

No. 23 - 6565

**23 - 6565**

FILED  
NOV 27 2023

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

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In Re DERRICK THOMPSON-PETITIONER

V.

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PATRICK GRIFFIN-RESPONDENT(S)

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ON PETITION FOR A WRIT OF MANDAMUS

TO THE UNITED STATES COURT OF APPEAL  
FOR SECOND CIRCUIT OF NEW YORK STATE

PETITION FOR A WRIT OF MANDAMUS

DERRICK THOMPSON 10A2753  
EASTERN CORRECTIONAL FACILITY  
P.O. BOX-338  
NAPANOCH, NEW YORK 12458-0338

**QUESTION(S) PRESENTED**

(1)

SHOULD THIS COURT GRANT THIS PETITION FOR A WRIT OF  
MANDAMUS TO DETERMINE WHETHER UNDER 28 U.S.C.A  
§1361 TO COMPEL AN OFFICER OR EMPLOYEE OF THE  
UNITED STATES OR ANY AGENCY THEREOF TO PERFORM A  
DUTY OWED TO THE PLAINTIFF. Banker's life & Cas.  
Co v. Holland, 346 U.S. 379, 382-385, 74 S.Ct. 145, 147-149,  
Ex Parte Fahey, 332 U.S. 258, 259, 67 S.Ct. 1558, 1559;

**LIST OF PARTIES**

- [x] 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:

## TABLE OF CONTENTS

OPINIONS BELOW .....	1
JURISDICTION .....	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	5
STATEMENT OF THE CASE .....	6
REASINS FOR GRANTING THE WRIT .....	10
CONCLUSION .....	13

## INDEX TO APPENDICES

APPENDIX A.

## TABLE OF AUTHORITIES CITED

<u>CASES</u>	<u>PAGE NUMBER</u>
<u>Banker's Life &amp; Cas Co v. Holland</u> , 346 U.S. 379	i, 10
<u>Ex Parte Fahey</u> , 332 U.S. 258	i, 10
<u>Berger v. U.S.</u> 295 U.S., 295 U.S. 78 at 88	3
 <u>FEDERAL STATUTES AND RULES</u>	
Local Rule 40.2	8, 12
28 U.S.C. §1254	3,
28 U.S.C. §1361	i, 3,
28 U.S.C. §2244	8, 11
28 U.S.C. §2254	9, 11
 <u>OTHER</u>	
<u>New York Statutes</u>	
CPL §30.20, 30.30	7,
CPL §440.10	6, 7, 9, 10, 11
CPL §460.15	9,
CPL §370.05 (2)	9,
CPL §470.15	9,

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

Petitioner respectfully prays that a Writ of Mandamus issue to the judgment below.

**OPINIONS BELOW**

[ ] For cases from Federal Courts:

The opinion of the United States Court of Appeals appears at Appendix A014-A015 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- [ ] is unpublished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 published.

[ ] For cases from State Courts:

The opinion of the highest State court to review the merits appears at Appendix A038-A052 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 \_\_\_\_\_, on has been designated for  
publication but is not yet reported; or  
 is unpublished.

## JURISDICTION

[ ] For cases from Federal Court:

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

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[X] A timely Petition for rehearing was denied by the United States Court of Appeals on the following date June 26, 2023

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

[X] For cases from State Courts:

The date on which the highest State Court decided my case was July 29<sup>th</sup>, 2022. A copy of that decision appears at Appendix A082.

The jurisdiction of this Court is involved under 28 U.S.C.A. §1361, Berger v. U.S. 295 U.S. 78, at 88.

APPENDIX

A001-A005 November 2<sup>nd</sup>, 2023 Letter

A006-A007 October 2<sup>nd</sup>, 2023 Letter

A008-A013 Change of Law 2022

A014-A015 U.S. Court of Appeals Decision/Order

A016-A026 Successive Habeas Corpus

A027-A033 August 8th, 2023 Letter to Second Circuit

A034-A037 July 25th, 2023 Letter to Second Circuit

A038-A052 Leave Application pursuant to CPL §450.15, 460.15

A053-A074 CPL §440.10 Motion

A075-A081 §30.30, §30.20 Motion

A082 Decision / Order on Leave Application §460.15

Please obtain May 12<sup>th</sup>, 2022 decision for CPL §440.10 Motion from the Lower Court I do not have in my possession.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED\$**

### **FEDERAL STATUTORY**

Local Rule 40.2

28 U.S.C. §1254

28 U.S.C. §1361

28 U.S.C. §2244

28 U.S.C. §2254

### **NEW YORK STATE CONSTITUTION / STATUE PROVISION**

Amendment of Law, 2021 (C.501) New York Legislative Law New York Article 1 §6,

New York Article 1 §6,

U.S. Const. VI, XIV

CPL §30.20

CPL §30.30

CPL §440.10

CPL §460.15

CPL §470.05

CPL §470.15

## STATEMENT OF THE CASE

In June 2021, New York State Legislative changed and amended New York Criminal Procedure Law Section §440.10 (2) (b) and (c). In considering the lower Court's abusive discretion in reaching arbitrary denials by proceeding's a trial record that is not developed for the purpose of litigating or preserving the claim of "ineffective assistance of counsel". In doing so, the analogous procedural bars commonly used by the lower court's to deny a defendant's "Mixed Claim" was removed. (See A001 current change, Amendment of the Law, 2021 (C. 501)).

On February 1<sup>st</sup>, 2022, Petitioner Thompson, in-light of retroactive change in the law, (A008-A013) effectively controlling claims of "ineffective assistance of counsel's"... moved to have his claims concerning counsel's less than meaningful representation consider "in its entirety".

On April 19<sup>th</sup>, 2022, the People filed an Affirmation in opposition to Appellant's request by arguing "the Court should not entertain the Appellant's instant Motion because, 'Appellant' failed to seek permission to file the same pursuant to the Lower Court's decision entered March 18<sup>th</sup>, 2016. Petitioner has not included the People's response herein his Appendix, but respectfully ask this Court to obtain their opposition from the lower Federal Court file.

On April 19<sup>th</sup>, 2022, the presiding judge, (Hon. Donna Marie E. Golia) reviewed the moving papers of Mr. Thompson's §440.10 motion to vacate judgment. (A \_\_\_\_\_) thereafter, entering written decision/order into the record (May 12<sup>th</sup>, 2022). Please obtain Lower Court's decision of CPL §440.10 Motion

In Petitioner's §440.10 motion, Appellant argued that he was denied effective assistance of counsel in that his attorney's failed to object to the People's late request for DNA, ensure that good cause had been shown on the record for the People's late motion to obtain his DNA sample or raise any objection to ensure that the Trial Court properly calculated all excluded time in deciding his C.P.L. §30.30 Motion. In that regard, Defendant seeks an order reversing the Court's decision denying his C.P.L. 30.30 Motion or alternatively, remitting the matter back to "County Court" to conduct the appropriate inquiry with the assistance of new Counsel being assigned. In opposition, the People argued that the motion must be denied per the Court decision dated March 18<sup>th</sup>, 2016. The People also asserted, that Defendant's claims are not proper for C.P.L. §440.10 motion because they are based on facts that appear on the record. The People further aver that Defendant's claims have already been rejected by the Court or could have been raised in his prior motions to vacate judgment.

On November 2<sup>nd</sup>, 2023, I received a letter from the United States Court of Appeals for the Second Circuit, regarding a letter I wrote to the Court on October 23<sup>rd</sup>, 2023, about the status of my action (A001 thru A007 letter to Court dated October 2<sup>nd</sup>, 2023; A letter from Second Circuit dated November 2<sup>nd</sup>, 2023).

On August 8<sup>th</sup>, 2023, I Petitioner wrote to (Chief Judge Debra Ann Livingston) United States Court of Appeals for the Second Circuit (A027-A033). In this letter, I submitted a request asking permission to file a Petition for "reconsideration En Banc" pursuant to L.R. 40.2, however, my papers was returned and denied (A027 thru A033). The Second Circuit Court of Appeals stated the denial of an authorization by the Court to file a Second or Successive Application is not appealable, nor can it be used as the subject of Petition for re-hearing or a motion for reconsideration relying on (28 U.S.C. §2244 (b) (3)). Here in this Petition, Petitioner conceded that the denial of an authorization by the Court to file a second or successive application is not appealable, but, when Petitioner is asking for panel reconsideration en banc, which request that all active judges on the Court to re-hear the case, this Court should have applied L.R. 40.2. See also July 25<sup>th</sup>, 2023 (A034 thru A037).

On May 1<sup>st</sup>, 2023, I Petitioner filed a letter Motion pursuant to 28 U.S.C. §2254, authorization-permission to file a successive Habeas Corpus Petition (A \_\_\_\_\_ thru A \_\_\_\_\_) successive habeas corpus.

On June 14<sup>th</sup>, 2022, I Petitioner submitted Notice of Motion seeking Leave to Appeal pursuant to CPL §460.15 (A038 thru A052).

On May 12<sup>th</sup>, 2022, I Petitioner received the decision/order from the Lower Criminal Court, (A \_\_\_\_\_ thru \_\_\_\_\_). Please see Lower Court's file.

Because, there's been retroactively, effective changes in the law controlling claims of "ineffective assistant of counsel." This was not raised, when Petitioner brought ineffective assistance of counsel in his prior motions, A053 thru A074. The arguments raised herein, has no bearing on any arguments previously raised by Petitioner in any prior post-conviction proceedings thus, the issues raised has never been placed on record or properly considered CPL §§470.05 (2), 470.15.

## REASONS FOR GRANTING THE PETITION

Most recently, New York State Legislators and Drafters, of the Statutes CPL §440.10 (2) (b) (c) considered the Lower Courts abusive discretion in reaching arbitrary or preserving the claim of "ineffective assistance of counsel." In doing so, the analogous procedural bars commonly used by the lower courts to deny a defendant's "mixed claim" was removed and in light of this retroactively effective change of law, A008 thru A013, on February 1<sup>st</sup>, 2022 caused Petitioner to move to have his claims concerning counsel's less than meaningful representation considered "in its entirety" (New York Criminal Procedure Law Section §440.10 effective November 16<sup>th</sup>, 2021).

## THE REMEDY OF MANDMUS

Writ of Mandamus is a drastic one, to be invoked only in extraordinary situation, Banker's Life & Cas. Co v. Holland, 346 U.S. 379, 382-385, 74 S.Ct. 145, 147-149; Ex Parte Fahey, 332 U.S. 258, 259, 67 S.Ct. 1558, 1559 Mandamus has traditionally issued in response to abuses of judicial power. Thus, where the district judge refused to take some action he is required to take or take some action he is not empowered to take, mandamus will lie. Bankers Life & Cas Co. v. Holland, 346 U.S. 379, 384 74 S.Ct. 145.

Herein Petitioner's case, the Court, United States Court of Appeals for Second Circuit denied Petitioner from filing a Second Successive Habeas Corpus regarding 28 U.S.C. §2254 Petition based on a New Rule of Constitutional Law A014 thru A015 June 26, 2023. However, in this (3) Judge Panel, decision/order they state:

As an initial matter, to the extent Petitioner raises Claims that also were raised in his prior §2254 Proceeding, those claims must be dismissed. (Relying On 28 U.S.C. §2244 (b)(1) ("A claim presented in a Second or successive habeas corpus application under Section §2254 that was presented in a prior application Shall be dismissed."))

However, even if all of Petitioner's present claims are deemed to be New, Petitioner has not made a prima facie showing that the requirements of §2244 (b)(2) are satisfied. Specifically, he has not made a showing that his claim rely "on a new rule of federal constitutional law, made retroactive to cases on collateral review by the United States Supreme Court that was previously unavailable," as required by §2244 (b)(2)(a). Petitioner asserts that parts of New York Criminal Procedure Law §440.10 codify or reflect a new Rule of Federal constitutional law, but does not identify relevant rule or any Supreme Court decision discussing it, demonstrate that it was "made retroactive to cases on collateral review by the supreme court" or "was previously unavailable," or explain how it is related here, additionally, the records available to this Court do not suggest that any new federal constitutional rule may be relevant to his case (A \_\_\_\_ thru A \_\_\_\_)

This decision is what prompts Petitioner to bring this Writ of Mandamus, because, L.R. 40.2 says, when the Court disposes of an appeal by a final three-judge order without entry of a separate judgment, a party may file a Motion for panel reconsideration and a Motion for Reconsideration En Banc. See L.R. 40.2.

Petitioner filed a Motion for Reconsideration En Banc, due to new law that came out June 2021, and took effect Jan 15<sup>th</sup>, 2022, regarding ineffective assistance of counsel. Because the Second Circuit 3 panel judge denied Petitioner reconsideration en banc motion, on ground that supports his contentions and took an action that their not power to do, Mandamus will lie Banker's Life & Cas Co. Holland, 346 U.S. 379, 387, 74 S.Ct. 145. Petitioner ask this Court to issue a Writ of Mandamus in aid of the appellate jurisdiction that might otherwise be defeated by unauthorized action of the Court below, McClellan v. Carland, 217 U.S. 268, 305 S.Ct. 501, 503.

Although, Writ of Mandamus, has traditionally been used in the federal Courts only "to confine an inferior Court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is duty to do so." Will v. United States, 389 U.S. at 95, 88 S.Ct. at 273, quoting Roche v. Evaporated Milk Assn., 319 U.S. 21, 26, 63 S.Ct. 938, 941. Here, the Second Circuit was duty bound to exercise its authority when it was duty to do so, on Petitioner's application for

a successive second habeas corpus especially, when a New Rule of Law has been added.  
"Ineffective Assistance of Counsel".

**CONCLUSION**

**WHEREFORE**, Petitioner respectfully request that a writ of mandamus is issued to compel the lower Federal Appellate Court Second Department to exercise its authority, when it is duty to do so.

Dated: December 30<sup>th</sup>, 2023  
Napanoch, New York 12458

Respectfully Submitted  
*Mr. Derrick Thompson*  
MR. DERRICK THOMPSON 10A2753  
Eastern Correctional Facility  
30 Institutional Road-Box-338  
Napanoch, New York 12458-0338

To: New York Attorney General's Office