No._____

In the Supreme Court of the United States

THE STATE OF OHIO,
Petitioner,

v.

STEVEN FARRIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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October 2, 2006

QUESTIONS PRESENTED

1. Whether the Fifth Amendment requires the suppression of post-*Miranda* warning statements because they cover the same information as pre-*Miranda* warning statements even when there is no police strategy to intentionally avoid *Miranda*.

2. Whether the Supreme Court of Ohio departed from established principles of the Fifth Amendment when it determined the combined pre- and post-*Miranda* questioning of Stephen Farris violated the Federal Constitution even though there was no police strategy to intentionally bait Farris into talking before the *Miranda* warning.

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INTRODUCTION

Federal courts and state supreme courts are divided over the appropriate standard to use when determining whether post-*Miranda* warning statements should be admitted into evidence when pre-*Miranda* warning questioning occurred without the intent to avoid *Miranda v. Arizona*, 384 U.S. 436 (1966). The State of Ohio seeks to appeal the decision of the Supreme Court of Ohio because the Supreme Court of Ohio has misinterpreted this Court's decisions on an issue of federal law, applied an incorrect legal test, and erroneously suppressed statements made by Stephen Farris.

The Supreme Court of Ohio did not rely on independent state constitutional grounds in making this particular determination. Instead, it ignored the holding of *Missouri v. Seibert*, 542 U.S. 600 (2004), and applied the plurality's "effective warning" test to determine if the pre-*Miranda* warning questioning of Farris made his post-*Miranda* warning statements inadmissable.

The Supreme Court of Ohio is not the only state supreme court to apply *Seibert* in this way. The Supreme Courts of Vermont and Louisiana have also treated the *Seibert* plurality opinion as the holding of the case. This is in contrast to three circuit courts and the Supreme Court of Kentucky, which regard Justice Kennedy's opinion as the holding of *Seibert*. Now, this Court's guidance is needed to resolve the split on this important legal issue for law enforcement, and the courts.

PETITION FOR A WRIT OF CERTIORARI

The State of Ohio respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (Pet. App. 1a - 23a) is published at 109 Ohio St.3d 519, 849 N.E.2d 985, and 2006-Ohio-3255. The opinion of the Ohio Court of Appeals for the Ninth Appellate District (Pet. App. 24a - 33a) is reported at 2004-Ohio-826. The opinion of the Wayne County Municipal Court (Pet. App. 34a - 37a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on July 12, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall... be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

Legal Background

1. In *Seibert*, a four Justice plurality of this Court said, "The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." *Seibert*, 542 U.S. at 611-612. A majority of this Court expressly rejected the test articulated by the plurality in *Seibert*. *Seibert*, 542 U.S. at 622 ("In my view, this test cuts too broadly.")(Kennedy, J., concurring in judgment), and, *Seibert*, 542 U.S. at 622 - 623 ("I believe that we are bound by [*Oregon v.*] *Elstad*[, 470 U.S. 298 (1985)] to reach a different result...")(O'Connor, J., dissenting, joined by Rehnquist, C.J., Scalia, J., and Thomas, J.).

Justice Kennedy, who supplied the fifth vote in favor of suppressing Seibert's statements, provided the narrowest opinion concurring in the *Seibert* judgment. Therefore, the holding in *Seibert* is found in the opinion of Justice Kennedy. *U.S. v. Mashburn*, 406 F.3d 303, 308 - 309 (4th Cir. 2005), citing, *Marks v. U.S.*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.").

In his opinion, Justice Kennedy stated,

> The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the

> deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. *Seibert*, 542 U.S. at 622.

2. Courts are divided over which opinion is the holding of *Seibert*. The Supreme Court of Ohio treated the four Justice plurality opinion as the holding, *Farris*, 109 Ohio St.3d 519, {¶ 30}; Pet. App. 12a, and highlighted its confusion stating:

> Seibert was a plurality opinion, leaving somewhat in doubt whether the intent of the officer in garnering the prewarning statement is important in determining whether a postwarning statement is admissible. Id at {¶ 31}. Pet. App. 13a.

3. In this case several issues were brought before the Supreme Court of Ohio. The Supreme Court of Ohio determined the admissibility of Farris's post-*Miranda* statements by applying only federal law. The current resolution of the case prevents the State from prosecuting Farris. The State would be able to prosecute Farris if the Supreme Court of Ohio is reversed, and his post-*Miranda* warning statements are admissible.

Factual Background

4. The facts of the case are undisputed. Trooper Menges of the Ohio State Highway Patrol was on routine patrol on U.S. 30 in Wayne County, Ohio. He observed the defendant's vehicle traveling eastbound at 68 m.p.h. in a 60 m.p.h. zone, and initiated a traffic stop. When Trooper Menges approached the defendant's vehicle he smelled a

light odor of burnt marijuana. Trooper Menges had drug training and was very familiar with the odor of burnt marijuana. He smelled raw marijuana and then burnt marijuana while being trained, and estimated that he smelled burnt marijuana inside 200 stopped cars.

Farris was told of the reason for the stop, and was asked to come back to the patrol vehicle. He was frisked, and emptied his pockets. Farris then got into the passenger seat of the patrol car. Trooper Menges asked Farris about the odor and was told Farris's house mates smoked marijuana earlier. Trooper Menges told Farris that he was going to search the vehicle. Then Trooper Menges asked Farris if there was any contraband in the vehicle. Farris told him that the trunk contained a pipe, which Farris used to smoke marijuana.

The defendant was then given *Miranda* warnings and again asked if there was any contraband in the vehicle. Farris again stated that a pipe was in the vehicle's trunk. The inside of the car was searched and nothing was found. Then the trunk was searched. Trooper Menges found rolling papers and the pipe, which contained marijuana residue. Trooper Menges field tested the pipe and it came back positive for marijuana. Farris was given a speed warning, a drug paraphernalia citation, and allowed to go. *State v. Farris*, No. CRB-02-12-0101, slip op. (Wayne Co. Municipal Ct. April 29, 2003). Pet. App. 34a - 35a.

Procedural History

5. In the trial court Farris filed "Pretrial Motions for Suppression of Evidence and Other Relief" in which he argued his statements were obtained illegally and in violation of Petitioner's constitutional rights under the United States Constitution, and the Ohio Constitution. Farris explained this position further in "Defendant's

Supplemental Brief in Support of Motion to Suppress." The State argued in its brief that the second statements were admissible under this Court's decision in *Elstad*.

6. The trial court denied the Motion to Suppress with regard to the second statement. In its order, the trial court determined that "[t]he first location statement should be suppressed, the second should not as full *Miranda* rights were given and voluntarily waived." Pet. App. 36a.

7. Farris, pursuant to the Ohio Rules of Criminal Procedure, preserved his right of appeal by entering a no-contest plea, and appealed the trial court's denial of the Motion to Suppress to the Ohio Court of Appeals for the Ninth Judicial District ("Ninth District"). Farris argued that neither inculpatory statements were admissible under *Elstad* and similar decisions. Again, the State argued in its appellate brief that the post-*Miranda* statements are admissible under *Elstad* because "the admissibility of any subsequent statements should turn in these circumstances solely on whether it is knowingly and voluntarily made." State's appellate brief, p. 6, citing, *Elstad*, 470 U.S. at 309 (emphasis added in the State's appellate brief).

8. The Ninth District unanimously overruled Farris's argument stating:

> Defendant chose to speak to the officer following the officer's recitation of the *Miranda* warnings. Defendant told the officer that he understood those rights. He did not in any way indicate his wish to exercise any of his *Miranda* rights. He did not preface his response with 'since I already told you,' or any other phraseology in that vein. Rather, he, again, answered the question of the officer in spite of being

> informed of his right to remain silent. The mere fact that the officer immediately repeated the same question following the *Miranda* warnings should have indicated to Defendant, a college student, that he was free to embrace his *Miranda* rights and remain silent. Defendant's acts indicate that he voluntarily, knowingly, and intelligently waived his *Miranda* rights. *State v. Farris*, 2004 - Ohio - 826 {¶14}. Pet. App. 30a.

9. After the Ninth District decided the case, this Court issued its decision in *Seibert*.

10. Farris then appealed to the Supreme Court of Ohio. Farris continued to argue that his statements were obtained in violation of *Miranda*. In response, the State argued that the post-*Miranda* statements should be admitted, and cited and distinguished this Court's decision in *Seibert*.

11. The Supreme Court of Ohio determined that under federal law, as explained by a plurality of this Court in *Seibert:*

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires. *Farris*, 109 Ohio St.3d 519 {¶20}, 849 N.E.2d 985, 2006-Ohio-3255 (2006), citing, *Seibert*, 542 U.S. at 611-612. Pet. App. 7a. See also, *Farris*, 109 Ohio St.3d 519, {¶21} (Post warning statements are inadmissable if the warning is not effective.) Pet. App. 7a - 8a.

The Supreme Court of Ohio ignored the fact that a majority of this Court expressly rejected the test articulated by the plurality in *Seibert*. *Seibert*, 542 U.S. at 622 ("In my view, this test cuts too broadly.")(Kennedy, J., concurring in judgment), and, *Seibert*, 542 U.S. at 622 - 623 ("I believe that we are bound by *Elstad* to reach a different result...")(O'Connor, J., dissenting, joined by Rehnquist, C.J., Scalia, J., and Thomas, J.). Also, the Supreme Court of Ohio dismissed Justice Kennedy's more narrow opinion, and the apparent holding of *Seibert*, because the court agreed "with the *Seibert* plurality and dissent that the intent of the officer doing the questioning is not relevant in a *Miranda* analysis." *Farris*, 109 Ohio St. 519, {¶35}. Pet. App. 14a.

12. The Supreme Court of Ohio then applied the "effective warning" test and suppressed the statements. *Farris*, 109 Ohio St.3d 519, {¶¶30, 36}. Pet. App. 12a, 14a. The Supreme Court of Ohio did this despite acknowledging that, "A difference between this case and *Seibert* is the seeming lack of an official police strategy to intentionally bait suspects into talking before the *Miranda* warning and then repeating damaging statements later after the warning has been given." *Farris*, 109 Ohio St.3d 519, {¶31}. Pet. App. 31a - 32a. Had the Supreme Court of Ohio recognized that Justice Kennedy's more narrow opinion is the *Seibert* holding, Farris's second set of statements would be admitted into evidence under *Elsted*.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons.

First, the Supreme Court of Ohio's decision highlights the division among the courts on the proper application of *Seibert*. Courts are confused. On one hand,

at least three state supreme courts treat the plurality opinion in *Seibert* as the case's holding when determining if pre-*Miranda* warning questioning taints post-*Miranda* statements. On the other hand, at least three circuit courts and one state supreme court treat Justice Kennedy's opinion as the holding of *Seibert* when reviewing the same issue. This case presents the Court with an opportunity to resolve this conflict, and clarify an important area of law.

Second, the Supreme Court of Ohio's analysis, based entirely on federal law, essentially overturned this Court's decision in *Seibert* by accepting the plurality's opinion as the holding. Since there was no intent to avoid *Miranda*, the Supreme Court of Ohio should have applied *Elstad*. Instead, it dismissed the holding of *Seibert* while claiming to follow this Court's guidance. The Supreme Court of Ohio essentially made itself the 10th member of this Court, voted with the plurality opinion, and changed *federal* law in Ohio.

Courts do not know if a defendant's statements are admissible when there was both pre- and post-*Miranda* questioning of the defendant, but no police strategy to intentionally bait the suspect into talking before the *Miranda* warning. This case cleanly presents this specific federal issue to the Court for review.

I. The Court should settle the split between some state supreme courts and the circuit courts over the application of *Seibert*.

1. There is a division among state supreme courts and circuit courts on how to apply the Fifth Amendment. This division occurs in situations where there is questioning of an individual both before and after *Miranda* warnings. The problem is that courts do not agree on how to apply this Court's decision in *Seibert*. This lack of clarity in federal

law caused the Supreme Court of Ohio to inappropriately suppress evidence and hinder the prosecution of Farris.

2. Three circuit courts and the Supreme Court of Kentucky, have recognized Justice Kennedy's opinion as the proper holding of *Seibert*. In the past year, however, at least three state supreme courts, including Ohio's, have treated the *Seibert* plurality as the holding of the case. Justice Kennedy's opinion is the narrowest position taken by a Justice that concurred in the *Seibert* judgment. The courts following his opinion say it controls because "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *U.S. v. Mashburn*, 406 F.3d 303, 308 - 309 (4th Cir. 2005), citing, *Marks v. U.S.*, 430 U.S. 188 (1977).

3. The Supreme Court of Ohio mistakenly treated the plurality decision in *Seibert* as the holding. In doing so, it quoted the *Seibert* plurality and stated:

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires. *Farris*, 109 Ohio St.3d 519 {¶20}, citing, *Seibert*, 542 U.S. at 611 - 612. Pet. App. 7a. See also, *Farris*, 109 Ohio St.3d 519, {¶21} (Post warning statements are inadmissable if the warning is not effective.) Pet. App. 7a - 8a.

The Supreme Court of Ohio then went on to apply the factors identified in the *Seibert* plurality opinion to this case. *Farris*, 109 Ohio St.3d 519 {¶30}. Pet. App. 12a.

The actual holding of *Seibert*, however, appears to be Justice Kennedy's opinion, which states:

> The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. *Seibert*, 542 U.S. at 622.

The Supreme Court of Ohio dismissed Justice Kennedy's opinion, stating:

> *Seibert* was a plurality opinion, leaving somewhat in doubt whether the intent of the officer in garnering the prewarning statement is important in determining whether a postwarning statement is admissible. *Farris*, 109 Ohio St.3d 519 {¶ 31}. Pet. App. 13a.

4. In the past year other state supreme courts have followed the plurality opinion. *State of Vermont v. Yoh*, ____ A.2d ____, 2006 VT 49, 2006 WL 1789117, was decided on June 30, 2006. In *Yoh*, the Supreme Court of Vermont made a statement similar to the Supreme Court of Ohio's statement of the law. The Supreme Court of Vermont said:

> The plurality opinion described the relevant analysis for determining whether warnings following a *Miranda* violation are effective: "The threshold issue... is thus whether it would be reasonable to find that in these

> circumstances the warnings could function 'effectively' as *Miranda* requires." *Yoh*, 2006 VT 49 at {¶ 14}, citing, *Seibert*, 542 U.S. at 611 - 612.

Also, in *Louisiana v. Leger*, ____ So.2d. _____, 2006 WL 1883421, which was decided on July 10, 2006, the Supreme Court of Louisiana stated that this Court "found that a midstream recitation of Miranda warnings could not comply with the object of Miranda, i.e. that the 'warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture.'" *Leger*, 2006 WL 1883421, *16, citing *Seibert*, 542 U.S. at 612.

5. These decisions stand in stark contrast to the decisions of three circuit courts and the Supreme Court of Kentucky. Unlike the Supreme Courts of Ohio, Vermont, and Louisiana, this second group of courts applied the rule in *Marks*, and found that Justice Kennedy's opinion is the actual holding in *Seibert*. *U.S. v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005)("Kennedy's opinion therefore represents the holding of the *Seibert* Court: The admissibility of postwarning statements is governed by *Elstad* unless the deliberate 'question-first' strategy is employed."), *U.S. v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004)("Where the initial violation of *Miranda* was not part of a deliberate strategy to undermine the warnings, *Elstad* appears to have survived *Seibert*."), *U.S. v. Black Bear*, 422 F.3d 658, 664 (8th Cir. 2005)("Second, the key to *Seibert* is whether the police officer's technique was a designed, deliberate, intentional, or calculated circumvention of *Miranda*.")(internal quotes omitted), and *Jackson v. Kentucky*, 187 S.W.3d 300, 309 (2006)("We have determined that the narrowest holding, rendered by Justice Kennedy, precludes use of the technique only where police deliberately employ the technique to circumvent the

suspect's *Miranda* rights.")(internal quotes omitted); see also, *People v. Paulman*, 5 N.Y.3d 122, 134, fn.5, 833 N.E.2d 239 (2005)("Since Justice Kennedy's narrower test is triggered only when the police have intentionally employed a 'question first' practice – which did not occur here – we need not address it further.").

6. Courts are split on how to apply *Siebert*. It appears that Justice Kennedy's opinion should be controlling, but some courts, including the Supreme Court of Ohio, have, instead, applied the plurality's opinion. Since the decision in this case did not follow Justice Kennedy's opinion, the Supreme Court of Ohio's decision effectively overruled this Court on an issue of federal law in Ohio.

By refusing to follow Justice Kennedy's opinion in *Seibert*, the Supreme Court of Ohio perpetuates the confusion on what opinion represents the holding of *Seibert*, and how *Seibert* should be applied. This Court should grant a writ of certiorari to prevent the application of *Miranda*, *Elsted*, and *Seibert* from becoming a "crazy quilt" spread across the land. If this split among courts is not resolved, citizens, law enforcement, and courts will continue to be confused about a person's rights under the Fifth Amendment.

II. The Supreme Court of Ohio erroneously suppressed Farris's statements because it misapplied or effectively overruled a decision of this Court by treating *Seibert*'s plurality opinion as federal law.

1. "[W]hen state courts erroneously invalidate [state] actions because they believe federal law requires it – and *especially* when they do so because they believe the Federal *Constitution* requires it – review by this Court, far from

undermining state autonomy, is the only possible way to *vindicate* it." *Kansas v. Marsh*, ____ U.S. ____, 126 S.Ct. 2516, 2531 (2006)(Scalia, J., concurring). Further, "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

2. Since there was no intentional effort to avoid *Miranda*, this Court's precedents appear to dictate that "[t]he admissibility of [Farris's] postwarning statements should continue to be governed by the principles of *Elstad*." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in judgment). Justice Kennedy's opinion is this Court's holding because it is the narrowest opinion concurring in the judgment in a case where there was no majority opinion. *Marks*, 430 U.S. 188, 193.

3. The Supreme Court of Ohio ignored this Court's holding and stated:

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires. *Farris*, 109 Ohio St.3d 519 {¶20}. Pet. App. 7a. See also, *Farris*, 109 Ohio St.3d 519, {¶21} (Post warning statements are inadmissable if the warning is not effective.) Pet. App. 7a - 8a.

The Supreme Court of Ohio synthesized this "threshold issue" from the plurality's opinion in *Siebert*. See, *Farris*, 109 Ohio St.3d 519 {¶20}, citing, *Seibert*, 542 U.S. at 611 - 612; *Farris*, 109 Ohio St.3d 519 {¶21}, citing, *Seibert*, 542 U.S. at 612, fn. 4; *Farris*, 109 Ohio St.3d 519 {¶27 - 29}, citing, *Seibert*, 542 U.S. at 615 - 617; *Farris*, 109 Ohio St.3d 519 {¶30}, citing, *Seibert*, 542 U.S. at 612, 616 - 617. Pet. App. 7a - 12a. It then applied the *Seibert*

plurality's factors to Farris's case, and suppressed the statements. *Farris*, 109 Ohio St.3d 519, {¶¶30, 36}. Pet. App. 12a, 14a.

4. In *Seibert*, this Court held that the admissibility of Ferris's statements should be governed by *Elstad* unless there was a deliberate two-step strategy employed to avoid *Miranda*. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in judgment). In this case the Supreme Court of Ohio specifically stated that there was no intentional action to avoid *Miranda*. *Farris*, 109 Ohio St.3d 519, {¶31}. Pet App. 12a - 13a. Therefore, under federal law, the effectiveness of the warning is not the "relevant analysis" described by the Supreme Courts of Ohio, Vermont, and Louisiana. Instead, the Supreme Court of Ohio should have applied *Elsted*.

5. In *Elsted*, this Court stated,

> We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. *Elsted*, 470 U.S. at 314.

Since there was no deliberately coercive or improper tactics in obtaining Farris's initial statement,"[t]he relevant inquire is whether, in fact, the second statement was also voluntarily made." *Elsted*, 470 U.S. at 318. In making this inquiry "[t]he fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative." *Elsted*, 470 U.S. at 318.

The trial court found that before Farris made the second set of statements "full Miranda rights were given and voluntarily waived." Pet. App. 36a. The Court of Appeals agreed. *Farris*, 2004-Ohio-826 {¶ 14}("Defendant's

acts indicate that he voluntarily, knowingly, and intelligently waived his Miranda rights."). Pet. App. 30a.

Farris's second statement was voluntarily made. Therefore, when applying federal law, under the test announced in *Elsted*, and affirmed in *Siebert*, the Supreme Court of Ohio, was required to affirm the decisions of the trial and intermediary appellate courts. The Supreme Court of Ohio's decision to change that result was based on its inappropriate application of *Seibert*.

6. When applying federal law, the Supreme Court of Ohio has no authority to overrule or ignore decisions of this Court. *Khan*, 522 U.S. at 20 ("[I]t is this Court's prerogative alone to overrule one of its precedents."). This Court's "principal responsibility under current practice..., and a primary basis for the Constitution's allowing [this Court] to be accorded jurisdiction to review state-court decisions, ..., is to ensure the integrity and uniformity of federal law." *Marsh*, 126 S.Ct. at 2530, (Scalia, J., concurring).

By applying an opinion that was not the holding of the Court, and treating it as federal law, the Supreme Court of Ohio has misapplied or effectively overruled a decision of this Court regarding federal law in Ohio. In doing so it invalidated the proper state action taken by Trooper Menges. "Turning a blind eye to federal constitutional error that benefits criminal defendants, allowing it to permeate in varying fashion each state Supreme Court's jurisprudence, would change the uniform 'law of the land' into a crazy quilt." *Marsh*, 126 S.Ct. at 2531, (Scalia, J., concurring).

The Supreme Court of Ohio was clearly confused by the *Seibert* decision. The decision of the Supreme Court of Ohio highlighted the split among courts on the application

of *Seibert*, misapplied and effectively overturned in Ohio a decision of this Court, resulted in the inappropriate suppression of evidence, and was the most recent in a string of developing case law misinterpreting this Court's decision in *Seibert*. This Court should grant review to finally and clearly hold that when police officers like Trooper Menges do not use a deliberate strategy to avoid *Miranda*, courts should continue to apply *Elsted* to determine if post-*Miranda* statements are inadmissable because of pre-*Miranda* questioning.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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October 2, 2006

THE STATE OF OHIO, APPELLEE, v. FARRIS, APPELLANT.

[Cite as *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255.]

Criminal law — Search and seizure — Traffic stop — Incriminating statements made by defendant after Miranda *warnings confirming statements made before warnings are inadmissible — Physical evidence seized as a result of inadmissible statements is also inadmissible — Odor of marijuana gave rise to probable cause for warrantless search of interior of vehicle but not its trunk.*

(No. 2004-0604 – Submitted April 27, 2005 – Decided July 12, 2006.)

APPEAL from the Court of Appeals for Wayne County, No. 03CA0022, 2004-Ohio-826.

PFEIFER, J.

Factual and Procedural Background

{¶ 1} On the afternoon of December 18, 2002, Ohio Highway Patrol Trooper Richard Menges stopped appellant, Stephen F. Farris, for speeding on U.S. Route 30, in Wooster. Once Farris pulled over and stopped his vehicle, Menges approached on the right side of the car. When Farris lowered the passenger window, Menges smelled a light odor of burnt marijuana coming from inside the car. Menges had not observed Farris smoking, nor did he see him throw anything out a window.

{¶ 2} Menges asked Farris to step out of the car. He did not conduct a field sobriety test on Farris, but did conduct a pat-down search and found no evidence of contraband or drugs. Menges took Farris's car keys and

requested that Farris sit in the front seat of the police cruiser.

{¶ 3} While they were seated in the front of the cruiser, Menges told Farris that he had smelled marijuana in the car. Without administering a *Miranda* warning or seeking consent to search the car, Menges asked Farris about the smell of marijuana. Farris told Menges that his housemates had been smoking marijuana when he left the house. Menges told Farris that he was going to search the car and then specifically asked whether there were any drugs or drug devices in the car. Farris admitted that there was a "bowl," i.e., a marijuana pipe, in a bag in his trunk.

{¶ 4} Menges testified that after Farris made those statements, Menges immediately administered *Miranda* warnings, but did not tell Farris that his previous admissions could not be used against him. He then asked Farris the same questions and obtained the same responses regarding the location of the drug paraphernalia.

{¶ 5} Menges and a second trooper searched the interior of Farris's vehicle and found nothing. They then opened the trunk, searched it, and seized a closed, opaque container that held a glass pipe and cigarette papers. Farris was charged with a misdemeanor for possession of drug paraphernalia.

{¶ 6} Farris filed a motion to suppress certain statements that he had made to the highway patrol troopers and to suppress the evidence seized from the trunk of his car. On April 29, 2003, the trial court ruled that statements made prior to the *Miranda* warnings were to be suppressed but that statements made after the warnings were admissible. The trial court also ruled that the seized paraphernalia was admissible, as the trooper had probable cause to search the trunk of Farris's vehicle based solely on

the odor of burnt marijuana coming from inside the car.

{¶ 7} After the trial court's evidentiary rulings, Farris entered a no-contest plea, and the trial court entered a judgment of conviction. Farris appealed, and the appellate court affirmed the trial court's holding. The appellate court held that Farris's statements – both before and after the *Miranda* warning – were voluntary and that once warned, he knowingly and intelligently waived his *Miranda* rights. The court further held that the search of the vehicle's trunk was proper because Farris's "admissible inculpatory statements relating to the drug paraphernalia gave the officer probable cause to search the trunk of [Farris's] vehicle without a warrant pursuant to the automobile exception."

{¶ 8} The cause is before this court upon the acceptance of a discretionary appeal.

Law and Analysis

{¶ 9} This case presents several issues for our review: (1) whether the detention of Farris constituted an unreasonable seizure and thus violated the Fourth Amendment to the United States Constitution, (2) whether Farris was in custody when he made his pre-*Miranda* statements in the police vehicle, (3) whether the statements Farris made after receiving a *Miranda* warning confirming his pre-*Miranda* statements can be used against him, (4) whether the fruits of Farris's post-*Miranda* statements are admissible, and (5) whether the above issues are irrelevant in this matter because an officer has probable cause to search an entire vehicle, including its trunk, when he smells the odor of burnt marijuana coming from the vehicle. We hold that Farris was not unreasonably detained; that he was, however, in custody; that his post-*Miranda* statements are inadmissible; that the physical evidence seized as a

result of his statements is inadmissible pursuant to the Self-Incrimination Clause of Section 10, Article I of the Ohio Constitution; and that with respect to the car, the officer had sufficient probable cause to search only the interior of the vehicle, not its trunk.

{¶ 10} Appellant argues first that he was being illegally held by Officer Menges when he made his incriminating statements. In *State v. Robinette* (1997), 80 Ohio St.3d 234, 685 N.E.2d 762, this court held in paragraph one of the syllabus:

> **{¶ 11}** "When a police officer's objective justification to continue detention of a person stopped for a traffic violation for the purpose of searching the person's vehicle is not related to the purpose of the original stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some illegal activity justifying an extension of the detention, the continued detention to conduct a search constitutes an illegal seizure."

{¶ 12} Here, Farris's extended detention was not based upon the purpose of the original stop, excessive speed, but was based upon Menges's detection of the scent of burnt marijuana. In *State v. Moore* (2000), 90 Ohio St.3d 47, 734 N.E.2d 804, a case involving the search of a driver and his car pursuant to a traffic stop, this court held, "The smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to search a motor vehicle" without a warrant. Based on *Moor*e, then, Farris's detention in order to effectuate a search was justified and did not violate the Fourth Amendment to the United States Constitution or its Ohio counterpart, Section 14, Article I of the Ohio Constitution.

{¶ 13} Having conceded below and in its memorandum opposing jurisdiction in this court that Farris was in custody for purposes of *Miranda*, appellee now argues that Farris was never in custody, rendering *Miranda* warnings unnecessary. A defendant need not be under arrest, however, to be "in custody" for *Miranda* purposes. Although a motorist who is temporarily detained as the subject of an ordinary traffic stop is not "in custody" for the purposes of *Miranda*, *Berkemer v. McCarty* (1984), 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317, if that person "thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*." Id.

{¶ 14} Here, the officer's treatment of Farris after the original traffic stop placed Farris in custody for practical purposes. Officer Menges patted down Farris, took his car keys, instructed him to enter the cruiser, and told Farris that he was going to search Farris's car because of the scent of marijuana. Farris was not free to leave the scene – he had no car keys and reasonably believed that he would be detained at least as long as it would take for the officer to search his automobile. The "only relevant inquiry" in determining whether a person is in custody is "how a reasonable man in the suspect's position would have understood his situation." *Berkemer*, 468 U.S. at 442, 104 S.Ct. 3138, 82 L.Ed.2d 317. We hold that a reasonable man in Farris's position would have understood himself to be in custody of a police officer as he sat in the cruiser.

{¶ 15} While in custody in the cruiser, Farris made virtually identical statements to Menges before and after Menges's recitation of the *Miranda* warning regarding the presence of drug paraphernalia in the trunk of his car. In *Missouri v. Seibert* (2004), 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643, the United States Supreme Court considered whether the technique of successive interrogations, first

unwarned and then warned, violates a defendant's *Miranda* rights.

{¶ 16} In *Seiber*t, an officer purposely and by design questioned a defendant without *Miranda* warnings for 30 to 40 minutes. After the defendant made an admission, the officer gave the defendant a 20-minute break. After the break, the same officer gave the defendant *Miranda* warnings, obtained a signed waiver, and resumed questioning, confronting the defendant with her prewarning statements. The defendant repeated her admission. The court referred to this interrogation technique as "question first" and wrote that "[t]he object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." Id. at 611, 124 S.Ct. 2601, 159 L.Ed.2d 643. The court held that the postwarning statements were inadmissible. Id. at 617, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643. Id. at 611, 124 S.Ct. 2601, 159 L.Ed.2d 643.

{¶ 17} The overarching concern when considering the sufficiency of a *Miranda* warning is whether it is given in a manner that effectuates its purpose of reasonably informing a defendant of his rights. The words themselves are not magical and are not curative of interrogation mistakes that occur before it is given:

> **{¶ 18}** "Just as 'no talismanic incantation [is] required to satisfy *[Miranda*'s] strictures,' *California v. Prysoc*k, 453 U.S. 355, 359 [101 S.Ct. 2806, 69 L.Ed.2d 696] (1981) *(per curia*m), it would be absurd to think that the mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance. 'The inquiry is simply whether the warnings reasonably

> "conve[y] to [a suspect] his rights as required by *Miranda*." ' *Duckworth v. Eagan*, 492 U.S. 195, 203 [109 S.Ct. 2875, 106 L.Ed.2d 166] (1989) (quoting *Prysock*, *supra*, at 361 [101 S.Ct. 2806, 69 L.Ed.2d 696])." *Seibert*, 542 U.S. at 611, 124 S.Ct. 2601, 159 L.Ed.2d 643.

{¶ 19} In a question-first scenario in which the *Miranda* warning is withheld and the suspect makes inculpatory statements, the risk is that the warning will mean less when it is eventually recited:

> **{¶ 20}** "The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment." *Seibert*, 542 U.S. at 611-612, 124 S.Ct. 2601, 159 L.Ed.2d 643.

{¶ 21} *Seibert* points out that in "question first" scenarios when the circumstances of the given case show that the *Miranda* warning could not reasonably be found effective, the postwarning statements are inadmissible

because "the earlier and later statements are realistically seen as parts of a single, unwarned sequence of questioning." I*d.* at 612, 124 S.Ct. 2601, 159 L.Ed.2d 643, fn. 4. The court clearly rejected the "fruit of the poisonous tree" doctrine as a basis for exclusion. That doctrine holds that "evidence otherwise admissible but discovered as a result of an earlier violation [of Fourth Amendment rights] is excluded as tainted." Id.

{¶ 22} In rejecting the "fruit of the poisonous tree" doctrine for *Miranda* violations, the court relied on its earlier decision in *Oregon v. Elstad* (1985), 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222. *Seiber*t, 542 U.S. at 612, 124 S.Ct. 2601, 159 L.Ed.2d 643, fn.4. The court in *Elstad* held admissible a post-*Miranda* warning confession that followed a prewarning admission solicited by an officer while the suspect was in custody. *Elstad* and *Seibert* stand on opposite sides of the line defining where prewarning statements irretrievably affect postwarning statements. Still, that line cannot be said to be bright or sharply defined.

{¶ 23} In *Elsta*d, police officers went to the home of the 18-year-old defendant with a warrant for his arrest. While one officer went to the kitchen to explain to the suspect's mother that her son was being arrested for the burglary of a neighbor's residence, another officer stayed with Elstad in the living room and had a brief discussion with him. The officer explained that the neighbor's house had been robbed and that he thought Elstad was involved. Elstad stated to the officer, "Yes, I was there." *Elsta*d, 470 U.S. at 301, 105 S.Ct. 1285, 84 L.Ed.2d 222.

{¶ 24} The officers then transported Elstad to the sheriff's department, and about one hour later, interviewed him in the office of one of the officers. One officer advised Elstad for the first time of his *Miranda* rights, reading from

a standard card, without mentioning Elstad's previous statement. Elstad waived his rights and then made a full, detailed statement, explaining that he had known that the neighbors would be out of town and that he had been paid to help several people gain entry through a defective sliding glass door. He added that upon leaving the house, he received a "bag of grass" from another person involved in the robbery.

{¶ 25} An Oregon appellate court held the postwarning confession inadmissible. The *Elstad* court reversed. The court rejected the idea that a confession following an earlier, unwarned statement is inadmissible as "fruit of the poisonous tree." The court explained that evidence can be excluded as fruit of the poisonous tree only after a constitutional violation and that a failure to give *Miranda* warnings is not equivalent to a violation of the Constitution: " 'The prophylactic *Miranda* warnings * * * are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." *Michigan v. Tucke*r, 417 U.S. 433, 444, 94 S.Ct. 2357, 2364, 41 L.Ed.2d 182 (1974); see *Edwards v. Arizon*a, 451 U.S. 477, 492, 101 S.Ct. 1880, 1888, 68 L.Ed.2d 378 (1981) (Powell, J., concurring). Requiring *Miranda* warnings before custodial interrogation provides "practical reinforcement" for the Fifth Amendment right.' " (Footnote omitted.) *Elstad,* 470 U.S. at 305, 105 S.Ct. 1285, 84 L.Ed.2d 222, quoting *New York v. Quarles* (1984), 467 U.S. 649, 654, 104 S.Ct. 2626, 81 L.Ed.2d 550.

{¶ 26} The court in *Elstad* also rejected the defendant's "cat out of the bag" argument, that after an unwarned statement of guilt, there exists a "subtle form of lingering compulsion, the psychological impact of the suspect's conviction that he has let the cat out of the bag and, in so doing, has sealed his own fate." *Elstad,* 470 U.S.

at 311, 105 S.Ct. 1285, 84 L.Ed.2d 222. The court wrote that "[t]his Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver." Id. at 312, 105 S.Ct. 1285, 84 L.Ed.2d 222.

{¶ 27} *Seibert* followed *Elstad* in rejecting a "fruit of the poisonous tree" analysis or "cat out of the bag" analysis. Instead, *Seibert* considers whether the sequential interrogations are essentially one continuous interrogation and whether an intermediate *Miranda* warning can be effective. Together with *Elsta*d, *Seibert* establishes factors to consider in making the decision:

> **{¶ 28}** "The contrast between *Elstad* and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first. In *Elsta*d, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow

up on the earlier admission.

{¶ 29} "At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings. The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise that her prior statement could not be used. Nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led her through a systematic interrogation, and any uncertainty on her part about a right to stop talking about matters previously discussed would only have been aggravated by the way [the officer] set the scene by saying 'we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?' * * * The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already

> given. It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." Id. at 615-617, 124 S.Ct. 2601, 159 L.Ed.2d 643.

{¶ 30} Applying the elements discussed in *Seibert* to the facts of this case, we hold that the interrogation here is much closer to *Seibert* than to *Elsta*d. Here, although the whole process was extremely brief, "[i]t would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before." *Seiber*t, 542 U.S. at 616-617, 124 S.Ct. 2601, 159 L.Ed.2d 643. Although the questioning was very simple, not in-depth, and not lengthy, it covered exactly the same subject both before the warning and after the warning. Both of Farris's statements were made in the police cruiser to the same police officer within moments of each other. Temporally and substantively, Menges's questioning of Farris constituted a single interrogation. Menges made no attempt to tailor the *Miranda* warning he eventually gave to the particular situation and did not convey any distinction whatsoever between statements that might come after the warning and those that came before. Thus, Farris was not in a position to make a *Seibert* informed choice. Id. at 612, 124 S.Ct. 2601, 159 L.Ed.2d 643.

{¶ 31} A difference between this case and *Seibert* is

the seeming lack of an official police strategy to intentionally bait suspects into talking before the *Miranda* warning and then repeating damaging statements later after the warning has been given. *Seibert* was a plurality opinion, leaving somewhat in doubt whether the intent of the officer in garnering the prewarning statement is important in determining whether a postwarning statement is admissible. Concurring in the judgment, Justice Kennedy wrote:

> **{¶ 32}** "The plurality concludes that whenever a two-stage interview occurs, admissibility of the postwarning statement should depend on 'whether the *Miranda* warnings delivered midstream could have been effective enough to accomplish their object' given the specific facts of the case. * * * This test envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations. * * * In my view, this test cuts too broadly." *Seiber*t, 542 U.S. at 621-622, 124 S.Ct. 2601, 159 L.Ed.2d 643 (Kennedy, J., concurring in judgment).

{¶ 33} However, in a dissent joined by Chief Justice Rehnquist and Justices Scalia and Thomas, Justice O'Connor wrote:

> **{¶ 34}** "The plurality's rejection of an intent-based test is * * *, in my view, correct. Freedom from compulsion lies at the heart of the Fifth Amendment, and requires us to assess whether a suspect's decision to speak truly was voluntary. Because voluntariness is a matter of the suspect's state of mind, we

> focus our analysis on the way in which suspects experience interrogation. * * * "Thoughts kept inside a police officer's head cannot affect that experience."*Seibert,* 542 U.S. at 624, 124 S.Ct. 2601, 159 L.Ed.2d 643 (O'Connor, J., dissenting*).*

{¶ 35} We agree with the *Seibert* plurality and dissent that the intent of the officer doing the questioning is not relevant in a *Miranda* analysis. The suspect's state of mind is the key. To delve into the issue of whether the two-stage questioning was an intentional attempt to undermine *Miranda* complicates matters so much that it could muddy a clear and effective rule. *(Seibert* presented the rare case in which the officer admitted that the two-part questioning was intentionally coercive.) *Miranda* itself provides a bright line for police behavior, and we believe that a bright line is also necessary in these types of cases.

{¶ 36} Because the intent of the trooper was irrelevant here, and because Farris's postwarning statements were the same as his prewarning statements, we hold that Farris's postwarning statements were not the result of an informed choice and are therefore inadmissible.

{¶ 37} Although we have held that Farris's statements to Menges are inadmissible, we still must determine whether the physical evidence found as a result of his statements is also inadmissible. In *United States v. Patane* (2004), 542 U.S. 630, 124 S.Ct. 2620, 159 L.Ed.2d 667, the court considered whether the failure to give a suspect a *Miranda* warning requires the suppression of the physical fruits of the suspect's unwarned but voluntary statements. The court concluded that the *Miranda* rule protects against violations of the Fifth Amendment's Self-Incrimination Clause, but does not apply to nontestimonial physical evidence.

{¶ 38} In *Patane*, the defendant was suspected of violating a restraining order. Police also suspected that the defendant, a convicted felon, might be in possession of a firearm. Officers arrested Patane at his home for violation of the restraining order; a detective started to advise Patane of his *Miranda* rights, but was interrupted by Patane, who said that he knew his rights. The officers never resumed the warning. The detective then asked Patane about the handgun he was suspected to have. Eventually, Patane told the detective that the pistol was in his bedroom and gave the detective permission to retrieve it. Patane was indicted for possession of a firearm by a convicted felon. Patane sought to have the gun suppressed as the fruit of an unwarned statement.

{¶ 39} The court wrote that "the core protection afforded by the Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial. * * * The Clause cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements." Id. at 637, 124 S.Ct. 2620, 159 L.Ed.2d 667. The court reiterated the court's rejection in *Elstad* and *Seibert* of the "fruit of the poisonous tree" doctrine in cases involving violations of the *Miranda* rule:

{¶ 40} "[J]ust as the Self-Incrimination Clause primarily focuses on the criminal trial, so too does the *Miranda* rule. The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn. For this reason, the exclusionary rule articulated in such cases as *Wong Sun [v. United States* (1963), 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441, which established the "fruit of the poisonous tree" doctrine] does not apply." *Patane*, 542 U.S. at 637, 124 S.Ct. 2620, 159 L.Ed.2d 667.

{¶ 41} The court held that violations of *Miranda*

occur only at trial and only as to statements:

> **{¶ 42}** "Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial. And, at that point, '[t]he exclusion of unwarned statements * * * is a complete and sufficient remedy' for any perceived *Miranda* violation." *Patane,* 542 U.S. at 642, 542 U.S. 630, 124 S.Ct. 2620, 159 L.Ed.2d 667, quoting *Chavez v. Martinez* (2003), 538 U.S. 760, 790, 123 S.Ct. 1994, 155 L.Ed.2d 984.

{¶ 43} The court rejected the argument that physical evidence seized as a result of an unwarned statement is the practical equivalent of a statement:

> **{¶ 44}** "[W]e have held that '[t]he word "witness" in the constitutional text limits the' scope of the Self-Incrimination Clause to testimonial evidence. *[United States v.] Hubbell* [2000], 530 U.S. [27] at 34-35, 120 S.Ct. 2037 [147 L.Ed.2d 24]. The Constitution itself makes the distinction. And although it is true that the court requires the exclusion of the physical fruit of actually coerced statements, it must be remembered that statements taken without sufficient *Miranda* warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination." (Footnote omitted.) *Patan*e, 542 U.S. at 643-644, 124 S.Ct. 2620, 159 L.Ed.2d 667.

{¶ 45} Pursuant to the Fifth Amendment, then, the physical evidence seized by the troopers in this case was

admissible. We must now consider whether the evidence was admissible pursuant to Section 10, Article I of the Ohio Constitution.

{¶ 46} 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." *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, paragraph one of the syllabus.

{¶ 47} In general, when provisions of the Ohio Constitution and United States Constitution are essentially identical, we should harmonize our interpretations of the provisions, unless there are persuasive reasons to do otherwise. *State v. Robinett*e, 80 Ohio St.3d at 239, 685 N.E.2d 762. In *State v.Brown,* 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, syllabus, this court diverged from federal Fourth Amendment jurisprudence, holding 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."

{¶ 48} 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.

{¶ 49} Only evidence obtained as the direct result of statements made in custody without the benefit of a *Miranda* warning should be excluded. We believe that to hold otherwise would encourage law-enforcement officers to withhold *Miranda* warnings and would thus weaken Section 10, Article I of the Ohio Constitution. In cases like this one, where possession is the basis for the crime and physical evidence is the keystone of the case, warning suspects of their rights can hinder the gathering of evidence. When physical evidence is central to a conviction and testimonial evidence is not, there can arise a virtual incentive to flout *Miranda*. We believe that the overall administration of justice in Ohio requires a law-enforcement environment in which evidence is gathered in conjunction with *Miranda*, not in defiance of it. We thus join the other states that have already determined after *Patane* that their state constitutions' protections against self-incrimination extend to physical evidence seized as a result of pre-*Miranda* statements. *State v. Knapp* (2005), 285 Wis.2d 86, 700 N.W.2d 899; *Commonwealth v. Martin* (2005), 444 Mass. 213, 827 N.E.2d 198. Thus, the physical evidence obtained as a result of the unwarned statements made by Farris in this case is inadmissible pursuant to Section 10, Article I of the Ohio Constitution.

{¶ 50} Finally, the appellee argues that, even without Farris's statements, Menges had probable cause to believe that the car contained contraband due to his detection of the scent of marijuana and that the automobile exception to the warrant requirement permitted him to search the vehicle. See *Chambers v. Maroney* (1970), 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419. However, the items seized are admissible only if Menges had the authority to

search the *trunk* of Farris's vehicle and its contents based upon the scent of marijuana. This court did not extend the search of the vehicle to the trunk in *Moor*e, 90 Ohio St.3d 47, 734 N.E.2d 804, and we decline to do so here.

{¶ 51} A trunk and a passenger compartment of an automobile are subject to different standards of probable cause to conduct searches. In *State v. Murrell* (2002), 94 Ohio St.3d 489, 764 N.E.2d 986, syllabus, this court held that "[w]hen a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the *passenger compartment* of that automobile." (Emphasis added.) The court was conspicuous in limiting the search to the passenger compartment.

{¶ 52} The odor of burnt marijuana in the passenger compartment of a vehicle does not, standing alone, establish probable cause for a warrantless search of the trunk of the vehicle. *United States v. Nielsen* (C.A.10, 1993), 9 F.3d 1487. No other factors justifying a search beyond the passenger compartment were present in this case. The officer detected only a light odor of marijuana, and the troopers found no other contraband within the passenger compartment. The troopers thus lacked probable cause to search the trunk of Farris's vehicle. Therefore, the automobile exception does not apply in this case.

{¶ 53} Accordingly, we reverse the judgment of the court of appeals.

Judgment reversed.

MOYER, C.J., O'CONNOR and LANZINGER, JJ., concur.

RESNICK, LUNDBERG STRATTON and O'DONNELL, JJ., concur in part and dissent in part.

ALICE ROBIE RESNICK, J., concurring in part and dissenting in part.

{¶ 54} I concur with the majority's finding that the appellant, Stephen F. Farris, was not unreasonably detained, that he was in custody when he made his pre-*Miranda* statements, and that his post-*Miranda* statements are inadmissible. However, I strongly disagree with the majority's determination that the physical evidence seized from the appellant's trunk is inadmissible pursuant to Section 10, Article I of the Ohio Constitution, and its determination that the physical evidence is inadmissible because the officer had sufficient probable cause to search only the interior of the vehicle.

{¶ 55} The majority first concludes that the physical evidence is inadmissible pursuant to Section 10, Article I of the Ohio Constitution. In reaching this holding, the majority concludes 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 need not and should not make such a finding in this case. Rather, the admissibility of the physical evidence turns not on the determination of a *Miranda* violation, but on the examination of the law relating to searches of vehicles pursuant to the automobile exception to the warrant requirement.

{¶ 56} Under the Fourth Amendment, searches conducted without prior approval by a judge or a magistrate are per se unreasonable, subject to certain established and well-delineated exceptions. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576. One of these, the automobile exception, was set forth in *Carroll v. United States* (1925), 267 U.S 132, 45 S.Ct. 280, 69 L.Ed. 543. In

*Carrol*l, the United States Supreme Court held that a warrantless search of an automobile stopped by law enforcement officers who had probable cause to believe the vehicle contained contraband was not unreasonable under the Fourth Amendment. 267 U.S. at 155-156, 45 S.Ct. 280, 69 L.Ed. 543.

{¶ 57} The court again reviewed the automobile exception to the warrant requirement and specifically addressed the scope of the search in the case of *United States v. Ross* (1982), 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572. In that case, the court held that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." (Emphasis omitted.) Id. at 825, 102 S.Ct. 2157, 72 L.Ed.2d 572.

{¶ 58} We have expressly interpreted Section 14, Article I of the Ohio Constitution as affording the same protections as the Fourth Amendment to the United States Constitution. *State v. Robinette* (1997), 80 Ohio St.3d 234, 238, 685 N.E.2d 762. In fact, this court has ruled that we should harmonize the Fourth Amendment and Section 14, Article I of the Ohio Constitution. *State v. Murrell* (2002), 94 Ohio St.3d 489, 496, 764 N.E.2d 986.

{¶ 59} This court has held that "the smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to search a motor vehicle, pursuant to the automobile exception to the warrant requirement." *State v. Moore* (2000), 90 Ohio St.3d 47, 48, 734 N.E.2d 804. In terms of the permissible scope of a warrantless search of a vehicle pursuant to the automobile exception, we held that "[w]here police officers have probable cause to search an entire vehicle, they may conduct a warrantless search of every part of the vehicle

and its contents, including all movable containers and packages, that may logically conceal the object of the search. *(United States v. Ross* [1982], 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572[,] followed.)" *State v. Welch* (1985), 18 Ohio St.3d 88, 18 OBR 124, 480 N.E.2d 384, syllabus.

{¶ 60} Despite this clear precedent, the majority concludes that the officer in the present case had sufficient probable cause to search only the interior of the vehicle, not its trunk. Inexplicably, the majority determines that the automobile exception does not apply in this case because no factors beyond the smell of burnt marijuana justified a search beyond the passenger compartment of the appellant's vehicle.

{¶ 61} The majority's decision in this case leaves the law on warrantless searches of vehicles seriously muddled. Although the majority holds that the scope of the search of the appellant's vehicle was limited to the passenger compartment, it fails to delineate which exception to the warrant requirement it believes justifies the warrantless search of the appellant's vehicle. In determining that the automobile exception to the warrant requirement does not apply, the majority asserts that our decision in *State v. Moor*e, which allowed the search of an automobile without a warrant based upon an officer's recognition of the smell of marijuana, limited the scope of the warrantless search of the appellant's vehicle in this case to the interior of the vehicle. The majority also claims that our decision in *State v. Murrell,* which addressed the search-incident-to-arrest exception to the warrant requirement, supports its conclusion that the scope of the warrantless search of the appellant's vehicle was limited to the passenger compartment of the vehicle.

{¶ 62} Our precedent makes clear that the smell of marijuana alone, by a person qualified to recognize the odor,

is sufficient to establish probable cause to search an automobile pursuant to the automobile exception to the warrant requirement. *State v. Moor*e, 90 Ohio St.3d at 48, 734 N.E.2d 804. We did not limit the scope of the search in *Moore* to the interior of the vehicle. Therefore, it is unquestionable that when the officer in this case smelled the odor of burnt marijuana coming from the appellant's vehicle, he had sufficient probable cause to search the automobile, including the trunk, pursuant to the automobile exception to the warrant requirement.

{¶ 63} Accordingly, I would affirm the appellate court's holding that the physical evidence seized from the appellant's trunk is admissible.

LUNDBERG STRATTON and O'DONNELL, JJ., concur in the foregoing opinion.

Martin Frantz, Wayne County Prosecuting Attorney, for appellee.

Robert E. Kerper Jr., for appellant.

STATE OF OHIO	)	IN THE COURT
	)ss:	OF APPEALS
COUNTY OF WAYNE	)	NINTH JUDICIAL
	)	DISTRICT

STATE OF OHIO

Appellee

v.

STEPHEN F. FARRIS

Appellant

C.A. No. 03CA0022

APPEAL FROM JUDGMENT
ENTERED IN THE
WAYNE COUNTY MUNICIPAL COURT
COUNTY OF WAYNE, OHIO
CASE No. CRB 02-12-0101

DECISION AND JOURNAL ENTRY

Dated: February 25, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

Slaby, Judge.

{¶1} Defendant, Stephen F. Farris, appeals from the judgment of the Wayne County Municipal Court finding him guilty of possession of drug paraphernalia and sentencing him to a $150 fine and 6 month suspension of his driver's license. We affirm.

{¶2} A police officer stopped Defendant for speeding. The officer approached Defendant's vehicle, and noted that when Defendant rolled down his driver's side window a light odor of burnt marijuana emanated from the passenger compartment. The officer asked Defendant to exit his vehicle, performed a pat-down search on Defendant, took Defendant's car keys, and escorted Defendant to his patrol car where he ordered Defendant to sit in the passenger seat. Without giving Defendant any Miranda warnings, the officer asked him whether there were any drugs or drug paraphernalia in the vehicle. Defendant admitted that his trunk contained a glass marijuana pipe and cigarette papers.

{¶3} The officer then immediately gave Defendant his Miranda warnings and repeated the questions. Defendant, again, admitted that he had drug paraphernalia in his trunk. The officer, along with a second officer who had arrived on the scene, then proceeded to search both the interior and trunk of Defendant's vehicle after placing Defendant in the back of the patrol car. The officer discovered the glass pipe, which tested positive for marijuana residue, and cigarette papers in an opaque box in Defendant's trunk.

{¶4} Defendant was charged with possession of drug paraphernalia. Defendant filed a motion to suppress on April 18, 2003. In response, the trial court ordered Defendant and the State to brief two issues prior to trial: whether inculpatory statements made by Defendant were admissible and whether the police officer had probable cause to search the trunk of Defendant's vehicle. On April 28, 2003, the court found that Defendant was in custody when he made inculpatory statements. Therefore, the court suppressed the inculpatory statements made prior to receipt of Miranda warnings, but ruled that identical statements, made by Defendant after receiving the required warnings, were admissible. The court also found that the police officer

had probable cause to search the trunk of Defendant's vehicle based on the odor of burnt marijuana in the passenger compartment of the vehicle.

{¶5} Following the court's rulings, Defendant pleaded no contest to possession of drug paraphernalia. The court sentenced Defendant to pay $150 in fines and suspended Defendant's driver's license for six months. The trial court stayed execution of the sentence pending appeal. Defendant timely appealed, raising two assignments of error.

ASSIGNMENT OF ERROR I

> "The trial court erred in denying [Defendant's] pretrial motion to suppress inculpatory statements made to the Ohio State Highway Patrol."

{¶6} In his first assignment of error, Defendant argues that the trial court erred by failing to suppress inculpatory statements made by Defendant to the police. Specifically, Defendant alleges that the second set of inculpatory statements, given after Miranda warnings, were inexorably intertwined and tainted by the immediacy of his prior non-Mirandized inculpatory statements and illegal arrest. He also asserts that the court should have suppressed the statements because he did not voluntarily and knowingly waive his rights, and the police did not obtain any written waiver. We disagree.

{¶7} The review of a motion to suppress presents a mixed question of fact and law for an appellate court. *State v. Yeage*r, 9th Dist. Nos. 21091, 21112, and 21120, 2003-Ohio-1808, at ¶5, citing *State v. Long* (1998), 127 Ohio App.3d 328, 332. This court "'is bound to accept factual determinations of the trial court made during the

suppression hearing so long as they are supported by competent and credible evidence.'" *State v. Robinson* (Oct. 25, 2000), 9th Dist. No. 19905, at 5, quoting *State v. Searls* (1997), 118 Ohio App.3d 739, 741. However, an appellate court reviews de novo the trial court's application of the law to those facts. *Robinso*n, supra, at 5, citing *Searl*s, 118 Ohio App.3d at 741.

{¶8} This court initially notes that Defendant in this case was never arrested. The officer neither had the intent to arrest Defendant, nor did he tell Defendant he was under arrest. Rather, the officer merely cited and released Defendant. Defendant, therefore, was never under arrest. See *State v. Darrah* (1980), 64 Ohio St.2d 22, 26. As such, the Fourth Amendment "fruit of the poisonous tree" doctrine, which applies to statements made by a defendant following an illegal arrest, does not apply. See *Brown v. Illinois* (1975), 422 U.S. 590, 45 L.Ed.2d 416 (statements excluded as fruit of an illegal arrest); *Wong Sun v. United States* (1963), 371 U.S. 471, 9 L.Ed.2d 441 (same).

{¶9} *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 16 L.Ed.2d 694, protects a defendant's Fifth Amendment right against self-incrimination by prohibiting admission of inculpatory statements resulting from custodial interrogation unless law enforcement officers have followed enumerated procedural safeguards. Prior to custodial interrogation, a defendant must be informed that he has the right to remain silent, any statement he makes may be used as evidence against him, and he has the right to the presence of an attorney. Id. We must answer two questions in determining whether Defendant's inculpatory statements made following the Miranda warnings are admissible: whether Defendant's inculpatory statements were voluntary, and whether Defendant voluntarily, knowingly, and intelligently waived his Miranda rights. See *State v. Clark* (1988), 38 Ohio St.3d 252, 261.

{¶10} In determining whether a statement was voluntary, the court considers the totality of the circumstances. *Clar*k, 38 Ohio St.3d at 261. Factors under this test may include "the age, mentality, and prior criminal experience of the accused; the length, intensity and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards* (1976), 49 Ohio St.2d 31, 40-41, citing *Brown v. United States* (C.A.10, 1966), 356 F.2d 230, 232. Generally speaking, for an inculpatory statement made after valid Miranda warnings to be considered involuntary, law enforcement officers must have engaged in some form of coercive action. *Colorado v. Connelly* (1986), 479 U.S. 157, 167, 93 L.Ed.2d 473.

{¶11} In this particular case, Defendant, a 21 year old college student with no prior criminal history, was asked a single question by a police officer during a brief traffic stop. The officer did not threaten Defendant or offer Defendant inducements to answer his question, nor did he mistreat Defendant. No evidence of physical deprivation has been offered. The officer exercised no overt coercion upon Defendant beyond the facts that Defendant was seated in the front seat of the police cruiser and that the officer had Defendant's keys. Defendant's first statements were voluntary.

{¶12} Likewise, Defendant's second set of inculpatory statements, given following the Miranda warnings, were voluntary. Defendant, again, was under no coercion to answer the officer the second time. The officer did not threaten Defendant or offer him inducements to answer, nor did the officer mistreat or physically deprive Defendant of anything. While Defendant argues that his prior unwarned confession defeats the voluntariness of his second set of Mirandized statements, this court has held

that:

> the mere fact that a defendant has made an unwarned confession does not raise the presumption that the unwarned confession was involuntary or that it tainted the admissibility of subsequent warned confessions. Thus, although a defendant's prior unwarned confession is inadmissible because of the failure to provide Miranda warnings, the administration of Miranda warnings before a subsequent confession 'ordinarily should suffice to remove the conditions that precluded admission of the earlier [confession].' (internal citations and emphasis omitted). *In re Taylor* (Mar. 29, 1995), 9th Dist. No. 93CA005650, at 11-12, citing and quoting *Oregon v. Elstad* (1985), 470 U.S. 298, 314, 318, 84 L.Ed.2d 222. See, also, *State v. McMillan* (1990), 69 Ohio App.3d 36, 40-41.

We find that Defendant's prior unwarned statements do not, by themselves, render his second set of inculpatory statements involuntary.

{¶13} Given that both sets of Defendant's inculpatory statements were voluntary, the question remains whether Defendant voluntarily, knowingly, and intelligently waived his Miranda rights. Where the prosecution alleges that a defendant has waived his Miranda rights, it must prove, by a preponderance of the evidence, that the defendant knowingly, voluntarily, and intelligently waived those rights based on the totality of the circumstances. See *State v. Gum*m, 73 Ohio St.3d 413, 429, 1995-Ohio-24. While an express or written statement of waiver may be preferable in Miranda cases, neither is required in order to find a valid

waiver of Miranda rights. *North Carolina v. Butler* (1979), 441 U.S. 369, 373, 60 L.Ed.2d 286. In some cases, "waiver can be clearly inferred from the actions and words of the person interrogated." Id. "A suspect's decision to waive his Fifth Amendment privilege against compulsory self-incrimination is made voluntarily absent evidence that his will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct." *State v. Dailey* (1990), 53 Ohio St.3d 88, paragraph two of the syllabus.

{¶14} Defendant chose to speak to the officer following the officer's recitation of the Miranda warnings. Defendant told the officer that he understood those rights. He did not in any way indicate his wish to exercise any of his Miranda rights. He did not preface his response with "since I already told you," or any other phraseology in that vein. Rather, he, again, answered the questions of the officer in spite of being informed of his right to remain silent. The mere fact that the officer immediately repeated the same question following the Miranda warnings should have indicated to Defendant, a college student, that he was free to embrace his Miranda rights and remain silent. Defendant's acts indicate that he voluntarily, knowingly, and intelligently waived his Miranda rights.

{¶15} Defendant, citing *Westover v. United States* (1966), 384 U.S. 494, 16 L.Ed.2d 735, alleges that the lack of time or events separating the prior unwarned and subsequent warned statements vitiated his ability to validly waive his Miranda rights. First, we note that *Westover* involved a defendant subject to nearly 14 hours of interrogation prior to receipt of any Miranda warnings. Defendant can hardly argue that the facts of his case, a brief traffic stop during which he was never arrested, parallel fourteen hours of custody suffused with interrogation. Second, and more importantly, this issue has subsequently

been addressed in depth by the United States Supreme Court in *Elsta*d, 470 U.S. at 317-18:

> A handful of courts have *** applied our precedents relating to confessions obtained under coercive circumstances to situations involving wholly voluntary admissions, requiring a passage of time or break in events before a second, fully warned statement can be deemed voluntary. Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of Miranda, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. *** The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative.

Because Defendant's first set of inculpatory statements were made voluntarily, a break in time is not necessary in order to find that Defendant voluntarily, knowingly, and intelligently waived his Miranda rights, and that his second inculpatory statements were also voluntary.

{¶16} This court does not mean to say that the recitation of Miranda warnings to a defendant following an unwarned confession will automatically result in admissibility of any later, Mirandized statements. Rather, each case must be dealt with according to the facts and circumstances at hand. On the facts of the case at hand, we find that both sets of Defendant's statements were voluntary and that Defendant voluntarily, knowingly and intelligently waived his Miranda rights. Accordingly, we overrule Defendant's first assignment of error.

ASSIGNMENT OF ERROR II

> "The trial court erred in denying [Defendant's] pretrial motion to suppress physical evidence seized by the Ohio State Highway Patrol from the trunk of [Defendant's] vehicle."

{¶17} In his second assignment of error, Defendant argues that the trial court should have suppressed the evidence seized by the officer from the trunk of his vehicle. Defendant alleges that the officer only had probable cause to search the passenger compartment of his vehicle, and not the trunk, because it is not probable that one would find burning marijuana in the trunk of a car. Given our determination as to the admissibility of Defendant's second set of inculpatory statements, we disagree.

{¶18} This court reviews de novo any determination of probable cause made by the trial court. *Ornelas v. United States* (1996), 517 U.S. 690, 699, 134 L.Ed.2d 911. The Fourth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, prevents unreasonable searches and seizures. Section 14, Article I of the Ohio Constitution is nearly identical, and 10 also prohibits unreasonable searches. *State v. Kinne*y, 83 Ohio St.3d 85, 87, 1998- Ohio-425. "For a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant." *State v. Moor*e, 90 Ohio St.3d 47, 49, 2000-Ohio-10, at 49, citing *Katz v. United States* (1967), 389 U.S. 347, 357, 19 L.Ed.2d 576, and *State v. Brown* (1992), 63 Ohio St.3d 349, 350. The State must show that probable cause existed, and that either a warrant was obtained or an exception to the warrant requirement applied. *Moor*e, 90 Ohio St.3d at 49. Failure to meet either step results in suppression of the evidence seized in the unreasonable search. *Moor*e, 90 Ohio St.3d at 49, citing *Mapp v. Ohio* (1961), 367 U.S. 643, 6 L.Ed.2d 1081.

{¶19} When a police officer validly stops an individual for a traffic violation, that officer must have further probable cause in order to conduct a search of the individual's vehicle. *Moor*e, 90 Ohio St.3d at 49. After the officer has probable cause to believe the vehicle contains contraband, he may search the vehicle based on the automobile exception to the warrant requirement. Id. at 51. In this case, Defendant's admissible inculpatory statements relating to the drug paraphernalia gave the officer probable cause to search the trunk of Defendant's vehicle without a warrant pursuant to the automobile exception. We, therefore, overrule Defendant's second assignment of error.

{¶20} We overrule Defendant's assignments of error and affirm the judgment of the Wayne County Municipal Court.

Judgment affirmed.

LYNN C. SLABY
FOR THE COURT

WHITMORE, P.J.
BATCHELDER, J.
CONCUR

APPEARANCES:
ROBERT E. KERPER, JR., Attorney at Law, One Cascade Plaza, 20 th Floor, Akron, Ohio 44308, for Appellant.

MARTIN FRANTZ, Wayne County Prosecutor and KARA DODSON, Assistant Wayne County Prosecuting Attorney, 215 N. Grant Street, Wooster, Ohio 44691, for Appellee.

IN THE WAYNE COUNTY MUNICIPAL COURT

WOOSTER, OHIO

STATE OF OHIO **)**

Plaintiff **)**

)Case No. **CRB-02-12-0101**

v. **)**

STEPHEN FARRIS **)**

Defendant

Facts

Trooper Menges was on routine patrol on U.S. in Wayne County, Ohio. Near the U.S. 250 split he observed the defendant's vehicle traveling eastbound at 68, 69, 69, 68 m.p.h. The officer pulled the defendant over. When Trooper Menges approached the defendant's vehicle he smelled a light odor of burnt marijuana. The Trooper had drug training and was familiar with the odor burnt marijuana. He had smelled raw marijuana and then burnt marijuana while being trained at the Ohio State Patrol Academy. He had further stopped 200 cars where he smelled burnt marijuana inside. The defendant was told of the reason for the stop. He was asked to come back to the Patrol vehicle and was seated in the passenger seat. He was frisked and emptied his pockets before getting into the patrol car. He asked the defendant about the odor of burnt marijuana was told his house mates smoked it earlier. The defendant was then told that the Trooper was going to search his vehicle. He asked if there was anything in the vehicle and was told about what was in the trunk. The defendant was given Miranda warnings and again asked the same questions

about the source of the marijuana odor. The defendant again stated where it was in the vehicle trunk. The inside of the car was searched first and nothing was found. The trunk was searched next and a marijuana bowl with marijuana residue and rolling papers was found in a box. Trooper Menges did a N.I.K. test and the pipe came back positive for marijuana. The defendant was given a speed warning and a drug paraphernalia citation and was allowed to go on his way.

Counsel for the defendant raised the issue of the proper calibration of the frequency and deviation measurements of Trooper Menges' radar unit. It appears that this was done only once in the past year and not twice. There was no testimony that the radar unit was not working properly check the calibration of the unit. It was clear to this writer that the Trooper believed his radar unit was functioning properly when he clocked the defendant at 69 m.p.h. in a 60 m.p.h. zone. Further, the officer's visual estimation of the defendant's speed was 70 m.p.h.

Issues

1.) Reasonable articuable suspicion of wrongdoing to justify the stop

2.) Probable cause to search the vehicle

3.) Miranda warnings

Law

1.) An officer must possess a reasonable, articuable suspicion of wrongdoing to effectuate a traffic stop. See *Delware -v- Prouse*, 440 U.S. 648 and *Westlake -v- Kaplysh*, *118 O App 3d 18*. In the case subjudice, Trooper Menges had stopped the defendant for speeding, 69 in a 60 m.p.h. zone. He had done all of his required radar checks before using the

unit in question and found it to be in working order. Further, his visual estimation of defendant's speed was 70 m.p.h. There was no showing that the once a year versus a twice a year frequency and deviation check in any way affected the radar unit's accuracy. Trooper Menges had reasonable suspicion to stop the defendant.

2.) A trained officer who recognizes the odor of burnt marijuana, may search for same. See the case of *State -v- Moore*, 90 O St 3d 47. Trooper Menges was clearly qualified to detect and recognize the odor of burnt marijuana. Justice Lundberg Stratton goes on to say that "such an odor detected by a trained officer is sufficient to establish probable cause to search a motor vehicle pursuant to the automobile exception to the warrant requirement." In *U.S. -v- Ross*, 456 U.S. 798 the United States Supreme Court stated "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."

The vehicle in question was lawfully stopped. Pursuant to *State -v- Moore* (*supra*) Trooper Menges had probable cause to search for the burnt marijuana. Pursuant to *U.S. -v- Ross* (*supra*) he had the right to search the entire vehicle, including the trunk. The search was proper.

3.) The last issue for discussion is defendant's so called Miranda rights. The initial comments elicited from the defendant were *Berkemer -v- McCarty*, *468 U.S. 420* background stop questions. No Miranda rights need be given. Once the defendant was in the officer's vehicle he was subject to custodial interrogation and told the Trooper where the contraband was located. He was then mirandized and still gave the officer the location of the contraband. The first location statement should be suppressed, the second should not as full Miranda rights were given and voluntarily waived.

Even assuming arguendo that those statements were suppressed, the officer had probable cause to search and was going to search anyway, regardless of what the defendant said. In the case of *Nix -v- Williams*, 467 U.S. 431 (1984) the U.S. Supreme Court created the inevitable discovery exception to the 4th amendment. Since Trooper Menges was going to search anyway, he was going to inevitably find the contraband in defendant's belongings.

Conclusion

Defendant's motion to suppress is denied except as to the defendant's first custodial statement. Same will be suppressed.

/s/ Stuart K. Miller
Stuart K. Miller, Judge
April 29, 2003