

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : **20-1211**
PLAINTIFF/APPELLEE : Supreme Court Case: _____
 : Appellate Case No 28364
V :
 : On Appeal from the
MARIA TURNEY : Second District Court of Appeal
DEFENDANT/APPELLANT : Montgomery County

AMICUS CURIAE DUI DEFENSE LAWYER'S ASSOCIATION

MEMORANDUM IN SUPPORT OF JURISDICTION

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INTEREST OF AMICUS CURIAE DUIDLA

The DUI Defense Lawyers Association (DUIDLA) is a nonprofit national bar association comprised of lawyers throughout North America who endeavor to protect the constitutional rights of all citizens, with the understanding that DUI/DWI cases, by virtue of their frequency and the stigma attached thereto, are often at the front line for erosion of civil liberties.

DUIDLA's mission is to protect and ensure by rule of law those individual rights guaranteed by the state and federal constitutions in DUI-related cases, to resist the constant efforts that are made to curtail these rights, while also facilitating cooperation between the defense lawyers who are engaged in the furtherance of these objectives.

Amicus Curiae DUIDLA has filed amicus briefs in various state supreme courts as well as the United States Supreme Court in cases where it appeared that the court could be aided by the submission of a brief providing a summary of the caselaw in the various states of the union and the instant case clearly fits that mold.

As all fifty states have laws that make it a crime to have above a specific level of alcohol in the person's breath sample, also known as the "DUI per se" charge, DUIDLA is particularly interested in scientific, legal and constitutional issues that would impact upon an accused citizen's ability to get a fair trial in a DUI per se case.

Should this Honorable Court accept the Defendant Appellant's request for review of her case, the DUIDLA would endeavor to provide the Court with a brief outlining how courts throughout the nation have addressed the issues presented in partitioners case.

EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

The ability of the defense to attack the weight of the breath test at trial, through questioning the specific procedures and machine used in the test, implicates fundamental constitutional issues – specifically, the due process right to present a defense. It is axiomatic that where the accused seeks to present expert testimony in support of her defense, if the expert testimony is relevant, probative and tends to support her defense, a trial court's refusal to allow the expert to testify on the critical issues underlying her defense violates due process and the rules of evidence.

As the Appellant outlines in her memorandum in support of jurisdiction, Ohio case law addressing the permissible bounds of attacking the weight of a breath test at trial is a hodgepodge – at best – and there is no clear roadmap for the trial courts to follow when confronted the question of what is permissible and what it forbidden.

Amicus DUIDLA looks forward to the opportunity to provide this Honorable Court with an understanding of how these issues have been, and are, addressed by courts in the other forty-nine states. A thorough review of other state's jurisprudence shows Ohio is an outlier and unconstitutionally restricts relevant and probative evidence that should be available to use to attack breath tests at trial.

STATEMENT OF CASE AND FACTS

Amicus accepts the Statement of the Case and Facts as set forth in Appellant's Memorandum in Support of Jurisdiction.

ARGUMENT

Nothing is more fundamental to the defendant's basic right to a fair trial under the law than the right to bring to court witnesses in his or her defense. As Justice O'Connor held for a unanimous Court in *Crane v. Kentucky*, 476 U.S. 683, 690 (1986):

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi* or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, . . . the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' . . . ('The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment'). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U.S. 257. . . . That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence

In her Memorandum in Support of Jurisdiction the Appellant asserts that she was denied the right to present a complete defense when she was not permitted to call an expert who would have supported her contention that breath test result in her case was not accurate. That expert would have discussed the medically and scientifically expected signs of impairment she would have exhibited if the breath test result was accurate. Appellant also sought to introduce videotapes of her performance on roadside tests and her behavior and demeanor at the roadside prior to her arrest. With expert testimony, this evidence was probative as to whether her true BAC exceeded prohibited levels—and because the court disallowed this evidence, Appellant was unable to present a full defense. This decision is emblematic of breath-test trials throughout the state.

Amicus DUIDLA has informally polled its members and submits that such evidence would be deemed relevant, probative, and admissible in an overwhelming majority of all the other states in the union.

The Appellant also asserts that the trial court improperly curtailed her confrontation and due process rights by unduly limiting counsel in his cross-examination of the state's witnesses about the procedures used in testing her breath. The scope and limits of the accused's confrontation rights in challenging the results of a breath testing device is certainly a matter worthy of the Court's consideration and an area where guidance is sorely needed.

Amicus DUIDLA urges this Honorable Court to accept jurisdiction and to review these important issues and stands ready to submit a brief outlining how the issues are addressed in the other states in the union.

Conclusion

The facts of this case, and Ohio's treatment of breath test evidence at trial, is an issue of critical importance. This Honorable Court has a profound opportunity to consider the issues and provide clear guidance to the lower courts which fundamentally protects the constitutional right to attack the breath machine at trial within appropriate limits – a right citizens in the vast majority of other state's rightfully enjoy. Amicus DUIDLA respectfully urges this Court to accept jurisdiction.

Respectfully Submitted,

/s Daniel J. Sabol_____

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Certificate of Service

The undersigned hereby certifies that a foregoing copy of the Amicus MISJ was served to Stephanie Cook, Chief Prosecutor, City of Dayton, by mail at the address listed above on 10/5/2020.

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