

ORIGINAL

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IN THE SUPREME COURT OF OHIO

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STATE OF OHIO

Plaintiff-Appellant

V.

JEFFREY SHIPLEY

Defendant-Appellee

UPON APPEAL FROM THE STARK  
COUNTY COURT OF APPEALS  
FIFTH APPELLATE DISTRICT

COURT OF APPEALS  
CASE NO. 2012-CA-00100

CASE NO. 13-1111

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MEMORANDUM IN OPPOSITION OF JURISDICTION  
OF APPELLEE JEFFREY SHIPLEY

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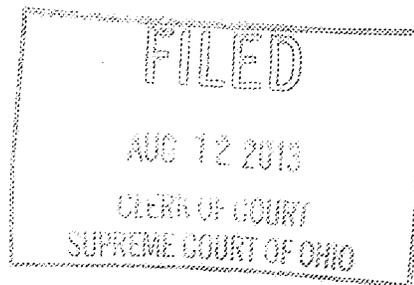
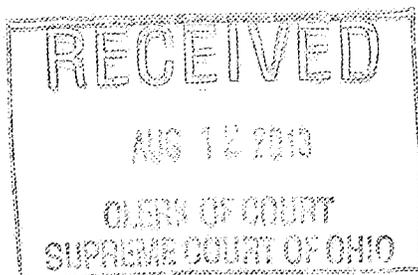
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**TABLE OF AUTHORITIES**

**CASES**

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## SATEMENT OF THE FACTS AND PROCEDURAL HISTORY

On February 9, 2012 Detective Bob J. Rajcan of the Alliance Police Department applied for and received a search warrant from the Honorable Judge Dixie Park, Probate Judge of Stark County Common Pleas Court, to search the business of Defendant-Appellee Jeff Shipley located at 1160 E. State Street, Alliance OH 44601. Judge Park is the elected judge of the Probate Division of the Stark County Common Pleas Court. The location sought to be searched is within the jurisdiction of the Alliance Municipal Court.

On March 26, 2012 the Defendant filed a motion to suppress the evidence obtained as a result of the search warrant. The motion to suppress argued that the search warrant at issue lacked probable cause and R.C. § 2931.01 precluded a Probate Judge from issuing the search warrant as a Probate Judge is not a judge of record. On April 4, 2012, a hearing on the above mentioned motion to suppress was held in the Alliance Municipal Court in front of Magistrate Jean Madden.

At the suppression hearing, defense counsel urged the Magistrate to grant the motion as the Stark County Common Pleas Probate Judge lacked subject matter jurisdiction to approve the search warrant. On April 30, 2012, the Magistrate issued a ruling granting the Defendant's motion to suppress. The ruling agreed with the Defense position that the Probate Judge lacked subject matter jurisdiction to properly authorize the search warrant at issue in this case.

After the issuance of the Magistrate's Report and Recommendation, the State filed its Objection to the Report of the Magistrate on May 11, 2012. On May 17, 2012 the Judge of the Alliance Municipal Court overruled the objections filed by the State and adopted the Report and Recommendations of the Magistrate. On May 28, 2013, after the



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State perfected an appeal, the Fifth District Court of Appeals issued a decision which held that a Probate Judge is not authorized to issue search warrants pursuant to codified Ohio law as well as the Rules of Criminal Procedure.

Specifically, the Fifth District noted that, in the present case, there was no showing that the probate court or probate judge were appointed to hear the criminal matter pursuant to Section (5)(A)(3) of Article IV of the Ohio Constitution. The Fifth District also reasoned that neither Ohio statutory law nor the Rules of Criminal Procedure provide the probate court or probate judge with the proper authority to issue a search warrant. Despite the ruling that the search warrant in the present case was invalid, the Fifth District ultimately reversed the lower court's grant of suppression based upon the good faith exception to the warrant requirement.



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## LAW AND ARGUMENT

**A. Authorization of Search Warrant by Probate Judge is contrary to the Fourth Amendment of the United States Constitution, the Ohio Revised Code, the Ohio Rules of Criminal Procedure and is therefore void.**

The issue presented for review by Appellant, State of Ohio, is not a substantial constitutional neither a question of public nor great general interest. In the present case, the Fifth Appellate District correctly applied both Ohio statutory law and the Ohio Rules of Criminal Procedure to conclude that a Probate Judge lacks the authority to issue a search warrant. Furthermore, the Court thoroughly considered and distinguished case law purported by Appellant to support the proposition that a probate judge possesses the authority to issue a search warrant. The question presented to this Court by the Appellant has a clear answer--as the Fifth District noted in the aforementioned decision—neither a probate judge nor a probate court possesses the authority to issue a search warrant in the State of Ohio. Section 2931.01 fits squarely within the provisions of both Section 2933.21 as well as Crim. Rule 41(A). There exists no need for this Court to reconcile the meaning of Section 2931.01.

Ohio Rule of Criminal Procedure 41(A) provides what party may issue valid search warrants and states, in pertinent part, “[a] search warrant authorized by this rule may be issued by a **judge of a court of record...**” (Emphasis added). In turn, Ohio Revised Code § 2933.21 states that “[a] judge of a court of record may, within his jurisdiction, issue warrants to search a house or place”. Therefore, pursuant to the Ohio Revised Code and Rule 41 a “judge of a court of record” has the proper authority to



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authorize a search warrant in accordance with the Fourth Amendment. Despite R.C. § 2933.21's distribution of authority, the statute does not define what a "court of record" is. Therefore, R.C. § 2931.01 becomes effective as it encompasses "[d]efinitions pertaining to jurisdiction and venue." Section 2931.01 states the following, "[a]s used in Chapters 2931. to 2953. of the Revised Code: ... (B) 'Judge' does not include the probate judge. (C) 'Court' does not include the probate court."

Additionally, the Ohio Rules of Criminal Procedure contain a definition of "judge" which excludes a Probate Judge. Rule 2 states, in pertinent part, "(E) 'Judge' means judge of the court of common pleas, **juvenile court**, municipal court, or county court, or the mayor or mayor's court magistrate of a municipal corporation having a mayor's court'." (emphasis added). It is instructive that the drafters included "juvenile court", a division of the Court of Common Pleas similar to the probate court, but purposely excluded probate court from the definition of judge. This is a further example that Appellant's rationale is beyond the scope of both Ohio statutory law and the criminal rules.

Appellant states that "the Modern Courts Amendment to the Ohio Constitution adopted in 1968 and 1973 abolished the Probate Court as it existed at that time and which was referenced in 2931.01 at that time." Appellant's Brief at 3. This statement is made to advance the Appellant's contention that definitions found within R.C. § 2931.01 are simply hold-overs that the legislature of Ohio did not eliminate due to their inability to "catch up with the full impact of the Modern Courts Amendment from 1968 and 1973." *Id.* The Appellant presumes both the legislature's action and intent with regard to §2931.01 with no support to justify such assertions. Indeed, the Appellant fails to



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acknowledge the reality that the legislature's actions should be viewed as an expression of the governing body's intent.

Instead, the Appellant relies on *State v. Johnson* (1986), 4<sup>th</sup> Dist. No. 412, unreported, 1986 WL 8799, to assert that the Fourth District has considered "the same arguments" holding that a probate judge has the proper authority to issue a search warrant. Appellant's Brief at 3-4. In *Johnson*, the Court did address the issue of whether a "Judge of the Probate-Juvenile Division of the Hocking County Court of Common Pleas ... acted outside the scope of the court's jurisdiction in the issuance of search warrants in a felony case." *Johnson*, 1986 WL 8799, at \*15. The Court found the definition of "judge" set forth in § 2931.01 to be a "relic of the past" and to be superseded by Criminal Rule 41 which states a search warrant "may be issued by a judge of a court of record." The Court concluded that the special provision in Crim. R. 41 governs over the general provision of § 2931.01 pursuant to the rules of construction found in R.C. 1.12 and R.C. 1.51. The Court, however, did not properly apply these rules of construction.

Specifically, § 1.51 states that the special provision prevails "unless the general provision is the later adoption and the manifest intent is that the general provision prevail." Rule 41 of the Rules of Criminal Procedure was adopted on January 1, 1973, became effective on June 13, 1975 and predates § 2931.01 which became effective January 1, 1976. In the present case, the Fifth District noted that both §2933.21 and Crim. R. 41 are general provisions to the specific exclusion of a probate judge and probate court in §2931.01(B) and (C). [pg 6]. As these provisions cannot be given dual effect, §2931.01(B) and (C) must prevail as the later adopted special provision. Additionally,



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even if 2931.01(B) and (C) are general provisions, they must still prevail as they are the later enacted and a manifestation of the legislature's intent to specifically exclude a probate judge or the probate court from Chapters 2931 to 2953 of the Ohio Revised Code. The State also fails to provide any guidance or authority that indicates the restructuring of the Ohio Constitution abrogated R.C. § 2931.01. Additionally, House Bill 154, passed by the 127<sup>th</sup> General Assembly, amended R.C. § 2931.01 to conform with the abolition of mayor's courts and the creation of community courts. Therefore, the General Assembly has had the opportunity to amend or even eliminate R.C. § 2931.01 and has refused to take any action that alters either the definition of "judge" or "court" under R.C. §2931.01(B)/(C).

To further the assertion that a probate judge possesses the authority to issue a search warrant, the Appellant cites several distinguishable cases. Initially, Appellant contends that the Eleventh District case, *State v. Tatonetti*, 11<sup>th</sup> Dist. No. CA 1021, 1983 WL 6255, 1983 Ohio App. LEXIS 12524, stands for the above proposition. Appellant's Brief at 5. However, the Appellant fails to instruct this Court on the actual rationale of the Eleventh District in *Tatonetti*. In *Tatonetti*, the Appellant argued that a judge within the Geauga County Probate-Juvenile Court was without authority to issue a search warrant. *Tatonetti*, 1983 WL 6255, at \*2. The Court cited Criminal Rule 2 which defines "judge" as including a judge presiding over juvenile court. *Id.* The Court then stated "[w]e conclude a judge of a Common Pleas Court-**Juvenile Division** is authorized to issue search warrants under the provisions of Crim. R. 41(A)." *Id.* (emphasis added).

The Court in *Tatonetti* conducted a thorough analysis under Crim. R. 2 and 41(A) to determine that a juvenile court judge was authorized to issue search warrants. *Id.* at \*2.



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The Court took effort to specifically tailor its holding by stating “[w]e conclude a judge of a Common Pleas Court-**Juvenile Division** is authorized to issue search warrants under the provisions of Crim. R. 41(A).” *Id.* (emphasis added) In the present case, Judge Park is a Probate Division judge and not a Juvenile Division judge which may more often hear criminal matters.

The State also uses *State v. Cotton* (1978), 56 Ohio St.2d 8, 381 N.E. 2d 190, for the proposition that the Ohio Supreme Court has rejected the argument that probate division courts have no authority to hear and decide criminal cases. Appellant’s Brief at 5–6. The Court in *Cotton*, however, did not address the issue of whether a probate judge has the same authority as a general division common pleas judge in issuing search warrants. The Court found that a probate judge may be appointed by the Supreme Court pursuant to Article IV, Section 5(A)(3) to sit on a three judge panel in a death penalty case. *Cotton*, 56 Ohio St. 2d at 12–13, Ohio Const., Art. IV, § 5(A)(3). The *Cotton* Court made no declaration or ruling as to whether a probate judge has authority to sign a search warrant. In the present case, there exists no evidence that Judge Park was ever appointed to oversee criminal matters generally or the present matter specifically.

Similarly, in *State v. Bays* (1999), 87 Ohio St. 3d 15, 20, 716 N.E. 2d 1126, the Ohio Supreme Court was asked to consider whether the presiding judge of a Common Pleas Court could appoint a judge of that court’s probate division to sit on a three judge panel. In *Bays*, the Ohio Supreme Court noted, initially, that this argument was actually waived by the Appellant’s failure to object to the probate judge during trial. *Id.* The Court then ruled that the appointment did not rise to the level of plain error because of the rejection of such an argument in *Cotton*. *Id.* The Court in *Bays* did not rule on whether or



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not a probate judge has authority to sign a search warrant. In the present case, there is no evidence in the record that Judge Park of the Stark County Common Pleas Court, Probate Division was appointed by a presiding judge. See Report at 5-6. In fact, the Magistrate's Report and Recommendation in the present case took the time to find that there was "no evidence of the probate judge presid[ing] over the issuance of the search warrant by appointment".

Although the State argues that the Ohio Supreme Court has had the opportunity to decide the current matter many times over the last thirty years it cites only cases where the Supreme Court ruled on a different matter entirely. *Cotton* and *Bays* are both factually distinguishable from the present case. In these prior cited cases the Ohio Supreme Court upheld only a Probate Judge's participation in criminal cases where that Probate Judge was assigned by a presiding judge from the respective Court of Common Pleas pursuant to Section (5)(A)(3) of Article IV of the Ohio Constitution. *Spicer* (2001), 91 Ohio St. 3d 469; *Bays* (1999), 87 Ohio St. 3d at 20; *Cotton* (1978), 56 Ohio St.2d 8. As previously noted, Probate Judge Park was never appointed to oversee any specific criminal case or criminal matters in general.

The Appellant is correct that the 1968 amendments to the Ohio Constitution added the Probate Judge to the Court of Common Pleas. However, the General Assembly still saw fit, nearly eight years later, to keep language via R.C. § 2931.01 which excluded the Probate Court and judge from the definition of "court" and "judge" in chapters 2931 to 2953. The Appellant, conveniently, presumes this behavior as a mere oversight by the legislature instead of an attribution of the legislature's intent to exclude the probate court and probate judge from Chapters 2931 to 2953. Therefore, R.C. § 2933.21, which



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provides jurisdiction to authorize search warrants to a judge of a court of record, falls within the range of statutory chapters that would have been considered by the General Assembly in 1976 when R.C. §2931.01 became effective.

The Appellant requests that this Court use valuable judicial resources reconciling provisions of the Ohio Revised Code that do not present a contradictory view. If the Appellant wishes for the elimination of § 2931.01, he is better suited to petition the legislature for such a change. Both § 2931.01 and the Criminal Rules exclude a probate judge from issuing a search warrant. Instead, the Appellant seeks judicial review to continue its long held, and unreasonable, practice of judge shopping and receiving authorization of search warrants from a probate judge wholly lacking the authority to issue such a document. For these reasons, this Court must deny jurisdiction for the propositions of law presented by Appellant.

### CONCLUSION

For the reasons enumerated and briefed above, Appellee respectfully requests that this Court deny jurisdiction to hear the propositions of law presented by the Appellant. A Probate Judge does not have the proper subject matter jurisdiction to make a probable cause determination and authorize a request for a search warrant pursuant to the both the Ohio Revised Code and the Criminal Rules. The State has provided no authority upon which to base its contention that a Probate Judge does have such authority. Furthermore, if Appellant seeks a change to the Ohio Revised Code, such an endeavor must be set upon in the state legislative body, not this Court.



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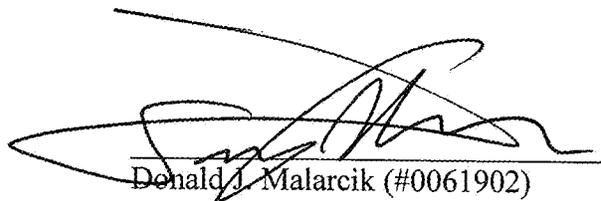


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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing motion was delivered on this 9<sup>th</sup> day of August, 2013 via U.S. Mail upon the following:

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