

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2014-0104
Plaintiff-Appellant,	:	
	:	On Appeal from the
vs.	:	Franklin County Court of Appeals
	:	Tenth Appellate District
TERRANCE BROWN,	:	
	:	C.A. Case No. WD-12-070
Defendant-Appellee.	:	

MERIT BRIEF OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER, IN SUPPORT OF TERRANCE BROWN

PAUL A. DOBSON (0064126)
 Wood County Prosecutor
 THOMAS A. MATUSZAK (0070499)
Counsel of Record
 DAVID T. HAROLD (0072338)
 Assistant Prosecuting Attorneys
 One Courthouse Square, Annex
 Bowling Green, Ohio 43402
 (419) 354-9250
 (419) 353-2904 – Fax
 tmatuszak@co.wood.oh.us

COUNSEL FOR STATE OF OHIO

RON O'BRIEN (0017245)
 SETH GILBERT (0072929)

Franklin County Prosecutor's Office
 373 South High Street, 13th Floor
 Columbus, Ohio 43215
 (614) 525-3555
 (614) 525-6103 – Fax
 E-mail: sgilbert@franklincountyohio.gov

**COUNSEL FOR AMICUS CURIAE,
PROSECUTING ATTORNEYS
ASSOCIATION**

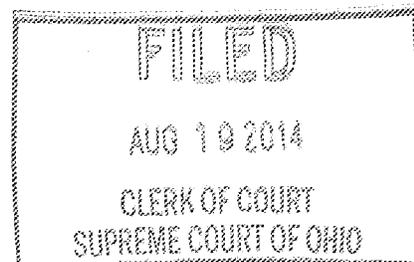
LAWRENCE A. GOLD (0078779)
Counsel of Record
 3852 Fairwood Drive
 Sylvania, Ohio 43560
 (419) 843-5719
 (419) 843-5719 - fax
 lgoldlawoffice@aol.com

COUNSEL FOR TERRANCE BROWN

CARRIE WOOD (0087091)
 Assistant State Public Defender

Office of the Ohio Public Defender
 250 East Broad Street, Suite 1400
 Columbus, Ohio 43215
 (614) 466-5394
 (614) 752-5167 – Fax
 E-mail: carrie.wood@opd.ohio.gov

**COUNSEL FOR AMICUS CURIAE,
OFFICE OF THE OHIO PUBLIC DEFENDER**



JULIA R. BATES
Lucas County Prosecutor
EVY M. JARRETT (0062485)
Assistant Prosecuting Attorneys
Lucas County Courthouse
Toledo, Ohio 43624
(419) 213-4700
(419) 213-4595 – Fax

**COUNSEL FOR AMICUS CURIAE
LUCAS COUNTY PROSECUTOR
JULIA R. BATES**

ANDREW FRENCH (0069384)
Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
P.O. Box 972
301 W. Third Street, 5th Floor
Dayton, Ohio 45422
(937) 225-5757

**COUNSEL FOR AMICUS CURIAE,
MONTGOMERY COUNTY
PROSECUTING ATTORNEY, MATHIAS
HECK**

MIKE DEWINE (0009181)
Attorney General of Ohio
ERIC E. MURPHY (0083284)
State Solicitor

30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980
(614) 466-5087 – Fax
E-mail:
eric.murphy@ohioattorneygeneral.gov

**COUNSEL FOR AMICUS CURIAE,
OHIO ATTORNEY GENERAL MIKE
DEWINE**

LAWRENCE A. GOLD (0078779)
Counsel of Record

3852 Fairwood Drive
Sylvania, Ohio 43560
(419) 843-5719
(419) 843-5719 - fax
lgoldlawoffice@aol.com

COUNSEL FOR TERRANCE BROWN

CARRIE WOOD (0087091)
Assistant State Public Defender

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
E-mail: carrie.wood@opd.ohio.gov

**COUNSEL FOR AMICUS CURIAE,
OFFICE OF THE OHIO PUBLIC DEFENDER**

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	1
STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER	3
ARGUMENT	3
STATE’S PROPOSITION OF LAW:	3
A violation of R.C. 4513.39 does not rise to the level of a constitutional violation under Article I, Section 14 of the Ohio Constitution or the Fourth Amendment to the United States Constitution; therefore, the exclusionary rule cannot be invoked to suppress the fruits of any such statutory violation	3
AMICUS CURIAE OHIO ATTORNEY GENERAL’S PROPOSITION OF LAW:	3
A police officer does not violate the Fourth Amendment to the U.S. Constitution when the officer makes an out-of-jurisdiction traffic stop in violation of state law so long as the officer has probable cause for the stop. Accordingly, because Article I, Section 14 of the Ohio Constitution has the same substantive reach as the Fourth Amendment, that type of out-of-jurisdiction stop also does not violate Article I, Section 14.	3
CONCLUSION	14
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

Page No.

CASES:

Atwater v. Lago Vista, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed 2d 549 (2001).....7,9,13

Britt v. Columbus, 38 Ohio St. 2d 1, 309 N.E.2d 412 (1974).....14

Guest v. Leis, 255 F.3d 325 (6th Cir.2001).....7

Kettering v. Hollen, 64 Ohio St.2d 232, 416 N.E.2d 598 (1980)10

Prudential Co-Operative Realty Co. v. City of Youngstown, 118 Ohio St. 204, 160
N. E. 695 (1928).....14

Sawicki v. Ottawa Hills, 37 Ohio St.3d 222, 525 N.E.2d 468 (1988)14

State v. Brown, 2013-Ohio-5351, 4 N.E.2d 452 (6th Dist.)..... *passim*

State v. Brown, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175..... *passim*

State v. Harrison, 20 Ohio Misc. 282, 251 N.E.2d 521 (March 14, 1969).....7

State v. Jones, 88 Ohio St.3d 430, 727 N.E.2d 886 (2000) *passim*

State v. Kosla, 10th Dist. Franklin Nos. 13AP-514, 13AP-517, 13AP-515, 13AP-
516, 2014-Ohio-138113,14

State v. Miller, 9th District Summit No. 12198, 1986 Ohio App. LEXIS 5412 (Jan.
22, 1986)7,8

State v. Robinette, 80 Ohio St.3d 234, 685 N.E.2d 762 (1997)13

State v. Spaw, 18 Ohio App.3d 77, 480 N.E.2d 1138 (3rd Dist.1984)4,5

State v. Weideman, 94 Ohio St.3d 501, 2002-Ohio-1484, 764 N.E.2d 997 *passim*

State v. Williams, 57 Ohio St.3d 24, 565 N.E.2d 563 (1991)4,5

Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923).....14

United States v. Beals, 698 F.3d 248 (6th Cir.2012)6

TABLE OF AUTHORITIES

	<u>Page No.</u>
CASES:	
<i>United States v. Calandra</i> , 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974)	13
<i>United States v. Kelley</i> , 140 F.3d 596 (5th Cir.1998).....	6
<i>United States v. Leon</i> , 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).....	6,13
<i>United States v. Lipford</i> , 203 F.3d 259 (4th Cir.2000)	5
<i>United States v. Marx</i> , 635 F.2d 436 (5th Cir.1981).....	6
<i>United States v. Thomas</i> , 263 F.3d 805 (8th Cir.2001).....	6
<i>Vernonia School District 47J v. Acton</i> , 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed. 2d 564 (1995).....	9
<i>Wyoming v. Houghton</i> , 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed. 2d 408 (1999).....	8,9
CONSTITUTIONAL PROVISIONS:	
Fourth Amendment, United States Constitution.....	<i>passim</i>
Section 14, Article I, Ohio constitution	<i>passim</i>
STATUTES:	
R.C. 2933.21	4
R.C. 2933.24	4,7,8
R.C. 2933.25	4
R.C. 2935.03	10
R.C. 2935.26	7,8,9
R.C. 4511.33	1,12
R.C. 4513.39	1,3,7,11,12
R.C. 737.04	14
R.C. 737.10	14

TABLE OF AUTHORITIES

Page No.

RULES:

Fed.R.Crim.P. 414,5,6

OTHER AUTHORITIES:

26 Ohio Jurisprudence 3d, Criminal Law, Section 527 (1981)7

INTRODUCTION

The Sixth District Court of Appeals applied this Court's analysis in *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175 ("*Brown I*") and *State v. Jones*, 88 Ohio St.3d 430, 2000-Ohio-374, to determine whether, under the facts of this case, the violation of R.C. 4513.39 amounted to a violation of Article I, Section 14 of the Ohio Constitution. In applying this Court's analysis from *Brown* and *Jones*, the Sixth District found that, on the facts of this case, where the State conceded that the officer did not have the statutory authority to stop Mr. Brown and the officer testified that there were situations in which she observed a similar traffic infraction and decided not to stop the vehicle, that this was not sufficient to outweigh Mr. Brown's privacy interest. The Sixth District properly articulated and applied the test this Court set out in *Brown* and *Jones*. *State v. Brown*, 2013-Ohio-5351, 4 N.E.2d 452, ¶ 19-20 (6th Dist.) ("*Brown II*"). The Sixth District did *not* create a per-se rule that an unauthorized stop by an officer pursuant to R.C. 4513.39 was a violation of Ohio's Constitution. Consequently, this case should be dismissed as improvidently granted or this Court should accept and affirm the decision below.

STATEMENT OF THE CASE AND FACTS

This case involves a traffic stop by Kelly Clark, a patrol officer and K-9 handler for the Lake Township Police Department. *Brown II* at ¶ 4. The State conceded that the officer in this case did not have statutory authority to stop Mr. Brown for a misdemeanor violation of R.C. 4511.33, driving outside the marked lanes, because the officer was outside of her jurisdiction. *Id.* at ¶ 12. *See also* R.C. 4513.39(A).

Officer Clark "testified that at approximately 6:00 p.m. on March 16, 2011, she was watching the southbound traffic on I-280 in Wood County while parked in a marked patrol car in

the median. She pulled out into the passing lane of the southbound traffic to observe another vehicle, but could not recall the reason for following the car.” *Id.* at ¶ 4. This other vehicle was in the right lane and Mr. Brown’s vehicle was in front of it. Tr. 28. “When [the officer] was approximately two car lengths behind appellant’s vehicle, she observed both of his right tires cross over the white line for about one hundred feet along a curve near the 795 exit ramp, but the car did not leave the paved highway. She did not, however, include the details of her observations in her report.” *Brown II* at ¶ 4. Officer Clark testified that she stopped paying attention to the initial vehicle that she pulled out for when she observed the lane violation. Tr. 33-34. “The officer testified she continued to follow appellant because he was not in a good area to make a stop.” *Brown II* at ¶ 4. However, the officer testified that after she observed the marked lane violation from the fast lane, she pulled the two car lengths up so that her vehicle was beside Mr. Brown’s vehicle. Tr. 9, 13-14. “As she pulled up alongside [Mr. Brown], she observed him staring straight ahead and he did not turn to look at her.” *Brown II* at ¶ 4. She was able to identify the driver, including sex and race, some distance before she pulled him over. Tr. 44-46. Officer Clark did not offer any reason for this action but denied she pulled over Mr. Brown on account of his race. Tr. 55. However, Officer Clark did testify that there were situations in which she observed a similar traffic violation, and she decided not to stop the vehicle. Tr. 22. “She initiated a stop just north of the intersection with the Ohio Turnpike, approximately two and one-half miles from where she had been parked.” *Brown II* at ¶ 4.

“The officer testified she informed [Mr. Brown] that he was being cited for a marked lane violation for leaving his lane of travel. She did not, however, ultimately write him a citation for the violation because she arrested him for possession of drugs.” *Id.* at ¶ 5.

“[Mr. Brown] and Deszira Gatewell, a passenger in appellant’s vehicle, both testified the officer informed appellant that he should have yielded to a truck that merged onto the highway and never said appellant had left his lane. [Mr. Brown] denied crossing the fog line and explained that he was driving very deliberately to avoid being stopped because of his outstanding warrant and because he had drugs on him that evening.” *Id.* at ¶ 6.

**STATEMENT OF INTEREST OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER**

The Office of the Ohio Public Defender (OPD) is a state agency designed to represent indigent criminal defendants, coordinate criminal defense efforts throughout Ohio, promote the proper administration of criminal justice, ensure equal treatment under the law, and protect the individual rights guaranteed by the state and federal constitutions. Accordingly, the OPD has an interest in ensuring the individual rights guaranteed by the Ohio Constitution.

ARGUMENT

STATE OF OHIO’S PROPOSITION OF LAW

STATE’S PROPOSITION OF LAW:

A violation of R.C. 4513.39 does not rise to the level of a constitutional violation under Article I, Section 14 of the Ohio Constitution or the Fourth Amendment to the United States Constitution; therefore, the exclusionary rule cannot be invoked to suppress the fruits of any such statutory violation.

**AMICUS CURIAE OHIO ATTORNEY GENERAL’S
PROPOSITION OF LAW:**

A police officer does not violate the Fourth Amendment to the U.S. Constitution when the officer makes an out-of-jurisdiction traffic stop in violation of state law so long as the officer has probable cause for the stop. Accordingly, because Article I, Section 14 of the Ohio Constitution has the same substantive reach as the Fourth Amendment, that type of out-of-jurisdiction stop also does not violate Article I, Section 14.

The Sixth District Court of Appeals determined that the trial court erred when it denied Mr. Brown’s motion to suppress the evidence obtained as a result of the stop. The Sixth

District's decision was based upon the protections available under Article I, Section 14 of the Ohio Constitution. *Brown II* at ¶ 19-20. This Court, utilizing statutes of this state, has provided more protection under Article I, Section 14 of the Ohio Constitution than what is provided by the Fourth Amendment to the United States Constitution. *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175. In addition, the exclusionary rule extends to a violation of Article I, Section 14 of the Ohio Constitution. Finally, any balancing test conducted under this Court's decision in *Jones* and *Brown* weighs in favor of individuals rights in this case.

A. Article I, Section 14 of the Ohio Constitution Affords More Protection Than the Fourth Amendment.

This Court has granted defendants more protection under Article I, Section 14 of the Ohio Constitution than those protections afforded under the Fourth Amendment of the U.S. Constitution. The primary example is *State v. Williams*, 57 Ohio St.3d 24, 565 N.E.2d 563 (1991). Ohio law requires that a search warrant be signed by a judge or magistrate in order to safeguard an individual's rights under the Fourth Amendment and Section 14, Article I of the Ohio Constitution. *Williams* at 26.

In Ohio, search warrants are issued under the authority found in R.C. 2933.21 and Crim.R. 41. Revised Code Section 2933.25 dictates the form of a search warrant. Included in the example form contained in R.C. 2933.25 is the requirement of the issuing judge's signature. Furthermore, R.C. 2933.24(A) provides that "... [s]uch warrant shall command the officer to search such house or place or person named or described for the property or other things...." Regarding the validity of an unsigned search warrant, this Court has stated, "[a] command without a known commander cannot be a command." *Williams* at 25.

In *Williams*, this Court approved a prior opinion of the Third Appellate District, *State v. Spaw*, 18 Ohio App.3d 77, 480 N.E.2d 1138 (3rd Dist.1984) with regard to the legitimacy of an

unsigned search warrant. Quoting *Spaw*'s discussion of an unsigned search warrant, the *Williams* court held that, "...what otherwise purports to be a search warrant *is not a search warrant* when it lacks any signature at all, and the officers here could not reasonably presume its validity. It never acquired the status of being merely voidable *but did not exist as a warrant and was void ab initio.*" (Emphasis added.) *Williams* at 14, quoting *Spaw* at 79. The *Williams* court acknowledged that some states have held that an unsigned warrant may still be valid if the failure of the judge or magistrate to sign it was mere oversight. The *Williams* court disagreed, and stated that "... we believe the better view is that expressed in *Spaw*, that a search warrant is void *ab initio* if not signed by a judge prior to the search." *Williams* at 25. This Court held that evidence obtained as the result of such a warrant must be suppressed. *Id.* at 24.

In *Spaw*, the State argued that the lack of a judge's signature on the search warrant was merely a ministerial error, and did not require the suppression of evidence obtained via that unsigned warrant. The affidavit in support of the search warrant was properly executed and signed by the reviewing judge. In addition, the judge executed a journal entry requiring the issuance of a search warrant. *Spaw* at 78. Nevertheless, the court of appeals stated that "with such defect being readily apparent on the face of the instrument it cannot be said that the officers exercising the 'warrant' acted in good faith" *Spaw* at 79. This Court has agreed with that analysis. *Williams* at 25.

This is more protection than is afforded by the Fourth Amendment to the United States Constitution. Similar to Ohio, federal search warrants are issued pursuant to Fed.R.Crim.P. 41. In *United States v. Lipford*, 203 F.3d 259, 269 (4th Cir.2000), defendant Farmer challenged the trial court's denial of his motion to suppress. Among his arguments was that the warrant for his home was not signed by the Magistrate. *Lipford*, 203 F.3d at 269. The Fourth Circuit held that,

presuming the defendant's allegations to be correct, this was, at most, a technical violation of Fed.Crim.R.P. 41, and not a violation of the Fourth Amendment. More specifically, the Fourth Circuit held that, absent a demonstration of prejudice or bad faith, suppression of the evidence was not a proper remedy for a violation of Fed.Crim.R.P. 41(d).

Indeed, other federal courts have held that the lack of a signature on a search warrant is not a violation of the Fourth Amendment, and does not require suppression. *United States v. Marx*, 635 F.2d 436, 441 (5th Cir.1981) (“Violations of Rule 41(d) are essentially ministerial in nature and a motion to suppress should be granted only when the defendant demonstrates legal prejudice or that non-compliance with the rule was intentional or in bad faith.”); *United States v. Beals*, 698 F.3d 248, 263-266 (6th Cir.2012). Federal courts have applied the good-faith exception from the United States Supreme Court case *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)¹ to other such technical requirements that would be an obvious defect on the face of the warrant. *See United States v. Thomas*, 263 F.3d 805, 808-9 (8th Cir.2001) (noting the address on the warrant was different from the address in the affidavit); *United States v. Kelley*, 140 F.3d 596, 604 (5th Cir.1998).

Another example of this Court affording more protection in the Ohio Constitution, again involves a state statute. Indeed, in *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, ¶ 7, this Court held that Section 14, Article I of the Ohio Constitution provided greater protection than the Fourth Amendment of the United States Constitution against warrantless arrests for minor misdemeanors. This Court noted that although Ohio's state

¹ The Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid. *Leon* at paragraph one of syllabus.

constitutional search-and-seizure jurisprudence generally tracked its federal counterparts and afforded no greater protection than the federal jurisprudence, it is also explained that Ohio's constitutional search-and-seizure jurisprudence need not track the federal jurisprudence as long as it afforded no less protection than Fourth Amendment jurisprudence. *Id.* at ¶ 5. In *Brown*, this Court acknowledged that the United States Supreme Court held that the Fourth Amendment did not forbid a warrantless arrest for a minor criminal offense, such as a misdemeanor seat-belt violation punishable by only a fine. *Id.* at ¶ 20, citing *Atwater v. Lago Vista*, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed 2d 549 (2001). However, in light of police officer's violation of R.C. 2935.26(A), this Court held that the arrest on the minor misdemeanor violated Section 14, Article I of the Ohio Constitution, and the evidence seized in the search incident to arrest required suppression. *Id.* at ¶ 25.

B. Violations of Ohio Statutes May Result in Violations of Article I, Section 14 of the Ohio Constitution as well as the Fourth Amendment to the United States Constitution.

At issue here is R.C. 4513.39, which gives highway patrol officers and sheriffs or their deputies jurisdiction, to the exclusion of all other peace officers, the power to make arrests for violations on all state highways. In other words, R.C. 4513.39, much like R.C. 2935.26(A), prohibits arrests in certain circumstances and is a state statute.

Other Ohio statutes impose jurisdictional limitations on police officers. For example, in general, a police officer may not execute a search warrant outside his or her territorial jurisdiction. R.C. 2933.24. *See also State v. Miller*, 9th District Summit No. 12198, 1986 Ohio App. LEXIS 5412, *3 (Jan. 22, 1986), citing *State v. Harrison*, 20 Ohio Misc. 282, 251 N.E.2d 521 (March 14, 1969); 26 Ohio Jurisprudence 3d (1981) 260, Criminal Law, Section 527; *Guest v. Leis*, 255 F.3d 325, 333-354 (6th Cir.2001) (Ohio law does not permit a police officer to execute a search warrant outside his jurisdiction unless an officer of the jurisdiction where the

warrant is executed accompanies the other officers and remains present at all times). Any evidence obtained from the extraterritorial execution of a search warrant must be suppressed. R.C. 2933.24; Section 14, Article I of the Ohio Constitution; Fourth Amendment to the United States Constitution; *State v. Miller*, 1986 Ohio App. LEXIS 5412, *3.

This Court has reviewed numerous cases in which evidence was obtained in violation of a state statute. Through these cases, the court has developed an analysis that must be utilized in determining whether evidence, which was gathered in violation of a state statute, must be suppressed.

In *State v. Jones*, 88 Ohio St.3d 430, 727 N.E.2d 886 (2000), *overruled in part by*, *followed by*, *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175 (holding that Section 14, Article I of the Ohio Constitution provides greater protection than the Fourth Amendment to the United States Constitution against warrantless arrests for minor misdemeanors), police officers arrested a person for jaywalking. *Id.* at 432. By making the arrest, the officers violated R.C. 2935.26(A), which prohibits arrests for minor misdemeanors. *Id.* In order to determine whether that governmental action violated the reasonableness requirement of the Fourth Amendment, this Court applied a two-prong test that had been adopted by the United States Supreme Court. *Id.* at 437, citing *Wyoming v. Houghton*, 526 U.S. 295, 299, 119 S.Ct. 1297, 143 L.Ed. 2d 408 (1999). The first prong of the test is to establish whether the governmental action was regarded as an unlawful seizure when the Fourth Amendment was adopted. *State v. Jones*, 88 Ohio St.3d at 437. This Court stated the second prong as follows: “[i]f, however, at the time of the Fourth Amendment’s ratification there was no clear practice either allowing or forbidding the type of governmental action at issue, then its reasonableness is judged by weighing the competing interests involved.” *Id.*

Because minor misdemeanors did not exist at common law, this Court moved on to the second prong of the test. *Id.* at 437-438. This Court applied a balancing test and stated that “the government’s interests in making a full custodial arrest for a minor misdemeanor offense, absent any R.C. 2935.26 exceptions, are minimal and are outweighed by the serious intrusion upon a person’s liberty and privacy that, necessarily, arises out of an arrest.” *Id.* at 440. Under this rationale, this Court concluded that a full custodial arrest for a minor offense was an unreasonable seizure and therefore a constitutional violation. In *Brown*, this Court, noting the ruling of the United States Supreme Court in *Atwater v. Lago Vista*, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001), acknowledged that the constitutional balancing test for the arrest of a minor misdemeanor when there is no state statute directly prohibiting the practice, may not constitute a violation of the Fourth Amendment. However, this Court made clear that this balancing test would continue to application to violations of Article I, Section 14 of the Ohio Constitution. This Court demonstrated that the violation of a state statute may—in certain instances—rise to the level of a constitutional violation, and that this Court—like many other state courts throughout the United States—can offer greater protection under the State Constitution.

It is also important to note that this Court has continued to determine whether violations of state statutes by police officers rise to the level of violations of both the Fourth Amendment and Article I, Section 14 of the Ohio Constitution under the analysis in *Jones*. *Compare State v. Jones*, 88 Ohio St.3d at 437, citing (*Wyoming v. Houghton*, 526 U.S. 295, 299-300, 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999) and *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652-653, 115 S.Ct. 2386, 2390, 132 L.Ed. 2d 564, 574 (1995)) with *State v. Weideman*, 94 Ohio St.3d 501, 2002-Ohio-1484, 764 N.E.2d 997. In *Weideman*, this Court

addressed the question as to “whether a stop and detention of a motorist by a police officer, who is *beyond* his or her jurisdictional limits, for an offense observed and committed *outside* the officer’s jurisdiction automatically constitutes a *per se* unreasonable seizure under the Fourth Amendment, thereby triggering the mandatory application of the exclusionary rule to suppress all evidence flowing from the stop.” (Emphasis sic.) *Weidman* at ¶ 5-6.²

This issue was similar to that in *Kettering v. Hollen*, 64 Ohio St.2d 232, 416 N.E.2d 598 (1980). In both cases, a police officer violated state law by making an extraterritorial warrantless arrest. The difference between the two cases is that in *Hollen*, the police officer made the extraterritorial arrest “based on probable cause that a crime was committed within the officer’s jurisdiction, and...the officer was in hot pursuit of the misdemeanant.” *Id.* at syllabus. (R.C. 2935.03 had not yet been amended to authorize extraterritorial arrests after hot pursuit). In *Weideman*, the probable cause for the detention of the defendant was created outside of the detaining officer’s jurisdiction. *Weideman* at ¶ 5-6.

This Court ultimately decided that the officer’s statutory violation did not require suppression of all evidence flowing from the stop. *Id.* at ¶ 13. In order to reach that conclusion, this Court looked to its previous decisions in *Kettering v. Hollen* and *State v. Jones*. As directed by *State v. Jones*, this Court first looked at whether the governmental action was regarded as an unlawful seizure when the Fourth Amendment was adopted. *Weideman* at ¶ 11. Because this Court knew of no such case at common law, this Court moved on to the second prong—balancing the interests of the government in making the stop and the rights of the affected driver. *Id.* Here, the officer observed a car coming toward him, traveling “well left of center.” The

² *Weidman* was decided by this Court on April 3, 2002. The United States Supreme Court decided *Atwater* on April 4, 2001. As such, *Weidman* continues to apply to violations of both the Fourth Amendment and Article I, Section 14 of the Ohio Constitution.

officer continued to observe the car, and it went off the right side of the road twice and again traveled left of center. *Id.* at ¶ 2. This Court concluded that “[t]he government’s interest in promoting public safety by stopping and detaining persons driving erratically outweigh[ed] the momentary restriction of the driver’s freedom.” *Id.* at ¶ 11-12. As such, the officer’s statutory violation did not require the application of the exclusionary rule. *Id.* at ¶ 12.

C. The Sixth District Properly Applied This Court’s Analysis in *Jones* to the Violation of R.C. 4513.39

This Court followed the two-pronged test of the United States Supreme Court for both the Fourth Amendment and Article I, Section 14 of the Ohio Constitution in *Jones* and *Brown*. First, prohibition against the conduct at common law at that time of ratification of the Fourth Amendment must be reviewed as well as the Ohio Revised Code. If the prohibition at common law is unclear, and a statute exists which prohibits officers’ conduct, and the officer violated that statute, the second prong of the analysis under *State v. Jones* must be completed. *See generally State v. Jones*, 88 Ohio St.3d 430; *State v. Brown*, 2003-Ohio-3931. The Sixth District undertook the above outlined analysis.

1. This Court’s determination regarding the common law and the State’s concession that the officer violated the statute require application of the balancing test.

In *Weidman*, the officer conceded he was making a traffic stop outside his jurisdiction.

Weidman at ¶ 2. This Court held that:

Under the first prong of the Fourth Amendment reasonableness test we must attempt to discern whether, at common law in 1791, police officers, who were outside their statutory jurisdiction, were permitted to stop and detain drivers of vehicles. We know of no such case at common law, and thus conclude that there was no clear practice either allowing or forbidding the government action of stopping such a vehicle. Therefore, because this situation was not contemplated at common law, we move to the second prong of the reasonableness test.

Weidman at ¶ 11.

In this case, the Sixth District noted that the State conceded that the officer did not have statutory authority to stop Mr. Brown for a misdemeanor violation of R.C. 4511.33, driving outside the marked lanes, because the officer was outside of her jurisdiction. R.C. 4513.39(A). *Brown II* at ¶ 12. Based on this Court's analysis in *Weidman*, the Sixth District correctly moved onto balancing the government's interests in making the stop against the intrusion upon the Mr. Brown's privacy based on the totality of circumstances. *Id.* at ¶ 17-20.

2. The Balancing Test Weighs in Favor of Individual Rights in This Case.

The balancing test requires the weighing of competing interests surrounding the governmental action at issue. *Jones*, 88 Ohio St.3d at 438. That is, evaluation of, on the one hand, the degree to which the governmental action intrudes upon a person's liberty and privacy, and, on the other hand, the degree to which the intrusion is necessary for the promotion of legitimate governmental interests. *Id.* Not only does common law mandate the exclusion of the evidence obtained by the search in the case sub judice, but the officer's interest is outweighed by Mr. Brown's interests. *Weidman* at ¶ 11-12. The officer's interest here is ensuring that motorists always stay within their marked lanes. However, the officer also testified that she does not always arrest when she observes this type of marked lane violation. Tr. 22. The government's interest, based on the officer's testimony, is minimal and simply cannot outweigh the privacy interest of Mr. Brown. The government interest is substantially less than that in *Weidman*, where this Court held that the government's interest in public safety, where the driver went well left of center, went off the right side of the road twice, and left of center again, outweighed the driver's privacy interest. *Weidman* at ¶ 2, 11-12. Therefore, the Sixth District properly held that:

It is undisputed that the township officer violated R.C. 4513.39 by making the extraterritorial stop on an interstate highway for a marked lane violation, which is specified in R.C. 4513.39(A) as being within the exclusive jurisdiction of the state highway patrol, sheriffs, and sheriff deputies. Further, no extenuating circumstances were presented to justify an extraterritorial stop by township police officers for this type of traffic violation. Therefore, we find the extraterritorial stop was unreasonable under the Ohio Constitution.

Brown II at ¶ 20.

There is nothing in the Sixth District's analysis and reasoning that is outside this Court's precedent. As such, its decision that the evidence seized as a result of the stop in this case should be suppressed pursuant to Ohio's Constitution should be affirmed. In addition, this Court should extend the reasoning of the Sixth District to this Court's jurisprudence under the Fourth Amendment, as *Atwater* does not apply to the proscribed conduct here. Compare *Weidman* with *Atwater*.

D. The Exclusionary Rule Applies to Violations of the Ohio Constitution.

The exclusionary rule applies to search and seizures found to be in violation of the Ohio Constitution. *State v. Kosla*, 10th Dist. Franklin Nos. 13AP-514, 13AP-517, 13AP-515, 13AP-516, 2014-Ohio-1381, ¶ 19-21; *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175; *State v. Robinette*, 80 Ohio St. 3d 234, 685 N.E.2d 762 (1997).

The State bemoans the Sixth District Court of Appeals' judicial creation of a remedy to a violation of Ohio's Constitution. State's Merit Brief, pp. 17-19. However, the Fourth Amendment exclusionary rule "operates as a 'judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" *United States v. Leon*, 468 U.S. 897, 906, 104 S.Ct. 1398, 67 L.Ed. 2d 369 (1981), quoting *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974). As the exclusionary rule also applies to Ohio, this rationale

applies in equal force to violations of the Ohio Constitution. *See Kosla*, 2014-Ohio-1381, ¶ 19-21.

The power of local self-government granted to municipalities relates solely to the government and administration of the internal affairs of the municipality, and, in the absence of statute conferring a broader power, municipal legislation must be confined to that area. *Britt v. Columbus*, 38 Ohio St.2d 1, 7, 309 N.E.2d 412 (1974), citing *Prudential Co-Operative Realty Co. v. City of Youngstown*, 118 Ohio St. 204, 160 N. E. 695 (1928). When the subject being legislated is not confined to the municipality, it is a matter for the General Assembly. *Britt v. Columbus*, 38 Ohio St.2d at 7. The enforcement of laws by local peace officers cannot be in conflict with state laws to be an appropriate exercise of local police power under the Ohio Constitution. *Struthers v. Sokol*, 108 Ohio St. 263, 265-67, 140 N.E. 519 (1923). As such, application of the exclusionary rule for its deterrent effect is appropriate here.

Finally, R.C. 737.04 and 737.10 provided insurance coverage only to those municipal police officers who *respond* outside their jurisdiction pursuant to a Mutual Aid Pact. Moreover, workers' compensation benefits were available only to police officers who acted within the scope of jurisdictional limitations. *Sawicki v. Ottawa Hills*, 37 Ohio St.3d 222, 226, 525 N.E.2d 468 (1988). The municipality should have an interest in protecting its officers and have them work within their jurisdiction unless circumstances dictate otherwise, and not, as the Sixth District seems to indicate, have them routinely working outside their jurisdiction. *Brown II* at ¶ 18.

CONCLUSION

The Sixth District Court of Appeals properly applied the applicable case law of this Court as to whether an officer's violation of a state statute gave rise to violation of Article I, Section 14

of Ohio's Constitution. Consequently, this case should be dismissed as having been improvidently accepted. Alternatively, this Court should affirm the decision below and extend the Sixth District's well-reasoned analysis to this Court's jurisprudence regarding the Fourth Amendment.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

Carrie Wood - KAS 0076729

CARRIE WOOD (0087091)
Assistant State Public Defender

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
E-mail: carrie.wood@opd.ohio.gov

COUNSEL FOR AMICUS CURIAE,
OFFICE OF THE OHIO PUBLIC DEFENDER

CERTIFICATE OF SERVICE

A copy of the foregoing **Merit Brief of Amicus Curiae Office of the Ohio Public**

Defender in Support of Terrance Brown was forwarded by regular U.S. Mail, postage prepaid to the attorneys listed below on this 19th day of August, 2014.

Thomas Matuszak
One Courthouse Square, Annex
Bowling Green, Ohio 43402

Lawrence A. Gold
3852 Fairwood Drive
Sylvania, Ohio 43560

Seth Gilbert
Franklin County Prosecutor's Office
373 South High Street, 13th Floor
Columbus, Ohio 43215

Evy M. Jarrett
Lucas County Courthouse
Toledo, Ohio 43624

Andrew French
P.O. Box 972
301 W. Third Street, 5th Floor
Dayton, Ohio 45422

Eric E. Murphy
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

Carrie Wood - KAS 0076729

CARRIE WOOD (0087091)
Assistant State Public Defender

COUNSEL FOR AMICUS CURIAE,
OFFICE OF THE OHIO PUBLIC DEFENDER