



66 Fed.Appx. 277, 2003 WL 21401287 (C.A.2 (N.Y.))  
 (Not Selected for publication in the Federal Reporter)  
 (Cite as: 66 Fed.Appx. 277, 2003 WL 21401287 (C.A.2 (N.Y.)))

## H

This case was not selected for publication in the Federal Reporter.

United States Court of Appeals,  
 Second Circuit.

Robert BOHAN, Petitioner-Appellee-Cross-Appellant,

v.

Robert KUHLMANN, Superintendent, Sullivan Correctional Facility, Respondent-Appellant-Cross-Appellee.

No. 02-2580(L), 03-2050(XAP).

June 16, 2003.

Appeal from the United States District Court for the Southern District of New York ([Marrero, J.](#)).

[Joel A. Brenner](#), NY, for Petitioner-Appellee-Cross-Appellant.

[Sylvia Wertheimer](#), Assistant District Attorney, New York County, N.Y. (Robert M. Morganthau, District Attorney, Mark Dwyer, Assistant District Attorney, on the briefs), for Respondent-Appellant-Cross-Appellee.

PRESENT: [MINER](#), [JACOBS](#), and [CABRANES](#), Circuit Judges.

### SUMMARY ORDER

**\*\*1** THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 16th day of June, two thousand and three.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the case is AFFIRMED.

The government appeals from a final judgment in the United States District Court for the Southern District of New York ([Marrero, J.](#)) granting Robert Bohan's petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. We affirm for substantially the reasons stated by the district court. *See Bohan v. Kuhlmann*, 234 F.Supp.2d 231 (S.D.N.Y.2002).

The district court opinion relies upon *Noble v. Kelly*, 246 F.3d 93 (2d Cir.), *cert. denied*, 534 U.S. 886, 122 S.Ct. 197, 151 L.Ed.2d 139 (2001). Although this panel is likewise constrained by that precedent, we have doubts as to whether *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988), prohibits state courts from precluding an un-noticed alibi witness from testifying if less onerous sanctions are available, absent a finding of wilfulness.

We also granted a Certificate of Appealability on the issue of whether comments by the prosecution during summation deprived Bohan of a fair trial. Because Bohan is entitled to *habeas* relief on other grounds, we decline to decide this issue \*278 and dismiss this separately docketed cross-appeal (docket no. 03-2050).

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