

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GEORGE DE LOS SANTOS, : Hon. Frederick B. Lacey, U.S.D.J.

Petitioner : Civil Action No. 82-1717

v. : FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

EDWARD O'LONE :
Superintendent,
Leesburg State Prison

Respondent :

AND :

IRWIN I. KIMMELMAN, :
Attorney General of the
State of New Jersey

Additional Respondent :

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ALYN Z. LITE, CLERK

STATEMENT OF PROCEDURAL HISTORY

On May 28, 1982, petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254.

On or about July 26, 1982 respondents filed their answer.

On September 10, 1982, petitioner filed a response and an appendix in support thereof.

On January 24, 1983, the court orally (and subsequently in a written opinion) denied respondents' motion for summary judgment on exhaustion grounds and further ordered that an evidentiary hearing be held March 1, 1983.

On February 14, 1983, the court heard argument on respondents' motion to certify its exhaustion decision pursuant to 28 U.S.C. § 1292(b) and entered its order of denial on February 22, 1983, also denying respondents' motion for stay.

Thereafter, petitioner and respondents filed proposed Findings of Fact and Conclusions of Law with the court and also filed with the court critiques of each other's proposals. Likewise, all submitted exhibits were designated joint exhibits and respondents and petitioner filed stipulations of fact.

Thereafter, the court held an evidentiary hearing.

Following the hearing, the parties submitted their briefs and Findings of Fact and Critiques.

The court expresses its appreciation to counsel for their cooperation and their excellent submissions. The court is particular indebted to counsel for the extensive stipulations in this matter.

With respect to said stipulations, they are annexed hereto as submitted by the parties.

INTRODUCTION

Prior to setting forth my Findings of Fact and Conclusions of Law, it is appropriate to state briefly the background of this matter. The Assistant Prosecutor who tried the charges against the petitioner frankly states that without the testimony of Delli Santi, who testified to what was a "cell" confession of the petitioner, a conviction would not have been obtained. This is understandable. The eye witness in this case was the subject of a comment by the Assistant Prosecutor in a letter to the state court judge, written to obtain leniency for Delli Santi, to the effect that he was hardly a "fountain" of credibility. (Ex. J-31) Having reviewed the pretrial statements given by that witness, and analyzing the testimony as it has been presented to me here, I would agree. Indeed, as to one of the persons he allegedly saw fleeing from the scene of the crime, who was indicted along with the petitioner on the basis of the eye witness' pretrial statement, the state had to dismiss just before trial when it was determined that that person had an ironclad alibi which put him in California at the time of the commission of the crime.

Thus, it all came down to Delli Santi and whether he was believed. However, Delli Santi's testimony stood on shaky ground. The petitioner charged that Delli Santi had gained knowledge of the underlying facts of the crime from having seen pretrial discovery material made available to him by the petitioner. While Delli Santi denied that he had seen this material, that he did see it could be inferred from his having originally disclosed to the prosecutors following the alleged

"cell" confession that the petitioner had told him that he and Harvey had committed the crime. Since it is obvious that Harvey did not commit the crime, the question to be answered is why Delli Santi placed Harvey into the alleged confession. The petitioner of course denied that he would name Harvey as an associate in crime. Thus, there only remains this answer: Delli Santi contrived the alleged confession from the discovery materials, saw that the eye witness had identified the petitioner and Harvey as the two whom he saw fleeing from the scene, and determined that he would thus implicate both the petitioner and Harvey in the alleged confession. As strong as this inference may be, the foregoing information was presented to the jury and obviously rejected by the jury in its determination of guilt of the petitioner. Nonetheless, the very fact that the jury was out 14 hours and returned only after having been given an "Allen" charge, bespeaks volumes as to the skepticism with which the jury viewed Delli Santi's testimony.

Against the foregoing, it is clear that the jury was deprived of critically significant information going to Delli Santi's credibility. Even a casual reading of his testimony demonstrates that it reeks of perjury. In addition to the perjury, the jury was also deprived of evidence that would have demonstrated the pattern of behavior of Delli Santi in the past. Repeatedly, when charged with a crime, he would attempt to make a deal by trading information. Not only is his status as an informant in question; he was so closely associated with several

detectives both in Newark and Essex County, and with at least one assistant prosecutor, as he dealt out information, that one had to ask why Delli Santi constantly offered cooperation and information to the police. The answer is a simple one: he feared for his life if he went to jail. Indeed, this is exactly the point made by a state court judge who obviously knew of Delli Santi's background with the police. That he was a person of reprehensible character is undisputed. That he committed numerous crimes is undisputed. Yet invariably he was able to talk his way out of a sentence of incarceration. It was on the razor-edge of this witness' testimony that the verdict here was pressed. Only one conclusion can be drawn: it is almost a virtual certainty that there would have been an acquittal here if the jury had had all the evidence that, little by little, has been made available over the years by the state to the petitioner.

My Findings of Fact and Conclusions of Law follow.

1. All Stipulations of Facts are hereby incorporated as if set forth fully herein.

2. STIPULATIONS XLII and XLIII demonstrate that prior to petitioner's State Post-Conviction Relief Proceeding, counsel for the petitioner provided the State with information indicating that Richard Delli Santi was involved as an informant in the D'Amore murder investigation.

3. Assistant Prosecutor Benjamin Liebowitz spoke to Prosecutor's Detectives Halleck and Martino concerning information they might have that Delli Santi had given information to them in regard to the "homicide charge against a Johnny Demara (or D'mara, Dimara, etc. etc.) and perhaps other matters also."

4. Detectives Martino and Halleck could not recall any specifics regarding Mr. Liebowitz' inquiry.

5. Prosecutor's Detectives Martino and Halleck had some information concerning the murder of Johnny D'Amore which they did not disclose to Assistant Prosecutor Benjamin Liebowitz.

6. The Prosecutor's Detective Martino also failed to disclose to Assistant Prosecutor Benjamin Liebowitz that Richard Delli Santi provided information to him when he was in the Newark Narcotics Squad against Kerry Afflitto.

7. The failure of the State to disclose the D'Amore and Afflitto matter was difficult to understand. This court was not persuaded that the State's witness could have forgotten the information.

8. Sometime after September 3, 1975 Assistant Prosecutor Kevin Kelly interviewed Richard Delli Santi, in the Essex County Prosecutor's Office.

9. Assistant Prosecutor Kevin Kelly made a determination to use Richard Delli Santi as a State's witness in the petitioner's trial.

10. Prior to petitioner's trial Kevin Kelly should have spoken to Assistant Prosecutor Robert Cerefice concerning Richard Delli Santi and his proposed testimony at petitioner's trial. Had he done so he would have learned what Mr. Cerefice knew and what the Prosecutor's detectives knew: that Delli Santi was an informant.

11. Prior to petitioner's trial, Assistant Prosecutor Kevin Kelly had Richard Delli Santi's statement taken by Prosecutor's Investigator Donohue.

12. While Mr. Kelly purports not to have had any information that Delli Santi was an informant, assuming that this is true, it is inconceivable to me how he could have prepared this case without thorough investigation into anything and everything that might have led to Delli Santi's credibility being impeached at trial. Even a cursory investigation would have uncovered Delli Santi's background as an informant.

13. On or about September 29, 1975 Assistant Prosecutor Kevin Kelly received a letter, J-31, from Richard Delli Santi.

14. Sometime after September 29, 1975 Kevin Kelly spoke to Richard Delli Santi concerning his letter of September 26, 1975.

15. On or about October 3, 1975, Mr. Kelly arranged for an investigator to arrange for Delli Santi's release from jail on bail and this was accomplished by Mr. Cerefice. Why Cerefice, knowing that Delli Santi was going to testify for Mr. Kelly, did

not discuss with Kelly all that he, Cerefice, knew about Delli Santi's informant status is impossible to understand. Primarily, there was a breakdown in communications between the two.

16. Richard Delli Santi was released from jail on October 3, 1975 and from that time through the petitioner's trial he maintained daily contact with A.P. Kevin Kelly. His conversation with Delli Santi certainly gave him the basis for a belief that Delli Santi had a habit of testifying.

17. During some of Assistant Prosecutor Kevin Kelly's conversations with Richard Delli Santi, individuals possessing actual knowledge of Delli Santi's informant activities were present.

18. Assistant Prosecutor Kevin Kelly prior to petitioner's trial had a conversation with Lieutenant Robert A. Gauthier, Newark Police Department Internal Affairs Division, concerning Richard Delli Santi.

19. The note of Assistant Prosecutor Kevin Kelly establishes that he knew "Delli Santi is in the habit of giving testimony" and that Delli Santi "testified against Joe Demare [?]."

20. Assistant Prosecutor Kevin Kelly never disclosed having any knowledge of Delli Santi's informant activities.

21. The court is not impressed by Mr. Kelly's testimony that to determine whether Delli Santi was an informant he, Kelly, asked Delli Santi. If Delli Santi did deny it, we now know that

he lied. It is incomprehensible to this court that Kelly did simply take Delli Santi's denial in view of all of the other facts which are now available.

CONCLUSIONS OF LAW

1. The Findings of Fact hereinabove set forth are incorporated herein by reference embodying as they do Conclusions of Law.

2. Based upon the record in the petitioner's State Post-Conviction Relief Proceeding, a new trial should have been ordered under the standards of United States v. Agurs, 427 U.S. 97 (1976) and Giglio v. United States, 405 U.S. 150 (1972).

3. The evidence at the petitioner's state post-conviction relief hearing clearly established that a specific demand had been made, by petitioner's trial counsel, for disclosure of the exculpatory evidence of Richard Delli Santi's informant activities. The evidence demanded and not disclosed was exculpatory.

4. The evidence of Delli Santi's informant activities which was developed during the state court post-conviction relief proceedings indicated that his trial testimony in denying he was an informant at the Miranda hearing and before the jury was false.

5. The evidence established that there was extensive knowledge of Delli Santi's informant activities by members of the Essex County Prosecutor's Office, including Assistant Prosecutor Robert Cerefice, and Assistant Prosecutor John Matthews, yet the evidence was suppressed. The state court refused to reach the issue of the imputability of actual knowledge to the trial prosecutor.

6. The state court did not properly apply the applicable constitutional standards of Agurs, supra; Giglio, supra; and Brady v. Maryland, 373 U.S. 83 (1963).

7. Resolution of petitioner's claim does not turn upon whether or not petitioner placed Delli Santi's credibility in issue before the jury on an issue unrelated to Delli Santi's informant activities, as the state court appears to have done. See Napue v. Illinois, 360 U.S. 264, 269 - 70 (1959).

8. The state court's decision and the trial record unequivocally establish the following facts: (1) Delli Santi was a "devastating" witness to the petitioner's case; (2) Delli Santi perjured himself regarding his informant status; (3) Delli Santi perjured himself regarding his "fathering" of the arson prosecution, and; (4) Delli Santi misled the court regarding the full terms and conditions of the arson plea bargain by omitting the fact that his agreement provided he was to testify against his co-defendants. The trial prosecutor did not correct the "devastating" witness' false and/or misleading statements.

9. This court is acutely aware that the state court's fact-finding "shall be presumed to be correct" by a federal habeas corpus court in the absence of one of eight exceptions set forth in 28 U.S.C. § 2254(d)(1970). See Sumner v. Mata, 449 U.S. 539 (1981); Cruz v. Alexander, Nos. 83-2329, 82-3075, slip op. at 3682 (2d Cir. May 2, 1983). However, as I have indicated in my memorandum opinion denying the state's motion to dismiss on exhaustion grounds, I do not perceive the state court's determination of whether the suppressed evidence was material in the Brady sense as a purely factual determination. Cf. Cruz v. Alexander, Nos. 82-2329, 82-3075, slip op. at 3681 (2d Cir. May 2, 1983). ("A finding of fact is simply a conclusion that the existence of a fact has either been proved or not been proved by evidence of sufficient probative force to satisfy the requisite burden of proof.") As the state court's opinion denying post-conviction relief indicates, the determination of whether suppressed evidence is material requires a choice of at least one of three tests, depending upon the circumstances surrounding the non-disclosure. See New Jersey v. De los Santos, No. 3605-74 Opinion at 6 (Super Ct January 4, 1980) (attached as an exhibit to petitioner's state court appeal from the denial of petitioner's post-conviction relief). However, after setting forth the "three possible Brady situations," the state court ruled against petitioner without indicating which of the three tests was being applied. See id. at 7-8. Thus, appreciating that the determination of "materiality" under any one of the

Third, this court having reviewed the record in the state court proceeding, it is concluded that, considered as a whole, this record does not fairly support the factual determination. See 28 U.S.C. § 2254(d)(8). The Appellate Division referred to Delli Santi as a devastating witness. The trial prosecutor acknowledged as much in his post-trial letters to the state court. Delli Santi wrongly implicated an individual in the crime--one who was in California on the date of the murder. The jury could not reach a verdict until given an "Allen" charge. In light of this, I simply cannot accept the state court's (sub silentio) ruling that either there was no reasonable likelihood that the outcome could have been affected by the suppressed evidence or that the suppressed evidence might not have affected the outcome of the trial. I appreciate that the jury was apprised of Delli Santi's prior criminal record and pending charges. However, this is qualitatively different evidence from evidence showing Delli Santi's now undisputed history of repeatedly offering to provide the authorities with evidence incriminating other individuals in return for favorable treatment on pending charges. See Napue v. Illinois, supra, 360 U.S. at 269-70. It is too clear that this was a "razor-edge" credibility case to believe that this information would not have affected the outcome of the trial.

Finally, even assuming that petitioner has not shown the existence of one or more of the circumstances set forth in 2254(d)(1)-(8), I find that petitioner has established "by

convincing evidence that the factual determination by the State court was erroneous." As established by the Stipulations entered into here, Delli Santi had previously sought to curry favor with the authorities by providing incriminating evidence against a fellow prisoner, which evidence was not used by the State in prosecuting this prisoner on murder charges. STIPULATION XIX. The natural inference from this stipulation, I find, is that Delli Santi manufactured a "cell" confession against this prisoner, in the hope of receiving favorable treatment on a pending charge. It was clearly erroneous for the state court to find, as it apparently did, that this suppressed information would not have had an effect on the jury verdict at petitioner's trial. Indeed, if STIPULATION XIX had simply been handed to the jury in petitioner's murder trial for use in its deliberations, I feel it to be a virtual certainty that petitioner would not have been convicted.

EXHAUSTION OF STATE COURT REMEDIES

10. Petitioner has satisfied the requirements of 28 U.S.C. §2254 (d) to exhaust his state court remedies. I hereby incorporate my opinion denying the state's motion to dismiss, as if set forth herein. The issue of Richard Delli Santi's informant activities was squarely presented to the state court. See Austin v. Swenson, 522 F. 2d 168, 170 n. 5 (8th Cir. 1975).

11. This court has previously stated that there are three approaches to the factual exhaustion issue, and that under the second approach, the court must assess whether the new facts are mere "bits of evidence" or facts which significantly alter the constitutional claim. If the latter is the case, under this second approach, the action must be dismissed. The third approach will not require a petitioner to return to the state court where through no fault of petitioner's, new facts arise in support of a constitutional claim. This court concluded that dismissal of the petition was not required in the case sub judice because application of either the second or third approach mandates that the petition not be dismissed.

12. The court has previously noted in its written opinion of February 22, 1983 that Hart v. Estelle, 634 F. 2d 987 (5th Cir. 1981) seems to be at odds with the court's decision concerning the issue of factual exhaustion. Petitioner now would have me distinguish Hart. Petitioner's Proposed Conclusion of Law. I need not deal with this issue. I do note, however, that Burns v. Estelle, 695 F.2d 847, 849-50 (5th Cir. 1983), while purporting to follow Hart, supra, actually leaves open the question of whether exhaustion requirements are met where the petitioner is not given the opportunity to present certain facts to the state courts.

13. The state in the petitioner's state court post-conviction proceeding must be held to have willfully failed to disclose incidents of Delli Santi's informant activities.

14. The petitioner through no fault of his own was prevented from developing a full factual record of the suppression of Delli Santi's informant activities. Investigators Martino and Halleck's failure to inform the state's attorney of Delli Santi's informant activities in the D'Amore homicide and the Afflitto case will not now be used to deny the petitioner relief in this court.

I find support for my decision that petitioner has satisfied the exhaustion requirements in Hales v. Redman, No. 79-1112, slip op. (3d Cir. August 24, 1979).^{*} There, the court held that where the state court had applied an erroneous legal standard to petitioner's post-conviction application, petitioner would not be required to return to state court with facts which had not previously been presented to the state court. A closely analogous situation exists here. The state court applied an erroneous legal standard (1) when it failed to specify which Brady test was applicable and (2) when it ruled that because petitioner had cross-examined Delli Santi about his criminal record, the suppressed information concerning his informant activities was not material. See Napue v. Illinois, supra, 360 U.S. at 269-70. In light of these erroneous legal rulings, I find that petitioner has satisfied the exhaustion requirements here. It would serve no purpose to send petitioner back to state court when the state court is of the erroneous view that evidence of Delli Santi's informant status is merely cumulative in light of the evidence admitted on his criminal convictions. Cf.

^{*}This court is not according precedential value to this case since it is unreported.

Hawkins v. West, No. 82-2309, slip op. at 3730 (2d Cir. May 4, 1983) (exhaustion satisfied where the "substance" of the claim has been submitted to the state court and rejected)

Contrary to the contentions of the respondents the Giglio doctrine is not extended to its outer limits here. See Respondent's Proposed Finding of Fact 13.

15. It is also noted that since the decision of this court on January 24, 1983, denying the respondents' motion to dismiss the petition, there has been disclosure to the petitioner, concerning the reference in the State v. Richard Delli Santi, Indictment No. 3183-71, Violation of Probation Hearing before the Honorable William J. Camarata, J.S.C., Essex County, which is contained in "Petitioner's Appendix submitted on Response to the State's Answer to Petition for Writ of Habeas Corpus," at pp. 198-212, [J-23] regarding Delli Santi's pre-March 1983 informant activities. The new facts alleged in this action have been "truly" disclosed solely as a result of the proceeding before the court. Austin v. Swenson, supra; United States ex rel. Merritt v. Hicks, 492 F. Supp. 99 (D.N.J. 1980). Prior to the proceeding petitioner was able actually to allege only the Kerry Afflitto case, but it is clear if the D'Amore homicide had been disclosed during the state hearing that the Afflitto case would also have been disclosed.

Contrary to respondent's contention Delli Santi's informant activities were not immaterial to this case. See Respondent's Finding of Fact 14. Had the petitioner known what

is now known, the jury would have concluded Delli Santi fabricated the petitioner's alleged "jailhouse" confession in order to avoid death or violence in a state prison at the hands of inmates who knew of his informant status. As stated by the Hon. William J. Camarata, J.S.C. State v. Delli Santi, Indictment No. 3183-71, March 16, 1973, "I can't send him to state prison . . . You know why? Word gets around, what people have done. His life isn't going to be worth a plug nickel." (Quote at p. 13, Petition; J-23, T11-20 to T12-31) The jury did not know that Delli Santi was, in Assistant Prosecutor Kelly's words, "in the habit of giving testimony." Had the jury known that Delli Santi had for years told the prosecutor what he wanted to hear in exchange for his life and a license to commit crime, petitioner would have been acquitted, since the only other evidence against him was that of a witness who, Kelly stated, "was definitely not a fountain of credibility"

16. Petitioner's burden is to establish by clear and convincing evidence that the outcome of his case could by "any reasonable likelihood" be affected by the suppressed evidence or, in the alternative, that the suppressed evidence "might have affected the outcome of the trial." Agurs.

17. Delli Santi's testimony at the Miranda hearing included that he never had a general discussion with anyone from the Prosecutor's Office or Newark Police generally about getting information as a police agent from fellow inmates and appears to

have been evasive, and, perhaps untruthful. (J6 at 9-19 to 10-2). Delli Santi perjured himself. STIPULATION XV, p. 19; STIPULATION XVI, p. 20; and STIPULATION XIX, p. 23.

18. Under Agurs, the first category encompasses the knowing use of perjured testimony by the prosecution. Agurs, supra, at 104. The second category consists of information withheld by the prosecution in face of a specific defense request, as well as "evidence [which] is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce . . ." Id. at 108. The third category includes material not disclosed after "only a general request for 'Brady material' had been made." Id. "Once evidence is found to be exculpatory, the question then focuses on whether the omitted evidence was material to the finding of guilt . . ." 'United States ex rel. Marzeno v. Gengler, 574 F. 2d 730, 735 (3d Cir. 1978). Materiality is established in the first category if "there is any reasonable likelihood that the [information] could have affected the judgment of the jury," Agurs, supra; in the second category if "the suppressed evidence might have affected the outcome of the trial," Id.; and in the third category only if "the omitted evidence creates a reasonable doubt that did not otherwise exist," Id. See also United States ex rel. Marzeno v. Gengler, supra at 735-36.* Under both the first two categories the petitioner's petition here must prevail.

* The respondents agree that this is an accurate analysis of Agurs.

Delli Santi lied in testifying at the Miranda hearing, in that he testified he had not informed in narcotics cases and that he had never voluntarily come forward with information.

19. The respondents have stipulated that a specific demand for the exculpatory evidence had been made. [STIPULATION III, p. 6; IV, p. 7] Thus, the second category or standard of Agurs applies. I further conclude that the suppressed exculpatory evidence of Delli Santi's detailed history of giving so-called information in order to curry favor with the prosecutor, if known by the jury, might have affected the outcome of the trial. Delli Santi also was untruthful in denying any knowledge of the reason why his sentencing had been put off.

20. Delli Santi repeatedly perjured himself during petitioner's trial [STIPULATIONS X, XVIII, XX, XXII and XXV]. Certain individuals who worked in some fashion on the petitioner's case were aware of Delli Santi's informant activities. Assistant Prosecutor Robert Cerefice received the letter of August 25, 1975; he also participated in the taking of Delli Santi's statement of September 3, 1975 as did Investigator Joseph Martino. Assistant Prosecutor Cerefice also appeared before a court on October 3, 1975 in order to obtain Delli Santi's release from jail because of his cooperation in the arson case and petitioner's case. Prosecutor's Investigators Patrick Graham and Edward "Ronnie" Donohue aided in locating the case

Delli Santi's letter of August 25, 1975 referred to. Giglio v. United States, supra, is dispositive of the issue of the imputability of knowledge to the trial prosecutor.

21. The facts established regarding Delli Santi's informant activities and the State's knowing use of his perjured testimony mandate the conclusion that there was a reasonable likelihood that the suppressed evidence could have affected the judgment of the jury.

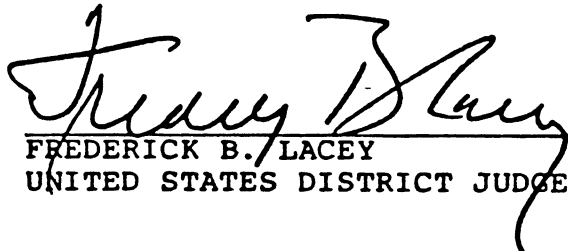
Contrary to the respondents' position, it is clear that the withheld information would have very substantially affected Delli Santi's credibility.

22. It is clear that petitioner has borne his burden and established by clear and convincing evidence that the outcome of his trial would have been affected by discovery of the information now presented to the court.

CONCLUSION

The writ will issue unless within 90 days the petitioner is afforded a new trial.

Dated: July 5, 1983


FREDERICK B. LACEY
UNITED STATES DISTRICT JUDGE