No. 21-6701

IN THE

SUPREME COURT OF THE UNITED STATES

NAKYIA D. PARKER,
(Your Name) — PETITIONER

vs.

DOUGLAS FENDER, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT/NORTHERN DISTRICT OF OHIO/EASTERN DIV.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

NAKYIA D. PARKER, #A690-764
(Your Name)

501 THOMPSON ROAD/P.O. BOX 8000
(Address)

CONNEAUT, OHIO 44030
(City, State, Zip Code)

N/A
(Phone Number)

CONSTITUTIONAL QUESTION(S)

I. WHETHER PETITIONER-APPELLANT, PARKER WAS DENIED A FAIR AND IMPARTIAL TRIAL DUE TO SEVERAL MAJOR CONSTITUTIONAL AND DUE PROCESS RIGHT VIOLATIONS THAT INCLUDED A WRONGFUL DENIAL OF PARKER'S MOTION TO SUPPRESS THE PREJUDICIAL EVIDENCE AGAINST HIM?

II. WHETHER THE TRIAL COURT ERRED, AS A MATTER OF LAW, BY GIVING AN INCOMPLETE AND OTHERWISE DETECTIVE INSTRUCTION TO THE JURY ON **"CONSTRUCTIVE POSSESSION"?**

III. WHETHER THE THERE WAS INSUFFICIENT EVIDENCE TO CONVICT PETITIONER-APPELLANT, PARKER OF THE CRIMES FOR WHICH HE WAS CONVICTED OF HEREIN?

IV. WHETHER THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES UPON PETITIONER-APPELLANT, PARKER?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

See the Table of Authorities attached hereto and incorporated by reference herein.

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TABLE OF AUTHORITIES CITED

CASES

STATUTES & RULES

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

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is Sixth Circiut Court of Appeals of the United States

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits 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 _____ 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

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was September 13, 2021.

[x] 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 _____.

[x] An extension of time to file the petition for a writ of certiorari was granted to and including 150 days (date) on March 19, 2020 (date) in Application No. A. Order List: 589 U.S.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Note: Order List: 589 U.S. (Pursuant to COVID-19 (Public Health Concerns).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] 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

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> 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.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> **Sec. 1. [Citizens of the United States.]** 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.

I. PROCEDURAL HISTORY:

STATEMENT OF THE CASE

A complaint was filed in the Warren Municipal Court charging Appellant with one count of Weapons Under Disability, a felony of the third degree. Subsequently, an indictment was issued charging Appellant with: (1) Weapons Under Disability, a felony of the third degree; and (2) Possession of Heroin, a felony of the second degree, along with a forfeiture specification. Appellant entered pleas of "not guilty" to both charges.

On March 5, 2014, Appellant filed a motion to suppress all evidence against him. As is more fully addressed infra, the motion was initially denied by the trial court after a hearing on the basis that Appellant had no standing to bring the motion, since the residence in question in the search was not Appellant's residence. Subsequently, Appellee concluded that if the residence in question was not Appellant's residence it would be unable to prove its case as to either charges. Consequently, a second suppression hearing was conducted. The trial court ultimately denied the motion and issued findings in support of its ruling. Appellant obtained new counsel who requested a supplemental hearing concerning the suppression issue. The court granted this hearing and, in an entry filed on July 6, 2016, the trial court once again denied the motion.

The matter proceeded to jury trial and Appellant was found guilty of all the charges. Ultimately, Appellant was sentenced to a term of incarceration of 24 months as to count one and eight years as to count two. The sentences were further ordered to run consecutive to one another.

Appellant timely appealed to the Eleventh Appellate District of Ohio, Trumbull County Court of Appeals which affirmed the trial court's judgment on August 13, 2018. Appellant timely appeals to Ohio Supreme Court to accept jurisdiction this case.

On December 12, 2018, the Ohio Supreme Court declined to accept jurisdiction of Petitioner Appellant, Parker's case. Petitioner-Appellant, Parker (hereinafter referred to as Parker and/or Appellant), sought federal review of his issues thereby, Parker filed a writ of habeas corpus pursuant to U.S.C.A. Section 2254 with the United States District Court of Ohio, Northern District. Upon the recommendation of the magistrate judge and over Parker's objections, the district court denied Parker's habeas corpus petition. Thereafter, Parker moved for a certificate of appealability ("COA") and for leave to proceed in forma pauperis ("IFP") on appeal. The district court also declined to issues a COA.

Parker timely filed his appeal to the United States Court of Appeals for the Sixth Circuit. On September 13, 2021, The Federal Sixth Circuit Court of Appeals denied Parker's appeal. Now Parker files this instant Writ of Certiorari to this Honorable High Court to accept jurisdiction of this case to address the gross injustice that has occurred herein.

State Conviction:

Petitioner-Appellant, Parker does not dispute the Respondent's submitted State convictions assertion thereby the presumption of correctness is established herein.

Direct Appeal:

Petitioner-Appellant, Parker does not dispute the Respondent's Direct Appeal assertion therefore, the presumption of correctness is established herein. Parker has exhausted his State legal remedies and has presented his federal habeas corpus claim properly and timely before this Honorable when considering the extraordinary circumstances involved in filing each and every appellate review herein. Plus the serious COVID-19 pandemic that has caused delays with even the best efforts.

REASONS FOR GRANTING THE PETITION

LAW AND ARGUMENT IN SUPPORT OF PETITIONER'S WRIT OF CERTIORARI

A. GROUND ONE:

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS ALL OF THE EVIDENCE AGAINST HIM, IN VIOLATION OF HIS RIGHTS PURSUANT TO THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Fourth Amendment of the United States Constitution guarantees the "right of the people to be secure in their person, houses, papers, and effects against unreasonable searches and seizures." Since **Mapp v. Ohio**, 367 U.S. 643 (1961), evidence obtained by illegal searches has been inadmissible. Specifically importrant to the case at bar, it is well settled law that, absent consent, the Fourth Amendment prohibits warrantless entry into a home to make an arrest unless there is both the existence of exigent circumstances and probable cause for arrest. See **Payton v. New York** (1980), 445 U.S. 573, 100 S.Ct.1371, 63 L.Ed.2d 639; **Johnson v. United States** (1948), 333 U.S. 10, 13-15, 68 S.Ct.367, 92 L.Ed 436: **Cleveland v. Shields** (1995), 105 Ohio App.3d 118, 121, 663 N.E.2d 726, 728; **State v. Jenkins** (1995), 104 Ohio App.3d 265, 268, 661 N.E.2d 806, 808. In this case there was no exigent circumstances or probable cause for the arrest.

A. No Exigent Circumstance

Exigent circumstances are a general category of recognized circumstances under which courts have found police officers do not need a warrant to conduct a search. "Exigent" is defined in Black's Law Dictionary as "requiring immediate action or aid; urgent" (Blacksllawdictionary.com).

The cases of **Ohio v. Letsche** and **Ohio v. Collins** explores the meaning of exigent circumstances. In **Letsche**, a witness heard a noise outside her home and observed a man walking near a van on the street. Witness notifies police, who responded and eventually located Mr. Letsche through the window of his home and determined that it was Mr. Letsche that he viewed through the window that

he matched the description given by witness. When Mr. Letsche did not respond to police orders, police forced opened a door to arrest him. The Fourth District Court of Appeals concluded that in order to justify a warrantless entry into a home, the State need only establish that the officers had an objectively reasonable belief that immediate entry into the residence was necessary to protect life or property. Thus, the trial court's use of the probable cause standard in Lynche was incorrect. The Court of Appeals concluded that the officers did not have an objectively reasonable belief that entry was necessary under the totality of the circumstances, even overcoming argument that Mr. Lynche not answering the door could've given rise to emergency or that he was not in his own home.

In Collins, police officers in the City of Berea followed Collins to his driveway at 1:a.m., for allegedly speeding. They followed him out engaged him in a conversation, and determined he had slurred speech. Collins continued forward and ran into his home, locking the door, running up steps, and stating he refused to open the door without a warrant. Officers forced open the door of the residence, without a warrant, and arrested Collins for O.V.I. Collins argued before the Eighth District Court of Appeals this was unconstitutional and the Court of Appeal agreed.

The State bears the burden of establishing exigency from the totality of the circumstances involved. **Welsh v. Wisconsin** (1984), 466 U.S. 740, 750, 104 S.Ct. 2091, 80 L.Ed 2d 732; **State v. Sladeck** (1998), 132 Ohio App.3d 86, 724 N.E.2d 488; **State v. Brooks** (June 27, 1995), **Franklin** App. No.94APA03-386, 1995 Ohio App. LEXIS 2764. Because the warrantless entries in Lynche violated Appellant's Fourth A,emdment rights, the court should have granted the Motion to Suppress Evidence. **Ohio v. Letsche** (2003), Ohio App. 4d6942 Ohio-6247. **Ohio v. Collins** (2014), Ohio App. 3822, LEXIS 3746.

Courts have emphasized that, under the exigent circumstances exception, there must be "compelling reasons" or "exceptional circumstances" to justify a warrantless entry. **State v. Lomax**, 8th Dist. Cuyahoga No. 86632, 2006-Ohio-3725, ¶16, citing **Alliance v. Barbee**, 5th Dist. Stark No. 2000CA00218, 2001 Ohio App. LEXIS 1120 (Mar.5, 2001), citing **State v. Moore**, 90 Ohio St.3d 47, 52, 2000 Ohio 10, 734 N.E.2d 804 (2000).

The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." **United State v. United States** Court of the E. Dist. of Michigan, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). Absent exigent circumstances, a warrantless search or seizure effected in a home is per se unreasonable. **State v. Freeman**, 8th Dist. Cuyahoga No. 95608, 2011-Ohio-5651, (citing Payton v. New York, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)). The courts have imposed on the state a heavy burden of demonstrating an exigent circumstances that would overcome the presumption of unreasonableness attached to all warrantless home entries. **Welsh v. Wisconsin**, 466 U.S. 740, 750-753, 1-4 S.Ct. 2091, 80 L.Ed.2d 732 (1984). See also **State v. Letsche**, 4th Dist. Ross No. 02CA2693, 2003-Ohio-6942, ¶20; **State v. Brooks**, 10th Dist. Franklin No.94APA03-386, 1995 Ohio App. LEXIS 2764, *10 (June 27, 1995).

The courts in Ohio have identified exception to the warrant requirement that jusrify a warrantless search of a home: (1) an emergency situation, (2) search incident to arrest, (3) easily destroyed or removed evidence, and (4) "hot pusuit" of a fleeing felon. **State v. Cheers**, 79 Ohio App.3d 322, 325, 607 N.E.2d 115 (6th Dist. 1992); **State v. King**, 8th Dist. Cuyahoga No. 80573, 2003-Ohio-1143. In common language, Appellate Courts review the warrantless entry and ask: was the entry so necessary as to be compelling; was it imperative that it be so immediate; was there no other good choice or option?

In making its conclusion of law, the trial court stated, inter alia:

> Defendant has standing to object to the search in this case. As Sgt. Coleman testified, this ordeal took some time and Defendant was inside the home the entire time. Testimony elicited from Sgt. Coleman and Officer Sumption indicated that Defendant had a bill, in his name sent to the residence. This was Dish Network bill. This bill demonstrates he occupied or used the home. The service he paid for is connected to the television that had an attached security system: the same television Defendant and his occupants used to watch police scramble outside investigating the matter. Defendant also had personal belongings in the home, including his wallet. All of these factors, taken together demonstrates Defendant had a legitimate expectation of privacy in the home located at 3126 Starlite. In an earlier partial hearing on suppression, standing was the issue, as there was no evidence presented regarding the Dish Network bill in the Defendant's name at the residence in question.
>
> It is well settled that in an emergency situation when someone is in need of immediate aid ... the police are not searching for evidence of a crime, but for victims. The emergency aid exception allows officers to enter into a dwelling without probable cause when they reasonably believe, based on a specific and articulable facts that a person within the dwelling is in need of immediate aid. *** This exception does not depend on the officer's subjective intent or the seriousness of the crime being investigated. It merely requires that there be an objectively reasonable basis to believe that a person within the house is in need of immediate aid. *** When an officer, lawfully enters inside the home pursuant to the emergency aid exception, discovers contraband, he or she may properly seize it.***
>
> The Warren Police Department had enough information for which they could have reasonably inferred the Defendant or any of the others inside the home were injured or even fatally injured. As testified by both Sgt. Coleman and Officer Sumption, they were called to this location because shots were fired. A witness at 3141 Starlite stated that his son was shot at; furthermore, a witness at 3127 Starlite informed them that they heard gunshots on the side of their home between 3141 and 3127 Starlite. Police recovered ample casings outside the homes of 3141 and 3126 Starlite. A car parked in the driveway of 3126 Starlite had its windows shot out. Bullet holes were found in the home of 3126 Starlite. Police while at the scene received information that a panic alarm sounded off at 3126 Starlite. And finally, officers with all of this evidence, were concerned enough about the safety of the individuals, they called the local hospitals to see if anyone was there with a gunshot wound. All of this evidence provided the Warren Police Department with an objectively reasonable basis for them to believe that someone inside the home was in need of medical assistance or or otherwise at risk. Consequently, police entered 3126 Starlite lawfully pursuant to the emergency aid exception. Thus, all the

evidence recovered in plain view was properly seized.

Third, the Warren Police had enough probable cause to seek the issuance of the search warrant; all evidence recovered in the search warrant should not be suppressed.***

Finally, the Fourth Amendment of the U.S. Constitution requires the police to obtain a search warrant based on probable cause before they conduct a search. However, the warrant requirement is subject to a number of well-established exceptions. Inevitable discovery is such an exception. Under this exception, evidence obtained in violation of a constitutional right may be properly admitted during a lawful investigation if no constitutional violation had taken place.

The Warren Police weren't leaving this residence. They were not going to allow anyone to walk out the back door or allow anyone to take the suspected drugs and move them to another location. Nobody was going to go anywhere until the search warrant arrived, and when it did, and they entered, they would have found the exact same material. Thus, all the evidence obtained from inside the home would have been inevitably discovered. Consequently, Defendant's Motion to Suppress is overruled.

With all due respect, the trial court's reasoning with regard to its suppression ruling is somewhat confusing and convoluted. This is especially with regard to its reliance upon the "inevitable discovery" doctrine. The trial court appears to be establishing a rule whereby police authorities need not first obtain a warrant prior to searching a residence if in fact the police authorities have probable cause to obtain a search warrant. Such reasoning is extremely circular and essentially nonsensical. If true, such a rule would totally gut the Fourth Amendment. None of these case authorities cited by the trial court support such a proposition.

The trial court's reliance upon the "emergency aid" exception is equally misplaced. In State v. Gooden, 2008-Ohio-178, the Ninth District Court of Appeals upheld a trial court's granting of a suppression motion. In so doing, the Ninth District provided an excellent review of the law in this area and stated, inter alia:

"A warrantless entry into a home to make a search or arrest is per unreasonable, and the burden of persuation is on the state to show

the validity of the search." **State v. Nields**, 93 Ohio St.3d 6, 15. Exigent circumstances, however, entry. **State v. Applegate**, 68 Ohio St.3d 348, at syllabus. Exigent circumstances and emergency aid are not functional equivalents. See, e.g., **People v. Davis**, 442 Mich. 1, 25-26 (1993). This court and others in Ohio, however, have often interchanged the two concepts. The United States Supreme Court has described the emergency aid exception as a subset of the exigent circumstances exception. See, generally, **Utah v. Stuart**, U.S. , 126 S.Ct. 1943 (2006). "One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such an injury. 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal...'" **Stuart**, 126 S.Ct. at 1947 (quoting **Mincey v. Arizona**, 437 U.S. 385, 392(1978)). For example, police would not be required to have a warrant or probable cause to break into a burning house to save occupants or extinguish a fire. **Davis**, 442 Mich. at 12-13 (citing **Wayne v. United States**, 115 U.S. App. D.C. 234,241 (1963), cert. den., 375 U.S. 860 (1963)(Burger, C.J.)).

While subtle, the distinction between applying the broader term "exigent circumstances" or its narrower subset, "emergency aid," carries substantial importance. In order to search for evidence of a crime without a search warrant in an emergency situation, there must be probable cause in addition to "exigent circumstances." See **State v. Sandor**, 9th Dist. No. 23353, 2007-Ohio-1482, at ¶7 (citing **State v. Marlow**, 9th Dist. No. 17400, 1996 WL 84627, at *2 (Feb. 28, 1996)). In an emergency situation when someone is in need of immediate aid, However, the police are not searching for evidence of a crime, but for victims. Thus, the emergency aid exception allows officers to enter a dwelling without a warrant and without probable cause when they reasonably believe, based on specific and articulable facts, that a person within the dwelling is in need of immediate aid. **Mincey v. Arizona**, 437 U.S. 385, 392 (1978); **People v. Davis**, 442 Mich. 1, 25-26 (1993). The key issue is whether the officers "had reasonable grounds to believe that some kind of emergency existed...The officer must be able to point to specific and articulable facts, which, taken with rational inferences from those facts, reasonably warrant intrusion into protected areas." **Davis**, 442 Mich. at 20 (citing 2 LaFave, Search & Seizure, Section 6.6(a)); see also, **State v. Letsche**, 4th Dist. No. 02CA2693, 2003-Ohio-6942, at ¶29.

The second suppression hearing was conducted on August 8, 2014, and all transcript references in this paragraph pertain to that hearing. Based upon the testimony at that hearing, Appellant respectfully submits that none of these three prongs discussed above were established. All of the officers that testified at this hearing appeared to agree that when they entered the residence in controversy they were looking for suspects. (See T.p.30). Furthermore, as far as seeing items of alleged contraband through a window, the transcript of that

hearing is quite clear that the window view was partially obstructed and in actuality one could see very little. (T.p.32). One officer described the urgency as being there was possibly a shooter in the house. (T.p.32, See, also T.p.34-35). With regard to the alleged sighting of hands moving a window shade within the house, the record in this hearing clearly establishes that this did not occur until the officers were already in the process of clearing house. (T.p.38). Once again, the occupants of the dwelling were threatened with a dog being released upon them if they did not appear after the officers entered the premises. (T.p.57).

Similar testimony was presented at the suppression hearing of April 1, 2016 and all transcript references in this paragraph are to that hearing. The testimony presented indicated that there were no exigent circumstances as the State claimed. The first officer dispatched responded to shots fired at a house on Starlite Drive, wherein the complainant, Kelvin.

Parks initially stated he was a victim of the shooting and that his car was shot by three black males dressed in black who were shooting from the lawn of the residence across the street at 3126 Starlite Drive and that he was unsure of the direction the shooters traveled. Officer sumption testified that Mr. Parks changed his statement and that he did not believe that what Mr. Parks said happened. Officer Sumption testified that based on the fact that there were nc spent shell casings in the yard of 3126 Starlite, he began to "look at other avenues" which included interviewing neighboring properties. (T.p.44-45). Officer Sumption also testified that there were numerous cruisers and officers on the scene and simultaneous investigations were being conducted at 3141 and 3126 Starlite Drive. (T.p.46-47). Officer Sumption also testified that there were no first responders on the scene and that neither he nor any of his fellow officers called for an ambulance or EMS personnel to be available on the scene.

He stated that the reason there were no first responders on the scene is that there were no victims. (T.p.61) However, the K-9 units were called to the scene. Dispatcher Maggie Powell testified that she placed a call to the local hospitals but there were no gunshot victims reported. Her testimony was that at 9:23 pm it was announced over the radio that there was a "vehicle hit, no victim." Additionally, she stated that radio calls identified that there were multiple subjects in the house at 3126 Starlite at 10:19pm, ten minutes before officers entered the residence at 10:29 pm. (T.p.11) Sergeant Gregory Coleman testified that there were at least 6 officers on the scene conducting simultaneous investigations at 3141 and 3126 Starlite. He testified that upon his arrival somewhere around 9:16 pm, he noted bullet holes in the house at 3126 Starlite. He and other officers on the scene questioned neighbors, searched for bullet casings and tried to recreate the events that had taken place. (T.p.27) He testified that officers had the perimeter of the home secured at 3126 Starlite. (T.p.24) He stated that a set of keys was found down the street that was determined to belong to 3126 Starlite and one of the officers went onto the porch of the residence who peered inside the window and identified what appeared to be drugs. (T.p.25) Next he placed a call to the sergeant in charge who placed a call to Warren City Prosecutor Traci Timko to obtain a search warrant, who then called him at the scene and gave him permission to enter the premises to go inside to check for victims. (T.p.27-28) This was an hour and ten minutes after the call of shots fired was received by the Warren Police. This begs the question: Why didn't the officers enter the home at 3126 Starlite upon the discovery of the bullet holes if they believed there was a possibility of victims inside? The answer to that question is that they obviously did not believe that there were any victims at all. The alleged exigent circumstances did not exist in their minds. Traci Timko's position is that of a prosecutor, her function is to

prosecute crimes, and not to make a judgment that an energency situation may exist more than an hour after the incident occurred. The police officers' claims of exigency was merely pretext to enter the residence once they observed what appeared to be drugs inside.

In light of these circumstances, Appellant respectfully submits that none of the three factors necessary to support entry based upon a medical emergency were established and the trial court erred in denying Appellant's motion to suppress evidence.

B. GROUND TWO:

THE TRIAL COURT ERRED, AS A MATTER OF LAW, BY GIVING AN INCOMPLETE AND OTHERWISE DEFECTIVE INSTRUCTION TO THE JURY ON "CONSTRUCTIVE POSSESSION."

Prior to the jury being instructed, defense counsel entered an objection to the trial court's propsed instruction concerning "constructive possession." In that regard defense counsel stated that she did not feel that the instruction was appropriate based upon the testimony and that it should include a portion indicating mere proximity is not sufficient to establish constructive possession. (T.p.248) Trial court have ruled defense counsel's objections. (T.p.248-249) The trial court eventually instructed the jury in relevant part as follows:

> Possess means having control over a thing or substance but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.
>
> Constructive possession. Possession may be either actual or constructive. A person has constructive possession when he is able to exercise control over a thing a substance.

Possession may be actual or constructive. State v. Chandler, Cuyahoga, 2011-Ohio-590, ¶55. Actual possession entails ownership or physical control, whereas constructive possession is defined as knowingly exercise dominion and control over an object, even though that object, even though that object may not be within

one's immediate physical possession. Id. citing State v. Hankerson (1982), 70 Ohio St.2d 87, 434 N.E.2d 1362. However, the mere fact that property is located within the premises under one's control does not, of itself, constitute constructive possession. It must also be shown that the person was conscious of the presence of the object. Hankerson, supra.

In the case at bar, the record is devoid of any evidence whatsoever indicating that Appellant was conscious of existence of alleged contraband in the dwelling in which he was found. Certainly, there was no evidence indicating Appellant actually exercised dominion or control over the property. Consequently, the instructions given by the trial court was properly objected to and provided to the jury nonetheless. In essence, the jury was invited to speculate as to ownership or control of the alleged contraband. Consequently, the trial court committed reversible error and a new trial must be ordered.

C. GROUND THREE:

APPELLANT'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AS THERE IS INSUFFICIENT EVIDENCE ALSO.

In State v. Cox (May 27, 1997), Trumbull App. No. 95-T-5279, unreported, this Court stated:

> The proper role of an appellate court assessing a manifest weight claim was articulated by the Eighth District Court of Appeals in State v. Wilson (June 9, 1994), Cuyahoga App. Nos. 644442, 644443, unreported, at 4, 1994 WL 258662;
>
> The touchstone of the appellate court's unique authority to re-weigh the evidence adduced at trial is Art.IV, Sec 3 of the Ohio Constitution. See State v. Cooey (1989), 46 Ohio St.3d 20, 544 N.E.2d 895, certiorari denied (1991), 499 U.S. 954, 113 LED 2d 482, 111 S.C.1431. No other state court in ohio, not even the Ohio Supreme Court, is vested with authority to pass upon the weight of evidence to support a conviction. *** (Citation omitted.)

Case law has aslo affirmed that, unlike the "analytical construct" discussed discussed in Wilson, supra, concerning "sufficiency of the evidence," a reviewing

court must undertake a limited weighting of the evidence when addressing the "manifest weight of the evidence." For example, in **State v. Thompkins** (Oct. 25, 1996), Clark App. No. 95-CA-0099, unreported, the Court of Appeals for Clark County held that a court reviewing whether a criminal conviction is against the manifest weight of the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created...a manifest miscarriage of justice." In **State v. Martin** (Dec. 24, 1996), Franklin App. Nos. 96-APA04-469, unreported, the Franklin County Court of Appeals held that when a criminal conviction is challenged as against the manifest weight of the evidence the evidence is not construed most strongly in favor of the State and the reviewing court engages in limited weighing of the evidence. Most instructive, in **State v. Ramage** (Dec. 26, 1996), Washington App. 95-CA-39, unreported, the Washington County Court of Appeals held that although a reviewing court finds that a verdict is supported by sufficient evidence," the same reviewing court may nevertheless conclude that the same criminal conviction is "against the manifest weight of the evidence." Finally, in **State v. Rutherford** (Dec. 27, 1996), Ross App. No.96-CA-2198, unreported, the Ross County Court of Appeals followed the same standard of review in addressing manifest weight as that previously stated in **State v. Thompkins**, supra.

Appellant hereby incorporates all factual statements and references to the record previously stated above as if fully rewritten herein.

In the case at bar, a total of four individuals exited the structure in question. Only Appellant was charged. The other three were released very shortly after coming upstairs from the basement. If there was essentially no explanation offered concerning these circumstances other than the fact that a

Dish Network bill and the Appellant's wallet were found in the residence. Clearly, all concerned agreed that the Appellant dod not actually reside at the premises.

While not rising to the level of reversible error, the record in this matter is replete with discovery violations and shortcuts being taken by investigating authorities. No forensic analysis was conducted upon the weapons found in the residence to determine whether they had been fired during the time in question. No attempt was made to obtain fingerprints from the weapons or the alleged contraband. No residue test was conducted upon either the Appellant ir any of the other individuals that came from the residence. Beyond what was conducted at the scene, none of the other individuals coming from the residence were further investigated. Adding insult to injury, the contraband seized from the residence was literally commingled with contraband seized from a neighbor's house. Some of his contraband, as it turned out, was not unlawful drugs. Which was which? The jury was left to speculate due to the extremely shoddy chain of evidence work.

In light of these circumstances, the Appellant respectfully submits that the jury lost its way and a new trial must be ordered.

D. GROUND FOUR:

THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES UPON APPELLANT.

In **State v. Kennedy**, 2017-Ohio-26, the Second District Court of Appeals recently reviewed Ohio Law concerning consecutive sentencing and stated, **inter alia:**

> In general, it is presumed that prison terms will be served concurrently. **R.C.§2929.41(A); State v. Bonnell**, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶16, ¶23("judicial fact-finding is once again required to overcome the statutory presumption in favor of concurrent sentences"). However, **R.C.§2929.14(C)(4)** permits a trial court to impose consecutive sentences if it finds that (1) consecutive sentencing is necessary to protect the public from future crime or to punish the offender, (2) consecutive sentences are

not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and (3) any of the following applies:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section **2929.16, 2929.17,** or **2929.18** of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

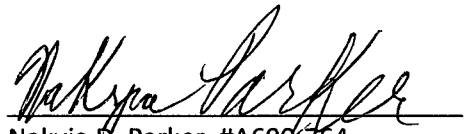
In reviewing felony sentences, appellate court must apply the standard of review set forth in **R.C.§2953.08(G)(2)**, rather than an abuse of discretion standard. See **State v. Marcum**, 146 Ohio St.3d 516, 2015-Ohio-1002, 59 N.E.3d 1231, ¶9. Under **R.C.§2953.08(G)(2)**, an appellate court may increase, reduce, or modify a sentence, or it may vacate the sentence and remand for resentencing, only if it "clearly and convincingly" finds either (1) that the record does not support certain specified findings or (2) that the sentence imposed is contrary to law.

Counsel for Appellant agrees that the Trial Court in the Case at bar effectively made all of the findings necessary to impose consecutive sentences. However, the record reveals that certain findings made by the Trial Court are clearly and convincingly not supported by the record. Most importantly, the Trial Court placed great emphasis upon a finding that Appellant was involved in this incident in which a great deal of gun play allegedly occurred and found it miraculous that no one was injured. (Sentencing T.p.8). However, there is no evidence in the record indicating that Appellant was actually involved in the shootout and, in fact, the Appellee took positively no effort to prove such! Thus, Appellant was clearly punished for a crime which was neither charged nor proven. **In Conclusion,** Appellant requests this Honorable Court to accept jurisdiction to give the issues herein de novo review.

CONCLUSION

Petitioner-Appellant, Parker was convicted and sentenced for some very serious crimes herein thereby, Petitioner-Appellant, Parker was sentenced to a very lengthy sentenced ten (10) years. considering the foregoing arguments and case laws, Petitioner, Parker has made a substantial showing of the denial of his constitutional and due process rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Therefore, this instant petition for writ of certiorari should be granted in the interest of law, justice, equity and good conscience and to prevent a manifest miscarriage of justice. Parker prays that this instant petition for a writ of certiorari should be granted to address the constitutional and due process violations herein.

Respectfully submitted,



Nakyia D. Parker, #A690-764
Petitioner-Appellant, **pro se**
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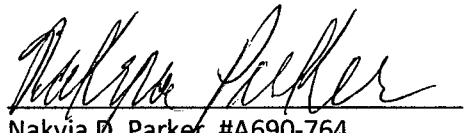
I, Nakyia D. Parker declare under penalty of perjury that the foregoing is true and correct and that this Writ of Certiorari was placed in the prison mailing system on December 8, 2021.

Executed On December 8, 2021.



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Petitioner-Appellant, **pro se**

APPENDIX

A