

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	SUPREME COURT CASE
	)	NO. 2013-0109
Appellant,)	
	)	ON APPEAL FROM THE
vs.	)	COURT OF APPEALS,
	)	SIXTH APPELLATE
THOMAS CAINE WHITE	)	DISTRICT NO. L-10-1194
)	
Appellee.	)	LUCAS COUNTY
	)	COMMON PLEAS COURT
	)	CASE NO. CR09-2300

BRIEF OF *AMICUS CURIAE*, OHIO PROSECUTING ATTORNEYS ASSOCIATION, IN SUPPORT OF APPELLANT, STATE OF OHIO

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE AND FACTS 1

LAW & ARGUMENT 2

Proposition of Law I: R.C. 2941.145 IS CONSTITUTIONAL AS APPLIED TO A LAW ENFORCEMENT OFFICER FOUND GUILTY OF COMMITTING AN ON-DUTY CRIME IN WHICH HE USED A FIREARM..... 2

Proposition of Law II: OHIO DOES NOT PERMIT PRE-TRIAL DISMISSALS OF CRIMINAL CHARGES BASED ON CIVIL IMMUNITY PRINCIPLES..... 13

Proposition of Law III: IN A TRIAL OF A POLICE OFFICER CHARGED WITH FELONIOUS ASSAULT FOR AN ON-DUTY SHOOTING, THE COURT COMMITS NEITHER AN ABUSE OF DISCRETION NOR PLAIN ERROR IF IT INSTRUCTS THE JURY TO DETERMINE, FROM THE PERSPECTIVE OF A REASONABLE POLICE OFFICER, WHETHER THE OFFICER’S USE OF DEADLY FORCE WAS OBJECTIVELY REASONABLE, OR WHETHER THE OFFICER HAD REASONABLE GROUNDS TO BELIEVE THAT HE OR A FELLOW OFFICER WAS IN IMMINENT DANGER OF DEATH OR GREAT BODILY HARM. 25

Proposition of Law IV: WHEN A JURY IS INSTRUCTED TO APPLY THE DEFINITION OF “KNOWINGLY” SET FORTH IN R.C. 2901.22(B), THE TRIAL COURT

	DOES NOT COMMIT PLAIN ERROR IN FAILING TO GIVE A MISTAKEN BELIEF INSTRUCTION.....	31
Proposition of Law V:	IN A TRIAL OF A POLICE OFFICER CHARGED WITH FELONIOUS ASSAULT, EXCLUSION OF TESTIMONY REGARDING THE PRECISE VIOLATION AND DEGREE OF OFFENSE A SUSPECT IS BELIEVED TO HAVE COMMITTED IS NOT AN ABUSE OF DISCRETION.....	39
CONCLUSION	.....	42
PROOF OF SERVICE	.....	44

TABLE OF AUTHORITIES

CASES

AAAA Enters., Inc. v. River Place Cmty. Urban Redev. Corp., 50 Ohio St. 3d
157, 553 N.E.2d 597 (1990).....25, 31, 40

Ada v. Guam Soc. of Obstetricians & Gynecologists, 506 U.S. 1011 (1992).....3

Akron v. Rowland, 67 Ohio St.3d 374, 618 N.E.2d 138 (1993)7

Anderson v. Creighton, 483 U.S. 635 (1987)14

Arbino v. Johnson & Johnson, 116 Ohio St. 3d 468, 2007 Ohio 6948.....2, 8

Arnold v. City of Cleveland, 67 Ohio St. 3d 35, 616 N.E.2d 163 (1993)9

Baker v. McCollan, 443 U.S. 137 (1979)16

Benson v. United States, W.D. Mich. No. 1:11-CV-368, 2011 U.S. Dist. LEXIS
137927, 2011 WL 6009961 (Dec. 1, 2011)10

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S.
388 (1971).....8

Blakemore v. Blakemore, 5 Ohio St. 3d 217, 450 N.E.2d 1140 (1983).....25, 31, 40

Butz v. Economou, 438 U.S. 478 (1978).....14

Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).....7

Carey v. Piphus, 435 U.S. 247 (1978)15

City of Cincinnati v. N. Liberties Co., 1st Dist. Hamilton No. C-950200, 1995
Ohio App. LEXIS 5035 (Nov. 15, 1995).....20

City of Columbus v. Harbuck, 10th Dist. No. 99AP-1420, 2000 Ohio App. LEXIS
5543 (Nov. 30, 2000)31, 32

City of Columbus v. Storey, 10th Dist. Franklin No. 03AP-743, 2004 Ohio 3377.....20

City of Vermilion v. Meinke, 6th Dist. Erie No. E-12-037, 2013 Ohio 225020, 22

Coley v. Bagley, 706 F.3d 741 (6th Cir. 2013).....36

Crawford-El v. Britton, 523 U.S. 574 (1998)18

Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118 (1954)3

Davis v. Scherer, 468 U.S. 183 (1984)43

District of Columbia v. Heller, 554 U.S. 570 (2008).....9, 10

Donnelley v. United States, 276 U.S. 505 (1928).....11

Fostoria v. Ohio Patrolman’s Benev. Assoc., 106 Ohio St. 3d 194, 2005 Ohio 4558.....	29
Garvey v. City of Vermilion, 9 th Dist. Lorain No. 10CA009873, 2012 Ohio 1258	19
Gomez v. Toledo, 446 U.S. 635 (1980).....	18
Graham v. Connor, 490 U.S. 386 (1989).....	<i>passim</i>
Grayned v. Rockford, 408 U.S. 104 (1972).....	7
Harlow v. Fitzgerald, 457 U.S. 800 (1982).....	<i>passim</i>
Henderson v. United States, 568 U.S. ___, 2013 U.S. LEXIS 1611 (Feb. 20, 2013).....	5
Hope v. Pelzer, 536 U.S. 730 (2002)	14
Hubbell v. City of Xenia, 115 Ohio St. 3d 77, 2007 Ohio 4839.....	23
Imbler v. Pachtman, 424 U.S. 409 (1976)	13
In re C.S., 115 Ohio St. 3d 267, 2007 Ohio 4919.....	7
In re M.M., 135 Ohio St. 3d 375, 2013 Ohio 1495.....	24
Johnson v. Fankell, 520 U.S. 911 (1997).....	23
Johnson v. United States, 520 U.S. 461 (1997).....	5
Krishbaum v. Dillon, 58 Ohio St. 3d 58, 567 N.E.2d 1291 (1991)	40, 41
Lansdowne v. Beacon Journal Publishing Co., 32 Ohio St. 3d 176, 512 N.E.2d 979 (1987).....	3
Lassiter v. Dept. of Social Servs. of Durham Cty., North Carolina, 452 U.S. 18 (1981).....	7
Lester v. Leuck, 142 Ohio St. 91, 50 N.E.2d 145 (1943)	29
McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).....	9, 10
Mitchell v. Forsyth, 472 U.S. 511 (1985).....	14, 23
New York v. Ferber, 458 U.S. 747 (1982).....	7
Owen v. City of Independence, 445 U.S. 622 (1980).....	13
Pearson v. Callahan, 555 U.S. 223 (2009).....	19, 21, 24
People v. Hood, 1 Cal. 3d 444, 462 P.2d 370 (1969)	35
Pons v. Ohio State Med. Bd., 66 Ohio St. 3d 619, 1993 Ohio 122 (1993).....	25, 31, 40
Robertson v. Baldwin, 165 U.S. 275 (1897).....	10
Ruther v. Kaiser, 134 Ohio St. 3d 408, 2012 Ohio 5686.....	2, 3
Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009)	21

Saucier v. Katz, 533 U.S. 194 (2001)	19, 21
Scott v. Harris, 550 U.S. 372 (2007).....	26, 27, 28
Scott v. United States, 436 U.S. 128 (1978).....	41, 42
State ex rel. Bishop v. Mt. Orab Village School Dist. Bd. of Edn., 139 Ohio St. 427, 40 N.E.2d 913 (1942).....	4
State ex rel. Bowman v. Allen Cty. Bd. of Commrs., 124 Ohio St. 174, 177 N.E. 271 (1931).....	3
State ex rel. Crabtree v. Ohio Bur. of Workers' Comp., 71 Ohio St. 3d 504, 644 N.E.2d 361 (1994).....	6
State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn., 111 Ohio St. 3d 568, 2006 Ohio 5512	3
State v. Awan, 22 Ohio St. 3d 120, 489 N.E.2d 277 (1986).....	4
State v. Blanton, 12 th Dist. Madison No. CA2005-04-016, 2006 Ohio 1785	34
State v. Bloomer, 122 Ohio St.3d 200, 2009 Ohio 2462, 909 N.E.2d 1254.....	2
State v. Brady, 119 Ohio St. 3d 375, 2008 Ohio 4493	20, 21, 22, 24
State v. Caldwell, 8 th Dist. Cuyahoga No. 92219, 2009 Ohio 4881	20
State v. Chambers, 4 th Dist. Adams No. 10CA902, 2011 Ohio 4352.....	33
State v. Chinn, 85 Ohio St. 3d 548, 709 N.E.2d 1166 (1999)	25, 31
State v. Clayton, 62 Ohio St.2d 45, 402 N.E.2d 1189 (1980)	30
State v. Comen, 50 Ohio St. 3d 206, 553 N.E.2d 640 (19990).....	29, 38
State v. Cook, 128 Ohio St. 3d 120, 2010 Ohio 6305.....	11
State v. Crago, 53 Ohio St. 3d 243, 559 N.E.2d 1353 (1990)	23
State v. Cunningham, 113 Ohio St. 3d 108, 2007 Ohio 1245.....	11
State v. Delaney, 9 th Dist. Lorain Nos. 07CA009188, 07CA009189 & 07CA009190, 2008 Ohio 1879	20
State v. Dixon, 8 th Dist. Cuyahoga No. 82951, 2004 Ohio 2406.....	35
State v. Dunn, 131 Ohio St. 3d 325, 2012 Ohio 1008	8
State v. Ferguson, 120 Ohio St.3d 7, 2008 Ohio 4824, 896 N.E.2d 110.....	2
State v. Fischer, 128 Ohio St. 3d 92, 2010 Ohio 6238	2
State v. Fox, 68 Ohio St. 2d 53, 428 N.E.2d 410 (1981).....	34
State v. Frazier, 9 th Dist. Summit No. 25338, 2011 Ohio 3189	38

State v. Frazier, 9 th Dist. Summit No. 25338, 2011 Ohio 3189.....	29
State v. French, 171 Ohio St. 501, 172 N.E.2d 613 (1961).....	34
State v. Gaines, 193 Ohio App. 3d 260, 2011 Ohio 1475 (12 th Dist.).....	20
State v. Goad, 4 th Dist. Washington No. 08CA25, 2009 Ohio 580	34
State v. Guster, 66 Ohio St. 2d 266, 421 N.E.2d 157 (1981)	25, 29, 31, 38
State v. Hehr, 4 th Dist. Washington No. 04CA10, 2005 Ohio 353	20
State v. Horner, 126 Ohio St. 3d 466, 2010 Ohio 3830.....	18
State v. Huff, 145 Ohio App. 3d 555, 763 N.E.2d 695 (1 st Dist. 2001).....	35
State v. Israel, 12 th Dist. Warren No. CA2011-11-115, 2012 Ohio 4876.....	9
State v. Kirksey, 11 th Dist. Portage No. 92-P-0004, 1992 Ohio App. LEXIS 4287 (Aug. 21, 1992).....	20
State v. Lavelle, 6 th Dist. Wood No. WD-98-083, 1999 Ohio App. LEXIS 3471 (July 30, 1999)	22
State v. Lester, 123 Ohio St. 3d 396, 2009 Ohio 4225	18
State v. McNamee, 17 Ohio App. 3d 175, 478 N.E.2d 843 (3d Dist. 1984).....	20
State v. Nelson, 36 Ohio St. 2d 79, 303 N.E.2d 865 (1973).....	29, 38
State v. O’Neal, 114 Ohio App. 3d 335, 683 N.E.2d 105 (2d Dist. 1996).....	20
State v. Payne, 114 Ohio St. 3d 502, 2007 Ohio 4642	4, 18
State v. Pecora, 87 Ohio App. 3d 687, 622 N.E.2d 1142 (9 th Dist. 1993).....	31
State v. Rawson, 7 th Dist. Jefferson No. 05 JE 2, 2006 Ohio 496	32
State v. Richards, 5 th Dist. Stark No. 2007 CA 00331, 2008 Ohio 5965.....	20
State v. Rohrbaugh, 126 Ohio St. 3d 421, 2010 Ohio 3286	30
State v. S.R., 63 Ohio St. 3d 590, 589 N.E.2d 1319 (1992)	11
State v. Shue, 97 Ohio App. 3d 459, 646 N.E.2d 1156 (9 th Dist. 1994).....	38
State v. Singleton, 124 Ohio St. 3d 173, 2009 Ohio 6434.....	2
State v. Steele, Slip Op. No. 2013-Ohio-2470.....	8, 10, 11, 42
State v. Swidas, 133 Ohio St. 3d 460, 2012 Ohio 4638.....	6
State v. Theuring, 46 Ohio App. 3d 152, 546 N.E.2d 436 (1st Dist. 1988).....	29, 38
State v. Thompkins, 75 Ohio St.3d 558, 664 N.E.2d 926 (1996).....	2
State v. Tooley, 114 Ohio St. 3d 366, 2007 Ohio 3698.....	7
State v. Treesh, 90 Ohio St. 3d 460, 739 N.E.2d 749 (2001)	36

State v. Varner, 81 Ohio App. 3d 85, 610 N.E.2d 476 (9 th Dist. 1991).....	20
State v. Warren, 118 Ohio St. 3d 200, 2008 Ohio 2011	7
State v. Wenger, 58 Ohio St. 2d 336, 390 N.E.2d 801 (1979).....	33, 34
State v. White, 6 th Dist. Lucas No. L-10-1194, 2013 Ohio 51	<i>passim</i>
State v. Williams, 126 Ohio St. 3d 65, 2010 Ohio 2453.....	2
State v. Williford, 49 Ohio St. 3d 247, 551 N.E.2d 1279 (1990)	17
Tennessee v. Garner, 471 U.S. 1 (1985).....	26, 38, 41
Terry v. Ohio, 392 U.S. 1 (1968).....	41
United States v. Goodlow, 389 Fed. Appx. 961 (11th Cir. 2010)	9
United States v. Jacobson, 406 Fed. Appx. 91 (8th Cir. 2011).....	10
United States v. Olano, 507 U.S. 725 (1993).....	5
United States v. Robinson, 414 U.S. 218 (1973).....	42
Wilson v. Layne, 526 U.S. 603 (1999)	14
Wood v. Strickland, 420 U.S. 308 (1975).....	14
Wyatt v. Cole, 504 U.S. 158 (1992)	13, 14, 19
Yajnik v. Akron Dept. of Health, Housing Div., 101 Ohio St. 3d 106, 2004 Ohio 357.....	3

STATUTES

28 U.S.C. § 1291.....	23
42 U.S.C. § 1983.....	8, 13, 14
Civil Rights Act of 1871, 17 Stat. 13.....	14
R.C. 1.47	2
R.C. 2505.02(B).....	24
R.C. 2744.02(C).....	23
R.C. 2901.21(A)(2)	36
R.C. 2901.21(C).....	34
R.C. 2901.21(D)(3).....	36
R.C. 2901.22	36
R.C. 2901.22(A).....	<i>passim</i>

R.C. 2901.22(B).....	32, 33, 34, 37
R.C. 2903.11	8, 12, 33
R.C. 2903.13	33
R.C. 2905.12(B).....	11
R.C. 2911.11(A).....	36
R.C. 2913.02	36
R.C. 2913.02(A).....	32
R.C. 2921.02	36
R.C. 2921.32	36
R.C. 2921.331(B).....	39, 40
R.C. 2921.331(C)(4)	40
R.C. 2921.331(C)(5)(a)(i)	40
R.C. 2921.331(C)(5)(a)(ii).....	40
R.C. 2923.12(C)(1)(a).....	11
R.C. 2923.121(B)(1)(a).....	11
R.C. 2923.122(D)(1)(a).....	11
R.C. 2923.125(D)(1)	9
R.C. 2923.17(C)(1)	11
R.C. 2925.02(B).....	10
R.C. 2925.03(B).....	11
R.C. 2925.11(B).....	11
R.C. 2941.141	9, 10, 12, 13
R.C. 2941.145	<i>passim</i>
R.C. 2941.146	6
R.C. 2945.67	23

RULES

Civ. R. 12(B).....18
Civ. R. 12(H).....18
Crim. R. 12.....21, 22
Crim. R. 12(A).....24
Crim. R. 12(C)4, 22
Crim. R. 12(C)(1).....4
Crim. R. 12(C)(2).....4
Crim. R. 12(D)4, 18
Crim. R. 12(H)4, 18
Crim. R. 12(K)23
Crim. R. 16(M)4
Crim. R. 7(E).....4
Crim.R. 30.....29, 38
Evid. R. 611(A).....40

OTHER AUTHORITIES

1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW (3d
Ed. 2000).....35, 37
Cong. Globe, 42d Cong., 1st Sess., 482 (1871).....15
JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW (3d Ed. 2001)35
KATZ & GIANELLI, OHIO CRIMINAL LAW (2010 Ed.)35

STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit membership organization founded in 1937 for the benefit of the eighty eight (88) elected county prosecutors.

The original mission statement, which is still adhered to, reads:

To increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies which affect the office of Prosecuting Attorney, and to aid in the furtherance of justice. Further, the association promotes the study of law, the diffusion of knowledge, and the continuing education of its members.

The current mission statement reads:

The Ohio Prosecuting Attorneys Association assists county prosecuting attorneys to pursue truth and justice as well as promote public safety. The Association advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and serve as legal counsel to county and township authorities. Further, the Association sponsors continuing legal education programs and facilitates access to best practices in law enforcement and community safety. The Association also offers information to the public about the role of prosecutors in the justice system.

Ohio Prosecuting Attorneys Association, <http://www.ohiopa.org/about.html> (last visited July 1, 2013).

In this matter, the OPAA supports the position of the State of Ohio that Thomas Caine White's conviction for felonious assault with a three-year firearm specification was proper. Because the appellate court's analysis of the issues is problematic for reasons advanced herein, the OPAA respectfully urges the Court to reverse the judgment of the Sixth District below.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae agrees with the Statement of the Case and Facts as presented by Appellant, the State of Ohio, in this matter.

LAW & ARGUMENT

Proposition of Law I: R.C. 2941.145 IS CONSTITUTIONAL AS APPLIED TO A LAW ENFORCEMENT OFFICER FOUND GUILTY OF COMMITTING AN ON-DUTY CRIME IN WHICH HE USED A FIREARM.

The Sixth District held in the case presented for review that the firearm specification in R.C. 2941.145 is unconstitutional as applied to a peace officer when the officer commits a criminal act while “acting in the scope of what he was employed to do.” *State v. White*, 6th Dist. Lucas No. L-10-1194, 2013 Ohio 51, at ¶ 168. As the jury in this case found, White was not acting in the scope of what he was employed to do. Instead, White’s conduct constituted the offense of felonious assault without justification.

A. Standard of Review for Constitutional Challenges to Statutes

Duly enacted laws have a strong presumption of constitutionality. *Ruther v. Kaiser*, 134 Ohio St. 3d 408, 2012 Ohio 5686, at ¶ 9, citing *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007 Ohio 6948, at ¶ 25. “To overcome the presumption, one must prove beyond a reasonable doubt that the statute is unconstitutional.” *State v. Williams*, 126 Ohio St. 3d 65, 2010 Ohio 2453, at ¶ 20, quoting *State v. Bloomer*, 122 Ohio St.3d 200, 2009 Ohio 2462, 909 N.E.2d 1254, ¶ 41; *State v. Ferguson*, 120 Ohio St.3d 7, 2008 Ohio 4824, 896 N.E.2d 110, ¶ 12. Moreover, “[i]n enacting a statute, it is presumed that . . . [c]ompliance with the constitutions of the state and of the United States is intended.” *State v. Singleton*, 124 Ohio St. 3d 173, 2009 Ohio 6434, at ¶ 21, overruled in part on other grounds, *State v. Fischer*, 128 Ohio St. 3d 92, 2010 Ohio 6238, quoting R.C. 1.47. “Furthermore, the General Assembly is vested with broad authority pursuant to its police powers to enact laws defining criminal conduct and prescribing its punishment, and such statutes will not lightly be held invalid.” *Id.*, citing *State v. Thompkins*, 75 Ohio St.3d 558, 560, 664 N.E.2d 926 (1996).

As an as-applied constitutional challenge, White claimed on appeal that application of the statute in this particular context would be unconstitutional. “The practical effect of holding a statute unconstitutional ‘as applied’ is to prevent its future application in a similar context, but not to render it utterly inoperative.” *Kaiser*, 134 Ohio St. 3d 408, at ¶ 9, quoting *Yajnik v. Akron Dept. of Health, Housing Div.*, 101 Ohio St. 3d 106, 2004 Ohio 357, at ¶ 14, itself quoting *Ada v. Guam Soc. of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., dissenting).

The standard for as-applied challenges is whether the party challenging the law has proved by clear and convincing evidence that the law is unconstitutional as applied to them. *Id.*, citing *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St. 3d 568, 2006 Ohio 5512, at ¶ 21. “Clear and convincing evidence is that measure or degree of proof which is more than a mere ‘preponderance of evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt’ in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Id.*, quoting *Lansdowne v. Beacon Journal Publishing Co.*, 32 Ohio St. 3d 176, 180-181, 512 N.E.2d 979 (1987), itself quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), at paragraph three of the syllabus.

The only judicial inquiry permitted as to the “constitutionality of a statute involves the question of legislative power, not legislative wisdom.” *Kaiser*, 134 Ohio St. 3d 408, at ¶ 9, quoting *State ex rel. Bowman v. Allen Cty. Bd. of Commrs.*, 124 Ohio St. 174, 196, 177 N.E. 271 (1931). “[A] court has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislative branch of the government. When the validity of a statute is challenged on constitutional grounds, the sole function of the court is to determine whether it transcends the limits of legislative power.” *Ohio Cong. of Parents & Teachers*, 111 Ohio St. 3d 568, at ¶ 20,

quoting *State ex rel. Bishop v. Mt. Orab Village School Dist. Bd. of Edn.*, 139 Ohio St. 427, 438, 40 N.E.2d 913 (1942).

B. White Forfeited Appellate Review by Failing to Challenge the Statute Prior to Trial

In this case, the appellate court noted that White did not challenge R.C. 2941.145 either before trial in a Crim. R. 12(C) motion or at sentencing. As an arguable defect in the indictment or institution of proceedings, however, White's challenge to the constitutionality of the firearm specification should have been made in a Crim. R. 12(C)(1) or Crim. R. 12(C)(2) motion. As Crim. R. 12(D) notes, all pre-trial motions – except for motions made under Crim. R. 7(E) and Crim. R. 16(M) – shall be made either within thirty-five (35) days after arraignment or seven (7) days before trial, whichever is earlier; but the court can extend the time for making motions in the interest of justice. The Rules of Criminal Procedure further provide that failure of the defendant to make any such motion which must be made prior to trial under Crim. R. 12(D) results in a waiver of the issue unless otherwise granted relief from the waiver for good cause shown. Crim. R. 12(H). In failing to challenge the indictment's specification on this basis prior to trial, White waived the issue on appeal. The appellate court should have overruled the assignment of error on this basis.

Moreover, in failing to raise his challenge before the trial court, however, White at least forfeited all but plain error. *E.g. State v. Payne*, 114 Ohio St. 3d 502, 2007 Ohio 4642, at ¶ 23. A party forfeits constitutional arguments when the party fails to raise them before the trial court and instead raises them for the first time on appeal. *State v. Awan*, 22 Ohio St. 3d 120, 489 N.E.2d 277 (1986), at syllabus. The appellate court nevertheless proceeded to consider White's argument, raised for the first time on appeal, without applying plain error principles. *White*, 2013 Ohio 51, at ¶ 168. As the United States Supreme Court recently reaffirmed, plain error is

limited to those situations where there is 1) error; 2) the error is plain; 3) the error affects a substantial right; and 4) the standard which should guide the exercise of remedial discretion under Rule 52 is whether the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Henderson v. United States*, 568 U.S. ____, 133 S. Ct. 1121 (Feb. 20, 2013), citing *United States v. Olano*, 507 U.S. 725, 734-735 (1993). The Court stressed that its decision in *Johnson v. United States*, 520 U.S. 461, 467-468 (1997), held that “plain error review is not a grading system for trial judges. It has broader purposes, including in part allowing courts of appeals better to identify those instances in which the application of a new rule of law to cases on appeal will meet the demands of fairness and judicial integrity.” *Henderson*, 133 S. Ct. at 1129-1130, citing *Johnson*, 520 U.S. at 467-468 and *Olano*, 507 U.S. at 732.

The appellate court failed to conduct even minimal analysis under the plain error standard. The Sixth District’s opinion therefore begins on a level of scrutinized review not appropriate based on the procedural posture of the argument in this case. The Sixth District held that it could forgive the forfeiture/waiver because the issue was important for all police officers. *White*, 2013 Ohio 51, at ¶ 141-147. As-applied challenges, however, turn on the unique *facts of each individual case*. Resolution of the challenge in *this* case does not necessarily resolve the issue for the entire class of people the Sixth District identifies – all peace officers in Ohio – because not every police officer will be engaged in an unjustified, unreasonable act which constitutes the offense of felonious assault. Because this case will not resolve all issues relating to application of R.C. 2941.145 for every factual situation, the Sixth District’s disregard of the forfeiture was inappropriate. Moreover, the existence of other means of relief exist for Ohio peace officers concerned about the constitutionality of a firearm specification under R.C. 2941.145, specifically declaratory judgment actions or their own constitutional challenges if they

should find themselves in this situation, undermines the Sixth District’s unique concern for police officers. This case is driven by its particular facts – facts which are not likely to recur in any significant numbers in the same specific manner.

This analysis is important because a reviewing court has a duty to attempt to resolve cases without resorting to the constitutionality of a statute. As this Court noted last year, “when a case can be decided on other than a constitutional basis, we are bound to do so.” *State v. Swidas*, 133 Ohio St. 3d 460, 2012 Ohio 4638, at ¶ 14, quoting *State ex rel. Crabtree v. Ohio Bur. of Workers’ Comp.*, 71 Ohio St. 3d 504, 507, 644 N.E.2d 361 (1994). Application of this doctrine in *Swidas* led the Court to hold that the discharge of a firearm from a motor vehicle specification under R.C. 2941.146 did not apply when the offender discharged the weapon while standing outside of the vehicle. *Id.* at ¶ 1, ¶ 26.

The Sixth District reviewed the procedural posture of the case differently, analyzing the constitutionality of R.C. 2941.145 as applied to White even though there was a procedural basis on which to dispose of the assigned error. The Sixth District’s opinion therefore unnecessarily reached the merits of White’s assignment of error. After noting that White failed to challenge the statute on this basis to the trial court, the Sixth District should have simply concluded that the argument was forfeited and overruled the assignment of error.

C. R.C. 2941.145 is Constitutional As-Applied

Even on its merits, however, the appellate court’s analysis was inapt. The court below held that application of R.C. 2941.145 is unconstitutional when applied to an officer acting in the scope of his employment. *White*, 2013 Ohio 51, at ¶ 168. As the jury found, Officer White was not acting within the scope of his employment – he committed the offense of felonious assault.

In this case, White challenges the specification as a violation of Due Process. This Court has previously outlined the factors implicated in a Due Process analysis.

“For all its consequence, “due process” has never been, and perhaps can never be, precisely defined. * * * [D]ue process “is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Cafeteria [& Restaurant] Workers [Union] v. McElroy* [1961], 367 U.S. 886, 895 [81 S.Ct. 1743, 6 L.Ed.2d 1230]. Rather, the phrase expresses the requirement of “fundamental fairness,” a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what “fundamental fairness” consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.’ *Lassiter v. Dept. of Social Servs. of Durham Cty., North Carolina* (1981), 452 U.S. 18, 24- 25, 101 S.Ct. 2153, 68 L.Ed.2d 640.” (Brackets and ellipsis sic.)

State v. Warren, 118 Ohio St. 3d 200, 2008 Ohio 2011, ¶ 28, quoting *In re C.S.*, 115 Ohio St. 3d 267, 2007 Ohio 4919, at ¶ 80. White’s Due Process challenge on appeal appears to advance the argument that the statute is unconstitutional because it impinges on a protected activity –acting in the capacity of a police officer.

“A clear and precise enactment may * * * be “overbroad” if in its reach it prohibits constitutionally protected conduct.’ [*Grayned v. Rockford* (1972)], 408 U.S. [104,] 114, 92 S.Ct. [2294,] 33 L.Ed.2d [222]. In considering an overbreadth challenge, the court must decide ‘whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments.’ *Id.*, 408 U.S. at 115, 92 S.Ct. at 2302, 33 L.Ed.2d at 231.” *Akron v. Rowland* (1993), 67 Ohio St.3d 374, 387, 1993 Ohio 222, 618 N.E.2d 138.”

State v. Tooley, 114 Ohio St. 3d 366, 2007 Ohio 3698, at ¶ 29. The *Tooley* Court further noted that “[a] statute will be invalidated as overbroad only when its overbreadth has been shown by the defendant to be substantial.” *Id.* at ¶ 30, quoting *New York v. Ferber*, 458 U.S. 747, 769 (1982).

As the Sixth District noted, acting as a police officer is not constitutionally protected conduct. *White*, 2013 Ohio 51, at ¶ 154 (“Employment as a police officer is not a ‘fundamental right,’ as traditionally construed, nor is White claiming it is”). Rational basis review thus

applies. *Id.* Under rational basis review, a statute must be upheld if it bears a real and substantial relation to the public health, safety, morals or general welfare and it is not unreasonable, arbitrary or discriminatory. *Arbino*, 116 Ohio St. 3d 468, at ¶ 49. The Sixth District noted there is no question that R.C. 2941.145 has a real and substantial relation to public safety. Thus the question the Sixth District addressed was whether application of the specification to peace officers is unreasonable, arbitrary or discriminatory. *White*, 2013 Ohio 51, at ¶ 154.

As the existence of actions under 42 U.S.C. § 1983 and constitutional causes of actions under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), underscores, police officers are subject to civil actions for their conduct in the course of their employment. *See State v. Dunn*, 131 Ohio St. 3d 325, 2012 Ohio 1008, at ¶ 11 (noting that if officer had not acted and Dunn had harmed or killed himself, Dunn or the estate could have filed a lawsuit against the police for failure to respond to the emergency). And although admittedly rarer, police officers are regularly prosecuted for criminal misdeeds. *See* cases collected by the majority. *White*, 2013 Ohio 51, at ¶ 155-167; *see also, e.g., State v. Steele*, Slip Op. No. 2013-Ohio-2470, at ¶ 8, 11 (police officer charged with two counts of abduction, three counts of extortion, two counts of rape, one count of sexual battery, and two counts of intimidation, all with firearm specifications and convicted by jury of two counts of abduction and one count of intimidation, each with firearm specification). Just as the felonious assault statute, R.C. 2903.11, is not unconstitutional as applied to peace officers, neither is the firearm specification under R.C. 2941.145.

Consider the related hypothetical of prosecution of a person with a license to carry concealed weapons for criminal acts committed while in possession of the concealed weapon.

The license under R.C. 2923.125(D)(1) to carry a concealed handgun provides a limited right for the license holder to carry a firearm subject to a number of exceptions provided by law. No one would seriously dispute that the commission of a felony by the license holder while in possession of the firearm or while displaying, brandishing, or using of the firearm to facilitate the offense would subject the defendant/license holder to a firearm specification under R.C. 2941.141 or R.C. 2941.145. The fact that the firearm specification covers otherwise permitted conduct does not mean that the statute is overbroad. The narrowing function is served by the specification's requirement that the firearm be connected to the commission of a criminal offense.

Furthermore, the Second Amendment to the United States Constitution, as recently interpreted by the U.S. Supreme Court, provides that individuals have a right keep and bear arms subject to certain limitations. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (Second Amendment incorporated against the States through Due Process Clause of Fourteenth Amendment). Certainly this constitutionally-protected right to possess handguns does not prevent application of criminal firearm specifications, even after application of more stringent "strict scrutiny" analysis in light of the constitutionally-protected nature of the conduct. *State v. Israel*, 12th Dist. Warren No. CA2011-11-115, 2012 Ohio 4876, at ¶ 97, citing *Arnold v. City of Cleveland*, 67 Ohio St. 3d 35, 616 N.E.2d 163 (1993) and *Heller*, 554 U.S. 570. *See also McDonald*, 130 S. Ct. at 3047, citing *Heller*, 554 U.S. at 626-627 (listing non-exhaustive restrictions on possession of firearms which would be presumptively valid). *Israel* cited federal court decisions which held that federal firearm enhancements, which are the federal equivalent of firearm specifications in Ohio, do not abridge the Second Amendment. *Israel*, 2012 Ohio 4876, at ¶ 97, citing *United States v. Goodlow*, 389 Fed. Appx. 961 (11th Cir. 2010); *United States v. Jacobson*, 406 Fed. Appx. 91

(8th Cir. 2011); and *Benson v. United States*, W.D. Mich. No. 1:11-CV-368, 2011 U.S. Dist. LEXIS 137927, 2011 WL 6009961 (Dec. 1, 2011). The Second Amendment right is not absolute. *Heller*, 554 U.S. 626-627; *McDonald*, 130 S. Ct. 3047-3048. See also *Robertson v. Baldwin*, 165 U.S. 275, 281-282 (1897). When a person commits a criminal offense either while having a firearm under their control, R.C. 2941.141, or in brandishing, displaying or using the firearm to facilitate the offense, R.C. 2941.145, that person is properly subject to a specification under Ohio law due to their conduct, regardless of the fact that possession of firearms is a constitutionally protected right or state law allows for their possession. Thus the fact that White was a peace officer is ultimately irrelevant.

The Sixth District's analysis thus proceeds from a faulty premise. Even if it were true that a statute could be unconstitutional because it would apply to the prescribed duties of a peace officer, no part of Officer White's employment responsibilities entailed shooting unarmed motorists in the back without sufficient justification. As the majority noted, "[a]n officer has a statutory duty to enforce the law, but he has no duty to break the law through a separate act of illegal conduct." *White*, 2013 Ohio 51, at ¶ 167. In finding White guilty of felonious assault and the firearm specification, the jury necessarily found that White was not acting in the scope of his employment.

This Court has likewise held that general criminal statutes are broadly applicable unless a person is a member of a specifically-excepted group. *Steele*, 2013-Ohio-2470, at ¶ 20. In *Steele*, the Court observed that the General Assembly has enacted various criminal statutes which provide exceptions for certain categories of people. *Id.* The Court noted that specific statutes prohibiting possession or distribution of controlled substances provide exceptions for certain authorized health professionals, police officers and others. *Id.*, citing R.C. 2925.02(B)

(corrupting another with drugs); R.C. 2925.03(B) (trafficking offenses); R.C. 2925.11(B) (drug possession offenses). The Court also noted that the offense of coercion provides exceptions for prosecutors acting in good faith and in the interests of justice. *Id.*, citing R.C. 2905.12(B). The Court further noted that many weapons possession statutes explicitly exclude authorized law enforcement officers acting in the scope of their duties. *Id.*, citing as an illustrative examples R.C. 2923.12(C)(1)(a) (carrying concealed weapons); R.C. 2923.121(B)(1)(a) (possessing firearm in liquor permit premises); R.C. 2923.122(D)(1)(a) (possessing deadly weapon in school safety zone); and R.C. 2923.17(C)(1) (possessing a dangerous ordnance).

The *Steele* Court noted, however, that a court is not free to add an exception to a statute where there is none. *Id.* at ¶ 21. And in light of other statutes which specifically exempt peace officers and other categories of persons from application of criminal laws, a court cannot presume that an exception applies to other statutes where no exemption appears. *Id.*, citing *State v. S.R.*, 63 Ohio St. 3d 590, 595, 589 N.E.2d 1319 (1992); *State v. Cunningham*, 113 Ohio St. 3d 108, 2007 Ohio 1245, at ¶ 20; *State v. Cook*, 128 Ohio St. 3d 120, 2010 Ohio 6305, at ¶ 45. As the *Steele* Court noted:

It always has been deemed necessary to enact laws to compel performance of duty and to prevent corruption on the part of public officers. They are not attended by any special presumption that general language in disciplinary measures does not extend to them.

Id., quoting *Donnelley v. United States*, 276 U.S. 505, 516 (1928).

Unlike undercover agents who often times must engage in illegal activity (most commonly drug transactions requiring the possession and/or trafficking of controlled substances) in order to investigate crimes, White was on road patrol in a police uniform and in a marked patrol car immediately before he shot the victim. Although he was required to carry a firearm on his person in the course of his duties that evening, he was *not* required to discharge it in a manner

so as to constitute a criminal act. The commission of that separate, voluntary act which constitutes the criminal offense of felonious assault under R.C. 2903.11 renders application of R.C. 2941.145 constitutional.

D. At Best, the Appellate Court's Analysis Would Apply to the 1-Year Specification Under R.C. 2941.141, and NOT to the 3-Year Specification Under R.C. 2941.145

The Ohio Revised Code contains two (2) separate firearm specifications as relevant in this case. One specification, R.C. 2941.141, proscribes being in possession of a firearm in committing a criminal offense and carries a mandatory, consecutive one (1) year prison sentence. A different specification, R.C. 2941.145, proscribes displaying, brandishing or using a firearm in committing a crime and carries a mandatory, consecutive three (3) year prison sentence. Whatever merit White's appellate argument has with respect to having a firearm on or about the person or under the defendant's control under R.C. 2941.141, it has no application to the different proscribed action of displaying, brandishing or *using* the firearm to facilitate a crime under R.C. 2941.145.

Where R.C. 2941.141 applies to the simple act of having a firearm under the person's control in committing a felony, R.C. 2941.145 applies to the possession of the firearm together with the offender displaying, brandishing, indicated possession of, or use of the firearm in order to facilitate the offense. The proscribed conduct is wholly different; R.C. 2941.141 applies to the simple possession of the firearm during commission of the offense while R.C. 2941.145 applies to use of the weapon to facilitate commission of the crime. A police officer is generally required to carry a weapon, yes, but he or she is *not* required to discharge the weapon in such a manner as to constitute a criminal act.

Viewed this way, even if specifications for simply having the weapon under the person's control under R.C. 2941.141 as applied to an on-duty police officer may be problematic for the reasons the Sixth District articulated, application of the more stringent specification under R.C. 2941.145 for displaying, brandishing or *using* the firearm is not. White did not merely have the weapon under his control when he committed the offense; he *used* the weapon to facilitate the offense by discharging it at McCloskey. The Sixth District's holding should therefore be reversed.

Proposition of Law II: OHIO DOES NOT PERMIT PRE-TRIAL DISMISSALS OF CRIMINAL CHARGES BASED ON CIVIL IMMUNITY PRINCIPLES.

The appellate court below held that under some circumstances “immunities of the kind resembling qualified immunity might also protect police officers from criminal prosecution for using deadly force.” *White*, 2013 Ohio 51, at ¶ 85. The Sixth District believed that civil immunity principles afforded to suits under 42 U.S.C. § 1983 should likewise apply to criminal cases where the defendant is a police officer accused of an act for which he or she is, or could be, subject to an action under § 1983.

A. Qualified Immunity Principles

Section 1983 “creates a species of tort liability that on its face admits of no immunities.” *Wyatt v. Cole*, 504 U.S. 158, 163 (1992), quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Nonetheless, the Supreme Court has accorded certain government officials either absolute or qualified immunity from suit because the tradition of immunity from suit was so firmly rooted in the common law and was supported by strong policy reasons such that had Congress meant to abolish those defenses it would have done so specifically. *Id.*, quoting *Owen v. City of Independence*, 445 U.S. 622, 637 (1980).

“Qualified immunity” is a specific remedy for government actors accused of depriving a person of federal rights under color of law. 42 U.S.C. § 1983. Under the reformulated approach to qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added), government officials performing discretionary functions are shielded from “liability for civil damages insofar as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” It exists “to safeguard government, and thereby to protect the public at large, not to benefit its agents.” *Wyatt*, 504 U.S. at 168. *See also id.* at 167-168, citing *Wood v. Strickland*, 420 U.S. 308, 319 (1975), *Butz v. Economou*, 438 U.S. 478, 506 (1978), and *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (immunity designed to prevent “distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service”).

When the contours of a right are sufficiently clear that a reasonable official would understand that what he or she is doing violates a right, the official is not entitled to qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The clarity of the right does not have to appear from previous cases. “[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *see also Wilson v. Layne*, 526 U.S. 603, 615 (1999).

B. § 1983 Actions Are Civil Claims.

Critically important to understanding the nature of the Sixth District’s error is the fact that § 1983 claims are civil in nature. Derived from § 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall

be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Supreme Court of the United States took as its starting point in *Carey v. Piphus*, 435 U.S. 247, 255, n. 9 (1978), that § 1983 actions are civil actions. The Court noted in a footnote that a proponent of the Civil Rights Act of 1871 asked during the debate in the House of Representatives, “what legislation could be more appropriate than to give a person injured by another under color of . . . State laws a remedy by *civil action*.” *Id.* (emphasis added), citing Cong. Globe, 42d Cong., 1st Sess., 482 (1871) (remarks of Rep. Wilson).

Thus, as a “species of tort liability,” *id.* at 253, it is universally understood that actions under § 1983 are *civil actions*. It is not a coincidence that the liability scheme under § 1983 speaks of “damages” as “compensation” for injuries caused by the deprivation of federal rights. *Id.* at 254. And as the Supreme Court in *Harlow* noted, under qualified immunity government officials performing discretionary functions are shielded from “liability *for civil damages* insofar as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” 457 U.S. at 818 (emphasis added). Qualified immunity is thus a defense in a civil action under § 1983 for the “damages” a court could impose.

Section 1983 contemplates two (2) means of redress for violations of federal statutory or constitutional law: 1) monetary damages for past actions; and 2) prospective injunctions to enjoin future misconduct. After diligent research, undersigned counsel could not find a single case in the United States which imprisoned a government officer as the result of a finding of liability in a § 1983 action. Application of civil immunity principles to the criminal law is wholly unsupported. The Sixth District therefore erred in attempting to import defenses from one area of the law into another without justification.

C. § 1983 Actions Contemplate Reasonableness in the Context of the Fourth Amendment – Criminal Cases of Self-Defense Contemplate General Reasonableness.

As *Graham v. Connor*, 490 U.S. 386, 397 (1989) makes clear, the question under qualified immunity claims in § 1983 actions is whether the officer's use of force was objectively reasonable. That standard of objective reasonableness, however, relates to a seizure under the Fourth Amendment. *Id.* Claims under § 1983 are only actionable to the extent they allege violation or deprivation of a federal constitutional or statutory right. *Id.* at 393-394. "As we have said many times, § 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Id.* at 393-394, quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). Analysis of any § 1983 claim thus begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. *Id.*, quoting *Baker*, 443 U.S. at 140.

In claims of excessive force arising in the context of an arrest or an investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right to be secure in their persons against unreasonable seizures of the person. *Id.* at 394. Thus, § 1983 claims alleging excessive force require reference to the Fourth Amendment, which carries its own standard of reasonableness as interpreted by the Court.

In contrast, claims of justification or self-defense in the common criminal case do not trigger application of the Fourth Amendment's reasonableness requirement. In the common self-defense case involving the use of deadly force, the issue is whether the defendant honestly and reasonably believed that he or she was in imminent danger or death or great bodily harm from

the use of unlawful force. *E.g. State v. Williford*, 49 Ohio St. 3d 247, 249, 551 N.E.2d 1279 (1990).

These questions relate to two different standards. On the one hand the question of excessive force in a § 1983 action requires reference to the Fourth Amendment's standard of reasonableness. On the other hand the question of reasonableness in self-defense cases relates to the overarching question whether the defendant had an honestly held and objectively reasonable belief that the use of deadly force was necessary to defend oneself from the imminent use of unlawful force. These questions ask for answers to two (2) different questions which requires reference to different sources of authority.

Because the questions in the two cases are not synonymous, the Sixth District erred in applying defenses available to civil § 1983 actions to this criminal case. The analytical difference between § 1983 claims which evaluate reasonableness under the Fourth Amendment and self-defense claims which require reference to a different kind of reasonableness, cautions against the application made by the appellate court below.

D. The Sixth District Considered the Argument for the First Time on Appeal.

There are numerous compelling reasons why the Sixth District's analysis importing qualified immunity to civil claims under § 1983 to criminal cases is inapt. First, felonious assault charges in a criminal action are not civil "claims." As the United States Supreme Court has specifically held, § 1983 claims exist only for "civil damages." *Harlow*, 457 U.S. at 818. *See also* Part B and C, *supra*.

Secondly, as the Sixth District initially noted, White never raised his claim of immunity to the trial court. *White*, 2013 Ohio 51, at ¶ 81. Therefore, even if the civil standard applied in criminal cases, White's claim of immunity is nevertheless barred on principles of waiver. As the

United States Supreme Court recognized in *Harlow*, “qualified or ‘good faith’ immunity is an ‘affirmative defense that must be pleaded by a defendant official.” 457 U.S. at 815, citing *Gomez v. Toledo*, 446 U.S. 635 (1980). The United States Supreme Court has repeatedly reaffirmed the validity of this requirement of affirmative pleading. *E.g. Crawford-El v. Britton*, 523 U.S. 574, 587 (1998), citing *Gomez*, 446 U.S. at 639-641. In a civil case when a party fails to plead an affirmative defense, the defense is deemed waived under Civ. R. 12(B) and Civ. R. 12(H). In criminal cases there is no such pleading requirement because, contrary to the belief of the Sixth District, affirmative defenses in criminal cases are not capable of resolution in a pre-trial motion because they touch on the general issue at trial. *See* part E and F, *infra*.

Notwithstanding White’s failure to move prior to trial to assert this affirmative defense, as required by *Harlow*, 427 U.S. at 815, White also never raised qualified immunity as a basis for dismissal at trial. In failing to argue qualified immunity at any time prior to raising it for the first time on appeal, White forfeited all but plain error on appeal. Crim. R. 12(D); Crim. R. 12(H); *Payne*, 114 Ohio St. 3d 502, at ¶ 23. *Compare State v. Horner*, 126 Ohio St. 3d 466, 2010 Ohio 3830, at paragraph three of the syllabus; *State v. Lester*, 123 Ohio St. 3d 396, 2009 Ohio 4225, at ¶ 6. The Sixth District, however, never analyzed the State’s contention that White at least forfeited the issue on appeal. *See White*, 2013 Ohio 51, at ¶ 81-83. After noting that claims of immunity must be raised in the trial court to be preserved on appellate review, *id.* at ¶ 82, the appellate court went on, without analysis, to consider the argument for the first time on appeal.

The Sixth District observed that White never raised a qualified immunity claim to the trial court. That should have been the end of the analysis. Crim. R. 12(D); Crim. R. 12(H); *Harlow*, 457 U.S. 815; *Crawford-El*, 523 U.S. at 587.

E. Qualified Immunity is Often Resolved on Summary Judgment.

Moreover, as an “affirmative defense,” *see Harlow*, 457 U.S. at 815, motions for qualified immunity represent a kind of motion for summary judgment in § 1983 proceedings. *See Harlow*, 457 U.S. at 816; *id.* at 818 (“On *summary judgment*, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.”) (emphasis added); *see also Pearson v. Callahan*, 555 U.S. 223, 226 (2009) (noting that qualified immunity issue was resolved on motion for summary judgment); *Wyatt*, 504 U.S. at 166 (discussing *Harlow*’s reformulated approach to qualified immunity and noting that “[t]his wholly objective standard . . . would ‘avoid excessive disruption of government and permit resolution of many insubstantial claims on summary judgment.’”), quoting *Harlow*, 427 U.S. at 818.

“When determining if qualified immunity shields an officer from an alleged violation of a constitutional right, a court must ask two questions: first, taken in the light most favorable to the party asserting the injury, whether the facts alleged show the officer’s conduct violated a constitutional right; and second, whether the right was clearly established.” *Garvey v. City of Vermilion*, 9th Dist. Lorain No. 10CA009873, 2012 Ohio 1258, at ¶ 13, quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In order to decide if the facts, taken in a light most favorite to the plaintiff, allege a constitutional right, the Court must first answer the question whether those facts exist. The court in a qualified immunity summary judgment motion therefore must address the general factual question for trial.

F. Summary Judgment Motions are Inappropriate in Criminal Cases.

Virtually every appellate court in Ohio has held that in criminal cases motions for summary judgment, which require reference to the general issue at trial, are inappropriate. *City*

of Cincinnati v. N. Liberties Co., 1st Dist. Hamilton No. C-950200, 1995 Ohio App. LEXIS 5035 (Nov. 15, 1995), at *3; *State v. O'Neal*, 114 Ohio App. 3d 335, 336, 683 N.E.2d 105 (2d Dist. 1996); *State v. McNamee*, 17 Ohio App. 3d 175, 176, 478 N.E.2d 843 (3d Dist. 1984); *State v. Hehr*, 4th Dist. Washington No. 04CA10, 2005 Ohio 353, at ¶ 3, n. 2; *State v. Richards*, 5th Dist. Stark No. 2007 CA 00331, 2008 Ohio 5965, at ¶ 18-23; *City of Vermilion v. Meinke*, 6th Dist. Erie No. E-12-037, 2013 Ohio 2250, at ¶ 5; *State v. Caldwell*, 8th Dist. Cuyahoga No. 92219, 2009 Ohio 4881, at ¶ 3; *State v. Delaney*, 9th Dist. Lorain Nos. 07CA009188, 07CA009189 & 07CA009190, 2008 Ohio 1879, at ¶ 6; *City of Columbus v. Storey*, 10th Dist. Franklin No. 03AP-743, 2004 Ohio 3377, at ¶ 7; *State v. Kirksey*, 11th Dist. Portage No. 92-P-0004, 1992 Ohio App. LEXIS 4287 (Aug. 21, 1992), at * 4; *State v. Gaines*, 193 Ohio App. 3d 260, 2011 Ohio 1475 (12th Dist.), at ¶ 16.

This Court distinguished that line of authority in 2008 on the facts of the case under review, but did not overrule it. *State v. Brady*, 119 Ohio St. 3d 375, 2008 Ohio 4493, at ¶ 18. Distinguishing the cases cited by the State, *O'Neal*, 114 Ohio App. 3d 335, and *State v. Varner*, 81 Ohio App. 3d 85, 610 N.E.2d 476 (9th Dist. 1991), this Court held that Brady's motion to dismiss did not embrace the general issue at trial. Brady's motion challenged the FBI's enforcement of federal child pornography laws against his expert as a violation of his constitutional right to a fair trial. 119 Ohio St. 3d 375, at ¶ 18. Brady's motion thus side-stepped the general rule that motions to dismiss which require consideration of outside facts or issues are in effect motions for summary judgment and are not authorized by the Ohio Rules of Criminal Procedure. *Id.*

In a different section of the *Brady* opinion, however, the Court upheld the rule that pre-trial motions cannot be used as summary judgment motions. The Court observed that Crim. R.

12 permits consideration of evidence outside the face of the indictment when ruling on a pre-trial motion to dismiss *only if* the matter is capable of determination without trial on the general issue. *Id.* at ¶ 3. If the pre-trial motion to dismiss touches upon the general issue at trial, the trial court lacks authority to consider, let alone grant, the motion. *Id.* Such claims involving the ultimate issue are only amenable to resolution through the process articulated in Crim. R. 29 beginning with the close of the State's case in chief.

Qualified immunity most often turns on the question whether the right at issue was “clearly established.” *Harlow*, 457 U.S. at 818; *see also Saucier*, 533 U.S. at 201. For a more recent example, *see Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009) (discussing issue of qualified immunity of school administrator in context of strip-search of school student and holding that school administrator was entitled to qualified immunity because several of the lower appellate courts had produced inconsistent results when analyzing similar school searches). The question whether the right was “clearly established” involves both a legal and factual element. *See Pearson*, 555 U.S. at 232, 238-239; *see also Harlow*, 427 U.S. at 815 (noting that if a plaintiff can show that the official knew or should have known that the action would violate the plaintiff's rights OR if the official took the action with malicious intention, qualified immunity would be unavailable). The United States Supreme Court has also held that the underlying reasonableness inquiry in excessive force cases is objective and that the intent of the defendant-officer is irrelevant. *Graham*, 490 U.S. at 397. That objective reasonableness test, however, goes towards the underlying merits of the reasonableness of the defendant's conduct in a § 1983 action and not to the question of whether the defendant is entitled to qualified immunity. *Id.*

When trying to apply qualified immunity to a criminal case, the factual element to be considered *is* the alleged criminal conduct itself. Thus, by definition, qualified immunity analysis embraces the general issue at trial. Therefore, § 1983 qualified immunity analysis exceeds the permissible scope of a Crim. R. 12(C) motion. *Brady*, 119 Ohio St. 3d 375, at ¶ 3 (“Crim. R. 12 permits a court to consider evidence beyond the face of the indictment when ruling on a pretrial motion to dismiss an indictment if the matter is capable of determination without trial of the general issue.”).

Against the weight of authority in this State, and contrary to its own prior decisions, *see Meinke*, 2013 Ohio 2250, at ¶ 5 and *State v. Lavelle*, 6th Dist. Wood No. WD-98-083, 1999 Ohio App. LEXIS 3471 (July 30, 1999), at * 7, the Sixth District in this case held that the trial court could consider the general issue at trial in a pretrial motion to dismiss. *White*, 2013 Ohio 51, at ¶ 85. Under a long line of appellate authority in this state, and as noted by this Court, trial courts lack authority under Crim. R. 12 to consider motions which embrace the ultimate issue at trial. *E.g. Brady*, 119 Ohio St. 3d 375, at ¶ 3.

In this case, White’s asserted immunity claim would encompass the general issue at trial – whether the use of force (shooting McClosky in the back) was reasonable. Any motion for qualified immunity would therefore constitute the equivalent of a motion for summary judgment. Motions for summary judgment being improper in criminal cases, *Brady*, 119 Ohio St. 3d 375, at ¶ 3, the Sixth District improperly articulated the scope of pre-trial motions in criminal cases against peace officers. The motions contemplated by the Sixth District are not available for non-peace officers, Crim. R. 12; *Brady*, 119 Ohio St. 3d 375, at ¶ 3, and there is no compelling reason to distinguish peace officers who must carry a firearm as part of their job from non-peace officers who have a Second Amendment right to carry a firearm as having any additional right to

file pre-trial motions in criminal cases. Claims of self-defense are best addressed by a jury, which has an opportunity at a trial not only to receive evidence on the question but to assess for themselves the veracity and credibility of the witnesses through the adversary process.

G. Qualified Immunity In Criminal Cases Would Have an Absurd Effect.

Treating the trial issue of reasonableness of an officer's actions as a qualified immunity issue and thus allowing summary judgment motions in criminal cases would also create an absurd effect. The denial of a motion for summary judgment asserting a claim of immunity is generally immediately appealable. *Hubbell v. City of Xenia*, 115 Ohio St. 3d 77, 2007 Ohio 4839, at ¶ 27, citing R.C. 2744.02(C). Although the U.S. Supreme Court has held that the denial of qualified immunity in state § 1983 suits need not be immediately appealable under state procedural rules, *Johnson v. Fankell*, 520 U.S. 911 (1997), the Court held in *Mitchell*, 472 U.S. at 526, that denial of qualified immunity under § 1983 and *Bivens* actions in federal courts is immediately appealable under the federal appellate jurisdiction statute, 28 U.S.C. § 1291.

In criminal cases under Ohio state law, however, denials of pre-trial motions to dismiss are generally not immediately appealable. *E.g. State v. Crago*, 53 Ohio St. 3d 243, 559 N.E.2d 1353 (1990), at syllabus (“The overruling of a motion to dismiss on the ground of double jeopardy is not a final appealable order.”).¹ With limited exceptions only for decisions granting motions to suppress or exclude evidence when certain conditions are met, Crim. R. 12(K); R.C. 2945.67, Ohio law generally does not allow for interlocutory appeals. Criminal defendants can

¹ The OPAA is aware that *State v. Anderson*, Ohio Supreme Court No. 2012-1834, which is scheduled for oral arguments on October 8, 2013, is also pending before the Court. *Anderson* involves a single proposition of law pertaining to denials of motions to dismiss for alleged Double Jeopardy violations and that denial's status, or lack thereof, as a final, appealable order under R.C. 2505.02. For purposes of the instant appeal in *White*, the OPAA takes no position on the merits of the proposition of law in *Anderson*. Nevertheless, the OPAA notes that the outcome and reasoning in *Anderson* could affect the analysis above in terms of when an order in a criminal case is final and appealable under R.C. 2505.02.

only appeal from a final, appealable order – generally a sentencing entry or some other order affecting their substantial rights. R.C. 2505.02(B). *Compare In re M.M.*, 135 Ohio St. 3d 375, 2013 Ohio 1495, at ¶ 7 (noting that the State did not seek interlocutory appeal of the magistrate’s order granting a *liminal* motion to exclude statements of victims).

Reading § 1983 qualified immunity as a purely civil matter cleanly resolves this potential conflict. Leaving § 1983 defenses as only applying to § 1983 actions would not create final, appealable orders in criminal cases on questions of immunity prior to trial. And it would not distort the remedial nature of § 1983 actions or alter the fact that qualified immunity is “an immunity from suit rather than a mere defense to liability” *Pearson*, 555 U.S. at 231. Appending qualified immunity and other § 1983 defenses to Ohio’s criminal code would allow for pre-trial summary judgment proceedings where none are authorized by the Rules of Criminal Procedure. That result would conflict with the command articulated in Crim. R. 12(A) that only those motions contemplated by the Rule are permitted. Rule 12(C) of the Rules of Criminal Procedure permits motions before trial which are capable of resolution without trial of the general issue. *Brady*, 119 Ohio St 3d 375, at ¶ 3. To allow qualified immunity defenses in a criminal case would make appeal of qualified immunity summary judgment motions for police officers accused of criminal acts the sole exception to the appellate scheme under the Ohio Revised Code and the Rules of Criminal Procedure. The motions are improper in criminal cases.

In attempting to import civil defenses under § 1983 actions to criminal cases, the Sixth District abrogated unambiguous language of the Rules of Criminal Procedure and encroached on the fact-finding authority of the jury. In allowing for summary judgment proceedings in criminal cases on the ultimate issue to be decided at trial, the Sixth District’s opinion is unsupportable in law. The judgment of the court below must therefore be reversed.

Proposition of Law III: IN A TRIAL OF A POLICE OFFICER CHARGED WITH FELONIOUS ASSAULT FOR AN ON-DUTY SHOOTING, THE COURT COMMITS NEITHER AN ABUSE OF DISCRETION NOR PLAIN ERROR IF IT INSTRUCTS THE JURY TO DETERMINE, FROM THE PERSPECTIVE OF A REASONABLE POLICE OFFICER, WHETHER THE OFFICER’S USE OF DEADLY FORCE WAS OBJECTIVELY REASONABLE, OR WHETHER THE OFFICER HAD REASONABLE GROUNDS TO BELIEVE THAT HE OR A FELLOW OFFICER WAS IN IMMINENT DANGER OF DEATH OR GREAT BODILY HARM.

The decision as to the contents of a jury charge is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Guster*, 66 Ohio St. 2d 266, 271-272, 421 N.E.2d 157 (1981); *State v. Chinn*, 85 Ohio St. 3d 548, 574-575, 709 N.E.2d 1166 (1999). An abuse of discretion implies that the trial court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140 (1983). A court abuses its discretion when its decision is not supported by any sound reasoning process. *AAAA Enters., Inc. v. River Place Cmty. Urban Redev. Corp.*, 50 Ohio St. 3d 157, 161, 553 N.E.2d 597 (1990). An appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St. 3d 619, 621, 1993 Ohio 122 (1993). “A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.” *AAAA Enters., Inc.*, 50 Ohio St. 3d at 161.

A. There Is No Difference Between “Excessive Force” and “Deadly Force” in § 1983 Actions – In Either Case the Question is Simple “Reasonableness”

In this case, the Sixth District held that the trial court erred in failing to distinguish between the standards for use of “excessive force” and “deadly force.” *White*, 2013 Ohio 51, at ¶

105. Unlike application of the doctrine of self-defense in Ohio which distinguishes between deadly force and non-deadly force, the Supreme Court in *Graham* made explicit what was implicit in *Garner*, that “all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard” *Graham*, 490 U.S. at 395, citing *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985).

The Sixth District’s concern that the jury instructions defined the wrong term is misplaced. Excessive force is a categorical description for all claims that the seizure of the person was accomplished through use of more force than was reasonably required. That category includes the use of deadly force, which includes shooting a suspect as well as forcing a suspect’s car from the road. See *Scott v. Harris*, 550 U.S. 372, 374 (2007) (describing question as whether officer can take action to place fleeing motorist at risk of serious injury or death in order to stop the motorist’s flight from endangering the lives of innocent bystanders).

In *Scott*, the Court noted that both sides contended that conduct at issue in ramming Harris’ vehicle to force it from the road was a seizure. 550 U.S. at 381. It was also conceded by both sides that a claim of “excessive force” in the course of effectuating a seizure is analyzed under the Fourth Amendment’s “objective reasonableness” standard. *Id.*, citing *Graham*, 490 U.S. at 388. Thus the question in all excessive force claims, involving deadly as well as non-deadly force, is the same: whether the actions were objectively reasonable. *Id.*

Moreover the *Scott* Court noted that Harris wanted the Court to review the claim under the standard in *Garner*, attempting to create a divide between deadly and non-deadly force. *Id.* at 381-382. The Sixth District majority opinion confronted this issue and chided the dissent for misreading the U.S. Supreme Court’s opinion in *Scott*. *White*, 2013 Ohio 51, at ¶ 109 and n.23.

The opinion in *Scott*, however, is quite clear that *Garner/Graham* does not establish a distinction between deadly force and non-deadly force. “*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute ‘deadly force.’ *Garner* was simply an application of the Fourth Amendment’s ‘reasonableness’ test to the use of a particular type of force in a particular situation.” *Scott*, 550 U.S. at 382 (internal citations omitted).

In this case the lack of distinction between deadly and non-deadly force standards in § 1983 claims means that the language of reasonableness and excessive force in the instructions could not confuse the jury. There is no distinction under the Fourth Amendment between deadly and non-deadly force – in both cases the question is was the official’s action reasonable given all of the attendant circumstances. *Id.* at 382, citing *Graham*, 490 U.S. at 388. “Whether or not [the official’s] actions constituted application of ‘deadly force,’ all that matters is whether [the officer’s] actions were reasonable.” *Id.* at 383. Despite the appeal of “easy-to-apply legal test[s],” every case requires the court to “slosh [its] way through the factbound morass of ‘reasonableness.’” *Id.*

The Sixth District’s artificial distinction between situations involving deadly force and non-deadly force misapplies the caselaw it deemed relevant to this criminal matter. The jury instructions in § 1983 actions need only describe the law related to “reasonableness” to determine whether the use of force, deadly or not, was justified. The instructions in this case on the officer’s use of force all pertained to the reasonableness of White’s action and belief. Any inconsistent use of “deadly force” or “excessive force” had no legal effect under § 1983 and thus could not have been prejudicial.

In light of the fact that there is no difference between *Garner* and *Graham* in terms of deadly or non-deadly force, *Scott*, 550 U.S. at 382, the Sixth District misconstrued the Supreme Court of the United States' decision. Based on that misunderstanding of the law it held that the trial court had misapplied legal precedent. In holding that the trial court misunderstood, the Sixth District held that the trial court had abused its discretion. The Sixth District, however, was confused on the law, not the trial court. The trial court's interpretation was correct or at least not an abuse of its discretion in deciding the contents of the jury's charge.

B. The Trial Court Gave, In Substance, the Appropriate Reasonableness Instruction under Graham

As the Sixth District noted, the trial court gave in substance the *Graham* reasonableness instruction. *White*, 2013 Ohio 51, at ¶ 124 (“The trial court’s ‘reasonableness’ instruction, to the degree that its language did not reinforce the erroneous ‘excessive force’ instruction, was substantially consistent with the federal decisions canvassed earlier.”). The trial court properly instructed the jury not to engage in 20/20 hindsight or consider later-learned facts, such as the knife and medical documentation of McCloskey’s blood-alcohol content or drug use. *Id.* The trial court also instructed the jury that those medical findings could be considered *against* McCloskey to the extent they bore on McCloskey’s credibility.

The Sixth District faulted the trial court, however, for not instructing the jury that they could not consider the fact that McCloskey was unarmed in assessing the reasonableness of White’s threat perception. The appellate court failed to account, however, for the fact that the trial court had already given that instruction in substance when it told the jury that it could not consider later-learned facts. The fact that McCloskey was ultimately determined to be unarmed was one of those later-learned facts.

A trial court need not give every possible instruction so long as the charge contains, in substance, all of the instructions warranted. As the Ninth District has held:

The Ohio Rules of Criminal Procedure provide that the trial judge shall charge the jury in accordance with Crim.R. 30. In construing Crim.R. 30(A), the Supreme Court of Ohio has stated that "after arguments are completed, a trial court must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, paragraph two of the syllabus. "A defendant is entitled to have his instructions included in the charge to the jury only when they are a correct statement of the law, pertinent and not included in substance in the general charge." *State v. Theuring* (1988), 46 Ohio App.3d 152, 154, 546 N.E.2d 436. If a requested instruction is not pertinent to the facts of the case, the court need not include it in its charge to the jury. See *State v. Guster* (1981), 66 Ohio St.2d 266, 271, 421 N.E.2d 157.

State v. Frazier, 9th Dist. Summit No. 25338, 2011 Ohio 3189, at ¶ 17; see also *State v. Guster*, 66 Ohio St. 2d 266, 269, 421 N.E.2d 157 (1981) (holding that a court need not give every requested instruction unless it is correct, pertinent, timely presented and not already included, in substance, in the charge already).

In having already given an instruction which encompassed the point the Sixth District held should have been included in the instructions, the trial court did not abuse its discretion in refusing to separately instruct on this point. *Theuring*, 46 Ohio App. 3d at 154; *Guster*, 66 Ohio St. 2d at 269; see also *State v. Nelson*, 36 Ohio St. 2d 79, 303 N.E.2d 865 (1973), at paragraph one of the syllabus; *Cincinnati v. Epperson*, 20 Ohio St. 2d 59, 61, 253 N.E.2d 785 (1969).

C. White Invited Any Error in the Instructions Re: § 1983

At trial, it was White who asked for instructions about the reasonableness of his use of force. The doctrine of invited error prohibits a party from inducing or inviting a trial court to commit error and then taking advantage of that error. See *Lester v. Leuck*, 142 Ohio St. 91, 50 N.E.2d 145 (1943), at paragraph one of the syllabus; *Fostoria v. Ohio Patrolman's Benev. Assoc.*, 106 Ohio St. 3d 194, 2005 Ohio 4558, at ¶ 12-13; *State v. Rohrbaugh*, 126 Ohio St. 3d

421, 2010 Ohio 3286, at ¶ 10. It was White who asked the trial court to give instructions pursuant to *Graham*. The State agreed with that request but asked for complete *Graham* instructions to be given, not the cherry-picked factors under the case which White submitted. The trial court accepted the instructions and determined that the whole reasonableness instruction should be given.

To the extent that White claimed on appeal that the instructions under *Graham* were improper, the error was one White invited or induced the trial court to make. Moreover, the plain error doctrine cannot be used to negate deliberate, tactical decisions by trial counsel. *State v. Clayton*, 62 Ohio St.2d 45, 46-48, 402 N.E.2d 1189 (1980). White asked for part of the *Graham* instruction, and the trial court acceded to that request with some supplementation based on the rest of the factors noted in that case. The instruction actually given substantially comported with the instruction White requested. The error, if any, was one White invited the trial court to make. He should not have been heard to complain about that invited error.

D. The Instructions Did Not Prejudice White

When any question arises about jury instructions, the reviewing court must determine not only whether the instruction was proper but whether it had a materially prejudicial impact on the defendant's trial. If the instruction did not prejudice the defendant, the error is not reversible.

The instructions given aligned with the instructions for § 1983 actions approved in *Graham*. To the extent that the trial court refused to instruct the jury exactly as White requested, the trial court retains broad discretion in deciding how to fashion a legally accurate jury charge. Substitution of words or phrases, when they do not change the meaning of the instruction, is not an abuse of the trial court's discretion. These instructions, consistent with the instructions

requested by White, conveyed in substance what the jury must find to convict. The trial court did not abuse its discretion and White was not prejudiced.

Proposition of Law IV: WHEN A JURY IS INSTRUCTED TO APPLY THE DEFINITION OF “KNOWINGLY” SET FORTH IN R.C. 2901.22(B), THE TRIAL COURT DOES NOT COMMIT PLAIN ERROR IN FAILING TO GIVE A MISTAKEN BELIEF INSTRUCTION.

The decision as to the contents of a jury charge is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Guster*, 66 Ohio St. 2d 266, 271-272, 421 N.E.2d 157 (1981); *State v. Chinn*, 85 Ohio St. 3d 548, 574-575, 709 N.E.2d 1166 (1999). An abuse of discretion implies that the trial court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore*, 5 Ohio St. 3d at 219. A court abuses its discretion when its decision is not supported by any sound reasoning process. *AAAA Enters.*, 50 Ohio St. 3d at 161. An appellate court may not substitute its judgment for that of the trial court. *Pons*, 66 Ohio St. 3d at 621. “A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.” *AAAA Enters., Inc.*, 50 Ohio St. 3d at 161.

A. Mistake of Fact Only Applies to the Mental State of “Purposefully.”

Ignorance or mistake of fact is a defense if it negates a mental state required to establish an element of the crime, except that if a defendant would be guilty of a crime under the facts as he or she believes them they may be convicted of the offense. *State v. Pecora*, 87 Ohio App. 3d 687, 622 N.E.2d 1142 (9th Dist. 1993). In *City of Columbus v. Harbuck*, 10th Dist. Franklin No. 99AP-1420, 2000 Ohio App. LEXIS 5543 (Nov. 30, 2000), at * 12-13 (emphasis added), the

court held that “[w]here the defendant is not charged with a *specific intent crime*, the trial court does not abuse its discretion in failing to give a jury instruction on mistake of fact.” Where a defendant is not required to have a specific intent to commit a crime, whether or not he or she has an honest belief in a mistaken fact is irrelevant to the crime charged. *Id.* at *13. A court therefore does not err in refusing to give a proposed mistake of fact instruction when the crime charged does not allege a specific intent offense. *Id.*

To that end, the Seventh District has held that mistake of fact can only be used as a defense to specific intent crimes such as theft. *State v. Rawson*, 7th Dist. Jefferson No. 05 JE 2, 2006 Ohio 496, at ¶ 7. Under the theft statute “no person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways” R.C. 2913.02(A). Although the statute speaks in terms of “knowing” conduct, it requires “purpose to deprive the owner” as the specific intent of the actor’s conduct. *Id.*

Although several courts of this state have held that mistake of fact applies to crimes with mental states of purposefully *and* knowingly, the *raison d’être* of those decisions is that mistake of fact only applies to “specific intent” crimes. Although the mental state of purposefully is clearly a specific intent mental state under language in R.C. 2901.22(A) requiring a “specific intention to cause a certain result,” the mental state of “knowingly” is not a specific intent mental state because there is no requirement under R.C. 2901.22(B) the offender have any “intent.”

R.C. 2901.22(A) defines the mental state of purposefully. “A person acts purposefully when it is his *specific intention* to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his *specific intention* to engage in conduct of that nature.” *Id.*

R.C. 2901.22(B), on the other hand, defines the mental state of knowingly. “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probable exist.” *Id.*

B. Felonious Assault is Not a Specific Intent Crime – It Does Not Require Purposeful Conduct.

The offense of felonious assault is not a specific intent crime. Felonious assault, as proscribed in the Revised Code, requires a culpable mental state of “knowingly.” R.C. 2903.11. “Knowingly” is not a specific intent crime in Ohio. The dissent below correctly noted that to act knowingly is not to act purposefully or with a specific intent. *White*, 2013 Ohio 51, at ¶ 183 (Singer, J., dissenting). Rather, as the Fourth District has held, motive, purpose, or specific intent are not relevant when determining whether a defendant acted “knowingly.” *State v. Chambers*, 4th Dist. Adams No. 10CA902, 2011 Ohio 4352, at ¶ 35.

The Fourth District in *Chambers* cited this Court’s opinion in *State v. Wenger*, 58 Ohio St. 2d 336, 339 n.3, 390 N.E.2d 801 (1979). In that case the defendant had argued mistake of fact as a basis to negate criminal *mens rea* for his assault conviction. *Id.* This Court responded in a footnote that the offense of assault under R.C. 2903.13 only requires a person to act “knowingly” and noted that “motive, purpose or mistake of fact is of no significance.” *Id.* For mistake of fact to be “of no significance” in a case where the culpable mental state was “knowingly,” mistake of fact must *only* apply to offenses where the culpable mental state is “purposefully.” This construction accords with the definition of “purposefully,” which is the only mental state that includes in its definition anything relating to a “specific intention.” R.C. 2901.22(A).

Specific intent in Ohio therefore encompasses only purposeful crimes. *See State v. Fox*, 68 Ohio St. 2d 53, 428 N.E.2d 410 (1981). In *Fox*, this Court held that evidence of voluntary intoxication was admissible in “specific intent” cases to negate the formation of the necessary purpose. *Id.* at syllabus; *id.* at 55 (“In such a case, intoxication, although voluntary, may be considered in determining whether an act was done intentionally or with deliberation or premeditation.”), citing *State v. French*, 171 Ohio St. 501, 502, 172 N.E.2d 613 (1961). *Fox* held that because murder and attempted murder have a *mens rea* of “purposefully,” they are specific intent crimes and evidence of voluntary intoxication was properly admitted to negate the formation of the requisite culpable mental state. *Id.* at 55.²

The Twelfth District has held that the mental state of knowingly is not a specific intent *mens rea*. *State v. Blanton*, 12th Dist. Madison No. CA2005-04-016, 2006 Ohio 1785, at ¶ 22. Moreover, the Eighth District has repeatedly and consistently held that felonious assault is not a specific intent crime. *State v. Goad*, 4th Dist. Washington No. 08CA25, 2009 Ohio 580, at ¶ 12 (collecting Eighth District cases). *Goad* notes that the Second, Fourth and Fifth Districts have either concluded or tacitly assumed that crimes with a mental state of “knowingly” are specific intent crimes. *Id.* (collecting cases). The *Goad* court argued, however, that the language of R.C. 2901.22(B) does not require any specific intent for the act to be done “knowingly.” *E.g. Wenger*, 58 Ohio St. 2d at 339 n.3. The only mental state which requires a “specific intention” to cause a certain result or a specific intention to engage in conduct of a certain nature is the mental state of “purposefully.” R.C. 2901.22(A). The mental state of knowingly is therefore not a specific

² Of course, the General Assembly subsequently enacted R.C. 2901.21(C), which declares that voluntary intoxication “may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense.” Evidence of voluntary intoxication is only potentially admissible to show whether the person was physically capable of performing the act with which the person is charged. *Id.* Voluntary intoxication is not admissible to negate a culpable mental state. *Id.*

intent mental state. Furthermore, to act knowingly is *not* to act purposefully or with a specific intent. KATZ & GIANELLI, OHIO CRIMINAL LAW § 85.7 (2010 Ed.); *see also State v. Dixon*, 8th Dist. Cuyahoga No. 82951, 2004 Ohio 2406, at ¶16, citing *State v. Huff*, 145 Ohio App. 3d 555, 563, 763 N.E.2d 695 (1st Dist. 2001).

C. The Court Should Hold that “Specific Intent” Means the Mental State of “Purposefully” Under R.C. 2901.22(A).

“[S]pecific and general intent have been notoriously difficult terms to define and apply” *People v. Hood*, 1 Cal. 3d 444, 455, 462 P.2d 370 (1969). “‘Specific intent’ and ‘general intent’ are the bane of criminal law students and lawyers . . . because the terms are critical to understanding various common law rules of criminal responsibility, yet the concepts are so ‘notoriously difficult . . . to define and apply . . . [that] a number of text writers recommend that they be abandoned altogether.’” JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 135-136 (3d Ed. 2001).

The phrase “specific intent” has had a number of meanings over the years. As Professor Dressler notes, some jurisdictions use the term to mean the mental state of “purposefully.” *Id.* Others use general intent in the same way as criminal intent to mean the general idea of *mens rea* while “specific intent” means the mental state required for a particular crime. *See* 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW §3.5(e) (3d Ed. 2000). As LaFave and Scott note, the most common usage by far of “specific intent” is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime. *Id.* Ohio generally follows this majority approach.

With the adoption of a set of modern laws in 1974, the Revised Code generally does not refer to “specific intent” or “general intent” crimes. Instead, Ohio, like virtually every other common law state, adopted the approach that there are identifiable mental states which are

generally applicable to criminal acts. R.C. 2901.22. Except for certain exceptions to the rule not applicable in this case, in enacting criminal laws the legislature chooses from those available mental states in proscribing criminal acts. R.C. 2901.21(A)(2) (stating that to be guilty of an offense a person must have a requisite degree of culpability); R.C. 2901.21(D)(3) (“‘Culpability’ means purpose, knowledge, recklessness, or negligence, as defined in section 2901.22 of the Revised Code.”).

The Sixth Circuit has observed that in Ohio specific intent and purpose “are one and the same.” *Coley v. Bagley*, 706 F.3d 741, 755 (6th Cir. 2013), citing *State v. Treesh*, 90 Ohio St. 3d 460, 485, 739 N.E.2d 749 (2001) (“A person acts purposefully when he or she specifically intends to cause a certain result.”), and R.C. 2901.22(A). In observing that “specific intent” is the same as “purpose,” the Sixth Circuit implicitly noted that a lesser mental state would not qualify as a “specific intent” offense. *Id.* “Specific intent” in Ohio does not include “knowingly.” *Id.*

A select few offenses in Ohio require an enhanced mental state for conduct to be considered criminal or to be charged at a certain level. Aggravated burglary under R.C. 2911.11(A), for example, requires a criminal trespass in an occupied structure when another person is present together with *purpose* to commit in the structure any criminal offense. Theft, R.C. 2913.02, requires knowingly obtaining or exerting control over property or services of another with *purpose* to deprive the owner of property or services. Bribery, R.C. 2921.02, requires promising, offering, or giving any thing of value to a public servant or party official, together with *purpose* to corrupt a public servant or party official. Obstructing justice, R.C. 2921.32, requires a person to do any of certain enumerated acts with *purpose* to hinder the discovery, apprehension, prosecution, conviction, or punishment of another. These offenses all

require a person to engage in particular conduct or to commit lower level offenses with a *specific purpose*. They are thus “specific intent” crimes because they contain conduct elements with a *specific* (particular) *intent* behind commission of the act. Compare LAFAVE & SCOTT, SUBSTANTIVE CRIMINAL LAW, § 3.5(e).

Only in application of some common law doctrines such as mistake of fact do intermediate appellate courts of this State continue to adhere to the minority view of “specific intent.” Moreover, the appellate courts are split on this issue. It is time for this Court to hold either that its “specific intent” jurisprudence applies only to offenses with a mental state of “purposefully” as defined in R.C. 2901.22(A) or applies to offenses which require a special mental element of “purpose” above and beyond a normal mental state required with respect to the *actus reus* of a crime. Only a person who acts with a particular *purpose* or *intent* to cause a *certain* result acts with a “*specific intent*.” As defined in R.C. 2901.22(B), a person who acts knowingly does not “intend” a particular result – by definition he or she need only be aware that the conduct will “probably” cause a certain result. An outcome achieved through conduct, or the *actus reus* of the crime, need not be the *intent* of the person to have acted *knowingly*.

Because the mistake of fact defense and corresponding instruction only applies to specific intent offenses, because specific intent is limited to acts done “purposefully,” and further because felonious assault does not require “purposeful” conduct, the trial court properly refused to instruct on mistake of fact. The Sixth District’s holding to the contrary is thus erroneous and should be reversed.

D. Even If the Mistaken Belief Instruction Was Required, White Received It In the Form of the *Graham* Instruction.

A trial court need not give every requested instruction. As the Ninth District has held:

The Ohio Rules of Criminal Procedure provide that the trial judge shall charge the jury in accordance with Crim.R. 30. In construing Crim.R. 30(A), the Supreme Court of Ohio has stated that "after arguments are completed, a trial court must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, paragraph two of the syllabus. "A defendant is entitled to have his instructions included in the charge to the jury only when they are a correct statement of the law, pertinent and not included in substance in the general charge." *State v. Theuring* (1988), 46 Ohio App.3d 152, 154, 546 N.E.2d 436. If a requested instruction is not pertinent to the facts of the case, the court need not include it in its charge to the jury. See *State v. Guster* (1981), 66 Ohio St.2d 266, 271, 421 N.E.2d 157.

State v. Frazier, 9th Dist. Summit No. 25338, 2011 Ohio 3189, at ¶ 17; *see also Guster*, 66 Ohio St. 2d at 269 (holding that a court need not give every requested instruction unless it is correct, pertinent, timely presented and not already included, in substance, in the charge already).

Consistent with White's request, the trial court instructed the jury on his defense of justification/self-defense. (Tr. at 1243-1246.) *Compare Graham*, 490 U.S. at 396; *Garner*, 471 U.S. at 11-12. This instruction provided, if not verbatim then in substance, the same factors as the United States Supreme Court's decisions in *Graham* and *Garner*.

The trial court gave an instruction which encompassed the substance of the instruction requested by White. Because the charge actually given contained, in substance, the instruction White requested, the trial court did not err in refusing to give White's requested instruction. *Theuring*, 46 Ohio App. 3d at 154; *Guster*, 66 Ohio St. 2d at 269; *Scott*, 41 Ohio App. 3d at 317; *Nelson*, 36 Ohio St. 2d 79, at paragraph one of the syllabus; *Epperson*, 20 Ohio St. 2d at 61. *See also State v. Shue*, 97 Ohio App. 3d 459, 471, 646 N.E.2d 1156 (9th Dist. 1994) (noting in murder case that mistake of fact instruction not warranted where jury instructed on definition of purpose).

The Sixth District reasoned that the instruction would allow the jury to assess the reasonableness of White's mistake. *White*, 2013 Ohio 51, at ¶ 122. The Sixth District's analysis

overlooks the fact that the *Graham* instruction agreed to by the State and actually given by the trial court provided, in substance, the same instruction. The trial court did not abuse its discretion. The decision of the Sixth District to the contrary must therefore be reversed and remanded for further consideration.

Proposition of Law V: IN A TRIAL OF A POLICE OFFICER CHARGED WITH FELONIOUS ASSAULT, EXCLUSION OF TESTIMONY REGARDING THE PRECISE VIOLATION AND DEGREE OF OFFENSE A SUSPECT IS BELIEVED TO HAVE COMMITTED IS NOT AN ABUSE OF DISCRETION.

It is important at the outset of this proposition of law to distinguish what exactly White claimed on appeal was improper to prevent the jury from receiving in evidence. White does not claim that the jury was improperly prevented from receiving evidence about McCloskey's actions leading up to the point where White shot him in the back. Instead, White's argument is that the jury was improperly prevented from hearing testimony regarding the specific *name of the violation* and *degree of the offense* that White believed that McCloskey committed justifying the traffic stop. Compared to the repeated playing of the recording from the in-car dashboard camera, White's testimony about what particular code section and degree of offense he potentially might have charged McCloskey with violating was irrelevant and entirely speculative. The assessment of reasonableness in this situation comes not from the degree of offense White believed McCloskey committed but from the totality of the factual circumstances. *Graham*, 490 U.S. at 396. In viewing the dashboard camera recording several times, the jury was well aware of McCloskey's actions and could assess the reasonableness of White's actions accordingly.

White claimed on appeal that it was erroneous for the trial court to prevent him from testifying that he would have charged McCloskey with a felony violation of R.C. 2921.331(B). To constitute a felony violation of the statute, the offender must willfully elude or flee from a

police officer after receiving a visible or audible signal to bring the vehicle to a stop, R.C. 2921.331(B), and the flight or elusion must come immediately after the commission of a felony, R.C. 2921.331(C)(4), or proximately cause or carry a substantial risk of causing serious physical harm to persons or property, R.C. 2921.331(C)(5)(a)(i)-(ii).

Such a charge was unsupported by the evidence. The evidence at trial, specifically the dashboard camera recording, shows that White did not give a visible or audible signal to McCloskey to bring the motorcycle to a stop when he first pulled behind McCloskey. When he finally gave such a signal multiple minutes after turning on the dashboard camera, McCloskey quickly brought the motorcycle to a stop at the stop bar of an intersection. And the few seconds between the visible and audible signal to stop and McCloskey coming to a complete stop did not entail McCloskey causing, or engaging in flight which carried a substantial risk of, serious physical harm to persons or property. The evidence in this case thoroughly belies White's claim that McCloskey engaged in a violation of R.C. 2921.331(B).

A trial court has broad discretion over the mode and order of interrogation of witnesses and presentation of evidence. *Krishbaum v. Dillon*, 58 Ohio St. 3d 58, 65, 567 N.E.2d 1291 (1991). *See also* Evid. R. 611(A). Absent an abuse of discretion that materially prejudices a party, a trial court's evidentiary determination should not be disturbed. *Dillon*, 58 Ohio St. 3d at 65. An abuse of discretion connotes more than a mere error in law or judgment. An abuse of discretion implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore*, 5 Ohio St. 3d at 219. A court abuses its discretion when its decision is not supported by any sound reasoning process. *AAAA Enters., Inc.*, 50 Ohio St. 3d at 161. An appellate court may not substitute its judgment for that of the trial court. *Pons*, 66 Ohio St. 3d at 621.

In this case, the exclusion of testimony from the defendant about what offense with which he might have charged McCloskey was an appropriate exercise of the trial court's discretion. Regardless of what offense White may have believed McCloskey had committed, there was no flight or even a substantial risk of serious physical harm. To the extent that White had offered testimony on this and was thereafter impeached, the admission of White's testimony would only have hurt his credibility and undermined the claimed reasonableness of his decision to use force. The decision to prevent his testimony on this point only inured to his benefit. As it inured to his benefit, it cannot be said to have been materially prejudicial to his defense. There was therefore no reversible error. *Dillon*, 58 Ohio St. 3d at 65.

Alternatively, the jury had the recording from White's in-car video system in evidence which was played several times at trial. The question under *Graham* does not require direct testimony from the officer but rather consideration of the totality of the factual circumstances, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others and whether he is actively resisting arrest or attempting to evade arrest by flight. 490 U.S. at 396, citing *Garner*, 471 U.S. at 8-9. Here, the jury had ample evidence regarding the "severity of the crime at issue" in the form of the video recording. Testimony from the officer regarding what offense he might have charged the victim with committing was entirely speculative.

Additionally, allowing White to testify what particular crime and degree of offense he would have charged based on his clearly exaggerated version of events would belie *Graham's* holding that "it is imperative that the facts be judged against an objective standard." 490 U.S. at 397, quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968) and citing *Scott v. United States*, 436 U.S. 128, 137-139 (1978). As *Graham* noted, "[a]n officer's evil intentions will not make a Fourth

Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.*, citing *Scott*, 436 U.S. at 138 and *United States v. Robinson*, 414 U.S. 218 (1973). The "reasonableness" inquiry in excessive force cases is an objective one. The question is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.*, citing *Scott*, 436 U.S. at 137-139. "[S]ubjective motivations of the individual officers . . . has no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment." *Id.*

Regardless of what White believed, only the objective facts were relevant. White's testimony as to his subjective evaluation of the circumstances was irrelevant and therefore properly excluded. Especially where White did not challenge the exclusion of his testimony as a standalone assignment of error but only in the context of a sufficiency of the evidence challenge, the appellate court erred in re-framing his assignment of error and reversing his conviction on this basis.

CONCLUSION

For the foregoing reasons, *Amicus Curiae*, Ohio Prosecuting Attorneys Association, respectfully urges this Court to reverse the judgment of the Sixth District Court of Appeals below and reinstate the Appellee's conviction for felonious assault.

The OPAA generally agrees with this Court's observation in *Steele* that "[p]olice officers must often act quickly and decisively, as a delay in response could have dire consequences or even constitute dereliction of duty." *Steele*, Slip Op. No. 2013-Ohio-2470, at ¶ 36, citing *Davis v. Scherer*, 468 U.S. 183, 196 (1984). "Police officers performing their valuable and often

dangerous duties” should not fear criminal charges every time they take action in the course of their ordinary duties. *Id.* But as evidenced by Steele’s recently-upheld conviction for abduction, intimidation and other offenses arising from his admitted arrest without probable cause, officers are not immune from criminal prosecution when they act in a way that constitutes a criminal offense.

In this case, a jury found that White acted in a manner which constituted the offense of felonious assault and that White used a firearm to facilitate the commission of that offense. The Sixth District’s opinion and judgment below should be reversed and White’s conviction reinstated.

Respectfully Submitted,

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PROOF OF SERVICE

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