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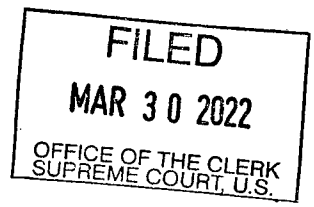

IN THE

SUPREME COURT OF THE UNITED STATES

Alexander Kates — PETITIONER
(Your Name)

vs.

State of New York — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States District Court for the Western District of New York
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Alexander Kates
(Your Name)

639 Exchange Street
(Address)

Attica, New York 14011
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Are district courts allowed to disregard State law and controlling federal precedent when handling state habeas corpus petitions?

2. Is a petitioner "in custody" for purposes of habeas corpus if a sentence for a parole violation runs consecutive to that of a new conviction?

3. May a district court analyze an actual innocence claim using its own standard rather than the one established by the Supreme Court?

4. Does it constitute ineffective assistance of counsel when an attorney in a criminal case does absolutely nothing except appear at court dates?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Alexander Kates v. Superintendent of Attica Correctional Facility, et al., No.19-cv-6647, U.S. District Court for the Western District of New York. Currently Pending.*

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* This case is related because it arose as a result of the 2011 conviction for which this Certiorari petition pertains. the 2015 conviction arose by way of plea contingent upon accepting and acknowledging being a predicate felon, and the 2011 conviction was used to enhance my 2015 conviction sentence.

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

RULES AND STATUTES

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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 B to the petition and is

[✓] reported at 2021 WL 1720924; 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 _____ 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 _____ 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.

JURISDICTION

[✓] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was January 13, 2022.

[ ] 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: March 3, 2022, and a copy of the order denying rehearing appears at Appendix F.

[ ] 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 _____. A copy of that decision appears at Appendix _____.

[ ] 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

United States Code, Title 28, section 2254 (Federal habeas Corpus for State Prisoners);

United States Constitution, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to [...] have the Assistance of Counsel for his defence."

United States Constitution, Fourteenth Amendment, Section One:

> " No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In 2011 I was convicted of Attempt Criminal Possession of a Weapon ("CPW") in the second degree in the State of New York and sentenced to two years in State prison plus two years of postrelease supervision ("PRS").

In 2014, before completing the PRS component of the 2011 judgment of conviction, I was arrested, convicted and sentenced on a new charge via plea that was contingent on accepting being a predicate felon, and given an enhanced sentence, as a result of the 2011 conviction. Curious as to why I had not received a disposition on the appeal for the prior conviction that I assumed was automatic and pending since 2011, I requested a copy of my 2011 assigned-counsel's notice of appeal and omnibus motion in August of 2018. Appendix ("App.") C. Soon thereafter I discovered that counsel never filed either document. App.D.

In September of 2018, I unsuccessfully sought relief through a collateral state motion based upon that discovery. I response to that motion, respondent attached the plea and sentencing minutes to their reply -- documents I never had or seen prior. Upon reading those documents I discovered, inter alia, that (1) the sentencing court also did not inform me of a right to appeal; (2) the prosecutor claimed I possessed a loaded firearm in my home and had no prior convictions at the time -- which constitutes only misdemeanor fourth degree CPW in New York State; (3) in order to secure a conviction, the prosecutor solely relied on a (unconstitutional) presumption statute; and (4) my counsel recognized and did not challenge the application of that presumption statute, resulting in a felony conviction for conduct designated a misdemeanor by the State's legislature. So I unsuccessfully sought state relief and exhausted all remedies based upon these discoveries.

In August of 2020 I filed a habeas corpus petition in the Western District of New York, with one of my claims being actual innocence grounded in law and fact. In October of 2021 the district court dismissed my petition, concluding that the 2011 sentence was "fully expired" and that I was no longer "in custody" on the 2011 conviction at the time I filed the habeas action, App.A at 4, and, with respect to the actual innocence claim, that :(1) I admitted to possession of a loaded firearm, (2) purportedly had sufficient time to discuss the plea with counsel, and (3) purportedly declined to challenge the statutory presumption. App.B at 7.

The court did not rule that I did not show a violation of a constitutional right until two months later, after I sought certificate of appealability ("COA").

The same court denied my request to reinstate the habeas petition.

A three-judge panel of the Second Circuit Court of Appeals denied my request for a COA in January of 2022. I then sought en banc review in February of 2022; it too was denied on March 3, 2022.

REASONS FOR GRANTING THE PETITION

I. Procedural Grounds

Jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Slack v. McDaniel,529 U.S. 473,478,484(2000).

The crux of the district court's conclusion that I was no longer in custody under the challenged conviction when I filed my petition was because respondent claimed that it had no records to the effect that I was parole-violated or sentenced to serve a consecutive sentence. App. A at 4-5. As a matter of state law, however, I was parole-violated, and the sentence for that parole violation was consecutive to the sentence for the later 2015 conviction.[1]

This is so because I was arrested on August 19,2014 for the crimes underlying the 2015 conviction while still serving the PRS portion of the 2011 conviction under challenge, which respondent claims expired eight months later on April 23,2015. According to state law, I was parole-violated when I was arrested under NYCRR §8004.2(d)(2), and that revocation of parole was mandatory under Executive Law §259-i(3)(c)(v).[2]

But the plea resulting in the 2015 conviction occurred on April 14,2015, which, under Criminal Procedure Law ("CPL") § 1.20(13), constitutes the date of conviction. So, even if my PRS from the 2011 conviction did expire on April 23,2015, I was convicted for a new felony nine days before. Accordingly, Penal Law § 70.25(2-a) required a consecutive sentence for a parolee convicted of a new felony, and Penal Law § 70.45(5)(d) required imposition of at least six months' incarceration. Also, see El-Aziz v. Goord, 27 A.D.3d 861,862(3d Dept.2006), leave denied, 7 N.Y.3d 704 (2006); People v. Ramon,239 A.D.2d 198,199(1st Dept.1997).

According to the New York State Court of Appeals, where the statutes mandate consecutive sentences the sentencing court is deemed to have imposed the required consecutive sentence, even absent an express judicial statement to that effect. People

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[1] A State's interpretation of state law binds a federal court sitting in habeas corpus. Bradshaw v. Richey,546 U.S. 74,76(2005). Also see West v. AT&T,311 U.S. 223,236(1940) and Engle v. Isaac,456 U.S. 107,128(1982).

[2] Both NYCRR §8004.2 and Exec. Law §259 have recently been amended under New York's parole reforms.

ex rel. Gill v. Greene,12 N.Y.3d 1(2009).

So, if for purposes of a habeas petition under §2254, "a prisoner serving consecutive sentences is 'in custody' under any one of them," even if the challenged sentence has been fully served under Garlotte v. Fordice,515 U.S. 39,45-46(1995), my habeas petition should not have been dismissed.

Not only was the district court's procedural ruling erroneous, but this court should resolve whether parole violations fall under Payton v. Rowe,391 U.S. 54(1968) and its progeny, as a matter of first impression, as well as reaffirm its ruling that federal courts sitting in habeas review are bound by a state's highest court's interpretation of state law.

II. Constitutional Grounds

Jurists of reason would find it debatable whether my petition stated a valid claim of the denial of a constitutional right. Slack v. McDaniel, supra.

At the very least, it is beyond clear that my attorney was ineffective, that my conviction was unconstitutionally obtained, and that I proved my actual innocence -- each a denial of my right to either effective assistance of counsel or due process.

(A). Actual Innocence

Once the prosecutor asserted that I possessed a loaded firearm in my home and had no previous convictions at the time the state established that only a misdemeanor was committed. See, e.g., People v. White,75 A.D.3d 109,120-121(2d Dept.2010). In fact, the New York States Court of Appeals has ruled that felony CPW in the second degree cannot be committed under those circumstances without first, by the same conduct, committing the lesser offense of misdemeanor fourth degree CPW. See People v. Rivera,15 N.Y.3d 844,845(2010).

Thus, I proved my actual innocence of CPW in the second degree, and even of an attempt, because actual innocence means that the petitioner "in fact [did] not commit[] the crimes on which the calculation or imposition of [his] sentence was based." Poindexter v. Nash,333 F.3d 372,381(2d Cir.2003).

The district court analyzed and disposed of this claim using three factors that do not have any basis in current jurisprudence or precedent, and to which are contrary to every U.S. Supreme Court case to have addressed actual innocence claims.

See infra at 4.[3]

(B). Unconstitutionally Obtained Conviction

1. This court ruled that presumptions should be able to be relied on by the People of a State only where" there is ample evidence in the record other than the presumption to support a conviction," **County Court of Ulster Cty. v. Allen,442 U.S. 140,160(1979)**, and that the People must do more than simply rely on a permissive presumption to meet their burden. **ID., at 167.**

In my case, the prosecutor violated this court's ruling by simply relying on a presumption statute, without more and where there was no evidence in the record to establish an "unlawful intent" other than via the presumption.

Specifically, during the plea proceeding the prosecutor stated:

> "there is under Penal Law section 265.15 subdivision 4 a presumption. That presumption essentially states that if you possess a loaded firearm, you do so withthe intent to use it unlawfully against another. At this time you're not challenging the application of that presumption for the purposes of this plea; is that correct?"

2. By applying the presumption in order to create and establish mens rea and the element of unlawful "intent":

a) The State unconstitutionally deprived me of the "home or place of business" and "no previous conviction" exceptions that I was entitled to, violating my fourteenth amendment right to due process and equal protection of the law;

b) Without, and contrary to, legislative authority and intent, the State rose what was designated as a misdemeanor up to a felony just for the sake of securing a felony conviction, and

c) The State relieved itself of its burden to prove every essential element of the offense charged (unlawful intent under N.Y. Penal Law §265.03[1][b]) beyond a reasonable doubt -- something this court has long ruled unconstitutional since at least **Sandstrom v. Montana,442 U.S. 510,524(1979).**

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[3] Assuming, arguendo, that there was a basis in law for the district court's analysis of the actual innocence claim, it was still erroneous. See App.G, point "D", at 5-7.

(C). Ineffective Assistance of Counsel ("IAC")

1. When the prosecutor applied the aforementioned presumption, my attorney "recognize[d] and d[id] not challenge that presumption." This was unreasonable. Cf. **Jones v. Zatecky,917 F.3d 578,582-83(7th Cir.2019)**(Counsel's failure to object to misapplication of the law was unreasonable).
This did not test the adversarial process at all, constituting IAC. See **United States v. Cronic,466 U.S. 648,659(1984).**

2. Counsel's negotiation of the plea and highly recommending that I plead guilty to a felony when I could not have committed any more than a misdemeanor at most on the law and facts was not legal advice within the range of competence demanded of attorneys in criminal cases. **McMann v. Richardson,397 U.S. 759,771 (1970).**

The prejudicial effect was that I ended up being sentenced to at least three years more than the maximum I could have received for the only misdemeanor I could have committed, and I wouldn't have pled guilty if I knew so or wasn't given the terrible advice to plead guilty by counsel.

3. My attorney also never conducted any pretrial discovery or filed any suppression motions, which this court has ruled falls below prevailing professional norms. **Kimmel v. Morrison,477 U.S. 365,385-90(1986).**

This is especially troubling here since the police committed a **Payton** violation, could not effect their admitted warrantless arrest "across the threshold" of my home in the absence of exigent circumstances, **U.S. v. Allen,813 F.3d 76,81(2d Cir. 2016)**, and no exigent circumstances existed because, inter alia, the offense being investigated was minor (a misdemeanor). See **Lange v. California,141 S.Ct. 2011, 2022-24(2021).**

This single omission(s) alone deprived me of effective assistance of counsel because suppression was likely to occur had counsel so moved, and suppression of what was seized would have been dispositive of every count of the indictment, especially the count I was convicted of. See **People v. Carter,142 A.D.3d 1342,1342 -43(4th Dept.2016).**

4. My attorney also never filed a notice of appeal, or even advised me that I had a right to appeal. Had he done so i would have taken an appeal; instead, I lost an appeal merits consideration altogether, and prejudice is presumed. **Roe v. Flores-Ortega,528 U.S. 470,483-84(2000).**

Essentially, it is as if I wasn't represented by counsel at all.

This court should determine if the collective conduct of an attorney such as here is effective assistance of counsel, or tantamount to being unrepresented. Alternatively, if this court determines the district court's procedural ruling to be correct it should determine whether I -- or any other person in my position -- is excused from purported or actual procedural bars based upon counsel's performance and whether the district court had jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Alexander Kates

Date: March 15, 2022