No. 24-5184 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Alexander Kates — PETITIONER
(Your Name)

vs.

Superintendent of Attica Correctional Facility, and New York State — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeal for the Second Circuit
(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 14011-1049
(City, State, Zip Code)

(Phone Number)

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:

QUESTION(S) PRESENTED

Whether the Court of Appeals for the Second Circuit should have issued the petitioner a Certificate of Appealability.

Whether this court's ruling in Lackawanna v. Coss,532 U.S. 394(2001) summarily forecloses review of a subsequent ineffective assistance of counsel claim in a later, unrelated case under Strickland v. Washington,466 U.S. 668(1984).

Whether a district court presiding over a habeas corpus petition under 28 U.S.C. § 2254 may circumvent review of an ineffective assistance of counsel claim raised under Strickland v. Washington,466 U.S. 668(1984) by applying this court's unrelated ruling from Lackawanna County District Attorney v. Coss,532 U.S. 394(2001).

Whether the district court erred in determining that it could not review the constitutional validity of petitioner's prior conviction in order to adjudicate petitioner's claim of ineffective assistance of counsel under his current conviction.

Whether the government breached the plea agreement by failing to return the petitioner's suppressed property after he pled guilty and was sentenced.

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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

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

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

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[ ] is unpublished.

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

[x] reported at 2023 WL 5486623; 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 february 21, 2024.

[ ] 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: May 20, 2024, and a copy of the order denying rehearing appears at Appendix B.

[ ] 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).

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

STATUTES AND RULES

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence."

United States Constitution, Amendment XIV, Section 1: "...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."

28 U.S.C. § 2254: "The Supreme Court, a justice thereof, a circuit judge, or a district court 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."

42 U.S.C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

A. Preliminary Statement

Among the few issues presented, this case asks the court to resolve a novel issue where a federal district court presiding over a habeas corpus petition pursuant to 28 U.S.C. § 2254 has applied this court's ruling in Lackawanna County District Attorney v. Coss,532 U.S. 394(2001) (hereinafter "Lackawanna") in a way that overrides this court's prior, controlling rulings governing analysis of ineffective assistance of counsel ("IAC") claims from Strickland v. Washington,466 U.S. 668(1984), as well as Hill v. Lockhart,474 U.S. 52(1985).

B. Introduction

Petitioner Alexander Kates ("Mr.Kates") seeks to appeal from a decision and order from the western district of New York denying him habeas corpus pursuant to 28 U.S.C. § 2254. In order to do so Mr.Kates requires issuance of a certificate of appealability ("COA"), which the Court of Appeals for the Second Circuit has denied. Mr.Kates asserts that a COA should have issued because, inter alia, he proved that he received IAC, that the government breached the plea agreement, and that the district court erroneously applied a ruling from this court in an extralegal manner in order to effectively evade review of the substance of his IAC claim.

C. Procedural History

In September 2014 a grand jury out of Monroe County, State of New York, returned a ten-count indictment against Mr.Kates charging him with one count of kidnapping in the first degree, two counts of kidnapping in the second degree, one count of criminal use of a firearm, and multiple counts of burglary in different degrees.

In February of 2015 the Monroe County court suppressed every single search warrant that Mr.Kates had standing to challenge. The state then offered Mr.Kates a plea of sixteen years' imprisonment, to which he declined. Following further negotiations between Mr.Kates's assigned counsel and the state it was agreed upon that the state would return Mr.Kates's (suppressed) property "should" he plead guilty. Appendix ("App.") G, pp. 8. The state also conditioned the plea upon Mr.Kates "admitting at the time of sentencing to being a second violent felony offender" as a result of a prior 2011 conviction. App. G, pp. 4.

Based upon the state's agreement to return Mr.Kates's property to him "should" he plead guilty, he accepted the plea. But after Mr.Kates was sentenced it became clear that the state was not going to return a majority of his most valuable property, and, ultimately, the state did not.

In June of 2018 one of New York State's intermediate appellate courts affirmed Mr.Kates's 2015 conviction. However, in August and September of 2018 Mr.Kates also discovered that the prior 2011 conviction that was used to both obtain his current 2015 conviction and adjudicate him a predicate felon was not only wholly unconstitutional but also that his conduct did not even constitute a felony in the state of New York on the undisputed facts and law. Based upon these discoveries Mr.Kates challenged the 2011 conviction through collateral motions, exhausted all state remedies, then filed a habeas corpus petition pursuant to 28 U.S.C. § 2254. The habeas petition directed at the 2011 conviction was dismissed for lack of jurisdiction because Mr.Kates was not in custody under the 2011 conviction at the time the action was filed because it had fully expired (Kates v. New York State, 2021 Dist. LEXIS 83434[W.D.N.Y.

2021]); he was in custody under the 2015 conviction.

Prior to this ruling, however, Mr.Kates filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 in 2019 in the western district of New York directed at his current 2015 conviction. The petition was assigned to the same judge that dismissed Mr.Kates's prior, unrelated habeas corpus petition for his prior, completely separate 2011 conviction. Among the issues presented, Mr.Kates argued that his right to due process was violated because the state breached the plea agreement by failing to return all of his property after they used it to induce a plea and he was sentenced. He also argued that he received IAC because his counsel (1) failed to investigate whether there were any constitutional infirmities with his prior 2011 conviction, admitting that he was "unaware of any" when asked by the sentencing court (App.F, pp. 4, line 6); (2) negotiated a predicate felon-based plea premised on the prior 2011 conviction, which was constitutionally infirm; and (3) did not lodge any challenge to the prior 2011 conviction used to adjudicate Mr.Kates a predicate felon during the only proceeding designed for that purpose in New York State.

In 2023, the western district of New York court denied Mr.Kates's habeas corpus petition. As to Mr.Kates's claim that the state breached the plea agreement the district court decided that it was unclear whether the return of Mr.Kates's property was part of the plea agreement and -- in contradiction to this very statement -- that Mr.Kates did not show that the plea agreement was either unfullfilled or illusory. App. E at 12. The court did not rule upon the merits of Mr.Kates's IAC claim; instead, the district court referred to its dismissal of Mr.Kates's prior habeas corpus petition challenging his prior 2011 conviction and decided that "the rule set forth in the Supreme Court's

ruling in Lackawanna... barred Kates's claims [of IAC] because he was no longer 'in custody' for the [prior 2011] conviction." App.E, pp.17.
The district court did not issue Mr.Kates a COA.

Mr.Kates timely sought a COA from the Court of Appeals for the Second Circuit arguing, inter alia, that the state court record and documentation proved beyond all doubt that the return of his property was part of the plea agreement; that, as required, he proved by at least a preponderance of the evidence that the state breached the plea agreement; and that not only could Lackawanna not override IAC claims raised under Strickland v. Washington,466 U.S. 668(1984), but also that the district court erred by completely evading review of his IAC claim altogether by erroneously applying and relying on Lackawanna. See App.C, pp.1-4 and 10-13.
A three-judge panel denied Mr.Kates a COA. App. A.

Mr.Kates then sought En Banc reconsideration of his application for a COA in the Second Circuit Court of Appeals, arguing that he sustained his burden of proving that the return of his property was part of the plea agreement, that the plea agreement was breached by at least a preponderance of the evidence, that the district court erred by extralegally applying Lackawanna, and that the three-judge panel should have issued him a COA. App.D.
En Banc Reconsideration was denied. See App.B.

Mr.Kates now seeks certiorari to primarily review the novel issue of whether Lackawanna can override IAC claims raised under Strickland v. Washington,466 U.S. 668(1984), and whether he should have received a COA from the Second Circuit based upon the issues above.

REASONS FOR GRANTING THE PETITION

The circumstances of petitioner's case presents a novel issue for which there lies no precedent and has national importance among the federal habeas corpus jurisprudence.

The district court erred as a matter of law by applying this court's ruling in Lackawanna to the petitioner's IAC claim, effectively circumventing this court's ruling in Strickland v. Washington,466 U.S. 668(1984) (hereinafter "Strickland").

Lackawanna was the case in which this court extended its ruling in Daniels v. United States,532 U.S. 374(2001) (hereinafter "Daniels") to also cover habeas corpus petitions brought by state prisoners under 28 U.S.C. § 2254. Specifically, in Daniels this court ruled that a defendant "may not collaterally attack his prior conviction through a motion under § 2255." Daniels,532 U.S. at 382.

There are two state court convictions relevant here in Mr.Kates's case: a 2011 conviction and a 2015 conviction. Mr.Kates claimed that his counsel for the 2015 case rendered IAC because he failed to investigate whether there were any constitutional infirmities with the prior 2011 conviction. This is not a challenge to the prior 2011 conviction. Therefore, Mr.Kates was not attacking his prior conviction at all and the district court erred in applying Lackawanna.

However, even if we assume, arguendo, that Lackawanna was at all applicable to the circumstances of Mr.Kates's case, the district court here still would have erred in evading review of Mr.Kates's IAC claim by deciding that "the rule set forth in the Supreme Court's ruling in Lackawanna... bar-

red [his] claims [of IAC] because he was no longer 'in custody' for the [prior 2011] conviction" (App.E, pp.17), because reviewing whether there was any constitutional infirmities with the prior 2011 conviction was required only in order to resolve whether Mr.Kates's counsel for his 2015 conviction was ineffective in failing to investigate that prior 2011 conviction. This court has long held that "a court may consider an issue 'antecedent to...and ultimately dispositive of' the dispute before it..." in U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.,508 U.S. 439,447(1993) (citing Arcadia v. Ohio Power Co.,498 U.S. 73,77[1990]). Simply put: Lackawanna cannot override that "antecedent" review requirement.

What the district court was required to do here under Strickland was determine whether Mr.Kates's counsel rendered IAC by failing to investigate the prior 2011 conviction -- for which there were numerous constitutional infirmities -- and then failing to mitigate at the sentencing/predicate-felon hearing phase based upon that failure to investigate. What was antecedent to determining whether Mr.Kates's 2015 counsel for his current conviction rendered IAC was a determination as to whether the prior 2011 conviction was indeed unconstitutional. Instead, the district court applied Lackawanna , entirely evading that review and therefore evading review of Mr.Kates's IAC claim as well -- which defeats the purpose of a habeas corpus petition. Not only was this an unreasonable application of Strickland and Lackawanna, but it also sets a dangerous precedent detrimental to habeas applicants if it goes unchecked by a higher court.

For example, it is well established that reviewing a federal IAC claim requires an analysis using Strickland's two-pronged test. A petitioner need only demonstrate a "reasonable probability" that "but for counsel's un-

professional errors, the result of the proceeding would have been different." Boria v. Keane,99 F.3d 492,496(2d Cir.1996)(citing Strickland). However, applying Lackawanna to an IAC claim in the way it was here in Mr.Kates's case so as to instantly foreclose any review of such claim not only prevents review of the antecedent underlying facts supporting or disproving a required finding that the two-pronged test was met by a petitioner, but the purely legal question of prejudice that can only be determmined by the facts on a case by case basis would also never be able to be reached. In other words, habeas petitioners whose IAC claims are based upon their counsel's failure to investigate and challenge a prior conviction would never be able to argue, let alone prove, that their counsel that represented them on the current conviction they are challenging was ineffective because the acts or omissions of counsel would be barred from review.

The Court of Appeals for the Second Circuit should have issued Mr.Kates a COA on this claim and erred in electing not to under this court's ruling in Buck v. Davis,137 S.Ct. 759(2017) (hereinafter "Buck"). In Buck, this court ruled that at the COA stage of a habeas proceeding the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. Buck,137 S.Ct. at773-774.

Mr.Kates met his burden of satisfying both of the standards in Buck in both of his applications for a COA. See App.C, pp.10-13 and App.D, pp.1-6.

The district court also erred and abused discretion in denying Mr.Kates habeas relief on his claim that the state government breached the plea agreement.

The district court's determination that it was unclear as to whether the

return of the property to Mr.Kates was part of the plea agreement was clearly erroneous for two specific, provable reasons. First, the prosecutor stated that Mr.Kates's (suppressed) property would be returned "...should Mr.Kates plead guilty..." See App.G, pp.8, line 9. The word "should" -- and the very context in which it was used -- was a linguistic convention of condition. Cf Bank of N.Y. Mellon Tr. Co. v. Morgan Stanley Mortg. Capital, Inc.,821 F.3d 297,305-306(2d Cir.2016). This alone established a condition precedent in terms of the consideration of the contract (plea agreement). As a matter of law, especially if there truly was any doubt, the district court here was required to first determine whether a condition precedent existed if it was at all "unclear" as to whether the return of property was part of the plea. See Sohm v. Scholastic, Inc., 959 F.3d 39,46(2d Cir.2020)(cleaned up).

Secondly, each lower state court, each party, and each parties' counsel made it record clear that the return of property was part of the plea agreement. Mr.Kates's counsel acknowledged that the return of the property was "part of Kates plea agreement..." in an email to the district attorney ("DA"). See App.H. Even the attorney general ("AG") office acknowledged that the "guilty plea [] involved the return of seized property..." and opined that "petitioner was entitled to the seized property after after he pleaded guilty..." App.I, pp.7-8. Also, see ibid. at 8(AG: "By negotiating the plea, counsel made it possible for petitioner to receive the seized property...[a]nd...follow[ed] up with an email to the prosecutors..."). Additionally, the trial court accepted the terms of the plea (App.G, pp.7-9), and in at least one collateral motion denial decision and order incorrectly determined that the plea promise to return the property was not unfulfilled. See App.J, pp.6-7. Furthermore, the intermediate appellate court acknowlegded that the return of the property was part of the plea -- but incorrectly

concluded that the agreement was not unfulfilled upon affirming Mr.Kates's conviction. See People v. Kates,162 A.D.3d 1627,1632-33(4th Dept.2018).

The district court also erred in deciding that Mr.Kates did not show that the plea agreement was unfulfilled. Not only is this decision in complete contradiction to the decision that it was unclear as to whether the return of property was part of the plea, it is also belied by the submitted state court record: (1) property custody reports list Kates's property up to item number "262." App.K. Thus, items "341-346" from page 2 of the "documentary proof" that the intermediate appellate court relied on (App.L) was not returned because it was not his; (2) the coffee maker and trash can, mentioned only as "2 bags from recently purchased merchandise..." that was "in the backseat" of Mr.Kates's car (App.M, pp.2) and that was not even itemized in the property custody reports, was never returned; (3) Mr.Kates's 2003 Cadillac CTS and car keys (items 247 and 248) were never returned. The district court even acknowledged this fact and commented that it was "troubling" in a prior decision and order from Mr.Kates's currently pending 42 U.S.C. §1983 against some of respondents' agents (App.N), so it is shocking to the conscious that the court would contradict its own prior decision just to subsequently deny Mr.Kates the habeas relief he was entitled. In fact, because the district court was aware of this material fact before Mr.Kates ever filed his habeas petition the district court was required to recuse himself from presiding over the habeas petition; (4) Mr.Kates's mother's computer (item 220) was not only not returned but couldn't be because it was not his; (5) item 235 ($1,497.75 USD) was not returned and was corruptly omitted from the property custody reports; and (6) Mr.Kates's jewelry, listed as items 223, 236, 251 and 258, was not returned because the DA instructed it not to be. See App.L. Mr.Kates's jewelry was given away to someone named "A.Sifain" (App.K) who was

not Mr.Kates's representative, and despite Mr.Kates furnishing photos of himself wearing said jewelry with dates months before the crimes he was accused of ever occurred (see App.O) -- meaning the jewelry couldn't have been anyone's except his.

The Court of Appeals for the Second Circuit should have issued Mr.Kates a COA on this claim because Mr.Kates not only satisfied both of the requirements in Buck, supra, in both of his COA applications, but also because the district court did not follow the requirements of Santobello v. New York,404 U.S. 257(1971) (hereinafter "Santobello"). In Santobello, this court ruled that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled" or the plea must be vacated. Santobello, 404 U.S. at 262-263. Mr.Kates certainly sustained his burden of proving the breach of plea agreement by a preponderance of the evidence (see e.g., U.S. v. Byrd,413 F.3d 249,251[2d Cir.2005]), but instead of abiding by the precepts of Santobello the district court here erroneously justified the breach by deciding: "Regardless of whether the prosecution would have been legally required to return the property anyway, the commitment to expedite the process of property return following the guilty plea was itself a benefit that [Mr.] Kates received as part of the bargain." App.E at *12.

The Second Circuit should have issued Mr.Kates a COA because the district violated Santobello; contradicted itself multiple times simply in order to deny Mr.Kates relief; in any event, the plea agreement was breached because Mr.Kates's property was not returned to him (despite the fact that it had to be returned without the quid pro quo of a guilty plea in exchange for the return as a result of the suppression); an expeditious or tardy return of property was immaterial; and Mr.Kates satisfied Buck, supra.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Alexander Yates

Date: July 25, 2024