

22-5953

No.

FILED
OCT 24 2022

IN THE SUPREME COURT OF
THE UNITED STATES

ORIGINAL

ROBERT L. SWINTON JR.,
Petitioner,

-v-

THE STATE OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE NEW YORK COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Robert L. Swinton Jr., PRO SE
INCARCERATED PETITIONER
FEDERAL CORRECTIONAL INSTITUTION DANBURY
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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

After a defendant has shown his counsel a desire to appeal, can counsel take a defendant's appeal of right and fail to file a Notice of Appeal in the State?

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

ALL NEW YORK STATE CASES

People v. Swinton, No. 21-00441, Appellate Division, Fourth Department.

People v. Swinton, No. 98-4247/99-F04, Monroe County, New York.
(Initial Case.)

Federal Case of Enhancement

United States v. Swinton, 15-CR-6055-EAW (W.D.N.Y.) (Enhanced by the prior 1999 New York offense.) (495 F.Supp.3d 197 (W.D.N.Y. 2020)).

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
CONCLUSION.....	9

INDEX OF APPENDIX

Order Denying Leave to Appeal	1
Order Denying Coram Nobis Petition	2
Defendant's Response to Opposition for Leave to Appeal	4
People's Opposition for Leave to Appeal	14
Exhibit A - Decision and Order denying 2020 motion	22
Exhibit B - Coram Nobis Denial	27
Exhibit C - Coram Nobis Denial	30
Application to The New York Court of Appeals	34
Notice of Application and Affirmation in Support	36
Petition For Error Coram Nobis	43
Prior 1999 Conviction Records	73
Documents From Stand-by Counselmen to Recover Records	88

TABLE OF AUTHORITIES CITED

Douglas v. California, 372 U.S. 353 (1963)	3
Garza v. Idaho, 203 L.Ed.2d 77,139 S.Ct. (2019)	3,7
Gideon v. Wainright, 372 U.S. 335 (1963)	3
Hill v. Lockhart, 474 U.S. 52,62 (1985)	3
Jones v. Barnes, 463 U.S. 745,751 (1983)	3
McCoy v. Louisiana, 138 S.Ct. 1500 (2018)	3,7
Penson v. Ohio, 488 U.S. 75 (1988)	3
Rodriquez v. United States, 395 U.S. 327,330 (1969)	3
Roe v. Florez-Ortega, 528 U.S. 470 (2000)	3,7
Shepard v. United States, 544 U.S. 13 (2005)	5
Strickland v. Washington, 466 U.S. 668 (1984)	3

NEW YORK STATE PENAL LAW

CPL § 20	4,5,8
CPL § 110	4,5,8
CPL § 220.39(1)	4,5,8

NEW YORK STATE CRIMINAL PROCEDURE LAW

CPL § 440.10	5
CPL § 440.20	5
CPL § 450.10(1)	3
CPL § 450.10(2)	3
CPL § 450.60	3

UNITED STATES CODE SERVICE

21 USC § 851 5

FEDERAL RULE OF CRIMINAL PROCEDURE

FRCP 16(a)(1)(D) 5

UNITED STATES DISTRICT COURT

United States v. Swinton, 495 F.Supp.3d 197 (WDNY 2020)..... 5
(related case)

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.

[x] For cases from state courts: *All per curiam denials.*

The opinion of the highest state court to review the merits appears at Appendix 1 to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the Appellate Division, Fourth Department court appears at Appendix 2 to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[x] 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 09/30/2022. A copy of that decision appears at Appendix p. 1.

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

(1) The right to appeal a conviction and sentence in The State of New York is at issue, by the U.S. Fourteenth Amendment and law of the land. New York Criminal Procedure Law § 450.60 confers jurisdiction upon a New York intermediate appellate court. N.Y. Crim. Proc. Law § 450.10(1) grants the right to appeal the judgment of conviction, and § 450.10(2) gives a criminal defendant the right to appeal a sentence. None of these rights were afforded to the petitioner.

(2) The Constitutional right to counsel, in order to take and perfect an appeal. See Douglas v. California, 372 U.S. 353 (1963); Penson v. Ohio, 488 U.S. 75 (1988).

(3) The autonomy right to take an appeal by the criminal defendant, that was taken by the actions of counsel. See Jones v. Barnes, 463 U.S. 745,751 (1983); McCoy v. Louisiana, 138 S.Ct. 1500 (2018).

(4) Ineffective assistance of counsel that in failing to take an appeal or file a notice of appeal forfeited the petitioner's right to an appeal and review in post-conviction motions in the State of New York. See Garza v. Idaho, 203 L.Ed.2d 77,139 S.Ct. (2019); Roe v. Florez-Ortega, 528 U.S. 470 (2000); Penson v. Ohio, Id.; Rodriquez v. United States, 395 U.S. 327,330 (1969); Hill v. Lockhart, 474 U.S. 52,62 (1985); Strickland v. Washington, 466 U.S. 668 (1984); Gideon v. Wainwright, 372 U.S. 335 (1963).

STATEMENT OF THE CASE

In 1998, Swinton was arrested in The City of Rochester, Monroe County, New York, on August 11, 1998, for possession and sales of a controlled substance, pursuant to NYS CPL §§ 220.16(1) and 220.39(1). Swinton was released and re-arrested on September 12, 1998 for sales of a controlled substance. Swinton remained incarcerated until November 12, 1998. See Appx. 83-84.

On November 12, 1998, Swinton was told that he would be sentenced as a predicate or second time felon in Monroe County, New York, by his counsel. Counselman Getz did not make any challenges to the use of the 1994 prior Florida offense. See Appx. 62-65,86. Swinton signed an indictment waiver and agreed to a 3 to 6 year term of incarceration, for one count of NYS CPL §§ 20, 110 and 220.39(1). See Appx. 73-78. The waiver did not contain an appeal waiver. No other agreements were signed by Swinton, and the waiver was signed in agreement that Swinton would be released, pending sentencing. After being released, Swinton was re-arrested on January 4, 1999, before sentencing. The pleading was renegotiated, and Swinton was sentenced to a 3½ to 7 year sentence and scheduled for sentencing on January 20, 1999. Swinton requested an appeal from counselor Getz, and was told by Getz that he would not appeal this sentence. Appx. 50-55.

Swinton's counselman, Jon P. Getz did not appeal the conviction or sentence after Swinton was sentenced on January 20, 1999, and there was no waiver to prevent an appeal. Swinton completed the incarceration in 2001, and parole in 2006.

On October 19, 2012, Swinton was arrested on federal charges in the Western District of New York, for drugs and firearms offenses. See Appx. 16-17. The federal court and government alleged that the 1999 conviction would support two enhancements, one under 21 U.S.C. § 851 and the other for United States Guideline 4B1.1 and criminal history calculations. No documents pursuant to Shepard v. United States, 544 U.S. 13 (2005) or FRCP 16(a)(1)(D) were produced by the government. A 'Certificate of Conviction and Judgment' was the only document produced in Swinton's criminal case, omitting CPL § 20 from the statutes of conviction. See Appx. 108-109. This caused a charged element of the 1999 conviction to avoid a correct federal categorical assessment until 2020. See United States v. Swinton, 495 F.Supp.3d 197 (WDNY 2020)(only using CPL §§ 110 and 220.39(1) for the prior offense). The correct document were finally compelled after years of correspondence with the Monroe County Clerk's Office. See Appx. 89-106.

On August 21, 2020, Swinton filed a post conviction motion pursuant to NYS CPL §§ 440.10 and 440.20, seeking to vacate the 1999 state court judgment of conviction and sentence for failing to pronounce the sentence, i.e., failing to state the crime of

conviction, which was misconstrued. Swinton also supplemented this motion, and raised that Getz was ineffective for failing to investigate and challenge the use of Swinton's prior 1994 Florida conviction, on September 29, 2020. The People responded to this motion, and there was no affirmation made by Getz.

On December 11, 2020, The new York Supreme Court made a decision and order, denying one claim on the record and refusing to rule upon the other ground because Swinton failed to take an appeal, which was denied by Getz. See Appx. 102-105.

Swinton filed a petition for Error Coram Nobis on March 10, 2022 with the State of New York, Appellate Division, Fourth Department. Appx. 42-107. The People did not respond to the Coram Nobis petition. The Fourth Department denied the petition on June 28, 2022. See Appx. 2. Swinton sought leave to appeal in the highest State court of Appeals. See Appx. 36-41. The People opposed this leave to The Court of Appeals. See Appx. 14-33. Swinton responded to this opposition on September 9, 2022, and found out from the Clerk that procedure barred his response. See Appx. 4-13. Leave to appeal was denied on September 30, 2022. There has been no written decision in this case since December 11, 2020. This petition now follows.

REASONS FOR GRANTING THE PETITION

THIS CASE WOULD CARVE OUT AN UNCONSTITUTIONAL
EXCEPTION TO DENY AN APPEAL OF
RIGHT GRANTED BY NEW YORK STATE LAW.

This case would effectively remove from a criminal defendant the right to take an appeal, and give this decision to the defendant's counsel in The State of New York. Swinton asserted his autonomy right with his counsel, and directly told by counsel that he would not be appealing his case. See Appx. 53. Getz has not submitted any statement in this case on the record.

The New York Supreme Court deemed issues waived on the grounds that an appeal was not taken by Swinton. Appx. 104. This court has consistently remanded these cases to prevent such a case from denying the right to an appeal by the actions of counsel, that a resentencing and notice of appeal would cure in both the federal and state courts. Unlike Garza, *Id.*, Swinton's pleading did not contain a waiver of appeal.

The autonomous right to appeal is at issue, and whether it is truly autonomous in The State of New York.

THIS CASE WOULD ALLOW ERRONEOUS STATE
DOCUMENTS AND INEFFECTIVE ASSISTANCE OF STATE
COUNSEL TO FORFEIT A CRIMINAL DEFENDANT'S STATE
APPEAL OF RIGHT AND EFFECT FEDERAL COURT ENHANCEMENTS.

In the State court, Getz had absolutely no reason not to file a notice of appeal in 1999. New York State has a 'strict equivalency' standard for the use of another sovereign's prior conviction, the same as the federal catagorical assessment. See Appx. 38,45. This is a meritous challenge that was forfeited by Getz, and also enhanced Swinton's 1999 sentence on the grounds of the 1994 Florida prior that was not challenged.

By this court's precedent, Getz could not take Swinton's right to appeal, nor was this Getz's right to take an appeal from Swinton. See McCoy, Id. Once Swinton made it known that he was interested in appealing, it was Getz's obligation to file a notice of appeal. See Roe, Id.

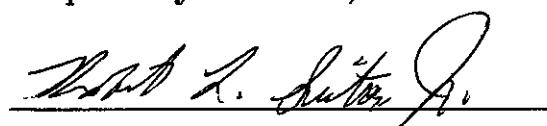
Repeatedly in federal court, Swinton has been held liable for the 1999 conviction as "Attempted Sale of A Controlled Substance, by CPL §§ 110 and 220.39(1). Clearly this conviction was by the 'accomplice liability of CPL § 20 as well, and the State statutes that combined two inchoate offenses to make one crime. Men's rea is at issue for use in a federal forum. This has deprived Swinton of a correct federal challenge when the State documents were not corrected and conflicting with each other; some documents alleging the accomplice liability, and some were not. See Appx. 74-75,81,108-109. Swinton signed a waiver for §§ 20, 110 and 220.39(1).

A resentencing in the State of New York would correct these errors, and prevent this prior offense from being used in federal calculations, which are still being argued in the federal Second Circuit Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark L. Sutton, Jr." The signature is written in a cursive style with a horizontal line underneath it.

Date: October 24, 2022