

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE : CRIMINAL TERM : PART 12

THE PEOPLE OF THE STATE OF NEW YORK

-vs- Indictment #91-1510-001

BENJAMIN CASTRICONE,
Defendant.

Erie County Hall
Buffalo, New York
July 27, 1994

B e f o r e: HONORABLE PENNY M. WOLFGANG
Supreme Court Justice

A p p e a r a n c e s:

KEVIN M. DILLON, ESQ.
Erie County District Attorney
By: PATRICIA I. CARRINGTON
Assistant District Attorney
Appearing for the People

JOHN J. CARNEY, III, ESQ.
Appearing for the Defendant

Liliana G. Cirulli
Official Supreme
Court Reporter

FILED
JUL 27 1994
CLERK'S OFFICE
ERIE COUNTY

1 Sentence

2 MS. CARRINGTON: Your Honor, the case of
3 the People of the State of New York against
4 Benjamin Castricone, Indictment 91-1510-001.
5 Patricia Carrington appearing on behalf of the
6 People. John Carney is present on behalf of
7 the Defendant Benjamin Castricone who is also
8 present.

9 Prior to sentencing, Your Honor, I
10 received yesterday pro se motion from the
11 Defendant to set aside the verdict, the jury's
12 verdict pursuant to section 330.30 Subdivision
13 3 of the Criminal Procedure Law, and I have
14 prepared a response asking that the Court deny
15 that motion for two reasons. First of all,
16 because the motion is made on the basis of
17 newly discovered evidence. However, the
18 Defendant admits in his motion papers, in his
19 affidavit, that this evidence was available to
20 the defense prior to the time of the second
21 trial. That apparently Mr. Carney spoke to the
22 witness, whom I believe is Johnnie Lane, who
23 has been convicted of several murders since
24 this incident, and apparently chose not to use
25 his testimony. So there is certainly, it does

not constitute newly discovered evidence pursuant to People versus Slaughter and People versus Salemi, both of which I have cited in my motion response and also it doesn't constitute a grounds to set aside a verdict pursuant to Subdivision 1 of Section 330.30 because this evidence does not rise to the level of something which would guarantee a reversal on appeal. As the Court is aware, this case has been reversed on appeal once. The Defendant was convicted once and was convicted again on a retrial.

So based on all the information that was available to the Defendant and defense counsel at the time of the second trial, I don't believe there is any basis for the setting aside of the verdict, and I would ask the Court to proceed to sentencing today.

With regard to sentencing, I have filed with the Court a second felony offender statement pursuant to Section 400.21 of the Criminal Procedure Law, and I would ask that the Defendant be sentenced as a second felony offender.

Other than that, I have no statement to make.

THE COURT: All right. Mr. Carney.

MR. CARNEY: Judge, we have received the second felony offender notice. We are waiving hearings. Mr. Castricone would like to briefly address the motion and it's a pro se motion.

VOICE: Your Honor, can I just say something? I'm his wife.

THE COURT: (Indicating.)

MR. CARNEY: Judge, you have read the memorandum of law and you have read the motion, have you not?

THE COURT: Certainly.

MR. CARNEY: Yes. We would -- Mr. Castricone has asked me to argue the motion. However, if you have read the motion I think that you understand the issues. I would only address the fact that I believe that it was a case of misidentification. I believe that he was wrongfully convicted. I also believe that he did have me speak to the witnesses and I did speak to the witnesses and, therefore, if the Court wishes to grant the motion I think you

1 have all of the law and all of the issues, and
2 Mr. Castricone is asking me to address the
3 motion. However, since it addresses my
4 ineffective assistance of counsel, I won't
5 speak against my client. I will allow that
6 part of the motion to have his written motion
7 speak for him.
8

9 THE COURT: The motion is in front of me.
10 The motion has been read by the Court. The
11 affidavit to set aside the verdict, the motion
12 regarding some information from other persons
13 who allegedly committed the crime and is that
14 correct?

15 THE DEFENDANT: Yes.

16 THE COURT: Castricone, and also attached
17 to it is, attached to this is a statement from
18 this alleged person, Mr. Johnnie Lane. Lane or
19 Lang?

20 THE DEFENDANT: Lane.

21 THE COURT: Well, it's Lane in one place
22 and Lang in another, but I read it to show you
23 that I read it, I understand that, and is there
24 anything further you wish to add?

25 THE DEFENDANT: Yes, a lot, Your Honor.

One of the things I would like to say is that I gave -- I told my attorney, I said this guy came to me, Mr. Lane, and told me about this crime.

THE COURT: Correct.

THE DEFENDANT: Only, there is officers that I want to call who overheard certain conversations firsthand about this crime who would be willing to come to court only if they were subpoenaed. I sent my lawyer notice, my witnesses that I wanted called including officers and the witnesses, I sent it to his office certified mail, returned -- which was refused, whoever got it refused to sign for it, sent it back to me after three days, it was sent to Mr. Carney's office three times. It was refused. They sent it back to me. Also in there I told him I wanted an expert witness which he denied.

And when I was in court here just before I started picking a jury I gave him two pieces of paper asking him to have these witnesses called. One of the papers which I told him to give you, which he refused to do, I told him

also to come and see Mr. Lane. He came down to see Mr. Lane. He told Mr. Lane that he would be called to go to trial to testify for me. This was a matter of record at the Holding Center where he signed in and signed out from seeing this man. This man also at that time gave Mr. Carney a written statement confessing to the crimes. Besides the one that you have here on your desk, I asked Mr. Carney today, where is this confession at. He said he thinks it's somewhere in his office, he doesn't know. I asked him why didn't he give it to the judge or at least to the District Attorney so she could go over and question this man and find out what's going on. He refused to give that to the District Attorney and to you after I repeatedly asked him. Basically almost begged him to have this sent to you, to give to you. I have things -- can you get the envelope, please? As a matter of fact, these are the two papers that he gave me back. One which was supposed to have been given to you the day before, the date that we supposed to pick the jury. He said that he was not going to call

those people because he feels that they may be lying. One of those was supposed to be for you and one of those supposed to be for him. I told him, listen, you told me what you think and I still want those witnesses called because I believe that what they're saying is true, because what they were telling me was only things that I read through the transcript, that witnesses would testify on the stand, was to be true and I had nothing to lose beyond that. All I could get was the six to twelve on this, I was already sentenced to. I had nothing to lose. My lawyer had nothing to lose.

I wanted these witnesses called, I demanded them to be called, I sat in the courtroom and begged him to call those witnesses. He said, well, it might ruin your case. You're going to get acquitted anyways, there is no evidence linking you to this robbery. He said five judges overruled your case, there is no way you can get convicted. I said, I want these witnesses here anyway. So I sat in the courtroom. He presented his case and when he called the last witness I asked him

1 Sentence
2 what about the other witnesses? Are you going
3 to call them? He said, no, I'm not, I don't
4 want to call them, the judge doesn't want to
5 hear it. Yes, he said this, and if he sits
6 here and denies it, he'll be lying to you.

7 I was going to go with a judge trial, he
8 told me that, no, he said the reason I couldn't
9 go with a judge trial is because you don't like
10 me, that you already think I'm guilty. That's
11 why you took my bail away from me. That's
12 another thing that he said.

13 When I told him, let me get another
14 lawyer, I told him on the phone, I called his
15 house every night, let me get another lawyer,
16 he said -- I told him, let me get another
17 lawyer. He said, no, you don't have to worry
18 about it. I'm going to represent you right.
19 This is what he said to me.

20 Not only that, not only that happened, I
21 gave him a written statement, I gave him other
22 officers which is in the correctional facility
23 over across the street who I told him they're
24 right here, their names are right here, the
25 officers' names are right here, overheard

1 Sentence
2 certain conversations. They said they would
3 not come to court on their own, come willingly,
4 they would have to be subpoenaed to come to
5 court. Not only that, I sent him other papers
6 with one of the guys in the robbery which is
7 Eric Gordon, too, came to my galley and
8 threatened me, told me if I sent it to my
9 lawyer or anybody, he would cause me bodily
10 harm. Not only -- there is an officer who
11 witnessed everything he said and he also told
12 me that he would come to court and testify for
13 me only if he subpoenaed to court. He also
14 told me that he heard everything that's present
15 that the guy said, that Eric Gordon said that
16 he would like to talk to my lawyer and tell him
17 everything about the robbery only if my lawyer
18 could get him a deal.

19 If you don't believe me, you can call your
20 own sheriffs that work in your Sheriff's
21 Department who can verify this. I'm not lying.
22 I don't know those people, they have no
23 interest in this case. I just happened to ask
24 the officer did he hear this. He said yes, and
25 as a matter of fact, a guy came from another

1
2 area of the jail down here just to see me to
3 tell me this. I have it notarized, everything
4 right here, if you would like to give it to the
5 judge, you can read it, if you want to.

6 I'm an innocent man. I didn't commit this
7 crime. I did not do this crime. I don't know
8 these people. I know nothing about this. I
9 have pictures of one of the guys, Derrick
10 Brown, who was, who was the man that was in
11 there which was supposed to have been me.
12 There is a picture of him. He does resemble
13 me, the way the witness, they got a quick
14 glance at him right here.

15 If you want to look at him, Mr. Lane told
16 me the same .22 caliber handgun that belonged
17 to Mr. Brown's father that was used in two
18 murders, two murders, was the same caliber
19 handgun that was used in the robbery that I'm
20 in prison for right now, right this minute.
21 And I'm quite sure that the officers that got
22 the gun from those murderers would take no
23 effort at all to take the gun over to see if
24 they can identify it or even bring in this
25 picture over there. I was identified -- I was

1 convicted and thrown in jail simply because I
2 look like somebody.
3

4 And if you don't believe, you go through
5 the whole transcript and see through the whole
6 transcript one of the witnesses, I could be
7 totally innocent, came from his own mouth.
8 Other witnesses, I look like the guy, I
9 resemble him. Yes. When the District Attorney
10 asked, is that the man, they said, yes, that's
11 the man that did it. But when my attorney got
12 up there and asked him, they said, I don't
13 know, he looks like the guy, he could be him.
14 I'm going to take as much time as I have. I'm
15 going to jail, not you.

16 And I told him, this is all on record,
17 this is, is the law that stated when you told
18 the jury, if you have reasonable doubt you have
19 to acquit. This is a law that you dictated to
20 the jury. It's obvious they were ignorant to
21 what you were telling them because the
22 witnesses in this crime have doubts that it was
23 me. They have to doubt, they had to. That's
24 the law, the law that you gave the jury, you
25 instructed to the jury. They have to have

doubt. They have to. I'm not supposed to be in jail. I'm innocent of this crime. I know nothing about it.

And I'll take you a step further. Maybe something you're not aware of. I was also brought up on charges in the Town of Tonawanda on the same type of charges that I've been convicted for, three witnesses positively identified me. It wasn't no, he may look like him or they -- through the whole trial they positively identified me and said I was the man. Your Honor, when this crime happened, I was at work at Ford Motor Company. My bosses came in and testified I was not there. I was not the man. Not only that, a police officer got on the stand and as a matter of record you can check it out for yourself, who said that I was not the man who committed the crime. A police officer said this. He said the ones who did it was caught with a sawed off shotgun used in the robbery that was completely ignored by the District Attorney in Niagara County. This is all a matter of record, Your Honor. I'm an innocent man. I did not do this crime.

1 Sentence

2 I did not.

3 THE COURT: Okay,

4 THE DEFENDANT: I have to go to jail. My
5 family is suffering, my wife, my children, they
6 all suffered for something I know nothing
7 about. How long, how long is this going to go
8 on? There is no, there is no evidence in this
9 case saying -- I don't even know how this case
10 was even brought to trial when you have a case
11 that there is no evidence linking a person to a
12 crime whatsoever at all. And the only evidence
13 you got is witnesses' testimony is completely
14 distorted, who saying one thing here, saying
15 one thing there, how could anybody sit in this
16 courtroom and say that, well, I'm guilty. How
17 could anybody even sit here and attempt to say
18 something like that. I don't see how justice
19 can even sit around and bring this to trial.
20 This is ridiculous. I've been in jail almost
21 three years. I've been through a lot up there,
22 a lot of things these people don't know nothing
23 about. I got scars on my body to prove, I got
24 a letter from a friend upstate, they got a war
25 up there, a racial war. This is what I'm

1 Sentence

2 getting ready to go back to for something I had.
3 nothing to do with.

4 THE COURT: Thank you.

5 THE DEFENDANT: I have much more to say.
6 I'm not finished. This is my life. I know you
7 may be upset that I'm talking. I got to go
8 back to prison. I have to go back to prison to
9 where I don't want to be, where I shouldn't be,
10 I shouldn't be there. This is what I got to go
11 back. You're getting ready to sentence me back
12 to a prison where I don't belong. I don't
13 belong there. I didn't commit this crime. I
14 know nothing about it. If I had done anything,
15 I would have at least have took a cop-out to
16 it. I would probably be home now. I don't
17 know nothing about this crime, Your Honor,
18 nothing, nothing at all. My family backs me
19 up. Everybody backs me up. My family is here.
20 What's going to happen to me now? Is this
21 motion going to be completely ignored? Are you
22 going to say, well, deny the motion? You're
23 not going to go back to prison or for what he
24 did, for what he failed to do, he had ample
25 time, he had a month before this trial when he

Sentence

1 talked to Mr. Lane. Why don't you ask him what
2 happened to the statement that Mr. Lane gave
3 him, the confession, the first original
4 confession? Isn't he supposed to give that to
5 you or the District Attorney? Isn't it up to
6 my discretion even though he advises me of
7 certain things? It's up to me if I want a
8 witness called. Why don't you ask him why my
9 letter was sent back. It was sent to the
10 office three times, they have legal secretaries
11 to sign for legal mail. Why was it sent back
12 to me?

14 Now, what's going to happen to me? I got
15 to go back in prison. Someplace I don't
16 belong, because this man made -- I'm not even
17 saying an error because error in effect is
18 something you do by mistake. This is not an
19 error, or this is something that was done
20 purposely. So now what's going to happen to
21 me? I sit here in cuffs. I've been in two
22 trials, I conducted myself as a gentleman
23 through two trials when I shouldn't even have
24 been at. I went and come back at trial, I
25 conducted myself as a gentleman, I did not act

1 up. But still I stand here cuffed up, shackled
2 up and everything. Granted, I've done some bad
3 things in my life, but this is not me. And all
4 this is sitting right here in front of me. I
5 could take you through the transcript and
6 everything you had firsthand to see all this,
7 firsthand, you sat in this courtroom. You sat
8 right where you sitting right now, heard
9 everything that was said here. You heard what
10 the witnesses said, you heard them sit there
11 and say they couldn't be sure, I look like the
12 guy. I only going to prison because I resemble
13 somebody. I resemble the man right here, Your
14 Honor, the man right here.

15
16 Now, what's going to happen? Everything
17 going to be denied to me again? What's going
18 to happen? It's up to you now. What's going
19 to happen?

20 THE COURT: As soon as you're done, let me
21 know.

22 THE DEFENDANT: Well, I'm not done. I got
23 to read you something.

24 THE COURT: All right. Mr. Castricone, do
25 you have much more you wish to say?

1 Sentence

2 THE DEFENDANT: If it's inconveniencing
3 you and it's going to give me a harsher
4 sentence I'll shut up right now.

5 THE COURT: Not at all. We're going to
6 adjourn the continuation of the sentencing to
7 2:00 today. 2:00. We'll have more time then.
8 Thank you.

9 THE DEFENDANT: Can I leave this here?

10 THE COURT: No. We're in the middle of a
11 jury trial. Please take your papers, plus we
12 want you to be responsible for them so --

13 (Whereupon, an adjournment was held until
14 2:00 P.M.)

15 (Proceedings continued.)

16 MS. CARRINGTON: Your Honor, People of the
17 State of New York against Benjamin Castricone,
18 Indictment 91-1550-001. Patricia Carrington
19 appearing on behalf of the People. The
20 Defendant is present in the courtroom with his
21 attorney, John Carney, III. And we're here on
22 a continuation of a sentencing from this
23 morning.

24 THE COURT: All right. Now, at this
25 point, we're still, I believe, Mr. Castricone,

1 Sentence

2 we're still addressing your -- or you are still
3 addressing your motion pursuant to CPL 330.30
4 Subdivision 2; is that correct?

5 THE DEFENDANT: Yes.

6 THE COURT: And you may, of course, have
7 all the time you wish to continue on the
8 record, since the jury trial is in recess
9 pending the determination of this matter.

10 THE DEFENDANT: Thank you very much, Your
11 Honor. May I talk now?

12 THE COURT: Okay.

13 THE DEFENDANT: Well, Your Honor, I'm
14 quite sure that you got the picture. I'm quite
15 sure you understand what I'm trying to say
16 here, and I really don't want to take up too
17 much of the Court's time, but due to the fact
18 that I'm the one who has to do this time, I
19 feel it's necessary, it's the only way I have
20 to fight for my freedom. I'm just going to say
21 a couple more things and read this letter to
22 you and let you go on with your business for
23 the day.

24 First, I have to address my wife, Mrs.
25 Rachel Castricone. There is a lot of things

Sentence

1 Sentence
2 that's going on here that is really scary, a
3 lot of things that the only one who is going to
4 have to deal with this scary feeling is myself
5 and my family. Right now I'm at a complete
6 loss of words because, I mean, nobody knows
7 what it's like to just be brought to trial,
8 brought to jail. People you have never seen
9 before, people you don't even know, can sit
10 here and say you committed a crime against
11 them. People who stated on the record they
12 weren't sure that it was me at all. I'd like
13 to let you know I'm not the only one here that
14 is suffering behind all of this. I have four
15 children that is also suffering, especially my
16 son who just started football, who I cannot be
17 there for him behind all of this.

18 I still would like for somebody or at
19 least my attorney to tell me how this happened.
20 I would like him to explain this to me, how he
21 lost this confession, how his so-called legal
22 secretary refused to sign for legal documents
23 to his office. These are things I would like
24 to know.

25 Also, I would like to know how he failed

Sentence

to get this, the confession, how he failed to get it to the judge or the District Attorney. Why did he do this? Why did he argue with me and tell me he wasn't going to call my witnesses as I asked him to? He says he feels that they were lying, as I said to you before. Were your deputy sheriffs lying also that were supposed to be called here to court to testify?

Also, I would like to say something which pertains to rehabilitation. My first bit that I did, when I went upstate I was rehabilitated not in the fashion to where education-wise or understanding-wise or in a loving way there was somebody that would sit down and actually help me. I was rehabilitated by physical abuse. On the record, you can check for yourself. I'm going blind in my right eye because I was upstate and I was kicked in the eye by officers because the officer chose to turn the lights off and spray me with hoses and did all those other type of things. If I got into all of them I would be here all day. You can check this on the record. I was not rehabilitated by them, I was rehabilitated by my wife who is an

Sentence

ex-deputy sheriff who took the time out to show me how to be a better man, to show me responsibility, and I can sit in this courtroom and say not most men would admit up to it, but my wife has made me a better man.

Now, I'm going to read this letter to you and after I finish reading this letter to you, I still would like you to ask my attorney the question I asked you to ask him. I appreciate it if you do but that will be up to you. The letter I'm about to read, after this letter here is done, you can, you know, do what you have to do.

I would like to say my name is Benjamin Louis Castricone, III, and I have much to say on behalf of my family as well as myself. I admire my wife, Mrs. Rachel Castricone for taking the time out and understanding me, and helping me to come from the life I led although the odds of someone going straight from a life of crime at a young stage is so great, but I can tell you with the love of a wife and family have overcome those odds in making a serious effort in bettering myself, applied myself and

Sentence

got a job at Ford Motor Company as well as being in a Bible study, it helped me to realize the necessities to have Jehovah in our lives and for me to have to show my family and my children how vital it is to have God in our lives. It wouldn't have been smart at all for me to jeopardize all this, my wife, my children for a seven hundred dollar hold-up. I would maintain my innocence until I have no more life in my body to fight with.

Many of our black men plea bargain, most because they did the crimes that they did and looking for a better way out, but some plea bargain knowing they are innocent for fear if found guilty they would face a stiff sentence because of their past criminal record. This is something that is becoming more and more common, but I will not become another statistic.

I look at you, Your Honor, for your help and your understanding as a judge. Why must a man do six to twelve years in prison for someone to see, someone to see this tragic injustice. As you may know, after doing three

1 Sentence

2 years of a six to twelve-year prison term, I
3 was granted a new trial by a five-member
4 Appellate Division of the State Supreme Court
5 that unanimously ruled in my favor, a ruling
6 that criticized as well as rebuked State
7 Supreme Court Judge Mario J. Rossetti and Chief
8 Prosecutor Karen Greenspan for outrageous,
9 vicious and illegal tactics to obtain the
10 conviction of an innocent man.

11 From the figures from Mr. McCoughlin came
12 up with a man who has won the release of
13 innocent men and woman all over the U.S., ten
14 percent of the felony cases brought before a
15 jury result in wrongful conviction. I myself
16 have -- I myself have come up with some figures
17 as well as became one. Here are just some of
18 the figures, if you take the eight and a half
19 years of Mr. Walker that he did of a life plus
20 fifty years' sentence for a rape and kidnapping
21 that he was innocent of --

22 THE COURT: This is Mr. Walker?

23 THE DEFENDANT: Walker, yes. Mr. Walker,
24 and, yes, he has three eyewitnesses as well as
25 the victim ID, this man, but after eight and a

Sentence

half years of his life in prison, a Supreme Court judge freed him after semen samples taken from the victim revealed that Mr. Walker's blood type did not match the one who raped this woman. And the twenty-nine-year-old Ricky Thomas who served time in a Texas jail, sentenced to life in prison for a purse snatching that he did not commit, only to be released when after it was discovered that he was in California at work. These are all on record. You can check them, Your Honor. I'll give you the papers. It's serious.

And how about the seventeen and a half years in prison by both Mr. Chane and Mr. Powell, both convicted on false evidence and coerced testimony of a 1973 murder of an off deputy sheriff?

Yes, I can go on with all those tragic figures that have been handed down, but I do feel that you understand what I'm saying. I know that injustice occurs for a variety of reasons, because of fabricated counsel witnesses, sloppy police investigation, overzealous prosecutors as well as incompetent

1 defense counsels. I did something, I put some
2 statistics together. This is what I came up
3 with. I have taken all the time that has been
4 given to the innocent men I have told you about
5 as well as others, eighty-five years. Think
6 about it. Eighty-five years of life they will
7 never get back, not one day, and all that youth
8 is no more and no one can give that life back,
9 not even the ones that have taken it away.

10
11 At present the population is fed a
12 misrepresentation of the symbol of justice
13 which one can see upon entering any courtroom
14 in the City of Buffalo, this symbol, a woman
15 blindfolded with a scale in one hand and a
16 sword in the other, is supposed to represent
17 the total and unbiased symbol of fairness and
18 consideration of all genders, creeds and
19 colors. However, I am forced to challenge and
20 question the purity of the symbol, the symbol
21 of justice.

22 THE COURT: Mr. Castricone, excuse me.
23 You can read a little faster because I gave
24 her, I see that you have written me this letter
25 already in writing. I can give this letter to

Sentence

the court reporter so you can read faster, she can follow the letter.

THE DEFENDANT: Okay. However, I am forced to challenge, I am forced to challenge and question the purity of the symbol, the symbol of justice peeking from behind the blindfold. There has been no consideration given to me or my family whatsoever and one is to think, will there ever be. I ask myself, has the sword of justice been raised against me because of guilt or is there someone's thumb on the very scales of justice keeping me from returning to my wife and children. For it has been clear that the female symbol of justice does not view African Americans worthy of her fair scales, only of her sword.

I say all of this to who can hear me, to the ones who know me from the love I can give and the ones who know me just on paper, if I had committed this crime I would not be wasting the time, money or love of my family. I would be the man that I am and serve this time silently. I know people will one day see my words, but never will see the young man that

Sentence

they come from or how he felt as the words came out of his mouth.

I can go on telling you how I feel but I must start my fight back from all of this and home to my wife and children. I do forgive all who had a hand in this, but I am going to fight like hell to show my innocence. I ask myself as well as you, what must I say, what must I do to show that I am innocent? Please let me know. I will do whatever it takes, but I will tell you, life will end before I ever give up trying to show I am innocent of this crime as I stand here today. I will be torn down and this sentence that will be handed down to me will be like hell coming to me to collect my soul. And I ask myself why. It belongs to me to give, not just for someone to take away. Why can't anyone hear, see I did not commit this crime? Out of all the years, time and experience, as well as knowledge and skills that are in this courtroom of law today, no one can determine innocence from guilt. This has to be a -- there has to be a feeling within this courtroom of law that knows an innocent man stands here

Sentence

today, stands here before this Court today.

Mrs. Wolfgang, I can say the word honorable with your name because I can say this much, that I have been honorable to myself as well as my family. Mrs. Honorable Wolfgang, I know it was a jury that convicted me, that had convicted an innocent man, not you. How and why they convicted me is unknown to myself as well as my wife and family. Mrs. Wolfgang, my family and I know that I have a job to do and it is a very big responsibility. Not everyone, not everyone is suitable to carry the judgment of a man and his family. This letter is an effort on my part to plead for my life. I know that I have been convicted of a crime I am innocent of. However, you have the opportunity to listen to all of the testimony firsthand and to formulate your own opinion. Mrs. Honorable Wolfgang, I urge you as a father and as a husband to have mercy and issue a sentence that reflects that mercy, a sentence that can somehow right the wrong that has occurred. I have four children and I do not desire to lose out on the greatest gift a man

Sentence

could want, the gift of fatherhood and watching your children develop.

Mrs. Wolfgang, my words and actions do not reflect a guilty man, but one of innocence. I can go on telling you about this overlooked wrongdoing but you've been a judge too long not to see this, you know injustice, and I do not see you as one of the judges who would agree with a jury's verdict to get out what is fair and right and in your heart.

I will end this letter, for I know you will do the right thing. Thank you.

THE COURT: All right.

MR. CARNEY: Thank you, Your Honor.

Judge, just briefly, I --

THE DEFENDANT: No, before you go any further I would please ask you to ask him the questions that I asked you to.

THE COURT: Before we go any further, I want to clarify the letter here. I think we're still on the 330.30 motion in this regard. Now, the District Attorney has spoken on the 330 motion; is that correct?

MS. CARRINGTON: Yes, Your Honor.

1 Sentence

2 THE COURT: And you don't need to add
3 anything, or do you wish to add anything?

4 MS. CARRINGTON: No.

5 THE COURT: And, Mr. Carney, what you were
6 about to say was regarding the 330 motion or in
7 regards to the sentence?

8 MR. CARNEY: Regarding the 330, Judge.
9 That since it's a pro se motion and the
10 District Attorney has responded and I am still
11 counsel of record, it would be inappropriate
12 for me to address the issues or respond but
13 rather to have Mr. Castricone speak.

14 THE COURT: Fine. I've heard Mr.
15 Castricone at length. I've read your papers
16 regarding the 330 motion to set aside the
17 verdict. I have heard the issues as you have
18 raised them in writing and verbally. It is the
19 rule of this Court that these issues are not
20 proper or legal for 330.30 determination,
21 although they may be raised on appeal. And,
22 therefore, at this time the motion for 330.30
23 relief is denied.

24 Regarding the sentencing, the People have
25 filed a motion pursuant to Section 400.21 of

Sentence

the CPL that indicates that the Defendant was previously convicted of the felonies of burglary on 7/31/86 in Buffalo, New York, and escape in the second degree on 2/27/85 in Buffalo, New York.

Now, have you received a copy of this, Mr. Carney?

MR. CARNEY: Yes, Your Honor.

THE COURT: Have you shown this to the Defendant?

MR. CARNEY: Yes.

THE COURT: At this time does the Defendant wish to admit, deny or stand mute as to whether or not he was the person who was previously convicted of these two crimes?

MR. CARNEY: He will admit that, Your Honor.

THE COURT: Mr. Castricone, are you the same Benjamin Castricone who was previously convicted of these two crimes?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Now, regarding the sentencing in this matter, do you -- well, does the District Attorney wish to say anything further

1 Sentence

2 regarding the sentencing?

3 MS. CARRINGTON: No, Your Honor.

4 THE COURT: Not further. Actually, you
5 haven't said anything, so let me start again.
6 Do you wish to say anything prior to the Court
7 sentencing the Defendant?

8 MS. CARRINGTON: No, Your Honor. Just
9 that I have read the pre-sentence report and I
10 note there is a statement there from the
11 victim, Henry Budzynski, who testified at both
12 trials. Other than to draw the Court's
13 attention to that and also to the fact that the
14 Defendant should be sentenced as a second
15 felony offender, I have nothing further to add.

16 THE COURT: Mr. Carney, do you have
17 anything you wish to say on behalf of the
18 Defendant before the Court imposes sentence?

19 MR. CARNEY: Yes, Your Honor. Judge, I
20 have read the pre-sentence report. I know that
21 you have studied it, respecting the issues of
22 Mr. Castricone, I think you know that he did
23 turn his life around, he did have a job at
24 Ford, he is a good family man. I would ask you
25 to sentence him to the least possible sentence

1
2 in view of the fact that even though his record
3 shows that he had some earlier arrests, as he
4 said, he did turn his life around and it is
5 still my belief that he was misidentified in
6 this robbery. Thank you, Your Honor.

7 THE COURT: Mr. Castricone, do you have
8 anything more you wish to say in your own
9 behalf before the Court imposes sentence?

10 THE DEFENDANT: Your Honor, I don't have
11 much to say. I just, I just wish somebody
12 could just check the fingerprints, see if they
13 match these people or get the gun, if they have
14 the gun, see if they can identify it. I mean,
15 I'm not going over -- if anybody wants anything
16 fair here, I mean, it won't take him more than
17 two or three days to check this out, Your
18 Honor. I'm going back to prison for something
19 I didn't do.

20 THE COURT: All right. As concerns your
21 conviction for the crimes of two counts of
22 robbery in the first degree and one count of
23 robbery in the second degree, it is the
24 judgment of this Court that on each of those
25 counts you be sentenced to an indeterminate

Sentence

sentence of imprisonment which shall have a maximum term of twelve years and the Court hereby imposes a minimum period of imprisonment of six years.

As concerns your conviction for the crime of criminal possession of a weapon in the third degree, it is the judgment of this Court that you be sentenced to an indeterminate sentence of imprisonment which shall have a maximum term of seven years and the Court hereby imposes a minimum period of imprisonment of three and one-half years. Each of those sentences imposed is to be served concurrently with the other. You are hereby committed to the custody of the New York State Department of Correctional Services.

You have thirty days to appeal the conviction and sentence imposed by this Court. Your attorney will advise you as to how the appeal may be filed and perfected.

There is a one hundred and fifty dollar surcharge and a five dollar victim's fee.

Thank you.

MR. CARNEY: Thank you, Your Honor.

I hereby certify that the foregoing is a transcript of the official stenographer's minutes of the testimony and proceedings upon the trial of the case of the People of the State of New York vs. Benjamin Castrocione

B. Smith
Official Supreme Court Reporter