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United States District Court, S.D. New York.

Ruben MONTALVO, Petitioner,

v.

Leonardo PORTUONDO, Superintendent, Shawangunk Correctional Facility, Respondent.

No. 97 Civ. 3336(RWS). July 30, 2001.

Opinion

MEMORANDUM DECISION

CHIN, J.

*1 On July 16, 2001, I held a hearing in connection with the petition for habeas corpus brought by petitioner Jose Morales. The only matter before the Court at that time was Morales's petition. Based upon the evidence presented at the July 16th Hearing, I issued an opinion, dated July 24, 2001 (the "Opinion"), setting forth findings of fact and conclusions of law and concluding that Morales's conviction had been obtained in violation of the Due Process Clause of the Constitution.

As the Opinion notes, Morales's co-defendant in the underlying state case, Ruben Montalvo, also filed a habeas corpus in this Court, which was assigned to United States District Judge Robert W. Sweet. Montalvo's petition was dismissed by opinion dated December 8, 1998, long before Father Joseph Towle disclosed his conversations with Jesus Fornes. *See Montalvo v. Portuondo*, No. 97 Civ. 3336(RWS), 1998 U.S. Dist. LEXIS 19137, at * 2 (S.D.N.Y. Dec. 9, 1998). Montalvo did not appeal.

In the course of considering Morales's petition, I reviewed all the evidence presented in connection with the underlying case, including the evidence against Montalvo. The evidence against Montalvo was slightly different from that against Morales. Although only one eyewitness identified Morales, two eyewitnesses, Jennifer Rodriguez and her eleven-year-old son Cesar Montalvo, placed Ruben Montalvo at the scene and indicated his involvement in the murder. Likewise, while Morales presented five alibi witnesses, including a neighbor who had yelled at him for throwing a light bulb at her cat, attesting to his whereabouts the night of the killing, Montalvo presented only two eyewitnesses-his mother and a friend.

Despite these differences in evidence, however, the vast majority of the evidence relevant to Morales's habeas petition applies to Montalvo. All of the statements made by Jesus Fornes to the four individuals in question-Maria Montalvo, Anthony Servino, Father Joseph Towle, and Stanley Cohen-exculpated Montalvo as well as Morales. The two were tried together and convicted together. The issues with respect to the admissibility of Fornes's statements are precisely the same.

At the hearing on July 16th, I noted that Montalvo's petition was not before me. Montalvo has now retained counsel-the same attorneys that have represented Morales-and he has moved by order to show cause pursuant to [Fed.R.Civ.P. 60\(b\)\(5\) and \(6\)](#) to vacate and seek relief from the judgment dismissing his habeas petition. He also requested bail and reassignment of the case to me.

The application was submitted to Judge Sweet, to whom Montalvo's petition was originally assigned. Judge Sweet, however, is presently out of the district and unable to hear either the [Rule 60](#) motion or the bail application. As a consequence, Judge Sweet's chambers directed Montalvo's attorneys to seek relief in Part I. The Part I Judge has now referred the matter to me, as I have extensive knowledge of the case.

*2 Accordingly, I heard argument on the [Rule 60](#) motion and the bail application this afternoon, July 26, 2001.

As stated on the record, I am granting the [Rule 60\(b\)](#) motion solely to the extent that the judgment dismissing the petition is vacated. Based upon the papers submitted by Montalvo, as well as the evidence presented to the Court during its consideration of Morales's habeas petition, I find that it is no longer equitable that the judgment dismissing Montalvo's habeas petition should have prospective relief. I also find, pursuant to [Fed.R.Civ.P. 60\(b\)\(6\)](#), that the testimony established at the July 16th hearing establishes a strong likelihood of Montalvo's innocence and thus justifies relief from the judgment dismissing his habeas petition. In addition, the judgment dismissing the petition was based on Montalvo's murder conviction which, for the reasons stated in my Opinion, is flawed and was obtained in violation of his constitutional rights.

Accordingly, the petition is reinstated. The District Attorney's Office is free, if it wishes, to continue to oppose the petition on the merits. I am not deciding whether the petition will be granted. The merits will be addressed at a later date by Judge Sweet, or, should he choose to transfer the case, by the undersigned.

In the meantime, however, for the reasons explained in my Opinion and as stated on the record this afternoon, I am granting Montalvo's application for bail.¹ As the Second Circuit has recently reiterated, "federal courts have inherent authority to admit to bail individuals properly within their jurisdiction." *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir.2001). This authority extends to habeas petitioners. *See id.* To succeed on an application for bail pending disposition of his petition, a habeas petitioner "must demonstrate that the habeas petition raises substantial claims and that extraordinary circumstances exist[] that make the grant of bail necessary to make the habeas remedy effective." *Id.*

- In view of the fact that this case is assigned to Judge Sweet, the Court consulted with Judge Sweet's chambers and was advised that Judge Sweet is of the view that both the [Rule 60\(b\)](#) motion bail applications should be granted.

Montalvo has made such a showing. For the reasons set forth in the Opinion, I conclude that Montalvo has raised substantial claims with respect to the admission of Jesus Fornes's statements. Moreover, the circumstances of this case are extraordinary. Montalvo shall be released, forthwith, on his own recognizance, on the condition that he reside with his aunt in the tri-state area, pending the resolution of this action.

SO ORDERED.

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