

IN THE SUPREME COURT OF OHIO  
2014

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

TERRANCE BROWN,

Defendant-Appellee.

Case No.

14-0104

On Appeal from the  
Wood County Court  
of Appeals, Sixth  
Appellate District

Court of Appeals  
Case No. WD-12-070

MEMORANDUM OF AMICUS CURIA OHIO PROSECUTING ATTORNEYS  
ASSOCIATION SUPPORTING JURISDICTION

RON O'BRIEN 0017245  
Franklin County Prosecuting Attorney  
SETH L. GILBERT 0072929  
Assistant Prosecuting Attorney  
(Counsel of Record)  
373 South High Street-13<sup>th</sup> Fl.  
Columbus, Ohio 43215  
614-525-3555  
sgilbert@franklincountyohio.gov

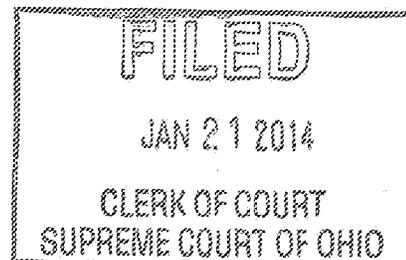
LAWRENCE GOLD 0078779  
(Counsel of Record)  
3852 Fairwood Drive  
Sylvania, Ohio 43560  
419-843-5719

COUNSEL FOR DEFENDANT-  
APPELLEE TERRANCE BROWN

COUNSEL FOR AMICUS CURIAE OHIO  
PROSECUTING ATTORNEYS  
ASSOCIATION

PAUL A. DOBSON 0064126  
Wood County Prosecutor  
THOMAS A. MATUSZAK 0067770  
(Counsel of Record)  
DAVID T. HAROLD 0072338  
Assistant Prosecuting Attorneys  
One Courthouse Square  
Bowling Green, Ohio 43402  
419-354-9250

COUNSEL FOR PLAINTIFF-APPELLANT



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## EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

Few constitutional issues are more important to the criminal-justice system than the scope of the Exclusionary Rule. Amicus curiae Ohio Prosecuting Attorneys Association (“OPAA”) respectfully requests that this Court accept jurisdiction in this case to determine whether, under Article I, Section 14 of the Ohio Constitution, an arrest that violates a statutory provision can trigger the Exclusionary Rule, even though the arrest was supported by probable cause.

The facts of this case are simple. A township police officer stopped defendant Terrance Brown for a marked-lanes violation, which ultimately led to Brown’s arrest for drug possession. The parties agreed that the traffic stop violated R.C. 4513.39(A), which gives the highway patrol and sheriffs and their deputies exclusive authority to make traffic stops on state highways for certain traffic offenses. Opinion at ¶ 12. Although acknowledging that the stop was supported by probable cause and thus did not violate the Fourth Amendment, *id.* at ¶ 15, the Sixth District nonetheless suppressed the drugs under the Ohio Constitution. The court concluded that the government’s interests in making the stop did not outweigh Brown’s privacy interests because “no extenuating circumstances were presented to justify an extraterritorial stop by township police officers for this type of traffic violation.” *Id.* at ¶ 20.

The Sixth District’s reliance on the Ohio Constitution to suppress evidence that is otherwise admissible under the Fourth Amendment is no small matter and warrants this Court’s full review. Any expansion of the Exclusionary Rule under the Ohio Constitution is a question of obvious constitutional substance and has significant practical consequences. As this Court has stated, “the exclusionary rule and the concomitant suppression of evidence generate substantial social costs in permitting the guilty to go free and the dangerous to remain at large.” *State v. Oliver*, 112 Ohio St.3d 447, 2007-Ohio-372, ¶ 12, quoting *Michigan v. Hudson*, 547 U.S. 586, 591 (2006), quoting *United States v. Leon*, 468 U.S. 897, 907 (1984) (internal quotation marks

omitted). Because of that “costly toll, the courts must apply the exclusionary rule cautiously and only in cases where its power to deter police misconduct outweighs its costs to the public.”

*Oliver* at ¶ 12, quoting *Hudson* at 591, quoting *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363-365 (1998).

Terrance Brown’s case is a prime example. He possessed 30 mg. of oxycodone, a second-degree felony. Opinion at ¶ 1. Yet the Sixth District’s decision—if not reversed—would withhold from the factfinder highly relevant evidence of Brown’s criminal behavior, resulting in this criminal being set free.

Moreover, this Court’s review is needed to address the lingering question of whether, under the Ohio Constitution, the constitutionality of an arrest that violates a statutory provision but was supported by probable cause turns on the application of a “balancing test.” In *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, this Court held that, when an arrest is supported by probable cause but violates R.C. 2935.26(A) (limiting arrests for minor misdemeanors), courts must balance the government’s interests against the individual’s interest in determining whether the arrest satisfies the Ohio Constitution. But in *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, this Court discarded this balancing test in the context of R.C. 2935.03 (limiting extraterritorial stops and detentions), holding that, even when an arrest violates a statutory provision, the arrest is constitutional under the Fourth Amendment as long as there is probable cause.

This Court has repeatedly admonished that Article I, Section 14 of the Ohio Constitution and the Fourth Amendment are “virtually identical” and thus “afford[] the same protection.” *State v. Buzzard*, 112 Ohio St.3d 451, 2007-Ohio-373, ¶ 13, n. 2, citing *State v. Robinette*, 80 Ohio St.3d 234, 238 (1997). Accordingly, this Court should accept jurisdiction to declare once

and for all that the reasonableness of an arrest under the Ohio Constitution—like the Fourth Amendment—turns *solely* on the existence of probable cause and does not require any additional balancing test when the arrest violates a statutory provision. This Court should overrule *Brown* or, at the very least, limit *Brown* to the narrow circumstances of that case.

In short, rather than taking a cautious approach to the Exclusionary Rule, the Sixth District in this case radically expanded the Exclusionary Rule under the Ohio Constitution by applying a “balancing test” that no longer exists under the Fourth Amendment. Such a drastic expansion of the Exclusionary Rule under the Ohio Constitution is too important an issue for this Court not to have the last word. OPAA respectfully requests this Court accept jurisdiction.

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

The OPAA is a private non-profit membership organization that was founded in 1937 for the benefit of the 88 elected county prosecutors. Its 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 that affect the office of the Prosecuting Attorney; and to aid in the furtherance of justice. The OPAA members have a strong interest in assuring that courts do not improperly expand the scope of the Exclusionary Rule under the Ohio Constitution. In the interest of aiding this Court’s review of this appeal, OPAA offers the following memorandum in support of Plaintiff-Appellant State of Ohio.

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

OPAA adopts the procedural and factual histories contained in the State’s memorandum in support of jurisdiction.

## ARGUMENT

**Proposition of Law:** The constitutionality of a seizure under the Ohio Constitution turns solely on whether there is probable cause or reasonable suspicion. The Ohio Constitution does not require any additional balancing of the government's interest against the individual's interest in privacy. [*State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, followed.]

OPAA does not concede that Ohio Constitution contains an Exclusionary Rule. *State v. Lindway*, 131 Ohio St. 166 (1936), paragraphs four, five, and six of the syllabus. *Lindway* has never expressly been overruled, but even if the Ohio Constitution really does have an Exclusionary Rule, then its application turns solely on whether the seizure is based on probable cause (or reasonable suspicion, if the seizure is a non-arrest investigative detention). Even when the seizure violates a statutory provision, the Ohio Constitution does not require any additional balancing of the government's interest against the individual's interest in privacy.

To start, it is well-settled that the Exclusionary Rule applies only to constitutional violations; it does not apply to statutory violations unless the statute itself requires exclusion. *State v. Emerson*, 134 Ohio St.3d 191, 2012-Ohio-5047, ¶ 32; *State v. Wilmoth*, 22 Ohio St. 3d 251, 262 (1986); *City of Kettering v. Hollen*, 64 Ohio St.2d 232, 234-235 (1980); *State v. Downs*, 51 Ohio St. 2d 47, 63-64 (1977); *State v. Myers*, 26 Ohio St.2d 190, 196 (1971).

In *Virginia v. Moore*, 553 U.S. 164 (2008), the United States Supreme Court held that an arrest that violates a statutory provision does not amount to a Fourth Amendment violation if the arrest was supported by probable cause. “[W]hen an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable.” *Id.* at 171, citing *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001). “Our decisions counsel against changing this calculus when a State chooses to protect privacy beyond the level that the Fourth Amendment requires.”

*Moore* at 171. “[A]n arrest based on probable cause serves interests that have long been seen as sufficient to justify the seizure.” *Id.* at 173, citing *United States v. Wren*, 517 U.S. 806 817 (1996). “A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional.” *Moore* at 174.

Following *Moore*, this Court in *Jones* refused to constitutionalize what was purely a statutory violation under R.C. 2935.03. Although the officer in *Jones* violated R.C. 2935.03 in arresting the defendant, this Court held that the “sole focus of the inquiry should have been on the stop itself because the violation of R.C. 2935.03 does not rise to the level of a constitutional violation for the reasons expressed in *Moore*.” *Jones* at ¶ 20. R.C. 2935.03 contains no remedy provision, and this Court “was not in the position to rectify this possible legislative oversight by elevating a violation of R.C. 2935.03 to a Fourth Amendment violation and imposing the exclusionary rule, because the stop in this case was constitutionally sound.” *Id.* at ¶ 21, citing *Moore* at 178. Establishing a remedy for a statutory violation is a job for the General Assembly, not the courts. *Id.*, citing *State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St.3d 246, 2006-Ohio-5202, ¶ 37.

Thus, after *Moore* and *Jones*, even when an arrest violates a statutory provision, the arrest is constitutional if it is supported by probable cause—period. (If the seizure is an investigative detention, then only reasonable suspicion is needed. *Jones* at ¶ 19, n. 4.) There is no requirement under the Fourth Amendment that the arrest satisfy any additional “balancing test.”

While this Court in *Brown* held that the existence of the balancing test provided “ample reason” for the Ohio Constitution to provide greater protection than the Fourth Amendment, *Brown* at ¶ 22, this holding is no longer viable after *Moore* and *Jones*. There is no reason—let

alone an “ample reason”—for the Ohio Constitution to require a balancing test when the Fourth Amendment does not.

Moreover, when the General Assembly provides no exclusion remedy for a statutory violation, courts have no more power to “rectify this possible legislative oversight,” *Jones* at ¶ 21, under the Ohio Constitution than they do under the Fourth Amendment. The separation-of-powers principles animating *Moore* and *Jones* are just as much part of Ohio’s Constitutional structure as they are under the Federal Constitution. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶¶ 41-53.

In the end, the Sixth District erred in holding that the Ohio Constitution requires probable cause *and* “extenuating circumstances.” In other words, while it is true in this case that “the constable has blundered,” the error was a *statutory* error, not a constitutional one that would trigger the Exclusionary Rule under the Ohio Constitution (if there is such a thing).

### CONCLUSION

For the foregoing reasons, OPAA respectfully submits that the within appeal presents a substantial constitutional question of such great public interest as would warrant this Court’s full review. It is respectfully submitted that jurisdiction should be accepted.

Respectfully submitted,

RON O’BRIEN 0017245  
Prosecuting Attorney



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Seth L. Gilbert 0072929  
Assistant Prosecuting Attorney  
373 South High Street-13<sup>th</sup> Fl.  
Columbus, Ohio 43215  
614/525-3555

Counsel for Amicus-Curiae OPAA

### CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, January 21, 2014, to THOMAS A. MATUSZAK, Wood County Prosecutor's Office, One Courthouse Square, Bowling Green, Ohio 43402; Counsel for Plaintiff-Appellant; and LAWRENCE GOLD, 3852 Fairwood Drive, Sylvania, Ohio 43560; Counsel for Defendant-Appellee.



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Seth D. Gilbert 0072929  
Assistant Prosecuting Attorney