

19-6780

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DARIUS KINNEY

(Your Name)

— PETITIONER

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.

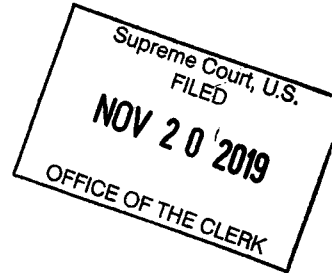
(Address)

ST. CLAIRSVILLE, OH 43950

(City, State, Zip Code)

N/A

(Phone Number)



QUESTION(S) PRESENTED

- A) Were Petitioner's Sixth Amendment rights violated when appellate counsel failed to: 1) Notify Petitioner (of his appellate rights) in a timely manner of the Ohio appellate court's decision; which thwarted petitioner's ability to file/utilize: a) Ohio Appellate Rules of Procedure #25, "Certify a Conflict;" and/or, b) Ohio Appellate Rules of Procedure #26, "Motion For Reconsideration." 2) File on behalf of his client, this Petitioner, either of the above stated Ohio Appellate Rules of Procedure(s) #25 or #26, when counsel knew or should have known that the Ohio appellate court's decision was blatantly erroneous, while all knowing that both of these "motions" require filing(s) within ten (10) days of the Ohio appellate court's decision and journal entry?
- B) Is/are Ohio's Appellate Rules of Procedure(s), i.e., Appellate Rule (Hereon out "App. R."), App. R. 26(B)(2)(c) constitutionally valid to deny this Petitioner (and others similarly situated--criminally convicted defendants) his right to effective counsel, and effective review on appeal?
- C) Is/are Ohio's ten (10) day time-limits (for filing(s)), and/or their inability to accept a "mail-box" rule constitutionally valid in denying this petitioner (and others similarly situated--criminally convicted defendants) his ability to effectively use his appellate rights in challenging the Ohio appellate court's decision, especially when their decision is blatantly erroneous, in the attempt to file under the above stated Ohio Appellate Rules of Procedure(s) #25 or #26?

LIST OF PARTIES

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

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☐ 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-2567; 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).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 9/3/19.
A copy of that decision appears at Appendix B.

☐ 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.

FOURTEEN AMENDMENT OF THE UNITED STATES CONSTITUTION STATES (in part):

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 arises from a denial of ineffective assistance of appellate counsel claim from the Eighth District Appellate Court of Ohio, pursuant to Ohio Appellate Rules of Procedure (here on out "App. R.") #26(B). Petitioner asserts that the App. R. 26(B) is the only remedy in which a criminally convicted defendant can raise an ineffective assistance of appellate counsel claim.

In June 2017, Petitioner was charged with two counts of aggravated vehicular homicide (Ohio Revised Code (O.R.C.) §2903.06(A)(2)(a)), failure to stop after an accident (O.R.C. §4549.02(A), and tampering with evidence (O.R.C. §2921.12 (A)(1)). On January 2, 2018, appellant pled "no-contest" to the indictment as advised by trial counsel. Petitioner was assigned an appellate counsel who timely raised, relative to this case, an ineffective assistance of trial counsel for failing to file a motion to suppress (before recommending this Petitioner to pled no-contest). The Court of Appeals affirmed the conviction (See Case No.: 2019-Ohio-629; Ohio Supreme Court declined Jurisdiction; United States Supreme Court declined Jurisdiction; United States Supreme Court Rehearing Pending.). Petitioner hastily filed an Application/Motion for Reconsideration pursuant to App. R. 26(A)¹ and a Motion to Certify Conflict pursuant to App. R. 25. During this time, Petitioner filed an Application to Reopen pursuant to App. R. 26(B), raising the issue(s) that are before this Court presently. The Eighth District Court of Appeals of Ohio dismissed the case Sua Sponte (See Case No.: 2019-Ohio-2567, Appendix "A"; Ohio Supreme Court declined Jurisdiction Case No.: 19-0954, Appendix "B ").

¹Petitioner asserts that if it weren't for fellow inmates monitoring the "LEXUS NEXUS" law computers and inform him of the Ohio's Appellate Procedures, he would not have been able to file any of the above mentioned motions because appellate counsel failed to notify him, not only timely, but, of his options to do so. (letter from appellate counsel available upon request).

REASONS FOR GRANTING THE PETITION

This case is of a national importance requiring this Honorable Court to decide the above question(s) presented. Petitioner asserts that: 1) An appellate counsel has an obligation to his/her client to: a) promptly notify his/her client of the appellate court's decision; and, b) notify his/her client of their appellate rights, to include the Appellate Rules of Procedures that would allow the appellate court to correct their error in the first instance; and 2) An appellate counsel should be responsible to file on behalf of his/her client documents with the (appellate) court that would contest the court's decision, especially when their decision is blatantly erroneous, when those filings are time-sensitive, i.e., due within ten (10) days of Court's decision, such as the Appellate Rules of Procedure(s) #25 and #26(A) (for Ohio).

This case is important to not only this Petitioner, but to all other criminally convicted defendants, not only in Ohio, but also those states that are similar to the Murnahan applicant(s). Petitioner asserts that he should not be foreclosed in raising an ineffective assistance of appellate counsel claim because the claim does "not present any new issues." Such denial to raise/file/notify a criminal defendant of his/her rights (as represented in the beginning above paragraph) in a prompt and timely manner significantly reduces a criminally convicted defendant of his rights to effectively appeal any/all decisions of the court(s). Such rule, such as the App. R. 26(B)(2)(c), stymies the criminally convicted defendant of adequate appellate representation because s/he relies on counsel to advise his/her client of the best, efficient, and proper methodologies in which to effectively pursue, ultimately over-coming his/her conviction/appellate processes. Such rule minimizes the responsibility of any/all appellate counsel's obligations, so to inconvenient the petitioner.

Currently, Ohio criminally convicted defendants are not entitled to trial transcripts, to challenge (un)timely notifications of court's decisions

which are currently to be informed through respective appellate counsel, nor to challenge the process by which appellate counsel handles a criminally convicted defendant's case (post-decision).

This Court recently held in *Garza v. Idaho*, 139 S. Ct. 738 (2019), "The presumption of prejudice recognized in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), applied regardless of whether a defendant had signed a appeal waiver." And, "[a]ccordingly, where an attorney performed deficiently in failing to file a notice of appeal despite the defendant's express instructions, prejudice was presumed with no further showing from the defendant of the merits of his underlying claims." (Overview--Garza).

This Court also held, "[i]n certain Sixth Amendment contexts, prejudice to the defense is presumed for purposes of the *Strickland* test." "...[P]rejudice is presumed if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. And prejudice is presumed when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken." (Garza).

This Petitioner respectfully asks that this Honorable Court extend this principle of ineffective appellate counsel claim to this case, where appellate counsel knew or should have known to promptly notify this Petitioner not only of his rights to/of the Ohio Appellate processes, such as, the App. R. #25 or #26(A); or, to file on his behalf, due to the narrow time-limits attached to the App. R. #25 or #26(A), these said "motions" with the court.

Secondly, this Petitioner asks that this Honorable Court find that Ohio Eighth District Court of Appeal's Decision, in applying App. R. 26(B)(2)(c), be held as unconstitutional, primarily by extending the *Garza* post-decision principle; in that, appellate counsel can be held responsible beyond claims "that previously were not considered on the merits." (App. R. 26(B)(2)(c)).

Lastly, this Petitioner would ask that Ohio's ten (10) day time-limits and/

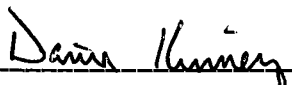
or their inability to accept a "mail-box" rule be held unconstitutional. Such current provisions/practices stymie most criminally convicted defendants the right to these appellate process because they are: 1) unable to be notified electronically by the court(s); 2) must rely on appellate counsel for a prompt mailing; and, 3) being incarcerated, their (inmate) legal mail is delayed because of internal institutional mail processing by staff (for example, if mail comes in on Friday, inmates will not get their mail until Monday; however, days such as Veterans Day (a Holiday), which fell on Monday this year, inmate's Friday mail will not be received until Tuesday--that is four days plus the normal mailing period of two-three days. Even if an inmate did get the mail within four days, s/he must hurry to put together something and into the mail in order for it to not be late within the court system). Such unreasonable delays create an Equal Protection and Due Process violations, especially those compared to those outside of the criminal processes, such as, civil actions.

There does not appear to be any United States Supreme Court case precedent related to the nature within the question(s) presented, within this petition, that gives direction/regulation(s) concerning the question(s) herenow presented. Such failure to grant Certiorari, continues to restrict Murnahan applicants, at least those in Ohio, the ability to raise ineffective appellate counsel claims to only claims that were not previously raised, and nothing else.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



Darius Kinney, #704-817
P.O. Box 540
St. Clairsville, OH 43950

Pro Se

11-18-19
date