

No. 19-_____

IN THE SUPREME COURT OF THE UNITED STATES

RANDY A. THOMAS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Ohio places the burden of proof and persuasion in a self defense case on the person asserting self defense. A person's state of mind is relevant in a self defense case. A life long history of developmental delay issues, very low IQ scores and Social Security disability records are relevant to the state of mind issue.

- I. Is counsel ineffective under the Sixth and Fourteenth Amendments of the federal Constitution when no investigation is conducted pre-trial concerning the client's developmental delay issues, very low IQ scores and history of Social Security benefits and post conviction investigation reveals such relevant information as to the client's state of mind in a self defense case?

- II. Is counsel ineffective under the Sixth and Fourteenth Amendments of the federal Constitution when one counsel does not know what the average IQ score is and lead counsel testifies it is between 70-80 and counsel does not consult a mental health expert when the affirmative defense of self defense is presented and the client testifies with a recent IQ score in the low 50's?

List of Related Cases

1. State Post Conviction II

State v. Thomas, 2019 Ohio 4247, Ohio Court of Appeals, case number 29112, 10-16-19

State v. Thomas, Ohio Supreme Court case number 2019-1648, 2-26-20

2. State Post Conviction I

State v. Thomas, 2016 Ohio 5507, Ohio Court of Appeals, case number 27698, 8-24-16

State v. Thomas, Ohio Supreme Court case number 2016-1480, 4-19-17

Thomas v. Ohio, U.S. Supreme Court case number 17-5117, cert denied 10-2-17

3. Direct appeal

State v. Thomas, 2015 Ohio 2935, Ohio Court of Appeals, case number 27266, 7-22-15

State v. Thomas, Ohio Supreme Court case number 2015-1482, 12-30-15

Thomas v. Ohio, U.S. Supreme Court case number 15-1214, cert denied 5-16-16

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	2
RELATED CASES.....	3
TABLE OF CONTENTS.....	4
APPENDIX.....	5
TABLE OF AUTHORITIES.....	5
PETITION FOR A WRIT OF CERTIORARI.....	6
OPINION BELOW.....	6
JURISDICTIONAL STATEMENT.....	6
CONSTITUTIONAL AND STATUTORY PROVISIONS.....	6
SUMMARY OF ARGUMENT.....	8
STATEMENT OF THE CASE.....	9
PROCEEDINGS BELOW.....	11
REASONS FOR GRANTING THE WRIT.....	11
I. Is counsel ineffective under the Sixth and Fourteenth Amendments of the federal Constitution when no investigation is conducted pre-trial concerning the client’s developmental delay issues, very low IQ scores and history of Social Security benefits and post conviction investigation reveals such relevant information as to the client’s state of mind in a self defense case?.....	11
II. Is counsel ineffective under the Sixth and Fourteenth Amendments of the federal Constitution when one counsel does not know what the average IQ score is and lead counsel testifies it is between 70-80 and counsel does not consult a mental health expert when the affirmative defense of self defense is presented and the client testifies with a recent IQ score in the low 50's?.....	20
CONCLUSION.....	21
PROOF OF SERVICE.....	22

APPENDIX

APPENDIX A, Supreme Court of Ohio denial of jurisdiction, Case number 2019-1648, 2-26-20

APPENDIX B, Ninth District Ohio Court of Appeals Opinion, Case number 29112, 10-16-19

TABLE OF AUTHORITIES

	Page
<u>Ake v. Oklahoma</u> , 470 U.S. 68 (1985).....	20
<u>Atkins v. Virginia</u> , 536 U.S. 302 (2002).....	15
<u>Clinkscale v. Carter</u> , 375 F.3d 430 (6 th Cir. 2004).....	19
<u>Commonwealth v. Williams</u> , 61 A.3d 979 (Pa. 2013).....	17
<u>Crane v. Kentucky</u> , 476 U.S. 683 (1986).....	16
<u>Hall v. Florida</u> , 134 S. Ct. 1986 (2014).....	17
<u>Hughes v. Epps</u> , 694 F. Supp. 2d 533 (N.D. Miss. 2010).....	17
<u>State v. Koss</u> , 49 Ohio St.3d 213 (1990).....	14
<u>State v. Mason</u> , 82 Ohio St.3d 144, 1998 Ohio 370.....	20
<u>State v. Thomas</u> , 13 Ohio App.3d 211 (1983).....	12
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).....	passim
<u>Towns v. Smith</u> , 395 F.3d 251 (6 th Cir. 2005).....	19
<u>United States v. Cronin</u> , 466 U.S. 648 (1984).....	11
<u>United States v. Smith</u> , 790 F. Supp. 2d 482 (E.D. La. 2011).....	17
<u>Weeden v. Johnson</u> , 854 F.3d 1063 (9 th Cir. 2017).....	19
<u>Williams v. Mitchell</u> , 792 F.3d 606 (6 th Cir. 2015).....	16

PETITION FOR WRIT OF CERTIORARI

Petitioner Randy A. Thomas respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Ohio.

OPINION BELOW

The order declining jurisdiction by the Supreme Court of Ohio is *State v. Thomas*, Case No. 2019-1648 and is reproduced at Pet. App. A. The Ohio Ninth District Court of Appeals, Summit County, opinion denying relief, CA 29112, 2019 Ohio 4247 is reproduced at Pet. App. B.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Ohio was entered February 26, 2020 and this Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment:

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.

Fourteenth Amendment: Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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.

Ohio Revised Code 2901.05(A)

Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

SUMMARY OF ARGUMENT

This Court should grant certiorari to address whether the effective assistance of counsel requires defense counsel to investigate and present evidence of a very low IQ, developmental disabilities since birth and Social Security disability in a case of self defense where the defendant's "state of mind" is critical and the burden of proof is placed by law on the person asserting self defense.

Ohio Revised Code 2901.05(A) requires a defendant to bear the burden of proof when raising a claim of self defense.

An evidentiary hearing was conducted in state post conviction where both trial defense attorneys testified. One lawyer did not know the average IQ; the lead lawyer testified an average IQ score was between 70-80. The average IQ score is 100.

No investigation into Thomas' state of mind was conducted before trial. The undisputed evidence in post conviction revealed Thomas had developmental disabilities since birth, had a life long record of very low IQ scores including one two years before this case when he achieved an IQ score in the low 50's and was receiving Social Security disability benefits due to his mental health disability.

Thomas was the only eyewitness to the shooting. He testified he acted in self defense. Thomas then fled the area. The jury had to determine his credibility. Moreover, under Ohio law, the jury had to place themselves in his shoes with his strengths and weaknesses. But the jury did not know about his low IQ and mental health issues because his lawyers did not investigate his "state of mind" and did not consult a mental health expert.

STATEMENT OF THE CASE

Randy Thomas was 21 years old at the time of the trial where he testified that he shot a man in self defense in Akron, Ohio. Mr. Thomas knew the man as a gang member or associate. Thomas had seen the man in gang videos, wear gang colors and had heard him brag about his exploits. One of the gang's videos was filmed on Seventh Avenue near the where the shooting took place. One video was called "Homicide." The gang was known to rob and shoot people and also kill for money. Thomas was in fear of the gang before and after seeing their videos where they bragged about their criminal exploits. He had even seen two gang members rob a man near the scene of the shooting a few months earlier. The man in this case was also a family member by marriage and Thomas knew him to be violent.

On the day in question, a Saturday around noon in April 2013, Thomas stopped by his grandparents home on Seventh Avenue. He regularly stopped to see his elderly grandparents who had raised him in his early years; he saw a man selling drugs in front of his grandparents home and did not like it. Thomas did not have a gun. The man challenged Thomas to a fist fight.

The two men drove around the corner to Eighth Avenue for the fist fight. As Thomas got out of his van, the man ran towards him. Thomas threw a punch but missed. The man pulled out a gun, unexpectedly, but Thomas was able to knock it out of his hand and pick it up off the ground. Thomas had just picked up the gun when the man charged back at him and Thomas shot him in self defense fearing for his life. No contrary evidence was presented. Thomas fled the scene and was later arrested, tried by a jury and convicted of Murder. The direct appeal was denied. A timely post conviction petition was filed in state court.

After a post conviction evidentiary hearing held pursuant to an order of the Ohio Ninth District Court of Appeals, it is clear that the lawyers for Thomas failed to investigate Thomas' personal background and failed to obtain records that he had a very low IQ, was developmentally disabled and on Social Security disability.

The lead attorney testified at the post conviction hearing that he thought the average IQ was 70-80; the other attorney testified he did not know the average IQ. No mental health experts were consulted by counsel. The average IQ is 100.

The post conviction trial court denied a new trial. On appeal, Thomas was denied a new trial in a 2-1 decision by the Ohio Court of Appeals. The Ohio Supreme Court declined jurisdiction in a discretionary appeal.

The evidence presented at the post conviction hearing concerning Thomas' state of mind as reflected in the records of his developmental problems and low IQ is not "another and better strategy" counsel could have pursued but an essential component of self defense. (See C.A. Opinion at para. 12)

Low intelligence scores are not "bologna" as lead counsel testified at the post conviction hearing and counsel has a duty to understand low intelligence, how it is measured and how it could impact the affirmative defense of self defense when a component is one's state of mind.

Trial counsel failed to investigate the state of mind of Mr. Thomas. In Ohio, a jury must place itself in the shoes of the person asserting self defense and must understand the person's state of mind. The jury had none of the information presented in the post conviction hearing about the state of mind of Mr. Thomas. The jury was deprived of information necessary to evaluate Mr. Thomas' testimony he provided in self defense and his actions afterwards.

PROCEEDINGS BELOW

Thomas had a jury trial on the single charge of Aggravated Murder with a firearm. He testified that he agreed to a fist fight but acted in self defense once the other man produced a firearm arm unexpectedly. The jury found Thomas not guilty of Aggravated Murder (prior calculation and design) but guilty of Murder (purposeful killing) and rejected his defense of self defense. The trial court imposed the only sentence available which was a life sentence with 18 years before parole eligibility.

A timely post conviction Petition was filed in state court. The Ohio Ninth District Court of Appeals ordered an evidentiary hearing on the issues present here. The trial court conducted an evidentiary hearing and denied relief. The Ohio Ninth District Court of Appeals affirmed in a 2-1 decision. The Supreme Court of Ohio declined jurisdiction as involving no substantial constitutional question on February 26, 2020. This Petition follows:

REASONS FOR GRANTING THE WRIT

I.

Mr. Thomas received the ineffective assistance of trial counsel under the Sixth and Fourteenth Amendments of the federal Constitution and Art. I, Section 10 of the Ohio Constitution. Strickland v. Washington, 466 U.S. 668 (1984); United States v. Cronin, 466 U.S. 648 (1984).

Mr. Thomas presented the affirmative defense of self-defense and testified on his own behalf. The trial court instructed the jury on self defense.

Ohio has adopted a subjective test in determining whether a particular defendant properly acted in self-defense. The defendant's state of mind is crucial to this defense. State v. Koss, 49 Ohio St.3d 213 (1990).

Defense counsel in this case failed to investigate and to present available evidence of the defendant's state of mind. Defense counsel's testimony at the post conviction hearing concerning a failure to investigate and present records stipulated to by the State is crystal clear on this point. (PC TR 144-146, 154)

The determination of guilt is personal and must be measured by that individual's equipment mentally and physically. Evidence of defendant's state of mind is relevant. State v. Thomas, 13 Ohio App.3d 211 (1983)(Summit County). (See PC TR 121-124.)

Lead counsel's testimony at the post conviction hearing that what was going on in Thomas' mind is not a concern reflects a misunderstanding of the law and is prejudicial and deficient performance. (PC TR 204)

The evidence that was available and should have been presented included defendant's lifelong low IQ scores consistent with borderline mental retardation or intellectual disability. Evidence in the school records and Social Security disability records also indicated treatment for speech and language impairments. (PC Exhibit 1, Akron School Records. PC Stipulated Ex. A.)

The Social Security Records establish beyond question a lifelong struggle with low IQ, seizures since the day of his birth and developmental delay issues.

Records and evidence from Dr. Webb, a psychologist at the Summit County Juvenile Court, were available but not presented concerning Thomas' mental health. (See SPPI Case Report PC Exhibit 2.)

Thomas suffered from a depressive disorder, his mother used drugs and alcohol during her pregnancy with him, and he suffered from speech and language development issues. (See PC Exhibit 2.)

Many of his psychological problems may be linked to childhood trauma. (See PC Ex. 2) Records from Greenleaf Family Center, Akron, Ohio were available but not presented which would show a “decreased impulse control” but no evidence of “homicidality” (page 2 of 6) and no other safety concerns. The records further show evidence of successful completion of an Anger Management Program (6-29-09) and behavior within “normal limits.” The Greenleaf records are also mentioned in the Dr. Webb’s report from Juvenile Court.

Thomas’ sense of self doubt was relevant to his perception of an honest belief that he was in imminent danger from the victim who challenged him to a fight and unexpectedly produced a firearm.

The jury had a duty to place itself in Thomas’ position with his characteristics, knowledge or lack of knowledge, and under the same circumstances and conditions that surrounded him.

All of the records not presented at trial but presented at the post conviction hearing support Thomas’ reasonable and honest belief that he was about to be killed or receive great bodily harm.

Yet defense counsel never investigated or presented the evidence available in the stipulated exhibits which included life long low IQ scores, developmental delay issues and the need for further physical and psychological testing. Just two years before the shooting, Social Security Records indicate Thomas had an IQ score in the low 50's.

Counsel could and should have called as a witness Dr. Webb from Juvenile Court to testify consistent with his records as well as to explain the low IQ. A representative from Akron Public schools could also have testified concerning the school records, the low IQ and language and speech issues. The Social Security records indicate that Dr. Magleby could have testified concerning his testing and finding of a 53 IQ just two years before this shooting.

Expert testimony is admissible in the search for the truth in a self-defense case. State v. Koss, 49 Ohio St.3d 213 (1990).

The evidence submitted at the post conviction hearing concerning IQ scores indicate that Thomas was in the very bottom of the population concerning intelligence. He was far below average. Dr. Webb stated in his report and testimony that Thomas was a complex individual and one could not detect his problems by simply talking to him. Thus, neither counsel nor the jury could understand Thomas' limitations by just listening or talking to him.

The jury was deprived of this information which is relevant to his conduct and state of mind and how he perceived the threat from the victim.

Dr. Webb's report and testimony is critical because he could explain to the jury the significance of the information contained in juvenile records and the impact of low IQ on the functioning of Thomas. Combined with the records from Greenleaf Family Center, which are cross referenced in Dr. Webb's report, the jury did not have a complete picture of Thomas' state of mind or his individual characteristics. On top of these records are the Social Security Records.

Lead counsel's belief that none of these records were relevant or important in a self defense case proves the deficient performance prong of Strickland.

Self defense in Ohio has a subjective aspect to it yet the jury was deprived of information and evidence unique to Thomas.

The Greenleaf records are critical too in that they show “decreased impulse control” but no evidence of “homicidality.” or other safety concerns. The self doubt discussed in the records is relevant to Thomas’ perception of an honest belief that he was in imminent danger from the victim and the jury had a duty to place itself in Thomas’ position with his characteristics, knowledge or lack of knowledge and under the same circumstances and conditions that surrounded him.

Unfortunately, counsel did not present available evidence concerning the unique personal history of Thomas that would allow the jury to do its job. Dr. Webb from Juvenile Court, representatives from the Akron Public Schools, Greenleaf Family Center and the Social Security doctor should have been called to testify concerning records of Thomas, his low IQ, language and speech issues and other relevant facts (i.e. decreased impulse control, no homicidality, behavior within normal limits etc) contained in various records and their impact on Thomas’ ability to function.

The U.S. Supreme Court has also held that those with low intelligence are “poor witnesses” which was critical to the Court’s decision that those with intellectual disabilities would be excluded from execution under the 8th Amendment. See Atkins v. Virginia, 536 U.S. 302 at 321 (2002).

While this is not a death penalty case, it is required under Ohio law for the jury to put itself in the defendant’s place in a self defense case.

If the jury believed Thomas was not a credible or good witness, it had to take into account his very low level of intellectual functioning; it further had to take into account this low level of functioning in his decision making. The impairments involving low intelligence include the areas of communication, the ability to learn from experience and to engage in logical reasoning. See Atkins supra.

In the context of the subjective component of self defense in Ohio, the jury must know whatever impairments a defendant possesses in regard to his state of mind. In this case, trial counsel did not understand the law and did not investigate the facts of Thomas' background in order to assist him in his complete defense of self defense. See Crane v. Kentucky, 476 U.S. 683 (1986)(Sixth and Fourteenth Amendments).

If the Court decides Strickland applies rather than Cronic, then Randy Thomas has met his burden of showing that there is a "reasonable probability" that counsel's deficient performance prejudiced him.

Without question, Randy Thomas has suffered, through no fault of his own, from low intelligence, developmental delays and speech problems from his earliest days.

Courts have recognized that intellectual capabilities remain stable throughout life and that early in life evidence of intellectual difficulties are directly relevant to present day intellectual determinations. See Williams v. Mitchell, 792 F.3d 606 (6th Cir. 2015) at footnote 4 and authorities cited therein. (See PC TR 239, Dr. Webb's testimony that IQ deficits are chronic)

Randy Thomas was the only witness who testified as to what happened during the incident in question; his credibility was obviously critical; as well as his state of mind. See Koss, supra.

Yet the jury was deprived of an abundant amount of information concerning Randy's state of mind and very low level of intelligence. The State even attacked Randy's manner of speech and argued to the jury that there was no evidence he was slow such as school records or anything like that. (Trial TR 1298)(PC Hearing TR 17-18)

There were an *abundance* of records but defense counsel never looked for them; during testimony on May 9, 2018 at the post conviction hearing it was clear that neither counsel obtained a signed release so that records could be gathered, never discussed such records with Thomas' guardians and family members (his grandmother Gloria and his sister Tamika) and even during the hearing trial counsel did not understand the importance of the records available in the context of a self defense case. (PC TR 37-38, 61-62; 189; 204) Prejudice here is overwhelming.

As discussed in Hall v. Florida, 134 S. Ct. 1986 (2014), IQ test scores can not be viewed in isolation and interpreting numerous test scores is a complex task. However, we know Randy had a lifetime of very low intelligence test scores. The IQ scores are not "bologna" as lead counsel testified at the post conviction hearing. (PC TR 189)

The following cases illustrate that an individual test score should not be given artificial weight especially by a non-mental health expert: State ex re Lyons v. Lombardi, 303 S.W. 3d 523 (Mo. 2010)(range of scores 61-84); Hughes v. Epps, 694 F. Supp 2d 533 (N.D. Miss. 2010)(scores from 62-81); United States v. Smith, 790 F. Supp 2d 482 (E.D. La. 2011)(scores of 67 and 93); Commonwealth v. Williams, 61 A. 3d 979 (Pa. 2013)(scores of 59-81).

It is not necessary to prove prejudice if Cronic is used instead of Strickland. Defense counsel were so lacking in their investigation and knowledge of basic IQ scores and what is an average score (and did not seek expert assistance) that counsel was essentially absent given the

subjective element of Ohio's self defense and the need for the defense to prove it.

The low level of intelligence also goes to the jury instructions on flight. (Trial TR 1246-47) The jury received the customary instruction on flight being evidence of consciousness of guilt unless otherwise explained. The other explanation that the jury never had concerned Thomas' low intelligence and poor decision making based on low intelligence rather than consciousness of guilt.

With respect to the duty to retreat instructions (Trial TR 1240-1241), there is a subjective element there too; in particular, the jury in this case had a jury question which asked what should the jury do if they believed Thomas was 10% at fault. If the jury had known about his low level of intelligence, then it is reasonably probable that they would have believed he was 0 % at fault.

Moreover, the subjective element goes to whether he had a reasonable and honest belief that he had to use deadly force. Finally, Thomas was allowed to use deadly force and had no duty to retreat even if he was mistaken to the danger. (Trial TR 1241, jury instructions) Thomas' state of mind, and low level of intelligence, is relevant to all of the above yet the jury was deprived of the information because defense counsel did not investigate.

It is important to keep in mind that even those diagnosed with "Mild Intellectual Disability" appear similar to unaffected individuals and often blend into the general population. (Approximately 85% of those with I.D.) Many achieve academic skills at the sixth grade level or higher and some graduate from high school. As adults, many individuals hold jobs, marry and raise families yet at times may appear slow or need extra help negotiating life's problems and tasks. Comprehensive Textbook of Psychiatry, Kaplan & Sadock, Tenth Edition (2017), page 3496.

In this case, CPI Diagnostics recommended just two years before this incident that further testing be done on Thomas to rule in or rule out intellectual disability. CPI noted that Thomas' ability to manage money and benefits was "markedly impaired." (Def. Ex. A, page 027) The trial defense lawyers never sought these CPI records or any other background records on Randy Thomas; and they did not consult a mental health expert.

Counsel can not justify a failure to investigate simply by invoking "strategy." Under Strickland, counsel's investigation must determine strategy, not the other way around.

Counsel had a duty to investigate the evidence of the defendant's state of mind in order to form a reasonable trial strategy. See Koss, supra. Counsel here did have such a duty since self defense is an affirmative defense, the defense had the burden of proof and the defendant's state of mind is critical. Koss. See also, Weeden v. Johnson, 854 F.3d 1063, 1070-71 (9th Cir. 2017)(Duty to investigate before forming trial strategy; authorities cited therein); see Towns v Smith, 395 F.3d 251, 258 (6th Cir. 2005)(Counsel's duty includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence); Clinkscale v. Carter, 375 F.3d 430, 443 (6th Cir. 2004)(Collecting cases where counsel was ineffective for failing to investigate potential alibi witnesses).

II.

Counsel were ineffective under Strickland and Ohio Revised Code section 2929.024 in failing to secure the services of a mental health expert to review and testify to the jury the information contained in the stipulated post conviction exhibits and its impact on petitioner's state of mind and the subjective elements of self defense under Ohio law. See State v. Koss and State v. Thomas, supra.

Due to Thomas' indigent status (PC TR 68) and his indictment for Aggravated Murder, he was entitled to experts who could assist his defense under O.R.C. 2929.024, Ake v. Oklahoma, 470 U.S. 68 (1985) and State v. Mason, 82 Ohio St.3d 144, 1998 Ohio 370.

Thomas' state of mind and the subjective component of self defense when combined with evidence of Thomas' low IQ and mental health history, as outlined by the stipulated post conviction evidence, proves the prejudice suffered by Thomas. The Social Security records are a treasure trove of critical information and documents; Dr. Magleby, who administered the testing and wrote the report of CPI Diagnostics could and should have testified; Dr. Webb's testimony is critical as well.

Thomas was denied a complete defense under Crane v. Kentucky, supra, by counsel's failure to consult and present the testimony of a mental health expert and present the evidence available concerning Thomas' mental health history as it relates to self-defense.

Prejudice is evidenced by Thomas' low IQ and developmental difficulties detailed in the post conviction exhibits discussed above. There is a reasonable probability of a different outcome if the jury had known the above information concerning Thomas' state of mind presented through a mental health expert in the context of self defense. Strickland.

Conclusion

For the foregoing reasons and pursuant to Sup Ct. R. 10(c), the petition for writ of certiorari should be granted.

Respectfully submitted,

/s/John P. Parker *

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PROOF OF SERVICE

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I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was served by regular U.S. Mail postage prepaid to Jacquenette Corgan, Ass't. Summit County Prosecutor, Summit County Safety Bldg., 53 University Avenue, 6th Floor, Akron, Ohio 44308 this 20th day of July 2020.

/s/John P. Parker
Counsel for Petitioner