

STATE OF MICHIGAN
IN THE SUPREME COURT

ORIGINAL

PATRICK J. KENNEY,
Plaintiff-Appellee,

-vs-

WARDEN RAYMOND BOOKER,
Defendant-Appellant.

Supreme Court Docket:

Court of Appeals No. 304900

Wayne County Circuit Court
No.: 11-003828-AH

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PLAINTIFF-APPELLEE'S APPLICATION FOR LEAVE TO APPEAL

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EXHIBITS

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ORDER APPEALED FROM AND GROUNDS FOR APPLICATION

Plaintiff Patrick Kenney appeals from the April 3, 2012 majority decision of the Michigan Court of Appeals reversing the trial court's judgment granting Plaintiff a writ of habeas corpus. (Judges O'Connell, Sawyer and Talbot.) According to the court of appeals majority decision, the lower court should not have granted Plaintiff a writ of habeas corpus because there was some evidence to support the charge of parole violation and that the hearing examiner's decision did not rest solely on her statement that Plaintiff should have known about the presence of the gun found in his car which formed the basis of his parole violation charge.

As discussed in the argument section of the application, the parole hearing officer exceeded her authority when she found Plaintiff guilty based on a should have known standard, and there was insufficient evidence to convict Plaintiff of a charge of parole violation based on constructive possession of a weapon based on the statutory requirement that a parole violation be proved by a preponderance of the evidence.

This issue has significant public interest and involves an officer of one of the subdivisions of the State in the officer's official capacity. It involves the proper standard for habeas review based on sufficiency of the evidence and the limits of the court's habeas powers. This Court has not issued opinions on these subjects for over fifty years. Accordingly, there is much need for clarification, especially given the evolution in other areas of the law. Further, the court of appeals decision in this case is clearly erroneous and will result in manifest injustice as it applies a wrong legal standard to a parole revocation hearing. Moreover, although the court of appeals decision is not published, it potentially impacts many persons beyond the litigants to this case.

Accordingly, Plaintiff respectfully submits that this Court should grant leave to appeal.

STATEMENT OF JURISDICTION

This application, filed within the forty-two day period [MCR 7.302(C)(2)] following the court of appeals decision of April 3, 2012, is within the jurisdiction conferred by this Court by MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

- I. Whether a parolee is entitled to habeas relief when he demonstrated there was a radical defect in his parole revocation hearing .

Plaintiff-Appellee answers "Yes".

- II. Whether the parole board lacks authority to revoke parole based on constructive possession of a weapon unless there is proof by a preponderance of evidence that the parolee knew of the presence of the weapon.

Plaintiff-Appellee answers "Yes".

- III. Whether convicting a person of parole violation for constructive possession of a weapon based on a "should have known" standard is a substantive due process violation and is a radical defect that provides the basis for habeas relief.

Plaintiff-Appellee answers "Yes".

- IV. Whether the trial court reviewed the sufficiency of evidence under the proper standard when conducting habeas review and found there was insufficient evidence to convict plaintiff of a parole violation based on constructive possession of a gun.

Plaintiff-Appellee answers "Yes".

- V. Whether the proper standard of review for insufficient evidence to support a revocation of parole is whether, taking the evidence in a light most favorable to the prosecution, any reasonable fact finder could conclude that the essential elements of the charged parole violation were proven by a preponderance of the evidence, and not whether there is merely some evidence to support the decision revoking parole.

Plaintiff-Appellee answers "Yes".

- VI. Whether there was insufficient evidence of a parole violation no matter what

standard was applied.

Plaintiff-Appellee answers "Yes".

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Introduction

On March 31, 2011, Plaintiff Patrick Kenney (hereafter "Plaintiff" or "Kenney") filed a complaint of habeas corpus claiming there was a radical defect at his parole revocation hearing after the hearing examiner found Kenney guilty of possession of a weapon without any proof of knowledge because Kenney "should have known" there was a handgun hidden in the battery compartment of the car he was driving. Kenney also claimed that he was entitled to an acquittal because there was no legal basis to convict him, and the hearing examiner implicitly found that he did not have actual or constructive possession. Kenney further maintained that he was entitled to a discharge from parole because the parole he was serving at the time of the alleged violation terminated in August of 2008, and his parole had otherwise terminated.

The trial court ruled that Kenney was entitled to habeas relief because he was convicted of parole violation based on an unconstitutional "should have known" standard. It ruled further that there was insufficient evidence as a matter of law to convict Kenney on the gun charge based on constructive possession, which the parole board was required to prove by a preponderance of the evidence. (Actual possession was never alleged.) It then ruled that the proper remedy was to discharge Kenney from parole.

In a two to one decision, with Judge Michael Talbot dissenting, the Court of Appeals reversed the trial court's order granting habeas relief. **(Exhibit 1, Opinion and Order.)** The majority opinion, after acknowledging that state law entitled Kenney to an

acquittal unless the parole board established a parole violation by a preponderance of the evidence, stated that Kenney was not entitled to habeas relief because there was "some evidence" to support the hearing examiner's decision that Kenney had knowledge of the presence of the gun because it could be inferred from his association with the drug dealer who had placed the gun, which Kenney was charged with possessing, in the battery compartment of the car Kenney was driving.

As demonstrated below, there was a radical defect during Kenney's parole revocation hearing because the hearing examiner found Kenney guilty based on a "should have known" standard, instead of requiring the parole board to prove actual or constructive knowledge by a preponderance of the evidence. Further, the proper test for state habeas review of sufficiency of evidence, when there is a state-created liberty interest in remaining on parole unless the parole board proves a parole violation by a preponderance of the evidence, is not whether there was "some evidence" to support the hearing examiner's decision, but whether there was sufficient evidence from which any reasonable fact finder could conclude that a parole violation had been proved by a preponderance of the evidence. Finally, there was insufficient evidence of knowledge even assuming a "some evidence" standard, as the only "evidence" of Kenney's knowledge of the gun was that he associated with man who put it there, and inferring guilt by association is a radical defect, no matter what standard is applied.

Background Facts

Kenney was originally incarcerated on two charges of simple possession of a controlled substance under 25 grams. He was paroled on October 4, 2005, and was scheduled to be discharged on August 3, 2008. On April 23, 2008, his parole was revoked for charges of possession of a weapon as a result of a gun found in a motor vehicle in Southfield, Michigan, and he received a 60 month sentence of incarceration. The trial court initially granted Mr. Kenney a writ of habeas corpus on October 8, 2010¹, Case No.: 10-009079-AH, because the Southfield Police failed to turn over crucial exculpatory evidence that tended to establish that another individual, John Cook, was responsible for the weapon found in the battery compartment of the car which Mr. Kenney was driving, (Specifically, the withheld evidence demonstrated that Cook, who was a passenger in the car Kenney was driving when Kenney was stopped by the Southfield police on November 23, 2007, was stopped by Southfield police in the same car without Mr Kenney on November 6, 2007 (a mere 17 days earlier) and during that stop, a handgun was found in virtually the same spot in the car, in the battery compartment ; the gun was previously stolen by an individual matching Cook's description from an area Cook was known to frequent; and Cook was seen brandishing a gun matching the description of the stolen gun several days before the November 6th arrest.) No criminal charges were brought against Kenney based on the November 23, 2007 arrest. **(Exhibits 2 and 3.)**

Kenney has a total of six felonies on his record. However, he was never

¹ The initial writ is not the subject of the application for leave to appeal.

convicted of a gun crime or an assaultive crime. **(Exhibit 4.)** Besides his drug possession convictions for which he was serving parole, Kenney has two convictions for uttering and publishing and two convictions for obtaining money by false pretenses over \$100.00. These property crimes occurred during a one week period between February 15 and February 22, 1995. **(Exhibit 4.)**

Summary Of Proceedings

On August 8, 2010, the trial court granted Plaintiff's previous complaint for writ of habeas corpus and remanded the matter to the parole board for a new parole revocation hearing to allow Kenney to present the exculpatory evidence that had been previously withheld. The new revocation hearing occurred over two days, November 18, 2010 and January 11, 2011. At the conclusion of the January 11 hearing, the hearing examiner stated that she was finding Kenney guilty of violating his parole because he "should have known" of the presence of the weapon found in the motor vehicle that he was driving. **(Exhibit 5, pp. 114-115.)**

On February 22, 2011, Plaintiff received official notice of this conviction. **(Exhibit 4.)** This time, he received a twenty four month sentence, which meant he was immediately eligible for parole. On March 11, 2011, Plaintiff was informed that his parole was conditionally granted. **(Exhibit 6.)**

On March 30, 2011, Plaintiff filed a complaint of habeas corpus, alleging there was a radical defect at his parole revocation hearing because he had been convicted of parole violation although the evidence was insufficient to establish that he had actual or constructive possession of the weapon for which he was convicted, but was instead

convicted based on an unconstitutional "should have known" standard. (**Exhibit 7, Complaint.**) On May 12, 2011, Plaintiff filed a brief for summary judgment, based on the complaint, with documentary and testimonial exhibits, pursuant to MCR 3.303(Q). On June 1, 2011, while the habeas complaint was pending, Kenney was paroled to a halfway house. On June 3, 2011, Defendant filed a response pursuant to MCR 3.303(K)(N) and (Q). On June 17, 2011, a summary hearing was held per MCR 3.303(Q). Kenney was released from the halfway house to attend the hearing, and was present. Following the hearing, the trial court entered an order granting the relief requested and discharging Kenney from the order of parole, the only restraint under which he was held at that time.

Substantive Facts

Kenney was originally charged with five counts of parole violation. Counts one and five were not subject to his complaint for habeas corpus². Counts two through four provided as follows:

2. On or about 11/26/2007 you were involved in behavior which constitutes a violation of state law when you had in your possession or under your control weapon, a 45 caliber handgun;
3. On or about 11/26/2007, you did have in your possession of 45 caliber handgun; and
4. On or about 11/26/2007 you did have in your possession a weapon and ammunition, a 45 caliber handgun loaded with one round and four in the magazine. (**Exhibit 4.**)

² Kenney pleaded guilty to count 1 on January 30, 2008, at the arraignment. (**Exhibit 4.**) It involved a single failure to report on one scheduled date, November 7, 2007. When Kenney was arrested for the gun charge on November 26, 2007, no absconding warrant had issued. Count 5, which was dismissed, involved an alleged conversion of which Kenney was acquitted following a bench trial. Neither Count 1 nor Count 5 were part of the original remand order for rehearing. Defendant's claim that on January 11, 2011, the ALE "again found Plaintiff guilty by plea of failing to report" is patently false. The conviction for failure to report was over three years old.

The trial court succinctly summarized the facts as follows:

Hearings were held on November 18, 2010 and January 11, 2011. The Department of Corrections misplaced the recording of the proceedings on November 18, 2010. Consequently, no transcript was able to be prepared for the hearing on that date. The facts that relate to testimony that was given on that date is based upon Plaintiff's counsel's affidavit, the original revocation hearing, and police reports. The statement of facts set forth in Plaintiff's briefs is not controverted by the Defendant as to what occurred on November 18, 2010. The only dispute relates to an unsupported statement made in Defendant's brief that Plaintiff pleaded the Fifth Amendment when asked who might have put the firearm in the car. A review of Plaintiff's testimony on January 11, 2011, establishes that this never occurred.

Southfield police officers, Freeman and Bryant, testified that Plaintiff was stopped for speeding by Southfield Police at approximately 2:00 a.m. on November 26, 2007, while driving a white Mercedes owned by his mother. Plaintiff was driving. The front seat passenger was John Cook. The back seat passenger was Keanna Rivers. The police officers obtained Plaintiff's license and ran a lien check, which revealed an outstanding warrant for larceny from Novi. The police then arrested Plaintiff.

One police officer drove Cook and Rivers home. After they left, an engine compartment search occurred and police found a handgun in the battery compartment. Plaintiff denied the weapon was his or that he had any knowledge of it. Plaintiff subsequently asked Detective Rata to check the gun for fingerprints to prove the gun was not his. A fingerprint analysis was performed and a visible print was found. It did not belong to Plaintiff or Cook.

Detective Smartsy testified that on November 9, 2007 Cook was stopped in the same white Mercedes and another handgun was found in the battery compartment. Cook was arrested because he had no valid driver's license. During a search of the vehicle, the police found a semiautomatic .40 caliber handgun hidden in the battery compartment of the car.

Dominique Johns was also in the car when Cook was stopped on November 9. Approximately one month before the stop on November 9, Johns saw Cook waving around a black semiautomatic pistol.

John Cook testified that he met Plaintiff in approximately October, 2007. Cook regularly supplied Plaintiff with drugs. In exchange, Plaintiff let Cook use the Mercedes. As a result of the arrangement, Cook essentially

had continuous possession of the car from the first day that he met Plaintiff.

On November 26, 2007, at approximately 2:00 a.m., Cook was driving the white Mercedes and picked up Plaintiff at Cook's drug house in Detroit. Prior to this, Cook had been driving around engaged in his drug trade. A friend of Cook's placed the gun under the hood of the white Mercedes. When Cook picked up Plaintiff, he asked Plaintiff to drive because he did not have a driver's license. Cook testified that Plaintiff did not know about the gun in the car. Plaintiff was not present when the gun was placed in the car. Cook did not tell Plaintiff that the gun was in the car or imply that the gun was in the car.

Cook admitted that his father attempted to retrieve the white Mercedes from the police the day after the November 26 stop.

Cook acknowledged that on November 9, 2007, he was pulled over by the police driving the same white Mercedes and a handgun was found under the hood of the car in the battery compartment. Cook did not inform Plaintiff about the gun.

Plaintiff testified that when the gun was found in the car on November 26, he told the police officer that it was not his gun. Plaintiff also testified that he told the officer that it probably belonged to Cook. Later, Plaintiff testified he told the detective he wanted the gun fingerprinted to prove that it did not belong to him.

Plaintiff also testified that Cook never told Plaintiff the gun was under the hood or there was a gun in the car. Plaintiff further testified that he had never seen Cook in possession of a gun, had never seen a gun in the car, and was not aware that a gun had been found in the battery compartment when Cook was stopped on November 9. Likewise, Plaintiff indicated that Cook never told him about the gun found in the car on November 9. **(Exhibit 8, 6/17/11 Hearing Transcript, pp. 16-20.)**

After citing at length from the hearing examiner's decision, **(Exhibit 8, pp. 13-16)**, the trial court stated: "It is clear from the opinion of the hearing officer that the hearing officer did not find that the Plaintiff had actual or constructive possession of the gun. Rather, she concluded that Plaintiff should have known that the handgun was in Plaintiff's mother's car because he was associating with John Cook, a known drug

dealer." *Id* at 16.

With regard to the "should have known" basis for the hearing examiner's decision, the record demonstrates as follows: At the close of proofs, the government began by arguing "when you choose to associate with a drug dealer and those of their like, **you take on the burden of responsibility of knowing that they oftentimes have a gun in their possession**". The government continued,

"so if you knowingly associate with the person that's involved in a crime he must take what comes with it which is why the association condition is placed upon parolees". . . . And another -- again, **a condition of parole and the comment is knew or should have known**, when you hang out with a drug dealer and your driving in the car and there was a smell of marijuana noted in the car... you know or should have known that there were drugs in the car one and **you knew or should have known that there was possibly a weapon in the car based on the November 9 stop the vehicle**".

The government concluded as follows: "So point the finger at Mr. Cook, but you can't put aside the fact that Mr. Kenny is on parole, **and when it's in your area of control, its your responsibility to know or you should have known** who was in your car and **what was brought into the car with it**, so that's why we find [sic.] for the finding of guilt." (Exhibit 9, 1/11/11 tr. pp. 105, 106, 109.)

Kenney responded by pointing out that he could not be convicted, consistent with due process, based on a "should have known" standard:

First of all, Your Honor, you cannot convict a person and deprive him of liberty based on what he should have known. There is no standard in the law that recognizes that. The standard is did he know. Not that he should have assumed or that he could have known or that he should have known. The question is did he know. That's the standard that the law recognizes and the only one. There is no constructive possession definition anywhere that says "should have known."

Kenney concluded by pointing out that to be convicted, even for constructive possession, the government had to prove knowledge, "Because you can't control something that you don't know is there, and there's no evidence that shows he knows it's in there" (Exhibit 9, 1/11/11 tr. p. 110.)

In its rebuttal argument, the government maintained that the knowledge requirement recognized at law was not something it had to prove at a parole revocation hearing:

Mr. Kenney is driving the car, so there might not be something in law, but in parole, knew or should have known is past practice and very common. It's in the prison system, you knew or should have known what was in your area of control. That's why it's stated so specifically in the parole orders it's parolee's responsibility to know. So again, we asked for the finding, thank you. (Exhibit 9, p.111.)

The hearing examiner agreed with the government position that it could revoke Kenney's parole based on a should have known standard. After first indicating that she found credible the testimony of the police officers, the parole officer and Mr. Cook, the hearing examiner stated:

It's not a stretch to believe that Cook was dealing in guns, he was admittedly a drug dealer and obviously a high drug dealer because he had several houses. He admitted that today. So it's not too much of a stretch to say that guns and drugs go together. . . . Area of control does deal with whether or not you knew or should have known. There is a standard for the Department of Corrections and that they are allowed to have and whether he knew or should have known. Here sir, should have known comes about when you were living with a known drug dealer, and the drug dealer, like I said it's not too much of a stretch to say that drug dealers deal with guns. He had been in your car that you claim was yours. . . . the gun was found in the same vehicle... there's no indication that you – when you got behind the wheel of the car in November 26 that you even talked to him or asked him were there any weapons in the car. And you sir, you were on parole, you have for all intents and purposes, you have a higher

degree than any normal citizen, and you have to -- have to know. And that's where the should have known comes in at. If you didn't ask, if you didn't check, and your being on parole you owned it sir
So I'm going to find you guilty of possessing the gun by it being in your area of control. *Id.* 114-115.

Notably, the hearing examiner also stated in her written summary provided to the parole board that she did not believe Cook had a *modus operandi* of hiding guns in battery compartment because the gun found in the battery compartment of the car Kenney was driving on November 26 was "not the same gun" as the one found by the Southfield police on November 9. **(Exhibit 10, p. 3.)** The gun found in the battery compartment on November 9, 2007, was reported on LIEN as stolen and the Southfield Police seized it. **(Exhibit 3, pp. 2, 4.)** She also maintained that Kenney had asserted his Fifth Amendment privilege when asked if he knew who put the gun in the battery compartment. **(Exhibit 10, p. 3.)** That never happened. She also stated that because a parole revocation was a civil proceeding, "The burden therefore can shift to parolee to offer some rebuttal as to how a handgun was located within his area of control and this did not occur". **(Exhibit 10, p. 3.)**

The court concluded that the hearing officer found Plaintiff guilty based on an unconstitutional "should have known" standard of knowledge. The court also ruled that the evidence was insufficient as a matter of law to establish constructive possession. **(Exhibit 9 at p. 24.)**

STANDARDS OF REVIEW

A claim of constitutional error is reviewed de novo. *People v McPherson*, 263

Mich App 124 (2004). Issues of law are reviewed de novo. *People v Carpentir*, 446

Mich 19, 60 (1994). Sufficiency of evidence is reviewed de novo. *People v Lueth*, 253

Mich App 670 (2002).

ARGUMENT

I. A PAROLEE IS ENTITLED TO HABEAS RELIEF WHEN HE DEMONSTRATED THERE WAS A RADICAL DEFECT IN HIS PAROLE REVOCATION HEARING.

Standard of Review

This issue involves question of Michigan law. Issues of law are reviewed de novo. *People v Carpentir*, 446 Mich 19, 60 (1994).

MCL 600.4301 *et seq*, governs habeas proceedings. Section 4304 provides that writs of habeas corpus may be issued by the circuit court. MCL 600.4307 provides:

An action for habeas corpus to inquire into the cause of detention may be brought by or on the behalf of any person restrained of his liberty within this state under any pretense whatsoever, except as specified in section 4310.³

MCL 600.4352 provides in part:

(1) If no legal cause is shown for the restraint, or for the continuation thereof, the court or judge shall discharge the person restrained from the restraint under which he is held.

MCR 3.300 *et. seq.* also pertains to habeas proceedings. MCR 3.301(A)(1) provides that an action for habeas is an original action. MCR 3.303(Q) directs the trial court to conduct a bench trial in a "summary manner" and enter judgment after the presentation of testimonial and/or documentary evidence. Further, MCR 3.303(E) states that the court may order production of the transcripts of the proceedings and record from "another court or agency" when the proceedings are "pertinent to a determination of the issues raised in a habeas corpus action".

In *Hinton v Parole Board*, 148 Mich App 235, 244 (1986), the Michigan Court of

³ None of the exceptions of 4310 apply to this case.

Appeals articulated the standard for obtaining habeas relief:

If a legal basis for detention is lacking, a judge must order the release of the detainee from confinement. MCL 600.4352. However, the writ of habeas corpus deals only with radical defects which render a judgement or proceeding absolutely void. A radical defect in jurisdiction contemplates ... an act or omission by state authorities that clearly contravenes an express legal requirement in existence at the time of the act or omission. *Hinton*, 148 Mich at 245; *Morales* 260 Mich App at 40.

The “express legal requirement”, the contravention of which gives rise to a radical defect triggering the right habeas relief, has never been limited by this Court to constitutional legal requirements. In *Fritts v. Krugh*, 354 Mich 97, 114-115 (1958), this Court held that a probate court’s order which clearly exceeded the statutory authority of the probate court was void, stating:

Even where, as here, a court has jurisdiction of the persons and the subject matter, an order affecting personal liberty which clearly exceeds the court’s statutory authority may be attacked by habeas corpus. *Id* at 115.

This Court stated that a court’s habeas powers included the power “to strike down an unjust order which is patently *ultra vires* , or an order entered in obvious violation of constitutional rights.” *Id.* at 121, emphasis supplied.

In *Hinton*, *supra*, the Court of appeals held that “review of a parole revocation decision is permissible upon a complaint for habeas corpus”. 148 Mich App at 244. The instant case involves the revocation of parole.

II. THE PAROLE BOARD HAS NO AUTHORITY TO REVOKE PAROLE BASED ON CONSTRUCTIVE POSSESSION OF A WEAPON UNLESS THERE IS PROOF BY A PREPONDERANCE OF EVIDENCE THAT THE PAROLEE KNEW OF THE PRESENCE OF THE WEAPON.

Standard of Review

This issue involves an interpretation of Michigan law. Issues of law are reviewed de novo. *People v Carpentir*, 446 Mich 19, 60 (1994).

With regard to parole revocation proceedings, the Michigan Parole Board has no inherent authority, but derives its authority entirely by legislative enactment. *People v. Holder*, 483 Mich 168, 175 n. 29 (2009). Parole revocation proceedings are governed by MCL 791.240a. MCL 790.240a(10) provides in part: "If a preponderance of the evidence supports the allegation that a parole violation occurred, the parole board may revoke parole" 791.240a(8) provides: "If the evidence presented is **insufficient** to support the allegation that a parole violation occurred, the parolee **shall** be reinstated to parole status." (Emphasis supplied.)

In this case, Plaintiff was charged with parole violation based on allegations that he constructively possessed a weapon in violation of his conditions of parole and Michigan law. It is clear under Michigan law that one of the requirements for proving constructive possession is "knowledge". In *People v. Emery*, 150 Mich App 657, 667-668 (1986), the court, citing *People v. Butler*, 413 Mich 377 (1982), found that proving knowledge of the presence of the weapon was essential to proving the charge of CCW. In *People v DeLongchamps*, 103 Mich App 151, 159 (1981), the court held that proving possession requires proof that the defendant was aware of the presence and character of the contraband, and intentionally and consciously possessed it. In *People v Gould*,

61 Mich App 614, 620 (1975), the court held that constructive possession requires, *inter alia*, that the defendant exercised control, or had the right to exercise control, over the contraband, and that he knew the contraband was present. In *People v. Davenport*, 39 Mich App 252, 257 (1972), the court held with regard to the concept of "joint possession", that "More than mere association must be shown to establish joint possession. An additional independent factor linking the defendant with the narcotic must be shown." More recently, the Court of Appeals stated:

Possession of a firearm can be actual or constructive, joint or exclusive. A person has constructive possession if there is proximity to the article together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is **known** and it is reasonably accessible to the defendant. Possession can be proven by circumstantial or direct evidence and is a factual question for the trier of fact. Opinion p. 2, citing *People v Johnson*, 293 Mich App 79, 83 (2011) (emphasis supplied).

Because the parole board derives its authority entirely by statute, it has no authority to create common law or deviate from its statutory mandates that require proof by a preponderance of the evidence in parole revocation proceedings. It also has no authority to dispense with the requirement that to prove constructive possession, there must be proof of knowledge.

III. CONVICTING A PERSON OF PAROLE VIOLATION FOR CONSTRUCTIVE POSSESSION OF A WEAPON BASED ON A "SHOULD HAVE KNOWN" STANDARD IS A SUBSTANTIVE DUE PROCESS VIOLATION AND IS A RADICAL DEFECT THAT PROVIDES THE BASIS FOR HABEAS RELIEF.

Standard of Review

This issue involves a constitutional question. A claim of constitutional error is reviewed de novo. *People v McPherson*, 263 Mich App 124 (2004).

Dispensing with the knowledge requirement for proving constructive possession of contraband and imposing a "should have known standard", what is essentially strict liability, especially for a weapon possession charge, is a substantive due process violation, and is subject to due process protections even where no fundamental right or liberty interest is at stake. In *Seal v Morgan et al.*, 229 F.3d 567 (CA 6, 2000), a student was suspended under the school board's "zero tolerance" policy after his friend's knife was found in the glove box of his car in the school parking lot. The suspended student brought a due process claim under §1983 against the school board. Under the school board's "zero tolerance" policy, actual knowledge of the weapon was not required for suspension. The Sixth Circuit found that the student had stated a viable due process claim. The court began by stating that school suspensions did not implicate fundamental rights or liberty interests, and thus were subject to extremely exacting "rational basis" scrutiny. However, the court found that suspending students for weapons possession, when the student did not knowingly possess the weapon, was not rationally related to any legitimate governmental interest. The court reasoned that a student could not use a weapon to injure another person, to disrupt school operations, or

for any other undesirable purpose, if he was unaware of the presence of the weapon. *Id* at 575-576.

As to the requirement of proving knowledge, the court stated: "Indeed, the entire concept of possession—in the sense of possession for which the state can legitimately prescribe and mete out punishment—ordinarily implies knowing or conscious possession." *Id*. In fact, the Sixth Circuit seemed flabbergasted by the defendant school board's position that knowledge was not required to prove possession, opining: "We would have thought this principle so obvious that it would go without saying." *Id* at 576. The court also specifically rejected the school board's contention that the criminal law requirement of knowing or conscious possession "should not be imported into school suspension cases" quoting the following passage from *Morrisette v. United States*, 342 U.S. 246, 250 (1952):

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty... to choose between good and evil. *Seal* at 576.

In this case, any fair reading of the hearing examiner's decision demonstrates that she found Plaintiff guilty of parole violation because he "should have known" the gun was in his car, as indicated by the trial court. The parole board representative argued that the hearing examiner should find Kenney guilty: "**when it's in your area of control, its your responsibility to know or you should have known** who was in your car and **what was brought into the car** with it, so that's why we find [sic.] for the finding of guilt." (1/11/11 tr. pp. 105, 106, 109.) When Plaintiff responded by arguing that the

HE could not, consistent with any notion of due process, find Kenney Guilty based on a "should have known" standard, the parole board again pressed the argument:

Mr. Kenney is driving the car, so there might not be something in law, but in parole, knew or should have known is past practice and very common. It's in the prison system, you knew or should have known what was in your area of control. That's why it's stated so specifically in the parole orders it's parolee's responsibility to know. So again, we asked for the finding, thank you. (Exhibit 10, p.111.)

And the hearing examiner, obviously siding with the parole board representative, agreed that Kenney could be convicted based on a "should have known" standard:

Area of control does deal with whether or not you knew or should have known. There is a standard for the Department of Corrections and that they are allowed to have and whether he knew or should have known. Here sir, should have known comes about when you were living with a known drug dealer, and the drug dealer, like I said it's not too much of a stretch to say that drug dealers deal with guns. He had been in your car that you claim was yours. . . . the gun was found in the same vehicle... there's no indication that you -- when you got behind the wheel of the car in November 26 that you even talked to him or asked him were there any weapons in the car. And you sir, you were on parole, you have for all intents and purposes, you have a higher degree than any normal citizen, and you have to -- have to know. And that's where the should have known comes in at. If you didn't ask, if you didn't check, and your being on parole you owned it sir So I'm going to find you guilty of possessing the gun by it being in your area of control. *Id.* 114-115.

To make matters worse, in her written opinion, the hearing examiner found that there was a presumption of guilt, and that Plaintiff had failed to rebut this presumption despite all the evidence and testimony from himself and Cook.

The court of appeals glossed over this issue and dismissed it with a couple of sentences stating that "it does not appear that the hearing officer's findings hinge solely on application of the should have known standard." (Exhibit 1, Opinion p. 5.) And after

conceding that the hearing officer's opinion "relied in part on a should have known standard" the court of appeals stated that the hearing officer's reasoning also suggested that the Plaintiff knew the weapon was there. This statement by the court of appeals is clearly contradicted by the context and text of the hearing officer's opinion. The hearing officer never indicated that she believed there was evidence demonstrating that the Plaintiff actually knew of the existence of the weapon. Further, even if her opinion was based in part on her mistaken belief that she could convict Plaintiff based on a "should have known" standard, it vitiates the finding.

Moreover, it would be nonsensical for her to base any part of her finding on a "should have known" standard if in fact she believed that the Plaintiff actually knew. In fact, if applying a should have known standard and indicating that Plaintiff was guilty because he should have known of the likelihood that a drug dealer like Mr. Cook could bring a weapon into his car is suggestive of anything, it is suggestive that she implicitly found that Kenney did not have knowledge. There would be no reason to even discuss a should have known standard if the hearing officer believed Kenney had actual knowledge. Finding the Plaintiff guilty of parole violation based in whole or in part on a should have known standard is an obvious constitutional violation and the State has no legitimate interest in punishing somebody for possession of a weapon about which they have no knowledge. *Seal, supra.*

IV. THE TRIAL COURT REVIEWED THE SUFFICIENCY OF EVIDENCE UNDER THE PROPER STANDARD WHEN CONDUCTING HABEAS REVIEW AND FOUND THERE WAS INSUFFICIENT EVIDENCE TO CONVICT PLAINTIFF OF A PAROLE VIOLATION BASED ON CONSTRUCTIVE POSSESSION OF A GUN.

Standard of Review

The proper scope of habeas review involves a question of law. Issues of law are reviewed de novo. *People v Carpentir*, 446 Mich 19, 60 (1994).

Insufficiency of evidence is a long-recognized basis for habeas review under the Michigan law. In *People v Artinian*, 320 Mich 441, this court found that it was proper for the trial court to consider the sufficiency of the evidence in habeas proceedings based on the detention of the Plaintiff under the criminal sexual psychopath law. In *Artinian*, the court granted the petitioner's habeas petition and ordered him discharged based on insufficient evidence. 320 Mich App 445. In *In Re Fidrych*, 331 Mich 485, this Court considered the sufficiency of evidence against a person that was detained based on a commitment as a "feeble minded person". After examining the sufficiency of the evidence supporting the order this Court found that the evidence was insufficient even though it contained some factual support (the child could not read or write, had an I.Q. of 41, and behavior typical of an imbecile). 331 Mich at 486.

The Court has also expressly recognized the right to seek habeas relief of a decision effecting personal liberty based on insufficiency of evidence. *Fritts, supra*, 354 Mich at 114-115. In *Fritts*, the Court held that the probate court exceeded its statutory authority to remove children from the custody of their parents due to the lack of evidence on which it based its decision, which the Supreme Court characterized as a "glaring

defect” 354 Mich at 112. The Court noted that the probate court had no inherent powers, and the power to remove custody, derived by statute, required evidence of neglect. *Id.* The Court also held that, given the lack of evidence, the deprivation of liberty would constitute a constitutional due process violation, even if the probate court's actions were authorized by statute. *Id.* at 122.

The parole board likewise has no inherent authority, but derives its authority entirely by legislative enactment. *Holder, supra*, 483 Mich at 175 n. 29. Under MCL 791.240a(10), parole can only be revoked if the charge of parole violation is proved by a preponderance of the evidence. Further, 791.240a(8) commands that a parolee **shall** be reinstated to parole if the evidence is insufficient to support the allegation of parole violation. A habeas proceeding in circuit court is an original action, MCR 3.301, in which the court is commanded to conduct a summary trial and consider documentary and testimonial evidence, MCR 3.303(Q). The court is specifically authorized to consider the proceedings conducted in an agency, MCR 3.303(E) and determine whether the agency action was ultra vires or authorized by statute (or resulted in a constitutional violation.) *Fritts*, 354 Mich at 121. Since the agency at issue was only authorized by statute to revoke Plaintiff's parole if the allegation of parole violation were proved by preponderance of evidence and compelled by statute to reinstate Plaintiff's parole if the evidence of parole violation was insufficient, it would seem curious indeed that on habeas review, the circuit court was constrained to consider whether there was “some evidence” of a parole violation, since clearly the parole board could not revoke parole on a finding there was “some evidence” to support the charge. Yet this is precisely what the

majority of Court of Appeals concluded. And it reached this conclusion based on a lack of understanding of the differences between state and federal habeas review, and misstatements of the principles of both.

To support its conclusion that the trial court should have applied the "some evidence" standard of review to the administrative hearing officer's opinion, the court began its analysis by maintaining that "Michigan case law is not entirely clear regarding whether or when a claim of insufficient evidence may establish a radical defect in jurisdiction for the purposes of habeas relief." *Id* at p. 2. The court of appeals majority then cites several Michigan Supreme Court cases of relatively distant vintage which, when placed in context, simply do not support the proposition that the case law is less than clear. In fact, as previously demonstrated, this Court has made it more than clear that sufficiency of evidence is reviewable on habeas.

The court of appeals first cited *In re Faint*, 341 Mich 408, 411 (1954), stating that "in a proceeding to have an accused person adjudged to be a criminal sexual psychopathic person, a claim that the proofs at the hearing were insufficient is not a proper one for consideration in habeas corpus proceedings." This is not an accurate portrayal of *Faint*. In *Faint*, the habeas petitioner claimed that there were insufficient proofs that he was a criminal sexual psychopath under the applicable statute (MCL 780.503). However, the petitioner in *Faint* relied on an amended statute which required that the facts relied upon by the psychiatrist making that determination be included in a report to the court. The statute in effect at the time the petitioner was declared a sexual psychopath had no such requirement. Notably, in *Faint*, this Court cited *People v*

Artinian, and *In Re Fidrych, supra*, both of which found that it was proper for the court to consider the sufficiency of the evidence in habeas proceedings. Moreover, in *Faint*, when this Court stated "the proofs at the hearing were insufficient was not a proper one for habeas review", that appeared to be because the petitioner failed to include the transcript from the hearing below and there was nothing upon which to conduct such a review. *Faint*, 331 Mich at 411.

The court of appeals also cites *In re Riggins*, 307 Mich 234, 239 (1943) for the proposition that "in a habeas proceeding, our Supreme Court does not pass upon the weight of the evidence but examines the evidence to note whether the finding of the court was supported by any credible evidence." Because the court of appeals omitted a portion of the sentence, it took it out of context. The full quote provides "On cert from denial of habeas corpus, the Supreme Court does not pass upon the weight of the evidence but examines the evidence to note whether the findings of the Court was supported by any credible evidence." *Id* at 239 (internal citations omitted). By its plain terms, this is a standard of appellate review concerning the deference owed by the appellate court to the trial court when it denies a petition for habeas review. As explained in *In re Lewis*, 124 Mich 199, 200-201 (1900):

It is not the office of habeas corpus to review the proceedings of the trial court where jurisdiction is shown. Such review should be taken on a writ of error. ... In determining this, it is to be kept in mind that the proceedings under review was held in a superior court. In habeas corpus proceedings, as in others where the attack is collateral, the judgments of a superior court receive different considerations than that accorded to those of inferior tribunals. (Citations omitted.)

In the case at bar, the trial court was engaged in habeas review which, the court

of appeals conceded is "an original action, not an administrative appeal." (**Exhibit 1, Opinion p. 2.**) The trial court is authorized by statute and court rule to review facts. Further, a parole revocation hearing tribunal is clearly "an inferior tribunal" as opposed to a circuit court, which is Michigan's court of general jurisdiction and a "superior court" as indicated in *In re Lewis*. Thus, when placed in proper context, *In re Riggins* does not stand for the proposition that in a habeas proceeding, the trial court owes an inferior tribunal the exacting deference suggested by the court of appeals. In fact, when placed in context, when this Court's other decisions and its pronouncements in the court rules are considered, the trial court in this case properly acted as a fact-finder with regard to the petitioner's claim of illegal detention and it was the court of appeals majority's complete lack of deference to the trial court which was questionable.

Finally, the court of appeals reliance on *In re Van Dyke*, 276 Mich 32, 34 (1936) for the proposition that "the present proceeding is not the proper one in which to determine whether the verdict was against the great weight of the evidence" is completely misplaced. *In re Van Dyke* simply stands for the oft repeated and well accepted principle that a criminal defendant cannot use habeas proceedings in place of an appeal. *In re Van Dyke* offers no guidance on the question of the correct standard of review of sufficiency of evidence in a petition for habeas corpus which is properly brought and which is not a wrongful attempt to supplant the appellate process.

V. THE PROPER STANDARD OF REVIEW FOR INSUFFICIENT EVIDENCE TO SUPPORT A REVOCATION OF PAROLE IS WHETHER, TAKING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE PROSECUTION, ANY REASONABLE FACT FINDER COULD CONCLUDE THAT THE ESSENTIAL ELEMENTS OF THE CHARGED PAROLE VIOLATION WERE PROVEN BY A PREPONDERANCE OF THE EVIDENCE, AND NOT WHETHER THERE IS MERELY SOME EVIDENCE TO SUPPORT THE DECISION REVOKING PAROLE.

Standard of Review

The proper standard of review to apply involves a question of law. Issues of law are reviewed de novo. *People v Carpentir*, 446 Mich 19, 60 (1994). This issue also involves a claim of constitutional error and is reviewed de novo. *People v McPherson*, 263 Mich App 124 (2004).

After misstating the state law with regard to review of sufficiency of evidence in a habeas proceeding, the court of appeals majority turns to several federal cases for guidance. Once again, the court of appeals takes the pronouncements of these cases out of context to find that the proper standard of review for considering a claim of insufficient evidence at a parole revocation hearing is simply whether "some evidence" supports the hearing examiner's decision. When the federal cases are cast in the proper light, it is clear that the "some evidence" standard does not apply.

In *Wilkinson v Austin*, 545 US 209, 221 (1991), the Supreme Court stated:

The Fourteenth Amendment's due process clause protects persons against deprivations of life, liberty, or property; those those who seek to invoke its procedural protection must establish that one of these interests is at stake. A liberty interest may arise from the constitution itself, by reason of guarantees implicit in the word "liberty", * * * or it may arise from an expectation or interest created by state laws or policies * * *. (Citations omitted.)

In *Swarthout v Cooke*, 131 S Ct 859, 862 (2011), the court stated:

We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the state. The touchstone of due process is protection of the individual against arbitrary action of government.

The United States Supreme Court also held that although there is no right to parole, once parole has been granted, the parolee has a liberty interest protected by the Due Process Clause of the Constitution itself. *Morrissey v Brewer*, 408 US 471, 481-482 (1972). Due process protections therefore apply to parole revocation proceedings. *Id* at 485-489. Moreover, there can be little doubt that MCL 791.240a (8) coupled with (10) bestow a state created liberty interest in parolees remaining on parole unless the parole board proves a parole violation by a preponderance of the evidence. See *Board of Pardons v. Allen*, 482 U.S. 369, 373-381, 107 S. Ct. 2415, 96 L. Ed. 2d 303 (1987); *Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 12, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979).

In *Pilon v Bordenkircher*, 444 US 1, 3 (per curiam) citing *Jackson v Virginia*, 443 US 307, 319 (1979), the United States Supreme Court recognized the right of a habeas petitioner to challenge the sufficiency of evidence under the Due Process Clause. Because a substantive component of the Due Process Clause imposed the "proof beyond a reasonable doubt" quantum of proof in criminal proceedings as a recognized liberty interest, the court found that the proper standard of review was: whether viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could find that the essential elements of the offense were established beyond a reasonable doubt. *Id*. Because a liberty interest created by a state is on equal footing with those created by the Constitution itself, it follows that when there is a state-imposed "proof by

a preponderance of the evidence” quantum of proof that creates a liberty interest, the standard of review for insufficient evidence should be, whether viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could find that the essential elements of the charged parole violation were established by a preponderance of the evidence.

The court of appeals majority erroneously applied the “some evidence” test by relying on cases in which there was no quantum of proof in the underlying proceeding guaranteed by the constitution itself or state law creation, beyond “some evidence”, and by relying on federal habeas cases, where review was constrained by 42 USC § 2254.

The Court of Appeals majority initially cites *Douglas v Buder*, 412 US 430, 431 (1973) for the proposition that Plaintiff’s insufficient evidence claim should be reviewed under the “some evidence” standard. In *Buder*, the petitioner sought **federal** habeas review of his **state** law probation violation. His probation was violated and he was sentenced to prison as a result of an alleged failure to immediately report an arrest, even though the petitioner had only received a traffic citation and had never been detained or taken into custody. *Buder* did not involve a state created liberty interest to remain free unless the state proved a probation violation by a preponderance of the evidence. In fact, the case never mentioned the state’s burden of proof at the probation violation hearing. The United States Supreme Court stated only that the petitioner’s federal due process rights were violated because there was no evidence that would support a charge of probation violation for failure to report an arrest given that the probationer was never arrested.

The court of appeals also relied on *Swarthout v Cooke*, 131 S Ct 859, 862 (2011), which Petitioner finds particularly ironic. There, the United States Supreme Court harshly criticized the Ninth Circuit for not adhering to the constraints that the federal habeas statute, 42 USC § 2254 placed on review of state court actions, and held that under federal habeas review, the federal courts should not second guess the state courts as to whether they had “unreasonably determined the facts in light of the evidence”. *Id* at 862. Further, under California law, the standard of proof at parole proceeding was “some evidence”; not preponderance of evidence, as it is under Michigan law. *Id* at 863. And most notably, the *Swarthout* Court concluded its opinion by stating:

The short of the matter is that the responsibility for assuring that the constitutionally adequate procedures governing California’s parole system are properly applied rests with the California courts and is no part of the Ninth Circuit’s business.” *Id*.

The instant case is not a federal habeas proceeding. Petitioner sought review in the Michigan courts of constitutionally adequate procedures governing the guarantee, under Michigan law to not have his parole revoked unless the state proved a parole violation by a preponderance of the evidence. The Michigan courts are not constrained by the procedural requirements of section 2254. Further, as plainly stated in *Swarthout*, it is the Michigan courts’ duties to assure that constitutionally adequate procedures are applied in the Michigan parole system. And whether the action by the hearing examiner and parole board in this case is defined as an *ultra vires* act or a violation of due process, there was a radical defect in the parole revocation hearing which entitled Petitioner to habeas relief.

The court of appeals reliance on *Superintendent, Massachusetts Correctional*

Institution, Walpole v Hill, 472 US 445, 455 (1985), is equally misplaced. First of all, *Walpole* involved prison disciplinary proceedings. As the United States Supreme Court made clear, those proceedings involve a balancing of institutional interests that do not generally maintain in parole revocation hearings:

This interest, however, must be accommodated in the distinctive setting of a prison where disciplinary proceedings "take place in a closed tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." Consequently, in identifying the safeguards required by due process, the court has recognized the legitimate institutional needs of assuring the safety of inmates and prisoners, avoiding burdensome administrative requirements that might be susceptible to manipulation, and preserving the disciplinary process as a means of rehabilitation.

Further, there are greater protections afforded in parole revocation proceedings, as the balancing of interests is not the same. See *Wolf v McDonald*, 418 US 539, 557-558 (1974). And perhaps most importantly, under Massachusetts law, there was no quantum of proof specified regarding the denial of good time credits. *Id.* at 454. As the *Walpole* Court stated:

The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact. Revocation of good time credits is not comparable to a criminal conviction and neither the amount of evidence necessary to support such a conviction, see *Jackson v Virginia*, 443 US 307 (1979), nor **any other standard greater than some evidence applies in this context.** (Emphasis supplied.)

And while revocation of parole may not be wholly comparable to a criminal conviction, it is certainly closer than revocation of good time credits. More importantly, in this case, unlike *Walpole*, there is a standard greater than some evidence that applies in this context because, at least under Michigan law, parole may not be revoked unless a

parole violation is proved by a preponderance of the evidence. And in this case, Mr. Kenney is not relying on a substantive component of the Due Process Clause to argue that the evidence was insufficient, he is relying on state created liberty interest that guarantees a quantum of proof beyond "some evidence".

It is clear under MCL 791.240a that a parolee has a liberty interest in remaining on parole unless the parole board proves a parole violation by a preponderance of the evidence. It is clear under *Hinton, supra*, that a parolee can seek habeas review of a parole revocation. Accordingly, it would seem somewhat less than logical to conclude that when conducting the habeas review, the trial court must limit its review to whether there is any evidence at all to support a finding of parole violation. That would be to ignore the quantum of proof guaranteed by Michigan law. It would seem more logical to require that the trial court review the decision to determine whether any rational trier of fact could find that a parole violation was proved by a preponderance of the evidence.

VI. THERE WAS INSUFFICIENT EVIDENCE OF A PAROLE VIOLATION NO MATTER WHAT STANDARD WAS APPLIED.

Standard of Review

Sufficiency of evidence is reviewed de novo. *People v Lueth*, 253 Mich App 670 (2002)

In this case, after Kenney was stopped by police and police discovered the handgun in the battery compartment, Kenney immediately denied he knew about the gun. He asked the police to fingerprint the gun, which they did and Kenney's prints were not found on the gun. Cook denied Kenney had any knowledge of the gun. Cook admitted one of his minions placed the gun in the car before he even picked Kenney up that evening, thereby incriminating himself. Cook was stopped 17 days earlier and a gun was found in the same spot. Both he and Kenney denied Kenney had any knowledge of the earlier stop, and Cook told Kenney that he had been arrested for driving on a suspended license, which he had repeated before and which Kenney had every reason to believe. Kenney had never seen Cook in possession of a gun. The gun was found in a place Kenney could not possibly have seen unless he opened the hood and looked inside the battery compartment, things that are not typically done before people drive their cars a short distance home. In short, there was simply no evidence establishing Kenney had knowledge of the presence of the gun. And even assuming the hearing examiner found parts of Kenney's testimony to lack credibility because he would not admit that he could not necessarily infer that Cook carried a weapon based on his drug dealing, this was not **evidence** that Kenney knew this particular gun was in his car when he was stopped on November 26, 2008.

After conceding that there was no direct evidence that Plaintiff knew of the gun, the court of appeals majority held there was circumstantial evidence that the petitioner was aware of the gun "given his close association with Cook and the fact Cook had the car seventeen days earlier when police found a gun in the same battery compartment." The majority stated further "Plaintiff's denial of any knowledge that police had found a gun in the car on the earlier occasion could lack credibility." The court of appeals continued "In short, the evidence established that (1) Plaintiff and Cook lived together, (2) Cook traded drugs to Plaintiff in exchange for use of the car in which the gun as found, (3) Plaintiff knew Cook was a drug dealer and could reasonably infer that drug dealers **sometimes** carry weapons, and (4) Cook was a passenger while Plaintiff was driving when the police stopped them for speeding. (**Exhibit 1, Opinion p. 5, emphasis supplied.**)

This finding by the court of appeals is in essence a finding that the petitioner was guilty by association. In *People v Blakes*, 382 Mich 570, 574, this Court agreed with the criminal defendant that "no inference of guilty participation can be drawn from mere association among persons, even those of shady reputation." In reversing the conviction, this Court, quoting an earlier decision, stated "what all of this testimony comes down to is that the defendant was keeping bad company. There is, at least, a breath of suspicion that he was involved somehow in nefarious business. But it is no more than a suspicion." *Id.*

In this case, likewise, what the evidence comes down to is that the Petitioner was guilty of keeping bad company. A reasonable fact-finder could not find there was proof

of knowledge of the gun because the Petitioner should have inferred that people who sell drugs often carry guns and that since he lent his car to a person who sells drugs, it could be inferred that a gun was actually in his car on the night he was stopped. This is not a reasonable inference of knowledge, this is pure speculation and a finding of guilt by association. This is all the more true when the drug dealer admitted he knew about the gun but that the Plaintiff did not, and when Plaintiff denied knowledge of the gun, his prints were not found on it, and he even asked the police to check the gun for prints to prove that the gun was not his. The facts cited by the majority of the court of appeals are simply not evidence of knowledge, or evidence which could support a reasonable inference that Kenney actually knew a gun was in the battery compartment of his mother's car on the night he was stopped.

RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Plaintiff requests that the Court summarily reverse the order of the court of appeals and reinstate the judgment of the trial court granting the writ, or, in the alternative, grant Plaintiff leave to appeal.

Respectfully submitted,



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Counsel for Plaintiff-Appellee

Date: May 15, 2012