

ORIGINAL

IN THE SUPREME COURT OF OHIO
2010

STATE OF OHIO,

Case No. 09-1552

Plaintiff-Appellant,

-vs-

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

ADRIAN L. JOHNSON,

Court of Appeals
Case No. 08AP-990

Defendant-Appellee

**PLAINTIFF-APPELLANT STATE OF OHIO'S MOTION FOR
RECONSIDERATION**

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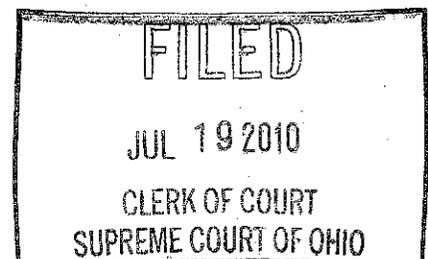
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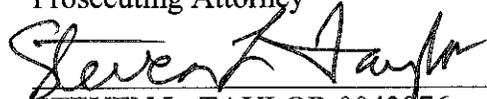
**PLAINTIFF-APPELLANT STATE OF OHIO'S MOTION FOR
RECONSIDERATION**

Pursuant to S.Ct.Prac.R. 11.2, and for the reasons stated in the following memorandum in support, plaintiff-appellant State of Ohio respectfully requests that this Court reconsider its decision dismissing this appeal as having been improvidently allowed. The State's appeal presents issues of statewide significance to the bench and bar of this state regarding the reach of the federal Exclusionary Rule and whether Ohio's search-and-seizure constitutional provision has any Exclusionary Rule at all. These issues would reach into the litigation of practically every search-and-seizure motion to suppress filed in this state, but this Court dismissed the appeal without addressing these vital questions. There is no other issue on this Court's criminal docket more important than these Exclusionary Rule questions. This Court should reconsider its dismissal of the appeal, reinstate the appeal, and issue a ruling in the State's favor on the merits.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

This Court's sua sponte dismissal of the State's appeal as improvidently allowed is subject to reconsideration. S.Ct.Prac.R. 11.2(B)(2). The State respectfully submits that reconsideration is warranted for the following reasons.

The State's first two propositions of law present questions of fundamental significance for the practice of criminal law in this state. These propositions of law state, as follows:

Proposition of Law No. 1. The federal Exclusionary Rule will only be applied to suppress evidence when the Fourth Amendment violation is the result of deliberate, reckless, or grossly-negligent disregard of Fourth Amendment rights or involves circumstances of recurring or systemic negligence. (*Herring v. United States* (2009), 129 S.Ct. 695, followed)

Proposition of Law No. 2. There is no Exclusionary Rule for a violation of the search-and-seizure provisions of Article I, Section 14, of the Ohio Constitution. (*State v. Lindway* (1936), 131 Ohio St. 166, paragraphs four, five, and six of the syllabus, approved and followed).

This Court's dismissal of the appeal is unexplained, but one wonders how these issues could or would escape this Court's review. They would affect the litigation of nearly every search-and-seizure motion to suppress filed in the state, and they present fundamental questions of when and whether guilty offenders shall go unpunished because of a police error in a search or seizure.

The issues are controversial, and the stakes are high. The controversy exists because the awarding of a get-out-of-jail card to the guilty defendant is unpopular, is often disproportionate to the "error" of the police officer, and runs counter to the

fundamental purpose of the criminal trial, i.e., the search for truth. The stakes are high because violent criminals and drug dealers can escape punishment, releasing them upon society to strike again. The stakes are also high in terms of judicial administration, as the litigation of suppression motions takes up time and resources better spent on the trial of cases. Given the controversy and the stakes, these questions readily satisfy the “public or great general interest” and “substantial constitutional question” standards.

The *Herring*-based first proposition of law calls for application of *Herring*'s formulation of a good-faith standard before evidence will be suppressed under the federal Exclusionary Rule. Applying *Herring* to the present case would lead to the rejection of the defense motion to suppress, for even if this Court has doubts about the constitutional validity of the search, see the State's Third and Fourth Propositions of Law, there was no basis to conclude that the police acted in a grossly-negligent disregard for Fourth Amendment rights in performing the search. Recognizing the reach of *Herring* would cause some motions to suppress to not even be filed, and it would save the admissibility of evidence in a fair number of cases when the police “error” was not grossly negligent or worse.

The *Lindway*-based second proposition of law calls for the rejection of an Exclusionary Rule altogether for purposes of the Article I, Section 14, of the Ohio Constitution. *Lindway*'s rejection of an Exclusionary Rule has never been overruled, mainly because cases resulting in suppression did not present the issue; prosecutors did not invoke *Lindway*, and the Court did not address it, the issue not having been

raised. The State invokes *Lindway* here, and it should be addressed. Since *Lindway* is this Court's own precedent, there is no Court better positioned say whether it will adhere to *Lindway*. And if *Lindway* is a dead letter (as the defense claims), then this Court should directly overrule it. Such an important shift in constitutional policy should not be left to mere implication. Since this Court has the final say on the meaning of the Ohio Constitution, this Court should decide this question, and there is no good reason not to decide it.

A review of this Court's discretionary criminal docket reveals that no case over the past year has presented questions of greater statewide significance. Indeed, in several cases, this Court reached the merits of issues that had lesser significance.

In *State v. Williams*, ___ Ohio St.3d ___, 2010-Ohio-2453, which was decided the same day as oral argument in the present case, this Court found constitutional the system for common pleas courts to retain jurisdiction of indicted felony offenders who have been found incompetent to stand trial. The issue undoubtedly had significance, but it only affects a relatively small category of offenders found incompetent. The State's propositions of law here regarding the Exclusionary Rule potentially reach thousands of search-and-seizure motions to suppress and reaches beyond just the common pleas court.

In *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147, this Court addressed the validity of the repeat-violent-offender specification in a particular case. While this issue, again, had some significance, its reach is certainly more limited than the State's Exclusionary Rule issues presented here, as the number of RVO offenders is

relatively small.

In *State v. Jackson*, ___ Ohio St.3d ___, 2010-Ohio-621, this Court reached the merits of the question of whether *Garrity*-warned statements had been misused for Fifth Amendment purposes. Again, this was another significant issue, but the issue affects a relatively small class of cases in comparison to the State's Exclusionary Rule arguments here.

Also, in *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, this Court addressed the propriety of searching a cell phone without a warrant. This question of some significance drew opinions from both sides of the 4-3 decision, and, notably, the Court limited review to the Fourth Amendment (perhaps cognizant that *Lindway* would bar suppression under the Ohio constitutional provision). Given this extensive expense of judicial effort to expound on the narrow cell-phone search issue, the State's Exclusionary Rule issues here, which affect many more cases, would justify similar treatment rather than dismissal.

Some discretionary appeals addressed by this Court clearly have had lesser significance. The proper means of proving a counterfeit-trademark charge was addressed in *State v. Troisi*, 124 Ohio St.3d 404, 2010-Ohio-275. The sufficiency of the actus reus for conveying drugs into a detention facility was addressed in *State v. Cargile*, 123 Ohio St.3d 343, 2009-Ohio-4939. See, also, *Cleveland v. Washington Mut. Bank*, ___ Ohio St.3d ___, 2010-Ohio-2219 (trial of corporation in absentia in municipal court); *Zanesville v. Rouse*, ___ Ohio St.3d ___, 2010-Ohio-2218 (what constitutes filing of complaint); *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590

(expungement when multiple counts involved).

Of course, this Court could conclude that these cases had sufficient significance to warrant this Court's attention. A legal issue need not have the fundamental importance of the Exclusionary Rule in order to justify this Court's review. Even so, it cannot be gainsaid that the State's Exclusionary Rule arguments here present far more important, and far more significant, questions than the narrow points of law addressed in many of the cases addressed on this Court's discretionary criminal docket. The dismissal of the State's appeal here is unwarranted in light of this Court's demonstrated willingness to address less-significant legal questions.

When measured against the importance of these Exclusionary Rule propositions of law, the possible reasons for not reviewing the present case fall well short of justifying dismissal. The State's third and fourth propositions of law address the validity of the search. The third proposition of law contends that the search was warranted by probable cause and exigent circumstances. The fourth proposition of law contends that the search was justifiable as a search incident to arrest. The ins-and-outs of the State's arguments will not be repeated here. Suffice it to say here that the search was valid.

Much of the oral argument was taken up with skeptical questioning about these propositions of law. In fact, some of the argument was taken up with questioning about whether the search was justifiable as a *Terry* stop, a justification the State was not even raising. But such skepticism and/or doubts about the validity of the search would merely heighten the need to address the important Exclusionary

Rule issues raised in the State's first and second propositions of law.

There might be a complaint that the search issues are fact-laden and therefore not likely to create new law of statewide interest. But even if the search issues were too fact-laden to warrant review by themselves, they come here as part of a larger case questioning whether police errors warrant the suppression of evidence. The State's Exclusionary Rule propositions of law provide ample justification to review this case.

Defendant might also contend that his mere fourth-degree and fifth-degree felony charges are not "big enough" to warrant the expenditure of this Court's resources. But this Court has addressed other seemingly "small" cases in deciding search-and-seizure issues on the discretionary docket. See, e.g, *State v. Hoover*, 123 Ohio St.3d 418, 2009-Ohio-4993 (additional ten days of jail at stake); *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316 (defendants received community control for CCW and dangerous-ordnance convictions).

Indeed, the defense is relying heavily on *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, as requiring greater protection under the Ohio Constitution's search-and-seizure provision, but that discretionary appeal involved a low-level felony drug offense, just like the present case. (See Montgomery County Common Pleas Docket No. 2001-CR-01167 – only charge was fifth-degree felony) These cases show that search-and-seizure issues with relatively small stakes for the offender can raise bigger questions and can warrant discretionary review. Though the present case does not involve a large amount of drugs or a high-degree charge, it does present Exclusionary Rule issues that have great significance. Review was warranted in the foregoing

cases, including *Brown*; it is certainly warranted here.

What the State argued in its memorandum supporting jurisdiction still applies in all respects:

One could say the score is tied 2-2. The trial judge, and the dissenting appellate judge, found that the search of defendant's pocket was supported by probable cause. The two-judge appellate majority, however, concluded that probable cause was lacking, doing so on what can only be described as the very subtlest of distinctions, i.e., upon a police officer smelling burnt marijuana, the existence of probable cause to search or arrest a person, as opposed to search a car, will turn on whether the officer can discern that the marijuana odor is emanating from the person, as opposed to the car. Even if this heretofore unannounced bellwether fact was legally controlling, its significance was so subtle and new that the police officers could hardly be blamed for failing to grasp it.

The present case thus highlights the need for this Court to address the applicability of the Exclusionary Rule. Police officers must make snap judgments, and to suppress evidence of crime in close cases is too heavy a penalty, especially when the judges later addressing the issue in relative leisure of time are themselves split on the question.

The State argued below that the fruits of the search should not be suppressed because, as recently observed in *Herring v. United States* (2009), 129 S.Ct. 695, the federal Exclusionary Rule should be limited to instances involving the intentional, reckless, or grossly negligent disregard of Fourth Amendment rights. The two-judge majority below did not address this contention, erroneously assuming that exclusion followed as a matter of course. Given the continuing controversy over the scope and existence of the Exclusionary Rule, this Court should address these issues under the State's first proposition of law in light of *Herring*.

In addition to relying on *Herring* vis-a-vis the

federal Exclusionary Rule, the State also argued that, based on *State v. Lindway* (1936), 131 Ohio St. 166, defendant could not rely on the Ohio Constitution to justify suppression. Under *Lindway*, there is no Exclusionary Rule for violating the search-and-seizure provisions in Article I, Section 14, of the Ohio Constitution. The two-judge appellate majority did not address this argument, even though *Lindway*'s rejection of the Exclusionary Rule has never been overruled. See pp. 7-10, *infra*. The present case is a prime example of why exclusion has been and should be rejected as a remedy under the Ohio Constitution. The constable erred in the spur of the moment (according to two of four judges), and the end result is to let the guilty go free and unpunished. The State's second proposition of law would allow this Court to address this backward result.

In light of the foregoing, the State respectfully requests that this Court should reconsider its dismissal of the appeal, should reinstate the appeal, and should issue a ruling in the State's favor on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered on this 19th day of July, 2010, to the office of Allen V. Adair, 373 South High Street, 12th Floor, Columbus, Ohio 43215, counsel for defendant-appellee.



STEVEN L. TAYLOR