Case No. S-2023-921

ORIGINAL

1057692523

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,

Appellant,

v.

ELMER VELASQUEZ,

Appellee.

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 11 2024

JOHN D. HADDEN
CLERK

BRIEF IN SUPPORT OF APPELLANT'S STATE APPEAL

FROM THE TULSA COUNTY DISTRICT COURT
CASE NO. CF-2023-2078
Before the Honorable Michelle Keely, District Judge

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March 11, 2024

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES.......... i

STATEMENT OF THE CASE.......... 1

STATEMENT OF THE FACTS.......... 2

ARGUMENT AND AUTHORITIES.......... 3

PROPOSITION OF ERROR

I. Availability of an Appeal.......... 3
II. Standard of Review.......... 6
III. Proposition of Error - The District Court abused its discretion when it applied the Exclusionary Rule to a violation of the knock and announce rule, codified at 22 O.S. § 1228.......... 6
   A. Constitutional principles and precedents.......... 7
   B. The Exclusionary Rule.......... 11
      1. Historical origins of the Exclusionary Rule and adoption into Oklahoma law.......... 12
      2. Purpose and application of the Exclusionary Rule.......... 16
      3. Statutory codifications and Oklahoma judicial approach.......... 20
   C. The knock and announce rule.......... 21
   D. The District Court erred when it applied the Exclusionary Rule as a remedy for a violation of the knock and announce rule.......... 25
      1. The District Court abused its discretion by excluding the evidence.......... 26
      2. An analysis of the applicable constitutional principles demonstrate that exclusion is not warranted.......... 32
         a. *Hudson v. Michigan* and its effect on the Exclusionary Rule.......... 32
         b. Adoption of the *Hudson* rationale is consistent with Oklahoma criminal jurisprudence.......... 35
         c. Application of *Hudson* to the instant case shows that suppression is not warranted.......... 37
IV. Conclusion.......... 42

CERTIFICATE OF DELIVERY.......... 43

Table of Authorities

Constitutions

U.S. Const. Amend IV 7, 38

Okla. Const. Art. I, Section 1 10

Okla. Const. Art. II, Section 30 .... 7, 38

Statutes

12 O.S. § 940 40

13 O.S. § 176.13 .... 21, 29

18 U.S.C. § 2518 20

18 U.S.C. § 3109 20

20 O.S. § 40 28

22 O.S. 2021 § 1053 4

22 O.S. 2021 § 1228 .... 22, 24, 25, 39

22 O.S. § 1240 .... 40, 41

51 O.S. §§ 151, *et seq.* 40

Ala. Code § 15-5-9 23

Ariz. Rev. Stat. § 13-3925 20

Ariz. Rev. Stat. § 13-3916 23

Cal. Penal Code § 1538.5 20

Comp.Laws Dak.1887, § 7620 .... 24, 29

DC ST § 48-921.02(g) 23

Fla. Stat. § 933.09 23

Ga. Code Ann., § 17-5-27 23

Idaho Code § 19-4409....................23

Iowa Code § 808.6....................23

Mich. Comp. Laws. § 780.656....................23

Nev. Rev. Stat. 179.055....................23

N.C. Gen. Stat. § 15A-974....................20

N.D. Cent. Code, § 29-29-08....................23, 24

S.D. Codified Laws § 23A-35-8....................23

Texas Code Crim Proc. art 38.23(a)....................20

Utah Code Ann. § 77-23-210....................23

Cases

Arizona v. Evans, 514 U.S. 1, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995)....................7, 15, 18

Boyd v. United States, 116 U.S. 616, 6. S.Ct. 524, 29 L.Ed. 746 (1886)....................12, 13

Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)....................18

Brown v. State, 2018 OK CR 3, 422 P.3d 155....................26

Brumfield v. State, 2007 OK CR 10, 155 P.3d 826....................26, 27, 32

Buxton v. State, 37 Okla. Crim. 402, 258 P. 814....................9

City of Elk City v. Taylor, 2007 OK CR 15, 157 P.3d 1152....................4

Cohee v. State, 1997 OK CR 30, 942 P.2d 211....................26

Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)....................19

Cuesta-Rodriguez v. State, 2010 OK CR 23, 241 P.3d 214....................11

Davis v. United States, 564 U.S. 229, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2001)....................17

DeGraff v. State, 2 Okla. Crim. 519, 103 P. 538....................*passim*

Dennis v. State, 1990 OK CR 23, 990 P.2d 277....................7

Dixon v. State, 1987 OK CR 90, 737 P.2d 942 .... 10, 36

Dyer v. State, 25 Okla. Crim. 328, 220 P. 69 15

Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960) 16

Erickson v. State, 1979 OK CR 67, 597 P.2d 344 .... 31, 36

Ex parte Burford, 3 Cranch, 448, 7 U.S. 448, 2 L. Ed. 495 (1806) 8

Gomez v. State, 2007 OK CR 33, 168 P.3d 1139 .... 7, 9, 10, 11, 35, 36

Gore v. State, 24 Okla. Crim. 394, 218 P. 545 .... *passim*

Hess v. State, 84 Okla. 73, 202 P. 310 .... 11, 12, 27

Hudson v. Michigan, 547 U.S. 586, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006) .... *passim*

Illinois v. Gates, 426 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) 17

James v. Illinois, 493 U.S. 307, 110 S.Ct. 648, 107 L.Ed.2d 676 (1990) 11

Johnson v. State, 2013 OK CR 12, 308 P.3d 1053 29

Keith v. State, 30 Okla. Crim. 168, 235 P. 631 9

Kuhn v. State, 70 Okla. Crim 119, 104 P.2d 1010 10

Layman v. Webb, 1960 OK CR 19, 350 P.2d 323 9

Long v. State, 1985 OK CR 119, 706 P.2d 915 .... 10, 36

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) 14, 15

McClary v. State, 34 Okla. Crim. 403, 246 P. 891 25

McGuire v. United States, 273 U.S. 95, 47 S.Ct. 259, 71 L.Ed. 556 (1927) 17

Miles v. State, 1987 OK CR 179, 742 P.2d 1150 16

Miller v. United States, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958) 21, 23, 24, 29

Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939) 33

Neloms v. State, 2012 OK CR 7, 274 P.3d 161 6

Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928) 14

Pennsylvania Board of Probation and Parole v. Scott, 524 U.S.357, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998) 17, 19

People v. Condon, 592 N.E.2d 951 (Ill. 1992) 40

Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) 18

Richards v. Wisconsin, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997) 22, 40

Rohrbaugh v. Celotex Corp., 53 F.3d 1181 (10th Cir.1995) 27

Sabbath v. United States, 391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968) 23, 24

Sears v. State, 1974 OK CR 205, 528 P.2d 732...30, 31

Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984)....................18

Semayne's Case, 77 Eng.Repr. 194 (K.B. 1603) 21

Silverthorne Lumber Co. v. United States, 251 U.S. 385, 30 S.Ct. 182, 64 L.Ed. 319 (1920) 14

Simpson v. State, 30 Okla, Crim. 344, 236 P. 55...15

Sloan v. Sprouse, 1998 OK CR 56, 968 P.2d 1254...10, 24, 28

State v. Campbell, 1998 OK CR 38, 965 P.2d 991...4, 5

State v. Delso, 2013 OK CR 5, 298 P.3d 1192...4

State v. Franks, 2006 OK CR 31, 140 P.3d 557...5

State v. Gilchrist, 2017 OK CR 25, 422 P.3d 182...5, 6

State v. Hooley, 2012 OK CR 3, 269 P.3d 949...6

State v. McNeal, 200 OK CR 13, 6 P.3d 1055...10, 36

State v. Pope, 2009 OK CR 9, 204 P.3d 1285...6

State v. Sakellson, 379 N.W.2d 779 (N.D. 1985) 24, 29

State v. Sayerwinne, 2007 OK CR 11, 157 P.3d 137...5

State v. Sheperd, 1992 OK CR 69, 840 P.2d 644...4

State v. Sittingdown, 2010 OK CR 22, 240 P.3d 714..................................10, 15, 16, 28, 37

State v. Stafford, 1992 OK CR 47, 845 P.2d 894..25, 29, 31

State v. Thomason, 1975 OK CR 148, 538 P.2d 1080..7

State v. Thompson, 2001 OK CR 27, 33 P.3d 930...4, 5

State v. Young, 1999 OK CR 14, 989 P.2d 949..28

Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) 11, 14, 17, 19, 28, 37

Stouffer v. State, 2006 OK CR 46, 147 P.3d 245...6

Sullivant v. City of Oklahoma City, 1997 OK 68, 940 P.2d 220.......................................40

Thompson v. Weyerhouser Co., 582 F.3d 1125 (10th Cir. 2009)......................................27

Tilley v. State, 1998 OK CR 43, 963 P.2d 607...7

Turner v. City of Lawton, 1986 OK 51, 733 P.2d 375...27, 28

Underwood v. State, 2011 OK CR 12, 252 P.3d 221...6

United States v. Acosta, 502 F.3d 54 (2d Cir. 2007)..20, 29

United States v. Banks, 540 U.S. 31, 124 S.Ct. 521, 157 L.Ed.2d 343 (2003)....................22, 23

United States v. Bruno, 487 F.3d 304 (5th Cir. 2007)..20, 29

United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) 11, 16, 19

United States v. Ceccolini, 435 U.S 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978)............18, 19, 33

United States v. Diaz-Ortiz, 927 F.3d 1028 (8th Cir. 2019)......................................20, 29

United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984) 38

United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) 16, 17, 19, 28, 31, 37

United States v. Payner, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980) 17

United States v. Southerland, 466 F.3d 1083 (D.C. Cir. 2006) 20, 29

Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914) 13, 14

Williams v. State, 30 Okla. Crim. 39, 234 P. 781 15

Wilson v. Arkansas, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995) 21, 22, 23, 38

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) 16, 18

The State of Oklahoma will be referred to as "the State" or "Appellant" in this State's appeal. Elmer Velasquez is the Defendant in the District Court and will be referred to as the "Appellee." Numbers in parenthesis refer to page citations from the Original Record (O.R.), the transcript of the Preliminary Hearing held on August 25, 2023, (P.H.Tr.) and the transcript of the Motion Hearing held November 8, 2023 (M.Tr.).

STATEMENT OF THE CASE

On June 20, 2023, Appellee was charged by an Information in Tulsa County District Court case no. CF-2023-2078 with Unlawful Possession of a Controlled Drug With Intent to Distribute, in violation of 63 O.S. § 2-401, and Acquiring Proceeds From Drug Activity, in violation of 63 O.S. § 2-503.1. (O.R. 5-6). On August 25, 2023, a preliminary hearing was held in front of the Honorable Kasey Baldwin, Special Judge. *See generally* P.H.Tr. During the hearing, Appellee interposed an oral motion to suppress, which was overruled. P.H.Tr., p. 12, lines 4-12. At the conclusion of the hearing, Judge Baldwin overruled Appellee's demurrer and bound him over for trial in District Court. P.H.Tr., p. 60, lines 5-19.

On September 5, 2023, Appellee appeared in District Court and requested time to file motions. On October 9, 2023, Appellee filed a "Motion to Quash Bindover." (O.R. 19-27). The State responded to Appellee's motion on October 24, 2023. (O.R. 28-36). A hearing on Appellee's motion was set for October 24, 2023, and continued to November 7, 2023, at which time it was continued to November 8, 2023, in order to secure an interpreter for Appellee. (O.R. 3). On November 8, 2023, the Honorable Michelle Keely, District Judge, after hearing argument from Appellee and the State, sustained Appellee's motion. M.Tr., p. 24, lines 4-8. At that time, the State gave its oral notice of intent to appeal. M.Tr., p. 24, lines 10-11. On November 9, 2023, the State filed its written Notice of Intent to Appeal and Designation of Record in the District Court. (O.R.

38-45). The State then filed its written Notice of Intent to Appeal and Designation of Record as well as its Petition in Error with the Clerk for the Oklahoma Court of Criminal Appeals on November 14, 2023, perfecting its appeal.

STATEMENT OF THE FACTS

On June 15, 2023, Officer Justin Oxford and other officers with the Tulsa Police Department went to 9223 East 32nd Place in the city and County of Tulsa to execute a search warrant Officer Oxford had previously obtained for that residence. P.H.Tr., p. 9, lines 17-25; p. 10, lines 1-13; p. 25, lines 2-11, 22-25; p. 26, lines 1-10; p. 27, lines 14-19; *Defendant's Exhibits 1* and *2*. Upon arriving at that location, Officer Oxford had a team of officers go to the back of the residence, and another team of officers make the approach to the front of the residence. P.H.Tr., p. 10, lines 14-19. Officer Oxford and other officers approached the front door of the residence and began to announce "Tulsa Police with a search warrant, come to the door." P.H.Tr., p. 11, lines 2-4. The announcement was made multiple times, and Officer Oxford testified he believed that the announcement was also made in Spanish by Officer Guardiola. P.H.Tr., p. 11, lines 9-12; p. 35, lines 5-10.

As he made the announcements, Officer Oxford noticed a camera above the door. P.H.Tr., p. 11, line 15; p. 32, lines 20-25. He testified he could not remember what the camera looked like or where exactly it was, but that he had seen it at some point before the execution of the search warrant. P.H.Tr., p. 32, lines 20-25; p. 33, lines 1-6, 14-25. He did not note the presence of a camera in his affidavit for the search warrant. P.H.Tr., p. 34, lines 10-17; *Defendant's Exhibit 1*. He was also unaware of whether the camera was operational. P.H.Tr., p. 34, lines 18-20. Officer Oxford noted that cameras can compromise the warrant, as persons who sell narcotics also have firearms and permit those inside a residence to observe persons coming to the residence, which

places officers in danger, and possibly destroy evidence inside the residence before officers are able to knock on a house. P.H.Tr., p. 11, lines 20-24. He believed the camera compromised the execution of the warrant, and announced to other officers "we are compromised" as he approached the door. P.H.Tr., p. 11, lines 15-16; p. 35, lines 15-16, 22-24. The door was then breached "pretty close" in time to Officer Oxford knocking on it, without giving the occupants of the residence the opportunity to answer the door. P.H.Tr., p. 35, lines 11-25; p. 36, lines 1-2, 20-23. Officer Oxford did not recall the exact amount of time he waited after knocking but before having the door breached. P.H.Tr., p. 35, lines 22-25; p. 36, lines 1-5.

Officer Oxford and other officers then entered the residence, and Officer Oxford continued to announce their presence. P.H.Tr., p. 12, lines 14-16. Three persons were located inside the residence. P.H.Tr., p. 12, lines 16-21. Appellee was later located in a Chevy pickup that he drove to the scene. P.H.Tr., p. 16, lines 20-25; p. 17, lines 16-25. A search of the residence revealed a passport and identification cards for Appellee, packaging materials commonly seen in the packaging of narcotics, a set of working digital scales, and a baggie of a white powdery substance which was tested by someone other than Officer Oxford which showed the presumptive presence of cocaine. P.H.Tr., p. 13, lines 22-25; p. 14, lines 1-2; p. 15, lines 3-5, 8-10, 13-17; p. 21, lines 10-17. Officer Oxford also found documents indicating Appellee was paying for the utilities at the residence. P.H.Tr., p. 24, lines 5-14. He also observed a large amount of cash, over eight thousand dollars ($8,000). P.H.Tr., p. 48, lines 2-13.

AUTHORITY AND ARGUMENT

I. Availability of an Appeal

Before reaching the merits of the State's appeal, this Court must first determine whether District Court's order is one which the State has a right to appeal and thus whether it has

jurisdiction to hear State's appeal. The right to an appeal is a statutory right and exists only when expressly authorized. *City of Elk City v. Taylor*, 2007 OK CR 15, ¶ 7, 157 P.3d 1152, 1154. The State's right to appeal in any case solely rests on statutory authority. *State v. Campbell*, 1998 OK CR 38, ¶ 6, 965 P.2d 991, 992; *State v. Sheperd*, 1992 OK CR 69, ¶ 9, 840 P.2d 644, 647. 22 O.S. § 1053 provides that the State may only appeal to the Oklahoma Court of Criminal Appeals in the following circumstances:

1. Upon judgment for the defendant on quashing or setting aside an indictment or information;
2. Upon an order of the court arresting the judgment;
3. Upon a question reserved by the state or a municipality;
4. Upon judgment for the defendant on a motion to quash for insufficient evidence in a felony matter;
5. Upon a pretrial order, decision, or judgment suppressing or excluding evidence where appellate review of the issue would be in the best interests of justice; and
6. Upon a pretrial order, decision or judgment suppressing or excluding evidence in cases alleging violation of any provisions of Section 13.1 of Title 21 of the Oklahoma Statutes.

Appellant brings the present appeal pursuant to 22 O.S. § 1053(5), as the District Court's order sustaining Appellee's "Motion to Quash Bindover" effectively suppresses the entirety of the evidence the State can use to support its burden of proof in this case. To resolve the nature of the order which the State seeks to appeal, this Court looks to the specific request which Appellee made before the District Court. *Campbell*, 1998 OK CR 38, ¶ 7, 965 P.2d at 992; *see also State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1193 (finding motion to dismiss was essentially motion to quash for insufficient evidence); *State v. Thompson*, 2001 OK CR 27, ¶ 14, 33 P.3d 930, 934 (finding State's appeal pursuant to § 1053(3) where motion to quash, set aside, and dismiss charge best characterized as demurrer). In ascertaining the requested relief, this Court does not solely rely upon the title of the motion or pleading, but instead reviews the substance of the request for relief. *Campbell*, 1998 OK CR 38, ¶ 7, 965 P.2d at 992; *Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d at 1193;

Thompson, 2001 OK CR 27, ¶ 14, 33 P.3d at 934. Additionally, in determining whether § 1053 affords the State an appeal, the Court reviews the nature of the District Court's judgement or order to ascertain whether it falls within the language of § 1053. *Campbell*, 1998 OK CR 38, ¶ 7, 965 P.2d at 992; *State v. Franks*, 2006 OK CR 31, ¶¶ 4-7, 140 P.3d 557, 558-559; *State v. Gilchrist*, 2017 OK CR 25, ¶¶ 10-11, 422 P.3d 182, 184-185.

In this case, despite titling his motion as a "Motion to Quash," Appellee essentially asked the District Court to suppress any evidence obtained by the Tulsa Police Department during its execution of a search warrant based on an alleged violation of the "knock and announce" rule. *See* (O.R. 25-26). Thus, the specifically requested relief in the District Court was the suppression of evidence, rather than dismissal based on the insufficiency of the evidence presented at the preliminary hearing. As such, one can properly characterize Appellee's motion as a motion to suppress, based on a constitutional violation, rather than a motion to quash authorized by 22 O.S. § 504.1. Further, in sustaining Appellee's motion, the District Court specifically concluded that, based on the evidence and the arguments of counsel, it would "suppress the search and everything that was found in it." M.Tr., p. 24, lines 4-8. Thus, the nature of the District Court's order was one suppressing evidence, rather than quashing for insufficient evidence.

Accordingly, the District Court's order is one which suppresses or excludes evidence sought to be admitted by the State. As the District Court's order effectively excludes the entirety of the proof the State seeks to admit, thereby substantially impairing its ability to prosecute the case, appeal is proper under 22 O.S. § 1053(5), as appellate review of the order would be in the best interests of justice. *See State v. Sayerwinne*, 2007 OK CR 11, ¶¶ 4–6, 157 P.3d 137, 138–39 (defining "best interests of justice" to mean "that the evidence suppressed forms a substantial part

of the proof of the pending charge, and the State's ability to prosecute the case is substantially impaired or restricted absent the suppressed or excluded evidence.").

II.
Standard of Review

In appeals brought pursuant to 22 O.S. § 1053, the Court reviews the trial court's decision to determine if the trial court abused its discretion. *State v. Gilchrist*, 2017 OK CR 25, ¶ 12, 422 P.3d 182, 185 (citing *State v. Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d 949, 950). An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Cuesta-Rodriguez v. State,* 2010 OK CR 23, ¶ 19, 241 P.3d 214, 225. An abuse of discretion has also been described as "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Stouffer v. State*, 2006 OK CR 46, ¶ 60, 147 P.3d 245, 263 (internal citation omitted); *see also Neloms v. State,* 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. On appeal, the Court reviews the trial court's factual findings for clear error and its legal conclusions *de novo*. *Underwood v. State*, 2011 OK CR 12, ¶ 12, 252 P.3d 221, 223 (citing *State v. Pope*, 2009 OK CR 9, ¶ 4, 204 P.3d 1285, 1287).

III.
Proposition of Error

I. The District Court abused its discretion when it applied the Exclusionary Rule to a violation of the knock and announce rule, codified at 22 O.S. § 1228.

The District Court erred when it suppressed the evidence obtained from Appellant's residence by Officer Oxford and other members of the Tulsa Police Department. Its reflexive application of the Exclusionary Rule, in which it relied heavily on *dicta* from *Brumfield v. State*, 2007 OK CR 10, 155 P.3d 826, is contrary to established constitutional principles and the purposes underlying the Exclusionary Rule. A proper analysis of Oklahoma's historical precedent concerning the relationship and interpretation of the Fourth Amendment and Article II, § 30 of the

Oklahoma Constitution, the Exclusionary Rule, and its application to knock and announce violations demonstrates that the District Court's decision to suppress the evidence was erroneous and should be reversed and the case remanded with instructions to admit the suppressed evidence in the State's case-in-chief.

A. Constitutional principles and precedents

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." Similarly, Article 2, § 30 of the Oklahoma Constitution also provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated..." Each of these provisions provides an independent source of protection for the citizens of the State of Oklahoma against unreasonable searches and seizures by the government. It is, of course, undisputed that a state may interpret its constitutional provisions to provide for broader, but not lesser, protections that the United States Constitution. *See Arizona v. Evans*, 514 U.S. 1, 8, 115 S.Ct. 1185, 1190, 131 L.Ed.2d 34 (1995) ("state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution"); *Gomez v. State*, 2007 OK CR 33, ¶ 14, 168 P.3d 1139, 1144; *Tilley v. State*, 1998 OK CR 43, 963 P.2d 607, 614. Further, this Court's independent interpretation of the Oklahoma Constitution is not necessarily constrained by the opinions of the United States Supreme Court which interpret provisions which are similar to those contained in the Oklahoma Constitution. *Dennis v. State*, 1990 OK CR 23, ¶ 20, 990 P.2d 277, 285-286; *State v. Thomason*, 1975 OK CR 148, ¶ 14, 538 P.2d 1080, 1086. However, this Court is not starting from a blank slate when it comes to interpreting and analyzing the interplay between these two Constitutional provisions.

Early on in statehood, this Court examined the relationship between the Fourth Amendment to the United States Constitution and Article II, Section 30, of the Oklahoma Constitution. *See DeGraff v. State*, 2 Okla. Crim. 519, 528, 103 P. 538, 541 (1909). In *DeGraff*, the appellant raised the issue of whether an information, verified by the county attorney, and based upon information or belief, could serve as the basis for the issuance of a warrant of arrest. 2 Okla. Crim. at 526-27, 103 P. at 540-41. The Court noted that interpretation of two separate statutes, in light of the requirements of the Oklahoma Constitution, was required to resolve the issue before it. *Id.* The Court looked at the requirements of Article II, Section 30 of the Oklahoma Constitution, recognizing that it required, for the issuance of a warrant of arrest, there must be a finding of probable cause by a magistrate supported by oath or affirmation. 2 Okla. Crim. at 527, 103 P. at 541. The Court then examined the relationship between Fourth Amendment to the United States Constitution and Article II, Section 30, of the Oklahoma Constitution in order to assist in resolving the question. *Id.* Noting that the substance of these two constitutional provisions is identical, the Court stated that in determining questions of a constitutional dimension, "it is important to find out what construction the United States courts have placed upon this provision." *Id.* The Court then examined two federal cases, including a United States Supreme Court case, *Ex parte Burford*, 3 Cranch, 448, 7 U.S. 448, 2 L. Ed. 495 (1806), and two cases from the Supreme Court of Oklahoma Territory, which substantially followed the previously cited federal cases, noting that each held what the Fourth Amendment required concerning the issuance of a warrant of arrest. 2 Okla. Crim. at 528-31, 103 P. at 541-42.

While the Court also assented to the general proposition that the Fourth Amendment "is not a restriction upon the exercise of power by the officers of a state, in dealing with their citizens and in enforcing their own laws," it found that there were a number of difficulties in escaping the

force of the previously examined cases." 2 Okla. Crim. at 531, 103 P. at 542. In particular, the Court noted that "[t]he provisions of our Constitution touching this matter are almost identically the same as those of the Constitution of the United States..." and "[w]hen the provision of our Constitution with reference to the issuance of warrants of arrest was practically copied from the Constitution of the United States by our constitutional convention, the construction which had been placed upon this provision by the United States courts, as well as by our territorial Supreme Court, was well known, and we are therefore bound to believe that said provision was adopted subject to this construction." *Id.* This marks the starting point of the historical legal basis of interpreting Article II, Section 30 of the Oklahoma Constitution in the same manner as the Fourth Amendment to the United States Constitution.

This specific construction was early on affirmed by this Court in a number of subsequent cases. *See Gomez*, 2007 OK CR 33, ¶ 3, 168 P.3d at 1146 (Lumpkin, P.J., specially concurring) ((citing *Keith v. State*, 30 Okla. Crim. 168, 171, 235 P. 631, 632 (1925) ("[s]ection 21 [of the Oklahoma Constitution] corresponds in substance with article 5 [of the federal constitution], and section 30 [of the Oklahoma Constitution] is identical with article 4, respectively, of the amendments to the Constitution of the United States"); *Buxton v. State*, 37 Okla. Crim. 402, 258 P. 814, 815 (1927) ("this court has followed the decisions of the Supreme Court of the United States in construing section 21 and 30 [of the Oklahoma Constitution]"); *Layman v. Webb*, 1960 OK CR 19, ¶ 24, 350 P.2d 323, 335 ("[t]herefore, for an answer to the problem we must determine whether in view of Sections 21 and 30, Art. II, Oklahoma Constitution, commonly known as the Bill of Rights, found as the 5th and 4th Amendments to the United States Constitution . . .".); *see also Gore v. State*, 24 Okla. Crim. 394, 402, 218 P. 545, 547 (1923) ("The guaranties of immunity from unreasonable searches and seizures, and that an accused shall not be compelled to give

incriminating evidence against himself, contained in the federal Constitution, and in our state Constitution, are practically the same."); *Kuhn v. State*, 70 Okla. Crim 119, 104 P.2d 1010, 1014 ("Section 21 corresponds in substance with article 5, and Section 30 is identical with article 4, respectively, of the amendments to the Constitution of the United States."). Further, this construction has endured to the present day. *See Sloan v. Sprouse*, 1998 OK CR 56, ¶ 16, 968 P.2d 1254, 1258; *State v. McNeal*, 2000 OK CR 13, ¶ 10, 6 P.3d 1055, 1057; *State v. Sittingdown*, 2010 OK CR 22, ¶ 17, 240 P.3d 714, 718.

Additionally, while being cognizant of its power to do so, this Court has declined to set up a different standard for interpreting Article II, Section 30, apart from the Fourth Amendment. *See Long v. State*, 1985 OK CR 119, ¶ 6, 706 P.2d 915, 916-17; *see also Dixon v. State*, 1987 OK CR 90, ¶¶ 6-7, 737 P.2d 942, 945. Rather, it has consistently held that "if it appears that the highest court of the land has definitely fixed a rule applying to the introduction of evidence obtained by illegal seizure, it follows without argument that the rule of evidence in the state courts, where like facts and principles of law are involved, should conform to that settled by the court having supreme prestige and authority." *Gore*, 24 Okla. Crim. at 402, 218 P. at 547-48; *see also Gomez*, 2007 OK CR 33, ¶ 15, 168 P.3d at 1145 ("if construction of federal constitutional provisions made by the United States Supreme Court appears to rest on 'sound principles,' the decisions of this Court construing equivalent provisions of the Oklahoma Constitution should harmonize with those of the United States Supreme Court construing the federal constitution."). This interpretive principle is further reinforced by Article I, Section 1 of the Oklahoma Constitution, which provides "[t]he State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land." "With this declaration, the Framers of our Constitution expressed a preference for a harmonious construction of the Oklahoma Constitution with the

Constitution of the United States where possible." *Gomez*, 2007 OK CR 33, ¶ 15, 168 P.3d at 1145. Accordingly, in cases where a defendant's right to be free of unreasonable searches and seizures is implicated, this Court will look to the United States Supreme Court's interpretations of the Fourth Amendment and, where the federal cases rest on "sound principles," interpret Article II, Section 30 of the Oklahoma Constitution in a like manner. *See Gore*, 24 Okla. Crim. at 402, 218 P. at 547; *see also Hess v. State*, 84 Okla. 73, 202 P. 310.

B. The Exclusionary Rule

While arriving at the truth is a fundamental goal of any judicial system, various rules limit the means by which government may conduct its search for truth. *James v. Illinois*, 493 U.S. 307, 311, 110 S.Ct. 648, 651, 107 L.Ed.2d 676 (1990). The Fourth Amendment to the United States Constitution contains no express provision precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure "[works] no new Fourth Amendment wrong." *United States* v. *Calandra*, 414 U.S. 338, 354, 94 S.Ct. 613, 623, 38 L.Ed.2d 561 (1974). In order to effectuate the guarantee against unreasonable searches and seizures, courts crafted a judicial remedy for violations of that guarantee by excluding evidence obtained in violation of it. *See Stone v. Powell*, 428 U.S. 465, 482, 96 S.Ct. 3037, 3047, 49 L.Ed.2d 1067 (1976). Notably, the rule operates to safeguard Fourth Amendment rights generally instead of acting as "a personal constitutional right of the party aggrieved." *Calandra*, 414 U.S. at 347, 94 S.Ct. at 620. Noting the historical constitutional principles surrounding the Fourth Amendment and Article II, Section 30, of the Oklahoma Constitution mentioned above, Oklahoma courts have adopted it as part of its search and seizure jurisprudence consistent with the United States Supreme Court's interpretation and

application of it. *See Gore*, 24 Okla. Crim. at 402, 218 P. at 547; *see also Hess*, 84 Okla. 73, 202 P. 310.

1. Historical origins of the Exclusionary Rule and adoption into Oklahoma law

The principles which lead to the creation of the Exclusionary Rule find their origins in *Boyd v. United States*, 116 U.S. 616, 6. S.Ct. 524, 29 L.Ed. 746 (1886). In *Boyd*, the government sought forfeiture of thirty-five cases of plate glass to the United States as being imported by the claimants in violation of certain customs laws. 116 U.S. at 617, 6 S.Ct. at 525. At trial, the government offered into evidence an invoice showing the quantity and value of the glass, which had been obtained by a judicial order pursuant to the same customs laws requiring claimants to produce said invoice. 116 U.S. at 618, 6 S.Ct. at 525. The claimants, while producing the invoice, objected to its production on two constitutional grounds, one being that the customs law compelled production of evidence from the claimants to be used against them. 116 U.S. at 618, 6 S.Ct. at 525-26. A jury found for the government and a judgment forfeiting the glass that was seized was entered. *Id.* The claimants appealed to the circuit court, which affirmed. *Id.* Claimants then sought review in the United States Supreme Court. *Id.*

The Court reversed the judgment of the trial court forfeiting claimant's property and ordered a new trial. 116 U.S. at 638, 6 S.Ct. at 536-37. In doing so, it took up the constitutional question of whether "a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an '*unreasonable* search and seizure' within the meaning of the fourth amendment of the constitution?" 116 U.S. at 622, 6 S.Ct. at 528 (emphasis in original). After extensively reviewing the history behind both the Fourth and Fifth Amendments, the Court concluded it was, finding that

"the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings." 116 U.S. at 638, 6 S.Ct. at 536-37.

The Court later expanded upon this principle in *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). In *Weeks*, police, after arresting the defendant, went to his residence, without a search warrant, searched it, and took possession of certain documents belonging to defendant. 232 U.S. at 386, 34 S.Ct. at 342. Defendant petitioned the trial court for return of his documents, which the court granted in part, but permitted the district attorney to retain some documents which were introduced against defendant at trial. 232 U.S. at 388-89, 34 S.Ct. at 342-43. At trial, defendant objection to the introduction of those documents, asserting that their introduction violated, among other things, the Fourth Amendment. 232 U.S. at 388-89, 34 S.Ct. at 343. The Supreme Court, in reversing the case, found that such actions of the government violated the Fourth Amendment. 232 U.S. at 398-99, 34 S.Ct. at 346. The Court first noted its decision in *Boyd* and the history behind the Fourth Amendment. 232 U.S. at 389-92, 34 S.Ct. at 343-44. In doing so, it laid the logical and legal foundation for the Exclusionary Rule, stating:

> The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution and

> to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.
>
> * * *
>
> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

232 U.S. at 391-393, 34 S.Ct. at 344. Accordingly, based on this reasoning, the Court held that "the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant... [and that in] holding them and permitting their use upon the trial, [ ] prejudicial error was committed." 242 U.S. at 398, 34 S.Ct. at 346. Thus, the basis for the Exclusionary Rule was established and has been continually followed in federal courts as the primary means of enforcing the Fourth Amendment's commands. *See Stone*, 428 U.S. at 482, 96 S.Ct. at 3047.

Initially, the opinions of the United States Supreme Court used language which indicated that the Exclusionary Rule would reflexively apply to all Fourth Amendment violations. *See Silverthorne Lumber Company v. United States*, 251 U.S. 385, 392, 30 S.Ct. 182, 183, 64 L.Ed. 319 (1920) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall *not be used at all*.") (emphasis added); *Olmstead v. United States*, 277 U.S. 438, 462, 48 S.Ct. 564, 567, 72 L.Ed. 944 (1928) (noting that *Weeks* "sweeping declaration" forbade the introduction of evidence if it was obtained by the government in violation of the Fourth Amendment); *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961) ("We hold that *all evidence* obtained

by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.") (emphasis added). However, that initial approach has subsequently been rejected in favor of an approach which looks at the issue of exclusion of evidence as separate from that of the issue of whether the Fourth Amendment was violated and determining whether exclusion is appropriate in light of its remedial objective of deterrence. *See Evans*, 514 U.S. at 14-15, 115 S.Ct. at 1192-93.

Oklahoma courts quickly followed the United States Supreme Court's lead in *Weeks* by adopting the Exclusionary Rule as a means of enforcing the identical guarantees against unreasonable searches and seizures in Article II, Section 30 of the Oklahoma Constitution. *See Gore,* 24 Okl.Cr. 394, 218 P. at 547, 550; *Dyer v. State*, 25 Okla. Crim. 328, 220 P. 69 (1923) (admission of evidence procured by means of an illegal search and seizure was error); *Williams v. State*, 30 Okla. Crim. 39, 234 P. 781, 782 (1925) (Evidence obtained in violation of an accused constitutional protection against unreasonable search and seizure under Const. art. 2, § 30, cannot be used as evidence against him at trial); *Simpson v. State*, 30 Okla, Crim. 344, 236 P. 55 (1925) (error in admitting evidence over defendant's objection which had been obtained in violation of defendant's rights under the Fourth and Fifth Amendments and Sections 21 and 30 of the Oklahoma Constitution confessed by Attorney General). In adopting the Exclusionary Rule, as set forth in *Weeks*, the Court in *Gore* noted that "[r]esting on sound principles, and to promote a uniformity of judicial decisions, it would seem that the decisions of this court should be in harmony with the constitutional construction of the issues here involved, as announced by [the United States Supreme Court and the Oklahoma Supreme Court]." 24 Okla. Crim. at 402, 218 P. at 547. This Court has continued to adhere to this principle, adopting Exclusionary Rule jurisprudence and reasoning in line with and in a like manner as the United States Supreme Court. *See Sittingdown*

v. State, 2010 OK CR 22, ¶ 17, 240 P.3d 714, 718 (adopting *Leon* good faith exception to the Exclusionary Rule after noting that Fourth Amendment and Article II, Section 30 are the same in the rights protected).

2. Purpose and Application of the Exclusionary Rule

As shown above, the Exclusionary Rule was adopted to effectuate the Fourth Amendment right of all citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .." *Calandra*, 414 U.S. at 347, 94 S.Ct. at 619. It operates as "a judicially created remedy designed to safeguard Fourth Amendment rights..." *Id.* at 348, 94 S.Ct. at 620. The rule excludes not only evidence that was directly obtained in violation of the Fourth Amendment, but also to the fruits of the illegally seized evidence. *See Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960). Accordingly, the objective and primary societal benefit of the exclusionary rule is to deter improper police conduct. *See United States v. Leon*, 468 U.S. 897, 916, 104 S.Ct. 3405, 3417, 82 L.Ed.2d 677 (1984); *Miles v. State*, 1987 OK CR 179, ¶ 9, 742 P.2d 1150, 1152.

However, "the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348, 94 S.Ct. at 620. The decision to apply the exclusionary rule to the facts of a case, thus excluding tainted but otherwise probative evidence, comes with high societal costs. The question of whether to apply the exclusionary rule to a given set of facts must "be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence..."

Leon, 468 U.S. at 907, 104 S.Ct. at 3412. "[U]nbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." *United States v. Payner*, 447 U.S. 727, 734, 100 S.Ct. 2439, 2445, 65 L.Ed.2d 468 (1980). Indiscriminate application of the exclusionary rule by the courts may well "generat[e] disrespect for the law and administration of justice." *Stone*, 428 U.S. at 491, 96 S.Ct. at 3051. "[S]ociety must swallow this bitter pill when necessary, but only as a 'last resort.'" *Davis v. United States*, 564 U.S. 229, 237, 131 S.Ct. 2419, 2427, 180 L.Ed.2d 285 (2001); *see also Hudson v. Michigan*, 547 U.S. 586, 591, 126 S.Ct. 2159, 2163, 165 L.Ed.2d 56 (2006).

However, even given its remedial objectives, the question of whether a court should invoke the rule is an issue separate from the question of whether the Fourth Amendment rights of the party seeking to invoke the rule have been violated by police conduct. *Leon*, 468 U.S. at 906, 104 S.Ct. at 3411, (quoting *Illinois v. Gates*, 426 U.S. 213, 223, 103 S.Ct. 2317, 2324, 76 L.Ed.2d 527 (1983)). "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *Calandra*, 414 U.S. at 348, 94 S.Ct. at 620. "A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule." *McGuire v. United States*, 273 U.S. 95, 99, 47 S.Ct. 259, 260, 71 L.Ed. 556 (1927). The "costly toll" of the Exclusionary Rule upon truth-seeking and law enforcement objective present a "high obstacle for those urging" its application. *See Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S.357, 364-65, 118 S.Ct. 2014, 2020, 141 L.Ed.2d 344 (1998). There are a number of limitations on the application of the rule to police conduct and suppression of evidence has "always been [a court's] last resort, not [its] first impulse." *Hudson*, 547 U.S. at 591, 126 S.Ct. at 2163; *see also Evans*, 514 U.S. at 13, 115 S.Ct. at 1193 (collecting

cases rejecting the reflexive application of the Exclusionary Rule to Fourth Amendment violations).

One important limitation on the rule is that of causation and attenuation. "[E]xclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence." *Hudson*, 547 U.S. at 592, 126 S.Ct. at 2164. But-for causation is a necessary, but not sufficient, condition that a defendant must show in order to seek suppression of evidence under the Exclusionary Rule. *Id.*; *Segura v. United States*, 468 U.S. 796, 815, 104 S.Ct. 3380, 3391, 82 L.Ed.2d 599 (1984). Even if one can show "but-for" causation, the United States Supreme Court "has never held that evidence is 'fruit of the poisonous tree' simply because 'it would not have come to light but for the illegal actions of the police.'" *Segura*, 468 U.S. at 815, 104 S.Ct. at 3391 (citing *Wong Sun*, 371 U.S. at 487-88, 83 S.Ct. at 417-18; *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); *Brown v. Illinois*, 422 U.S. 590, 599, 95 S.Ct. 2254, 2259, 45 L.Ed.2d 416 (1975)). Even then, "but-for cause, or 'causation in the logical sense alone,' can be too attenuated to justify exclusion." *Hudson*, 547 U.S. at 592, 126 S.Ct. at 2164 (citing *United States v. Ceccolini*, 435 U.S 268, 274, 98 S.Ct. 1054, 1059, 55 L.Ed.2d 268 (1978)).

While attenuation can occur when the causal connection between the violation and the discovery of evidence is too remote, it also occurs when, "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." *Hudson*, 547 U.S. at 593, 126 S.Ct. at 2164. Thus, the factual context of the violation shapes whether or not suppression serves the interests protected by the specific constitutional guarantee. In factual contexts where suppression does not serve those specific constitutional interests, application of the rule is unwarranted, as the harsh sanction of

exclusion would not "bear some relation to the purposes which the law is to serve." *Id.* (quoting *Ceccolini*, 435 U.S. at 279, 98 S.Ct. at 1061-62).

Another important limitation on the application of the Exclusionary Rule is, given the factual context of the violation, determining whether the Rule's "deterrence benefits outweigh its 'substantial social costs.'" *Scott*, 524 U.S at 363, 118 S.Ct. at 2019 (quoting *Leon*, 468 U.S. at 907, 104 S.Ct. at 3412). "[I]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct." *Calandra,* 414 U.S. at 350, 94 S.Ct. at 621; *see also Leon*, 468 U.S. at 910, 104 S.Ct. 3405. The main societal cost involved in applying the rule is that it "deflects the truthfinding process and often frees the guilty." *Stone*, 428 U.S. at 490, 96 S.Ct. at 3050. "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.* Given the high costs the rule exacts on the truth finding process, which is the central purpose behind a criminal trial, the Court has been cautious against expanding it. *See Colorado v. Connelly*, 479 U.S. 157, 166, 107 S.Ct. 515, 521, 93 L.Ed.2d 473 (1986).

Next to the "substantial social costs" imposed when the rule is invoked, courts "must consider the deterrence benefits, existence of which is a necessary condition for exclusion." *Hudson*, 547 U.S. at 597, 126 S.Ct. at 2166. "To begin with, the value of deterrence depends upon the strength of the incentive to commit the forbidden act." *Id.* Of course, that incentive to commit those acts will vary depending upon the factual context in which they occur. Further, in determining the deterrence value of applying the rule, a court should also take into account whether there are existing legal mechanisms in place, aside from the Exclusionary Rule, which provide adequate deterrence to committing an act that may violate a person's constitutional rights. *See*

Hudson, 547 U.S. at 596-99, 126 S.Ct. at 2166-68 (describing various deterrence mechanisms, aside from the Exclusionary Rule, used to enforce a person's constitutional rights).

3. Statutory codifications and Oklahoma's judicial approach

Despite the judicial origins of the Exclusionary Rule, some States, through their Legislatures, have codified it into statute, making its command a statutory imperative. *See* Texas Code Crim Proc. art 38.23(a).[1] Other States have adopted a statutory exclusionary rule for violations of either the United States or state constitutions, and providing for suppression in the event of a substantial violation of state statutes. *See* N.C. Gen. Stat. § 15A-974. Other States passed statutory exclusionary rules which permit exclusion based on violations of either state or federal constitutional standards. *See* Ariz. Rev. Stat. § 13-3925(A); Cal. Penal Code § 1538.5. The Federal Government has also provided exclusion as a statutory remedy in certain cases, although not with regard to statutory knock and announce violations. *See* 18 U.S.C. § 2518(10)(a)(providing for statutory remedy of suppression in wiretaps on enumerated grounds); *cf. United States v. Southerland*, 466 F.3d 1083, 1086 (D.C. Cir. 2006) (violation of 18 U.S.C. § 3109[2] did not require court to suppress evidence); *United States v. Acosta*, 502 F.3d 54, 60-61 (2d Cir. 2007) (alleged violations of § 3109 do not trigger the exclusionary rule); *United States v. Bruno*, 487 F.3d 304, 306 (5th Cir. 2007) (same); *United States v. Diaz-Ortiz*, 927 F.3d 1028, 1030 (8th Cir. 2019). However, Oklahoma's Legislature has not explicitly codified the Exclusionary Rule into statute, despite its ability to do so. Further, there is legislative precedent in Oklahoma for doing so and

[1] "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."
[2] "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance ..."

providing suppression as a remedy outside of the statutes dealing with the requisites for searches and seizures pursuant to a warrant. *See* 13 O.S. § 176.13(A).[3] Thus, in Oklahoma, the Exclusionary Rule generally remains an exclusively judicially enforced remedial device and this Court has consistently applied it in a like manner as the United States Supreme Court.

C. The knock and announce rule

The rule that law enforcement must knock and announce their presence prior to executing a search warrant is an ancient one, findings its roots in the common law of England and was brought to the United States prior to the Revolutionary War. *See Wilson v. Arkansas*, 514 U.S. 927, 931-34, 115 S.Ct. 1914, 1916-17, 131 L.Ed.2d 976 (1995); *Miller v. United States*, 357 U.S. 301, 307-08, 78 S.Ct. 1190, 1194-95, 2 L.Ed.2d 1332 (1958). The most cited example of this rule was set forth in *Semayne's Case*, 77 Eng.Repr. 194 (K.B. 1603), in which the requirement was announced, at page 195, that:

> [I]n all cases where the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors.

This common law principle "was woven quickly into the fabric of early American law," as many States enacted constitutional provisions or statutes generally incorporating English common law. *Wilson*, 514 U.S. at 933, 115 S.Ct. at 1917 (collecting examples). Early American courts also

[3] Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority may move to suppress the contents of any intercepted wire, oral or electronic communication, or evidence derived therefrom, on the grounds that:

1. The communication was unlawfully intercepted;

2. The order of authorization under which it was intercepted is insufficient on its face; or

3. The interception was not made in conformity with the order of authorization.

adopted this principle. *Id.* (collecting cases). A few States, at the time the Fourth Amendment was ratified, also enacted statutes which "specifically embrac[ed] the common law view that the breaking the door was permitted once admittance was refused." *Id.* (collecting statutes). Thus, since the founding of the United States, the knock and announce rule has obtained wide recognition as part of the law.

In addition to recognition of the knock and announce rule as part of the common law, there are a number of exceptions that have been recognized by the courts. *See Wilson*, 514 U.S. at 936, 115 S.Ct. at 19191 (knock and announce requirement may give way under circumstances "presenting a threat of physical violence," or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given."); *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S.Ct. 1416, 1421, 137 L.Ed.2d 615 (1997) (in order to justify non-compliance with knock and announce, officer must "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime."). In Oklahoma, these exceptions to the knock and announce rule have further been codified into statute, allowing an officer to obtain permission from a magistrate to dispense with the knock and announce requirement upon showing reasonable cause the certain enumerated exigent circumstances exist. *See* 22 O.S. § 1228(2).[4] Further, compliance with the rule is ultimately determined by a case-by-case analysis of the reasonableness of the officer's actions, given the factual context they encounter. *See United States v. Banks*, 540

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[4] Despite the language of the statute which permits officers to seek a "no-knock" warrant in instances where they can show reasonable cause that certain enumerated exigencies exist, an officer still retains discretion in executing a search warrant to determine whether or not an exigency exists. *See Richards*, 520 U.S. at 395-96, n. 7, 117 S.Ct. at 1422, n. 7 ("a magistrate's decision not to authorize a no-knock entry should not be interpreted to remove the officers' authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed.").

U.S. 31, 35-36, 124 S.Ct. 521, 525, 157 L.Ed.2d 343 (2003); *see also Hudson*, 547 U.S. at 590, 126 S.Ct. at 2163 (noting that when the knock and announce rule does apply, the "reasonable wait time standard" is necessarily vague); *Wilson*, 514 U.S. at 934, 115 S.Ct. at 1918 ("The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests").

Despite the stated exceptions to the rule and the flexible requirement of "reasonableness," as determined by the totality of the circumstances, the knock and announce rule still serves important purposes. Courts have concluded that the rule protects three distinct interests. First, it protects "human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident." *Hudson*, 547 U.S. at 594; *Sabbath v. United States*, 391 U.S. 585, 589, 88 S.Ct. 1755 20 L.Ed.2d 828 (1968); *Miller*, 357 U.S. at 313, n. 12, 78 S.Ct. 1190. Second, the rule protects against the unnecessary destruction of property. *Hudson*, 547 U.S. at 594; *Richards*, 520 U.S. at 393, n. 5, 117 S.Ct. at 1421, n. 5. Last, the knock-and-announce rule "protects those elements of privacy and dignity that can be destroyed by a sudden entrance." *Hudson*, 547 U.S. at 594.

As noted above, from early on, some States codified the knock and announce rule by passing statutes which were virtually identical to the common law rule set forth in *Semayne's Case*. *See Wilson*, 514 U.S. at 933, 115 S.Ct. at 1917. Other states have continued to follow this approach by codifying the common law knock and announce rule into statute.[5] In 1917, Congress passed the Espionage Act, incorporating this traditional protection into federal statutory law, *see* 40 Stat. 229,

[5]*See* Fla. Stat. § 933.09 (1997); Ala. Code § 15-5-9 (1975); Ariz. Rev. Stat. § 13-3916(B); DC ST § 48-921.02(g); Ga. Code Ann., § 17-5-27; Idaho Code § 19-4409; Iowa Code § 808.6; Mich. Comp. Laws. § 780.656; Nev. Rev. Stat. 179.055; N.D. Cent. Code, § 29-29-08; S.D. Codified Laws § 23A-35-8; Utah Code Ann. § 77-23-210.

currently codified at 18 U.S.C. § 3109. *See Hudson*, 547 U.S. at 589, 126 S.Ct. at 2162; *Miller*, 357 U.S. at 308-09, 78 S.Ct. at 1195 (recognizing 18 U.S.C. § 3109 as statutory restatement of the common law); *Sabbath v. United States*, 391 U.S. 585, 591 n.8, 88 S.Ct. 1755, 1759, n. 8, 20 L.Ed.2d 828 (1968) (holding that the exceptions to the common law knock-and-announce rule also applied to 18 U.S.C. § 3109 "since they existed at common law, of which the statute is a codification"). Oklahoma, even before it was a state, was not a stranger to this trend.

The first territorial statute in Oklahoma largely mirrored the common law rule, stating "[t]he officer may break open an outer or inner door or window of a house, or any part of the house, or anything therein, if, after notice of his authority and purpose he be refused admittance." St.1890, § 5824; *see also* St.1893, § 5389; St.1903, § 5677. The first laws concerning search warrants that were enacted after Oklahoma was admitted to the Union were borrowed from the laws of the North Dakota. *See Sprouse*, 1998 OK CR 56, ¶ 12, 968 P.2d at 1257. Concerning the requirement of officers knocking and announcing their presence prior to entering a residence, the first version of the knock and announce rule in Oklahoma was modelled after a Dakota territorial law which stated that "[t]he officer may break open an outer or inner door or window of a house, or any part of the house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he be refused admittance." *See* Comp.Laws Dak.1887, § 7620;[6] R.L.1910, § 6066. Title 22 O.S. § 1228 remained virtually unchanged until 1990, when the Legislature amended it to read, in pertinent part:

> A peace officer may break open an outer or inner door or window of a house, or any part of the house, or anything therein, to execute the warrant, when ...[t]he

[6] This statute served as the predecessor for North Dakota's present statutory "knock and announce" rule, N.D. Cent. Code, § 29-29-08, and North Dakota courts have concluded that the statute is "a codification of the common law rule that police may breaking into a home only after announcing their presence and purpose in seeking entry." *State v. Sakellson*, 379 N.W.2d 779, 781-82 (N.D. 1985).

> officer has been refused admittance after having first given notice of his authority and purpose.

See Okla. Sess. Laws 1990, H.B. 1778 c. 290, § 3, effective Sept. 1, 1990. Even with this change, 22 O.S. § 1228 still embodies the general common law principles originating in *Semayne's Case*. Accordingly, the statute is simply a codification of those principles.

The statutes concerning search warrants set forth rules for law enforcement to follow and provide a baseline for determining the when a search conducted pursuant to a search warrant is reasonable or not. *See State v. Stafford*, 1992 OK CR 47, ¶ 6, 845 P.2d 894, 895 (absent certain compelling facts, Legislature determined that nighttime search is unreasonable, per 22 O.S. § 1230); *McClary v. State*, 34 Okla. Crim. 403, 246 P. 891, 892 (1926) (evidence obtained during execution of warrant which had been issued 14 days prior, violated statute and therefore search was unreasonable). Notably, none of the statutes, and specifically, 22 O.S. § 1228, state what the remedy is for violation of them. The determination of whether to exclude any evidence obtained in violation of those statutes has historically rested on this Court's determination of whether or not to apply the Exclusionary Rule. Accordingly, in Oklahoma, the determination of whether or not to suppress evidence based on violation of a statute is function of the Exclusionary Rule, not a statutory command.

D. The District Court erred when it applied the Exclusionary Rule as a remedy for a violation of the knock and announce rule

The District Court abused its discretion when it reflexively applied the harsh sanction of the Exclusionary Rule to a violation of the knock and announce rule, codified at 22 O.S. § 1228, rather than conducting the requisite analysis of whether to apply the Exclusionary Rule to such a violation. A review and application of the above stated constitutional principles and the knock and

announce rule to the instant facts demonstrates that the District Court's application of the Exclusionary Rule in this matter is both unreasonable and contrary to the facts and the law.

1. The District Court abused its discretion by excluding the evidence

In this case, the District Court's conclusion that 22 O.S. § 1228 was violated was not an abuse of discretion. The record shows that Officer Oxford and other officers breached the door to the residence "pretty close" in time to when Officer Oxford knocked on it, leaving very little time for anyone inside to respond or refuse entry. However, in excluding the evidence obtained by Officer Oxford and the Tulsa Police Department, the District Court abused its discretion, erring in a number of ways. First, the District Court erred when it utilized *dicta* from *Brumfield v. State* in reaching its decision to suppress the evidence obtained during the execution of the search warrant.[7] Despite devoting eight paragraphs of discussion to the particular topic of the knock and announce rule and the Exclusionary Rule, the holding of *Brumfield* is deceptively simple: In order to preserve a claim of error that evidence should be suppressed for violating a defendant's constitutional rights, a defendant must object to its admission at trial, or it is waived for all but plain error. 2007 OK CR 10, ¶ 16, 155 P.3d 826, 833-34. The remainder of the discussion concerning appellants and the State's various positions and arguments concerning the knock and announce rule and whether suppression is the appropriate remedy is *dicta* in the most classical sense, as they were not necessary or essential to the Court's determination of that issue. *See Brown v. State*, 2018 OK CR 3, ¶ 47, 422 P.3d 155, 167 (citing *Cohee v. State*, 1997 OK CR 30, ¶ 4, 942 P.2d 211, 219 (Lane, J., concurring in results) (*dicta* "is an expression in a court's opinion which goes beyond the facts before the court and therefore is an individual view of the author and is not binding in subsequent

[7] Notably, Appellee did not attack the sufficiency of the search warrant or affidavit in support of it in the District Court, confining his motion merely to the manner of entry as a basis for suppression. *See* (O.R. 19-27).

cases."); *Thompson v. Weyerhouser Co.*, 582 F.3d 1125 (10th Cir. 2009) (quoting *Rohrbaugh v. Celotex Corp.,* 53 F.3d 1181, 1184 (10th Cir.1995)(Dicta are "'statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand.'"). Therefore, being *dicta*, does not accurately represent what the actual state of the law is nor is it binding on any court, and the District Court erred in treating it as such.

Second, the language cited in *Brumfield* concerning the appellant's position, which Appellee wholly adopted in arguing for suppression, *see* (O.R. 23-25), and which the District Court utilized in making its decision, misapprehends the relationship and evolution of both Oklahoma and federal constitutional jurisprudence as outlined above. In *Brumfield*, the Court cited to the Oklahoma Supreme Court's decision in *Turner v. City of Lawton*, 1986 OK 51, 733 P.2d 375, in tracing the development of the Exclusionary Rule in Oklahoma. 2007 OK CR 10, ¶ 15, 155 P.3d at 833. At bottom, *Turner* stands for the unremarkable notion that Oklahoma adopted the Exclusionary Rule, citing to *Hess* and *Gore* as the origins of the adoption of the Exclusionary Rule in Oklahoma. *Turner*, 1986 OK 51, ¶¶ 6-7, 733 P.2d at 377-78. However, both *Hess* and *Gore* adopted the Exclusionary Rule based on the United States Supreme Court's decisions construing the Fourth Amendment and the remedies for its violation as stated in its decisions in *Boyd* and *Weeks*. *See Hess*, 202 P. at 313-15; *Gore*, 218 P. at 548. The Court in *Gore* specifically noted its rationale for adopting the rule, that "[r]esting on sound principles, and to promote a uniformity of judicial decisions, it would seem that the decisions of this court should be in harmony with the constitutional construction of the issues here involved, as announced by [the United States Supreme Court and the Oklahoma Supreme Court]." 24 Okla. Crim. at 402, 218 P. at 547.

Additionally, the *Turner* Court, in proclaiming that the Oklahoma Constitutional prohibition on unreasonable searches and seizures was "broader in scope than its federal counterpart," entirely failed to account for the historical development of Article II, Section 30 of the Oklahoma Constitution. 1986 OK 51, ¶ 15, 733 P.2d at 380. As was stated by this Court well before the decisions in *Hess* or *Gore* or *Turner*:

> "[t]he provisions of our Constitution touching this matter are almost identically the same as those of the Constitution of the United States..." and "[w]hen the provision of our Constitution with reference to the issuance of warrants of arrest was practically copied from the Constitution of the United States by our constitutional convention, the construction which had been placed upon this provision by the United States courts, as well as by our territorial Supreme Court, was well known, and we are therefore bound to believe that said provision was adopted subject to this construction."'

See DeGraff, 2 Okla. Crim. at 531, 103 P. at 542; *see also Sprouse*, 1998 OK CR 56, ¶ 16, 968 P.2d at 1258. Even after the Exclusionary Rule was adopted in Oklahoma, it has continually been examined by the federal courts from which it originated and has evolved appreciably from those origins to effectuate its goal of deterrence of police misconduct while not unnecessarily impinging on the truth finding process that lies at the heart of the criminal law. *See Leon*, 468 U.S. at 906, 104 S.Ct. at 3411; *Stone*, 428 U.S. at 490, 96 S.Ct. at 3050. Oklahoma has followed this evolution of the Exclusionary Rule. *See Sittingdown*, 2010 OK CR 22, ¶ 17, 240 P.3d at 718.Given Oklahoma's historical tradition of interpreting Article II, Section 30 of the Oklahoma Constitution in line with that of the Fourth Amendment to the United States Constitution, the *Brumfield* Court's reliance on *Turner* as providing for a broader Exclusionary Rule based on state law is *dicta*, historically misplaced, and in any event, not binding on this Court.[8] The District Court erred as treating it as such in reaching its conclusion.

[8] *See State v. Young*, 1999 OK CR 14, ¶ 17, 989 P.2d 949, 953; 20 O.S. § 40.

Next, the District Court further erred when it concluded that a violation of 22 O.S. § 1228 automatically warranted the harsh sanction of exclusion. This is so for three reasons. First, nothing in the plain language of the statute, or any of the statutes which govern search warrants[9], requires that evidence obtained in violation of them be automatically suppressed as a result of their violation.[10] While the Legislature could have provided for suppression as a remedy pursuant to statute, as it has done elsewhere, *see* 13 O.S. § 176.13(A), it did not provide it here. This Court cannot enlarge the language of the statute to imply such a remedy where none plainly exists. *See Johnson v. State*, 2013 OK CR 12, ¶ 10, 308 P.3d 1053, 1055 ("A statute should be given a construction according to the fair import of its words taken in their usual sense, in connection with the context, and with reference to the purpose of the provision."). Thus, nothing in the plain language of the statute supports the District Court's ruling.

Second, rather than providing some elevated protection against unreasonable searches and seizures, as contended by Appellee and concluded by the District Court, 22 O.S. § 1228 simply codified the historic common law practice. As shown above, the origins of this statute demonstrate this fact. *See* Comp.Laws Dak.1887, § 7620; R.L.1910, § 6066. The plain language of the statute does not create a new right or enlarge a pre-existing right. It merely codifies what was inherited as part of the common law. *See Hudson*, 547 U.S. at 589, 126 S.Ct. at 2162; *Miller*, 357 U.S. at 308-09, 78 S.Ct. at 1195; *Sakellson*, 379 N.W.2d at 781-82. While the statute marks a legal guidepost for courts as to whether or not a search or seizure is reasonable, *see Stafford*, 1992 OK CR 47, ¶ 6, 845 P.2d at 895, it does not speak at all to whether or not exclusion is warranted for its violation.

[9] 22 O.S. §§ 1221 through 1241.

[10] Other similar knock and announce statutes, such as 18 U.S.C. § 3109, also do not provide for suppression as a remedy in their plain language, and courts have held that suppression does not result from their violation. *See Southerland*, 466 F.3d at 1086; *Acosta*, 502 F.3d at 60-61; *Bruno*, 487 F.3d at 306; *Diaz-Ortiz*, 927 F.3d at 1030.

Rather, that determination is made by a court, guided by Exclusionary Rule principles and precedent.

Last, this Court has equated a violation of 22 O.S. § 1228 with a violation of defendant's Fourth Amendment rights, and has suppressed evidence because the violation of 22 O.S. § 1228 was necessarily a violation of a defendant's Fourth Amendment rights. The interplay between 22 O.S. § 1228 and the Exclusionary Rule was dealt with in *Sears v. State*, 1974 OK CR 205, 528 P.2d 732. In *Sears*, officers went to defendant's apartment to conduct a search pursuant to a validly issued warrant. 1974 OK CR 205, ¶ 3, 528 P.2d at 732. Officers observed defendant inside the apartment. *Id.* The door latch to the front door of the apartment was not in its groove, and when officers knocked on it, it began to open. 1974 OK CR 205, ¶ 3, 528 P.2d at 733. Officers entered the apartment, identified themselves to the defendant, and served him with a copy of the search warrant. *Id.* A search of the residence revealed marijuana, scales, bags, and cash. 1974 OK CR 205, ¶ 4, 528 P.2d at 733. Defendant was subsequently convicted of Unlawful Possession of Marijuana With Intent to Distribute. 1974 OK CR 205, ¶ 1, 528 P.2d at 732. On appeal, defendant asserted that the search of his apartment was illegal and any evidence from his apartment should have been suppressed, as the search warrant was not executed in the manner set forth in 22 O.S. § 1228. 1974 OK CR 205, ¶ 6, 528 P.2d at 733. The Court agreed, and concluded that the officer's actions were contrary to 22 O.S. § 1228, and that the evidence should have been suppressed.[11] Thus, because the search violated the express terms of 22 O.S. § 1228, it was unreasonable, and the Exclusionary Rule applied to the evidence obtained from the search.

[11] The Court did note that exigent circumstances might exist which would form the basis for an exception to the statute. 1974 OK CR 205, ¶ 13, 528 P.2d at 735.

The Court again revisited 22 O.S. § 1228 and its interplay with the Exclusionary Rule in *Erickson v. State*, 1979 OK CR 67, 597 P.2d 344. In *Erickson*, a sheriff and his deputies went to the defendant's residence to conduct a search pursuant to a validly issued search warrant. 1979 OK CR 67, ¶ 2, 597 P.2d at 345. The front door to the residence was open, but the screen door was closed. 1979 OK CR 67, ¶ 3, 597 P.2d at 345. The sheriff knocked on the door multiple times, waited, then opened the screen door and called out "Is there anyone home?" *Id.* Defendant replied "yeah," and the sheriff and his deputies entered the residence without announcing his authority or purpose. *Id.* A search of the residence revealed nine (9) or ten (10) growing marijuana plants. 1979 OK CR 67, ¶ 4, 597 P.2d at 345-46. Defendant was subsequently convicted of Unlawful Cultivation of Marijuana. 1979 OK CR 67, ¶ 1, 597 P.2d at 345. On appeal, he contended that his motion to suppress should have been sustained, as the search was not conducted in conformity with 22 O.S. § 1228, and thus any fruits of the search should have been suppressed. 1979 OK CR 67, ¶ 6, 597 P.2d at 346. The Court agreed, holding that "the failure of the officer named in the warrant to observe the constraints of [22 O.S. § 1228], in executing the search warrant, where no extenuating circumstances existed, *rendered the search and subsequent seizure invalid as a violation of [defendant's] Fourth Amendment rights*..."1979 OK CR 67, ¶ 12, 597 P.2d at 347 (emphasis added). Thus, because the statute was violated, the defendant's Fourth Amendment rights were violated, and the Court utilized the Exclusionary Rule to suppress that evidence.

Accordingly, when officers violate the terms of 22 O.S. § 1228, their search is rendered constitutionally unreasonable. *See Sears*, 1974 OK CR 205, 528 P.2d 732; *Erickson*, 1979 OK CR 67, 597 P.2d 344; *see also Stafford*, 1992 OK CR 47, ¶ 6, 845 P.2d at 895. However, this marks the beginning, rather than the end of the inquiry as to whether or not the Exclusionary Rule applies. *See Leon*, 468 U.S. at 906, 104 S.Ct. at 3411. While 22 O.S. § 1228 codifies the traditional common

law practice and sets a guidepost for measuring the reasonableness of a law enforcement's actions, it contains no express command that evidence obtained in violation of it be excluded. Thus, a court must look to the Exclusionary Rule and its precedents in determining whether evidence taken in violation of it should be suppressed. A proper analysis of the constitutional principles involved and the purposes behind the Exclusionary Rule and knock and announce rule, codified at 22 O.S. § 1228, reveals that suppression is not required in the event the statute is violated.

2. An analysis of the applicable constitutional principles demonstrate that exclusion is not warranted

A proper analysis of the relevant constitutional principles demonstrates that the District Court erred when it applied the Exclusionary Rule to a violation of 22 O.S. § 1228. Here, the District Court automatically applied the Exclusionary Rule to the violation of 22 O.S. § 1228 without separately analyzing whether it was appropriate to do so. As noted above, the question of whether a court should invoke the rule is an issue separate from the question of whether the Fourth Amendment rights of the party seeking to invoke the rule have been violated by police conduct. *Leon*, 468 U.S. at 906, 104 S.Ct. at 3411. While this Court has had the opportunity in *Brumfield* to opine on the merits of whether or not the Exclusionary Rule should apply to a violation of 22 O.S. § 1228, particularly in light of the Supreme Court's decision in *Hudson*, it did not directly rule on that issue, as it ultimately determined that it had been waived from review for all but plain error. *Brumfield*, 2007 OK CR 10, ¶ 16, 155 P.3d at 833-34. The question which the Court in *Brumfield* avoided, whether to apply the harsh sanction of the Exclusionary Rule to a violation of the knock and announce rule as set forth in 22 O.S. § 1228, is now directly before this Court.

a. Hudson v. Michigan and its effect on the Exclusionary Rule

In *Hudson*, the United States Supreme Court took up the issue of whether application of the Exclusionary Rule was an appropriate remedy for a violation of the knock and announce

requirement. 547 U.S. at 590, 126 S.Ct. at 2163. The Court concluded that "[r]esort to the massive remedy of suppressing evidence of guilt is unjustified" for knock and announce violations. 547 U.S. at 599, 126 S.Ct. at 2168. In reaching its conclusion, the Court examined two distinct requirements for application of the Exclusionary Rule. First, it looked at the requirement of causation, noting that "but-for causality is only a necessary, not a sufficient, condition for suppression." 547 U.S. at 592, 126 S.Ct. at 2164. The Court reasoned that the constitutional violation concerning the illegal manner of entry was not the but-for cause of obtaining the evidence seized, as that evidence would have been discovered "[w]hether th[e] preliminary misstep had occurred or not," as the police would have, in any event, executed their search warrant and discovered the evidence. *Id.* However, even if the violation of the knock and announce rule could have been characterized as the "but-for" cause of discovering evidence pursuant to a search warrant, evidence is not "fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police." *Id.* (quoting *Segura*, 468 U.S. at 815, 104 S.Ct. at 3391). Rather, causation "can be too attenuated to justify exclusion." *Id.*

The Court expounded on the principle of attenuated causation, noting that there are two situations where it can occur. 547 U.S. at 593, 126 S.Ct. at 2164. The first situation was when the causal connection between the violation and the discovery of evidence was too remote. *Id.; see also Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307 (1939); *Wong Sun*, 371 U.S. at 491, 83 S.Ct. at 419. The second situation 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." *Id.* In determining whether the remedy of exclusion should apply in this situation, the penalty "must bear some relation to the purposes which the law is to serve." *Id.* (citing *Ceccolini*, 435 U.S at 279, 98 S.Ct. at 1061-62). While the knock

and announce rule protected certain interests – protection of human life and limb, protection of property, protection of privacy and dignity – it does not, and has never protected "one's interest in preventing the government from seeing or taking evidence described in a warrant." 547 U.S. at 594, 126 S.Ct. at 2165. The Court conclude that since the interests that were violated had "nothing to do with the seizure of evidence, the exclusionary rule is inapplicable." *Id.*

The second requirement the *Hudson* Court examined for application of the Exclusionary Rule was whether or not the deterrence benefits of applying the rule were outweighed by its substantial social costs. 547 U.S. at 594, 126 S.Ct. at 2165. The Court reasoned that the costs of applying the Exclusionary Rule in this situation were particularly high. *Id.* It noted that, in addition to the exclusion of evidence of guilt which risks releasing dangerous criminals into society, there was the potential for increased and extensive litigation, which imposition of such a massive remedy would generate for the courts. 547 U.S. at 595, 126 S.Ct. at 2166. Another consequence would be officers refraining from timely entering after knocking and announcing, as the amount of time they must wait is necessarily uncertain and dependent upon the circumstances, which in turn may produce "preventable violence against the officers in some case, and the destruction of evidence in many others." *Id.*

The Court then examined the deterrence benefits of applying the Exclusionary Rule to knock and announce violations. The Court first noted that the value of deterrence, which is a necessary, but not sufficient, condition of applying the Exclusionary Rule, depends upon the incentive to commit the forbidden act. 547 U.S. at 596, 126 S.Ct. at 2166. The Court reasoned that massive deterrence in this situation was hardly required, as ignoring the knock and announce rule could realistically be expected to achieve nothing aside from preventing destruction of evidence and avoiding life-threatening resistance, two dangers which, if they are reasonably suspected to

exist, "suspend the knock and announce requirement anyway." *Id.* As such, "[m]assive deterrence is hardly required." *Id.* The Court also noted other existing mechanisms to deter such violations, specifically, lawsuits for civil rights violations under 18 U.S.C. § 1983, which could entail, among other things, lawyer's fees and potential for municipal liability. 547 U.S. at 597-98, 126 S.Ct. at 2167-68. Additionally, the Court noted the deterrent effect of "increasing professionalism of police forces, including a new emphasis on internal police discipline," which can limit successful police careers and potentially expose municipalities to liability for failure to teach and enforce constitutional requirements. 547 U.S. at 598-99, 126 S.Ct. at 2168. As such, "[r]esort to the massive remedy of suppressing evidence of guilt is unjustified." 547 U.S. at 599, 126 S.Ct. at 2168.

b. Adoption of the Hudson rationale is consistent with Oklahoma criminal jurisprudence

This Court should adopt the rule set forth in *Hudson* and hold that violations of the knock and announce rule, codified at 22 O.S. § 1228, do not warrant the harsh sanction of the Exclusionary Rule. Adoption of the rationale for not applying the Exclusionary Rule to a knock and announce violation in *Hudson* is consistent with Oklahoma's historical interpretation of Article II, Section 30 of the Oklahoma Constitution and the Fourth Amendment, as well as this Court's precedent. Since statehood, this Court has interpreted Article II, Section 30 of the Oklahoma Constitution as being identical in substance with the Fourth Amendment. *See DeGraff*, 2 Okla. Crim. at 531, 103 P. at 542; *Gore*, 24 Okla. Crim. at 402, 218 P. at 547. As the Exclusionary Rule became the vehicle the United States Supreme Court utilized to effectuate the guarantees of the Fourth Amendment, Oklahoma quickly adopted it as part of its criminal jurisprudence, as it rested on "sound principles" and promoted "a uniformity of judicial decisions..." *Gore*, 24 Okla. Crim. at 402, 218 P. at 548; *see also Gomez*, 2007 OK CR 33, ¶ 15, 168 P.3d at 1145. Thus, implementation of the Exclusionary Rule in Oklahoma jurisprudence found its origins in not in

any decisions of a state court or state constitutional principles, but from federal courts, based on their interpretations of the Fourth Amendment. As the rights protected by both the Fourth Amendment and Article II, Section 30 of the Oklahoma Constitution are viewed as being "identical," *see McNeal*, 1990 OK CR 13, ¶ 10, 6 P.3d at 1057, the application of the remedy to effectuate those rights, and the limitations of that remedy, should also be viewed in the same manner. Thus, adoption of the rule in *Hudson* would simply be consistent with Oklahoma jurisprudence, as the decision in *Hudson* is based on "sound principles" and adoption of it would promote "a uniformity of judicial decisions. *See Gore*, 24 Okla. Crim. at 402. 218 P. at 548. Adoption of the *Hudson* rationale is also consistent with this Court's practice of declining to adopt a standard for interpreting Article II, Section 30 of the Oklahoma Constitution which differs from that of the Fourth Amendment. *See Long*, 1985 OK CR 119, ¶ 6, 706 P.2d at 916-17; *see also Dixon*, 1987 OK CR 90, ¶¶ 6-7, 737 P.2d at 945; *Gomez*, 2007 OK CR 33, ¶ 15, 168 P.3d at 1145 (expressing a "preference for a harmonious construction of the Oklahoma Constitution with the Constitution of the United States where possible," based in part on Article I, Section 1 of Oklahoma's Constitution).

As shown above, 22 O.S. § 1228 codifies the common law knock and announce rule. This Court has held that a violation of 22 O.S. § 1228 is a violation of a person's Fourth Amendment rights. *See Erickson*, 1979 OK CR 67, ¶ 12, 597 P.2d at 347. However, given the absence of a statutory remedy, the penalty for a violation of the statute is necessarily based the Exclusionary Rule, and therefore subject to the principles and limitations on which the Exclusionary Rule is grounded. While the Court intimated in *Sears* and held in *Erickson* that suppression was warranted for a violation of the statute, as the Court equated it with a violation of a person's Fourth Amendment rights, the Exclusionary Rule has continued to evolve to meet its stated goals of

deterrence while not unnecessarily impinging on the truth finding process. *See Leon*, 468 U.S. at 906, 104 S.Ct. at 3411; *Stone*, 428 U.S. at 490, 96 S.Ct. at 3050. Oklahoma has followed this evolution of the Exclusionary Rule. *See Sittingdown*, 2010 OK CR 22, ¶ 17, 240 P.3d at 718. As the analysis in *Hudson* shows, application of the Exclusionary Rule to suppress evidence based on a violation of the knock and announce rule is ultimately unjustified. *See* 547 U.S. at 599, 126 S.Ct. at 2168.

c. Application of Hudson to the instant case shows that suppression is not warranted

Applying the reasoning of *Hudson* to the instant facts, suppression of the evidence is not warranted for Officer Oxford's violation of the knock and announce rule set forth in 22 O.S. § 1228. First, there is a lack of but-for causation, a necessary, but not sufficient, condition for invocation of the Exclusionary Rule. *See Hudson*, 547 U.S. at 592, 126 S.Ct. at 2164. Officer Oxford and other members of the Tulsa Police Department went to Appellee's residence with a valid search warrant. Whether or not they had complied with 22 O.S. § 1228, they would have executed the warrant and discovered the drugs inside Appellee's residence. As such, there lacks a causal link between the manner of entry, which the District Court concluded was in violation of the law, and the discovery and obtaining of evidence pursuant to the valid warrant. Thus, given the absence of but-for causation, suppression is not warranted, as "exclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause of obtaining evidence." *Id.*; *see also Hudson*, 547 U.S. at 604, 126 S.Ct. at 2171 (Kennedy, J., concurring in part and concurring in the judgment) ("In this case the relevant evidence was discovered not because of a failure to knock and announce, but because of a subsequent search pursuant to a lawful warrant.").

Even if the Court were to conclude that there is the requisite but-for causation (and it should not), exclusion is still not warranted, as "the interest protected by the constitutional guarantee that

has been violated would not be served by suppression of the evidence obtained." 547 U.S. at 593, 126 S.Ct. at 2164. At the heart of both the Fourth Amendment and Article II, Section 30 of the Oklahoma Constitution are their protections against unreasonable searches and seizures. *See* U.S. Const. Amend IV; Okla. Const. Art. II, Section 30. Warrantless searches and seizures "are presumptively unreasonable," *see United States v. Karo*, 468 U.S. 705, 717, 104 S.Ct. 3296, 3304, 82 L.Ed.2d 530 (1984), and citizens "are entitled to shield their persons, houses, papers, and effects from the government's scrutiny" until a valid warrant has been issued, *see Hudson*, 547 U.S. at 593, 126 S.Ct. at 2165. The application of the Exclusionary Rule to suppress any evidence obtained from an unlawful warrantless search vindicates a person's Fourth Amendment rights, deters subsequent Fourth Amendment violations, and, given the presumptive unreasonableness of a warrantless search, bears a meaningful and proportionate relationship to the purpose the Fourth Amendment serves. *See Hudson*, 547 U.S. at 593, 126 S.Ct. at 2165. Application of the Exclusionary Rule to this situation is a meaningful and congruent response to that violation. See *id.* Thus, in these instances, the interests that were to be protected, and which were violated, are clearly served by suppression.

While the knock and announce rule forms a portion of the Fourth Amendment's reasonableness inquiry, *see Wilson*, 514 U.S. at 930, 115 S.Ct. at 1916, its primary import is to protect human life and limb, protect property from destruction, and protect privacy and dignity. *See Hudson*, 547 U.S. at 594, 126 S.Ct. at 2165. What the knock and announce rule does not protect, and has never protected, is a person's "interest in preventing the government from seeing or taking evidence described in a warrant." *Id.* Here, the interests sought to be protected by 22 O.S. § 1228, while important, have nothing to do with the seizure of evidence pursuant to a valid warrant. The interests served by the Fourth Amendment and Article II, Section 30, the right to be

free from unreasonable searches and seizures, was vindicated in this case by Officer Oxford resorting to a neutral and detached magistrate, presenting that magistrate with an affidavit supporting probable cause, and obtaining a warrant based on that probable cause, as determined by a magistrate, to search Appellee's residence. Thus, application of the Exclusionary Rule would be incongruent and not "bear some relation to the purposes which the law is to serve." *See id.* As the interests that are infringed upon by a violation of the knock and announce rule "have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable." *Id.* Accordingly, exclusion of the evidence recovered, based on a failure to comply with 22 O.S. § 1228, is not mandated.

Second, the social costs of applying the rule are outweighed by any deterrence benefits applying the rule in this situation may entail. The social costs described by the Court in *Hudson* – exclusion of incriminating evidence which risks allowing dangerous criminals into society, increased litigation due to the enormous payout entailed by application of the rule to knock and announce violations, and officers refraining from timely entry which produces preventable violence against officers or the further destruction of evidence, remain to this day. 547 U.S. at 595, 126 S.Ct. at 2165-66. Some of the deterrence benefits described by the Court also remain today. There is still little to be gained in the way of evidence from violating the knock and announce rule, as the two things which its violation can be expected to achieve, preventing violence and destruction of evidence, still suspend the rule, provided there is reasonable suspicion for their existence. *Hudson*, 547 U.S. at 596, 126 S.Ct. at 2166. And while Oklahoma may have authorized dispensing with the knock and announce requirement by a statutory showing of reasonable suspicion of certain enumerated exigencies to a reviewing magistrate,[12] officers still retain their

[12] 22 O.S. § 1228(2).

discretion to determine, based on the facts they are confronted with, whether an exigency exists. *See Richards*, 520 U.S. at 395-96, n. 7, 117 S.Ct. at 1422, n. 7. Thus, while an officer can apply for a no-knock search warrant, the fact that one is not obtained does not take away an officer's ability to dispense with the rule in proper circumstances.[13] Thus, "massive deterrence is not required." *Hudson*, 547 U.S. at 596, 126 S.Ct. at 2166.

The *Hudson* Court also discussed the impact of other existing legal deterrents, civil lawsuits pursuant to 28 U.S.C. § 1983 and the increased professionalism and internal disciple of the modern police forces, on whether to apply the harsh sanction of exclusion. In addition to those existing legal deterrents mentioned in *Hudson*, Oklahoma has further legal mechanisms which provide additional deterrents, aside from invocation of the Exclusionary Rule, for a violation of the knock and announce rule. A violation of 22 O.S. § 1228 can result in additional civil liability for a municipality based on an officer's actions under the Oklahoma Government Tort Claims Act, 51 O.S. §§ 151, *et seq. See Sullivant v. City of Oklahoma City*, 1997 OK 68, ¶¶ 6-8, 940 P.2d 220, 223 (cities may not rely on GTCA's exemption of liability for execution or enforcement of the lawful orders if police fail to comply with 22 O.S. § 1228(1)). Additionally, should property damage result from an officer's failure to comply with 22 O.S. § 1228, a municipality may also be liable for a plaintiff's attorney fees. *See* 12 O.S. § 940 (providing for prevailing party to be allowed reasonable attorney's fees in cases of negligent or willful injury to property). Additional deterrents aimed specifically at law enforcement officers, aside from internal discipline, are also present to deter willful violations of the knock and announce rule. *See* 22 O.S. § 1240 ("A peace officer in

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[13] Appellee appeared to take the position at District Court that the presence of the camera should have caused Officer Oxford to seek a no-knock warrant pursuant to 22 O.S. § 1228(2). While certainly relevant to the finding of exigent circumstances, courts analyzing the issue have held that the mere presence of a surveillance camera, without more, does not amount to an exigency. *See People v. Condon*, 592 N.E.2d 951, 956 (Ill. 1992).

executing a search warrant, who willfully exceeds his authority, or exercises it with unnecessary severity, is guilty of a misdemeanor.").[14] Thus, the social costs attendant to applying the Exclusionary Rule to a knock and announce violation are still present and substantial. As there is little practical incentive to violate the knock and announce rule, and given the substantial existing deterrents, both under Oklahoma and federal law, "[r]esort to the massive remedy of suppressing evidence of guilt is unjustified." *See Hudson*, 547 U.S. at 599, 126 S.Ct. at 2168.

Accordingly, when applying the rationale of *Hudson* to the instant facts, it is clear that suppression is not warranted. There is an entire lack of but-for causation, as the evidence was discovered not because of a violation of 22 O.S. § 1228, but because officers had a warrant for the residence. Further, the interests protected by the knock and announce rule are sufficiently attenuated from the guarantee against unreasonable searches and seizures, which in this case was vindicated by Officer Oxford obtaining a search warrant based on probable cause from a neutral and detached magistrate prior to conducting his search. Since the interests protected by the knock and announce rule, codified at 22 O.S. § 1228, have nothing to do with the lawful seizure of evidence, the Exclusionary Rule is not applicable. Furthermore, the social costs of applying the Exclusionary Rule to Officer Oxford's actions outweigh the deterrence benefits that come from suppression in these circumstances, particularly in light of the multiple extant deterrents, both at the state and federal levels. Therefore, a proper analysis of the constitutional principles and Oklahoma's precedent that are at play in this case demonstrate that resort to the harsh sanction of the Exclusionary Rule to a violation of the knock and announce rule, codified at 22 O.S. § 1228, is not warranted. The District Court's order suppressing the evidence recovered in this case must

[14] The State is not asserting or implying that Officer Oxford or any other officer's behavior in this case violated 22 O.S. § 1240, as Officer Oxford articulated why he believed, even if mistakenly, an exigency existed which justified dispensing with the requirements of 22 O.S. § 1228.

be reversed and the case remanded with instructions to admit the evidence seized by Officer Oxford and other members of the Tulsa Police Department.

IV.
Conclusion

The District Court erred when it applied the Exclusionary Rule as a remedy for a violation of the knock and announce rule, codified at 22 O.S. § 1228. As such, its ruling was unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. Accordingly, the State requests that this Court reverse the order of the District Court suppressing the evidence seized in this case, and remand the case with instructions to admit that evidence in the State's case-in-chief.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

This is to certify that on the 11th day of March, 2024, a copy of the foregoing Brief was couriered to John D. Hadden, Clerk of the Oklahoma Court of Criminal Appeals, State Capital Bldg., 2300 N. Lincoln, Room B-2, Oklahoma City, OK 73105 with sufficient postage thereon fully prepaid.

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