

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	Case No. 2007-2295
	)	
Plaintiff-Appellant,	)	On Appeal from the
	)	Union County Court
v.	)	of Appeals, Third
	)	Appellate District
COREY HOOVER,	)	
	)	Court of Appeals
Defendant-Appellee.	)	Case No. 14-07-11

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AMICUS CURIAE BRIEF ON BEHALF OF THE CITY OF CLEVELAND IN  
SUPPORT OF APPELLANT STATE OF OHIO

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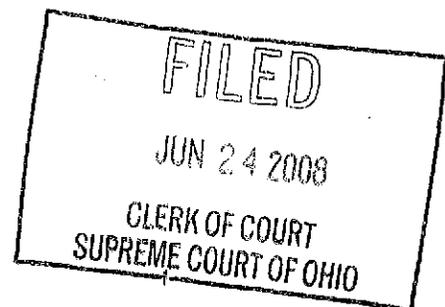
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**BRIEF *AMICUS CURIAE* OF  
THE CITY OF CLEVELAND**

**I. INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>**

*Amicus* City of Cleveland (Cleveland) is a municipality in the State of Ohio. Protecting its citizens is one of Cleveland's primary goals. The City of Cleveland, through its enforcement and prosecutorial powers, enforces and prosecutes Ohio Revised Code § 4511.19(A)(2), in conjunction with O.R.C. § 4511.19(G)(1)(b)(ii), to protect Cleveland's citizens. Cleveland has prosecuted countless individuals under this statute and believes that this has resulted in a safer and more livable environment in Cleveland.

The citizens of Cleveland demand to be protected from drunk drivers, especially repeat offenders. Someone is killed in an alcohol-related accident every 39 minutes in the United States.<sup>2</sup> Approximately one-third of all drivers who are arrested or convicted of DUI are repeat offenders.<sup>3</sup> More than 160,000 Ohioans have been convicted of three or more DUIs.<sup>4</sup> The State of Ohio ranks sixth in the nation for alcohol-related accident fatalities in the United States.<sup>5</sup> Those statistics more than prove that the City of Cleveland has a substantial interest in protecting its citizens from drunk drivers, especially repeat offenders.

Cleveland is interested in Supreme Court Case Number 2007-2295, *State of Ohio v. Corey Hoover*, because of the alarming precedent that would be created were the appellate court's decision affirmed. An affirmation of the Third District's ruling would create a question

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus or their counsel, make a monetary contribution to the preparation or submission of this brief.

<sup>2</sup> Sherri Bevan Walsh, Summit County Prosecutor's Newsletter, May 2008  
<http://www.co.summit.oh.us/prosecutor/Newsletters/2008%20Criminal/May%202008.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

of constitutionality for O.R.C. § § 4511.19(A)(2) and 4511.19(G)(1)(b)(ii). This ruling would make it difficult to obtain crucial evidence to prosecute repeat drunk drivers. Furthermore, an affirmation of this ruling would destroy the specific deterrence created by the legislature targeting repeat DUI offenders.<sup>6</sup> Without the protections against repeat drunk drivers that § § 4511.19(A)(2) and 4511.19(G)(1)(b)(ii) provide, Cleveland's exercise of its police power would suffer and directly impact the lives, health, and general welfare of its citizens.<sup>7</sup> Cleveland strives to provide a safe environment for its citizens and strongly disagrees with any decision that would jeopardize its ability to protect its citizens.

Cleveland and its residents know the danger that repeat drunk drivers create. The citizens of Cleveland voiced a need to increase the penalties for repeat offenders. The Ohio General Assembly answered with a bill that will help to create a safer state. With the present case, this Court can help to protect the citizens of Cleveland and the rest of Ohio from the dangers created by repeat drunk drivers.

## II. SUMMARY OF ARGUMENT

This *amicus curie* brief by Cleveland addresses the two issues decided by the Third District. Regarding the first issue, Cleveland argues that, contrary to the holding of the Third District, there is no constitutional right to refuse a chemical test and revoke implied consent. While there may be statutory permission to refuse a chemical test and revoke implied consent, there is no constitutional right to do so, and the Third District erred by holding otherwise.

Regarding the second issue, Cleveland argues that, because there is no constitutional right to refuse, severance of the sentencing statute, O.R.C. § 4511.19(G)(1)(b)(ii), was

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<sup>6</sup> See Jim Siegel, "Stiffer DUI Rules Await OK," The Columbus Dispatch, June 11, 2008.

<sup>7</sup> See *People v. Brown* (1971), 174 Colo. 513, 517.

improper. The 20 day mandatory minimum jail sentence pursuant to that statute is not unconstitutional because it does not penalize an exercise of a constitutional right.

### III. LEGAL ARGUMENT

#### A. THIS COURT SHOULD CLARIFY THE CONSTITUTIONALITY OF R.C. 4511.19(A)(2) AND ITS COMPANION SENTENCING STATUTE R.C. 4511.19(G)(1)(b)(ii).

**Proposition of Law No. I: There is statutory permission but no constitutional right to refuse a chemical test and revoke implied consent.**

##### a. There is precedent suggesting no constitutional right of refusal.

By driving on Ohio's roads, Defendant-Appellee impliedly consented to a chemical test if suspected of driving under the influence by a law enforcement officer. Defendant-Appellee suggests, and the Third District seems to agree, that Defendant-Appellee can revoke this implied consent because he has a constitutional right to do so. While the Ohio Revised Code *permits* a chemical test refusal, there is no *right* to such a refusal. It follows that driving on Ohio's roads is a privilege not a right<sup>8</sup>, and withdrawing implied consent to a chemical test is permitted, but no constitutional right exists. The act of driving "constitutes an irrevocable, albeit implied, consent to the officer's demand for a breath sample."<sup>9</sup> The *Rowley* court held that to allow implied consent to be "unilaterally withdrawn would 'virtually nullify the Implied Consent Law.'"<sup>10</sup> Other courts have held that the implied consent is irrevocable and the Third District's holding seems to be in sole opposition to those holdings.<sup>11</sup>

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<sup>8</sup> See *Id.* at 518 (holding that "there is no constitutionally guaranteed illimitable right to drive upon highways").

<sup>9</sup> *Rowley v. Commonwealth* (2006), 48 Va. App. 181, 187 citing *Burnett v. Anchorage* (1986), 806 F.2d 1447, 1450.

<sup>10</sup> *Id.* citing *Deaner v. Commonwealth* (1969), 210 Va. 285, 293.

<sup>11</sup> See *Schmerber v. California* (1966), 384 U.S. 757, *Brown*, 174 Colo. at 518; *Rowley*, 48 Va. App. at 187; *Deaner*, 210 Va. at 293; *Cash v. Commonwealth* (1996), 251 Va. 46, 49; *Burnett*,

While the Third District was correct in holding that a chemical test is a search of a person under the Fourth Amendment<sup>12</sup>, the Third District did not take into account the other holdings of *Schmerber*. This Court, following *Schmerber*, has held that one accused of intoxication has **no constitutional right to refuse** to take a reasonably reliable chemical test for intoxication.<sup>13</sup> Other courts have explicitly and unequivocally held that there is no constitutional right to refuse to submit to a breathalyzer examination.<sup>14</sup> The crafting by the Third District of this new supposed constitutional right is diametrically opposed not only to numerous holdings of other courts, but to the holding of this very Court as well.<sup>15</sup>

O.R.C. § 4511.191 authorizes permission of a person validly arrested for a DUI to refuse a chemical test. The statute reads in pertinent part:

If a person under arrest for operating a vehicle while under the influence of alcohol...refuses upon the request of a police officer to submit to a chemical test...no chemical test shall be given.<sup>16</sup>

This statutory permission does not make a constitutional right. As the court in *McCracken* held, “A legally arrested defendant has no constitutional right to refuse a breathalyzer examination. True, he may fail to cooperate or give his assent to a breath test as a matter of fact, but failure to cooperate does not create a legal right where it would otherwise not exist.”<sup>17</sup> The Sixth District Court of Appeals has recently held that Ohio’s Implied Consent statute does

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806 F.2d at 1450; *U.S. v. Harvey* (1983), 701 F. 2d 800, 805; *Deno v. Commonwealth* (2005), 177 S.W.3d, 753,761.

<sup>12</sup> *Schmerber*, 384 U.S. 757.

<sup>13</sup> *Westerville v. Cunningham* (1969), 15 Ohio St. 2d 121, 124 citing *Schmerber*, 384 U.S. 757 (emphasis added).

<sup>14</sup> *McCracken v. Alaska* (1984), 685 P.2d 1275, 1278-79; see *Brown*, 174 Colo. at 515.

<sup>15</sup> See *Cunningham*, 15 Ohio St. 2d 121.

<sup>16</sup> O.R.C. § 4511.191

<sup>17</sup> *McCracken*, 685 P.2d at 1280.

not “expand on the constitutional guarantees afforded the criminally accused.”<sup>18</sup> Here, Defendant-Appellee may have exercised an option of refusal permitted by statute, but he did not exercise a legal or constitutional right of refusal, since none exists.

**b. Legislative intent shows a proclivity against a right to refuse a chemical test.**

The statute under which Defendant-Appellee was charged, O.R.C. § 4511.19(A)(2), was recently added to the Revised Code in 2004 by H.B. 163.<sup>19</sup> The recent enactment of the statute shows the legislature’s growing concern with not only the problem of repeat drunk drivers, but also with the difficulties posed by chemical test refusals. In fact, this particular statute has been revisited twice by the General Assembly and O.R.C. § 4511.19(A)(2) has not been amended. Indeed, its sentencing corollary has not been altered either, showing a legislative intent that the mandatory minimum sentence remain.

Moreover, not only has the legislature not relaxed the repeat drunk driving statute, it has recently voted to substantially increase the penalties for recidivists. Senate Bill 17 passed the House 87-6 on June 10, 2008.<sup>20</sup> The bill then met Senate approval 33-0 on that same day.<sup>21</sup> Governor Strickland does plan to sign the bill into law<sup>22</sup> and doing so would enhance the penalties for repeat drunk driving. The purpose and aim of the bill is to “address a key aggravation for prosecutors and law-enforcement officers who often can’t get blood-alcohol evidence from drivers who refuse a breath or blood test.”<sup>23</sup> Under Senate Bill 17, a driver twice convicted of a DUI cannot refuse a chemical test for a third offense and law enforcement

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<sup>18</sup> *State v. Matus*, 2008 WL 307709 at \* 6 (Ohio App. 6 Dist.), 2008-Ohio-377.

<sup>19</sup> *State v. Dickson*, 2008 WL 1933583 at \* 3 (Ohio App. 11 Dist.), 2008-Ohio-2125

<sup>20</sup> Jim Siegel, “Stiffer DUI Rules Await OK,” *The Columbus Dispatch*, June 11, 2008.

<sup>21</sup> William Hershey, “Drunk Drivers May Face Stricter Penalties In Ohio.” *Dayton Daily News*, June 10, 2008.

<sup>22</sup> *Id.*

<sup>23</sup> *Supra*, fn.6.

could employ “whatever reasonable means necessary” to gather a blood sample.<sup>24</sup> The bill also requires the use of alcohol-monitoring devices to be worn at all times and interlocking devices for vehicles.<sup>25</sup>

States throughout the nation are following suit with similar bills<sup>26</sup>, recognizing the inherent dangers of repeat drunk drivers. Should the Third District’s ruling be affirmed, all the effort put into Senate Bill 17 would be for naught. The bill is specifically aimed at strengthening the penalties for DUI recidivists and overcoming the prosecutorial hurdles of chemical test refusals. If there was an actual constitutional right to refuse, as the Third District suggests, then there would be no reason to pass a bill effectively dismantling that “right.” As such, legislative intent and indeed, practice, lends credence to the fact that there is no constitutional right to refuse a chemical test and revoke implied consent.

**Proposition of Law No. 2: Since there is no constitutional right of refusal, the mandatory minimum jail sentence in O.R.C. § 4511.19(G)(1)(b)(ii) does not unconstitutionally penalize one’s assertion of a constitutional right.**

As previously stated, Defendant-Appellee chose to refuse a chemical test as he was permitted to do so by statute. In so doing, Defendant-Appellee did not exercise a constitutional right of refusal, since one cannot exercise a right where it does not exist. The Third District held that O.R.C. § 4511.19(G)(1)(b)(ii) criminalizes one’s assertion of a constitutional right—the supposed right of refusal—and for that reason, is unconstitutional. However, since there is

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Alaska, Arkansas, Arizona, California, Colorado, District of Columbia, Delaware, Florida, Georgia, Hawaii, Iowa, Idaho, Indiana, Kansas, Louisiana, Massachusetts, Maine, Missouri, Mississippi, Montana, North Dakota, Nebraska, New Jersey, New Mexico, Nevada, New York, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, Virgin Islands, Vermont, Washington, Wisconsin, West Virginia, Wyoming all have similar laws passed or pending. <http://www.madd.org>, last updated June 17, 2008.

no constitutional right to be exercised, there can be no criminalization of a right that does not exist.

The 125<sup>th</sup> General Assembly designated specific and exact punishments for repeat offenders who refuse a chemical test. Those punishments are delineated in O.R.C. § 4511.19(G)(1)(b)(ii) and include a mandatory twenty days in jail. The legislature was obviously aware of the vast dangers that repeat drunk drivers pose and the difficulty in sustaining a conviction without a blood-alcohol concentration test. As such, the legislature enacted a “punishment that fit the crime.” Indeed, the legislature decided to further increase the penalties for repeat drunk drivers.<sup>27</sup> The legislature “clearly did not intend to immunize a refusal from sanction or otherwise protect noncooperation.”<sup>28</sup> Further, the legislature “permitted but did not condone refusal, and imposed sanctions for refusal in the form of criminal penalties.”<sup>29</sup> An affirmation of the Third District’s severance of the repeat drunk driver refusal sentencing statute would effectively chill the legislature’s efforts at protecting the citizens of Ohio.

The Eighth District Court of Appeals has recognized the benefit of stiffer penalties for repeat offenders when it held that “[it] see[s] no distinction in the use of...refusal as an element to enhance a minimum term of imprisonment.”<sup>30</sup> Implicit in the Eighth District’s reasoning is the notion that a sentence enhancement, or a mandatory minimum, based on a refusal cannot be criminalizing the exercise of a constitutional right. If there was a constitutional right to refuse,

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<sup>27</sup> *Supra*, fn. 6.

<sup>28</sup> *McCracken*, 685 P.2d at 1281.

<sup>29</sup> *Id.*

<sup>30</sup> *City of Middleburg Heights v. Henniger*, 2006 WL 2034774 at \* 13 (Ohio App. 8 Dist.), 2006-Ohio-3715.

a holding that the refusal could enhance a minimum term of imprisonment would be repugnant to the Constitution, but clearly, that is not the case.

In fact, the United States Supreme Court held that “the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices.”<sup>31</sup> Here, Defendant-Appellee was informed of the consequences of refusal; yet, he made the choice—not exercised the right—to refuse a chemical test and now he has to deal with the consequences of his decision.

#### IV. CONCLUSION

Drunk driving is the nation’s most perpetuated crime.<sup>32</sup> It is imperative that the laws protecting Ohio’s citizens reflect the seriousness of the crime of driving under the influence of alcohol. The United States Supreme Court has recognized and lamented the tragedies resulting from the actions of drunk drivers: “The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield.”<sup>33</sup> Since *Breithaupt* was decided, and that statement made by the Court, fatalities from drunk drivers has risen exponentially.

Drunk drivers pose a threat to the citizens of Cleveland. Drunk drivers choose to drink and drive, putting into danger unsuspecting innocent victims. Repeat drunk drivers pose an exceptional threat to the citizens of Cleveland. Drunk drivers who *repeatedly* put the citizens of Cleveland in peril by being under the influence clearly show no respect for the law and the penalties attached to DUI offenses by *constantly* driving impaired. Almost 40,000 Ohioans

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<sup>31</sup> *South Dakota v. Neville* (1983), 459 U.S. 553, 564.

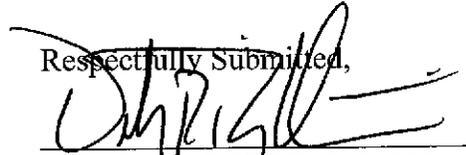
<sup>32</sup> Kelsey P. Black, “Undue Protection Versus Undue Punishment: Examining the Drinking and Driving Problem Across the United States,” 40 *Suffolk U.L. Rev.* 463 (2007).

<sup>33</sup> *Neville*, 459 U.S. at 558 citing *Breithaupt v. Abram* (1957), 352 U.S. 432,439.

have been convicted of five or more DUIs.<sup>34</sup> The only way to stop repeat offenders is to strengthen and increase the penalties. Evidence of an offender's blood-alcohol concentration is imperative to putting a stop to the danger repeat drunk drivers create. Approximately 20,000 Ohioans refuse to submit to a chemical test each year<sup>35</sup> and that is 20,000 DUI cases that become that much harder to prove without chemical evidence.

The safety and welfare of the citizens of Cleveland are the City's primary concerns. An affirmation of the Third District's ruling would not only endanger Cleveland's citizens but would frustrate legislative efforts to keep Ohioans safe from repeat drunk drivers

Respectfully Submitted,



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<sup>34</sup> *Supra*, fn. 2.

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I certify that a true and accurate copy of this Amicus Curiae Brief was sent by ordinary U.S. mail on this 23<sup>rd</sup> day of June, 2008 to:

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