

**IN THE SUPREME COURT OF OHIO**

State of Ohio,

Case No. 09-1552

Plaintiff-Appellee,

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

vs.

Adrian L. Johnson,

Court of Appeals  
Case No. 08AP-990

Defendant-Appellee.

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**MEMORANDUM IN OPPOSITION TO APPELLANT'S MOTION FOR  
RECONSIDERATION**

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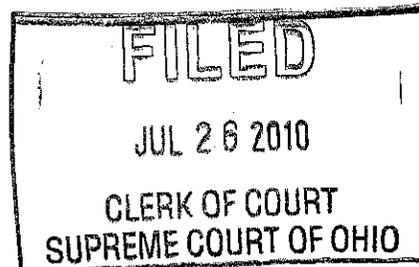
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**MEMORANDUM IN OPPOSITION TO  
APPELLANT'S MOTION FOR RECONSIDERATION**

Appellant State of Ohio has asked the Court to reconsider its dismissal of this appeal as having been improvidently accepted. Appellee responds that this case was properly decided by the Tenth District Court of Appeals applying settled Fourth Amendment and Article I, Section 14 jurisprudence, and that this court's sua sponte dismissal was a proper and fair disposition of this cause.

Appellant's focus in the reconsideration motion are two propositions of law based on matters not raised in the trial court or addressed by the Court of Appeals. First, appellant argues that the Fourth Amendment exclusionary rule does not extend to the circumstances of this case, relying on Herring v. United States (2009), 129 S.Ct. 695. Alternately, appellant attempts to save the search through the fiction that it was incident to an arrest for a minor misdemeanor, which is acceptable under the U.S. Constitution, but in most instances is not under the Ohio Constitution. See State v. Brown, 99 Ohio St. 3d 323, 2003-Ohio. From this point of departure, appellant goes on to argue that there is no exclusionary rule for violations of Article I, Section 14.

In the trial court no attempt was made to justify the search in question as having been incident to an arrest for a minor misdemeanor. No claim was made that R.C. 2935.26 allowed arrest instead of issuance of a citation. Instead, the testimony at the suppression hearing indicated that appellant was stopped and immediately searched for contraband. For the state, which bore the burden of establishing the search satisfied constitutional standards, the best claim that might be made is that observation of marijuana in a car he walked away from provided probable cause to search him for marijuana. But the marijuana was seen in the front of the car, and appellee was said to be approaching a rear door, and there was no testimony that the odor of marijuana was detected on appellee's person. Most significantly, before appellee was stopped and searched, the driver of the car admitted ownership of the marijuana, apologized, and offered to throw it away. This falls far short of probable cause to search appellee for contraband, or to cite him for possession of marijuana.

From this fictional characterization appellant wants the Court to resurrect State v. Lindway (1936), 131 Ohio St. 166. Lindway came relatively early in the evolution of exclusionary rule jurisprudence. In fact Lindway reversed earlier Ohio cases applying an exclusionary rule. Nicholas v. City of Cleveland (1932), 125 Ohio St. 474; Browning v. Cleveland (1933), 126 Ohio St. 285. Since Mapp v. Ohio 367 U.S. 643 was decided in 1961, this court has not applied Lindway. On an intermittent but continuing basis it has applied the exclusionary rule to violations of the Ohio Constitution, in circumstances where federal courts have not done so in application of the U.S. Constitution. Cf. State v. Brown, supra, State v. Robinette (1997), 80 Ohio St. 3d 234, and other cases discussed at pp. 17-19 of appellee's merit brief. When the Court believes the state constitution requires no more than the federal constitution, it may give both the same interpretation. But wholesale abandonment of the exclusionary rule for state constitutional violations, in a case where its applicability was not an issue in the lower courts, is not a matter this court urgently needs to address.

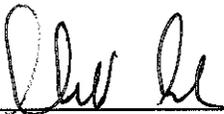
Nor is it a matter of urgency to determine whether the Fourth Amendment's exclusionary rule should be applied when officers participating in an initiative program overreach constitutional limits in their dealings with members of the public. Herring v. United States, supra, involved a records keeping error by court, rather than police department, employees, and an incremental extension of an exception to the exclusionary rule previously established in Arizona v. Evans (1995), 514 U.S. 1. The strategies employed by the police task force involved in this case were not the subject of much inquiry in the trial court, but the basics are an approach to citizens, based on minor traffic or other violations, in anticipation that the production of ID might lead to arrest on an outstanding warrant, or exposure of evidence of more serious criminal activity. Such circumstances plainly call for an exclusionary rule to deter unlawful police activity which sweeps in both malefactors and those legitimately going about their business. Even those with nothing to conceal would be offended by being grabbed and searched after leaving a carryout.

At page 7 appellant's memorandum suggests, "There might be a complaint that the search

issues are fact-laden and therefore not likely to create new laws of statewide interest," but goes on to ask that the state's "Exclusionary Rule propositions of law" be decided anyway. Appellee responds that while intermediate Courts of Appeal must decide disputed legal issues for the benefit of the parties, in discretionary review state supreme courts, like the U.S. Supreme Court, face a different task. Good law, in the sense that it provides useful guidance to courts of inferior jurisdiction, is best articulated when it flows from a factual background demonstrating its wisdom. Dismissal of this appeal as improvidently accepted is a completely satisfactory outcome for Adrian Johnson, and leaves the state free to advance its claims in other cases presenting a better record.

Respectfully submitted,

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By   
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(Counsel of Record)

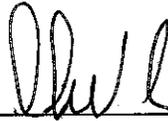
and

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this memorandum was hand delivered to the office of the Franklin County Prosecuting Attorney, Counsel for Appellant, 373 South High Street, 13th Floor, Columbus, Ohio 43215, this 26th day of July, 2010.



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Allen V. Adair, Counsel of Record  
Counsel for Appellee,  
Adrian L. Johnson