

IN THE SUPREME COURT OF OHIO
CASE NO. 2014-1295

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

**BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION
OFFICE ON BEHALF OF APPELLANT, STATE OF OHIO**

Counsel for *Amicus Curiae* Ohio Prosecuting Attorneys Association Counsel for Defendant-Appellee

JOHN MURPHY,
EXECUTIVE DIRECTOR, OPAA
196 E. State Street, Suite 200
Columbus, Ohio 43215

WILLIAM BOBULSKY
William P. Bobulsky Co., L.P.A.
1612 E. Prospect Rd.
Ashtabula, Ohio 44004

TIMOTHY J. McGINTY (0024626)
Cuyahoga County Prosecutor
(0062932)

Counsel for Amicus Curiae
STEPHEN P. HARDWICK

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394

BRETT HAMMOND (0091757)*
***COUNSEL OF RECORD**

DANIEL T. VAN (0084614)
Assistant Prosecuting Attorneys
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

Counsel for Appellant
NICHOLAS A. IAROCCI (0042729)
Ashtabula County Prosecutor

SHELLEY M. PRATT (0069721)
Assistant Prosecutor
25 W. Jefferson Street
Jefferson, Ohio 44047-1092

TABLE OF CONTENTS

INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE1

STATEMENT OF THE CASE AND FACTS.....2

LAW AND ARGUMENT3

AMICUS CURIAE’S PROPOSITION OF LAW I: IN ORDER TO
SUBSTANTIALLY COMPLY WITH OHIO ADM. CODE 3701-53-05(F), THE
STATE DOES NOT NEED TO ESTABLISH RELIABILITY OF THE BLOOD OR
URINE SAMPLE, NON-COMPLIANCE WITH OHIO ADM. CODE 3701-53-05(F)
MAY BE DE MINIMIS AND ADMISSIBLE ABSENT A SHOWING OF
PREJUDICE TO THE DEFENDANT

CONCLUSION.....13

CERTIFICATE OF SERVICE14

TABLE OF AUTHORITIES

Cases

Cincinnati v. Sand (1975), 43 Ohio St.2d 79, 87, 72 O.O. 2d 44, 48, 330 N.E.2d 908, 912-13 6
City of Defiance v. Kretz, 60 Ohio St.3d 1, 573 N.E.2d 32 (1991) 6
Macaulay v. State, 734 P.2d 1020, 1026 (Alaska App. 1987)..... 11
Mentor v. Giordano (1967), 9 Ohio St.2d 140, 146, 38 O.O.2d 366, 369, 224 N.E.2d 343, 347 .. 6
State v. Baker, 11th Dist. No. 2013-A0020, 2014-Ohio-2873..... 1, 2, 3, 7, 10, 11
State v. Brown (1996), 109 Ohio App.3d 629, 632, 672 N.E.2d 1050 6
State v. Burnside, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71 4, 5, 6, 7
State v. Codeluppi, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691 4
State v. Curtis, 10th Dist. Franklin No. 09AP-1199, 2011-Ohio-3298 10
State v. DeJohn, 5th Dist. Perry No. 06-CA-16, 2007-Ohio-163 10
State v. Dickerson (1986), 25 Ohio St.3d 64, 66, 25 OBR 86, 88, 495 N.E.2d 6, 8..... 6
State v. Fanning (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583..... 4
State v. Mayl, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216 4, 6, 7, 8, 9
State v. McNamara (1997), 124 Ohio App.3d 706, 707 N.E.2d 539..... 5
State v. Mullins, 4th Dist. Ross No. 12C3350, 2013-Ohio-2688..... 10
State v. Plummer, 22 Ohio St.3d 292, 490 N.E.2d 902, 22 O.B.R. 461 (1986)..... 4, 6, 8, 9, 11
State v. Rauscher, 3d Dist. Marion No. 9-06-42, 2007-Ohio-3339 10
State v. Roberts, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168 4
State v. Schell, 5th Dist. Stark No. CA-7884, 1990 WL 83992 (June 18, 1990)..... 10
State v. Schneider, 1st Dist. Hamilton No. C-120786, 2013-Ohio-4780..... 9, 10
State v. Steele (1977), 52 Ohio St.2d 187, 192, 6 O.O. 3d 418, 421, 370 N.E.2d 740, 743 ... 6, 7, 9
Village of Gates Mills v. Wazbinski, 8th Dist. No. 81863, 2003-Ohio-5919..... 10

Statutes

R.C. 4511.19 5, 7

Other Authorities

1 R. Erwin, *Defense of Drunk Driving Cases* Section 17.07 at 17-68 (3rd ed. 1987)..... 11
Ohio Adm. Code 3701-53-05(F)..... 2, 3, 4, 5, 8, 9

INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae, Ohio Prosecuting Attorney's Association ("OPAA") has an interest in the admissibility of blood test results, as it impacts the ability of the State of Ohio to effectively prosecute cases involving intoxication, including charges of aggravated vehicular assault, aggravated vehicular homicide, and operating a vehicle under the influence of alcohol and drugs.

At issue in this case is the requirement pursuant to OAC 3701-53-05(F) that blood and urine samples be refrigerated while not in transit or under examination. This case squarely presents this Court with the opportunity to clarify the legal standards for determining when blood and urine samples that have not been kept in strict compliance with OAC 3701-53-05(F) are admissible.

In *State v. Baker*, 11th Dist. Ashtabula No. 2013-A0020, 2014-Ohio-2873, three of the five judges of the Eleventh Appellate District provided three different opinions on how to treat the approximate four hour period of time in which Appellee Michael Baker's blood sample remained unrefrigerated prior to its mailing. Troubling in *Baker* is that it undermines any notion that non-compliance with the refrigeration requirement can be *de minimis*. Instead, the lead opinion holds that prosecutors must always demonstrate the reliability of any blood alcohol test while the concurring opinion requires strict compliance with refrigeration requirements.

Uniformity and resolution of any confusion on this matter should be resolved because any rule of law reached by this Court would extend beyond the mere admissibility and exclusion of evidence. Placing an additional requirement that for any deviation from OAC 3701-53-05(F), that the state must then introduce evidence of reliability to admit blood samples increases the burden placed on the state in prosecuting crimes involving blood samples. Furthermore, any decision by this Court could impact state wide training of law enforcement officers with respect to the handling of blood and urine samples.

For reasons more fully developed in the remainder of this brief, Amicus Curiae in support of Appellant State of Ohio urges reversal of *State v. Baker*, 11th Dist. No. 2013-A0020, 2014-Ohio-2873.

STATEMENT OF THE CASE AND FACTS

Amicus curiae adopts and incorporates by reference the Statement of the Case and Statement of the Facts as set forth by the Appellant, State of Ohio, in its merit brief. This Court is presented with the issue of whether or not the trial court should have suppressed the results of Defendant-Appellee Michael Baker's blood test. To properly resolve this matter, this Court must (1) determine the correct set of legal standards to evaluate the admissibility of a blood test that is challenged under Ohio Adm. Code 3701-53-05(F); and (2) apply the appropriate legal standards to the instant matter to determine whether the results of Appellee's blood test are in fact admissible.

With respect to determining the correct set of legal standards to apply in this case, it is pertinent to point out that the highly fractured opinion set forth in *State v. Baker*, 11th Dist. Ashtabula No. 2013-A0020, 2014-Ohio-2873 excluded blood test results on the basis that the prosecution did not establish the test results were *reliable*. The lead opinion in *Baker* further concluded that that the prosecution need not establish a foundation of reliability when there is substantial compliance with the administrative regulation.

The dissent relied upon the Eleventh District's prior decision in *State v. Price*, 11th Dist. Geauga No. 2007-G-2785, 2008-Ohio-1134, for the proposition that a delay of four hours constitutes substantial compliance and that the analysis should end there with Baker's blood test deemed admissible. *Baker* at ¶ 45 (Grendell, J., dissenting). For reasons more fully developed below, Amicus Curiae maintains that substantial compliance rather than reliability is the

appropriate legal standard to apply in reviewing the admissibility of the blood alcohol tests in this case.

LAW AND ARGUMENT

AMICUS CURIAE’S PROPOSITION OF LAW I: IN ORDER TO SUBSTANTIALLY COMPLY WITH OHIO ADM. CODE 3701-53-05(F), THE STATE DOES NOT NEED TO ESTABLISH RELIABILITY OF THE BLOOD OR URINE SAMPLE. NON-COMPLIANCE WITH OHIO ADM. 3701-53-05(F) MAY BE DE MINIMIS AND ADMISSIBLE ABSENT A SHOWING OF PREJUDICE TO THE DEFENDANT.

At issue in this case is the admissibility of blood and urines samples collected from defendants in criminal cases. Pursuant to Ohio Adm. Code 3701-53-05(F), “[w]hile not in transit or under examination, all blood and urine specimens shall be refrigerated.”

Here, Baker filed a motion to suppress his blood sample at trial and argued that the sample was not maintained in compliance with Ohio Adm. Code 3701-53-05(F). A hearing was held on Baker’s motion and the trial court ultimately concluded that the four hour and ten minute period where the sample was unrefrigerated did not substantially comply with regulations. The trial court therefore suppressed the blood sample evidence.

On appeal, the Eleventh District Court of Appeals affirmed the trial court’s suppression of the blood sample evidence. *State v. Baker*, 11th Dist. No. 2013-A0020, 2014-Ohio-2873, ¶ 1. In affirming the trial court’s decision to suppress the evidence, the Eleventh District did not fully consider the issue of whether the failure to refrigerate a blood sample for four hours fell within the range of substantial compliance. Absent from the Eleventh District’s lead opinion is any discussion of whether the deviation from the administrative code was *de minimis* or whether the test results were somehow rendered unreliable based on the deviation from the administrative

guidelines. Furthermore, the Eleventh District's lead opinion did not consider this Court's opinion in *State v. Plummer*, 22 Ohio St.3d 292, 490 N.E.2d 902, 22 O.B.R. 461 (1986).

Contrary to the lead opinion from the Eleventh District, Amicus Curiae maintains that this Court's opinion in *Plummer* provides the best guidance in resolving this issue. In accordance with *Plummer*, the State did substantially comply with Ohio Adm. Code 3701-53-05(F). Furthermore, a legal determination that the State substantially complied is consistent with two other opinions by this Court that addressed the collection and handling of blood and urine samples, namely *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71 and *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216. In accordance with precedent established by this Court in *Plummer*, *Burnside* and *Mayl*, Amicus Curiae asks this Court to hold that the State substantially complied with Ohio Adm. Code 3701-53-05(F) because the non-compliance was *de minimis*. Furthermore, Amicus Curiae asks this Court to hold that the State was not required to establish reliability of the blood sample in order to prove substantial compliance with Ohio Adm. Code 3701-53-05(F).

I. Standard of Review

In reviewing Baker's motion to suppress, this Court is presented with a mixed question of fact and law. *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 7; *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 100; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. The trial court is in the best position to resolve factual determinations in its role as the trier of fact. *Burnside, supra*, at ¶ 8, citation omitted. This Court must accept the trial court's findings of fact provided they are supported by competent, credible evidence. *Id.*, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583.

After accepting the factual findings as true, the appellate court must “independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.” *Burnside* at ¶ 8, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539. Therefore, this Court reviews the issue of whether the facts in this case demonstrate that the State substantially complied with Ohio Adm. Code 3701-53-05 de novo. *See id.* (“We therefore consider whether the facts in the instant case demonstrate substantial compliance with the Department of Health regulations under a de novo standard of review.”).

II. Applicable Legal Standards for Determining the Admissibility of a Blood or Urine Sample under Ohio Adm. Code 3701-53-05(F).

Substantial compliance is the appropriate legal standard to apply to the facts of this case.

In this matter, Baker was charged with operating a vehicle while under the influence, in violation of R.C. 4511.19. Subsection (D) of R.C. 4511.19 establishes the criteria for the admissibility of alcohol related test results in the prosecution of cases for operating a vehicle while under the influence. In particular, the relevant subsection provides that “bodily substance withdrawn under division (D)(1)(b) of this section shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to section 3701.143 of the Revised Code.” In short, the General Assembly establishes that the Director of Health determine the parameters for blood draws in cases such as this.

Of particular importance to this case, the Director of Health established the following alcohol testing regulation under Ohio Adm. Code 3701-53-05: “While not in transit or under examination all blood and urine specimens shall be refrigerated.” Ohio Adm. Code 3701-53-05(F). Accordingly, proper review of this case requires this Court make a legal determination as to whether the blood drawn was done so in accordance with regulations of the Director of Health.

It is well-established that “the admissibility of test results to establish alcoholic concentration under 4511.19 turns on substantial compliance with ODH regulations.” *City of Defiance v. Kretz*, 60 Ohio St.3d 1, 573 N.E.2d 32 (1991), citing *State v. Plummer* (1986), 22 Ohio St.3d 292, 294, 22 OBR 461, 463-64, 490 N.E.2d 902, 905; *Cincinnati v. Sand* (1975), 43 Ohio St.2d 79, 87, 72 O.O. 2d 44, 48, 330 N.E.2d 908, 912-13; *State v. Dickerson* (1986), 25 Ohio St.3d 64, 66, 25 OBR 86, 88, 495 N.E.2d 6, 8; *State v. Steele* (1977), 52 Ohio St.2d 187, 192, 6 O.O. 3d 418, 421, 370 N.E.2d 740, 743; *Mentor v. Giordano* (1967), 9 Ohio St.2d 140, 146, 38 O.O.2d 366, 369, 224 N.E.2d 343, 347.

Following *Plummer*, this Court has continued to evaluate cases concerning the administrative rules governing the collection of blood and urine samples under a substantial compliance standard. In both *Burnside* and *Mayl*, this Court clarified how the substantial compliance review standard should be applied in cases.

This Court has stated that a burden shifting test applies to the admissibility of alcohol test results. A blood draw is presumed admissible if the defendant does not challenge it through a pre-trial motion to suppress. *Burnside* at ¶ 24. However, once a defendant has challenged the “validity of [alcohol] test results in a pretrial motion, the state has the burden to show that the test was administered in substantial compliance with regulations prescribed by the Director of Health.” *Mayl, supra*, at ¶ 49. If the State satisfies its burden, “the burden then shifts to “the defendant to rebut that presumption by demonstrating that he was prejudiced by anything less than strict compliance.” *Burnside* at ¶ 24, citing *State v. Brown* (1996), 109 Ohio App.3d 629, 632, 672 N.E.2d 1050.

Although the Eleventh Appellate District concluded that the blood draw in this matter was inadmissible because the State failed to establish the reliability of the test, the application of such a legal standard is unsupported by precedent. In fact, this Court has clarified that it is the responsibility of Director of Health, rather than the judiciary, to ensure the reliability of blood alcohol tests. *Burnside* at ¶ 32. This Court again reiterated in *Mayl* that “the Director of Health, and not the judiciary, has been entrusted with ensuring the reliability of blood-alcohol test results through regulation – precisely because the former possesses the scientific expertise that judges do not have.” *Mayl* at ¶ 58. Moreover, this Court has explained that creating a test where the judiciary must make a determination as to reliability would be inconsistent with R.C. 4511.19. *Burnside* at ¶ 32. For these reasons, the dissent in *Baker* correctly stated that this Court has “rejected the approach that requires the court to adjudicate the reliability of test results * * *.” *State v. Baker*, (Grendell, J., dissenting).

Rather than determining substantial compliance through a reliability test, this Court has established a *de minimis* standard for determining whether the State substantially complied with the regulations of the Director of Health. *See, e.g., State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629 (reviewing the State’s compliance with regulations of Director of Health concerning the refrigeration of alcohol tests based on whether the deviations from those regulations were *de minimis*). In applying the substantial compliance standard, it is recognized that strict compliance with the Department of Health regulations concerning alcohol testing is not necessary for test results to be admissible. *State v. Steele* (1977), 52 Ohio St.2d 187, 6 O.O.3d 418. The rationale behind applying substantial compliance rather than strict compliance in these cases is due to the fact that “strict compliance is not always realistically or humanly possible.” *Burnside* at ¶ 34,

citing *Plummer*, 22 Ohio St.3d at 294, 22 OBR 461, 490 N.E.2d 902. Therefore, a substantial compliance test permits minor procedural deviations.

It is with these aforementioned principles in mind that the State asks for this Court to review the admissibility of the alcohol testing in this case.

III. The Alcohol Test Results Are Admissible Under the Facts of this Case

Suppression is unwarranted in this case because the noncompliance was trivial.

In this case, Baker was involved in a fatal crash and consented to a blood sample which was drawn in compliance with the administrative code at approximately 1:50 a.m. The Ohio State Highway Patrol trooper maintained custody of the sample until it was mailed at 6:00 a.m. There was a period of approximately 4 hours and 10 minutes where Baker's blood sample was not refrigerated. It is important to note that this is not a case where the specimen remained unrefrigerated at all times.

Baker challenged the admissibility of the blood alcohol test. It follows that the State had an obligation to demonstrate substantial compliance with the Department of Health's refrigeration requirement. Based on former legal precedent from this Court and other appellate courts, the State did substantially comply with Ohio Adm. Code 3701-53-05(F) in this case.

A. Legal Precedent in this Court and Other Appellate Courts Support a Finding of Substantial Compliance

This Court's decisions in *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216 and *State v. Plummer*, 22 Ohio St.3d 292, 490 N.E.2d 902, 22 O.B.R. 461 (1986) demonstrate that the State substantially complied refrigeration requirement of Ohio Adm. Code 3701-53-05.

In *Plummer*, the defendant was transported to the hospital after being involved in a one car accident. A State Highway Patrol trooper responded to the hospital where he observed physical signs consistent with intoxication. The trooper collected a urine sample from the defendant, which he mailed to a crime lab approximately an hour and twenty-five minutes later. The urine sample was not refrigerated during that time and may not have been refrigerated when received at the lab. Although it is unclear how long the sample may not have been refrigerated when received at the lab, it is possible that it was not refrigerated an additional three to four hours prior to testing. *Id.* at 294-95. In total, the failure to keep the urine sample refrigerated may have lasted as long as five hours. Applying *State v. Steele*, 52 Ohio St.2d 187, 370 N.E.2d 740 (1977), this Court found that the state substantially complied with the administrative regulation and agreed with the lower court's reasoning "that the storage temperature requirement of Ohio Adm. Code 3701-53-05 contemplates cases involving longer periods of specimen retention, rather than a relatively slight delay between receipt and testing as in this case." *Plummer* at 295.

In *Mayl*, this Court again found that not refrigerating a sample up to five hours substantially complies with the relevant provisions of the Ohio Administrative Code in this case. Specifically, this Court concluded 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)." *Mayl* at 214 footnote 2, citing *State v. Plummer*, 22 Ohio St.3d 292, 294-295, 490 N.E.2d 902. Because the failure in this case to refrigerate the sample is shorter than the five hour window in *Plummer* and *Mayl*, this Court should find the State substantially complied with Ohio Adm. Code 3701-53-05(F).

It bears noting that other appellate courts have found substantial compliance where samples were not refrigerated for shorter and longer periods than five hours. *See State v. Schneider*, 1st Dist. Hamilton No. C-120786, 2013-Ohio-4780 (finding substantial compliance for a period of 19

hours without refrigeration); *State v. Curtis*, 10th Dist. Franklin No. 09AP-1199, 2011-Ohio-3298 (finding lack of refrigeration for 4 hours was *de minimis*); *State v. Rauscher*, 3d Dist. Marion No. 9-06-42, 2007-Ohio-3339 (finding the failure to refrigerate for 2 hours and 10 minutes substantially complied with administrative regulations); *Village of Gates Mills v. Wazbinski*, 8th Dist. No. 81863, 2003-Ohio-5919 (finding substantial compliance when there was failure to refrigerate for 3 hours); *State v. Schell*, 5th Dist. Stark No. CA-7884, 1990 WL 83992 (June 18, 1990) (finding substantial compliance for failure to refrigerate for 5 hours); But see *State v. Mullins*, 4th Dist. Ross No. 12C3350, 2013-Ohio-2688 (finding 12 hours lack of refrigeration was not *de minimis*) and *State v. DeJohn*, 5th Dist. Perry No. 06-CA-16, 2007-Ohio-163 (finding 17 hour lack of refrigeration was not *de minimis*). Therefore, legal precedent clearly demonstrates that the failure to refrigerate the blood alcohol sample in this case was *de minimis*.

B. Alternative Grounds for Finding that the State Substantially Complied

Practical considerations in this case also support a finding that the four hour and ten minute period was no more than a minor procedural deviation.

It is difficult to discern how the lack of refrigeration for four hours and ten minutes was substantial when considered in light of the total time that the blood sample remained unrefrigerated. As noted by the dissenting judge in *Baker*, “preoccupation with the four hour delay overlooks the fact that the blood sample was unrefrigerated for a period of ten days while ‘in transit.’” *Baker* at ¶ 60. This line of reasoning was applied by the First Appellate District when it stated that “it is undisputed that a specimen is generally not refrigerated while in the mail; thus, the delay in mailing [the defendant’s] specimen was inconsequential, and a minor deviation from the requirements of the regulation.” *State v. Schneider*, 1st Dist. Hamilton No. C-120786, 2013-

Ohio-4789, ¶ 18. Given the above, the approximate delay of four hours was no more than a minor procedural deviation from the requirement to refrigerate the blood sample.

Additionally, Amicus Curiae proposes that the use of an anticoagulant in this case rendered the State's treatment of the blood samples substantially compliant with administrative regulations. Preservatives and refrigeration accomplish the same basic purpose of retarding the process of decomposition of the blood alcohol. *Macaully v. State*, 734 P.2d 1020, 1026 (Alaska App. 1987), citing 1 R. Erwin, *Defense of Drunk Driving Cases* Section 17.07 at 17-68 (3rd ed. 1987). In fact, the process of decomposition may be "entirely eliminated by using a preservative." *Id.* Here, the State submitted evidence that an anticoagulant was used in preparing the blood sample. Specifically, "Emily Adelman, a technician with the Ohio State Highway Patrol's crime laboratory, testified that the grey tops signify that the vials 'contain our anticoagulant powder in them before they have the blood * ** put into them.'" *Baker, supra*, at ¶ 50. Given that the use of the anticoagulant powder serves a functionally equivalent purpose to the refrigeration requirement, this Court should find that the State was substantially compliant with administration regulations in spite of its failure to refrigerate the sample for approximately four hours.

As a final point, Baker may have even benefitted from the State's failure to strictly comply with administrative regulation. In this Court's opinion in *Plummer*, it cited a study from Leonard J. Porter, the former Chief Toxicologist and Chief of Alcohol Testing with the Ohio Department of Health, for the fact that failure to refrigerate a urine sample was unlikely to prejudice the defendant. *Plummer* at 295, fn. 2. In fact, in reviewing the study by Leonard Porter, this Court observed that the failure to refrigerate may reduce alcohol content and therefore serve as a benefit to the defendant. *Id.* The former observation by this Court has been supported by more recent

studies.¹ Therefore, Amicus Curiae emphasizes that Baker has not demonstrated that he has been prejudiced in any way by the State's failure to strictly comply with the administrative regulations concerning the refrigeration of a blood specimen.

¹ David M. Penetar, Jane F. McNeil, Elizabeth T. Ryan, and Scott E. Lukas, *Comparison Among Plasma, Serum, and Whole Blood Ethanol Concentrations: Impact of Storage Conditions and Collection Tubes*, Journal of Analytical Toxicology, Vol. 32, September 2008.

CERTIFICATE OF SERVICE

A copy of the foregoing Brief Of Amicus Curiae Ohio Prosecuting Attorney's Association on behalf of Appellant, State Of Ohio has been sent this 16th day of March, 2015 via U.S. mail to the following:

WILLIAM BOBULSKY
Counsel for Defendant-Appellee
William P. Bobulsky Co., L.P.A.
Ashtabula, OH 44004

STEPHEN P. HARDWICK
Counsel for Amicus Curiae
250 East Broad Street, Suite 1400
Columbus, Ohio 43215

NICHOLAS IAROCCI
Ashtabula County Prosecutor
SHELLEY PRATT
Assistant Prosecuting Attorney
25 W. Jefferson St.
Jefferson, Ohio 44047

/s/ Brett Hammond
BRETT S. HAMMOND (0091757)
DANIEL VAN
Assistant Prosecuting Attorneys