

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
	:	District Case No. L-10-1194
THOMAS CAINE WHITE,	:	
	:	Lucas County Common Pleas Court
Appellee.	:	Case No. CR09-2300

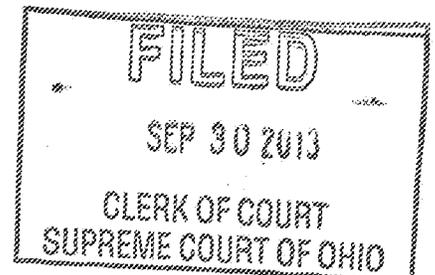
**AMICUS BRIEF OF THE NATIONAL FRATERNAL ORDER OF POLICE
AND FRATERNAL ORDER OF POLICE OF OHIO IN SUPPORT
OF APPELLEE, THOMAS CAINE WHITE**

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STATEMENT OF INTEREST OF AMICUS

The National Fraternal Order of Police (“FOP”) is the world’s largest organization of sworn law enforcement officers, with more than 325,000 members in more than 2,100 lodges. The Fraternal Order of Police of Ohio, Inc. (“Ohio FOP”) has 25,000 active and retired law enforcement members residing in almost every community in the State of Ohio. The FOP and the Ohio FOP are the voice of those who dedicate their lives to protecting and serving our communities. The FOP and the Ohio FOP represent law enforcement personnel at every level of crime prevention and investigation, nationwide and internationally.

With this Brief, the FOP and the Ohio FOP submit the views of their law enforcement members and the potential implications for officers in law enforcement that will result should this Court overturn the decision rendered by the Sixth District Court of Appeals. The FOP and the Ohio FOP urge this Court to adopt the ruling and rationale of the court of appeals. This Brief will focus on the following:

1. The extraordinary responsibilities imposed upon police officers acting in the line of duty require different consideration regarding application of R.C. 2941.145, and because officers are required to carry firearms incident to their employment, application of the statute to officers acting in the line of duty is unconstitutional.
2. The trial court erred when it failed to properly instruct the jury regarding the reasonableness of Officer White’s actions in the use of deadly force and when it failed to instruct the jury on the issue of “mistaken belief.”

The FOP and the Ohio FOP adopt and incorporate by reference the statement and arguments made within the Brief filed on behalf of Appellee Thomas Caine White.

STATEMENT OF THE CASE AND FACTS

The FOP and Ohio FOP agree with the Statement of the Case and Facts presented by Appellee Officer White.

LAW AND ARGUMENT

I. Introduction.

One law enforcement officer is killed in the line of duty in the United States every 57 hours.¹ “Firearms-related fatalities were the second leading cause of death among [the] nation’s law enforcement officers [and] ambush attacks were the leading circumstance of fatal shootings” *Id.* It is the law of the State of Ohio that sworn officers “shall arrest and detain . . . a person found violating . . . a law of this state, an ordinance of a municipal corporation, or a resolution of a township.” R.C. 2935.03(A)(1). In other words, police officers do not have the option of retreat in the course of their official duties. Unlike ordinary citizens, police officers have undertaken a sworn duty to uphold the law, including apprehending and arresting offenders, and they are authorized to use deadly force to do so.

As one court noted:

If police . . . may not employ the limit of force, then the law befriends the criminal, encourages him to flee from his crimes, and insures him protection if he is injured while seeking to

¹ Nat’l Law Enforcement Officers Mem’l Fund, Law Enforcement Facts, <http://www.nleomf.com>, Research Bulletin; Law Enforcement Officer Deaths: mid-year 2013.

evade the consequences of his evil doings. *Such cannot be the law.*

Clark v. Carney, 71 Ohio App. 14, 17, 36 Ohio Law Abs. 68, 42 N.E.2d 938 (1st Dist. 1942)(Emphasis added.)

This mandatory duty to apprehend and arrest criminals leads to police officers being placed in dangerous and uncertain situations on a daily basis. Policing is a “distinctive . . . enterprise arising out of the state’s responsibility to protect freedom by creating order.”² The duties that a police officer owes the State and its citizens are of a most exacting nature. Courts have recognized that a police officer, placed in a dangerous situation in the line of duty, does not have to “await the glint of steel” before he can act to preserve his own safety. Once the glint of steel appears, it is often too late. *People v. Morales*, 198 A.D. 2d 129, 130, 603 N.Y.S.2d 319, 320 (1993); *Anderson v. Russell*, 247 F.3d 125, 131 (4th Cir. 2001).

As one observer noted and as quoted by the court of appeals below:

Law enforcement officers are trained to evaluate human behavior as a part of their basic functions. Attempts to evade the officer, as well as furtive glances, sudden turns and ignoring request to bring one’s hands into view are common indicia of behavior which demonstrates reasonable suspicion and prospective danger. Police encounters often occur at night, which substantially limits vision and enhances risk to everyone. Criminals often flee and take cover in uncertain terrain, thus putting officers at a further disadvantage. The most common

² Rachel A. Harmon, *When is Police Violence Justified?*, 102 Northwestern Univ. L. Rev., 1119, 1122 (2008).

gesture that fuels the need for the use of force is the reach towards a pocket or the waistband area.³

Most importantly, police officers are authorized to use lethal force to protect their own safety, and that of the public, so long as the use of force is objectively reasonable, even if it is, ultimately, mistaken. *Saucier v. Katz*, 533 U.S. 194, 205, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). “If an officer reasonably, but mistakenly, believed that the suspect was likely to fight back . . . the officer would be justified in using more force than in fact was needed.” *Id.* Where encounters with criminals occur late at night, on dark, deserted streets, reasonable force may seem quite different to an officer apprehending a criminal “than to someone analyzing the question at leisure.” *Smith v. Freeland*, 954 F. 3d 343, 347 (6th Cir. 1992). In cases where a suspect fails to respond to commands and/or fails to raise his hands in compliance with directions and a police officer is unable to determine if the suspect is armed, courts “will not second guess the split-second judgment of a trained police officer merely because that judgment turns out to be mistaken, particularly where inaction could have resulted in death or serious injury to the officer or others” *McLenagan v. Karnes*, 27 F.3d 1002, 1008 (4th Cir. 1994). As a final matter, situations where suspects are shot by officers in the back, such as the case here, present a more complicated, but no less compelling, case for the use of deadly force. “[B]allistics studies reveal ‘that a person can turn around in less time than it takes to fire a drawn and pointed weapon.’ This recognized

³ J. Michael McGuinness, *Law Enforcement Use of Force: The Objective Reasonableness Standards under North Carolina and Federal Law*, 24 Campbell L. Rev. 201, 214 (2002).

[phenomenon] justifies many cases with shootings from the rear as being objectively reasonable.”⁴

It is not only the threat of personal harm that motivates the split-second decision making of police officers. Officers must also balance the potential harm to the public that may result from *inaction*. Officers are “damned if they do and damned if they don’t” in many circumstances. Failing to take immediate action may result in catastrophic harm such as a fleeing suspect injuring or killing bystanders or innocent citizens in the vicinity of the scene. Yet, if the officer reasonably believes that deadly force is necessary, and deploys it, harming or killing a suspect, he may be subject to criminal punishment, based upon what people decide about the incident in retrospect with the distorting effect of hindsight. That is precisely why the law requires a demonstration of more than poor judgment on the part of the officer and why the proper evaluation of police use-of-force cases is so elusive.

For police officers charged with a line-of-duty crime, what starts as a tactical decision by a well-trained professional results in second-guessing by laymen with little or no knowledge of the actual job requirements of law enforcement. No judicial review of a line-of-duty police shooting case can be complete without a full appreciation of the challenges facing law enforcement officers and an acknowledgement of the fact that their duties may, at any time, require the ultimate sacrifice – their lives. In carrying out these duties, he must

⁴ J. Michael McGuinness, *A Primer on North Carolina and Federal Use of Force Law: Trends in Fourth Amendment Doctrine, Qualified Immunity and State Law Issues*, 31 Campbell L. Rev. 431, 496 (2009) citing Ernest J. Tobin & Martin L. Fackler, *Officer Reaction – Response Times in Firing a Handgun*, 3 Wound Ballistics Rev. 3, 6 (1997).

be entitled to use his training, perceptions and good faith beliefs in order to protect the public and himself. Anything else cannot be the law.

II. Response to Proposition of Law No. 1: The Extraordinary Responsibilities Imposed Upon Police officers Acting in the Line of Duty Require Different Consideration Regarding Application of R.C. 2941.145, and Because Officers are Required to Carry Firearms Incident to their Employment, Application of the Statute to an Officer Acting in the Line of Duty is Unconstitutional.

Appellant urges the Court to treat this case like any other criminal case. It is not. Both the State and its *Amicus Curiae* argue that the statute should be applied the same to Officer White's discharge of his service weapon in the line of duty as to any armed robber or serial killer. To accept the State's arguments would be to discourage police officers from utilizing service weapons as a tool in the line of duty, in an atmosphere increasingly proliferated with criminals armed with every manner of firearm, including assault rifles and machine guns. Further, police officers are placed in situations requiring them to, on occasion, utilize a service weapon because they are required by state law to apprehend and arrest criminals. Criminals, on the other hand, choose to commit crimes.

The Court of Appeals succinctly outlined the legislative intent behind R.C. 2941.145, Ohio's Firearm Enhancement statute, which was enacted because "there was a drastic rise in violent crimes involving the use of firearms . . ." and "the legislature wanted to send a message to the criminal world" regarding use of guns to commit crimes. Ct. of Appeals Opinion, pgs. 81-2 (citing *State v. Murphy*, 49 Ohio St. 3d 206, 208, 551 N.E.2d 932 (1990) and *State v. Gaines*, 46 Ohio St. 3d 65, 545 N.E.2d 68 (1989)). Despite this clear legislative

intent, the State takes the position that the statute cannot possibly be unconstitutional as applied to Officer White because the legislature did not explicitly exempt on-duty police officers from its application. That consideration is not the test in the State of Ohio for analyzing an “unconstitutional as-applied” challenge to a statute. In fact, that argument could be made as to any statute.

The fact that a person or class of persons is not exempted from the application of a criminal statute by the legislature does not also serve to divest those parties of their constitutional rights. As this Court found in the case of *In re D.B.*, 129 Ohio St.3d 104, 950 N.E.2d 528, 2011-Ohio-2671, a criminal statute must be analyzed for a constitutional violation when challenged, regardless of what exceptions to prosecution do or do not appear in its text. In *In re D.B.*, a twelve-year-old was prosecuted for the crime of statutory rape, defined by R.C. 2907.02(A)(1)(b) as sexual contact with a person less than 13 years of age. *Id.* at ¶ 13. Clearly, the legislature, when enacting the statutory rape statute, could have excluded from its application *offenders under 13 years of age*, but it did not. Nonetheless, this Court found that the statute, as applied, violated both the due process and equal protection rights of the minor defendant. *Id.* at ¶ 29-32.

The same is true here. The FOP will not reiterate the “unconstitutional as-applied” arguments made by Officer White and articulated by the Court of Appeals. However, the underpinning of any constitutional analysis begins and ends with the concept of *fairness*. The statute at issue is a sentencing enhancement, not a separate criminal offense. How is the

concept of fairness served if police officers go through rigorous firearms training and qualification, are required to carry their firearms on duty, but then are subject to an amplified penalty if they are later judged to have used that firearm improperly? The United States Supreme Court has held that the due process clause protects against application of laws which violate precepts of fundamental fairness, even if they do not violate specific constitutional guarantees. See, e.g., *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Henderson v. Kibbe*, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977); *Hicks v. Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). A constitutional analysis cannot be performed with blinders on – sometimes a court must simply assess and decide the question in a way that serves the ultimate ends of justice and fairness. To apply the firearm sentencing enhancement to Officer White and other sworn officers acting in the line of duty accomplishes neither.

III. Response to Proposition of Law No. 3: The Trial Court Erred When it Failed to Properly Instruct the Jury Regarding the Reasonableness of Officer White's Actions in the use of Deadly Force and When it Failed to Instruct the Jury on the Issue of "Mistaken Belief."

As an initial matter, this Court should note that the State, at trial, agreed to jury instructions consisting of language derived from 42 U.S.C. § 1983 civil jury instructions on the issue of the Officer White's "objectively reasonable belief" at the time of the line-of-duty shooting. In doing so, it consented to adopting the reasoning in the Fourth Amendment U.S. Supreme Court jurisprudence on that topic. However, the State and its *Amicus* now engage in significant argument parsing between jury instructions regarding intent, specific intent,

general intent and purpose in criminal cases, in an attempt to explain why the “objective reasonableness” instruction given by the trial court in this case was not in error. They appear to argue that a jury instruction regarding self defense, which is an affirmative defense in a criminal case, is appropriate here, while ignoring the fact that the State *agreed* in the trial court to the “objective reasonableness” instruction language derived from 42 U.S.C. § 1983 civil jury instructions.⁵

It is undisputed that an officer would be entitled to proper “objective reasonableness” and “mistaken belief” jury instructions in a 42 U.S.C. § 1983 case if charged with use of deadly force in a civil context. It defies logic that an officer would not be entitled to the same instruction in a criminal line-of-duty case, where the burden of proof is higher and where his constitutional liberty rights are at stake.

With that backdrop in mind, i.e. the State agreed at trial to instruct the jury on “objective reasonableness,” the only inquiry then is whether the trial court properly instructed the jury. It did not.

⁵ The State further argues that its agreement with Officer White to utilize Fourth Amendment principles for the jury instructions somehow prohibits Officer White from now (and then) objecting to the *actual language* selected by the trial court for the “objectively reasonable belief” instructions. The State claims that because Officer White requested such instructions in principle, even though he objected to the trial court’s actual wording of such instructions, the request constitutes “invited error.” The invited error doctrine has no application where, as here, a timely objection has been made on the same issue at trial. If the defendant objects to the particular issue at trial, he cannot also be said to have “invited” error. *Ellis v. Chambers*, 6th Dist. No. H-84-40, 1985 WL 7525, HN 4 (July 5, 1985)(Invited error doctrine only applies “absent an appropriate objection to the trial court”)

A. Jury Instructions: Deadly vs. “Excessive” Force.

As the court of appeals correctly observed, the jury instructions given by the trial court “confusingly” combined the concepts of “objective reasonableness,” which is the correct standard by which to judge Officer White’s actions, and “excessive force,” which has no application to the facts of this case and is highly prejudicial to Officer White. The offending instruction stated as follows:

The defendant has asserted the affirmative defense that he was justified in his use of force in the exercise of his official duties as a police officer. * * * In order to establish this defense, the defendant must prove by a preponderance of the evidence that he was acting in pursuit of his official duties and that his *use of deadly force was objectively reasonable under the circumstances.* (Emphasis added.)

Now, *excessive force.* If the defendant *used more force than reasonably necessary* in pursuing his official duties, the *defense of justification* is not available. (Emphasis added.)

(Ct. of Appeals Decision, pg. 51(quoting the trial court’s jury instruction)).

By instructing the jury to consider whether Officer White “used more force than reasonably necessary,” the trial court improperly directed the jury to engage in an analysis of *what other actions Officer White could have taken* that night, when the only appropriate jury consideration is whether Officer White reasonably believed his safety was in jeopardy based upon a totality of the circumstances. Thus, as more fully discussed below, the trial court gave not only an incomplete “deadly force” jury instruction, it proceed to then also give an improper 8th/14th Amendment “excessive force” instruction.

Despite the arguments of the State and its *Amicus*, which amount to a claim of “close enough,” the concepts of “use of deadly force” and “use of excessive force” are neither analogous nor interchangeable. Use of deadly force cases require an analysis of whether the officer’s actions were objectively reasonable. Simply put, the central issue is whether an objectively reasonable officer could have reasonably believed that deadly force was appropriate under the totality of the circumstances. See *Saucier*, supra, 533 U.S. at 210, modified by *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009), *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), *Tennessee v. Garner*, 471 U.S. 1, 3, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). Such cases do not allow the admission of evidence, or even the implication, that there were less drastic means available.

As noted by the Eighth Circuit, following the *Graham* decision:

[T]he appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available. Officers must not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within the range of conduct we identify as reasonable.

Schulz v. Long, 44 F.3d 643, 649 (8th Cir. 2005).

A determination of “excessive force,” on the other hand, compels the analysis of what is the least amount of force possible to effectuate the action undertaken by the officer. In fact, the question of “excessive force” is not an appropriate one under a 4th Amendment analysis, but is most typically seen in 8th Amendment or 14th Amendment cases involving

prisoners or pre-trial detainees. See, e.g., *Whitley v. Albers*, 475 U.S. 312, 318, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), *Taylor v. McDuffie*, 155 F.3d 479, 483 (4th Cir. 1998).

This case is not one appropriate for an “excessive force” analysis or jury instruction. This is a case involving the use of “deadly force.”⁶ The deadly force inquiry focuses solely on whether the officer reasonably perceived a threat. The excessive force inquiry implies to the jury that the officer had some sort of duty to run through a list of possible lesser measures before taking action to protect his own life. The deadly force inquiry requires the jury to decide the appropriateness of an officer’s decision to use deadly force based upon the totality of circumstances as reasonably perceived by the officer in the moment the force was used. The excessive force inquiry requires the jury to attempt to substitute its own judgment about “what else” Officer White could have done, short of discharging his weapon. It is not only possible, but likely, because of the juxtaposition of the excessive force and deadly force jury instructions, that the jury was confused and also improperly imported an excessive force analysis into what should have been solely a question of reasonable belief. The injection of an excessive force analysis into the jury instructions by the trial court is reversible error.

B: Jury Instructions: Mistaken Belief.

In addition to confusing and improperly muddling together the concepts of “deadly force,” “objectively reasonable belief” and “excessive force” in the jury instructions, the trial

⁶ The court of appeals phrased its analysis on this issue in terms of “deadly force” versus “non-deadly force.” In reality, the 4th Amendment analysis regarding both is the same, i.e. the “objectively reasonable” test. The concept of “excessive force,” quite simply, has no application to the 4th Amendment analysis.

court also failed to give a 4th Amendment instruction which was complete. The jury instructions by the trial court omitted an essential element in the 4th Amendment analysis applicable to the facts of this case, to wit: mistaken belief. The U.S. Supreme Court has acknowledged that no 4th Amendment analysis is complete unless it acknowledges the fact that the officer's actions can be reasonable *and also mistaken*. *Saucier*, supra, 533 U.S. at 205. As the Fourth Circuit explained in the case of a police officer mistakenly shooting an unarmed suspect:

[A] suspect's failure to raise his hands in compliance with a police officer's command to do so may support the existence of probable cause to believe that the suspect is armed [W]e do not think it wise to require a police officer, in all instances, to actually detect the presence of an object in a suspect's hand before firing on him. . . . *We will not second-guess the split-second judgment of a trained police officer merely because that judgment turns out to be mistaken*, particularly where inaction could have resulted in death or serious injury to the officer and others. . . .

McLenagan, supra, 27 F.3d at 1007-08. See also *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004)(Holding that a police officer is not liable for shooting a suspect in the back, even if her belief regarding dangerous surrounding circumstances amounted to "constitutionally deficient . . . misapprehen[sion].")

Instructing the jury on this concept is particularly important, because it may not be readily apparent to a lay person that it is possible to be both reasonable and wrong. In fact, unless properly instructed, it is hard to imagine that a juror, who is not familiar with such legal principles, would otherwise conclude that an officer's action can be both reasonable and

incorrect. The dictionary definitions of these terms demonstrate that in common parlance they are mutually exclusive. Merriam-Webster Dictionary defines the term reasonable as “fair and sensible.” *Merriam Webster Online*, Merriam Webster n.d. Web Sept. 19, 2013. It defines mistaken as “to make a wrong judgment.” *Id.* “Sensible” and “wrong” are antonyms. By failing to instruct the jury that Officer White’s beliefs that led to the discharge of his weapon could be *both* reasonable *and* mistaken, the trial court deprived him of a crucial constitutional distinction that could have led to his acquittal.

IV. Conclusion.

This appeal must either be dismissed as improvidently accepted or the decision of the Sixth District Court of Appeals must be affirmed. To do anything less would be to provide Officer White with fewer constitutional protections than the criminal offenders he is sworn to apprehend.

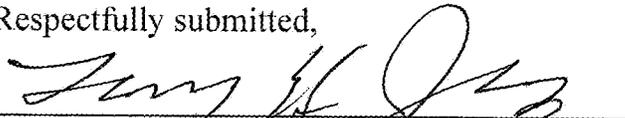
First, to apply the firearm sentencing enhancement contained in R.C. 2941.145 to police officer line-of-duty shootings serves neither the legislative intent of the statute nor the due process concept of fundamental fairness. Its imposition in line-of-duty shooting cases is unconstitutional as applied.

Second, the trial court’s failure to properly instruct the jury in regard to the concepts of objective reasonableness and mistaken belief deprived Officer White of a fair trial. It appears to be agreed that, had Officer White been sued in a civil suit for this line-of-duty shooting, he would be entitled to the precise jury instructions that his attorney requested at

the trial court. However, the State of Ohio now argues that he is not entitled to the same instructions in a criminal context, where there is a higher burden of proof and Officer White's constitutional liberty interest is at stake.

Police officers risk their lives every day. Sometimes it is a small risk, sometimes it is a significant risk. This Court must analyze this case taking into account the unique duties and dangers confronted by police officers carrying out their sworn responsibility to serve and protect the public. The analysis cannot occur in a vacuum. Criminal “[s]uspects create varying ‘fight or flight’ scenarios which require officers to employ physical force to apprehend suspects and stop the threats to themselves and the public. . . . Both actual and apparent threats must be thwarted by reasonable force.” McGuinness, *supra*, 31 Campbell L. Rev. at 434. A jury hearing Officer White's case must be instructed to weigh these important principles when deciding his fate.

Respectfully submitted,



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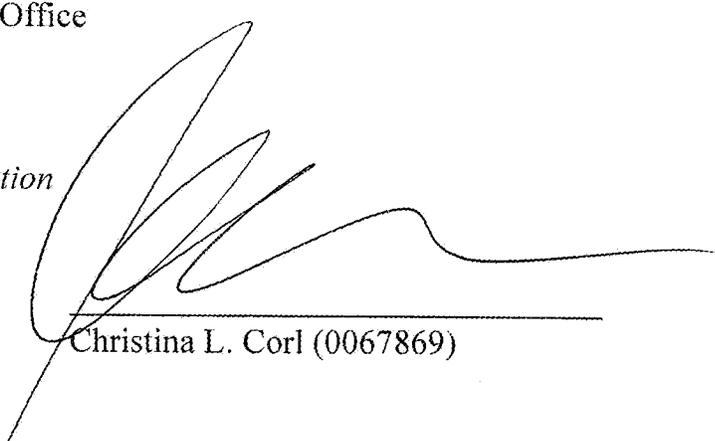
CERTIFICATE OF SERVICE

A copy of the foregoing **Amicus Brief of the National Fraternal Order of Police and Fraternal Order of Police of Ohio in Support of Appellee, Thomas Caine White**, was sent, via regular U.S. Mail, to the following individuals, this **30th day of September, 2013**:

Julia R. Bates
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