IN THE SUPREME COURT OF OHIO
2016

STATE OF OHIO, Plaintiff-Appellee, -vs- SHERRI BEMBRY & HARSIMAN SINGH, Defendant-Appellants.	Case No. 16-238 On Appeal from the Mahoning County Court of Appeals, Seventh Appellate District Court of Appeals No. 2014 MA 51/52

BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTOR RON O'BRIEN IN SUPPORT OF APPELLEE STATE OF OHIO

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STATEMENT OF AMICUS INTEREST

The office of Franklin County Prosecuting Attorney Ron O'Brien handles thousands of felony cases every year. These cases often involve litigation over motion-to-suppress issues and the reach and scope of any Exclusionary Rule(s) under Ohio law. As a result, amicus curiae Ron O'Brien has a strong interest in such matters, which directly impact the work of his office and the admissibility of evidence in these felony prosecutions.

This case also involves the specific problem of heroin trafficking in Ohio, as defendant Singh was charged with trafficking heroin and had been identified in two sales of heroin to a confidential informant. Given the epidemic of heroin overdoses that Ohio is facing, amicus curiae Ron O'Brien has a strong interest in the successful prosecution and punishment of heroin traffickers in this state. The "[p]ossession, use, and distribution of illegal drugs represent 'one of the greatest problems affecting the health and welfare of our population.'" *Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991). Suppression in the present case would be a step in the wrong direction in that regard.

Accordingly, in the interest of aiding this Court's review herein, amicus curiae Ron O'Brien offers the present amicus brief in support of appellee State of Ohio and in support of the Seventh District's decision refusing to suppress evidence.

STATEMENT OF FACTS

Amicus adopts by reference the procedural and factual history as set forth in the State's brief and paragraphs three through six of the Seventh District's opinion.

ARGUMENT

Response to Defendants' Proposition of Law: A knock-and-announce violation will not lead to the suppression of evidence discovered during the ensuing execution of a valid search warrant, as there is no causal connection between the violation and the discovery of the evidence.

In executing the valid search warrant on the heroin trafficker's residence, the police mostly complied with knock-and-announce requirements. They knocked on the door, and, after 30 seconds, an occupant directly on the other side of the door asked "Who is it?" The police responded, "Police. Open the door." After many more seconds, the police forcibly entered.

The police had knocked and waited long enough, and their lone omission had been that they had not specified that they were there to execute a search warrant. If the police had only added two words to their announcement – "Police. Open the door. *Search Warrant*." – there would have been full compliance with knock-and-announce requirements. This is a case of near compliance in which the defendants seek the massive windfall of suppression.

There is no dispute that the defendants' suppression claim fails under the Fourth Amendment. As held in *Hudson v. Michigan*, 547 U.S. 586 (2006), a knock-and-announce violation will not justify suppression of the fruits of the execution of a valid search warrant. When the search warrant is valid, the manner of entry bears no causal relationship to the discovery of the evidence, which would have been discovered even if the police had fully complied with knock-and-announce requirements before making entry.

This Court has no option as to federal law. This Court is bound to adhere to

Hudson as a matter of federal law. *State v. Burnett*, 93 Ohio St.3d 419, 422 (2001). The defendants cannot obtain suppression under federal law.

This is why the defendants seek to invoke Ohio law in the form of a statute, R.C. 2935.12, which they seek to constitutionalize by incorporating its provisions into Article I, Section 14, of the Ohio Constitution. But the supposed constitutionalization of a statutory provision violates basic background principles of Ohio law and Ohio separation of powers: the General Assembly cannot amend the Ohio Constitution by mere statute; the General Assembly would control whether its statutory provision would authorize suppression; and this Court cannot engage in judicial constitutionalization of a mere statutory provision when the General Assembly could not have done so directly.

Given these basic problems with the defendants' proposition of law, and given that *Hudson* is soundly reasoned and should be followed on the state level, the defendants' suppression claim should be rejected.

A.

The defendants' proposition of law would stand American Civics principles on their head. They propose the following rule of law:

> The exclusionary rule is the appropriate remedy under Article I, Section 14 of the Ohio Constitution for a violation of R.C. 2935.12.

The defendants are seeking to elevate a mere statutory provision to the level of the Constitution and then seeking to employ an Exclusionary Rule they think applies under the Constitution. But an Exclusionary Rule under the Ohio Constitution would be limited to violations of that document; it would not incorporate mere statutory violations.

The Ohio Constitution is very clear on how the Ohio Constitution can be

amended. An amendment requires the approval of the people after the amendment process is initiated by petition, by the General Assembly, or by constitutional convention. Article II, Section 1a, Ohio Constitution; Article XVI, Sections 1 and 2, Ohio Constitution. "The Constitution is * * * subject to amendment only by the people, and neither the Legislature by legislative enactment, nor the courts by judicial interpretation, can repeal or modify such expression * * *." *Hoffman v. Knollman*, 135 Ohio St. 170, 181 (1939).

No such amendment process was undertaken in adopting R.C. 2935.12. It is a statute. It is not a constitutional amendment and cannot purport to be one. The General Assembly cannot amend a constitutional provision by passing a mere statute, and that is what the defendants are requesting by their proposition of law.

In addition, when enacting a statute, the General Assembly as a matter of separation of powers has plenary legislative power to craft the statute as it thinks best and has the ultimate and final say on whether its statute will have an Exclusionary Rule remedy attached to it. The people "vested the legislative power of the state in the General Assembly," and courts "must respect the fact that the authority to legislate is for the General Assembly alone * * *." *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶¶ 43, 48, 52. "The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, * * *." Id. ¶ 44 (quoting another case). The General Assembly's legislative power is plenary in enacting legislation. *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, ¶ 10.

Given the General Assembly's plenary control over its own legislation, this Court has correctly held that it will not apply any Exclusionary Rule to a statutory violation unless the General Assembly itself has provided a legislative mandate for such remedy. "In *State v. Myers* (1971), 26 Ohio St.2d 190, 196, * * * this court enunciated the policy that the exclusionary rule would not be applied to statutory violations falling short of constitutional violations, absent a legislative mandate requiring the application of the exclusionary rule." *Kettering v. Hollen*, 64 Ohio St.2d 232, 234 (1980). "This was, and is, a matter for the General Assembly. In our view, there is no judicial machinery available to produce the missing sanction." *Myers*, 26 Ohio St.2d at 197. "It is * * * clear that the General Assembly chose not to enact a statutory exclusionary rule that would come into play when evidence is obtained in violation of" the statute. *State v. Geraldo*, 68 Ohio St.2d 120, 128-29 (1981).

The defendants are attempting to circumvent the General Assembly in this respect. The statute makes no provision for an Exclusionary Rule, and yet they seek to have this Court apply an Exclusionary Rule to the statute through indirection by constitutionalizing the statute. This would amount to judicial legislation by invading the General Assembly's prerogative to decide for itself whether there will be an Exclusionary Rule for violating the statute. "Generally, establishing a remedy for a violation of a statute remains in the province of the General Assembly, not the Ohio Supreme Court." *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, ¶ 22. Given the separation of powers, "we are not in the position to rectify this possible legislative oversight" by elevating a mere statutory violation to the level of a constitutional violation. Id. ¶ 21. "[A]ccordingly, we refuse to constitutionalize [the statute]. Nor,

under the guise of construing the statute, do we choose to write into [the statute] a provision excluding probative evidence obtained in violation thereof." *Geraldo*, 68 Ohio St.2d at 128-29.

Although *Jones* was discussing this concept in relation to the impropriety of elevating a mere statutory violation to the level of a Fourth Amendment violation, the concept would apply with even more force when the defendant is seeking to elevate a statutory violation to the level of an Ohio constitutional violation. The separation-of-powers doctrine is operative on the state level to preclude the courts from invading the legislature's prerogative to decline to create a suppression remedy. It is also ultimately up to the people whether a constitutional provision will be amended to bring it into line with mere statutory language.

B.

To the extent the defendants attempt to justify exclusion under the Ohio Constitution, such arguments assume that there is an Exclusionary Rule for a violation of the search-and-seizure provisions in Article I, Section 14, of the Ohio Constitution. But syllabus law of this Court indicates that the Ohio Constitution does not recognize an Exclusionary Rule for illegal searches and seizures under Section 14. *State v. Lindway*, 131 Ohio St. 166 (1936), paragraphs four, five, and six of the syllabus.

While subsequent decisions have assumed the existence of an Exclusionary Rule, this Court has not engaged the *Lindway* non-exclusionary syllabus in a direct and discrete way so as to overrule that decision. Because this Court does not make "implied" precedents, see *In re Bruce S.*, 134 Ohio St.3d 477, 2012-Ohio-5696, ¶ 6, and *State v. Payne*, 114 Ohio St.3d 502, 2007 Ohio 4642, ¶ 12, the question of whether Section 14

should be enforced through an Exclusionary Rule remains a question open to debate. See, also, *Cincinnati v. Alexander*, 54 Ohio St.2d 248, 255-56 n. 6 (1978) (*Lindway* not overruled); *State v. Thierbach*, 92 Ohio App.3d 365, 370 n. 5 (1993) (same).

It is clear, however, that Ohio is not required to apply an Exclusionary Rule merely because federal law includes one. *California v. Greenwood*, 486 U.S. 35, 43-44 (1988).

In any event, it is unnecessary to address the question of the existence of an Exclusionary Rule because it is so clear that, even if Section 14 would be enforced through an Exclusionary Rule, suppression still would not be required. Such an Exclusionary Rule would not be so broad and indiscriminate as to provide the remedy of suppression when the violation bears no causal relationship to the discovery of the evidence.

C.

The Exclusionary Rule carries "substantial social costs" and should not be applied indiscriminately. *United States v. Leon*, 468 U.S. 897, 907 (1984). As stated in *Stone v. Powell*, 428 U.S. 465 (1976):

> The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant. * * * Application of the rule thus deflects the truthfinding 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. * * *

Id. at 489-90 (footnotes omitted).

An Exclusionary Rule "allows many who would otherwise be incarcerated to escape the consequences of their actions." *Pennsylvania Bd. of Probation v. Scott*, 524 U.S. 357, 364 (1998). "The principal cost of applying any exclusionary rule 'is, of course, letting guilty and possibly dangerous criminals go free * * *.'" *Montejo v. Louisiana*, 556 U.S. 778, 796 (2009) (quoting *Herring v. United States*, 555 U.S. 135, 141 (2009). Letting the guilty go free is "something that 'offends basic concepts of the criminal justice system.'" *Herring*, 555 U.S. at 141, quoting *Leon*, 468 U.S. at 90 *Hudson*, 547 U.S. at 595 (discussing "the grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society)"). "'[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.'" *Herring*, 555 U.S. at 141, quoting *Scott*, 524 U.S. at 364-65.

This Court has echoed these concerns about the negative effects of an Exclusionary Rule. "[T]he 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 (internal quotation marks omitted). "Exclusion exacts a heavy toll on both the judicial system and society at large." *State v. Hoffman*, 141 Ohio St.3d 428, 2014-Ohio-4795, ¶ 25 (quoting *Davis v. United States*, 564 U.S. 229, 237 (2011)). "It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence."

Id. "And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." Id.

These negative effects weigh heavily against the indiscriminate and unwarranted application of the Exclusionary Rule.

D.

When a search-and-seizure violation has occurred, the defendant is required to show that the evidence he is seeking to suppress was "'come at by exploitation of that illegality * * *.'" *Nix v. Williams*, 467 U.S. 431, 442 (1984), quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). The Exclusionary Rule does not lead to the suppression of evidence that would have been discovered anyway.

As the Court recognized in *Hudson*, the knock-and-announce rule only addresses the *manner* of making entry. It regulates when the police can use force to enter. It does not preclude entry altogether, and there is no dispute in the present appeal that the search warrant could lawfully lead to the discovery of the drugs and evidence.

The Exclusionary Rule places the police in no worse position than if they had complied with the constitutional provision. "In light of the rationale behind the Exclusionary Rule, these competing interests can be properly balanced only if the prosecution is put in the same, but not worse, position had the misconduct not occurred." *State v. Perkins*, 18 Ohio St.3d 193, 195 (1985). "While the Exclusionary Rule is used to deny the admission of evidence unlawfully gained, and thereby to put the state in the same position it would have been absent the evidence seized, the rule should not be used to put the state in a worse position by refusing evidence that would have been subsequently discovered by lawful means." Id. at 196.

This Court has recognized the inevitable-discovery and independent-source doctrines as limitations on the Exclusionary Rule, see *Perkins*, and the same limits would apply under Section 14. See, also, *State v. Carter*, 69 Ohio St.3d 57, 66-68 (1994) (citing *Segura v. United States*, 468 U.S. 796 (1984), and *Murray v. United States*, 487 U.S. 533 (1988)).

In the case of a knock-and-announce violation, the police still would have been able to execute the valid search warrant and still discover the drugs and other evidence. In terms of causation, there is not even a but-for causal connection between the violation and the evidence found during the execution of the valid search warrant. "[T]he constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence. Whether that preliminary misstep had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the * * * drugs inside the house." *Hudson*, 547 U.S. at 592 (emphasis sic). In other words, even with full compliance, the police still would have been able to enter promptly, and they could even force entry if necessary, and the police still would have been able to search for and discover the drugs and evidence. In terms of the ultimate discovery of the evidence, there was no difference between the police entering as they did and the police entering after additionally saying "search warrant" and thereafter gaining or forcing entry. The result – the discovery of the drugs and evidence – would have been the same.

As the *Hudson* majority further recognized, even if but-for causation could be shown, suppression would still be unwarranted because the remedy of suppression would be too far attenuated from the purposes and scope of the knock-and-announce rule. "Our cases show that but-for causality is only a necessary, not a sufficient, condition for

suppression. * * * [B]ut-for cause, or 'causation in the logical sense alone,' * * * can be too attenuated to justify exclusion * * *." Id. at 592 (citations omitted).

As further stated by the *Hudson* majority:

> Attenuation can occur, of course, when the causal connection is remote. Attenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. "The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve." Thus, in *New York v. Harris,* 495 U.S. 14, * * * (1990), where an illegal warrantless arrest was made in Harris's house, we held:
>
> > "[S]uppressing [Harris's] statement taken outside the house would not serve the purpose of the rule that made Harris' in-house arrest illegal. The warrant requirement for an arrest in the home is imposed to protect the home, and anything incriminating the police gathered from arresting Harris in his home, rather than elsewhere, has been excluded, as it should have been; the purpose of the rule has thereby been vindicated." *Id*., at 20, 110 S.Ct. 1640.
>
> For this reason, cases excluding the fruits of unlawful warrantless searches, say nothing about the appropriateness of exclusion to vindicate the interests protected by the knock-and-announce requirement. Until a valid warrant has issued, citizens are entitled to shield "their persons, houses, papers, and effects," U.S. Const., Amdt. 4, from the government's scrutiny. Exclusion of the evidence obtained by a warrantless search vindicates that entitlement. The interests protected by the knock-and-announce requirement are quite different – and do not include the shielding of potential evidence from the government's eyes.
>
> One of those interests is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident.

> Another interest is the protection of property. Breaking a house (as the old cases typically put it) absent an announcement would penalize someone who "'did not know of the process, of which, if he had notice, it is to be presumed that he would obey it ... .'" The knock-and-announce rule gives individuals "the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry." And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the "opportunity to prepare themselves for" the entry of the police. "The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed." In other words, it assures the opportunity to collect oneself before answering the door.
>
> What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.

Hudson, 547 U.S. at 593-94 (citations omitted); see, also, *Utah v. Strieff*, 136 S.Ct. 2056 (2016).

The *Hudson* majority also recognized that exclusion was unjustified because the grave adverse consequences of exclusion would amount to a "massive remedy" for knock-and-announce violations without any material deterrence. *Hudson*, 547 U.S. at 595. Police can expect no real benefit from violating the knock-and-announce requirement, since "ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises – dangers which, if there is even 'reasonable suspicion' of their existence, *suspend the knock-and-announce requirement anyway.* Massive deterrence is hardly required." Id. at 596 (emphasis sic).

"Resort to the massive remedy of suppressing evidence of guilt is unjustified." Id. at 599.

In short, suppression of the evidence during the execution of the valid search warrant is out of all proportion to the violation of the knock-and-announce rule and does not serve its purposes, which is to merely regulate the manner of entry, not to prevent entry altogether and not to preclude the discovery of evidence inside the structure. "[S]everal appellate districts, following *Hudson*, have concluded that the exclusionary rule does not apply to violations of the knock-and-announce rule." *State v. Gervin*, 3rd Dist. No. 9-15-51, 2016-Ohio-5670, ¶ 23 n. 2 (collecting cases).

In an attempt to establish a causal connection, the defendants might argue that the knock-and-announce violation prevented them from hiding or destroying the evidence. But such an argument would not be supported by the evidence, as there is no indication that the defendants would have been in a position to hide or destroy the evidence or that they would have been inclined to do so if given the opportunity. Indeed, the knock-and-announce rule presumes that the occupants would obey the police demand to enter, see *Hudson*, 547 U.S. at 594, a presumption that undercuts the notion that they would hurry around to destroy evidence instead.

Moreover, as *Hudson* recognized, the dangers of evidence destruction authorize the *suspension* of the knock-and-announce rule altogether, and so giving the occupants greater leeway to hide or destroy evidence is simply not one of the purposes behind the rule. The rule is merely meant to notify the occupants so that they can comply in a timely manner and thereby avoid a forcible entry. Authorizing suppression based on a destroy-the-evidence theory would contradict the very bases for the rule itself.

Such an argument would also contradict the defendants' own focus on statutory law as providing a basis for suppression. Any such destroy-the-evidence theory would violate the General Assembly's own statutory prohibition against tampering with evidence. R.C. 2921.12. It would violate legislative intent to try to justify suppression based on a destroy-the-evidence theory that Ohio law expressly prohibits.

It also must be kept in mind that, absent the use of excessive force against the person, resistance to the police activity is not allowed as a matter of public policy in this state, even when the officer's action violates search-and-seizure protections. *Columbus v. Fraley*, 41 Ohio St.2d 173 (1975); *State v. Pembaur*, 9 Ohio St.3d 136 (1984). There is no privilege to commit fresh crimes in response to an officer's search-and-seizure actions, even when those actions are unlawful. *United States v. Waupekenay*, 973 F.2d 1533, 1538 (10th Cir. 1992); *United States v. Schmidt*, 403 F.3d 1009, 1016 (8th Cir. 2005); *United States v. Sprinkle*, 106 F.3d 613, 619 (4th Cir. 1997).

Such illegal conduct is an independent criminal act that is not the product of the police activity. *State v. Browning*, 190 Ohio App.3d 400, 2010-Ohio-5417, ¶ 20 (4th Dist.); *In re T.W.*, 3rd Dist. No. 1-12-16, 2012-Ohio-5938, ¶ 11; *State v. Trammel*, 2nd Dist. No. 17196 (1999); *State v. Scimemi*, 2nd Dist. No. 94-CA-58 (1995).

If Section 14 incorporates the knock-and-announce rule, it only would have provided the defendants with the right to insist on compliance with that rule, not with an additional right to tamper with evidence in response to an impending lawful entry to execute a valid search warrant.

Applying the Exclusionary Rule to this partial knock-and-announce violation would provide a suppression remedy that is far out of proportion to the violation, that is

far too attenuated, and that would not even satisfy basic but-for causation requirements.

No matter which constitution is being addressed, state or federal, this profligate use of the suppression remedy should be rejected.

The defendants' proposition of law should be rejected.

CONCLUSION

For the foregoing reasons, amicus curiae Franklin County Prosecutor Ron O'Brien supports the State here and urges that this Court affirm the judgment of the Seventh District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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