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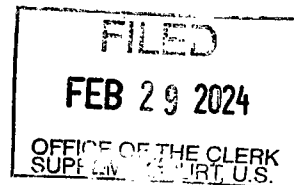
ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

DONALD LEE KISSNER -- PETITIONER

VS.

MICHIGAN -- RESPONDENT



ON PETITION FOR A WRIT OF CERTIORARI TO
MICHIGAN SUPREME COURT

Sincerely
D. Kissner
Donald L. Kissner
#383502
Petitioner In Prose
Macomb Court / Fac
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QUESTIONS PRESENTED

WAS MR. KISSNER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF APPOINTED APPELLATE COUNSEL WHERE THERE WAS A BREAKDOWN IN COMMUNICATION AND DIVESTED MR. KISSNER OF THE RIGHT TO FILE A STANDARD-4 SUPPLEMENTAL BRIEF PURSUANT TO ADMINISTRATIVE ORDER 2004-63471 MICH CII (2004)?

WAS MR. KISSNER'S STATE AND FEDERAL CONSTITUTIONAL RIGHT TO PRESENT A VALID DEFENSE OF DIMINISHED CAPACITY WHICH WOULD NEGATE THE CRIMINAL RESPONSIBILITY TO THE ACT COMMITTED?

WAS MR. KISSNER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DISCOVERY AND PRODUCTION OF DOCUMENTS VIOLATED?

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The court should Grant certiorari to clarify the proper scope of effective assistance of appointed appellate Counsel and communication, and the right to present a valid defense of diminished capacity and the reason why the lower court's decisions were clearly erroneous and abuse of discretion

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PETITION FOR WRIT OF CERTIORARI

Petitioner Donald L. Kissner respectfully request the issuance of a writ of certiorari to review the judgment of the Michigan Court of Appeals and the Michigan Supreme Court.

DECISIONS BELOW

The Michigan Supreme Court denied reconsideration in *People vs. Kissner*, MSC No. 166008 on Jan. 30, 2024. The Michigan Supreme Court denied leave to appeal in *People vs. Kissner*, MSC No. 166008 on October 31, 2023. The Michigan Court of Appeals denied reconsideration in *People vs. Kissner*, COA No. 364626 on July 13, 2023. The Michigan Court of Appeals denied leave on May 24, 2023.

JURISDICTION

The Michigan Supreme Court denied reconsideration on Jan. 30, 2024. This petition for writ of certiorari is filed within 90 days pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

On August 20, 2020 at around 20:30 hours Mr. Kissner was drugged by Shannon L. Boudro later victim. This caused Mr. Kissner to become highly suicidal in which he ended up naked covering himself with flammable chemicals trying to commit suicide by setting himself on fire. Ms. Boudro call 911 to which the 911 dispatcher sent two Durand police officers to the scene. To which these two officer's confirmed that Mr. Kissner was naked covered in a flammable chemicals smoking a cigarette stating that he wanted to die.

The officers Joseph M. Orr and Luke Rogers handcuffed Mr. Kissner and placed him in the back of a patrol car and went on to investigate what was going on. This is when Shannon L. Boudro became a victim. She stated that Mr. Kissner came at her and tried to cover her in the flammable chemicals and stated that she was here and your in trouble, your going to die.

I do not know what her words were as I

do not have the court record, etc. And I do not know what happened the night of August 20, 2020 after a certain time. I do not recall what was going on until the next day when I woke up in the Owosso Memorial hospital.

Officer Orr and Rogers after an hour and 45 minutes of investigation stated that they made a warrantless arrest of me. They then took me to the Shiawassee County Jail who refused to accept me into their custody and ordered Officer Orr and Rogers to get me medically cleared.

Officer Orr and Officer Rogers took me to the Owosso Memorial hospital and petitioned for a mental health examination. see APPENDIX-T. The Doctor Jeremy Zariski examined me and found me mentally ill pursuant to Mich. Comp. L. 330.1400(g). see APPENDIX-T. I was given the following medicine at the hospital. Lorazepam or Ativan, Olanzapine or Zyprexa, and Haloperidol Lactate or Haldol. The next day I woke up in a room with an RN sitting next to me watching

me. I asked her what was going on and she told me that the police brought me in late last night. She said that I did not recognize my brother that worked at the hospital or my mother when she showed up.

She then called for the doctor and my brother to come see me. I had chemical burns all over my body and they decided to clean me up. I seen to doctor's and my brother who all stated that I was gone the night before. I was release from the hospital in the care of my mother and brother 48 hours after coming to the hospital with orders that if I start acting funny to call 911 or bring me back. ①

FOOTNOTE ONE

The hospital had no beds open for me and could not find any place that could take me. see APPENDIX - T. The hospital decided that since I was on medicine and know what was going on at that time I could go home to continue the treatment.

END FOOTNOTE

On August 31, 2020 my sister Bobby called me and said that I was on the Shiawassee page that there was an arrest warrant for me for assault with intent to murder. That day I called my parole officer and asked him if he knew of any-thing to which he called me back an hour later and stated that yes there was warrants. That night I meet him at the Shiawassee county jail and turned myself in.

I was arraigned on Sept. 1, 2020 on one count of assault with intent to murder, and two counts preparation to burn property valued at \$1,000 to 20,000. I was appointed Steven R. Ellis as my counsel who moved for forensic evaluation and indepented forensic evaluation. Both found that I was competent to stand trial, that I was not insane. The question that remains that was not answered and under michigan in People vs. Carpenter, 464 Mich 223 (2001) I was not allowed to present a defense of diminished capacity for the night of August 20, 2020.

This was not brought up at trial or prior to or before the plea was taken. It was brought up on Appeal by appointed appellate counsel who stated that Mr. Kissner should be allowed to withdraw his Plea if *People vs. Carpenter*, was overturned in *People vs. Tyson*, which was denied *People vs. Tyson*, 509 Mich 1049 (2022). see *People vs. Tyson*, 511 Mich 1080 (2023), and then *People vs. Sudz*, 2023 Mich Lexis 1865.

The appointed appoint counsel did not inform me of filing this issue, that she abandoned the sentencing issue presented to the 35th Judicial Circuit court after the denial in part, granting in part. Appointed appellate counsel never informed me of this decision, nor filing to the michigan court of appeals.

on April 14, 2023 I filed motions to the 35th Judicial circuit court. see APPENDIX-N. TO which the court struct in APPENDIX-O. ②

FOOTNOTE TWO

The court struct the motion's stating that I

have appointed counsel and there is no right to hybrid representation. see APPENDIX - O. The court did not say that the matter was no longer before that court.

— — — — END FOOTNOTE — — — —

on May 30 2023 appointed appellate counsel contacted me after the 35th Judicial circuit court informed her of its May 22, 2023 ruling. The appointed appellate counsel sworn that she had informed me of all decisions and filing that is until she looked at her records. see **APPENDIXS - D, F, G, and S.**

I was divested of communication from appointed appellate counsel as to the courts ruling, filing leave to appeal to the Michigan court of Appeals, the right to file my standard-4 supplemental brief Pursuant to Administrative order 2004-6;471 Mich cii (2004). Then learning on May 30, 2023 that the Michigan court of Appeals denied leave to appeal. That was on May 24, 2023. Both the appointed appellate counsel and myself filed

motion for reconsideration in the Michigan Court of Appeals. see APPENDIXS-C, and D. which explain the breakdown in communication. The court denied this motion and the Michigan Supreme court then denied leave to appeal and then denied reconsideration.

The courts deemed the breakdown in the communication and divesting of rights to be nothing at all.

I, Mr. Kissner was appointed Liane Kufchack for appeal. Twice Mr. Kissner contacted the 35th Judicial circuit court to question why appointed appellate counsel had not responded to any of my letters.

In the issue here the Petitioner must show (1) that his counsel's performance was deficient, and (2) that he was prejudiced by the deficiency. cf. Strickland vs. Washington, 466 U.S. 668, 687 (1984), or he can show counsel entirely fails to subject the case to meaningful adversarial testing. cf. United States vs. Cronin, 466 U.S. 648, 659 (1984). The test

for ineffective assistance of appellate counsel is the same as that applicable to claims of ineffective assistance of trial counsel. *People vs. Uphaus*, 278 Mich App 174, 186 (2008).

Michigan rules of professional conduct.

Rule 1.4 communication. In short: "counsel shall keep the client reasonably informed of all the decisions and the proceedings" The American Bar Association requires the same. The standards of communication cannot be forgotten.

Appellate counsel failed to inform me of the 35th Judicial circuit court's decision on his motion for resentencing in Dec. of 2022. Or that she filed application for leave to appeal in the Michigan court of Appeals on Jan. 19, 2023. That she had abandoned the motion for resentence which was preversed on the record for an issue which she did not move to preverse in the 35th Judicial circuit court, nor filed a motion to remand in the Michigan court of Appeals.

In appointed appellate counsel's failure to communicate which is clearly "objectively

unreasonable in light of prevailing professional norms, and that was prejudicial by all standards. Mr. Kissner had no information or decision in what was filed to the Michigan court of Appeals and he was divested of his right and ability to file a "standard-4 supplemental brief" pursuant to Administrative order 2004-6; 471 Mich cii (2004). See Taylor vs. Bell, 2023 U.S App Lexis 2681 n.1; People vs. Good, 2023 Mich App Lexis 2620 * 5-10

In Taylor vs. Bell, 2023 U.S App. Lexis 2681 n.1, The court noted:

"In Michigan, an indigent criminal defendant who 'insists that a particular claim or claims be raised on appeal against the advice of counsel' has the 'right under standard-4 of Administrative order 2004-6; 471 Mich cii (2004) to file a supplemental brief in propria person presenting the claim or claims'"

As this court has explained, "effective appellate counsel should not raise every non-

frivolous argument on appeal, but rather only those arguments most likely to succeed." *Davila vs. Davis*, 582 U.S. 521, 531-533 (2017) (quoting *Smith vs. Murray*, 471 U.S. 527, 536 (1986); *Jones vs. Barnes*, 463 U.S. 745, 751-753 (1983)). Declining to raise a claim on appeal, therefore, is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate courts. see *Smith vs. Robins*, 528 U.S. 259, 288 (2000).

The ineffective assistance of appellate counsel in failing to raise the defaulted issue is a recognized "cause" that can excuse procedural default. see *Edwards vs. Carpenter*, 529 U.S. 446, 451-452 (2000); *People vs. Freese*, 2021 Mich App Lexis 465 *10-11; *People vs. Good*, 2023 Mich App Lexis 2620 *5-10.

I was divested of the right that the courts allow me which is a standard-4 supplemental brief pursuant to Administrative Order 2004-6; 471 Mich cii (2004). To file any issues in which appointed appellate counsel declined to file

on his application for leave to appeal to the Michigan court of Appeals. This was divested however, by appointed appellate counsels complete breakdown in communication to inform me of the start of the 84 days in which to file. Moreover, she failed to inform that she even filed to that court. The court should have moved for remand pursuant to *People vs. Allen*, 501 Mich 1075 (2018); *People vs. Ginther*, 390 Mich 436, 440-442 (1973); *People vs. Hunt*, 2021 Mich Lexis 1692; *People vs. Nichols*, 2021 Mich Lexis 1926

I had the right to file claims that I felt necessary but was divested by appellate counsels' complete breakdown in communication.

II. Did the Michigan court of Appeals error in the denial of reconsideration when appointed appellate counsel admitted to a communication breakdown.

The counsel admitted in APPEDIX-C. To

a breakdown in communication but attempts to blame this breakdown on me being transferred from facility to another. This was cleared up in APPENDIXS - D, K, and L. This shows that on Feb. 14, 2023 I wrote to her requesting documents. Then in APPENDIX - L shows other letters mailed out to her.

The Michigan court of Appeals committed clear error in failing to properly review the facts and just denied relief on reconsideration. This should have been reviewed de novo as it was a claim of ineffective assistance of appellate Counsel claim.

III. Did the Michigan supreme court error in the denial of leave to appeal when there was a communication breakdown with appointed appellate counsel.

The Michigan supreme court committed clear error when it failed to remand for an evidentiary hearing into the breakdown in communication with appointed appellate counsel and myself. see

People vs. Allen, 501 Mich 1075 (2018); People vs. Ginter, 390 Mich 436, 440-442 (1973); People vs. Hunt, 2021 Mich Lexis 1692; People vs. Nichols, 2021 Mich Lexis 1926. The court committed clear error and abused its discretion, see Halbert vs. Michigan, 545 U.S 605 (2005); People vs. Caldwell, 502 Mich 900 (2018); People vs. Foster, 501 Mich 1024 (2018); People vs. Xiloj - Perez, 501 Mich 939 (2017).

IV. Does Michigan law violate Mr. Kissner's right to present valid defense to charges against him.

The Michigan Legislature and Michigan Supreme Court in People vs. Carpenter, 464 Mich 223, 225-226 (2001). The Legislature and Michigan Supreme Court have effectively divested a defendant of filing a valid defense of diminished capacity to the charges against him. I was taken to the hospital in which found me mentally ill pursuant to Mich. Comp. L 330.1400(g).

I have a state and Federal constitutional right to present a defense to any charge. see

Mich. const. of 1963, art 1, §§ 13, 17, 20; U.S const. Am's VI, XIV; People vs. Hayes, 421 Mich 271, 278 (1984); People vs. Kurr, 253 Mich App 317, 326 (2002).

on the night of August 20, 2020 the officer's took me to the hospital after the jail refused to take me. Officer Orr petition for mental health examination pursuant to Mich. comp. L 330.1401(1) (a), and (b). The ER Dr. Zarski found me mentally ill pursuant to Mich. comp. L 330.1400(g). Then found the need for involuntarily hospitalized pursuant to Mich. comp. L 330.1403.

Mich. comp. L 330.1400(g) states clearly:

"Mental illness", mean a substantial disorder of thought or mood that significantly impairs Judgment, behavior, capacity to recognize reality or ability to cope with the ordinary demands of life".

In People vs. McRunels, 237 Mich App 168, 173 (1999). The court stated:

"The 1994 amendment of the insanity statute, 1994 PA 56, Mich. comp. L 768.21a; MSA 28.1044(1), took

effect on October 1, 1994, adding to the statute that a 'legal insanity' is an affirmative defense and that a Defendant has the burden of proving the defense by a preponderance of the evidence. we quote the amended statute below, with the amendments provisions emphasised:

(1). It is an affirmative defense to a prosecution for a criminal offense that the Defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness as defined in ... [Mich. comp. L 330.1400a; MSA 14.800(400a)]... that the person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity".

Requiring Treatment pursuant to Mich. comp. L 330.1401(1) provides:

"(a). An individual who is mental illness, and who as a result of that mental illness can reasonably be expected within the near future to intentionally or unintentionally seriously physical injure himself or herself, or another individual, and who has

engaged an act or acts or made significant threats that are substantially supportive of the expectation."

I was naked covered in flammable chemicals trying to set myself on fire. At the hospital I did not recognize my own brother at that time. I was on one on one observation at the hospital, and was given injections of psychiatric medication.

V. Does the diminished capacity defense go's directly to the heart of the criminal responsibility of charges against him.

"criminal responsibility at the time of the alleged offense ... is a distinct issue from one's competency to stand trial. Jackson vs. Indiana, 406 U.S 715, 739 (1972). see also People vs. Krugman, 377 Mich 559 (1966) (An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect). Mr. Kissner was clinical determination of Mental ill person. This was a determination by Doctor Jeremy Zariski at the Owosso Memorial hospital on August 20, 2020 at 2230 to 2306. This pursuant to

Mich. comp. L 330.1400(g); Mich. comp. L 330.1401; Mich. comp. L 330.1403; Mich. comp. L 330.1416; Mich. comp. L 330.1429; Mich. comp. L 330.1452 (1)(a).

Mr. Kissner was involuntarily intoxicated by the so called victim Shannon L. Boudro who admitted to drugging me because I refused to do drugs with her. I did not know what was going on until the next day after the hospital gave me a lot of antipsychotic medication throughout the night. see APPENDIX - T.

I was clinically found "Mentally ill." This means a "substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life". see Mich. comp. L 330.1400(g). see also People vs. Toma, 462 Mich 281, 318 n. 11 (2000); People vs. McPherson, 507 Mich 957

(2021); People vs. Griffin, 433 Mich 860 (1989); People vs. Fernandez, 427 Mich 321, 341-343 (1987); People vs. Ramsey, 422 Mich 500, 513-514, 518-519, 534, 546 (1985); People vs. Krugman, 377 Mich 559 (1966); People vs. Cummins, 47 Mich 334, 337 (1882); People vs. Knapp, 26 Mich 112, 115 (1872); Shannon vs. People, 5 Mich 71, 88 (1858).

I state that my diminished capacity the night of August 20, 2020 via involuntarily intoxication is a direct defense to the criminal responsibility to the charges at hand. The refusal a defense of diminished capacity violates my constitutional rights to present substantial if not valid defense to the charges. I have the constitutional right to present a defense. see e.g., U.S. Const. Am's. VI, XIV; Mich. Const. of 1963, art 1, §§ 13, 20; People vs. Kurt, 253 Mich App 317, 326 (2002); People vs. Hayes, 421 Mich 271, 278 (1984). see furthermore, Crane vs. Kentucky,

476 U.S. 683 (1986); California vs. Trombetta, 467 U.S. 479 (1984); Chamber vs. Mississippi, 410 U.S. 284 (1973); Washington vs. Texas, 388 U.S. 14, 19 (1967).

Black's Law Dictionary Eleventh Ed.

Defines: "Responsibility" as: (1) "The quality, state, or condition of being duty-bound, answerable, or accountable; Liability, (2) criminal law. A person's mental fitness to answer in court for his or her actions. See competency. (3) criminal law. Guilt. - Also termed (in senses 2 & 3) criminal responsibility. - responsible. pg. 1569

Black's Law Dictionary Eleventh Ed.

Defines: "diminished responsibility" as: "Diminished capacity and capacity (3). pg. 1569

Black's Law Dictionary Eleventh Ed.

Defines: "capacity" as: "The role in which one performs an act; esp., someone's job, position, or duty - in her corporate capacity 7. pg. 257

Black's Law Dictionary Eleventh Ed.

Defines: "diminished capacity" as: "An impaired mental condition - short of insanity - that is caused

by intoxication, trauma, or disease and that prevents a person from having the mental state necessary to be held responsible for a crime. • In some jurisdictions, a defendant's diminished capacity can be used to determine the degree of the offense or the severity of the punishment. (2). A failure-of-proof defense or a partial-excuse defense based on the defendant's diminished capacity at the time of the offense. — Also termed diminished responsibility; partial insanity; partial responsibility. cf. **INSANITY**."

"'Diminished capacity' refers to two distinct doctrines: The use of evidence of mental abnormality to negate a mens rea required by the definition of the crime charged (the mens rea variant) and the use of mental abnormality evidence to establish some type of partial affirmative defense to excuse (the partial excuse variant). courts have various other terms, such as diminished responsibility, to refer to one or both of these distinct doctrines, but the term used is unimportant. confusion arises, however, when the two types of doctrine are not clearly distinguished." Stephen J. Morse, "Diminished capacity" in Encyclopedia of Crime & Justice 528, 528 (Joshua Dressler Ed., 2d ed. 2002). see APPENDIX - U.

I was found mentally ill by the Doctor at

Owosso Memorial hospital the night of August, 20, 2020 at 2306 hours. This after the officer's Joseph M. Ott and Luke Rogers found him naked trying to set himself on fire at 20:43 hours that night and placed me in handcuffs and placed me in a patrol car for my safety and failed to call EMS-EMT's to look over me.

The clinical diagnosis by Doctor Jeremy Zarski that night and the involuntarily intoxication both negate my criminal responsibility the night of August 20, 2020 and charges therefrom. This is a right via constitution to present a substantial or valid defense to the charges. This is a diminished capacity defense to the criminal responsibility.

VI. Does the trial court refusal to produce Mr. Kissner the court record impede him the proper ability to file to the higher courts impeding him of a right to petition the higher courts.

I have petition the court. The 35th Judicial circuit court for the production of the court record. This being a copy of felony complaint, felony warrant, felony bindover, felony information, all transcripts. The 35th Judicial circuit court has refused to produce these documents.

The Michigan supreme court refused to order production of documents. see APPENDIX-H.

The request for these documents was pursuant to Mich.ct. R 6.433(B) and (C). see APPENDIX-I.

I requested these documents to provide me the ability to properly file to this court or in the 35th Judicial circuit court or to file Petition for writ of habeas corpus. which ever came first. The denial of this request violates the fundamental fairness. see U.S const. Am's V, XIV; Mich.const. of 1963, art 1 § 2; Smith vs. Bennett, 365 U.S 708, 710

(1961); Griffin vs. Illinois, 351 U.S. 12, 20 (1956).

In People vs. Houlihan, 474 Mich 958, 959 (2005). The Michigan Supreme court stated:

"It was decided in 1963. The United States Supreme court made it clear at that time that 'there can be no equal justice where the kind of an appeal a man enjoys [depends on the amount of money he has]' (quoting Douglas vs. California, 372 U.S. 353, 355 (1963); Griffin vs. Illinois, 351 U.S. 12, 19 (1956)).

The 35th Judicial circuit court held that I did not show good cause for the documents pursuant to Mich. Ct. R 6.433 et seq. The court erred in this conclusion and abused its discretion.

REASONS FOR GRANTING THE WRIT

The state court's have abused their discretion and denied me of due process pursuant to U.S. Const. Am's V, XIV; Mich. Const. of 1963, art 1, § 17. But also denied him the right to present a defense of diminished capacity.

This pursuant to U.S. Const. Am's VI, XIV; Mich. Const. of 1963, art 1, §§ 13, 17, 20; People vs. Kurtz, 253 Mich App 317, 324 (2002); Crane vs. Kentucky, 476 U.S. 683 (1986); California vs. Trombetta, 467 U.S. 479 (1984); Chamber vs. Mississippi, 410 U.S. 284 (1973); Washington vs. Texas, 388 U.S. 14, 19 (1967).

I was also denied the effective assistance of appointed appellate counsel where counsel failed to communicate with me during the appellate process in violation of American Bar's Association Rule 1.4, and Michigan Rules of Professional conduct Rule 1.4 which both demand communication of all rulings and filings. Because of this breakdown in critical communication by counsel I was divested of filing a standard -4 supplemental brief pursuant to Administrative Order 2004-6; 471 Mich cii (2004).

The court should Grant certiorari to clarify

the proper scope of effective assistance of appointed appellate counsel and communication, and the right to present a valid defense of diminished capacity and the why the lower court's decisions were clearly erroneous and abuse of discretion.

CONCLUSION.

Mr. Kissner prays that this Court Grant writ of certiorari and decide the proper law in this matter.

Date.
Feb. 20, 2024

Respectfully submitted
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