No. 18-9736

In the Supreme Court of the United States

Darius Kinney,

Petitioner,

v.

State of Ohio,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS, EIGHTH APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Does the Sixth Amendment require trial counsel to file a motion to suppress evidence that officers observed in plain view?

LIST OF PARTIES

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INTRODUCTION

It is "well established that under certain circumstances the police may seize evidence in plain view without a warrant." *Horton v. California*, 496 U.S. 128, 134, 110 S.Ct. 2301 (1990)(*citing Coolidge v. New Hampshire*, 403 U.S. 443 (1971)). The Court's recent decision in *Collins v. Virginia*, --U.S.--, 138 S.Ct. 1663 (2018) did not change that.

Petitioner Kinney entered a no contest plea after killing two people with his car. His trial counsel did not file a motion to suppress, and there is limited evidence in the record about the search of his vehicle. On direct appeal, Petitioner argued that his trial counsel was ineffective for failing to file a motion to suppress. The state court disagreed, applying the plain view exception to the warrant requirement. *State v. Kinney*, 8th District (Cuyahoga) App. No. 106952, 2019-Ohio-629, jurisdiction declined, 2019-Ohio-1759.

The Court has never required trial counsel to file a futile motion to suppress evidence. *See Premo v. Moore*, 562 U.S. 115, 124, 131 S.Ct. 733 (2011) ("[c]ounsel also justified his decision by asserting that any motion to suppress was likely to fail."). Based on the limited record below, a motion to suppress would not have been granted. Police responded to Petitioner's house following an anonymous tip of his involvement. From the street, officers were able to observe Petitioner's black SUV that was partially backed into the garage. The SUV appeared to match the video of the accident. Seeing the police, Kinney came out of his home and confessed.

The Court should deny certiorari. *First*, this case is a bad vehicle to decide either constitutional issue because the record is not fully developed. *Second*, trial

counsel reasonably decided not to pursue a motion to suppress where his client's Fourth Amendment rights were not violated.

COUNTERSTATEMENT

Around one o'clock in the morning on May 29, 2017, Petitioner Darius Kinney was speeding down East 93rd St. in Cleveland in his 2003 Chevrolet Tahoe when he hit and killed Denise Bradley and Leo Pinkard, Jr. The homicide was captured on video. Petitioner failed to stop after the accident and fled the area in his damaged SUV.

Approximately twelve hours later, officers received an anonymous tip that the vehicle involved in the homicide was located at Petitioner's house. As officers approached the home from the street, they could see the 2003 Chevrolet Tahoe backed into the garage. The hood of the vehicle was covered by a blanket, but there was obvious damage to the windshield consistent with the accident. Petitioner exited his home and admitted to officers that he was operating the vehicle when Ms. Bradley and Mr. Pinkard, Jr. were killed.

Petitioner was indicted with two counts of aggravated vehicular homicide, one count of failure to stop after an accident, and one count of tampering with evidence. Petitioner entered a no contest plea to the indictment. During his plea colloquy, Petitioner stated that he was satisfied with trial counsel's representation. He was sentenced to twelve years in prison.

Petitioner appealed, and for the first time argued that his trial counsel was ineffective for failing to file a motion to suppress. Petitioner, represented by new

counsel, argued that the search of his vehicle was illegal. The Ohio appellate court disagreed and affirmed. *State v. Kinney*, 8th District (Cuyahoga) App. No. 106952, 2019-Ohio-629. The Ohio Supreme Court declined to accept jurisdiction. *State v. Kinney*, Slip Op. No. 2019-Ohio-1759.

REASONS FOR DENYING THE WRIT

I. This case does not provide a good avenue to address Petitioner's claims.

Petitioner's constitutional challenge was not well developed in the state courts. Due to Petitioner's no contest plea, the facts placed on the record were limited. To compensate, Petitioner relies on facts contained in a presentence investigation report prepared by a probation officer. There are multiple errors with Petitioner's reliance on the report.

First, the presentence investigation report did not exist until after Petitioner entered his no contest plea. Trial counsel could not have relied on the presentence investigation report to file a motion to suppress because it was not available. *Second*, presentence investigation reports "do not perform any evidentiary function." *State v. Glenn*, 28 Ohio St.3d 451, 459, 504 N.E.2d 701 (1986). Under Ohio law, the contents of a presentence investigation report are confidential and are not public records. Ohio Revised Code §2951.03(D)(1). When not being used for an authorized purpose, a presentence investigation report is held under seal. Ohio Revised Code §2951.03(D)(3). Petitioner's reliance on a summary contained in this confidential report is misplaced.

The state appellate court's decision did not reference the presentence

investigation report when it reviewed Petitioner's claim. *State v. Kinney*, 8th District (Cuyahoga) App. No. 106952, 2019-Ohio-629. That is because Petitioner may have a different avenue for relief: Ohio affords criminal defendants the ability to raise constitutional challenges supported by evidence outside of the record by filing a petition for postconviction relief. Ohio Revised Code §2953.21. The Court should decline to grant certiorari on Petitioner's undeveloped claim.

II. Based on the record below, Petitioner was not prejudiced by trial counsel's decision not to file a motion to suppress.

Petitioner failed to satisfy the burden the Court articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). "Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S.Ct. 2574 (1986).

Petitioner argues that the search of his vehicle was unconstitutional under *Collins v. Virginia*, --U.S.--, 138 S.Ct. 1663 (2018). In *Collins*, the Court held that the automobile exception did not justify a warrantless intrusion into a "partially enclosed top portion of a driveway[.]" *Id.* at 1671. Notably, the Court held that despite the officer's lawful observations, he could not "unlawfully trespass" into a protected area. *Id.* at 1675.

As the Ohio court found, the officer's view of Kinney's vehicle did not involve an unlawful trespass. *State v. Kinney*, 8th District (Cuyahoga) App. No. 106952, 2019-

Ohio-629, ¶24. Officers observed Kinney's vehicle while standing on the street, a place where they could lawfully be. *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301 (1990). Although partially covered with a blanket, officers could determine from their location that the vehicle had a cracked windshield and was consistent with the vehicle observed in the video of the offense. Unlike *Collins*, the observations here occurred without any intrusion into a constitutionally protected area.

The state court's decision is consistent with precedent. The Court has previously held that "[w]hat a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507 (1967). Petitioner did not show a reasonable expectation of privacy in what officers could view while standing on the street. Addressing a similar argument, the Ninth Circuit Court of Appeals held that a defendant had no reasonable expectation of privacy that prevented an officer from entering an unenclosed driveway to check on the license plate of a parked car where the car was visible from the street. *United States v. Humphries*, 636 F.2d 1172, 1179 (9th Cir. 1980).

The Court has previously recognized that "efforts to restrict access to an area do not generate a reasonable expectation of privacy where none would otherwise exist." *New York v. Class*, 475 U.S. 106, 114, 106 S.Ct. 960 (1986). In *Class*, the Court held the Fourth Amendment was not violated when a police officer reached into the passenger compartment of a vehicle during a traffic stop to move papers that were obscuring a VIN number. Reaching its holding, the Court found that the "exterior of

a car...is thrust into the public eye, and thus to examine it does not constitute a 'search.'" *Id.* (*citing Cardwell v. Lewis*, 417 U.S. 583, 588-589 (1974)). The officer's observations of Kinney's vehicle fall squarely into actions the Court has previously upheld. Kinney's trial counsel was not required to file a meritless motion to suppress.

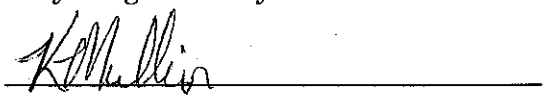
For all these reasons, the instant case does not provide a good vehicle to decide the question Kinney presented. The Court should deny certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL C. O'MALLEY
Cuyahoga County Prosecutor



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