

ORIGINAL

IN THE SUPREME COURT OF OHIO  
Case No. 11-2134

STATE OF OHIO	:	
Appellant	:	On Appeal from the
-vs-	:	Montgomery County
DAMAAD S. GARDNER	:	Court of Appeals,
Appellee	:	Second Appellate
		District Court of Appeals
		CA: 24308

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BRIEF OF AMICI CURIAE PROFESSOR LEWIS R. KATZ,  
OFFICE OF THE OHIO PUBLIC DEFENDER, AND  
OFFICE OF THE CUYAHOGA COUNTY PUBLIC DEFENDER  
IN SUPPORT OF APPELLEE

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## **SUMMARY OF ARGUMENT**

The State of Ohio urges this Court to establish a bright-line rule that allows the State to justify an otherwise-illegal warrantless seizure and search when the defendant happens to have been the subject of a pre-existing arrest warrant of which the police were unaware when they originally seized and searched the defendant. The State's proposition is contrary to traditional search and seizure principles under both the Fourth Amendment and Article I, Section 10 of the Ohio Constitution. It is inconsistent with decisions of federal courts, including the Sixth Circuit and the Southern District of Ohio. The State's proposition of law will not promote good police work. It is bad public policy. This Court should either affirm the Second District's decision in this case or dismiss this case as improvidently allowed in order to allow the Second District's decision to remain undisturbed.

## **INTERESTS OF AMICI CURIAE**

Lewis R. Katz is the John C. Hutchins Professor of Law at Case Western Reserve University where he has taught criminal law and procedure since 1966. Professor Katz is the author of "Ohio Arrest Search and Seizure;" and the co-author of "Baldwin's Ohio Practice Criminal Law" (2nd edition), and "Ohio Criminal Laws and Rules" (formerly "Ohio Criminal Justice."). He has also served as a member of the advisory committee to the Ohio Sentencing Commission during the period leading to the enactment of S.B.2. Professor Katz is a frequent lecturer on Ohio criminal law and procedure.

The Ohio Public Defender is responsible for the representation of indigent defendants throughout the State. This Office frequently argues before this Court as well as the various courts of appeals and trial courts throughout the State.

The Cuyahoga County Public Defender is legal counsel to more than one-third of all

indigent persons indicted for felonies in Cuyahoga County. As such this Office is the largest single source of legal representation of criminal defendants in Ohio's largest county, Cuyahoga.

## STATEMENT OF THE CASE AND FACTS

Your amici defer to the factual statement set forth in Mr. Gardner's Merit Brief of Appellee.

## ARGUMENT

*In opposition to the State of Ohio's Propositions of Law I (as formulated by the State):*

**When a person is subject to arrest on an outstanding warrant, he or she has no expectation of privacy that would protect him or her from execution of the warrant.**

The State's proposition of law is inconsistent with traditional search and seizure principles, including those pertaining to the exclusionary rule, and is also contrary to public policy. Accordingly, this Court should reject the State's proposition and, instead, adopt the following proposition as the holding in this case:

**The discovery by police that the defendant is the subject of an outstanding arrest warrant, unknown to the police at the time of the seizure, has no effect on whether the seizure of the defendant was legal or illegal, and has no effect on whether evidence obtained prior to the discovery of the warrant was legally or illegally obtained, nor on whether evidence obtained prior to the discovery of the arrest warrant should be suppressed.**

### **A. Examining the State's Proposition of Law in Light of Traditional Search and Seizure Principles**

#### **1. The Police Must Be Able to Articulate A Justification for Their Actions Prior to Taking Them**

The Fourth Amendment and Article I, Section 10 of the Ohio Constitution<sup>1</sup> expect police

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<sup>1</sup> Article I, Section 10 of the Ohio Constitution provides at least as much protection to a defendant as the Fourth Amendment. Accordingly, analysis under the Fourth Amendment is a starting point for analysis under Article I, Section 10.

to respect a person's ability to go about his or her business without unreasonable searches and seizures. To that end, the police may "search" and "seize" a defendant only when they can articulate a Fourth-Amendment-countenanced basis for doing so at the time of their actions. *See Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts *available to the officer at the moment of the seizure or the search* 'warrant a man of reasonable caution in the belief' that the action was appropriate?

*Id.* at 21-22 (emphasis added, footnotes omitted).

This requirement that the police be able to articulate a justification before acting insulates the citizenry from police actions premised upon inchoate suspicion or hunches. *Id.*, at 22. "This demand for specificity in the information *upon which police action is predicated* is the central teaching of this Court's Fourth Amendment jurisprudence. *Id.* at 22, n.18 (emphasis added; collecting cases)

Police cannot conduct a search or seizure without a known justification but then use subsequently-discovered circumstances to justify the already-effected search or seizure. *Smith v. Ohio* (1990) 494 U.S. 541, 110 S.Ct. 1288, 108 L.Ed.2d 464 (per curiam) ("an incident search may not precede an arrest and serve as part of its justification," quoting *Sibron v. New York* (1968), 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917, and collecting cases). *Smith* and its ancestry stand for the proposition that it is not enough for the police to be able to claim a justification in the end. Rather, police conduct must be justifiable on the basis of the information known to the police at the time of the police action. Otherwise, the subsequent discovery of incriminating evidence would always justify a seizure or search, effectively overruling the exclusionary rule.

Following these principles, federal courts have consistently held that officers who violate a defendant's Fourth Amendment rights in effecting an arrest, while unaware of the existence of an outstanding arrest warrant for the defendant, violate the Fourth Amendment. *United States v. Gross*, 624 F.3d 309 (6<sup>th</sup> Cir. 2010); *United States v. Lockett*, 484 F.2d 89 (9<sup>th</sup> Cir. 1973); *United States v. Lopez*, 443 F.3d 1280 (10<sup>th</sup> Cir. 2006),

This federal caselaw has extended to civil rights cases as well as the criminal cases cited above. The Sixth Circuit held that police officers who conduct a warrantless search of a defendant's home while unaware of an outstanding arrest warrant can be civilly liable for violating that person's constitutional rights against unreasonable searches and seizures. *United States v. El Bey*, 530 F.3d 407, 421 (6<sup>th</sup> Cir. 2008) ("Reasonable officers . . . should have known that a warrantless search of El Bay's home, and an arrest based on an outstanding warrant that was discovered only as a result of the warrantless search, would be unconstitutional;" qualified immunity not available as a matter of law). The United States District Court for the Southern District of Ohio reached a similar conclusion in a case where the defendant was stopped without adequate justification by officers who did not know at the time that there was an outstanding arrest warrant. *Fulson v. City of Columbus*, 801 F.Supp. 1 (S.D. Ohio 1992) (Graham, J.) (summary judgment for police officers denied because "[i]f, as plaintiff's evidence tends to suggest, the officers did not know about the outstanding warrants, and if there was no other valid basis for plaintiff's arrest, then plaintiff may be able to establish that his arrest was invalid, even if there were in fact warrants outstanding for plaintiff's arrest."). *Accord, Moreno v. Baca*, 431 F.3d 633 (9<sup>th</sup> Cir. 2005); *Bruce v. Perkins*, 701 F.Supp. 163, 165 (N.D. Illinois, 1988) (notion that pre-existing warrant that was unknown to police could justify arrest is "preposterous; the Fourth Amendment does not countenance such post hoc rationalization.").

Moreover, the State's proposition of law is also inconsistent with the syllabus of the court in the Fourth District Court of Appeals' decision in *State v. Pettit*, 20 Ohio App.2d 170, 252 N.E.2d 325 (4<sup>th</sup> Dist. 1969), syllabus par. 1. There, the court stated:

Where there is an outstanding warrant for the arrest of an accused, *and the existence of such warrant is known to police officers*, and where an arrest is made by such police officers without the actual possession of the warrant, but the warrant arrives a few minutes after the arrest and the contents of the warrant are read to the accused, the arrest meets the minimum federal standards and is, therefore, a legal arrest.

(emphasis added). While, *Pettit* focused on the issue of whether it was necessary to have actual possession of the warrant at the time of the arrest, the Fourth District obviously believed that the fact that the officers knew of the warrant at the time of the arrest was significant enough to be part of its syllabus law.

**2. When the Police Act Unreasonably and Contrary to the Fourth Amendment, the Fruits of the Police Illegality Must Be Suppressed**

The primary goal of the Fourth Amendment's exclusionary rule is to deter police misconduct by ensuring that police act consistently with the Fourth Amendment. *Terry*, 392 U.S. at 12. In *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 108 (1961), the Court recognized that permitting the introduction of illegally seized evidence served to encourage disobedience to the federal Constitution. To that end, the United States Supreme Court has consistently applied the exclusionary rule to searches and seizures that were illegal at the time of their commission, even though the seizure or search would have been justified had post-arrest circumstances been known earlier by the police. *E.g.*, *Smith, supra*. (post-arrest discovery of evidence cannot be bootstrapped to justify the preceding arrest).

In *United States v. Gross*, 624 F.3d 309 (6<sup>th</sup> Cir. 2010), the United States Court of Appeals for the Sixth Circuit suppressed evidence that police obtained in violation of the Fourth

Amendment even though there existed an outstanding arrest warrant about which the police were unaware. In so doing, *Gross* relied upon the Ninth Circuit Court of Appeals in *United States v. Luckett*, 484 F.2d 89 (9<sup>th</sup> Cir. 1973), and the Tenth Circuit in *United States v. Lopez*, 443 F.3d 1280 (10<sup>th</sup> Cir. 2006), which had reached similar conclusions.

At the same time, there are circumstances, not applicable to this case, where exclusion of evidence is not the appropriate remedy for police illegality. For example, that evidence that follows police illegality but is sufficiently attenuated, in time or other distinction, from the police illegality will not be suppressed. *See generally, Wong Sun v. United States* (1963), 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (fruit of the poisonous tree doctrine). This notion of “attenuation” has been used by the United States Court of Appeals for the Seventh Circuit to hold that the discovery of an outstanding arrest warrant, by itself, can be an intervening event that attenuates future taint from a prior illegal arrest. *E.g., United States v. Green*, 111 F.3d 515 (7<sup>th</sup> Cir. 1997). The Seventh Circuit thus allows only that evidence obtained *after the police become aware of the warrant’s existence* to be admissible. It should be noted that *Gross* rejects the Seventh Circuit’s attenuation theory.

In this case, attenuation is not an issue because all the evidence that was obtained through the seizure and subsequent search came before the police learned of the outstanding warrant. As noted by the court of appeals, below, “the warrant was discovered as a direct, proximate and non-attenuated result of Gardner’s seizure.” Opinion, at 15-16, ¶37. In light of this fact, it is not surprising that the State of Ohio specifically asks this Court not to engage in an attenuation analysis, even as an alternative to its bright-line proposition of law. Brief of Appellant, at 8-10.

Another exception to exclusion is the “inevitable discovery” doctrine. *See generally, Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). This arises in those cases

where the evidence would have inevitably been discovered lawfully. Once again, under the facts of this case, there is no reason to conclude that the drugs found in Mr. Gardner's pocket would have been inevitably discovered, and the State has not urged this theory upon this Court. Moreover, not having had the opportunity to judge the credibility of the witness who testified at the suppression hearing, this Court is not in a position to rule on this type of fact-bound inquiry.

Finally, it should be recognized that the exclusionary rule does not prohibit the State from prosecuting Mr. Gardner on the charge for which the outstanding arrest warrant existed. *E.g.*, *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984). This is not an issue in this case.

**B. Fourth Amendment Policy and Public Policy Are Both Adversely Affected by the State's Proposition of Law**

**1. The State's Proposition of Law Opens the Door to Police Abuse**

By using the pre-existing warrant as a bootstrap to admit evidence obtained by police misconduct, the State's proposition of law encourages illegal conduct on the part of the police. *Gross* recognized this important point as a justification for its holding that a pre-existing arrest warrant would not excuse Fourth Amendment violations by the police:

To hold otherwise would result in a rule that creates a new form of police investigation, whereby an officer patrolling a high crime area may, without consequence, illegally stop a group of residents where he has a 'police hunch' that the residents may: 1) have outstanding warrants; or 2) be engaged in some activity that does not rise to a level of reasonable suspicion. Despite a lack of reasonable suspicion, a well-established constitutional requirement, the officer may then seize those individuals, ask for their identifying information (which the individuals will feel coerced into giving as they will have been seized and will not feel free to leave or end the encounter), run their names through a warrant database, and then proceed to arrest and search those individuals for whom a warrant appears. Under this scenario, an officer need no longer have reasonable suspicion on probable cause, the very crux of our Fourth Amendment jurisprudence. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); [*United States v.*] *Williams* [2010], 615 F.3d [657] at 670, n. 6 ('[A]llowing information obtained from a suspect about an outstanding warrant to purge the

taint of an unconstitutional search or seizure would have deleterious effects. It would encourage officers to seize individuals without reasonable suspicion—not merely engage them in consensual encounters—and ask them about outstanding warrants.’); see, also, Kimberly, *Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability*, 118 Yale L.J. 177 (2008) (commenting that a rule where the discovery of an outstanding warrant constitutes an intervening circumstance has the perverse effect of encouraging law enforcement officials to engage in illegal stops where they have an inarticulable hunch regarding a person on the street or in a car).”

*Gross*, at 624 F.3d at 321-22.

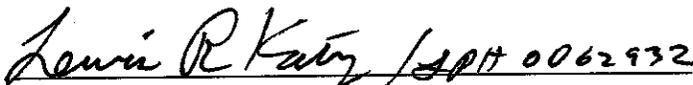
## **2. The State’s Proposition of Law Does Not Promote Good Police Work**

As *Gross* recognized, using an outstanding arrest warrant as a crutch encourages police abuse. But it also discourages the police from using the investigative tools at their disposal that do not violate the Fourth Amendment. Casual police-citizen encounters (which do not implicate the Fourth Amendment), non-custodial interrogation, and other non-intrusive investigative procedures are neglected when officers have been able to avoid exclusion of evidence in prior cases because of the happenstance of an outstanding arrest warrant about which the officers had no advance knowledge. And, when possible, officers should be encouraged to determine if an arrest warrant is outstanding before they engage in Fourth-Amendment protected activity, not after.

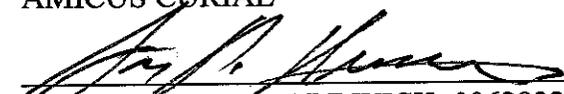
**CONCLUSION**

For these reasons, this Court should affirm the decision of the Second District Court of Appeals or dismiss this appeal as improvidently allowed.

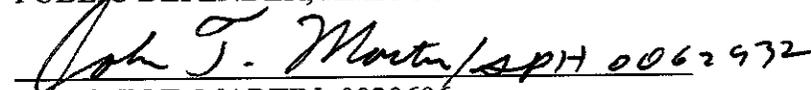
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A copy of the foregoing was served via U.S. mail, first-class, postage prepaid, upon Carey Ingram, Assistant Prosecuting Attorney for Montgomery County, P.O. Box 972, 301 West Third Street, Suite 500, Dayton, Ohio 45422, and upon Rebekah Neurherz, 150 North Limestone Street, Suite 218, Springfield, Ohio 45502, this 25<sup>th</sup> day of July, 2012.

  
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