# IN THE SUPREME COURT OF OHIO

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| STATE OF OHIO, | } | |
| | } | CASE NO. 2016-0271 |
| Plaintiff-Appellant, | } | |
| | } | |
| v. | } | ON APPEAL FROM THE FRANKLIN |
| | } | COUNTY COURT OF APPEALS |
| JOSHUA POLK, | } | TENTH APPELLATE DISTRICT |
| | } | |
| Defendant-Appellee. | } | COURT OF APPEALS CASE NO. 14-AP-787 |

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**MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLEE JOSHUA POLK**

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## STATEMENT OF INTEREST OF AMICUS

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured by law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

## STATEMENT OF THE CASE AND THE FACTS

*Amicus* concurs in the Statement of the Case and the Facts presented in the Merit Brief of Appellee.

## LAW AND ARGUMENT

**I. When a trial court's findings of fact are supported by competent, credible evidence, they must be accepted by an appellate court upon review.**

**A. The lower court correctly followed the legal standard for appellate review of a motion to suppress, which defers to the trial court to resolve questions of fact, and reviews legal conclusions *de novo*.** This Court has stated that

> [a]ppellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. [Citations omitted]. Consequently, an appellate court must accept the trial court's findings of fact if they are supported

> by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the trial court, whether the facts satisfy the applicable legal standard.

*State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8. A court of appeals must "be guided by a presumption that the findings of the trier of fact were indeed correct." *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273, 1276 (1984). The Tenth District heeded this standard, deferring to the trial court's determination that two separate searches of Polk's backpack were conducted. App. Op. ¶11, 15. An appellate court should also "give due weight to inferences drawn from [the] facts." *Ornelas v. United States*, 517 U.S. 690, 699 ,116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). Further, it is the responsibility of appeals courts to defer to determinations of credibility made by the trier of fact. *Testa v. Roberts*, 44 Ohio App.3d 161, 165, 542 N.E.2d 654 (6th Dist. 1998).

**B. The trial court properly determined using competent, credible evidence that two separate searches were conducted.** Contradictory evidence was presented for consideration at the suppression hearing. Decision and Entry, 1. In response to this, the trial court "place[d] greater weight on the testimony that was provided under oath" by Lindsey, who was the only individual that testified during the hearing. *Id*. Any "discrepant facts" were weighed "in favor of the defendant." *Id*. It was reasonable for the trial court to weigh the evidence in that manner, and in doing so, the trial court determined that the second search of the bag was conducted solely based on rumors about Polk's reputation as a gang member. *Id*. at 4. That the search was conducted solely based on rumors about Polk's reputation is a reasonable inference to be made from the testimony presented during the hearing, and making such reasonable inferences is the prerogative of the trial court. *Ornelas*, 517 U.S. at 699. The trial court also concluded that

Lindsey's testimony was not entirely credible, and disbelieved his statement that he would have conducted the more thorough second search of the bag even without knowing the owner's identity. App. Op. ¶ 16. The Tenth District correctly deferred to the trial court's determination of Lindsey's credibility. *Testa*, 44 Ohio App.3d at 165. Properly accepting the conclusion of the trial court that two separate searches were conducted, the Tenth District reviewed the legal conclusions of the trial court *de novo*. *Id.* at ¶11.

**C. Because two searches were conducted, the court must determine as a matter of law whether each search was "justified at its inception."** When determining the validity of a search in a school environment, a court must look first at whether the search was "'justified at its inception,'" and second whether the "search as actually conducted '[was] reasonably related in scope to the circumstances which justified the interference in the first place.'" *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), quoting *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Accordingly, the fact that two separate searches were conducted is legally relevant. Because there were two separate searches, the two-pronged test of *T.L.O.* must be started anew in analyzing each search; the reasonableness of the first search is not determinative of the reasonableness of the second.

## II. When a public school employee conducts a search that is unreasonable under the two-prong test set forth in *New Jersey v. T.L.O., supra,* and evidence uncovered in that unreasonable search is used to effectuate a subsequent search, anything uncovered from the search is fruit of the poisonous tree and must be excluded.

**A. The second search conducted by Lindsey was unreasonable because it was not justified at its inception.** Relying on a legitimate factual determination, the trial court held that Lindsey's second search was not justified at its inception. As such, it was unnecessary to examine whether the search was "reasonably related in scope to the circumstances which

justified the interference in the first place." Decision and Entry, 4; *T.L.O.*, 469 U.S. at 341 (internal citations and quotations omitted). Lindsey's subjective motivation does not nullify any objective justification for the search. Whether a search is reasonable is an objective test, based on whether "'the circumstances, viewed objectively, justify [the] action.'" *Brigham City v. Stuart*, 547 U.S. 398, 404, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006), quoting *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978). The trial court determined that there were no objective circumstances justifying the second search, holding that the search was based "solely on the identity and reputation of the owner." Decision and Entry, 4. Stating that there was a subjective justification for the search does not imply that any objective justification was nullified; there simply was not any objective justification at all.

In reviewing the trial court's decision, the Tenth District affirmed the conclusion that there was no objective justification for the search, accepting that the decision to search the bag more thoroughly in the principal's office was motivated *solely* by Lindsey's subjective intent. App. Op. ¶ 15. Further, the decision to conduct a second search of the bag was not a mere interruption of the first search. The trial court made a reasonable determination to the contrary. Once the bag's owner and the fact that the bag was not a threat had been determined, there was no longer any justification to invade Polk's privacy and search the bag.

Both the trial court and the Tenth District concluded that the school's search protocol to determine the owner of a bag and to determine whether the bag was a threat was reasonable. Decision and Entry, 4; App. Op. ¶ 16. Emptying the bag entirely would have been a reasonable way to comply with that protocol. *Id*. Any search in compliance with a reasonable policy "is reasonable under the Fourth Amendment." *State v. Peagler*, 76 Ohio St.3d 496, 502-503, 1996-Ohio-73, 688 N.E.2d 489. But because the initial, less-invasive search was capable of fulfilling

both requirements of the search protocol—and in fact did so—there was no need to do a second search. The second search was therefore both illegal *and* in violation of the school's search protocol.

**B. Because Lindsey's role is analogous to that of a police officer, public policy supports applying the exclusionary rule to his unreasonable search.** Although Lindsey is not employed as a law enforcement officer, his position with Columbus Public Schools is highly analogous to that of one. Lindsey is employed as a "safety and security resource coordinator," and testified at the suppression hearing that his job duties include "anything to do with safety and security." Tr., 5. He does "[a] little bit of everything." *Id.* He does security checks. *Id.* He checks the buildings. *Id.* He checks kids. *Id.* He checks lockers. *Id.* He does fire drills. *Id.* He searches kids. *Id.* He ensures kids are safe. *Id.* In short, he does "anything that has anything to do with safety and security." *Id.* All of these are duties similar to those of a police officer. He even accompanied the police officer to locate Polk. *Id.* at 9. The police officer restrained Polk, and Lindsey assisted the officer by searching his bag. *Id.* at 11. He conducted that search "under the guidance of the officer." *Id.* at 13.

While law enforcement personnel conduct searches to reveal evidence of a violation of the law, as opposed to gathering evidence for school discipline, Lindsey's job, as revealed by his description of his duites, requires him to fulfill both roles, and to cooperate with law enforcement. A search conducted by a school safety and security resource coordinator, if it turns up evidence of a crime, is likely to be used in a criminal trial, as it was here. The security guard steps into the police officer's shoes. The situation in this case is far from unusual: today, 42 percent of schools employ security guards, watching over more than 65 percent of all students. Christopher A. Mallet, *The School-to-Prison Pipeline: A Critical Review of the Punitive*

*Paradigm Shift*, 33 CHILD ADOLESCENT SOC. WORK J. 15, 18 (2016). The state undercuts its own argument that there is not overlap between the roles of a school administrator and the roles of a police officer by acknowledging that school administrators should craft policies to help combat the "war against drugs." State's Brief, p. 8.

Because of the parallels between the role of a school security guard and a police officer, application of the exclusionary rule in this case is appropriate. When schools conduct searches for use in criminal prosecutions, they become adjuncts to the law enforcement team. Appellee and *amicus* are not advocating for the application of the exclusionary rule to school disciplinary procedures, nor are they interested in disturbing the "informality of the student-teacher relationship." Applying the exclusionary rule in this case excludes illegally obtained evidence, gathered in conjunction with law enforcement, from being admitted in a *criminal trial*. -Other courts have recognized that "when school officials, who are responsible for the welfare and education of all students within the campus, initiate an investigation and conduct it on school grounds in conjunction with the police, the school has brought the police into the school-student relationship." *In the Interest of Angela D.B.*, 211 Wis.2d 140, 564 N.W.2d 682, 688 (Wis. 1997).

**C. Application of the exclusionary rule to public school employees would deter police misconduct.** "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). Once those individuals have been identified, use of the rule must result in "appreciable deterrence." *Id.* at 454. In the instant case, two groups of actors must be deterred: school security guards, such as Mr. Lindsey, and police officers who frequently work in conjunction with them. Application of the rule and its deterrent sanction will result in

appreciable deterrence to both of those groups, and most importantly, to keep in line with current jurisprudence, application of the rule will deter police misconduct.

As has been stated, schools must work closely with law enforcement officers. This relationship is so close that it is acknowledged in Mr. Lindsey's description of his job, and it played out on the facts of this case: the third search conducted, which turned up the handgun, was conducted by Mr. Lindsey at the direction of a Columbus Police Department officer. This close relationship between police and school administrators was so concerning to the Tenth District that they feared that "law enforcement would have an incentive to use school employees as Fourth Amendment immune agents to conduct illegal searches in schools" if the case were decided otherwise. App. Opp. ¶ 21. Whether Special Duty Officer Sykes intended to use Mr. Lindsey to perform the search because of his potential role as a "Fourth Amendment immune agent" is not something that can be known at the time of this appeal. But the notion that school employees would collude with police to perform searches the police could not otherwise perform is not unheard of.

The Tenth District's concern has been played out in full form in New Hampshire. Londonderry, New Hampshire. Police there assigned one of their officers, Michael Bennette, to investigate criminal matters that took place on the grounds of the local high school. *State v. Heirtzler*, 147 N.H. 344, 789 A.2d 634, 636 (N.H. 2001). Prior to his placement, Bennette had conversations with school officials about what his position would entail. *Id*. During the course of his employment there, less serious matters that could nonetheless be criminal were handled by school officials, and more serious matters were handled by Bennette. *Id*. at 637. But matters that were less serious but nonetheless criminal would sometimes arrive in Bennette's lap after an investigation by school officials: "Bennette conceded that a 'silent understanding' existed

between him and school officials that passing information to the school when he could not act was a technique used to gather evidence otherwise inaccessible to him due to constitutional restraints." *Id*. Cooperation between schools and law enforcement, absent the promise of exclusion of illegally obtained evidence by school officials, creates the incentive for school officials to conduct searches the police cannot just to get evidence admitted. Application of the exclusionary rule, at least to school personnel who are serving in a quasi-law enforcement capacity, would preclude this attempted end-around of search and seizure law.

## III. The search in this case was illegal and its fruits should be suppressed under Article I, Section 14 of the Ohio Constitution.

**A. The Ohio Constitution is an independent source of rights for Ohio citizens.** This court's first occasion to examine the relationship between the Federal and Ohio Constitutions came in *Arnold v. City of Cleveland,* 67 Ohio St.3d 35, 616 N.E.2d 163 (1993), in which the plaintiffs sought to invalidate certain Cleveland regulations which banned possession or sale of "assault weapons." The court noted the development of the doctrine of "new federalism," as argued in Justice William Brennan's 1977 law review article. Brennan, State Constitutions and the Protection of Individual Rights (1977), 90 Harv.L.Rev. 489. At the time *Arnold* was decided, the United States Supreme Court had not held that the right to bear arms was an individual, rather than a collective one,[1] so the Federal constitution was of no help to plaintiffs.

The court instead engaged in a comprehensive analysis of Section 4, Article I of the Ohio Constitution, the analog to the Second Amendment in the Bill of Rights. The court concluded

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[1] It eventually held that the right was an individual one in *McDonald v. City of Chicago,* 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010).

that while the state constitutional provision did indeed provide for a personal right to bear arms, it did not guarantee an absolute one, and the police power allowed a municipality to regulate the possession of certain types of weapons.

As the court recently acknowledged, while *Arnold* "stands as the court's first clear embrace" of the idea that the Ohio Constitution provided its own set of protections of the civil liberties of its residents, "in the wake of *Arnold*, we have often, but inconsistently, heeded the hortatory call of the new federalism." *State v. Mole,* Slip Opinion 2016-Ohio-5124, ¶¶15-16. While the court has frequently held that various provisions of the Ohio constitution provide greater protections than their Federal analogues, at other times, they have found them to be mutually inclusive.

This is particularly true in the area of Fourth Amendment protections. In *State v. Jones*, 88 Ohio St.3d 430, 2000-Ohio-374, 727 N.E.2d 886, the court held that an arrest for a minor misdemeanor, prohibited in most cases by R.C. §2935.26, "violates the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution."

Just three years later, though, in *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, the court was forced to revisit the issues, because in the interim the United States Supreme Court had held in *Atwater v. Lago Vista*, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001) that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." U.S. at 354.

That foreclosed Brown's reliance on the United States Constitution, and his situation was made worse by the fact that *Jones* had held that the protections of the Ohio Constitution were co-extensive with those afforded by the federal Constitution. The court in *Brown* nonetheless

looked beyond the Fourth Amendment, and held that "Section 14, Article I of the Ohio Constitution provides greater protection than the Fourth Amendment to the United States Constitution against warrantless arrests for minor misdemeanors." *Brown,* ¶7.

The court most recently revisited this issue in another case by the same name, but with a different defendant, in *State v. Brown*, 143 Ohio St.3d 444, 2015-Ohio-2438, 39 N.E.3d 496. In that case, a township police officer conducted a traffic stop of a car for crossing over the solid fog line. Under R.C. §4513.39, the officer lacked authority to do so because he was outside his jurisdiction. Despite holding six years earlier in *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, 902 N.E.2d 464, that a stop outside the officer's jurisdiction did not violate the Fourth Amendment, the court came to a different conclusion regarding the application of the Ohio Constitution, holding that "the traffic stop and the ensuing search and arrest in this case were unreasonable and violated Article I, Section 14 of the Ohio Constitution, and the evidence seized as a result should have been suppressed."

Regardless of the variance of the court's approach in the past, *Mole* stands for the clear affirmation of *Arnold's* first syllabus:

> The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

**B. The "new federalism" doctrine advances important constitutional and societal goals.** The concept of state constitutionalism is in keeping with the basic theory of federalism. As one commentator has noted,

> Our constitution's founders believed that the rights of Americans could only be secured by creating a federal system full of checks and balances. They borrowed this idea from the French philosopher Montesquieu, who proposed that governmental authority be dispersed among competing institutions in order that no part of the government could achieve so much power as to have the capacity for tyranny. The federal system created in 1787 supposes two kinds of dispersion of power: One is vertical, that we call separation of powers: legislative, judicial, and executive. The other is horizontal, between state governments and the national government.

Randall T. Shepard, Second Wind for the Indiana Bill of Rights, 22 Ind.L.Rev 575, 586 (1988).

While some might contend that the Federal and state provisions should be read coextensively because the latter were modeled after the former, in fact the converse is true: the Bill of Rights was modeled after the state constitutions, rather than the other way around. The First Amendment's Free Exercise and Establishment Clauses were drawn from the Virginia Statute for Religious Freedom, written by Thomas Jefferson and passed by that state in 1786. At the time of the Framing, every state constitution provided for trial by jury; a majority of the state constitutions provided for rights against self-incrimination, cruel and unusual punishment, excessive bail, and unreasonable searches and seizures, and for confrontation, counsel, notice of charges, due process, and compulsory process. See chart at http://teachingamericanhistory.org/bor/origins-chart/, last accessed 9/7/16.

Ohio's Constitution, initially passed in 1802, and then substantially revised in 1851, post-dated the passage of the Bill of Rights, and so the temptation exists to believe that its analogous provisions were intended merely to echo the protections afforded by the Federal document.

But this leads to the second problem with the argument that the state constitutions were intended to duplicate the protections already provided by the Bill of Rights. At the time the Ohio Constitution was drafted and revised, the first ten amendments to the United States Constitution

provided *no* protection to Ohio citizens; the Bill of Rights applied only to the Federal, not state, governments. *Barron v. Baltimore*, 32 U.S. 243, 8 L.Ed. 672 (1833). Indeed, it was not until the Supreme Court began using the Fourteenth Amendment in the 1960's to "incorporate" the Bill of Rights so that they applied to the States that citizens could rely on anything except their own state constitutions for protection of their civil liberties.[2]

While all this might provide an abstract rationale for a true federalist approach, there are practical reasons as well. The idea that the United States Constitution is the final word on civil rights and liberties presumes that the states are homogeneous entities: that the right to bear arms or the right to free exercise of religion meant the same thing to the framers of the state constitutions of, say, Oregon and Massachusetts. But they do not:

> The founders of a populist frontier state with a tradition of ferocious individualism, like Washington or Oregon, probably intended to carve out a large sphere of rights, a larger arena of activity into which the government could not intrude, at least with respect to such matters as bearing arms and avoiding scrutiny, than a more communitarian, homogeneous state like Massachusetts or one with sectarian roots like Maryland. Those latter states, on the other hand, might be assumed to have cared more deeply about matters of religion.

David Schuman, Advocacy of State Constitutional Law Cases: A Report from the Provinces, 2 Emerging Issues in St. Const. L. 275, 285 (1989).[3]

And there are substantial differences in the need for protections of various rights from

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[2] The Court had applied the First Amendment's protections of speech and religious liberty prior to that time; the Fourth, Fifth, and Sixth Amendments were, with few exceptions (such as the right to grand jury indictment), incorporated in the 1960's.

[3] At the time of the framing of Ohio's first constitution, it may well have qualified as a "populist frontier state with tradition of ferocious individualism." According to the 1800 census, the population of New York City alone was a third greater than the entire population of Ohio.

state to state. Just three months ago, in *Utah v. Strieff*, ___ U.S. ___, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016), the Supreme Court held that an illegal stop did not require exclusion of evidence if it turned out that the person stopped had an outstanding arrest warrant, even if the officer was not aware of it. Whatever the merits of the decision, its application to more racially diverse states and areas could prove problematic. As Justice Sotomayor noted in her dissent in *Strieff*, in Ferguson, Missouri, the majority-black city which was the site of extensive protests after a police shooting of a black man, 16,000 of the 21,000 residents had outstanding warrants, the vast majority for minor traffic violations. *Strieff, supra*, S.Ct. at 2068 (Sotomayor, J., dissenting). A state like Ohio, with cities of significant minority populations, might have second thoughts about giving the police a pass for illegal stops if the suspect has an outstanding warrant, especially given the history of racially discriminatory law enforcement. National Institute of Justice, Racial Profiling and Traffic Stops, http://www.nij.gov/topics/law-enforcement/legitimacy/pages/traffic-stops.aspx, last accessed 9/7/16. Application of the Ohio Constitution not only protects the rights of its citizens, but allows this court to tailor those protections with more particularity.

## IV. The good faith exception is not applicable to the search conducted in this case.

**A. The State misconstrues the nature of the good faith exception to the exclusionary rule.** In its Third Proposition of Law, the State argues that even if the exclusionary rule is to apply, it should be not be applied in this case. It contends that only "deliberate, reckless, or grossly negligent" conduct triggers application of the exclusionary rule. State's Merit Brief, at 37. This assertion is based on a complete misreading of the case law.

The good faith exception was first articulated by the Supreme Court in *United States v.*

*Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). *Leon* held that suppression of evidence is not appropriate where the police act in objectively reasonable reliance upon the magistrate's determination of probable cause, even if that determination is subsequently determined to be wrong.

But *Leon* presupposes the issuance of an actual warrant; essentially, it holds that once a warrant is issued, the police can rely on it, even though it is later established that the warrant shouldn't have been issued because the magistrate's finding of probable cause was in error. Here, again, there was no warrant at any point in either of the searches of Mr. Polk's bookbag.

While *Leon's* good faith exception has been extended in two situations, neither of those are helpful to the State. The first arose in *Arizona v. Evans*, 514 U.S. 1, 115 S.Ct. 1185, 131 L.Ed.2 34 (1995) and *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009). In both cases, the police had arrested the defendant on a warrant which turned out to have been invalid; in both cases, the clerical staff had allowed a warrant to remain in the database, when it had in fact been rescinded.

The State points to language in *Herring* which it implicitly claims established a new rule: that exclusion of evidence is only permissible where police conduct is "deliberate, reckless, or grossly negligent." State's Merit Brief at 37, quoting *Herring* at 141. But *Herring* was merely an extension of *Evans*, and simply held that the police couldn't be faulted for relying on data furnished them when they had a right to rely on it. Any suggestion that *Herring* announced a new test for warrantless searches was disproved just three months later when the Court threw out a warrantless search in *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), overruling a 28-year-old precedent in the process, with nary a word about any "new test."

*Gant* leads to the second situation to which the courts have extended the good faith

exception. In *Davis v. United States*, 564 U.S. 229, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), the police had arrested Davis, placed him in a police cruiser, and searched his car incident to the arrest. The district court denied Davis' motion to suppress, but while the case was pending on direct appeal, the Supreme Court handed down *Gant*, which overruled the Court's prior decision in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), and held that the police could not search a car incident to arrest once the occupant had been removed so that he no longer had access to the vehicle. The Court held in *Davis* that the police had the right to rely on *Belton*, which was the law in effect at the time the search was conducted.

The Ohio Supreme Court reached a similar result in *State v. Hoffman*, 141 Ohio St.3d 428, 2014-Ohio-4795, 25 N.E.3d 993. In that case, Hoffman was arrested on three misdemeanor warrants, and during the arrest the police found a gun which they later determined linked him to a murder. Hoffman was convicted of the murder, and claimed on appeal that the arrest warrants were illegal because they had been issued by the clerk of courts, and the affidavits in support of the warrant made no showing of probable cause. The 6th District had actually addressed that issue fifteen years earlier, and had held that the warrants were valid. The Supreme Court determined that the warrants were not valid, but concluded that the police had properly relied on the prior 6th District decision, *State v. Overton*, 6th Dist. No. L-99-1317, 2000 Ohio App. LEXIS 3919, 2000 WL 1232422.

But those cases all have one thing in common. In each, the police officer was relying on someone else's judgment: the magistrate who issued the warrant, the clerk who failed to remove it, the court which issued the ruling stating that the search was legal. As one court pointed out, "[t]he Supreme Court has never applied the good faith exception to excuse an officer who was negligent himself, and whose negligence directly led to the violation of the defendant's

constitutional rights." *United States v. Camou,* 773 F.3d 932, 945 (9th Cir. 2014). "Where there is no outside authority on which the officer reasonably relied, the principal rationale relied upon by the Supreme Court in *Leon* and its progeny – that it would serve no deterrent purpose to punish the officer, acting in good faith, for the error of the magistrate, the legislature, or by a negligent mistake by a court or police employee – is not present." *State v. Thomas*, 10th Dist. Franklin No. 14AP-185, 2015-Ohio-1778.

"Leon's good-faith exception applies only narrowly, and ordinarily only where an officer relies, in an objectively reasonable manner, on a mistake made by someone other than the officer." *United States v. Herrera*, 444 F.3d 1238, 1249 (10th Cir.2006). That is not the situation here. Lindsey was relying on his own judgment when he conducted the search, and if that judgment was in error, the exclusionary rule applies.

**B. The good faith exception should not be extended beyond *Leon* and its progeny.**

As we have seen, there is no basis for the State's claim that a "balancing test," in which "suppression is proper only if the benefits of deterrence outweigh the costs of 'letting guilty and possibly dangerous defendants go free," is applicable to warrantless searches in general or this search in particular. And there are good reasons not to extend the good faith exception to warrantless searches beyond the narrow confines outlined above.

As we have seen, it makes sense to say we're not going to apply the exclusionary rule to certain *classes* of cases. If the police have done what the 4th Amendment commands, and gone out and gotten a warrant, it makes little sense to exclude evidence just because a court later decides that the magistrate got it wrong. It makes little sense to exclude evidence where the police are acting pursuant to a law which is subsequently determined to be unconstitutional, or pursuant to case law which is subsequently overruled. It makes little sense to hold a police

officer responsible if clerk makes a mistake and doesn't pull a warrant. The purpose of the exclusionary rule is to deter police misconduct, and if the police haven't done anything wrong, there's no sense in excluding the evidence.

But it's one thing to make an *a priori* determination that we won't apply the exclusionary rule in certain cases, and an entirely different matter to argue that we should make an *ad hoc* determination whether to apply it in *every* case, trying to decide whether the police officer's conduct crossed the blurry line of "negligence" into "gross negligence" or "recklessness," and where the balance lies between the societal costs and deterrent benefits of imposing the rule. Every search case would involve determinations of the degree of the police officer's misconduct, and the balancing of the societal interest versus the deterrent effect.

The obvious problem with this is that it would render Justice Rehnquist's comment that the law of warrantless searches "is something less than a seamless web" a gross understatement. *Cady v. Dombrowski*, 413 U.S. 433, 440, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). The calculation of determining whether "reasonable suspicion" or "probable cause" exists is difficult enough for the police officer to apply in the field in the few seconds he may have to make that determination. Requiring him to also calculate whether some court might subsequently gauge his conduct to be grossly negligent or reckless, as opposed to "simply" negligent, places far too high a burden on him, and the vagaries of that formulation will result in appellate decisions which establish no meaningful precedent, and which provide him no meaningful guidance.

Moreover, how the societal interest would be measured against the deterrent effect is difficult to discern. The mere phrasing of the analysis suggests that the two are diametrically opposed. They are not; in a county founded on a system of ordered liberty, there is a substantial societal interest in deterring illegal police conduct.

There is also a problem of sample bias here. A judge is acutely aware of the societal costs of throwing out the discovery of two kilograms of cocaine because of an illegal search, because that is the case in front of her. She never knows of the twenty illegal stops that were *not* conducted – the twenty drivers and their passengers who were not pulled over, only to be let go after being forced to stand on the side of the roadway for half an hour, subject to public humiliation – because the police were deterred from making them, and no prosecution results. We know of the cases where "the guilty go free because the constable erred." We never know of the many times our privacy is not invaded by government action because the exclusionary rule deters the police from doing so.

The Supreme Court has narrowly expanded the good faith exception to those cases where the officer himself bears no responsibility for the illegality of the search. There is no rationale for expanding it beyond that, and doing so result in the law of search and seizure becoming a hopeless morass.

## CONCLUSION

The search here was illegal, under both the Federal and Ohio Constitutions. The school security guard here performed the same functions as a police officer, and his conduct should be measured accordingly. The exclusionary rule should be applied here; there is no reason to extend the "good faith" exception to the search.

For the foregoing reasons, *Amicus* respectfully prays the Court to affirm the decision of the Franklin County Court of Appeals.

Respectfully submitted,

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