ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	Case No. 2013-0186
	)	
Plaintiff-Appellee,	)	On Appeal from the Lorain
	)	County Court of Appeals,
- vs -	)	Ninth Appellate District
	)	
CORRINE CODELUPPI,	)	Court of Appeals Case No.
	)	11CA010133
Defendant-Appellant.	)	

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INTRODUCTION

A defendant in a criminal case has a right to challenge the admissibility of evidence which was illegally seized from her. The vehicle to raise this challenge is a motion to suppress evidence. The decisions below create a nearly impossible burden which will effectively eliminate litigation of valid Fourth Amendment claims in many criminal cases. Even with the changes to Criminal Rule 16, defense counsel cannot provide a detailed factual basis for a motion to suppress.

STATEMENT OF THE CASE AND THE FACTS

Defendant-Appellant, Corrine Codeluppi, was stopped by a North Ridgeville police officer for allegedly driving her car in excess of the speed limit. After stopping the car, the officer detained Ms. Codeluppi to investigate criminal activity unrelated to the alleged speeding violation. As a result of the officer's investigation, he collected inculpatory evidence which the State sought to use against Ms. Codeluppi in her trial on the charge of driving under the influence.

Before the trial, Ms. Codeluppi filed a timely ten-page motion to suppress the evidence on the grounds that her seizure and arrest violated her rights under the Ohio and Federal Constitutions, as well as the Ohio Revised Code. The motion contained a statement of facts, along with a memorandum of law. Specifically, the motion alleged that: (1) the police officer stopped her for an alleged traffic violation; (2) that the officer detained her after the stop for reasons unrelated to the traffic violation; (3) that the

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 these outcome-determinative constitutional and statutory issues.

I. A defendant in a criminal case has a right to challenge the admissibility of evidence 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

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law:

A highly detailed pleading of facts and law is not required to trigger the right to a hearing on a motion to suppress as long as the State and the trial court are on notice as to the facts and law at issue.

The Ninth District's decision in this case 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.

The decisions below depart from the careful balance created by this Court in *State v. Shindler*, 70 Ohio St.3d 54, 1994-Ohio-452, 636 N.E.2d 319. In that case, this Court has properly 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. There, the defendant was arrested and charged with driving under the influence. 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.

Ms. Codeluppi's motion contained a recitation of facts, and specifically identified four statutory and constitutional provisions she believed were violated. As such, 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 now requires a full briefing of suppression issues instead of the notice required under *Shindler*. The decision below shifts the burden of proof to the defendant to anticipate arguments the State may make to justify a stop and search, and then establish *why* the State wouldn't be able to meet its burden of proof. This burden is impractical because it is virtually impossible to anticipate and 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 these outcome-determinative constitutional and statutory issues.

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assistance of counsel)." *Elfrink*, 77 Ohio St.3d at 158; *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

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. 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.*

Finally, a defendant who wishes to challenge the admissibility of blood test results *must* file a motion to suppress. *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216. At the hearing on the motion to suppress, the State "must show substantial compliance with R.C. 4511.19(D)(1) and Ohio Adm.Code Chapter 3701-53 before the tests results are admissible." *Id.*, paragraph one of the syllabus.

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. *French; Edwards; Boczar; Mayl.* See also, *State v. Jeffries,* 57 N.C.App. 416, 424, 291 S.E.2d 859 (1982)("The exclusive method of challenging evidence on [constitutional] grounds is a motion to suppress. . .").

Ms. Codeluppi's motion to suppress alleged that she was stopped, and 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,* 389 U.S. at 357. "*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."). Having established the warrantless search, the burden of proof shifted to the State to show the validity of Ms. Codeluppi's stop, search, and arrest. *Xenia v. Wallace,* 37 Ohio St.3d 216, 524 N.E.2d 889 (1988).

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, "[t]he State bears the ultimate burden of proving that evidence seized without a warrant should *not* be suppressed." *Southern v. State*, 371 Md. 93, 102, 807 A.2d 13, 18 (Md.2002)(Emphasis added.) To challenge the suppression of evidence, the *State* bears the burden 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).

The burden of proof therefore provides guidance as to how an issue must be framed in a motion to suppress. A defendant is not required to prove the non-existence of probable cause for a warrantless search or arrest. Therefore, she is not required to plead facts in her motion to suppress which would prove the non-existence of probable cause.

The State may attempt to overcome the *per se* constitutional violation by identifying and proving that an exception applies. As discussed above, 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.)

Other courts share this Court's position in *Wallace* regarding the burden of proof. In *United States v. Longmire,* 761 F.2d 411 (7th Cir.1985), the Court observed, "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." *Id.* at 417. See also, *People v. Williams,* 20 Cal.4th 119, 129-30, 973 P.2d 52, 59, 83 Cal.Rptr.2d 275, 282 (1999)("Because law enforcement personnel, not the defendant, made the decision to proceed without a warrant, they, not the defendant, are in the best position to know what justification, if any, they had for doing so.").

In light of the constitutional issues, and the burden of proof, this Court has held that the defendant's burden in a motion to suppress is to identify the issues to be raised so that the prosecutor may prepare a defense to suppression. In *Shindler,* this Court emphasized that defendant's motion was sufficient, not because it disproved the State's case, but because it "gave the prosecutor and court sufficient notice of the basis of her challenge." *Shindler,* 70 Ohio St.3d at 58.

Other courts follow the same rule as *Shindler* that a motion to suppress needs only to identify for the court and the prosecutor the issues to be decided at a hearing.

For example, in *Lavelle v. State*, 250 Ga. 224, 297 S.E.2d 234 (1982), the Georgia Supreme Court recognized that "with respect to warrantless searches, many of the necessary allegations are negative facts (e.g., the search was conducted without a warrant, the movant did not consent to the search) and conclusions based upon mixed questions of law and negative fact (e.g., the officer lacked probable cause to arrest or search)." *Id.* at 227. The Court concluded that the purpose of the written motion to suppress was to provide notice to the court and the State of the issues to be addressed at the hearing. "The motion in this case was sufficient to put the state on notice as to the type of search involved (without a warrant vs. with warrant), which witness to bring to the hearing on the motion, and the legal issues to be resolved at that hearing." *Id.* See also, *State v. Fitterer*, 652 N.W.2d 908, 2002-ND-170, ¶8 (2002)(Defendant's motion to suppress "need only provide adequate notice of the issues raised to the trial court and the prosecution."); *State v. Miller*, 17 Or.App. 352, 355, 521 P.2d 1330, 1332 (Or.App.1974)("a motion claiming 'there was not probable cause to arrest' could be sufficient" to place the State and Court on notice of the issue to be decided); *State v. Esguerra*, 113 N.M. 310, 315, 825 P.2d 243 (N.M.App.1991)(a motion to suppress which alleged that the search of a hotel room was "without probable cause or a search warrant" was sufficient notice).

These cases reinforce this Court's holdings in *Shindler, Wallace,* and *Mayl* that the essence of a written motion to suppress is to provide notice of the issues. This notice

allows the State to prepare to contest the suppression with the proper witnesses, evidence, and argument.

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 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, Ms. Shindler alleged that the officer did all of these things without a warrant. The motion was more than sufficient to put the state on notice as to

the type of search involved (i.e., without a warrant), which witnesses to bring to the hearing, and the legal issues to be resolved at that hearing.

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 was 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 anticipate arguments the State may make to justify the warrantless search. Nor was she required 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.

In addition to outlining the facts of the case, Ms. Codeluppi 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 the 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 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 requires defendants to plead facts they 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 requires defendants to plead a facts they do 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*. The purpose of the motion is to "articulate with sufficient particularity the specific reason on which [the defendant] bases his claim that the seizure without a warrant was illegal, *so that the court will recognize the issue to be decided.*" *Shindler*, 70 Ohio St.3d at 58 (emphasis added), quoting *State v. Desjardins*, 401 A.2d 165, 169 (Me.1979). In other words, *Shindler* requires a defendant to simply articulate facts which will allow the State and the trial court to recognize the issue to be decided. The issue for the court to decide in this case was whether the officer substantially complied. Ms. Codeluppi's motion identified that issue. There is no precedent for requiring her 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 assumes that Ms. Codeluppi had enough information to make any such showing. See, *People v. Mendoza*, 82 N.Y.2d 415, 429, 604 N.Y.S.2d 922, 928 (1993)(the information available to a defendant is a "factor in determining the sufficiency of a defendant's factual allegations" in a motion to suppress); *State v. Johnson*, 16 Or.App. 560, 568, 519 P.2d 1053, 1057 (Or.App. 1974)("when motions to suppress are filed, defendants possibly are not and in some instances cannot be aware of all the facts"). 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 relied on "NHTSA guidelines," or any other "guidelines." 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.

This is not to suggest that Ms. Codeluppi's burden under *Shindler* would have changed had she had access to more detailed discovery. A defendant's burden to identify issues in a motion to suppress does not fluctuate depending on the amount of discovery provided. However, the lack of discovery may affect a defendant's ability to detail all of the underlying facts with particularity in a pleading. A defendant is not "required to allege facts about which [s]he had no knowledge." *People v. Jones*, 95 N.Y.2d 721, 729, 746 N.E.2d 1053, 1059, 723 N.Y.S.2d 761, 767 (2001). A defendant will never be able to state facts and 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). In addition to cross-examination, 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. And, it required her to anticipate and refute the manner in which the state's evidence would have been insufficient to establish probable cause. 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.

As discussed above, this Court has rejected the Ninth District's requirement that a defendant anticipate and refute the state's arguments. See, *Wallace,* 37 Ohio St.3d at 219-20 ("it is less burdensome for a party to produce evidence on the *existence* of probable cause than the *lack* of probable cause.") (Emphasis added.) Other Courts have rejected it as well.

In *State v. Fitterer*, 2002-ND-170, 652 N.W.2d 908, the defendant was charged with driving under the influence after he was stopped at a "sobriety checkpoint." *Id.* at ¶2. Prior to trial, defendant filed a motion to suppress the evidence obtained from him on the ground that the sobriety checkpoint was illegal under the North Dakota and United States Constitutions. The trial court dismissed defendant's motion without a hearing on the ground that the motion did not explain "what was wrong with the checkpoint," *id.* at ¶2, or "how and why the checkpoint was unconstitutional." *Id.* at ¶3.

The North Dakota Supreme Court reversed, holding that defendant's motion provided adequate notice of the issues raised in order to reach a hearing. *Id.* at ¶11. At the hearing, the State, not the defendant, bore the burden of "proving [that] the

checkpoint stop was in fact conducted appropriately and pursuant to protocols that did not violate the Fourth Amendment." *Id.* at ¶10.

In *State v. Rogers*, 476 So.2d 942 (La. 2d Cir.1985), the defendant filed a motion to suppress tangible evidence and statements he made to the police after his arrest. His motion alleged "that his arrest was illegal and that the physical evidence was seized without a warrant and the inculpatory statements were made upon his illegal arrest." *Id.* at 943. The trial court denied defendant's motion without a hearing, agreeing with the state's contention that in order to be entitled to a hearing the defendant "must make a prima facie showing why the evidence he seeks to have excluded should be so excluded." *Id.* at 944. The Louisiana Court of Appeals reversed, holding that "[a]n allegation of facts sufficient to establish the defendant's right to relief does not require that he allege facts to negate every possible response by the state." *Id.* at 944. To hold otherwise would "erroneously relieve[]" *id.*, the State of its burden to prove an exception to the warrant requirement, and to prove that defendant's statement was freely and voluntarily given.

In *United States v. Coward*, 296 F.3d 176 (3d Cir.2002), two police officers received a call over the police radio requesting the stop of defendant's car. The call did not state the reasons for the requested stop. *Id.* at 178. After stopping the car, the police searched the car and found a handgun. Defendant filed a motion to suppress the handgun on the ground that the police lacked reasonable suspicion for the stop. *Id.* At the hearing on the

motion to suppress the only witness called by the government was the officer who made the stop; the government did not present the testimony of the officer who requested the stop, nor any other evidence demonstrating the reason for the stop of defendant's car. *Id.* The trial court denied defendant's motion, mistakenly concluding that the government did not need to produce evidence why the officer who issued the bulletin had reasonable suspicion to justify the stop. *Id.* at 178, fn.2. The trial court further mistakenly held that the burden of proof was on the defendant to "show that there was no reasonable suspicion behind the police radio request." *Id.* at 178. The trial court reasoned that the government, having shown the reasonableness of the officer's actions, "should not have to take on the added burden of looking behind the request from police radio." *Id.* Instead, "since the defendant has as much access to this proof as the Government, it seems to us not excessive to place the burden of such proof upon the parting claiming that the radio dispatch was illegitimate." *Id.* at 178-79.

On appeal the government conceded, and the Third Circuit held, that it did not meet its burden of proving reasonable suspicion to stop the car, and that the trial court "incorrectly shifted the burden to the defendant on this issue." *Id.* at 179. The Court held that while a police officer may rely on the representations of other officers when making a stop, the government was required to present evidence at the suppression hearing of the requesting officer's reasonable suspicion. The defendant did not bear the burden of proving the absence of reasonable suspicion.

These cases therefore recognize the distinction between the defendant's burden of raising the issue, and the State's burden of proof on that issue. Ms. Codeluppi stated in her motion to suppress that she was arrested without a warrant. "Upon establishing that single fact 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 at 944.

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.

A Defendant cannot be expected to guess what facts or justifications the State will offer to justify a warrantless arrest. 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.

The importance of a hearing was discussed in *State v. Cullers*, 119 Ohio App.3d 355, 695 N.E.2d 314 (2d Dist.1997), where the defendant was stopped after a traffic violation. After he was removed from his vehicle, the police searched the passenger compartment of the car and found a gun and drugs in a purse under the driver's seat. *Id.* at 355-58. The trial court held that the stop of the vehicle was justified. But, the trial court suppressed the gun and drugs found under the seat, finding that "the state had failed to demonstrate that the totality of the facts and circumstances before the officers after Cullers's vehicle was stopped warranted a reasonable and articulable suspicion of specific criminal activity that justified his continued detention and the search of his vehicle under the *Terry [v. Ohio]* standard." *Id.* at 358.

The Second Circuit overturned the trial court. In its view of the facts, the defendant's furtive movements gave the officer probable cause to search the car. The Court acknowledged, however, that the prosecution offered little evidence to explain why the officer believed the defendant's furtive movements gave him probable cause to search the car. The Court explained the importance of the hearing at 359-60:

> The element lacking from the state's proof, in the trial court's view, was an explanation by Officer Kraft of why he suspected that Cullers might have a weapon under the seat of his vehicle. Perhaps that seemed manifestly clear to the officer, so clear that no more particular explanation was required. Nevertheless, in order to determine the objective reasonableness of the officer's suspicion the court was required to consider the basis of

> that suspicion, which is a necessary element of the state's proof in resisting a motion to suppress. That proof is not the officer's personal burden, but the state's legal burden, and it has particular application where the suspicion is not readily supported by the evidence because the activity that gives rise to the officer's suspicion is ambiguous or innocuous.

Cullers therefore provides helpful guidance regarding the mechanics of a motion to suppress. The motion itself provides notice of the issues. But, these issues often cannot be resolved on paper. The purpose of the hearing is to determine whether the State can meet its burden of proof on the issues. A defendant cannot assess and refute the "objective reasonableness of the officer's suspicion" *id.* at 360, in a pleading. These issues can only be addressed after a hearing where the "totality of the facts and circumstances" *id.* at 358, known to the officers is explored through direct and cross examination.

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. The prosecution therefore bore the burden of proof on this issue. *Brown v. Illinois*, 422 U.S. 590, 604, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

III. The trial court and Ninth District erred in concluding that Ms. Codeluppi's motion provided 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.

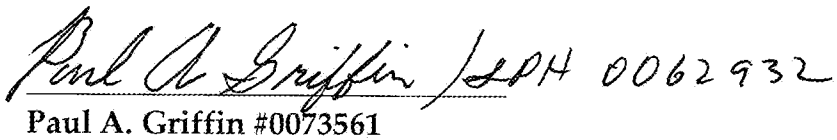
"Our system of justice is founded upon the principle of due process, which includes notice, an opportunity to be heard, and fair play among litigants." *Codeluppi,* at ¶38 (Belfance, J., dissenting)(citations omitted). For these reasons, "[t]he guarantees of due process call for a 'hearing appropriate 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. at 696-97(Marshall, J., dissenting). 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, Amici request that this Court reverse the decision of the Ninth District Court of Appeals.

Respectfully submitted,

Paul A. Griffin Co., L.P.A.



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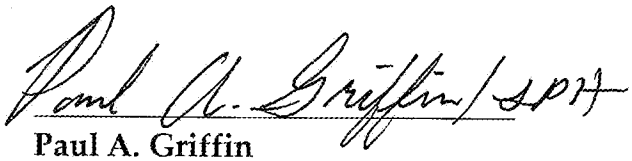
CERTIFICATE OF SERVICE

I certify that a copy of this Brief of Amicus Curiae the Ohio Association of Criminal Defense Lawyers in Support of Appellant Corrine Codeluppi was sent by ordinary U.S. Mail to Tony L. Morgan, North Ridgeville City Prosecutor, 7307 Avon Belden Road, North Ridgeville, Ohio 44039, Counsel for Appellee; and Joseph T. Burke, Polito, Paulozzi, Rodstrom & Burke, LLP, 21300 Lorain Road, Fairview Park, Ohio 44126, Counsel for Appellant, on this 10th day of July 2013.



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