

No.

IN THE

SUPREME COURT OF THE UNITED STATES

GREGORY SCOTT ROSS,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

Petition for a Writ of Certiorari to the
Kentucky Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a defendant that enters a plea of guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) and is sentenced to a pretrial diversion program is permitted to withdraw that plea under post-conviction remedies available to the accused pursuant to §11.42 of the Kentucky Rules of Criminal Procedure and *Strickland v. Washington*, 466 U.S. 668 (1984).

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this Court
are as follows:

Gregory Ross, Petitioner

Commonwealth of Kentucky, Respondent

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The Petitioner respectfully requests that a writ of certiorari issue to review the Denial of Discretionary Review by the Kentucky Supreme Court on December 7, 2017. Underlying, the Kentucky Supreme Court's Denial of Discretionary Review is the Opinion and Order Denying Motion for Post-Conviction that was entered in this case on August 5, 2015.

BASIS FOR JURISDICTION IN THIS COURT

The December 7, 2017, Decision of the Kentucky Supreme Court, which decision is herein sought to be reviewed, was not published, but is reprinted in the appendix. The Opinion of the Court of Appeals of Kentucky, dated July 28, 2017, was not reported, and is reprinted in the appendix. The Opinion and Order Denying the Motion of Post-Conviction of the Circuit Court of Jefferson County, Kentucky, made August 5, 2015, was not reported, and is reprinted in the appendix.

The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

North Carolina v. Alford, 400 U.S. 25 (1970) allows a defendant to plead guilty in order to take advantage of a plea bargain while continuing to maintain his or her innocence.

The Sixth Amendment of the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Kentucky Rule of Criminal Procedure §11.42, states:

Motion to vacate, set aside or correct sentence.

(1) A prisoner in custody under sentence or a defendant on probation, parole or conditional discharge who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it.

(2) The motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant re-

lies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

(3) The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

(4) The clerk of the court shall notify the attorney general and the Commonwealth's attorney in writing that such motion (whether it be styled a motion, petition or otherwise) has been filed, and the Commonwealth's attorney shall have 20 days after the date of mailing of notice by the clerk to the Commonwealth's attorney in which to serve an answer on the movant.

(5) Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and if financially unable to employ counsel, shall upon specific written request by the movant appoint counsel to represent the movant in the proceeding, including appeal.

(6) At the conclusion of the hearing or hearings, the court shall make findings determinative of the material issues of fact and enter a final order accordingly. If it appears that the movant is entitled to relief, the court shall vacate the judgment and discharge, resentence, or grant him or her a new trial, or correct the sentence as may be appropriate. A final order shall not be reversed or remanded because of the failure of the court to make a finding of fact on an issue essential to the order unless such failure is brought to the attention of the court by a written request for a finding on that issue or by a motion pursuant to Civil Rule 52.02.

(7) Either the movant or the Commonwealth may appeal from the final order or judgment of the trial court on a motion brought under this rule. If the trial court finds the movant received ineffective assistance of appellate counsel and the Commonwealth fails to pursue a timely appeal, the movant may appeal the trial court's order by filing a notice of appeal within sixty (60) days after the date of notation of service of the judgment or order under Criminal Rule 12.06(2). If neither party has filed a notice of appeal within this sixty (60) day period, the trial court shall issue to the movant an order to show cause within ten (10) days why the judgment vacated on his behalf should not be reinstated. If the movant fails to respond within ten (10) days or fails to show cause, the trial court shall reinstate the vacated judgment. If upon the movant's showing

the trial court is satisfied that the movant's failure to appeal should not be deemed a waiver of his right to do so, it shall grant the movant an additional thirty (30) days in which to file notice of his appeal.

(8) The final order of the trial court on the motion shall not be effective until expiration of time for notice of appeal under RCr 12.04 and shall remain suspended until final disposition of an appeal duly taken and perfected.

(9) Original applications for relief of the nature described in this Rule 11.42 that are addressed directly to a court other than the one in which the sentence was imposed shall be transmitted to the court in which the sentence was imposed for further disposition in the manner above set forth.

(10) Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:

- (a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or
- (b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

If the judgment becomes final before the effective date of this rule, the time for filing the motion shall commence upon the effective date of this rule. If the motion qualifies under one of the foregoing exceptions to the three-year time limit, the motion shall be filed within three years after the event establishing the exception occurred. Nothing in this section shall preclude the Commonwealth from relying upon the defense of laches to bar a motion upon the ground of unreasonable delay in filing when the delay has prejudiced the Commonwealth's opportunity to present relevant evidence to contradict or impeach the movant's evidence.

Kentucky Revised Statutes §533.258, states:

Effects of successful completion of pretrial diversion agreement.

(1) If the defendant successfully completes the provisions of the pretrial diversion agreement, the charges against the defendant shall be listed as “dismissed-diverted” and shall not constitute a criminal conviction.

(2) The defendant shall not be required to list this disposition on any application for employment, licensure, or otherwise unless required to do so by federal law.

(3) Pretrial diversion records shall not be introduced as evidence in any court in a civil, criminal, or other matter without the consent of the defendant.

STATEMENT OF THE CASE

The Petitioner, Gregory Ross, plead guilty to two amended charges in the Commonwealth of Kentucky: (1) custodial interference, a Class D Felony carrying a penalty of one (1) to five (5) years in prison, and (2) sexual misconduct, a Class A Misdemeanor, carrying a penalty of up to twelve (12) months in prison. *Appx. 2.*

On March 16, 2010, the Circuit Court for Jefferson county, the Honorable Brian Edwards, presiding, accepted the *Alford* plea, sentencing the Petitioner to a term of five (5) years pre-trial diversion under §533.258, Kentucky Revised Statutes. *Appx. 2.*

During the pendency of his pre-trial divisionary program, on or about June 24, 2014, the Petitioner filed a Motion for Post-Conviction Relief under §11.42 of the Kentucky Rules of Criminal Procedure. In his Motion for Post-Conviction Relief, Petitioner challenged the legitimacy of his *Alford* plea under ineffective assistance of counsel grounds pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). In that Motion for Post-Conviction Relief filed pursuant to Kentucky Rule of Criminal Procedure, §11.42, Petitioner challenged the knowing and voluntary nature of his guilty plea based on constitutionally ineffective assistance of counsel. *Appx. 10.*

Furthermore, in his Motion for Post-Conviction Relief, the Petitioner alleged that he was “falsely ac-

cused”. Petitioner contended “actual innocence” stating that he requested post-conviction relief based upon ineffective assistance of counsel, seeking to vacate the *Alford* Plea that he entered. *Appx. 9*. Beyond advancing a claim of actual innocence, Petitioner asserted he was forced into entering a plea by his trial counsel, as well as other ineffective assistance of counsel arguments such as, trial counsel’s failure to provide the evidence against the Petitioner. Finally, Petitioner alleged trial counsel foreclosed any opportunity for the Petitioner to proceed to trial in lieu of taking the *Alford* plea. In this regard, trial counsel “threatened” the Petitioner with a “competency exam” unless he entered the *Alford* plea in lieu of proceeding to trial. *Appx. 9-10*.

On March 3, 2015, the Petitioner obtained a hearing in Jefferson County Kentucky on his Motion for Post-Conviction Relief, contending that this *Alford* plea should be withdrawn based on ineffective counsel and *Strickland v. Washington*. Following the hearing, the Circuit Court of Jefferson County Kentucky denied Petitioner’s Motion for Post-Conviction Relief. *Appx. 9*. In that Order, the Circuit Court held the following:

Relief is available under [Kentucky Rule of Criminal Procedure] 11.42 under limited circumstances. The rule allows "[a] prisoner in custody under sentence or a defendant on probation, parole or conditional discharge who claims a right to be released on the ground that the sentence is subject to collateral attack to proceed directly by motion in the court that

imposed the sentence to vacate, set aside or correct [...]

Mr. Ross is not in custody, nor is he on probation, parole, or completing a sentence to be conditionally discharged. Mr. Ross has successfully completed the pretrial diversion program although the Court does note that the instant motion was filed prior to his successful completion. Charges against a defendant who successfully completes the program do not constitute a criminal conviction. *See* [Kentucky Revised Statutes] [§]533.258. Post-conviction relief is not available under [Kentucky Rule of Criminal Procedure] 11.42 if there has been no actual conviction. As such, the Court lacks jurisdiction over this matter and cannot consider Mr. Ross's motion on its merits. *Appx. 10-11.*

The circuit court denied the Petitioner's motion finding that Petitioner's claim was not cognizable because to Kentucky Rule of Criminal Procedure, §11.42 requires a movant to be in custody under sentence or on probation, parole, or conditional discharge. The Circuit Court of Jefferson County, Kentucky also found that although Petitioner's motion was filed prior to his completing pretrial diversion, he had since completed the program. Therefore, there was no conviction for which relief could be granted. *Appx. 1-1.*

Petitioner promptly filed an appeal to the Court of Appeals of Kentucky. In his appeals to the Court of Appeals of Kentucky, Petitioner contended, that the

Circuit Court erred in finding that the Petitioner was not entitled to relief. In support, he argues that Kentucky Rule of Criminal Procedure, §11.42 requires a sentence but not a conviction and that pretrial diversion is a sentence. He further argued that pretrial diversion is a form of probation and that the legislature intended to protect individuals "sentenced" to pretrial diversion. *Appx. 1-2.*

The Court of Appeals of Kentucky denied Petitioner's appeals holding: "Because the language of Kentucky Rule of Criminal Procedure §11.42 is clear and unambiguous, we decline to follow Ross's reasoning to conclude that the rule provides relief for individuals placed on pretrial diversion." *Appx. 3.*

Although the Court of Appeals found that Kentucky Rule of Criminal Procedure, §11.42 allows a defendant who has been convicted of a crime to collaterally attack his sentence, the Rule expressly limits the filing of such a motion to one who is "in custody under sentence or . . . on probation, parole, or conditional discharge." Kentucky Rule of Criminal Procedure, §11.42 (1). *Appx. 2.* The Court of Appeals added: "The list of those permitted to file motions under the Rule does not include individuals placed on pretrial diversion." *Appx. 3.* The appellate court founds the language of Kentucky Rule of Criminal Procedure §11.42 to be "plain" and "unambiguous", holding "[b]ecause [Kentucky Rule of Criminal Procedure §11.42] does not include individuals placed on pretrial diversion, we cannot construe into existence language that is not in the Rule." *Appx. 3.* The Court of Appeals of Kentucky based its decision on the argument that a

defendant placed on pretrial diversion is not yet sentenced and that such a defendant will never be sentenced if his diversion is successfully completed. The Court of Appeals concluded:

Therefore, one placed on diversion has no sentence from which he can claim a right to be released. This is particularly true for one who has successfully completed his diversion because at that point there is no possibility of executing the diverted sentence [...] In this case, [Petitioner] was placed on diversion. He successfully completed his diversion, and his charges were dismissed. Therefore, he was never sentenced. There is not—and never will be in this case—a sentence from which [Petitioner] can claim a right to be released. The language of [Kentucky Rule of Criminal Procedure, §11.42] is clear and unambiguous: relief is not available under the Rule for individuals placed on pretrial diversion. Accordingly, the trial court correctly denied [Petitioner's] motion. *Appx. 5*.

Petitioner promptly sought discretionary review before the Kentucky Supreme Court. On December 7, 2017, the Kentucky Supreme Court denied Petitioner's request for discretionary review.

This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

I. THE DECISION OF THE KENTUCKY SUPREME COURT OF APPEALS CONFLICTS WITH THE CLEAR PURPOSE *NORTH CAROLINA V. ALFORD*.

This Court should accept this Petition because the Kentucky Supreme Court's decision incorrectly construed and applied an important issue of uniform national law under *North Carolina v. Alford*,

In order to maintain an ineffective assistance of counsel claim, a movant must satisfy a two-part test showing that his counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668 (1984). Allegations of ineffective assistance of counsel arising from a guilty plea require a showing that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty but would have insisted on going to trial. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky. App. 1986), citing *Hill v. Lockhart*, 474 U.S. 52 (1985).

To be eligible for habeas relief pursuant to §11.42, Kentucky Court of Appeals and Kentucky Supreme Court found that Petitioner must be "in cus-

tody' as a result of the conviction or sentence under attack at the time his petition is filed." This analysis also applies to defendants seeking to vacate a state conviction under 28 U.S.C. §2254. *See, Maleng v. Cook*, 490 U.S. 488, 490-91, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989) (per curiam). If the petitioner is not "in custody" on the date his petition is filed, it must be dismissed for lack of jurisdiction. *See Charlton v. Morris*, 53 F.3d 929 (8th Cir. 1995) (per curiam).

However, this case is uniquely different as Petitioner Ross: (1) filed the initial Motion for Post-Conviction Relief while under the supervision of the pre-trial divisionary program in Kentucky, and (2) satisfied the custody requirement under Federal law as he had to undergo stringent reporting standards as part of the pre-trial diversionary program, such as probationary reporting, and (3) the finding that the Petitioner must be "convicted" under the meaning of Kentucky Revised Statute §533.258 in order to sustain a post-conviction or habeas challenge to his conviction is contrary to federal law.

Petitioner first addresses the "custody" issue. In this case, Petitioner Ross is the exception to the rule. There are situations in which the petitioner may satisfy the "in custody" requirement even when no longer physically confined, such as a term of supervised release similar to a pre-trial divisionary program.

Petitioner argues that he was "in custody" when his Motion for Post-Conviction Relief was filed, thus establishing jurisdiction for two reasons. First, as a re-

sult of his 2010 *Alford* plea conviction, he was required to report to evaluations, counseling meetings, and undergo “sex offender treatment”, which he argues is a collateral consequence entitling him to habeas relief. If a petitioner is “in custody” at the time the petition is filed, a collateral consequence will prevent a court from dismissing the petition as moot. *Carafas v. La Vallee*, 391 U.S. 234, 237-38, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968). The Circuit Court for Jefferson County did not consider this claim when finding that the requirements of pre-trial diversion are not a collateral consequence satisfying the “in custody” requirement for habeas relief pursuant to §11.42, Kentucky Rule of Criminal Procedure.

Petitioner contends that the pre-trial diversionary requirement is akin to a “civil commitment” for which the “custody” prong under §11.42, Kentucky Rule of Criminal Procedure is satisfied. Federal Courts entertain 28 U.S.C. §2254 claims for persons under a civil commitment. The same application should apply for persons situated under a pre-trial diversion program.

The Kentucky Court of Appeals found that Petitioner’s claims under Kentucky Rule of Criminal Procedure §11.42 are moot because movant was not in custody at the time of the filing of the Motion for Post-Conviction Relief. §11.42 motions are patterned after Federal 28 U.S.C.A. §2255, which in turn follows the principal guidelines and rules governing Habeas Corpus petitions. The Kentucky Supreme Court applied the wrong law. The law previously held that Habeas

Corpus is limited to relief from defendants under present detention. For example, in *Parker v. Ellis*, 362 U.S. 574, 80 S. Ct. 909 4 L. Ed.2d 963 (1960), the Supreme Court of the United States held:

[...] when a prisoner was released from state prison after having served his full sentence, this Court could not proceed to adjudicate the merits of the claim for relief on his petition for habeas corpus which he had filed with the Federal District Court. This Court held that upon petitioner's unconditional release the case became "moot".

However, in 1968 the United States Supreme Court overruled *Parker v. Ellis* with its decision in *Carafas v. LaVallee*, 391 U.S. 234, 237, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968), stating,

The petitioner in this case was sentenced in 1960. He has been attempting to litigate his constitutional claim ever since. His path has been long-partly because of the inevitable delays in our court processes and partly because of the requirement that he exhaust state remedies. He should not be thwarted now and required to bear the consequences of assertedly unlawful conviction simply because the path has been so long that he has served his sentence. The federal habeas corpus statute does not require this result, and *Parker v. Ellis* must be overruled [...] [and] petitioner was entitled to consideration of his application for

relief on its merits since petitioner was suffering, and would continue to suffer, serious disabilities because of the law's complexities and not because of his fault if his claim that he had been illegally convicted was meritorious.

The precedent set by *Carafas v. LaVallee* was upheld in *Puchner v. Kruziki*, 111 F.3d. 541 543 (7th Cir. 1997), quoting *Carafas v. LaVallee* with, [motion is not moot if] "sufficient collateral consequences of the conviction persist to give the petitioner 'a substantial stake in the judgement of conviction which survives the satisfaction of the sentences imposed on him'". *Id.*

These rulings do not alter the standing of Petitioner Ross in any significant way, rather, they set a fundamentally fair standard for the uncommon circumstance that has presented itself in this case. Therefore, Petitioner Ross contends that the Kentucky Supreme Court misapplied the "custody" analysis when failing to accept jurisdiction over his case.

Next, Petitioner contends that 28 U.S.C. §2254 also provides guidance as to the "custody" requirement for filing of habeas corpus proceedings. Section 2254 directs that a federal 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." 28 U.S.C. §2254 (a). It is well established that persons confined under an involuntary civil commitment scheme, such as may use a §2254 habeas petition to challenge a term or judgment of commitment. *See Duncan v. Walker*, 533 U.S. 167, 176, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001); *Souder v.*

McGuire, 516 F.2d 820, 823 (3d Cir. 1975); *Wood v. Wood-El, et al.*, 2005 U.S. Dist. LEXIS 17030, Civil No. 05-1447 (RBK), 2005 WL 1899335 (D.N.J. Aug. 5, 2005).

Petitioner next addresses the issue that he is precluded from post-conviction relief as he was not “convicted” under the meaning of Kentucky Revised Statute §533.28.

In this case, both the Kentucky Court of Appeals and Kentucky Supreme Court mis-interpreted Kentucky Revised Statute §533.28 as well as the meaning of the term “conviction”. An *Alford* plea is a deferred judgment of conviction. Had Petitioner Ross violated the terms of the pre-trial diversion program, he could have been convicted of Count I and Count II of the amended information without a jury trial. An *Alford* plea “permits a conviction without requiring an admission of guilt and while permitting a protestation of innocence.” *Wilfong v. Commonwealth*, 175 S.W.3d 84, 103 (Ky. App. 2004).

“The entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty. By entering such a plea, a defendant may be able to avoid formally admitting guilt at the time of sentencing, but he nonetheless consents to being treated as if he were guilty with no assurances to the contrary.”

Wilfong, 175 S.W.3d at 102.

Kentucky Rule of Criminal Procedure §11.42 is the procedural mechanism for a defendant who seeks to “vacate, set aside or correct” a “sentence,” not a conviction. The term “conviction” is not used in any form throughout §11.42. Because §11.42 is a procedural remedy to vacate, set aside, or correct a sentence, the operative procedural requirement is the existence of a sentence, not a conviction, and the Jefferson Circuit Court’s determination that relief is unavailable without an actual conviction was erroneous under the plain language of the rule. Mr. Ross was sentenced to pretrial diversion.

The Supreme Court of Kentucky considers felony pretrial diversion to be a form of sentencing and uses this exact language when referring to pretrial diversion. *Ballard v. Commonwealth*, 320 S.W.3d 69, 70 (Ky. 2010)(“In exchange for his plea, he was sentenced to the felony pretrial diversion program, with a one-year prison sentence diverted for three years.”); *Ky. Bar Ass’n v. Osborne*, 463 S.W.3d 752, 753-4 (Ky. 2015)(“Osborne pled guilty to a lesser charge and is currently serving a five-year diversion sentence for theft by failure to make a required disposition of property.”); *Ky. Bar Ass’n v. Roberts*, 141 S.W.3d 366, 369 (Ky. 2004)(“In January of 2000, she was sentenced to five years supervised pre-trial diversion...”); *Bowling v. Commonwealth*, 2007 Ky. Unpub. LEXIS 15 (Ky. Apr. 19, 2007).

Mr. Ross was sentenced in the underlying matter. §11.42 is the proper procedural mechanism for vacating, setting aside, or correcting a sentence, and because §11.42 does not require an actual conviction in

order for a defendant to obtain relief, the Kentucky Supreme Court's determination that it lacked subject-matter jurisdiction over Mr. Ross' petition pursuant to §11.42 was incorrect and should be reversed and vacated.

This is an issue of great importance to the thousands of persons that partake in pre-trial diversionary programs throughout the nation. As a result, the Petitioner requests this Honorable Court grant the Petition.

CONCLUSION

This Court can use this case to put an end to the question as to whether persons situated in a pre-trial diversion program under an *Alford* plea qualify for relief under both federal and state habeas corpus statutes.

Respectfully submitted,

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