

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

TERRENCE BROWN,

Defendant-Appellee.

Sup. Ct. No. 2014-0104

Ct. App. No. WD-12-070

On Appeal from the Wood County
Court of Appeals, Sixth Appellate
District

REPLY BRIEF OF PLAINTIFF-APPELLANT, STATE OF OHIO

PAUL A. DOBSON (0064126)
DAVID T. HAROLD (0072338)
THOMAS A. MATUSZAK (0067770)
Counsel of Record
Wood County Prosecutor's Office
One Courthouse Square, Annex
Bowling Green, Ohio 43402
Tel: (419) 354-9250
Fax: (419) 353-2904
Email: tmatuszak@co.wood.oh.us
*Counsel for Plaintiff-Appellant,
State of Ohio*

LAWRENCE A. GOLD (0078779)
Counsel of Record
3852 Fairwood Drive
Sylvania, Ohio 43560
Tel: (419) 843-5719
Fax: (419) 843-5719
Email: lgoldlawoffice@aol.com
*Counsel for Defendant-Appellee,
Terrence Brown*

RECEIVED
SEP 08 2014
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
SEP 08 2014
CLERK OF COURT
SUPREME COURT OF OHIO

MICHAEL DEWINE (0009181)
Attorney General of Ohio
ERIC E. MURPHY (0083284)
State Solicitor
Counsel of Record
Office of the Ohio Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Tel: (614) 466-8980
Fax: (614) 466-5087
Email: eric.murphy@ohioattorneygeneral.gov
Counsel for Amicus Curiae
Ohio Attorney General Michael DeWine

MATHIAS H. HECK, JR. (0014171)
Montgomery County Prosecuting Attorney
ANDREW T. FRENCH (0069384)
Counsel of Record
Montgomery County Prosecutor's Office
301 West Third Street, 5th Floor
Dayton, Ohio 45422
Tel: (937) 225-5757
Counsel for Amicus Curiae
Montgomery County Prosecutor's Office

ROBERT L. BERRY (0007896)
Counsel of Record
Law Office of Robert L. Berry LLC
7582 South Goodrich Square
New Albany, Ohio 43054
Tel: (614) 855-3054
Email: rberrylaw@ameritech.net
Counsel for Amicus Curiae
Buckeye State Sheriff's Association

RON O'BRIEN (0017245)
Franklin County Prosecuting Attorney
SETH L. GILBERT (0072929)
Assistant Prosecuting Attorney
Counsel of Record
Franklin County Prosecutor's Office
373 South High Street, 13th Floor
Columbus, Ohio 43215
Tel: (614) 525-3555
Email: sgilbert@franklincountyohio.gov
Counsel for Amicus Curiae
Ohio Prosecuting Attorney's Association

JULIA R. BATES (0013426)
Lucas County Prosecuting Attorney
EVY M. JARRETT (0062485)
Counsel of Record
Lucas County Prosecutor's Office
700 Adams Street
Toledo, Ohio 43604
Tel: (419) 213-4700
Fax: (419) 213-4595
Counsel for Amicus Curiae
Lucas County Prosecutor's Office

CARRIE WOOD (0087091)
Counsel of Record
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
Tel: (614) 466-5394
Fax: (614) 752-5167
Email: carrie.wood@opd.ohio.gov
Counsel for Amicus Curiae
Office of the Ohio Public Defender

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
RESTATEMENT OF THE SOLE PROPOSITION OF LAW.....	1
INTRODUCTION.....	1
LAW AND ARGUMENT.....	1
CONCLUSION.....	5
CERTIFICATE OF SERVICE.....	6

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Arnold v. Cleveland</i> , 67 Ohio St.3d 35, 616 N.E.2d 163 (1993).....	3
<i>Houck v. State</i> , 106 Ohio St. 195, 140 N.E. 112, 1 Ohio L. Abs. 40 (1922).....	3
<i>Mapp v. Ohio</i> , 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 86 Ohio Law Abs. 513 (1961).....	4
<i>McDonald v. Chicago</i> , 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010).....	4
<i>Nicholas v. Cleveland</i> , 125 Ohio St. 474, 182 N.E. 26 (1932).....	3
<i>State v. Brown</i> , 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175.....	3, 4
<i>State v. Brown</i> , 6 th Dist. Wood No. WD-12-070, 2013-Ohio-5351.....	1
<i>State v. Buzzard</i> , 112 Ohio St.3d 451, 2007-Ohio-373, 860 N.E.2d 1006.....	3
<i>State v. Gardner</i> , 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995.....	2
<i>State v. Geraldo</i> , 68 Ohio St.2d 120, 429 N.E.2d 141, 22 O.O.3d 366 (1981).....	3
<i>State v. Jones</i> , 121 Ohio St.3d 103, 2009-Ohio-316, 902 N.E.2d 464.....	2
<i>State v. Jordan</i> , 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864.....	3
<i>State v. Kinney</i> , 83 Ohio St.3d 85, 1998-Ohio-425, 698 N.E.2d 49.....	3
<i>State v. Murrell</i> , 94 Ohio St. 3d 489, 2002-Ohio-1483, 764 N.E.2d 986.....	3
<i>State v. Orr</i> , 91 Ohio St.3d 389, 2001-Ohio-50, 745 N.E.2d 1036.....	3
<i>State v. Robinette</i> , 80 Ohio St.3d 234, 1997-Ohio-343, 685 N.E.2d 762.....	3
<i>State v. Smith</i> , 124 Ohio St.3d 163, 2009- Ohio-6426, 920 N.E.2d 949.....	3
<i>Struthers v. Sokol</i> , 108 Ohio St. 263, 140 N.E. 519, 2 Ohio L. Abs. 9, 1 Ohio L. Abs. 485 (1923).....	3

Constitutions

Fourth Amendment to the Constitution of the United States..... *passim*

Article I, Section 14 of the Constitution of the State of Ohio..... *passim*

Statutes

R.C. 2935.26..... 4

R.C. 4513.39..... *passim*

RESTATEMENT OF PLAINTIFF-APPELLANT'S SOLE 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.

ARGUMENT

I. INTRODUCTION

As a matter of judicial policy, constitutional consistency is imperative. But Appellee Brown and the Ohio Public Defender's Office do not want constitutional consistency; rather, they invite this Court to cement an enduring constitutional conflict by either affirming the lower court's decision or dismissing this appeal as having been improvidently allowed.

The only sound result in this case is for this Court to reverse the lower court's decision and declare—once and for all—that Ohio's trial and appellate courts must harmonize Article I, Section 14 of the Ohio Constitution with the Fourth Amendment to the United States Constitution. And if there is to be any deviation from that rule, it should come from but one court, this Court, which serves as the ultimate arbiter of the Ohio Constitution.

II. LAW AND ARGUMENT

In *State v. Brown*, 6th Dist. Wood No. WD-12-070, 2013-Ohio-5351, ¶ 9-15, the Sixth District Court of Appeals ruled that a township police officer's extra-territorial stop in violation of R.C. 4513.39 **did not** violate the Fourth Amendment to the United States Constitution, but it **did** violate Article I, Section 14 of the Ohio Constitution. In so ruling, the Sixth District's decision went rogue on several constitutional fronts:

1. It ignored this Court's prior decisions that call for harmonizing Article I, Section 14 of the Ohio Constitution with the Fourth Amendment to the United States Constitution;
2. It created a conflict between Article I, Section 14 and the Fourth Amendment;
3. It ignored this Court's decision in *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, 902 N.E.2d 464, in which this Court declined to create a constitutional remedy for a police officer's violation of the statutory territorial limits on arrest powers; and
4. It invaded the province of the Ohio General Assembly by effectively creating a statutory remedy for a violation of R.C. 4513.39 where none otherwise exists.

The Sixth District's decision usurped this Court's authority as the ultimate arbiter of the Ohio Constitution. It also usurped the Ohio General Assembly's authority to create (or not create) remedies for violations of the legislation it passes. In short, the Sixth District's decision is not just aberrant; it has altered the constitutional landscape of this State, and it needs to be reversed.

This Court has previously stated that “[w]e must be cautious and conservative when we are asked to expand constitutional rights under the Ohio Constitution, particularly when the provision in the Ohio Constitution is akin to a provision in the U.S. Constitution that has been reasonably interpreted by the Supreme Court.” *State v. Gardner*, 118 Ohio St.3d 420, 437, 2008-Ohio-2787, 889 N.E.2d 995. That warning is particularly important when it comes to Article I, Section 14 of the Ohio Constitution and the Fourth Amendment to the United States Constitution. The reason is that “[t]he Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution are virtually identical. Any difference in the protections afforded by them is

due strictly to judicial interpretation.” *State v. Brown*, 99 Ohio St.3d 323, 328, 2003-Ohio-3931, 792 N.E.2d 175 (O’Conner, J., dissenting). That idea, furthermore, predates this Court’s decision in *Robinette III*. See *State v. Geraldo*, 68 Ohio St.2d 120, 125-126, 429 N.E.2d 141, 22 O.O.3d 366 (1981); *Nicholas v. Cleveland*, 125 Ohio St. 474, 484, 182 N.E. 26 (1932); *Houck v. State*, 106 Ohio St. 195, 199, 140 N.E. 112, 1 Ohio L. Abs. 40 (1922); *Compare Struthers v. Sokol*, 108 Ohio St. 263, 271, 140 N.E. 519, 2 Ohio L. Abs. 9, 1 Ohio L. Abs. 485 (1923).

This Court has repeatedly ruled that Article I, Section 14 of the Ohio Constitution should be harmonized with the Fourth Amendment to the United States Constitution. See e.g. *State v. Robinette*, 80 Ohio St.3d 234, 239, 1997-Ohio-343, 685 N.E.2d 762; *State v. Kinney*, 83 Ohio St.3d 85, 87, 1998-Ohio-425, 698 N.E.2d 49; *State v. Orr*, 91 Ohio St.3d 389, 391, 2001-Ohio-50, 745 N.E.2d 1036; *State v. Murrell*, 94 Ohio St. 3d 489, 493-494, 2002-Ohio-1483, 764 N.E.2d 986; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 55; *State v. Buzzard*, 112 Ohio St.3d 451, 2007-Ohio-373, 860 N.E.2d 1006, ¶ 13, fn. 2; *State v. Smith*, 124 Ohio St.3d 163, 2009- Ohio-6426, 920 N.E.2d 949, ¶ 10, fn. 1.

The rejoinder that state constitutions may provide broader protections than those provided by the United States Constitution, while accurate, does not warrant the conclusion reached by the Sixth District in this case. The argument to support the claim of differing constitutional protections resides in *Arnold v. Cleveland*, 67 Ohio St.3d 35, 41-42, 616 N.E.2d 163 (1993). But the Ohio Constitution had to be employed in that case because, at that time, the Second Amendment to the United States Constitution had not been incorporated to the states. *Id.*, at 41 (“We note that the Second Amendment has

not been held applicable to the states. The amendment has not been absorbed either directly or through selective incorporation in the Fourteenth Amendment.”). That, however, does not hold true for the Fourth Amendment, because it has been incorporated to the states. *Mapp v. Ohio*, 367 U.S. 643, 655-656, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 86 Ohio Law Abs. 513 (1961); *See also McDonald v. Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 3028-3036, 177 L.Ed.2d 894 (2010).

This state’s jurisprudence eschews the idea of independent and adequate state grounds when it comes to the Fourth Amendment and Article I, Section 14. Indeed, in her dissent in *State v. Brown*, 99 Ohio St.3d 323, 328, 2003-Ohio-3931, 792 N.E.2d 175 (O’Conner, J., dissenting), now-Chief Justice O’Connor warned of the constitutional dangers posed by elevating a statutory right to a state constitutional right:

The majority’s position is untenable. R.C. 2935.26 creates only a statutory right not to be arrested for a minor misdemeanor. The statutory right may be revoked at any time by the Ohio General Assembly’s repealing the statute. Certainly the majority would not support the proposition that the General Assembly can revoke a constitutionally granted right.

Yet, given the Sixth’s District’s decision in this case, that very thing could happen if the Ohio General Assembly repeals R.C. 4513.39.

The Sixth District’s decision in this case is not simply bad law in need of error correction. It is a constitutional morass. If left untouched, it will serve as dangerous precedent for lower courts to unilaterally interpret Article I, Section 14 in any way they deem fit for the occasion, despite this Court’s otherwise-binding precedent and the constitutionally-intended autonomy of the Ohio General Assembly.

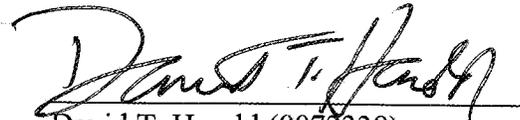
III. CONCLUSION

This Court should reverse the Sixth District's decision in this case, adopt the State's sole proposition of law, and conclude that 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.

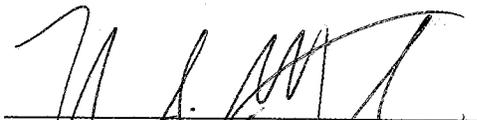
In so ruling, this Court should also declare—once and for all—that Ohio's trial and appellate courts **must** harmonize Article I, Section 14 of the Ohio Constitution with the Fourth Amendment to the United States Constitution. And if there is to be any deviation from that rule, it should come only from this Court—the ultimate arbiter of the Ohio Constitution.

Respectfully submitted,

HON. PAUL A. DOBSON (0064126)



David T. Harold (0072338)
Wood County Prosecutor's Office
One Courthouse Square, Annex
Bowling Green, Ohio 43402
Counsel for Plaintiff-Appellant



Thomas A. Matuszak (0067770)
Counsel of Record
Wood County Prosecutor's Office
One Courthouse Square, Annex
Bowling Green, Ohio 43402
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

The undersigned counsel certifies that a true and accurate copy of the foregoing was served via regular U.S. Mail to the following counsel on this 5th day of September, 2014:

MICHAEL DEWINE (0009181)
Attorney General of Ohio

ERIC E. MURPHY (0083284)
State Solicitor

Counsel of Record
Office of the Ohio Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Tel: (614) 466-8980
Fax: (614) 466-5087

Email: eric.murphy@ohioattorneygeneral.gov
Counsel for Amicus Curiae
Ohio Attorney General Michael DeWine

RON O'BRIEN (0017245)
Franklin County Prosecuting Attorney

SETH L. GILBERT (0072929)
Assistant Prosecuting Attorney

Counsel of Record
Franklin County Prosecutor's Office
373 South High Street, 13th Floor
Columbus, Ohio 43215
Tel: (614) 525-3555

Email: sgilbert@franklincountyohio.gov
Counsel for Amicus Curiae
Ohio Prosecuting Attorney's Association

JULIA R. BATES (0013426)
Lucas County Prosecuting Attorney

EVY M. JARRETT (0062485)
Counsel of Record

Lucas County Prosecutor's Office
700 Adams Street
Toledo, Ohio 43604
Tel: (419) 213-4700
Fax: (419) 213-4595

Counsel for Amicus Curiae
Lucas County Prosecutor's Office

LAWRENCE A. GOLD (0078779)
Counsel of Record

3852 Fairwood Drive
Sylvania, Ohio 43560

Tel: (419) 843-5719

Fax: (419) 843-5719

Email: lgoldlawoffice@aol.com

Counsel for Defendant-Appellee,
Terrence Brown

CARRIE WOOD (0087091)

Counsel of Record

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215

Tel: (614) 466-5394

Fax: (614) 752-5167

Email: carrie.wood@opd.ohio.gov

Counsel for Amicus Curiae
Office of the Ohio Public Defender

MATHIAS H. HECK, JR. (0014171)
Montgomery County Prosecuting
Attorney

ANDREW T. FRENCH (0069384)

Counsel of Record

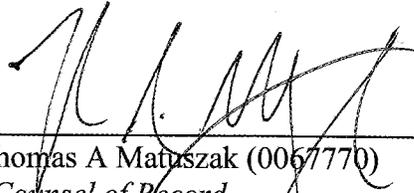
Montgomery County Prosecutor's Office
301 West Third Street, 5th Floor
Dayton, Ohio 45422

Tel: (937) 225-5757

Counsel for Amicus Curiae

Montgomery County Prosecutor's Office

ROBERT L. BERRY (0007896)
Counsel of Record
Law Office of Robert L. Berry LLC
7582 South Goodrich Square
New Albany, Ohio 43054
Tel: (614) 855-3054
Email: rberrylaw@ameritech.net
Counsel for Amicus Curiae
Buckeye State Sheriff's Association



Thomas A Matuszak (0067770)
Counsel of Record
Wood County Prosecutor's Office
One Courthouse Square, Annex
Bowling Green, Ohio 43402
Counsel for Plaintiff-Appellant