

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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JEFFREY BLAKE,

97 CV 4800

Petitioner,

MEMORANDUM  
AND  
ORDER

- against -

CHRISTOPHER ARTUZ,

Respondent.

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THE LEGAL AID SOCIETY  
(Kevin Casey, of counsel)  
90 Church Street - 13<sup>th</sup> Floor  
New York, New York 10007  
for petitioner.

CHARLES J. HYNES  
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(Ann Bordley, of counsel)  
400 Municipal Building  
210 Joralemon Street  
Brooklyn, New York 11201

NICKERSON, District Judge:

On April 11, 1997, petitioner, by his attorney, brought this proceeding for a writ of habeas corpus challenging his conviction pursuant to 28 U.S.C. § 2254.

The jury could have found from the evidence that on June 18, 1990 petitioner, armed with an Uzi .9 millimeter automatic weapon, fired approximately fifty rounds into the front seat of a moving car, killing Everton Denny and Kenneth Felix. The main witness

*clm*

against petitioner was Dana Garner, who said he saw the shooting. Petitioner was found guilty by the jury in Supreme Court, Kings County, of two counts of intentional murder in the second degree and one count of criminal possession of a weapon in the second degree.

On April 19, 1991 petitioner moved to set aside the verdict because, among other things, the verdict was against the weight of the evidence. Petitioner also said the presentence report prepared by New York Probation Officer Beverly Chatham contained previously undisclosed exculpatory material that would have changed the outcome of the trial and was known and withheld by the prosecutor.

At a hearing on the motion Chatham testified that Assistant District Attorney Anthony Catalano told her that Garner came forward to the police as an eyewitness against petitioner after he had been arrested in an unrelated case, and that Garner, who had sold drugs with petitioner, wished to make a deal. She also testified that Assistant District Attorney Anthony Catalano had said that Garner "did not feel anything about coming forward" with information about petitioner who had told a rival drug gang, who had kidnapped Garner, to kill him, and that Garner wished to "get back" at petitioner. Catalano testified that he did

talk to Chatham, whom he had never met before, that Garner had never attributed any blame to petitioner for the kidnapping, that Catalano had never made a deal with Garner, and that he did not say the things to which Chatham testified.

The trial court denied the motion, finding that Officer Chatham's allegations were not credible and would not have benefitted the defense, and that the verdict was not against the weight of the evidence.

The court sentenced petitioner to two consecutive terms of imprisonment of eighteen years to life on the murder counts and to a concurrent term of imprisonment of five to fifteen years on the weapons count.

On July 22, 1991 the Appellate Division, Second Department, assigned the Legal Aid Society to represent the petitioner on appeal from the conviction and from the denial of the motion to set aside the verdict.

On appeal on March 5, 1993, petitioner claimed that (1) the prosecution failed to prove his guilt beyond a reasonable doubt, and (2) the trial court erred by (a) failing to set aside the verdict, (b) denying petitioner's request to call Garner to testify at the hearing on the motion to set aside the verdict, and (c) preventing the defense from eliciting from Garner's cousin Otis Garry testimony that would have

undermined Garner's credibility. Petitioner also argued that the sentence imposed on him was excessive.

While his appeal was pending, petitioner moved to vacate the judgment of conviction in light of newly discovered evidence in the form of an affidavit by Garner stating that he had perjured himself at the trial by testifying that he was an eyewitness to the murders, that his trial testimony was coerced by the police, and that he had entered into an undisclosed deal with the District Attorney's Office in exchange for his testimony.

On October 20, 1993, the trial court denied the parts of the motion based on Garner's claims that his trial testimony was coerced and that he had made a deal with the District Attorney's Office in exchange for his testimony, finding that these claims had been the subject of vigorous cross-examination of Garner at the trial. The court ordered an evidentiary hearing concerning Garner's alleged recantation.

At the hearing held on February 25, 1994, Garner, then represented by counsel, did not recant his trial testimony, nor did he adopt his affidavit recanting the testimony. But he refused to answer various questions, invoking his privilege under the Fifth Amendment. The trial court held that Garner had said nothing at the

hearing to support the alleged recantation and denied the motion to vacate the judgment on March 18, 1994.

The petitioner appealed to the Appellate Division, Second Department on December 23, 1994. The appeal was consolidated with petitioner's appeal from the judgment of conviction.

By decision an order dated September 25, 1995, the Appellate Division affirmed both the judgment of conviction and the denial of the motion to vacate the judgment of conviction. People v. Blake, 219 A.D.2d 730, 631 N.Y.S.2d 430 (2d Dep't 1995).

On October 2, 1995, petitioner sought permission to appeal to the New York Court of Appeals. He made three of the five claims raised below, namely, whether (1) petitioner's guilt was proved beyond a reasonable doubt; (2) the trial court improperly refused to permit defense counsel to elicit certain testimony from Garner's cousin that would have undermined Garner's credibility; and (3) the trial court erred by refusing to permit the petitioner to call Garner to testify as a witness at the hearing on the motion to set aside the verdict. On October 31, 1995 petitioner requested that his application for leave to appeal be held in abeyance pending the outcome of his application to the Appellate Division for reargument of his direct appeal.

On November 13, 1995, petitioner filed a motion in the Appellate Division, Second Department, for reargument of his appeal. That motion was denied on January 3, 1996.

On January 16, 1996, petitioner reinstated his pending application for leave to appeal to the Court of Appeals. The application was denied on August 21, 1996. People v. Blake, 88 N.Y.2d 980, 649 N.Y.S.2d 387 (1996).

On September 18, 1996, petitioner applied for reconsideration, which the Court of Appeals denied on October 29, 1997. People v. Blake, 88 N.Y.2d 1067, 651 N.Y.S.2d 410 (1997).

Petitioner filed the petition for writ of habeas corpus in this Court on August 11, 1997. He claims that his conviction violated due process because (1) guilt was not proved beyond a reasonable doubt; (2) the prosecution failed to disclose evidence that was favorable to the defense; and (3) the court deprived the petitioner of his constitutional right to present a defense.

#### I

In his first claim, that his conviction violates due process because his guilt was not proved beyond a reasonable doubt, petitioner argues that the only witness against him, Garner, was inherently incredible.

The argument is that Garner, a career criminal, later recanted his testimony, and gave testimony contradicted by the physical evidence. Petitioner also says that the defense presented an alibi that the prosecution did not refute.

The respondent says that while this first claim was raised in petitioner's direct appeal, it was not raised in petitioner's request for leave to appeal to the New York Court of Appeals and thus is not reviewable by this Court. But the first three pages of petitioner's October 26, 1995 submission to the Court of Appeals argue that Garner's testimony was not credible, bringing into question whether petitioner's guilt was proved beyond a reasonable doubt.

In any event, petitioner's first claim is meritless. A rational trier of fact could certainly have found proof of guilt beyond a reasonable doubt. The relationship of Garner to the police and the District Attorney's Office was fully explored before the jury. While Garner admitted that at one point he told the police and the petitioner's cousin that he had lied in his grand jury testimony, he refuted that testimony and said he had lied only because he was frightened of petitioner. The jury could have believed Garner.

## II

In petitioner's second claim, he says he was deprived of due process by the state's withholding of information concerning Garner in violation of Brady v. Maryland, 373 U.S. 83 (1963). Petitioner maintains that Garner was a professional witness who had been rewarded in the past for his cooperation and could reasonably be expected to benefit from his testimony against petitioner. This allegation is based on the presentence report prepared by Officer Chatham, and on the affidavit by Garner stating that his trial testimony was coerced by the police.

The trial court considered this claim on petitioner's motion to set aside the verdict, and found Officer Chatham's allegations not credible and not beneficial to the defense. The trial court rejected the claim a second time in petitioner's motion to vacate the judgment of conviction. The Appellate Division upheld these factual determinations on appeal. People v. Blake, 219 A.D.2d 730, 631 N.Y.S.2d 430 (2d Dep't 1995).

The petitioner has not rebutted the presumption of correctness of these facts by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The decision of the State court that there was no exculpatory evidence that the prosecution should have revealed to petitioner was

based on an reasonable determination of the facts. 28  
U.S.C. § 2254(d)(2).

### III

Petitioners chief argument is that the court deprived him of his constitutional right to present a defense. The argument is as follows.

The defense called as a witness Otis Garry, the first cousin of Garner. When in New York Garner usually stayed at his grandmother's house where Garry lived. Garry testified that Garner was not in New York on June 18, 1990, the day of the murders, and that he knew this because when Garner came to the grandmother's house several days later, he told Garry it was the first place he went. Defense counsel made an offer of proof showing that when Garner arrived he asked Garry "what happened at the shooting" and Garry "told him basically what he [Garry] knew" as to the incident.

The judge ruled that defense counsel had not laid a foundation as to Garner's statement since counsel had not confronted Garner on cross-examination with what he allegedly had said to Garry at the time. Petitioner argues that, even if Garner's supposed question of "what happened" was inadmissible, the proposed testimony as to what Garry said was not hearsay because it was offered not for its truth but only for the fact that it was said to Garner.

But defense counsel did not restrict the offer of proof to what Garry said to Garner. Counsel based the offer on Garner's alleged question as to "what happened," a comment that indeed would have been significant evidence that he had not seen the shooting.

In any event, if the judge erred in excluding the entire conversation, that hardly made the trial "fundamentally unfair." Rosario v. Kuhlman, 839 F.2d 918, 923 (2d Cir. 1988). Nor has petitioner established that the error, if any, had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 631--38 (1993). Petitioner managed to get into evidence Garry's statement that Garner admitted he was not in New York on the day of the shooting.

Moreover, although petitioner now argues in his brief that Garry, not a witness to the shooting, described to Garner "the details" about it, the offer of proof did not suggest that Garry told Garner the details but only "basically" what Garry knew. In addition Garner in his testimony said he had seen Garry on the day of the shooting. He also admitted hearing a conversation among various persons about the shooting at the grandmother's house several days after the incident but a day or so before he went to the police on June 25, 1990.

Defense counsel argued vigorously to the jury without objection that Garner was a contemptible liar, that "he wasn't there" at the shooting but "came back three days later," as Garry had testified, that he spoke to people who were "talking about how these two people got shot," and that at trial and in talking to the police Garner made "up out of whole cloth" from the "conversations" he had heard a story in order to "pin" the crime on petitioner. Petitioner's counsel had ample evidence in the record on which to make these arguments.

Finally, it seems unlikely that, based on what he had heard, Garner could have made up the numerous details to which he testified and which were corroborated by the ballistic evidence, the physical remains left at the scene, and the nature of the wounds inflicted on the two deceased.

This is not a case in which petitioner was precluded from offering testimony in support of a theory that Garner was not present to see the commission of the crime. In addition, the defense was able to impeach Garner's testimony in various ways. Garner admitted he had been a drug dealer and had been arrested and convicted several times. He testified he did not remember numerous statements he had made some nine months earlier to the grand jury and to the

District Attorney's office. He admittedly did not approach the police for several days after the shooting. At a meeting he told Garry, some detectives, and an assistant District Attorney that he had lied to the Grand Jury and the District Attorney's office about seeing the shooting. He only withdrew that retraction later saying he had been "nervous" about testifying against petitioner.

Petitioner relies on Rosario v. Kuhlman, 839 F.2d 918 (2d Cir. 1988). In that case Rosario was twice found guilty of murder by a jury in New York Supreme Court, Kings County. At the first trial of Rosario and his codefendant Rafael Cruz, one Victor Cartagena was the only witness claiming to have seen Rosario and Cruz commit the robbery-homicide. Cartagena testified that he was with his girlfriend Eva Lopez when he observed the crime. Both defendants were found guilty and sentenced, and both appealed.

The Appellate Division reversed Rosario's conviction on the basis of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1988), and ordered a new trial. The ground for the reversal was that an unredacted confession, purportedly made by Cruz, was introduced and implicated Rosario. The same court also reversed Cruz's conviction on the ground that his confession had been obtained in violation of his right

to counsel. The court suppressed the confession and ordered a new trial.

The second trial of Cruz began four years after the joint trial. Rosario could not be tried at that time because his appeal was pending before the New York Court of Appeals. In the meantime Cartagena had died of gunshot wounds in an unrelated matter. The prosecutor introduced into evidence at Cruz's second trial Cartagena's perpetuated testimony from the joint trial. The defense called a woman named Irma Coreano, a Brooklyn Law School student and a first cousin of Cartagena. She testified that Cartagena did not meet Lopez, her roommate, until some months after the murder on October 12, 1974, and that Cartagena had been in jail and did not get out until January or February of 1995. On his release he went to see Coreano. Lopez was there, and Coreano introduced her to him. Cruz was acquitted.

At Rosario's later second trial the court received Cartagena's perpetuated testimony but refused to admit the perpetuated testimony of Lopez on the ground that the defense had not made a diligent effort to locate her. Rosario was convicted. The Appellate Division affirmed, and the New York Court of Appeals denied leave to appeal.

The United States District Court for the Southern District Court for the Southern District of New York granted habeas corpus, and the Second Circuit affirmed, holding that the exclusion of Coreano's perpetuated testimony "deprived Rosario of his fundamental right to a fair trial." 839 F.2d at 927.

The Second Circuit dismissed the prosecutor's lead argument that the defense had not made a good faith effort to locate Coreano. In fact Rosario's counsel had successfully served Coreano with a subpoena before trial. After she failed to appear at trial the New York Police were unable to serve her with a warrant issued by the court. Plainly the defense had made a "good faith effort to locate the witness." 839 F.2d at 925.

The Second Circuit held that Coreano's perpetuated testimony, if received in evidence, could have created a reasonable doubt that did not otherwise exist. The same cannot be said as to the facts that the defense in the present case offered to prove. Those facts were at best merely cumulative when considered in the light of the other admissions of Garner to which Garry testified. As noted above, defense counsel was fully able to argue to the jury that Garner had made "out of whole cloth" his testimony as to witnessing the homicide.

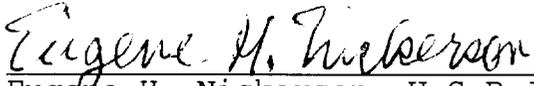
## IV

The petition for a writ of habeas corpus is denied.

The Court issues a certificate of appealability only as to petitioner's third claim concerning Otis Garry, because in that claim petitioner has made a substantial showing of the denial of a constitutional right.

So ordered.

Dated: Brooklyn, New York  
June 17, 1998

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