

Honorable Louis L. Buchalter
Clerk
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UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Office of the Clerk
U.S. COURT HOUSE FOLEY SQUARE
NEW YORK, N.Y. 10007

DISTRICT ATTORNEY
NEW YORK COUNTY
ATTN APPEALS BUREAU

Re: PRO SE 76 CIV 0534

Enclosed please a copy of a petition for a writ of habeas corpus filed with this Court on Feb 3, 1976 acopy of the Court's order permitting the petitioner to proceed in forma pauperis, and a copy of our letter to the petitioner

You are further advised that an answering affidavit should be served upon petitioner and submitted to the Pro Se Office within 20 days of the date of filing of the petition

Requests for extension of time in which to answer the petition should be presented to the Judge presiding in Part One, on notice to the Pro Se Office.

YOURS TRULY

RAYMOND F. BURGHARDT
CLERK OF COURT

By JOEL BLUM

DEPUTY PRO SE CLERK

Pro Se Office

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Office of the Clerk
U.S. Courthouse, Foley Square
New York, N.Y. 10007

NORMAN BUTLER
#24091
Box 149
Attica N Y. 14011

Date 2/3/76

Re: PRO SE 76 CIV
0334

Enclosed herewith is a copy of an order dated 1/29/76

This order, and the papers previously received, were filed under the above docket number on 2/3/76. Any further papers you submit should bear this number, and should be submitted to the Pro Se Office.

The DISTRICT ATTORNEY NEW YORK COUNTY has been given 20 days from the above filing date in which to serve and file answering papers.

When an answer is filed you will have 20 days thereafter in which to serve and file a reply to the same.

Yours truly

JOEL BLUM
Deputy Pro Se Clerk

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK

NORMAN BUTLER, Petitioner

-v-

HARLOD J. SMITH, Superintendent
Attica Correctional Facility
Respondent

76 CIV. 0534

Upon reading the annexed affidavit of Norman Butler
requesting that he be permitted to file his/her
petition for a writ of habeas corpus

without prepayment of fees or costs or security
therefor, and it appearing to the Court that this
application should be granted, it is

ORDERED, that he be and is hereby permitted to
proceed in forma pauperis without prepayment of fees
or costs or security therefor, in accordance with
Title 28 United States Code, Section 1915(a)

Dated: New York, N.Y.

JAN 29 1976

Robert J. Harbo
U.S.D.J.

Part One

PETITION FOR WRIT OF HABEAS
CORPUS BY PERSON IN
STATE CUSTODY

76 CIV. 0534

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Norman Butler-----24091-----

Full name and prison number (if any)
of Petitioner & NYGIS Number

Case No.-----
(Clerk to supply)

vs.

Harold J. Smith,--Superintendent-----

Name of Respondent

INSTRUCTIONS - READ CAREFULLY

To be considered by the District Court, this petition must be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized and sworn to). Answers to each applicable question must be concise. If the space is too small for the answer to a particular question, finish it on the reverse side of the page or insert an additional blank page, making clear to which question the continued answer refers.

Every petition for habeas corpus must be sworn to under oath. A false statement of a material fact in the petition may be made the basis of prosecution and conviction for perjury. Petitioners should take great care that their answers are true and correct.

The Filing Fee is \$5.00.

If the petition is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information that will establish whether petitioner will be unable to pay the fees and costs of the habeas corpus proceedings.

The execution and filing of this form shall be deemed a complete substitution for any and all papers heretofore filed in this Court for the same relief.

When the petition is completed, the original and two copies shall be mailed to the Clerk of the District Court for the Southern District of New York.

A copy of the petition, must be served on respondent (SUPERINTENDENT) and a verified (notarized and sworn to) statement of such service must be attached to the petition.

In addition, please be advised that under Title 28 U.S.C., Sec. 2241 (d), a petition for a writ of habeas corpus may be filed in the U. S. District Court for the Southern District of New York, only if you are presently incarcerated within the Southern District, or were sentenced by a Court within the Southern District.

The undersigned, having read and agreed to the foregoing instruction, hereby applies for a Writ of Habeas Corpus pursuant to Chapter 153 of Title 23 of the United States Code and, in support thereof, makes the following statements and answers under oath.

1. Place of detention--~~Attica Correctional Facility, Attica, N.Y.~~

2. Name and location of the court which imposed sentence-----

~~Supreme Court of the State of New York, County of New York~~

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) ~~871/65~~-----

(b)-----

(c)-----

4. The date upon which sentence was imposed and the terms of the sentence:

(a) ~~April 16, 1966~~---~~Life imprisonment~~-----

(b)-----

(c)-----

5. Check whether a finding of guilty was made

(a) after a plea of guilty-----

(b) after a plea of not guilty---~~X~~-----

(c) after a plea of nolo contendere-----

6. If you were found guilty after a plea of not guilty, check whether that finding was made by

(a) a jury---~~X~~-----

(b) a judge without a jury-----

7. Did you appeal from the judgment of conviction or the imposition of sentence?

---~~Yes~~-----

8. If you answered "yes" to (7), list

(a) the name of each court to which you appealed:

1. ~~New York Supreme Court, Appellate Division, First Department.~~

11. ~~Court of Appeals, State of New York~~-----

111. ~~Supreme Court of the United States~~-----

(b) the result in each such court to which you appealed:

1. Appellate Division-First Department: Unanimously affirmed.

Court of Appeals: Affirmed, all concur

11. Supreme Court denied certiorari

111.

(c) the date of each such result:

1. April 18, 1968

11. April 16, 1969

111. October 22, 1969

(d) if known, citations of any written opinion or orders entered pursuant to such results:

1. 289 N.Y.S.2d 384

350 N.Y.S.2d 935

11. 90 S.Ct. 173

111.

9. If you answered "no" to (7), state your reasons for not so appealing:

(a)

(b)

10. State concisely all the grounds on which you base allegation that you are being held in custody unlawfully:

(a) The exclusion of all spectators and members of the press during the testimony of prosecution witnesses Timber Lake and Sullivan deprived the defendant of his statutory and constitutional right to a public trial guaranteed by the sixth and Fourteenth Amendments to the United States Constitution.

(b) The exclusion of all spectators and members of the press during the testimony of prosecution witnesses was not within the court's inherent power and was not authorized by statute and violated defendant's rights by the New York State Constitution.

(c) The trial court's exclusion of all spectators and members of the press during the testimony of prosecution witnesses prejudiced the defendant and the exclusion orders rested upon no credible showing of need for them.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- d. The jury was inflamed by the prosecutor's comments and evidence of the defendant's Black Muslim beliefs and practices and activities which was designed to show defendant(s) might possibly have a motive to kill the victim.
- e. The trial court by rebuking defense counsel in the presence of the jury, deprived the defendants of an impartial trial.
- f. The defendants were entitled to a list of the witnesses who testified before the grand jury and a list of witnesses intended to be called by the People and all the people interviewed by the police in connection with the case and were denied this.
- g. The trial judge abused his discretion in refusing to require the prosecution to furnish a list of the witnesses who had testified before the grand jury.

(a) The exclusion of all spectators and press during the testimony of Ronald Timberlake and FBI agent Sullivan was error for many reasons. The trial court correctly said it did not have the power to deny the defendant (s) a public trial simply because Timberlake said he was afraid to testify but reversed, and offered to arrange police protection for the witness-Tr 1273 81, itself and over the objections of all the defendants, ordered the court room cleared, Tr 1287, 1292-99, and even allowed this to continue and even through the testimony of the FBI agent who being an FBI agent, surely was not afraid. The court could not give any reasons for the continued closing of the trial while the FBI agent testified.

(b) The court did not have the power to exclude people and therefore renders this portion of the trial private. It is stated by the judge that he did not have the power, then he reversed his position, TR. 1287, 1292-99. There is no room in the judicial powers to hold a secret trial in this time period.

(c) In order to have a secret trial, the court must rest its decision on some facts to justify its decision. In this case there is no showing that the FBI agents or the other witnesses would be in danger. Only one witness said he received a telephone threat from unknown sources. TR 1282. This statement was not under oath and not verified.

12. Prior to this petition have you filed with respect to this conviction

(a) any motion in State court for a new trial?--No-----

(b) any petition in State court for a writ of error coram nobis or any motion in the nature of coram nobis?

-----No-----.

(c) any petitions in State or Federal courts for habeas corpus?--No-----

- d. The trial was unfair and prejudiced the defendants when the prosecution was allowed over objections to infer (motive) from the defendants religious faith TR 170. In any case the jury must find (individual) guilt from evidence, but from this case it was evident that the wrongfully injected, inferred motive that the Black Muslim Mosque of New York City felt that Malcolm X was a defector and should be killed did inflame the jury and cause irreparable damage thus denying defendants a fair trial.
- e. Many times during the trial the judge rebuked defendants counsel in the presence of the jury. One of many times on record the judge during the questioning of a witness remarked to a defendants lawyer that the examination was unduly prolonged, combined with its gratuitous sarcasm, "Now ask him whether he told the elevator operator" TR759. Could not but rob the line of inquiry of its effect. Also the judge told the lawyer to be seated, also that the lawyer's action will be discussed at the conclusion of the trial TR 3637-38.
- f. The defendant was entitled to a list of the witnesses according to basic fairness. The motions were denied, before trial, and finally just twelve days before trial a list of witnesses was given TR 1795-98. The defendant's indigence and the complexity at the Audubon Ballroom on the day in question constituted an irrefutable showing of defendant's need for the list months before the trial.
- g. A list of witnesses before the Grand Jury and the witnesses the People planned to call should be granted in every case where the defendant can show the needs of this to help him prepare for trial. The prosecutor's bland assurance that nothing he had would be helpful is just not enough. Only a defendant or his counsel should decide whether information will help or hurt.

(d) any petitions in the United States supreme Court for certiorari other than petitions, if any, already specified in (c)? No

(e) any other petitions, motions or applications in this or any other court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application

(a) the specific nature thereof:

1.-----

11.-----

111.-----

1V.-----

(b) the name and location of the court in which each was filed:

1.-----

11.-----

111.-----

1V.-----

(c) the disposition thereof:

1.-----

11.-----

111.-----

1V.-----

(d) the date of each such disposition:

- 1.-----
- 11.-----
- 111.-----
- 1V.-----

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- 1.-----

- 11.-----
- 111.-----

- 1V.-----

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed?

No-----

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

- 1.-----

- 11.-----
- 111.-----

(b) the proceedings in which each ground was raised:

- 1.-----
- 11.-----

- 111.-----

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a)

(b)

(c)

17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? Yes-----

(b) your trial, if any? Yes-----

(c) your sentencing? Yes-----

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes-----

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes-----

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

1. ?-----

(b) J.B. Williams of Brooklyn, New York-----

11. (e) J.B. Williams of Brooklyn, New York-----

(d) Edward Bennett Williams, Harold Ungar
100 Hill Building, Washington, D.C. 20006-----

111.-----

(b) the proceedings at which each such attorney represented you:

1. (a) Arraignment-----

(b) Trial-----

11. (c) Appellate Division-----

(d) Court of Appeals-----

111. (e) Supreme Court of the United States-----

19. If you have any additional information relevant to this application, not covered by the foregoing questions and answers, add the same below.

20. If you are seeking leave to proceed in forma pauperis., have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? Yes-----

Norman Butler

Signature of Petitioner

State of New York

X

County of Wyoming

X ^{ss}

Norman Butler-----, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

Norman Butler

Signature of petitioner

SUBSCRIBED and SWORN TO before me this

13-----day of January, 1976-----
(month) (year)

David J. Carg-----
Notary Public

My commission expires

3-----30-----76-----
(month) (day) (year)

FORMA PAUPERIS AFFIDAVIT

(see instructions, page 1 of this form
(make a general statement explaining your financial status
and why you are unable to pay the costs of prosecuting this
action.)

I have been in prison for eleven years
now and unable to acquire the kind of
money that it takes to get good counsel.
Therefore, I am seeking the court's assis-
tence.

Norman 3x Butler

Signature of Petitioner

STATE OF NEW YORK

X

ss

COUNTY OF

X

Norman 3x Butler, being first sworn under oath,
presents that he has subscribed to the above and does state that
the information therein is true and correct to the best of his
knowledge and belief.

Norman 3x Butler

Signature of Petitioner

SUBSCRIBED and SWORN TO before me this

13 day of Jan, 76
(month) (year)

David J. Long

Notary Public

My commission expires

3 30 76
(month) (day) (year)

AFFIDAVIT OF SERVICE

-----, being duly sworn, states that
he has served a copy of the attached petition upon -----
-----.

Wm. 3x Butler

Signature and Prison Number
(if any)

SUBSCRIBED and SWORN TO before me this

13 day of Jan. 76
(month) (year)

Daniel J. Culp
Notary Public

My commission expires

3 30 76
(month) (day) (year)

IF NOT DELIVERED IN 5 DAYS

RETURN TO

ATTICA CORRECTIONAL FACILITY

ATTICA, N. Y. 14011

Norman Butler

24091



District Attorney
Richard H. Kuh
155 Lennard Street
New York, New York 10013

2/3
BD
Jury
Karp
ca 34
7910224

NORMAN BUTLER
#24091
Box 149
Attica, New York 14011
Petitioner Pro Se

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

United States of America, ex rel.
NORMAN BUTLER,

Petitioner,

-vs-

HAROLD J. SMITH, Superintendent
of Attica Correctional Facility,

Respondent.

AFFIDAVIT FOR ENTRY

OF DEFAULT

Pro Se 76 civ 0534

STATE OF NEW YORK)
COUNTY OF WYOMING) ss.:

NORMAN BUTLER, being duly sworn,

deposes and says:

1. I am the petitioner herein.
2. The petition herein was filed on the third day of February, 1976.
3. The court files and the records herein show that the respondent was served by the United States Marshal with a copy of the petition and the order herein on the date of filing, February 3, 1976 .
4. More than 20 days elapsed since the date on which the petitioners papers were filed and the respondent herein was served with a copy of the petition and order, excluding the date of service.
5. The respondent herein failed to answer or otherwise oppose petitioner's application for habeas corpus relief, or serve a copy of any answer or other defense which he might have had upon affiant.

6. It is now March 2, 1976, and the respondent still has not seen fit to file his affidavit in opposition.

7. At this time the petitioner most strenuously would oppose any further delay or applications by the respondent for extension of time to file.

posts
WHEREFOR, petitioner ~~renews~~ his application for entry of default against the respondent in accordance with Rule 55(a) of the Federal Rules of Civil Procedure for their failure to answer or otherwise defend as to petitioner's application.

Norman Butler
NORMAN BUTLER

and sworn
Subscribed to before me
this 3rd day of March, 1976

Robert C. George
NOTARY PUBLIC

ROBERT C. GEORGE
Notary Public, State of New York
Qualified in Wyoming County
My Commission Expires March 30, 1977

NEW YORK COUNTY
CLERK OF THE COURT

RECEIVED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NORMAN BUTLER,

Petitioner,

-against-

Harold J. Smith, Superintendent,
Attica Correctional Facility,

Respondent.

PRO SE 76 Civ. 0534

ORDER
and
AFFIDAVIT

Form 39-10M-702209 (75) 346

ROBERT M. MORGENTHAU
District Attorney
New York County
155 Leonard Street
New York, New York 10013
(212) 732-7300

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ORLANDO DIAZ

being duly sworn,

deposes and says, that on the 10th day of March ,

19 76, he served the within PROPOSED ORDER and SUPPORTING
AFFIDAVIT

on NORMAN BUTLER

~~Attorney for~~ Respondent Appellant, by enclosing a true copy thereof in a securely

sealed postage paid wrapper and depositing the same in a Post-Office box
regularly maintained by the United States Government at No. 100 Centre
Street, in the Borough of Manhattan, City of New York, directed to said

Appellant
~~Attorney~~ at

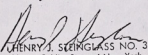
Box 149
Attica Correctional Facility
Attica, New York 14011

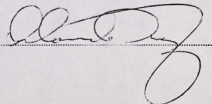
, that being the

address within the State designated by him them for that purpose on the
preceding papers in this action.

Sworn to before me, the 10th

day of March, 1976. }


HENRY J. SPRINGGLASS NO. 3831277
Notary Public, State of New York
Qualified in Orange County
My Commission Expires March 30, 1978



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
NORMAN BUTLER,

Petitioner, :

Pro Se

-against-

: 76 Civ. 0534

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

: ORDER

Respondent.
-----X

UPON reading the annexed affidavit of ALLEN ALPERT
requesting that the time for respondent to reply to the
petition in the above-captioned matter be extended until
March 30, 1976, and it appearing to the Court that this
application should be granted, it is

ORDERED, that the time for respondent to reply to
the petition in the above-captioned matter be extended to
March 30, 1976.

Dated: New York, New York
March , 1976

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
NORMAN BUTLER,

Petitioner,

Pro Se

-against-

: 76 Civ. 0534

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

: AFFIDAVIT

:
Respondent.
-----X

ALLEN ALPERT, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice before this Court. I am an Assistant District Attorney, of counsel to ROBERT M. MORGENTHAU, District Attorney of New York County, and am assigned to respond to the above-captioned matter.

2. On February 5, 1976, the central clerk's office in the Office of the District Attorney of New York County received Norman Butler's petition for a writ of habeas corpus.

3. Responses to petitions for writs of habeas corpus are handled by the Appeals Bureau of the District Attorney's Office.

4. However, due to an administrative error which

caused the instant petition to be misfiled, it did not reach the Chief of the Appeals Bureau until today, when it was immediately assigned to me.

5. In light of the issues raised in this action, I will need until March 30, 1976 to complete the response to the petition in the above-captioned matter.

WHEREFORE, it is respectfully requested that the time for respondent to reply to the petition be extended until March 30, 1976.

ALLEN ALPERT

Sworn to before me this
10th day of March, 1976

Notary Public

HENRY J. STEINGLASS NO. 3831277
Notary Public, State of New York
Qualified in Orange County
My Commission Expires March 20, 1977

NYC.gov/records 24
NYC.gov/records NYC.gov/records NYC.gov/records NYC.gov/records NYC.gov/records
Norman Butler
24-091
Box 149
Attica, New York 14011

NEW YORK COUNTY

DISTRICT ATTORNEY'S OFFICE

ALLEN ALPERT, ASSISTANT DISTRICT ATTORNEY

155 LEONARD STREET

NEW YORK, NEW YORK 10013
NYC.gov/records NYC.gov/records NYC.gov/records NYC.gov/records NYC.gov/records
NYC.gov/records NYC.gov/records NYC.gov/records NYC.gov/records NYC.gov/records



STATE OF NEW YORK)
COUNTY OF WYOMING) SS.:

Robbie Alpert
name
See me
please

Martin FitzPatrick being duly sworn,
deposes and says, that on the _____ day of _____,
1976, he served the within AFFIDAVIT TO FURNISH THE COMPLETE RECORD,
AND TIME EXTENSION
on DISTRICT ATTORNEY, ALLEN ALPERT

Respondent, by enclosing a true copy thereof in a securely
sealed postage paid wrapper and depositing the same in a Post-
Office box regularly maintained by the United States Government
at Box 149 Attica, New York, 14011, Town of Attica, directed to
said Respondent's at NEW YORK COUNTY

DISTRICT ATTORNEYS OFFICE c/o Allen Alpert

155 Leonard Street

New York, New York 10013

THAT being the address within the State designated by them for
that purpose on the preceding papers in this action.

Sworn to before me, the 12th

day of April, 1976.

Robert E. Alexander

Martin FitzPatrick

ROBERT E. ALEXANDER
Notary Public, State of N.Y. Commission Expires Mar 30, 1978

871/65

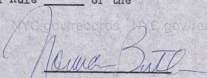
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----- :
NORMAN BUTLER, : NOTICE OF MOTION
 :
Petitioner, : Pro Se
 :
-against- :
 : 76 Civ. 0534 (JK)
HAROLD J. SMITH, Superintendent, :
Attica Correctional Facility, :
Respondent. :

State of New York)
) ss.:
County of Wyoming)

NOTICE is hereby given that the attached motion will
come on for hearing before this Court at _____ o'clock, _____
M., _____, 19____, under the provisions of Rule _____ of the
Court.


Appellant Pro Se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- :
NORMAN BUTLER, : AFFIDAVIT IN SUPPORT
 : OF MOTION TO FURNISH
 Petitioner, : THE COMPLETE RECORD
 : AND FOR AN EXTENSION
 -against- : OF TIME
 HAROLD J. SMITH, Superintendent, :
 Attica Correctional Facility, :
 Respondent. :

Pro Se

State of New York) 76 Civ. 0534 (jk)
 ss.:
County of Wyoming)

NORMAN BUTLER, being duly sworn, deposes and says;

1. That he is the Petitioner in the above action.
2. That on March 10, 1965, a New York County Grand Jury returned a one count indictment against the Petitioner and others.
3. That the trial commenced on December 6, 1965 (MARKS, J., and a jury).
4. That Petitioner and others were found guilty of Murder in the First Degree on March 10, 1966.
5. That on April 14, 1966 Petitioner and others were sentenced to life imprisonment.
6. That on May 22, 1968, the Appellate Division, First Department affirmed the judgments of conviction. (People v Hagan 29 A.D.2d 931 (1st Dept., 1968)).
7. That on April 16, 1969, the Court of Appeals unanimously affirmed the judgments (People v Hagan, 24 N.Y.2d 395 (1969)).
8. That on October 27, 1969, the United States Supreme Court denied certiorari. (Hayer A/K/A/ Hagan, et al. v New York, 396 U.S. 886).
9. That on August 8th, 1975 the Petitioner put in a motion to the Supreme Court New York County requesting the trial record to be furnished free of charge to him.

Page two (2) of the Affidavit in support of motion

10. That the above motion was never ruled on.
11. That on February 3rd, 1976 a Federal Habeas Corpus Petition was filed in the United States District Court of the Southern District of New York.
12. That on March 3rd, 1976 the Petitioner served an affidavit for entry of default in the above action (76 Civ.0534).
13. That on March 10th 1976, the proposed order and supporting affidavit of Allen Alpert requesting a extension of time until March 30, 1976 was put before the court.
14. That an unsigned and undated order was received from the court granting the extension until March 30, 1976.
15. That on April 2nd, 1976 the Petitioner received the Respondents brief.
16. That the Respondents brief contains 57 pages plus appendix.
17. That the Petitioner filed the original petition on the only papers he has available which are:
 1. Brief for appellants for the Appellate Division.
 2. Brief for appellants for the Court of Appeals.
 3. Brief of the petition for writ of certiorari to the United States Supreme Court.NOTE: It must be noted that there was no rebuttal briefs available.
18. That on page three (3) of the respondents brief he states: "Petitioner more than six years after the United States Supreme Court denied certiorari, commenced the instant proceeding fo a writ of habeas corpus in the United States District Court."
20. It must be pointed out that petitioner is not versed in law and has no funds and could not find anyone to work on his case.
21. That the respondent uses the complete trial transcript and in fact uses over 247 references to it which covers the complete record, exhibit etc.

22. That it must be pointed out that petitioner has no way of reading the complete transcript to respond to the respondents brief that possibly has errors on purpose or otherwise.

23. That the petitioner is being denied equal protection of the law as required by the Fourteenth Amendment, by denial of record.

24. That the petitioner is being denied due process and at this time and this court must protect the petitioners rights and make these proceedings conform ^{to} the Due Process Clause of the Fourteenth Amendment.

25. That this petitioner prays this court grant this motion that the respondent Allen Alpert Assistant District Attorney of New York County furnish this petitioner with the complete record including all pre-trial proceedings etc.

26 That this petitioner prays this court grant this motion for extension of time to receive the complete record and to have a reasonable time to prepare the answering brief.

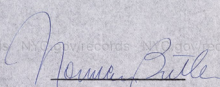
Sworn to before me,

this 12 day of April, 1976.

NOTARY PUBLIC

ROBERT E. ALEXANDER

Notary Public, State of New York
My Commission Expires Mar 30, 1978


NORMAN BUTLER
Box 149 # 24091
Attica, New York
14011

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- :
NORMAN BUTLER, : MEMORANDUM OF LAW
 :
 Petitioner, :
 :
 -against- : Pro Se
 :
 HAROLD J. SMITH, Superintendent, : 76 Civ. 0534 (JK)
 Attica Correctional Facility, :
 :
 Respondent. :

ARGUMENT

WHEN RESPONDENT FILES A 57 PAGE BRIEF AGAINST THE PETITIONER AND THE PETITIONER HAS NO WAY TO READ THE OVER 247 REFERENCES TO THE COMPLETE TRIAL RECORD, THIS DENIES THE PETITIONER ADEQUATE AND EFFECTIVE REVIEW BECAUSE HE DOESN'T HAVE ENOUGH MONEY TO BUY THESE TRANSCRIPTS. IN FACT HE IS CUT OFF FROM EFFECTIVELY APPEALING HIS CASE. AND ACCORDING TO THE UNITED STATES SUPREME COURT THE FOURTEENTH AMENDMENT WEIGHS THE INTERESTS OF RICH AND POOR CRIMINALS IN EQUAL SCALE, AND ITS HAND EXTENDS AS FAR TO EACH.

A case parallel to the one at bar is Griffin v People of the State of Illinois, 76 S.Ct. 585 which established the "Griffin Doctrine" that brings forth the central aim of judicial systems is to supply both equal protection and due process to all people charged with crime and ALL must stand on an equality before the bar of justice. In the case at bar the petitioner does not stand equally before the bar of justice just as Griffin did not. In Griffin, Crenshaw and him were convicted of armed robbery in Cook County, Illinois. They filed a motion to the trial court asking for the complete and entire record be given to them free. Griffin claimed if the court failed to provide them it would be a violation of Due Process and Equal Protection Clauses of the Fourteenth Amendment. The trial court denied the motion without a hearing. Griffin then filed

page two (2) of the memorandum of law

a petition under the Illinois Post-Conviction Hearing Act and this petition was dismissed without hearing any evidence. The Illinois Supreme Court affirmed. The United States Supreme Court granted certiorari. 75 S.Ct. 786. The sole question the court decided was because Griffin and his partner had no money to buy the complete trial transcripts did this violate the due process or equal protection clauses of the Fourteenth Amendment? The court said yes.

On page 589 we find the following:

"Providing equal justice for poor and rich, weak and powerful alike is an age old problem. 'Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the mighty: BUT in righteousness shalt thou judge thy neighbor.'" Leviticus, c. 19, v. 15."

The United States Supreme Court in this famous Griffin case continued

on page 590 where it stated :

"Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside"

In the instant case the petitioner always has maintained his innocence and at this point be given a chance for an adequate review of his complete trial record.

In the case of Askridge v Washington State Bd. of Prison T.&P.

78 S.Ct. 1061, the defendant was convicted of murder in 1935 and sentenced to life imprisonment. He filed a timely notice of appeal and moved for a free transcript. This was denied. Petitioner then moved in the State Supreme Court for a writ of mandate ordering the trial judge to have a transcript furnished for the prosecution of his appeal. This was denied. In 1956 petitioner applied for habeas corpus in the Washington Supreme Court charging that failure to furnish a free transcript of the proceedings had violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. This was denied. Then the United States Supreme Court granted certiorari 77 S.Ct. 683. The court

page three (3) of the memorandum of law

held on page 1062 that:

"The State concedes that the reporter's transcript from the 1935 trial is still available. In Griffin v People of the State of Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, we held that a State denies a constitutional right guaranteed by the Fourteenth Amendment if it allows all convicted defendants to have appellate review except those who cannot afford to pay for the records of their trials. We held that Washington has denied this constitutional right here. But here, as in the Griffin case, we do hold that, '(d)estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.' "Griffin v. People of the State of Illinois, 351 U.S. 12, 19, 76 S.Ct. 585, 591.

The court said that the judgment of the Washington Supreme Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

Also we find in the case of Draper v. State of Washington, 83 S.Ct. 774, Decided March 18, 1963. In this case the petitioners who were indigent, were convicted of two counts of robbery and sentenced to two consecutive 20-year terms after a three-day trial ending on September 14, 1960, during which they were represented by court-appointed counsel. Their motions for new trials were denied. They filed timely notices of appeal and motions requesting the trial judge to order preparation of the transcript free of charge. On November 28, 1960 petitioners were brought from the State Penitentiary for the hearing and after the prosecutors argument indicated orally that he would deny their motions. On December 12 he entered an order in which he stated that:

"That the assignments of error as set out by each defendant are patently frivolous..."

Petitioners then went to the Supreme Court of Washington where that court quashed the writ. But the United States Supreme Court held on page 779 that:

"In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds-the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions."

The Court continued with a lengthy opinion and reversed his conviction.

page (4) of the memorandum of law

In the case of Johnson v United States, 77 S.Ct. 550 decided March 4, 1957 The United States District Court for the Eastern District of New York denied a leave to appeal in forma pauperis and certified that appeal was not taken in good faith. The defendant then petitioned the United States Court of Appeals for the Second Circuit and that court also denied. The United States Supreme Court vacated the judgment and remanded the case holding that certification by District Court that appeal was not taken in good faith was not final or conclusive and that, since defendant challenged such certification, Court of Appeals must afford him aid of counsel, unless he insisted on acting as his own counsel, and must assure him adequate means of presenting fair basis for determining whether District Court's certification was warranted. In the case at bar the petitioner must have a adequate means for researching his case and therefore needs the transcripts. In Johnson the Court went on to say on page 551 that: "...and since it does not appear that the Court of Appeals assured petitioner adequate means of presenting it with a fair basis for determining whether the District Courts certification was warranted the judgment must be vacated..."

In the case of Ellis v United States, 78 S.Ct. 974, decided May 26, 1958, the defendant was convicted of housebreaking and larceny. The Court of Appeals denied petitioner leave to appeal in forma pauperis. The United States Supreme Court granted certiorari and held that an issue on appeal as to probable cause for arrest could not necessarily be characterized as frivolous and application for leave to appeal in forma pauperis should have been granted. The Ellis case is parallel to the petitioners case as his contentions are of grave concern to the principle of fairness in the appeal process.

page (5) of the memorandum of law

The United States Supreme Court in Burns v State of Ohio, 79 S.Ct. 1164 decided June 15, 1959 the defendant was convicted of burglary and sentenced to life imprisonment. Although the issue in this case is his inability to pay for the cost of filing and docket fees it is similar to the case at bar as if the complete trial record is not made available to petitioner he will be denied a basic right. In the Burns case the judgment was vacated. On page 1169 the court said:

"The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law." In the case at bar the petitioner is in fact at this point in time being denied Equal Justice Under Law.

A very interesting case that should be considered by this court is United States ex rel. Ellington v Conboy, 333 F. Supp. 1318 decided by the United States District Court on October 6, 1971. There were many issues in this case-exhaust state remedies-Miranda rights-eye-witness identification, and also the question of a free transcript. In this case he was issued a certificate of probable cause. He did not exhaust his State remedies where the petitioner at bar did. Also in point we find on page 1321 the following:

"With respect to collateral attack, as distinguished from appeal, there is no showing that before making his application for a writ of habeas corpus petitioner sought to obtain a transcript for that purpose in the State Court."

It is pointed out that the petitioner at bar DID seek to obtain a transcript by a notarized legal motion and this was never ruled on.

In People v Pride, 170 N.Y.S.2d 321, decided January 16, 1958 the defendant was convicted for assault in the third degree. The Supreme Court, Special Term, Erie County entered an order dismissing the appeal and defendant appealed. The Court of Appeals held that where dismissal of defendants appeal was due to his inability, due to indigence, to serve necessary return upon the district attorney,

page (6) six of the memorandum of law

such dismissal amounted to a denial of defendant's constitutional rights to fair and equal treatment. The case at bar is parallel with the Pride case. The order was reversed and Pride was granted the relief. The court said on page 323:

"Unequivocally and with emphasis upon the importance and fundamental nature of the right to appellate review, the courts on each occasion held that the making of such a record and its availability to defendant-appellant were absolute requisites and concomitants of the right to review and that adequate returns would have to be made by the lower courts and defendant granted access to them through this requirement was not expressly mandated by the pertinent statute (People v Giles, supra, 152 N.Y. at page 139, 46 N.E. at page 327) and though the expense of preparing such a record might fall upon the Trial Judge himself (People v Schenkel, supra)....Therefore, without the opportunity at least of viewing a transcript of the minutes free of charge and making his own copy or copies necessary for the return, it would be impossible for defendant to perfect his appeal."

It is submitted that the above quote is in direct point with the case at bar and the relief sought in this motion should be granted.

In the case of People v Montgomery, 278 N.Y.S.2d 226, 18 N.Y.2d 993, decided December 30, 1966 the New York State Court of Appeals reversed the judgment and ordered a new trial where the defendant had been denied the minutes of the preliminary hearing without charge to him. The court stated on page 227:

"When the State constitutionally or statutorily affords a defendant a right, the exercise thereof cannot be conditioned upon the defendant's ability to pay (People v Hughes, 256 N.Y.S.2d 803; People v Pride, 170 N.Y.S.2d 321; Long v District Ct. of Iowa, 87 S.Ct. 362; Lane v Brown 83 S.Ct. 768; Douglas v People of the State of California 83 S.Ct. 814; Gideon v Wainwright, 83 S.Ct. 792; Griffin v People of State of Illinois 76 S.Ct. 585)."

Although this case had as its main issue a preliminary hearing issue it is pointed out that the petitioner at bar also requests this plus the complete transcript.

page seven (7) of the memorandum of law

In the case at bar the petitioner has been in prison since 1965 and has no money or assets. In a less serious situation, being in prison only two years, we find the case of People v Ballott, 286 N.Y.S.2d 1, decided November 30, 1967, In Ballott the defendant wanted to buy the minutes of a previous trial. He was denied this. But the New York State Court of Appeals reversed his conviction and ordered a new trial because as stated on page 4:

"In a case such as the present-where the first indictment had been dismissed because of insufficient evidence of identity and the first trial had resulted in a mistrial because the jury had been unable to agree on a verdict-the defendant's need for the minutes of the earlier trial is particularly obvious. Under the circumstances, the defense was "entitled" to procure the testimony previously given by the witnesses who were again to testify against him in order to enable him to conduct an effective cross-examination.(See, e.g., People

v Rosario, 213 N.Y.S.2d 448; People v Malinsky, 262 N.Y.S.2d 65.) Without such testimony a defendant is deprived of a substantial right. And, where he is an indigent, the State must make the testimony available to him. (See People v Montgomery, 278 N.Y.S.2d 226; People v Jaglom 269 N.Y.S.2d 405; Williams v United States, 358 F.2d 325 (9th Cir.); Peterson v United States, 351 F.2d 606 (9th Cir.); People v Miller, 35 111.2d 615, 221 N.E. 2d 653. ...Since this inability resulted in a deprivation of a substantial right, he was denied equal protection of the laws. See Griffin v People of State of Illinois 351 U.S. 12, 76 S.Ct. 585, 100L.Ed. 891.)

Like Ballott this petitioner needs the complete transcript of the testimony of the witnesses who the District Attorney exhaustingly uses in his brief against the petitioner.

In the case of Coppedge v United States, 82 S.Ct. 917, decided April 30, 1962, the petitioner was convicted in a federal district court and applied for leave to appeal which was denied. He was granted a writ of certiorari and the United States Supreme Court held that defendant was unable to prove charge because of refusal to permit him to examine grand jury proceedings would alone have warranted allowance of appeal in forma pauperis. It is pointed out that the case at bar is similar because if this petitioner is not allowed the complete transcripts he like Coppedge will be denied a basic constitutional right.

page (8) eight of the memorandum of law

Petitioner Butler finds himself in a like situation that Willie Wade Jr. found himself. Butler can not even borrow a copy of the complete record and petitioner Wade could not either. In that case Wade Jr. v Wilson, 90 S.Ct. 501, Decided January 13, 1970 Wade and his co-defendant Pollard were convicted like Butler of murder in 1960 and sentenced to life imprisonment. Pollard received the trial transcript and refused to turn it over to Wade. Wade won his case in the United States Supreme Court with the rule that Wade be given access to them. In the case at bar Petitioner Butler needs the complete record immediately to answer the District Attorneys brief which is extensive and covers the complete trial transcript. For these reasons it is important that this court consider this petition and realize that it is difficult for a State prisoner to draw up a petition to present to this court to compare with a lawyer who has had formal training. It is prayed that this court grant the motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE PEOPLE OF THE STATE
OF NEW YORK
NORMAN BUTLER,
Petitioner,
against

HAROLD J. SMITH, SUPERINTENDENT
ATTICA CORRECTIONAL FACILITY,

Respondent.

AFFIDAVIT IN RESPONSE TO
PETITIONER'S MOTION

ROBERT M. MORGENTHAU
DISTRICT ATTORNEY

155 Leonard Street
Borough of Manhattan
New York City
(212-732-7300)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
NORMAN BUTLER,

Petitioner,

-against-

HAROLD J. SMITH, SUPERINTENDENT,
ATTICA CORRECTIONAL FACILITY,

Respondent,

:
Pro Se
76 Civ. 0534
:

AFFIDAVIT IN RESPONSE
: TO PETITIONER'S MOTION

-----X
STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ALLEN ALPERT, being duly sworn, hereby deposes and
says:

1. I am an Assistant District Attorney, of counsel
to ROBERT M. MORGENTHAU, District Attorney of New York County,
attorney for respondent herein.

2. By motion, petitioner has requested that the
record of his trial (New York County Indictment Number 871/
65) be provided to him and that the time for his reply to
respondent's memorandum in opposition to his petition for a
writ of habeas corpus be enlarged. This affidavit is respect-
fully submitted in response to petitioner's instant motion.

259 COTTON

3. In paragraphs 9 and 10 of his instant affidavit, petitioner states that in August 1975 in Supreme Court, New York County, he moved to be provided, free of charge, with the record of his trial, and that this motion was never ruled on.

4. I have examined the official court papers which pertain to the above-cited indictment and have found no indication that petitioner ever made such a motion.

5. I am further informed by the clerk's office of the New York County District Attorney and of the Supreme Court of New York County that they have searched their respective records and have each found no indication that petitioner has submitted such a motion.

6. In any event, respondent is no longer in possession of any copies of the record of this matter. Following completion of the respondent's memorandum, at the request of Judge Whitman Knapp, I delivered respondent's sole copy of the printed record on appeal to His Honor, for His Honor's use in the consideration of this petition. Since this is the only copy of the record available to respondent, and since respondent anticipates that its use will be required in the future, respondent strenuously objects to the request that it be turned over to petitioner.

7. Respondent respectfully suggests that petitioner be directed to obtain the record from one or both of the attorneys who represented him at trial or from the attorneys who represented him on appeal.

8. Respondent takes no position with respect to petitioner's motion for an extension of time to reply to respondent's memorandum.

Respectfully submitted,

s/
ALLEN J. ALPERT
Assistant District Attorney

Sworn to before me the
19th day of April, 1976

s/

Notary Public

HENRY J. STEINGLASS NO. 3831277
Notary Public, State of New York
Qualified in Orange County
My Commission Expires March 31, 1978 *17*

Stevens, J. P., Steuer, Tilzer, Petitioner, v. NEW YORK STATE Liquor Authority. The petition sought to be reviewed in and, without costs or disbursement of improper concealment of fact. In our view, however, the failure of the licensee, is the unfair, misplaced confidence in and to whom he dealt. The binder presented to by Kenneth Beyers was \$22,000. The subsequent price and a disproportionate followed by the acquisition of a Trading Company, are facts. The failure to do so deprived ascertain if any of its rules were the opinion that the \$13,000 was a purchase price and therefore the transaction thereafter was and would be readily revealed Kenneth Beyer is the beneficiary his disposal the funds necessary and secured by the mortgage record to indicate that he is other who could credibly conduct a involved a cancellation rather than the immediate filing of a new it satisfied that there is no unre-such application, possibly condi- Concuer—Stevens, J. P., Steuer,

OWARD JOHNSON'S INCORPORATED 18, 1967, herein appealed from, in the exercise of discretion, with the motion denied. The accident occurred in 1960. The case was Plaintiff allegedly discovered the for the motion to amend and to approximately 12 months there-delay (*Koi v. P. S. & M. Catering Co.*, 25 A D 2d 988; *de los Reyes v. P.*, 25 A D 2d 988; there is no affidavit of al connection between the accident ur—Stevens, J. P., Eager, Steuer,

Respondent, v. NEW YORK STATE Liquor Authority. Judgment entered on December 20th, Respondent State Liquor Authority's action for an entertainment liquor case upon petitioner's representing, gals would completely divest them- owned by them, reversed, on the law er reconsideration, without costs or

disbursements. On the basis of the present record it appears that Special Term acted upon facts which were not before the Authority when it made its determination. Upon the remand the Authority may consider petitioner's application *de novo*. Concuer—Capozzoli, Tilzer, McGivern and McNally, JJ.; Steuer, J. P., dissents in the following memorandum: I dissent. The disposition made by Special Term was well warranted by the facts. Respondent has refused petitioner's application for a liquor license for its premises located at 47th Street and Broadway. There can be no doubt that the application was refused because of the nature of the enterprise to be carried on in the premises sought to be licensed. The petitioner conducts a dance hall on the second floor of the building. On a raised platform inside a seven-foot window, and plainly visible from the abutting sidewalk, several girls perform a so-called "Go-Go" dance. One could very well sympathize with respondent's aversion of this type of operation and accord with their refusal to further it by granting it a license. But neither the Authority nor this court in passing on its ruling can allow its views on the desirability of the operation to control. In the 17 days from August 12 to August 29, 1967, eight summonses were issued against petitioner for various violations of the Administrative Code in connection with maintaining the premises in this way, and all were dismissed. It is now no longer contended that the operation offends against any law or ordinance. While this does not make it any more palatable, it does remove the operation from the prohibited class. Respondent now concentrates its attack on a different front. Relying on the incontestable fact that these premises are located in a sensitive area and will require strict supervision if they are to remain orderly, respondent claims that the other activities of petitioner's principals will prevent them from giving the necessary attention to that supervision. In this connection respondent points to the fact that said principals are currently the owners and operators of a billiard parlor on West 79th Street. When this point was raised at Special Term, petitioner's principals promptly offered to dispose of their interest in the billiard parlor and to consent to make the issuance of the license conditional on their so doing within 90 days. Respondent refused to accept the condition, asserting its right to review the application *de novo* in the light of this change of circumstance. The majority of this court agrees with this position. It must be obvious that the respondent's position is a mere subterfuge for delay and that the reversal of Special Term countenances the subterfuge. The respondent has raised an objection. That objection has been obviated. Plainly the situation in regard to the issuance of a license is as if the objection had never existed. Yet the respondent desires to consider the application anew when it has already considered it and found no valid existing objection. If this were an exercise in futility it might be dismissed as of no moment. But it is not. Despite persistent effort, it has taken the petitioner over 10 months to reach this stage in its proceeding to review respondent's action. The respondent can anticipate with confidence that the new proceeding ordered will take at least that long to reach final disposition. By that time the resources of petitioner's principals could well be exhausted and attrition will have accomplished what assault could not. I do not believe that we should lend ourselves to this type of administration, no matter how strongly we disapprove of petitioner's project.

13 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. THOMAS HAGAN, Also Known as TALMADGE HAYER, Also Known as THOMAS HAYER, NORMAN BUTLER, Also Known as NORMAN 3X BUTLER and THOMAS JOHNSON, Also Known as THOMAS 15X JOHNSON, Appellants.—Judgments convicting defendants of murder in the first degree unanimously affirmed. Defendants' guilt was overwhelmingly established. And no contention that it was not, was advanced. One of the defendants in testimony given on the trial admitted his participation,

including shooting the deceased, in unequivocal terms. Reversal is sought on several grounds, only one of which merits any discussion. During the trial one witness refused to testify unless the courtroom was cleared of spectators and press representatives. He gave as grounds for his refusal his fear of reprisals which had been threatened against him. After considering alternatives, strenuously objected to by counsel for each of the defendants, the court acceded to the witness' request and cleared the courtroom for his testimony and that of another witness whose testimony, purely formal, was related to the testimony of the other. None of us approves the practice followed, and some members of the court believe it to have constituted error. But we are all in accord that it was not error which mandates a reversal. Even if it be assumed that the claimed error is constitutional error, it does not automatically call for reversal (*Chapman v. California*, 386 U. S. 18, 23-24; *Fahy v. Connecticut*, 375 U. S. 85, 86-87). Here we believe that the prosecution has established beyond a reasonable doubt that the claimed error did not contribute to the verdict obtained. The period of public exclusion was less than 3% of the time taken for trial; and the testimony given was largely cumulative and it is inconceivable that a public hearing as to these witnesses would have induced potential evidence for the defense which the vastly greater publicly given testimony failed to evoke. Concur—Stevens, J. P., Eager, Steuer, Tilzer and McNally, JJ.

14. ROBERT B. BLAQUIE, Respondent, v. BORDEN CO. et al., Defendants, and DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, INC., Appellant.—Order, entered on June 2, 1967, granting motion by plaintiff for leave to plead his individual cause of action and directing service of his amended complaint, unanimously reversed, on the law, with \$30 costs and disbursements to appellant, the motion denied and the amended complaint dismissed. Leave to plead further is denied. Still unremedied, in our opinion, are the deficiencies which were noted in connection with the original complaint (see 27 A D 2d 804). The affidavit by plaintiff which is now included in the record falls short of meeting the requirement that "there must be some evidentiary showing that the claim can be supported" (*Cushman & Wakefield v. John David, Inc.*, 25 A D 2d 133, 135), indeed so far short that no further attempt to plead may be countenanced. Concur—Bolein, P. J., Stevens, Steuer, Capozzoli and McNally, JJ.

15. RAYMOND P. VERES, Respondent, v. CUNARD STEAMSHIP CO., LTD., Defendant, and JOHN T. CLARK & SON, Appellant.—Judgment unanimously reversed on the facts and the law and new trial ordered, with \$50 costs and disbursements to appellant to abide the event. Plaintiff sues for injuries claimed to have been suffered when the trailer section of his tractor-trailer tilted while going around a turn and parted from the tractor. Defendant loaded the trailer and the asserted basis for liability is that improper loading caused the trailer to tilt. Plaintiff's proof is insufficient in that the claims that the trailer was improperly loaded and that the improper loading was the cause of the trailer's eccentric course rest entirely on his own conclusory averments unsupported by proof of any supporting facts. There was no proof of how the load was distributed on the trailer, nor in what way it failed to conform to proper practice, nor what effect it did or could have on the trailer's movements. Concur—Stevens, J. P., Eager, Steuer, Capozzoli and Tilzer, JJ.

16. In the Matter of ADOLPH R. LANDSMAN, Appellant, v. CHARLES M. SCHUTZMAN, Respondent.—Order entered November 21, 1967, unanimously modified, on the law and on the facts, and in the exercise of discretion, by deleting from the fifth ordering paragraph, subdivision 3, the sum of \$2,250 and substituting in lieu thereof the sum of \$1,250, and, as so modified, the order is affirmed, without costs or disbursements. Considering the nature and extent of the services rendered by the guardian ad litem and the fact that the adjudica-

NORMAN BUTLER

#207091

ATTICA CORRECTIONAL
FACILITY

BOX 149

ATTICA, NEW YORK

14011

CERTIFIED

No. 612525

MAIL



RETURN RECEIPT REQUESTED

DISTRICT ATTORNEY'S OFFICE
ALLEN ALPERT ESQ
165 LEONARD STREET
NEW YORK, NEW YORK
10013

CERTIFIED MAIL

CERTIFIED MAIL
RETURNED RECEIPT

CERTIFIED MAIL

PRO SE OFFICE
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
OFFICE OF THE CLERK
U. S. COURTHOUSE

FOLEY SQUARE, NEW YORK, N. Y. 10007

YMOND F. BURGHARDT
CLERK

7/ 19/76

RECEIVED
MAIL
NORMAN BUTLER
BOX 149
ATTICA N.Y. 14011
AUG 2 - 1976
DEPARTMENT OF LAW
NEW YORK CITY OFFICE

TITLE BUTLER -v- SMITH

DOCKET NUMBER 76 CIV 534

DECISION DATE July 13, 1976

JUDGE KNAPP

THERE IS ENCLOSED HERewith A COPY OF A DECISION
FILED AND ENTERED IN THE ABOVE ENTITLED PROCEEDING

YOURS TRULY

RAYMOND F. BURGHARDT
Clerk of Court

By J. BLUM
Deputy Pro Se Clerk

ATTORNEY GENERAL
STATE OF N.Y.

12
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NORMAN BUTLER,

Petitioner,

- against -

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent.

MEMORANDUM AND ORDER

76 Civ. 534

FILED
U.S. DISTRICT COURT
JUL 14 3 03 PM '76
S.D. OF N.Y.

44 756
KNAPP, D.J.

On July 8, 1976, the court received a motion by petitioner to dismiss his petition without prejudice, so that he might at some later date refile his petition. Despite several extensions of time granted by the court, the petitioner professes to need additional unlimited time within which to prepare and file his Reply. More specifically, he claims for the first time that, in order to substantiate his contention that the trial judge behaved in a prejudicial manner towards defense counsel, he must have access to that part of the trial court's charge contained in Volume VI of the transcript. Heretofore, this court had forwarded to Attica Volumes I-V for petitioner's use in preparation of his Reply, said volumes constituting the transcript of the entire trial and part of the court's charge.

In the first place, such allegations of prejudice

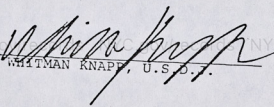
in the court's charge - not heretofore made in the Petition itself - are not the proper subject of a Reply brief. Moreover, this court has searched in vain for any remarks which might arguably be considered prejudicial in that part of the charge contained in Volume VI.

The petitioner having proffered no meritorious reason for granting the relief requested and since repetitious petitions are to be discouraged, the motion is denied. 28 U.S.C. §2244. The petitioner's Reply being due by July 22, 1976, the matter will be considered fully submitted as of that date.

SO ORDERED.

Dated: New York, New York

July 13, 1976.


WHITMAN KNAPP, U.S.D.

UNITED STATES DISTRICT COURT
CHAMBERS OF JUDGE WHITMAN KNAPP
NEW YORK, N. Y. 10007

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UNITED STATES COURTS



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Allen Alpert, Esq.
Assistant District Attoroney
155 Leonard Street
New York, New York 10013

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - -x

NORMAN BUTLER,

Petitioner,

- against -

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent.

- - - - -x

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MEMORANDUM AND ORDER

76 Civ. 534

KNAPP, D.J.

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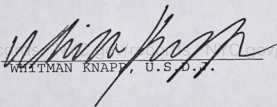
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SO ORDERED.

Dated: New York, New York

July 13, 1976.


WHITMAN KNAPP, U.S.D.J.

STATE OF NEW YORK) ss.:
COUNTY OF WYOMING)

Martin J. Patrick, being duly sworn,
deposes and says, that on the 19 day of July,
1976, he served the within PETITIONERS REPLY MEMORANDUM
on United States District Court Judge WHITMAN KNAPP; District
Attorney ALLEN ALPERT ESQ.
by enclosing a true copy thereof in a securely sealed postage paid
wrapper and depositing the same in a post office box regularly
maintained by the United States Government at Attica Correctional
Facility Box 149, Attica, New York 14011 directed to said

United States District Court
Chambers of
Judge Whitman Knapp
United States Courthouse
Foley Square
New York, New York 10007

District Attorney's
Allen Alpert Esq.
155 Leonard Street
New York, New York
10013

that being the address within the State designated by them for that
purpose on the proceeding papers in this action.

Sworn to before me, the 19
day of July, 1976

Daniel J. Corp
NOTARY PUBLIC

Martin J. Patrick

DANIEL J. CORP
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NORMAN BUTLER,	:	REPLY MEMORANDUM TO
	:	
Petitioner,	:	RESPONDENT'S MEMORANDUM
	:	
-against-	:	OF MARCH, 1976
	:	
HAROLD J. SMITH, Superintendent,	:	
Attica Correctional Facility,	:	Pro Se
	:	
Respondent.	:	76 Civ. 0534 (jwn)
	:	

State of New York)
County of Wyoming) ss.:

NORMAN BUTLER'S PRO SE REPLY MEMORANDUM

PRELIMINARY STATEMENT

On March 10, 1965 a New York County Grand Jury returned a one count indictment against the Petitioner and others. The trial commenced on December 6, 1965 (MARKS, J., and a jury). The Petitioner and others were found guilty of Murder in the First Degree on March 10, 1966 and on April 14, 1966 Petitioner and others were sentenced to life imprisonment. On May 22, 1968 the Appellate Division, First Department affirmed the judgment of conviction (People v Hagan 29 A.D.2d 931, 1st Dept 1968), and the Court of Appeals unanimously affirmed the judgment on April 16, 1969 (People v Hagan, 24 N.Y.2d 395 1969). On October 27, 1969 the United States Supreme Court denied certiorari (Hayer a/k/a/ Hagan et al v New York, 396 U.S. 886. The petitioner on August 8th, 1975 put in a motion to the Supreme Court New York County requesting the trial record to be furnished free of charge to him, this motion was never ruled on. On February 3rd, 1976 a Federal Habeas Corpus Petition was filed in the United States District Court of the Southern District of New York. On March 3rd, 1976 the Petitioner served an affidavit for entry of default in the above action (76 Civ. 0534) which by law should of been granted, but was not. On March 10th, 1976 the proposed

order and supporting affidavit of Allen Alpert requesting a extension of time until March 30, 1976 was put before the court, and an undigned and undated order was received from the court granting the extension until March 30, 1976. On April 2nd, 1976 the Petitioner received the Respondents brief which contains 57 pages plus appendix, with over 247 references to the record on appeal. On April 12, 1976 the Petitioner made a motion for an extension of time to receive the complete record which is six volumes under #2099A which was the number assigned in the Court of Appeals. On May 10, 1976 a letter was received from Carolyn Sternchein law clerk to Judge Knapp stating that FIVE volumes of the record will be sent here to Attica Prison to be used during the day at the law library but Volume SIX was never sent. In a letter dated June 11, 1976 Judge Knapp quoted and made part of the record the requests in behalf of petitioner that have been received concerning retained counsel and another extension of time was received. On July 3rd, 1976 a motion was made to dismiss the writ of Habeas Corpus Without Prejudice because Attorneys are involved in a case that will take some weeks to conclude and the fact Volume SIX is still missing. On July 13, 1976 a Memorandum and order was issued in the case 76 Civ 534 by Judge Whitman Knapp which denied petitioners motion to dismiss the petition without prejudice. The order by Judge Knapp states that petitioner has not "...proffered no meritorious reason for granting the relief requested..." and that "...allegations of prejudice in the court's charge- not heretofore made in the petition itself- are not the proper subject of a Reply brief" and that "...this Court has searched in vain for any remarks which might arguably be considered prejudicial in that part of the charge contained in Volume VI."

The first conclusion of the court that petitioner has not proffered no meritorious reason for granting the relief requested is disputed by the fact assistance of counsel is a basic guarantee in this

country. This point was made part of the record and was the pivot point of motion that petitioner has retained counsel now who are involved in another case and will take petitioners case as soon as possible which could be many weeks or months from now. This standing by itself is ground enough and a meritorious reason to have granted petitioners motion. This prison was the scene again of another disturbance on July 11th, 1976 where officers and prisoners were injured. The prison has been closed down since Sunday July 11th, 1976 and of this date July 17, 1976 the law library has been closed so petitioner has no access to incomplete record that are here. What better meritorious reason is there than seeing the petitioner can not pro se have a full record to review, have access to them because of this shut down because of this new riot, have counsel take over his case?

The next point this court mentions in denying petitioners motion is that allegations of prejudice in the courts charge-not heretofore made in the petition itself-are not the proper subject of a Reply brief. It must be considered that a prisoner has only a limited knowledge of the law, rules of procedure of a Federal Court. A denial of due process is evident if a point of relief is denied petitioner because of a rule or procedure. A point in the petition is that the trial court rebuked defense counsel's in the presence of the jury and deprived the defendants of an impartial trial. The trial court must of mentioned this in his charge, and petitioner is entitled to read the charge. What reason could be put forth for not giving petitioner the complete six volumes? One more volume would weigh to much -more than five? One more volume couldn't fit in the box? Five is an odd number and it would be bad luck to ship six because its an even number? Assistant District Attorney Allen Alpert said not to give petitioner the six volumes ? It is

submitted it is unheard of in modern American Jurisprudence to deny petitioner to borrow under strict conditions all six volumes of his own trial record, not just five. The difference of this one volume may mean the difference of life in prison or freedom.

The last point this court gives is most interesting : " the Court has searched in vain for any remarks which might arguably be considered prejudicial in that part of the charge contained in volume vl " . Why did the court choose to keep this volume for its personal reading ? With all due respect given to the court it is submitted by petitioner that it is for the petitioner to have the opportunity to review this mysterious-elusive six volume and come to his own conclusions about the contents of the volume. The court should not "help" at this point as it "may" influence its decision in the case. The petitioner would like to "search " this volume for OTHER mistakes as well, not limiting its search to the trial courts words about the defense counseles conduct which would be interesting to read I'm sure, but all other words by the trial court that would pertain td the other points raised in the petition.

For the above reasons the petitioner requests this court to reconsider its determination of the July 13, 1976 and if this is not possible, which again could be possibly true according to procedure in the Federal Courts, at least stipulate the above is a key part of this record in this case.

Accordingly, because of this order by the court dated July 13, 1976, the petitioner has completed a pro se unskilled reply brief to be put against one from a well run skillful District Attorney's Office of Counsel. It is acknowledged by the petitioner that his limited knowledge and access to the law library, the missing sixth volume, and being up against a full-staffed District Attorney's Office has put

this petitioner at a clear disadvantage. But according to the courts order this Reply Brief is submitted and mailed on July 19, 1976 at Attica Correction Facility so it can be processed here, money taken out of prisoners account for postage, and hopefully sent out of the prison by authorities to the post office in Attica New York to be delivered to this court before July 22nd, 1976 as the court order stated it must be.

HISTORY AND EVIDENCE OF THE CASE

Malcolm Little, also know as Malcolm x, died of multiple bullet and shotgun pellet wounds at approximately 3:30 p.m. on February 21, 1965. Tr.2091-92. The assassination on February 21, 1965 was carefully planned. All the previous public meetings addressed by Malcolm were covered by large numbers of police visible for all to see. On this day there was a different procedure followed by the police. No uniformed policemen were visible, in fact Lawyer Chance during the trial realized this and brought it out on page 2450 but the judge won't allow him to continue along these lines. On this day, instead of being visible, we find officer Henry and his partner hidden inside the building. They were in walkie-talkie communication with a police detail concealed across the street in the hospital where Malcolm's body was later taken. Officer Henry said he was told to notify the detail "if anything happened In charge of the detail that day is a Sgt. Devaney p. 1451, 2411.

As Malcom x began to speak a disturbance started. There were many guards there that day to protect Malcolm as he had been living with the fear that someone would kill him as he spoke out about the American political, economic, and social atmosphere. The guards were former members of another organization, and knew the defendants in this case.

It has always been a question how Malcolm's guards could have let any well-known members of the other organization into the ballroom that afternoon, or at the best, search them. It was highly unlikely that any member of the former organization was there that day. But there was a five man assassin team there, and it was reported police had film of the incident. This film never got into the case because it would show that the defendants were not there that afternoon. We find out about this assassin team if we put all the pieces together in the case and read the papers carefully. As the New York Times and the Herald Tribune reported two men were almost killed by the crowd. One was identified as Talmadge Hayer, the other was caught by a Patrolman Hoy and taken to the Wadsworth Avenue station. The interesting point is Patrolman Hoy was never called to testify as to just who this second man he rescued was. Also we find a Police Sergeant "standing on the corner" when Police Sergeant Aronoff and Patrolman Angelos happened to be driving by, who it is found out later happened to be assigned to not this precinct, but the adjoining precinct the 30th. These policemen take Hayer away. We can only speculate what would of happened to the two men if the angry crowd was not stopped at that time by these two policemen driving by. Would they have been a member of the special police detail, a police agent, or a member of Boss killed along with Hayer?

During this time it must be pointed out that the audience had panicked and terror affected many people. Although the District Attorney never explains the smoke bomb Tr. 3156-57, 3176-78, 3228, we find that someone threw a smoke bomb toward the rear of the

auditorium. This as anyone can see is a fourth person in the plot. The District Attorney can never explain this as he has three people participating, not four. As this confusion continued the bewildered people ran, fell on the floor, and tried to save their lives as men were shooting into this crowd. As far as identification is concerned, these poor befuddled people couldn't really be expected to be of any help in this area. As the trial record discloses they were not and no one really can identify anyone but Hayer who was outside. It must be remembered that in this crowd there were several undercover plainclothes policemen.

The defendants Butler and Johnson denied guilt and introduced evidence of an alibi. Hayer testified confessing guilt and exonerating his co-defendants Tr 3144-51

The prosecution called Ronald Timberlake who was in fear to testify in open court as "threats have been made on his life" 1273-74. Timberlake said he received telephone calls. The court asked who they were ? Timberlake said he didn't know Tr 1282. He first said threats came from fellow workers but now he says the were over the telephone. After a lengthy discussion between the court, Timberlake, his counsel, the prosecutor then suggested that the courtroom be cleared of all spectators in the interest of justice Tr 1285, a suggestion opposed by counsel for all three defendants Tr 1287. The court ordered total exclusion Tr 1298. Again the court ordered total exclusion during the testimony of F.B.I. agent John Sullivan Tr 1768-72.

The opening statement by the prosecutor was prejudicial to the defendants as he used the defendants religion against them. The defense counsel objected tr170. The court overruled all objections and denied motions to strike and for a mistrial.

The trial judge all through this trial rebuked defense counsel's for one thing or another. To just cite a few, Tr 759 where Judge asks counsel to ask witness to tell elevator operator. Again when counsel asked for a short recess the judge said every time a paper is offered there is a recess Tr 1168-69. Another time the judge said he would discuss counsels conduct at the close of the trial. Tr 3637-38. Once the judge called them "children", Tr.2832 Harmful comments appear on the following pages: 279, 575, 580, 612, 690, 857, 998, 1023, 1122, 1154-55, 1172, 1246, 1533, 1729, 1752, 1874, 1909, 1915, 1956, 2036, 2113; 2300-01, 2362, 2648-49, 2709, 2796, 2798, 2809-11, 2819, 2831, 2858, 3126, 3362-64, 3415, 3458, 3560, 3562, 3808, 3809, 3394, 3402, 3140, 4017. * (It must be noted this comment comes in the judges charge which the petitioner never had.)

The court denied motions for access to grand jury minutes, for a list of the peoples witnesses Tr. 64-70, 108, 179-80, 285-86, 643-44. Also denied were list of the witnesses interviewed by police and for grand jury testimony and detectives reports of those witnesses, Tr. 180-83. The courts interpretation of the law of criminal discovery was error.

POINT ONE

THE EXCLUSION OF ALL SPECTATORS AND MEMBERS OF THE PRESS DURING THE TESTIMONY OF PROSECUTION WITNESSES TIMBERLAKE AND SULLIVAN DEPRIVED THE DEFENDANTS OF THEIR STATUTORY AND CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL

In this case the trial court violated the right of the defendants to have a public trial, a right guaranteed by common law, by statute,

and by the New York and United States Constitutions. The reasons and guarantees to the right to a public trial are found in Article one section one of the New York Constitution, which is identical to Article XIII of the 1777 Constitution and speaks in the language of the Magna Carta to guarantee that no one shall be condemned but "by the law of the land, or the judgment of his peers." IN RE OLIVER, 333 U.S. 257, 278 (1948) holds the right to a public trial a part of "the law of the land."

In TURNER V LOUISIANA, 379 U.S. 466 (1965) the court noted that "in the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a PUBLIC COURTROOM where there is full judicial protection of the defendant's right of confrontation, cross-examination, and of counsel." 379 U.S. at 472-73 .

In another leading case, PEOPLE V JELKE, 308 N.Y.56 (1954) the right to a public trial was clearly defined and pointed out the right is precisely the quality which has caused other Sixth Amendment provisions to applied to the states E.g. POINTER V TEXAS, 380 U.S. 400 (1965); DOUGLAS V ALABAMA, 380 U.S. 415 (1965); GIDEON V WAINWRIGHT 372 U.S. 335 (1962). The court in JELKE said:

"Of uncertain origin, but nevertheless firmly rooted in the common law, the right to a public trial has long been regarded as a fundamental privilege of the defendant in a criminal prosecution"

In this case Timberlake had no right to refuse to testify even if he believed in good faith that it might endanger his life. In the case of PIERMONTE V UNITED STATES, 276 F.2d 148, 150 (7th Cir. 1960), the court, noting the district courts determination that a refusal to testify had actually been based on fear, affirmed a judgment of contempt, saying:

"(T)he District Court was on solid ground in holding that fear of the underworld retaliation is no reason to excuse the appellant from his obligation to testify under a complete grant of immunity."

In UNITED STATES V DAVIS, 247 Fed. 394 (8th Cir. 1917), the record showed some disorderly incidents outside the courtroom and considerable ill-will on the part of the defendants and their friends against some of the prosecution witnesses; the trial court excluded most spectators but permitted relatives of the defendants, members of the bar and the press to remain. The court of appeals nonetheless reversed the conviction for denial of a public trial saying:

"...individuals whose conduct outside the courtroom made their presence within a menace might have been excluded. But it is quite a different thing to exclude the public generally, regardless of their conduct or character." 247 Fed. at 395.

In the case of PEOPLE V BEVEL, RICHARD, 369 N.Y.S.2d 162, App. Div. 1st Dept. (6-12-75), unanimously reversed the judgment on the law and as a matter of discretion in the interest of justice on the issue of the right to a public trial. The court said:

"Moreover we believe reversible error was committed when the court excluded the public during the testimony of the undercover officer because he was still engaged in a similar activities in the same "General Area". ... "We find no "Unusual circumstances presented in the instant case sufficient to sanction the violation of defendant's general right to a public trial."

The court's in other states have held the right to a public trial is a fundamental right. In the case of STATE V SCHMIT, 139 N.W.2d 800, (Minnesota), the court held:

"Defendant is entitled to new trial without showing prejudice where trial judge unconstitutionally excluded public from courtroom."

The beneficial effects of public presence at a trial in general is an ancient tradition and this benefit cannot be taken away from the defendant in this case by the total exclusion of the public. The court had already taken all the necessary security measures, all the spectators were searched and extra court personell were on duty to see that all security measures were carried out. A major principle

of a public trial was sacrificed by the courts exclusion of the public thus making the proceeding a secret "star chamber " proceeding which made the defendant suffer overwhelming prejudice which made it impossible for him to receive a fair trial. The damage to the jury's attitude against the defendant was predicated by this exclusion. The jury's attitude against the defendants was damaged beyond repair . They found themselves in a serious dangerous position because of this ecclusion and it overwhelmed them into AT THAT POINT judging the defendants guilty before all the evidence was in.

POINT 11

THE JURY WAS INFLUENCED BY THE IMPROPER RECEIPT OF EVIDENCE OF THE DEFENDANT'S RELIGIOUS BELIEFS WHICH WAS INTRODUCED IN ORDER TO SHOW A MOTIVE FOR THE MURDER THIS WAS ERRONEOUSLY ADMITTED AND TENDED TO INFLAME THE JURY AND PREJUDICE THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

In the opening statement by the prosecutor he used the defendants religion against them and this was the principal theme throughout the trial. The prosecutor's conduct and the trial court's statements violated the rule laid down by the Court of Appeals in TOOMEY V FARLEY 2 N.Y.2d 71, 82 (1956):

"In all but the rarest of cases, the religious faith and observances of a party are matters entirely irrelevant to the issue presented, and their intjection into a trial is improper and constitutes reversible error..."

In TOOMEY the Court of Appeals cited both criminal and civil cases dealing with the misuse of a party's or witness's race, nationality or religion. In the civil case of ABBATE V SOLAN ET AL, 257 A.D. 776, 15 N. Y.S.2d 33, questions clearly intended to discrdit plaintiff and her

witness with the jury because of their nationality led to the judgment being reversed on the law and a new trial granted. The court held:

"Even if done in good faith, it was an appeal to prejudice without any foundation therefor and, of itself, requires a reversal of the judgment. 2 Wigmore on evidence, 2d ed. sec. 937; Zobel Co. v Canale, 188 A.D. 231, 176 N.Y.S. 537; Skuy v U.S. 8 Cir. 261 F 316; Commonwealth v Kazules 246 Mass. 564, 141 N.E. 584; Yee Chung v U.S. 9 Cir 243 F. 126."

Along the same line of cases is PEOPLE V HEARNS, 18 A.D.2d 922 (1963), 283 N.Y.S.2d 173, the prosecutor in his summation stressed that two of the principal witness, namely, a police officer and a correction officer, had testified against the defendant despite the fact that such officers were of the same color or race as the defendant. The court reversed on the law and a new trial was ordered as it said:

"In our opinion such a plea to the jury, based on color and race no matter how artfully phrased, constitutes an appeal to prejudice and passion; it violates every basic concept of a fair trial; and it vitiates the resulting judgment of conviction (Abbate v Solan, 257 A.D. 776, 15 N.Y.S.2d 332; People v Castellano 273 A.D. 978, 78 N.Y.S.2d 356; Bowen v Mahoney Coal Corp. 256 A.D. 485, 10 N.Y.S.2d 454; Saunders v Champlain Bus Corp. 263 A.D. 683, 34 N.Y.S.2d 447; Skuy v U.S. 10 cir. 261 F.316; Commonwealth v Kazules, 246 Mass 564, 141 N.E. 584; Annotation, 45 A.L.R.2d 303; Zobel Co. v Canale, 188 A.D. 231, 176 N.Y.S. 537; 2 Wigmore on Evidence (3ded.) sec. 937)".

The prosecutor in this case with his comments about the defendants Black Muslim Beliefs had the effect of inference and the jury did infer collective guilt of the Black Muslims to defendants denied them of a fair trial. In PEOPLE V CASTELLANO, 273 A.D. 978, 78 N.Y.S.2d 356, the prosecutoe deprived the defendant of a fair trial by the adverse and improper comments during the course of summation upon the race of the deceased and defendant. In reversing his second degree murder conviction the court held:

"...defendant was deprived of a fair trial... Malinski v People of the State of New York 324 U.S. 401, 65 Set 781, 89 L.Ed 1029; People v Esposito 224 N.Y. 370, 373, 121 N.E. 344, 345; Abbate v Solan 257 A.D. 776, 15 N.Y.S.2d 332; Saunders v Champlain Bus Corp, 263 A.D. 683."

In the same line of cases the Court of Appeals has recognized in PEOPLE V AGRON, 10 N.Y.2d 130, cert. denied 368 U.S. 922 (1961), permitted discussion of race, creed or nationality purely for the purpose of identification, and with appropriate cautionary instructions by the trial judge. Even in this case the judges wrote:

"While it would undoubtedly have been better to have avoided references to defendants nationality or ancestry where at all possible..."

The above case points out the very narrowly defined limits a prosecutor has and a reading of the petitioners minutes will prove the prosecutor in the instant case did abuse his discretion at every chance he got. It would of been possible in this case to have a complete trial without testimonial reference to the previous common associations of Malcolm X. The man Malccclm was killed, not the associations he did or did not belong to. Evidence of the defendants active membership in a religious group as the cases cited above point out, are not proper evidence to be considered by the jury.

POINT THREE

THE TRIAL COURT BY REBUKING DEFENSE COUNSEL IN THE PRESENCE OF THE JURY, DEPRIVED THE DEFENDANT OF AN IMPARTIAL TRIAL.

Whenever a trial judge rebukes defense counsel in the presence of the jury, the jury is led ineluctably to discredit the defendant's case. In the skillful Respondents Brief, he says there are only two examples of the judge rebuking defense counsel, but there are so many it seemed it was not necessary to fill a brief with them. To point to a few, I submit the following pages: 118; 155; 185; 190; 249; 574; 613; 630; 690; 1753; 3364; 3638; 3808; 3837; 3857; 3890; 3910.

A jury must not be permitted to hear comments from the court. In SMITH V STATE, 12 Okla. Crim. 513, 159 Pac. 941, 944 the court held:

"(T)o reprimand counsel for a defendant in the presence of a jury is highly prejudicial. If counsel's conduct is improper, the court must excuse the jury before administering a rebuke, or threatening to fine or imprison him for contempt."

In the case of STARR V UNITED STATES, 153 U.S. 614, 626 (1894). the court held:

"...it is obvious under any system of jury trial, the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference and may be controlling."

In PEOPLE V KEPNER, 267 A.D. 838, 46 N.Y.S.2d 111, (1944) defendants counsel was hampered and embarrassed. The court in reversing the judgment and ordering a new trial stated:

"Had defendant received a fair trial, the evidence if credited, would have warranted his conviction. Here his rights to such a trial has been infringed not in respect of mere technicalities but in substantial matters. His counsel was hampered and embarrassed;..."

Along the same line of cases is PEOPLE V ADLER, 274 A.D. 820, 80 N.Y.S.2d 210, (1948), where the judgment was reversed and a new trial was ordered. The court held:

"...its disparaging remarks directed to defendants counsel constituted prejudicial error and deprived defendant of a fair and impartial trial. Any new trial should be had before another judge."

According to respondents brief there are 4, 414 pages in the record which petitioner was allowed to see only the first 3, 900 or so, and if they are an example of the complete record-it is plain to see petitioner was denied a fair trial. The first of the record reeks of inappropriate behavior by the trial judge. Defense counsels were treated in a disgraceful, discreditable way and this deprived the defendants of a fair and impartial trial.

POINT FOUR

THE DEFENDANTS WERE ENTITLED TO A LIST OF THE WITNESSES WHO APPEARED BEFORE THE GRAND JURY, A LIST OF THE WITNESSES INTENDED TO BE CALLED BY THE PEOPLE, A LIST OF THE WITNESSES INTERVIEWED BY THE POLICE IN CONNECTION WITH THIS CASE, AND THE DETECTIVE REPORTS ON POLICE INTERVIEWS.

Defendant Butler moved before trial for access to grand jury minutes; for a list of the peoples witnesses; for a list of those interviewed by the police; for grand jury testimony and detectives reports of those witnesses. All these motions were denied. But at a point 12 days before defendants were to begin there part of the case the judge and prosecutor realizing that the were making a reversible error, gave the list of witnesses over to the defense- a justure much to late for the proper preparation of a case. In PEOPLE V MILLER, 42 Misc. 2d 794, 796-97 (1964) the court held:

"Where there is evidence in possession or control of the prosecution which is of such a nature that may require lengthy inspection or examination by expert to determine whether it is favorable to the accused, the court will afford to the accused an adequate opportunity, pretrial, to examine the evidence."

In the case of PEOPLE V NASSAR, 301 N.Y.S.2d 678(1969) the rule in MILLER, supra, was followed when the court said:

"The concept of fairness inherent in due process imposes a duty upon the prosecution to apprise the defense of evidence favorable to the accused, ... (People v Fein, 18 N.Y.2d 162, 172, 272 N.Y.S.2d 753, 759, 219 N.E.2d 274, 278 (1966)). In this Court's view those 'special circumstances' exist here***." People v Chambers, 56 Misc2d 683, 687, 289 N.Y.S.2d 804, 808 (Supreme Court, Oneida County 1968, Cardamone, J.)

In Respondents brief he says that petitioner doesn't claim that he suffered any harm, nor is there any claim that anyone on any of the lists possessed information beneficial to any of the defendants. It is submitted the mere fact petitioner alleges a point is enough to infer he has been harmed in a constitutional way. As far as the lists themselves the District Attorney wins the point for petitioner as he states there was no claim that "anyone on any of the lists possessed information beneficial to any defendants" -naturally the whole point is that defendants did NOT HAVE TIME to check these lists properly as they were in the middle of the trial. So it is a surprise but a fact that Respondents belief wins this point for the petitioner. The actions of the trial judge constituted an exercise of judicial discretion that gave rise to constitutional violations.

CONCLUSION

The petition for a writ of habeas corpus should be granted.

Respectfully Submitted,

NORMAN BUTLER
24091
Attica Correctional
Facility
Box 149
Attica, New York
14011

JULY 19, 1976

RECEIVED

JUL 23 10:33 AM
NEW YORK COUNTY
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Butler

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UNITED STATES DISTRICT COURT

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NEW YORK CITY OFFICE

8/16/76

NORMAN BUTLER

#24091

BOX 149

ATTICA N.Y. 14011

TITLE

BUTLER -v- SMITH

DOCKET NUMBER

76 CIV 534

DECISION DATE

7/26/76

JUDGE

KNAPP

THERE IS ENCLOSED HERewith A COPY OF A DECISION
FILED AND ENTERED IN THE ABOVE ENTITLED PROCEEDING

YOURS TRULY

RAYMOND F. BURGHARDT
Clerk of Court

By

J. BLUM

Deputy Pro Se Clerk

ATTORNEY GENERAL
STATE OF N.Y.

No record

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22
NYC.gov/records NYC.gov/records NYC.gov/records NYC.gov/records NYC.gov/records
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
NORMAN BUTLER,

Petitioner,

- against -

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent.
-----x

44853
MEMORANDUM AND ORDER

76 Civ. 534

KNAPP, D.J.

Petitioner, presently serving a term of life imprisonment at the Attica Correctional Facility for the murder of the Black Muslim leader Malcolm X, seeks his release on a writ of habeas corpus pursuant to 28 U.S.C. §2254. This application is based on the following claims:

- NYC.gov/records NYC.gov/records NYC.gov/records NYC.gov/records NYC.gov/records
- (1) the exclusion of spectators and members of the press from the courtroom during the brief testimony of two of the People's witnesses violated petitioner's right to a public trial under the United States Constitution,
 - (2) the jury was improperly influenced by the receipt of evidence of the defendants' religious beliefs which had been introduced in order to show a motive for the murder,
 - (3) the Court, by rebuking counsel for one of petitioner's co-defendants in the presence of the jury, deprived petitioner of a fair trial, and
 - (4) the trial court's refusal to require the State to provide defendants with a list of the people who had been interviewed by the
- JUL 27 1976

police during the investigation of the murder, a list of the people who had testified before the grand jury, and a list of the people whom the State intended to call as witnesses at trial violated principles of fundamental fairness.

Three of the above claims (1,2 and 4) were fully briefed and argued on petitioner's direct appeal of his conviction and both the Appellate Division and the New York Court of Appeals specifically addressed the issues raised thereby, rejecting each of petitioner's objections in thorough, well-reasoned opinions. We see no reason to disturb the conclusions reached therein. The third claim - that of improper conduct on the part of the trial judge - was apparently never raised by petitioner on his direct appeal. Nevertheless, rather than dismissing said claim on the sole ground of failure to exhaust (28 U.S.C. §2254b and c), we have determined that on the merits nothing the trial judge did or said can reasonably be construed as depriving petitioner of a fair and impartial trial.

With respect to the merits of claims (1), (2) and (4), we share the reluctance - often expressed in this Circuit - of other "federal judges sitting in habeas corpus . . . to retry the case from the vantage point of their reflective wisdom". U.S. ex rel. Bruno v. Herold (2d Cir. 1969) 408 F.2d 125, 129. Of particular note in this respect is the fact that petitioner was tried and convicted ten years ago and the record we are asked to review has, of necessity, become quite cold. See U.S. ex rel. Smallwood v. LaValle (E.D.N.Y. 1974) 377 F.Supp. 1148, 1153, aff'd without opinion, 508 F.2d 837 (2d Cir. 1974), cert. den., 421 U.S. 920 (1975) (" . . . this court

is very reluctant to second-guess the trial court's discretion on a cold record four years hence".) (emphasis added).

Before we discuss each of petitioner's claims in more detail, a brief sketch of the background facts is necessary to place these claims in their proper perspective.

Malcolm X, a prominent Black leader and important member of the Nation of Islam (commonly known as the Black Muslims), was brutally murdered on the afternoon of February 21, 1965 while addressing a meeting of his followers in the Audubon Ballroom in Manhattan. Prior thereto, he had split with the Nation of Islam in a bitter dispute, taking with him many of its members. On March 10, 1965 a New York County grand jury returned a one count indictment for Murder in the First Degree against Norman Butler (the petitioner herein), Thomas Hagan and Thomas Johnson, the three Muslims claimed to have shot Malcolm X repeatedly with pistols and a shotgun. Trial commenced on December 6, 1965 before Justice Marks and a jury and ended on March 10, 1966 with a verdict of guilty against all three defendants, each of whom were sentenced to life imprisonment. The judgments of conviction were unanimously affirmed by the Appellate Division, First Department on May 22, 1968 (People v. Hagan, Butler and Johnson, 29 A.D.2d 931) and by the Court of Appeals on April 16, 1969 (24 N.Y.2d 395). On October 27, 1969, the United States Supreme Court denied certiorari. Hayer a/k/a Hagan, et al. v. New York, 396 U.S. 886.

I. Exclusion of the Public and Press

Petitioner's primary ground of attack against his conviction

is that the temporary exclusion from the court of the public and members of the press during the testimony of two of the state's relatively minor witnesses was in violation of his Sixth Amendment right to a public trial. At one point in the presentation of the prosecution's case, an application was made to the Court on behalf of one Ronald Timberlake, who was scheduled to be the next witness, to clear the courtroom. A Mr. W. Eugene Sharpe, attorney for the witness, explained to the Court that Mr. Timberlake was "in mortal fear of testifying in an open courtroom because threats have been made on his life consistently since the incident which is at issue here at trial". Transcript, at 1273-4. Timberlake himself told the Court that he had received anonymous threatening telephone calls (Tr. 1282). Despite the fact that security measures had been taken in the courtroom since the inception of the trial, in that all spectators were searched for weapons before being admitted - a fact of which the Court reminded the witness - he remained steadfast in his refusal to testify unless the courtroom was cleared. So great was his fear of retaliation that an offer of police protection was rejected as inadequate. Nor would he agree to testify when threatened with contempt. Reluctant to accede to Timberlake's application, the Court ruled that he would have to take the witness stand, make his refusals and accept the consequences (Tr. 1278). The defendants, however, objected in concert, citing the prejudicial impact on the jury of a fearful witness' steadfast refusal to testify (Tr. 1281-7). After a short recess, the Court ordered all spectators and members of the press excluded during Timberlake's testimony (Tr. 1288). In support of his decision, he cited People v. Jelke (1954) 308 N.Y. 56,

63 for the proposition that the right to a public trial, although a basic privilege, has "never been viewed as imposing a rigid, inflexible strait jacket on the courts. It has uniformly been held to be subject to the inherent power of the court to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally further the administration of justice" (Tr. 1289). The court specifically found Timberlake sincere in his belief that testifying for the State would place him in mortal danger and concluded further that he would persist in his refusal to testify in a public courtroom, thus frustrating the adjudicatory process. Accordingly, the court concluded that the facts warranted the exercise of its inherent power to exclude (Tr. 1290-1). Somewhat later in the prosecution's case, an F.B.I. agent, John C. Sullivan, was briefly called to the stand for the purpose, inter alia, of corroborating Timberlake's earlier account of having retrieved one of the murder weapons - belonging to petitioner's co-defendant, Hagan - at the scene of the crime. In order to protect Timberlake's identity - which would of necessity be revealed in Agent Sullivan's testimony - the court again excluded the press and the public (Tr. 1768-72).

As noted by the courts in this and other Circuits, the Sixth Amendment right to a public trial is not absolute, but rather, must be balanced against other interests - such as protecting a witness from intimidation^{2/} or embarrassment,^{3/} maintaining the fairness and orderliness of the proceedings,^{4/} or protecting trade secrets^{5/} or the confidentiality of law enforcement techniques^{6/} - which might justify exclusion. U.S. ex rel. Lloyd v. Vincent (2d Cir. 1975)

520 F.2d 1272, 1273-4, cert. den., U.S. . In the instant case, the record amply supports the trial court's finding as to the sincerity and depth of the witness' fear and its determination that the orderly administration of justice would be frustrated unless the courtroom was cleared. The background of and atmosphere at the trial was such that security measures had already been instituted, at least one juror had expressed fear for his personal safety when his identity had become known (Carter, Tr. 75-6) and the People's first witness, one Thomas, had been afraid to testify in the grand jury (Tr. 472). Indeed, the very nature of the state's evidence against the defendants disclosed an incredibly hostile and vicious climate of hate and revenge which set the stage for a brutal, political murder of a one-time leader now viewed as a traitor. Given such a climate, it is not at all surprising that one called to testify against those claimed to be responsible would fear for his life.

Equally significant is the relatively minimal duration of the exclusion, for as stated by the Court in U.S. ex rel. Smallwood v. LaValle (E.D.N.Y. 1974) 377 F.Supp. 1148, 1151, aff'd without opinion, 508 F.2d 837 (2d Cir. 1974) cert. den. 421 U.S. 920 (1975), in cases involving exclusion for the protection of a witness, it is the length of time of the exclusion, rather than the number of people excluded, that is important. Timberlake was only one of twenty-three prosecution witnesses; his entire testimony - which, as it related to petitioner, was merely cumulative of the testimony of several other witnesses - occupied 144 pages of a 4,414 page trial

record; Sullivan's testimony occupied only 21 pages; and the court-
room was only closed for seven hours of a three month trial. ^{8/}

Moreover, petitioner has failed to show, much less suggest, how he was prejudiced by such a minimal and relatively insignificant, period of exclusion. Indeed, the Appellate Division on petitioner's direct appeal found it "inconceivable that a public hearing as to these witnesses would have induced potential evidence for the defense which the vastly greater publicly given testimony failed to evoke". People v. Hagen, et al., supra, at 932. We are constrained to agree. We also endorse as accurate the observation of the Court of Appeals that defendants were at least partially responsible for the exclusion order, in that they objected "to the only alternative open to the Judge: to swear the witness and hold him in contempt if he refused to testify". People v. Hagen, supra, at 399.

In conclusion, we note that Judge Neaher, in an unrelated case, was asked to reject the reasoning behind the New York Court of Appeals decision affirming this petitioner's conviction. He declined to do so, ruling that the exclusion of the public in petitioner's trial had been a "sensible accommodation to the rights of defendants, witnesses, and the integrity of the State's judicial process, and completely consistent with fundamental notions of due process and the generally recognized contours of the public trial right". U.S. ex rel. Smallwood v. LaValle, supra, at 1153, n. 12. Judge Neaher's decision was unanimously affirmed by our Court of Appeals. Id.,

508 F.2d 837, cert. den., 421 U.S. 920.

II. Admissibility of Evidence Concerning
the Defendants' Membership in the
Black Muslim Organization

Petitioner's second main claim is that the receipt into evidence of testimony concerning the defendants' membership in the Black Muslim organization, Malcolm X's break with the Muslims, and his founding of the Organization for Afro-American Unity unnecessarily inflamed the jury and tended to substitute collective culpability for a finding of individual guilt. After carefully reviewing the trial transcript, we agree with the state court's conclusion that such evidence was relevant for the specific purpose of establishing motive. People v. Hagan (1969) 24 N.Y.2d 395, 400. It was not utilized for any other purpose. In fact, a great deal of testimony of this ilk was offered by the defendants' own witnesses (e.g., Tr. at 2757-61, 2867-2871, 3028-9, 3247, 3277, 3284, 3287-9, 3291. Petitioner's guilt was not established by proof of the hostile sentiments of the Black Muslims or petitioner's membership in that group. That evidence merely provided a reason for the murder. Rather, his guilt was established by eyewitness testimony that he did in fact shoot Malcolm X. Without testimony establishing a motive, the murder would have appeared so bizarre as to call in question the accuracy of the testimony describing it. Petitioner has suggested no constitutional infirmity in the procedure followed, nor can we imagine any.

III. Trial Court's Conduct Towards
Defense Counsel

Petitioner's claim that the trial judge's repeated rebuking

of defense counsel in the presence of the jury deprived him of an impartial trial was apparently never raised on his direct appeal, and thus must be dismissed for failure to exhaust 28 U.S.C. §2254(b). Were we to reach the merits, however, our decision would remain unchanged. Petitioner's contentions are stated in conclusory fashion, supported by only two citations to the record, both of which involve incidents concerning counsel other than his own. There is no allegation of any improper conduct on the judge's part with respect to his own counsel, Messrs. Williams and Chance. In any event, the two incidents referred to by petitioner reflect (1) an attempt by the judge to limit unduly long cross-examination, and (2) an attempt to curb counsel's own improper conduct. Not only did the court proceed in a cautious and restrained manner, but it was at pains to insure that none of the exchanges between it and counsel inured to the detriment of the defendants in the jury's eyes (Tr. 3638-9). Our review of the transcript reveals a long, arduous and emotion-charged trial which was remarkably free of inappropriate behavior or comment by the trial judge. Nothing he said or did can reasonably be construed as depriving petitioner of a fair and impartial trial.

IV. Failure to Disclose Witness Lists

Of the numerous motions made by defense counsel for disclosure of witness lists, only one was joined in by petitioner, the denial of which is the only issue now before us on his fourth claim. That motion was one made during the voir dire, for a list of all those individuals who would be called as witnesses for the State. There being no constitutional requirement that the prosecution provide

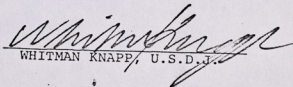
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defendants with such a list,^{9/} the sole question before us is whether
the failure to disclose deprived petitioner of a fair trial. We
have concluded that this question must be answered in the negative.
In this regard, we note that the Court declined to order disclosure
on the prosecutor's good faith representation that attempts had
already been made by members of the Black Muslim organization to
intimidate various potential witnesses and because the State feared
that such efforts would increase in the event that witnesses'
identities were disclosed; the prosecution did turn over to defense
counsel any statements of a witness at the conclusion of that witness'
direct testimony; in denying the defendants' motion for disclosure,
the Court indicated that it would be favorably inclined to grant
any requests for adjournments if during the cross-examination of any
of the State's witnesses, defense counsel needed more time to inves-
tigate the witness, and the prosecutor voluntarily and in the interest
of judicial economy 12 days before the State rested, provided defense
counsel with a list of the names and addresses of everyone who had
been interviewed in connection with the case.

For the reasons set forth above, the petition is denied
and the case dismissed. Let judgment enter.


SO ORDERED.

Dated: New York, New York

July 26, 1976.


WHITMAN KNAPP, U.S.D.J.

4UL30103
JUDGMENT ENTERED - 7/28/76


Raymond F. Berglund

NYC.gov/records NYC.gov/records NYC.gov/records NYC.gov/records NYC.gov/records

FOOTNOTES .

1/

It is perhaps necessary also at this point to outline the history of the instant proceeding, as petitioner has in his Reply brief questioned the good faith of the Court.

1. On April 19, 1976, and after service of respondent's brief, petitioner requested that he be furnished with the transcript of the trial record so as to prepare his Reply.
2. Efforts by my staff to locate a duplicate copy of said record with petitioner's previous attorneys were to no avail.
3. The District Attorney's Office informed the Court that only one other transcript was extant, that being in the possession of the Supreme Court, New York County; however, that set only included Vols. 1-V, whereas the set lent to this Court by the D.A. included six volumes (the sixth volume being comprised of the final part of the trial court's charge, the verdict and photographic exhibits).
4. Since there was thus only one copy of Vol. VI and it appearing that nothing in the Petition made said volume relevant, we determined to forward Vols. 1-V to Attica for petitioner's use in preparation of his Reply.
5. On May 10, 1976, Vols. 1-V were forwarded to Attica, with instructions that they be returned after 10 days, the time provided for in the Rules for preparation of a Reply.
6. Three extensions of time - until July 21, 1976 - were granted to petitioner by the Court.
7. On July 13, 1976, the Court denied a motion by petitioner to dismiss his petition without prejudice. As we noted in our Memorandum and Order of that date, the purpose of said motion was to circumvent our previous denial of any further extensions of time within which to file petitioner's Reply brief, in that he expected to refile a second petition when he had more time. Specifically, he claimed that in order to adequately document a 13th hour contention that the trial judge behaved improperly towards defense counsel while charging the jury, he must have access to that part of the court's charge as was contained in Vol. VI. Since such a claim is not the proper subject of a Reply brief (not having been made heretofore) and because our reading of the charge disclosed nothing even arguably prejudicial, we denied his motion to dismiss without prejudice, citing the statutory policy against repetitious writs. (28 U.S.C. §2244).

2/
U.S. ex rel. Bruno v. Herold (2d Cir. 1969) 408 F.2d 125, cert. den., 337 U.S. 957

3/
Geise v. U.S. (9th Cir. 1958) 262 F.2d 151, cert. den., 361 U.S. 842, Melanson v. O'Brien (1st Cir. 1951) 191 F.2d 963.

4/
U.S. ex rel. Orlando v. Fay (2d Cir. 1965) 350 F.2d 967, cert. den. sub nom. Orlando v. Follette (1966) 384 U.S. 1008.

5/
Stamicarbon, N.V. v. American Cyanamid Co. (2d Cir. 1974) 506 F.2d 532.

6/
U. S. ex rel. Lloyd v. Vincent (2d Cir. 1975) 520 F.2d 1272, cert. den., U.S. v. Bell (2d Cir.) 464 F.2d 667, cert. den., 409 U.S. 991 (1972).

7/
Petitioner contends - without citation of authority - that the trial court should have conducted a hearing, under oath, to develop more fully the reasons for Timberlake's refusal to testify in open court. Given the extent of the inquiry that was made by the court, such a hearing does not appear to be constitutionally mandated. U.S. ex rel. Smallwood v. LaValle (E.D.N.Y. 1974) 377 F.Supp. 1148, 1152-3, aff'd, 508 F.2d 837, cert. den., 421 U.S. 920 (1975). See also U.S. ex rel. Lloyd v. Vincent, supra, U.S. ex rel. Orlando v. Fay, supra and U.S. ex rel Bruno v. Herold, supra.

8/
As noted by the Appellate Division on the direct appeal, the period of public exclusion was less than 3% of the time taken for trial.

9/
Barrington v. Missouri (1907) 205 U.S. 483, 488, Thiede v. Utah Territory (1895) 159 U.S. 510, 514. See also U. S. v. Cannone (2d Cir. 1975) 528 F.2d 296.

n. Butler
Box 149
Attica N.Y.



New York State Attorney Gen.
Two World Trade Center
New York, N.Y. 10047

FROM THE DESK OF

Jane E. Neysaur

9/13

Bob Pittler:

Please give these
papers to Allen Alpert.

Thanks!

Jane N.

Alpert

SPNY

760534

RECEIVED

BY

MAIL

AUG 14 1976

DEPARTMENT OF LAW
NEW YORK CITY OFFICE

*Roman
Butler
v. Harold Smith
Who handled this
case in USDC.*

State of New York)
County of Wyoming) ss.:

MARTIN FITZPATRICK, being duly sworn,

deposes and says, that on the day of , 1976, he served the within NOTICE OF APPEAL AND CERTIFICATE OF PROBABLE CAUSE on United States District Court Judge Whitman Knapp; District Attorney Allen Alpert; United States Court of Appeals; New York State Attorney General. by enclosing a true copy thereof in a securely sealed postage paid wrapper and depositing the same in a post office box regularly maintained by the United States Government at Attica Correctional Facility Box 149, Attica, New York 14011 directed to said:

United States District Court
Chambers of
Judge Whitman Knapp
United States Courthouse
Foley Square
New York, New York 10007

District Attorney
Allen Alpert Esq.
155 Leonard Street
New York, New York 10013

United States Court of Appeals
For the Second Circuit
U.S. Court House, Foley Square
New York, New York 10007

New York State Attorney General
Two World Trade Center
New York, New York 10047

that being the address within the State designated by them for that purpose on the proceeding papers in this action.

Sworn to before me

the 12 day of Aug 1976

Daniel J. Corp

Martin Fitzpatrick

NOTARY PUBLIC

DANIEL J. CORP
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S.A., ex rel. NORMAN BUTLER,

Appellant,

-vs-

HAROLD J. SMITH, SUPERINTENDENT,
Attica Correctional facility,

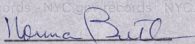
Respondent.

NOTICE OF APPEAL

Civ. 76 Civ 0534 (JK)

Notice is hereby given that NORMAN BUTLER, appellant
above named, hereby appeals to the United States Court of Appeals
for the Second Circuit from the order denying his application
for a writ of habeas corpus entered in this action on July 26, 1976.

Dated August 9, 1976


NORMAN BUTLER
Box 149 #24091
Attica, New York
14011

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----	:	APPLICATION FOR CERTIFICATE
U.S.A., ex rel. NORMAN BUTLER,	:	OF PROBABLE CAUSE
Appellant,	:	
-vs-	:	76 Civ. 0534 (JK)
HAROLD J. SMITH, Superintendent,	:	
Attica Correctional Facility,	:	
Respondent.	:	

The petitioner respectfully shows to the court:

1. That he made application to this court for a writ of habeas corpus, challenging the validity of his detention by process issuing out of a state court, to wit the direct appeal.
2. That on July 26, 1976 this court entered its order denying the said writ of habeas corpus and remanding petitioner to the custody of respondent named herein.
3. That petitioner on August 9, 1976 filed a notice of appeal from the order of this court denying the said writ.
4. That a certificate of probable cause is required before the appeal may be heard and determined on the merits.
5. That petitioner intends to raise on appeal the following points, which he believes to be meritorious:
 - a) the exclusion of spectators and members of the press from the courtroom during the testimony of two of the people's witnesses violated petitioner's right to a public trial under the United States Constitution.
 - b) the jury was improperly influenced by the receipt of evidence of the defendants' religious beliefs which had been introduced in order to show a motive for the murder.
 - c) the court, by rebuking defense counsel's in the presence of the jury, deprived the defendants of a fair trial, and due process.

page 2 of the Application for Certificate of Probable Cause

d) basic fairness required that the defendants be provided a list of the people who had been interviewed by the police during the investigation of the murder, a list of the people who had testified in the Grand Jury, and a list of the people who the State intended to call as witnesses at trial.

e) why volume six (6) was never given to the defendant to use.

f) why in the order dated June 11, 1976 and in the order July 26 1976 the Judge never in GOOD FAITH made part of the record and footnotes that requests in behalf of petitioner that have been received concerning retained counsel as counsel said they needed time because they were working on another case.

g) that the missing sixth volume of the record contained the judges charge and as the record and points in the writ show this judge was a prejudiced party in this action which denied the Petitioner a fair trial.

WHEREFORE, petitioner prays that certificate of probable cause for appeal issue.

Norman Butler

NORMAN BUTLER
Petitioner Pro Se
24091
Attica, New York
14011

N. Butler
Box 149
Attica, N.Y.



District Attorney
Allen Alpert, Esq.
155 Leonard Street
New York, N.Y. 10013

State of New York)

ss.:

County of Wyoming)

MARTIN FITZPATRICK, being duly sworn,

deposes and says, that on the day of , 1976, he served
the within NOTICE OF APPEAL AND CERTIFICATE OF PROBABLE CAUSE

on United States District Court Judge Whitman Knapp; District Attorney
Allen Alpert; United States Court of Appeals; New York State Attorney
General.

by enclosing a true copy thereof in a securely sealed postage paid
wrapper and depositing the same in a post office box regularly
maintained by the United States Government at Attica Correctional
Facility Box 149, Attica, New York 14011 directed to said:

United States District Court
Chambers of
Judge Whitman Knapp
United States Courthouse
Foley Square
New York, New York 10007

District Attorney
Allen Alpert Esq.
155 Leonard Street
New York, New York 10013

United States Court of Appeals
For the Second Circuit
U.S. Court House, Foley Square
New York, New York 10007

New York State Attorney General
Two World Trade Center
New York, New York 10047

that being the address within the State designated by them for that
purpose on the preceding papers in this action.

Sworn to before me

the 12 day of Aug., 1976

Daniel J. Corp

NOTARY PUBLIC

DANIEL J. CORP
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978

Martin Fitzpatrick

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NORMAN BUTLER,

Petitioner,

-against-

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent.

:
: NOTICE OF MOTION
: FOR
: REARGUMENT AND
: RECONSIDERATION
: Pro Se
: 76 Civ. 0534 (JK)

State of New York)
 ss.:
County of Wyoming)

NOTICE is hereby given that the attached motion will
come on for hearing before this Court at _____ o'clock, _____
M., _____, 19____, under the provisions of Rule _____ of the
Court.

Norman Butler
Appellant Pro Se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

		AFFIDAVIT IN SUPPORT
NORMAN BUTLER,	:	OF MOTION FOR
Petitioner,	:	REARGUMENT AND
-against-	:	RECONSIDERATION
HAROLD J. SMITH, Superintendent, Attica Correctional Facility,	:	Pro Se
Respondent.	:	76 Civ. 0534 (JK)

State of New York)
County of Wyoming) ss.:

NORMAN BUTLER, being duly sworn, deposed and says:

1. That he is the Petitioner in the above action.
2. On February 3rd, 1976 a Federal Habeas Corpus Petition was filed in the United States District Court of the Southern District of New York.
3. On July 3rd Petitioner sent a motion to Dismiss the Writ of Habeas Corpus Without prejudice for many reasons some of which were:
 - (a). that volume six (6) of the record is missing.
 - (b). that in the order dated June 11, 1976 Judge Knapp quoted and made part of the record the requests in behalf of petitioner that have been received concerning retained counsel. The counsel said they needed time because they were working on another case.
 - (c). That the missing sixth volume of the record contained the judges charge and as the record and points in the writ show this judge was a prejudiced party in this action which denied the Petitioner a fair trial.
4. That in an order dated July 13, 1976 Judge Knapp denied the motion for dismissal without prejudice and ordered all reply's due by July 22, 1976 "the matter will be considered fully submitted as of that date.

5. On July 19, 1976 the petitioner had notarized his Reply Memorandum and handed it to the department in charge of mailing. On July 20, 1976 a certified Mail slip # 612526 form 3800 was issued and the same is put forth as an exhibit for this motion.

6. On July 22, 1976 the certified mail # 612526 was received and signed for by Judge Whitman Knapp, this is made part of this motion by being attached as an exhibit.

7. On July 26, 1976 a nine page order with footnotes was issued which denied the petitioners writ.

8. In #1 of the footnotes the following is found:

"It is perhaps necessary also at this point to outline the history of the instant proceeding as petitioner in his Reply brief questioned the good faith of the Court."

The point is that the court failed and continues to fail to make part of the record that retained counsel requested the time and they pointed out that a motion to Dismiss the Writ would be best as the case they are working on would be a lengthy one. This shows where the "good faith" of the court is.

9. The request of this motion is to have this court consider the entire petition and ALL the moving papers and to reconsider its decision and make part of the record that this court did consider the request for retained counsel.

10. That this petitioner prays this court grant this motion for ~~extension of time to reargue~~ the complete consideration from this court to reconsider its decision and make part of the record all the moving papers and for such other and just relief that this court deems just and proper.

Sworn to before me,
this 13 day of Aug, 1976

Daniel J. Corp
NOTARY PUBLIC

DANIEL J. CORP
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978

Norman Butler

NORMAN BUTLER
Box 149 #24091
Attica, New York
14011

Butler 24091

RECEIPT FOR CERTIFIED MAIL

SENT TO J. Edgar Hoover U. S. Justice Building P. O. Box 149 Attica, N. Y.		POSTMARK ATTICA JUN 20 P.M. 1970 14011
P. O. STATE AND ZIP CODE N. Y., N. Y.		
OPTIONAL SERVICES FOR ADDITIONAL FEES		
RETURN RECEIPT SERVICES	1. Shows to whom and date delivered With restricted delivery	CHARGE POSTAGE FOR RECEIPT
	2. Shows to whom, date and where delivered With restricted delivery	
RESTRICTED DELIVERY		
SPECIAL DELIVERY (extra fee required)		
PS Form 3800 Jan. 1976		NO INSURANCE COVERAGE PROVIDED— NOT FOR INTERNATIONAL MAIL

(See other side)
GPO: 1975-O-591-452UNITED STATES POSTAL SERVICE
OFFICIAL BUSINESS

SENDER INSTRUCTIONS

- Print your name, address, and ZIP Code in the space below.
- Complete items 1, 2, and 3 on reverse side.
 - Moisture gummed ends and attach to back of article.

PENALTY FOR PRIVATE
USE TO AVOID PAYMENT
OF POSTAGE, \$300RETURN
TO

Butler 24091
Box 149 ACP
Attica, N. Y. 14011

NYC.gov/records NYC.gov/records NYC.gov/records NYC.gov/records NYC.gov/records

Form 3811, Rev. 1975

1. SENDER. Complete items 1, 2, and 3. Add your address in the reverse.

2. RETURN TO: space on reverse.

3. The following service is requested (check one):

☒ Show to whom and date delivered..... 15¢

☐ Show to whom, date, & address of delivery..... 35¢

☐ **RESTRICTED DELIVERY.** Show to whom and date delivered..... 65¢

☐ **RESTRICTED DELIVERY.** Show to whom, date, and address of delivery..... 85¢

4. ARTICLE ADDRESSED TO:
Whitman Knapp
US Courthouse Foley Sq.
N. Y., N. Y.

5. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	612526	

(Always obtain signature of addressee or agent)

I have received the article described above:

SIGNATURE _____ Address _____

DATE OF RECEIPT JUL 22 1976

5. ADDRESS (Complete only if requested.)

6. UNABLE TO DELIVER BECAUSE:

CLERK'S INITIALS

7. POSTAGE PAID BY ADDRESSEE

8. POSTAGE PAID BY SENDER

9. POSTAGE PAID BY ADDRESSEE

10. POSTAGE PAID BY SENDER

11. POSTAGE PAID BY ADDRESSEE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----	:	APPLICATION FOR CERTIFICATE
U.S.A., ex rel. NORMAN BUTLER,	:	OF PROBABLE CAUSE
	:	
Appellant,	:	76 Civ. 0534 (JK)
-vs-	:	
HAROLD J. SMITH, Superintendent,	:	
Attica Correctional Facility,	:	
	:	
Respondent.	:	

The petitioner respectfully shows to the court:

1. That he made application to this court for a writ of habeas corpus, challenging the validity of his detention by process issuing out of a state court, to wit the direct appeal.
2. That on July 26, 1976 this court entered its order denying the said writ of habeas corpus and remanding petitioner to the custody of respondent named herein.
3. That petitioner on August 9, 1976 filed a notice of appeal from the order of this court denying the said writ.
4. That a certificate of probable cause is required before the appeal may be heard and determined on the merits.
5. That petitioner intends to raise on appeal the following points, which he believes to be meritorious:
 - a) the exclusion of spectators and members of the press from the courtroom during the testimony of two of the people's witnesses violated petitioner's right to a public trial under the United States Constitution.
 - b) the jury was improperly influenced by the receipt of evidence of the defendants' religious beliefs which had been introduced in order to show a motive for the murder.
 - c) the court, by rebuking defense counsel's in the presence of the jury, deprived the defendants of a fair trial, and due process.

page 2 of the Application for Certificate of Probable Cause

d) basic fairness required that the defendants be provided a list of the people who had been interviewed by the police during the investigation of the murder, a list of the people who had testified in the Grand Jury, and a list of the people who the State intended to call as witnesses at trial.

e) why volume six (6) was never given to the defendant to use.

f) why in the order dated June 11, 1976 and in the order July 26 1976 the Judge never in GOOD FAITH made part of the record and footnotes that requests in behalf of petitioner that have been received concerning retained counsel as counsel said they needed time because they were working on another case.

g) that the missing sixth volume of the record contained the judges charge and as the record and points in the writ show this judge was a prejudiced party in this action which denied the Petitioner a fair trial.

WHEREFORE, petitioner prays that certificate of probable cause for appeal issue.

Norman Butler

NORMAN BUTLER
Petitioner Pro Se
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Attica, New York
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