ORIGINAL

No. 18-9736

IN THE

SUPREME COURT OF THE UNITED STATES

DARIUS KINNEY — PETITIONER
(Your Name)

vs.

STATE OF OHIO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

EIGHTH APPELLATE DISTRICT COURT OF APPEALS OF OHIO
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DARIUS KINNEY
(Your Name)

P.O. BOX 540, 68518 BANNOCK RD.
(Address)

ST. CLAIRSVILLE, OH 43950
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Were Petitioner's Sixth Amendment rights violated where counsel did not file a motion to suppress although the record indicates that police violated petitioner's Fourth Amendment rights by entering on his property without a warrant in order to search a vehicle therein which resulted in the unlawful search and seizure upon which the charge in this case is based?

LIST OF PARTIES

[XX] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

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

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

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[ ] is unpublished.

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

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[ ] is unpublished.

[XXX] For cases from **state courts**:

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

[XX] reported at State v. Kinney, 2019-Ohio-629; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

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[ ] is unpublished.

JURISDICTION

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

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

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[X] For cases from **state courts**:

The date on which the highest state court decided my case was May 15, 2019. A copy of that decision appears at Appendix D.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION STATES:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION STATES:

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

STATEMENT OF THE CASE

This cause presents one critical issue of and for a Sixth Amendment right (ineffective trial counsel) violation in failing to raise a Fourth Amendment right (illegal search and seizure) violation by failing to file a motion to suppress evidence on behalf of this petitioner.

This case arises from a no-contest plea of petitioner, Darius Kinney, upon the recommendation of procured trial counsel to take such plea. In June 2017, petitioner was charged with two (2) counts of aggravated vehicular homicide (R.C. §2903.06(A)(2)(A)), failure to stop after an accident (R.C. §4549.02(A)), and tampering with evidence (R.C. §2921.12(A)(1)). On January 2, 2018, petitioner pled "no-contest" to the indictment. Petitioner was sentenced to twelve (12) years in prison. Petitioner timely appealed to the Eighth District Appellate Court of Ohio. The Court of Appeals affirmed appellant's conviction basing their decision upon the "plain-view" exception to a warrantless search and seizure established upon **Horton v. California**, 496 U.S. 128 (1990). (See Appx **"A"**). Petitioner timely appealed that decision to the Ohio Supreme Court; of which, declined to accept jurisdiction on May 15, 2019. Now herein comes this petitioner requesting a Writ of Certiorari to challenge the erroneous decision of the Eighth District Court of Appeals of Ohio.

STATEMENT OF THE FACTS

The facts are limited, but sufficient to determine that the police violated petitioner's Fourth Amendment rights.

The trial court ordered a PSI (Pre-Sentence Investigation) that was prepared on 1/30/18 and includes an offense summary. (PSI, p. 1-2). In this PSI, it was recorded that "a detective received information that the wanted SUV was located at 3591 East 104th St. It was backed into the garage at the address and was covered up. From the street, police could see a black SUV backed halfway into

the garage with a blanket draped over the hood concealing the front end. Police approached the vehicle and removed the blanket to find that the grill was intact but missing the Chevy 'bow-tie' emblem. Police radioed the license plate and requested [assistance]." (PSI, p. 1-2--emphasis added). The offense summary indicates petitioner made statements to the police, but only after they had entered onto his property and searched his vehicle.

Counsel did not file a motion to suppress. Petitioner, upon counsel's advice, entered a "no-contest" plea and was found guilty.

The record does not demonstrate any exigent need for the officers to trespass onto petitioner's property at 8:00 a.m. that morning. There was no indication why officers could not have obtained a warrant or obtain permission utilizing the "knock-and-talk" approach instead of trespassing onto petitioner's property to conduct an unlawful search and seizure (of vehicle and petitioner).

The court of appeals erred in ruling that the second and third conditions/ requirements of **Horton** were satisfied in this case that would justify a warrantless search or seizure under the plain-view exception.

In support of its position on this issue, the petitioner presents the following reasons for granting this petition.

REASONS FOR GRANTING THE PETITION

This case is of a national importance requiring this Honorable Court to decide the above question presented. Petitioner asserts that: 1) A trial counsel does have an obligation to their client (as here), the criminal defendant, to challenge the legality of any evidence obtained i.e., through a motion to suppress, before a recommendation of a plea aggreement; 2) Police do not have a lawful authority to, without a warrant or permission by the property occupants, to search and seize a vehicle (or other property) and subsequent arrest on private property; and, 3) The "Plain-view" Doctrine does not allow a warrantless search and seizure within the sanctity of the curtilage of a private property. Petitioner asserts that regardless of the discovery of inculpatory evidence, the Sixth Amendment is violated when trial counsel fails to challenge a "winnable" Fourth Amendment violation, which would have resulted in the suppression of evidence, and would have changed the outcome of the proceeding (unlikely to plead "no-contest").

This case is important not only to this petitioner, but others similarly situated. Petitioner asserts that: 1) Although he plead "no-contest" to this crime, he along with others are guaranteed a constitutional right of effective representation (Sixth Amendment), and a right against illegal search and seizure including arrest (Fourth Amendment); 2) Petitioner's confession to the police "That he hit something..." and any other derivative(s) from the illegal police intrusion should also be suppressed due to the initial unlawful search and seizure; 3) Police cannot make a warrantless search and seizure of one's home and curtilage on an anonymous tip (an automobile exception is also inapplicable); and, 4) Anticipation of a search and seizure negates/diminishes a warrantless search and seizure regardless of any exigent circumstances (none were asserted by the State), where an ample opportunity to get a warrant was reasonable.

The Eighth Appellate District Court of Appeals of Ohio's decision applying **Horton** was erroneous in regards to **Horton's** second (2nd) and third (3rd) prongs/ requirements: "[T]he officer has a lawful right of access to the object itself;" AND, "[I]t is immediately apparent that the item seized is incriminating on its face." **State v. Grimes**, 2011-Ohio-4406 ¶33, quoting **Horton v. California**, 496 U.S. 128, 136-37 (1990).

This case conflicts with the decisions of other Ohio Appellate Court cases, but more importantly, this Honorable Court's binding precedence of **Horton, Soldal,** and more recently **Collins.**

Matters dealing with petitioner's Sixth Amendment right to effective counsel is contingent to whether a motion to suppress would have prevailed. In order to determine such, petitioner asserts that his Fourth Amendment rights were violated --such violation demands the suppression of evidence.

Petitioner asserts that **Kimmelman v. Morrison**, 477 U.S. 365, is similar and controlling; by stating, that trial counsel's incompetence was in failing to raise/present a Fourth Amendment exclusionary rule claim. The **Kimmelman** Court remanded for consideration of the prejudice issue. Arguably, implicit in the remand was the assumption that prejudice would be established if there was a reasonable likelihood that the exclusion of the illegally seized evidence would have altered the outcome--petitioner would not have plead "no-contest."

Similarly to **Kimmelman,** petitioner's trial counsel failed completely in not filing a motion to supress. The **Kimmelman** Court noted a "startling ignorance" of state law and practice that clearly placed counsel's actions outside "prevailing professional norms." There can be no suggestion that petitioner's trial counsel's decision was tactical, and his error could not be excused by otherwise competent performance during the remainder of the proceedings. Petitioner contends that, if the evidence seized by illegal and improper procedures were to be suppressed; the outcome of the proceedings would have been different.

Petitioner asserts that the SUV (and any contents, such as, the black box), statements made to the police, and any other derivatives that may have occurred from the initial unlawful intrusion should all be suppressed.

Under Ohio case law, "To establish ineffective assistance of counsel for failure to file a motion to suppress, [petitioner] must prove that there was a basis to suppress the evidence in question and that the failure to file the motion to suppress caused him prejudice." **State v. Garcia**, 2010-Ohio-5780, ¶8, citing **State v. Adams**, 103 Ohio St. 3d 508, 2004-Ohio-5845, 817 N.E. 2d 29, ¶135.

The court of appeals has stated:

> "In order to justify the warrantless seizure of property under the plain view exception, the following must be established: "'1) the seizing officer must be lawfully present at the place from which he can plainly view the evidence; 2) **the officer has a lawful right of access to the object itself, and** 3) **it is immediately apparent that the item seized is incriminating on its face.**'" **State v. Grimes**, 2011-Ohio-4406, ¶33, quoting **Horton v. California**, 496 U.S. 128, 136-37 (1990)." (Emphasis).

(See Appx. **"A"**, ¶19). **Horton** specifically states:

> "[T]hat plain view alone is never enough to justify the warrantless seizure of evidence." "It is, of course, and essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. **There are, moreover, two additional conditions that must be satisfied to justify the warrantless seizure. First**, not only must the item be in plain view, **its incriminating character must also be 'immediately apparent.'** Id., @ 466; See also **Arizona v. Hicks**, 480 U.S., @ 326-27. Thus, in **Coolidge**, the cars were obviously in plain view, but their probative value remained uncertain until after the interiors were swept and examined microscopically. **Secondly**, not only must the officer be lawfully located in a place from which the object can be plainly seen, **but he or she must also have a lawful right of access to the object itself.**" (Emphasis).

Horton, @ 136. The court of appeals stated, "The officers were lawfully present at appellant's house to follow up on an anonymous tip. Because these officers had a lawful right to be at appellant's residence based on this tip, the officers had a lawful right of access to the evidence. See **State v. Young**, 2015-Ohio-1347, (12th Dist.)." (See Appx. **"A"**, ¶20). An anonymous tip does not give officers a lawful right to petitioner's residence, but only, the justification

to investigate that tip (from the street); or in other words per **Horton**'s first requirement: "the officer be lawfully located in a place from which the object can be plainly seen," and, "did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." Id. @ 136.

The court of appeals cited two seperate cases: **State v. Young**, 2015-Ohio-1347; and, **Willoughby v. Dunham**, 2011-Ohio-2586 (See Appx. **"A"**, ¶20 and ¶21 respectively); both cases the officers utilized the "knock-and-talk" approach, unlike this case before this Court. The other two above cited cases met the second requirement of **Horton** (although no one answered the door in **Young**, the officer did attempt to knock on the door first), unlike here, the officers went straight to the SUV in question, removed the blanket; thus revealing the vehicle's (missing) key piece of evidence--a Chevy 'bow-tie' emblem--which was recovered from the accident. The officer then called in the license plate, asked for assistance, then approached the petitioner. At no time, prior to walking up to the vehicle, did the officers go to the front door to ask for permission to search the vehicle, nor was a warrant issued to allow such action of the officers a "lawful trespass."

Thus, the officers never satisfied the second requirement of **Horton**. In addition, had the SUV been "immediately apparent," and "incriminating on its face," there would have been no need for the officers to remove the blanket to realize a crucial piece of evidence--the Chevy 'bow-tie' emblem. Its "probative value remaind uncertain until after" the blanket was removed. Both the second and third conditions/requirements of **Horton** were not met.

More recently; prior to the court of appeals decision, but after petitioner's "no-contest" plea, this Honorable Court ruled in **Collins v. Virginia**, 138 S. Ct. 1663, up-holding **Horton**'s "plain-view" requirements. "A plain-view seizure thus cannot be justified if it is effectuated 'by unlawful trespass.' **Soldal v. Cook County**, 506 U.S. 56, 66 (1992)." **Collins** @ 1672.

Nearly identical to this case, the **Collins** Court reversed and remanded the lower courts decision citing that the plain-view exception nor the automobile exception grant/permit an officer to enter the curtilage without a warrant to search and seize the vehicle because it did not justify an intrusion on a person's seperate and substantial Fourth Amendment interest in his home and curtilage.

If a motion to suppress had been filed, it would have been granted based on the binding precendent established by **Horton**, **Soldal**, and recently **Collins**. There are no strategic reasons for trial counsel in not filing a suppression motion. Because of the evidence seized as a result of the unlawful search and seizure, it is subjected to suppression; therefore, prejudice resulted because a motion to suppress was not filed on behalf of this petitioner.

Furthering, the motion to suppress would have been granted, it is highly unlikely that this petitioner would have entered a "no-contest" plea and an even higher probability that the result of the trial would have been different--perhaps a lack of evidence to proceed to trial. This question of law should be granted certiorari. Petitioner request that his convictions and plea be vacated and the matter should be returned to the trial court for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Darius Kinney

Darius Kinney, #704-817
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June 10, 2019
Date