ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	Case No. 13-0688
APPELLEE,	
vs.	On Appeal from the Lucas County Court of Appeals, Sixth Appellate District
HOFFMAN,	Court of Appeals Case No. L-12-1262
APPELLANT.	

REPLY BRIEF OF APPELLANT BRANDON HOFFMAN

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Reply to Propositions of Law

In response to Mr. Hoffman's Proposition of Law, the State and its *Amici* advance four arguments: the exclusionary rule does not apply to judicial misconduct; the arresting officers acted reasonably by relying on binding appellate precedent; the societal cost of exclusion does not justify the deterrent value; and the disputed evidence would have been obtained independently or inevitably. These arguments all fail in one or more of four ways: the arguments rest on misapplied legal principles; the arguments find no support in the record evidence before this Court; the arguments ignore the necessity of a magisterial finding of probable cause; and the arguments fail to acknowledge the admitted responsibility of the Toledo Police Department to make sure their arrest practices are legal.

Reply to First Proposition of Law

In its First Proposition of Law, the State makes a categorical argument the exclusionary rule is not applicable to punish judicial error, and law enforcement officials cannot be expected to oversee judicial behavior. Before addressing this proposition, it is important to crystalize the police conduct at issue.

The police conduct Mr. Hoffman seeks to deter is the 17 year practice of the Toledo Police Department of obtaining arrest warrants without the fundamental protection of a probable cause determination made by a neutral magistrate disengaged from the business of making arrests. This protection afforded citizens by our Constitutions is the foundation of our system of government that protects individual liberties above all else. Mr. Hoffman does not complain

about a technical or trivial oversight. He complains about a fundamental omission.

Contrary to the assertion of the State, Mr. Hoffman knows who is culpable (Appellee's Brief, p. 12). Mr. Hoffman seeks suppression based on the failure of the Toledo Police Department to recognize the obvious, systemic flaw in their arrest warrant process. "[E]vidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may be properly charged with knowledge, that the [challenged action] was unconstitutional under the Fourth Amendment.'" *Illinois v. Krull,* 480 U.S. 340, 348-349, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987) (quoting *U.S. v. Peltier,* 422 U.S. 531, 542, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975)).

The indisputable corollary to this dictate is that police officers are charged with a certain amount of rudimentary knowledge of criminal procedure. *U.S. v. Leon*, 468 U.S. 897, 919 n. 20, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); *U.S. v. Peltier,* 422 U.S. 531, 542, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975). This amount of rudimentary knowledge includes the necessity of a meaningful probable cause determination before issuing a warrant. The *Leon* Court made explicit that the good faith exception to exclusion does not apply where a magistrate wholly abandons his or her judicial role. A reasonably well trained officer knows not to rely on that warrant. *U.S. v. Leon*, 468 U.S. 897, 923, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

What the First Proposition of Law of the State fails to acknowledge is that it is the Toledo Police Department who want to arrest citizens for violations of the law, and it is their responsibility, and nobody else, to do it legally. This fact was conceded by Detective Clark at the suppression hearing in the Trial Court (Transcript of 8/24/12 Hearing, p. 19).

The scope of the negligence afforded the Toledo Police Department by the State and its *Amici* is both staggering and frightening. They argue it is not the job of the Toledo Police to

make sure their arrest procedures conform to the most basic tenets of the Constitution. Despite the frantic and energetic finger pointing at the Toledo Municipal Court, it is not someone else's job. It is the job of the Toledo Police Department, and they failed – for at least 17 years – to ensure that their arrest practices satisfied the dictates of the Fourth Amendment in the most fundamental way. That is the conduct to be deterred.

In the first part of its First Proposition of Law, the State argues the exclusionary rule is a judicial remedy and not an individual right. Mr. Hoffman concurs with this segment of the first proposition advanced by the State. It is not the purpose of the exclusionary rule to benefit an individual defendant. The purpose of the rule is to deter the police from future constitutional violations. Consequently, not every constitutional violation results in exclusion. Exclusion is required only where police conduct is sufficiently deliberate and culpable to justify deterrence. *Herring v. United States*, 555 U.S. 135, 144, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009).

In the remainder of their first proposition, the State argues the exclusionary rule is intended to deter misconduct by law enforcement officials and has no application to errors committed by court officials. This argument is premised on misapplied case law and fails to acknowledge the admitted responsibility of the Toledo Police Department to insure its arrest practices conform to the Constitution.

The State relies heavily on *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009), and *Arizona v. Evans*, 514 U.S. 1, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995), to support this proposition. The obvious distinction between the clerical errors of *Herring* and *Evans* and the failure of law enforcement to secure the required probable cause review for at least 17 years requires no additional comment. This case is not about data entry; it is about probable

cause.

Despite this distinction, *Herring* in particular remains instructive:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.
>
> . . .
>
> If the police have been shown to be reckless in maintaining the warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation
>
> *Herring v. United States*, 555 U.S. 135, 144, 146, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009)

These primary holdings of *Herring* make clear the emphasis of the inquiry is on police behavior. Exclusion applies to police behavior that is patently unconstitutional. *Id.* at 143, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009). The behavior of the Toledo Police can be summed up with one uncontroverted fact: for at least 17 years the Toledo Police secured thousands of arrest warrants without a magisterial finding of probable cause.

The fundamental nature of the magisterial finding of probable cause makes the police conduct here more than sufficiently reckless, and definitely grossly negligent. The evidence here reveals a warrant process identical to what is characterized in *Leon* as clearly unreasonable:

> The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979); in such circumstances, no reasonably well trained officer should rely on the warrant. Nor

> would an officer manifest objective good faith in relying on a warrant based on a affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'
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> *U.S. v. Leon*, 468 U.S. 897, 923, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)

For 17 years the Toledo Police Department submitted bare bones complaints rubber-stamped by the Toledo Municipal Court. The portrayal of this case as "an isolated example of minor negligence on the part of a single officer" is absurd (Brief of Amicus Ohio Prosecuting Attorneys Association, p. 10). The claim that the Toledo Municipal Court was neutral and fulfilled its judicial role is equally absurd (Brief of Amicus Ohio Attorney General, p. 14). In 17 years of arrest warrant applications by the Toledo Police Department, no deputy clerk of the Toledo Municipal Court ever asked a question or said "no" to an arrest warrant request (Transcript of 6/8/2012 hearing, p. 32-33; Transcript of 8/24/12 Hearing, p. 47-50). This meets any definitional standard of reckless, grossly negligent, or systemic failure. The proper application of *Herring* and *Evans* requires exclusion.

Reply to Second Proposition of Law

In its Second Proposition of law, the State argues that the officers relied on binding precedent when carrying out the warrant process, and the arresting officers could reasonably rely on the computer record indicating Mr. Hoffman had active arrest warrants. Mr. Hoffman contends these arguments once again rest on misapplied legal principles and are unsupported by the record.

In its brief, the State questions whether Mr. Hoffman continues to challenge the facial

sufficiency of the complaints. He does to the extent he still needs to challenge them. The Sixth District Court of Appeals held the complaints were constitutionally insufficient because they contained only statutory allegations and were not issued by a detached magistrate, and overruled *State v. Overton*, 6th Dist. No. L-99-1317 (September 1, 2000), 2000 WL 1232422. *State v. Hoffman*, ___ Ohio App.3d ___, 2013-Ohio-1082, 989 N.E.2d 156, ¶16, 17, 19 (6th Dist.). The State makes no argument that the complaints are facially sufficient, so the question was not addressed in Mr. Hoffman's merit brief.

In support of its second proposition, the State relies heavily on *Davis v. U.S.*, ___ U.S. ___, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011). *Davis* holds that officers act reasonably for exclusionary rule analysis when they follow binding appellate precedent. *Id.* at ____, 131 S.Ct. at 2428-2429, 180 L.Ed.2d 285. The binding precedent relied on by the State is *State v. Overton*, 6th Dist. No. L-99-1317 (September 1, 2000), 2000 WL 1232422. At the time Mr. Hoffman's motion to suppress was heard, *Overton* was the only decision in the country to hold that bare bones pleading of a criminal complaint satisfied the Fourth Amendment.

The solitary existence of *Overton* in the legal realm is the first reason *Overton* was not binding precedent. The final arbiter of Federal Constitutional questions is the United States Supreme Court. *Cohens v. Virginia*, 19 U.S. 264, 5 L.Ed. 257, 6 Wheat. 264, 1821 WL 2186 (1821). State Courts frequently interpret and apply the United States Constitution. "In doing so, they are *not* free from the final authority of this Court." *Arizona v. Evans*, 514 U.S. 1, 8-9, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995)(emphasis in original).

In *Overton*, the Sixth District Court of Appeals considered the sufficiency of a criminal complaint that contained only statutory allegations with no supporting facts. The identical issue

was raised in both *Giordenello v. U.S.*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958), and *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971). All three cases addressed the question whether a criminal complaint that contains only statutory allegations satisfies the Fourth Amendment. *Giordenello* and *Whiteley* both said it did not; *Overton* said it did. It is difficult to argue that the unreported *Overton* decision carries greater weight than United States Supreme Court cases deciding the identical issue. *Overton* was not binding.

Another reason *Davis* is inapplicable is the absence of a probable cause determination by a detached magistrate in Mr. Hoffman's case. Nowhere in the history of *Overton* is it suggested that *no* probable cause determination was attempted or made. The absence of a probable cause determination by a detached magistrate was not raised, briefed, argued, or discussed at any point in the *Overton* proceedings. All of the discussion concerns the facial sufficiency or insufficiency of the complaint and clearly presupposed a probable cause determination made by someone, even if erroneous.

Without the constitutionally mandated neutral probable cause determination, it does not matter what the complaints say. A valid warrant cannot be issued. This Court recently discussed the constitutional significance of neutral scrutiny of arrest warrants in *State v. Hobbs*, 133 Ohio St.3d 43, 2012-Ohio-3886, 975 N.E.2d 965. This Court held that a probable cause review by a law enforcement agent who doubled as a deputy clerk was insufficiently neutral to satisfy the Fourth Amendment. *Id.* at ¶19. It did not matter what the complaint said. What occurred here was less sufficient than *Hobbs* because there was no probable cause review at all.

The omission of a probable cause review results in arrest warrants on which no officer

could reasonably rely. *Leon* holds that there can be no reasonable reliance where the magistrate "wholly abandoned his judicial role." It follows that there can be no reasonable reliance in a case where there was no judicial role undertaken by anybody.

The State also argues that the arresting officers could reasonably rely on the existence of another officer's warrant. This is conditionally true.

> Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.
>
> *Whiteley*, *supra*, at 568, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971).

This pronouncement was restated with approval in *Leon*. "Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a 'bare bones' affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search." *Leon* at 923 n. 24, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

The State suggests in their brief that the precedential value of *Whiteley* is minimal. *Whiteley* "clearly retains relevance in determining whether police officers have violated the Fourth Amendment." *Arizona v. Evans*, 514 U.S. 1, 8-9, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995). Mr. Hoffman claims a Fourth Amendment violation occurred in his case, and it cannot be cured by the warrants changing hands, no matter how reasonably.

Reply to Third Proposition of Law

The third proposition advanced by the State is the societal cost of exclusion does not justify the deterrent effect. Mr. Hoffman maintains this argument is unsupported by the record and clearly premature.

With less hysteria than its *Amici*, the State infers that granting Mr. Hoffman's motion to suppress allows a brutal murderer to go free. The response to this argument is that Mr. Hoffman's motion to suppress was denied. Nobody knows what would be excluded. That portion of the record is undeveloped.

The State apparently concedes that every item of evidence obtained would be excluded. Should this case be remanded for a hearing on the scope of exclusion, Mr. Hoffman expects a different attitude from the State. On the record before this Court, the societal cost of exclusion cannot be argued with any certainty.

Mr. Hoffman acknowledges the possible societal cost of exclusion. However, at issue here is the independent assurance of probable cause to arrest, the fundamental protection that separates us from a police state. The State contends that exclusion in this case will generate disrespect for the law. Mr. Hoffman contends the opposite is true. "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio,* 367 U.S. 643, 659, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

The charter of our existence requires a magisterial finding of probable cause made by one detached from law enforcement. It is the means by which our government prevents indiscriminate arrest. The minute the government takes away that protection, the law is no

longer worthy of respect.

Reply to Fourth Proposition of Law

In their Fourth Proposition of Law, the State claims the disputed evidence would inevitably have been found pursuant to a search warrant. Mr. Hoffman asserts the search warrant was tainted by the illegality of his arrest and cannot serve as an independent means of obtaining the evidence. Without the evidence obtained from the illegal arrest, the search warrant is unsupported by probable cause.

Disposition of this proposition turns on a single operative fact: the Toledo Police obtained the 333 Chapin address from the illegal arrest warrants. Despite some attempts at sidestepping, the testimony is clear that the address came from the warrants. State witnesses testified no fewer than five times that it was the address on the warrants that brought them to 333 Chapin (Transcript of 6/8/2012 hearing, p. 63, 64, 115; Transcript of 8/24/12 Hearing, p. 16, 25).

With this fact established, Mr. Hoffman contends that the authority relied on by the State is inapplicable. *Nix v. Williams,* 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) and *State v. Perkins*, 18 Ohio St.3d 193, 480 N.E.2d 763 (1985), admittedly stand for the contention that evidence seized unconstitutionally will not be excluded if the State shows the evidence would have been discovered by independent legal investigation. Both of these cases also require a showing by a preponderance that the evidence ultimately or inevitably would have been discovered by lawful means, independent from the illegality. *Nix v. Williams,* 467 U.S. 431, 443, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); *State v. Perkins*, 18 Ohio St.3d 193, 196, 480 N.E.2d 763 (1985). If there is no independent source, than the exception to exclusion does not apply.

It is well established that evidence gained by exploiting an illegality cannot be used to support a subsequent warrant. *Wong Sun v. U.S.*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). It is also clear that the State cannot show an independent source untainted by the illegality of the arrest warrants. At the 8/24/12 hearing, the State introduced Exhibit 2, the probable cause affidavit in support of the search warrant. There are three numbered paragraphs purporting to provide the reviewing judge probable cause. The first paragraph describes the scene at 842 Lorain, where Scott Holzhauer's body was found; there is no mention of Mr. Hoffman (Transcript of 8/24/12 Hearing, p. 23-30). The second paragraph asserts Mr. Hoffman was developed as a suspect; no supporting information was provided (*Id.*). The third paragraph recited all of the evidence found at 333 Chapin when the arrest warrants were served on Mr. Hoffman (*Id.*). Detective Clark admitted that without the information in the third paragraph, he would not have asked for a search warrant (*Id.* at p. 30).

This admission forecloses any serious consideration of this proposition of law. The search warrant rests entirely on the evidence derived from the illegal warrants. The independent source/inevitable discovery exception to exclusion is not applicable here.

Conclusion

Throughout its brief, the State argues that Mr. Hoffman seeks holdings and new rules that are novel and unfair. Mr. Hoffman seeks enforcement of his Fourth Amendment rights, which are neither novel nor unfair. He seeks enforcement of the requirement of probable cause found by a detached magistrate who was provided information from which he or she can make a decision. It is the bare minimum required by the Fourth Amendment.

The State goes to great lengths to argue that the exclusionary rule does not apply to judicial misconduct. They emphasize that it is police miscdonduct the exclusionary rule is to deter, but they spend very little time examining the actual conduct of the police here, conduct that falls well below the objectively reasonable standard illustrated in *U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The little discussion about the actual conduct claims officers provided appropriate information to the judicial officer who accepted it in conformity with the prevailing practice. This presupposes the existence of a judicial officer. For 17 years nobody at the Toledo Municipal Court ever asked a question or refused a warrant. It also presupposes that conformity and prevailing practice cure the constitutional ills, an assertion all the parties here know to be false.

The judicial second guessing predicted by the State as a consequence of granting Mr. Hoffman's motion to suppress reflects a basic misunderstanding of the applicable law. As long as the police give a disinterested magistrate information from which a probable cause determination can be made, they do not have to second guess the magistrate. That is the point of *Leon* and its progeny.

This case is as basic as it gets. It is a test of our commitment to the fundamental right to a probable cause determination by a third party before arrest. It did not happen here, and it has not happened for 17 years. Mr. Hoffman respectfully requests judgment from this Court granting his motion to suppress and remanding the case to the trial court for a hearing on the scope of exclusion.

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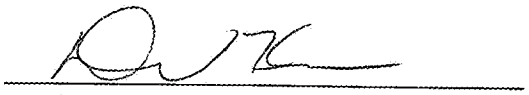

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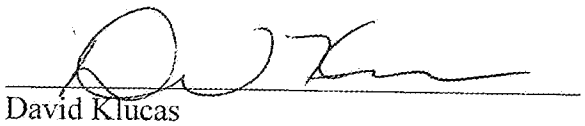

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Certification

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