid down by the Supreme Court because only that Court can "dictate" to a state court how it must interpret the Constitution. Ramirez v. Senkowski, 7 F. Supp. 180, 188 (E.D.N.Y. 1998).

Petitioner has cited no Supreme Court precedent, and this court is aware of none in existence when petitioner's conviction became final in 1996, that "dictates" that this court issue a writ of habeas corpus based on the state courts' failure to redact petitioner's statement. See Ramirez v. Senkowski and cases cited.

The contention that petitioner's sentence was excessive does not present a basis for habeas corpus relief. White v. Keane, 969 F.2d 1381, 1383 (2d Cir. 1992).

The petition for habeas corpus is denied.

So ordered.

Dated: Brooklyn, New York  
September 22, 1998

*Eugene H. Nickerson*  
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Eugene H. Nickerson, U.S.D.J.