In the Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2014-1295
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Ashtabula County
v.	:	Court of Appeals,
	:	Eleventh Appellate District
MICHAEL D. BAKER,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. 2013-A-0020
	:	

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLANT STATE OF OHIO

NICHOLAS A. IAROCCI (0042729)
Ashtabula County Prosecutor

SHELLEY M. PRATT* (0069721)
Assistant Prosecutor
**Counsel of Record*
25 W. Jefferson Street
Jefferson, Ohio 44047-1092
440-576-3664
440-576-3600 fax

Counsel for Appellant
State of Ohio

WILLIAM P. BOBULSKY* (0007357)
**Counsel of Record*
1612 East Prospect Road
Ashtabula, Ohio 44004
440-998-4214

Counsel for Appellee
Michael Baker

MICHAEL DEWINE (0009181)
Attorney General of Ohio

ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
PETER T. REED (0089948)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Michael DeWine

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INTRODUCTION

Defendant Michael Baker struck and killed a pedestrian while driving home in the early hours of March 6, 2011. The state trooper who reported to the scene detected a "strong odor of alcohol" and observed several signs of impairment during a subsequent HGN test. Defendant Baker consented to a blood draw and subsequent testing of the sample showed a .095 blood-alcohol level. At trial, though, Baker moved to suppress the test results because the trooper (responding to a fatal accident) technically violated a regulatory requirement—that a sample be refrigerated as long as it is retained—by not refrigerating the blood sample for four hours and ten minutes before placing it in the mail to the laboratory. *See* Ohio Adm. Code 3701-53-05 ("While not in transit or under examination, all blood and urine specimens shall be refrigerated."). The trial court granted the motion to suppress and the Eleventh District affirmed.

This Court should reverse. The question presented was decided long ago in *State v. Plummer*, 22 Ohio St.3d 292, 490 N.E.2d 902 (1986), which held under nearly identical facts that such test results are admissible because (a) the State is in "substantial compliance" if a sample is only unrefrigerated for 4.5 to 5.5 hours, *id.* at 294-95, and (b) a defendant cannot be prejudiced by a pre-testing failure to refrigerate, which can only result in alcohol evaporation, *id.* at 295 n.2. *Plummer* therefore dictates that Baker's sample is also admissible, as the State substantially complied with the regulations by only leaving his sample unrefrigerated for about four hours between the time of arrest and shipment to the laboratory.

The lower court relies on *State v. Burnside*, 100 Ohio St. 3d 152, 2003-Ohio-5372, 797 N.E.2d 71, but that case did not disturb *Plummer*'s holding. *First*, this Court itself confirmed in 2005 that *Plummer* remains good law after *Burnside*, finding substantial compliance with the refrigeration requirement despite a period of non-refrigeration prior to testing. *See State v. Mayl*, 106 Ohio St. 3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, ¶ 50 & n.2. Although the lower court

discounts *Mayl*, it does so incorrectly and its position conflicts with later decisions from Ohio's other appellate districts that follow *Plummer*.

Second, *Burnside* simply rejected as overbroad the approach taken by some appellate courts that had expanded *Plummer* to require a "judicial determination that an alcohol test . . . is unreliable" rather than an inquiry into actual compliance with applicable regulations. *Burnside*, 100 Ohio St. 3d at ¶ 32. "Substantial compliance" excuses "clearly de minimis" errors or "minor procedural deviations," but still requires "*compliance with the regulations*." *Id.* at ¶¶ 32, 34 (emphasis original). In *Burnside*, the State had presented no evidence of actual compliance, so the test results were inadmissible. *Id*. at ¶ 33. But *Burnside* did not revisit *Plummer*'s holding, it simply reemphasized that the state must substantially comply with the regulatory text.

Third, *Plummer* is dispositive here in light of *Burnside*'s emphasis on substantial compliance with the regulatory text. The regulatory text shows that the refrigeration requirement is necessarily one of degree, while the solid-anticoagulant requirement considered in *Burnside* was not susceptible to substantial-compliance analysis—either a solid anticoagulant is used when drawing a blood sample or else it is not. To determine what constitutes "substantial compliance" here, the court must turn to the text of the regulation, which requires that a sample be refrigerated as long as it is retained, and that it must be retained for at least a year. Here, as in *Plummer*, it is uncontroverted that the State refrigerated Baker's sample for virtually all of the time required, only leaving the sample unrefrigerated for four hours of the yearlong requirement. This constitutes substantial compliance and only a *de minimis* violation. Any argument to the contrary must look beyond the regulatory text.

Fourth, the purpose of the regulatory requirement further supports the admissibility of Baker's blood sample. Non-refrigeration prior to testing will never yield a *higher* alcohol

content because it only risks alcohol *evaporation* from the sample. The purpose of the refrigeration requirement, then, is the preservation of the sample during the *post*-testing period. Indeed, the refrigeration requirement gives effect to Defendant's right to independently test his sample by requiring that it be preserved in the same condition as it was when tested. Accordingly, the State's actions in this case comply with the regulatory purpose of the refrigeration requirement, and defendant's test results are admissible.

Fifth, the relevant regulation has remained unchanged over the past 27 years. This inaction over the past decades creates a presumption that this Court correctly interpreted the promulgated regulations. It thus confirms that *Plummer* is dispositive.

Because *Plummer* controls, the burden shifts to Baker to establish prejudice arising from the State's technical violation. He cannot do so here, for the reasons stated above.

STATEMENT OF AMICUS INTEREST

As Ohio's chief law officer, the Attorney General has a keen interest in the admissibility of urine and blood tests that substantially comply with the relevant regulations. In addition, the Attorney General oversees numerous local law enforcement agencies that prosecute drunk driving and collect evidence for use in those prosecutions. The Eleventh District's decision casts doubt on the proper methodology for collection of such evidence and the admissibility of blood and urine tests in drunk-driving prosecutions. If this Court were to affirm the Eleventh District's decision, it would retroactively raise these standards and potentially result in increased costs and the exclusion of relevant evidence.

STATEMENT OF THE CASE AND FACTS

Defendant Baker struck and killed a pedestrian in Andover Township while driving home in the early hours of March 6, 2011. *State v. Baker*, 11th Dist. Ashtabula No. 2013-A-0020, 2014 WL 2958271, *1 (2014) ("App. Ct. Op."). The trooper who responded to the scene

identified Baker as the driver of the vehicle. *Id.* After detecting a "strong odor of alcohol" and other signs of impairment, the trooper requested a blood draw and Baker consented. *Id.* At about 1:50 a.m., Baker's blood was drawn in the emergency room at Saint Joseph's Hospital. *Id.* The trooper then mailed the vials at about 6:00 a.m. *Id.* The vials were not refrigerated during this time. *Id.* Baker's blood-test result showed 0.095 grams of alcohol per one hundred milliliters. *Id.*

Baker was charged with operating a motor vehicle under the influence in violation of R.C. 4511.19(A)(1)(b). *Id.* He pleaded not guilty and filed a motion to suppress the blood-test results, arguing that the State had not complied with the regulatory requirements for admissibility because the trooper had not refrigerated the blood sample from the time it was taken to when it was mailed about four hours and ten minutes later. *Id.* The trial court granted the motion to suppress, holding that the State's failure to refrigerate the sample during this time was "not a de minimus [sic] shortcoming" because the "regulations require refrigeration." *Id.*

The Eleventh District affirmed in a split decision. The lead opinion held that the State had not complied with the regulations requiring refrigeration, triggering the requirement that the State "put forth evidence at the suppression hearing that the lack of compliance . . . did not affect the reliability of the blood test results." *Id.* at *3. The lead opinion cited *State v. Burnside* in support of the proposition that "in the absence of any evidence to the contrary" the court may not substitute its own reliability opinion for that of the Director of Health, who issued the applicable regulation. *Id.* at *4. A concurring opinion disagreed with the lead opinion's interpretation that *Burnside* allowed independent expert testimony, noting that *Burnside* required substantial compliance with the regulations, not an independent judicial judgment of reliability. *Id.* at *8.

But the concurring opinion agreed that the refrigeration violation was not *de minimis*, and so agreed that the test results were inadmissible. *Id.* at *9.

ARGUMENT

Amicus Curiae's Proposition of Law:

> *Alcohol-test results are admissible under R.C. 4511.19(D)(1)(b) even if the underlying sample is not refrigerated for four hours and ten minutes prior to testing, because this short period of non-refrigeration constitutes only a de minimis violation of the regulatory requirement in Ohio Adm. Code 3701-53-05(F), as this Court explained in* State v. Plummer, *22 Ohio St. 3d 292 (1986) and* State v. Mayl, *106 Ohio St. 3d 207, 2005-Ohio-4629.*

To be admissible in a prosecution for driving under the influence, a blood or urine sample must be "analyzed in accordance with methods approved by the director of health." R.C. 4511.19(D)(1)(b). The Director of Health has issued regulations governing such methods in Ohio Adm. Code 3701-53-01 *et seq.*, which include the requirement that a blood specimen be refrigerated "while not in transit or under examination" as long as the sample is retained. Ohio Adm. Code 3701-53-05(F); 3701-53-06(A). The question presented here is whether test results may be admitted despite a four-hour-and-ten-minute period of non-refrigeration immediately after the sample is drawn.

This Court answered that precise question in *State v. Plummer*, admitting test results under nearly identical facts. 22 Ohio St. at 294-95. Ignoring this precedent and decisions from numerous other districts on point, the Eleventh District here held that the State was *not* in substantial compliance after only four hours and ten minutes of non-refrigeration. But *Plummer* controls despite the Eleventh District's misreading of *Burnside*, as later case law and the regulations themselves confirm. Accordingly, the lower court should be reversed.

A. *State v. Plummer* is dispositive here because it held that alcohol-test results are admissible even if a sample is unrefrigerated for up to five-and-a-half hours.

1. Literal compliance with the regulation is not required.

Plummer held that a blood or urine sample is admissible absent "literal" compliance with the regulatory refrigeration requirement because "strict compliance" with the requirement "is not always realistically or humanly possible." *Plummer*, 22 Ohio St. 3d at 294-295; *see also Mayl*, 106 Ohio St. 3d at ¶ 49; *Burnside*, 100 Ohio St. 3d at ¶ 34. As explained *infra*, the refrigeration requirement is designed not to prohibit technical violations, but to ensure the long term retention and preservation of the sample post-testing. *Plummer*, 22 Ohio St. 3d at 295 (the refrigeration requirement "contemplates cases involving longer periods of specimen retention, rather than a relatively slight delay between receipt and testing as in this case").

2. *Plummer* held that test results were admissible despite non-refrigeration of the sample for four-and-a-half to five-and-a-half hours.

Instead of requiring literal compliance, this Court applies a two-part test. The results of an alcohol test are admissible if (a) administered in "substantial compliance" with the regulatory requirements, and (b) the defendant is unable to demonstrate that he has been prejudice by the State's failure to "comply with the literal requirements of the administrative regulation regarding refrigeration." *Plummer*, 22 Ohio St. 3d at 295.

The Court found that the test results in *Plummer* were admissible under this standard. First, the Court noted that the State had refrigerated the sample for all but a 1.5 hour period before transit and a 3-4 hour period immediately after transit. *Id*. at 294. This constituted substantial compliance because non-refrigeration was minimal compared to the "longer period of specimen retention" contemplated by the regulations. *Id*. at 295. Second, the Court held that the defendant could not demonstrate that he was prejudiced by the failure to refrigerate the sample during this 4.5-5.5 hour period. *Id*. Indeed, the Court rightly noted that any failure to refrigerate

may have *benefited* the defendant, as non-refrigeration can result in vapor loss of alcohol. *Id*. at 295 & n.2.

3. Baker's test results are admissible under *Plummer* because his sample was only unrefrigerated for four hours and ten minutes.

Baker's test results are admissible for the same reasons. The State complied with the refrigeration requirement except for four hours and ten minutes when Baker's sample went unrefrigerated, from withdrawal of the sample at about 1:50 a.m. to mailing at about 6:00 a.m. *See* App. Ct. Op. at *2. This constitutes substantial compliance under *Plummer*, which involved a slightly longer period of non-refrigeration. On remand, defendant will be unable to establish prejudice, because as this Court pointed out in *Plummer*, any failure to refrigerate a sample pre-testing only favors the defendant. Accordingly, the lower courts wrongly excluded Defendant's test results simply because his sample was unrefrigerated for a short period before it was tested.

B. *Burnside* does not affect this analysis under *Plummer*.

Contrary to the lower court's suggestion, *State v. Burnside* does not alter this analysis. *Burnside* left *Plummer* in place. Subsequent case law, *Burnside* itself, and the regulatory text, purpose, and history of the refrigeration requirement all confirm that *Plummer* is dispositive and remains good law.

1. This Court's decision in *Mayl* demonstrates that *Plummer* remains good law, as do subsequent decisions by the appellate courts.

A few years after *Burnside*, this Court affirmed *Plummer* in *Mayl*, 106 Ohio St. 3d at ¶ 50 & n.2. *Mayl* applied *Plummer*'s holding—non-refrigeration for up to five hours constitutes substantial compliance—and held that the State had substantially complied with the refrigeration requirement. *Id*. at ¶ 50 & n.2 (noting that "f]ailure to refrigerate a sample for as much as five hours has been determined to substantially comply with Ohio Adm. Code 3701-53-05(F))" and citing *Plummer*, 22 Ohio St. 3d at 294-95). Although the Court ultimately held that the test

results in *Mayl* were inadmissible based on other regulatory requirements, it applied *Plummer*'s substantial compliance test to all of the regulations at issue. *Id*. at ¶ 49.

Ohio's appellate districts have also generally followed *Plummer*, finding that non-refrigeration between two and fourteen hour constitutes substantial compliance. *See, e.g.*, *State v. Sheppeard*, 2nd Dist. Clark No. 2012-CA-27, 2013-Ohio-812, ¶ 47 (finding substantial compliance under *Mayl* despite 1.5 hour delay); *State v. Morris*, 5th Dist. Licking No. 11-ca-106, 2012-Ohio-3210, ¶ 25 (finding substantial compliance under *Mayl* despite 2 hour delay before refrigeration); *State v. Neale*, 5th Dist. Licking No. 2011-CA-090, 2012-Ohio-2530, ¶ 36 (finding substantial compliance under *Mayl* even though urine sample was not refrigerated for 11-14 hours); *State v. Curtis*, 10th Dist. Franklin No. 09AP-1199, 2011-Ohio-3298, ¶ 35 (finding substantial compliance under *Mayl* even though sample was not refrigerated for four hours); *State v. Price*, 11th Dist. No. 2007–G–2785, 2008–Ohio–1134, ¶ 26 (holding that retention of a blood specimen in an unrefrigerated state for six hours before mailing was not a violation); *State v. Hutson*, 1st Dist. Hamilton Nos. 060274, 060275, and 060276, 2007-Ohio-1178, ¶ 14 (blood sample not refrigerated for approximately two hours and five minutes was admissible as state demonstrated substantial compliance "[o]n the authority of *Plummer* and *Mayl*"); *State v. Glenn*, 3rd Dist. Seneca No. 13-04-15, 2004-Ohio-7038, ¶ 13 (blood sample not refrigerated for 32 minutes was admissible, noting that "several procedural steps" had to be taken during this time); *State v. Schell*, 5th Dist. Stark No. CA-7884, 1990 WL 83992, *2 (June 18, 1990) (finding test results admissible even though sample was not refrigerated for five hours); *but see State v. Mullins*, 4th Dist. Ross No. 12-CA-3350, 2013-Ohio-2688, ¶ 17 (holding a 12 hour delay was not clearly de minimis); *State v. DeJohn*, 5th Dist. Perry No. 06–CA–16, 2007–Ohio–163, ¶ 18 (holding that a 17 hour delay was "not a relatively slight delay or minor procedural deviation").

2. *Burnside* simply refused to extend *Plummer*; it did not disturb *Plummer*'s holding.

Burnside did not disturb *Plummer*'s holding; it simply refused to extend its substantial-compliance doctrine to instances of non-compliance. Indeed, *Burnside*'s analysis begins with a confirmation that the State need only demonstrate "substantial compliance rather than strict compliance" with the applicable regulations. *See Burnside*, 100 Ohio St. 3d at ¶ 27. But *Burnside* rejected earlier appellate court decisions (and the State's position in that case) that had discarded regulatory compliance altogether and instead emphasized a judicial determination of reliability. That position, this Court held, subverted the rulemaking authority of the Director of Health. *Id*. at ¶ 32. And it ran contrary to the statutory text. *Id*. (the statute "provides that *compliance with the regulations*, rather than a judicial determination as to reliability, is the criterion for admissibility"). "Substantial compliance" under *Plummer*, the Court explained, still requires *compliance*, it simply excuses "clearly de minimis" errors and "minor procedural deviations." *Id.* at ¶ 34.

This distinction was important in *Burnside* because the State had presented no evidence whatsoever of compliance with the regulatory requirement at issue—the use of a vacuum container with a solid anticoagulant. *Id*. at ¶¶ 33, 36. Without any evidence of compliance with the regulatory text, *Burnside* excluded the test results. But that is not the case here, where the State complied with the refrigeration requirement for all but a few hours. *Burnside* itself, then, supports the admissibility of Baker's test results.

3. The regulatory context shows that the refrigeration requirement differs in kind from the regulatory requirement considered in *Burnside*.

Ultimately, *Burnside* points the reader back to the regulatory text, and that text demonstrates that the State is in substantial compliance here.

A natural reading of the "solid anticoagulant" requirement in *Burnside* suggests that it is not amenable to a "substantial compliance" analysis. Ohio Adm. Code 3701-53-05(C). As *Burnside* observed, one cannot "substantially" comply with this requirement—either the State used a vacuum container with a solid anticoagulant or else it did not, there is no in between. *Burnside*, 100 Ohio St.3d at ¶ 36.

In contrast, a natural reading of the refrigeration requirement suggests that it only requires substantial compliance, not strict compliance, as *Plummer* held. *See* Ohio Adm. Code 3701-53-05(F); *Plummer*, 22 Ohio St. 3d at 293 ("strict compliance is not always realistically or humanly possible"). The text of the regulations themselves makes strict and literal compliance with the refrigeration requirement impossible because such a reading would conflict with other regulatory requirements. A sample, for example, cannot be refrigerated while it is drawn, capped, labeled, and sealed in accordance with the regulatory requirements of Ohio Adm. Code 3701-53-05(D)-(E); it cannot be refrigerated before, during, and after transit as contemplated by Ohio Adm. Code 3701-53-05(F); it cannot be refrigerated before, during, and after actual testing as contemplated by Ohio Adm. Code 3701-53-05(F); and it cannot be refrigerated during all of the above time periods if defendant chooses to have the sample independently tested as contemplated by R.C. 4511.19(D)(3). *See Plummer*, 22 Ohio St. 3d at 293 (making the same point). Since strict compliance is impossible, only substantial compliance can be required.

4. The regulatory context shows that substantial compliance is measured by the one year period for which a sample must be refrigerated.

But if only substantial compliance is required, by what standard is substantial compliance (or a *de minimis* violation) measured? The express terms of the regulation answer this question. A blood sample "shall be retained in accordance with" the refrigeration requirement "for a period

of not less than one year." Ohio Adm. Code 3701-53-06(A). A sample must be refrigerated for a "substantial" portion of this period; any non-refrigeration must be for a "de minimis" period.

Based solely on the regulatory text, therefore, the State substantially complied with the regulatory requirements. The State only left Baker's blood sample unrefrigerated for approximately 4.2 hours of the at least 8,760 hours required by the regulations. The text demands the conclusion that the State substantially complied with the regulation. So while the regulatory text in *Burnside* suggested that the State had not complied, the regulatory text here demonstrates substantial compliance. Any other framing of "substantial compliance" must go beyond the text of the regulation to either the underlying purpose of the regulation or a broader question of reliability.

5. The regulatory purpose shows that the requirement is only concerned with post-testing refrigeration.

If the Court looks beyond the text of the regulation to the purpose of the regulations, it finds an even stronger case for admitting Baker's test results. The Department of Health designed the refrigeration requirement to reduce potential vapor loss of alcohol. *See* Leonard J. Porter (then Chief Toxicologist and Chief of the Alcohol Testing, Approval and Permit Program for the Ohio Department of Health), *The Impact of Chemical Test for Intoxication (Senate Bill 432) Considered* (1983) at 159 ("[w]hen specimens are not in transit or analysis, it is required by rule that they be refrigerated. This further reduces vapor loss of alcohol . . ."") (as quoted in *Plummer*, 22 Ohio St. 3d at 295 n.2). This means that any failure to refrigerate pre-testing can only benefit the *defendant*, not the *State*, by reducing the alcohol content of his sample.

Therefore, as a requirement for the admission of evidence, the refrigeration requirement is concerned with post-testing refrigeration, not pre-testing refrigeration. While pre-testing refrigeration may be the best practice to ensure a high conviction rate, it makes little sense for

pre-testing refrigeration to be an absolute requirement of admissibility. After all, if the State does not refrigerate the sample before testing, and the test results *still* show a high alcohol-content even after possible alcohol evaporation, the defendant more certainly violated the law. This was the conclusion reached by this Court in *Plummer*. 22 Ohio St. 3d at 295 ("the storage temperature requirement . . . contemplates cases involving longer periods of specimen retention, rather than relatively slight delay between receipt and testing as in this case"). Besides, law enforcement is already incentivized to refrigerate a sample pre-testing to ensure a successful prosecution; there is no reason for it to be an absolute regulatory requirement.

The regulatory and statutory texts also support this conclusion by showing *why* post-testing preservation is important. The same statutory subsection that requires compliance with the regulatory requirements also provides a defendant with an opportunity to independently test his own sample. *See* R.C. 4511.19(D)(3). In order for this right to independent testing to be meaningful, the sample must still be in the same condition as when the State tested it. This suggests that the purpose of the refrigeration requirement and its yearlong time frame (*see supra*) is to give effect to this statutory right. By making admissibility of the test results contingent on the proper preservation of the sample, the regulations incentivize the State to preserve not only the test results, but also the sample itself.

C. Plaintiff has not established that he was prejudiced by the state's de minimis failure to refrigerate the sample for four hours and ten minutes before it was tested.

If a state has substantially complied with the refrigeration requirement, this Court's precedent shifts the burden of proof to Plaintiff to establish that he was prejudiced by the State's *de minimis* shortcoming. *Plummer*, 22 Ohio St. 3d at 295; *Burnside*, 100 Ohio St. 3d at ¶ 36. Here, Plaintiff has not shown prejudice. Nor can he establish prejudice for the reasons stated above: any failure to refrigerate pre-testing can only be beneficial to the defendant.

Accordingly, Defendant's test results are admissible under R.C. 4511.19(D)(1)(b) because the State has complied with the regulatory requirements for admissibility.

CONCLUSION

This Court should reverse the Eleventh District's judgment and remand the case for further proceedings.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

/s Eric E. Murphy
ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
PETER T. REED (0089948)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Michael DeWine

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellant was served on March 16, 2014, by U.S. mail on the following:

Nicholas A. Iarocci
Ashtabula County Prosecutor
Shelly M. Pratt
Assistant Prosecutor
25 W. Jefferson Street
Jefferson, Ohio 44047-1092

Counsel for Appellant
State of Ohio

William P. Bobulsky
1612 East Prospect Road
Ashtabula, Ohio 44004

Counsel for Appellee
Michael Baker

Stephen Hardwick
Office of the Ohio Public Defender
250 E. Broad Street
Suite 1400
Columbus, Ohio 43215

Counsel for *Amicus Curiae*
Ohio Public Defender

Katherine Mullin
Daniel T. Van
Assistant Prosecuting Attorneys
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

Counsel for *Amicus Curiae*
Ohio Prosecuting Attorneys Association

/s Eric E. Murphy
Eric E. Murphy
State Solicitor