No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Charles Chandler
Petitioner

v.

The State Of Vermont, et al
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT CERTIORARI

William Maselli
Attorney for Petitioner
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207-780-8400

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QUESTIONS PRESENTED

1. Is the Exception for Habeas Corpus Custody under Lackawanna valid law as affirmed by the Ninth, Tenth, and Fifth Circuits?

2. Has Petitioner satisfied the Lackawanna exception by showing that his legitimate Constitutional challenge was arbitrarily and unjustifiably dismissed by the Vermont Courts?

3. Where an attorney communicates to his client in the days before trial that he wishes the client will go to jail along with directing obscenities at him, and then proceeds to engage in bizarre and destructive actions during trial, does this constitute prejudice per se under Strickland, Cronic, and Nixon?

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OPINIONS BELOW

The Summary Order and Judgment of the United States Court of Appeals for the Second Circuit, dated June 26, 2018, is included in the Appendix at pages beginning App 19. The Dismissal on Summary Judgment in the Vermont Superior Court, the Decision of the Vermont Supreme Court upholding that dismissal, and the Decision of the United States District Court, District of Vermont, dismissing the Habeas Corpus Petition, are included in the Appendix.

JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit was entered on June 26, 2018.

This Court has jurisdiction on this Petition pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. § 2254 provides that the Federal Courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

The Sixth Amendment to the United States Constitution provides that, "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATEMENT OF CASE

Petitioner Chandler was convicted on November 20, 2009 after jury trial for the felony charge of impeding a public officer, 13 V.S.A. 3001 in Windham District Court, Brattleboro, Vermont, Docket No. 663-5-06. Chandler was sentenced on March 30, 2010 to 30 days jail. He filed a direct appeal of his conviction, which was denied by the Vermont Supreme Court on January 27, 2011. Chandler filed a Petition for Post-Conviction Relief/Extraordinary Relief on March 14, 2011; however his requests for a stay of execution of the balance of his jail sentence were denied by both the District and Supreme Courts. The Post-Conviction Petition was Dismissed by the Vermont District Court on the issue of custody, which dismissal was overturned by the Vermont Supreme Court and remanded. In re Chandler, 3013 VT 10, 193 Vt. 246.

The District Court then granted a Motion for Summary Judgment filed by the State of Vermont on the basis that Petitioner had not designated an expert to establish ineffective assistance of counsel. Chandler filed an appeal of this Order, which was denied by the Vermont Supreme Court on May 14, 2015. He then filed a Petition For Extraordinary Relief under Vermont Rule of Civil Procedure 75 and Vermont Rule of Appellate Procedure 21 in the Vermont District Court on May 27, 2015, which was treated by the District Court as a successive Post-Conviction petition and Dismissed on September 30, 2015. Petitioner appealed this dismissal to the Vermont Supreme Court, which affirmed the dismissal on May 27, 2016. Chandler filed for Habeas Corpus Relief pursuant to 28 U.S.C. 2254 in the United States District Court, District of Vermont. The State of Vermont filed a Motion to

Dismiss the Petition on jurisdictional grounds without even addressing any of Petitioner's allegations. After oral argument the Magistrate Judge Issued a Recommended Decision dismissing the Petition on the basis of lack of jurisdiction. Chandler appealed to the District Court Judge, who affirmed the dismissal, in a separate written Decision, on March 21, 2017 [App. p. 9]. Chandler filed a Notice of Appeal to the Second Circuit Court of Appeals on April 19, 2017 and requested a Certificate of Appealability, which was granted on September 5, 2017. After briefing and oral argument, the Second Circuit denied the Appeal on June 26, 2018.

Charles Chandler, an electrician with no criminal record, was confronted on his private property by three volunteer firemen, the alleged public officers relating to the felony charge of

Impeding a Public Officer. Chandler had a contentious relationship with these individuals; in fact he had an active restraining order in place against one of them. Chandler was burning brush and/or preparing a barbecue, while the volunteers were aggressively demanding that the fire be extinguished. This confrontation between Chandler and the volunteers resulted in his arrest and prosecution.

Chandler was convicted by a jury on November 20, 2009. A week prior to trial Chandler's attorney left him a voice message concerning the legal fee. The message did not terminate before the attorney launched into a diatribe against Chandler which communicated that Chandler should go to jail. Toward the end of this message counsel stated, "I want my f___'n money bitch." He went on to say, "F___'n Charlie Chandler. I hope you go to jail on

that. . . . Tell Charlie I'm going down to f__k him. I'm going to f__k him." The recording concluded with, "Believe me. I have to." *See Transcript of voice message*, Appendix p. 1.

The result of this voice message resulted in acute hostility between client and attorney. This hostility only increased as trial was underway. Meanwhile Chandler's attorney flagrantly botched every aspect of the trial, including impeaching his own client and defense witnesses, acceding to the admission of inadmissible evidence, misstating the law, failing to object to Chandler being called a liar in the State's closing argument as well as to critical misstatements of facts, presenting a pathetic closing argument which provided no rational basis for acquittal, and withdrawing from representation prior to sentencing which resulted in Chandler being sentenced to jail *pro se*.

REASONS FOR GRANTING THE WRIT

I. The 'Second' Exception to the In Custody Requirement of 2254 pronounced in Lackawanna is Good Precedent and Strong Law Despite A Current Split in the Circuits.

The United States Supreme Court recognized a narrow exception to the in custody requirement in Section 2254 cases in Lackawanna County Dist. Atty. v. Coss, 532 U.S. 394, 405 (2001). This exception relates to situations where a litigant is prevented from presenting legitimate constitutional challenges. Lackawanna, *supra*, at 405. Where "a state court . . . without justification, refuse[s] to rule on a constitutional claim that has been presented to it," custody may be found. Id. "It is not always the case, however, that a defendant can be faulted for failing to obtain timely review of a constitutional claim. For

example, a state court may, without justification, *refuse to rule* (emphasis added) on a constitutional claim that has been properly presented to it." Id.

The Circuit Courts have been divided in applying the Lackawanna exception. The Second Circuit Court of Appeals has discussed the Lackawanna exception, seemingly approvingly, without ever fully adopting it. Calaff v. Capra, No. 16-4048-PR, 2017 WL 5077527 (2d Cir. Nov. 6, 2017), cert. denied, No. 17-1114. The Ninth, Tenth, and Fifth Circuits have adopted the Lackawanna exception. Dubrin v. People of California, 720 F. 3d 1095, 1098-99 (9th Cir. 2013); McCormick v. Kline, 572 F. 3d 841, 851 (10th Cir. 2009); Brattain v. Cockerel, 281 F. 3d 1279 (5th Cir. 2001) (unpublished). However, the Seventh and Eleventh Circuits have decided against the application of the Lackawanna exception.

Grigsby v. Cotton, 456 F. 3d 727, 730 (7th cir. 2006); Hubbard v. Haley, 317 F. 3d 1245, 1256 n. 20 (11th Cir. 2003).

In Brooms v. Ashcroft, 358 F. 3d 1251 (10th Cir. 2004), the court applied the Lackawanna exception outside the context of where it has usually arisen, sentencing enhancement issues, in an immigration case. The logic of Lackawanna, and the inherent justice in its principle applies broadly and with a solid basis and rationale — — providing an opportunity for justice where it has been arbitrarily denied. The arguments that only a plurality recognized this exception ignores the reality that the dissenting Justices also implicitly embraced it, creating a solid majority.

III. Petitioner was denied effective assistance of counsel under clearly established Federal Law.

There may exist circumstances that suggest "a breakdown in the adversarial process that our system counts on to produce just results," Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed 2d 674 (1984), and from which we must presume prejudice to the defendant. See United States v. Cronic, 466 U.S. 648, 659 (1984); Florida v. Nixon, 543 U.S. 565, 578, (2004); Anders v. California, 386 U.S. 738, 743 (1967). There are some situations where prejudice will be presumed because it will be "so likely that case-by-case inquiry into prejudice is not worth the cost," Strickland v. Washington, supra, at 692, 104 S. Ct. 2067. Strickland also discussed another, more limited, type of presumed prejudice, and it offered as one example

cases in which counsel is burdened by a conflict of interest. In such instances, where counsel has breached the duty of loyalty, it is difficult to quantify the effect on the defense.

United States v. Cronic, 466 U. S. 648, 659 (1984), as well as Strickland, "recognized a narrow exception to Strickland's holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense. Cronic instructed that a presumption of prejudice would be in order in circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Florida v. Nixon, 543 U.S. 565, 578, 125 S. Ct. 551 (2004).

Here, the conflict was so profound that the specific manifestations of that hostility should not

need to be elaborated in order to determine that Petitioner suffered prejudice. A genuine conflict of interest existed between Petitioner and his trial counsel which began shortly before trial and continued in ever-more aggravated form throughout the proceedings. The fact that prejudice is so clear is what highlights the arbitrary actions of the Vermont Courts in refusing to allow Petitioner to create a record concerning his Federal Constitutional claims with a rationale that finds no shelter within Federal jurisprudence.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Respectfully submitted,

Dated: November 26, 2018

William Maselli
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39 Portland Pier
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williammaselli55@gmail.com

APPENDIX

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Appellants

Exhibit A

Transcript of Telephone Message left by Attorney Matt Branchaud to Charles Chandler on October 23, 2009 On Chandler Electric Telephone answering machine.

Answering Machine: Mailbox one You have 3 old messages. Friday 4:55 p.m.

Branchaud:……Hey Charlie, Matt Branchaud, Hope all is well down there. Haven't heard from you for a little while. Om listen I was calling in regards to payment I hadn't received anything up here in the mail you had mentioned shipping something out on Friday. Om I hadn't received anything up here. Om were going to have to get working on that we got trial becoming and everything's coming up in the main court I think it's the 29th I'll see you up here for. But

anyway I was just dropping you a phone message about that. We had talked about that last week and I still haven't received anything so anyway you got any chance give me a buzz 775-2508 extension 30 again that's 775-2508 extension 30 otherwise talk to you soon. Thanks Charlie Chan……I want my Fucking Money Bitch Boop Boop Boop Boop Boop Boop Boop Boop Fucking Charlie Chandler Boop Boop Boop Boop Fucking Charlie Chandler I hope you go to Jail on that …… (inaudible)

Unknown person asks: (inaudible) (Sounds like Atty. Chris Montgomery) where is that going on in Brattleboro?

Branchaud: yep tell Charlie I'm going down to fuck him. I'm going to fuck him. Alright.

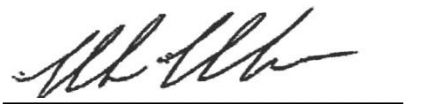
Unknown Person says: Might as well.

…Laughter from both men.

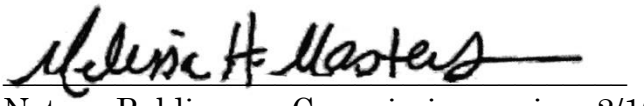
Branchaud: Believe me. I have to!

Note: Answering Machine I retrieved this message at Friday 8:23 p.m.

I, Charles Chandler state that I transcribed the above telephone message from my answering machine in my Office left by Attorney Mathew Branchaud. Under the pains and penalties of perjury I swear it is true and accurate to the best of my knowledge and belief.



Charles Chandler



Notary Public Commission expires 2/10/15

Exhibit G

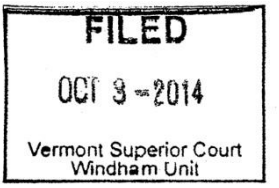
STATE OF VERMONT

SUPERIOR COURT CIVIL DIVISION
Windham Unit Docket No. 114-3-11 Wmcv

CHARLES CHANDLER,
Petitioner

v.

STATE OF VERMONT,
Respondent



RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

In this post-conviction relief case, Petitioner Charles Chandler seeks to vacate a criminal conviction on the grounds that the lawyer who represented him provided ineffective assistance of counsel. On September 5, 2014, a summary judgment ruling was issued denying Petitioner's Motion for Summary Judgment. The Court ruled on a portion of Respondent's Motion and set the case for oral argument on a specific issue in the motion. The

hearing took place on October 3, 2014. Petitioner represented himself, and Respondent was represented by Attorney Tracy Shriver.

The facts are set forth in the Decision of September 5, 2014.

The issue is whether Petitioner needs expert testimony to succeed on his claim that his lawyer's performance prior to and during trial fell below an objective standard of reasonableness informed by prevailing professional norms, and that such deficient performance prejudiced the Petitioner such that the outcome would have been different without the substandard performance.

In the ruling of September 5, 2014, the Court has already determined that expert testimony was not needed to show that the attorney had a bias against Petitioner based on a portion of a telephone

voicemail message left by the attorney. However, even assuming that the attorney had bias against Petitioner, a petitioner must also prove the second prong of the test, i.e., that the result of the trial would have been different. The voicemail bias, even if believed, would not be sufficient to prove that the outcome of the trial would have been different without additional facts showing a substandard performance on the part of the attorney in conducting the defense of Petitioner prior to and at trial.

While bias based on the voicemail is not sufficient by itself to support the claim, such evidence may be pertinent if there is also evidence of substandard performance, but Petitioner is still obliged to present facts to show a substandard performance. The question for oral argument was whether an expert is needed to testify concerning the

three grounds on which Petitioner alleged the attorney's performance was substandard: failure to object to the Information charging Petitioner with impeding public officers; failure to obtain certain exculpatory evidence from a prior lawyer for Petitioner, and failure to object to jury instructions and closing arguments during trial.

These three allegations all require a criminal defense attorney familiar with prevailing professional norms to testify about the standard of care required of a criminal defense attorney under the circumstances of this case. The Court cannot determine whether Petitioner's attorney failed to meet that standard without an evidentiary basis for determining *what that standard* is as it relates to raising an objection to the content of an information, requesting materials from a former attorney, and making objections to the content of a jury instruction

and closing argument. Expert testimony is needed in order for Petitioner to meet his burden of proof, both as to what the standard is in relation to the specific allegations in the case, and whether the attorney's actions fell below that standard and further whether the outcome would have been different without the substandard performance. This is not one of the rare situations in which ineffective assistance can be presumed without expert testimony.

Since Petitioner failed to make a timely disclosure of an expert who would provide such testimony, Petitioner is unable to succeed on his claim.

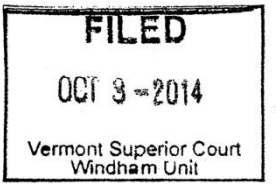
ORDER

For the foregoing reasons, Respondent's Motion for Summary Judgment is *granted*.

Dated at Newfane this 3rd day of October, 2014.

_____

Honorable Mary Miles Teachout
Superior Court Judge



CC: C. Chander, Prose
T. Shriver, Esq.

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2014-375

MAY TERM, 2015

Charles Chandler	}	APPEALED FROM:
	}	
	}	Superior Court, Windham
v.	}	Unit, Civil Division
	}	
	}	
State of Vermont	}	DOCKET NO. 114-3-11 Wmcv
		Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Petitioner appeals orders of the superior court, civil division, denying his motion for summary judgment and granting the State's motion for summary judgment with respect to his petition for post-conviction relief (PCR). We affirm.

Following a confrontation with several firefighters who entered his property in response to a reported brush fire, petitioner was charged in 2006

with impeding a public officer; in violation of 13 V.S.A. § 3001. A jury convicted · petitioner · of the offense after a three-day jury trial in November 2009. Petitioner received a sentence of twenty-nine-to-thirty days to serve. In January 2011, this Court affirmed defendant's conviction. State v. Chandler,.No. 10-135, 2011 WL 4974829 (Vt. Jan. 27, 2011) (unpub. mem.), https://www.vermontjudiciary.org/LC/unpublishedeo.aspx.

In March 2011, petitioner filed a PCR petition and sought extraordinary relief, alleging ineffective assistance of counsel at trial. He alleged that his trial counsel, Matthew Branchaud: (1) left a voicemail message on petitioner's telephone shortly before the trial demonstrating his bias toward petitioner; (2) failed to object to the State's clearly defective information; (3) failed to obtain from his

predecessor counsel exculpatory evidence that would have bolstered petitioner's defense had the evidence been admitted at trial; (4) failed to object to a jury instruction that substituted "public officers" for "civil officers"; and (5) failed to object to the prosecutor's statement during closing argument that petitioner had lied at trial. The Superior court dismissed the petition for lack of jurisdiction, but in February 2013 this Court reversed that ruling and remanded the matter for further consideration. In re Chandler, 2013 VT 10, 193 Vt. 246.

In April 2013, petitioner filed a motion for summary judgment. The State responded by arguing that material facts were in dispute and that petitioner could not prove his trial counsel's ineffective assistance without expert testimony. That same month, the superior court issued a scheduling order that, among other things, required petitioner to

disclose by May 15, 2013 all expert witnesses he expected to call. In June 2013, the State filed a motion for summary judgment, asserting that petitioner had failed to disclose an expert witness to support his claims of ineffective assistance of counsel. On September 5, 2014, the superior court denied petitioner's motion for summary judgment, concluding that were disputed issues of material fact. Regarding the State's motion for summary judgment, the court concluded that expert testimony was not needed for a jury to determine whether petitioner's trial counsel was biased against petitioner, but that, irrespective of any finding of bias, petitioner still had to prove that his trial counsel's performance fell below an objective standard of professional norms and that, but for the deficient performance, there is a reasonable probability that the outcome of the trial would have been different. Accordingly, the court

scheduled oral argument to give the parties an opportunity to address whether expert testimony was required to support petitioner's claims of ineffective assistance of counsel.

Following a hearing at which the parties presented oral argument, the superior court issued a decision granting the State summary judgment. The court examined all of petitioner's specific allegations of ineffective assistance of counsel and determined that each of them required an expert criminal defense attorney familiar with prevailing professional norms to testify about the standard of care required of an attorney under the circumstances of this case. The court further concluded that expert testimony was needed not only to address whether the actions of petitioner's trial counsel fell below an objective standard of professional norms but also whether, assuming a deficient performance, the outcome of the

trial would have been different with competent representation.

On appeal, petitioner contends that the ineffectiveness of his trial counsel was so obvious that it could be understood by lay persons without the benefit of expert testimony. In so arguing, he relies primarily on his attorney's pretrial voicemail suggesting an intent to lose the case because petitioner was not paying his bill for legal services and his attorney's conduct at trial, particularly his closing argument, which he claims made it apparent to everyone in the courtroom that the attorney was deliberately trying to lose the case.*

* Petitioner also argues that the superior court erred by ignoring additional facts stated in his motion for summary judgment. In denying petitioner's motion for summary judgment, the court stated that the only relevant allegations were those raised in petitioner's March 2011 complaint, insofar as the State did not have notice of any additional allegations raised for the first time in petitioner's motion for summary judgment Petitioner suggests that the court erred in so ruling, but does not indicate what additional allegations he made or explain how any such allegations did not involve disputed issues of material fact. Accordingly, this argument is unavailing.

The law in this area is well-settled. A petitioner claiming ineffective assistance of counsel must demonstrate by a preponderance of the evidence that: "(1) his counsel's performance fell below an objective standard of performance informed by prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the proceedings would have resulted in a different outcome." In re Grega, 2003 VT 77, ¶7, 175 Vt. 631. We are "not permitted to judge from hindsight whether tactical decisions are ultimately successful in determining claims of attorney competence; rather, we must look to whether such decisions were within the range of competence demanded of attorneys in a criminal case at that time." In re Mecier, 143 Vt. 23, 32 (1983). "Only in rare circumstances will ineffective assistance of counsel be presumed without expert

testimony." Grega, 2003 VT 77, ¶16. Expert testimony is required except in instances "[w]here a professional's lack of care is so apparent that only common knowledge and experience are needed to comprehend it." Estate of Fleming v. Nicholson, 168 Vt. 495, 497-98 (1998).

In arguing that he did not need expert testimony to support his PCR petition, petitioner cites first and foremost his allegation that his trial attorney left a voicemail shortly before the trial demonstrating bias toward him. Apparently, the attorney was angry about not having received compensation from Chandler for his services. In his complaint, petitioner indicates that the attorney stated, "f----ing money b---- ... f---ing Charlie Chandler .... [and] going to go to jail." As noted, the trial court ruled that no expert testimony was needed for a jury to determine that these statements

demonstrated bias against petitioner, but that, to prevail on his PCR petition, petitioner still had to demonstrate that his trial counsel's performance at trial was below the standard of prevailing norms and that there is a reasonable probability that, but for his counsel's deficient performance, the outcome of his trial would have been different. We agree with this analysis. To be sure, the alleged pretrial comments by trial counsel are outrageous. But unless petitioner is able to satisfy both prongs of the ineffective assistance-of-counsel test, " 'it cannot be said that the conviction or ... sentence resulted from a breakdown in the adversary process that renders the result unreliable.' "Grega, 2003 VT 77, ¶7 (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)). In his anger over not being paid, the attorney may have taunted petitioner about him going to jail, but that does not demonstrate, per se,

that his trial performance was deficient, or, if so, that the outcome of the trial would probably have been different had his performance not been deficient.

Apart from his trial counsel's pretrial voicemail, petitioner focuses on remarks made by the prosecutor and trial judge during closing arguments to support his claim that his trial counsel's ineffectiveness was so apparent that expert testimony was not required for him to prevail. He notes that at one point the prosecutor called his attorney's arguments ridiculous, and that the trial judge admonished the attorney that his defense was inappropriate. According to petitioner, his attorney's defense was simply that the law was wrong.

The record does not support these contentions. As indicated in our decision affirming petitioner's conviction, the principal defense presented at

petitioner's three-day trial was that petitioner had a legal right to prevent the firefighters from entering his property because he did not need a permit for the fire due to the nature of the fire and the presence of snow on the ground. Chandler, No. 10-135, 2011 WL 4974829, at *2 (Vt. Jan. 27, 2011) (unpub. mem.). His trial counsel began closing argument by noting that sometimes laws become obsolete and that the law that petitioner was accused of breaking had never been challenged. In response to the prosecutor's objection, the trial judge reminded petitioner's attorney that the jurors would be told that they must apply the law as instructed and not weigh its wisdom. Eventually, petitioner's attorney made his point that there was a conflict between the statute allowing persons to have brush fires without a permit when snow was on the ground and the statute giving firefighters general authority to come onto

private property to extinguish fires they deemed to be a threat. Petitioner's counsel suggested that this conflict in the law could have led petitioner to reasonably believe that he had a right to exclude the firefighters from his property. In response, the prosecutor stated that it was "utterly ridiculous" to suggest that firefighters cannot come onto private property to put out a fire because no permit was needed to start the fire. Notwithstanding petitioner's argument to the contrary, the prosecutor's stated belief that the defense's theory of the case was ridiculous does not demonstrate that the defense was in fact ridiculous or that trial counsel's representation was deficient under the circumstances. More importantly for purposes of this appeal, the prosecutor's statement cannot substitute for an expert opinion that the defense presented to the jury amounted to ineffective representation.

Apart from citing his attorney's pretrial voicemail and the prosecutor's and trial judge's remarks during closing argument, petitioner's claims of ineffective assistance of counsel at trial are the following. First, petitioner argues that his trial counsel failed to object to the State's information on grounds that it did not include the mental elements of the charged crime. In our decision affirming petitioner's conviction, we found no reason.to reverse his conviction based on this claim because petitioner understood the charge, was able to present an intelligent and complete defense to the charge, and in fact acknowledged that he strongly challenged at trial the notion that the firefighters had a right to be on his property to ·extinguish the fire. Id. Second, petitioner contends that his trial counsel failed to obtain from prior counsel and present at the trial the affidavit of a firefighter and photographs indicating

that there was snow on the ground at the time of his alleged offense. Presumably, this evidence would have supported petitioner's defense that he thought he had a right to exclude the firefighters because the law allows him to burn brush without a permit when snow is on the ground. As we indicated in our decision affirming petitioner's conviction, "firefighters are authorized to enter property to investigate and extinguish fires that threaten public safety, irrespective of whether a landowner is required under the circumstances to obtain a permit to burn brush." Id. Third, petitioner asserts that his trial counsel failed to object to the trial court using in its jury instruction the term "public officers" rather than the term "civil officers" that was used in the State's information. We pointed out in our decision affirming petitioner's conviction that the trial court defined the term "public officer" to include the

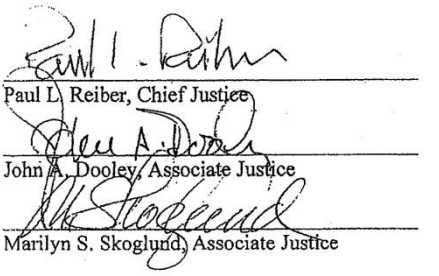
categories designated in 13 V.S.A. § 3001, the statute that defendant was charged with violating. Id. at *3. Fourth, petitioner argues that his trial counsel failed to object to the prosecutor's statement during closing argument suggesting that petitioner lied while testifying at trial.

Petitioner does not explain how any of these actions or inactions on the part of his trial counsel fell below the standards for competent counsel under the prevailing norms and the circumstances of this particular case. Nor does he even attempt to explain how the outcome of his trial probably would have been different if trial counsel had done what petitioner claims he should have done. Most importantly for purposes of this appeal, petitioner fails to explain why expert testimony was not necessary for the court to answer these questions. Accordingly, we discern no basis to overturn the

superior court's decision granting the State's motion for summary judgment and denying petitioner's motion for summary judgment with respect to petitioner's PCR opinion.

Affirmed.

BY THE COURT:



Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CHARLES CHANDLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 5:16-cv-199
	)	
STATE OF VERMONT and THOMAS J. DONOVAN, JR.,[1]	)	
	)	
Defendants.		

OPINION AND ORDER
(Docs. 1, 5, 9)

Petitioner Charles Chandler has filed a petition under 28 U.S.C. § 2254, seeking to vacate his 2009 conviction for impeding a public officer, a felony, in violation of 13 V.S.A. § 3001. (Doc. 1.) The Magistrate Judge filed a Report and

[1] The original petition named the State of Vermont and then-Attorney General William Sorrell as respondents. Assuming that Mr. Chandler is or may be in custody (the very issue to be determined here), the current Vermont Attorney General is a proper respondent. *See* Rules Governing § 2254 Cases, Rule 2(a), (b). The court has amended the caption to reflect Vermont's current Attorney General, Thomas J. Donovan, Jr., who succeeded William Sorrell in January 2017. *See* Fed. R. Civ. P. 25(d).

Recommendation (R&R) on December 8, 2016 (Doc. 9), recommending that the court grant the Motion to Dismiss for Lack of Jurisdiction (Doc. 5) filed by Respondents. Mr. Chandler has filed an objection to the R&R (Doc. 10) that incorporates his July 13, 2016 Memorandum in Support of his § 2254 petition (Doc. 1-1).

A district judge must make a de novo determination of those portions of a magistrate judge's report and recommendation to which an objection is made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The district judge may accept, reject, or modify, in whole or in part, the findings or recommendation made by the magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). A district judge is not required to review the factual or legal conclusions of the magistrate judge as to those portions of a report and recommendation to which no

objections are addressed. *Thomas v. Arn, 474 U.S. 140, 150 (1985).*

In his nineteen page R&R, the Magistrate Judge carefully analyzed whether Mr. Chandler satisfies § 2254's "in custody" requirement. (See Doc. 9.) Mr. Chandler asserted that the satisfied the "custody" requirement for three reasons: (1) the current petition relates back to the date of the filing of his initial Vermont petition for post-conviction relief; (2) his non-confinement restraints are sufficient to render him "in custody". And (3) he meets an exception to the "in custody" requirement under *Lackawanna County District Attorney v. Coss*, 532 U.S. 394 (2001). The Magistrate Judge concluded that each of those arguments lacks merit. (Doc. 9 at 7.) Mr. Chandler objects to the R&R, asserting primarily that he qualifies for an exception

established by the *Lackawanna* decision. (See Doc. 10 at 3; Doc. 1-1 at 29-31.)

Background

The court relies upon the facts as set forth in the R&R, none of which are challenged in Mr. Chandler's objection.

I. Conviction and Sentence

Mr. Chandler was arrested on March 30, 2006, and charged in Vermont Superior Court, Windham Criminal Division, with impeding a public officer, in violation of 13 V.S.A. § 3001. The Vermont Supreme Court later described the offense conduct as follows:

> On March 30, 2006, a member of the Newbrook Fire Department, a volunteer member-owned fire department that covers the Town of Newfane, became aware of a reported brush fire on defendant's property. After consulting the fire warden, three members of the Department went to defendant's property to investigate. Upon their

> arrival, they decided to extinguish the fire because no permit had been given for a brush fire, and they believed the fire posed a potential hazard. A confrontation ensued between the firefighters and defendant and his brother, culminating in defendant grabbing one of the firefighters by the arm and walking him off his property. The firefighters waited across the street for the fire chief. When he arrived, the chief decided that the fire needed to be extinguished. He called the district fire warden to determine whether they should pursue the matter or leave. The fire warden arrived at the scene and tried to explain to defendant that the fire had to be extinguished. Defendant resisted, however, claiming that it was a campfire, not a brush fire. Eventually, a deputy sheriff arrived and cited defendant for impeding an officer.

State v. Chandler, No. 2010-135, 2011 WL 4974829, at *1 (Vt. Jan. 27, 2011) (unpublished mem.). After a three-day jury trial in November 2009, Mr. Chandler was convicted of the charged offense. *See In re Chandler*, 2013 VT 10, ¶2, 193 Vt. 246, 67 A.3d261. On March 30, 2010, the trial court sentenced Mr. Chandler to serve 29 to 30 days in jail. Id. The

Vermont Supreme Court affirmed on direct appeal. *State v. Chandler*, 2011 WL 4974829, at *1.

II. Post-Conviction Proceedings

The R&R recounts the numerous post-conviction proceedings that followed the jury's verdict, including Mr. Chandler's petition for post-conviction relief (PCR) under 13 V.S.A. § 7131. (Doc. 9 at 3-5.) The Vermont Supreme Court summarized those post-conviction proceedings in a May 27, 2016 decision:

> In March 2011, plaintiff filed a PCR petition seeking relief from his 2009 conviction on ineffective-assistance-of-counsel grounds. Specifically, plaintiff alleged that his trial counsel failed to effectively represent him in the criminal case because of a fee dispute and made prejudicial omissions or errors, including failing to object to the States information, the jury instructions, and the prosecution's closing statement and declined to present exculpatory evidence. As a result, plaintiff alleged that his conviction was unlawfully obtained. The trial court initially dismissed plaintiff's petition on

> the ground that it was moot because he was no longer in custody under sentence. We reversed that decision, holding that the case was not moot, and remanded for consideration of the merits. In re Chandler, 2013 VT 10, ¶24, 193 Vt. 246, 67 A.3d 261.

On remand, the following oral argument, the trial court granted the State's motion for summary judgment, concluding that expert testimony—which plaintiff failed to provide—was necessary to support all but one of his claims of ineffective assistance of counsel and that plaintiff could not show that the remaining claim—based on bias of counsel—affected the outcome of his trial. We affirmed this decision. *Chandler v. State*, No. 2014-375, 2015 WL 2383669 (Vt. May 14, 2015) (unpub. mem.), https://www.vermontjudiciary.org/LC/unpublishedco.aspx.

Chandler v. State, 2016 VT 62, ¶¶2-3, 148 A.3d 574.

In its May 14, 2015 decision affirming the grant of summary judgment, the Vermont Supreme Court noted that "[o]nly in rare circumstances will ineffective assistance of counsel be presumed without expert testimony," *Chandler*, 2015 WL 2383669, at *2 (quoting In re Grega, 2003 VT 77, ¶16, 175 Vt. 631, 833 A.2d 872 (mem.)), and that "[e]xpert

testimony is required except in instances '[w]here a professional's lack of care is so apparent that only common knowledge and experience are needed to comprehend it,'" *id*. (quoting *Estate of Fleming v. Nicholson*, 168 Vt. 495, 497-98 (1998)). The Supreme Court rejected Mr. Chandler's arguments that he did not need expert testimony, discussing his claims that a voicemail left by his attorney demonstrated bias; that his claim of ineffectiveness was supported by criticisms leveled against his attorney by the prosecutor and the trial judge; and four other instances of alleged deficient performance. *Id*. At *2-3. The Supreme Court concluded as follows:

> Petitioner does not explain how any of these actions or inactions on the part of his trial counsel fell below the standards for competent counsel under the prevailing norms and the circumstances of this particular case. Nor does he even attempt to explain how the outcome of his trial probably would have been different if trial counsel had done what petitioner claims he should have done. *Most*

> *importantly for purposes of this appeal, petitioner fails to explain why expert testimony was not necessary for the court to answer these questions.*

Id. At *4 (emphasis added).

After the Vermont Supreme Court affirmed the trial court's grant of summary judgment, Mr. Chandler filed a "Petition for Extraordinary Relief" on May 27, 2015. *Chandler*, 2016 VT 62, ¶4. The State moved to dismiss, arguing that Mr. Chandler's petition was a successive PCR that was barred by 13 V.S.A. ¶7134. *Id*. The trial court granted the State's motion, and Mr. Chandler appealed. *Id*. On May 27, 2016, the Vermont Supreme Court affirmed, concurring that Mr. Chandler's "Petition for Extraordinary Relief" was "effectively a PCR petition and was properly dismissed by the trial court." *Id*. ¶9.

The Supreme Court also rejected Mr. Chandler's argument that the summary judgment

decision was not a decision on the merits. The Court cited *Mitchell v. NBC*, 553 F.2d 265, 271 (2d Cir. 1977), for the proposition that summary judgment is a final decision on the merits. *Id.* ¶14. The Court reasoned that Mr. Chandler "had the evidentiary burden in the PCR proceeding to prove that his lawyer's representation provided ineffective assistance under the constitutional standard" and that he had "failed to show that he had the evidence that could meet his burden of proof." *Id.*

Mr. Chandler filed his petition under 28 U.S.C. § 2254 on July 13, 2016. (Doc. 1.) He was not in prison or on probation or parole when he filed the petition.

Analysis

"In order for a federal court to have jurisdiction over a habeas petition, the petitioner must be 'in custody pursuant to the judgment of a State court' at the time the petition is filed." *Nowakowski v. New York*, 835 F.3d 210, 215 (2d Cir. 2016) (quoting 28 U.S.C. § 2254(a)). Mr. Chandler does not dispute that, when he filed his § 2254 petition on July 13, 2016, he had already completed service of his 29-30 day jail sentence for the conviction that he was challenging. He concedes that it is difficult to satisfy the "in custody" requirement once the original sentence has expired (Doc. 1-1 at 22), but argues that the circumstances of his case meet that requirement and also satisfy what he says in an exception articulated in *Lackawanna County District Attorney v. Coss*, 532 U.S. 394 (2001). In particular, according to Mr. Chandler, the "heart" of

his objection to the R&R relates to what he asserts is an exception in *Lackawanna* for situations in which a state court "without justification, refuse[s] to rule on a constitutional claim that has been properly presented to it." *Lackawanna*, 532 U.S. at 405.

The R&R rejected Mr. Chandler's *Lackawanna* argument, reasoning that: (1) the Vermont Supreme Court *did* rule on the merits of his ineffective-assistance claim; (2) the holding in *Lackawanna* is narrower than the interpretation that Mr. Chandler advances; and (3) the Vermont Supreme Court's ruling on the merits should stand in light of the deferential standard articulated in 28 U.S.C. § 2254(d). (*See* Doc. 9 at 13-18.) Mr. Chandler challenges the R&R, asserting that the Vermont Supreme Court's analysis of his ineffective-assistance claim is undermined because that analysis was based on an inadequate record. (Doc. 10 at 3.)

The record was inadequate, he says, because he was "illegally prevented from establishing in an evidentiary hearing his bases for ineffective assistance of counsel." (*Id.*) He argues that "the Superior Court dismissed his Petition by making a clearly incorrect application of Federal Law in requiring expert testimony to establish sub-par representation as well as prejudice." (*Id*; see also Doc. 1-1 at 1-2 ("Simply stated, there is no requirement in Federal Law for expert testimony to establish ineffective assistance of counsel.").) Mr. Chandler's position is that the Vermont PCR proceedings—insofar as they required him to produce an expert to establish his ineffective-assistance claim—violated concepts of fundamental fairness and due process. (*See* Doc. 1-1 at 3-4.)

The court turns first to the requirement of custody. In Mr. Chandler's view, the evidentiary

requirement that he present expert testimony in the state court PCR trial represents a structural error in the Vermont procedure which brings his case within the group of exceptional cases recognized in *Lackawanna* in which petitioners may seek § 2254 relief despite the expiration of the original sentence. (*See* Doc. 10 at 4-5 ("Therefore it can be seen that the Vermont Courts fully abrogated their responsibility to deal with these issues under federal law and therefore the exception under Lackawanna, supra, is applicable relating to jurisdiction.").)

The argument fails because, as the R&R reasons (see Doc. 9 at 9, 14), the *Lackawanna* decision does not acknowledge or create an exception to the custody requirement at all. In *Lackawanna*, the petitioner, Edward R. Coss, Jr., had served the full sentences for certain 1986 convictions, but remained in custody serving a 6-12 year sentence on

a 1990 conviction. He filed a § 2254 petition challenging the constitutionality of his 1986 conviction, arguing that he met the custody requirement because his current sentence for the 1990 conviction was enhanced by the 1986 convictions.

The Supreme Court began its analysis with § 2254's custody requirement. *Lackawanna*, 532 U.S. at 401. The Court noted that Coss was no longer serving the sentences imposed for his 1986 convictions, and therefore could not bring a federal habeas petition directed solely at those convictions. But since Coss was serving the sentence for his 1990 conviction—and since he was asserting a challenge to his 1990 sentence as enhanced by the allegedly invalid prior 1986 conviction—the Supreme Court held that Coss satisfied the custody requirement. *Id.*

The more difficult hurdle for Coss was not the custody requirement, but was instead the general rule that, if a state conviction is no longer open to direct or collateral attack, and that conviction is later used to enhance a criminal sentence, "the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained." *Id*. at 403-04. Coss sought an exception to that rule. The Supreme Court recognized an exception "[w]hen an otherwise qualified § 2254 petitioner can demonstrate that his current sentence was enhanced on the basis of a prior conviction that was obtained where there was a failure to appoint counsel in violation of the Sixth Amendment." Id. At 404.[2]

[2] Notably, the exception required that the § 2254 petitioner be "otherwise qualified"—which would include satisfaction of the custody requirement.

Mr. Chandler concedes that his petition does not fit within that exception. (Doc. 1-1 at 29.) Instead, he asserts that his case fits a "second" exception articulated in Lackawanna. Three justices in Lackawanna entertained the possibility of further exceptions in certain cases. *Lackawanna*, 532 U.S. at 405-06 (opinion of O'Connor, J., joined by Rehnquist, C.J. and Kennedy, J.) (citing Daniels v. *United States*, 532 U.S. 374, 383-84 (2001)); *Daniels*, 532 U.S. at 383 (opinion of O'Connor, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.) ("We recognize that there may be rare cases in which no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own."). But those three justices concluded that the circumstances of the case did not require resolution of that issue. *Lackawanna*, 532 U.S. at 405-06. Thus, a majority of justices has not

recognized any additional exception, and the three justices who considered the possibility did not actually decide the issue. And, most importantly, even assuming that there are additional exceptions, those, too, are limited only to habeas petitions directed at *enhanced* sentences; the petitioner still must be in custody on the enhanced sentence in order to qualify for an exception. See id. At 406 ("In such situations, a habeas petition *directed at the enhanced sentence* may effectively be the first and only forum available for review of the prior conviction." (emphasis added)).

In short, *Lackawanna* does not eliminate the requirement that a § 2254 petitioner must be in custody when he files his petition. A former prisoner who is not in custody under any sentence cannot make use of § 2254 to challenge his conviction. This requirement is as old as the writ of habeas corpus

itself and was not altered by *Lackawanna. See Hensley v. Mun. Court, San Jose Milpitas Judicial Dist., Santa Clara Cty., Cal.*, 411 U.S. 345,351 (1973) ("The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty."). The exceptions discussed in *Lackawanna* are not exceptions to the custody requirement, but are instead exceptions to the general rule that a petitioner cannot use § 2254 to challenge an enhanced sentence on the ground that the prior conviction was unconstitutionally obtained. See id. at 404[3]. Mr. Chandler's release from custody following the completion of his original sentence

[3] The R&R therefore correctly declines to follow *Resendiz v. Kovensky*, 416F.3d 952 (9th Cir. 2005), *abrogation on other grounds recognized by Chaidez v. United States*, 133 S. Ct. 1103 (2013). The Ninth Circuit in that case stated that the Supreme Court had identified "two possible exceptions to the 'in custody' requirement." *Resendiz*, 416 F.3d at 959. As discussed above, none of the exceptions discussed in *Lackawanna* are exceptions to the custody requirement.

entirely disqualifies him from pursuing a § 2254 petition. Even if he had been convicted without counsel or could adduce compelling evidence of innocence, he would not meet the requirement of custody for purposes of § 2254.

Because Mr. Chandler fails to satisfy the statutory requirement of custody, there is no need to consider the merits of his claim that Vermont's requirement of proof of ineffective assistance of counsel through expert testimony violates the Due Process Clause. And because that court's analysis depends only on Mr. Chandler's failure to meet the custody requirement, the court does not consider the other bases for the Magistrate Judge's ruling on Mr. Chandler's *Lackawanna* argument.

Mr. Chandler's remaining objections depend upon his *Lackawanna* argument (*see* Doc. 10 at 1-2, 5), so those arguments necessarily also fail. For the

reasons stated in the R&R (Doc. 9 at 9-13), the court rejects Mr. Chandler's argument (Doc. 10 at 2) that the infringements upon his liberty resulting from his felony conviction constitute "custody."

Conclusion

The court ADOPTS the Magistrate Judge's R&R (Doc. 9). The State's Motion to Dismiss (Doc. 5) is GRANTED and Mr. Chandler's Petition for Writ of Habeas Corpus (Doc. 1) is DENIED.

A certificate of appeal ability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b) is DENIED because Mr. Chandler has failed to make a substantial showing of denial of a federal right, and because his grounds for relief do not present issues that are debatable among jurists of reason, which could have been resolved differently, or which deserve further proceedings. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Dated at Rutland, in the District of Vermont, this 21 day of March, 2017.

Geoffrey W. Crawford, Judge
United States District Court

17-1129-pr
Chandler v. State of Vermont, et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of June, two thousand eighteen.

Present:

PIERRE N. LEVAL,
GUIDO CALABRESI,
DEBRA ANN LIVINGSTON,
Circuit Judges.

CHARLES CHANDLER,

Petitioner-Appellant,

v. 17-1129-pr

STATE OF VERMONT, THOMAS J. DONOVAN, JR., ATTORNEY GENERAL OF VERMONT,

Respondent-Appellee.[*]

For Petitioner-Appellant: WILLIAM MASELLI, Portland, ME.

For Respondent-Appellee: BENJAMIN D. BATTLES, Solicitor General, *for* Thomas J. Donovan, Jr., Attorney General of Vermont.

[*] The Clerk is directed to conform the official caption to the caption on this order.

Appeal from a March 21, 2017 judgment of the United States District Court for the District of Vermont (Crawford, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Petitioner-Appellant Charles Chandler appeals a March 21, 2017 dismissal of his petition for habeas corpus by the United States District Court for the District of Vermont (Crawford, *J.*). The district court dismissed the petition because Chandler, who finished serving his prison sentence before he filed his federal petition for habeas corpus, was not "in custody" for purposes of 28 U.S.C. § 2254. This appeal followed. "We review de novo a district court's dismissal of a § 2254 petition, including whether a petitioner was 'in custody' at the time of filing."

Vega v. Schneiderman, 861 F.3d 72, 74 (2d Cir. 2017). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

1. Background

In 2006, Chandler was arrested and charged with impeding a public officer in violation of Vt. Stat. Ann. tit. 13, § 3001 when he tried to prevent volunteer firemen from putting out a brushfire on his property. *State v. Chandler*, No. 2010-135, 2011 WL 4974829, at *1 (Vt. Jan. 27, 2011). He was convicted after a jury trial and sentenced to serve a twenty-nine-to-thirty-day custodial sentence. The Vermont Supreme Court affirmed this conviction and sentence. *Id*.

While serving his sentence, Chandler filed a petition for post-conviction relief in state court, arguing that he had received ineffective assistance of

counsel at his criminal trial because his attorney had failed adequately to prepare for the trial, had made a series of tactical errors during the trial, and had been biased against Chandler. To support the last point, Chandler provided a transcript of a voicemail his attorney left him before trial in which the attorney requested that Chandler pay him for his services, while making crude, offensive comments directed at Chandler. Chandler was released from custody while this petition was pending. The state trial court then dismissed the petition for lack of jurisdiction because he was no longer in custody. The Vermont Supreme Court reversed the trial court's dismissal because Chandler had been in custody when he filed the petition. *See In re Chandler*, 67 A.3d 261, 263-70 (Vt. 2013). On remand, the trial court granted summary judgment to the state on Chandler's ineffective assistance claim, concluding

that without expert testimony as to prevailing norms in the legal profession and whether the outcome in Chandler's case would have been different if Chandler had had better counsel, Chandler could not and had not made out his ineffective assistance claim. The Vermont Supreme Court affirmed, holding that Chandler's ineffective assistance of counsel claim was meritless. *See Chandler v. State*, No. 2014-375, 2015 WL 2383669, at *2-4 (Vt. May 14, 2015).

Chandler filed a habeas petition in the United States District Court for the District of Vermont in July 2016, arguing that he had received ineffective assistance of counsel in his state court trial. In December 20 16, the magistrate judge recommended that the petition be dismissed for lack of jurisdiction because Chandler was not "in custody" when he filed his federal petition for purposes of 28 U.S.C. § 2254.

The district court adopted the magistrate judge's report and recommendation and dismissed the petition on March 21, 2017. Chandler filed a timely notice of appeal, and we granted him a certificate of appealability on September 5, 2017.

2. Analysis

Only those "in custody" at the time a habeas petition is filed may petition for a writ of habeas corpus under 28 U.S.C. § 2254. *See Finkelstein v. Spitzer*, 455 F.3d 131, 133 (2d Cir. 2006). This "requirement may be satisfied by restraints other than 'actual, physical custody' incarceration," such as when a petitioner "is subject to a significant restraint upon her physical liberty 'not shared by the public generally.'" *Vega*, 861 F.3d at 74 (quoting *Jones v. Cunningham,* 371 U.S. 236, 239-40 (1963)). Chandler argues that the district court erred in holding that he was not in "custody," and thus that it lacked

jurisdiction over his petition, because he is subject to "significant physical restraints." In addition, he contends that a plurality of the Supreme Court has suggested that a person no longer in custody may petition for a writ of habeas corpus under § 2254 if the state court "without justification, refuse[d] to rule on a constitutional claim that has been properly presented to it," *Lackawanna Cty. Dist. Att'y v. Coss*, 532 U.S. 394, 405 (2001) (O'Connor, *J.*, plurality), and that he qualifies under that purported exception to the custody requirement. We disagree.

First, even if some of the legal restrictions to which Chandler says he is subject might conceivably satisfy the custody requirements, which is dubious because they "do not impose a severe restraint on individual liberty," *Vega*, 861 F.3d at 74, Chandler does no more than give speculative suggestions as to whether, when, and how they might attach. That is,

they are not sufficient. Accordingly, the district court did not err in holding that Chandler was not "in custody."

Second, the *Lackawanna* plurality exception was discussed in the context of a petitioner "challeng[ing] an enhanced sentence on the basis that [] prior conviction[s] used to enhance the sentence" were invalid. 532 U.S. at 404 (majority opinion); *see also Dubrin v. People of California*, 720 F.3d 1095, 1097 (9th Cir. 2013) (characterizing the exception as limited to those cases). It is thus not apposite here. Even assuming arguendo that the Lackawanna plurality exception could apply, moreover, the state court *did* rule on the merits of his ineffective assistance of counsel claim. The Vermont Supreme Court explained that Chandler failed to show both how his trial counsel's performance "fell below the standards for competent

counsel under the prevailing norms and the circumstances of his particular case" and that "the outcome of his trial probably would have been different if trial counsel had done what Chandler claims he should have done." *Chandler*, 2015 WL 2383669, at *4. Chandler's assertion that he was "barred from presenting his claims altogether" because he did not present any expert witness testimony is simply incorrect. Pet'r-Appellant Br. 14. Therefore, his invocation of the Lackawanna exception fails.

* * *

We have considered Chandler's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk