IN THE
SUPREME COURT OF INDIANA

NO.82S05-1007-CR-343

Court of Appeals Cause No. 82A05-0910-CR-00592

Richard L. Barnes, *Appellant (Defendant below),* v. State of Indiana, *Appellee (Plaintiff below).*	) Appeal from The Vanderburgh Superior Court)) Trial Court case no.: 82D02-0808-CM-759)))) The Honorable Mary Margaret Lloyd, Judge

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PETITION FOR REHEARING

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PETITION FOR REHEARING

Comes now the Appellant, Richard L. Barnes, pursuant to Appellate Rule 54, and files his Petition for Rehearing of this Court's decision dated May 12, 2011.

STATEMENT OF THE ISSUES

I. In finding that there is no right to reasonably resist unlawful entry by police officers into a residence, this Court's opinion conflicts with the 4th Amendment of the U.S. Constitution.

II. In finding that Barnes was not entitled to a jury instruction on the right to resist unlawful police entry into his residence, this Court's opinion punishes Barnes Ex Post Facto in violation of the Due Process Clause of the 5th Amendment to the U.S. Constitution, made applicable to the States by the 14th Amendment, and Marks v. United States, 430 U.S. 188, 191, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).

III. In upholding Barnes's conviction for Disorderly Conduct, this Court's opinion conflicts with the 1st Amendment of the U.S. Constitution, with Article I, Section 9 of the Indiana Constitution, and with this Court's prior holdings in Price v. State, 622 N.E.2d 954, 958 (Ind. 1993).

ARGUMENT

I. In finding that there is no right to reasonably resist unlawful entry by police officers into a residence, this Court's opinion conflicts with the 4th Amendment of the U.S. Constitution.

In Steagald v. United States, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981), the Supreme Court held that, in the absence of valid consent or exigent circumstances,

warrantless searches are per se unreasonable and violate the Fourth Amendment. Id. at 211. Absent consent, the Fourth Amendment requires that even when probable cause for a warrantless arrest exists, an officer may only enter a defendant's home to make the arrest when exigent circumstances exist that make it impracticable to obtain a warrant first. Adkisson v. State, 728 N.E.2d 175, 177 (Ind. Ct. App. 2000). The State has the burden of proving that exigent circumstances existed in order to overcome the presumption of unreasonableness that accompanies all warrantless home entries. Robinson v. State, 814 N.E.2d 704, 707-708 (Ind. Ct. App. 2004). When the police act without a warrant, the burden of proof is on the government. United States v. Melendez, 301 F.3d 27, 32 (1st Cir. 2002).

> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. When, on the other hand, the officer demands entry but presents no warrant, there is a presumption that the officer has no right to enter, because it is only in certain carefully defined circumstances that lack of a warrant is excused. An occupant can act on that presumption and refuse admission. He need not try to ascertain whether, in a particular case, the absence of a warrant is excused. He is not required to surrender his Fourth Amendment protection on the say-so of the officer. The Amendment gives him a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime. Nor can it be evidence of a crime.

United States v. Prescott, 581 F.2d 1343, 1350-51 (9th Cir. 1978) (citations and quotations omitted).

> Coupling an unlawful arrest with an unlawful entry adds to the seriousness of the governmental intrusion because of the recognized privacy interest that attaches to a private home. In such circumstances, it is reasonable to view the governmental intrusion as especially provocative and a defendant's resistance to entry and arrest as excusable and therefore privileged. A greater privilege is recognized to resist an unlawful entry into private premises than to resist an unlawful arrest in a public place.

Casselman v. State, 472 N.E.2d 1310, 1316 (Ind. Ct. App. 1985). "In the eyes of the law, such an entry represents the use of excessive force." Id.

This Court's holding in the case at bar abrogates the protections found in the Fourth Amendment. Faced with the holding that there is no right to reasonably resist illegal police entry into a private residence, an occupant can no longer act on the presumption that an officer has no right to enter and refuse the officer entry. The ruling on its face appears to give police officers unfettered rights to enter any residence, for any reason, and dispenses with the occupant's Fourth Amendment rights.

In the case at bar, the officers did not have a warrant. Nor did the State prove that exigent circumstances existed to overcome the presumption of unreasonableness. The State did not prove that the officers were lawfully engaged in their duties. Barnes's wife was present *outside* the apartment and was interviewed by the officers *outside* the apartment. Barnes's wife had no physical injury, and told both the 911 dispatcher and the officers that Barnes did not hit her. Barnes was entitled to resist the officers' forceful and unlawful entry into his residence. There were no circumstances that required the officers to enter Barnes's apartment without first securing a warrant. As a result, the entry into the residence was in violation of Barnes's Fourth Amendment rights.

Generally, evidence obtained as a result of a violation of a defendant's Fourth Amendment rights, the so-called fruit of the poisonous tree, may not be used against him. Wong Sun v. United States, 371 U.S. 471, 484, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). To be admitted, the evidence must be so distanced from the underlying illegal police conduct "as to

dissipate the taint of the illegal search or seizure." United States v. Medina, 451 F. Supp. 2d 262, 272 (D. Mass. 2006).

In the case at bar, the evidence upon which the State relied for Barnes's conviction for both the Battery and Resisting charges existed only as a direct result of the illegal conduct of the police officers. But for the officer's illegal and forceful entry into Barnes's residence, there would have been no altercation. Barnes was placed in a choke hold and tasered by the officers. The excessive force of the officers caused Barnes to require medical treatment, as evidenced by Joint Trial Exhibits 1 through 3, which are attached to this Petition for Rehearing, and which were a part of the Record on appeal. (Pet for Reh P. 9-11).

II. In finding that Barnes was not entitled to a jury instruction on the right to resist unlawful police entry into his residence, this Court's opinion punishes Barnes Ex Post Facto in violation of the Due Process Clause of the 5th Amendment to the U.S. Constitution, made applicable to the States by the 14th Amendment, and Marks v. United States, 430 U.S. 188, 191, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).

Article I of the United States Constitution provides that neither Congress nor any state may pass any ex post facto law. See U.S. Const. art. I, § 9; U.S. Const. art. I, § 10. An ex post facto law is one which applies retroactively to disadvantage an offender's substantial rights. Weaver v. Graham, 450 U.S. 24, 29-30, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

The Ex Post Facto Clause does not apply to judicial decisionmaking; however, the prohibition on ex post facto laws embodies "one of the most widely held value-judgment[s] in the entire history of human thought," that is, that there should be no punishment without a law authorizing it. Rogers v. Tennessee, 532 U.S. 451, 468, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001). The notion that "persons have a right to fair warning of that conduct which will

give rise to criminal penalties is fundamental to our concept of constitutional liberty." Marks v. United States, 430 U.S. 188, 191, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). Therefore, the Due Process Clause of the Fifth Amendment, made applicable to the states by the Fourteenth Amendment, protects offenders from judicial decisions that "retroactively alter the import of a law to negatively affect the offender's rights without providing fair warning of that alteration." Marks, 430 U.S. at 192.

Just as legislatures are barred by the Ex Post Facto Clause from passing laws that unforeseeably enlarge criminal statutes, so too are courts "barred by the Due Process Clause from achieving precisely the same result by judicial construction." Bouie v. City of Columbia, 378 U.S. 347, 353-54, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964). "In sum, the central question to be asked in deciding whether retroactive application of a judicial decision violates due process is whether the defendant had fair warning that his conduct was criminal at the time he engaged in it." Armstrong v. State, 848 N.E.2d 1088, 1092-1094 (Ind. 2006).

This Court's opinion in Barnes v. State of Indiana, 2011 Ind. Lexis 353 (Ind. 2011) states: "We acknowledge that the Court of Appeals followed its own precedents in its analysis." Slip op. at 11. "In sum, we hold that Indiana [sic] the right to reasonably resist an unlawful police entry into a home is no longer recognized under Indiana law." Slip op. at 10. This Court's opinion acknowledges the right to resist unlawful police action has been firmly ingrained in our common law for "over three hundred years, and some scholars trace its origin to the Magna Carta in 1215." Slip op. at 3. The only Indiana authority cited recognized this important right. Slip op. at 4 (citing Casselman v. State, 472 N.E.2d 1310 (Ind. Ct. App. 1985)). At the time of Barnes' trial there is no question that his tendered instruction was a correct statement of law. The trial court was obligated to give the tendered

instruction because it was a correct statement of the law, supported by the evidence, and not covered by other instructions. Overstreet v. State, 783 N.E.2d 1140, 1163 (Ind. 2003). Trial courts should not be free to disregard the law or refuse instructions thinking the law may be changed months or years later on appeal. This Court's decision to alter the rule in the future does not alter the deeply ingrained law at the time of the offense of which Barnes was on notice. Due process demands a new trial at which he is entitled to a correct instruction of the law as it existed at the time of his trial.

III. In upholding Barnes's conviction for Disorderly Conduct, this Court's opinion conflicts with the 1st Amendment of the U.S. Constitution, with Article I, Section 9 of the Indiana Constitution, and with this Court's prior holding in Price v. State, 622 N.E.2d 954, 958 (Ind. 1993).

A person who recklessly, knowingly, or intentionally . . . makes unreasonable noise and continues to do so after being asked to stop . . . commits disorderly conduct, a Class B misdemeanor. I.C. 35-45-1-3(2). The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." Likewise, Art. 1, § 9 of the Indiana Constitution guarantees to the citizens of this state the right of free expression. Article 1 Section 9 of the Indiana Constitution provides: "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." Thus, "the legislature's sole authority over expression is to sanction individuals who commit abuse." Price v. State, 622 N.E.2d 954, 958 (Ind. 1993). Abating excessive noise is an objective legitimately pursued by the legislature; and I.C. 35-45-1-3(2) is rationally calculated to achieve this objective. Id. at 960.

I.C. 35-45-1-3(2) "was adopted to provide relief to people whose privacy or use and enjoyment of land has been intolerably impaired by unwelcome and unreasonable noise. It is expressly aimed at preventing the harm which flows from the volume of the expression and not its substance." Price, 622 N.E. 2d at 966. *See also* Hooks v. State, 660 N.E.2d 1076, 1077 (Ind. Ct. App. 1996), trans. denied. (To sustain a conviction, the State must show that the complained-of speech infringed upon the right to peace and tranquility enjoyed by others.)

A two-step inquiry is applied to review the constitutionality of an application of the disorderly conduct statute. The court must first consider whether state action has restricted a claimant's expressive activity. If so, the court must then decide whether the restricted activity constituted an "abuse" of the right to speak. Whittington v. State, 669 N.E.2d 1363, 1367 (Ind. 1996).

Expression is not materially burdened if the State produces evidence that the speech inflicted particularized harm analogous to tortious injury on readily identifiable private interests. Whittington, 669 N.E.2d at 1370. This requires evidence that the speech caused actual discomfort to persons of ordinary sensibilities or that it interfered with an individual's comfortable enjoyment of his privacy. Price v. State, 622 N.E.2d 954 (Ind. 1993).

In J.D. v. State, 859 N.E.2d 341 (Ind. 2007), this Court found that where speech obstructs or interferes with police, an abuse of the right of free speech has occurred. However, in J.D., the juvenile, who was a resident at a youth home, continued to yell and became louder with the officer's attempts to speak to her Id. at 343. This case is distinguishable from J.D.

Barnes told the officers that they were not needed. Barnes told the officers to leave.

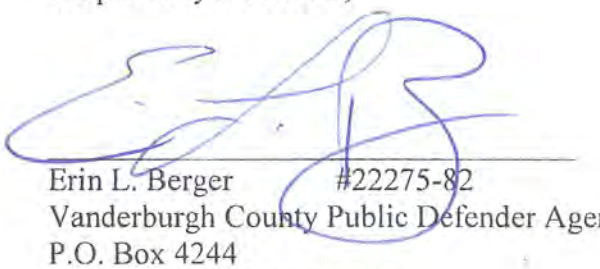
Barnes told the officers that they were not welcome in his residence. Barnes's speech was commenting on government action, including criticism of the conduct of an official acting under color of law. Barnes's speech was aimed at persuading the police officers to leave the parking lot, was not intended to interfere with the police officer's performance of his job, and did not interfere with said performance.

The State was required to prove that the speech inflicted particularized harm analogous to tortuous injury on readily identifiable private interests. The State did not meet this burden. Testimony showed that Barnes's speech did not even attract a crowd from the residents that were in the parking lot of the apartment complex at the time of the incident. The state failed to show any harm that was inflicted by Barnes's speech, or that Barnes created excessive noise. Barnes's conviction for disorderly conduct cannot stand.

CONCLUSION

For the foregoing reasons, Richard L. Barnes respectfully requests this Court grant rehearing and affirm the holding of the Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the forgoing has been served upon the following counsel of record by first class mail, postage prepaid, this 9 day of June, 2011.

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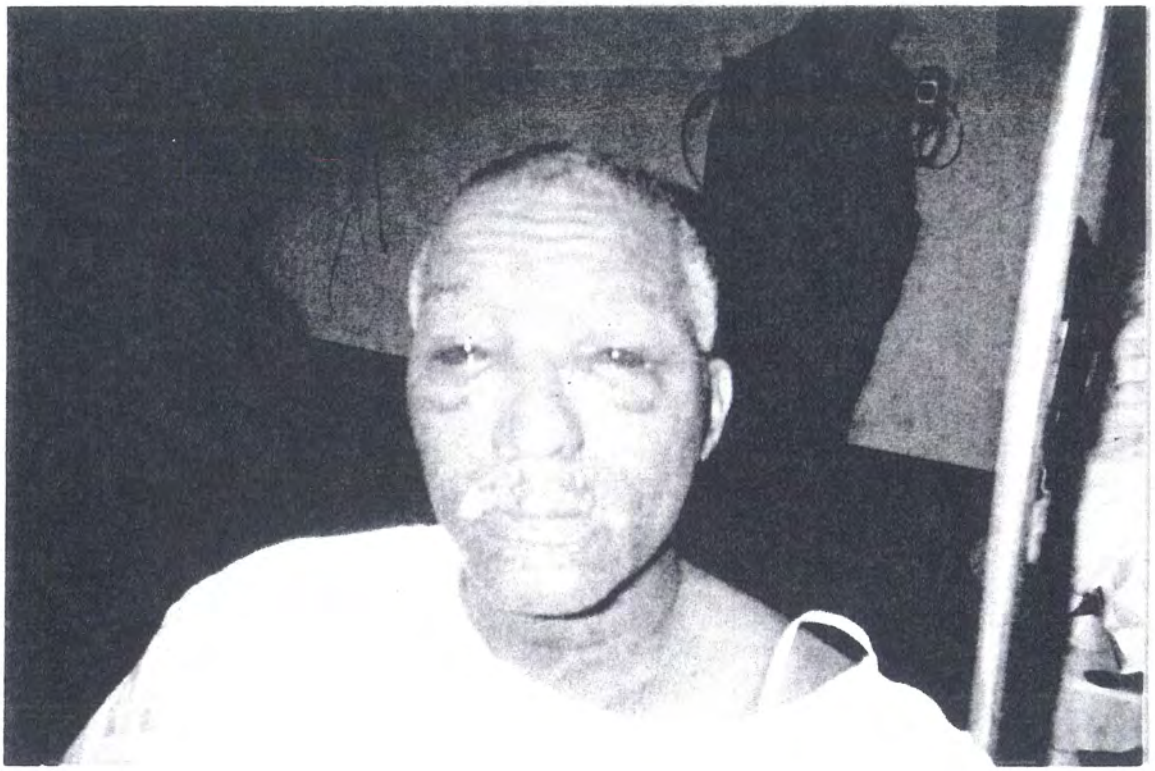
PHOTO



STATE AND DEFENDANT'S JOINT EXHIBIT NO. 1 - 06/25/09 - J.T.

PHOTO

STATE AND DEFENDANT'S JOINT EXHIBIT NO. 2 - 06/25/09 - J.T.

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STATE AND DEFENDANT'S JOINT EXHIBIT NO. 3 - 06/25/09 - J.T.

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