

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2003

4 (Argued: April 8, 2004

Decided: August 31, 2004)

5 Errata Filed: September 24, 2004)

6 Docket No. 02-2666

7 -----
8 WILLIAM K. McMAHON,

9 Petitioner-Appellee,

10 - v -

11 GARY HODGES, Warden, Gowanda Correctional Facility, and
12 THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

13 Respondent-Appellant.
14 -----

15 Before: FEINBERG and SACK, Circuit Judges, WEXLER, District Judge.*

16 Appeal from a judgment of the United States District Court
17 for the Southern District of New York (Denny L. Chin, Judge) granting
18 the petitioner's application for a writ of habeas corpus pursuant to 28
19 U.S.C. § 2254 on the ground that his waiver of his right to a jury
20 trial prior to a criminal trial in New York State court was involuntary
21 and therefore void. See McMahon v. Hodges, 225 F. Supp. 2d 357, 359
22 (S.D.N.Y. 2002). We conclude that the court erred in deciding that the
23 state trial judge violated established federal law, as determined by
24 the Supreme Court of the United States, by transferring the
25 petitioner's case to another judge for a bench trial only, with the

* Hon. Leonard D. Wexler, of the United States District Court for the Eastern District of New York, sitting by designation.

1 petitioner's consent, even though that resulted in the petitioner's
2 waiver of a jury trial.

3 Reversed.

4 William A. Gerard, Palisades, NY, for
5 Petitioner-Appellee.

6 TINA GUCCIONE, District Attorney's Office
7 Rockland County (Michael E. Bongiorno,
8 District Attorney, Ellen O'Hara Woods, Ann C.
9 Sullivan, Senior Assistant District Attorneys,
10 of counsel), New City, NY, for Respondent-
11 Appellant.

12 DAVID A. LEWIS, The Legal Aid Society Federal
13 Defender Division Appeals Bureau, New York,
14 NY, Amicus Curiae.¹

15 SACK, Circuit Judge:

16 The State of New York appeals from a judgment of the United
17 States District Court for the Southern District of New York (Denny L.
18 Chin, Judge) granting the petitioner-appellee William McMahon's
19 application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.
20 The district court concluded that although the state trial judge did
21 not err in declining to recuse himself from presiding over McMahon's
22 trial, he did violate established federal law, as determined by the
23 Supreme Court of the United States, by conditioning the transfer of
24 McMahon's case at his request to another judge on McMahon's waiver of
25 his right to trial by jury. McMahon v. Hodges, 225 F. Supp. 2d 357,
26 359 (S.D.N.Y. 2002). We agree with the district court that the

¹ Mr. Gerard declined to submit a brief in McMahon's behalf. Mr. Lewis and the Legal Aid Society therefore, at our request, ably submitted a brief and argued, as amicus curiae, in support of our affirming Judge Chin's judgment. We are grateful to them for so doing.

1 original trial judge was not required to recuse himself but disagree
2 with the district court's conclusion that McMahon's waiver of his right
3 to a jury trial was void. McMahon waived that right in the course of
4 accepting the original trial judge's offer to transfer McMahon's case
5 to another judge for a bench trial. The offer to McMahon of the option
6 of a bench trial before another judge did not coerce McMahon into
7 waiving his right to trial by jury. Because McMahon's waiver was
8 voluntary, the application for a writ of habeas corpus should have been
9 denied.

10 **BACKGROUND**

11 The facts relevant to this appeal are set forth in some
12 detail by the district court in its published opinion. McMahon, 225 F.
13 Supp. 2d at 359-64. We rehearse them here only insofar as we think it
14 necessary to explain our resolution of this appeal.

15 On October 6, 1995, McMahon and his brother-in-law Ronald
16 Hall were charged in New York State County Court, Rockland County, with
17 kidnaping in the second degree, unlawful imprisonment in the first
18 degree, attempted rape in the first degree, and assault in the second
19 degree. The charges arose out of allegations that they had assaulted a
20 woman who was renting a room in the McMahon family home, where both
21 McMahon and Hall were living at the time. The prosecutions of the two
22 were severed for trial.

23 Then-Orange County Court Judge Jeffrey G. Berry presided over
24 Hall's trial first. A jury found Hall guilty of charges of kidnaping
25 in the second degree, unlawful imprisonment in the first degree, and

1 assault in the second degree. He was acquitted of attempted rape in
2 the first degree.

3 Subsequently, on the day McMahon's trial was scheduled to
4 begin before Judge Berry, the judge held an ex parte conference with
5 defense counsel to review the evidence that the defense wanted to offer
6 to impeach the credibility of the victim. Judge Berry indicated that
7 all of the proffered evidence would likely be held inadmissible. Judge
8 Berry then convened a preliminary conference with the prosecution and
9 the defense during which the judge discussed, on the record, his view
10 of the case. He explained some of the benefits he thought McMahon
11 would receive if he accepted a plea agreement rather than go to trial.
12 He characterized the state's plea offer as "very, very fair." Prelim.
13 Conf., June 11, 1996, at 5. He also said that he had read McMahon's
14 grand jury testimony and thought that McMahon had admitted to
15 imprisoning the victim unlawfully.

16 As Judge Berry made these comments, McMahon's counsel became
17 concerned that the judge had decided that McMahon was guilty of the
18 charges against him. Counsel asked Judge Berry to "keep an open mind."
19 Id. at 11. The judge responded that he had "sat through the trial of
20 this case already [i.e., the related charges against Hall, and had]
21 heard the evidence in this case already." Id. He noted that McMahon's
22 grand jury testimony was "extremely inculpatory to the degree that he
23 inculcates himself for the unlawful imprisonment first degree." Id. at
24 12. After defense counsel protested, the judge continued, "From what I
25 can see from the facts of this case, [] your client -- having sat
26 through the trial of the co-defendant -- that the People have the

1 ability to prove him guilty beyond a reasonable doubt." Id. at 13. He
2 nonetheless assured counsel that, "[a]s a judge, [he would be] totally
3 fair and impartial." Id. At the end of this colloquy, McMahon's
4 counsel asked Judge Berry to recuse himself. Judge Berry declined to
5 do so.

6 Later that day, in open court, Judge Berry returned to the
7 question of his recusal and his impartiality. He said:

8 Well, you know, I'm not the trier of fact in this
9 case. I am the judge who will moderate and produce
10 a fair and impartial trial. Now, if, in fact, you
11 wanted to have a non-jury trial, I would -- could
12 arrange to have a judge here to try the case
13 non-jury if you felt that that right was being
14 impeded at this time.

15 Do you feel that that's being impeded? Is there a
16 desire for a non-jury trial?

17 Sandoval Hearing,² June 11, 1996, at 32-33.

18 After consulting with McMahon, McMahon's counsel accepted
19 Judge Berry's offer of a transfer to another judge for a non-jury
20 trial. The case was then transferred to County Court Judge Robert R.
21 Meehan.

22 When the parties appeared before Judge Meehan, he said, "I
23 understand there's an application by the defense in this case and, for
24 that reason, the case has been approved by the presiding judge . . . to
25 be transferred to me." Waiver of Jury Trial Proceedings, June 11,

² "In New York state courts a defendant may request a preliminary hearing, known as a Sandoval hearing, to determine whether, if he elects to testify, his prior criminal record may be used to impeach his credibility. People v. Sandoval, 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974)." Norde v. Keane, 294 F.3d 401, 408 n.1 (2d Cir. 2002).

1 1996, at 40. McMahon's counsel then made an application to waive trial
2 by jury. Judge Meehan explained to McMahon and his counsel that
3 McMahon had a right to a trial by jury and discussed the consequences
4 of waiving that right. Judge Meehan asked McMahon if he "really
5 want[ed] to . . . waive [his] constitutional right to a jury trial."
6 Id. at 41. McMahon answered in the affirmative. McMahon's lawyer
7 reviewed the court-supplied document incorporating the waiver with his
8 client. McMahon executed the waiver, which Judge Meehan then read
9 aloud.

10 Pursuant to the waiver, the case was then tried to Judge
11 Meehan without a jury. He found McMahon guilty of kidnaping in the
12 second degree, attempted rape in the first degree, and assault in the
13 second degree.

14 McMahon appealed his conviction to the Appellate Division,
15 Second Department, on several grounds, including that he had been
16 denied his right to trial by jury. The Appellate Division, although
17 modifying the judgment by reversing the conviction of kidnaping in the
18 second degree, affirmed on all other grounds. People v. McMahon, 248
19 A.D.2d 642, 643, 669 N.Y.S.2d 951, 951 (2d Dep't 1998). Leave to
20 appeal to the New York Court of Appeals was denied. People v. McMahon,
21 92 N.Y.2d 928, 680 N.Y.S.2d 469, 703 N.E.2d 281 (1998) (Wesley, J.).

22 On September 29, 1999, McMahon filed an application for a
23 writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States
24 District Court for the Southern District of New York. He argued,
25 first, that his due process rights had been violated because the trial
26 judge was biased, and, second, that he had been denied his right to a

1 jury trial under the Sixth Amendment to the United States Constitution
2 as applied to New York State through the Fourteenth Amendment because
3 the trial judge had impermissibly conditioned his recusal from
4 McMahan's case on McMahan's waiver of that right. The district court
5 concluded that McMahan's first argument had no merit, noting that "the
6 state court system permits a judge to participate in [plea]
7 negotiations," McMahon, 225 F. Supp. 2d at 369, and that, according to
8 the United States Supreme Court, "opinions formed by the judge on the
9 basis of facts introduced or events occurring in the course of the
10 current proceedings, or of prior proceedings, do not constitute a basis
11 for a bias or partiality motion unless they display a deep-seated
12 favoritism or antagonism that would make fair judgment impossible," id.
13 (quoting Liteky v. United States, 510 U.S. 540, 555 (1994)) (internal
14 quotation marks omitted). Because New York State law permits a judge
15 to participate in plea negotiations and the trial judge had not
16 displayed a "deep-seated favoritism or antagonism that would make fair
17 judgment impossible," Liteky, 510 U.S. at 555, there was neither a
18 state-law nor a constitutional basis for requiring him to recuse
19 himself.

20 But the district court agreed with McMahan's second argument.
21 The court concluded that the state trial judge had violated the Sixth
22 Amendment by conditioning McMahan's transfer of the case to another
23 judge on McMahan's waiver of his right to a jury trial. Id. at 371.
24 Noting that the right to a trial by jury for serious criminal offenses
25 is "fundamental," id., the district court concluded that McMahan gave
26 up that right "under undue pressure," id. at 373, and "received no

1 benefit in return," id. at 374. The district court therefore granted
2 McMahon's application for a writ of habeas corpus.

3 The State appeals.

4 **DISCUSSION**

5 I. Standard of Review

6 We review a district court's decision to grant a writ of
7 habeas corpus de novo. Lurie v. Wittner, 228 F.3d 113, 121 (2d Cir.
8 2000), cert. denied, 532 U.S. 943 (2001).

9 II. Review Under AEDPA

10 Under the Antiterrorism and Effective Death Penalty Act,
11 Pub.L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), a federal court may
12 grant a petition for habeas corpus notwithstanding a contrary state
13 court adjudication on the merits³ if that adjudication "resulted in a
14 decision that was contrary to, or involved an unreasonable application
15 of, clearly established Federal law, as determined by the Supreme Court
16 of the United States," 28 U.S.C. § 2254(d)(1), or "resulted in a
17 decision that was based on an unreasonable determination of the facts
18 in light of the evidence presented in the State court proceeding," id.
19 § 2254(d)(2).⁴ The United States Supreme Court has read the phrase
20 "contrary to . . . clearly established Federal law, as determined by
21 the Supreme Court," to require that the state court (1) have "applie[d]

³ Neither party argues, nor do we find any basis for concluding, that the decision of the Appellate Division was anything other than an adjudication on the merits.

⁴ McMahon argues that the state court erred in its application of law, not its determination of fact. We therefore look only to 28 U.S.C. § 2254(d)(1).

1 a rule that contradicts the governing law set forth in [Supreme Court]
2 cases," Williams v. Taylor, 529 U.S. 362, 405 (2000), or (2), upon
3 "confront[ing] a set of facts that are materially indistinguishable
4 from a decision of th[e] Court[, . . . have] arrive[d] at a result
5 different from [its] precedent," id. at 406. Only if the state court's
6 decision was an "objectively unreasonable" application of clearly
7 established Supreme Court precedent do federal courts grant the
8 petition. Id. at 409.

9 III. McMahon's Waiver

10 At the preliminary hearing, Judge Berry was in effect
11 participating in plea negotiations between the prosecution and McMahon.⁵
12 In the course of doing so, and in light of his knowledge of the case
13 acquired during the Hall trial, Judge Berry expressed his view that
14 McMahon was likely to be found guilty. McMahon had the right only to

⁵ Although federal judges are prohibited from participating in plea bargaining, see Fed. R. Crim. P. 11, this blanket prohibition does not apply to state judges. See, e.g., Miles v. Dorsey, 61 F.3d 1459, 1466 (10th Cir. 1995) (stating that Rule 11 does not apply to state courts and "does not necessarily establish a constitutional prohibition" (quoting Frank v. Blackburn, 646 F.2d 873, 882 (5th Cir. 1980), cert. denied, 454 U.S. 840 (1981))) (collecting cases). In New York State courts, a trial judge is permitted to participate in plea negotiations with criminal defendants. People v. Fontaine, 28 N.Y.2d 592, 593, 268 N.E.2d 644, 644, 319 N.Y.S.2d 847 (1971); see also People v. Signo Trading Int'l, Ltd., 124 Misc.2d 275, 277, 476 N.Y.S.2d 239, 241 (N.Y. City 1984) ("In the absence of prejudice against or prejudgment of a defendant, there is no reason for a judge [who has participated in plea discussions] to disqualify himself."). While participating in plea negotiations, a judge is permitted to discuss the possible sentencing repercussions of a defendant's choice to go to trial rather than plead guilty. People v. Zer, 276 A.D.2d 259, 259, 714 N.Y.S.2d 257, 257 (1st Dep't 2000) ("The court was not acting in a coercive manner when it reminded defendant of the scope of sentencing available in the event of a conviction after trial.").

1 either a jury trial over which Judge Berry would preside and a jury
2 would act as the trier of fact, or a bench trial at which Judge Berry
3 would act as the trier of fact. But Judge Berry also offered McMahon a
4 third alternative to which he did not have a right: a bench trial
5 before another judge unacquainted with the facts. In the course of
6 choosing the latter, McMahon waived his right to trial by jury. The
7 question is whether that waiver was coerced and therefore void under
8 applicable constitutional principles -- i.e., whether the Appellate
9 Division's decision to the contrary violated "clearly established
10 Federal law, as determined by the Supreme Court of the United States,"
11 28 U.S.C. § 2254(d)(1). We conclude that the waiver was not coerced
12 and, therefore, that the Appellate Division decision did not violate
13 clearly established Supreme Court precedent.

14 "[T]he right of the accused to a trial by a constitutional
15 jury [must] be jealously preserved." Patton v. United States, 281 U.S.
16 276, 312 (1930). At the same time, however, "an accused, in the
17 exercise of a free and intelligent choice, and with the considered
18 approval of the court, may waive trial by jury." Adams v. United
19 States ex rel. McCann, 317 U.S. 269, 275 (1942). An accused may waive
20 even fundamental rights⁶ if the proper safeguards are in place to ensure
21 that the waiver is voluntary and intelligent. Patton, 281 U.S. at 312

⁶ For instance, it is permissible for a criminal defendant, by entering into a guilty plea, to waive "nearly all of the safeguards that attend prosecution in a criminal trial," Innes v. Dalsheim, 864 F.2d 974, 977 (2d Cir. 1988), including "[the] right to call witnesses . . . , [the] right to confront and cross-examine . . . accusers, and [the] right to trial by jury," id.

1 ("[B]efore any waiver can become effective, the consent of government
2 counsel and the sanction of the court must be had, in addition to the
3 express and intelligent consent of the defendant."); see also Johnson
4 v. Zerbst, 304 U.S. 458, 464 (1938) (explaining, in the context of the
5 right to counsel, that for a waiver to be effective, it must be the
6 "intentional relinquishment or abandonment of a known right or
7 privilege").

8 The Supreme Court has held that "[a] guilty plea, if induced
9 by promises or threats which deprive it of the character of a voluntary
10 act, is void." Machibroda v. United States, 368 U.S. 487, 493 (1962).
11 It does not follow, however, that all inducements for a defendant to
12 plead guilty render either a plea or the consequent waiver of the right
13 to trial by jury involuntary. An otherwise-valid plea agreement in
14 which the accused gives up his or her right to a jury trial is not
15 rendered involuntary by the fact that, for example, it was induced by
16 an appeal to the defendant's desire to limit his or her exposure to
17 penalty. Parker v. North Carolina, 397 U.S. 790, 795 (1970) ("[A]n
18 otherwise valid plea is not involuntary because induced by the
19 defendant's desire to limit the possible maximum penalty to less than
20 that authorized if there is a jury trial.") (citing Brady v. United
21 States, 397 U.S. 742 (1970)).⁷

⁷ Although Justice Brennan's dissent in Parker stated that "any surrender of fundamental constitutional rights[should] reflect the unfettered choice of the defendant," Parker, 397 U.S. at 801 (Brennan, J., dissenting) (emphasis added), the Supreme Court has never held that the choice to waive even a fundamental constitutional right must be unfettered. Waiver must be knowing and voluntary -- no more.

1 The district court, in addressing McMahon's habeas petition,
2 correctly decided that Judge Berry was not required by constitutional
3 principle to recuse himself from presiding at McMahon's trial -- he had
4 not evidenced the "deep-seated favoritism or antagonism that would make
5 fair judgment impossible." McMahon, 225 F. Supp. 2d at 369 (quoting
6 Liteky, 510 U.S. at 555) (internal quotation marks omitted). Although
7 the trial judge had undoubtedly formed opinions about McMahon's likely
8 guilt during the course of Hall's trial at which the judge presided,
9 "opinions formed by the judge on the basis of facts introduced or
10 events occurring in the course of . . . prior proceedings[] do not
11 constitute a basis for a bias or partiality motion." Id. (quoting
12 Liteky, 510 U.S. at 555) (internal quotation marks omitted); see also
13 Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821 (1986) (noting that
14 "only in the most extreme of cases would disqualification on [the]
15 basis [of allegations of bias or prejudice by a judge] be
16 constitutionally required"). As appellate counsel for McMahon
17 conceded, McMahon, therefore, had no right to have a trial -- by the
18 bench or by a jury -- presided over by a judge other than Judge Berry.

19 The district court nevertheless concluded that McMahon "had
20 no meaningful 'choice'" but to waive his right to a jury trial,
21 McMahon, 225 F. Supp. 2d at 374; that he was "unduly fettered" in
22 making that choice, id. at 366; and that he "received no benefit in
23 return" for giving up his right to a jury trial before Judge Berry
24 because he "was already entitled to have both a fair and impartial
25 judge preside over his case and a trial by jury," id. at 374. The
26 court premised this conclusion on its view that "the surrender of any

1 fundamental constitutional right must reflect the unfettered choice of
2 the defendant." Id. at 372-73 (citing Parker, 397 U.S. at 801
3 (Brennan, J., dissenting)).

4 Although it may be said that "McMahon bargained away an
5 important right in return for the granting of his recusal motion," id.
6 at 374, a defendant may, consistent with the requirements of the
7 Constitution, bargain away his or her right to a jury trial in order to
8 receive something of value otherwise unavailable to him or her. See
9 generally Parker, 397 U.S. 790. As the district court correctly
10 observed, "[d]efendants often waive their fundamental rights in
11 criminal cases . . . [for] tangible benefit[s] that [they] otherwise
12 might not have." McMahon, 225 F. Supp. 2d at 374.

13 McMahon wishes us to characterize his waiver of a jury trial
14 before Judge Meehan as having resulted from Judge Berry's coercion.
15 But we do not think that Judge Berry coerced McMahon by offering him a
16 bench trial before another judge, something to which McMahon was not
17 entitled. At the time of his Sandoval hearing, McMahon had the right
18 either to a bench trial before Judge Berry, who had permissibly
19 indicated his view of McMahon's likely guilt, or to a jury trial over
20 which Judge Berry would preside but a jury would act as the trier of
21 fact. At that hearing, however, Judge Berry indicated that if McMahon
22 "wanted to have a non-jury trial" in which a judge who had not been
23 involved in the case would act as trier of fact instead of Judge Berry,
24 Judge Berry would "arrange" that. Sandoval Hearing, June 11, 1996, at
25 32-33. McMahon was not being coerced into giving up his right to a
26 trial by jury; he was being offered something to which he had no right:

1 a bench trial before a judge who, at the time of trial, was unfamiliar
2 with the facts of the case. His right to a jury trial was not thereby
3 abridged.

4 We conclude that the Appellate Division's decision in
5 McMahon's case was not "contrary to, [and did not] involve[] an
6 unreasonable application of, clearly established Federal law, as
7 determined by the Supreme Court of the United States." 28 U.S.C. §
8 2254(d)(1). We therefore reverse the judgment of the district court
9 granting McMahon's application for a writ of habeas corpus based on his
10 waiver of trial by jury.

11 **CONCLUSION**

12 For the foregoing reasons, the judgment of the district court
13 is reversed.