McKnight v. Albauch

United States District Court for the Southern District of New York

July 28, 2000, Decided ; August 2, 2000, Filed

97 Civ. 7415 (WK)

Reporter
2000 U.S. Dist. LEXIS 10792 *; 2000 WL 1072351

LARRY McKNIGHT a/k/a JACKIE NEVITT, Petitioner, -against- SUPERINTENDENT ALBAUCH and ATTORNEY GENERAL VACCO, Respondents.

Disposition: [*1] Amended petition for writ of habeas corpus DENIED.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

HN1[] **Review, Standards of Review**

A district court's review of a petition for writ of habeas corpus is governed by the standards articulated in the habeas statute, *28 U.S.C.S. § 2254(d)*, as amended by the Antiterrorism and Effective Death Penalty Act of 1996.

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

HN2[] **Review, Standards of Review**

See the Antiterrorism and Effective Death Penalty Act of 1996, *28 U.S.C.S. § 2254(d)*.

Criminal Law & Procedure > Habeas Corpus > Independent & Adequate State Grounds > General Overview

HN3[] **Habeas Corpus, Independent & Adequate State Grounds**

A federal court may grant a writ of habeas corpus if either: (1) the state court arrives at a conclusion opposite to that reached by the district court on a question of law, or (2) the state court decides a case differently than the district court has on a set of materially indistinguishable facts. A decision of a state court can involve an "unreasonable application" of federal law if the state court identifies the correct governing legal rule from the district court's cases but unreasonably applies it to the facts of the particular state prisoner's case. In construing the meaning of "unreasonable," the court adopts an "objectively unreasonable" standard as the decisional guide.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > General Overview

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial

HN4[] **Juries & Jurors, Voir Dire**

As a matter of state law, New York courts now afford all criminal defendants the right to be present during the questioning of potential jurors concerning bias.

Criminal Law & Procedure > Habeas Corpus > Independent & Adequate State Grounds > General Overview

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > General Overview

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Questions of State Law

HN5[] **Habeas Corpus, Independent & Adequate State Grounds**

Questions of state law do not constitute grounds for federal habeas relief.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial

HN6 **Defendant's Rights, Right to Presence at Trial**

Federal standards regarding a defendant's presence at a side bar are less stringent that New York's standards. Indeed, the federal Constitution generally does not require a defendant's presence at sidebar conferences. The Due Process Clause does demand the presence of defendants during criminal proceedings to the extent that a fair and just hearing would be thwarted by their absence, that is, when such absence would have had a substantial effect on their ability to defend.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Criminal Law & Procedure > Juries & Jurors > Voir Dire > General Overview

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial

HN7 **Judges, Discretionary Powers**

As a matter of federal law, decisions as to when to question jurors and the manner of that inquiry are generally left to the trial judge's broad discretion. Thus, except under egregious circumstances, a defendant has no constitutional right to watch jury selection.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > General Overview

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial

HN8 **Juries & Jurors, Voir Dire**

The doctrinal underpinning of the right to be present at voir dire sidebars is one of state, not federal, law.

Civil Procedure > ... > Jurors > Selection > Voir Dire

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Self-Representation

Criminal Law & Procedure > Counsel > Right to Self-Representation

HN9 **Selection, Voir Dire**

The *U.S. Const. amend. VI* requires that a pro se defendant be allowed to control the organization and content of his own defense. This generally includes the right to participate in voir dire. The primary focus must be on whether the defendant had a fair chance to present his case in his own way.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Self-Representation

Criminal Law & Procedure > Counsel > Right to Self-Representation

HN10 **Defendant's Rights, Right to Self-Representation**

The federal right to self-representation is implicit in the *U.S. Const. amend. VI* while the New York State constitutional right is explicit and unambiguous.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Self-Representation

HN11 **Defendant's Rights, Right to Self-Representation**

In order to retain the right to proceed at trial pro se, a defendant must not have engaged in conduct which would prevent the fair and orderly exposition of the issues. The trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. The right of self-representation is not a license to abuse the dignity of the courtroom.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Self-Representation

HN12 **Defendant's Rights, Right to Self-Representation**

If a particular defendant has done something that is plainly identifiable as disruptive in character, such as to overturn the premise of reasonable cooperation, that would be a predicate for denying the pro se right to self-representation at trial.

Criminal Law & Procedure > Trials > Defendant's

Rights > Right to Self-Representation

HN13[] **Defendant's Rights, Right to Self-Representation**

A defendant may be characterized as "disruptive" when it is his intent to upset or unreasonably delay the trial. The trial judge may forbid a defendant from serving as his own lawyer when the defendant's unruly behavior at a pre-trial hearing stays consistent with his behavior during other proceedings and would likely continue at trial. However, the mere possibility that reasonable cooperation may be withheld, and the right later waived, is not a reason for denying the right of self-representation at the start.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Self-Representation

HN14[] **Defendant's Rights, Right to Self-Representation**

A defendant's insubordinate behavior need not necessarily scandalize the court in order for the court to cut off self-representation. Self-representation may be stopped when a defendant continually rambles and does not obey the court's instruction to keep quiet. Abusive remarks hurled at the judge need not be tolerated.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Criminal Law & Procedure > Counsel > Right to Self-Representation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Self-Representation

HN15[] **Criminal Process, Assistance of Counsel**

The supreme court has outlined two general limitations on the extent of standby counsel's participation at trial: First, the pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the Faretta right is eroded. Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself.

Civil Procedure > Judicial Officers > Judges > General Overview

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Self-Representation

Criminal Law & Procedure > Counsel > Right to Self-Representation

HN16[] **Judicial Officers, Judges**

A defendant's *U.S. Const. amend. VI* rights are not violated when a trial judge appoints standby counsel -- even over the defendant's objections -- to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the pro se defendant's appearance of control over his own defense.

Counsel: For Petitioner: Larry McKnight, Washington Correctional Facility, Comstock, NY.

For Respondents: Rebecca Ann Durden, Assistant Attorney General, New York, NY.

Judges: WHITMAN KNAPP, SENIOR U.S.D.J.

Opinion by: WHITMAN KNAPP

Opinion

MEMORANDUM & ORDER

WHITMAN KNAPP, SENIOR DISTRICT JUDGE

Petitioner Larry McKnight, a/k/a Jackie Nevitt (hereinafter "petitioner") has brought this habeas corpus proceeding pursuant to *28 U.S.C. § 2254* to challenge the lawfulness of his incarceration. After we dismissed his original petition for failure to exhaust available state remedies for some of his claims, petitioner filed an amended petition now listing a single ground

for relief, namely, that the trial court allegedly violated his constitutional right to proceed *pro se* by banning him from participation in side-bar conferences (during *voir dire*) and permitting his court-appointed legal advisor to wrest control of the defense from him.

Petitioner is currently imprisoned at Washington Correctional Facility in Comstock, New York after a jury convicted him in May 1988 of arson in the second degree. He was **[*2]** sentenced in the Supreme Court, New York County (Haft, J.) to a prison term of from 8 1/3 to 25 years. The Appellate Division affirmed the conviction on November 22, 1994. Petitioner then sought leave to appeal to the New York Court of Appeals, which leave was denied on February 21, 1995. On March 4, 1997, the Appellate Division also denied his 1995 application for a writ of error *coram nobis*. *People v. Nevitt (1st Dep't 1994) 619 N.Y.S.2d 6, 209 A.D.2d 341*, *leave to appeal denied*, *624 N.Y.S.2d 383, 85 N.Y.2d 864, 648 N.E.2d 803 (1995)* and *appeal denied*, *85 N.Y.2d 865, 624 N.Y.S.2d 384, 648 N.E.2d 804 (1995)*; *People v. Nevitt* (App. Div. 1st Dep't Mar. 4, 1997) No. 9190/86 (unpublished order).

Respondents Superintendent Albauch and former Attorney General Vacco (hereinafter "respondents") have opposed the writ. For reasons that follow, we deny the habeas corpus petition.

BACKGROUND

Petitioner's legal advisor and standby counsel at trial, Robert Beecher, first appeared for petitioner in March 1988. Before Beecher, other lawyers had appeared for him (including Nancy Ennis and Brian Barrett) and each withdrew. Petitioner became disillusioned with both Ennis and Beecher and continues without any rational supporting **[*3]** evidence to accuse Beecher of having lied outrageously and conspired with the prosecution in specific ways.

Before trial, petitioner repeatedly showed that he could not control his anger. First, petitioner displayed a pattern of insulting his attorneys in open court. For example, before attorney Nancy Ennis confirmed that petitioner had expressed "such an extent of mistrust and hostility" that she felt it impossible to continue representing him, the court remarked that petitioner had "made a scurrilous allegation concerning [Ms. Ennis] and the district attorney" on the record (10/19/87: 6) (apparently on a day whose minutes have been lost). [1] Petitioner commented that, "Ms. Ennis is a lawyer, if you believe that" (*id.: 7*) and that, "Ms. Ennis wasn't worth a nickel" (12/1/87: 5-6). Later, expressing his interest in representing himself, he wrote to the court, "I will not be part of the farce to rob taxpayers by accepting another lawyer, who's [sic] only purpose would be to do like the rest, cross the defendant from getting a fair trial" (4/4/88 Letter, at 2).

[*4] Petitioner also was disrespectful and insulting to the trial judge. After his first request to relieve counsel was denied, petitioner interrupted the judge's conversation with counsel to state, "Your honor, you're not talking to me. What are you trying to tell me?" (9/11/87: 5). Petitioner also apparently responded by simply refusing to come to court at all (9/15/87: 2; *see also* 10/16/87: 2). When counsel asked to be relieved, and the court set forth the chronology of counsel's representation, petitioner replied, "Your honor, that is not accurate at all what you are saying. It is not accurate at all," adding, "You know better than that yourself" (10/19/87: 5).

The level of petitioner's disruptive conduct became more serious. When the court explained the facts of prior counsel's dismissal to petitioner's new counsel, petitioner interrupted to say, "That's a bunch of crap." (12/1/87: 3). When the court advised petitioner that it would not relieve new counsel and that petitioner's best interests would be served by cooperating with his lawyer, petitioner chided the court, saying, "Your Honor, this is not a joke," adding that, "You know the real deal on this" (10/19/87: 4, 7-8).

[*5] That same day, petitioner accused the judge of dragging his feet on a "long-standing matter" which petitioner refused to describe, saying, "You know what I'm talking about" (*Id.: 8*); and on the next court date petitioner accused the court of "jumping to something else," adding, "We keep coming back, we don't straighten out this whole business" (12/1/87: 6-7).

The culmination of this erratic behavior came when the court denied petitioner's speedy trial motion, finding that "very little time is includable against the People" (3/21/88: 9). Upon hearing this, petitioner stated, "You are crazy, Your Honor." When the court threatened to hold petitioner in contempt, he repeated, "You are crazy. I have been in eighteen months. This

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[1] Numbers preceded by "V" refer to the minutes of the *voir dire*, dated May 5-6, 1988. Numbers not preceded by a letter or a date refer to the minutes of the trial, dated May 6-10, 1988. Other parenthetical citations refer to other dates and page numbers in the state transcript as indicated.

Respondents concede that the record of *voir dire* is somewhat spotty. Petitioner has convinced himself of a nefarious plot to destroy transcripts favorable to him (*see* Reply Br. 8, 12, 14, 26; *cf. Nevitt v. Conroy (S.D.N.Y. Sept. 19, 1997) 1997 U.S. Dist. LEXIS 14358*, No. 95 Civ. 466, *1997 WL 582874* (Griesa, J.) (petitioner's lawsuit attempting unsuccessfully to censure the court reporter and his own appellate counsel for failing to transcribe and keep minutes of certain hearings held by the trial court)).

crapping around with my attorney is a bunch of crap." The court ordered petitioner to "be quiet," but petitioner persisted, saying: "My lawyer is not liable for nothing. It is the district attorney." When the court then ordered that petitioner be removed from the courtroom while the ruling continued, petitioner responded, "You're full of it, pal" (*Id.*).

On the next court date, petitioner announced that the trial judge would be "called into" federal court **[*6]** because of his "conflict of interest" (3/30/88: 3-4), and petitioner later demanded that the judge disqualify himself (4/4/88 Letter). The judge, however, had not received any federal papers and affirmed that he had no antagonistic feelings towards petitioner (3/30/88: 3-4).

Jury selection took place on May 5, 1988. The trial court set a rule that petitioner must not personally question potential jurors during *voir dire* sidebars (V 5, 8-9). As examined in depth herein, the court apparently established this rule for two reasons: first, its fear that petitioner would continue in a pattern of insulting conduct aimed at the judge and his lawyer; and, second, that he would not understand the rules of criminal procedure. The court instructed Beecher to attend these sidebars and to convey what occurred at the bench to petitioner (V 8-9). The court also issued a warning that if at any point during the trial petitioner did not conduct himself appropriately, his standby counsel would take over the case (V 5).

Petitioner announced, however, that he had "a problem" with Beecher -- that Beecher had lied to him about several matters, had not consulted with him on "what he should have done **[*7]** with witnesses," and had an "ill-fated purpose" (V 6). The court suggested that this was precisely the sort of complaint that petitioner had registered about previous attorneys (V 6). The court then reiterated that petitioner was responsible for his own defense, and that Beecher would remain present only as an advisor (V 6-7). But, petitioner further objected that he could not trust Beecher to tell him the truth about what occurred at bench conferences (V 9-11).

The trial court made an effort to minimize the effect of its ruling upon petitioner's ability to choose a jury. To make it easier for petitioner to question potential jurors, his seat was moved closer to the jury box (V 8-9). The court assured petitioner that it would make a "substantial effort" to conduct very few bench conferences, and only when "absolutely necessary." In addition, the court agreed to excuse the jury if it became necessary for petitioner to participate in a particular *voir dire* bench conference (V 11). The court also ordered that petitioner receive a daily transcript, so that he could supervise Beecher (V 9-10, 11-12). As the judge promised, he held only three bench conferences during *voir dire* (**[*8]** *see* V 35, 39, 100-16, 127-28).

In the first round of jury selection, the court invited prospective jurors to approach the bench to discuss only one matter: whether they or a member of their immediate family had been arrested or convicted of a crime (V 33-34). Three jurors approached, and at least one of them expressed hesitation about whether she could deliberate based on the facts. At unrecorded conferences, the trial judge excused these jurors (V 35, 39).

The court conducted most of the questioning of this panel (V 26-82), and then afforded the prosecution and petitioner fifteen minutes each to question it (V 89). Petitioner primarily made a speech asking the jurors to listen to the evidence and to acquit him if the government did not prove his guilt beyond a reasonable doubt (V 90-92).

After this questioning, the court instructed petitioner's standby counsel to consult with petitioner about challenges (V 92-93). Petitioner accompanied Beecher to the sidebar (V 93), where he himself exercised four peremptory challenges but declined to make any challenges for cause (V 92-95). Petitioner also stated in open court that the seven jurors selected were acceptable to him (V 96).

[*9] Jury selection continued that afternoon with a new panel. The court excused three jurors in succession who each had stated that they could not remain objective about an arson case. For example, one juror stated that his house had been "torched" the previous week and he had almost lost family members; the court immediately excused him "with the consent of the defendant" (V 100). Another juror indicated that she probably could not be impartial because she had witnessed an intentionally set fire that killed a co-worker. The court excused her after Beecher agreed (V 106).

Then, after questioning by the court and Beecher, another juror stated that he felt he could remain impartial although he worked as a peace officer (V 106-09). After this interview, the court noted on the record that Beecher had conferred with petitioner, who gave his consent to excuse this juror (V 109).

Another group of potential jurors was then interviewed (V 110). One prospective juror stated that his or her son had been recently convicted for a narcotic offense, but the juror did not feel that this would affect his or her ability to serve (V 110-11). Immediately after this juror was returned to the panel, standby **[*10]** counsel told the court that, "The record should reflect that my client feels that we may be maneuvering him into an all-white jury" (V 111). During a discussion of this matter, standby counsel added that, "I have made all of the reasons, all of the objections as to the individual jurors to defendant, and he has consented…" (V 111-12).

The court disposed of the *Batson* issue (V 111-13), and then another juror approached the sidebar. He had been in a fire set

in a restaurant and sensed that this would affect his impartiality; the court excused him "with the consent of the lawyers" (V 113-14). The court inquired if petitioner consented to discharging this juror, and standby counsel stated that his client had (V 116).

After the court finished questioning the jurors, the prosecutor briefly did so. Then, petitioner again made a speech to the panel, stressing the government's burden of proof (V 155-57). Next, petitioner himself came to the sidebar to exercise challenges. However, he did not exercise any peremptory or for cause challenges to the remaining jurors or alternates (V 157-60). Petitioner confirmed that the jurors were acceptable to him (V 161).

In reality, petitioner ultimately **[*11]** played a larger role injury challenges than the court originally anticipated. The judge initially informed petitioner that challenges to jurors would be made by petitioner telling standby counsel what to do, and counsel exercising the challenges at the bench (V 8). It turned out, however, that petitioner himself came to the bench and exercised the challenges, both peremptory and for cause, to each panel of jurors.

After the jury was impaneled, petitioner conducted the entire trial himself. He made an opening statement, extensively cross-examined each of the government's witnesses, and delivered a summation in which he emphasized that no one saw him set the fire and challenged the credibility of the government's witnesses. He attended several bench conferences (117-18, 212-14, 239-45) and other legal discussions (*see, e.g.*, 82-98, 246-58). Petitioner also registered objections to testimony and to the prosecutor's summation, and he objected when the court decided not to submit the second, lower count of the indictment to the jury. He also in effect asked for a missing witness charge, which the court seriously considered. After trial, petitioner moved *pro se* to set aside the **[*12]** verdict on the basis of newly discovered evidence and several perceived flaws at the trial. Also, despite his alleged protests, petitioner voluntarily consulted standby counsel several times. [2]

DISCUSSION

I. STANDARD OF REVIEW

HN1[↑] Our review of the petition is governed by the standards articulated in the habeas statute, *28 U.S.C. § 2254(d)*, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (the *HN2*[↑] "AEDPA"):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable **[*13]** application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Recently, in *Williams v. Taylor (2000) 529 U.S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495, 1518-23* (O'Connor, J., for the Court), the Supreme Court held that *HN3*[↑] a federal court may grant the writ of habeas corpus if either (1) "the state court arrives at a conclusion opposite to that reached by this Court on a question of law," or (2) "the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *120 S. Ct. at 1523*; *see also Clark v. Stinson (2d Cir. 2000) 214 F.3d 315, 2000 WL 710044*, *4-5 (discussing *Williams*). The Court noted that a decision of a state court can involve an "unreasonable application" of Federal law "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams, 120 S. Ct. at 1520*; **[*14]** *see also id. at 1523*. In construing the meaning of "unreasonable," the Court adopted an "objectively unreasonable" standard as the decisional guide. *See id. at 1521*.

In the instant case, the Appellate Division rejected petitioner's arguments in a published opinion, holding that:

> Where defendant conceded that he had been involved in prior "run-ins" with the court, and that he did not intend to "sit back down and just let [his] life just go down the drain," it was not an abuse of discretion for the court to exclude defendant from sidebar conferences with potential jurors during *voir dire* (*cf., People v. Rosen, 81 N.Y.2d 237, 597 N.Y.S.2d 914, 613 N.E.2d 946*). Standby counsel did not unduly interfere with defendant's right to try his case (*McKaskle v. Wiggins, 465 U.S. 168, 79 L. Ed. 2d 122, 104 S. Ct. 944*), since he had conferred with defendant and had obtained defendant's consent prior to challenging any jurors, and defendant failed to challenge counsel's representation during trial although he was provided with daily copies of the proceedings. Nor does defendant claim that he was excluded from any material part of the trial. **[*15]** In any event, this proceeding preceded *People v. Sloan* and *People v. Antommarchi*.

[2] Petitioner consulted Beecher about whether to testify, to complain about transportation to and from Rikers Island, and about whether to speak for himself at sentencing (215-16, 240-41, Sentencing: 12).

Nevitt, 619 N.Y.S.2d at 7.

Hence, first, the Appellate Division rejected petitioner's asserted analogy to *People v. Rosen (1993) 81 N.Y.2d 237, 597 N.Y.S.2d 914, 613 N.E.2d 946* ("arbitrary" exclusion of a *pro se* defendant from sidebar conferences despite a specific request to attend violates the state constitution). Second, that tribunal found that, under *McKaskle v. Wiggins (1984) 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122*, petitioner's federal constitutional right to try his case had not been unduly interfered with. (The significance of *Antommarchi* is discussed immediately below.)

Applying this standard, we find that petitioner has not shown that the state tribunals' rejection of his arguments represents an objectively unreasonable application of Supreme Court precedent.

II. POTENTIAL RIGHT OF A DEFENDANT TO BE PRESENT DURING JURY SELECTION

We distinguish between the potential right that *any* criminal defendant may have to be present during *voir dire*, in his role as the accused and even when he is represented **[*16]** by counsel, with the more important right that a defendant may have when he assumes control over his defense. In this section II, we confirm that petitioner has no federal right *qua* defendant to participate in *voir dire* and that he cannot raise any state rights in the present action.

HN4[⬆] As a matter of state law, New York courts now afford all criminal defendants the right to be present during the questioning of potential jurors concerning bias. *See People v. Mitchell (1992) 80 N.Y.2d 519, 591 N.Y.S.2d 990, 992-93, 606 N.E.2d 1381* (citing *People v. Antommarchi (1992) 80 N.Y.2d 247, 590 N.Y.S.2d 33, 604 N.E.2d 95*). However, first, because petitioner's trial convened back in 1988, he cannot claim benefit of this prospective-only rule. *591 N.Y.S.2d at 994-95*. Second, the United States Supreme Court has repeatedly declared that ***HN5***[⬆] questions of state law do not constitute grounds for federal habeas relief. *See, e.g., Estelle v. McGuire (1991) 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385*; *Lewis v. Jeffers (1990) 497 U.S. 764, 780, 110 S. Ct. 3092, 111 L. Ed. 2d 606*. Since the *Antommarchi* rule was "manifestly decided **[*17]** as a question of State law," *Mitchell, 591 N.Y.S.2d at 993*, we would not in any event consider it in a federal habeas petition.

As for any claimed infringement of federal law, petitioner's allegations also fail. ***HN6***[⬆] "Federal standards regarding a defendant's presence at a side bar are less stringent that New York's standards." *Nichols v. Kelly (W.D.N.Y. 1996) 923 F. Supp. 420, 425*. Indeed, the Federal Constitution generally "does not require a defendant's presence at sidebar conferences." *Gaiter v. Lord (E.D.N.Y. 1996) 917 F. Supp. 145, 152* (citing *Mitchell*). The Due Process Clause does demand the presence of defendants during criminal proceedings "to the extent that a fair and just hearing would be thwarted by [their] absence," that is, when such absence "would have had a substantial effect on [their] ability to defend." *Id.* (quoting *Michell; Snyder v. Massachusetts (1934) 291 U.S. 97, 107-08, 54 S. Ct. 330, 78 L. Ed. 674*); *accord, Clark*, 2000 WL 710044, at *7.

HN7[⬆] As a matter of federal law, however, "decisions as to when to question jurors and the manner of that inquiry are generally left **[*18]** to the trial judge's broad discretion." *United States v. Ruggiero (2d Cir.) 928 F.2d 1289, 1301*, *cert. denied sub nom. Gotti v. United States, 502 U.S. 938, 116 L. Ed. 2d 324, 112 S. Ct. 372 (1991)* (citations omitted). Thus, except under egregious circumstances, not present here, a defendant has no constitutional right to watch jury selection. *See, e.g., Wigfall v. Senkowski* (S.D.N.Y. Apr. 5, 1999) *No. 98 Civ. 7963, 1999 U.S. Dist. LEXIS 4165* (citing, *inter alia, Ruggiero*); *Lopez v. Warden, Sullivan Corr. Facility (S.D.N.Y. July 20, 1999) 1999 U.S. Dist. LEXIS 10924*, *2, No. 97 Civ. 2174; *Siri-Fernandez v. Keane (E.D.N.Y. Sept. 30, 1999) 1999 U.S. Dist. LEXIS 15900*, *14-16, No. 97 Civ. 670; *see also People v. Sprowal (1994) 84 N.Y.2d 113, 615 N.Y.S.2d 328, 638 N.E.2d 973* ("***HN8***[⬆] the doctrinal underpinning of the right to be present at *voir dire* sidebars [is] one of State, not Federal, law").

III. RIGHT OF A DEFENDANT PROCEEDING *PRO SE* TO PARTICIPATE IN *VOIR DIRE*

Now, we consider petitioner's right to participate in *voir dire* that arises from his *pro se* status **[*19]** and conclude that his right was not violated. ***HN9***[⬆] The *Sixth Amendment* requires that a *pro se* defendant "be allowed to control the organization and content of his own defense…." *McKaskle, 465 U.S. at 174*. This generally includes the right "to participate in *voir dire*." *Id.* "The primary focus must be on whether the defendant had a fair chance to present his case in his own way." *Id. at 177*.

Petitioner essentially makes four arguments concerning the alleged denial of his right to participate in *voir dire*. These will be analyzed separately below. First, he cites the New York state constitution, which grants him expanded rights not germane to this petition.

Second, although trial judges are allowed to limit or deny the right to self-representation if a particular defendant becomes unruly, petitioner asserts that the trial judge did not limit him due to such a fear of future disruption but rather solely because the judge felt that *voir dire* conferences were technically too complex for him to handle. In any event, petitioner apparently claims that no reasonable basis existed to presume that he would "act out" in front of the jury.

Third, **[*20]** he avers that Beecher intentionally withheld from

him what actually took place during the sidebars and did not meaningfully consult him about jury issues. Thus, he alleges that Beecher impermissibly took control of the defense away from him.

Finally, petitioner accuses his own lawyer and the district attorney of engaging in conspiracies to railroad him. These allegations have no support in the record, they were not correctly raised in his state appeals, and they are not properly before us.

A. State Constitution

We must ignore petitioner's state law argument. The precedent he cites, *People v. Rosen, supra*, applies only *state* constitutional law, which, as observed above, is not relevant to federal habeas corpus analysis.

The *Rosen* Court noted that ***HN10***[↑] the federal right to self-representation is "implicit in the *Sixth Amendment*" while the New York State constitutional right is "explicit and unambiguous." *597 N.Y.S.2d at 916*. Thus, while the Court proceeded on several occasions to cite and to quote from a seminal United States Supreme Court opinion discussing the federal standard, *see id. at 917* (citing *McKaskle, 465 U.S. at 174, 176-77, 182)*, **[*21]** the *Rosen* Court focused on the state right and twice expressly declared that it established its ruling upon state law only. *See 597 N.Y.S.2d at 916, 918*. Therefore, we do not further consider that decision.

B. Potential for Disruptive Conduct

The trial court's decision to preclude petitioner from some *voir dire* sidebar conferences is constitutionally protected because the court legitimately worried that petitioner might disrupt the proceedings. The right of a defendant to attend sidebars is no broader than the right to self-representation itself, which the trial judge may, within an appropriate exercise of discretion, divest or circumscribe.

Crucially, ***HN11***[↑] in order to retain the right to proceed *pro se*, a defendant must not have "engaged in conduct which would prevent the fair and orderly exposition of the issues." *People v. McIntyre (1974) 364 N.Y.S.2d 837, 36 N.Y.2d 10, 17, 324 N.E.2d 322*. As the Supreme Court has recognized, "The trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct…. The right of self-representation is not a license to abuse the dignity of the courtroom. **[*22]** " *Faretta v. California (1975) 422 U.S. 806, 835 n.46, 95 S. Ct. 2525, 45 L. Ed. 2d 562* (citing *Illinois v. Allen (1970) 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353*; *United States v. Dougherty (D.C. Cir. 1972) 154 U.S. App. D.C. 76, 473 F.2d 1113, 1124-26)*.

HN12[↑] If a particular defendant has done something "that is plainly identifiable as disruptive in character, such as to overturn the premise of reasonable cooperation… that would be a predicate for denying the *pro se* right." *Dougherty, 473 F.2d at 1126*. The *Dougherty* Court (cited by the Supreme Court in *Faretta*) ***HN13***[↑] characterized "disruptive" as evincing a defendant's intent to upset or unreasonably delay the trial. *Id. at 1127*; *cf. McIntyre, 36 N.Y.2d at 18* (defendant may lose his right when his conduct "is calculated to undermine, upset, or unreasonably delay the progress of the trial"; "the trial court is afforded wide latitude in maintaining courtroom decorum"). The trial judge may forbid a defendant from serving as his own lawyer when the defendant's unruly behavior at a pre-trial hearing stayed "consistent with his behavior during **[*23]** other proceedings and would likely continue at trial." *People v. Taylor (3d Dep't 1996) 638 N.Y.S.2d 841, 842, 225 A.D.2d 834* (citing *McIntyre*). However, the mere "possibility that reasonable cooperation may be withheld, and the right later waived, is not a reason for denying the right of self-representation at the start." *Dougherty, 473 F.2d at 1126*; *accord, Larrabee v. Bartlett (N.D.N.Y 1997) 970 F. Supp. 102, 107*.

HN14[↑] A defendant's insubordinate behavior need not necessarily scandalize the court in order for the court to cut off self-representation. In *Taylor*, such representation was properly stopped when, at pre-trial hearings, defendant continually rambled and would not obey the court's instruction to keep quiet. *Taylor, 638 N.Y.S.2d at 842*. Abusive remarks hurled at the judge need not be tolerated. *See Mayberry v. Pennsylvania (1971) 400 U.S. 455, 456-57, 91 S. Ct. 499, 27 L. Ed. 2d 532* (calling the judge a "dirty sonofabitch" and a "dirty, tyrannical old dog" who wants to "railroad [defendant] into [a] life sentence").

Applying these precedents to the case at bar, the minor restriction **[*24]** that the court imposed on petitioner's self-representation was reasonable under the circumstances. As described above, the record reflects that petitioner had engaged in obstreperous and disruptive conduct throughout the months during which his case had been pending. It was therefore appropriate for the court, still fearing trouble by petitioner but anxious to protect his interests, to rule that standby legal counsel, but not petitioner, would approach the sidebar.

The court could have denied petitioner's request to proceed *pro se* entirely because of petitioner's repeated disruptive, angry, and insulting conduct. The court instead gave petitioner permission to act as his own attorney in all respects, with the one exception that he could not appear at sidebars. This was an objectively reasonable, measured response to petitioner's conduct.

Petitioner argues that Justice Haft's later decision to allow him more leeway demonstrates that the court "arbitrarily failed to follow its own order" (Reply Br. 29). Apparently, however, the court wanted to test the waters and ensure that petitioner did not upset the early stages of the trial. When the first hours took place without a problem, **[*25]** the judge rationally chose to permit petitioner further scope.

Petitioner also contends that the judge never stated that petitioner would be banned from sidebars because of his previous behavior, and that the judge never expressed trepidation that petitioner would transgress in front of potential jurors. Instead, petitioner claims that "the court was merely warning petitioner like any other *pro se* defendant that if he did not act properly, the court had the power to rescind his *pro se* status" (*Id. 26-27*). These assertions are manifestly false. The judge gave *two* reasons for his sidebar exclusion (*see* V 4). The first one, that petitioner might "interfere" with the trial and "cause a scene," was immediately and logically construed by petitioner himself as a reference to his *past* "run-ins" with the judge (V 5). Secondarily, the court noted that Beecher would assist petitioner in picking a jury due to "technical rules" concerning challenges (V 8). However, the court clearly demonstrated substantial concern with how this particular defendant would behave, given his prior record of invective, catalogued above.

C. Control of Trial

HN15[↑] The Supreme Court **[*26]** has outlined two general limitations on the extent of standby counsel's participation at trial:

> First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury… If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the *Faretta* right is eroded. Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself.

465 U.S. at 178-79 (citing *Faretta, supra*) (footnote omitted).

However,

> *HN16*[↑] A defendant's *Sixth Amendment* rights are not violated when a trial judge appoints standby counsel -- even over the defendant's objections -- to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation **[*27]** by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the *pro se* defendant's appearance of control over his own defense.

Id. at 184.

In *United States v. Mills (2d Cir.) 895 F.2d 897, 905*, *cert. denied*, *495 U.S. 951, 109 L. Ed. 2d 541, 110 S. Ct. 2216 (1990)*, the Second Circuit had occasion to consider the extent of a defendant's role in self-representation. The defendant proceeded to trial *pro se* with the assistance of standby counsel. The defendant argued that the failure to allow him to make legal arguments and to attend sidebar conferences violated his constitutional rights. The Court disagreed, holding under *McKaskle* that despite these complaints, "in the context of the trial as a *whole*, we cannot conclude that [the defendant's] *Faretta* rights were violated, for we see no indication that [defendant] did not control and guide his defense and only a minuscule risk that the jury did not perceive [defendant's] control." *Id.* (emphasis added); *cf. Snowden v. State of Delaware (Del. 1996) 672 A.2d 1017, 1020-21* **[*28]** (citing several cases addressing the issue of excluding a *pro se* defendant from sidebar conferences).

Applying this standard to the case at bar, even if plaintiff had not misbehaved, we still find as an *independent* ground for denying the instant petition that "in the context of the trial as a whole," petitioner had a fair chance to present his case in his own way. For several reasons, no reasonable jury could have perceived that petitioner did not control his defense. First, the judge instructed the jury panel at the very beginning that petitioner was in control (*see* V 26).

Second, the court allowed petitioner to represent himself at all stages of the trial, including opening statements, examination of witnesses, and summation. The court actually permitted him to come to the sidebar during the trial itself and to engage in other legal colloquies.

Third, although the transcript of the *voir dire* does not reflect everything that took place, potential jurors were dismissed only for obvious reasons. Thus, their dismissal could not have upset petitioner's trial strategy, and nobody watching the proceedings could reasonably have concluded that such strategy was compromised.

[*29] Nonetheless, petitioner complains that his legal advisor consented that certain jurors be excused without consulting him. However, we can reasonably conclude that petitioner's

standby counsel did not do so. The record reflects that, on at least one occasion, Beecher conferred with petitioner before panel members interviewed at the bench were challenged for cause. Beecher also advised the judge that, before he challenged various jurors, he had told petitioner of all his objections, and petitioner had consented to their discharge. Indeed, counsel labored under a clear obligation to do so, for the court had already ruled that no challenges would be made until after petitioner consulted with Beecher (V 8). Additionally, petitioner declared in open court that he accepted the jurors eventually selected.

Finally, nothing in the record substantiates the alleged conspiracy between Beecher and the prosecution, or that someone maliciously destroyed part of the transcript. In fact, petitioner received daily transcripts. He could have checked for gaps in the record and for ethical lapses in Beecher's conduct, but he made no objections at trial. Indeed, despite his alleged mistrust of standby **[*30]** counsel, the record reflects that petitioner several times voluntarily consulted Beecher. [3]

CONCLUSION

For all of the reasons examined above, the amended petition for writ of habeas corpus is DENIED. Moreover, we decline to issue a certificate of appealability because petitioner has not "made a substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253(c)(2)*; *see also Tankleff v. Senkowski (2d Cir. 1998) 135 F.3d 235, 242* (citing *Barefoot v. Estelle (1983) 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090*). **[*31]** The Clerk of the Court is directed to close this case.

SO ORDERED.

July 28, 2000

New York, New York

WHITMAN KNAPP, SENIOR U.S.D.J.

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[3] Respondents also urge that the petition is barred by the statute of limitations as set forth in the AEDPA, *28 U.S.C. § 2254(d)(1)(A)*, and that petitioner has failed to establish a record for review because he did not object during trial to each sidebar conducted without his presence. We disagree with each of these arguments, but we need not reach a discussion of them because the petition should be dismissed on its merits.