

ORIGINAL

IN THE SUPREME COURT OF OHIO

12-0415

STATE OF OHIO,

\*

C.A. No.

Plaintiff-Appellee,

\*

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

-vs-

\*

AL E. FORREST,

\*

Court of Appeals  
Case No. 11AP-291

Defendant-Appellant.

\*

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE,  
OHIO PROSECUTING ATTORNEYS ASSOCIATION

RON O'BRIEN, #0017245  
Franklin County Prosecuting Attorney  
373 South High Street, 13th Floor  
Columbus, Ohio 43215  
Phone: 614-525-3555  
Fax: 614-525-6103  
E-mail: [sltaylor@franklincountyohio.gov](mailto:sltaylor@franklincountyohio.gov)

MICHAEL SIEWERT, #0012995  
307 East Livingston Avenue  
Columbus, Ohio 43215  
Phone: 614-224-6488

COUNSEL FOR DEFENDANT-APPELLEE

and  
STEVEN L. TAYLOR, #0043876  
Counsel of Record  
Chief Counsel, Appellate Division  
COUNSEL FOR PLAINTIFF-APPELLANT

RECEIVED  
MAR 12 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

JULIA R. BATES, PROSECUTING ATTORNEY,  
LUCAS COUNTY, OHIO  
Lucas County Courthouse  
Toledo, Ohio 43624  
Phone No: (419) 213-4700  
Fax No: (419) 213-4595  
E-mail: [ejarrett@co.lucas.oh.us](mailto:ejarrett@co.lucas.oh.us)  
By: EVY M. JARRETT, #0062485  
Counsel of Record  
Assistant Prosecuting Attorney

FILED  
MAR 12 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

COUNSEL FOR AMICUS CURIAE  
OHIO PROSECUTING ATTORNEYS ASSOCIATION

TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF INTEREST OF AMICUS CURIAE .....	1
EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION .....	1
STATEMENT OF THE CASE AND FACTS .....	6
ARGUMENT .....	6
First Proposition of Law: The totality of the circumstances of a search, including the fact that it occurred in a high-crime neighborhood, must be evaluated in determining the search's constitutionality. <i>State v. Bobo</i> , 37 Ohio St.3d 177, 524 N.E.2d 489 (1988) and <i>State v. Batchili</i> , 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, applied. .....	6
Second Proposition of Law: If, after evaluating the totality of the circumstances, a court determines that a search was unconstitutional, the exclusionary rule may nevertheless apply only to conduct by law enforcement officers that is deliberate, reckless, or grossly negligent or where the conduct is part of recurring or systemic negligence. <i>Herring v. United States</i> , 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496, explained. ....	11
Third Proposition of Law: The "good faith" exception to the exclusionary rule applies to warrantless cases. <i>Davis v. United States</i> , 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011). .....	14
CERTIFICATION .....	16

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

The Ohio Prosecuting Attorneys Association is a private non-profit organization founded in 1937 for the benefit of the 88 elected county prosecutors in Ohio. The OPAA's mission is to increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies which affect the office of Prosecuting Attorney, and to aid in the furtherance of justice.

Review of this case furthers justice by promoting the development of case law that is consistent in its application of controlling precedents from this court and the United States Supreme Court. The OPAA therefore joins in seeking review of the Tenth Appellate District's decision in this case.

### **EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION**

This case presents an opportunity for this court to clarify that a neighborhood's reputation as a high crime area is a relevant factor that must be considered in evaluating the propriety of a search, and that consideration of this factor is not tantamount to stating that residents of a "minority neighborhood" are entitled to a lower standard of constitutional protection than other individuals. Further, this case presents an opportunity for this court to clarify that a good faith exception applies to the exclusionary rule, and that this exception applies even when a search is conducted without reliance upon a search warrant or an arrest warrant.

In 1988, this court considered and upheld the constitutionality of a search conducted under circumstances remarkably similar to those involved in this case. See

*State v. Bobo*, 37 Ohio St.3d 177, 524 N.E.2d 489 (1988). In *Bobo*, officers patrolling a high-crime neighborhood noticed two individuals seated in a legally parked car. The officers saw one of the individuals pop up and then bend back down as if hiding something beneath the seat. The officers approached the vehicle and asked the driver to step out. After he did so, one of the officers looked under the seat, where he discovered a firearm.

*Bobo* upheld the constitutionality of the search. Among the factors weighing in favor of the search's validity were the "reputation of an area for criminal activity," the officers' professional experience and their familiarity with the particular neighborhood and with drug transactions, and the defendant's suspicious movement when he saw the police officers.

*Bobo* and similar cases became well-established precedents in Ohio law. Nevertheless, in 2011, the Tenth District reached a different result when considering almost identical factors: two officers, experienced in making narcotics arrests and arrests in a particular three-block, high-crime area, observed two individuals in a vehicle parked in that neighborhood. When the officers approached the vehicle, they could see that appellee was holding a wad of cash in his left hand consistent with the exchange of drugs for money. Appellee, upon becoming aware of the officers, was startled and appeared nervous. With his right hand, he made a quick movement to the center of the vehicle that caused the officer to believe he might have hidden a weapon. Appellee then deliberately rotated his body in such a way as to shield the interior of the car from the officer's view.

Despite the circumstances of the case, the Tenth District held that the officer's

search of appellee was unconstitutional. *State v. Forrest*, 10th Dist. No. 11AP-291, 2011-Ohio-6234 ("*Forrest I*"). The State moved for reconsideration and en banc review, pointing out that the decision neglected to consider (1) the location of the search in a high crime neighborhood; (2) the officers' experience with narcotics arrests and with arrests in that neighborhood; (3) one officer's testimony that he believed the appellee's "quick movement" with his right hand might have been an effort to hide a weapon; and (4) the officer's testimony that when he approached the vehicle, he could see appellee held several folded bills in his left hand, which was consistent with an exchange of cash for drugs.

The Tenth District denied the State's motion for reconsideration. The court's opinion<sup>1</sup> reasoned that the "State's argument at times seems to imply that persons who live in a minority neighborhood have fewer rights under the Fourth Amendment . . . than persons who live elsewhere." *State v. Forrest*, 10th Dist. No. 11AP-291, 2012-Ohio-280, ¶8 ("*Forrest II*"). The decision reduced the case to the question of whether "a police officer can pull a citizen out of a parked vehicle merely because the citizen is parked in a minority neighborhood and acts surprised when he or she suddenly sees a police officer . . ." *Id.*, ¶9. *Forrest II* did not address the remaining factors omitted from the original decision, including the officers' experience, their knowledge of the area and of narcotics crimes, their concern that Forrest had hidden a weapon, or their conclusions regarding his possession of a wad of cash when they approached the car.

The OPAA recognizes that the common law evolves to reflect changing social

---

<sup>1</sup>Two of the three members of the panel concurred in the judgment denying the motion to reconsider but did not join in the opinion for the court.

values or public policy concerns. See, e.g., *Gross v. Gross*, 11 Ohio St.3d 99, 104, 464 N.E.2d 500. The OPAA is also aware that the "high crime" consideration is occasionally criticized for its effect on residents of minority neighborhoods. See, e.g., *United States v. Goddard*, 491 F.3d 457, 468 (D.C.Cir. 2007), Brown, J., dissenting. Despite these criticisms, the OPAA has been unable to find any decision from the United States Supreme Court, from this court, or from any other division of Ohio's Court of Appeals that considers "high crime" to be synonymous with "minority neighborhood." In fact, the OPAA has been unable to find any case law prohibiting consideration of the neighborhood's reputation for criminal activity in the evaluation of a search's constitutionality. The Tenth District's refusal to consider previous criminal activity in the location is thus contrary to well-established precedent requiring consideration of "all" or the "totality" of the circumstances surrounding a search.

But significantly, even if *Bobo* and related cases are at some point declared not to express the law of Ohio, the officers in this case were entitled to rely on that case and similar controlling precedents at the time of the search involved in this case. See, e.g., *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009); *Davis v. United States*, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011).

The interpretation of *Herring* has generated considerable controversy, with some commentators reading the decision as a step toward abolition of the exclusionary rule, and others attempting to minimize the decision's significance. Cf. Liptak, *Justices Step Closer to Repeal of Evidence Ruling*, The New York Times (Jan.30, 2009), A1; and Kerr, *Comments* (Jan.14, 2009), <http://volokh.com/archives/archive>

\_2009\_01\_11-2009\_01\_17.shtml#1231961926 (last accessed March 5, 2012). Thus far, this court has not interpreted or applied *Herring*. This case presents an opportunity for this court to clarify, consistent with *Herring*, that police officers' simple negligence is not adequately deterred by operation of the exclusionary rule to justify its social cost.

In *Herring*, the Supreme Court reinforced earlier holdings that suppression is not an automatic right arising out of a violation of the Fourth Amendment. *Herring* also noted that the exclusionary rule has been applied only when the conduct of law enforcement officials was deliberate, reckless, or grossly negligent or involved circumstances of recurring or systemic negligence. Finally, *Herring* provided that the exclusionary rule may be applied only when the deterrent value of application outweighs the social cost of allowing a guilty party to go free.

The Tenth District refused to apply *Herring*, based on the rationale that "[t]he good-faith exclusionary rule claimed by the State of Ohio exists only in the context of searches and arrests where people believe they have a valid warrant" and "does not apply to situations where no warrants exist." *Forrest II*, ¶13. The Tenth District's refusal to apply *Herring* is squarely at odds with the Supreme Court's subsequent decision in *Davis*, which clarified that suppression is inappropriate when officers perform a warrantless search in compliance with a binding precedent that is overruled after the search is conducted.

Despite *Davis*' unambiguous holding, numerous practitioners share the view that the good faith exception to the exclusionary rule is limited to cases involving a warrant: *See, e.g., State v. Dennis*, 182 Ohio App.3d 674, 2009-Ohio-2173, 914 N.E.2d 1071,

¶57. See also Bensing, *Case Update* (Feb. 2, 2012), <http://briefcase8.com/2012/02/01/a-new-rule-of-law-not-quite/#more-4914> (last accessed on Feb. 29, 2012.)

This case presents an opportunity for this court to apply *Herring* and *Davis* and to clarify for the benefit of Ohio's judiciary and practitioners that the good faith exception to the exclusionary rule applies in warrantless search cases.

Because this case presents constitutional issues of great significance both with respect to the initial determination that a constitutional violation occurred and with respect to the consequences of that violation, the OPAA joins in appellant's request for further review.

### **STATEMENT OF THE CASE AND FACTS**

The OPAA relies on the statement of facts and case submitted on behalf of the State of Ohio.

### **ARGUMENT**

**First Proposition of Law:** The totality of the circumstances of a search, including the fact that it occurred in a high-crime neighborhood, must be evaluated in determining the search's constitutionality. *State v. Bobo*, 37 Ohio St.3d 177, 524 N.E.2d 489 (1988) and *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, applied.

The Tenth District correctly noted that police officers did not need any suspicion of illegal activity in order to approach Forrest's vehicle. *Forrest I*, ¶10. See also *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); *United States v. Flowers*, 909 F.2d 145, 147 (6th Cir.1990); and *State v. McClendon*, 10th Dist. No. 09AP-554, 2009-Ohio-6421, ¶8. Police officers' approach of a car parked in a public place has the legal status of a consensual encounter. See, e.g., *McClendon*, ¶8.

Although the initial approach of Forrest's vehicle is legally considered a consensual encounter, that encounter ripened into a seizure when the police officer opened the door to the vehicle without his permission. See, e.g., *Mentor v. Walker*, 11th Dist. No. 12-243, 1988 Ohio App. LEXIS 5226. The issue, of course, is whether the seizure and the subsequent search were reasonable under the circumstances, or whether there are "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889.

In evaluating the propriety of a seizure and search, courts "may not evaluate in isolation each articulated reason for the stop." *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, paragraph two of the syllabus. See also *State v. Bobo*, 37 Ohio St.3d 177, 524 N.E.2d 489 (1988), paragraphs one and two of the syllabus. Rather, the "reasonable and articulable standard" encompasses the totality of the circumstances." *Id.*, ¶17, citing *United States v. Arvizu*, 534 U.S. 266, 274, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002).

Articulable facts justifying an investigatory stop and search "fall into four general categories: (1) location; (2) the officer's experience, training or knowledge; (3) the suspect's conduct or appearance; and (4) the surrounding circumstances." *State v. Edwards*, 5th Dist. No. 2006-CA-00107, 2007-Ohio-705, ¶30.

**Location.** "Location" refers "to whether the confrontation occurred in a reputed 'high crime' area, an area of known drug activity, or perhaps a location under police surveillance." *Id.*, ¶31, citing to *Bobo*, 37 Ohio St.3d at 179 and *State v. Andrews*

(1991), 57 Ohio St.3d 86, 88, 565 N.E.2d 1271. Ohio's consideration of this factor is, of course, consistent with federal case law. See, e.g., *Adams v. Williams*, 407 U.S. 143, 144, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); and *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).

In this case, the officer testified that he had made numerous arrests and received complaints regarding criminal activity in the three-block area in which the search occurred. Appellee did not present any evidence to contradict this testimony.

At best, the Tenth District improperly discounted this factor. Ohio and federal law is clear that "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." *Wardlow*, 528 U.S. at 124. At worst, the Tenth District imputed an improper motive to consideration of the reputation of a neighborhood for crime by equating the phrase "high crime" with the term "minority neighborhood." As a legal matter, the opinion cites no authority for the proposition that an area's reputation for crime should not be considered, and the undersigned has been unable to find any such authority. The OPAA respectfully submits that such a conclusion is contrary to established precedent from this court and the United States Supreme Court.

As a practical matter, the Tenth District's suggestion rests on a vast oversimplification--high crime does not in fact automatically correspond to "minority neighborhood." In Lucas County, for example, the population of the 43605 area code is predominantly Caucasian, yet it suffers from a total crime risk of nearly three times the national average. See <http://verylocaldata.com/43605>; and [http://www.clrsearch.com/Toledo\\_Demographics/OH/Crime-Rate?compare=43605](http://www.clrsearch.com/Toledo_Demographics/OH/Crime-Rate?compare=43605) (last accessed

Feb. 29, 2012).

The Tenth District's initial failure to consider the criminal activity common to the location of the search was an error, and any suggestion that the location's reputation for crime is synonymous with "minority neighborhood" compounds that error. The analysis in the *Forrest II* opinion implies a policy shift that this court should evaluate for the benefit of Ohio's law enforcement, judiciary and legal practitioners. However, the remaining circumstances of the search also weigh in favor of its constitutionality.

**Experience.** An officer's experience may be measured in terms of his years of experience or his experience with a particular kind of crime, including drug trafficking. *Edwards*, ¶32. In this case, the officer testified that he had been on the police force for more than ten years, that he had made approximately 1,000 felony arrests, and that he was familiar with the three-block area in which the search was performed and knew it to be an area of significant criminal activity.

*Forrest I* and *II* are devoid of any mention of this testimony, despite this court's instructions that "the circumstances surrounding the stop must be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *Bobo, supra*, 37 Ohio St.3d at 179 (internal quotations omitted).

**Conduct or appearance.** The element of "conduct or appearance includes suspicious, inexplicable, or furtive movements." *Id.*, ¶33. The officer in this case described a series of observations of appellee. First, appellee had a nervous reaction when he became aware of the officer's presence. Nervous behavior is a relevant factor in determining reasonable suspicion. *Wardlow*, 528 U.S. at 124.

Appellee was also holding a wad of cash in his left hand, which the officer testified was consistent with an exchange of cash for drugs. Courts have "recognized the importance of allowing police officers to draw reasonable inferences from their observations in light of their specialized training and experience." *United States v. Jones*, 562 F.3d 768, 776 (6th Cir.2009).

With his right hand, appellee made a quick movement to the center of the car, causing the officer to fear that he might have hidden a weapon. Weapons are, of course, commonly associated with drug trafficking. As this court has recognized, "The nature of narcotics trafficking today reasonably warrants the conclusion that a suspected dealer may be armed and dangerous." *State v. Jordan*, 104 Ohio St.3d 21, 36, 2004-Ohio-6085, 817 N.E.2d 864, ¶¶61 (citations omitted). *Accord State v. Hansard*, 4th Dist. No. 07CA3177, 2008-Ohio-3349, ¶26 ("Ohio courts have long recognized that persons who engage in illegal drug activities are often armed with a weapon."). Any concern that a weapon might be present is heightened in a high-crime neighborhood. See *United States v. Pearce*, 531 F.3d 374, 383 (6th Cir.2008).

Appellee next turned his body in an unusual way, in an obvious effort to shield the vehicle's interior from the officer's view. That movement, coupled with a concern that a weapon might be in play, led to the officer to tell him to get out of the car. Given the progression of events and the totality of circumstances suggesting "the possible presence of a firearm in a confrontational setting," the officer acted reasonably in responding with "an immediate show of authority to neutralize potential danger and conduct further investigation." *Jones*, 562 F.3d at 776.

The Tenth District's decisions in *Forrest I* and *II* neglected to consider the totality of the circumstances and then exacerbated that failure by imputing an improper motive to the State's argument in support of considering certain of those factors. The OPAA therefore joins the State in seeking review of the initial determination that the search in this case was unconstitutional.

**Second Proposition of Law: If, after evaluating the totality of the circumstances, a court determines that a search was unconstitutional, the exclusionary rule may nevertheless apply only to conduct by law enforcement officers that is deliberate, reckless, or grossly negligent or where the conduct is part of recurring or systemic negligence. *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496, explained.**

In *Herring*, the Supreme Court observed that "[t]he 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." *Id.*, 129 S.Ct. at 700. In fact, the presumption is against exclusion, which "'has always been our last resort, not our first impulse.'" *Id.*, quoting *Hudson v. Michigan* (2006), 547 U.S. 586, 591, 126 S.Ct. 2159, 165 L.Ed.2d 56. *Herring* laid to rest any notion that the exclusionary rule is a right inherent in the Constitution. Exclusion of evidence "is not an individual right," and "applies only where it results in appreciable deterrence." *Herring*, 129 S.Ct. at 700.

Because the rule's purpose is to deter future Fourth Amendment violations, the conduct at issue by law enforcement officials must be "sufficiently deliberate that exclusion can meaningfully deter it." *Id.* at 702. The exclusionary rule has no application to simple negligence by law enforcement officials: "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* *Herring* emphasized that the

existence of simple negligence was "crucial" to the decision. *Id.* As the Sixth Circuit has opined, "the *Herring* Court's emphasis seems weighed more toward preserving evidence for use in obtaining convictions, even if illegally seized, than toward excluding evidence in order to deter police misconduct unless the officers engage in 'deliberate, reckless, or grossly negligent conduct.'" *United States v. Master*, 614 F.3d 236, 243 (6th Cir.2010).

The culpability of law enforcement officials is a threshold requirement but not a guarantee of exclusion. Before application of the exclusionary rule, the benefits of deterrence must be balanced against the social cost of allowing a guilty party to go free:

In addition, the benefits of deterrence must outweigh the costs. We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence. [T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs. The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that offends basic concepts of the criminal justice system. [T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application. *Id.*, at 700-701 (quotation marks and citations omitted).

Two aspects of *Herring* are relevant to this case. First, the case clearly provides that even when a violation of the Fourth Amendment occurs, suppression does not

automatically flow from that violation. In this case, the Tenth District erred in assuming that a violation of Fourth Amendment rights automatically requires suppression of evidence.

Second, *Herring* emphasized that "[t]he extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct." *Id.* at 701. Application of the exclusionary rule may occur only when the benefit of deterring future comparable conduct by law enforcement officers outweighs the high cost to society in allowing a guilty party to go free. The trial court and the Tenth District did not engage in the necessary step of balancing the benefit of deterring future similar misconduct against the cost of the exclusionary rule.

The closest the Tenth District comes to assessing the culpability of the officer was to quote with apparent approval the trial court's finding that police "did not have an objective evidentiary justification to initiate the stop and conduct any search." The Tenth District interpreted the statement to mean that there was no justification for application of a protective search pursuant to *Terry*. Under *Terry*, a search is warranted if an officer has "an articulable and reasonable suspicion that the person is armed and dangerous." *Id.* The failure to act reasonably may amount to negligence, but does not necessarily equate to "deliberate, reckless, or grossly negligent conduct" or to "recurring or systemic negligence" for which the exclusionary rule was intended to apply.

The prosecution raised *Herring* in both the trial court and in the Court of Appeals, but the Tenth District refused to apply it to the facts of this case. The OPAA therefore joins in seeking further review in order to ensure consistent application of United States

Supreme Court precedent.

**Third Proposition of Law:** The "good faith" exception to the exclusionary rule applies to warrantless cases. *Davis v. United States*, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011).

*Herring* itself noted that the good faith exception was extended to warrantless administrative searches performed in good-faith reliance on a statute later declared unconstitutional. *Herring*, 555 U.S. at 142, citing *Illinois v. Krull*, 480 U.S. 340, 349-350, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987). As recently as last year, the United States Supreme Court applied the good faith exception described in *Herring* to a case that involved neither a search warrant nor arrest warrant. *Davis, supra*.

*Davis* arose in the context of a change in controlling case law governing searches incident to arrest. Until recently, numerous courts had permitted police to search the passenger compartment incident to the arrest of a recent occupant. In 2009, the United States Supreme Court adopted a two-part rule under which an automobile search incident to a recent occupant's arrest is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains "evidence relevant to the crime of arrest. See *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). In the aftermath of *Gant*, numerous courts considered the validity of searches performed in reliance on the former case law. See, e.g., *United States v. Davis*, 598 F.3d 1259, 1265-1268 (11th Cir.2010), cert. granted (2010), 131 S.Ct. 502.

In its review of *Davis*, the Supreme Court upheld application of *Herring* and found that searches conducted in objectively reasonable reliance on binding appellate

precedent are not subject to the exclusionary rule:

Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield “meaningfu[l]” deterrence, and culpable enough to be “worth the price paid by the justice system.” *Herring*, 555 U.S., at 144, 129 S. Ct. 695, 172 L. Ed. 2d 496. The conduct of the officers here was neither of these things. The officers who conducted the search did not violate Davis's Fourth Amendment rights deliberately, recklessly, or with gross negligence. See *ibid.* Nor does this case involve any “recurring or systemic negligence” on the part of law enforcement. *Ibid.* The police acted in strict compliance with binding precedent, and their behavior was not wrongful. Unless the exclusionary rule is to become a strict-liability regime, it can have no application in this case. *Id.*, 131 S. Ct. at 2428.

Pursuant to *Davis*, the Tenth District quite clearly erred in holding that *Herring* has no application to a case in which there was no warrant or basis for believing a warrant existed. *Accord State v. Geiter*, 190 Ohio App.3d 541, 2010-Ohio-6017 (8th Dist.), ¶¶41-43; *State v. Baughman*, 12th Dist. Nos. CA2010-08-069, CA2010-08-070, ¶¶27-31. The OPAA therefore joins the State in requesting this court's review and clarification of *Herring* and *Davis*.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY  
LUCAS COUNTY, OHIO

By:   
Evy M. Jarrett, #0062485  
Assistant Prosecuting Attorney

**CERTIFICATION**

I certify that a copy of the foregoing was sent via ordinary U.S. Mail this 9<sup>th</sup> day of March, 2012, to Steven L. Taylor, Office of the Franklin County Prosecuting Attorney, 373 South High Street, 13th Floor, Columbus, Ohio 43215 and to Michael Siewert, 307 East Livingston Avenue, Columbus, Ohio 43215.



---

Evy M. Jarrett, #0062485  
Assistant Prosecuting Attorney