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STATEMENT OF INTEREST OF AMICI

The Office of the Ohio Public Defender is the state agency responsible for protecting and defending the rights of indigent persons. The Office provides and supports representation in criminal and juvenile cases across the State of Ohio in trial courts, appellate courts, and parole and probation hearings. The Office also works with other stakeholders to help create a more just criminal and juvenile justice system.

The Cuyahoga County Public Defender is legal counsel to more than one-third of all indigent persons indicted for felonies in Cuyahoga County. As such the Cuyahoga County Public Defender is the largest single source of legal representation of criminal defendants in Ohio's largest county. Representation of those clients frequently involves issues under the Warrant Clauses of the Constitution of the United States and the Ohio Constitution and the scope of the so-called "good-faith" exception to the Warrant Clause.

The Ohio Association of Criminal Defense Lawyers is an organization of 705 dues-paying attorney members with a mission to defend the rights secured by law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; to provide

periodic meetings for the exchange of information and research regarding the administration of criminal justice.

The Maumee Valley Criminal Defense Lawyer's Association (MVCDLA) is an association of public defenders and private attorneys who practice primarily in the field of criminal defense law in northwest Ohio including Lucas County. MVCDLA has a lasting interest in protecting the rights of the criminally accused under the United States and Ohio Constitutions. The practice at issue in this case is of particular significance to MVCDLA's members and their clients as the case arises in and its outcome directly relevant to the accused in Lucas County.

STATEMENT OF THE CASE AND THE FACTS

Amici adopt by reference the statements of the case and of the facts set forth by Appellant Brandon Hoffman.

ARGUMENT

Proposition of Law:

Because the magisterial finding of probable cause is essential to the warrant requirement, there can be no good faith reliance on warrants systematically issued without such a preliminary finding.

A. Introduction

The exclusionary rule was created to deter police misconduct. The good faith exception to that rule limits the exclusion of evidence seized in violation of the Constitution to those instances where the constitutional violation stems from intentional or reckless conduct by police. Evidence obtained in a reasonable, good faith belief that the activity in question was permissible, the Supreme Court explained, should be admissible despite technical or less egregious violations. *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). As the Supreme Court put it in *Leon*:

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Id. at 919 (internal quotations omitted).

Accordingly, the good faith exception applies when the police violate the Fourth Amendment but the violation is a sort of technicality — the kind of violation for which an exclusion would be an extravagant remedy. Examples of such technical violations

include minor defects in a warrant, *Leon*, knock-and-announce violations, *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006), and reliance on negligent errors in a police database, *Herring v. United States*, 555 U.S. 135, 141, 129 S.Ct. 695, 172 L.Ed.2d 496 (2008). These are minor, technical sorts of violations, where imposing the remedy of suppression would simply be too much given the nature of the violations.

The good faith exception may also apply when a warrant issues although the magistrate's determination of probable cause is arguable. *Leon* explained.

Because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime," *United States v. Chadwick*, 433 U. S. 1, 9 (1977) (quoting *Johnson v. United States*, 333 U. S. 10, 14 (1948)), we have expressed a strong preference for warrants and declared that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *United States v. Ventresca*, 380 U. S. 102, 106 (1965). See *Aguilar v. Texas*, 378 U. S., at 111. Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according "great deference" to a magistrate's determination. *Spinelli v. United States*, 393 U. S., at 419. See *Illinois v. Gates*, 462 U. S., at 236; *United States v. Ventresca*, *supra*, at 108-109.

Id. at 913-914.

That broad rule is promptly limited, however, as the first sentence of the next paragraph makes clear. "Deference to the magistrate, however, is not boundless." *Id.* The magistrate must in fact act as a detached and neutral magistrate in making the determination of probable cause.

At bottom, and underlying both the exclusionary rule and the good-faith exception to it, is the idea that – whatever the defect in the process – the arrest or search at issue is grounded on a preliminary magisterial finding of probable cause. Where that does not first occur, no amount of “good faith” will excuse the arresting officer’s conduct or insulate it from the exclusionary rule. In the City of Toledo, the Toledo Municipal Court typically issues arrest warrants at the request of police officers without an initial finding of probable cause. It did so in this case. The record reveals that it has done so for at least 17 years. Accordingly, a substantial number of persons in and around Toledo are being and have been arrested in violation of their constitutional rights. The practice is routine, and it must stop. Simply put, expanding the good faith exception pronounced in *Leon* so that it applies to arrests warrants issued without a magisterial finding of probable cause will only incentivize the exception’s abuse.

B. “[N]o warrants shall issue, but upon probable cause[.]”

The text of the Fourth Amendment to the United States Constitution is clear:

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

And more than 55 years ago, in *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958), the Supreme Court reiterated that an arrest warrant may not issue but upon probable cause. Probable cause may be based on a grand jury’s

return of an indictment. But “in the absence of an indictment, the issue of probable cause had to be determined by the Commissioner, and an adequate basis for such a finding had to appear on the face of the complaint.” *Id.* at 487. That rule, that an arrest warrant must be based on probable cause, remains unchallenged.

The arrest warrant in *Giordenello* was defective because it was issued solely on a complaint containing neither “affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,” nor any indication of the “sources for the complainant’s belief,” nor “any other sufficient basis upon which a finding of probable cause could be made.” With none of that presented, the magistrate who issued the warrant had no basis to, and could not, “assess independently the probability that [the] petitioner committed the crime charged.” *Id.*

C. The problem in Toledo: The Clerk admitted that no deputy clerk has ever made a probable cause determination.

The record in this case, as detailed in Appellant’s merit brief, reveals the Toledo police have a longstanding practice to obtain arrest warrants from the deputy clerks of the Toledo Municipal Court. And the deputy clerks issuing the warrants make no effort to determine whether the complaints on which they issue the warrants set forth probable cause. (Appellant’s Brief, Statement of Facts.) That is how it has been done for at least 17 years. And this case is not alone. As Cindy Downs, a supervisor in the Toledo Municipal Court Clerk’s Office, testified in this case, in her 17 years there, *no deputy clerk has ever made a probable cause determination* before issuing an arrest warrant.

The Toledo practice of issuing arrest warrants without probable cause determinations has been raised before. In *State v. Overton*, 6th Dist. Lucas No. L-99-1317, 2000 WL 1232422, the Sixth District Court of Appeals declined to suppress evidence obtained pursuant to an arrest warrant from Toledo Municipal Court. Rather than rule on the validity of the warrant itself or on the practice of issuing warrants without probable cause determinations, the court held that the arrest was not improper because the detective who executed the warrant, who was not the detective who obtained it, had probable cause to arrest the defendant.

In a statement respecting the denial of certiorari, Justice Breyer (joined by Justices Stevens, Souter, and O'Connor) reiterated the basic rule:

The probable-cause determination must be made by a neutral magistrate in order "to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause." *Wong Sun v. United States*, 371 U.S. 471, 481-482, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Overton v. Ohio, 534 U.S. 982, 122 S.Ct. 389, 151 L.Ed.2d 317 (2001). Although the warrant in the case was, he said, wholly defective, Justice Breyer explained that he would not grant certiorari because the "basic legal question" had already been answered. *Id.*

The warrant at issue in *Overton* was executed 15 years ago, on November 23, 1998. The record of this case makes clear that nothing has changed in the interim. Toledo police obtain arrest warrants with no concern about probable cause as they did

in 1998 and as they have since then. That is what Detective Kim Violanti did in this case.

D. The courts below misread the Sixth District's precedent.

The common pleas court denied suppression in this case because it felt constrained by the Sixth District's decision in *Overton* which, the trial court concluded, approved Toledo's warrant application practice. The trial court was wrong. *Overton* did not say that the Toledo practice was correct. *Overton* did not say that the warrant obtained by Detective Andre Woodson set forth probable cause or, more importantly, that the warrant was issued upon a determination of probable cause. And the court did not hold that a clerk could issue a warrant without a finding of probable cause. Rather, the court simply held that the detective in that case had probable cause, and then ceased consideration of any other issue:

Detective Navarre had reasonable ground to believe that the offense was committed and reasonable ground to believe that the person alleged to have committed the offense is guilty of the violation. Therefore, the Court finds that Detective Navarre had probable cause to arrest appellant in this case.

State v. Overton, supra, at *3.

The Sixth District made the same mistake, effectively reading words into *Overton* that did not appear in the opinion. The appeals court acknowledged that the warrants issued in this case were invalid, *State v. Hoffman*, 6th Dist. Lucas No. L-12-1262, 2013-Ohio-1082, ¶ 16. But the court also claimed that *Overton* found the arrest warrant in that case "valid." *Id.* at ¶ 18. As a result, the court held, the officers in this case, "had no

reason to doubt the validity of the warrants and thus, they acted in good faith.” *Id.* at ¶ 28. The conclusion could follow only if *Overton* had held that clerks could issue arrest warrants without a determination of probable cause. But, as we have seen, *Overton* does not say that. Even if it did, that would not satisfy *Leon*’s exception for good faith.

E. The good faith exception does not excuse a police officer’s failure to obtain a warrant from a non-judicial officer who does not make a probable cause determination.

When the *Leon* court set forth the good faith exception to the exclusionary rule, it explained that there were limits, circumstances in which suppression would still be proper.

Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. *Franks v. Delaware*, 438 U. S. 154 (1978). *The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in Lo-Ji Sales, Inc. v. New York*, 442 U. S. 319 (1979); in such circumstances, no reasonably well trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” *Brown v. Illinois*, 422 U. S., at 610-611 (POWELL, J., concurring in part); see *Illinois v. Gates*, *supra*, at 263-264 (WHITE, J., concurring in judgment). Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient — i. e., in failing to particularize the place to be searched or the things to be seized — that the executing officers cannot reasonably presume it to be valid. Cf. *Massachusetts v. Sheppard*, *post*, at 988-991. (Emphasis added.)

Leon, 468 U.S. 897, at 923.

What each of those circumstances has in common is that a competent, reasonably trained police officer would know better than to rely on the warrant. Police officers, *Leon* says, do not act in good faith if they rely on a warrant obtained through lies and material omissions. *Officers do not act in good faith if they rely on a warrant issued by a magistrate who is not acting as a neutral and detached decision-maker.* Officers do not act in good faith if they rely on a warrant so facially deficient that it cannot reasonably be presumed valid. And officers do not act in good faith if they rely on a warrant issued from an affidavit so lacking in probable cause that no reasonable officer could believe it justified a warrant.

For an officer to rely in good faith on a warrant, then, the officer must have at least a minimal understanding of just what the Fourth Amendment requires. As we have seen, the United States Supreme Court has made it clear that the Fourth Amendment requires that an arrest warrant may issue only after a determination of probable cause.

That has not been the practice in Toledo for at least 17 years. It was not the practice when Detective Violanti obtained the arrest warrants in this case. If she knew that she needed to present the clerk with probable cause to issue the arrest warrants but did not bother because local practice said it wasn't necessary to obey the Fourth Amendment, then her behavior was actively bad faith. If, instead, she did not know that she needed to present the clerk with probable cause, her lack of training in the most

basic principles of the Fourth Amendment cannot support a finding of good faith. And if she knew that the clerk wouldn't make even a rudimentary determination of probable cause and therefore did not concern herself with it, then she willfully violated the Fourth Amendment.

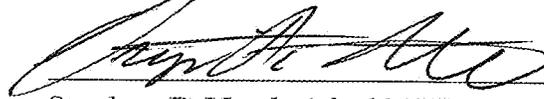
CONCLUSION

The purpose of the exclusionary rule is to deter police from violating the Constitution. As the United States Supreme Court explained in *Leon*, the deterrent purpose of the exclusionary rule requires suppression when the police have engaged in willful or negligent conduct that has deprived the defendant of Fourth Amendment protections. Toledo police do just that when they obtain arrest warrants from a clerk who does not determine probable cause. Detective Violanti did just that when she obtained the arrest warrants in this case from a clerk who did not determine probable cause.

Accordingly, the good faith exception to the exclusionary rule does not apply, this Court should adopt Appellant's proposition of law, and this Court should reverse the decision of the Sixth District.

Respectfully submitted,

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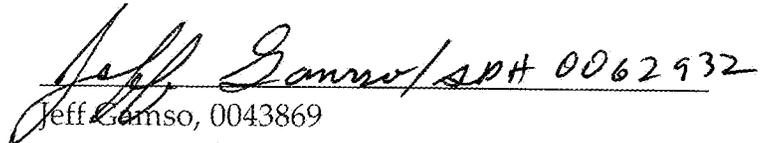
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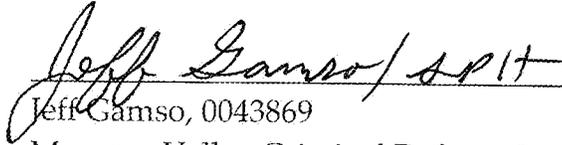
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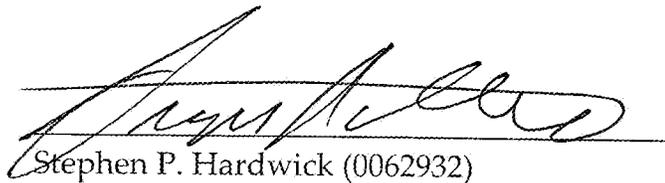
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Certificate of Service

I hereby certify that a true copy of the foregoing was forwarded by regular U.S. Mail, postage pre-paid to the office of David Klucas, 1900 Monroe Street, Toledo, Ohio 43604 and to Evy M. Jarrett and Frank H. Spryszak, Assistant Lucas County Prosecuting Attorneys, 700 Adams Street, Toledo, Ohio 43604, on this 25th of November, 2013.



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