ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	Case No. 13-0688
Plaintiff-Appellee,	*	On appeal from the Lucas County Court of Appeals, Sixth Appellate District,
-vs-	*	Case No. L-12-1262
BRANDON LEE HOFFMAN,	*	
Defendant-Appellant.	*	
	*	

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INTRODUCTION

While executing arrest warrants for misdemeanor charges, Toledo Police officers discovered appellant was in possession of a gun registered to the victim of a brutal murder. Police dialed the number of the victim's cell phone and determined that appellant was also in possession of the victim's phone, which was lying in plain view at the scene of the arrest. Police then sought and obtained a search warrant for the premises, after which they discovered still more evidence incriminating appellant in the murder.

When appellant was charged with the murder, he filed a motion to suppress arguing that the arrest was invalid because there was no independent judicial finding of probable cause for the misdemeanor charges. Appellant did not contend that probable cause did not exist, merely that the issuing court did not make any finding as to probable cause.

The trial court denied the motion to suppress, and the Sixth Appellate District affirmed. Appellant now seeks a rule of law from this court that a warrant issued without a magisterial finding of probable cause is invalid and that police officers, even those who did not seek the warrant, may not in good faith rely on such warrants.

But appellant's proposed rule of law punishes law enforcement for the acts of the judiciary at the same time it imposes the cost of suppression of evidence related to a brutal crime. Because the exclusionary rule does not apply to deter the actions or inactions of the judiciary, suppression is inappropriate. Moreover, the misdemeanor complaints were filed in the normal course of law enforcement in conformity with the judiciary's policies at the time.

The complaints were also filed in a jurisdiction in which the Court of Appeals had previously approved an arrest based on a complaint identical in form to the complaints against Hoffman. *See State v. Overton*, 6th Dist. App. No. L-99-1317, 2000 Ohio App. LEXIS 3919. Although the Sixth District overruled *Overton* in Hoffman's case, until that date it was still good law and was indistinguishable in any material respect from Hoffman's. *See* Opinion and Judgment Entry, *State v. Hoffman*, Lucas C.P. Case No. CR 11-2970 (Aug. 27, 2012) at p. 11 ("*Hoffman I*"); and *State v. Hoffman*, 6th Dist. No. L-12-1262, 2013-Ohio-1082, ¶19 (*"Hoffman II"*).

Suppression under the circumstances of the case does not serve to deter police misconduct. Rather, suppression burdens law enforcement with the task of second-guessing both the court issuing the arrest warrants and the Court of Appeals in the jurisdiction. Because the exclusionary rule should not punish law enforcement for the policies and procedures of the judiciary, or for reliance on appellate decisions, suppression in this case is inappropriate, and the judgments of the trial court and the Sixth Appellate District should be affirmed.

STATEMENT OF THE CASE

On December 6, 2011, appellant Brandon Hoffman was indicted on a single count of aggravated murder in violation of R.C. 2903.01(B),(F) and a single count of aggravated robbery in violation of R.C. 2911.03(A)(3). Hoffman filed a motion to suppress evidence recovered during the execution of an arrest on unrelated charges, but the trial court denied the motion. The trial court did not reach the question of whether some of the evidence would have been discovered independent of the arrest.

Hoffman withdrew his plea of not guilty and entered a plea of no contest to both counts. He was sentenced to life without parole for the aggravated murder conviction, to be served concurrently with a term of 11 years imprisonment for the aggravated robbery conviction. The Sixth Appellate District affirmed the trial court's judgment. *See Hoffman II*. Like the trial court, the Court of Appeals did not address the question of whether any of the evidence would have been discovered independent of the arrest.

Hoffman now seeks review of the Sixth District's decision.

STATEMENT OF FACTS

Misdemeanor Complaints against Brandon Hoffman. In the fall of 2011, Toledo Police Detective Kim Violanti investigated a charge of breaking and entering at 337 Chapin Street. The homeowner and two eye witnesses reported seeing the next door neighbor, Brandon Hoffman, coming and going from the house and putting things into his car. Detective Violanti also viewed a video recording of the incident herself. Based on the interviews and the video recording, she identified Hoffman as a suspect. (Tr. June 8, 2012 at pp. 22-23, 29, 38-39.)

On November 11, 2011, Detective Violanti filed three misdemeanor criminal complaints for theft, criminal damaging, and house stripping against Hoffman in Toledo Municipal Court. The complaints listed the location of the offenses, the items taken, and the victim's name. The complaints also stated the defendant's name, social security number, a Regional Identification Database (or "RID") number, and last known address. The complaints did not summarize the evidence against Hoffman. However, Detective Violanti also filed a praecipe ordering subpoenas of the two eyewitnesses.

Violanti presented the complaint and praecipe to a clerk at the Toledo Municipal Court. The clerk asked Violanti if everything was correct and truthful, and Violanti stated that it was. (Tr. June 8, 2012 at pp. 22-39.)

Investigation of Murder of Scott Holzhauer. Two weeks after the warrants were issued, on November 26, 2011, police responded to a call to Scott Holzhauer's home. They discovered Holzhauer's body face down on his living room floor. Holzhauer's head was lying in a pool of blood, and a crowbar was embedded in his skull. A gun safe nearby was open and empty and a gun box was lying on the floor. (*Id.* at pp. 42-43, 59-60.)

Police at the scene learned that Holzhauer normally kept his cell phone on the TV tray next to a chair, where there was a "significant, massive amount of blood spatter." An area on the tray "was void of any blood spatter . . . in the shape of what appeared to be a flipped cellular telephone." (Tr. Aug. 24, 2012 at p. 11.)

Officer Alexander Schaller interviewed Holzhauer's girlfriend, Ms. Rafferty, who had been trying to call Holzhauer's cell phone. Officers contacted their communications department, which began efforts to trace the phone's location. (Tr. June 8, 2012 at pp. 51-53, 90.)

Mr. Holzhauer was known in the neighborhood to possess firearms. When police could not find guns that neighbors described, they believed "there were several handguns and possibly automatic weapons missing from that residence." (Tr. Aug. 12, 2012 at p. 13.)

Officer Schaller spoke with a neighbor, Mr. Gerard, who reported that a man

named Brandon had recently visited Holzhauer, and Holzhauer showed Brandon some firearms. Gerard also said that Brandon had borrowed a crowbar from Holzhauer. A second neighbor also reported to officers that Holzhauer had mentioned a sale of guns to a man named Brandon. Brandon was described as a white male with short brown hair and tattoos on his arms and face, 5'8" to 5'9" tall, and 175 pounds. (Tr. June 8, 2012 at pp. 44-46, 49-51, 61, 65.)

Neighbors told investigators that Brandon lived across the street from Holzhauer for a year or two. TPD's investigative services bureau determined that Brandon Hoffman was linked to that address and that Hoffman's last known address was 333 Chapin Street. The bureau also reported that a computerized database, NORIS,[1] showed that Hoffman had three active arrest warrants. Detective Jeffrey Clark and others with TPD agreed to have officers go to the Chapin address to serve the warrants. (Tr. June 8, 2012 at pp. 62-65.)

Officer Schaller testified that he was told that there were active misdemeanor warrants for Hoffman's arrest. He and Officer Zaborowski used a mobile data terminal to view Hoffman's photograph in which tattoos on his cheek and neck were visible. When officers arrived at the house, Officer Zaborowski could see through the curtains that Hoffman was lying on the living room floor. (Tr. at June 8, 2012 at pp. 53-57, 105-107.)

When one of the officers knocked, a man came to the door. Sergeant Nichols said "we're looking for Brandon," and the man stepped back, allowing police to enter.

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[1]"NORIS" refers to the Northwest Ohio Regional Information System.

(*Id.* at pp. 104-107.)

Hoffman was lying on the floor of the apartment, and officers immediately handcuffed him. After he was handcuffed, police discovered a .45 caliber Ruger semi-automatic registered to Scott Holzhauer that had been lying near or beneath Hoffman. (Tr. June 8, 2012 at pp. 84, 104-107, 114; Tr. Aug. 24, 2012 at pp. 7-8.)

Detective Jeff Clark did not arrive at Hoffman's house until after the arrest. However, Clark said that he would have gone to Hoffman's home to question him about Holzhauer's death, even if there were no active warrants for his arrest. (Tr. Aug. 24, 2012 at pp. 7, 14.)

When Clark entered Hoffman's living room, the gun was in the center of the room on the floor, and a couple cell phones were visible. Clark asked Detective Wise to dial the number for Holzhauer's cell. One of the cell phones, located near a baseboard of the room, immediately rang. Clark said that when the phone rang, he believed he had probable cause for a search warrant of the premises. Clark directed Sergeant Nichols to remove everyone from the house and secure the scene while Clark drafted and obtained a search warrant. He obtained the search warrant within about two and a half hours of securing the scene. (Tr. Aug. 24, 2012 at pp. 7-11.)

In the subsequent search, officers found sweatpants and a t-shirt with blood on them. The victim's keys were in the pocket of the pants. Hoffman's shoes were confiscated when he was taken into custody, and testing revealed that there were drops of Mr. Holzhauer's blood on the shoes. The return on the warrant and the inventory were dated the day after the discovery of Holzhauer's body, at 5:05 a.m. (Tr. Aug. 24, 2012 at pp. 11-12; Exhibits 2 and E; Tr. Sept. 5, 2012 at p. 16.)

Hearing on Hoffman's Motion to Suppress. In addition to testimony from Detective Violanti and officers investigating Holzhauer's murder, the court received testimony related to the process for filing criminal complaints in Toledo Municipal Court.

Nellie Mata, a deputy clerk at Toledo Municipal Court, received the complaints and followed the court's procedure for swearing in affiants requesting arrest warrants. She verified the defendant's name and address, Record Bureau or "RB" number, violation codes, date and description of the offense, and the officer's signature. She then administered an oath, asking Violanti, "Do you swear the statements made in this affidavit are true and that is your true and legal signature?" Ms. Mata testified she did not make a finding of probable cause, but she issued three misdemeanor warrants for Hoffman's arrest. (Tr. June 8, 2012 at pp. 93-97; Exhibit D.)

Kathryn Wiciak, an employee of the records section of the Toledo Police Department, testified that when a warrant is issued, Toledo Municipal Court enters the information into NORIS. Users of the database could enter a particular individual's name and retrieve a list of any active warrants for the individual's arrest, along with a notation that "a courtesy letter was sent" informing the defendant that the warrants were issued. (Tr. June 8, 2012 at pp. 13-16.)

Sergeant Nichols testified that he was not present when Detective Violanti filed the complaints or when the warrants were issued. Nichols said that he had no reason to believe that the arrest warrants were invalid. (Tr. June 8, 2012 at pp. 105, 109.)

Detective Clark likewise testified that he did not file the warrants for Hoffman's arrest, that he had no personal knowledge of how the warrants were issued, and that he had never before seen the Toledo Municipal Court's written procedure for receiving

criminal complaints and issuing warrants. Clark testified that he did not believe the procedure had been circulated in his department, and that TPD did not train municipal court employees. Finally, Clark said that until the issue was raised in this case, he believed that his oath was sufficient to satisfy the probable cause requirement for issuing arrest warrants. (Tr. June 8, 2012 at p. 63; Aug. 24, 2012 at pp. 4-6.)

Clarification of factual statements by appellant's amici. Appellant's amici suggest that Toledo Municipal Court continues to accept warrants without a probable cause determination. (Brief of Amici at p. 5.) Those suggestions are inaccurate. The Toledo Municipal Court changed its procedures after the trial court held that the process violated the Ohio and United States Constitutions and the Rules of Criminal Procedures. *See* Erica Blake, "*Warrants subject to increased scrutiny*," (Sept. 19, 2012), http://www.toledoblade.com/Courts/2012/09/19/Warrants-subject-to-increased-scrutiny.html, last accessed Jan. 10, 2013.

ARGUMENT

First Proposition of Law: The exclusionary rule is not applicable to punish judicial error or misconduct, and law enforcement officials may not be expected to oversee judicial practices and procedures.

A. The exclusionary rule is not an individual right.

The United States Supreme Court has repeatedly emphasized that the exclusionary rule "is not an individual right." *Herring v. United States,* 555 U.S. 135, 141, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009). The exclusionary rule is not intended to operate to the benefit of the individual or to "cure the invasion of the defendant's rights which he has already suffered." *United States v. Leon,* 468 U.S. 897, 906, 104 S.Ct.

3405; 82 L.Ed. 2d 677 (1984). Rather, the exclusionary rule was created to prevent future violations through the rule's deterrent effect. *Arizona v. Evans*, 514 U.S. 1, 10, 115 S.Ct. 1185, 131 L.Ed. 2d 34 (2005). In short, the exclusionary rule "is calculated to prevent, not to repair." *United States v. Calandra*, 414 U.S. 338, 347, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), quoting *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960). As a consequence, the exclusionary rule "applies only where it results in appreciable deterrence." *Herring*, *supra*, 555 U.S. at 141, quoting *Leon, supra*, 468 U.S. at 906. *See also Hudson v. Michigan*, 547 U.S. 586, 594, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006).

Herring emphasized 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.*, 555 U.S. at 140. In fact, the presumption is against exclusion, which " 'has always been our last resort, not our first impulse.' " *Id.*, quoting *Hudson,* 547 U.S. at 591. In contrast with an automatic application of the exclusionary rule upon a finding of a Fourth Amendment violation, *Herring* permits application of the exclusionary rule only when **police conduct** is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, *supra*, 555 U.S. at 144.

B. The exclusionary rule is intended to deter misconduct by law enforcement officials.

"In evaluating the need for a deterrent sanction, one must first identify those who are to be deterred." *United States v. Janis*, 428 U.S. 433, 448, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976). *Herring* unambiguously answered the question of precisely who

may be deterred by application of the exclusionary rule: exclusion is dependent "on the culpability of the police and the potential of the exclusion to deter wrongful police conduct." *Herring*, *supra*, 555 U.S. at 137. As noted by the Twelfth Appellate District, "[t]he exclusionary rule was not designed to exclude evidence of misconduct by an actor outside of law enforcement." *State v. Baughman*, 12th Dist. Nos. CA2010-08-069, CA2010-08-070, 2011-Ohio-162, ¶30.

C. The exclusionary rule has no application to deter judicial action or inaction.

Herring cited with approval the prior decision in *Evans,* which held that a judicial employee's mistake would not justify application of the exclusionary rule. *Evans* reasoned that the rule was crafted to curb police rather than judicial misconduct and there was "no basis for believing that application of the exclusionary rule in [those] circumstances" would have any significant effect in deterring the errors. *Evans*, *supra,* 514 U.S at 15. Because "court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime," they "have no stake in the outcome of particular criminal prosecutions." *Id.*, 514 U.S. at 14-15. *Evans* concluded by limiting sharply one of appellant's authorities, *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568-569, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971).

Evans' refusal to hold law enforcement accountable for the judiciary's actions is consistent with prior precedents from the United States Supreme Court. *See, e.g., United States v. Sheppard*, 468 U.S. 981, 990, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984) (exclusionary rule did not apply when a warrant was invalid due to a judge's failure to make a "clerical correction" to it).

And *Evans* is consistent with Ohio case law. The Twelfth Appellate District has considered and rejected the notion that the judiciary's mistakes of law will require application of the exclusionary rule. *See State v. Commins*, 12th Dist. App. Nos. CA2009-06-004, CA2009-06-005, 2009-Ohio-6415. In *Commins,* a court-appointed magistrate signed a search warrant, as she had done on numerous occasions before. The Twelfth District held that because the magistrate was appointed, she had no authority to issue the search warrant. *Id.*, ¶22. Nevertheless, evidence recovered in the search was not excluded, because a judicial employee's error was distinct from an error by law enforcement:

> Detective Eastes testified he never contacted or talked to the prosecutor's office regarding Magistrate Rowlands' authority to issue search warrants; until Magistrate Rowlands' authority to issue a search warrant became an issue in the case at bar, he never questioned her authority to issue search warrants; in fact, he believed she had the authority to issue search warrants, including the search warrant in the case at bar; and based upon that belief, he executed that search warrant in good faith. The error committed here was not on the part of Detective Eastes (or of the police conducting the search), but rather was an error on the part of Magistrate Rowlands in issuing the search warrant believing she had the authority to do so.

Id., ¶31, citing *State v. Wilmoth*, 22 Ohio St.3d 251, 266, 490 N.E.2d 1236 (1986).

D. The judiciary must determine the existence of probable cause.

Significantly, the judiciary is charged with assessing the proper procedures for issuing a warrant; the judicial officer "must judge for himself" whether probable cause exists. *Giordenello v. United States*, 357 U.S. 480, 486, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958). Application of the exclusionary rule for failures in the court's issuance of a warrant fails to deter constitutional violations by law enforcement:

> It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. "[Once] the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." Id., at 498 (BURGER, C. J., concurring). Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.

Leon, 468 U.S. at 921, 104 S.Ct. 3405, 82 L.Ed.2d 677.

Appellant advances a proposition of law that gives no regard whatsoever to where culpability lies. By asserting that officers cannot rely in good faith on warrants issued without a preliminary finding of probable cause, appellant seeks a rule of law that makes law enforcement responsible for the actions of other branches of the government.

The State respectfully submits that such a rule reaches too far, because law enforcement has no control over the judiciary. That lack of control is amply demonstrated by the record in this case. At the time of the second hearing on the motion to suppress, Toledo Police had begun filing complaints with a statement of supporting evidence. However, Toledo Municipal Court had not revised its procedures. (Tr. Aug. 24, 2012 at pp. 19, 52; see also Blake, "*Warrants subject to increased scrutiny*," (Sept. 19, 2012), http://www.toledoblade.com /Courts/2012/09/19/ Warrants-subject-to-increased-scrutiny.html, last accessed Jan. 10, 2013.)

Appellant's theory of the case -- that the absence of a magisterial probable cause determination invalidates a subsequent arrest on the warrant -- would arguably invalidate warrants even when police provided the appropriate evidentiary support.

Such a result is fundamentally unfair, considering that law enforcement cannot change or dictate the court's policies and procedures.

<u>Second Proposition of Law:</u> Police do not engage in misconduct when they make arrests based on warrants or when they file complaints for arrests using a format validated by the appellate court of the jurisdiction.

Appellant has not argued in this appeal that the warrants were so facially deficient that officers could not be rely upon them. *See* Tr. Aug. 24, 2012 at p. 62; *compare Leon, supra,* 468 U.S. at 923. Of course, any such argument would be unfounded. Facial defects in a warrant will not necessarily result in suppression of evidence obtained during their execution. Courts considering suppression must still examine the culpability of law enforcement in obtaining the warrant. *See, e.g., United States v. Rosa*, 626 F.3d 56, 58-59 (2d Cir.2010); *United States v. Allen*, 625 F.3d 830 (5th Cir.2010); *United States v. Otero*, 563 F.3d 1127 (10th Cir.2009); and *United States v. De La Torre,* 10th Cir. No. 12-7084, 2013 U.S. App. LEXIS 22269 (Nov. 1, 2013).

Moreover, as in *Herring,* the officers making the decision to arrest Hoffman relied upon a computer database showing active warrants for his arrest. The arresting officers did not obtain the warrants or the complaints underlying the warrants, and they had no personal knowledge of the process involved in these warrants. *Compare Giordenello*, 357 U.S. at 481-482, 78 S.Ct. 1245, 2 L. Ed. 2d 1503 (narcotics agent obtained arrest warrant without establishing probable cause and then used the defective warrant to arrest defendant); and *State v. Mendell*, 2nd Dist. No. 24822, 2012-Ohio-3178 (detective who served the arrest warrant on the defendant also filed the

criminal complaint).

In contrast with the officers involved in *Giordenello* and *Mendell*, Detective Violanti did not physically arrest Hoffman. She filed the complaints for the misdemeanor warrants on November 11, 2011, well before Holzhauer's death and Hoffman's identification as a person of interest in the murder. Officers uninvolved in the misdemeanor complaints then arrested Hoffman in reliance on computer records showing that warrants existed for his arrest. The record does not reflect that the arresting officers had the opportunity to review the criminal complaints against Hoffman.[2] Rather, Sergeant Nichols testified that he was not present when the complaints were filed against Hoffman and had no reason to believe they were invalid. Detective Clark testified that he learned about the warrants from the investigative services bureau. (Tr. June 8, 2012 at pp. 63, 105, 109.)

But even if the full criminal complaints were reviewed by the testifying officers or by anyone else at TPD, reliance on the warrants was justified based on a previous decision from the Sixth Appellate District, *State v. Overton*, 6th Dist. App. No. L-99-1317, 2000 Ohio App. LEXIS 3919. In *Overton*, an officer executing an arrest warrant discovered crack cocaine in the defendant's possession. When she was charged with cocaine possession, she moved to suppress evidence of the crack on grounds that the arrest warrant was based on an invalid complaint. That complaint stated

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[2]Although a copy of the complaint must be attached to the warrant,"[t]he officer need not have the warrant in the officer's possession at the time of arrest." Crim.R. 4(C)(1) and (D)(3).

> Complainant being duly sworn states that Desarie Overton defendant at Toledo, Lucas County, Ohio on or about July 10, 1998 did violate ORC # 2925.13 constituting a charge of permitting drug abuse in that the defendant, being the owner, lessee, or occupant of certain premises, did knowingly permit such premises to be used for the commission of a felony drug abuse offense, to wit: Desarie Overton being the lessee, owner, or occupant of 620 Belmont, Toledo, Ohio 43607 knowingly permitted Cocaine, a schedule two controlled substance to be sold and possessed by the occupants, there, both being in violation of the Ohio Revised code, a felony drug abuse offense. This offense occurred in Toledo, Lucas County, Ohio.

Id., [*6].

The complaint in *Overton* is virtually identical to the form of the three complaints at issue in this case. But despite the fact that the *Overton* complaint did "no more than recite the statutory elements" of the crime, the court held upheld the order denying suppression of evidence. *Id.*, [*3] (Sherck, J., dissenting). The court reasoned that the complaint "listed a specific code section and contained specific factual information sworn to by a fellow Toledo Police Detective," and was "certified by a clerk of court pursuant to Crim.R. 4," so that the arresting officer "had reasonable ground to believe that the offense was committed and reasonable ground to believe that the person alleged to have committed the offense is guilty of the violation." *Id.*, at [*6-7]. Neither the Ohio Supreme Court nor the United States Supreme Court granted review of the decision. *See State v. Overton*, 91 Ohio St.3d 1415, 741 N.E.2d 142 (2001); and *Overton v. Ohio*, 534 U.S. 982, 122 S.Ct. 389, 151 L.Ed.2d 317 (2001).

The U.S. Supreme Court has clarified that police officers are entitled to rely on binding judicial precedent in the conduct of their professional duties. *See Davis v. United States,*131 S.Ct. 2419, 180 L.Ed.2d 285 (2011). In *Davis*, police searched a

vehicle's passenger compartment following an arrest in conformity with Eleventh Circuit precedent. After the search, the Supreme Court issued *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). The vehicle's "search turned out to be unconstitutional under *Gant*." *Davis, supra*, 129 S.Ct. at 2428.

Despite the fact that the search was unconstitutional, evidence recovered in the search was not excluded. *Davis* reasoned that "when binding appellate precedent specifically authorizes a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities." An officer who relies on binding appellate precedent "acts as a reasonable officer would and should act," so that the effect of applying the exclusionary rule "can only be to discourage the officer from do[ing] his duty." *Id.*, 131 S.Ct. at 2429 (quotation marks and citation omitted). *Accord United States v. Barbary*, S.D.Fla. No. 12-60011-CR-Rosenbaum, 2012 U.S. Dist. LEXIS 146824 (S.D.Fla.2012).

As in *Davis*, police in this case were entitled to rely upon appellate precedent authorizing a specific practice. The criminal complaint in *Overton* included the code section, the elements of the crime charged, facts sworn to by the officer, and the clerk's certification, without supporting evidence. Nevertheless, the Sixth Appellate District held that arresting officers had probable cause to make an arrest based on the warrant.

Appellant does not address Overton in his brief on the merits in this court, but in the lower courts, appellant contended that *Overton* is distinguishable, arguing that the sole issue *Overton* was the complaint's facial validity, whereas here the trial court heard evidence that no probable cause determination was made. *See, e.g.,* Brief of

Appellant, filed Oct. 19, 2012 at pp. 9-10. In fact, the dissent in *Overton* raised--but the majority apparently rejected--the argument that the form of the complaint was insufficient to support any probable cause determination by a court official:

> Warrants satisfactory to meet the requirements of the Fourth Amendment must be obtained from a neutral and detached judge, magistrate, clerk, or other officer of the court who shall assess the evidence presented and determine whether there is probable cause that such warrant should issue. Since it is the independent official who is charged with making this determination, it has long been held that a mere recitation of the statutory elements of the crime is not sufficient to support a finding that probable cause exists.

Id., at [*9] (Sherck, J., dissenting) (citations omitted). As the trial court concluded, *Overton* was identical in all material respects to Hoffman's case, and the majority's rejection of the dissent permitted the arresting officers in this case to rely in good faith on a warrant based on a similar complaint. *Hoffman I* at 10-14.

Appellant and appellant's amici argue that Detective Violanti was at fault for filing a complaint without a statement of probable cause or that T.P.D. was at fault for not training officers to include a statement to support probable cause. But at worst, Detective Violanti and the department filed criminal complaints, which the judicial officer accepted in conformity with the court's past practices, and after the appellate court had contemplated the validity of an arrest based on a similar complaint and held that the arrest was supported by probable cause.

The process of filing the complaints in this case was far removed from the intentional and flagrant abuses that gave rise to the exclusionary rule, in which officers took action without any show of judicial authority. For example, in one early case, officers broke into a home, confiscating papers and then returning with marshals in

order to confiscate more. *Herring, supra,* 555 U.S. at 143, citing *Weeks v. U.S.*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). In contrast with this case, in which the lower court unambiguously held that a determination of probable cause could have been made on the evidence available to Detective Violanti, officers in *Weeks* did not have a warrant and "could not have gotten one if they tried." *Herring, supra; see also Hoffman I* at f.n. 16.

In another case, officers went to an office and "made a clean sweep of every paper" in a seizure even the government admitted "was an outrage." *Herring, supra,* 555 U.S. at 144, citing *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). Officers in that case acted "without a shadow of authority." *Id.* Here, in contrast, officers acted under the authority of warrants issued in conformity with the appellate court's decision in *Overton.*

In *Mapp v. Ohio*, officers forced open a door to a home, prevented the homeowner's attorney from entering, and forced the homeowner into handcuffs as they searched her house. *Herring*, 555 U.S. at 144, citing *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Officers in *Mapp* "brandished what the court concluded was a false warrant." Of course, officers arresting Hoffman did not fabricate their legal authority; they merely sought to arrest Hoffman on warrants that pre-dated the murder of the victim in this case.

In filing the criminal complaints, Detective Violanti followed the court's procedures, which had survived a previous appellate challenge in the jurisdiction. Officers executing the arrest warrant did so with the knowledge that a brutal murder had

been committed, and some of the guns belonging to the victim appeared to be missing. *Hoffman II*, 2013-Ohio-1082, ¶26. Despite their legitimate concerns with public safety, as soon as Detective Clark saw clear evidence connecting Hoffman with the murder, he immediately took steps to secure the scene and obtain a search warrant. The officers' conduct was consistent with normal practices and can hardly be said to be "official lawlessness in flagrant abuse" of basic constitutional rights. *Compare Mapp, supra*, 367 U.S. at 655.

<u>Third Proposition of Law</u>: The deterrence benefits of exclusion do not outweigh the substantial societal costs in this case.

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. * * * [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.

Herring, supra, 555 U.S. at 141 (quotation marks and citations omitted).

A case-by-case analysis is essential to fulfill the purpose of the exclusionary rule:

> Application of the rule thus deflects the truth-finding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating

disrespect for the law and administration of justice.

Stone v. Powell, 428 U.S. 465, 490, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). A "case-by-case approach examining the culpability and conduct of law enforcement" is also "more appropriate given the preferences expressed in *Davis* for cost-benefit analysis . . . as opposed to a 'reflexive' application" of the exclusionary rule. *State v. Johnson*, 12th Dist. No. CA2012-11-235, 2013-Ohio-4865, ¶23.

In this case, the social costs of applying the exclusionary rule are tremendous. Clear evidence linked Hoffman to a brutal murder. Application of the exclusionary rule in such a case is likely to have the effect of "generating disrespect for the law and administration of justice." *Powell, supra.*

On the other hand, the benefits of applying the rule are minimal when the critical action was that of the judiciary rather than law enforcement. *Leon*, 468 U.S. at 917, 104 S.Ct. 3405, 82 L.Ed.2d 677. As *Leon* observed, other forms of deterrence exist to curb misconduct by judicial officials. Judicial employees are "subject to court supervision" and remedies for "rubber stamp" approvals include "closer supervision or removal." *Id.*, at f.n. 18.

While *Leon* acknowledged that "a ruling by an appellate court" might also serve to deter judicial misconduct, such a ruling did not occur in this case before the warrants were issued. *Id.*, at f.n. 15. To the contrary, *Overton* and the subsequent denials of further appellate review appeared to validate the court's procedures. When Detective Violanti filed the complaints in a form approved in *Overton,* she " 'act[ed] as a reasonable officer would and should act' under the circumstances." Opinion and

Judgment Entry, Lucas C.P. Case No. CR 11-2970 (Aug. 27, 2012) at 14, quoting *Davis, supra*, 131 S.Ct. at 2429. Suppression thus has minimal value to weigh against the social cost of suppression.

Fourth Proposition of Law: In any event, the evidence would inevitably have been discovered pursuant to search warrant.

Under the doctrine of inevitable discovery, evidence that was obtained illegally is still admissible if the state demonstrates a reasonable probability that the law enforcement officers would inevitably have discovered the evidence during the course of a lawful investigation. *See State v. Perkins*, 18 Ohio St.3d 193, 196, 480 N.E.2d 763 (1985). *See also Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

In this case, Detective Clark testified that Hoffman was identified as a person of interest in Holzhauer's murder while officers were still at the crime scene. Clark also testified that he would have gone to Hoffman's house even if the warrants were not listed on the computerized database. Moreover, officers at the crime scene were aware that Holzhauer's cell phone was missing and had already undertaken efforts to locate it.

When officers got to Hoffman's house, they were admitted by a third party, without the use of force. At least a couple cell phones were in plain sight, and when Detective Clark had someone dial Holzhauer's cell phone number, a phone located by the baseboard and away from the center of the room rang. Clark testified that as soon as the cell phone rang, he knew he had probable cause to obtain a search warrant, and he had the house cleared and began the process of obtaining a warrant.

Appellant argued in the lower court that the address of 333 Chapin was obtained only because it was listed on the warrants. In fact, Detective Clark testified that he got

the address from the investigative bureau, but that he did not know the bureau's source. He pointed out that NORIS may be queried for driving records or information contained in the RID system, as well as for any active warrants. Appellant's address could have been listed elsewhere in NORIS in addition to the warrants. (Tr. Aug. 12, 2012 at pp. 15-16, 33.)

The evidence of record demonstrates a reasonable probability that police would have discovered the phone, providing sufficient probable cause to obtain a search warrant even without the warrants for Hoffman's arrest. The cell phone and evidence discovered pursuant to the search warrant should therefore not be suppressed.

The State acknowledges that the trial court's decision was not based on the inevitable discovery doctrine. However, "Ohio appellate courts will find evidence saved from suppression by operation of the inevitable discovery rule even where it had apparently not been raised at the trial level." *State v. Lewis*, 6th Dist. Nos. L-09-1224, L-09-1225, 2010-Ohio-4202, ¶48, quoting *State v. Flippin*, 2d Dist. No. 93-CA-65, 1994 Ohio App. LEXIS 5604.

CONCLUSION

Evidence obtained during Hoffman's arrest should not be excluded, because the exclusionary rule's purpose is not served and because law enforcement would have inevitably discovered the evidence anyway. The decisions of the trial court and Sixth Appellate District should therefore be affirmed.

Respectfully submitted,

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CERTIFICATION

I certify that a copy of the foregoing was sent via ordinary U.S. Mail this 15th day of January, 2014, to David Klucas, 1900 Monroe Street, Toledo, Ohio 43604; Stephen P. Hardwick, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215; Jeff Gamso, Cuyahoga County Public Defender's Office, 310 Lakeside Avenue, Suite 200, Cleveland, Ohio 44113-1021; Matt Bangerber, 2720 Airport Drive Suite 100, Columbus, Ohio 43219; Jeff Gamso Maumee Valley Criminal Defense Lawyers, 1119 Adams Street, Second Floor, Toledo, Ohio 43624.

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