In the Supreme Court of Ohio

STATE OF OHIO,	}	
	}	CASE NO. 2024-0965
Plaintiff-Appellee,	}	
	}	ON APPEAL FROM THE FAIRFIELD
v.	}	COUNTY COURT OF APPEALS
	}	FIFTH APPELLATE DISTRICT
JASON THOMAS HIKEC,	}	
	}	COURT OF APPEALS NO. 2023-CA-18
Defendant-Appellant.	}	

MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF AMICUS

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured by law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice; and to pursue appellate litigation to argue for the rights of criminal defendants.

STATEMENT OF THE CASE AND THE FACTS

Amicus concurs in the Statement of the Case and the Facts presented in the Merit Brief of Appellant.

LAW AND ARGUMENT

PROPOSITION OF LAW NO 1: A limiting instruction to a jury cannot render harmless the admission of evidence which was obtained in violation of a defendant's Fourth Amendment right against unreasonable search and seizure which was not subject to the good faith exception.

1. The appellate court was correct in holding that the search of Hikec's phone violated his Fourth Amendment rights. The police here examined Hikec's phone in the hope that they might discover evidence they could use against him. This was similar to the policing rummaging through Nick Castagnola's computer on the off-chance that they might find something vaguely associated with the crime with which he was charged.

In 2007, a Federal court observed that "for most people, their computers are their most private spaces." *United States v. Andrus*, 483 F.3d 711, 718 (10th Cir. 2007). As the Supreme Court remarked in *Riley v. California*, 573 U.S. 373, 385 (2014), cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." Hikec's cell phone had a storage capacity 32 times greater than the one possessed by Riley ten years ago, and the modern cell phone is the repository of all manner of personal information, from photos to emails to "apps" which can track virtually every aspect of our lives.

Since privacy is the touchstone of Fourth Amendment analysis, *Katz v. United States*, 389 U.S. 347 (1967), the Court held in *Riley* that a warrant was necessary to search the contents of a cell phone.

Obviously, the same privacy interests apply to a computer, which was the issue this Court addressed in *State v. Castagnola,* 145 Ohio St.3d 1, 2015-Ohio-1565. There, the police had seized Castagnola's computer under the theory that it might provide evidence of his vandalizing

the automobile of a prosecutor's wife. In that context, this Court addressed another aspect of search and seizure law: the amendment's requirement that the warrant "particularly describ[e] the place to be searched, and the persons or things to be seized."

> Because computers can store a large amount of information, there is a greater potential for the "intermingling" of documents and a consequent invasion of privacy when police execute a search for evidence on a computer. * * * Officers must be clear as to what it is they are seeking on the computer and conduct the search in a way that avoids searching files of types not identified in the warrant. ¶81. [Internal quotations and citations omitted.]

Riley and *Castagnola* set forth two principles: first, that an individual has a heightened privacy interest in the contents of his computer or cell phone, and second, that those interests can only be adequately protected if the warrant describes the search of those items as narrowly as possible.

The court below correctly found that "the cell phone warrant was broadly worded and thus permitted a sweeping, comprehensive search of Hikec's cell phone with no meaningful limits on the discretion of law enforcement to search the cell phone." *State v. Hikec*, 2024-Ohio-1940 (5th Dist.), ¶26. It was also correct in determining that the good faith exception did not save the warrant. *Id.*, ¶28. The warrant in *Castagnola* was "facially deficient in failing to particularize the items to be searched for," ¶100, and the warrant here suffered the same defect.

2. A Fourth Amendment violation cannot be remedied by a curative instruction.

The lower court nonetheless found the admission of the text messages found in the search harmless because the trial court gave a limiting instruction, specifically, an instruction that the jury was not to consider the messages as "direct evidence that the Defendant owned or possessed" any of the particular firearms alleged. Since a jury is presumed to have followed the instructions, the court held, any resulting error was harmless.

In support of the notion that a constitutional violation can be cured by telling the jury to disregard it, the lower court cited two cases. The first is *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179. To be sure, *Perez* did involve a limiting instruction, but it was in relation to evidence admitted under Evid.R. 404(B). Perez did raise a Fifth Amendment issue regarding statements he made to an undercover informant, but the court found the self-incrimination clause did not apply because there was no coercion involved. That argument had nothing to do with a limiting instruction.

The lower court here fares no better with its reliance on *State v. Davis*, 2015-Ohio-889 (5th Dist.). There, the defendant assigned as error the trial court's allowing the jury to view for a second time the video of his arrest, where he asked to see an attorney. The trial court instructed the jury to ignore that and consider the video only for purposes of gauging whether Davis was intoxicated. But *Davis* hardly stands for the proposition that constitutional error can be remedied by a curative instruction, because Davis never claimed any constitutional error; he did not file a motion to suppress any statement he made, did not object to the introduction of the video when it was first played, and only objected to the replaying because he thought the jury might draw an adverse inference from his request for counsel. That was what the instruction was intended to address.

There is no question that a Fourth Amendment violation, like any error, can be harmless. *United States v. Tenerelli*, 614 F.3d 764 (8th Cir. 2010) (Fourth Amendment); *United States v. Phillips*, 71 F.4th 817 (10th Cir. 2023) (request for counsel). But for constitutional error to be harmless, the government must show that it is harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967). To do that, the government must show that "the remaining evidence, standing alone, constitutes overwhelming proof of defendant's guilt." *State v.*

Williams, 6 Ohio St.3d 281 (1983), ¶6 of the Syllabus.

The court below never engaged in any of this analysis. It never analyzed the weight of the evidence to determine how the text messages may have impacted the result, and in fact used the wrong standard of harmless error, choosing the definition provided by Crim.R. 52(A), rather than the standard of harmless beyond a reasonable doubt. It simply concluded that because the trial court gave a limiting instruction, the error it found was resolved.[1]

There is no logical nor legal support for the contention that evidence obtained in violation of the Fourth Amendment can be admitted so long as the trial court tells the jury to ignore it. As indicated by its name, the exclusionary rule demands that evidence seized in violation of the Fourth Amendment cannot be introduced at trial. To allow illegally-obtained evidence to be presented to the jury if there is a cautionary instruction not to consider it makes no logical sense, and would gut both the constitutional protections of the Amendment and the exclusionary rule intended to effectuate it.

***AMICUS* PROPOSITION OF LAW NO. 2: For evidence of other acts to be admissible under the theory that the other acts are "inextricably intertwined" with the charged crime, evidence of the other acts must be essential to the jury's understanding of the charged crime.**

1. 404(B) evidence in general. Evid.R. 404(A) provides that "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." This codifies the general prohibition against propensity

[1] In his Brief, Hikec gives an extensive explanation of why the evidence cannot be declared harmless. See Brief of Appellant, pp. 14-16.

evidence: that the evidence at trial will be limited to what a person is charged with doing, rather than what he has done in the past. A "hallmark of the American criminal justice system is the principle that 'proof that the accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime.'" *In re C.T.*, 2013-Ohio-2458 (8th Dist.), ¶ 5, quoting *State v. Curry*, 43 Ohio St.2d 66, 68 (1975). It is indeed a hallmark; the rule excluding evidence of criminal propensity dates back some three centuries. 1 Wigmore, Evidence (3d Ed. 1940, §194).

Since the early 20th century, the courts have developed an exception to the general rule against evidence of prior crimes and acts. That effort culminated in Ohio with Evid.R. 404(B)(2) and R.C. §2945.59:

As the courts have recognized, "other act evidence is usually capable of being used for multiple purposes, one of which is propensity." *United States v. Gomez,* 763 F.3d 845, 855 (7th Cir. 2014) (en banc). For that reason, the rule is "to be strictly construed against the state, and to be conservatively applied by a trial court." *State v. DeMarco*, 31 Ohio St.3d 191, 194, (1987).

But the appellate court here did not analyze the text messages in the context of 404(B), nor did the State seek their admission on the theory that the messages fit within one of the exceptions in it. Rather, both the State and the court of appeals argued that the messages were "inextricably intertwined" with the firearm specifications and weapons under disability charge, 404(B) did not prohibit their introduction. See State's Appellate Brief at 11; *Hikec*, *supra*, at ¶39.

2. The problems with the "inextricably intertwined" doctrine. The difference in analysis is based on the definition of "other acts." Evid.R. 404(B) applies initially to limit the admission of other acts evidence that are "extrinsic" to the crime charged. *Jordan v. Dayton*

Testing Lab., Inc., 2004-Ohio-2425 (2nd Dist.), ¶48. "Accordingly, acts intrinsic to the alleged crime do not fall under Evid.R. 404(B)'s limitation on admissible evidence." *State v. Plevyak*, 2014-Ohio-2889 (11th Dist.).

The "intrinsically intertwined" doctrine, of course, features the same problems that 404(B) evidence does: the concern that jurors will regard it as simply propensity evidence in another form. Moreover, allowing evidence in that fashion bypasses the notice requirements of Evid.R. 404(B).

Efforts to limit the applicability of "intrinsically intertwined" evidence have not been particularly successful. The Seventh Circuit examines

> whether the evidence is properly admitted to provide the jury with a complete story of the crime on trial, whether its absence would create a chronological or conceptual void in the story of the crime or whether it is 'so blended or connected' that it incidentally involves, explains the circumstances surrounding, or tends to prove any element of, the charged crime.

United States v. Hughes, 213 F.3d 323, 329 (7th Cir. 2000).

In *United States v. Carboni*, 204 F3d. 39, 44 (2nd Cir. 2000), the court offered a slightly different variation:

> [E]vidence of uncharged criminal activity is not considered other crimes evidence under Fed. R. Evid. 404(b) if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial.

These formulations raise as many questions as they answer. When does some act "arise out of the same transaction" as the crime charged? What is meant by "extrinsically intertwined"? When is the other act "necessary to complete the story"? As one court pointed out, "all relevant prosecution evidence explains the crime or completes the story." *United States*

v. Bowie, 232 F.3d 923 (D.C. Cir. 2000).

3. To be admissible, intrinsic evidence must be essential to proving the State's case.

A better formulation was offered by this Court in *State v. Wilkinson*, 64 Ohio St.3d 308 (1980): other acts evidence is inextricably intertwined to the crime charged when they are "necessary to give a complete picture of what occurred." 64 Ohio St.3d at 318.

The key word here is "necessary." The prosecution would undoubtedly be aided by introduction of any evidence *related* to the crime charged, but that would run afoul of the general proscription of propensity evidence. The *Wilkinson* court cited *People v. Vails*, 43 N.Y.2d 364 (1977), as an example of where introduction is proper:

> In this case the trial court admitted the evidence of the prior transaction because the process of buying and making preparations for the sale was inextricably interwoven into this one transaction. Reference to the prior sale was intrinsic to the bargaining between defendant and Officer Molfetta. It concerned the price to be paid and the quality of the drugs, providing highly probative evidence relating directly to the crime charged.

But that does not mean that any evidence *related* to the crime comes in. In *State v. Sinclair*, 2003-Ohio-3246 (2nd Dist.), the defendant was accused of raping an 11-year-old neighbor. The incidents mainly took place in Sinclair's house, but the victim also offered testimony that Sinclair would take him to a cabin Sinclair owned in Kentucky on numerous occasions, and that Sinclair would sexually abuse him there.

The State sought to admit this testimony in the trial court under the theory that it fell within the exceptions under 404(B) for proof of motive, opportunity, intent, preparation, plan or knowledge, and the trial court allowed it for that purpose. On appeal, though, the State argued that the evidence of the Kentucky sexual acts were "inextricably intertwined" with the crimes charged.

The appellate court found that none of the 404(B) exceptions applied, and rejected the "inextricably intertwined" contention as well.

> Proof of sexual activity on certain weekends in Kentucky does not in any way "incidentally involve" sexual activity occurring on different days in Fairborn, Ohio. Likewise, evidence that Sinclair and J.S. engaged in sexual conduct at a cabin in Kentucky does not in any way "explain the circumstances" of their sexual conduct at Sinclair's home. Nor does evidence about sexual conduct in Kentucky tend logically to prove any element of the crimes charged. In short, any uncharged sexual activity between Sinclair and J.S. in, or on the way to, Kentucky simply does not "form part of the *immediate* background" of the crimes charged in the indictment. ¶36 [Emphasis in original.][2]

4. The text messages here were not admissible under the "inextricably intertwined" doctrine. The text messages at issue here cannot be considered essential to the State's case. Indeed, there is serious doubt whether they are even probative: there is nothing to indicate that the messages pertained to the guns found in Hikec's possession, or that they did not refer to the ancient flintlocks the police discovered. Unlike the discussions of the evidence of conversations relating to preparations and price of the drug transaction that was "inextricably interwoven" into the evidence of the drug sale in *Vail*, the text messages here were more like the out-of-state sexual activities in *Sinclair*. The text messages did nothing to explain Hikec's possession of the firearms he was charged with. The messages did not logically prove any of the elements of that offense.

All the evidence did was portray Hikec to the jury as a person who was more likely – had the propensity – to possess guns. That is exactly the type of propensity evidence that the rules forbid.

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[2] While finding admission of the evidence improper, the court nonetheless affirmed Sinclair's conviction, finding the evidence of his guilt overwhelming.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully prays the Court to reverse Appellant's conviction and to remand the case to the trial court for a new trial.

Respectfully submitted,

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SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Association of Criminal Defense Lawyers was served upon all parties by email.

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