

No. 21-500

Supreme Court, U.S.  
FILED  
AUG 30 2021  
OFFICE OF THE CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

FRANCIS FINSTER — PETITIONER

vs.

THE STATE OF NEW YORK — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE NEW YORK STATE COURT OF APPEALS  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

FRANCIS FINSTER

(Your Name)

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**ORIGINAL**

## QUESTIONS PRESENTED

Under NY law the trial court's failure to adhere to procedural requirements of the waiver of indictment process, constitutes a mode of proceedings error that strips the trial court of its jurisdiction to enter a judgment of conviction / sentence a criminal defendant. This case not only involves the question of whether the state trial court circumvented those requisites, but raises three important federal questions:

- 1). Was petitioner denied his constitutional right to effective assistance of counsel on direct appeal in state court, based on counsel's failure to assemble an accurate appeal record (that included an unsigned waiver of indictment and not the waiver on file in the trial court), which may have prevented meaningful / accurate review of a mode of proceedings error?
- 2). Does the state's waiver of indictment process, which is deemed a jurisdictional basis to try and convict a criminal defendant, implicate the constitutional right to due process?
- 3). Was the petitioner denied the constitutional right to due process and or equal protection, as a result of the state courts failure to duly consider the merits of whether there was a mode of proceedings error and a fraud upon the trial court proceeding by ignoring his claims, with summary denials?

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☒ reported at People v. Finster, 192 AD3d 1634; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the NY Appeals court appears at Appendix B to the petition and is

☐ reported at People v. Finster, 37 NY3d 964; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

## JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 6/8/21.  
A copy of that decision appears at Appendix B.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend VI.

"In all criminal prosecutions, the accused shall enjoy the right  
.... to have the assistance of counsel for his defense."

U.S. Const. Amend. XIV.

"... nor shall any state deprive any person of life, liberty or  
property, without due process of law, ..."

U.S. Const. Amend. XIV

"...nor deny to an person within it's jurisdiction the equal  
protection of the laws..."

U.S. Const. Amend. I

"...the right of the people... to petition the government for  
redress of grievances."

## STATEMENT OF THE CASE

This case involves constitutional implications that concern public confidence in the integrity of state judicial process. The petitioner was essentially denied meaningful appellate advocacy in advancing jurisdictional errors (that a trial judge and ADA later attempted to cover up with a fraudulent waiver document), which the state appellate court ignored with a summary denial.

The petitioner was convicted by a plea of guilty (entered on Jan. 20, 2010), of the offense of course of sexual conduct against a child in the first degree; and was later sentenced to the determinate term of 20 yrs imprisonment / 10 yrs Post Release Sup.

The petitioner was charged by Superior Court Information (Oneida County No. S10-2011), that was filed along with a "waiver of indictment" on Dec. 2, 2010.

Under New York Law the right to indictment is recognized as a public fundamental right that is the basis of the court's jurisdiction to try and sentence a defendant (People v. Boston, 75 NY2d 585, 587 [1990]; People v. Trueluck 88 NY2d 546, 548 [1996]). A "waiver of indictment" and departure from this right is only available within the express authorization of the governing state constitutional and statutory exception (NY Const. art. 1, §6 and CPL §195.20).

Accordingly, the history of the waiver provision shows that New



York considers the waiver process to be of jurisdictional stature. Whereas, the failure to adhere to the statutory prerequisites is treated as a jurisdictional defect that cannot be waived by a guilty plea (People v. Zanghi, 79 NY2d 815, 817 [1991]; Boston, 75 NY2d at 589 n.; Trueluck, 88 NY2d at 549).

The applicable provisions of the NY Const. art. 1, §6 and NY CPL §195.20 unequivocally demand that a waiver of indictment shall be accompanied by a written instrument signed by a defendant in open court (before a judge) in the presence of his attorney.

In following dictates of the NY Court of Appeals, the intermediate appellate court observed that "when the clear & unambiguous language of the constitution (NY) demands that, the waiver be accompanied by a written instrument signed by defendant in open court it compels the conclusion that the waiver must be accomplished in that manner (People v. Donnelly, 23 AD3d 921, [NYAD 3 Dept. 2005]; People v. Finkle, 262 AD2d 971, 973 [NYAD 4 Dept. 1999]).

Moreover, the NY Court of Appeals has been strict in terms of dictating that the lower courts may not take short cuts circumventing these statutory requirements. Holding that a court's jurisdiction cannot be lawfully gained from a vacuum. People v. Pierce, 14 NY2d 564, 570 [2010]; Trueluck, 88 NY2d at 549 ("the general good end does not justify specific end run means.").

Here, the petitioner did not sign the "Waiver of Indictment" in open court as required. Instead, it was executed out in a hallway

before his case was even called. And although he signed one of two identical waivers in the presence of his attorney, the documents were impermissibly presigned by the trial judge (Dwyer, J.), ADA (K. Wilson) and counsel (P. Marthage).

a). Appellate counsel ignored evidence of the mode of proceeding errors and failed to assemble a complete record on direct appeal, that would have ensured adequate appellate review of the issue.

Under NY State rules it is the obligation of appellate counsel to assemble the appeal record, which must contain all of the relevant papers that were before the lower court (22 NYCRR §1015.7[d], 22 NY ADC §1250.7[d][1]).

Here, appellate counsel neglected to find a signed copy of the "Waiver of Indictment" and yet, took no additional steps to investigate any potential mode of proceedings error. Instead, he substituted the appellate record with an unsigned waiver form (Appendix D).

Albeit, petitioner argued that the waiver process was defective (by pro se supplemental brief), the appellate court ignored the unsigned waiver on record and applied a presumption of regularity, denying relief based on the plea minutes (People v. Finster, 136 AD3d 1279 [4 Dept. 2016]). Notably, during the plea allocution the petitioner indicated that the waiver was signed out in a hallway (exhibit G).

b). The Trial Court (Judge / ADA) falsified court records to cover

up it's routine practice of circumventing statutory requisites that affected the court's jurisdiction.

The petitioner subsequently filed a motion for post conviction relief (NY CPL §440.10), which included a copy of the presigned waiver (Appendix E). Judge Dwyer neglected to recuse himself and denied the motion, indicating inter alia, that the defendant was mistaken, that a review of the record had revealed the waiver was actually signed by another ADA Matthew P. Waltz (Appendix F).<sup>1</sup> Yet the record clearly reflects the fact that it was the ADA assigned to the case (K. Wilson), who was actually in court that day and not ADA P. Waltz as falsely suggested by Judge Dwyer (Appendix G, H). The waiver signed by ADA P. Waltz is a fraudulent document.

No hearing was held and the question of validity as to either of the two contradicting waivers has never been reached or addressed.

c). Despite the evidence reflecting said errors / implicating the integrity of the trial court, the NY appeals court ignored that evidence, by issuing summary denials.

The petitioner subsequently sought leave to appeal to the NY Appellate Court, from denial of the CPL 440 motion. Ignoring the seriousness of the jurisdictional issue and the contradictive documents (precluding any presumption of regularity) the appellate court denied petitioner leave to appeal on October 4, 2017, in an

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<sup>1</sup>Within the court's decision, it was indicated by the Judge that a copy of said waiver was attached to it, but it was not. The petitioner later obtained a copy via records request he filed.

unpublished decision.

The petitioner later filed the more current motion for Writ of Error Coram Nobis in the NY Appellate Division, Fourth department. Yet, again it ignored the evidence and summarily denied the motion. The appellate court's decision is therefore, silent on the merits and the law. A copy of that decision is attached at Appendix A. Application for leave to appeal said denial to the NY Court of Appeals was likewise denied on June 8, 2021. A copy of that decision is attached as Appendix B.

This petitioner was systematically unable to meaningfully / fairly litigate issue of the state trial court's jurisdiction to enter a judgment against him. First, by the lack of effective appellate - advocacy and then, by entry of false documents, which the state appeals court(s) ignored with summary denials.

## REASONS FOR GRANTING THE PETITION

This court should grant a Writ of Certiorari to address the serious constitutional implications involved in this case. The very serious issues presented here will most likely recur and as here, will typically evade review. There is a great public importance to have confidence in the integrity of the judiciary system and all associated rights to meaningful access, to equal process, fair adjudication and meaningful representation.

This court has long observed that when a state grants a defendant a statutory right of appeal, due process compels it to make certain that criminal defendants receive the careful advocacy needed to ensure that rights are not foregone and that substantial legal and factual arguments are not inadvertantly passed over. Pension v. Ohio, 488 U.S. 75, 85 [1988], citing Evitts v. Lucey, 469 U.S. 387 [1985].

Consistently, this court has made clear that the state's process must provide the criminal appellant with the minimal safegaurds necessary to make an adequate and effective appeal. Smith v. Robbins, 528 U.S. 259 [2000]; Evitts, 469 at 394.

Here, the petitioner was systematically deprived of all but, the physical filing of his appeal. An empty formality at best and not a meaningful process envisioned by the dictates of due process. Evitts, 469 U.S. at 396 - 97 ("First appeal as of right is not adjudicated in accord with due process of law if the

appellant does not have effective assistance of attorney").

This case, presents a serious breakdown in both advocacy and review at the state appellate level, to such extent as to threaten confidence in the fairness / integrity of the state judiciary. A mode of proceedings error (affecting the trial court's jurisdiction) and fraud were ignored by the state appellate court, due to ineffective appellate advocacy.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Francis Finster  
FRANCIS FINSTER, Pro Se

Date: August 23, 2021