IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2020-0495
Plaintiff-Appellee,	:	
	:	On Appeal from the Hamilton County
v.	:	Court of Appeals,
	:	First Appellate District
LEANDRE JORDAN,	:	Case Nos. C180559, C180560
	:	
Defendant-Appellant.	:	

MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANT LEANDRE JORDAN

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STATEMENT OF THE CASE AND FACTS

Amicus curiae adopts the statement of the case and facts set forth in Appellant Leandre Jordan's merit brief.

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is a state agency designed to represent indigent criminal defendants and to coordinate criminal-defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect and defend the rights of indigent persons by providing and supporting superior representation in the criminal and juvenile justice systems.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle criminal cases in Ohio courts. This work includes representation at both the trial and appellate levels. Through this work, we have seen shifts in Fourth Amendment doctrine towards a more robust warrant requirement. The OPD has an interest in the present case insofar as this Court will consider whether and when a warrant is necessary to effectuate a delayed felony arrest.

INTRODUCTION

The Fourth Amendment's warrant requirement is riddled with exceptions. By the end of the twentieth century, commenters were lamenting that the number of these exceptions and their growing breadth was eroding the warrant requirement nearly to the point of meaninglessness. *See* Thomas Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. Crim. L. & Criminology 933 (2010) (hereinafter "*The Supreme Court Giveth and the Supreme Court Taketh Away"*); James Sokolwski, *Government Drug Testing: A Question of Reasonableness*, 43 Vanderbilt L.Rev. 1343, 1350 (1990). Although these exceptions widened and proliferated in past decades, the wholesale relaxation of the warrant requirement has not continued into the twenty-first century. Starting with *United States v. Jones,* 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) and *Florida v. Jardines*, 569 U.S. 1, 8, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) and continuing through *Carpenter v. United States*, 585 U.S. ____, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018), the Roberts Court has begun narrowing the circumstances in which it is reasonable for law enforcement to proceed without a warrant to fact patterns that initially justified the exception.

Mr. Jordan's case presents this Court with an opportunity to re-evaluate both the scope of *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed. 598 (1976) and the protections afforded by Article I, Section 14 of the Ohio Constitution in a moment when the warrant requirement is being reinvigorated in other contexts.

After this reevaluation, this Court should either hold that the Fourth Amendment requires a warrant for a stale public arrest where exigent circumstances are not present, or it should hold that the Ohio Constitution's independent protections against government search and seizure require a warrant in such circumstances.

ARGUMENT

APPELLANT'S PROPOSITION OF LAW:

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

I. *Watson* must be understood in its historical context.

In *Watson*, the United States Supreme Court held that "a warrantless arrest that is based upon probable cause and occurs in a public place does not violate the Fourth Amendment." *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858. This holding did not distinguish between warrantless arrests that immediately follow the commission of a felony and those where "it was practicable to get a warrant." *Watson* at 423. The majority in *Watson* supported this decision, in part, with reference to the fact that the common law permitted warrantless felony arrests. *Id.* at 421. In his dissenting opinion, Justice Marshall argued that this comparison is of little value to the Fourth Amendment because "a felony at common law and a felony today bear only slight resemblance, with the result that the relevance of the common-law rule of arrest to modern interpretation of our Constitution is minimal." *Id.* at 438 (Marshall, J., dissenting). While Justice

Marshall would not have required a warrant for a felony arrest in exigent circumstances, he would have required a showing of exigency to justify a warrantless felony arrest. *Id.* at 453 (Marshall, J., dissenting).

While the Court resolved *Watson* by looking backwards to the common law, the case itself must be placed in historical context. The Burger Court's Fourth Amendment jurisprudence was characterized by decisions that limited its scope and protections. This is unsurprising, as Chief Justice Burger was a critic of the exclusionary rule while serving on the D.C. Circuit Court of Appeals. Warren E. Burger, *Who Will Watch the Watchman?*, 14 Am. U. L.Rev. 1 (1964). In the early Burger Court years, the government won 79% of the Fourth Amendment cases before the Court, as the Court "engaged in a multi-prong campaign to loosen Fourth Amendment restraints on police." *The Supreme Court Giveth and the Supreme Court Taketh Away* at 995. In the 1970s, it became easier for law enforcement to conduct warrantless automobile searches, consent searches, and searches incident to an arrest. *Hill v. California,* 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971); *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 806 (1973); *United States v. Robinson,* 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); *Cardell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974).

II. The Roberts Court has shifted towards reading exceptions to the warrant requirement more narrowly and requiring warrants when they can be reasonably obtained.

After its erosion during the last third of the twentieth century, the warrant requirement is reemerging. The Roberts Court has issued several decisions in the last decade that recalibrate when warrantless government intrusion is reasonable. In doing so, the Roberts Court has explicitly engaged the Burger Court's erosion of the warrant requirement. *See Riley v. California*, 573 U.S. 373, 382, 134 S.Ct. 2473, 189 L.ed.2d 430 (2014) ("Although the existence of the [warrant] exception for [searches incident to arrest] has been recognized for a century, its scope has been debated for nearly as long."). These opinions by the Roberts Court do not simply apply well-worn exceptions to the warrant requirement. Instead, they re-examine the purpose of the exception before applying it.

One line of the Roberts Court's Fourth Amendment jurisprudence, culminating in *Collins v. Virginia*, 584 U.S. ___, 138 S.Ct. 1663, 1670, 201 L.Ed.2d 9, 19 (2018), reaffirms that it is not reasonable for law enforcement to enter a person's house or curtilage without either consent or a warrant. These cases protect the sanctity of the home from other warrant exceptions. In *Collins*, the Court held that the Fourth Amendment's automobile exception does not permit the warrantless search of a vehicle that is parked within a home's curtilage. *Collins*, 138 S.Ct. at 1670. This holding builds upon the Court's earlier decision in *Jardines*, which held that a warrant is required before the Government may enter a house or its curtilage without consent. *Jardines*, 569 U.S. at 9. Both *Jardines* and *Collins* can be read as

extensions of the Burger Court's conclusion that the "chief evil against which the wording of the Fourth Amendment is directed" is the Government's "physical entry of the home." *Payton v. New York*, 445 U.S. 573. 585, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). But notably, *Collins* rejects the easy application of the automobile exception and instead looks to its rationale to find it inapplicable when a car is parked within the curtilage of a home. *Collins*, 138 S.Ct. at 1674.

In other parts of its Fourth Amendment doctrine, the Roberts Court has narrowly read Burger Court precedents, with the effect of strengthening the Fourth Amendment's warrant requirement. *Jones, Riley,* and *Carpenter* are notable examples of this.

In *Jones*, the Court limited the application of the Burger Court's decision in *United States v. Knotts*, 460 U.S. 267, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). The *Knotts* Court held that law enforcement did not need a warrant to track Knotts's movements with a "beeper" that it placed into a container of chloroform that Knotts purchased. *Id.* at 278, 285. The plurality in *Jones* held that the *Knotts* rationale—that a person does not have a reasonable expectation of privacy in their movement—does not permit the government to place a tracker directly onto a person's car. *Jones*, 565 U.S. at 408. Justice Sotomayor's concurrence, foreshadowing *Carpenter*, went one step further to challenge the *Knotts* conclusion that people lack an expectation of privacy in their movements. *Id.* at 416 (Sotomayor, J., concurring). The concurring opinion recognizes that the factual circumstances that justified *Knott's* conclusion in the 1980s may not extend to

government investigation in a digital age, when location can be tracked in deeply intrusive ways. *Id.*

In *Riley*, the Court held that the search incident to a lawful arrest exception to the warrant requirement does not allow law enforcement to search a person's cellular phone. *Riley*, 573 U.S. at 386. The search incident to arrest rule, announced in *Robinson*, held that such a warrantless search was justified because of the twin risks of officer safety and destruction of evidence. *Robinson*, 414 U.S. at 235. *Riley* explicitly cabined *Robinson*, a Burger-era categorical rule permitting searches incident to arrest, to "physical objects," holding that "neither of its rationales has much force with respect to digital content on cell phones." *Id.* A cell phone does not place officers at risk and it can be stored by law enforcement in a way that prevents evidence destruction before the issuance of a warrant. *Id.* Put another way, the Roberts Court did not simply rely upon the Burger Court's exception to the warrant rule. Instead, it returned to the exception's justification and tethered its application to the justification.

In *Carpenter*, the Court held that the government must obtain a warrant before obtaining over seven days of cell-site location information (CLSI) from a wireless service provider. *Carpenter*, 138 S.Ct. at 2217. In doing so, the Court declined to extend the Burger Court's third-party cases, *United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976) and *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). The rationale for this decision relates to the expectation of privacy that people have in cellular tracking of their location:

> Neither does the second rationale underlying the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly "shared" as one normally understands the term. In the first place, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. *Riley,* 573 U.S., at ——, 134 S.Ct., at 2484. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up. Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily "assume[ ] the risk" of turning over a comprehensive dossier of his physical movements. *Smith,* 442 U.S., at 745, 99 S.Ct. 2577.

Carpenter, 138 S.Ct. at 2220. Like it did in *Jones* and *Riley*, the Roberts Court did not simply apply a Burger-era exception to the warrant requirement. Instead, the Roberts court examined the viability of the exception on the specific facts before it.

III. Requiring an arrest warrant in the absence of exigency is reasonable and normatively desirable, given the ease with which warrants can be obtained.

In *Jones, Riley,* and *Carpenter*, the Roberts Court addressed the ways that the digital revolution changed expectations of privacy and undercut previously developed exceptions to the warrant requirement. But the digital revolution has not just broadened the sphere of citizens' lives that needs protection from government intrusion, it has also made it easier for the government to obtain warrants quickly.

In *Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), the Court explained the ways in which the digital revolution has improved law enforcement access to neutral magistrates. There, the Court was tasked with

determining whether "the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk driving cases." *Id.* at 144. In *McNeely*, the government pointed to the rationale of *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), where a warrantless blood draw was permitted as an exigent circumstance. The Court rejected this comparison, pointing to technological developments that make obtaining a warrant easier:

> We by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process. Warrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review. Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record, such as preparing a duplicate warrant before calling the magistrate judge. See Fed. Rule Crim. Proc. 4.1(b)(3). And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest. But technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency. That is particularly so in this context, where BAC evidence is lost gradually and relatively predictably.

McNeely at 155. This empirical observation—that warrants may be more easily obtained today than in past decades—is relevant to whether law enforcement should be required to obtain a felony arrest warrant in situations where exigency does not justify a warrantless arrest.

In *Watson*, the Court acknowledged that the better course is to seek an arrest warrant prior to a public arrest. *Watson*, 423 U.S. at 423 ("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."). In a concurring opinion, Justice Powell argued that the value of a warrant may be undercut by the harm requiring it would cause for "effective law enforcement." *Id.* at 431 (Powell, J., concurring); *but see id.* at 448-449 (Marshall, J., dissenting) (explaining that a warrant requirement would not hamper law enforcement efforts). Weighing the costs and benefits, the Court concluded that warrants are advisable but not required.

But the reasons for a warrant preference extend beyond the perceived legitimacy of law enforcement's later actions: warrants are an important ex ante check on what would otherwise be illegal government conduct. *See* Oren Bar-Gill and Barry Friedman, *Taking Warrants Seriously*, 106 N.W. L.Rev. 1609, 1613 (2012). And, given the lowered costs in time and energy that are now necessary to secure a warrant, a warrant requirement would not imperil law enforcement objectives in a way that outweighs its benefits. Concerns about a warrant that becomes stale after additional surveillance are less significant today than they were in 1976 because lower transaction costs allow for more quickly obtaining a second warrant. *McNeely* at 155; *Watson* at 431 (Powell, J., concurring). Similarly, unsuccessful good faith attempts to obtain a warrant could be used to demonstrate exigency in circumstances where law enforcement personnel are "caught in [a] squeeze." *Watson* at 431 (Powell, J., concurring).

IV. To the extent that the United States Constitution does not require an arrest warrant when exigent circumstances do not exist, the Ohio Constitution does.

The Supreme Court's doctrinal shifts over the last decade point to the ways in which *Watson* has weakened as a Fourth Amendment precedent. That point is reinforced by state supreme courts, which have weighed *Watson's* costs and determined that their state constitutions offer more protection than the Fourth Amendment. To the extent that this Court does not recognize the shift in Fourth Amendment doctrine as a justification to limit *Watson*, it should hold that the Ohio Constitution is more protective than the federal constitution.

This Court has held that Article I, Section 14 of the Ohio Constitution offers greater protection than the Fourth Amendment. *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, ¶ 20-21 (hereinafter "*Dali Brown*") (holding that, although the Fourth Amendment permits a warrantless arrest for a minor misdemeanor, the Ohio Constitution forbids it); *see also State v. Brown*, 143 Ohio St.3d 444, 2015-Ohio-2438, 39 N.E.3d 444,¶ 23. In *Dali Brown*, this Court departed from federal rule that allows custodial arrests for minor misdemeanors because the "government's interests in making a full custodial arrest for a minor misdemeanor * * * are minimal and are outweighed by the serious intrusion upon a person's liberty and privacy that, necessarily, arises out of arrest." *Id.* at 19 quoting *State v. Jones*, 88 Ohio St.3d 430, 440, 727 N.E.2d 886 (2000). A similar analysis—weighing government interest against individual interest—shows why this Court should cabin *Watson* to cases involving exigent circumstances.

In fact, this analysis was done by the Supreme Court of New Mexico in *Campos v. State*, 117 N.M. 155, 870 P.2d 117 (1994), which rejected the *Watson* rule on state constitutional grounds. In holding that an arrest warrant is required absent exigent circumstances, the *Campos* court noted that "[w]e understand that an officer may wish to forego an arrest temporarily in order to gather evidence" and "do not wish to interfere unduly with the officer's investigation," but "[w]e will not hesitate * * * to find a warrantless arrest unreasonable if no exigencies existed to excuse the officer's failure to obtain a warrant." *Id.* at ¶ 15. The *Campos* Court was "strongly influenced by the factor of time" and suppressed evidence because "the officers had no good reason not to get the warrant." *State v. Paananen,* 2015-NMSC-031, 357 P.3d 958, ¶ 23 (applying *Campos* to find that there were exigent circumstances for the warrantless arrest of Paananen).

Mirroring this Court's analysis in *Dali Brown*, the *Campos* court found that the minimal costs to law enforcement did not justify subjecting a person to a warrantless arrest. The costs of obtaining a warrant have further lessened since 1994, when *Campos* was decided. *McNeely* at 569 U.S. at 155. That *Paananen* reaffirmed *Campos* in 2015 demonstrates that requiring either exigent circumstances or a warrant for a public felony arrest has not created undue costs for law enforcement.

CONCLUSION

As early as 1994, the Supreme Court of New Mexico rejected *Watson*'s rule that a warrant is *never* needed to conduct a public arrest. Ohio's Second Appellate District followed suit in *State v. VanNoy*, 188 Ohio App.3d 89, 2010-Ohio-2845, 934 N.E.2d 413 (2d Dist). In those earlier cases, courts engaged state constitutional analysis instead of a Fourth Amendment analysis. But, since 2012, the United States Supreme Court has recalibrated the Burger Court's Fourth Amendment jurisprudence in ways that undermine *Watson's* continued viability. This Court should hold that either the Fourth Amendment or Article I, Section 14 of the Ohio Constitution require either a warrant or a showing of exigency before a delayed public arrest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Amicus Brief of Amicus Curiae Office of the Ohio Public Defender** was sent by electronic mail to, Melynda J. Machol, Assistant Prosecuting Attorney, melynda.machol@hcpros.org, and Sarah E. Nelson, Assistant Hamilton County Public Defender, snelson@cms.hamilton-co.org, on this 26th day of August, 2020.

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