No. _____

23-7610 ORIGINAL

In The

Supreme Court of the United States

David K. Horsley,
Petitioner,

v.

State of Ohio,
Respondent.

On Petition for a Writ of Certiorari to the
4th District Court of Appeals
for the State of Ohio.

PETITION FOR A WRIT OF CERTIORARI

David K. Horsley
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McArthur, Ohio 45651
(740) 978-6242

Petitioner, *Pro Se*

The Question Presented

The State of Ohio has created a rule to reopen an appeal. It is Ohio App. R. 26 (B). In (B)(1) of that rule it applies a time limit to reopening of an appeal even when the applicant has proven, that due to counsels error, the procedural safeguards found in *Anders v. California*, 386 U.S. 738 and *Penson v. Ohio,* 488 U.S. 75 (1988) were not followed. This Court ruled that the failure to perform an *Anders* review is unconstitutional and the appeal left unadjudicated. *Evitts v. Lucy*, 469 U.S. 387, 396-397. It forces appellants to represent themselves on direct appeal, via the Application to reopen process, as they have been denied the benefit of counsel reviewing the merits of the case on direct appeal, in direct violation of the 6th Amendment to the United States Constitution and *stare decisis*.

The question presented is,

Does Ohio's App. R. 26 (B)(1) violate the 6th Amendment of the United States Constitution by applying a time limit to when an applicant can file to reopen an appeal when an applicant has proven, that due to counsel error, a review of the legal merits of the case on direct appeal, as required by *Anders v. California*, 386 U.S. 738 and *Penson v. Ohio*, 488 U.S. 75, was never performed?

RELATED PROCEEDINGS

TRIAL

Judge P. Randell Knece

Trial counsel: O.P.D. Attorney William Archer

M-1 Assault enhanced to an F-4. O.R.C. 2903.13 (C)(5).

Failure to Appear dismissed in return for guilty plea.

Date Sentenced Nov 24, 1999, Disposition FOUND GUILTY

WITHDRAWAL OF PLEA HEARING

Judge P. Randell Knece

Withdrawal of Plea counsel: O.P.D. Attorney Tracey Leonard

Testimony given by Ptl Baer, Trial counsel W. Archer and the petitioner.

Date of hearing Oct 6, 1999, Disposition DENIED

APPEAL

Notice of Appeal Nov 15, 1999, Filed by Attorney T. Leonard

Praecipe of Transcript of the Record Nov 15, 1999, Filed by Attorney T. Leonard

*Attorney T. Leonard failed to certify a copy of the Praecipe to the Court Reporter. As a result a complete copy of the transcript of the record was never created or transmitted to the appellate court and therefore, never been reviewed by the appellate court. The transcript of the withdrawal of plea hearing whose result I am appealing has never been reviewed by appellate counsel or the appellate court on my behalf. (App G, H and I)

Stay of Execution of Sentence: Attorney T. Leonard never filed one with Appellate court.

Entry/ Motion to Withdrawal an Appeal Nov 24, 1999, Judge Abele

Entry accept Motion to Withdrawal Appeal Dec 09, 1999, Judge Abele

Appellate counsel: O.P.D. Attorney Jerry McHenry

Motion for reconsideration of his appeal May 28, 2021

Motion denied with review, Jun 02, 2021 Judge Smith

The Ohio Supreme Court denied without review 2021-Ohio-0750.

The United States Supreme Court denied without review Jan 10, 1999, # 21-5961

Application to reopen appeal May 21, 2022

Application denied without review, Jun 02, 2022 Judge Smith

Magistrates order without review Jun 27, 2022 Magistrate T. Ruth

Motion to reconsider the application to reopen, Jun 08, 2022

Motion denied with review, Jul 12, 2022 Judge Hess

Ohio Supreme Court denied without review 2022-Ohio-0885.

Delayed application to reopen App. R. (B) Jan 17, 2023

Application denied without review, Feb 08, 2023 Judge Hess

The Ohio Supreme Court denied without review. 2023-Ohio-0224

Writs of Mandamus and Prohibition May 05, 2023, 2023-0591

Cause dismissed without review. Aug 08, 2023, 2023-2600

*Received e-mail from Court Reporter Aug 11, 2023 App I of App D

Delayed application to reopen #2. Oct 11, 2023 99CA33

Denied Dec 13, 2023 99CA33

Appealed Ohio Supreme Court Jan 09, 2024 2024-0043

Denied	Mar 19, 2024	2024-Ohio-984
Filed Motion to Reconsider	Mar 22, 2024	2024-0043
Denied	May 14, 2024	2024-Ohio-1832

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RULE

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On Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, David K. Horsley, respectfully seeks a writ of certiorari to review a judgment of the 4th District Court of Appeals for the State of Ohio.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Ohio, Case no. 2024-0043. Decision entry denying Motion to Reconsider, 2024-Ohio-1832, (Pet. App. C) Decision entry declining jurisdiction. 2024-Ohio-984 (Pet. App. B) and the lower court opinion of the 4th District Court of Appeals for the State of Ohio, Case no. 99C33, Judge Hess denial (Pet. App. A), are published on the Ohio Supreme Court website as required by Rep. Op. R. 3.2 dated July 1, 2012.

JURISDICTION

The judgment of the Supreme Court of the State of Ohio entered on August 3, 2021.

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

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense."

The Fourteenth Amendment to the U.S. Constitution provides that "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 TO THE CASE

I signed a Motion to Withdraw an Appeal after being told my case had no legal merits to appeal. After multiple attempts to reopen my appeal I have found out that assigned counsel who represented me at the Withdraw of Plea hearing failed to properly Certify the Praecipe of the Transcript of the Record to the Court Reporter. A full transcript of the record was not created nor was a copy transmitted to the appellate court. The appellate court never admitted counsels obvious error in its ruling denying my requests to reopen my appeal. (App E, ¶8 of Delayed application to Reopen #2 / App D) Instead the appellate court blamed me for the lack of a transcript. I have been finally been able to prove counsels error with the e-mailed response to a Public Records Request. (App G, H, and I of App D) In that response she states that counsel failed to properly Certify the Praecipe of the

Transcript of the Record to the Court Reporter. That evidence clearly proves that my appeal is unadjudicated and unconstitutional.

Counsels error is a violation of Ohio Appellate Court rules and of the ruling in *Entsminger v. Iowa*, 386 U. S. 748 (1967). Appellate counsel never submitted an *Anders* brief to the appellate court. (App C, D of App D) The appellate court ruled on my case without a full transcript of the record. Failure to perform a merit review is a violation of the procedural safeguards found in *Anders v. California*, 386 U.S. 738 and *Penson v. Ohio,* 488 U.S. 75. Both violations have been ruled unconstitutional in *Evitts v. Lucy*, 469 U.S. 387, 396-397.

I received the e-mail from the Court Reporter identifying counsels error on August 11, 2023. I filed this appeal on October 11, 2023.

REASONS FOR GRANTING THE PETITION

A ruling on this case would create a ruling in a series of rulings that would govern how appellate courts handle Motions to Withdraw an Appeal. The rulings in *Anders* and *Penson* outline the procedural safeguards that must be followed in submitting a Motion to Withdraw an Appeal. This case will define how to reopen an appeal when the applicant has proven that the procedural safeguards found in *Anders* and *Penson* were not followed due to counsels error.

Appellants must be afforded that one chance to be properly represented by counsel on direct appeal as required by the 6th Amendment to the U.S. Constitution. If that right is denied altogether, as in this case, then they must have a guaranteed path to reopen that appeal to correct that constitutional error regardless how much

time has passed. Currently, if you do not discover counsels error within 90 days then you are denied the benefit counsel altogether on direct appeal. It forces appellants to represent themselves on direct appeal, via the Application to reopen process, as they have been denied the benefit of counsel reviewing the merits of the case on direct appeal, in direct violation of the 6th Amendment to the United States Constitution and *stare decisis*. To deny *Certiorari* would leave open a loophole that would offer tyranny a way to deny our 6th Amendment Right to Counsel altogether on direct appeal and would effectively nullify the procedural safeguards found in both *Anders* and *Penson, supra*.

I have proven that Ohio's App. R. 26 (B)(1) is in conflict with the 6th Amendment to the U.S. Constitution as it applies a time limit to reopening an appeal where the applicant has shown that an *Anders* review was not performed due to counsels deficient performance which has been ruled by this Court to be unconstitutional. *Evitts v. Lucy*, 469 U.S. 387, 397.

ARGUMENTS IN SUPPORT

A. Motions To Withdraw An Appeal.

In *Anders v. California*, 386 U.S. 738 and *Penson v. Ohio,* 488 U.S. 75, this Court outlined the procedural safeguards for the appellate courts to follow when it accepts a Motion to Withdraw an Appeal. It requires appellate counsel to list anything that could possibly be considered a legal merit to be raised on an appeal in an *Anders* brief, go over it with the appellant to sign, and submit it to the appellate court. Then once the *Anders* brief is submitted to the appellate court it requires the

appellate court to conduct a separate review of the legal merits of the case on direct appeal and if any merits are found then the appellate court must assign new counsel to argue those merits on appeal. A merit review cannot be performed with a full transcript of the record.

This Court has held that failure to follow the merit review procedures in *Anders*, thus *Penson*, and the failure to provide a full transcript of the record found in *Entsminger v. Iowa*, 386 U. S. 748 (1967) are unconstitutional.

> "The petitioners in both Anders v. California, 386 U. S. 738 (1967), and Entsminger v. Iowa, 386 U. S. 748 (1967), claimed that, although represented in name by counsel, they had not received the type of assistance constitutionally required to render the appellate proceedings fair. In both cases, we agreed with the petitioners, holding that counsel's failure in Anders to submit a brief on appeal and counsel's waiver in Entsminger of the petitioner's right to a full transcript rendered the subsequent judgments against the petitioners unconstitutional." *Evitts v. Lucy,* 469 U.S. 387, 397.

Counsels error results in my appeal being unconstitutional.

B. The Rule Governing Errors of Ministerial Tasks.

The filing of a Praecipe of the Transcript of the Record is a ministerial task that counsel failed to properly perform. The Notice of Appeal and the Praecipe of the Transcript of the Record are usually filed together. They are both ministerial tasks that imposed no great burden on counsel. The ruling in *Garza v. Idaho, 586 U.S. __*, (2019) applies to the filing of a Notice of Appeal. I believe it also applies to Praecipe of the Transcript of the Record as both are ministerial tasks.

> "Filing such a notice is a purely ministerial task that imposes no great burden on counsel." Flores-Ortega, 528 U. S., at 474." *Garza v. Idaho,* 586 U.S. __, 6 (2019).

This Court created a rule that when a ministerial filing error occurs, that was caused by counsels error, and that results in an applicant being denied an appeal altogether, then the appellant gets a new opportunity to appeal. I have clearly shown counsels error. (App G, H, and I of App D) The appellate court denying my application to reopen under these circumstances conflicts with this Courts rule. The rule says I should be granted a new opportunity to appeal.

> "The more administrable and workable rule, rather, is the one compelled by our precedent: When counsel's deficient performance forfeits an appeal that a defendant otherwise would have taken, the defendant gets a new opportunity to appeal."

Justice Sotomayor goes on to explain that If the appellate court were to assign counsel to finish my appeal it does no more than restore that which was taken from me by counsels error.

> "That rule does no more than restore the status quo that existed before counsel's deficient performance forfeited the appeal, and it allows an appellate court to consider the appeal as that court otherwise would have done—on direct review, and assisted by counsel's briefing." internal quotations marks deleted, Garza v. Idaho, 586 U.S. __, 13-14. (2019)

This Court also held that that 6th Amendment remedies should be tailored to the injury suffered and must "neutralize the taint" of a constitutional violation.

> "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be

> tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *U.S. v. Morrison,* 499 U.S. 361, 364. (1981) Thus, a remedy must "neutralize the taint" of a constitutional violation," *Lafler v. Cooper,* 566 U.S. __, 11-12. (2012)

But for counsels deficient performance, I would have had a copy of the transcript of the record at state expense and I would have had a merit review of that transcript performed by appellate counsel on my behalf and submitted to the appellate court at state expense and I would have had a merit review of the full transcript of the record conducted by the appellate court as required by *Anders* and *Penson, supra.* I have not had my claims presented by a lawyer to the appellate court. I have simply not had my day in court due to counsels error. That is what I lost and what must be restored in this case. The appellate court must be ordered to proceed to Ohio App. R. 26 (B)(6) through (9).

C. The Appellate Court Argues *Res Judicata*

Ohio's 4th District Court of Appeals ruled it is barred from looking at the application to reopen by *res judicata.* (App A) The Ohio Supreme Court ruled that *res judicata* does not apply if 1) a merit review of the case has not occurred and 2) if the application was filed within the 90 day time limit contained in (B)(1). *State v. Davis,* 2008-Ohio-4608, ¶23 - ¶29. As I have proven a merit review of my case did not occur, *supra,* then it leaves only the time limit preventing me from proceeding with my reopening. The issue is the time limit in App. R. 26 (B)(1).

D. Time and *Anders* reviews.

Time stops tolling at the point of constitutional injury as my case on direct appeal has not been properly adjudicated. This Court has held that failure to follow the procedures in *Anders v. California*, 386 U. S. 738 (1967), thus *Penson v. Ohio,* 488 U.S. 75 and *Entsminger v. Iowa*, 386 U. S. 748 (1967) is unconstitutional and my appeal has yet to be properly adjudicated. *Evitts v. Lucy*, 469 U.S. 387, 396-397. The evidence clearly shows that due to counsels error I have been effectively denied an appellate review of my conviction. The appellate court has reviewed the merits of my case on appeal without a complete copy of the transcript of the Withdraw of Plea hearing whose result it is that I am appealing. The appellate court also denied my request to reopen my appeal without conducting a merit review of the full transcript of the record. All of this is due to counsels error. This has effectively left me without counsel on direct appeal. This Court held that,

> "A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucy*, 469 U.S. 387, 396.

My direct appeal is not finished yet as my appeal has not yet been properly adjudicated. The time limit in (B)(1) should not start running until after my case on direct appeal is properly adjudicated. It requires the appellate court to toll the time from the point of constitutional injury. The appellate court should base that adjustment on my submission of hard evidence that an *Anders* review was never performed due to counsel error, *supra* p 2-3. Ohio's App. R. 26 (B)(1) does not permit reopening under such conditions and that proves it conflicts with the 6th

Amendment to the United States Constitution. As a result it is null and void. *Maybury v. Madison*, 5 U.S. 137.

If Ohio's App. R. 26 (B)(1) is null and void then Ohio App. R. 26 (B)(5) should be controlling. Ohio App. R. 26 (B)(5) states,

> "An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." Ohio App. R. 26 (B)(5)

But it does not explain how the time limit in (B)(1) applies to (B)(5) or if it applies at all. If (B)(1) does not apply then that would leave only (B)(5) to determine if the appellate court should proceed with reopening or not.

E. Other Options

Ohio Revised Code Section 2953.21 | Post conviction relief petition.

This provision of law does not provide for an attorney at state expense nor does it provide for a copy of the transcript of the record at state expense. Therefore, it is not an adequate remedy for the constitutional injury I have suffered.

> "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *U.S. v. Morrison,* 499 U.S. 361, 364. (1981) Thus, a remedy must "neutralize the taint" of a constitutional violation," *Lafler v. Cooper,* 566 U.S. __, 11-12. (2012)

But for counsels deficient performance I would have had a copy of the transcript of the record at state expense, I would have had a merit review of that

transcript performed by appellate counsel on my behalf at state expense, and I would have had a merit review by the appellate court as required by *Anders* and *Penson*, supra. That is what must be restored in this case.

F. Do I have legal merits to raise on appeal?

I believe I do not need to do anything other than prove counsels error denied me an appeal. "with no further showing from the defendant of the merits of his underlying claims." See Flores-Ortega, 528 U. S., at 484." *Garza v. Idaho*, 586 U.S. __, 14. (2019) It is not for me to argue the merits of my case on appeal.

However, in seeking support for my cause I have included my reasoning as to what legal premise my case can be overturned on appeal. Those arguments are contained in the Delayed Application to Reopen #2 (App D) which I submitted to the appellate court. I have legal merits to raise on appeal which will result in the overturning the plea agreement. I should then be acquitted of both charges contained in the plea agreement. I am innocent and I have nothing to fear in facing both of these charges once again.

Conclusion

The United States Supreme Court should grant my request for *Certiorari.*

Respectfully Submitted,

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