IN THE SUPREME COURT OF OHIO
2020

STATE OF OHIO, Plaintiff-Appellee, -vs- LEANDRE JORDAN, Defendant-Appellant.	Case No. 20-495 On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Nos. C-180559, C-180560

BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF APPELLEE STATE OF OHIO

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STATEMENT OF AMICUS INTEREST

Founded in 1937, the Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports the state's 88 elected county prosecutors. Its mission is to assist county prosecuting attorneys to pursue truth and justice as well as promote public safety. OPAA advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and serve as legal counsel to county and township authorities. Further, OPAA sponsors continuing legal education programs and facilitates access to best practices in law enforcement and community safety.

In light of these considerations, OPAA has a strong interest in the effective prosecution of felonies, the use of consistent standards for police conduct in the investigation of such felonies, and the admissibility of evidence in such felony prosecutions.

This case also involves the specific problem of drug trafficking in Ohio, as defendant was charged with a number of offenses showing that he is a large-scale heroin and cocaine offender in this state. The "[p]ossession, use, and distribution of illegal drugs represent 'one of the greatest problems affecting the health and welfare of our population.'" *Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991). Suppression in the present case would be a step in the wrong direction in these regards, especially when the police were complying with existing law at the time in making a warrantless public arrest based on probable cause.

Accordingly, in the interest of aiding this Court's review herein, amicus curiae OPAA offers the present amicus brief in support of appellee State of Ohio and in support

of the First District's decision refusing to suppress evidence.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history as set forth in the State's brief and in paragraphs two through seven of the First District's opinion.

ARGUMENT

> **Response to Defendant's Proposition of Law**: Existing law allows the police to make a warrantless public arrest based on probable cause regardless of questions related to when probable cause developed supporting the arrest. Changing that principle after a valid public arrest would implicate the good-faith exception to the exclusionary rule and would still lead to the denial of a motion to suppress based thereon.

A question exists whether defendant's challenge to the warrantless nature of the public arrest is properly preserved. The State argued in the First District that the defense had not timely raised that claim in the trial court. (State Appeals Brf. 13-14) Given the defense failure to timely raise the issue, the wisest course would be to dismiss the appeal as improvidently allowed and to wait for another case to come along that would provide a better vehicle in which to address this legal question.

In any event, on the merits of the warrantless-public-arrest issue, the Fourth Amendment issue is settled. As the United States Supreme Court has held and repeatedly recognized, a warrantless public arrest based on probable cause is compliant with the Fourth Amendment, regardless of questions of whether it was practicable to obtain an arrest warrant in the time before the arrest was made. This Court has also held that, in felony cases, it will follow the Fourth Amendment standard for purposes of Article I,

Section 14, of the Ohio Constitution.

Even if this Court would now adopt a different legal standard under the federal or state constitution, changing the controlling legal standard at this point would trigger the application of the good-faith exception and would thereby prevent the suppression of the evidence.

A.

Defendant's proposition of law does not dispute the existence of probable cause to arrest. The trial court and the First District both concluded that probable cause existed to arrest given the confluence of facts pointing toward defendant's involvement in the burglary. These facts included: the neighbor's sighting of the cream-colored Chrysler 300 in the area at the time of the burglary; the son's peculiar efforts by phone to ascertain whether the victims were present in the house around the time of the burglary; the "inside job" nature of the burglary pointing to the son's involvement because he and just one other person knew of the location of the safe and money therein; the phone calls between the son and defendant around the same time of the burglary, which were confirmed by the detective reviewing the time of the son's outgoing and incoming phone calls on his phone; defendant's association with the son on the afternoon of the burglary; defendant's known association with a cream-colored Chrysler, which was confirmed through surveillance of defendant and the Chrysler in the week after the burglary.

Defendant off-handedly and mistakenly uses the word "stale" to describe the probable cause supporting the arrest. Probable cause can become "stale" as to *searches* when the passage of time undercuts or dissipates the previously-existing probabilities indicating that particular items will be found at a particular location. But the concept of

staleness has lesser relevance to the concept of probable cause to arrest. "When there is a reasonable belief that someone has committed a crime, time by itself does not make the existence of that fact any less probable." *United States v. Haldorson*, 941 F.3d 284, 292 (7th Cir.2019). "[P]robable cause to support an arrest normally does not grow stale"; it "would grow stale only if it emerges that it was based on since discredited information." *United States v. Bizier*, 111 F.3d 214, 219 (1st Cir.1997).

The concept of staleness in relation to probable cause to arrest does not come into play in the present case. No new or discrediting information had come to light undercutting probable cause, and the surveillance over the following week confirmed defendant's comings and goings using the cream-colored Chrysler, thereby *adding* to probable cause rather than detracting from it.

Defendant's use of the term "stale" merely reflects a colloquial use of the term to criticize the delay in making the arrest, not any factual development undercutting the probable cause to arrest. Instead of truly challenging the probable cause to arrest, defendant's proposition of law focuses on the delay between the burglary and arrest. Defendant argues that this was an "unexplained" and "unreasonable delay" and that there was no exigency or impracticability that prevented the police from seeking an arrest warrant before the arrest. Of course, the main reason for any lack of "explanation" for the delay would be that the defense did not timely challenge the lack of a warrant before the hearing, and the prosecution therefore had no reason to develop "explanations" for the delay.

In any event, defendant's arguments fail because the existing law at the time of the arrest and at the time of the evidentiary hearing *allowed* warrantless public arrests

based on probable cause. Given that the arrest was valid, the ability to search defendant incident to arrest and to find the identification card and keys on his person followed as a matter course. *United States v. Robinson*, 414 U.S. 218 (1973).

B.

This Court has followed the United States Supreme Court in rejecting the need for an arrest warrant for a public arrest based on probable case. As stated in *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, ¶ 66, "[a] warrantless arrest that is based upon probable cause and occurs in a public place does not violate the Fourth Amendment." In stating that principle, this Court was relying on *United States v. Watson*, 423 U.S. 411 (1976), which also rejected any requirement to have an arrest warrant for a public arrest.

This Court also cited *Watson* in *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶ 38, stating that a "warrantless arrest of an individual in a public place upon probable cause does not violate the Fourth Amendment".

The *Watson* Court specifically refused to impose an arrest-warrant requirement for public arrests and rejected any exigency requirement:

> Law enforcement officers may find it wise to seek arrest warrants where practicable to do so, and their judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate. But we decline to transform this judicial preference into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like.

Watson, 423 U.S. at 423-24 (citations omitted).

The Court has relied on *Watson* again and again. "[I]t ha[s] *long been settled* that a warrantless arrest in a public place [is] permissible as long as the arresting officer had probable cause * * *." *New York v. Harris*, 495 U.S. 14, 17-18 (1990) (emphasis added; citing *Watson*). "[I]f probable cause exists, no warrant is required to apprehend a suspected felon in a public place." *Steagald v. United States*, 451 U.S. 204, 221 (1981) (citing *Watson*). "In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) (citing *Watson*). "A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause." *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (citing *Watson*). "[O]ur Fourth Amendment jurisprudence has consistently accorded law enforcement officials greater latitude in exercising their duties in public places. For example, although a warrant presumptively is required for a felony arrest in a suspect's home, the Fourth Amendment permits warrantless arrests in public places where an officer has probable cause to believe that a felony has occurred." *Florida v. White*, 526 U.S. 559, 565 (1999) (citing *Watson*). There are "specific and engrained" "historical and legal traditions" underlying the *Watson* principle allowing warrantless public arrests. Id. at 571 n. 5 (Stevens, J., dissenting). See, also, *Elder v. Holloway*, 510 U.S. 510, 512 (1994) ("officers planned to apprehend Elder at his workplace, in a public area where a warrant is not required").

The *Watson* Court's refusal to second-guess police on the timing of an arrest and the length of the investigation is supported by other case law indicating that police have a

great deal of discretion in deciding when to undertake an arrest. "[W]hen probable cause exists, the timing of an arrest is a matter that the Constitution almost invariably leaves to police discretion." *United States v. Winchenbach*, 197 F.3d 548, 554 (1st Cir.1999). "Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." *Hoffa v. United States*, 385 U.S. 293, 310 (1966). "Good police practice often requires postponing an arrest, even after probable cause has been established, in order to place the suspect under surveillance or otherwise develop further evidence necessary to prove guilt to a jury." *Watson*, 423 U.S. at 431 (Powell, J., concurring); *Bizier*, 111 F.3d at 220; see, also, *United States v. Lovasco*, 431 U.S. 783, 791 (1977) ("prosecutors are under no duty to file charges as soon as probable cause exists").

C.

In seeking a contrary result, defendant relies on a line of Second District cases, including *State v. VanNoy*, 188 Ohio App.3d 89, 2010-Ohio-2845 (2nd Dist.) and *State v. Armstead*, 2015-Ohio-5010, 50 N.E.3d 1073 (2nd Dist.). But these Second District decisions are outliers in the state as a whole.

As the dissenting judge in *Armstead* pointed out, the Second District itself has a number of cases that have followed the *Watson/Brown* principle that an arrest warrant is not required. *Armstead*, ¶ 73 (Welbaum, J., dissenting). The dissenter traced the origin of the conflict in that district to *State v. Jones*, 183 Ohio App.3d 839, 2009-Ohio-4606, which was relying on *State v. Heston*, 29 Ohio St.2d 152 (1972), as requiring an arrest

warrant or a showing of impracticability to allow a warrantless public arrest. As stated in the *Heston* syllabus, "[a]n arrest without a warrant is valid where the arresting officer has probable cause to believe that a felony was committed by defendant and the circumstances are such as to make it impracticable to secure a warrant." *Heston*, paragraph two of the syllabus.

But the *Heston* syllabus stated that a warrantless public arrest is lawful if there is a showing of impracticability. It is "dubious logic * * * that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it". *United States v. Knights*, 534 U.S. 112, 117 (2001). Upholding a public arrest with exigent circumstances does not invalidate public arrests without them.

In this regard, this Court's decision in *Brown* is far more probative. Without reference to any exigency requirement, *Brown* unqualifiedly stated that warrantless public arrests based on probable cause are *valid*. In a much more recent decision, the Second District also has quoted *Brown* on this very point that warrantless public arrests are allowed. *State v. Short*, 2nd Dist. No. 27712, 2018-Ohio-3202, ¶ 18; see, also, *State v. Day*, 2nd Dist. No. 27770, 2018-Ohio-2217, ¶ 16 (citing *Brown* and *Watson*)

As the First District stated below, "the Second District's position in *VanNoy* is a minority position. There is even dispute within the Second District as to *VanNoy*'s viability." Decision, ¶ 20. In rejecting the Second District's approach, the Tenth District has stated that "we continue to adhere to the holdings in *Brown* and *Watson* that a warrantless arrest that is based on probable cause and occurs in a public place does not violate the Fourth Amendment." *State v. Taylor*, 10th Dist. No. 18AP-7, 2019-Ohio-2018, ¶ 14.

Other districts also follow *Watson* and/or *Brown*. See, e.g., *State v. Davis*, 3rd Dist. No. 1-08-62, 2009-Ohio-2527, ¶ 6; *State v. Murta*, 4th Dist. No. 1441, 1980 WL 351069, *2; *State v. Hovatter*, 5th Dist. No. 17-CA-37, 2018-Ohio-2254, ¶¶ 16-17; *State v. Torres*, 6th Dist. No. C.A. WD-85-64, 1986 WL 9097, *3; *State v. Fornore*, 7th Dist. No. 11 CO 36, 2012-Ohio-5339, ¶ 27; *Morrison v. Horseshoe Casino*, 8th Dist. No. 108644, 2020-Ohio-4131, ¶ 45; *State v. Gedeon*, 9th Dist. No. 29153, 2019-Ohio-3348, ¶ 31; *State v. Everett*, 11th Dist. No. 2018-L-142, 2019-Ohio-2397, ¶ 29; *State v. Ingram*, 20 Ohio App.3d 55, 57 (12th Dist.1984).

D.

In relying on *Heston* and *State v. Woodards*, 6 Ohio St.2d 14, 20 (1966), the defense simply fails to recognize that those cases predated the decision by the United States Supreme Court in *Watson*. Even if *Heston* and/or *Woodards* could be said to absolutely require exigent circumstances for a warrantless public arrest, *Watson* negated any such requirement. Notably, the three United States Supreme Court cases cited in *Heston* and *Woodards* all involved the warrantless entry of *private* premises to *search*; and making such a warrantless entry to search or arrest is fundamentally different than making a warrantless public arrest. *Payton v. New York*, 445 U.S. 573, 590 (1980) (requiring arrest warrant for entry of private premises to arrest resident unless there are exigent circumstances; distinguishing public arrests).

Defendant's suppression claim fails under the Fourth Amendment and *Watson*. The trial court, and the First District, and this Court, are all bound to adhere to *Watson* as a matter of federal Fourth Amendment law. *State v. Burnett*, 93 Ohio St.3d 419, 422 (2001).

Defendant argues that the Roberts Court is charting a different path on Fourth Amendment issues that may call into question the result in *Watson*. But such analysis provides no basis for this Court to deviate from *Watson*. Even if later cases would be providing indication(s) that an earlier decision might be subject to change in light of doctrinal or other changes, the decision on whether to overrule *Watson* would be for the United States Supreme Court to make, as that Court alone has "the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) (quoting another case). "Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252-53 (1998); see, also, *Bosse v. Oklahoma*, 137 S.Ct. 1, 2 (2016).

The *Watson* decision stands in good stead with cases like *United States v. Jones*, 565 U.S. 400 (2012), which applied an originalist approach to the issue of whether it was a "search" to attach a GPS monitor to a motor vehicle. *Watson* itself represents the same kind of originalist approach, relying on the "ancient common-law rule" that applied at the time of the Founding and relying on the initial expressions of Congress in that regard as well as the states. *Watson*, 423 U.S. at 417-22. "In *Watson* the Court relied on (a) the well-settled common-law rule that a warrantless arrest in a public place is valid if the arresting officer had probable cause to believe the suspect is a felon; (b) the clear consensus among the States adhering to that well-settled common-law rule; and (c) the expression of the judgment of Congress that such an arrest is 'reasonable.'" *Payton*, 445 U.S. at 590 (footnotes omitted).

Defendant also contends that technological advances would allow police to get

warrants more quickly than were available in the 1970's. But such advances do nothing to assuage the *Watson* Court's concerns about enmeshing "criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like." *Watson*, 423 U.S. at 423-24. Those concerns would remain even with advances in technology.

Nor can *Watson* be "distinguished" based on the amount of delay involved in *Watson* itself. The *Watson* Court expressly declined to engage in a case-by-case assessment of factors regarding length of delay and practicability, and the rule of law that emerged from *Watson* drew no such distinctions. Moreover, *Watson* decided the case based on the premise that the police "concededly had time" to obtain a warrant. *Watson*, 423 U.S. at 414. A post-hoc "distinguishing" of *Watson* on this basis would be improper since *Watson* itself rejected such line-drawing. See, e.g., *State v. Murrell*, 94 Ohio St.3d 489, 493 (2002) (earlier decision should not have "distinguished" bright-line Fourth Amendment standard from *Belton*).

It is a fundamental point in this case that "*Watson* remains good law today." *State v. Paananen*, 2015-NMSC-031, 357 P.3d 958, ¶ 18.

E.

Given that defendant's suppression claim fails under the Fourth Amendment, defendant falls back on a claim that an exigency/impracticability requirement should be imposed as matter of state constitutional law under Article I, Section 14, of the Ohio Constitution. But such a claim would face significant hurdles.

Initially, there is no textual basis for arriving at a different conclusion under

Section 14. "[T]he language of Section 14, Article I of the Ohio Constitution is virtually identical to the language of the Fourth Amendment" and, as a result, "this court has accordingly interpreted Section 14, Article I of the Ohio Constitution as affording the same protection as the Fourth Amendment in felony cases." *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, ¶ 10 n. 1. "This court has held that in felony cases, Article I, Section 14 of the Ohio Constitution provides the same protection as the Fourth Amendment to the United States Constitution." *State v. Banks-Harvey*, 152 Ohio St.3d 368, 2018-Ohio-201, ¶ 16, citing *State v. Jones*, 143 Ohio St.3d 266, 2015-Ohio-483, ¶ 12; *State v. Hoffman*, 141 Ohio St.3d 428, 2014-Ohio-4795, ¶ 11; *State v. Hawkins*, 158 Ohio St.3d 94, 2019-Ohio-4210, ¶ 18.

There would be no textual basis to broaden Section 14 beyond the Fourth Amendment as found in *Watson*. As the Alaska Court of Appeals has stated:

> [The defendant] has not pointed to anything in the text, context, or history of the Alaska Constitution suggesting why it should be interpreted differently than the Federal Constitution on this issue. Indeed, there is substantial evidence to the contrary: Alaska law has been consistent with the common-law felony-arrest rule since long before statehood. [The defendant] has presented nothing to suggest that the Alaska Constitution was intended to abrogate this long standing rule.

Shorty v. State, 214 P.3d 374, 379 (Alaska App.2009) (footnote omitted).

Given that Section 14 is coextensive with the Fourth Amendment in felony cases, defendant cannot prevail by seeking to have this Court deviate from *Watson* as a matter of state constitutional law. And, again, this Court has followed *Watson* anyway.

F.

To the extent defendant would attempt to justify exclusion under the Ohio

Constitution, such arguments also wrongly assume that there is an exclusionary rule for a violation of the search-and-seizure provisions in Section 14. Syllabus law from this Court indicates that the Ohio Constitution does not recognize an exclusionary rule for illegal searches and seizures under Section 14. *State v. Lindway*, 131 Ohio St. 166 (1936), paragraphs four, five, and six of the syllabus.

While subsequent decisions have assumed the existence of an exclusionary rule, this Court has not engaged the *Lindway* non-exclusionary syllabus in a direct and discrete way so as to overrule that decision. Because this Court does not make "implied" precedents, see *In re Bruce S.*, 134 Ohio St.3d 477, 2012-Ohio-5696, ¶ 6, and *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 12, the question of whether the *Lindway* non-exclusionary principle should be overruled would remain in play. See, also, *Cincinnati v. Alexander*, 54 Ohio St.2d 248, 255-56 n. 6 (1978) (*Lindway* never overruled); *State v. Thierbach*, 92 Ohio App.3d 365, 370 n. 5 (1993) (same).

Indeed, neither the text of Section 14 nor its history support having an exclusionary rule, as discussed by the Office of the Ohio Attorney General. *Brief of Amicus Curiae Ohio Attorney General in State v. Bembry*, 2016 WL 5867510 (2016). Ohio is *not* required to apply an exclusionary rule for violations of its own constitution merely because federal law includes one. *California v. Greenwood*, 486 U.S. 35, 43-44 (1988).

In any event, it is unnecessary to address the question of the existence of an exclusionary rule generally here. Even if Section 14 would be enforced through an exclusionary rule, suppression *still* would not be required in this case because the good-faith exception would apply. An exclusionary rule under Section 14 would not be so

broad and indiscriminate as to provide the remedy of suppression when the police acted in total compliance with then-controlling interpretations of search-and-seizure protections.

G.

Under binding precedent of the Ohio Supreme Court and United States Supreme Court, the police did not need an arrest warrant to make a public arrest based on probable cause. The courts can find a constitutional violation here only by changing these legal rules after the fact by imposing an arrest-warrant requirement that the law has not heretofore required under the Fourth Amendment. Controlling case law from this Court also has provided that Section 14 will be construed to be coextensive with the Fourth Amendment for purposes of felony cases. Exclusion would be highly inappropriate under these circumstances.

The existence of a constitutional search-and-seizure violation "does not necessarily mean that the exclusionary rule applies." *Herring v. United States*, 555 U.S. 135, 140 (2009). "[E]xclusion 'has always been our last resort, not our first impulse' * * *." Id. (quoting another case). "[T]he exclusionary rule is not an individual right and applies only where it results in appreciable deterrence." Id. at 141 (quote marks & brackets omitted). "The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct." Id. at 143.

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or

> grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Id. at 144. "[T]he question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." Id. at 137. "[W]e have focused on the efficacy of the [exclusionary] rule in deterring Fourth Amendment violations in the future." Id. at 141. "The rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application." Id. at 141 (quote marks and brackets omitted).

"The pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of arresting officers. We have already held that our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances" taking into account the "particular officer's knowledge and experience * * * but not his subjective intent." Id. at 145-46 (internal quotation marks omitted). "[W]hen police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not pay its way. In such a case, the criminal should not go free because the constable has blundered." Id. at 147-48 (internal quotation marks omitted).

This Court has favorably cited the *Herring* standard and thereby reinforced that exclusion is only meant to serve "as a deterrent against future violations" and that the deterrent benefits of the exclusionary rule are limited to deliberate, reckless, and grossly-negligent violations of the Fourth Amendment. *State v. Dibble*, ___ Ohio St.3d ___, 2020-Ohio-546, ¶¶ 15, 16.

This analysis is often referred to as the "good-faith exception", but, in fact, it is a

predicate to the basic operation of the exclusionary rule generally. Absent police conduct that culpably violates the Fourth Amendment, there is insufficient deterrence so as to justify suppression.

No deliberate, reckless, or grossly negligent disregard of Fourth Amendment rights was involved here. Even if this Court would now conclude that an arrest warrant was required, such an error on the officer's part at most would amount to a non-negligent "mistake". In fact, given the law at the time of the arrest, it was entirely proper to make the warrantless public arrest based on probable cause. There would be no basis to conclude that the officer disregarded Fourth Amendment rights in a grossly negligent fashion or worse when the "violation" can only be found by changing the controlling legal principle after the fact.

H.

The good-faith analysis applies to police actions that were undertaken without a warrant. Indeed, the *Herring* Court noted that the good-faith exception already applied to warrantless searches that were based on a statute later found unconstitutional. *Herring*, 555 U.S. at 142 (discussing *Illinois v. Krull*, 480 U.S. 340, 352-353 (1987)). *Herring* summarized the good-faith exception in broad terms and did not even mention the word "warrant" in that summary *Herring*, 555 U.S. at 147-148.

In *Davis v. United States*, 564 U.S. 229 (2011), the Court confirmed that the good-faith exception can apply to avowedly warrantless actions. The *Davis* Court repeated *Herring*'s test for the good-faith exception:

> The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue.

> *Herring*, 555 U.S., at 143, 129 S.Ct. 695. 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. Id., at 144, 129 S.Ct. 695. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, *Leon*, *supra*, at 909, 104 S.Ct. 3405 (internal quotation marks omitted), or when their conduct involves only simple, "isolated" negligence, *Herring*, supra, at 137, 129 S.Ct. 695, the "'deterrence rationale loses much of its force,'" and exclusion cannot "pay its way." See *Leon*, *supra*, at 919, 908, n. 6, 104 S.Ct. 3405 (quoting *United States v. Peltier*, 422 U.S. 531, 539, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975)).

Davis, 564 U.S. at 238. "The [exclusionary] rule's sole purpose, we have repeatedly held, is to deter *future* Fourth Amendment violations." Id. at 236-37 (emphasis added). "Where suppression fails to yield appreciable deterrence, exclusion is clearly unwarranted." Id. at 237 (quotation marks and ellipses omitted). "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." Id. at 237.

The *Davis* Court emphasized that "[t]he Court has over time applied this 'good-faith' exception across a range of cases." Id. at 238. "The good-faith exception * * * is no less an established limit on the *remedy* of exclusion than is inevitable discovery." Id. at 244. *Davis* plainly allows the good-faith exception to be applied to all kinds of searches or seizures.

Davis applied the good-faith exception to prevent exclusion when the Court after-the-fact had changed the legal principle that had allowed the police to search the vehicle at the time the search occurred.

> About all that exclusion would deter in this case is conscientious police work. Responsible law enforcement

> officers will take care to learn "what is required of them" under Fourth Amendment precedent and will conform their conduct to these rules. But by the same token, when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than "'ac[t] as a reasonable officer would and should act'" under the circumstances. The deterrent effect of exclusion in such a case can only be to discourage the officer from "'do[ing] his duty.'"

Davis, 564 U.S. at 241 (emphasis sic; citations omitted).

This Court also applied the good-faith analysis to situations in which police had acted without a warrant in attaching a GPS device to a car before the United States Supreme Court changed course from earlier decisions addressing electronic surveillance and found that attaching the device was a "search". "[T]he good-faith exception should be applied where new developments in the law have upended the settled rules on which the police relied". *State v. Johnson*, 141 Ohio St.3d 136, 2014-Ohio-5021, ¶ 48 (quoting another case).

Applying any exclusionary rule here would contribute nothing to the goal of deterrence. The officer proceeded without a warrant because the law expressly informed him that he could do so, just as officers had reasonably believed in *Davis* and *Johnson* that the warrantless action was allowed based on existing case law in those cases. And, given that suppression here would allow a major drug offender to avoid significant punishment, the application of any exclusionary rule here would offend justice and would not pay its way.

I.

The draconian remedy of suppression would be rendered even more inappropriate when it is considered that the police still could have acted without a warrant in major respects. The existing probable cause that would allow an arrest also would have allowed a warrantless investigatory stop under the lower standard of reasonable suspicion pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). Given the existence of probable cause to arrest, there was necessarily reasonable suspicion, which is a standard that is obviously less than the standard for probable cause. *Navarette v. California*, 572 U.S. 393, 397 (2014).

A *Terry* stop would not have required proof that there would be evidence of the burglary on the defendant's person or in his vehicle at the time. Reasonable suspicion of entirely-past felony activity is enough to justify the stop to investigate further; *Terry* does not require reasonable suspicion of on-going criminal activity. *United States v. Hensley*, 469 U.S. 221, 229 (1985). Accordingly, even without a warrant, the police *still* could have stopped and detained defendant briefly to investigate the burglary. The police could have asked questions related to the burglary without any need for *Miranda* warnings and perhaps learned defendant's residence location that way. See *Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984). They also could have asked for consent to search the defendant and his vehicle. *Florida v. Royer*, 460 U.S. 491, 501 (1983) (during "a justifiable *Terry*-type detention, Royer's consent, if voluntary, would have been effective to legalize the search of his two suitcases."). A consent search in these regards could have led to the discovery of the same identification card and same set of keys that led to the later issuance of the search warrant.

In short, had the police known of an arrest-warrant requirement for a public arrest, they could have still acted without a warrant and adapted their approach accordingly in ways that very well could have led to the same result. The exact outcome that would have been reached by such a less-intrusive *Terry* approach is unknown. Nevertheless, in reliance on existing law, the police rightly believed they did not need to adopt such an approach and relied on the law allowing them to make a valid warrantless public arrest. Changing the law after the fact, and imposing suppression, would work a grave injustice by retroactively depriving the police of a lawful warrantless approach that very well could have led to the same result.

J.

Finally, while defendant's proposition of law cites R.C. 2935.04, the defense does not develop its argument thereunder. Nothing in the text of that statute imposes a pre-arrest warrant requirement, since the statute expressly authorizes arrest "without a warrant".

In addition, when enacting a statute, the General Assembly as a matter of separation of powers has plenary legislative power to craft the statute as it thinks best and has the ultimate and final say on whether its statute will have an exclusionary rule remedy attached to it. The people "vested the legislative power of the state in the General Assembly," and courts "must respect the fact that the authority to legislate is for the General Assembly alone * * *." *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶¶ 43, 48, 52. "The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the

other departments, * * *." Id. ¶ 44 (quoting another case). The General Assembly's legislative power is plenary in enacting legislation. *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, ¶ 10.

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

"Generally, establishing a remedy for a violation of a statute remains in the province of the General Assembly, not the Ohio Supreme Court." *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, ¶ 22. Given the separation of powers, "we are not in the position to rectify this possible legislative oversight" by elevating a mere statutory violation to the level of a constitutional violation. Id. ¶ 21. "[A]ccordingly, we refuse to constitutionalize [the statute]. Nor, under the guise of construing the statute, do we choose to write into [the statute] a provision excluding probative evidence obtained in violation thereof." *Geraldo*, 68 Ohio St.2d at 128-29.

Defendant's proposition of law should be rejected as a matter of law.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA urges that this Court affirm the judgment of the First District Court of Appeals.

Respectfully submitted,

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