IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND,	:	
	:	
Plaintiff-Appellant,	:	Case No.: 2016-0172 and 2016-0282
	:	
v.	:	
	:	On Appeal from the
BENJAMIN OLES,	:	Cuyahoga County Court of Appeals
	:	Eighth Appellate District
Defendant-Appellee.	:	Case No. 102835

BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON BEHALF OF DEFENDANT-APPELLEE

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STATEMENT OF INTEREST OF AMICUS

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured by law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

STATEMENT OF THE CASE AND THE FACTS

Amicus concurs in the Statement of the Case and the Facts presented in the Merit Brief of Appellee.

ARGUMENT

I. Summary of Argument

The City has presented two propositions of law. The first is that investigative questioning of an individual by the police in a police vehicle does not constitute a custodial interrogation requiring *Miranda* warnings. The second is that evidence obtained "independently" of an investigation of driving under the influence cannot be suppressed.

No extensive analysis of those contentions will be made here. As amply demonstrated by the Merit Brief of Appellee, neither of those arguments have merit. Quibbling about whether the officer took Oles' keys before placing him in the cruiser is beside the point; no one could seriously believe that Oles, or anyone else for that matter, being placed inside a police vehicle and questioned by a uniformed police officer, would believe that terminating the interrogation and leaving the vehicle was a viable option. When a police officer commands someone to enter the police car and begins to grill him, that is a custodial interrogation, in any legal or common-sense use of the term.

Similarly, the City's argument that the officer "independently" determined that there was a basis for administering field sobriety tests has no merit. The lower court's opinion, and the Appellee's Merit Brief, demonstrates that prior to being told by Oles that he'd had four mixed drinks at the wedding party, under both the facts and the law, the officer had not developed the reasonable suspicion necessary for administration of the tests – a position in which the officer himself concurred.

Instead, the brief of *amicus* will focus on an issue that has recently become a dominant theme in this Court's consideration of constitutional issues: whether the Court should use the United States Constitution, or Ohio's own Constitution, as a guide. *Amicus* will review the

Court's recent decisions in that area, and present a coherent rationale for relying on Ohio's Constitution to determine critical questions of the constitutional rights of Ohio citizens.

II. Development of the Ohio constitutional doctrine.

A. Evolution of the doctrine of "new federalism." This court's first occasion to examine the relationship between the Federal and Ohio Constitutions came in *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993), in which the plaintiffs sought to invalidate certain Cleveland regulations which banned possession or sale of "assault weapons." The court noted the development of the doctrine of "new federalism," as argued in Justice William Brennan's 1977 law review article. Brennan, State Constitutions and the Protection of Individual Rights (1977), 90 Harv.L.Rev. 489. At the time *Arnold* was decided, the United States Supreme Court had not held that the right to bear arms was an individual, rather than a collective one,[1] so the Federal constitution was of no help to plaintiffs.

The court instead engaged in a comprehensive analysis of Section 4, Article I of the Ohio Constitution, the analog to the Second Amendment in the Bill of Rights. The court concluded that while the state constitutional provision did indeed provide for a personal right to bear arms, it did not guarantee an absolute one, and the police power allowed a municipality to regulate the possession of certain types of weapons.

As the court recently acknowledged, while *Arnold* "stands as the court's first clear embrace" of the idea that the Ohio Constitution provided its own set of protections of the civil liberties of its residents, "in the wake of *Arnold*, we have often, but inconsistently, heeded the

[1] It eventually held that the right was an individual one in *McDonald v. City of Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010).

hortatory call of to the new federalism." *State v. Mole,* Slip Opinion 2016-Ohio-5124, ¶¶15-16. While the court has frequently held that various provisions of the Ohio constitution provide greater protections than their Federal analogues, at other times, they have found them to be mutually inclusive.

This is particularly true in the area of Fourth Amendment protections. In *State v. Jones*, 88 Ohio St.3d 430, 2000-Ohio-374, 727 N.E.2d 886, the court held that an arrest for a minor misdemeanor, prohibited in most cases by R.C. §2935.26, "violates the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution."

Just three years later, though, in *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, the court was forced to revisit the issues, because in the interim the United States Supreme Court had held in *Atwater v. Lago Vista*, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001) that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." U.S. at 354.

That foreclosed Brown's reliance on the United States Constitution, and his situation was made worse by the fact that *Jones* had held that the protections of the Ohio Constitution were co-extensive with those afforded by the federal Constitution. The court in *Brown* nonetheless looked beyond the Fourth Amendment, and held 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." *Brown,* ¶7.

The court most recently revisited this issue in another case by the same name, but with a different defendant, in *State v. Brown*, 143 Ohio St.3d 444, 2015-Ohio-2438, 39 N.E.3d 496. In that case, a township police officer conducted a traffic stop of a car for crossing over the solid

fog line. Under R.C. §4513.39, the officer lacked authority to do so because he was outside his jurisdiction. Despite holding six years earlier in *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, 902 N.E.2d 464, that a stop outside the officer's jurisdiction did not violate the Fourth Amendment, the court came to a different conclusion regarding the application of the Ohio Constitution, holding that "the traffic stop and the ensuing search and arrest in this case were unreasonable and violated Article I, Section 14 of the Ohio Constitution, and the evidence seized as a result should have been suppressed."

Regardless of the variance of the court's approach in the past, *Mole* stands for the clear affirmation of *Arnold's* first 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.

B. Criticisms of the doctrine. There have been two main criticisms lodged against the "new federalism" doctrine. The first is that Justice Brennan's advocacy for it was outcome-motivated. According to figures provided each fall by the Harvard Law Review, during the heyday of the Warren Court, Brennan dissented only 2.6% of the time in cases disposed of by written opinion. With the replacement of liberals on the Court by Warren Burger, a then-conservative Harry Blackmun, William Rehnquist, and Lewis Powell, by 1975 Brennan was dissenting almost one-third of the time. It is understandable, according to the critics, that Brennan would seek to have state courts accomplish what he no longer could in the Supreme Court.

This criticism ignores the fact that state interest in utilizing their own constitutions substantially pre-dated Brennan's 1977 law review article. As early as 1962, the Georgia Supreme Court held that while a law requiring all films to obtain the prior approval of the Board of Motion Pictures Censors did not violate the First Amendment, it did violate Georgia's free speech provision. *K. Gordon Murray Productions, Inc. v. Floyd*, 217 Ga. 784, 125 S.E.2d 207 (Ga. 1962). See also *Simonson v. Cahn*, 27 N.Y.2d 1, 261 N.E.2d 246 (N.Y. 1970) (grand jury indictment); *State v. Moore*, 79 Wn.2d 51, 483 P.2d 630 (Wash. 1971) (self-incrimination); *Commonwealth v. Davis*, 369 Mass. 886, 343 N.E.2d 847 (Mass. 1976) (right to bear arms); *State v. Burkhart*, 541 S.W.2d 365 (Tenn. 1976) (right to counsel). In short, whatever motivations Brennan might have had in advocating for state constitutionalism, he simply joined a movement that had already begun.

The second criticism is that state constitutional provisions were modeled after the Bill of Rights, and should be read as being co-extensive with them. This criticism also fails, for two reasons. First, it has the process backwards: the Bill of Rights was modeled after the state constitutions, rather than the other way around. The First Amendment's Free Exercise and Establishment Clauses were drawn from the Virginia Statute for Religious Freedom, written by Thomas Jefferson and passed by that state in 1786. At the time of the Framing, every state constitution provided for trial by jury; a majority of the state constitutions provided for rights against self-incrimination, cruel and unusual punishment, excessive bail, and unreasonable searches and seizures, and for confrontation, counsel, notice of charges, due process, and compulsory process. See chart at http://teachingamericanhistory.org/bor/origins-chart/, last accessed 9/7/16.

Ohio's Constitution, initially passed in 1802, and then substantially revised in 1851, post-dated the passage of the Bill of Rights, and so the temptation exists to believe that its analogous provisions were intended merely to echo the protections afforded by the Federal document.

But this leads to the second problem with the argument that the state constitutions were merely intended to duplicate the protections already provided by the Bill of Rights. At the time the Ohio Constitution was drafted and revised, the first ten amendments to the United States Constitution provided *no* protection to Ohio citizens; the Bill of Rights applied only to the Federal, not state, governments. *Barron v. Baltimore*, 32 U.S. 243, 8 L.Ed. 672 (1833). Indeed, it was not until the Supreme Court began using the Fourteenth Amendment in the 1960's to "incorporate" the Bill of Rights so that they applied to the States that citizens could rely on anything except their own state constitutions for protection of their civil liberties.[2]

C. The "new federalism" doctrine advances important constitutional and societal goals. The concept of state constitutionalism is in keeping with the basic theory of federalism. As one commentator has noted,

> Our constitution's founders believed that the rights of Americans could only be secured by creating a federal system full of checks and balances. They borrowed this idea from the French philosopher Montesquieu, who proposed that governmental authority be dispersed among competing institutions in order that no part of the government could achieve so much power as to have the capacity for tyranny. The federal system created in 1787 supposes two kinds of dispersion of power: One is vertical, that we call separation of powers: legislative, judicial, and executive. The other is horizontal, between state governments and the national government.

Randall T. Shepard, Second Wind for the Indiana Bill of Rights, 22 Ind.L.Rev 575, 586 (1988).

[2] The Court had applied the First Amendment's protections of speech and religious liberty prior to that time; the Fourth, Fifth, and Sixth Amendments were, with few exceptions (such as the right to grand jury indictment) incorporated in the 1960's.

While this might provide an abstract rationale for a true federalist approach, there are practical reasons as well. The idea that the United States Constitution is the final word on civil rights and liberties presumes that the states are homogeneous entities: that the right to bear arms or the right to free exercise of religion meant the same thing to the framers of the state constitutions of, say, Oregon and Massachusetts. But they do not:

> The founders of a populist frontier state with a tradition of ferocious individualism, like Washington or Oregon, probably intended to carve out a large sphere of rights, a larger arena of activity into which the government could not intrude, at least with respect to such matters as bearing arms and avoiding scrutiny, than a more communitarian, homogeneous state like Massachusetts or one with sectarian roots like Maryland. Those latter states, on the other hand, might be assumed to have cared more deeply about matters of religion.

David Schuman, Advocacy of State Constitutional Law Cases: A Report from the Provinces, 2 Emerging Issues in St. Const. L. 275, 285 (1989).

And there are substantial differences in the need for protections of various rights from state to state. Just three months ago, in *Utah v. Strieff*, ___ U.S. ___, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016), the Court held that an illegal stop did not require exclusion of evidence if it turned out that the person stopped had an outstanding arrest warrant, even if the officer was not aware of it. Whatever the merits of the decision, its application to more racially diverse states and areas could prove problematic. As Justice Sotomayor noted in her dissent in *Strieff*, in Ferguson, Missouri, the majority-black city which was the site of extensive protests after a police shooting of a black man, 16,000 of the 21,000 residents had outstanding warrants, the vast majority for minor traffic violations. *Strieff, supra*, S.Ct. at 2068 (Sotomayor, J., dissenting). A state like Ohio, with cities of significant minority populations, might give second thought to giving the police a pass for illegal stops if the suspect has an outstanding warrant, especially

given the history of racially discriminatory law enforcement. National Institute of Justice, Racial Profiling and Traffic Stops, http://www.nij.gov/topics/law-enforcement/legitimacy/pages/traffic-stops.aspx, last accessed 9/7/16.

III. Application of Ohio's constitution to the case at bar.

In *Farris*, *supra*, the court applied the Ohio constitution to the question of whether the failure to give Farris his *Miranda* warnings required exclusion of the evidence obtained as a result of his statements. The United States Supreme Court had held in *United States v. Patane*, 542 U.S. 630, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004), that it did not. This court, relying on *Arnold's* declaration that the Ohio constitution was a document of independent force, acknowledged the question and answered it:

> To hold that the physical evidence seized as a result of unwarned statements is inadmissible, we would have to hold that Section 10, Article I of the Ohio Constitution provides greater protection to criminal defendants than the Fifth Amendment to the United States Constitution. We so find here.

Farris, ¶48.

The court found that to follow *Patane* would "would encourage law-enforcement officers to withhold Miranda warnings and would thus weaken Section 10, Article I of the Ohio Constitution." ¶49.

Obviously, *Farris* precludes the City from arguing that the field sobriety tests, which the officer decided to administer after he learned that Oles had four mixed drinks at a wedding, can be admitted despite the failure to *Mirandize* him. Instead, as noted, the City argues that the officer had "independent" evidence of intoxication sufficient to justify the administration of the tests, namely the odor of alcohol and Oles' "deliberate" movements. As the Merit Brief of

Appellee capably demonstrates, such observations fall far short of the requirement of probable cause to administer the tests, especially in light of the substantial evidence contradicting intoxication, primarily the lack of any indication of difficulties in coordination or speech, or any of the numerous other factors cited in *State v. Evans*, 127 Ohio App.3d 56, 711 N.E.2d 761 (11th Dist. 1998).

But the City also resorts to numerous Federal cases, such as *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2 317 (1984), for the proposition that placing in defendant in a police cruiser does not constitute a custodial interrogation requiring the *Miranda* advisement. This court decided in *Farris* that the self-incrimination provisions of Section 10, Article I of the Ohio Constitution provide greater protection to Ohio's citizens than does the Fifth Amendment to the United States Constitution. Since then, this court has increasingly articulated the view that other provisions of the Ohio Constitution provide increased protections as well. *State v. Brown*, *supra*, 99 Ohio St.3d 323 (arrest for minor misdemeanor); *State v. Blankenship*, 145 Ohio St.3d 221, 2015-Ohio-4624, 48 N.E.3d 516 (cruel and unusual punishment); *State v. Mole*, *supra* (equal protection). The court should follow that policy, and utilize the Ohio Constitution in determining that Oles was subject to a custodial interrogation which required he be given the *Miranda* warnings, for the reasons cited in the Merit Brief of Appellee.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Ohio Association of Criminal Defense Lawyers prays the Court to affirm the decision of the 8th District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of *Amicus Curiae* Ohio Association of Criminal Defense Lawyers on Behalf of Defendant-Appellee was served on September 7th, 2016, by ordinary U.S. Mail upon the following:

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