IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2016-0238
Plaintiff-Appellee,	:	
	:	On Appeal from the Mahoning County
v.	:	Court of Appeals,
	:	Seventh Appellate District
SHERRY BEMBRY	:	Case Nos. 2014 MA 51, 2014 MA 52
AND	:	
HARSIMRAN SINGH	:	
Defendant-Appellants.	:	

MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANTS SHERRY BEMBRY AND HARSIMRAN SINGH

PAUL J. GAINS (0020323)
Mahoning County Prosecutor

RALPH RIVERA (0082063)
Assistant Prosecuting Attorney

21 W. Boardman St.
Youngstown, Ohio 44503
(330) 740-2330
(330) 740-2008 – Fax
rrivera@mahoningcountyoh.gov

COUNSEL FOR APPELLEE STATE OF OHIO

LOUIS M. DEFABIO (0059101)
4822 Market Street, Suite 220
Youngstown, Ohio 44512
(330) 782-3000
(330) 782-5224 – Fax
loudefabio@aol.com

COUNSEL FOR APPELLANTS SHERRY BEMBRY AND HARSIMRAN SINGH

OFFICE OF THE OHIO PUBLIC DEFENDER

KATHERINE ROSS-KINZIE (0089762)
Assistant State Public Defender

250 East Broad Street – Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
katherine.ross-kinzie@opd.ohio.gov

COUNSEL FOR AMICUS CURIAE OHIO PUBLIC DEFENDER

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STATEMENT OF THE CASE AND FACTS

Amicus curiae hereby adopts the statement of the case and facts set forth in Appellants Bembry and Singh's merit brief.

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 and to coordinate criminal-defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect and defend the rights of indigent persons by providing and supporting superior representation in the criminal and juvenile justice systems.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle criminal cases in Ohio courts. This work includes representation at both the trial and appellate levels. The OPD has an interest in the present case insofar as this Court will consider the fundamental right of allocution and when that right applies. As amicus curiae, OPD urges this Court to fully retain the important right encapsulated in Ohio Criminal Rule 32(A) by affirming the First District's decision in this case.

ARGUMENT

PROPOSITION OF LAW

The exclusionary rule is the appropriate remedy under Article I, Section 14 of the Ohio Constitution for a violation of R.C. 2935.12.

The "knock and announce" rule is rooted in common law and requires the police, absent certain circumstances, to knock and announce their presence and allow time for a response

before forcibly entering a home. *State v. Taylor*, 135 Ohio App.3d 182, 185, 733 N.E.2d 310 (12th Dist.1999). This rule is reflected in the Fourth Amendment to the United States Constitution and also in Article 1, Section 14 of the Ohio Constitution. Additionally, Ohio has codified this rule in statute. Ohio Revised Code 2935.23 requires:

> When making an arrest or executing an arrest warrant or summons in lieu of an arrest warrant, or when executing a search warrant, the peace officer, law enforcement officer, or other authorized individual making the arrest or executing the warrant or summons may break down an outer or inner door or window of a dwelling house or other building, if, after notice of his intention to make the arrest or to execute the warrant or summons, he is refused admittance, but the law enforcement officer or other authorized individual executing a search warrant shall not enter a house or building not described in the warrant.

In 2006, the United States Supreme Court determined that the Fourth Amendment to the United States Constitution did not require suppression of evidence collected subsequent to violations of the knock and announce rule. *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159 (2006). Soon after *Hudson* was decided, this Court remanded *State v. Oliver* to the trial court to consider its suppression ruling following a violation of the knock and announce rule in light of *Hudson*. *State v. Oliver*, 112 Ohio St.3d 447, 2007-Ohio-372, 860 N.E.2d 1002, ¶ 13. This Court left unanswered the question of "whether the Ohio Constitution provides greater protections against forcible entries of homes than the United States Constitution does, and whether those protections include rendering inadmissible the fruits of such entries." *State v. Oliver*, 112 Ohio St.3d 447, 2007-Ohio-372, 860 N.E.2d 1002, ¶ 18 (Pfeifer, J., dissenting).

The knock-and-announce rule's common-law roots underscore its purpose to prevent violence and physical injury to the police and occupants, to protect an occupant's privacy expectation against the unauthorized entry of unknown persons, and to prevent property damage resulting from forced entry during the execution of a search warrant. Further, this Court should recognize that the Ohio Courts of Appeals have long held that violations of Ohio's knock-and-

announce rule warrant judicial remedies. *See State v. Furry*, 31 Ohio App.2d 107, 113, 286 N.E.2d 301 (6th Dist.1971) ("We conclude, therefore, that the conviction of both defendants should be reversed because of an invalid execution of the search warrant by the police officers who failed to announce their purpose before entering the house of defendants through an unlocked but closed screen door."); *State v. Edmonds*, 8th Dist. Cuyahoga No. 40002, 1979 Ohio App. LEXIS 9751, at *9-10 (Apr. 19, 1979) (affirming the trial court's suppression decision for a violation of the knock-and-announce rule under both the Fourth Amendment and Article I, Section 14).

I. This Court has previously recognized that Article I, Section 14 of the Ohio Constitution provides independent protection than that provided by the Fourth Amendment of the United States Constitution.

In this Court's recent decision in *State v. Mole*, Justice Lanzinger noted that the Ohio Constitution is a document of independent force. Slip Opinion No. 2016-Ohio-5124, ¶ 72 (Lanzinger J., concurring in judgment only). "The decisions of the [United States Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them." (Footnote omitted.) *Mole*, Slip Opinion No. 2016-Ohio-5124 at ¶ 71 (Lanzinger J., concurring in judgment only), citing Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489, 502 (1977).

This Court has previously held that the Ohio Constitution affords greater protections than those afforded under the United States Constitution[1] and has specifically held that Article I, Section 14 provides greater protections than those provided by the Fourth Amendment. In *State*

[1] *See State v. Mole*, Slip Opinion No. 2016-Ohio- 5124, ¶ 15-21 (chronicling the Ohio Supreme Court's decisions "heeding the horatory call to the new federalism").

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 constitutional search-and-seizure jurisprudence generally tracked its federal counterpart, it 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; *accord Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993), paragraph one of the syllabus ("The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.").

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 seatbelt violation punishable by only a fine. *Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175 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.

In another case captioned *State v. Brown*, this Court faced the question of whether a traffic stop made without statutory jurisdiction or authority violates the protection against

unreasonable searches and seizures afforded by Article I, Section 14 of the Ohio Constitution. 143 Ohio St.3d 155, 2015-Ohio-2438, 39 N.E.3d 496, ¶ 11. *Brown* involved a traffic stop for a misdemeanor violation of R.C. 4511.33, driving outside the marked lanes, by a patrol officer who did not have statutory authority to make the stop because the officer was outside of her jurisdiction. *Id*. at ¶ 12. *See also* R.C. 4513.39(A). After pulling Mr. Brown over for the violation, the officer walked her drug dog around the car, leading to the discovery of 120 oxycodone tablets and a baggie of marijuana. *Id*. at ¶ 6. At his trial, Mr. Brown filed a motion to suppress, which the trial court denied. *Id.* After pleading no contest, Mr. Brown appealed and the Sixth District Court of Appeals determined that the stop did not violate the Fourth Amendment, because Clark had probable cause to believe Brown had committed a misdemeanor in her presence. *Id*. at ¶ 7. However, the court held that the stop was unreasonable and violated the Ohio Constitution. *Id*.

The State appealed to the Ohio Supreme Court and argued that the prohibitions against unreasonable searches and seizures set forth in the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution are nearly identical and should be read in harmony. *Id*. at ¶ 9 However, this Court held that Article I, Section 14 of the Ohio Constitution affords greater protection than the Fourth Amendment against searches and seizures conducted by members of law enforcement who lack authority to make an arrest. Therefore, a traffic stop for a minor misdemeanor offense made by a township police officer without statutory authority to do so violates Article I, Section 14 of the Ohio Constitution. *Id*. at ¶ 23.

II. Other states have recognized the exclusionary rule is the appropriate remedy for violations of knock-and-announce rules found in their state constitutions and state statutes.

While this Court has not determined whether Ohio law requires that violations of the knock and announce rule be remedied by the exclusion of evidence found incident to the

violation, other states have made similar determinations regarding their own state constitutions and statutes.

In a case decided prior to *Hudson*, the Montana Supreme Court held that "the law enforcement officers' no-knock entry into Appellants' house to execute the search warrant violated Appellants' federal and state constitutional rights to be free from unreasonable searches and seizures. Consequently, the trial court erred in failing to suppress the evidence resulting from that search." *State v. Anyan*, 325 Mont. 245, 2004 MT 395, 104 P.3d 511, ¶ 65. Prior to its decision in *Anyan*, the Montana Supreme Court had not considered the issue of violations of the knock and announce rule. Unlike Ohio, Montana has no statutory provisions addressing the knock and announce rule. *Id.* at ¶ 21. In making its decision in *Anyan*, the Court looked to the relevant federal law at the time, the laws of other states, and also "to the greater protections afforded to Montanans in search and seizure matters under Article II, Sections 10 and 11 of the Montana Constitution. *Id.* Ultimately the *Anyan* court held that under the Fourth Amendment, the knock and announce rule applied in Montana. *Id.* at ¶ 61.

While the Court's decision regarding the Fourth Amendment in *Anyan* was made prior to *Hudson*, the Court cited the state constitution as an independent and greater source of protection against unreasonable searches and seizures for Montanans. *Id.* ("Article II, Sections 10 and 11 of the Montana Constitution provided greater protections against unreasonable searches and seizures and government infringement of individual privacy than does the federal constitution.") Further, since *Hudson* was released, the *Anyan* Court's holding regarding the Montana Constitution's protections has been cited favorably in other search and seizure cases. *See Cassady v. Yellowstone Cnty. Mont. Sheriff Dep't*, 333 Mont. 371, 2006 MT 217, 143 P.3d 148, ¶ 25 ("We noted that we rendered our decision [in *Anyan*] pursuant to the Fourth Amendment of

the United States Constitution and federal authority, but that since Article II, Sections 10 and 11 of the Montana Constitution provide even greater privacy protections than the federal constitution, the Montana Constitution provided an independent basis for our holding that the forced entry and subsequent search were unreasonable.").

Similar to Montana and unlike Ohio, New Mexico has no statute setting forth the requirements of announcement prior to a forcible entry when executing a search warrant. New Mexico also does not have a deep history of common-law decisions regarding the knock-and-announce rule. However, prior to the United States Supreme Court's decision in *Hudson*, the New Mexico Supreme Court held that Article II, Section 10 of the New Mexico state constitution incorporates a knock-and-announce requirement and that "if an officer does not knock and announce prior to forcible entry and exigent circumstances are not present, the fruits of that search would be excluded as a violation of the general constitutional reasonableness requirement." *State v. Attaway*, 117 N.M. 141, 1994-NMSC-011, 870 P.2d 103, ¶ 21-22, fn.6. The New Mexico Supreme Court has not revisited the issue since *Hudson*, but the appellate courts have continued to apply *Attaway*. *See e.g.*, *State v. Jean-Paul*, 2013-NMCA-032, 295 P.3d 1072, ¶ 7 ("Therefore, *Attaway* controls, and the remedy for any violation of Article II, Section 10's knock-and-announce requirement continues to be suppression of the evidence.").

The Pennsylvania Supreme Court has long recognized that the prohibition against unreasonable searches and seizures found in the Pennsylvania state constitution is violated when officers fail to follow the "knock and announce" rule as announced in Pennsylvania Rule of Criminal Procedure 207. The Court has held that evidence found following such a violation must be suppressed. *See Commonwealth v. Chambers*, 528 Pa. 403, 410-411, 598 A.2d 539 (1991) ("We hold that the forcible entry without waiting a reasonable amount of time under the

circumstances of this case violated Article I, § 8 of the Pennsylvania Constitution. Exclusion of evidence is the appropriate remedy for this violation"); *Commonwealth v. Crompton*, 545 Pa. 586, 595, 682 A.2d 286 (1996) ("In violating the knock and announce rule, the police infringe upon a fundamental constitutional concern, Article I, Section 8's guarantee that all Pennsylvanians will be free from unreasonable searches of their houses. Regardless of the type of front door to a premises, the remedy for noncompliance with the knock and announce rule is always suppression"); *Commonwealth v. Carlton*, 549 Pa. 174, 184, 701 A.2d 143 (1997) ("Accordingly, we now hold that in the absence of exigent circumstances, forcible entry without announcement of purpose violates Article 1, Section 8 of the Constitution of Pennsylvania, which prohibits unreasonable searches and seizures").

Like Pennsylvania, Ohio has both a statutory basis and constitutional basis for the knock-and-announce rule, and similarly, this Court should find that the Ohio constitution requires suppression of evidence seized subsequent to a violation of Ohio's knock-and-announce rule. The issue has not squarely reached the Pennsylvania Supreme Court since *Hudson* was released.

The Supreme Court of Florida has specifically considered whether the United States Supreme Court decision in *Hudson* required the Florida Court to recede from its 1964 opinion in *Benefield v. State*, 160 So.2d 706 (Fla. 1964), in which that Court held that a violation of Florida's knock-and-announce statute vitiated the ensuing arrest and required the suppression of the evidence obtained in connection with the arrest. *State v. Cable*, 51 So.3d 434, 435 (Fla.2010). The Florida Supreme Court determined that "[a]s a matter of state law, a state may provide a remedy for violations of state knock-and-announce statutes, and nothing in *Hudson* prohibits it from doing so." *Id.* at 442. The Court rejected the State's argument that a 1982 amendment to the Florida state constitution requiring the Florida Supreme Court to interpret its constitutional

amendment against unreasonable search and seizures in conformity with the United States Constitution was controlling because "*Hudson* is not automatically dispositive of the question of whether the exclusionary rule may be applied for violations of Florida's knock-and-announce statute because it involved a Fourth Amendment knock-and-announce violation—not one based on a state statute." *State v. Cable*, 51 So.3d 434, 443 (Fla.2010).

Similar to the Florida Supreme Court's decision, the Alaska Court of Appeals also held that the appropriate remedy for a violation of Alaska's knock-and-announce statute was not controlled by the United State Supreme Court's decision in *Hudson*. While Alaska's Supreme Court has not weighed in on the issue, the Court of Appeals was faced with a violation of Alaska's "knock and announce" statute, AS 12.25.100 and found that because the issue before it was one of state law the United States Supreme Court's decision in *Hudson* was not binding. *Berumen v. State*, 182 P.3d 635 (Alaska App.2008) ("While the majority and dissenting opinions in Hudson may have persuasive value, our ultimate duty is to employ the test set forth in *Harker v. State*, 637 P.2d 716, 719 (Alaska App.1981), to independently determine whether a violation of our state statute triggers the exclusionary rule.")

The Alaska decision emphasizes the lengthy history of the knock-and-announce rule in Alaska's codified law and notes that under its own precedent, it is sometimes appropriate to apply the exclusionary rule to violations of a statute (as opposed to violations of the constitution).[2] *Berumen* at 641. After applying the four factor test from *Harker*, the court held that those four factors "support the application of the exclusionary rule to violations of AS 12.25.100 that are neither justified by exigent circumstances nor excused under the 'substantial compliance' doctrine." *Berumen v. State*, 182 P.3d 635, 642 (Alaska App.2008).

[2] Because the defendant only raised the Alaska Constitution for the first time in its reply brief to the Court of Appeals, the *Berumen* court did not consider that argument. *Id.* at 641.

This Court should take this opportunity to confirm for the citizens of Ohio that when the police violate our state Constitution and statute, those violations require suppression of the evidence seized as a consequence.

III. Exclusion is necessary to ensure compliance with the knock and announce rule of R.C. 2935.12.

In *Hudson*, the majority conducted a balancing of the costs and benefits of suppression, and concluded that "the social costs of applying the exclusionary rule to knock-and-announce violations are considerable," while suppressing the evidence would do little to deter police misconduct and therefore held that the "remedy of suppressing evidence of guilt is unjustified." *Hudson*, 547 U.S. at 599. Regarding Justice Scalia's majority opinion in *Hudson*, Emory University Professor Morgan Cloud argued that "[a]lthough he acknowledged that in the past the Court had applied the exclusionary rule expansively, Scalia inaccurately claimed that suppression 'has always been our last resort, not our first impulse' because of the 'substantial social costs' that criminals would go free because the police had erred. Scalia argued not only that the costs of exclusion outweighed its benefits, but also that the remedy was no longer needed to deter police misconduct. Changes in the application of 42 U.S.C. section 1983, for example, had made damage suits an adequate remedy. Justice Breyer's dissent questioned the factual accuracy of this conclusion, arguing that the majority had simply 'assumed' it to be correct." Cloud, *A Conservative House United: How the Post-Warren Court Dismantled the Exclusionary Rule*, 10 Ohio St. J. Crim. L. 477, 514 (2013).

In fact, in a study which consisting of a detailed survey of police chiefs in major U.S. cities performed by Christopher Totten and Sutham Cobkit (Cheurprakobkit), the researchers found that "[p]erhaps most significantly, the study's findings regarding police chiefs' perceptions of the impact of exclusion of evidence as a deterrent for police misconduct in the knock-and-

announce area may not reflect the [majority's] belief in *Hudson* that exclusion is no longer a necessary and effective deterrent for knock-and-announce misconduct by police during searches. In particular, the majority of police chiefs (64.6%) perceives the factor of exclusion of evidence as having a significant impact in deterring knock-and-announce violations (e.g., 64.6% of police chiefs perceive that exclusion "helps the most" or "helps somewhat" in deterring these violations)." Totten and Cheurprakobkit, *The Knock-and-Announce Rule and Police Searches after Hudson v. Michigan: Can Alternative Deterrents Effectively Replace Exclusion for Rule Violations?* 15 New Crim. L. R. 414, 448 (2012).

James J. Tomkovicz, Professor at the University of Iowa College of Law, argued that the majority's premise that exclusion offered little deference effect for knock-and-announce violations was illogical. Professor Tomkovicz argued that "[a] proper understanding of the role of the suppression doctrine in preserving constitutional interests unmasks the illogic of the attenuation doctrine announced in *Hudson*. The knock-and-announce rule's underlying interests - even if they are as limited as the majority asserts - would undoubtedly be served by depriving officers of directly connected fruits, sending the message that such violations cannot yield profit. To the extent that future officers - chary of losing valuable evidence - would comply with the rule, human life and limb, property, and the privacy and dignity interests violated by unannounced entry would all be protected." Tomkovicz, *Hudson v. Michigan and the Future of Fourth Amendment Exclusion*, 93 Iowa L. Rev. 1819, 1871 (2008).

Andrew E. Taslitz, Professor at Washington College of the Law at American University argues vehemently against the United States Supreme Court's narrowed view in *Hudson* of the purpose of the exclusionary rule. Taslitz argues that the Court had previously viewed the exclusionary rule as an inherent part of the Fourth Amendment, and as dictated by judicial

integrity, in addition to the sole justification enumerated in *Hudson* that it is necessary to deter police violations. Professor Taslitz further argues that the majority's assertion in *Hudson* "that deterrence is little needed because police today rarely violate constitutional rights" is unsupported by "empirical data and psychological and economic theory[, which] establish quite the opposite: law enforcement violations of Fourth Amendment protections are numerous, and the obstacles to alternative remedies so great as to render them largely meaningless." Taslitz, *Why Judicial Integrity Justifies the Exclusionary Rule*, 10 Ohio St. J. Crim. L. 419, 419-421 (2013).

Professor Taslitz notes that search and seizure violations are numerous and that civil remedies do very little to deter police misconduct and generally are not available to the bulk of indigent criminal defendants. *Id.* at 425-429, citing Harris, *How Accountability-Based Policing Can Reinforce-or Replace-The Fourth Amendment Exclusionary Rule*, 7 Ohio St. J. Crim. L. 149, 156-157 (2009); Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence"*, 37 Fordham Urb. L.J. 743, 771 (2010); Schulhofer, *More Essential Than Ever: The Fourth Amendment in the Twenty-First Century 68* (2010) ("There is no evidence to support (and much evidence to contradict) the Court's assumption [in *Hudson*] that internal police discipline and civil damage liability provide all the incentives needed to ensure fair treatment [of racial minorities]."). Thus, "[t]he result in a regime without an exclusionary rule is that such minorities and the poor would be disproportionately denied any remedy whatsoever." *Id.* at 429.

CONCLUSION

In order to adequately protect the rights guaranteed to all Ohio citizens by our state Constitution, especially those indigent criminal defendants with no real recourse to any civil

remedy, this Court should hold that exclusion is the proper remedy for violations of Ohio's knock-and-announce rule under Article I, Section 14 of the Ohio Constitution. The Office of the Ohio Public Defender urges this Court to reverse the judgment of the Seventh District Court of Appeals and affirm the decision of the Mahoning County Common Pleas Court.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

/s/: *Katherine Ross-Kinzie*
KATHERINE ROSS-KINZIE (0089762)
Assistant State Public Defender

250 E. Broad Street – Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
katherine.ross-kinzie@opd.ohio.gov

COUNSEL FOR AMICUS CURIAE
OHIO PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Merit Brief of Amicus Curiae Office of the Ohio Public Defender** was sent by regular U.S. mail, postage prepaid, to Ralph Rivera, Assistant Mahoning County Prosecutor, 21 W. Boardman Street, Youngstown, Ohio 44503; and Louis M. Defabio, 4822 Market Street, Suite 220, Youngstown, Ohio 44512, on this 8th day of August 2016.

/s/: *Katherine Ross-Kinzie*
KATHERINE ROSS-KINZIE (0089762)
Assistant State Public Defender

COUNSEL FOR AMICUS CURIAE
OHIO PUBLIC DEFENDER

#469546