

**No.**  
**IN THE**  
**SUPREME COURT OF THE UNITED STATES**

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**KENNY PUGH**, Petitioner,

-vs-

**PEOPLE OF THE STATE OF ILLINOIS**, Respondent.

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On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED FOR REVIEW**

Whether an individual who involuntarily discards property (here a firearm on private property) as the direct result of unconstitutional police actions is considered to have abandoned that property for purposes of the Fourth Amendment.

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The Petitioner, Kenny Pugh, respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINION BELOW**

The decision of the Illinois Appellate Court (Appendix A) is reported at 2021 IL App (1st) 181981-U, appeal denied, 175 N.E.3d 81 (table) (Ill. 2021), and is not published. The order of the Illinois Appellate Court denying rehearing (Appendix B) is not reported. The order of the Illinois Supreme Court denying leave to appeal (Appendix C) is reported at 175 N.E.3d 81 (table) (September 29, 2021). The order of Illinois Supreme Court denying Pugh's motion to reconsider denial of his leave to appeal (Appendix D) is not reported.

## **JURISDICTION**

On March 31, 2021, the Appellate Court of Illinois issued its decision. A petition for rehearing was timely filed and denied on April 23, 2021. The Illinois Supreme Court denied a timely-filed petition for leave to appeal on September 29, 2021. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **The Fourth Amendment to the United States Constitution provides:**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

### **The Fourteenth Amendment to the United States Constitution provides:**

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.

U.S. Const. amend. XIV.

## STATEMENT OF THE CASE

On the evening of July 27, 2017, Cedric Carr, a resident at 5914 South Emerald Avenue in Chicago, Illinois, held a wedding party in his backyard for family members and friends. (R. 71) (“I had threw a party for my brother. He was getting married the next day.”). One of the guests was Kenny Pugh, Carr’s “best friend.” (R. 71) Carr knew Pugh, a stay-at-home dad, for over 30 years. (R. 76-77) Describing the backyard, Carr testified: “It’s big and [a] two flat and it’s wide and there is a gate that lead[s] to the whole parking lot on 59th [Street].” (R. 71) Surrounding the backyard was a large, wrought-iron fence and a gate that could fit a car through it. (R. 71) The gate was open during the party. (R. 35, 47-48, 73-74)

The party began at 8:00 p.m. (R. 71) Due to noise complaints, Chicago police officers came by three times with the last time being around 3:00 a.m. on July 28. (R. 34-35, 47-48, 73-74) During this last visit, party attendees wanted to close the gate; Sergeant Nick Zattair ordered that the gate remain open to clear the party’s music equipment. (SE #5 1:20-3:15) While discussions about this were occurring at the gate, Officer Michael Filetti and another officer (from the alley abutting the yard) saw Pugh (who was standing in the yard with others) with the butt of a handgun sticking out of his front, right pocket. (R. 35-37, 49-50) Filetti alerted Zattair who then “ordered [the officers] to go in and apprehend [Pugh].” (R. 37); *see also* (SR. 12) (Filetti’s partner testified: “One of them went to the supervisor and he directed us to go in there and get the gun.”) Through three body-worn camera (“BWC”) videos, Filetti’s vantage point during the events was shown to the trial court. (SE #1, 4-5; R. 39-42, SR. 34-39) Officers had no arrest warrant for Pugh nor a search warrant for the property. (SR. 25-26)

Carr had given Pugh permission (and in fact asked Pugh) to have a handgun on Carr's property. (R. 74) Carr could not possess a firearm due to a 2011 driving on a suspended license conviction. (R. 76) In the backyard, Pugh possessed the gun, with Carr's permission, to protect Carr's family and friends. (R. 49, 75) Carr explained why this was necessary:

It's gang related over there and I want to make sure my people enjoy themselves right that because a month prior to that, a lot of people across the street are gang ready. My little cousin walk to the gas station which my uncle stay at 58th and Peoria. They gun him down like he is a gangbanger. He was 17 years old and lost his life for nothing. As I proceeded to that, I called my best friend, Mr. Pugh, to bring a little assistance to the party. Not for gangbangers but for the protection of my family and best, close friend. (R. 75)

Pursuant to Sergeant Zattair's order, approximately ten to 15 officers entered the backyard to arrest Pugh. (SE #1,4-5; R. 68, 42 ("I drew my weapon and I observed [Pugh].")) After the officers "[t]old [Pugh] to keep his hands up to place him under arrest[.]" Pugh "lowered his hands" and put the firearm underneath the car "he was leaning against." (SR. 26) Pugh only did this after the ten to 15 officers rushed toward him and yelled at him to show his hands and get on the ground, which he did. (SR. 27, 31); *infra*, pp. 9-10 (detailing the BWC videos admitted into evidence by the State). Filetti's partner recovered the gun. (SR. 16-17) Officers arrested Pugh. (SR. 28)

From the incident, the State charged Pugh with six counts of aggravated unlawful use of a weapon ("AUUW"): Counts 1 through 3 alleged Pugh had no Firearm Owners Identification card ("FOID")/no Concealed Carry License ("CCL"); Counts 4 through 6 charged possession of a weapon in a public alley.<sup>1</sup> (C. 11-17) Pugh filed a motion to suppress

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<sup>1</sup> Post-trial, these counts were vacated due to insufficient evidence of Pugh being on the public way. (SR. 53-61)

evidence alleging the police illegally entered private property and arrested Pugh without probable cause, and the trial court held a hearing on the motion. (C. 62-63; SR. 4-51)

### **Motion to suppress evidence hearing**

Two officers testified at the hearing: Robert Bandola and Michael Filetti. On the night in question, officers were called to 5914 South Emerald three times due to noise complaints. (SR. 16) The first time was at 11:00 p.m. on July 27, 2017, and the third time was at 3:00 a.m. early the next morning. (SR. 22) Filetti asserted the first time he stopped by that there were “hundreds of people there.” (SR. 23) The backyard was enclosed by a wrought-iron fence. (SR. 23) At 3:00 a.m., there were about 50 people in the yard and about 30 officers in the alley/area adjacent to the yard. (SR. 24-25, 29)

Initially, neither Bandola nor Filetti saw Pugh. (SR. 9, 23) When they did see Pugh, he was in the yard. (SR. 10, 23) Filetti took his flashlight, “because it was dark in there,” and looked inside the yard. (SR. 24) He observed the handle of a gun sticking out of Pugh’s right front pocket. (SR. 24) He notified his supervisor, Sergeant Zattair. (SR. 31) Zattair told the officers to “go in and apprehend” the person with the gun. (SR. 25) Bandola acknowledged he did not see the gun but that other officers had. (SR. 11)

Ten to 15 officers went into the yard. (SR. 25) Filetti had to “wade” through people to get to Pugh. (SR. 19, 31) Officers shouted commands at Pugh, including directing him to go to the ground. (SR. 20) Arresting Pugh, Filetti told him to keep his hands up. (SR. 26) Three partygoers surrounded Pugh and covered him to prevent the officers from “making an arrest.” (SR. 25) Filetti yelled at Pugh to show his hands and get to the ground. (SR. 27) Filetti stated he observed Pugh lower his hands, put his hand on the firearm, and throw it to the ground. (SR. 26) The firearm landed underneath a car that Pugh was leaning against.

According to Filetti, Pugh tossed the gun “after 10 to 15 officers rushed in against defendant.” (SR. 27) Filetti put his foot over the gun to secure it. (SR. 31) Officer Kerry Ferrantella’s BWC, and still images of the video, showed Filetti’s view of the incident and he pointed out the gun on them. (SR. 33-34; SE #1-3) The State also played portions of this video for the trial court. (SR. 39)

Bandola and other officers handcuffed Pugh after he “put himself on the ground.” (SR. 14) Bandola recovered a loaded revolver from underneath the rear of the car. (SR. 16-17) Pugh was arrested. (SR. 28) After Pugh was booked, police learned that his residence was at 8214 South Ellis Avenue. (SR. 32) Prior to arresting Pugh, officers never asked Pugh where he lived, or whether he had a CCL or FOID card, or whether he had permission to have a gun on the premises. (SR. 12-13, 17-18, 28) Officers also did not ask nor receive permission<sup>2</sup> to enter the yard and did not have an arrest or search warrant. (SR. 10)

The State made a motion for directed finding, which the trial court granted and denied Pugh’s motion to suppress evidence. (SR. 45-50) The court opined that Pugh had abandoned the firearm:

First off, the gun was abandoned. There was no search of Mr. Pugh. The gun was taken out of his pocket by him before it was placed in an area off of his person after it was clear from the testimony of the officer’s that he made

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<sup>2</sup> Trial counsel and Bandola had the following exchange on this subject:

[Counsel]: And did you receive any permission to go inside that fence?  
[Bandola]: From the owner?  
[Counsel]: Yes.  
[Bandola]: No. (SR. 10)

The state appellate court’s order relating Bandola’s testimony on this subject is inaccurate. *See Pugh*, 2021 IL App (1st) 181981-U, ¶8 (“Officer Bandola stated that he received permission from the owner to enter the backyard to investigate.”).



together with these other individual's conscious efforts to prevent the police from getting to him and getting the gun, which certainly is circumstantial evidence of his belief at the time which the officer[s] could conclude constituted consciousness of guilt. (SR. 46)

## **Bench trial**

At trial, Cedric Carr testified in Pugh's case-in-chief, and the State presented Filetti's and Bandola's testimony and the BWC videos from Ferrantella (SE #1), Bandola (SE #4), and Zattair (SE #5). Carr lived on the first floor of the two-flat building at 5914 South Emerald Avenue. (R. 70-71) On July 27, 2017, he was throwing a party for his brother who was getting married the next day. (R. 71) He invited family and select friends, including his best friend, Pugh. (R. 71-72) Carr had known Pugh, a stay-at-home dad, for over 30 years. (R. 76-77)

As a resident of the property, Carr requested Pugh to bring a firearm to the party to protect the attendees because of gang activity in the area, (R. 74-75) Carr could not possess a firearm due to a 2011 driving on a suspended license conviction. (R. 76) Carr's safety concerns were due to "a lot of people across the street are gang ready" and because his 17-year old cousin had recently been murdered nearby. (R. 74-75) Carr trusted Pugh – Carr did not ask anyone else to bring a gun and no one else had a firearm. (R. 86-87) Carr did not ask Pugh whether he had a valid FOID card or CCL but believed Pugh could have a firearm. (R. 78, 85)

The party began at 8:00 p.m. and about 70 to 80 people were there. (R. 71) Police came by at about 10:30 or 11:00 p.m. and told them that the music was too loud. (R. 72) Police came back again and told people to move their cars from the adjacent, vacant lot. (R. 73) The party continued, with police coming back around 3:00 a.m.; at that time, the officers "bum rush[ed]" into the yard. Pugh was in the yard but not near the gate when this

occurred. (R. 74) Officers never asked Carr if Pugh had his permission to have the firearm at the party. (R. 76) Due to the chaotic nature of the incident, Carr did not have a chance to tell police that Pugh had Carr's permission. (R. 78-79, 84) Sergeant Zattair's BWC video was played during Carr's testimony. (R. 81-83; SE #5) Carr identified himself on the video. (R. 81)

Officers Filetti and Bandola testified. During the State's case, the video from Bandola's and Officer Ferrantella's BWC videos were admitted into evidence. (R. 38-60; SE #1, 4) During their testimony, Filetti and Bandola narrated the events shown on the two videos. (R. 38-40, 60-63) They had been to the property twice that night for noise complaints. (R. 34-45) At 11:00 p.m., neither saw Pugh. (R. 45, 64) At 3:00 a.m., other officers had been instructed to write tickets for cars that were parked in the adjacent, vacant lot. (R. 46) At this point, 50 people were still lingering in the yard and alley; the gate of the fence for the property was open. (R. 35, 47) Neither Filetti nor Bandola ever saw Pugh outside the yard. (R. 46, 66) Officers told the party attendees to leave. (R. 48)

While standing in the alley and looking through the wrought-iron property fence, Filetti observed Pugh, who was in the yard, with the butt of a firearm sticking out of his right, front pocket. (R. 35) In Ferrantella's video (SE #1), Filetti identified Pugh. (R. 39) After Filetti and another officer told Zattair about the gun, Zattair ordered them "to go and get the gun and apprehend [Pugh]." (R. 36, 49) Filetti went in first, then Zattair, then Bandola. (R. 67) According to Bandola, there were ten to 12 officers in the yard when Pugh was arrested. (R. 68) Zattair's BWC video corroborated Bandola's testimony as to the number of officers involved in arresting Pugh. (SE #5, 3:15-6:30)

Filetti “drew [his] weapon” when he entered the backyard. (R. 42) He claimed Pugh took a “bladed” stance behind three others and by a car, shielding himself from observation. (R. 42-43) Filetti and other officers ordered Pugh to keep his hands up and to lay on the ground, which he complied with (others around Pugh resisted the officers’ instructions). (R. 43; SE #1, 5:55-6:30; SE #4, 6:15-7:30; SE #5, 4:00-6:00) During this process, Filetti claimed he saw Pugh “grab the butt of the handgun, pull it out of his right front pocket, throw it on the ground at the rear of the vehicle at which point [Pugh] proceeded to lay on the ground.” (R. 43) At that point, Filetti secured the gun by putting his foot over it. (R. 43, 52) Bandola handcuffed Pugh and later recovered the gun. (R. 57) The firearm was a .357 magnum revolver with six live rounds. (R. 44, 58) After Pugh’s arrest, Filetti learned Pugh lived at 8214 South Ellis Avenue. (R. 44) The parties stipulated that Pugh did not have a FOID card nor a CCL at the time of the events. (R. 69)

The trial court found Pugh guilty of aggravated unlawful use of a weapon (no FOID/CCL) and rejected Carr’s testimony that Pugh had possessed the firearm with Carr’s permission. (R. 90-93) The court, in part, denied Pugh’s motion for new trial, which alleged, *inter alia*, that the court erred in denying the motion to suppress evidence. (SC. 5-9; SR. 53-61) The court sentenced Pugh to one year of prison. (SR. 61-63)

### **Direct appeal**

On appeal, Pugh argued, *inter alia*, that the trial court erred in denying his motion to suppress evidence as officers lacked probable cause to arrest him. *People v. Pugh*, 2021 IL App (1st) 181981-U, ¶3. Addressing Pugh’s argument, the state appellate court first held that the State forfeited any argument on appeal, by not raising it in the trial court, that the officers’ seizure of Pugh could be upheld as a *Terry* stop (*Terry v. Ohio*, 392 U.S. 1 (1968)).

*Pugh*, 2021 IL App (1st) 181981-U at ¶¶28-29. Thus, the state appellate court only analyzed whether there was sufficient probable cause to support Pugh’s arrest. *Pugh*, 2021 IL App (1st) 181981-U at ¶¶30-38. Avoiding whether there was probable cause for Pugh’s seizure, the state appellate court held that the “validity of the arrest” issue was “irrelevant” because Pugh’s “actions in disposing of the gun terminated his right of privacy in the property and his fourth amendment protections therein.” *Id.* at ¶38; *see also Id.* at ¶31 (“We find in this case, [Pugh] abandoned the firearm. His actions constituted a voluntary relinquishment of the property and any expectation of privacy therein under the fourth amendment.”). The state appellate court thereafter denied Pugh’s petition for rehearing. The Illinois Supreme Court denied Pugh’s petition for leave to appeal and a subsequently-filed motion to reconsider denial of that petition.

## REASON FOR GRANTING CERTIORARI

**This Court should resolve the well-developed split in the lower courts as to whether an individual who involuntarily discards property as the direct result of unconstitutional police actions is considered to have abandoned that property for purposes of the Fourth Amendment.**

Celebrating his best friend's brother's wedding, Kenny Pugh was in the fenced-in backyard of Cedric Carr's residence. That celebration was terminated when ten to 15 uniformed Chicago police officers entered the yard without an arrest or search warrant. *See Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) ("When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. . .[s]uch conduct thus is presumptively unreasonable absent a warrant."), citing *Florida v. Jardines*, 569 U.S. 1, 6 (2013). The officers illegally entered Carr's curtilage to arrest Pugh for possessing a gun, the butt of which was sticking out of his pocket, that Carr had asked Pugh to bring in order to protect the attendees from nearby gang activity. *See McDonald v. City of Chicago*, 561 U.S. 742, 749, 767 (2010) (Second Amendment protects possession of a handgun in the home as "citizens must be permitted 'to use [handguns] for the core lawful purpose of self-defense.'"). Pugh submitted to the officers' show of authority by putting down the gun and laying on the ground as instructed by those officers. **Pugh's involuntary discarding of the gun was the direct result of the Chicago police officers' illegal seizure of him.**

Nearly 100 years ago, this Court held that the protections of the Fourth Amendment do not extend to willfully abandoned property. *Hester v. United States*, 265 U.S. 57, 58 (1924); accord *Abel v. United States*, 362 U.S. 217, 241 (1960). This Court should grant certiorari where this Court has not yet addressed, and the lower courts are split on, a related question: **is an individual who involuntarily discards property as the direct**

**result of unconstitutional police actions considered to have abandoned that property for purposes of the Fourth Amendment?** *See Jones v. State*, 28 A.3d 1046, 1055 (Del. 2011) (“The United States Supreme Court has never held that abandonment of evidence in response to unlawful police action (*e.g.*, an illegal seizure) constitutes an exception to the ‘fruit of the poisonous tree’ doctrine.”); *compare People v. Pugh*, 2021 IL App (1st) 181981-U, ¶38 (“[Pugh’s] actions in disposing of the gun terminated his right of privacy in the property and his fourth amendment protections therein. ‘Because no search or seizure occurs when police take hold of an abandoned item, the validity of the arrest is irrelevant.’”); *see also People v. Sylvester*, 253 N.E.2d 429, 430 (Ill. 1969) (“In our judgment determination of the validity of the arrest is irrelevant as are the arguments relating to the reasonableness of a search, for in this case no ‘search’ ever occurred.”).

The Minnesota Supreme Court has explained: “In the law of search and seizure. . . the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment. . . In essence, what is abandoned is not necessarily the defendant’s property, but his reasonable expectation of privacy therein.” *St. Paul v. Vaughn*, 237 N.W.2d 365, 345 (Minn. 1975). Absent controlling precedent from this Court, Professor Wayne R. LaFare’s Fourth Amendment treatise delves into how reviewing courts have contemplated whether the legality of a person’s seizure has an effect on that person’s abandonment of property:

[I]t is useful to note at the outset that it is clearly established that, **although abandoned property may normally be obtained and used for evidentiary purposes by the police, this is not so if the abandonment was coerced by or otherwise the fruit of unlawful police action.** “Property is not considered abandoned when a person throws away incriminating articles due to the unlawful activities of police officers.” Thus, where a person has disposed of

property in response to an illegal seizure or search by the police, courts have not hesitated to hold that property inadmissible. Wayne R. LaFave, *Search And Seizure: A Treatise On The Fourth Amendment*, 1 Search & Seizure § 2.6(b) (6th ed. 2020) (Footnotes omitted, emphasis added) (here after cited as “*Search & Seizure*”).

Federal courts have usually, but not always, concluded that individuals, like Pugh, who discard property because of illegal police actions do not abandon such property for purposes of the Fourth Amendment. *See, e.g., United States v. Coggins*, 986 F.2d 651, 652 (3d Cir.1993) (“As both parties concede, when the abandonment of property is precipitated by an unlawful seizure, that property also must be excluded.”); *United States v. Bailey*, 691 F.2d 1009, 1015 (11th Cir.1982) (footnotes omitted) (“As a factual matter, we can perceive no difference between this case and the aforementioned cases in the strength of the causal connection between the evidence obtained and the illegal police conduct.”); *United States v. Barber*, 557 F.2d 628, 633 (8th Cir.1977) (“Under the facts of this case it is clear that the illegal arrest of [the defendant] led directly to his placement of the envelope under the seat of the police car.”); *United States v. Newman*, 490 F.2d 993, 995 (10th Cir.1974) (“When Agent Jackson proceeded to the rear of the camper to investigate its contents he initiated an illegal warrantless search. . . Under these circumstances the government’s theory of abandonment is without merit.”); *Fletcher v. Wainwright*, 399 F.2d 62, 64 (5th Cir.1968) (“Several courts have considered this situation and have uniformly held that the initial illegality tainted the seizure of the evidence since the throwing was the direct consequence of the illegal entry. [citations omitted]. In such a situation it cannot be said that there was a ‘voluntary abandonment’ of the evidence.”).

In contrast, some federal courts have held a defendant’s discarding of evidence renders the legality of any prior illegal police action irrelevant. *See United States v.*

*Washington*, 146 F.3d 536, 537-38 (8th Cir. 1998) (despite possessing “grave doubts” about the officer’s manipulation of the defendant’s bag, reviewing court found bag abandoned for purposes of the Fourth Amendment); *United States v. Colbert*, 474 F.3d 174, 176-77 (5th Cir. 1974) (legality of defendants’ seizure not reviewed where defendants “disclaimed any interest in the briefcases and began to walk away from them.”).

Similarly, there is a split within the state courts. Some state courts and the District of Columbia have held a defendant’s relinquishment of evidence to be involuntary if it resulted from illegal police action. *See, e.g., Johnson v. United States*, 253 A.3d 1050, 1061 (D.C. 2021), citing *Brown v. United States*, 97 A.3d 92, 97 n.5 (D.C. 2014) (“In order to be effective, abandonment must be voluntary. It is considered involuntary if it results from a violation of the Fourth Amendment. . . [P]roperty is considered to have been involuntarily abandoned if the defendant discards it as a consequence of illegal police conduct.”); *Wingate v. State*, 764 S.E.2d 833, 838 (Ga. 2014) (“Because [defendant] was unlawfully detained at the time he apparently discarded the marijuana, the marijuana was the product of an unlawful seizure.”); *Jones*, 28 A.3d at 1055 (“[S]uppression is required if the abandonment [of contraband] was a direct consequence of the illegal seizure.”); *State v. Tucker*, 626 So.2d 707, 710 (La. 1993)(“[E]vidence abandoned by a citizen and recovered by the police as a direct result of an unconstitutional seizure may not be used in a resulting prosecution against the citizen.”); *State v. Oquendo*, 613 A.2d 1300, 1314 (Conn. 1992) (“We conclude that the defendant did not abandon the duffel bag that he discarded during Birney’s unlawful pursuit of him.”); *Comer v. State*, 754 S.W.2d 656, 659 (Tex. Crim. App.1986) (abandonment must occur “independent of any police misconduct”).



Conversely, other state courts, including Illinois, have instead held that illegal action by the police is immaterial to whether the defendant legally abandoned property. *See, e.g., Carlisle v. State*, 533 So.2d 645, 647 (Ala. Crim. App. 1987) (“However, this is a case where the existence of probable cause need not be determined, because the act of dropping the bag to the median constituted an abandonment.”); *State v. Oliver*, 368 So.2d 1331, 1335-36 (Fla. Dist. Ct. App. 1979) (“[A] person’s otherwise voluntary abandonment of property cannot be tainted or made involuntary by a prior illegal police stop of such person”); *People v. Boodle*, 391 N.E.2d 1329, 1332-33 (N.Y. 1979) (defendant’s discarding of gun after illegal seizure was “abandonment” because it was not a “spontaneous reaction” to seizure but rather was “an independent act involving a calculated risk”); *see also Sylvester*, 253 N.E.2d at 430; *accord Carlisle*, 533 So.2d at 648 (finding *Sylvester* persuasive); *Pugh*, 2021 IL App (1st) 181981-U at ¶¶35, 38; *People v. Thomas*, 129 N.E.3d 584, 601 (Ill. App. Ct. 2019); *but see People v. Jackson*, 906 N.E.2d 56, 61 (Ill. App. Ct. 2009) (gun recovered by police should have been suppressed where defendant’s act of dropping the gun was a result of the unlawful seizure).

In the jurisdictions that have concluded that an individual who involuntarily discards property as the result of illegal police activity is protect by the Fourth Amendment, those reviewing courts have used this Court’s related-precedent in *Dunaway v. New York*, 442 U.S. 200, 218 (1979), and *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975), to create a multi-factor test: “*Dunaway* and *Brown* have set forth several factors which are relevant to determining whether the defendant’s behavior was a product of the illegal police action. The relevant factors include the temporal proximity of the arrest and the defendant’s response, the presence or absence of intervening circumstances, and the purpose and flagrancy of the official misconduct.” *Bailey*, 691 F.2d at 1015; *see also Jones*, 28 A.3d at 1056 (applying

these factors). This test protects an individual's fourth amendment rights against illegal seizure and search,<sup>3</sup> and concurrently furthers the government's interests by ensuring that willfully abandoned property is still admissible against a defendant. *See Abel*, 362 U.S. at 241.

Review of what constitutes abandonment is all the more critical in today's current, societal climate. This Court has recognized that "hostile confrontations [between citizens and police] are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation." *Terry v. Ohio*, 392 U.S. 1, 13 (1968). Police-civilian encounters involving firearms tragically, yet all-too-frequently, turn deadly and even lawful firearm owners may be wary of speaking to police officers while in possession of a firearm, and may anticipatorily place the firearm out of view. *Miles v. United States*, 181 A.3d 633, 641-45 (D.C. 2018) (discussing the myriad reasons why a law-abiding person may want to avoid unnecessary police interaction); Lou Raguse, *Jurors in Philando Castile Case May Not Hear He Had Gun Permit*, USA Today,

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<sup>3</sup> The state appellate court did not address whether Pugh's seizure was lawful as the court concluded Pugh's abandonment of the firearm made the seizure's legality "irrelevant." *Pugh*, 2021 IL App (1st) 181981-U at ¶38. For purposes of this petition, this Court should assume that the officers show of authority and seizure of Pugh was illegal as they lacked probable cause to arrest Pugh. *See California v. Hodari D.*, 499 U.S. 621, 626 (1991) ("An arrest requires either physical force. . . or, where that is absent, submission to the assertion of authority."); *Torres v. Madrid*, 141 S.Ct. 989, 995-99 (2021) (analyzing what a seizure encompasses); *see also Narain v. State*, 556 A.2d 1158, 1159, 1161, fn. 4 (Md. Ct. Spec. App. 1989) (analyzing the lower court's finding of abandonment by the defendant, reviewing court reasoned that "[a]lthough ordinarily there must be a finding of antecedent Fourth Amendment applicability before a court is even required to consider the merits of Fourth Amendment satisfaction or violation, in this case the merits play a necessary preliminary role in the very determination of applicability.").

May 30, 2017 (describing how, during a routine traffic stop, a police officer shot and killed a lawful gun owner).

In Pugh's case, at least one of the ten to 15 officers (Filetti) had his gun drawn when he entered the yard to arrest Pugh. (R. 42); *see United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Displaying a gun is one of factors to be considered for evaluating a seizure along with the threatening presence of several officers and police use of language or tone of voice indicating that compliance with the officer's request might be compelled.). Pugh's act of removing the gun from on his person, which was in direct response to unlawful police action, was not abandonment but an attempt to ensure the situation did not escalate or turn deadly (whether for himself, the rest of the 50 party attendees, or the 30 officers in the yard and nearby alley). (R. 43; SE #1, 5:55-6:30; SE #4, 6:15-7:30; SE #5, 4:00-6:00); *supra*, pp. 9-10.

Pugh's case presents this Court with an ideal vehicle to answer the question: does an individual who involuntarily discards property as the result of illegal police activity abandon that property for purposes of the Fourth Amendment? The split in the lower courts has been well-developed and should be resolved. Further, the three BWC videos depicting the instant events provide this Court with an unbiased palate from which to craft an answer to the question presented. This Court should grant review.

## CONCLUSION

For the foregoing reasons, Petitioner, Kenny Pugh, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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