

In the  
Supreme Court of Ohio

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

**MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLEE STATE OF OHIO**

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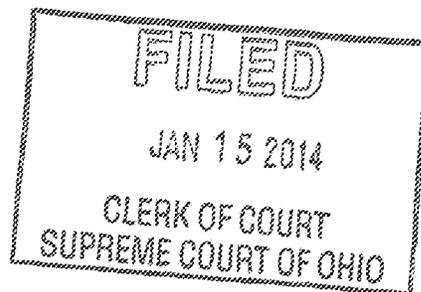
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## INTRODUCTION

“Suppression of evidence” is a judicial “last resort,” not a judicial “first impulse.” *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). That is so because exclusion “exact[s] a heavy toll on . . . society at large” and often operates to “set the criminal loose in the community without punishment.” *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011). The exclusionary rule is therefore limited. Its “sole purpose . . . is to deter future Fourth Amendment violations” by *police*, *id.* at 2426, not to deter the “errors of *judges*.” *United States v. Leon*, 468 U.S. 897, 916 (1984) (emphasis added). Here, the Toledo police acted according to binding appellate precedent, precedent that both this Court and the U.S. Supreme Court had long left undisturbed. Because any errors here were by the courts rather than the police, there is no need to impose the heavy social burden levied by excluding reliable evidence implicating Brandon Hoffman in the brutal murder of Scott Holzhauser.

Hoffman bludgeoned Holzhauser to death with Holzhauser’s own crowbar. Hoffman asks this Court to exclude a substantial amount of evidence linking him to the murder based on policies of the Toledo Municipal Court that have since changed, not based on any police policies or misconduct. See Erica Blake, *Warrants Subject to Increased Scrutiny: Deputy Clerks Asking Police More Questions*, Toledo Blade, Sept. 19, 2012.<sup>1</sup> The court of appeals correctly affirmed the trial court’s decision denying Hoffman’s request to exclude reliable, inculpatory evidence. This Court should likewise affirm for two basic reasons: (1) because the exclusionary rule seeks to deter police misconduct and here any alleged errors were committed by the courts, and (2) because, regardless, the evidence that Hoffman seeks to exclude falls within the so-called “independent source” exception to the exclusionary rule.

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<sup>1</sup> <http://www.toledoblade.com/Courts/2012/09/19/Warrants-subject-to-increased-scrutiny.html> (last visited Jan. 14, 2014).

*First*, the exclusionary rule should not apply in this case because the alleged errors concern warrant-processing policies by the court rather than misconduct by the police, and so the rule's application would not deter future police misconduct. It is well-established that the exclusionary rule is "not a personal constitutional right" designed to "redress the injury" from a Fourth Amendment violation. *Stone v. Powell*, 428 U.S. 465, 486 (1976). Rather, it is a judicially created doctrine intended to "safeguard against" future police misconduct through "general deterrent effect." *Arizona v. Evans*, 514 U.S. 1, 10 (1995). "The fact" of a Fourth Amendment violation, therefore, "does not necessarily mean that the exclusionary rule applies." *Herring v. United States*, 555 U.S. 135, 140 (2009). Instead, exclusion is proper only if police misconduct is "sufficiently deliberate that exclusion can meaningfully deter it" and "sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* at 144.

In this respect, "when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities." *Davis*, 131 S. Ct. at 2429. In this case, the Sixth District Court of Appeals decision in *State v. Overton*, No. L-99-1317, 2000 WL 1232422 (6th Dist., Sept. 1, 2000), specifically authorized and upheld the Toledo Municipal Court's procedures for issuing arrest warrants. It was reasonable for the police to rely on that decision, particularly when the trial court itself felt compelled to obey and follow the case. *See* App't. App. 41-42 ("While this Court respectfully disagrees with the *Overton* decision, it finds the instant case indistinguishable. This Court is bound by the precedent of the Sixth District Court of Appeals.").

The exclusionary rule, moreover, does not apply "as a means of deterring misconduct on the part of judicial officers who are responsible for issuing warrants." *Evans*, 514 U.S. at 11. Even though *Overton* was later reversed, that is no basis to apply the exclusionary rule. *Overton*

controlled at the time that the police arrested Hoffman and seized the evidence he wants excluded. Invoking the exclusionary rule is not necessary to change a court's behavior; "a judicial ruling that a warrant was defective [is] sufficient to inform [a] judicial officer of the error made." *Illinois v. Krull*, 480 U.S. 340, 348 (1987). Such was the case here. The Toledo Municipal Court has already modified its procedures for issuing arrest warrants, and, as noted, it did so even *before* the Sixth District reversed *Overton* because of the concerns expressed by the court of common pleas. See Blake, *Warrants Subject to Increased Scrutiny*.

*Second*, and alternatively, the Court does not even need to address the question of whether the exclusionary rule applies in this case. The evidence that Hoffman wants excluded is admissible on the alternate ground of the independent-source doctrine. Separate and apart from Hoffman's arrest, the police investigating the murder were voluntarily invited into the house in which he was found. Upon entering, they observed Holzhauer's cell phone sitting in plain view (which was confirmed when it rang after the police called Holzhauer's phone number). On the basis of that evidence, the police obtained a search warrant authorizing them to search the premises and its occupants. That search warrant was supported by an independent determination of probable cause based on the cell-phone discovery. Therefore, even if the police were not entitled to rely in good faith on the warrants issued for Hoffman's arrest, they would have discovered the challenged evidence when they independently executed the search warrant.

For the foregoing reasons, and for the reasons set forth below, the Court should affirm the judgment of the Sixth District Court of Appeals.

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

As the State's chief law officer, R.C. 109.02, the Ohio Attorney General has an interest in the enforcement of Ohio's criminal laws through sound police practices. Enforcement of the exclusionary rule prevents the use at trial of inherently trustworthy evidence and exacts a

substantial social cost, but the exclusionary rule promotes sound police work when properly applied. The Attorney General believes that use of the exclusionary rule in this case would have no connection to encouraging proper police conduct, and therefore would exact too high of a social cost with no corresponding deterrence benefits.

## STATEMENT OF THE CASE AND FACTS

### **I. When investigating the murder of Scott Holzauer, the Toledo police identified Brandon Hoffman as a suspect.**

Responding to a call from a neighbor, Toledo police officers were dispatched to the residence of Scott Holzauer. (Tr. June 8, 2012, p. 42-43). They arrived and found Holzauer face down in a pool of blood with a crowbar protruding from his skull. (Tr. June 8, 2012, p. 43). Holzauer's gun safe was open and empty. (Tr. June 8, 2012, p. 59-60). Holzauer's cell phone was also missing, a conclusion the police reached in part after observing a blood-covered TV tray with the silhouette of a cell phone outlined in the blood. (Tr. Aug. 24, 2012, p. 10-11).

The police questioned several of Holzauer's neighbors and quickly identified Brandon Hoffman as a suspect. (Tr. June 8, 2012, p. 61-62). Among other things, the police learned that a white male named "Brandon" had been interested in buying some guns from Holzauer, (Tr. June 8, 2012, p. 60-61, 65, 83-84; Tr. Aug. 24, 2012 p. 13), and that the same person had borrowed a crowbar from him, (Tr. June 8, 2012, p. 45). Neighbors told police officers that "Brandon" had previously lived across the street. (Tr. June 8, 2012, p. 62). On that basis, the police were able to link Hoffman to the address identified as "Brandon's" former residence. (Tr. June 8, 2012, p. 62).

The police then searched a computerized database (NORIS) for information about Hoffman. (Tr. June 8, 2012 p. 63; Tr. Aug. 24, 2012, p. 33). The NORIS database aggregates information about individuals from a variety of sources including, among other things, their

driving status and any outstanding arrest warrants. (Tr. June 8, 2012 p. 105; Tr. Aug. 24, 2012, p. 33). As a result of their database search, the police identified Hoffman's current address and at the same time discovered that there were outstanding warrants for his arrest. (Tr. June 8, 2012, p. 64). The police did not review the arrest warrants themselves, nor did they learn about the warrants in any significant detail. (Tr. June 8, 2012 p. 63, 105).

Acting with the dual intent of both speaking with Hoffman about Holzhauer's murder and arresting him on the outstanding warrants, the police visited the address provided by the NORIS database. (Tr. June 8, 2012 p. 64, 73-74; Tr. Aug. 24, 2012 p. 6-7, 13). When the police arrived, they saw Hoffman lying on the floor. (Tr. June 8, 2012 p. 107). They knocked at the door and someone else let them into the house. (Tr. June 8, 2012 p. 104; Tr. Aug. 24, 2012 p. 34-35). The police arrested Hoffman on the outstanding warrants and discovered one of Holzhauer's missing handguns on the floor next to him. (Tr. June 8, 2012 p. 106-107).

**II. The Toledo police secured a search warrant for the house in which Hoffman was located that was supported by independent probable cause.**

Apart from Hoffman's arrest, Toledo police obtained a search warrant authorizing them to search the house in which Hoffman was located. Detective Jeffery Clark was involved in investigating Holzhauer's murder, (Tr. June 8, 2012 p.58), and he arrived at Hoffman's location shortly after Hoffman had been arrested, (Tr. Aug. 24, 2012 p.7). Upon his arrival, Clark observed several cell phones sitting in plain view. (Tr. Aug. 24, 2012 p. 8, 36). Knowing that Holzhauer's cell phone was missing from the murder scene, Clark requested that another officer call the number belonging to the missing phone. (Tr. Aug. 24, 2012 p. 8). When that officer did so, one of the phones rang. (Tr. Aug. 24, 2012 p. 8, 36-37). That phone call was made independent of Hoffman's arrest, (Tr. Aug. 24, 2012 p. 36-37), and Clark testified that it

provided probable cause upon which he was able to obtain a search warrant for the house, (Tr. Aug. 24, 2012 p. 11).

When Toledo police executed the search warrant, they obtained numerous pieces of evidence linking Hoffman to Holzhauser's murder. (Tr. Aug. 24, 2012 p. 11-12, 36). Among other things, they found clothing with blood spatter on it, (Tr. Aug. 24, 2012 p. 11), as well as Holzhauser's house and car keys, (Tr. Aug. 24, 2012 p. 12). And although the police had first observed Holzhauser's missing gun when they arrested Hoffman, that gun was not taken into police custody until they executed the search warrant. (Tr. Aug. 24, 2012 p. 36).

**III. After his motion to suppress was denied, Hoffman pleaded no contest to the murder of Holzhauser, and the Sixth District Court of Appeals affirmed.**

Hoffman was charged with aggravated murder and aggravated robbery in conjunction with Holzhauser's death. App't. App. 4. He filed a motion to suppress the physical evidence linking him to the murder. *Id.* Hoffman argued that the outstanding warrants for his arrest were invalid because a neutral magistrate had never made an independent finding that the warrants were supported by probable cause. App't. App. 36. The trial court agreed that the complaints supporting the warrants were insufficient to establish probable cause. App't. App. 40. But it nevertheless denied Hoffman's motion to suppress.

Although it expressed doubts about the validity of the warrants, the trial court concluded that it was bound by controlling Sixth District precedent upholding the Toledo Municipal Court's procedures for issuing arrest warrants. App't. App. 41. The court concluded that in *State v. Overton*, No. L-99-1317, 2000 WL 1232422 (6th Dist., Sept. 1, 2000), the Sixth District had "determined that complaints identical in form and content to the arrest warrants described [in this case] are sufficient to meet the requirements of the Fourteenth Amendment and Crim. R. 4(A)(1)." App't. App. 41. The trial court therefore denied Hoffman's motion to

suppress because it found that “the officers’ conduct was not wrongful in that the police acted in strict compliance with binding precedent.” App’t. App. 44. The court concluded that, by following controlling appellate precedent, the Toledo police “did not violate Hoffman’s rights deliberately, recklessly or with gross negligence.” *Id.*

Following the denial of his motion to suppress, Hoffman pleaded no contest to the charges of aggravated murder and aggravated robbery. App’t. App. 17-18. He then appealed to the Sixth District Court of Appeals from the trial court’s denial of his motion to suppress. The court of appeals affirmed the trial court’s denial of Hoffman’s motion. App’t. App. 11-15.

In doing so, the court of appeals overruled its *Overton* decision and made clear that it would no longer consider a recitation of the statutory elements of a crime sufficient to support a finding of probable cause to arrest. App’t. App. 9-10. But the court of appeals did not end its inquiry there. Noting that “[t]he exclusionary rule is not a personal right or a means to redress constitutional injury,” the court of appeals went on to analyze the deterrent value of excluding the evidence implicating Hoffman in Holzhauser’s murder and the societal costs of doing so. App’t. App. 12. Like the trial court, the court of appeals ultimately concluded that “[s]uppressing the evidence under the facts in this case would not serve to deter deliberate, reckless or illegal conduct on the part of police officers.” App’t. App. 14. It affirmed the trial court’s denial of Hoffman’s motion to suppress on that basis. App’t. App. 15.

Hoffman appealed to this Court, which accepted review. *State v. Hoffman*, 136 Ohio St. 3d 1472, 2013-Ohio-3790.

## ARGUMENT

The question in this case is not whether the arrest warrant lacked probable cause, but whether the exclusionary rule requires suppressing the substantial inculpatory evidence that Hoffman challenges. Both the trial court and the Sixth District Court of Appeals correctly concluded that it does not. At least two separate reasons exist to affirm the decisions below. First, there was no police misconduct in this case; the police properly relied on binding appellate precedent when they obtained the earlier misdemeanor warrants for Hoffman's arrest. Suppressing the challenged evidence would serve only to exclude reliable evidence and would not deter future culpable police conduct. Second, the police had probable cause to obtain a search warrant for the house in which Hoffman was found and they would have inevitably discovered the challenged evidence independent of any constitutional violation. Resolution of the exclusionary-rule question is therefore ultimately unnecessary. Either of the foregoing reasons provides an adequate (and independent) basis on which to affirm the denial of Hoffman's motion to suppress.

### *Amicus Curiae* Ohio Attorney General's Proposition of Law I:

*A court properly denies a motion to suppress evidence obtained in violation of the Fourth Amendment when the police obtain a warrant in a manner consistent with binding appellate precedent and when exclusion will therefore not deter future police misconduct.*

#### **I. To determine whether the exclusionary rule applies to particular circumstances, courts balance the rule's benefits of deterring future Fourth Amendment violations against its societal costs of excluding reliable evidence of crime.**

The exclusionary rule is not a personal constitutional right, *Stone v. Powell*, 428 U.S. 465, 486 (1976), and the Fourth Amendment "contains no provision expressly precluding the use of evidence obtained in violation of its commands," *United States v. Leon*, 468 U.S. 897, 906 (1984). Indeed, "[s]uppression of evidence . . . has always been [a] last resort, not [a] first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). Thus, whether a violation of the

Fourth Amendment occurred and whether the exclusionary rule applies for that violation are two entirely different questions. See *Illinois v. Gates*, 462 U.S. 213, 223 (1983) (“The question whether the exclusionary rule’s remedy is appropriate in a particular context has long been regarded as 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 sole purpose of the exclusionary rule is to deter future Fourth Amendment violations on the part of the police. *Davis*, 131 S. Ct. at 2426. And its application “turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct.” *Herring v. United States*, 555 U.S. 135, 137 (2009). “[E]vidence should be suppressed ‘only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the [challenged action] was unconstitutional under the Fourth Amendment.’” *Illinois v. Krull*, 480 U.S. 340, 348-349 (1987) (quoting *United States v. Peltier*, 422 U.S. 531, 542 (1975)). The U.S. Supreme Court has “repeatedly rejected efforts to expand the focus of the exclusionary rule beyond deterrence of culpable police conduct.” *Davis*, 131 S. Ct. at 2432.

Deterrence, however, is only half of the equation when determining whether the exclusionary rule should apply. The societal costs of excluding reliable evidence and of freeing a potentially dangerous criminal must also be considered. In most instances, for example, “the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.” *Stone*, 428 U.S. at 490. Application of the exclusionary rule thus “deflects the truthfinding process and often frees the guilty.” *Id.* Because “[e]xclusion exacts a heavy toll on both the judicial system and society at large,” a court weighing a motion to suppress must determine whether the “deterrence benefits . . . [of the exclusionary rule] outweigh its heavy costs.” *Davis*, 131 S. Ct. at 2427.

**II. Under the general balancing test, the exclusionary rule does not apply when police officers, in good faith, conform their conduct to controlling appellate precedent.**

Based on this general balancing test, the U.S. Supreme Court has long recognized an exception to the exclusionary rule “when law enforcement officers [act] . . . in objective good faith or their transgressions [are] . . . minor, [because] the magnitude of the benefit conferred [by the exclusionary rule] on . . . guilty defendants offends basic concepts of the criminal justice system.” *Leon*, 468 U.S. at 908. Consistent with *Leon*, this Court has done so as well. See *State v. Wilmoth*, 22 Ohio St. 3d 251, syl. ¶¶ 1-2 (1986). Under this large umbrella known as “the good-faith exception,” the U.S. Supreme Court has identified a variety of situations where the exclusionary rule should not apply because its costs outweigh its benefits. Those situations include, but are not limited to, times when police officers rely on a statute that is later found to violate the Fourth Amendment (*Krull*, 480 U.S. at 349-52 (declining to apply exclusionary rule when police relied on unconstitutional statute authorizing warrantless administrative searches)), when police rely on inaccurate database entries about pending arrest warrants made by court personnel (*Evans*, 514 U.S. at 3-4), and when police rely on inaccurate database entries about pending arrest warrants made by law enforcement personnel (*Herring*, 555 U.S. at 136-37).

Most relevant to this case, the good-faith exception also holds that the exclusionary rule does not apply when police obtain evidence “during a search conducted in reasonable reliance on binding precedent.” *Davis*, 131 S. Ct. at 2429. Reliance on binding appellate precedent is just one more example of an instance where the significant costs of applying the exclusionary rule do not outweigh the minimal deterrence benefits. Because the exclusionary rule’s sole purpose is deterrence, and the “deterrence benefits ‘var[y] with the culpability of the law enforcement conduct’ at issue,” *id.* at 2427 (quoting *Herring*, 555 U.S. at 143), “an assessment of the flagrancy of the police misconduct constitutes an important step” in determining whether that

exception should apply. *Leon*, 468 U.S. at 911. Where police officers adhere in good faith to practices approved by controlling appellate precedent, there is no culpable conduct and there is nothing to deter. The police officers have merely followed and obeyed controlling law. In such cases “the deterrence rationale loses much of its force and exclusion cannot pay its way.” *Davis*, 131 S. Ct at 2428 (internal citations omitted). Indeed, police officers are not only *permitted* to rely on binding appellate precedent, but also *expected* to. Officers are expected to conform their conduct to the requirements of the Fourth Amendment, and “when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their . . . responsibilities” to protect the public. *Davis*, 131 S. Ct. at 2429.

**III. Applying these rules here, the Toledo police obtained the warrants for Hoffman’s arrest in a manner consistent with binding appellate precedent, and so the exclusionary rule should not apply to their conduct.**

This case calls for nothing more than a straightforward application of *Davis*, a case Hoffman does not even cite. Binding appellate precedent—in the form of the *Overton* decision—authorized the Toledo Municipal Court’s procedures for issuing arrests warrants. Once the Sixth District affirmed those procedures, Toledo police officers could reasonably adhere to them; excluding the challenged evidence would not change that fact. *See Stone*, 428 U.S. at 540 (White, J. dissenting) (“Excluding the evidence can in no way affect [a reasonable officer’s] future conduct unless it is to make him less willing to do his duty.”).

For all intents and purposes, the affidavits supporting Hoffman’s arrest warrants were indistinguishable from the affidavit in *Overton*. In *Overton*, the defendant filed a motion to suppress certain evidence against her arguing—like Hoffman did below—that the evidence was obtained pursuant to her arrest and that her arrest warrant was not based on a finding of probable cause. *Overton*, 2000 WL 1232422 at \*2. In affirming the denial of the motion to suppress, the Sixth District reviewed the substance of the affidavit supporting the warrant. *Id.* And it

concluded as a practical matter that an affidavit reciting the elements of an offense was sufficient to establish probable cause. *Id.* at \*2-3.

Any attempts to distinguish *Overton*, or to argue that it was not controlling, are unavailing. Like in *Overton*, the affidavits in this case recited the statutory elements of the misdemeanor offenses that Hoffman had allegedly committed. *See* App't. App. 40-44. *Overton*, then, is the type of binding appellate precedent discussed in *Davis*, and it authorized the issuance of arrest warrants based on the level of detail found in the affidavits that were provided in this case. The Toledo police adhered to governing law when they obtained the misdemeanor warrants for Hoffman's arrest. Once the Sixth District had approved of the Toledo Municipal Court's warrant procedures, the police could not have been expected to think that they had any greater obligation under the Fourth Amendment. *See Davis*, 131 S. Ct. at 2429 ("An officer who conducts a search in reliance on binding appellate precedent does no more than act as a reasonable officer would and should act under the circumstances." (internal citations omitted)).

The *Overton* court itself (as evidenced by the dissent), and every subsequent court to have considered that decision, concluded that the decision upheld the Toledo Municipal Court's practice of issuing warrants based on affidavits that "[do] no more than recite the statutory elements of [the alleged offense]." *Overton*, 2000 WL 1232422 at \*3 (Sherck, J. dissenting). It was for that very reason that four justices of the U.S. Supreme Court, while they voted to deny certiorari, might have been inclined to summarily reverse the decision had they garnered a fifth vote. *See Overton v. Ohio*, 122 S. Ct. 389 (2001). But they did not. Justice Breyer's separate opinion in that case had no effect on the state-court judgment upholding the warrant practice. Instead, the denial of certiorari had no precedential value, *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950), and left the state-court judgment undisturbed as precedent for the

lower courts and police in other cases. See *Darr v. Burford*, 339 U.S. 200, 226 (1950) (Frankfurter, J. dissenting); see also *United States v. Carver*, 260 U.S. 482, 490 (1923).

The Toledo police officers who obtained the warrants for Hoffman's arrest (and who likely were unaware of Justice Breyer's non-binding opinion in *Overton*) cannot be said to have acted in bad faith when they adhered to court practices blessed by *Overton*, especially considering that even the courts below viewed that decision as controlling in this case. Both the trial court and the court of appeals in this case interpreted *Overton* as having affirmatively blessed the Toledo Municipal Court's warrant procedures. Even though the trial court expressed a strong disagreement with that decision, the court nevertheless held that it was required to deny Hoffman's motion to suppress in light of it. See App't. App. at 41-42 ("While this Court respectfully disagrees with the *Overton* decision, it finds the instant case indistinguishable. This Court is bound by the precedent of the Sixth District Court of Appeals.").

In sum, the Toledo police acted in good faith when they relied on the Sixth District's decision in *Overton*. Application of the exclusionary rule is unwarranted because the police did not deliberately or recklessly engage in illegal behavior and there was no culpable behavior that must be deterred in the future.

**IV. Even assuming it was wrongly decided, the *Overton* decision does not warrant suppression of the evidence against Hoffman because the exclusionary rule is not concerned with judicial errors.**

Whether *Overton* was correctly decided is a question separate and apart from whether the Toledo police were entitled to rely on that decision. Even assuming *Overton* was inconsistent with the Fourth Amendment, responsibility for any post-*Overton* Fourth Amendment violations lies with the Sixth District (and the reviewing courts that allowed the *Overton* decision to remain undisturbed). It is an error made not by law enforcement, but by the judiciary.

The exclusionary rule, however, is not designed to “punish the errors of judges and magistrates.” *Leon*, 468 U.S. at 916. Judges and magistrates “are not adjuncts to the law enforcement team” and “[t]he threat of exclusion thus cannot be expected significantly to deter them.” *Leon*, 468 U.S. at 917. Instead of requiring exclusion, “a ruling by an appellate court that a search warrant was unconstitutional would be sufficient to deter similar [judicial] conduct in the future.” *Id.* at 916 n.15 (quoting *Commonwealth v. Sheppard*, 387 Mass. 488, 506 (1982)).

In this case, claims that the Toledo police obtained warrants for Hoffman’s arrest without an adequate finding of probable cause challenge judicial—not police—conduct. As discussed above, the Toledo police merely relied on court practices that had been approved by the controlling appellate precedent set forth in *Overton*. Assuming any error, it would belong with the Sixth District’s *Overton* decision—not with the Toledo police officer who relied on the policies affirmed by that decision.

Contrary to Hoffman’s claim, moreover, there is no indication that the Toledo Municipal Court was not neutral or that it otherwise “abandoned [its] judicial role in the manner condemned in *Lo-Ji Sales, Inc. v New York*, 442 U.S. 319 (1979).” *Leon*, 468 U.S. at 923. In *Lo-Ji Sales*, a judicial officer accompanied the police when they conducted a search and through his actions became “an adjunct law enforcement officer.” *Lo-Ji Sales*, 442 U.S. at 326-27. The officials of the Toledo Municipal Court did nothing similar in this case. No matter how flawed their rulings, they did not abandon their neutral judicial roles to instead become de factor members of the police.

If anything, this case provides a prime example of why application of the exclusionary rule is *not* necessary to correct judicial errors. Both the trial court and the Sixth District may have denied Hoffman’s motion to suppress, but the Toledo Municipal Court changed its

procedures for issuing arrest warrants as a result of their decisions questioning the procedures. See Erica Blake, *Warrants Subject to Increased Scrutiny: Deputy Clerks Asking Police More Questions*, Toledo Blade, Sept. 19, 2012.<sup>2</sup> Indeed, those changes occurred well before the Sixth District issued its decision below. As predicted by the Court in *Leon*, a critical decision by a reviewing court was sufficient to deter future violations of the Fourth Amendment. See *id.* (Clerk of the Toledo Municipal Court stating that the court’s procedures were changed in light of the trial court’s decision because “[i]t casts a shadow over the entire system when there is a judge who disagrees with how the warrants have been filed”). Thus the remedy for judicial errors—a ruling from a superior court—was sufficient to “inform the judicial officer of the error made.” *Krull*, 480 U.S. at 348. And even if the exclusionary rule did apply to judicial errors, there would be no reason to apply it here—the challenged judicial practices have changed; the errors that occurred below will not occur again. There is simply nothing left to deter.

For the foregoing reasons, the Court should affirm the denial of Hoffman’s motion to suppress and should hold that the Toledo police acted in good faith when they obtained arrest warrants in a manner consistent with the Sixth District’s decision in *Overton*.

**Amicus Curiae Ohio Attorney General’s Proposition of Law II:**

*A court properly denies a motion to suppress evidence obtained in violation of the Fourth Amendment when the police would have uncovered that same evidence independent of the alleged Fourth Amendment violation.*

This Court need not even reach whether the good-faith exception applies in this case. Even if the exclusionary rule would otherwise apply, the decisions of the courts below should still be upheld based on the independent-source and inevitable-discovery doctrines. The independent-source doctrine is a “well-recognized exception[] to the Exclusionary Rule” that

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<sup>2</sup> <http://www.toledoblade.com/Courts/2012/09/19/Warrants-subject-to-increased-scrutiny.html> (last visited Jan. 14, 2014).

“allows admission of evidence that has been discovered by means entirely independent of any constitutional violation.” *State v. Perkins*, 18 Ohio St. 3d 193, 194 (1985). It permits the introduction of evidence obtained in violation of the Fourth Amendment if the evidence “was discovered by independent lawful means.” *Id.* at 195. Thus the fact that challenged evidence was first discovered because of a Fourth Amendment violation does not necessarily affect its admissibility. Under the independent-source doctrine, evidence discovered during an unlawful search is admissible if it was “later obtained independently from activities untainted by the initial illegality.” *Murray v. United States*, 487 U.S. 533, 537 (1988). That is, if evidence is “acquired by an untainted search,” it is admissible *even if* it is identical to evidence that was previously discovered unlawfully. *Id.* at 538.

The inevitable-discovery doctrine, by comparison, is “an extrapolation from the independent source doctrine,” *id.* at 539, and it likewise permits the admission of evidence “[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . .” *Nix v. Williams*, 467 U.S. 431, 444 (1984). Both the independent-source and inevitable-discovery doctrines reflect the fact that excluding evidence that was (or would have been) discovered even absent a Fourth Amendment violation would serve only to “undermine the adversary system” and would add nothing to “either the integrity or fairness of a criminal trial.” *Id.* at 446-47.

In this case, the independent-source doctrine supports the denial of Hoffman’s motion to suppress. The evidence against Hoffman was discovered pursuant to a lawfully issued search warrant supported by probable cause; it was obtained independent of any Fourth Amendment violation associated with his arrest. The Toledo police lawfully entered the house where Hoffman was located; they knocked at the door and were given permission to enter. (Tr. June 8,

2012 p. 104; Tr. Aug. 24, 2012 p. 34-35). Once inside, the police observed several cell phones sitting in plain view. (Tr. Aug. 24, 2012 p.8, 36). One of those phones rang when they called the phone number belonging to Holzauer, Hoffman's victim. (Tr. Aug. 24, 2012 p. 8, 36-37). Based in part on those facts, the police obtained a search warrant allowing them to lawfully search the house. (Tr. Aug. 24, 2012 p. 11).

By obtaining a search warrant, the Toledo police purged all of the evidence that Hoffman now challenges of any "taint" stemming from the alleged Fourth Amendment violations. *See Segura v. United States*, 468 U.S. 796, 814-15 (1984) (concluding that evidence was admissible "when the link between the [prior] illegality and that evidence was sufficiently attenuated to dissipate the taint"). In this case, the Toledo police observed Holzauer's cell phone independently of Hoffman's arrest. (Tr. Aug. 24, 2012 p. 11). They then obtained a search warrant, relying in large part on the presence of the cell phone to establish probable cause for the warrant. Even if Hoffman were to challenge the validity of the search warrant based on the fact that Detective Clark's affidavit referenced the gun that was discovered when he was arrested, that challenge would fail. Because the presence of Holzauer's cell phone was alone sufficient to provide probable cause, the police's subsequent search was untainted by any earlier Fourth Amendment violation. *See United States v. Herrold*, 962 F.2d 1131, 1138 (3rd Cir. 1992) (collecting cases); *see also Franks v. Delaware*, 438 U.S. 154, 171-72 (1978) (finding no hearing necessary on challenge to warrant if, setting aside falsities in affidavit, "there remains sufficient content in the warrant affidavit to support a finding of probable cause").

Execution of the lawfully obtained search warrant was an independent basis pursuant to which the police discovered the evidence linking Hoffman to Holzauer's murder. (Tr. Aug. 24, 2012 p. 11-12). The evidence obtained as a result of the execution of the search warrant,

moreover, was not simply limited to evidence that the police discovered for the first time when executing the warrant. It also included the gun that the police had already discovered at the time that they arrested Hoffman. In that respect, the facts of this case are similar to those in *Murray*, where the police *rediscovered* evidence that they had improperly discovered earlier without a search warrant. *See Murray*, 487 U.S. at 538-89.

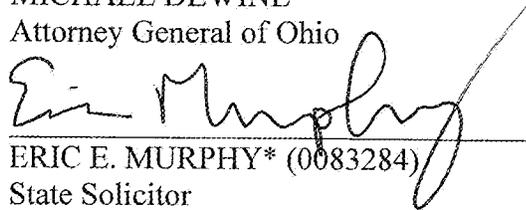
For its part, the trial court recognized that questions about whether Hoffman's arrest was supported by probable cause were different from questions about whether the search warrant was supported by probable cause. (Tr. Aug. 24, 2012 p. 61). Because the court concluded that the Toledo police relied on *Overton* in good faith, it never needed to consider the effect of the subsequent search of the house in which Hoffman was located based on the search warrant. (Tr. Aug. 24, 2012 p. 61). But, had it done so, it would have reached the same result—it would have denied Hoffman's motion to suppress.

This Court likewise can affirm the denial of Hoffman's motion to suppress for multiple reasons. As discussed above, it can and should affirm the denial of Hoffman's motion to suppress on the basis of *Davis* and because of the reliance by the Toledo police on the policies approved by *Overton*. But the Court need not reach that question. Because the Toledo police obtained a search warrant supported by independent probable case, the Court can also affirm the judgment below on an alternative basis; it can affirm because the evidence implicating Hoffman in Holzhauser's murder would have been discovered pursuant to the search warrant—and independent of any alleged Fourth Amendment violation.

**CONCLUSION**

For the foregoing reasons, this Court should affirm the judgment of the Sixth District Court of Appeals.

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**CERTIFICATE OF SERVICE**

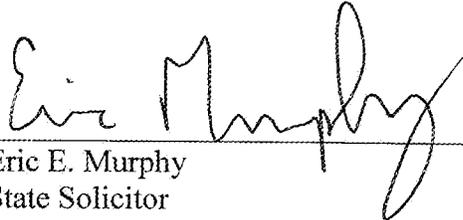
I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine Support of Appellee State of Ohio was served on January 15, 2014, by U.S. mail on the following counsel of record:

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