

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,	:	Case No. 2020-0495
Plaintiff-Appellee,	:	On Appeal from the Hamilton
vs.	:	County Court of Appeals,
	:	First Appellate District
LEANDRE JORDAN,	:	C.A. Case Nos. C-1800559
Defendant-Appellant.	:	C-1800560

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**REPLY BRIEF OF DEFENDANT-APPELLANT LEANDRE JORDAN**

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## REPLY ARGUMENT

**Sole Proposition of Law: Under R.C. 2935.04, once probable cause is established, a warrantless arrest is unconstitutional if there is unreasonable delay in effecting the arrest. Whether the delay is reasonable depends upon the circumstances surrounding the delay and the nature of the offense.**

### **A. Mr. Jordan's arguments are properly preserved.**

The Ohio Prosecuting Attorneys Association, writing as amicus for the state, asserts that the arguments presented herein are waived. (OPAA brief at 2). Despite waiver being raised by the state in the court below, the First District Court of Appeals addressed Mr. Jordan's challenge to his warrantless arrest when it declined to follow *State v. VanNoy*, 188 Ohio App.3d 89, 2010-Ohio-2845, 934 N.E.2d 413 (2d Dist). *State v. Jordan*, 2020-Ohio-689, 145 N.E.3d 357, ¶¶ 18-20 (1st Dist.). The warrantless arrest issue was also properly raised at the trial court level. In Mr. Jordan's motion to suppress, defense counsel argued there was no probable cause to arrest Mr. Jordan, as the officers did not personally observe Mr. Jordan commit a criminal offense at the time of his arrest. At the motion to suppress hearing, it was revealed that Mr. Jordan's arrest was based upon the week-old burglary, rather than his conduct at the time of his arrest. Based on the arresting detective's testimony, defense counsel argued to the trial court that the warrantless arrest was unreasonable as the officers had over a week to obtain a warrant but elected not to. (T.p. 230). Thus, this is not an instance where arguments raised in this Court were not presented in the courts below. *See State v. Castagnola*, 145 Ohio St.3d 1, 2015-Ohio-1565, 46 N.E.3d 638, ¶¶ 68, 70.

Furthermore, the role of this Court as "the court of last resort is to clarify confusing constitutional questions, resolve uncertainties in the law, and address issues of public or great general interest." *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 991 N.E.2d 1095, ¶ 63 (O'Donnell, J., dissenting). The proposition of law accepted in this case asks this Court to do exactly that: clarify whether a delay in making a probable cause arrest without a warrant renders

the warrantless arrest pursuant to R.C. 2935.04 unreasonable. *See State v. Thompson*, 92 Ohio St.3d 584, 586, 2001-Ohio-1288, 752 N.E.2d 276. Given the constitutional uncertainty in the scope and application of R.C. 2935.04, Mr. Jordan encourages this Court to hold that, absent any exigency or reasonable justification for delay, delayed probable cause arrests are unreasonable, and an arrest warrant must be obtained when it is practicable to do so.

**B. Mr. Jordan proposes a narrow rule that would not unduly burden law enforcement and restores full meaning to the warrant requirement.**

Contrary to the state’s concern, Mr. Jordan’s proposition of law would not burden law enforcement by imposing an exigency requirement on every arrest made under R.C. 2935.04. (Appellee brief at 6, 8). Rather, Mr. Jordan asks this Court to determine when warrantless, probable cause arrests under R.C. 2935.04 become unreasonable. While the state argues that probable cause is the “sine qua non” of the Fourth Amendment, to the contrary, *reasonableness* is the foundation of the Fourth Amendment. (*Id.* at 8). “*Unreasonable* searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the [Fourth] Amendment.” (Emphasis added.) *Payton v. New York*, 445 U.S. 573, 585, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). “[T]he warrantless arrest of a person is a species of seizure required by the Amendment to be reasonable.” *Id.*, citing *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). Even though R.C. 2935.04 permits law enforcement to make warrantless felony arrests in a public place based on probable cause, this limited grant of authority does not mean that all warrantless arrests under the statute are *per se* reasonable.

Mr. Jordan asks this Court to impose narrow limitations upon arrests pursuant to R.C. 2935.04. Simply put, delayed probable cause arrests must be justified in order for the arrest to be reasonable. Whether it was practicable under the circumstances preceding the arrest to obtain a warrant should be the standard for ascertaining whether a warrantless arrest was conducted

reasonably. A lack of exigent circumstances preceding a delayed, warrantless arrest based on probable cause would tend to support that the arrest was unreasonable, as the lack of exigency combined with the delayed suggests it was practicable to obtain a warrant. However, the type of offense under investigation may also form the reasonableness of a delayed, warrantless arrest. For instance, when police have probable cause to arrest a suspect and have knowledge that the suspect intends to engage in ongoing criminal activity, such circumstances may require a delayed arrest to further investigate any impending criminal acts. Law enforcement will have the opportunity to explain why an ongoing investigation was necessary, and why it was impracticable to obtain an arrest warrant under the circumstances.

Furthermore, adopting Mr. Jordan's proposition of law would not create endless litigation as the state warns. In fact, the opposite is likely to be true. Obtaining a warrant generally limits Fourth Amendment challenges to police conduct. That is because "[i]t is ultimately the responsibility of the magistrate to determine whether there is a sufficient legal basis to issue a warrant, and in most instances, police officers are not expected to second-guess the judge." *State v. Dribble*, 159 Ohio St.3d 322, 2020-Ohio-546, 150 N.E.3d 912, ¶ 18. Additionally, police action justified by exigent circumstances is protected under Fourth Amendment jurisprudence, so there would be little to contest under that particular warrantless arrest scenario. *State v. Davis*, 7th Dist. Columbiana No. 19 CO 0033, 2020-Ohio-4821, -- N.E.3d --, ¶ 13, citing *State v. McGee*, 2013-Ohio-4165, 996 N.E.2d 1048, ¶ 17 (7th Dist.), and *State v. Akron Airport Post No. 8975*, 19 Ohio St.3d 49, 51, 482 N.E.2d 606 (1985) (recognizing probable cause to search combined with the presence of exigent circumstances as a judicially recognized exception to the warrant requirement in Ohio). Thus, contrary to the state's concern, delayed, warrantless arrests where warrants could be obtained are more likely to be litigated if a rule limiting warrantless-arrest authority is not

adopted.

The state in effect asks this Court to find R.C. 2935.04 arrests to be per se reasonable, despite whether a warrant could be obtained. It challenges Mr. Jordan's analogy to stale search warrants and argues that probable cause to arrest does not grow stale, while also pointing out that arrest warrants can remain open for years before being executed. (State's brief at 10). This assertion places an officer's delayed, warrantless probable cause arrest on equal footing with a delayed arrest that is supported by a warrant. If R.C. 2935.04 provides law enforcement with authority to arrest based on probable cause at any time, then there is never an incentive to obtain a warrant. The vital role of the judiciary to test an officer's probable cause determination to arrest would be virtually eliminated. While the General Assembly has codified a "probable cause" exception to the warrant requirement, it could not have possibly intended for R.C. 2935.04 to completely eliminate the need for felony arrest warrants entirely. To avoid this outcome, the statute must be interpreted in a way that comports with the reasonableness requirement of the Fourth Amendment and Article I, Section 14 of the Ohio Constitution. The obvious limitation upon probable cause arrests is to ensure that they are made under circumstances where it is impracticable to obtain a warrant.

In this case, it must be remembered that Mr. Jordan was not engaged in any criminal activity at the time of his arrest or at any time while he was under police surveillance. He was arrested based on probable cause related to a burglary offense that occurred a week prior to his arrest. No new information was developed during the week-long surveillance. That week-long delay served as the practicability of obtaining a warrant in this case. Nothing in the record indicated the delay was justified by any exigency. There was no indication Mr. Jordan intended or planned to commit a subsequent burglary offense.

As a counter point, the state argues that good police practice sometimes requires postponing an arrest to develop additional evidence necessary to prove guilt to a jury. (State's brief at 9). This affirmatively did not happen in this case. Moreover, any ongoing surveillance for burglary would seem unjustified when the stolen items could easily be disposed of, or, as in this case, the stolen cash could easily be converted. Moreover, if ongoing surveillance is necessary in certain cases, this Court's acceptance of Mr. Jordan's proposition of law would not preclude said surveillance. Rather, it would require a searching assessment of the need for further investigation under the circumstances of the particular case versus the propriety of obtaining a warrant. This level of scrutiny is necessary to ensure that the warrant requirement and the role of the judiciary to test probable cause does not give way to unfettered police discretion.

**C. The Fourth Amendment and Article I, Section 14 of the Ohio Constitution protect against unreasonable warrantless seizures.**

The state argues that this Court is bound to follow the federal Fourth Amendment standard under *Watson*. (OPAA brief at 9; *see* State's brief at 9-10). As discussed in Appellant's merit brief, Mr. Jordan maintains that *Watson* can be read in a way that does not preclude the rule for which he advocates in this case. (Appellant's brief at 10-11). While *Watson*'s holding appears to decide the issue, the factual predicate to that holding is distinguishable, as the United States Supreme Court did not contemplate a delayed arrest like the one at issue in this case. The defendant in *Watson* was arrested at a time when he was engaged in the commission of a criminal offense. *United States v. Watson*, 423 U.S. 411, 412-413, 96 S.Ct. 820, 46 L.Ed.2d 59 (1976). Law enforcement was aware of a prior offense, but utilized a confidential informant to make an arrest at a time when the defendant was actively engaged in criminal activity. *Id.* Similar circumstances were pointedly absent from this case, which makes Mr. Jordan's warrantless arrest categorically different from the arrest in *Watson*. Therefore, despite *Watson*, this Court can rule that delayed, warrantless, probable

cause arrests are unreasonable under the Fourth Amendment.

If this Court finds *Watson* settles the Fourth Amendment argument, this Court still maintains the unique authority to interpret Ohio's Constitution in a way that allows for more protection to Ohio citizens than the protections afforded under the Fourth Amendment. *California v. Greenwood*, 486 U.S. 35, 43, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988) ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal constitution."). As this Court observed:

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

(Emphasis added.) *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, ¶ 21, citing *Arnold v. Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993), paragraph one of the syllabus. While this Court endeavors to harmonize its interpretation of Article I, Section 14 of the Ohio Constitution with the Fourth Amendment, it can also provide more protections when there are persuasive reasons to do so. *Brown* at ¶ 22, citing *State v. Robinette*, 80 Ohio St.3d 234, 239, 685 N.E.2d 762 (1997). The state's amicus argues any claim under the Ohio Constitution would face significant hurdles. (OPAA brief at 11-12). However, there are persuasive reasons to afford more protections under the circumstances presented in the instant case and cases like it.

First, this Court has previously afforded greater protections against unreasonable seizures to Ohio citizens when it declined to follow *Atwater v. Lago Vista*, 532 U.S. 318, 121 S.Ct. 1536, 149 L.E.2d 549 (2001). *Brown* at ¶ 7. In *Atwater*, the United States Supreme Court held that an officer can arrest an individual without a warrant and without violating the Fourth Amendment when the most minor offense is committed in the officer's presence. *Atwater* at 354. However,

prior to *Atwater*, this Court held that a full custodial arrest for a minor misdemeanor violated the Fourth Amendment and Ohio Constitution, absent an exception provided by R.C. 2935.26. *State v. Jones*, 88 Ohio St.3d 430, 2000-Ohio-374, 727 N.E.2d 886. Subsequently, in *Brown*, this Court was asked to reconsider its *Jones* decision in light of *Atwater*. *Brown* at ¶¶ 3-7. This Court departed from *Atwater* and maintained that “Section 14, Article I of the Ohio Constitution provides greater protection than the Fourth Amendment to the United States Constitution against warrantless arrests for minor misdemeanors.” *Id.* at ¶ 7.

In analyzing whether warrantless minor misdemeanor arrests were reasonable, this Court weighed the interests of the government in making the arrest against the interest of the individual to be free from unreasonable government intrusion upon their personal liberty and privacy. *Jones*, 88 Ohio St.3d at 438-40; *Brown* at ¶¶ 17-19. Law enforcement clearly has a strong interest in making probable cause felony arrests, and that interest is squarely protected by R.C. 2935.04. But the strength of that interest is negated when the warrantless arrest is delayed without justification. This was particularly true under the facts of the instant case, as the delay negated the potential for law enforcement officers to apprehend the suspect and recover the victim’s \$40,000. Thus, the government’s interest in making a delayed, warrantless arrest without justification for the delay was outweighed in this case by the “serious intrusion upon a person’s liberty and privacy interest that, necessarily, arises out of an arrest.” *Brown* at ¶ 19, quoting *Jones* at 440.

Second, the New Mexico Supreme Court has departed from *Watson* and extended more protections to its citizens under New Mexico’s Constitution with regard to warrantless felony arrests. *Campos v. State*, 117 N.M. 155, 1994-NMSC-012, 870 P.2d 117 (1994); *State v. Paananen*, 357 P.3d 958, 2015-NMSC-031. Notably, when this Court declined to follow *Atwater* in *Brown*, it recognized that Montana had also concluded that Montana’s Constitution afforded

more protections to its citizens than the Fourth Amendment as interpreted by *Atwater*. *Brown* at ¶¶ 23-24, citing *State v. Bauer*, 307 Mont. 105, 36 P.3d 892 (2001). This Court should similarly recognize and follow New Mexico’s lead in departing from *Watson*.

In *Campos*, the high court of New Mexico held: “for a warrantless arrest to be reasonable the arresting officer must show that the officer had probable cause to believe that the person arrested had committed or was about to commit a felony and some exigency existed that precluded the officer from securing a warrant.” *Campos* at ¶ 14. The *Campos* Court “expressly disavowed the *Watson* holding that a warrant was not required, even when officers had sufficient time and opportunity to obtain one.” *Paananen* at ¶ 19. At the time of the *Campos* decision, a New Mexico statute permitted warrantless arrests when officers had probable cause that a suspect was violating the state’s Controlled Substances Act. *Campos* at ¶ 4. The arresting officer in *Campos* had obtained information from a reliable confidential informant that the defendant was intending to engage in a drug transaction. *Id.* at ¶ 2. These circumstances fit within the parameters of the felony arrest statute; however, the New Mexico Supreme Court refused to determine the arrest was reasonable with a “simple determination of probable cause.” *Id.* at ¶ 5. “To give the statute conclusive effect would be to abdicate our duty as the primary interpreters of our constitution and would give the legislative branch the power to define constitutional provisions in violations of separation of powers.” *Id.* at ¶ 7, citing *Watson*, 423 U.S. at 455 (Marshall, J., dissenting) (“criticizing the majority’s decision as according ‘constitutional status to a distinction that can be readily changed by legislative fiat’”).

“[E]ach case must be reviewed in light of its own facts and circumstances,” and no warrantless, probable cause arrest should be deemed per se reasonable. *Campos* at ¶ 10.

Accordingly, in light of *Campos* and this Court’s willingness in *Jones* and *Brown* to extend more

protections to Ohio citizens under Ohio’s Constitution, it should continue to do so with respect to felony arrests and require officers to obtain arrest warrants when practicable. *See id.* at ¶ 15 (“To set forth a clear rule for police officers, we limit our inquiry in reviewing warrantless arrests to whether it was reasonable for the officer not to procure an arrest warrant”). *Compare State v. Heston*, 29 Ohio St.2d 152, 280 N.E.2d 376 (1972) (“arresting officer must have probable cause to believe that a felony was committed \* \* \* and the circumstances must be such as to make it impracticable to secure a warrant.”); *State v. VanNoy*, 188 Ohio App.3d 89, 2010-Ohio-2845, 934 N.E.2d 413 (2d Dist.) (“judicially untested determinations by police officers are simply not reliable enough to justify an arrest without a warrant – at least where the officers had sufficient opportunity to seek one beforehand.”).

**D. The good faith exception is inapplicable, and the evidence illegally obtained in this case must be suppressed under the exclusionary rule.**

The state’s amicus argues that the good faith exception to the exclusionary rule should apply in this case. (OPPA brief at 16; *See State’s* brief at 10). This argument fails at the outset. Notably, the state as appellee did not raise a good faith argument in its brief, nor did it raise good faith in either the trial court or the court below. Therefore, the argument has been waived and should not be considered in the first instance by this Court. *See State v. Carnes*, 154 Ohio St.3d 527, 2018-Ohio-3256, 116 N.E.3d 138, ¶ 20 (declining to address the amicus’ unpreserved argument). *Compare State v. Reniff*, 146 Ohio App.3d 749, 2001-Ohio-4353, 768 N.E.2d 667, ¶ 14 (good faith not waived when the state raised the issue in its brief in opposition to defendant’s motion to suppress).

Even if considered on its merits, good faith does not apply here. The relevant standard is whether the arresting officers acted in “objectively reasonable, good-faith reliance” on the governing law at the time. *State v. Johnson*, 141 Ohio St.3d 134, 2014-Ohio-5021, 22 N.E.3d

1061. The conduct at issue in this case was subject to two simultaneous standards: the constitution's reasonableness requirement and the authority to make felony arrests under R.C. 2935.04. The arresting officer's exclusive reliance on R.C. 2935.04 was not objectively reasonable in this case. It is significant that Mr. Jordan was not engaged in any criminal offense at the time of his arrest. Additionally, he was not driving the suspect vehicle at the time of his arrest, negating any notion that he would be in possession of evidence related to the burglary. The week-long delay for continued surveillance did not reveal any new information pertaining to the burglary and did not reveal any new criminal behavior to justify a belated arrest. To make an arrest under these circumstances, without even attempting to have probable cause tested by a neutral and detached magistrate, demonstrates a deliberate disregard for the warrant requirement under Article I, Section 14 of the Ohio Constitution and the Fourth Amendment. *See Davis v. United States*, 564 U.S. 229, 238, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) ("when the police exhibit 'deliberate,' reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs.")

Alternatively, the state's amicus opines that this case merely contemplates a statutory violation, not a constitutional violation; therefore, the exclusionary rule does not apply. (OPAA brief at 20-21). This assertion misstates Mr. Jordan's arguments. The arrest was constitutionally unreasonable as it was conducted without a warrant, and R.C. 2935.04 does not purport to validate all delayed, warrantless felony arrests when it is practicable under the circumstances to obtain a warrant. Accordingly, Mr. Jordan directly asks this Court to give R.C. 2935.04 an appropriate constitutional interpretation in light of the statute's susceptibility to law enforcement's abuse of authority. *See State v. Thompson*, 92 Ohio St.3d at 586 ("A statute will be given a constitutional interpretation if one is reasonably available.").

Doubling its efforts to avoid the exclusionary rule, the state’s amicus also argues this Court is not required to apply the exclusionary rule. (OPAA brief at 13). It directs this Court to the “discussion” provided in *Brief of Amicus Curiae Ohio Attorney General in State v. Bembry*, OSC No. 2016-0238 in support of this proposition. (*Id.* citing 2016 WL 5867510). However, in *Bembry*, this Court explicitly acknowledged the availability of the exclusionary rule:

Although the exclusionary rule is *undoubtedly available to remedy a violation of the Fourth Amendment*, it is an entirely separate question “[w]hether the exclusionary sanction is appropriately imposed in a particular case.” *United States v. Leon*, 468 U.S. 897, 906, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The exclusionary rule is “applicable only where its deterrence benefits outweigh its ‘substantial social costs.’ ” *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998), quoting *Leon* at 907, 104 S.Ct. 3405. Those social costs “sometimes include setting the guilty free and the dangerous at large.” *Hudson*, 547 U.S. at 591, 126 S.Ct. 2159, 165 L.Ed.2d 56. At the very least, exclusion prevents “consideration of reliable, probative evidence,” which “undeniably detracts from the truthfinding process.” *Scott* at 364, 118 S.Ct. 2014. And so, before a court sanctions the exclusion of evidence, it must consider whether exclusion will actually remedy the wrong and deter future wrongdoing.

(Emphasis added.) *State v. Bembry*, 151 Ohio St.3d 502, 2017-Ohio-8114, 90 N.E.3d 891, ¶ 18.

Accordingly, it is readily apparent that the exclusionary rule will be invoked by this Court when appropriate. *See Castagnola*, 2015-Ohio-1565, ¶¶ 91- 108 (finding the good-faith exception to the exclusionary rule did not apply and ordering the evidence obtained to be suppressed).

The state’s amicus warns that applying the exclusionary rule in this case would not promote deterrence, and claims that suppression is a draconian remedy that would permit a major drug offender to avoid punishment, thereby offending notions of justice. (OPAA brief at 18). In other words, the state essentially argues that the end justifies the means. “There is always a temptation in criminal cases to let the end justify the means, but as guardians of the Constitution, we must resist that temptation.” *State v. Gardner*, 135 Ohio St.3d 99, 2012-Ohio-5683, 984 N.E.2d 1025, ¶ 24. *See also State v. Harding*, 180 Ohio App.3d 497, 2009-Ohio-59, 905 N.E.2d 1289, ¶ 30 (2d Dist.) (Donovan, J., dissenting), *majority overruled, State v. Gardner*, 2d Dist.

Montgomery No. 24308, 2011-Ohio-5692 (“Officers Coleman and Barnes’s flagrant and impermissible conduct in illegally detaining Harding dictates that the contraband be suppressed, despite the ultimate discovery of outstanding warrants. \* \* \* The law should not hold that the ends justify the means.”).

Relying on the discovery of illegal drugs as a basis to forego application of the exclusionary rule belittles Mr. Jordan’s fundamental right to be free from unreasonable search and seizure. Equally troubling is the fact that the amicus’ argument ignores the origin of this case: a burglary offense wherein \$40,000 cash was stolen. The delay in arresting Mr. Jordan certainly thwarted any reasonable opportunity for law enforcement to feasibly recover the stolen cash, providing no justice for the victims of the burglary. Interestingly, the state makes no attempt to justify how the belated arrest in this case protected the state’s interest in securing a burglary arrest and conviction.

Lastly, the state’s amicus also observes that the officers could have engaged Mr. Jordan in a *Terry* stop, and suggests that if they had done so, the outcome would be the same. (OPAA at 19). First, this assertion is highly speculative. Second, it is well-known that *Terry* allows for a *limited* pat-down search for weapons, and must be justified under the facts and circumstances known to the officer at the time of the search, not facts developed a week before the search. *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.E.2d 889 (1968); *State v. Andrews*, 57 Ohio St.3d 86, 87, 565 N.E.2d 1271 (1991) (when evaluating a *Terry* stop, the question is whether the facts available to the officer at the moment of the seizure reasonably warrant that intrusion). There was no indication in this case that officers believed Mr. Jordan was armed and dangerous at the time of his arrest, nor was there any reasonable suspicion that Mr. Jordan may have been in possession of evidence of a crime. Moreover, Mr. Jordan’s wallet, containing the identification card, and set of keys that were

used to support the search warrant, were not weapons, and were not immediately apparent contraband subject to discovery under a *Terry* search. *See State v. Dunlap*, 7th Dist. Columbiana No. 12 CO 31, 2013-Ohio-5637, ¶ 44 (removing wallet from defendant's pocket exceeded scope of *Terry* search). The fact that a less invasive alternative was available to the detectives further demonstrated how the delayed, probable cause arrest was unreasonable and not made in good faith.

Reviewing the totality of the circumstances presented in this case, the exclusionary rule is the proper remedy for the ill-gotten evidence. *See Bembry*, 2017-Ohio-8114 at ¶ 28 (explaining that exclusion was appropriate in cases that turned in part on the lack of a valid arrest warrant, but inappropriate in *Bembry's* case when a warrant was issued even though the knock and announce rule was violated during its execution). The arresting officers actively chose to delay an arrest for a burglary offense, an offense where time was of the essence to recover the stolen items. The officers' warrantless intrusion upon Mr. Jordan's liberty and privacy interests did not promote any legitimate governmental interest, as the belated arrest detracted from the truthfinding process with respect to whether Mr. Jordan was in fact involved in the burglary. In other words, any interest in apprehending a potential burglary suspect was diminished by the delay, and the discovery of illegal drugs does not justify law enforcement's blatant wrongdoing. Police had no objectively reasonable basis to delay their arrest and should not be rewarded for circumventing the warrant requirement under the facts and circumstances of this case. Accordingly, given the absence of a warrant, the absence of good faith, and the diminished interest in apprehending a burglary suspect by virtue of the delayed arrest, the exclusionary rule should be applied.

### **CONCLUSION**

The Fourth Amendment and Article I, Section 14 protect against unreasonable search and seizure. Whether there is probable cause to arrest or search should be determined by a neutral

and detached magistrate rather than by an official of the executive branch whose duty is to enforce the law, to investigate, or to prosecute. *See Coolidge v. New Hampshire*, 403 U.S. 443, 450, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). This requirement reflects “our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.” *United States v. United States Dist. Court for E. Dist. of Michigan, S. Div.*, 407 U.S. 297, 317, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), citing Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A. J. 943, 944 (1963). In this case, although law enforcement had ample time to procure an arrest warrant for Mr. Jordan, they chose to act without one. Delayed arrests without justification for the delay and without a warrant are unreasonable in light of the Fourth Amendment’s warrant requirement.

Accordingly, Mr. Jordan respectfully requests that this Court adopt his proposition of law and reverse the decision of the First District Court of Appeals with instruction to remand the matter back to the trial court to grant his motion to suppress and order that the illegally obtained evidence be excluded.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the Reply Brief of Defendant-Appellant Leandre Jordan has been served via email delivery on November 24, 2020, to the following counsel of record:

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