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BARBARA ANN SALDINGER

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BARBARA ANN SALDINGER,

Petitioner,

v.

SANTA CRUZ COUNTY SUPERIOR COURT,

Respondent.

Case No. CV 10-3147 SBA

REPLY TO STATE'S OPPOSITION TO STAY OF PETITIONER'S JAIL SENTENCE

INTRODUCTION

On July 19, 2010, petitioner Saldinger filed her pending habeas corpus action challenging on federal constitutional grounds her California conviction for the misdemeanor offense of brandishing an imitation weapon. The following day, she filed in this Court an emergency motion for a stay of her 60 day sentence of incarceration, as she anticipated that she would be ordered to surrender to serve that sentence at a status conference to be held in the respondent Santa Clara Superior Court on July 28, 2010. Dr. Saldinger appeared at that status conference yesterday and was ordered to report to the Santa Cruz County Sheriff's Department by 3 p.m. to arrange to serve her sentence. The Sheriff's Department then ordered Doctor Saldinger to return on Monday, August 23, 2010 to begin serving her sentence. Since August 23rd is the effective date on which Doctor Saldinger will be first incarcerated, she renews her request that a stay order be issued before that date.

The most important statement in the state's opposition to petitioner's stay motion is its agreement that "petitioner would likely serve her short term in jail before a decision on the merits [of her petition] could be reached herein...." (Opp., at 12). The state argues that the fact that, absent a stay, Dr. Saldinger will serve the entirety of a sentence before this Court can decide the constitutionality of her confinement should not concern the Court, because "[a]n ordinary federal habeas petitioner may serve years in state prison before a resolution — favorable or unfavorable — of her petition on the merits." (Opp., at 11-12). But, as the Supreme Court long ago made clear, the very purpose of the writ of habeas corpus is "to examine the legality of the [prisoner's] commitment" and "to liberate an individual from unlawful imprisonment...." *Ex Parte Watkins*, 28 U.S. 193, 202, 203 (1830). The troubling fact that there have been instances in which some prisoners illegally confined by a state were forced to serve portions of their sentences before a federal court could put an end to those wrongs is hardly a reason to abandon the Great Writ's function of preventing unlawful imprisonment whenever possible, as is the case here.

A serious error in the state's pleading also merits mention. The state asserts that "the state court charitably stayed petitioner's jail term pending her direct review in state court..." (Opp., at 12). That statement is factually and legally inaccurate. In its initial post-conviction ruling, the state trial judge in fact denied Dr. Saldinger release pending appeal. Her appellate counsel was forced to file a motion for reconsideration pointing out that under California law, a party appealing a misdemeanor conviction *must* be granted release pending appeal. (See Exhibit A to this Reply). There was nothing "charitable" about the subsequent grant of release pending appeal; the state trial judge was powerless to rule otherwise. The important legal point is that California law recognizes that those convicted of misdemeanors must not be required to begin their sentences until the appellate challenges to those convictions can be decided on the merits, precisely because, were stays not granted, the relatively brief sentences at issue would be completely served before their legality could be determined. That same concern for fairness favors the grant of a stay in this case. *Turner v. Yates*, 2006 WL 1097319, 1 (E.D. Cal. 2006) (explaining that exceptional circumstances may be found where petitioner's sentence may be

completed before collateral review is completed).

Although the state, through the office of the California Attorney General, has never reviewed the record in this case (Opp., at p.2, n.1), it nonetheless contends that Dr. Saldinger has "virtually no chance of success on any" of her three constitutional claims.[1] Petitioner will briefly respond to that assertion.

I. THE STATE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR IN REFUSING DEFENDANT'S PROPOSED INSTRUCTION CONCERNING HER RIGHT TO EJECT A TRESPASSER

In its opposition, the state does not dispute two critical components of Dr. Saldinger's claim of federal due process error in the trial court's refusal to instruct on petitioner's defense of the right to use reasonable force to prevent a trespass on her property:

One, a right to use reasonable force to protect property exists under California law. Cal. Civil Code § 50 (emphases added); *see also Boyer v. Waples*, 206 Cal.App.2d 725, 727, 24 Cal.Rptr. 192 (1962) ("The degree of force which may be used by a person in defense of himself, his family or his property must be limited to such force as would have appeared to be necessary to a reasonable man in all of the circumstances, knowing what the defendant knew, and facing the facts which presented themselves at the time to the defendant.")

Two, a defendant possesses a due process right under the Fifth and Fourteenth Amendment's to an instruction on defending one's property "when there is 'evidence sufficient for a reasonable jury to find in [her] favor.'" (Opp., at 8, citing inter alia, *Mathews v. United States*, 485 U.S. 58, 63 (1988).)

Thus the state's response rests on its assertion that there was insufficient evidence to justify giving an instruction on the right to defend property. (Opp., at 8-10). Yet the state trial court did *not* deny the instruction on the ground of insufficient evidence; it denied the instruction for the incomprehensible reason that Dr. Saldinger was not charged with trespassing.

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[1] The state notes that "ordinarily, respondent provides the record when answering a petition on the merits" (Opp., at p.2, n.1), but suggests that it is the petitioner's obligation to provide that record to the Court in support of her stay request. Petitioner's counsel does have a copy of the trial transcript and will gladly provide it to the Court if requested to do so.

Rejecting the instruction, the trial court stated:

> Defense instruction number three asks to modify CALCRIM and give CALCRIM 3475, and in that particular case it talks about the right to eject a trespasser from real property. And in this particular situation, there was no legal authority specifically cited, although it is a CALCRIM instruction, Ms. Saldinger is not charged with specific trespassing nor is the specific instruction relevant to the actual charges that were before the Court.
>
> Also, the Court found it problematic because in this particular instruction, it was argued that it should be given because of Ms. Nikiforak [sic] had testified, "I have the right to shoot you if you come back on our property," something to that effect.
>
> And basically, the Court saw it as a double if, if you come back is one issue and then if you don't leave our property or if you pose a threat to us, then I can take action and use force against you.
>
> So, there were two ifs involved in that. I saw that this was basically confusing to the jury and I did not feel that it was relevant to the specific charges.

(ERT6 1459-1460)

The defense responded:

> Ms. Nikiforak . . . and Mr. Wagner had originally stated to Deputy MacDonald that Ms. Saldinger had said that if you come back onto my property, I have a right to shoot you and I was proffering the instruction because I thought it was relevant to the fact that indeed, owners of property have a right to exercise reasonable force to cause trespassers to leave. And the reasonable force is defined in the code section.

(ERT6 1460) The court again declined to give the requested instruction. (*Ibid.*)

Had the trial court applied the correct constitutional test, it would have recognized that there was more than enough evidence "for a reasonable jury to find in [petitioner's] favor."[2] Prosecution witnesses Magoc and Nikiforak both admitted they had climbed down onto the area that the Saldingers believed they owned and which had been excavated and prepared for placement of the Saldingers' water tank. Not only did Dr. Saldinger and her husband repeatedly testify that they believed the excavated property belonged to them, they testified that they were

[2] Indeed, even in the absence of an instruction on defense to the brandishing charge — the right to defend one's property by reasonable force — the jury deadlocked on that charge before convicting. During deliberations, after consulting with the jury, the court "reported that there was a real possibility that the jury was not going to reach a verdict on Count 2." (ERT7 1476.)

awaiting an expensive survey to confirm it. That was the entire point of the ongoing property dispute.

In addition, both Dr. Saldinger and her husband testified that, having recently purchased the property, they had been told that it extended from the line of cedars *thirty feet toward the Bloxham house* (ERT4 883; ERT5 1136), which means that the testimony of the prosecution witnesses placed Dr. Saldinger on property *she* believed to be her own when she followed Nikiforak and Magoc and issued her warning regarding future trespass. The fact that the Saldingers had agreed to remain on their side of the drip line (the "agreed upon" line was the drip line of the cedars, a point approximately 12 feet from the tree trunks on either side of the trees, not the cedar trunks themselves) and had ceased work on the water tank pad during completion of the survey certainly did not mean that the Saldingers had relinquished their claim to the land or that, when faced with a trespass which agitated their horses and caused a dangerous situation to exist on their property, they were not entitled to warn the intruders against future trespass. Notably, the state fails to cite a single case which requires that petitioner be standing on her *own* land when issuing a warning regarding future trespass on property she owns.

Thus, as required in the defense of property instruction (CALCRIM 3475) requested by the defense, there was evidence in the record from which a reasonable jury could find that, given "all the circumstances *as they were known to and appeared to the defendant*" and considering "what a reasonable person in a similar situation with similar knowledge *would have believed*," "the *defendant's* beliefs [that her property was in danger] were reasonable" and, thus, *"the danger [did] not [even] need to have actually existed."* (*Id.* [emphasis added].)

There was indeed substantial evidence presented at trial to support the inferences that (1) petitioner believed she owned the property on which Ms. Madoc and Ms. Nikiforak were standing when first seen; (2) even if Madoc and Nikiforak left within a reasonable time, petitioner was not precluded from warning them not to return; (3) Madoc and Nikiforak need not have posed an actual threat to petitioner or her property for petitioner's warning against future trespass to be considered reasonable; and (4) petitioner, who warned the intruders in a

harsh tone while carrying an unloaded pellet gun which she never once pointed at anyone, was acting reasonably under the circumstances. Every single witness agreed that the message Dr. Saldinger intended to convey was "Stay off my property," a fact that alone constitutes substantial evidence of her motivation.

The trial court was thus required to provide the jury with the instructions necessary to decide whether Dr. Saldinger's actions in ejecting trespassers and preventing future intrusions was reasonable under the circumstances, and its refusal to do so justifies federal habeas relief. *Bradley v. Duncan*, 315 F.3d 1091, 1098 (9th Cir. 2002) (holding petitioner's federal constitutional right to due process was violated by state trial court's refusal to instruct on defense theory and stating that "the right to present a defense would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense") (internal quotation marks omitted).

II. THE CONDUCT OF DR. SALDINGER WAS PROTECTED BY THE SECOND AMENDMENT

Under *McDonald v. City of Chicago*, 2010 WL 2555188 (June 28, 2010) and *District of Columbia v. Heller*, __ U.S. __, 128 S.Ct. 2783, 2822 (2008), the Second Amendment, as incorporated in the Fourteenth Amendment, guarantees citizens the right to protect their persons and residential properties by the reasonable use of armed force. *Heller* makes clear that a state cannot criminalize a homeowner's act of pointing a firearm at an intruder. 128 S.Ct. at 2818-20.

The state claims that the invocation in this case of the Second Amendment is a "red herring," apparently on the ground that while the Supreme Court has recognized the constitutional right to display a handgun in the defense of person and property, it has not yet decided a case involving the use of BB guns in such defense. (Opp., at 10, n. 5) By that logic, if the firearms at issue in *Heller* and *McDonald* were .45 caliber, those precedents would not provide a right to possess or display a .22 caliber pistol in self-defense. That analysis would constitute an unreasonable application of clearly established federal law within the meaning of 28 U.S.C. § 2254(d)(1). *Williams v. Taylor*, 529 U.S. 362, 407 (2000) (Even where controlling Supreme Court cases are factually distinguishable from a case under state court consideration,

Supreme Court precedent expresses fundamental constitutional principles of general application that control the disposition of asserted constitutional claims, and a state court acts unreasonably where it "unreasonably refuses to extend th[ose] principle[s] to a new context where [they] should apply.")

In this case, petitioner could not be constitutionally convicted of the crime of brandishing an imitation firearm unless a jury decided whether her conduct constituted a reasonable exercise of her Second Amendment rights. Because her state court jury did not decide that issue, her conviction and sentence must be invalidated.

III. CALIFORNIA LAW DID NOT GIVE CONSTITUTIONALLY ADEQUATE NOTICE THAT PETITIONER'S CONDUCT COULD SUBJECT HER TO A BRANDISHING CONVICTION

It cannot be reasonably maintained that the charged *act* in this case — holding a BB gun across one's chest without pointing it at anyone,[3] is in itself criminalized by California's brandishing statute. Nor does (or could) California law criminalize Ms. Saldinger's statements made while holding the BB gun. While a threat to shoot another party can subject a defendant to criminal sanction under California's criminal threats statute, that is only true if the threat to shoot is unconditional and immediate. "Mere angry utterances or ranting soliloquies, however violent," do not rise to the level of a crime unless they contain an "unequivocal, *unconditional*, immediate and specific" threat that "convey[s] to the person threatened ... an immediate prospect of execution of the threat." (*People v. Teal* (1998) 61 Cal.App.4th 277, 281; emphasis added).

Under the First Amendment, stating a right to shoot *if* another person commits the future crime of trespassing, an assertion of a legal right, cannot be criminalized, even if the proposition it advances is wrong as a matter of law. (*Hess v. Indiana*, 414 U.S. 105, 108 (1973) (*citing Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) and *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ["A]dvocacy of illegal action at some indefinite future time . . . is not sufficient to

[3] Both Ms. Magoc and Ms. Nikiforak testified that Ms. Saldinger never pointed the rifle at them. (ERT2 321; ERT2 399).

permit the State to punish [defendant's] speech."])

"[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997); *see also Skilling v. United States*, __ U.S. __, 2010 WL 2518587, at *25 (Jun. 24, 2010), quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). The state's opposition cites no case law supporting its contention that Ms. Saldinger was on notice that her conduct and speech could subject her to criminal sanction (Opp., at 11). The statute in question certainly does not provide such notice. Petitioner's claim of a denial of her due process right to notice is meritorious.

CONCLUSION

For the foregoing reasons, Dr. Saldinger respectfully asks this Court to order the execution of her sentence stayed and to continue her release on bail on existing conditions pending decision of her Petition for Writ of Habeas Corpus by this Court.

Dated: July 29, 2010

Respectfully submitted,

RIORDAN & HORGAN

/s/ Dennis P. Riordan
By: Dennis P. Riordan

Counsel for Petitioner
BARBARA ANN SALDINGER

EXHIBIT A

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BARBARA ANN SALDINGER

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CRUZ

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. BARBARA ANN SALDINGER, Defendant.	Court No.: M31752 **NOTICE OF MOTION AND RENEWED MOTION FOR RELEASE PENDING APPEAL** Date: May 18, 2007 Time: 8:30 AM Court: Dept. 1

TO: BOB LEE, DISTRICT ATTORNEY FOR THE COUNTY OF SANTA CRUZ; KRISTINA OVEN, DEPUTY DISTRICT ATTORNEY; AND THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on May 18, 2007, at 8:30 A.M. or as soon thereafter as counsel can be heard in Department 1 of the above-entitled Court, defendant BARBARA ANN SALDINGER, by and through her attorney, will renew her motion for release pending appeal.

This motion is based upon the instant notice, California Penal Code §1272 subd. 2, the

accompanying memorandum of points and authorities, and any further evidence, argument, and authority to be adduced by defendant at the hearing of this motion.

Dated: May 3, 2007

Respectfully submitted,

RIORDAN & HORGAN

_____

BY: DENNIS P. RIORDAN

Attorney for Defendant
BARBARA ANN SALDINGER

POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

Following a jury trial, defendant BARBARA ANN SALDINGER was convicted on March 7, 2007 in Department 1 of the Superior Court of Santa Cruz County of a single misdemeanor violation of California Penal Code section 417.4 (drawing or exhibiting an imitation firearm). Defendant was acquitted of resisting arrest and brandishing a firearm. Defendant's motion for new trial was heard and denied on April 25, 2007. Time was waived for sentencing; among other terms and conditions, the Court ordered Dr. Saldinger to serve 60 days in the county jail. (Exhibit A: Minute Order, 04/25/07).

Dr. Saldinger immediately requested a stay of the sentence and release pending appeal. That request was denied by the Court. *Id.* The Court imposed a conditional sentence and stayed execution until June 1, 2007. *Id.* Dr. Saldinger was released with an order to present herself to the Santa Cruz County Jail for processing by April 26, 2007. (Exhibit B: Probation/Conditional Sentence Order, 04/25/07) She has done so. (Exhibit C)

II. ARGUMENT

A defendant appealing a misdemeanor conviction has a statutory right to bail when a sentence of imprisonment is imposed. California Penal Code §1272(2); *see also In re Bakke* (1986) 42 Cal.3d 84, 88 ("*[A] misdemeanant has an absolute right to bail pending appeal when a jail sentence is imposed.* (§ 1272, subd. 2.)") (emphasis supplied); *In re Weiner* (1995) 32 Cal.App.4th 441, 444.

In *In re O'Driscoll* (1987) 191 Cal.App.3d 1356, the petitioner had been convicted of driving under the influence of alcohol (hereafter "DUI"), and was placed on probation. *Id.* at 1357. He was charged shortly thereafter with a second DUI. *Id.* at 1358. A probation revocation proceeding was stayed until after the defendant's trial for the alleged second offense; when the jury was unable to reach a decision, the judge declared a mistrial and calendared a hearing on the probation revocation, where it "reinstated" petitioner to probation but imposed a jail term of 120

days. *Id.* O'Driscoll immediately requested bail pending appeal; his request was denied. *Id.* Even though O'Driscoll's matter involved an order after judgment in which misdemeanor probation was reinstated, the reviewing Court found that the trial court should have granted petitioner's request for bail pending appeal.

> We conclude that section 1272, subdivision 2 guarantees a right to bail on an appeal from any appealable order or judgment imposing imprisonment on a misdemeanor offense. We base our conclusion on the clear language of the statute itself, and the decisions of our Supreme Court interpreting it.

Id. at 1359. *See also In re Newbern* (1961) 55 Cal.2d 500.

Dr. Saldinger suffered a misdemeanor conviction and was sentenced to incarceration for 60 days. She was conditionally released following sentencing and ordered to self-surrender on June 1, 2007. Under section 1272, subd. 2 and controlling Supreme Court precedent, she must be released pending decision of her appeal.

CONCLUSION

The defendant respectfully requests that this Court reconsider its previous ruling and grant her request for release pending appeal on the same terms and conditions presently in effect.

Dated: May 3, 2007

Respectfully submitted,

RIORDAN & HORGAN

_____

BY: DENNIS P. RIORDAN

Attorney for Defendant
BARBARA ANN SALDINGER