

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee	:	Case No. 2013-0688
	:	
vs.	:	On Appeal from the Lucas County
	:	Court of Appeals, Sixth Appellate
BRANDON HOFFMAN	:	Dist. Case No. L-12-1262
	:	
Defendant-Appellant	:	

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MERIT BRIEF OF *AMICUS CURIAE* OHIO PROSECUTING ATTORNEYS  
ASSOCIATION IN SUPPORT OF APPELLEE

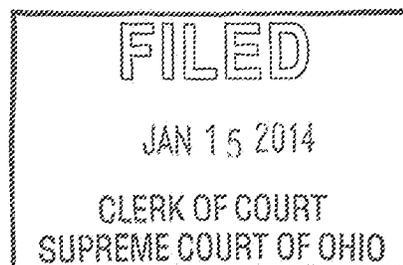
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**TABLE OF CONTENTS**

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES ..... 1

STATEMENT OF INTEREST OF *AMICUS CURIAE* .....2

STATEMENT OF FACTS .....3

PROPOSITION OF LAW .....4

LAW AND ARGUMENT .....5

CONCLUSION ..... 16

CERTIFICATE OF SERVICE.....17

TABLE OF AUTHORITIES

CASES

*Arizona v. Evans* (1995), 514 U.S. 1 .....5, 8, 15

*Davis v. U.S.* (2011), 131 S.Ct. 2419 .....5, 8, 10, 12

*Franks v. Delaware* (1978), 428 U.S. 154 ..... 10

*Herring v. U.S.* (2009) 555 U.S. 135 ..... 5, 6, 9, 10, 11, 13, 14

*Hudson v. Michigan* (2006) 547 U.S. 586 .....5, 13

*Illinois v. Gates* (1983), 462 U.S. 213 .....5

*Illinois v. Krull* (1987), 480 U.S. 340 .....6, 8, 12, 14, 15

*Johnson v. United States* (1948), 333 U.S. 10. ....6, 15

*Mapp v. Ohio* (1961), 367 U.S. 643.....5

*Massachusetts v. Sheppard* (1984) 468 U.S. 981 .....6

*Rochin v. California* (1952), 342 U.S. 165 .....5

*State v. Hoffman*, Case No. L-12-1262, 2013 (6<sup>th</sup> Dist. Court of Appeals) ..... 11

*State v. Overton*, 6<sup>th</sup> Dist. No. L-99-137, 2000 WL 1232422 (Sept. 1, 2000). ..... 11, 12, 13

*State v. Wilmoth* (1986), 22 Ohio St.3d 251.....5

*United States v. Janis* (1976), 428 U.S. 433 .....5

*United States v. Leon* (1984), 468 U.S. 897.....6, 8, 15

*Weeks v. United States* (1914), 232 U.S. 383 .....5

*Whiteley v. Warden, Wyo. State Penitentiary* (1971), 401 U.S. 560.....6

## **STATEMENT OF INTEREST OF *AMICUS CURIAE***

The Ohio Prosecuting Attorneys Association is an association of the county prosecutors from the eighty-eight counties in the State of Ohio. This case comes before this Honorable Court because Appellant seeks to overturn the decisions of the Trial Court and Sixth District Court of Appeals. Both courts properly determined that evidence derived from a search incident to Appellant's arrest was not subject to suppression. Both courts concluded that suppression of the evidence would have no deterrent value in this case.

Appellant now seeks to expand the scope of the exclusionary rule to circumstances in which it would provide no meaningful deterrence. Equally concerning to this *amicus curiae* is Appellant's desire to allow judicial misconduct, rather than that of law enforcement, to trigger the exclusionary rule. Such novel expansions of the exclusionary rule would have adverse consequences upon the administration of justice across the State of Ohio.

## STATEMENT OF FACTS

The *amicus curiae* fully adopts the Statement of Facts as contained in the brief filed by the Appellee, State of Ohio.

## **PROPOSITION OF LAW**

The Sixth District Court of Appeals properly found Appellant's arrest to be lawful and that the suppression of the evidence in this case would not serve to deter deliberate, reckless, or illegal conduct of police officers.

## LAW AND ARGUMENT

The United States Supreme Court has long recognized the general principle that evidence procured as the result of a constitutional violation cannot be used to convict a defendant in a federal prosecution. Weeks v. United States (1914), 232 U.S. 383. After Weeks, the Court held that where police misconduct so offended a sense of justice as to constitute a violation of the Due Process Clause, evidence derived from such misconduct must be excluded in state prosecutions as well. Rochin v. California (1952), 342 U.S. 165, 173. Ultimately, the Court extended what had become known as the exclusionary rule to all prosecutions in state courts. Mapp v. Ohio (1961), 367 U.S. 643, 654.

Whether the exclusionary sanction is appropriately imposed in a particular case is “an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct... The fact that a Fourth Amendment violation occurred—i.e., that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies.” Herring v. U.S. (2009) 555 U.S. 135, 140 (quoting) Illinois v. Gates (1983), 462 U.S. 213, 223. Where “the exclusionary rule does not result in appreciable deterrence, then, clearly, its use ... is unwarranted.” Arizona v. Evans (1995), 514 U.S. 1, 11, citing United States v. Janis (1976), 428 U.S. 433, 454; State v. Wilmoth (1986), 22 Ohio St.3d 251.

The United States Supreme Court has recently recognized that it was not particularly discriminating in its application of the exclusionary rule, or careful with its discussion thereof, in the years after its adoption. See e.g. Hudson v. Michigan (2006) 547 U.S. 586, 591; Davis v. U.S. (2011), 131 S.Ct. 2419, 2427. In its early decisions, the Court suggested that the exclusion of evidence followed almost automatically from constitutional violations. See e.g. Mapp at 365 “All

evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.” See also Whiteley v. Warden, Wyo. State Penitentiary (1971), 401 U.S. 560, 568 (“...petitioner's arrest violated his constitutional rights under the Fourth and Fourteenth Amendments; the evidence secured as an incident thereto should have been excluded from his trial”).

However, the jurisprudence surrounding the exclusionary rule has evolved significantly since those decisions. The United States Supreme Court has explained that the exclusionary rule only serves to deter deliberate, reckless, grossly negligent conduct, or in some circumstances recurring or systemic negligence. Herring at 144. Moreover, the police misconduct must be sufficiently deliberate that exclusion can meaningfully deter it and sufficiently culpable that such deterrence is worth the price paid by the justice system. Id.

The Court has repeatedly held that the exclusionary rule exists to deter police misconduct, not to punish the errors of magistrates and judges.” See e.g. Massachusetts v. Sheppard (1984) 468 U.S. 981, 990; Illinois v. Krull (1987), 480 U.S. 340, 348. The Court has explained that in the case of errors on the part of magistrates and judges, there is no basis for believing that the application of the exclusionary rule will have a significant effect on court employees. This is because “court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime and have no stake in the outcome of particular criminal prosecutions. Johnson v. United States (1948), 333 U.S. 10, 14; United States v. Leon (1984), 468 U.S. 897, 917; Krull at 352.

**I. The exclusionary rule does not apply because there is no deliberate, reckless, or illegal police misconduct to deter in this case.**

It is undisputed that the Toledo Municipal Court's policies for the issuance of arrest warrants, as they existed at the time, cast an ill light on the judicial system. Judges, magistrates, and deputy clerks are supposed to provide a meaningful safeguard to residents of Ohio accused of criminal activity. It is unfortunate that the deputy clerk who issued the arrest warrants at issue in this case lacked the training and knowledge to provide a meaningful review of the detective's request. Trans. 6/8/12 p. 94. Even more troubling is that it appears no deputy clerk employed by the Toledo Municipal Court has been trained to make a probable cause determination when an officer requests an arrest warrant. Trans. 6/8/12 p.49. However, the failures present in this case are not those of law enforcement and cannot be deterred by the application of the exclusionary rule.

In this case, Detective Violanti conducted the investigation of Appellant's suspected involvement in a breaking and entering offense. She spoke with the victim of the offense, located witnesses and, upon completion of her investigation, approached the Toledo Municipal Court for arrest warrants. Trans. 6/8/12 p. 22-24. Detective Violanti ultimately drafted misdemeanor complaints for house stripping, petty theft, and criminal damaging. Trans. 6/8/12 p. 25. Although Detective Violanti, possessed ample evidence that Appellant had engaged in that conduct, she did not reference the evidence she possessed in the "to-wit" section of the misdemeanor complaint. Trans. 6/8/12 p. 22-25, 32. Detective Violanti affirmed the contents of the complaints under oath before deputy clerk Mata and was not questioned about why she believed Appellant was guilty of the stated offenses. Trans. 6/8/12 p. 32.

While deputy clerk Mata failed to conduct a probable cause review of the warrants in this case, there is no evidence that she was acting as an agent of law enforcement. Similarly, there is no evidence that law enforcement worked in conjunction with the Toledo Municipal Court to

develop the procedures for the issuance of arrest warrants. In fact, Detective Clark testified that he was not familiar with the Toledo Municipal Court's guidelines for reviewing warrant requests. Trans. 8/24/2012 p. 5. To the best of his knowledge those guidelines had never been circulated within the Toledo Police Department and no one from the department assisted in their development. Trans. 8/24/2012 p. 5-6. Neither detective Violanti, nor the officers who later served the warrants, knew or could reasonably have been expected to know that the Toledo Municipal Court deputy clerks were not properly trained.

It is undisputed that the Toledo Municipal Court deputy clerks are not, and have not, been properly trained for a number of years. Appellant seeks suppression on this basis. However, the United States Supreme Court has "repeatedly rejected efforts to expand the focus of the exclusionary rule beyond deterrence of culpable police conduct." Davis at 2432. In Leon, the Court stated that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges." Leon at 916. Similarly, in Krull the Court noted that "legislators, like judicial officers, are not the focus of the exclusionary rule." Krull at 350. Finally, in Evans, the Court reiterated that the exclusionary rule was aimed at deterring "police misconduct, not mistakes by court employees." Evans at 14. Cases such as these make it unequivocally clear that the sole purpose of the exclusionary rule is the deterrence of culpable law-enforcement conduct. See also Davis at 2433.

In this case Detective Violanti conducted a thorough investigation of Appellant, developed probable cause that he committed a number of misdemeanor offenses, and affirmed three complaints on that basis to a deputy clerk under oath. Unbeknownst to her, the deputy clerk did not perform an independent review of the complaints for probable cause. Deputy clerk Mata, a court employee, had not been properly trained and could not therefore act as an effective

constitutional safeguard as required by the Fourth Amendment. However, the sole purpose of the exclusionary rule is to deter deliberate, reckless, or grossly negligent conduct on the part of *law-enforcement*; no such conduct occurred in this case.

Once the warrants in question were entered into the system, the officers who ultimately arrested Appellant had no reason to doubt their validity. Neither the detective who obtained the warrants nor the officers who served the warrants had any way of knowing that Mata had failed to review them for probable cause. A reasonable officer should be able to presume that the judicial officer reviewing an application for a warrant is trained, competent, and performing her role as intended. Once the warrants were entered into the computer database, it was reasonable for law enforcement to rely upon them in good faith. Appellant seeks to impute the actions, or rather inaction, of the Toledo Municipal Court onto law enforcement. There is simply no rational basis for doing so.

The record is devoid of evidence that Detective Violanti engaged in any misconduct, deliberate, reckless, or otherwise, in an effort to violate Appellant's rights. However, Herring does recognize that in some circumstances, "recurring or systemic negligence" *on the part of law enforcement* might trigger the exclusionary rule. Id at 145. Appellant could make a colorable argument Detective Violanti's failure to specify the evidence supporting the misdemeanor complaints constituted some degree of negligence. If her negligence had constituted "recurring or systemic negligence" as contemplated in Herring, the exclusionary rule may have been triggered.

The Court in Herring explained that if, for example, a police department was reckless in maintaining a warrant system, or knowingly entered false information to lay the groundwork for future arrests, exclusion would be justified. Id at 146. Similarly, in cases where systemic errors in

a warrant system had been previously demonstrated, it might be reckless for officers to rely on such an unreliable system. In each example of “systemic negligence” offered by the Court in Herring, the negligence that could trigger the exclusionary rule is that of law enforcement. The only “systemic negligence” arguably present in this case is on the part of the Toledo Municipal Court. As explained in Evans, the purpose of the exclusionary rule is to deter police misconduct, not mistakes by court employees. Evans at 14.

In this case, Detective Violanti possessed ample evidence that Appellant had engaged in the misdemeanor offenses in question. Had the clerk requested additional information, she could have informed her that Appellant was observed on video committing the offenses and several witnesses had observed Appellant removing the victim’s property. Appellant will undoubtedly feel this constituted systemic negligence that must be deterred. However, without additional evidence it is, at best, an isolated example of minor negligence on the part of a single officer. The United States Supreme Court has previously held that “police negligence in obtaining a warrant did not rise to the level of a Fourth Amendment violation, let alone meet the more stringent test for triggering the exclusionary rule.” Herring at 145 (citing Franks v. Delaware (1978), 428 U.S. 154). Here, the officer’s failure to include the information she gathered does not rise to the level of a Fourth Amendment violation, let alone trigger the exclusionary rule.

Appellant refers to recurring and systemic negligence, but offers little support for this assertion beyond references to the conduct of the Toledo Municipal Court. The record contains little information on precisely how commonplace it is for the complaints written by the Toledo Police Department to lack the “to-wit” language that could provide a reviewing magistrate an independent basis for determining probable cause. Appellant cites the arrest warrant examined in a prior Sixth District case and the anecdotal experiences of the officers who testified in this case.

There is simply insufficient evidence in the record for this Court to independently conclude that there was any “recurring systemic negligence” on the part of the Toledo Police Department in drafting warrants.

Assuming *arguendo* that it was in fact common for the Toledo Police Department to obtain misdemeanor warrants without referencing the facts supporting the allegations, such conduct would still not rise to the level of “recurring or systemic negligence” contemplated in Herring. Binding precedent within the Sixth District suggested the practice of using “bare bones” complaints was acceptable. See State v. Overton, 6<sup>th</sup> Dist. No. L-99-137, 2000 WL 1232422 (Sept. 1, 2000). One can hardly find law enforcement to be negligent for continuing a practice that had been, at least tacitly, approved of by the local court of appeals.

In Overton, as in this case, the defendant challenged the validity of an arrest warrant on the basis that it merely contained factual allegations and did not provide the basis of information on which the complaint was sworn. Overton at \*2. The Sixth District Court of Appeals determined there was probable cause for the arrest and affirmed the trial court’s decision not to suppress the evidence seized. In this case, the court of appeals cited that decision and opined that they had previously found the arrest warrant in Overton valid despite the fact that the complaint merely recited the statutory elements of a crime.

In affirming the trial court’s decision in this case, the Sixth District Court of Appeals was mindful of its own precedent suggesting such a practice was acceptable. See State v. Hoffman, Case No. L-12-1262, at ¶18 (citing State v. Overton). Although the court of appeals overruled Overton in this case, their prior ruling is highly relevant as it would be absurd to fault law enforcement for continuing a practice that had been examined and not faulted by the local appellate court. Recognizing the irrationality of a similar position, the United States Supreme

Court recently stated that penalizing an officer for an appellate judge's error cannot logically contribute to the deterrence of Fourth Amendment violations. See Davis at 2429 (examining whether to apply the exclusionary rule when police conduct a search in objectively reasonable reliance on binding judicial precedent). The Court held "evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." Id. at 2429. While the Davis decision involved a fundamental change in Fourth Amendment jurisprudence, its reasoning is applicable in this case.

There is no evidence of misconduct, recklessness, or illegal conduct on the part of law enforcement in this case. The only colorable argument that can be made for negligence on the part of law enforcement in this case is Detective Violanti's failure to include facts supporting the allegations contained in the arrest warrants. However, given that such warrants had previously been (at least tacitly) approved of by the local appellate court, it would be unfair to expect a reasonable officer to know better. Assuming the Overton decision was in error, law enforcement should not now be penalized for continuing a practice previously sanctioned by the court. To apply the exclusionary rule in this case would do nothing more than undermine faith in the judiciary and deter law enforcement from relying upon its decisions.

**II. The substantial societal costs of exclusion outweigh any marginal deterrent value that the application of the exclusionary rule would produce in this case.**

Assuming, *arguendo*, this Court finds sufficiently deliberate law enforcement conduct to merit deterrence in this case, the marginal deterrence produced by applying the exclusionary rule would not outweigh the substantial social cost of exclusion in this case. The United States Supreme Court has repeatedly held "to the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its]

substantial social costs.” See e.g. Krull 352–353. The Court has explained that “real deterrent value is a necessary condition for exclusion, but it is not a sufficient one. See Hudson v. Michigan (2006), 547 U.S. 586, 596. Moreover, “exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a last resort. For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.” See Davis at 2427 (internal quotations and citations omitted).

Unless the conduct of the Toledo Municipal Court can be imputed to law enforcement, Appellant would have this Court hold that Detective Violanti’s conduct alone was sufficiently egregious as to warrant exclusion of the evidence derived from Appellant’s arrest. Appellant contends that as a reasonable officer, Detective Violanti should have known better than the Overton Court and known that misdemeanor complaints must contain sufficient information to allow the deputy clerk an independent basis for review. Moreover, when the deputy clerk accepted this warrant upon affirmation, Detective Violanti should have known Mata had no grounds to make a probable cause determination. Given the supposed enormity of Detective Violanti’s misconduct, Appellant requests the court employ the last resort of exclusion to deter future “misconduct.”

There is no evidence that Detective Violanti’s omissions were deliberate or designed to subvert the probable cause requirement of the Fourth Amendment. There is no evidence that these “bare bones” warrants were issued as a pretext to arrest Appellant for an offense for which they did not yet have probable cause. The record is clear that had the deputy clerk requested

information supporting the complaints, Detective Violanti could have provided it upon request. While it is true that Detective Violanti should have provided more information in her complaints, this Court must weigh those omissions against the cost of exclusion in this case. Krull at 352. Exclusion is not an automatic remedy triggered by law enforcement misconduct. For exclusion to be warranted in any given case, the deterrent value must outweigh the substantial costs of suppression. Herring at 141.

Were this Court to exclude the evidence in question based upon Detective Violanti's omissions, there would likely be some marginal deterrent value. Undoubtedly Detective Violanti would be unlikely to ever again omit facts supporting her allegations when filing municipal complaints. Additionally, law enforcement officers around Ohio would be reminded of the importance of providing sufficient facts in their complaints to allow effective review of probable cause. The deterrent value of sending this message must be weighed against the costs of suppression. Simply put, the cost of sending this message is to let a murderer walk free. Appellant brutally murdered Scott Holzhauser; he beat him to death and left him to be found with a crowbar impaled through his skull.

What this cursory analysis ignores is the fundamental issue in this case. While including "to-wit" language in misdemeanor complaints is important, the conduct to be deterred in this case is that of the Toledo Municipal Court, not that of law enforcement. However, even if the exclusionary rule did apply to misconduct by the judiciary, the exclusion of evidence in a particular criminal case would have virtually no deterrent value.

If an officer considers kicking down a suspect's door to seize evidence without regard to the Fourth Amendment, he presumably will think twice if he knows he will not be able to use the evidence he finds to convict his suspect. Similarly, an officer would be deterred from using

coercive interrogation tactics if she knew that the suspect's statement would be in admissible at trial. However, consider a judge who is tasked with routinely reviewing search warrant requests during the nighttime hours. Rather carefully than reviewing the affidavits for probable cause, he merely signs the warrants and sends the officer on his way so he can return to bed.

In the first two examples there is a close nexus between the constitutional violation and the evidence to be excluded. Exclusion of the evidence can effectively prevent officers from violating a suspect's constitutional rights because doing so would only harm their case. However, the sleepy judge described above has no interest in the outcome of any particular criminal case. The fact that a piece of evidence may ultimately be excluded in a case before a different judge has no tangible impact upon him. He gets a good night's sleep and the officer leave happy. Any remote consequences he may suffer are far too attenuated from his conduct for the exclusion of evidence to have any real deterrent value.

In this case, as in that of the "sleepy judge," the deputy clerk who reviewed Appellant's warrants had no real interest in the outcome of criminal cases for which the warrants were issued. Suppression of evidence in those criminal cases, let alone future criminal cases of which she is not aware, is far too attenuated from her failure to conduct a probable cause review for her to be deterred. The United States Supreme Court has long recognized "court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime and have no stake in the outcome of particular criminal prosecutions. Johnson at 14; Leon at 917; Krull at 352. Because there would be little, if any, effect on the Toledo Municipal Court if this Court were to suppress the evidence in question, application of the exclusionary rule in this case would be improper. Where "the exclusionary rule does not result in appreciable deterrence, then, clearly, its use ... is unwarranted." Evans at 11.

While this case has shone a bright light on disturbing practices within the Toledo Municipal Court, application of the exclusionary rule in this case is an improper and ineffective means to affect any desired changes. The suppression of evidence in this case would do little to change the practices of the Toledo Municipal Court; moreover, the societal costs are too high. A murderer would go free not because of misconduct by law enforcement, but because the Toledo Municipal Court failed to properly train its clerks. Appellant cites no cases, and this *amicus* can find none, where society has been forced to pay such a steep price for an error by the court.

## **CONCLUSION**

There was no police misconduct to deter in this case. The fundamental failure in this case was that of the Toledo Municipal Court, not of law enforcement. The *amicus curiae* would respectfully request this Court follow the well-established jurisprudence of the United States Supreme Court and not impute the shortcomings of the Toledo Municipal Court onto law enforcement. Were this Court to find that the derivative evidence in question should have been excluded, there would be virtually nothing the State could do to implement the changes required to make sure this would not occur again.

Neither the Toledo Police Department nor the Lucas County Prosecuting Attorney has the ability to train and supervise the employees of the Toledo Municipal Court. Even if every affidavit submitted to the deputy clerks was flawless and detailed, the State would be powerless to ensure that the deputy clerks conduct meaningful reviews of those affidavits for probable cause. Exclusion can yield no “real deterrent value” if the party to be deterred has no interest in the outcome of the criminal cases. This is why the United States Supreme Court has long recognized that the purpose of the exclusionary rule is to deter misconduct by law enforcement, not by the legislature, or employees of the court.

In light of the foregoing reasons, the Ohio Prosecuting Attorneys Association respectfully requests this Honorable Court affirm the ruling of the Sixth District Court of Appeals.

Respectfully submitted,

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#### CERTIFICATE OF SERVICE

The undersigned Attorney hereby certifies that a true and accurate copy of the foregoing MERIT BRIEF OF *AMICUS CURIAE* OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF APPELLEE was served upon the following counsel via regular mail this 15<sup>th</sup> of January, 2014; David Klucas, 1900 Monroe St., Toledo, OH 43604; Evy M. Jarrett, 700 Adams St. Toledo, OH 43604; Stephen P. Hardwick, 250 E. Broad St., Suite 1400, Columbus, Ohio 43215.



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