APL-2014-00206

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against –

ALMA CALDAVADO a/k/a ALMA CALDERARO,

Defendant-Appellant.

BRIEF *AMICI CURIAE* FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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STATEMENT PURSUANT TO RULE 500.1(f)

The proposed *amici curiae*, the National Association of Criminal Defense Lawyers (NACDL) and the New York State Association of Criminal Defense Lawyers (NYSACDL) have no parents, subsidiaries, or affiliates, except as indicated in the statement of interest below.

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INTEREST OF AMICI CURIAE

The New York State Association of Criminal Defense Lawyers (NYSACDL), an affiliate of the National Association of Criminal Defense Lawyers (NACDL) and the state's largest private criminal bar group, is a nonprofit membership organization of some 800 criminal defense attorneys practicing throughout New York. It helps its members better serve their clients and works to enhance their professional standing. NYSACDL strives to protect individual rights and liberties for all.

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

Founded in 1958, NACDL has roughly 10,000 members nationwide, up to 40,000 with affiliates. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges. NACDL is the only nationwide professional bar association open to public defenders and private criminal defense attorneys alike. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL is committed to advancing the fair and efficient administration of justice. It regularly files amicus briefs in federal and state courts – the U.S.

Supreme Court among them – assisting in cases that present issues of broad importance to criminal defendants, criminal defense lawyers and the justice system at large. NACDL and NYSACDL have a particular interest in this case as they seek to assure that the innocent can vindicate their rights on collateral review.

STATEMENT OF FACTS

Amici rely on the facts set out in the brief for defendant-appellant Alma Caldavado, filed around Oct. 20, 2014.

ARGUMENT

THE NEW YORK CONSTITUTION AND CRIMINAL PROCEDURE LAW § 440.10 SUPPORT RECOGNIZING ACTUAL INNOCENCE AS A BASIS FOR COLLATERAL RELIEF.

In 1765, Sir William Blackstone famously wrote, "[b]etter that ten guilty persons escape than that one innocent suffer." As recent events remind, our justice system – like all human enterprise – is imperfect and prone to malfunction, occasionally falling short of Blackstone's aspiration. See, e.g., Joseph Berger, After 26 Years in Prison, Settling a Wrongful Conviction, N.Y. Times, Jan. 12, 2015; Stephanie Clifford, Conviction to Be Cleared in 1991 Brooklyn Murder Case, N.Y. Times, Jan. 5, 2015; Michael Powell, He Lost 3 Years and a Child, But Got No Apology, May 14, 2014; James Barron, State Pays $2 Million to Settle Man's Wrongful Conviction, Oct. 1, 2012. Indeed, it is now long past debate that

a significant number of people have been convicted, and sentenced to lengthy prison terms, for crimes they did not commit.

Though it seems elementary that a defendant should be able to collaterally attack his conviction when demonstrably innocent, New York law in this area is surprisingly unsettled. In fact, while many lower courts recognize such a right,[1] this Court has never made it explicit. It is time to rectify that omission. As we will see, our State constitution, combined with the text, structure and purpose of CPL § 440.10, confirms what common sense and public policy irrefutably suggest: substantive innocence itself provides a valid avenue for post-conviction relief.

At the federal level, the issue first came to prominence some 22 years ago, in Herrera v. Collins, 506 U.S. 390 (1993). There, the justices considered a habeas challenge to a death sentence rooted in affidavits indicating that the petitioner had been wrongly convicted of murder. But the Herrera Court skirted the question, saying only that the innocence "showing made" there fell "short of any" conceivable "threshold" for toppling an otherwise final conviction on factual grounds. Id. at 417.

Since Herrera the Court has yet to recognize actual innocence as a freestanding basis for relief, shunning several opportunities to do so. It has,

[1] See, e.g., People v. Caraway, 36 Misc 3d 1224[A], 2012 NY Slip Op 51466[U] (Sup. Ct. Kings Co. 2012); People v. Bermudez, 25 Misc 3d 1226[A], 2009 NY Slip Op 52302[U] (Sup. Ct. N.Y. Co. 2007); People v. Bryant, 25 Misc 3d 1206[A], 2009 NY Slip Op 51986[U] (Sup. Ct. Bronx Co. 2009); People v. Wheeler-Whichard, 25 Misc 3d 690 (Sup. Ct. Kings Co. 2009); People v. Cole, 1 Misc 3d 531 (Sup. Ct. Kings Co. 2003).

however, let prisoners assert innocence as a "gateway" for review of independent constitutional claims that are procedurally barred.

In House v. Bell, for example, the justices took up a defaulted claim of ineffective counsel where the habeas petitioner alleged he was factually innocent of the crime of conviction. But at the same time, they declined to entertain his innocence claim on the merits. "[W]hatever burden a hypothetical freestanding innocence claim would require," the Court reasoned, "this petitioner has not satisfied it." 547 U.S. 518, 554 (2006).

More recently, the Court reiterated that "actual innocence, if proved, serves as a gateway through which a petitioner may pass" otherwise defaulted collateral challenges. McQuiggan v. Perkins, 133 S. Ct. 1924, 1928 (2013). Yet again, the justices took care to note that "[w]e have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." McQuiggan, 133 S. Ct. at 1931.

Of course, the High Court's circumspection merely begins the inquiry in this Court. As the Court has historically emphasized, the New York constitution furnishes additional protection beyond its federal counterpart. See People v. Lavelle, 3 N.Y.3d 88, 127 (2006) (state Due Process clause offers "greater protection than its federal counterpart as construed by the Supreme Court"); People v. Benevento, 91 N.Y.2d 708, 714 (1998); People v. Harris, 77 N.Y.2d 434, 439-40

(1991) ("By constitutional and statutory interpretation, we have established a protective body of law … resting on concerns of due process, … which is substantially greater than that recognized by other … jurisdictions").

Construed in this expansive tradition, our state constitutional rights to due process and freedom from cruel and unusual punishment support allowing actual innocence claims on collateral review. As the Second Department cogently explained: "Since a person who has not committed any crime has a liberty interest in remaining free from punishment, the conviction or incarceration of a guiltless person, which deprives that person of freedom of movement and freedom from punishment and violates elementary fairness, runs afoul of the Due Process Clause of the New York Constitution." People v. Hamilton, 115 A.D.3d 12, 26 (2d Dep't 2014). Likewise, "because punishing an actually innocent person is inherently disproportionate to the acts committed by that person, such punishment also violates the provision of the New York Constitution which prohibits cruel and unusual punishments." Id. at 26.

Given that convicting an innocent offends due process and inflicts cruel and unusual punishment, it follows that an actual innocence claim must lie under CPL § 440.10(1)(h). By its terms, that provision authorizes relief from judgments "obtained in violation of a right of the defendant under the constitution of this state or of the United States" (emphasis supplied).

Equally compelling, approving substantive innocence claims would plug a conspicuous hole in New York post-conviction law. For § 440.10, while appearing and intending to offer multiple paths to relief, nonetheless stops short of fully vindicating the rights of the factually innocent.

Subsection (g), for instance, permits reversal based on newly discovered evidence – but only if, among other criteria, it "could not have been produced by the defendant at the trial even with due diligence on his part." That is a formidable impediment[2] – often prohibitively so, as reflected in the sheer number of motions that founder for want of diligence. See, e.g., People v. Boyette, 201 A.D.2d 490, 490-91 (2d Dep't 1994); People v. Latella, 112 A.D.2d 321, 323 (2d Dep't 1985); People v. Rodriguez, 193 A.D.2d 363, 366 (1st Dep't 1993); People v. Suarez, 98 A.D.2d 678, 679 (1st Dep't 1983).

More pointedly, the diligence requirement effectively strips at least some innocent inmates of any remedy whatsoever. Consider a scenario in which trial counsel must choose between competing defenses: say, asserting an alibi or presenting no case and arguing reasonable doubt. Though both strategies have

[2] See People v. Salemi, 309 N.Y. 208, 216 (1955) (adopting stringent six-factor test for relief premised on newly discovered evidence: "(1) It must be such as will probably change the result if a new trial is granted; (2) It must have been discovered since the trial; (3) It must be such as could not have been discovered before the trial by the exercise of due diligence; (4) It must be material to the issue; (5) It must not be cumulative to the former issue; and, (6) It must not be merely impeaching or contradicting the former evidence.") (citations and internal quotes omitted).

pluses and minuses, many competent lawyers will pick the second option, if only to avoid conviction due to skepticism of the alibi's credibility.

Yet on a collateral motion to vacate, an aggrieved defendant could not couch the alibi witnesses as "newly discovered," having known of their existence and identities before trial. See People v. Hamilton, 115 A.D.3d 12, 20 (2d Dep't 2014). Nor could he successfully assail counsel's tactical decision to favor an alibi defense over one sounding in reasonable doubt. See People v. Satterfield, 66 N.Y.2d 796, 799-800 (1985); People v. Baldi, 54 N.Y.2d 137, 148 (1981). As this readily imaginable example shows, New York's habeas regime threatens to deny all recourse to an entire class of potentially innocent prisoners.

Nor can our hypothetical defendant necessarily look to subsection (c), applicable when "[m]aterial evidence adduced at a trial resulting in the judgment was false and was, prior to … entry …, known by the prosecutor or … court to be [so]" (emphasis supplied). With recent advances in forensics – the advent of DNA evidence, the burgeoning science of mistaken identifications and false confessions,[3] the exposure of corrupt crime labs,[4] the impugning of time-honored

[3] See, e.g., J.D.B. v. N.C., 131 S. Ct. 2394, 2401 (2011) ("the pressure of custodial interrogation is so immense that it can induce a frighteningly highly percentage of people to confess to crimes they never committed") (citation and internal quotes omitted); Perry v. N.H., 131 S. Ct. 716, 737-39 (2012) (Sotomayor J., dissenting) ("Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by post-event information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-

investigatory techniques like fingerprint and handwriting analysis[5] – many wrongful convictions involving blameless judges and prosecutors will not come to light until years after trial. Subsection (c) thus offers cold comfort in precisely those circumstances where a backstop against imprisoning the innocent is most imperative.

The necessity and propriety of collateral innocence relief established, an ancillary issue arises as to the appropriate standard of proof. Hamilton is instructive, though not dispositive, in this regard.

As a preliminary matter, the court there required a "prima facie showing of actual innocence" – one of "sufficient … possible merit to warrant … fuller exploration." 115 A.D.3d at 27 (defendant made "a prima facie showing based upon evidence of a credible alibi and manipulation of the witnesses, and the fact

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orchestrated procedures.") (citations omitted); Young v. Conway, 698 F.3d 69, 78-85 (2d Cir. 2012) (drawing on social science literature to affirm habeas writ overturning conviction obtained through unreliable eyewitness identification).

[4] See, e.g., Celeste Katz, IG Finds Big Problems at Nassau County Crime Lab, N.Y. Daily News, Nov. 10, 2011, available at http://www.nydailynews.com/blogs/dailypolitics/ig-finds-big-problems-nassau-county-crime-lab-blog-entry-1.1687780 (as visited 8/20/15).

[5] See, e.g., U.S. v. Johnsted, 30 F. Supp. 3d 814, 815 (W.D. Wisc. 2013) (excluding expert handwriting testimony as "fall[ing] well short of a reliability threshold when applied to hand printing analysis"); U.S. v. Aman, 748 F. Supp. 2d 531, 539-41 (E.D. Va. 2010) (acknowledging that "ACE-V method" of latent fingerprint examination is "not without criticism," court characterized "proposition" that no two prints are alike as "not easily susceptible to scientific validation," describing claimed "zero-percent error rate" in matching as "scientifically [im]plausible") (citations, internal quotes and footnote omitted); cf. U.S. v. Ashburn, No. 11 CR 303 (NGG), __ F. Supp. 3d __, 2015 WL 739928, at *8-*10 (EDNY Feb. 20, 2015) (barring ballistics expert from professing match with absolute certainty).

that the witness against him had recanted") (citations and internal quotes omitted). Leaping that hurdle then triggers an evidentiary hearing as needed. Id.

Ultimately, the Hamilton Court decided, an inmate must prove his innocence by clear and convincing evidence. It reasoned:

> The constitutional violation on a claim of actual innocence is that the defendant is subject to a criminal conviction while he or she is in fact innocent. Mere doubt as to the defendant's guilt, or a preponderance of conflicting evidence as to the defendant's guilt, is insufficient, since a convicted defendant no longer enjoys the presumption of innocence, and in fact is presumed to be guilty.

Id.

From that premise, the court went on to conclude:

> If the defendant establishes his actual innocence by clear and convincing evidence, the indictment should be dismissed pursuant to CPL § 440.10(4), which authorizes that disposition where appropriate. There is no need to empanel another jury to consider the defendant's guilt where the trial court has determined, after a hearing, that no juror, acting reasonably, would find the defendant guilty beyond a reasonable doubt.

Id. at 28.

Hamilton appeared to borrow its clear and convincing evidence test from the Supreme Court's McQuiggin opinion. But as discussed earlier, McQuggin involved a gateway, not substantive, innocence claim designed to overcome a procedural obstacle – in that case, a time bar. It was in this posture that the Court prescribed a showing that "no juror, acting reasonably, would have voted to find [petitioner] guilty beyond a reasonable doubt." 133 S. Ct. at 1928.

Even this standard, however, actually seems closer to a preponderance test than one of clear and convincing evidence. For to "establish a fact" – viz., that any rational jury would have acquitted – "by a preponderance … means to prove that the fact is more likely than not to have occurred." In re Beautisha B., 115 A.D.3d 854 (2d Dep't 2014) (citing Matter of Tammie Z., 66 N.Y.2d 1 (1985)). And the High Court took pains to dub McQuiggin's test "demanding" in its own right. 133 S. Ct. at 1935.

Whatever the appropriate burden – preponderance, clear and convincing evidence or something else – fundamental fairness certainly calls for recognizing post-conviction claims of actual innocence. As the Second Department aptly remarked: "It is abhorrent to our sense of justice and fair play to countenance the possibility that someone innocent of a crime may be incarcerated or otherwise punished for a crime which he or she did not commit." People v. Tankleff, 49 A.D.3d 160, 177 (2d Dep't 2007).

CONCLUSION

The abiding purpose of habeas corpus is to correct manifest injustice. But the Great Writ – essentially codified in CPL § 440.10 – cannot fulfill its office unless able to vindicate our legal system's transcendent goal: punishing the guilty and freeing the innocent. With new false conviction cases seeming to generate almost daily headlines, the issue is more timely and pressing than ever.

Conviction integrity initiatives, like those some district attorneys have implemented, are a commendable development and a step in the right direction. Still, they are no substitute for exacting scrutiny by impartial judges. And with truly persuasive innocence showings exceedingly scarce – "seldom" made, to quote the Supreme Court[6] – the ruling we urge is unlikely to open any floodgates or materially impair the competing interest in preserving the finality of judgments.

For the reasons given, we ask the Court to take this opportunity to formally enshrine actual innocence as a substantive ground for post-conviction relief.

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Respectfully submitted,

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[6] McQuiggan, 133 S. Ct. at 1928.

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