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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

This case presents substantial constitutional and statutory issues because the decision below inhibits the orderly process of litigating and deciding motions to suppress. A defendant in a criminal case has a constitutional right to challenge the admissibility of evidence which was illegally seized from her. The State has the right to contest that challenge and the vehicle to resolve a suppression challenge is a pre-trial motion to suppress. This Court has clearly defined the information which must be included in a motion to suppress to place the prosecutor and court on notice as to the issues to be resolved. In *State v. Shindler*, 70 Ohio St.3d 54, 1994-Ohio-452, 636 N.E.2d 319, this Court held that a defendant's motion must simply cite the "statutes, regulations and constitutional amendments she alleged were violated, [and] set forth some underlying factual basis to warrant a hearing." *Id.* at 58. Ms. Codeluppi's motion contained a recitation of facts, and specifically identified four statutory and constitutional provisions she believed were violated. As such, she was entitled to a hearing on her motion. And at that hearing, the State would bear the burden of proving that the officer complied with the constitutional and statutory provisions Ms. Codeluppi cited in the motion.

The Ninth District's decision in this case turns the *Shindler* process on its head. The decision holds that a defendant's motion to suppress must do more than provide notice of the issues to be resolved. In essence, the Ninth District shifted the burden of proof to the defendant to establish *why* the State wouldn't be able to meet its burden of proof. This burden is impractical because it is virtually impossible to prove a negative. The burden is also unconstitutional because when evidence is seized without a warrant, the Ohio and Federal Constitutions place the burden on the State to prove an exception to the warrant requirement. *Katz v. United States*, 389 U.S.

347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). And where a defendant submits to chemical tests, or field sobriety tests, the Ohio Revised Code places the burden of proof on the State to establish that the officer complied with its foundational requirements. R.C. 4511.19(D)(1) and (4).

The burden imposed by *Shindler* is notice of the issues, nothing more. The Ninth District's opinion impermissibly shifts an impossible, and unconstitutional, burden of proof to a defendant, and requires a defendant to plead facts in a motion to suppress she would not be required to establish at a hearing. Ms. Codeluppi was deprived of an opportunity to litigate outcome-determinative constitutional and statutory issues.

Finally, the OACDL does not argue that Ms. Codeluppi must *win* her motion to suppress. The State very well may have evidence that rebuts her claims. But defendants who file detailed and specific motions to suppress are entitled to a hearing and a ruling on the merits of the motion from the trial court.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amicus adopts the Statement of the Case and Statement of facts submitted by Appellant, Corinne Codeluppi.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW:

When a defendant files a motion to suppress which is sufficient to place the State on notice of the facts and law, the trial court errs in dismissing the Motion without a hearing.

- I. A defendant in a criminal case has a right to have evidence excluded from her trial which was seized in violation of her constitutional or statutory rights.**

Any evidence which is illegally obtained either directly or indirectly from a defendant must be excluded from her trial. *State v. French*, 72 Ohio St.3d 446, 449-51, 1995-Ohio-32, 650 N.E.2d 887; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). A motion to suppress is the “proper vehicle” for raising both constitutional, and statutory challenges to illegally seized evidence. *French*, 72 Ohio St.3d at 449-51; *Hilliard v. Elfrink*, 77 Ohio St.3d 155, 1996-Ohio-333, 672 N.E.2d 166. A trial court must “eliminate from the trial of a criminal case evidence which has been secured illegally, generally in violation of the Fourth Amendment (search and seizure), the Fifth Amendment (privilege against self incrimination), or the Sixth Amendment (right to assistance of counsel).” *Elfrink*, 77 Ohio St.3d at 158.

In addition to constitutional violations, the exclusionary rule applies to certain non-constitutional, or statutory, violations. *State v. Edwards*, 107 Ohio St.3d 169, 2005-Ohio-6180, 837 N.E.2d 752, ¶10. This Court has held that a defendant charged with driving under the influence who wishes to challenge to admissibility of chemical test results *must* do so in a pre-trial motion to suppress. *Id.* at ¶11; *French*, paragraph one of the syllabus. See also, R.C. 4511.19(D)(1)(b). At that pre-trial hearing, the State bears the burden of proving substantial compliance with the Ohio Revised Code, as well as Ohio Department of Health regulations.

Similarly, a defendant *must* raise objections regarding the administration of field sobriety tests prior to trial. R.C. 4511.19(D)(4); *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155 (2007). At the hearing, the State bears the burden of proving by clear and convincing evidence that the officer administered the tests in substantial compliance with established testing standards. *Id.*

A motion to suppress therefore protects and vindicates a defendant's statutory and constitutional rights while also giving the State a fair opportunity to oppose suppression. It is not only the "proper vehicle" to raise constitutional and statutory violations—it is the *only* vehicle.

Ms. Codeluppi's motion to suppress alleged that evidence was seized from her without a warrant. A warrantless seizure is *per se* unreasonable, unless it falls within one of the recognized exceptions to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Once a warrantless search is established, the burden of proof shifts to the State to show the validity of the search. *Xenia v. Wallace*, 37 Ohio St.3d 216, 524 N.E.2d 889 (1988). If the State does not prove that a specific exception to the warrant requirement applies, the fruits of the warrantless search must be suppressed. *French*, 72 Ohio St.3d at 449.

The burden of proof is important in a motion to suppress. In a warrantless search case, the burden is *not* on the defendant to show why the search was illegal. Instead, the burden is on the *State* to demonstrate an exception to the constitutional warrant requirement. The exceptions to the warrant requirement "are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative. *The burden is on those seeking exemption to show the need for it.*" *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)(internal quotations omitted, emphasis added).

A defendant is therefore not required to prove the non-existence of probable cause, for example. The defendant establishes a *per se* constitutional violation simply by showing that evidence was seized without a warrant. This showing alone requires the suppression of evidence. “Upon establishing that single fact [i.e., a warrantless search] the defendant would be entitled to have the evidence suppressed unless the state then goes forward to show that one of the exceptions to the warrant requirement is applicable.” *State v. Rogers*, 476 So.2d 942, 944 (La.App. 2 Cir.1985)(emphasis added). See also, *Carmona v. State*, (Tex.App. No. 05-96-01789-CR, and No. 05-96-01790-CR), 1998 Tex. App. LEXIS 3528 (“once a defendant has established 1) that a search or seizure occurred and 2) that no warrant was obtained, the burden of proof shifts to the State.”).

The State may attempt to overcome the *per se* constitutional violation by proving that an exception applies. This burden of proof is not only constitutionally required, but on a practical level, the State is in a better position to prove the existence of an exception, rather than the defendant. This Court observed that “it is less burdensome for a party to produce evidence on the existence of probable cause than the lack of probable cause.” *Wallace*, 37 Ohio St.3d at 219-20. (Emphasis sic). See also, *United States v. Longmire*, 761 F.2d 411, 417 (7th Cir.1985)(“because the evidence allegedly constituting probable cause is solely within the knowledge and control of the arresting officers, they should bear the additional burden of establishing that probable cause in fact existed.”).

II. Ms. Codeluppi's Motion to Suppress provided the State and the trial court sufficient notice of the constitutional and statutory bases for her challenge to the evidence.

This Court has outlined the information which a defendant's motion to suppress evidence must include: "In order to require a hearing on a motion to suppress evidence, the accused must state the motion's legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided." *Shindler*, paragraph one of the syllabus. See also, Crim.R. 47; *Wallace*, 37 Ohio St.3d, paragraph one of the syllabus. *Shindler* creates a process for litigating suppression motions that permits the defendant to seek suppression of illegally obtained evidence, and permits the State to use properly obtained evidence.

In *Shindler*, the defendant was arrested and charged with driving under the influence. *Shindler*, 70 Ohio St.3d at 54. She filed a written motion to suppress which was a "virtual copy of the sample motion to suppress" found in a DUI form book. *Id.* at 57. Her first claim in the motion to suppress was that the arresting officer did not have probable cause to stop and arrest her. This Court found the motion sufficient to raise these constitutional arguments because it "cited legal authority and set forth a factual basis for challenging the investigative stop and the arrest." *Id.* at 57. *Shindler's* motion also raised seven statutory grounds for suppression of the alcohol test. *Id.* Again, this Court found that the motion adequately set forth facts and law to support suppression because it "challenged the admission of her breathalyzer test results on the basis of specific regulations and constitutional amendments she believed were violated." *Id.* at 57. This Court concluded that *Shindler's* "motion and memorandum stated with particularity the statutes, regulations and constitutional amendments she alleged were violated, set forth some underlying factual basis to warrant a hearing, and gave the prosecutor and court sufficient notice of the basis of her challenge." *Id.* at 58.

In this case, Ms. Codeluppi's ten-page motion to suppress exceeded the requirements of *Shindler, Wallace*, and Crim.R. 47. The "factual bases" for suppression identified in her motion were: (1) that she was operating a motor vehicle; (2) that a police officer stopped her for an alleged traffic violation; (3) that the officer detained her after the stop; (4) that he asked her to perform certain field-sobriety tests; (5) that the officer arrested her based on his observations and conclusions; and (6) that the officer interrogated her. Finally, and most importantly, Ms. Shindler alleged that the officer did all of these things without a warrant.

These "factual bases" formed the basis for her legal arguments. First, because the officer did not have a warrant, Ms. Codeluppi established that the seizure and search were *per se* illegal and she was entitled to have the evidence suppressed. The burden therefore shifted to the prosecutor to prove an exception to the warrant requirement. Under *Shindler* and *Wallace*, Ms. Codeluppi's assertion in her motion to suppress that a search or seizure was conducted without a warrant is sufficient, in and of itself, to notify the prosecutor and court of the constitutional issues to be decided. Nothing more was required. It was not Ms. Codeluppi's burden to explain why every possible exception to the warrant requirement did not apply to this case, nor to explain why the State would not be able to meet its burden of proof as to each hypothetical issue.

But, Ms. Codeluppi's motion to suppress went beyond merely alleging that a search and seizure occurred without a warrant. She cited four distinct legal arguments tied to specific facts to justify the suppression of evidence.

A. The stop of Ms. Codeluppi's car.

The first legal issue presented in her motion to suppress was that the officer did not have a sufficient basis to stop her car. In his police report, the officer asserted that he stopped Ms. Codeluppi's car because she was exceeding the speed limit. In her motion to suppress, Ms.

Codeluppi specifically disputed the officer's conclusion by stating that the officer did not have a reasonable suspicion sufficient to stop her car. This was sufficient to squarely present this issue to the prosecutor and court. "A simple allegation that there was insufficient probable cause to make an initial stop, without more, [is] sufficient to support a motion to suppress based on that ground. From the defendant's point of view, there is nothing more to be said. From his point of view, he was driving along, minding his own business, when the police unaccountably stopped him." *State v. Palmer*, 2d Dist. No. 3085, 1995 Ohio App. LEXIS 892 (March 8, 1995).

The Ninth District did not address this portion of Ms. Codeluppi's motion; it summarily concluded that *none* of the motion was sufficient to provide notice. But this is arguably the most critical argument in the motion. If the trial court concluded that the officer did not have sufficient grounds to stop the car, all of the evidence he thereafter seized would have been suppressed.

B. Field sobriety tests.

The next argument presented in her motion was whether the field sobriety tests the officer conducted were admissible. Specifically, Ms. Codeluppi alleged: "the State of Ohio will be unable to maintain its burden of proof, by clear and convincing evidence, that the arresting officer performed said tests in substantial compliance with NHTSA guidelines." The motion contains a four-page legal analysis regarding the admissibility of field sobriety tests. It cites R.C. 4511.19(D)(4), along with several cases which analyze the admissibility, and subsequent use at trial, of field sobriety tests.

These assertions were sufficient to place the prosecution on notice that it was required to prove compliance with R.C. 4511.19(D)(4). The statute requires, in relevant part, that where a police officer has administered "field sobriety test[s] to the operator of a motor vehicle," the state must show "by clear and convincing evidence" that the officer "administered the test[s] in

substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests. . . .” The statute itself, therefore, outlines the legal and factual grounds the prosecutor bears the burden of establishing. “In many cases, and as implicitly recognized in *Shindler*, the simple identification of a code section is clearly sufficient to place the state on notice of what is being challenged.” *State v. Slates*, 9th Dist. No. 25019, 2011-Ohio-295, ¶77, footnote 3 (Belfance, J., dissenting). By identifying, in a separately-headed section of her motion, the exact code section dealing with field sobriety tests, Ms. Codeluppi placed the state on notice regarding “what facts would be necessary to demonstrate substantial compliance as the grounds for [the] challenge are sufficiently apparent by virtue of the language of the provision itself.” *Id.*

The Ninth District found Ms. Codeluppi’s motion failed to “state *with particularity* any factual allegations as to . . . the respects in which [the officer] allegedly violated provisions of the NHTSA guidelines in administering the Field Sobriety Tests.” *State v. Codeluppi*, 9th Dist. No. 11CA010133, 2012-Ohio-5812, ¶24 (emphasis sic). This analysis is erroneous on both legal, and practical grounds.

At the outset, the Ninth District’s holding places a burden on the defendant to prove, in her written motion, facts which she would not be required to prove at the hearing. The statute itself explicitly places the burden of proof on the State to show “substantial compliance with the testing standards” by “clear and convincing evidence.” R.C. 4511.19(D)(4). If the State is unable to establish these two things, the trial court must suppress the field sobriety tests. The Ninth District’s opinion thus incorrectly required Ms. Codeluppi to plead a facts she did not bear the burden of proving.

Second, as discussed above this holding places a burden on the defendant which this Court has specifically denounced in *Shindler* and *Wallace*. There is no precedent for requiring a defendant in a motion to suppress to show *how* or *why* a police officer failed to comply with a statute. A defendant must place the State on notice of what the issues are, not to disprove the state's case. With respect to field sobriety tests, a defendant meets that burden by citing the statute which specifically tells the State what it must prove.

On practical grounds, the Ninth District's analysis also mistakenly assumes that Ms. Codeluppi had enough information prior to the hearing to make this showing. Ms. Codeluppi's performance on the field sobriety tests was discussed in general in the arresting officer's report. But, it is important to note what the officer does *not* state in his report. Contrary to the Ninth District's assertion, there is no indication in the report that the officer used "NHTSA guidelines," or any other "guidelines," in this case. Clearly, a defendant should not have to prove the ways in which an officer failed to comply with NHTSA guidelines, if the officer didn't even *use* NHTSA guidelines. Furthermore, there is no indication in the officer's report that the tests he used were based on "testing standards for any reliable, credible, and generally accepted field sobriety tests" as required by R.C. 4511.19(D)(4). The officer does not state that he administered the tests in substantial compliance with a "testing protocol." He did not state how he scored the tests, or whether Ms. Codeluppi "passed" or "failed" the tests. In short, a defendant will never be able to state potential issues "with particularity" when the only information available to her (i.e., a police report) *itself* lacks particularity.

In addition to the issue of whether the officer complied with R.C. 4511.19(D)(4), Ms. Codeluppi contradicted the officer's conclusions regarding her performance on the tests with three separate assertions of her own: (1) her performance on the tests was negatively affected by

her emotional state, not the consumption of alcohol; (2) the tests were performed under difficult environmental conditions; and (3) the officer's analysis of Ms. Codeluppi's performance on the tests was unfairly biased. Therefore, aside from any issues regarding whether the officer substantially complied with testing regulations, Ms. Codeluppi's motion raised factual disputes for the trial court to resolve.

A motion to suppress is an opportunity for both the State, and the defendant, to develop facts in support of legal arguments. "The outcome of a lawsuit - and hence the vindication of legal rights - depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents." *Speiser v. Randall*, 357 U.S. 513, 520, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). Ms. Codeluppi had a right to present evidence at the hearing, call witnesses, and testify on her own behalf. She may have offered evidence to show that she was not, in fact, speeding as the officer claimed. She may have disputed the officer's observations and conclusions regarding her sobriety with observations and conclusions of her own. The trial court's resolution of these factual issues would have been essential to resolving the legal issues.

C. Probable cause to arrest.

The third issue raised in the motion to suppress was whether the officer had probable cause to arrest Ms. Codeluppi for driving under the influence. As with the field sobriety tests, the Ninth District found that Ms. Codeluppi failed to "state *with particularity* any factual allegations as to . . . how [the officer] allegedly lacked probable cause to further detain Ms. Codeluppi after initiating the traffic stop." *Codeluppi* at ¶24 (emphasis sic). As stated above, this is a misstatement of law regarding pleading requirements, and the burden of proof. The Ninth District imposed a requirement on Ms. Codeluppi to plead facts she would not have been

required to prove at a hearing to justify exclusion of the evidence. A defendant need do nothing more than assert that a search or seizure was without a warrant to shift the burden of proof to the State. Ms. Codeluppi met her burden. She proved a *per se* constitutional violation by showing that the officer did not have a warrant. The burden shifted to the State to identify and prove the existence of an exception to the warrant requirement.

Furthermore, as with the information in the police report regarding the field sobriety tests, the officer does not state the bases for his decision to arrest. A defendant cannot be expected to prove *how* an officer lacked probable cause if she doesn't know *why* the officer thought he had probable cause. The officer does not state, for example, how Ms. Codeluppi's performance on the field sobriety tests factored into his decision to arrest her. There is no indication in his report that his decision to arrest was based *solely* on her performance on the field sobriety tests, or a combination of the tests and other factors such as the odor of alcohol. It is entirely possible that Ms. Codeluppi's performance on the tests had nothing to do with his probable cause determination. This Court has held that probable cause can be based on a variety of factors, including "an officer's observations regarding a defendant's performance on nonscientific field sobriety tests." *State v. Schmitt*, 101 Ohio St.3d 79, 83, 2004-Ohio-37, 801 N.E.2d 446. These issues can only be explored by either the State or the defense at a hearing.

D. Unlawful interrogation.

Finally, Ms. Codeluppi's motion alleged that the officer unlawfully interrogated her. As with her allegation that the stop of her car was unlawful, the Ninth District did not address this portion of the motion to suppress. The state may not introduce a defendant's incriminating statements against her unless it first proves by a preponderance of the evidence that there was a voluntary, knowing, and intelligent waiver of the accused's constitutional rights. *Miranda v.*

Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1996). Ms. Codeluppi's motion clearly notified the prosecutor and court of this issue.

III. The Ninth District created an illegal and unworkable rule when it ruled that Ms. Codeluppi's detailed motion provided the State insufficient notice.

The trial court cited *City of Bowling Green v. O'Neal*, 113 Ohio App.3d 880, 682 N.E.2d 709 (6th Dist.1996) in support of its conclusion that Ms. Codeluppi's motion to suppress was insufficient. Curiously, this case actually supports Ms. Codeluppi's argument. In *O'Neal*, the Sixth District reversed the trial court's denial of his motion to suppress, finding that O'Neal's assertion in his motion that the BAC results were "improperly obtained" was vague, but that the additional statement that "'the machine was improperly calibrated and improper solution was used' sufficiently delineated those issues to give the prosecutor notice of the legal and factual grounds upon which the challenge was based." *Id.* at 883. See also, *State v. Lyons*, 138 Ohio App.3d 614, 2000-Ohio-1754, 741 N.E.2d 974 (6th Dist.2000). Clearly, Ms. Codeluppi's motion far exceeded the *O'Neal* Court's standard.

The Ninth District did not discuss *O'Neal*. Instead, it analogized Ms. Codeluppi's motion to the motion filed by the defendant in *State v. Zink*, 9th Dist. No. 17484, 1996 Ohio App. LEXIS 3836 (Sept. 4, 1996). In *Zink*, the defendant's motion was a one-paragraph long boilerplate assertion that the State did not comply with various provisions of the Ohio Revised Code and the Ohio Administrative Code. Hardly the same is true here. Ms. Codeluppi's motion was not a "gotcha" or "boilerplate" motion. It contained exactly what *Shindler, Wallace*, and Crim.R. 47 required it to contain. It outlined four clear arguments with facts supporting each argument.

"Our system of justice is founded upon the principle of due process, which includes notice, an opportunity to be heard, and fair play among litigants." *Codeluppi*, at ¶38 (Belfance,

J., dissenting)(citations omitted). For these reasons, “[t]he guarantees of due process call for a ‘hearing appropriate to the nature of the case.’” *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Where a defendant notifies the court and the prosecutor of specific constitutional and statutory rights she believes were violated, she has a right to vindicate those rights through a hearing. “The Due Process Clause promotes participation and dialogue in the decisionmaking process by ensuring that individuals adversely affected by governmental action may confront the ultimate decisionmaker, and thus play some part in formulating the ultimate decision.” *United States v. Raddatz*, 447 U.S. 667, 696-97, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980)(Marshall, J., dissenting). The purpose of a motion to suppress is to provide notice. Ms. Codeluppi’s motion provided the notice this Court has required, and she was denied an opportunity to participate in the “ultimate decision” when the trial court denied her motion to suppress without a hearing.

CONCLUSION

For the foregoing reasons, this case involves matters of public and great general interest. Amicus request that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction of Amicus Curiae the Ohio Association of Criminal Defense Lawyers in Support of Appellant Corrine Codeluppi was sent by ordinary U.S. Mail to:

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