IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2011-1328
Plaintiff-Appellee,	:	
	:	On Appeal from the Wayne
v.	:	County Court of Appeals,
	:	Ninth Appellate District
RACHEL FRIEDMAN,	:	
	:	C.A. Case No. 10-CA-0025
Defendant-Appellant.	:	

MERIT BRIEF OF APPELLANT RACHEL FRIEDMAN

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STATEMENT OF THE CASE AND FACTS

In October 2009, Rachel Friedman was a 19-year-old student at the Ohio State University at Wooster. On the evening of October 21, she parked and locked her car on the streets of the Applewood Village Apartments on OSU's Wooster Campus. Suppression Tr. 6-7.

That night, three university police officers and a Wooster police officer conducted a neighborhood sweep using a drug-sniffing dog named "Hades." The purpose of the neighborhood sweep was to identify parked cars in the neighborhood that may have drugs inside them. Such searches are conducted at least once per year, and have been carried out for at least five years. Supp. Tr. 15. Formerly, the neighborhood sweeps were performed under the supervision of a prosecutor. *Id.* More recently, the sweeps have been by the police with no supervision. *Id.*

When Hades approached Ms. Friedman's parked car, he alerted. Supp. Tr. 4, 13. A crowd gathered around to watch the four officers and Hades. Supp. Tr. 11. The police were unable to find Ms. Friedman after trying for "20 to 30 minutes," so they decided to break into her car. Supp. Tr. 7. Although the car was parked and locked, and no exigent circumstances existed, the officers decided not to obtain a search warrant authorizing entry into the car. Supp. Tr. 7, 10-11.

Three officers and Hades then performed a search of the interior of the car. Supp. Tr. 11, 23-24. One officer testified that he searched areas of the interior that Hades had not alerted to, to look "for anything that the dog would have missed." Supp. Tr. 25. The officers located and seized a small quantity of what appeared to

be marijuana, as well as a pipe and other paraphernalia consistent with personal use. Complaint, *State v. Friedman*, Wayne M.C. No. CRB 10-2-00224 (Feb. 18, 2010).

Ms. Friedman was charged with possession of marijuana, a minor misdemeanor, and possession of drug paraphernalia, a fourth degree misdemeanor. *Id.* Ms. Friedman pleaded not guilty and filed a motion to suppress, alleging that the search of her car was unconstitutional. After a hearing, the trial court granted Ms. Friedman's motion to suppress. Judgment Entry, *State v. Friedman*, Wayne M.C. No. CRB 10-2-00224 (May 7, 2010).

The State of Ohio appealed that ruling to the Ninth District Court of Appeals, which reversed the decision on Ms. Friedman's suppression motion. *State v. Friedman*, 9th Dist. No. 10CA0025, 2011-Ohio-2989. One judge dissented, and would have affirmed the trial court's ruling, because the warrantless search of Ms. Friedman's car violated her Fourth Amendment rights.

Ms. Friedman submitted a timely Notice of Appeal and Memorandum in Support of Jurisdiction to this Court, regarding the Fourth Amendment issue. On November 16, 2011, this Court accepted Ms. Friedman's appeal.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

FIRST PROPOSITION OF LAW

Random, orchestrated drug-dog sniffs of cars and trucks parked on residential streets, conducted without warrants or any suspicion of criminal activity, are searches that violate the Fourth Amendment and Section 14, Article I of the Ohio Constitution.

This case involves the systematic and suspicionless use of drug-sniff dogs. "Without any suspicion that any vehicle parked on the street was involved in criminal activity, even a traffic or parking violation, police officers paraded a drug dog up and down the street, attempting to create probable cause to search some of them." *Friedman*, 2011-Ohio-2989 at ¶ 24 (Carr., J., dissenting).

The sweep that led to the police breaking into Ms. Friedman's car was not merely a one-time operation. As one of the officers testified at the suppression hearing, "[w]e normally do at least one of these operations each year and for the first four or five years that we did this we would have an Assistant Prosecutor present with us during the searches." Supp. Tr. 15.

The starting point for analyzing the constitutionality of the government's conduct should be the United States Supreme Court's recent decision in *United States v. Jones*, ___ U.S. ___, 2012 WL 171117 (Jan. 23, 2012) (No. 10-1259). In *Jones*, the Supreme Court held that it is a Fourth Amendment "search" for the government to install a GPS device on a car and use it to monitor the location of

the car for a period of 30 days. Although all of the Justices agreed that the government's conduct was a search, the Justices were divided sharply as to why.

The majority opinion by Justice Scalia reasoned that it was a search because installing the device was a physical trespass. *Id.* at *3-*4. The concurring opinion by Justice Alito reasoned that the long-term use of the GPS device was a search because it violated a reasonable expectation of privacy: "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id.* at *17 (Alito, J., concurring in the judgment, joined by Justices Ginsburg, Breyer, and Kagan). Justice Sotomayor both joined the majority opinion in *Jones*, and indicated her agreement with Justice Alito's rationale. *See id.* at *8-*9 (Sotomayor, J., concurring)

The use of a dog to sniff for marijuana in Rachel Friedman's car may not have in itself been physical trespass, but the monitoring in this case violated Rachel Friedman's reasonable expectation of privacy, much like the GPS monitoring did in *Jones*. *Id.* at *17 (Alito, J., concurring in the judgment, joined by Justices Ginsburg, Breyer, and Kagan) and *id.* at *8-*9 (Sotomayor, J., concurring). The citizens of Ohio have a reasonable expectation that their cars parked on a public street will not be subject to surveillance by dogs specially trained to act as narcotics detection tools. To be sure, it is commonplace and expected that drug-sniffing dogs can be brought to the scene of a valid traffic stop when the police identify a traffic violation. But Rachel Friedman was not driving when her car was searched—she committed no traffic violation, and was not even present when her

car was searched. Her car was merely parked on the street, and it was not causing any threat to public safety.

"[S]ociety's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor" cars parked on public streets to determine if they happen to contain small amounts of marijuana. *Id.* at *17 (Alito, J., concurring in the judgment). For that reason, the use of trained dogs to alert for narcotics stored in cars that just happened to be located on a public street violates the reasonable expectations of privacy of the citizens of Ohio.

The State will rely on *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005) to justify this search. But as the dissent below correctly recognized, *Caballes* is a narrow case and is distinguishable from the situation presented here. In that case, Mr. Caballes was stopped for speeding, and as the first trooper radioed in information about the stop, a second trooper arrived on the scene with a drug-sniffing dog. *Id.* at 406. While the trooper who made the stop wrote a warning ticket, the dog alerted to the trunk, where the troopers found marijuana. The United States Supreme Court concluded that such police conduct did not violate the Fourth Amendment, holding that "[a] dog sniff *conducted during a concededly lawful traffic stop* that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." *Id.* at 410 (emphasis added).

Caballes is readily distinguishable in several ways. First, *Caballes* involved a one-vehicle, targeted search conducted against someone already detained for an

observed violation of the law. In contrast, the operation that the police officers and their dog conducted here involved the legally parked cars of dozens of individuals, about whom the police knew nothing. *Caballes* simply does not extend to the latter. *Cf. id.* at 417 (Souter, J., dissenting) (noting that the majority opinion does not "signal[] recognition of a broad authority to conduct suspicionless sniffs for drugs in any parked car . . . or on the person of any pedestrian minding his own business on a sidewalk.")

And *Caballes* does not extend to the facts of this case because there is a critical difference between a law enforcement practice used in a valid traffic stop and a practice used with no suspicion whatsoever.[1] As the Court recognized in *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), a traffic stop following a traffic violation presents a police procedure based on individualized suspicion. The driver who has been stopped is understood to be subject to a set of somewhat invasive procedures based on an observed violation of the law. *See id.* at 659. In contrast, "choosing randomly from the entire universe of drivers" provides no reason to believe that any wrongdoing at all is involved, and certainly not any wrongdoing by any particular individual. *Id.* When the police subject citizens to scrutiny merely because they have a car, with no individualized

[1] The United States Supreme Court recently agreed to decide "[w]hether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause." *See Jardines v. Florida*, 73 So.3d 34, *cert. granted*, 80 U.S.L.W. 3392 (Jan. 6, 2012) (No. 11-564). In *Jardines*, the place searched was suspected as a marijuana grow house based on a tip to law enforcement, not a place that was approached with no suspicion whatsoever. The dog-sniff was used to support the application and issuance of a search warrant. *Jardines*, 73 So.3d at 37-38.

suspicion, the randomized scrutiny will not be "sufficiently productive to qualify as a reasonable law enforcement practice under the Fourth Amendment." *Id.* at 660.

Caballes is distinguishable for a second reason. *Caballes* was premised on the assumption that when a dog alerts positive for narcotics, then narcotics are in fact present. As a result, the dog alert can only reveal the mere presence or absence of narcotics, for which a person cannot entertain a reasonable expectation of privacy. This point was assumed in *Caballes* because the defendant in that case conceded that "drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband." *Caballes*, 543 U.S. at 409 (quoting brief of Respondent).

But that core assumption underlying *Caballes* does not apply in this case. First, dog sniffs are not likely to reveal only the presence of contraband when used on randomized vehicles. The error rates of drug-sniffing dogs are dramatically magnified when their searches are directed at a large number of random vehicles as opposed to individual vehicles that the police already suspect may contain drugs. *See, e.g.*, Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 Geo.Mason L.Rev. 1, 12-18 (2006) (in which the author, a former Assistant United States Attorney, sets forth detailed statistical predictions of the prevalence of false alerts in random street sweeps using canines).

To understand why, it helps to realize that when a dog alerts there are two possibilities. First, the dog may have alerted because there are in fact drugs in the car. We can call this a "true" positive. Second, the dog may have alerted incorrectly, when there are no drugs at all in the car. We can call this a "false"

positive. When estimating the chances that an alert means that there are drugs in the car, the proper question is this: what proportion of the overall alerts are "true" positives? Put another way, what proportion of the combination of "true" positives and "false" positives are "true" positives?

The fundamental problem with relying on dog sniffs to search randomized vehicles is that the rate at which randomized vehicles actually contain drugs is very low, dramatically increasing the "false" positives and lowering the chances that a dog alert actually reveals the presence of narcotics. Assume, for example, that a dog is right 80% of the time, and further assume that there is a 2% chance that a randomly-selected car has drugs inside. If a dog alerts to a randomly selected car, the chance that a particular dog alert means that drugs are in the car is not 80%; *remarkably, the chance is only about 7.5%.* That is because, given the above assumptions, in 1000 randomly-chosen cars, there would be 16 "true" positives and 196 "false" positives.[2] Accordingly, the overall proportion of "true" positives is only 16 out of 212 total positives: about 7.5%.

If this result seems surprising – and to most people, it is – the reason is that many individuals routinely make a simple error in calculating probability known as the "base-rate fallacy." *See* Maya Bar-Hillel, *The Base-Rate Fallacy in Probability Judgments*, 44 Acta Psychologica 211 (1980). The error is in assuming

[2] If the dog is exposed to 1000 random cars, that should mean 20 cars have drugs and 980 cars do not. For the 20 cars with drugs in them, the dog would alert 16 times (80% accuracy for 20 cars) and not alert 4 times. For the 980 cars with no drugs inside them, the dog would alert 196 times and not alert 784 times.

that the chance the dog is correct *generally* is the same as the chance the dog is correct *in the subset of cases when the dog alerts.* But those chances are not the same. The latter probability is entirely dependent on the chance that a typical car has drugs—which is known as the "base rate." *See* Myers, at pp. 12-18. As a result, the use of dog sniffs on multiple random automobiles cannot support the legal presumption the Supreme Court applied to a single specific automobile in *Caballes*—that dog sniffs only reveal the presence or absence of narcotics. While that presumption may be correct under the conditions described in *Caballes* ("the use of a well-trained narcotics detection dog . . . during a lawful traffic stop" of a single car), it cannot be correct under the conditions present here—where police officers use a dog to randomly sniff dozens of parked cars, without any other basis to justify a suspicion that narcotics would be present in any individual car. *Cf. Caballes,* 543 U.S. at 409 (noting that "the dog sniff was performed on the exterior of respondent's car *while he was lawfully seized for a traffic violation.*") (emphasis added).

The Florida Supreme Court recently examined at length the reliability of drug-dog alerts to cars, and concluded that "the potential for false alerts, the potential for handler error, and the possibility of alerts to residual odors" means that such alerts cannot themselves serve as probable cause for a search of a car. *Harris v. State,* 71 So.3d 756, 768, and *id.* at fn. 12 (surveying "accuracy" rates of dogs reported in five cases from various jurisdictions, and noting that such rates ranged from 55% to 87.5%). *See also Caballes,* 543 U.S. at 412 (Souter, J., dissenting) (stating that "a study cited by Illinois in this case for the proposition

that dog sniffs are 'generally reliable' shows that dogs in artificial testing situations return false positives anywhere from 12.55 to 60% of the time, depending on the length of the search.") Given that neighborhood sweeps of the type conducted here will be not be performed by infallible police dogs, it quickly becomes apparent that the prospect of false alerts and alerts to residual odors on parked cars are compelling reasons to proscribe such sweeps.

Another aspect of the fallibility of drug-sniffing dogs is highlighted in recent scientific research. In a study published last year in the journal Animal Cognition, several researchers found that dog alerts are influenced by the perceptions of their handlers. *See* Lisa Lit, et. al., *Handler Beliefs Affect Scent Detection Dog Outcomes*, 14 Animal Cognition 387 (2011). In the study, scientists set up a test course at a church for law-enforcement dogs trained to sniff for narcotics and explosives. The scientists intentionally misled the dogs' handlers as to whether such items would be found in the church. The study revealed that the tendency of dogs to alert correlated in large part with the beliefs of their handlers. If the human handlers believed that there were drugs located in the place to be searched, the dogs would alert accordingly—whether or not any drugs were present. The scientists concluded that the results were best explained by the so-called "Clever Hans" effect: the dogs took their cues about when to alert from their handlers, rather than alerting based on the presence of drugs.[3]

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[3] "Clever Hans" was a famous horse that was claimed to have been able to perform arithmetic and other intellectual tasks. After an investigation, it was demonstrated that the horse was not actually performing these mental tasks, but was instead responding to involuntary cues in the body language of the human trainer, who was unaware that he was providing such cues. *See generally* Oskar Pfungst, *Clever*

The use of a police dog to detect the presence of possible contraband within a car parked on a residential street—without any suspicion whatsoever—is an impermissible Fourth Amendment intrusion. The evidence taken from Ms. Friedman's car was gained through an unlawful search unjustified by any exception, and that evidence should be excluded as the fruit of a constitutional violation. *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

SECOND PROPOSITION OF LAW

Police may not break into a parked car to conduct a warrantless search and seizure, when such a break-in is premised on nothing more than a drug-dog alert to the car and no exigent circumstances exist.

Even if the Court concludes that it was not impermissible to use a drug-sniffing dog to alert to Rachel Friedman's car, the Court should hold that it violated both the federal and state constitutions to open the car and search it without a warrant, absent any exigent circumstances.

It is clear that Rachel Friedman had a reasonable expectation of privacy in the contents of her car. As the United States Supreme Court recognized in *Delaware v. Prouse*, 440 U.S. at 662-663:

> Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of

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Hans: The Horse of Mr. Van Osten (1911), available at http://www.gutenberg.org/ebooks/33936 (accessed Jan. 30, 2012). *Cf.* Ken Lammers, *Canine Sniffs: The Search that Isn't*, 1 N.Y.U.J.L. & Liberty 844, 852 (noting "Clever Hans" effect can apply to dog sniffs).

> security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

Because Rachel Friedman had a reasonable expectation of privacy as to the contents of her personal vehicle, the government's conduct was a warrantless search. And once she moved to suppress the fruits of the warrantless search of her private car, the government assumed the burden to demonstrate that the search fell under an established exception to the warrant requirement. *United States v. Jeffers*, 342 U.S. 48, 51, 72 S.Ct. 93, 96 L.Ed. 59 (1951).

It has long been established that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In *Terry v. Ohio,* the United States Supreme Court reaffirmed that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Further, "the burden is on those seeking [an] exemption [from the warrant requirement] to show the need for it." *Jeffers*, 342 U.S. at 51.

No established exception exists for the police conduct here, nor should one be created. As a result, this Court should rule that the search was impermissible and that similar future intrusions upon the privacy rights of Ohio's citizens are prohibited. Here, the police were in the midst of a planned operation involving

numerous officers, and the car they wanted to search was legally parked on a city street. The police could readily have obtained prior approval for the physical search of Rachel Friedman's car—especially if they had put a judge or magistrate on notice that one or more warrants might be required that night due to the sweep—and the State cannot demonstrate why its search of her car should be exempted from the constitutional prohibition on warrantless government searches. If the first proposition of law is adopted by this Court, this proposition of law becomes moot. But if the Court sanctions suspicionless neighborhood sweeps with drug-sniffing dogs, the practice of breaking into cars without a warrant, based merely on a drug-dog alert, must be proscribed.

The majority opinion below stated that the officers "accessed the vehicle [] because they did not have enough officers on duty to stay with the vehicle in the event Friedman returned," and relied primarily on *Pennsylvania v. Labron*, 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996) to excuse the warrantless search. The dissent, however, took the view that "[t]he warrantless [entry and] search in this case appears to have been done simply for the convenience of law enforcement." *State v. Friedman*, 2011-Ohio-2989, at ¶ 24. Because "there was no need for [the police] to act quickly in the heat of an ongoing investigation to protect the safety of themselves or others or to prevent the destruction of evidence or flight of a suspect," *id.*, this Court should establish a bright-line rule that requires a warrant to be obtained before police can break into a car under circumstances similar to those giving rise to this case.

And even if this Court concludes that the Fourth Amendment does not require a warrant in such circumstances, it should rule that a warrant is required under the state constitution. The Pennsylvania Supreme Court reached this same result in *Labron*. After receiving the case back from the United States Supreme Court, the Pennsylvania Supreme Court construed the state constitution as prohibiting such warrantless searches absent a demonstration of exigency. *Commonwealth v. Labron*, 547 Pa. 344, 690 A.2d 228 (1997). Pennsylvania does not stand alone in this respect. The Montana Supreme Court has likewise determined that that state's constitution requires that there be exigent circumstances before a warrantless automobile search may be conducted. *State v. Elison*, 2000 MT 288, 302 Mont. 228, 14 P.3d 456 (2000). *Accord State v. Cooke*, 163 N.J. 657, 671, 751 A.2d 92 ("The automobile exception applies only in cases in which probable cause and exigent circumstances are evident, making it impracticable for the police to obtain a warrant.").

A final example, from an Oregon Supreme Court decision issued last year, provides the specific rule that Ms. Friedman urges this Court to adopt. In *State v. Kurokawa-Lasciak*, 351 Or. 179, 263 P.3d 336 (2011), that court held that the state constitution prohibits a warrantless search of a car, unless the car was mobile when first encountered by the police. Here, Ms. Friedman's car was not in motion when the police first came to suspect that it might contain contraband, and there was no threat it would move any time soon. Thus, a warrant should have been sought absent an affirmative showing of exigent circumstances.

This Court has repeatedly recognized its inherent ability to independently construe sections of the state constitution that that are identical or similar to the federal constitutional amendments contained in the Bill of Rights. See generally *State v. Robinette*, 80 Ohio St.3d 234, 238, 1997-Ohio-343, 685 N.E.2d 762 (holding that Ohio "may impose greater restrictions on police activity pursuant to its own state constitution than is required by federal constitutional standards.") And while the Court's case law generally indicates that Ohio "should harmonize our interpretation of Section 14, Article I of the Ohio Constitution with the Fourth Amendment," it also observes that the Ohio Constitution is a document of independent force and can provide greater protection than the Fourth Amendment when "there are persuasive reasons to find otherwise." *Id.* at 239, 245. This Court has found the state constitution to provide more protection in analogous situations when Ohio's citizens expect that they are shielded from government intrusion. *See, e.g., State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, syllabus ("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."). *See also State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985 (Fifth Amendment violation precludes use by the prosecution of physical evidence derived therefrom).

The citizens of Ohio would be surprised, if not shocked, to be informed that the Ohio Constitution authorizes the police to walk a dog down a public street looking for contraband in parked cars, and then to break into a citizen's personal car, without the involvement of a detached member of the judiciary, merely

because a dog has signaled that the car either contains or has contained drugs. If the police are permitted to conduct such neighborhood sweeps with drug-sniffing dogs, and if they believe that a car contains contraband sufficiently serious to warrant breaking into that car, then a warrant authorizing such a break-in must be obtained.

Here, there was more than adequate manpower to permit one or more officers to remain with the car while another officer secured the warrant. But because the police acted without a warrant, and because their conduct did not fall under an exception to the warrant requirement, all evidence was seized in violation of the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution. Accordingly, the evidence must be excluded.

CONCLUSION

For the reasons stated above, Ms. Friedman asks this Court to reverse the judgment of the court of appeals, and to reinstate the suppression order issued by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellant Rachel Friedman has been sent by regular U.S. mail, postage prepaid to Latecia E. Wiles, Assistant Wayne County Prosecutor, 115 West Liberty Street, Wooster, Ohio 44691 this 30th day of January, 2012.

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, v. RACHEL FRIEDMAN, Defendant-Appellant.	: : : : : : : : :	Case No. 2011-1328 On Appeal from the Wayne County Court of Appeals, Ninth Appellate District C.A. Case No. 10-CA-0025

APPENDIX TO

MERIT BRIEF OF APPELLANT RACHEL FRIEDMAN

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, v. RACHEL FRIEDMAN, Defendant-Appellant.	:	Case No. 11-1328 On Appeal from the Wayne County Court of Appeals Ninth Appellate District Court of Appeals Case No. 10CA0025

NOTICE OF APPEAL OF RACHEL FRIEDMAN

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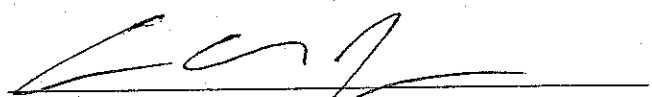
NOTICE OF APPEAL OF RACHEL FRIEDMAN

Rachel Friedman hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Wayne County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case No. 10CA0025 on June 20, 2011.

This case raises a substantial constitutional question and raises an issue of public or great general interest.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing Notice of Appeal of Rachel Friedman was forwarded by regular U.S. Mail, postage prepaid to the office of Daniel R. Lutz, Wayne County Prosecutor, 115 West Liberty Street, Wooster, Ohio 44691, this 4th day of August, 2011.

CRAIG M. JAQUITH 0052997
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COUNSEL FOR APPELLANT,
RACHEL FRIEDMAN

#349228

STATE OF OHIO)
) ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellant

v.

RACHEL FRIEDMAN

Appellee

C.A. No. 10CA0025

APPEAL FROM JUDGMENT
ENTERED IN THE
WAYNE COUNTY MUNICIPAL COURT
COUNTY OF WAYNE, OHIO
CASE No. CRB-10-02-00224

DECISION AND JOURNAL ENTRY

Dated: June 20, 2011

WHITMORE, Judge.

{¶1} Appellant, the State of Ohio, appeals from the judgment of the Wayne County Municipal Court, granting Appellee, Rachel Friedman's, motion to suppress. This Court reverses.

I

{¶2} On October 21, 2009, police officers from Ohio State University, who were assigned to the school's satellite campus in Wooster, led one of their canines along Franklin Court, a residential street on campus. After the canine alerted on one of the parked vehicles on Franklin Court, the officers attempted to contact the vehicle's owner, Friedman. Specifically, they went to Friedman's apartment, called her cell phone, and tried to locate her at the school's activity center. When the officers failed to locate Friedman, they used a lockout device referred to as a "Big Easy" to open her locked vehicle and removed several items.

{¶3} On February 18, 2010, the State filed a criminal complaint against Friedman for the possession of marijuana, in violation of R.C. 2925.11(A), and the possession of drug paraphernalia, in violation of R.C. 2925.14(C)(1). On March 24, 2010, Friedman filed a motion to suppress, challenging the warrantless search of her vehicle. The trial court held a hearing on Friedman's motion on May 4, 2010. The court granted the motion on May 7, 2010, concluding that the police lacked any justification to search Friedman's vehicle in the absence of a warrant.

{¶4} The State now appeals from the trial court's judgment and raises one assignment of error for our review.

II

Assignment of Error

"THE TRIAL COURT ERRED IN GRANTING RACHEL FRIEDMAN'S MOTION TO SUPPRESS ON THE BASIS THAT A SEARCH WAS IMPROPERLY CONDUCTED ON HER VEHICLE."

{¶5} In its sole assignment of error, the State argues that the trial court erred by granting Friedman's motion to suppress. Specifically, it argues that the police lawfully searched Friedman's vehicle, which was parked in a public area, based on probable cause arising from a canine sniff. We agree.

{¶6} The Ohio Supreme Court has held that:

> "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8.

Accordingly, this Court reviews the trial court's factual findings for competent, credible evidence and considers the court's legal conclusions de novo. *State v. Conley*, 9th Dist. No. 08CA009454, 2009-Ohio-910, at ¶6, citing *Burnside* at ¶8.

{¶7} The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, prohibits unreasonable searches and seizures. Section 14, Article I of the Ohio Constitution contains language nearly identical to that of the Fourth Amendment, and similarly prohibits unreasonable searches and seizures. Although the Fourth Amendment recognizes that individuals have privacy interests in their vehicles, the inherent characteristics of vehicles "justif[y] a lesser degree of protection of [the privacy] interests [in them]." *California v. Carney* (1985), 471 U.S. 386, 390. See, also, *Chambers v. Maroney* (1970), 399 U.S. 42, 48; *Carroll v. United States* (1925), 267 U.S. 132, 153. "Once a law enforcement officer has probable cause to believe that a vehicle contains contraband, he or she may search a validly stopped motor vehicle based upon the well-established automobile exception to the warrant requirement." *State v. Moore* (2000), 90 Ohio St.3d 47, 51, citing *Maryland v. Dyson* (1999), 527 U.S. 465, 466. "[T]he concept of exigency underlies the automobile exception to the warrant requirement." *Moore*, 90 Ohio St.3d at 52. Yet, "the 'automobile exception' has no separate exigency requirement." *Dyson*, 527 U.S. at 466. Accord *U.S. v. Ross* (1982), 456 U.S. 798, 809 ("In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained."). "All that is required to support a warrantless intrusion is probable cause to believe that a particular vehicle is carrying evidence of a crime." *State v. Lang* (1996), 117 Ohio App.3d 29, 36. Accord *State v. Underwood*, 12th Dist. No. CA2003-03-057, 2004-Ohio-504, at ¶14-19; *State v. Moore*, 9th Dist. Nos. 22146 & 22216, 2005-Ohio-3304, at ¶24.

{¶8} The facts that emerged at the suppression hearing are not in dispute. At approximately 8:30 p.m. on October 21, 2009, a canine working with police officers on assignment from Ohio State University alerted on a parked, locked car on a residential street on campus. The police identified Friedman as the owner of the vehicle and attempted to contact her over the course of the next twenty to thirty minutes. Specifically, the police identified Friedman's apartment residence, spoke with her roommate, called her cell phone, and went to the school's activity center after her roommate suggested that she might be exercising there. When the police were unable to contact Friedman, they used a lockout tool to gain access to her vehicle. The police did not secure a warrant before entering Friedman's vehicle. According to the officers who testified, they accessed the vehicle at that time because they did not have enough officers on duty to stay with the vehicle in the event Friedman returned.

{¶9} The sole issue at the suppression hearing was whether the police, having probable cause to believe that Friedman's vehicle contained contraband, needed to procure a warrant before searching it. Friedman conceded that probable cause arose as a result of the canine sniff that occurred. She also did not challenge the method the police employed to obtain probable cause; namely, selecting a residential street on campus and subjecting all the cars on that street to a canine sniff. Her sole argument was that, once they had probable cause that her vehicle contained contraband, the police needed either her consent or an exception to the warrant requirement before conducting their search. Because they had neither, Friedman argued, their search was unlawful.

{¶10} The trial court granted Friedman's motion, concluding that no justification for the warrantless search existed. The trial court distinguished this case from cases where a vehicle search ensues as a result of a valid traffic stop and canine sniff on the basis that Friedman was

not detained along with her vehicle. Because the vehicle was parked and locked in Friedman's absence, the court reasoned, there was no danger of her immediately driving out of the area. Moreover, the court emphasized the fact that Friedman's vehicle was parked at her place of residence, thereby reasoning that the vehicle's physical location further distinguished it from a vehicle stopped on a roadway in the course of a traffic stop.

{¶11} The fact that Friedman's vehicle was parked on a residential street did not entitle her to any greater privacy interest than a driver whose vehicle is detained on a roadway pursuant to a valid traffic stop. See, e.g., *Underwood* at ¶14-20 (upholding search of parked vehicle and concluding that "[t]he immobilization of the vehicle or a low probability of its being moved or evidence being destroyed does not remove the officers' justification to conduct a search pursuant to the automobile exception"); *Lang*, 117 Ohio App.3d at 34, quoting *State v. Claytor* (1983), 85 Ohio App.3d 623, 633 (Harsha, P.J., concurring) ("While the accused may have a subjective expectation of privacy in his car while parked in a business lot [or a public street], it is not one *** society is prepared to recognize as reasonable."). Under either scenario, officers are performing their duties in a place where they are legally entitled to be. See, generally, *State v. Halczyszak* (1986), 25 Ohio St.3d 301, 305-06. The question is whether the search of Friedman's vehicle, which was locked and parked in a public area, is deserving of more scrutiny than a vehicle search conducted in the course of a valid traffic stop. This Court must conclude that no meaningful distinction exists between the two searches so as to warrant different results.

{¶12} "[O]nce a trained drug dog alerts to the odor of drugs from a lawfully detained vehicle, an officer has probable cause to search the vehicle for contraband." *State v. Carlson* (1995), 102 Ohio App.3d 585, 601. Accord *State v. White*, 9th Dist. No. 23522, 2008-Ohio-657, at ¶15-16; *Moore* at ¶24; *State v. Shook* (June 15, 1994), 9th Dist. No. 93CA005716, at *5. In

upholding the search of vehicle parked outside a defendant's apartment, this Court noted that "[t]he search was lawful on the basis of the response of the drug-sniffing dog alone; the officers were not required to take the extra step of obtaining a search warrant." *Moore* at ¶24. We see no reason to depart from that conclusion in the instant case. While canine sniffs that give rise to vehicle searches often occur as the result of a traffic stop, we are not convinced that a traffic stop is a condition precedent to such a search, such that the absence of a stop invalidates the search.

{¶13} The canine sniff in this instance gave rise to probable cause that Friedman's vehicle contained contraband, and the officers searched the vehicle pursuant to that conclusion. Id. See, also, *Lang*, 117 Ohio App.3d at 36 ("All that is required to support a warrantless intrusion is probable cause to believe that a particular vehicle is carrying evidence of a crime."). Although Friedman's vehicle was parked and locked at the time of the search, there was no way for the officers at the scene to anticipate when Friedman would return. See *Pennsylvania v. Labron* (1996), 518 U.S. 938, 940 ("If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more."). Her whereabouts were unknown, despite the officers attempting to contact her at her residence, on her cell phone, and at the school's activity center. Further, there was testimony that there were not enough officers on duty to post an officer with the vehicle. The fact that Friedman was not present when the officers developed probable cause does not detract from the inherent mobility of her vehicle or render inapposite the application of the automobile exception to the warrant requirement. See *Carney*, 471 U.S. at 390; *Chambers*, 399 U.S. at 48; *Carroll*, 267 U.S. at 153. Probable cause that Friedman's vehicle contained contraband arose as a result of the canine sniff that was performed. *Carlson*, 102 Ohio App.3d at 601. The officers in question did not violate Friedman's Fourth Amendment rights as a result of the search they

performed. Consequently, the trial court erred by granting her motion to suppress. The State's sole assignment of error is sustained.

III

{¶14} The State's sole assignment of error is sustained. The judgment of the Wayne County Municipal Court is reversed, and the cause is remanded for further proceedings consistent with the foregoing opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Wayne County Municipal Court, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

Beth Whitmore

BETH WHITMORE
FOR THE COURT

DICKINSON, J.
CONCURS

CARR, P. J.
DISSENTS, SAYING:

{¶15} I respectfully dissent because I cannot agree that the State met its burden at the suppression hearing. In fact, the evidence presented by the State was so deficient that it failed to reveal what areas of Friedman's vehicle were searched, what incriminating evidence was found, or where the officers found it. I do not believe that this Court can or should address the isolated issue of whether a search warrant was required to enter the vehicle, as we are presented with too limited a record and the necessity of a warrant does not resolve the ultimate question at the suppression hearing: whether the subsequent search of Friedman's vehicle and seizure of evidence from it were constitutional.

{¶16} Searches conducted outside the judicial process, without a warrant, are per se unreasonable, subject to a few specifically established exceptions. *Athens v. Wolf* (1974), 38 Ohio St.2d 237, 239. The State had the burden of showing, by at least a preponderance of the evidence, that the search of Freidman's vehicle, and ultimate seizure of evidence, fell within a recognized exception to the Fourth Amendment's requirement of a warrant. Id. at 241, citing *Chimel v. California* (1969), 395 U.S. 752, 761 and *Lego v. Twomey* (1972), 404 U.S. 477, 488.

{¶17} The State's burden to demonstrate the propriety of its warrantless search and seizure was not limited to the officers' initial decision to open the vehicle and commence its search without a warrant. "The question remains whether, apart from the lack of a warrant, this search was reasonable." *California v. Carney* (1985), 471 U.S. 386, 394. The "'touchstone of the Fourth Amendment is reasonableness,'" which is "measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette* (1996), 519 U.S. 33, 39, quoting *Florida v.*

Jimeno (1991), 500 U.S. 248, 250, 114 L.Ed.2d 297. Given the limited record before us, we cannot begin to examine the totality of the circumstances.

{¶18} Friedman was charged with possession of marijuana and possession of drug paraphernalia, described as a glass smoking pipe. Aside from the charges against her, which suggest that the State discovered marijuana and a glass smoking pipe in her possession, there is nothing in the record to indicate what evidence was apparently seized from her vehicle. She filed a broad motion to suppress, asserting that evidence had been seized from her vehicle in violation of her Fourth Amendment rights. Prior to the commencement of the suppression hearing, the parties met with the trial judge and agreed to narrow the legal issues. Freidman did not dispute that a drug dog had alerted to the exterior of her vehicle, which was parked and locked on public property, and that she was not present at the scene. The hearing was explicitly limited to the subsequent warrantless search and seizure. Ultimately, however, the State confined its evidence almost exclusively to facts that preceded the officers' decision to enter Friedman's vehicle without obtaining a warrant. Evidence of what happened after the officers opened the car door is noticeably lacking from the record.

{¶19} Most of the evidence at the hearing focused on the officer's unsuccessful attempts to locate Friedman. A warrantless search of her vehicle then ensued, but we are left to speculate about what happened after the police officers opened the car door. The only testimony about the search was that the drug dog went into the vehicle "and hit on a couple areas" and then the two officers "basically divided the vehicle in half," with one officer searching the driver's side and the other searching the passenger side. The State presented no evidence about how the officers conducted the search, what specific areas of the vehicle or items within it were searched, or where and what items of contraband were found. I cannot agree to reverse the trial court's

suppression order without any evidence to demonstrate that the search and seizure were reasonable.

{¶20} The officers' entry into Friedman's vehicle without a warrant was merely the beginning of the alleged invasion of her Fourth Amendment rights. It was the warrantless search and seizure of evidence that was challenged by Friedman, not simply the warrantless entry into her vehicle. It was far more significant that, after entering her vehicle, the officers proceeded to search it and ultimately found and seized incriminating evidence. Had the officers entered her vehicle and found nothing, Freidman would not have been charged and this suppression issue would not be before us.

{¶21} Moreover, even if I could agree with the majority that this Court should address the reasonableness of this warrantless search and seizure on the merits, I cannot agree to reverse the trial court's suppression order. While I recognize that *Carney*, supra, *Illinois v. Caballes* (2005), 543 U.S. 405, and other controlling case law in this area *could* be extended to authorize the warrantless search in this case, I cannot agree that it *should* be extended to the facts of this case.

{¶22} Although Justice Ginsberg warned her colleagues in *Caballes*, 543 U.S. at 422 (Ginsberg, J., dissenting), that "[t]oday's decision *** clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots[,]" it is clear that *Caballes* did not authorize the random and wide scale use of drug dogs as a means to create probable cause to search vehicles parked on public streets. *Caballes* involved an occupied vehicle that was subjected to a lawful traffic stop. In a separate opinion, Justice Souter emphasized that he did not agree with the decision of the majority due to the fallibility of drug dogs and further stated that, although he shared Justice Ginsberg's concerns about the

implications of the majority's holding, he did not believe that the decision had authorized the wide scale use of drug dogs to justify searching parked vehicles. Id. at 417 (Souter, J., dissenting). In fact, the language of the majority opinion is explicitly limited to dog sniffs by trained narcotics dogs during lawful traffic stops that reveal no information other than the location of an illegal substance. Id. at 409.

{¶23} The facts of *Caballes* and most of the case law in this area have involved a search following a dog alert during a lawful traffic stop and the Fourth Amendment reasonably supported the end result: the use of a drug dog to sniff a lawfully stopped vehicle has been effective in detecting a drug trafficker who was in the process of using a vehicle to transport drugs on one of our nation's highways. The minimal intrusion of the drug dog, and resulting search after it alerted, was justified because it enabled the police to protect the public from a drug trafficker and a sizable quantity of drugs that could be lost if the police were required to wait for a warrant.

{¶24} There is no similar rationale for extending that body of case law to the facts of this case, which are in sharp contrast to any of the cases cited by the majority. Unlike the settings of any prior precedent on this issue, the police officers in this case had not lawfully stopped Friedman's vehicle, nor had they encountered her vehicle at the scene of a criminal investigation. Consequently, there was no need for them to act quickly in the heat of an ongoing investigation to protect the safety of themselves or others or to prevent the destruction of evidence or flight of a suspect. Without any suspicion that any vehicle parked on the street was involved in criminal activity, even a traffic or parking violation, police officers paraded a drug

dog up and down the street,[1] attempting to create probable cause to search some of them. They deliberately targeted parked vehicles because an assistant prosecutor had advised them that, if the trained drug dog alerted after sniffing the exterior of a vehicle, they had probable cause to enter and search without a warrant. The warrantless search in this case appears to have been done simply for the convenience of law enforcement.

{¶25} I fear that these circumstances may be perceived as a matter of the ends justifying the means. Subjecting parked, locked, and unoccupied vehicles to suspicionless drug dog sweeps, in an effort to create probable cause to search them, does not better serve the public, but instead threatens the privacy of anyone who parks a vehicle on public property, if the drug dog falsely alerts. The fact that, in this case, a minor misdemeanant was apprehended does not justify the intrusion. In some situations, the dog will falsely alert, and an innocent vehicle owner will have the entire contents of her vehicle rifled through by the police, outside her presence. Moreover, she will not likely have any recourse for the unnecessary invasion into her privacy, for no criminal case against her will result. I would overrule the State's assignment of error and affirm the trial court's decision granting Friedman's motion to suppress.

APPEARANCES:

DANIEL R. LUTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellant.

WILLIAM A. LEFAIVER, Attorney at Law, for Appellee.

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[1] It is unclear from the record whether Friedman's vehicle was parked on Ohio State University property or on a public street in the city of Wooster.

Prosecutor

RECD MAY 10 2010

IN THE WAYNE COUNTY MUNICIPAL COURT
TIM NEAL WOOSTER, OHIO
CLERK OF COURTS

2010 MAY 7 PM 4 19

STATE OF OHIO FILED WAYNE COUNTY MUNICIPAL COURT	:	Case No. CRB 10-02-00224
Plaintiff	:	
vs	:	
	:	JUDGMENT ENTRY
RACHEL FRIEDMAN	:	
Defendant		

This matter came before the Court upon a motion to suppress. The State was represented by Assistant Prosecuting Attorney Michelle Fink and the Defendant was represented by Attorney William A. LeFaiver.

STATEMENT OF FACTS

The Ohio State University Police Department which patrols the Ohio Agriculture Research and Development Center (OARDC) as well as the Agriculture and Technical Institute (ATI) joined forces with a Wooster Police Department Officer and his canine partner to randomly search for drugs in parked cars.

The canine hit on the Defendant's car which was parked and locked in the residential parking lot close to her apartment. The Defendant was not present. The police officers verified that the registered owner of the car was a tenant in the apartment complex. They also obtained her cell phone number. The officers went to her apartment and learned she was not there, but that she may be at the activity center. She was not found at the activity center. After attempting to locate the Defendant for

approximately 20 minutes the officers gave up the effort because it was close to the end of their shifts. There was also testimony that there were not enough officers to continue surveillance on the Defendant's car although four officers were working together on this particular assignment.

The officers then used a "Big Easy" to jimmy open the Defendant's car. They proceeded to search the vehicle and removed several items including a camera.

STATEMENT OF LAW

The State cites State v. Carlson (1995, 9th Dist) 102 App 3d 585, for the proposition that when a vehicle is lawfully detained, an officer does not need a reasonable suspicion of drug-related activity in order to conduct a dog sniff of the vehicle.

That case is distinguished from the present one in that the Friedman's car was not lawfully detained. It was not detained at all. It was parked in its proper parking place for residents at the nearby apartment complex. It follows that the Defendant was not properly detained. In fact, the Defendant was not detained at all as she was not present when the intrusion took place.

The State also cites State v. Shook (1994, 9th Dist) Lorain App. No. 93CA005716 for the proposition that once a properly trained canine alerts on a vehicle, officers have probable cause to search the vehicle for contraband. The vehicle in Shook was stopped for drifting outside its lane of travel on the Ohio Turnpike. The Shook case follows well established Ohio authority that the exterior of a vehicle is subject to inspection by a properly trained canine after the vehicle is stopped based upon probable

cause for the stop, providing the additional time the driver is detained for the drug sniff is not unreasonable.

Again, in the case presently before the Court, the vehicle was not detained. It was parked in its proper location for a resident living at the nearby apartment complex. The officers had no more authority to enter the Defendant's car without a warrant than they had to enter her apartment without a warrant. Because the car was parked at its residence there was no concern that the Defendant would be immediately driving out of the area. Leaving the jurisdiction is the basis for the rationale of permitting a warrantless search when a vehicle is stopped on a roadway. Such was not the case here. Finally, the fact that the officers' shifts were soon to end, was no justification for a warrantless search and seizure of the Defendant's property.

The motion to suppress is granted.

IT IS SO ORDERED.

Carol White Millhoan

Carol White Millhoan, Judge
May 7, 2010

5 - 7, 2010

TIME

BY _____ DEPUTY CLERK

cc: Prosecutor
Atty for Defendant

The Supreme Court of Ohio

State of Ohio

v.

Rachel Friedman

Case No. 2011-1328

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Wayne County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Wayne County Court of Appeals; No. 10CA0025)

Maureen O'Connor
Chief Justice

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 14 SEARCH AND SEIZURE

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized.