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**APPELLEE’S STATEMENT IN OPPOSITION TO**

**APPELLANT’S ASSERTION ABOUT WHETHER THERE IS A SUBSTANTIAL  
CONSTITUTIONAL QUESTION, OR THE CASE IS OF PUBLIC OR GREAT  
GENERAL INTEREST**

Appellant claims that this case presents a substantial constitutional question, and therefore she has an appeal of right. S.Ct. Prac. R. 2.1(A)(2). She does not claim that this is a matter of “public or great general interest” which could invoke the Court’s discretionary jurisdiction. S.Ct. Prac. R. 2.1(A)(3).

Appellant was charged and convicted of multiple counts of neglecting companion animals. Appellant specifically *asked* law enforcement officers to enter her home to care for her many animals while she was receiving treatment from EMS. Appellant was determined to be alert and competent when she made the request. There was no evidence presented to the contrary.

Appellant also argues that the officers could not enter Appellant’s home under the exigent circumstances exception to the search warrant requirement. That was not the issue. The officers entered Appellant’s home because Appellant asked them to do so. Whether there might also have been exigent circumstances justifying the entry is irrelevant.

A search resulting from consent does not present a “substantial constitutional question” entitling Appellant to an appeal of right, therefore Appellant’s request should be denied. See *State v. Kitts*, 177 Ohio St. 169, 203 N.E.2d 229 (1964).

## ARGUMENT AGAINST APPELLANT'S PROPOSITIONS OF LAW

**Appellant's Proposition of Law No. 1: "Appellant Hartman's Fourth Amendment rights were violated as the question of whether consent to a search was voluntary or the product of a temporary inability to consent, duress, or coercion, express or implied, as a question of fact to be determined from the totality of the circumstances, and her physical and mental condition at the time prevented her from giving voluntary consent."**

Voluntary consent is an exception to the warrant requirement. *Schneckloth v. Bustamonte* 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Law enforcement officers do not need a warrant, probable cause or even reasonable, articulable suspicion to conduct a search when consent for a search is voluntarily given. *Schneckloth id.* at 219; *State v. Comen*, 50 Ohio St.3d 206, 211, 553 N.E.2d 640 (1990). Whether consent was voluntary or was the product of duress or coercion is to be determined from the totality of all the circumstances." *Schneckloth, supra* at 227.

The standard of proof to show a waiver of Fourth Amendment rights is less strict than that required to demonstrate a waiver of Fifth or Sixth Amendment rights. *State v. Barnes*, 25 Ohio St. 3d 203, 495 N.E.2d 922 (1986). It need not be shown that there has been a knowing and intelligent waiver. Rather, the court must examine the totality of the circumstances to determine the voluntariness of the consent. *Schneckloth; United States v. Mendenhall* 446 U.S. 544, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980).

The standard for measuring the scope of consent is objective reasonableness. In other words, what a typical reasonable person would have understood by the exchange between the

officer and the suspect. *Florida v. Jimeno* 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991).

In this case, humane officers had an appointment to meet Appellant at her residence. When they arrived, they found Appellant unresponsive in a vehicle on the property. The officers summoned an ambulance, but it was agreed that Appellant appeared only to have been in a deep sleep. EMS decided to transport Appellant to a hospital only because a suicide note was also found on the scene. Appellant was able to stand on her own, and was not confused. (Tr. p. 82-83.)

Appellant had the presence of mind to make arrangements for the care of her animals. She asked the officers to enter her house to do so. Appellant described precisely where to find a key to unlock a storage area where she kept the animals' food. (Tr. p. 83-84, 128-129.) Appellant was never threatened or promised anything to secure her permission to enter the house, and she was not placed under arrest. (Tr. p. 129, 133.)

Authority to enter Appellant's residence in this case goes *beyond* mere consent. Consent may be shown when a suspect simply opens the front door, then steps aside and allows police to enter. *In re M.H.*, 129 Ohio Misc. 2d 5, 2003 Ohio 7371, 814 N.E.2d 1264 (C.P.) In this case, Appellant specifically *asked* the officers to enter her home to perform a service.

Appellant wants this Court to recognize a previously unknown "sleep rule": that a person cannot be competent to give consent within an undefined period of awakening from a deep sleep. Appellant also advances the previously unknown "ambulance rule": that a person cannot give voluntary consent whenever the person is examined by EMS professionals. Trial courts are not

required to adhere to such arbitrary rules. The Trial Court in the instant case considered the uncontradicted testimony that Appellant was competent and coherent, and came to the conclusion that she gave voluntary consent for entry into her home. The Court of Appeals agreed.

For the above reasons, Appellant's Proposition of Law No. 1 is without merit.

**Appellant's Proposition of Law No. 2: "Appellant Hartman's Fourth Amendment rights were violated as the community-caretaking/emergency-aid exception to the warrant requirement allows police officers to enter a residence to render aid if they reasonably believe that there is an immediate need for their assistance only to protect human life or prevent serious injury to a human being, and no person was in danger at the time of the search."**

Appellant concedes that neither the Trial Court nor the Court of Appeals addressed the issue of whether the search of Appellant's home was justified under the exigency exception to the warrant requirement. The exigency exception would only be raised *if* this Court were to accept jurisdiction on Appellant's First Proposition of Law, *and* find that appellant's consent was invalid. Then presumably the matter could be remanded to the Appellate or Trial Court for further proceedings, which might or might not involve consideration of the exigency exception.

Since this case was not decided on the exigency exception to the Fourth Amendment, Appellant's Proposition of Law No. 2 is without merit.

For the sake of argument, however, Appellee will briefly consider the merits of Appellant's Proposition of Law No. 2:

The exigent circumstances exception is present when:

- (1) Police have reasonable grounds to believe that there is an emergency and an immediate need for their assistance for the protection of life or property;
- (2) The search is not be primarily motivated by the intent to arrest and seize evidence.
- (3) There is some reasonable basis, approximating probable cause to associate the emergency with the area to be searched.

*State v. Cheers*, 79 Ohio App. 3d 322, 326, 607 N.E.2d 115 (1992). Generally, actions taken by the police are deemed reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify the action. *Brigham City v. Stuart* (2006), 547 U.S. 398, 404, 126 S.Ct. 1943, 1948, 164 L. Ed. 2d 650, citing *Scott v. United States* (1978), 436 U.S. 128, 138, 98 S.Ct. 1717, 1723, 56 L. Ed. 2d 168.

Animals are personal property. *Oberschlake v. Veterinary Assocs. Animal Hosp.*, 151 Ohio App. 3d 741, 2003 Ohio 917, 785 N.E.2d 811 (2<sup>nd</sup> Dist.) Police may specifically enter an area under the exigent circumstances exception to protect animals in immediate need of care. *State v. Kilburn*, 12<sup>th</sup> Dist. No. CA96-12-130, CA96-12-131, 1998 Ohio App. LEXIS 1200 (Mar. 30, 1998) (horse that could not get out of the mud); *State v. Fisher* 5<sup>th</sup> Dist. No. 2006CA00338, 2007 Ohio 4820 (entry into barn with dogs, overwhelming odor on a hot, humid day); *State v. Mills* 5<sup>th</sup> Dist. No. CA-89-2, CA-89-3, 1990 Ohio App. LEXIS 246 (January 24, 1990) (entry into a home to rescue animals where there was a foul odor, dead mice and live fleas visible prior to entry); *State v. Bauer*, 127 Wis.2d 401, 379 N.W.2d 895 (1985) (entry into a barn

where one dead horse was observed prior to the entry); *People v. Thorton*, 286 Ill. App.3d 624, 676 N.E.2d 1024 (1997) (entry into an apartment where dog was barking in apartment for 2-3 days and owner could not be reached) *Pine v. State*, 889 S.W.2d 625 (Texas App. 1994); *Montana v. Stone*, 92 P.3d 1178 (2004) (search based on observation of dead and dying rabbits.)

In this case, humane officers were asked to enter the premises by the owner, who was worried about the animals getting the care they needed. The officers heard many dogs barking inside the house, and could smell an overwhelming stench of ammonia from animal waste, even through the closed doors and windows. (Tr. p. 75-76.) Appellant had already advised the officers that she had run out of room to put more dogs in her house. (Tr. p. 77.) When the door was opened, the odor increased. It smelled like pure ammonia, the worst the officer had encountered in 17 years as a humane officer. (Tr. p. 85.) The ammonia content was so high that it presented a health hazard to humans and animals. (Tr. p. 112.) Ammonia fumes are poisonous to animals. (Tr. p. 37.)

In short, Appellant consented to the entry of her home. But one were to set aside consent, the officers had ample reason to believe that the animals inside the home were in immediate jeopardy, and thus were permitted to enter the premises under the exigency exception to the warrant requirement. Contrary to Appellant's assertion, the exigency exception requires that the animals be alive and in jeopardy to give the officer justification to enter. One cannot rescue animals from imminent harm if the animal is already deceased and thus made worthless as property.

For the above reasons, Appellant's Proposition of Law No. 2 is without merit.

**Appellant's Proposition of Law No. 3:** "The evidence in the record could not support a finding of guilty beyond a reasonable doubt as the trial court did not find whether the birds at issue were "companion animals" or "wild animals" per R.C. 959.131(A)(1) and R.C. 1531.01(X), depriving Appellant Hartman of her rights under Section 16, Article I of the Ohio Constitution and the Due Process Clause of the Fourteenth Amendment."

Appellant is required to set forth, in her Memorandum in Support of Jurisdiction, "a thorough explanation of why a substantial constitutional question is involved" which entitles her to an appeal of right. S. Ct. Prac. R. 3.1(B)(2). Appellant does not address the issue stated in Appellant's Proposition of Law No. 3 at all in that portion of Appellant's Memorandum. Nor does Appellant assert that any issue is a matter of "public or great general interest." Proposition of Law No. 3 therefore seems to be surplusage, and should be disregarded.

Further, Proposition of Law No. 3 asserts that there is a "substantial constitutional question" simply because Appellant disagrees with the lower courts' findings on sufficiency of the evidence, asserting that this alleged error offends Appellant's rights of Due Process. If that is so, then every failed appeal on grounds of insufficiency of the evidence is potentially before this Court as an appeal of right.

Nevertheless, Appellee shall briefly address the merits of this Proposition:

Appellant was charged in the disjunctive. The allegation was whether Appellant caused or permitted unnecessary pain or suffering to *one or more* of the animals listed, being 25 birds, one iguana, two ferrets and six mice. Appellant does not dispute that these animals were housed inhumanely. Appellant's only argument is whether all of said animals are "companion animals."

Thus, if *any* of the animals listed in the complaint were “companion animals,” Appellant’s conviction on this count was sustained by sufficient evidence.

“Companion animal” means any animal that is kept inside a residential dwelling and any dog or cat regardless of where it is kept. “Companion animal” does not include livestock or any wild animal.

O.R.C. §959.131(A)(1).

“Wild animals” includes mollusks, crustaceans, aquatic insects, fish, reptiles, amphibians, wild birds, wild quadrupeds, and all other wild mammals, but does not include domestic deer.

O.R.C. §1531.01(X).

As noted above, “companion animals” are any animal kept in a residential dwelling. “Wild animals,” including “wild birds,” are excluded from that definition. This makes sense, so that citizens are not in danger of being charged with animal neglect should a wild bird accidentally fly into one’s house through an open window.

Contrary to Appellant’s assertion, evidence *was* presented that the birds possessed by Appellant were not wild. Photos were entered into evidence of the birds inside the residence, inside cages commonly used for pet birds. The birds were identified by breed, including cockatiels (Tr. p. 89-90), macaws and cockatoos (Tr. p. 96), parrots and parakeets. (Tr. p. 97, 100.) The fact that the birds were kept in bird cages, and were consistent with breeds commonly known as being kept as pets, was sufficient evidence that they were indeed not “wild.”

Furthermore, Appellant has not disputed that ferrets and mice kept in cages are domestic pets, not wild animals.

Sufficient evidence was provided to show that all of the animals listed in Count 2 were kept in a residential dwelling as pets, and were not excluded by statute, therefore Appellant's Proposition of Law No. 3 is without merit.

Respectfully submitted,  
HOLLAND & MUIRDEN



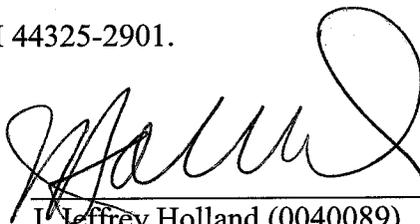
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#### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Response was mailed this date to Dean Carro, University of Akron School of Law, Legal Clinic/Appellate Review Office, 150 University Avenue, Akron OH 44325-2901.

12/14/12

Date



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