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STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

vs.

DAVID HENRY SERGES **No.167154**
Defendant-Appellant.

L.C. No. 18-42951-FC
COA No. 355554

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE

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Statement of the Question

I.

The police do not meaningfully interfere with a person's possessory interest or violate his expectation of privacy in his clothing once they collect the clothing after a lawful arrest, nor is there "any doubt that clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected to laboratory analysis or that the test results are admissible at trial." Defendant's clothing was exchanged, as a matter of routine, for jail clothing and later subjected to laboratory analysis. Were the test results thus admissible?

Amicus answers: YES

Statement of Facts

Amicus joins in the Statement of Facts of the People of the State of Michigan.

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Argument

I.

The police do not meaningfully interfere with a person's possessory interest or violate his expectation of privacy in his clothing once they collect the clothing after a lawful arrest, nor is there "any doubt that clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected to laboratory analysis or that the test results are admissible at trial." Defendant's clothing was exchanged, as a matter of routine, for jail clothing and later subjected to laboratory analysis. The test results were thus admissible.

A. Introduction

1. The Court's MOAA order

The Court has specified the issues to be addressed on supplemental brief:

- whether the defendant was unlawfully arrested such that his pants should be excluded as the result of an unreasonable seizure under U.S. Const., Am. IV or Mich. Const. 1963, art. 1, § 11;

- if the defendant was lawfully arrested, whether police violated the defendant's rights under U.S. Const., Am. IV or Mich. Const. 1963, art. 1, § 11, by having his pants tested for DNA without a warrant while in possession of the pants due to the defendant's detention in jail, *People v. Trudeau*, 385 Mich. 276 (1971); *People v. Carr*, 370 Mich. 251 (1963); and

- whether the defendant's trial attorney rendered ineffective assistance of counsel by failing to file a motion to suppress the evidence obtained as a result of the seizure and testing of the clothing

Amicus agrees with the People that the answer to all is "no." But first a word about the principle of party presentation is appropriate, as "whether the defendant was unlawfully arrested such that his pants should be excluded as the result of an

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unreasonable seizure under U.S. Const., Am. IV or Mich. Const. 1963, art. 1, § 11" was not raised by the appellant but by this Court.

2. The principle of party presentation precludes the first issue specified by the Court

This Court has said emphatically that "[i]n our adversary system, *in both civil and criminal cases*, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present,"[1] otherwise, "best we ditch the adversarial system of law today, as ... the Court will always know not only the better answer than any supplied by the parties but even the better questions than those asked by the parties."[2] And not long ago Justice Viviano, concurring in the denial of leave said that "it is not our role to find and develop unpreserved arguments on behalf of litigants."[3] As the United States Supreme Court has put it, "Courts are essentially passive instruments of government. ... They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties."[4]

Despite these statements, the Court *does* regularly raise in criminal cases—for the defense—arguments and issues not raised in the application, sometimes deciding cases on these issues—sallying forth looking for wrongs to right—and, on occasion,

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[1] Quoting *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S. Ct. 2559, 171 L.Ed.2d 399 (2008).

[2] *Michigan Gun Owners, Inc. v. Ann Arbor Pub. Sch.*, 502 Mich. 695, 710 (2018) (emphasis supplied).

[3] *People v. Worthington*, 503 Mich. 863 (2018) (Viviano, J., concurring).

[4] *United States v. Sineneng-Smith*, 590 U.S. 371, 140 S. Ct. 1575, 1579, 206 L. Ed. 2d 866 (2020) (cleaned up).

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without opportunity for briefing and argument by the appellee.[5] Given that this is so—and it is certainly sometimes appropriate for the Court to direct briefing on additional *arguments*[6]—amicus suggests that the Court at some point set out for the bench and bar just when the raising of an argument, and most especially an issue, by the Court not raised by the appellant is appropriate,[7] and, most particularly, establish that the raising of additional arguments by the appellee to *support* a judgment is permissible so long as supported by the record, something that is routine in the rest of the country[8] but denied in Michigan to prosecutors.[9]

It is, amicus submits, inappropriate for the judiciary to act as a "self-directed board of legal inquiry and research" for the appellant while denying to the appellee additional arguments in *support* of the judgment, arguments raised by the appellee him or herself and *not* the Court; the former should be rare, the latter should always

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[5] See e.g., *People v. McKinley*, 496 Mich. 410 (2014).

[6] See Timothy A. Baughman, "Appellate Decision Making in Michigan: Preservation, Party Presentation, and the Duty to 'Say What the Law Is'," 97 U. Det. Mercy L. Rev. 223, 245-57 (2020); Andrey Spektor, Michael A. Zuckerman, "Ferrets and Truffles and Hounds, Oh My: Getting Beyond Waiver," 18 Green Bag 2d 77, 79 (2014)(discussing the "oft-forgotten distinction between 'issues' and 'arguments'").

[7] See Baughman, supra; Robert J. Martineau, "Considering New Issues on Appeal: The General Rule and the Gorilla Rule," 40 Vand. L. Rev. 1023, 1060 (1987).

[8] See 5 Am. Jur. 2d Appellate Review § 464: "Because a cross-appeal is not necessary if an appellee desires only to defend the judgment rendered below, an appellee's answering brief may raise for the first time new arguments or new reasoning to support the judgment."

[9] See e.g. *People v. Walker*, 504 Mich. 267, 276 (2019) ("The prosecution argues for the first time in its supplemental brief to this Court that defendant waived any challenge to the instruction by approving of the instruction before it was given. The prosecution abandoned this theory"); *People v. Jemison*, 505 Mich. 352, 359 fn 4 (2020) ("because the prosecution did not raise this argument before the Court of Appeals, we decline to address it"). Cf. Jeffrey M. Anderson, "Right for Any Reason," 44 Cardozo L. Rev. 1015, 1020 (2023) ("an appellee may defend a district court's judgment on any ground supported by the record, even a ground that the district court ignored or expressly rejected").

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be permissible,[10] especially given this Court's duty under MCL § 769.26. See also MCR 7.307(B) ("A party is not required to file a cross-appeal to advance alternative arguments in support of the judgment or order appealed. A cross-appeal is required to seek new or different relief than that provided by the judgment or order appealed").

Here, with regard to the spot of blood on the pants, defendant made the following argument headings in his brief:

- Police unconstitutionally seized Mr. Serges' pants by collecting them from the jail.
- Extracting and testing samples of Mr. Serges' pants was a search.
- Extracting and testing samples of Mr. Serges' pants was not a search incident to arrest.
- Extracting and testing samples of Mr. Serges' pants was not an inventory search
- Extracting and testing samples of Mr. Serges' pants was not justified by the plain view doctrine.[11]

The statement of the question was:

> The police seized and searched Mr. Serges' property without a warrant in violation of the state and federal constitutions. The fruit was the prosecution's central piece of evidence against Mr. Serges. Was the use of illegally obtained evidence [that is, seized "without a warrant] plain error that affected Mr. Serges' substantial rights? Alternatively, was trial counsel ineffective for failing to move to suppress?[12]

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[10] And there is no unfairness to the appellant, who may respond by way of a reply brief, allowed under the rules. MCR 7.305(E); MCR 7.312(E).

[11] Defendant's application, p. 2.

[12] Defendant's supplemental brief p. 12.
To the extent that defendant mentioned probable cause, he said that:

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This Court should limited itself to the second and third questions in the MOAA order; in any event, however, defendant was lawfully in custody, jail clothing lawfully exchanged for his clothing, and his clothing lawfully examined. Counsel, then, could not have been ineffective in not challenging the acquisition of the blood and DNA evidence.

B. The defendant was lawfully in custody when his clothing was exchanged, as a matter of routine, for jail clothing

The People have ably argued that defendant was lawfully in custody when his clothing was exchanged, as a matter of routine jail policy, for jail clothing. He was in custody either as a result of an arrest for murder or because he had outstanding warrants, but in any event he was lawfully in custody and his clothing lawfully seized and in government possession when tested. Amicus leaves the argument to the People. The issue is whether that warrantless testing was permissible.

> If Mr. Serges was arrested for murder, his arrest was not supported by probable cause and was therefore unconstitutional. *United States v US District Court*, 407 US 297, 316-318 (1972). Any seizure or search conducted incident to an unlawful arrest is per se unreasonable and the fruits are inadmissible at trial. *People v Mersino,* 419 Mich 899, 900 (1984).
>
> If, as the police report says, Mr. Serges was arrested on an outstanding warrant for an ordinance violation, the seizure and search of his clothing was likewise unconstitutional because no exception to the warrant requirement justified the intrusion. Defendant's supplemental brief, p.36.

This is not sufficient to raise the issue before this Court. See *People v. Yarbrough*, 183 Mich. App. 163, 165 (1990).

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C. There is not "any doubt that clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected to laboratory analysis or that the test results are admissible at trial"

This Court's MOAA order cites *People v. Trudeau*[13] and *People v. Carr*.[14] But *Trudeau* is no longer good law, and *Carr* is inapplicable to the facts. In *Trudeau,* defendant was arrested on felony charges, and after the preliminary examination was postponed the police examined defendant's shoes and later took them from him, and they were admitted at trial. This Court, in a rather cryptic opinion, said that the seizure of the shoes was improper because it was not justifiable under the plain view doctrine; because there was no probable cause, and the defendant was incarcerated on a different offense than that for which the shoes were examined, a warrant would have been required to seize the shoes. The majority concluded that a warrant was necessary because a person imprisoned is not "stripped of his civil rights and his constitutional safeguards,"[15] citing and quoting *Carr.* There defendant was serving a sentence after a guilty plea when stolen property was found in his car, and during this time the car was stored in a jail parking lot. During this time the police suspected defendant of involvement in the looting of a state liquor store, and his car was searched and a monkey wrench taken from it and an analysis made of paint scrapings from the wrench and from inside the vehicle and compared to the bars of the store; further, his car was taken to the store and the tires were compared to casts made at the store. The case, then, had nothing to do with the examination of clothing of an in-custody individual. The Court concluded that the search of the vehicle was improper (inventory search principles had not yet been developed, nor was the car, in any event, searched under any inventory policy of the police):

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[13] *People v. Trudeau*, 385 Mich. 276 (1971)

[14] *People v. Carr*, 370 Mich. 251 (1963);

[15] *Trudeau* at 280.

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> It could not be seriously urged that the search and seizure made by the officers without defendant's consent or without a search warrant could not, nor likely would not even have been attempted, had defendant been at liberty and his automobile been parked on his own premises. Defendant was not stripped of his civil rights and his constitutional safeguards merely because he was serving a sentence in the county jail for an unrelated misdemeanor.[16]

Carr, then, had nothing to do with the clothing of an incarcerated individual that had been exchanged for jail clothes.

After *Trudeau*, the United States Supreme Court decided *United States v. Edwards*.[17] The defendant was arrested on a felony and placed in a jail cell. The next morning his clothing was taken from him and he was given substitute clothing. His clothing was examined and paint chips matching samples taken from a window which had been damaged in the attempted break-in for which the defendant was charged were discovered. The Sixth Circuit Court of Appeals held that the seizure of the clothing was impermissible because it was carried out "after the administrative process and the mechanics of the arrest" had come to a halt.[18] The Supreme Court reversed.

The Court of Appeals said that clothing may be seized and examined, even by way of laboratory tests, without a warrant, but it held that the seizure must occur immediately on booking. But the Supreme Court held that the police were entitled, either with or *without* probable cause, to search the defendant's clothing and even to take it from him and keep it in official custody. The Court concluded that "it is difficult to perceive what is unreasonable about the police examining and holding as evidence those personal effects of the accused that they already have in their lawful

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[16] *Carr*, at 255.

[17] *United States v. Edwards*, 415 U.S. 800, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974).

[18] Id., 94 S. Ct. at 1236.

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custody as the result of a lawful arrest."[19] And the Court said flatly that "[n]or is there any doubt that clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected to laboratory analysis or that the test results are admissible at trial."[20] Trudeau's shoes were as much in the "lawful custody" of the police as was Trudeau.

After *Trudeau* and *Edwards*, in *People v. Cicotte*[21] the defendant was arrested on a felony and his clothing and jewelry were taken from him incident to incarceration, and later a feather necklace and a black glove were taken from the pockets of the clothing. While agreeing that his clothing was properly taken, defendant argued that it could not be searched without a warrant. The Court of Appeals, however, relying on *Edwards*, disagreed. So also in *People v. Nesbitt*,[22] where the defendant was arrested for an armed robbery, and plaster casts were taken of footprints at the scene. Defendant's boots were taken from him when he was placed in a cell, and were compared to the casts. Citing *Edwards*, the Court of Appeals upheld the warrantless police action.[23]

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[19] Id., 94 S. Ct. at 1238.

[20] Id., 94 S. Ct. at 1237.

[21] *People v. Cicotte*, 133 Mich. App. 630 (1984).

[22] *People v. Nesbitt*, 159 Mich. App. 740 (1987).

[23] See further, *State v. Wells*, 2024-Ohio-4813, 13-14, 2024 WL 4403987, at 2 (Ohio Ct. App., 2024) (not reported):

> Wells contends the trial court erred by denying his motion to suppress. Specifically, he notes that when he was booked into jail, his clothing was placed in the "jail property room which housed property of incarcerate[d] persons." The clothing was later retrieved by the investigating officers and sent to a lab to be tested for gunshot residue. Wells asserts the seizure and testing were improper because the clothing was taken without a warrant.
>
> We addressed this very issue in *State v. Kinley*, 1993 WL

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The Court of Appeals here did not err in both distinguishing *Trudeau* and applying *Edwards* to the facts here.[24]

D. Counsel was not ineffective

Because the evidence was admissible, counsel cannot have been ineffective for not moving to suppress it.

> 224496 (2d Dist. June 24, 1993), wherein we noted that the United States Supreme Court has held that, "once an accused has been lawfully arrested and is in custody, the effects in his possession at the place of his detention that were subject to search at the time and place of arrest may lawfully be searched and seized without a warrant even after a substantial time has elapsed between the arrest and later administrative processing and the taking of the property as evidence." Id. at 6, quoting *United States v. Edwards*, 415 U.S. 800 (1974), syllabus.

And see LaFave, *3 Search & Seizure*(6th ed.) § 7.5(c) ("*Edwards* clearly states that effects seized from the person and put into the property room are subject to warrantless inspection"); LaFave, *2 Search & Seizure* (6th ed.) § 4.1(b) ("the Court ... declined, in *United States v. Edwards*, to require a warrant for a search of an arrestee's effects, already taken from him, during his subsequent incarceration").

[24] The court distinguished *Trudeau*:

> The defendant in Trudeau obviously had a reasonable or justifiable expectation of privacy in the shoes on his feet. This case differs from Trudeau in that defendant's pants and other clothing and belongings were *not in his possession*. They were previously taken by the jail in relation to his lawful arrest. Defendant had no reasonable or justifiable expectation of privacy in them after taken by the jail.

People v. Serges, —Mich. App.—, 2024 WL 1469924, at 9 (No. 355554, Mich. Ct. App. Apr. 4, 2024).

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Relief

WHEREFORE, amicus submits that the Court of Appeals should be affirmed, or leave to appeal should be denied.

Respectfully submitted,

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Certificate of Compliance

This brief contains 2896 countable words.

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