

Richard Rosario was in Deltona, Florida the entire day of June 19, 1996. On that same day on a street in New York City's Bronx borough someone fatally shot Jorge Collazo. It is indisputable that being over a thousand miles from where a murder occurs is significant evidence proving the truth of the claim, "It wasn't me." It is not sufficient, however, to convince NYPD detectives, the Bronx's District Attorney, or New York state judges that Rosario didn't shoot Collazo.

The Crime

On the morning of June 19, 1996, Collazo and his friend Michael Sanchez were walking in the Bronx from Collazo's school to Sanchez's home when they encountered two young men, an African-American and a Hispanic. Collazo and the Hispanic got into an argument that lasted about one minute. Collazo and Sanchez then resumed walking. After they had walked a few blocks the Hispanic approached them from behind. He hollered something like, "So, what's up now?", and then fatally shot Collazo in the head. Sanchez was not injured and he ran after the fleeing shooter, but he could not catch up to him. Collazo was carrying a loaded firearm at the time he was shot.

Robert Davis was the porter for the apartment building next to the crime scene. He was sweeping the sidewalk with his back turned towards Collazo and the shooter when he heard someone angrily yell. As Davis turned around he saw the shooter take a gun out of a coat or jacket pocket and shoot Collazo in the head. Davis claimed he was standing approximately two car lengths from where the shooting took place.

A hot dog vendor, Jose Diaz, witnessed the initial argument between Collazo and the shooter, but he did not see the actual shooting a few minutes later.

On the day of the shooting, the detectives asked Sanchez and Diaz to look through "mugshots" of persons whose photographs were on file in the 43rd precinct. Diaz was unable to recognize anyone as the shooter. Sanchez, however, eventually selected the picture of 20-year-old Richard Rosario as the shooter. According to the police, Davis also selected Rosario's picture later that day. Based solely on the two "mugshot" identifications, a warrant was issued for Rosario's arrest.

Rosario's alibi

Rosario was in Deltona, Florida when he found out about the warrant for his arrest

1,070 Miles From Crime Scene Not Enough To Prevent Murder Conviction – The Richard Rosario Story

By Karyse Philips *

from family members who lived in the Bronx. They told him that the NYPD was looking for him in connection with a recent homicide. Since he hadn't been in New York at the time of the murder he was confident that he could easily resolve the situation. Rosario voluntarily went back to New York on a Greyhound bus on June 30 – eleven days after Collazo's murder. Rosario telephoned the police when he arrived in New York on July 1, and told them that he had just returned from Florida. He also told them that he would come to the precinct. Nevertheless, after his call a police car was sent to his mother's home and he was arrested.

On the day of his arrest, Rosario provided a detailed statement to NYPD detectives about his whereabouts during the preceding month. He identified thirteen eyewitnesses who could attest to the fact that he had been Florida during the month of June 1996 – and so it was impossible for him to have murdered Collazo, who he didn't know and had never met.

After his arrest Richard Rosario gave a statement to the NYPD that named 13 alibi witnesses who could verify that he was in Florida in June 1996 when Jorge Collazo was murdered in New York City. There is no evidence that the police or prosecutors attempted to interview any of those witnesses to determine if they had arrested the "right man."

Rosario also explained that he first traveled to Deltona from New York in December 1995. He returned to Deltona in February 1996, at which time he became friendly with a group of people who lived there, particularly John Torres and his fiancée (now his wife) Jenine Seda. In March of 1996 Rosario was arrested in Florida for an outstanding warrant in New York, and he was not released from jail until approximately one month later. He immediately returned to New York upon his release.

In late May 1996, Rosario returned once again to Deltona, informing his fiancée, Minerva Godoy, that he was looking for a job and an apartment so that she and their two children could join him there. In reality,

Rosario was staying with Torres and Seda, hanging out with friends, and dating other women. He spent a significant amount of time with one woman, Denise Hernandez. [JD note: It was Ms. Hernandez who first contacted JD about

Rosario's case.] Rosario never obtained employment and was not working during his time in Deltona. Godoy, however, wired him spending money by Western Union and talked with him on the telephone.

On June 20, 1996, one day after Collazo was murdered 1070 miles away in New York, Seda gave birth in Deltona to her first child, John Torres, Jr. ¹ The birth of this child enabled Rosario to distinctly remember the days immediately before and after the date of the murder, and provided an unmistakable frame of reference that enabled many people in Deltona to recall seeing Rosario there during that same time period.

After Rosario's arrest, Sanchez and Davis chose him out of a lineup as the man they previously identified from his mugshot.

Lack of pre-trial defense investigation

The court appointed Joyce Hartsfield to represent Rosario. Hartsfield hired an investigator, Jessie Franklin, to aid her with the preparation of Rosario's defense.

After meeting with Rosario and learning the details of his alibi, Franklin attempted to contact various witnesses in Florida. However, because Franklin was unable to contact many of the witnesses by phone, in October 1996 Rosario's lawyer asked the court to approve expenses to send Franklin to Florida to continue her investigation. Franklin submitted an affidavit in conjunction with this request, specifically stating that she was "unable at a long distance to render an effective investigation on this very serious case." On March 19, 1997 – nine months after Rosario was arrested – the court granted the request and approved expenses to send an investigator to Florida.

Hartsfield, however, didn't follow-up on the court's authorization because she never told Franklin to go to Florida. Many months passed with no further investigation into Rosario's case. Finally, in frustration, Rosario requested another lawyer. The court granted his request, and in February 1998 assigned Steven Kaiser as substitute counsel. Kaiser was unaware that the court had approved

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travel expenses for an investigator, so he did not send a defense investigator to Florida.

Consequently, prior to Rosario's trial, neither the defense nor the prosecution sent anyone to talk to his many alibi witnesses in Deltona. Furthermore, Kaiser never spoke by telephone to many of the witnesses named in Rosario's post-arrest statement to the police, and he made no attempt to document Rosario's alibi through phone records, Western Union receipts for money wired to him by Godoy, or Florida police records.

Rosario's trial

Rosario's trial began in the Bronx on November 10, 1998, with Kaiser representing him.

Sanchez and Davis identified Rosario as the shooter. The prosecution also called Diaz, the hotdog vender who had witnessed the argument leading up to the shooting, expecting him to make an in-court identification. However, Diaz refused to identify Rosario as the shooter. The prosecution presented no other evidence linking Rosario to the shooting. Although many people in the Bronx knew Rosario and his fiancée lived there, the prosecution presented no witnesses who said they saw him in New York during the month of June — except the two strangers who briefly glimpsed Collazo's murderer.

Rosario's defense was he was the victim of mistaken identity, and that at the time of the crime he was more than 1,000 miles away in Deltona. Torres and Seda agreed to travel to New York at their own expense to testify as witnesses at the trial. Also called as a witness for the defense was a representative from Greyhound, who testified about Rosario's bus ticket for his return trip from Deltona to New York on June 30, 1996. Rosario also testified in his own defense about his presence in Florida in June 1996, with particular reference to events around the time of the birth of Torres and Seda's child. Rosario's attorney, however, did not examine Torres, Seda, or Rosario about many of the facts detailed in Rosario's post-arrest statement to the police. Neither did the jury hear testimony from any of the eleven other witnesses Rosario named in his statement that could corroborate he was in Florida at the time of the murder.

On cross-examination, the prosecution attempted to discredit the two alibi witnesses as close friends of Rosario. The prosecution attacked Rosario's credibility through a rebuttal witness from the Volusia County Department of Corrections, who testified about

Rosario being jailed in Florida in March 1996. Rosario's attorney didn't ask him about the jail sentence, so the prosecution suggested Rosario attempted to conceal it from the jury — even though it was in his post-arrest statement. The prosecution also suggested that Rosario wasn't the person who traveled from Deltona to New York on June 30, since Greyhound didn't require a passenger to present identification.

Rosario's trial ended on November 23, 1998, when the jury returned a guilty verdict for the charge of second-degree murder.

Sentencing

On December 17, 1998, Rosario was sentenced to a prison term of 25 years to life. The court noted Rosario's prior criminal history of robbery, criminal possession of stolen property, and a probation violation — all of which took place while he was a juvenile. During his sentencing Rosario continued to maintain his innocence.

Direct appeal

The Legal Aid Society, Criminal Appeals Bureau, was appointed to represent Rosario, and they filed an appeal of his murder conviction. The New York Appellate Division affirmed the judgment of conviction, (*People v. Rosario*, 288 A.D.2d 142, 733 N.Y.S. 2d 405 (N.Y.App.Div. 2001)) and in 2002 the N.Y. Court of Appeals denied leave to review.

Motion to vacate Rosario's conviction

In addition to challenging Rosario's conviction on direct appeal, the Legal Aid Society retained an investigator, Joseph Barry, to locate additional alibi witnesses. Barry traveled to Florida to investigate the information provided by Rosario in his 1996 post-arrest statement. Even though it was five years after the murder, Barry was able to locate at least five individuals who had not been contacted by Hartsfield or Kaiser, but had a clear memory of seeing Rosario in Florida in June 1996. Barry also performed polygraph examinations on Rosario, Torres, Seda, and Fernando and Margarita Torres — the parents of John Torres, who also resided in Deltona. Barry concluded that all of these individuals were absolutely truthful when they stated that they saw Rosario in Florida on June 19, 1996, except for Margarita Torres, whose examination was deemed inconclusive.

During the course of its investigation, the Legal Aid Society became convinced that Rosario was the victim of a mistaken identification and wrongful conviction. Consequent-

ly, on June 11, 2003, Legal Aid filed a motion to vacate Rosario's judgment of conviction pursuant to Section 440.10 of the New York Criminal Procedural Law. The motion asserted that Rosario had received ineffective assistance of counsel, that there was newly discovered evidence, and that Rosario was completely innocent of the crime charged.

Faced with fierce opposition to Rosario's Section 440.10 motion by the Bronx County District Attorney, in March 2004 the Legal Aid Society enlisted the law firm of Morrison & Foerster to serve as co-counsel to Rosario. Morrison & Foerster had the legal expertise and financial resources necessary to properly represent Rosario in his complicated case. During the subsequent investigation, numerous witnesses in New York and Florida were interviewed who had not previously spoken with Rosario's counsel or investigators. Documentary evidence was also pursued that supported Rosario's alibi. Through Florida police records not previously obtained by the defense, Rosario's claim was confirmed that he had contact with Florida police on May 30, 1996 — less than three weeks before the shooting. Attempts were also made to retrieve phone records and proof of Western Union wire money transfers — leads that Rosario had provided to his pretrial and trial attorneys, but which they didn't pursue. During the exhaustive investigation funded by Morrison & Foerster, the Bronx D.A. refused to cooperate in any way or entertain the possibility that Rosario was a victim of mistaken identification.

An evidentiary hearing on Rosario's motion took place in August and September 2004. The defense called seven exculpatory witnesses to testify on Rosario's behalf. Most of these witnesses had little, if any, contact with Rosario during the eight years from the time of his arrest, and they did not have a close personal relationship with him or any reason to not tell the truth. The lack of a personal relationship between Rosario and most of the seven witnesses underscores the truthfulness of their testimony that they saw him in Florida on or about June 19, 1996. Four witnesses testified specifically that they saw him on June 19 — the day before his friend Jenine Seda gave birth to her son.

In spite of the new evidence supporting Rosario's misidentification as the shooter, the court denied his motion to vacate on April 4, 2005. Although the court acknowledged there was a serious misunderstanding by both Hartsfield and Kaiser in believing that the trial court had denied the request for approval of investigative expenses when in fact it had been granted, the court considered the mis-

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take as harmless error since it “was not deliberate.” In its decision the court failed to take into account the failure of Rosario’s attorneys to pursue documentary evidence and, notably, the court made no finding that any of the witnesses at the hearing were not credible. That is significant and makes the court’s ruling somewhat inexplicable, because if even one of the seven witnesses was judged to be credible (and hence telling the truth), then Rosario is actually innocent, and the victim of a miscarriage of justice.

The New York Appellate Division denied Rosario’s motion for leave to appeal the lower court decision.

Federal habeas petition

With his state appeals exhausted, on September 15, 2005 Rosario’s attorneys filed a writ of habeas corpus on his behalf in the U.S. District Court for the Southern District of New York. The writ states four grounds for relief:

1. Petitioner did not receive constitutionally effective assistance of counsel
2. The prosecutor’s use of peremptory challenges established a *prima facie* case of racial discrimination
3. The prosecutor’s introduction of extrinsic evidence on a collateral matter deprived petitioner of his constitutional due process right to a fair trial
4. Due process requires reversal of petitioner’s conviction because the evidence demonstrates that he is innocent.

The essence of Ground 1 is that the failure of Rosario’s pre-trial lawyer Hartsfield, and his trial lawyer Kaiser, to locate and interview numerous exculpatory witnesses and investigate documentary evidence supporting Rosario’s alibi, amounted to deficient representation under the Sixth Amendment to the federal constitution. In *Wiggins v. Smith*, 539 U.S. 510 (2003), the U.S. Supreme Court established the principle that defense counsel has a constitutional responsibility to investigate their client’s defense in preparation for trial.

The essence of Ground 2 is the prosecution violated the U.S. Supreme Court’s prohibition set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986) against juror discrimination on the basis of race, by using all six of its peremptory challenges to strike African-Americans from the jury.

The essence of Ground 3 is that Rosario’s federal right to a fair trial was violated when

the trial judge permitted the prosecution, over the objections of Rosario’s attorney, to introduce evidence of Rosario’s jailing for a month in Florida several months before Collazo’s murder.

The essence of Ground 4 is that the new testimony and documentary evidence the jury did not consider establishes that Rosario is actually innocent of murdering Collazo, “rendering his continued incarceration to be a violation of his due process rights and the prohibitions against cruel and unusual punishment.”²

The petition’s Memorandum of Law describes the absurdity of the prosecution’s case against Rosario:

According to the State’s theory, the following events must have occurred: (i) Petitioner returned to New York from Florida sometime between May 30, 1996, and June 19, 1996, without contacting his fiancée, Minerva Godoy, or their children; (ii) he spent time with an unidentified friend, rather than his family, in the Bronx; (iii) he engaged in a random verbal argument with Collazo — a stranger — on the street; (iv) after this verbal argument, he approached Collazo from behind and lethally shot him in the head; (v) sometime between June 19, 1996, and June 30, 1996, he traveled back to Florida from New York; (vi) on June 30, 1996, he again returned to New York from Florida; and (vii) on July 1, 1996, he called the police to go voluntarily to the police station the following day. Meanwhile, John Tones, Jenine Seda, Fernando Tones and Chenoa Ruiz each must have lied under oath that they saw Petitioner in Deltona, Florida, on June 19, 1996. Clearly, no reasonable juror could view these facts and find Petitioner guilty of Collazo’s murder beyond a reasonable doubt. This is especially true when considering the weakness of the People’s case, which consisted of only two eyewitnesses who had only minutes, if not seconds, to see the shooter.³

U.S. Magistrate Judge Henry Pitman was assigned to evaluate Rosario’s writ of habeas corpus and submit a report and recommendation to U.S. District Court Judge P. Kevin Castel. On March 13, 2007 Rosario’s attorneys submitted a letter to Judge Pitman informing him of two relevant federal decisions filed after Rosario submitted his reply brief on May 8, 2006.

The first case was *Garcia v. Portuondo*, 459 F.Supp.2d 267 (S.D.N.Y. 2006). Jose Garcia’s federal habeas petition was granted based on the ineffectiveness of his counsel for failing to

investigate witnesses and documentary evidence corroborating his alibi that he was in the Dominican Republic when the murder occurred in New York City that he was convicted in 1993 of committing. Like Rosario, Garcia’s conviction was based solely on eye-witness testimony. In *Garcia* the federal court rejected the government’s contention that the defense lawyer’s failure to conduct a thorough alibi investigation was a “strategic” decision. The *Garcia* decision is precedential for Rosario because it was issued by a federal judge in the Southern District of New York, where Rosario’s habeas petition was filed. The same as Rosario, New York state courts refused to grant Garcia a new trial — even though there is compelling unrefuted evidence he was more than 1,500 miles from New York City at the time the murder occurred.

The other case was *Raygoza v. Hulick*, 474 F.3d 958 (7th Cir. 2007). Christopher Raygoza’s defense counsel was found ineffective for failing to interview all available alibi witnesses before deciding which ones to call to testify at Raygoza’s first-degree murder trial. The court ruled, “In a first-degree murder trial, it is almost impossible to see why a lawyer would not at least have investigated the alibi witnesses more thoroughly.” *Id.* at 964. Similar to Rosario’s case, Raygoza’s lawyer didn’t investigate seven alibi witnesses.

Current status

As of early summer 2007, Magistrate Judge Pitman has not issued his response to Rosario’s habeas petition. The Legal Aid Society and Morrison & Foerster continue to represent Rosario. He can be written at:

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In the Subject line write: Richard Rosario

* This article was derived (with permission) from a Memorandum written by three of Rosario’s lawyers, and other case documents available for no-charge downloading or printing on the Justice Denied website at, www.justicedenied.org/rr/rrdocs.htm

Endnotes:

1 It is 1,072 miles from Deltona, FL to the Bronx, NY, according to mapquest.com. Last checked June 20, 2007.

2 *Rosario v. Robert*, Case No. 05 CV 8072 (PKC) (S.D.N.Y.), Memorandum Of Law In Support Of Petition Under 28 U.S.C. § 2254 For Writ Of Habeas Corpus, December 16, 2005, p. 57.

3 *Id.* at 57-8.

