No. _____

IN THE

Supreme Court of the United States

ALEXANDER DOCKERY,

Petitioner,

—v.—

WILLIAM LEE, SUPERINTENDENT,
EASTERN CORRECTIONAL FACILITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the federal habeas custody requirement met where a petitioner makes a constitutional challenge to a previously unchallenged conviction that was used to enhance the sentence the petitioner is currently serving if the failure to challenge the earlier conviction was through no fault of the petitioner?

PARTIES TO THE PROCEEDING

All parties to the proceedings below are named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alexander Dockery respectfully petitions for a writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit issued a Summary Order on October 31, 2022, affirming the District Court's denial of Dockery's habeas petition. *Dockery v. Lee*, No. 21-2234-pr, 2022 WL 16543813 (2d Cir. Oct. 31, 2022) (Summary Order). A copy is reproduced in the Appendix to this Petition ("Pet. App.") at 1a–12a.

The opinion and order of the United States District Court for the Southern District of New York denying Dockery's petition for a writ of habeas corpus, filed on August 18, 2021, is reported as *Dockery v. Lee*, No. 15-cv-7866 (AJN), 2021 WL 3667943 (S.D.N.Y. Aug. 18, 2021), and is reproduced at Pet. App. 13a–25a.

The United States District Court for the Southern District of New York issued a Report and Recommendation on September 8, 2017, recommending the dismissal of Dockery's petition for a writ of habeas corpus. Report & Recommendation, *Dockery v. Lee*, No. 15-cv-7866 (AJN) (S.D.N.Y. Sept. 8, 2017), ECF No. 27. A copy is reproduced at Pet. App. 26a–48a.

The New York Court of Appeals issued its decision, dismissing Dockery's appeal on his 1986 conviction, on April 3, 2014. It is reported at *People v. Perez*, 23

N.Y.3d 89 (2014), and is reproduced at Pet. App. 49a–74a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The order of the Court of Appeals was entered on October 31, 2022.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(a):

> 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.

U.S. Const. amend. XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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

This case raises the important question of whether a habeas petitioner can assert a constitutional challenge to an expired prior conviction that was used to enhance the sentence the petitioner is currently serving, where the failure to challenge the earlier conviction was through no fault of the petitioner.

State Proceedings

In 1986, the State of New York deprived Dockery of his constitutional right to appellate counsel in connection with his conviction for robbery in the first and second degree. Dockery was sixteen years old at the time of his conviction and sentencing. Like countless other juvenile defendants, Dockery was stripped of his constitutional rights because the New York judicial department in which he was tried did not automatically provide indigent defendants appellate counsel or any assistance to obtain appellate counsel. Rather, the procedure at the time only permitted trial counsel to file the notice of appeal and then placed the burden of securing appellate counsel on the indigent, juvenile defendant through an "'unreasonably confusing,' misleading, and inaccessible" procedure. Pet. App. at 22a (*quoting Calaff v. Capra*, 215 F. Supp. 3d 245, 252–53 (S.D.N.Y. 2016)). Despite being only sixteen years old at the time, Dockery was not given clear notice that he was required to apply to receive appellate counsel, nor any warning that he would lose his right to counsel and right to appeal if he failed to apply for appellate counsel. *Id.* at 76a, 104a–105a.

Like many other juvenile, indigent defendants in New York's Appellate Division, First Department (the

"First Department"), Dockery mistakenly believed that his appointed trial counsel, who noticed the appeal, would pursue an appeal on his behalf. Pet. App. at 76a–77a. Instead, his appointed trial counsel ceased his representation of Dockery after noticing the appeal as per the rules of the First Department, and Dockery was never provided with counsel to perfect his appeal. *Id.*; *see also id.* at 80a–81a. Had Dockery been convicted in nearly any other jurisdiction in the country, his trial counsel would have automatically continued as his appellate counsel, the trial court would have appointed a lawyer to represent him as appellate counsel, or his trial counsel would have been required to assist Dockery in obtaining appellate counsel. J.A. at A-30–31.[1]

Instead of instructing Dockery as to his constitutional rights immediately after sentencing, the trial judge—in accordance with the procedure in the First Department—instructed Dockery's trial counsel to provide the sixteen-year-old Dockery a written Notice of Rights to Appeal ("Rights Notice"), which set forth Dockery's option to either have his "present attorney" file a notice of appeal or to file his own notice of appeal. Pet. App. at 76a–77a, 80a–81a, 104a–105a. The Rights Notice did not say that trial counsel would notice the appeal but take no additional steps to perfect it and made no distinction between *noticing* an appeal and *perfecting* it. *Id. a*t 80a–81a.

[1] Pursuant to S. Ct. R. 12.7 ("In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court."), citations herein to "J.A." refer to the Parties' Joint Appendix filed with the Second Circuit, available at CA2 Case No. 21-2234, ECF Nos. 22–24 (Jan. 3, 2022).

The paragraphs immediately following that clause instructed a defendant who appeared *pro se* as to how he may file a notice of appeal on his own behalf. The Rights Notice continued that "[i]f [a defendant is] without funds, after the notice of appeal has been filed, [he] must write to the Appellate Division requesting that counsel be assigned to [him] for the purpose of appeal." *Id.* at 81a. The Rights Notice stated that the defendant, on his own, must make a detailed showing of his financial circumstances to explain why he could not afford to hire an attorney for his appeal. *Id.* The Rights Notice did not explain that this section applied to defendants who already had counsel, like Dockery, and were not appearing *pro se*. *Id.* Despite being only sixteen years old, neither the court, the State, nor his trial counsel offered Dockery any assistance in interpreting the Rights Notice or drafting the letter referred to, and Dockery neither understood the Rights Notice nor the appellate procedure. *Id.* at 76a, 104a–105a.

Dockery recalls telling his trial counsel that he wanted to appeal his conviction. *Id.* at 76a. Dockery's counsel filed a notice of appeal. *Id.* at 77a, 94a–95a. However, Dockery's counsel never explained the mechanics or deadlines involved in the appeal. *Id.* at 76a–77a, 104a–105a. Dockery reasonably believed that his trial counsel would continue to handle his appeal and would contact him if there were any developments in his case. *Id.* at 76a–77a. Because of the First Department's "unreasonably confusing, misleading, . . . inaccessible," *Id.* at 22a (citation and internal quotation marks omitted), and ultimately unconstitutional process to obtain appellate counsel, Dockery did not understand that he needed new

counsel and did not apply for appellate counsel. *Id.* at 76a–77a. Instead, unbeknownst to Dockery, but in accordance with First Department procedure, Dockery's trial counsel's responsibility as Dockery's appointed counsel ended following the notice of appeal and Dockery never received appellate counsel for his 1986 appeal. *Id.* As a result, the State deprived Dockery of his chance to challenge his 1986 conviction on appeal. This constitutionally deficient conviction was used to enhance two later convictions in 1992 and 2000, resulting in Dockery being labeled a persistent violent felony offender in 2000 and sentenced to the maximum penalty for a burglary in the second degree conviction, twenty-five years to life. *Id.* at 77a; *see also* J.A. at A-302. Without the 1986 conviction, the maximum sentence he could have received would have been fifteen years. N.Y. Penal L. § 70.04(3)(b).

Dockery did not learn that his 1986 conviction had not actually been appealed until 2008. Pet. App. at 77a. The nature of the State's unconstitutional denial of the assistance of appellate counsel in 1986, as well as the State's own actions following that conviction, kept the State's constitutional violation hidden from Dockery:

- Despite being a sixteen-year-old, indigent defendant at the time of his 1986 conviction, no one assisted Dockery in obtaining appellate counsel or explaining how to obtain appellate counsel. *Id.* at 76a–77a, 104a–105a.

- Dockery reasonably believed that his trial counsel, who had filed the notice of appeal, proceeded to unsuccessfully pursue his appeal. *Id.* at 76a–77a.

- At Dockery's 1992 sentencing, both Dockery and his counsel believed that his 1986 appeal had been unsuccessfully pursued. *Id*. at 77a–78a.

- In fact, at Dockery's 1992 plea hearing, during a discussion about whether Dockery was "afforded all [of his] constitutional rights" in connection with his 1986 conviction, the prosecutor asserted that Dockery's 1986 conviction "would have been appealed by now." *Id.* at 91a–92a.

- After the prosecutor's comment, no one—not the prosecutor, the court, nor Dockery's counsel—questioned the validity of using Dockery's 1986 conviction to enhance his 1992 sentence. *Id.*; J.A. at A-472–74.

- Again, at Dockery's 2000 sentencing, Dockery and his counsel believed that his 1986 appeal had been unsuccessfully pursued, particularly since the State previously relied on that conviction to enhance Dockery's 1992 sentence. Pet. App. at 77a–78a.

- Dockery began to wonder if the conviction he received in 1986 actually had been appealed as he observed the appellate process in connection with his 2000 conviction. *Id.* at 77a.

- In 2008, while challenging his 2000 conviction through a *pro se* habeas petition, Dockery learned that information about his 1986 conviction and appeal may be relevant to that petition. *Id.*

- As a result, Dockery wrote to the First Department requesting information about the

appeal of his 1986 conviction and was advised that a notice of appeal was filed. *Id.*

- Believing that the First Department's response might mean that his 1986 appeal *had* been pursued, Dockery requested copies of the notice of appeal, the briefing, and the outcome of the 1986 appeal. *Id.*

- Because he was unsure of the process, Dockery also prudently requested that, in the event the 1986 appeal had not been perfected, he be allowed to pursue that appeal. *Id.*

- The First Department responded by sending Dockery an *in forma pauperis* form. *Id.*

- Dockery completed the form and the State responded by moving to dismiss Dockery's 1986 appeal, which was still pending yet unperfected. *Id.* at 77a–78a; *see also* J.A. at A-292–97.

- It was only when Dockery read in the State's 2008 motion that there was "no appellate history" that he understood that the appeal of his 1986 conviction was never pursued. Pet. App. at 78a.

Upon learning for the first time in 2008 that the appeal of his 1986 conviction was never pursued, Dockery diligently and persistently sought to reinstate the appeal and vindicate his constitutional rights. Despite Dockery's diligence, it took New York state courts *six years*—from 2008 to 2014—to fully resolve Dockery's request, in part due to additional errors by the State. For example, the State did not effectuate proper service of its motion opposing Dockery's request

on the attorney who last appeared for Dockery, as required by N.Y. Crim. Proc. L. § 470.60(2). *See* J.A. at A-253, A-298. The Legal Aid Society, incorrectly identified as trial counsel, received a copy of the prosecution's motion but did not respond, *id.* at A-253, and the First Department, without opinion, granted the State's motion. *People v. Dockery*, Motion Nos. M-5358, M-5467, 2008 WL 5396790 (N.Y. App. Div. Dec. 30, 2008).

In 2009, Dockery contacted the Legal Aid Society, which informed him that it was not his trial counsel and directed Dockery to the Center for Appellate Litigation ("CAL"), telling him that the First Department stated that CAL represented him regarding his appeal—which was incorrect. J.A. at A-289. When Dockery contacted CAL, CAL informed him that it had not been his appellate counsel but offered to assist him in his efforts to reinstate his appeal. *Id.* at A-251–52. CAL moved on Dockery's behalf to reinstate the appeal, arguing that Dockery was entitled to the assistance of counsel in responding to the prosecution's Motion to Dismiss. Pet. App. at 53a. The Appellate Division reinstated the appeal without prejudice to the prosecution's right to move to dismiss. *Id.*

The People again moved to dismiss Dockery's appeal, contending that the delay justified dismissal because it prejudiced the case. *Id.*; *see also* J.A. at A-306, A-311. In 2012, the First Department again dismissed Dockery's appeal without opinion. *People v. Dockery*, Motion No. M-2472, 2012 WL 2344932 (N.Y. App. Div. June 21, 2012).

On April 3, 2014, the New York State Court of Appeals then consolidated Dockery's appeal with those of several similarly situated appellants and affirmed the decision dismissing Dockery's appeal. Pet. App. at 53a, 60a. In dissent, Judge Rivera wrote that "the Appellate Division must consider age when deciding whether to dismiss an appeal for failure to timely perfect [the appeal]." *Id.* at 61a, 72a (Rivera, J., dissenting). Judge Rivera said that by failing to consider Dockery's age at the time when he might have perfected his appeal, the Court had abused its discretion. *Id.* at 61a, 68a–72a. During the oral argument of the appeal, then-Chief Judge Jonathan Lippman acknowledged that in this area New York appellate procedure was "not coherent." Transcript of Oral Argument at 45, *People v. Perez*, 23 N.Y.3d 89.

On October 6, 2014, this Court denied Dockery's petition for a writ of certiorari. *Dockery v. New York*, 574 U.S. 893 (2014).[2]

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[2] As noted above, in 2005, Dockery, proceeding *pro se*, challenged his 2000 conviction through a habeas petition. *See Harris v. Phillips*, No. 05-cv-2870 (RPM), 2013 WL 1290790 (E.D.N.Y. Mar. 28, 2013). That petition was stayed until 2010 to allow Dockery to exhaust his state-court remedies. *Id.* at *3. In his petition challenging his 2000 conviction, Dockery raised four issues: "1) he was arrested without probable cause in violation of the Fourth Amendment; 2) he was convicted upon insufficient evidence; 3) he was denied the effective assistance of trial counsel; and 4) he was denied effective assistance of appellate counsel." *Id.* at *4 (footnote omitted). Notably, all of these challenges solely related to Dockery's 2000 conviction and not his 1986 conviction or the enhancement of his 2000 conviction under N.Y. Crim. Proc. L. § 400.20 and N.Y. Penal L. § 70.10. Dockery's habeas petition was denied. *See id.* at *14.

The District Court Habeas Proceedings

On October 5, 2015, within one year of the denial of his petition for a writ of certiorari, Dockery filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 2254. Despite Dockery's timely briefing of his petition in 2016, the District Court did not issue its final decision on Dockery's petition until 2021, in part due to a three-year delay between the full briefing of the jurisdictional issues raised in the petition and the District Court's scheduling of oral argument.

In his habeas petition, Dockery argued that the New York Court of Appeals decision was contrary to, and an unreasonable application of, Supreme Court precedent for two reasons.

First, the First Department's imposition on indigent defendants of the burdens of applying for appellate counsel and proving their indigence without the assistance of counsel violates the Due Process and Equal Protection Clauses and is contrary to this Court's holding in *Douglas v. People of the State of Cal.*, 372 U.S. 353 (1963). J.A. at A-41–50. By placing the burden on indigent defendants to affirmatively prove their indigence before assigning counsel (assuming, that is, that they were even aware that they needed to make such a showing), New York impermissibly deprived indigent defendants of an equal and fair appeal of their conviction to which they were entitled.

Second, even if it were permissible to require indigent defendants to apply for appointed appellate

counsel without assistance, neither the State, the court, nor counsel gave Dockery sufficient notice as to his rights and their possible waiver. *Id.* at A-50–54. Therefore, Dockery never understood that he personally had to apply for appellate counsel. *Id.* at A-50. He reasonably believed that his instruction to his trial counsel to notice the appeal was the only action he needed to take to exercise his right to appeal. *Id.* at A-52. Once Dockery learned that there had been no appellate counsel appointed for, and no appeal of, his 1986 conviction, he diligently and persistently sought to exercise his rights. It is an established principle that fundamental constitutional rights cannot be waived unknowingly. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The First Department's misleading and inaccessible procedure not only violated Dockery's rights but also obscured the violation by making Dockery believe that his trial counsel would pursue his appeal. No judge took time to be certain that Dockery knew that he was waiving an important constitutional right to appellate counsel by not applying for counsel. Pet. App. at 76a–77a, 104a–105a. It cannot be said that Dockery knowingly waived his right to appellate counsel or his right to an appeal.

The District Court found Dockery's claim of a constitutional violation "compelling" and the challenged New York procedure "unreasonably confusing, misleading, and inaccessible." Pet. App. at 22a. (citation and internal quotation marks omitted). Similarly, an earlier court found a constitutional violation inherent in New York's procedures for the appointment of appellate counsel. *Calaff*, 215 F. Supp. 3d at 253 ("[T]he First Department's procedure as

articulated in the Rights Notice was unconstitutional as an unreasonable precondition on the right to appellate counsel.").

Nevertheless, the District Court erroneously denied Dockery's petition, concluding that Dockery was barred from invoking the no-fault exception to the "in-custody" requirement established in *Lackawanna Cnty. Dist. Att'y v. Coss*, 532 U.S. 394 (2001), to challenge his 1986 conviction because a lawyer in 2001 assisted him through the process of getting appointed counsel to perfect his appeal of an unrelated 2000 conviction. Pet. App. at 21a–22a. The District Court faulted Dockery for not more promptly recognizing, based on the assistance he received in 2001, that a) contrary to his prior reasonable belief, his trial counsel in 1986 had only noticed his appeal but did not prosecute it; b) he was never provided appellate counsel as a sixteen-year-old, indigent defendant; and c) New York's procedure deprived him of his constitutional right to appellate counsel such that he could seek to have his appeal reinstated. *Id.* The District Court reached that conclusion even though Dockery, proceeding as a *pro se* defendant while collaterally challenging his 2000 conviction, acted with reasonable diligence to investigate what occurred with his 1986 appeal and immediately pursued the appeal upon finally learning in 2008, for the very first time, that his 1986 appeal had never been pursued. *Id.* at 75a–78a.

Even in denying Dockery's petition, the District Court found that Dockery made a "substantial showing of the denial of a constitutional right," and granted Dockery's request for a certificate of

appealability as to all claims raised in his habeas petition. *See id.* at 25a; 28 U.S.C. § 2253(c).[3]

The Second Circuit Decision

The Second Circuit Court of Appeals affirmed the District Court's judgment denying Dockery's petition, but only on the grounds that Dockery could not meet either *Lackawanna* exception. Pet. App. at 1a–11a. Without deciding whether the "no fault" *Lackawanna* exception is available to petitioners, the Court of Appeals concluded that "Dockery does not qualify for it" because he "could have challenged his 1986 conviction when it was used as an enhancement at his 1992 sentencing" and "in 2001 when he appealed his 2000 conviction." *Id.* at 9a–10a.

[3] The District Court also issued an alternative holding that erroneously concluded that Dockery's present habeas petition is a "second and successive" petition because he had previously attacked his 2000 conviction—though not his 1986 conviction—in a habeas petition filed in 2005, amended in 2010, and denied in 2013. Pet. App. at 23a–24a. The Second Circuit did not consider the District Court's alternative holding that the petition was barred as a second and successive petition. *Id.* at 11a. Thus, the District Court's alternative holding is not a basis on which to deny certiorari. *See, e.g.*, *Manuel v. City of Joliet*, 580 U.S. 357, 372–73 (2017) (resolving the matter brought before the court while remanding the case back to the Seventh Circuit to confront issues the Seventh Circuit did not previously consider); A. Bruhl, The Remand Power and the Supreme Court's Role, 96 Notre Dame L. Rev. 171, 218 & n. 241 (2020) ("[T]he Court's usual practice upon finding error on the question on which it granted certiorari is to remand to the lower court to sort out any remaining issues in the case.").

REASONS FOR GRANTING THE WRIT

There is a split among the Circuits as to whether a petitioner may use a habeas petition to lodge a constitutional challenge to a prior conviction used to enhance a sentence the prisoner is currently serving. The Court should clarify that such a challenge is appropriate in cases, like here, where the prior conviction was obtained in violation of *Douglas*, 372 U.S. 353 (1963), because the defendant was deprived of the assistance of counsel on appeal. At present, the right of a petitioner to secure relief under the habeas corpus statute largely depends on where in the United States the petitioner is incarcerated or was convicted, and the manner in which a particular court interprets this Court's decision in *Lackawanna*.

To ensure all defendants are treated equally, this Court should grant certiorari to resolve the split among the Circuits and make clear that *Lackawanna*'s exceptions to the general rule barring challenges to enhancing convictions extend to convictions obtained in violation of *Douglas*.

I. THE COURT SHOULD RESOLVE THE SPLIT OF THE CIRCUITS AS TO THE CIRCUMSTANCES IN WHICH A HABEAS PETITIONER CAN CHALLENGE A PRIOR CONVICTION THAT WAS USED TO ENHANCE A CURRENT SENTENCE

A. The Circuits Are Split on When a Habeas Petitioner Can Challenge a Prior

Conviction That Is Used to Enhance a Current Sentence

In two companion cases in 2001—*Daniels v. United States*, 532 U.S. 374 (2001), which considered petitions of federal prisoners under 28 U.S.C. § 2255, and *Lackawanna*, 532 U.S. 394, which considered petitions of state prisoners under § 2254—this Court considered whether a prisoner serving a sentence that was enhanced because of a prior conviction could use a habeas petition to challenge that prior conviction. In both cases, the Court held that generally:

> once a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid. If that conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained.

Lackawanna, 532 U.S. at 403–04 (internal citation omitted).

Notwithstanding that holding, eight Justices in *Lackawanna* agreed that there were exceptions that would allow a challenge to a current extended sentence on the basis of a constitutional infirmity in the earlier conviction. *Id.* at 405–06 (plurality opinion), 408–10 (dissenting opinion). The five-Justice majority held that, while the Court's interest in finality and administrative efficiency would generally bar such a challenge, *id.* at 402–04, there was an exception for

cases in which the underlying conviction was obtained without trial counsel in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Id.* at 404. The Court recognized that the "'failure to appoint counsel for an indigent [is] a unique constitutional defect,' . . . which therefore warrants special treatment among alleged constitutional violations." *Id.* at 404 (quoting *Custis v. United States*, 511 U.S. 485, 496 (1994)). The Court also found that allowing an exception for challenges based on a failure to appoint counsel does not implicate concerns about administrative ease because such a failure is readily apparent from the record. *Id.*

Three members of the majority also concluded that a challenge to a prior expired conviction could be appropriate where the petitioner, through no fault of his or her own, "fail[ed] to obtain timely review of a constitutional claim" as to the earlier conviction. *Id.* at 405 (plurality opinion) (citing *Daniels*, 532 U.S. at 383); *see also Daniels*, 532 U.S. at 383 (plurality opinion) ("We recognize that there may be rare cases in which no channel of review was actually available to a defendant with respect to a prior conviction, *due to no fault of his own*." (emphasis added)). Three dissenting Justices would allow even broader challenges to prior convictions. They concluded that challenges should not be limited to particular constitutional violations such as failure to provide counsel under *Gideon* because "there is no excuse for picking and choosing among constitutional violations here, when other forums are closed." *Daniels*, 532 U.S. at 391 (dissenting opinion); *Lackawanna*, 532 U.S. at 408 (dissenting opinion) (incorporating *Daniels*

dissent).[4] Thus, the dissenting Justices' exception would encompass all constitutional violations, including cases where a defendant did not obtain timely review of his or her constitutional claim through no fault of his or her own.

Following the *Lackawanna* decision, other federal courts have attempted to articulate a uniform standard, but have reached different conclusions about whether a prisoner asserting a constitutional claim other than a *Gideon* violation may use a habeas petition to challenge a prior conviction that extended the prisoner's current sentence. The Circuits are split with each other, and some are even split internally.

The Ninth and Tenth Circuits have held that the second *Lackawanna* exception, available when a defendant failed to exercise his or her rights through no fault of his or her own, is good law. *See Dubrin v. People of California*, 720 F.3d 1095, 1098–99 (9th Cir. 2013) ("[W]hen a defendant cannot be faulted for failing to obtain timely review of a constitutional challenge to an expired prior conviction, and that conviction is used to enhance his sentence for a later offense, he may challenge the enhanced sentence under § 2254 on the ground that the prior conviction was unconstitutionally obtained."); *McCormick v. Kline*, 572 F.3d 841, 851 (10th Cir. 2009) ("We have recognized the [*Lackawanna*] plurality's second

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[4] Justice Breyer did not address the issue. Justice Breyer dissented in both *Lackawanna* and *Daniels* for reasons unique to each case. *Lackawanna*, 532 U.S. at 410 (Breyer, J. dissenting); *Daniels*, 532 U.S. at 392 (Breyer, J. dissenting). In *Daniels*, Justice Breyer noted that the majority rule limiting challenges to prior convictions by a habeas attack on an extended sentence "may well prove unduly restrictive." 532 U.S. at 392 (Breyer, J. dissenting) (internal quotation marks and brackets omitted).

exception as good law." (citing *Broomes v. Ashcroft*, 358 F.3d 1251, 1254 (10th Cir. 2004), *abrogated on other grounds by Padilla v. Kentucky*, 559 U.S. 356 (2010))).

The Fifth, Sixth, Seventh, and Eleventh Circuits have reached inconsistent decisions. In a 2001 unpublished opinion, the Fifth Circuit acknowledged both exceptions in *Lackawanna*. *Brattain v. Cockrell*, No. 00-10538, 2001 WL 1692470, at *2 n.7 (5th Cir. Nov. 27, 2001) ("This rule is subject to two exceptions: where counsel was not appointed for indigent defendants and where the habeas petition in question is, effectively, the first and only forum available for review of the prior conviction.").

However, later Fifth Circuit decisions indicate that it only considers the *Gideon* exception good law. *Campbell v. Tanner*, No. 16-30831, 2017 WL 4773261, at *1 (5th Cir. June 6, 2017) (denying a motion for certificate of appealability because "[t]o date, the Supreme Court has recognized an exception to this rule only where the prior conviction 'was obtained [because of] a failure to appoint counsel in violation of the Sixth Amendment'"); *Godfrey v. Dretke*, 396 F.3d 681, 686 (5th Cir. 2005) (noting that district court found that the petitioner did not qualify for the *Gideon* exception, but also noting that the issue was not before the court).

The Sixth Circuit has denied a certificate of appealability because "[t]he only exception to this [*Lackawanna*] rule is if the state obtained the prior conviction in violation of the petitioner's Sixth Amendment right to counsel." *Sweet v. Howes*, No. 16-2247, 2017 WL 2385274, at *3 (6th Cir. June 1, 2017). However, in other decisions it has suggested that additional exceptions exist. *See Reynolds v. Laurel Cir. Ct.*, No. 18-5473, 2018 WL 11301138, at *2 (6th

Cir. Oct. 29, 2018) (observing that "two possible exceptions could allow review," including that "there was no 'channel of review' available to him for the underlying state conviction 'due to no fault of his own'" (quoting *Steverson v. Summers*, 258 F.3d 520, 524 (6th Cir. 2001))); *see also, e.g.*, *Bowling v. White*, 694 F. App'x 1008, 1016–17 (6th Cir. 2017) (acknowledging the possibility of second exception but stating that even if it exists, it does not apply in the instant case); *Abdus-Samad v. Bell*, 420 F.3d 614, 630 (6th Cir. 2005) (same); *Steverson*, 258 F.3d at 524–25 (same).

The Seventh Circuit previously read *Lackawanna* as having only a single exception—a failure to provide trial counsel as required by *Gideon*. *Martin v. Deuth*, 298 F.3d 669, 672 (7th Cir. 2002) (affirming denial of habeas petition because petitioner failed to argue that prior conviction was obtained in violation of *Gideon*); *see also Grigsby v. Cotton*, 456 F.3d 727, 730 (7th Cir. 2006) (stating that "the Court recognized a single exception"). But, in a more recent case, the Seventh Circuit maintained that "a plurality of the [Supreme] Court also recognized that 'there may be rare cases in which no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own." *Kelley v. Zoeller*, 800 F. 3d 318, 326 (7th Cir. 2015) (quoting *Daniels*, 532 U.S. at 383).

The Eleventh Circuit has held, in an unpublished opinion, that only the first exception is good law. *Hamm v. Comm'r, Alabama Dep't of Corr.*, 620 F. App'x 752, 769 (11th Cir. 2015) ("But the biggest problem for Hamm is that the 'actual innocence' exception language in [*Lackawanna*] was joined by only three Justices and has not been embraced by a majority of the Supreme Court as an exception to the general rule established in [*Lackawanna*]."); *see also Jackson v. Sec'y for Dep't of Corr.*, 206 F. App'x 934,

936 (11th Cir. 2006) ("We have noted that the *Daniels*/*Lackawanna* exception is not implicated where a defendant was represented by counsel during the proceedings related to his prior conviction underlying the expired sentence."). However, in a published opinion, it has acknowledged the possibility of a second exception, but has not decided the issue. *See Hubbard v. Haley*, 317 F.3d 1245, 1256 n.20 (11th Cir. 2003) (acknowledging that "Justice O'Connor also recognized that a possible exception might exist when a state court has, without justification, refused to rule on a properly presented constitutional claim or when the defendant has obtained compelling evidence of innocence after the time for direct or collateral review has passed," but finding it did not apply under the circumstances); *see also Birotte v. Sec'y for Dep't of Corr.*, 236 F. App'x 577, 579 (11th Cir. 2007) (stating that there is a second exception to *Lackawanna* when "no channel of review was available with respect to the prior conviction, through no fault of the petitioner," but finding that it did not apply to petitioner).

The other circuits have not decided the issue, but some have provided various interpretations of the scope of the exceptions to *Lackawanna*'s general rule. *See, e.g.*, *Brackett v. United States*, 270 F.3d 60, 66 (1st Cir. 2001) (observing that the Court "did leave open the possibility" of an additional exception where the prisoner "is prevented by no fault of his own" from challenging his conviction earlier), *abrogated on other grounds by Johnson v. United States*, 544 U.S. 295 (2005) (vacatur of prisoner's prior state convictions was a matter of fact, which could start renewed one-year limitations period for attacking federal sentence under AEDPA); *United States v. Napolitan*, 830 F.3d 161, 165 n.6 (3d Cir. 2016) (noting that a plurality of the Supreme Court recognized that an exception may

exist where "no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own," but finding that the petitioner failed to meet that exception (quoting *Daniels*, 532 U.S. at 383–84 (plurality opinion))); *Lyons v. Lee*, 316 F.3d 528, 533 (4th Cir. 2003) (describing, after assuming that the plurality's exception exists, that the exception was not satisfied because the prisoner's actual innocence claim "[did] not rest on evidence that could not have been discovered earlier through the exercise of due diligence"); *cf. Lyons*, 316 F.3d at 535 (Gregory, J., concurring) (interpreting *Lackawanna* more broadly than the majority's interpretation to apply "to situations where there is a Sixth Amendment violation so substantial that it is as if a defendant never had the benefit of legal representation").

Since *Lackawanna*, this Court has commented on this issue only once, as the Second Circuit noted, Pet. App. at 9a, and did not then provide clear guidance. In *Johnson v. United States*, the Court observed that the general rule in *Daniels* and *Lackawanna* was subject to an "exception for *Gideon* claims" and that the case does "not call for further exploration of" the second "no fault" exception. 544 U.S. 295, 304 & n.4 (2005).

Due to these substantial intra- and inter-circuit conflicts, petitioners across the United States are on unequal footing when seeking to challenge an expired conviction that is being used to enhance the conviction he or she is currently serving. This Court should grant certiorari to resolve the long-standing confusion among the lower federal courts.

B. The Court Should Hold That Petitioners Can Challenge a Prior Conviction If It Was Obtained in Violation of *Douglas*

The Court should hold that a habeas petitioner can challenge a prior conviction that was used to enhance a current sentence if the prior conviction was obtained in violation of *Douglas*. That holding flows from a straightforward application of the Court's rationale for recognizing an exception for *Gideon* claims in *Daniels* and *Lackawanna* and with *Lackawanna*'s "no fault" exception.

On the same day that the Court recognized a defendant's Sixth Amendment right to trial counsel, it also recognized a defendant's Fourteenth Amendment right to appellate counsel. *Douglas*, 372 U.S. 353. The Court has stressed that *Gideon* is "a bedrock principle in our justice system." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). The Court has made equally clear that the right to the assistance of appellate counsel is also critical. In *Douglas*, the Court found that "where the merits of the *one and only appeal* . . . as of right are decided without benefit of counsel, an unconstitutional line has been drawn between rich and poor." *Douglas*, 372 U.S. at 357 (emphasis added). The Court recognized that absent appellate counsel, "[t]he indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual" and not a meaningful appeal. *Id.* at 358.

In *Evitts v. Lucey*, the Court held that "[a] first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." 469 U.S. 387, 396 (1985). The Court went on to recognize that *Gideon*

and *Douglas* are inextricably linked, writing that "the promise of [*Gideon*], that a criminal defendant has a right to counsel at trial . . . would be a futile gesture unless it comprehended the right to the effective assistance of counsel" "on appeal." *Id.* at 397. Like *Gideon* claims, *Douglas* claims deserve special consideration among alleged constitutional violations.

Also, like a *Gideon* claim, a *Douglas* claim does not implicate this Court's concerns about administrative ease. As with the failure to appoint trial counsel, the failure to appoint appellate counsel will generally be readily apparent from the record. There will be no need for sentencing courts to "rummage through frequently nonexistent or difficult to obtain state-court transcripts or records" as the Court was concerned about with other non-*Gideon*-type constitutional attacks on prior convictions. *Daniels*, 532 U.S. at 378. Allowing *Douglas* claims would not delay or impair the orderly administration of justice or untenably disrupt the finality of state-court judgments obtained where the defendant was provided the assistance of appellate counsel.

A *Douglas* claim also embodies *Lackawanna*'s "no fault" exception. As the Court noted, the "no fault" exception is a recognition that "[i]t is not always the case . . . that a defendant can be faulted for failing to obtain timely review of a constitutional claim." *Lackawanna*, 532 U.S. at 405 (plurality opinion). While the Court in *Lackawanna* noted two potential examples of what would constitute "no fault"—a state court refusing to rule on a properly presented constitutional claim and an actual innocence claim that could not have been uncovered in a timely manner—the Court determined that neither *Daniels*

nor *Lackawanna* required the Court to determine the precise circumstances of the exception. *Id.* In a *Douglas* claim, it is the State, not the defendant, who is at fault for denying the defendant their right to appellate counsel. As a result of that failing, the State strips the defendant's *one and only appeal* of any meaning because, as this Court set forth in *Douglas*, an indigent defendant is ill-equipped to discern complicated records or hidden errors. A *Douglas* violation is firmly within the situations this Court said constitute "no fault" because—similar to the Court's "no fault" example of a court refusing to rule on a properly presented constitutional claim—the State denying a defendant the assistance of appellate counsel effectively prevents constitutional claims from ever being properly presented to a court at all.

It is therefore consistent with the Court's holdings in *Lackawanna* and *Daniels* to find that *Douglas* claims warrant the same treatment as *Gideon* claims *and* satisfy the "no fault" exception to the general rule for § 2254 petitions that challenge an enhanced sentence based on a constitutional defect in the prior conviction used to enhance the sentence.

C. The Court Should Hold Generally That Petitioners Can Challenge a Prior Conviction If They Previously Failed to Do So Through No Fault of Their Own

The Court should also affirm that *Lackawanna*'s "no fault" exception is good law. That would be consistent with the position of the majority of the Justices, six altogether, in *Lackawanna* and *Daniels* and the underlying rationale of those cases.

The position that some Circuit courts have adopted that *Gideon* is the only exception to *Lackawanna* and *Daniels* is based on a misunderstanding of the fractured decisions in those cases.

As described *supra*, each of the eight Justices to consider this issue in *Lackawanna* was in agreement that certain exceptions to the general rule did exist. Six Justices endorsed protections beyond challenges to a prior conviction based on a *Gideon* violation. *Lackawanna*, 532 U.S. at 405–406 (plurality opinion), 408–10 (dissenting opinion). Three members of the majority concluded that a challenge to a prior expired conviction could be appropriate where the petitioner failed to obtain timely review of an earlier conviction through no fault of his or her own. *Id.* at 405 (plurality opinion). Three dissenting Justices went even further, concluding that a petitioner's ability to challenge a prior conviction should not be limited to any particular constitutional violation. *Id.* at 408 (dissenting opinion) (incorporating *Daniels* dissent).

Because it was not necessary under the facts of *Lackawanna* and *Daniels* to hold that *Gideon* was the only exception, the position of the concurrence is not binding precedent. Indeed, only the two concurring Justices—Justices Scalia and Thomas—took the position that challenges to expired convictions that enhance current sentences were generally prohibited and subject only to the single exception for *Gideon* violations. *Id.* at 396 & n.*. By contrast, *six Justices* would have allowed challenges to prior convictions where the petitioner lost his opportunity to challenge the earlier conviction "due to no fault of his own," *Daniels*, 532 U.S. at 383: three Justices in the plurality along with the three dissenting Justices, who would have allowed *all* constitutional challenges of prior convictions, which would include challenges

based on the "no fault" exception. *Lackawanna*, 532 U.S. at 405 (plurality opinion), 408 (dissenting opinion).

Not only is the second "no fault" exception consistent with the position taken by the majority of the Justices in *Daniels* and *Lackawanna*, it is consistent with the underlying rationale behind the general prohibition against challenging prior convictions through habeas petitions, as the Ninth Circuit explained in *Dubrin*, 720 F.3d at 1096–97. In *Dubrin*, the petitioner filed a state post-conviction challenge to his prior conviction, that was erroneously dismissed on the basis that he was not in custody. *Id.* at 1096. The Ninth Circuit held that the two prudential considerations articulated by this Court as justification for the *Lackawanna* rule—administrability and the need for finality of convictions—"carry little or no weight" where a criminal defendant is prevented from challenging the constitutionality of an earlier expired state conviction through no fault of his or her own. *Id.* at 1098. The court, relying on similar rules relating to claim and issue preclusion, noted that there is a diminished interest in finality when the litigant did not have a "full and fair opportunity to litigate in a prior forum." *Id.* (citing *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480–81 & n.22 (1982) (claim preclusion); *Allen v. McCurry*, 449 U.S. 90, 95 (1980) (issue preclusion)).

Second, relying on its experience with a similar rule allowing habeas petitions based on Fourth Amendment claims that the petitioner was not able to litigate, the court reasoned that the second *Lackawanna* exception would not be unreasonably burdensome to administer. *Id.* at 1099 (citing *Stone v. Powell*, 428 U.S. 465, 494 n.37 (1976)). The court concluded that "when a defendant cannot be faulted

for failing to obtain timely review of a constitutional challenge to an expired prior conviction, and that conviction is used to enhance his sentence for a later offense, he may challenge the enhanced sentence under § 2254 on the ground that the prior conviction was unconstitutionally obtained." *Id.* This Court should explicitly adopt the *Dubrin* court's holding in order to resolve the confusion concerning the scope of *Lackawanna.*

D. This Case Is an Ideal Vehicle to Clarify *Lackawanna* and Resolve This Circuit Split

This case provides the Court with the ability to clarify that *Lackawanna*'s exceptions cover *Douglas* claims, to affirm the validity of *Lackawanna*'s "no fault" exception, and to further clarify the scope of that exception. The critical facts in this case are not in dispute: Dockery is serving an extended sentence that was enhanced by his prior 1986 conviction that he is challenging as unconstitutional. Dockery did not receive the assistance of appellate counsel in his appeal of his 1986 conviction because, despite being a juvenile, indigent defendant, no counsel was appointed to him. Dockery's petition raises a *Douglas* claim and alleges that the First Department procedure, which placed the burden of securing appellate counsel on indigent, juvenile defendants, violated his constitutional right to the assistance of counsel on appeal. Dockery did not challenge his 1986 conviction prior to the expiration of the time for direct and collateral review of that conviction due to no fault of his own but rather because of the nature of the State's *Douglas* violation.

This case is an ideal vehicle to clarify the scope of *Lackawanna*'s exceptions because a *Douglas* claim is a prime example of a case falling under the "no fault" exception. Dockery's *Douglas* claim underscores the prejudice caused by depriving indigent defendants counsel on appeal. First Department procedure did not just deny Dockery the assistance of appellate counsel, it caused Dockery and other indigent defendants to reasonably, but mistakenly, believe that New York *had* provided them appellate counsel when, in fact, it deprived them of this constitutional right. By permitting trial counsel to file a notice of appeal but then requiring juvenile, indigent defendants to navigate a confounding and misleading process without the assistance of counsel in order to secure appellate counsel and perfect their appeal, the State hid its constitutional violation from those defendants. Moreover, in this case, no one—not the prosecutor, the court, nor Dockery's counsel—explained to Dockery that if he did not successfully navigate this inaccessible procedure, later courts may find that he forfeited this critical right.

Dockery's long and lonely fight through New York's convoluted appellate and sentencing enhancement process is a tragic, but apt, illustration of why the right to appellate counsel guaranteed in *Douglas* is a critical right deserving of the same treatment of *Gideon* under *Lackawanna*. By denying Dockery the assistance of appellate counsel but leading him to believe that he had been represented, New York's constitutional violation prevented Dockery from ever being able to challenge a conviction that would be twice used to inappropriately enhance sentences years later and further deprive him of his liberty. As a result, without receiving the reprieve from *Lackawanna*'s general rule

granted to *Gideon* claims, the unconstitutional deprivation of the critical right of appellate counsel—the companion right to *Gideon*—morphs into an unchallengeable unconstitutional deprivation of the critical right of liberty. All the while, the affected defendants have the reasonable, but mistaken, belief that their rights were never violated. The denial of appellate counsel causes the same harm as the denial of trial counsel; it is a fundamental defect that undermines the integrity of the prior conviction as well as the later sentences enhanced due to that conviction.

The Second Circuit's decision not to affirm the validity of *Lackawanna*'s "no fault" exception and its erroneous interpretation of that exception in this case also require correction. The Second Circuit's reasoning for its denial of Dockery's petition is rooted in the theory that Dockery had procedural opportunities to challenge his 1986 conviction prior to his discovery of the violation of his constitutional rights in 2008. However, the Second Circuit's reasoning wrongly constrains *Lackawanna*'s "no fault" exception in two ways.

First, the Second Circuit's reasoning reads into *Lackawanna* a timeliness requirement for unearthing the underlying constitutional violation that this Court never identified or intended. The only timeliness issue *Lackawanna* considers is whether a constitutional claim is raised before or after the expiration of the time for direct or collateral review of a conviction. *Lackawanna*, 532 U.S. at 402. Claims raised before that expiration are generally permissible, while claims raised after that expiration must satisfy one of *Lackawanna*'s two exceptions to be considered. *Id.* at 402–04 (majority opinion), 405–06 (plurality opinion). Nowhere in *Lackawanna* does this Court contemplate how soon after the expiration of the time for direct or

collateral review a claim must be raised to be eligible for *Lackawanna*'s exceptions. That is because whether the defendant brings his or her habeas challenge to a conviction one day or ten years after the expiration of the time for direct or collateral review, a *Lackawanna* exception must be met. And, because *Lackawanna*'s exceptions contemplate challenging the expired conviction only when it is used to enhance a new sentence, it will always be the case that defendants seeking to rely on *Lackawanna*'s exceptions will be raising their habeas challenge at an indeterminate time years or decades after the expired conviction. Thus, contrary to the Second Circuit's reasoning, the proper evaluation a court should undertake when assessing *Lackawanna*'s "no fault" exception is whether the expiration of the period *for direct or collateral review* of the original conviction was due to no fault of the petitioner, not the time that has passed since the conviction or later sentencing enhancement.

This case illustrates why the Second Circuit's reasoning is irreconcilable with *Lackawanna*. Even if Dockery had raised his constitutional challenge at one of the procedural opportunities identified by the Second Circuit, it would have proceeded through New York state courts just as it did when he discovered the claim in 2008 and resulted in the same denial of his request to reinstate his 1986 appeal. Pet. App. at 53a. Therefore, Dockery still would have been forced into this forum with an identical habeas petition making federal habeas "effectively . . . the first and only forum available for review of the prior conviction." *Lackawanna*, 532 U.S. at 406 (plurality opinion).

Second, the Second Circuit's reasoning effectively permits defendants to unknowingly waive a fundamental constitutional right in violation of this Court's holding in *Johnson*. 304 U.S. at 464. Dockery

did not even begin to wonder whether his 1986 conviction has been fully pursued by his trial counsel until he saw the appellate process play out after his 2000 conviction and did not *know* that his rights had been violated until 2008. Pet. App. at 77a–78a. The State's *Douglas* violation caused him to believe that there would be no need to raise a constitutional claim related to his 1986 conviction at any future procedural opportunity, including those identified by the Second Circuit. *Id.* As this Court recognized that an appeal without the assistance of counsel is a "meaningless ritual," *Douglas*, 372 U.S. at 358, a procedural opportunity without knowledge of a viable claim is also a meaningless ritual—particularly where, as here, the actions of the State are at fault for a defendant's lack of knowledge. The Second Circuit's reasoning that *Lackawanna* stands for the proposition that meaningless procedural opportunities can result in a waiver of the right to appellate counsel is a substantial break from the kind of notice necessary to protect the constitutional rights of indigent defendants. The right to counsel at issue here can only be waived knowingly, and *Lackawanna* cannot be read to exempt courts from the obligations this Court set out in *Johnson* to make "every reasonable presumption against waiver of fundamental constitutional rights." 304 U.S. at 464 (citation and internal quotation marks omitted); *see also id.* at 465 ("[T]he guaranty [of counsel] would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution.").

Dockery's representation by counsel at his later sentencings cannot be grounds to find that Dockery was at fault for not uncovering and challenging the State's 1986 conviction more readily. It will always be the case that counsel should recognize the importance

of challenging the validity of prior convictions at the sentencing phase. For the *Lackawanna* exceptions to have meaning, they must apply to instances, like here, where despite the general understanding that it is important to challenge prior convictions, there is no factual basis for which counsel would even consider that the constitutional claim had merit.

This case is also the best vehicle to clarify *Lackawanna* because once the applicability of the *Lackawanna* exception is resolved, the underlying constitutional violation is apparent. The District Court found Dockery's merits claim that the First Department procedure violated his constitutional rights "compelling." It found persuasive the conclusion of the District Court Judge Robert Sweet, that this New York procedure was "'unreasonably confusing,' misleading, and inaccessible." Pet. App. at 22a (quoting *Calaff*, 215 F. Supp. 3d at 252–53). In *Calaff*, the District Court also found that "the First Department's procedure as articulated in the Rights Notice was unconstitutional as an unreasonable precondition on the right to appellate counsel." 215 F. Supp. 3d at 253. During oral argument before the New York Court of Appeals to reinstate Dockery's original appeal, then-Chief Judge Jonathan Lippman acknowledged that in this area New York appellate procedure was "not coherent." Trs. of Oral Arg. at 45, *People v. Perez*, 23 N.Y.3d 89.

Dockery satisfies *Lackawanna*'s "no fault" exception and should be allowed to challenge the State's violation of his constitutional right to appellate counsel through the instant habeas petition. This is especially true because the very nature of the State's

Douglas violation is what prevented him from raising this issue earlier.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court grant his petition for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: January 30, 2023

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of October, two thousand twenty-two.

PRESENT:

DENNIS JACOBS,
JOSEPH F. BIANCO,
STEVEN J. MENASHI,
Circuit Judges.

21-2234-pr

Alexander Dockery,

Petitioner-Appellant,

—v.—

William Lee, Superintendent,
Eastern Correctional Facility,

Respondent-Appellee.

FOR PETITIONER-APPELLANT:

Matthew Cormack (Daniel F. Kolb, *on the brief*), Davis Polk & Wardwell LLP, New York, NY.

FOR RESPONDENT-APPELLEE:

David M. Cohn, Assistant District Attorney (Steven C. Wu, Christopher P. Marinelli, Assistant District Attorneys, *on the brief*), *for* Alvin L. Bragg, Jr., District Attorney for New York County, New York, NY.

Appeal from an order of the United States District Court for the Southern District of New York (Nathan, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the district court is **AFFIRMED**.

Petitioner-appellant Alexander Dockery appeals from an August 18, 2021 order of the United States

District Court for the Southern District of New York (Nathan, *J.*), denying his request for habeas corpus relief pursuant to 28 U.S.C. § 2254. In his petition, Dockery seeks to challenge his 2000 state conviction, for which he is currently in custody, on the ground that his sentence was enhanced by his allegedly unconstitutional 1986 conviction in state court. We assume the parties' familiarity with the underlying facts and procedural history of this case, to which we refer only as necessary to explain our decision to affirm.

BACKGROUND

I. Prior Convictions

In 1985, then-fifteen-year-old Dockery was charged with robbery in the first and second degree. Following a trial in New York County, Dockery was convicted and sentenced to two to six years' incarceration. At his sentencing, his appointed trial counsel provided him a written Notice of Rights to Appeal form that explained how Dockery could apply for appellate counsel. Pursuant to the procedures in place at the time in the New York Appellate Division, First Department, the form stated that an indigent defendant was required to write to the Department himself and request *in forma pauperis* status. According to Dockery, he did not understand the procedure at the time and no one, including his trial counsel, attempted to explain it to him. His trial counsel filed a notice of appeal but took no further action. Dockery did not follow the required steps to obtain counsel and completed his 1986 sentence without perfecting his appeal, but the appeal remained pending.

In 1992, Dockery pled guilty to third-degree attempted criminal possession of a weapon. Dockery waived his right to appeal and was sentenced as a second violent felony offender, receiving a prison term of two to four years. Then, in 2000, Dockery was convicted of second- degree burglary and criminal trespass. Because of his prior two convictions, Dockery was sentenced as a persistent violent felony offender and received a mandatory sentence of 25 years to life.[1] Dockery is currently serving this sentence.

II. Post-Conviction Proceedings

In 2005, after exhausting New York post-conviction remedies, Dockery filed a federal habeas petition challenging his 2000 conviction. After it was stayed so that he could exhaust his state-court remedies, the petition was ultimately denied in 2013. In 2008, Dockery wrote to the First Department to inquire about the status of his appeal on the 1986 robbery conviction and to request either information about its outcome or, if no appeal had been taken, an opportunity to appeal the conviction. In response, the State filed a motion to dismiss that appeal due to Dockery's failure to prosecute the appeal, which the First Department granted. After obtaining counsel, Dockery persuaded the First Department to reinstate his appeal on the basis of procedural flaws in its prior dismissal; having corrected those flaws, the court again dismissed Dockery's appeal for failure to prosecute. The New York Court of Appeals affirmed,

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[1] Dockery, who was prosecuted under the alias "John Harris," failed to appear for proceedings in this case and was tried, convicted, and sentenced *in absentia*. He began serving that sentence in 2001 following an unrelated arrest.

concluding that: (1) the First Department's procedure did not deprive Dockery of any constitutional right; and (2) Dockery's appeal was properly dismissed because he "consciously chose not to exercise" his appellate rights for a protracted period of time. *People v. Perez*, 23 N.Y.3d 89, 99–101 (2014).

In 2015, Dockery filed the instant habeas petition pursuant to 28 U.S.C. § 2254, challenging the First Department's appellate procedure for indigent defendants in connection with his 1986 conviction. The district court denied the petition for lack of subject-matter jurisdiction, concluding that Dockery was not "in custody" for the purpose of the habeas statute because Dockery failed to qualify for an exception to the rule against challenging a predicate conviction while serving a later sentence. Furthermore, the district court determined that his petition would be barred as a second or successive petition even if it satisfied such an exception.[2] Despite denying the petition on these two grounds, the district court found that Dockery had made a "substantial showing of the denial of a constitutional right" and granted his request for a certificate of appealability. *Dockery v. Lee*, 15-cv-7866 (AJN), 2021 WL 3667943, at *6 (S.D.N.Y. Aug. 18, 2021) (quoting 28 U.S.C. § 2253(c)). This appeal followed.

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[2] The district court adopted the Report and Recommendation ("R&R") issued on September 8, 2017, by United States Magistrate Judge Kevin Fox, as to the denial of the petition on these grounds, but declined to decide the other alternative bases for denial identified in the R&R.

DISCUSSION

We review *de novo* a district court's denial of a Section 2254 habeas petition. *Washington v. Schriver*, 255 F.3d 45, 52 (2d Cir. 2001).

On appeal, Dockery argues that the district court erred by: (1) concluding that Dockery did not qualify for the "no fault of his own" exception to the rule against challenging a predicate conviction while serving a sentence for a later conviction, as articulated in *Lackawanna County District Attorney v. Coss*, 532 U.S. 394, 405–06, 408 (2001); and (2) alternatively concluding that Dockery's petition was a second or successive petition barred by 28 U.S.C. § 2244(b). Although we disagree with the district court that *Lackawanna* implicates the "in custody" requirement (and therefore the court's subject-matter jurisdiction), we agree that Dockery's petition is barred by *Lackawanna*, which prohibits a prisoner from challenging his present sentence on the ground that it was enhanced by a prior unconstitutional conviction.

I. The 1986 Conviction

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") grants federal courts jurisdiction to review petitions for habeas relief only from "person[s] in custody . . . in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Accordingly, "[t]he first showing a § 2254 petitioner must make is that he is in custody pursuant to the judgment of a State court." *Lackawanna*, 532 U.S. at 401 (internal citation omitted); *Finkelstein v. Spitzer*, 455 F.3d 131, 133 (2d Cir. 2006). The Supreme Court has clarified that this requires "that the habeas petitioner be 'in custody'

under *the conviction or sentence under attack at the time his petition is filed*." *Maleng v. Cook*, 490 U.S. 488, 490–91 (1989) (emphasis added). "[O]nce the sentence imposed for a conviction has completely expired"—*i.e.*, once the petitioner has finished serving that sentence—the petitioner is no longer considered "in custody" for that conviction and therefore cannot challenge its validity through habeas proceedings. *Id.* at 492. Dockery's petition facially challenges the constitutionality of his 1986 conviction. As he fully served his 1986 sentence, Dockery is unequivocally no longer "in custody" for that conviction and, accordingly, cannot directly challenge it through a federal habeas petition. *Id.* Therefore, if we understood Dockery's petition to challenge his 1986 conviction—as the petition facially purports to do—we would lack jurisdiction to consider such a challenge. *See Calaff v. Capra,* 714 F. App'x 47, 50 n.1 (2d Cir. 2017) (summary order).

II. The 2000 Conviction

Dockery asks us to construe his petition as attacking the sentence associated with his 2000 conviction, for which he is currently in custody, on the ground that the sentence was enhanced by his allegedly unconstitutional 1986 conviction. However, Section 2254 does not authorize a federal court to consider a "sentence" apart from a "conviction." A federal court may "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) (emphasis added), and a "judgment" is "comprised of a conviction and the sentence imposed thereon," N.Y. Crim. Proc. Law § 1.20(15). For Dockery's petition to survive the "in custody" requirement, therefore, we must construe his petition

as attacking the 2000 conviction, as the district court did. Even with the benefit of such a construction, Dockery's petition is nonetheless barred by *Lackawanna*, which forbids a petitioner from challenging his current sentence on the ground that it was enhanced by an unconstitutional prior conviction. Dockery does not qualify for an exception to this rule: even construed as challenging his 2000 conviction, his petition may not proceed.

A. The *Lackawanna* Rule

It is a general rule that, if a prior conviction is used to enhance a later sentence, a petitioner "may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained." *Lackawanna*, 532 U.S. at 403–04. However, the Supreme Court identified an exception to this rule for when the enhancing conviction was obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See Lackawanna*, 532 U.S. at 404. Dockery does not contend that he qualifies for this exception, nor could he based upon this record. Instead, he argues that he falls under *Lackawanna*'s purported *second* exception—*i.e.*, where a defendant cannot "be faulted for failing to obtain timely review of a constitutional claim," such as when a "state court . . . without justification, refuse[s] to rule on a constitutional claim that has been properly presented to it," or when, "after the time for direct or collateral review has expired," he obtains "compelling evidence that he is actually innocent for the crime for which he was convicted, and which he could not have uncovered in a timely manner." *Id.* at 405.

This "no fault" exception, however, was outlined by a three-justice plurality that expressly declined "to determine whether, or under what precise circumstances, a petitioner might be able to use a § 2254 petition in this manner." *Id.* To date, the Supreme Court has not conclusively held that this second exception exists, *see United States v. Johnson*, 544 U.S. 295, 304 n.4 (2005); neither has this Court, *see Calaff*, 714 F. App'x at 50–51. As in *Calaff*, we need not do so here: even assuming that the second *Lackawanna* exception is available, Dockery does not qualify for it.[3]

The facts of this case do not establish that Dockery has "no fault." We disagree with Dockery's assertion that his instant petition is "effectively . . . the first and only forum available for review of the prior conviction." *Lackawanna*, 532 U.S. at 406. Dockery could have challenged his 1986 conviction when it was used as an enhancement at his 1992 sentencing, as New York law allows. *See* N.Y. Crim. Proc. § 400.15 (stating that, when determining whether a defendant is a second violent felony offender, a "defendant may, at any time during the course of the hearing hereunder controvert an allegation with respect to [a prior] conviction . . . on the grounds that the conviction was unconstitutionally obtained"). Dockery argues that he was misled as to the status of his 1986 appeal because, when the prosecutor was asked at the 1992 plea hearing whether there had been a trial on the prior conviction, the prosecutor responded,

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[3] Dockery contends that the relevant time period for analyzing any "no fault" exception under *Lackawanna* is the period between his 1986 conviction and the imposition of his 2000 sentence, rather than what occurred after 2000. As set forth below, we conclude that Dockery cannot satisfy any such exception regardless of which time period is used.

"No, it would have been appealed by now." Joint App'x at 469. However, that comment does not persuasively explain Dockery's delay. As a threshold matter, as the district court noted, Dockery was present during the 1986 trial and knew the prosecutor's statement regarding the lack of a trial was incorrect. In any event, even if Dockery was misled about the earlier appeal by this passing comment, he was represented by counsel who had initially "ask[ed] for time to look into the file of the [1986] conviction" but then unreasonably "withdr[e]w" that request. Joint App'x at 468–69. Similarly, at the time of his 2000 conviction and sentencing, even if Dockery continued to believe that his 1986 conviction had already been appealed, he was represented by counsel who again had the opportunity to investigate and challenge his 1986 conviction.[4]

Moreover, Dockery could have challenged his 1986 conviction in 2001 when he appealed his 2000 conviction, at which time he was fully aware of the process to obtain appellate counsel in New York and "began to wonder" whether his 1986 trial counsel had fully pursued his appeal. Appellant's Br. at 10. Additionally, Dockery concedes that, when he filed his first federal habeas petition in 2005, "he learned that information about his 1986 appeal might be relevant to that petition." *Id.* However, Dockery made no effort to follow up on these concerns until 2008, when he first inquired about his 1986 appeal. Indeed, the New York Court of Appeals concluded that "[t]he facts permit an inference that [petitioner] did not simply neglect [his] appellate rights, but consciously chose not to exercise them until [he] acquired a

[4] We note Dockery does not claim that his counsel in either the 1992 or 2000 case was constitutionally ineffective.

reason to do so." *Perez*, 23 N.Y.3d at 101. Dockery offers insufficient explanations for his failure to utilize the multiple opportunities available to him over a period of two decades to challenge his 1986 conviction and, thus, has not demonstrated that he would qualify for the second *Lackawanna* exception even if it were available.

The district court concluded that because Dockery failed to satisfy either exception, he could not meet the "in custody" requirement of § 2254 and therefore the court lacked subject- matter jurisdiction over Dockery's petition. In fact, if we are to construe Dockery's petition as challenging his 2000 conviction, as the district court did, then Dockery meets the "in custody" requirement. The *Lackawanna* rule is not an application of the "in custody" requirement; it is based instead "on considerations relating to the need for finality of convictions and ease of administration." *Lackawanna*, 532 U.S. at 402–04. Indeed, the Court specifically held that the petitioner in *Lackawanna* "satisfied § 2254's 'in custody' requirement." *Id.* at 402. The district court therefore did not lack subject-matter jurisdiction, but *Lackawanna* did bar Dockery's petition.

* * *

Given the denial of the petition under *Lackawanna*, we need not consider the district court's alternative holding that the petition was also barred as a second or successive petition. We **AFFIRM** the order of the district court.

FOR THE COURT:
/s/ Catherin O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk of Court
[SEAL]

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2021 WL 3667943

Only the Westlaw citation is currently available.

Alexander DOCKERY, Petitioner,

—v.—

William LEE, Respondent.

15-cv-7866 (AJN)

Signed 08/18/2021

Attorneys and Law Firms

Matthew Cormack, Shahira Dia Ali, Daniel F. Kolb, Davis Polk & Wardwell LLP, New York, NY, for Petitioner.

Deborah L. Morse, Gina Mignola, New York County District Attorney's Office, New York, NY, for Respondent.

MEMORANDUM OPINION AND ORDER

ALISON J. NATHAN, District Judge:

Magistrate Judge Fox recommends that this Court deny Petitioner Alexander Dockery's Petition for Writ of Habeas Corpus. For the reasons discussed below, the Court adopts Magistrate Judge Fox's recommendation and denies Dockery's petition.

I. Background

In 1986, Alexander Dockery was convicted by a jury for first-degree robbery and second- degree robbery and then sentenced to two to six years' imprisonment. Report and Recommendation ("Report") at 3, Dkt. No. 27. He was sixteen years old at the time. *Id.* After he was sentenced, Dockery's appointed trial counsel provided him a written notice that explained how he could apply for counsel on appeal. *Id.* Trial counsel filed a notice of appeal but took no further action regarding the appeal. *Id.* After Dockery served the sentence for his 1986 sentence, he was convicted again in 1992, this time pleading guilty to third-degree attempted criminal possession of a weapon. *Id.* The sentencing court in 1992 took account of the 1986 conviction and sentenced Dockery as a "second violent felony offender." Gov't Appendix at 11, 14–15, Dkt. No. 16-1. Dockery waived his right to appeal his 1992 conviction and sentence. *Id.* at 15.

Next, in 2000, Dockery was convicted of second-degree burglary and second-degree criminal trespass under the name John Harris. Report at 3. Because the 1986 and 1992 convictions qualified Dockery as a persistent felony offender, he was sentenced to twenty-five years to life. *Id.* Dockery, with the assistance of appellate counsel, appealed his 2000

conviction in 2001. As he later recounted in a 2012 affidavit, it was in preparing his 2001 appeal that he "learned about the forms that needed to be filed with the court for an appeal to be taken" and, he affirmed, he "began to wonder whether [his] first case really had been appealed." Dockery Appendix, Ex. F at A170, Dkt. No. 4.[1]

Then in 2008, while serving the sentence for his 2000 conviction, Dockery wrote to the state appellate court to request a copy of the notice of appeal for his 1986 conviction and the outcome of the appeal. Report at 3. That inquiry led the State to file a motion to dismiss his appeal for failure to prosecute, which was granted. *People v. Perez*, 12 N.E.3d 416, 419 (N.Y. 2014). After acquiring counsel in 2011, Dockery reinstated his appeal and pursued it to the New York Court of Appeals. *Id.* That court affirmed the dismissal of Dockery's appeal in 2014 alongside the appeals of several similarly situated defendants. *Id.* at 421.

On October 5, 2015, Dockery, with counsel, filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. Habeas Petition ("Petition"), Dkt. No. 1. He argues that the New York Appellate Division, First Department's policy of requiring that indigent defendants apply for appellate counsel and prove their indigence violated his right to appointed appellate counsel guaranteed by the Fourteenth Amendment.

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[1] In the record submitted to the Court, Dockery's affidavit is dated January 25, 2015, and notarized September 28, 2015. Dockery Appendix, Ex. F at A172. But the affidavit is attached as an exhibit to a brief submitted to the New York Appellate Division on February 2, 20212. *Id.* at A147. The Court therefore presumes the affidavit was prepared and sworn to by Dockery sometime in 2012.

See Douglas v. California, 372 U.S. 353, 357–58 (1963). Magistrate Judge Fox issued a Report and Recommendation dated September 8, 2017, that recommended this Court dismiss Dockery's petition for lack of subject matter jurisdiction. Report at 17. Dockery filed a timely objection. Objection, Dkt. No. 30.

Dockery also filed a letter noting new authority on November 9, 2017. Dkt. No. 31 (citing *Calaff v. Capra*, 714 F. App'x 47 (2d Cir. 2017)). The Court ordered the parties to file supplemental briefing, which both parties timely did. Dkt. Nos. 32, 36, 39. The parties also filed a joint letter in which they agreed that this Court may rely on the new supplemental authority to "resolve the petition on grounds independent of Judge Fox's report." Dkt. No. 35.

The Court heard oral argument on Dockery's petition on August 16, 2021. Dkt. No. 42.

II. Analysis

Magistrate Judge Fox recommended that this Court deny Dockery's petition. Because Dockery objected, the Court reviews de novo those parts of Magistrate Judge Fox's report to which Dockery objects. *See* Fed. R. Civ. P. 72(b)(3).

To file a habeas petition, a petitioner must be "in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254(a). Custody is a prerequisite to the Court's jurisdiction. *Maleng v. Cook*, 490 U.S. 488, 490 (1989). Generally, a petitioner is no longer in custody for a conviction—and so cannot challenge its validity—if he has finished serving the sentence for that conviction. *Id.* at 490–91.

Dockery's habeas petition listed the "[d]ate of the judgment of conviction" as February 6, 1986. Petition

at 1. The petition mentioned his 2000 conviction only on the third-to-last page as a "future sentence to serve after [he] complete[s] the sentence for the judgment that [he is] challenging." *Id.* at 13. Magistrate Judge Fox therefore concluded that Dockery's habeas petition challenged only his 1986 conviction, the sentence for which Dockery is no longer in custody. Report at 14.

In his objection, Dockery argues that this Court should construe his petition's challenge to his 1986 conviction as attacking his 2000 conviction, for which he is plainly in custody, because the earlier conviction enhanced the later sentence. Objection at 18. This Court will, for present purposes, construe Dockery's petition as attacking his 2000 conviction, the sentence of which was enhanced by his 1986 conviction. *See Calaff v. Capra*, 714 F. App'x 47, 49 n.1 (2d Cir. 2017) (construing "liberally" a nearly identical petition prepared by counsel as challenging the later enhanced sentence).

But even if this Court construes the petition as properly attacking Dockery's enhanced 2000 conviction, he confronts a more fundamental obstacle to satisfying the custody requirement. Generally, a petitioner cannot challenge the validity of a prior conviction even if that prior conviction enhanced a sentence that the petitioner is currently serving. *Lackawanna Cnty. Dist. Att'y v. Coss*, 532 U.S. 394, 402–04 (2001). Rather, defendants should challenge a conviction by direct appeal and not wait until that conviction is used to enhance a later sentence. *Id.* at 402–03.

In *Lackawanna*, the Supreme Court identified two exceptions to the general rule. First, if a defendant's prior conviction was obtained in violation of *Gideon v.*

Wainwright, 372 U.S. 335 (1963). *Lackawanna*, 532 U.S. at 404. And second, if a defendant for some reason "can[not] be faulted for failing to obtain timely review of a constitutional claim." *Id.* at 405; *see also Daniels v. United States*, 532 U.S. 374, 383 (2001) (describing a similar exception when a § 2255 petitioner's failure to challenge a prior conviction was "no fault of his own"). For example, a state court may simply "refuse to rule on a constitutional claim that has been properly presented to it" or a defendant may receive evidence of his innocence only after "the time for direct or collateral review has expired." *Lackawanna*, 532 U.S. at 405. If neither exception applies, then a petitioner cannot satisfy the custody requirement necessary to challenge a prior conviction by attacking a current enhanced sentence.

The Court finds that neither exception is satisfied. There is no suggestion that the first *Lackawanna* exception applies here because Dockery was represented by counsel at his 1986 trial. Report at 16. Dockery instead relies on the second, "no-fault" exception. Objection at 14–15. The Second Circuit has "never decided whether the second *Lackawanna* exception is good law." *Calaff*, 714 F. App'x at 50; *see also id.* at 51 n.2 (noting that courts are split on this question). Nevertheless, the Second Circuit applied the no-fault exception in *Calaff v. Capra*, an appeal of a habeas petition filed by a petitioner in circumstances virtually identical to those of Dockery. *Id.* at 48–49; *see also* Calaff Br. at 1, *Calaff v. Capra*, 215 F. Supp. 3d 245 (S.D.N.Y. 2016) (No. 15-CV-07868) (referring to the *Calaff* petition as a "companion" to Dockery's petition). In fact, the New York Court of Appeals dismissed the *Calaff* petitioner's direct appeal in the same 2014 opinion as

it did Dockery's, and for the same reasons. *Perez*, 12 N.E.3d at 421.

In *Calaff*, the petitioner in 2015 filed a habeas petition to challenge a 2004 conviction that had been enhanced by an earlier 1993 conviction. 714 F. App'x at 48. Like Dockery, the *Calaff* petitioner did not receive appellate counsel for his 1993 conviction but did properly appeal his 2004 conviction. *Id.* at 48–49. He claimed to have first learned about the process for requesting appellate counsel in 2004. *Id.* at 51. But he did not appeal his 1993 conviction until 2012—a nearly eight-year delay for which he "offer[ed] no persuasive reason." *Id.* Therefore, the Second Circuit concluded, the petitioner could not invoke any no-fault exception in *Lackawanna*, even granting that the petitioner may have had a valid excuse for failing to appeal his prior conviction in 1993. *Id.* at 51 & n.3.

Though *Calaff* is a summary order by the Second Circuit and therefore not binding on this Court, it is highly relevant and persuasive authority. And its reasoning requires that this Court dismiss Dockery's petition. As Dockery himself stated, he first "learned about the forms that needed to be filed with the court for an appeal to be taken" in 2001. Dockery Appendix, Ex. F at A170. And as the State argues, Dockery successfully completed those forms to be appointed counsel for the appeal of his 2000 conviction. Gov't Suppl. Br. at 5, Dkt. No. 39; *see People v. Harris*, 757 N.Y.S.2d 878, 879 (App. Div. 2003). He therefore could have challenged his 1986 conviction when he appealed his 2000 conviction, the sentence for which was enhanced by the 1986 conviction. *See Calaff*, 714 F. App'x at 51. New York's appellate courts have previously granted relief to defendants in that procedural posture. *E.g.*, *People v. Brewington*, 8 N.Y.S.3d 439, 440 (App. Div. 2015);

People v. Johnson, 601 N.Y.S.2d 103, 105 (App. Div. 1993). Instead, seven years passed before Dockery inquired about the status of his pending 1986 appeal. While this Court does not fault Dockery for failing to perfect his appeal in 1986, like the *Calaff* petitioner, Dockery's failure to prosecute promptly his appeal after his 2000 conviction bars him from invoking *Lackawanna*'s no-fault exception. *Calaff*, 714 F. App'x at 51.

Dockery argues that this Court should treat his petition differently than the petition in *Calaff*. The Court concludes that none of the distinctions he raises alter the outcome. First, Dockery points to a statement made by the state prosecutor during the plea hearing for his 1992 conviction. Dockery Suppl. Br. at 6, Dkt. No. 36. When asked by Dockery's counsel whether there had been a jury trial in 1986, the State responded, incorrectly, "No, it would have been appealed by now . . . ." Dockery Appendix, Ex. F at A90. Dockery argues that he reasonably relied on that statement to conclude that his appeal had been perfected. Dockery Suppl. Br. at 6.

That argument, however, overreads the record. The state prosecutor was asked whether Dockery was convicted in a jury trial, not whether an appeal was taken. Moreover, Dockery knew that the state prosecutor's statement was false given that Dockery himself was present at the 1986 trial in which he was convicted by a jury. Tellingly, Dockery does not mention the state prosecutor's statement in his 2012 affidavit where he explains his failure to file an earlier appeal. Dockery Appendix, Ex. F at A170. And in any event, the isolated statement made in 1992 does not explain the seven-year delay that followed the point when Dockery learned about the process for requesting appellate counsel in New York.

Rather than justify Dockery's inaction, the transcript of the 1992 plea proceeding demonstrates that Dockery had a prior counseled opportunity to challenge the validity of his 1986 conviction. That proceeding, as required by N.Y. Crim. Proc. Law § 400.15, provided Dockery the express opportunity to challenge the validity of his 1986 conviction before it could be used to enhance his sentence. He was represented by counsel at that proceeding who undertook an "investigation" of the 1986 conviction. Dockery Appendix, Ex. F at A89–A90. Nothing in the record before the Court suggests that counsel did not satisfy his constitutional obligation of zealous representation.

Nor was 1992 Dockery's last opportunity to challenge the validity of his 1986 conviction with the assistance of counsel. He was also counseled at his 2000 conviction, and that counsel would have also recognized the importance to Dockery's sentencing of challenging the validity of predicate felony convictions. To be sure, Dockery was a fugitive at the time of his 2000 conviction and sentencing and so could not have himself told counsel about his 1986 conviction. Gov't Br. at 9, Dkt. No. 16. But that fact cannot help Dockery to satisfy a no-fault exception. As with his 1992 counsel, Dockery does not argue that his counsel in 2000 was constitutionally ineffective, and nothing in the record would support such a claim. In short, Dockery had multiple procedural opportunities to challenge his 1986 conviction with the assistance of counsel well before he contacted the state appellate court in 2008. The Second Circuit's reasoning in *Calaff* is therefore on all fours with Dockery's case.

Second, Dockery observes that he was only sixteen years old in 1986 but that the *Calaff* petitioner was

an adult at the time of his earlier conviction. Dockery Suppl. Br. at 3, 6. Yet Dockery was an adult in 2001 when he learned about the method for perfecting an appeal. Even if this Court were to excuse Dockery's failure to appeal in 1986, his youth cannot explain the seven-year delay that followed the appeal of his 2000 conviction. *Cf. Calaff*, 215 F. Supp. 3d at 256 ("While the delay between 1993 and 2004 was not Petitioner's fault, his failure to prosecute his appeal between 2004 and 2012 was a valid ground for dismissal by the New York Court of Appeals").

That does not mean that Dockery's youth in 1986 would be irrelevant if this Court were able to reach the merits of his Fourteenth Amendment claim. An indigent defendant is entitled to appointed counsel on his first appeal as of right, and it has long been settled that "the right to be furnished counsel does not depend on a request." *Swenson v. Bosler*, 386 U.S. 258, 260 (1967) (per curiam) (quotations omitted); *see also, e.g.*, *Koenig v. North Dakota*, 755 F.3d 636, 642 (8th Cir. 2014). In assessing the petition in *Calaff*, Judge Sweet persuasively concluded that the process for an indigent defendant to request appellate counsel in the New York Appellate Division, First Department is "unreasonably confusing," misleading, and inaccessible. 215 F. Supp. 3d at 252–53. What confuses the typical indigent defendant is likely to be even less well understood by a sixteen-year-old defendant tried as an adult like Dockery. *See Perez*, 12 N.E.3d at 428 (Rivera, J., dissenting) (advocating that youth be considered "in cases involving minor children and their right to appellate review"). Dockery's merits claim is therefore compelling. But that assessment of the merits does not alter the Court's subject matter jurisdiction analysis under *Lackawanna* and *Calaff*.

Last, Dockery argues that this Court may not consider the State's arguments about the second *Lackawanna* exception, as applied by *Calaff*, because the State waived the issue in earlier briefing. Dockery Suppl. Br. at 8. But the State did timely file briefing on this question once prompted to by this Court. Gov't Suppl. Br., Dkt. No. 39. More importantly, the proper application of *Lackawanna* implicates this Court's subject matter jurisdiction and therefore "cannot be waived." *Torres v. Senkowski*, 316 F.3d 147, 153 (2d Cir. 2003).

Because Dockery is not currently in custody serving the sentence he received in 1986 and because neither *Lackawanna* exception is satisfied here, the Court concludes that it lacks subject matter jurisdiction to consider Dockery's Fourteenth Amendment claim regarding his appeal of his 1986 conviction.

Even if the Court were to set aside the custody requirement, it also concludes, as did Magistrate Judge Fox, that the present habeas petition is a "second or successive" petition because Dockery previously attacked his 2000 conviction in a habeas petition denied in 2013. Report at 13–14. The Court must dismiss a second or successive petition unless the petition either "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court" or it raises new, previously unavailable facts that prove the petitioner's innocence of the underlying offense. 28 U.S.C. § 2244(b)(1)–(2). Additionally, a petitioner must receive prior authorization from the court of appeals before filing a successive petition in the district court. *Id.* § 2244(b)(3). Because Dockery does not even purport to satisfy these statutory prerequisites, the Court lacks subject matter jurisdiction on this alternative basis. *Torres*, 316 F.3d at 153 (holding that

§ 2244(b)'s authorization requirement is jurisdictional and not waivable).

Dockery responds that the second-or-successive-petition prohibition should not be understood literally but instead with reference to broader "equitable principles." Objection at 21 (quoting *James v. Walsh*, 308 F.3d 162, 167 (2d Cir. 2002)). He invokes the Second Circuit's holding that a later-filed petition is not "second or successive" when it asserts a claim that "did not exist" at the time the earlier petition was filed. *James*, 308 F.3d at 168. This holding, however, does not save Dockery's petition from § 2244(b)'s prohibition. Dockery initially filed his first petition in June 2005, and he then filed an amended first petition in June 2010. Dkt. Nos. 1, 27, *Harris v. Phillips*, No. 05-CV-2870 RRM, 2013 WL 1290790 (E.D.N.Y. Mar. 28, 2013). As detailed above, Dockery by 2010 had learned about the process to perfect an appeal and written to the appellate division about his 1986 appeal, and the appellate court had dismissed that appeal the first of two times for failure to prosecute. *Perez*, 12 N.E.3d at 419. Though Dockery's right-to-appellate-counsel claim existed and was plainly known to him in 2010, he did not raise it in his amended first petition and he thus missed his opportunity for collateral review of the claim. *See Harris*, 2013 WL 1290790, at *4. His second petition that raises the claim for the first time therefore "shall be dismissed." 28 U.S.C. § 2244(b)(1).

The Court adopts Magistrate Judge Fox's conclusion as to the second-or-successive- petition ground, but it does not decide the other alternative bases for denial identified in the report.

III. Conclusion

For the reasons discussed above, the Court concludes on two independent grounds that it does not have subject matter jurisdiction to consider the merits of the petition. The Court therefore adopts Magistrate Judge Fox's recommendation and denies Dockery's Petition for Writ of Habeas Corpus.

Though this Court denies Dockery's petition, the Court finds that Dockery makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). The Court therefore GRANTS Dockery's request for a certificate of appealability as to all claims raised in his habeas petition. Objection at 25. The Court further finds that an appeal of this order would be in good faith and therefore GRANTS Dockery *in forma pauperis* status on appeal. *See Coppedge v. United States*, 369 U.S. 438, 444–45 (1962).

SO ORDERED.

All Citations

Slip Copy, 2021 WL 3667943

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[STAMP]
USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #. _____
DATE FILED: 9/8/17

ALEXANDER DOCKERY,

Petitioner,

—v.—

WILLIAM LEE, SUPERINTENDENT,

Respondent.

15-CV-7866 (AJN) (KNF)

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE ALISON J. NATHAN,
UNITED STATES DISTRICT JUDGE

INTRODUCTION

On October 5, 2015, Alexander Dockery ("Dockery"), represented by Daniel F. Kolb ("Kolb"), Shahira D. Ali, Matthew Cormack and Sarah Breslow ("Breslow"), of the law firm Davis Polk & Wardwell LLP, filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. Dockery indicated the following in his petition:

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: Supreme Court of the State of New York, County of New York
   (b) Criminal docket or case number (if you know): Ind. No. 3931/85
2. (a) Date of judgment of conviction (if you know): 2/6/1986
   (b) Date of sentencing: 2/28/1986
3. Length of sentence: Robbery First Degree (2-6 Years); Robbery Second Degree (1-3 Years) (Concurrent)
4. In this case, were you convicted on more than one count or of more than one crime: Yes
5. Identify all crimes of which you were convicted and sentenced in this case: One count of First Degree Robbery; Two counts of Second Degree Robbery

Dockery asserts: (1) "New York's procedure that requires defendants to submit a detailed application for appointed counsel on appeal is contrary to Due Process and Equal Protection Clauses of the U.S. Constitution, amend. XIV"; and (2) "[t]he Court of

Appeals' determination that Dockery—having received no notice as to how to appeal—had 'abandoned' his appeal, was inconsistent with the Due Process and Equal Protection Clauses of the U.S. Constitution, amend. XIV, because Dockery did not understand that he was required to apply for appellate counsel and did not abandon his right to counsel knowingly." Dockery answered "yes" to question No. 17 in his petition: "Do you have any future sentence to serve after you complete the sentence for the judgment you are challenging?" He indicated that the court "that imposed the other sentence you will serve in the future" is the "Supreme Court of the State of New York, County of Kings," and the sentence, "25 years to life under the mandatory persistent felony offender/three strikes rule," was imposed on him, on April 24, 2000. Dockery answered "yes" to question No. 17(d): "Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future?" In his petition, Dockery seeks the following relief: "Reinstatement of Dockery's direct appeal of his conviction." In support of his petition, Dockery submitted a memorandum of law and a declaration by Breslow with: (1) Exhibit A, "Affirmation of Robert S. Dean, Attorney-in-Charge, Center for Appellate Litigation," dated September 24, 2015; (2) Exhibit B, "Affirmation of Richard Joselson, Supervising Attorney, Criminal Appeals Bureau, The Legal Aid Society," dated September 30, 2015; (3) Exhibit C, a copy of *"Dockery v. New York,* 135 S. Ct. 229 (2014)"; (4) Exhibit D, a copy *of* "*People v. Dockery,* 23 N.Y.3d 89 (2014)"; (5) Exhibit E, a copy of "the briefs submitted to the New York Court of Appeals in *People v. Dockery,* 23 N.Y.3d 89 (2014)"; and (6) a copy of "the record presented to the New

York Court of Appeals in *People v. Dockery,* 23 N.Y.3d 89 (2014)."[1] The respondent, represented by Deborah L. Morse, Assistant District Attorney, New York County, opposes the petition.

BACKGROUND

In 1986, when Dockery was 16 years old, he was sentenced, upon a jury conviction, for first degree robbery and second-degree robbery to an aggregate of two to six years imprisonment. At the conclusion of the sentencing proceeding, Dockery's trial counsel gave him a written notice that explains how an indigent person could obtain legal assistance in connection with seeking relief on appeal. Dockery's trial counsel filed a notice of appeal on Dockery's behalf. Dockery completed his 1986 sentence, without perfecting his appeal.

In 1992, Dockery pleaded guilty to third-degree attempted criminal possession of a weapon. In adjudicating Dockery a second violent felony offender, the court inquired about his 1986 conviction. Dockery's assigned counsel requested time to review

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[1] Exhibits A and B, affirmations made in 2015, are not part of the state-court record because they postdate the 2014 state-court decision challenged by the petition and have been submitted in contravention to Cullen v. Pinholster, 563 U.S. 170, 181, 131 S. Ct. 1388, 1398 (2011), holding that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." Dockery's reliance on Young v. Conway, 715 F.3d 79, 82-83 (2d Cir. 2013), for his contention that Pinholster is not "a full bar to a federal court's ability to consider materials outside of the state court record," is misplaced because the court in Young v. Conway did not state that Pinholster permits courts "to consider materials outside of the state court record" to reach their results.

the 1986 conviction file, but the prosecutor stated "it would have been appealed by now." Thereafter, Dockery, represented by the same assigned counsel, was sentenced, in absentia, as a second violent felony offender.

In 2000, under the name John Harris, Dockery was convicted for second-degree burglary and second-degree criminal trespass and was sentenced, as a persistent felony offender, to 25 years to life imprisonment. In 2008, Dockery requested from the state court a copy of the notice of appeal, the brief and any other documents in connection with his 1986 conviction and asked for the outcome of his appeal of that conviction. In response, the court sent him an in forma pauperis form. Dockery made an in forma pauperis application in connection with the appeal of his 1986 conviction. The prosecution made a motion to dismiss the appeal for failure to prosecute. Thereafter, counsel was appointed to assist Dockery. The motion to dismiss was granted and the dismissal of the appeal was affirmed. People v. Perez, 23 N.Y.3d 89, 98, 989 N.Y.S.2d 418, 419 (2014).

PETITIONER'S CONTENTIONS

Dockery asserts, in ground one of his petition:

> New York's procedure that requires indigent defendants to submit a detailed application for appointed counsel on appeal is contrary to the Due Process and Equal Protection Clauses of the U.S. Constitution, amend. XIV. . . . Dockery was indigent at the time of his trial and conviction, but appellate counsel was not appointed to perfect his appeal because the First Department—unlike the Second Department, 48 other

> states, and the federal courts—requires that indigent either assistance in understanding the requirement or in preparing the application; and Dockery did not fulfill that requirement.

In ground two of his petition, Dockery asserts:

> The Court of Appeals' determination that Dockery—having received no notice as to how to appeal—had "abandoned" his appeal, was inconsistent with the Due Process and Equal Protection Clauses of the U.S. Constitution, amend. XIV, because Dockery did not understand that he was required to apply for appellate counsel and did not abandon his right to counsel knowingly. . . . After his conviction, Dockery instructed his trial counsel to file a notice of appeal and was given a notice regarding his right to appeal. The notice indicated that if he was without funds after the notice of appeal was filed, he must apply for counsel. Dockery reasonably believed that his trial counsel would handle the entire appeal and did not understand that the application requirement applied to him. Dockery did not know—and he was never told that his trial counsel would only file the notice of appeal, and would not perfect the appeal. Because he did not apply for counsel, his appeal was not perfected and he unknowingly lost his right to appeal. Dockery for years believed that his trial counsel had pursued an unsuccessful appeal and therefore did not take any additional steps.

> In the preliminary statement of his memorandum of law, Dockery contends:
>
> This petition for habeas corpus targets a New York criminal procedure that caused Petitioner Alexander Dockery to lose his constitutional right to appointed counsel and, as a result, his guaranteed right to appeal a criminal conviction. Because New York requires indigent defendants to apply for appellate counsel without giving clear notice of the need to apply, countless defendants in New York, like Petitioner Dockery, have lost their right to appellate counsel and their right to appeal. . . . The Constitution requires that if a state provides convicted defendants with the right to appeal their criminal convictions and a convicted defendant is unable to afford counsel, the state must provide appointed appellate counsel for that defendant. *Douglas v. California,* 372 U.S. 353, 357-58 (1963). . . . New York's imposition on indigent defendants of the burden of applying for appellate counsel without assistance conflicts directly with the Supreme Court's holding that indigent criminal defendants are entitled to appointed counsel on appeal under the Equal Protection and Due Process Clauses of the Constitution. . . . This petition for habeas relief . . . raise[s] and challenge[s) this fundamental defect in the procedure in New York for providing indigent and poorly educated defendants with counsel on appeal.

Dockery asserts that the state court's decision "was an unreasonable application of, and contrary to, clearly established federal law." He contends that,

"[u]nder [Douglas v. People of State of California, 372 U.S. 353, 83 S. Ct. 814 (1963)], Dockery, who was unquestionably indigent, was entitled to appointed counsel on the direct appeal of his criminal sentence." Dockery maintains that the Supreme Court held in Douglas that "a state may not administer criminal appeals in a manner that 'discriminate[s] against some convicted defendants on account on their poverty.'" According to Dockery, the state court's decision that "he suffered 'no constitutional deprivation' because he was 'given notice of how to obtain a lawyer at state expense'" is contrary to clearly established law for two reasons: (i) "requiring indigent defendants to affirmatively apply for counsel places an impermissible burden on the constitutional right established by *Douglas*"; and (2) "even if New York's application requirement were permissible, the Court of Appeals decision was still contrary to *Douglas* because Dockery was only informed of *how* to apply for counsel, but was never informed that he *needed* to apply. It is settled that one cannot abandon a constitutional right unknowingly. [Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019 (1938)]." Dockery contends that his "*Douglas* right to appellate counsel cannot be waived unknowingly," and the state court's decision "rests on the unsupportable premise that Dockery knowingly waived his right to appointed appellate counsel by failing to apply for such counsel, despite not understanding that he needed to make such an application" this "premise is inconsistent with clear Supreme Court precedent."

Dockery contends that "the right to counsel established in *Douglas* has no application requirement," and "[i]t is an unreasonable application of *Douglas* to require indigent defendants to successfully apply for constitutionally required

counsel." Dockery asserts that "the Supreme Court never held or even suggested that an indigent defendant must take some affirmative step to obtain counsel required by *Douglas*. Indeed, the Supreme Court has stated that 'the right to be furnished counsel [on appeal] does not depend on a request.'" [Swenson v. Bosler, 386 U.S. 258, 260, 87 S. Ct. 996, 998 (1967)] (quoting *Carnley v. H.G. Cochran, Jr.,* 369 U.S. 506, 513, 82 S. Ct. 884, 889 (1962)) (internal quotation marks omitted)."

Dockery contends that "the Supreme Court has held that courts must make 'every reasonable presumption against waiver of fundamental constitutional rights.' *Zerbst,* 304 U.S. at 464," and the state court's "statement that Dockery received 'clear notice of *how* to obtain a lawyer at state expense,' . . . wholly ignores the complexity of the information required to make an application . . . and it critically misses the fact that the [Notice of Right to Appeal] did not communicate clearly to Dockery that he, Dockery, needed to apply for counsel." Dockery maintains that the state court "incorrectly relied on its prior decision in *People v. West,* 100 N.Y.2d 23 (2003)" because "Dockery received no notice that his failure to apply for appellate counsel meant his appeal was not perfected."

RESPONDENT'S CONTENTIONS

The respondent contends that "the petition should be dismissed because petitioner is not 'in custody' for the 1986 conviction that is the subject of the challenge." The respondent asserts that

> "[w]ith certain exceptions not applicable here, a state-court conviction will not satisfy the "in custody" requirement even if it served

> to enhance the very subsequent sentence on which the petitioner is incarcerated at the time of the habeas application and thus can be viewed as a cause of petitioner's incarceration. Lackawanna County District Attorney v. Coss, 532 U.S. 394 (2001); Maleng v. Cook, 490 U.S. 488 (1989). The rule is clear: If a person has fully served his sentence for a state court conviction and has been released unconditionally, he is not 'in custody' for that conviction even if that state-court conviction "has been used to enhance the length of a current or future sentence imposed for a subsequent conviction." Maleng, 490 U.S. at 491.

Since the petitioner must still be in state custody pursuant to the "conviction or sentence under attack," and Dockery is not in custody pursuant to the 1986 conviction that he challenges in this petition, the court has no jurisdiction over his petition. Although Dockery's 2000 sentence was enhanced by the 1986 conviction, "this enhancement effect is not enough to satisfy the 'in custody' requirement for habeas review." "One exception to this 'in custody' rule permits the challenge of a prior enhancement producing conviction where there was the kind of wholesale Sixth Amendment violation featured in Gideon v. Wain[w]right, 372 U.S. 335 (1963)"; however, that exception does not apply to Dockery because his "1986 conviction was not obtained in violation of Gideon." Moreover, "the two other possible exceptions to the 'in custody' requirement" do not apply to Dockery, namely, where a petitioner challenges a prior conviction used to enhance a current sentence if either: "(1) the state court, 'without justification, refuse[d] to rule on a

constitutional' challenge to the prior conviction that was 'properly presented to it,' or (2) the defendant 'obtain[ed] compelling evidence that he is actually innocent' of the prior crime, and petitioner could not have uncovered the evidence 'in a timely manner.'"

The respondent contends that "the state court did not violate clearly established Supreme Court precedent by dismissing petitioner's appeal, which had remained dormant for fully 22 years," and in light of "the complete lack of credible justification for that extraordinary delay," because the Supreme Court has never held "that 'due process requires state courts to provide for appellate review where the would-be appellant has not satisfied reasonable preconditions on her right to appeal as a result of her own conduct.' Goeke v. Branch, 514 U.S. 115, 119-120 (1995)." According to the respondent, "a state court is entitled to establish 'documentary requirements and timely filing schedules' as 'reasonable preconditions' of the right to appeal." The state court considered all relevant factors properly when it dismissed Dockery's appeal for failure to prosecute.

The respondent asserts that "the state court procedure for appointing appellate counsel comported fully with constitutional requirements" because Dockery's failure to perfect his appeal was "a willful, strategic choice that had nothing to do with the procedure for the assignment of appellate counsel" and he "had forfeited his right to appeal by having waited—inexcusably—22 years after his 1986 conviction to express any interest in perfecting his appeal." The state procedure only required Dockery to "provide proof of financial need, which was a permissible rule," and "the Supreme Court has never held that a defendant cannot be required to demonstrate his inability to afford appellate counsel."

The respondent maintains that Dockery's "challenge to the First Department's procedure for obtaining appellate counsel is unreviewable and, in any event, without merit." Furthermore, Dockery is not entitled to an evidentiary hearing because no basis exists "upon which to allow petitioner to develop new facts in a federal habeas corpus proceeding."

PETITIONER'S REPLY

Dockery contends that "[t]his habeas petition is a direct challenge to New York's requirement that indigent defendants—without any assistance—apply for appointment of appellate counsel.[2] The challenge is lodged because imposing that procedural hurdle effectively denies indigent defendants their constitutional right to appellate counsel and is an evident denial of equal protection and due process." Dockery asserts that the "respondent's arguments as to the merits are not persuasive" because, inter alia, the state court "unreasonably failed to consider Dockery' s status as a juvenile at the time of his 1986 conviction and sentencing when evaluating the delay in prosecuting this appeal," as "Judge Rivera stated in her dissent."

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[2] Dockery did not assert this ground in his petition or under the section "Argument" of his memorandum of law. Dockery asserted in his petition that "requiring indigent defendants to affirmatively apply for counsel places an impermissible burden on the constitutional right established by *Douglas,"* not that requiring that indigent defendants apply for counsel "without any assistance" violates clearly established federal law. However, "[a]rguments may not be made for the first time in a reply brief." Knipe v. Skinner, 999 F.2d 708, 711 (2d Cir. 1993).

Dockery asserts that the "respondent's procedural arguments are without merit." According to Dockery, the respondent "seeks dismissal of the petition based on purported procedural deficiencies," namely, that: "(1) Dockery cannot challenge his 1986 'conviction' because he is no longer serving his sentence under that conviction; and (2) because Dockery did not promptly challenge the 1986 'conviction' on constitutional grounds, he cannot now complain about the sentence on his 2000 conviction being extended due to the denial of his right to counsel in 1986." Dockery contends that he "is challenging the validity of his 1986 conviction by attacking the portion of his 2000 sentence that was added as a result of that conviction." He asserts, in a footnote in his reply:

> Nothing in the Southern District's form petition suggests Dockery needed to identify the later *sentence* as being challenged. Rather, the form only requests that petitioner lists the *conviction* being challenged. Dockery's brief supporting his challenge is very clear that, as in *Maleng* and *Lackawanna,* he is challenging the later sentence based on the constitutional infirmities in his earlier conviction.

Dockery contends that

> in *Lackawanna,* . . . eight Justices agreed that a petitioner who was in custody on a sentence that was extended by an earlier conviction could challenge the current extended sentence on the basis of a constitutional infirmity in the earlier conviction. . . . Given the voting alignment in *Lackawanna,* Respondent's narrow reading

> is inappropriate, as six Justices would allow challenges to prior convictions when, in addition to *Giddeon* violations, the petitioner lost his opportunity to challenge the earlier conviction "due to no fault of his own."

LEGAL STANDARD

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides: "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." 28 U.S.C. § 2254(a). The Supreme Court has "interpreted the statutory language as requiring that the habeas petitioner be 'in custody' under the conviction or sentence under attack at the time his petition is filed." Maleng, 490 U.S. at 490-91, 109 S. Ct. at 1925. A habeas petitioner does not remain "'in custody' under a conviction after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted." Id. at 492, 109 S. Ct. at 1926. "[F]ederal postconviction relief is [generally not] available when a prisoner challenges a current sentence on the ground that it was enhanced based on an allegedly unconstitutional prior conviction for which the petitioner is no longer in custody." Lackawanna County Dist. Attorney, 532 U.S. at 396, 121 S. Ct. at 1570. The Supreme Court carved out "an exception to the general rule for § 2254 petitions that challenge an enhanced sentence on the basis that the prior conviction used to enhance the sentence was

obtained where there was a failure to appoint counsel in violation of the Sixth Amendment, as set forth in *Gideon v. Wainwright,* 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963). The special status of *Gideon* claims in this context is well established in our case law." Id., at 404, 121 S. Ct. at 1574. Other than the Gideon exception to the general rule, the Supreme Court left open the question "whether, or under what precise circumstances, a petitioner might be able to use" a § 2254 "petition directed at the enhanced sentence . . . for review of the prior conviction." Id. at 406, 121 S. Ct. 1575.

APPLICATION OF LEGAL STANDARD

What Conviction or Sentence Does Dockery's Petition Attack?

Dockery indicated in his petition that he is challenging "the judgment of conviction" entered in 1986, by the "Supreme Court of the State of New York, County of New York." In his memorandum of law, Dockery made two arguments in connection with his challenge to his 1986 judgment of conviction: (1) "The Right to Counsel Established In *Douglas* Has No Application Requirement"; and (2) "The *Douglas* Right to Appellate Counsel Cannot Be Waived Unknowingly." The only place in his petition where Dockery mentions the 2000 sentence imposed on him by the "Supreme Court of the State of New York, County of Kings," is in his answer to the petition's question No. 17: "Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging?" Dockery makes no arguments challenging his 2000 sentence on any ground, including that his 2000 sentence was enhanced based on the unconstitutionally obtained

1986 conviction; he does not even mention his 2000 sentence in the section entitled "Argument" of his memorandum of law. Thus, Dockery's petition indicates, clearly and unambiguously, that he is challenging his 1986 judgment of conviction, entered by the "Supreme Court of the State of New York, County of New York," not the 2000 sentence, imposed on him by the "Supreme Court of the State of New York, County of Kings."

Dockery's contention, relegated to a footnote in his reply, that his "brief supporting his challenge is very clear that, as in *Maleng* and *Lackawanna,* he is challenging the later sentence based on the constitutional infirmities in his earlier conviction," is astonishing. Dockery did not make this contention proceeding pro se; he is represented by counsel. More shocking and disturbing than the claim that Dockery's "'brief supporting his challenge is very clear" that his petition is challenging his 2000 sentence is the contention in the same footnote that "[n]othing in the Southern District's form petition suggests Dockery needed to identify the later *sentence* as being challenged. Rather, the form only requests that petitioner list the *conviction* being challenged." The petition completed and filed by counsel on Dockery's behalf asked Dockery to identify: (i) the name and location of "court that entered **the judgment of conviction you are challenging**"; (ii) criminal docket or case number; (iii) date of "**the judgment of conviction**"; (iv) date of sentencing; (v) length of sentence; (vi) whether he was convicted on more than one count or of more than one crime; and (vii) "all crimes of which you were convicted and sentenced in this case." The petition form does not request "that a petitioner list the *conviction* being challenged," as Dockery contends; rather, the petition

form asked Dockery to identify "the judgment of conviction you are challenging." "A judgment is comprised of a conviction and the sentence imposed thereon and is completed by imposition and entry of the sentence." New York Criminal Procedure Law § 1.20(15); accord Fed. R. Crim. P. 32(k)(1). Accordingly, by identifying in his petition that he is challenging "the judgment of conviction" entered in 1986 by the "Supreme Court of the State of New York, County of New York," in criminal docket or case number "Ind. No. 3931/85," Dockery indicated, clearly and unambiguously, that he is challenging his 1986 judgment of conviction, which includes his 1986 conviction by the jury and sentence by the court respecting criminal docket or case number "Ind. No. 3931/85." The fact that the petition identified: (a) "2/6/1986" as the "[d]ate of the judgment of conviction," when that is the date the jury rendered its guilty verdict; and (b) "2/28/1986" as the "[d]ate of sentencing," suggests that Dockery's counsel is not aware that the judgment of conviction includes the sentence and cannot precede the sentencing date.

Dockery is not challenging his 2000 sentence because he never indicated so anywhere in his petition or made any arguments in connection with his 2000 sentence in his memorandum of law in support of the petition. Furthermore, Dockery indicated in his petition that he already made a petition that challenged his 2000 "judgment or sentence to be served." That petition, "challenging his conviction for Burglary in the Second Degree and Criminal Trespass in the Second Degree," which Dockery filed under the name John Harris, was denied in 2013. See Harris v. Phillips, No. 05-CV-2870, 2013 WL 1290790, at *l (E.D.N.Y. March 28, 2013). Thus, if it were true, as Dockery contends in

the footnote in his reply, that the instant petition challenges his 2000 sentence, the instant petition would be "a second or successive habeas corpus application under section 2254," as provided by 28 U.S.C. § 2244. This is so because Dockery conceded in his petition that he already challenged his 2000 "judgment or sentence to be served," in a petition which was denied, in 2013. In his first petition challenging his 2000 judgment of conviction, Dockery raised four issues: "(1) he was arrested without probable cause in violation of the Fourth Amendment; (2) he was convicted upon insufficient evidence; (3) he was denied the effective assistance of trial counsel; and (4) he was denied effective assistance of appellate counsel." Harris, 2013 WL 1290790, at *4. None of the four issues Dockery raised in his first petition challenging his 2000 judgment of conviction is raised in the instant petition. Thus, if it were the case, as it is not, that the instant petition challenges Dockery's 2000 sentence, the instant petition would have to be dismissed. This is so because Dockery failed to satisfy the requirements of 28 U.S.C. §§ 2244(b)(2) and 2244(b)(3) that would permit the instant petition to be filed as a second or successive petition, since the claims he raises in the instant petition were not presented in the first petition challenging his 2000 judgment of conviction. Thus, to contend that the instant petition is challenging Dockery's 2000 sentence is not only baseless but also troubling because it suggests that counsel is not knowledgeable about the basics of AEDPA. Furthermore, Dockery's argument that he "is challenging the validity of his 1986 conviction by attacking the portion of his 2000 sentence that was added as a result of that conviction," appears to suggest that he is challenging

both the 1986 judgment of conviction and his 2000 sentence. Such an argument is meritless because"[a] petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court." Rule 2(e) of the Rules Governing Section 2254 Cases in the United States District Courts. Since Dockery's 1986 judgment of conviction and his 2000 judgment of conviction were entered by different courts, he would be required to file a separate petition covering the judgment of each court if he wished to seek relief from both the 1986 and the 2000 judgments of conviction; Dockery did not do this. The Court finds that the instant petition challenges Dockery's 1986 judgment of conviction, not his 2000 sentence, as contended in Dockery's reply.

Whether Dockery Satisfies the "In Custody" Requirement of 28 U.S.C. § 2254

Although Dockery indicated in his petition that he is challenging his 1986 judgment of conviction, and it is undisputed that he completed the sentence imposed on him by the 1986 judgment of conviction in 1992, Dockery failed. to address the "in custody" requirement of 28 U.S.C. § 2254 in his memorandum of law. In reply to the respondent's argument that "the petition should be dismissed because petitioner is not 'in custody' for the 1986 conviction that is the subject of the challenge," Dockery contends that "respondent's procedural arguments are without merit." However, the "in custody" requirement of 28 U.S.C. § 2254 is jurisdictional, not procedural, because it concerns the "subject-matter jurisdiction of the habeas court." See Maleng, 490 U.S. at 494, 109 S. Ct. at 1927.

Dockery was not "in custody," pursuant to the 1986 judgment of conviction that is under attack, at the time the instant petition was filed because his sentence pursuant to the 1986 judgment of conviction "ha[d] *fully expired* at the time his petition [was] filed." Id. at 491, 109 S. Ct. at 1925. Dockery did not remain "'in custody' under [the 1986 judgment of] conviction after the sentence imposed for it ha[d] fully expired, merely because of the possibility that the [1986] conviction [would] be used to enhance the sentences imposed for any subsequent crimes of which he is convicted." Id. at 492, 109 S. Ct. 1926. Dockery filed the instant petition while he was in custody pursuant to the 2000 judgment of conviction. However, Dockery is not challenging his 2000 judgment of conviction in the instant petition. Moreover, unlike the petitioner in Maleng, Dockery: (i) is not proceeding pro se and he is not entitled to "the deference to which *pro se* litigants are entitled." Id. at 493, 109 S. Ct. at 1927; (ii) does not assert, in the instant petition, that his prior 1986 conviction had been used illegally to enhance his 2000 sentence; and (iii) does not have a future sentence claimed to be enhanced by an illegal prior conviction that he had not yet begun to serve. The Court finds that Dockery is not in custody pursuant to the judgment of conviction he is attacking in the instant petition; rather, he is in custody pursuant to the judgment of conviction he is not attacking in the instant petition.

Dockery does not satisfy the only exception to the general rule that a petitioner "may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained" which allows "§ 2254 petitions that challenge an enhanced sentence on the basis that the prior conviction used to enhance the

sentence was obtained where there was a failure to appoint counsel in violation of the Sixth Amendment, as set forth in *Gideon v. Wainwright,* 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963)." Lackawanna County Dist. Attorney, 532 U.S. at 404, 121 S. Ct. at 1574. That is because, in the instant petition, Dockery does not: (1) "challenge an enhanced sentence," namely, his 2000 sentence; and (2) assert a Sixth Amendment violation pursuant to Gideon because he had counsel at his 1986 trial and sentencing. Since the instant petition is not "directed at the enhanced sentence," id. at 406, 121 S. Ct. at 1575, namely, the 2000 sentence, Dockery does not qualify to have his petition reviewed under the Lackawanna exception. The Court finds that Dockery is not "in custody," as required for the purpose of subject-matter jurisdiction under 28 U.S.C. § 2254.

Additionally, Dockery does not satisfy the "in custody" jurisdictional requirement because he does not assert, in his petition, the right to be released. At the core of a habeas corpus challenge of a state judgment of conviction is a request for "immediate release or a speedier release from that imprisonment." Preiser v. Rodriguez, 411 U.S. 475, 500, 93 S. Ct. 1827, 1841 (1973). The relief Dockery seeks through the instant petition, challenging his 1986 judgment of conviction, is "[r]einstatement of Dockery's direct appeal of his conviction," not "immediate release or a speedier release from that imprisonment." Dockery cannot seek "immediate release or speedier release" from his imprisonment, pursuant to the 1986 judgment of conviction, because he completed his 1986 sentence in 1992. Dockery does not make citation to any authority conferring on a United States district court jurisdiction over a state court or permitting a United States district court to order a

state court to reinstate "Dockery' s direct appeal of his conviction." Thus, the relief he seeks cannot be obtained using 28 U.S.C. § 2254. Even assuming that the relief Dockery seeks through this petition, "[r]einstatement of Dockery's direct appeal of his [1986 state court] conviction," could be obtained in this proceeding, it would not provide "immediate or speedier release." The Court finds that Dockery does not satisfy the "in custody" jurisdictional requirement because he does not assert his right to be released. See Wilkinson v. Dotson, 544 U.S. 74, 83, 125 S. Ct. 1242, 1248 (2005) ("[A] case challenging a sentence seeks a prisoner's 'release' in the only pertinent sense: It seeks invalidation (in whole or in part) of the judgment authorizing the prisoner's confinement[.]").

RECOMMENDATION

For the foregoing reasons, I recommend that the petition be dismissed for lack of subject- matter jurisdiction.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Alison J. Nathan, 40 Centre Street, Room 2102, New York, New York, 10007, and to the chambers of the undersigned, 40 Centre Street, Room 425, New York, New York, 10007. Any requests for an extension of time for filing objections must be directed to Judge

Nathan. ***Failure to file objections within fourteen (14) days will result in a waiver of objections and will preclude appellate review.*** See Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466 (1985); Cephas v. Nash, 328 F.3d 98, 107 (2d Cir. 2003).

Dated: New York, New York
September 8, 2017

Respectfully submitted,

/s/ Kevin Nathaniel Fox
KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

Appendix D

COURT OF APPEALS OF NEW YORK

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23 N.Y.3d 89, 12 N.E.3d 416, 989
N.Y.S.2d 418, 2014 N.Y. Slip Op. 02326

The People of the State of New York, Respondent,

—v.—

Reynaldo Perez, Appellant.

The People of the State of New York, Respondent

—v.—

Ivan Calaff, Appellant.

The People of the State of New York, Respondent

—v.—

Alexander Dockery, Also Known
as John Harris, Appellant.

The People of the State of New York, Respondent

—v.—

Teofilo Lopez, Also Known as Garcia Lopez,
Also Known as Isidoro Garcia, Appellant.

Court of Appeals of New York
55, 56, 57, 58

Argued February 20, 2014
Decided April 3, 2014

CITE TITLE AS: People v Perez

OPINION OF THE COURT

Smith, J.

These four cases involve criminal appeals that were not pursued for more than a decade—in one case more than two decades—after the filing of a notice of appeal. In each case, the Appellate Division dismissed the appeal on the People's motion. We hold that the dismissals in *People v. Perez, People v. Calaff* and *People v. Dockery* did not violate defendants' constitutional rights and were proper exercises of discretion. We remit the fourth case, *People v. Lopez,* to the Appellate Division so that counsel can be appointed to represent Lopez in opposing the dismissal of his appeal.

I

Perez

Reynaldo Perez was convicted of murder and manslaughter in 1996, and was sentenced to consecutive terms totalling 33 1/3 years to life. On

August 1, 1996, he filed a notice of appeal. In 1997, Perez's mother retained a lawyer whom we will call John Johnson to represent Perez on appeal, paying him a retainer of $30,000. Johnson did not prepare or file a brief.

The Departmental Disciplinary Committee for the Appellate Division, First Department began an investigation of Johnson in 2001. In 2003, the Committee notified Perez's mother that Johnson had been admonished for neglecting Perez's case. Apparently, Johnson continued to represent Perez after 2003, but he still did not pursue the appeal. In 2008, Johnson filed a motion in Supreme Court to set aside Perez's conviction under CPL 440.10. The motion was unsuccessful.

On August 22, 2012, Perez retained new counsel, who moved in the Appellate Division to enlarge the time to perfect Perez's appeal. The People cross-moved to dismiss the appeal. The Appellate Division granted the motion to dismiss on February 5, 2013, more than 16 years after the notice of appeal was filed (2013 N.Y. Slip Op. 63657[U] [2013]). A Judge of this Court granted leave to appeal (21 N.Y.3d 946 [2013]), and we now affirm.

Calaff

Ivan Calaff was convicted of attempted burglary, on his plea of guilty, in 1993, and sentenced to 3 to 6 years. At sentencing, he was handed a printed form explaining the need to file a notice of appeal and describing the steps to be taken "[i]f you are without funds" to request the assignment of counsel. On April 15, 1993, the lawyer who represented Calaff at sentencing filed a notice of appeal. Calaff did not request the assignment of appellate counsel. He served his time and was released from prison in 1996.

Calaff was later convicted of several other crimes. Eventually, in 2004, he was adjudicated a persistent violent felon on a burglary charge and was sentenced to 16 years to life. An appeal from the 2004 conviction was unsuccessful (*People v. Calaff,* 30 A.D.3d 193 [1st Dept. 2006]).

On May 9, 2012, the Center for Appellate Litigation, which had represented Calaff on the appeal from the 2004 conviction, moved to be appointed as his counsel on the appeal that had begun in 1993, and sought poor person relief. The Appellate Division assigned counsel, granted poor person relief, and enlarged the time to perfect the appeal (2012 N.Y. Slip Op. 76425[U] [2012]). The People moved to dismiss the appeal. In an affidavit submitted in opposition to the People's motion, Calaff asserted that the lawyer who represented him at sentencing had told him in 1993, in response to a question about the appeal: "Don't worry about that, I'll take care of it." In 2008, according to Calaff's affidavit, he began to make inquiries about the appeal from his 1993 conviction, but got no helpful response until the Center for Appellate Litigation agreed in 2012 to take the case.

On February 19, 2013, almost 20 years after the notice of appeal was filed, the Appellate Division granted the People's motion to dismiss, saying that defendant's attempt "to explain his failure to follow the instructions he received at sentencing. . . . is refuted by the sentencing minutes and otherwise without merit" (*People v. Calaff,* 103 A.D.3d 500 [1st Dept. 2013]). A Judge of this Court granted leave to appeal (21 N.Y.3d 1072 [2013]) and we now affirm.

Dockery

In 1986, Alexander Dockery, then 16 years old, was convicted of robbery and committed to the New York State Division for Youth for a term of 2 to 6 years. The lawyer who represented him at trial and sentencing filed a notice of appeal on his behalf on February 28, 1986. Nothing was done to pursue the appeal for 22 years. Meanwhile, Dockery, like Calaff, served his time, was released, and committed more crimes. In 2000, under the name John Harris, he was convicted of burglary and sentenced as a persistent violent felony offender to 25 years to life. His appeal from that conviction was unsuccessful (*People v. Harris,* 304 A.D.2d 839 [2d Dept. 2003]).

In 2008, Dockery moved pro se in the Appellate Division for poor person relief on his 1986 appeal. The People cross-moved to dismiss that appeal, and the Appellate Division granted the cross motion (2008 N.Y. Slip Op. 93213[U] [2008]). In 2011, Dockery, now represented by the Center for Appellate Litigation, moved to reinstate the 1986 appeal on the ground that he did not have the assistance of counsel at the time of the People's previous motion, and that service of that motion was defective. The appeal was reinstated (2011 N.Y. Slip Op. 93236[U] [2011]), the People again moved to dismiss it, and that motion was granted on June 21, 2012, more than 26 years after the notice of appeal was filed (2012 N.Y. Slip Op. 76557[U] [2012]). A Judge of this Court granted leave to appeal (21 N.Y.3d 911 [2013]), and we now affirm.

Lopez

Teofilo Lopez, having absconded before trial, was convicted in absentia of several counts of robbery in 1999. He was sentenced to concurrent terms of

imprisonment, the longest of which was 15 years. The record contains a form dated August 23, 1999, apparently signed on Lopez's behalf by his attorney, addressed "TO MY ATTORNEY/OR THE COURT CLERK," which says: "Please file a timely notice of appeal on my behalf." The parties agree that this document may be considered a timely notice of appeal.

Lopez remained a fugitive for approximately 11 years; nothing was done in that time to prosecute his appeal. In 2010, he was rearrested and returned to court. He was then resentenced to correct his original sentence, which had omitted a term of postrelease supervision (*see People v. Sparber,* 10 N.Y.3d 457 [2008]). The Legal Aid Society was assigned to represent him on appeal from the resentencing (2010 N.Y. Slip Op. 84894[U] [2010]).

In 2012, Legal Aid moved on Lopez's behalf to amend the order assigning counsel so that it applied to the 1999 conviction rather than the resentence, for "leave to file and serve a brief in support of reversing the judgment on direct appeal," and for other relief. The People moved to dismiss the appeal from the 1999 conviction for failure to prosecute. Legal Aid submitted an affirmation in opposition to this motion, making arguments on the merits and arguing, in the alternative, that the motion was premature because Legal Aid had not yet been assigned to the 1999 appeal, had not seen the trial record, and did not know what issues Lopez would raise.

The Appellate Division granted the People's motion to dismiss on October 25, 2012, more than 13 years after the notice of appeal was filed (2012 N.Y. Slip Op. 88716[U] [2012]). A Judge of this Court granted

leave to appeal (21 N.Y.3d 1017 [2013]), and we now reverse and remit for further proceedings.

Defendants formulate their arguments on appeal differently, but we think all can be interpreted as making two arguments: that their constitutional rights to a fair appellate process were violated, and that, even if there was no constitutional violation, the Appellate Division abused its discretion in dismissing their appeals. Lopez also argues, as he did below, that the Appellate Division acted prematurely in dismissing his appeal before counsel could review the trial record and identify the issues to be raised on appeal. We reject the arguments made by Perez, Calaff and Dockery. We agree with Lopez that the Appellate Division acted prematurely, and in his case we do not reach any other issue.

II

Defendants are correct in asserting that they have a constitutional right to a fair appellate procedure that provides them "with the minimal safeguards necessary to make an adequate and effective appeal" (*People v. West,* 100 N.Y.2d 23, 28 [2003]). That right includes a right to "receive the careful advocacy needed 'to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over'" (*id.,* quoting *Penson v. Ohio,* 488 U.S. 75 [1988])—i.e., a right to counsel. The *West* case establishes, however, that the procedure followed in *Perez, Calaff* and *Dockery* did not deprive the defendants in those cases of any constitutional right.

West bears a distinct resemblance to the cases now before us. The defendant there filed a notice of appeal but "failed to perfect his appeal for more than 14

years" (100 N.Y.2d at 24, 759 N.Y.S.2d 437, 789 N.E.2d 615). We held that the appeal was abandoned, and that the Appellate Division did not abuse its discretion in dismissing it. Noting that West had been given "clear instructions on how to apply for poor person relief" (*id.* at 28), we rejected his argument that he was constitutionally entitled to appointment of counsel to assist in preparing a poor person application.

Calaff's and Dockery's constitutional claims here are essentially identical to West's. They, like West, were given clear notice of how to obtain a lawyer at state expense, but failed year after year to ask for one. They, like West, suffered no constitutional deprivation when none was appointed. We reject Calaff's argument that *West* should be overruled.

Dockery seeks to distinguish his case from *West* on the ground that Dockery was only 16 when he first failed to request the assignment of counsel to represent him on appeal. The distinction might be more persuasive if the failure had not continued until Dockery was 38. But even if we assume that youthful defendants are constitutionally entitled to some relaxation of the rule that defendants who want to obtain appellate counsel must follow the simple instructions given them for requesting that relief, they are not entitled to 22 years of indulgence. Dockery was an adult during the great majority of the time in which he failed to seek counsel to pursue his appeal, and his situation is not constitutionally distinct from that of other adults. *Dowd v. United States ex rel. Cook,* 340 U.S. 206 (1951), on which Dockery relies, is not in point. The State in *Dowd* had enforced an unconstitutional rule forbidding a prisoner from filing appeal papers; the Supreme Court held that a long lapse of time in which the

prisoner took no action after the rule was rescinded was not a waiver of his constitutional claim. Here, the State did nothing to prevent Dockery from pursuing his appeal until the People moved in 2008 to dismiss it.

Perez's constitutional claim is more colorable than Calaff's and Dockery's, because Perez had a lawyer—one who was undoubtedly ineffective in failing to perfect the appeal that he was hired to pursue. We have held that a client who was victimized by his appellate lawyer's procedural errors has been deprived of his constitutional right to the effective assistance of counsel (*see People v. Syville,* 15 N.Y.3d 391, 397–398, [2010] [counsel ineffective for disregarding a timely request to file a notice of appeal]). But the long delay in Perez's appeal—from the notice of appeal in 1996 to the motion for an extension of time in 2012—cannot be attributed solely to Johnson's ineffectiveness. Perez knew at least by 2003, when Johnson was admonished by the Departmental Disciplinary Committee, that his lawyer was neglecting his case. At any time in the following nine years, if not sooner, he could have obtained another lawyer. His counsel said in a 2012 affirmation that Perez was "without funds to retain another attorney," but Perez has offered no explanation of why he failed to seek assigned counsel. *West* establishes that it is not unconstitutional to require a defendant to take some minimal initiative to assure himself adequate representation on appeal. The dismissal of Perez's appeal after his own lengthy neglect of it did not deprive him of any constitutional right.

III

Nor can we conclude that the Appellate Division abused its discretion in dismissing Perez's, Calaff's and Dockery's appeals. Two compelling facts stand out in all three cases: the delays were extremely long, and the defendants did not have a good excuse for them. Delays like this are inconsistent with an orderly and efficient system of appellate procedure, and if tolerated can bring a system into disrepute. Even if we assume—a large assumption—that the People can show no specific prejudice from the delays, the Appellate Division was not required as a matter of law to permit these appeals to proceed.

In *Calaff* and *Dockery,* there are other reasons supporting the exercise of the Appellate Division's discretion in the People's favor. Both Calaff and Dockery, having served their original sentences, continued to ignore their pending appeals until after they were adjudicated predicate felons—and then sought counsel to challenge the long-ago convictions. The facts permit an inference that these defendants did not simply neglect their appellate rights, but consciously chose not to exercise them until they acquired a reason to do so. The inference is particularly strong in Calaff's case, because his 1993 conviction was based on his guilty plea—a plea with which he was presumably satisfied when he entered it, and with which he may still have been satisfied until the earlier conviction became a problem in future cases. Appellate courts are not required to accommodate such belated changes of strategy by entertaining stale appeals (*cf. West,* 100 N.Y.2d at 27 [appeal held abandoned where the defendant "repeatedly attempted to bypass the state appellate process"]).

Perez has a more sympathetic case. There is no obvious strategic reason for his delay, and his mother did hire, at great expense, a lawyer who failed in his duty. But an unfortunate choice of lawyer does not entitle Perez, as a matter of law, to perfect his appeal 16 years after it was taken, where nine of those years elapsed after the lawyer's failure had been made the subject of a formal sanction, and where no reasonable excuse for that nine-year delay was offered.

IV

We decide *Lopez* on a narrower ground: The Appellate Division should not have dismissed Lopez's appeal before assigning him counsel on that appeal and giving counsel a chance to review the record. *Taveras v. Smith,* 463 F.3d 141 (2d Cir.2006) is directly in point. Taveras, like Lopez, had failed to appear for his trial, had been tried and convicted in absentia, and had remained a fugitive for years. Taveras's trial attorney, like Lopez's, filed a notice of appeal on his behalf, and the appeal remained dormant until Taveras was returned to court. The Appellate Division denied Taveras poor person relief and dismissed his appeal, without assigning counsel.

The United States Court of Appeals for the Second Circuit, considering Taveras's federal habeas corpus petition, found the Appellate Division dismissal to be "contrary to or an unreasonable application of settled Supreme Court precedent" (463 F.3d at 143)—specifically *Douglas v. California,* (372 U.S. 353 [1963]), which held that an indigent criminal defendant has a federal constitutional right to court-appointed counsel on his first appeal if the state has provided such an appeal as of right. The Second Circuit reasoned that since, under New York law, a

decision to dismiss an appeal by a former fugitive is discretionary, Taveras was entitled to a lawyer to argue that the court should exercise its discretion to retain the appeal (*see also People v. Kordish,* 22 N.Y.3d 922 [2013] [following the Second Circuit holding in *Taveras*]).

There is no meaningful difference between this case and *Taveras*, except that Lopez, unlike Taveras, was not completely without counsel when his appeal was dismissed—counsel had been appointed on Lopez's 2010 appeal from his resentencing. But Lopez did not have counsel on the 1999 appeal, and that is a fact of practical, not just technical, significance: his counsel had not reviewed, or even seen, the record of his 1999 trial. A right to the assistance of appellate counsel has not been honored where counsel has not looked at the record. We therefore remit the *Lopez* case to the Appellate Division, which should appoint counsel for Lopez and then consider de novo, after receiving counsel's submissions, whether Lopez's appeal should be dismissed or retained.

Accordingly, in *People v. Perez, People v. Calaff* and *People v. Dockery* the order of the Appellate Division should be affirmed. In *People v. Lopez,* the order of the Appellate Division should be reversed and the case remitted to the Appellate Division for further proceedings in accordance with this opinion.

Rivera, J. (dissenting). For the reasons stated by the majority I agree that the facts and law support affirmance of the Appellate Division's dismissal in *People v. Calaff,* and that reversal and remittal is required in *People v. Lopez,* in order to permit counsel to review the record and make any warranted submissions on behalf of defendant Lopez (*see* majority op. at 102). However, I part ways with the

majority in *People v. Perez* and *People v. Dockery* and would reverse in both cases.

In *People v. Perez,* the defendant's right to pursue a timely appeal was effectively thwarted by appellate counsel's violations of the professional duties and obligations he owed the defendant. Despite the defendant's years-long struggle to secure his attorney's services in furtherance of the appeal from his conviction, today's decision leaves him subject to possible life imprisonment without any appellate review of the merits of his claims. In *People v. Dockery,* the record is bereft of any indication that the Appellate Division took into consideration that defendant was a juvenile when he was convicted and the impact of his age on the defendant's ability to seek assistance with his appeal. Unlike the majority, I would expressly hold the Appellate Division must consider age when deciding whether to dismiss an appeal for failure to timely perfect.

Today's majority opinions in *Perez* and *Dockery* violate the defendants' fundamental rights to appeal their appellate convictions and, as a consequence, the Court's decisions in these cases undermine public confidence in the legal profession and our system of justice. I dissent.

I.

"[A] defendant has a fundamental right to appellate review of a criminal conviction" (*People v. Yavru–Sakuk,* 98 N.Y.2d 56, 59 [2002], citing *People v. Harrison,* 85 N.Y.2d 794, 796 [1995], *People v. Montgomery,* 24 N.Y.2d 130, 132 [1969], and CPL 450.10). A defendant's inexcusable delay in pursuing an appeal is grounds for dismissal (*see*CPL 470.60[1] [appellate court may "dismiss such appeal upon the

ground of ... failure of timely prosecution or perfection thereof"]), but as we recognized in *People v. Taveras,* the Appellate Division has broad authority to permit an appeal that is otherwise untimely to proceed (10 N.Y.3d 227, 233, [2008], citing CPL 470.60[1]). In fact, there is no legal impediment to the Appellate Division granting such permission in appropriate cases, regardless of the length of delay.

We have also recognized that "[t]he invariable importance of the fundamental right to an appeal, as well as the distinct role assumed by the Appellate Divisions within New York's hierarchy of appellate review (*see* N.Y. Const., art. VI, § 5; *see e.g.* CPLR 5501[c]), makes access to intermediate courts imperative" (*People v. Ventura,* 17 N.Y.3d 675, 680–681 [2011]). As a consequence, the Appellate Division's broad statutory authority to dismiss pending appeals cannot be accorded such an expansive view as to curtail defendants' basic entitlement to appellate consideration. As a matter of fundamental fairness, all criminal defendants shall be permitted to avail themselves of intermediate appellate courts as "the State has provided an absolute right to seek review in criminal prosecutions" (*id.* at 682 [citation omitted]; *see also* CPL 470.60[1]). Where the Appellate Division exceeds acceptable bounds in the exercise of this authority, it abuses its discretion in dismissing the appeal (*see e.g. id.* at 679).

II.

People v. Perez

Following his sentencing, in 1997 the defendant's family retained an attorney to prosecute the appeal

and paid him $30,000 as payment in full for his services. After taking some initial steps on behalf of the defendant this attorney failed to perfect the appeal, and, as the record reflects, violated his professional obligations by neglecting the defendant to work on other clients' cases.

The attorney's failures were so egregious as to be grounds for the defendant's complaint to the Departmental Disciplinary Committee for the Appellate Division, First Department. As a result of its investigation, the Disciplinary Committee formally admonished the defendant's attorney for violation of the Code of Professional Responsibility, DR 6–101(a)(3). In its 2003 letter to the defendant's mother, the Committee informed her that it had admonished the attorney for neglecting the defendant's case based on the attorney's admission that he performed "no work" on the appeal "for long periods of time, because he was working on other cases."

Even though the attorney did not complete the work he was paid for, he continued to represent the defendant, apparently because the defendant lacked funds to hire new counsel. Unfortunately for the defendant, this attorney failed to move for an enlargement of time to perfect his appeal. Instead, on September 12, 2008, the attorney moved to vacate the conviction, pursuant to CPL 440.10(1)(h), wholly avoiding presenting to the court his own professional failures and ineffectiveness in representing the defendant, and arguing instead that the trial counsel was ineffective for failing to challenge the legal sufficiency of the reckless/depraved indifference murder count. The People opposed, arguing that defendant had received overall meaningful representation at trial.

In December 2009, Supreme Court denied the motion in a one-paragraph decision stating, in part, that any alleged omission at trial by counsel "could have been raised as an issue on direct appeal (had defendant filed and perfected such an appeal)." In March, 2010, the attorney filed leave to appeal the denial of the 440 motion to the Appellate Division, which the Appellate Division denied in April 2010 (2010 N.Y. Slip Op. 67810[U] [2010]). No further action was taken by the attorney.

Then, in 2012, the defendant's newly retained counsel filed a motion to enlarge the time within which to perfect the defendant's appeal and attached a proposed brief for filing. The People cross-moved, pursuant to CPL 470.60, to dismiss the appeal for failure to timely prosecute. The Appellate Division, without opinion, denied the defendant's motion and granted the People's motion to dismiss the appeal (2013 N.Y. Slip Op. 63657[U] [2013]).

In this case, it cannot be disputed that the first appellate counsel's failure to perfect the appeal within the time limit set forth in the First Department's rules (*see* Rules of App. Div., 1st Dept. [22 NYCRR] § 600.8[b]) and his subsequent ineffectiveness, placed defendant in peril of losing his right to appeal for failure to prosecute, and set in motion the events which ultimately resulted in the dismissal of the defendant's appeal. The attorney's neglect resulted in years of delay that the defendant could have spent seeking to appeal his conviction, and the money spent on the attorney could have been used to pay for actual services rendered by new counsel. Moreover, the defendant's efforts to secure the attorney's professional paid-for services required the expenditure of time and resources pursuing a complaint before the Disciplinary Committee. While

the complaint resulted in the attorney's admonishment, this was insufficient to undo the damage already done to the defendant, who by then had no funds to retain new counsel. Expecting his paid-for legal services, the defendant again relied on his attorney. However, when the attorney had the opportunity he failed to pursue a direct appeal. Moreover, the attorney ignored one of the strongest arguments in favor of a motion for enlargement of time to perfect the defendant's appeal: attorney neglect as found by the Disciplinary Committee.

The defendant's conduct, under the circumstances of this case, does not support dismissal of his appeal. First, the defendant does not bear any blame for the initial delay in seeking to perfect his appeal because it was his attorney who failed to work on the case. As the majority acknowledges, up to 2003 the defendant cannot be blamed for the delay in perfecting his appeal because the defendant's attorney "was undoubtedly ineffective in failing to perfect the appeal that he was hired to pursue" (majority op. at 100, citing *People v. Syville,* 15 N.Y.3d 391, 397–398 [2010]). Second, the defendant took action against his attorney in order to secure proper representation. The record shows that the defendant and his family paid counsel, and when it appeared the attorney was derelict in his obligations to his client, he was reported to the Disciplinary Committee, which acknowledged and thanked "the initiative and forthrightness" displayed in reporting the attorney to the Committee. Third, the defendant's conduct throughout the years does not evince an abandonment of his right to appeal. Quite the opposite. For years, the defendant took all the appropriate steps to pursue his rights as provided for by our legal system: he retained an attorney to appeal

his conviction; he complained to the appropriate professional disciplinary body about his attorney's failures which, as the Committee noted, makes it possible "to improve the quality of legal representation available to the public"; and he filed a motion to request an enlargement of time to perfect his appeal and briefed the merits in support of his motion. Fourth, nothing in the record suggests that the defendant sought to "game the system" by manipulating events or circumstances surrounding his conviction and appeal.

The majority, nevertheless, concludes that once the Disciplinary Committee informed the defendant in 2003 that his lawyer was neglecting his case, he should have acted to perfect his appeal, and having failed to do so until 2012, he cannot complain that the Appellate Division dismissed his appeal (majority op. at 100). Thus the majority concludes that the delay attributable to the defendant is the type of extremely long delay that "can bring a system into disrepute" (*id.* at 101). I disagree that the defendant's actions were of such character that despite his own attorney's ineffectiveness, the defendant should be foreclosed from a direct appeal. This is not the case where the defendant sat back for years and allowed an opportunity to appeal to pass, and with it caused prejudice to the People.

While placing the blame on defendant, the majority too easily discounts the impact of the attorney's professional neglect, and continued representation of the defendant, his family and the viability of his appeal. For example, the defendant and his family were in a financially worse position from when they first retained the lawyer in 1997, having paid him thousands of dollars for undelivered services and having no additional financial resources to retain new

counsel. The majority minimizes the significant financial hardship in which the defendant found himself because, according to the majority, the defendant could simply have requested assigned counsel. However, having already waited so long for his retained attorney to act, it was not unreasonable for the defendant to expect that, once admonished, the attorney would comply with his professional obligations. This choice seems even more plausible given that the Disciplinary Committee stated that the attorney had "initially performed some work on" the defendant's appeal. Thus, the defendant could have found that the lawyer would be able to quickly act on his case, and since the Disciplinary Committee concluded that the lawyer had neglected the defendant, not that he was incompetent, the defendant could have expected the proper level of legal services would finally be provided.

"The right to appeal a criminal conviction is fundamental and cannot be lost because the defendant was unaware of its existence or because counsel failed to keep a promise to file or prosecute an appeal" (*People v. Melton,* 35 N.Y.2d 327, 329 [1974], citing *People v. Montgomery,* 24 N.Y.2d 130, 132 [1969]). I would not deny the fundamental right to appellate review because the defendant, now facing a lifetime of incarceration, entrusted his future to counsel who failed him (*see generally Maples v. Thomas,* 565 U.S. ___, ___, 132 S.Ct. 912, 924, [2012] ["a client cannot be charged with the acts or omissions of an attorney who has abandoned him"]).

III.

People v. Dockery

In 1986, Alexander Dockery, then 15 years old and in the ninth grade, was charged with robbery in the first and second degrees (Penal Law §§ 160.15, 160.10). After a jury trial, the defendant was convicted of both counts and, now 16 years old, sentenced as a juvenile offender to an aggregate of 2 to 6 years' imprisonment in a youth facility. The sentencing minutes reflect that defendant acknowledged receipt of the notice to appeal, and answered affirmatively when asked if his counsel advised him of his right to appeal.

In 1992, the defendant pleaded guilty to attempted criminal possession of a weapon in the third degree (Penal Law § 265.02). The defendant waived his right to appeal, but in adjudicating him a second violent felony offender the court inquired about the 1986 conviction. Defendant's assigned counsel requested time to review the file from 1986, and the prosecutor stated that the "[1986 case] would have been appealed by now." That, apparently, ended the discussion about the 1986 conviction.

In 2008, while incarcerated on another conviction, the defendant wrote a letter to the Appellate Division, First Department, requesting a copy of the notice of appeal filed in the 1986 case, a copy of the brief, and a copy of any other relevant documents. "Basically," the defendant wrote, "I would like to know what the [outcome] of the appeal was." The First Department responded by sending the defendant an in forma pauperis form. The defendant immediately filed an affidavit attesting to his indigency, and, apparently based on his own

misunderstanding, stating incorrectly that he was represented by the Legal Aid Society in 1986.

The People opposed the defendant's motion to appeal as a poor person and cross-moved for dismissal. The Legal Aid Society was served a copy of the People's motion but filed no response. On December 30, 2008, the Appellate Division denied the defendant's motion and granted the People's motion to dismiss (2008 N.Y. Slip Op. 93213[U] [2008]).

In 2011, the defendant wrote to the Center for Appellate Litigation which then moved, on the defendant's behalf, for reinstatement of the appeal and assignment of counsel. The Appellate Division reinstated the appeal without prejudice to the People to move for dismissal (2011 N.Y. Slip Op. 93263[U] [2011]), which the People did and which the defendant opposed. In 2012 the Appellate Division again dismissed the appeal, without opinion (2012 N.Y. Slip Op. 76557[U] [2012]).

The defendant contends that the Appellate Division abused its discretion by dismissing his appeal on the grounds of inaction and speculative claims of prejudice to the People. The defendant further argues that he believed his lawyer would "handle things"—which the defendant argues was a reasonable way for a defendant who was 15 at the time of conviction and 16 at the time of sentencing, to view his situation and his attorney's role. He argues that minors should not be expected to understand and appreciate the appeals process and should have assistance of counsel in applying for poor person relief.

It is generally accepted and well established that young people and adults mature at different rates and that children simply do not have the capacity to fully appreciate the world and the consequences of

their actions and choices. As the United States Supreme Court stated in 2011 in *J.D.B. v. North Carolina,* "[t]he law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them" (564 U.S. ___, ___, 131 S.Ct. 2394, 2397 [2011]). "Children 'generally are less mature and responsible than adults' . . . [and] 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them' " (*id.* at ___, 131 S.Ct. at 2403 [citations omitted]). Moreover, children "are more vulnerable or susceptible to . . . outside pressures than adults" (*id.* at ___, 131 S.Ct. at 2403 [internal quotation marks omitted], citing *Roper v. Simmons,* 543 U.S. 551, 569 [2005];*see also Johnson v. Texas,* 509 U.S. 350, 367 [1993] ["A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions"]). The inescapable conclusion is that children are unable to understand life's challenges or exercise judgment as would adults.

The defendant's argument that minors simply cannot be expected to make their own informed choices about conduct that may carry significant legal consequences is supported by data. Studies have established that juveniles are unable to fully understand and appreciate their legal rights (*see e.g. Graham v. Florida,* 560 U.S. 48, 68 [2010] ["developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"]). The neuroscience research data confirms juveniles do not possess the

maturity necessary to make decisions that, in the case of criminal convictions, carry lifelong consequences (*see e.g.* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood,* Proc. Nat'l Acad. Sci., vol. 101, No. 21 at 8177 [May 25, 2004], available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC419576/pdf/1018174.pdf; Linda Spear, The Behavioral Neuroscience of Adolescence, 108–111 [2009]). The inescapable conclusion is that the inherent differences between young people and adults impact on a defendant minor's ability to appreciate and respond to the requirements of the appellate review process (*see e.g.* Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting,* Child Dev., vol. 80, No. 1 at 30, 35–36 [Jan./Feb. 2009]).

A conviction and a criminal record can impose severe lifetime consequences before the child develops the capacity to appreciate fully the meaning of negative life choices (*see* Jari–Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning,* 11 Developmental Rev. 1, 28–29 [1991]). The collateral consequences that accompany a criminal conviction are far reaching and can include the loss of the right to vote; loss of public benefits; exclusion from public housing; deportation for noncitizens; exclusion from jury service; and loss or exclusion from public employment (*see generally* Legal Action Center, *After Prison: Roadblocks to Reentry, A Report on State Legal Barriers Facing People with Criminal Records* [2004], available at http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf [accessed Mar. 20, 2013]). Moreover, a criminal record undermines efforts to redirect a youth in a positive, life-

affirming direction (*see generally* Devah Pager, *The Mark of a Criminal Record,* Am. J. Soc., vol. 108, No. 5 [Mar. 2003], available at https://www.princeton.edu/%25pager/pager_ajs.pdf [accessed Mar. 21, 2014]). Given the potential impact on a young life, access to appellate review for this class of defendants is of critical importance. The stakes are simply too high to risk the future of a young person without at least considering how age may have affected the minor defendant's conduct.

We ignore what science and experience tells us at our own peril. As related to the specific issues involved in this case, there is simply no reason not to acknowledge the scientific reality of differences based on age in cases involving requests to extend the period of time to appeal. The United States Supreme Court's conclusion in the context of sentencing that "criminal procedure laws that fail to take defendants' youthfulness into account at all [are] flawed" (*Graham,* 560 U.S. at 76), is no less true in cases involving minor children and their right to appellate review (*see People v. Rudolph,* 21 N.Y.3d 497, 506 [2013, Graffeo, J., concurring] ["Young people who find themselves in the criminal courts are not comparable to adults in many respects—and our jurisprudence should reflect that fact"]).

Therefore, I would hold that before dismissing for failure to prosecute an appeal from a conviction imposed upon a minor defendant, the Appellate Division must consider the impact of the defendant's age in determining whether the delay in pursuing the appeal is inexcusable, and failure to do so is an abuse of discretion. Accordingly, I would vote to remit back to the Appellate Division for such consideration.

IV.

I share the majority's concern that an extensive delay in the appellate process has an adverse impact on our criminal justice system. During any given year, the Appellate Division can hear and decide thousands of appeals. Indeed, our current legal system is plagued by many delays not attributable to defendants or the courts themselves, but due to the sheer volume of cases or other matters beyond the control of the People or the defendants.

Concern over the potential impact of untimely appeals on the criminal justice system, however, must not outweigh our responsibility to ensure the rights of defendants. For, as justice delayed lessens public confidence in our legal system, so do denials of rights to appellate review of defendants failed by their attorneys, and defendants whose youth impacts their ability to understand and appreciate the appellate process. I dissent.

Judges Graffeo, Read and Pigott concur with Judge Smith; Judge Rivera dissents in an opinion in which Chief Judge Lippman concurs; Judge Abdus–Salaam taking no part.

In *People v. Perez* and *People v. Dockery:* Order affirmed.

Chief Judge Lippman and Judges Graffeo, Read, Pigott and Rivera concur; Judge Abdus–Salaam taking no part.

In *People v. Calaff:* Order affirmed.

Chief Judge Lippman and Judges Graffeo, Read, Pigott and Rivera concur; Judge Abdus–Salaam taking no part.

In *People v. Lopez:* Order reversed and case remitted to the Appellate Division, First Department, for further proceedings in accordance with the opinion herein.

Appendix E

SUPREME COURT OF
THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE FO THE STATE OF NEW YORK,

Respondent,

—v.—

ALEXANDER DOCKERY aka JOHN HARRIS,

Defendant-Appellant.

AFFIDAVIT

N.Y. Co. 3931/85

STATE OF NEW YORK)
) ss:
COUNTY OF DUTCHESS)

JOHN HARRIS, being duly sworn, hereby deposes and says:

1. I am the defendant -appellant in the above captioned case. I am submitting this affidavit to explain my failure to perfect an appeal in my case before this point. I ask the Court to deny the People's motion to dismiss the appeal.

2. I was convicted after trial of robbery in the first degree and sentenced to a two to six year term on February 28, 1986. I was 15 years old when the trial

began and 16 years old at the time of sentencing. I was in the ninth grade at the time of these events. My mother attended the trial but was otherwise not involved in the case.

3. My lawyer was appointed. In the middle of sentencing, he told me I had the right to appeal the case, and I told him that I wanted to do so. He did not have time then to explain the appeal process to me and did not explain the process to me at any later time. From the sentencing minutes, which I have reviewed, I know that my lawyer handed me a notice explaining the right to appeal. I do not recall seeing an in forma pauperis form attached to the notice, and I do not recall him explaining the procedures for appealing, either then (during sentencing) or at any time afterwards. I did not know that I had to fill anything out to pursue an appeal, and would not have known how to fill out the forms anyway. I was very scared and depending on my lawyer to take care of the appeal.

4. To the best of my knowledge, no adult spoke with my lawyer about the appeal process. My mother never asked me about it either.

5. After I was sentenced, I was sent to a youth facility, where I stayed until 1987. The youth facility was concerned with my education, and no one discussed with me the appeal process, nor did I discuss it with anyone. There were no law libraries there. I do not recall having any contact with my trial lawyer while I was confined.

6. I did not contact my trial lawyer or the court once I was released. I was happy to be home, and assumed the appeal was taking place on its own. I thought that if any change in the case occurred, I would be contacted. My family and I were not

sophisticated about these matters and made no inquiries.

7. For years, I did not know that the appeals process did not happen automatically. I was convicted in Kings County on a third-degree weapon possession charge in 1992, when I was 22 years old. I pleaded guilty, and as part of my guilty plea, I waived my right to appeal, so I did not learn about the need to ask for poor person relief and assignment of counsel in order to take an appeal. I didn't think anything irregular had happened with my prior case. I was under the misapprehension that the appeal had happened and nothing had come of it.

8. I was subsequently convicted and sentenced in 2000 of burglary in the second degree, and sentenced as a mandatory persistent felony offender to 25 years to life. In connection with that case, I learned about the forms that needed to be filed with the court for an appeal to be taken.

9. Now knowing for the first time that an appeal did not happen automatically, I began to wonder whether my first case really had been appealed. In 2008, I wrote the Appellate Division, First Department and asked whether a notice of appeal had been filed in my 1986 case. Mr. David Spokony advised me that a notice was filed. Thinking this might mean that an appeal had been taken as I had long thought, I then wrote a letter asking Mr. Spokony for a copy of the notice of appeal, the brief, and for the outcome. (This letter is attached to the end of my affidavit.) But because I also suspected that perhaps no appeal had been taken after all, I asked for the chance to appeal the case now.

10. Mr. Spokony sent me back an in forma pauperis form, which I filed and which prompted the

People's cross-motion to dismiss the appeal. It was only when I saw the statement in the People's cross-motion to appeal that there was "no appellate history" related to my case that I knew for sure that no appeal had ever been taken from the 1986 case.

11. I recognize that many years have passed since my 1986 conviction. However, I never abandoned my appeal, as the People have accused me of doing. I wanted to appeal the conviction and told my lawyer that. I thought it was happening automatically, and that I would be told something if and when that became necessary. I was little more than a child when I was convicted, and, to my best recollection, my lawyer never told me about the forms that I would need to fill out to get an appeal, never explained the notice of appeal form that he handed me in the middle of sentencing, never told me that he wouldn't be handling the appeal, and never helped me fill out any forms. No other adult did either, even though I was sent to a youth facility and a guardian was appointed to me there. In the years that passed since then, I thought the appeal had happened and was over. There was no reason for me to think otherwise, because I did not become familiar with the appeal process until my conviction in 2000. When I began to suspect that an appeal may not have been taken from the 1986 conviction, I wrote the court to confirm what had happened, and took steps to begin the appeal process.

12. I believe there were errors in my 1986 trial, and I respectfully ask the Court to now give me a chance to pursue these issues on appeal.

/s/ John Harris
John Harris

Sworn to before me
this 25th day of January, 2015

/s/ Matthew J. Farrand

[STAMP]
Matthew J. Farrand
Notary Public State of NY
No. 01FA6249046
Qualified in Dutchess County
My Comm. Expires 9/26/2015

Appendix F

[SEAL]
NOTICE OF RIGHT TO APPEAL
(SUPREME COURT)

Immediately after the pronouncement of sentence, where there has been a conviction by plea, or after trial, this form is to be given to the defense attorney. The defense attorney must then give it to his/her client and state on the record that the defendant has been given written notice of his/her right to appeal.

Upon the refusal of the Court to grant a writ of Habeas Corpus or upon denial of a writ of Habeas Corpus brought on behalf of a defendant in a criminal action, this form must be made available to the defense attorney.

TO THE DEFENDANT:

You have a right to appeal a conviction and/or sentence; and you have a right to appeal the refusal of the Court to grant a writ of Habeas Corpus, or a judgment denying a writ of Habeas Corpus.

In order to exercise this right, you must file a NOTICE OF APPEAL **within thirty (30) days**.

If you desire your present attorney to file this notice, you must fill out and give or mail to him the bottom part of this page.

lf you have appeared pro se (without counsel) you may request the Clerk of the Court to file the NOTICE OF APPEAL on your behalf.

If you intend to file the notice of appeal yourself, you must send **two (2)** copies of the NOTICE OF APPEAL to the Clerk of the Supreme Court in the County in which you were convicted or the County in which your writ was denied. You must also send one (1) copy to the District Attorney's Office. The addresses of the Courts and District Attorneys' Offices are listed below. Be sure to choose the correct County.

If you are without funds, after the notice of appeal has been filed, you must write to the Appellate Division requesting that counsel be assigned to you for the purpose of appeal. Send this sworn letter to the Appellate Division, First Department, 27 Madison Avenue, New York, New York 10010. The letter must be notarized.

You should request that you be granted permission to appeal upon the original record. You should mention that you are without funds with which to retain counsel or to purchase a transcript of the proceedings. State fully your financial circumstances, explaining why you cannot afford to hire an attorney for an appeal or purchase a transcript of the proceedings. You must write this letter yourself.

MANHATTAN

Supreme Court	District Attorney
Appeals Bureau	New York County
100 Centre Street	1 Hogan Place
New York, NY 10013	New York, NY 10013

BRONX

Supreme Court Appeals Bureau 851 Grand Concourse Bronx, NY 10451	District Attorney Bronx County 851 Grand Concourse Bronx, NY 10451

TO MY ATTORNEY / OR THE COURT CLERK

I wish to appeal my conviction and/or sentence; or the denial of my writ of Habeas Corpus. Please file a timely notice of appeal on my behalf.

Your Name _____ DIN/ID# _____

Your Indictment Number or Docket Number _____

Date _____

Appendix G

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 2

THE PEOPLE OF THE STATE OF NEW YORK,

—v.—

ALEX DOCKERY,

Defendant.

INDICTMENT NO. 6562/88

---

320 Jay Street
Brooklyn, New York
July 21, 1992

B E F O R E: THE HONORABLE ALBERT TOMEI,
Justice of the Supreme Court

A P P E A R A N C E S:

OFFICE OF CHARLES HYNES, ESQ.
DISTRICT ATTORNEY – KINGS COUNTY
Attorney for the People
350 Jay Street
Brooklyn, New York 11201
BY: WILLIAM LEE, ESQ.
Assistant District Attorney

ALFRED DORFMAN, ESQ.
ATTORNEY FOR DEFENDANT DOCKERY
26 Court Street
Brooklyn, New York 11201

TERI MALTESE
Senior Court Reporter

PROCEEDINGS

(Whereupon the following takes place on the record in open court in the presence of the Court, the assistant district attorney defense counsel and Alex Dockery.)

COURT CLERK: Calendar number one — calling number one and calling number five. Defendants are being produced, your Honor.

MR. GRADY: Richard A Grady, 50 Court Street, Brooklyn, New York on behalf of Owen Thomas.

MR, HOROWITZ: Andrew Horowitz, Legal Aid Society on behalf of Kareem Johnson.

MR. DORFMAN: Also number two —

THE COURT: They're not interested, lets go. Mr. Grady, I would suggest you get your motions in unless you want to join in on the motions?

MR. GRADY: I could join in the motions on behalf of their response. And one set of motions I think they're just about the same and then I should — couple of weeks we can do it.

MR. HOROWITZ: Can we approach?

THE COURT: Yes.

(Discussion at the bench.)

THE COURT: Second call.

COURT CLERK: With respect to Dockery, are we ready on that case?

MR. LEE: Yes.

THE COURT: We will go ahead with that case. We are going to proceed with the hearing in this case and the trial.

MR. DORFMAN: What about the other one?

THE COURT: We are — whatever we are going to do we are going to do. Unless he wants to take the plea to this one? What was offered on there? I have two to four.

MR. LEE: He is a predicate.

THE COURT: on 6562, on this one?

MR. DORFMAN: I have one year.

THE COURT: It can't be, he is a violent felony offender. He was convicted of robbery two. Wait a minute, was he a juvenile offender?

MR. DORFMAN: Right, Judge, 15 years old. He was convicted of robbery in the rob one, but I don't know, he may be a violent felony offender because I don't know if he does—if he got YO.

MR. LEE: I don't have him as a YO.

THE COURT: I don't think he is.

I don't think he is YO. I think he is a fell — second felony offender.

MR. LEE: It appears that — it looks like he was convicted of a designated felony.

THE COURT: He was, and I don't. believe he was given YO treatment. So he is not shielded. He is going to have to do the two to four.

THE COURT: Mr. Horowitz, up here. Mr. Grady, come up here.

(Discussion at the bench.)

THE COURT: What do you want to do, Mr. Horowitz, I have to know? Before we do anything, I wanted to know, Mr. Dorfman what you're doing because I am going to take Mr. Dockery's plea first. I know what he wants to do. I wanted to know what Mr. Dockery wants to do. I will take his plea first and then Mr. Johnson. Let's go.

What is your application? By the way, give him the waiver of right to appeal and explain it to him, have him read it so we don't have any problems.

COURT CLERK: Number two, Alex Dockery, number five.

THE COURT: Mr. Dorfman, advise your client that if it's found to be — he's found to be not a predicate, then I will not give him the two to four, I will give him a year in jail; do you understand that?

MR. DORFMAN: Very well, your Honor.

THE COURT: If he is a YO, he will get one year. If he is not, he's not going to get the two to four.

MR. DORFMAN: Very well.

THE COURT: What is your application?

MR. DORFMAN: In regards to indictment number 6562/88, the defendant withdraws his previously entered plea of not guilty and pleads guilty to attempted CPW 3.

THE COURT: What is your real name? Is it Steven Cherry?

THE DEFENDANT: Dockery.

THE COURT: Give him the waiver. Mr. Dorfman, would you please explain the waiver to him? Did you make your application?

MR. DORFMAN: Yes.

THE COURT: Mr. Dockery, is Mr. Dorfman your attorney standing next to you?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had enough time to discuss this plea with him?

THE DEFENDANT: Yes, sir.

THE COURT: And you understand that you have an absolute right to appeal from any and all of the proceedings as it relates to this indictment? More particularly, from the conviction which is going to be in the form of a plea to this charge, and also the judgment of conviction which will be the sentence in this case; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, you also understand as part of this plea negotiation you're giving up your right to appeal; you understand that?

THE DEFENDANT: Yes.

THE COURT: You have been handed a written waiver of the right to appeal. Have you had the time to read it and discuss it with your attorney?

THE DEFENDANT: I know what it is, I read it before.

THE COURT: You do. And has anybody forced you or coerced you to sign this and to waive this right to appeal?

THE DEFENDANT: Nah, no, sir.

THE COURT: Are you waiving this right to appeal voluntarily and of your own free will?

THE DEFENDANT: Yes.

THE COURT: You also understand you're entitled to a judge or jury trial and at that judge or jury trial you have the right to remain silent?

THE DEFENDANT: Yes, sir.

THE COURT: The right to confront or cross-examine any of the witnesses and also the right to call your own witnesses; do you understand that?

THE DEFENDANT: Yes.

THE COURT: You understand by pleading guilty you're giving up all those rights?

THE DEFENDANT: Yes.

THE COURT: The court promised, in consideration of your plea, to sentence you to a minimum of two years in jail and a maximum of four years in jail provided, of course, you're found to be a second felony offender.

If you're not found to be a second felony offender then the court will sentence you to one year in jail; do you understand that?

THE DEFENDANT: Yes.

THE COURT: Any other promise been made to you?

THE DEFENDANT: No, sir.

THE COURT: Are you entering this plea voluntarily and of your own free will?

THE DEFENDANT: Yes.

THE COURT: Okay. Now, has anybody forced you or coerced you to enter into this plea?

THE DEFENDANT: No, sir.

THE COURT: Reading the charge, tell me if you're guilty or if the — guilty of criminal possession of a weapon in the third degree on July 11, 1988 knowingly and unlawfully possessed a loaded pistol not in your home or place of business, how do you plead, guilty or not guilty?

THE DEFENDANT: I plead guilty.

THE COURT: On that day, July 11th of 1988 in Kings County, did you have in your possession a loaded pistol?

THE DEFENDANT: Yes.

THE COURT: What kind?

THE DEFENDANT: Excuse me?

THE COURT: What kind?

THE DEFENDANT: .22.

THE COURT: And did you have a license to possess it?

THE DEFENDANT: No, sir.

THE COURT: Did you know it was unlawful to possess it?

THE DEFENDANT: Yes.

THE COURT: And did you, at the time you possessed it, did you possess it in your home or place of business?

THE DEFENDANT: None of the above.

THE COURT: And was that in Kings County, Brooklyn that you possessed it?

THE DEFENDANT: Yes.

THE COURT: Arraign the defendant please. Arraign him on this and as a second felony offender.

COURT CLERK: Alex Dockery, if you have previously been sentenced as a predicate felony offender as defined in section 70.06, that fact may be established and a plea of guilty in the action now before this court and you may be subject to different or additional punishment.

Mr. Dockery, do you now withdraw your plea of not guilty to indictment 6562 of 1988, and do you now plead guilty to attempted criminal possession of a weapon to cover that indictment?

THE DEFENDANT: Yes.

THE COURT: Arraign him as a second felony offender.

COURT CLERK: Mr. Dockery, you have been provided with a statement by the court —

THE COURT: A second violent felon.

COURT CLERK: According to Article 400 and Article 70 of the Penal Law on a prior violent felony. You may admit or deny or stand mute as to whether you are the person convicted and sentenced on that violent felony as recited in the statement. If you wish to controvert that statement on any grounds, including the violation of your constitutional rights, you're entitled to a hearing before this court without a jury.

Did you receive a copy of the statement through your attorney, Mr. Dorfman?

THE DEFENDANT: Yes.

COURT CLERK: Have you discussed the matter with him?

THE DEFENDANT: Yes.

COURT CLERK: Do you now admit the prior sentence?

THE DEFENDANT: Yes.

COURT CLERK: Were you afforded all your constitutional rights?

THE DEFENDANT: I didn't understand that.

MR. DORFMAN: I would ask for time to look into the file of the 1985 conviction. I don't know what happened at that time. I will go down there myself and look at the file myself. He is only taking a plea at this time, he is not being sentenced; am I correct, your Honor?

THE COURT: You're going to have to get the minutes. What do you think you're going to do? You think you're going to do this in five weeks?

MR. DORFMAN: The minutes are sometimes in the file.

THE COURT: I doubt it.

MR. DORFMAN: I've seen it at certain times. He was 15 years old at the time. I think he should be protected to the full extent of my ability.

MR. DORFMAN: That was a trial evidently. Was there a trial in this case?

MR. LEE: No, it would have been appealed by now, your Honor.

MR. DORFMAN: Then I withdraw my last remark.

COURT CLERK: I repeat the question?

During that proceeding in which you were convicted of a felony, were you afforded all your constitutional rights?

THE DEFENDANT: Yes.

THE COURT: The defendant is found to be a second violent felony offender and will be sentenced as such.

MR. DORFMAN: This is, of course, subject to our investigation.

THE COURT: Yes, If he was given YO then fine.

COURT CLERK: 8:10 for sentence.

MR. DORFMAN: I think I'm going on my vacation on August 5th for a few weeks.

TEE COURT: Give me a date.

MR. DORFMAN: September time, okay?

THE COURT; September? No, I can't. I got to get him sentenced earlier than that.

You're going on vacation when?

MR. DORFMAN: August 5th I have blocked out.

THE COURT: When are you coming back?

MR. DORFMAN: Until about the 18th.

THE COURT: Put it on for the 19th.

COURT CLERK: 8/19 for sentence. Same bail?

THE COURT: Yes, he is remanded.

(Whereupon, the matter was adjourned for sentence to August 19, 1992 in Part 2.)

* * * *

Certified to be a true and accurate transcript of the stenographic minutes taken within.

/s/ Teri Maltese
TERI MALTESE
Senior Court Reporter

Appendix H

SUPREME COURT
COUNTY OF N.Y. – APPEALS BUREAU

Order:
Sentence: 2/28/86

Deft. DOCKERY, ALEXANDER
Justice GOODMAN
Ind. No. 3931/85

APPELLATE DIVISION

Notice of Appeal filed: 2/28/26

Case Jacket retrieved: _____

AFFIRMED: _____

Reversed: _____

Remittitur Filed: _____

_____

_____

Dismissed: _____

Withdrawn: _____

Steno Transcript No. _____

COURT OF APPEALS

Affirmed : _____

Reversed : _____

Filed : _____

Order on Remittitur _____

NOTICE TO [ILLEGIBLE] 3 27 86

STENOS NOTIFIED

Appendix I

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF NEW YORK:
CRIMINAL TERM: PART 62

THE PEOPLE OF THE STATE OF NEW YORK

—v.—

ALEXANDER DOCKERY,
aka ROOSEVELT BORN,

Defendant.

Indictment # 3931/85

SENTENCE MINUTES

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100 Centre St.
New York, New York
February 28, 1986

BEFORE: Hon. Budd G. Goodman, Justice of the Supreme Court

APPEARANCES: ROBERT MORGENTHAU
DISTRICT ATTORNEY
NEW YORK COUNTY
1 Hogan Place
New York, New York
BY: MS. ENSWORTH, A.D.A.

*

ALLAN STIM, ESQ.
Representing Mr. Dockery

*

WILLIAM MC GARITY, COURT CLERK

M. BARTILLARO, O.P.R.

SENIOR COURT REPORTER

SENTENCE

COURT CLERK: On the Calendar, Number 1 on the sentence calendar, the People v. Alexander Dockery. Alexander Dockery; is that you name?

THE DEFENDANT: Yes, sir.

COURT CLERK: Is Allan Stim, present in court, your attorney?

THE DEFENDANT: Yes, sir.

COURT CLERK: And present for the People, Laurie Ensworth. Counsel, you reserved motions for today.

MR. STIM: Yes. At this time I would like to reiterate the motion made at the end of the People's case and ask the, that the verdict be set aside with respect to the respective counts on the ground they are against the weight of the evidence.

THE COURT: Let the record reflect that the court's position is that each of those, with respect to the three counts in which the defendant is found guilty, the motion to set aside those counts is denied. There was ample evidence in the record based both on the complainant's testimony and on the testimony of the co-defendant Mr. Divinio, Mr. Dockery, in fact, possessed a gun. There was ample evidence from the complainant and he had the property taken from him

and that he sustained a physical injury and that Mr. Dockery was acting in concert with another in robbing Mr. Wheeler so, therefore, the motions are denied and you have an exception.

MR. STIM: Thank you, your Honour.

THE COURT: Let us proceed with sentence.

COURT CLERK: Alexander Dockery, you are here before the court for sentencing on your conviction by jury verdict of the crimes of robbery in the first degree and two counts of robbery in the second degree. Indictment #3931/1985. Does the D.A. have anything to say relative to sentencing?

MS. ENSWORTH: Yes, your Honour. Your Honour, you were present at the trial, obviously, you heard the evidence. I dont want to dwell on the facts too long. There were a few things I would like to bring up with respect to the testimony as it applies to sentence. The first is that, the evidence in this case was overwhelming. This defendant is guilty of the crime of robbery in the first degree. The testimony from the victim of the crime, from the co-defendant and from the independent witness who was a teacher established that after an altercation in the gym earlier in the day this defendant returned to the high school with a gun and qapproached the complainant in this case and placed the gun to his head, ripped a chain from his neck and beat him, with the help of other people in the group in which he was acting, to the point where he suffered some substantial physical injuries. Now, the testimony also established that the motive for this robbery was the fact that the victim had foiled another earlier robbery that this defendant was also involved in. The testimoney was that Demetric Wheeler saw this defendant shaking down another student in the gym and he came up and brought the other student,

referred to as Baby Monster, out of the defendant's control and saved him from that robbery, that's what inspired the defendant to go get the gun and bring it to school, that textimony, I think, established this defendant was the ringleader in this crime and the prime mover in the robbery. The defendant indicated that he had the chain, the chain was introduced into evidence. He admitted he got it at the scene of the crime and the theft was also amply corroborated. I am sure that when Mr. Stim speaks he would bring to the court's attention some of the things that are contained in the probation report. Also some of the letters he's shown to you. There is information in there that the defendant has seen, since he's been in jail, to improve his attendance at school and his interest. I think that it's important to look at his record at school before he was arrested and placed in jail, to look at the kind of student he was, the probation report and the school records themselves indicate that the defendant seldom attended school at Park West while he was there. He was a serious discipline problem. In addition, the defendant, with Emanuel Jones and Demetric Wheeler (sic) were were involved in several robberies, were involved in the robbery earlier that day in the gym. The defendant was also adjudiciated a y.o. for a subsequent robbery at Park West High School of another student less than two months after he committed this gunpoint robbery and that robbery occurred while he was appearing in court on this case waiting to be indicted. I think that shows that the defendant has no interest in conforming his conduct to the requirements of the law. He's not—he did not learn from his first arrest and he went out and continued to commit crimes.

THE COURT: Was he adjudicated a y.o. in Family Court?

MS. ENSWORTH: Yes, he was, and placed on probation.

THE COURT: This case then constitutes a violation of his probation.

MS. ENSWORTH: That's correct.

MR. STIM: I think that was committed; when was this committed, which one was committed after?

MS. ENSWORTH: The second robbery in which he was adjudicated a y.o. and placed on probation was committed after he was arrested on this case after this robbery but before he was indicted on this robbery.

THE COURT: It occurred on March 20, 1985 and September 13, 1985. Judge Marks placed him on probation over the strenuous objection of the People and many people. The most important aspect of the case that you should consider in sentencing is the impact that this crime had on the victim, you heard testimony from Demetric Wheeler he was a student at Park West High School at the time this crime occurred. As a result of the defendant's conduct and his conduct with the rest of the people in the group who robbed Mr. Wheeler he was injured. He had bruised ribs, he had a slashed face. He was in a lot of pain requiring him to stay in bed. He had difficulty breathing and he testified he's still havig pain to this day as a result of the fact that this defendant beat him and that other defendants beat him and kicked him during the robbery; you also heard the testimony that at the time of the crime Mr. Wheeler was the captain of the basketball team of the high school. He had been recruited for a basketball scolarship for Seton Hall the following year. He was expected to go to Seton after that based upon that recruitment after

his graduation. He was no longer to play basketball after that. He was removed from the school because the school was not able to guarantee his personal safety and his physical inability, and the fact that the school could not protect him, he lost the scholarship to college. The case had serious emotional consequences for him as well, seeing that he couldn't go to college, he couldn't continue his career plans Demetric Wheeler dropped out of school and got a job as a janitor's assistant. Now, he intends to try to get his general equivalency diploma. In balance to what I expect Mr. Stim to say about the effect incarceration will have on the defendant's life, it is important for the court to take into consideration the consequences that the conduct had on the victim's life. As you know, if this defendant had not been a juvenile offender, if he had been older, the maximum sentence would have been 8 1/3rd to 25 years. Since he's a juvenile offender the maximum sentence is 3 1/2 to 10, given the totality of the crime and the effect on the victim, that maximum is in ordinately low and under other circumstances I would be asking for more time and more time would be justified. The defendant should serve three and-a-half to ten years.

THE COURT: 3 1/2 to 10 would be an illegal sentence. Three times three and-a-half would be 10 1/2.

MS. ENSWORTH: 3 and-a-third; I'm sorry.

THE COURT: Mr. Stim, I'll hear from you.

MR. STIM: Well, first of all, I would like to hand up the letters that ..

THE COURT: I have read them.

MR. STIM: Could they be made part of the record, your Honour, these three, put in the file? I would like

to point out that this defendant, Alexander Dockery, was 15 years old at the time the offenses were committed and he's 16 now. One of the reasons that the defendant went to trial in this case was that the co-defendant, Maurice Divinio, refused to take any plea. The plea prior to the trial, there were plea offers made on behalf of—by the D.A. to the defendant and Dockery had made it known to the D.A. and the court that—I am not talking abut this court, I know in Judge Sclar's part, that he was willing to take a plea. I think at the time they were discussing about 1 1/2 to—or so—to 4. 1 1/2 to 4 1/2, and there was a possibility that he might get 1 to 3 but Mr. Divinio refused to consider any plea and the court's hands were bound unless Mr. Dockery would plead to the top count, which he would not. I mean this—

THE COURT: The problem with your argument is that in reading the Probation report the defendant to this day denies his culpability in the crime. Maybe he wanted to take a plea for convenience sake. He never told anybody he's guilty of robbing anyone with a gun.

MR. STIM: With a gun, he still denies he had a gun, which is his privilege.

THE COURT: If he was going to deny that, he couldn't take a plea since he's charged with robbery with a gun.

MR. STIM: He never even had the opportunity to because the fact—and the thing that is unfair about this, is that the very person who prevented him from being able to attempt to take a plea is the one who got up on the stand and testified with the — was the worse witness to testify against him at the trial. Now, I mean, it is not my business there to attack the victim of the crime, Mr. Wheeler, but I am not even

putting a but in but I would say that there were a lot of factors beyond this particular defendant apparently caused Mr. Wheeler not to return to school. I am not making my—I state that my client is not the only factor with regard to Mr. Wheeler's life. I see that the family of Mr. Wheeler were interviewed and what they say is a little different than the D.A. states. I mean, I am not saying that such an experience had—does not have a traumatic effect but I mean, everything is not as black with regard to Mr. Dockery as they paint it and I respectfully ask that your Honour be as lenient as possible with regard to this defendant. I handed up papers there when he did attend school up at the institution where he's confined. He shows promise that he has apparently potential for rehabilitation. I am sure, your Honour has read the presentence report which goes into the details. I don't want to go into them here but I think that Mr. Dockery is deserving of a change to rehabilitate himself.

COURT CLERK: Alexander Dockery, you have a right to make a statement in your own behalf. Do you have anything you wish to say to the court?

THE DEFENDANT: No, sir.

THE COURT: Let the record reflect I have read the probation report in this case, this is obviously the defendant's third brush with the law, third robbery that he's had, it seems to be escalating in seriousness, now, since the first two robberies did not involve a gun. In any event, I will not punish Mr. Dockerty for going to trial. It is not my intention to give him the maximum sentence. I am going to give him the same sentence I would be giving to Mr. Divinic who is as culpable as Mr. Dockery in this case. I do not feel since Mr. Dockery has already been adjudged a y.o.

he's obviously not eligible for y.o. in this case and it requires him to be incarcerated, now because of his age he will not be put in the same institution as will people over the age of 16. I view this as a most serious and vicious crime when somebody pulls a gun on someone and aids somebody to cut the complainant. But again I don't think the maximum sentence of 3 1/3rd to 10 is appropriate. This defendant will be sent to the New York State Department of Youth—

COURT CLERK: N.Y.S. Division of Youth.

THE COURT: —to be dealt with in accordance with the law to 2 years minimum and a maximum period of 6 years with credit for all time served. That is on the first count, which is the charge of robbery in the second degree.

COURT CLERK: That was the first count.

THE COURT: Robbery in the first degree; with respect to the third count, robbery in the second degree, the defendant will be sentenced to the same period of 1 to 3 years, that sentence to run concurrent with and not consecutive with the sentence imposed under count 1 and on count 4, which is also an inclusory and concurrent count, New York State Department of Youth for a period of 1 to 3 years also to run concurrent with and not consecutive with the sentence imposed under the first count; that's the judgment of this court.

COURT CLERK: On the recrod, advise the defendant of his right to appeal and hand him notice of right to appeal form, describing the procedures to be followed in filing a notice of appeal.

THE COURT: Do you want to talk to him for a minute?

COURT CLERK: On the record, please—

MR. STIM: I have notified the defendant, your Honour.

THE COURT: Have you received notice of your right to appeal?

THE DEFENDANT: Yes.

COURT CLERK: Has counsel advised you of your right to appeal?

THE DEFENDANT: Yes.

THE COURT: For the record, the reason the defendant will go to a separate facility, since he committed the crime he was under 16, he's still under the aegis of the State Department of Youth.

THE COURT: The mandatory surcharge is waived.**

[STAMP]
I Hereby Certify That
The Foregoing Is A True
And Accurate Transcription
Of My Stenographic Notes.

/s/ Maryann Barillaro, OCR
Maryann Barillaro, OCR

OCT 20 2008

I hereby certify that the foregoing
paper is a true copy of the original
thereof, filed in my office.

/s/ [ILLEGIBLE]
[ILLEGIBLE]
County Clerk and Clerk of
Supreme Court, New York County